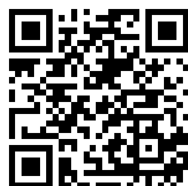
This is a reproduction of a library book that was digitized by Google as part of an ongoing effort to preserve the information in books and make it universally accessible.

Google™ books

https://books.google.com



ORIGINS OF THE

UNITED STATES NAVY

JUDGE ADVOCATE GENERAL'S CORPS

A HISTORY OF LEGAL ADMINISTRATION IN THE UNITED STATES NAVY, 1775 TO 1967

Digitized by Google

Digitized by Google

Digitized by Google

ORIGINS OF THE NAVY JUDGE ADVOCATE GENERAL'S CORPS

A HISTORY OF LEGAL ADMINISTRATION IN THE UNITED STATES NAVY, 1775 TO 1967

by
CAPTAIN JAY M. SIEGEL
JUDGE ADVOCATE GENERAL'S CORPS
UNITED STATES NAVAL RESERVE

Foreword by
REAR ADMIRAL H.E. GRANT
JUDGE ADVOCATE GENERAL'S CORPS
UNITED STATES NAVY
JUDGE ADVOCATE GENERAL OF THE NAVY

Digitized by Google

Library of Congress Catalog Card Number 97-73190

For sale by the U.S. Government Printing Office
Superintendent of Documents, Mail Stop: SSOP, Washington, DC 20402-9328
ISBN 0-16-049135-5

DOC.
D205.2:
OR4

FOREWORD

Origins of the Navy Judge Advocate General's Corps: A History of Legal Administration in the United States Navy, 1775 to 1967, is a definitive text which examines the economic, political, and military events that shaped legal administration in the United States Navy from Colonial times and led to the establishment of the Navy Judge Advocate General's (JAG) Corps in 1967. More than a history of lawyers in the Navy, this book traces the legislative and executive processes which influenced Navy legal affairs. In so doing, it provides a unique perspective into the workings of American government from the time of its founding to the present.

This history is alive, full of narrative accounts based on personal interviews and papers of key officials involved in the formation of the Navy JAG Corps. Their personal accounts, woven throughout the text, reflect the heroism, foibles, courage, and commitment of these dedicated men and women. Every lawyer in uniform should read this history, for it imparts a greater sense of pride and purpose for the Navy JAG Corps.

The author, Captain Jay M. Siegel, JAGC, USNR, served on active duty in the Navy as both a line officer and judge advocate. As a judge advocate, he served in many assignments, including appellate counsel at the Navy-Marine Corps Appellate Review Activity and Commanding Officer of Civil Law Support Activity 206 and Civil Law Support Activity 106, the latter being the largest unit in the Judge Advocate General's Corps Reserve program. He devoted countless hours to research and write the exciting and wonderful history which is before you.

On this 30th anniversary of the JAG Corps, I am honored to present this dynamic story to the uniformed services and to naval and legal historians.

H. E. GRANT
Rear Admiral, Judge Advocate General's
Corps, U.S. Navy
JUDGE ADVOCATE GENERAL

Digitized by Google

Digitized by Google

TABLE OF CONTENTS

FOREWORD iii

TABLE OF CONTENTS v

LIST OF APPENDICES vii

LIST OF ILLUSTRATIONS ix

ACKNOWLEDGMENTS xiii

PROLOGUE xvii

CHAPTER 1
Historical Antecedents: Our Maritime Heritage
Antiquity to 1775 1

CHAPTER 2
The Continental Navy
1775 to 1789 21

CHAPTER 3
The Pre-Civil War Navy
1789 to 1860 31

CHAPTER 4
Civil War to Uniformed Judge Advocate General
1861 to 1878 101

CHAPTER 5
The First Uniformed Judge Advocate General
1878 to 1892 173

CHAPTER 6
The Office Grows
1892 to 1909 215

Digitized by Google

CHAPTER 7
False Start: Line Officers with Law Degrees
1909 to 1939 ... 277

CHAPTER 8
The Harshest Test: Demands of War
1939 to 1945 ... 345

CHAPTER 9
Winds of Change: Aftermath of War
1945 to 1946 ... 409

CHAPTER 10
The Law Specialists Emerge
1947 to 1954 ... 481

CHAPTER 11
The Scarlet Letter: The Law PGs' Last Stand
1954 to 1956 ... 531

CHAPTER 12
Recognition and Realization: A Legal Corps for the Navy
1956 to 1967 ... 617

EPILOGUE ... 687

APPENDICES ... A-1

INDEX ... I-1

Digitized by Google

List of Appendices

Appendix A
Chronological Listing of Presidents of the United States, Secretaries of the Navy, and Judge Advocates General of the Navy A-3

Appendix B
Statutes and Administrative Pronouncements Relating to Duties of the Judge Advocate General of the Navy, the Naval Solicitor, and the General Counsel of the Navy A-13

Appendix C
Letter from Secretary of the Navy R.W. Thompson to Hon. J.R. McPherson A-29

Appendix D
House Report No. 459, Solicitor and Judge-Advocate-General of Navy and Marine Corps A-33

Appendix E
The Navy Appellate Review Process A-37

Appendix F
The Scarlet Letter: Rear Admiral Ira H. Nunn, USN, to the Law Specialists A-45

Appendix G
Reply to The Scarlet Letter: Captain William C. Mott, USN, to Rear Admiral Ira H. Nunn, USN A-57

Appendix H
Marine Corps Judge Advocates A-87

Appendix I
Naval Reserve Multiple Address Letter No. 15-48 Establishing the Volunteer Naval Reserve Law Program A-93

Digitized by Google

APPENDIX J
The Naval Reserve Law Program: 1954 to Date A-95

APPENDIX K
The Navy Judge Advocate General's Corps Insignia A-111

APPENDIX L
The Naval Legal Service Command: District Legal Offices
to Law Centers to Naval Legal Service Offices A-123

APPENDIX M
The Navy-Marine Corps Trial Judiciary A-139

APPENDIX N
The Naval Justice School: 1950 to Date A-143

APPENDIX O
Women in the Navy Judge Advocate General's Corps A-153

APPENDIX P
African-Americans, Hispanic-Americans,
and Other Ethnic Minorities in the
Navy Judge Advocate General's Corps A-161

APPENDIX Q
Legalmen and Limited Duty Officers (Law) A-175

APPENDIX R
The Act of 8 December 1967 Establishing a
Navy Judge Advocate General's Corps A-185

Digitized by Google

List of Illustrations

Form showing appointment of a surgeon as judge advocate of a general court martial 40

Letter from United States Attorney General Richard Rush to the Secretary of the Navy 44

Letter from Secretary of the Navy Upshur to Henry A. Wise, Chairman of the House Committee on Naval Affairs, proposing appointment of a Judge Advocate General for the Navy 69

The brig, *USS Somers*, with two suspected mutineers hanging at the yardarm 95

Letter from Secretary of the Navy Borie to Senator Grimes, urging support of a bill to make the Office of Solicitor and Naval Judge Advocate General permanent 127

Letter from President-elect Grant to Congressman Pike, urging support of a bill to continue the office of Judge Advocate General of the Navy 128

Two seating arrangements for courts martial of the nineteenth century 142

Portrait photograph of Colonel William B. Remey, USMC 175

The Judge Advocate General's receipt stamp, 1884 194

Telegram from Acting Secretary of the Navy to Commanding Officer, Naval Station, Beaufort, South Carolina 196

A sail-steam powered cruiser of the 1880s 198

Typical summary entries of inquiries from Judge Advocate General Remey to "W.F.C." 203

Digitized by Google

Letter from Edwin P. Hanna, Chief Clerk of the Office of the Judge Advocate General of the Navy, to Senator William E. Chandler 250

Walter Browne Woodson, the first Judge Advocate General of the Navy to hold a law degree 347

James V. Forrestal, Under Secretary of the Navy, 1940 to 1944, and Secretary of the Navy, 1944 to 1947 362

H. Struve Hensel, Head of the Procurement Legal Division during World War II, and the first General Counsel of the Navy 379

Thomas L. Gatch, Judge Advocate General of the Navy, 1943 to 1945 . . 403

Letter from Secretary of the Navy Frank Knox to Arthur A. Ballantine 414

The United States Naval School (Naval Justice), U.S. Naval Station, Port Hueneme, California, 1946 460

"Seabees Coverall," 21 July 1943 462

United States Naval Prison at Portsmouth, New Hampshire 495

The Naval Justice School at Newport, Rhode Island 505

Ira H. Nunn, Judge Advocate General of the Navy, 1952 to 1956 526

Naval Reserve Law Company 8-6, of Dallas, Texas, arrives in Washington, D.C. 529

William C. Mott, Judge Advocate General of the Navy, 1960 to 1964 . . . 547

Chester C. Ward, Judge Advocate General of the Navy, 1956 to 1960 . . . 580

A Law Specialist recruiting poster from the 1960s 625

Wilfred A. Hearn, Judge Advocate General of the Navy, 1964 to 1968 . . 665

Robert H. Hare, Deputy and Assistant Judge Advocate General of the Navy, 1964 to 1968 673

Digitized by Google

Joseph B. McDevitt, Judge Advocate General of the Navy, with the pen used by President Lyndon B. Johnson to enact the Navy Judge Advocate General's Corps legislation 684

Reserve lawyers receive a briefing at a Logistical Exercise conducted at Fort Lee, Virginia A-98

Reserve lawyers attend an East Coast Law Seminar at Naval Air Station, Jacksonville, Florida A-103

Naval Reserve Law Program flag officers A-109

The insignia of the Navy Judge Advocate General's Corps A-111

Some suggested designs for the Navy Judge Advocate General's Corps insignia A-113

Lieutenant Commander Feldman's suggestions for a Navy Judge Advocate General's Corps insignia A-115

Judge Advocate General McDevitt at Lincoln's Inn, London A-117

A typical milling configuration showing a millrind A-121

Mary Louise McDowell, upon her promotion to captain, 1967 .... A-155

Chart showing distribution of women in the Navy Judge Advocate General's Corps A-159

Letter from Secretary of the Navy Paulding to Attorney General Gilpin A-163

Chart showing participation of African-American lawyers in the United States legal profession A-165

Judge John D. Fauntleroy receives his commission as a commander in the Naval Reserve Judge Advocate General's Corps A-169

Chart showing ethnic minority officers in the Navy Judge Advocate General's Corps, 1988 .... A-172

Digitized by Google

Chart showing ethnic minority officers in the
Navy Judge Advocate General's Corps, 1991 .... A-173

Chart showing ethnic minority officers in the
Navy Judge Advocate General's Corps, 1997 .... A-173

Digitized by Google

ACKNOWLEDGMENTS

The inspiration for this work came, in 1990, from the collaborative efforts of two of the finest leaders and gentlemen ever to serve in the Navy Judge Advocate General's Corps: Rear Admiral Everett D. Stumbaugh, JAGC, USN, at that time the Judge Advocate General of the Navy, and Rear Admiral Robert E. Wiss, JAGC, USNR (Retired), who had recently completed serving as the Naval Reserve Senior Judge Advocate. Their intent was to assemble a history of the Navy Judge Advocate General's Corps, to be published coincident with the Corps's twenty-fifth anniversary on 8 December 1992. Rear Admiral Wiss prepared an extensive outline for the book, which provided the author with a working tool of immense proportion. Rear Admiral Stumbaugh provided the commitment of the Office of the Judge Advocate General to see the project through to completion.

As we got further into the project, and began collecting research data, the enormity of its scope, and its import as a chronicle of the Navy and Marine Corps lawyer, came more clearly into focus. It could not be completed in the two years allotted and still do justice to its original concept. The anniversary deadline came and went. With the patience and understanding of Rear Admiral Stumbaugh and his successors, strained, no doubt, to the limit by the author, the work was finally completed some six years after it had begun.

Over the several years that it took to write this book, I had the cooperation and willing assistance of literally scores of people. Some participated by assisting in research and writing chores, often on their own time. Others made themselves available for consultation, providing substantive, procedural, and editorial advice. It is a cliché of authors to warn of probable omissions in a list of such persons, and to beg forgiveness for any such omissions, yet it must be done. The list is too long, and one's memory too short.

Rear Admiral Bob Wiss, whose untimely death in October 1995 deprived him of the pleasure of seeing the completed work, nevertheless has his hand on every page. His identification of events of importance, his boundless enthusiasm, and his wise counsel, were invaluable during the research and early writing stages. Commander George E. Erickson, JAGC, USNR, devoted several tours of training duty to the project, in

Digitized by Google

addition to countless hours of his own time. He was in many ways a co-author, assisting in research, conducting interviews, writing drafts, and collaborating on form and content. Captain Charles M. Ingram, JAGC, USNR, was on the scene before the author. His organizational acumen provided scores of research leads. Captain Homer A. Walkup, JAGC, USNR (Retired), the first and preeminent historian of the Navy Judge Advocate General's Corps, gave me his time and his thoughts, and permitted the plundering of his pioneering writings on the history of Navy lawyers and the Navy Judge Advocate General's Corps. Captain Henry M. Shine, JAGC, USNR (Retired), a driving force behind establishment of the Navy Judge Advocate General's Corps, who maintains a corporate history of relevant personalities and events, provided answers not found in reference materials. Commander Richard A. Grinley, JAGC, USNR, performed some of the finest original research the author has seen. And Kathy Hendrixson, my part-time assistant, who through tenacity and innate analytical skill solved research puzzles for which there appeared to be no solution.

I am deeply grateful to the several Judge Advocates General who had the confidence in my ability to complete this project, and who gave me the opportunity to do so: Rear Admiral John E. Gordon, JAGC, USN, Rear Admiral William L. Schachte, JAGC, USN, and Rear Admiral Harold R. Grant, JAGC, USN. I appreciate also the great and constant support I received from the Reserve side of flag country: my very good friends Rear Admiral Gerald E. Gilbert, JAGC, USNR (Retired), and Rear Admiral F. Stephen Glass, JAGC, USNR.

The following persons gave up their time to be interviewed, and in so doing provided invaluable insight and clarification to some of the events described herein. In almost every case the substance of their interviews has been transcribed, and it is hoped that the collection of transcripts can be placed in an appropriate repository, accessible to others who have an interest in original sources relating to the history of the Navy Judge Advocate General's Corps. As with all other persons mentioned in these pages, rank and duty status are given as of the time of their participation in the research process.

Rear Admiral Penrose A. Albright, JAGC, USNR (Retired)
Former Lieutenant John M. Baker, JAGC, USNR
Rear Admiral Julian R. Benjamin, JAGC, USNR (Retired)
Major General John Russell Blandford, USMCR (Retired)
Captain Bert R. Carraway, JAGC, USN (Retired)

Digitized by Google

Rear Admiral Donald D. Chapman, JAGC, USN (Retired)
Master Chief Legalman Maurice L. Connor, Jr., USN
Captain A. Jay Cristol, JAGC, USNR (Retired)
Captain William H. Dalton, JAGC, USN
Rear Admiral Thomas E. Flynn, JAGC, USN (Retired)
Captain Maitland G. Freed, JAGC, USN (Retired)
Captain John J. Geer, Jr., JAGC, USN
Rear Admiral Gerald E. Gilbert, JAGC, USNR (Retired)
Captain Harold E. Grant, JAGC, USN
Captain Mack K. Greenberg, JAGC, USN (Retired)
Captain Jack R. Grunawalt, JAGC, USN (Retired)
Captain Gardiner M. Haight, JAGC, USN (Retired)
Helen O. Hare (Mrs. Robert H. Hare)
Captain William H. Hogan, USNR (Retired)
Rear Admiral John S. Jenkins, JAGC, USN (Retired)
Rear Admiral Joseph B. McDevitt, JAGC, USN (Retired)
Captain Mary Louise McDowell, JAGC, USNR (Retired)
Rear Admiral James J. McHugh, JAGC, USN (Retired)
Captain Louis M. Milano, JAGC, USN (Retired)
Captain Ashton C. Miller, Jr., JAGC, USN (Retired)
Rear Admiral William O. Miller, JAGC, USN (Retired)
Rear Admiral William C. Mott, USN (Retired)
Former Lieutenant W. Matt Murray, JAGC, USNR
Commander Max S. Ochstein, JAGC, USNR (Retired)
Commander Richard R. Ozmun, JAGC, USN
Rear Admiral Horace B. Robertson, Jr., JAGC, USN (Retired)
Rear Admiral William R. Sheeley, USN (Retired)
Rear Admiral Richard L. Slater, JAGC, USN (Retired)
Lieutenant Commander Elvira Smith, USNR (Retired)
Rear Admiral Merlin H. Staring, JAGC, USN (Retired)
Captain Homer A. Walkup, JAGC, USNR (Retired)
Rear Admiral Robert E. Wiss, JAGC, USNR (Retired)
Captain Max D. Wiviott, JAGC, USN (Retired)

Writing contributors, in addition to those mentioned above, included Lieutenant Commander Lewis T. Booker, JAGC, USNR, Captain Paul K. Costello, JAGC, USNR, Lieutenant Commander Barbara J. Finsness, JAGC, USNR, Lieutenant Commander Mary A. Flynn, JAGC, USNR, Captain Caliph Johnson, JAGC, USNR, Captain John G. Wallace, JAGC, USNR, and Captain Kent A. Willever, JAGC, USN.

Digitized by Google

Researchers and interviewers, also in addition to those mentioned above, included Commander Lawrence K. Bamberger, JAGC, USNR, Captain Thomas L. Jones, JAGC, USNR, Captain Joseph Q. Koletsky, JAGC, USNR, Commander Patricia A. Leonard, JAGC, USNR, Lieutenant Commander Daniel Lippman, JAGC, USNR, Captain Walton J. McLeod, JAGC, USNR, Commander Richard R. Ozmun, JAGC, USN, Captain David B. Strong, JAGC, USNR, and Captain John E. Tuthill, JAGC, USNR.

I must also thank the Deputy Assistant Judge Advocates General for Reserve Affairs, whose offices, equipment, and personnel I shared: Commander Richard R. Ozmun, JAGC, USN, Commander Timothy M. McGuan, JAGC, USN, and Commander Jeanne "Bonnie" McGann, JAGC, USN. Along with them, I am indebted to Mr. Dennis J. Oppman, who always managed to find the resources to keep me going, and to the military personnel people who had to modify my orders *ad nauseam* to keep me on active duty long enough to complete the project.

I owe much gratitude to my editorial board for its support and encouragement, heavily leavened, as it needed to be, with prodding to get the job done: Captain John E. Dombroski, JAGC, USN, Captain John J. Geer, Jr., JAGC, USN, Captain Thomas A. Morrison, JAGC, USN, Colonel Richard E. Ouellette, USMC, and Captain Richard B. Schiff, JAGC, USN.

Finally, I am indebted to the entire support staff of the Office of the Judge Advocate General, military and civilian. No favor was too much to ask, nor any request too unreasonable.

Writing this book has been a great adventure for me. I hope those who read it will enjoy many of the discoveries I made in writing it.

Captain Jay M. Siegel, JAGC, USNR (Retired)
Alexandria, Virginia
12 March 1997

Digitized by Google

PROLOGUE

> ***Perhaps no military institutions ever existed in any country, in which the administration of justice was so little cared for by the government, as in those of the United States.***—CAPTAIN W.C. DEHART, USA, 1846

The Judge Advocate General's Corps of the Navy came into being on 8 December 1967, with the stroke of President Lyndon B. Johnson's pen. The Corps, a creation of statute, was not easily born. The Navy commander, with his tradition of self-reliance and jealous protection of disciplinary authority, saw no need for a separate cadre of professional lawyers in uniform who might usurp, or at the least temper, that authority. For almost two centuries American navies had sailed without a legal corps, attending to disciplinary matters through a system of justice administered by non-lawyer line officers, and attending to other legal affairs on an *ad hoc* basis. Throughout all this time most of the Navy's highest-ranking military and civilian leaders including, at times, the Judge Advocate General of the Navy himself, thwarted every attempt to bring about the creation of a Navy Judge Advocate General's Corps.

Not until December 1967, when the United States Navy was 170 years old, was a Navy Judge Advocate General's Corps established. This book explores how and why the Corps finally came into being. In so doing, it examines the foundations of naval law; the Navy's approach to the disposition of legal issues since the time of its founding in 1789; its focus on discipline as the totality of naval law throughout much of its existence; the uniformed lawyer's tentative growth within a system that ignored the need for lawyers in uniform for over a century, then treated the profession as little more than a secondary qualification for line officers; and the Navy lawyer's final emergence as a respected professional staff corps member.

Although we speak of the *Navy* Judge Advocate General's Corps, the Marine Corps has been integral throughout history to the administration of the Navy's legal affairs. Marine Corps officers served as prosecutors for both Navy and Marine Corps courts martial almost from the day the Marine Corps was established. They were the first to staff the Office of the Judge Advocate General of the Navy after its establishment in 1880.

Digitized by Google

They took the lead in publishing guides for the conduct of courts martial. They were among the first to receive formal legal training through the Judge Advocate General's law education program. Their contributions to the administration of legal affairs in the Navy are vital and extensive. It is impossible to write a history of the Navy's legal system without including the role of the Marine Corps officer, so entwined are the two. The Marine lawyer's history and the Navy lawyer's history are one.

Digitized by Google

CHAPTER 1

HISTORICAL ANTECEDENTS: OUR MARITIME HERITAGE ANTIQUITY to 1775

***If a pilot undertakes the conduct of a vessel to bring her to port, and fail of his duty so as the vessel miscarry, he shall be obliged to make full satisfaction and if not, lose his head.*—LAWS OF OLERON, 13TH CENTURY**

Overview

The history of the Navy Judge Advocate General's Corps is, at bottom, the history of naval law, the manner in which it has developed, and the manner in which the Navy—or perhaps more accurately the Congress—has chosen to administer it.

"Military law," as the term is used today, connotes the body of laws which regulates conduct in the land, sea and air forces.[1-1] Historically,

---

1-1. In defining military law, the United States Supreme Court stated in *Burns v. Wilson*, 346 U.S. 137, 140 (1953):

> Military law . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment. This Court has played no role in its development; we have exerted no supervisory power over the courts which enforce it; the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress. (Footnotes omitted.)

Also of interest on the definition of military law is *Parker v. Levy*, 417 U.S. 733 (1974) and cases cited therein at 743-44.

This nice isolation from matters military was tempered somewhat by the addition of article 67(a) to the *Uniform Code of Military Justice* in 1983. Article

(continued...)

Digitized by Google

however, military law comprised that body of jurisprudence established for the maintenance of discipline in the land forces, and naval law comprised that body of jurisprudence established for the maintenance of discipline in the sea services. Statutorily merged under the *Uniform Code of Military Justice* in 1950,[1-2] these specialized legal systems form the basis of the legal regulations under which the United States Navy operates, and in turn have shaped the role of the Navy lawyer, resulting, ultimately, in the creation of the Navy Judge Advocate General's Corps. No study of this sort can be done without a study of the evolution and impact of these regulatory systems.

The structure and composition of the United States Navy's legal organization from the earliest days of the Navy has, not surprisingly, been a reflection of the Navy's perception of its legal responsibilities toward its members and toward its body corporate. Until shortly after World War II, this structure evolved along two rather distinct paths. Matters relating to discipline, or "naval justice," were, in great part, treated as executive rather than judicial concerns; while justice was to be done, discipline was paramount. Naval justice was an agency of command, administered by the line, and existing to enforce discipline. Civilian lawyers were employed to prosecute courts martial when it was convenient or politically important. But except in rare instances, or for brief periods, it was not until 1951, with the advent of the *Uniform Code of Military Justice*, that lawyers in uniform assumed a recognized role in this sphere.

"Civil," or non-disciplinary law within the Navy, did, on the other hand, involve the expertise of lawyers, but not the expertise of uniformed Navy lawyers until shortly before the United States' entry into World War I (see page 285). Until that time the Secretary of the Navy, when dealing with legal issues, either handled them himself, sought counsel from the Attorney General of the United States, turned to civilian "clerks" in the Office of the Judge Advocate General, or, in some instances, hired civilian lawyers of his own choosing.

1-1. (...continued)
67(a) provides that decisions of the United States Court of Appeals for the Armed Forces (then the United States Court of Military Appeals) are subject to review by the U.S. Supreme Court by writ of certiorari. See Appendix E.

1-2. Act of 5 May 1950, codified at 10 United States Code, secs. 801-940. The *Uniform Code* became effective on 31 May 1951.

Digitized by Google

This attitude toward naval justice as the domain of the line shaped the early development of the Office of the Judge Advocate General of the Navy in both the disciplinary and civil law fields. A need for uniformed professionals within the Navy who would devote their careers to legal matters was simply not given serious consideration until after World War II. Until that time it was felt that the administration of legal affairs and the resolution of legal problems of whatever sort were best overseen by line officers with broad experience in naval matters of all sorts, whether expert in the law or not. This system worked, and sometimes quite well, until the sophistication of legal affairs overwhelmed it, at which point the jurisdictional authority of the Judge Advocate General over commercial matters was removed. Ultimately it was replaced by a Congressionally-motivated legal cadre in the Navy, a definition of the role of the professional lawyer, and establishment of the Navy Judge Advocate General's Corps.

While an extensive analysis of the historical antecedents of military and naval law is beyond the scope of this history, the following pages should provide sufficient background for our purposes.[1-3] We will

---

1-3. The organization of chapters 1 through 3 of this book has followed, to a degree, the outline of a draft manuscript (partially handwritten) titled *The Jurisdiction of Naval Courts*. The manuscript was obtained from Captain Mack Greenberg, JAGC, USN (Ret.), during an interview with the author on 14 May 1992. Captain Greenberg had been holding the manuscript for a number of years for safekeeping, and indicated at the time of the interview that he believed it to have been prepared by Commander Kurt Hallgarten, USNR (Dec.), a lawyer assigned to the Office of the Judge Advocate General of the Navy during and after World War II. While the exact date of the manuscript is unknown, its content indicates that it was completed after World War II, but prior to passage of the *Uniform Code of Military Justice* in 1950.

Subsequent to receiving the manuscript from Captain Greenberg, the author had occasion to consult a pamphlet-size work by Brigadier General James Snedeker, USMC (Dec.), titled *A Brief History of Courts-Martial*, published by the United States Naval Institute Press in 1954. A comparison of the "Hallgarten" manuscript and the Snedeker work reveals that they are virtually identical in parts.

Upon consulting with Captain Greenberg following this revelation, he indicated that he had been told that the manuscript was the work of Commander Hallgarten when it was given to him, but that he also had known Brigadier General (then Colonel) Snedeker; that Snedeker had been assigned to the Office of the Judge Advocate General of the Navy contemporaneously with Hallgarten; and that the manuscript could easily have been Snedeker's effort.

(continued...)

Digitized by Google

examine in turn the origins of military law and the origins of naval law for—as will be seen—they developed separately and distinctly, retaining their unique character throughout history and for over a century and a half

---

1-3. (...continued)

To confuse the matter still further, a scathing criticism of Snedeker's book appears in a footnote to an article written in 1986 by Lieutenant Colonel William R. Hagan, JAGC, USA, for the *Military Law Review*. To quote in part:

> Snedeker's little book is full of interesting information about the origins of military law. Unfortunately, the author did not disclose his sources. Snedeker is flawed by more than an absence of footnotes. In fact, he should be ignored. The current, inexplicable enthusiasm for Snedeker may readily be dampened by reading Frederick Bernays Wiener, *The Teaching of Military Law in a University Law School*, 5 J. Legal Ed. 475, 488-98 (1953).

William R. Hagan, "Overlooked Textbooks Jettison Some Durable Military Law Legends," *Military Law Review* 113 (Summer 1986): 163, 164.

Hagan's criticism of Snedeker's book as lacking footnotes is well placed but curious, since the underlying manuscript is heavily annotated with citations. Why they were omitted from his book is not clear. The criticisms leveled by Professor Wiener are directed at a different work of Snedeker's, *Military Justice Under the Uniform Code* (1953), and are unrelated to either the manuscript or the book castigated by Hagan. Concerning the accuracy of *this* book, the author worked from the Snedeker(?) manuscript, which permitted review of its abundant citations, and consulted parallel sources before committing word to paper.

As for Commander Hallgarten "he was," according to Rear Admiral Donald D. Chapman, JAGC, USN (Ret.), "one of the true legends in the JAG office." In an interview with the author on 18 July 1991, Admiral Chapman noted that Commander Hallgarten was a German national, a lawyer, and a refugee from a German concentration camp who somehow escaped to the United States during World War II and dedicated his whole life thereafter to service in the United States Navy. He was never seen out of uniform, ate all his meals in the Pentagon cafeteria (the Office of the Judge Advocate General was located in the Pentagon at that time), and was at his desk from early in the morning until late at night. He always maintained a Prussianistic bearing; he spoke English well, with a German accent, and his communications were always brief and to the point. He was an expert on *Navy Regulations*, the *Uniform Code of Military Justice*, the *Manual for Courts-Martial*, the *JAG Manual*, and the *Code of Federal Regulations*. Commander Hallgarten retired from the Navy in 1967 and, as noted above, is now deceased.

Digitized by Google

of our nation's existence, merging, finally, in 1950 with adoption of the *Uniform Code of Military Justice*. As noted by the military historian, Homer A. Walkup:

> From 1775 until the enactment of the Uniform Code of Military Justice in 1950, regulation of the land and naval forces, respectively, of the United States was by two separate and distinct lines of authority. . . . [I]n general, from the Houses of Congress, in each of which a Naval Affairs Committee and a Military Affairs Committee were respectively jealous of their jurisdiction, down to the yard craft moored at an Army pier, there was apparent little exchange of experience reflected in evolution of common regulatory provisions.[1-4]

Historical Antecedents of Military Law

Military law for the maintenance of discipline within military forces has existed as early as the Greek and Roman armies.[1-5] Tribunals for the administration of discipline were generally conducted by military commanders or their delegates.[1-6] During the Middle Ages civil and military jurisdictions were almost indistinguishable, with military

---

1-4. Homer A. Walkup, "Investigation: 1968," *JAG Journal* (July-August 1968): 5.

1-5. William Winthrop, *Military Law and Precedents*, 2d ed. (Washington, D.C.: Government Printing Office, 1920), 17, citing, among others, Potters', *Archaeologia Graeca*; Smith's, *Dictionary of Greek and Roman Antiquities*; and Adam's, *Roman Antiquities*. See also Hagan, "Overlooked Textbooks," 200.

The Winthrop book is a reprint of his original 1896 edition. All citations herein are to the 1920 edition which contains cross-pagination references to the 1896 edition.

1-6. Winthrop, *Military Law and Precedents*, 45.

Digitized by Google

commanders assuming the role of civil judges.[1-7] Written military laws began to appear during this time and by the ninth century the Western Goths, the Lombards, the Burgundians and the Bavarians all had written codes.[1-8]

The earliest English codes were ephemeral ordinances issued to the Army when about to leave on expeditions, or during a war.[1-9] One such code was issued by Richard I in 1190 to govern conduct and prevent disputes between soldiers and sailors embarked together for a voyage to the Holy Land. The following excerpt conveys both the tone and content:

> Richard, by the grace of God, King of England, . . . to all his subjects about to proceed by sea to Jerusalem, greeting. Know ye, that we, with the common consent of fit and proper men, have made the enactments underwritten. Whoever shall slay a man on ship-board, he shall be bound to the dead man and thrown into the sea. If he shall slay him on land he shall be bound to the dead man and buried in the earth.[1-10]

Curiously, because it was designed to regulate soldiers' conduct while at sea, this earliest of English *military* codes is said to have been based on a *maritime* ordinance, the *Laws of Oleron*, which emerged at the end of the Dark Ages as a derivation of a still earlier maritime code, the *Sea Law*

1-7. Winthrop, *Military Law and Precedents*, 18, 45.

1-8. Winthrop, *Military Law and Precedents*, 18; John Henry Wigmore, *A Panorama of the World's Legal Systems* (St. Paul: West Pub. Co., 1928), 836-39.

1-9. Winthrop, *Military Law and Precedents*, 18, citing in part Francis Grose, *Military Antiquities Respecting a History of the English Army*, 2:58; M.L. Clode, *Military Forces of the Crown* 1:29, 72.

1-10. *Ordinance of Richard I* (1190), reprinted in Winthrop, *Military Law and Precedents*, app. I, 903.

Digitized by Google

of Rhodes (300 B.C.-A.D. 700).[1-11] A brief discussion of these maritime codes begins at page 11.

In 1385 the second Richard issued his *Articles of War* consisting of "Statutes, Ordonnances and Customs, to be observed in the Army,"[1-12] a more comprehensive set of regulations consisting of twenty-six items, and being the earliest British articles of war.[1-13]

The formalized court martial, as a vehicle for adjudicating guilt and ascribing punishment, is credited by the military historian, William Winthrop (see footnote 1-5), to the 1532 penal code of the Holy Roman Emperor Charles V, the *Constitutio Carolina Criminalis*, or "*Carolina*," which, according to Winthrop, specifically provided for the "spear" court in which the assembled regiment passed judgment upon the accused.[1-14] Charles may also be credited with institutionalizing the office of military lawyer when he created the position of auditor for his Army of the Netherlands in 1553:

> In order that we may be able to keep our said army in good discipline and justice, we have found it necessary to commission some scholarly person . . . learned and experienced in the matter of justice, to be with our captain-general of our said army, and . . . give

---

1-11. Leland Pearson Lovette, *Naval Customs, Traditions, and Usage*, 4th ed. (Annapolis: Naval Institute, 1934), 61.

1-12. Reprinted in Winthrop, *Military Law and Precedents*, app. I, 904.

1-13. Walkup, "Investigation: 1968," at 4.

1-14. Winthrop, *Military Law and Precedents*, 45-46. Winthrop's crediting of Charles V with the promulgation of a unique *military* code is sharply disputed by Hagan (see footnote 1-3), who maintains that the *Carolina* was a penal code for the *entire* Holy Roman Empire (Hagan, "Overlooked Textbooks," 178-80). As there is no existing English translation of the *Carolina*, this difference of opinion is difficult to resolve. Nevertheless, even if the *Carolina* did govern both civil and military affairs, it may be assumed to have advanced the development of the court martial as a vehicle of military discipline.

Digitized by Google

> him good advice and counsel in what shall concern justice . . . .[1-15]

A similar position (Judge Martial) was held by one Matthew Sutcliffe in the English armies fighting in the Low Countries in the 1580s.[1-16] Legal advisors became so entrenched in the British forces that by 1815 the Duke of Wellington wrote to the Earl of Bathurst stating that he found it "scarcely possible to get on without some legal person in the situation of Judge Advocate."[1-17]

The court martial was perfected under the hand of Gustavus Adolphus of Sweden when, in 1621, he issued his *Articles and Lawes to be Observed in the Warres*,[1-18] establishing an on-call regimental court martial for "minor" offenses, with the regimental commander as president and members appointed from the regiment. There was also a standing general court martial which tried serious offenses, a provision for appeal from the lower to the higher court, and a final appeal to the king.[1-19] Translated and published in London in 1639, the laws of Gustavus Adolphus had a great influence on the form of later English military codes and, derivatively therefrom, American military codes.[1-20]

Three years later, in 1642, the Earl of Essex, commanding the Parliamentary Army during England's Great Rebellion, issued a military ordinance passed by both houses of the Long Parliament which, for the first time, gave direct statutory authority to convene courts martial in the English military and granted to the court the power to appoint necessary officers, including a judge advocate to prosecute on behalf of the

---

1-15. Hagan, "Overlooked Textbooks," 192-93, n. 158.

1-16. Hagan, "Overlooked Textbooks," 188, n. 130, citing Webb, "Dr. Matthew Sutcliffe," *Philological Quarterly* 23, no. 1 (1944): 85.

1-17. Hagan, "Overlooked Textbooks," 193, n. 158.

1-18. Reprinted in Winthrop, *Military Law and Precedents*, app. III, 907.

1-19. Winthrop, *Military Law and Precedents*, app. III, 915-17; Theodore Ayrault Dodge, *Gustavus Adolphus* (Boston & New York: Houghton, Mifflin, 1895), 58-59.

1-20. Winthrop, *Military Law and Precedents*, 19.

Digitized by Google

government.[1-21] This ordinance formed the model for a successive series of legislatively-enacted *Mutiny Acts*,[1-22] the first in 1689.[1-23] These acts, together with articles of war adopted under crown prerogative, notably the *Rules and Articles for the better Government of our Horse and Foot Guards, and all other Our Forces in Our Kingdoms of Great Britain and Ireland, Dominions beyond the Seas, and Foreign Parts*[1-24] issued by George III in 1765, which contained provisions for military justice, regulated the conduct of British soldiers at home and abroad for almost the next 200 years.[1-25] In 1879 legislation and edict were consolidated by the *Army Discipline and Regulation Act*[1-26] into a single statute which, with later amendments, brought the British Army into the twentieth century.[1-27]

The first American written laws for the governance of military forces were adopted by the Provisional Congress of Massachusetts Bay on 5 April 1775.[1-28] This code, known as the *Massachusetts Articles of War*, drew its substance directly from George III's "*Rules and Articles*" of 1765, which were adopted almost intact. On 30 June 1775 the Continental Congress adopted a set of sixty-nine articles of war, the *Rules and Articles for the government of the Continental Troops*, many of

---

1-21. Nathan Sargent, "The Evolution of Courts-Martial," *U.S. Naval Institute Proceedings*, 9 (May 1883): 700.

1-22. Sargent, "The Evolution of Courts-Martial," 700.

1-23. Winthrop, *Military Law and Precedents*, 19.

1-24. Reprinted in Winthrop, *Military Law and Precedents*, app. VII, 931.

1-25. Winthrop, *Military Law and Precedents*, 20.

1-26. Winthrop, *Military Law and Precedents*, 20, citing 42 & 43 Vict. c. 33. See also Department of the Navy, *Report and Recommendations of the General Court-Martial Sentence Review Board on Court-Martial Procedures and Policies* (1947), 7.

1-27. Great Britain, War Office, *Manual of Military Law* (London, 1899), 14, 18.

1-28. Winthrop, *Military Law and Precedents*, 22, n. 32.

Digitized by Google

which had been copied directly from the *Massachusetts Articles*.[1-29] In 1776 these articles were revised and enlarged,[1-30] and by Act of 29 September 1789, the Congress of the United States provided that the Army should continue to be governed by them. A superseding set of articles was enacted in 1806, amended from time to time, and partially incorporated into a revision in 1874. A total revision (*Articles of War, 1916*)[1-31] became effective in 1917, but was completely revised in 1920.[1-32] At its entry into World War II, the Army was operating under these 1920 articles (with minor amendments in 1931 and 1937) and a 1928 edition of its *Manual for Courts-martial*.

Historical Antecedents of Naval Law

Thus far we have examined military law as it has applied to land forces.[1-33] The military law of the sea, or naval law, developed quite apart. Arising from rules to regulate maritime commerce, little distinction was made between early admiralty precepts and naval law.[1-34] The sea presented a realm ruled by no man; the hazards and needs faced by seamen were universal to all. Common rules, driven by common need, were accepted by common understanding.

1-29. *Journals of the Continental Congress* 2 (1775): 111, edited by Chauncey Ford from the original documents (Washington, D.C.: Government Printing Office, 1904); Winthrop, 22.

1-30. *Journals of Congress* 5 (1776): 788, edited by Chauncey Ford from the original documents (Washington, D.C.: Government Printing Office, 1904).

1-31. Act of 29 August 1916, 39 Stat. 586.

1-32. Act of 4 June 1920, 41 Stat. 787.

1-33. A possible exception might be the *Ordinance of Richard I*, intended to regulate the conduct of soldiers and sailors underway to the Crusades. See footnote 1-10.

1-34. L. Cleveland McNemar, "Administration of Naval Discipline," *Georgetown Law Journal* 13 (January 1925): 89, n. 3, citing W.J. Nunnaly, "The Origin of Naval Law," *U.S. Naval Institute Proceedings*, 50 (November 1924).

Digitized by Google

The roots of Western maritime custom are found in the Mediterranean. Wigmore notes that coastal trade in the Mediterranean must have been quite heavy as many as 3,000 years before Christ, with the overseas expedition of an Egyptian king somewhere around 2,900 B.C. being the earliest on record. Ocean-going ships of the Egyptians evolved about 1,500 B.C., making that land the center of maritime commerce at the time. Trade centers gradually shifted west along the Mediterranean, to Phoenicia a thousand years later, Rhodes in 300 B.C., Amalfi during the Middle Ages, and Barcelona during much of the Renaissance. Each of these centers had its own code of sea laws for the resolution of disputes arising from maritime affairs.[1-35] In the northern countries trade centers and maritime codes arose in rough tandem with those in the Mediterranean region; thus English, Scotch and Norman seamen compiled and adopted as their rules the *Laws of Oleron*,[1-36] decisions of local maritime courts from the reign of Richard I (1189-1199)[1-37] through that of Edward III (1327-1377).[1-38] The Swedes, Germans, Danes and Flemings abided by another code, the *Laws of Wisbuy*.[1-39] As the Renaissance dawned, commerce in northern Europe fell under the control of the Hansa League of the Baltic.[1-40] The *Hansa Ordinance of 1482*, adopted by the Hansa Assembly of "merchant-princes" in response to the grievances of

---

1-35. See generally Wigmore, *Panorama of the World's Legal Systems*, 875-85.

1-36. Reprinted with commentary in the appendix to *Federal Cases* 30:1171. Each paragraph recorded a judicial decision.

1-37. A listing of English sovereigns since the Norman Conquest and their regnal years appears in A.K.R. Kiralfy, ed., *Potter's Historical Introduction to English Law and its Institutions*, 4th ed. (London: Sweet & Maxwell, Ltd., 1958), xxx-xxxi.

1-38. *Federal Cases* 30:1171 (app., commentary).

1-39. Reprinted with commentary in the appendix to *Federal Cases* 30:1189.

1-40. Wigmore, *Panorama of the World's Legal Systems*, 893.

Digitized by Google

shipmasters over alleged misbehavior of mariners,[1-41] was succeeded in the following century by the more extensive *Laws of the Hanse Towns*,[1-42] first enacted in 1597 and revised in 1614, which became the dominant maritime regulations of the region. Drawing on these and other regulations, the *Marine Ordinances of Louis XIV* were promulgated in 1681 by the French king, and served that nation into the twentieth century.[1-43]

While these various codes or compilations of law were designed primarily to settle commercial disputes, they necessarily incorporated regulatory, or disciplinary terms as well. Thus, the *Laws of Oleron* contained provisions such as the following:

> ARTICLE XII
>
> A master, having hired his mariners, ought to keep the peace betwixt them, and to be as their judge at sea; so that if there be any of them that gives another the lie . . . he ought to pay four deniers . . . and if the master strike any of the mariners, he [the mariner] ought to bear with the first stroke . . . but if the said mariner doth first assault the master, he ought to pay five sols, or lose his hand.

Such disciplinary measures were necessary to ensure the safety of men, ships and cargo against the perils and hardships of life at sea. But they were minimal and imposed primarily economic, as opposed to physical, sanctions, intended only to ensure the flow of maritime commerce. Unlike standing armies which required constant regulation and discipline, and posed a threat of usurpation even to their own sovereigns, naval fleets were temporary; no concerns of intrigue or rebellion attached to the early naval forces, for they were not permitted to remain organized

---

1-41. A list of the grievances upon which the Hansa ordinance was based appears in Wigmore, *Panorama of the World's Legal Systems*, at 907-11. The ordinance appears at 911-14.

1-42. Reprinted with commentary in the appendix to *Federal Cases* 30:1197.

1-43. *Federal Cases* 30:1203 (app., commentary).

Digitized by Google

past the end of their mission. Fleets were improvised by impressing merchant vessels as needed, primarily to transport troops and supplies, then promptly disbanded at the conclusion of hostilities.[1-44] Not until 1490 did England build a vessel exclusively as a man-of-war.[1-45] In time naval procurement became more formalized; in exchange for franchises and privileges from the crown, some shipowners assumed obligations to provide the monarch with vessels for use in wartime. The king, of course, had the right to impress into service any English ship in any port of the realm. Also, he usually had a few ships of his own.[1-46] But the operations of such naval forces were temporary in nature, and because of this no special laws were deemed necessary for their governance, and no strong apparatus for naval administration was established.[1-47] The officers and men of such fleets were merchant sailors, drawn from peaceful maritime pursuits; even when under control of the monarch they remained governed by general maritime laws and customs of the sea.[1-48]

Early in the thirteenth century King John appointed an official to manage the crown's own ships, as well as those which owed it allegiance in time of war, and any which might be impressed into service from time to time. Known originally as the "Keeper of the King's Ships," and by various titles thereafter, this office existed until the middle of the sixteenth century.[1-49] Regardless, the administration of discipline on the seas remained the prerogative of individual ship masters until 1300, and then

---

1-44. Charles Richard Williams, "On the History of Discipline in the Navy," 45 *U.S. Naval Institute Proceedings* (March 1919): 367.

1-45. *The Great Harry*. Built by Henry VII at a cost of 14,000 pounds, she burned in 1553. Sargent, "The Evolution of Courts-Martial," 699, n. †.

1-46. Williams, "Discipline in the Navy," 366.

1-47. Williams, "Discipline in the Navy," 367.

1-48. Williams, "Discipline in the Navy," 367.

1-49. Williams, "Discipline in the Navy," 366-67.

Digitized by Google

passed to the "Admiral of the Cinque Ports,"[1-50] an officer appointed by the crown, and to several fleet admirals concurrently appointed.[1-51] Initially imbued only with authority to enforce discipline among those in the fleets under their commands, these admirals sought to extend the range of their jurisdiction beyond disciplinary affairs and into commercial matters, establishing first several, and then a single court of admiralty for this purpose. During the next three centuries this admiralty court asserted and expanded its authority in the jealous shadow of the local courts of the seaport towns, which continued to assert the same mercantile jurisdiction sought by the admiralty.[1-52]

In an attempt to consolidate the power of the crown over maritime matters, and provide guidance both to those subject to the laws and those administering them, a compilation of the sundry regulations and decisions which formed the body of the law merchant of the time was compiled in the *Black Book of the Admiralty*[1-53] during the reign of Henry VI (1422-1461).[1-54] Included were the *Laws of Oleron*,[1-55] ordinances from the reign of John (1199-1216),[1-56] and maritime decisions of the local courts of the various British seaport towns.[1-57] Decisions and rules of the

---

1-50. Sir William Searle Holdsworth, *A History of English Law*, ed. A.L. Goodhart and H.G. Hanbury, 7th ed., 16 v. (London: Methuen, 1966), 1:544.

1-51. Holdsworth, *History of English Law*, 1:530, 544-45, 548.

1-52. Holdsworth, *History of English Law*, 1:530-32, 5:120.

1-53. Sir Travers Twiss, ed. and trans., *Black Book of the Admiralty*, 4 v. (London: Longman & Co., 1871-76). The *Black Book of the Admiralty* was written in Norman French, the judicial language of the time.

1-54. Holdsworth, *History of English Law*, 5:125. Some commentators have placed the first compilations in the *Black Book* as early as 1351. See, for example, McNemar, "Administration of Naval Discipline," 90, n. 4.

1-55. Holdsworth, *History of English Law*, 1:527.

1-56. Holdsworth, *History of English Law*, 5:123, n. 12.

1-57. Holdsworth, *History of English Law*, 5:120.

Digitized by Google

admiralty courts dating back to 1332[1-58] occupy a paramount place, becoming increasingly prominent through the 15th and 16th centuries. In addition to its compilation of laws, the *Black Book* defined the duties of the English Navy admirals, including the responsibility to administer justice "according to the law and ancient customs of the sea."[1-59] These provisions imbued the admirals with the power to issue regulations for the control of ships in their fleets, giving the English Navy—rather than the individual masters—control over discipline on vessels at sea.[1-60] The authority to act pursuant to this responsibility was ofttimes delegated to subordinates who were issued commissions empowering them to impress ships and men, and to deal summarily with certain offenses.[1-61] Although no seaman was to be "beaten or ill used," a man convicted by a jury of stealing a boat anchor worth 21 pence was to be hanged, as was a sailor who persisted three times in stealing oars or other petty items.[1-62]

By the early fifteenth century the admiralty had succeeded in wresting control over commercial maritime matters from the local seaport courts, reaching the height of its authority during the Tudor reign (1485-1603).[1-63] Its preeminence was not to be sustained, however. The admiralty office by this time had been reduced to a single Lord High Admiral.[1-64] Criminal jurisdiction had been effectively stripped in the sixteenth century, when, in 1536, dissatisfaction with the failure to provide trial by jury in

---

1-58. Holdsworth, *History of English Law*, 1:545; see also Lovette, *Naval Customs*, 62.

1-59. Williams, "Discipline in the Navy," 368.

1-60. Edward M. Byrne, *Military Law*, 3d ed. (Annapolis: Naval Institute, 1981), 3.

1-61. Holdsworth, *History of English Law*, 1:547; Lovette, *Naval Customs*, 65.

1-62. Williams, "Discipline in the Navy," 369.

1-63. Holdsworth, *History of English Law*, 1:546, 549.

1-64. Holdsworth, *History of English Law*, 1:545.

Digitized by Google

admiralty courts led to passage of a statute of Henry VIII[1-65] which transferred admiralty's criminal jurisdiction to the common law courts.[1-66] By the end of the seventeenth century the mercantile jurisdiction of the admiralty had also passed to the British common law courts.[1-67]

The admirals nevertheless held on as long as possible to their power to issue regulations for the administration of the ships of their fleets,[1-68] issuing such instructions until the beginning of the eighteenth century.[1-69] Among the most important of these early edicts were the regulations of Robert, Earl of Essex, and Lord Howard, Lord High Admiral of England, joint commanders of the British expedition to loot the Spanish treasure fleet at Cádiz, Spain, in 1596.[1-70] Relying on the traditional conformity to standards of conduct and discipline through common adherence to the laws and customs of the sea, it was sufficient that the regulations contained only twenty-nine articles.[1-71] Found in those written articles, however, are the seeds of some of our present-day naval traditions: the

---

1-65. 28 Henry 8, c. 15.

1-66. Holdsworth, *History of English Law*, 1:550.

1-67. Holdsworth, *History of English Law*, 1:550, 553.

1-68. Williams, "Discipline in the Navy," 370.

1-69. Sir W. Laird Clowes, *The Royal Navy, a History from the Earliest Times to the Present* (Boston: Little, Brown and Co., 1897-1903), 2:103. Pasley and Larkin note that "occasionally power was given to an admiral by patent under the great seal to publish ordinances for the good government of the fleet. Many such admiral's codes were promulgated, based largely on existing law. They provided the models after which later statutory codes were patterned." Robert S. Pasley, Jr. and Felix E. Larkin, "The Navy Court Martial: Proposals for Its Reform," *Cornell Law Quarterly* 33 (November 1947): 197.

1-70. Samuel Shelburne Robison, *A History of Naval Tactics from 1530 to 1930* (Annapolis: Naval Institute, 1942), 86; *Encyclopaedia Britannica*, 14th ed., s.v. "Cádiz."

1-71. Williams, "Discipline in the Navy," 370-71.

Digitized by Google

holding of divine services; a prohibition against stealing; references to "officers or gentlemen."[1-72]

The first written provision for a court martial at sea is contained in the orders of Sir Walter Raleigh, issued in 1617 for his voyage to America. The orders provided that "no private man shall strike another, under pain of receiving such punishment as a martial court shall think him worthy of."[1-73]

We have noted at page 8 that the Long Parliament passed, in 1642, the first ordinance statutorily authorizing courts martial in the English military. Three years later, in 1645, the same Parliament also passed *An Ordinance and Article of Martial Law for the Government of the Navy*, establishing for the first time a regular naval tribunal with instructions for convening "general and ships' courts-martial with written records."[1-74] The power of the admirals to regulate conduct had waned substantially.

In March 1649 the Commons adopted rules for the Earl of Warwick's fleet, and on Christmas Day, 1652, made them applicable, in modified form, to all British naval forces.[1-75] In effect during the years of the Cromwell Protectorate (1653-1660), and sometimes referred to as "Cromwell's Articles,"[1-76] they stressed religion and moral conduct.[1-77] Although they did little more than codify the customs practiced by

---

1-72. Thomas Lediard, *The Naval History of England*, 2 v. (London: J. Wilcox, 1735), 1:325, 328.

1-73. Julian S. Corbett, ed., *Fighting Instructions 1530-1816* (London: Navy Records Society, 1905) 36-45.

1-74. Pasley and Larkin, "The Navy Court Martial: Proposals for Its Reform," 197; Lovette, *Naval Customs*, 65; Sargent, "The Evolution of Courts-Martial," 700-701.

1-75. Williams, "Discipline in the Navy," 373.

1-76. *Report of the General Court-Martial Sentence Review Board on Court-Martial Procedures and Policies* (1947), 11.

1-77. Williams, "Discipline in the Navy," 374.

Digitized by Google

commanders of individual ships for generations past,[1-78] they were significant as the first established general articles of governance for the Royal Navy,[1-79] and the progenitor of all British and American naval regulations.[1-80]

In 1661 a revised code, *An Act for the Establishing Articles and Orders for the regulating and better Government of His Majesties Navies, Ships of Warr & Forces by Sea*, based upon the 1652 regulations, was passed by Parliament.[1-81] With its enumeration of offenses, provision for courts martial for offenses committed aboard ship, authority to delegate the power to convene courts martial, and provision for a judge advocate[1-82] with the power to administer oaths, examine witnesses, and perform other functions,[1-83] this act bore a strong paternal resemblance to the American *Articles for the Government of the Navy* (see discussion at page 33). Various statutory and regulatory changes followed during the next several decades, including the *King's Regulations and Admiralty Instructions* which first appeared in 1731.[1-84] On Christmas Day, 1749, one hundred years after passage of Warwick's rules, *An Act for Amending, Explaining, and Reducing into One Act of Parliament, the Laws Relating to the Government of His Majesty's Ships, Vessels, and Forces by Sea* was passed by Parliament, consolidating and clarifying, but not

---

1-78. McNemar, "Administration of Naval Discipline," 89, n. 2.

1-79. Clowes, *The Royal Navy*, 2:103; Michael Oppenheim, *A History of the Administration of the Royal Navy and of Merchant Shipping in Relation to the Navy* (London, New York: J. Lane, 1896), 311; Williams, "Discipline in the Navy," 373.

1-80. Oppenheim, *Administration of the Royal Navy*, 311; Clowes, *The Royal Navy*, 2:103; Williams, "Discipline in the Navy," 373.

1-81. 13 Car. 2, c. 9. See Sargent, "The Evolution of Courts-Martial," 702, n. †; Williams, "Discipline in the Navy," 374.

1-82. The Parliamentary ordinance issued by Essex in 1642, nineteen years earlier (see page 8) also provided for the employment of a judge advocate.

1-83. Sargent, "The Evolution of Courts-Martial," 702.

1-84. Lovette, *Naval Customs*, 66.

Digitized by Google

substantially changing, existing naval laws.[1-85] This act, supplemented by the *King's Regulations and Instructions Relating to His Majesty's Service at Sea* (1772), was the operative law for the Royal Navy when the American Revolution erupted.[1-86]

1-85. Sargent, "The Evolution of Courts-Martial," 704. The Act was passed mainly through the efforts of Lord Anson. Lovette, *Naval Customs*, 66.

1-86. Williams, "Discipline in the Navy," 374-75.

Digitized by Google

Digitized by Google

CHAPTER 2

THE CONTINENTAL NAVY
1775 to 1789

> ***Whilst the ships sent forth by the Congress may and must fight for the principles of human rights and republican freedom, the ships themselves must be ruled and commanded at sea under a system of absolute despotism.*—JOHN PAUL JONES, 1776**

The second Continental Congress meeting in 1775 recognized the need for a Navy to guard the coast and interdict British ships carrying supplies to the king's forces in Boston.[2-1] On 13 October 1775 a three-man Naval Committee was authorized to arm two merchant vessels,[2-2] and the Navy of the United Colonies of North America was born. Two more ships were authorized on 30 October 1775.[2-3] Thus did the Continental Navy secure its armed vessels in the same way as had the English kings of the Middle Ages; by the expedient of converting merchant ships. Also on 30 October 1775 the Naval Committee was increased in number to seven, with John Adams being among the new members.[2-4] Problems facing the committee included matters of discipline, pay, and condemnation of prizes, the same issues which were

---

2-1. James Fenimore Cooper, *History of the Navy of the United States of America* (New York: Blakeman & Mason, 1864), 46. This book is a reprint of the original 1841 edition, "continued to 1860 from the author's manuscripts, and other authentic sources."

2-2. *Journals of the Continental Congress* 3 (1775): 293-94. The members of the Naval Committee were Messrs. Deane, Langdon, and Gadsen.

2-3. *Journals of the Continental Congress* 3 (1775): 311-12.

2-4. *Journals of the Continental Congress* 3 (1775): 311-12. The other members of the augmented Naval Committee were Messrs. Hopkins, Hewes, and Lee. See also L.H. Bolander, "Two Notes on John Paul Jones," *U.S. Naval Institute Proceedings*, 54 (July 1928): 547.

Digitized by Google

to comprise the major part of the legal and administrative problems to face the Navy for almost the next century. Proposed rules dealing with these and other matters were drafted by the Naval Committee and placed before the Continental Congress on 23 November 1775.[2-5] On 28 November 1775 the Congress adopted the first laws for the governance of an American Navy, the *Rules for the Regulation of the Navy of the United Colonies of North America*,[2-6] consisting of forty-four articles. This document, a forerunner of today's *Navy Regulations* and *Uniform Code of Military Justice*, contained all the administrative and punitive provisions felt necessary for the Navy at that time, as well as the rudiments of court martial procedures—the number of officers required, the oaths to be taken by members and witnesses, and provisions for executing and remitting death sentences.[2-7] Only about a dozen specific offenses were set forth but significantly, Article 38 provided that "all other faults, disorders and misdemeanors which shall be committed on board any ship belonging to the Thirteen United Colonies, and which are not herein mentioned, *shall be punished according to the laws and customs in such cases used at sea*." (Italics added.) Thus did the first American Naval regulations reach back through British usage to the ancient practice of defining acceptable shipboard conduct in accordance with custom and tradition.

The *Rules* were compiled largely by John Adams,[2-8] at that time a prominent Boston lawyer and statesman with a keen understanding of English maritime law. He relied heavily on the British naval law as it then

2-5. Charles Oscar Paullin, *History of Naval Administration, 1775-1911* (Annapolis: Naval Institute, 1968), 6; *Journals of the Continental Congress* 3 (1775): 364.

2-6. United States, Continental Congress, *Rules for the Regulation of the Navy of the United Colonies of North America* (Washington, D.C.: Naval Historical Foundation, 1944), Introductory Note. This copy of the *Rules* is a facsimile reprint of the original edition printed by William and Thomas Bradford at Philadelphia in 1775. See also *Journals of the Continental Congress* 3 (1775): 378-87.

2-7. *Rules for the Regulation of the Navy of the United colonies of North America*, arts. 39, 41, 42-44.

2-8. Paullin, *History of Naval Administration*, 6; Charles Richard Williams, "On the History of Discipline in the Navy," 45 *U.S. Naval Institute Proceedings* (March 1919): 358-59.

Digitized by Google

existed (see page 18), with necessary modifications to meet differing American political and cultural conditions. This was a pragmatic course, for many American seamen had served in the British Navy and were familiar with its rules and regulations.

At least one author, Augustus Buell, credits John Paul Jones with providing guidance to the committee in its deliberations. Buell suggests that Jones, in a letter to one of the members, stated that "The naval officer should be familiar with the principles of international law, and the general practice of admiralty jurisprudence."[2-9] Thus at the infancy of the American Navy was the recognition, born of necessity, that the isolation of life at sea would require the naval officer, without formal schooling in the law, to resolve legal problems as they arose. This attitude of self-reliance was to color the Navy's approach to legal administration until the middle of the twentieth century.[2-10]

The substance, and in some cases the exact wording, of the rules adopted by the Naval Committee served the United States Navy for almost two centuries, through several wars, to the adoption of the *Uniform Code of Military Justice* in 1950. Vestiges remain today even in the *Code*.

On 10 November 1775, while the Naval *Rules* were still under consideration, the Continental Congress established the forerunner of the Marine Corps, authorizing the raising of the First and Second Battalions of American Marines, two units consisting of men "as are good seamen,

---

2-9. Augustus C. Buell, *Paul Jones, Founder of the American Navy* (New York: C. Scribner's, 1905), 33. Bolander (see footnote 2-4) challenges the date ascribed by Buell to Jones's letter, but not the substance.

2-10. "Doubtless because of the minuteness of the Navy and its total dearth of shore installations, provision for legal counsel was made neither then [1775] nor for long afterward. Discipline was enforced at the mast or, in grievous matters, by court-martial without benefit or recognized necessity of advocates learned in the law, while such quasi-civil problems as procurement, taxation, and the like were reserved in their variety and subtleties for a more complex era." Bureau of Naval Personnel, *Office of the Judge Advocate General—Duties, Organization and Administration,* NAVPERS 10843-A (Washington, D.C.: Bureau of Naval Personnel, 1961), 1. The author would agree with this statement only to a point. While no provision was made to incorporate legal counsel into the uniformed ranks until the twentieth century, or indeed even on the civilian staff for the next ninety years, lawyers were retained on an *ad hoc* basis almost from the founding of the Navy to handle certain legal problems as they arose, and to prosecute selected courts martial.

Digitized by Google

or so acquainted with maritime affairs as to be able to serve to advantage by sea when required."[2-11] Conduct in the Marine Corps during this time was regulated by the 1776 *Articles of War* (see page 10), the Marine battalions being "considered as part of the number which the continental Army before Boston is ordered to consist of."[2-12]

On 14 December 1775 the Congress created a "Marine Committee" consisting of one member from each colony, to oversee the construction of thirteen frigates.[2-13] This committee soon absorbed the smaller, less active Naval Committee, and took over administration of the new Navy.[2-14] Among its tasks was the selection of officers for the new fleet; those assigned to duty were instructed, among other things, to "preserve strict discipline."[2-15]

Procurement and discipline having been attended to, the committee turned next to another major legal concern, the disposition of prizes. "Agents for prizes," private individuals, were appointed in each of the major colonial ports, assisting also with procurement and personnel matters.[2-16] Thus were the infant Navy's major legal matters handled.

To assist the Marine Committee and provide some permanence to its affairs, two "Navy Boards" were established in 1776 and 1777, one to represent the interests of the mid-Atlantic region, and one the interests of the New England area.[2-17] These boards acted in an advisory capacity to the Marine Committee, keeping it apprised of the state of Naval affairs in

---

2-11. *Journals of the Continental Congress* 3 (1775): 348.

2-12. *Journals of the Continental Congress* 3 (1775): 348. The provisions regarding the raising of the Marine force was marked "Secret" in the "*Corrected Journals*."

2-13. *Journals of the Continental Congress* 3 (1775): 427-28.

2-14. Paullin, *History of Naval Administration*, 9.

2-15. Williams, "Discipline in the Navy," 356-57.

2-16. Paullin, *History of Naval Administration*, 12-13.

2-17. Paullin, *History of Naval Administration*, 13-14.

Digitized by Google

their respective districts.[2-18] While the powers of these boards were not similarly apportioned, they were extensive and can be said to compass virtually all legal matters which the Navy might have faced at the time, including the power to suspend officers and to order courts martial.[2-19] The Marine Committee, in turn, reviewed the findings of courts martial and recommended final action to the Congress.[2-20] It also exercised *de novo* jurisdiction. In one such trial in 1776 the accused, Commodore Esek Hopkins, commander in chief of the fleet, was defended before the committee by John Adams. Hopkins escaped with a Congressional censure, but in 1778 was dismissed by Congress from the Naval service for, among other things, being found guilty of calling the members of the Marine Committee "ignorant fellows—lawyers, clerks—persons who don't know how to govern men." There was little about the Hopkins trial which resembled a military tribunal, other than the person of the accused.

In November 1779 the Congress authorized the Marine Committee to appoint "advocates" from time to time "for the purpose of taking care of and managing the maritime causes in which the United States are or may be concerned."[2-21] This appears to be the first formalized authority for the employment of "legal officers," in an American Navy. Note, however, that although there was no limitation imposed on the range of duties for these "advocates" (*i.e.*, apparently they could be employed for commercial matters as well as military trials), what obviously was envisioned was the hiring of *civilian* lawyers to handle Navy legal matters.

This procedure contrasts markedly with that employed by the Army at the time. The Army had an "in-house" legal organization, headed by a succession of Judge Advocates General who were distinguished attorneys. Between 1775 and 1783 the post was held by Colonel William Tudor,

---

2-18. Paullin, *History of Naval Administration*, 17.

2-19. Paullin, *History of Naval Administration*, 16-17.

2-20. Paullin, *History of Naval Administration*, 23.

2-21. *Journals of Congress*, 15 (1779): 1278.

Digitized by Google

Colonel John Laurance, and Lieutenant Thomas Edwards.[2-22] Of perhaps greater significance was the composition of the Army's legal "staff" at that time. Notable were Captain John Marshall, later Chief Justice of the United States; Major John Taylor, later senator from Virginia; and Major Joseph Bloomfield, later governor of New Jersey. So also were the duties of the Judge Advocate General or his deputies defined; the 1776 Articles of War directed them to "prosecute in the name of the United States of America."[2-23]

To put matters in perspective, it must be remembered that the Navy at this time was small and ephemeral, being managed not by an executive but by a committee of the Congress. Nor was the Navy alone in employing civilian lawyers. John Tudor, the first Judge Advocate General of the Army, was a civilian who received a direct appointment after a year of service. Another civilian served with distinction as a judge advocate between 1777 and 1782, a "Mr. Strong," who was possibly Caleb Strong, later senator from and governor of Massachusetts.[2-24]

At the same session in which Congress had authorized the appointment of "advocates" by the Marine Committee, it adopted a resolution recommending to the legislatures and "executive authority of the respective states," that judge advocates of courts martial be granted subpoena powers within the states to compel the attendance of witnesses at such courts.[2-25]

Administration of the Navy by the Marine Committee of Congress and its subordinate boards ultimately proved both unwieldy and technically unsatisfactory. In 1778 and 1779 a system of executive boards was tried, and on 8 December 1779 a Board of Admiralty, with

---

2-22. The post was called "Judge Advocate of the Army" from 29 July 1775 to 10 August 1776, when it became "Judge Advocate General of the Army." Tudor assumed and held the post for some time as a civilian, although he retired from the office with the brevet rank of colonel. See generally U.S. Army Judge Advocate General's School, *The Army Lawyer: A History of the Judge Advocate General's Corps, 1775-1975*, comp. Paul F. Hill (Washington, D.C.: Government Printing Office, 1975), 7-23. See also William F. Fratcher, "History of the Judge Advocate General's Corps, United States Army," *Military Law Review* 4 (April 1959): 89-91.

2-23. U.S. Army Judge Advocate General's School, *The Army Lawyer*, 11.

2-24. U.S. Army Judge Advocate General's School, *The Army Lawyer*, 25.

2-25. *Journals of Congress* 15 (1779): 1277-78.

Digitized by Google

three "outside" commissioners and two members of Congress was established in place of, and succeeding to the same powers and duties as, the Marine Committee.[2-26]

The Board of Admiralty, which was little more than the Marine Committee with a new name, fared no better than that body nor proved more efficient or responsive. Congress finally determined to place a single executive in charge of the Navy, and on 7 February 1781 created the office of "Secretary of Marine," creating the office of Secretary of War at the same time.[2-27]

On 1 March 1781 the *Articles of Confederation* were adopted, significantly retaining in Congress extensive authority over Naval forces. Article IX provided:

> The united states in congress assembled shall . . . have the sole and exclusive right and power of . . . appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the united states—making rules for the government and regulation of the said land and naval forces, and directing their operations.[2-28]

The Secretary of Marine was to succeed generally to the powers and duties of the Board of Admiralty,[2-29] the latter being dissolved in July 1781.[2-30] Congress was unable to fill the Secretary post, however, and the United States Navy went into irons. This state lasted until 7 September 1781 when Robert Morris, the Superintendent of Finance who had earlier

---

2-26. Paullin, *History of Naval Administration*, 29-32.

2-27. Paullin, *History of Naval Administration*, 41.

2-28. *Documents Illustrative of the Formation of the Union of the American States*, 69th Cong., 1st sess., H. Doc. 398 (1927), 33.

2-29. *Journals of Congress* 19 (1781): 127-28.

2-30. Paullin, *History of Naval Administration*, 35.

Digitized by Google

served with distinction on the Marine Committee in 1776 and 1777, took on the additional duties of "Agent of Marine," an office created by Congress on 29 August 1781 to serve temporarily in the stead of the Secretary until one should be appointed.[2-31] At this point the Navy Boards (see page 24) were also dissolved, and Morris became, in effect, the head of the Navy Department.

The Agent's duties included the responsibility to forward to Congress the record of every court martial involving a death sentence prior to execution of the sentence.[2-32] An act of 12 June 1782 authorized ships' captains to convene courts martial for the trial of offenses committed by all persons other than commissioned officers, with the Secretary of Marine or the Agent of Marine required to convene courts in the latter instance.

With the threat of war diminished following the Revolution, the young American nation followed in the tradition of maritime nations centuries past. Seeing no need to maintain a standing Navy, the force was permitted to wither. Morris retired from the post of Agent of Marine on 1 November 1784, and was not replaced.[2-33] In 1785, despite "considerable effort . . . to keep the American flag on the seas," *Alliance*, the last Naval ship, was disposed of.[2-34] Thus, although there was heightened debate during the Constitutional Convention in 1787 as to the wisdom of maintaining a standing Army with its historical penchant for rebellion (see page 12), the matter was virtually a "non-issue" with respect to the Navy.[2-35] Ultimately deciding in favor of a permanent military force, the framers, in words now familiar, adopted Article 1, section 8, clauses

---

2-31. Paullin, *History of Naval Administration*, 44; Cooper, *History of the Navy*, 50.

2-32. *Journals of Congress* 21 (1781): 1126.

2-33. Paullin, *History of Naval Administration*, 53.

2-34. Clyde Hill Metcalf, *A History of the United States Marine Corps* (New York: G. Putnam's Sons, 1938), 27. See also Paullin, *History of Naval Administration*, 52-53; Department of the Navy, "A Brief History of the Organization of the Navy Department, Prepared by Capt. A.W. Johnson, United States Navy" (1940), Doc. No. 284, at 2280.

2-35. United States, Constitutional Convention, *The Records of the Federal Convention of 1787*, Max Farrand, ed., rev. ed., 4 v. (New Haven: Yale Univ. Press, 1966), 2:329-33.

Digitized by Google

12-14 of the Constitution, giving Congress the power "to raise and support armies . . . to provide and maintain a Navy . . . [and] to make rules for the Government and Regulation of the land and naval Forces."[2-36] By the time the Constitution became effective, however, on 4 March 1789, there was little left of the Navy for which to make rules. The Marine Corps had fared even worse, going out of existence sometime prior to disposal of the *Alliance* in 1785.[2-37] When the Congress of the United States met in 1789, only a War Department (much later to become the Department of the Army)[2-38] was created. The Secretary of War was given control over the remnants of the Navy.[2-39] The Continental Navy had lived out its short existence with the thinnest of formal legal apparatus, directed exclusively toward the maintenance of order and discipline. All other matters which today would be considered "legal" in nature were handled on an *ad hoc* basis. It must be clear, however, even from this rapid and superficial overview of Naval affairs during the colonial period, that legal problems were few in number and, by today's standards, simple in nature.

2-36. Constitution of the United States.

2-37. Metcalf, *History of the United States Marine Corps*, 27. See also U.S. Marine Corps, *A Chronology of the United States Marine Corps* (Washington, D.C.: Headquarters, U.S. Marine Corps, 1985).

2-38. National Security Act of 1947, 61 Stat. 495, as amended by Act of 10 August 1949, 63 Stat. 578.

2-39. Act of 7 August 1789, 1 Stat. 49.

Digitized by Google

Digitized by Google

CHAPTER 3

THE PRE-CIVIL WAR NAVY
1789 to 1860

All hanging, and no money will not keep any Army together. A little hanging, and a little money will do better.—ENGLISH GENERAL, 18TH CENTURY

The Navy remained torpid for almost a decade after disposition of the *Alliance*. In 1794, as a reaction to the plundering of American shipping in the Mediterranean by the "Algerine corsairs"—the infamous "Barbary pirates" of the North African coast—Congress provisionally authorized the construction of six frigates, contingent upon a peace treaty not being effected with the Regency of Algiers.[3-1] When a peace treaty with that regime was concluded in 1795, construction of the frigates was temporarily abandoned, only to be revived the following year when plundering of American merchant ships in the West Indies by French privateers provoked cries for defensive action and resulted in undeclared war with France.[3-2] By 1797 three frigates, the *Constitution*, the *United States*, and the *Constellation* had been built, manned and commissioned, and the young American republic had a *de facto* Navy.[3-3]

3-1. Act of 27 March 1794, 1 Stat. 350; Bureau of Naval Personnel, *Office of the Judge Advocate General—Duties, Organization and Administration*, NAVPERS 10843 (Washington, D.C.: Bureau of Naval Personnel, 1949), 1; Charles Oscar Paullin, *History of Naval Administration, 1775-1911* (Annapolis: Naval Institute, 1968), 91; Roy W. Hensley, "Evolution of the Office of the Judge Advocate General" (Office of the Judge Advocate General of the Navy, 1962?), 2.

3-2. Act of 20 April 1796, 1 Stat. 453; *Office of the Judge Advocate General—Duties, Organization and Administration*, NAVPERS 10843, 1; Paullin, *History of Naval Administration*, 98; Charles Richard Williams, "On the History of Discipline in the Navy," 45 *U.S. Naval Institute Proceedings* (March 1919): 357.

3-3. Paullin, *History of Naval Administration*, 97; Hensley, "Evolution of the Office of the Judge Advocate General," 2.

Digitized by Google

These frigates had been built under the direction of the War Department, in shipyards supervised by government agents who directly purchased materials and paid the workmen.[3-4] A sense of the intimacy of the government at that time is demonstrated by the fact that the President was charged with appointment of the crews of the ships. The entire Naval Establishment of the time comprised 2,060 men.[3-5] President Washington himself is said to have chosen the names of the frigates.[3-6]

To provide for the administration of the rebuilding Navy, Congress in 1797 re-enacted the 1775 *Rules for the Regulation of the Navy*, along with provisions for the armament and employment of the three frigates.[3-7] Approximately a year later, on 30 April 1798, President John Adams, author of the 1775 Rules (see page 22), signed into law an act establishing a Department of the Navy and creating a new cabinet post, the Secretary of the Navy.[3-8] Benjamin Stoddert of Maryland was appointed to serve as the first Secretary (1798-1801), after the position had been offered to and declined by George Cabot of Massachusetts.[3-9] Two offices comprised the entire Navy Department at this time; the Office of the Secretary, occupied by Stoddert, a chief clerk, and a few "inferior" clerks, and the subordinate

---

3-4. Paullin, *History of Naval Administration*, 95-96.

3-5. Paullin, *History of Naval Administration*, 91.

3-6. Paullin, *History of Naval Administration*, 96.

3-7. Act of 1 July 1797, 1 Stat. 523; Hensley, "Evolution of the Office of the Judge Advocate General," 2.

3-8. Act of 30 April 1798, 1 Stat. 553; Paullin, *History of Naval Administration*, 101; Department of the Navy, "A Brief History of the Organization of the Navy Department, Prepared by Capt. A.W. Johnson, United States Navy" (1940), Doc. No. 284, at 2281. A chronological listing of the Secretaries of the Navy, the Presidents under whom they served, and, where applicable, their Judge Advocates General, appears at Appendix A.

3-9. Paullin, *History of Naval Administration*, 102-3. See also James Fenimore Cooper, *History of the Navy of the United States of America* (New York: Blakeman & Mason, 1864), 152.

Digitized by Google

Office of the Accountant of the Navy.[3-10] The Marine Corps was re-established on 11 July of the same year (1798), this time as a separate service to be governed by the *Articles of War* (Army) or the *Rules for the Regulation of the Navy* "according to the nature of the service in which they shall be employed . . . ."[3-11] All naval records held by the Secretary of War were turned over to the Secretary of the Navy, who also took control of all naval assets, and jurisdiction over all naval personnel. Secretary Stoddert's major concern at this time was the building and purchasing of ships for the new Navy, a task which he delegated to several agents in ports from Massachusetts to Georgia.[3-12] A board of four Navy captains[3-13] was convened to draft regulating legislation for submission to Congress, and on 2 March 1799 *An Act for the Government of the Navy of the United States*, containing a disciplinary code and other regulations for the government of the new Navy, became law.[3-14]

The 1799 act drew heavily upon the 1775 *Rules*, and, like those rules, drew as well upon the then-current British naval code which had been adopted in 1790.[3-15] Numerous offenses were made amenable to trial and

---

3-10. The Office of the Accountant of the Navy was created by Act of 16 July 1798, 1 Stat. 610. It was abolished by Act of 3 March 1817, 3 Stat. 366. "Letters Received by the Secretary of the Navy from the Attorney General, 1807-1825," Naval Records Collection, Record Group 45, National Archives, *Introduction*. See also Paullin, *History of Naval Administration*, 104.

3-11. Act of 11 July 1798, 1 Stat. 594. See also Cooper, *History of the Navy*, 153.

3-12. Paullin, *History of Naval Administration*, 105-6.

3-13. Captains Barry, Dale, Tingey and Truxtun served on the board. See Nathan Sargent, "The Evolution of Courts-Martial," *U.S. Naval Institute Proceedings*, 9 (May 1883): 708, n. *.

3-14. Act of 2 March 1799, 1 Stat. 709. In 1798 President Adams had issued a set of regulations for the Navy, *Marine Rules and Regulations*. See "Notes on Early Naval Regulations" by H.R. Skallerup in Department of the Navy, *Naval Regulations, 1802* (Annapolis: Naval Institute, 1970).

3-15. See Sargent, "The Evolution of Courts-Martial," 708; Leland Pearson Lovette, *Naval Customs, Traditions, and Usage*, 4th ed. (Annapolis: Naval Institute,
(continued...)

Digitized by Google

punishment by court martial, although procedures for the conduct of such courts were barely mentioned. Typical of such codes, much was left to custom. The presence of a judge advocate at trial was noted, but his role was not defined; all that was said was that the president of the court was required to administer an oath "to the judge advocate, or person officiating as such."[3-16] His duties were strictly prosecutorial, as they always had been. The role of the judge advocate at Navy courts martial had by now become one of those "customs of the sea," the parameters of which were apparently felt to need none but the barest of definition.[3-17]

3-15. (...continued)
1934), 69.

3-16. Act of 2 March 1799, sec. 1, art. 48.

3-17. Prior to establishment of the Navy Judge Advocate General's Corps in 1967, the term "judge advocate" in the Navy retained the restrictive connotation it had inherited from British custom and ancient usage—a military prosecutor for a court martial. With regard to courts of inquiry, *Navy Regulations* until 1909 referred to such tribunals as being criminal in nature, and to the judge advocate of such courts as the recorder and *prosecutor*. See, for example, Department of the Navy, *Navy Regulations, 1900* (Washington, D.C.: Government Printing Office, 1900), chap. XL, sec. 1, pars. 1780, 1791. The judge advocate's adversary in either case, when there was one, was a defense counsel, not a judge advocate *serving* as a defense counsel.

In 1967 Congress enacted Public Law 90-179, 81 Stat. 545, (1967), which created the Navy Judge Advocate General's Corps. Section 8(b) of that law stated that "All law specialists in the Navy are redesignated as judge advocates in the Judge Advocate General's Corps of the Navy."

While the term "judge advocate" retained its ancient meaning in Navy parlance until 1967, it actually went out of use in the Navy shortly after World War II, when the Navy's lawyers became known as "Law Specialists." Various proposals put forth for revision to the *Articles for the Government of the Navy* at that time uniformly suggested that the term "judge advocate" be applied to a person acting as a law member or judge, and that the attorney for the government be called the "prosecutor." See Department of the Navy, *Report and Recommendations of the General Court-Martial Sentence Review Board on Court-Martial Procedures and Policies* (1947), 89. These proposals were overtaken by the *Uniform Code of Military Justice*, which referred to prosecutors at all courts martial as "trial counsel," and made no reference to a "judge advocate." The term was retained internally in the Army and Air Force, but was applied to the professional lawyers of those services who might serve as either trial counsel or defense counsel. It thus completely lost its prosecutorial bias.

(continued...)

Digitized by Google

On 1 June 1800 *An Act for the better government of the Navy of the United States* (commonly known as the "*Articles for the Government of the Navy*"), considerably more complete than the 1799 rules, became effective.[3-18] This act repealed the 1799 act and went into substantially more detail regarding the enumeration of offenses and the administrative particulars of court martial procedures. It was, nevertheless, strikingly similar in substance to the 1749 British Articles which, in turn, were substantially the same as "Cromwell's Articles" of 1649. The 1800 *Articles* were to provide the essential framework of laws which would guide the United States Navy for the next century and a half. Thus was naval justice guided until 1951 by laws first enacted in 1649.[3-19]

The 1800 act provided for two types of courts, both criminal in nature; a court of inquiry, which was a fact-finding tribunal without punishment authority, and a general court martial. The judge advocate was mentioned but twice in connection with general courts martial, and received similar shrift in connection with courts of inquiry, in all instances regarding only his duty with respect to the administration of oaths. It should be noted, however, that his oath did reveal one of his duties, directing him to "keep a true record of the evidence given to and the proceedings of [the] court,"[3-20] perhaps a somewhat difficult task while acting as prosecutor, although we may assume that some judge advocates had clerical help to assist them in this undertaking. Of note also is section

---

3-17.(...continued)

In 1967, after the Navy established its Judge Advocate General's Corps, the term "judge advocate" was officially defined for the first time in the *Uniform Code* to mean "an officer of the Judge Advocate General's Corps of the Army or the Navy or an officer of the Air Force or the Marine Corps who is designated as a judge advocate." Public Law 90-179, [sec. 1](2).

3-18. Act of 23 April 1800, 2 Stat. 45.

3-19. See Robert S. Pasley, Jr. and Felix E. Larkin, "The Navy Court Martial: Proposals for Its Reform," *Cornell Law Quarterly* 33 (November 1947): 198. The fact that the Navy was operating under ancient rules did not wait for the twentieth century to become apparent. Speaking before the House in 1842, John Quincy Adams noted that the rules grafted on the Navy by the 1800 act "had existed for centuries." *Niles' National Register*, 28 May 1842, at 207.

3-20. Act of 23 April 1800, art. XXXVI.

Digitized by Google

1, article XXXII, which incorporated the sense of similar articles from both the 1775 *Rules* and the 1799 act:[3-21]

> All crimes committed by persons belonging to the Navy, which are not specified in the foregoing articles, shall be punished *according to the laws and customs in such cases at sea.* (Italics added.)

Secretary Stoddert was instrumental in this revision to Navy laws, as well as in drafting a bill for the government of the Marine Corps.[3-22] As observed by Paullin, writing in 1906, "The work of the Navy Department was much simpler and much less technical in the first years of its existence, than is its work at the present time. A civilian Secretary, such as Stoddert, was therefore able to master most of the department's problems."[3-23]

A curious historical footnote to the 1800 *Articles* was the small set of *Naval Regulations* "issued by command of the President of the United States of America" on 25 January 1802.[3-24] Consisting of a mere thirty-six undersized pages, primarily administrative in nature but of questionable authority nevertheless, little has been written about them. Containing but five paragraphs on courts martial, two of these paragraphs nonetheless contained guidance on court martial procedure which would not appear officially until 1865. Important for historical purposes was the

---

3-21. United States, Continental Congress, *Rules for the Regulation of the Navy of the United Colonies of North America* (Washington, D.C.: Naval Historical Foundation, 1944), art. 38; Act of 2 March 1799, sec. 1, art. 46.

3-22. Paullin, *History of Naval Administration*, 112.

3-23. Paullin, *History of Naval Administration*, 112.

3-24. Department of the Navy, *Naval Regulations, 1802* (Annapolis: Naval Institute, 1970). This book is a facsimile reproduction of the original 1802 edition. A short background sketch on the 1802 *Regulations* and related enactments appears in the introduction to this volume. One of the few authors to note the 1802 *Regulations* is Valle, who terms them the "Black Book." James E. Valle, *Rocks & Shoals, Order and Discipline in the Old Navy, 1800-1861* (Annapolis: Naval Institute, 1980), 62.

Digitized by Google

directive that the judge advocate was the only one authorized to examine witnesses—either for the prosecution or the defense. While these *Regulations* were immediately ignored or overlooked by the entire Naval Establishment, because they re-stated custom rather than implemented new rules, they give insight into naval procedures of their day.

The earliest legal problems to face the Navy were those of a disciplinary nature, and there was little reluctance to convene courts martial or courts of inquiry to adjudicate them. Until the late nineteenth century, when the Justice Department Act of 22 June 1870 imposed restrictions on the hiring of attorneys to represent government interests (see page 152), the judge advocate at one of these courts could be a private civilian attorney[3-25] or a United States District attorney,[3-26] as well as a Navy or Marine Corps officer. The hiring of private or government attorneys to act as judge advocates was widespread during the first several decades of the nineteenth century, at least for those courts martial convened by the Secretary of the Navy and held at shore stations, generally on the East Coast. Courts martial convened by fleet and squadron commanders, on the other hand, were often held aboard ships on foreign stations where civilian lawyers were unavailable. (While

---

3-25. The practice of the Navy in employing *civilian* judge advocates to prosecute some of its courts martial probably ensured better representation for the Navy than it would otherwise have received, since such civilians were professional attorneys. The Army, which wanted to retain military authority over its judge advocates, kept its practice more rigid, but not necessarily more professional; the Army judge advocate had to be a person subject to military law. William C. DeHart, *Observations on Military Law, and the Constitution and Practice of Courts Martial* (1846; reprint, Buffalo, New York: William S. Hein & Co., 1973?), 99, 315, 317, 321. This reprint of the DeHart work appears to be a facsimile of an 1859 edition printed by Wiley and Halsted, New York. It is published as volume 18 of the "Classics in Legal History" series of reprints, edited by Roy M. Mersky and J. Myron Jacobstein.

3-26. Attorneys for the federal districts were quasi-independent until 1861. Although the office of Attorney General of the United States had been established by the Judiciary Act of 1789, with authority to prosecute all suits in the Supreme Court in which the United States had an interest, the Attorney General did not acquire supervisory authority over United States District attorneys until 1861. Act of 2 August 1861, 12 Stat. 285. See Whitney R. Harris, "The Hoover Commission Report: Improvement of Legal Services and Procedure," *American Bar Association Journal* 41 (June 1955): 500.

Digitized by Google

applicable regulations provided that only the President or Secretary of the Navy could convene courts martial, an exception was provided for the commander in chief of the fleet, or commander of a squadron, while acting out of the United States.)[3-27] Since shore duty in the United States for enlisted personnel was virtually unheard of before the Civil War, and the normal mode of operation for the young Navy was extended cruises abroad of two or three years' duration,[3-28] fleet and squadron commanders had opportunity to—and in fact did—convene a significant number of courts martial at which Navy and Marine Corps officers acted as judge advocates.

Courts martial aboard ships underway were handled by line officers, an approach both understandable and necessary. Unlike the Army, which was land-based, semi-permanent, and capable of transporting a retinue of staff personnel which could include officers trained in the law,[3-29] the

---

3-27. Act of 23 April 1800, 2 Stat. 45, art. XXXV.

3-28. Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1828, at 135. A splendid account of one of these cruises, viewed through the eyes of a seaman, can be found in a narrative by F.P. Torrey, *Journal of the Cruise of the United States Ship Ohio, Commodore Isaac Hull, Commander, in the Mediterranean, in the Years 1839, '40 and '41* (Boston: S.N. Dickinson, 1841).

3-29. The Army counted some thirty-three lawyer-officers among the ranks of its newly-created Judge Advocate General's organization during the Civil War, the great majority of whom served in field assignments. U.S. Army Judge Advocate General's School, *The Army Lawyer: A History of the Judge Advocate General's Corps, 1775-1975*, comp. Paul F. Hill (Washington, D.C.: Government Printing Office, 1975), 54. The advantage enjoyed by the Army of having lawyers in the field, however, apparently did not filter down to the court martial level, or, if it did, then not for very long. During hearings in 1919 on Army *Articles of War* reform legislation, Edmund M. Morgan, a professor of law at Yale, testified that he considered the *Articles* to be deficient in several major areas. Among these he noted that a lawyer was "a rarity" at courts martial and that both the judge advocate and the defense counsel were almost always line officers. The results, he said, were uniformly amateurish and inexpert. William T. Generous, Jr., *Swords and Scales, The Development of the Uniform Code of Military Justice* (Port Washington, N.Y.: Kennikat Press, 1973), 7, citing U.S. Congress, Senate Committee on Military Affairs, *Hearings on S. 64 on the Establishment of Military Justice*, 66th Cong., 1st sess. (1919), 1372-95.

For a view contrary to Morgan's, see Howard Clark II, "A Comparison of (continued...)

Digitized by Google

Navy traditionally traveled in ships—individual, self-contained, virtually autonomous units which lacked the luxury of communication with the rest of the Navy, even when sailing "in company." This isolation,[3-30] the crowded and uncomfortable conditions aboard ship, and the questionable loyalties of the crew, were the elements which made essential the need for firm control. Discipline could not wait until the men put ashore.

3-29. (...continued)
Civil and Court-Martial Procedure," *Indiana Law Journal* 4 (June 1929): 589-99. Clark wrote from the vantage of having served as a member of the Allied Expeditionary Force during World War I, and as a commissioned officer of the line for several years before receiving his law degree in 1929. There is no question that the general court martial process in the Army improved significantly following adoption of the 1920 *Articles of War*. For example, every general court was required by the *Articles* to have a "law member" who was to be an officer of the Judge Advocate General's Department, "if available." In addition to serving on the court, the law member was its legal adviser. See Daniel Walker, ed., *Military Law* (New York: Prentice-Hall, 1954), 147, n. 11. Further, no general court could be convened, nor the review process completed, without the advice of a legally-trained staff judge advocate. See Clark, "A Comparison of Civil and Court-Martial Procedure," 595. For a more complete discussion of the 1920 *Articles of War* see U.S. Army Judge Advocate General's School, *The Army Lawyer*, 130-38.

3-30. A sense of both the isolation and the danger which accompanied sea duty in the early nineteenth century is manifest in the annual report of Secretary of the Navy Dobbin to the President for the fiscal year ending 30 June 1855. The following is an edited extract:

> No intelligence has been received touching the sloop Albany, about whose fate, at the date of my last [annual] report, a painful anxiety was felt. The steamers Princeton and Fulton were both sent in search of her . . . making rapid and searching cruises, evincive of the most indefatigable and untiring zeal. Not the slightest information could be obtained of the missing ship.

Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1855, at 1.

Digitized by Google

Marine Corps officers, presumably because they were not required to adhere to the rigid watch schedules common to the naval line officer, were frequently called upon to serve as prosecutors. Likewise it was the Navy staff officers, who enjoyed the same freedom from the watch bill, who were tapped on a rather regular basis for such service. Rarely did a line officer serve in the prosecutorial capacity. Naval officers assigned as judge advocates included such staff officers as engineers, paymasters, surgeons (see illustration), and even chaplains. Indeed, one can imagine

LETTER OF APPOINTMENT OF A JUDGE ADVOCATE

TO SURGEON B.F., U.S.N.,
U.S.S...................... :

UNITED STATES FLAG SHIP ....}
GIBRALTAR BAY, *OCTOBER*......, 186...}

SIR: A naval general court-martial, of which you are appointed judge advocate, has been ordered to convene on board of the United States ship...............on Thursday the.........day of November next, at which time and place you will appear, and report yourself to the presiding officer of the court.

I am, respectfully,
Your obedient servant,
J.P., *Rear Admiral,*
Commanding U.S. Naval Forces
in the Mediterranean.

Form showing appointment of a surgeon as judge advocate of a general court martial. A similar form appointing a court member was directed to an officer of the Regular Navy, a commander of the line. (Harwood, THE LAW AND PRACTICE OF UNITED STATES NAVAL COURTS-MARTIAL, Appendix)

the wrath and indignity aimed at the unfortunate Midshipman Robert Nichols who had to defend himself before a court of inquiry in 1819 for

Digitized by Google

keeping a prostitute aboard ship, where the commodore had appointed his flagship chaplain as the prosecuting judge advocate.[3-31]

Court *members*, on the other hand, since they held authority to award punishment, were more restrictively chosen:

> The responsibility for manning naval tribunals rested entirely on one segment of the Navy's population, the Regular officer corps. Even during the Civil War, when the volume of cases to be heard rose dramatically, all requests to let volunteer officers serve on court-martial and court-of-inquiry boards were firmly resisted . . . .[3-32]

Some "extreme traditionalists" in the Navy maintained that even Regular *staff* officers should not sit on courts martial because they were not "fighting" officers.[3-33] Apparently this position was more than mere

---

3-31. See Valle, *Rocks & Shoals*, 178. Valle describes in detail a number of courts martial which took place before the Civil War, including the case of Washington Sherman, surgeon of the sloop of war *USS Dale*. Dr. Sherman was defended at his court in 1858 by the surgeon of the squadron flagship, the senior medical officer present. Valle at 194.

3-32. Valle, *Rocks & Shoals*, 56. The Navy's traditional practice, a practice with vestiges to the mid-twentieth century, was to assign the governance of its courts martial, and the conduct of many other legal matters, to its line officers; thoughtful, intelligent, analytical men, but generally without formal training in the law. There were exceptions to be sure, and those exceptions sowed the seeds of today's Navy Judge Advocate General's Corps. But by and large, and for entirely rational reasons, many of the Navy's legal affairs were handled by its non-lawyer officers.

3-33. Valle, *Rocks & Shoals*, 56, citing Reuben E. Stivers, *Privateers and Volunteers* (Annapolis: Naval Institute, 1975?), 366. Niven speaks of the "jealousy and ambition" of both line and staff officers, noting that Secretary of the Navy Welles's action in raising the relative rank of staff officers through the grades to a top rank of commander in 1863 was followed in 1869 by the action of Admiral Porter in reversing the order and reducing the staff to its prewar rank. John Niven, "Gideon Welles," ed. and comp. Paolo E. Coletta, *American Secretaries of the Navy*, 2 v.
(continued...)

Digitized by Google

conviction. In response to a request from Secretary of the Navy William Jones on 8 November 1814 for an opinion on the question, Attorney General Rush responded that

> The act of congress of the 23d of April 1800 for the government of the Navy of the United States, does not contemplate either pursers or surgeons as constituent members of general courts martial.[3-34]

This state of affairs continued well into the nineteenth century, prompting the following commentary which appeared in the *Army and Navy Chronicle* of 29 January 1842:

> Another branch of the present naval organization casting contempt upon civil officers is that which excludes them from being members of courts martial. It is a universally just principle that a man shall be tried by his peers, and an approach to this principle would be made by requiring courts for the trial of civil officers to be in part composed of their own grade.[3-35]

Apart from disciplinary matters, legal issues in the pre-Civil War Navy were not a major concern. The Navy Department throughout the entire nineteenth century was minuscule by today's measure, but this was especially true before the Civil War, consisting as it did of far-flung ships

---

3-33. (...continued)
(Annapolis: Naval Institute, 1980), 1:349.

3-34. "Letters Received by the Secretary of the Navy from the Attorney General of the United States Containing Legal Opinions and Advice, 1807-1825," Naval Records Collection, Record Group 45, Microfilm Publication M1029, National Archives, Washington, D.C., letter dated 11 November 1814.

3-35. *Army and Navy Chronicle*, 29 January 1842, at 30.

Digitized by Google

and squadrons and an uncoordinated, mostly civilian, bureaucracy. In 1820 the civilians in the Navy Department comprised the Secretary and fewer than ten others, including a messenger boy.[3-36] Matters of a legal nature, when they arose, were often disposed of in-house if the Secretary happened to be a lawyer or if they were common enough for his staff to handle. Sometimes they were referred to civilian counsel, the "traditional practice of . . . any head of Department . . . for the conduct of legal business arising in his Department."[3-37] Often they were referred to the Attorney General under the provisions of the Judiciary Act of 1789, which provided that it was the duty of the Attorney General of the United States "to give his advice and opinion upon questions of law . . . when requested by the heads of any of the departments, touching any matters that may concern their departments . . . ."[3-38] The opinion of Attorney General Richard Rush (following page) is typical.[3-39]

Issues which arose most often at the departmental level concerned civil or administrative matters, as opposed to disciplinary concerns. Among the questions treated before the Civil War were those involving pay for officers and enlisted men, the time for which seamen were to be shipped, licenses, minors in the naval service, suspicion of civilian espionage, prize and salvage matters, prosecution of piracy, veterans' and survivors' pension benefits, various personnel issues, commercial matters, litigation issues, accounts of Navy agents, trial of civilians, the size of the

---

3-36. Valle, *Rocks & Shoals*, 12.

3-37. 21 Op. Atty. Gen. 195-96 (1895), citing 10 Op. Atty. Gen. 43, 48 (1861) and 12 Op. Atty. Gen. 369 (1868).

3-38. Act of 24 September 1789, 1 Stat. 73.

3-39. Richard Rush (1780-1859) served as Attorney General for the state of Pennsylvania (1810-1811); Comptroller of the United States Treasury (1811-1814); United States Attorney General (1815-1817); Acting Secretary of State (1817); Minister to Great Britain (1817-1825); Secretary of the Treasury (1825-1829); and Minister to France (1847-1849). Throughout his career in public service he maintained a keen interest in naval matters. Writing in 1822, he proposed building warships of the then-unheard of displacement of 6,000 tons, by which the United States could command unchallenged dominion over the seas. Anthony M. Brescia, "The American Navy, 1817-1822: Comments of Richard Rush," *American Neptune* 31 (July 1971): 217.

Digitized by Google

I do not think, that there is any thing in the act of April 18, 1814, limiting the right of the President to increase the pay of the officers and men belonging to the Navy, to the close of the war with Great Britain which then existed. But, undoubtedly, it is in his discretion to do so. I think, however, that no increase ought to take place in their pay since the war without a new and particular authority from the President.

Richard Rush
A.G.

August 16, 1816

Letter from United States Attorney General Richard Rush to the Secretary of the Navy giving his opinion on the legality of pay raises for Naval officers and men. (National Archives)

Marine Corps, authority over the Marine Corps, sureties, disposition of slaves, powers of the Board of Navy Commissioners, rank and seniority, and a petition by Midshipman Edward Preble for restoration of his commission after it had been tendered by his guardian in a fit of "mental

Digitized by Google

derangement."[3-40] Shipbuilding and ordnance contracts were a continuing concern. Secretary of the Navy George Bancroft (1845-1846), not a lawyer but alert to contractual issues, wrote in his 1845 annual report that

> The present contract system requires modification, so that no fraud to the United States may shield itself under the letter of the law; nor contracts be given out at prices exceeding the market price.[3-41]

Land acquisition proceedings could warrant legal advice at the highest level of government. In 1857 Secretary Isaac Toucey (1857-1861) described a routine business transaction wherein the Attorney General had examined and certified good title to land purchased by the Navy from the State of Georgia.[3-42]

Criminal matters, which were subsumed under the broad heading of discipline, were more a fleet than a departmental concern. Of the seventy opinions rendered by the Attorney General to the Secretary of the Navy

---

3-40. "Letters Received by the Secretary of the Navy from the Attorney General, 1807-1825," Naval Records Collection, Record Group 45, National Archives; "Letters Sent by the Secretary of the Navy to the President and Executive Agencies, 1821-1886," Naval Records Collection, Record Group 45, Microfilm Publication M472, National Archives, Washington, D.C.

No copies of letter requests sent by the Secretary of the Navy to the Attorney General before 1821 have been found in Record Group 45. A few letters, dated 1815-1821, are among the Attorney General's papers, 1789-1870, in General Records of the Department of Justice, Record Group 60. These letters, along with others from the Secretary of the Navy that are no longer among the Attorney General's papers, are entered in registers of letters received, in Record Group 60. In the records of the Office of the Attorney General, also in Record Group 60, are opinion books covering the period 1817 to 1832, in which appear some of the cases and opinions upon which the Attorney General based his responses to, and to which he sometimes made reference in, his letters to the Secretary of the Navy.

3-41. Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1845, at 648.

3-42. Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1857, at 582.

Digitized by Google

between 1807 and 1825, only fifteen dealt with questions of a clearly disciplinary nature, being concerned primarily with the organization, jurisdiction, sentencing authority, and review of courts martial.

Discipline was handled in an authoritarian way where enlisted men were involved; the punishments available to a commander at mast (imprisonment in irons, solitary confinement, bread and water, discharge from the service, flogging) were usually sufficient to maintain order without resorting to courts martial. When courts were felt necessary, however, they were readily convened under the 1800 *Articles*.

Most enlisted men were viewed as treacherous and indolent. There was no cadre of career enlisted personnel as exists today, and no sense of loyalty to a unified Navy. Seamen signed on to a particular ship for the duration of a cruise, and often left at its conclusion.[3-43] As many as one-tenth of ships' crews in the mid-nineteenth century were probably criminals or fugitives, and one-third were of foreign citizenship[3-44] (by

---

3-43. *Report of the Secretary of the Navy*, 1828, at 136.

3-44. Valle, *Rocks & Shoals*, 15, citing Donald W. Griffin, "The American Navy at Work on the Brazil Station," *American Neptune* 19 (October 1959): 239. Commenting on this situation in 1828, Secretary of the Navy Southard wrote:

> They [foreigners in the United States Navy] are a distinct class of people from those useful citizens who have sought protection under our institutions, and made our country their home. Very few of them have their interest located here . . . . They produce a large proportion of the offences and insubordination of which we have to complain; and, when their time expires abroad, seldom return—for their home is not here.

Report of the Secretary of the Navy, 1828, at 136.

Torrey, an obvious reformer, provided one explanation for this state of affairs:

> Suppose [a sailor appeared drunk on deck? He] would be confined in the brig, double irons put on [him] and gagged; and when called before the captain, receive a severe reprimand, then stripped and receive one dozen over the bare back with the cats—a species of torture which would disgrace the

(continued...)

Digitized by Google

1888 a full fifty percent of the crews of American warships were foreign-born).[3-45] Living conditions were wretched. A forty-four-gun frigate, which could be sailed by a crew of fifty, was obliged to carry ten times that number in order to man her guns. It was these excess personnel—criminals, fugitives, alcoholics, foreigners, often with time on their hands and make-work to fill it—over which the officers felt obliged to maintain iron discipline.[3-46] Their "rights" were perceived as virtually

---

3-44. (...continued)

> demons of the Spanish Inquisition. Is it strange [there are] so few native seamen in the service? What American who feels the noble impulse of freedom throb in his bosom, would ever consent to rivet the chains of slavery upon himself? If they do, the clanking of their chains may serve to deter others.

Torrey, *Journal of the Cruise of the Ohio*, 111.

3-45. Valle, *Rocks & Shoals*, 19. Noting that the crews of United States Navy vessels were in large part composed of foreigners, Secretary of the Navy Tracy was moved to state in 1889 that "The American who deserts must expatriate himself, but the foreigner who deserts . . . goes to his own home. For a man so placed desertion has no penalties." Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1889, at 22. The Bureau of Navigation Report for that year recommended that the enlistment of aliens (except for musicians and servants) be discontinued unless they spoke English and had applied for naturalization with intent to become citizens. *Report of the Secretary of the Navy*, 1889, at 304.

The 1890 Report contained a recommendation to amend the statute so as to permit enlisted men serving in the United States Navy to become naturalized citizens. Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1890, at 124.

3-46. For a far more charitable view of the mettle of the post-colonial sailor, consider the observations of Richard Rush en route to England aboard the seventy-four-gun warship *Franklin* in 1817:

> When I came on board this ship, the high state of order and discipline in which everything appeared to be, did not fail to awaken my admiration. Such silence; such cleanliness, the decks over which seven hundred men walked being like parlour floors; such method and quickness in doing all kinds of work,

(continued...)

Digitized by Google

non-existent, creating little call for lawyers to guard against their abuse.[3-47] They were viewed as potentially untrustworthy under combat, and incapable of responding to corrective measures other than physical punishment such as flogging, confinement in irons, sweat boxes, and the threat—indeed sometimes the act—of capital punishment[3-48] (as exemplified by the bravado remark of Lieutenant Andrew Sterett of the *Constellation* in 1799: "We put men to death for even looking pale on this ship.").[3-49]

Although rights were few, the Navy sought to ensure that all persons were made aware of the conduct expected of them and their exposure to discipline should they transgress. A part of the first Sunday of every month was generally set aside for a reading of the 1800 *Articles* in the presence of the entire ship's company.[3-50] Enlisted men were tried by court martial often as not to legitimize the more severe forms of punishment not available at captain's mast, not to ensure any protection of their rights. Consider the account of F.N. Torrey, a seaman aboard the *USS Ohio*, sailing the Mediterranean in the early 1840s:

3-46.(...continued)

filled me with scarcely less surprise than admiration.

Brescia, "Comments of Richard Rush," 218.

3-47. "It was taken for granted that the imperatives of naval service made it necessary to suspend constitutional rights and guarantees among its personnel." Valle, *Rocks & Shoals*, 277. This would, of course, change. A century later the United States Senate held hearings on the "Constitutional Rights of Military Personnel." Senate Committee on the Judiciary, *Constitutional Rights of Military Personnel: Hearings before the Subcommittee on Constitutional Rights*, 87th Cong., 2d sess., 1962.

3-48. Valle surmises that twenty-six enlisted men were sentenced to death between 1799 and 1862, with eleven assuredly executed and six probably dispatched. Valle, *Rocks & Shoals*, 102-3.

3-49. Valle, *Rocks & Shoals*, 4, citing Eugene S. Ferguson, *Truxtun of the Constellation: The Life of Commodore Thomas Truxtun, U.S. Navy, 1755-1822* (Baltimore: Johns Hopkins Univ. Press, 1956), 172.

3-50. Torrey, *Journal of the Cruise of the Ohio*, 72.

Digitized by Google

> [The] court martial . . . commenced on the 14th, and continued several successive days. The trials were held in the cabin. The usual forms and customs were observed—the firing of a gun at ten o'clock, and hoisting a signal jack on each day, which serves, if possible, to render more odious and to fill with alarm the victim. The injunction of secresy [*sic*] is considered binding until the verdict is read on the quarter deck. The persons who stand accused have an opportunity to cross examine their accusers, and a person is selected if they request it, as their counsel; so you would suppose that in all trials of this description, justice and mercy were meted out to the parties. But in too many instances it is but the cruel record of the Captain of the ship, and the proceedings are a cloak, under which are perpetrated the grosest [*sic*] tyranny and injustice.[3-51] (Original text amalgamated to form quotation.)

Sometimes, according to Torrey, even the "cloak" was dispensed with. Although both article XX and article XXX (section 1) of the 1800 act restricted the number of lashes which could be imposed at mast to twelve, this limitation was often ignored, with twenty or thirty "stripes" being commonly administered.[3-52]

Lest this be understood as an indictment of the entire establishment, it must be kept in mind that without harsh and certain discipline order might well have broken down not only between officers and men, but among the men themselves. The societal ethics of duty, loyalty and civility as we know them in the late twentieth century often did not

---

3-51. Torrey, *Journal of the Cruise of the Ohio*, 23, 87.

3-52. See Torrey, *Journal of the Cruise of the Ohio*, 24, 49.

Digitized by Google

exist.[3-53] There was, nevertheless, some restraint on the commander's authority to impose punishment. Under the 1800 *Articles*, no sentence could be executed until reviewed and confirmed by the Secretary of the Navy or, if a death sentence, by the President. An exception was made in the case of courts held "out of the United States," where the commander of the fleet or squadron who convened the court had full review authority.[3-54]

This review process was not *pro forma*. Consider for example the case of seaman Peter Clark in 1838. Convicted of mutinous conduct, Clark was sentenced to receive 50 lashes—a mild punishment for so serious an offense. Nevertheless, on review, the Secretary noted that the record indicated that the judge advocate had not been sworn (as required by section 1, article XXXVI of the 1800 act), and that the prisoner had not been furnished with a copy of the charges against him (as required by section 1, article XXXVIII of the 1800 act). The Secretary requested an opinion from the Attorney General as to whether these "omissions and irregularities" vitiated the proceedings and, if so, whether seaman Clark could be tried a second time for the same offense. Unfortunately, the Attorney General's reply was not appended to the inquiry, so we know neither his answer nor Clark's fate.[3-55] Nor was the review process *pro forma* in the case of Marine private William Bansman. Sentenced to death, the President sought to mitigate the punishment to "service and restraint" and a drumming-out. On seeking the Attorney General's advice

---

3-53. Sailors in the merchant service were not exempt from the harsh treatment meted out in the naval service. See Richard Henry Dana, *Two Years Before the Mast* (1840; reprint, Boston and New York: Houghton Mifflin Company, 1923); Margaret Scott Creighton, *The Private Life of Jack Tar: Sailors at Sea in the Nineteenth Century* (Ph.D. diss., Boston University, 1985).

3-54. Act of 23 April 1800, art. XLI. Captains and commodores who were careless or unduly severe in the awarding of punishments abroad were occasionally court-martialed themselves on charges of cruelty, oppression, or inflicting illegal punishment brought by their subordinate officers. Valle, *Rocks & Shoals*, 52.

3-55. "Letters Sent by the Secretary of the Navy to the President and Executive Agencies, 1821-1886," Naval Records Collection, Record Group 45, National Archives, letter dated 20 December 1838.

Digitized by Google

(through the Secretary of the Navy), he was told he might legally mitigate the sentence as he wished.[3-56]

Courts martial occurred with almost monotonous regularity. Those not held to discipline enlisted men were convened to try officers, frequently as retaliation for personal disputes or perceived affronts. This was especially true after 1840, when efforts to eliminate dueling as a means of settling disputes among officers saw the pistol replaced by the pen.[3-57] This state of affairs undoubtedly prompted Secretary of the Navy Abel Upshur (1841-1843) to issue the following order in 1841:

> Officers of the Navy are strictly prohibited from publishing, or causing to be published, in newspapers, pamphlets, handbills, or otherwise, any disrespectful or offensive matter relative to transactions of a private nature, between officers . . . and any officer so offending shall be arrested and tried therefor . . . .[3-58]

In a celebrated case involving a personal dispute in the Mediterranean Squadron earlier in the century, Captain Oliver Hazard Perry brought charges against a Marine Corps captain, John Heath, for insubordination. The judge advocate was Doctor Robert S. Kearney, probably one of the surgeons traveling with the fleet (in addition to its medical connotation, the term "surgeon" denoted the rank of a medical officer just below that

---

3-56. 1 Op. Atty. Gen. 327 (1820). See also DeHart, *Observations on Military Law*, 218-19.

3-57. Valle, *Rocks & Shoals*, 4, citing Gardner Weld Allen, ed., *The Papers of Isaac Hull* (Boston: The Boston Athenaeum, 1929), 151-52.

3-58. The order appeared in the *Army and Navy Chronicle*, 9 December 1841, at 391. It was later included in U.S. Navy, *Regulations, Circulars, Orders & Decisions for the Guide of Officers of the Navy of the United States* (Washington, D.C.: C. Alexander, 1851) at 8.

Digitized by Google

of lieutenant).[3-59] Heath was found guilty at a court which sat from 31 December 1816 to 9 January 1817, and was awarded a "private reprimand" from the president of the court. On 10 January 1817 a second court convened, also with Doctor Kearney as its judge advocate, this time to hear charges brought by Heath against Perry for using abusive language (Perry had called Heath "a damned rascal and scoundrel"), and for striking him. Perry too was found guilty, and suffered the same punishment as Heath. These proceedings led to an inquiry to determine whether any changes should be made to the 1800 *Articles*. None were recommended.[3-60]

Naval officers thus had ample opportunity, as witnesses, members, and not infrequently defendants, to observe naval justice in action:

> There is considerable evidence to indicate that courts-martial were much more common in the Old Navy [1800-1861] than they are today in relation to the relative size of the service then and now. . . . Officers found themselves intimately involved with the naval justice system throughout their service lives. The officer corps was small, and the requirements of naval tribunals took up a good deal of its time and energy. It was a rare officer who did not have, at intervals throughout his career, to appear before naval courts as a witness, serve on a court-martial or court of inquiry, and occasionally defend his own actions before a tribunal of his brother officers. In those days courts-martial did not, however carry quite the same stigma or exert quite the same penalty on an officer's career as they do today. Acquittals were common,

3-59. Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1850, at 199.

3-60. U.S. Congress, House Documents Concerning the Navy Department, House Committee on Naval Affairs, *Report of the Naval Committee, on the Resolution to Inquire into the Laws Governing the Navy, Etc.*, 15th Cong., 1st sess., 1 April 1818 (Washington, D.C.: E. DeKrafft, 1818).

Digitized by Google

> sentences for those found guilty were often mitigated or overturned; and since promotion was primarily by seniority, an officer with an adverse court-martial verdict in his record could still count on advancement.[3-61]

With this wealth of opportunity to observe the workings of military courts, some officers became quite facile at serving as judge advocates. Also, since officers were frequently the defendants before courts, it is likely that some became quite proficient at serving as defense counsel, either at the behest of an accused fellow officer, or in defense *pro se*. Although the 1800 *Articles* were silent with regard to the right to such representation it was generally permitted, subject, however, to the discretion of the court; the officer, like his enlisted counterpart, gave up substantial rights upon entering the naval service.[3-62] Defense counsel usually meant a fellow officer, although representation by professional attorneys was by no means unknown.[3-63]

While the fine nuances of legal strategies were not always employed under such circumstances, the vague and imperfect language of the *Articles* left a vacuum into which rushed the "customs of the sea," and left room as well for creative forensics. This imprecision in the law was not only tolerated but sanctioned by no less a body than the United States Supreme Court:

> [C]ourts martial have jurisdiction of such crimes as are not specified, but which have been recognised to be crimes and offences by the usages in the Navy of all nations, and . . .

3-61. Valle, *Rocks & Shoals*, 52-53. See also 247-48. At page 278 Valle states that "officer discipline was a problem of major proportions in the Old Navy."

3-62. "[I]t is a circumstance well understood, that persons going into military service, part for the time with the portion of their civil rights." House Committee on Naval Affairs, *Report of the Naval Committee, on the Resolution to Inquire into the Laws Governing the Navy, Etc.*, 1 April 1818.

3-63. See, for example, Valle, *Rocks & Shoals*, 208.

Digitized by Google

> they shall be punished according to the laws and customs of the sea. . . . [W]hat those crimes are, and how they are to be punished, is well known by practical men in the Navy . . . .[3-64]

Some officers lacking legal training of any sort acquitted themselves remarkably well both as judge advocates and defense counsel, showing a keen understanding of constitutional and other legal arguments.[3-65] With regular exposure to Navy courts, an exposure augmented by the advent in 1855 of the summary court for the trial of enlisted men (see page 79), officers became more familiar with their workings, although civilian lawyers continued to act as judge advocates in virtually all non-shipboard general courts martial of officers, and many of enlisted.

In what would appear today to be a most unusual case, although perhaps not viewed as such at the time, not only the respondent, but the complainant as well, were represented by their own counsel at a court of inquiry. The court was held on 3 November 1851 to investigate charges brought by Lieutenant William Taylor Smith against Commander Thomas O. Selfridge for "cowardly behavior in the face of the enemy." According to Valle, "the role played by the judge advocate [in this court of inquiry] was a small one. Both Commander Selfridge and Lieutenant Smith were represented by counselors who handled most of the cross examination. Lieutenant Smith's lawyer made a determined effort to demonstrate that in spite of his wound Selfridge should have remained at his post . . . ." Apparently Lieutenant Smith's sense of honor and duty, or perhaps retribution, was so strong as to persuade him to bring in a professional attorney rather than rely on the appointed judge advocate.[3-66]

3-64. *Dynes v. Hoover*, 61 U.S. 65, 82 (1857). A discussion of *Dynes* appears in Daniel Walker, *Military Law* (New York: Prentice-Hall, Inc., 1954), 56-62.

3-65. See, *e.g.*, the trial of Passed Midshipman John P. Hall who had "read some law" before entering the Navy, and did a creditable job of defending himself against charges of conduct unbecoming an officer and other complaints. Valle, *Rocks & Shoals*, 180-82.

3-66. Valle, *Rocks & Shoals*, 159.

Digitized by Google

For the unfortunate sailor, whose guilt was seldom in issue, there was generally no need to employ a professional prosecutor. Furthermore, the court's discretion in permitting the assistance of defense counsel was negatively exercised far more often in the trials of seamen, who generally sought the assistance of their enlisted fellows, than in the trials of officers. The concept of a right to assigned professional counsel was unheard of even in the civilian courts of the day. Few enlisted men could get officers to defend them because of the ironbound class distinctions between officer and enlisted,[3-67] although a request to be "represented" at trial by a fellow crewman was normally granted.[3-68] And most enlisted men could not afford to, felt it unnecessary to, or did not understand the advantages of retaining professional civilian counsel. One who had reason to consider these advantages was seaman James Steerwel of the *USS Ohio*, who was tried in 1841 for using mutinous and seditious words. His lay counsel pleaded drunkenness as a defense; the commodore on review considered it a matter in aggravation. Poor Steerwel received fifty lashes and a discharge from the Navy.[3-69] On the other hand, the "*Ewing* Mutineers" might have questioned the advantage of retaining professional counsel. Accused of overpowering a boat officer and throwing him overboard to drown, they were convicted and sentenced to death notwithstanding the vigorous defense put up by their civilian attorney.[3-70]

Notions of counsel for the accused, when they did arise, contemplated not so much a right but a concession—a concession to permit the accused

---

3-67. The case of the defense of a seaman, John Herring, by the Rev. Thomas R. Lambert, chaplain of the *USS United States*, in 1837, was a deviation from the norm. Herring was tried for murder of a shipmate. Lambert, who had studied law, conducted a vigorous defense, resulting in a finding of guilt to the lesser offense of manslaughter. Herring was sentenced to 400 lashes, later mitigated to 300. Valle, *Rocks & Shoals*, 139-40. The Rev. Lambert's reason for undertaking the defense in not known, although the fact that he was a man of God with an education in law may have been factors.

3-68. Torrey, *Journal of the Cruise of the Ohio*, 23.

3-69. Torrey, *Journal of the Cruise of the Ohio*, 85.

3-70. "Records of General Courts Martial and Courts of Inquiry of the Navy Department, 1799-1867," Naval Records Collection, Record Group 45, Microfilm Publication M273, National Archives, Washington, D.C., case No. 1237.

Digitized by Google

to have a "friend in court," although that friend was generally not envisioned to be a professionally trained lawyer. The eminent military historian, Frederick Bernays Wiener, has noted that even civilian courts of the post-colonial period were often conducted by judges untrained in the law, who struggled to understand and apply the constitutional protections enacted at the end of the eighteenth century.[3-71]

The ability to hire private counsel to serve as judge advocates when required, the familiarity of officers with the workings of the Navy's "judicial" system, the lack of any substantial rights on the part of enlisted transgressors, the diminished protections enjoyed even by officers, the crowded conditions aboard ship, and the dangers attendant upon long cruises, made the carrying of a professionally-trained judge advocate (who would necessarily have had to have been a civilian lawyer, for there were no naval officers trained in the law), an unaffordable "luxury."[3-72] Given this state of affairs with regard to courts martial, and the somnolent conditions which existed with regard to civil matters (a list of *all* the contracts made by the Navy in 1816 occupied only one and one-half pages),[3-73] it is easy to understand why the Navy did not feel hard-pressed to develop a legal organization of its own.

Indeed, given this context, one can only speculate as to the motives of Secretary of the Navy Benjamin Crowninshield (1815-1818) when in 1816, according to no less an authority than Paullin, he called for a permanent "law officer, or officers" in the Navy, becoming the first Navy

---

3-71. U.S. Army Judge Advocate General's School, *The Army Lawyer*, 15.

3-72. Occasionally—but only fortuitously—a person trained in the law might accompany a squadron abroad. This was the situation aboard the *Constitution* in 1837 when Commodore Elliott was able to call upon his *chaplain*, Thomas R. Lambert, who had been "a student at law." Lambert referred Elliott to "a passage in *Hough on Courts Martial* where . . . it is stated that the judge is bound to approve the proceedings of the court where they were legal." "Records of General Courts Martial and Courts of Inquiry of the Navy Department, 1799-1867," Naval Records Collection, Record Group 45, National Archives, case No. 748, at 463.

3-73. Walter Lowrie and Walter S. Franklin, eds., *American State Papers (1789-1825): Documents, Legislative and Executive of the Congress of the United States (Naval Affairs)* (Washington, D.C.: Gales and Seaton, 1834), 1:430.

Digitized by Google

official to suggest this.[3-74] The explanation for Crowninshield's proposal may lie in his displeasure with the performance of several of the United States District Attorneys in representing the government's interests in prize cases. During 1815-1816 Crowninshield, a retired merchant sea captain untrained in the law,[3-75] was compelled to write—or have written for him—a series of legally-crafted letters to attorneys, agents, and naval personnel, asserting the government's position regarding prize moneys and the disposition of captured ships.[3-76] We may thus assume that Crowninshield was suggesting by his remark the hiring of "in-house" civilian attorneys to handle persistently recurring legal matters such as this which confronted the Navy from time to time. It may also be assumed that a legal organization within the Navy's uniformed structure, similar to today's Judge Advocate General's Corps, was neither intended nor remotely contemplated by the Secretary.

Crowninshield had taken office in January 1815. Naval successes in the War of 1812 had placed the fledgling American Navy in great favor with the people and Congress, resulting in a program of fleet expansion.[3-77] Up to this time the Secretary of the Navy had had direct responsibility for all administrative functions of the Navy Department,

---

3-74. Paullin states:

> Probably the first man to recommend the appointment of a permanent law officer, or officers, for the Navy was Secretary Crowninshield in 1816. Many later Secretaries made similar recommendations.

Paullin, *History of Naval Administration*, 262-63. Unfortunately, Paullin does not cite an authority for Crowninshield's statement, and the author has been unable to locate it to verify the accuracy of Paullin's reporting, or to provide further context.

3-75. See Edwin M. Hall, "Benjamin W. Crowninshield," ed. and comp. Coletta, *American Secretaries of the Navy*, 1:113.

3-76. *American State Papers: Naval Affairs* (1815-1816), Doc. Nos. 134-35, 137, 139-40, 163.

3-77. Paullin, *History of Naval Administration*, 159.

Digitized by Google

save those assigned to the Marine Corps and the Navy yards.[3-78] As the demands on the Secretary's office increased dramatically as a result of the 1812 war, Secretary William Jones (1813-1814), Crowninshield's immediate predecessor, sought assistance. The result was the Act of 7 February 1815,[3-79] establishing a Board of Navy Commissioners comprised of "post captains" (captains in command of capital ships)[3-80] appointed by the President and confirmed by the Senate. While the Secretary retained his direct control over personnel matters and ship movements,[3-81] these officers, under his direction, were to "discharge all the ministerial duties of [the Secretary's] office, relative to the procurement of naval stores and materials, and the construction, armament, equipment, and employment, of vessels of war, as well as all other matters connected with the naval establishment of the United States." Within a year of taking office, however, naval appropriations were cut. The Navy moved into peacetime "doldrum years,"[3-82] and after establishment of the Board of Commissioners Secretary Crowninshield's job "became a virtual sinecure."[3-83]

In addition to its ministerial duties, the board was charged with preparing new rules and regulations for the specific and limited purpose of "securing an [*sic*] uniformity in the several classes of vessels and their equipments, and for repairing and refitting them, and for securing responsibility in the subordinate officers and agents." Subject to

---

3-78. "Letters Received by the Secretary of the Navy from the Attorney General, 1807-1825," Naval Records Collection, Record Group 45, National Archives, *Introduction*.

3-79. *An Act to alter and amend the several acts for establishing a Navy Department, by adding thereto a board of commissioners*, 3 Stat. 202.

3-80. Lawrence Fasano, *Naval Rank* (New York: Horizon House, 1936), 133-34.

3-81. "Letters Received by the Secretary of the Navy from the Attorney General, 1807-1825," Naval Records Collection, Record Group 45, National Archives, *Introduction*.

3-82. Samuel Flagg Bemis, *John Quincy Adams and the Foundations of American Foreign Policy* (New York: A.A. Knopf, 1949), 252.

3-83. Hall, "Benjamin W. Crowninshield," ed. and comp. Coletta, *American Secretaries of the Navy*, 1:114, 118-19.

Digitized by Google

approval, alteration, and revocation by the President, these revised rules and regulations were to be "laid before Congress at their next session."[3-84] It was not clear whether this implied a requirement for Congressional approval, but none was ever sought.

Ostensibly in furtherance of its charter, but far exceeding the scope, the board prepared what Secretary of the Navy Upshur later pejoratively termed "a general code of rules and regulations for the government of the Navy."[3-85] The *Rules, Regulations, and Instructions, for the Naval Service of the United States*, known as the "Blue Book" because of the blue cover in which they were bound, were approved by the President in 1817 and published in 1818.[3-86] The *Rules* touched only lightly on matters of discipline. Paragraph 46 enjoined commanders from awarding punishment in excess of that authorized by the 1800 *Articles*; not to torture the men; and not to deprive them of grog for more than a week. Transgressors were to be "brought to the gangway" except for severe offenses which were to be tried by court martial. Procedural guidance for such courts, such as it was, could be found only in the 1800 act. It is interesting to note that these provisions, unlike proposed revisions to the Navy's disciplinary code which would be presented during the next half-century, had application primarily to sailors rather than officers.

At about this time (1818) the qualifications sought in choosing the men to hold the office of Navy Secretary underwent a change in philosophy. Until then, the office had been filled by men who had "hands-on" knowledge of maritime matters. Indeed, Crowninshield had

---

3-84. Act of 7 February 1815, 3 Stat. 202; Paullin, *History of Naval Administration*, 168.

3-85. Upshur maintained that the Navy Commissioners who drafted the 1818 *Rules* far exceeded their authority by preparing a *general* code of rules and regulations, making their effort void *ab initio*. Failure to obtain Congressional sanction compounded the transgression. Writing in 1841, Upshur asserted that the only valid regulations controlling the Navy Department were those contained in the 1800 act. Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1841, at 353-54.

3-86. U.S. Navy, *Rules, Regulations, and Instructions, for the Naval Service of the United States* (Washington, D.C.: E. DeKrafft, 1818). See, *e.g.*, 6 Op. Atty. Gen. 10, 12 (1853) where the term "Blue Book" is employed to describe these rules and regulations.

Digitized by Google

been a sea captain for twenty years before he became Secretary of the Navy, and the roots of his substantial fortune were to be found in his maritime background.[3-87] Beginning in 1818, however, political considerations became all-important, and during the next twenty-seven years the post was filled, with one exception, by men who had served as both lawyers and judges,[3-88] with the following eighteen years seeing a monopoly of lawyers in the job. This legal expertise on the part of the Secretary may account, in part, for the delay in establishing a formal legal organization within the Navy Department.

Although the office of Secretary was filled with generally competent, and in some cases exceptional, men throughout this period, Congress jealously guarded its prerogative to manage naval affairs, but did little to exercise it.[3-89] New regulations to meet changing needs were not forthcoming, despite the best efforts of several of the Secretaries.[3-90] This refusal by Congress to allow the Navy to manage itself was all-pervasive;[3-91] it extended even to the power of the Secretary to alter the food ration for seamen![3-92] By 1832 chaos was rapidly attending the administrative organization of the Navy Department. In an attempt to

---

3-87. Hall, "Benjamin W. Crowninshield," ed. and comp. Coletta, *American Secretaries of the Navy*, 1:113.

3-88. Paullin, *History of Naval Administration*, 160.

3-89. For an example of the jealous guard which Congress placed over the power of the Navy to regulate itself, see the account of the House debate of 17 May 1842 which appears in *Congressional Globe*, 27th Cong., 2d sess., 17 May 1842, at 507.

3-90. See, for example, Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1827, at 213; Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1828, at 133.

3-91. Upshur to White, 16 February 1843, *Letter from the Secretary of the Navy Transmitting Rules and Regulations for the Government of the Navy of the United States; Prepared in Obedience to a Resolution of May 24, 1842*, 27th Cong., 3d sess., H. Doc. No. 148. John White was the Speaker of the House of Representatives.

3-92. Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1832 (reprinted at 22d Cong., 2d sess., H. Doc. No. 486), at 161.

Digitized by Google

bring some order to the establishment, Secretary of the Navy Levi Woodbury (1831-1834) issued the *Rules of the Navy Department Regulating the Civil Administration of the Navy of the United States*.[3-93] These contained nothing new; rather, they were a compilation of circulars, regulations, orders and decisions which were "found dispersed over the records and files of this Department." Woodbury noted in his promulgating letter that "many of the original papers, relating to these numerous subjects, are so detached and imperfectly classified, that some, probably have escaped my research." Of legal significance were provisions for payment to civilian attorneys, filing of general assignments of sub-contracts, compensation for United States District Attorneys acting on behalf of the Navy, certification of the accounts of judge advocates for pay purposes, a requirement that all courts martial convened at places where there were yards or vessels of the United States be held aboard such yard or vessel, recommendations that flogging be discontinued, and an admonition that "subordination and authority are to be maintained by humanity and kindness on one hand, and respect and implicit obedience on the other."[3-94]

Two months later an attempt was made to improve and modernize these diverse regulations which Woodbury had struggled to compile. The Act of 19 May 1832 authorized the President

> to constitute a board of naval officers to be composed of the [board] of naval commissioners and two post captains . . . whose duty it shall be with the aid and assistance of the attorney general, carefully to

---

3-93. U.S. Navy, *Rules of the Navy Department Regulating the Civil Administration of the Navy of the United States* (Washington, D.C.: F.P. Blair, 1832).

3-94. *Rules of the Navy Department* (1832), ch. XXXV, sec. 1. Secretary Woodbury was pleased with his compilation, stating that "all the benefit anticipated to the relief of the Department and the officers, from much unnecessary correspondence and many unpleasant decisions, have [*sic*] been fully realized." *Report of the Secretary of the Navy*, 1832, at 161-62. The next compilation, which did not appear until 1851, contained no legally significant information. *Regulations, Circulars, Orders & Decisions for the Guide of Officers of the Navy of the United States*.

Digitized by Google

> revise and enlarge the rules and regulations governing the naval service, with the view to adapt them to the present and future exigencies of this important arm of national defence, which rules and regulations, when approved by him *and sanctioned by Congress*, shall have the force of law, and stand in lieu of all others heretofore enacted.[3-95] (Italics added.)

The board established by this act convened in November 1832. A year later it submitted its proposed *Regulations for the Navy of the United States* to Secretary of the Navy Woodbury who readily approved and forwarded them to President Andrew Jackson. The President immediately signed them and presented them to Congress for sanction on 23 December 1833.[3-96] Congress, however, failed to act, and Woodbury's proposed regulations died still-born when Congress adjourned in June 1834.[3-97]

Woodbury's proposal was extensive and minutely detailed, but was distinctly administrative in nature. Although only a small portion was devoted to "Arrests and Courts-Martial," being a codification of the procedural practice of the day, this was the first time that detailed court martial guidance had been prepared at the departmental level. And while the regulations contained nothing substantial regarding the duties of judge advocates, they were significant in that, for the first time, an accused's conditional right to representation before a Navy court martial was codified. Article 459 of the proposed *Regulations for the Navy* stated:

> The court may allow counsel to the accused, for the purpose of aiding him in his defence against the charges, but always under

---

3-95. Act of 19 May 1832, 4 Stat. 516.

3-96. *American State Papers: Naval Affairs* (1833), Doc. No. 524.

3-97. *Report of the Secretary of the Navy*, 1841, at 355. Controversy swirled around the proposed regulations. See *American State Papers: Naval Affairs* (1834), Doc. No. 524.

Digitized by Google

> the restriction that all motions or communications shall be made in writing.[3-98]

While Woodbury's proposed *Regulations* are important for their administrative codification and reform, there is reason to believe that he had also proposed a statutory revision to the 1800 *Articles*. The Attorney General had advised the Navy draftsmen that they were free to "alter, omit or modify" the *Articles*.[3-99] And in a letter dated 12 June 1834 to the chairman of the Naval Committee of the House of Representatives, Woodbury indicated that two *separate* reports had been submitted to Congress; one on Navy regulations (discussed above), and another on Navy *laws*.[3-100] If this is indeed the case the latter work, and whatever visionary proposals regarding discipline, rights, and punishment it may have contained, has been lost.[3-101]

3-98. *American State Papers: Naval Affairs* (1834), Doc. No. 524.

3-99. Informal letter opinion of the Attorney General of the United States to the Board of Navy Commissioners dated 20 March 1833, found at *American State Papers: Naval Affairs* (1834), Doc. No. 524.

3-100. *American State Papers: Naval Affairs* (1834), Doc. No. 524.

3-101. The loss of a document such as a draft revision to the 1800 *Articles*, while unlikely, is not improbable. In the days when copying was manually done by clerks, and clerks were a scarce commodity at the Navy Department, there might be only a copy or two made of such a document. Just such a concern faced Secretary Upshur in 1842 when he transmitted his proposed *Rules and Regulations for the government of the Navy* to the Speaker of the House:

> I am unable, amid the pressure of other duties, to have a copy of the rules and regulations made in time for the action of the House. I therefore send the original, and respectfully request that the Clerk be authorized to return it to this Department when it shall have been acted on by the House.

Upshur to White, 16 February 1843, *Letter from the Secretary of the Navy Transmitting Rules and Regulations for the Government of the Navy of the United States; Prepared in Obedience to a Resolution of May 24, 1842.*

Digitized by Google

In 1840, acting under questionable color of the 1832 legislation,[3-102] Navy Secretary James Paulding (1838-1841) directed the Board of Navy Commissioners (apparently without the assistance of two post captains and the Attorney General, as it had been constituted in 1832-1833), to draft the proposed *General Regulations for the Navy and Marine Corps, 1841.*[3-103] Like the proposed 1833 *Regulations for the Navy*, these proposed regulations bore the endorsement of the Secretary (Paulding signed them in February 1841) and the President. And like the 1833 *Regulations* they met a similar fate although not, as in the case of the former, from neglect. Rather, Paulding having left office in March 1841, succeeded by George E. Badger who held the post for six months and did nothing to advance their adoption, disposition of the proposed regulations was left to Secretary of the Navy Abel Upshur who took office in October 1841. Upshur, a strong proponent of reform, presented Paulding's proposed *General Regulations* to Congress in December 1841, but with the recommendation that they *not* be approved because of insufficient civilian input into their preparation.

This was an unfortunate strategy on Upshur's part. The 1841 proposed *General Regulations* offered the most complete guidance on the conduct of courts martial to date, setting forth in considerable detail the manner in which a Navy trial should be conducted.[3-104] As in the 1833 *Regulations for the Navy*, an accused's conditional right to representation by counsel before a Navy court martial was confirmed.[3-105]

3-102. Secretary Woodbury, in his 12 June 1834 letter to Chairman C.P. White of the Naval Affairs Committee of the House of Representatives (*American State Papers: Naval Affairs* (1834), Doc. No. 524), assumed that the legal powers of the 1832 board had terminated when the draft *Regulations for the Navy* were approved by the President and submitted to Congress.

3-103. U.S. Navy, *General Regulations for the Navy and Marine Corps of the United States, 1841* (Washington, D.C.: J. and G.S. Gideon, 1841).

3-104. *General Regulations for the Navy and Marine Corps, 1841*, ch. XXX, "Arrests and Court Martials" [*sic*].

3-105. Article 506 of the proposed *General Regulations* was virtually identical to the corresponding provision in the 1833 *Regulations for the Navy*:

> The court may allow counsel to the accused, for

(continued...)

Digitized by Google

The motive behind Upshur's negative recommendation to Congress was clear. Recognizing the urgent need for reform of the Navy's regulatory rules, he nevertheless wished to cast his own print on the revision. Pursuant to this end he sought legislation from Congress authorizing the appointment of a board to prepare a revision to the 1800 *Articles*. To drive home his point that the Navy was in dire need of revised regulations, Upshur asserted that the 1818 *Rules* under which the Navy was operating far exceeded the scope of their authority, never received Congressional sanction, and were void. The Navy, according to Upshur, was operating on a legal thread, a situation which would, "if not remedied, ultimately ruin the naval service of our country."[3-106] He received strong support from the military press:

> [T]he Navy rules and regulations which have been in force for more than the quarter of a century, were palmed off upon the service by [the Navy board] as law and gospel; and . . . though practically enforced at this day, they never had even the shadow of any lawful authority, nor binding sanction. . . . What can more strikingly illustrate the negligence, which has hitherto obtained in the management of the Navy, than the fact, that such a discovery should now be made for the first time?[3-107]

To accomplish his task of revision, Upshur wanted no warmed-over 1832 board with its heavy representation of Navy Commissioners. Nor did he long adhere to the position upon which he had urged scuttling of

3-105. (...continued)

> the purpose of aiding him in his defence against the charges, but always under the restriction that all motions or communications shall be made in writing, and in the name of the accused.

3-106. *Report of the Secretary of the Navy*, 1841, at 353-56.

3-107. *Army and Navy Chronicle*, 12 February 1842, at 60.

Digitized by Google

Paulding's 1841 proposal, that there must be civilian representation on the board. Instead, Upshur recommended that the board comprise "two officers from each of the following grades: captains, commanders, lieutenants, pursers, and surgeons."[3-108]

Upshur had promising connections to serve his purpose of reform. The chairman of the House Committee on Naval Affairs, Henry A. Wise, was a friend.[3-109] A bill to appoint "a board for the preparation of rules and laws for the regulation and government of the Navy," of the composition requested by Upshur, was introduced in the House by Wise on 8 February 1842.[3-110] Despite Wise's influence, however, the bill met with opposition from those who felt that subordinate officers had no place in the drafting of Navy regulations; those who felt that there should be civilians on the board to represent the interests of seamen; those who called for Marine Corps representation; and those who felt the task was the sole responsibility of the Secretary. The bill was twice tabled,[3-111] but on 24 May 1842 a joint resolution of Congress offered by John Quincy Adams directed the Secretary and the Attorney General to prepare the new code.[3-112]

3-108. Letter dated 8 January 1842 from Abel Upshur to Henry A. Wise, chairman of the House Committee on Naval Affairs. *Army and Navy Chronicle*, 5 March 1842, at 98.

3-109. Paolo E. Coletta, "Abel Parker Upshur," ed. and comp. Coletta, *American Secretaries of the Navy*, 1:178. Wise was also chairman of the House Ways and Means Committee.

3-110. *Congressional Globe*, 27th Cong., 2d sess., 8 February 1842, at 222. The date is reported as 9 February 1842 in *Army and Navy Chronicle*, 12 March 1842, at 114-15.

3-111. See *Army and Navy Chronicle*, 19 April 1842, at 182; *Congressional Globe*, 27th Cong., 2d sess., 23 May 1842, at 525-26.

3-112. "It was eminently proper that, in the preparation of a legal code affecting so large a body of persons, and that in a manner so vitally important to them, a technical man, a professional lawyer should be employed—one who should be acquainted with the precise force of the terms to be employed." This would "produce a better code than calling in the aid of a board of naval officers." *Niles' National Register*, 28 May 1842, at 207.

A copy of the resolution of 24 May 1842 has proven elusive, making it (continued...)

Digitized by Google

Upshur submitted his proposed *Rules and Regulations* to Congress on 16 February 1843. It contained less guidance on the conduct of courts martial and the duties of judge advocates than did either Woodbury's 1833 proposal or Paulding's 1841 effort. In transmitting his proposal, Upshur made a point of noting that he had "availed [himself] of the best information [he] could obtain from officers of the Navy," with the code being "the result of their labors, conjointly with [his] own."[3-113] On 10 March 1843, Chairman Wise proposed a joint resolution of Congress providing that Upshur's proposed code "be submitted to Congress at its next session; and that, until then [it] be put in operation, and printed, for the use of the Navy."[3-114] Again Wise's efforts foundered. The resolution

---

3-112.(...continued)
difficult to determine the precise direction given to, and authority placed upon, the Secretary of the Navy. A review of House and Senate proceedings for 24 May 1842 has proven fruitless. The Attorney General, writing in 1853, stated that the resolution had been adopted by the House on 23 May 1842. 6 Op. Atty. Gen. 11, at 13. A review of House proceedings of that date, however, shows that the resolution was tabled, not adopted. See *Congressional Globe*, 27th Cong., 2d sess., 23 May 1842, at 525-26; *Niles' National Register*, 28 May 1842, at 207. The authority for terming the resolution a joint endeavor, and fixing its date of passage as 24 May 1842, is quite conclusive. See Upshur to White, 16 February 1843, *Letter from the Secretary of the Navy Transmitting Rules and Regulations for the Government of the Navy of the United States; Prepared in Obedience to a Resolution of May 24, 1842*. Hall states that "John Quincy Adams, after conferring with Upshur, moved to give the Secretary sole responsibility [for preparation of the naval disciplinary code]. Congress accepted this proposal and by a joint resolution adopted on May 24, 1842, authorized the Secretary of the Navy and the Attorney-General to submit a new code to the next session." Claude H. Hall, *Abel Parker Upshur, Conservative Virginian* (Madison: State Historical Society of Wisconsin, 1963), 136. Finally, a joint resolution of Congress adopted on 11 August 1842 refers to "the resolution of the twenty-fourth May, eighteen hundred and forty-two, which requires of [the Secretary of the Navy and the Attorney General] the preparation of rules and regulations for the Navy." Richard Peters, ed., *The Public Statutes at Large*, 8 v. (Boston: Charles C. Little & James Brown, 1848), 5:584.

3-113. Upshur to White, 16 February 1843, *Letter from the Secretary of the Navy Transmitting Rules and Regulations for the Government of the Navy of the United States; Prepared in Obedience to a Resolution of May 24, 1842*.

3-114. *Congressional Globe*, 27th Cong., 3d sess., 10 March 1843, at 386.

Digitized by Google

failed, and Upshur's proposed code was doomed. When Upshur left office in July 1843, the Navy was still operating under the 1800 *Articles*.

Although Upshur did not succeed with his code, he did oversee passage of legislation that dramatically altered the organization of the Navy, and which, had it passed in the version reported out by Wise's Naval Affairs Committee, would have changed the entire course of the Navy's legal organization and administration.

On 8 January 1842, Upshur wrote to his friend Henry Wise, suggesting legislation to reform court martial procedures of the day.[3-115] The letter (following page) is enlightening as to the legal requirements of the Navy at that time, the fact that they fell upon the Secretary for their completion, and the Secretary's opinion that virtually all naval justice matters should be handled by a professional civilian attorney. It is noteworthy too for the fact that it marks the first formal request to be laid before Congress that a Judge Advocate General be appointed for the Navy.

Note that Upshur's request was for a *civilian* lawyer rather than a man in uniform (although the Army had had several uniformed judge advocates general earlier in the century). It is interesting to note also that the dominant legal problem of the day was naval justice, and that courts martial had attained a magnitude which Secretary Upshur felt required dedicated attention and coordination. It is also interesting to note that he would have substantially restricted the authority of fleet and squadron commanders to convene courts martial by moving all courts, with few exceptions, to Washington where they could be tried by the Judge Advocate General. (One wonders whom Secretary Upshur had in mind to relieve him from the judicial labor imposed by the examination of records if the Judge Advocate General was to prosecute all charges.) While many of the courts martial with which Upshur was concerned were courts martial of officers,[3-116] who would have been amenable to trial in Washington, Upshur fails to explain how he would try enlisted offenders

---

3-115. The letter, which has been edited for this text, was reprinted in *Army and Navy Chronicle*, 5 March 1842, at 98.

3-116. The military press of the day was replete with accounts of the trials of officers. See, for example, *Army and Navy Chronicle*, vols. 12, 13 (1841-1842). Hall makes note of "the number of courts-martial [of officers] for trivial offenses." Hall, *Abel Parker Upshur*, 129.

Digitized by Google

NAVY DEPARTMENT, *January* 8, 1842.

SIR: I propose the appointment of a judge advocate general. The *judicial* labor now imposed upon the department, in the examination of voluminous records, together with the labor of preparing charges and specifications is very great and oppressive. Besides, it does not follow, as a matter of course, that the Secretary of the Navy is competent to these duties. They are strictly professional, and ought to be performed by a professional man. The head of the department is entitled to be relieved on this point.

All courts martial should be held in the city of Washington, under the eye of the Secretary, except in any special and particular cases. Thus a uniformity of decision would be had, and something like a regular system would be established. The abuses which now prevail, and which have brought the whole system into disrepute and odium would be at once corrected.

The arrangement would be attended with no additional expense whatever. A salary of twelve or fifteen hundred dollars per annum would ensure the services of a competent officer, among the practising lawyers of the District of Columbia. The annual charge for judges advocate, for the last ten years, has been $1,482.

I attach much importance to this measure.

With very great respect,

A.P. UPSHUR.

Hon. H.A. WISE.

Letter from Secretary of the Navy Upshur to Henry A. Wise, Chairman of the House Committee on Naval Affairs, proposing appointment of a Judge Advocate General for the Navy. (*ARMY AND NAVY CHRONICLE*)

Digitized by Google

since, as we have noted above, sailors were only infrequently in United States waters, and almost never on shore duty.

The "disrepute and odium" into which the Secretary felt the Navy's justice system had fallen was pervasive, but was primarily a criticism of court members, not of judge advocates. Court members often had not the "plainest understanding" of the rules of evidence, subjecting themselves to "indirect but cutting condemnation from the Secretary" on review of proceedings.[3-117] Judge advocates, on the other hand, were assumed in most cases—and especially the trials of officers—to be professional lawyers, competent in the ways of litigation. If a judge advocate could overcome his inherent bias toward the prosecution, his opinion on legal questions should be given great deference by the court.[3-118] In fact, in the opinion of at least one commentator of the day "a *lawyer* is indispensable in the organization of a Court Martial."[3-119] This same commentator inferred that a "level playing field" was also essential; that if the judge advocate was a professional attorney, so too should be the counsel for the accused.

On 8 February 1842 Congressman Wise reported a bill "to reorganize the Navy Department of the United States."[3-120] Included was legislation dissolving the Board of Navy Commissioners, establishing a system of bureaus, and incorporating Upshur's recommendations *in toto*, including authorization for the Secretary "to appoint a Judge Advocate General of the Navy, to reside in Washington, with a salary of $1,200." His duties, as set forth in the bill, would be

> to prepare all charges and specifications for the trial of offences arising in the naval service; to conduct the trial thereof; to prepare a correct brief of the record in each case, for the examination of the Secretary, with his

---

3-117. *Army and Navy Chronicle*, 9 December 1841, at 390.

3-118. *Army and Navy Chronicle*, 16 December 1841, at 398.

3-119. *Army and Navy Chronicle*, 16 December 1841, at 398.

3-120. *Congressional Globe*, 27th Cong., 2d sess., 8 February 1842, at 222. The date is reported as 9 February 1842 in the *Army and Navy Chronicle* of 19 February 1842 at 77.

Digitized by Google

> opinion thereon; and to perform all other duties which are now usually performed by judges advocate of naval courts martial. The better to secure uniformity of decision in the said courts, they shall, in all cases of commission and warrant officers of the Navy, be held in the city of Washington, unless, for special reasons, the Secretary shall otherwise direct. Whenever a court martial shall be held in any other place than the city of Washington, and in all cases of inability of the Judge Advocate General to attend, by reason of sickness or other disabling cause, another Judge Advocate may be appointed for the particular occasion, as is now usual in the service.[3-121]

Although lawyers may have been indispensable to the organization of courts martial, they were not considered necessary to prepare contracts. Writing again to Wise on 21 May 1842, Secretary Upshur requested consideration of several modifications to the bill before the House. Among these Upshur requested authorization to hire a clerk who would prepare contracts for the Department. "For such duties, an able accountant, thoroughly acquainted with the proper forms and guards to be observed in drawing up contracts, would be required . . . for a compensation [of] $1,400 per annum."[3-122] In the same communication, Upshur warned that he now had "great doubts" whether the $1,200 salary proposed for a Judge Advocate General of the Navy was sufficient to procure "the services of a competent person."[3-123] (Note that the salary proposed for the contract clerk was $200 greater than that for the Judge Advocate General.)

3-121. *Army and Navy Chronicle*, 19 February 1842 at 77.

3-122. *Army and Navy Chronicle*, 21 May 1842, at 267.

3-123. *Army and Navy Chronicle*, 21 May 1842, at 269.

Digitized by Google

The act reorganizing the Navy was passed by Congress on 31 August 1842.[3-124] It contained sweeping changes in the organization of the Navy, establishing a bureau system in place of the Board of Navy Commissioners. It also had provision for a contract clerk at the Secretary's suggested annual salary of $1,400, with authorization to appoint an agreeable naval officer "not above the grade of lieutenant" to this post at a salary not to exceed $900 per year. What the bill did *not* contain were Upshur's proposals to appoint a Judge Advocate General of the Navy and reorganize the venue of courts martial. Apparently these proposals were dropped by Upshur when he was unable to persuade Congress to authorize a salary of more than $1,200 a year for a Judge Advocate General. Upshur felt that he would be unable to induce any competent attorney to take the job at that amount.

Although the provision for a Judge Advocate General was excised from the bill, it is of significant interest to note that the legislation had contemplated a chief law officer who would prepare and try virtually *all* general courts martial in the Navy, certainly, at least, all trials of commissioned or warrant officers, and that they would all be held in Washington, D.C. It is also significant that when a "substitute" judge advocate was to stand in, it was clearly intended that this person be a professional civilian lawyer.

At the time the Board of Navy Commissioners was replaced by the bureau system in 1842, the entire staff of the Navy Department in Washington consisted of about thirty men. The period of the board's service was marked by significant technical advances in ship construction, propulsion, protection and armament, for which it could take much of the credit. In matters with legal overtones, the Commissioners established a system of procuring supplies by contract, instituted a program of checks against fraud and misapplication of public moneys by Navy agents, pursers and contractors, and initiated several worthwhile financial accounting measures.[3-125] The Navy was emerging from its doldrums.

Whatever vestige of authority the Navy Department may have had to issue regulations under either the 1815 act or the 1832 act evaporated in 1842 when the Board of Commissioners was disestablished. While the War Department (Army) had been given permanent rule-making authority

3-124. Act of 31 August 1842, 5 Stat. 579.

3-125. Paullin, *History of Naval Administration*, 201.

Digitized by Google

in 1816,[3-126] and the President had been authorized to make regulations for the administration of the Marine Corps in 1834 (under the same statute which placed the Marine Corps within the Department of the Navy and removed it from jurisdiction of Army courts "except when detached for service with the army by order of the President of the United States"),[3-127] Congress refused to pass similar legislation for the Navy[3-128] despite the repeated requests of Navy Secretary after Navy Secretary for such authority.[3-129] It is important to remember that this lack of authority to enact or modify regulations affected not just the statutory *penal* regulations, the *Articles for the Government of the Navy*. It extended to *all* rules and regulations to govern the Navy short of simple, basic orders, or the limited-scope "circulars" issued from time to time by the Secretary. In this respect the Navy was virtually hostage to an inflexible—or impotent—Congress, which would neither exercise nor concede its power. The 1818 regulations had proven to be an anomaly—a brief and limited relinquishing of Congressional control over the power of the Navy to govern itself.

This refusal by Congress to equip the Navy with a mechanism to revise its regulations was symptomatic of a much larger issue; the factionalism which would soon erupt into civil war. The 1800 *Articles* reflected the Southern and Federalist doctrines of their day. While the North was now driving toward a more democratic, egalitarian society, the South viewed any movement to liberalize disciplinary rules as a direct attack on the iron-clad and sometimes brutal treatment of slaves, and thus on the institution of slavery itself. Furthermore, a great number of the Navy's officer corps, either because of Southern loyalties or its traditional (and supportable in theory, although not in practice) belief in the need for

---

3-126. Act of 24 April 1816, 3 Stat. 297; 8 Op. Atty. Gen. 337 (1857).

3-127. Act of 30 June 1834, 4 Stat. 712.

3-128. See 8 Op. Atty. Gen. 337 (31 January 1857). See also Valle, *Rocks & Shoals*, 273.

3-129. "The deficiency of the articles of war for the government of the Navy has been so repeatedly brought to the attention of Congress in the reports of my predecessors, that I could content myself on this head by a general reference to them . . . ." *Report of the Secretary of the Navy* [William Alexander Graham], 1850, at 207.

Digitized by Google

discipline, opposed change. Compromise was impossible, and the Navy was forced to drift along under a hodgepodge of general orders, the out-dated directives of the 1800 *Articles*, and the tarnished "Blue Book" of 1818.[3-130] The bureau system of the 1840s was grafted upon a Navy Department which had neither an Assistant Secretary, an "in-house" legal officer, a relevant or utile code of regulations, nor the authority to govern itself.

As the Navy entered the decade of the 1850s, reform movements gained strength. Secretary Bancroft, who served from 1845 to 1846, had expressed this reform sentiment and broken with centuries of naval tradition when he stated "the men have *rights*, and must be protected in them."[3-131] (Italics added.) Flogging as a form of punishment was

---

3-130. Upshur seems to have had a change of heart regarding the validity of the 1818 Blue Book. Writing in 1843 he stated that "the rules and regulations for the government of the Navy, as contradistinguished from laws . . . are those compiled by the Board of Navy Commissioners in 1818, commonly called the Blue Book . . . ." Upshur to White, 16 February 1843, *Letter from the Secretary of the Navy Transmitting Rules and Regulations for the Government of the Navy of the United States; Prepared in Obedience to a Resolution of May 24, 1842*. The Attorney General of the United States, who twice had an opportunity to review the legality of the Blue Book, found no impediment to its validity. See 6 Op. Atty. Gen. 11 (1853); 8 Op. Atty. Gen. 337 (1857).

3-131. *Report of the Secretary of the Navy*, 1845, at 654. Bancroft made this assertion of rights on the part of enlisted men in the context of a criticism that commanding officers were abdicating their responsibilities with regard to discipline:

> Efforts have been made to break up a violation of law, which has too long existed on ship-board. The mercy of the statute intrusts the power of the lash exclusively to the commanding officer. No officer, worthy of command, will inflict punishment, except after due examination into the offences charged. The former customs of delegating this power to subordinate officers is a flagrant violation of the will of Congress and the people. The men have rights, and must be protected in them. Experience shows that discipline is never so good, as when the commanding officer sets the example of subordination by obedience to the laws of his country.

Digitized by Google

abolished in 1850,[3-132] despite strong resistance from officers and surprisingly widespread opposition from enlisted men, both groups fearing a breakdown in discipline.[3-133] One writer has noted that sailors considered flogging such a "manly and seamanlike form of punishment" that some of them petitioned Congress to defeat the abolition bill.[3-134] While obviously correct from a humanitarian standpoint, this action removed the most effective, and certainly the "swiftest and surest" form of punishment available to a commanding officer at captain's mast.

Perplexed by this problem, Secretary William Graham (1850-1852) sought advice from his officers and "availed [himself] of the presence of a board of highly intelligent and experienced officers, assembled at the seat of government for another purpose, to ask their opinion on several questions connected with this change of discipline . . . ."[3-135] He also suggested that a committee of Congress take sworn testimony of respectable and experienced *seamen* and officers" (italics added) that it might enact "a proper code of discipline for the service and especially in regard to the discretionary punishment to be imposed by officers in command of single ships."[3-136]

Although Congress failed to act at Secretary Graham's request, the board of naval officers upon whom he had called for advice prepared a revised code of regulations.[3-137] Termed a "system of orders and instructions," they were signed by Graham's successor, John Pendleton

---

3-132. The prohibition against flogging was added as a *proviso* to the Naval Appropriation Bill, Act of 28 September 1850, 9 Stat. 513. It also abolished flogging "on board vessels of commerce." Flogging in the Army was abolished in 1861. 12 Stat. 317.

3-133. See Lovette, *Naval Customs*, 234-35; Valle, *Rocks & Shoals*, 277. For a contrary view, see Torrey, *Journal of the Cruise of the Ohio*, 65-66, 71.

3-134. "A Brief History of the Organization of the Navy Department," 2291.

3-135. *Report of the Secretary of the Navy*, 1850, at 207. The purpose for which the board had originally been assembled was not stated by Secretary Graham.

3-136. *Report of the Secretary of the Navy*, 1850, at 208.

3-137. Harold D. Langley, "James Cochrane Dobbin," ed. and comp. Coletta, *American Secretaries of the Navy*, 1:293.

Digitized by Google

Kennedy (1852-1853), and issued as a general order by President Millard Fillmore on 15 February 1853, a scant twenty days before he left office. These *Orders and Instructions* comprised some 229 pages, defining numerous crimes, specifying their punishment, and establishing procedures for courts martial.[3-138] They were essentially similar to Paulding's 1841 proposed *General Regulations* (and in this respect were far more extensive than Upshur's 1843 proposal) with the addition of provisions admonishing officers not to express opinions on the conduct or motives of other officers against whom they made complaints, or to use abusive epithets or other improper language in such complaints,[3-139] and a prohibition against allowing offenses to accumulate in order collectively to form sufficient matter for prosecution. A variance from the 1841 proposed *General Regulations* permitted the accused to examine his own witnesses, rather than requiring that they be examined on his behalf by the judge advocate (see the discussion of the duties of the judge advocate, beginning at page 83). Curiously, in only one place in the 1841 proposed *Regulations* was there mention of an accused being other than an officer,[3-140] and in the 1853 *Orders and Instructions* officers alone were mentioned. The enumeration of punishments in both codes related only to officers.[3-141] Although enlisted offenders were usually brought to task at mast, it is an established fact that they were also court martialed. The restrictive wording of the proposed 1841 and 1853 regulations, however,

---

3-138. U.S. Navy, *Orders and Instructions for the Direction and Government of the Naval Service of the United States* (Washington, D.C.: Robert Armstrong, 1853). Although these regulations had been prepared under the aegis of Secretary Graham, they were signed by Secretary Kennedy, who took office on 26 July 1852.

3-139. In 1841 Secretary of the Navy Upshur had published an order to the same effect. See footnote 3-58.

3-140. "The Secretary . . . will, in all cases, exercise his discretion in deciding whether a court martial shall be ordered . . . against officers *or others* belonging to the Navy . . . ." (Italics added.) *General Regulations for the Navy and Marine Corps, 1841*, art. 484.

3-141. Upshur's proposed code was more ambivalent as to its intent, concerned only with the treatment of officers in the arrest and pre-court procedure stage, but then using the more generic term "accused," when discussing trial procedures. Unlike the 1841 and 1853 proposals, Upshur did not include an enumeration of punishments, choosing instead to fall back on provisions in the 1800 *Articles*.

Digitized by Google

would indicate that they were intended to give order primarily to the trials of officers, with enlisted personnel being subject more to the non-judicial aspects of the 1800 act as interpreted by custom.

This double standard carried over to punishment as well. A review of the sentences awarded by courts martial to officers and enlisted persons for virtually the same offense, indicates that both the form and the degree of penalties to seamen were far more severe than those meted out to officers.[3-142]

Aware of the urgent need for a fair, relevant, and up-to-date disciplinary code in the Navy, but also aware of the necessity that such a code be legally enacted, Kennedy's successor, James Dobbin (1853-1857), requested an opinion from the Attorney General as to the validity of the 1853 *Orders and Instructions*. On 5 April 1853, in response to this request, Attorney General Cushing found the *Orders and Instructions* in derogation of Congress's constitutional authority "to make rules for the government and regulation of the . . . naval forces," and declared them invalid.[3-143] In the same opinion the Attorney General gratuitously noted that both Paulding's 1841 *General Regulations* and Upshur's 1843 *Rules and Regulations* were void *ab initio* because of their similar failure to receive the statutorily required Congressional approval.

The state of affairs which existed after the Attorney General's opinion must have been chaotic. In addition to lacking any effective form of punishment to be administered at captain's mast, due to the prohibition on flogging in 1850, commanders were left with no official direction for the

---

3-142. See Torrey, *Journal of the Cruise of the Ohio*, 43, 86. Secretary Woodbury felt that the disciplinary system was more equitable than did Torrey:

> Strict discipline among the officers has generally been attempted, tempered . . . with all reasonable indulgences. Such discipline has been found not only beneficial to the officers themselves . . . but a most efficient instrument in the control and reformation of the seamen, who seldom complain of a system of government extended with firmness and impartiality to their superiors.

Report of the Secretary of the Navy, 1832, at 161.

3-143. 6 Op. Atty. Gen. 10.

Digitized by Google

conduct of courts martial other than the decades-old 1800 act with its bare-bones guidance. Navy judge advocates had no choice but to conduct their courts martial practice in accordance with the unwritten procedures, the "customs of the sea," which had evolved over the course of time.

These conditions may, in part, have led Commander Samuel Francis DuPont, in January of 1855, to note the administrative burdens on the person of the Secretary, which he felt were exacerbated by the absence of any form of permanent legal officer in the Navy. In an informal report to the Secretary of the Navy, DuPont stated:

> The organization of the Navy Department . . . requires the Secretary to attend to certain minute details of office—him moreover without the aid of a permanent Judge Advocate & an officer whose duty would correspond with that of the Adjutant General of the Army—both considered as important factors in the organization of the War Dept.[3-144]

By 1855 the maintenance of discipline in the Navy was becoming a matter of serious concern. Desertions and insubordination increased, validating the warnings of those who had opposed the abolition of flogging. The outdated regulations under which the Navy was operating were insufficient to cope with its problems. Pressure was put upon Congress to restore flogging or establish new forms of punishment to take its place. Finally, in 1855, Congress passed *An act to provide a more Efficient Discipline for the Navy*.[3-145]

The 1855 act moved to restore discipline by reward and punishment. The act provided for the award of an "honorable discharge" together with a form of re-enlistment bonus to those sailors who exhibited "fidelity and

---

3-144. The author regrets that the citation for the DuPont statement was inadvertently deleted from the draft manuscript and could not be re-located.

3-145. Act of 2 March 1855, 10 Stat. 627.

Digitized by Google

obedience" during a three year hitch.[3-146] It also established a three-member summary court martial (roughly similar to the present-day special court martial), which could be convened by commanders of vessels, and equipped it with various punishments greater than those permitted at mast for the trial of minor offenses by enlisted men,[3-147] including institution of the bad conduct discharge.[3-148] It failed, however, to provide any overall revision to the Navy's disciplinary regulations which, rather than adapting to change, remained mired in the laws of 1800.

Establishment of the summary court did serve to expand the opportunities for officers to participate in the court martial process. Although the prosecutors for these courts were called "recorders," they were called upon to perform essentially the same function as judge advocates for general courts, "with as much conciseness and precision as may be consistent with the ends of justice, and under such forms and rules as may be prescribed by the Secretary of the Navy, with the approval of

---

3-146. Of the honorable discharge, Secretary of the Navy Dobbin commented as follows:

> The toil-worn tar prizes it not merely as a title to extra pay for early re-enlistment, but cherishes the parchment as a signal testimonial from his country of fidelity and character, worthy to be preserved in the modest archives of his family and home, and the surest passport to certain employment and the highest wages.

Report of the Secretary of the Navy, 1855, at 15.

3-147. Authorized punishments under section 7 of the act included a bad conduct discharge; solitary confinement in irons, single or double, on bread and water or diminished rations; confinement; reduction in rating; deprivation of liberty; extra police duty; and loss of pay.

3-148. The bad conduct discharge was authorized as a punishment to be awarded by the newly-created summary court, since it was purported to be less stigmatizing than the dishonorable discharge which could only be awarded by a general court martial. This position has been disputed. See Generous, *Swords and Scales*, 65.

Digitized by Google

the President . . . ."[3-149] No such "forms and rules" were forthcoming for another decade, however. Lacking either substantive or procedural guidance, recorders and judge advocates held to the "customs of the sea" and a few unofficial manuals to define their responsibilities in the court martial process. Commenting on the Navy practice, Attorney General Cushing, writing in 1857, observed that

> unfortunately, it is not the practice of the Navy Department, as it is of the War Department, to promulgate [procedural guidelines and precedential guidance] . . . and thus they are inaccessible, except in a few cases of printed trials, or when a question of military law happens to be referred to the Attorney General. . . .
>
> . . . [The term] "laws and regulations . . ." cannot be understood as confining us to the letter of the brief and imperfect provisions . . . of the [1800] statute for the government of the Navy. If it were to be so construed, we should be left wholly without guidance in matters of grave interest, as to which the statutes are silent. We must of necessity construe the term "laws" . . . as comprehending the common law military . . . .
>
> The question may be stated with greater amplitude, thus: What rules are to govern the court in those numerous incidents of its constitution and mode of action, concerning which the statute rules do not speak? . . . there is but one possible answer . . . namely, that the court is to be governed by the general principles of military law, applying the

3-149. Act of 2 March 1855, 10 Stat. 628. Valle, in *Rocks & Shoals* at pages 277-78, states that enlisted men were permitted to serve as recorders. This is not likely. Naval custom is such that it would never permit the entrustment of such responsibility to persons other than officers. Further, section 6 of the statute itself stated that "the commander of a ship shall have authority to order any *officer* under his command to act as the recorder of a summary court-martial." (Italics added.)

Digitized by Google

> analogies of a court martial where those are applicable, and recurring to adjudged cases, precedents ruled, authoritative legal opinions, and approved books of legal exposition, where there is no pertinent paramount statute rule.[3-150]

The earliest manuals for the guidance of judge advocates had appeared around the turn of the century. The first were British publications intended to assist the judge advocate serving under the crown who suffered the same neglect in guidance as his American counterpart. British commentators noted that a judge advocate, whether he be a civilian or a military man (either could serve), should be thoroughly acquainted with military customs, military courts, and criminal law; he should be both a lawyer and a soldier. These commentators noted further, however, that there were no official regulations to guide the nomination, qualifications or competency of those who served, and rhetorically asked whether the fitness of any person appointed as a judge advocate was "*ever* ascertained previous to appointment."[3-151]

Because these manuals focused on British law they bore limited utility for the judge advocate on this side of the Atlantic. The first American book on military law was published in 1809, by Major Alexander Macomb of the Army Corps of Engineers.[3-152] Dealing only with Army

---

3-150. 8 Op. Atty. Gen. 345-46.

3-151. R.M. Hughes, comp., *The Duties of Judge Advocates* (London: Elder Smith, 1845), 9, 178.

3-152. Alexander Macomb, *Martial Law; and Courts-martial as Practiced in the United States of America* (Charleston, S.C.: J. Hoff, 1809). Macomb, as a major general, republished his treatise in 1840 under the title *The Practice of Courts Martial* (New York: Samuel Coleman, 1840). Of this later work the *Army and Navy Chronicle* commented:

> All on this subject, which can be considered official is contained in about two pages of the regulations, and a few old general orders.

(continued...)

Digitized by Google

courts, however, it was of little value to Navy judge advocates.[3-153] And despite the fact that repeated attempts at re-ordering of the Navy's disciplinary code had met with failure after failure during the first half of the nineteenth century, there had been no initiative to produce an administrative handbook, which would not have required the jealously-guarded sanction of Congress, and to which judge advocates as well as court members could turn for procedural guidance. Nor was there throughout this period an effective system of promulgating the results of courts which were often held on remote stations from which communications to the United States could take months to arrive. (The ill-fated 1841 *Regulations* would have required that the approved sentences of all courts martial be communicated to all vessel and station commanders "that they may be made public," and that disapproved proceedings be similarly made known "so as to prevent, if possible, a recurrence of [informalities or] irregularities.")[3-154] It is little wonder that court martial decisions during this period were frequently inconsistent,

---

3-152. (...continued)

> . . . Major General [Macomb] published . . . an excellent treatise on this subject [in 1840], but the plan of it is too general . . . . [M]embers of courts martial . . . are not obliged to conform to it. . . .
>
> . . . [T]hese are totally inadequate to afford an officer a knowledge of the powers and duties of courts, and the manner of conducting them. The consequence is, that many . . . are conducted with great irregularity and informality.
>
> All these things might be avoided, and courts martial conducted with dignity, propriety, and despatch, if there were a proper official work on this subject.

Army and Navy Chronicle, 24 February 1842, at 92.

3-153. DeHart (see footnote 3-25) caustically asserts that the Macomb work was of little value to anyone: "Since the legal establishment of the Army and Navy of the United States, there has been no work produced, written for the express purpose, in conformity with the laws, regulations, and customs of the services, and intended as a guide for the administration of military justice. The small treatise on Courts-martial by the late Major-Genl. Macomb, is no exception to the remark." DeHart, *Observations on Military Law*, iii.

3-154. *General Regulations for the Navy and Marine Corps, 1841*, arts. 508-9.

Digitized by Google

often contradictory, and sometimes unjust;[3-155] "Errors were frequent; the practice of courts-martial was both inconsistent and contradictory; and no settled interpretation was received of either the law or modes of procedure."[3-156]

As diverse as they were ill-defined, the responsibilities of a judge advocate were a product of custom. (Since both recorders and judge advocates performed essentially the same legal function, they will hereafter be referred to simply as "judge advocates.") These responsibilities were manifold and, in theory at least, awesome from a juridical perspective. A trial guide was sorely needed.

It was not until 1846, however, that a work appeared which offered some real guidance. Published by a noted military law scholar and Army captain, William C. DeHart, who had served as Acting Judge Advocate of the Army "for a considerable space of time" in the early 1840s,[3-157] *Observations on Military Law, and the Constitution and Practice of Courts Martial*[3-158] contained specific references to Navy procedures

---

3-155. *A Naval Encyclopaedia* (Philadelphia: L.R. Hamersly & Co., 1881), 176.

3-156. DeHart, *Observations on Military Law*, iii.

3-157. The dates of DeHart's service as Acting Judge Advocate of the Army can only be estimated. See U.S. Army Judge Advocate General's School, *The Army Lawyer*, 41; DeHart, *Observations on Military Law*, iv, n. *.

3-158. DeHart, *Observations on Military Law*. The full citation to the DeHart work appears in footnote 3-25.

The impression one gets from reading DeHart's manual is that there was no guidance for the Army judge advocate prior to his writing. In fact, the Army Regulations of 1841 contained a rather complete, if bare-bones, exposition of the judge advocate's duties, including the following:

> The duties of the Judge-Advocate [are] . . . to direct prosecutions in the name of the United States; to counsel courts-martial as to the forms of proceedings, and the nature and limits of their authority; to admonish the accused, and guard him in the exercise and privileges of his legal rights; to collect, arrange, and evolve the testimony that may be required, and when circumstances render it necessary, to present the evidence in a succinct and collected form . . . .

(continued...)

Digitized by Google

where they differed from those of the Army, and became a mainstay for the Navy judge advocate for the next quarter century.[3-159]

The judge advocate, although he often lacked formal legal training, was required to be, among other things, the legal adviser to the court. That he could act impartially in this role was open to question. One commentator writing under the pseudonym ".˙. K." stated that "these officers, on foreign stations, at least, are appointed [as judge advocates] by the Commodore (generally his secretary), and are as much interested in the conviction of the accused as the person from whom the charges emanate, and by whom he is employed."[3-160] This circumstance, which imposed responsibilities and demanded legal knowledge well beyond that

---

3-158. (...continued)

William F. Fratcher, "History of the Judge Advocate General's Corps, United States Army," *Military Law Review* 4 (April 1959): 93-94, quoting *Army Regulations 1841*, section 473.

Since Congress refused to grant the Navy authority to promulgate its own regulations (see page 73), similar guidance was unavailable to Navy judge advocates.

3-159. A manual on court martial procedures written specifically for Navy courts finally appeared in 1867: A.A. Harwood, *The Law and Practice of United States Courts-Martial* (New York: D. Van Nostrand, 1867). This was followed in 1870 by a formal, poorly organized, and hence not too useful official compilation of extant directives: Department of the Navy, *Orders, Regulations, and Instructions for the Administration of Law and Justice in the United States Navy* (Washington, D.C.: Government Printing Office, 1870). In 1874 a small, privately-published manual authored by a Marine captain, appeared: McLane Tilton, *Order of Procedure in Naval General Courts Martial* (Washington, D.C.: Powell & Ginck, 1874). Like the Navy's official 1870 publication, Captain Tilton's manual incorporated extant directives. But it set them forth in the context of sequential procedures to be followed during trial, and thus was of great practical value to judge advocates. In 1891 a booklet treating summary courts alone was co-produced by Navy Lieutenant Samuel C. Lemly, who became Judge Advocate General of the Navy in the following year, and Marine First Lieutenant Frank L. Denny: Samuel Conrad Lemly and Frank Lee Denny, comps., *Naval Summary Courts-martial* (Washington, D.C.: Army and Navy Register Publishing Company, 1891). The first truly-useful official publication for Navy judge advocates did not appear until 1896: Department of the Navy, *Forms of Procedure for General and Summary Courts-martial, Courts of Inquiry, investigations, Naval and Marine Examining and Retiring Boards, Etc., Etc.*, comp. Charles H. Lauchheimer (Washington, D.C.: Government Printing Office, 1896).

3-160. *Army and Navy Chronicle*, 9 December 1841, at 390.

Digitized by Google

required to act as prosecutor or defense counsel (see further comment on this point by Benét, beginning at page 92), led DeHart to remark that the judge advocate was "frequently less fitted to advise the court, than any individual making part of it; . . . his opinion, if ever asked, is received with very little deference, and acted upon with less confidence."[3-161] To this condition DeHart critically attributed "the great irregularities, and numerous and constantly recurring errors, which have characterized the proceedings of courts-martial."[3-162]

This charge to give legal advice extended even to deliberations of the court, where the judge advocate had the duty, "should he observe the court inclined to find a verdict *contrary* to evidence, to point out the same and prevent, if possible, a wrong decision."[3-163] One cannot help but observe that this duty would extend to both guilty and not guilty verdicts!

In addition to his obligation to advise the court, the judge advocate was to give the *accused*, out of court, "all the assistance in his power . . . pointing out to [him] the way in which he might best conduct his defence." In court the judge advocate would be expected to "see that no improper advantage be taken of the [accused], by the admission of illegal testimony, [and] direct him how to present the facts upon which his defence might hinge, in the most effective light to the court." Bearing in mind that the judge advocate was often a lay person, it was nonetheless his added duty, in furtherance of his responsibility to guard the interest of the accused, "to object to any leading question to any of the witnesses, or any question to the [accused], the answer to which might tend to criminate himself . . . ." These schizophrenic admonitions continue, charging the judge advocate, at the request of the accused, to frame questions suggested by the accused, both for direct and cross-examination, in proper legal form.[3-164] DeHart even suggested that the judge advocate, being "more free from bias . . .

3-161. DeHart, *Observations on Military Law*, 97.

3-162. DeHart, *Observations on Military Law*, 301. Despite DeHart's exhortations, this problem persisted in the Army until at least 1919. See footnote 3-29.

3-163. DeHart, *Observations on Military Law*, 326.

3-164. DeHart, *Observations on Military Law*, 308-10.

Digitized by Google

than any other person," should speak with the accused before trial, since "great benefits to the accused . . . may result therefrom."[3-165]

In short, the judge advocate appeared before the court in a multiple capacity: first, as an officer of the court for the purpose of recording its proceedings, ensuring the correctness and sufficiency of the charges, reading the warrants, administering oaths, arraigning the accused, and questioning the witnesses; second, as the adviser to the court in matters of form and law; third, as public prosecutor; and fourth, as a guarantor of the rights of the accused. That the judge advocate could ethically play such a role did not trouble DeHart:

> Not being a party, and having no interest in the issue, [the judge advocate] must be considered as unprejudiced against the defendant, and being entirely impartial, he stands forward as the public prosecutor, only to see justice done between the accused, and the accuser.[3-166]

3-165. DeHart, *Observations on Military Law*, 310. The following, from the record of the case of *U.S. v. Sloyd* (1849), fairly illustrates the "great benefits" an accused might expect from representation by the judge advocate who had prosecuted him:

> On the part of the Prosecution the case was now declared to be closed by the Judge Advocate and the Prisoner was asked if he wished to examine any witnesses for his defense. After conferring with the Judge Advocate he stated that he did not wish to examine any witnesses for his defense . . . [T]he Prisoner . . . was now informed by the President that the Court was now ready to hear his defense . . . which was read by the Judge Advocate.

The "defense," which had also been prepared by the judge advocate, was a masterpiece of confession and contrition. The accused was found guilty and sentenced to receive seventy-five lashes. "Records of General Courts Martial and Courts of Inquiry of the Navy Department, 1799-1867," Naval Records Collection, Record Group 45, National Archives, case No. 1236.

3-166. DeHart, *Observations on Military Law*, 320. Whether or not the judge advocate could ethically play his various roles was only one consideration. Another was the amount of extra compensation he should receive for performing in such

(continued...)

Digitized by Google

Despite the fact that the judge advocate was the prosecutor, that he was an officer imbued with a myopic sense of the need for strict discipline, and almost certainly must have been egocentric enough to consider anything less than a conviction as a personal failure, it is nevertheless conceivable that an uneducated enlisted seaman, receiving the assurances of the judge advocate that his only interest in the outcome of the proceedings was to see justice done, would forego consideration of any need for an attorney of his own. Of course, if he wanted representation, DeHart notes that the accused had the "right" to counsel:

> Courts-martial always admit counsel for the prisoner; and all military writers admit it to be the custom to allow a prisoner to have a counsel. This privilege of the prisoner to have a friend, (*amicus curiae*), is of advantage to all—by the assistance rendered to the accused,

---

3-166. (...continued)
varied capacities. When a House committee suggested reducing a judge advocate's request for additional compensation of $220.00 to a lesser amount (based on the $1.25 per day allowance granted to Army judge advocates), the officer, Marine Lieutenant John L. Gardner, objected. Writing to the Secretary of the Navy to justify his requested fee, Gardner noted that the judge advocate was

> the administrative officer of the court, its legal adviser, its sheriff, and its clerk, [that] he acts also in the duplicate capacity of counsellor for the prosecution and the prisoner, [makes] the necessary preparations for the trial; [drafts] the charges and specifications in the most legal form; [collects] the documents for the proceedings; [arranges] evidence, [summons] numerous witnesses, [consults] with the prosecutor [*sic*] and the prisoner, etc.

Gardner's umbrage may have also been fostered by the sense of import which he attached to his role; he had prosecuted no less a personage than Lieutenant Colonel Anthony Gale, Commandant of Marines! Lowrie and Franklin, eds., *American State Papers (1789-1825): Documents, Legislative and Executive of the Congress of the United States (Naval Affairs)*, 1:740.

Digitized by Google

> and to the court, by frequently restraining the conduct of the prisoner.[3-167]

DeHart's repeated use of the term "prisoner" in the above passage probably reflects his Army orientation, although the term was used with Navy courts also. That such a prisoner might frequently require restraint probably indicates that DeHart is describing the right to representation primarily as it related to enlisted personnel. While no comparative study has been made by the author, there is nothing to evidence, however, that the Army was less willing to court martial its officers than was the Navy.

The right to representation by counsel was subject to strict limitation; the court could object to the person selected as counsel, and refuse to let him appear, if it felt that he was going to be disruptive to the proceedings.[3-168]

Even when representation was permitted, counsel were subject to stringent constraints. The practice in both the Army and the Navy was not to permit the accused's counsel to speak in court.[3-169] Rather, counsel was required to suggest to the accused what questions to ask. These were then written on slips of paper and handed by the accused to the judge advocate, who submitted them to the court for approval. If approved, they were put forth *by the judge advocate* in the case of enlisted defendants, or by the accused himself in the case of officers. The accused's counsel was not permitted at any time to question witnesses or address the court.[3-170] Although DeHart notes a distinction between a "military friend" and a "professional counsel" (with the latter presumably a lawyer), nevertheless neither could address the court:

> Lawyers, technically as such, are not recognized by courts-martial, though permitted

3-167. DeHart, *Observations on Military Law*, 132.

3-168. DeHart, *Observations on Military Law*, 134.

3-169. Tilton, *Order of Procedure in Naval General Courts Martial*, 6.

3-170. DeHart, *Observations on Military Law*, 132; U.S. Army Judge Advocate General's School, *The Army Lawyer*, 90. See also the proposed *General Regulations for the Navy and Marine Corps, 1841*, arts. 492 and 493.

Digitized by Google

> to appear as a friend, to assist the prisoner with advice in the conduct of his defence; and therefore it is, that interruptions by nice distinctions or pleadings, orally, are not permitted. Such pleadings, too, would be entirely out of place, and tend to no good result, but on the contrary would embarrass by delays the business of the court.[3-171]

A wonderful example of this practice appears in the trial of Commodore Jesse D. Elliott in 1840.[3-172] Represented by civilian counsel, Elliott nonetheless advanced all questions himself, both on direct and cross-examination, consistently referring to himself in the third person. This custom eventually broke down. Although Tilton, writing as late as 1874, said that only the parties and not their counsel could address the court, the procedure had come to be honored in the breach. As previously noted, counsel in the 1851 Selfridge trial (see discussion beginning at page 54) played a major role to the virtual exclusion of the judge advocate. Similarly, in the "*Ewing* Mutineers" court[3-173] in 1849, counsel for the accused did all the questioning on their behalf.

Stating Army policy, DeHart felt it to be essential that the judge advocate be a military man, so as to maintain proper control over him. "Without authority, by the medium of military rules, to regulate the official deportment of the judge advocate, it is evident that such person would be left entirely to the guidance of his own will, and might thereby leave the court without safety, and the prisoner without protection!"[3-174]

3-171. DeHart, *Observations on Military Law*, 162.

3-172. "Records of General Courts Martial and Courts of Inquiry of the Navy Department, 1799-1867," Naval Records Collection, Record Group 45, National Archives, case No. 748.

3-173. "Records of General Courts Martial and Courts of Inquiry of the Navy Department, 1799-1867," Naval Records Collection, Record Group 45, National Archives, case No. 1237.

3-174. DeHart, *Observations on Military Law*, 316. See generally 315-17.

Digitized by Google

This requirement, together with the strong assertion that this military man also have a "competent acquaintance with the principles and maxims of criminal jurisprudence,"[3-175] no doubt contributed to the Army's early development of a legal corps, since it chose not to employ civilian lawyers in the role of judge advocate. It must be observed, however, that the Army, which was in effect a "home guard," had the luxury of accessibility and portability with respect to legally-trained soldiers. They could be transferred from place to place with relatively little disruption of force strength. Not so with the Navy which operated primarily at sea, in widespread units, where few officers could be spared from their assigned duties or readily moved about, and where the part-time nature of legal work would not justify a full-time member of the wardroom.

Speaking on the Navy practice of using civilian judge advocates, DeHart stated:

> It is objectionable, too, to have the presence of [civilian judge advocates] taking part in the business of the court, as it in general only tends to prolong and complicate the proceedings. . . . [I]n the naval service . . . there is still some latitude of indulgence claimed on that head.[3-176]

DeHart, who was sharply critical of the legal competence of the Army officers who served as judge advocates,[3-177] apparently failed to appreciate the professional advantages which might come from the Navy's practice of employing civilian lawyers in this capacity. And while DeHart may have been parochial in his condemnation of the Navy's use of civilian lawyers, the Congress was not. In 1853 that body enacted a law recognizing the practice, and regulating the fees of civilian attorneys by

3-175. DeHart, *Observations on Military Law*, 302. At 304 DeHart stated that the qualifications of both the legal and military professions were requisite for duty as a judge advocate.

3-176. DeHart, *Observations on Military Law*, 321.

3-177. DeHart, *Observations on Military Law*, 301. See footnote 3-162 and related text.

Digitized by Google

all government departments. This "regulation" was rather imprecise in the case of judge advocates, for the act stated that the fee "for the services of counsel, rendered at the request of the head of a department [would be] such sum as may be stipulated or agreed on."[3-178] In 1855, and again in 1861 and 1868, Attorneys General confirmed the authorization inherent in the act to permit heads of departments, such as the Secretary of the Navy, to hire civilian counsel in their discretion.[3-179] It must of course be recognized that as long as the Navy was free and content to hire counsel from without, there would be little motivation to develop a cadre of lawyers in uniform. And, in fact, a small cadre of *civilian* lawyers actually came into being. At least one of these civilian lawyers, William H. Norris, Esq., of Baltimore, was retained over a period of several years during which time he represented the Navy at numerous courts martial on both the East and West Coasts, including at least two murder trials.[3-180]

Having exposed the deficiencies of military judge advocates in knowledge of the law, DeHart joins the British military writer, Hughes, in warning that the accused was not the only trial participant exposed to jeopardy:

> Without an adequate degree of knowledge on [the laws, customs and modes of discipline of military life, and the principles and maxims of criminal jurisprudence] it is impossible for a Judge Advocate to direct and guide the members of a Court Martial in the right path, so that justice be duly administered, the proceedings of trials correctly and legally

---

3-178. Act of 26 February 1853, 10 Stat. 161.

3-179. In 1855, Attorney General Cushing noted that the 1853 act "expressly recognises the existence of [the] power in any Head of Department . . . to employ counsel in his discretion for the conduct of legal business arising in his Department." 7 Op. Atty. Gen. 141-42 (1855). This was echoed by Attorney General Bates in 1861 (10 Op. Atty. Gen. 40), and again by Attorney General Stanbery in 1868 (12 Op. Atty. Gen. 368).

3-180. Norris represented the Navy at the Mackenzie trial in New York in 1843 (see page 98), and the "Ewing Mutineers" trial in San Francisco in 1849 (see page 55).

Digitized by Google

> conducted, and the members of the Court protected from the penalties every member, including the Judge Advocate himself, is liable to, should the Court (*from not having a competent legal adviser, through ignorance, or inadvertency*) exceed its authority in deviating from the established law of the land.[3-181]

This admonition was repeated by Captain Stephen Vincent Benét, USA, writing in 1862, who warned that "the members [of a court martial] are collectively and individually responsible to the federal courts of civil judicature for any abuse of power or illegal proceedings." To make his point, Benét cites a 1743 English case where a Royal Marine lieutenant was awarded civil damages of £1,000 against the president of a court martial which had convicted him on "illegal" evidence—the depositions of illiterate persons. He further notes by way of example that in Massachusetts

> the law is settled, that parties who have legal ground to complain of the doings of military courts, are to get their remedy by action at law for damages, if they have right to any; which corresponds with the view of the Supreme Court of the United States, where trespass was maintained to recover damages for an act done by a court-martial *"clearly without its jurisdiction."* (Footnote omitted.)

Benét was considerably more lenient toward the responsibilities of a judge advocate:

> The unreasonableness of holding judge advocates in our service responsible,

---

3-181. Hughes, *The Duties of Judge Advocates*, 9-10, cited by DeHart, *Observations on Military Law*, at 302.

Digitized by Google

> appointed as they usually are from the junior officers of the army, and frequently without experience and with inferior qualifications for the discharge of such important duties, would seem to border on the ridiculous. His opinions, in the majority of cases, would weigh less than that of any member of the court. . . . The court is not required to decide points of law and fact according to his advice or opinion. He is a mere *prosecutor*, not a judge . . . and the members of the court . . . are . . . to *administer justice* . . . according to their consciences, . . . and not according to the understanding and conscience of the judge advocate.[3-182]

In 1857 an attempt was again made to revise the Navy's disciplinary system. The appropriations act for fiscal year 1858 contained the following provision:

> The Secretary of the Navy . . . is hereby directed to have prepared, and to report to Congress at its next session for its approval, a code of regulations for the government of the Navy, which shall embrace such general orders and forms for the performance of all the necessary duties incumbent on the officers thereof, both ashore and afloat, including rules for the government of courts martial and courts of enquiry . . . .[3-183]

3-182. Stephen Vincent Benét, *A Treatise on Military Law and the Practice of Courts-Martial* (New York: D. VanNostrand, 1862). The quoted passages are from pages 59-61. Benét, an Army officer, had served as an assistant professor of ethics and law at the Military Academy.

3-183. Act of 3 March 1857, 11 Stat. 243, 247.

Digitized by Google

In furtherance of the act's directive, Secretary of the Navy Isaac Toucey convened a board of officers on 7 August 1857, consisting of a Navy captain, commander, lieutenant, purser, and surgeon, and a Marine lieutenant colonel. The board was to draft the new code of regulations conforming to the requirements of the act.[3-184] In his annual report for fiscal year 1858,[3-185] the Secretary included the extensive (228-page) draft *Code of Regulations for the Government of the Navy* which had been prepared by the board. The disciplinary provisions, which the Secretary called a "code of laws," was contained within thirty-five pages of the greater *Code*. Containing nothing controversial or revolutionary in substance, its purpose was to amalgamate sixty years of custom and procedure which had developed without clear guidance under the 1800 *Articles*, and to provide definition to the disciplinary system and the role of those caught up in it.[3-186] Congress failed to adopt it, and the Navy continued to function under its ancient regulations.

It is impossible to leave this era without mention of the most notorious disciplinary tribunal to have been held during that time. The term "tribunal" is used advisedly, for the proceedings involved were neither formal, legal, nor a recognized disciplinary forum. Nevertheless this tribunal colored the commanding officer with authority to execute death sentences upon three of his crew—and later to be vindicated himself before both a court of inquiry and court martial. The matter involved is, of course, the "*Somers* Affair."En route from Africa to the West Indies in November 1842, Commander Alexander Slidell Mackenzie, commanding the *USS Somers*, suspected a conspiracy among three of his crew to murder the officers and the loyal men of the ship.

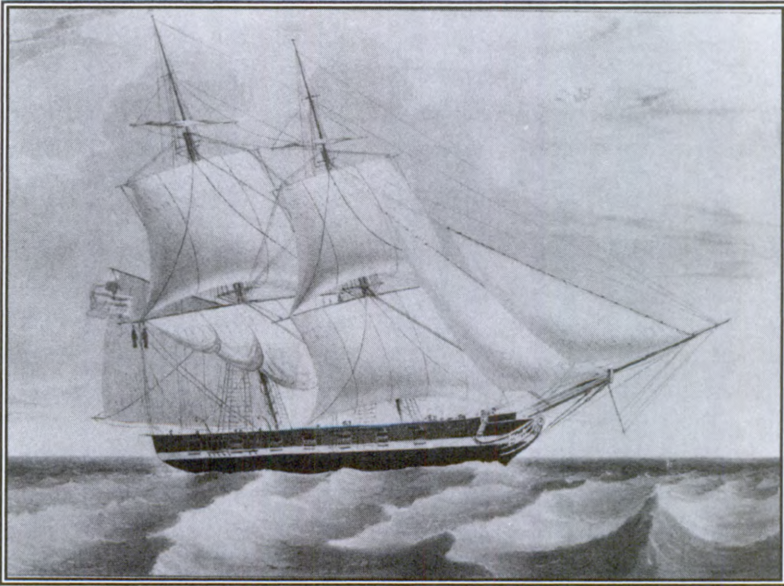
3-184. *Report of the Secretary of the Navy*, 1857, at 579.

3-185. Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1858.

3-186. *Report of the Secretary of the Navy*, 1858, at 217-51. The Secretary vehemently dissented from the Congressional mandate that non-disciplinary regulations, which he termed "the *minutiae* of unimportant details," be enacted by statute, stating his opinion that the authority of the commander in chief was adequate to their establishment and modification. He did not find the statutory enactment of the disciplinary regulations "obnoxious to the same objections." *Report of the Secretary of the Navy*, 1858, at 12.

Digitized by Google

The facts may be briefly stated. Although one of the three was Midshipman Philip Spencer, nephew of John C. Spencer, the Secretary of War, Commander Mackenzie nevertheless placed the suspects under arrest and asked his officers "to take into deliberate and dispassionate consideration the present condition of the vessel and the contingencies of every nature that the future may embrace, throughout the remainder of our cruise, and enlighten me with your opinion as to the best course to be pursued."[3-187] At best an unstructured investigation, and wanting the status of either a court of inquiry or a court martial (there was no judge advocate for the "government;" the suspects did not have counsel;



The brig, USS Somers, with two suspected mutineers hanging at the yardarm. (Beverly R. Robinson print collection, Naval Academy Museum Library)

3-187. Edward M. Byrne, *Military Law*, 3d ed. (Annapolis: Naval Institute, 1981), 18.

Digitized by Google

Mackenzie lacked authority to convene a court martial),[3-188] the investigation resulted in a recommendation that the three be put to death. Spencer and one other thereupon confessed guilt, and although the third professed innocence, all were summarily hanged from the brig's yardarm.

While the provisions of the 1800 *Articles* would be regarded today as highly imperfect in the protections which they afforded an accused, they nevertheless were intended to provide *some* safeguards. Despite these strictures this event aboard the *Somers* stands as a striking example of the dispatch with which Navy justice could be meted out, and deserves note as an aberration from the limited procedural due process obtaining at that time, demonstrating, however, the bonds which naval "justice" still retained to the "customs of the sea."

It should be noted that Mackenzie ignored several mandates of the 1800 act in ordering the execution of the alleged conspirators. Article XIII (Section 1) stated that the crime of mutiny could be punished by death, but only "on conviction thereof by a court martial." Spencer received no trial by court martial. Article XXXV limited the convening of courts martial outside the United States to the commander in chief of the fleet or commander of a squadron, neither of which Mackenzie was.[3-189] Article XXXVIII required that the accused be furnished with a written copy of the charges, and be given time to prepare his defense, which did not occur. Finally, Article XLI stated that no death sentences adjudged by trials outside of the United States could be carried into execution until confirmed by the commander of the fleet or squadron involved, again, neither of which Mackenzie was.[3-190]

Mackenzie's conduct was subsequently investigated by a court of inquiry which exonerated him. Nonetheless, aware that Spencer's family was seeking to obtain relief in the civilian courts, Mackenzie requested

---

3-188. U.S. Navy, *Proceedings of the Naval Court Martial in the Case of Alexander Slidell Mackenzie* (New York: Henry G. Langley, 1844), 249.

3-189. *Proceedings of the Naval Court Martial in the case of Alexander Slidell Mackenzie*, 249.

3-190. *Proceedings of the Naval Court Martial in the case of Alexander Slidell Mackenzie*, 249.

Digitized by Google

that he be tried by court martial in order to clear his name.[3-191] He was brought before a court of eleven captains and two commanders held aboard the *USS North Carolina* in February 1843. Charged with murder, oppression, illegal punishment, conduct unbecoming an officer, and general cruelty and oppression, he was acquitted, the court finding that the exigencies of the circumstances and the risk of mutiny spreading among the crew warranted his extreme action.[3-192] Secretary of the Navy Upshur, the reviewing authority, avoided all newspaper accounts of the trial, in order to "bring a mind free and unprejudiced to the official record."[3-193]

> Upshur spent a week reviewing the testimony before upholding the court's verdict of acquittal and recommending to the cabinet that the President also approve. When Secretary Spencer demanded a new trial, Upshur heatedly argued against placing Mackenzie in Double jeopardy. Words led to blows until the President himself separated the two men. Tyler compromised by approving the court's verdict but never again giving Mackenzie a command. Side effects of the affair included the disappearance of the apprentice system until 1864, the upholding of Upshur's contention that the method of appointing midshipmen be improved, and the sparking of a naval and public demand for a

---

3-191. Harrison Hayford, *The Somers Mutiny Affair* (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1959), 121. Hayford's book contains reprinted excerpts from newspaper coverage at the time, including verbatim accounts of the court of inquiry and court martial testimony, unpublished manuscripts, literary materials, service records, and other documents related to the *Somers* affair.

3-192. Paullin, *History of Naval Administration*, 246-47.

3-193. Hall, *Abel Parker Upshur*, 170.

Digitized by Google

> school for naval officers—a demand answered in 1845.[3-194] (Original endnote omitted.)

Mackenzie's trial was notable also for the fact that it helped delimit the parameters of the role of the judge advocate at Navy courts martial. The Navy's employment of civilian judge advocates has been well-documented. In the Mackenzie trial the family of Midshipman Spencer took this one step further, and sought to "assist" the judge advocate, William H. Norris, Esq., of Baltimore, apparently with the prosecution's full accord, by employing two eminent lawyers "to attend the trial and take part therein, by examining and cross-examining the witnesses . . . and propounding such questions, and offering such suggestions in relation to the proceedings, and presenting such comments on the testimony . . . as they might deem necessary."[3-195] The court denied the petition but did not deter the judge advocate's ardor for the

---

3-194. Coletta, "Abel Parker Upshur," ed. and comp. Coletta, *American Secretaries of the Navy*, 1:191.

3-195. DeHart, *Observations on Military Law*, 318-19, citing James Fenimore Cooper, *The Trial*, 8-9. A variation on this theme of assisting the judge advocate was played out in an earlier trial of a Lieutenant George F. Lindsay, USMC, in 1841. In that case the Navy had also employed a civilian judge advocate, one Henry M. Morfit, Esq. Morfit proposed that the accuser, a Lieutenant Alexander G. Gordon, USN, assume the role of prosecutor following his testimony before the court. Morfit felt that Gordon could aid in the prosecution "by his suggestions . . . in bringing out the evidence." The court split on the question, and Morfit requested that Secretary of the Navy Upshur obtain a ruling from the Attorney General. Relying on "settled" English law, the Attorney General opined that Gordon might remain in court after testifying in order to conduct the prosecution. 3 Op. Atty. Gen. 714 (1841).

Not only does the Attorney General's opinion give insight into court martial procedures of the day, it also shows how legal problems were resolved before the Navy had its own lawyers. It is of interest, too, for demonstrating the facility with which a legal issue, which today would be considered relatively minor, was resolved at the highest levels of government.

One commentator hints that the Attorney General's viewpoint was honored in the breach. Harwood, discussing the opinion in 1867, states that "by the articles of war for the army . . . the judge advocate or his deputy is the official prosecutor in behalf of the United States, and this, though not prescribed by the naval laws, is the practice in the Navy." A.A. Harwood, *The Law and Practice of United States Courts-Martial* (New York: D. Van Nostrand, 1867), 53.

Digitized by Google

prosecution. He proposed that, rather than have the accused frame the questions to be put to his own witnesses on direct examination, and the prosecution witnesses on cross-examination, that *he* develop the questions for both prosecution and defense, in order better to find "the whole truth."[3-196] The court denied this request also.

Mackenzie for his part was represented by private civilian counsel, but did his own questioning of witnesses in accordance with court martial procedures of the day. At one point in the proceedings Mackenzie's counsel was permitted to read from a prepared paper, in opposition to a motion by the judge advocate.

Thus, at the outset of the Civil War, the Navy found itself virtually at the same point in the development of its legal system as it had been sixty years before. With the exception of the abolition of flogging and establishment of the summary court martial, the three score years between passage of the 1800 act and the Civil War marked a period of small legal achievement for the United States Navy. Legal questions, when they arose, continued to be handled directly by the Secretary or his small clerical staff, an occasional few of whom may have had legal training; were referred on an *ad hoc* basis to private counsel; or were submitted to the Attorney General of the United States.[3-197] Matters involving personnel and discipline were the virtual exclusive province of the line officer, subject to review only by the Secretary. Valle has observed that "the evolution of naval law took place slowly . . . primarily because, until the twentieth century, the Navy grew slowly."[3-198] While growth may have indeed been slow, we shall see that the second half of the nineteenth century witnessed far more changes in the Navy's legal system than did the first half.

3-196. *Proceedings of the Naval Court Martial in the case of Alexander Slidell Mackenzie*, 6.

3-197. *Office of the Judge Advocate General—Duties, Organization and Administration*, NAVPERS 10843, 2.

3-198. Valle, *Rocks & Shoals*, 8.

Digitized by Google

Digitized by Google

CHAPTER 4

CIVIL WAR
TO
UNIFORMED JUDGE ADVOCATE GENERAL
1861 to 1878

***Why, the durned thing's hollow—I always thought they were solid.*—REMARK ATTRIBUTED TO SECRETARY OF THE NAVY RICHARD W. THOMPSON, FROM INDIANA, UPON SEEING HIS FIRST SHIP IN THE STOCKS IN 1877**

The American Navy in 1861 reflected the status of its regulations—neglected. Consisting of a mere forty-two ships in commission and 7,600 men,[4-1] Secretary of the Navy Gideon Welles (1861-1869) pronounced it "a feeble Navy, reduced to the lowest peace establishment, composed largely of sailing vessels, most of which were dismantled or dispersed abroad. . . ."[4-2] Nor was materiel Welles's only problem. Many of his officers, demoralized by conditions, had deserted.[4-3] Because of the abolition of flogging and consequent degradation of discipline, the better qualified and reliable class of seaman refused to reenlist.[4-4] This situation clearly contradicted the glowing prophesies of those who had hailed the Act of 1855 establishing the summary court

4-1. Department of the Navy, *Report of the Secretary of the Navy* [to the President of the United States], 4 July 1861, at 1-2.

4-2. Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1864, at III.

4-3. *Report of the Secretary of the Navy*, 1864, at III.

4-4. Leland Pearson Lovette, *Naval Customs, Traditions and Usage*, 4th ed. (Annapolis: Naval Institute, 1934), 235. Lovette says that Secretary of the Navy Welles reported this fact on 4 December 1862, but does not indicate how or where the report was made. It was not included in Welles's annual report to the President, which was dated 1 December 1862.

Digitized by Google

martial as the solution to the disciplinary problems which arose when flogging was abolished.[4-5]

The Civil War would end this lassitude and put significant strains on the Navy's procurement and disciplinary systems. The feeble Navy of 1861 would have to be built to a force sufficient to mount a 3,500 mile coastal blockade. Lawyers would be essential to expansion of the wartime Navy. New ships would be built (contracts); every steamer which could be made a fighting vessel would be procured from the merchant service (leases and indemnity); the capacity of the Navy yards would be enlarged (eminent domain); private foundries and workshops would be employed in the production of supplies of ordnance and steam machinery (contracts); shipmasters would be commissioned from the commercial maritime community. This extensive procurement of ships (the Navy boasted 626 by 1865)[4-6] and supplies would in turn require the assistance of lawyers to frame and administer contracts, and to prosecute the government's interests in cases of fraud or default.[4-7] On the disciplinary side the Navy would expand from 7,600 men to 51,500 by war's end,[4-8] severely straining the capacity of its judicial system.

4-5. Secretary Dobbin wrote in 1855:

> The hope is indulged with much confidence by many experienced observers and officers, notwithstanding painful apprehensions and gloomy forebodings of disastrous consequences from the abolition of punishment by flogging, that by this humane act, together with the recent discipline bill of rewards and punishments, the character of the seamen, as a class, will be improved by the increased willingness of the laboring young men of our own country to serve under the flag.

Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1855, at 16.

4-6. Dudley W. Knox, *A History of the United States Navy* (New York: G.P. Putnam's Sons, 1948), 317.

4-7. *Report of the Secretary of the Navy*, 1864, at IV.

4-8. Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1865, at XIII.

Digitized by Google

To obtain the assistance of lawyers the Secretary was authorized—indeed, virtually required—to hire private counsel. Although United States District Attorneys were authorized and required by law to represent the government in all legal matters, it often happened that it was "expedient to employ other counsel in his aid, or in his place,"[4-9] and the Act of 26 February 1853, previously discussed (see footnote 3-178 and the associated text), authorized such employment.

The build-up in personnel exacerbated the already-strained disciplinary system in the Navy. Ironically, the very situation which precipitated the build-up—the Southern secession—gave rise to its relief. Once the Southern opposition to increased naval autonomy was removed from Congress, two acts of major significance were passed.

The first of these was the Naval Appropriations Act of 1862.[4-10] In addition to making appropriations necessary to the war effort, section 5 of the Act provided the following:

> [T]he orders, regulations, and instructions heretofore issued by the Secretary of the Navy be, and they are hereby, recognized as the regulations of the Navy Department, subject, however, to such alterations as the Secretary of the Navy may adopt, with the approbation of the President of the United States.

This was indeed unprecedented legislation. Never before in the history of the United States Navy had the Secretary (albeit with the "approbation" of the President) been given the authority to promulgate his own regulations. Granted that Congress retained the power, as it does to this day, to enact the penal provisions which would guide the Navy. Nevertheless, the Secretary finally had his hand on the helm and could make those internal course corrections necessary to respond to changing administrative, social and political conditions within the Navy, without

4-9. 10 Op. Atty. Gen. 43-44 (1861).

4-10. Act of 14 July 1862, 12 Stat. 561.

Digitized by Google

beseeching the grace of Congress each time they became necessary. From this act springs all authority for *Navy Regulations*.[4-11]

Because the situation was urgent, Congress chose in the same legislation to sanction immediately all "orders, regulations, and instructions heretofore issued by the Secretary." While this was expedient it was less than specific, for clearly three, and possibly as many as five sets of regulations could be said to have been issued by Navy Secretaries in the previous sixty-four years of the Navy's existence.[4-12] All of these were immediately placed in force and effect, as well as the earlier (1832) compilation of existing regulations which had been compiled and issued by Secretary of the Navy Levi Woodbury.[4-13] Fortunately there should

---

4-11. See discussion of the status and force of *Navy Regulations* in L. Cleveland McNemar, "Administration of Naval Discipline," *Georgetown Law Journal* 13 (January 1925): 100.

4-12. The three sets of regulations which clearly had been issued by a Secretary were Woodbury's 1833 *Regulations for the Navy of the United States* (*American State Papers: Naval Affairs* (1833), Doc. No. 524); Paulding's 1841 *General Regulations* (U.S. Navy, *General Regulations for the Navy and Marine Corps of the United States, 1841* (Washington, D.C., J. and G.S. Gideon, 1841)); and the Graham-Kennedy *Orders and Instructions* (U.S. Navy, *Orders and Instructions for the Direction and Government of the Naval Service of the United States* (Washington, D.C.: Robert Armstrong, 1853)). In addition, the 1802 *Naval Regulations* (Department of the Navy, *Naval Regulations, 1802* (Annapolis: Naval Institute, 1970), had been issued "by command" of the President over the signature of the Secretary, and the 1818 "Blue Book" (U.S. Navy, *Rules, Regulations, and Instructions, for the Naval Service of the United States* (Washington, D.C.: E. DeKrafft, 1818) had been issued by the Board of Navy Commissioners "with the consent" of the Secretary of the Navy.

It seems equally clear that neither Upshur's 1843 *Rules and Regulations*, (Upshur to White, 16 February 1843, *Letter from the Secretary of the Navy Transmitting Rules and Regulations for the Government of the Navy of the United States; Prepared in Obedience to a Resolution of May 24, 1842*), nor the 1858 *Code of Regulations for the Government of the Navy* which had been submitted for approval by Secretary of the Navy Toucey (Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1858), would have been resuscitated by the 1862 legislation, since neither of them could be said ever to have been "issued" by a Secretary.

4-13. U.S. Navy, *Rules of the Navy Department Regulating the Civil Administration of the Navy of the United States* (Washington, D.C., F.P. Blair, 1832).

Digitized by Google

have been relatively slight confusion and ambiguity with regard to disciplinary provisions, since some of these sets of regulations contained virtually no disciplinary procedures, and those that did had simply borrowed from or built upon their predecessors. We may assume that the most recent (and, fortuitously, the most complete) of the regulatory provisions, the Graham-Kennedy *Orders and Instructions* of 1853 would have been followed. As previously noted (see discussion beginning at page 75), these regulations contained extensive provisions detailing the conduct of court proceedings, as well as the most detail to date regarding the duties of judge advocates at courts martial.

The second act of major significance to the Navy, passed three days after the 1862 appropriations act, was a long-overdue revision to the 1800 *Articles*. Known by the same title used in 1800 ("*An Act for the better Government of the Navy of the United States*"), the 1862 *Articles*[4-14] were perhaps more significant for the fact that Congress had finally passed a revised naval code, than they were for their substance. While the scope of this work prevents an in-depth analysis of the 1862 *Articles*, the following brief comparison with the 1800 act will serve to illustrate the point.

The 1862 *Articles* were longer, but only slightly longer, than their 1800 counterpart. This resulted from additional provisions covering prize proceedings, probably occasioned by the on-going Civil War and the fact that the United States Navy had grown in size and power. With regard to prize proceedings, Section 12 of the act specifically authorized the Secretary to employ counsel "to assist the district attorneys and protect the interests of the [prize] captors" whenever he considered it necessary to do so.

Although the revised *Articles* contained procedural provisions regarding prize proceedings, they still contained virtually no procedural guidance with regard to courts martial,[4-15] nor did they contain the sorely-needed guidance regarding the duties of a judge advocate. It would appear, in fact, that the purpose of the 1862 *Articles* was not to revise

---

4-14. Act of 17 July 1862, 12 Stat. 600.

4-15. Procedural guidance for courts martial was left to those regulations of the Secretary which had been ratified by section 5 of the 14 July 1862 Appropriations Act.

Digitized by Google

penal regulations or court martial procedures, but rather to codify the few statutory changes which had been made since 1800.[4-16] These included the abolition of flogging, which is either specifically prohibited as a disciplinary measure in the 1862 *Articles*, or removed from enumerations of permissible punishments; more detail with regard to the enumeration of authorized punishments at captain's mast; and recognition (but only barely) of the institution of the summary court martial. Like the 1800 *Articles*, the 1862 counterpart contained an ample number of offenses for which the death penalty was authorized.

In a change which may have recognized (or anticipated) the more formalized nature of naval justice, references to the "customs of the sea" were removed from the 1862 *Articles*.[4-17] Despite this change at least one

---

4-16. About the 1862 Act, Byrne says:

> Between 1775 and 1862, at least six changes were made to naval law, adding to its scope and content. Flogging was abolished by Congress in 1850. In 1862, the pressures of the Civil War and the problems of administering law that was partially statutory and partially custom encouraged Congress to pass an act titled "Articles for the Government of the Navy," commonly known as the "Rocks and Shoals." In the same enactment, Congress abolished the sailors' traditional spirit ration and, to compensate, increased their pay by five cents per day. The Articles for the Government of the Navy, revised several times, remained in effect until 1951. By that time, the number of articles in the act had increased from 25 to 70.

Edward M. Byrne, *Military Law*, 3d ed. (Annapolis: Naval Institute, 1981), 4-5. Byrne, a retired captain, served on active duty as a Law Specialist and later in the Navy Judge Advocate General's Corps, from 1962 to 1990.

4-17. For example, Article XXXII of the 1800 *Articles* directed that all crimes not specified therein be punished "according to the laws and *customs* in such cases at sea." (Italics added.) Article 8 of the 1862 *Articles* states that punishment shall be "as a court-martial shall direct." Article I of the 1800 *Articles* recognizes a commander's duty "to correct all such as are guilty of [dissolute and immoral practices], according to the *usage of the sea service*." (Italics added.) The comparable Article 1 of the 1862 *Articles* states the duty as being "to correct all who may be guilty of [dissolute and immoral practices] *according to the laws and*

(continued...)

Digitized by Google

observer at the time felt that naval justice was still guided, at least in part, by custom. Writing in 1867 Harwood (see discussion beginning at page 140) observed that "the old standing customs and usage of the service are resorted to in like manner as the unwritten law is auxiliary to the statute."[4-18] Still later, from the vantage of perspective, a second commentator echoed Harwood. Writing in 1925, McNemar said:

> The "Articles for the Government of the Navy" now in force in our Navy, do not provide in terms for the determination of naval discipline according to "The Law and Ancient Custom of the Sea." But Article 22, by providing that "All offenses committed by persons belonging to the Navy which are not specified in the foregoing Articles shall be punished as a court-martial may direct," clearly authorizes a naval court-martial to punish any offense against naval custom, the punishment of which is not otherwise provided for, according to "The Law and Ancient Custom of the Sea." Such offenses are generally recognized as coming under one of the following heads: "Neglect of duty," "Conduct to the prejudice of good order and discipline," or "Conduct unbecoming an officer and a gentleman."[4-19] (Footnotes omitted.)

4-17.(...continued)
regulations of the Navy, upon pain of such punishment as a general court-martial may think proper to inflict." (Italics added.) The proposed 1857 *Code of Regulations for the Government of the Navy* was similar to the 1862 *Articles* in this regard also in eliminating the terms "usage of the sea service" and "customs in such cases at sea."

4-18. A.A. Harwood, *The Law and Practice of United States Courts-Martial* (New York, D. Van Nostrand, 1867), 9 (quoting "McArthur," ch. viii).

4-19. McNemar, "Administration of Naval Discipline," 90.

Digitized by Google

Another change, easily overlooked but of great significance, was the inclusion of a provision in the section on courts of inquiry which recognized the right of "the party whose conduct shall be the subject of inquiry" both to be represented by an attorney, and the right of that attorney to cross-examine all witnesses.[4-20] This is the first statutory recognition of the right to counsel in a military tribunal, and the first formal concession that a counsel other than the judge advocate had the right to question witnesses before a military court.[4-21]

Such changes did little to assuage Congressional critics of the court martial system. Senator Garret Davis of Kentucky, a dedicated Unionist and opponent of radical reconstruction,[4-22] in a floor speech on 14 February 1863, stated that "men of war . . . are to be tried by that stern

---

4-20. Act of 17 July 1862, sec. 1, art. 23.

4-21. The 1833, 1841 and 1853 administrative regulations which were legitimized by the Naval Appropriations Act of 1863 contained provisions, identical to one another, making the "right" to counsel permissive with the court, and restricting all motions or communications by such counsel to writings. See article 459 of the 1833 *Regulations for the Navy of the United States*; article 506 of the 1841 *General Regulations for the Navy and Marine Corps, 1841*; and article 27 of the 1853 *Orders and Instructions for the Direction and Government of the Naval Service of the United States*. This "gag order" on counsel for an accused before a court martial continued, at least nominally, until the latter part of the nineteenth century. See the prior discussion of this phenomenon beginning at page 88.

The Army enforced this rule more strictly than the Navy, prohibiting all oral communication between counsel for the accused and the court, and requiring counsel for the accused to submit all motions or arguments in writing. Winthrop, writing about Army court martial procedures in 1875, stated that there had been no relaxation of the rule "as to the silence of professional advisors and their taking no part in the proceedings." William Winthrop, *Military Law and Precedents*, 2d ed. (Washington, D.C.: Government Printing Office, 1920), 166, quoted by Ziegel W. Neff, "Right to Counsel in Special Courts-Martial," *The Judge Advocate Journal* (October 1962), 59, n. 2. The rule was generally relaxed during the latter part of the nineteenth century, and by 1886 was seldom applied. Daniel Walker, ed., *Military Law* (New York: Prentice-Hall, 1954), 108.

A discussion of the court of inquiry provisions of the 1862 act, including the "right to counsel" provisions, appears in Homer A. Walkup, "Investigation: 1968," *JAG Journal* (July-August 1968), 3-18.

4-22. *Who Was Who in America*, Historical Volume, 1607-1896, revised edition, 1967, s.v. "Davis, Garret."

Digitized by Google

code, and by men whose rule is arbitrary power and implicit obedience rather than the just principles of law."[4-23]

The Navy was not the only service which had received Congressional attention in 1862. On the same day the Navy bill was passed, Congress also adopted an act authorizing the President to appoint for the Army

> by and with the advice and consent of the Senate, a judge advocate general, with the rank, pay and emoluments of a colonel of cavalry, to whose office shall be returned, for revision, the records and proceedings of all courts-martial and military commissions, and where a record shall be kept of all proceedings had thereupon.[4-24]

President Lincoln appointed a lawyer, Joseph Holt, to serve as Judge Advocate General of the Army. Holt, an accomplished civilian attorney who had been both Secretary of the Army and Postmaster General, was assuredly not a professional soldier. Nevertheless, upon his appointment he was made a brigadier general by Lincoln.[4-25]

4-23. *Congressional Globe*, 37th Cong., 3d sess., 14 February 1863, at 956.

4-24. Act of 17 July 1862, 12 Stat. 597, 598. There is a discussion of the act at U.S. Army Judge Advocate General's School, *The Army Lawyer: A History of the Judge Advocate General's Corps, 1775-1975*, comp. Paul F. Hill (Washington, D.C.: Government Printing Office, 1975), 49-50.

4-25. U.S. Army Judge Advocate General's School, *The Army Lawyer*, 52.

Digitized by Google

The same act also laid the foundation for the Army Judge Advocate General's Corps, by providing for central control of legal personnel.[4-26] The act provided:

> [T]here may be appointed by the President . . . for each army in the field, a judge advocate . . . who shall perform the duties of judge advocate . . . under the direction of the judge advocate general.

One of these judge advocates appointed by Lincoln was Major John Augustus Bolles, who later became Solicitor and Naval Judge-Advocate General (1865-1870), and Naval Solicitor at the Department of Justice (1870-1878).[4-27]

With Congress having resolved, at least temporarily, the Navy's internal administrative problems, Secretary Welles turned to the thorny issue of contracts. The procurement system had been rife with abuse for a number of years, requiring as it did contracts for the purchase of supplies to be made for a year at a time.[4-28] Unstable prices made it almost impossible to procure responsible offers for so long a period, yet no discretion was given to contracting officers to decline the lowest bid, even if it was obvious that the bidder could not furnish good articles at the price offered. Corruption fed on itself; "combinations, fictitious bids,

---

4-26. Although Holt, in describing his duties, refers to the "corps of judge advocates" (U.S. Army Judge Advocate General's School, *The Army Lawyer*, 70), the term "corps" does not appear in the act in connection with the Army's legal organization at this time. The Army Judge Advocate General's Corps was not formally created until the Elston Act of 24 June 1948, 62 Stat. 604. Prior thereto the Army's legal organization was known as the Judge Advocate General's *Department*. U.S. Army Judge Advocate General's School, *The Army Lawyer*, 198. See also William T. Generous, Jr., *Swords and Scales, The Development of the Uniform Code of Military Justice* (Port Washington, N.Y.: Kennikat Press, 1973), 24.

4-27. U.S. Army Judge Advocate General's School, *The Army Lawyer*, 54.

4-28. Secretary of the Navy George Bancroft had pressed for contract reform in 1845. See page 45.

Digitized by Google

adulteration and bribery of petty Navy-yard officials" were common. Honest merchants were forced from the market.[4-29]

Welles suggested that supplies be procured "when wanted and as wanted, at the market price, either in open purchase, by an honest agent, or upon bids received for immediate delivery, with prompt payment . . . ." He noted that

> Contracts are made under the operation of existing laws, which cannot be honestly fulfilled; and under the practice that has prevailed, the whole system has become tainted with demoralization and fraud, by which the honest and fair dealer is too often driven from the market. Articles inferior in quality and deficient in quantity are delivered and passed. Bribery and other improper practices are resorted to, to induce persons in the employment of the government to aid in these frauds.[4-30]

In late 1863 Welles hired a detective to sound the depth of the problem. The initial findings revealed a scandal of such magnitude that Welles applied to the Army for the services of Colonel H.S. Olcott,[4-31] an Army investigator who held the title of "Special Commissioner" in the War Department. Olcott was thereupon detailed to the Navy to investigate and gather evidence for prosecution of fraud cases.

4-29. Richard S. West, *Gideon Welles, Lincoln's Navy Department* (Indianapolis and New York: Bobbs-Merrill Company, 1943), 249.

4-30. *Report of the Secretary of the Navy*, 1864, at XLII.

4-31. West, *Gideon Welles, Lincoln's Navy Department*, 249.

Digitized by Google

Olcott approached his duties with zeal. Described by Welles as a "cormorant,"[4-32] a reading of his reports reveals an officious, imperious, high-handed, but competent and thorough investigator, with a high sense of moral righteousness and patriotism.[4-33]

Olcott reported for duty on 12 January 1864 and almost immediately uncovered lurid details. While Union sailors were engaged in the bloody conflict between the states, unscrupulous merchants were falsifying delivery records, delivering inferior goods, smuggling equipment and supplies out of the Navy yards, or diverting deliveries and selling the goods for personal gain. As part of his plan to end this corruption, Welles concurrently obtained the services of Nathaniel Wilson, an Assistant United States Attorney, to prosecute the persons whom Olcott would incriminate.[4-34]

Wilson was no judge advocate general. His role was intended to be limited and temporal, that of a "special counsel" and "judge advocate," rather than a general administrative department head within the Navy organization. He had no staff, and when the demands of his trial schedule in Brooklyn consumed most of his time, the presumptuous Olcott recommended to Fox that he select "some other counsel" to handle the cases in Boston.[4-35] The Secretary's annual reports failed to recognize his appointment, no mention of it being made in either the 1864 or 1865

4-32. Gideon Welles, *Diary of Gideon Welles* (Boston, Houghton Mifflin, 1911), 2:54. Charles Oscar Paullin, writing in 1912-1914, discussed the fraud problems during the Civil War and the trials of several of the contractors involved. He singled out Olcott, "employed by Welles as a special commissioner to investigate the Navy frauds," as playing a key role in the fraud investigation. See Charles Oscar Paullin, *History of Naval Administration, 1775-1911* (Annapolis: Naval Institute, 1968), 305-7.

4-33. "Confidential Letters from Special Investigators of Frauds in Naval Procurement, February-December 1864," Naval Records Collection, Record Group 45, National Archives, Washington, D.C.

4-34. A brief but enlightening biographical sketch of Nathaniel Wilson appears in Homer A. Walkup, *History of U.S. Naval Law and Lawyers* (Prepared on the occasion of the ninetieth anniversary of the establishment of the Office of the Judge Advocate General of the Navy, 1970), 3.

4-35. "Confidential Letters from Special Investigators of Frauds in Naval Procurement, February-December 1864," Naval Records Collection, Record Group 45, National Archives, letter dated 10 April 1864.

Digitized by Google

account. Small wonder that Wilson himself seemed to suffer some identity crises, signing his letters variously "Judge Advocate, Special Counsel, Navy Department"; "Judge Advocate"; and "Special Counsel."[4-36] Also indicative of Wilson's limited role is the fact that despite Wilson's presence, the Secretary continued to seek his general legal advice from the Attorney General during this period.[4-37]

Welles intended that Wilson try the contractor fraud cases before courts martial under the provisions of the Frauds Act of 2 March 1863.[4-38] That act extended military jurisdiction to "any contractor, agent, paymaster, quartermaster, or other person whatsoever" in "the land or naval forces of the United States." Such trials would remain within his control (rather than that of the United States District Attorneys in the civilian courts), and, Welles no doubt assumed, result in a more expeditious and certain delivery of "justice."

4-36. "Confidential Letters from Special Investigators of Frauds in Naval Procurement, February-December 1864," Naval Records Collection, Record Group 45, National Archives, letters dated 30 March 1864, 1 July 1864, 7 September 1864, 17 September 1864, and 26 December 1864.

4-37. "Letters Sent by the Secretary of the Navy to the President and Executive Agencies, 1821-1886," Naval Records Collection, Record Group 45, Microfilm Publication M472, National Archives, Washington, D.C.

At one point Wilson implicitly suggested that the Navy would do well to employ legal help on a more permanent basis, noting that the Navy agent at the Brooklyn Navy Yard was poorly equipped to deal with the volume of contracts which came his way, and unskilled in negotiations. "Confidential Letters from Special Investigators of Frauds in Naval Procurement, February-December 1864," Naval Records Collection, Record Group 45, National Archives, letter dated 12 May 1864.

Judge Advocate General of the Navy Latimer, in his fiscal year 1923 annual report to the Secretary of the Navy, attributes the following statement to Gideon Welles in 1864: "The Navy Department had no solicitor or law officer with whom I could consult or with whom I could share responsibility." Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1923, at 165. Rear Admiral Latimer does not indicate the source of Secretary Welles's remark.

4-38. Act of 2 March 1863, 12 Stat. 696.

Digitized by Google

By March 1864 a number of arrests had been made. Olcott recommended against permitting the accused contractors to see counsel until he had had an opportunity to consult with Assistant Secretary of the Navy, G.V. Fox.[4-39] Concurrently, Wilson added an additional jurisdictional foundation to use in the pursuit of justice by advising Secretary Welles that, in his opinion, the contractors were properly triable by court martial under section 16 of the Act of 17 July 1862 which provided as follows:

> [A]ny person who shall contract to furnish supplies of any kind or description for the army or Navy *he* [*sic*] shall be deemed and taken as a part of the land or naval forces of the United States . . . and be subject to the rules and regulations for the government of the land and naval forces of the United States.[4-40]

Wilson pointed out that the statute further provided that any such contractor who committed fraud in contracting with the government was to be punished as a court martial should adjudge. Wilson noted, however, that he felt applicability of the statute was limited to contractors because of its narrow wording, and that he found no basis for asserting military jurisdiction over any other civilians:

> I have not been able to discern anything in the acts of July 17, 1862 and March 2, 1863 [the Frauds Act], or in any acts of congress passed prior to those acts anything which makes the Navy agent, naval storekeeper, Masters of the various departments of labor, or the clerks in the yards "*in the naval forces of the United States*" or adds any persons or classes of persons to such forces except *contractors* and

4-39. "Confidential Letters from Special Investigators of Frauds in Naval Procurement, February-December 1864," Naval Records Collection, Record Group 45, National Archives, letter dated 10 March 1864.

4-40. Act of 17 July 1862, 12 Stat. 594, 596.

Digitized by Google

> perhaps agents, and certainly it would be dangerous to assume [court martial] jurisdiction upon no more substantial ground than implication.[4-41]

In May 1864 a second lawyer was retained by the Navy Department to assist Wilson. H.H. Goodman was signed on as a special counsel and began working with Wilson and Olcott to prepare cases for trial before both courts martial and the federal district court at Brooklyn.[4-42] Their first prosecution met with failure; the case was dismissed after the witnesses disavowed their affidavits which had been taken by the overbearing Olcott.[4-43] Wilson pressed on, securing the conviction by court martial of one Schofield, a New York Navy Yard contractor.[4-44] Wilson was dismayed, however, at the leniency of the sentence, terming "grossly inadequate" the award of one year in prison.[4-45]

Wilson and Goodman continued throughout the year to try cases in both civil and military courts, assuming the role of special counsel when

---

4-41. "Confidential Letters from Special Investigators of Frauds in Naval Procurement, February-December 1864," Naval Records Collection, Record Group 45, National Archives, letter dated 21 March 1864.

4-42. "Confidential Letters from Special Investigators of Frauds in Naval Procurement, February-December 1864," Naval Records Collection, Record Group 45, National Archives, letter dated 18 May 1864.

4-43. "Confidential Letters from Special Investigators of Frauds in Naval Procurement, February-December 1864," Naval Records Collection, Record Group 45, National Archives, letter dated 19 May 1864.

4-44. "Confidential Letters from Special Investigators of Frauds in Naval Procurement, February-December 1864," Naval Records Collection, Record Group 45, National Archives, letter dated 20 June 1864.

4-45. "Confidential Letters from Special Investigators of Frauds in Naval Procurement, February-December 1864," Naval Records Collection, Record Group 45, National Archives, letter dated 21 June 1864.

Digitized by Google

in civil courts, and that of judge advocate when in courts martial.[4-46] At one point Goodman requested help: an "associate judge advocate" or "assistant judge advocate" to relieve him "somewhat in the examination of witnesses."[4-47]

Despite the fraud and corruption racking his department, Welles was able to state in December 1864 that the United States Navy, "including the additions to it now in progress and near completion, constitutes, for all the purposes of defence, if not of attack and conquest, the most powerful national Navy in the world."[4-48] Summarizing the status of his prosecutorial efforts, Welles reported that

> Malfeasance on the part of officials in connexion [*sic*] with the purchase and delivery of supplies was alleged to exist, and with the purpose of investigating and bringing such fraudulent practices to light, application was made to the War Department, which detailed an officer to prosecute these inquiries. The result is that many and great frauds have been discovered. Proceedings have accordingly been instituted, and are now in progress against some of the parties implicated before military tribunals under the statute, and against others in the civil courts.[4-49]

4-46. "Confidential Letters from Special Investigators of Frauds in Naval Procurement, February-December 1864," Naval Records Collection, Record Group 45, National Archives, letters dated 15 July 1864, 18 July 1864, 19 July 1864, and 30 July 1864.

4-47. "Confidential Letters from Special Investigators of Frauds in Naval Procurement, February-December 1864," Naval Records Collection, Record Group 45, National Archives, letter dated 19 September 1864.

4-48. *Report of the Secretary of the Navy*, 1864, at XLVII. As will be seen, this euphoria would prove to be short-lived.

4-49. *Report of the Secretary of the Navy*, 1864, at XLII.

Digitized by Google

In December 1864 yet another lawyer for the Navy appeared on the scene. William Eaton Chandler of New Hampshire, who in 1865 was to become the first statutorily appointed "Solicitor and Naval Judge-Advocate General," wired on 5 December 1864 that he would "reach Washington Monday . . . ."[4-50]

Hired as a special counsel like Wilson,[4-51] Chandler quickly overshadowed the latter, who, being subordinated to the United States District Attorney's office in New York, unceremoniously withdrew from his position. Chandler had immediate concerns about the legality of trying civilian contractors before military courts martial. Writing to Assistant Secretary Fox in 1864, Chandler emphasized that he should "hardly be willing to try a dozen thieves by court martial at large expense, to have the proceedings disapproved for want of jurisdiction. This question must in some way be disposed of and definitely settled, if possible, before we begin."[4-52] Nevertheless, in a contemporaneous opinion even more jurisdictionally expansive than that previously provided to Welles by Wilson (see page 114), Chandler took the position that even Navy Yard *employees* should be triable by court martial under the 1863 Frauds Act, rationalizing that the fact that such persons collected wages within the bounds of a naval establishment placed them "in the . . . naval forces of

4-50. "Confidential Letters from Special Investigators of Frauds in Naval Procurement, February-December 1864," Naval Records Collection, Record Group 45, National Archives, letter dated 5 December 1864.

4-51. Chandler signed his correspondence "Special Counsel for the Department." See, for example, "Letters Sent by William E. Chandler, Special Counsel for the Navy Department, and George H. Chandler, Investigating Frauds Connected with War Contracts, December 1864-April 1865," Naval Records Collection, Record Group 45, National Archives, Washington, D.C., letters dated 16 December 1864 and 22 December 1864.

4-52. "Letters Sent by William E. Chandler, Special Counsel for the Navy Department, and George H. Chandler, Investigating Frauds Connected with War Contracts, December 1864-April 1865," Naval Records Collection, Record Group 45, National Archives, letter dated 15 December 1864.

Digitized by Google

the United States."[4-53] Chandler also relied on the Act of 4 July 1864, section 7 of which extended the definition of any contractors who might be deemed to be part of the naval forces of the United States under the Act of 2 March 1863 to all persons engaged in executing contracts with the United States, "whether as agents of such contractors or as claiming to be assignees thereof, or otherwise."[4-54] By Chandler's way of thinking "or otherwise" included virtually anyone connected with a supply contract.

While preparation for the prosecution of fraud cases was at its height, Welles seized the opportunity to petition Congress for a permanent, formally appointed lawyer for the Navy Department. In February 1865 he sent the following letter to A.H. Rice, chairman of the House of Representatives Naval Committee, and J.W. Grimes, chairman of the Naval Committee of the Senate:

> Sir: Many, and some of them very important, legal questions and suits, growing out of the transactions of this Department, are constantly arising. Some of them involve large pecuniary amounts and frequently embrace great variety of detail. The cases of courts-martial are numerous, and require scrutiny and careful preparation and revision. The forms and execution of contracts under the provisions of law demand deliberate and attentive care and consideration. Frauds and abuses on the part of contractors and employés call for investigation and prosecution, and the miscellaneous legal questions which arise are innumerable, involving often a vast extent and variety of detail.
>
> For these important duties, the Department has no law officer. I would, therefore, respectfully suggest that the interest

4-53. "Letters Sent by William E. Chandler, Special Counsel for the Navy Department, and George H. Chandler, Investigating Frauds Connected with War Contracts, December 1864-April 1865," Naval Records Collection, Record Group 45, National Archives, letter dated 17 December 1864.

4-54. Act of 4 July 1864, 12 Stat. 394, 397.

Digitized by Google

> of the government would be greatly promoted were Congress to create the office of "Solicitor and Naval Judge Advocate General," to be attached to this Department. The officer to fill this position should be selected by the President, by and with the advice and consent of the Senate, whose duty it shall be to attend to the matters herein indicated, and to any special duties that may be assigned to him by the Secretary of the Navy.[4-55]

Welles succeeded—albeit partially and temporarily—where his predecessors had failed. Congress responded to his request by passing the Act of 2 March 1865:[4-56]

> That the President be, and he is hereby, authorized to appoint, by and with the advice and consent of the Senate, for service during the rebellion and one year thereafter, an officer in the Navy Department, to be called the "Solicitor and Naval Judge-Advocate General," . . . .

4-55. *Congressional Globe*, 38th Cong., 2d sess., 25 February 1865, at 1086. The letter to Grimes was dated 20 February 1865; that to Rice was dated 10 February 1865. See Paullin, *History of Naval Administration*, 263.

4-56. 13 Stat. 468.

Digitized by Google

The "Solicitor and Naval Judge-Advocate General" was to receive a yearly salary of $3,500. On 6 March 1865 President Lincoln appointed special counsel Chandler to the post.[4-57]

Chandler pressed on with the prosecution of civilian contractors. The test which he applied to determine military jurisdiction was that of exigency. Jurisdiction would lie, argued Chandler, "if the President and the [Navy] Department consider the exigency of sufficient importance to require such summary and absolute proceedings [as courts martial]."[4-58] Nor was Chandler any more eager than Olcott to permit counsel to the accused. With respect to one defendant, master plumber Isaiah Pascoe of the Philadelphia Navy Yard, Chandler recommended neither release on bond nor access to counsel, stating that "his frauds upon the government have been atrocious, are almost innumerable, and the proof is clear and conclusive."[4-59]

In only one instance did Chandler find absolutely no basis on which to ground court martial jurisdiction. He turned over the case of one William H. Harris, a "sailor boarding house keeper," to Charles Gilpin, United States District Attorney for Philadelphia, for trial in United States District Court under the concurrent jurisdiction provisions of the Act of

---

4-57. The reader will recall that the first judge advocate of the Army, John Tudor, was also a civilian at the time of his appointment (see footnote 2-22 and text at page 26). Tudor, however, went on to hold the brevet rank of colonel, while Chandler and his successor under the 1865 Act (John Augustus Bolles), were never given military commissions.

4-58. "Letters Sent by William E. Chandler, Special Counsel for the Navy Department, and George H. Chandler, Investigating Frauds Connected with War Contracts, December 1864-April 1865," Naval Records Collection, Record Group 45, National Archives, letter dated 17 December 1864.

4-59. "Letters Sent by William E. Chandler, Special Counsel for the Navy Department, and George H. Chandler, Investigating Frauds Connected with War Contracts, December 1864-April 1865," Naval Records Collection, Record Group 45, National Archives, letter dated 16 December 1864.

Digitized by Google

2 March 1863.[4-60] All others he retained for trial by court martial, despite his persistent misgivings as to jurisdiction.

Chandler's misgivings were well-founded. During the debate surrounding passage of the Frauds Act of 2 March 1863 Congress had diluted a provision in the act which would have specifically deemed contractors as being in the military or naval service. The legislators left only a sliver of ambiguity in the wording; barely enough to permit government prosecutors to argue for judicial interpretation of the question and, as some hoped, a finding that the contractor on trial *was* subject to court martial jurisdiction.[4-61] At length, however, Chandler considered the

---

4-60. "Letters Sent by William E. Chandler, Special Counsel for the Navy Department, and George H. Chandler, Investigating Frauds Connected with War Contracts, December 1864-April 1865," Naval Records Collection, Record Group 45, National Archives, letter dated 21 December 1864. The concurrent jurisdiction provisions were found in section 4 of the 2 March 1863 act.

4-61. *Congressional Globe*, 37th Cong., 3d sess., 14 February 1863, at 952-58. There were strong views on both sides of the question. The view of those who maintained the absolute unconstitutionality of "deeming" private contractors as being in the military or naval service, and thus the impossibility of achieving such a transmogrification by legislation, was summed up in the floor speech of Senator Davis of Kentucky:

> If Congress were to pass a law declaring a cloud to be a whale, it would nevertheless be a cloud, and would be so treated by the world beside.

Congressional Globe, 37th Cong., 3d sess., 14 February 1863, at 957.

Senator Howard of Michigan represented the opposing view. Citing the example of shells having been filled by unscrupulous contractors not with explosives but sawdust, "thus making the instrument of no utility whatever," Howard argued that it was

> entirely hopeless to expect that any sufficient punitive or preventive system can be adopted which depends upon the action of a grand jury. . . . [S]ome provision [must be] adopted which shall bring these gentry to speedy and exemplary justice . . . .

(continued...)

Digitized by Google

odds against a finding of court martial jurisdiction too great, and he yielded. On 21 March 1865 he advised Charles Gilpin, the United States District Attorney for Philadelphia, that the trials of certain accused contractors would be moved to the "law-courts," and asked Gilpin to prepare to try them. He advised Gilpin that A.T. Smith, Esq., a private attorney who had been retained as the judge advocate to try the accused parties before a court martial, would turn over the charges to Gilpin as an aid in preparing indictments.[4-62] An interesting sidelight on this exchange is found in the fact that Chandler signed his correspondence "Solicitor for the Navy Department," albeit he had been appointed "Solicitor and Naval Judge-Advocate General" two weeks earlier. Perhaps Chandler thought the title of "Naval Judge-Advocate General" should be reserved for correspondence in connection with military tribunals only.

Ultimately dozens of malefactors, including many persons of influence in financial and political circles, were convicted and fined in the civil courts of Philadelphia, New York and Boston by the respective United States District Attorneys. Politics and influence being what they were, however, the government recovered only $75,000, and President Lincoln set aside the convictions.[4-63] In 1878 the United States Circuit Court of Appeals for the District of Kentucky held the controversial provisions of the Frauds Act of 2 March 1863 to be strictly limited to persons actually in the military service, and held section 16 of the Act of 17 July 1862 to be unconstitutional.[4-64]

4-61. (...continued)
Congressional Globe, 37th Cong., 3d sess., 14 February 1863, at 955.

4-62. "Letters Sent by the Solicitor and Naval Judge-Advocate General, March 1865-January 1866" (title on binding: *Solicitor's Letters, No. 1*), Naval Records Collection, Record Group 125, National Archives, Washington, D.C.

4-63. "Letters Sent by the Solicitor and Naval Judge-Advocate General, March 1865-January 1866," Naval Records Collection, Record Group 125, National Archives, letter dated 21 April 1865; John Niven, *Gideon Welles, Lincoln's Secretary of the Navy* (New York: Oxford University Press, 1973), 465; Richard S. West, *Gideon Welles, Lincoln's Navy Department*, 251.

4-64. *Ex parte Henderson*, 11 F. Cas. 1067 (1878). A brief discussion of Frauds Act jurisdiction over civilian contractors appears in Walker, ed., *Military Law*, 198-99. A summary of the Army's use of trial by military commissions during the
(continued...)

Digitized by Google

Chandler, who many years later became Secretary of the Navy, served only four months as Solicitor and Naval Judge-Advocate General. He had held his post without trying a single civilian before a Navy court martial. On 10 July 1865 he was appointed by President Andrew Johnson to be Assistant Secretary of the Treasury. He was succeeded by John Augustus Bolles, of Massachusetts.[4-65]

The statute creating the office of Solicitor and Naval Judge-Advocate General reveals nothing of the role Congress expected this official to play in the Navy Department.[4-66] Reading the debate surrounding passage of the bill adds little enlightenment, for there seemed to be a general lack of understanding or comprehension as to the type of work this official would do. Some felt that he would "attend to courts-martial and to prize cases, and . . . advise the Secretary of the Navy generally." Others would have limited his role to litigation support for the United States District Attorneys, who would actually try whatever cases arose. Some opposed to the bill felt that the Secretary of the Navy should be "capable of understanding and expounding the law applicable to his Department" without the need of a solicitor's assistance, while others would have had the Secretary rely on the Attorney General for "legal questions," using "some officer" to act as judge advocate for courts martial. In the end the compelling consideration seemed to be the argument that employment of a Solicitor and Naval Judge-Advocate General might save money, in that

---

4-64. (...continued)
Civil War appears in U.S. Army Judge Advocate General's School, *The Army Lawyer*, chaps. III, IV.

4-65. Paullin, *History of Naval Administration*, 263; Walkup, *History of U.S. Naval Law and Lawyers*, 4.

4-66. The several statutory and administrative pronouncements relating to the duties of the Judge Advocate General of the Navy; the Solicitor of the Navy (for the periods during which that office existed, either in concert with or apart from the Office of the Judge Advocate General); and, after 1944, the General Counsel of the Navy, are chronologically set out in Appendix B.

Digitized by Google

the Secretary would not thereafter have to hire special counsel on so frequent a basis.[4-67]

However broad in scope Congress may have intended the duties of the Navy Department's new lawyer to be, they were destined to be constrained by the Navy's traditional policy of controlling its own affairs, including the administration of naval justice. This policy found full expression in the Bureau of Navigation.

Established under the naval reorganization plan in 1842, the Bureau of Navigation had been organized as a purely scientific entity. This began to change in 1864 when Secretary Welles placed certain personnel duties in the Bureau.[4-68] Coincident with its personnel duties the Bureau of Navigation was charged by the Secretary with the administration and review of proceedings of all courts and boards—in short, the oversight of discipline in the Navy. This responsibility was unaffected by the advent of the civilian "Solicitor and Naval Judge-Advocate General" in 1865; this officer played but a minor role in the administration of naval discipline.[4-69]

It is obvious also that Welles did not have an officer of the line, or indeed any uniformed officer in mind for the new job. Welles was not looking for a judge advocate *general* to administer the Navy's disciplinary system, as the term would traditionally connote, but rather for a capable civilian lawyer who could litigate when appropriate; coordinate civil actions with the United States District Attorneys; and provide legal counsel when called upon to do so. In short, "house counsel." This would alleviate much of the inconvenience of requesting legal assistance from the Attorney General or negotiating fees with private attorneys, and the Secretary's constant concern that he would overspend the Department's budget for legal services. The primary focus of the position was the on-going fraud prosecution—any other services would be a nice bonus.

4-67. *Congressional Globe*, 38th Cong., 2d sess., 25 February 1865, at 1086-88.

4-68. Department of the Navy, "A Brief History of the Organization of the Navy Department, Prepared by Capt. A.W. Johnson, United States Navy" (1940), Doc. No. 284, at 2300-2301.

4-69. One chronicler has stated that the Solicitor and Naval Judge-Advocate General's duties were limited to advising on questions of law, and then only when called upon by the Secretary. "A Brief History of the Organization of the Navy Department, A.W. Johnson," 2300-2302. It appears that he did somewhat, although not a great deal, more than this. See discussion later in this chapter.

Digitized by Google

Perhaps because of its temporal nature, Welles appears to have viewed the creation of the office as a rather hum-drum matter, attaching no great significance to its establishment. None of his annual reports makes even passing reference to the event, nor do his diaries of this period.[4-70]

Once the decision had been made to try all contractor cases in the civil courts, the role of the Solicitor and Naval Judge-Advocate General seems to have diminished substantially. Little can be found in historical records which enlightens our understanding of the contributions of this official. Indeed, during the first full year of the Solicitor's tenure (1865-1866), the Secretary of the Navy continued to turn to the Attorney General for his legal advice, seeking opinions on such topics as the validity of judicial proceedings under authority of a military governor; the propriety of withholding payment on unfulfilled contracts; a provision of *Navy Regulations*; when students at the Naval Academy officially became ensigns; the validity of title to real property; whether district collectors could impose a revenue tax on government sales at a Navy yard; whether a civilian court could enjoin the commandant of a naval station from carrying out an order issued by the Navy Department; and the effective date of resignation of a naval officer.[4-71] By comparison, correspondence generated by the Solicitor contains little of legal substance.[4-72]

Although the Solicitor and Naval Judge-Advocate General position had been created only for the duration of the war and one year thereafter, annual appropriations continued the office until 4 March 1869, at which time a deficiency appropriation continued it to 1 July of that year. Several

---

4-70. Welles, *Diary of Gideon Welles*. Although his *Diary* comprises three volumes, covering the period from 1861 to 1869, Welles does not deign to mention the appointment of the "Naval Solicitor and Judge Advocate General."

4-71. "Letters Sent by the Secretary of the Navy to the President and Executive Agencies, 1821-1886," Naval Records Collection, Record Group 45, National Archives.

4-72. "Letters Sent by the Solicitor and Naval Judge-Advocate General, March 1865-January 1866," Naval Records Collection, Record Group 125, National Archives.

Digitized by Google

attempts were made to establish the office on a permanent basis.[4-73] While the office was being carried by deficiency appropriation, Senator Drake proposed an amendment to the 1869-1870 naval appropriations bill:

> For the salary of the Solicitor and Naval Judge Advocate General from July 1, 1869 to June 30, 1870, $3,500; *and the said office is hereby made permanent.*[4-74] (Italics added.)

Drake asked that the following supporting letters, one from Secretary of the Navy Adolf E. Borie (1869-1869), and one from President-elect Ulysses S. Grant, be read into the record:[4-75]

4-73. For example, Senator Grimes of the Committee on Naval Affairs introduced a bill on 1 April 1869 "to establish the office of Solicitor and Naval Judge Advocate General." *Congressional Globe*, 41st Cong., 1st sess., 1 April 1869, at 410.

4-74. *Congressional Globe*, 41st Cong., 1st sess., 7 April 1869, at 578.

4-75. *Congressional Globe*, 41st Cong., 1st sess., 7 April 1869, at 578.

Digitized by Google

NAVY DEPARTMENT
WASHINGTON, *March 27, 1869.*

DEAR SIR: The office of Solicitor and Naval Judge Advocate General which, without further legislation, will expire in June, is in my judgment of permanent importance and necessity, and I respectfully ask your favorable attention to the passage of an act substantially like the inclosed draft.

The present views of the President are expressed in his letter of December 22, 1868, of which I forward herewith a copy.

Very respectfully, yours,

A.E. BORIE
Secretary of the Navy.

HON. J.W. GRIMES.
Chairman, Committee on Naval Affairs.

Letter from Secretary of the Navy Borie to Senator Grimes, urging support of a bill to make the Office of Solicitor and Naval Judge Advocate General permanent. (CONGRESSIONAL GLOBE)

Digitized by Google

HEADQUARTERS ARMY OF THE UNITED STATES,
WASHINGTON, *December 22, 1868.*

DEAR SIR: I would respectfully recommend to the favorable consideration of your committee the importance of legislating for the continuance of the office of Judge Advocate General of the Navy. Trials by courts-martial, both in the Army and Navy, are necessarily conducted by officers who cannot be expected to have a thorough knowledge of the law, and it looks as though their proceedings should at least be submitted to the scrutiny of a law officer to secure justice.

U.S. GRANT, *General*

HON. F.A. PIKE
Chairman House Committee on Naval Affairs

Letter from President-elect Grant to Congressman Pike, urging support of a bill to continue the Office of Judge Advocate General of the Navy. (CONGRESSIONAL GLOBE)

Secretary Borie's letter is interesting for its lack of substance, perhaps owing to the fact that Borie had taken office less than three weeks

Digitized by Google

earlier.[4-76] President-elect Grant's letter is interesting for its misconception of the duties of the office he was writing to support. As we know, the Solicitor and Naval Judge-Advocate General had virtually *no* review responsibilities with respect to courts martial, these duties having been handled by the Secretary himself, or in conjunction with the Bureau of Navigation. Grant hit the mark on his other point, however, recognizing that the officers assigned to conduct courts martial could not "be expected to have a thorough knowledge of the law." Unfortunately, his proposed solution (and the one followed by the Navy for the next eighty years), was to correct errors on review, rather than address them at the trial level by the insertion of legally-trained personnel.

Drake's amendment to fund the Solicitor position for another year was opened to debate:

> MR. EDMUNDS. Now I want to have the chairman of the Committee on Appropriations tell us what the state of the law now is about the Naval Judge Advocate General. Is there such an office existing by law, and if so, when does it terminate?
>
> MR. FESSENDEN. All I know is that the officer has been recognized in repeated appropriation bills and paid; and that has been considered as authorizing subsequent appropriations. . . .
>
> MR. GRIMES. . . . This office was created during the war, and I believe at my instance. At any rate, I introduced the bill providing for its continuance during the war and for one year thereafter. There have been included in the annual appropriation bills from that time to the

4-76. Borie followed up with a second letter to Senator Grimes of the Committee on Naval Affairs on 6 April 1869, and a letter to Senator Fessenden of the Appropriations Committee on the same date. "Letters to Congress [sent by the Secretary of the Navy and others], 1798 to 1886," Naval Records Collection, Record Group 45, National Archives, Washington, D.C., letters dated 6 April 1869.

Digitized by Google

> present the words "Solicitor and Naval Judge Advocate General;" and on the strength of that the office has been continued. . . .
>
> MR. DRAKE. It is the unanimous opinion of the Committee on Naval Affairs that the office should be continued, and a bill was passed embodying a provision of that kind at an early day in this session; but as that bill is not likely to be acted on in the other House at the present session, at the urgent request of the Secretary of the Navy this amendment is introduced for the purpose of continuing to that Department the benefit of the service of such an officer.[4-77]

The amendment was agreed upon, but only after deleting the words "and the said office is hereby made permanent." The Solicitor and Naval Judge-Advocate General had life for another year, although it was clear that Congressional support was limited and Congressional comprehension of the officer's function even more limited.

The office was clearly under-utilized, probably as a result of the rapid drawdown in naval strength following the Civil War. Congress was never persuaded as to the need to make it permanent.[4-78] Although it had been funded for another year, both the office and its incumbent, John Augustus Bolles, went into eclipse.[4-79]

4-77. *Congressional Globe*, 41st Cong., 1st sess., 7 April 1869, at 578-79.

4-78. On 6 June 1870 the Senate voted to postpone indefinitely S. 216, a bill to establish the office of Solicitor and Naval Judge Advocate General. *Congressional Globe*, 41st Cong., 2d sess., 6 June 1870, at 4147.

4-79. Referring to the lack of vitality surrounding the office of Solicitor and Naval Judge-Advocate General during the period from 1 July 1869 to 30 June 1870 (fiscal year 1870 at that time), one source refers to it as "a brief hiatus." Bureau of Naval Personnel, *Office of the Judge Advocate General—Duties, Organization and Administration,* NAVPERS 10843-A (Washington, D.C., Bureau of Naval Personnel, 1961), 2. In fact, however, fiscal year 1870 was one of the few years during Bolles's tenure that records any evidence of activity on his part; on 26 (continued...)

Digitized by Google

Until creation of the position of "Solicitor and Naval Judge-Advocate General," obtaining litigation services was a cumbersome affair for a Secretary of the Navy, who had to endure the inconvenience of calling upon the Attorney General or retaining a civilian lawyer. For a few years this problem had been eased, at least with regard to civil litigation. So too with regard to obtaining legal advice, although as noted above the Solicitor does not appear to have been over-taxed in that role.[4-80] But with respect to attending to day-to-day legal administration, little seems to have changed, for the Solicitor does not appear to have been employed in such a capacity. Faced thus with the bureaucratic inconvenience and delay which often attended requests for advice from the Attorney General,

---

4-79. (...continued)
December 1869 he served as the judge advocate in the court martial of Paymaster T.C. Masters, USN, at the Norfolk Navy Yard. "Records of Proceedings of General Courts Martial, February 1866-November 1940," Naval Records Collection, Record Group 125, National Archives, Washington, D.C., case No. 5037.

An example of Bolles's *lack* of involvement in significant military trials is found in the case of Major Thomas Y. Field, USMC, tried by general court martial in 1867. Field, Commander of the Marine Barracks in Philadelphia, was charged with attending a ball given by the enlisted men of his command in a state of intoxication. He was represented by Commander T.C. Harris, USN. The judge advocate was First Lieutenant Lyman P. French, USMC. Field was found guilty. At the end of the trial Field caused a letter to the editor, signed by himself, to be published in the Philadelphia *Daily Evening Telegraph* of 13 April 1867. In the letter Field stated that one member of his court had been reported for ungentlemanly behavior on duty, and that charges were being prepared against the judge advocate and other members of the court for scandalous conduct tending to the destruction of good morals, and neglect of duty. The Secretary of the Navy immediately dissolved the court and appointed a new court to try Field for scandalous conduct in procuring publication of this letter to the newspaper. The civilian lawyer, H.H. Goodman, was appointed as judge advocate. Field also was represented by a civilian lawyer, Samuel C. Perkins of Philadelphia. At no stage of either of these proceedings does Bolles appear to have participated.

4-80. In the debate surrounding establishment of the position of Solicitor and Naval Judge-Advocate General, Senator J.W. Grimes, chairman of the Senate Naval Committee and sponsor of the bill, stated that it was "impossible to get a legal opinion from the Attorney General or the Assistant Attorney General, because they are nearly all the time . . . engaged in arguing cases before the Supreme Court." *Congressional Globe*, 38th Cong., 2d sess., 25 February 1865, at 1087.

Digitized by Google

budget constraints which attended obtaining advice from civilian lawyers, and the limited role of the Solicitor and Naval Judge-Advocate General, the Secretary of the Navy continued to do much of the Department's legal work himself. Welles, for example, who had "read law" with William W. Ellsworth, the leader of the Hartford, Connecticut bar, "personally drafted a bill calling for an appropriation of $1.5 million to underwrite the design and construction of three experimental ironclad vessels."[4-81] Thus the Secretaries continued to loom large in the administration of the Navy's legal affairs even after appointment of a judge advocate general. This role was to carry forth until early into the twentieth century.

The Solicitor and Naval Judge-Advocate General's Office in the Navy was one of a number of kindred offices established in several departments of the government to meet the increased demand of legal work after the Civil War. The legal demands of the Navy Department, however, were more a surge (caused by the fraud prosecutions and wartime disciplinary matters) than a steady flow. In fact, the Navy entered a phase of massive decline after the Civil War, from which it would not emerge until the last decade of the century.[4-82] Ranks—both officer and enlisted—would thin, and ships would once again be neglected. By 1869 the fleet would be reduced from its high of 626 to a scant 81.[4-83] The position of Assistant Secretary of the Navy, established coincident with the mobilization for war in 1861, would be abolished in 1869, not to be re-instituted until 1890.[4-84] For the next few years, until 1870, the smaller, post-Civil War

4-81. John Niven, "Gideon Welles," ed. and comp. Paolo E. Coletta, *American Secretaries of the Navy*, 2 v. (Annapolis: Naval Institute, 1980), 1:321. See also Paullin, *History of Naval Administration*, 250.

4-82. Knox notes that demobilization of the Navy began as soon as Richmond was captured, with most of the ironclads and sailing vessels being laid up and the numerous converted merchant vessels sold. Most of the vessels kept in commission were sent to foreign stations to aid the overseas business and shipping of American citizens. Knox, *A History of the United States Navy*, 317.

4-83. Niven, "Gideon Welles," ed. and comp. Coletta, *American Secretaries of the Navy*, 1:356.

4-84. Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 2 December 1861, at 23; Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United

(continued...)

Digitized by Google

Navy would handle its legal matters essentially as it had before the war: by requesting opinions from the Attorney General; by hiring private lawyers to supplement—and generally supplant—the role of the Solicitor and Naval Judge-Advocate General; by assigning its uniformed officers and staff personnel[4-85] to serve as judge advocates for its shipboard and

---

4-84. (...continued)
States], 1 December 1869, at 29; Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 26 November 1890, at 43. A short discussion of the establishment, abolition, and reestablishment of the Office of Assistant Secretary of the Navy appears in "A Brief History of the Organization of the Navy Department, A.W. Johnson," 2294, 2305. See also Roy W. Hensley, "Evolution of the Office of the Judge Advocate General" (Office of the Judge Advocate General of the Navy, 1962?), 4.

4-85. Staff personnel in the Navy were not always uniformed officers:

> In the very early days of the Navy the pursers, surgeons and civil engineers were civilians. Probably as a result of the complaints of the surgeons sent to sea that they had no place to sit, sleep or eat and were excluded from the wardroom . . . these specialists, surgeons, pursers, civil engineers, chaplains, and so on, were given what was called assimilated or relative rank. This was based on their number of years of service. For example, 20 years or more assimilated to captains; 12 or more, with commanders, etc. Still later—much later—they were given positive rank and thus became uniformed military staff corps.

"The Judge Advocate General's Presentation Before the Dornin Board Convened to Review the Low Board Report of 24 March 1953" (n.d.), I, 7. The context of the Judge Advocate General's remarks indicate that they were presented sometime in 1958. The Judge Advocate General at that time was Rear Admiral Charles Chester Ward, USN.

Even after being given positive rank, however, staff corps officers were subject to a subtle discrimination that required the intervention of the Secretary of the Navy to extinguish. The following is from the 1918 Annual Report of Secretary of the Navy Josephus Daniels:

(continued...)

Digitized by Google

less sensitive domestic courts martial;[4-86] and by the Secretary himself, assisted by his small staff of clerks, performing day-to-day administrative duties.

These clerks did not occupy mere ministerial positions. The Act of 1798 had authorized the appointment of a chief clerk as the immediate

---

4-85. (...continued)

> For many years in the Navy there were differences, and sometimes controversy, between the line and staff. These no longer exist. The naval officer is a naval officer. If he has a commission he is in all respects the equal of every other officer in rank and title. No longer is a naval constructor denied the title that goes with his rank. He is not now addressed as "naval constructor." He is "admiral" or "captain," as the case may be. An order was issued in August [1917] which brought about this equality in terms. . . . The order, which ended all distinction, was in these words:
>
> GENERAL ORDER }
> NO. 418 } AUGUST 15, 1918
>
> Applicable alike to regulars and reservists, the uniform of any given rank or rating in the Navy shall hereafter be identical in every respect throughout, except for the necessary distinguishing corps devices, and every officer in the Navy shall be designated and addressed by the title of his rank without any discrimination whatever.
>
> JOSEPHUS DANIELS,
> *Secretary of the Navy*

Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1918, at 84.

Although fifty years would elapse before the Judge Advocate General's Corps would be formed, Secretary Daniels's order had direct applicability when that event occurred. To paraphrase the Secretary, "a Navy lawyer is not now addressed as 'Navy lawyer Jones.' He is 'Admiral Jones' or 'Captain Jones,' as the case may be."

4-86. The uniformed officers assigned to serve as judge advocates were overwhelmingly junior Marine Corps officers who, together with the Navy staff personnel, performed relatively few shipboard operational duties underway, and thus had more time both to learn and to practice military law.

Digitized by Google

assistant to the Secretary. In case of vacancy of the secretaryship the chief clerk was empowered to take charge of records and documents of the Department. Secretary Paul Hamilton (1809-1812) had four clerks in 1810, which grew to nine due to the extra work imposed by the War of 1812.[4-87] A number of clerks brought formal legal training to the job. Consider the following: "As the [Civil] war drew to a close, [Secretary of the Navy] Welles gave his son Edgar, now a law graduate from Yale, a clerical post in the Navy Department. . . . Edgar had charge of the complicated and often vexatious naval prize cases."[4-88]

At war's end, revised *Regulations for the Government of the United States Navy* were issued by Secretary Welles pursuant to that authority which had been granted by the 1862 act.[4-89] These were the first of the modern-day "*Navy Regulations*," and the first promulgated by the Secretary rather than the President. Welles undoubtedly played a key role in drafting them. An extensive document, the *Regulations* contained twelve pages on court martial procedures alone, which were later supplemented by circular. The promulgating statement accompanying the *Regulations* stated that they revoked all conflicting orders or regulations of the Navy Department, thus ending three years of uncertainty as to which regulations actually governed the Navy.

Welles's 1865 *Regulations* included and expanded upon prior administrative directives regarding the right of representation by counsel at courts martial. While provisions regarding representation before general courts martial were identical to those in the previous regulations,[4-90] summary courts were now included for the first time, with the rules rather dramatically changed. Written defenses, required in general courts, were prohibited in summary courts, in favor of oral

---

4-87. "A Brief History of the Organization of the Navy Department, A.W. Johnson," 2282-83.

4-88. West, *Gideon Welles, Lincoln's Navy Department*, 315.

4-89. Department of the Navy, *Navy Regulations*, 1865 (Washington, D.C.: Government Printing Office, 1865), 217-28.

4-90. *Navy Regulations, 1865*, par. 1237.

Digitized by Google

argument which was not to be "protracted." Counsel for the accused was still permissive with the court, and was restricted to a commissioned, warrant or petty officer. The major change, however, was the provision that the accused's counsel was specifically authorized to cross-examine witnesses in his behalf.[4-91]

Still more surprising changes were to come. Paragraph 15 of U.S. Navy Regulation Circular No. 3, issued by Welles on 30 April 1866, stated as follows:

> In all cases of trial by courts martial of any person in the naval service, where the accused has no legal adviser, he will be permitted to select some officer within reach to defend him; and in case he does not select any one, the authority convening the court will detail an officer, who shall faithfully advise and assist the accused to the best of his ability.

Individual military counsel in 1866! This was progressive administration indeed, and its impact was felt throughout the fleet.[4-92] But

---

4-91. *Navy Regulations, 1865*, par. 1247, sub. 8.

4-92. Examples of the implementation of Circular No. 3 are found in a series of general courts martial held aboard the *USS Franklin* while she was deployed in the Atlantic and Mediterranean. In one, Landsman Michael Dowling was represented by Lieutenant Commander W.B. Hoff, USN. Dowling pleaded guilty to a charge of desertion, but there is no indication of his sentence in the record of trial. "Records of Proceedings of General Courts Martial, February 1866-November 1940," Naval Records Collection, Record Group 125, National Archives, case No. 4862, 21 July 1868. In another trial, Lieutenant Commander William Harris, Jr., USN, appeared for Landsman William J. Lappins. Lappins pleaded not guilty and was acquitted on all charges. "Records of Proceedings of General Courts Martial, February 1866-November 1940," Naval Records Collection, Record Group 125, National Archives, case No. 4893, September 1868.

Even when the accused was represented by counsel pursuant to the mandate of Circular No. 3, it was almost universal practice that the record of trial would not indicate counsel's presence in the courtroom. The record indicated the presence only of the court members, the judge advocate, and the accused. This held true until the latter half of the 1860s, when counsel's presence began to be

(continued...)

Digitized by Google

the life span of Circular No. 3 was ephemeral. The following is from a letter by Secretary of the Navy Gideon Welles to Commodore William K. Latimer, USN, president of the general court martial of Second Class Fireman James Griffith, held at the New York Navy Yard in November 1866:

> Sir:
>
> Your letter of [2 November 1866] has been received.
>
> You will consider paragraph 15 of Regulation circular No. 3 as suspended for revision.
>
> When the accused before your Court has no counsel it will be the duty of the Court and Judge Advocate to act as his counsel. It is not their business exclusively to prosecute but to take all necessary and proper steps to arrive at the truth and a just judgment. If they do this the accused will not actually need counsel and may fare better without than with an advocate to conduct his case.[4-93]

4-92. (...continued)
acknowledged. An example of the change is found in the case of Ship's Cook T.C. Spencer, tried in Hong Kong on 26 December 1866. All questioning for the defense was done "by the accused," even though he was represented by an officer. When the court reassembled, following the taking of testimony, however, the record for the first time stated that the accused *and his counsel* were present. The record went on to state that "The Counsel for the accused then submitted and read the final defence . . . ." Other records began to follow suit. "Records of Proceedings of General Courts Martial, February 1866-November 1940," Naval Records Collection, Record Group 125, National Archives, case No. 4582, 26 December 1866.

4-93. "Records of Proceedings of General Courts Martial, February 1866-November 1940," Naval Records Collection, Record Group 125, National Archives, case No. 4494, November 1866.

Digitized by Google

While this letter demonstrates a paternal, command-prerogative attitude, it cannot be said in this case that Griffin, the accused, was unfairly tried. Charged with assault with intent to kill and insubordination toward a commissioned officer, Griffin proceeded without counsel, leaving his "defense" in the hands of the judge advocate. He was found guilty, but sentenced to only three years at hard labor and forfeiture of all pay during confinement.[4-94]

Ultimately Circular No. 3 proved too progressive. Approximately a year after its promulgation, on 20 May 1867, the following Circular No. 5 was issued:

> So much of . . . Circular No. 3 as makes it obligatory upon the authority convening a Court Martial to detail an officer to assist the accused, is rescinded. The court may, upon the request of the accused, select some officer within reach to defend him.[4-95]

4-94. Even during the brief period when an accused had the right to request independent counsel under Circular No. 3, he sometimes chose the judge advocate to represent him. See, for example, the trial of Seaman Augustus Cleveland, where "The accused was asked by the Judge Advocate if he desired counsel, and chose the Judge Advocate." "Records of Proceedings of General Courts Martial, February 1866-November 1940," Naval Records Collection, Record Group 125, National Archives, case No. 4299, 30 May 1866.

4-95. Word of rescission was slow to reach some quarters. Note that several of the courts aboard the *USS Franklin*, where officer representation was provided to enlisted personnel (see footnote 4-92) were held in 1868, more than a year after the rescission date of Circular No. 3. This demonstrates rather effectively the isolation faced by ships at sea, and the unique requirements imposed on naval disciplinary systems.

In 1869 there was an attempt to resurrect the radical "right to counsel" provisions of Circular No. 3. George M. Robeson, a successor Secretary to Welles, issued a draft revision of *Navy Regulations* on 1 October 1869 "merely for the information of Commanders of Squadrons and Stations, and not to go out of their hands." Paragraph 1018 of this revised *Navy Regulations* contained wording identical to the circular as it was originally promulgated. The draft was withdrawn, however, and the next iteration of *Navy Regulations* (1870), issued by Robeson six months later, eliminated the articles on court martial procedures entirely, choosing instead to include them in a separate publication, *Orders, Regulations, and Instructions for the Administration of Law and Justice in the United States Navy*

(continued...)

Digitized by Google

Although short-lived, Circular No. 3 breached, temporarily and in a small way, the officer-enlisted barrier. The circular also served to draw more Navy officers into the court martial process, both as defense counsel[4-96] and judge advocates, the latter field having been heavily overshadowed by Marine officers to that time. Most of the Navy counsel were non-line officers, *e.g.*, surgeons, paymasters, and engineers. Marines still dominated as judge advocates, but Navy officers increasingly participated, and for the first time officers of both services widened their defense experience. With the rescission of the circular on 20 May 1867 these defense opportunities virtually disappeared, officer-enlisted "class" barriers were restored, and until 1870 ante-bellum customs again prevailed.

The seven-fold increase in personnel experienced by the Navy during the Civil War had created a strain on its disciplinary system greater than any before seen. Increased numbers of Navy officers were pressed into service as judge advocates for general courts martial or courts of inquiry, or recorders for summary courts martial. Throughout this period the uniformed judge advocate had little clear guidance, faced with the mélange of rules in the several series of orders issued by the Secretaries of the Navy in the previous six decades of its existence, and armed only with DeHart's *Observations on Military Law*,[4-97] a treatise intended primarily for use by Army personnel.

4-95. (...continued)
(see footnote 4-138).

4-96. The appointing letter in the case of Ship's Cook T.C. Spencer (see footnote 4-92) directed Master W.C. Wise to serve as counsel for the accused in accordance with Paragraph 15 of U.S. Navy Regulations, Circular No. 3. The letter further directed Wise to "visit the accused . . . forthwith, and make yourself thoroughly acquainted with his case." "Records of Proceedings of General Courts Martial, February 1866-November 1940," Naval Records Collection, Record Group 125, National Archives, case No. 4582, 26 December 1866.

4-97. William C. DeHart, *Observations on Military Law, and the Constitution and Practice of Courts Martial* (1846; reprint, Buffalo, New York: William S. Hein & Co., 1973?).

Digitized by Google

Although personnel ranks diminished rapidly after the war, the experience of mobilization and a large naval force to administer, the first revised *Articles* in more than half a century, and a coherent and validly enacted set of *Regulations* indicated the urgent need for a naval work on court martial procedure. The need was met, at least partially, with the publication in 1867 of *The Law and Practice of United States Naval Courts-Martial*, a manual by Rear Admiral Andrew A. Harwood, USN, the first such document written expressly for use by the naval judge advocate.[4-98] According to Snedeker, Harwood's work "at once became the generally accepted authority on the subject."[4-99]

Harwood seemed to address DeHart's Army bias head-on at the outset of his book:

> All that has been thought essential is to provide a guide and assistance to naval officers . . . who . . . would . . . willingly avoid the toil and embarrassment of seeking the solution of doubts or questions which arise in the course of their judicial duties, in works not written in conformity with the . . . customs of our Navy, and intended either for a foreign or a different service.[4-100]

While Harwood may have been suggesting by this that his book would present only a Navy perspective, it is replete with quotations from "foreign or different service" authors, and there is little original in it. Nevertheless, it did bear a naval list, and became the mainstay of naval judge advocates.

Harwood's work was, if nothing else, inclusive. He discussed the theory of military and naval law; jurisdictional grounds for trial by court

---

4-98. Harwood, *The Law and Practice of United States Naval Courts-Martial*. A full citation appears in footnote 4-18.

4-99. James Snedeker, *A Brief History of Courts Martial* (Annapolis: Naval Institute, n.d., © 1954), 58.

4-100. Harwood, *The Law and Practice of United States Naval Courts-Martial*, 3.

Digitized by Google

martial; pre-trial and post-trial court martial procedure; rules of evidence; and the mechanics of the naval forum for general courts martial, summary courts martial, and courts of inquiry.

An entire chapter was devoted to the duties of the judge advocate. While much of it is an amalgam of prior, and in some case quite old, materials, it is nonetheless complete. He notes that in the Army the judge advocate is by statute the official prosecutor for the United States, while in the Navy that role falls upon him by "the custom of the service."[4-101] Harwood was not simply stating an obvious fact. In 1841 the Attorney General of the United States had issued an opinion holding that the military accuser could not only testify as a witness, but could then remain in court as the prosecutor, supplanting the judge advocate.[4-102] Harwood took issue with this opinion, stating that by naval custom "when the military accuser is allowed to be present in court, it is not as prosecutor, but merely for the purposes of material justice as assistant to the judge advocate."[4-103]

In a refreshing passage, Harwood becomes the first American commentator to come to grips with reality when discussing the duties of the judge advocate in relation to the accused. Noting that the judge advocate is obliged to give the accused "the best advice in his power" should the accused consult him, Harwood recognizes the inherent conflict here and states that "the opinion that it is the official duty of the judge advocate to assist the prisoner in his defence appears to be no longer maintained. The judge advocate ought not for a moment to forget his duty as prosecutor, and . . . is . . . bound, by the cross-examination of the prisoner's witnesses to give every effect to the prosecution."[4-104]

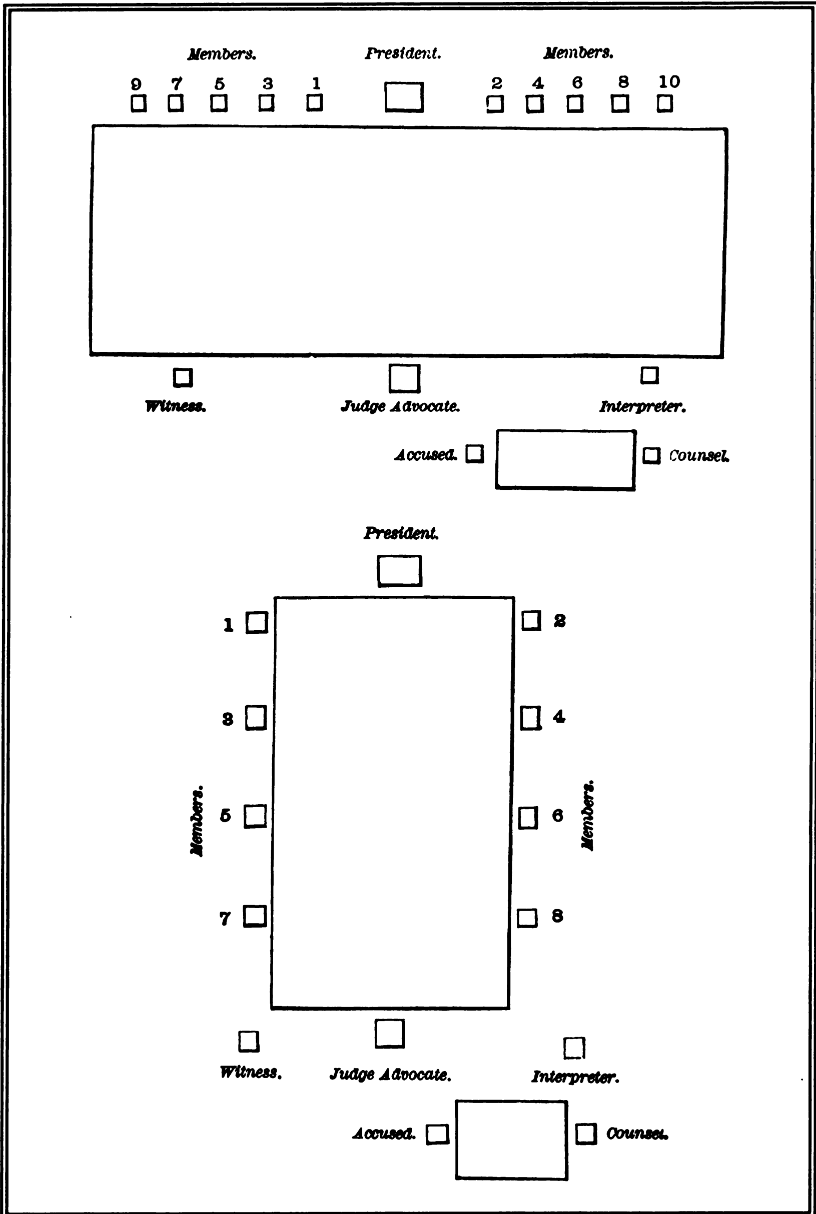
4-101. Harwood, *The Law and Practice of United States Naval Courts-Martial*, 53, 182.

4-102. 3 Op. Atty. Gen. 714 (1841).

4-103. Harwood, *The Law and Practice of United States Naval Courts-Martial*, 182.

4-104. Harwood, *The Law and Practice of United States Naval Courts-Martial*, 182.

Digitized by Google



Two seating arrangements for courts martial of the nineteenth century. Note the prominent position of the judge advocate in relation to the president of the court. Members sat on either side of the president according to rank. (Harwood, THE LAW AND PRACTICE OF UNITED STATES NAVAL COURTS-MARTIAL, 62)

Digitized by Google

Harwood sets the same professional standards for Navy judge advocates as for their civilian counterparts of the bar, stating that

> Whoever is nominated to officiate as judge advocate of a naval court-martial, whether he be a civilian or a naval officer, should in every respect be a *qualified* person, thoroughly acquainted, not merely with the provisions of the articles of war and regulations for the government of the Navy, but well instructed in the principles and practice of criminal law, besides that of military courts and the customs of war.[4-105]

Harwood's inclusion of civilian lawyers in the foregoing admonition notwithstanding, his treatise was to be the last work in which guidance for civilian judge advocates at Navy courts martial was relevant. In 1870 legislation of sweeping impact was passed, changing forever the way in which the Navy addressed its legal problems. The days of the civilian judge advocate were over.

The driving force behind this change was the same force which so often drives legislation—the search for economy in government. The federal government in 1853 had formally addressed the problem of the escalating costs of judicial administration and legal services, addressing what one senator termed "the most enormous system of frauds and piracies perpetrated under the anomalous mode of collecting fees in the United States courts than is to be found anywhere."[4-106] The *Act to Regulate the Fees and Costs to be allowed Clerks, Marshals, and Attorneys of the Circuit and District Courts of the United States* passed in that year was intended to cap the expenses of such services, including those of civilian attorneys hired by the Navy Department, both as judge

4-105. Harwood, *The Law and Practice of United States Naval Courts-Martial*, 184-85.

4-106. *Congressional Globe*, 32d Cong., 2d sess., 5 February 1853, at 516.

Digitized by Google

advocates and litigators in the federal courts. While the 1853 act had its immediate effect, by 1870 the pressures brought on by an ever-increasing volume of legal work throughout the government required the employment of even greater numbers of civilian counsel. The system again yielded to abuse. Congress's solution this time was not to regulate the fees which might be charged by civilian lawyers representing the government, but to restrict severely such representation to the point of near prohibition. The vehicle for this restriction was establishment of the United States Department of Justice.[4-107]

Until 1870 legal representation of the several executive departments at civil and criminal forums below the level of the United States Supreme Court had been provided by "special counsel" retained by the various department heads, in some cases by uniformed military or naval officers (the former often lawyers, the latter never), or by a loosely coordinated network of United States District Attorneys who represented the government in their respective districts. While there had been "a meet person, learned in the law," serving as Attorney General since creation of that office by the Judiciary Act of 1789,[4-108] the act gave him little power and, until 1861, not even supervisory authority over the District Attorneys. Colonialists, fearing the tyranny that could result from a strong central enforcement of laws, had imbued the Attorney General with power to do nothing more than represent the United States before the Supreme Court and, upon request, give opinions on matters of law to the President and heads of departments (including, of course, the Secretary of the Navy).[4-109]

Nevertheless, as we have seen, the government's legal business grew. Periodic attempts to create a centralized law department to meet the challenge of increased legal concerns met with the same degree of success as attempts to revise the *Articles for the Government of the Navy*; that is to say, none. The Navy's stop-gap solution to each critical legal mass was to hire special counsel; the permanent Congressional solution was to

---

4-107. The Department of Justice was created by the Act of 22 June 1870, 16 Stat. 162. It was officially established on 1 July 1870.

4-108. 1 Stat. 93.

4-109. Griffin B. Bell, "The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many?" *Fordham Law Review* 46 (1977-1978): 1050-51.

Digitized by Google

create a law officer in the department wherein the legal issues arose, usually called a "Solicitor," and put him in charge of the problematic litigation. Thus were the posts of several solicitors, including the "Solicitor and Naval Judge-Advocate General," created.[4-110] These special counsel and solicitors served to fragment still further the government's position on various legal issues.

The Department of Justice in 1870 was an idea whose time truly had come. In the words of former Attorney General Griffin Bell,

> [M]emories of legal oppression from the Old World receded and the federal government increased in power without becoming more prone to abuses of the states or individuals in the process. Added to that development was a growing belief that centralization of the legal activity of the federal government would be more efficient and thus cheaper than the system of solicitors and relatively independent district attorneys. That system had effectively broken down under the continuing press of new business in the 1860's, resulting in the hiring of numerous outside counsel at considerable expense.
>
> The conjunction of these two threads—acceptance of the idea of centralization, and a desire for economy—helped to create the Department of Justice in 1870. The debates in Congress at the time evidence a third reason for the move—the need to insure that the federal government spoke with one voice in its view of and adherence to the law.[4-111]

4-110. Bell, "The Attorney General," 1052.

4-111. Bell, "The Attorney General," 1053.

Digitized by Google

Floor debate provides some interesting insight. Reporting on the bill for the Committee on Retrenchment, Representative Jenckes of Rhode Island noted the great expense to which the government had been put due to the "numerous litigations which can arise under the law of war." Jenckes cited abuses "for the services of counsel" by the War Department, the Internal Revenue Department, the Treasury Department, and the Post Office Department, significantly omitting the Navy Department. He noted that the bill was "shaped for that purpose, to cut off all this outside work."[4-112]

Speaking directly to the issue of the several solicitors, Jenckes was no less direct:

> [W]e have gone on creating law officers in the different Departments of this Government who are entirely independent of the head of the law department and of the Attorney General of the United States. . . .
>
> . . . we have found that there has been a most unfortunate result from this separation of law powers. We find one interpretation of the laws of the United States in one Department and another interpretation in another Department. . . .
>
> We have found, too, that these law officers, being subject to the control of the heads of the Departments, in some instances give advice which seems to have been instigated by the heads of the Department, or at least advice which seems designed to strengthen the resolution to which the head of the Department may have come in a particular instance.[4-113]

4-112. *Congressional Globe*, 41st Cong., 2d sess., 27 April 1870, at 3035.

4-113. *Congressional Globe*, 41st Cong., 2d sess., 27 April 1870, at 3036.

Digitized by Google

The Justice Department would absorb these several solicitors, bringing them, together with the various United States Attorneys, under the coordination and control of the Attorney General. The question of disposition of the offices of the Solicitor and Naval Judge-Advocate General, and the Army Judge Advocate General, revealed some deep animosities toward these positions:

> MR. GARFIELD, of Ohio. It reads here [that the] Judge Advocate General [is to be transferred to the Justice Department.]
>
> MR. JENCKES. That is the naval Judge Advocate General. We do not touch in this bill the Bureau of Military Justice of the Army nor the Judge Advocate General of the Army. They are out of the scope of this civil law business.
>
> MR. GARFIELD, of Ohio. I wish to ask the gentleman from Rhode Island [Jenckes] the reason for not adding the Judge Advocate General [of the Army] to this department. Of course there is great dissimilarity between military and civil law; but it seems to me that this department of military justice should be in some appropriate way subordinated to the civil law. . . .
>
> MR. WOODWARD. . . . I understand there is no such civil officer as Judge Advocate General. It is a monstrosity which has grown up, and in my opinion it ought to be thrown overboard. It is a military office and does not belong to the civil service at all. Instead of being transferred to the Attorney General's department it should be abolished. I would not disfigure our civil system by retaining or transferring this to it.
>
> MR. JENCKES. [The Office of the Army Judge Advocate General] is an entirely

Digitized by Google

> different branch of law, and ought to be under a military chief and not a civil law officer.
>
> MR. GARFIELD. Why, then, include the naval Judge Advocate General? Are not the duties similar to those of the Judge Advocate General of the Army?
>
> MR. JENCKES. *The duties of the naval Judge Advocate General are, as we learned on inquiry, purely civil. He has nothing to do with courts-martial. His duties are similar to those formerly performed by the solicitor of the War Department. He gives advice when the Department comes into conflict with the civil Departments.*[4-114] (Italics added.)

The italicized portion of the quoted debate is worthy of note. It is, perhaps, the most reliable account we have of the duties of the Solicitor and Naval Judge-Advocate General from 1865 to 1870. While it does not describe those duties in detail, it shows clearly the perception, and probably the reality, that this officer had nothing to do with naval discipline and was involved only with civil matters. (Bolles's participation as a judge advocate in the 1869 court martial of Paymaster T.C. Masters (see footnote 4-79) was clearly an aberration.) The scope of the Solicitor's duties became a matter of some controversy in later years (see page 168).

A matter of controversy in 1870 was the need for *any* lawyers in any branch of the military or naval services. Attendant upon the establishment of the Office of the Judge Advocate General of the Army and his staff of assistants in 1862 had come a cadre of professionally-trained judge advocates "from the rank of brigadier general downward." These officers, at substantial cost to the government, had displaced the system theretofore in place in the Army wherein "any intelligent officer . . . was sufficiently competent to be a judge advocate on a court-martial." The normal procedure had been that "Lieutenants were generally detailed for the

---

4-114. *Congressional Globe*, 41st Cong., 2d sess., 27 April 1870, at 3037.

Digitized by Google

purpose."[4-115] "Courts-martial," noted Jenckes, "are not composed of lawyers, but of officers. The military law which is enforced in those courts has very little analogy to the common law or the civil law. The modes of proceeding are entirely different, and . . . almost any well-informed officer, either of the Army or the Navy, can act as judge advocate."[4-116]

There was a concern also that many questions relating to civil matters were being referred to the Judge Advocate General of the Army rather than to the Attorney General where they properly belonged. "In the Army they have got into the habit of referring every legal question, civil as well as military, to the Judge Advocate General." A rather pointed solution was proposed by Representative Woodward of Pennsylvania. He suggested that the bill provide "for doing away with the office of Judge Advocate General of the Army, and clear away this whole excrescence which grew up during the war."[4-117] Clearly there was an undercurrent of opposition in the Congress to a chief uniformed lawyer with military law responsibilities, and very strong opposition to one with civil law responsibilities. Representative Woodward eventually moved to abolish the office of the Judge Advocate General of the Army and all his assistants. The motion did not pass.[4-118] A less drastic proposal would have transferred the Judge Advocate General of the Army and his assistants, together with the Solicitor and Naval Judge-Advocate General, to a "Bureau of Military and Naval Law" within the Department of Justice, there to be administered under a single head.[4-119] In the end political realities prevailed. Recognizing that any attempt to abolish or transfer the Office of the Judge Advocate General of the *Army* would have

---

4-115. *Congressional Globe*, 41st Cong., 2d sess., 27 April 1870, at 3037.

4-116. *Congressional Globe*, 41st Cong., 2d sess., 27 April 1870, at 3037.

4-117. *Congressional Globe*, 41st Cong., 2d sess., 27 April 1870, at 3037.

4-118. *Congressional Globe*, 41st Cong., 2d sess., 28 April 1870, at 3067.

4-119. *Congressional Globe*, 41st Cong., 2d sess., 28 April 1870, at 3066.

Digitized by Google

generated a firestorm of opposition and imperiled the entire bill, Congress backed down, contenting itself with the belief that under the bill

> the Judge Advocate General of the Army . . . will not be called upon for any opinion relating to martial law or military law, except as to that portion of the administration of military law which relates to military justice. In other words, the Judge Advocate General, instead of giving legal opinions to the Secretary of War relating to the status of States of this Union, their right to call upon the Government for military protection or military aid, and other grave constitutional questions, will be limited, as the law under which he was appointed designed he should be, to the mere supervision of the records and proceedings of military courts-martial; and as to these it will be the duty of the President and Secretary of War to ask the opinion of the Attorney General on all important or doubtful questions. The Judge Advocate General will perform duties administrative in their character and almost exclusively so.[4-120]

The Navy, without a Judge Advocate General's Department, indeed without even a centralized "Office of Judge Advocate General" or strong legal presence, was simply swept up. Representative Lawrence noted that "so far as the solicitor and naval Judge Advocate General is concerned, he is transferred [to the Department of Justice] with all his supervisory power over naval courts martial, and the records and proceedings of such courts."[4-121] On this account Lawrence was grossly mistaken; the Solicitor and Naval Judge-Advocate General had *no* supervisory power over "naval courts martial and the records and proceedings of such courts." Those

---

4-120. *Congressional Globe*, 41st Cong., 2d sess., 28 April 1870, at 3066.

4-121. *Congressional Globe*, 41st Cong., 2d sess., 28 April 1870, at 3066.

Digitized by Google

powers resided in the Secretary of the Navy and, as delegated by him, to the Bureau of Navigation. All functions pertaining to the trial, examination, promotion, and retirement of Navy and Marine Corps personnel were retained in the Navy Department.[4-122] Nor, as we have seen, did the Solicitor and Naval Judge-Advocate General exercise wide power in other areas, being confined primarily to an advisory role. Although John Augustus Bolles would receive his paycheck from the new Department of Justice after 1 July 1870, that Department was getting little more than a title when it drafted this official. Perhaps because of the animus which attached to the title "Judge Advocate General" during the debate, the transferred office was to be known simply as the "Naval Solicitor."[4-123] Notwithstanding the essentially non-military, advisory-only role played by this officer, the Navy had lost its first Judge Advocate General. The act creating the Department of Justice was passed by Congress on 22 June 1870.

Having thus dealt with the solicitor issue, the act next disposed of the special counsel problem. The Navy to this time had relied extensively on civilian lawyers to prosecute its general courts martial. Civilians tried virtually all officer, and many enlisted cases. The exception, of course, was when the trial was held aboard a ship at sea or on a foreign station. (In cases where ships were not at sea, but were berthed in domestic ports on both the East and West Coasts, civilian lawyers prosecuted the shipboard courts martial.)[4-124] A small group of "favored" attorneys developed. One whose name appears frequently is H.H. Goodman, who had been Nathaniel Wilson's assistant in 1864. Goodman generally tried cases at the New York and Philadelphia Navy Yards. At the Washington Navy Yard, A. Thomas Smith usually prosecuted on behalf of the Navy;

4-122. James R. Masterson, comp., "Preliminary Checklist of the Records of the Office of the Judge Advocate General (Navy), 1799-1943," *Record Group No. 125: Records of the Office of the Judge Advocate General (Navy)*, National Archives, Washington, D.C. (December 1945), v.

4-123. *Congressional Globe*, 41st Cong., 2d sess., 28 April 1870, at 3065.

4-124. See, for example, "Records of Proceedings of General Courts Martial, February 1866-November 1940," Naval Records Collection, Record Group 125, National Archives, case Nos. 4224-38.

Digitized by Google

in Pensacola, Alexander S. Gibson. In only one general court martial in 1866 was a civilian not used; this was aboard ship where the judge advocate was a surgeon and the accused was enlisted. From late 1868 through 1869 still another civilian lawyer appeared frequently for the Navy in trials at the Washington Navy Yard; Thomas G. Welles, son of the Navy Secretary.[4-125]

The Department of Justice Act made it unlawful for a department head "to employ attorneys or counsel at the expense of the United States." When in need of "counsel or advice," the department head was to call upon the Department of Justice, whose officers would "attend to the same." A narrow exception to this directive was made in the case of the War and Navy Departments.[4-126] Further, the door was left open ever so slightly even for litigation counsel to be retained when "authorized by law." Payment of the fees for such special litigation counsel was contingent upon issuance of a certificate by the Attorney General that services were actually rendered, and that they could not be performed by any attorney in the Department of Justice.[4-127]

4-125. Welles was appointed to serve as the judge advocate in the celebrated general court martial of Paymaster Washington Irving. Irving, however, was in an insane asylum at Bloomington, New York, and his trial did not proceed. Welles was thereupon directed by his father, the Secretary of the Navy, to go to the asylum and personally check on Irving's condition. Apparently he was satisfied of Irving's incompetence, since Irving was never required to appear, never arraigned, and never tried. "Records of Proceedings of General Courts Martial, February 1866-November 1940," Naval Records Collection, Record Group 125, National Archives, case No. 4934, 27 January 1869.

4-126. The act specifically provided that "whenever a question of law arises in the administration, either of the War or Navy Department, the cognizance of which is not given by statute to some other officer from whom the head of either of these Departments may require advice, the same shall be sent to the Attorney-General . . . ." 16 Stat. 162, sec. 6. This provision was obviously intended to appease the Army, which had a statutory Judge Advocate General who remained under the direct authority of the Secretary of War. It was less beneficial to the Navy, whose Solicitor was transferred to the supervision of the Attorney General, and which would not have a statutory Judge Advocate General for several years.

4-127. 16 Stat. 162, sec. 17. Custom, if not intent, quickly limited the reach of the act's prohibition. By 1927 it could be stated that

> a Solicitor is never required to perform duties as an

(continued...)

Digitized by Google

4-127. (...continued)

> officer of the Department of Justice. As for the requirement that all legal officers of the government should be officers of the Department of Justice, the appropriation acts have long since reduced that to a nullity.

Albert Langeluttig, *The Department of Justice of the United States* (Baltimore: The Johns Hopkins Press, 1927), 60.

In 1928, in his annual report, the Attorney General counted only 115 of 900 legal positions in the executive branch in Washington as being even nominally under his control. Department of Justice, *Annual Report of the Attorney General*, 1928, at 1-2, 347.

The prohibition only momentarily halted the hiring of "agency" counsel, and today [1978] it is accepted practice for the Department of Justice to "work closely with its [agency] clients in a cooperative effort, recognizing the peculiar expertise and abilities of agency lawyers and delegating authority to agency lawyers in certain circumstances . . . ." Bell, "The Attorney General," 1059.

Notwithstanding, the restriction has consistently been applied to prevent the hiring and payment of outside counsel by agencies on an *ad hoc* basis, which the Navy sought to do from time to time. (In addition to the two Attorney General opinions discussed in the immediately following pages, see the text beginning on page 259 regarding a plea by Secretary of the Navy Bonaparte in 1906 to obtain authorization to hire outside counsel.) See also 6 Dec. Comp. Gen. 517 (1927) where the Secretary of the Navy is again reminded of the prohibition on employment of outside attorneys, and admonished not to make any further payments to counsel whom he had hired in connection with a real estate transaction.

To ensure consistency of governmental positions before the courts, the prohibition has been specifically advanced, but with mixed success, as a ban on executive agencies outside the Department of Justice conducting their own litigation through in-house counsel. Bell notes (at page 1056) that in 1932 President Roosevelt issued an Executive order centralizing all litigating authority in the Department of Justice, but that the directive was soon diluted. Writing in 1955, one commentator observed of this attempt:

> [When] [t]he Department of Justice was created in 1870 . . . Congress sought to co-ordinate legal services in the executive branch by transferring the solicitors of the various departments to the Department of Justice. But this first attempt at co-ordination was not fully effective since older laws

(continued...)

Digitized by Google

The Secretary of the Navy, George M. Robeson (1869-1877), did not, or could not, believe that this power had been stripped from him. When directed by resolution of the House of Representatives in 1871 to institute

---

4-127. (...continued)

> establishing independent legal staffs were not repealed. [*There was no such law respecting the Navy.—ED.*] By executive order in 1933, the handling of all litigation for departments and agencies was transferred to the Department of Justice. Since that time, however, various agencies have been given statutory authority to conduct their own litigation.

Whitney R. Harris, "The Hoover Commission Report: Improvement of Legal Services and Procedure," *American Bar Association Journal* 41 (June 1955): 500.

The position of the Army, stated in 1941, was that agencies were free to hire "in-house" counsel at will: "[the] 1870 statute . . . never stood in the way of employing a lawyer in a fixed position in any department. The prohibition is merely against the outside employment of counsel without legislative authority." Assistant Secretary of War (unidentified by name), letter to H. Struve Hensel, 10 May 1941, quoted by T.C. Osborne in a "Memorandum to Mr. Gross" (General Counsel of the Navy), 5 December 1952, at page 5 of enclosure (1).

The current statutory provisions, found in 28 U.S.C. 516, "Conduct of litigation reserved to Department of Justice," and 5 U.S.C. 3106, "Employment of attorneys; restrictions," now circumscribe only litigation. Present policy is expounded in a 1979 memorandum opinion for the Assistant Attorney General:

> A primary purpose for creating the Department of Justice was to centralize control of litigation involving the United States or a Federal agency. . . .
>
> . . . So long as this Department retains control over the conduct of the litigation, even an extensive role for attorneys of other agencies seems consistent with the purposes of 28 U.S.C. § 516 and 5 U.S.C. § 3106.

Larry A. Hammond, Memorandum Opinion [No. 79-17] for the Assistant Attorney General, Civil Rights Division, 15 March 1979, at 107.

The act had no impact on uniformed lawyers, albeit the Navy had none until the second decade of the twentieth century.

Digitized by Google

court martial proceedings against Rear Admirals Sylvanus W. Godon[4-128] and Charles H. Davis, Robeson sought an opinion from Attorney General Akerman as to whether the Navy Department could appoint and pay "any person that it may think proper" [presumably a civilian lawyer] to conduct courts-martial against two fleet commanders; or whether the Navy Department was bound by the law establishing the Department of Justice and had to apply to the Department of Justice "for such counsel as is thought needed."[4-129]

The Attorney General pointed out that in cases arising in the Navy the judge advocate was, by custom, either a naval officer specially designated, or a counselor-at-law employed for that purpose. He then noted that section 17 of the Department of Justice Act prohibited the Secretaries of the Executive Departments from employing attorneys or counsel at the expense of the United States:

> Considering it settled that the services in question are such as can be properly performed only by a naval officer or a counselor-at-law, I am of the opinion that if, in your judgment, the cases in hand should be conducted by a person of the latter description, you are not at liberty to employ such counsel, but should call upon the Department of Justice, which will furnish you with an officer for the service.[4-130]

4-128. This was not Godon's first brush with the naval justice system. In 1841 he was tried in Norfolk upon a charge of disobedience of orders and neglect of duty. He was found guilty and sentenced to suspension from duty for two years. The Secretary of the Navy reversed the conviction and disapproved the sentence. *Army and Navy Chronicle*, 25 November 1841, at 373.

4-129. "Letters Sent by the Secretary of the Navy to the President and Executive Agencies, 1821-1886," Naval Records Collection, Record Group 45, National Archives, letter dated 24 August 1871.

4-130. 13 Op. Atty. Gen. 515 (1871).

Digitized by Google

Strongly implying that the Secretary should seek to utilize the services of John Augustus Bolles, the newly-transferred Naval Solicitor, Akerman continued:

> [T]he 3d section of said act transfers from the Navy Department to the Department of Justice the officer once known as the Solicitor and Naval Judge-Advocate General. His title is changed by said section to that of Naval Solicitor, but his functions are unchanged, and it is expressly provided that he, and other transferred officers, shall exercise their functions under the supervision and control of the head of the Department of Justice. Though the functions of that officer are nowhere distinctly defined by statute, yet *the very name of the office* [Solicitor and Naval Judge-Advocate General] *indicates that he was generally charged with such duties as a judge-advocate performs*.[4-131] (Italics added.)

Akerman was misguided, of course, as to the duties which had been assigned to the former Solicitor and Naval Judge-Advocate General, for, as we have seen, he participated in but one court martial during the entire five years he held that office. However, the Navy Secretary could not reasonably have expected a different opinion from the Attorney General. Persistent and opportunist, Robeson asked for reconsideration only six months later, when George Williams took over the Attorney General position from Akerman. The reply was predictable:

> I have the honor to acknowledge the receipt of your communication of the 29th [of February], containing a copy of the opinion of my predecessor, of date August 25, 1871 . . . . I am asked to review this opinion. . . .

4-131. 13 Op. Atty. Gen. 515-16 (1871).

Digitized by Google

> My predecessor's opinion appears to be little more than an amplification of the plain and comprehensive language of this statute, and I discover no grounds upon which to question its correctness.[4-132]

Secretary Robeson appears to have resolved his immediate problem by not convening courts against Rear Admirals Godon and Davis.[4-133] But the strictures of the Department of Justice Act had more far reaching consequences. It must be remembered that even though many of the lawyers whom the Navy hired to serve as judge advocates were civilians, they nonetheless worked for and were controlled by the Navy. Because this control would be lost if Department of Justice lawyers were employed as judge advocates (since they were ultimately responsible only to the Attorney General), the Navy was understandably reluctant to seek their assistance. For all practical purposes then, the Department of Justice Act marked the end of the Navy's practice of retaining civilian lawyers to serve as judge advocates.[4-134]

4-132. 14 Op. Atty. Gen. 13 (1872).

4-133. A search of court martial records at the National Archives for the period 1870 to 1880 indicates no courts martial instituted against either Rear Admiral Godon or Rear Admiral Davis. "Records of Proceedings of General Courts Martial, February 1866-November 1940," Naval Records Collection, Record Group 125, National Archives. A review of an official listing of court martial orders for the period 1863 to 1887 is likewise negative. Navy Department, *General Orders and Circulars Issued by the Navy Department from 1863 to 1887*, comp. M.S. Thompson (Washington, D.C.: Government Printing Office, 1887), 289-301. In any event, Rear Admiral Davis died on 19 February 1877, and Rear Admiral Godon on 5 June 1879. *General Orders and Circulars, 1863 to 1887*, "Death Notices," 303.

4-134. Only isolated instances of the practice can be found. In 1876 a civilian, A.B. Wagner, served as the judge advocate at a general court martial convened by the Secretary of the Navy at the Mare Island, California, Navy Yard. He was relieved (without explanation) at the end of the trial by a Navy pay inspector. "Records of Proceedings of General Courts Martial, February 1866-November

(continued...)

Digitized by Google

Commenting on this phenomenon in a different context three-quarters of a century later, a board reviewing World War II court martial convictions nevertheless captured the mood of the Navy in 1870:

> [D]iscipline is a function of command . . . the court-martial . . . developed historically as an extension of the authority of the commander. . . .
>
> . . . [W]ith minor exceptions, the whole system of military and naval justice is built around it. Whatever their historical origin, most of those features of military and naval justice which differ radically from the civilian judicial system bear a direct relationship to the exercise of command.[4-135]

A review of all officer general court martial records for the period 1870 to 1887 indicates that the Secretary of the Navy opted to use non-lawyer Navy and Marine Corps officers as judge advocates rather than give up control to the Department of Justice.[4-136] A random sampling

4-134. (...continued)
1940," Naval Records Collection, Record Group 125, National Archives, case No. 5881, 30 May 1876. A limited revival of the practice next occurred in the mid-1880s. In February 1885 the Attorney General authorized the appointment of a civilian lawyer, A.H. Cragin, to serve as special counsel to assist a Navy judge advocate in a court martial. At least one other request for such an appointment was made in June of that same year. See discussion beginning at page 205.

4-135. Department of the Navy, *Report and Recommendations of the General Court-Martial Sentence Review Board on Court-Martial Procedures and Policies* (1947), 16-17.

4-136. The review covered the trials of virtually every officer in the Navy from June 1870 through 1887, as listed in *General Orders and Circulars, 1863 to 1887*, at 289-301.

The last officer court martial held before enactment of the Department of Justice Act was No. 5075 (Commander J.H. Upshur, USN) held on 30 April 1870. The judge advocate was a *civilian* attorney, John W. Bell, Esq. The first officer court martial held after the Department of Justice Act was No. 5210 (First

(continued...)

Digitized by Google

of enlisted general court martial records for this period yields the same conclusion, as does a random sampling of officer general court martial records for the period 1887 to 1898. Initially the judge advocates so appointed comprised, as before, a disproportionate number of Marine Corps officers, followed by staff Navy officers (paymasters, pay inspectors, surgeons, chaplains, etc.). Because the services were small, the same officers were repeatedly tapped for court martial duty. Eventually the command backbone of the Navy, its line officers, also came to assume these duties, and by the mid-1870s were serving on a more-or-less regular basis as judge advocates.

Thus the irony of the Department of Justice Act was an immediate depreciation in the legal credentials of the persons who represented the Navy at general courts martial, and, presumably, a decline in the soundness of the legal advice which the judge advocate was required to impart to the court for its guidance. For the Navy it was a step back into the time-honored customs of the sea, where the untrained naval officer took on the complexities of courtroom litigation. Errors, when they occurred (and they undoubtedly did occur), would more often than not go unrecognized. Review by the Secretary was summary, usually without benefit of legal analysis other than that which he himself might bring to it. One cannot feel that the accused party was free from prejudicial error.

We have noted the publication of Harwood's trial manual in 1867. With increased prosecutorial responsibilities falling upon the uniformed officer after 1870, Harwood's book was even more welcome. Perhaps recognizing the growing need for increased reliance on uniformed

---

4-136. (...continued)
Lieutenant E.C. Saltmarsh, USMC) held on 19 January 1871, six months later. The judge advocate in the Saltmarsh trial was a military officer, First Lieutenant William B. Remey, USMC. Lieutenant Remey later became the first uniformed Judge Advocate General of the Navy.

The Department of Justice Act had no effect on the use of Navy and Marine Corps officers as judge advocates on ships or foreign stations; geographic isolation in those cases dictated that the judge advocate was virtually always a Navy or Marine Corps officer.

A random sampling of court martial records indicates that, prior to the Department of Justice Act, enlisted men were usually tried by Navy or Marine Corps officers serving as judge advocates. Civilian lawyers were occasionally used.

Digitized by Google

resources, or perhaps by happy coincidence, Harwood was supplemented by two official works of the Navy Department which appeared in 1870; *A Method for Classifying Offenses and Punishments on Board Vessels of the U.S. Navy*,[4-137] and *Orders, Regulations, and Instructions for the Administration of Law and Justice in the United States Navy*.[4-138]

Offenses and Punishments was a down-to-earth guide distributed "for the purpose of promoting good order and discipline in the Navy, and to secure uniformity in awarding punishments." To achieve this goal the manual listed forty-four infractions which, unless aggravated, were recommended for disposition by commanders of vessels at mast. Accompanying each of these offenses was a suggested punishment or range of punishments, running from extra duties to five days' solitary confinement on bread and water, without irons. Following this section were a list of offenses "suggestive of such as may be punished by summary courts martial."

Orders, Regulations and Instructions was a more extensive volume, lacking the informality of *Offenses and Punishments*. Rescinding all prior directives in conflict therewith, it covered the full range of procedural rules for disciplinary and investigative proceedings, including captain's mast, summary and general courts martial, courts of inquiry, and the several types of boards. It was, in fact, a precursor to *Naval Courts and Boards*,[4-139] the procedural guide which was to serve the Navy from 1917 to 1951. Rules for summary courts were modified. Section 30 provided that counsel for the accused was no longer permissive with the court. If the accused requested the assistance of a friend, he was to receive it. No longer did counsel have to be a commissioned, warrant, or petty officer. If, however, the accused requested one of the latter, the request once again became permissive with the court. Formalized for the first time in writing was the provision in section 31 that (in the absence of other counsel) the recorder was to regard himself as counsel for the

---

4-137. Department of the Navy, *A Method for Classifying Offenses and Punishments on Board Vessels of the U.S. Navy* (Washington, D.C.: 1870).

4-138. Department of the Navy, *Orders, Regulations, and Instructions for the Administration of Law and Justice in the United States Navy* (Washington, D.C.: Government Printing Office, 1870).

4-139. Department of the Navy, *Naval Courts and Boards* (Washington, D.C.: Government Printing Office, 1917).

Digitized by Google

accused "in precisely the same manner, and to the same extent, as the judge advocate of a general court martial."[4-140] (Compare Harwood's observation, at page 141, that this custom was "no longer maintained.")

Regarding general courts martial, much remained the same. Harwood's observation notwithstanding, section 176 stated that

> Justice being the object for which a Court is convened, the Judge Advocate, though he is not for a moment to forget his duties as Prosecutor, will, at all times, and especially when the person arraigned shall appear either inexperienced or ignorant, prevent him from advancing anything which may tend either to criminate him or prejudice his cause, and should he have no competent adviser, is also to see that no illegal testimony is brought against him and to direct him how to present to the Court, in the most effective light, the facts upon which his defense may hinge.

Section 177 noted that

> It is the Judge Advocate's most particular duty to object to the admission of improper evidence, and to point out to the Court the irrelevancy of any matter which may be adduced, which does not tend to prove, either directly or consequently, the charge under investigation.

4-140. Also formalized for the first time was the Navy's position that the complainant or accuser might remain in court to *assist* the judge advocate, but that the judge advocate could not be displaced as the prosecutor. *Orders, Regulations and Instructions*, secs. 65, 175. See earlier discussion of this point at page 141.

Digitized by Google

New was a provision, similar to that for summary courts, that the accused had a *right* to counsel, courts being told that they could not "with propriety deny him the assistance of a professional or other friend . . . ." If the accused had no particular "friend" in mind he could request that the court "select some officer within reach to assist him," which assistance would be provided, however, only with the consent of such officer (who would not, of course, be a lawyer).[4-141] Such assistance notwithstanding, as was the prior custom and rule no person other than a party was "on any account to be permitted to address the Court."[4-142]

Also new was a provision calling for the detail of at least one-third of the court from the Medical, Pay, Marine or Engineering Department or Corps where an officer being tried belonged to such organization;[4-143] a provision that all judge advocates for general courts martial were to be appointed by the Secretary of the Navy;[4-144] and, although minimal, the first-ever guidance for judge advocates as to how to prepare for trial.[4-145]

Writing in 1871, Secretary Robeson noted the import of courts martial to the social order of the Navy:

> Courts martial and courts of inquiry, composed of commissioned officers, as

---

4-141. With the exception of the short-lived Circular No. 3 (see page 136), section 199 of *Orders, Regulations and Instructions* contained for the first time in Navy directives a provision which stated that the court might appoint counsel for the accused, and that the person so appointed should be an officer. By contrast, Army procedures at this time recognized no right to counsel, and the Judge Advocate General of the Army specifically ruled that Army courts had no authority to assign counsel to an accused, even if he had requested it. S. Sidney Ulmer, *Military Justice and the Right to Counsel* (Lexington: Univ. Press of Kentucky, 1970), 29.

4-142. *Orders, Regulations and Instructions*, sec. 199.

4-143. *Orders, Regulations and Instructions*, sec. 144. The provision was qualified to the extent that the exigencies of the service had to permit such detailing. Recall the 1814 opinion of the Attorney General to the Secretary of the Navy (cited at page 42) to the effect that pursers and surgeons should not sit on courts martial.

4-144. *Orders, Regulations and Instructions*, sec. 161.

4-145. "It is proper that [the judge advocate] should prepare, in writing, a short analysis or plan for his own guidance in the conduct of the trial and examination of Witnesses." *Orders, Regulations and Instructions*, sec. 168.

Digitized by Google

> required by law, are as indispensable in administering naval law and justice as are civil courts in civil affairs.[4-146]

The purpose of Robeson's observation was to highlight the demands which courts martial now placed upon Navy personnel in an era of dwindling personnel resources, where civilians no longer augmented the cadre of judge advocates. Courts martial were, in fact, directly competing with the assignment of officers to sea duty. Robeson thus sought to reduce the convening of unnecessary or frivolous general courts martial, and free up officers for sea duty. Section 106 of the *Orders, Regulations and Instructions* directed commanding officers to inquire carefully into the circumstances of all complaints before recommending such courts, and section 121 stated that no officer had the right to demand a court martial "on himself or others."

These two official publications were followed in 1874 by another commercial title, *Order of Procedure in Naval General Courts Martial*.[4-147] The title page declared that this small book, by McLane Tilton, an active duty Marine Corps captain who served as a judge advocate in a number of trials during the 1870s,[4-148] was "compiled from various orders, regulations, and instructions, which have been issued from time to time from the Navy Department, and from other sources, for the convenience of novitiating judge advocates." Unquestionably the most coherent guide yet written for the lay judge advocate, this pamphlet-sized publication re-ordered applicable rules for conducting a general court

---

4-146. Department of the Navy, [Annual] *Report of Secretary of the Navy* [to the President of the United States], 1871, at 19.

4-147. McLane Tilton, *Order of Procedure in Naval General Courts Martial* (Washington, D.C.: Powell & Ginck, 1874).

4-148. Captain Tilton appears as the judge advocate in a number of general courts martial (including the trials of four officers) which were held on the East Coast in the 1870s. "Records of Proceedings of General Courts Martial, February 1866-November 1940," Naval Records Collection, Record Group 125, National Archives.

Digitized by Google

martial into a sequential format which could be followed by the judge advocate during trial. Written in narrative, rather than directive form, the book also contained a sample record of proceedings of a summary court martial and a brief but adequate outline for conducting a court of inquiry. It must be assumed that this practical little guide assisted many a judge advocate, novice as well as seasoned.

As for civil affairs, it was "business as usual" during the 1870s, with the important exception that the Secretary could no longer hire private civilian lawyers on a case-by-case basis. But the need was less. The Navy continued to shrink in size and armament. Such civil matters as arose were handled by the Secretary, his staff of clerks (some of whom had legal training), and referral to the Attorney General. How the newly constituted Naval Solicitor fit into this scheme is difficult to discern. Neither he nor the Attorney General filed any periodic reports during his tenure. There is virtually no correspondence on record originated by or directed to the Solicitor. Overlaid upon this documentary vacuum are what Griffin Bell calls "two serious oversights" by Congress at the time it established the Department of Justice:

> First, Congress failed to repeal or modify the statutes establishing the various Solicitors as independent legal officers and defining their duties. The 1870 Act did state that they now were subject to "supervision" by the Attorney General, but that is a vague term and the Solicitors continued to claim their same pre-1870 powers and independence. The second oversight greatly compounded the difficulties caused by the first. Congress gave the new Department no building or other quarters where all the attorneys under the Attorney General's supervision could concentrate their offices. The Solicitors stayed in the buildings housing their old departments, where they were subject to continuing supervision by the heads of those departments

Digitized by Google

> rather than their nominal new boss, the Attorney General.[4-149] (Footnotes omitted.)

The first part of Bell's analysis is probably inapplicable with regard to the Naval Solicitor, for his duties were not defined in the 1865 statute establishing his office,[4-150] nor did they take shape in the intervening years before the Department of Justice was created. About all we know is what he *didn't* do before 1870. He did not become involved in operational, policy, personnel or disciplinary matters. (Bolles served as judge advocate in only one court martial during this time, in 1869. See footnote 4-79.) The Secretary of the Navy virtually ignored him in his annual reports from 1865 to 1870, making no mention whatsoever of his office. This lack of specificity as to the Solicitor's duties continued after 1870 and compounded the second oversight noted by Bell, the physical separation of the Solicitor from the Attorney General.

The Secretary of the Navy then, as he does today, held ultimate responsibility for ensuring that there were no legal errors in court martial proceedings.[4-151] Because he was usually a lawyer, the Secretary attended to this task personally. As the work became more onerous to the Secretary, he sought relief from the burden and turned to the Naval Solicitor for assistance.[4-152] Because of this, and perhaps because the

---

4-149. Bell, "The Attorney General," 1054.

4-150. Act of 2 March 1865, 13 Stat. 468.

4-151. Supervisory power over Navy courts martial resided at the time in the Bureau of Navigation, which later became the Bureau of Naval Personnel. But the Bureau was concerned only with the *disciplinary* aspect of courts martial. This narrow concern was bolstered by the fact that there were no lawyers in the Bureau. Thus started the bifurcation of responsibility—disciplinary review versus legal review—which lasted until the advent of the *Uniform Code of Military Justice* in 1951.

4-152. Testimony to the Naval Solicitor's role in court martial review is given by Representative Harris of Pennsylvania in floor debate during deliberations on

(continued...)

Digitized by Google

Naval Solicitor was aware that his job was in greater jeopardy of extinction than ever before (it had never been popular with the Congress),[4-153] Bolles finally began reviewing records of courts martial (both officer and enlisted) in 1877. While he did not review every one, a fair number for that year bear the "Received" stamp of the Naval Solicitor's Office.[4-154]

In what may have been a further attempt to give the Solicitor's office more visibility and responsibility—and by so doing bolster an argument

---

4-152. (...continued)
abolition of the Solicitor position:

> When I was at the Navy Department a few weeks since, the Secretary of the Navy had lying upon his table the minutes of a naval court-martial, covering over one hundred pages of manuscript, and he said to me that it was impossible for him as Secretary of the Navy to investigate carefully and thoroughly such a mass of papers as that in order to render a just opinion upon the case; that without the aid of a solicitor of the Navy the work could not be properly done in his Department.

Congressional Record, 45th Cong., 2d sess., 3 May 1878, at 3160.

4-153. The House leveled scathing criticism on both the man and the office. See *Congressional Record*, 45th Cong., 2d sess., 3 May 1878, at 3158-60. On this same date Secretary Thompson responded to an inquiry by W.C. Whitthorne, chairman of the House Committee on Naval Affairs, and one of Bolles's sharpest critics, stating "Solicitor Bolles' appointment not on record in this Department. Probably in the Department of Justice." "Letters to Congress [sent by the Secretary of the Navy and others], 1798 to 1886," Naval Records Collection, Record Group 45, National Archives, letter dated 3 May 1878.

4-154. There is no obvious explanation as to why Bolles reviewed some records and not others. Perhaps he reviewed selected records at the request of the Secretary. Further, the uneven organization of court martial records during this period makes it often difficult to find the Secretary of the Navy's approving order, and to determine whether there was any prior review by Bolles.

In those few cases when Bolles acted as judge advocate at trial he obviously compromised his ability to act as a reviewer for the Secretary. In the November 1876 trials in which Bolles acted as judge advocate, the records were approved by General Order No. 221 of Secretary Robeson on 9 January 1877, without any input from Bolles as Solicitor.

Digitized by Google

for its retention—Secretary of the Navy Richard W. Thompson (1877-1880) issued the following circular on 14 March 1877:

> All cases involving questions of law and regulations shall be immediately referred to the Naval Solicitor and Judge Advocate of the Department, who will promptly consider them and render his opinion as early as possible, together with a brief of same, to the Secretary.[4-155]

In a communication to Congress the following year, Thompson twice referred to Bolles as an officer of the *Navy* Department rather than the Justice Department, and conveyed the impression that the office in general, and Bolles in particular, was indispensable to the operation of the Secretary's office.[4-156]

On 25 May 1878, Solicitor Bolles died.[4-157] Less than a month later his office, which had been under attack,[4-158] was abolished by the Appropriations Act of 19 June 1878:

> And so much of section three hundred and forty-nine of the Revised Statutes as provides

---

4-155. *General Orders and Circulars, 1863 to 1887*, at 156. It is curious that Thompson refers to Bolles as the *Judge Advocate* of the Navy Department in the circular, for no legislation or directive had authorized such an office since the time of its abolition in 1870 when its incumbent was known as the Judge Advocate General.

4-156. "Letters to Congress [sent by the Secretary of the Navy and others], 1798 to 1886," Naval Records Collection, Record Group 45, National Archives, letter dated 17 May 1878.

4-157. John Howard Brown, ed., *Lamb's Biographical Dictionary of the United States*, 7 v. (Boston: James H. Lamb Company, 1900).

4-158. *Congressional Record*, 45th Cong., 2d sess., 3 May 1878, at 3158-60.

Digitized by Google

> for the appointment and payment of a salary to
> a "naval solicitor" is hereby repealed.[4-159]

Throughout this debate the Attorney General made no visible effort to retain the Office of Naval Solicitor which ostensibly was under his supervision. Secretary of the Navy Thompson appears to have given up *his* faltering attempts following Bolles's death, for there are no communications in this regard once Bolles had passed away.[4-160]

It is clear that Congress had considered the Naval Solicitor position superfluous, and welcomed the economies which would result from one less salary to pay.[4-161] What is not so clear is what the Solicitor's actual function had been. Original documentary sources indicate that Bolles played only a minor role in naval administration. In the eight years of his tenure as Naval Solicitor he acted as judge advocate at only six courts martial; one in 1873, and the remaining five in 1876. None was notable for the issues or personalities involved.[4-162] This paucity of court martial participation is mirrored by a dearth of documentary evidence of Bolles's contributions to naval administration if, indeed, there were such contributions.[4-163]

4-159. 20 Stat. 178, 205.

4-160. On the day before the Solicitor's office was abolished, Secretary Thompson's sole communication to the Congress concerned proposed legislation to fit out a Navy steam ferryboat for use by the Fish Commission. "Letters to Congress [sent by the Secretary of the Navy and others], 1798 to 1886," Naval Records Collection, Record Group 45, National Archives, letter dated 18 May 1878.

4-161. *Congressional Record*, 45th Cong., 2d sess., 3 May 1878, at 3158-60. See also Richard G. McClung, Office of the Under Secretary of the Navy, Procurement Legal Division, Washington, D.C., *Memorandum*, 19 February 1943, at 4.

4-162. "Records of Proceedings of General Courts Martial, February 1866-November 1940," Naval Records Collection, Record Group 125, National Archives. Four of the courts were held *seriatim* in November 1876 at the New York Navy Yard.

4-163. Naval records for the period during which Bolles held office are, unfortunately, both incomplete and difficult to locate. Nevertheless, a search of all (continued...)

Digitized by Google

4-163. (...continued)
sources where records of his activities might reasonably be expected to be found reveal only three legal opinions by the Naval Solicitor during his entire term of office. In 1876 an opinion which Bolles prepared on patent legislation was forwarded by the Secretary to the Speaker of the House of Representatives. "Letters to Congress [sent by the Secretary of the Navy and others], 1798 to 1886," Naval Records Collection, Record Group 45, National Archives, letter dated 20 June 1876. On 1 January 1878 he drafted an opinion on a question of relative rank of a Navy lieutenant. "Letters Received [by the Secretary of the Navy], December 1879 to June 1883," Naval Records Collection, Record Group 125, National Archives, Washington, D.C., letter dated 1 January 1878. And four months later his endorsement on an officer's appeal for restoration to duty was noted by the Secretary in a communication to the Congress. "Letters to Congress [sent by the Secretary of the Navy and others], 1798 to 1886," Naval Records Collection, Record Group 45, National Archives, letter dated 30 April 1878. With the exception of court martial reviews, the author's research turned up no other document ascribed to Bolles while he held the office of Naval Solicitor.

A somewhat more charitable view of Bolles's productivity is found in the comments of Representative Harris of Massachusetts:

> In my experience as a member of the Committee on Naval Affairs, more than once long and exhaustive opinions of [the Naval Solicitor] have been sent to the committee for their examination . . . .

Congressional Record, 45th Cong., 2d sess., 3 May 1878, at 3159-60.

Homer Walkup suggests that the Naval Solicitor may have been employed to some degree in defending claims against the Navy in the United States Claims Court which had been established in 1855. Captain Homer A. Walkup, JAGC, USNR (Ret.), letter to author, 22 March 1992. This would certainly appear to be a valid hypothesis, especially for the period after 1870 when the Navy could no longer hire private lawyers to represent it.

A more neutral observation of the Solicitor's duties was made half a century ago by H. Struve Hensel, then Chief of the Procurement Legal Division, Office of the Under Secretary of the Navy:

> No one can be sure today [*1943—ED.*] just what duties were performed by that Solicitor during his sojourn in the Navy. It is reasonably clear that legal work as we know it today was almost non-existent.

(continued...)

Digitized by Google

Congressional opinion as to Bolles's duties differed markedly. Only a handful of representatives in the House could recall his name during the floor debate when his office was abolished. Misconception as to his responsibilities abounded. One representative claimed that he knew of his own personal knowledge that the Solicitor had prosecuted courts martial in San Francisco, Boston and New York. This was immediately challenged by a member of the Naval Affairs Committee of the House who said that the Solicitor had never been to those places. The only undisputed point appeared to be a statement by Representative Harris that the Solicitor had been employed in reviewing court martial transcripts for the Secretary of the Navy (see footnote 4-152) although, as we have seen, he did not assume this role until 1877 (see page 166).

It also appears that Solicitor Bolles failed to supervise or review the award of numerous questionable procurement contracts, resulting in the unauthorized placement of millions of dollars' worth of Navy business.[4-164] Whether he neglected this responsibility, or was denied the opportunity to assume it, was hotly debated on the House floor. In the end, Congress determined that procurement matters would be best left to the Attorney General, with assistance from the Navy Secretary's staff of clerks.[4-165]

In truth, Bolles, having no statutorily defined duties, and his office having long out-lived the purpose for which it had been established, did

---

4-163. (...continued)

H. Struve Hensel, memorandum to file, Subject: "The Judge Advocate General is not the exclusive 'lawyer' of the Navy—An answer to the Judge Advocate General's memoranda of April 25 and July 10, 1941," 27 March 1943, at 3.

Secretary Thompson continued his support for either the office or the man to the very end. When a Senate Committee requested a compilation of laws on Navy pensions, Secretary Thompson declined, noting that Bolles had fallen critically ill and that he (Thompson) would not entrust the assignment to any other officer of the Navy Department. "Letters to Congress [sent by the Secretary of the Navy and others], 1798 to 1886," Naval Records Collection, Record Group 45, National Archives, letter dated 17 May 1878.

4-164. "When these five millions of spurious contracts were foisted upon the country your naval solicitor never supervised one of them." Representative Durham of Kentucky, in *Congressional Record*, 45th Cong., 2d sess., 3 May 1878, at 3160.

4-165. *Congressional Record*, 45th Cong., 2d sess., 3 May 1878, at 3158-60.

Digitized by Google

only what he was asked by the Secretary to do.[4-166] In the twilight of his tenure this comprised primarily the review of court martial records. Now, with the Solicitor's office abolished, Secretary Thompson had lost his only court martial reviewer. Unless he could fill the void, much of that burden would fall back upon him, at a time when commercial matters preoccupied his time. Recognizing that he would not get Congress to change its mind, the Secretary became pragmatic. While he could not secure an appropriation for a separate civilian officer, he could, on his own authority, designate someone already in the naval service to perform the burdensome court martial-related duties. The stage was set for the appointment of the Navy's first uniformed Judge Advocate General.

4-166. Judge Advocate General Latimer concurred in this assessment:

> Before [1880] the records of proceedings of courts-martial, courts of inquiry, boards for the examination of officers for promotion, retirement, etc., had been handled by the Bureau of Navigation, the naval solicitor only advising the Secretary of the Navy and the bureaus of the department upon questions of law when called upon.

Report of the Secretary of the Navy, 1923, at 166.

Digitized by Google

Digitized by Google

CHAPTER 5

THE FIRST UNIFORMED JUDGE ADVOCATE GENERAL
1878 to 1892

He will be forgiven much of the mischief he has done if he succeeds in getting us a Navy.—COMMENT IN THE *NEW YORK WORLD* UPON THE APPOINTMENT OF WILLIAM E. CHANDLER AS SECRETARY OF THE NAVY IN 1882

On 2 July 1878, a bare two weeks after the Naval Solicitor position had been abolished, Navy Secretary Thompson issued the following circular by which he administratively created the position of "acting Judge Advocate," a position he could fill by detail without need of Congressional approval:

> 1. All matters submitted to the Secretary of the Navy involving questions of law or regulations will be referred by him or by the chief clerk of the Department, acting under his order, to the proper Bureau, or clerk, for the ascertainment and report of the facts in the case, and on the receipt of a written report of the facts the Secretary of the Navy will refer the matter to the acting Judge Advocate for a report on the question of law, or regulation, which may be involved.
>
> 2. All summary and general courts-martial will be briefed by the proper clerk and laid before the acting Judge Advocate for examination, report, and recommendation to the Secretary of the Navy.
>
> 3. Reports of examining and retiring boards will be referred to the acting Judge Advocate for report to the Secretary of the Navy, whether they are correct in form and

Digitized by Google

> substance, and whether the evidence sustains the finding.[5-1]

This circular was markedly different in tone from that of the previous year.[5-2] Gone was any reference to a "Solicitor," and its civilian, professional-lawyer connotations. The Judge Advocate was to report on questions of law or regulations, but only after such matters had been sifted through other "proper" bureaus or clerks for a factual analysis. The emphasis was upon personnel and disciplinary matters, the kinds of questions traditionally handled by men in uniform. The review of court martial transcripts was specifically included—the new Judge Advocate would obviously be expected to relieve the Secretary of this burden. No doubt mindful of the Congressional criticism which had precipitated abolition of the Naval Solicitor's office, the title given this new position was simply "Judge Advocate," rather than the grander and more authoritative title "Judge Advocate General."[5-3] To assuage the keepers of the fisc, the Judge Advocate, whoever he might be, would be appointed from the ranks, and in an acting capacity only, clearly giving the position a temporary flavor. To fill the position of acting Judge Advocate, Secretary Thompson designated a thirty-six-year-old Marine Corps officer, Captain William Butler Remey.[5-4]

5-1. Navy Department, *General Orders and Circulars Issued by the Navy Department from 1863 to 1887*, comp. M.S. Thompson (Washington, D.C.: Government Printing Office, 1887), 172.

5-2. Circular of 14 March 1877. See page 167.

5-3. William Tudor, the first Judge Advocate General of the Army, was initially appointed as Judge Advocate of the Army, on 29 July 1775. The title of his office was changed to Judge Advocate General of the Army on 10 August 1776. U.S. Army Judge Advocate General's School, *The Army Lawyer: A History of the Judge Advocate General's Corps, 1775-1975*, comp. Paul F. Hill (Washington, D.C.: Government Printing Office, 1975), 7, 11. See footnote 2-22 and accompanying text.

5-4. The reader will recall from the discussion in Chapter 4 that, among the uniformed ranks, Marine Corps officers had handled the lion's share of court martial prosecutorial duties until the mid-1870s, and were by far more experienced in court martial procedure than Navy officers of the line. Thus, the appointment of the (continued...)

Digitized by Google

Portrait photograph of Colonel William B. Remey, USMC, first Judge Advocate General of the Navy. (Office of the Judge Advocate General of the Navy)

Although not a lawyer, Remey was no stranger to military justice; indeed, his experience in this arena was impressive. He began his Marine Corps service in 1861 when, at the age of 19, he was commissioned a second lieutenant.[5-5] During the next several years, at various duty

---

5-4. (...continued)
Marine, Captain Remey, was a logical choice.

5-5. Much of the biographical material on William Butler Remey is taken from Homer A. Walkup, *History of U.S. Naval Law and Lawyers* (Prepared on the occasion of the ninetieth anniversary of the establishment of the Office of the Judge Advocate General of the Navy, 1970), 6-9, and from Charles Mason Remey, "Reminiscent of Colonel William Butler Remey, United States Marine Corps, 1842-1894, and Lieutenant Edward Wallace Remey, United States Navy," (1955, Library of Congress CS 71 R386 1957a), 14-28. Biographical material on Colonel Remey will also be found in John Howard Brown, ed., *Lamb's Biographical*
(continued...)

Digitized by Google

stations, Remey frequently served as a judge advocate at courts martial.[5-6] In 1870 he was appointed acting Judge Advocate of the Marine Corps, serving in that capacity until 1873, during which time he was promoted to the grade of captain. After a tour aboard the *USS Colorado*, where he held the billet of Captain of Marines, Remey returned to his prosecutorial duties as Judge Advocate of the Marine Corps, holding that post until the latter part of 1875. Following additional tours at sea and ashore, Remey was ordered to report to Washington for duty as a member of the Board of Inspection. He arrived in May 1878.

Remey's arrival at this time was serendipitous, coming as it did shortly before the death of Solicitor Bolles, and abolition of the Naval Solicitor's office. And, while the timing of his arrival was coincidental, it is unlikely that his appointment was by chance. Remey was ideally suited for the role of acting Judge Advocate, and the position offered him an opportunity to pursue an interest in law which had developed over the years.[5-7] It is probable that he spent the month of June, 1878, negotiating his acceptance of the position and, probably, participating in the drafting of the July circular.

The issues which Remey addressed during the two years in which he served in an acting capacity (1878-1880) were strictly of a disciplinary nature, essentially reviewing court of inquiry and court martial records for

---

5-5. (...continued)
Dictionary of the United States, 7 v. (Boston: James H. Lamb Company, 1900-1903).

5-6. For example, in 1866-1867, Remey tried a number of cases, both in California (at Mare Island Naval Shipyard and embarked aboard ship), and at the Washington Navy Yard. He continued to try cases on behalf of the Navy and Marine Corps until his 1878 appointment as acting Judge Advocate. Prior to 1870 and the Department of Justice Act, Remey generally tried enlisted men rather than officers, prosecution of the latter being more often conducted by civilian lawyers. After 1870 Remey prosecuted both officer and enlisted personnel. See "Records of Proceedings of General Courts Martial, February 1866-November 1940," Naval Records Collection, Record Group 125, National Archives, Washington, D.C.

5-7. Remey enrolled in a night course in law at the Columbian College, which later became a part of George Washington University. There is no indication that Remey ever received a degree in law; apparently he was satisfied simply to pursue those areas of the discipline which interested him.

Digitized by Google

procedural, evidentiary, and jurisdictional errors.[5-8] All other legal affairs were handled by the Secretary of the Navy, and included contractual matters, issues of title to and waste of land, claims against the Navy, personnel transfers and tenure, appointment of rank upon retirement, assignment of rank, admiralty questions, and navigational rulings. When legal questions arose in connection with such matters, the Secretary turned not to the acting Judge Advocate, but to the Attorney General of the United States.[5-9]

In truth, there was not a great deal of business going on in the Navy at this time:

> During 1877-81 the Navy touched its low-water mark, with fewer improvements under President Hayes than during any administration since that of Jefferson. . . .
>
> This was a period of differences of opinion among the experts. A revolution was going on between wood and iron, between iron and steel, between steam and wind, between armored and unarmored ships, between ordnance and armor, and between ships and torpedoes, which had yet to be decided. During the period 1866-81 Congress authorized not a single new vessel . . . .[5-10]

5-8. "Letters Sent [by] Colonel William B. Remey, USMC, Acting Judge Advocate General, later Judge Advocate General, December 1879-January 1883" (title on binding: *Letter Book, No. 1*), Naval Records Collection, Record Group 125, National Archives, Washington, D.C.

5-9. "Letters Sent by the Secretary of the Navy to the President and Executive Agencies, 1821-1886," Naval Records Collection, Record Group 45, Microfilm Publication M472, National Archives, Washington, D.C.

5-10. Department of the Navy, "A Brief History of the Organization of the Navy Department, Prepared by Capt. A.W. Johnson, United States Navy" (1940), Doc. No. 284, at 2299-2300. Captain Johnson apparently overlooked the Act of 10 February 1873 by which Congress authorized the construction of eight ships. See footnote 5-33.

Digitized by Google

Secretary of the Navy William H. Hunt (1881-1882) observed in his 1881 Annual Report that "Unless some action be had in . . . behalf [of the Navy] it must soon dwindle into insignificance."[5-11]

Notwithstanding the lack of commercial and procurement matters to otherwise occupy the Naval Establishment, Remey found challenge in the naval justice matters with which he was charged, and thrived in the Judge Advocate billet.[5-12] During the two years he occupied the position he worked toward giving it both greater stature and permanence. He enjoyed considerable social and political influence, which no doubt helped to advance his cause.[5-13] His efforts were rewarded with passage of the following statute on 8 June 1880:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the President of the United States be, and he is hereby, authorized to appoint, for the term of four years, by and with the advice and consent of the Senate, from the officers of the Navy or

---

5-11. Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1881, at 1.

5-12. Remey may not have been overly-challenged. His nephew, Charles Mason Remey, wrote:

> Life was easy and relaxed and the officials of the Government enjoyed themselves. For three months in the summer most of them were away at the resorts and even those clerks who had but one month vacation . . . and an allowance of one month's sick leave had things very easy. Office hours were from 9:00 A.M. to 4:00 P.M. with time out for lunch.

Remey, "Reminiscent of Colonel William Butler Remey," 20.

5-13. Remey was a member of the elite Metropolitan Club, where he took his meals with military, political and diplomatic officials. According to his nephew, "Uncle Will was the ladies man of his generation of the [Remey] family, a beau about Washington where he was very popular socially. . . . He drove a snappy one horse high trap in the late afternoons and he cut quite a figure about the town . . . ." Remey, "Reminiscent of Colonel William Butler Remey," 15.

Digitized by Google

> the Marine Corps, a judge-advocate-general of the Navy, with the rank, pay, and allowances of a captain in the Navy or a colonel in the Marine Corps, as the case may be. And the office of the said judge-advocate-general shall be in the Navy Department, where he shall, under the direction of the Secretary of the Navy, receive, revise, and have recorded the proceedings of all courts-martial, courts of inquiry, and boards for the examination of officers for retirement and promotion in the naval service, and perform such other duties as have heretofore been performed by the solicitor and naval judge-advocate-general.[5-14]

5-14. Act of 8 June 1880, 21 Stat. 164. The statute creating the position of Judge Advocate General of the Army, almost twenty years earlier, contained similar language:

> SEC. 5. *And be it further enacted,* That the President shall appoint, by and with the advice and consent of the Senate, a judge advocate general, with the rank, pay, and emoluments of a colonel of cavalry, to whose office shall be returned, for revision, the records and proceedings of all courts-martial and military commissions, and where a record shall be kept of all proceedings had thereupon.

Act of 17 July 1862, 12 Stat. 598.

The Army act also authorized the appointment of judge advocates for each army in the field, with military law, martial law, and personnel law responsibilities—the forerunner of the Army's Judge Advocate General's Corps. One of these judge advocates was Major John A. Bolles, the enigmatic Naval Solicitor. U.S. Army Judge Advocate General's School, *The Army Lawyer: A History of the Judge Advocate General's Corps, 1775-1975*, comp. Paul F. Hill (Washington, D.C.: Government Printing Office, 1975), 54.

The duties of the Judge Advocate General of the Army were restated from time to time as the Army was reorganized, but no substantive changes had been made as of 1880. See Acts of 28 July 1866 (14 Stat. 334), and 23 June 1874 (18 Stat. 244)

Digitized by Google

On the following day, 9 June 1880, President Rutherford B. Hayes appointed Remey to the position of Judge Advocate General of the Navy, whereupon the Marine captain immediately assumed the rank of Marine colonel.[5-15] Remey thus became the first uniformed officer to hold the post. He was the only Marine Corps officer ever to have done so; it has since been held continuously by uniformed Navy officers.

The wording of the bill (H.R. No. 2788) which ultimately became the Act of 8 June 1880 was little different from the final statute quoted above.[5-16] The House report and Senate debate which accompanied its

---

5-15. The statute provided that the officer assuming the position of Judge Advocate General of the Navy, regardless of his rank upon taking office, would hold the rank of captain in the Navy or colonel in the Marine Corps during his tenure. This provision appeared to have rankled the Commandant of the Marine Corps, who included the following pointed remark in his 1880 report to the Secretary of the Navy:

> After the [Civil] war the grade of brigadier-general was created and given to the commandant as a reward for the services of the Corps from its foundation. From motives of economy, Congress afterwards provided that this grade be again reduced to colonel, at which it now remains, two other officers in the Corps holding the same rank and receiving the same pay as the commandant.

Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1880, at 529 ["Report of the Colonel Commandant of the Marine Corps"].

5-16. The bill introduced in the House read as follows:

> *Be it enacted, &c.,* That the President of the United States be, and he is hereby, authorized to appoint, by and with the advice and consent of the Senate, from the officers of the Navy or the Marine Corps, a judge-advocate-general of the Navy, with the rank, pay, and allowances of a captain in the Navy or a colonel in the Marine Corps, as the case may be. And the office of the said judge-advocate-general shall be in the Navy Department, where he shall, under the direction of the Secretary of the Navy, receive, revise, and have recorded the proceedings of all courts-martial, courts of inquiry, and boards for the

(continued...)

Digitized by Google

passage reveal a consensus understanding that the principal duty of the office was the oversight of naval disciplinary and personnel matters, to be effected through review of the proceedings of the Navy's several courts and boards.[5-17] These were duties which we would expect to see assigned to the office; duties which were considered to be well within the ken of the non-lawyer officer-of-the-line. There was, however, ambiguity, and perhaps a lack of appreciation, as to what other responsibilities the office might ultimately carry.

The bill was reported out favorably by the House Committee on Naval Affairs on 10 March 1880. House Report No. 459 which accompanied the bill[5-18] specifically defined the personnel and disciplinary-related responsibilities of the office. Less specifically, but nonetheless unequivocally, it assigned the Judge Advocate General responsibility over those matters requiring an understanding of "the statutes, regulations, and established customs of the service" relating to "questions of law and regulation arising in the [Navy] department."

5-16. (...continued)

> examination of officers for retirement and promotion in the naval service, and perform such other duties as have heretofore been performed by the solicitor and naval judge-advocate-general.

Congressional Record. 46th Cong., 2d sess., 1880. Vol. 10.

The bill was introduced in the House at the request of Navy Secretary Thompson. It must be assumed that both he and Remey had a hand in drafting it. Secretary Thompson sent several letters to members of the Naval Affairs committees of the House and Senate in support of the bill. The letters were virtually identical; one appears as Appendix C.

5-17. "[I]t shall be [the Judge Advocate General's] duty, under the direction of the Secretary of the Navy, to receive, revise, and have recorded the proceedings of all courts-martial, courts of inquiry, and boards for the examination of officers for retirement and promotion in the naval service." U.S. Congress, House Committee on Naval Affairs, *Report on Solicitor and Judge-Advocate-General of Navy and Marine Corps*, 46th Cong., 2d sess., 10 March 1880, H. Rept. 459.

5-18. The full report appears at Appendix D. The report adopted the rationale for creating the office expressed in Secretary Thompson's letters to members of the House Naval Affairs Committee. Some portions are verbatim.

Digitized by Google

But House Report 459 became ambiguous regarding responsibility and authority beyond these parochial naval issues. For example, the report noted that the Navy should have a Judge Advocate General "to systematize the details of administration of law and justice in the Navy" (a task well within the competence of line officers), but then analogized the position to the Judge Advocate General of the Army, a professional lawyer-soldier,[5-19] and stated that the Navy Judge Advocate General would be expected to "discharge similar duties" to those discharged by the Army's chief lawyer.[5-20] Most confusing of all, while the report disavowed

---

5-19. Every officer who has held the position of Judge Advocate General of the Army, or its equivalent, since 1775, has been a lawyer, as have virtually all the officers who held subordinate positions of field army judge advocates. To achieve this nice marriage, the Army not infrequently appointed civilian attorneys to these posts, concomitantly commissioning them as Army officers. Incredibly, there was no legal requirement that the Judge Advocate General of *any* service be a qualified lawyer until 1951, when such a qualification was made requisite in conjunction with implementation of the *Uniform Code of Military Justice*. See U.S. Congress, House Committee on Armed Services [*Report on the Uniform Code of Military Justice*], 81st Cong., 1st sess., 28 April 1949, H. Rept. 491.

5-20. The House may have intended to refer to the limited duties set out in the 1862 act which established the office of the Judge Advocate General of the Army. See footnote 5-14. By 1872, however, the Judge Advocate General of the Army had assumed rather extensive and sophisticated legal duties. These were described by Brigadier General Joseph Holt, the Judge Advocate General at that time, as including:

> The review of cases tried by military courts; the reporting upon applications for pardon or clemency submitted by officers and soldiers sentenced by courts martial; the furnishing of written opinions upon questions of law, claims, etc., referred by the Secretary of War, etc., as well as in answer to letters from officers of courts martial and others; the framing of charges and the acting by one of its officers, in cases of unusual importance, as judge advocate of military courts; and the direction of the officers of the *corps* of judge advocates. (Italics added).

While the above duties involved primarily military justice matters, Holt amplified them with the following:

(continued...)

Digitized by Google

any Congressional intent "to revive the office of Naval Solicitor," the final clause of the statute stated that the incumbent of the office would "perform such other duties as have heretofore been performed by the solicitor and naval judge-advocate-general," a position which had been held only by civilian lawyers.[5-21] This wording proved to be an

---

5-20. (...continued)

> [A] leading part of these duties, certainly since the establishment of the office in 1862, has been the preparing and furnishing of legal opinions upon various subjects of military law and administration constantly arising in the War Department and in the Army . . . .
>
> Of the questions upon which opinions are given by the judge advocate general, some—often at his suggestion—are subsequently submitted to the Attorney General, but the great mass are at once acted upon by the Secretary of War.

U.S. Army Judge Advocate General's School, *The Army Lawyer*, 69-70.

More detail as to the duties of the Army Judge Advocate General's Department is available in two books by William McKee Dunn, Judge Advocate General from 1875 to 1881, both titled *A Sketch of the History and Duties of The Judge Advocate General's Department, United States Army, Washington, D.C.* (Washington, D.C.: McGill & Witherow, 1876 and 1878).

Compare Holt's rather expansive view of the scope of responsibility and authority of the Army Judge Advocate General with the belief held by Congress in 1870 that this officer would be "limited, as the law under which he was appointed designed he should be, to the mere supervision of the records and proceedings of military courts-martial . . . ." See text beginning on page 149.

On 5 July 1884, Congress consolidated the Army's Bureau of Military Justice and Corps of Judge Advocates under the title of the Judge Advocate General's Department. At the head was the Judge Advocate General, followed by an Assistant Judge Advocate General, three Deputy Judge Advocates General, and three judge advocates. 23 Stat. 113.

5-21. While we saw in Chapter 4 that the duties of the Naval Solicitor were ofttimes not readily defined, it was clear nonetheless that his were generally duties contemplated to be performed by a professional attorney. The reason stated in the report for not reviving the Solicitor's office was that the office had been "unsuited to the requirements of the naval service." There was no further explanation as to this finding of unsuitability, but we may assume that the locus of the office in the Department of Justice, where the Secretary of the Navy lacked direct control over it,

(continued...)

Digitized by Google

intermittent source of confusion and conflict for the next sixty-five years, leading to schisms in the Office of the Judge Advocate General as well as the Navy Department itself.

The Senate, in approving the bill, acted on Navy Secretary Thompson's 7 January 1880 letter to Senator McPherson (see Appendix C) in place of a committee report. Floor debate revealed concern over the cost of the proposed office (Sen. McPherson); a startling lack of comprehension as to its purpose (Sen. Saulsbury); but only little amplification as to the intended scope of the Judge Advocate General's duties (Sen. Jones):

> SEN. MCPHERSON. . . . The pay proposed here is the pay of colonel in the Marine Corps or of a captain in the Navy. If a colonel in the Marine Corps is taken it will not increase his pay one single dollar; it will not add to the expense of the Department as it would if you took a man from civil life with a salary, I suppose, of $4,000 or $5,000 a year, and you would not secure the necessary talent at a much less sum. . . .
>
> SEN. SAULSBURY. Is it not now in the power of the Secretary of the Navy to detail officers to act as judge-advocates before naval courts-martial? I happen to be personally acquainted with a lieutenant in the Navy who has been so detailed. . . .
>
> SEN. JONES. . . . I am very well convinced that there is a great necessity for an officer of this rank [Navy captain or Marine Corps colonel] . . . who can bring to that position something beyond the average ability; . . . . Our committee find constant occasion to call on the Department in regard to . . . looking into the merits of applications for restoration to the naval service and involving nice

5-21. (...continued)
was a major consideration.

Digitized by Google

> questions of law; and we have not the time to go into all those things. It is necessary that there should be an officer there to prepare the cases and send them to the committee with the opinion of the Department in regard to them, so that we may act intelligently.[5-22]

The Judge Advocate General was empowered to hold the status of a bureau chief during the term of his office, following which he was to "go back again into his corps and take the same rank he held when he was appointed to this position."[5-23]

Within days of the statute's enactment, Secretary Thompson, by Circular of 28 June 1880, rescinded the Circular of 2 July 1878, and set forth revised procedures for operation of the Judge Advocate General's office:

> The Circular issued by the Department under date of July 2, 1878, in relation to the office of Acting Judge Advocate, is hereby rescinded; and the following rules for the transaction of the business appertaining to the office of the Judge Advocate General of the Navy, as established by the Act of June 8, 1880, will hereafter be observed:
>
> 1. All matters submitted to the Secretary of the Navy, involving questions of law or regulation will be referred by him, or by the chief clerk of the Department acting under his order, to the Judge Advocate General for examination and report.
>
> 2. The Chiefs of the several Bureaus and other offices connected with the Navy Department, and the clerks in the Secretary's

---

5-22. *Congressional Record*. 46th Cong., 2d sess., 1880. Vol. 10.

5-23. *Congressional Record*. 46th Cong., 2d sess., 1880. Vol. 10.

Digitized by Google

> office, will furnish the Judge Advocate General, upon his application, by reference of papers or otherwise, with all such facts and information from the books or records bearing upon any case or cases under consideration by him as he may require.
>
> 3. The records of all general and summary courts-martial, courts of inquiry, and boards for the examination of officers for retirement and promotion will be filed in the office of the Judge Advocate General.[5-24]

While this circular established slightly different procedures for operation of the office from those in the 1878 circular, it did not expand the authority of the Judge Advocate General. In fact, the only part which appears to go beyond the scope of naval justice matters is paragraph 1 ("All matters . . . involving questions of law or regulation will be referred . . . to the Judge Advocate General for examination and report."). Comparison with the 1878 circular, however, shows that the two are virtually identical in wording on this point, and we know that the Judge Advocate, acting under the 1878 circular, was strictly confined to naval justice and personnel matters.

Concurrently with the circular there was issued General Order No. 250. Intended to inform the naval service of the new act and set forth guidance for its implementation, the General Order made reference to the performance by the Judge Advocate General of the "duties as have heretofore been performed by the [Naval] Solicitor." This served to perpetuate the ambiguity as to the scope of the Judge Advocate General's authority. Note the italicized wording in the following excerpt from General Order 250:

> In accordance with the law . . . and with a view of defining more particularly the duties and functions of the Office of Judge Advocate General of the Navy, it is hereby ordered—

5-24. *General Orders and Circulars, 1863 to 1887*, at 182.

Digitized by Google

> *First*. The Judge Advocate General shall receive, revise, report upon, and have recorded the proceedings of all courts-martial, courts of inquiry, and boards for the examination of officers for retirement and promotion in the naval service, and *perform such other duties as have heretofore been performed by the Solicitor* and Naval Judge Advocate General.[5-25] (Italics added.)

We will see in later chapters the substantial (and ultimately misplaced) reliance placed on this phrase. During World War II, for example, the Judge Advocate General seized on the wording in an unsuccessful attempt to retain the extensive jurisdiction over legal matters that his office had by that time acquired (see text beginning at page 368). Two decades later a Navy training publication advanced it as the basis for a thesis that the legal scope of the Judge Advocate General's office was virtually all-inclusive:

> [I]t is quite obvious from the statutory passage imposing upon the Judge Advocate General the duty to "perform such other duties as have heretofore been performed by the Solicitor and Naval Judge Advocate General" that it was intended to make the field of the Office of the Judge Advocate General coextensive with all legal matters, of whatever kind, affecting the interests of the Navy.
>
> The term Solicitor employed along with that of Judge Advocate General indicates concern with civil as well as military practice and it was certainly within memory of the Congress of 1880 that Solicitor Wilson had dealt continually with contractual and similarly

---

5-25. *General Orders and Circulars, 1863 to 1887*, at 182-83. A copy of the full order, as it appeared in compilation, is reprinted at Appendix B.

Digitized by Google

> [*sic*] commercial questions in the latter days of the Civil War, while subsequent incumbents in the office of Solicitor and Naval Judge Advocate General were known to have handled habitually the widest assortment of cases by no means confined to those rooted in traditionally naval sources.[5-26]

The text went on to state that "Great weight is lent this contention by the . . . report of the House Committee on Naval Affairs [*House Report 459—ED.*] accompanying the bill ultimately enacted into law as the Act of June 8, 1880 . . . ."[5-27] House Report 459, however, was virtually a paraphrase of Secretary Thompson's letters advocating establishment of the office, and contained little to indicate an independent analysis of its function by the House committee. When, in 1943, a House subcommittee re-examined the matter, it challenged the foregoing thesis, and endorsed the opinion that it was "impossible to determine just what duties were 'performed prior to June 8, 1880, by the Solicitor and Naval Judge Advocate General.'" The opinion went on to state that

---

5-26. Bureau of Naval Personnel, *Office of the Judge Advocate General—Duties, Organization and Administration,* NAVPERS 10843-A (Washington, D.C., Bureau of Naval Personnel, 1961), 3-4.

The foundation for the thesis advanced in the publication appears to be shaky. A review of the annual appropriations debates for the Office of the Solicitor and Naval Judge-Advocate General in the 1860s indicates little knowledge in Congress even at that time of the functions of its incumbent. Wilson, who served from about January 1864 to January 1865, never formally acquired the title of "Solicitor;" about the closest he came was "Special Counsel." His work was confined to prosecution of contract fraud cases, and there is no indication that he handled any contract or commercial law matters. By 1880 it was barely within the memory of the Congress as to what *the most recent* Solicitor (Bolles) had done while in office. It is unlikely that Wilson's activities would have been recalled.

5-27. The Judge Advocate General also relied on House Report 459 in a 1932 opinion wherein he stated that the Bureau of Supplies and Accounts had no authority to handle claims, since all matters of a legal nature had been placed under the cognizance of the Judge Advocate General by the 8 June 1880 act. Eugene H. Clay, Office of the Secretary of the Navy, memorandum to Secretary of the Navy, Subject: "Proposed Reorganization of the Navy's Law Business," 28 April 1941, at 5.

Digitized by Google

> there is nothing in the record indicating any intention to give the Judge Advocate General the exclusive authority—or, in fact, any authority—to render legal opinions or to handle the civil-law problems. How could such opinions be prepared by a nonlawyer?[5-28]

We can be fairly certain that Secretary Thompson, writing in 1880, was unaware of any involvement by Wilson with contractual or commercial matters, for it is unlikely that such involvement had ever existed. Nor is it likely that such duties were performed by Wilson's successor, Chandler. As for his understanding of Bolles's duties, we have seen in the previous chapter that Bolles was employed by the Secretary's office to a very limited extent, and that Secretary Thompson (who took office little more than a year before Bolles died) used him primarily to review courts martial. In retrospect it is probably correct to state that careless draftsmanship led to statutory ambiguity. There could have been no specific intent to give the non-lawyer, line-officer Judge Advocate General personal responsibility for performance of civil legal functions, the substance of which (if they existed at all) were for the most part

---

5-28. U.S. Congress, Personnel Subcommittee of the House Committee on Naval Affairs, *Report on the Reorganization of Procurement Procedures and Coordination of Legal Services in the Navy Department*, 78th Cong., 1st sess., 10 May 1943 (Washington, D.C.: Government Printing Office, 1943), 48, referring to opinion of H. Struve Hensel appearing as Exhibit Q to the report.

The subcommittee's reliance on the Hensel opinion may be somewhat misplaced. While records are incomplete, it is not "impossible" to determine the type of work which was done before 1880, at least in the cases of Wilson (1864-1865) and Chandler (1865). They were preoccupied with prosecuting contractors, Navy yard workers, and other civilians, in connection with frauds and larceny against the Navy. Wilson and Chandler personally tried some of the cases before *courts martial*, even though the defendants were civilians, and assisted in the indictments and trial of others in federal district courts. Their duties were definitely prosecutorial, and followed the Navy's habit to that point in time of employing professional civilian lawyers to try courts martial on behalf of the Navy.

Digitized by Google

unknown to Congress.[5-29] To paraphrase the statute, what was probably intended was to assign to the Judge Advocate General "such other duties *in connection with naval discipline, naval laws, and naval regulations* as have heretofore been performed by the Solicitor and Naval Judge Advocate General."

The ambiguity and legislative carelessness attending passage of the statute notwithstanding, traditional methods of operation remained in place to moderate the need for a professional attorney in the position of Judge Advocate General. These included: personal intervention in legal affairs by the Secretary of the Navy, who was usually a lawyer;[5-30] the employment of law school graduates and others with legal training as clerks in the Secretary's office;[5-31] referral of certain matters to the Attorney General of the United States; and, rarely, the employment of special counsel. Further militating against the need for a Judge Advocate General with commercial law credentials or civil law attainments was the state of the Navy in 1880 which (as we have noted at page 177), was not in a mode of expansion:

> [S]hortly after the Civil War, public and political interest in the Navy waned to the degree that by 1880 it appeared destined to

---

5-29. "The act [of 8 June 1880] was clear enough as to the duties of the JAG [*sic*] with respect to military law, but the last clause stating that he was to 'perform such other duties as have heretofore been performed by the Solicitor . . .' was ambiguous in that it required a constant referral back to what duties had been performed by the Solicitor . . . ." Julius Augustus Furer, *Administration of the Navy Department in World War II* (Washington, D.C.: Department of the Navy, Naval History Division, 1959), 638. Furer seems to assume that it would have been possible, through "constant referral back," to determine the duties of the Solicitor. The author respectfully disagrees with this assumption.

5-30. Twelve Navy Secretaries served between 1877 and 1908, by which time there had been established a staff of civilian attorneys in the Secretary's office. Of these twelve Secretaries, all but one were lawyers. The only non-lawyer was a businessman, Paul Morton (1904-1905).

5-31. For example, Edgar Welles, the son of Navy Secretary Gideon Welles and a Yale Law School graduate, was appointed as a legal clerk in the Navy Department toward the end of the Civil War. He was placed in charge of prize cases, a legally complex area. See page 135. He worked directly for the Secretary, and not for the Solicitor and Naval Judge Advocate General.

Digitized by Google

> ultimate extinction as an effective fighting force. The United States Navy descended to such a level of debility that unranked powers, such as Peru and Brazil, could boast stronger sea forces. This lamentable state of the United States fleet was matched by equally unfavorable personnel morale, and deplorable construction, repair, and dock facilities.[5-32]

In the eighteen years which passed between the end of the Civil War and 1883, a mere twelve keels were laid.[5-33] One ship, the *New York*, had

---

5-32. George W. Coutris, "Emergence of the New American Navy: 1880-1896" (master's thesis, Navy Department Library, Washington, D.C., 1966), I. The paper contains some startling revelations of the weakness of the American Navy after the Civil War, such as the following:

> [W]hen Admiral Balch undertook to make some kindly suggestions between [Peru and Chile], the Chileans simply told the American Admiral, and the American government through him, that if he did not mind his own business they would send him and his fleet to the bottom of the ocean. . . .
>
> . . . [T]he [Chilean ship] *Esmeralda* was capable of steaming at eight knots an hour from Chile to San Francisco without exhausting half its coal supply, and once there it could have blasted the Golden Gate city into submission with its high-powered guns. The Atlantic coast could have been subjected to similar terror. For example, the two Brazilian armored cruisers, *Riacheulo* and *Aquidaban*, could have reached New York harbor in ten days, and upon arrival they could have shelled the city without receiving any effective reprisal.

Coutris, "Emergence of the New American Navy," 25-26.

5-33. Construction was started on four small ships in 1867, remnants of the Civil War build-up. Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1867, at 148. Six years later the Act of 10 February 1873 authorized the Secretary of the Navy "to construct eight steam

(continued...)

Digitized by Google

laid in the stocks since 1865 and was still unfinished as of 1884.[5-34] At one point the patience of the Bureau of Construction and Repairs, awaiting Congressional authorization to continue the building of four monitors in private yards, ran out. The Bureau proceeded with the construction in *ad hoc* fashion. Admiral David D. Porter, critical of such action, but unable to intervene,[5-35] commented that "There is no other instance on record where ships of the Navy were built without authority of law, and the mode of construction left to the builders without a regular contract."[5-36]

Thus the Navy of 1880 had little need for a lawyer skilled in procurement, commerce or real estate matters. The legal concerns of greatest significance at this time were discipline and punishment.[5-37] The sailors of the fleet provided an abundance of grist for the discipline mill:

> [T]he typical seaman . . . represented the most undesirable and often vicious element associated with the Navy [which] became a

---

5-33. (...continued)
vessels of war with auxiliary sail-power, and of such class or classes as, in his judgment will best subserve the demands of the service, each carrying six or more guns of large caliber; the hulls to be built of iron or wood, as the Secretary may determine . . . ." 17 Stat. 423. The progress of their construction, or lack thereof, can be traced in the following Secretary of the Navy's annual reports to the President of the United States: 1879, at 25; 1880, at 524; 1881, at 256; 1882, at 145-46; and 1883, at 282.

5-34. Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1882, at 276-77. It was not uncommon, however, for ships to lay in the stocks for some period of time to permit green timbers to season.

5-35. The several Navy bureaus at this time led "a virtually independent existence save for the general supervision of the Secretary." Donald Mitchell, *History of the Modern American Navy* (New York: A.A. Knopf, 1946), 4.

5-36. *Report of the Secretary of the Navy*, 1881, at 97 ["Report of the Admiral of the Navy to the Secretary of the Navy"].

5-37. Of the Navy and Marine Corps personnel on active duty in 1881, both officer and enlisted, one of every 150 members was tried by general court martial. By way of comparison, one of every 850 members was tried by general court martial in fiscal year 1993.

Digitized by Google

> refuge for drunkards, degenerates, and vagabonds, who spent every free moment indulging in morally dissolute activities. The American Navy eventually came to be ignominiously stigmatized as a "vagrant" Navy. In addition, the seaman corps consisted primarily of foreigners who displayed gross negligence and irresponsibility toward their duties. Even worse, they contributed very heavily toward a high desertion rate.[5-38]

Although discipline was a major concern, its administration remained firmly under the hand of the line, requiring no intervention by professional lawyers. And if discipline and the processing of courts martial were the pressing legal issues of the day, William Butler Remey was well-equipped to handle them.

The range of Remey's responsibilities during the first few years of his tenure reflect his primary concern with disciplinary matters, and a secondary concern with personnel matters of an administrative nature. He reviewed the records of proceedings of all courts and boards held in the Navy. He was capable of detailed legal analysis, and could and did cite applicable civil and military legal precedents, Attorney General's opinions, and legal treatises on court martial procedures, including those of Hough, McComb, DeHart, and Harwood.[5-39] Reports by officers of alleged violations of regulations were commonly received, with requests that the Secretary convene general courts martial to try the purported offenders.

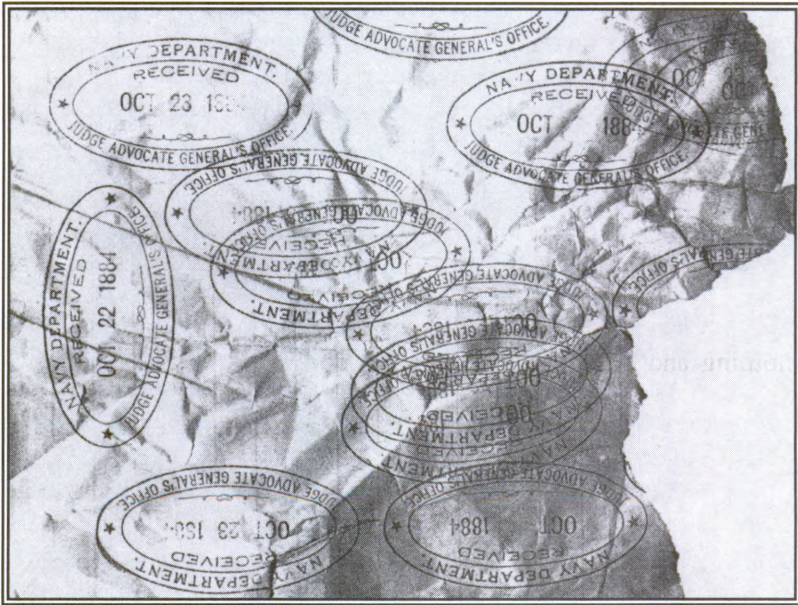
5-38. Coutris, "Emergence of the New American Navy," 8-9, citing George T. Davis, *A Navy Second to None* (New York: Harcourt, Brace and Company, 1940), 19; A.P. Cooke, "Naval Reorganization," *U.S. Naval Institute Proceedings*, 12 (13 October 1886): 500-502.

5-39. "Opinions issued by the Judge Advocate General, August 1878-April 1884" (title on binding: *Record, No. 1*), Naval Records Collection, Record Group 125, National Archives, Washington, D.C.

Digitized by Google

These reports invariably bore the stamp of the Secretary's office, "Referred to Judge Advocate Gen'l."[5-40]

Personnel and administrative issues with which Remey became



Until 1877, all records of trial received for review in the Department of the Navy were stamped by the Office of the Secretary. In 1877 and early 1878, some bore the stamp of the Solicitor's office (see footnote 4-154 and related text). Between 1878 and 1880 they again bore the Secretary's stamp. After Remey's appointment in 1880, only the Judge Advocate General's receipt stamp (shown above) appeared on records of trial received in the Secretary's office. (Markings appear on paper scrap found in "Records of Proceedings of General Courts Martial, February 1866-November 1940," National Archives)

concerned included pay and promotion questions, interpretations of Navy regulations, retirement matters, claims against the government, and even civilian personnel "reductions in force." Presaging things to come in the

---

5-40. "Letters Received [by the Secretary of the Navy], December 1879 to June 1883," Naval Records Collection, Record Group 125, National Archives, Washington, D.C.

Digitized by Google

Office of the Judge Advocate General, Remey offered limited advice on a claim for breach of contract by a supplier (Remey's legal analysis concluded that the contractor should present his claim to Court of Claims), and a claim for patent infringement in which Remey presented a sound legal analysis of patent law. Rounding out Remey's province was a smattering of admiralty issues.[5-41]

Other claims presented to the Secretary, and reviewed by Remey, include sundry letters from both Navy and civilian suitors seeking reimbursements, either for work or travel undertaken on behalf of the Navy, or because of an alleged wrong committed by the Navy Department or by Navy personnel. One in particular gives a flavor of the concerns of the day and the types of problems dealt with at the highest levels of the Navy; a claim by a Navy lieutenant commander to be reimbursed for his clothing and bedding which were destroyed to prevent the spread of yellow fever (Remey recommended approval of the claim).

The Secretary was also asked to adjudicate squabbles of the most petty nature. Perhaps the most trivial of these was a letter from a midshipman third rate requesting a ruling as to whether he was entitled to his choice of bunks on the starboard side of starboard steerage quarters because of his seniority. Almost as trivial was a dispute involving non-payment of a wardroom mess bill aboard the *USS Passaic*. Remey's recommendation: detach the offending officer. As with claims and requests to convene courts martial, such matters were stamped "Referred to Judge Advocate Gen'l."

Matters involving repayment of individual debts by officers also loomed large. There were a number of these cases throughout the documents, with significant pressure by the Secretary and the Judge Advocate General to get officers to pay their debts. Even child support appeared as a concern.[5-42]

In a matter which would seem to have involved legal analysis beyond Remey's ken, and which we would expect to have seen referred to the Attorney General, the commanding officer of the naval station at

---

5-41. See, generally, "Opinions issued by the Judge Advocate General, August 1878-April 1884," Naval Records Collection, Record Group 125, National Archives.

5-42. The issues noted here were found in "Letters Received [by the Secretary of the Navy], December 1879 to June 1883," Naval Records Collection, Record Group 125, National Archives.

Digitized by Google

Beaufort, South Carolina, inquired of the Secretary as to whether the civil authorities of South Carolina had the right to board a ship and arrest and take from the ship a crew member upon civil process. Perhaps because it was arguably related to discipline, the Judge Advocate General was asked to offer an opinion. Acting on the Judge Advocate General's advice, the Secretary wired the following response to the Commanding Officer:

TELEGRAM

IN THE CASE CITED IN YOUR LETTER OF THE SEVENTH INST, THEY HAVE. SEE STATUTES SOUTH CAROLINA.

WILLIAM N. JEFFERS
ACTING SECRETARY NAVY

On the other hand, when Secretary Hunt sought to retire the Chief of the Bureau of Navigation in the rank of commodore, rather than captain, which would appear to have been an administrative matter, he consulted the Attorney General. When that official responded in the negative, the Secretary suggested to the President in his Annual Report that Congress pass an act directing the bureau chief's retirement in the flag rank.[5-43] Nevertheless, with some exceptions such as this, the mode of operation of the Secretary's office for the next several years would be to assign matters of a naval character to the Judge Advocate General, and request the assistance of the Attorney General upon matters of a civil nature.

Remey's time during the early 1880s was taken up not just with court martial review, but with court martial administration as well. Because most general courts martial were convened by the Secretary, there was close, "real-time" coordination and control of their proceedings through use of telegraph communications. Instructions were often sent while court

5-43. *Report of the Secretary of the Navy*, 1881, at 26.

Digitized by Google

was in session on matters of such small detail as approval of adjournments and authorization to call witnesses.[5-44]

But even as Remey focused on disciplinary and administrative matters, the seeds of widening responsibility of the Office of the Judge Advocate General were being sown. Those seeds found nurturing soil in the period of naval expansion upon which Congress embarked in the early 1880s; a period of appropriations and ship building that would carry through to the First World War. The spark which ignited this expansion was the appointment of a Naval Advisory Board by Secretary Hunt in 1881, to determine the requirements of a modern Navy. This board, consisting of fifteen naval officers, recommended an ambitious building program which would equip the Navy by 1889 with 21 armored vessels, 70 unarmored cruisers, 20 torpedo boats, 5 torpedo gunboats, and 5 rams.[5-45] Upon presenting its proposals to the Secretary, the board disbanded.

Acting on the board's recommendations, Congress included in its 1882 appropriations act authorization for the construction of two steel-hulled "steam cruising vessels of war."[5-46] The act also directed the Secretary to establish a second Naval Advisory Board comprising five naval officers and two civilians. This board was to have general supervision of the newly authorized construction under the Secretary's direction. It was also to prepare plans for future vessels, and could block the construction of any proposed ship by withholding approval of the plans. In 1883 Congress modified its previous year's appropriation to

---

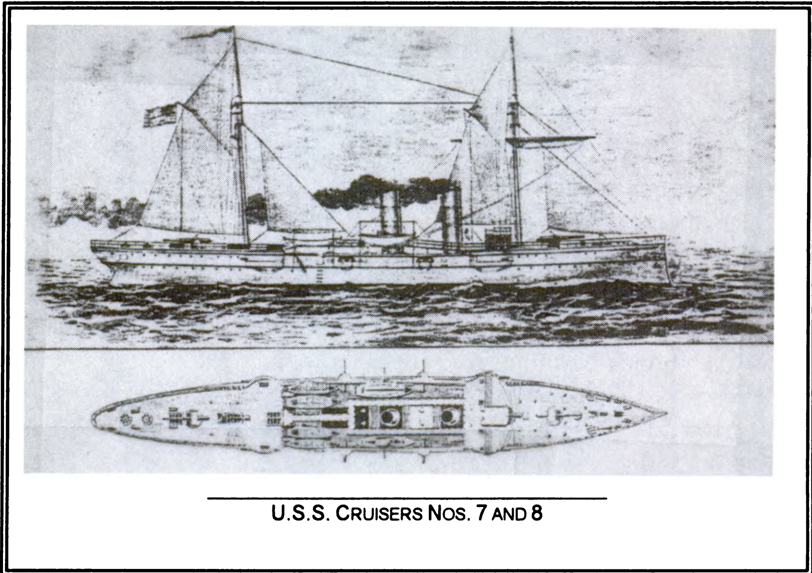
5-44. "Letters Sent [by] Colonel William B. Remey, USMC, Acting Judge Advocate General, later Judge Advocate General, December 1879-January 1883," Naval Records Collection, Record Group 125, National Archives.

5-45. *Report of the Secretary of the Navy*, 1881, at 27-38 ["Report of the Naval Advisory Board"]; "A Brief History of the Organization of the Navy Department, A.W. Johnson," 2303.

5-46. Act of 5 August 1882, 22 Stat. 291.

Digitized by Google

provide for construction of two smaller cruisers in place of the larger one which had been authorized, and appropriated funds for the construction of an iron dispatch boat.[5-47]



U.S.S. CRUISERS NOS. 7 AND 8

A sail-steam powered cruiser of the 1880s, of 3,000 tons displacement. Naval expansion in the latter part of the nineteenth century called for the construction of this hybrid form of ship, and began to impose commercial responsibilities on the Office of the Judge Advocate General of the Navy. (REPORT OF THE SECRETARY OF THE NAVY, 1889, opp. 497)

5-47. The four ships now authorized were to have full sail power as well as steam power. The cruisers were the first American-built warships ever constructed of domestically-produced steel. Acclaimed as the "nucleus of the new Navy," the *Atlanta*, *Boston*, *Chicago* and *Dolphin* were popularly called the "ABCDs." Act of 3 March 1883, 22 Stat. 477; Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1883, at 3-5; Walter R. Herrick, "William E. Chandler," ed. and comp. Paolo E. Coletta, *American Secretaries of the Navy*, 2 v. (Annapolis: Naval Institute, 1980), 1:399. Together with ships that followed they became known as the "White Squadron" because of their distinctive white-painted hulls. "A Brief History of the Organization of the Navy Department, A.W. Johnson," 2303.

Digitized by Google

Concurrently with this naval expansion, the Office of the Judge Advocate General began to take on a broader role. As the Navy grew and changed, legal issues became more numerous and complex, extending well beyond disciplinary matters. Because Remey was chief of the Navy's only "legal" office, he came to oversee the administration of such matters. The Bureau of Naval Personal summarized this widening of responsibilities thus:

> Expansion of naval programs undertaken shortly after the establishment of the Office of the Judge Advocate General required the performance of additional duties. Such matters as advertising, proposals, contracts, bonds, insurance, plans and specifications required legal handling. [These] . . . and other duties naturally fell to this office.[5-48]

While this statement is correct regarding the increased responsibilities placed upon the Office of the Judge Advocate General, it is misleading in its implication that the Judge Advocate General was himself equipped to handle such problems. Indeed, Remey was not expected to deal with them personally, nor necessarily to grasp their substance. His role was one of overseer or caretaker although occasionally, because of his interest in law and his training in legal fundamentals, and because of the exigencies presented by a Navy intent on expansion, Remey became involved in matters of legal substance extending well beyond naval discipline and administration. Aware of the pitfalls this situation presented, and recognizing the need for a person on his staff schooled in civil and commercial law, the Secretary stated in his annual report for 1884 that it would be impossible to continue to conduct the legal affairs of the Navy

---

5-48. Bureau of Naval Personnel, *Office of the Judge Advocate General—Duties, Organization and Administration,* NAVPERS 10843 (Washington, D.C.: Bureau of Naval Personnel, 1949), 2-3.

Digitized by Google

Department unless the position of solicitor were reestablished.[5-49] Despite this admonition the solicitor position was *not* reinstated, and it fell to the Office of the Judge Advocate General, by and large by default, to assume responsibility for much of the increased legal business which faced the Navy.

Indicia of the office's future growth came early in Remey's tenure. In 1882 he had forwarded to the Secretary a list of reference books which he had catalogued in his office. They totaled 239, a surprisingly large number for an officer whose primary duty was the review of Navy courts martial. Remey recommended that they be retained for "reference in the business of this office."[5-50] At about the same time, the Secretary requested funding for four clerks and one laborer in the Judge Advocate General's office.[5-51] While it is not stated whether any of these clerks were to have legal training, past practice in the Secretary's office would indicate that such was the case, and that these clerks would handle the civil and commercial law matters which crossed the desk of the Judge Advocate General.

5-49. Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1884, at 26. The Secretary's call for a resurrection of the solicitor's office in no way diminishes the importance attached to the duties and position of the Judge Advocate General. The Judge Advocate General was listed with the Secretary's office and ahead of all bureau chiefs in every edition of the *Navy Register* during this period of time.

5-50. "Letters Sent [by] Colonel William B. Remey, USMC, Acting Judge Advocate General, later Judge Advocate General, December 1879-January 1883," Naval Records Collection, Record Group 125, National Archives, letter dated 9 November 1882.

5-51. *Report of the Secretary of the Navy*, 1882, at 48. In 1881 and 1882 the office staff comprised only two clerks and the Judge Advocate General. *Register of the Commissioned and Warrant Officers of the Navy of the United States and of the Marine Corps to January 1, 1882* (Washington, D.C.: Government Printing Office, 1882), 9; Act of 5 August 1882, 22 Stat. 244. Funds for the additional employees requested by the Secretary were appropriated in the Act of 3 March 1883, 22 Stat. 555. Remey himself had written directly to Senator William B. Allison seeking an appropriation for more clerical help. "Letters Sent [by] Colonel William B. Remey, USMC, Acting Judge Advocate General, later Judge Advocate General, December 1879-January 1883," Naval Records Collection, Record Group 125, National Archives, letter dated 26 February 1881.

Digitized by Google

By statute the Judge Advocate General's specified responsibilities extended only to matters of a naval character. These additional, non-naval responsibilities, were assigned at the discretion of the Secretary of the Navy, falling within that amorphous realm of "other duties as have heretofore been performed by the solicitor and naval judge-advocate-general." Secretary Hunt seemed inclined to charge Remey with duties well beyond disciplinary matters. When William E. Chandler (1882-1885) assumed the office of Secretary on 17 April 1882, he brought a more parochial approach.[5-52] Most matters of a non-naval character were referred to the Attorney General. This included a significant number of claims against the Navy which were defended by the Attorney General in the United States Claims Court, as well as a few cases which we would expect to have seen Remey handle. This latter category included issues such as proceedings relating to the discharge of an ordinary seaman from the naval service; a salvage matter involving a Navy tug; discharge of a Marine Corps member; and administration of the Naval Asylum.[5-53]

Nevertheless, the Judge Advocate General slowly assumed added responsibility. Procurements, which had been handled through the bureaus and the Secretary's office, now received attention by the Judge Advocate General's office. After preparation of specifications by the appropriate bureau, clerks (initially in the Secretary's immediate office and later in the Office of the Judge Advocate General), prepared the advertisements for bids. The Secretary's immediate office oversaw the opening of bids and awarding of contracts, and the clerks in the Judge Advocate General's office then tailored the contracts to suit the award. (A standard form of contract, no doubt originally prepared by an attorney,

5-52. The reader will recall that Chandler had been the "Solicitor and Naval Judge Advocate General" for approximately four months in 1865. Whether this influenced his attitude toward the amount of responsibility which should be given the Judge Advocate General is strictly a matter of speculation.

5-53. "Letters Sent by the Secretary of the Navy to the President and Executive Agencies, 1821-1886," Naval Records Collection, Record Group 45, National Archives.

Digitized by Google

was used in these cases.) The Judge Advocate General's office then served as the repository of the completed contracts.[5-54]

Late in 1882 the Secretary's office took on an added dimension. An employee identified only by the initials "W.F.C." assumed the *de facto* role of general counsel for the Navy, providing legal advice and opinions to both the Secretary and the Judge Advocate General on virtually all manner of legal questions. As the Judge Advocate General received inquiries from the Secretary, he frequently referred them to "W.F.C." for legal analysis and opinion. In many cases the Secretary referred questions *directly* to "W.F.C.", bypassing the Judge Advocate General completely. Typical of referrals to "W.F.C." by the Judge Advocate General are the edited summary entries shown in the following illustration, from a ledger maintained at that time in the Office of the Judge Advocate General. The ledger bore on its binder the cryptic title, *Key to Letters Received*.[5-55] A substantial portion of the ledger consists of these summary records of inquiries received by "W.F.C." from the Secretary of the Navy, or the Judge Advocate General, and the disposition thereof. The first page is titled "Register of business referred to W.F.C. commencing Dec. 9, 1882."

5-54. All contracts were filed in the Returns Office at the Department of the Interior, as required by the Act of 2 June 1862. Following such filing they were returned to the Secretary's office where they were invariably stamped "Referred to Judge Advocate Gen'l".

5-55. "Register of Decisions of the Judge Advocate General, December 1882-November 1886" (title on binding: *Key to Letters Received*), Naval Records Collection, Record Group 125, National Archives, Washington, D.C.

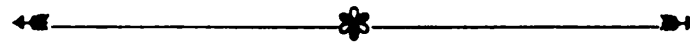
Digitized by Google

01/30/1883

From:	*Judge Advocate General [to W.F.C.]*
Subject:	*Communication from Chief of Bureau of Provisions and Clothing recommending rescission of a circular allowing commutation of parts of rations.*
Disposition:	*Brief submitted [by W.F.C.] to the Judge Advocate General, January 30 [1883].*

01/1883

From:	*Judge Advocate General [to W.F.C.]*
Subject:	*Claim by a whaling steamer for compensation in going to rescue of crew of USN ship.*
Disposition:	*[W.F.C.] drafted letter to Congress recommending an appropriation (letter personally approved by Secretary).*



01/15/1883

From:	*Judge Advocate General [to W.F.C.]*
Subject:	*Report against a sailor for smuggling liquor aboard a Navy ship.*
Disposition:	*[W.F.C.] prepared brief recommending proceedings by court martial. Drafted charges and specifications.*

Typical summary entries of inquiries from Judge Advocate General Remey to "W.F.C." (National Archives)

The tone of the entries in the ledger indicates that it was personally maintained by "W.F.C." during his tenure. He was probably a legal clerk and possibly even a lawyer. Whether he was assigned to the Secretary's

Digitized by Google

immediate office, or that of the Judge Advocate General, is not clear. If the latter, he appears to have been the first lawyer in the office of the uniformed Judge Advocate General of the Navy. What is clear is that "W.F.C." handled a complete range of legal problems. If he was in fact a subordinate of the Judge Advocate General, the implication is important, for it would mean that jurisdiction over all legal matters concerning the Navy—both civil and naval—would for the first time be consolidated in an office other than the immediate office of the Secretary.

"W.F.C." also became involved with disciplinary matters. He reviewed reports of alleged offenses, recommended the convening of courts martial, and drafted charges and specifications. The review of records of trial, however, remained the exclusive province of the Judge Advocate General.

The *Key to Letters Received* continues with a section titled "Record of Decisions, General Principles, Etc., Commencing December 1884." Here are recorded for reference informal opinions and decisions of the Secretary on all manner of subjects, including interlocutory rulings on courts martial, and legal guidance as to the conduct of courts martial. The tone of the document changes at this point, and it appears that "W.F.C." is no longer involved. Next follows a section summarizing judicial decisions and United States Attorney General decisions impacting on the Navy, and the ledger ends.[5-56]

Remey had been re-appointed to a second four-year term as Judge Advocate General of the Navy by President Arthur in 1884. Nevertheless, with "W.F.C." gone, Secretary Chandler again placed increased reliance on the Attorney General rather than his non-lawyer Judge Advocate General. The purchase of vessels, examination of title to land, land purchases, salvage matters, rates of pay for retired officers, and contract administration were typical of the civil and commercially-related matters for which the Attorney General's assistance was solicited.[5-57] So great was

5-56. The Judge Advocate General and his clerical staff undoubtedly played a role in drafting the court martial rulings and summarizing the judicial and Attorney General decisions.

5-57. "Letters Sent by the Secretary of the Navy to the President and Executive Agencies, 1821-1886," Naval Records Collection, Record Group 45, National Archives.

On one civil law question, however, Remey's opinion was sought; the (continued...)

Digitized by Google

this reliance that in 1885 the Secretary requested fifty copies of the Attorney General's *Digest of Opinions* "for issue to the libraries of ships-of-war."[5-58] Chandler even reverted to the Navy custom of employing civilian counsel to serve as judge advocates at courts martial. On 16 February 1885 he sent the following request to Attorney General Augustus H. Garland:

> Special legal assistance is required in this Department in an important Court-Martial Case shortly to be tried, which will occupy several weeks. I shall be glad to have you place at the service of this Department for this work some one of your assistants. If you are not able to do this, I desire that you will

---

5-57. (...continued)
propriety of expending appropriated funds for establishment of a naval war college. The Judge Advocate General determined that such an expenditure would be permissible. "Communications to the Secretary of the Navy, July 1885-February 1912, from the Judge Advocate General, Relative Chiefly to Matters of Discipline, Contracts, and Law" (title on binding: *Letters, Memoranda, Reports, Opinions, &c.*, and other titles), Naval Records Collection, Record Group 125, National Archives, Washington, D.C.

The reason Chandler sought Remey's opinion on the naval war college question may be more pragmatic than appropriate. Chandler determined to establish the war college over the objection of his bureau chicfs and most of the senior officers in the Navy, who dismissed the concept as "mere intellectual window dressing." Herrick, "William E. Chandler," ed. and comp. Coletta, *American Secretaries of the Navy*, 1:401. Anticipating a favorable ruling from his own Judge Advocate General, but not sure of the opinion which the Attorney General might render, he turned to Remey. On this somewhat shaky legal ground was founded the Naval War College on Coaster's Harbor Island in Newport, Rhode Island. Today the War College, on its original site, sits opposite another of the Navy's premier educational facilities, the Naval Justice School on Coddington Point.

5-58. "Letters Sent by the Secretary of the Navy to the President and Executive Agencies, 1821-1886," Naval Records Collection, Record Group 45, National Archives, letter dated 16 March 1885.

Digitized by Google

> authorize the employment of some special counsel whom I may select . . . .[5-59]

The "important Court-Martial Case" to which Chandler referred was the trial of Commodore Philip S. Wales, USN, the Surgeon-General of the Navy and Chief of the Bureau of Medicine and Surgery.[5-60] Attorney General Garland determined that he was unable to assign anyone from his department to assist with the trial, but authorized Chandler to employ special counsel. Chandler selected A.H. Cragin, a Washington, D.C. attorney, and former United States senator.[5-61] During the course of the trial, William C. Whitney (1885-1889) replaced Chandler as Secretary of the Navy. Whitney, being either unaware of previous pronouncements by Attorney General Garland, or perhaps hoping that gentleman would ignore the clear wording of the law, asked if he (the Secretary) could employ special counsel in courts martial "in his discretion and without application to the Department of Justice." Whitney should have let sleeping dogs lie. Not only did the Attorney General reaffirm previous opinions on this matter (see discussion beginning at page 154), he further stated that in

---

5-59. "Letters Sent by the Secretary of the Navy to the President and Executive Agencies, 1821-1886," Naval Records Collection, Record Group 45, National Archives.

5-60. "Records of Proceedings of General Courts Martial, February 1866-November 1940," Naval Records Collection, Record Group 125, National Archives, case no. 6639. At the time of Wales's trial in 1885 he held the relative rank of captain. He had been removed from the position of Surgeon-General and designated a medical director (without assignment) *Register of the Commissioned and Warrant Officers of the Navy of the United States and of the Marine Corps to February 1, 1885* (Washington, D.C.: Government Printing Office, 1885), 46.

5-61. Cragin's role at the court martial of Medical Director Wales was to assist the Navy judge advocate, Lieutenant (junior grade) Samuel C. Lemly, USN, who, in 1892, became Judge Advocate General of the Navy. Aside from the notoriety of trying the former Surgeon-General of the Navy, the Wales trial was noteworthy for another reason; an extraordinary technological breakthrough in court reporting procedures, the typewritten transcript. Until this time records of trial had been laboriously hand written, generally in ornate, but often difficult to read, script. An extensive sampling of handwritten records of trial can be found in "Records of Proceedings of General Courts Martial, February 1866-November 1940," Naval Records Collection, Record Group 125, National Archives.

Digitized by Google

those cases where special counsel was authorized, the Attorney General, and not the Secretary of the Navy, would henceforth make the selection of counsel.[5-62]

Whitney then balked at paying special counsel Cragin from Navy Department funds, and restated Secretary Chandler's earlier request to the Attorney General that he appoint a Justice Department lawyer and, implicitly, bear the expense. Before the Attorney General had a chance to respond, Medical Director Wales filed a writ of *habeas corpus* in federal court, forcing the Attorney General to intervene despite his efforts to remain aloof.[5-63] At this point the former Secretary, Chandler, stepped in, and prevailed upon Whitney to continue the services of special counsel Cragin. (The fact that Cragin agreed to continue at no additional compensation undoubtedly influenced Whitney's decision to continue him as special counsel.) Apparently not one to be deterred by past rebuffs, a few weeks later Secretary Whitney again requested the Attorney General to "place at the service of the [Navy] Department some one of your assistants" to serve as an assistant judge advocate at still another court martial.[5-64]

5-62. 18 Op. Atty. Gen. 138. Garland, the Attorney General, did state that this provision applied only to the employment of *special* counsel, thus leaving the clear implication that the Navy (and other agencies) might hire staff attorneys as they wished.

5-63. In the most proper protocol of the day, Whitney communicated the writ to Garland, stating:

> I have the honor to request that you take such steps, as may in your judgment, be necessary for the proper representation of the [Navy] Department upon the return of said writ and in the judicial proceedings connected therewith.

"Letters Sent by the Secretary of the Navy to the President and Executive Agencies, 1821-1886," Naval Records Collection, Record Group 45, National Archives, letter dated 10 April 1885.

5-64. "Letters Sent by the Secretary of the Navy to the President and Executive Agencies, 1821-1886," Naval Records Collection, Record Group 45, National Archives, letter dated 29 June 1885. The trial for which Secretary Whitney requested assistance was probably that of the Paymaster General of the Navy,

(continued...)

Digitized by Google

With Secretary Chandler's departure from office in March, 1885, and the assumption of the post by Secretary Whitney, Remey and his office settled into a routine. He was occupied primarily with naval matters: review of courts martial records; legal analysis of the jurisdiction of courts martial; interpretation of Navy regulations and directives as they applied to disciplinary matters; promotion questions; and interpretation and analysis of the Acts of 1799, 1800, 1862, Attorney General opinions, British precedent, and judicial decisions as applied to disciplinary matters. In addition to this business, however, the office continued to dabble in matters of a civil nature. Questions of the award of contracts,[5-65] minor contract administration, patent law issues,[5-66] and communications with United States Attorneys regarding litigation in United States District Courts fell under Remey's purview. It was not unusual for Remey's recommendations on a legal issue to contain a handwritten note at the end bearing Secretary Whitney's initials, stating that the Judge Advocate General's interpretation of the law was correct.[5-67] Remey's office also

---

5-64. (...continued)
Commodore J. Adams Smith, USN, which was held in July 1885. Once again Lieutenant (junior grade) Lemly served as the judge advocate. The Attorney General acceded to Secretary Whitney's request and assigned Assistant Attorney General William A. Maury to assist Lemly. "Records of Proceedings of General Courts Martial, February 1866-November 1940," Naval Records Collection, Record Group 125, National Archives, case no. 6758.

5-65. Procurement functions were scattered throughout the Navy, with no central control. The requirement to purchase by contract was often circumvented by a bureau certification that there existed an emergency which required an immediate purchase. Thus, Remey's responsibilities in this arena were not as great as might at first appear. See Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1885, at XXVII-XXXII.

5-66. Patent law issues arose in the context of protecting, for the Navy, designs and inventions developed by employees of the Navy Department, primarily related to nautical machinery and armaments.

5-67. Remey enjoyed substantial influence with the Secretary. His office, and those of his assistants and clerks, were adjacent to that of the Secretary, with porticos overlooking the White House. He also enjoyed being called "Judge" and "General" by acquaintances unfamiliar with the naval service. When his name was proposed for commandant of the Marine Corps, he indicated that he would prefer to remain in the Judge Advocate General's billet, "which office had been created for
(continued...)

Digitized by Google

developed several forms to be used in the course of the Navy's business. These included forms of contracts, surety bonds, and releases.[5-68] All other legal affairs, including major commercial issues, admiralty matters, and prize claims, were handled by the Department of Justice.[5-69]

By 1886 the Navy had fourteen new vessels commissioned or under construction, including twelve warships in excess of 1,000 tons displacement.[5-70] In the same year the Secretary could boast of a course of instruction in international law at the Naval War College.[5-71] This increase in the size of the Navy which occurred during the 1880s fostered a concomitant increase in the size of the Navy's bureaucracy. The files and records of the Judge Advocate General, which were combined at that time with those of the Secretary, now required the "constant attention of at least two clerks." The Secretary called for more help.[5-72]

In 1888 Remey was appointed for a third term by President Cleveland. The following year Secretary of the Navy Benjamin F. Tracy

---

5-67. (...continued)
him and where he could use his legal talents." Remey, "Reminiscent of Colonel William Butler Remey," 19-20.

5-68. "Communications to the Secretary of the Navy, July 1885-February 1912, from the Judge Advocate General, Relative Chiefly to Matters of Discipline, Contracts, and Law," Naval Records Collection, Record Group 125, National Archives.

5-69. See, for example, Secretary Whitney's discussion of the dispute over the contracts for construction of the *Atlanta*, *Boston*, *Chicago*, and *Dolphin*, including a determination by the Attorney General that the contract for construction of the last ship was null and void. *Report of the Secretary of the Navy*, 1885, at XXII-XXV. Whitney painted a bleak picture of the sea trials for all four ships. Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1886, at 5-6. His evaluation was dismissed as "a mere flight of political rhetoric" by his successor, Benjamin F. Tracy. Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1889, at 7.

5-70. Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1887, at VI-VII.

5-71. *Report of the Secretary of the Navy*, 1886, at 26.

5-72. *Report of the Secretary of the Navy*, 1886, at 29.

Digitized by Google

(1889-1893) called for a fleet of 100 vessels, including the United States Navy's first battleships.[5-73] To meet the procurement needs of this rapidly expanding Navy, the Office of the Judge Advocate General itself continued to expand. The Judge Advocate General now had a civilian staff of seven clerks, one copyist, and one laborer,[5-74] up from the original two clerks in 1881. Remey also had two uniformed line-officer assistants permanently assigned to his office.[5-75]

Tracy also called for a codification of the methods by which the Navy Department carried on its affairs. He implemented this design on 25 June 1889 with the issuance of General Order No. 372.[5-76] This order set forth in detail the manner in which "the business of the Navy Department will, under the direction and supervision of the Secretary, be distributed and conducted . . . ." Responsibility for the Navy Department's civil and commercial law affairs was specifically assigned to the Office of the Judge Advocate General, thus formally placing in that office cognizance over the legal functions it had assumed by default.[5-77] The Department's

---

5-73. *Report of the Secretary of the Navy*, 1889, at 11-12.

5-74. Act of 26 February 1889, 25 Stat. 734; Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1888, at 1.

5-75. *Register of the Commissioned and Warrant Officers of the Navy of the United States and of the Marine Corps to January 1, 1891* (Washington, D.C.: Government Printing Office, 1891). The first uniformed line officer assigned to assist Remey was Lieutenant (junior grade) Samuel C. Lemly, USN, in 1884. *Register of the Commissioned and Warrant Officers of the Navy of the United States and of the Marine Corps to July 1, 1885* (Washington, D.C.: Government Printing Office, 1885), 19. Thereafter, until early in the next century when the staff increased significantly, the number of officers assigned to the office (in addition to the Judge Advocate General) fluctuated between two and three. This number always included at least one Marine Corps officer.

5-76. Those provisions of General Order No. 372 which set forth the duties assigned to the Judge Advocate General appear in Appendix B.

5-77. Assignment of commercial and civil law functions to the Office of the Judge Advocate General marked the first time these responsibilities had been specifically assigned to any office of the Navy Department. Although no uniformed personnel in the Office of the Judge Advocate General, including the Judge Advocate General himself, were lawyers, and none had any expertise in civil or

(continued...)

Digitized by Google

bifurcated oversight of disciplinary matters, however, did not change. All questions with regard to discipline were to be submitted to the Bureau of Navigation for its action or recommendation, with that Bureau having charge of enforcement of the Navy's laws and regulations. The Judge Advocate General continued to be responsible for the procedural administration of courts martial, courts of inquiry, and personnel boards.

By 1890, Remey was requesting the designation of a chief clerk for his office.[5-78] The following year witnessed publication of the first trial guide to summary courts martial for naval officers, Lemly and Denny's booklet, *Navy Summary Courts-martial* (see footnote 3-159), which was in vogue for several years.[5-79] Navy discipline also caught the attention of the Secretary, who recommended that subpoena power be extended to naval courts martial and courts of inquiry to compel the attendance of civilian witnesses.[5-80]

In the spring of 1891 Remey became ill. His doctors attributed it to overwork, and ordered rest. He spent the entire summer in the mountains of Maryland, returning to work in the fall. The following spring, tragedy struck; Remey suffered a complete physical and mental breakdown.[5-81]

5-77. (...continued)
commercial affairs, the office employed clerks with legal training, some of whom were lawyers. It was these latter employees who were expected to attend to the civil and commercial matters. This is discussed in greater detail in the following chapter.

5-78. Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1890, at 43.

5-79. James Snedeker? "The Jurisdiction of Naval Courts" (unpublished manuscript, n.d.), 64.

5-80. Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1891, at 47. At the time, Army courts martial enjoyed subpoena power over civilians.

5-81. Remey, "Reminiscent of Colonel William Butler Remey," 25. If indeed the cause of Remey's breakdown was overwork, this is testimony to the acceleration in activity in the Navy Department which occurred during the last part of the nineteenth century. Compare this to the pace of activity which prevailed in the early years of Remey's tenure, described at footnote 5-12.

Digitized by Google

> One of Colonel Remey's first symptoms of insanity was his eccentric conduct at the Gilsey House, New York, in May, 1892. He walked into the hotel one evening in a pompous manner, and around his neck was a huge laurel wreath, while turned round his hat was an abundance of smilax. His hands were filled with bouquets of violets, tube roses and yellow rosebuds, and in the buttonholes of his coat and waistcoat were red and white roses. An acquaintance remarked to Colonel Remey in the cafe: "You resemble a walking nosegay, Colonel." Colonel Remey responded: "Yes, I suppose I do; but these are deserved decorations, honors bestowed, yet fully earned, sir." Then he distributed flowers to every woman who passed him on the street.[5-82]

Discrete enough not to print such an account while Remey was still in office (or even while he was alive), the *Army and Navy Journal* carried the following report signaling Remey's condition:

> The third term of Col. Wm. B. Remey, as Judge Advocate General of the Navy, will expire on June 12 next. Ill health, it is thought, may prevent his reappointment, and, acting upon that belief, the friends of other aspirants for that office have begun the campaign for the successorship. Any officer of the Navy or Marine Corps is eligible for the appointment. If selected from the Navy the officer is entitled to the rank and pay of captain; if from the Marine Corps the rank and pay of colonel. There is considerable legal talent in both Services to select from. Among

5-82. From the obituary for Colonel Remey which appeared in the *Army and Navy Journal*, 26 January 1895, at 359.

Digitized by Google

> those prominently mentioned in connection with the position are Capt. A.T. Mahan, Lieut. S.C. Lemly, who is now in charge of the office in the absence of Col. Remey; Lieut. Lauchheimer, M.C., an assistant in the office, and Paymr. Allen. The prevailing impression is that Capt. Mahan will receive the appointment.[5-83]

Remey retired on 4 June 1892 on his own application, receiving all benefits of the rank of colonel. On 8 June Secretary Tracy secured the appointment of Remey's assistant, Lieutenant Samuel C. Lemly, USN, to the position. Lemly thus became the second uniformed Judge Advocate General of the Navy, and the first naval officer to hold the post. Upon taking office Lemly assumed the Navy rank of captain. Inconceivably, both Remey's retirement and Lemly's appointment went unmentioned in the Secretary of the Navy's *Annual Report* to the President.

At the time of Remey's retirement, according to the *Army and Navy Journal*, insanity had developed. He died of pneumonia on 21 January 1895 in a sanatorium at Sommerville, Massachusetts. His nephew tells us that Navy and Marine Corps personnel from the Boston Navy Yard escorted his coffin from Sommerville to the Fitchburg Railway Station in Boston where, in the train shed, he received full military honors. His remains were taken to Burlington, Iowa, and interred in the Remey burial plot.[5-84]

5-83. *Army and Navy Journal*, 7 May 1892, at 642.

5-84. Remey, "Reminiscent of Colonel William Butler Remey," 26. Tragedy had earlier struck the Remey family. William's brother, Lieutenant Edward W. Remey, USN, had disappeared on 17 February 1885, with never an explanation as to his fate. He was dropped from the Navy's rolls as of that date with the remark, "Supposed to be dead." *Army and Navy Journal*, 26 January 1895, at 359.

Digitized by Google

Digitized by Google

CHAPTER 6

THE OFFICE GROWS
1892 to 1909

Who knows what noble sailors these waifs would some day have made after having passed through the reform school of the Navy?—**ADMIRAL OF THE NAVY DAVID D. PORTER, IN HIS ANNUAL REPORT TO THE SECRETARY OF THE NAVY, 18 JULY 1888, SUGGESTING A LOWERING OF RECRUITING STANDARDS TO ACCEPT WAYWARD CITY BOYS INTO THE U.S. NAVY AND "REFORM" THEM THROUGH NAVAL DISCIPLINE AND TRAINING**

At the time of Remey's retirement in 1892 his successor, Captain Samuel C. Lemly, USN, was serving in the Office of the Judge Advocate General as Remey's senior uniformed assistant. Also attached to the office were two other uniformed assistants, Marine Corps First Lieutenant Charles H. Lauchheimer, and Navy Ensign Wilford B. Hoggatt.[6-1] The *Army and Navy Journal* carried the following account of Lemly's appointment:

> We understand that Lieut. Samuel C. Lemly has been selected for the Judge Advocate Generalship of the Navy, vice Col. Remey, retired. We congratulate the appointing power, the service and the fortunate candidate on the selection. A year's experience in the office as assistant and a good portion of the time in charge has made him fully acquainted with the entire routine of this important branch of the Navy Department. His legal attainments are conspicuous, and it has not taken a good lawyer like Mr.

6-1. *Register of the Commissioned and Warrant Officers of the Navy of the United States and of the Marine Corps to January 1, 1893*, (Washington, D.C.: Government Printing Office, 1893), 145.

Digitized by Google

> [Secretary of the Navy] Tracy long to find that out. . . . Lieut. Lemly is so well known to the Service through his connection with all the important Courts-martial and Courts of Inquiry of recent years that a review of his record is entirely unnecessary. His appointment carries with it the rank and pay of captain—a promotion he well deserves.[6-2]

The "conspicuous legal attainments" of which the *Journal* spoke—Lemly's court martial and court of inquiry experience—related strictly to disciplinary matters (although Lemly had received some exposure to civil and commercial law matters while serving in the Judge Advocate General's office). Typical of Navy practice of the day, these attainments were not the product of any formal training. Rather, as was the custom for naval officers at that time, such attainments were the fruit of on-the-job experience.

For United States Navy officers in 1892, the operation of naval law was a discipline to be learned through trial and error rather than theory. It was, perhaps, too mundane a subject to be included in the stuff of a naval officer's formal education. Naval cadets (as midshipmen at the Naval Academy were then called)[6-3] received exposure only to the more prestigious disciplines of constitutional and international law,[6-4] the latter

---

6-2. *Army and Navy Journal*, 11 June 1892, at 734. In a previous issue the *Journal* noted that Lemly had received "strong endorsements . . . by persons most prominent in administration and Congressional circles . . . ." *Army and Navy Journal*, 28 May 1892, at 696.

6-3. The title "midshipman" was revived shortly after 1900. Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1899, at 152 ["Report of the Board of Visitors to the Naval Academy, 1899"].

6-4. Naval cadets studied the Constitution of the United States in their second year. In their fourth year they were schooled in international law. Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1892, at 94 ["Report of the Board of Visitors to the Naval Academy, 1892"].

Digitized by Google

being, in fact, the "customs of the sea" updated to the nineteenth century.[6-5] These teachings would serve them on the high seas and abroad.

The Marine Corps, on the other hand, adhered to its long-standing practice of placing its officers in the way of naval justice. The Marines established a "School of Application" for graduates of the Naval Academy assigned to the Marine Corps. The curriculum of the School of Application was intended to "supplement the course of the Naval Academy by instruction . . . in the administrative and military duties of the corps."[6-6] Students attended before joining other stations. The organization of the school included a department of law which taught

---

6-5. The curriculum description for international law read as follows:

> The objects, sources, and sanctions of international law; the laws of war, embargo, reprisal, and retortion; blockade; contraband of war; right of search; ship's papers and nationality; prizes; privateering; piracy; the rights and duties of neutrals; jurisdiction over vessels at sea and in territorial waters; fugitives and deserters; licenses to trade; recaptures.

Report of the Secretary of the Navy, 1892, at 94 ["Report of the Board of Visitors to the Naval Academy, 1892"].

6-6. *Report of the Secretary of the Navy*, 1892, at 641 ["Report of the Commandant of the United States Marine Corps"]. For officers taking commissions in the Navy, the course of undergraduate instruction extended for six years; four years at the Academy, followed by a two year probationary period at sea during which time naval cadets performed duties as officers on ships of the line, while nevertheless retaining their technical status as students. Upon successful completion of the two-year probationary period, cadets were commissioned as ensigns. See Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1894, at 121, 123, 130-33 ["Report of the Board of Visitors to the Naval Academy, 1894"]. Naval cadets were frequently called upon to act as recorders at summary courts martial during this probationary period, notwithstanding their lack of any formal training in naval law. "Communications to the Secretary of the Navy, July 1885-February 1912, from the Judge Advocate General, Relative Chiefly to Matters of Discipline, Contracts, and Law" (title on binding: *Letters, Memoranda, Reports, Opinions, &c.*, and other titles), Naval Records Collection, Record Group 125, National Archives, Washington, D.C., memorandum of Judge Advocate General Lemly dated 10 January 1898, at 2.

Digitized by Google

military law and courts-martial through "lessons supplemented by lectures." The law syllabus was remarkably complete, designed to equip the Marine Corps officer with the tools necessary to serve in virtually any naval justice capacity. In this respect the naval law course offered by the School of Application was not unlike the "non-lawyer" course offered at today's Naval Justice School.[6-7] The "Detailed Programme of Studies" for the law course read as follows:

> DETAILED PROGRAMME OF STUDIES
>
> Military law proper; the subject defined and divided; constitutional provisions; the written military law; the unwritten military law; the court-martial; the constitution and composition of general courts-martial; the jurisdiction of general courts-martial; the procedure of general courts-martial; arrest; the charge; assembling and opening of the court; the president and members; the judge-advocate; challenges; organization; arraignment, pleas and motions; the trial; evidence; the finding; sentence and punishment; action on the proceedings; the reviewing authority; summary courts-martial; courts of inquiry.[6-8]

6-7. The Navy incorporated a "military law" course into the Naval Academy curriculum in 1899, temporarily obviating the need for postgraduate study of the subject. (See discussion beginning at page 236.)

6-8. *Report of the Secretary of the Navy*, 1892, at 643 ["Report of the Commandant of the United States Marine Corps"].

The final examination given to students of the court martial course was short, subjective, and inclusive. It contained no true/false or multiple choice questions; it was designed to test a thorough working knowledge of the naval justice system:

III.—MILITARY LAW AND COURTS MARTIAL.

By whom may the several courts martial be appointed?

(continued...)

Digitized by Google

Notwithstanding a lack of formal legal training, Lemly was as well-equipped to handle the naval law functions of the Office of the Judge Advocate General as any officer of his time. An 1873 graduate of the Naval Academy, he had extensive sea-going experience, having served on the Atlantic Station, the Asiatic Station, the Pacific Station, and with the European Squadron. From October 1884 to April 1886 he had been assigned to the Office of the Judge Advocate General. The year before he had been attached to the Bureau of Navigation on "special duty," during

---

6-8. (...continued)

- Give the number of members required for each court martial.
- How do you determine the kind of court that has jurisdiction in each particular case?
- What is necessary to be stated in the specification as to the acts committed, as to persons and as to the time and place?
- What is a challenge, and how is a question of challenge decided?
- What is the arraignment of a prisoner, and at what stage of the proceedings does it take place?
- Give the various pleas which may be made.
- What is the purpose of cross-examination, and to what is it restricted?
- May depositions be read in evidence, and if so, under what circumstances?
- Describe the making up of the record as to its form and substance.
- What is the mode of procedure when the proceedings of a court are returned to it for revision?
- Define the word "evidence."
- State why hearsay evidence is not receivable.
- When may evidence of character be admitted?

Report of the Secretary of the Navy, 1892, at 649-50 ["Report of the Commandant of the United States Marine Corps"].

The School of Application was transferred from the Marine barracks in Washington, D.C., to the Naval Academy at Annapolis, in May 1903, because of the better training facilities available at the Naval Academy. Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1903, at 1216-1217 ["Report of the Commandant of the United States Marine Corps"]; Charles Oscar Paullin, *History of Naval Administration, 1775-1911* (Annapolis: Naval Institute, 1968), 466.

Digitized by Google

which time one of his primary assignments was to act as the judge advocate (prosecutor) at general courts martial. In a period of seven months, Lemly tried eight general courts.[6-9] This was significant, not only for the experience it gave Lemly, but because it marked a policy shift in the administration of naval justice. Heretofore Navy line officers generally sat only in judgment, as members of the court. Lemly was one of the first Navy line officers to serve as a judge advocate on a regular basis.

The courts martial tried by Lemly during this time literally spanned the globe. They included trials aboard ship in Hong Kong harbor, as well as trials at the Brooklyn Navy Yard, the Boston Navy Yard, and the Washington, D.C. Navy Yard. After being posted to the Judge Advocate General's office, Lemly received two major trial assignments; he prosecuted both the Chief of the Bureau of Medicine and Surgery, and the Paymaster General of the Navy (see discussion of these cases beginning at page 205).

While undoubtedly qualified to administer naval justice, Judge Advocate General Lemly also took over an office poised to assume full responsibility for the legal administration of the Navy's burgeoning commercial matters. The following sums up the shipbuilding fever which had overtaken the Navy Department by this time:

> When Grover Cleveland won the presidential election of 1892, pro-Navy hopefuls did not anticipate disaster for the naval cause as they had when Cleveland had been elected in 1884. Both Cleveland and his party had demonstrated during his first administration that they were firm friends of naval rehabilitation. Anticipation reached a high pitch in pro-Navy circles since the time appeared auspicious for heightened naval expansion, particularly in the area of battleship construction. President Cleveland's appointment of Hilary A. Herbert [1893-1897]

6-9. "Records of Proceedings of General Courts Martial, February 1866-November 1940," Naval Records Collection, Record Group 125, National Archives, Washington, D.C.

Digitized by Google

> of Alabama as Secretary of the Navy, and William McAdoo of New Jersey as Assistant Secretary of the Navy, confirmed the optimism of the battleship supporters in Congress, for Herbert and McAdoo accepted the Mahanian thesis that future American naval prowess was contingent on intensive battleship construction. Like Tracy, Herbert and McAdoo were steadfast disciples of Mahan.[6-10]

From the outset, Lemly's tenure in office was marked by the flurry of commercial activity which attended this continuing build-up in American naval power.[6-11] From a nation which stood behind unranked navies such as Peru and Brazil in 1880, the United States had risen by 1892 to the seventh strongest seapower in the world.[6-12] To administer the day-to-day legal details which this business of the Navy required, the Judge Advocate

---

6-10. George W. Coutris, "Emergence of the New American Navy: 1880-1896" (master's thesis, Navy Department Library, Washington, D.C., 1966), 91-92.

6-11. Naval expansion received a temporary setback in 1893 when an economic panic gripped the country:

> The economic stability of the nation was so disrupted that naval appropriations were reduced approximately $1,500,000 from the preceding year. Allocations for the construction of new vessels in the naval bills of 1893 and 1894 virtually disappeared. Congress authorized the construction of only three gunboats and one submarine in 1893, and three torpedo boats and one tugboat in 1894.

Coutris, "Emergence of the New American Navy," 92.

6-12. Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1893, at 13.

Digitized by Google

General's office continued to expand its cadre of legally-trained clerks.[6-13] By 1892 the Judge Advocate General had on his staff an acting chief clerk who was a lawyer,[6-14] and six assistant clerks,[6-15] three of whom were either members of the bar or had some training in the law. Although subject to the supervision of the uniformed naval personnel in the office, these clerks were nevertheless far more knowledgeable in the intricacies of civil law than their overseers who had no formal legal training, and whose legal experience was primarily confined to disciplinary matters. Their importance to the office was underscored in the following note by Secretary of the Navy Herbert in his appropriation request for fiscal year 1893:

> In consequence of the large amount of work devolving upon the office of the Judge-Advocate-General, in conjunction with contracts growing out of recent acts of Congress providing for the increase of the Navy, the services of an additional law and contract clerk are rendered necessary . . . .[6-16]

6-13. The first listing of clerks for the Office of the Judge Advocate General appeared in the appropriations act of 3 March 1881 (21 Stat. 406), which authorized a staff of one legally-trained clerk and one regular clerk.

6-14. Navy Department personnel records searched in 1943 indicated that the acting chief clerk, Edwin P. Hanna, began his association with the Office of the Judge Advocate General on 11 November 1889 when, at the age of 38, he was appointed from Saline County, Kansas, to a position as a clerk. Richard G. McClung, Office of the Under Secretary of the Navy, Procurement Legal Division, Washington, D.C., memorandum to file, Subject: "History of Solicitor of the Navy and of Navy JAG," 19 February 1943, at 13. We know from the *Congressional Record* that Hanna was a lawyer ("Mr. Hanna is a civil lawyer, an able one . . . ." 59th Cong., 1st sess., 8 May 1906. Vol. 40. We do not know how he received his license (*i.e.*, law school or office clerkship); when he received it; nor where he received it.

6-15. Act of 16 July 1892, 27 Stat 210.

6-16. *Report of the Secretary of the Navy* 1893, at 65.

Digitized by Google

Naval officers will credit Judge Advocate General Lemly for delivery of the legal services essential to the naval expansion of the 1890s. Historians will credit him for memorializing the work of his office in writing. Starting with fiscal year 1893, Lemly provided an annual report to the Secretary of the Navy which was incorporated in the latter's annual report to the President. The "Report of the Judge-Advocate-General of the Navy"[6-17] provides us with the first organized summation of the work done by the office, as well as the Judge Advocate General's observations on legal matters affecting the Navy. We learn, for example, that the office engaged in prolific correspondence. During the period from 1 July 1892 to 30 June 1893 (fiscal year 1893), each of the eight or so persons in the office (if we include the Judge Advocate General and the acting chief clerk, and exclude filing clerks) sent out, on average, four to five letters a day, every day of the year except Saturdays, Sundays, and holidays. Each received back, and presumably read, two to three letters a day. Added to this burden of correspondence, disciplinary and personnel-related tasks raised the workload to staggering levels. The two or three Navy officers on the staff prepared charges and specifications for a general court martial every third day throughout the year,[6-18] and reviewed general court martial records and prepared and issued court martial orders at an even greater pace. They also reviewed the records of three summary courts martial every day. On top of this, a convening order for an examining board, retiring board, or court of inquiry was prepared every other day, and at least two applications for removal of desertion charges were assessed

---

6-17. *Report of the Secretary of the Navy* 1893, at 87-108 ["Report of the Judge-Advocate-General of the Navy"].

6-18. With a total officer corps of only 1,545 in the Navy and Marine Corps combined (see Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1896, at 64-65, 604), and a minimum of five members plus the judge advocate required to convene a general court martial, the strain on personnel to staff approximately 100 general courts martial a year was heavy. One convening authority noted in his appointing letter that the eight officers assigned to a general court were all that could be summoned "without manifest injury to the service." *In re Crain*, 84 Fed. 788, 790 (1897).

Digitized by Google

every day.[6-19] This productivity is even more impressive when one considers that the normal workday was only six and one-half hours (see footnote 6-64), and the office was doing all the Navy's civil law work at the time, including all its commercial and procurement work.

Although disciplinary and personnel cases are the only matters quantified, the report discusses at length the contracting procedures employed by the office in connection with the construction of vessels or public works. Each step is set forth: the preparation of the advertisement for bids; the form of proposal; the opening and award; the notification of acceptance or rejection; the form and award of contract; the approval of surety and insurance; contract changes and administration; and progress payments. It is clear from this that the Judge Advocate General had full oversight of procurement for the Navy.

Other items in the report give further insight into the scope of the Judge Advocate General's jurisdiction. He recommended that aliens serving extended periods at sea in the United States Navy be granted citizenship without need to reside in a state or territory. He recommended the inventory and disposal of live oak timber reservations, no longer required in shipbuilding operations. He reported on the sale of lands lying within the limits of the Brooklyn Navy Yard. He reported on the grant of a railroad right-of-way through the Pensacola Naval Reservation. He reported on the purchase of land for use as a coaling station in Pago Pago, Samoa. He reported on the construction by the Spanish government of a reproduction of one of Christopher Columbus's ships, the *Santa Maria*, for display in the World's Columbian Exposition at Chicago. He reported on payments of indemnities for crewmen of the *USS Baltimore*, who were injured or killed at Valparaiso, Chile, during a local uprising in October 1891.[6-20] The Judge Advocate General also noted that he was frequently

---

6-19. The annual totals are as follows: 9,292 letters sent; 5,118 letters received; 99 general courts martial ordered; 121 general court martial records received and examined; 104 general court martial orders prepared and issued; 725 summary court martial records received and examined; 126 examining boards, 28 retiring boards, and 10 courts of inquiry and boards of investigation convening orders prepared; and 614 applications received for removal of the charge of desertion. *Report of the Secretary of the Navy* 1893, at 87-88.

6-20. In January 1892, at Mare Island, California, then-Lieutenant Lemly had conducted an examination into the "Baltimore Affair" before a U.S. Commissioner. See *Report of the Secretary of the Navy* 1892, at 43. Chile paid $75,000.00 in

(continued...)

Digitized by Google

called upon to answer requests from the Attorney General, the Court of Claims, or even the Congress, for information respecting claims against the Navy. Reporting on another area of responsibility, the Judge Advocate General related the results of his personal inspection of the naval prisons at Boston, Massachusetts, and reported the condition of the

---

6-20. (...continued)
indemnity, which was apportioned by the Navy among the injured sailors or their next of kin. See *Report of the Secretary of the Navy* 1893, at 104-6 ["Report of the Judge-Advocate-General of the Navy"]. The board of officers which determined the distributive allocation from the fund made note of the fact that it would not be diminished by attorney fees:

> [A]s our Government was not aided or assisted in any way by any attorney acting in the interest of the men, the board would recommend that the amounts named be paid directly to the men themselves.

Report of the Secretary of the Navy 1893, at 105.

Digitized by Google

prison at Mare Island, California.[6-21] In closing, the Judge Advocate General summarized the broad scope of his duties as follows:

> Questions arising in the several bureaus of the Department, or at the Navy yards or stations, respecting the construction of statutes relating to naval affairs; questions respecting the meaning and practical application of the Navy regulations, departmental orders or circulars; and questions growing out of the

---

6-21. Although his statutory duty under *Navy Regulations* during his entire tenure in office was only "to attend to all correspondence relating to the care of naval prisons and prisoners," Judge Advocate General Lemly faithfully visited and reported upon the conditions at the naval prison in Boston, Massachusetts in almost every year of his term. Regarding his 1894 visit, his report included the following concern:

> I partook of the Saturday dinner and found it to be well prepared and properly served. Indeed, my only fear is lest the food be too bountiful and good for men who are necessarily, under existing circumstances, deprived of active exercise.

Report of the Secretary of the Navy, 1894, at 82 ["Report of the Judge-Advocate-General of the Navy"].

His visit in 1895 voiced less concern with the welfare of the inmates:

> On account of the confined space about this prison, and in view of the fact that it is located in a thickly populated part of the city, it was decided not to equip the prison guards with firearms, in consideration of possible injury which might result to innocent persons . . . . Instead, the guards were furnished with stout cudgels . . . .

Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1895, at 34 ["Report of the Judge-Advocate-General of the Navy"].

In 1900 he recommended expansion of both the Boston and Mare Island prisons, both of which had become inadequate to house the increasing number of prisoners which attended the growth of the Navy. Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1900, at 112 ["Report of the Judge Advocate General"].

Digitized by Google

> interpretation of contracts and the rights of bidders, sureties, contractors, laborers, and material men thereunder, when submitted to the Department for instructions or on appeal, are referred to this office for examination. . . . [W]ork of this character . . . has increased very greatly in consequence of the numerous questions arising under contracts for the construction of new naval vessels . . . .[6-22]

As previously noted, the commercial and civil law duties of the office were not quantified in the manner that the disciplinary and naval law functions were. Nevertheless, it appears that they comprised a significant portion of the workload of the office. In fact, if we were to assume that the two or three Navy officers attended to the personnel and disciplinary matters, and the seven civilian clerks to the civil and commercial matters, in proportion to their numbers in the office, the latter work would constitute twice that of the former. This same ratio of civil to naval law responsibilities appears in the 1893 edition of *Navy Regulations* where the duties of the Judge Advocate General are set forth. While virtually identical to General Order No. 372 (see Appendix B), promulgation of the Judge Advocate General's duties in *Navy Regulations* carried with it the approval of the President of the United States.[6-23] As of 1893, the duties of the Judge Advocate General may be summarized as follows:

⚓ To oversee and administer, under the direction of the Secretary of the Navy, all courts martial, courts of inquiry, boards for the examination of officers for retirement and promotion, and boards for the examination of candidates for appointment as commissioned officers in the Navy, other than naval cadets.

6-22. *Report of the Secretary of the Navy* 1893, at 107-8.

6-23. Department of the Navy, *Navy Regulations, 1893* (Washington, D.C.: Government Printing Office, 1893), art. 14. This was the first time the duties of the Judge Advocate General were spelled out in *Navy Regulations*.

Digitized by Google

- ⚓ To consider and report upon all matters referred to him by the Department involving questions of law, regulations, and discipline.
- ⚓ To attend to all correspondence relating to the care of naval prisons and prisoners.
- ⚓ To review and act upon applications for the removal of the mark of desertion standing against the names of enlisted men of the Navy or Marine Corps.
- ⚓ To examine and report upon the official bonds of pay officers, and all questions presented to the Department relating to pay and traveling expenses of officers.
- ⚓ To oversee and administer all procurement and contracting matters.
- ⚓ To conduct all official correspondence relating to the business connected with the increase in the size of the Navy.
- ⚓ To examine and report upon all claims filed against the Navy, including admiralty claims, commercial claims, and personnel claims.
- ⚓ To conduct all correspondence with the Attorney General relative to the institution of suits by the Navy Department, and relative to the defense of suits brought by private parties against the officers or agents of the Department.
- ⚓ To answer calls from the Department of Justice and Court of Claims for information and papers relating to pending cases connected with the Navy Department.
- ⚓ To conduct all correspondence with the Attorney General relative to questions of statutory construction submitted for the Attorney General's opinion.[6-24]

6-24. In addition to stating the duties of the Judge Advocate General, the 1893 *Navy Regulations* also contained the procedural rules for courts martial, which had been separately carried since 1870 in *Orders, Regulations, and Instructions for the Administration of Law and Justice in the United States Navy* (see text beginning at page 160).

Little was changed in the rules. The judge advocate at a general court martial was still to watch over the accused lest he do anything "either to criminate him or prejudice his cause" (article 1812). If the accused lacked a "competent adviser," the judge advocate was to see that no illegal testimony was brought against him, and was to "direct him how to present to the court, in the most efficient manner, the facts upon which his defense is based" (article 1812). Similar rules

(continued...)

Digitized by Google

The Judge Advocate General construed his charter as broad indeed. He took an active role in proposing measures of all sorts, in both the naval and civil law areas, that he felt would benefit the Navy. In several of these, despite their merit, he was unsuccessful. He was never able to obtain authorization to use depositions in courts martial, despite the fact

---

6-24. (...continued)
obtained for summary courts martial.

Both the judge advocate and the accused, but no one else, were permitted to address "communications, motions, and questions" to the court, but only in writing unless a stenographer was present. Permission to address the court orally when a stenographer was employed was discretionary with the court (article 1824).

One area in which there was a significant change concerned the representation of an accused at a summary court martial. The revised summary court rules provided that the accused could no longer have a "professional or other friend" represent him as of right. Now, counsel for the accused had to be a commissioned, warrant, or petty officer, and such person could only serve, provided he consented to do so, with permission of the court (article 1767).

The representation rules remained unchanged for general courts martial. In general courts the accused was entitled as of right to counsel, professional or otherwise, at his own expense. If requested by the accused the court could, in its discretion, select "some officer within reach" to assist him, provided the officer consented to such assignment (article 1824).

Army practice at this time differed in degree as to general courts martial. General Order No. 29 (1890) required commanders of posts convening general courts martial, when requested by an accused, to detail a "suitable officer" as his counsel, if practicable. Practice as to inferior courts differed far more substantially; there was no right to representation before inferior Army courts. For slightly different perspectives as to the reach of General Order No. 29, see William Winthrop, *Military Law and Precedents*, 2d ed. (Washington, D.C.: Government Printing Office, 1920), 165-67; George B. Davis, *A Treatise on the Military Law of the United States* (New York: John Wiley & Sons, 1898), 38-40.

The Navy rule before summary courts changed in 1909, when *Navy Regulations* of that year gave the accused the additional right to furnish his own counsel. Department of the Navy, *Navy Regulations, 1909* (Washington, D.C.: Government Printing Office, 1893), art. 1685. In 1913 a major change was implemented for general courts martial. Counsel for officers was ***required*** to be detailed upon request. For enlisted men, detailed counsel was mandatory unless the accused explicitly stated that he did not desire such assistance. The only exception in either case was impracticability of appointment. Department of the Navy, *Navy Regulations, 1913* (Washington, D.C.: Government Printing Office, 1913), art. 767.

Digitized by Google

that the Army could do so.[6-25] Nor did he receive authorization to subpoena civilian witnesses before Navy courts martial.[6-26] He lacked

---

6-25. The rationale for the use of depositions at courts martial was virtually the same from year to year. The 1893 explanation set the tone:

> It frequently happens in the Naval service that a considerable time must elapse between the date on which an offense is committed and the convening of a naval court for the trial of the accused. In that interval witnesses may have been ordered to other duty on foreign stations, at a great distance from the place where the court is being held. . . . [I]t would seem that a provision . . . authorizing the introduction in evidence before naval courts of depositions of witnesses stationed or residing at such a distance from the place where such courts are held that it is not practicable to secure their personal attendance, would materially promote the administration of justice in the Navy.

Report of the Secretary of the Navy, 1893, at 90 ["Report of the Judge-Advocate-General of the Navy"].

While Lemly was unsuccessful in obtaining enactment of this legislation, his successors continued to press for it. Persistence paid off. The Act of 16 February 1909, 35 Stat. 621, included a provision authorizing the use of depositions in certain instances before naval courts, except in capital cases and cases where the a punishment of imprisonment or confinement for more than one year could be imposed.

6-26. In requesting this authority, the Judge Advocate General stated:

> It not unfrequently happens that important witnesses for the Government, whose testimony before a court-martial or court of inquiry is essential to the administration of justice, are civilians, whose attendance can not be enforced, and such witnesses are enabled to avoid the unpleasant duty of giving evidence concerning military offenses or frauds attempted or perpetrated against the Government, facts respecting which may be within their knowledge, by simply declining to appear.

Report of the Secretary of the Navy, 1893, at 90 ["Report of the Judge-Advocate-General of the Navy"]. Note that the authority requested by the Judge

(continued...)

Digitized by Google

6-26. (...continued)
Advocate General would extend only to the prosecution (the "Government"), and not to the defense.

The Judge Advocate General noted that section 1202 of the Revised Statutes provided the Army with subpoena power, albeit limited. *Report of the Secretary of the Navy*, 1895, at 30. The Attorney General, however, determined that this authority did not extend to the Navy. 19 Op. Atty. Gen. 501 (1890).

In 1899, the Judge Advocate General took a different tack in attempting to secure this legislation. Although the effort was unsuccessful, the argument is interesting in that it shows a dramatic change occurring in the Navy's orientation (the added italics illustrate this point):

> The necessity of the enactment of some provision of law empowering naval courts-martial and courts of inquiry to secure the testimony of civilian witnesses is a matter of growing importance. In this respect *a gradual but marked change in the relations of the Navy generally, and particularly in the circumstances and conditions under which naval courts-martial exercise their functions, has taken place in recent years. During the period when the Navy was composed largely or exclusively of sailing vessels it was doubtless true that the majority of offenses were committed on board ship and at sea, in which case the witnesses were of course persons in the naval service.*
>
> *In these days of steamships and comparatively short voyages, offenses committed at sea are, as a rule, few and relatively unimportant. . . . [A] very large proportion of the serious offenses for the punishment of which courts-martial are convened now occur at Navy-yards or stations, or during the period when a naval vessel is in port and while officers and men are ashore on duty or otherwise.* In such cases it very frequently occurs that the facts necessary to establish the guilt or innocence of a person accused lie either in part or wholly within the knowledge of civilians . . . .

Report of the Secretary of the Navy, 1899, at 133 ["Report of the Judge-Advocate-General of the Navy"].

Note that the argument had also been modified to include a plea for fairness to the accused. The Senate actually passed the requested legislation in
(continued...)

Digitized by Google

similar success in his attempts to revise the procedures for naval examining and retiring boards,[6-27] and in authorizing the Navy's use of inventions patented by active-duty naval officers.[6-28]

But in many other areas the Judge Advocate General successfully advanced his agenda. Thus did he effectively propose passage of

---

6-26. (...continued)
1899, but it failed to reach the House. *Report of the Secretary of the Navy*, 1899, at 134.

As with the deposition legislation just discussed, however, the persistent efforts to obtain subpoena authority over civilians was rewarded. The same Act of 16 February 1909 included a provision giving general courts martial and courts of inquiry power to compel the attendance of witnesses within the state, territory, or district where the court was sitting. Refusal to appear or testify was a misdemeanor punishable on information in federal court. Incriminating or degrading questions were prohibited and no witness could be made to incriminate himself.

6-27. The revised procedures requested by the Judge Advocate General were intended to streamline the process by which officers were certified for promotion. See *Report of the Secretary of the Navy*, 1893, at 93-94 ["Report of the Judge-Advocate-General of the Navy"].

6-28. In the late nineteenth century era of rapid naval expansion and remarkable technological development, it was not unusual for naval officers to develop, on their own, devices which might be of use to the Navy, and to secure patents for them. The Judge Advocate General sought authorization to acquire the right to use such inventions ("upon such terms and at such rate of compensation as may by the Secretary of the Navy be deemed just and equitable") where the officer was not employed by the Navy to develop the device, and the invention was developed by the officer at his own expense and using his own facilities. The Judge Advocate General recommended that

> Congress . . . enact legislation providing that the United States may at any time acquire the right to use devices covered by letters patent issued to any officer of the Navy, whether retained in his ownership or assigned to others, upon such terms and at such rate of compensation as may by the Secretary of the Navy be deemed just and equitable.

Report of the Secretary of the Navy, 1895, at 38-39 ["Report of the Judge-Advocate-General of the Navy"].

Digitized by Google

legislation in Congress to outlaw fraudulent enlistment;[6-29] to modify bidding requirements for the construction of vessels;[6-30] to permit naturalization of foreign seamen by enlistment and service in the United States Navy;[6-31] to prescribe Presidential limitations on punishments which could be awarded at the discretion of a court martial in time of peace;[6-32] to restore live oak timber reservations to the public domain;[6-33] to authorize judge advocates and certain other officers to administer oaths "for the purpose of the administration of naval justice and for other purposes of naval administration";[6-34] to establish a statute of limitations for certain offenses;[6-35] and to authorize the acceptance from contractors

---

6-29. Act of 3 March 1893, 27 Stat. 716, discussed in *Report of the Secretary of the Navy*, 1894, at 75 ["Report of the Judge-Advocate-General of the Navy"].

6-30. Act of 26 July 1894, 28 Stat. 140-41, discussed in *Report of the Secretary of the Navy*, 1894, at 74 ["Report of the Judge-Advocate-General of the Navy"].

6-31. Act of 26 July 1894, 28 Stat. 123-24, discussed in *Report of the Secretary of the Navy*, 1894, at 75 ["Report of the Judge-Advocate-General of the Navy"].

6-32. Act of 27 February 1895, 28 Stat. 689, which added a new article 63 to the *Articles for the Government of the Navy*. The President was empowered to prescribe maximum punishments for offenses committed in peacetime, and courts martial were enjoined not to exceed such limits. Punishments for wartime offenses, not being covered, were left without any ceiling whatsoever. James Snedeker? "The Jurisdiction of Naval Courts" (unpublished manuscript, n.d.), 65. A schedule of such punishments was promulgated in General Order No. 459 of 25 May 1896.

6-33. Act of 2 March 1895, 28 Stat. 814, discussed in *Report of the Secretary of the Navy*, 1895, at 32 ["Report of the Judge-Advocate-General of the Navy"].

6-34. Act of 25 January 1865, 28 Stat. 639-40.

6-35. Act of 25 February 1895, 28 Stat. 680, which added new articles 61 and 62 to the *Articles for the Government of the Navy*. Congress now provided that no person should be tried or punished for any offense, except desertion in time of peace, committed more than two years before the issuing of the order for such trial or punishment, unless through absence or some other "manifest impediment" he was not amenable to justice within that period. This was the first statutory limitation period ever enacted for the Navy, although the service had adhered to an administrative three-year limitation contained in section 138 of the 1870 *Orders*,
(continued...)

Digitized by Google

of certified checks in lieu of bonds.[6-36] He also persuaded the Secretary to modify *Navy Regulations* so as to permit introduction of evidence as to previous convictions on sentencing.[6-37]

For most of the decade the staff of the Judge Advocate General's office remained static, at three to four officers (including the Judge Advocate General), an acting chief clerk, six assistant clerks, and one laborer.[6-38] The naval law workload leveled off at the 1893 plateau, while commercial law work increased constantly.

In 1894 a perennial issue again surfaced; the employment of special litigation counsel by the Navy Department. Although several opinions confirming the impropriety of the procedure had been issued by the Attorney General since the passage of the act prohibiting such employment in 1870, there were occasions when the restriction seemed to be ignored. Such was the case in 1894, when Secretary of the Navy Herbert, without prior consultation with the Department of Justice, authorized libeling of the English steamer *Azov* in Antwerp, Belgium, and

---

6-35. (...continued)
Regulations, and Instructions for the Administration of Law and Justice in the U.S. Navy for the previous twenty-five years. The limitation on desertion in time of peace was also two years, but it did not begin to run until the expiration of the term of enlistment. See Snedeker? "The Jurisdiction of Naval Courts," 64-65.

6-36. Act of 25 May 1896, 29 Stat. 136, discussed in *Report of the Secretary of the Navy*, 1896, at 99 ["Report of the Judge-Advocate-General of the Navy"].

6-37. U.S. Navy Regulation Circular No. 12, 18 July 1894, amending paragraph 1 of article 1848 of *Navy Regulations, 1893*. Discussed in *Report of the Secretary of the Navy*, 1894, at 75 ["Report of the Judge-Advocate-General of the Navy"].

6-38. The Judge Advocate General chaffed under these civilian personnel allowances. In 1894 he reported that "the clerical force of this office is not fully adequate to meet the demands of current business. The work of the office has been steadily increasing for several years, but no corresponding increase has been made in its clerical force." He requested the addition of "at least one clerk of sufficient ability to undertake duties of general correspondence and the preparation of decisions," and an additional copyist. *Report of the Secretary of the Navy*, 1894, at 84 ["Report of the Judge-Advocate-General of the Navy"]. But the size of the clerical staff remained fixed at seven for another five years, until 1899, when it was increased to eight. Act of 24 February 1899, 30 Stat. 874.

Digitized by Google

retention of counsel to institute the proceedings.[6-39] Unfortunately for the Navy the suit was dismissed with costs. Secretary Herbert thereupon sought an opinion from the Attorney General as to whether the Navy Department "should continue the conduct of [the] case, employing the necessary counsel, or whether the matter should be referred to the Department of Justice for its action and management."[6-40] Holding that the prohibition was broad enough to forbid the employment of counsel in foreign countries by the Secretary of the Navy, the Attorney General's reply was unequivocal:

> I am of the opinion that the Navy Department should not continue the conduct of this case, and that the matter should be referred to the Department of Justice, which is charged with the duty of determining when the United States shall sue, for what it shall sue, and that such suits shall be brought in appropriate cases.[6-41]

6-39. It is not known whether Secretary Herbert consulted with his Judge Advocate General prior to granting such authority. No mention of the episode appears in the Secretary's or the Judge Advocate General's annual reports, nor could any account be found in correspondence files.

6-40. 21 Op. Atty. Gen. 195, 196 (1895).

6-41. 21 Op. Atty. Gen. 195, 198 (1895). Although stating in the opinion that he was not determining the right of the Navy Department to employ counsel in a foreign country in an emergency, the Attorney General nevertheless opined that Congress

> must have contemplated, inasmuch as ships of war are constantly on the high seas and in foreign ports, that questions of law would arise in respect of them in the administration of the Navy Department. No exception whatever is made of such cases in [the Department of Justice Act].

21 Op. Atty. Gen. 195, 198 (1895).

Digitized by Google

We noted earlier the Marine Corps's School of Application at which was taught military law (see text beginning at page 217). In 1895 the Judge Advocate General first recommended the establishment of a similar course at the Naval Academy.[6-42] He renewed this recommendation in 1896, for the reason that

> [U]pon being graduated from the Academy an officer may be called upon at any time to perform the duty of recorder of a summary court-martial, and . . . early in their career all commissioned officers are subject to service as members or judges-advocate of general courts-martial, a duty upon which they ought not to be required to enter without preliminary instruction.
>
> . . . It is most desirable that officers who, when acting as judge-advocate, are charged with the double responsibility of protecting the interests and honor of the accused where no counsel is employed on the one hand, and the discipline and welfare of the service on the other, or who, when sitting as members of a court-martial, act not only as jurors but also as judges, and are not infrequently in the latter capacity called upon to decide difficult and intricate questions of law, should, before undertaking such duties, be equipped at the very least with a general knowledge of the leading principles of naval law and some familiarity with the forms of procedure

---

6-42. Lemly's recommendation was to establish a course in *military* law. He would have been more technically correct to have recommended a course in *naval* law, since in its strictest sense at that time the term "military law" applied only to the Army. This distinction has long since ceased to exist and, unless necessary to avoid confusion, the term military law will be used henceforth in its broader sense to include naval law.

Digitized by Google

> essential to the administration of justice by naval courts.[6-43]

Although Secretary Herbert failed to endorse this recommendation when first made, nor in the following year, Lemly persisted. With Herbert's departure in 1897, Lemly found a sympathetic ear in his successor, John D. Long (1897-1902). Lemly not only persuaded Long of the importance of including the subject in the curriculum, he persuaded him to propose its institution to the superintendent of the Naval Academy. The superintendent's response was negative; the already-saturated curriculum at the Academy could not absorb another course. Instead, he proposed that it be taught during the naval cadets' two years at sea after they had completed classroom instruction at the Academy. Anticipating this opposition, Lemly had commissioned the Deputy Judge Advocate General of the Army, Lieutenant Colonel George B. Davis, USA, a professor of law at the United States Military Academy,[6-44] to review the adequacy of the instruction of law at the Naval Academy and present his views. Davis recommended the inclusion of a course in naval law and court martial practice, stating that "the subject of discipline . . . should receive at least a minimum of recognition in the official curriculum."[6-45] Lemly was quick to forward this analysis to Secretary Long, together with his recommendation that international law be removed from the classroom

---

6-43. *Report of the Secretary of the Navy*, 1896, at 100-101 ["Report of the Judge-Advocate-General of the Navy"]. Perhaps tellingly, Judge Advocate General Lemly failed to mention the one other trial position to which an officer might find himself appointed; that of counsel for the accused. The relevant provisions at this time, unchanged since 1893 (see footnote 6-23), were contained in Department of the Navy, *Navy Regulations, 1896* (Washington, D.C.: Government Printing Office, 1896), art. 1760 (summary courts martial) and art. 1817 (general courts martial).

6-44. The Military Academy included a course in military law in its curriculum, a fact noted by Lemly in his 1897 report to the Secretary of the Navy. Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1897, at 81 ["Report of the Judge-Advocate-General of the Navy"].

6-45. "Communications to the Secretary of the Navy, July 1885-February 1912, from the Judge Advocate General," Naval Records Collection, Record Group 125, National Archives, memorandum dated 16 December 1897, at 3.

Digitized by Google

curriculum and taught at sea, with military law taking its place at the Academy.[6-46] Long, in strong terms, presented both the Davis and Lemly memorandums to the superintendent, stating that:

> [T]he subject of military law is of such importance to the naval service that arrangements must be made for the study thereof, even at the partial or entire sacrifice during the Academic course of the study of international law . . . .
>
> It further appears that . . . constitutional law . . . might properly be subordinated to military law . . . which, on account of its close relation to the discipline of the service, there can be no more important branch of the law prescribed for study by the younger officers of the Navy.[6-47]

Long's communication had its desired effect. A "brief course" in military law was inserted into the curriculum of third-year cadets, commencing with the September, 1899, term.[6-48] Lemly, however, was less than satisfied:

6-46. Lemly had strong support for this position. The Chief of the Bureau of Navigation stated that "Officers are seldom required to exercise their knowledge of international law until they attain command rank, while a knowledge of military law, as far as relates to court-martial procedure, is frequently required immediately upon leaving the Naval Academy." "Communications to the Secretary of the Navy, July 1885-February 1912, from the Judge Advocate General," Naval Records Collection, Record Group 125, National Archives, memorandum of Judge Advocate General Lemly dated 10 January 1898, at 2. This was not a surprising position for the bureau chief to take, since he had overall responsibility for the administration of discipline in the Navy.

6-47. "Communications to the Secretary of the Navy, July 1885-February 1912, from the Judge Advocate General," Naval Records Collection, Record Group 125, National Archives, letter written in January 1898.

6-48. *Report of the Secretary of the Navy*, 1900, at 122 ["Report of the Board of Visitors to the Naval Academy, 1900"].

Digitized by Google

> [T]he course . . . may be regarded . . . as an entering wedge . . . that . . . will lead to the establishment of this important branch of study as a permanent feature of the instruction given at the Academy. . . . I can not too strongly urge the maintenance and the gradual and judicious development of this feature of the curriculum at the Naval Academy.[6-49]

Lemly's importuning notwithstanding, the course lasted only a short while, probably a victim of the compressed curriculum which resulted when the program of study was reduced from six to four years shortly after the turn of the century.

Always eager to improve the efficacy of discipline in the Navy, through the education of those who administered it, Lemly could boast of the fact that one of his uniformed assistants, First Lieutenant Charles H. Lauchheimer, USMC, had, at the invitation of its president, delivered a two days' series of lectures on naval law at the Naval War College in 1896.[6-50] But this achievement paled alongside Lemly's and

---

6-49. Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1898, at 157 ["Report of the Judge-Advocate-General"]. While it lasted, the course received considerable interest from the Secretary's office. On 9 August 1900, then-Solicitor Hanna informed Judge Advocate General Lemly that "Mr. Hackett [Assistant Secretary of the Navy?] has written a letter to Wainwright [Commander Richard Wainwright, USN, stationed at the Naval Academy] asking suggestions respecting the introduction of moot Courts-Martial." A few days later Hanna informed Lemly that "The Acting Secretary read, apparently with much interest, the remarks in your annual report on the subject of instructions in military law at the Academy." "Unofficial Letters Sent [from the Office of the Judge Advocate General], April 1892-October 1909," Naval Records Collection, Record Group 125 (Preliminary Checklist entry number NRC 19), National Archives, Washington, D.C.

6-50. The Lauchheimer lectures were reprinted in *U.S. Naval Institute Proceedings*, vol. 23 (1897) at 85. Lauchheimer was both a talented and versatile officer. In 1899, upon leaving the Office of the Judge Advocate General, then-Major Lauchheimer received assignment as Inspector of Rifle Practice for the Marine Corps. *Report of the Secretary of the Navy*, 1899, at 926 ["Report of the

(continued...)

Digitized by Google

Lauchheimer's greatest accomplishment. In 1896 the Navy Department published as an official document, *Forms of Procedure for General and Summary Courts-martial, Courts of Inquiry, investigations, Naval and Marine Examining and Retiring Boards, Etc., Etc.*, compiled and arranged under the direction of Lemly, and edited by Lauchheimer.[6-51] This was the Navy's most ambitious effort ever to assemble a procedural guide for its officers, and was the first such guide published under the auspices of the Office of the Judge Advocate General. It proved to be the seminal work of *Naval Courts and Boards*, the procedural guide which took the Navy through the middle of the twentieth century.[6-52]

6-50. (...continued)
Commandant of the United States Marine Corps"].

6-51. *Forms of Procedure for General and Summary Courts-martial, Courts of Inquiry, investigations, Naval and Marine Examining and Retiring Boards, Etc., Etc.* (Washington, D.C.: Government Printing Office, 1896). A second edition of *Forms of Procedure*, revised and enlarged by then-Major Lauchheimer, was published in 1902.

6-52. *Forms of Procedure* was written in a theatrical-script style, with a "fill-in-the-blanks" narrative leading the players through the conduct of a court martial. There was a fairly extensive, and well-written section on evidence, geared, of course, toward the non-lawyer. Judge Advocate General Lemly was obviously proud of *Forms of Procedure*:

> I take pleasure in inviting attention to a volume of Forms of Procedure for General and Summary Courts-Martial, Courts of Inquiry, Investigations, Naval and Marine Examining and Retiring Boards, by Lieutenant Lauchheimer, which has recently been issued by authority of the Department. This volume was compiled and arranged under my general direction from cases on file in this office, and is intended to present, in compact and accessible shape, forms which . . . may be safely followed by officers called upon to perform duty in connection with courts and boards. It is believed that the general use of these forms will not only promote uniformity of procedure, and thus facilitate the work of examination and review by the convening authority, but will tend to reduce the number of omissions, irregularities, and formal errors which are often the

(continued...)

Digitized by Google

The continuing demands of a growing Navy thrust additional demands upon the Judge Advocate General. In 1896 a revision to *Navy Regulations* required him "to examine all contracts, and the bonds accompanying them, made by any of the bureaus for buildings or other public works, as to the form and validity of the same."[6-53] On the Navy side he was to review all proposed changes or amendments to *Navy Regulations* and report their impact to the Secretary.[6-54]

The office managed commercial work of every description. Advertisements, forms of proposal, and contracts for ships; contracts for stationery supplies; contracts for ice, washing towels, and the sale of waste paper; modifications to existing contracts; final releases and patent guarantees from contractors upon completion of contracts, all came within its purview.[6-55] It supervised the condemnation of land, the sale of land, and the purchase of land.[6-56] Judge Advocate General Lemly issued opinions to the Secretary of the Navy covering such diverse matters as jurisdictional questions at court martial, disciplinary matters, interpretation of Navy regulations, promotion questions, patent issues, validity of competitive bids, review of pending legislation, and the

---

6-52. (...continued)

> source of vexatious annoyance and delay, and are occasionally sufficiently grave to render the proceedings fatally defective, and thereby occasion a failure of justice.

Report of the Secretary of the Navy, 1896, at 101 ["Report of the Judge-Advocate-General of the Navy"].

When a Marine Corps second lieutenant failed to follow correct procedure in forwarding a record of a general court martial, Lemly castigated him for it, citing Lauchheimer's *Forms of Procedure* as the authority for how the record should have been forwarded. "Unofficial Letters Sent [from the Office of the Judge Advocate General of the Navy], April 1892-October 1909," Naval Records Collection, Record Group 125, National Archives, letter dated 6 September 1899.

6-53. *Navy Regulations, 1896*, art. 14.

6-54. *Navy Regulations, 1896*, at (3).

6-55. *Report of the Secretary of the Navy*, 1894, at 72.

6-56. See, for example, *Report of the Secretary of the Navy*, 1894, at 79-82.

Digitized by Google

government's rights and liability under contracts into which it had entered. There was a very significant commercial emphasis in these opinions, and Lemly demonstrated surprising familiarity with rather detailed legal issues.

By 1897 the work of the office, by Lemly's calculations, had increased three-fold over its original level.[6-57] One consequence of this was that the reference books of which Remey had proudly spoken in 1882 (see footnote 5-50 and accompanying text) were no longer adequate to support the legal research demanded. In February of that year (1897) then-Acting Chief Clerk Hanna wrote to Banks & Brothers, Law Publishers, inquiring as to the price of a set of Supreme Court reports.[6-58] The following year, Judge Advocate General Lemly requested a special appropriation of $100.00 for "law books, books of reference, and periodicals of a legal character."[6-59]

Lemly's request was denied, so he repeated it the following year, this time with supporting argument:

> The office of the Judge-Advocate-General of the Navy has never been provided with a law library. From time to time heretofore, when the limited contingent fund was available and when any of it could be spared for such

---

6-57. *Report of the Secretary of the Navy*, 1897, at 68 ["Report of the Judge-Advocate-General of the Navy"].

6-58. "Communications to the Secretary of the Navy, July 1885-February 1912, from the Judge Advocate General," Naval Records Collection, Record Group 125, National Archives.

6-59. *Report of the Secretary of the Navy*, 1898, at 161 ["Report of the Judge-Advocate-General"]. A special appropriation was necessary, because the purchase of such books from existing appropriations was specifically prohibited by section 3 of the 15 March 1898 appropriations act (30 Stat. 277, 316). Section 3 stated:

> [L]aw books, books of reference, and periodicals for use of any Executive Department . . . shall not be purchased or paid for from any appropriation made for contingent expenses or for any specific or general purpose unless such purchase is authorized and payment therefor specifically provided in the law granting the appropriation.

Digitized by Google

purpose, a few text-books, absolutely indispensable "tools of trade," have been purchased. Aside from this the office has no equipment of law books or books of reference whatever, with the exception of reports of the Supreme Court of the United States, the Court of Claims, Opinions of the Attorneys-General, Decisions of the Accounting Officers of the Treasury, and such other publications as are furnished to officers of the Government generally, through the superintendent of documents or other official sources. The office does not even possess the reports of the United States circuit and district courts; has no sets of State reports, and is almost wholly without modern treatises on those specialties of the law necessary to be examined when any exhaustive research in a particular line of inquiry is undertaken. In such case, since the Navy Department is likewise without a satisfactory law library, this office is reduced to the necessity of borrowing from other departments. Notwithstanding the uniform courtesy extended by the custodians of the law libraries in this building and in the Department of Justice, the practice of borrowing law books and books of reference is open to serious objection, if on no other ground, certainly by reason of the inconvenience and loss of time thereby occasioned.

The number, variety, and difficulty of the purely legal questions referred to this office for examination annually increase with the development and growing activities of the Navy, and this fact emphasizes the desirability of providing the Judge-Advocate-General's Office with a suitable law library without longer delay.

Digitized by Google

> I have thought it my duty to invite attention to this matter and to recommend that it be given such consideration and favorable commendation to Congress as may be deemed proper.[6-60]

Despite this clearly demonstrated need, Lemly failed to get his law library.[6-61] Congress did, however, accede to one of his other perennial requests. In 1897 Congress authorized the position of chief clerk for the office, albeit at the expense of one of the assistant clerk positions.[6-62] Edwin P. Hanna, the acting chief clerk, was elevated to the post. But Lemly needed bodies more than titles. He requested authorization to hire another "law and contract clerk." Lemly explained such a person's duties, and by so doing gives us, for the first time, insight into the qualifications and responsibilities of his clerical staff. The law and contract clerk was to be a law school graduate who was "capable of preparing and construing contracts, and of drafting official correspondence," and who possessed "sufficient experience, ability, and judgment to examine questions of departmental and naval law, and to reach a conclusion thereupon which [could] be adopted by the head of the office and by the Department."[6-63] In other words, what we would today call "agency counsel." By way of

---

6-60. *Report of the Secretary of the Navy*, 1899, at 140 [Report of the Judge Advocate General].

6-61. He failed again in 1900 and 1901. But persistence was finally rewarded, at least to a degree. In 1911, Judge Advocate General Robert Lee Russell could report that he had an "inadequate" law library, as opposed to no library at all. Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1911, at 173 ["Report of the Judge-Advocate-General"]. The following year Russell spoke of the "need of a better law library," stating that "some additions" had been made during the past year. Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1912, at 110 ["Report of the Judge-Advocate-General"].

6-62. Act of 19 February 1897, 29 Stat. 564.

6-63. *Report of the Secretary of the Navy*, 1897, at 68 ["Report of the Judge-Advocate-General of the Navy"]. A law and contract clerk could expect a starting salary of $1,600.00. *Report of the Secretary of the Navy*, 1897, at 82.

Digitized by Google

comparison, the attainments expected of an ordinary clerk were that he be competent in stenography and typing, with some knowledge of law. He would be expected to search statutes and law books in verification of citations and authorities, and should he develop an ability therefor, might have original work assigned to him from time to time. For this he would receive a starting salary of $900.00 per year, but "a diligent and competent young man [might] reasonably expect promotion in time to higher grades, not exceeding $1,800.00 per year. Work hours were 9:00 a.m. to 4:00 p.m., with 30 minutes for lunch. There was no additional pay for overtime, but it was "rarely required."[6-64]

The wisdom of the steady growth that the Navy had undergone during the past decade was tested in 1898. On 15 February of that year the *USS Maine* was destroyed in Havana harbor. War with Spain followed in

---

6-64. The information concerning office conditions was gleaned from two letters written by Chief Clerk Edwin P. Hanna. The first, dated 28 October 1897, was addressed to Mr. William R. Spilman, of Manhattan, Kansas. In the letter, Hanna offered Spilman the clerical position, describing the Office of the Judge Advocate General as "the law department of the Navy." Spilman accepted the position. The second letter, dated 25 April 1899, was sent by Hanna "To Whom It May Concern," and was a letter of recommendation for Spilman who at that time had served 18 months in the Judge Advocate General's office. Hanna noted that Spilman, who had been an official court stenographer for six years before coming to Washington, D.C., could, "upon occasion, improve a phrase, cure a lameness in dictation, compose an official letter, or frame the whole or a part of a legal paper, in an acceptable manner." "Unofficial Letters Sent [from the Office of the Judge Advocate General of the Navy], April 1892-October 1909," Naval Records Collection, Record Group 125, National Archives.

The brevity of Spilman's employment with the Navy Department was endemic of a larger problem. Paullin observed that

> The Navy Department does not offer an attractive opening to ambitious and capable young men. Their opportunities for advancement are less than in some of the other departments or in civil life. As a result, resignations are frequently tendered by the most useful and wide-awake clerks, and the clerical force of the department lacks stability.

Paullin, *History of Naval Administration*, 444.

Digitized by Google

April.[6-65] Procurement and commercial activity in the Navy, which had been proceeding apace, suddenly burgeoned. Reacting to this abrupt spike in demand, Secretary of the Navy Long offered a visionary—but radical—suggestion to meet the increasing calls for legal services being thrust upon the Office of the Judge Advocate General. He proposed the creation of a *judge-advocates corps*. The Secretary of the Navy suggested that the naval officers assigned to the Office of the Judge Advocate General be qualified lawyers! Because of his keen analysis of the legal needs which faced the Navy at the time, and its enduring relevance to the problems and shortfalls which were to accompany the delivery of legal services by the Office of the Judge Advocate General until the middle of the twentieth century, the Secretary's remarks are reprinted in full:

> Naval jurisprudence is a distinct branch of the law. It requires study and experience, and for its efficient and successful administration a trained corps of officers who can devote themselves wholly to it. The present practice of the Department is to detail officers for duty

---

6-65. The Spanish-American War lasted from April 1898 to August 1898. Despite its brevity, Paullin has called it the principal event in the history of the Navy and the Navy Department during the period of 1897-1911, giving an impetus to every naval activity during this period:

> The [Spanish-American] war . . . accelerated the building of ships, the increase of officers and seamen, the improvement of the Navy yards and the establishment of naval stations, coaling depots, magazines and hospitals. . . . Its effect upon . . . the provision of adequate educational facilities for naval officers was far-reaching. . . . As a result of the brilliant victories of Dewey and Sampson, which greatly popularized the Navy, large sums of money have been freely granted for naval purposes."

Paullin, *History of Naval Administration*, 427.

Thus it was that after a decade of naval expansion, with all the demands for increased legal services it entailed, the Office of the Judge Advocate General entered the twentieth century against this backdrop of even further acceleration of naval growth.

Digitized by Google

under the Judge-Advocate-General from any branch of the service, but these officers are without the training and experience in the law which are important to the proper administration of justice. The time has come when the subject is of such importance as to justify the creation of a small judge-advocate's corps upon a basis as to organization corresponding to that now existing in the Army.

The efficiency of such a corps would, in the opinion of the Department, be materially promoted if it were provided that appointments might be made from the service or from civil life, at the discretion of the appointing power, persons only being eligible who are learned in both civil and military law, promotions to be made according to relative seniority as vacancies occur.

The duties which devolve upon the office of the Judge-Advocate-General of the Navy are of great importance to the Department. He is the legal adviser of the Secretary of the Navy, has the drawing up and making of all contracts for the construction of vessels, the manufacture of armor, etc., and has direct charge of all matters involving the administration of justice in the Navy. The work of the office of the Judge-Advocate-General has steadily increased, and is of such an important nature and so efficiently performed as to merit the approval of the Department.[6-66]

6-66. *Report of the Secretary of the Navy*, 1898, at 53. About five years later the chairman of the House Committee on Naval Affairs (not otherwise identified) introduced a bill which would have drastically reorganized the Office of the Judge Advocate General. The proposed legislation would have made the Judge Advocate (continued...)

Digitized by Google

It is not clear from this proposal whether the Secretary was displeased with the caliber of the work coming out of the Judge Advocate General's office. Certainly the last sentence (which seems to militate against the basic recommendation) indicates no dissatisfaction. Notwithstanding, the plan is remarkable for its suggestions that uniformed naval officers devote themselves exclusively to the practice of law in the Navy, and that civilian lawyers be given direct commissions. Whether a non-lawyer judge advocate general could remain under the plan is unclear, although if it were organizationally similar to the Judge Advocate General's Department of the Army, as suggested by Long, the top officer would be a lawyer. No clarifying documents relating to the proposal were found, nor was it repeated the following year, so the many questions it raises must go unanswered.

It is interesting to note that the Judge Advocate General's report for 1898, which accompanied the Secretary's report, has not a word in it suggesting a corps of uniformed lawyers.[6-67] To be sure it recognizes, indeed emphasizes, the increased workload on the office. But Lemly's solution was far less extreme than Long's; he would simply increase the civilian clerical force of the office. He again asked for the addition of one law and contract clerk, a request finally granted in the following year.[6-68]

6-66. (...continued)
General a civilian lawyer, with a staff comprised entirely of civilians. When asked for his opinion two years after the fact, then-Secretary of the Navy Bonaparte objected to the proposal, stating that the "proper duty" of the Judge Advocate General was the administration of courts martial and not civil law. If properly limited to court martial matters, the work could be discharged by a naval officer as well as, if not better than, a civilian. U.S. Congress, House Committee on Naval Affairs, *Hearings on Appropriation Bill for 1907*, 59th Cong., 1st sess. (1906), 1068-69.

6-67. The Secretary of the Navy's annual report as it related to legal affairs and the Office of the Judge Advocate General had, until 1898, invariably been a recapitulation of those recommendations made by the Judge Advocate General to the Secretary, and which appeared in more detail in the Judge Advocate General's annual report. Not so in the case of the "judge-advocate's corps."

6-68. Act of 24 February 1899, 30 Stat. 874. A penurious Congress had, for the past several years, denied any increase in the personnel level of the office. Lemly attributed his ability to meet workload demand to what he termed "civil service (continued...)

Digitized by Google

As for Secretary Long's proposed "judge-advocate's corps," it died quietly, although it may have languished awhile. A curious letter (see following illustration), not otherwise explained, from Chief Clerk Hanna to Senator William E. Chandler (the former Solicitor and Naval Judge Advocate General), appears to make reference to it, and to suggest that legislation on the matter was at least contemplated, if not actually prepared.

From the tone of the letter it appears that Hanna stood to gain through the creation of a "Judge Advocate's Corps." But what his stake was, or what his "personal disappointments" may have been, we shall never know.[6-69] The balance of the letter, however, is more easily understood. Hanna at this time was maneuvering for establishment of the position of "Solicitor" within the Office of the Judge Advocate General. Being the chief clerk of the office, and a member of the bar, he was well-positioned to move into the job should it be created. The letter he forwarded to Senator Chandler was probably a copy of Secretary Long's request to the Senate Appropriations Committee that it include funding for a new position of Solicitor within the Office of the Judge Advocate General. The House had passed an appropriations bill containing no provision for the position. The Senate inserted an amendment to include the position, which was agreed to in conference on 19 March 1900.[6-70]

6-68. (...continued)
principles," according to which incompetent clerks were gradually eliminated, and efficient and worthy men retained and promoted as they became more expert and mastered the details of the business intrusted to them. *Report of the Secretary of the Navy*, 1898, at 152 ["Report of the Judge-Advocate-General of the Navy"].

6-69. We can, however, speculate. As chief clerk, Hanna was *de facto* the second most powerful person in the office. Perhaps he anticipated that creation of a judge advocate's corps would bring him a direct commission to the position of Deputy Judge Advocate General of the Navy or, should the proposal have contemplated a lawyer as Judge Advocate General, Hanna may even have aspired to the top position.

6-70. H.R. 8347, as amended. See *Congressional Record*. 56th Cong., 1st sess., 1900. Vol. 33. Hanna took no chances as to the final outcome of the legislation. On 30 March 1900 he wrote to Representative Henry H. Bingham advising him that the work of the Office of the Judge Advocate General had increased ten-fold since 1880, and was sorely in need of a solicitor. "Unofficial
(continued...)

Digitized by Google

NAVY DEPARTMENT
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON

February 15, 1900

Senator:

Remembering your kindness to me individually--and my personal disappointments--last winter in the matter of the "Judge Advocate's Corps" item, I venture to send you a copy of a letter Secretary Long has just forwarded to the Committee on Appropriations of the Senate. I know you will be interested, if nothing more, and I believe that if you had been personally in charge of this Office during the past three or four years, and knew the burdens actually carried and the work faithfully done, you would strongly favor this or something better. Anyhow, you know more about the matter than anybody else at the Capitol does, and I earnestly hope you will find it in your power to help us in this, as we think, modest and deserved measure. May I call and see you about it?

Respectfully and sincerely yours,

E.P. Hanna

Hon. Wm. E. Chandler
United States Senate

Letter from Edwin P. Hanna, Chief Clerk of the Office of the Judge Advocate General of the Navy, to Senator William E. Chandler. ("Unofficial Letters Sent [from the Office of the Judge Advocate General of the Navy], April 1892-October 1909," Naval Records Collection, Record Group 125, National Archives)

6-70. (...continued)
Letters Sent [from the Office of the Judge Advocate General of the Navy], April 1892-October 1909," Naval Records Collection, Record Group 125, National Archives.

Digitized by Google

It may be that Secretary Long, recognizing the obstacles that faced creation of a uniformed "judge-advocates corps" restricted to naval officers with law degrees, opted to obtain his professional legal advice from a civilian solicitor and perhaps a small staff.[6-71] In any event, the Act of 17 April 1900 appropriated $2,500 for a Solicitor, "to be an assistant to the Judge-Advocate [*sic*] of the Navy, and to perform the duties of that officer in case of his death, resignation, absence, or sickness."[6-72] The appropriation for the Solicitor position was effective as of 1 July 1900. Hanna was appointed to the post.[6-73] Pickens Neagle, who began his

---

6-71. The legislative history on the appropriation bill which established the solicitor position (H.R. 8347) provides no enlightenment as to the reasoning behind its creation. Furer notes that during the period right after the Spanish-American War the Naval Establishment was expanding rapidly, both afloat and ashore, posing many new legal problems for the Secretary of the Navy. He implies that this was one of the reasons the position of solicitor was created, *i.e.*, to assist the Secretary. Julius Augustus Furer, *Administration of the Navy Department in World War II* (Washington, D.C.: Department of the Navy, Naval History Division, 1959), 639.

The Navy had indeed grown, and was continuing to grow, in part to preserve the territories recently acquired in the war with Spain. Secretary of the Navy Long wrote in 1901:

> The Navy to-day is a far greater factor in our relations with the world than it was before the recent national expansion which now includes Porto Rico, the Hawaiian Islands, the vast area of land and sea in the Philippines, and our obligations to Cuba. If we are to have a Navy at all it must be commensurate with these great extensions—greater in international even than in territorial importance. This necessarily involves the construction of more naval vessels, their manning, exercise, and maintenance.

Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1901, at 28.

6-72. 31 Stat. 117. Note that the appropriation referred to the "Judge-Advocate of the Navy," a non-existent office. The catch-line for the appropriation correctly referenced the "Judge-Advocate-General, United States Navy."

6-73. Furer notes that the $2,500 salary was higher than any that had previously been paid to any civilian lawyer in the Judge Advocate General's office, and opines

(continued...)

Digitized by Google

service in the Office of the Judge Advocate General as a law clerk in 1887, and who himself became Solicitor in 1921, succeeded Hanna as chief clerk.[6-74]

Although the Solicitor would eventually come to serve the Secretary directly, the position was established as an assistant to the Judge Advocate General, probably for Congressional palatability.[6-75] Curious, however, was the fact that the *civilian* Solicitor was to assume the duties of the Judge Advocate General in the event of the latter's "death, resignation, absence or sickness." Curious perhaps; but perhaps with specific purpose.

Legal issues of all kind were referred by the Secretary of the Navy to the Office of the Judge Advocate General for opinion. Often it was Hanna who prepared the response and, not infrequently, signed it as well. Starting at least as early as 1899, Judge Advocate General Lemly began to take extended periods of leave from his work, sometimes weeks at a time. During these absences the full management of the office fell to Hanna, who made major decisions and initiated and answered official correspondence, signing his name over the title "Acting Judge Advocate General." During such periods, Hanna forwarded daily status

---

6-73. (...continued)
that this was done to make the solicitor position attractive to experienced civilian lawyers. This was probably an unnecessary inducement to Hanna, who, as chief clerk, was already the highest paid civilian lawyer in the office. Furer, *Administration of the Navy Department in World War II*, 639.

6-74. *Register of the Commissioned and Warrant Officers of the Navy of the United States and of the Marine Corps to 1 January 1901* (Washington, D.C.: Government Printing Office, 1901), 3; McClung, memorandum to file, 19 February 1943, at 13-14, citing *Who's Who in America, 1929-1930.*

6-75. Had the Secretary sought to establish the position of solicitor for the Navy Department, he would have run afoul of the 1870 Department of Justice Act which placed all department solicitors under the supervision of the Attorney General. By making the Navy solicitor an assistant to the Judge Advocate General, he apparently was able to avoid the mandate of the statute.

The Judge Advocate General seemed pleased with this arrangement. "The appointment of a solicitor, to be an assistant to the Judge-Advocate-General . . . will, it is believed, prove to be of advantage, especially in connection with that part of the work for which time and research are requisite." *Report of the Secretary of the Navy*, 1900, at 109 ["Report of the Judge Advocate General of the Navy"].

Digitized by Google

memorandums to Lemly, advising him of all matters which had come into the office and the disposition he had made of them.[6-76]

In June, 1902, Lemly was found "incapacitated for active service by reason of defective hearing and vision." On the 17th of that month he was retired from the Navy with the rank of captain.[6-77] Nonetheless, the Secretary of the Navy requested the President's approval to continue Lemly on duty as Judge Advocate General. The request was granted, and Lemly continued to serve,[6-78] being carried for two more years as a retired officer employed on active duty. There can be little doubt that the lion's share of the work of the office following Lemly's disability was handled by Hanna, whose correspondence during this period revealed a fierce loyalty to his chief.

Lemly relinquished his active status on 3 June 1904. Ill health continued to plague him for the next several years. He died on 30 September 1909, at the Government Hospital for the Insane in Anacostia, Maryland. He was buried in Arlington Cemetery. Among his pallbearers was Colonel Charles H. Lauchheimer, USMC.[6-79]

Lemly had served as Judge Advocate General through a period of unprecedented growth in the Naval Establishment, straining to the limit the capabilities of his office. Expert in courts martial and disciplinary matters, he managed the naval law functions of the office with facility.

6-76. "Unofficial Letters Sent [from the Office of the Judge Advocate General of the Navy], April 1892-October 1909," Naval Records Collection, Record Group 125, National Archives.

6-77. *Register of the Commissioned and Warrant Officers of the Navy of the United States and of the Marine Corps to 1 July 1902* (Washington, D.C.: Government Printing Office, 1902), 60.

6-78. The fact that Lemly became ill, and the Secretary requested his continuance in office, was revealed in correspondence by Hanna. "Unofficial Letters Sent [from the Office of the Judge Advocate General of the Navy], April 1892-October 1909," Naval Records Collection, Record Group 125, National Archives, letter dated 14 June 1902. There is no mention of it in either the Secretary of the Navy's annual report to the President, nor the Judge Advocate General's annual report to the Secretary. Since Lemly was continued in office, it is assumed that the President approved the Secretary's request to do so.

6-79. *Army and Navy Journal*, 11 September 1909, at 34. According to the *Army and Navy Journal*, the cause of death was hardening of the arteries.

Digitized by Google

Untrained in civil law matters, he relied upon subordinates with civil law credentials. Although we know little about Lemly's personal life, it was said of him that he had few if any equals as a wit and raconteur in the Naval Establishment.[6-80]

Lemly was succeeded in office on 24 June 1904 by a Naval Academy classmate, Commander Samuel Willauer Black Diehl, USN. Little is known of Diehl's prior service, although it is not distinguished by the extensive court martial experience that Lemly brought to the office. Nor had Diehl served before in the Office of the Judge Advocate General. He had, however, served for four years in the Bureau of Navigation, at that time the disciplinary branch of the Navy.[6-81]

Diehl's first annual report to the Secretary of the Navy,[6-82] submitted after only three months in office, essentially reiterated Lemly's unfulfilled initiatives (subpoena powers for courts martial; use of witness depositions at courts martial; re-organization of examining and retiring boards; use of devices patented by naval officers). In addition, however, Diehl introduced a new recommendation which Lemly had been poised to propose shortly before his retirement: establishment of the one-officer "deck court." This was perhaps the most far-reaching initiative developed by Lemly who had, in February, 1904, addressed an extensive memorandum to the Secretary in support of such courts, together with proposed enabling legislation.[6-83] Lemly's memorandum pointed out the drain on officer manpower required to assemble a four-man summary

---

6-80. *Army and Navy Journal*, 11 September 1909, at 34.

6-81. Some of the biographical information on Commander Diehl was obtained from Homer A. Walkup, *History of U.S. Naval Law and Lawyers* (Prepared on the occasion of the ninetieth anniversary of the establishment of the Office of the Judge Advocate General of the Navy, 1970), 9-10.

6-82. Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1904, at 89-97 ["Report of the Judge-Advocate-General"].

6-83. "Communications to the Secretary of the Navy, July 1885-February 1912, from the Judge Advocate General," Naval Records Collection, Record Group 125, National Archives, memorandum dated 4 February 1904.

Digitized by Google

court, and proposed the one-officer deck court to deal with the many minor offenses which plagued the Navy.[6-84]

Diehl's tenure may be noted not for his achievements in office, but for the debate which began to swirl about the office regarding its organizational and jurisdictional composition. This debate, to which Diehl perhaps unintentionally contributed, continued to ebb and flow until mid-century and even beyond, ultimately shaping the structure of the Navy's legal organization.

The Navy continued to grow at a breathtaking pace, and with it the demands for legal services. On 5 December 1904, the Secretary of the Navy, Paul Morton (1904-1905), addressed a letter to the chairman of the House Committee on Naval Affairs, requesting creation of the office of Assistant to the Judge Advocate General because of the "enormous increase of business which . . . has taken place [since the Act of 8 June 1880 establishing the Office of the Judge Advocate General] at a time when the Navy was small and inactive." Morton stated that the assistant "should be learned in the civil as well as in the naval law."[6-85] This is curious on two grounds: first, there was no requirement of learning in civil law imposed on the Judge Advocate General himself, yet Morton would require it of his assistant; and second, there already *was* an assistant to the Judge Advocate General supposedly learned in the civil law, namely Edwin Hanna, the Solicitor. Morton was, in fact, proposing the creation of a position which already existed, that of Solicitor. Yet he makes no mention of Hanna or the role of the Solicitor in his letter to the Naval Affairs committee.[6-86]

6-84. In 1892 the Office of the Judge Advocate General received 613 records of summary courts martial for review. By 1903, while the enlisted force had trebled, the number of summary courts had grown almost ten-fold, to 5,725. *Report of the Secretary of the Navy*, 1904, at 94 ["Report of the Judge-Advocate-General"].

6-85. U.S. Congress, House Committee on Naval Affairs, *Hearings on Appropriation Bill for 1906 Subjects*, 58th Cong., 3d sess., 1904-1905. Letter dated December 5, 1904, from Paul Morton to Chairman.

6-86. Morton does not state in his letter whether he contemplated a uniformed officer or a civilian for the job of Assistant to the Judge Advocate General. It would, of course, have been difficult to find a uniformed Navy or Marine Corps officer to fill the position since few, if any, had any civil law training. Twelve years later, in

(continued...)

Digitized by Google

Morton left office on 30 June 1905, succeeded by Charles J. Bonaparte (1905-1906) the following day.[6-87] So far as can be determined, the recommendation to appoint an Assistant to the Judge Advocate General rested only with Morton. Diehl did not consider it worthy of mention in his first report to Secretary Bonaparte.[6-88] The proposal to establish deck courts was relegated to a "reminder" in the Judge Advocate General's report, and was not underscored by Bonaparte in his summary to the President.[6-89]

6-86. (...continued)
1916, legislation was enacted providing for the detail of an officer of the line of the Navy or Marine Corps to serve as Assistant to the Judge Advocate General. Legal training was not a requisite. See footnote 7-52 and related text.

6-87. Charles Bonaparte's grandfather, Jerome, was Napoleon's youngest brother and King of Westphalia. He married an American during a visit to the United States. Charles Bonaparte was raised in the United States, attending secondary school near Baltimore, and receiving his undergraduate and law degrees from Harvard. Following his service as Secretary of the Navy he became Attorney General of the United States. He founded the Federal Bureau of Investigation in 1908. Paul T. Heffron, "Charles J. Bonaparte," ed. and comp. Paolo E. Coletta, *American Secretaries of the Navy*, 2 v. (Annapolis: Naval Institute, 1980), 1:475.

6-88. Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1905, at 77-82 ["Report of the Judge-Advocate-General"].

6-89. Deck court legislation was finally enacted in 1909, by the Act of 16 February 1909, 35 Stat. 621. The act established a court composed of a single officer appointed by the commander of the accused's ship or station. The deck court had generally the same punishment authority as a summary court, except that confinement or loss of pay was more limited. The accused had to consent to be tried before a deck court.

The act also gave to commanding officers of naval stations beyond the continental United States the same authority to convene general courts martial as was held by the Secretary of the Navy and fleet and squadron commanders. It abolished the use of irons, "single or double," except for the purpose of safe custody or when part of a sentence imposed by a general court martial. It authorized the Secretary of the Navy to set aside, remit, or mitigate the sentence of any court martial convened by him or by any officer of the naval service. Finally, the act authorized the use of depositions before naval courts, and empowered general courts martial and courts of inquiry to compel the attendance of witnesses. This latter legislation has been previously discussed at footnotes 6-25 and 6-26, respectively.

Digitized by Google

Diehl's report to Secretary Bonaparte stressed the disciplinary work of the office, noting that he now had a staff of four uniformed officers and could not get by with less, due to "the increase of business in connection with the exercise of the judicial function in the administration of naval discipline . . . ."[6-90] But after a year as Judge Advocate General he seemed almost surprised at the extent to which the office was called upon to perform civil law work, and reflected a sense of apprehension in his staff's ability to handle it. Diehl's commentary on the matter is repeated in full, to show the extent of the civil law work which had now befallen the office:

> A branch of the work of this Office which is of large and rapidly growing importance has nothing directly to do with the review of the records of general and summary courts-martial and courts of inquiry, and is connected only remotely, if at all, with the administration of naval discipline. This feature of the work consists in part in the interpretation of general statutes relating to naval affairs; interpretation of the Navy regulations; questions of international law; the relations of the Department to its contractors for ships, dry docks, public buildings, and naval supplies; the acceptance or rejection of proposals; status of certified checks; changes in contracts; payment of reservations; bonds accompanying proposals and contracts, and bonded commissioned officers; insurance; questions growing out of the acquisition and status of naval reservations at home and abroad

---

6-90. *Report of the Secretary of the Navy*, 1905, at 78 ["Report of the Judge-Advocate-General"]. Two officers, one Navy and one Marine Corps, were responsible for preparing and reviewing a total of 1,504 general courts in 1906. Two others reviewed the 5,358 summary court cases which came through the office. Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1906, at 112 ["Report of the Judge-Advocate-General"].

Digitized by Google

(including Guantanamo, Culebra, San Juan, Guam, and Tutuila), and of persons and property thereon, including property of the United States, that of contractors, and that of individuals; habeas corpus proceedings; suits, whether instituted against persons in the naval service for acts performed in the course of their duties or relating to claims against the United States, its naval agents or representatives; claims generally, whether prosecuted in the courts or before the Department by officers and men of the service or by private individuals; customs duties and harbor dues; admiralty questions growing out of collisions and claims for damages to or by naval vessels; royalties under the patent laws where patents have been granted to persons in the Navy or where the Navy uses patented devices; service pensions; rights in the Naval Home; care of the insane; and the usual administrative questions respecting appropriations, clerical force, leaves of absence, etc., not pertaining directly to the Navy, but such as arise in all Departments of the Government.

These questions, of which the foregoing is a partial enumeration only, cover a wide range and require research in almost every branch of the law, and they demand the painstaking, conscientious, and unremitting attention of the limited civilian force of the Office. Some of the members of this force have had special legal training, and are, in fact, performing a high grade of duty as law clerks.[6-91]

6-91. *Report of the Secretary of the Navy*, 1905, at 80-81 ["Report of the Judge-Advocate-General"]. Note that the non-naval legal work was the exclusive province of the *civilian* staff of the office.

Digitized by Google

Bonaparte, too, seemed to find the civil work of the office alien. He unequivocally interpreted its original charter as being limited to disciplinary and military (or naval) law functions:

> The Office [of the Judge Advocate General] is now obliged to discharge some duties which hardly come fairly within its proper sphere, since it must act as the legal adviser of the Department with regard to a large number of questions not governed by the principles of military law.[6-92]

While Diehl's solution to handling the heavy civil law demands on the office was the continued "painstaking, conscientious, and unremitting attention of the limited civilian force of the Office,"[6-93] Bonaparte was not so sanguine as to the staff's competence. His proposed solution to the problem was to appropriate $5,000.00 from the contingent fund of the Navy Department in order to retain civilian lawyers from time to time "to procure legal advice as to matters concerning which the Office of the Judge-Advocate-General may be reasonably entitled to professional assistance [and] enable the Department to act more promptly and with less danger of error in dealing with a class of questions which have been found to frequently arise in administration."[6-94]

6-92. *Report of the Secretary of the Navy*, 1905, at 15.

6-93. The civilian force was not nearly so limited as it had once been. By 1905 there were fifteen civilians on the Judge Advocate General's staff: the solicitor, the chief clerk, eleven clerks, and two messengers. Act of 3 February 1905, 33 Stat. 664. The entire force was crowded into four rooms; the Judge Advocate General requested two additional rooms "to relieve a situation that does not admit of the best work possible." *Report of the Secretary of the Navy*, 1906, at 118 ["Report of the Judge-Advocate-General"].

6-94. *Report of the Secretary of the Navy*, 1905, at 15. Bonaparte had a further suggestion for increasing the efficiency of the Office of the Judge Advocate General. He proposed to combine it and the Bureau of Navigation, the Bureau of Medicine and Surgery, the Marine Corps, and the Naval Academy which, as he stated, were "all concerned with the same general subject, namely, the personnel of the Navy." Such consolidation would, he felt, "tend toward unity of direction, increased

(continued...)

Digitized by Google

Because of the Department of Justice Act's prohibition on hiring outside counsel, Bonaparte was constrained to seek Congressional approval to invade the contingent fund. His testimony before the House Committee on Naval Affairs reveals a perception of the mission and role of the Office of the Judge Advocate General in sharp contrast to the reality, revealing an organization that grew without planning or forethought, and which was ill-equipped to discharge the increasingly complex and sophisticated legal matters which fell to it. The concerns politely expressed by Bonaparte were to grow, during World War II, into vituperative criticism of the Judge Advocate General, his office, and the concepts which established it.

Bonaparte began his testimony[6-95] by noting that the Navy Department was quite frequently confronted with legal issues involving substantial amounts of money, especially in the contracting arena. By default rather than design the Office of the Judge Advocate General, which was organized only to supervise military justice, had assumed cognizance over such matters. Bonaparte found this to be entirely unsatisfactory, to the point where he felt himself to be without a competent legal advisor for such matters. Bonaparte noted that he, as a lawyer, had relied primarily upon his own judgment in such matters, but that a non-lawyer in the position of Secretary of the Navy would be decidedly disadvantaged. (Bonaparte noted that the Secretary had the option of asking for an opinion from the Attorney General, but that such a process was cumbrous, sometimes taking so much time that it became altogether impractical to do so.)[6-96] Bonaparte simply wanted

---

6-94. (...continued)
efficiency, and the elimination of discussion and delay." *Report of the Secretary of the Navy*, 1905, at 4.

6-95. The account of Secretary Bonaparte's testimony before the House Committee is found in House Committee on Naval Affairs, *Hearings on Appropriation Bill for 1907*, 59th Cong., 1st sess. (1906), 1068-71, and in *Congressional Record.* 59th Cong., 1st sess., 1906. Vol. 40.

6-96. The Secretary was asked why he felt constrained not to submit questions to the Department of Justice, to which he replied:

> The Department of Justice has, of course, a great deal of important work to attend to, and if the question is

(continued...)

Digitized by Google

authorization to consult with civilian lawyers from time to time, as issues arose.[6-97]

Bonaparte also damned with faint praise the civilian staff in the Judge Advocate General's office:

> There are in the Judge-Advocate-General's office two or three men who are members of the bar, and who for merely such things as you would naturally give to a law clerk are very well qualified and do their work very well; but for a matter on which I would like to get an opinion which I would like to feel that I could rely on, I would prefer to select the lawyer myself . . . .

6-96. (...continued)

> one that has to be attended to very promptly, which would be the case at least as a matter of convenience usually with these matters, because you do not want to wait a month before determining whether your contract is in shape, it would very much break up the routine work of the Department of Justice to have it consider it. In fact, the Attorney-General asked his colleagues of the Cabinet not very long ago not to submit to the Department of Justice any questions that they did not consider really urgent and important, and not to get into the habit of taking too much advice on the subject.

Between 1876 and 1940 the Attorney General issued over 65 opinions in which he declined, for various reasons, to give an opinion on a matter requested by the head of an executive department. These opinions are summarized at 288-91 of U.S. Navy, Office of the Judge Advocate General, *Laws Relating to the Navy Annotated* (*In Force January 1, 1945*), comp. George Melling (Washington, D.C.: 1945).

6-97. Bonaparte did not seek to retain a lawyer on a permanent basis because "you would not be able to pay him a salary which would secure a first-class lawyer, and he would have practically little or nothing to do for nineteen-twentieths of his time."

Digitized by Google

It is not clear from the above whether Bonaparte meant to include Solicitor Hanna as one of the men with mere law clerk abilities, although that would be the inference since he did not otherwise recognize Hanna's utility. (The reader will recall that Secretary Morton, Bonaparte's predecessor, likewise seemed to overlook Hanna when he proposed creation of the position of Assistant to the Judge Advocate General.) Regardless of Morton's or Bonaparte's motives, the existence of the position was not lost on the Congress. When Bonaparte's request was considered by the House on 8 May 1906, Congressman Tawney was quick to point out that the Navy Department employed

> a solicitor, or legal officer . . . independent of the Attorney-General's Office, which by law is an office to which the Secretary of the Navy may apply, and to which he has very frequently in the past applied, for legal advice and counsel in respect to any legal question which may arise in the administration of his Department.[6-98]

Tawney then opined that it looked to him as if Bonaparte was trying to create "a place for some other officer under the guise of legal advice." Tawney's position prevailed. The appropriation request was defeated on a point of order, on the ground that it was new legislation which could not be entertained in an appropriation bill.[6-99]

Bonaparte answered this criticism in his next annual report to President Theodore Roosevelt, in November 1906. Stating that it was not contemplated or desired that a new office should be created for anyone, he noted that during the past year "questions of great intricacy, involving

---

6-98. *Congressional Record.* 59th Cong., 1st sess., 1906. Vol. 40.

6-99. *Congressional Record.* 59th Cong., 1st sess., 1906. Vol. 40. The House in 1906 had a far better understanding of the role of the Office of the Judge Advocate General than it did when Congress created the position in 1880. Although referring repeatedly to the office as a "Judge-Advocate-General's *Corps*," the members clearly understood that the Judge Advocate General was not a lawyer; that his role was to supervise military justice; and that his office employed law clerks to handle civil matters, primarily the administration of Navy contracts.

Digitized by Google

very large pecuniary consequences to the Government," had been submitted to him for decision:

> The parties dealing with the Government in such cases obtain the best professional advice: it is obviously unfair, both to the Secretary of the Navy and to the Judge-Advocate-General, and yet more unfair to the Government, to deny the latter the benefit of counsel of the same class.[6-100]

To further make his point, Secretary Bonaparte attached a letter written by the Judge Advocate General in which the latter recounted a specific example of the difficulty faced by the Navy (and possible adverse consequences flowing therefrom) in obtaining counsel under emergency conditions, due to the impediment posed by existing statutes.[6-101]

Bonaparte left office on 16 December 1906, succeeded by Victor H. Metcalf (1906-1908). The civil demands on the office continued to grow. In September 1907, Judge Advocate General Diehl recommended an increase in his civilian force of two law clerks (law school graduates), at salaries approaching that paid to the Solicitor, and two stenographers. He also requested more office space.[6-102] The civil law demands on the office seemed too much for Diehl. On 1 November 1907, in a move which

---

6-100. *Report of the Secretary of the Navy*, 1906, at 17.

6-101. Judge Advocate General Diehl told of the plight of a U.S. Navy ship captain who, after colliding with a small Chinese junk off Hong Kong, faced possible fine and imprisonment. Due to the prohibition on retaining counsel apart from the Department of Justice, lengthy delays were encountered before it was resolved to retain the crown solicitor at Hong Kong to defend the ship under British admiralty rules. The Judge Advocate General recommended that the best way to deal with such situations in the future would be to place at the Navy Department's disposal a small sum (he suggested, not surprisingly, $5,000.00) for the purpose of retaining counsel. *Report of the Secretary of the Navy*, 1906, at 44.

6-102. Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1907, at 112-13 ["Report of the Judge-Advocate-General"].

Digitized by Google

proved precedential, Secretary Metcalf removed all non-naval justice matters from the Judge Advocate General's cognizance and placed them under the supervision of Solicitor Hanna, whom he installed in an independent office,[6-103] together with approximately half the Judge Advocate General's clerical staff.[6-104] Diehl left office less than a fortnight later, succeeded by Lieutenant Commander Edward Hale Campbell, USN.

On 22 May 1908, Congress ratified Secretary Metcalf's administrative reordering by providing a separate appropriation for the Solicitor apart from the Office of the Judge Advocate General, and removing the reference to the Solicitor as an assistant to the Judge Advocate General.[6-105] Shortly thereafter, on 17 June 1908, Secretary

---

6-103. Furer, *Administration of the Navy Department in World War II*, 638.

6-104. By the time the Solicitor was established in an independent office, he had virtually become the exclusive counsel to the Secretary on all matters not related to naval discipline. Review of and opinions on commercial matters bore the signature of the Solicitor rather than the Judge Advocate General. "Communications to the Secretary of the Navy, July 1885-February 1912, from the Judge Advocate General," Naval Records Collection, Record Group 125, National Archives.

6-105. 35 Stat. 218. The statute, which became effective on 1 July 1908, was a rather clumsy bit of legislative drafting. While no longer calling the Solicitor an assistant to the Judge Advocate General, it set forth no independent jurisdiction or duties, and provided incongruously for a

> Solicitor, who shall perform the duties of the Judge-Advocate-General of the Navy in case of the death, resignation, absence, or sickness of that officer . . . .

The Judge Advocate General, Captain Edward Hale Campbell, noted the inconsistency in the legislation and recommended that it be changed:

> This act provides that in the absence of the Judge-Advocate-General the Solicitor shall perform his duties. Inasmuch as the two offices are entirely separate this seems inadvisable, and I would recommend its omission from the [next appropriation] bill . . . .

Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1908, at 81 ["Report of the Judge-Advocate-

(continued...)

Digitized by Google

Metcalf issued General Order No. 72, which stated the respective duties of the Judge Advocate General and the Solicitor. The order clearly established the Solicitor as equal in importance to the Judge Advocate General.

The Solicitor was responsible for examining and reporting upon all questions of law not relating to personnel; for preparing advertisements, proposals and contracts; for attending to insurance matters, patents, and bonds; for overseeing acquisition of and questions affecting lands; for supervising all proceedings in civil courts by or against the Navy; and for maintaining liaison with the Attorney General. He was also charged with rendering opinions upon any matter or question of law when directed to do so by the Secretary.[6-106]

The Judge Advocate General was reduced to naval justice and personnel matters. He was to have charge of courts martial, courts of inquiry, and examining boards. In addition, he was to interpret Navy regulations when called upon to do so; supervise and control naval prisons; and attend to all matters affecting personnel.[6-107]

There is some speculation that the establishment of the Solicitor as an independent office was the Congressional compromise to Secretary Bonaparte's request to hire special counsel.[6-108] The legislative history is

---

6-105. (...continued)
General"].

Campbell's recommendation was followed. The corresponding provision in the Act of 4 March 1909, 35 Stat. 883, simply read "Solicitor, four thousand dollars . . . ."

6-106. The Solicitor thus became the first legal officer in the Navy Department authorized to render opinions that carried the force of administrative rulings. The Judge Advocate General did not receive this authority until 1920. Department of the Navy, *Navy Regulations, 1920* (Washington, D.C.: Government Printing Office, 1920), art. 470. See text beginning at page 328. It was withdrawn from the Solicitor the following year (1921). See text beginning at page 332.

6-107. The provisions of General Order No. 72 were incorporated into the next revision to *Navy Regulations*, effective 2 January 1909. They are reprinted herein at Appendix B.

6-108. One of those to speculate was H. Struve Hensel, a former Assistant Secretary of the Navy:

(continued...)

Digitized by Google

not helpful on this point.[6-109] If this was the Congressional solution, however, it was a strange one. The civilian position of Solicitor had existed in the Office of the Judge Advocate General since 1900, occupied by the same attorney (Hanna) who moved into the independent office in 1907. Secretary Bonaparte wanted to retain civilian lawyers even when the Solicitor was available to serve him. Bonaparte wanted to call on private attorneys skilled in specific areas of law as problems in those areas arose, and apparently did not feel that the Solicitor could have the requisite ability in all such fields.

The statute further provided for the hiring of two *law* clerks for the Solicitor's office, the first time that designation had been used in a Navy appropriation bill.[6-110] One of the law clerks so hired (or, more correctly,

---

6-108. (...continued)

> The 1906 bill [to permit Bonaparte to use his contingent fund] was defeated on a point of order . . . but the desired result was obtained soon thereafter by the creation of the Solicitor.

H. Struve Hensel, memorandum to file, Subject: "The Judge Advocate General is not the exclusive 'lawyer' of the Navy—An answer to the Judge Advocate General's memoranda of April 25 and July 10, 1941," 27 March 1943, at 8.

6-109. The closest the legislative history comes to an elucidation is in the conference committee explanation to the House as to the reason the Senate included the appropriation for a solicitor which had not appeared in the House bill:

> [The amendment] provides specifically for the office of the Solicitor of the Navy Department independently of the office of the Judge-Advocate-General, all as proposed by the Senate.

Congressional Record. 60th Cong., 1st sess., 1908. Vol. 42.

6-110. Note that Judge Advocate General Diehl had argued for authorization to hire two law clerks (law school graduates) "at salaries commensurate with the talent required," to administer the civil affairs of the office in his 1907 report to the Secretary. Although they were assigned to the Solicitor's office, the Judge Advocate General was not left without lawyers of his own, albeit they were classified only as clerks. Budgetary constraints on the Judge Advocate General would not permit him to classify employees as law clerks (much less as attorneys) since under government hiring classifications they would have to be paid greater salaries than ordinary clerks (who could also be lawyers). In this regard, compare, for example, the Act of 31

(continued...)

Digitized by Google

transferred) was Pickens Neagle, who had been serving as chief clerk of the Judge Advocate General's office.[6-111] Four other clerks and a messenger completed the Solicitor's staffing. The same act authorized seven clerks and an assistant messenger for the Office of the Judge Advocate General, to supplement the five naval officers who were assigned to duty there.[6-112]

Even with the civil law functions of the office assigned to the Solicitor, Judge Advocate General Campbell still found his remaining clerical staff insufficient to keep up with the demands occasioned by the continuing personnel increases of the Navy and the disciplinary problems they engendered. He requested additional civilian clerks.[6-113] He also offered a suggestion by which errors in court martial proceedings might be reduced, thus lightening the review burden on his office; he proposed creation of a permanent corps of judge advocates:

> A short period of service in this office has brought forcibly to my notice the importance of the continuation of the office force on this character of duty for longer periods of time than is customary in the case of officers detailed for shore duty. It should practically be a permanent force. Each officer in the office, and above all the Judge-Advocate-General himself, should be an acknowledged authority on all points of military and naval law and court-martial procedure. Such

---

6-110. (...continued)
July 1894, 28 Stat. 202, where the Department of Justice received appropriations to hire both law clerks and attorneys.

6-111. *Register of the Commissioned and Warrant Officers of the Navy of the United States and of the Marine Corps to January 1, 1909* (Washington, D.C.: Government Printing Office, 1909), 3.

6-112. *Register of the Navy to January 1, 1909*, at 224.

6-113. *Report of the Secretary of the Navy*, 1908, at 81 ["Report of the Judge-Advocate-General"]. By 1908 the U.S. Navy ranked second in warship tonnage only to Great Britain. *Report of the Secretary of the Navy*, 1908, facing page 12.

Digitized by Google

knowledge can only be obtained by continuous association with and study of the law for a number of years. It is altogether different from the ordinary routine work of a naval officer's life, and although all officers have more or less knowledge of court-martial procedure, there are very few who can claim more than a fundamental knowledge of naval law and precedents. There are complicated questions of law rising continually in connection with the work of this office, requiring a knowledge of previous decisions of the Supreme Court, Court of Claims, Attorney-General, Comptroller of the Treasury, Judge-Advocate-General of the Army, decisions of this office, etc., covering the various points at issue. By the time an officer in this office gets a fair knowledge of the subject, and can be depended upon as an authority, it is time for his detachment and orders to sea, and for another beginner to take up the work.

The continuous changing of the judge-advocates [prosecutors] of the large [permanent] courts is also undesirable.[6-114]

There is a very perceptible difference in the manner in which cases are handled at the yards where the judge-advocate has not been frequently changed and at the other yards.

I believe that it would be for the best interests of the service if there were a small corps of officers in the Navy, well versed in naval law, similar to the Judge-Advocate-General's Department of the army. A corps of

6-114. Judge Advocate General Campbell cites statistics from several Navy yards. Included are New York, where four different officers served as judge advocates in a total of 392 trials, and Philadelphia, where only one judge advocate prosecuted all 260 cases tried there. *Report of the Secretary of the Navy*, 1908, at 98 ["Report of the Judge-Advocate-General"].

Digitized by Google

> 12 officers, 6 in the office of the Judge-Advocate-General, 1 at each of the four more important Navy-yards, to act as judge-advocates of the courts in session there, where an average of from 20 to 40 cases are tried each month, and 1 on the staff of the commander in chief of both the Atlantic Fleet and Pacific Fleet, would be sufficient to carry on all the work of this nature. In addition to an examination such as might be prescribed by the department, one of the requisites for admission to such a corps should be a sea service of a number of years, insuring a knowledge of naval customs and unwritten laws, and the members of the corps should alternate on sea duty to keep in close touch with conditions as they exist on board ship.[6-115]

Campbell's proposal for a corps differed markedly from that advanced by Secretary of the Navy Long in 1898 (see text beginning at page 246). Long had proposed a corps of law-school-trained lawyer-officers, from civilian backgrounds if necessary, equipped to handle commercial as well as disciplinary matters. Campbell was far more parochial. He focused exclusively on the naval line officer, whose schooling was the experience gained through successive tours of sea service, seasoned by duty in the Office of the Judge Advocate General. His primary responsibilities would involve courts martial, Navy administration, and personnel matters; there was no hint of civil or commercial law duties.[6-116]

6-115. *Report of the Secretary of the Navy*, 1908, at 97-98 ["Report of the Judge-Advocate-General"].

6-116. Note Campbell's obeisance to the ancient doctrines of "naval customs and unwritten laws" as still integral to the substantive law of U.S. naval courts martial even after a century of statutory and administrative definition. Note also his proposal for a judge advocate on the staff of each of the fleet commanders, analogous to today's staff judge advocate.

Digitized by Google

Campbell, however, quickly shed this narrow perspective as he came to appreciate the authority he had lost when the Solicitor's office became autonomous. Thus, with the advent of George von L. Meyer (1909-1913) as the new Navy Secretary in March 1909, and the extended illness of Solicitor Hanna which caused him to be absent for long periods from his office,[6-117] Campbell addressed a memorandum to the Secretary on 22 April 1909. In it he asserted that by statute all the legal duties of the Navy Department were to be performed by the Office of the Judge Advocate General.[6-118] He then pointed out (at least from his perspective) the disadvantages in having two legal offices in the Navy Department. Campbell recommended consolidation of the offices.[6-119]

6-117. Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1909, at 73 ["Report of the Solicitor"].

6-118. This was, perhaps, technically correct. The Act of 8 June 1880 authorizing appointment of a Judge Advocate General of the Navy, vague as it was, was the only statute both designating a legal officer for the Navy and defining his duties. The statute pertaining to the Solicitor was merely an appropriation provision designating a sum for his annual salary, with no exposition of the responsibilities or authority of his office. In fact, the only responsibility that *had* been assigned to the Solicitor, (assumption of the Judge Advocate General's duties in the event of the death, resignation, absence, or sickness of the latter), had been removed from the appropriation language on the recommendation of Judge Advocate General Campbell (see footnote 6-105). The flaw in Campbell's argument was that the language of the Act of 8 June 1880 was hardly exclusive; nothing in it precluded the Secretary of the Navy from assigning legal duties to others.

6-119. The existence and content of Campbell's 22 April 1909 memorandum are described in Henry P. Beers, "Historical Sketch of the Office of the Judge Advocate General, Navy Department," *U.S. Naval Institute Proceedings*, 67 (May 1941): 672. The author has not been able to locate the original. Of Campbell's motive in forwarding the memorandum, Beers says:

> The separation of the Office of the Solicitor from the authority of the Judge Advocate General did not meet with the approval of the latter, and efforts were soon made to restore the old arrangement.

It is likely that Campbell had actually begun his agitation on 27 February 1909, in a memorandum referenced by Solicitor Hanna that the author has also been unable to locate. Writing of that memorandum, Hanna advised Secretary Metcalf:

(continued...)

Digitized by Google

On 3 July 1909 Solicitor Hanna died. Campbell pressed the attack. On 1 September 1909 he submitted his annual report to the Secretary. As in his 1908 report he again recommended a permanent corps of naval-officer judge advocates, but this time with a difference; these officers would have studied law. They would be knowledgeable, through study and experience, both of matters maritime and matters legal. The Solicitor, if not his staff of civilian lawyers, would be extraneous:

> The recommendation made in the annual report of this office for the preceding year regarding a permanent corps of

---

6-119. (...continued)

> By memorandum dated February 27, courteously forwarded to me for comment, the Judge Advocate General [Campbell] suggests a reopening of the assignment of duties made by General Order No. 72, June 17, 1908, between the offices of the Judge Advocate General and the Solicitor.
>
> Mr. Secretary Metcalf having made the existing assignment after very careful consideration, based on intimate knowledge and experience, and having himself been the originator as well as the executor of the plan of division of duties, I think a reopening of the matter would not be in the interests of good administration.

Hanna concluded with an undisguised warning that Campbell would have been wise to heed, but obviously did not (see footnote 7-8):

> While believing, in the interests of repose and absence of controversy, that a reopening of the question is decidedly inadvisable, should the Department determine to reopen it I request to be heard with respect to certain matters assigned to the Judge Advocate General *which it seems to me should more appropriately be handled by this office.* (Italics added.)

"Unofficial Letters Sent by Various Judge Advocates [*sic*] and E.P. Hanna, Chief Clerk of the Office of the Judge Advocate General (Solicitor on and after July 1, 1908), April 1892-October 1909," Naval Records Collection, Record Group 45, National Archives, Washington, D.C., memorandum dated March 1, 1909.

Digitized by Google

> judge-advocates is renewed. I believe that it would be to the best interests of the service in many ways if there were a small corps of officers well versed not only in naval law and court-martial procedure, but in international law and common law as well; the officers of this corps to be drawn from officers of the Navy and Marine corps who have had experience at sea and in handling and disciplining men, and whose experience and inclinations may lead them to a study of the law.[6-120]

Campbell would have his officer corps alternate between shore and sea duty in order to "keep in touch with the seagoing officers and with conditions as they exist on board ship," but they would do so in legal billets, "as members of the staff of the commander in chief of the large fleets for duty in connection with courts-martial and for such other duty as the commander in chief might direct." Campbell envisioned operational law, as it is today called, as an integral part of these other duties:

> An officer who is well informed in international law would be of unquestioned value on the staff of a commander in chief in time of disturbances, in which a flag officer may at any time be called upon to decide questions of vast importance.

To be admitted to the judge advocate corps, officers would be required to pass examinations in court martial procedures, international law, and common law, "and at regular intervals thereafter . . . take examinations in order to insure constant study and improvement."

6-120. The quotations on these pages regarding Judge Advocate General Campbell's recommendation for a judge advocates corps are taken from *Report of the Secretary of the Navy*, 1909, at 94-95 ["Report of the Judge Advocate General"].

Digitized by Google

Recognizing the fact that there were few, if indeed any, officers in the Navy who met the proposed qualifications, "the corps at its incipiency would have to be composed of officers who from their records and experience appear to be best fitted for such a corps, and its efficiency as a legal corps would be a matter of development."

Campbell closed with his primary agenda:

> Should the office of the solicitor eventually be combined with the office of the Judge-Advocate-General, placing all the legal work of the department under one head, as was formerly the case, the existence of a corps of officers combining practical naval experience with a knowledge of common law would unquestionably be of great value to the department, especially as regards claims arising from collisions, etc., and changes in contracts for ships, where not only is a knowledge of common law required, but a knowledge of ships and their management as well.[6-121]

Campbell was rebuffed. Pickens Neagle, the law clerk in the Solicitor's office, was appointed Acting Solicitor and enthusiastically endorsed the separation of offices. On 1 October 1909 he reported that "the segregation of the employees formerly in the office of the Judge-Advocate-General that were engaged upon the work now assigned to the Solicitor, has, during the first year of the existence of this office, proven to be an advantageous business arrangement."[6-122] Secretary Meyer

6-121. Campbell does not address the disposition of the Navy Department's civilian lawyers, either in the Office of the Judge Advocate General or the Solicitor's office.

6-122. *Report of the Secretary of the Navy*, 1909, at 73 ["Report of the Solicitor"]. Neagle's report also gives a sense of the scope of the business handled by the Solicitor:

(continued...)

Digitized by Google

underscored his support for the Solicitor by "urgently" recommending continuation of the existing $4,000.00 appropriation for the position, stating that it would be "impossible to obtain for a less sum a lawyer of sufficient experience and legal training in whose opinions the department may have every confidence."[6-123]

The tide was running against Campbell. On 9 October 1909 he resigned the Office of Judge Advocate General of the Navy, reverted to his permanent rank of lieutenant commander, and accepted orders to the *USS North Dakota*.[6-124] He left office on 4 November 1909, succeeded by Commander Robert Lee Russell, USN. Russell brought useful experience with him; he had served in the office from 1903 to 1905.[6-125] One of

---

6-122. (...continued)

> [A] large number of contracts, including those for public works and naval vessels, aggregating in amount millions of dollars, and bonds of disbursing officers of the Navy and Marine Corps and Navy [*sic*] mail clerks have been attended to; many cases relating to claims, purchase of lands, and miscellaneous questions of magnitude have been considered and disposed of, and much correspondence of a general character conducted; and petitions to the Interstate Commerce Commission for adjustment of freight rates on naval property have been prepared and presented, requiring the attendance before the commission of one, and sometimes two, of the employees of the office.

6-123. *Report of the Secretary of the Navy*, 1909, at 36.

6-124. *Register of the Commissioned and Warrant Officers of the Navy of the United States and of the Marine Corps to January 1, 1910* (Washington, D.C.: Government Printing Office, 1910), 20.

6-125. See, generally, *Register of the Commissioned and Warrant Officers of the Navy of the United States and of the Marine Corps to January 1, 1904* (Washington, D.C.: Government Printing Office, 1904), through *Register of the Commissioned and Warrant Officers of the Navy of the United States and of the Marine Corps to January 1, 1906* (Washington, D.C.: Government Printing Office, 1906).

Digitized by Google

Judge Advocate General Russell's first acts was to require his officers to attend law school.[6-126]

6-126. Writing in 1913, Judge Advocate General Russell stated:

> Accordingly, I have made it a rule since I entered upon the duties of the Judge Advocate General to expect officers assigned to duty in this office to take a course in law . . . . A continuation of this practice of giving selected officers a legal education is certain to prove of great benefit in the Navy, where we have no permanent corps of judge advocates as is provided in the Army.

Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1913, at 93 ["Report of the Judge Advocate General"].

The obvious conclusion one draws from Russell's action is that it was taken as an offensive move to position the Judge Advocate General to displace the civilian Solicitor's office, with its cadre of professional attorneys. The author is not the only one to so speculate. Hensel concluded that "the creation of the civilian Solicitor [in 1908] spurred that decision." Hensel, memorandum to file, 27 March 1943, at 7.

Digitized by Google

Digitized by Google

CHAPTER 7

FALSE START: LINE OFFICERS WITH LAW DEGREES 1909 to 1939

***It is to avoid those gimlet-hole savings and bung-hole wastings that I say it is necessary to have a competent lawyer to attend to these things.*—REPRESENTATIVE HANNA OF INDIANA, VAINLY ARGUING IN FAVOR OF THE APPROPRIATION FOR A NAVAL SOLICITOR ON THE HOUSE FLOOR, 3 MAY 1878**

Judge Advocate General Russell's action in sending his officers to law school began what came to be known as the "Law PG" Program (short for Law Postgraduate Program). Officers who received their law degrees through the Program were referred to as "Law PGs." Over the next thirty years the Law PG Program provided virtually all the Navy's uniformed lawyers.[7-1]

7-1. The Law PG Program started informally, but soon became institutionalized. After graduation from the Naval Academy and service for several years in the line, Navy and Marine Corps officers interested in acquiring a legal education would so indicate to the Navy Department. If selected, they would be assigned to the Office of the Judge Advocate General, with their duties split between attendance at a local, Washington, D.C. law school at night, and military law work in the office during the day. Tuition was paid by the Navy Department. After graduation from law school and admission to the bar, officers would be re-assigned to line duties, normally at sea. Thereafter, any tours of shore duty would be spent in the Office of the Judge Advocate General. See Julius Augustus Furer, *Administration of the Navy Department in World War II* (Washington, D.C.: Department of the Navy, Naval History Division, 1959), 640-41; see also Homer A. Walkup, "Lawyers for and of the Navy," *The Judge Advocate Journal* (Bicentennial Issue, July 1976): 39.

In 1931 the Program was modified to provide that an officer's primary duty would be full-time attendance at a three-year course in law school. The officers selected that year studied at Harvard, rather than attend night school in the District of Columbia. This meant that they were available to work at the Office of the Judge Advocate General only during the summer months. Department of the Navy, *Annual Report of the Judge Advocate General of the Navy to the Secretary of the Navy*, 1931, at 1-2; U.S. Congress, Senate Committee on Armed Services, *Hearings before a Subcommittee on the Nomination of Rear Adm. Ira H. Nunn*, 82d Cong., 2d sess.,

(continued...)

Digitized by Google

In sending his officers to law school, Russell charted two objectives. First, with an understanding of legal niceties, they would be better able to process the military justice and personnel matters with which the Office of the Judge Advocate General was charged. The second objective was less obvious, although equally important, at least to Russell. By qualifying *all* his officers as professional lawyers, Russell sought to neutralize the advantage held by the Solicitor and his handful of civilian lawyers in dealing with civil law matters. With a staff of seven officer-lawyers Russell would have twice the legal talent of the Solicitor.[7-2]

7-1. (...continued)
16 May 1952, at 6. The Law PG Program was suspended when the United States entered World War II, but was resumed after the war ended, with officers attending the law schools at George Washington University or Georgetown University. Rear Admiral George L. Russell, USN, Judge Advocate General of the Navy, memorandum to Mr. Vinson [*Presumably Representative Carl Vinson, chairman of the House Armed Services Committee.—ED.*], Subject: Sections 12 and 13, H.R. 4080 [*A bill to enact a Uniform Code of Military Justice.—ED.*], 20 April 1949.

Officers applied to the Law PG Program just as they applied to any other graduate program:

> When you applied they asked you to give an alternate program you would be interested in. I applied for the law and then as an alternate I put engineering. I was notified first that I had been selected for the engineering program, and I got a bunch of materials to start reviewing. Two months later I got the notification that I had been selected for the law program.

Rear Admiral Horace B. Robertson, Jr., JAGC, USN (Ret.), interview with author, 12 May 1992.

The program was finally terminated in 1953. Rear Admiral Chester Ward, USN, Judge Advocate General of the Navy, memorandum for the Assistant Secretary of the Navy (Personnel and Reserve Forces), Subject: Report of the Committee on Organization of the Department of the Navy, 1959, 6 April 1959, at 3.

7-2. As of 1 January 1911, the Office of the Judge Advocate General was staffed by four naval officers (not including the Judge Advocate General) and three Marine Corps officers. *Register of the Commissioned and Warrant Officers of the Navy of the United States and of the Marine Corps to January 1, 1911* (Washington, D.C.: Government Printing Office, 1911), 240. In addition, at least one civilian clerk held a law degree. Act of 4 March 1911, 36 Stat. 1209. The

(continued...)

Digitized by Google

With his officers trained in both military and civil law, Russell hoped to make the Solicitor's office superfluous.

In addition to Russell's opposition, the newly-independent Solicitor's office was handicapped by an internal impairment; a lack of constancy at the top. A series of misfortunes combined with untimely resignations to deprive the office of the continuity of leadership it needed to withstand the challenge from the Judge Advocate General. We noted in the last chapter the death of Solicitor Hanna after barely a year in the office, and the interim appointment of his law clerk, Pickens Neagle, who served for six months in an acting capacity. On 2 February 1910 the office was again filled "permanently" with the appointment of Henry M. Butler. Butler served for little more than a year before he resigned on 31 March 1911. The following day Tristam B. Johnson was appointed to the post.[7-3] The unfortunate Johnson occupied the office for less than three and one-half months when he was killed by lightening on 16 July 1911. Pickens Neagle again became Acting Solicitor[7-4] and again served for approximately six months. He was succeeded on 3 January 1912 by Harry W. Miller, who resigned on 9 August 1913.[7-5] A month later, Graham Egerton, a Tennessee circuit court judge, was appointed Solicitor of the Navy.[7-6] The post would remain independent of the Judge Advocate

7-2. (...continued)
Solicitor had four lawyers on his staff, including himself. Act of 4 March 1911, 36 Stat. 1208.

7-3. Richard G. McClung, Office of the Under Secretary of the Navy, Procurement Legal Division, Washington, D.C., memorandum to file, Subject: "History of Solicitor of the Navy and of Navy JAG," 19 February 1943, at 13.

7-4. Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1911, at 159 ["Report of the Solicitor"].

7-5. McClung, memorandum to file, 19 February 1943, at 13.

7-6. Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1913, at 71 ["Report of the Solicitor"]; *Who Was Who in America*, 1897-1942, s.v. "Egerton, Graham." Egerton had been born in Bombay, British India, in 1861. McClung, memorandum to file, 19 February 1943, at 13.

Digitized by Google

General until 1 September 1921,[7-7] but the damage had been done. From 1910 to 1913 five persons had held the position of Solicitor, one of them twice. On the other hand, but one person held the post of Judge Advocate General, and he was set on eliminating the Solicitor as an independent office.

Notwithstanding the Judge Advocate General's officially limited area of responsibility under *Navy Regulations, 1909* (see Appendix B), he took every opportunity to expand his jurisdiction, or to give the impression that it was expanding. Thus in 1911 he spoke of "the number and variety of the purely legal questions referred to this office for investigation and preparation of opinions during the year." Although acknowledging that no record had been kept to substantiate this statement, and despite the fact that the "purely legal questions" were unidentified, the Judge Advocate General implied that non-disciplinary matters were a major part of the work of the office:

> This branch of the work of this office is in many respects of even greater importance than the work connected with the administration of naval discipline and is of large and rapidly growing proportions. The questions which arise cover a wide range, requiring exhaustive research in various branches of the law.[7-8]

7-7. The status of the Solicitor's office as an independent entity in the Navy Department was terminated on 1 September 1921 when it was merged into the Office of the Judge Advocate General. This reorganization was later reflected in changes to *Navy Regulations, 1920*. See text beginning at page 330.

7-8. *Report of the Secretary of the Navy*, 1911, at 173 ["Report of the Judge Advocate General"]. Notwithstanding these assertions, the Judge Advocate General's communications to the Secretary of the Navy during this period were confined to personnel and disciplinary matters. See "Communications to the Secretary of the Navy, July 1885-February 1912, from the Judge Advocate General, Relative Chiefly to Matters of Discipline, Contracts, and Law" (title on binding: *Letters, Memoranda, Reports, Opinions, &c.*, and other titles), Naval Records Collection, Record Group 125, National Archives, Washington, D.C. The Judge Advocate General was occupied almost exclusively with review and disposition of the records of courts martial, courts of inquiry, boards of investigation, boards of inquest, and examining boards for promotion, retirement, and appointment of candidates as commissioned officers in the Navy other than midshipmen. Naval

(continued...)

Digitized by Google

This is not to diminish the importance and extent of the military work being done in the Office of the Judge Advocate General. In the first year of the deck court (1909-1910), that tribunal was used no less than 13,674 times. And despite this heavy reliance on deck courts, trials by summary courts also increased. Overall, courts martial in 1910 showed an increase of 94.2 percent over 1909 levels.[7-9] On average, better than one in three

---

7-8. (...continued)
prison oversight and interpretation of Navy regulations, as they applied to the personnel, essentially rounded out his responsibilities.

The Solicitor, on the other hand, was deeply involved in civil matters. Writing in 1911, Acting Solicitor Neagle described the previous year's accomplishments. Among them: drafting of contracts; interpretation of contracts; payments on contracts; coordination with the Department of Justice on claims against the Navy in the Court of Claims; petitions to the Interstate Commerce Commission in freight and passenger rate disputes with railroad and steamboat companies; appearances before the Interstate Commerce Commission in connection with such disputes; administration of patent use reimbursements; adjudication of collision claims; oversight of surety bonds on construction contracts; coordination of condemnation proceedings with the Attorney General; quieting of title to land; negotiations for purchase of land. *Report of the Secretary of the Navy*, 1911, at 159-63 ["Report of the Solicitor"]. In 1910 the Solicitor had been given additional responsibility for the sale of the Navy's condemned vessels. Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1910, at 150 ["Report of the Solicitor"]. In 1913 he assumed responsibility for safeguarding the muniments of title to land acquired for naval use. Henry P. Beers, "Historical Sketch of the Office of the Judge Advocate General, Navy Department," *U.S. Naval Institute Proceedings*, 67 (May 1941): 673. An inclusive summary of the duties of every employee of the Solicitor's office, including the messenger boy, prepared during the short term of Tristam Johnson, appears in "Letters Sent by the Solicitor of the Navy, June 1908-December 1911," Naval Records Collection, Record Group 45, National Archives, Washington, D.C.

7-9. *Report of the Secretary of the Navy*, 1910, at 154 ["Report of the Judge Advocate General"].

Digitized by Google

enlisted men was being tried by court martial.[7-10] The Judge Advocate General had his hands full.

This increase in disciplinary proceedings apparently caused the Navy to recognize the need to indoctrinate its junior officers in court martial and board procedures in a more conventional manner. After a brief hiatus (see text beginning at page 236), military law was once again included in the curriculum at the Naval Academy. The primary text was Lemly's and Lauchheimer's *Forms of Procedure for General and Summary Courts-martial, Courts of Inquiry, investigations, Naval and Marine Examining and Retiring Boards, Etc., Etc.*, which was revised by the Office of the Judge Advocate General and re-issued in 1910.[7-11]

But Judge Advocate General Russell persisted in his quest to acquire control over civil as well as military matters. When the Solicitor called for improvement in the condition of the Navy Department's law library,[7-12] the Judge Advocate General was quick to echo the cause to his own advantage, emphasizing the civil law responsibilities of his office:

> [A]ttention is invited to the need of a law library in the department . . . . The inadequacy

---

7-10. In 1910, with a total enlisted population of 68,441 men in the Navy and Marine Corps, 25,397 trials by court martial were held. *Report of the Secretary of the Navy*, 1910, at 152-54 ["Report of the Judge Advocate General"].

This enormous load inspired a change in record keeping methods that was long overdue; records of proceedings of general and summary courts martial would henceforth be filed alphabetically in loose-leaf binders rather than bound chronologically, the method used for over a century. *Report of the Secretary of the Navy*, 1911, at 17.

7-11. *Report of the Secretary of the Navy*, 1910, at 156 ["Report of the Judge Advocate General"].

7-12. The Solicitor wrote:

> The law library possessed by the office, though such books as are in it are in the main useful and appropriate, is inferior, and the dispatch of business would be facilitated if a more adequate library could be obtained.

Report of the Secretary of the Navy, 1910, at 149 ["Report of the Solicitor"].

Digitized by Google

> of the present law library is constantly becoming more apparent as questions of special importance arise, the correct determination of which demands an examination of the leading authorities in order to ascertain how the principles involved therein have ben applied *in analogous cases by the civil courts*. In a majority of these questions the parties interested are represented by able civilian counsel who usually submit briefs in support of their contentions, citing and discussing adjudicated cases to which this office is without ready access.[7-13] (Italics added.)

Slowly, ever slowly, the tide began to turn in Russell's direction. In 1912, an amendment to *Navy Regulations, 1909*, removed from the Solicitor cognizance over proceedings in the civil courts in all cases concerning the personnel, and gave it to the Judge Advocate General.[7-14]

7-13. *Report of the Secretary of the Navy*, 1911, at 173 ["Report of the Judge Advocate General"].

7-14. Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1912 at 110 ["Report of the Judge Advocate General"]. The respective provisions of *Navy Regulations* before and after the change were as follows:

DUTIES OF THE SOLICITOR

Navy Regulations, 1909, article 13(1):
It shall be the duty of the Solicitor to examine and report upon questions of law, including . . . proceedings in the civil courts by or against the Government or its officers . . . .

Navy Regulations, 1913, article 117(1):
It shall be the duty of the Solicitor to examine and report upon questions of law, including . . . proceedings in the civil courts by or against the

(continued...)

Digitized by Google

Russell stated that this resulted in "numerous cases" being handled in his office during fiscal year 1912, but gives no figures, nor does he describe the types of cases handled. Nevertheless, it was a definite erosion of the Solicitor's authority, and a symbolic, if not real, increase in that of the Judge Advocate General. Meanwhile, Judge Advocate General Russell continued to emphasize the importance of his office, noting that

> [N]aval courts-martial have jurisdiction not only of violations of laws and regulations governing the discipline and administration of the naval service, but also of every conceivable criminal offense committed by members of its personnel whether at sea or on shore, at home or abroad, with the single exception of murder committed within the territorial jurisdiction of the United States.[7-15]

Russell subsequently reminded the Secretary that the work of his office encompassed more than disciplinary matters, and that the uniformed

---

7-14. (...continued)

> Government or its officers in cases relating to material *and not concerning the personnel as such* . . . (Italics added.)
>
> DUTIES OF THE JUDGE ADVOCATE GENERAL
>
> *Navy Regulations, 1909*, article 12(2):
> It shall also be the duty of the Judge Advocate General to examine and report upon all questions relating to [no mention of civil proceedings].
>
> *Navy Regulations, 1913*, article 134(2):
> It shall also be the duty of the Judge Advocate General to examine and report upon all questions relating to . . . *proceedings in the civil courts in all cases concerning the personnel as such.* (Italics added.)

7-15. *Report of the Secretary of the Navy*, 1912 at 97 ["Report of the Judge Advocate General"].

Digitized by Google

personnel under his direction were rapidly becoming qualified to deal with legal matters of all kinds:

> Important legal questions continually arise in connection with every branch of work under the cognisance of the Judge Advocate General . . . . [T]here are numerous and varied legal questions of a miscellaneous character which are necessarily presented for decision in the administration of the Navy and Marine Corps. A proper determination of these questions is of importance not only in connection with the specific case presented, but because of their enduring and far-reaching effect as precedents for future guidance. The questions which arise cover a wide range, requiring exhaustive research in various branches of the law, as well as first-hand knowledge of conditions on board ship or elsewhere in the service which may be involved by the facts in the different cases. Accordingly, I have made it a rule since I entered upon the duties of the Judge Advocate General to expect officers assigned to duty in this office to take a course in law at one of the universities in this city, in addition to performing their regular duties in this office. As a result several of these officers have already graduated in law and been admitted as members of the bar in the District of Columbia, some have been detached from the office and returned to duty in the service at large, carrying with them the advantage of the special training thus acquired, while others on

Digitized by Google

> duty in the office are still pursuing their legal studies.[7-16]

In his contemporaneous report, the Solicitor seemed to offer rebuttal:

> The work done in this office . . . is altogether of a legal character . . . . Many of the subjects that come up for consideration . . . [involve] intricate and complicated questions of law . . . .[7-17]

Russell left the post of Judge Advocate General on 5 November 1913, succeeded by Commander Ridley McLean, USN, on that same date. McLean entered the office as the United States was about to enter the world stage. In the words of Captain A.W. Johnson:

> [President] Wilson's policy of watchful waiting in Mexico was reversed to one of aggressive action. Unfriendly hands in California were straining at the ties that bound us to Japan. In the Caribbean the Navy was to be occupied with intervention in Haiti, Santo Domingo, and Cuba, and in a bombardment of

---

7-16. *Report of the Secretary of the Navy*, 1913, at 93 ["Report of the Judge Advocate General"]. There does not appear to have been any funding for this program, even though it was hardly voluntary. Presumably the individual officers paid their own expenses. Nevertheless, the program was not as informal as Judge Advocate General Russell made it sound, at least not by 1919. In that year the Board of Visitors to the Naval Academy noted that the Post-Graduate Department of the Academy "has jurisdiction over officers specializing in law who are on duty in the office of the Judge Advocate General of the Navy in Washington." Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1919, at 272 ["Report of the Board of Visitors to the Naval Academy"].

7-17. *Report of the Secretary of the Navy*, 1913, at 71 ["Report of the Solicitor"].

Digitized by Google

> Vera Cruz. There were rumblings of war across the Atlantic.
>
> By midsummer of 1914 the greatest war in history was devastating Europe. . . . A year later we hear of Pershing crossing the Mexican border in pursuit of [Pancho] Villa.[7-18]

The material build-up and attendant commercial dealings which accompanied the United States's involvement in the Caribbean and Mexico, and its entry into World War I should have strengthened the Solicitor's toehold in the Secretariat.[7-19] Instead, he made bare headway. Almost from the outset the Solicitor found himself receiving second-class treatment in the allocation of office spaces. As early as 1910 he complained that his entire staff of nine persons was housed in but two rooms.[7-20] By 1914 conditions had worsened. Whereas his entire staff had previously been in two adjacent rooms, they were now split between a room on the second floor, and a part of the library on the fourth floor:

> There are four typewriters in one room, and in that same room all consultations among employees and with attorneys and other representatives from outside must be carried on. With the head of the office [the Solicitor] and four other persons huddled in this one room, it is surprising that work of the high

---

7-18. Department of the Navy, "A Brief History of the Organization of the Navy Department, Prepared by Capt. A.W. Johnson, United States Navy" (1940), Doc. No. 284, at 2219.

7-19. As a consequence of the war in Europe, the U.S. Navy undertook a modernization and expansion program. In 1914 Congress authorized construction of three dreadnoughts, six torpedo-boat destroyers, seven coastal submarines, and one sea-going submarine. Additional ships were requested for consideration in a subsequent session of Congress. Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1914, at 5.

7-20. *Report of the Secretary of the Navy*, 1910, at 149 ["Report of the Solicitor"].

Digitized by Google

> quality turned out by the employees can be accomplished . . . .[7-21]

Judge Advocate General McLean's report was far more sanguine. He took the opportunity to remind the Secretary that the officers in his charge were continuing to become proficient in all aspects of the law:

> In order to equip [the officers assigned to the Office of the Judge Advocate General] for work of this varied and technical character, my predecessor [Russell] established the custom of requiring all officers assigned to duty in this office to take a course of law in one of the universities in this city [Washington, D.C.]. This requirement, with which I am in hearty accord, should be continued, for only in this way will this office be supplied with officers possessing the requisite knowledge of law, and the service with officers competent to prosecute important cases ashore and afloat.[7-22]

McLean seemed content, however, to confine his lawyer-officers to military duties, perhaps intending that when a sufficient number became proficient in general law they could displace the Solicitor. To acquire these numbers, he advanced a proposal to establish a cadre of lawyer-officers, restricted to legal duties. This was similar to the proposal made by Judge Advocate General Campbell in 1909 (see text beginning at page 267), but without the suggestion that the officer-lawyers be organized into a corps of judge advocates:

7-21. *Report of the Secretary of the Navy*, 1914, at 95 ["Report of the Solicitor"].

7-22. *Report of the Secretary of the Navy*, 1914, at 124 ["Report of the Judge Advocate General"].

Digitized by Google

[O]fficers . . . who successfully complete the required course of study [in law] should be treated as specialists, if they so elect . . . . In other words, the Navy requires the services of a few officers who are good lawyers; officers who have added to their technical naval knowledge a special understanding of the law, both military, civil, and international. If they are to become and continue to be good lawyers, naval officers, like civilians, must make the study and practice of law their paramount work. In order to perfect this knowledge and in order that the Navy may obtain the maximum benefit from their services, they should be assigned to duty in this office when they become due for shore duty, and, when at sea, to duty in the line of their specialty. They will be of especial value on the staff of each commander in chief as aids in the preparation of legal papers originating with such officer, and to detect errors in the proceedings of courts which are not now discovered in many cases until the proceedings have reached a point where corrections can not be made. Certain of these officers should be thorough students of international law and their advice and opinions on this subject will make them doubly valuable to the service whether afloat or ashore. In order to accomplish this it is recommended that officers who have completed the course of law as above described, on their next tour of shore duty take a special course in international law.

If these officers devote the time necessary to familiarize themselves with this diverse and exacting work, and the naval service is benefitted thereby, as I believe it will be, some provision should be made for their advancement without detriment because of the

Digitized by Google

> fact that they have not been able to bestow the usual amount of time on strictly professional naval subjects. The Army accomplishes this end by means of a separate Corps of Judge Advocates. As long as existing laws relating to promotion are in operation,[7-23] I consider a separate corps unnecessary and not in accord with the general thought of the Navy . . . .[7-24]

Although the concept behind McLean's proposal would be resurrected in substantial part after World War II as the "Law Specialist" program (see discussion beginning at page 481), it was virtually ignored at the time he presented it. The Secretary of the Navy failed to acknowledge it in his forwarding report to the President, and McLean did not again raise it.

With disciplinary problems in the Navy continuing to run at a high rate, McLean not surprisingly focused on military law as his area of

---

7-23. Promotion was by seniority, not by merit; the senior officer in the next lower grade filling the first vacancy above him. See Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1915, at 23. But a prerequisite to acquiring this seniority was time at sea:

> The business of a naval officer is on the sea. It has been wisely ordered that every officer . . . shall alternate his service afloat with service ashore. . . . [N]o officer coming up for promotion should be promoted unless he [has] had adequate sea service in his grade.

Report of the Secretary of the Navy, 1913, at 19. McLean was no doubt mindful of this sea service requisite when he structured his proposal to include sea duty, albeit on a staff.

By mid-1918, promotion for officers above the rank of lieutenant commander was by selection, and Secretary of the Navy Daniels was arguing for extension of the same system to all grades. [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1917 at 14-15; [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1918 at 72-73, 409.

7-24. *Report of the Secretary of the Navy*, 1914, at 124-25 ["Report of the Judge Advocate General"]. McLean either ignored, or had no proposal for, the two Marine Corps officers in his office at the time he made his suggestion, both of whom, presumably, were studying law alongside their Navy brethren.

Digitized by Google

primary concern.[7-25] His annual report for fiscal year 1915 is replete with statistics showing the number of courts martial held, the types of offenses committed, and several permutations of such data.

McLean also addressed the *corpus juris* of courts martial. Distressed by the fact that virtually all publications on courts martial were published by the Army and based on the Articles of War, and that the entire body of law on naval courts martial consisted of court martial orders which had been published and then filed away over the years, McLean inaugurated the compilation of a card index of the decisions, with a view to their

---

7-25. The Judge Advocate General was responsible for the physical condition of all naval prisons in which personnel were confined, and for the administration of all court martial punishments. With almost one of every four enlisted men being court martialled in 1914, this was no small task. *Report of the Secretary of the Navy*, 1915, at 133-42, 162 ["Report of the Judge Advocate General"].

Judge Advocate General McLean devoted considerable attention to his penal responsibility. For example, he instituted a program whereby convicted offenders were interviewed in prison to try to determine why they committed their offenses and what benefits they derived from incarceration. In the case of deserters, the most prevalent reason given by inmates at the Portsmouth, New Hampshire Naval Prison for committing the offense was "disliked the Naval service" and "disliked my ship." Other reasons included "bad company," "induced to desert by a woman," and "no reason at all." Of the benefits derived from imprisonment, far and away the most often cited was "learned my lesson." *Report of the Secretary of the Navy*, 1915, at 159 ["Report of the Judge Advocate General"].

Judge Advocate General McLean was also convinced that certain men were "defectives," *i.e.*, that they could not perform in the Navy under any circumstances, and thus were prone to violate regulations. He tried for several years to assemble empirical evidence to support this theory, with less than conclusive results:

> As pointed out in [my 1914 Report], something is lacking in the make-up of a very large percentage of naval prisoners, though investigations which have been made by the bureau [of Medicine and Surgery] fail to develop as high a percentage as I had anticipated of men who under various tests could be classed as morons.

Report of the Secretary of the Navy, 1915, at 141 ["Report of the Judge Advocate General"]. See generally 133-42.

Digitized by Google

publication as a legal digest.[7-26] Two years later he proudly announced completion of his *Naval Digest*[7-27] Also, pursuant to a resolution of the Senate enacted at the suggestion of Judge Advocate General McLean,[7-28] work began on an annotated compilation of laws relating to the Navy and Marine Corps, with administrative interpretations and applications. This had far broader scope than the digest of court martial orders, and could easily reach into the civil law. The task was assigned to George Melling, the law clerk in the Judge Advocate General's office.[7-29] The project, which came to be known as *Laws Relating to the Navy, Annotated*, was daunting in concept. It was to be completed outside of office hours,[7-30] and was to contain the full body of naval laws, as amended, with all

---

7-26. *Report of the Secretary of the Navy*, 1914, at 125 ["Report of the Judge Advocate General"].

7-27.

> The Naval Digest . . . cover[s] selected opinions of this office, decisions of the department, and remarks upon court-martial records extending back to 1879 . . . . The digest will furnish in abridged form a comprehensive treatise on naval law, precedents, and decisions. . . . I regard the Naval Digest in its bearing upon naval law and procedure as one of the most valuable products of my incumbency.

Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1916, at 180 ["Report of the Judge Advocate General"].

7-28. *Report of the Secretary of the Navy*, 1916, at 158 ["Report of the Judge Advocate General"]. Walkup assigns the date of 30 March 1914 to the Senate resolution. Homer A. Walkup, *History of U.S. Naval Law and Lawyers* (Prepared on the occasion of the ninetieth anniversary of the establishment of the Office of the Judge Advocate General of the Navy, 1970), 13.

7-29. *Report of the Secretary of the Navy*, 1915, at 146 ["Report of the Judge Advocate General"].

7-30. *Report of the Secretary of the Navy*, 1916, at 180 ["Report of the Judge Advocate General"].

Digitized by Google

decisions and interpretations that had been placed upon them.[7-31] Finally, McLean announced that he had begun an extensive revision to *Forms of Procedure for Courts and Boards in the Navy and Marine Corps*.[7-32]

7-31. *Report of the Secretary of the Navy*, 1914, at 125 ["Report of the Judge Advocate General"]. The project proved even more daunting in reality than in concept. Year after year the Judge Advocate General's annual report recited the obstacles to its completion, not least of which was the plethora of legislation and administrative and judicial rulings coming out of World War I. See, for example, *Report of the Secretary of the Navy*, 1918, at 418 ["Report of the Judge Advocate General"]; *Report of the Secretary of the Navy*, 1919, at 335-36 ["Report of the Judge Advocate General"]; *Report of the Secretary of the Navy*, 1920, at 510 ["Report of the Judge Advocate General"]. Melling was constantly trying to catch up. The work was finally completed in 1922, eight years after it had begun. Melling was rewarded by a grateful, or perhaps relieved, Congress:

> Attorney George Melling, attached to this office, is the exclusive compiler of these statutes. His valuable work in this respect has received substantial recognition by the Congress in the sum of $3,000 . . . .

Report of the Secretary of the Navy, 1922, at 52 ["Report of the Judge Advocate General"].

A subsequent effort by Melling to keep the work current was rewarded with a similar stipend. The naval appropriation act of 2 March 1927 (44 Stat. 1278) included a provision "To pay George Melling for compiling and indexing supplement to Laws Relating to the Navy, Annotated . . . $3,000, to be available upon completion of such work." The supplement was completed and distributed in 1929. Department of the Navy, *Annual Report of the Judge Advocate General of the Navy to the Secretary of the Navy*, 1929, at 1.

7-32. *Report of the Secretary of the Navy*, 1914, at 125 ["Report of the Judge Advocate General"]. The revision was completed in 1917, at which time the title of the publication was shortened to *Naval Courts and Boards* the name by which it would henceforth be known. It was superseded in 1951 by the *Manual for Courts-Martial*, a joint-service procedural guide spawned by the *Uniform Code of Military Justice*.

The 1917 revision contained the rules for courts martial, thus again segregating them from *Navy Regulations*. According to Snedeker, *Courts and Boards* was

> a comprehensive law manual which superseded both

(continued...)

Digitized by Google

McLean's interest in disciplinary affairs spilled over to the Naval Academy. In 1916, at the request of the Superintendent, the officers and civilian lawyers in the Office of the Judge Advocate General developed and conducted a course in military law as part of the curriculum for fourth-year midshipmen. This was the first time a law course at the Naval Academy had been taught by lawyers. Teaching methods included lectures and moot courts martial. Subjects covered included the object and jurisdiction of military courts, the relation of military law to civil law, keeping the record of proceedings, conducting a trial by court martial, and examining witnesses.[7-33] The course was presented again in February 1917. Following this second presentation by personnel of the Office of the Judge Advocate General, the course syllabus was turned over to Academy instructors. Its subsequent presentation was canceled due to the early graduation of students needed to man the ships that were being built as part of the nation's arsenal for World War I. Judge Advocate General William Carleton Watts, who took office on 6 January 1917, recommended in his first annual report to the Secretary that the course be made a permanent part of the Naval Academy curriculum,[7-34] but succeeding annual reports contain no further mention of it.

7-32. (...continued)
the *Forms of Procedure* and the basic rules for courts martial theretofore contained in *Navy Regulations*. The manual was published by the Secretary "for the guidance of the naval service," but in its text [at section 6(b)] it stated that it had "the full force and effect of law," whether expressly approved by the President or not, under the authority of section 1547, Revised Statutes. The manual did not purport to have the President's approval.

James Snedeker? "The Jurisdiction of Naval Courts" (unpublished manuscript, n.d.), 69.

In addition to containing the rules for courts martial, *Courts and Boards* contained a thirty-six page chapter on the rules of evidence.

7-33. *Report of the Secretary of the Navy*, 1916, at 159 ["Report of the Judge Advocate General"].

7-34. *Report of the Secretary of the Navy*, 1917, at 143-44 ["Report of the "Judge Advocate General"].

Digitized by Google

Efforts to displace him notwithstanding, there was also an abundance of work for the Solicitor. By 1915 the war in Europe had intensified. As the possibility of American involvement became more likely, Secretary of the Navy Josephus Daniels (1913-1921) proposed a five-year construction plan which would bring the fleet to a 444-ship Navy by 1921.[7-35] In addition to its surface ships, the Navy was acquiring air ships. As of 1 December 1915 it had 15 airplanes, with appropriations authorized for 20 more airplanes, 73 replacement motors, and one free balloon.[7-36]

The Solicitor noted the significant increase in his contracting responsibilities occasioned by the "addition of ships, the increase of public works development, and the establishment of radio stations."[7-37] Other commercial matters such as insurance, freight and passenger rates, patents, labor relations, collision claims, and land use and acquisition further occupied him.[7-38] And his years of complaining about working conditions finally bore fruit, albeit a somewhat bitter harvest. He was given adequate office space, but in a building without any law library, and apart from the Navy Department's files and records:

> The rooms . . . into which this office was moved . . . are comfortable and satisfactory so far as concerns space, light, and convenience of arrangements. The separation, however, from the main building, where the files and records are and where it was convenient to consult with other offices and bureaus and to borrow books from the libraries of the

---

7-35. *Report of the Secretary of the Navy*, 1915, at 5. Although Daniels oversaw the greatest peacetime expansion in American sea power since the establishment of the Navy Department in 1798, he is perhaps best remembered for General Order 99 which prohibited the use of liquor on American warships. See *Report of the Secretary of the Navy*, 1914, at 42.

7-36. *Report of the Secretary of the Navy*, 1915, at 41.

7-37. *Report of the Secretary of the Navy*, 1915, at 121 ["Report of the Solicitor"].

7-38. *Report of the Secretary of the Navy*, 1915, at 121-32 ["Report of the Solicitor"].

Digitized by Google

> department, the Judge Advocate General's Office, and the War Department, has resulted in detriment and hindrance to the transaction of the business handled.[7-39]

Judge Advocate General McLean, meanwhile, took every opportunity to enhance the prestige of his staff. When two "important" courts martial required the prosecutorial expertise of trained lawyers, but the Department of Justice was reluctant to authorize employment of special counsel, McLean assigned his own officer-lawyers to the task.[7-40] As the need for opinions from the Judge Advocate General regarding the legal implications of proposed actions by the Navy Department increased, so too did the expertise of the office. McLean considered it to be "of no little significance" that in the period of a year his office consulted the Attorney General only once for an opinion on a pending matter, "and in that case the Attorney General's opinion when rendered fully sustained the opinion previously expressed by this office."[7-41]

In his annual report for 1915, McLean had noted that every one of the ten officers detailed to duty in his office[7-42] (save himself) either held a law degree or was enrolled in law school, and that the majority of the nine clerks employed by the office[7-43] were law school graduates.[7-44] After an extensive exposition of the types of matters handled by his staff, he noted

---

7-39. *Report of the Secretary of the Navy*, 1915, at 121 ["Report of the Solicitor"].

7-40. *Report of the Secretary of the Navy*, 1915, at 145 ["Report of the Judge Advocate General"].

7-41. *Report of the Secretary of the Navy*, 1916, at 176 ["Report of the Judge Advocate General"].

7-42. *Register of the Commissioned and Warrant Officers of the Navy of the United States and of the Marine Corps to January 1, 1916* (Washington, D.C.: Government Printing Office, 1916), 296.

7-43. Act of 16 July 1914, 38 stat. 454, 484.

7-44. *Report of the Secretary of the Navy*, 1915, at 145 ["Report of the Judge Advocate General"].

Digitized by Google

that a background in military law alone was not sufficient; his officers also required knowledge of civil law, the very area reserved to the Solicitor:

> It is needless to say that work of the above nature necessitates a trained body of officers informed in both *civil* and military law. This is accomplished by continuing the requirement . . . that all officers attached to this office take a regular course in law outside of office hours.[7-45] (Italics added.)

McLean extended the qualifications of his officers by requiring each of them, himself included, to take a course in international law. Foreseeing significant developments in international law arising from World War I, and seeking to shape them "along lines most favorable from a naval point of view,"[7-46] McLean recommended to the Secretary of the Navy that his office have cognizance over all international law matters in the Navy.[7-47] Shortly before the United States's entry into the European conflict, the Secretary of the Navy assigned responsibility for international law affairs to the Office of the Judge Advocate General.[7-48]

7-45. *Report of the Secretary of the Navy*, 1915, at 145 ["Report of the Judge Advocate General"].

7-46. *Report of the Secretary of the Navy*, 1916, at 159, ["Report of the Judge Advocate General"].

7-47. *Report of the Secretary of the Navy*, 1915, at 145 ["Report of the Judge Advocate General"].

7-48. A retired officer was assigned exclusive responsibility for the "international law desk" in the Office of the Judge Advocate General, where he could become expert in the field. McLean accurately predicted a demand for such a person to "be available to represent the Navy as a delegate at international conventions and conferences where it may be desirable to have someone able to speak with authority concerning naval subjects." Matters which quickly came to the attention of the international law desk included regulations for the treatment of prisoners of war, regulations governing internment, naval jurisdiction over

(continued...)

Digitized by Google

Other developments impacted on the Office of the Judge Advocate General. An amendment to the *Articles for the Government of the Navy* by the Act of 29 August 1916 (39 Stat. 586) gave the Secretary of the Navy authority to empower certain officers to convene general courts martial.[7-49] In addition to those officers authorized by statute to convene general courts,[7-50] the Secretary now had discretion to authorize squadron, division, and flotilla commanders to do so and, in time of war, could extend this authority to commandants of Navy yards and stations located within the continental United States. The authority also extended to commanding officers of Marine Corps brigades or larger forces. This legislation had the effect of relieving the Secretary, and in reality the Judge

7-48. (...continued)
belligerent vessels in United States waters, interference with United States mail, visit and search in United States territorial waters, and violations of radio neutrality. *Report of the Secretary of the Navy*, 1916, at 159, 177-79 ["Report of the Judge Advocate General"].

7-49. While the Navy was concerned with the question of convening authority, the Army was re-organizing its entire court martial hierarchy. A major revision to the Articles of War, also enacted in 1916, created a three-tiered system of general, special and summary courts martial for the Army. (Act of 29 August 1916, 39 Stat. 619, 651.) See discussion in S. Sidney Ulmer, *Military Justice and the Right to Counsel* (Lexington, Kentucky: University Press of Kentucky, 1970), 32. While generally approving of the structural mechanics of the Army's trial system, Ulmer was critical of the representation protections afforded an accused:

> We can say then that by 1916, the right of the defendant in a federal criminal trial to have counsel furnished in capital cases was a legal right which did not exist in military courts. We can say further that the lower federal courts evidenced a slightly higher degree of sensitivity to the importance of counsel to fair trial than Congress reflected in its enactments and revisions of the Articles of War.

Ulmer, *Military Justice and the Right to Counsel*, 38.

7-50. In addition to the President and the Secretary of the Navy, the officers so authorized were limited to the commander in chief of a fleet or squadron, and the commanding officer of any naval station beyond the continental limits of the United States. Act of 16 February 1909, 35 Stat. 621, sec. 9

Digitized by Google

Advocate General, from the burdens of a convening authority in all but a handful of cases.[7-51]

The same act served the Judge Advocate General in another way, by providing for the detail of an officer of the line of the Navy or Marine Corps as Assistant to the Judge Advocate General. The assistant would perform the duties of the Judge Advocate General in case of the latter's death, resignation, absence or sickness.[7-52]

All this was prelude to the step which few wanted but many anticipated; the United States's entry into World War I. In authorizing construction of 157 ships, including ten battleships, at cost of almost $140 million, Congress reluctantly stated:

> [T]he United States . . . looks with apprehension and disfavor upon a general increase of armament throughout the world, but it realizes that no single nation can disarm,

---

7-51. In an attempt to relieve *all* convening authorities of at least a part of the burden which court martialling one-fourth of the Navy's enlisted force placed upon them, the 1916 act contained a provision permitting any sailor who had completed a year's service at sea to receive, at his request, an honorable discharge in the next succeeding month of June or December. A second provision authorized the Secretary of the Navy to grant a furlough without pay to any enlisted man for the unexpired portion of his enlistment. With desertion and absence comprising three-fourths of the offenses committed, the Judge Advocate General felt that "these two provisions . . . should put an end to desertion by men who are not mental defectives." *Report of the Secretary of the Navy*, 1916, at 166 ["Report of the Judge Advocate General"].

7-52. An assistant to the Judge Advocate General was first proposed by Secretary of the Navy Paul Morton in 1904. Upon passage of the 1916 act, McLean noted that the Judge Advocate General's duties were largely prescribed by statute and that, until the 1916 legislation, no person had been statutorily authorized to perform them in his absence. *Report of the Secretary of the Navy*, 1916, at 181 ["Report of the Judge Advocate General"]. He apparently overlooked the legislation in effect from 1900 to 1909 which gave this authority to the Navy Solicitor. See footnote 6-105 and related text.

The position is today called the "Deputy Judge Advocate General." This office was variously called "Assistant to the Judge Advocate General," "Assistant Judge Advocate General," and "Deputy and Assistant Judge Advocate General" before its final designation as "Deputy Judge Advocate General" by Public Law 90-179 (Act of 8 December 1967, 81 Stat. 546).

Digitized by Google

> and that without a common agreement upon the subject every considerable power must maintain a relative standing in military strength.[7-53]

The Office of the Judge Advocate General made plans to detail Reserve and volunteer officers to permanent court martial duty, to replace Regular officers who would be required in combat roles.[7-54] Judge Advocate General McLean requested an increase in his staff, including employment of a chief law clerk.[7-55] Likewise the Solicitor noted a substantial increase in the work of his office, due to the "great additions to the naval establishment authorized at the last session of Congress . . . ."[7-56] The same act that authorized an increase in force for the Judge Advocate General added two additional clerks to the Office of the Solicitor.

McLean resigned the position of Judge Advocate General on 2 December 1916 to assume command of *USS Columbia*, with additional duty as chief of staff to Commander, Submarine Force, U.S. Atlantic Fleet.[7-57] On 6 April 1917 the United States declared war on the Imperial Government of Germany. Before the year was out the United States naval fleet would expand from 300 to more than 1,000 vessels; expenditures for all naval purposes would increase from $8,000 per month to $60,000 per

---

7-53. Act of 29 August 1916, 39 Stat. 556, 618.

7-54. *Report of the Secretary of the Navy*, 1916, at 159 ["Report of the Judge Advocate General"].

7-55. *Report of the Secretary of the Navy*, 1916, at 182 ["Report of the Judge Advocate General"]. McLean's request was granted. The Act of 3 March 1917, 39 Stat. 1070, increased the number of clerks in the Office of the Judge Advocate General from eight to ten, added a chief law clerk, and added a messenger.

7-56. Department of the Navy, *Annual Report of the Solicitor to the Secretary of the Navy for the Fiscal Year 1916*, at 3. For unexplained reason, the Solicitor's report for 1916 was not bound with that of the Secretary of the Navy's report to the President, as it had been in every previous year.

7-57. Walkup, *History of U.S. Naval Law and Lawyers*, 11.

Digitized by Google

month.[7-58] Over the course of Josephus Daniels's tenure as Secretary of the Navy, from 1913 to 1921, naval appropriations for all purposes ballooned from $142,000,000 to $1,900,000,000.[7-59] The Navy was a big business; a big employer and a big consumer.

Much of the burden of facilitating the business practices of the Navy fell to the Solicitor, who noted that the work of his office had become "more diversified and intricate" as a result of the demands of war. Constantly seeking to augment his staff, Solicitor Egerton pointed out that his "numerically inadequate" work force could not handle the additional workload without help. Temporary relief came in the form of several yeomen and yeowomen of the Naval Reserve force, who were detailed to assist the civilian employees of the Solicitor's office.[7-60]

7-58. *Report of the Secretary of the Navy*, 1917, at 2.

7-59. "A Brief History of the Organization of the Navy Department, A.W. Johnson," 2326.

7-60. *Report of the Secretary of the Navy*, 1917, at 107 ["Report of the Solicitor"].

The "yeowomen" mentioned by Solicitor Egerton were the first uniformed women members of the United States Navy. Their official designation was "Yeoman (F)," the "(F)" standing for female. At the end of the war they were all de-mobilized. The Annual Report of the Secretary of the Navy for 1919 contains the following accolade by Secretary of the Navy Daniels to these first women in the Navy:

> There was a time when the Navy was said to be the one department of Government that could get along without women. But the war taught us that this supposition was incorrect. . . . The imperative need for thousands of stenographers, typewriters and clerks in the early days of the war was met by enlisting women in the yeoman branch of the enlisted force, and, in all, more than 11,000 were enrolled. It had never been done before, but there was no law against it, and the new departure enabled the Navy to meet the emergency call and aided it greatly in the good record it made for efficiency. . . .
>
> Women also served in making and assembling the more delicate parts of torpedoes and in other branches of war service calling for skill and deftness.

(continued...)

Digitized by Google

As the Solicitor was struggling under the onus of wartime demands on his office, an executive act of the President transpired which impacted only obliquely on the Solicitor at the time. It was, however, to have unforseen consequences. The background is described by Beers:

> [M]uch confusion arose in the conduct of the government's legal work during the World War through the creation of new legal offices and the uncontrolled functioning of the departmental solicitors . . . .[7-61]

The Congressional remedy for resolving this "confusion" was to enact legislation authorizing the President to reassign and consolidate legal officers and their staffs among the several executive agencies as he saw fit. Such reorganization was to last not longer than six months after the end of the war.[7-62] Once given this authority, President Wilson signed Executive Order No. 2877,[7-63] by which he placed all wayward law officers of whatever stripe under the control of the Attorney General:[7-64]

7-60. (...continued)
Report of the Secretary of the Navy, 1919, at 144-45.

7-61. Beers, "Historical Sketch of the Office of the Judge Advocate General, Navy Department," 673. It is unlikely that Beers intended to include the Navy Department Solicitor when he spoke of "uncontrolled functioning," for we have seen how little autonomy the Navy Department Solicitor had.

7-62. Act of 20 May 1918, 40 Stat. 556, known as the "Overman Act". The wording of the statute authorized the President "to make such redistribution of functions among executive agencies as he may deem necessary . . . during the continuance of the present war and for six months after the termination of the war . . . ."

7-63. The Executive Order was issued on 31 May 1918. It is reprinted with further explanation in Sewall Key, "The Legal Work of the Federal Government," *University of Virginia Law Review* 25 (1938): 190, n. 94.

7-64. The preamble to Executive Order No. 2877 invoked the *raison d'être* of the Department of Justice Act:

(continued...)

Digitized by Google

> [A]ll law officers of the government . . . shall "exercise their functions under the supervision and control of the head of the Department of Justice," in like manner as is now provided by law with respect to the Solicitors for the principal Executive Departments . . . all litigation . . . shall be conducted under the supervision and control of the head of the Department of Justice . . . and . . . any opinion or ruling by the Attorney General . . . shall be treated as binding . . . .[7-65]

For the Navy Solicitor this order was both unnecessary and inappropriate. The title "Solicitor" as applied to the Navy office had been a misnomer from the outset, connoting as it does an attorney engaged in litigation for the government. The Navy Solicitor was hardly such an official, being charged, rather, with the business affairs of the Navy. Further, he sought out opinions and rulings from the Attorney General, precisely for their binding effect. He remained physically located in the Navy Department, in the same inconvenient office spaces he had hitherto occupied. He continued to submit his annual reports and requests for additional personnel to the Secretary of the Navy. Appropriations for his office were carried with those of the Department of the Navy. And he was carried in the *Navy Register* as an employee of the Navy Department throughout the war. In no discernable way did the appearance, function,

---

7-64. (...continued)

> WHEREAS, in order to avoid confusion in policies, duplication of effort, and conflicting interpretations of the law, unity of control in the administration of the legal affairs of the Federal Government is obviously essential, *and has been so recognized by the acts of Congress creating and regulating the Department of Justice*; (Italics added.)

7-65. Executive Order No. 2877 specifically exempted the Judge Advocates General of the Army and Navy from its ambit.

Digitized by Google

or procedures of his office change.[7-66] Thus, Executive Order No. 2877 had no perceptible impact on the affairs of the Navy Solicitor.

The Solicitor's annual report to the Secretary of the Navy for 1918 is of interest in this regard, for it confirms the absence of any change of allegiance or mission. And it paints an intriguing portrait of Solicitor Egerton, whose personality clearly shows through; a man devoted to his duty, but at the same time feeling that he has not been given the support necessary to carry it out.

ANNUAL REPORT OF THE SOLICITOR

NAVY DEPARTMENT

OFFICE OF THE SOLICITOR
Washington, October 14, 1918.

Owing to the enormous increase in the amount of work being handled by this office and the limited force available, it has been found necessary, in order to minimize the tendency to congestion, to devote every effort to the orderly dispatch of business, and in pursuance of this course it has been found impossible to spare the time for the collection of data upon which to predicate an annual report in its customary detail and volume.

It is believed that the foremost duty on hand, "winning the war," can be best accomplished by directing the entire energies of this office in an uninterrupted endeavor to keep pace with the tide of business that shows no indication of ebbing. . . .

7-66. See, generally, Beers, "Historical Sketch of the Office of the Judge Advocate General, Navy Department," 673; Walkup, *History of U.S. Naval Law and Lawyers*, 13; Bureau of Naval Personnel, *Office of the Judge Advocate General--Duties, Organization and Administration*, NAVPERS 10843 (Washington, D.C.: Bureau of Naval Personnel, 1949), 2-3; Bureau of Naval Personnel, *Organization and Functions of Office of the Judge Advocate General*, NAVPERS 10843-A (Washington, D.C., Bureau of Naval Personnel, 1961), 5.

Digitized by Google

. . . We really can not devote time just now to the pleasing occupation of patting ourselves on the back or the self-gratifying performance of blowing our own horn.

There is, however, one subject which, in the interests of efficiency and good economy, we can not afford to pass over. This office needs more workers of a permanent nature. I am not speaking now of clerical assistance; I allude especially to the lack of adequate and competent legal assistants. . . .

In brief, the solicitor feels that, in justice to the office and in the interests of the department, he should have an assistant who could properly represent the office and attend to business, to which through stress of other matters the solicitor often finds it impossible to give his personal attention.

Three additional law clerks at salaries that would invite competent applicants are urgently needed, and I am not beside the mark in stating that there is work on hand and inevitably in sight that will demand their services indefinitely. . . .

I can not too strongly press the importance of supplying this office with the permanent personnel indicated, for it is obvious that the services of such will be a necessity for a long time after the cessation of hostilities. . . .

Respectfully submitted.

GRAHAM EGERTON,

Solicitor.

THE SECRETARY OF THE NAVY.

As wartime business had escalated the workload of the Solicitor, a massive influx of personnel swelled the workload of the Judge Advocate General. In the space of a year, from 1 July 1917 to 1 July 1918, the

Digitized by Google

enlisted strength of the Navy and Marine Corps grew more than four-fold, from 95,548 to 412,415.[7-67] The number of trials by court martial, every one of which was reviewed by the Office of the Judge Advocate General, doubled in this space of time.[7-68] In addition, the office was called upon

---

7-67. Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1920, at 497 ["Report of the Judge Advocate General"].

7-68. In 1917, 17,768 enlisted men of the Navy and Marine Corps were tried by court martial. In 1918 the number jumped to 34,853. Nevertheless, both the Secretary of the Navy and the Judge Advocate General took consolation in the fact that the percentage of total personnel tried actually decreased, from 18.60% in 1917 to 8.45% in 1918. The Judge Advocate General attributed this to the "higher sense of duty and responsibility . . . in the personnel as [a result of] the state of war . . . which . . . tend[ed] to reduce the number of offenses to be expected in time of peace." *Report of the Secretary of the Navy*, 1917, at 119-20 ["Report of the Judge Advocate General"].

The normal time required to process a record of a general court martial was two days:

> On the day of receipt it is reviewed and the legal features are passed upon; the record is then forwarded to the Bureau of Navigation for comment as to disciplinary action; upon the return of the record therefrom the promulgating letters are written and mailed.

Report of the Secretary of the Navy, 1918, at 404 ["Report of the Judge Advocate General"].

Despite this seemingly cursory review process, the Judge Advocate General reported that:

> It has been the unceasing effort of this office, in its review of court-martial records . . . to see to it that no case in which the evidence is not conclusive, receives the approval of the department. . . . It seems not too much to say that no single feature has contributed more to obviate criticism of the administration of naval justice than that which requires all court-martial records to be submitted to this office for review, without regard to where the trail took place. This has made possible the application of a leveling process whereby the sentences of different courts, sitting in different

(continued...)

Digitized by Google

to review all war legislation affecting the Navy, including commercial legislation. Unlike the situation in the Solicitor's office, however, the Judge Advocate General's staff had been substantially expanded in anticipation of the increased demand. At the height of wartime mobilization the Office of the Judge Advocate General had a staff of fifty persons, approximately half of whom were attorneys or had legal training. This latter group included sixteen officers, all of whom came from the Reserve force or the retired list.[7-69] Four civilian attorneys[7-70] and four law

---

7-68. (...continued)

> quarters of the globe but trying offenders on like charges, for like offenses, committed under like conditions, are reconciled and made uniform.

Report of the Secretary of the Navy, 1919, at 322 ["Report of the Judge Advocate General"].

7-69. A number of retired Navy officers with Navy law experience were mobilized to the Judge Advocate General's office. *Report of the Secretary of the Navy*, 1917, at 118. The only officers on the active list were the Judge Advocate General and the Assistant Judge Advocate General, neither of whom had legal training. All other officers on the active list who had been stationed in the office at the outbreak of war had gone to sea or foreign service. *Report of the Secretary of the Navy*, 1918, at 403 ["Report of the Judge Advocate General"].

7-70. Several civilian attorneys with experience in naval law were consulted on various matters, and some were employed to augment the office staff, pursuant to special appropriations by Congress. *Report of the Secretary of the Navy*, 1917, at 118 ["Report of the Judge Advocate General"].

The first regular appropriation act authorizing the Judge Advocate General to hire attorneys was that of 1 March 1919 (40 Stat. 1213, 1242). Curiously, the Solicitor, with his extensive civil law responsibilities, never received authorization to hire attorneys; he was limited to law clerks. We have noted, however, that the "attorney" designation at that time was used in part as a pay-grade classification to permit the hiring of certain lawyers at a higher salary level than others. Law clerks, and even clerks in some cases, were simply lower paid lawyers. These personnel classifications notwithstanding, the Solicitor never had more than five lawyers on his staff, including himself, compared to the Judge Advocate General's two dozen or so.

Digitized by Google

clerks rounded out the complement of legally-trained personnel.[7-71] The remainder of the staff comprised three male yeomen, two female yeomen, fifteen clerks, two messengers, and two mess attendants.[7-72] With so many personnel, the office itself was organized into discrete divisions for the first time.[7-73]

7-71. Expansion of the Army Judge Advocate General's Department during World War I affords an interesting perspective on the Navy's growth. At the time the United States entered the war, there were seventeen officers serving in the Army Department; four in the Office of the Judge Advocate General, and thirteen overseeing military justice in the field. At war's end 426 officer-lawyers were in Army uniform, including a major general and four brigadier generals. U.S. Army Judge Advocate General's School, *The Army Lawyer: A History of the Judge Advocate General's Corps, 1775-1975*, comp. Paul F. Hill (Washington, D.C.: Government Printing Office, 1975), 116. During this time the Navy Judge Advocate General's office grew from nine to eighteen officers. *Report of the Secretary of the Navy*, 1917, at 118 ["Report of the Judge Advocate General"]; *Report of the Secretary of the Navy*, 1918, at 403 ["Report of the Judge Advocate General"].

The Army also permanently attached enlisted men to its Judge Advocate General's Department during World War I, to serve as legal assistants in the headquarters office and in the field. U.S. Army Judge Advocate General's School, *The Army Lawyer*, 116.

7-72. *Report of the Secretary of the Navy*, 1918, at 403 ["Report of the Judge Advocate General"]. The Judge Advocate General's staff essentially doubled between 1917 and 1919. Most of the gains were retained after the war ended, although 1918 is the only year in which mess attendants are listed among the complement of personnel.

7-73. Five divisions were created:

1. Administration of Justice
2. Officers' Records
3. Legislation
4. Legal Matters
5. International Law

Report of the Secretary of the Navy, 1917, at 119 ["Report of the Judge Advocate General"].

In addition to this divisional organization, the Judge Advocate General created the position of "Attorney" (presumably a title accorded the most senior civilian lawyer in the office) which was bestowed upon George Melling, compiler of *Laws Relating to the Navy, Annotated*. This may have been a reward for Melling's ongoing toil on the project. *Register of the Commissioned and Warrant*

(continued...)

Digitized by Google

Growth in the stature of the Office of the Judge Advocate General was accompanied by growth in the stature of the man running it. Included in the appropriations act of 1 July 1918 (40 Stat. 717) was a provision authorizing the Judge Advocate General of the Navy to hold the rank of rear admiral "while so serving."[7-74] The first officer to benefit from this statute was Captain George Ramsey Clark, USN, who assumed the post of Judge Advocate General and the rank of rear admiral on 20 July 1918.[7-75]

7-73. (...continued)
Officers of the Navy of the United States and of the Marine Corps to January 1, 1918 (Washington, D.C.: Government Printing Office, 1918), 3.

7-74. The statute tied the Navy Judge Advocate General's rank to that of the Army's Judge Advocate General:

> And hereafter . . . the Judge Advocate General of the Navy shall, while so serving, have corresponding rank and shall receive the same pay and allowances as are now or may hereafter be prescribed by or in pursuance of law for . . . the Judge Advocate General of the Army.

7-75. Clark's predecessor as Judge Advocate General, Captain William Carleton Watts, had resigned the office and detached on 15 April 1918, to accept command of *USS Albany* for convoy escort duty in the Atlantic. Pursuant to the Act of 29 August 1916, the Assistant Judge Advocate General, Commander Frank B. Freyer, USN, served as Acting Judge Advocate General in the interim. *Report of the Secretary of the Navy*, 1918, at 403 ["Report of the Judge Advocate General"].

Clark also benefitted from the step-up in rank conferred by the statute after he left office. Because this was his last naval assignment, Clark retired directly from the Office of the Judge Advocate General. His annual report for 1919 noted that:

> [I]t was held by the Attorney General, in accordance with the views of this office, that . . . the Judge Advocate General when retired while so serving, [is] entitled on the retired list to the rank incident to [his office], overruling former opinions of the Attorney General to the contrary.

Report of the Secretary of the Navy, 1919, at 333 ["Report of the Judge Advocate General"]. See 31 Op. Atty. Gen. 505 (1919).

(continued...)

Digitized by Google

In Clark's first year as Judge Advocate General his office processed over 447,000 records of courts martial, the highest number in the history of the Navy.[7-76] Clark was not pleased with the quality of the records that passed through his office, and he railed at the additional burdens placed on his staff in reviewing them. He chided both counsel for their lack of competence, and the court members for their unfamiliarity with court martial procedures. As a remedy, Clark suggested assignment to every general court martial of an officer "trained in the law," whose function it would be to assure a properly conducted trial. Clark would place these officers in a permanent legal organization within the Navy, which he proposed be established. He called it a "corps of judges advocate":

> I can not forebear to submit to the department a recommendation which I have had in mind and under advisement for more than a year. . . . I have no hesitancy in recommending to the department that legislation be secured looking to the formation of a permanent corps of judges advocate for the naval service. A detailed plan for such a corps, together with a draft of the requisite legislation to effectuate the same, will be forthcoming herefrom, upon the expression of the department's wishes in the premises.[7-77]
> One of the principal difficulties with which this office has been compelled to contend in the preparation for action of court-martial

---

7-75. (...continued)

Had Clark left office for another duty assignment, he would have reverted to his former rank and, unless subsequently promoted, would have retired as a captain. But by retiring from the position of Judge Advocate General, he retained his "while so serving" rank of rear admiral, together with the retirement pay for that grade.

7-76. *Report of the Secretary of the Navy*, 1920, at 497 ["Report of the Judge Advocate General"].

7-77. Although the Navy Department, in the person of the Secretary, endorsed Clark's concept, there is no record of any "detailed plan" having been drawn up to implement it.

Digitized by Google

> cases, has been the direct outgrowth of the fact that, upon some occasions, officers sitting on courts and those functioning as prosecutors and as counsel for the defense[7-78] were equally and alike devoid of adequate knowledge of the law or understanding of the fundamental principles upon which are founded the rights of Anglo-Saxon freemen. Serious miscarriages of justice have unquestionably followed in some cases as a result solely of badly conducted trials wherein the trial court, prosecutor, and counsel were alike in error. It has been less difficult to avoid unfortunate results when defendants have been improperly convicted than when acquittals have been unlawfully arrived at, inasmuch as in the former situation the department has had but to set aside the conviction .... When, however, an accused who is patently guilty, is improperly acquitted, the department is in effect powerless [because it chooses not] to exercise a power which exists in the department, and return a finding of acquittal for reconsideration by the court.[7-79]

7-78. Note Clark's concern for the competency of defense counsel.

7-79. A reviewing authority had the prerogative to return a record of trial to a court martial for reconsideration of an acquittal if he perceived errors in such a result. Use of this provision had fallen out of favor, however, and on 13 December 1919 the Judge Advocate General of the Navy promulgated Court Martial Order No. 309, which stated in part that the President had directed that no authority would return a record of trial to any military tribunal for reconsideration of an acquittal. Legislation pending before Congress at the time, and subsequently enacted as Article 40 to the 1920 revision to the *Articles of War* (see text beginning at page 314), provided that cases of acquittal should not be returned to Army courts martial for reconsideration. Neither the Army nor the Navy provision, however, precluded *disapproval* of the findings and acquittal without a direction for reconsideration, which led to the anomaly of a finding of not guilty and acquittal being disapproved

(continued...)

Digitized by Google

> In conjunction with the foregoing, I am of opinion that it should, as soon as a sufficient number of officers can be properly trained, be made an immutable rule of the department that no general court-martial be convened without the presence among its membership of at least one officer trained in the law . . . whose advice upon legal questions arising in connection with the hearing shall be binding upon the court,

---

7-79. (...continued)
as contrary to the weight of evidence, yet the accused suffering no punishment unless convicted on other charges. See, for example, *Index of Court-Martial Orders for the Year Ending December 31, 1929* (Washington, D.C.: Government Printing Office, 1930), Order No. 1, at 21 (court's finding of not guilty and acquittal on a charge of embezzlement was disapproved by the convening authority; the Secretary of the Navy concurred in the disapproval, but refused to follow the recommendation of the Bureau of Navigation that the case be returned for reconsideration).

This policy of permitting the convening authority to disapprove a finding of not guilty also led to the blatant exercise of command influence:

> It is the opinion of the convening authority that the majority of the members of this court-martial, by rendering a finding of not guilty in this case, failed to perform their sworn duty. Such action meets with the disapprobation of the Commanding General.

Court-Martial Orders, 1929, Order No. 8, at 8. The Secretary of the Navy concurred with the convening authority's remarks and directed that they be distributed to all members of the court martial.

Use of the device of disapproving a finding of not guilty was finally ended by adding a new section 472½ to the 1937 revision to *Naval Courts and Boards*:

> No action shall be taken by a reviewing authority which purports to approve or disapprove an acquittal or finding of not guilty or not proved. Approval in such cases is not required and disapproval cannot affect the finality of the proceedings, if legal, as a bar to a second trial for the same offense.

Digitized by Google

> but who shall have no vote upon questions of fact.[7-80]

Thus Clark joined with two of his recent predecessors, Campbell and McLean, in advocating a legal organization for the Navy. Clark felt, as did Campbell, that a corps concept was required, to set his judges advocate apart from other naval officers. But Clark was far more singular in purpose than Campbell or McLean. Clark wanted only a corps of officers to serve as non-voting legal advisers to courts martial. He did not suggest that they be professional lawyers, only that they have military justice training. Whether they would have other duties, such as tours in the Office of the Judge Advocate General, went unsaid.

There was another major distinguishing mark between Clark's plan and that of this predecessors; Clark had the open support of the Secretary of the Navy:

> The Judge Advocate General has recommended, in his annual report, legislation establishing a judge advocate corps as an integral part of the Navy, and that provision be made for a law member to sit with each general court-martial, his decision upon questions of law arising in the conduct of the hearing to be binding upon the court, but he to have no voice in determining matters of fact which are at issue. The department has in a number of cases recently granted to accused persons a new trial when vital errors of law have transpired in the conduct of the hearing. Such errors, rare as they may be, tend to create a doubt as to the justice of the verdict. The retrial of cases is obviously expensive and productive of delay, which might be avoided if the courts had available men trained in the law.

7-80. *Report of the Secretary of the Navy*, 1919, at 323 ["Report of the Judge Advocate General"].

Digitized by Google

> It is this which the creation of a distinct judge advocate corps would provide.[7-81]

Judge Advocate General Clark may have been motivated in making his recommendation by a desire to head off the type of scrutiny leveled at the Army at the time, manifested in a reform movement directed against the *Articles of War*. (The Navy's *Articles for the Government of the Navy* were conceptually similar to the Army code, and thus susceptible to the same criticism.) Of primary concern to the reformers was the ability of an accused to obtain a fair trial under military law. Attacks were mounted by lawyer-officers from within the Army's Judge Advocate General's Department, and by legal scholars from without (see footnote 3-29). A major suggestion for reform was the concept of the law member of a court martial; an arbiter who would sit with the court to rule upon questions of law. It was the same concept that Judge Advocate General Clark had embraced as the *raison d'être* for his "corps of judges advocate."[7-82]

7-81. *Report of the Secretary of the Navy*, 1919, at 130. Secretary Daniels's appeal to Congressional frugality (avoidance of expense and delay in the retrial of error-laden cases) was no doubt a calculated attempt to overcome opposition to the creation of another corps in the Navy, with its perceived insulation from Congressional oversight.

7-82. It is not clear whether Clark had initiated the law member proposal on his own, or was following the Army lead. It was, no doubt, a popular concept of the time among reformers of military law. The movement in the Navy, however, even with the backing of the Judge Advocate General and the Secretary of the Navy, failed to gather significant support.

The result in the Army was strikingly different. The *Articles of War* were literally overhauled by an act of Congress passed on 4 June 1920 (41 Stat. 759). The eighth article provided for law members to be seated on courts martial:

> The authority appointing a general court-martial shall detail as one of the members thereof a law member, who shall be an officer of the Judge Advocate General's Department, except that when an officer of that department is not available for the purpose the appointing authority shall detail instead an officer of some other branch of the service selected by the appointing authority as specially

(continued...)

Digitized by Google

Another amendment suggested by Clark, and also proposed by the Army reformers, concerned the practice of not releasing the findings of a court martial until they were published by the convening authority or the Navy Department. Under this practice even persons who had been acquitted "and against whom further action [was] neither contemplated nor regarded as proper . . . remain[ed] confined, or under arrest for considerable periods of time."[7-83] Clark recommended legislation requiring courts martial to announce their findings and sentence, if any, at the conclusion of their deliberations, in open court, and in the presence of the accused and the judge advocate. If the finding was guilty, the accused should be permitted to move for a new trial at that time. If the accused were acquitted, or given a sentence not involving confinement, the accused should be released from arrest. A draft bill was submitted to Congress the following year.[7-84] Despite passage of an act authorizing virtually identical procedures for the Army in the same session of Congress,[7-85] the

---

7-82. (...continued)

> qualified to perform the duties of law member. The law member, *in addition to his duties as a member*, shall perform such other duties as the President may by regulations prescribe. (Italics added.)

Note that the law member on Army courts, unlike the Navy proposal, was to be a voting member of the court, a provision that could make him less than objective (since he had to "negotiate" findings and sentence with his peers), or might at least distract him. Note also that he would be a lawyer (*i.e.*, a member of the Army Judge Advocate General's Department), only if such an officer was available.

7-83. *Report of the Secretary of the Navy*, 1919, at 324 ["Report of the Judge Advocate General"].

7-84. *Report of the Secretary of the Navy*, 1920, at 134-35 ["Report of the Judge Advocate General"].

7-85. The Army provision, Article 29 of the revised *Articles of War*, read as follows:

> Whenever the court has acquitted the accused upon all specifications and charges, the court shall at once announce such result in open court. Under such regulations as the President may prescribe, the

(continued...)

Digitized by Google

Navy bill failed. The Judge Advocate General determined to proceed administratively. A 1923 revision to *Courts and Boards* contained a provision requiring all acquittals (whether of all charges and specifications, or only some of them) to be announced in open court.[7-86] It necessarily followed that findings of not guilty would also be announced. Pronouncements of guilt and sentence, however, had to await approval by the reviewing authority. This practice continued unchanged until adoption of the *Uniform Code of Military Justice*, although World War II saw it come to be honored in the breach.[7-87]

7-85. (...continued)
findings and sentence in other cases may be similarly announced.

7-86. *Naval Courts and Boards, 1923* (Washington, D.C.: Government Printing Office, 1923), sec. 685; *Naval Courts and Boards, 1937* (Washington, D.C.: Government Printing Office, 1937), sec. 433. The 1923 and 1937 editions of *Courts and Boards*, unlike prior editions, carried the approval and thus the authority of the President of the United States.

7-87. The following engaging insight into the actual workings of this rather senseless procedure, as well as other aspects of the court martial process during World War II, was provided by the late Captain Louis L. Milano, JAGC, USN, in an interview with the author:

> Milano: Let me tell you what a court martial was like under the Articles for the Government of the Navy. You had a trial counsel, and you appointed somebody a defense counsel, and you had a semblance of the rules of evidence. Few of the laymen understood them, and the court would rule. There was no law officer, no trial judge. And when they came to sentencing the accused, they wouldn't announce the sentence to the accused. They only told the trial counsel. And when the record was written up he had to write the sentence out in longhand, and he had to get every word, every comma exactly right. Then it would go to the convening authority. The accused still did not know what his sentence was. And then the convening authority would give it his approval—I don't think he even read the record, but he knew what was going on, you

(continued...)

Digitized by Google

In another area of military justice the Navy had moved forward, inching closer to a recognition of the lawyer's role in the military courtroom. Provisions regarding representation by counsel at general courts martial had undergone substantial revision in the 1913 *Navy Regulations*, the first such change since 1870. If requested by the accused, the court was now *required* to detail "a suitable officer" to act as his counsel. If no suitable officer was available, that fact had to be reported to the convening authority "for action."[7-88] The 1917 *Courts and Boards* carried the requirement still further; if the accused requested a specific person to act as his counsel, he was to be "allowed such person as he requests." If it was necessary to refuse the request, the record of trial was to indicate the grounds for refusal.[7-89] Enlisted men were to be "particularly advised of their rights" to counsel and were to be represented

---

7-87. (...continued)

know, what the accused did. And he would approve the sentence, and he could reduce it somewhat. Then the accused was "read off," they called it.

Author: Did they reconvene the court for that?

Milano: No, no. The legal officer of the command would call the accused in and say "You have been sentenced to so-and-so." I used to read 'em off left and right up in Brooklyn.

Author: What was the reason for delaying the announcement of sentence to the accused?

Milano: I don't know. When I was a trial counsel I used to tell them. If they'd found out they probably would have hung me out to dry, but I couldn't see any sense, you know. If this poor bastard's gone to trial and . . . . It was hard to get an acquittal, I'll tell you.

Captain Louis L. Milano, JAGC, USN (Ret.), interview with author, 26 September 1991.

7-88. Department of the Navy, *Navy Regulations, 1913* (Washington, D.C.: Government Printing Office, 1913), art. 767(2).

7-89. *Naval Courts and Boards, 1917* (Washington, D.C.: Government Printing Office, 1917), sec. 267.

Digitized by Google

unless they explicitly stated that they did not desire such assistance.[7-90] To ensure conformity throughout the Navy, Judge Advocate General Clark transmitted the following "semi-official communication" to the commanders in chief of the Atlantic and Pacific fleets:

> The accused should always be provided with counsel, preferably of his own choice otherwise detailed by the convening authority; but counsel may not properly be forced upon him against his will. Such detailed counsel should be an officer of sufficient rank and experience to cause the accused to feel satisfied that his interests will be carefully safeguarded during the trial. The primary duty of the judge advocate is the vigorous prosecution of the case; and although in our practice, especially when the accused is without counsel, this officer is required to give the accused his assistance both in and out of court in preparing the defense, it is undeniably better that the judge advocate be not required to act in such dual capacity if it can possibly be avoided; since, on disputed points, he may be compelled to argue on both sides—a very difficult thing to do impartially.[7-91]

7-90. *Navy Regulations, 1913*, art. 767(2); *Naval Courts and Boards, 1917*, sec. 265.

7-91. *Report of the Secretary of the Navy*, 1920, at 488-89 ["Report of the Judge Advocate General"]. These revised representation provisions were made "generally" applicable to summary (now special) courts martial by section 424 of *Courts and Boards, 1917*. Note the concern for the judge advocate's ability to "represent" the accused impartially.

Similar protections existed under the *Articles of War, 1920*. Article 17 stated that the accused had the right to be represented before a general or special court martial by counsel of his own selection. This could be a civilian counsel if paid for by the accused, or military counsel of the accused's choosing if such person were reasonably available. If neither of these options was available to the accused, he would be represented by a defense counsel appointed by the officer convening the

(continued...)

Digitized by Google

The reforms implemented by Clark during his tenure received the hearty, if somewhat myopic, endorsement of the Secretary. Despite the fact that 1920 was the first time in five years that the percentage of men tried by court martial exceeded 20 percent, Daniels wrote:

> The administration of justice in the Navy is one of the personnel tasks calling for a humane and consistent policy. The hard-boiled and inflexible military discipline and punishments of the past did not develop the best in men. . . . It made obedience follow fear of punishment rather than an appeal to a sense of comradeship . . . .
>
> The Navy is largely a boy institution. Most of its personnel is [*sic*] under 21 years of age, and many enlist around the age of 18. . . . [T]he Judge Advocate General and the officers of the Navy have sought by instruction and leniency to incite rather than compel obedience. I can not too highly commend the spirit and practice of the Judge Advocate General . . . and those associated with him in their administration of the discipline and punishment in the Navy.[7-92]

7-91. (...continued)
court. Article 11 required the convening authority to appoint a defense counsel for each general or special court martial.

Bear in mind that even in the Army with its Judge Advocate General's Department, "counsel" seldom equated to "lawyer," except in the case of civilian counsel hired by the accused.

7-92. *Report of the Secretary of the Navy*, 1920, at 132. Court martial statistics for the five-year period from 1916 to 1920 are as follows:

(continued...)

Digitized by Google

The reform agitation that had been fomented by World War I proved ephemeral. It quickly subsided after 1920 and military justice went out of focus. Granted, the result for the Army had been upheaval and major revision to its *Articles of War*.[7-93] But the result for the Navy was virtual

---

7-92. (...continued)

	1916	*1917*	*1918*	*1919*	*1920*
Total enlisted:	86,772	95,548	412,415	447,199	167,447
Total tried:	17,935	17,768	34,853	46,639	41,259
Percentage tried:	20.67%	18.60%	8.45%	10.43%	24.64%

Report of the Secretary of the Navy, 1920, at 497 ["Report of the Judge Advocate General"]. The statistics do not indicate how many of the court martial defendants counted among the "boys" of which Secretary Daniels spoke.

After 1920, as shown by data in the Judge Advocate General's annual reports, trials by court martial continued to run in double-digit percentages. They did not reach single digits until 1935, when they finally dropped to 7.7%. Thereafter they remained well below 10% until World War II, when they again broached the double-digit barrier, although nowhere near the levels of the past; during the forty-five month period of hostilities, from December 1941 through August 1945, an average of 12.7% of the Navy's enlisted population was tried by court martial. Arthur A. Ballantine, *et al.*, table of statistics (dated 28 June 1946) to report and recommendations to the Secretary of the Navy [on the handling of legal problems in the Navy], 27 April 1946 (*Table of Statistics to Ballantine Report, 1946*), *passim*.

By way of comparison, in 1965, with 861,635 Navy and Marine Corps personnel on active duty, 13,513 general and special courts martial were held. This amounted to the trial of only 1.57% of the total Navy and Marine Corps population. By 1967, the year in which the Navy Judge Advocate General's Corps was established, the figure had dropped to 1.46%. Only two of every one hundred trials were by general court martial. Rear Admiral George R. Muse, USN, report to the Under Secretary of the Navy, Subject: "Uniformed Officer-Lawyer Personnel; Requirements, Retention and Procurement of," 12 June 1967, Section I at 7, Section II at 15.

7-93. In addition to the several revisions discussed in the preceding pages, the 1920 amendments to the *Articles of War* contained two provisions that had no counterpart in existing Navy procedures. Both concerned the process by which records of trial were reviewed for error:

Article 46 of the *Articles of War* required that every record of trial by general court martial or military commission was to be referred by the reviewing or

(continued...)

Digitized by Google

inertia.[7-94] A handful of policies that impacted on the delivery of military

---

7-93. (...continued)
confirming authority to his staff judge advocate, a lawyer, for a review as to possible error. And Article 50½ extended the review process beyond the initial stage, and added a formal layer of scrutiny at the highest level. It established boards of review in the office of the Judge Advocate General, consisting of not less than three officer-lawyers per board. All cases that required Presidential confirmation were reviewed by a board and required its and the Judge Advocate General's approval before being sent to the President. If error was found, the board, in conjunction with the Judge Advocate General, had authority to vacate or set aside the findings and sentence in whole or in part, or to order a rehearing or such other action as it deemed appropriate.

McNemar argues that the Office of the Judge Advocate General of the Navy performed a function similar to that of the Army boards of review. In fact, with a heavy lacing of hyperbole, he equates the Navy office to a *court of appeals*. L. Cleveland McNemar, "Administration of Naval Discipline," 13 *Georgetown Law Journal* (1925): 130. But this is far from fact. While the Judge Advocate General of the Navy reviewed all court martial records forwarded to the Secretary for approval, he lacked the authority to take any action other than that of making recommendations.

7-94. In his book, *Swords and Scales*, Generous offers Wiener's explanation for the relative peace enjoyed by the Navy justice system:

> Frederick Bernays Wiener, Reserve colonel, judge advocate, scholar and lawyer, thinks the reason is that the Navy did much less to rearrange the social patterns and customs of its population than the Army did. During peacetime, both services made officers out of gentlemen and enlisted men out of lower class recruits. During the mobilization, the Navy continued that practice by commissioning mostly college graduates. But the Army selected its officers on the basis of merit. The result, according to Wiener, was that in the Navy those who were the likely victims of perceived court-martial abuse were the same who had been abused in civilian life. In the Army, on the other hand, the scions of high society who were forced by circumstances to serve in the enlisted ranks complained at every real or fancied maltreatment. The overall consequence was great agitation for changes in military law, but much less, almost none, in the sea service.

(continued...)

Digitized by Google

justice in the period between the world wars was introduced by the Office of the Judge Advocate General;[7-95] the concept of "meritorious mast" was inaugurated by the commanding officer of the battleship *Tennessee*;[7-96] and the 1923 and 1937 editions of *Courts and Boards* enhanced the "right

---

7-94. (...continued)

William T. Generous, Jr., *Swords and Scales, The Development of the Uniform Code of Military Justice* (Port Washington, N.Y.: Kennikat Press, 1973), 13.

7-95. In 1920 Judge Advocate General Clark instituted a "speedy trial" policy of dropping all cases that were not brought to trial within sixty days after charges were preferred and offenders placed in detention awaiting trial. *Report of the Secretary of the Navy*, 1920, at 488 ["Report of the Judge Advocate General"].

In an attempt to infuse some degree of competence into court martial procedures, Clark also recommended that membership of courts martial at shore stations be made as permanent as possible, with retired officers assigned to court-martial duty. "It is particularly important that the president and the judge advocate be retained as long as possible." *Report of the Secretary of the Navy*, 1920, at 495 ["Report of the Judge Advocate General"]. This recommendation was followed.

> Before [World War II] general courts martial which were more or less permanent in character had been appointed at a number of naval bases within the United States, and to a large extent during the war the Navy has used a system of permanent courts. Thus, the general courts martial established for each of the naval districts within the United States were composed of more or less permanent personnel.

Department of the Navy, Report and Recommendations of the General Court-Martial Sentence Review Board on Court-Martial Procedures and Policies (1947), 65.

Permanent general courts martial were established at the Navy yards at New York, Charleston, Puget Sound, Boston, Philadelphia, and Washington; the naval operating bases at San Diego and Hampton Roads; New Orleans Naval Station; Pensacola Naval Air Station; the Marine barracks at Quantico and Parris Island; the receiving ship at San Francisco; and Great Lakes Naval Training Station. McNemar, "Administration of Naval Discipline," 119, n. 82.

7-96. *Report of the Secretary of the Navy*, 1920, at 91. Secretary of the Navy Daniels noted that meritorious mast was an excellent idea, worthy of general adoption throughout the Navy.

Digitized by Google

to counsel" provisions discussed above,[7-97] but with little else in the way of substantive change. Few other initiatives were advanced. Naval justice rode out the next two decades practically unnoticed, and was soon joined in this state of anonymity by the Army.[7-98]

7-97. The Navy Department took the position that naval courts fell within the spirit of the Sixth Amendment's guarantee of assistance of counsel, and admonished convening authorities that "only in extreme cases may this right be denied an accused without committing a fatal error." Convening authorities were to detail (assign) counsel for *all* courts, general, summary and deck. Whenever practicable, if the accused requested a specific person to act as his counsel, he was to be provided. *Naval Courts and Boards, 1923*, secs. 587-89; *Naval Courts and Boards, 1937*, secs. 356-58. In one respect, by requiring the assignment of counsel in all cases, and even assigning a specific counsel when requested, Navy courts moved significantly ahead of their civilian counterparts. But in another respect they remained behind, since the counsel assigned was seldom a professionally-trained lawyer. See, generally, *Gideon v. Wainwright*, 372 U.S. 335 (1963).

7-98. Ulmer makes the following commentary on the status of military justice in the Army during the period between the two world wars. It is equally applicable to the Navy:

> The importance of [the 1920 revision to the *Articles of War*] is not to be denied. But the army was not disabused of its view that discipline was a function of command. As a result, the fact that the 1920 Code permitted the same officer to accuse, draft and direct charges, appoint defense counsel from the officers of his command, choose the members of the court, review and alter their decisions, and change any sentence the court might hand down, presaged further effort at reform at the appropriate time. In accordance with our general expectations—that large numbers of citizen soldiers is the key factor promoting liberalization of military law in the United States—the "appropriate time" was during and after World War II. In the interim between the wars, the army was allowed to diminish in personnel and in budget. Moreover, the peacetime draft still lay in the future.

Ulmer, *Military Justice and the Right to Counsel*, 49.
For an overview of military justice procedures in the Army between the (continued...)

Digitized by Google

Naval justice was not the only area in which Clark tried to effect change. Even before making his recommendation to establish a "corps of judges advocate," Clark, like his predecessors, had trained his sights on the Solicitor's office. But Clark was less subtle than those he succeeded. On 6 November 1918, less than a week before the armistice which would end World War I, Clark recommended to the Chief of Naval Operations[7-99] that *Navy Regulations* be changed to give the Judge Advocate General cognizance over all matters of law arising in the Navy Department.[7-100]

7-98. (...continued)
world wars, and a perspective different from Ulmer's, see Howard Clark II, "A Comparison of Civil and Court-Martial Procedure," *Indiana Law Journal* 4 (June 1929): 589.

7-99. It is not clear why Clark's communication requesting changes in *Navy Regulations* was addressed to the Chief of Naval Operations, who had no authority to make such changes. Presumably Clark sought to enlist his influence with the Secretary of the Navy.

7-100. According to McClung's memorandum to file of 19 February 1943, at 9, a copy of Judge Advocate General Clark's letter to the Chief of Naval Operations appears as Appendix K to a 1941 memorandum prepared by Edward D. Gasson, a civilian employee of the Navy Department. The Clark letter is referenced in the body of the Gasson memorandum as follows:

> [O]n November 6, 1918 the Judge Advocate General of the Navy recommended that the office of the Solicitor be put under his jurisdiction and suggested certain changes in the naval regulations to effectuate this end. No action was taken upon this recommendation at that time nor was any change made in 1920 when the new regulations were issued. However, in that year the regulations provided that before any opinion or decision of either the Solicitor or the Judge Advocate General should be the basis for official action by any bureau or office or officer, such opinion or decision should receive the approval of the Secretary of the Navy.

Edward D. Gasson, memorandum, Subject: "Office of Judge Advocate General (Navy)," April 1941, at 18. See also Beers, "Historical Sketch of the Office of the Judge Advocate General, Navy Department," 673.

Digitized by Google

Clark argued that this was the intent of the statute creating his office.[7-101] The cornerstone to Clark's recommendation was that such a change would make the Solicitor subordinate to the Judge Advocate General.[7-102]

Whether Solicitor Egerton became aware of Clark's overture to the Chief of Naval Operations, or simply out of vainglory, his next annual report, filed on 30 September 1919, went to great length and detail to set forth the work accomplished by his office and its importance to the Navy. The opening paragraph set the tone:

> I deem it proper to invite your attention to the fact that the business handled by this office in the past 12 months has been largely in excess of that of any similar previous period in its history, and this is true not only with respect to the volume but as regards the

---

7-101. It is important to remember that the Office of the Solicitor was not statutorily established. It survived from year to year on the basis of a Congressional appropriation. With the war winding down, and the Navy's "business" operations sure to diminish, Judge Advocate General Clark may have sensed a mood in Congress for fiscal prudence, with the Solicitor as one of its likely first targets. Commenting on this vulnerability of the Solicitor's office, Hensel states:

> The office of the Solicitor, resting solely on appropriations therefor, was not, however, securely established. It had to run the gauntlet each year. So when World War I was over and the pressure of legal work subsided, the struggle to gain control was started by the Judge Advocate General. Why a nonlawyer wanted to be in charge of legal work is hard to understand but, nevertheless, he did.

H. Struve Hensel, memorandum, Subject: "The Judge Advocate General is not the exclusive 'lawyer' of the Navy—An answer to the Judge Advocate General's memoranda of April 25 and July 10, 1941," 27 March 1943, at 5.

7-102. According to Walkup, the recommendation to merge the Solicitor's office into the Judge Advocate General's office was made because "it had proved inefficient and vexatious to have separate law offices in the Department, with separate libraries and administrative staffs, sometimes uttering separate opinions on the same issues, not always reconcilable." Walkup, *History of U.S. Naval Law and Lawyers*, 13.

Digitized by Google

> importance from a pecuniary viewpoint of the various items considered.[7-103]

But Egerton soon reverted to the whining and carping that had punctuated his previous reports:

> [I]n the matter of legal assistants [lawyers], capable as are the gentlemen now attached to the office, it has been found to be absolutely beyond our power to keep abreast of the work that each day pours in upon us, demanding careful scrutiny and consideration by men of legal training and experience . . . .
>
> There is a limit, sir, to human capacity and effort, as there is to one's powers of endurance, and the strain of overwork . . . has . . . deprived this office temporarily of the services of . . . Mr. Pickens Neagle, chief clerk of the Solicitor's Office since its organization. Mr. Neagle has been trying to accomplish the work of two men since the beginning of the war . . . it was only his amazing grit that enabled him to hold out as long as the did.
>
> I have used the foregoing concrete examples to emphasize if I can the necessity of providing this office with a permanent staff of legal assistants adequate to its needs.[7-104]

Regardless of the tone of Egerton's report, it had its desired effect. The Secretary's report the following year, for the first time since the Solicitor's office had been established, contained public acknowledgment of, and praise for, the work Egerton was doing:

7-103. *Report of the Secretary of the Navy*, 1919, at 301 ["Report of the Solicitor"].

7-104. *Report of the Secretary of the Navy*, 1919, at 301 ["Report of the Solicitor"].

Digitized by Google

> The work of the solicitor's office, important as it was during the war, dealing with intricate and vital questions under contracts and the statutes requiring prompt determination, has continued to be voluminous owing to the subsequent settlement of questions arising out of the modification and the cancellation of munition contracts and agreements, in addition to the matters it must handle under normal conditions. *The solicitor, Hon. Graham Egerton, has rendered a service comparable with that of the officers in important commands*, and his assistants have been equally efficient.[7-105] (Italics added.)

Daniels then noted that the Navy was involved in litigation arising out of interpretation of the statutes under which the war time contracts had been made, and that it involved questions not previously brought before the courts. He made much of the fact that Solicitor Egerton had framed the Navy's position in these matters, and that the Department of Justice had availed itself of Egerton's assistance in preparation of the government's defense in this litigation.[7-106] Daniels went on to enumerate the type of work done by the Solicitor. It covered a remarkable spectrum

---

7-105. *Report of the Secretary of the Navy*, 1920, at 166. To speculate that Daniels was intentionally throwing support to the Solicitor in an attempt to maintain his office in the face of the overt recommendation by Judge Advocate General Clark, may not be off the mark. Consider that in an earlier report, when the Solicitor's office was more secure, Secretary Daniels had discussed "The Business Side of the Navy" in some detail, but considered it unnecessary to mention the Solicitor who obviously played a key role. *Report of the Secretary of the Navy*, 1918, at 96-99. Consider also that Secretary Daniels's support for Solicitor Egerton is not unlike that of Secretary Thompson in 1878, who attempted, unsuccessfully, to persuade Congress to continue appropriations for Naval Solicitor Bolles by expounding the importance of the latter's office. See text beginning at page 166.

7-106. *Report of the Secretary of the Navy*, 1920, at 166.

Digitized by Google

of civil law matters.[7-107] In concluding, Daniels supported the Solicitor's request for an augmented staff to the extent of "at least two additional permanent legal assistants,"[7-108] although he failed to mention Egerton's oft-repeated plea for an Assistant Solicitor.[7-109]

Two years had passed since Judge Advocate General Clark had recommended the change to *Navy Regulations* that would have absorbed the Solicitor's office. When the next edition of *Navy Regulations* was promulgated, in 1920, it remained essentially unaltered with respect to the jurisdictional bounds of the Judge Advocate General and the Solicitor. In one respect, however, it contained a significant change; for the first time since the office was established, the Judge Advocate General was given

---

7-107. By 1920 the Solicitor's office was engaged in eminent domain proceedings; land acquisition by purchase; injuries to private property; deeds to and leases of land and buildings; disposition of emergency buildings and shops and other facilities and equipment to contractors and others; contracts for ordnance supplies and equipment; commandeering of plants and property; commandeering, chartering, and return of vessels; labor relations; settlement of claims for use of inventions and patents; settlement of claims for personal injuries; collisions between Navy and commercial vessels; salvage matters; insurance to protect the government's interests; freight and transportation matters; approval of bonds; and drafting of legislation. *Report of the Secretary of the Navy*, 1920, at 166; *Report of the Secretary of the Navy*, 1920, at 458-77 ["Report of the Solicitor"].

7-108. *Report of the Secretary of the Navy*, 1920, at 166.

7-109. After failing to gather sufficient support for an assistant on the basis of need, Egerton tried a patently bureaucratic approach:

> [T]he establishment of such a position would only be according to this office the same recognition and dignity that is enjoyed in the corresponding offices of the other governmental departments.

Report of the Secretary of the Navy, 1920, at 457 ["Report of the Solicitor"].

This last effort, superficial in rationale, achieved results superficial in fact. Pickens Neagle, the chief clerk of the office, was administratively designated "Assistant Solicitor" at no increase in salary, no formal recognition by Congress, and no increase in the manning level of the office. *Register of the Commissioned and Warrant Officers of the Navy of the United States and of the Marine Corps to January 1, 1921* (Washington, D.C.: Government Printing Office, 1921), 3.

Digitized by Google

the authority to render opinions having the force of law.[7-110] The Solicitor's preeminent legal position had been eroded. Daniels's support for Egerton would prove to have served only to delay the inevitable.[7-111] In 1920 the Solicitor filed his last annual report with the Secretary of the Navy.

7-110. The Judge Advocate General's authority to render legal opinions was made concurrent with that of the Solicitor, who had been given such authority in 1908 (see footnote 6-106 and related text). In both cases the process was subject to restrictive oversight by the Secretary, as indicated by the added italics:

> All requests for opinions or decisions to be rendered on any subject by the Judge Advocate General of the Navy or by the Solicitor for the Navy Department *shall be formally submitted in writing to the Secretary of the Navy for approval and reference to those officers*. Only formal opinions or decisions in writing shall be rendered thereon when such requests are referred. Such opinions or decisions shall be the basis of official action by any bureau or any office or officer of the Navy Department or Marine Corps *only after the approval of such opinion or decision by the Secretary of the Navy. No oral or informal opinions shall be rendered* by the Office of the Judge Advocate General of the Navy or the Solicitor of the Navy Department.

Department of the Navy, *Navy Regulations, 1920* (Washington, D.C.: Government Printing Office, 1920), art. 470.

One writer suggested that because the opinions were rendered only upon the request of the Secretary, and did not obtain any official character until they had been approved by the Secretary, they were, in fact, the opinions of the Secretary, and could have been rendered by him without any reference whatsoever to the Judge Advocate General or the Solicitor. Eugene H. Clay, Office of the Secretary of the Navy, memorandum to Secretary of the Navy, Subject: "Proposed Reorganization of the Navy's Law Business," 28 April 1941, at 11.

7-111. Also providing protection for Egerton was the edict of Executive Order No. 2877 (see discussion beginning at page 302), which had nominally transferred the Office of the Solicitor to the Department of Justice. Presumably, so long as the Attorney General had *de jure* control of the office, the Secretary of the Navy was without authority to disestablish it. Thus did the "unforseen consequences" of Executive Order No. 2877 come into play.

Digitized by Google

Secretary Daniels, a Democrat, left office in March 1921, coincident with the inauguration of the Republican President, Warren G. Harding. Harding immediately appointed a fellow-Republican from Michigan, Edwin Denby (1921-1924), as his Secretary of the Navy. George R. Clark, the Judge Advocate General under Daniels, retired on 29 April 1921, but not until he had forwarded an opinion to the new Assistant Secretary of the Navy advising him that the regulations establishing the Solicitor's office in 1908 and the appropriations continuing it thereafter were "to say the least," open to question as to validity.[7-112] This argument had been advanced from the time the Solicitor's office was made independent of the Judge Advocate General in 1907 (see footnote 6-118). It was based on the theory that the only statutory authorization for a legal officer for the Navy was the 1880 act authorizing appointment of the Judge Advocate General, thus making him the exclusive legal officer of the Navy and precluding the assignment of legal matters to any other office. Unsuccessful until now, it received a sympathetic hearing from the new administration.[7-113]

Clark was succeeded by Captain Julian Lane Latimer, USN, who assumed the rank of rear admiral upon taking office as Judge Advocate General. Of all the major Navy players who had occupied the post-war stage, only the Solicitor, Graham Egerton, remained. He quickly learned that he had no support among the new cast.[7-114]

On 4 March 1921, the state of hostilities with the Central Powers was officially terminated.[7-115] Pursuant to the self-limiting terms of the

---

7-112. The opinion by Judge Advocate General Clark, dated 11 April 1921, is summarized in an index to the papers of H. Struve Hensel, referenced as "Document No. 10."

7-113. In the retrenchment climate that descended upon the country after World War I, the economies attendant upon elimination of an office that held the status of a Navy bureau were no doubt as compelling to the new administration as Clark's legal argument.

7-114. In addition to the animus of the Judge Advocate General toward the Office of the Solicitor, Egerton was a Democratic holdover in a Republican administration. *Who Was Who in America*, 1897-1942, s.v. "Egerton, Graham."

7-115. "[I]n 1921 . . . termination of the state of war was officially proclaimed and changes under Executive Order No. 2877 automatically reverted to original status."

(continued...)

Digitized by Google

Overman Act, Presidential authority to reassign functions among the executive agencies ceased. The Office of the Navy Solicitor officially reverted from the Department of Justice to the Department of the Navy on 1 September 1921. On that same date Secretary of the Navy Denby ordered its subordination into the Office of the Judge Advocate General.[7-116] On 1 November 1921, change number 2 to *Navy Regulations, 1920*, formalized the consolidation.[7-117] Exactly one month

---

7-115. (...continued)
Organization and Functions of Office of the Judge Advocate General, NAVPERS 10843-A, at 5.

7-116. U.S. Congress, Personnel Subcommittee of the House Committee on Naval Affairs, *Report on the Reorganization of Procurement Procedures and Coordination of Legal Services in the Navy Department*, 78th Cong., 1st sess., 10 May 1943 (Washington, D.C.: Government Printing Office, 1943), 38. Commenting on the event, Secretary Denby said without further explanation:

> With a view to bringing all the legal work of the department into the office of the Judge Advocate General *as required by law*, the personnel and duties of the office of the solicitor were placed under the Judge Advocate General on September 1, 1921. (Italics added.)

Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1921, at 9.

7-117. Paragraphs (3) and (4) of Article 393 of *Navy Regulations, 1920*, as amended by change number 2, provided:

> (3) The Judge Advocate General of the Navy shall, in accordance with the statute creating his office, have cognizance of all matters of law arising in the Navy Department, and shall perform such other duties as may be assigned to him by the Secretary of the Navy.
>
> (4) The Solicitor shall perform such duties as may be assigned by the Judge Advocate General of the Navy.

Digitized by Google

later Graham Egerton resigned.[7-118] The following day, 2 December 1921, Pickens Neagle, who began his career in 1887 as a clerk in the Office of the Judge Advocate General, was named Solicitor of the Navy Department.[7-119]

Whatever illusions Pickens Neagle may have held regarding the scope of his authority, they must have been quickly dispelled by the Judge Advocate General, who now equated the position of Solicitor to that of one of his division heads:

> [T]he Solicitor's Office of the Navy Department was merged into this office *as a division hereof* in order to consolidate all the legal work of the department under this office as required by law and regulations.[7-120] (Italics added.)

Change number 2 to the 1920 *Navy Regulations* removed all autonomy from the Solicitor, recognizing him only as a subordinate to the Judge Advocate General.[7-121] All jurisdiction and authority previously

---

7-118. Egerton practiced law briefly in Washington, D.C., after leaving office. He died in March 1922. *Who Was Who in America*, 1897-1942, s.v. "Egerton, Graham."

7-119. Neagle was sixty years old at the time of his appointment. McClung notes that Neagle, who never married, served longer than anyone else in the Office of the Judge Advocate General (forty-six years), and was the only one of the Solicitors to be included in *Who's Who*. He had received his law degree from Columbian University (now George Washington University) in 1886. McClung, memorandum to file, 19 February 1943, at 14-15; *Who's Who*, 1929-1930.

7-120. *Report of the Secretary of the Navy*, 1921, at 53.

7-121. Despite this change to *Navy Regulations* in November 1921, Congress enacted an appropriation for the Solicitor and his entire office staff, apart from that of the Office of the Judge Advocate General, several months later. Act of 1 July 1922, 42 Stat. 788-89. This oversight was corrected the following year; the Solicitor was included in the appropriation for the Office of the Judge Advocate General. Act of 22 January 1923, 42 Stat. 1135. The following year (fiscal year 1925) individual salaries were no longer itemized, the appropriation showing simply

(continued...)

Digitized by Google

residing in the Solicitor's office was transferred to that of the Judge Advocate General, an anomalous situation that made the latter, a non-lawyer, the exclusive lawyer for the Navy, and assigned him responsibility for all civil law as well as military law matters.[7-122] The Judge Advocate General's staff, which had fallen to a post-World War I low of thirty-seven in 1920,[7-123] shot up to a total of sixty-eight after assimilating the personnel of the Solicitor's office. Included were Navy and Marine Corps officers, civilian attorneys, law clerks, clerks, stenographers, and messengers. "Solicitor" Neagle occupied the position of chief of Division 4, "Contract and Real Estate Matters."[7-124] The

---

7-121. (...continued)
a total for all civilian salaries under the tag line "For officers and employees in the office of the Judge Advocate General." The Solicitor's salary was included in this lump-sum amount. Act of 28 May 1924, 43 Stat. 185.

7-122. The duties and authority of the Judge Advocate General, as they appeared following the change to *Navy Regulations*, are set forth in Appendix B.

7-123. *Report of the Secretary of the Navy*, 1920, at 486 ["Report of the Judge Advocate General"].

7-124. Neagle was carried on the Judge Advocate General's table of organization in a dual capacity; as chief of the Contract and Real Estate Matters division, and as Solicitor. He was carried in the *Navy Register* from 1922 to 1929 as "Solicitor," and was the only officer in the Office of the Judge Advocate General to be included in the *Register* other than the Judge Advocate General and Assistant to the Judge Advocate General. In 1929 Neagle's alter ego was administratively eliminated. His credit in the *Navy Register* was changed from "Solicitor" to "Chief of Contracts, Real Estate and Patent Section, Office of Judge Advocate General." *Register of the Commissioned and Warrant Officers of the Navy of the United States and of the Marine Corps to January 1, 1930* (Washington, D.C.: Government Printing Office, 1930), 4. He was so listed at the time of his retirement on 31 May 1933. *Register of the Commissioned and Warrant Officers of the Navy of the United States and of the Marine Corps to January 1, 1933* (Washington, D.C.: Government Printing Office, 1933), 6; McClung, memorandum to file, 19 February 1943, at 15. Thenceforth only the Judge Advocate General and the Assistant to the Judge Advocate General were listed in the *Register*. *Register of the Commissioned and Warrant Officers of the Navy of the United States and of the Marine Corps to January 1, 1934* (Washington, D.C.: Government Printing Office, 1934), 6.

Change 15 to *Navy Regulations, 1920*, issued 18 January 1934, observed the elimination of the Solicitor position in 1929 by removing Article 393(4), the

(continued...)

Digitized by Google

civilian lawyers formerly of the Solicitor's staff were assigned to that division.[7-125]

Article 470 of *Navy Regulations*, which had given concurrent authority to the Judge Advocate General and the Solicitor to render legal opinions, was amended by deleting all references to the Solicitor. Following this change, and despite the qualification requiring the Navy Secretary's approval of any opinion rendered by the Judge Advocate General (or perhaps because of it), *Courts and Boards* identified opinions of the Judge Advocate General as a source of "unwritten naval law" equal in stature to "decisions of the President and the Secretary of the Navy and the opinions of the Attorney General."[7-126]

7-124. (...continued)
provision placing the Solicitor under the control of the Judge Advocate General, since there no longer was a Solicitor.

7-125. The office underwent an organizational change at this time also. Whereas there had been five divisions before (see footnote 7-73), there were now four:

1. Administration of Justice
2. Officer Records and International Law
3. Administrative and Admiralty Law
4. Contract and Real Estate Matters

Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1923, diagram following 195 ["Report of the Judge Advocate General"].

7-126. *Naval Courts and Boards, 1923*, sec. 5(b); *Naval Courts and Boards, 1937*, sec. 5(b).

In this era of the *Uniform Code of Military Justice*, we have grown accustomed to obtaining judicial interpretations of questions of military law through pronouncements by Navy and Marine Corps judges, the United States Navy-Marine Corps Court of Criminal Appeals, and the United States Court of Appeals for the Armed Forces. But before these institutions became established, direct resolution of military law questions was administratively obtained, generally through legal opinions issued by the Judge Advocate General pursuant to his authority under Article 470 of *Navy Regulations*. Similarly, the Judge Advocate General's opinions on administrative, personnel, pay, and admiralty matters came to be determinative of issues in those areas. These opinions were frequently the final interpretive authority on the questions presented. Thus, the Judge Advocate General's power under Article 470 was significant.

Other sources for the explication of military law included court martial

(continued...)

Digitized by Google

Judge Advocate General Latimer outlined the mission of his office following the assimilation of the Solicitor's duties in his 1923 report to the Secretary of the Navy:

(1) To aid the department and its bureaus by advising them of the legal means by which their purposes may be accomplished.
(2) To draft appropriate legislation to accomplish these purposes when they have not been authorized by law.
(3) To protect and advance the interests of the personnel of the Navy.
(4) To so advise the department that even-handed justice may be dispensed to all.[7-127]

7-126. (...continued)
orders prepared for the Secretary of the Navy by the Judge Advocate General, legal opinions issued by the Attorney General of the United States at the request of the Secretary of the Navy, and, far less frequently, decisions of the federal courts.

7-127. While "even-handed justice" may have been dispensed to all, it was done so liberally. Courts martial continued to run at an intolerable rate. Better than one in five enlisted men in the Navy and Marine Corps was being tried. Of a total enlisted strength of 104,633 in the Navy and Marine Corps in 1924, 21,846 men were tried by court martial. These figures do not include sixty-six general courts martial of officers, nor 764 courts of inquiry, boards of investigation, or boards of inquest held that year. Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1924, at 19, 118-19, 663. Perhaps because of this, Secretary of the Navy Curtis D. Wilbur (1924-1929) "paid special attention to the administration of justice in the Navy" by personally reviewing the proceedings of general and summary courts martial. Nevertheless, Wilbur was content with what he saw, and steadied the Navy on the sideways course it was to take during these years:

> The Secretary has been pleased to find this branch of the work so well and ably administered, and has as yet been unable to see many points in which the present plan may be improved. . . . It is felt that changes should be made gradually and after due consideration and consultation with the officers of the Navy, and no radical changes have been made or are proposed.

(continued...)

Digitized by Google

(5) To guard the interests of the Government in the dealings of the Navy with the business world in a spirit of fairness and equity.[7-128]

Work in the Judge Advocate General's office settled into a predictable pattern. With but few exceptions in the manner of organization, the following summary of the office's routine in 1926 could as easily have been written at any time during the inter-war period:

> Throughout the fiscal year the operations of the office were carried on under the same general scheme of organization of personnel and distribution of work which has proved suitable and effective during several years recently past. No fundamental changes have

---

7-127. (...continued)

Report of the Secretary of the Navy, 1924, at 3. As previously noted (see footnote 7-92), not until 1935 was the Judge Advocate General able to report that less than ten percent of the Navy's enlisted population was being tried by court martial.

Although Wilbur saw no need for change, a commentator writing in 1925 reminds us of the relevance, or lack thereof, of naval justice to the Navy of the 1920s. He might just as easily have been writing of naval justice in the 1940s, for little changed to affect his thesis during the next two decades:

> The administration and enforcement of discipline in the Navy are based primarily on the "Articles for the Government of the Navy," revised and reenacted June 22, 1874 . . . . Many of the principles incorporated in these Articles are found in slightly different form in the "Navy Discipline Act" enacted by the English Parliament in 1749 for the government of the English Navy, which Act, in turn, is a restatement of some of the same principles found in the law enacted by the English Parliament in 1652 . . . .

McNemar, "Administration of Naval Discipline," 89.

7-128. *Report of the Secretary of the Navy*, 1923, at 185 ["Report of the Judge Advocate General"].

Digitized by Google

> been made therein; accordingly, the organization chart has been omitted from this report. The same general remarks concerning the loyalty and efficiency of the commissioned and civilian assistants attached to this office as were made in the last annual report might just as appropriately be repeated herein.[7-129]

7-129. Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1926, at 85 ["Report of the Judge Advocate General"].

This static state of affairs, as well as the character of the civilian lawyers in the Office of the Judge Advocate General, was the subject of comment by Robert H. Connery in a study undertaken at the request of Secretary of the Navy James V. Forrestal:

> The Navy traditionally manned its legal department in the same way that it did the various bureaus. Military and civilian personnel were mixed together, but the most important posts were filled by naval officers. Many of the civilian staff of the Judge Advocate General had entered the Department's service at a relatively early age, and through commendable devotion to their work had advanced from grade to grade. Like the naval officers, most of the civilian lawyers had obtained their legal training at evening sessions of one of the neighboring law schools. These civilian lawyers, in a sense, had grown up with the JAG Office, and knew through experience its procedures and traditions. While such a background may have provided for the continuance of a stable policy in the day-to-day administration in the JAG Office, it did not make for flexibility. To a large extent the civilian lawyers had become thoroughly imbued with the attitude and conceptions of the naval officers assigned to the Judge Advocate General.

Robert H. Connery, *The Navy and the Industrial Mobilization in World War II* (Princeton University Press: 1951), 69.

The character of the civilian lawyers in the Office of the Judge Advocate General was again commented upon, eight years later, by Rear Admiral Julius Augustus Furer, USN (Ret.), who wrote on behalf of the Naval History Division of

(continued...)

Digitized by Google

Year after year the Judge Advocate General's annual reports discussed the handling of the following matters, virtually *seriatim*:

- Military justice and discipline
- Administration of naval prisons
- Personnel, pay, and allowances
- International law
- Drafting and review of legislation of interest to the Navy
- Admiralty
- Personnel and property claims against the Navy
- Approval of bonds of disbursing officers
- Review of contracts for construction of ships and public works projects
- Real estate acquisition, disposal, appraisal, leasing, use, and title matters

---

7-129. (...continued)
the Department of the Navy. While the parameters are almost identical to those set by Connery, the perspective is quite different:

> The civilian lawyers in the JAG's office were recruited largely from men who had entered the government service in Washington at an early age, had studied law in the night classes of one of the several excellent law schools in Washington and had qualified for Civil Service appointment as lawyers in the various departments of the government. Before World War II, congressional limitations on salaries made it difficult to pay any civilian attorney in the JAG's office more than $5,000 a year. The Navy Department could not, therefore, offer a financially attractive career to its civilian lawyers . . . comparable to that in private life. The system of recruitment, education, training, and association did, however, produce a very high type of lawyer, both civilian and in uniform, from the point of view of integrity and dedication to the public interest. Many of these men furthermore developed legal acumen equal to that of the keenest minds in private practice.

Furer, *Administration of the Navy Department in World War II*, 642.

Digitized by Google

⚓ Patents[7-130]

Concomitant with this repetitive workload, the manning level in the office remained constant at approximately seventy persons throughout the interim years. As shown by the annual reports of the Judge Advocate General for this period, this number generally included twenty to twenty-five officers, of whom approximately half were attending law school under the Law PG Program.

Of the few organizational changes that occurred in the period between the world wars, the first, and most significant, came in 1928. That year saw the creation of the position of "consulting attorney." The person holding this position was to be the "corporate memory" of the office; a lawyer familiar with all aspects of the work of the office, not subject to transfer, who would be available year after year as a resource person. By definition he had to be a civilian. The significance of this restructuring was not so much in the organizational change itself, but in the philosophical recognition that the legal delivery system was not working. Here, in the words of Judge Advocate General Edward Hale Campbell, was a tacit acknowledgment of the shortcomings of the Navy's Law PG Program in providing the Navy with legal professionals:

> [T]he . . . new position . . . of consulting attorney [was created], which is not assigned to any division, but the duties of which, as the name implies, pertain to the work of the entire office. The fact that officers of the Navy and Marine Corps assigned to this office are regularly detached after limited periods of duty in order that they may have an opportunity to acquire the necessary experience in sea and field duties appropriate to their grades, results in a constantly changing officer personnel

7-130. Connery's observation is that the Office of the Judge Advocate General "was concerned with both military and civilian legal matters although military legal problems, the operation of courts martial, the maintenance of naval prisons, and disciplinary matters generally far outweighed in importance civilian legal work." Connery, *The Navy and the Industrial Mobilization in World War II*, 14-15.

Digitized by Google

> which prompted the creation of the new position[7-131] . . . to the end that the Judge Advocate General, as well as the Secretary of the Navy and chiefs of the bureaus, might have available for consultation a civilian attorney of adequate experience in the office and familiarity with the statutes and precedents

---

7-131. Officers alone did not account for all the personnel changes in the office. There was a substantial amount of civilian turnover as well. Judge Advocate General Campbell complained of problems retaining civilian lawyers in 1925, noting that several had resigned to accept better paying jobs. Campbell particularly lamented the difficulty he had in finding a patent attorney; after a search of several months, the person hired resigned after three months to take a better-paying job. Department of the Navy, *Annual Report of the Judge Advocate General of the Navy to the Secretary of the Navy*, 1925, at 1. Connery commented on this phenomenon:

> In a sense the Navy's problems in recruiting and in keeping a competent legal staff, while perhaps more pronounced, were little different from those of any government agency. Congressional limitations on salaries made it difficult to offer civilian attorneys more than a maximum of $5,000 a year. The Navy not only had trouble getting a good civilian staff but did not know how to use professionally trained civilians effectively for many billets which really required civilians. As an alternative, the Navy tried to use Regular naval officers. The unsatisfactory results were not so much the fault of individuals in JAG as they were an unfortunate and unavoidable result of the system.

Connery, *The Navy and the Industrial Mobilization in World War II*, 69.

The author disputes Connery's thesis that the Navy tried to use Regular officers because it did not know how to use professionally trained civilians effectively. Rather, the Navy used Regular officers in legal billets because its tradition of line control over disciplinary matters virtually mandated it. It accepted civilians to handle its business law affairs as a practical necessity. The Navy had had no difficulty with line officer-lawyers handling discipline or even personnel matters, since these were the fabric of the daily life of a naval officer. But in matters of a civil nature, the officer-lawyer had moved too far from his element.

Digitized by Google

affecting questions arising in all branches of naval and administrative law.[7-132]

7-132. Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1928, at 121 ["Report of the Judge Advocate General"]. For similar reasons of continuity, a civilian attorney was placed in charge of the digest of legal opinions and decisions, office publications, and the law library.

There were only two other significant organizational changes in the Office of the Judge Advocate General during the inter-war period. In 1928 the Officer Records and International Law division was eliminated, and its functions distributed among the remaining three divisions, namely:

1. Administration of Justice
2. Administrative Law
3. Contract and Real Estate Matters

The Judge Advocate General explained that this would simplify office procedure and "facilitate the expeditious performance of duty." *Report of the Secretary of the Navy*, 1928, at 121 ["Report of the Judge Advocate General"].

This structure remained in effect until 1933, when the second organizational change occurred; the patents section was broken out from the Contracts and Real Estate Matters division and established as a separate division. Department of the Navy, *Annual Report of the Judge Advocate General of the Navy to the Secretary of the Navy*, 1934, at 24. According to Beers, the reason for this latter reorganization was that:

> The work of the Patent Section was considerably increased by the passage of the Settlement of War Claims Act of 1928. Under this Act, the Patent Section was charged with collecting information regarding the use by the Navy Department of patents that were seized by the Alien Property Custodian during [World War I]. For several years the Section collaborated with the Department of Justice in the defense of the Government before the War Claims Arbiter.

Beers, "Historical Sketch of the Office of the Judge Advocate General, Navy Department," 672.

Digitized by Google

George Melling, the force behind *Laws Relating to the Navy, Annotated*, was named to the post of consulting attorney.[7-133] There was a certain irony in this appointment. Melling, a civilian, was appointed to a position that had been established to provide the office with continuity in the fields of naval justice, discipline, and personnel matters, affairs from which civilians were systematically excluded. On the other hand, the traditionally civilian concerns—procurement and contracting—were not even contemplated within the scope of the consulting attorney's responsibilities.

Thus were legal affairs in the Navy administered in the years between the world wars:

⚓ There was no requirement that the Judge Advocate General be a lawyer. A line officer with no legal training had exclusive control over all legal matters.

⚓ Military law functions were carried on throughout the Navy almost exclusively by line officers untrained in the law.

7-133. Melling held both LL.B. and LL.M. degrees, probably acquired while working in the Office of the Judge Advocate General. He had also attended business school. Melling started his service in the Office of the Judge Advocate General in 1905 as a clerk. He served in that capacity until 1911 when he was promoted to the position of law clerk. In 1917 he was classified as an "attorney," and in 1922 he was designated the assistant chief of the Administrative and Admiralty Law Division. He held this latter position until his appointment as consulting attorney in 1928.

Melling served as consulting attorney until sometime in the mid-1940s, and enjoyed the complete confidence of the Judge Advocate General. (McClung noted in a 1943 memorandum that "Melling's present duties are unknown—his office is physically next to the JAG's office, with a door between the two offices.") He was succeeded by Hugh J. McGrath, who retired at the end of 1957. John A. McIntire succeeded McGrath. In 1968 McIntire's title was changed to "civilian counselor." He continued to serve until sometime after August 1976. By September 1978 the position had been eliminated.

The biographical information in this footnote was obtained from the following sources: McClung, memorandum to file, 19 February 1943, at 15, 16; Act of 4 March 1911, 36 stat. 1209; appropriation acts for fiscal years 1913-1916; *Report of the Secretary of the Navy*, 1914, at 125 ["Report of the Judge Advocate General"]; *Register of the Navy to January 1, 1918*, at 3; Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1922, at 52 ["Report of the Judge Advocate General"]; Walkup, *History of U.S. Naval Law and Lawyers*, 13; Department of the Navy, *Directory of the Office of the Judge Advocate General*, NAVEXOS P-550 (Washington, D.C.: October 1950; June 1968; August 1976; September 1978), *passim*.

Digitized by Google

There was no requirement for lawyer participation at any stage of court martial, investigative, or disciplinary proceedings.

- ⚓ Only in the Office of the Judge Advocate General did Navy line officers (with the exception of the Judge Advocate General himself) have formal legal training.
- ⚓ These officer-lawyers rotated between operational billets (usually sea duty), and shore duty assignments in the office of the Judge Advocate General.
- ⚓ The business affairs of the Navy, including their legal aspects, were conducted primarily by civilians, some of whom, but not all, were lawyers. These civilians were employed in the Office of the Judge Advocate General and in the separate bureaus. They were invariably supervised by line officers.

The period between the world wars had demanded relatively little of the military services. As a result they stayed removed from public scrutiny. The Office of the Judge Advocate General went unquestioned as the exclusive legal office of the Navy. The Judge Advocate General, a non-lawyer, stood unchallenged as the Navy's chief legal officer. There had been no talk of a legal corps or similar professional cadre in twenty years. A career-force Navy of 100,000 men had reduced its court martial rate to less than seven percent. The business affairs of the Navy were being carried on in hodge-podge fashion, but adequate to its needs.

All this was soon to change. The clouds of war were descending upon Europe and Asia, and would presently draw the United States into World War II, with its massive build-up of men and equipment. Existing procedures for procurement of matériel would prove woefully inadequate. The Navy Department's response would inextricably alter the shape of its legal organization.

And a second event, of more parochial significance, would also impact the shape of the Navy's legal organization. On 20 June 1938, sixty years after the appointment of the first uniformed Judge Advocate General of the Navy, a lawyer was finally appointed to the post. Captain Walter Browne Woodson, USN, a product of the Law PG Program, became

Digitized by Google

Judge Advocate General of the Navy and assumed the rank of rear admiral.[7-134]

7-134. Woodson had graduated with distinction from George Washington University Law School in 1914 while assigned to duty in the Office of the Judge Advocate General. He had served as Assistant to the Judge Advocate General in 1921, and again from 1931 to 1934. Walkup, *History of U.S. Naval Law and Lawyers*, 15. All subsequent Judge Advocates General of the Navy have held law degrees.

Digitized by Google

CHAPTER 8

THE HARSHEST TEST: DEMANDS OF WAR
1939 to 1945

> ***The Judge Advocate General is of the opinion that a ship of the Navy should return a dip made by a yacht flying the yacht ensign and that the yacht ensign may properly be made the object of a hand salute to be rendered on boarding or leaving a yacht.***—OPINION OF THE JUDGE ADVOCATE GENERAL OF THE NAVY IN REPLY TO AN INQUIRY BY THE SECRETARY OF THE NAVY, 1939

Woodson inherited a legal organization focused principally on the proper discharge of the Navy's administrative and disciplinary regulations. He also inherited a legal organization that managed the Navy's commercial affairs, and particularly its procurement requirements, in a manner not significantly changed since the previous century. It was a *modus operandi* that would not meet the challenge of war it was about to face; a methodology that would bring on a redefinition of the role and jurisdiction of the Office of the Judge Advocate General.

To carry out the functions of his office, Woodson had a staff of twenty-eight lawyers, officer and civilian.[8-1] Commercial affairs comprised only one-third of the total office workload,[8-2] with contracting

---

8-1. There were nine Navy or Marine Corps officer-lawyers (Law PGs) and eighteen civilian lawyers. Not included in the total were twelve officers who were attending law school on a full-time basis. Department of the Navy, *Annual Report of the Judge Advocate General of the Navy to the Secretary of the Navy*, 1939, at 1-3.

8-2. The commercial matters with which the Office of the Judge Advocate General was involved, to varying degrees, included the following: preparation or review of various contracts, certificates of disinterestedness, vouchers, bonds and insurance policies; contract performance and administration issues; collections; opinions and reports pertaining to contract matters; commercial litigation assistance to the Department of Justice; acquisition and disposal of real property; cession of jurisdiction over real property by the states; boundary dispute resolution;
(continued...)

Digitized by Google

and procurement matters a fraction of that.[8-3] To deal with contracting and procurement, the Judge Advocate General had assigned two civilians and one officer.[8-4] To some observers, this was evidence of the Judge Advocate General's failure to appreciate the importance of legal counsel in the procurement process:

> [T]he Judge Advocate General adheres to the philosophy that the lawyer occupies a minor role so far as naval procurement is concerned. Under this theory, the terms of contracts, etc., are matters for decision by technicists, and it is the duty of the Judge Advocate General only to insure that the

---

8-2. (...continued)
administration of naval petroleum and oil shale reserves; protection of government rights in tidelands and submerged lands; use of government-owned lands by other government agencies and private interests; use of non-Navy-controlled lands by the Navy Department; legislative matters affecting the interests of Navy Department real property; preparation and prosecution of applications for letters patent covering inventions conceived by officers, enlisted men, or civilians in the Naval Establishment; investigation of alleged patent infringement; assignment and licensing arrangements for non-Navy Department patents; and litigation assistance to the Department of Justice in patent infringement cases. See Department of the Navy, *Annual Report of the Judge Advocate General of the Navy to the Secretary of the Navy*, 1941, unpaginated.

8-3. See Julius Augustus Furer, *Administration of the Navy Department in World War II* (Washington, D.C.: Department of the Navy, Naval History Division, 1959), 640.

8-4. J.R. Wallace, Office of the Judge Advocate General, memorandum for the Assistant Judge Advocate General, Subject: "Study of Personnel, Division III, to Effect Possible Reductions," 5 January 1943, "Section P Report."

The Wallace memorandum, as with many of the documents that proved invaluable to composition of this chapter, was included in a collection of papers assembled at the direction of the General Counsel of the Navy in 1952. The author is indebted to Mr. Michael F. Bowman of the Office of General Counsel for access to the collection.

Digitized by Google

contracts comply as to form with existing regulations.[8-5]

Rear Admiral Walter Browne Woodson, USN, the first Judge Advocate General of the Navy to hold a law degree. (Office of the Judge Advocate General of the Navy)

8-5. U.S. Congress, Personnel Subcommittee of the House Committee on Naval Affairs, *Report on the Reorganization of Procurement Procedures and Coordination of Legal Services in the Navy Department*, 78th Cong., 1st sess., 10 May 1943 (Washington, D.C.: Government Printing Office, 1943), 65.

Digitized by Google

Such limited staffing seems incredible in light of procurement demands as we know them today. In fairness to Judge Advocate General Woodson and his office, however, the resources that he devoted to procurement were probably adequate to the demands on his office, the authority he was given over contracting, and his responsibilities in that arena. Navy procurement was, as we shall see, a product of the Navy's bureau system and the jealousies and idiosyncracies that attended it. That the product was inadequate to the challenge it would face in the 1940s was not so much the fault of the Judge Advocate General as it was the Navy's tradition of relying on its line officers not only to determine its operational requirements, but also to effect their execution whenever possible.

In the Navy of 1939, procurement was conducted by competitive bidding. Specifications were developed for the equipment or service required, a lengthy advertising process ensued, bids were received and opened, and the lowest bidder received the contract:

> Peacetime Government procurement was a mechanical process delineated by Section 3709 of the Revised Statutes (the competitive bidding authority) and by certain form contracts promulgated by the Treasury Department, Procurement Division. Under such system there was no negotiation. The selection of the contractor and the determination of the price was [*sic*] determined by the low bidder. No changes in contract forms were permitted. . . . Except for the preparation of specifications, contract writing was largely a matter of filling in blanks. Amendments of contracts were the exception rather than the rule and then limited to the blanks filled in. . . .[8-6]

8-6. H. Struve Hensel and C. Bouton McDougal, "The Business Lawyer in the Wartime Navy" (unpublished essay, 1944), 2.

> [C]ontracts were stylized, and emphasis was placed on a standard form. In the middle 1920's, the various government contracting agencies under the

(continued...)

Digitized by Google

This lack of complexity in the contracting process enabled several of the bureaus, as well as the Marine Corps, to attend to their own contracting needs. Some did so without the aid of lawyers. Several employed their own staffs of civilian attorneys to handle contracting and provide advice on other commercial matters.[8-7] These attorneys were

---

8-6. (...continued)

> sponsorship of the Bureau of the Budget had worked out such standard form contracts as a means of reducing the great number of varying forms. U.S. Standard Form 32 thereafter was generally used by the Navy for the purchase of supplies through the Bureau of Supplies and Accounts. A slightly different form was used to purchase fuel. In addition, certain other Navy contracts, by usage, had developed into more or less standard forms—such as NOrd contracts for ordnance, NObs for ships, and NOj for the acquisition of land and the purchase of utilities services.

Robert H. Connery, *The Navy and the Industrial Mobilization in World War II* (Princeton University Press: 1951), 64-65.

8-7. As of March 1941 the Bureau of Yards and Docks, the Bureau of Construction and Repair, the Bureau of Engineering, and the Marine Corps employed lawyers. The Bureau of Aeronautics employed two patent examiners, and lawyers to prepare facilities contracts. The Bureau of Ordnance had a contract division headed by a non-lawyer, with a patent lawyer assistant, and employed lawyers to prepare facilities contracts. The Bureau of Ships had a contract division headed by an officer-lawyer, and employed lawyers to prepare facilities contracts. The Bureau of Supplies and Accounts employed lawyers, but not for contract work. Personnel Subcommittee of the House Committee on Naval Affairs, *Report on the Reorganization of Procurement Procedures and Coordination of Legal Services in the Navy Department*, 10 May 1943, at 145, 151 (Exhibit M: Rear Admiral Leslie E. Bratton, USN (Ret.), Acting Judge Advocate General of the Navy, letter to Donald C. Cook, Director, Investigating Staff, Personnel Subcommittee, 16 April 1943; Exhibit O: H. Struve Hensel, "The Directive of December 13, 1942—An Explanation," 19 February 1943).

A former general counsel to the Department of Defense, Mansfield D. Sprague, estimated that there were at least fifty-five civilian attorneys employed by the various bureaus in contracting divisions immediately prior to World War II. Mansfield D. Sprague, memorandum for Chairman, Ad Hoc Committee on (continued...)

Digitized by Google

responsible only to the bureaus that employed them.[8-8] There was little or no coordination among the several bureaus with respect to legal affairs and, with the exception of the Bureau of Ships, infrequent contact between bureau contracting personnel and the Office of the Judge Advocate General.[8-9]

The bureaus, which could best define their own needs, enjoyed autonomy in determining the types and quantities of materials they required, in preparing specifications for bidders, and in selecting the low bidding supplier or contractor. But procurement procedures had developed haphazardly in the Navy, and once the contractor had been selected, any rationality in the process broke down. Responsibility for preparation and execution of the written contract was determined not by any logical or expedient methodology, but by the type of materials or services being purchased. Thus, depending upon the nature of the procurement, the contract: (1) might be prepared and executed in the purchasing bureau; (2) might be prepared in the purchasing bureau and sent to the Secretary of the Navy for execution, or, as frequently happened; (3) might be sent by the purchasing bureau to the Bureau of Supplies and Accounts for preparation and execution.[8-10] Because of this

---

8-7. (...continued)
Codification [of the duties of the Judge Advocate General of the Navy], Subject: "H.R. 7049, Section 5148(c), Duties of the Judge Advocate General of the Navy," 31 May 1956, at 5-6.

8-8. Personnel Subcommittee of the House Committee on Naval Affairs, *Report on the Reorganization of Procurement Procedures and Coordination of Legal Services in the Navy Department*, 10 May 1943, at 38-40, 48-49, 53, 145, 151. The relocation of these bureau attorneys to the Office of the Judge Advocate General was considered from time to time. In 1938 the Secretary actually authorized such a transfer, but rescinded the authorization before any moves were carried out. Personnel Subcommittee of the House Committee on Naval Affairs, *Report on the Reorganization of Procurement Procedures and Coordination of Legal Services in the Navy Department*, 10 May 1943, at 145.

8-9. Personnel Subcommittee of the House Committee on Naval Affairs, *Report on the Reorganization of Procurement Procedures and Coordination of Legal Services in the Navy Department*, 10 May 1943, at 145, 151.

8-10. A sense of the disorder that attended contracting procedures can be gained from the following examples:

(continued...)

Digitized by Google

8-10. (...continued)

- *Bureau of Ordnance:* Prepared and executed contracts for guns, gun forgings, heavy armor, projectiles, and torpedoes. Sent all other purchase requests to the Bureau of Supplies and Accounts for preparation and execution of the contracts.
- *Bureau of Ships:* Prepared (but did not execute) contracts for the construction of vessels and the purchase of diesel propelling machinery. These contracts were then sent to the Secretary for signature. Sent all other purchase requests (*e.g.*, existing vessels, radio, radar, all other equipment), to the Bureau of Supplies and Accounts for preparation and execution of the contracts.
- *Bureau of Aeronautics:* Did not prepare or execute any contracts. Sent all purchase requests to the Bureau of Supplies and Accounts for preparation and execution of the contracts.
- *Bureau of Yards and Docks:* Prepared and executed contracts for public works construction, and the purchase of construction equipment which required erection by the manufacturer at the place of use. Sent purchase requests for equipment not requiring erection by the manufacturer at the place of use to the Bureau of Supplies and Accounts for preparation and execution of the contracts.
- *Bureau of Supplies and Accounts:* Prepared and executed contracts for supplies (*e.g.*, provisions, clothing, petroleum products, general accessories, stores). Prepared and executed certain contracts for other bureaus as described above.
- *Judge Advocate General's office:* Prepared public utilities contracts. Executed those involving a single bureau; sent those involving more than one bureau to the Secretary for signature. Prepared (but did not execute) contracts for the purchase and lease of land, which were then sent to the Secretary for signature.
- *Other:* Contracts for government-owned or government-financed facilities were prepared in the various bureaus and signed by the Secretary.

See Personnel Subcommittee of the House Committee on Naval Affairs, *Report on the Reorganization of Procurement Procedures and Coordination of*

(continued...)

Digitized by Google

authority in the bureaus to effect much of their own purchasing, and the superincumbent authority of the Bureau of Supplies and Accounts in most other cases,[8-11] the Judge Advocate General had very little actual contracting responsibility. The only contracts he was authorized to prepare were those for public utility services and those for the purchase or lease of land (see footnote 8-10), and it is beyond the scope of this work to determine why he, rather than one of the bureaus, held even this authority. Although the Judge Advocate General also took credit for preparing vessel construction contracts,[8-12] in reality they were prepared in the Bureau of Ships with occasional assistance from the Judge Advocate General's office, then reviewed for form by the Judge Advocate General prior to signature by the Secretary.[8-13] Other thousands of contracts forwarded from the bureaus, for which the Judge Advocate General claimed review responsibility,[8-14] were in fact received simply for

---

8-10. (...continued)
Legal Services in the Navy Department, 10 May 1943, at 149-50 (Exhibit O: Hensel, "The Directive of December 13, 1942—An Explanation," 19 February 1943).

8-11. Footnote 8-10 gives an overview of the extensive authority of the Bureau of Supplies and Accounts in the procurement arena. This authority is even more remarkable when one considers that the Bureau of Supplies and Accounts employed no legal counsel in the entire procurement process. See Personnel Subcommittee of the House Committee on Naval Affairs, *Report on the Reorganization of Procurement Procedures and Coordination of Legal Services in the Navy Department*, 10 May 1943, at 40.

8-12. See, for example, Department of the Navy, *Annual Report of the Judge Advocate General of the Navy to the Secretary of the Navy*, 1940, at 11; *Annual Report of the Judge Advocate General of the Navy*, 1941, unpaginated.

8-13. See Personnel Subcommittee of the House Committee on Naval Affairs, *Report on the Reorganization of Procurement Procedures and Coordination of Legal Services in the Navy Department*, 10 May 1943, at 39-40; H. Struve Hensel, confidential memorandum for Mr. Forrestal, "Conclusions and Recommendations in re Preparation and Signing of Contracts," 25 March 1941, at 5; Hensel and McDougal, "The Business Lawyer in the Wartime Navy," 3. A similar situation obtained with respect to heavy ordnance contracts.

8-14. See, for example, Department of the Navy, *Annual Report of the Judge Advocate General of the Navy to the Secretary of the Navy*, 1940, at 12; *Annual*
(continued...)

Digitized by Google

filing with the General Accounting Office.[8-15] They were fully executed when received, and the Judge Advocate General's "review" consisted merely of ensuring that certain clauses required by law or executive order were included and that the contract was properly executed and acknowledged.[8-16] Ministerial in nature, this contract review process was also moderate in volume. Rear Admiral E.W. Mills, USN, Assistant Chief of the Bureau of Ships, described the 1939-1940 workload thus:

> [T]he volume of contract work in the . . . Bureau of Ships . . . was so limited as to make it feasible for the work of contract review and execution, along with the similar work from

---

8-14. (...continued)
Report of the Judge Advocate General of the Navy, 1941, unpaginated.

8-15. Personnel Subcommittee of the House Committee on Naval Affairs, *Report on the Reorganization of Procurement Procedures and Coordination of Legal Services in the Navy Department*, 10 May 1943, at 39-40.

8-16. H. Struve Hensel, "Draft of Testimony on H.R. 3913," 21 January 1944, at 4. In some instances the Judge Advocate General reviewed the contract after signature by the contractor, but before signature by the bureau chief:

> [B]ids were prepared and the award of the contract made by [the Bureau of Yards and Docks]. After award a draft of the contract and accompanying bonds was prepared, usually by the Bureau, sent to the successful bidder and, after return executed, was submitted to the Judge Advocate General for approval of the contract as to the form and execution and for approval of the bonds; after such approval, the contract was signed by the Chief of the Bureau.

Personnel Subcommittee of the House Committee on Naval Affairs, *Report on the Reorganization of Procurement Procedures and Coordination of Legal Services in the Navy Department*, 10 May 1943, at 39-40.

Digitized by Google

> the other bureaus, to be centralized in the Office of the Judge Advocate General.[8-17]

If the contract review process for the Judge Advocate General was not overly burdensome, the contract preparation process was virtually effortless. While the data are not uniformly or completely reported from year to year, it is reasonable to estimate that, on an annual basis, the Office of the Judge Advocate General never prepared even *one percent* of the total contracts let by the Navy.[8-18] And even the contracts "prepared" by the Judge Advocate General's office involved little more than insertion of bidding data into standard forms.[8-19]

Disorganized as it was, the process functioned tolerably well given the modest demands imposed upon it. But this felicitous state ended in the summer of 1940. June of that year witnessed enactment of Public Law

---

8-17. Personnel Subcommittee of the House Committee on Naval Affairs, *Report on the Reorganization of Procurement Procedures and Coordination of Legal Services in the Navy Department*, 10 May 1943, at 39.

8-18. The number of contracts actually prepared by the Office of the Judge Advocate General was an insignificant fraction of the Navy's total. For example, in fiscal year 1941 (1 July 1940 to 30 June 1941), 31,949 contracts were processed through the Judge Advocate General's office. Of these, the author estimates that less than 300, and perhaps as few as 41, were actually prepared by that office. See *Annual Report of the Judge Advocate General of the Navy*, 1941, unpaginated; Wallace, memorandum for the Assistant Judge Advocate General, 5 January 1943, "Section P Report." The remainder were merely passed through for filing with the General Accounting Office. Not even considered in this estimate is the fact that some of the contracts prepared in the Bureau of Supplies and Accounts were never forwarded to the Judge Advocate General. Connery, *The Navy and the Industrial Mobilization in World War II*, 67.

8-19. H. Struve Hensel, a harsh critic of the Office of the Judge Advocate General, described the contract preparation process:

> Form contracts required almost no legal services . . . . The clauses were identical for every contract . . . .

Hensel, "Draft of Testimony on H.R. 3913," at 4-5.

Digitized by Google

671.[8-20] This law not only instituted an emergency shipbuilding program to expand the fleet, it also provided for *negotiation* of the contracts to implement such construction. Under this new law the Secretary of the Navy was afforded a mechanism by which he could authorize the several bureaus to dispense with time-consuming advertising and competitive bidding, and instead work directly with contractors to hammer out the most expeditious schedules for the construction of naval vessels and aircraft. Negotiation meant a change in the procedures by which contracts were arrived at (by instituting a bargaining process that required an evaluation of variables other than cost alone), and a change in the form of the contract itself (by requiring these variables to be incorporated accurately in writing). It did not, however, shift jurisdiction for contract preparation or review. The bureaus that had previously prepared their own contracts continued to do so, and, in fact, they increased their legal staffs for this purpose.[8-21] Those that had relied on the Bureau of Supplies

---

8-20. Act of 28 June 1940, 54 Stat. 676. This was later followed by Public Law 354, the First War Powers Act (Act of 18 December 1941, 55 Stat. 838), which further expanded contracting flexibility.

8-21. In testimony before the Personnel Subcommittee of the House Committee on Naval Affairs, Rear Admiral Leslie E. Bratton, USN (Ret.), Acting Judge Advocate General of the Navy, stated:

> With the beginning of the existing emergency and with the full approval of the Judge Advocate General, [several of the Bureaus and the Marine Corps] added to their respective contract divisions employees with legal training, by employment under the Civil Service, by contract or enrollment in the Naval Reserve. . . . This was a natural result of the decentralization necessary to meet the demands of accelerated procurement . . . .

Personnel Subcommittee of the House Committee on Naval Affairs, *Report on the Reorganization of Procurement Procedures and Coordination of Legal Services in the Navy Department*, 10 May 1943, at 145 (Exhibit M: Bratton letter to Cook, 16 April 1943).

The statement that the bureaus added employees with legal training to their legal staffs "with the full approval of the Judge Advocate General" is curious, since the Judge Advocate General had neither authority over, nor coordination

(continued...)

Digitized by Google

and Accounts for contract preparation continued to so rely. And the review process in the Office of the Judge Advocate General continued to function in the same summary manner as in the past.[8-22]

Together with Public Law 671, the summer of 1940 also brought a new Secretary to the Navy's helm. In an attempt to secure bipartisan support for his military preparedness policies, President Roosevelt appointed Frank Knox (1940-1944), a Republican, to the post. Connery describes the problems the new Secretary faced:

> Immediately he faced a whole battery of perplexing problems. The European War and belligerent operations in the Atlantic made necessary the consideration of fleet reorganization and assignment. There were bases to be built overseas and at home, and a vast naval expansion program to be carried through to a successful conclusion. . . . Above all there were contracts to be signed—contracts for ships and parts of ships, for aircraft and aircraft factories, for guns and ammunition plants. Little contracts for petty items, and huge ones covering the expenditure of millions of dollars.[8-23]

8-21. (...continued)
responsibility for, such staffs. The apparent basis for the statement was the Judge Advocate General's duty, under *Navy Regulations*, to "examine and report upon all questions relating to . . . preparation of advertisements, proposals, and contracts . . . ." See Appendix B.

8-22. As we shall see (text beginning at page 357), very few of the negotiated forms of contract were prepared, and thus would have been subject to review by the Office of the Judge Advocate General, until early in 1941. By June of that year the Judge Advocate General was employing 133 personnel, an increase of fifty-five over the 1940 level. This included ten additional officers (probably not all lawyers) and eight additional civilian lawyers. The bulk of the increase was in civilian clerical personnel, of which thirty-five were added. *Annual Report of the Judge Advocate General of the Navy*, 1941, unpaginated.

8-23. Connery, *The Navy and the Industrial Mobilization in World War II*, 54.

Digitized by Google

Within a month Knox had appointed James V. Forrestal as his Under Secretary, and immediately assigned him responsibility over contracts, tax and legal matters.[8-24] Because of the Under Secretary's cognizance over legal affairs, the Judge Advocate General was directed to report directly to him.[8-25]

We noted above that Public Law 671 empowered the Secretary of the Navy to authorize the several bureaus to negotiate contracts. In the first year of the act's existence, negotiation authority was granted to the bureaus in 1,143 instances.[8-26] Given such authority, however, the bureaus quickly realized that they lacked sufficient personnel to reduce to writing in a timely manner the myriad agreements being reached, while negotiating additional contracts at the same time. They also lacked, in some cases, sufficient familiarity with the intricacies of sophisticated commercial agreements that would enable them to craft such contracts in the exacting manner required to protect the Navy's interests.

To expedite production, while forestalling the difficult but inevitable task of preparing the legal documents embodying the varied and sometimes complex agreements arrived at in negotiations, the Navy employed a device known as a "letter of intent." The Judge Advocate General took credit for developing it:

> It was recognized early in the beginning of the present emergency that considerable time would elapse between the negotiations and the execution of the formal contract. In order that work might be immediately started without awaiting execution of such formal contract,

---

8-24. The office of Under Secretary of the Navy had been created by the Naval Reorganization Act of 1940 (Act of 20 June 1940, 54 Stat. 492). The same act had merged the Bureau of Construction and Repair and the Bureau of Engineering, renaming the newly consolidated bureau the Bureau of Ships.

8-25. Connery, *The Navy and the Industrial Mobilization in World War II*, 56. See also Eugene H. Clay, Office of the Secretary of the Navy, memorandum to Secretary of the Navy, Subject: "Proposed Reorganization of the Navy's Law Business," 28 April 1941, at 1.

8-26. *Annual Report of the Judge Advocate General of the Navy*, 1941, unpaginated.

Digitized by Google

> there was developed in [the Office of the Judge Advocate General], in conjunction with the bureaus, the procedure whereby Letters of Intent . . . were placed with the contractor which upon acceptance by the contractor permitted the work to be started immediately.[8-27]

Although the letter of intent expedited production, it added to the chaos that was Navy procurement:

> The Bureaus in 1940 did not have enough men to handle the contract writing job, and as a consequence were piling up a very large backlog of letters of intent covering procurement not embodied in contracts.[8-28]

Furthermore, while the Judge Advocate General was of the opinion that the letters of intent set forth all basic principles necessary to be contained in the executed contract,[8-29] others disagreed:

> [The] "letter of intent" . . . was merely a notification to a contractor directing him to

---

8-27. Personnel Subcommittee of the House Committee on Naval Affairs, *Report on the Reorganization of Procurement Procedures and Coordination of Legal Services in the Navy Department*, 10 May 1943, at 141 (Exhibit M: Bratton letter to Cook, 16 April 1943). The Judge Advocate General noted that letters of intent were based upon a somewhat similar procedure used during World War I, the so-called "bankable form of contract." *Annual Report of the Judge Advocate General of the Navy*, 1941, unpaginated; Personnel Subcommittee of the House Committee on Naval Affairs, *Report on the Reorganization of Procurement Procedures and Coordination of Legal Services in the Navy Department*, 10 May 1943, at 136 (Exhibit M: Bratton letter to Cook, 16 April 1943).

8-28. Hensel, "Draft of Testimony on H.R. 3913," at 9.

8-29. *Annual Report of the Judge Advocate General of the Navy*, 1941, unpaginated.

Digitized by Google

> begin work on a certain project but leaving the exact contract provisions, and often the price, to be worked out in a formal contract later.[8-30]

In the early part of 1941, the letters of intent dam burst. Letters representing four billion dollars' worth of procurement had accumulated, and the contracts they represented began to flood the office of Under Secretary Forrestal.[8-31] The Under Secretary discovered first-hand the chaos in the Navy procurement system:

> A hodgepodge of contracts came into the Under Secretary's Office—ship contracts, facilities contracts, and supply contracts—yet the Under Secretary knew that many contracts were signed in the bureaus. Sometimes a contract would include a clause authorizing a bureau chief to approve amendments. Then under authority of this clause a bureau chief would amend a one-ship contract to authorize the building of fifty.[8-32]

8-30. Connery, *The Navy and the Industrial Mobilization in World War II*, 61.

8-31. See Connery, *The Navy and the Industrial Mobilization in World War II*, 61. The great increase in procurement resulted from the Naval Expansion Acts of 14 June 1940 (54 Stat. 394) and 9 September 1940 (54 Stat. 876) which authorized eleven and seventy percent increases, respectively, in the size of the Navy. The latter act was known as the "Two-Ocean Navy Act." See Furer, *Administration of the Navy Department in World War II*, 643, 979.

8-32. Connery, *The Navy and the Industrial Mobilization in World War II*, 61-62. Under Secretary Forrestal commented personally on the state of contracting when he testified in June 1941 before the subcommittee in Charge of Deficiency Appropriations of the House Committee on Appropriations:

> I found I was signing some contracts for ten dollars, and I found others for millions of dollars that were not being signed by me.

(continued...)

Digitized by Google

Aside from his concerns over the rationality of the process, Forrestal was almost physically overwhelmed by the mechanics of it:

> [Forrestal] was almost completely hidden by the piles of unsigned contracts on the top of his desk. In addition, there were two large piles of papers on the floor flush with the desk surface. A nearby table was covered with signed contracts. Two assistants were as busy as bird dogs handing him fresh contracts

---

8-32. (...continued)

U.S. Congress, Subcommittee of the House Committee on Appropriations, *Hearings on H.R. 5166, the Second Deficiency Appropriation Bill for 1941*, 77th Cong., 1st sess. (1941), 403.

A memorandum prepared in Forrestal's office summarized the problem in even greater detail:

> 1. Contracts for ships are signed by the Secretary; contracts for small boats are made by and signed in the Bureau of Supplies and Accounts.
> 2. Contracts prepared in the Bureau of Supplies and Accounts are not examined by a lawyer until after execution.
> 3. The Secretary signs all experimental contracts which may be for as little as $100 but contracts for the purchase of millions of dollars worth of supplies are made without the knowledge of the Secretary.
> 4. While the Secretary must authorize the negotiation of contracts, obviously in doing so, he must rely entirely on the technical certifications of Bureau Chiefs.
> 5. Many contracts are prepared by technical offices in the Bureaus who rely generally on forms and have little, if any, legal advice.
> 6. The JAG's office is staffed to a large extent by naval officers on temporary shore duty who have had little, if any, commercial legal experience.

Unsigned memorandum on letterhead of the Office of the Under Secretary of the Navy, Subject: "Memorandum Re Procurement Legal Division," 2 June 1941, single page.

Digitized by Google

> nicely clipped open to the place of signature, blotting his many signatures, and taking away the quadruplicates and quintuplicates. Forrestal was obviously in a bad humor about the whole situation. . . . It was very easy at that moment to understand why he had dropped the initial "V" [from his signature] and, whenever possible, omitted the "James."[8-33]

Greatly concerned by the problem, Forrestal called upon an aide, H. Struve Hensel, to study the Navy's procurement and contracting procedures. Hensel, a partner in the prestigious New York law firm of Milbank, Tweed and Hope, had come to Washington at Forrestal's request in January 1941 to serve as a special assistant. His background in commercial law gave him unassailable credentials to conduct the investigation of Navy contracting methods. His recommendations led to a total revision of Navy procurement procedures. Although intended only to resolve procurement problems for the duration of the "emergency," his critique of existing policies had consequences far beyond contracting matters, leading to a narrowing of the role and authority of the Judge Advocate General and a restructuring of the Judge Advocate General's office. The spotlight that he cast illuminated the Navy's entire legal services organization, and led to review after review of its purpose and effectiveness, both from within, by Navy boards, and without, by Congressional and executive branch studies. An unsettled quarter-century for the Navy's legal organization followed, not resolved until establishment of the Navy Judge Advocate General's Corps in 1967.

8-33. H. Struve Hensel, "A Lesson from James Forrestal," speech given at a dinner of the Office of the General Counsel of the Navy, 21 April 1951.

Digitized by Google

In March, 1941, Hensel forwarded his recommendations to Under Secretary Forrestal. His resonant theme was the Navy Department's general failure to recognize the need to involve lawyers in the contract preparation process:

James V. Forrestal, Under Secretary of the Navy, 1940 to 1944, and Secretary of the Navy, 1944 to 1947. (U.S. Naval Historical Center)

There is a general practice of having contracts prepared by laymen, i.e., officers, engineers, etc., without legal training or skill,

Digitized by Google

> who rely on forms and general conversations
> with lawyers as to general principles.[8-34]

Hensel suggested no change in location of responsibility for determining what and how much was to be purchased; such responsibility should remain with the bureaus. He would, however, place competent business attorneys in each of the bureaus to act as special counsel, to be consulted and present during the negotiation of important contracts. These attorneys would not be considered as employees of the bureaus. Rather, they would be a part of a new "Procurement Legal Department" that Hensel would establish as a centralized coordinating office for all contracts. At the head of such department would be "a civilian lawyer of substantial ability and commercial experience."[8-35]

Conceptually, Hensel's vision for Navy procurement was not totally unlike the framework that already existed. That is, Hensel felt that determination of purchase requirements should remain decentralized with the bureaus. But he would coordinate and centralize the preparation of the contracts and resolution of the legal issues common to Navy procurement. Hensel's thought was to establish the organization he was recommending under the direction of a "re-created Solicitor." Provided it could be kept "civilian and freed of naval channels," he felt that it could be set up to function within the Office of the Judge Advocate General.

By suggesting that the Procurement Legal Department could function within the Office of the Judge Advocate General, Hensel intended that the procedures of that office would be modified to accommodate the processes he had outlined. The Procurement Legal Department would take over all activities of the Office of the Judge Advocate General with respect to facilities and supplies contracts. All civilian personnel in the Office of the Judge Advocate General engaged in such work would be reassigned to that department. And the new organization would provide all legal services required in the drafting of contracts, including a central legal staff for administration and legal research. Legal advice and assistance would

---

8-34. Hensel, confidential memorandum for Mr. Forrestal, 25 March 1941, at 3.

8-35. Hensel, confidential memorandum for Mr. Forrestal, 25 March 1941, at 7.

Digitized by Google

be on-going during the contracting process, given at the bureau level, and rendered immediately, when and as needed.

Woodson balked, then dug in. In his office legal issues were never discussed informally with a "client." Lawyer time was not to be wasted on unframed issues. All legal opinions were formal documents, thoroughly reviewed before being issued, to avoid misinterpretation later. To obtain an opinion it was always necessary to submit a written request setting forth a complete statement of the question. Lawyers from the Judge Advocate General's office did not sit down with clients to discuss and work out issues.[8-36] Obviously this was the antithesis of the type of organization proposed by Hensel, where lawyers would be in the

---

8-36. See Furer, *Administration of the Navy Department in World War II*, 642; Homer A. Walkup, "Lawyers for and of the Navy," *The Judge Advocate Journal* (Bicentennial Issue, July 1976): 40; Homer A. Walkup, *History of U.S. Naval Law and Lawyers* (Prepared on the occasion of the ninetieth anniversary of the establishment of the Office of the Judge Advocate General of the Navy, 1970), 16-17.

As with some other criticisms leveled against Woodson, these stifling procedures were not of his doing, although he did nothing to attempt to change them. Article 470 of *Navy Regulations, 1920* stated:

> All requests for opinions or decisions to be rendered on any subject by the Judge Advocate General of the Navy shall be formally submitted in writing to the Secretary of the Navy for approval and reference to that officer. Only formal opinions or decisions in writing shall be rendered thereon when such requests are referred. Such opinions or decisions shall be the basis of official action by any bureau or any office or officer of the Navy Department or Marine Corps only after the approval of such opinion or decisions by the Secretary of the Navy. No oral or informal opinions shall be rendered by the Office of the Judge Advocate General of the Navy.

Woodson, however, seems to have stretched the literal interpretation of this regulation to its breaking point. In 1943, he refused the request of a Congressional investigatory committee for an opinion as to the legality of the contracts divisions that existed in some of the bureaus prior to World War II. See Personnel Subcommittee of the House Committee on Naval Affairs, *Report on the Reorganization of Procurement Procedures and Coordination of Legal Services in the Navy Department*, 10 May 1943, at 68, n. 26.

Digitized by Google

client-bureaus to work hand-in-hand with the client in the procurement process.

Whether Hensel had realistically expected Woodson's acquiescence is open to question. Now, however, with the Judge Advocate General firmly opposed to his plan, Hensel prepared his case for establishing the Procurement Legal Department directly within the Office of the Under Secretary. A detailed memorandum prepared by an aide examined the origins and jurisdiction of the Office of the Judge Advocate General and that of the Solicitor. It concluded that there was no "valid reason why the Secretary should not issue new regulations . . . bestowing upon some person with legal training some or all of the duties formerly carried out by the Solicitor." The way was clear, or so Hensel thought, to set up a separate office to handle the Navy's procurement.[8-37]

At about the same time that Hensel had submitted his recommendations to Forrestal in March, the latter, recognizing the urgency of the situation, had persuaded several experienced and successful civilian attorneys to leave their practices and come to work as assistants to the Under Secretary. Three were assigned to procurement work in the Bureaus of Ordnance, Aeronautics, and Ships. All were paid on a *per diem* basis, as was Hensel.[8-38] Persuaded that the proposed procurement organization could not function in the formal framework of the Judge Advocate General's office, Forrestal instructed Hensel to prepare a written proposal for its establishment in the Office of the Under Secretary. It was Forrestal's intention to circulate the proposal for comment to all bureau and office chiefs in the Navy Department and Marine Corps Headquarters including, of course, the Judge Advocate General. Forrestal then left for England in connection with Lend-Lease affairs.

In Forrestal's absence, Secretary Knox determined to move the plan along. He assumed that Woodson would be glad to be relieved of the contracting responsibility for which his office was ill equipped, and

---

8-37. Edward D. Gasson, memorandum, Subject: "Office of Judge Advocate General (Navy)," April 1941, at "Summary and Conclusions."

8-38. Connery, *The Navy and the Industrial Mobilization in World War II*, 71. Neither the Secretary nor the Under Secretary had received the necessary appropriation authority to hire legal assistants on a salaried basis. They did, however, have emergency authority to hire on a *per diem* basis, which Forrestal exercised in this instance.

Digitized by Google

assured Hensel that he (Knox) could handle the Judge Advocate General without any trouble.[8-39] On 24 April 1941, Woodson received his copy of Hensel's memorandum proposing establishment of a Procurement Legal Division in the Office of the Under Secretary. Expecting no more than a simple endorsement from the Judge Advocate General, Knox instructed Woodson to submit his comments not later than 11:00 a.m. the following day.

The memorandum incorporated, refined, and enlarged upon the recommendations from Hensel's earlier (March) memorandum:

> 1. [I]n order in this emergency to co-ordinate and bring about uniformity in the preparation of contract forms and contracts and all legal matters relating thereto . . . there is hereby established, within the Office of . . . the Under Secretary, a Procurement Legal Division consisting of civilian attorneys . . . .
>
> 2. The Procurement Legal Division will supply to all Bureaus and Offices legal advice and services in the negotiation, preparation and making of all contracts for the procurement by the Navy Department of . . . ships, planes, and other naval war materials, and for defense purposes. From the personnel of such Procurement Legal Division, there will be supplied to the Bureaus of Ships, Aeronautics, Ordnance, Yards and Docks, and supplies and Accounts, respectively, an attorney, who although remaining a member of the Procurement Legal Division . . . will act as General Counsel to such Bureau in its procurement work as above described. . . . Unless otherwise directed, no authorities to negotiate, no letters of intent and no contracts for the procurement of matériel or facilities should be prepared, executed, modified,

8-39. H. Struve Hensel, letter to William Winslow Dulles, Special Assistant to the Under Secretary of the Navy, 25 April 1941.

Digitized by Google

> supplemented or extended by any Bureau unless the form thereof has been approved by such Procurement Legal Division or an appropriate member thereof. . . .
>
> 4. The Procurement Legal Division will be under the direct supervision of H. Struve Hensel, formerly a member of the firm of Milbank, Tweed and Hope, New York, N.Y. . . . For convenience in his dealings with other departments and public relations, Mr. Hensel will bear the title of The Naval Solicitor.[8-40] The Chiefs of all Bureaus, Boards and Offices will deal directly with Mr. Hensel with respect to necessary and appropriate legal services in procurement work.
>
> 5. Arrangements will be made, for the period of this emergency, between the Under Secretary and the Judge Advocate General for the transfer of such personnel of the Contracts Division of the Office of the Judge Advocate General as may be directed by the Under Secretary. . . .[8-41]

Although Woodson clearly had foreseen the impending need to expand naval forces, he had never proposed a restructuring of the procurement process to meet that need, nor even suggested that a revision to procurement procedures was necessary. Now, with the draft

---

8-40. Hensel sought to adopt the title of Naval Solicitor, a position that had previously existed in the Navy Department and thus had indicia of legitimacy, to overcome an anticipated, and forthcoming, attack from the Judge Advocate General that his position was illegal.

8-41. Draft Memorandum for Chiefs of All Bureaus, Boards and Offices, Navy Department, Headquarters, U.S. Marine Corps, for signature by the Secretary of the Navy, Subject: "Procurement Legal Division, Under Secretary of the Navy," 25 April 1941.

Digitized by Google

memorandum in hand, Woodson was forced to present a plan of his own, or cede jurisdiction to Hensel.

Secretary Knox had misread Woodson's resolve. He did not, as Knox had expected him to do, acquiesce. Rather, in a rebuttal memorandum, Woodson moved to block Hensel and acquire control over the procurement process himself.[8-42]

He began in a conciliatory tone, acknowledging the need for a revamping of the contracting process by stating that he was "in full accord with the spirit and purpose" of the draft memorandum. Then, while endorsing the mechanics of Hensel's plan, he attacked its implementation as illegal:

> The Secretary of the Navy is not empowered, without further legislation . . . to establish a new division which shall be charged with the duty and responsibility of handling important legal business of the Navy Department independently of the Judge Advocate General . . . .

Woodson based his opposition on a thesis used with mixed success by some of his predecessors; he asserted that he had been statutorily established as the exclusive legal officer for the Navy:[8-43]

> [T]he law is very explicit that *all* of the legal business of the Navy Department shall be handled by the Judge Advocate General under the direction of the Secretary of the Navy. This is *required* by an Act of Congress approved June 8, 1880 . . . . [*The act*

8-42. Walter B. Woodson, Judge Advocate General of the Navy, memorandum to Secretary of the Navy, Subject: "Proposed Reorganization of the Navy's Law Business," 25 April 1941.

8-43. The "exclusive legal officer" argument had been last advanced, and successfully so, by Judge Advocate General Clark in dismantling the Navy Solicitor's office in 1921. See text beginning on page 330. See also text beginning on pages 187 and 270 for additional discussion of this argument.

Digitized by Google

authorizing appointment of a Judge Advocate General of the Navy; the text of the act appears at Appendix B.—ED.]

This statute cannot . . . be modified by executive action but only by further legislation. . . . [T]he statute places under the cognizance of the Judge Advocate General all matters submitted to the Navy Department involving questions of law or regulation. Among the most important of these matters are those which the proposed order would now assign to a new departmental organization, to be known as the "Procurement Legal Division." That division would be under the direct supervision of an attorney in the Office of the Under Secretary of the Navy in nowise connected with the Office of the Judge Advocate General. Said attorney would have no responsibilities or duties directly or indirectly prescribed by any law of the United States, but would occupy a position which had not been created by Congress and which, in view of the statute prescribing the duties of the Judge Advocate General, would be in contravention of law. . . .

Without quoting or discussing voluminous documents on this subject, I may say that they fully support the conclusion above set forth and that it is my deliberate judgment that no other conclusion is legally possible.[8-44] (Italics added.)

8-44. Walter B. Woodson, Judge Advocate General of the Navy, memorandum to Secretary of the Navy, Subject: "Proposed Reorganization of the Navy's Law Business," 25 April 1941, at 1-2.

Digitized by Google

Woodson then played his trump card. Having concurred that a restructuring of the procurement process was vital to national defense; having endorsed the concept of Hensel's plan as the only effective way to effect such restructuring; but having admonished the Secretary of the Navy of the absolute illegality of implementing Hensel's plan as he proposed it, Woodson cut the Gordian knot. Suggesting not an alternative to creation of a Procurement Legal Division, Woodson offered instead a solution to its creation. The Procurement Legal Division could be legally established if it were installed *within the Office of the Judge Advocate General*. "Inasmuch," said Woodson, "as the Under Secretary of the Navy may control and supervise the Judge Advocate General, this suggested modification is of a minor nature from a practical point of view, although of considerable importance as a matter of law." Woodson then stated that if his suggestion was approved he would "assign a qualified officer or attorney at the head thereof."[8-45]

The battle lines were drawn. Hensel refused to function within the Office of the Judge Advocate General. Vital now to the success of his proposal to establish an organization separate from that of the Judge Advocate General was to remove the Judge Advocate General from any role in the contracting process. To accomplish this end he set out to discredit both the organization and the personnel within it.

Although Hensel had disparaged the Judge Advocate General's emphasis on naval law and regulations, to the detriment of commercial law, when he made his initial recommendations to the Under Secretary, his criticism of the procurement process had extended generally to the entire Navy Department.[8-46] Now, with Woodson in his sights, and the Under

---

8-45. Woodson, memorandum to Secretary of the Navy, 25 April 1941, at 2. Enclosed with the Woodson memorandum was an alternative draft for the creation of a Procurement Legal Division within the Office of the Judge Advocate General.

8-46. An exception to the general nature of Hensel's critique was his specific disdain for the civil service lawyers in the Judge Advocate General's office:

> The civilian professional personnel in the division of the Office of the Judge Advocate General devoted to the examination of contracts is in general low grade as to experience, skill and pay, is subordinated to the constantly shifting naval personnel, and is without the necessary commercial

(continued...)

Digitized by Google

Secretary in his confidence, Hensel leveled damning censure on the Office of the Judge Advocate General. He focused on what he considered to be the Judge Advocate General's Achilles; his contract review performance. Hensel would later write:

> [T]he general practice in the Judge Advocate General's office was to review contracts after they had been prepared—*i.e.*, to read the contracts "cold" without knowing the background and progress of the negotiations. Men from the Judge Advocate General's office were not stationed in the various Bureaus but read the contracts in their own central office just before mailing them to the contractors. Whether the contracts set forth the true intent of the parties could not thus be known. The making of any corrections was extremely difficult. Adequate legal services could not be

---

8-46. (...continued)

> legal training or experience. . . .

Hensel, confidential memorandum for Mr. Forrestal, 25 March 1941, at 5. Hensel spared at the time the Civil Service lawyers in the bureaus. Later, however, he wrote of them:

> Very few of [these] men . . . had any commercial experience. . . . [They] were [un]able to appreciate the legal problems involved or to determine the best way to apportion the work. . . . The subordinate personnel in such [bureaus] were not experienced commercial attorneys.

Personnel Subcommittee of the House Committee on Naval Affairs, *Report on the Reorganization of Procurement Procedures and Coordination of Legal Services in the Navy Department*, 10 May 1943, at 151 (Exhibit O: Hensel, "The Directive of December 13, 1942—An Explanation," 19 February 1943).

Digitized by Google

> rendered by even the most experienced lawyers under such circumstances.[8-47]

Hensel did not, however, confine his criticism to the process. He attacked as well the general competence of the Judge Advocate General's professional staff:

> It quickly became apparent that the legal services available in the Judge Advocate General's Office were not sufficient. Unless the lawyers representing the Navy Department were equal in skill and experience to the lawyers representing the contractors, the Government would in many cases enter into improvident and extravagant contracts without being aware that they were improvident and extravagant.[8-48]

Having attacked general competence, Hensel stated why, in his view, the problem existed. In doing so he attacked the very core of the uniformed Navy's legal organization, the Law PG. His criticism was the first to challenge this time-honored program, and would lead, eventually, to replacement of the Law PGs by a cadre of professional attorneys whose duties would be devoted exclusively to legal matters:

8-47. Personnel Subcommittee of the House Committee on Naval Affairs, *Report on the Reorganization of Procurement Procedures and Coordination of Legal Services in the Navy Department*, 10 May 1943, at 151 (Exhibit O: Hensel, "The Directive of December 13, 1942—An Explanation," 19 February 1943).

In defense of the Judge Advocate General, we must bear in mind that the contracts reviewed by his office were form contracts for which the specifications themselves set the terms. With no deviation permitted from the "boiler plate" language of the contract, intent of the parties was seldom open to question. The Judge Advocate General needed to do little more than ensure that all blanks were filled in. Negotiated contracts totally changed this.

8-48. Hensel, "Draft of Testimony on H.R. 3913," at 5.

Digitized by Google

> The lawyers in the Judge Advocate General's Office were . . . without commercial experience. The naval officers in such office had studied law in afternoon or night classes . . . . Their promotions depended, properly, on their proficiency at sea and not in the law, and often most of their legal experience was in the field of naval law. None of them had ever practiced commercial law, and a lawyer in the real sense is made by experience and not by school education. . . .[8-49]

Hensel then shifted his attack to the civilian lawyers in the office:

> The civil service employees were no more experienced in the commercial field. Most of them had spent their careers in the Judge Advocate General's office—some were women, who had studied law while employed as stenographers.[8-50] None were equipped to meet the volume of negotiated contracts or the type of lawyers employed by the contractors.

8-49. Personnel Subcommittee of the House Committee on Naval Affairs, *Report on the Reorganization of Procurement Procedures and Coordination of Legal Services in the Navy Department*, 10 May 1943, at 151 (Exhibit O: Hensel, "The Directive of December 13, 1942—An Explanation," 19 February 1943).

8-50. There were four women attorneys on the Judge Advocate General's staff in 1941, all civilians. *Annual Report of the Judge Advocate General of the Navy*, 1941, unpaginated. By 1943 three of the civilians remained, joined by three Naval Reserve ensign lawyers, known then as WAVES. (WAVES was an acronym for "Women Accepted for Volunteer Emergency Service.") These women were among the very first female lawyers in the Navy. They were assigned to the ship, ordnance and facilities contracting section; the public works contracting section; the federal and state tax section; and an on-going project to revise the *Laws Relating to the Navy, Annotated.* Richard G. McClung, Office of the Under Secretary of the Navy, unaddressed memorandum, Subject: "Divisions III and IV of the Office of the Judge Advocate General," 10 April 1943, *passim.*

Digitized by Google

> There had been some Reserve officers called to duty but these men had not been selected from the fields of commercial contract drafting.[8-51]

Perhaps the supreme irony attending Woodson's opposition to Hensel's plan to restructure naval contracting was the fact that Woodson had, in reality, little real authority in the procurement area. What authority he did have sprang from imprecise language in Article 469 of *Navy Regulations, 1920*, language that was hardly conclusive:

> It shall also be the duty of the Judge Advocate General of the Navy to examine and report upon . . . all matters relating to . . . preparation of advertisements, proposals, and contracts [and] the sufficiency of official contracts, and other bonds and guarantees . . . .[8-52]

This vague command did not direct the Judge Advocate General to prepare all contracts for the Navy, nor even to oversee their preparation. Rather, it gave him the responsibility only to "examine and report" upon the contracting process.[8-53] It is no wonder, therefore, that Woodson

---

8-51. Personnel Subcommittee of the House Committee on Naval Affairs, *Report on the Reorganization of Procurement Procedures and Coordination of Legal Services in the Navy Department*, 10 May 1943, at 151 (Exhibit O: Hensel, "The Directive of December 13, 1942—An Explanation," 19 February 1943).

8-52. The full regulation can be found at Appendix B.

8-53. Consider, as we have seen, that the Judge Advocate General:

- Lacked authority to review any contract prior to its execution, except those that required the signature of the Secretary of the Navy.
- Lacked authority to prepare, on his own prerogative, any but utility and real estate contracts.

(continued...)

Digitized by Google

sought to co-opt the plan put forth by Hensel, for it would give him full control over the massive field that was to be Navy procurement.

But Woodson was obstructing while Hensel was creating. Forrestal demanded action and vision; Woodson gave him neither. Forrestal sided with Hensel and determined to seek Congressional sanction for the new legal division. The device he used was to request an appropriation to fund permanent salaries in place of the temporal *per diem* payments he was then using for the men who would staff it.[8-54] Forrestal testified at a hearing before the House Committee on Appropriations on 6 June 1941. He opened by stating:

> Mr. Chairman, in order in this emergency to coordinate and bring about uniformity in the preparation of contracts and all legal matters relating thereto . . . there is proposed to be established, within the office of, and under the control and supervision of, the Under Secretary, a Procurement Legal Division consisting of civilian attorneys, some of whom have been heretofore engaged in special legal

---

8-53. (...continued)

- Lacked authority to intercede in the negotiation process of any contract except when requested to do so by the bureaus.
- Lacked authority to coordinate the various contract lawyers and contracting division personnel in the bureaus.
- Lacked authority to change the contracting procedures established in the bureaus.

8-54. On May 23, 1941, Mr. Forrestal, as required by law, wrote the Director of the Budget requesting that special authority be granted to the Secretary of the Navy in the then-pending Deficiency Appropriation Bill to appoint fifteen additional employees in the Navy Department at salaries in excess of [the Congressional limit of] $5,000 per year.

Connery, *The Navy and the Industrial Mobilization in World War II*, 71.

Digitized by Google

> services as special assistants to the Under Secretary. . . .
>
> The Procurement Legal Division will bear the burden of the vast amount of additional commercial legal work resulting from the defense program, and to that extent will supplement the present function of the office of the Judge Advocate General. Certain of the personnel of the Contracts Division of the office of the Judge Advocate General will be transferred to this Division for the period of the emergency.[8-55]

The Under Secretary was not warmly received; Woodson, who numbered several friends on the House Appropriations Committee, had been at work in the background:

> MR. LUDLOW. Will this be a legal set-up that will operate under the Judge Advocate General?
>
> MR. FORRESTAL. No; they will work in concert with them. My hope is to have someone like Mr. McLaine, a highly competent lawyer [in the Judge Advocate General's office], to be a liaison . . . .
>
> MR. WOODRUM. How many [lawyers] do you propose to have?
>
> MR. FORRESTAL. Not more than fifteen over $5,000. . . .
>
> MR. WOODRUM. At what salaries? . . .
>
> MR. FORRESTAL. There would be [a chief of division] at $10,000, ten to twelve at $7,500, two at $6,000, and the balance at $5,000 or under.

8-55. U.S. Congress, Subcommittee of the House Committee on Appropriations, *Hearings on H.R. 5166, the Second Deficiency Appropriation Bill for 1941*, 77th Cong., 1st sess. (1941), 401-2.

Digitized by Google

MR. WOODRUM. Most of this, as I understand it, is on account of general construction and expansion work of the Navy?

MR. FORRESTAL. Yes. Also, to bring together into a focus and into a pattern the whole legal procedure, we would like to have this done. . . .

MR. JOHNSON. . . . [W]hy is it necessary to have this new organization with an increase in salaries for the same people who are [doing the work now]?

MR. FORRESTAL. . . . We pay them a certain amount per diem, $25, or $15, or whatever it is.

MR. JOHNSON. I did not know that you had anybody there on a per diem basis. I thought they were all regular salaried people.

MR. FORRESTAL. . . . [O]ur authorization comes in the form of the authority of the Secretary of the Navy to have special assistants . . . to do special work, and the purpose of this plan is to put them into more regular employment.

MR. JOHNSON. How much more will it cost to do the job as . . . you propose to do?

CAPTAIN ALLEN. . . . I would say it would cost not more than $3,000 or $4,000, except that there is one man proposed for the head of the section at $10,000.

MR. WOODRUM. We have no authority to appropriate for a $10,000 position. . . .

MR. FORRESTAL. We have in the last year or so had contracts totaling millions of dollars for the Bureau of Aeronautics. The men drawing those contracts were regular line officers in the Bureau of Aeronautics. . . . I felt that it was not proper to have them engaged in that sort of work and that we ought to have men skilled in that particular field, and

Digitized by Google

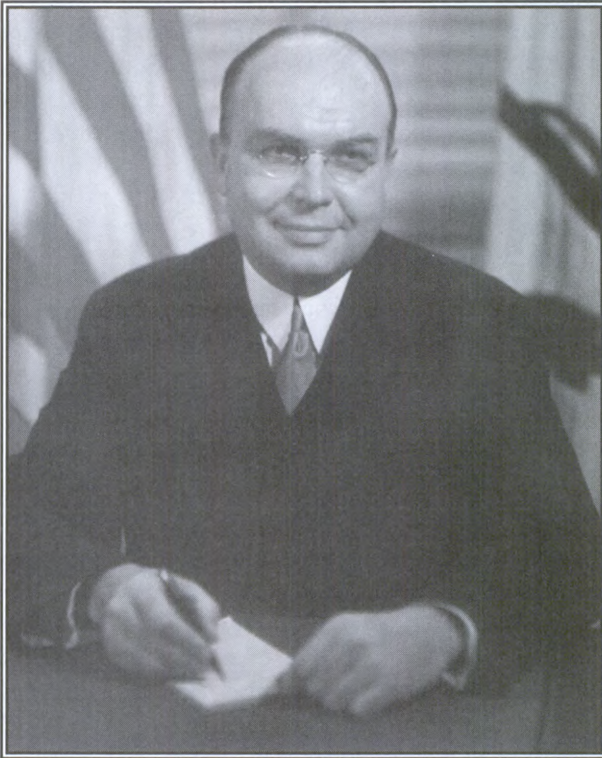
> I thought if we could get some lawyers to do that we would get better results. . . .
>
> MR. RABAUT. You have pretty much of a routine form to follow there, have you not? It is somewhat standardized after you go through it once?
>
> MR. FORRESTAL. Yes; that is right to some extent. . . .
>
> I am going to get as few lawyers as possible. What I am hoping to do is to . . . standardize all our contracts and have them of a pattern that can be readily handled, so we do not have to have separate contracts for each job.[8-56]

The bill that emerged from this committee and ultimately became law as the Second Deficiency Appropriation Act, 1941 (Act of 3 July 1941, 55 Stat. 541), authorized not fifteen additional attorneys, as requested, but only one, the "special attorney" to the Under Secretary, at a salary not of $10,000, but of $8,000. Hensel was disappointed. In a handwritten letter to his friend Winslow Dulles that revealed more that just disappointment, he wrote:

> I wish I had been born rich or had been able to make enough money so that I could afford patriotism without any self-examination—but $8,000 is either just at or below the figure where I can hold out without dropping insurance etc. . . .
>
> Could the tax certification work—in form and substance—be dumped on the JAG? That would pay him back & release some good lawyers—and put a real problem on the JAG's

8-56. U.S. Congress, Subcommittee of the House Committee on Appropriations, *Hearings on H.R. 5166, the Second Deficiency Appropriation Bill for 1941*, 77th Cong., 1st sess. (1941), 403-7.

Digitized by Google



H. Struve Hensel, Head of the Procurement Legal Division during World War II, and the first General Counsel of the Navy. (National Archives)

door which I think would always redound to his discredit. . . .

Can we add up any expense allowances to augment $8,000?[8-57]

8-57. H. Struve Hensel, letter to W. Winslow Dulles, dated "Friday."

Digitized by Google

Despite his distress over the salary matter, Hensel had achieved his greater goal of obtaining Congressional approval of the Procurement Legal Division. He pointed to language in the committee report which stated that the request for attorneys to staff a Procurement Legal Division had been accommodated by the allowance of one additional position in the Office of the Under Secretary of the Navy, and that it was the latter's duty (and not, as Hensel was quick to point out, the Judge Advocate General's duty) "to pass upon naval contracts."[8-58]

Hensel accepted the $8,000 position as Forrestal's special attorney. The remaining personnel whom the Under Secretary had hired as his procurement assistants on a *per diem* basis continued in that capacity. The Procurement Legal Division had been launched in spirit though not in name, with Hensel at the helm.

In the face of this victory by Hensel, Woodson redoubled his attack. He sought an opinion from the Comptroller General declaring the employment of attorneys by the Secretary on a *per diem* basis illegal. The Comptroller General sided with the Secretary.[8-59] Woodson then protested to Forrestal that:

- The Procurement Legal Division was fundamentally unsound from an organizational standpoint.
- The Procurement Legal Division was contrary to statute.
- The Procurement Legal Division "would not conduce to efficiency and expedition of the Department's legal work and would tend to disrupt the present organization and set-up in the Office of the Judge Advocate General."
- The present organization was running smoothly.
- The "special attorney [Hensel] recently authorized in the Supplemental Appropriation Bill in the Office of the Under Secretary [could] best be employed in coordinating the activities of the various special attorneys and assistants now on duty in the Department as a part of the Under Secretary's Office by acting as the head of that group and acting as a

---

8-58. U.S. Congress, House Committee on Appropriations [*Report on the Second Deficiency Appropriation Bill, 1941*], 77th Cong., 1st sess., 25 June 1941, H. Rept. 849, at 7.

8-59. Connery, *The Navy and the Industrial Mobilization in World War II*, 72. The Comptroller General's opinion appears to have been unpublished.

Digitized by Google

personal advisor to the Under Secretary in contract and procurement matters."[8-60]

But Forrestal had made up his mind. On 10 July 1941 he met with Woodson and Hensel. His purpose was to set ground rules for the operation of the Procurement Legal Division. The following agreements were reached:

- Legal advice and services in connection with all procurement matters except real estate would be provided by the Procurement Legal Division.
- The Procurement Legal Division would place one of its attorneys in each of the purchasing bureaus.
- Any contract prepared by the Procurement Legal Division that previously would have been reviewed by the Office of the Judge Advocate General, would still go to that office for review.
- The senior civilian contracting attorney in the Office of the Judge Advocate General, Mr. Warren McLaine, would be "loaned full time to the Procurement Legal Division for such period as may be necessary to establish satisfactorily the Procurement Legal Division."[8-61]

8-60. Connery, *The Navy and the Industrial Mobilization in World War II*, 72. The Judge Advocate General's objections were contained in a memorandum of 10 July 1941. Notwithstanding the parochial viewpoint expressed by Woodson, he closed his memorandum in the best manner of an officer of the United States Navy:

> If, in spite of the above views, the Secretary decides to set up a separate and independent legal office in the Department, I shall do everything within my power loyally to carry out the Secretary's directives and to attain the objectives which he seeks.

8-61. H. Struve Hensel, "Memorandum of Agreement Reached at Conference, July 10, 1941, by Under Secretary James V. Forrestal, Mr. H. Struve Hensel, and Rear Admiral W.B. Woodson, with respect to the Procurement Legal Division, and the Objectives Thereof," 11 July 1941.

Digitized by Google

The Procurement Legal Division functioned under this "gentleman's agreement," without official Navy Department acknowledgment, through the summer of 1941. Then, on 10 September of that year, Forrestal, as Acting Secretary of the Navy, issued a formal memorandum in Knox's name. Although the essential purpose of the memorandum was to announce to the Navy Department the existence of the new organization, Forrestal, wary of exacerbating still festering wounds, did not refer to the Procurement Legal Division in the heading of the memorandum, titling it innocently "Negotiation of Contracts—Supplemental Instructions." Nor was there any substantive detail as to the role the Procurement Legal Division would play in the actual negotiation and drafting of contracts. The announcement, by which the Under Secretary had supplanted military control with the civilian authority of his office, was contained in the second paragraph:

> To assist in expediting procurement, a Procurement Legal Division has been established in the Office of the Under Secretary with a central office at Room 2065 and representatives in the Bureau of Ordnance, the Bureau of Aeronautics, the Bureau of Supplies and Accounts, and the Bureau of Ships.[8-62]

Despite the July 1941 agreement, and the September 1941 memorandum, the Hensel-Woodson feud continued. Hensel chaffed under the requirement that the Judge Advocate General would review contracts that his staff had drafted. Some of the bureau personnel were less than receptive to his attorneys; they resented "outsiders" who reported not to the bureau chief but to a civilian in the Secretary's office. Procurement Legal Division attorneys lacked clear authority to intervene in the contracting process, and were ignored or circumvented by naval officers in the bureaus. Some bureau officers even tried to establish or supplement in-house legal staffs, by ordering in Reserve officers with legal

8-62. Secretary of the Navy memorandum to All Bureaus and Offices of the Navy Department, Subject: "Negotiation of Contracts—Supplemental Instructions," 10 September 1941.

Digitized by Google

backgrounds, or persuading civilian attorneys to accept commissions. The results were often disappointing:

> These lawyers found themselves handicapped by lack of direction and the absence of any co-ordinating body that could consider the Navy's procurement problems as a whole, as well as by the failure of the other naval officers in the bureau either to recognize the need for any legal help, or to avail themselves fully of the training and experience of these lawyers. Other bureaus, failing to comprehend that there were any special legal problems involved, tried to carry on without legal advice.[8-63]

With the stunning loss of ships and aircraft at Pearl Harbor, and the declarations of war on the Axis Powers in December 1941, one might have expected this disorder to have been resolved. Such was not the case. Commercial legal work continued to be disorganized, with the Judge Advocate General's office, the various bureaus, and the Procurement Legal Division each asserting some degree of authority, but without clear

---

8-63. J. Henry Neale, "Naval Procurement During World War II: Its Legal Aspects," *American Bar Association Journal* 38 (March 1952): 215.

The early attempt by the bureaus to induce civilian lawyers to accept commissions prompted Hensel's written complaint that "the Navy has decided that the best way to block a civilian legal department is to employ attorneys in the various bureaus and have them accept commissions." H. Struve Hensel, letter to W. Winslow Dulles, 16 May 1941. On 12 June 1941, less than a month after Hensel wrote, all Naval Reservists not in a deferred status were called to active duty. Furer, *Administration of the Navy Department in World War II*, 981. Some, with legal training, were assigned to the Office of the Judge Advocate General. Others were assigned to the Procurement Legal Division after it became firmly established. By the end of the war, over half of Hensel's staff consisted of Naval Reserve officer-lawyers. Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1946, at 60 ["Report of the General Counsel of the Navy"].

Digitized by Google

division of responsibility.[8-64] Rivalries, inefficiencies, and friction threatened the war effort. During the next year a frustrated Hensel proposed several organizational realignments in an attempt to resolve the impasse.[8-65] Finally, on 9 December 1942, Vice Admiral Frederick J.J. Horne, USN, the Vice Chief of Naval Operations, recognizing the consumptive nature of the situation and the need for clarification, led a delegation of bureau chiefs, including the Judge Advocate General, to speak with Forrestal.

The meeting revealed a somewhat unexpected show of support among a majority of the chiefs as to the value to them of the Procurement Legal Division's services. Yards and Docks, Ships, Ordnance, and Aeronautics expressed generally favorable comments. Only Admiral Young, of the Bureau of Supplies and Accounts, and Woodson, the Judge Advocate General, failed to join in the show of approval.[8-66]

Following the meeting Hensel asked to see Vice Admiral Horne privately to explain the theory and position of the Procurement Legal Division. In Hensel's words:

> Admiral Horne listened while I explained the history of the Procurement Legal Division from the inception of the idea. I urged upon him the necessity of establishing a single legal division in the Navy Department for

---

8-64. H. Struve Hensel, memorandum, "Legal Work in the Navy," 26 May 1942.

8-65. One of Hensel's proposals, presented in November 1942 in a draft executive order, would have abolished the Office of the Judge Advocate General and replaced it with an Office of Law and Courts-Martial, a bifurcated office with separate military law and civil law responsibilities. The Chief of the Office of Law and Courts-Martial could be appointed by the President either from "the officers of the Navy or the Marine Corps or from civil life."

8-66. When questioned by Forrestal as to his opposition, Admiral Young indicated that he had only limited knowledge as to the work being done in his bureau by the Procurement Legal Division attorney assigned to it. Woodson, while not expressing opposition, somewhat illogically asked why Procurement Legal Division attorneys were assigned to all the bureaus but not to *his* office. When asked by Hensel what such an attorney would do, Woodson gave no answer. H. Struve Hensel, memorandum, "The December 13 [1942] Directive—How It Came To Be Signed on December 13," 7 April 1943, at 3-4.

Digitized by Google

> procurement legal services and the elimination of the office of the Judge Advocate General from that work. . . . Admiral Horne asked a number of questions on the subject and then asked us if we had the available time to see the Under Secretary to settle the matter.
>
> We thereupon went in to Mr. Forrestal's Office where Admiral Horne announced that he felt certain on two points—(1) that the legal services of the Navy Department should be consolidated under a single division (other than the Judge Advocate General's Office) and that efforts should be made to make such division as permanent as possible, and (2) that the technical Bureaus should be permitted to prepare, execute and service contracts for war materials as to which they really negotiated the bargains and that the system of having the Bureau of Supplies and Accounts prepare contracts as to which that Bureau had no special knowledge should be discontinued. . . . Admiral Horne suggested that a directive be prepared and signed to carry out his suggestions, and Mr. Forrestal acquiesced. We thereupon left.[8-67]

Hensel, in concert with his top aides, then prepared a draft directive which he took to Horne on 12 December. Horne read it through and said:

> I would like to make the Procurement Legal Division more permanent but take this to Mr. Forrestal, and tell him that I recommend that he sign it forthwith, without discussing the matter further with anyone. We already know the views of the various Admirals and there is

---

8-67. Hensel, memorandum, 7 April 1943, at 5-7.

Digitized by Google

> nothing which can be added thereto except several months of talk.[8-68]

Forrestal signed the directive the following day.[8-69] The directive established a single legal division in each bureau, and placed the lawyers employed by each bureau in that division. All such bureau divisions were placed under the professional supervision of the Procurement Legal Division which was assigned exclusive cognizance for all legal work in connection with procurement, property disposal, and related matters.[8-70] In a provision removing forever the Judge Advocate General's authority in this arena, all provisions in orders and directives requiring that contracts were to be sent to the Office of the Judge Advocate General before execution were canceled and rescinded.

Notwithstanding the language of the directive, Woodson and Hensel continued to feud. Seeking to minimize the import of the directive, Woodson wrote that "the directive of December 13, 1942 . . . was merely a reduction to writing of a system and procedure which had actually been in effect since the late summer of 1941." Although totally removing him from influence in the commercial sphere, Woodson attempted to downplay the indignity; he stated that rescission of the requirement "that contracts be sent to the Office of the Judge Advocate General for approval as to form and legality before execution," the very wellspring of his contracting authority, was the only change that affected his office.

Removal of contract and procurement responsibility was not the only loss suffered by the Judge Advocate General in 1942. In May of that year Under Secretary Forrestal established an insurance division in the Office of Procurement and Material to "formulate uniform insurance policies and procedures for the Navy Department," and relieved the Judge Advocate

---

8-68. Hensel, memorandum, 7 April 1943, at 8.

8-69. Secretary of the Navy, directive to All Bureaus and Offices, Navy Department, Commandant, U.S. Marine Corps, Commandant, U.S. Coast Guard, Subject: "Reorganization of Procurement Procedures and Coordination of Procurement Legal Services," 13 December 1942.

8-70. See Sprague, memorandum for Chairman, Ad Hoc Committee on Codification, 31 May 1956, at 6.

Digitized by Google

General of responsibilities in this area.[8-71] Later, in July, all duties and functions relating to real estate were stripped from the Judge Advocate General and transferred to the Bureau of Yards and Docks. The Judge Advocate General viewed this divestment as an accommodation to an overworked office:

> Transfer of real estate duties and functions from the Office of the Judge Advocate General to the Bureau of Yards and Docks was effected by President Roosevelt through Executive Order No. 9194 of 7 July 1942, pursuant to Title I of the First War Powers Act of 1941, for the purpose of relieving the Judge Advocate General of the rapidly multiplying burdens consequent upon the unprecedented expansion of Navy shore installations both within and beyond the continental United States in the early months of World War II.[8-72]
>
> These changes, occasioned by unprecedented increase in all naval activities, enabled the Office of the Judge Advocate General to carry its share of the added burden, particularly in the fields of military and administrative law and claims.[8-73]

8-71. Personnel Subcommittee of the House Committee on Naval Affairs, *Report on the Reorganization of Procurement Procedures and Coordination of Legal Services in the Navy Department*, 10 May 1943, at 54, n. 14.

8-72. Bureau of Naval Personnel, *Organization and Functions of Office of the Judge Advocate General*, NAVPERS 10843-A, (Washington, D.C.: Bureau of Naval Personnel, 1961), 6.

8-73. Bureau of Naval Personnel, *Office of the Judge Advocate General—Duties, Organization and Administration,* NAVPERS 10843 (Washington, D.C.: Bureau of Naval Personnel, 1949), 3.

Digitized by Google

It appears, however, that the reason for the reassignment of responsibility was not to accommodate the Judge Advocate General, but rather to correct still another shortcoming in his office. Rear Admiral Ben Moreel, USN, Chief of the Bureau of Yards and Docks, stated the true reason:

> The action was initiated by the Navy Department, following criticisms of . . . Department of Justice officials both at the seat of government and in the field of Navy land-acquisition procedure. An investigation was made by the Navy Department which resulted in the preparation of Executive Order No. 9194 which was submitted to the President by the Secretary of the Navy.[8-74]

A Congressional subcommittee expanded on Rear Admiral Moreel's statement:

> The complaints of the Department of Justice mentioned above were directed largely at inefficiency of the legal work performed by the office of the Judge Advocate General and the unnecessary duplication of work caused by the interposition of the Judge Advocate General between the Bureau of Yards and Docks and the Department of Justice, which had final legal responsibility for the Navy's real-estate acquisitions. An investigation by the Navy Department of such criticisms resulted in the decision to consolidate all work relating to real estate in the Bureau of Yards and Docks. The Chief of the Bureau of Yards and Docks states that the consolidation has

---

8-74. Personnel Subcommittee of the House Committee on Naval Affairs, *Report on the Reorganization of Procurement Procedures and Coordination of Legal Services in the Navy Department*, 10 May 1943, at 54, n. 15.

Digitized by Google

> been highly advantageous and has greatly facilitated land acquisitions.[8-75]

The prestige of the Office of the Judge Advocate General suffered still another blow in 1942 with the removal of patent responsibilities. To Woodson's dismay they were assigned by Secretarial directive to a newly-formed patent section in the Procurement Legal Division.[8-76]

8-75. Personnel Subcommittee of the House Committee on Naval Affairs, *Report on the Reorganization of Procurement Procedures and Coordination of Legal Services in the Navy Department*, 10 May 1943, at 54, n. 15. In October 1952, when the transfer authority under Title I of the First War Powers Act expired, the Bureau of Yards and Docks' cognizance over real estate matters was continued by Secretarial order. See memorandum from Captain Sanford B.D. Wood, USN, Assistant Judge Advocate General of the Navy, to Mr. Scott Heuer, Office of General Counsel, Department of Defense, Subject: Office of the Judge Advocate General of the Navy—History of Legal Services, 18 April 1955, at 2; Walkup, "Lawyers for and of the Navy," 42. By this time the Navy's Office of General Counsel was handling all commercial law matters for the bureaus, so the Secretary's act was tantamount to a transfer of responsibility to that office. In 1955 real estate matters were formally and directly transferred to the Office of General Counsel. See Secretary of the Navy Instruction 5430.25, Subject: "Office of the General Counsel for the Department of the Navy; Legal Services in the Field of Business and Commercial Law," 2 February 1955, at 2.

8-76. The directive was dated 15 August 1942. See Personnel Subcommittee of the House Committee on Naval Affairs, *Report on the Reorganization of Procurement Procedures and Coordination of Legal Services in the Navy Department*, 10 May 1943, at 54, n. 16, and at 147 (Exhibit M: Bratton letter to Cook, 16 April 1943). See also, Hensel, "Draft of Testimony on H.R. 3913," at 16; *Office of the Judge Advocate General—Duties, Organization and Administration*, NAVPERS 10843, at 3. On 1 August 1946, patent duties were assigned to the Office of Naval Research by an act of that date (60 Stat. 779).

The Judge Advocate General lost responsibility for bonding functions in the spring of 1944. Office of the Judge Advocate General of the Navy, "Administrative History of the Office of the Judge Advocate General for the Period 8 September 1939 to 7 October 1947," (1947), 4. To complete the shifting of responsibility away from the Judge Advocate General, supervision and control of naval prisons and prisoners, including prisoners of war, was transferred to the Bureau of Naval Personnel by letter of the Secretary of the Navy on 11 February 1944, implemented by All-Navy message 58 on 11 March 1944. *Organization and*

(continued...)

Digitized by Google

If Woodson did not accept the loss of cognizance over real estate and patent affairs, he remained silent on the subject. This was not the case with contracting and procurement. Woodson persisted in his opinion that the Procurement Legal Division, although "sound in principle and necessary to assist the contracting officers of the Navy Department," was constituted in contravention of statute. He continued to insist that it "be placed under the general direction of the Judge Advocate General and function as a part of his Office."[8-77] Hensel, for his part, reviewed his options *vis a vis* the Office of the Judge Advocate General, including the extent of the Secretary's authority to remove the incumbent or abolish the office [conclusion: "It seems much more desirable to have the matter done cleanly by the President"].[8-78]

As if his adversaries within the Navy Department did not provide sufficient distress, the attacks on Woodson were compounded in the spring of 1943 when the failings of his office attracted the notice of Representative Carl Vinson's House Committee on Naval Affairs. Vinson's committee had observed

> a gradual, yet decided and increasing, tendency on the part of the bureaus and offices in the [Navy] Department to curtail the jurisdiction of the Office of the Judge Advocate General or to ignore it entirely.[8-79]

8-76. (...continued)
Functions of Office of the Judge Advocate General, NAVPERS 10843, at 3.

8-77. The Judge Advocate General, draft memorandum to The Under Secretary of the Navy, Subject: "Reorganization of Procurement Procedure and Coordination of Procurement Legal Services," 12 February 1943.

8-78. Richard G. McClung, Procurement Legal Division, Memorandum for Mr. Hensel, Subject: "Power of Secretary to Remove JAG, Abolish Office," 11 February 1943.

8-79. Personnel Subcommittee of the House Committee on Naval Affairs, *Report on the Reorganization of Procurement Procedures and Coordination of Legal Services in the Navy Department*, 10 May 1943, at 54.

Digitized by Google

Vinson appointed a subcommittee, under the chairmanship of Representative Lyndon B. Johnson, to investigate and determine "whether the war effort [was] being carried forward efficiently, expeditiously, and economically." Its focus was the Office of the Judge Advocate General of the Navy. Its report was a scathing condemnation of the organization, management, and philosophy of that office.

The subcommittee cited most of the specifics of mismanagement that attended procurement procedures in the Office of the Judge Advocate General that have already been discussed in these pages, as well as others. No further examples are needed. Generally, the subcommittee found that the Judge Advocate General had abdicated his responsibility in the procurement area by failing to "fight, if necessary, for review of . . . contracts prior to their execution." To the subcommittee this indicated "a complete lack of initiative, an utter disregard of the fact that contract provisions, even though they be onerous, are generally enforced by the courts, and a lack of understanding of the proper functions of a law office."[8-80]

In evaluating the respective performance of the Procurement Legal Division and the Office of the Judge Advocate General, the subcommittee left no doubt as to its position:

> The Procurement Legal Division has at all times been concerned with matters of substance, that is, protection of the Government's interest from every angle. The Judge Advocate General has been primarily concerned with matters of form. Punctuation marks must be inserted or removed. The language must be clear and unambiguous, for if the Government is to pay through the nose, let there be no doubt about it.[8-81]

8-80. Personnel Subcommittee of the House Committee on Naval Affairs, *Report on the Reorganization of Procurement Procedures and Coordination of Legal Services in the Navy Department*, 10 May 1943, at 45.

8-81. Personnel Subcommittee of the House Committee on Naval Affairs, *Report on the Reorganization of Procurement Procedures and Coordination of Legal*
(continued...)

Digitized by Google

As for the Navy's method of training lawyers (through the Law PG Program), the subcommittee was again condemnatory:

> [Uniformed Navy lawyers] alternate their naval service between a tour of duty at sea and a tour of duty in the Office of the Judge Advocate General. Indeed, immediately upon the completion of their legal training, naval officers are forthwith ordered to sea for a tour of duty before they return to the Judge Advocate General's office.
>
> It seems that serving two masters, the law and the sea, would seriously impair the efficiency of the officer so far as the law is concerned. However, the Judge Advocate General states that a better understanding of the problems of naval procurement is obtained "by standing a watch on the bridge of a ship." Without doubt, service at sea, especially in war, impresses one with the need for speedy procurement, but this subcommittee is at a loss to understand how this service enables a naval officer to match wits with the best legal talent this country can offer. Furthermore, any need for speedy procurement, which may have been observed by members of the Judge Advocate General's staff while serving at sea, has not been translated into speedy action in the office.[8-82]

8-81. (...continued)
Services in the Navy Department, 10 May 1943, at 66.

8-82. Personnel Subcommittee of the House Committee on Naval Affairs, *Report on the Reorganization of Procurement Procedures and Coordination of Legal Services in the Navy Department*, 10 May 1943, at 67-68.

The philosophy driving the Law PG Program is candidly stated in the following excerpt from a 1942 lecture on naval law given by Lieutenant Commander (continued...)

Digitized by Google

The subcommittee concluded that the Judge Advocate General had shown a total lack of initiative, and a failure to assume responsibility, with regard to procurement matters. It emphatically supported the action of Under Secretary Forrestal in establishing the Procurement Legal Division to overcome these problems. It recommended establishment by statute of a civilian office within the Navy Department, to be called the Office of the Solicitor, which would have exclusive jurisdiction of all matters pertaining to commercial law.[8-83]

8-82. (...continued)
Charles J. Whiting, USN. Whiting had attended law school while assigned to the Office of the Judge Advocate General from 1935 to 1937:

> In peacetime a few officers each year are ordered to duty in the Judge Advocate General's Office, and during this time they also attend George Washington University Law School where they get a regular law course during the forenoons. In the afternoon they apply this law training practically by reviewing courts-martial.
>
> At the beginning of our law course the Assistant Judge Advocate General called us in and said "Gentlemen, at this law school you will be competing with civilians who are making law their life's work, but there is one difference as regards you. You are primarily naval officers and secondarily lawyers. Never forget that and always try to maintain the proper perspective. We don't want any shyster lawyers in the Navy."

Charles J. Whiting, "Naval Law" (lecture given to the class of V-5 instructors, U.S. Naval Academy, Annapolis, Maryland, 24 March 1942, Law Library of the Office of the Judge Advocate General), 1.

8-83. Personnel Subcommittee of the House Committee on Naval Affairs, *Report on the Reorganization of Procurement Procedures and Coordination of Legal Services in the Navy Department*, 10 May 1943, at 74-75.

Digitized by Google

Even as the subcommittee issued its report, in the spring of 1943, Woodson fell ill.[8-84] His resistance to Hensel and the Procurement Legal Division, and the acrimony that attended it on both sides, abruptly ended.

The Procurement Legal Division had been conceived in 1941 and presented to Congress as a temporary expedient to streamline procurement as the United States prepared for war:

> It is proposed that this new division shall be considered temporary in character and continue only so long as the pressure of increased contract work continues. . . . [I]ts work can be tied in with the work of the Judge Advocate General so that at the end of the present emergency conditions the unit can be dissolved and its activities absorbed by the Office of the Judge Advocate General without disruption.[8-85]

As the nation moved into war and looked to the future, however, it became apparent that the Navy could never again function under the fragmented and informal business procedures that had carried it through most of its existence. Hensel began to envision a permanent "commercial law firm" for the Navy. In a lengthy memorandum written in March 1943, Hensel proposed such an entity:

> The need of a civilian Solicitor's Office in the Navy Department has been with us since

---

8-84. Woodson was hospitalized at the Bethesda, Maryland, Naval Hospital. On 16 April 1943, Rear Admiral Leslie E. Bratton, the Acting Judge Advocate General, commented that he had been advised by the commanding officer of the hospital that "Woodson's physical condition is such as to preclude his giving attention to matters relating to his office." Personnel Subcommittee of the House Committee on Naval Affairs, *Report on the Reorganization of Procurement Procedures and Coordination of Legal Services in the Navy Department*, 10 May 1943, at 133 (Exhibit M: Bratton letter to Cook, 16 April 1943).

8-85. Subcommittee of the House Committee on Appropriations, *Hearings on the Second Deficiency Appropriation Bill for 1941*, 77th Cong., 1st sess. (1941), 405-6.

Digitized by Google

> the advent of modern business. The theory that the legal work of one of the largest modern businesses, whether in peacetime or wartime, can be handled by naval officers who devote only a part time to the study of law, who never practice law, and whose promotions are dependent on their progress at sea—cannot stand the test of efficiency. It will be noted that in the past, when the legal work in the Navy Department became heavy, drives were made to get civilian lawyers independent of the Judge Advocate General to do the legal work. . . . It is the same pressure that has brought about the creation of the Procurement Legal Division in 1941—the successor to the World War I Solicitor. *That function and office ought to be definitely established in statute so that it will remain available for all time.*[8-86] (Italics added.)

Hensel restated his conviction a few months later:

> The precise position of the [Procurement Legal] Division has never been adequately and authoritatively defined. Even the December 13 directive did not put the Division on a sound foundation of recognized dignity and importance. In some Bureaus, efforts still persist to depreciate the Division's position in relation to other sections of such Bureaus. . . .

8-86. H. Struve Hensel, memorandum, Subject: "The Judge Advocate General is not the exclusive 'lawyer' of the Navy—An answer to the Judge Advocate General's memoranda of April 25 and July 10, 1941," 27 March 1943, at 9-10. The draft version of this memorandum caused one of Hensel's close associates, Gene Duffield, to suggest to Hensel that he "warn JVF [*Forrestal—ED.*] how hard you slug the JAG."

Digitized by Google

> *The Navy must, as soon as practicable, establish a commercial legal organization capable . . . of handling . . . procurement and termination programs . . . .*[8-87] (Italics added.)

Judge Advocate General Woodson was retired for physical disability on 1 September 1943. He was succeeded immediately by Rear Admiral Thomas L. Gatch, USN. Relations between the Office of the Judge Advocate General and the Procurement Legal Division began to improve rapidly and dramatically. On 8 December Hensel proposed a merger of the two offices into a new "Office of Law and Courts-Martial."[8-88] Hensel was surprisingly accommodating in suggesting that the organization be headed by a naval officer, albeit a lawyer "qualified . . . by education and experience," to be known "as either the Chief of the Office of Law and Courts-Martial, or the Judge Advocate of the Navy." As for the organization of the office, Hensel proposed that it be

> distributed between two main divisions—one devoted to commercial law and related matters and headed by a General Counsel to the Navy Department and the other devoted to naval discipline, the rights, duties and liabilities of naval personnel, admiralty matters and international relationships and headed by a Chief Assistant to the Chief or Judge Advocate.[8-89]

8-87. H. Struve Hensel, Memorandum for Mr. Forrestal, "Legal Services in the Navy," 7 August 1943.

8-88. H. Struve Hensel, memorandum, Subject: "Basic Outline of a Single Legal Organization in the Navy Department," 8 December 1943.

8-89. Hensel, memorandum, 8 December 1943, at 2-3. The General Counsel, who might be either a naval officer or a civilian, would be selected by the Secretary of the Navy, as would the Chief or Judge Advocate.

Hensel had been far less indulgent in a proposed executive order that he had drafted a year earlier. He would have abolished the position and cognizance of the Judge Advocate General, replacing him with a Presidentially-appointed "Chief

(continued...)

Digitized by Google

Hensel's effort failed almost immediately, and he hardened his resolve to oppose any further attempts at consolidation of the offices. He did not have to wait long for an opportunity. On 10 January 1944, House Naval Affairs Committee Chairman Vinson, contrary to the recommendations of the Johnson subcommittee, introduced a bill (H.R. 3913) that would have redesignated the Office of the Judge Advocate General the "Bureau of Law." The Judge Advocate General was to be the chief of the bureau, and the chief law officer of the Department of the Navy. To assist the Judge Advocate General in matters of commercial law, the President would appoint a civilian general counsel who would "perform such duties as may be assigned him by the Judge Advocate General."

Hensel was irate. He wrote to Vinson requesting to be heard on the bill.[8-90] Privately, he wrote to Forrestal, advising him that as part of his testimony he would state that if the bill were passed he would not serve either as or under the General Counsel in the Bureau of Law. Forrestal penned a comment on Hensel's note:

> I think Struve should not say this. It could impair the splendid record he has made.[8-91]

Hensel omitted the objectionable comment from his proposed testimony. Nevertheless, his adamant opposition to the bill was evident:

> While I have been at several times in the past willing to attempt to work out with both Admiral Woodson and Admiral Gatch an

---

8-89. (...continued)
of the Office of Law and Courts-Martial," who might be either a Navy or Marine Corps officer or a civilian. H. Struve Hensel? draft Executive Order No. ___ [*sic*], 7 November 1942. See footnote 8-65.

8-90. H. Struve Hensel, letter to Hon. Carl Vinson, Chairman, Committee on Naval Affairs, House of Representatives, 13 January 1944.

8-91. H. Struve Hensel, Memorandum for Mr. Forrestal, Subject: "H.R. 3913—Amalgamation of PLD into Bureau of Laws," 17 January 1944.

Digitized by Google

> amalgamation of the Office of the Judge Advocate General and Procurement Legal Division, I am unwilling to do so today. The two serious efforts which were made to unite the two offices have fallen through (November, 1942 and December, 1943). I am more than ever convinced that the whole idea of placing the commercial law services under the direction of officers subject to military channels and discipline is ridiculous, bizarre and unseemly, as well as unnecessary.[8-92]

Hensel had picked up support for his position from an unlikely corner:

> Admiral Gatch agrees with me that it is undesirable today to consider joining the two offices, and it is my understanding that he will oppose this bill. Relations between the Judge Advocate General's Office and the Procurement Legal Division are today reasonably harmonious. Admiral Gatch and I are able to iron out possible conflicts with a minimum of friction.[8-93]

Hensel was also joined in his opposition to H.R. 3913 by Rear Admiral DeWitt Clinton Ramsey, USN, the Chief of the Bureau of Aeronautics, who gratuitously endorsed the Procurement Legal Division concept. In a 28 June 1944 memorandum to the Judge Advocate General, Ramsey said:

> The Chief of the Bureau of Aeronautics is opposed to H.R. 3913, and recommends against its enactment. . . .

8-92. Hensel, "Draft of Testimony on H.R. 3913," at 8.

8-93. Hensel, "Draft of Testimony on H.R. 3913," at 8.

Digitized by Google

> This office is manned, in most part, by civilian lawyers of outstanding ability and reputation. It is doubtful that the same professional quality will obtain under the proposed organization.[8-94]

Hensel and Gatch, allied in opposition to the bill, sought to preempt its passage by drafting a merger plan of their own, in the form of an executive order.[8-95] The proposed executive order (which followed generally the outline of Hensel's December 1943 proposal—see footnote 8-89 and related text) would have abolished the office and position of Judge Advocate General of the Navy, and established an Office of Law and Courts-Martial to be headed by a Chief of Office or a Judge Advocate of the Navy. Assisting him would be a General Counsel appointed by the Secretary. But unlike the General Counsel proposed in the Vinson bill, who would perform duties as assigned by the Judge Advocate General, the Hensel-Gatch General Counsel would have clearly defined jurisdiction over "all legal matters relating to the procurement or disposition of naval material and facilities." Hensel could live with this. In advising Forrestal of their strategy, Hensel conveyed a sense of the trust and respect that had developed between Gatch and him:

> [A]s soon as practicable a proposed executive order will be submitted combining the JAG's office and PLD into a new bureau or

---

8-94. Chief, Bureau of Aeronautics, memorandum to Judge Advocate General, Subject: "H.R. 3913 'To Promote the Administration of Law in the Navy,'" 28 June 1944. A note attached to the memorandum from Stuart N. Scott, the Procurement Legal Division attorney assigned to the Bureau of Aeronautics, gave the endorsement even more impact. The note said simply:

> Struve,
> BuAer comment on H.R. 3913. I had nothing to do with its preparation.
> Stu

8-95. H. Struve Hensel? draft Executive Order No. ___ [*sic*], *ca.* 15 March 1944.

Digitized by Google

> office with Admiral Gatch at the top and with the commercial law and military discipline divisions established separately. Admiral Gatch has expressed himself as agreeable to [this]. Timing and maintenance of prestige will be most important. That is recognized by Admiral Gatch and I feel sure it can be worked out.
>
> The maintenance of morale in PLD has become somewhat of a problem and the suggested combination with the JAG's office has added to our difficulties. . . .
>
> Admiral Gatch has suggested a series of dinners attended by his top men and by mine. . . . One such dinner was given by Admiral Gatch . . . and was attended by John Kenney, Charlie and myself. I think it was very successful and helped greatly with the personnel relationship.[8-96]

8-96. H. Struve Hensel, Memorandum for Mr. Forrestal, Subject: "Miscellaneous Matters," 3 March 1944, unpaginated.

The reader should not conclude that total harmony prevailed once Gatch took over as Judge Advocate General. The following excerpts from a proposed memorandum to Gatch, drafted by Richard G. McClung, one of Hensel's more militant aides, should serve to dispel any such conclusion. Although cooler heads prevented the memorandum from being sent, its content displays both the lingering animosities that hung on between the offices, as well as the satiric humor they could generate.

> Memorandum for Admiral Gatch:
>
> [M]y attention has been called to the Circular Letter sent out over your signature on February 25, 1944, relative to the changes accomplished by the 1943 Revenue Act. This letter, which came into my hands . . . an hour or two after the Senate had voted to enact the bill, I can only regard with awe as one of the most brilliant coups ever engineered by that master tactician, your Commander Meacham.
>
> Your Commander Meacham . . . indicates that the Navy is consulting with the Treasury Department on the possible exemptions under the new Revenue

(continued...)

Digitized by Google

The Vinson bill died with Congressional adjournment in 1944, and the proposed executive order was withdrawn from further consideration. For Hensel, the executive order had been the lesser evil. Despite his collaboration with Gatch, his clear preference was to continue the Procurement Legal Division as a separate and permanent commercial law organization for the Navy, run by civilian lawyers.[8-97] He was not, however, sanguine as to this likelihood:

8-96. (...continued)

> Act. I can assure you that there will be no such exemptions. Your Commander Meacham is an insolent little puppy who should have been sacked some time ago. While I have the highest regard for you, I do think that you have retained several subordinates whose capacity for general incompetence and interference borders on genius. Among such subordinates Commander Meacham ranks high.
>
> I am reliably informed that officers with legal experience are being sent to certain advance bases. While it is no slight reflection on the legal profession to suggest that Commander Meacham has any legal experience, I should like to suggest that he be considered for a post at some such base. And while I feel most grateful to our men in the Pacific for their splendid performance and wish to do everything possible for them, I do think that they should be educated in some of the rigors to which we in Washington are subjected [and] I know of no one more ably qualified than Commander Meacham to teach them what we, too, are going through. I have just one further suggestion—Commander Meacham, as the legal officer at this advance base, should naturally be the first man put ashore, as his speed in yesterday's fiasco indicates that he is not a man to be left behind.

Unsigned, draft Memorandum for Admiral Gatch, Subject: "Tax Directive," 26 February 1944, *passim*.

8-97. H. Struve Hensel, Memorandum for the Under Secretary, Subject: "The Procurement Legal Division—Its Future," 19 July 1944.

Digitized by Google

> As yet no serious consideration has been given to the overall problem of establishing the Navy procurement organization on a long-range basis. . . .
>
> The Congress has never sat down and thought through a sensible and efficient organization for the Department. Viewed in the light of the history of the Navy Department, it seems unlikely that the Congress ever will set up a sound organization.[8-98]

Gatch, for his part, held to the view that the offices should be unified, under the direction of a Regular Navy officer-lawyer. His position on this point was no doubt influenced by the recommendations of one of his aides, F.A. Ironside, Jr. Ironside, at Gatch's request, had prepared a memorandum outlining suggestions for the provision of legal services to the Naval Establishment after the war. Among them was a proposal that the Office of the Judge Advocate General serve as the Navy's central—and only—legal office. Other entities providing legal services, including the Procurement Legal Division, would be supervised by naval officers in the Office of the Judge Advocate General.[8-99]

8-98. Hensel, "Draft of Testimony on H.R. 3913," at 20-21.

8-99. F.A. Ironside, Jr., Memorandum for the Judge Advocate General of the Navy, Subject: "Organization and Provision of Legal Services for the Naval Establishment," 10 February 1944. Lengthy and tedious, the Ironside memorandum nevertheless affected Gatch's thinking on several of the issues confronting the Navy's legal organization at the time. Among Ironside's other observations and conclusions:

- It would be impossible to separate commercial work from other legal work in the Office of the Judge Advocate General, so it made no sense to appoint a General Counsel with cognizance over commercial work only.
- The work of the Procurement Legal Division would either diminish to the point where it was no longer necessary to maintain such an organization, or would change in character such that it would be assigned to

(continued...)

Digitized by Google

Rear Admiral Thomas L. Gatch, USN, Judge Advocate General of the Navy, 1943 to 1945. (Office of the Judge Advocate General of the Navy)

8-99. (...continued)

other offices and bureaus.

⚓ A separate Judge Advocate General's Corps was neither essential nor desirable. "[T]here never would be sufficient work to engage the full time of any considerable number of personnel in the departmental or field service."

It appears that Ironside was a civilian employee, since he is not listed in any of the *Navy Registers* for the war years. This cannot be confirmed, however, because the Judge Advocate General's annual reports for the war years do not list the personnel of his office, military or civilian.

Digitized by Google

While Gatch and Hensel were attempting to reach consensus on the future role of the Procurement Legal Division, Forrestal, who had taken over as Secretary of the Navy (1944-1947) on 19 May 1944, added a further dimension. On 3 August 1944, Forrestal changed the name of Hensel's office from the Procurement Legal Division to the "Office of General Counsel for the Department of the Navy." The Office of General Counsel was to "assume the functions and duties assigned to the central office of the Procurement Legal Division." Hensel, as head of the office, was now to be called the General Counsel for the Department of the Navy and was to report not to the Under Secretary, but directly to the Secretary.[8-100] Whether intended or not, and without changing the mission of the Procurement Legal Division, Forrestal had forever changed its status.

Fourteen months later, on 1 October 1945, Gatch presented his "Post War Plan - Legal" to the Assistant Secretary of the Navy, outlining his vision for the role of the Office of the Judge Advocate General in the post-war years. The plan called for abolishment of the Office of the General Counsel, with the Navy's legal services organized as follows:

- Commercial law services for the Navy (contract law, insurance law, real property law, and labor law) would be coordinated and supervised in a commercial law division of the Office of the Judge Advocate General.
- Commercial law services to the bureaus would be rendered through a commercial law section in each bureau, headed by a bureau counsel who would serve as liaison with the commercial law division in the Office of the Judge Advocate General.
- All attorney positions would be filled by Regular Navy officers holding law degrees, or by Reserve officers with law degrees who had transferred to the Regular Navy.
- The legal organization would require approximately 428 officers. Of this number, an estimated 397 would be law specialists, restricted to legal duties only.

8-100. Secretary of the Navy, directive to All Bureaus, Boards and Offices of the Navy Department, Commandant, U.S. Marine Corps, Commandant, U.S. Coast Guard, Subject: "Establishment of the Office of General Counsel for the Department of the Navy," 3 August 1944.

Digitized by Google

- ⚓ There should be no revival of the Law PG Program.
- ⚓ Navy lawyers should not be organized in a separate corps of judge advocates.
- ⚓ The suggestion of the Assistant Chief of Naval Personnel that civilians should handle all legal work of a "non-disciplinary" nature (procurement, legislation, admiralty, international law), should be rejected.[8-101]

The cornerstone of Gatch's plan was the abolishment of the Office of the General Counsel. It was not warmly received by the Assistant Secretary. The Assistant Secretary of the Navy to whom Gatch presented his plan was now H. Struve Hensel.

The General Counsel of the Navy, Patrick H. Hodgson, also presented a post-war plan to the Assistant Secretary. Hodgson stated that careful consideration should be given to a separate legal corps as the ultimate solution to the form which the Navy's legal organization should take:

> If a legal corps were created; if a first rate lawyer were obtained to head the corps during the period of its creation and establishment; if young men of promise were commissioned

---

8-101. The content of the Judge Advocate General's "Post War Plan - Legal" is taken from a summary of the Plan contained in a memorandum written by the General Counsel of the Navy in January 1946. J. Henry Neale, "Performance of Commercial Legal Services in the Naval Establishment During the Post-War Period," 15 January 1946, at 2-3. Neither the full Plan, nor any portions thereof, could be otherwise located.

Neale critiqued the "Post War Plan - Legal" in his memorandum, faulting the Judge Advocate General for failing to appreciate the extent of commercial work which would be required. Gatch had proposed assigning only 24 of his estimated 428 law specialists to commercial matters. Consider that as of January 1946 the Office of the General Counsel employed 124 lawyers, and had reached a peak, as the Procurement Legal Division, of 160 lawyers during World War II. About 120 of these were assigned to duty in the bureaus, with the rest assigned to approximately fifteen field activities or branch offices. See Neale, "Naval Procurement During World War II: Its Legal Aspects," 216.

Neale also suggested that Navy pay was insufficient to attract able lawyers, that rank and promotion strictures would interfere with the delivery of effective legal services, and that a civilian staff was the only practical answer.

Digitized by Google

> upon graduation from recognized law schools; if their promotion did not depend upon their military proficiency; if such a corps were independent and responsible only to the Secretary . . . then the Navy should be able to select, from within the corps, a lawyer who would have sufficient ability and distinction in the legal profession to be the head of the corps and to attract and keep other lawyers, military and civilian. The Navy could then have one legal organization which would be fitted to dispense military justice on a sounder basis and in which the civilian and military lawyers could work together in professional harmony. Such legal corps would overcome the shadows of incompetence and ineffectiveness that, rightly or wrongly, have been cast on the Office of the Judge Advocate General under its administration by the predecessors of the present head of that office.[8-102]

Despite Hodgson's vision for the future, he saw no hope of immediate change. "For the present," he stated, "I reluctantly accept as a fact that the Navy will continue to have officers of the line, or persons who are lawyers only as an incident to their military profession, performing legal functions."[8-103] Hodgson's answer was to "try to build the best we can

---

8-102. Patrick H. Hodgson, Memorandum for Mr. Hensel, Subject: "The Offices of the General Counsel and the Judge Advocate General—Their Respective Futures," 12 October 1945, at 4.

8-103. Hodgson observed, as had others, that military law was dispensed in the Navy by officers owing allegiance to their military profession, who alternated between sea and shore duty:

> This training is designed to produce an excellent and versatile naval officer. It cannot produce a sound and experienced lawyer. . . . Presumably nobody would suggest that naval doctors would be better

(continued...)

Digitized by Google

around this unsatisfactory framework." To do this, Hodgson proposed, as had the Johnson subcommittee and Hensel before him, that the Office of the General Counsel be established by statute.[8-104] He also proposed that all functions of the Office of the Judge Advocate General, with the exception of those relating to military personnel and discipline, be transferred to the Office of the General Counsel.[8-105] While the scope of responsibility of the Office of the Judge Advocate General was little

---

8-103. (...continued)

> doctors if they periodically took a long tour as a navigation or gunnery officer at sea.

Hodgson, Memorandum for Mr. Hensel, 12 October 1945, at 3.

8-104. Almost incredibly, forty years would pass before the position of General Counsel would be established by statute. This was finally effected by the Act of 1 October 1986, 100 Stat. 992, 1047 (the Goldwater-Nichols Department of Defense Act of 1986). The statute was codified at 10 United States Code, section 5019:

> (a) There is a General Counsel of the Department of the Navy, appointed from civilian life by the President.
>
> (B) The General Counsel shall perform such functions as the Secretary of the Navy may prescribe.

In explaining the purpose of the legislation, the House conference report stated that it "merely recognizes in law a position that already exists in [the Navy] and eliminates confusion caused by the absence of statutory specification." U.S. Congress, House Committee on Armed Services, 99th Cong., 2d sess., 12 September 1986, H. Conf. Rept. 99-824, at 154.

Prior to passage of the legislation, the General Counsel had been appointed by the Secretary of the Navy and his office funded through annual Congressional appropriations. The General Counsel's charter has been defined and re-defined from time to time through instructions issued by the Secretary of the Navy. See, for example, Secretary of the Navy instructions 5430.18 of 30 April 1954; 5430.25 of 2 February 1955; 5430.39 of 8 March 1957; 5430.25B of 23 March 1963; 5430.25C of 21 June 1966.

8-105. Under Hodgson's plan the Office of the General Counsel, in addition to those functions it was already performing, would have been responsible for taxation, admiralty, claims, legislation, and administrative law, all, according to Hodgson, functions of civilian lawyers. Navy lawyers would be "confined to matters of military law, *i.e.*, courts martial, courts of inquiry, boards of investigation and prisoners of war."

Digitized by Google

affected by these sweeping changes proposed by Hodgson, the stature of the Office of the General Counsel was to grow substantially.

The creation of an independent Solicitor in 1907 had inaugurated a duality into the Navy's administration of legal affairs by establishing a military legal office and a civilian legal office. It was abandoned in favor of a return to a unified military office in 1921. The creation of the Procurement Legal Division in 1941 signaled a rebirth of the bifurcated legal system. But unlike the Solicitor, it was not later abandoned. Rather, it evolved into the Office of the General Counsel and became a permanent institution within the Department of the Navy.[8-106] The subsequent shaping and growth of that office is a tale unto itself, far beyond the scope of this work.

The sea change that descended upon the Office of the Judge Advocate General at the outset of World War II was the product of an attitude that regarded legal matters as collateral to the duties of line officers. It was an attitude that went unchallenged in the seductively simple legal atmosphere between the world wars. There was no organization of legal professionals, uniformed or otherwise, capable of meeting the commercial demands of war. In this the Navy had done a disservice to both its line officers and to itself. Although the line officer lawyers did well those things they were trained to do—disciplinary and personnel matters—at war's end these were virtually all they had left.[8-107]

8-106. Although firmly established today (see footnote 8-104), the future of the Office of the General Counsel was far from certain at the close of World War II. At that time most of its lawyers were Naval Reserve officers who had been commissioned for legal duty in that office, and who intended to return to private practice following the war. Further, while civilians held the key posts of General Counsel, the two Assistant General Counsel, and the counsel to the several bureaus, most of these lawyers also intended to leave government service at war's end. Neale, "Naval Procurement During World War II: Its Legal Aspects," 216.

8-107. The duties and responsibilities of the Judge Advocate General at the close of World War II, as they appeared in *Navy Regulations, 1948*, can be found at Appendix B.

Digitized by Google

CHAPTER 9

WINDS OF CHANGE: AFTERMATH OF WAR 1945 to 1946

> ***It seems to me that a general statement can be made . . . that in the Navy, at least, justice is sometimes forgotten in order to impose on people in the service punishment of some kind or other. . . . While I was in the service, I always rebelled . . . as far as the manner in which military justice was meted out . . . .*—GERALD R. FORD, JR.**

Events of the war years had dramatically limited and defined the jurisdiction of the Office of the Judge Advocate General. Now, the years immediately following the war would witness a coalescing of the authority left to the Judge Advocate General, a centralization of control over the legal services for which he was responsible, and the beginnings of a global expansion of influence by his office. In the process the Navy's code of discipline, which at the middle of the twentieth century still clung to procedural concepts and punitive regulations directly traceable to those which governed the British Navy in the seventeenth century (see text beginning at page 18), would undergo the most significant changes it had witnessed since the founding of the Continental Navy in 1775—changes so profound as to drive the need for a cadre of professional lawyers to administer them.

We have seen the intense scrutiny focused upon the Judge Advocate General's handling of procurement matters during World War II. Procurement, however, was not the only area which came under inquiry. The Judge Advocate General's management of naval law and discipline did not go unnoticed—or uncriticised:

> There have been intimations from time to time that the Judge Advocate General's office was not handling even the naval law very efficiently. Prior to Admiral Gatch's appointment, suggestions were made that the bulk, if not all, of this work involving naval

Digitized by Google

> law be transferred to the Bureau of Naval Personnel.[9-1]

The "intimations" referred to in the quotation were contained in the findings of the House Naval Affairs Personnel Subcommittee; the very same subcommittee that had so mercilessly condemned the Judge Advocate General's handling of procurement and contracting:

> In March 1943, 448 general courts martial were reviewed and [802] charges and specifications for general courts martial were prepared [by the Office of the Judge Advocate General]. In peacetime an average of about 35 general courts martial was reviewed each month and about 45 charges and specific actions were prepared. The usual number of summary courts martial in peacetime was estimated to be about 600 per month; however, in March 1943, 4,864 cases were reviewed. Similarly, 5,830 deck courts were reviewed in March 1943, while the peacetime average was about 500. . . .
>
> As the administration of military law is in no way related to the legal aspects of procurement, the subcommittee has not investigated the efficiency of this administration. Our first, but unsubstantiated, impression is that approximately 11,000 trials per month are too many. Accordingly, it is thought that the mechanics, basis, and effects of the mode of dispensing military justice to

9-1. H. Struve Hensel, "Draft of Testimony on H.R. 3913," 21 January 1944, at 11.

Digitized by Google

> naval personnel should be thoroughly investigated.[9-2]

These findings of the subcommittee were translated into the following conclusion and recommendations:

> That the increase in the number of courts martial now being handled by the military law division of the Office of the Judge Advocate General has reached alarming proportions and should be investigated.
>
> That a thorough investigation of the administration of military law be conducted and that in the course of such investigation the advisability of transferring the present military law functions of the office of the Judge Advocate General to the Bureau of Naval Personnel be considered.[9-3]

9-2. U.S. Congress, Personnel Subcommittee of the House Committee on Naval Affairs, *Report on the Reorganization of Procurement Procedures and Coordination of Legal Services in the Navy Department*, 78th Cong., 1st sess., 10 May 1943 (Washington, D.C.: Government Printing Office, 1943), 55.

These quantum increases in courts martial reviewed, troublesome as the numbers were, could hardly be attributed to the Judge Advocate General. A year earlier, Secretary of the Navy Knox had sought to reduce the number of courts martial convened. In a message to all Navy activities he directed that, when the ends of discipline could be met, mast punishment be used in place of deck courts, deck courts in place of summary courts, and summary courts in place of general courts. Obviously the directive had only limited success. "History of the District Legal Office, Twelfth Naval District," September 1939 to September 1945, at 10.

9-3. Personnel Subcommittee of the House Committee on Naval Affairs, *Report on the Reorganization of Procurement Procedures and Coordination of Legal Services in the Navy Department*, 10 May 1943, at 75.

The Judge Advocate General of the Navy in 1947, Rear Admiral Oswald S. Colclough, USN, cast the World War II military justice crisis in slightly less dramatic terms:

(continued...)

Digitized by Google

The Navy's bungling of procurement matters had placed it under the Congressional microscope, and now it stood exposed to further examination for its apparent inability to administer discipline in a rational and efficient manner. But in this latter case the Navy was not totally at fault. Granted, archaic procedures delayed and prolonged trials. But there had also been a failure on the part of Congress to provide the Navy with adequate punishment authority below the level of general court martial, thus forcing the excessive use of that forum for disciplinary purposes. And the Navy was hardly alone among the services in responding to the explosive disciplinary problems of World War II through quantum increases in the number of trials by court martial. Generous makes the following observation:

> During World War II, the United States expanded its armed forces to a maximum strength of something over twelve million men and women. In a sophisticated and complex study published shortly after the war, two social scientists analyzed one facet of that inflated wartime military society. Because induction standards were low, they argued, criminals and potential criminals were not automatically excluded from enlisting.

9-3. (...continued)

> The problems in naval justice brought to light by a global war have been subjected to careful scrutiny by the Navy Department. Early in the war it was recognized that a court-martial system, adequate for a relatively small, compact organization, might show weakness under unprecedented wartime expansion. Because of the impracticability of making extensive changes while we were at war, the first studies taken to cope with the problem of expansion looked chiefly to expedition and simplification, and to attainment of a greater uniformity in punishments.

Judge Advocate General of the Navy, Rear Admiral Oswald S. Colclough, USN, to a meeting of the New York State Bar Association at Saranac, New York, on 21 June 1947, reprinted as "Naval Justice," *Journal of Criminal Law and Criminology* 38 (September-October 1947): 202.

Digitized by Google

> Moreover, the military population was heavily skewed towards males between the ages of seventeen and forty, the largest crime-producing segment of the society at large. Arraying these facts against the 1940 census and other known data pertaining to civilian society, the scientists argued that the World War II Armed Forces included about 30 percent of the nation's potential criminals.
>
> It was not surprising, therefore, that court-martial business during the war was brisk. There were about eighty thousand general court-martial convictions during the war, *an average of nearly sixty convictions by the highest form of military court, somewhere in the world, every day of the war.* There were about two million convictions handed down by American courts-martial of all types during the hostilities.[9-4] (Italics added; original footnotes omitted.)

Six weeks after the House Personnel Subcommittee recommended that "a thorough investigation of the administration of military law" in the Navy be conducted, Secretary of the Navy Knox appointed Arthur A. Ballantine, a prominent New York attorney and former Under Secretary of the Treasury, to carry out such an inquiry:

9-4. William T. Generous, Jr., *Swords and Scales, The Development of the Uniform Code of Military Justice* (Port Washington, N.Y.: Kennikat Press, 1973), 14.

Lieutenant Commander Bentley M. McMullin, USNR, an observer of the Navy's judicial system during World War II, made the astounding comment that general courts martial were "grind[ing] out absence cases . . . at the rate of one every fifteen minutes . . . in some of the naval districts." Bentley M. McMullin, "Revision of the Articles for the Government of the Navy," (unpublished paper, 26 September 1945, Law Library of the Office of the Judge Advocate General), eleventh page (unpaginated).

Digitized by Google

25 June 1943

Dear Mr. Ballantine:

You and such associates as shall be approved by me are requested to prepare and submit as promptly as practicable a report on the organization, methods, and procedure of naval courts with recommendations, if found warranted, of possible improvement in procedure and practices that will facilitate the satisfactory handling of the largely increased volume of cases handled by such courts. The office of the Judge Advocate General and all other Offices, Bureaus and activities of the Navy having information in the matter will be requested to supply all information germane to the survey.

You will be furnished with quarters and such assistants as may be found necessary.

Sincerely yours,

Frank Knox

Mr. Arthur A. Ballantine
31 Nassau Street
New York City, New York

Letter from Secretary of the Navy Frank Knox to Arthur A. Ballantine. (Arthur A. Ballantine and Noel T. Dowling, REPORT TO THE SECRETARY OF THE NAVY, 24 SEPTEMBER 1943)

Ballantine selected only one associate to assist in the conduct of the investigation; Noel T. Dowling, a law professor at Columbia Law School. Ballantine and Dowling turned their immediate attention to the manner in

Digitized by Google

which general courts martial were convened and reviewed. They noted that commanders of major shore installations in the continental United States, those closest in contact with disciplinary problems, could not convene the general courts martial sometimes required to resolve those problems.[9-5] Rather, recommendations for trial had to be submitted to the Secretary of the Navy via both the Office of the Judge Advocate General and the Bureau of Naval Personnel. By mid-1943, the Secretary was receiving approximately 750 such recommendations each month, and the number was growing.[9-6]

If the commander's recommendation to convene a general court martial was accepted, charges and specifications were drawn up by the Judge Advocate General and returned to the field for trial. Following trial, any sentence adjudicated could not be executed until the Secretary of the Navy approved it, since he was the convening authority. This required the records of trial to be sent back to the Navy Department for review both in the Office of the Judge Advocate General and the Bureau of Naval Personnel, following which they were acted upon by the Secretary. Thus, noted Ballantine, each case made two round trips to, and several detours in, the Navy Department before the sentence could be carried into execution:

> As a result, the time between an accusation and the promulgation of sentence was prolonged to an average period in excess of 100 days, of which approximately 60 days elapsed before the case was tried.[9-7]

9-5. These commanders could, of course, convene summary courts martial. The punishments that could be awarded by summary courts, however, were sometimes considered not adequate to the disciplinary problem at hand.

9-6. Arthur A. Ballantine and Noel T. Dowling, Report to the Secretary of the Navy, Subject: "Organization, Methods and Procedure of Naval Courts," 24 September 1943 (interim letter recommendation, 23 July 1943).

9-7. Ballantine and Dowling, 1943, at 14-15. A survey in the Twelfth Naval District showed that, for the 295 cases tried by general court martial in that district during the first six months of 1943, Navy Department processing in Washington caused delays ranging from two and one-half to seven months. "History of the (continued...)

Digitized by Google

Less than a month after they began their inquiry into court martial procedures, Ballantine and Dowling made their first recommendation to Secretary Knox. On 23 July 1943, in an interim letter recommendation, they proposed that the power to convene general courts martial be extended to most of the commandants of naval stations in the continental United States under article 38 of the *Articles for the Government of the Navy*:[9-8]

> You have before you for approval and signature drafts of letters authorizing the convening of general courts martial for the period of the present war by the officers named in the attached list, in the continental limits of the United States, conferring on them under Article 38, A.G.N., the same authority as now held by commanding officers of certain forces afloat or beyond the continental limits of the United States. The effect of the authority granted by these letters will be to decentralize the power to convene general courts martial. This, it is believed, will effect the saving of at least sixty per cent of time now consumed due to the present

9-7. (...continued)
District Legal Office, Twelfth Naval District," September 1939 to September 1945, at 23.

9-8. Such authority was permanently held by fleet and squadron commanders, and by commanding officers of naval stations beyond the continental United States. When empowered by the Secretary, as was done shortly after the attack on Pearl Harbor in 1941, it could be extended to commanding officers of squadrons, divisions, flotillas, or larger naval forces afloat, and to naval brigade commanders on shore beyond the continental limits of the United States. In time of war, upon authority of the Secretary, it could be further extended to commandants of Navy yards or naval stations in the continental United States, and to commanding officers of certain Navy or Marine Corps brigades in the continental United States.

General courts martial convened by order of the Secretary of the Navy were referred to as "Department Cases." All others were referred to as "Fleet and Foreign Cases." Department of the Navy, Office of the Management Engineer, "Survey of Division I, Judge Advocate General's Office," June 1943, at 1.

Digitized by Google

> centralization of such authority in Washington, a saving which would aggregate considerably over 500,000 man-days a year. . . . In addition to the great saving in time and manpower, it is believed decentralization will produce many other beneficial results, such as saving in brig space, guards, and time of witnesses, and will doubtless result in an uplift in morale in that the accused men will be speedily tried and informed of their sentences.[9-9]

Secretary Knox issued the recommended order by letter dated 24 July 1943. In it he authorized a majority of the commandants of naval stations within the United States to convene general courts martial, as had been suggested. But he went even beyond Ballantine and Dowling's recommendation, and extended this authority to the commandants of all naval districts within the continental United States.[9-10] This change had

---

9-9. Ballantine and Dowling, 1943 (interim letter recommendation, 23 July 1943). Note that Ballantine and Dowling were not breaking new ground here. The option to authorize commandants of naval stations to convene general courts martial in time of war had existed in the *Articles for the Government of the Navy* since 1916, and had been previously used at that time (see text beginning at page 298). Ballantine and Dowling merely revived it. (One may wonder why the Judge Advocate General, who witnessed first-hand the burden and inefficiencies that court martial convening responsibilities placed on an already over-laden Secretary of the Navy, had not already made a similar recommendation.)

Well over a year before Ballantine and Dowling made their recommendation, the Commandant of the Twelfth Naval District, seeking to eliminate the excessive delays in general court martial proceedings caused by Navy Department processing in Washington, had requested authority from the Secretary of the Navy to convene general courts martial. The request was repeated, with substantiating data (see footnote 9-7), on 23 June 1943, in a letter to the Chief of Naval Personnel. "History of the District Legal Office, Twelfth Naval District," September 1939 to September 1945, at 7, 23-24.

9-10. See Vice Admiral Joseph K. Taussig, USN, "Naval War-Time Discipline," *U.S. Naval Institute Proceedings*, 70 (July 1944): 3-4; Department of the Navy, *Annual Report of the Judge Advocate General of the Navy to the Secretary of the Navy*, 1944, Table IX; "History of the District Legal Office, Twelfth Naval District,"

(continued...)

Digitized by Google

an immediate and substantial effect on the relative case loads of the Secretary of the Navy and the commanders in the field in convening and reviewing general courts martial. And although it had no perceptible impact on the growth in the number of courts martial convened during the

---

9-10. (...continued)
September 1939 to September 1945, at 24. The Secretary's authorizing letter is identified as Navy Department File A17-11(I)/A17-20 in Department of the Navy, *Report and Recommendations of the General Court-Martial Sentence Review Board on Court-Martial Procedures and Policies* (1947), 44.

The Secretary's authority for extending general court martial convening powers to naval district commandants did not appear in article 38 of *Navy Regulations* at this time. Apparently the Secretary acted under emergency powers.

Ballantine and Dowling had not recommended full utilization of the article 38 authority, recognizing that some of the field commanders lacked "legal assistants" who would be needed to draft charges and specifications and perform review functions. However, two months later, when they filed their final report, Ballantine and Dowling did recommend that article 38 be amended to include naval district commandants in the class of commanders to whom the Secretary could extend court martial convening authority. Ballantine and Dowling, 1943, at 16. This recommendation was incorporated into *Navy Regulations, 1920*, by change 27 of 14 August 1946, which also eliminated the "time of war" condition in all cases and stated:

> When empowered by the Secretary of the Navy, [general courts-martial may be convened] by the commanding officer of a division, squadron, flotilla, or other naval force afloat, and by the commandant or commanding officer of any naval district, naval base, or naval station, and by the commandant, commanding officer, or chief of any other force or activity of the Navy or Marine Corps, not attached to a naval district, naval base, or naval station.

Department of the Navy, *Navy Regulations, 1920* (Washington, D.C.: Government Printing Office, 1920), art. 38(2).

Digitized by Google

war,[9-11] it did have the desired effect in reducing the time required to process such courts.[9-12]

9-11. The House Naval Affairs Personnel Subcommittee had criticized the Judge Advocate General for the fact that in a single month (March 1943) the Secretary of the Navy conducted 448 general court martial reviews and ordered 802 trials by general court martial (even though the Judge Advocate General had little control over these numbers). After several reviews and numerous recommendations, including that of Ballantine and Dowling, the Navy's total by 1945 was 1,033 reviews per month (more than double the 1943 number) and 2,322 cases ordered to trial (more than three times the 1943 number). The Secretary of the Navy, however, ordered only eighteen of these trials. Thus, Ballantine's "decentralization" recommendation dramatically reduced the caseload in the Secretary's office (and thus in the Judge Advocate General's office), but did nothing to reduce the total number of courts martial being convened, which had been the main criticism of the House Naval Affairs Personnel Subcommittee. Department of the Navy, *Annual Report of the Judge Advocate General of the Navy to the Secretary of the Navy*, 1945, at 1.

Far from being distressed by these numbers, or even critical of them, Ballantine considered them a success:

> As a measure of the success in maintaining naval discipline during the war . . . it is to be noted that the percentage of men tried by court-martial rose only from 17.3% to 18.5%, in spite of the fact that such a large portion of naval personnel were new to the service and subjected immediately to the rigors of wartime service.

Arthur A. Ballantine, *et al.*, Report and Recommendations to the Secretary of the Navy [on the Handling of Legal Problems in the Navy], 27 April 1946, at 4.

The percentage of naval personnel tried by court martial was revised downward significantly when further data became available. The Table of Statistics submitted by Ballantine two months after he filed his report indicated that the total percentage of personnel tried was 12.75%. Of these, only 1.1% were tried by general court martial.

9-12. By December, 1943, the average overall time between the date of an offense and final action on a general court martial had been reduced from 103.5 days to 61.8 days. The Secretary of the Navy was still dissatisfied, and directed that final action in all absence cases should be taken within a total of 20 days, and all other cases in 30 days. His rationale was pragmatic:

> The present delays result in unnecessary loss of a tremendous number of man days at a time when the

(continued...)

Digitized by Google

Following on the heels of the loss of procurement and other responsibilities, Secretary Knox's order also further diluted the scope of the Judge Advocate General's responsibility. As we shall see, however, the decentralization of court martial authority was one of the catalysts leading to the formation of a cadre of uniformed lawyers in the field, over which the Judge Advocate General would eventually assume control, and which would become the nucleus of the future Judge Advocate General's Corps.

In their interim letter recommendation, Ballantine and Dowling had foreseen the increased demands that would fall upon legal officers in the field:

> An immediate result of the recommended authorization to convene general court martial [*sic*] will be that the task of dealing with the recommendations for trial and preparing charges and specifications will fall on the legal advisors of the convening authorities; also, the task of examining cases on review in order to make recommendations to the convening authority as reviewing authority. This will probably call for some additional legal personnel in the field.[9-13]

At the time Ballantine and Dowling wrote, in 1943, the Navy had already begun to take steps to meet the need for legal personnel in the field. Professional lawyers were being commissioned from civilian life and assigned "legal-only" duties in legal offices on major naval shore

---

9-12. (...continued)

> war effort requires the full use of the services of all naval personnel.

Heeding the Secretary's admonition, the courts turned to. By the end of 1944, general courts martial in the Twelfth Naval District were handling general court martial absence cases in an average of 14.6 days. "History of the District Legal Office, Twelfth Naval District," September 1939 to September 1945, at 37-42.

9-13. Ballantine and Dowling, 1943 (interim letter recommendation, 23 July 1943).

Digitized by Google

staffs. These legal offices were a new phenomenon, established only two years earlier. Prior to that time they had not existed. Matters of legal significance in the field had simply been assigned to line officers as a collateral duty.[9-14] These non-lawyer "legal officers" were generally responsible for the coordination of local matters with the Office of the Judge Advocate General, which held general supervisory responsibility over all legal matters in the Navy:

> During this early period [before World War II] many of the legal functions . . . were handled in Washington, and in most cases legal matters were referred directly and independently to the Judge Advocate General's Office. The [collateral-duty legal officer] was principally concerned with checking the legality and form of proceedings of summary court martial cases, boards of investigation, and examining boards . . . . There existed at this time considerable independent local handling of legal matters by the various naval activities and commands . . . . The lack of uniformity in disposing of these matters and the lack of coordination of these functions . . . were evidenced in the following examples.
>
> Correspondence and interviews in which naval personnel requested legal advice regarding domestic problems or wills and powers of attorney were handled by both the Chaplain and the Morale Officer. . . . Civilian claims . . . were referred to the Public Works Officer, who forwarded the matter to the Judge Advocate General; all property cases and land matters were handled by the JAG. In pier damage or vessel damage cases, the Port Director's Office carried the responsibility for

9-14. When available, Law PGs could be assigned to collateral duty as legal officers, but such a nice match would have been fortuitous and coincidental.

Digitized by Google

> obtaining surveys and submitting reports to the Judge Advocate General; the same procedure was followed in admiralty litigation cases . . . .
>
> During these . . . pre-war years the most outstanding characteristics of legal functions were (a) the fact that legal duties . . . were for the most part performed by officers who were not trained lawyers . . . ; (b) the extreme centralization of legal functions in Washington and the resulting delays in settling . . . legal matters; and (c) the lack of uniformity in procedures and the independent local handling of many legal matters directly with the Judge Advocate General's Office by various naval activities.[9-15]

The first step toward improvement came about in the naval districts. In May 1941, the Chief of Naval Operations, recognizing the need for uniformity in the handling of legal matters for command, and the need to coordinate these various legal functions under the supervision of professionally-trained lawyers, directed that a district legal officer be designated to serve on the headquarters staff of each naval district. For reasons that are unclear, but hark back to the appointment of Captain Remey as the first uniformed Judge Advocate General of the Navy, all district legal officers were to be officers of the Marine Corps, if possible:[9-16]

> The District Legal Officer should be an officer of the Marine Corps of the rank of Major, having a legal background equivalent to bar admission. If a reserve officer is selected, he

---

9-15. "History of the District Legal Office, Twelfth Naval District," September 1939 to September 1945, at 1-2.

9-16. In the Twelfth Naval District a retired Marine Corps captain was selected for the position of district legal officer. The recall of a retired officer for this duty was probably typical throughout the Navy.

Digitized by Google

> should have had bar admission in the area of the affected District. The District Legal officer is to serve under orders . . . with no collateral duty. It may be necessary in certain instances to further augment the legal staff of the District Commandant by additional legal officer personnel, in which case regular or reserve officers of the line in the Navy will be detailed.[9-17]

The primary function of these district legal offices was to ensure the legality of the proceedings of courts martial, boards of investigation, and examining boards.[9-18] Initially staffed by a handful of experienced civilian lawyers of the Navy and Marine Corps Reserve, called to active duty specifically for their legal expertise, the legal offices demonstrated, for the first time, the value to the Navy of officers who devoted themselves exclusively to legal duties. They also demonstrated the benefits of placing lawyers in billets beyond the confines of the Office of the Judge Advocate General. The Navy *lawyer*, and not the Navy line-officer-as-lawyer, was making his mark.

As the war expanded and the Naval Establishment grew, branch legal offices under naval district cognizance sprang up in the various bases, stations, yards, and other naval facilities throughout the world. The Navy's only ready source of uniformed lawyers, the Law PGs, held shiphandling and combat credentials and were increasingly in demand to

---

9-17. Although perhaps a bit ambiguous, the directive contemplated that any "regular or reserve officers of the line" who might be assigned as "additional legal officer personnel" would be qualified attorneys. In time of war, the district legal office (as the district legal officer's domain came to be known) was to be organized into three divisions: military, civil, and maritime. "History of the District Legal Office, Twelfth Naval District," September 1939 to September 1945, at 4, 6. Note that the Judge Advocate General was given no authority over any of the district legal officers or their assistants. Even in areas which might impact his office (such as admiralty claims) he was required to get the approval of the district commandants in order to set up administrative procedures he felt were useful or necessary.

9-18. "History of the District Legal Office, Twelfth Naval District," September 1939 to September 1945, at 2, 4.

Digitized by Google

man the ever-growing number of ships being produced under the naval expansion programs. They could not be spared for "legal-only" duties.[9-19] The question became, therefore, where to find uniformed lawyers to staff these burgeoning legal offices. To meet the need, the Navy turned to an established but little-used program of the Volunteer Reserve, one in which civilian lawyers could be given direct commissions and mobilized to active duty as line officers restricted to legal duty only. They were called "Class L-V(S)" officers:

LEGAL OFFICERS, VOLUNTEER RESERVE (SPECIAL SERVICE), CLASS L-V(S).

(1) The following professional and special qualifications are considered as the basis for eligibility for appointment in this class:

(*a*) The candidate must hold a degree in law.
(*b*) He must be a member, in good standing, of a state bar, or its equivalent.
(*c*) He must be especially fitted for the particular position to which he will probably be assigned in the event of emergency.
(*d*) Candidates for appointment must have outstanding reputation considering their ages, or must show promise of attaining eminence in their profession.

(2) In determining the rank to be assigned, the following are considered as the minimum of practical experience in the legal profession:

(*a*) For ensign, 2 or more years.
(*b*) For lieutenant (junior grade), 4 or more years.
(*c*) For lieutenant, 7 or more years.
(*d*) For lieutenant commander, 10 or more years.[9-20]

9-19. At the end of 1941 there were fifty-six naval officers and nineteen Marine Corps officers with Law PG credentials. Of these, twenty-seven were at sea, nine at outlying stations, and twenty-four at non-legal billets in the United States. Only fifteen were available to the Judge Advocate General, and as the war effort expanded, most of these were put into front-line positions. James Snedeker, "Why the Navy Needs a Law Corps," *U.S. Naval Institute Proceedings*, 72 (January 1946): 20. Snedeker, himself a Law PG, fought with the Third Marine Division in the Pacific Theater during the war.

9-20. *Bureau of Navigation Manual* (Washington, D.C.: Government Printing Office, 1925), 347. This provision of the *Bureau of Navigation Manual* first appeared in 1925, and remained unchanged throughout World War II where it appeared in the *Bureau of Naval Personnel Manual*, the successor to the Bureau of Navigation.

(continued...)

Digitized by Google

9-20. (...continued)

The Volunteer Reserve had been established under an act of 29 August 1916. Members of the L-V(S) class of the Volunteer Reserve were part of the "Administrative, Specialist, and Technicist Class of Reserves." This included "those men who, through their connections in civil life, have become specialists in certain lines and in times of national emergency would be extremely useful to the Navy." Identified were doctors, dentists, chaplains, lawyers, ship constructors, civil engineers, ordnance and ballistic experts, and "others skilled in lines so that they could be used by the Navy in its supply, intelligence, and transportation services." The L-V(S) class comprised an amorphous pool of officers with law degrees who participated on an individual basis. Without a formal program, they were encouraged to improve themselves professionally through the "distribution of educational literature and by conducting correspondence courses." The Volunteer Reserve was administered by the naval district commandants. See Department of the Navy, "The United States Navy in Peace Time," (Washington, D.C.: Government Printing Office, 1931), 155-56.

These officers lacked mobilization assignments to any identifiable legal billets, for the simple reason that there were virtually no such billets to which to assign them. Until the district legal officer billets were created in 1941, the only active duty legal billets that existed were the two dozen or so in the Office of the Judge Advocate General staffed by Law PGs. There is no indication that the L-V(S) class had been established to support these billets, and it is not clear in what capacity the lawyers were intended to be employed.

Little detail is available regarding the L-V(S) class before World War II, or any officers who may have been associated with it. The following account, which has not been verified through any other source, appears to be the earliest utilization of L-V(S) officers:

> During the latter part of 1940 and in 1941, representatives of the Judge Advocate General participated in the drafting of the agreement for the use of naval bases with Great Britain, and the establishment of these bases in the spring of 1941 resulted in the call to duty of the first Naval Reserve legal specialists who were sent to the bases in Argentia, Bermuda, and Trinidad.

Executive Office of the Secretary of the Navy, Publication 1038 (NAVEXOS P-1038), "The Naval Establishment—Its Growth and Necessity for Expansion, 1932 - 1950 (Office of the Judge Advocate General)," July 1951.

The Judge Advocate General's annual report to the Secretary of the Navy for the period 1 July 1940 to 30 June 1941 notes acquisition of the bases, but makes no mention of the recall to active duty of "Naval Reserve legal specialists," nor,

(continued...)

Digitized by Google

Although the L-V(S) Program could have resolved much of the Navy's lawyer-staffing problem, the Navy had imposed minimum age requirements for affiliation. These restrictions made the program unattractive to all but the most fervently patriotic practitioners, who, at the relatively advanced ages necessary to qualify, would generally have had to make substantial financial sacrifices when mobilized.[9-21] As a result, the number of officers entering the Navy as lawyers under the Class L-V(S) Program remained limited. This impacted directly upon the legal offices where, because of severe undermanning, only military law matters could be addressed. The coordination and expedition of other legal matters, the very purpose for which the legal offices had been established, went unattended to.

In December, 1942, the age restrictions on Class L-V(S) officers were lifted,[9-22] and the program saw an influx of volunteers. Those commissioned through the L-V(S) Program were generally experienced men,[9-23] assigned to billets requiring some degree of legal expertise. They were assigned to positions in the Office of the Judge Advocate General,

---

9-20. (...continued)
indeed, the assignment of any personnel from the Office of the Judge Advocate General to these bases. See Department of the Navy, *Annual Report of the Judge Advocate General of the Navy to the Secretary of the Navy*, 1941, unpaginated.

9-21. One such lawyer willing to make the sacrifice was D. Barlow Burke, an attorney and professor of government at the University of Pennsylvania. In Burke's words, "I wanted to escape from a category which some of my contemporaries found comfortable—that of being too young for the first World War and too old for the second." Burke was accepted into the L-V(S) Program and served on active duty from the spring of 1942 until his release in the fall of 1944. His assignments included a tour as a Navy Department representative to the Interdepartmental Visa Committees, and service as the legal officer at the U.S. Naval Receiving Station, Brooklyn, New York. His written account of his experiences gives an insight into the employment of L-V(S) officers during World War II. Lieutenant D. Barlow Burke, USNR, *Navy Lawyer* (Philadelphia: *The Legal Intelligencer*, 1945).

9-22. "History of the District Legal Office, Twelfth Naval District," September 1939 to September 1945, at 16.

9-23. The term "men" is used advisedly. Although women with law degrees served on active duty with the Navy during World War II, including some in "legal-duty only" billets, none was commissioned through the L-V(S) Program. See discussion beginning at page 429.

Digitized by Google

the Procurement Legal Division of the Office of the Secretary, or the various legal offices throughout the Naval Establishment.

It has been estimated that more than 12,000 lawyers, all Reservists, served in the Navy during World War II.[9-24] Less than ten percent were assigned to billets that were exclusively legal in character.[9-25] Only a fraction of these were Class L-V(S) officers:[9-26]

> They had more lawyers than you could shake a stick at. You had to have a lot of influence to get into a legal billet in the Navy. The ones they took were distinguished people like Bob Quinn, former Governor of Rhode Island, who was made a captain and put in

9-24. The most precise estimate of this number, 12,266, was made by Snedeker. Snedeker, "Why the Navy Needs a Law Corps," 22.

9-25. "Legal Reserve News," *JAG Journal* (January 1948), 2. Not all Reserve officers with law credentials sought out or were used in legal-only billets. For example, William Sheeley, who served as Assistant Judge Advocate General from 1955 to 1956, had resigned his Regular commission after graduating from the Naval Academy in 1930, gone to law school, and was engaged in business and the practice of law when he was called to active duty from the Naval Reserve in 1940. Not only did he serve as a line officer in combat during most of World War II, he was never given even collateral legal duties, and could not recall ever having been appointed to perform court martial duties in any capacity. Rear Admiral William Robert Sheeley, USN (Ret.), interview with author, 28 July 1992.

9-26. The Class L-V(S) officers carried a distinct designation and thus could be identified as lawyers and assigned to law-duty-only billets. Although the Judge Advocate General had no authority to detail them, he could make recommendations for their assignments to the Chief of Naval Personnel. But non-L-V(S) personnel had to be identified as lawyers to be put into legal billets. The problem here was that questionnaire forms filled out by volunteers or inductees identifying themselves as lawyers stayed at the local draft boards. Thus, there was no accessible data base from which to recruit and assign these lawyers. Consequently they were sent to whatever jobs needed to be filled, almost always non-lawyer jobs. Captain Homer A. Walkup, JAGC, USNR (Ret.), interview with Commander George E. Erickson, Jr., JAGC, USNR, 23 and 24 June 1992, and with author, 27 February 1992.

Digitized by Google

> charge of the district legal office in Boston. They took men like that. But there weren't many of them.

As for the rest:

> They didn't want lawyers; we weren't going to sue the Japanese.[9-27]

What, then, of the 11,000 or so other lawyers called into the Navy? How did they serve? A few were selected for another of the direct commissioning programs, the "Deck Officers, Volunteer Reserve (Special Service)," or D-V(S) Program. The pertinent criteria under which they entered were only remotely related, if at all, to legal experience. Chosen were those who had "administrative experience in responsible positions," or those able to be used "in an administrative position at district headquarters, or elsewhere." Similar to the L-V(S) Program, the rank assigned to a Class D-V(S) officer depended on the applicant's age, previous experience, prominence, and general qualifications for the station to which he was to be assigned.[9-28]

One such lawyer selected for the D-V(S) Program was Homer Walkup. Walkup had received his law degree from the University of West Virginia in 1938. After practicing law for four years, he volunteered in 1942 for the D-V(S) Program, and was commissioned as an ensign. He, together with a number of other Class D-V(S) officers, several of whom were lawyers, was ordered to the Bureau of Naval Personnel. After a few

---

9-27. Captain Louis L. Milano, JAGC, USN (Ret.), interview with author, 26 September 1991. Captain Milano observed that the Navy just did not see a need for lawyers, and had put most of them, together with school teachers, in the amphibious force. When asked why the Navy did not attempt to use its lawyers in more traditional roles, he replied:

> Laymen were trying the courts-martial. They had laymen reviewing them. There was no court that oversaw the reviews. The Navy Department over on Constitution Avenue—they could bury anyone they wanted.

9-28. *Bureau of Naval Personnel Manual* (1942), 432.

Digitized by Google

months, because of his law credentials, he was assigned to a "legal" billet in the Office of Discipline section, where he reviewed court martial records. There were, however, lawyers working in almost every section of the Bureau of Naval Personnel; the Officer Discipline Section, the Detailing Section, the Procurement Section. Few if any were L-V(S) officers. They were not assigned there as lawyers, and did not necessarily do legal work. But the Bureau found that lawyers made good administrators, especially in detailing.[9-29]

Another segment of the legal profession that entered the service in World War II, again not into a law program, was women lawyers. Women like Elvera Smith. Smith graduated from the University of California's Law School, Boldt Hall, in 1934. Following admission to the California and Nevada bars, she practiced law in Reno and Carson City for several years. She volunteered for the Navy's WAVES Officer Program in 1943, and was sent to indoctrination training at Smith College in Northampton, Massachusetts.[9-30] From 1943 to 1945 she served in the Bureau of Naval Personnel, but never in a legal billet.[9-31]

Another woman lawyer who entered the Navy in 1943 through the WAVES Program was Mary Louise McDowell. Unlike Elvera Smith, however, McDowell served almost exclusively in a legal position. McDowell was assigned to the personnel office of the Eastern Sea Frontier in Portland, Maine, following completion of the WAVES course at Smith College. Because she had a law degree, she was given the billet of assistant legal officer. In this capacity she reviewed claims and physical disability cases. She also tried cases before summary courts martial, serving mostly as a defense counsel.[9-32]

9-29. Walkup, interview, 23 and 24 June 1992, 27 February 1992.

9-30. Prospective women officers were enrolled in the W-V(S) Program, "Women Officers, Volunteer Reserve (Special Service)." The L-V(S) Program for lawyers was not open to women.

9-31. Elvera Smith left active duty at the end of the war and served with a Naval Reserve Law Company until her retirement. Commander Elvera Wollitz Smith, USNR (Ret.) interview with Captain Paul K. Costello, JAGC, USNR, 1 April 1991.

9-32. Captain Mary Louise McDowell, JAGC, USNR (Ret.), interview with Captain Paul Keely Costello, JAGC, USNR, 4 April 1991.

Digitized by Google

But for most of the lawyers who served in World War II, combat service as a Reserve line officer was the norm. The experience of Donald Chapman, former Deputy Judge Advocate General of the Navy, is typical. Chapman had passed the Texas bar exam in 1942, and volunteered for one of the Navy's "Ninety-Day Wonder" programs:[9-33]

> I was called to active duty and went to the University of Notre Dame for indoctrination. From there I went to Northwestern University as a Naval Reserve midshipman. After our three months as midshipmen we were commissioned as general deck officers so we could expect to have general line duties during our tenure in the Navy. Other lawyers were commissioned as intelligence specialists and some as communications specialists. They were Reserve officers who were given direct commissions in a specialty program but not necessarily law. They could have been anything as a matter of fact. Admiral Mott [*Rear Admiral William C. Mott, USN (Ret.), Judge Advocate General of the Navy from 1960 to 1964.—ED.*] had been practicing law for several years before the war and he served as an intelligence officer when he came in.[9-34]

Another of the Ninety-Day Wonders was Joseph McDevitt, who would become Judge Advocate General of the Navy in 1968. Immediately upon completion of law school, in August 1942, and without taking a bar exam, McDevitt was sent to midshipman school at Columbia University.

9-33. "Ninety-Day Wonder" was a term applied to college graduates without any prior Navy experience who were commissioned as unrestricted line ensigns in the Naval Reserve after an intensive three-month course. "Wonder" was used in a pejorative sense, comparing these hastily-trained officers with the four-year graduates of the Naval Academy.

9-34. Rear Admiral Donald D. Chapman, JAGC, USN (Ret.), interview with author, 18 July 1991.

Digitized by Google

Upon completion he was assigned to the amphibious force and served in the Pacific as a boat crew commander. He had no legal duties at all during the war:

> They avoided me like the plague. We didn't have very many courts martial on board the ship, but anytime there was one, they made it a point to steer completely clear of me. They didn't want any "legal eagles" having anything to do with it. So I had no legal duties at all, not even as a court member. The courts martial were run strictly like the old line Navy had always done it.[9-35]

9-35. McDevitt's duties were strictly those of the line. The first landing he made was at Saipan, where he took the Marines in at Red Beach:

> I was out in front and the first wave was right behind me, and it was terrifying, of course, because we were going in under the guns of the battleships, and the cruisers and the destroyers, which were laying on the bombardment, and the planes were hitting the beach, but they didn't get everything. As we kept going in, what appeared to me to be the water breaking on the reef was mortar fire, and we sailed right through it, and the first thing that happened was that we took a hit—it hit the turret behind me—and I got thirteen pieces of shrapnel in my back, and my spine, and my neck, and my buttocks. I still have some in my spine, and every time I have a chest x-ray done I have to tell them that if I have a couple of black spots in there, don't worry about it. I had three Marines killed who were on the fantail, but our wave went on in, and, of course, the Marines took one hell of a beating there, from day one, the minute they hit the beach.

Rear Admiral Joseph B. McDevitt, JAGC, USN (Ret.), interview with author, 23 March 1993.

Digitized by Google

The observations of William Hogan, who sailed with Admiral Arleigh ("31 knot") Burke's squadron aboard the *USS Claxton* (DD-571), were similar to McDevitt's:

> You didn't need lawyers under the *Articles for the Government of the Navy* because of the low incidence of courts martial at sea. You just didn't have time for that sort of thing. In my destroyer squadron and in the cruiser division I can only remember, in all of those years [World War II], maybe three or four courts martial in the wardroom of some ship. You didn't use courts martial on the shipboard level. If you had real trouble you would get rid of the person and let some shore facility handle it. Plus the fact that nobody on the ships knew how to do it. [*A commentary on the military justice inexperience of Reserve officers.—ED.*] I think we had one summary court martial the whole time that I was on the *Claxton*, and nobody knew what to do. They had the book in front of them but they didn't know what to do. Nobody knew what to do and they didn't want any part of it, including the commanding officer. So if somebody slugged somebody, or somebody got drunk or something, we'd leave them with the shore patrol if we could, and that was it.[9-36]

9-36. Captain William Hogan, USNR (Ret.), interview with Commander George E. Erickson, Jr., JAGC, USNR, 17 June 1991. Hogan's sentiment was echoed by Milano. As a lawyer who received a line-officer commission, Milano tried courts martial in Guam and the Philippines when a judge advocate was needed:

> We didn't know the first thing about courts martial. They had a yellow book called *Naval Courts and Boards*. I read that and I barely knew what I was doing. I didn't know what a "convening authority" was—I had never heard of anything like that.

(continued...)

Digitized by Google

The Marine experience was predictably similar. John Russell Blandford notes that when World War II erupted he was plucked from Yale Law School after completing only two years of the three year program. When he reported to Quantico he was asked if he had any special qualifications. He mentioned his law school experience and was told, "No, we mean something we can use." He then stated that he had studied Spanish for two years. This was recorded in his file, but not the fact that he had attended Yale Law School. Marines who were lawyers tended to hide the fact, said Blandford, because it was perceived to harm promotion chances.[9-37]

Experiences varied. Not all commands eschewed the legal talent available to them. Louis Milano, another lawyer who also served as a boat officer in the amphibious force, observed that line officers with law degrees were commonly given court martial duties as collateral assignments. At some of the larger afloat commands, and at shore commands where there were adequate personnel to convene courts martial without jeopardizing operations, lawyers, regardless of their primary assignments, were often tapped for legal duties. Most often this was to serve as judge advocate (prosecutor) for a court martial. Thus Mack Greenberg, who entered the Navy as an ordnance specialist after several years in the private practice of law, handled all legal and disciplinary problems as a collateral assignment while at the Naval Air Technical Training Command in Chicago. Later, aboard the "jeep" carrier *Chassen*

9-36. (...continued)
Milano, interview, 26 September 1991.

9-37. By coincidence, Blandford had a tent-mate during the war who had been a civilian lawyer before entering the service. To the Marine Corps it meant not a thing; both Blandford and his tent-mate were designated as forward observers.

Blandford's unit fought on Guadalcanal. After the battle the unit was sent to Australia for rest and rehabilitation leave. Some of the enlisted Marines who found themselves defendants in court martial proceedings soon discovered that Blandford had attended law school, and requested that he defend them at courts martial. After he had run off seven or eight straight acquittals, Blandford was designated judge advocate for the 11th Marines. In that way his skills would be used for the prosecution rather than the defense. Major General John Russell Blandford, USMCR (Ret.), interview with Commander George E. Erickson, Jr., JAGC, USNR, 24 June 1992.

Digitized by Google

Bay as aviation ordnance officer, he did all the court martial work for the commanding officer, and served as legal assistance officer as well.[9-38] And just as in the days of sail, in many cases when a court martial was convened aboard ship it was the Marine line officers, without watchstanding duties, who did the litigating.[9-39]

In the midst of this chance approach to the procurement and utilization of lawyers by the Navy, in late 1942 and early 1943, a movement by the civilian bar to bring about the establishment of formal legal assistance programs within the military services began to bear fruit, and at the same time advanced the professionalism of legal services in the Navy.[9-40]

Legal assistance for all servicemen before 1940 was so haphazard as to be, for practical purposes, inconsequential or nonexistent. This began to change in 1940 with passage of the Selective Training and Service Act.[9-41] Under this act many persons were brought into the service from civilian life—some of whom had very little advance notice or opportunity

---

9-38. Greenberg, the only lawyer on board the *Chassen Bay*, served primarily as the judge advocate. He prevailed upon the commanding officer to let him act as defense counsel in a few cases, but the privilege was quickly withdrawn when the acquittal rate rose dramatically.

During one trial, while serving as judge advocate at a three-man summary court martial, Greenberg observed the senior member going to the captain's cabin during deliberations. He found out later that he had gone there to talk to the captain about what the court was going to do. Although the court returned a guilty verdict as he had requested, Greenberg got the captain to throw the case out. In Greenberg's words, "I wanted to see that justice was being done." Captain Mack K. Greenberg, JAGC, USN (Ret.), interview with author, 14 May 1992. The reader is reminded of the admonition to judge advocates contained in section 401 of *Naval Courts and Boards, 1937*, to protect the interests of an accused who does not have counsel.

9-39. Walkup, interview, 23 and 24 June 1992, 27 February 1992.

9-40. The discussion of the evolution of legal assistance which follows in the text has been extracted from Milton J. Blake, *Legal Assistance for Servicemen, A Report of The Survey of the Legal Profession* (Boston: Lord Baltimore Press, 1951). In the discussion, portions of the Blake book have been quoted verbatim, while others have been paraphrased, without direct attribution. Omissions of text have not been indicated. Where necessary for context, some portions of the book have been quoted or paraphrased out of order.

9-41. Act of 16 September 1940, 54 Stat. 885. The purpose of the act was to provide for the expansion and training of the armed forces.

Digitized by Google

to arrange their personal affairs, with consequent difficulties and some hardship. To provide a measure of protection for such persons, the Soldiers' and Sailors' Civil Relief Act of 1940 was approved on 17 October of that year.[9-42]

Although the Soldiers' and Sailors' Civil Relief Act provided legal remedies and relief, it did not, in general, work automatically. It was still necessary to obtain legal advice and assistance were necessary to enforce its benefits. In addition, newly inducted personnel had many other legal problems, such as the need for a will, a power of attorney, or other legal matters, concerning which they required professional legal counsel. As a result, bar associations in different localities began to establish committees of volunteer lawyers in order to assist service personnel with these problems. Such organizations sprang up independently in various parts of the country in recognition of this need, and as a result of a feeling of responsibility on the part of the bar to make legal services available to those involuntarily in the armed forces. Legal aid organizations also recognized this new need and undertook, as a matter of patriotic service, to handle the legal problems of servicemen and their dependents, ofttimes without charge.

The first nationwide organization to handle legal problems of servicemen resulted from activities of the American Bar Association. That association, as the nation's largest organization of civilian lawyers, recognized at an early date its unique opportunity and responsibility for service in this field. On 12 September 1940, four days before the Selective Training and Service Act was approved, the House of Delegates of the American Bar Association authorized the appointment of a Committee on National Defense (later the Committee on War Work) to cooperate with governmental agencies in preparation for national defense. A few weeks later the Committee on National Defense suggested the establishment of voluntary committees of lawyers to work with federal advisory boards,[9-43] the organized bar, legal aid societies, and other welfare organizations to provide counsel for persons protected by the

---

9-42. 54 Stat. 1178.

9-43. Advisory boards had been established under the Selective Training and Service Act to assist men with problems caused by the act's requirements to register, and their exposure to induction into military service.

Digitized by Google

Soldiers' and Sailors' Civil Relief Act, but who were unable to obtain it themselves.

The Navy Department's first organized effort at legal assistance was made by the Chief of the Bureau of Navigation in January 1941, with notice of the availability of the civilian legal services being provided by volunteer lawyers under the auspices of the American Bar Association's Committee on National Defense. Over the next year, the Bureau of Navigation promulgated various circular letters and bulletins to all ships and stations advising that civilian bar associations would provide lawyers to advise and assist naval personnel in understanding and exercising their rights under the Soldiers' and Sailors' Civil Relief Act, and in settling their personal affairs. (It is interesting to note that the Judge Advocate General was not involved in this endeavor.) Despite these efforts, however, the availability of the services of the civilian bar generally was not understood by naval personnel. For many such persons, at sea, at remote bases, or restricted to naval installations, the services were unobtainable and virtually irrelevant.

In May 1943, the Bureau of Naval Personnel (which had formerly been the Bureau of Navigation) issued another circular letter.[9-44] This letter required that the substance of the Soldiers' and Sailors' Civil Relief Act be explained to each man in the naval service, and that a pamphlet, "Legal Effects of Military Service," be distributed to all ships and stations and made available to their personnel. While this circular letter greatly heightened an awareness of legal protections among members of the naval service, it was apparent that simply making a pamphlet available, without the concomitant availability of individual consultation, could not resolve their legal problems.

At the same time (early 1943), the American Bar Association's War Work Committee had begun discussions with the Office of the Navy Judge Advocate General directed at establishing an organized legal assistance program in the Navy.[9-45] As a result, on 26 June 1943, Acting

---

9-44. Circular Letter No. 72-43 of 11 May 1943.

9-45. The War Department, in cooperation with the American Bar Association, had adopted a formal legal assistance plan for Army personnel on 10 March 1943, "thus instituting, for the first time in the history of the armed forces, an official, uniform and comprehensive system for making legal advice and assistance available to military personnel and their dependents in regard to their personal legal affairs."
(continued...)

Digitized by Google

Secretary of the Navy Forrestal promulgated a circular letter to all ships and stations. This directive established for the first time in the sea services a workable plan to make legal assistance generally available to Navy, Marine Corps and Coast Guard personnel and their dependents. The Navy Department, the American Bar Association, state and local bar associations, and legal aid organizations were to participate in the provision of such assistance. The Navy would designate qualified uniformed lawyers to act as its legal assistance officers. Most would come from the D-V(S) Program and the recently liberalized L-V(S) Program. Others, including line officers with the requisite legal qualifications, would be shifted from other duties or assigned legal assistance responsibility as a collateral task.

A sea change in the Navy's employment of uniformed lawyers was underway. Originally confined to the Office of the Judge Advocate General, Navy lawyers had just recently taken their military law expertise to the naval districts to assist commanders with disciplinary matters. Now, driven by the demands of war, they were required to assume a role never before played; that of counselor and adviser to the rank and file officers and men of the Navy. This, without doubt, was the greatest philosophical shift yet seen in the Navy's legal history.

Aside from the historic significance of the legal assistance plan itself, the program set up under Forrestal's directive was significant for another reason; it assigned to the Judge Advocate General "the general organization, supervision and direction" of legal assistance offices and officers, thus supplanting the Bureau of Naval Personnel, and placing full responsibility for legal assistance under the Judge Advocate General. For the first time in history, the Judge Advocate General of the Navy was directly responsible for the provision of legal services outside the Office of the Secretary. Equally significant, for the first time since his office had been established, the Judge Advocate General had responsibility, albeit limited to legal assistance, for supervising and coordinating the work of uniformed lawyers throughout the Naval Establishment.

9-45. (...continued)
Blake, *Legal Assistance for Servicemen*, 16-17.

Digitized by Google

Because of a significance far beyond the scope of its immediate purpose, pertinent portions of the Secretary's directive are reprinted below.[9-46]

R-1164—LEGAL ASSISTANCE FOR NAVAL PERSONNEL
JAG:J:JL:ac, 26 June 1943
ACTION: ALL SHIPS AND STATIONS

1. The following instructions relative to the establishment of legal assistance offices in the naval service are hereby promulgated:

2. *Purpose*. These instructions are issued for the purpose of establishing in naval districts and elsewhere in the naval service legal assistance offices to provide legal assistance to naval personnel in the conduct of their personal affairs and to expand such services where now being rendered. This action is being taken in coöperation with the American Bar Association and various State bar associations.

3. *Legal-Assistance Offices*. The commandant of each naval district, and the commandant or other commanding officer of each Navy yard, naval station, marine Corps base, Marine barracks, or other naval activity where qualified lawyers are available in the naval service, will establish a legal-assistance office . . . . The officer in command of any of the forces afloat may, if considered desirable, also establish a legal-assistance office . . . . Where a legal office already exists, such legal-assistance office may be a section of, or otherwise assimilated with, such legal office.

4. *Local Supervision*. The district legal officer of each naval district shall, under the direction of the commandant, exercise general supervision and coördination of all legal-assistance offices within the district.

5. *General Supervision*. The general organization, supervision, and direction of such legal-assistance offices and officers is assigned to the Judge Advocate General . . . .

6. *Qualifications of Legal-Assistance Officers*. Legal-assistance officers shall be members of the bar . . . but need not necessarily be commissioned officers. However, where available, officers so designated should possess sufficient maturity and legal experience to inspire confidence and to discharge their duties efficiently. If there is no such qualified person available for such assignment, a suitable officer may be assigned as acting legal-assistance officer . . . . such acting officer may perform all the functions of a legal-assistance officer except giving legal advice and counsel or otherwise practicing law.

9-46. The complete directive appears as Circular Letter No. R-1164 in *Navy Department Bulletin*, 1 July 1943.

Digitized by Google

7. *Duties and Services of Legal-Assistance Offices.* Legal-assistance officers . . . shall render such personal legal assistance to naval personnel and their dependents (including all components of the Navy, Marine Corps, and Coast Guard, and persons serving with naval forces anywhere, and where necessary the personnel of other branches of the armed forces) as is deemed necessary or desirable for their morale or efficiency, which may include but is not necessarily limited to the following . . .

(*f*) Legal-assistance officers . . . will not advise or assist naval personnel in any case in which such personnel are or may be involved in an investigation or court martial or other official proceedings. . . . Nor will legal-assistance officers appear in person or by pleadings in or before civil courts, boards, or commissions as attorneys for persons otherwise entitled to the advice and counsel of such legal-assistance officers.

(*g*) Legal-assistance officers will as far as possible avoid handling legal matters which should in their judgment appropriately be handled by private counsel. . . .

8. *Direct Action of Legal-Assistance Officers.* The Judge Advocate General's Office and the district legal officers are authorized to correspond directly with each other and with legal-assistance offices in the performance of their supervisory duties.

9. *Confidential and Privileged Character of Services Rendered.* The usual attorney and client relationship shall be maintained by legal-assistance offices . . . and the files thereof . . . will be treated and considered as *confidential and privileged* in a legal rather than a military sense. . . .

The district legal offices, created in 1941, had, for the first time, placed uniformed Navy lawyers in the field to perform legal duties. Legal offices in subordinate commands had followed. Now, two years later, the Judge Advocate General was given superintendence over a number of them.[9-47] A century and a half after the Department of the Navy was

---

9-47. Note that the specific authorization of the Secretary of the Navy was required to permit the Judge Advocate General to correspond directly with district legal officers and legal assistance officers. See paragraph 8 of the 26 June 1943 directive. This was because such legal officers were under the direct authority of the district commandants or other line commanders. It was these officers, and not the Judge Advocate General, who designated the legal assistance officers for their commands. See paragraph 3 of the 26 June 1943 directive. This basic organizational structure, whereby the assignment of lawyers to fleet and support activities was the responsibility of major commands rather than the Judge Advocate (continued...)

Digitized by Google

established, a legal organization was taking root in the United States Navy!

Pursuant to the foregoing directive, Judge Advocate General Gatch sent a letter to all ships and stations stating the general policy his office would follow in discharging its responsibilities regarding legal assistance. This included:

- ⚓ Assisting in any way possible the organization of legal assistance offices
- ⚓ Bringing to the attention of legal assistance officers, from time to time, pertinent general information to assist them in the performance of their duties and to aid them in carrying out the purposes for which such legal assistance offices have been established.
- ⚓ Collaborating with the American Bar Association and other bar organizations and legal aid societies with the view to making certain that adequate legal assistance is made available to all naval personnel and their dependents.[9-48]

9-47. (...continued)
General, remained in effect until the Naval Legal Service was established in 1973. Rear Admiral Richard L. Slater, JAGC, USN (Ret.), interview with author, 17 January 1991; Judge Advocate General of the Navy, memorandum to Distribution List, Subject: "Navy Law Center Organization Modification," 19 October 1973. A discussion of the development of the law center organization following the formation of the Navy Judge Advocate General's Corps in 1967 can be found at Appendix L.

9-48. *Navy Department Bulletin*, 15 September 1943, at 20. A legal assistance section was created in the contract division of the Office of the Judge Advocate General to administer the legal assistance program. There was a certain logic to this for, although the contract division had lost most of its responsibility in the procurement arena, it still had cognizance over certain claims for damages to private property, an area at least arguably related to legal assistance. Office of the Judge Advocate General of the Navy, "Administrative History of the Office of the Judge Advocate General for the Period 8 September 1939 to 7 October 1947," (1947), 2-3. The chief of the legal assistance section was charged with, among other duties, visiting the various legal assistance offices and Naval district headquarters to observe and assist in coordination of legal assistance matters. "Outline of Functions Performed in Office of the Judge Advocate General," 1 August 1944, 7-8.

Notwithstanding this opportunity to extend the influence of his office, the Judge Advocate General saw his role as strictly supervisory, and held to some of the stiff formality that had plagued the office during most of its existence:

(continued...)

Digitized by Google

By 31 December 1943 the Navy counted 465 legal assistance offices throughout the Naval Establishment. On 8 February 1945, citing an improvement in morale and reduction in disciplinary problems resulting from the provision of legal assistance, Secretary Forrestal sent a letter to all ships and stations extending the program:

> [A]t least one legal assistance officer or acting legal assistance officer shall, as soon as practicable, be appointed . . . on each ship or station having a complement of more than 1,000 where no such officer has as yet been appointed, except where in the opinion of the Commandant or commanding officer such appointment is either wholly impracticable or clearly unnecessary.[9-49]

By 1 October 1945, shortly after the end of the war, 1,023 legal assistance offices had been stood up. One estimate placed the total

---

9-48. (...continued)

> The services of the office of the Judge Advocate General are not intended to be utilized by legal assistance officers to assist in the handling of specific personal legal problems of naval personnel and their dependents. It is expected that the services of local representatives of the bar associations and legal aid societies will be utilized in cases where adequate service is not available in legal assistance offices.

Navy Department Bulletin, 15 September 1943, at 20. As "expected" by the Judge Advocate General, a number of Navy personnel, particularly dependents, were provided legal services by members of the civilian bar who voluntarily participated in the legal assistance program. These services were gratuitous in a great number of cases. Blake, *Legal Assistance for Servicemen*, 32, 34.

9-49. "History of the District Legal Office, Twelfth Naval District," September 1939 to September 1945, at 69.

Digitized by Google

number of cases handled by Navy legal assistance officers during World War II at several million.[9-50]

Ballantine and Dowling, whose interim letter recommendations regarding decentralization of general court martial authority had clearly contributed to an ever-growing number of professionally qualified "legal officers" in the Navy, issued their final report to the Secretary on 24 September 1943. In it they critically analyzed the practices of all four disciplinary tribunals then existing (general courts martial, summary courts martial, deck courts, and captain's mast), then made recommendations for changes in their procedures.[9-51]

9-50. Blake, *Legal Assistance for Servicemen*, 29-30. A more conservative, and probably more accurate, estimate placed the number at something over a million:

> More than a million service personnel and dependents were assisted or advised by Navy Legal Assistance officers during the war, prior to V-J Day . . . .

"Legal Assistance," *JAG Journal* (August 1947), 7.

Regardless of the real number, the field offices may have been handling their cases without a great deal of guidance from the Judge Advocate General, at least during their first year of operation. A memorandum written by an aide to the Judge Advocate General in February 1944 stated that

> There are a number of current legal problems about which little if anything is being done . . . . For example . . . implementation of the program for legal assistance . . . .

F.A. Ironside, Jr., Memorandum for the Judge Advocate General of the Navy, Subject: "Organization and Provision of Legal Services for the Naval Establishment," 10 February 1944, at 8.

Although considered for disestablishment at the end of World War II, legal assistance programs in the armed services, including the Navy, have survived to the present. Legal assistance officers can now be found at every naval legal service office, as well as other legal offices within the Navy and Marine Corps. Legal assistance regulations and guidelines are summarized in the *Manual of the Judge Advocate General.*

9-51. Ballantine and Dowling were especially critical of the outmoded and ofttimes stultifying practices still in use at Navy courts martial. For example:

(continued...)

Digitized by Google

Ballantine and Dowling concluded that general courts martial were overused, in part because the maximum punishments which could be adjudged at the summary court level were felt by commanders administering discipline to be inadequate. This overuse of the general court, together with confusing and inconsistent provisions regarding sentencing responsibilities and clemency authority, resulted in the adjudication of a disproportionate number of excessively severe sentences: "A study of over 1,600 cases cleared through the Office of the Judge Advocate General in the months of April, May, and June of 1943 shows that over three-quarters of sentences adjudged by general courts martial are substantially mitigated in the process of review."[9-52] To address this problem, Ballantine and Dowling recommended that the punishment authority of summary courts be increased.[9-53]

Ballantine and Dowling also recommended appointment of a law member to general courts, a sort of "voting judge," as was the practice in the Army:

> Nowhere do we find a requirement of law or statement of policy that any member of a general court martial shall be skilled in the

---

9-51. (...continued)

> *Naval Courts and Boards* provides for the reading of the record of the previous day or of the salient features of the proceedings upon the opening of the court on each successive day. This practice results in unnecessary delay.
>
> [T]he findings and sentence of the court are required to be recorded in the handwriting of the judge advocate.

Ballantine and Dowling, 1943, at 21.

9-52. Ballantine and Dowling, 1943, at 23-24.

9-53. In 1947 the Judge Advocate General, at the direction of the Secretary of the Navy, prepared legislation to increase the sentencing powers of summary courts martial. Before any action was taken on this legislation, it was preempted by the *Uniform Code of Military Justice*, which replaced court martial procedures and sentencing powers for all the services.

Digitized by Google

> law. *Naval Courts and Boards* specifies that the judge advocate should be "an officer who is skilled in the law"; and it is his duty to "advise the court in all matters of form and of law." However, it is his principal duty to act as prosecutor. In the British Navy the judge advocate is also the advisor of the court; but he does not prosecute the case and he is especially charged under the law to "maintain an entirely impartial position." In the United States Army, the *Articles of War* provide for a law member of each general court martial.[9-54]

In addition to the law member, Ballantine and Dowling foresaw the need for appointment of a *designated* defense counsel for the accused at every general court martial. It was not sufficient, they argued, that the accused had the right to counsel, since he might fail to understand the benefits of representation:

> *Naval Courts and Boards* provides that the accused "shall be advised to consult counsel before deciding to proceed with the case without counsel." If the accused so requests, the convening authority must detail a suitable officer to act as his counsel. The judge advocate (the prosecutor) may advise the accused in the event that the accused has no counsel of his own.

9-54. Ballantine and Dowling, 1943, at 18. Army practice for general and special courts martial was to appoint a law member as a voting member of the court, a trial judge advocate as prosecutor, and a defense counsel for the accused. For a detailed discussion of Army court martial procedures during World War II, see Lee S. Tillotson, *The Articles of War Annotated*, 3d rev. ed. (Harrisburg, Pa.: The Military Service Publishing Company, 1944).

The law member concept was never voluntarily adopted by the Navy. A modification of the concept, in the form of a non-voting "law officer," was imposed on the Navy by enactment of the *Uniform Code of Military Justice* in 1951. See discussion at page 502.

Digitized by Google

> All this falls short of adequate protection of accused men. They need to have, and to be informed that they have, a designated defense counsel to whom they can go for advice as to their rights and the steps to be taken to vindicate them. They should, of course, be entitled to counsel of their own choice, but they should in any event be able to obtain the assistance of the designated and responsible defense counsel. Defense counsel, like judge advocates, should be skilled in the law.[9-55]

9-55. Ballantine and Dowling, 1943, at 18-19. Although Ballantine and Dowling use the phrase "skilled in the law" as a term of art, nothing in the context of their recommendations indicates that they contemplated a person with the professional attainments of a lawyer. A search of *Naval Courts and Boards, 1937* reveals nothing which defines the term "skilled in the law." Apparently one could become "skilled in the law" by having an understanding of court martial procedures and some experience with them:

> Let us now more closely examine the publication, *Naval Courts and Boards*. . . . It is not the intention that all naval officers should be required to be experienced lawyers. In fact that would be impossible since only three or four officers a year are sent to law school. On the other hand, every naval officer is expected to be able to read this book and apply it intelligently to the case at hand. If you read this publication carefully, especially those parts which concern a case at hand and your duties in connection therewith, you should have no trouble with courts and boards in the Navy.

Charles J. Whiting, "Naval Law" (lecture given to the class of V-5 instructors, U.S. Naval Academy, Annapolis, Maryland, 24 March 1942, Law Library of the Office of the Judge Advocate General), 4.

Nowhere were the duties of either the judge advocate or the defense counsel set forth. Section 350 of *Naval Courts and Boards, 1937*, required only that the judge advocate be "a competent commissioned officer."

Digitized by Google

We have briefly noted the Navy practice between the world wars of appointing retired officers to "permanent" courts martial, primarily general courts, to tap their experience and, hopefully, foster competence in court martial proceedings (see footnote 7-95).[9-56] This practice was expanded during World War II as disciplinary demands increased.[9-57]

9-56. Pasley and Larkin's endorsement of permanent courts martial was cautious:

> There are certain obvious advantages in having courts martial comprised of experienced, relatively permanent personnel, although it must be conceded that occasionally such courts tend to become callous and to impose unconscionable sentences. (Citing *Report of the General Board, United States Forces, European Theater, on Military Justice Administration in theaters of Operation*, W.D. File, 250/1, Study No. 83, p. 46 (1946).)

Robert S. Pasley, Jr. and Felix E. Larkin, "The Navy Court Martial: Proposals for its Reform," *Cornell Law Quarterly* 33 (November 1947): 205.

9-57. By June, 1943, there were nineteen permanent general courts martial, located on the perimeter of the continental United States:

Navy Yard, Boston, Massachusetts
Navy Receiving Station, New York, New York
Navy Yard, Philadelphia, Pennsylvania
Navy Yard, Washington, D.C.
Marine Corps Base, Quantico, Virginia
Naval Operating Base, Norfolk, Virginia
Marine Corps Base, Camp LeJeune, North Carolina
Navy Yard, Charleston, South Carolina
Marine Corps Base, Parris Island, South Carolina
Naval Training Station, Jacksonville, Florida
Naval Air Station, Miami, Florida
Naval Air Station, Pensacola, Florida
Naval Air Station, Corpus Christi, Texas
Naval Operating Base, San Diego, California (No. 1)
Naval Operating Base, San Diego, California (No. 2)
Naval Operating Base, San Pedro, California
Naval Operating Base, San Francisco, California
Navy Yard, Puget Sound, Washington
Naval Training Station, Great Lakes, Illinois

(continued...)

Digitized by Google

These permanent courts were staffed primarily by retired senior officers, often of flag rank, recalled to active duty for that purpose only, together with men with physical disabilities or those recovering from wounds or illness. In this way the Navy could avoid, to a great extent, the removal of line officers from the operational tasks to which they were regularly assigned. In addition to these permanent *members*, as more lawyers entered active naval service and were assigned to "legal-only" duties, these courts typically carried one or more officer-lawyers as judge advocates and defense counsel.[9-58] As the war ground on, virtually all naval districts, and even some overseas theater commands, had lawyers serving as judge advocates and defense counsel.[9-59] Thus, a number of the defendants tried by court martial during World War II, particularly by general court martial, had the advantage of representation by professionally-qualified lawyers, as had been recommended by Ballantine and Dowling.[9-60]

9-57. (...continued)
Department of the Navy, Office of the Management Engineer, "Survey of Division I, Judge Advocate General's Office," June 1943, at 3.

9-58. At least one permanent general court martial, that in the Twelfth Naval District, had an *enlisted* lawyer in its complement of defense counsel. James Cusick had graduated from Georgetown Law School in 1930, and had been practicing law in Binghamton, New York. Because of his age, he was not drafted into the Navy until late in the war. His enlisted status notwithstanding, he was assigned as one of the defense counsel in the Twelfth Naval District. As a second class petty officer, in uniform of course, Cusick defended everybody from seamen recruits to commanders, at their request. After the war, Cusick received a commission as a lieutenant junior grade, and served in the Officer Performance Division of the Bureau of Naval Personnel. Walkup, interview, 23 and 24 June 1992, 27 February 1992.

9-59. Captain Homer A. Walkup, JAGC, USNR (Ret.), letter to author, 22 March 1992. This is not intended to imply that the overseas theater commands had permanent courts martial.

9-60. Ballantine and Dowling must have been aware that this procedure was already in use in some of the naval districts when they recommended the assignment of designated defense counsel for accused naval personnel. The district legal officer from the Twelfth Naval District, Major Thornton Wilson, USMC, had been called to Washington in June 1943 to assist in the formulation of Ballantine and Dowling's recommendations. Lawyer-defense counsel were permanently assigned to courts
(continued...)

Digitized by Google

9-60. (...continued)
martial in that district. "History of the District Legal Office, Twelfth Naval District," September 1939 to September 1945, at 24.

Also, section 357 of *Naval Courts and Boards, 1937*, provided that, upon request of an accused, the convening authority would appoint an officer to represent him. While this officer did not *have* to be a lawyer, a sampling study of general court martial cases by a Secretary-appointed board in 1946 concluded that the Navy made "a most creditable effort to assign [as judge advocate and defense counsel] officers with legal training." A sample study of 413 cases showed that lawyers (defined as persons holding law degrees, or admitted to practice, or both) were assigned as judge advocates in 306 such cases, and as defense counsel in 268 such cases, with civilian lawyers appearing for the accused in five additional cases, and enlisted persons appearing as defense counsel in five other cases. (The board presumed that the enlisted counsel were lawyers, on the theory that if they were not "they would not have been requested by the accused.") In 37 cases the accused declined the assistance of counsel. Department of the Navy, *Report and Recommendations of the General Court-Martial Sentence Review Board on Court-Martial Procedures and Policies* (1947), 85-86.

Neither this partial representation of defendants, nor the manner in which it was provided, satisfied a first-hand observer:

> While permanent defense counsel are usually assigned at the naval districts, suitable defense counsel for courts held elsewhere cannot always be easily found. The trend in civil court organization toward the appointment of public defenders is worthy of some consideration. The [*Articles for the Government of the Navy*] should make some provision for defense counsel, and should, furthermore, leave no doubt as to certain rights of the accused now sometimes disregarded, [such as speedy trial, opportunity to see and interview witnesses, opportunity for counsel to prepare the defense carefully and to act with complete freedom, physical and logistic assets for defense counsel equal to those provided to the judge advocate, and keeping defense counsel from the administrative command of the president of the court or the judge advocate].

McMullin, "Revision of the Articles for the Government of the Navy," tenth page (unpaginated). McMullin wrote as a Naval Reserve lieutenant commander.

An imperfect but interesting comparison of the Navy's procedures with those of the Army, was made by Pasley and Larkin:

(continued...)

Digitized by Google

A disadvantage with this arrangement, however, arose from the fact that the judge advocates and defense counsel designated by the commandant for court duty were assigned to such duty as part of the complement of the courts. As such, they were under the supervision of the president or senior member of the court, a situation rife for judicial influence. This condition was remedied to an extent in 1945, with their assignment to the district legal offices under the administrative control of the district legal officer.[9-61] An equally troubling influence problem, the influence of command, a problem not so easily remedied, was also underscored by Ballantine and Dowling in their 1943 report:

> Our system, to the extent that it provides a means for dealing with major military offenses and crimes, might well provide greater independence to the judicial function.

9-60. (...continued)

> During World War II, because of the shortage of judge advocate officers, it was the exception rather than the rule for one to be appointed as law member, (the exceptions usually being cases of especial complexity or seriousness), although judge advocate officers were frequently detailed as trial judge advocate.

Pasley and Larkin, "The Navy Court Martial: Proposals for its Reform," 208.

9-61. On 26 June 1945, arguing for the sake of *uniformity*, the Judge Advocate General had proposed to the Chief of Naval Personnel that all judge advocates and defense counsel be carried on the complements of the district legal offices, rather than those of the permanent general courts martial. On 4 August 1945 the Chief of Naval Operations directed that officers on duty as judge advocates, recorders, or defense counsel in the various naval districts should be under the administrative control of the legal officer, and that presidents of general courts and senior members of summary courts should not, as such, mark their fitness reports. See "History of the District Legal Office, Twelfth Naval District," September 1939 to September 1945, at 73-77.

The Judge Advocate General's request to the Chief of Naval Personnel underscores the fact that the Judge Advocate General had no authority with regard either to the procurement or assignment of lawyers.

Digitized by Google

> There is a substantial risk that members of courts, judge advocates and defense counsel may not be altogether free from pressure and restraint by superior authority exercised not in violation but as a part of the system. Convening authorities, for example, not only convene the courts from among those under their command but also order men to trial, and, since it is not their practice to order a man to trial unless reasonably convinced of his guilt, acquittal may be considered tantamount to an expression of disagreement with a superior officer. The opinions of convening authorities respecting adequacy of sentences, not infrequently known to the courts convened by them, may result in the imposition of unduly severe sentences. We speak thus of the risks in the system without any criticism whatsoever of the integrity and sense of fairness of officer personnel and with the belief that substantial justice is generally effected.[9-62]

A far more critical and damning commentary on the independence of the judicial process at the time has been offered by Homer Walkup:

> The unwritten law was that both acquittal on legal grounds and clemency were the prerogative of command, not of the courts. The defense function was to make up a record which would be persuasive to reviewing officers, not to sway the trial tribunal. The trial itself was largely ceremonial.[9-63]

9-62. Ballantine and Dowling, 1943, at 39.

9-63. Captain Homer A. Walkup, JAGC, USNR (Ret.), letter to author, 23 January 1993.

Two little booklets presenting polar views of the forces working on lay (continued...)

Digitized by Google

9-63. (...continued)
defense counsel are *Tragedy of Errors* (Jack Pope, Firm Foundation, Austin, Texas, 1945?), and *The Duties and Obligations of Defense Counsel* (Lieutenant Owen W. Pittman, Jr., L-V(S), USNR, 1943?). In *Tragedy of Errors* the author asserts that an accused could not be fairly represented at a court martial, due either to the incompetence of lay defense counsel or the onerous hand of command influence that caused defense counsel to put forth less than a worthy defense; caused the court to convict despite the evidence; or caused either or both to suffer consequences to their careers if there was an acquittal. In *Duties and Obligations*, the author's concern is that defense counsel would be overly zealous and try to gain acquittal at any cost, through methods that strained or breached ethical bounds. Neither booklet gives sufficient information as to the author or the sponsor of the work to evaluate properly the merit of the theses presented. The booklets are of interest primarily because of their diametrically opposing views of the perceived motives driving lay defense counsel during World War II.

Adding support to the concerns over command influence, John J. Finn, testifying on behalf of the American Legion before a subcommittee of the House Armed Services Committee in hearings on the proposed *Uniform Code of Military Justice* in 1949, presented some arresting statistics. They showed that in fiscal year 1945, Navy general courts martial (which were not infrequently prosecuted by inexperienced laymen), convicted over 97 percent of those tried, and reviewing officers upheld 99.5 percent of these convictions. In contrast, experienced lawyers in United States Attorneys' offices, trying criminal cases in federal courts before lifetime judges, had an 82 percent conviction rate, of which 81.4 percent were upheld on appeal. U.S. Congress, Subcommittee of the House Committee on Armed Services, *Hearings on H.R. 2498, A Bill to . . . Enact and Establish a Uniform Code of Military Justice*, 81st Cong., 1st sess. (1949), 681-82.

Finn's selection of statistics for 1945 is significant. It was on 10 March of that year that the Judge Advocate General of the Navy administratively established the first court martial board of review, comprising three officers as members. Department of the Navy, *Annual Report of the Judge Advocate General of the Navy to the Secretary of the Navy*, 1948, unpaginated. Finn, while on active duty in the Office of the Judge Advocate General, had served on that board for three months. Subcommittee of the House Committee on Armed Services, *Hearings on the Uniform Code of Military Justice*, 81st Cong., 1st sess. (1949), 677.

Notwithstanding the Navy's extraordinarily high convictions-sustained rate, a board appointed by the Secretary of the Navy to review the appropriateness of general court martial convictions during all of World War II found that in less than one percent of the cases reviewed did there appear to be any question as to legality of the conviction. *Report of the General Court-Martial Sentence Review Board on Court-Martial Procedures and Policies* (1947), 5. The board, chaired by Professor Arthur John Keeffe of the Cornell Law School, considered the cases of 2,165 of the approximately 8,500 general court martial prisoners in confinement at the end of the
(continued...)

Digitized by Google

Ballantine and Dowling concluded their 1943 report with a section entitled "Impressions on the Administration of Naval Justice." Their implication as to the need for a cadre of professional lawyers in the Navy is interesting, although inconclusive. It does, however, provide a clue as to the degree of proficiency contemplated by them for a naval officer to become "skilled in the law:"

> The system also might well give greater recognition to the value of specialized training of those charged with the administration of naval justice. Whether or not all officers should have specialized training in naval law is questionable, but there can be no doubt that those who may be called on to participate in the administration of naval justice should be adequately trained in this field. And while experience may to a degree take the place of training, it appears that legal work in the Navy is generally performed pursuant to temporary assignment or on intermittent tours of duty, which is hardly conducive to the accumulation of experience.

9-63. (...continued)
war, these being the ones that had received maximum departmental review. Of all the men convicted only one had been sentenced to death, a Marine for the offense of desertion in battle. The sentence was reduced from death to five years' confinement. Department of the Navy, *Report and Recommendations of the General Court-Martial Sentence Review Board* (1946), 3-4, 27, 58.

One type of sentence the Keeffe Board most assuredly did not review for appropriateness involved a stunt called "flat-heading," a violation of regulations involving Navy aviators who flew over their home towns to see how close they could come to someone's head. Because there was a pressing need to keep pilots in the Navy, and to keep them flying, the offenders were never tried by court martial for this practice, although they were brought to mast. Their punishment would usually be a reprimand or, in more serious cases, a fine. Since they were drawing extra pay they could easily afford the fines, and thus the Navy kept them flying. The sentence was pragmatically appropriate, though hardly deterring. Source: Walkup, interview, 23 and 24 June 1992, 27 February 1992.

Digitized by Google

> Moreover, competence in law does not appear to be a factor of particular importance contributing to a successful career in the Navy. Competence in a specialized activity is not normally to be expected when it is neither induced by instruction, nor developed by experience, nor rewarded when acquired by independent effort.
>
> In the past, suggestions have been made from time to time in the Annual Reports of the Secretary of the Navy in favor of the establishment of a Judge Advocates' Corps or of a classification of "Legal Duty Only" for line officers. Irrespective of the creation of a Judge Advocates' Corps or an independent classification of "Legal Duty Only," we believe that, even under present conditions, development of a training program might well be undertaken.[9-64]

Ballantine and Dowling's call for a training program to promote competence in naval law reflected the total lack of a coordinated, Navy-wide approach to the development and management of legal training at this time. This deficiency was rooted in the Navy's approach to legal administration which, as we have seen, was at best one of failure to understand or appreciate the importance of professional legal services, and at worst, pure neglect.[9-65] The irony of Ballantine and Dowling's call for the development of a training program was that such a program had

---

9-64. Ballantine and Dowling, 1943, at 39-40.

9-65. The Navy's clumsiness with the employment of lawyers was no more clearly demonstrated than in the Twelfth Naval District. When a lawyer finally became available to provide legal assistance, in March 1943, he was assigned not to the legal office, but to the morale office, which still had cognizance over such matters as landlord-tenant disputes, domestic relations problems, and even wills and powers of attorney. "History of the District Legal Office, Twelfth Naval District," September 1939 to September 1945, at 6, 12.

Digitized by Google

already existed for several months, but because of the disarray of the Navy's legal organization, probably not even the Judge Advocate General knew about it.

The training program that existed evolved from the need to equip newly-commissioned, and totally inexperienced officers with a basic knowledge of disciplinary procedures in the Navy. We have previously noted the explosion in courts martial proceedings that accompanied the induction of millions of civilians into uniformed ranks in World War II.[9-66]

9-66. Noting that the number of discipline cases in the Navy had increased dramatically as a result of the wartime personnel expansion (from approximately 150,000 officers and men to upwards of 2,000,000 personnel in uniform), Ballantine and Dowling said:

> This rapid growth represents the entry into the service of a large number of young men unaccustomed to rigorous discipline whose complete indoctrination can only be achieved gradually, and who, of necessity, do not look forward to permanent careers in the Navy. Yet the system for handling discipline cases remains substantially as developed under conditions very different from those now prevailing. . . .
>
> The object of the recommendations is to expedite dealing with offenses within the framework of the present system. We believe that the suggested steps will minimize delay and loss of man hours to the service, while affording adequate safeguards for the rights of accused men and avoiding any possible impairment of naval discipline.

Ballantine and Dowling, 1943, at 1-2.

The documentation of disciplinary affairs during World War II speaks overwhelmingly, if not exclusively, of the involvement of men. But what of those women who ran afoul of naval discipline? The record is sparse. We know that the number of enlisted women in the Navy and Marine Corps peaked at 91,366 on 30 June 1945, which was approximately two and one-half percent of the total enlisted force at that time. Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1945, at A-15. The disciplinary treatment accorded at least some of these women reflected the mores of a bygone day. The following account of captain's mast at the U.S. Naval Receiving Station in Brooklyn, New York, in 1944, illustrates a more lenient disciplinary standard applied to women in the Navy.

After disposing of the cases of eight male sailors in the mess hall, some by

(continued...)

Digitized by Google

Few anticipated the scope of the problem. But even as it became apparent, the Navy developed no comprehensive plan for dealing with it, content to rely on the hackneyed legal training received by Naval Academy midshipmen, and the whirlwind introductions to naval discipline presented to fledgling ensigns in the various officer training programs.[9-67] With the

---

9-66. (...continued)
referral to courts martial, the commanding officer pauses. His legal officer, Lieutenant Burke, explains:

> Today there is a special case, but it is not to be heard with the others. The officers adjourn to Captain Wuest's office where A___ A___, Wave seaman second class, is awaiting judgment. She is dignified, composed but pale. The C.O. is less severe but outwardly firm. The witness appearing against A___ begins.
>
> "Yesterday morning I was walking toward the station, coming down Flushing Avenue. I recognized A___ in civilian dress, out of uniform, and placed her on report. That's the substance of it, Captain."
>
> The Captains turns to A___. "Why were you in civilian clothes?"
>
> A___ replies: "I didn't mean to break the rules, sir. My husband is leaving for overseas, and I knew he wanted to see me in a dress—I mean like a woman. When Miss C___ saw me, I was on my way to change back to my uniform. That's all I can say, sir."
>
> The Captain pondered. "I should penalize you, A___. But I'm going to let you off with a warning this time. You understand, of course, that you must at all times comply with uniform regulations. That's all."
>
> The Wave, with an audible expression of relief, leaves the office.

Burke, *Navy Lawyer*, 32.

9-67. Until World War II the Naval Academy had been the source of all but a handful of Navy and Marine Corps officers entering active duty. The military law course at the Naval Academy had provided sufficient training to equip these officers to administer discipline in a relatively small, professional Navy. For a discussion of
(continued...)

Digitized by Google

onset of the war, however, non-Naval Academy officers soon outnumbered Academy graduates. The "citizen-sailor" naval officer was beset with disciplinary responsibilities for which he lacked both background and experience.

As more men were put into uniform, the demand for more extensive and more practical training in disciplinary procedures mounted. This demand ultimately became the catalyst that henceforth would alter and shape formal, service-school legal training for naval officers. The origin of such training was unlikely; its evolution almost haphazard.

Formal, service-wide training in Navy law had its origins not in the Office of the Judge Advocate General, but at a construction battalion ("Seabee") training facility at Port Hueneme, California, in 1943. It was here that many recently-uniformed personnel, both officer and enlisted, received their technical training in naval construction methods and procedures. The station legal officer at Port Hueneme was Lieutenant Oliver S. Aas, USNR, a lawyer and former Minneapolis bank executive. Lieutenant Aas's assistant was Lieutenant (junior grade) Chalmers E. Lones, USNR. Lones was also a lawyer, and as a civilian had been the attorney for the city of Kingsburg, California.[9-68] Lones and Aas were among those relatively few lawyers who were placed in "legal-duty-only" billets during World War II.[9-69]

Lones and Aas recognized the need to indoctrinate the newly commissioned officers and enlisted men in the basics of the naval justice system before they embarked on overseas duty. To do this they developed

---

9-67. (...continued)
the evolution of the Naval Academy's military law course see materials beginning at page 216.

9-68. The biographical information on Lieutenant Aas and Lieutenant (junior grade) Lones appeared in "Base Legal Office Grows; Aids Men In Many Ways," *Seabees Coverall*, 21 July 1943 (newspaper of the U.S. Naval Advance Base Depot, Camp Rousseau, Port Hueneme, California).

9-69. See prior discussion beginning at page 420. Lones, a D-V(S) officer, went first to the Officer Discipline Division of the Bureau of Naval Personnel, then to the Office of the Judge Advocate General, prior to reporting to the legal office at Port Hueneme. Captain Homer A. Walkup, JAGC, USNR (Ret.), telephone conversation with author, 6 January 1993.

Digitized by Google

a course of instruction in naval justice early in 1943,[9-70] which they called the "Naval Courts and Boards Training Course."[9-71] Aimed at providing basic indoctrination in military law and legal matters,[9-72] lectures were presented one day a week to officers and enlisted men who were about to

---

9-70. Several secondary sources fix the date of establishment of the training course as early 1942. See, for example, "The School of Naval Justice," *Seabees Coverall*, 27 June 1946; "School of Justice Established," *All Hands*, August 1946, at 26; U.S. Naval Station, Port Hueneme, California, *School of Naval Justice* (information pamphlet, 1946?); "Journal Discusses Seabee Role," *Seabee Center Courier*, 12 May 1972; U.S. Naval Justice School, "Significant Dates in the History of the Naval Justice School," (handout, 1988?); Gary D. Solis, *Marines and Military Law in Vietnam: Trial by Fire* (Washington, D.C.: Government Printing Office, 1989), 11. It appears that the 1942 date has been perpetuated in error. The 1943 date asserted by the author was gained from the 21 July 1943 issue of the *Seabees Coverall*, which stated in an article on the base legal office (see footnote 9-68) that the legal office had been established earlier that year, *i.e.* 1943, and that Lieutenant (junior grade) Lones, who initiated the training course, had reported for duty after the legal office had been established. In further support of the 1943 date is an article in the 26 February 1948 *Seabees Coverall* ("Ninety-two Diplomas Presented to Graduates") wherein the officer in command of the training facility, Captain H.P. Needham, CEC, USN, cited instances of naval justice breakdowns as late as 1943 which, he said, could have been avoided had the School of Naval Justice been established at that time. Finally, the course of the war made it unlikely that construction battalions would have been forming up in early 1942 for Pacific operations, within weeks of the attack on Pearl Harbor and before any territories were re-gained.

9-71. The course was established under the auspices of the Commandant of the Eleventh Naval District. "Base Legal Office Grows," *Seabees Coverall*, 21 July 1943; "Lones Commands Justice School," *Seabees Coverall*, 27 June 1946.

9-72. Note that none of the students trained by Lones were destined for legal billets, even if they were lawyers. Those officer-students who might coincidentally have held bar credentials were line officers headed to non-legal billets. Their training, as with all officer-students at the school, was confined to the types of disciplinary matters which would be faced by the line officer. All other legal matters were the bailiwick of the lawyers in the Office of the Judge Advocate General, the legal offices attached to various larger commands such as naval districts, bases and stations, and the Procurement Legal Division in the Office of the Secretary of the Navy.

Digitized by Google

depart from the United States.[9-73] The base newspaper, *Seabees Coverall*, summarized their purpose and their work:

> Naval law differs in a great many respects from Civil law and many officers and men who were successful as attorneys and business executives in civilian life find themselves at a loss when dealing with Naval law. For this reason a course of instruction for battalion officers and yeomen was inaugurated a few months ago, with both Lieut. Aas and Lieut. Lones as instructors. Comment from battalion officers and men who deal with disciplinary matters indicated that the course has proven informative and helpful.[9-74]

To supplement his lectures, Lones prepared mimeographed study guides that he eventually incorporated into an instructional text entitled *Naval Justice*.[9-75] Students took Lones's study guides with them, to be used as practical reference manuals. Wherever they appeared they supplanted the abstruse *Naval Courts and Boards*, and word of the "Seabee" training course spread literally around the globe. Requests to attend the course, and for copies of Lones's materials, poured in to Port Hueneme. In the first two years of the course's existence, over one thousand naval activities sent their officers and enlisted personnel to the Seabee program as a result of this word-of-mouth publicity.[9-76]

9-73. *School of Naval Justice* (information pamphlet). Lectures were supplemented by "field trips" to observe regular captain's masts, deck courts and summary courts martial held at the naval station. Bureau of Naval Personnel Training Bulletin, issue number NAVPERS 14918, 15 May 1944.

9-74. "Base Legal Office Grows; Aids Men In Many Ways," *Seabees Coverall*, 21 July 1943.

9-75. "Lones Commands Justice School," *Seabees Coverall*, 27 June 1946.

9-76. "Lones Commands Justice School," *Seabees Coverall*, 27 June 1946. The Naval Courts and Boards Training Course at Port Hueneme was not the only such

(continued...)

Digitized by Google

This groundswell demand for a naval justice course made the need for such training apparent. In June 1945, Secretary of the Navy Forrestal designated the Seabee training course as the official Navy-wide course for instruction in naval justice,[9-77] and established a U.S. Naval School (Naval Justice) at Port Hueneme to administer it.[9-78] The school's mission was to

---

9-76. (...continued)
course in the Navy. A similar program was set up at the U.S. Naval Training Center in Miami, Florida, in 1944, by the legal officer, Lieutenant R.H. Powell, USNR. Powell utilized a locally-prepared instructional guide titled "Are You Ready for Trial?" It is probable that legal officers at other commands instituted similar courses of instruction.

9-77. Although Ballantine and Dowling may have been unaware of the existence of the Courts and Boards Training Course at Port Hueneme when they first recommended establishment of a law training program for naval officers in 1943, their recommendation was nonetheless instrumental in prompting Secretary Forrestal to act in June 1945:

> As a result of [various reviews of disciplinary procedures during World War II] a School of Naval Justice was established to provide indoctrination and advanced instructions in the theory and concept of justice for officers and men assigned to ships and stations.

Report of the Secretary of the Navy, 1945, at 19.

The *Seabees Coverall* of 27 June 1946 suggests that it was Ballantine and Dowling's recommendation that led to establishment of the school.

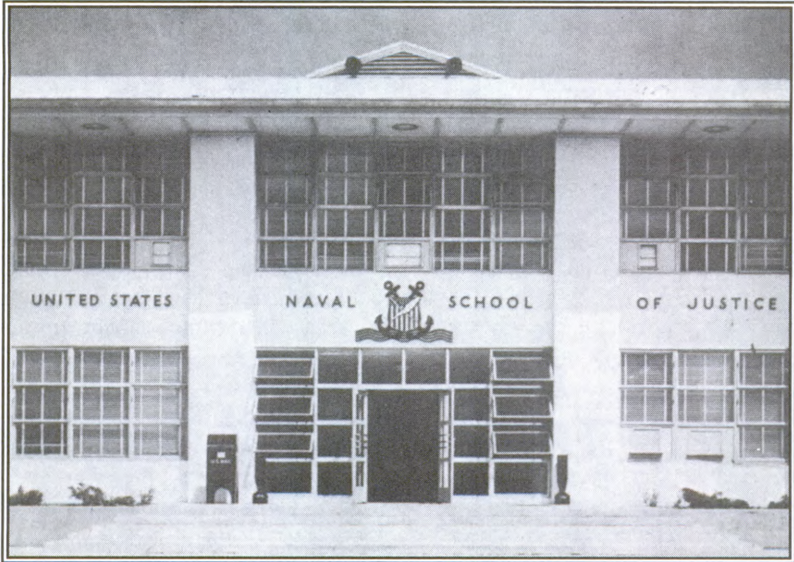
9-78. The authority for this statement, appearing in a 1988? Naval Justice School handout, "Significant Dates in the History of the Naval Justice School," is somewhat cryptic, reading as follows:

> SECNAV letter OP 13-1d-psp, Ser. 351613, 6-21-2 of 29 June 1945; AS&SL January-June 1945, 45-689, Page 15 established the U.S. Naval School (Naval Justice) at the Advance Base Receiving Barracks, Port Hueneme, California, under an officer in charge.

The school retained the name "U.S. Naval School (Naval Justice)" until 1961. On 9 May of that year it was changed to "Naval Justice School," the name it (continued...)

Digitized by Google

provide legal training throughout the Navy to prospective court martial



The United States Naval School (Naval Justice), U.S. Naval Station, Port Hueneme, California, 1946. (Naval Justice School)

members, recorders, judge advocates, and defense counsel, as well as enlisted support personnel.[9-79] It is significant to note that the school was *not* organized to train lawyers; it was organized to train the line officers who, in the Navy, still had full responsibility for all court martial and disciplinary functions.

9-78. (...continued)
bears today. Secretary of the Navy Notice 5450, 9 May 1961.

9-79. Bureau of Naval Personnel Circular Letter No. 191-45, 29 June 1945. Secretary Forrestal authorized a two-week course of legal instruction, replacing the one-day-a-week program that had originally been instituted by Lones. *School of Naval Justice* (information pamphlet). See also Officer in Charge, U.S. Naval School (Naval Justice), correspondence to Commander, U.S. Naval Station, Port Hueneme, California, Subject: "Narrative Summary of Events Pertaining to U.S. Naval School (Naval Justice) from 1 September 1945 to 1 October 1946," 3 December 1946, at 1.

Digitized by Google

In October 1945, the study guide which evolved from Lieutenant Lones's lecture notes, *Naval Justice*, was designated by the Navy as its official naval justice textbook. Thirty thousand copies were published and distributed for use at the school and throughout the fleet.[9-80] This text served as a field guide to assist court martial personnel in the use of *Naval Courts and Boards*, the official but arcane manual of legal proceedings for the Navy.

Aas and Lones had instituted their course in naval law to meet a need. The Port Hueneme legal office in which they served had also been created to meet a need—primarily that of providing military justice support to the base commander. It was a product of the war, typical of the many legal offices that sprung up throughout the far-flung Naval Establishment. And typical of those offices, it quickly grew to meet other needs as well. A Navy newspaper article on the workings of the Port Hueneme office, written during World War II and reproduced on the following page, describes the functions of the office. Note that Aas and Lones were providing legal assistance to Navy personnel well before a formal program had been established by the Navy Department:[9-81]

9-80. *Report of the Secretary of the Navy*, 1945, at 19; *Seabees Coverall*, 27 June 1946.

9-81. "Base Legal Office Grows; Aids Men In Many Ways," *Seabees Coverall*, 21 July 1943. In order to preserve the full flavor of the article, no corrections to obvious grammatical or syntactical errors were made.

Digitized by Google

SEABEES COVERALL

21 July 1943

Base Legal Office Grows; Aids Men in Many Ways

In less than 6 months, the Legal Office at the Administration building has become one of the busiest on the Base, a *Coverall* reporter found after a survey.

Furthermore, the reporter discovered that few people on the station were familiar with its varied activities and what's more important, with the services it performs for members of Naval personnel.

At its establishment early this year [*1943.—ED.*] the Legal Office consisted only of Lieutenant Oliver S. Aas, USNR, and a civilian stenographer. Since then there has been a steady growth forced by increasing demands, and soon the addition of an assistant, Lieutenant (jg) Chalmers E. Lones, Jr., two stenographers, and four yeomen. Physically, the Legal Office has likewise expanded and at present it occupies 2 rooms in the Administration building and can use a third most conveniently.

Many are the functions of the Legal office, each of equal importance.

Simple wills, powers of attorney, and other legal instruments are prepared without cost, as is also aid in their execution. Although the Legal Office does not represent anyone in court matters, it is in a position to give advice to men who are burdened with domestic troubles or other personal difficulties, and if necessary, to advise them to see an attorney and take their troubles to court. Many a man has gone overseas with a light heart after getting aid from the Legal office instead of facing the prospect of spending his time on "Island X" worrying about his personal affairs.

Censorship matters, National Service Life Insurance, and the Navy's V-12 College Training program, are also handled at the Legal Office.

In addition to being a friend and counselor to the men, all disciplinary matters on the Base are in one manner or other brought to the attention of the Legal office. It is a clearing house for those who run afoul of the law. Besides preparing the specifications and records for Ship's company men who warrant disciplinary action, the Legal office serves in an advisory capacity for battalion officers and men charged with maintaining discipline in their units. Disciplinary matters cover a wide variety of subjects, from very minor violations of regulations to the most serious felonies.

Lieut. Aas has repeatedly stated that men should not hesitate to come to the Legal office at any time. "We are here to be of service to every Navy Man," he asserted.

Digitized by Google

Although the tone of the foregoing article is bright, the state of the Navy's legal health, and specifically its disciplinary well-being, was not good. At war's end the Secretary of the Navy appointed a committee, headed by Matthew F. McGuire, a United States District Judge for the District of Columbia, to report on the naval justice system.[9-82] The committee's findings were neither commendatory nor surprising:

> [I]t may be stated categorically that the present system of naval justice is not only antiquated, but outmoded—a conclusion concurred in by everyone in or out of the Navy who has had anything to do with it and is competent to judge.
>
> It has its genesis and its roots in the traditions of the British Navy and is based procedurally upon the structure of a legal system which it, and the civilian courts of both countries, have long since discarded.[9-83]

Recognizing that the civilian system of justice could not be imposed upon the Navy, the committee nonetheless insisted that the Navy system failed to accept or safeguard certain basic rights that were essential to any order of justice. It found that court members did not, and could not be presumed to know the law; that they were not given instruction as to basic evidentiary elements; and that the essentials of due process were lacking from trials by court martial, such that the rights of accused persons were neither respected nor safeguarded. As to the presumed protection provided by the judge advocate's duty to advise the court in all matters of

---

9-82. The other members of the committee were Colonel James M. Snedeker, USMC, a Law PG officer and a student of naval justice, and Alexander Holtzoff, identified in various writings as "a prominent attorney."

9-83. Matthew F. McGuire, *et al.*, Report and Recommendations to the Secretary of the Navy [on the *Articles for the Government of the Navy* and Courts-Martial Procedure], 21 November 1945, at 1.

Digitized by Google

form and law, the committee said tersely that "Humanity simply does not admit of such perfection."[9-84]

The committee found the naval justice system rife with command influence, where the fitness reports of the members of the court, the judge advocate, and the defense counsel were prepared by the convening authority. And it focused bitterly upon the Navy's long-standing avoidance of lawyers in the court martial process, which it termed an "attitude of regarding lawyers as surplus, and the consequent appointment of incompetents to act as defense counsel in serious cases."[9-85] To correct these deficiencies the report contained a proposed revision to the *Articles for the Government of the Navy*, drafted by Colonel Snedeker, reducing them in number from seventy to eleven, and including in them proposed rules of practice, pleading, and procedure for courts martial.

In concluding its report, the committee noted that

> no system, no matter how perfect, can work well without proper implementation. . . . Modern war embraces tremendous problems of materiel and supply which in themselves raise legal difficulties of a highly intricate character . . . . Contrary to what some might think, good sea-going officers to whom the function of the fighting command is committed are neither fitted by training or experience to handle such problems, including the administration of naval justice . . . .[9-86]

The committee then set the stage for the post-war debate which was to follow as to the shape of the Navy's legal structure:

> A JAG Corps in which officers will perform legal duties *only*, is the answer—with

9-84. *McGuire Report, 1945*, at 4.

9-85. *McGuire Report, 1945*, at 4-5.

9-86. *McGuire Report, 1945*, at 10.

Digitized by Google

> promotion dependent on legal merit without any reference to sea duty. . . . Efficiency demands their separation. . . . [W]hat is needed are officers of experience and ability who *like* the Navy and are willing to make it a career . . . with no impediments placed in the way of their advancement and no discrimination practiced against them because they are not officers of the line or graduates of the Academy . . . . Half-way measures simply will not do.[9-87]

McGuire's harsh evaluation, no matter how accurate, had called for remedies that the uniformed Navy clearly would not accept. Commanders were not prepared to exchange their broad and loosely-reined authority under the *Articles for the Government of the Navy* for a tightly defined judicial code administered by a corps of uniformed lawyers over whom they had no direct control. On 15 November 1945, less than a week before the McGuire Committee reported out, the Secretary commissioned another board to examine the questions under review by McGuire. Forrestal called again on Arthur Ballantine to study the *Articles for the Government of the Navy* and the procurement and training of officers to perform law duties, including commercial law duties. Matthew McGuire was prominent among the members of Ballantine's board. Colonel James Snedeker, author of the radically-revised *Articles* proposed by the McGuire panel, did not participate.[9-88]

9-87. *McGuire Report, 1945*, at 11. A note on the signature page of the McGuire report stated that the military member of the committee, Colonel Snedeker, "as a regular officer," refrained from expressing any views with respect to the establishment of a Judge Advocate General's corps "for obvious reasons." Whatever the cause of Snedeker's reticence, he broke his silence less than two months later. An article by Snedeker in the *Naval Institute Proceedings* of January 1946 (previously cited in full) argued strenuously in favor of a legal corps for the Navy. Snedeker, "Why the Navy Needs a Law Corps," 19.

9-88. There were ten members on the board, including Ballantine and McGuire. Of the ten, seven were on active duty with the Navy, Marine Corps, or Coast Guard.

(continued...)

Digitized by Google

The Ballantine Board submitted its report to the Secretary on 24 April 1946. Far more temperate in tone than the McGuire report, it stated that the disciplinary system of the Navy had, in general, functioned well, although the recent wartime experience had shown the need of changes in the court martial system. Among those changes recommended by the board were the following:

- ⚓ That the Judge Advocate General train and certify officers to act as "judge advocates" at general courts martial. Unlike the traditional connotation attached to the title, this new breed of judge advocates would act not as a prosecutor but as a judge, although with advisory powers only.[9-89] (The Secretary of the Navy approved this recommendation and directed the Judge Advocate General to include it in a revision to *Naval Courts and Boards* then underway.)[9-90]
- ⚓ Pointing to a statistical survey of trials held during the war, the board noted that unauthorized absence accounted for 77 percent, and desertion for about 10 percent, of the total *general* court martial charges brought. The board recommended, as had Ballantine and Dowling in 1943, that

---

9-88. (...continued)
All are believed to have been law school graduates.

9-89. *Ballantine Report, 1946*, at 6-7.

9-90. Secretary of the Navy, letter to the Judge Advocate General, Subject: "Ballantine Report," 25 June 1946. The revision to *Naval Courts and Boards* was to be called the *Naval Law Manual*. Its stated purpose was "the simplification of the existing text to afford a readier and fuller use to naval personnel engaged in the legal field. Department of the Navy, *Annual Report of the Judge Advocate General of the Navy to the Secretary of the Navy*, 1947, unpaginated.

The revision project was assigned to Colonel James Snedeker. His plan, approved by Judge Advocate General Colclough, was ambitious. He proposed a six-volume set for the new *Naval Law Manual*, to be updated by quarterly pocket parts. Colonel James Snedeker, USMC, memorandum to the Judge Advocate General, Subject: "A Plan for Revision of *Naval Courts & Boards*," 9 July 1946.

Plans to revise *Courts and Boards* were halted in May 1948 when drafting of the *Uniform Code of Military Justice* was begun. *Annual Report of the Judge Advocate General of the Navy*, 1948, unpaginated. The *Naval Law Manual* was never issued. *Courts and Boards* was replaced by the *Manual for Courts-Martial* in 1951.

Digitized by Google

the punishment authority of summary courts martial be increased to reduce this reliance on general courts martial.[9-91] (The Secretary of the Navy accepted the recommendation and directed the Judge Advocate General to prepare legislation increasing the sentencing power of summary courts.)[9-92]

9-91. *Ballantine Report*, 1946, at 8-9; Table of Statistics, 5.

9-92. Secretary of the Navy, letter to the Judge Advocate General, 25 June 1946. This legislation (S. 1338; H.R. 3687) was presented to the first session of the Eightieth Congress in 1947 as part of a package of proposed amendments to the *Articles for the Government of the Navy*. They included some significant departures from traditional practice:

- The convening authority would be required to appoint a defense counsel, who should be a lawyer if practicable, for every general court martial and summary court martial. For deck courts, a defense counsel would be appointed upon request of the accused.
- The judge advocate would assume the impartial role of court adviser for every general court martial. Other officers would serve as prosecutor and defense counsel. The judge advocate's qualifications would be approved by the Judge Advocate General and he would be under the supervision of the Judge Advocate General insofar as his law duties were concerned. He would rule on admissibility of evidence, witness privilege, and all interlocutory questions except challenges. His rulings could be overturned by the court members.
- An office of chief defense counsel (to act as an appellate advocate for a convicted member), and a board of review, would be established in either the Secretary's office or the Judge Advocate General's office.

Office of the Judge Advocate General of the Navy, *Synopsis of Recommendations for the Improvement of Naval Justice* (1947), 18, 21, 42. This document compared the recommendations of the several commissions which had been chartered by the Secretary of the Navy to study the condition of naval justice during and after World War II.

Because of a distraction created by serious opposition to a similar bill to (continued...)

Digitized by Google

In addition to recommending an increase in the punishment authority of summary courts martial, the Ballantine report proposed several other changes to the *Articles for the Government of the Navy*. Unlike the McGuire Committee's recommendations, the Ballantine Board did not propose a complete revision to the *Articles* arguing, anachronistically, that although the *Articles* would still contain a certain amount of repetition and redundance, they constituted such an important basis of naval usage and tradition that it would be unwise to revise them completely.[9-93]

The board then addressed its most controversial charge, the shape of the organization that should guide legal affairs for the Navy of the future.[9-94] The Law PG Program had been resumed at the end of the war,[9-95] but clearly this was not what the board contemplated to meet the Navy's legal needs. Stating the need to train and employ a larger number of naval officers to perform legal duties, the board felt that these officers

---

9-92. (...continued)
revise the *Articles of War* (see footnote 10-28 and related text), no hearings were held on the proposed amendments to the *Articles for the Government of the Navy* at either session of the Eightieth Congress. Then, in May 1948, the Secretary of Defense appointed a committee consisting of a representative from each of the three armed services (Army, Navy, and Air Force) to prepare a uniform code of military justice for submission to the first session of the Eighty-first Congress, convening in January 1949. *Annual Report of the Judge Advocate General of the Navy*, 1947, unpaginated; *Annual Report of the Judge Advocate General of the Navy*, 1948, unpaginated. All consideration of revision to the *Articles for the Government of the Navy* ceased. Revision to the *Articles for the Government of the Navy* was totally obviated by adoption of the *Uniform Code of Military Justice* in 1950.

9-93. *Ballantine Report*, 1946, at 5.

9-94. The Bureau of Naval Personnel, the West Coast naval districts, and half of the East Coast naval districts favored a return to a modified Law PG system, wherein naval officers would handle military law, and civilian lawyers all other legal matters. The other half of the East Coast naval districts favored a legal corps, primarily to improve the quality of court martial proceedings. Snedeker, "Why the Navy Needs a Law Corps," 21-22.

9-95. Rear Admiral George L. Russell, USN, Judge Advocate General of the Navy, memorandum to Mr. Vinson [*Presumably Representative Carl Vinson, chairman of the House Armed Services Committee.—ED.*], Subject: Sections 12 and 13, H.R. 4080 [*A bill to enact a Uniform Code of Military Justice.—ED.*], 20 April 1949.

Digitized by Google

should be organized and employed in such a way that legal duties would be their *primary* duty, but not their *only* duty. The distinction was significant, for it precluded establishment of a legal corps in which officers, performing legal duties only, would be insulated from the line. A corps, the board bluntly stated, "would lend itself to such undesirable features as compartmentation [*sic*] and rigidity, and the distinct possibility that the line of the Navy would not find such an organization as useful as some other form."[9-96]

Rather than a "legal-duty-only" corps, the board recommended that naval officers performing legal duties be designated as "Law Specialists." In this capacity their duties would be primarily law duties, "but they would be available and qualified to perform certain other duties now assigned so-called 'unrestricted' line officers. . . . The performance of such duties, even to a limited extent, would result in the acquisition of naval experience so necessary to maximum effectiveness."[9-97]

9-96. *Ballantine Report, 1946*, at 11. Despite its recommendation that the Navy lawyer of the future would share in unrestricted line duties, and apparently ignoring the events that drove commercial affairs from the Office of the Judge Advocate General, the board recommended that ultimately there should be only one legal organization in the Navy, under the cognizance of the Judge Advocate General. It proposed "that as in the development of his force the Judge Advocate General secures trained legal specialists of suitable qualifications, they be assigned to the General Counsel's Office as replacements of civil personnel. The Board believes that in this manner there will be made possible a smooth transition to the ultimate development of a single legal organization." *Ballantine Report*, 1946, at 15. On this recommendation the Secretary took no action, stating: "No decision is made with respect to the recommendation as to the cognizance of commercial law matters. The Office of General Counsel shall continue to perform its present functions." Secretary of the Navy, letter to the Judge Advocate General, 25 June 1946.

9-97. In the opinion of the board the Law Specialist organization had all the advantages of a legal corps, and a minimum of its disadvantages. *Ballantine Report, 1946*, at 11-12. Without entering into the fray, the Keeffe Board (see footnote 9-63), whose precept had been expanded to include review of and recommendations concerning court martial procedures and policies, wholeheartedly concurred in Ballantine's recommendation that the Navy's legal affairs be handled by full-time lawyers. Opining that even the present court martial system with the participation of lawyers would be better than any other system without lawyers, the Keeffe panel unreservedly recommended the immediate procurement of 600 lawyers for court martial work:

(continued...)

Digitized by Google

The board identified a need for approximately 400 Law Specialists, and three potential sources from which to draw them: the Law PGs in the Regular Navy;[9-98] the estimated 12,000 Reserve lawyers who had served

---

9-97. (...continued)

> The Navy is no longer a body of general line officers and men, qualified to do any and all tasks assigned. It has become . . . a Navy of specialists . . . . It can no longer be expected that its legal affairs can be handled competently except by qualified, full-time experts.
>
> The court-martial, especially the general court-martial, can no longer be regarded as a mere instrument for the enforcement of discipline. While it is this, it is also much more; it is a criminal court, enforcing a penal code, and applying highly punitive sanctions.

Report of the General Court-Martial Sentence Review Board on Court-Martial Procedures and Policies (1947), 7.

9-98. There were at this time on active duty, fifty-four Law PGs in the Navy and thirty-two in the Marine Corps, a total of eighty-six. Only one held rank below that of commander or lieutenant colonel:

Rank	Number
Rear Admiral	5
Commodore	2
Captain	40
Colonel	16
Commander	6
Lieutenant Colonel	16
Major	1

Source: *Register of the Commissioned and Warrant Officers of the Navy of the United States and of the Marine Corps to July 1, 1945* (Washington, D.C.: Government Printing Office, 1945). Only a tenth of the above officers would elect to transfer to the Navy's new legal organization (see footnote 9-100).

The board cautioned that establishment of a Law Specialist designation would require special measures in order to ensure a proper distribution of Reservists and direct-commission civilians throughout the various grades, *vis a vis* the Law PGs.

Digitized by Google

during the war (most, as we have seen, in non-legal billets); and civilians.[9-99]

Without question some action had to be taken, and taken quickly. The war years had awakened Congress, the Navy Secretariat, and the public to the need for a more rational and competent legal organization within the Navy. The Law PGs were too small in number, too top-heavy in grade, and many were too absorbed with pursuing a career in the line to meet this need.[9-100] The L-V(S) officers were returning to civilian life. A legal corps faced opposition from the line and uncertain Congressional support.[9-101] Within a short time the Office of the Judge Advocate General, indeed the entire Navy, would lose most of its legal expertise—or at least that portion of it serving in uniform.[9-102] In recommending a Law

---

9-99. *Ballantine Report, 1946*, at 12. The General Court Martial Sentence Review Board concurred in Ballantine's recommendation for a group of Law Specialists, although it would have set the number at 600 rather than 400. *Report of the General Court-Martial Sentence Review Board on Court-Martial Procedures and Policies* (1947), 6.

9-100. "[M]ost of the unrestricted line officers who performed law duties before the war moved on to other duties. Some of them retired. Some of them are too senior or have been away from law work too long to be useful in the organization. There are a few, however, numbering not more than ten, who have performed law duties periodically right straight along, and who are definite assets." Russell, memorandum to Mr. Vinson, 20 April 1949.

9-101. Snedeker summarized the opposition to a legal corps:

- Members of a corps would soon lose their understanding of the Navy's problems.
- There was not enough legal work to warrant full-time dedication to legal duties.
- A law corps would not attract the Law PGs because their opportunities for command would be forfeited, and their chances to achieve flag or general rank diminished.

Snedeker, "Why the Navy Needs a Law Corps," 22.

9-102. Merlin Staring, who later became Judge Advocate General of the Navy, had been assigned to the Office of the Judge Advocate General at the end of World War II. He made the following observation:

(continued...)

Digitized by Google

Specialist organization the Ballantine Board may have been yielding to pragmatism or may have been acquiescing to the preferences of the line.[9-103] For even as Ballantine wrote, all Reserve officers with law degrees who had served in World War II were being solicited to apply for

---

9-102. (...continued)

> Many of the division directors in the Judge Advocate General's office were Law PG officers. So there were a number of part-time lawyers. There were others, Reserve officers who had been lawyers as civilians, who had come into the Navy during the war and were serving as lawyers in the Judge Advocate General's office and were looking forward to their release from active duty and return to private practice. So between the part-time Law PGs, and the Reserve lawyers leaving active duty, the office was going to lose most of its personnel and expertise within a short time.

Rear Admiral Merlin H. Staring, JAGC, USN (Ret.), interview with Rear Admiral Robert E. Wiss, JAGC, USNR, 17 October 1989.

9-103. We have noted at several points the "line-officer Navy's" opposition to the formation of a legal corps. This opposition centered on the concept of control; a concern that the giving over of trial functions to an autonomous legal corps would dilute or emasculate the disciplinary prerogatives of command.

A lesser concern was expressed by McMullin:

> It has been said that one of the reasons why such a corps has not been established in the Navy is that its establishment would deprive line officers of their opportunity to pursue a course in law and to become familiar with that phase of the Navy's activities.

McMullin, "Revision of the Articles for the Government of the Navy," ninth page (unpaginated). McMullin's answer to this was that members of a Judge Advocate General's Corps would be used to provide "special skills for continuous service in key legal positions," but that there would still be a need for line officers with general legal training in the fleet and shore establishments.

Because it failed to achieve a true legal organization within the Navy, the Law Specialist concept drew few ardent supporters. But for this same reason, it had relatively few opponents. It was far more palatable to the line than a legal corps. Law Specialists were still technically line officers. As such they were detailed to their assignments by the line, their fitness reports were written by line officers, and their promotion was controlled by the line.

Digitized by Google

a Law Specialist designation and transfer to the Regular Navy—even though the designation had not yet been authorized.[9-104]

Two members of the Ballantine Board, and only two, had the benefit of serving in legal billets during World War II. In addition, and unlike the other officers on the board, they had also practiced law as civilians before their naval service. Of all the members of the Ballantine Board, they could be expected to understand best the demands upon the Navy lawyer, the failings of the *Articles for the Government of the Navy*, and the relative merit of the various proposals to provide legal services to the Navy. These two officers, Lieutenant Commander Richard L. Tedrow, USNR, and Lieutenant John J. Finn, USNR,[9-105] took exception with the Ballantine report and filed a dissent of equal length. Its strongest criticism was leveled at the board's failure to recommend an end to the dual role of the Navy lawyer; what it termed the "present and pre-war half-time legal system:"

> We take issue with the statement that a corps would lend itself to "compartmentation and rigidity" and call attention to the fact that the JAG Tentative Post-War Plan dated 19 June 1945 . . . stated, "The establishment of a law corps (JAG Corps) would provide all the

---

9-104. *Ballantine Report, 1946*, at 12.

9-105. Finn entered the Navy as a lieutenant in 1943 through the L-V(S) Program, after fourteen years of law practice. He served in the Office of the Judge Advocate General for virtually the entire duration of the war, where he reviewed general court martial records. At the time of his appointment to the Ballantine Board, he was serving as an assistant to the McGuire Committee. Subcommittee of the House Committee on Armed Services, *Hearings on the Uniform Code of Military Justice*, 81st Cong., 1st sess. (1949), 677.

Tedrow began practicing law in Washington, D.C., in 1934. He also entered the Navy through the L-V(S) Program and served for four years as a special assistant to the Judge Advocate General, and as the assistant inspector general of naval courts martial and legal activities during World War II. He also served on the Naval Clemency and Prison Inspection Board and the naval disciplinary Policy Review Board, in addition to his service on the Ballantine Board. He returned to his law practice after the war. Subcommittee of the House Committee on Armed Services, *Hearings on the Uniform Code of Military Justice*, 81st Cong., 1st sess. (1949), 762.

Digitized by Google

> advantages of the Specialist Corps **** with none of its disadvantages except (1) popular sentiment against a Law Corps and (2) restriction to law duty only", and recommended . . . the creation of a "Judge Advocate General Corps." These are not convincing arguments that any disadvantage exists.[9-106]
>
> The present Report then goes on to recommend . . . the partial continuance of the present and pre-war half-time legal system which the JAG Plan . . . found . . . had "proved a failure ***." This same conclusion was reached by the Sub-Committee of the Naval Affairs Committee of the House in its confidential report when it studied these matters at the time the Procurement Legal Division was organized. The past failure of the Navy to recognize that the law is a highly specialized profession is regretted. This failure made the original establishment of the General Counsel's office mandatory.[9-107]

9-106. Like the Judge Advocate General's "Post War Plan - Legal" of 1 October 1945, discussed previously (see text beginning at page 404), this earlier Post-War Plan of 19 June 1945 could not be located for analysis by the author. If in fact the Judge Advocate General advocated a corps of judge advocates in the tentative June plan, it would have been well for Tedrow and Finn to have considered the October plan. In the later plan the Judge Advocate General stated that Navy lawyers should *not* be organized into a separate corps of judge advocates.

9-107. Richard L. Tedrow and John J. Finn, minority report to *Ballantine Report*, n.d. (April 1946?), 6-7.

Perhaps too much has been written, or implied, of the shortcomings of the Law PGs. Virtually all of the officers who served as Law PGs were intelligent, competent officers, with broad capabilities. Their failing resulted from a conceptual flaw in the Law PG Program itself, and their foray into fields which they were not equipped to navigate, such as commercial law. And while they could not be skilled in all areas of the law, they could be brilliant in some. The Pacific war crimes trials is a case in point.

Not so well known as the international tribunals at Nuremberg and Tokyo,

(continued...)

Digitized by Google

Secretary Forrestal did not specifically endorse either the Law Specialist or the corps concept. He did, however, recognize the long-standing opposition within the Navy to establishment of a legal corps, and further recognized the immediate need to provide augmented legal services throughout the Naval Establishment. His directive to the Judge Advocate General left only the Law Specialist option:

> Undertake, in cooperation with the Chief of Naval Personnel, the immediate procurement and detail of an adequate number of officers qualified to perform law duties in

---

9-107. (...continued)
the United States convened a national (*i.e.* United States Navy) war crimes commission to try war criminals in several Pacific Ocean areas of operations following the close of World War II. In the area of international law these trials were of first importance, for they helped define the role of a national tribunal to try war criminals within the international sphere.

Navy lawyers played an integral role in the trials. The commission sat on Guam and Kwajalein under the direction of Captain (later Rear Admiral) John D. Murphy, USN, a Law PG assigned to the Office of the Judge Advocate General of the Navy. Rear Admiral Murphy was assisted by a staff which included several other Law PGs. They were later (1947) supplemented by the assignment of additional Navy lawyers to serve as judge advocates and defense counsel, with a provision to permit the additional assignment of Japanese lawyers to assist the defendants. Procedures followed by the commission were generally those outlined in *Naval Courts and Boards, 1937*, which provided that evidentiary matters were to be supplemented as necessary by the Federal Rules of Criminal Procedure.

During the four years of the commission's tenure (from 1945 to 1949), the dossiers of 550 suspects were reviewed. Of these, 144 were tried, for a variety of war crimes. Eight were acquitted, two committed suicide, and the remainder were convicted. Of those convicted, many were sentenced to death and subsequently hanged. All convictions received initial review by the Director of the commission, intermediate review by the Commander in Chief, Pacific, and final review by the Secretary of the Navy (presumably with the assistance of the Judge Advocate General), following which unsuccessful attempts were made to present the cases to the United States Supreme Court. No judgment was final until all review was completed and all appellate avenues exhausted.

Source: George E. Erickson, Jr., "United States Navy War Crimes Trials," *Washburn Law Journal* 5 (Winter 1965): 89-111; *Report of the General Court-Martial Sentence Review Board on Court-Martial Procedures and Policies* (1947), 92.

Digitized by Google

> your office, in the naval districts, and with the forces afloat.[9-108]

As these events were unfolding in Washington, a related cornerstone in the Navy's legal history was being set in place on the West Coast. On 29-30 June 1946, after a successful year of operation, the Navy's justice school was formally dedicated during a two-day legal conference presided over by Rear Admiral Oswald S. Colclough, USN, the Judge Advocate General of the Navy. Among the dignitaries present were Arthur Ballantine; Matthew McGuire; Arthur J. Keeffe; Vice Admiral Joseph K. Taussig, USN (retired), senior member of the Naval Clemency and Inspection Board; and Vice Admiral Jessie B. Oldendorf, USN, Commandant of the Eleventh Naval District. Chalmers Lones, who had initiated the "Courts and Boards" course in 1943, now a commander, was designated the officer in charge.[9-109] Seven other officers, four of whom held law degrees, and four Navy yeomen, completed the faculty. The school was housed in a two-story building on the naval base, in which the students were also to be berthed and fed.[9-110] Large enough to house 300

9-108. Secretary of the Navy, letter to the Judge Advocate General, 25 June 1946.

9-109. In February 1947, at the direction of the Chief of Naval Operations, the title of officer in charge was changed to commanding officer. For many years thereafter, the Naval Justice School was the only command position available to those naval officers who opted to serve as Law Specialists, a designation in which their primary duties were restricted to legal affairs.

This re-designation had its genesis in a recommendation by the officer in charge of the school, and received the concurrence of all endorsees, including the Judge Advocate General of the Navy and the Chief of Naval Personnel. Commanding Officer, U.S. Naval School (Naval Justice), correspondence to Naval Inspector General, Subject: "Preliminary Report of Survey of the First Naval District by the On-Site Surveys Division, Party No. 1, (Op-82) 11 October-17 November 1955, submission of comments on recommendations contained therein," 23 November 1955.

9-110. Due to a lack of enlisted personnel, institution of messing facilities within the school building proved unfeasible. As a result, students were transported by bus to other mess halls on the naval station to be fed. Officer in Charge, U.S. Naval School (Naval Justice), correspondence to Commander, U.S. Naval Station, Port Hueneme, California, Subject: "Narrative Summary of Events Pertaining to U.S.

(continued...)

Digitized by Google

students and staff, for a few years the U.S. Naval School (Naval Justice) was "the only school of its kind in the world."[9-111]

In an article about the school the naval station newspaper stated:

> Under Lones' supervision an excellent staff of five specially trained Naval Officers and Marines[9-112] . . . were entrusted with the instruction and well being of the student

---

9-110. (...continued)
Naval School (Naval Justice) from 1 September 1945 to 1 October 1946," 3 December 1946.

9-111. The Navy school held this unique distinction from 1946 to 1950, after the Army abandoned military justice training in 1946. *School of Naval Justice* (information pamphlet, 1946?).

The Army had established a military justice school at National University in Washington D.C., in 1942, to train lawyers who were entering the Army Judge Advocate General's Department from civilian life. The school was moved shortly afterward to the University of Michigan at Ann Arbor, but was discontinued in 1946.

The Army resumed legal education in September 1950, when it established a refresher course at Fort Meyer, Virginia, for reserve officers called to active duty during the Korean Conflict. In August 1951, the Army Judge Advocate General's School was reactivated as a permanent institution at Charlottesville, Virginia. William F. Fratcher, "History of the Judge Advocate General's Corps, United States Army, *Military Law Review* 4 (April 1959): 109; U.S. Army Judge Advocate General's School, *The Army Lawyer: A History of the Judge Advocate General's Corps, 1775-1975*, comp. Paul F. Hill (Washington, D.C.: Government Printing Office, 1975), 186-89.

Note that the focus of the Army's legal training was the instruction of lawyers whose primary, and usually only, duties were legally-related. The Navy, on the other hand, focused on training its line officers for whom legal duties would be necessary, but incidental.

9-112. The staff numbered eight in all; the officer in charge, the assistant officer in charge, a personnel officer, and five instructors. At the time, two of the instructors were Marine Corps officers. As of December 1946, however, there were no longer any Marine officers on the teaching staff, despite the fact that officer and enlisted Marines comprised approximately twenty percent of the student population. Several requests to obtain Marine instructors proved unsuccessful. Officer in Charge, U.S. Naval School (Naval Justice), correspondence to Commander, U.S. Naval Station, Port Hueneme, California, 3 December 1946.

Digitized by Google

> Officers. Quite wisely these men do not attempt to be the peers of battle-scarred veteran sea officers; lectures are given but rarely. The chief method is discussion, question and answer, and encouraging the student's own initiative so he will engage in the practical field work of the trial and investigation.[9-113]

On 1 July 1946, the duration of the officer course (which was then two weeks) was extended to seven weeks, and a legal training course of the same duration was established for yeoman, the rate designated to act as legal assistants. The officer curriculum included instruction in naval law, disciplinary powers of the commanding officer, elements of offenses and drafting of charges and specifications, jurisdiction of courts martial, trial procedure, review of courts martial, rules of evidence, misconduct and naval fact finding bodies, and administrative matters related to discipline. The course also included moot courts requiring student participation and student and staff critiques. A corresponding course for yeoman included training in drafting of specifications, as well as advanced typing and shorthand, designed to give them the legal and technical knowledge required to serve as court reporters.[9-114]

9-113. *Seabees Coverall*, 27 June 1946.

9-114. *Seabees Coverall*, 27 June 1946; "School of Justice Established," *All Hands*, August 1946, at 26. Unfortunately, the ambitious curriculum was not supported by an adequate instructional staff. Writing in December 1946, the officer in charge of the school stated:

> Instruction of yeomen in the yeomen section was carried on with difficulty occasioned by the fact that there were no instructors attached to the School who could instruct in shorthand and typing, and the other instruction afforded the yeomen pertaining to court martial records was hampered greatly by the lack of such instructors. They were, however, given valuable instruction which was more nearly that given the officers than was planned. Instruction in the officers' section was greatly handicapped by the

(continued...)

Digitized by Google

Lones was released from active duty in August 1946.[9-115] He left an indelible mark on legal training in the Navy. From an informal series of lectures which he developed to introduce construction battalion personnel to court and board procedures, would emerge today's Naval Justice School, the center of legal training for sea service personnel, lawyer and non-lawyer alike.

9-114. (...continued)
lack of competent instructors.

Officer in Charge, U.S. Naval School (Naval Justice), correspondence to Commander, U.S. Naval Station, Port Hueneme, California, 3 December 1946.

9-115. *School of Naval Justice* (information pamphlet, 1946?). Information on the subsequent development of the Naval Justice School appears in Appendix N.

Digitized by Google

Digitized by Google

CHAPTER 10

THE LAW SPECIALISTS EMERGE
1947 to 1954

It is not believed that a separate Judge Advocate General Corps is . . . desirable. . . . [T]here never would be sufficient work to engage the full time of any considerable number of personnel. . . . —F.A. IRONSIDE, MEMORANDUM TO THE JUDGE ADVOCATE GENERAL OF THE NAVY, 1944.

At about the time of Lones's release from active duty, Judge Advocate General Oswald Colclough presented Forrestal with a plan for implementing the Secretary's directive to "procure and detail an adequate number of officers qualified to perform law duties." In a further refinement of his "Post War Plan - Legal," the Judge Advocate General recommended the procurement of 300 officers to serve as Law Specialists.[10-1] Nominally officers of the line, their primary duties were to

10-1. The Ballantine Board had identified a need for 400 law specialists, to be recruited from the lawyer-Reservists who served in World War II, those Law PGs who wished to restrict their careers to legal duties only, and civilians. In recommending procurement of only 300 from the Reserve ranks, the Judge Advocate General was not completely short-changing himself. He intended to utilize, on a rotating basis, several of the eighty-six Law PGs then on active duty (or so many of them as did not elect to join the ranks of Law Specialists) to round out his requirements. And, with the Law PG Program resumed after World War II, there would be a continuing supply of these officers to supplement the ranks of the Law Specialists:

> The Law PGs were to be a sort of lawyer-leavening among the line, and a sort of line-leavening in the legal organization. We were supposed to do our shore tours in the JAG office or some JAG assignment and sea tours in a regular line billet.
>
> The plan was that the naval officers who finished law school under the Law PG Program after World War II would not become Law Specialists. So

(continued...)

Digitized by Google

be legal only. They were ineligible for command at sea, and could assume command ashore only as authorized by the Secretary of the Navy.[10-2] In approving the plan, Secretary Forrestal described it as "the most fundamental change instituted in the entire history of the Judge Advocate General's Office:"

> The reorganization of law personnel centers around a basically new method of procuring and making available the caliber and quantity of legal talent required for the expanded postwar Navy. The approved plan provides for the immediate procurement of 300 law specialist officers who will be full-time Navy lawyers and largely supplant in legal billets the general service officers [*The Law PGs.—ED.*] who, prior to the war, were given law training and served intermittently in legal billets.[10-3]

10-1. (...continued)

these Law PGs, all of whom were Regular Navy officers, could not become Law Specialists.

Rear Admiral Horace B. Robertson, Jr., JAGC, USN (Ret.), interview with author, 12 May 1992.

Because of their seniority (see footnote 9-98), and because old habits die hard, for several years the Law PGs continued to hold the supervisory billets in the Judge Advocate General's office, notwithstanding their lack of legal experience relative to many of the Law Specialists. Captain Mack K. Greenberg, JAGC, USN (Ret.), interview with author, 14 May 1992. For a limited time after the Law Specialist Program was instituted, those officers holding a Law PG designation at the end of World War II were afforded the opportunity to become Law Specialists. U.S. Congress, Senate Committee on Armed Services, *Hearings before a Subcommittee on the Nomination of Rear Adm. Ira H. Nunn*, 82d Cong., 2d sess., 16 May 1952, at 47. Not more than ten of them accepted the offer to transfer. See footnote 9-100.

10-2. Act of 7 August 1947, 61 Stat. 795, sec. 401(c). There were, in 1947, no ashore commands for which Law Specialists were eligible.

10-3. Department of the Navy, [Annual] *Report of the Secretary of the Navy* [to the President of the United States], 1946, at 46. Forrestal's understanding that the (continued...)

Digitized by Google

For the first time in the history of the United States Navy, there was to be a permanent cadre of uniformed lawyers, *specializing in legal duties*. Some of these would be assigned to the Office of the Judge Advocate General. The rest would be dispersed throughout the Naval Establishment.[10-4] The Judge Advocate General was responsible for the

---

10-3. (...continued)
Law Specialists would "largely supplant" the Law PGs differed from the official position of the Bureau of Naval Personnel:

> [The Law Specialists] will be a part of the Judge Advocate General's Office. . . . It is not intended . . . to completely replace the present officers of the Judge Advocate General's Department [*sic*] with this group. *This group is merely going to supplement them* in order to give more continuity to the legal procedures of the Judge Advocate General's Office. (Italics added.)

Testimony of Commander DL Marten, USN, representing the Bureau of Naval Personnel at hearings on H.R. 2536, the Officer Personnel Act of 1947. U.S. Congress, House Committee on Armed Services, *Hearings on H.R. 2536 on the Bill to Provide for the Procurement, Promotion, and Elimination of Regular Army Officers, and for Other Purposes*, 80th Cong., 1st sess. (1947), 2626.

10-4. One of the first steps taken by the Judge Advocate General to meet his new responsibility of providing for the delivery of legal services of all types to fleet and shore commands was to inaugurate publication of the *JAG Journal* in August 1947. Its mission was described as the education of all officers of the Navy and Marine Corps (primarily the *non*-lawyers) in the sound, basic principles of naval justice, and of so much of the body of general law as commonly applied to naval affairs. The Navy's basic legal problems were to be discussed in terms as near as possible to the everyday idiom. Articles on legal subjects were to be replete with practical applications of the principles involved.

A secondary purpose of the *JAG Journal* was the establishment of contact between the Office of the Judge Advocate General and the Navy's legal officers throughout the Naval Establishment. This was believed to be essential to integrating into the naval service those officers who had been accepted for transfer from the Naval Reserve to the Regular Navy as Law Specialists. The intention was to stress the function of the Judge Advocate General as "house counsel" for the Department of the Navy and to provide an assuring link between the Office of the Judge Advocate General and those of his staff assigned to duty outside the Navy (continued...)

Digitized by Google

procurement, training, and certification of these officers. For those not assigned to his office, however, he had little authority beyond that. He could only advise and recommend respecting their duty station assignments, detailing to billets, and employment.[10-5] Although there was still no requirement that the Judge Advocate General himself be a lawyer, the Navy was careful to ensure that none but Law PGs now held the post.

We earlier noted that the Judge Advocate General had begun soliciting lawyer-Reservists on active duty for the Law Specialist Program as early as 1946, conditional upon legislative ratification. By 30 June

---

10-4. (...continued)
Department itself. By furnishing authoritative statements as to current policy, the Judge Advocate General hoped to assist the transition from civilian legal reasoning and practice to exclusively naval legal thought.

By March 1948 the Government Printing Officer had accepted the *JAG Journal* for publication, and its circulation was extended to 10,000 copies. Every ship in the Navy, all major shore establishments, selected Marine Corps commands, and selected Coast Guard units received copies. Source: Department of the Navy, *Annual Report of the Judge Advocate General of the Navy to the Secretary of the Navy*, 1948, unpaginated.

The *JAG Journal* grew into "a scholarly publication prepared in law review format," that included "all areas of law practiced by Navy judge advocates." Rear Admiral James J. McHugh, JAGC, USN, Judge Advocate General of the Navy, "A Personal Message from the Judge Advocate General," *Off the Record* (15 August 1984), 1. It was published on an annual basis.

Publication of the "*JAG Journal*" was discontinued with the Summer 1984 issue. In 1985 the Naval Justice School assumed responsibility for its revitalization. The following year it was reintroduced as the "*Naval Law Review.*" Since that time the Naval Justice School has retained cognizance over its publication and editorial content.

10-5. The Judge Advocate General's duty to advise nevertheless extended his influence throughout the Naval Establishment. A case in point is the Federal Tort Claims Act (Act of 2 August 1946, 60 Stat. 842), which became effective on 2 August 1946. The Judge Advocate General issued instructions to district legal officers throughout the United States setting forth the need for complete investigation of claims, and cooperation with United States Attorneys. On the advice of the district legal officers, the district commandants then issued directives to all commands under their authority stressing the importance of detailed investigatory reports. "History of the District Legal Office, Twelfth Naval District," 1 October 1946 to 1 April 1947, at 4-5. The Federal Tort Claims Act also increased the work load upon the Navy's officer-lawyers. It had not been mentioned by Ballantine or the Judge Advocate General as a factor in determining the size of the Navy's fledgling legal organization.

Digitized by Google

1947, the Judge Advocate General reported that 175 officers had been selected for the program.[10-6] Selection was by boards of three officers, generally captains, and usually including a Law PG officer.

On 7 August 1947, authorization to designate officially these selected officers as Law Specialists was provided in the Officer Personnel Act of that date. The act provided for a class of special duty line officers to perform specialized duties in the field of law, as well as communications, naval intelligence, photography, public information, psychology, and hydrography.[10-7] Law Specialists appointed from civilian life, because they were required to hold graduate degrees, were to be appointed in the grade of lieutenant (junior grade).[10-8] Promotion of special duty officers was to be recommended by selection boards of nine line officers, with alternate representation by no more than three special duty officers, if available.[10-9]

10-6. Department of the Navy, *Annual Report of the Judge Advocate General of the Navy to the Secretary of the Navy*, 1947, unpaginated. In addition to the selection of Reserve officers for active duty billets, the Judge Advocate General inaugurated a program to provide two week's active duty training annually for inactive-duty Reserve lawyers.

10-7. 61 Stat. 795, sec. 401(a). This authorization expired on 20 October 1947, at which time it was anticipated that the Law Specialist "numbers" would be maintained by the direct appointment of civilians. Rear Admiral George L. Russell, USN, Judge Advocate General of the Navy, "A Message to Navy Lawyers," *JAG Journal* (July 1948), 5; *JAG Journal* (August 1947), 4. Earlier, legislation had been passed authorizing transfer of Reserve officers to the Regular Navy. Act of 18 April 1946, 60 Stat. 92.

10-8. 61 Stat. 795, sec. 408. This direct appointment program was not without its problems. Former Judge Advocate General Robertson recalled the case of a lieutenant commander in the line who left active duty and re-entered as a lieutenant (junior grade) in the Law Specialist Program. Admiral Robertson noted that "This didn't make the program too attractive." Robertson, interview, 12 May 1992.

10-9. 61 Stat. 795, sec. 105(a). Because of their relative lack of seniority, Law Specialists were not represented on these selection boards at the outset. For example, a board for the selection of officers to the grade of lieutenant was required to be filled by nine officers above the grade of commander.

Women lawyers fared even worse than the men. Five women are known to have been affiliated with the Navy's legal organization by the mid-1950s, although (continued...)

Digitized by Google

Writing of this new organization in July 1948, Judge Advocate General George L. Russell defined the Navy lawyer's role as a restricted line officer:

> [O]ne of the purposes of the law specialist organization as distinguished from a law corps is to make each law specialist available for the performance of any collateral line duties which may be assigned to him. Those duties are his, not only because he is ordered to perform them, but because they are a part of his job. That is why you wear the star on your sleeve. Our experience to date has been that those officers who understand that and who are not fussy about the exact nature of their work, but who take the attitude of desiring to be helpful in any capacity, are the most successful. Conversely, those who, because of their designation as law specialists, feel that they should be allowed to lock themselves in law offices and commune with law books to the exclusion of everything else, are of considerably less value to their commands and are regarded accordingly.[10-10]

Russell then stated that the Navy's legal organization required about 300 lawyers overall, of which 241 were to be Law Specialists, 30 to 40

10-9. (...continued)
only three were designated as Law Specialists. They all came before the WAVES general-duty-officer selection board for promotion, with no special-duty-officer representation on the board. One, Mary McDowell, was ultimately promoted to captain after intercession by Judge Advocate General Wilfred Hearn in the 1960s persuaded the Secretary of the Navy to remove the women Law Specialists from the same promotion category as the general duty women officers. Captain Louis L. Milano, JAGC, USN (Ret.), interview with author, 26 September 1991; Captain Mary Louise McDowell, JAGC, USNR (Ret.), interview with Captain Paul Keely Costello, JAGC, USNR, 4 April 1991.

10-10. Russell, "A Message to Navy Lawyers," 5.

Digitized by Google

were to be Reserve officers retained on active duty (but not transferring to the Regular Navy), and the remaining 25 were to be Law PGs.[10-11] A third of these lawyers were to be assigned to the Office of the Judge Advocate General and the Navy Department, with the remainder spread throughout the Naval Establishment; assigned to the staffs of major afloat and shore commands, naval stations and bases, naval air stations, naval district headquarters, Naval Justice School, and training commands.[10-12] By April 1949 the Judge Advocate General had reached his goal of 240 Law Specialists.[10-13] There were also 30 Naval Reserve officer-lawyers on active duty, and 10 Law PGs or unrestricted line officers with law

---

10-11. Of the status of the Law PGs (of which Russell himself was one), the Judge Advocate General stated:

> [T]here are not enough law specialists, or Reserve officers retained on active duty, to meet our needs for lawyers, consequently there are a number of billets which must be filled by unrestricted line officers. It should be remembered, however, that while these unrestricted line officers are in a sense specialists in the field of law, the purpose of their being educated in the law is to increase their value as unrestricted line officers.

Russell, "A Message to Navy Lawyers," 4-5.

10-12. Russell, "A Message to Navy Lawyers," 4.

10-13. In the Judge Advocate General's haste to reach his personnel goals, certain qualifications were apparently overlooked. Judge Advocate General Russell stated in 1949 that "all but about a dozen" of the 240 Law Specialists were known to be members of the bar somewhere, and that it was possible "that most of the twelve we are not sure about are also members—the records are now being searched." Rear Admiral George L. Russell, USN, Judge Advocate General of the Navy, memorandum to Mr. Vinson [*Presumably Representative Carl Vinson, chairman of the House Armed Services Committee.—ED.*], Subject: Sections 12 and 13, H.R. 4080 [*A bill to enact a Uniform Code of Military Justice.—ED.*], 20 April 1949.

One of those not a member of the bar at the time was Lieutenant Joe McDevitt, who entered the Navy immediately out of law school in 1942, and was unable to take his bar examination until 1952. Rear Admiral Joseph B. McDevitt, JAGC, USN (Ret.), interview with author, 23 March 1993.

Digitized by Google

degrees.[10-14] Twelve civilian attorneys working in the Office of the Judge Advocate General completed the military side of the Navy's legal organization.[10-15]

The Reserve officer had been the life support of the Judge Advocate General's office and the legal assistance program during World War II. Many had answered the call at war's end and formed the nucleus—indeed almost the entirety—of the uniformed Navy's first legal organization. Of those who left the service, the Navy wanted to ensure that they would be ready and available should they be needed again. To this end, some of the district legal officers, under the auspices of the naval district commandants, began to organize the Reserve attorneys in their districts into volunteer training units, which came to be known as law companies. In the event of another mobilization, Reserve lawyers would be recalled to billets in the legal offices of their home districts, because of their familiarity with local laws. Although not required to do so, those Reservists who met basic requirements established, not by the Judge Advocate General but by the Chief of Naval Personnel, could apply for classification as Reserve Law Specialists. By the end of 1947 approximately thirty Reserve lawyers had received this designation.[10-16]

10-14. Less than a handful of Regular Navy, unrestricted line officers, had obtained their law degrees outside of the Law PG Program between the wars. A couple of them were now serving in legal billets, *e.g.*, William C. Mott and William Robert Sheeley.

10-15. The Judge Advocate General's Tentative Post-War Plan of 19 June 1945 had assumed that cognizance over real estate matters would automatically revert to the Judge Advocate General upon expiration of the First War Powers Act, and that cognizance over insurance, patent law, and contracts would be restored to the Judge Advocate General "by mutual understanding between the Secretary of the Navy and the Judge Advocate General." T.C. Osborne, Office of the General Counsel of the Navy, "Memorandum for Mr. Gross" [*The General Counsel at the time–ED.*], 5 December 1952, enclosure (1), at 20. As of 1949, however, the Office of General Counsel was continuing to handle the Navy's commercial affairs , and has held that responsibility to the present day. See footnote 8-104.

10-16. Eligibility for the Law Specialist designation was initially restricted to those lawyers who had served during World War II, with a minimum age limit of thirty-five and a minimum of five years' experience in the practice of law. The theory behind this was based on the reality that there were far more lawyers than were needed in legal billets in the event of mobilization. It was felt to be a wiser use of

(continued...)

Digitized by Google

After a year or more of informal operation, the Naval Reserve Law Program was formally established on 5 March 1948. On that date the Bureau of Naval Personnel promulgated a general plan for the Volunteer Naval Reserve Law Program in Naval Reserve Multiple Address Letter No. 15-48. Addressed to the commandants of the naval districts and the Potomac River Naval Command, the letter incorporated the outlines of the informal organization that had developed during the previous year.[10-17]

Notwithstanding the fact that the Judge Advocate General had developed the proposal on which the Reserve Law Program was based,[10-18] the letter assigned responsibility for supervision and administration of the program to the district commandants, not to the Judge Advocate General. Further, the district legal officers, none of whom were in the Judge Advocate General's chain of command, were made directly responsible to the commandants "in liaison with the District Director of Naval Reserve and the District Director of Training for the activation, operation, maintenance, and training of the Volunteer Naval Reserve law units."[10-19]

10-16. (...continued)
manpower to assign younger, able-bodied lawyers to combat roles, and the older lawyers to support billets. As stated by Judge Advocate General Russell, "If you put the young fellow to work at a desk, you can't use the older man." This policy obviously limited the field of eligible candidates for the Reserve Law Specialist designation. *The Judge Advocate Journal* (October 1950): 23. Selection of Reserve Law Specialists was made by a board convened by the Judge Advocate General. *JAG Journal* (December 1947), 7. The Judge Advocate General had authorization to designate as many as 1,000 Reserve Law Specialists. By July 1948, he had selected 405. *Annual Report of the Judge Advocate General of the Navy*, 1948, unpaginated. By 1950 the full quota of 1,000 was on board. *The Judge Advocate Journal* (October 1950): 23. Those Reservist-lawyers not eligible for designation as Law Specialists could nevertheless affiliate with the Reserve Law Program. Approximately 5,000 did so.

10-17. The text of Naval Reserve Multiple Address Letter No. 15-48 appears in Appendix I.

10-18. Commander Morell E. Mullins, JAGC, USNR (Ret.), and Captain Donald J. Gavin, JAGC, USNR (Ret.), "History of Naval Reserve Law Programs" (unpublished manuscript, 1976), I-4.

10-19. The Judge Advocate General assisted in the recruitment effort by compiling a list of the home addresses of Naval Reserve lawyers. Mullins and (continued...)

Digitized by Google

The Judge Advocate General could advise and persuade, but his only specific responsibility for the Reserve Law Program was to prepare "lectures and other additional material . . . for dissemination to the volunteer law units, and to make information regarding current changes in naval law available through the *JAG Journal*."[10-20]

By July 1948, the district legal officers had organized forty-three volunteer law units.[10-21] Training in these units consisted of correspondence courses, basic training and indoctrination courses, training films, lectures, review of current legal publications and documents, and annual fourteen-day active training duty. Pay was provided only for the annual training, provided that funds were available.[10-22]

To assist the district legal officers in establishment of law units, a Reserve lawyer, Commander George Henry Tyne, was recalled to active duty at the Office of the Judge Advocate General in 1948. Commander Tyne undertook a whirlwind, coast-to-coast automobile recruiting tour of sixty cities in fifteen states, completing his circuit in less than a month. His mission was to locate and persuade interested Reserve lawyers to serve as commanding officers of Reserve law units. Those who agreed also assumed responsibility for the formation of the unit and recruiting of

---

10-19.(...continued)
Gavin, "History of Naval Reserve Law Programs," I-1, I-3.

10-20. Naval Reserve Multiple Address Letter No. 15-48, 5 March 1948. In June 1946, at the direction of the Secretary of the Navy, the Judge Advocate General had established a Military Personnel section within his Planning and Organization Counsel Division to monitor, coordinate, and advise with regard to implementation of the Reserve Law Program. Mullins and Gavin, "History of Naval Reserve Law Programs," I-1, citing a memorandum of 12 June 1946 from Judge Advocate General Russell to Rear Admiral I.M. McQuiston, USNR.

10-21. *Annual Report of the Judge Advocate General of the Navy*, 1948, unpaginated.

10-22. Requests for training duty were acted upon by the district commandants, within quotas established for each district. Generally, training duty was to be performed in the district legal office of the "home" district of the officer concerned, although it was occasionally performed in the Office of the Judge Advocate General or at a training seminar. Funding was not always available. Mullins and Gavin, "History of Naval Reserve Law Programs," I-12. See also *JAG Journal* (December 1947), 6.

Digitized by Google

its members.[10-23] In a year's time Tyne's efforts had doubled the number of units. By the middle of 1949, the program could boast ninety-eight units varying in size from 5 to 220 members, with a total membership nationwide of 2,100.[10-24]

But though the program had grown, the Judge Advocate General's influence over it had not. Mullins and Gavin summarized the Judge Advocate General's status *vis a vis* the Reserve Law Program as the decade of the 1940s drew to a close:

> [T]he program itself, and the units, were the operational responsibility of District Commandants, as directed by the Chief of Naval Personnel. [The Judge Advocate General] could only furnish support to the units in the field. This support necessarily had to be by suggestion rather than mandating action. . . . the end result, over the years, would be lack of direct authority on the part of the Judge Advocate General to exercise the kind of direct control necessary to meet the various problems which would occur.[10-25]

10-23. Mullins and Gavin, "History of Naval Reserve Law Programs," I-6. In Tyne's words:

> I started driving, beginning with the Fifth Naval District at Norfolk, and went all the way to the West Coast and back.

Captain George H. Tyne, USNR (Ret.), letter to Captain Richard K. Stacer, Director, Phased Forces Law Division, Office of the Judge Advocate General, 6 July 1965, as quoted by Mullins and Gavin, "History of Naval Reserve Law Programs," I-7.

10-24. Mullins and Gavin, "History of Naval Reserve Law Programs," I-21.

10-25. Mullins and Gavin, "History of Naval Reserve Law Programs," I-13.

Digitized by Google

The Judge Advocate General's lack of direct authority over the Navy's Law Specialists, both active duty and Reserve, was due largely to the structure of the Navy's legal organization. Navy lawyers comprised, on the one hand, Law Specialists and Reserve officers retained on active duty, and on the other, the Law PGs. There was not a totally happy marriage. The Judge Advocate General, the Navy's top uniformed lawyer, was in fact not a lawyer so much as a line officer. He held the Judge Advocate General's post not necessarily out of dedication to the legal organization of which he was the head, but as a desirable shore duty assignment. The Judge Advocate General was not so much a leader of the Law Specialists as he was their administrator. As a line officer his personal goals, and those of the Navy's, sometimes conflicted with the philosophy of the Law Specialist Program, and the Law Specialists themselves.

One of the first manifestations of this conflict occurred with the hearings on the proposed *Uniform Code of Military Justice* in 1949. The impetus for a uniform military code had sprung from the same movement that had combined the services under the umbrella of the Department of Defense. If the services were unified, then too should be their judicial systems. And if they were to operate under a single judicial system, perhaps, some thought, the structure of their legal organizations should also be identical.

The Army's legal organization had undergone its second major overhaul of the century in 1948. Just as the exposition of abuses that followed World War I had produced reform (see discussion beginning at page 314), so did a review of World War II court martial proceedings. According to one source, the Army tried 2,000,000 of its personnel by court martial during World War II—one out of every eight men and women in uniform. Of these it imprisoned 45,000 and executed 140.[10-26]

10-26. *Dallas Morning Mail*, 24 November 1991, "Military Justice: Judge, Jury and Jailer," page 26A. The Navy tried a comparable percentage for a total of 606,672 courts martial. Office of the Judge Advocate General, "Report on a Survey of Wartime Naval Courts," 19 April 1946, at 3. The report does not contain comparable statistics on the number of convicted members who were sentenced to confinement, although Taussig claims there were 15,000 men (Navy and Marine Corps) incarcerated at any given time in 1944. Vice Admiral Joseph K. Taussig, USN, "Naval War-Time Discipline and Rehabilitation," *U.S. Naval Institute Proceedings*, 70 (October 1944): 25. As we have previously noted (see footnote 9-63), none was executed. This abstention from execution was not for lack of

(continued...)

Digitized by Google

Veterans' groups and bar associations now began to clamor for genuine reforms. The American Legion, its membership swelled by huge numbers of World War II ex-GI's, was one of the early protesters against the "outmoded system of Military Justice" that then existed. Another veterans' organization was composed of former military lawyers: the Judge Advocates Association, founded at the instigation of the Army's Judge Advocate General shortly after V-J Day. . . .

Bar associations, too, became active in advocating changes. In and around New York City, for example, there were a number of lawyers, all ex-servicemen and members of the various city, county, and state bar organizations, who devoted almost full-time effort to obtain meaningful court-martial reform legislation. . . .[10-27]

10-26. (...continued)
opportunity. Throughout World War II there were twenty-two offenses in the *Articles for the Government of the Navy*, some as mundane as unlawful destruction of public property, for which a man could be put to death. This fact is even more disquieting when one considers that there was no requirement in the Navy for representation of a defendant by legally-qualified counsel.

It has been estimated that at the height of mobilization during World War II, military courts handled one-third of all the criminal cases tried in courts under American jurisdiction. This figure, of course, includes unauthorized absence and desertion cases, offenses not recognized under civilian law, but which comprised almost ninety percent of the court martial workload. Nevertheless, it is an indication of the pervasive nature of the court martial system during the war. See Frederick Bernays Wiener, Comment: "The Teaching of Military Law in a University Law School," *Journal of Legal Education* 5 (1953): 476.

10-27. William T. Generous, Jr., *Swords and Scales, The Development of the Uniform Code of Military Justice* (Port Washington, N.Y.: Kennikat Press, 1973), 23-24.

Digitized by Google

The result of this agitation was a revision to the *Articles of War* known as the "Elston Act."[10-28] It contained numerous changes to the Army's court martial procedures, not a few of which were carried over a few years later to the *Uniform Code of Military Justice*. It also established, effective 1 February 1949, a Judge Advocate General's Corps for the Army, in place of the Judge Advocate General's Department that had existed since 1884.[10-29] The consequences of this were to resonate on the Navy for years to come, causing, at least indirectly, the end of line-officer Judge Advocates General, and ultimately leading to establishment of a Judge Advocate General's Corps for the Navy.

With the move toward a uniform code following close-on to the Congressional imposition of a Judge Advocate General's Corps for the Army, there arose the sentiment in Congress that all three services required a corps organization in order to implement properly the unified provisions of a new judicial code.[10-30] Some even suggested that there be

---

10-28. Act of 24 June 1948, 62 Stat. 627.

10-29. Despite their long history of organization as a Judge Advocate General's Department, and the Army's penchant for forming corps for all its specialties, until 1949 Army lawyers had never had a Judge Advocate General's Corps. The Elston Act provided that the Judge Advocate General of the Army would carry the rank of major general, with a major general as his assistant, and three brigadier generals as additional assistants. U.S. Army Judge Advocate General's School, *The Army Lawyer*, 198; Fratcher, "History of the Judge Advocate General's Corps, United States Army, 108.

The Elston Act was not without its critics, primarily because of the inclusion of the provision to form a corps of lawyers. None less than General Dwight D. Eisenhower, then Army Chief of Staff, and Robert Patterson, the Army Secretary, opposed its enactment. Generous, *Swords and Scales*, 26, 28.

10-30. U.S. Congress, House Committee on Armed Services, *Uniform Code of Military Justice: H. Rept. 491 on H.R. 4080*, 81st Cong., 1st sess., 28 April 1949, at 8.

Digitized by Google

a single Judge Advocate General, with deputies for each service.[10-31] Both the Air Force and the Navy opposed these proposals. Judge Advocate

United States Naval Prison at Portsmouth, New Hampshire. Artist's rendition circa 1944. The caption under the original illustration read: "ONLY SERIOUS OFFENDERS ARE SENT TO A NAVAL PRISON." (U.S. NAVAL INSTITUTE PROCEEDINGS)

10-31. Senator Patrick A. McCarran, letter to the chairman of the Senate Armed Services Committee, 30 April 1949.

Digitized by Google

General Russell testified at length before a subcommittee of the House Committee on Armed Services, stating in great detail the many reasons why the Navy opposed the creation of a legal corps.[10-32]

Russell was persuasive to a point; the House Armed Services Committee reserved judgment. It determined that it lacked sufficient data to decide whether a corps was needed as a requisite to proper implementation of the new *Uniform Code*, but further determined that a vehicle for obtaining such data lay within the *Code*:

> [S]ince we now have a Judge Advocate Corps in the Army and since the Court of Military Appeals will have an opportunity to review the comparative results of the Army with its corps as against the Navy and the Air Force without such a corps, . . . we should permit the services to operate under their present different plans until such time as we may be able to factually determine the best method of operation.

The committee then issued a clear warning to the Navy and Air Force:

> In spite of this decision we have reached the conclusion that the Navy and the Air Force are not giving adequate recognition to their law

10-32. U.S. Congress, Subcommittee of the House Committee on Armed Services, *Hearings on the Uniform Code of Military Justice*, 81st Cong., 1st sess., 4 April 1949, at 1298-1303. Rear Admiral Russell reiterated the several reasons advanced earlier by the Ballantine Board and others when the Navy determined to employ its Law Specialist organization rather than a corps. He also offered some new thoughts, *e.g.* the new *Uniform Code* would do away with command influence, so there was no need to remove Law Specialists from the line; if lawyers were organized into a corps they could not be assigned collateral duties, and would "sit idle in the midst of the continuous activity of the ship when [their] law work was at a low ebb." This latter argument is curious since, except for assignment to the staffs of afloat commands, no lawyers were assigned to shipboard duty. See *JAG Journal* (July 1948), 4.

Digitized by Google

> specialists and judge advocate officers, respectively.[10-33]

But the committee did not leave the issue with only a warning. There was, at this time, no requirement for any of the services that the Judge Advocate General be a lawyer. Viewing this as "a deficiency which should be corrected," the committee proposed to add a new section to the *Uniform Code* which would establish professional qualifications for the Judge Advocates General. This provision as first drafted would have required the Judge Advocate General of the Navy to meet the following criteria:

- Be a member of a federal or state bar.
- Have at least eight years' cumulative experience working under the direction of the Office of the Judge Advocate General.
- Have spent the last three years, immediately prior to appointment as Judge Advocate General, working under the direction of the Office of the Judge Advocate General.
- Be a Law Specialist.[10-34]

The Navy hierarchy, and especially the Law PGs, could not live with this, especially the last two requirements. In a letter to Carl Vinson, chairman of the House Armed Services Committee, Judge Advocate General Russell argued that it was far too restrictive. He pointed out that the requirement of three years' consecutive law duty under the direction of the Office of the Judge Advocate General immediately prior to

---

10-33. House Committee on Armed Services, *Uniform Code of Military Justice: H. Rept. 491*, 81st Cong., 1st sess., 28 April 1949, at 8.

10-34. These requirements have been paraphrased to show how they would have applied to the Navy. The generic requirements as first drafted, applicable to all the services, appeared as section 13 of article 140 of the *Uniform Code*. See House Committee on Armed Services, *Uniform Code of Military Justice: H. Rept. 491*, 81st Cong., 1st sess., 28 April 1949, at 8.

Digitized by Google

appointment would eliminate all the Law PGs from consideration.[10-35] Further, according to Russell, the requirement for eight years' cumulative experience would eliminate all the Law Specialists.[10-36] In this latter assertion Russell was wrong. There were, as he wrote, two Law Specialists who were eminently qualified to occupy the post of Judge Advocate General of the Navy—Captain Sanford B.D. Wood, USN, and Captain Chester C. Ward, USN. Captain Wood had graduated from Cornell Law School in 1922, had served for eight years as United States Attorney for Hawaii, entered the Navy in 1941 and served as district legal officer for the Eleventh and Fourteenth Naval Districts, and had been the General Inspector and the director of the military justice division of the Office of the Judge Advocate General.[10-37] Captain Ward entered naval aviation in 1927, left active duty in 1930 as a Reserve officer, graduated from George Washington University Law School in 1936 after which he remained there as an associate professor of law, and served during World War II and thereafter in the Office of the Judge Advocate General.[10-38] The problem with Wood and Ward was that they were Law Specialists,

---

10-35. The committee was not overly sympathetic to this argument:

> We . . . insist that all Judge Advocates General be legally qualified, with a prescribed amount of experience, and that a substantial portion of that experience be obtained immediately prior to appointment to the office of the Judge Advocate General.

House Committee on Armed Services, *Uniform Code of Military Justice: H. Rept. 491*, 81st Cong., 1st sess., 28 April 1949, at 8-9.

10-36. Russell, memorandum to Mr. Vinson, 20 April 1949.

10-37. *JAG Journal* (July 1952).

10-38. Homer A. Walkup, *History of U.S. Naval Law and Lawyers* (Prepared on the occasion of the ninetieth anniversary of the establishment of the Office of the Judge Advocate General of the Navy, 1970), 24.

Digitized by Google

and the line was not willingly going to give up a coveted flag billet to them.[10-39]

Russell was struggling to protect an institution—the Law PG Program—that was never intended to handle the task it now faced. It had evolved out of an earlier Judge Advocate General Russell's attempt to neutralize the office of the Naval Solicitor and his staff of civilian lawyers by sending his line officers to law school on a informal basis (see text beginning at page 278). When it was suggested by the House committee that the Law PGs could be re-designated as Law Specialists to meet the criteria of section 13 (as the proposed qualifications were commonly referred to),[10-40] Russell acknowledged the practicality of the proposal but dismissed it as constituting "a breach of faith with Congress" if section 13 became law.[10-41] He then suggested to Vinson that the wording of section 13 be changed to require only that the Judge Advocate General be a

---

10-39. Russell, in his letter to Chairman Vinson, described the Law Specialists as being, "by and large," an excellent group of men who, after they had acquired sufficient service experience, would be competent to handle the law business of the Navy, but that none of them were "quite ready for the top jobs yet." Russell, memorandum to Mr. Vinson, 20 April 1949, at 2. In addition to Wood and Ward, there were ten other Law Specialists holding the rank of captain, all with four or more years of naval service acquired after extensive experience in private practice. Senate Committee on Armed Services, *Hearings before a Subcommittee on the Nomination of Rear Adm. Ira H. Nunn*, 82d Cong., 2d Sess., 16 May 1952, at 44.

10-40. The House report proposed the following:

> If the Navy [has] officers who are not law specialists . . . but are otherwise qualified under this section, they are not precluded from designating such officers as . . . law specialists immediately prior to appointment. . . . We think it entirely sound and proper that the Judge Advocates General be chosen from those who have sacrificed the prerogatives of the line officer in order to follow a legal career in the services.

House Committee on Armed Services, *Uniform Code of Military Justice: H. Rept. 491*, 81st Cong., 1st sess., 28 April 1949, at 9.

10-41. Russell, memorandum to Mr. Vinson, 20 April 1949, at 3. Russell did not enter into further explanation as to his cryptic reasoning on this point.

Digitized by Google

member of a federal or state bar, with not less than eight years' total experience in legal duties as a commissioned officer.[10-42]

Section 13 passed the House as proposed, but when it came before the Senate Armed Services Committee for discussion it was amended along the lines suggested by Russell. The Senate committee noted that Congressman Elston had agreed to the imposition of professional qualifications on the Judge Advocate General "in lieu of the corps at this time," and was satisfied "with having the corps postponed for several years pending experience if this or something akin to it is in [the bill]."[10-43] The House agreed to the amendment following conference:

> [I]t was determined [by the Senate] that not more than two officers in the Navy could qualify for appointment to the office of the Judge Advocate General of the Navy. This was considered to be so restrictive that it would deny the Secretary of the Navy any

---

10-42. Russell, memorandum to Mr. Vinson, 20 April 1949, at 3.

10-43. U.S. Congress, Senate Committee on Armed Services, *Hearings before a Subcommittee on a Bill to Enact a Uniform Code of Military Justice*, 81st Cong., 1st sess., 27 May 1949, at 321.

Elston had, nevertheless, made his position quite clear during floor debate on the *Uniform Code*:

> [T]hese [Law Specialists] are entitled to the right to become the Judge Advocate General of the Navy. They apparently have that right today but I can assure you that it does not work out that way in practice. The office of Judge Advocate General in the Navy is a position which is now reserved for line officers of the Navy who have acquired a legal education. Their first love is the sea and the office of Judge Advocate General is just another convenient position where they may obtain a spot promotion from captain to admiral.

Congressional Record. 81st Cong., 1st sess., 1949. Vol. 95.

Digitized by Google

> choice in his selection of a Judge Advocate General.[10-44]

The *Uniform Code of Military Justice* was enacted by the second session of the Eighty-first Congress on 5 May 1950. There was to be a year of preparation, with the provisions becoming effective on 31 May 1951. Section 13 of article 140 required only that the Judge Advocate General be a member of the bar of a federal court, or the highest court of a state or territory, with eight years' experience in legal duties as a commissioned officer.[10-45] As we shall see, even these modest requirements were to prove nettlesome for the next nominee to the post of Naval Judge Advocate General, Rear Admiral Ira Hudson Nunn, USN.

But section 13 was not the heart of the *Code*. At the core were provisions which would overturn a century and a half of tradition and make lawyers essential to the operation of the Navy:

- ⚓ A "thorough and impartial" pre-trial investigation was required before charges could be referred to a general court martial. The accused person had the right to be represented by a military lawyer at such proceedings.[10-46]

10-44. U.S. Congress, House Committee on Armed Services, Senate Committee on Armed Services, *Uniform Code of Military Justice: Conf. Rept. 1946 on H.R. 4080*, 81st Cong., 2d sess., 24 April 1950, at 5.

10-45. An act of 10 August 1956 moved this provision to section 5148 of Title 10 of the United States Code, and made it specifically applicable to the Judge Advocate General of the Navy. It is almost identical in wording to the original statute with one important modification added in 1967. The Judge Advocate General must now be selected from "judge advocates of the Navy or Marine Corps," which virtually ensures that he or she will be a legal-duty-only officer.

10-46. The lawyer so appointed under the provisions of the new *Code* could be a member of any of the services if he was in the chain of command of the convening authority. For the trial of Navy or Marine Corps personnel, he would invariably be a Navy or Marine Corps officer. He was to be a lawyer admitted to the bar and certified to be competent by the Judge Advocate General. In all cases such representation was, of course, without cost to the accused person. The accused service member could request a specific military lawyer, who was to be provided if (continued...)

Digitized by Google

- ⚓ A service member brought to trial before a general court martial had the right to be represented by a military lawyer.
- ⚓ A service member brought to trial before a special court martial was to be represented by counsel with qualifications at least equal to those of the prosecuting counsel. He could request representation by a specific military lawyer who would be assigned if available.[10-47]
- ⚓ A qualified lawyer was to preside as a law officer over all general courts martial. His role was similar to that of a civilian judge in making rulings, although the senior member of the court still presided and ran the proceedings.
- ⚓ A lawyer on the staff of the officer convening the court martial had to review the record of every general court martial and every special court martial in which a bad conduct discharge was awarded, and render a legal opinion as to the validity of the proceedings.
- ⚓ Boards of review in the Office of the Judge Advocate General, with virtually plenary authority, composed of not less than three lawyers (who could be either officers or civilians), were required to review the record of every trial in which an approved sentence affected a flag or general officer, imposed the death penalty, dismissed an officer, cadet or midshipman, imposed a dishonorable or bad conduct discharge, or awarded confinement for one year or more. The convicted service member was represented by a military lawyer before such boards.[10-48]
- ⚓ An independent, three-judge civilian Court of Military Appeals (now called the United States Court of Appeals for

---

10-46. (...continued)
reasonably available. He could also retain civilian counsel at his own expense.

10-47. The designations of the levels of courts martial had changed for the Navy. Army terms were adopted. The summary court was now a special court. The deck court was now a summary court. Mast was now known as "nonjudicial punishment," although it continued to be popularly called "captain's mast."

10-48. The Navy boards of review evolved into the Navy-Marine Corps Court of Criminal Appeals. A discussion of the development of the Court appears at Appendix E.

Digitized by Google

the Armed Forces), was established to hear appeals of selected cases from the boards of review. Again, the convicted service member was entitled to representation by a military lawyer before such court.

⚓ A new, joint-service guidebook, the *Manual for Courts-Martial*, replaced *Naval Courts and Boards*.[10-49]

One can quickly see from these provisions that the new *Code* created immediate requirements for the Navy to recruit more lawyers, not only to fill the many trial roles for which they were now needed, but also to interpret the procedures imposed by the *Code*, and to advise and teach the operational forces how to administer it.[10-50] Not so obvious was another effect that the *Code* would have; it would force a change in the Navy's attitude toward lawyers. From 31 May 1951 and thereafter, lawyers could no longer be dismissed as unneeded, nor could they be ignored.

It would be the height of understatement to say only that there was widespread criticism of the *Code* from the fleet and the field. Commanders thought it was a disaster, that the whole structure of discipline was destroyed. Further, they were being asked to embrace an alien system. The United States Navy had operated under the *Articles for the Government of the Navy*, substantially unchanged, since the Civil War. There had, in fact, been no conceptual change to the Navy's judicial

---

10-49. Judge Advocate General Russell said of the changes wrought by the *Code*: "this is a more radical change for the Navy system than it is for the Army or Air Force. We have never had anything that approached this." *The Judge Advocate Journal* (October 1950): 24.

10-50. Note that Ballantine's recommendation for 400 Law Specialists, which the Judge Advocate General cut by 100, had been made before the *Code* had even been conceived, at a time when the Navy was operating under the comfortable and familiar *Articles for the Government of the Navy* which imposed *no* requirements for lawyers. As the demands of the *Code* grew apparent, Judge Advocate General Russell drastically revised his best estimate of the Navy's needs. Testifying before the Senate Armed Services Committee in 1949, Russell stated that the Navy would require an additional 287 Law Specialists in addition to the 277 lawyers already on duty, for a total of 564. Senate Committee on Armed Services, *Hearings before a Subcommittee on a Bill to Enact a Uniform Code of Military Justice*, 81st Cong., 1st sess. (1949), 281, 283. It is interesting to note that the Navy did not reach that level until 1965-1966, during the Vietnam War build-up.

Digitized by Google

system since the original *Articles* evolved from those used in the British Navy of Cromwell's time. But Congress had spoken. The *Uniform Code of Military Justice* was now the law of the Navy. A major re-training program was implemented.

The U.S. Naval School (Naval Justice) assumed a major role in training fleet personnel to administer the new *Code*. The school had been moved to the U.S. Naval Base, Newport, Rhode Island, on 15 March 1950, by authority of the Secretary of the Navy, to be co-located with the rest of the Bureau of Naval Personnel schools at that command.[10-51] An earlier recommendation, in September 1948, to consolidate the school with the Navy's postgraduate school at Monterey, California, had been disapproved after considerable study.[10-52]

The Justice School was located in a World War II "temporary" structure, Building M-3, on Coddington Point. Formal dedication took place on 1 May 1950, and the first classes were held on 15 May 1950.[10-53] The curriculum underwent total revision to accommodate the new *Code*. Instruction was directed toward the line officers who had to administer discipline under the *Code*. There was no separate course for lawyers.

10-51. Rear Admiral Donald D. Chapman, JAGC, USNR (Ret.), letter to author, 11 February 1994. The school was placed under the military command and coordination control of Commander, Naval Base, Newport, Rhode Island, the management control of the Bureau of Naval Personnel, and the technical control of the Judge Advocate General of the Navy. Secretary of the Navy letter, Op 24C/cj, Ser 61P24, 10 February 1950.

10-52. Commanding Officer, U.S. Naval School (Naval Justice), letter to Naval Inspector General, 23 November 1955.

10-53. In the fall of 1951, Building M-6 was added to the school complex. Both Building M-3 and M-6 were wooden structures erected during World War II, and were originally occupied by the naval base medical department. U.S. Naval Justice School, "Significant Dates in the History of the Naval Justice School," n.d.

Digitized by Google

The Naval Justice School at Newport, Rhode Island, was housed in "temporary" World War II Buildings M-3 and M-6 from 1951 until 1984. Shown here is Building M-3. Building M-6 was located behind it, and cannot be seen in this view. (Naval Justice School)

One of those line officers who attended the Justice School at this time for instruction in the new *Code* was Rear Admiral Robert W. Hayler, USN, a retired officer who had been recalled to active duty to serve as president of one of the permanent general courts martial in the Ninth Naval District. The following aneedote by Commander Max Ochstein, USNR (Ret.), who served as a Law Specialist, typifies the distrust and even contempt some officers had for the new *Code*:

> Bill Mott [*Judge Advocate General of the Navy from 1960 to 1964—ED.*], then a captain, was the first commanding officer of the Justice School under the *Uniform Code*. He had to "educate" Admiral Hayler and a group of admirals on the *Code*. When he told them about peremptory challenges, where they could be dismissed from the court for no reason at all, Admiral Hayler got up and said, "You mean, any young defense counsel can have me thrown off the court without giving any reason?" When Mott answered in the affirmative, Hayler said, tweaking his nose, "Well, they may have the right but they very well better not try it with me."

Digitized by Google

Well, someone did try it, a young lieutenant by the name of Wrzesinski. Howard H. Brandenberg, a feisty little commander, now deceased, who wrote *Navy Evidence*, was sitting as law officer on Hayler's court. He ruled Wrzesinski's challenge of Admiral Hayler to be proper, and Hayler said, "I object." Well, Brandenberg was years ahead of his time. He said, "Admiral, I am the law officer and whether my ruling is right or wrong, it's the law of this case." Admiral Hayler slammed shut his *Manual for Courts-Martial*—it made a resounding noise—and he said, "The court's in recess." That night "Stogie" Roberts, the district legal officer, came to my place in government housing. He said, "I've been in the Navy for thirty-two years or better, graduated from the Academy, and never have I been chewed out like I was chewed out today by Admiral Hayler." Then he said, "You're the new law officer."

For a long time after that nobody had the courage to peremptorily challenge the president of a general court, because of what had happened to Brandenberg. But finally someone did it again, and to Hayler, as a matter of fact. I think it was a Reserve officer on a two-week tour of training duty. After that it became a regular thing. It got to the point where Admiral Hayler, who could see the end of the permanent-court concept, was practically begging, "I'll be fair, just don't challenge me." So eventually even people like Admiral Hayler came to accept the *Code*.[10-54]

10-54. Commander Max S. Ochstein, USNR (Ret.), interview with author, 13 October 1991; William C. Mott, letter to Captain and Mrs. George A. Sullivan,

(continued...)

Digitized by Google

There were many others who had misgivings about the efficacy of the untested *Code*, including Russell, the Judge Advocate General himself. They were not openly disdainful of it, as was Admiral Hayler, and they felt that it might operate tolerably well in peacetime. But they doubted that it could work in combat when absolute discipline was essential. They hoped that it could be implemented without the distractions of conflict. These hopes were dashed only weeks after the *Code* was adopted. On 25 June 1950 the Army of North Korea crossed the thirty-eighth parallel and invaded the Republic of South Korea. America once again mobilized its naval and Marine Corps forces, this time for a far less popular cause than World War II. And this time under an untested and distrusted disciplinary code.

In the Office of the Judge Advocate General, a legal advisory section had been established in the military justice division to field questions about the *Code*. Don Chapman was one of the staffers:

> There were about four or five of us that were in the legal advisory section, and when these questions would come in from the field, why we would consult our crystal balls and write an opinion for the Judge Advocate General on what certain articles meant and so forth. Of course, the Court of Military Appeals had come into being then, but it hadn't really touched any of this kind of stuff. This was before the Court had a shot at it. And we were turning out hundreds of opinions whereas the Court of Military Appeals probably put out a dozen or so a year. The *Code* was in effect for a long, long time before

10-54. (...continued)
6 February 1956.

Digitized by Google

> the Court of Military Appeals had really charted a course that we could identify.[10-55]

In Newport, at the Naval Justice School, Mack Greenberg was teaching the crystal ball readings from Washington:

> We were teaching the *Code* with nothing to go by but the telephone. The Justice School staff was in constant telephone communication with the Office of the Judge Advocate General, and the pundits there would tell us, "this is what we are going to do and this is what we are going to do," and that is what we taught.
>
> At one point we asked for permission to teach the troops in Korea about the *Code*. George Sullivan, Bill Collier, and I went. We also went to San Diego to give lectures. We had gotten the manuals just before we left, the first *Manuals for Courts Martial*. The three of us went out to acquaint the fleet with what was going on with the new *Uniform Code*. We had tremendous seminars. People came from all over.[10-56]

It had been the Judge Advocate General's responsibility to recruit the lawyers who formed the original cadre of Law Specialists, to recommend where they be assigned, and to oversee the administration of naval justice throughout the Navy.[10-57] Now, with the new *Uniform Code of Military*

10-55. Rear Admiral Donald D. Chapman, JAGC, USN (Ret.), interview with author, 18 July 1991.

10-56. Greenberg, interview, 14 May 1992.

10-57. See article 6(a) of the *Uniform Code of Military Justice*. The language of article 6(a) has remained essentially unchanged since its passage.

Digitized by Google

Justice in effect, Russell had to supplement his ranks not only to implement the *Code*, but to support a mobilization of forces.

The cornerstone of the Judge Advocate General's post-war legal organization was the Law PG Program. With about forty officers a year graduating from law school, the Judge Advocate General had a renewable resource of lawyers around which he could structure his legal organization. The Law PGs were his bedrock, the Law Specialists their supplement. Suddenly this changed. In 1952, Congress determined to end the Law PG Program. It was as if Congressman James Sutton of Tennessee, speaking on the House floor, had uncovered a wicked, fifty-year-old Navy secret:

> Last week, I . . . *exposed* forty members of the Navy who were going to Georgetown, George Washington, and Catholic University at the expense of the taxpayers, after they had been trained and educated at Annapolis. . . . [We should not] send boys to Annapolis to be made lawyers, or we would have legal instruction at Annapolis.[10-58] (Italics added.)

Sutton's objection to the program was based on a false premise, indeed, the antithesis of the program itself. He represented to the Congress that the Law PGs, upon completion of law school, eschewed further sea duty:

> We spend around $50,000 to $100,000 to send a boy to Annapolis . . . and then after . . . we have trained him to be a fighting man, we send him to law school, and do away with the instruction that he had at Annapolis . . . .[10-59]

10-58. *Congressional Record*. 82d Cong., 2d sess., 1952. Vol. 98.

10-59. *Congressional Record*. 82d Cong., 2d sess., 1952. Vol. 98.

Digitized by Google

Accurate or not, Sutton's argument prevailed. The 1953 Defense Appropriations bill cut Law PG funding back to twenty officers for the entire Department of Defense.[10-60] Future appropriations bills eliminated such funding completely. The Navy turned once again to the Reserves, and mobilization of lawyers in the Naval Reserve Law Program, to augment its legal ranks.

The Naval Reserve Law Program at this time had just taken hold. It was acquiring an identity and visibility, and developing a coherent organization, training philosophy, staffing policy, and mission. With the recall of many of its members to support the Korean mobilization, membership, attendance, and interest in the program began to suffer.[10-61]

10-60. Act of 10 July 1952, 66 Stat. 537. Those persons presently attending law school were permitted to complete their education.

Robertson says there were really two reasons the Law PG Program was terminated. The official reason was that it was a waste of money, since it was felt that the Navy could get all the lawyers it needed by direct commissioning. But a second, unspoken reason, was that there was growing dissatisfaction within the increasingly influential Law Specialist community, and its allies in Congress, which felt that this was a way of preserving the top appointments for line officers. Robertson, interview, 12 May 1992.

10-61. The recall of lawyers was on a voluntary basis. Most of the volunteers were younger lawyers, the future of the Reserve Law Program. Ironically, they lacked the Law Specialist (SL) designation, being ineligible to qualify for it because of age or other criteria. See footnote 10-16.

Judge Advocate General Russell complained that the older lawyers, who were to form the backbone of the Reserve Law Program, did not wish to serve, whereas younger lawyers were anxious to do so since they had less at stake financially. A virtual glut of younger lawyers exceeded mobilization requirements for legal billets. Judge Advocate General Russell was not reluctant to see lawyers involuntarily assigned outside the legal field, a circumstance that further served to thin the ranks of the Reserve Law Program:

> I have been told I shouldn't have any trouble understanding that [the great majority of volunteers lack the Law Specialist designation], because we deliberately passed out these designations to the older people and they are too well established to drop whatever they are doing and come back into uniform unless we have a full-blown war on our hands. I have to admit that makes a lot of sense, but SL designation or no SL designation, if any of those

(continued...)

Digitized by Google

This was exacerbated by the increased workload on the district and other legal offices, which left little time for attention to the Reserve Law Program.[10-62] Mobilization, which reduced the ranks of the law companies temporarily, left a permanent scar as well. Many officers, once recalled, chose to remain on active duty. The Naval Reserve Law Program, still in its developmental stages when the Korean War broke out, was severely and adversely affected.[10-63]

One of those recalled from the Reserve ranks who stayed on active duty was Bill Hogan. Hogan had been released from his World War II service as a line officer (see text beginning at page 432) shortly before Christmas 1945. He stayed in the Reserves, attended law school at Boston College, and graduated in the spring of 1950, just as the Korean

---

10-61. (...continued)

> folks are [*sic*] particularly well qualified in a given field where there is a shortage, like electronics or something else, that is where he is going to go, and we can find another lawyer to take his place . . . .

The Judge Advocate Journal (October 1950): 24.

Russell said that he was able to be highly selective in accepting volunteers, taking about one out of five. This would indicate that the personnel ceiling, not recruiting, was the major obstacle to adequate staffing of the active duty Law Specialist ranks. Judge Advocates Association, *Minutes of the Fifth Annual Meeting* (Report by Rear Admiral George L. Russell, USN, Judge Advocate General of the Navy), 19 September 1951.

10-62. Annual Management Report of the Judge Advocate General of the Navy to the Secretary of the Navy for fiscal year 1953, at 4.

10-63. The Reserve Law Program also suffered because of preoccupation by the Judge Advocate General's staff with interpreting and implementing the new *Uniform Code of Military Justice* under wartime conditions. This left little time for attention to the nascent Reserve Program. During 1951, officers attached to the Office of the Judge Advocate General, who might otherwise have directed their attention to support of the Reserve Law Program, were detailed to give lectures on the *Uniform Code*. For example, in just a two month period (April and May, 1951), three-day instructional conferences to familiarize officers with procedures under the *Uniform Code* were scheduled for San Francisco, Pearl Harbor, Tokyo, San Diego, Washington, D.C., Seattle, Jacksonville, Camp LeJeune, Norfolk, and Newport. Memorandum of the Judge Advocate General, 27 March 1951, cited in Mullins and Gavin, "History of Naval Reserve Law Programs," II-4, n. 7.

Digitized by Google

War broke out. No sooner had he passed the bar than he was recalled to active duty.

Although still a line officer, because he was now a lawyer Hogan got unsolicited orders to the Office of the Judge Advocate General. From there he was transferred to Yokosuka, Japan, and was thrust immediately into general court martial work under the new *Uniform Code of Military Justice*, trying cases sometimes six days a week. He had no opportunity to go to the Naval Justice School to learn about the *Code*. He had had absolutely no experience with military justice during World War II. "I had to teach myself. Fortunately, most of the people with whom I worked had gone to the Justice School, and were able to help me." He was not a Law Specialist at this point, nor had he even applied for the program; he was an unrestricted line officer. But because of personnel ceilings on the Law Specialists, and because of the sudden demand for lawyers, the Navy got its lawyers where it could.[10-64]

One of the more serendipitous acquisitions of lawyers came about in the Pacific Fleet amphibious force, and involved Don Chapman. Chapman's experience in lawyer procurement and implementation of the *Code* was probably unique. If nothing else, it shows foresight approaching brilliance on his part.

Chapman reported to the staff of Commander, Amphibious Force Pacific, in 1949. The Force commander, at the direction of the Chief of Naval Operations, was preparing a wartime billet structure plan, to man ships with Reservists in the event of a call-up. As Chapman tells it:

> The project was to draw up a complement of the manning we envisioned as being needed for the amphibious ships. I was tagged as the lawyer representative. This wasn't a job that many people wanted, but anyway they tagged me to be one of the members of that complement committee. So we sat down and decided that each ship should have so many of such a rank of officer and so forth. And I had my input, and I said "We need a lawyer in there. That ship needs a lawyer with all those

10-64. Captain William Hogan, USNR (Ret.), interview with Commander George E. Erickson, Jr., JAGC, USNR, 17 June 1991.

Digitized by Google

people. An unrestricted line officer Reservist who's a lawyer ought to be on the complement of that ship to serve as the legal officer." Well, the paperwork must have gotten to Washington just about the time the Korean War broke out. The Chief of Naval Operations got it and just handed it to the Bureau of Personnel and said "Go." So people started coming out of the woodwork. All these Reserves were recalled, and these ships were all pulled out of mothballs. And when they started coming in I said, "Well, I think I ought to know who these people are down there. After all, they're lawyers and they're going to be handling the courts martial and legal matters and so I think as a courtesy they ought to all stop by my office and say "hello" on the way to their ships. So that was written into a directive. So here these people were lining up coming into my office. They were all lawyers and they were assigned as legal officers as a collateral duty.

And then the *Uniform Code* came in. We were all out there in the Far East, and you would have thought that would have been a big problem, but it wasn't. We held a seminar one day and we discussed it. They came in from all these ships, and we had no problem at all transferring over to the *Code*. It was only in our amphibious force where I had been sitting on that complement committee where we had this situation. Most legal officers at that time had little or no formal legal training.[10-65]

10-65. Chapman, interview, 18 July 1991.

Digitized by Google

After the outbreak of the Korean War, Judge Advocate General Russell estimated that the combined requirements of mobilization, and implementation of the *Uniform Code*, would necessitate *at least* a doubling of the 300-or-so Law Specialists on active duty.[10-66] By 1951 the number on active duty had grown to 402, including 115 recalled Reserve officers.[10-67] The Judge Advocate General was able to maintain this strength for the next several years, since seventy-five percent of those recalled elected to remain on active duty, and there was an adequate supply of additional volunteers to round out the number.[10-68] But the total number of Law Specialists grew slowly during the decade of the 1950s, increasing to only 469 by 1961. This included small accessions of Law PGs from time to time who transferred from the line. The "transfer

---

10-66. Executive Office of the Secretary of the Navy, Publication 1038 (NAVEXOS P-1038), "The Naval Establishment—Its Growth and Necessity for Expansion, 1932 - 1950 (Office of the Judge Advocate General)," July 1951. The reader will recall that Russell had called for a very similar increase in the size of his legal force in 1949, in anticipation of the enactment of the *Uniform Code*, but before the Korean War had become a factor. See footnote 10-50.

The number of courts martial processed in the Office of the Judge Advocate General increased from 3,299 in July 1950, to 6,677 by January 1952. Department of the Navy, "History of Administrative Problems, Korean War," Office of the Judge Advocate General, 25 June 1950 to 1 March 1952, at 300. Interestingly, after a year of experience with the *Uniform Code*, Russell did not point to it as contributing to any of the administrative problems identified in the cited report. He did note, however, that he had to double his work force and double his reviewing force to keep up with the increased demands placed on his office because of the *Code*. U.S. Congress, Subcommittee of the House Committee on Appropriations, *Hearings on the Navy Appropriations for 1953*, 82d Cong., 2d sess. (1952), 1609.

10-67. Judge Advocates Association, *Minutes of the Fifth Annual Meeting* (Report by Russell), 19 September 1951. The number also included 250 Regular Law Specialists, 25 Reserve Law Specialists retained on active duty since World War II, and 12 Law PGs. Of this total number, 126 were assigned to the Office of the Judge Advocate General, a better-than fifty percent increase over the 1948 level of 47. Subcommittee of the House Committee on Appropriations, *Hearings on the Navy Appropriations for 1953*, 82d Cong., 2d sess. (1952), 1611.

10-68. Judge Advocates Association, *Minutes of the Fifth Annual Meeting* (Report by Russell), 19 September 1951. Russell announced at this time that the Navy was experimenting with a plan of having full-time Law Specialists aboard ships of the fleet.

Digitized by Google

window" was opened and shut depending upon the Navy's perceived need for lawyers.[10-69] Horace Robertson, later to become Judge Advocate General of the Navy, was one of those who transferred:[10-70]

> In the spring of 1954, as a line-officer lieutenant, I got orders to report as commanding officer of the *USS Steuben County* (LST-1138) in San Francisco. I attended two weeks of amphibious school, which was the extent of my knowledge of amphibious craft, then assumed command and took the ship to Japan.
>
> By this time the Navy had changed its policy and offered the opportunity for Law PGs to become Law Specialists. I had come to the conclusion that doing tours ashore as a Law PG, in jobs totally unrelated to the operating Navy, would put me at a disadvantage when I went back to sea. I felt that I could not be a really good lawyer, nor could I be a really good ship driver. So I decided to apply for the Law Specialist program.
>
> I got my acceptance by mail in Sasebo, Japan, while I was still commanding officer of the *Steuben County*. The letter said that the Secretary of the Navy had appointed me a "Lieutenant, Special Duty Officer, Law," and that I was no longer eligible for command at sea. So I went to my squadron commander and I said, "Commodore, look what I have

---

10-69. Office of the Judge Advocate General, "Information for Lawyers and Law Students Regarding Commissioning in the Navy or Naval Reserve and the Performance of Legal Duties and Civilian Employment in the Office of the Judge Advocate General," 20 January 1956.

10-70. At the time Robertson transferred (1954), the opportunity was limited to officers of the grade of lieutenant and below.

Digitized by Google

> here. You've got a skipper in command of one of your ships who isn't eligible for command at sea. The Secretary of the Navy says so. What should we do?" So the commodore said, "Well, the first thing we do is, I'm going to withhold this letter from you." And I continued on as commanding officer until I was relieved in February 1955.[10-71]

We noted earlier that section 13 of article 140 of the *Uniform Code*, which established professional qualifications for appointment to the position of Judge Advocate General (see discussion beginning at page 497), would vex the next nominee, Ira Nunn. So it did.

Rear Admiral Ira Hudson Nunn, USN, was nominated for the post of Judge Advocate General of the Navy early in 1952 by the Secretary of the Navy. In so doing the Secretary acted on the recommendations of the Chief of Naval Personnel, the Chief of Naval Operations (whom Nunn was then serving as executive assistant and senior aide), and Judge Advocate General Russell.[10-72] Nunn was as well qualified to serve as

---

10-71. Robertson, interview, 12 May 1992. Robertson had graduated from Georgetown Law School in June, 1953. As with all Law PGs at the time, he had attended school in the morning and worked in the Office of the Judge Advocate General in the afternoon. Despite the limitations on his academic time, he became editor in chief of the Georgetown Law Journal. By 1953, all Law PGs were required immediately after graduation to take a bar exam, and then were sent to the Naval Justice School, where they took the same naval justice orientation course given to line-officer legal officers. The more advanced course, for lawyers only, was not established until sometime after 1965.

10-72. Secretary of the Navy Dan A. Kimball (1951-1953), in forwarding Nunn's nomination to the Senate, noted that he had personally selected him, and stressed Nunn's ability to advise him on administration of the new *Uniform Code of Military Justice* (with which Nunn had no experience) because of his familiarity with the traditions and customs of the naval service. Kimball was careful to note that he had considered—and rejected—some "legal specialists" for the position. Senate Committee on Armed Services, *Hearings before a Subcommittee on the Nomination of Rear Adm. Ira H. Nunn*, 82d Cong., 2d Sess., 16 May 1952, at 55-56. Unless otherwise indicated, the following discussion of the confirmation of Real Admiral Nunn is based on the minutes of the 16 May 1952 hearing.

Digitized by Google

Judge Advocate General as any man who had yet held the post. He was not, however, the best qualified lawyer in the Navy.

Nunn was, of course, a line officer. He had graduated from the Naval Academy in 1924 and served the required seven years at sea before attending law school. He received his law degree from Harvard in 1934, being among the only class of Law PGs not attending law school in the District of Columbia. He took and passed the Massachusetts bar examination in June of that year. Following law school he again served at sea until 1937, and in the Office of the Judge Advocate General as legislative counsel from 1937 to 1939. He commanded a destroyer division and a destroyer squadron during World War, receiving the Navy Cross and two Bronze Stars, served again in the Office of the Judge Advocate General for three years, then took command of the *USS Manchester*, a light cruiser. Leaving the *Manchester* in 1949, Rear Admiral Nunn served as executive assistant and senior aide to the Chief of Naval Operations, the post he held at the time of his nomination as Judge Advocate General.[10-73] He had been admitted to the Massachusetts bar at the end of 1949.

Nunn's nomination met with opposition. It was one of the few times that a uniformed nominee to the post of Judge Advocate General had been particularly noticed, and the first time that one had been challenged. He was opposed by respected forces, among them the Special Committee on Military Justice of the American Bar Association, the Special Committee on Military Justice of the New York County Lawyers Association, and the American Legion. Spokesmen for this opposition were quick to note that there was no question as to Nunn's integrity or character, nor his outstanding abilities as a line officer. The question, rather, was as to his legal qualifications.[10-74]

10-73. *The Judge Advocate Journal* (July 1952), 21.

10-74. A letter from Senator Patrick A. McCarran of Nevada, then chairman of the Committee on the Judiciary, inserted into the minutes of the Nunn confirmation hearing, set the tone for the proceedings:

> Unlike the Army, the Navy has not now, and never has had, a corps of lawyers. Until [World War II] it possessed a very small group of officers who were regular line officers, but who had been sent to

(continued...)

Digitized by Google

Much of the hearing focused on the newly-enacted requirement that the Judge Advocate General have had at least eight years' legal experience, and whether Nunn did in fact have such experience. In somewhat non-specific testimony, Nunn appeared to claim approximately eleven and one-half years of legal experience. (Secretary Kimball represented to the Senate that Nunn had spent *nine* years in legal duties as a commissioned officer, some of which were "now performed, in part, by legal specialists of the Navy.")[10-75] There was a minor skirmish as to whether Nunn's five years as legislative counsel in the Office of the Judge Advocate General constituted legal duties.[10-76] The substance of the controversy, however,

---

10-74. (...continued)

> law schools. Most of them had never been admitted to any bar outside of an officer's club. . . .
>
> Since the war, the Judge Advocate General has accepted some Reserve lawyers in the Regular Navy . . . . However, the Navy continues to consider these lawyers as specialists and apparently has no plans for integrating them properly into their promotion system, holding fast to the belief that a prerequisite to being the Judge Advocate General is the training and experience necessary to command a battleship or a division of destroyers.

McCarran, letter to the chairman of the Senate Armed Services Committee, 30 April 1949.

10-75. The discrepancy between Nunn's and Kimball's calculations may be explained by Nunn including his time at Harvard Law School as constituting legal duties. A provision in section 13 to exclude law school time from such calculations was dropped in conference.

10-76. Senator Harry P. Cain of Washington challenged Nunn from the outset:

> SENATOR CAIN. Do you believe, Admiral Nunn, that on such duties as you performed . . . and are being performed by the legislative counsel it requires a lawyer and that such an assignment can be construed as being legal duty?
>
> ADMIRAL NUNN. Yes, sir. Of all of the billets I know of, sir, that requires the highest order of legal practice.
>
> SENATOR CAIN. Then how does it come about

(continued...)

Digitized by Google

arose with regard to his duties outside that office. Nunn recounted his collateral assignment as legal officer on the staff of the Commander in Chief, Asiatic Fleet, aboard the cruiser *USS Augusta* from 1936 to 1937. He referred to this assignment as his "principal" duty, but specifically declined to call it his "primary" duty. Although he also served as assistant first lieutenant and stood deck officer watches at the same time, he claimed that his legal duties occupied eighty percent of his time.[10-77] He made a similar claim with regard to his service from 1940 to 1942 as flag secretary to Commander, Cruisers Scouting Force, Pacific. Finally, in his current billet as executive assistant and senior aide to the Chief of Naval Operations, Nunn stated that his present duties consisted in giving legal advice to the Chief of Naval Operations.

Nunn was then questioned sharply as to why, having passed the Massachusetts bar examination in June 1934, he did not seek admission to the Massachusetts bar until October 1949. Senator Cain asked him if there was any relationship between his petition for admission to the bar in 1949, and the fact that Congress at that time was about to pass the *Uniform Code* requiring any future Judge Advocate General of the Navy to be a member of the bar. Nunn denied this, and stated that, in the intervening fifteen years between bar exam and bar admission, the opportunity for admission had simply not presented itself.[10-78]

Cain then challenged the quality of Nunn's experience:

10-76. (...continued)

> . . . the present legislative counsel of the Navy is not a lawyer and has never been exposed to a law course? You have just stated that capacity calls for a lawyer of the highest ability.

10-77. Nunn was not clear on exactly what legal duties he performed. When asked to elaborate he described the legal duties performed in the early 1950s by Law Specialists on afloat commands.

10-78. Senator Cain also pressed Nunn on his choice of Massachusetts as his state of admission, noting that one of the requirements for admission there was an intention to practice in that state. Nunn, a native of Arkansas, replied that the "controlling reason" for selecting Massachusetts was his intention to practice law there when he retired, and that he had so represented this to the president of the board of bar examiners. When Rear Admiral Nunn retired from the Navy in 1953 he became District of Columbia counsel for the National Restaurant Association. He resided in Arlington, Virginia, until his death in 1990.

Digitized by Google

> I do not know, Admiral Nunn, that you are as familiar as some of us with the history that went into the making of our code of justice, but against what background you may have, do you believe that the Congress intended to count *part-time additional legal duties* as constituting full compliance with the provisions that require eight years of legal duties by everyone to become the Judge Advocate General? (Italics added.)

Growing agitated, Nunn stated that before he went to law school he had been the "judge advocate *general*" of two courts of inquiry; had tried, either as prosecutor or counsel for the defense "more than a thousand cases . . . most of them . . . of a minor nature;"[10-79] and had been "either the judge advocate *general* or counsel for the defense in a great many important general courts martial and courts of inquiry." He concluded by saying "I fancy myself during my naval career as a trial lawyer."

Cain pressed on. He asked Nunn if he would be willing, as a condition to becoming Judge Advocate General, to be designated as a Law Specialist. Nunn demurred. "If I should become Judge Advocate General and finish a tour of duty as such . . . I must then either retire or be demoted, you see, if I am a specialist."[10-80]

Cain's agenda was now clear. After confronting Nunn with the fact that no Law Specialist had yet been selected for flag rank, nor nominated for Judge Advocate General, he addressed the following question: "Admiral Nunn, if your appointment is confirmed . . . do you expect . . . to appoint a line officer or a legal specialist to be your first assistant . . . ?" Nunn tried to escape, but was pressed. Finally, he said "I feel that I could be best served by employing one of the senior-most of the captains who are legal specialists as Assistant Judge Advocate General."

10-79. This was a significant pace for a collateral duty; approximately one court martial every three days for ten years.

10-80. This was not accurate in Nunn's case, since he had already been selected and promoted to rear admiral prior to assuming the post of Judge Advocate General.

Digitized by Google

The Law Specialists had broken through. Nunn would be the last line officer, and the last part-time lawyer, to be Judge Advocate General of the Navy.[10-81] The Secretary concurred:

> I can envision a situation, after the group of eligible legal specialists in the Navy has become larger, when there would be little or nothing to choose between the qualifications and eligibility of several persons. In that event it would be our policy to give preference in the selection of a Judge Advocate General to a law specialist in order to give encouragement and provide incentive to younger officers of the specialist group. Such a situation does not exist at present, but can come about within a few years.

Politics and compromise being what they are, Nunn's agreement to relinquish the legacy of his office to the Law Specialists earned him his confirmation. As Judge Advocate General Russell had earlier noted, there

---

10-81. Cain also observed that the last three Judge Advocates General had held the billet of legislative counsel, and asked Nunn if that meant that the Judge Advocates General came only from among those who had held that billet. Nunn replied that the single most important function of the Judge Advocate General was his relationship with Congress, and thus the most energetic or promising officers were placed in the legislative job. "Can you tell me," asked Cain, "if the Navy has thus far ever assigned a legal specialist to the legislative counsel's billet?" To which Nunn replied "Not the principal one, sir. *If I am confirmed, I shall do so.*" Law Specialists would now hold the two most important jobs in the Office of the Judge Advocate General, save the top position itself.

Digitized by Google

was, in fact, little choice but to confirm him.[10-82] Senator John C. Stennis of Mississippi reported the opinion of the committee:

> Members of the committee were impressed with the testimony of the witnesses appearing in opposition to the nomination to the effect that a good corps of legal specialists could not be built up in the Navy unless an opportunity was afforded for their selection to be the senior legal officer. . . . While the committee believes that the appointment of the Judge Advocate General of the Navy should normally be selected from the legal specialists group and not a line officer trained in the law, because of the limited number of eligible legal specialists at this time, the committee unanimously recommends the nomination of Admiral Ira H. Nunn as Judge Advocate General of the Navy to be confirmed by the Senate.[10-83]

Nunn took office on 18 June 1952. He appointed Captain Sanford B.D. Wood, USN, a Law Specialist, to be the Assistant Judge Advocate

---

10-82. The same legislators who two years earlier had created the very law that now boxed them in, were incredulous. Senator Russell B. Long of Louisiana summed up their feeling:

> That sounds unreasonable; that someone would insist upon such a stipulation in the law. . . . [F]rankly I am amazed to find that the law would be such that there would only be two or perhaps three officers in the Navy who would be qualified for appointment to Judge Advocate General.

10-83. U.S. Congress, Senate Committee on Armed Services, *Report on the Nomination of Captain Ira H. Nunn, United States Navy, to be Judge Advocate General of the Navy, with the Rank of Rear Admiral*, 82d Cong., 2d sess., 22 May 1952, Executive Rept. No. 9, at 2.

Digitized by Google

General. For the position of legislative counsel he also chose a Law Specialist, Commander James R. Carnes, USN.[10-84]

Nunn assumed office little more than a year after the effective date of the *Uniform Code of Military Justice*.[10-85] His office, and indeed the entire Navy, were still in the throes of adjusting to procedures that were significantly altering the judicial and disciplinary system of the Navy.

The immediate challenge facing Nunn was that of personnel procurement. A 1953 study popularly called the "Low Board Report,"[10-86] in which Nunn participated as a member of the board, had unanimously recommended that end strength ceilings for Law Specialists and other restricted duty categories continue to be based on a percentage of the number of unrestricted line officers on active duty, as previously set in the Personnel Act of 1947.[10-87] The ceiling for Regular-Navy Law Specialists

---

10-84. The position was actually that of Director, Legislative Division, one of the several divisions in the Office of the Judge Advocate General. The title "Legislative Counsel" appears to have been the popular name for the job. Neither Wood nor Carnes went on to become Judge Advocate General of the Navy.

10-85. The *Code*, Public Law 506, had become effective on 31 May 1951. It had been enacted by the Act of 5 May 1950, 64 Stat. 107.

10-86. Department of the Navy, Board to Study the Engineering Duty, Aeronautical Engineering Duty and Special Duty Officer Structure, 24 March 1953. The senior board member was Vice Admiral Francis S. Low, USN.

10-87. The Low Board made another interesting recommendation. In what appeared to be a concession to the Law Specialists, but was in fact a device for perpetuating line control over the Office of the Judge Advocate General, the Low Board had also recommended that the Assistant Judge Advocate General be a rear admiral, selected from the ranks of the Law Specialists. In this way the Law Specialists (in the words of the board) would be assured of at least one flag billet to which they could aspire.

But the Law Specialist rear admiral was to be selected by a board of unrestricted line officers. And by the very nature of the selection process, the board would in fact be choosing the Assistant Judge Advocate General. Further, the promotion was to be temporary; if the Assistant Judge Advocate General did not retire from office, he would revert to the rank of captain upon completion of a term of three years.

Unstated in the recommendation was the hope that throwing out the bone of an Assistant Judge Advocate General with flag rank would head off a growing (continued...)

Digitized by Google

(which was also the estimated number required to meet operational requirements) was determined to be approximately 289, a mark that Nunn did not plan to meet until 1958.[10-88] As of 1 February 1954, Nunn had only 238 Regular-Navy Law Specialists on board (a loss of two from the previous July's level), plus 171 Reserve Law Specialists (who were in addition to the 289 "required" Regular officers). He would have to recruit over 50 lawyers to meet end strength.[10-89] Complicating Nunn's problem was the fact that over eighty-three percent of his Regular officers were commanders or captains, who were approaching retirement eligibility. Nunn estimated that he would need 70 new appointments to reach the 289

10-87. (...continued)
movement to place a Law Specialist in the position of Judge Advocate General. This, in turn, would enable the unrestricted line to retain control over the top job, assuming the availability of Law PGs with the required eight years' legal experience.

The Low Board intended that the flag billet for the Assistant Judge Advocate General be an "additional number," so as not to reduce the number of flag billets in the unrestricted line. If this was unacceptable to Congress, the board recommended that the billet be taken from the staff corps, since, it observed, "bona fide billets for all staff corps flag officers cannot reasonably be justified . . . ."

The Low Board report included proposed legislation to implement its recommendation. This was ignored by Congress. The Assistant Judge Advocate General was not statutorily authorized to assume flag rank as a perquisite of office until 1967, coincident with a change in the title of the office to Deputy Judge Advocate General, and establishment of the Judge Advocate General's Corps. (Act of 8 December 1967, 81 Stat. 545, 546.) As with the Judge Advocate General, the Deputy held the rank of rear admiral "while so serving." In 1994, flag rank became permanent for the first time for both the Judge Advocate General and the Deputy Judge Advocate General when the law was changed to provide for their selection to, and appointment in, the regular grade of rear admiral. (Act of 5 October 1994, 108 Stat. 2751.)

10-88. Note that Nunn's predecessor, Judge Advocate General Russell, had twice called for an *immediate* augmentation of the legal ranks to a level well in excess of Nunn's projection, most recently in 1951 when he set the need at more than 600. See footnote 10-66 and related text.

10-89. The general population of the Navy had grown from 449,175 in 1949 to 725,720 in 1954, while the number of Law Specialists (Regular and Reserve) increased from 268 to only 409. Thus, despite the added requirements imposed by the *Uniform Code of Military Justice* and the Korean War, the ratio of lawyers to total naval personnel actually decreased. Henry M. Shine, Jr., "A Judge Advocate General's Corps for the Navy?" *Federal Bar Journal* 15 (October-December 1955): 316.

Digitized by Google

level by 1958. He proposed to acquire the bulk of them from the Reserves, supplemented by the direct appointment of some civilians.[10-90]

Despite this pressing need for lawyers, a source of qualified personnel was not only ignored, it was disdained. Female lawyers were not wanted in the Law Specialist Program.[10-91] We have previously noted the experience of Mary McDowell who, as a line-officer WAVE, managed to serve in legal billets during World War II. (See text beginning at page 429). McDowell was released from active duty in 1947. At that time she was the legal officer of the Great Lakes Demobilization Center which processed personnel being released from the Navy.

When the Korean War started in 1950, McDowell wrote a letter to the Bureau of Naval Personnel requesting a return to active duty in a legal billet. She received a reply (from a desk headed by a woman officer) stating that there were no legal positions available for women:

> So I put in an application to return as a line officer, and was accepted. I got orders to Naval Air Station, Memphis, as the personnel officer and assistant legal officer. The commanding officer saw my law qualifications encoded on the orders, and he said, "We're in need of legal help here. Who the hell is sending you as a personnel officer?" So he immediately assigned me as the station legal officer.

In 1952, McDowell was selected to be a Law Specialist.[10-92] She went on to become the first woman general court martial law officer in the Law

---

10-90. Judge Advocate General of the Navy, memorandum to Chief of Naval Personnel, Subject: "Proposed Procurement Plan for Code 1620 Officers for Fiscal Years 1954-1958; Submission of," 28 October 1953.

10-91. Nunn's "Proposed Procurement Plan for Code 1620 Officers" limited applicants to male citizens of the United States.

10-92. Since McDowell was already on active duty at the time of Nunn's "only males need apply" procurement plan, presumably she was immune to its restriction.

Digitized by Google

Specialist Program, and the first woman to serve as a captain in the Judge Advocate General's Corps of the Navy.[10-93]

If Nunn did not want women, he did want male Reservists. Unfortunately, the Reserve Law Program was suffering.

Rear Admiral Ira H. Nunn, USN, Judge Advocate General of the Navy, 1952 to 1956, and a champion of the Law PGs. (U.S. Naval Historical Center collection)

We have seen that the preoccupation of the Judge Advocate General with meeting the demands of the Korean war and adjusting to the *Uniform Code* had given rise to a period during which the Reserve Law Program had to fend for itself. The program went into eclipse for a year and a half.

10-93. McDowell, interview, 4 April 1991.

Digitized by Google

Nunn, however, recognized the need for a viable Reserve legal organization. He stated that "one of my primary responsibilities as Judge Advocate General is the continued development of a constructive program for the Reserve attorney . . . ."[10-94] He called upon the Reservists themselves for help. In August, 1952, the commanding officers of two volunteer law units were ordered to the Office of the Judge Advocate General for training duty specifically for the purpose of conducting a study to recommend the methods best calculated to achieve maximum interest in Reserve legal matters and, through such methods, to serve the best interests of the naval service.[10-95] They recommended the following:

- ⚓ Appointment of officers in the Office of the Judge Advocate General and in the district legal offices to supervise and develop the Reserve Law Program.
- ⚓ Preparation of a training curriculum for Reserve law units, including distribution of appropriate reference publications.
- ⚓ Establishment of an incentive program, including certification procedures, annual training, and awards to outstanding units.
- ⚓ A requirement that all Reserve lawyers be certified by the Judge Advocate General under article 27 of the *Uniform Code of Military Justice* as being qualified to perform court martial trial duties.[10-96]

These measures were quickly implemented. Commander F.L. Forshee, USN, in the Office of the Judge Advocate General, was

---

10-94. Rear Admiral Ira H. Nunn, USN, Judge Advocate General of the Navy, "Memorandum from Judge Advocate General Regarding Naval Reserve Law Program," *JAG Journal* (November 1952), 3.

10-95. Captain Robert G. Burke, USNR (of New York), and Lieutenant Commander Arthur A. Klein, USNR (of Texas), performed the study.

10-96. *JAG Journal* (November 1952), 3.

Digitized by Google

appointed to oversee development of the program.[10-97] A training curriculum, designed to cover thirty drills, was printed by the Bureau of Naval Personnel.[10-98] Reserve law units received copies of the *Court Martial Reporter*, the *Uniform Code of Military Justice*, and the *Manual for Courts-Martial*.[10-99] For a brief period the program underwent revitalization. It would repeat the process many times in the forthcoming decades.[10-100]

Unlike the Reserve Law Program that was struggling for survival, the Law Specialist Program continued to gain in influence. By the end of 1954 it was firmly entrenched. This is somewhat remarkable, given the fact that it was not initiated by the uniformed Navy but was imposed upon it. It had no organized advocates in the Navy; no coterie of lawyers who advanced its formation. It had mostly enemies. The best that could be said for the Judge Advocate General at the time it was set up was that he was neutral to the idea. The Navy's only lawyers, the Law PGs, disdained it. The Navy had to turn to lawyers who had not practiced Navy law in order to create it. Although it was teetering precariously from a top-heavy rank structure that would need to undergo severe pruning, Congressional nurturing had protected and fostered it. The Judge Advocate General of the Navy, Ira Nunn, while not accepting the Law Specialists as equals, recognized them as a necessary evil and tolerated them.

10-97. Working with the Naval Air Reserve, Commander Forshee arranged flights to Washington, D.C., for members of Naval Reserve law companies throughout the country. Receiving neither pay nor allowances, Reservists underwent four-day orientation tours of the Office of the Judge Advocate General for on-the-spot orientation in current organization and operations. According to the JAG Journal of August 1955, over a period of two years (1955-1956), nearly half the Reserve Law Program members (over 400 officers) had received this brief, but significant, orientation training before it was discontinued.

10-98. *Curriculum for Units of the Volunteer Naval Reserve,* NAVPERS 91809.

10-99. Judge Advocate General, memorandum to Commandant, Thirteenth Naval District, 3 April 1953.

10-100. See Appendix J, "The Naval Reserve Law Program, 1954 to Date."

Digitized by Google

Naval Reserve Law Company 8-6, of Dallas, Texas, arrives in Washington, D.C., for orientation training in the Office of the Judge Advocate General. Commander Forshee can be seen at the front left center of the photograph. (Office of the Judge Advocate General of the Navy)

This is more than he had done with the *Uniform Code*. Nunn's attitude toward the *Code* was that it would not work in time of war. It was too cumbersome, too burdensome, too different. Nunn felt that discipline would break down. He felt that commanders would be unable to function under all the restrictions of the *Code*. He felt that they had lost too much authority. But in fact the *Code* was working. Chapman showed us that. So did Hogan. A survey of Navy units in the Far East, taken in 1952 by the Commander in Chief, Pacific Fleet, concluded as follows:

> Personal reactions in the fleet concerning the *Uniform Code of Military Justice* when it became effective one year ago were decidedly negative. In six months time the feeling

Digitized by Google

> abated to the extent that in the main the *Code* itself was considered sound and workable but that the *Manual for Courts-Martial* needed drastic revision. The current opinion is that, generally, the concepts of the *Manual* are also basically sound and workable.[10-101]

This acceptance of the *Uniform Code* carried with it an acceptance of the Law Specialists. It was they, after all, who bore the greatest responsibility for its implementation and administration. It was the Law Specialists who interpreted the unfamiliar and often cumbrous language of the *Manual for Courts-Martial*, and charted the course of naval justice under the new law. The *Code*, because it now was the law of naval justice, would have been implemented and followed in any event. But the Law Specialists smoothed the way, and in so doing gained the respect of the entire Naval Establishment. After 150 years, full-time uniformed lawyers had a home in the Navy.

10-101. Generous, *Swords and Scales*, 71, citing Commander in Chief, U.S. Pacific Fleet, letter, ser. 6733, 1 October 1952.

Digitized by Google

CHAPTER 11

THE SCARLET LETTER: THE LAW PGS' LAST STAND
1954 to 1956

We have a law specialist on duty at Guantanamo Bay, Cuba. There isn't enough law business down there to keep that fellow busy . . . [s]o . . . he acts as intelligence officer, he acts as public relations officer, and he has about four or five other jobs. . . . Now, if he were unavailable for anything but law business he would have time hanging pretty heavy on his hands.—**REAR ADMIRAL GEORGE L. RUSSELL, JUDGE ADVOCATE GENERAL OF THE NAVY, 1949**

Although the full-time uniformed lawyer had a home in the Navy, to many in the ranks of the Law Specialists, and to many outside observers, it was a home badly in need of repair. The most visible problem was the recruiting of new lawyers. Not only were they needed to supplement the current ranks, they were needed to take the places of the many senior Law Specialists who were approaching retirement eligibility, as well as a number of mid-grade Reserve officers on active duty whose career opportunities were ill-defined. As noted in the previous chapter, Nunn proposed to acquire the bulk of these replacements, at the rate of ten to twelve per year, by inducing lawyers in the Reserve Law Program to return to active duty. If the Reserves failed to yield sufficient recruits, Nunn proposed the direct commissioning of civilian lawyers. Both plans proved disappointing.

In fiscal year 1953, with recruiting efforts limited to Reserve lawyers, only eight candidates were found to be initially qualified[11-1] Of these eight, one-half either failed to finally qualify, or subsequently declined

---

11-1. One reason for this paucity of qualified candidates among the Reserve law community was the fact that the average age of the Reserve lawyer was over 40 years. The Reserve Law Program was overage and over-ranked. To compound the problem, there were insufficient young replacements coming into the Program. Educational deferments from the draft had allowed many lawyers, who remained in school until their mid-twenties, by which time they were married, to avoid military service altogether. See Joe H. Munster, Jr., letter to Ira H. Nunn, 18 April 1956.

Digitized by Google

appointment. In fiscal year 1954 the program was opened to civilians as well as Reservists. Nonetheless, only six candidates were found to be qualified, and none of these was a civilian applicant. In fiscal year 1955, Nunn received authorization to appoint eighteen candidates in an attempt to recoup the deficiencies of the previous two years. He selected twenty-seven, only to have twelve decline. Nunn offered a solution; he would bring back the Law PG Program. He presented his proposal in writing to the House Committee on Appropriations.[11-2]

Nunn's proposal was not as reactionary as one might think. While he would have the Navy resume the law school education of junior line officers with about five years' sea duty experience, he would require an agreement from those selected that they continue to serve an additional six years following graduation from law school. But more important than that, Nunn would require that such officers *accept designation and assignment as Law Specialists for the remainder of their naval*

11-2. Nunn's proposal to restore the Law PG Program was contained in a memorandum he wrote to The Judge Advocate General of the Army, dated 4 April 1955, and read into the record of the minutes of a hearing of the House Committee on Appropriations. U.S. Congress, House Committee on Appropriations, *Hearings on the Defense Appropriation Bill, 1956*, 84th Cong., 1st sess., 1956, at 748.

The recruiting figures presented by Nunn were included in the memorandum. Nunn gives no indication as to the total number of applicants each year; only the total number selected. The 1955 figures were compiled before the end of fiscal year 1955, so it is possible that even more than twelve selectees declined. The most probable reason for declining appointment arose from the fact that candidates applied to all the services. The great majority of those receiving multiple acceptances chose to enter the Army or Air Force law programs, for reasons explained in the following pages.

Nunn's presentation of the recruiting situation, however, apparently depended upon the point he was trying to make. When asked by Senator Eugene D. Millikin of Colorado, chairman of the Senate Finance Committee, whether the Navy's failure to have a Judge Advocate General's Corps impacted adversely on recruiting, Nunn responded:

> Insofar as attracting young men to the Navy for careers as law specialists is concerned, our applicants for commissions far outnumber our openings. Nor do I feel our successful applicants compare other than favorably with their contemporaries in the other services or in civilian life.

Ira H. Nunn, letter to Senator Eugene D. Millikin, 17 January 1956.

Digitized by Google

careers.[11-3] If Nunn's plan were accepted, the Law PGs would no longer be part-time lawyers; there would be no more "seamen among lawyers and lawyers among seamen."

Nunn's written testimony was followed by the personal appearance of Admiral Robert B. Carney, USN, the Chief of Naval Operations. Either Nunn had not briefed Carney, or Carney was the reactionary that Nunn tried not to be. In any event Carney proposed, as had Nunn, that the law school education of line officers be continued. Unlike Nunn, however, Carney sought to restore the discredited Law PG Program to its original form:

> Recent restrictions contained in the annual appropriation acts have tended to deprive the command element of the Navy of its authoritative interest in legal matters and has removed from the Navy and Marine Corps a right to have, in the ranks of those qualified to command at sea or in the field, a proper leaven of legal experience and qualification. . . .
>
> Neither the legal specialists in the Regular Navy nor the Reserves on active duty completely fulfil the need . . . .[11-4]

11-3. House Committee on Appropriations, *Hearings on the Defense Appropriation Bill, 1956*, 84th Cong., 1st sess., 1956, at 748. To support the merit of his proposal, Nunn advised the committee that the last five officers who were then completing law school under the expiring Law PG Program had been given the opportunity to become Law Specialists, and three were "expected to request designation as law specialists." It is not known if they did.

Nunn, however, was an enigma. Even as he proposed solving a critical personnel shortage by funding the education of new Law Specialists from the ranks of the Regular Navy, he oversaw the release from active duty of thirteen experienced Reserve Law Specialists, none of whom was offered a Regular (*i.e.*, permanent) commission at the time of release. Henry M. Shine, Jr., "A Judge Advocate General's Corps for the Navy?" *Federal Bar Journal* 15 (October-December 1955): 324.

11-4. House Committee on Appropriations, *Hearings on the Defense Appropriation Bill, 1956*, 84th Cong., 1st sess., 1956, at 751.

Digitized by Google

In proposing this complete restoration of the Law PG Program, Carney disdained the findings and recommendations of ten years of Congressional, Presidential, and Departmental panels. It was typical of the Navy leadership's failure to understand and appreciate the Navy's legal needs. Perceived as arrogant at worst, insensitive at best, such remarks fortified Congress's resolve not to reinstate graduate law education for the armed services. For Nunn, it was another recruiting setback. Nor were Nunn's recruiting problems confined to numbers. The quality of those recruited was also a concern. Nowhere was this shortcoming more authoritatively pointed out than by the judges of the United States Court of Military Appeals, who had been charged by Congress to evaluate the performance of the non-corps Navy lawyer versus his Army counterpart.[11-5]

The court's evaluation was not complementary; there was clear dissatisfaction with the quality of performance by uniformed Navy lawyers. In its report for the period from 1 January 1955 to 31 December 1955, the court made the following observation:

> During the hearings on the *Uniform Code of Military Justice*, the House Armed Services Committee reported that practically every witness who testified before the Committee had urged a separate Judge Advocate General's Corps for the Navy and the Air Force. The Committee, however, postponed any final determination until the Judges of the United States Court of Military Appeals had an opportunity to "review the comparative results of the Army with its corps as against the Navy and the Air Force without such a corps." *It is now believed that the period of operation of the Code has furnished a base for an intelligent appraisal of the merits of a Corps and that Congress could profitably proceed*

11-5. The United States Court of Military Appeals is now the United States Court of Appeals for the Armed Forces. To avoid confusion it will be referred to consistently in this chapter as the Court of Military Appeals, the name it held at the time the events described in this chapter transpired.

A brief discussion of the court appears in Appendix E.

Digitized by Google

> *with hearings on this controversial subject.*[11-6] (Italics added.)

Although moderate in tone, the court's recommendation—because it was based on objective observation—was a stinging criticism of the quality of Navy lawyers. This criticism was directed not at the World War II veterans who had joined the Law Specialist Program at its inception, and were now the "middle-management" of the legal organization, but at the lawyer recruits who were coming into the Navy in the early 1950s. These lawyers were joining not necessarily out of patriotism or commitment, but rather to avoid the more unpleasant consequences of the universal draft in existence at that time. It was these lawyers, often ill-equipped and sometimes ill-prepared, who were appearing before the Court of Military Appeals and demonstrating to that body the caliber of lawyer the non-corps Navy was attracting and molding.[11-7]

11-6. Annual Report of the United States Court of Military Appeals and the Judge Advocates General of the Armed Forces and the General Counsel of the Department of the Treasury, pursuant to the Uniform Code of Military Justice, for the period January 1, 1955, to December 31, 1955, at 10.

The final wording of the court's report, with its implied criticism, was considerably attenuated from the draft language that had been presented to the judges. The draft language would have stated:

> The Court feels that from its appellate vantage point, the legal presentation of the Army, with its corps, and the Air Force, with its separate Department, has generally measured up to higher professional standards than has the Navy, with its legal specialist system. The Court, therefore, agrees . . . that the Navy should have a separate Judge Advocate General's Corps.

Ziegel W. Neff, letter to William C. Mott, 30 January 1956.

11-7. Feeding the problem was the fact that there were simply not enough lawyers to handle the appellate caseload. This lack of adequate manpower contributed to the lack of preparation for argument criticized by the judges of the Court of Military Appeals. See Commander Howard H. Brandenburg, USN, letter to Ira H. Nunn, 24 October 1955. As of 31 December 1954 there were 1,047 Navy

(continued...)

Digitized by Google

Nor did the Court of Military Appeals confine its criticism to the formalities of an annual report. The judges were personally candid in expressing their disapproval. Ziegel W. "Ziggy" Neff, a commissioner for the Court of Military Appeals and a Law Specialist in the Naval Reserve,[11-8] recalled the following comment by George W. Latimer, one of the court's judges:

> I have been quite outspoken on the subject and Ira [Nunn] is well acquainted with my views. Insofar as I am concerned, the Navy lags badly behind the Army and Air Force.[11-9]

11-7. (...continued)
cases docketed in the court. A year later there were 1,496. The Navy's legal system was moving backwards.

11-8. Neff, a recipient of the Navy Cross, had been a carrier-based Navy fighter pilot during World War II. He was recalled to active duty and served as a Law Specialist (Special Assistant to the Judge Advocate General for Military Justice) during the Korean War. In 1957, after serving as commissioner on the Court of Military Appeals, he became a civilian member of Board of Review Number One in the Office of the Judge Advocate General of the Navy.

11-9. Ziegel W. Neff, letter to William C. Mott, 6 January 1956. In his letter to Mott, Neff said:

> [I]t really is a shame that the Navy does not have a more lawyer-like set-up. It is horribly true from where I sit that in appellate procedures the Navy is far outstripped by her sister services.

Bill Mott, the person to whom Neff wrote the above letter, was without doubt the dominant figure in the effort to achieve professional autonomy for uniformed Navy lawyers. While he was not able to bring about the establishment of the Navy Judge Advocate General's Corps during his time in uniform, he was preeminent in laying the foundation for its later inauguration in 1967. A bit of biographical background is, therefore, in order.

William C. Mott graduated from the United States Naval Academy in 1933. After resigning his commission, he received a law degree from George Washington University Law School, where he studied under Associate Professor—and later Judge Advocate General of the Navy—Chester C. Ward (introduced in the previous chapter; see text beginning at page 498). He re-entered the Navy in 1940 as a Reserve officer assigned to the Office of Naval Intelligence.

(continued...)

Digitized by Google

Later, Latimer wrote directly to Mott, saying in part:

> A short while ago I appeared before the American Legion . . . and re-expressed my views. In addition, I made a rather strong statement in favor of Congress enacting some legislation to improve the status and caliber of the lawyers in the Navy. As you know, I believe collectively they are below the standards of the other services and, of course, that is chargeable to the fact that *the officer at the head* [*Nunn—ED.*] *has little, if any, desire to build up the prestige and standing of the attorney.*[11-10] (Italics added.)

11-9. (...continued)
In 1942 he became Assistant Naval Aide to President Franklin D. Roosevelt, and also served as officer in charge of the Naval Section of the White House Intelligence and Communication Center. From 1944 to 1945 he was attached to the staff of Commander, Amphibious Force, Pacific Fleet, where he served as aide, flag secretary, legal officer, and personnel officer, receiving the Legion of Merit with Combat "V" for operations at Iwo Jima and Okinawa. He was then assigned to the Office of the Chief of Naval Operations, serving as liaison officer with the Department of State and the United Nations. In 1946, on the verge of leaving the naval service to practice law, he was persuaded to remain on active duty and accept a Regular commission at the urging of his personal friend, Rear Admiral Oswald Colclough, the Judge Advocate General of the Navy. He thus had his first assignment to the Office of the Judge Advocate General, as head of the International Law Branch and Foreign Claims Commission Office. He became a Law Specialist in 1947. In 1960 he became Judge Advocate General of the Navy. Rear Admiral William C. Mott, USN (Ret.), interview with Commander George E. Erickson, Jr., JAGC, USNR, 19 February 1991; Homer A. Walkup, *History of U.S. Naval Law and Lawyers* (Prepared on the occasion of the ninetieth anniversary of the establishment of the Office of the Judge Advocate General of the Navy, 1970), 25.

11-10. George W. Latimer, letter to William C. Mott, 16 May 1956. To put the matter in greater perspective, one need only imagine the impact on the morale of a large civilian law firm if it were faced with similar comments from the judiciary before which its lawyers practiced.

Digitized by Google

The cause for criticism by the court lay in the Navy's inability to attract quality young lawyers, and to retain those who did show promise. The reasons for this were several:

- ⚓ Navy lawyers without prior military experience were commissioned as ensigns, the lowest officer grade in the Navy. The Army and Air Force commissioned their lawyers a grade or two higher. This meant more money and more prestige for the young Army or Air Force professional.[11-11]
- ⚓ Opportunities for further professional education were dismal. Policy and strategy courses were reserved exclusively for the line.[11-12] The Naval Justice School had no courses designed to train Navy lawyers, not even a basic orientation course. By contrast, the Army was in the process of developing a superb school for its lawyers on the grounds of the University of Virginia, and offered them instruction at several postgraduate schools.[11-13]

11-11. Munster to Nunn, 18 April 1956.

11-12. In October 1952, Commander Hilbert S. Cofield, USN, a Law Specialist stationed as an instructor at the Naval Justice School in Newport, Rhode Island, requested permission to attend the Naval War College, also at Newport. His commanding officer, Bill Mott, wrote a worthy endorsement and forwarded it to the Judge Advocate General, Ira Nunn, for a second endorsement. Nunn wrote the following:

> Although the Judge Advocate General fully subscribes to the enlargement of the service background of law specialists through attending staff colleges and other courses of instruction, due to the present shortage of subject officers, Commander Cofield can not be spared at this time for duty as a student at the U.S. Naval War College.

11-13. Army lawyers had dedicated quotas to attend the Army War College, the Industrial College of the Armed Forces, the Armed Forces Staff College, the Command and General Staff College, and the Army Language College. Captain William C. Mott, USN, Commanding Officer, U.S. Naval School (Naval Justice), first endorsement on request of Commander H.S. Cofield to attend Naval War College, 21 October 1952.

Digitized by Google

⚓ The Navy's legal organization was confused and ill-defined. It had a line officer as its senior lawyer, for whom the job was only another shore duty billet *en route* to more prestigious seagoing positions.[11-14] It had part-time lawyers (the Law PGs) who moved in and out of legal billets yet often held the most important supervisory positions.[11-15] And

---

11-14. Joe Munster captured the feeling of most of the Law Specialists and outside observers regarding the occupancy of the Office of Judge Advocate General by a line officer:

> [T]he Office of Judge Advocate General is not the pinnacle of [an officer's] naval career . . . [the occupant] will go on to positions of, navally [*sic*] speaking, greater responsibility and greater rank. . . . [T]he Office of Judge Advocate General has seemed to be a stepping stone to greater things, not the "top of the heap," but to non-uniformed attorneys, the Office of Judge Advocate General is the top of the heap for uniformed lawyers and there is a feeling, perhaps badly expressed on many occasions, that there is something wrong with a professional group when the top of the profession isn't the top of the heap.

Munster to Nunn, 18 April 1956,

11-15. As the Law Specialists gained experience, this practice had a devastating effect on morale, for it

> resulted in the assignment of some senior officers, recently out of law school, to legal posts for which they were scarcely qualified by legal experience and in preference to junior officers of much greater experience. Experienced attorneys of junior rank have seen the avenues of advancement blocked by the promotion of less experienced superiors. Indeed, in many instances junior officers have had to perform the duties of the superior as a subordinate member of the latter's staff . . . .

Task Force on Legal Services and Procedure, *Report on Legal Services and Procedure* (Prepared for the Commission on Organization of the Executive

(continued...)

Digitized by Google

it had the Law Specialists who were clearly the more proficient lawyers, yet who lacked the authority to set policy for their own administration.

- ⚓ The Army had a Judge Advocate General's Corps, the Air Force a Judge Advocate General's Department, both semi-autonomous. There was no distinctive corps, with its aura of professionalism, in the Navy.
- ⚓ For the Law Specialist, there was no realistic possibility of attaining flag rank, either through selection by a promotion board, or as an accouterment of office. The Army and Air Force had multiple opportunities for their lawyers to do so.
- ⚓ The Reserve Law Program, for those Navy lawyers looking ahead to post-active duty affiliation, was disorganized and dysfunctional. In addition, there was little likelihood of receiving a pay billet, and no assurance of annual training duty.
- ⚓ There was an undercurrent of antagonism toward the Law Specialists among much of the line, who resented the infringement of the *Uniform Code* upon their authority, considered it unworkable in wartime, and viewed the lawyers as aspiring to be the "high priests" of a body of untouchable laws.[11-16] This antagonism was returned by the lawyers, who considered their control by the line professionally demeaning, and line policy-makers insensitive to their problems and needs. In a word, there was a problem of morale.

While these factors had combined to frustrate recruiting, their impact on morale was even more untoward. There was not yet, however, a focus to the frustration felt by the Law Specialists This changed in March 1953, with release of the Low Board report, in which the Judge Advocate General himself had participated in recommendations perceived by the

---

11-15. (...continued)
Branch of the Government), March 1955, at 106.

11-16. See Vice Admiral James L. Holloway, Jr., USN, Chief of Naval Personnel, letter to William C. Mott, 25 January 1956.

Digitized by Google

Law Specialists as designed to keep them subservient to the line.[11-17] The lawyers smarted over the proposed restrictions on personnel increases in their ranks, the deceptive recommendation for a flag officer billet, the recommendation that there not be a Judge Advocate General's Corps, and the fact that not a single Law Specialist had been asked to testify before the board. But one finding above all others ignited the cause for professional autonomy among the Law Specialists:

> The specialty [*in this case the Law Specialists—ED.*] should deal directly with functions which are essential to naval warfare, and which *the line of the Navy should wholly control.*[11-18] (Italics added.)

Joe Munster spoke for the Law Specialists:

> In my various inspection trips as General Inspector I found that morale was not good among the law specialists. . . .
>
> In any event, the Low Board report and other events resulted in extremely low morale amongst the law specialist. . . . I discovered the group, almost to a man, considered the report to have placed them, as a group, in a category quite removed and definitely of lower caste than other groups. More than that, language was utilized by the [Low] Board to the effect that the law specialist group must be wholly controlled by the line. Some . . . felt that if such control extended to their legal

---

11-17. Department of the Navy, Board to Study the Engineering Duty, Aeronautical Engineering Duty and Special Duty Officer Structure, 24 March 1953. See footnotes 10-86, 10-87, and related text for discussion of some of the contents of the report.

11-18. Board to Study the Engineering Duty, Aeronautical Engineering Duty and Special Duty Officer Structure, 24 March 1953, at 9.

Digitized by Google

> opinions they would then have lost what value they had to the Navy. . . .
>
> There was some thought to the effect the Low Board report was indicative of the alleged fact that the unrestricted line had little use for law specialists and regarded them as a necessary evil to be dispensed with as soon as possible.[11-19]

The Low Board recommendations impacted so adversely on morale among the Law Specialists, and caused so much resentment, that all copies of the board's report were withdrawn from circulation.[11-20]

The Navy's legal house was in disorder. It had an inferior product to sell to new recruits. As Bill Mott said:

> Whatever else lawyers may be called, they are not stupid. Given a free choice, they will pick an organization where they will be most likely to succeed. . . . The Navy . . . cannot . . . compete with [the Army and Air Force] for outstanding young lawyers.[11-21]

While recruiting shortfalls were a quantifiable demonstration of the problems in the legal organization, they were merely symptoms of the real illness. The real illness was one of morale, and it festered most virulently at the top of the organization. Captain Robert A. "Bob" Fitch, USN, a Law Specialist, was especially caustic in his evaluation of the situation:

> While I had hoped that our troubles could be resolved by change in the present law, it has become quite clear that will never happen and

---

11-19. Munster to Nunn, 18 April 1956. Munster was no doubt mindful of the fact that Nunn had been a member of the Low Board.

11-20. William C. Mott, letter to Ira H. Nunn, 1 December 1955.

11-21. Mott to Nunn, 1 December 1955.

Digitized by Google

we will continue to exist on the benevolence of the line until we get a corps. . . .

Our status in the line is an anomaly . . . .[11-22] It has been said by many line officers that if the lawyers had applied for regular line commissions they would have been turned down—they weren't good enough for the line . . . . A lawyer in the line is like an Okie in California—tolerated because needed but doesn't belong in the group. . . .[11-23]

To conclude my thesis the law group will never achieve proper recognition and career opportunities so long as its internal affairs are administered by an outside competitive agency—the line. We will always get the leavings which are begrudgingly given only under protest and pressure. In such a setting we older people can ride things out to our retirement and say to H--- with it. But meanwhile no one worth his salt will join the group and it will deteriorate into a group worthless to everyone.[11-24]

11-22. "Although law specialists were considered line officers, wore line insignia, and competed for line promotions, everyone knew they were fit only for legal jobs. The Navy became trapped in its own mythology here." William T. Generous, Jr., *Swords and Scales, The Development of the Uniform Code of Military Justice* (Port Washington, N.Y.: Kennikat Press, 1973), 110.

11-23. It is useful to keep in mind, as one reads of the animosity that developed between the Law Specialists and the line over the corps issue, that the Law Specialists were not some alien force that had infiltrated the Navy. As we have seen in previous pages, many of them were the decorated battle heroes of World War II, and had, at one time, been as well qualified for command at sea as any of the senior line officers who were now disparaging their abilities.

11-24. Robert A. Fitch, letter to William C. Mott, 19 January 1956.

Digitized by Google

The senior Law Specialists saw in the Navy's legal structure an organization that could not, in its present form, deliver the type of legal services to the Navy that it needed. They saw a Judge Advocate General who failed to work for the organization or care about its people. They saw a failed recruiting program that could not attract enough new lawyers to maintain the current numbers, much less increase to the levels projected to be necessary for the future. In short, they saw an organization on the verge of self-destruction. Because of their interest in the organization and their dedication to the Navy, a number of these senior Law Specialists began a loosely-organized but covert effort to change things. They became known (probably through their own efforts to romanticize their cause) as the "cabal." Their rallying cry was a corps. Their goals, however, were to place a Law Specialist at the top of the organization, to obtain two or perhaps three flag billets for his immediate senior assistants, to give him cognizance of and authority over the recruitment, training, appointment, and promotion of his Law Specialists, and to insulate the Law Specialists from unreasonable control by the line.[11-25] Virtually all the proponents of a corps agreed that the solution to these problems did not require the corps organization. Even Mott, in a letter of 8 March 1956 to Chester Ward, said:

> I am for a Corps only because I feel we were driven to it. Personally I am in favor of retaining the line designator *provided* we can build a professional organization and have better control of the recruitment, education and assignment of our lawyers.[11-26]

11-25. William C. Mott, letter to Sanford B.D. Wood, 23 January 1956.

11-26. William C. Mott, letter to Chester C. Ward, 8 March 1956. This was a consistent position with Mott. In an earlier letter to Robert E. Quinn, the chief judge of the Court of Military Appeals, Mott said:

> There is, of course, no magic in the word "corps" Frankly, many a law specialist has been driven to the corps concept because of the Navy Department's intransigent refusal to even discuss with us organizational structures which we feel are necessary to carry out our obligations under the *Uniform Code*.

(continued...)

Digitized by Google

While these things could be achieved without a corps, the concept of a corps gave the "cabal" a clarion call.[11-27]

The cabal comprised a nucleus of the most influential senior officers in the Law Specialist group. Bob Fitch, Mack Greenberg, Bill Mott,[11-28]

11-26. (...continued)

> Like other law specialists, I am perfectly willing to listen to any plan the Navy Department suggests which will assure professional lawyers running the organization from the top and will likewise assure reasonable career opportunities for young lawyers coming in at the bottom. Everyone who has looked at our present organization objectively and impartially has come to the conclusion that it does not satisfy those two basic requirements.

William C. Mott, letter to Hon. Robert E. Quinn, 19 December 1955. Others shared Mott's view on this:

> I wrote George Sullivan a short while back that in any extended hazzle [*sic*] we are going to have to admit that 90% of what we have fought for can be accomplished without a Corps.

Joe H. Munster, Jr., letter to William C. Mott, 22 December 1955.

11-27. The real case for the corps was rarely stated, and then only within the confines of personal communications:

> [T]he line is determined to retain control of the lawyers in order to bend them to their will . . . . That is the reason the line is so strongly opposed to a corps; they would lose control of the lawyers who would be free to express their true opinions without fear of retribution. Except for this loss of control, there is nothing a corps will do that cannot be done under present law.

Fitch to Mott, 19 January 1956.

11-28. At the time of his participation in the "cabal," Mott was serving as District Legal Officer to the Commandant, Ninth Naval District, in Great Lakes, Illinois, just

(continued...)

Digitized by Google

Joe Munster, Herb Ost, John Owen, George A. Sullivan, Chester Ward,[11-29] and Sanford B.D. "Sandy" Wood (the last being the Assistant Judge Advocate General under Nunn from June 1952 to August 1955). All but Ost was a captain. On the other side were, or course, Ira Nunn; his executive assistant, Herb Schwab;[11-30] and Bill Collier, his special assistant and general inspector.[11-31]

Of all the members of the cabal, Mott held far and away the most influence. Especially important was his friendship with Admiral Arthur A. Radford. This friendship had fused during the Korean War, when Mott

---

11-28. (...continued)
north of Chicago.

11-29. Ward at this time was serving as staff legal officer to the Commander in Chief, Pacific, and Commander in Chief, Pacific Fleet, Admiral Arthur A. Radford, at Pearl Harbor, Hawaii. Following Radford's detachment, Ward continued as staff legal officer to Admiral Felix B. Stump, Radford's successor. Walkup, *History of U.S. Naval Law and Lawyers*, 24.

11-30. Captain Herbert S. Schwab, USN. Schwab was a Naval Academy graduate who had served in World War II as a line officer. He left the Navy after the war to attend law school, then came back in as a Law Specialist. At the time of the "cabal," he was serving as executive assistant to Judge Advocate General Nunn. Though a Law Specialist and a Naval Academy classmate of Mott's, Schwab was a prime strategist for Nunn and his anti-corps policies.

11-31. Commander William A. Collier, USN, another Law Specialist.
The lines between the pro-corps advocates and the anti-corps supporters were rather clearly defined, and often crossed the boundaries of friendship. Mack Greenberg recalls the following incident:

> Herb Schwab was a very good friend of mine. I was in the JAG Office at that time, the Assistant Judge Advocate General for personnel, manpower, something like that. And Herb Schwab and George Sullivan came to my apartment in Washington and Herb said, "I am going to go with Ira Nunn because that is the only way I can ever make admiral." And I said, "Herb, you are going to be walking over the heads of a lot of your men who served with you." But he went that route.

Captain Mack K. Greenberg, JAGC, USN (Ret.), interview with author, 14 May 1992.

Digitized by Google

served as Radford's legal officer in Pearl Harbor, Hawaii. Radford at that time held the post of Commander in Chief, Pacific, and was the ranking military officer in Hawaii.

Rear Admiral William C. Mott, USN, Judge Advocate General of the Navy, 1960 to 1964. (U.S. Naval Historical Center collection)

In connection with prosecution of the Korean War, President Truman had arranged to meet General MacArthur at Wake Island, with a stopover at Pearl Harbor. Because Radford had testified against building the B-36 bomber, the Air Force, which was transporting Truman, decided to snub Radford, notwithstanding his rank and protocol, and sequester Truman at Hickam Air Force Base during his stay in Hawaii. Mott got wind of the plan:

Digitized by Google

I went to Admiral Radford and I said "Admiral, they can't do this to CINCPAC." And he said, "Well, I don't know what I can do about it, Bill." So I said, "If you let me, I can do something." He said, "Well, go ahead." So I called Vice Admiral John McCrea in Washington, the guy who had sent me to the White House as assistant naval aide to President Roosevelt, and he called Rear Admiral Bob Dennison, the naval aide to the President, who was in the hospital. Dennison got up out of his sick bed and went to President Truman and said, "You can't do this to CINCPAC. You've got to stay with CINCPAC and you have to be his guest." And so the President, who didn't know anything about this—frequently presidents don't know what's happening beneath them—said, "Well, of course, if that's what you think, Bob, that's what I'll do." So Truman stayed at the CINCPAC guest house with Radford, and I was appointed as his naval aide because Dennison went back to the hospital.

I got to be very fond of President Truman.[11-32] He was a down-to-earth kind of fellow. His administrative assistant was a man named George Elsey, whom I had known from the White House. George and I arranged that whenever the President went anywhere—and he went to a lot of places in Hawaii—he would ride with Admiral Radford. We had the

---

11-32. Mott's fondness for Mr. Truman is understandable. Part of Truman's daily constitution was to take a nap in the afternoon, during which time Mott stood by in an anteroom of the guest house. One day the telephone rang and Mott answered. The caller advised that he was "The Reverend Forester," who knew the President's family in Independence, Missouri, and requested that Mr. Truman attend his church while he was in Hawaii. When the President awoke, Mott told him about the call. Truman said, "I don't know any Reverend Forester. The only Forester I know is 'Old Forester,' and it's time we had a drink." Mott, interview, 19 February 1991.

Digitized by Google

> feeling that Admiral Radford could sell himself to a cigar store indian if given the opportunity, and that's what happened. President Truman came back one day and he said to me, "I got a lot of wrong information about that man." He said, "He's a very fine man, Admiral Radford." Well, of course, Admiral Radford knew what I had done and he never forgot it.[11-33]

Initially the actions of the "cabal" forces consisted of infrequent communications to each other. Their cause received a significant boost in April 1954. Nunn had been persuaded to call a world-wide conference of Law Specialists, to be held at the Naval Justice School in Newport, Rhode Island, in April 1954, to address interests of common concern. Approximately seventy Law Specialists, mostly senior in rank, attended, including all members of the "cabal." Although this was to be the only meeting of Law Specialists held during the whole of Nunn's tenure, for whatever reason Nunn did not attend. Without Nunn there, discussion of the lot of the Law Specialists was open and incisive. An item, not on the

---

11-33. Mott, interview, 19 February 1991. In the same interview, Mott noted that his wife and Mrs. Radford became very close:

> My wife used to help Mrs. Radford when she had official guests. One time she had the Prime Minister of Australia, Prime Minister Menzies, as her house guest. Admiral Radford was in Korea at the time in talks with General MacArthur. He used to appoint me as aide to these people, so I was serving as aide to the Prime Minister. Mrs. Radford had engaged a troupe of hula dancers at the Royal Hawaiian Hotel to entertain him. Now, the hula dancers didn't have much on under their skirts, and Mrs. Radford became terribly embarrassed, and she came to me and said, "Whatever will I do? Raddy will kill me when he hears about this." And I said, "Mrs. Radford, I wouldn't worry about it if I were you, because the Prime Minister just moved up to the front row."

Digitized by Google

agenda previously seen and approved by Nunn, was put to the floor. It read as follows:

> The Navy should develop a regular program for the recruitment of law specialists, should establish additional flag billets in the law field or, in the alternative, *should establish a law specialist corps*. (Italics added.)

When put to a vote, the "Newport Resolution" was adopted by the affirmative vote of all but one. The sole dissent was Mack Greenberg, who thought the resolution too weak and wanted it only to recommend a corps, without the alternative proposals.[11-34] Nunn virtually ignored the

11-34. Mott to Nunn, 1 December 1955; William C. Mott, letter to Robert A. Fitch, 17 November 1955.

Digitized by Google

recommendation, but not, as we shall see, the forces behind it.[11-35] The "cabal" carried on. Joe McDevitt recalls some of the machinations:

> I was stationed in the Office of the Judge Advocate General at the time. Mack Greenberg, George Sullivan, Herb Ost, Bill Mott, Chester Ward, and some others were secretly working to create a Judge Advocate General's Corps. The ones who were stationed in the Judge Advocate General's office were working behind closed doors, literally locked doors, putting together the beginnings of legislation to establish a corps.
>
> Ira Nunn was the JAG of course, and he was opposed to it. They didn't trust any secretary to do the typing. But they knew that

---

11-35. Nunn had his spies:

> Will Hearn was a mole. He attended the meeting at the Naval Justice School at which the Law Specialists formulated a plan to establish a Judge Advocate General's Corps contrary to the wishes of Ira Nunn, and then went back to Nunn and reported the whole thing.

Greenberg, interview, 14 May 1992. Apparently Hearn did not have a very effective cover:

> I would use the utmost care in dealing with Wilfred Hearn. You will remember that at the Newport Conference he was most anxious to find out everything that was being done concerning promoting a Corps. He was not a member of the Policy panel, but kept showing up there and listening in. He asked me to send him a draft of any bill we prepared for a JAG Corps. Then, when I talked with him in Washington, he told me that "in his position" he could not afford to be identified with any movement favoring a JAG Corps.

Chester C. Ward, letter to George A. Sullivan, 18 February 1955.

Digitized by Google

> I had taken shorthand and typing in high school. So I did their typing, and became a member of the "inner sanctum."[11-36]

Don Chapman offers a more detached perspective:

> There was lots and lots of inside stuff going on there in the JAG office at that time with the Law Specialists trying to get their feet in the door. I was in the background and knew what was going on, and it was led primarily by Sandy Wood [*the Assistant Judge Advocate General—ED.*] and George Sullivan. I was working closely with George and Sandy. I was a commander and they were captains and they told me, "Stay out of this. This is a real deadly fight that's going on here and there's no use for you to have your career all messed up with what we're doing."
>
> And I was also getting the same thing from the other side. Herb Schwab had been brought in by Nunn to be his executive assistant. Herb was a Law Specialist, but he was also a Naval Academy graduate who had gotten out of the Navy after World War II and come back in as a Law Specialist. Herb was one of our group, but he was also of the Ira Nunn persuasion. And Herb said to me, "There are many things happening here in this office and I know you're right in the middle of them, but don't get your head up here and get it chopped off with the rest of them." I didn't,

11-36. Rear Admiral Joseph B. McDevitt, JAGC, USN (Ret.), interview with author, 23 March 1992.

Digitized by Google

> but I was sitting in on and listening to them and contributing to all of it.[11-37]

Schwab's advice to Chapman turned out to be wise. For, as we shall see, heads were indeed chopped off, in an act of vengeance by Nunn. But Nunn's revenge was to be short-lived; Schwab was betting on the wrong horse. Slowly but surely the tide continued to turn against Nunn and the Navy Establishment. Both were becoming increasingly isolated in their stand against a legal corps.

One of the major forces contributing to this isolation was a report by an advisory body headed by former President Herbert Hoover. Created by the Eighty-third Congress in 1953,[11-38] and known as the Commission on Organization of the Executive Branch of the Government,[11-39] the commission was charged with recommending such changes in the operation of the executive branch, including the military services, as would "promote economy, efficiency, and improved service in the transaction of the public business."[11-40] For its examination of legal procedures in the government, the commission constituted a working group, the "Task Group on Legal Services within the Armed Forces."[11-41]

To assist the task group in its fact-finding efforts, the Secretary of Defense, Charles E. Wilson, issued a memorandum on 12 April 1954 to

---

11-37. Rear Admiral Donald D. Chapman, JAGC, USN (Ret.), interview with author, 18 July 1991.

11-38. Act of 10 July 1953, 67 Stat. 142.

11-39. The commission immediately came to be referred to as the "Second" Hoover Commission, the "First" Hoover Commission on Reorganization of the Executive Branch of the Government having issued its final report and dissolved in 1949. Robert G. Storey, "The Second Hoover Commission: Its Legal Task Force," *American Bar Association Journal* 40 (June 1954): 483.

11-40. Storey, "The Second Hoover Commission: Its Legal Task Force," 485.

11-41. This task group was actually one of nine task forces set up by the commission, the Task Force on Legal Services and Procedure. See Storey, "The Second Hoover Commission: Its Legal Task Force," 486, 537.

Digitized by Google

the Secretaries of the Army, Navy and Air Force. The memorandum read in part:

> In order to cooperate fully with the Commission, it is requested that you authorize and direct the various military and civilian officers performing legal work within your department and their subordinates to furnish [the Task Group on Legal Services within the Armed Forces] and its staff complete data, including suggestions and observations for the betterment of the legal services in the defense establishment. All personnel should be encouraged to express personal viewpoints and suggestions.[11-42]

In furtherance of this effort, the Navy's *JAG Journal* for July 1954 carried a notice which read in part as follows:

> A study of legal services within the armed forces is now being conducted by [the Task Group on Legal Services within the Armed Forces]. Questionnaires seeking preliminary data have been sent . . . to the various law offices within the Department of Defense . . . .[11-43]

The notice then included the above quote from Defense Secretary Wilson's memorandum.

After almost two years of study, the Second Hoover Commission released its findings and recommendations. With respect to the Navy, it reinforced the position of the Law Specialists:

11-42. *JAG Journal* (July 1954), 2.

11-43. *JAG Journal* (July 1954), 2.

Digitized by Google

> The morale of officers in the Navy legal service is low, due largely to the practice of categorizing Navy lawyers as "restricted line officers," and denying them opportunity to attain flag rank or to belong to a professional corps.[11-44]

The commission's solution to the morale problem was simple and straightforward:

> The only way in which a strong professional spirit can be regained by lawyers in the Navy . . . is by establishing a staff corps for Navy officers whose primary duties shall be legal. *It is particularly important that the Judge Advocate General and his assistants be selected from that corps.*[11-45] (Italics added.)

The commission's findings were incorporated into the following recommendation to Congress:

> *Recommendation No. 18:*
>
> The Army, Navy, and Air Force should have a Judge Advocate General's Corps or Department under the direction of Judge Advocates General. These Judge Advocates General should develop a program within the Armed Forces to recruit lawyers of ability upon graduation from law school or within 5

11-44. Commission on Organization of the Executive Branch of the Government, *Legal Services and Procedure* (March 1955), 26-27.

11-45. Commission on Organization of the Executive Branch of the Government, *Legal Services and Procedure*, 27.

Digitized by Google

> years thereafter for career military legal service, and to establish the corps or department on a basis of professional independence, sound promotion, and adequate compensation.[11-46]

The commission's report, and particularly *Recommendation No. 18*, was a great boost to the pro-corps forces, adding enormous credibility to their cause. It did not, however, have a salutary effect on the line, whose position was pointedly stated by Vice Admiral James L. Holloway, Jr., USN, the Chief of Naval Personnel:

> The Hoover Commission recommendations . . . are being fully appraised . . . although I personally am inclined to accord less weight to those recommendations than I am to the views of persons who have lived, are living, and will continue to live, day-to-day, in the naval organization as it is and as it may be changed. Or, metaphorically speaking, on issues of comfort and convenience I prefer the testimony of those sleeping in beds to the remarks of those who have merely observed them and talked to some persons who sleep in them.[11-47]

The commission's report also drew the immediate attention of Under Secretary of the Navy Thomas S. Gates, Jr. Seeking to determine the

---

11-46. Commission on Organization of the Executive Branch of the Government, *Legal Services and Procedure*, 27. Since the Army already had a Judge Advocate General's Corps, and the Air Force a Judge Advocate General's Department, the substance of *Recommendation No. 18* was obviously directed at the Navy. The commission specifically recommended *against* a separate legal corps for the Marine Corps, since it was part of the Navy and, in the opinion of the commission, could draw supplemental legal services, when needed, from the Navy.

11-47. Holloway to Mott, 25 January 1956.

Digitized by Google

validity of the commission's findings, Gates called several senior Law Specialists to his office. He summoned Bill Mott, Sandy Wood, Joe Munster, John Own, and George Sullivan. The five were unanimous in their support of *Recommendation No. 18*. Gates had tapped directly into the cabal.

When Nunn found out about the meeting with Under Secretary Gates he was furious. Following upon the Newport Resolution of the previous year (see text beginning at page 549), he thought it smacked of disloyalty. At his first opportunity, and just prior to the convening of a selection board which would pick the first—and only—Law Specialist ever selected for rear admiral, he wrote what came to be known as the "kiss-of-death" fitness reports, on Wood, Munster, Owen and Sullivan.[11-48] The reports effectively ended their naval careers.

But Nunn could not do the same to Mott. Mott was the district legal officer for the Commandant, Ninth Naval District, and thus not in Nunn's chain of command. Nunn could not write a fitness report on him. So he took another tack. He had the Bureau of Naval Personnel prepare orders sending Mott to the Philippines, to a job subordinate to one he once held. Initial attempts to rescue Mott fell short:

> Admiral Nunn's attempt to send me to the Philippines was so outrageously unjust that both my Commandant and a former Commandant protested, all to no avail.[11-49]

But Mott had not played all his cards. Admiral Radford was now Chairman of the Joint Chiefs of Staff:

> Finally, Admiral Radford heard about it, called Admiral Nunn down to talk with him, and told him that he regarded the orders as "personally obnoxious."

11-48. William C. Mott, letter to Henry M. Shine, Jr., 23 November 1955.

11-49. Mott to Shine, 23 November 1955.

Digitized by Google

> "What are these orders to the Philippines that I've heard about?" asked Radford. "That's a subordinate position to one that Mott held when he was my lawyer at CINCPAC." And Nunn said, "Well, he's an expert in international law and we need him out there." And Admiral Radford, who had a steely glance, said to him, "Admiral Nunn, I'm going to give you twenty-four hours to change his orders and assign him to my staff. Do you understand? Or," he said, "we're going to meet in the Secretary of Defense's office." And that's how I became military assistant to the Chairman of the Joint Chiefs of Staff.[11-50]

In furtherance of their recommendation to establish a Judge Advocate General's Corps for the Navy, members of the Second Hoover

---

11-50. Mott, interview, 19 February 1991; Mott to Shine, 23 November 1955.
There was also vindication for the others, albeit too late to save their careers. Mott asked Captain Draper Kauffman, USN, the aide to Under Secretary Gates and a classmate and friend of Mott's, to bring the kiss-of-death reports to the Under Secretary's attention. When Gates learned of them he sent for Nunn. Without specifics, the admiral asserted that in each case the officer concerned had been caught by him in errors that had nothing to do with his position on a corps. Not satisfied with this explanation, Gates sent for Mott. Mott gave him more background on Nunn's antagonism to a corps, the kiss-of-death fitness reports, and his own orders to the Philippines. Gates, convinced by Mott, had the matter reviewed by the Board for the Correction of Naval Records, and the kiss-of-death fitness reports were removed. Then he again sent for Nunn:

> "Admiral Nunn," he said, "you will never again serve in the Pentagon while I'm here." And he sent him first to Korea and second to Norway, and he never did serve in the Pentagon again.

Mott, interview, 19 February 1991; William C. Mott, letter to George A. Sullivan, 31 October 1955. William C. Mott, letter to Joe H. Munster, Jr., 19 December 1955; William C. Mott, letter to Chester C. Ward, 19 December 1955; William C. Mott, letter to Mack K. Greenberg, 27 December 1955.

Digitized by Google

Commission's Task Force drafted a bill for that purpose.[11-51] They enlisted the aide of a pro-corps advocate, Representative Frank Thompson of New Jersey, to introduce the bill in the House of Representatives of the Eighty-fourth Congress on 9 May 1955.[11-52] Thompson intended that the bill, H.R. 6115, be referred to the Committee on the Judiciary for hearings. He had caught the House leadership, which was aligned with the anti-corps Navy leadership, off guard. It rallied quickly, however. Summoning Thompson to the well of the House, Speaker Sam Rayburn deflected the intended referral of the bill to the Judiciary Committee. Representative Carl Vinson then co-opted it as his own, re-introducing it as H.R. 6172 and referring it to the Committee on Armed Services, of which he was the chairman. There the bill lay dormant, awaiting the recommendation of the Department of Defense, which was not eager to get into the pro-corps versus anti-corps fray. Several months later, on 18 October 1955, Defense adopted the Navy's position on the bill:

> The Navy opposes a separate JAG Corps because it desires to keep separate organizations for specialists to a minimum. . . . [A]ccordingly the Department of Defense does not concur in the desirability of forcing the Navy to establish a separate corps or department.[11-53]

11-51. Henry M. Shine, Jr., interview with author, 8 March 1996.

11-52. "A bill to improve legal services in the executive branch of the Government by . . . establishing certain offices within the Department of Defense . . . and creating a Judge Advocate General's Corps for the Navy, and for other purposes." *Congressional Record*. 84th Cong., 1st sess., 1955. Vol. 101. The reader may recall that the first recommendation for a Navy Judge Advocate General's Corps had been made by Secretary of the Navy Long in 1898. See text beginning on page 246. It was now 1955 and the first legislation to effect that purpose had finally been introduced.

11-53. Captain Mitchell K. Disney, USN, Director, Legislative Division, Office of the Judge Advocate General of the Navy, memorandum to Rear Admiral Robert H. Hare, USN, Deputy and Assistant Judge Advocate General of the Navy, Subject: "Legislative History and Background of Navy Judge Advocate's General Corps," 1965?, at 2.

Digitized by Google

The bill, under Vinson's control, never surfaced in the Eighty-fourth Congress. This came as a disappointment but not a surprise to the pro-corps forces, which spoke frequently of Nunn's influence with Vinson and his committee.[11-54] Also, for most members of Congress, the matter of a Navy Judge Advocate General's Corps was not a pressing concern. The majority were as unaware of the issues as their brothers had been when debating the abolition of the Office of Naval Solicitor in 1878 (see text beginning at page 167).[11-55]

Also before the Eighty-fourth Congress for consideration were a series of recommendations for improvements to the *Uniform Code of*

11-54. See, for example, Mott's letter to George A. Sullivan, 4 January 1956, where he speaks of "Nunn's proven ability to control the House Armed Services Committee," and his letter of 20 January 1956 to Captain Robert G. Burke, USNR:

> I know Admiral Nunn is of the opinion that he has H.R. 6172 safely bottled up in committee under the protecting arm of Carl Vinson.

Bills similar to H.R. 6172, also introduced during the Eighty-fourth Congress, met similar fates: H.R. 7420 by Church; S. 2502 by Wiley; and S. 2527 by McCarthy. Shine, interview, 8 March 1996. The bill's chances in the Senate were no greater than its chances in the House:

> Bob Powers [*Captain Robert D. Powers, Jr., USN, a pro-corps Law Specialist—ED.*] says he talked to Senator Byrd about the corps bill—the Senator thinks it will be "introduced at the right time" whatever that is, and said he thinks highly of Nunn. Powers believes we have little or no chance of success until Nunn is gone.

Robert A. Fitch, letter to William C. Mott, 24 January 1956.

11-55. See, for example, Congressman James C. Murray's letter of 23 January 1956 to Daniel Walker, Esq. Murray was a member of the Illinois Congressional delegation:

> I am greatly surprised that the Navy does not have a Judge Advocate Corps and had assumed it had one similar [to that of the Army]. . . .
> Thank you for calling this matter to my attention.

Digitized by Google

Military Justice. Of these proposals, seventeen had been agreed upon and recommended by the "Code Committee,"[11-56] an advisory body established under the *Uniform Code of Military Justice* comprising the judges of the Court of Military Appeals, the three Judge Advocates General, and the Chief Counsel of the Treasury Department (the latter at that time having had peacetime jurisdiction over the Coast Guard).[11-57] The judges specifically refused to endorse a number of additional proposals advanced only by the Judge Advocates General that they viewed as "hostile to the beneficent purposes of the *Uniform Code of Military Justice* and contrary

---

11-56. The recommendations were first put forth in the Court of Military Appeals's second "annual" report, covering the period from 1 June 1952 to 31 December 1953. "The Annual Reports on UCMJ," *The Judge Advocate Journal* (July 1955): 18. They did not receive expedited treatment; it was not until 18 April 1956 that Judges Quinn and Latimer testified on the proposals before the House Armed Services Committee. George A. Sullivan, letter to William C. Mott, 18 April 1956. Judge Latimer was not optimistic as to the chances for further action:

> No doubt by this time you have received information that the proposed amendments are now bottled up in the [House Armed Services] Committee. I am afraid that spells the death knell of the bill and it may be that [committee chairman] Vinson's handiwork can be seen in the background.

Latimer to Mott, 16 May 1956. Latimer was prophetic. Notwithstanding repeated attempts over the next several years, with but one exception (noted below), the reform legislation sponsored as an omnibus bill by the Code Committee was not enacted until 1968. Act of 24 October 1968, 82 Stat. 1335, "*The Military Justice Act of 1968*."

The one exception was a 1962 amendment to Article 15 of the *Uniform Code*. Public Law 87-648, enacted in that year, gave commanding officers substantially increased non-judicial punishment authority. Act of 7 September 1962, 76 Stat. 447.

11-57. Jurisdiction over the Coast Guard in peacetime was transferred to the Department of Transportation in 1966. Act of 15 October 1966, 80 Stat. 931. In time of war, control of the Coast Guard is transferred to the Department of the Navy.

The Code Committee ultimately came to include, in addition to those named above, the Staff Judge Advocate to the Commandant of the Marine Corps, and two public members appointed by the Secretary of Defense. The committee was disestablished by legislative amendment in 1989.

Digitized by Google

to the will of Congress."[11-58] Paramount among these were several proposals advanced by Ira Nunn, the Judge Advocate General of the Navy.[11-59]

11-58. Annual Report of the United States Court of Military Appeals for the period January 1, 1955, to December 31, 1955, Joint Report, 3.

Even as they attacked the motive behind the Judge Advocates Generals' proposals, the judges of the Court of Military Appeals attempted to reassure them that they understood their concerns. Speaking on 24 September 1953 at the Forum on Military Justice held at the Law Center, New York University Law School, Chief Judge Quinn stated the following:

> We have not lost sight of the necessity for discipline in military law. We will not lose sight of the fact that the first obligation of armies and navies is to fight and win wars. We will never do anything to improperly interfere with the efficient operation of our military forces. But consistent with these objectives, we will do everything in our power to see that every member of the military forces accused of crime gets a fair and speedy trial, and an absolutely square deal.

Source: Dr. Jonathan Lurie, historian for the Court of Military Appeals, and author of a history of the court, *Arming Military Justice* (Princeton: Princeton University Press, 1992).

11-59. Among Nunn's proposals were recommendations that would have accomplished the following:

- Increased the range of non-judicial punishment and the class of persons authorized to administer it.
- Made the law officer of general courts martial a voting member of the court.
- Permitted, in certain instances, the trial of cases by one-member courts.
- Increased the range of punishments of summary and special courts-martial.
- Removed the disqualification of investigating officers, law officers, and court members from subsequently acting as trial counsel in the same matter.
- Permitted earlier execution of portions of sentences not requiring review.
- Eliminated review by boards of review in "guilty plea" cases.

(continued...)

Digitized by Google

11-59. (...continued)

± Created a new punitive article to cover "bad check" violations.

"The Annual Reports on UCMJ," *The Judge Advocate Journal* (July 1955): 20.

Typical of the reactionary viewpoint underlying the Nunn proposals, as well as the lingering animosity that commanders held toward lawyers, was the attitude of Vice Admiral James L. Holloway, Jr., the Chief of Naval Personnel. In a letter to the Chief of Naval Operations, Admiral Arleigh A. Burke, USN, on 10 February 1956, he attacked the *Uniform Code* as having been "foisted" on the line by "that large majority of the legal fraternity whose view of the military personnel woods is obscured by their proximity to individual saplings." He went on to laud the paternalism of the *Articles for the Government of the Navy* and their roots in British and Roman law:

> We must restore the powers—largely paternal ones—formerly vouchsafed our captains in the *Articles for the Government of the Navy*. The *Articles* served us well for centuries, their soundness perhaps being best exemplified by the observation of John Adams . . . that they were derived almost verbatim from Codes employed by two empires—The British and The Roman—which had attained the peak of World power.

Chief of Naval Personnel, memorandum to Chief of Naval Operations, 10 February 1956. The Second Hoover Commission had condemned this antagonism toward the *Uniform Code* on the part of senior line officers:

> [N]onattorney officers of senior rank should be encouraged to attend a . . . school of military justice. Our belief stems from the conviction that officer-attorney professional independence has suffered in all services by reason of the resistance of some responsible officers to the *Uniform Code of Military Justice* and the Court of Military Appeals. This resistance is usually based upon unwarranted allegations that the *Code* is impractical or unworkable and imposes unreasonable costs in the administration of military justice.

Commission on Organization of the Executive Branch of the Government,
(continued...)

Digitized by Google

Nunn was outspoken in his opposition to those provisions of the *Uniform Code* that took away the absolute powers of commanding officers and replaced them with procedural protections for the accused. He felt that such provisions imposed unreasonable burdens on commanders, stood in the way of administering discipline swiftly and informally, made criminals of sailors by criminalizing offenses that had previously been disposed of administratively, and led to overcrowded brigs.[11-60] Despite the reasonably successful experience in Korea, he remained adamant and vocal in his belief that the *Code* would not work in time of war, stating in his annual report for 1954 that the resulting failure of the military criminal process would cause such a loss of discipline and order as to jeopardize the success of military operations.[11-61]

11-59. (...continued)
Legal Services and Procedure, 29-30.

11-60. Nunn claimed that before the advent of the *Code* the Navy and Marine Corps were confining three and one-half persons per thousand, as compared to eight persons per thousand after the *Code*'s implementation. Ira H. Nunn, "Problems of Maintaining Discipline and Administering Justice," speech given at U.S. Atlantic Fleet seminar on discipline and the *Uniform Code of Military Justice*, U.S. Naval Base, Norfolk, Virginia, 17 December 1953. Nunn did not say to what degree, if any, the Korean War was believed to have been responsible for the increase in confinements.

Nunn was by no means isolated in his opinion. According to Generous, a 1953 report by a board headed up by a chaplain, Rear Admiral Robert J. White, CHC, USNR, (Ret.) found that in sixty-three percent of the court martial cases examined, the penalties imposed were only slightly more stringent that those authorized by Article 15, the nonjudicial punishment provisions of the *Code*. Father White's conclusion was that if these slightly harsher penalties had been available under Article 15, as they had been under the *Articles for the Government of the Navy*, the commanders would have disposed of the cases using the more expeditious and far less stigmatizing nonjudicial proceedings. The White Board concluded that this weakness in Article 15 had a detrimental effect on naval discipline. Generous, *Swords and Scales*, 126-27.

11-61. "The Annual Reports on UCMJ," *The Judge Advocate Journal* (July 1955): 19. At the field level, where discipline was actually being administered, things seemed to progress with far less anxiety. Don Chapman's observation is pertinent:

(continued...)

Digitized by Google

While Nunn would have favored a return to the paternalistic system that existed under the *Articles for the Government of the Navy*, he nevertheless recognized that the *Code* was here to stay, and moved to reconstruct it within the legislative system.[11-62]

Concerned that the Nunn proposals, as well as those suggested by the other Judge Advocates General, would set back the advances made under the *Uniform Code* to provide protections to service personnel, the National Commander of the American Legion appointed a Special Committee on the *Uniform Code of Military Justice* and the U.S. Court of Military Appeals, headed by Brigadier General Franklin Riter, USAR (Ret.), to study the pending legislation and make recommendations

---

11-61. (...continued)

> When Ira Nunn came in as Judge Advocate General, his theory was that the *UCMJ* would not work in time of war. That was the message that we were getting from the front office: "The *UCMJ* will not work in time of war." But I didn't see any great difference between the *Articles* and the *Code*. There was concern, of course, about the amount of paperwork. It did impose more paperwork until it got settled down, but I think everybody just said, "Well, this is the law. We've got to live with it and make the best of it."

Chapman, interview, 18 July 1991.

11-62. Mott learned that Admiral Radford was going to be asked to testify before the House Armed Services Committee in favor of the Nunn proposals, to go on record as stating that the *Uniform Code* would break down in time of war without the changes suggested by Nunn. Ever-suspicious of Nunn and his motives, Mott wrote to Alfred Proulx, the Clerk of the Court of Military Appeals, to determine whether anyone on the court staff had ever made an objective analysis of Nunn's proposals, and why they should or should not be enacted. When Proulx responded in the negative, Mott arranged to have a law school professor perform a two week tour of active duty in his office to analyze what had by then become known as the "Nunn Bill." See Mack K. Greenberg , letter to William C. Mott, 24 and 25 December 1955; William C. Mott, letter to Alfred C. Proulx, 28 December 1955; Alfred C. Proulx, letter to William C. Mott, 5 January 1956; William C. Mott, letter to William C. Jones, 9 January 1956.

Digitized by Google

thereon to Congress.[11-63] In addition to its investigation into the *Code* amendments, the American Legion committee also inquired into the Hoover Commission's proposal for a Navy Judge Advocate General's Corps, thus illustrating how the *Code* and the Navy's legal structure were interrelated in the minds of many observers. Appearing, among others, as witnesses on the matter of the Navy Judge Advocate General's Corps were Ziggy Neff (as noted above, a commissioner at the Court of Military Appeals), and Henry M. Shine, Jr. Shine, a Naval Reserve lawyer, who had written a factually persuasive and thoroughly documented article advocating the establishment of a Navy Judge Advocate General's corps. The Shine article was published in the *Federal Bar Journal* and touted by the pro-corps forces.[11-64]

Shine testified before the American Legion committee on 30 April 1956.[11-65] He wrote to Mott the following month concerning his testimony:

11-63. In addition to Riter, the committee consisted of John J. Finn, counsel to the American Legion, and Carl C. Matheny. F. Trowbridge vom Baur, letter to William C. Mott, 2 May 1956. One of the witnesses before the committee speaking in favor of the seventeen Code Committee proposals was Judge George W. Latimer of the Court of Military Appeals. See footnote 11-10 and related text.

11-64. Shine, "A Judge Advocate General's Corps for the Navy?" A full citation to the article appears in footnote 11-3.

Shine had served as an assistant to Commissioner Robert G. Storey of the Second Hoover Commission, and as a consultant to the Task Force on Legal Services and Procedure. At the time he wrote his article, Shine was a lieutenant commander in the Naval Reserve Law Program. For his efforts, Shine remained a lieutenant commander for over a decade. After the establishment of the Judge Advocate General's Corps in 1967, and with the intercession of the Judge Advocate General, Joe McDevitt, who told him "You've done penance enough," he received a long-overdue promotion to commander. Up to that time Shine had not requested transfer to the corps, so as not to give the appearance of attempting to advance his self-interest. He retired as a captain.

11-65. In addition to the formal testimony of Neff, Shine, and others, on the question of a Judge Advocate General's Corps for the Navy, the committee had informal contact with George Sullivan and Bill Mott. William C. Mott, letter to George A. Sullivan, 7 May 1956.

Digitized by Google

> The Committee . . . took testimony . . . relative to the Hoover Commission proposals for a Navy JAG Corps. . . .
>
> I called to the Committee's attention the harm that had been done to the records of those Navy captains who followed the mandate of the Congress when the Hoover Commission was created, and who gave their personal viewpoints in adherence to the directive of Secretary of Defense Wilson. [*Shine was referring to the recommendations by Captains Wood, Munster, Owen, and Sullivan, to Under Secretary of the Navy Gates, that a Navy Judge Advocate General's Corps be established, and the "kiss-of-death" fitness reports that they received from Nunn as retribution.—ED.*] As a result, I am convinced the Committee is properly impressed with the need for a JAG Corps to insure that the Navy implements and administers the *Code* as Congress intended.
>
> . . .

Shine then told Mott of a recent conversation he had had with Herbert Hoover:

> Three weeks ago former President Herbert Hoover was here in Dallas, and I mentioned to him the so-called "kiss-of-death" fitness reports. He was advised that the reports were of such a nature that they did not permit a reply from the officer concerned but were in the aggregate sufficiently poor to be irrevocably damaging to promotion opportunities.

Digitized by Google

When Hoover expressed an interest in the plight of the aggrieved officers, Shine suggested in his letter to Mott that it might be "an excellent opportunity to . . . force or embarrass the Department of Defense to endorse a Navy JAG Corps in order to prevent a recurrence of such discriminatory action."[11-66]

The pressure on Nunn was mounting. The Second Hoover Commission report; the threat of legislation to establish a corps; the covert but effective influence of the cabal; Congressional interest; criticism from the Court of Military Appeals; agitation from the civilian bar; recruiting problems; absence of flag-rank opportunities for Law Specialists; the American Legion committee hearings; the "Newport Resolution;" accusations of low morale within the Navy's legal community; these all combined to force Nunn to address the legal corps issue. On 15 October 1955, Ira H. Nunn, the Judge Advocate General of the Navy, wrote an eleven-page letter to all 398 Navy Law Specialists, Regular and Reserve, on active duty.[11-67] Each copy was personally addressed. Each was marked "PRIVATE - OFFICIAL," a classification not defined in naval directives.[11-68] Each letter was written in an informal

---

11-66. Henry M. Shine, Jr., letter to William C. Mott, 15 May 1956.

11-67. The letter was generally understood to have been drafted by Nunn's executive assistant, Herb Schwab. Alfred C. Proulx [Clerk of the Court of Military Appeals], letter to William C. Mott, 8 November 1955. One of Schwab's former commanding officers concurred in this estimation:

> Captain Walter Prien, who's our Dental Supply Officer here [at Great Lakes], used to have Schwab as his executive officer when the latter was in the Supply Corps. On reading the letter, Captain Prien said he could well understand that Schwab was the author because he never understood the Corps organization when he was in it.

Mott to Ward, 19 December 1955.

11-68. The "PRIVATE - OFFICIAL" term used by Nunn was intentionally vague, to hinder public airing of the corps issue. Writing to George Sullivan, Mott mentioned that he had several of his officers researching the meaning of the term to determine what obligations were put upon him to keep both Nunn's letter and any response "out of the stream of public opinion." "The more I think about the letter," said Mott, "the more I have to acknowledge that its method of promulgation was (continued...)

Digitized by Google

style, rather than the prescribed format of the standard Navy letter, and was not routed via official channels, but was nevertheless typed on paper bearing the letterhead of the Judge Advocate General of the Navy and the seal of the Department of Defense. The letter was unalterably anti-corps. Its purpose was to indoctrinate those who had not yet formed an opinion on the corps issue, fortify those who lay in Nunn's camp, proselytize those who opposed him, and strand those who refused to convert. Almost immediately following its distribution, Nunn's missive was dubbed the "Scarlet Letter."[11-69]

Nunn opened his remarks by expressing his regret that he was unable to address personally all the Law Specialists.[11-70] He then stated that the primary purpose of the letter was to dispel doubts related to the future of

---

11-68. (...continued)
pretty cute." Mott to Sullivan, 31 October 1955. Mott eventually concluded that the term had no standing in naval law. Mott to Shine, 23 November 1955.

11-69. Although bearing no metaphorical connection, the term was borrowed from the 1850 novel of the same name by Nathaniel Hawthorne. In the novel one Hester Prynne, a seventeenth century Massachusetts settler, had been convicted of adultery and was sentenced to wear a scarlet letter in the form of a capital "A" sewn onto the bosom of her dress.

Mott disavowed any part in the labeling of the Scarlet Letter, both for himself and for any of the other likely "suspects." In a letter of 7 December 1955 to Captain Robert D. Powers, Jr., Mott says that "The law specialists who gave a name to the letter and so described it [as the Scarlet Letter] were *not*, by the way, captains." If he knew who did name the letter, Mott did not reveal it.

When Nunn left office in 1956, he left behind his "Scarlet Letter" file. It was found by George Sullivan (see Greenberg, interview, 14 May 1992), and the file was apparently supplemented with related papers of Sullivan, Mott, and others. They, too, left it behind, and for years the Scarlet Letter papers, comprising an indexed file of some 177 documents upon which the following account is based, lay forgotten in a cardboard box on the floor of a closet in the office of the Deputy Judge Advocate General. It was discovered when the research for this book was begun. In the file was Mott's copy of the Scarlet Letter sent to him by Nunn. Mott's marginalia on this copy reflect his distrust of Nunn and the polarization that the pro-corps versus the anti-corps issue had generated. A facsimile of Mott's copy of the Scarlet Letter, containing Mott's marginal notations, is reproduced at Appendix F.

11-70. The reader will recall that, at the only conference of Law Specialists convened during Nunn's tenure, at Newport, Rhode Island, in 1954, Nunn had failed to appear.

Digitized by Google

the Law Specialist Program, and to "define again the purpose toward which the legal arm of the Navy must strive."

He argued that the establishment of a Judge Advocate General's Corps, as "urged by some senior law specialists," favored the Law Specialists to the detriment of the naval service, since it would set them apart—indeed isolate them—from the line of the Navy. He discounted the prevalence of command influence under the existing system, and asserted that under the *Uniform Code* "the effective exercise of command influence to the substantial prejudice of an accused . . . is practically impossible."

Nunn created bogeymen, playing to the fears of his audience. He asserted that there was an "insidious danger" that a corps organization would lead to an inequitable selection system, where the junior lawyers in the corps would be evaluated exclusively by lawyers senior in rank, rather than by their line officer "clients." Such a system, Nunn warned, would permit a single officer, or a very few officers, to control the promotion opportunities of their subordinates throughout their careers.[11-71]

Blurring the distinction between Law Specialists and Law PGs, Nunn played on the myth that the Law Specialist was an integral member of the line community,

> a member of the operating team of the Navy and, as such, [one whose] services would be of greater scope and value. . . .
>
> The law specialist has made his name in the Navy as much by his contribution outside the field of law as by the contributions he has made within his specialty.[11-72]

11-71. For the benefit of readers not familiar with the organization of the Navy Judge Advocate General's Corps, or the Navy promotion system, the author is constrained to point out that Nunn's argument was totally without merit or foundation. Lawyers are not rated exclusively by other lawyers, nor is it possible for a senior officer or officers to control the promotion opportunities of subordinates throughout their careers.

11-72. While this may have been true in the case of a few Law Specialists (Nunn gives the examples of those serving as flag secretary, force intelligence officer, assistant chief of staff for administration, and fleet public information officer), the overwhelming majority were restricted, both by time and regulation, to the performance of legal tasks as their overriding duty. Most "outside contributions"

(continued...)

Digitized by Google

Nunn then reminded his readers that lawyers wore on their sleeves the star of the line, an insignia "identical with that worn on the sleeve of the Chief of Naval Operations, and entitled to the same respect." Joe Munster, in a reply to Nunn, captured the sentiment of the Law Specialists in this regard:

> You point out that [the Law Specialists] have every right to be proud to wear the star of command and that we wear the same insignia as that worn by the Chief of Naval Operations. Without meaning any disrespect to that star I have the feeling that I am sailing under false colors when I wear it. I cannot, by law, exercise command. I am not qualified to exercise command at sea even though I were permitted to do so and thus I may even be detracting from the dignity of that star. I believe RADM Duke mentioned some feeling along that line in his report.[11-73] If loss of the

---

11-72. (...continued)
took the form of mundane collateral duties such as cryptographic officer, duty watch officer, casualty assistance officer, and the like; important, but hardly the type of job by which an officer "makes his name." Mott even suggested that there was a degree of risk in attempting to perform such duties:

> Any lawyer who tries to inject himself into the main stream of command today, without invitation, is in for trouble. He can contribute to that main stream, however, by proving his capabilities no matter what sleeve device he wears.

Mott to Nunn, 1 December 1955.

11-73. Munster was being charitable; nowhere was the ill-feeling against the inclusion of Law Specialists in the line more virulently expressed than in a 1954 report to the Chief of Naval Operations prepared by Rear Admiral Irving T. Duke, USN. Duke was utterly hostile, and belied Nunn's assertion of fraternalism:

(continued...)

Digitized by Google

> right to wear the star is one of the disadvantages connected with the formation of a legal corps I believe that we should, in deference to those qualified to wear the star, accept that loss gracefully. I am sure that the Navy's uniformed lawyers would work just as hard to further the nation's interests if they wore no sleeve device whatsoever.[11-74]

Nunn then asserted, without foundation, that the corps proposal would restrict the Law Specialists "to the trial and review of courts martial," thus restricting the scope of their experience and opportunities for advancement. To make his point, he presented selected data showing a greater percentage of captains and commanders in the Law Specialist

---

11-73. (...continued)

> The lumping of specialized and limited duty officers in the "Line" and permitting such officers to wear a star has reduced the prestige of those in line to command at sea. It has thus removed the historical distinction of being a member of the sea-going Navy. It has lessened the pride that shipboard officers had, since similar uniforms make them indistinguishable from large numbers of shore-based specialists. The definition of a "Line officer" should be changed to include only those in line to command at sea, and the star should be reserved as a sacred emblem of membership in this group. Officers of other qualifications should wear other emblems.

Rear Admiral Irving T. Duke, USN, *Report of Fleet Readiness and Performance Standards*, 27 January 1954, at AN 2-6, as quoted in Shine, "A Judge Advocate General's Corps for the Navy?" 321.

Although Duke did not identify Law Specialists as such, they were the only "specialized and limited duty officers" who wore the star device. Duke's report clearly exacerbated the already low state of morale among the Law Specialists.

11-74. Munster to Nunn, 18 April 1956.

Digitized by Google

group than in the Supply Corps or the Civil Engineer Corps.[11-75] He

---

11-75. While these data were correct, the reason was not attributable, as Nunn would have had his audience believe, to a rosy promotion picture. Rather, as a matter of equity with regard to the Law PGs who gained seniority while attending law school at the Navy's expense, the Regular Navy Law Specialists had been given constructive credit for time spent in law school at their own expense. Act of 5 August 1949, 63 Stat. 567. Nor did Nunn's data take into account the Reserve Law Specialists serving on extended active duty who did not receive constructive credit, and whose promotion opportunities, indeed career opportunities, were considerably dimmer than the Regular Law Specialists.

Nunn's opinion of promotion opportunities was certainly not universally accepted. The following is from the author's interview with former Deputy Judge Advocate General Chapman:

> All during that time promotions were very, very restricted. The attrition rate was murderous. Sometimes you'd have selection boards with only a sixty percent selection opportunity, at all levels. The ones who survived, those of the original 300-or-so Law Specialists who survived to make four stripes, they really went through a lot of sieves. And a lot of them were cut off coming up, so we have a lot of retired lieutenant commanders and commanders who were victims of that attrition. And also back in 1956, sometime in there, they had what they called a "hump board" because the Navy found that it had too many senior officers, three and four stripers from World War II, and they didn't have a pyramid structure. This was blocking the junior officers in their promotions because the billets were all filled at the top. So they had the hump board that reviewed the records of all commanders and captains. And under its precept, it was required to select out a certain percentage. Now mind you, these were officers who had already survived selection processes up to that grade. But mandatorily this board had to select people out. Now these guys were performers. They were not sub-marginal people or anything. So that was another cut that the lawyers faced too, along with the line. I guess it worked, but it was a very ruthless thing and it hurt a lot of people; a lot of good people. Well again, as I say, anybody that survived to get into the JAG Corps went through a lot of

(continued...)

Digitized by Google

neglected, however, to include data from the Dental or Medical Corps. If he had, they would have shown over three times the percent of officers in the grade of captain than the Law Specialists had.[11-76]

But without doubt, the most difficult argument for Nunn concerned opportunities for Law Specialists to attain flag rank. The lowest percentage of flag officers in the established corps was the .5 percent of the Supply Corps. The Medical Corps boasted 1.1 percent. The Law Specialists had none.[11-77]

11-75. (...continued)

> screening down the line. It was really bad.

Chapman, interview, 18 July 1991.

11-76. Mott to Nunn, 1 December 1955. Mack Greenberg and George Sullivan asked Herb Schwab why the Medical and Dental Corps statistics (which were unfavorable to Nunn's position) had been omitted from Nunn's letter. They were told that the data were unavailable. Mott termed this "a fraud." He was able to obtain the data through George Sullivan, and presented them to Nunn in his 1 December letter. William C. Mott, letter to Joe H. Munster, Jr., 3 November 1955.

11-77. It appears that Russell had requested authorization for three flag billets in the Law Specialist community while he was serving as Judge Advocate General:

> The problem of flag selections for the restricted line was . . . raised early in 1949. This first appeared in the form of a report of an informal meeting of [special duty] captains to discuss the problem of selection to flag rank. In their report, they recognized that while there were at present no special duty flag officers, in the very near future the [other line specialist communities] would be faced with the problem of giving up flag vacancies in order that the special duty officers have their contemplated opportunity for selection. In a letter of 17 May 1949 to the Chief of Naval Operations, the Chief of Naval Personnel recognized the difficulty in administering the provisions of the flag selections for restricted line officers and noted further that with the implementation of the *Uniform Code of Military Justice* there would be a required increase in flag officers in the office of the Judge Advocate General. The Judge Advocate General in turn requested that he have at least three flag billets and a proposal was submitted to the Chief

(continued...)

Digitized by Google

Or at least they had none until just shortly before Nunn composed his letter, for Nunn had covered his flanks. A special-duty-only flag selection board had met in July 1955 and selected William R. Sheeley, a Law Specialist, for the rank of rear admiral. Nunn was thus able to show in his letter that .4 percent of the Law Specialist group (one person) now numbered in the flag category. Even this small percentage was misleading, however, for it failed to take into account the 136 *Reserve* Law Specialists on extended active duty who were an integral component of the legal organization. With these lawyers factored in, the flag representation for Law Specialists dropped to .2 percent.

Perhaps still feeling vulnerable on this issue, Nunn took the further step of attempting to paint the corps proponents with the brush of self-interest, arguing that the push for flag billets was a ploy on the part of some senior Law Specialists to advance their personal ends:

> The three most vigorous proponents of the corps [*It was generally understood that Nunn was referring to Ward, Mott and Sullivan—ED.*] urge that its immediate effect would be the appointment of three flag officers from among their group.[11-78]

11-77. (...continued)

> of Naval Operations to increase the flag billets of the restricted line category . . . . Because of Congressional scrutiny of the number of senior officers at that time, this proposed increase was disapproved by the Chief of Naval Operations.

Report of the Board to Study the Career Management and Utilization of Line Officers Designated for Special Duty to the Chief of Naval Personnel, 20 October 1958, at 11.

11-78. While there is no way of knowing how persuasive this argument was with the Law Specialists, apparently it was used to good purpose by Nunn with his fellow line officers:

> Ira Nunn must have been able to convince the otherwise unbiased senior general service line officers that a number of senior law specialist

(continued...)

Digitized by Google

Nunn concluded his discussion of the flag-rank issue with a dramatic pledge—or so it seemed. He promised that he would recommend that a Law Specialist succeed him as Judge Advocate General:

> I am convinced that there are now several officers among the law specialists well qualified for appointment as Judge Advocate General. . . . I propose to recommend that when I am relieved I be relieved by a law specialist . . . .

Nunn's promise to recommend a Law Specialist to succeed him as Judge Advocate General was not as accommodating as it might appear, and was motivated more by resignation than enlightenment. The *Uniform Code* requirement, that anyone appointed to the post of Judge Advocate General have a total of eight years' experience in legal duties as a commissioned officer before appointment, eliminated virtually all Law PGs from consideration.[11-79] Of those few who remained in contention, the problems at Nunn's confirmation hearing eliminated any likelihood

---

11-78. (...continued)

> captains were deliberately opposing the best interests of the Navy in order to promote their own interests, and that the *sole* possible motivation of any Navy lawyers in supporting a JAG Corps was against the Navy and for self-aggrandizement. . . .
>
> By implication so clear as to be unmistakable, his letter smears three senior law specialists as working against the best interests of the Navy so that they can attain flag rank.

Chester C. Ward, letter to William C. Mott, 15 December 1955.

11-79. As of 1 February 1954, there were fifty-four Law PGs, and nineteen unrestricted line officers with law degrees, on active duty. Of these, only 26 were serving in legal billets. It is not known how many, if any, had eight years' legal experience. Task Force on Legal Services and Procedure, *Report on Legal Services and Procedure*, March 1955, Part VI, Chart II-I-5.

Digitized by Google

that the nomination of a Law PG would be favorably received by the Senate.[11-80]

In fact, Nunn had already picked his heir apparent; William Sheeley, the Law Specialist noted above who had been selected for promotion to the rank of rear admiral. At the time the Scarlet Letter was written, Sheeley was serving as "Deputy and Assistant Judge Advocate

---

11-80. George Russell, Nunn's immediate predecessor who in 1955 became the Deputy Chief of Naval Personnel for Administration, was more pragmatic about—or perhaps more resigned to—the selection of a Law Specialist as the next Judge Advocate General. Chester Ward wrote that Russell had told him

> that he intends to make "them" (presumably the General Service Line high command) face the facts of life concerning law specialists, with particular reference to the next JAG being one of same. He says there just is not anyone else qualified available.

Ward to Sullivan, 18 February 1955.

Digitized by Google

General."[11-81] There was no mystery as to whom Nunn would designate as his intended successor.

But Sheeley's selection lacked the support of the Law Specialists. It was suspect. Nunn himself was on the selection board that picked him, and was the only lawyer so sitting, having thwarted the intent of Congress by blocking the participation of other lawyers on the board.[11-82] Nunn also blocked the appointment of any special-duty-only officers to the board, although precedent called for it, so that there would be no competition in the selection of a Law Specialist; all members of the board were unrestricted line officers.[11-83] And, although there were eight Law

---

11-81. "Deputy and Assistant Judge Advocate General" was a title administratively conferred upon Sheeley by Nunn. The relevant statute, 10 U.S.C. § 5149, provided for the office of "Assistant to the Judge Advocate General," and was amended on 10 August 1956 to change the title to "Assistant Judge Advocate General." There was no statutory recognition of the "Deputy" title until the 1967 legislation creating the Navy Judge Advocate General's Corps. See *Robert Davis Powers, Jr. v. The United States*, 185 Ct. Cl. 481 (1968).

But Nunn had re-organized his office in March 1955 and chose to give his top aide the Deputy and Assistant Judge Advocate General title. This was necessary because he also created four "Assistant Judge Advocate General" positions, one each for Administration, Legislation, Military Justice, and Civil Affairs, just below the Deputy and Assistant level. These he filled with Law Specialists. Greenberg's observation was that this was done to convince Congress that the Law Specialists were holding key positions in the Judge Advocate General's Office, and speculated that they would be displaced by Law PGs after the current fall-out from the Second Hoover Commission report had dissipated. Mack K. Greenberg, letter to William C. Mott, 10 December 1955.

In the same letter, Greenberg noted that all Law PGs were being given additional duty orders as legal officers to various staffs and commands. He opined that this was probably intended to deflect criticism by the Second Hoover Commission that the Law PGs were not doing any legal work, and also to give them the necessary experience now required under the *Uniform Code* to qualify for the position of Judge Advocate General.

11-82. Chester C. Ward, letter to William C. Mott, 10 January 1956. According to Ward, there were three rear admirals holding law degrees on duty in the Washington area at the time the selection board convened. Chester C. Ward, letter to George A. Sullivan, 28 June 1956.

11-83. According to Mott, the board had been instructed to select a Law Specialist for the rear admiral billet. Ward to Mott, 10 January 1956. Sheeley's "flag" came from one of the other line specialist communities, and was probably an

(continued...)

Digitized by Google

Specialists senior to Sheeley eligible for promotion, some unquestionably better qualified, the board dipped six years below zone to pick Sheeley.[11-84]

Sheeley had obviously been picked at Nunn's urging in order to use the fact of his selection in the Scarlet Letter to de-fuse the argument of the pro-corps forces that Law Specialists could not get promoted to flag rank. But there were also reasons for picking Sheeley specifically, and not one of the other Law Specialists. First, Nunn could control him. And second, many in the Law Specialist community felt that Nunn picked Sheeley because he was incompetent and would embarrass the Law Specialists as a flag officer-Judge Advocate General, thus vindicating the Law PGs. Chester Ward relayed their position:

> Some of my friends . . . are writing me that they strongly suspect that Nunn deliberately picked Scheeley [*sic*] so that the first law specialist flag officer-JAG would fall flat on his face. . . . Nunn simply doesn't know enough about law to distinguish a lawyer from a palooka. It took Scheeley [*sic*] three days to

---

11-83. (...continued)
anomaly. It was not likely that they would give up another one when Sheeley retired. As matters developed, they were never called upon to do so. The use of emergency powers by the President in 1961, and again in 1964, bestowed flag rank on the Assistant Judge Advocate General "while so serving." See *Powers v. United States*, 185 Ct. Cl. 481 (1968). The 1967 legislation creating the Navy Judge Advocate General's Corps provided that the Deputy Judge Advocate General (as he was then—and now—called) would hold the rank of rear admiral. Act of 8 December 1967, 81 Stat. 545, 546. See also footnote 10-87. Sheeley was thus the only Law Specialist ever to have been selected for flag rank.

11-84. Commenting on this aspect of the selection process, Chester Ward said:

> I simply cannot believe that the selection board could have been convinced (unless the records were falsified in the briefing) that none of the lawyers senior to Sheeley were competent.

Ward to Mott, 15 December 1955.

Digitized by Google

Rear Admiral Chester C. Ward, USN, Judge Advocate General of the Navy, 1956 to 1960. (Office of the Judge Advocate General of the Navy)

give Arleigh Burke an answer which should have been made within 30 minutes, since all the research had been completed last fall."[11-85]

But the most beguiling aspect of the Scarlet Letter was Nunn's invitation for replies. He told the Law Specialists that they were to "feel free" to respond to him with their views on the matters discussed in the

11-85. Chester C. Ward, letter to William C. Mott, 24 February 1956. See also Chester C. Ward, letter to William C. Mott, 28 June 1956; Ward to Sullivan, 28 June 1956; Edward H. Jones, memorandum to Dan O'Brien, 12 June 1956.

Digitized by Google

letter. Mott's initial reaction to this invitation, handwritten in the margin of his copy of the Scarlet Letter, was "and what happens then?" Later, Mott paraphrased the invitation and adopted a more relevant response, suggested to him by Commander Ed Kenny:

> Feel free to write to me. If I don't like what you say, we'll talk it over. After all, airmail from the Philippines is very swift these days.[11-86]

The substance of the Scarlet Letter—which made the same hackneyed arguments for keeping the Law Specialists in the line that had been discredited time and again by all objective observers—was not nearly so important as the fact that it was written at all, for it showed that the pro-corps forces, both within and without the Navy, had grown strong enough to force Nunn to defend his anti-corps position.[11-87]

The inclination of most recipients of the Scarlet Letter was to do nothing. Many of the junior officers were unfamiliar with the issue, or chose to ignore it. The mid-grade officers, most of whom sided with the pro-corps forces, feared reprisal by Nunn, and wisely chose not to respond. As for the senior Law Specialists, all save Nunn's immediate coterie disagreed with their boss. They felt the letter to have been written in bad faith, and felt that only those Law Specialists who didn't know the facts, or those who were in search of personal gain, would answer it in the affirmative. Most, however, felt it both futile and foolhardy to respond directly to Nunn, although all agreed that the matter could not just sit, as

---

11-86. Mott to Munster, 3 November 1955; Edward F. Kenny, letter to William C. Mott, 26 October 1955.

11-87. As noted above (see text beginning at page 544) the "pro-corps" forces believed that the overwhelming majority of their grievances could be resolved short of establishment of a corps. In fact, their focus now became to neutralize Nunn's arguments in the Scarlet Letter and, if possible, wrest control of the Navy's legal organization from the line. A corps could come later. With the reader's indulgence, however, and for the sake of convenience, they will continue to be referred to as "pro-corps."

Digitized by Google

Nunn would claim acquiescence through silence. It was into this latter group, of course, that Mott and the rest of the cabal fell:

> I would like to suggest that [we] take no precipitate action, but await a comparing of notes so that we do not lose one single argument. We have many to refute the statements, the straw men, the inaccuracies, and the imaginary horribles which are depicted in the letter. I think a beautiful job can be done in rebuttal. The only question is: What should be the method of presentation? I think, for instance, that this gives us an opportunity to open up the question with Arleigh Burke, which I would be willing to do in order to avoid washing dirty linen outside. If we fail, however, to get any kind of fair hearing, there is only one course of action to take in my judgment, and that is to have someone write the rebuttal who cannot be given a kiss-of-death fitness report or be sent to the Philippines![11-88]

The matter became personal and bitter. George Sullivan wrote to Mott on 27 October 1955. The tone of his letter reveals how deep-seated was the animus between the opposing sides:

> Nunn is gadding about with an olive branch in his teeth these days with the hand of friendship extended to all(?) law specialists—of course the other hand is clasping a long sharp knife with which to give

11-88. William C. Mott, letter to George A. Sullivan, 25 October 1955.

Digitized by Google

> certain people an encouraging pat in the back![11-89]

Chester Ward, meantime, had taken his own course of action. He had petitioned Admiral Radford in an attempt to get his support to pressure the Navy Department to set up a hearing panel to review the entire subject.[11-90]

One of the first replies to Nunn, and certainly the first negative reply, came from Bob Powers. In a short letter on 9 November 1955, Powers told Nunn that he believed a legal corps would be in the best interest of the Navy and its lawyers.[11-91] Confirming the general opinion that he would turn a deaf ear to such arguments, Nunn replied to Powers that "the law specialists uniformly oppose the establishment of a corps."[11-92]

By mid-November, Mott felt that he would have to write a rebuttal. He wrote to Fitch, "I . . . am prepared to write such a letter, documented in detail."[11-93] Fitch, too, was so committed, and on 29 November 1955 he sent a reply to Nunn in which he took issue with the Scarlet Letter.[11-94] In addition to his "personal" reply to Nunn, Fitch sent an official letter to the Chief of Naval Operations, requesting a review of the matter. He forwarded copies of both to Mott, accompanied by a note in which he said:

11-89. George A. Sullivan, letter to William C. Mott, 27 October 1955.

11-90. William C. Mott, letter to Edward T. Kenny, 24 October 1955. Mott subsequently made a similar request to Arleigh Burke and Under Secretary Gates a few weeks later. William C. Mott, letter to Trowbridge vom Baur, 7 December 1955. Neither Ward's nor Mott's effort was successful.

11-91. Robert D. Powers, Jr., letter to Ira H. Nunn, 9 November 1955.

11-92. Ira H. Nunn, letter to Robert D. Powers, Jr., 28 November 1955.

11-93. Mott to Fitch, 17 November 1955.

11-94. Robert A. Fitch, letter to Ira H. Nunn, 29 November 1955.

Digitized by Google

> [W]e must avoid anything that could be charged as a combination (or a gang) which we all know is prohibited by Navy Regs.[11-95]

Nunn intended to use the Scarlet Letter as the cornerstone in his design to retain line control of the Navy's legal organization. For this reason he widened the letter's circulation. In addition to its indicated distribution to all Law Specialists, Nunn arranged undisclosed dissemination to Charles E. Wilson, the Secretary of Defense; Under Secretary of the Navy Thomas Gates; Assistant Secretary of the Navy for Personnel and Reserve Forces, Albert Pratt; Chief of Naval Operations Arleigh Burke; Chief of Naval Personnel James Holloway; and Captain David L. Martineau, USN, head of the Current Plans Section of the Bureau of Naval Personnel. And then he went further. Knowing that the Law Specialists were legally prohibited from lobbying directly for a corps, and that they depended on the support and assistance of surrogates from the civilian bar and Reserve Law Program, Nunn attempted to influence these supporters as well. He sent the Scarlet Letter to Naval Reserve Law Specialist Captain Robert G. Burke, a director of the Judge Advocates Association, and arranged a personal meeting with him in New York.[11-96]

When Mott learned of Nunn's strategy he decided that he must prepare a response, not for Nunn's benefit (who could not be persuaded by

---

11-95. Robert A. Fitch, letter to William C. Mott, 28 November 1955.

11-96. William C. Mott, letter to Chester C. Ward, 5 December 1955; Mott to Sullivan, 31 October 1955.

The Judge Advocates Association was, and is, an organization open to military lawyers, active and inactive, of all the armed services. Its membership has traditionally comprised a majority of inactive duty Reserve lawyers. Its support, as a surrogate spokesman for the pro-corps forces, was vital. Writing of this support, Mott said "The only way [we can bring the corps issue before Congress] is through public demand, and that public demand can be generated only by the bar associations and individuals who know the story and will fight for a hearing. There is little [the active duty Law Specialists] can do . . . but there is much that Reserve officers and civilian lawyers can accomplish. Mott to Wood, 23 January 1956.

Bob Burke had been tasked by the other directors of the Judge Advocates Association to draw up a supporting memorandum for a resolution favoring a legal corps for the Navy. Mott was concerned that Nunn was trying to influence him otherwise. Not incidentally, Mott was one of the "other directors" of the Association. William C. Mott, letter to George W. Latimer, 19 December 1955.

Digitized by Google

anything Mott said), but to lay his case before those outside the Law Specialist community whom Nunn had sought to inculcate:

> I probably never would have written my [response to the Scarlet Letter] had I not learned that Admiral Nunn was distributing copies of the "Scarlet Letter" outside the Navy Department . . . . So far as I was concerned, that was the straw that broke the camel's back, and I decided that answer would have to be made or he would be able to say to Congress that he had not received any unfavorable replies.[11-97]

On 1 December 1955, Mott delivered his response to Nunn. What had taken Nunn eleven pages to present, Mott answered in twenty-four. Mott's letter, which rebutted in exquisite detail every point advanced by Nunn, became the manifesto of the Law Specialist, pro-corps movement.[11-98] He concluded his letter with a challenge to Nunn:

11-97. Mott to Wood, 23 January 1956. Mott was also convinced that Nunn was hiding facts from Arleigh Burke, persuading him that there were neither problems of professional competence nor discontent within the Law Specialist community.

11-98. At the time he wrote, Mott was only the eleventh most senior captain (out of twenty-nine) among the Law Specialists. Obviously it was not his seniority that gave Mott's response the weight it carried. Mott, in brief, held influence. A Naval Academy graduate, Mott numbered among his close associates many senior unrestricted line officers. He had served as a naval aide or adviser to Presidents Roosevelt, Truman, and Eisenhower, and was personally acquainted with Chiang Kai-Shek, the president of Nationalist (non-communist) China, who represented a vital American interest in the Far East at that time. He had ties to businessmen, Congressmen, and jurists, and he had the full confidence of the pro-corps forces. When he wrote, they implicitly lent their support to his cause.

It is sufficient for an understanding of the events of the time to note only that Mott's reply fully and logically rebutted Nunn's arguments. The more important of Mott's points have already been presented in connection with the foregoing discussion of the Scarlet Letter. For the reader wishing to review Mott's reply in full, a copy appears at Appendix G. For a summary of Mott's proposals for the shape

(continued...)

Digitized by Google

> Would you consider then duplicating this response and distributing it to all law specialists so they may have an opportunity to sift and conclude? If I have misstated any fact, I would appreciate, too, a correction.[11-99]

When Nunn refused to accommodate him (Mott had not expected that he would), Mott undertook his own distribution. He sent copies of his response to everyone to whom Nunn had sent copies of the Scarlet Letter, including Admiral Burke, Vice Admiral Holloway, and Under Secretary Gates. He then broadened his circulation to persons whom Nunn had not contacted, always including a copy of the Scarlet Letter with his own letter. He sent his response to key Law Specialists, both active and inactive duty. He included Trowbridge vom Baur, the civilian General Counsel of the Navy. Henry Shine was on his list, as was Frederick Bernays Wiener, the retired Army judge advocate and noted legal scholar.[11-100] The judges of the Court of Military Appeals were

---

11-98. (...continued)
of the Navy's legal organization, see text beginning at page 588.

11-99. On 4 January 1956, in a letter to Mott, Nunn declined Mott's challenge. "I do not believe that it would be proper or appropriate to afford your letter any distribution other than that already accomplished by you, inasmuch as I recognize you as speaking only for yourself, as an individual law specialist, and not as speaking for any group."

11-100. In his cover letter to Wiener, Mott said:

> Admiral Nunn has already attempted to have me ordered to the Philippines, but his attempt backfired when Admiral Radford found out about it and directed that my orders be canceled. When he receives the enclosed letter he will probably try to send me to Adak. [*Adak is a naval outpost on a remote island of that name in the Aleutian Chain off the coast of Alaska.—ED.*]

William C. Mott, letter to Frederick Bernays Wiener, 9 December 1955. Wiener did not share the euphoria of some others upon receiving Mott's reply. He wrote back to Mott stating:

(continued...)

Digitized by Google

included,[11-101] together with leaders of the American Bar Association and the Judge Advocates Association. Through the good offices of Ziggy Neff, the counsel for the House Armed Services Committee was induced to request copies.[11-102] And, through the intercession of certain Reservists, Senator Bourke Hickenlooper of the Foreign Relations Committee, and Senators Stuart Symington and others from the Armed Services Committee, were made aware of the issue.[11-103] In this way Mott succeeded in enlisting support from almost all quarters save the Navy line. In a manner unthinkable in the Navy of today, he mobilized civilian support firmly behind his cause, and thwarted Nunn's attempt to subordinate it. While the Scarlet Letter and Mott's response had not created the schism between the pro-corps and anti-corps forces, it did lay it bare before the Navy, the Congress, and the organized bar.

11-100. (...continued)

> I would have wished that your letter had not been written.
>
> Of course the screed to which you made reply was silly; all the more reason for ignoring it. You cannot argue a stubborn stupid man into sense on any subject, much less on one where he is not demonstrably wrong, however wrong his reasons may be.

Frederick Bernays Wiener, letter to William C. Mott, 3 January 1956.

11-101. Ziggy Neff, who received the copies on behalf of the judges, responded with enthusiasm and prepared for the worst:

> [A]ll I can say is "It's wonderful, absolutely wonderful!" We may all get our throats cut as Leonidas did at Thermopylae; however, along with the Spartans we will merit the respect of our fellows and will enjoy the personal satisfaction of manning the ship as she slips beneath the waves with all batteries blazing.

Ziegel W. Neff, letter to William C. Mott, 2 December 1955.

11-102. See Ziegel W. Neff, letter to William C. Mott, 13 December 1955.

11-103. Mott to Ward, 19 December 1955.

Digitized by Google

In retrospect, Mott's reply, and others like it, was incredible. While the tone of his letter was measured and respectful, with all arguments factually supported, it nevertheless attacked not just the legal organization of the Navy, but the soundness of the reasoning and judgment of the legal organization's titular leader, the Judge Advocate General of the Navy. Further, the Judge Advocate General was supported by virtually all civilian and uniformed leaders in the Navy Department. It took a keen sense of wind direction for Mott to challenge them as he did.

Mott's letters to Arleigh Burke and Tom Gates had the desired effect of opening a dialogue. In a fortnight he was contacted by Gates's office, and told that Gates was sending his aide (and friend and Naval Academy classmate of Mott's), Captain Draper Kauffman, from Washington to Great Lakes to discuss the matter with Mott. Burke and Gates wanted Mott's views on the type of legal organization he felt could best serve the Navy, with particular emphasis on the type of organizational structure that would aid recruiting. And, in a developing breach in their support of Nunn's policies, they also requested Mott's personal recommendation as to which Law Specialist could best serve as Judge Advocate General in resolving these organizational problems.[11-104] It was clear that Gates and Burke had become embarrassed by Nunn's patronage of Sheeley, and were considering the appointment of another Law Specialist as the next Judge Advocate General.[11-105]

Mott and Kauffman met in mid-December. The discussion was frank. Mott presented his views on a legal organization for the Navy:

- It was essential that the head of the Navy's legal organization be a Law Specialist. Mott made his point on this issue with a bit of gallows humor, reminding Kauffman that the lepers on Molokai (an island in the Hawaiian chain on which was located a leper colony) never trusted Father Damien (the founder) until he became a leper himself.
- It made no difference what name was given to the legal organization ("Whether you call it a Corps or any other name

11-104. William C. Mott, letter to Edward T. Kenny, 19 December 1955.

11-105. Nunn was being isolated from these considerations. He was unaware that Gates and Burke had received copies of Mott's response to the Scarlet Letter, and he was not told of Draper Kauffman's visit to Mott. Mott to Ward, 19 December 1955; Mott to Greenberg, 27 December 1955.

Digitized by Google

is . . . immaterial. . . . [M]ost law specialists had been driven to the Corps concept because of the intransigent refusal of the Navy Department to consider [their views].")

- ⚓ The composition and rank structure of the Law Specialist Group was fragile. Eighty-one percent of the lieutenant commanders, sixty-one percent of the lieutenants, and fifty-one percent of the junior-grade lieutenants were Reserve officers, "here today and gone tomorrow, with no certain tenure." Legislation was essential to integrate outstanding Reserves into the Navy's legal organization without loss of rank, as was the current situation.
- ⚓ The views of the Law Specialists should be consulted before any organizational decisions were made.
- ⚓ There should be three flag billets at the top, restricted to career lawyers.
- ⚓ The career lawyers at the top should be given a free hand to work out methods of training and recruiting that would attract good young lawyers at the bottom.[11-106]

On the question of his recommendation as to the person best suited to be the next Judge Advocate General of the Navy, Mott did not hesitate. He recommended Chester Ward.[11-107] On this he was in good company;

11-106. William C. Mott, letter to Draper Kauffman, 19 December 1955; Mott to Munster, 19 December 1955; Mott to Ward, 19 December 1955.

11-107. Mott's recommendation of Ward as the best-suited Law Specialist to serve as Judge Advocate General was an honest and forthright evaluation. It did not necessarily, however, exclude others. In a gesture of solidity with the cause, Mott wrote to Bill Sheeley shortly after recommending Ward:

> Someone who recently visited Washington stated that there was some concern that I, Bill Mott, was taking steps to try to block your nomination [as the next Judge Advocate General] in the Senate. Nothing could be further from the truth. As George Sullivan and I agreed within a week after your selection . . . any law specialist who made such a move should be "read out of the party." . . . I would

(continued...)

Digitized by Google

Admirals Radford and Stump had also been pushing for Ward, as were former Judge Advocates General Colclough and Russell. Ward's record was pulled for consideration by Gates and Burke; Ward was called to Washington from Hawaii. On 23 December he met with Burke; Admiral Donald B. Duncan, the Deputy Chief of Naval Operations; Russell; Nunn; and Sheeley. The discussion concerned selection of the next Judge Advocate General of the Navy. It could not have been a comfortable meeting.[11-108]

Mott and his allies among the Law Specialists were hopeful that the good offices of Arleigh Burke would bring about a resolution within the Navy family. He assured Burke that he would contact all persons to whom he had sent his response to the Scarlet Letter, and admonish them to keep the documents closely guarded, and under no circumstances release copies of either outside the Navy Department.[11-109] But he still had his doubts as to the likelihood that Burke and Gates would resolve the problem to the satisfaction of the pro-corps forces.[11-110] He did not feel

---

11-107. (...continued)

> be happy to go to Washington at my own expense to testify in your behalf before the Senate Armed Services Committee.

Mott sent a copy of the letter to George Sullivan with the following note subscribed:

> Dear George,
> I felt this necessary to prevent Herb [Schwab] or anyone else from trying to convince Sheeley that I was battling against his confirmation.

William C. Mott, letter to William R. Sheeley, 19 December 1955.

11-108. Mott to Ward, 19 December 1955; George A. Sullivan, letter to William C. Mott, 28 December 1955; George A. Sullivan, letter to William C. Mott, 29 December 1955.

11-109. Mott to Ward, 19 December 1955.

11-110. Mott wrote:

> Like George Sullivan and Mack Greenberg, I very much doubt that we will ever get any

(continued...)

Digitized by Google

that their involvement required any lessening of efforts to obtain passage of H.R. 6172 (the Navy Judge Advocate General's Corps bill) and he exhorted his civilian colleagues to move forward on these fronts.[11-111] He, too, continued on this course, drafting a resolution in support of passage to present to the House of Delegates of the American Bar Association at its upcoming February meeting in Chicago.[11-112] Even so, he was not optimistic:

> I am working every day on the American Bar Association and the Federal Bar Association and through Reserves on Congressmen.
>
> I have had considerable experience dealing with the Congress and even more watching Admiral Nunn do so. He is a most effective operator, and only a groundswell of public opinion will defeat him.[11-113]

Arleigh Burke met again with Nunn and others at the end of December. Nunn represented that he had a training plan for Law Specialists that included schools and sea duty experience for new lawyers, and (despite the dismal recruiting situation) he told Burke he could get all

---

11-110. (...continued)

> satisfaction out of the Navy Department and believe it will be necessary, if we are ever to bring the matter into the open, to go to Congress with it.

William C. Mott, letter to Robert A. Fitch, 18 December 1955.

11-111. See, for example, William C. Mott, letter to D.W. Gilmore, 19 December 1955; William C. Mott, letter to Robert G. Burke, 19 December 1955; William C. Mott, letter to Robert A. Fitch, 22 December 1955.

11-112. William C. Mott, letter to George A. Sullivan, 21 December 1955.

11-113. William C. Mott, letter to Howard H. Brandenburg, 28 December 1955.

Digitized by Google

the young lawyers he wanted from law schools.[11-114] On 29 December Mott received Burke's determination. Polite, thoughtful, and sincere, it failed to grasp or solve the problem:

> [W]ithin the law specialist group, so I understand, there are some who favor a corps, more or less violently, some who are opposed, equally violently, and many, probably the great majority, who, while they may have an opinion on the subject, do not have strong feelings one way or the other. Outside of the law specialist group in the Navy, nearly every one is opposed to a law corps. Outside of the Navy there's probably pressure for it.
>
> The Navy Department's position, with which I am in agreement, and which has been approved by the Secretary of Defense, is against the corps organization for Navy lawyers. We simply do not believe it will cure our difficulties, real or imaginary, and we do believe the service will be better off without it. I note that a great deal of the criticism of our present organization—an inordinate amount, I think—is predicated on what is alleged to be an unsatisfactory, even discriminatory, flag rank situation. Without making any commitments, I see no reason why those criticisms, if they are valid, can not be dealt with adequately under existing law. . . .

Burke closed with a paragraph that fortified Mott's belief that the admiral was being kept unaware of the criticism leveled at the quality of legal work produced by the Law Specialists:

> I have heard no charge from any quarter that legal services rendered by the law

11-114. Sullivan to Mott, 28 December 1955.

Digitized by Google

> specialists, individually or collectively, have fallen short of what was expected. In my view, that is the potent argument against a radical change in organization.[11-115]

Clearly, Nunn was hiding criticism of his organization from his boss. In a letter to a Naval Reserve ally, Mott charged that Burke had "been sold a bill of goods" by Nunn. He contrasted Burke's naïveté with the harsh and revealing evaluation of Judge Latimer of the Court of Military Appeals:

> Ira [Nunn] is well acquainted with my views. Insofar as I am concerned, the Navy lags badly behind the Army and the Air Force.[11-116]

With hopes of an internal resolution dashed, the pro-corps forces intensified their pressures for legislation. Mott no longer felt bound by his assurance to Burke to keep the matter within the Navy Department. He forwarded a copy of the Scarlet Letter, his response thereto, and other

---

11-115. Arleigh A. Burke, letter to William C. Mott, 29 December 1955. Of Burke's position at the time, Mott commented years later:

> Arleigh Burke was a friend of mine. I would say that he was equivocating, because the judgment of the Court of Military Appeals and the judgment of Congress was that we needed a JAG Corps. And they prevailed. It's that simple. There are times, you know, when Congress simply overrules the military and the Department of Defense, and in this case, it did.

Mott, interview, 19 February 1991.

11-116. William C. Mott, letter to Earle Bennett, 20 January 1956.

Digitized by Google

relevant documents to his friend, Congressman Sidney Yates of Illinois, "so that we may have at least one well informed Congressman."[11-117]

But the pro-corps forces were realistic. They were also pragmatic and patient. They now realized that the goal of Congressional action to establish a corps was illusory as long as Nunn remained as Judge Advocate General; indeed, as long as a Law PG occupied the office. They turned their energies to a far more attainable goal; to place a Law Specialist in the position of Judge Advocate General of the Navy. If it had to be Sheeley, at least it would be a Law Specialist, and the precedent would be fixed. If it could be Ward, perhaps they could move forward on the corps issue. They decided, tacitly, at first, then openly, that they would push for Ward. To succeed, they would have to discredit Sheeley without harming the Law Specialists in general. This could be done by discrediting his sponsor, Nunn.

On 3 January 1956, Ward called Mott to report the latest development. Arleigh Burke had personally requested that he take the job of Assistant Judge Advocate General to Sheeley with no guarantee or commitment for flag rank. Ward understood it as an order; he agreed.[11-118] Shortly after, in a letter to Mott, he suggested, not too subtly, that it might

---

11-117. William C. Mott, letter to Sidney R. Yates, 30 December 1955. Mott had written to George Sullivan the previous day, emphasizing his resolve to push for legislation:

> I really don't expect as much out of the Navy Department as Mr. Dulles got from Khrushchev and Bulganin at Geneva. I am redoubling my efforts to bring pressure from the grass roots.
>
> I write a least one letter a day to keep things stirred up. Today I have written three in addition to this one. I have already presented the facts in person to [Naval Reserve] law companies in Peoria, Cedar Rapids, Des Moines, Denver, Milwaukee, and St. Louis and intend, in the near future, to visit Detroit, Chicago and Indianapolis. Every one of these law companies is seeking support for the [Second] Hoover Commission recommendations and a hearing on [the Navy Judge Advocate General's Corps bill].

William C. Mott, letter to George A. Sullivan, 29 December 1955.

11-118. William C. Mott, letter to George A. Sullivan, 4 January 1956.

Digitized by Google

be better for the Navy if he, or at least someone other than Sheeley, were nominated for the top position. With logic not entirely clear, Ward suggested that if Sheeley were nominated for the position of Judge Advocate General, the constitution of the board that selected him for rear admiral might come under scrutiny and attack.[11-119] One thing was clear. Whether Ward was the Judge Advocate General or Assistant Judge Advocate General, Herb Schwab's days were numbered:

> Chester Ward and I . . . more or less made a pact that if either one of us got in a position to control Schwab, we would quietly sideline him. For my money, he is a first cousin to Judas Iscariot.[11-120]

Nunn and Schwab were not prepared to let this happen. They also persuaded Sheeley that Ward's nomination, even as his assistant, would be disastrous for him. It would not be smooth sailing for Ward. Sullivan alerted Mott:

> Heard this morning that Nunn, Schwab, *and Sheeley* would fight Ward's appointment as AJAG—the first two because they don't like him and fear him from a line point of view. Sheeley evidently has been sold on the idea that Ward would over-shadow him and take the driver's seat. Also, Secretary of the Navy Thomas has not been cleared with regard to a Sheeley-Ward team. Someone has been stalling—and from what I can find out Under Secretary of the Navy Gates will not have all the say.[11-121]

11-119. Ward to Mott, 10 January 1956.

11-120. William C. Mott, letter to George A. Sullivan, 30 December 1955.

11-121. George A. Sullivan, letter to William C. Mott, 2 February 1956.

Digitized by Google

As Nunn was maneuvering behind the scenes to block Ward's appointment, the House of Delegates of the American Bar Association was convening at the Edgewater Beach Hotel in Chicago for its mid-winter meeting. Prominent on the agenda was Resolution No. 6, a resolution supporting the findings of the Second Hoover Commission on the question of a Judge Advocate General's Corps for the Navy. The resolution was being presented by the Legal Services and Procedures Committee, a special committee headed by Ashley Sellers of Washington, D.C., that had been formed to recommend action on the various proposals of the Second Hoover Commission.[11-122] If the resolution passed the House of Delegates, it would likely gain the support of the entire American Bar Association, a powerful and formidable lobby in its behalf. Nunn determined to sabotage efforts to pass it.[11-123]

Nunn sent an "advance team" from his office to lobby the delegates and attempt to persuade them to vote against the resolution and hence against a corps for the Navy. Mott was not impressed: "The advance team consisted of Schwab, Emery Smith and Richard the Ryan-hearted. They were picked for their supposed influence in the A.B.A. A poorer choice couldn't have been made."[11-124]

Upon learning of the arrival of Nunn's delegation, Sellers called a special meeting of his committee, at which Mott was allowed to be present, to decide how to deal with the situation. At Mott's suggestion, Edward H. Jones, a delegate from Iowa, and a friend and ally of Mott's, called Herb Schwab's room and told him that he was interested in military law and would like to discuss Resolution No. 6 with him. Schwab was totally taken in. He completely revealed Nunn's strategy, even to the extent of giving Jones an advance copy of Nunn's prepared remarks. Just before Jones left he said to Schwab: "I have a very good friend who's a Law Specialist in whom I have the greatest confidence. His name is

---

11-122. James M. Spiro, Director of Activities, American Bar Association, letter to William C. Mott, 20 December 1955.

11-123. Nunn may have had more confidence in his powers of persuasion than did his peers. Major General Reginald C. Harmon, the Judge Advocate General of the Air Force, was invited to accompany Nunn to the House of Delegates meeting and declined. His reason was blunt: "I knew Ira would make an ass of himself." William C. Mott, letter to Chester C. Ward, 6 March 1956.

11-124. William C. Mott, letter to Chester C. Ward, 21 February 1956.

Digitized by Google

Chester Ward. How does Chester stand on this issue of a corps?" Schwab could not have been more disingenuous: "Well," he said, "Chester used to be in favor of a corps, but he is with us now 100 percent."[11-125]

Nunn appeared at the House of Delegates meeting the next day and requested permission to address the assembly on the matter of Resolution No. 6. The request was unanimously granted.

Nunn began his comments by stating, without fact or authority, that he was there to present the point of view of all the armed services—the Army, the Navy, the Air Force, the Marine Corps, and the Department of Defense itself.[11-126] He then went on to voice objection to the establishment of a Judge Advocate General's Corps in the Navy:

> [L]adies and gentlemen, the Department of Defense does not want this. The Department of the Navy does not.
>
> The Department of the Navy has said, "With a view to keeping the Navy on an integrated basis, with as few separated parts as possible, it is preferred that no corps for uniformed lawyers be established. In point of fact the Navy's uniformed lawyers are now set apart as a group of specialists. . . . It is believed that whatever improvement or change may be desirable in the recruitment, training, promotion and employment of legal specialists in the Navy can be accomplished as well under the existing structure as under a corps concept.[11-127]

11-125. Mott to Ward, 21 February 1956.

11-126. American Bar Association, "Excerpt of Transcript, Meeting of House of Delegates," 20 February 1956, at 2.

11-127. American Bar Association, "Excerpt of Transcript," 20 February 1956, at 4.

Digitized by Google

Nunn then made reference to the Scarlet Letter, grossly misrepresenting it as a methodical survey, and unconscionably overstating the support he had received:

> After the Hoover Commission report came out, I took occasion to canvass carefully the legal specialists of the entire Navy, and I say to you now that over ninety percent of them preferred to remain in the line, in the line of the Navy. That gives them a preferred status, one which the majority of them wish to retain, and one in which the Navy wishes to keep them.[11-128]

Nunn concluded by implying that a vote for the resolution, which enjoyed the unanimous support and recommendation of the Legal Services and Procedures Committee, was tantamount to an attack on the security of the United States:

> I have spent a long time in the service of our country. In a measure, I have contributed to the defense of this country. However, I feel that if my ten-minute effort here today has been successful, I will have done more for my

11-128. American Bar Association, "Excerpt of Transcript," 20 February 1956, at 4. By year's end, approximately thirty-five of the 398 Law Specialists who had received the Scarlet Letter, or a bit over eight percent, had responded to Nunn. This would prove to be the virtual extent of the responses. Of these, less than thirty supported Nunn's policies (twenty-two of whom were stationed in the immediate Office of the Judge Advocate General and responded "verbally"), while six had the courage to oppose them. Opposition came in the form of letters from Brandenburg, Powers, Fitch and Mott, and "verbal dissent" from Greenberg and Sullivan, the latter two being stationed in the Judge Advocate General's office. See George A. Sullivan, letter to William C. Mott, 1 December 1955.

Digitized by Google

> country and for yours than I have ever done before.[11-129]

When Nunn finished, several persons rose to speak in opposition. It was pointed out that Nunn had had many previous opportunities to make his views known, not only before the Sellers Committee, but to the Judge Advocates Association (of which he was a member of the board of directors), the 1954 Newport conference of Law Specialists, and several professional organizations. At no time had he seen fit to appear before any of these groups and risk exposure to debate.

Edward Jones, the lawyer who had infiltrated Schwab's confidence, made his point with a humorous anecdote:

> Without a Judge Advocate General's Corps of the Navy or something like it, the line has unlimited power over the Navy lawyer and his career, and his whole future can be held constantly in the balance. . . .
>
> I have run into the problem when the commanding officer (whatever his rank might be he always outranked me), says, "Jones, I

11-129. American Bar Association, "Excerpt of Transcript," 20 February 1956, at 4. Nunn's implication stirred resentment in at least one listener, Ralph G. Boyd, chairman of the Committee on Military Justice:

> If it is implied from the suggestion that the killing of the . . . motion would be so great a step in the defense of this country, I, for one, and . . . a couple of thousand Judge Advocates . . . would say that we would resent any such suggestion.

American Bar Association, "Excerpt of Transcript," 20 February 1956, at 6.

Digitized by Google

> want a legal opinion on this subject and this, by God, is what it's supposed to say."[11-130]

The most devastating, personal, and impassioned opposition, however, came from Cody Fowler, a delegate from Tampa, Florida, a member of the Second Hoover Commission Task Group on Legal Services within the Armed Forces, and a former president of the American Bar Association:

> There were some glittering generalities told you by Admiral Nunn, for whom I have the highest respect, who has been in the Navy and fighting for his country for some thirty-five years, but who went to Harvard in 1935 and passed the Massachusetts Bar in 1950. [*Nunn was actually admitted to the Massachusetts Bar late in 1949.—ED.*] The gentleman didn't win those wonderful ribbons of honor in the legal service; it was as a line officer. He has never been a legal specialist, and, of course, he doesn't get the approach to these problems that a lawyer does.
>
> Now, he talks about the survey he has made of the legal officers. I'll say to you that when the admiral writes a letter and says he is against a separate corps . . . there are not many of the lesser officers who have the courage to come up and say, "I don't agree with you."
>
> I will say to you that in the case of every officer to whom we talked, who was a lawyer first, and was interested in putting his life's work in law work for the Navy, there wasn't one of them who said he was against a corps for the Navy. . . .

11-130. American Bar Association, "Excerpt of Transcript," 20 February 1956, at 11. Jones was a Naval Reserve Law Specialist.

Digitized by Google

> Incidentally, at a meeting of . . . law specialists of the Navy held at Newport . . . in 1954, they passed a resolution . . . . These were lawyers in uniform, in the Navy, who hadn't been happy. . . . [W]e found that the morale of the lawyers in uniform in the Navy was low . . . .
>
> [T]hey are for a corps in the Navy. . . .
>
> Every profession that I know of has a special corps in the Navy except the lawyers, and I can't see why the lawyers would sink the Navy if you had a corps for the lawyers alone, letting them run their own problems and not letting them be subject to command control.[11-131]

When a vote was taken, Resolution 6 passed overwhelmingly. Nunn had been defeated. He had overreached, and in so doing he had destroyed whatever credibility the Navy Department had in its anti-corps position. The effect among the civilian bar was to solidify support for a Navy Judge Advocate General's Corps, as well as support for the *Uniform Code of Military Justice*. In a letter to Ward the next day, Mott was effusive in recounting the events that had transpired:

> Yesterday, a certain Admiral, unloved and unrespected by both of us, got his come-uppance at the February meeting of the House of Delegates of the American Bar Association. The enclosed clipping from the *Chicago Sun Times* is only indicative of the going over that Admiral Nunn took when he dared to assume that professional lawyers of intelligence would swallow the kind of

11-131. American Bar Association, "Excerpt of Transcript," 20 February 1956, at 8.

Digitized by Google

> claptrap he has used successfully on the uninformed. . . .
>
> It was a devastating rejection of Nunn personally and everything he stands for. In fact, as Cody Fowler pointed out—"He comes before us not as a lawyer but as a line officer, the very thing we object to about the legal organization of the Navy."[11-132]

The effect of Nunn's erratic behavior carried over to his office, and began to taint his putative successor, Sheeley. The latter was increasingly coming to be viewed as one who could not make decisions. He was perceived as lacking confidence in himself and in the legal organization.[11-133] Arleigh Burke's doubts about Sheeley were renewed; he again considered Ward for the post of Judge Advocate General.[11-134] At the same time, Secretary of the Navy Charles S. Thomas (1954-1957), growing annoyed with pressures brought on behalf of Sheeley, determined to take the decision into his own hands.

In late February 1956, Mott spent a week on a special assignment to Admiral Radford's staff in the Office of the Chairman of the Joint Chiefs of Staff.[11-135] Mott seized the opportunity to discuss the Nunn-Sheeley

---

11-132. William C. Mott, letter to Chester C. Ward, 21 February 1955.

11-133. Ward to Mott, 24 February 1956.

11-134. William C. Mott, letter to Chester C. Ward, 3 March 1956.

11-135. Mott had been called to Washington at the behest of Admiral Radford to prepare guidance for the admiral to use in connection with troop-withdrawal negotiations with Chiang Kai-Shek. The question of Seventh Fleet operations in the Formosa Straits to protect the Chinese Nationalist islands of Quemoy and Matsu became an issue, requiring policy discussions with President Eisenhower. Mott accompanied Herbert Hoover, Jr., the Acting Secretary of State, to the White House to meet with Eisenhower. "It was," said Mott, "an amazing meeting; Eisenhower turned out to be one of the most profane men I had ever met."

The conversation quickly settled on the Quemoy and Matsu Islands. Turning to Mott, Eisenhower erupted:

> Those goddam f****** islands. They really

(continued...)

Digitized by Google

situation with him. Radford, who was well aware of the problem, was supportive. He told Mott that although he had once backed Nunn, he had become thoroughly fed up with him and had called Arleigh Burke down to his office to tell him so. Mott made the point that disliking Nunn wasn't enough, because even though Nunn was leaving, he would still damage the organization mortally unless steps were taken to block Sheeley's appointment. Radford agreed to help, and to arrange a meeting for Mott with Mansfield T. Sprague, the General Counsel of the Department of Defense. Within days Mott, together with George Sullivan, met with Sprague. They asked him to talk to Admiral Radford in order to get a first-hand briefing on Ward's record, and then to speak to Secretary of the Navy Thomas in Ward's behalf. Even while these events were unfolding, Mott got word that Admiral Stump was coming to Washington. He urged Radford to get together with him to form a united front in support of Ward's nomination. This they did, lobbying Secretary Thomas quite effectively.[11-136]

As a final step in isolating Nunn, Mott drafted a letter to be sent to the Secretary of Defense and the Secretary of the Navy. Intended to embarrass Nunn, it dissected his speech before the House of Delegates, pointing out that he had no authority to speak other than for himself, and

---

11-135. (...continued)

> have been the bane of my existence. I'll tell you, captain, every time I get to the top of my golf swing at the Burning Tree Club, I think about those goddam f****** islands. They've added ten strokes to my score. How did we ever get involved with those islands in the first place?

Mott related the historical basis of the United States's involvement with the islands, including the fact that John W. Foster, grandfather of Eisenhower's Secretary of State, John Foster Dulles, was seminally involved. Eisenhower seemed to gloat:

> You mean Foster's family had something to do with those f****** islands? At last I can blame something on his family!

Mott, interview, 19 February 1991.

11-136. Mott to Ward, 3 March 1956.

Digitized by Google

that he had taken positions which were in direct opposition to those officially adopted by the Secretary of Defense and the Secretary of the Navy. The letters, when sent, bore the signature of Cody Fowler.[11-137]

Although Sheeley was out of favor, and Nunn was discredited, the confirmation of Ward, if nominated, could not be assured. Arleigh Burke, while no doubt recognizing Ward as better qualified, still urged Secretary Thomas to appoint Sheeley in order not to make the Navy selection system look bad.[11-138] The Senate Armed Services Committee, which had confirmed Sheeley's appointment as a rear admiral, was likely to question the reason for not nominating Sheeley as Judge Advocate General. The House Armed Services Committee, which had no official role to play in the confirmation process, intervened nonetheless. It convened a subcommittee and took testimony from Nunn as to why a captain (Ward) was being considered for nomination over a rear admiral (Sheeley). Nunn testified that Ward's selection would violate an agreement by Secretary Thomas to appoint Sheeley as Judge Advocate General and Ward as Assistant Judge Advocate General. He laid the blame for Thomas's alleged reneging on the efforts of Admiral Stump when he was in Washington.[11-139] Following Nunn's testimony Chairman Vinson advised Secretary Thomas that he "would take a dim view" of the appointment of Ward over Sheeley.[11-140] The only thing now certain was that *some* Law Specialist, probably Sheeley or Ward, would be the next Judge Advocate General; no line officer could meet the criteria of eight years' legal experience as required by the *Uniform Code*. Ward's task was to persuade Thomas that he was the best-qualified man for the job.

11-137. William C. Mott, letter to Chester C. Ward, 24 March 1956; William C. Mott, letter to Robert A. Fitch, 8 March 1956.

11-138. William C. Mott, letter to Edward T. Kenny, 2 May 1956.

11-139. William C. Mott, letter to Chester C. Ward, 14 June 1956. Despite Nunn's insistence on the inviolability of the agreement struck with Secretary Thomas, he himself was supporting not Ward, but Schwab, for Assistant Judge Advocate General. Mott to Kenny, 2 May 1956.

11-140. Edward H. Jones, memorandum to Dan O'Brien (assistant to Senator Hickenlooper), 12 June 1956.

Digitized by Google

Ward, early on, had matched his qualifications against Sheeley's. He had prepared a chart, comparing his experience with that of his rival.[11-141] His findings were now put to good use. To Sheeley's twelve years of legal experience, Ward had twenty-four. To Sheeley's ten years as a Navy lawyer, Ward had fifteen. To Sheeley's two years of civilian practice in Dadeville, Alabama, Ward had nine years in Washington, D.C.[11-142]

Sheeley had published no legal articles, had received no legal honors. Ward, on the other hand, had been widely published as a law professor at George Washington University Law School, and was a past president of the Washington, D.C. chapter of the Order of the Coif, a national legal honor society. But the most damning revelation in the eyes of Ward's sponsors, and one they played to the fullest, was the fact that Sheeley had attended an unaccredited law school; Jones School of Law, in Montgomery, Alabama, was neither accredited nor approved by the American Bar Association nor the Association of American Law Schools.[11-143] Since graduation from an accredited law school had become a requirement for acceptance into the Law Specialist Program, the man Nunn proposed as the next Judge Advocate General of the Navy would have been unable to qualify for appointment as a junior grade lieutenant

---

11-141. See Chester C. Ward, letter to William C. Mott, 6 March 1956.

11-142. Of Sheeley's civilian practice claim, modest as it was, Mott said:

> Actually he was not engaged in the practice of law even during those two years, but was managing some farm lands. Independent investigators, put in motion by an interested Reserve officer, failed to discover a single case in Dadeville in which he had acted as counsel, or in the tax court which he lists as his specialty.

Mott to Ward, 8 March 1956.

11-143. American Bar Association, letter to William C. Mott, 9 August 1955. In point of fact, this did not prevent Sheeley from being admitted both to the Bar of Alabama and that of the United States Supreme Court, nor did it in any way impede his license to practice law.

Jones Law School was accredited by the Southern Association of Colleges and Schools in 1990. It has never been accredited by the American Bar Association. Source: Office of the Registrar, Jones School of Law, Montgomery, Alabama.

Digitized by Google

in the Navy's legal service. Ward and Mott both knew, of course, that this did not disqualify Sheeley for the position of Judge Advocate General, since he met the requirements of the *Uniform Code*.[11-144] But it was a tantalizing fact, and Ward's supporters were diligent in spreading it about.

Ward's supporters were also diligent in mobilizing their political allies. George Sullivan met with the members of the American Legion committee that had been conducting hearings on proposed changes to the *Uniform Code*. They agreed to prevail upon Postmaster General Summerfield to go to the White House for Ward.[11-145] Edward Jones contacted Congressman Paul Cunningham, a member of the House Armed Services Committee; Dan O'Brien, assistant to Senator Hickenlooper; a Mr. Schweppe, administrative assistant to Senator Henry M. Jackson of the Armed Services Committee; E. Smythe Gambrell, president of the American Bar Association; and Robert G. Storey of the Second Hoover Commission. These persons, in turn, would contact Senators Hickenlooper, Jackson, Lyndon B. Johnson, and Richard B. Russell the latter three being on the Senate Armed Services Committee, with Russell the chairman. Commander Bill Hogan, now a Law Specialist stationed at Great Lakes in Mott's, office, contacted his college roommate, Congressman William Bates, a ranking Republican on the House Armed Services Committee.[11-146] Also in Mott's office at the time, performing a

---

11-144. Mott had been privy to investigations of Sheeley's background since the moment he was selected for rear admiral:

> I know that an investigation of Sheeley's graduation from law school, admission to the Bar in Alabama, and admission to the Supreme Court of the United States was thoroughly carried out by a group of Reserve officers who bear him no love. Their answer was that he was completely qualified under the law, a conclusion they reached most reluctantly.

William C. Mott, letter to Chester C. Ward, 4 January 1956.

11-145. George A. Sullivan, letter to William C. Mott, 6 May 1956.

11-146. Bates responded to Hogan almost immediately with the following tantalizing information:

> There is a good deal which I could say to you

(continued...)

Digitized by Google

tour of Reserve training duty, was E. L. Gross, whose brother, Harold R. Gross, was a Congressman from Iowa. Mott dispatched E.L. Gross to Washington on official business, combined with a fact-finding mission on behalf of the Ward nomination. Cody Fowler who, if necessary, would contact Sherman Adams, President Eisenhower's chief of staff, was held in reserve.[11-147] Within days Secretary Thomas appeared to make up his mind. Mott was one of the first to hear the rumor, and he wasted no time in passing the news to Ward:

> Congressman Gross, after a briefing by his brother [*the Reserve officer whom Mott had sent to Washington specifically to gather information—ED.*] went off to talk with a certain influential member of the house Armed Services Committee who he knew had had breakfast with Mr. Thomas that very morning, *i.e.*, Wednesday, 13 June. This particular member of the House Armed Services Committee had asked Mr. Thomas pointblank whom he was going to nominate as JAG. Mr. Thomas's answer was: "Captain Ward is my man."[11-148]

11-146. (...continued)

> personally which discretion prevents. However, I don't believe you will be disappointed in the decision that will be ultimately made. I would suggest that this information be closely held for obvious reasons.

William C. Mott, letter to Chester C. Ward, 15 June 1956.

11-147. Mott to Ward, 14 June 1956.

11-148. Mott to Ward, 15 June 1956. One of the factors that may have caused Thomas to lean toward Ward was a change of heart on the part of Arleigh Burke, who finally threw his support behind Ward. William C. Mott, letter to Chester C. Ward, 25 June 1956.

Digitized by Google

Although Thomas had apparently settled on "his man," he had not done so publicly. Nor had he settled on the timing of his announcement. And, while Ward continued to wait, and Thomas continued to ponder, Nunn left office. On 18 June 1956, Sheeley became Acting Judge Advocate General of the Navy. With Congress due to adjourn shortly, there was a real possibility that there would be no action on any nomination during the current session The specter of Sheeley as Acting Judge Advocate General for several more months loomed before the Ward forces.

After another week without any movement on Thomas's part, Mott speculated that the Secretary was being pressured by White House aides to reconsider his intention to nominate Ward. He suggested to Ward that if this was the case, they should ask Radford to speak directly to President Eisenhower.[11-149] Even as Mott wrote, however, Secretary Thomas was sending Chester Ward's name to the White House with his recommendation that Ward be appointed the next Judge Advocate General of the Navy.[11-150] To Secretary Thomas's great credit, he had ignored the threats of Carl Vinson. He had seen through the duplicity of Ira Nunn. He had withstood pressures to appoint the man already confirmed by the Senate as a rear admiral and acting in the capacity of Judge Advocate General. He had resolved to select the man best qualified to do the job, and he had selected Chester Ward.

Ten days later President Eisenhower announced that he had forwarded the nomination to the Senate.[11-151] Confirmation, however, was far from assured. Nunn, was not yet ready to give up the fight. In a last-ditch effort, he approached friends on the Senate Armed Services Committee. The result was a "plant" in the *Army-Navy-Air Force Journal*:

> The Senate Armed Services Committee will want to know why the current Acting JAG, RAdm. William R. Scheeley, [*sic*] USN, was not given the post. THE POINT WILL BE MADE that Admiral Scheeley is the only

---

11-149. Mott to Ward, 25 June 1956.

11-150. The nomination was forwarded by Secretary Thomas on 25 June 1956. Chester C. Ward, letter to George A Sullivan, 28 June 1956.

11-151. D.O. Cooke, letter to William C. Mott, 9 July 1956.

Digitized by Google

> law specialist in Navy history selected for flag rank; this was done by a board which passed over Captain Ward, also a legal specialist. . . . [S]ome Armed Service Committee members . . . now argue that Captain Ward, if confirmed, would receive a spot promotion to the flag rank which the selection board refused him.[11-152] . . . DON'T BE SURPRISED if the Senate [Armed Services] Committee holds a special hearing on the JAG nomination.[11-153]

11-152. This statement is technically incorrect. Ward was not "passed over" for selection. The term "passed over" is a term of art, applied only to those officers in the eligible zone (or above it) who are not selected for promotion. Ward was "below zone," a term applied to those officers junior in seniority to the most junior man in the eligible zone. As such, he could not be passed over. It should be noted, however, that the "deep selection" of officers for flag rank from below the zone is not uncommon. Indeed, it occurred in the case of Sheeley. Both Ward and Sheeley were, in fact, "below zone."

Bear in mind also, the allegations previously noted as to Nunn's influence in the selection of Sheeley. (See text beginning at page 578.)

11-153. *Army-Navy-Air Force Journal*, 14 July 1956, at 1436.

Political intrigue was not the only obstacle in Ward's way; misinformation was also a hazard. On 21 July 1956, during floor debate on a military appropriations bill, Congressman Albert Rains of Alabama made the following statement concerning Ward's nomination:

> The gentleman . . . related about the Secretary of the Navy reaching back and picking out a captain and recommending him to be the Judge Advocate General of the Navy. Does the gentleman know that in doing so, he picked a man who had twice been passed over by the Selection Board and is turning down the Vice Admiral who is now the Acting Judge Advocate General who was picked by every board all the way up?

Congressional Record. 84th Cong., 1st sess., 1956. Vol. 102.

Digitized by Google

As predicted, the committee did hold special hearings. At the instance of Senator Lister Hill of Alabama, when Ward's nomination was received by the Senate Armed Services Committee, it was referred to a special subcommittee for a hearing. Secretary Thomas testified on 20 July 1956.[11-154]

As expected, questioning centered around Thomas's reasons for nominating Ward, and his reasons for not nominating Sheeley. Specifically, the senators wanted to know why, if Ward was the more qualified man for the post of Judge Advocate General, the earlier selection board had not chosen him over Sheeley at that time. If Thomas knew of Nunn's involvement with the board in selecting Sheeley (which it must be assumed he did), he did not reveal the fact to the committee. Rather, he speculated:

> I do not know. I would guess that the sea duty of the admiral [Sheeley] would be a compelling influence because he has been at sea a lot more. Captain Ward is a specialist. But that is what we need in that office [of the Judge Advocate General]. We need men of standing in the legal fraternity. . . .
>
> [Y]ou cannot get and really you cannot expect a Naval officer, regardless of how good he is, that had a lot of sea duty to be a highly experienced man in law.[11-155]

Thomas then approached brilliance in his closing response. Asked by Stennis if he thought the Ward nomination might affect morale, he replied:

11-154. Secretary Thomas was the only person who testified; no witnesses came forth in opposition. Included among the spectators were two of the "cabal" wives, Harriet Greenberg and Isobel Sullivan. According to George Sullivan, Thomas was angered by the proceedings, believing them to have been inspired by Vinson and Nunn. William C. Mott, letter to Chester C. Ward, 20 July 1956.

11-155. "Senate Snags JAG Job," *The Washington Daily News*, 24 July 1956, at 19.

Digitized by Google

> I think it will. Bringing in a man who has great recognition in the legal fraternity will be a great encouragement to all legal people in the legal department of the Navy.[11-156]

With the Senate due to adjourn in exactly one week, the subcommittee took the nomination under advisement. Ward's chances for confirmation were in jeopardy. Mott, writing to Ward, assessed the situation, then steamed full ahead:

> As you probably have heard by now, your confirmation is in an uncertain state. I talked with both George [Sullivan] and Means [*Commander Means Johnston, USN, aide to Admiral Radford, the Chairman of the Joint Chiefs of Staff–ED.*] . . . and they seem to feel that the nomination would die in Sub-Committee if some effort were not made to bring pressure on Democratic senators on the Committee. . . .
>
> George went to [Senator] Saltonstall's office and was told that the chances were only about fifty-fifty for confirmation in this session. . . .
>
> On Saturday I called Governor Quinn [*Chief Judge Quinn of the Court of Military Appeals–ED.*] and explained the situation to him, and he said "Bill, I will get ahold of Senators Pastore and Green Monday morning, as well as Congressman Fogarty (all good Democrats), and I will do everything in my power to break the nomination loose." . . . [Congressman] Sidney [Yates] said he would

11-156. "Senate Snags JAG Job," *The Washington Daily News*, 24 July 1956, at 19.

Digitized by Google

> be glad to go to Senator Stennis this morning and see what he could do. . . .
>
> Ed Jones . . . is getting in touch with Senator Hickenlooper this morning to see what pressure he can bring on his Democratic colleagues. Ed . . . also knows Lister Hill's brother and will call him. He is also going to call Senator Jackson of Washington, a Democratic member of the Senate Armed Services Committee.
>
> I called the Commanding Officer of our Law Company in St. Louis to get after Senator Hennings–a close friend of the CO, a Democrat, a lawyer, and a Naval Reserve Officer. At the same time Ziggy Neff called Judge Gilmore in Kansas City to get after Symington. Bill Hogan went after some members of the Massachusetts delegation. . . .
>
> When I was at the School of Justice I had occasion to do Senator Lyndon Johnson some favors. We got quite friendly. In his last letter to me he said: "I am grateful for your many favors and want you to know that if there is ever anything I can do for you, you have but to call on me." Yesterday I . . . told him . . . I [was] not asking for any favor for myself, but only for something the Secretary of the Navy has already asked for, and something all lawyers should have and want. . . . [I asked him to] please break loose your nomination for the good of all Navy lawyers.[11-157]

The Senate adjourned on Friday, 27 July 1956. On that day the Senate Armed Services Committee confirmed the appointment of Chester Ward as Judge Advocate General of the Navy. The final, all-out effort, had succeeded, although no one was sure what had tipped the balance. As

11-157. William C. Mott, letter to Chester C. Ward, 23 July 1956.

Digitized by Google

Mott later said "I don't know whose shove pushed the nomination through at the end."[11-158]

A bitter battle had been waged between the Judge Advocate General and his top-ranking assistants. Highly principled on both sides, with little thought of personal gain, it nonetheless skirted the very edges of insubordination. It ignored the chain of command. It had pitted a coalition of senior naval officers, the judges of the Court of Military Appeals, Naval Reserve lawyers, civilian leaders of the organized bar, and Congressional forces, against other senior naval officers and other Congressional elements. In the end, the Law Specialists held a firm grasp on the legal organization of the Navy.

The story of the Scarlet Letter goes far beyond the debate over the letter itself. It cemented Bill Mott's position as informal leader of the pro-corps forces, and it spelled the end of the line officer Judge Advocate General. There would be no more line officers, no more Law PGs, as Judge Advocate General of the Navy.[11-159] No longer was there an

---

11-158. William C. Mott, letter to E.L. Gross, 31 July 1956.

11-159. Despite the widely-recognized failings of the Law PG Program, attempts to revive it continued to be made. See, for example, debate in the House of Representatives on 21 July 1956 on an amendment to an appropriations bill to include funding for Law PG education. *Congressional Record*. 84th Cong., 1st sess., 1956. Vol. 102. A decade later there were still attempts to resurrect the program, although the objection to it now (as advanced by the American Bar Association and the American Legion) was that the lawyer educated at government expense, while becoming a Law Specialist, would have seniority in rank over the lawyer who educated himself, with the result that only those who were educated at government expense would rise to the top. See U.S. Congress, Senate Subcommittee of the Committee on Appropriations, *Hearings on H.R. 7179 Making Appropriations for the Department of Defense for the Fiscal Year Ending June 30, 1964*, 88th Cong., 1st sess. (1963), 1443-49.

A program akin to the Law PG Program, although markedly different in critical respects, was instituted in 1967 when retention rates in the legal community dropped to almost ten percent. Known as the Excess Leave Program, an officer was permitted to enter a "leave without pay" status to enroll in law school. The officer retained his military status and benefits, such as medical care and commissary privileges, but was required to bear all expenses of attending law school, including tuition, other related school expenses, and all other living expenses. Upon completion of law school the officer was obligated to request a change of designator to that of Law Specialist, and to serve an additional nine months of active duty for

(continued...)

Digitized by Google

adversary in the legal pulpit, preaching against a corps for Navy lawyers. The Law PGs, once so firmly in control, would diffuse throughout the Navy in non-legal billets and eventually retire from the service. Those line officers who had adamantly opposed the formation of a Judge Advocate General's Corps had forever lost their "inside line" to the Judge Advocate General's office. The Scarlet Letter, which Nunn had intended to use to bolster his thesis that the Navy did not need a legal corps, and that its lawyers did not want a legal corps, had worked the opposite effect by rallying the pro-corps forces.

If Ward was right about Nunn's motive to bring disgrace upon the Law Specialists by installing a puppet Judge Advocate General, his scheme had backfired. Mott, caught up in the vernacular of the dawning space age, savored the victory and contemplated a requital:

> I can't agree more that Schwab, Collier and a number of lesser satellites must be moved into outer space where they can revolve around each other and not disturb the orbit of progress.[11-160]

11-159. (...continued)
each six months that he was in the Excess Leave Program. The program was open to both Navy and Marine Corps officers in the grade of lieutenant or below (captain or below for the Marine Corps), with at least two years and no more than six years of service. Bureau of Personnel Instruction 1520.99, Subject: "Excess Leave Program (Law); Promulgation of," 20 January 1967.

In 1974, the Secretary of the Navy established the Law Education Program. Secretary of the Navy Instruction 1520.7 of 24 July 1974. Under this program, which continues in effect today, officers selected to attend law school receive their full salary and benefits, plus payment of all school-related expenses, while attending law school. Following graduation, officers generally must serve two years as judge advocates (Navy or Marine Corps lawyers) for each year of law school attendance.

The Law Education Program totally superseded the Excess Leave Program for the Navy. The Marine Corps was permitted to continue using either program, and does so to this day.

11-160. William C. Mott, letter to Robert A. Fitch, 16 July 1956. While it was easy enough to dispose of Schwab and his compatriots in such a manner, Sheeley himself presented a unique problem, for he held *permanent* rank as a Law Specialist rear admiral. As further proof of the fiction that Law Specialists were part of the line, the reality of the matter was that the only rear admiral billet available to a Law Specialist was that of Judge Advocate General, the post that Ward was to hold.

(continued...)

Digitized by Google

On 3 August 1956, Chester W. Ward, a Law Specialist, became the twentieth uniformed Judge Advocate General of the United States Navy. He selected Captain Philip A. Walker, USN, a Law Specialist, as his Deputy and Assistant Judge Advocate General.

11-160. (...continued)
Sheeley refused to retire, and it was untenable for him to remain in the Office of the Judge Advocate General, where he was senior (by date of rank) to Ward. It was finally determined to "upgrade" the Law Specialist billet of Officer in Charge, United States Sending State Office for Italy, to that of rear admiral, and put Sheeley in it. He served there from December 1956 to August 1961, when he retired. The Sending State Office billet was then "downgraded" back to that of captain.

Digitized by Google

Digitized by Google

Chapter 12

Recognition and Realization: A Legal Corps for the Navy 1956 to 1967

***My ultimate objective is to make the JAG organization into the hardest hitting, the most effective, the most efficient, the most loyal, the most dedicated, and the most can-do and up-and-coming team in the United States Navy.*—Rear Admiral Chester C. Ward, Judge Advocate General of the Navy, *JAG Journal*, 1956**

The reader can be excused for expressing surprise at Ward's selection of someone other than Bill Mott as his Deputy and Assistant Judge Advocate General. In fact, Ward *had* offered the post to Mott, as early as March 1956, when the former's selection as Judge Advocate General was still far from assured.[12-1] Mott had declined:

> With respect to my serving as your deputy, you know that I would do whatever you ask, although I confess I cannot muster much enthusiasm for the job because of the program of re-education and de-brainwashing we would have to embark on. In any event I consider that my name is probably anathema to the front office by now and, like you, I wouldn't want it to bog down the program or the Navy's best interests.[12-2]

There were other reasons as well for Mott not to accept Ward's offer. He had been approached by his mentor, Admiral Radford, Chairman of

12-1. Chester C. Ward, letter to William C. Mott, 6 March 1956.

12-2. William C. Mott, letter to Chester C. Ward, 8 March 1956.

Digitized by Google

the Joint Chiefs of Staff, to serve as his military assistant. Aside from the prestige of the job, he owed it to Radford personally to accept. Also, there was no established tradition then, as is often followed today, of the deputy succeeding the Judge Advocate General to the top position. In fact, it had actually *never* happened in the entire history of the office,[12-3] and it was impossible to predict what would happen now that the Law Specialists had taken over. One could reasonably ask, however, "Why Walker?" Perhaps the best answer is that he was non-controversial and essentially unaligned with either the pro-corps or anti-corps forces. A distinguished war veteran, he was tapped for the job while serving as district legal officer for the commandant of the Twelfth Legal District.

Despite its comparative shortcomings with the Army and Air Force, the legal organization that Ward and Walker were to manage had grown substantially in professional stature since the days before World War II. Law Specialists, Marine Corps lawyers, civilian lawyers employed by the Office of the Judge Advocate General, and Law PGs were assigned to legal jobs throughout the world. And while the general areas of legal work for which the organization was responsible had not changed significantly in the past decade (they still comprised military justice, investigations, admiralty, international law, claims, administrative law, personnel matters, and legal assistance),[12-4] their volume and complexity had expanded

---

12-3. There were two instances in the seventy-five year history of the Office of the Judge Advocate General where an officer serving in a subordinate billet had assumed the top post directly from the subaltern position, but in neither case had the officer been serving a normal tour as the Assistant Judge Advocate General. In 1892, Lemly succeeded Remey, after serving for several months as Acting Judge Advocate General (there being no recognized position of Assistant Judge Advocate General until 1916). And in 1945, Colclough succeeded Gatch after serving for three months as his assistant, an obvious position of convenience while awaiting Gatch's transfer.

12-4. Early in 1955 the Secretary of the Navy had attempted to resolve the chronic jurisdictional tug-of-war between the Office of the Judge Advocate General and the Office of General Counsel that had persisted since World War II, by defining the responsibilities of each office. To the General Counsel were assigned all legal services in the field of business and commercial law, including real and personal property matters, procurement matters, intellectual property matters, and industrial security. Secretary of the Navy Instruction 5430.25, Subject: "Office of the General Counsel for the Department of the Navy; Legal Services in the Field of Business and Commercial Law," 2 February 1955, at 2. The instruction specifically canceled the

(continued...)

Digitized by Google

enormously due to the explosion of statutory requirements, decisional law, and international agreements that succeeded the war. Paramount among these was, of course, the *Uniform Code of Military Justice*, but other laws and accords, such as the *Federal Tort Claims Act*, mutual defense pacts, status of forces agreements, and base operating agreements, to name but a few, also imposed added burdens. These burdens were exacerbated by the recruiting problems already mentioned, and by personnel ceilings that placed the manning level for Navy lawyers at approximately one-third that of the Army or the Air Force, despite similar workloads.[12-5] Of interest in this regard is a letter dated 31 May 1956 from Ira Nunn to the Secretary of the Navy, in which, in fourteen detailed pages, Nunn seems to have experienced a conversion of enlightenment. The opening paragraph sets the tone:

12-4. (...continued)
pivotal memorandum of 13 December 1942 (see footnote 8-69 and accompanying text). To the Judge Advocate General were assigned "all legal duties and services throughout the Department of the Navy other than those specifically assigned to the General Counsel . . . ." Secretary of the Navy Instruction 5430.27, Subject: "Responsibility of the Judge Advocate General for Supervision of Legal Services," 21 February 1955, at 1.

Copies of these instructions are reprinted in Chapter 1 of Bureau of Naval Personnel, *Office of the Judge Advocate General–Duties, Organization and Administration*, NAVPERS 10843-A (Washington, D.C., Bureau of Naval Personnel, 1961). They have also been included in Appendix B.

By 1967, a committee of senior naval officers could report that the division of responsibility had worked well and had "eliminated the jurisdictional disputes that plagued [the] two organizations in the early years of OGC's existence." Rear Admiral George R. Muse, USN, report to the Under Secretary of the Navy, Subject: "Uniformed Officer-Lawyer Personnel; Requirements, Retention and Procurement of," 12 June 1967, at 28.

12-5. In 1954 the Navy had a personnel ceiling of 417 Law Specialists, compared to 1,150 in the Army and 1,261 in the Air Force. "Historical Development," attachment to Memorandum [from the Judge Advocate General of the Navy] for the Assistant Secretary of the Navy (Personnel and Reserve Forces), Subject: "Report of the Committee on Organization of the Department of the Navy, 1959," 6 April 1959, at 12; see also, Judge Advocate General, letter to Secretary of the Navy, Subject: "Law Program; Recommendations for Improvement in," 31 May 1956, fifth page.

Digitized by Google

> In less than a month my term of office as Judge Advocate General of the Navy will end. Prior to leaving office I consider it appropriate to review my four years in that position and, based on that review, to make specific recommendations aimed at the overall improvement of legal services performed in behalf of the naval service under the cognizance of the Judge Advocate General. The instant letter incorporates the recommendations made as a result of that review.

Nunn argued that lawyers, indeed their expansion in number, were now *essential* to the Navy. But he went even further. He identified the lawyers needed as *Law Specialists*, an acknowledgment of substantial proportion for one who had fought so hard to repress that group. He then noted that despite the greatly increased demands placed upon the Law Specialists, there had been no significant change in the allocation of legal billets in the Navy since the creation of the Law Specialist Program. He stated that in his opinion this allocation (for which he was at least in part responsible, through his participation in the Low Board recommendations; see text beginning at page 540) was inadequate and affected adversely the performance of legal services in the Navy:

> [T]he personnel allocation plan now in effect is, and those in effect during the past four years have been, adequate only to accommodate barely the need for legal services within the narrow confines of military law, so far as legal billets are concerned. All other needs for legal services have been treated as secondary. As a consequence, there are major activities in the Navy now without any adequate legal services, other activities with grossly overburdened legal departments, and fields of legal activity that are being neglected to the detriment of the service.

Digitized by Google

Nunn recommended the immediate conversion of 100 *Law PG* billets to Law Specialist billets, a recommendation that was substantially approved within the year.[12-6] He recommended that the number of Law Specialist billets be increased immediately from 417 to a total of 550, a recommendation not followed by the Secretary.[12-7] And he suggested a review of all legal billets in the Navy, to include specific recommendations relative to the establishment of new billets, and the disestablishment or reassignment of existing billets. In what may have been a gesture of reconciliation toward the Law Specialists, Nunn closed with the following:

> [T]he time has now come to reshape the legal organization along the lines recommended herein in order that the Navy may receive full benefit from the uniformed lawyers who have made, and who may make, careers of serving their country.

Despite the ill feelings that had existed between Ward and Nunn, and perhaps because of the proffer of reconcilement contained in Nunn's letter, Ward acted almost immediately to pursue Nunn's suggestion for a review of legal billets. As a result of Ward's preliminary findings, the Chief of Naval Personnel established an *ad hoc* group composed of officers representing the Chief of Naval Operations, the Chief of Naval Personnel,

---

12-6. Robert A. Fitch, "The Law Specialist Program, " *JAG Journal* (June 1957), 3. Perhaps as a gesture of loyalty to the Law PG community, Nunn stated that this recommendation was "not to be construed as dispensing with the employment, when available, in legal billets of unrestricted line officers trained at government expense in the field of law." Short on specifics, Nunn supposed that some plan could be developed with the Chief of Naval Personnel to assure the continued utilization of such officers. He did not go so far as to suggest a reinstitution of the Law PG Program.

12-7. Nunn proposed to procure the additional lawyers through the direct commissioning of civilians, the recall and augmentation of Reserve officers, and unspecified "USN sources." Nunn's previous recommendation on the question of manning levels, made in 1953, had set a goal of only 460 Law Specialists on active duty by 1958. See text beginning at page 523.

Digitized by Google

and the Office of the Judge Advocate General, to examine the question in depth. This was but the first of several studies, sometimes running in parallel, conducted during the forthcoming decade dealing either directly or tangentially with the size and shape of the Navy's legal structure. Early in 1957 the *ad hoc* group issued a number of recommendations aimed at alleviating the legal-personnel situation. Among those approved (by the Chief of Naval Personnel) were the following:

- ⚓ Convert seventy-five Law PG billets to Law Specialist billets within two years (discussed above).
- ⚓ If requested and justified by the Judge Advocate General, convert an additional eighty-five general service line officer billets to Law Specialist billets within six years.
- ⚓ Recruit civilian lawyers to attend Officer Candidate School and, while there, apply for commissioning as Law Specialists. Of those selected, commission them as lieutenants junior grade, with three years of constructive service. Prior to their first duty assignment, send the newly-commissioned Law Specialists to the Naval Justice School for instruction. (Note that the Naval Justice School did not offer a course specifically designed for Navy lawyers until after 1965. Until then the Law Specialists took the course designed to familiarize line officers with the *Uniform Code of Military Justice*.)
- ⚓ Solicit Reserve-officer lawyers on active duty who are not designated as Law Specialists to request redesignation as Law Specialists.
- ⚓ Expand the program whereby Reserve-officer lawyers on inactive duty not designated as Law Specialists can become redesignated as Reserve Law Specialists.
- ⚓ Re-evaluate and revise upward the personnel ceiling for Law Specialists.
- ⚓ Establish direct liaison between the Bureau of Naval Personnel (which made the assignment of Law Specialists to duty stations), and the Office of the Judge Advocate General (which was responsible for the administration of military justice in the Navy), in order to keep the Judge Advocate General informed of the assignment of Law Specialists throughout the Navy, and to consider the recommendations of the Judge Advocate General with regard to such

Digitized by Google

assignments. (Note that this was the first time a formal mechanism had been established to give the Judge Advocate General direct input into the assignment of lawyers in the Navy.)[12-8]

Ward himself moved to reorganize his immediate office, proposing a "five-man top-management team." Where there had been several division directors with parochial responsibilities, under the direct supervision of a single, statutorily-authorized Assistant Judge Advocate General, Ward set up *three* Assistant Judge Advocates General, with cognizance over the broad areas of military justice; international and administrative law; and personnel, Reserve, and management matters. Each would coordinate the work of the division directors within his area of responsibility. The statutory post of Assistant Judge Advocate General would now be called the *Deputy* Judge Advocate General, a position that Ward proposed should carry the rank of rear admiral "while so serving."[12-9] Finally, Ward considered the possibility of seeking a reduction in the statutory four-year term of office for the Judge Advocate General, in order that a greater number of officers might have an opportunity to serve in the post.[12-10]

12-8. The recommendations were reported in Fitch, "The Law Specialist Program," *passim*.

12-9. Nunn had already changed the title of this billet to Deputy *and Assistant* Judge Advocate General before leaving office. Ward continued to use the Nunn designation rather than the "Deputy Judge Advocate General" title he had originally suggested. Ward's proposals were approved by the Secretary of the Navy in a directive of 23 November 1956.

In a coincidental and curious oversight of Congress at precisely the time Ward was reorganizing his office, the statute authorizing appointment of an officer to serve as the Assistant Judge Advocate General was amended to provide that "An officer *in the line* of the Navy may be detailed as Assistant Judge Advocate General . . . ." Nowhere was there any mention of a requirement that he be a lawyer. Act of 10 August 1956, 70A Stat. 290.

12-10. Ward's organization plan is set forth in "A Message from the Judge Advocate General," *JAG Journal* (September-October 1956), 5. An irony of Ward's plan was that it so closely resembled one proposed by Nunn late in 1955, which was (continued...)

Digitized by Google

Notably absent from Ward's plan, even in the abstract, was any mention of a Judge Advocate General's Corps.

Driving Ward's proposals was the revitalization of the Law Specialist Program. Speaking before the Judge Advocates Association shortly after taking office, Ward described the personnel problems in the Navy's legal community as acute.[12-11] He stated that one of his immediate concerns was the recruiting and retention of capable young lawyers. To attract these lawyers the Law Specialist Program needed career incentives. Ward proposed positions of greater responsibility, professional recognition, and opportunities to advance to top management jobs, including the post of Judge Advocate General itself.[12-12] Although the imprimatur of legislation was desirable to implement "officially" all of Ward's proposals, such

---

12-10. (...continued)
condemned by the "cabal" forces as window dressing intended to persuade Congress that Law Specialists were holding key positions in the Judge Advocate General's office. See George A. Sullivan, letter to William C. Mott, 5 December 1955; Mack K. Greenberg, letter to William C. Mott, 10 December 1955.

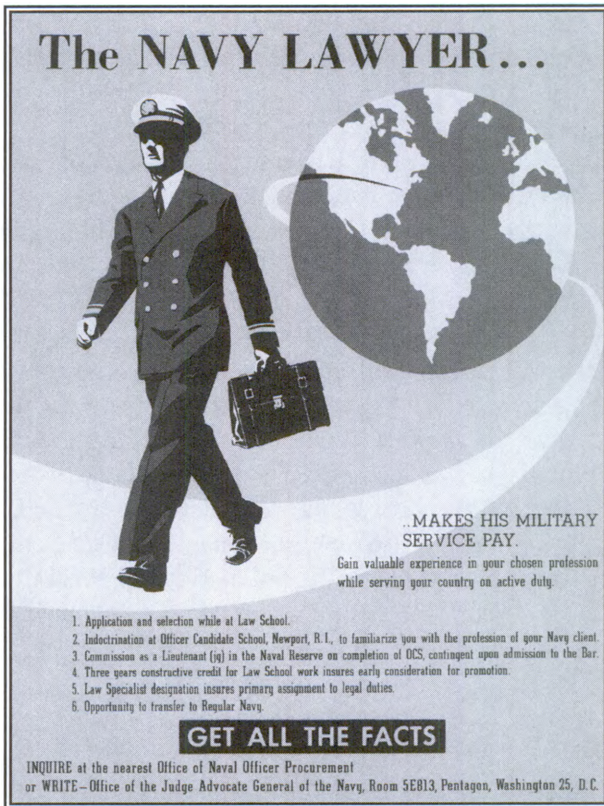
12-11. Judge Advocates Association, *Minutes of the Tenth Annual Meeting* (Report by Rear Admiral Chester C. Ward, USN, Judge Advocate General of the Navy), 28 August 1956.

12-12. Generous's observation on the significance of a Law Specialist becoming the Judge Advocate General is noteworthy:

> Psychological factors now went to work. Before Ward's appointment, JAG had merely been another post to be held by a high-ranking naval officer as he worked his way up the promotional ladder. After 1956, however it became the highest achievement a naval lawyer could aspire to. Moreover, because by holding the job he would have fulfilled his ultimate career ambition, the JAG would have less reason than heretofore to be obsequious when dealing with line admirals around him.

William T. Generous, Jr., *Swords and Scales, The Development of the Uniform Code of Military Justice* (Port Washington, N.Y.: Kennikat Press, 1973), 111.

Digitized by Google



A Law Specialist recruiting poster from the 1960s. Item number 2 (Indoctrination) may have been an attempt to answer the criticism of the line, that the Law Specialist lacked an understanding of the problems of command. (Office of the Judge Advocate General of the Navy)

legislation was not forthcoming. With the blessing of the Secretary of the Navy, Ward administratively instituted those that he could. They actually comprised the majority of his recommendations. This reorganization by

Digitized by Google

fiat remained in place for ten years, until 1967, when the suggested legislation was finally enacted.[12-13]

Ward was almost half-way into his tour of office when personal tragedy struck his deputy. On 20 March 1958, Walker suffered a cardiac seizure and died three days later. He was succeeded in office by William C. Mott. The Ward-Mott alliance was complete.[12-14]

The office which Ward directed, assisted now by Mott, consisted of fourteen principal divisions: International Law, Admiralty, Civil Law, Administrative Law, Litigation, Personnel Security, Military Personnel, Administrative Management, Naval Reserve and Legal Assistance, Appellate Defense, Military Justice (which included Appellate Government), Investigations, Editorial and Research, and Bureau of Naval Personnel Discipline Liaison. In addition to the divisions were the appellate boards of review, varying between five and six in number, established under the *Uniform Code of Military Justice* to hear appeals from court martial convictions. Because of the volume of work on the West Coast, two of these boards were located in San Bruno, California, in what was known as the "Office of the Judge Advocate General, West Coast" (see Appendix E).[12-15] By the end of 1958 the West Coast office had expanded to include branches for admiralty, claims, fiduciary affairs, litigation, appellate defense, appellate government, and legal advisory services.[12-16]

12-13. The legislation was incorporated into the bill creating a Judge Advocate General's Corps for the Navy: Act of 8 December 1967, 81 Stat. 545. An edited and abridged text of the act appears in Appendix R.

12-14. Homer A. Walkup, *History of U.S. Naval Law and Lawyers* (Prepared on the occasion of the ninetieth anniversary of the establishment of the Office of the Judge Advocate General of the Navy, 1970), 25. Mott actually took office on 15 September 1958, at the conclusion of his tour at the Office of the Joint Chiefs of Staff.

12-15. *Organization Statement of the Department of the Navy*, subsection H, "Office of the Judge Advocate General," 16 F.R. 12585-86 (1957).

12-16. *Office of the Judge Advocate General–Duties, Organization and Administration*, NAVPERS 10843-A, at 124-27; Judge Advocate General of the Navy Notice 5400 to All Ships and Stations, Subject: "Organization and Functions of the Office of the Judge Advocate General, West Coast," 29 August 1958.

Digitized by Google

With the enthusiasm generated by their heightened influence, new opportunities for innovation, and a commitment to excellence, the enfranchised Law Specialists found imaginative ways to improve the delivery of legal services to the Naval Establishment. One such innovation was the "Dockside Court Program" developed and first introduced by Mack Greenberg in December 1957 when he was stationed at Atlantic Fleet headquarters in Norfolk, Virginia. The concept was to help the ships, which did not have lawyers on board, with their court martial proceedings. A team of Law Specialists, gathered from the several type commands in the Norfolk area, met the ships when they came into port and served as trial and defense counsel, and sometimes even as court president, to conduct trials of personnel who had committed offenses while the ship was underway. Since the ship was at sea until the time of trial, the accused never had to be confined in a brig ashore prior to trial, a saving in administrative time and expense. It was a great service to the ship commanders, especially those on the smaller ships who were hard-pressed to supply personnel to conduct and administer courts martial.[12-17] Related to the Dockside Court Program were the East and West Coast Task Forces. Each of these was "a traveling nucleus of legal talent, available for duty as trial and/or defense counsel and/or law officer–plus top-notch court reporters if needed."[12-18] With the relatively meager and thinly-stretched number of lawyers available to the Navy, unpredictable demands, particularly surges of military offenses, strained staff legal personnel beyond their capabilities. These "circuit-riding" task

---

12-17. Captain Mack K. Greenberg, JAGC, USN (Ret.), interview with author, 14 May 1992; Generous, *Swords and Scales*, 113. By 1959 the Dockside Court Program was established throughout the Atlantic Fleet Minesweeper Command, the Pacific Fleet Service Force, and the Eleventh Naval District. Captain Mack K. Greenberg, USN, letter to Chief of Naval Personnel, Subject: "Study of Navy Billet Structure for the Employment of Law Specialists and Officers of Other Categories who are Qualified for Law Duty–Minority Report," 9 July 1959.

The Dockside Court Program was an idea whose time had indeed come, at least in concept. In 1966 a "law center," providing a full array of court martial and other legal services to the fleet, was established in Norfolk, Virginia. See Appendix L.

12-18. Chester C. Ward, "A Message from the Judge Advocate General, " *JAG Journal* (July-August 1960), 17.

Digitized by Google

forces were established to augment these staff lawyers as needs occurred.[12-19]

Another program designed to expedite the administration of naval justice was "Operation Tapecut," an initiative designed to reduce the number and complexity of trials by general court martial. The essential element of this program was the direct contact by the Judge Advocate General with commands that were using general courts martial in cases where lesser procedures would work faster and better, most notably desertion cases. By 1959, Ward had succeeded in reducing the number of general courts by over fifty percent of their 1956 level.[12-20] With the number of general courts reduced to manageable levels, the Navy adopted a system of negotiated pleas in September 1957, and extended it to special courts martial in December of that year.[12-21]

These measures instituted by Ward had a common goal; to make the *Uniform Code of Military Justice* work effectively for the Navy:

> Five years after its effective date, when I took office as JAG, this law had not yet been made to work to the satisfaction of Navy command. The new law, many commanders contended, (1) generated too much red tape, (2) caused too many delays, (3) used too much officer time in trials and work preliminary to trials, (4) required too many lawyers, (5) required too much paper work, (6) had built up

---

12-19. The trails blazed by these "circuit riders" ultimately led to the establishment of an independent judiciary for the Navy and Marine Corps. See Appendix M.

12-20. Chester C. Ward, "A Message from the Judge Advocate General, " *JAG Journal* (July-August 1960), 11-12. Ward acknowledged that he was greatly assisted in his efforts by the Court of Military Appeals, which held in the case of *United States v. Cothern*, 23 C.M.R. 382 (C.M.A. 1957), that successful prosecution of the offense of desertion required evidence of a specific intent to desert. This significant evidentiary burden had a marked impact in decreasing the number of desertion offenses charged and, consequently, the number of general courts martial convened.

12-21. Chester C. Ward, "A Message from the Judge Advocate General, " *JAG Journal* (July-August 1960), 12.

Digitized by Google

> a big pre-trial brig population, and (7) deprived the Commanding Officer of too much of his essential powers of mast punishment.
> These complaints were justified. . . .[12-22]

Ward then pointed out that the measures he had administratively implemented, set forth above, had cured all of the faults save the need for additional mast punishment authority in the commanding officer.[12-23] Legislation to grant this authority, he noted, had been pending since 1953.[12-24]

12-22. Chester C. Ward, "A Message from the Judge Advocate General, " *JAG Journal* (July-August 1960), 11.

12-23. In addition to the measures already noted, Ward took steps to reduce pre-trial brig populations, eliminate brig maltreatment, utilize the clemency powers authorized to the Judge Advocate General by the Secretary of the Navy, encourage the use of suspended sentences as a probationary measure, and increase the use of administrative discharges.

12-24. Ward related an anecdote which nicely captured the sentiment of the line-officer commander on this issue of mast punishment authority. Noting that he often lectured on naval justice before groups of line officers, he explained that he had been frequently confronted with the following statement:

> Admiral, as the commanding officer of my destroyer I have more experience, more maturity and more responsibility than any other officer on my ship. Under the law, however, I am substantially without effective power to punish any of the crew. On the other hand, I could appoint my youngest and most inexperienced officer as a summary court, and he could then exercise powers of punishment vastly greater than my own. Does this make sense?

To which Ward confessed that he could never conscientiously answer that it did make sense. "It's contrary to the great tradition of the sea that the commanding officer must not merely represent authority–he must *be* authority." Chester C. Ward, "A Message from the Judge Advocate General, " *JAG Journal* (July-August 1960), 18.

(continued...)

Digitized by Google

Despite these innovations in the provision of legal services to the fleet, the intensified recruiting and commissioning efforts, and Ward's initiatives in developing career incentives, the Law Specialist personnel situation worsened. The Navy legal community was not alone in this; the entire Navy, and indeed all the military forces suffered from a failure to attract qualified applicants. But the situation was especially acute for the Law Specialists. Ward came to the conclusion that none of his programs could solve the problem without an additional sweetener; increased pay for lawyers. Both the Department of the Navy and the Department of Defense opposed such an incentive. Ward, in his official capacity as Judge Advocate General, nominally supported those positions. But, in an interesting bifurcation of status, Ward announced a *personal* view in favor of such pay. Then he went even further, presenting his personal opinion at the invitation of the Senate Armed Services Committee. Called an "official statement," Ward's blunt remarks before the committee reveal the depth of the problem and the state of the Law Specialist Program at the time:[12-25]

> Shortly after assuming office, I caused a study to be made on the ways and means of improving legal services in the Navy. I found (1) a great and continuing increase in workload, and (2) the number of lawyers available to me was inadequate to render the type of service to which I believe the Navy is entitled and needs. Added to this, and of special significance, I found that I was unable to retain those presently on board. The inability to retain lawyers in the program seriously affects my capacity, as Judge Advocate General, to perform statutory duties.

12-24. (...continued)
The *Uniform Code* was finally amended in 1962 to provide commanding officers with increased mast punishment authority. See footnote 11-56.

12-25. *Congressional Record*. 85th Cong., 2d sess., 1958. Vol. 104. Because of the length of Ward's comments, numerous but minor editorial changes have not been indicated. The substance has not been affected.

Digitized by Google

Virtually every young lawyer gets out of the service as soon as his military obligation is fulfilled. This means, therefore, that he would not have come in at all but for the draft. By the time they have attained a modicum of experience their military obligation is completed and they return to the more lucrative civilian practice. With the draft law as it is, those departing are being replaced–but they, too, will depart when they have completed their military obligation.

The constant ebb and flow of these young lawyers in the military results in lack of continuity of service and, of even greater import, *low experience level*. It is difficult for servicemen being tried before courts martial to believe that a young, inexperienced lawyer can fully protect their legal rights. This has a definite effect on the morale of those accused of offenses.

The Court of Military Appeals had this to say in the case of *United States v. Fisher*: "It is quite possible that the shortage of legally trained personnel, particularly in the Navy, is so great that the few are just physically unable to carry the heavy burden."

I do not believe that I should be required to entrust the handling of important matters to inexperienced lawyers. Substantial interests of the United States are constantly at stake.

Efforts to retain junior Law Specialists on active duty have proved unavailing. A recent program offered eligible Law Specialists three years' constructive service in return for a voluntary extension of one year of obligated service. Less than ten percent of the officers eligible accepted. During the last half of fiscal year 1957, *twenty* Reserve Law Specialists

Digitized by Google

came into the program but *twenty-four* left. During the first half of fiscal year 1958, *forty-one* Reserve Law Specialists came into the program but *fifty-three* left.

As a consequence, the Navy has been forced to rely largely on a hard core of senior Law Specialists, whose contributions in terms of experience and legal ability have been outstanding. In four or five years, the large majority of this group will attain eligibility for voluntary retirement. A recent poll revealed that seventy-two percent would seek retirement. Of these, eighty-three percent indicated that they would remain on active duty if incentive pay legislation were enacted.

The younger Regular officers are resigning. A vital factor which causes these young officers to return to civilian life is inadequate pay. The procurement program for Regular officers is not meeting with success. During fiscal year 1957, *ten* officers were procured for the Regular Navy. Thus far in 1958, *six* have been procured. Prior years were less productive.[12-26]

In addition to these *vitally* important needs, I wish to invite your attention to the need in the Navy for flag rank for the position of Deputy Judge Advocate General. The Navy is at a definite disadvantage in this powerful incentive to able lawyers to remain in the service to compete for flag rank and responsibility.

12-26. Less than two years earlier, Ira Nunn recommended a net *gain* of twenty Law Specialists in each year from 1957 through 1961, and represented to the Secretary of the Navy that he had experienced "comparatively little difficulty in attracting and retaining lawyers as officers." Judge Advocate General to Secretary of the Navy, 31 May 1956, ninth and tenth pages.

Digitized by Google

Ward closed with an ominous warning of the consequences to the administration of legal services if incentive pay were not provided to Navy lawyers:

> I am convinced that unless effective remedial action is taken, the Navy will be faced with the unacceptable situation of being unable to carry out within reasonable professional standards its legal duties demanded by the *Uniform Code of Military Justice*. Further, I believe we will be unable to render the legal services necessary to the proper administration of the Navy as a whole, and to conserve naval appropriations in areas such as tort and admiralty claims.[12-27]

12-27. The recruiting and retention situation remained a chronic problem throughout the 1960s. Don Chapman identified it as a major concern even as the Judge Advocate General's Corps was established in 1967:

> After the JAG Corps came into existence in 1967, we were confronted with having to do a lot of things. One problem was that we weren't able to retain officers. They were leaving, the lawyers were leaving, and we just couldn't keep them on active duty. And we were struggling to fill the billets with the officers we had. So the logical thing was to offer them professional pay like the doctors and dentists were getting. So pro-pay legislation was proposed about that time. All the armed forces, the Army and the Air Force, were also having the same problem. But somehow the legislation just never did get off the ground and sometime after I left active duty, why they had an excess of lawyers, and recruiting lawyers was no longer a problem, so the pro-pay concept sort of died on the vine.

Rear Admiral Donald D. Chapman, JAGC, USN (Ret.), interview with author, 17 July 1991.

The Navy Judge Advocate General's Corps reached full authorized

(continued...)

Digitized by Google

Despite Ward's alarming and gloomy assessment, incentive pay legislation for Navy lawyers was never enacted by Congress. Several attempts at passage met with failure, most notably the "Pirnie" legislation of the 1960s.[12-28] The Navy Department, which failed to support the concept of incentive pay until 1965, turned instead to a time-honored solution; the appointment of a board to re-examine the place of special duty officers in the Navy. This necessarily included a renewed examination of the place of the Law Specialist.

In June 1958 the Chief of Naval Personnel convened the "Dornin Board" to "investigate the problems related to the career management and

---

12-27. (...continued)
strength, at 999 uniformed lawyers, for the first time in 1983 (fiscal year 1984). Improvements on the recruiting side of this equation were attributed to the Excess Leave Program, the Law Education Program, and the increased augmentation of Reserve officers to the Regular Navy. Improvements in retention were attributed to a depressed economy, higher military pay levels, and the increased esteem that accompanied membership in the professionally-respected Judge Advocate General's Corps. Rear Admiral James J. McHugh, JAGC, USN, Judge Advocate General of the Navy, "A Personal Message from the Judge Advocate General," *Off the Record* (31 March 1983), I.

12-28. The "Pirnie" legislation comprised a series of bills sponsored by Congressman Alexander Pirnie of New York between 1965 and 1969. They provided pay incentives for lawyers in all the services. In 1969, Pirnie introduced H.R. 4296, which included provisions for professional pay and continuation bonuses. Pirnie's testimony in favor of H.R. 4296 before the House Armed Services Committee, as well as that of the Assistant Secretary of Defense for Manpower, the Judge Advocates General of all the services, and the Chief Counsel of the Coast Guard, can be found at U.S. Congress, House Committee on Armed Services, *Hearings Before and Special Reports Made by Committee on Armed Services of the House of Representatives on Subjects Affecting the Naval and Military Establishments*, 91st Cong., 1st sess. (1969), 4393-4412.

The testimony of then-Judge Advocate General of the Navy Joseph B. McDevitt on H.R. 4296 indicates the continuing gravity of the retention situation. McDevitt noted that because of the draft, the Navy could get all the high caliber law school graduates it needed. The problem lay in retaining them on active duty; both the Navy and the Marine Corps were retaining only about one-third of the lawyers needed. See House Committee on Armed Services, *Hearings Before and Special Reports . . . on Subjects Affecting the Naval and Military Establishments*, 91st Cong., 1st sess. (1969), 4407-09.

Digitized by Google

utilization of line officers designated for special duty."[12-29] Ward appeared before the board to present his views.[12-30]

He began with the assertion that the Law Specialist concept, as special duty officers affiliated with the line, was a misalignment that had proven to be administratively unworkable since its inception in 1947. It lacked the support of the line, yet had no affinity to the Navy's staff corps. In Ward's words, this had "induced a dilution in morale and esprit and a pervasive anemia stemming from inadequate nutrition in the form of vital career opportunities." The already inadequate personnel allowance of 328 Regular officers that Ward had bemoaned before the Senate Armed Services Committee had just been further reduced by the Bureau of Naval Personnel, without explanation, to 267.[12-31] Of the 2,000 non-fleet naval activities throughout the world, Law Specialists could be assigned to only 180, with an average distribution of 1.9 lawyers per activity. With such a distribution, argued Ward, he could not accomplish his mission of providing legal services throughout the Navy. Finally, Ward pointed out that a disproportionate number of Law Specialists occupied senior ranks, and that most of them would become eligible for voluntary retirement within four years. Without incentives for them to remain on active duty, most would leave, further decimating his ranks. To induce them to stay, Ward now urged, not incentive pay, but establishment of a lawyer corps separate from the line, with three flag-rank billets.[12-32]

12-29. Report of the Board to Study the Career Management and Utilization of Line Officers Designated for Special Duty to the Chief of Naval Personnel, 20 October 1958, enclosure (1). The Domin Board derived its name from its senior member, Rear Admiral Marshall E. Domin, USN.

12-30. The text of Ward's comments, as well as other materials relating to the Domin Board, were located in a file maintained by the Military Personnel Division of the Office of the Judge Advocate General.

12-31. Adding to Ward's personnel problem was the fact that he presently had 279 Regular Navy Law Specialists on active duty. With his allowance now cut beneath that number, he could not recruit replacements until sufficient vacancies occurred.

12-32. Another factor impacting adversely on retention was the Draconian attrition rate from which the legal community was suffering. Because the Law (continued...)

Digitized by Google

Ward's arguments held sway. The Dornin Board recommended establishment of a corps for lawyers. Its report stated that the two major objections to a legal corps in the past had been the small size of the legal group and the concern that a corps would drain off the Law PGs from the needs of the line, and that neither of these objections any longer obtained.[12-33] It further recommended the presidential appointment of two rear admirals in "while so serving" billets if the strength of the corps were less than 1,000, and three if it exceeded that number.[12-34]

The report was submitted to the Chief of Naval Personnel, Vice Admiral Harold P. Smith, on 20 October 1958. In less than a fortnight he

---

12-32. (...continued)
Specialists were considered for promotion by *line officer* selection boards, and competed for promotion against unrestricted line officers, their opportunities for advancement were impaired, or at least perceived to be so; in 1957, fifty-four percent of the Law Specialist commanders eligible for promotion to captain failed to be selected. These dim prospects for promotion beyond commander had a devastating effect on morale, and provided little inducement to remain on active duty; the attrition rate from lieutenant commander to commander was more than seventy-three percent. Judge Advocates Association, *Minutes of the Twelfth Annual Meeting* (Report by Captain Robert A. Fitch, USN, Assistant Judge Advocate General for Personnel, Reserve and Management), 26 August 1958. Although Ward failed to stress this point, the Dornin Board itself recognized it:

> [I]t becomes extremely difficult for a selection board to compare the performances and weigh the values of officers serving in special duty categories against those of unrestricted line officers and arrive at a valid opinion as to which officers merit promotion.

Report of the Board to Study the Career Management and Utilization of Line Officers Designated for Special Duty, 20 October 1958, at 3.

12-33. There is no indication in the Dornin report or in the comments of the Judge Advocate General to explain how the Dornin Board arrived at this conclusion. It is, however, clearly erroneous. First, the size of the legal group had never been an issue in connection with arguments against a corps; the Law Specialists numbered few more in 1958 than they had in 1948, and their numbers were shrinking. Second, there was never any strong sentiment to pull the Law PGs into whatever legal corps might be established. The unfortunate result of this position by the Dornin Board was that it was indefensible against the anti-corps forces.

12-34. Report of the Board to Study the Career Management and Utilization of Line Officers Designated for Special Duty, 20 October 1958, at 35-37.

Digitized by Google

had forwarded it on to the Chief of Naval Operations with his recommendation that a legal corps *not* be established. The argument against a corps was articulate but far from novel:

> Notwithstanding the apparent administrative virtue of [a corps], it is the opinion of the Chief of Naval Personnel that more far reaching considerations dictate that the legal group remain as close to the unrestricted line as administratively possible . . . .
>
> Discipline is a part of leadership and a function of command. . . . [I]t is considered essential that the power to administer discipline remain with the Commander and his direct subordinates, within the limits of the law. The establishment of a staff corps for legal specialists would give rise to the inference that the administration of discipline was no longer an area of primary responsibility of, and concern to, the military commander.

Then, taking a position so discredited as almost to defy logic, Admiral Smith urged resurrection of the Law PG Program:

> Further, the Chief of Naval Personnel is not prepared to acquiesce to a philosophy that naval lawyers be trained outside the naval establishment and subsequently become naval officers merely because the current situation with relation to funds for postgraduate education require [*sic*] this. Rather he is of the opinion that the needs of the service could better be met were young men to be trained as naval officers first and as lawyers as a corollary duty second. . . .

Digitized by Google

> [I]t is not possible in periods of reducing strength, and under the austere officer allowance now prevalent in the units of the fleet, to further specialize or to provide separate billets for legal specialist. [*sic*][12-35]

On 8 January 1959 Arleigh Burke, the Chief of Naval Operations, concurred fully in Vice Admiral Smith's recommendations.[12-36] No further action was taken on the Dornin proposal.

On the very day that Arleigh Burke dismissed the Dornin recommendations, Chester Ward, the Judge Advocate General, submitted a letter request to him asking for an increase in the number of Law Specialists on active duty.[12-37] Ward set forth all the now-customary reasons for making such a request: increased responsibilities in the field of international law; demands created by new laws and regulations; increased requirements in the fields of admiralty, investigations, claims, retirements, and legal assistance; demands created as a result of the *Uniform Code of Military Justice*; and demands created by interpretative opinions of the Court of Military Appeals, including significant requirements for the employment of counsel not within the original contemplation of the *Manual for Courts-Martial*. Then he set forth some additional–and highly-charged–data. Highly-charged both because of the manner in which it had been collected, and the implications arising from it.

Unknown to Burke, Chester Ward and Mack Greenberg had persuaded the Secretary of the Navy to survey the major Navy commands, including major combatant ships, to determine if they had any officers assigned to their commands who were lawyers. They were not looking for

---

12-35. Chief of Naval Personnel, letter to Assistant Secretary of the Navy (Personnel and Reserve Forces), 31 October 1958. The Chief did recommend that one additional rear admiral billet be authorized on a "while so serving" basis, for the Deputy and Assistant Judge Advocate General.

12-36. Chief of Naval Operations, letter to Assistant Secretary of the Navy (Personnel and Reserve Forces), 8 January 1959.

12-37. Judge Advocate General, letter to Chief of Naval Operations, Subject: "Law Specialist Billets and Strength, Increase in; Request for," 8 January 1959.

Digitized by Google

Law Specialists, since they knew where they were assigned,[12-38] but rather for officers who had law degrees and were *not* designated as Law Specialists, and thus not under the Judge Advocate General's direction or supervision. When such lawyers were found, the inquiry then turned to their employment, specifically, whether they were performing any legal duties. The results were startling.[12-39]

12-38. Where Law Specialists were *not* assigned was to the backbone units of the Navy, the ships at sea. The Chief of Naval Personnel provided the reason:

> To do this would obviously only further reduce the extremely critical unrestricted line officer strength upon which the command structure rests.

Judge Advocate General, letter to Chief of Naval Operations, 8 January 1959.

12-39. Arleigh Burke was not pleased that Ward and Greenberg had gone around him to obtain the data. In the words of Mack Greenberg:

> Chester Ward and I went to the Secretary of the Navy and convinced him that we ought to canvas the fleet with a letter from the Secretary asking the commanding officers if they felt that they should have a lawyer on board–not only for military justice but as an advisor to the commanding officer. And the letter went out. And one day the Chief of Naval Operations sent for Chester Ward and he took me with him. We were ushered into his office, which was a tremendous office in the Pentagon. And we stood there inside the door, I would say for ten minutes–it seemed like eternity. The Chief had his back to us; he was doing something. And finally he turned to us and he said, "Secretaries come and go but the Navy Blue goes on forever." And then he started to chastise us because we had sent that letter out without getting his approval. But the results of that letter were tremendous. All the commands at sea wanted a lawyer; they would be glad to give up a line billet. But as the Deputy Chief of Naval Operations told me "You know, every time we give up a line billet for a Law Specialist billet, we are

(continued...)

Digitized by Google

The survey showed that there were 548 non-Law Specialist lawyers on active duty as of 1 January 1958. Chiefly assigned to general service line officer billets, they ranged in rank from ensign to admiral. Of these 548 officers, *approximately 265 were engaged primarily in legal duties, to the virtual exclusion of any line duties*.[12-40] Ward had made the case for increasing the number of Law Specialists on active duty by at least 265![12-41] He requested the convening of an *ad hoc* group to redetermine the Law Specialist strength and allocations needed by the Navy. On 13 January, he was advised by the Chief of Naval Personnel, Vice Admiral Harold P. Smith, that such a study group would be formed with a general service line officer, Captain Glover T. Ferguson, USN, as senior member. Mack Greenberg would represent the Judge Advocate General. The third member was Commander William H. Christensen, USN, another general service line officer.[12-42]

The Ferguson Committee met in early March, 1959, and reviewed relevant data. Its work was temporarily halted, however, when Thomas S. Gates, Jr., now the Secretary of the Navy (1957-1959), released the results of still another study group that he had convened during the previous August. Called the "Committee on Organization of the

---

12-39. (...continued)

> giving up a piece of an admiral; did you know that?" I said, "Well, I can recognize that, but for the good of the Navy, maybe it is a good idea." But that was the feeling back then.

Greenberg, interview, 14 May 1992.

12-40. About 250 of the non-Law Specialist lawyers performing legal duties were Reserve officers. The remaining fifteen were Regular officers, some of whom were Law PGs. Ward opined that, except for the very few junior officers among the Law PGs, this group lacked the requisite experience for assignment to legal billets commensurate with their rank.

12-41. The Law Specialist ceiling at this time was 444. Ward had persuasively shown that a more realistic limit would be in excess of 700.

12-42. Harold P. Smith, memorandum for the Judge Advocate General, Subject: "Law Specialists' Billets and Strength," 13 January 1959; Chief of Naval Personnel, letter to Captain Glover T. Ferguson, USN, Subject: "Study of Navy Billet Structure for the Employment of Law Specialists and Officers of Other Categories who are Qualified for Law Duty," 6 February 1959.

Digitized by Google

Department of the Navy," it was chaired by Under Secretary of the Navy William B. Franke. That Committee's mission was far broader in scope than either the Dornin Board or the Ferguson Committee. Whereas those groups had been convened by the Chief of Naval Personnel for the limited purpose of examining the status of special duty officers, the Franke Committee was convened by the Secretary of the Navy to conduct a top-to-bottom study of the Navy Department in light of post-war advances in the science and technology of modern weapons and weapons systems, and to make recommendations to the Secretary relating to the performance of its assigned tasks and missions.[12-43] Primary consideration was to be given to recommendations insuring maximum combat effectiveness. The committee was, however, directed also to provide recommendations which would ensure the most effective, efficient, and economical administration of the Naval Establishment. It was this latter charge that led the committee to a study of restricted line officer specialists, including lawyers, "from the standpoint of the purpose of such specialists in the Navy and their contribution to the effectiveness of the Operating Forces of the Navy."[12-44]

The Franke Committee filed its report with Secretary Gates on 31 January 1959, barely three weeks after Arleigh Burke had disapproved the Dornin Board's recommendation for a legal corps, and just as the Ferguson Committee was forming. The Franke Committee appeared to establish a logical foundation for its study of the restricted line officer question. It stated that the restricted line officer designation had been used to provide officer-specialists to fill positions requiring technical proficiency, which could only be acquired and maintained through extensive education and continuous duty in the specialty. This, in turn, precluded the opportunity to attain the necessary qualifications for line

---

12-43. Secretary of the Navy Notice 5420, Subject: "Establishment of Committee on Organization of the Department of the Navy," 26 August 1958.

12-44. Department of the Navy, *Report of the Committee on Organization of the Department of the Navy* (1959). To keep the emphasis of the committee's review of the Law Specialists in perspective, one need only consider that the entire report was in excess of 185 pages. Of these, no more than fifteen pages dealt with the study of restricted line officer specialists, with the study of Navy lawyers being only a fraction of that.

Digitized by Google

duties and command at sea. It found that this fact was not well understood in the Navy; that the practice of classifying such officers as line officers "even in a restricted sense" was misleading and should be discontinued. The true specialists, argued the committee, "should enjoy a separate and distinctive designation." In what appeared to be a boost for the pro-corps forces in the legal community, the committee recommended that the restricted line officer designation be eliminated, and that a corps be established to give the specialists "a recognized, rightful place in the personnel structure of the Navy."[12-45]

Then the committee reached an almost unbelievable conclusion. It determined that there was only one true specialty, that involving communications. All the others, *including law*, could be filled by line officers given postgraduate training. The Franke Committee had recommended a return of the Law PGs!

A major consideration driving the committee's findings in this regard was the reduction in personnel, including unrestricted line officers, being suffered at that time by the Navy. In the committee's collective opinion, whenever an officer was designated as a restricted line officer, this had the effect of reducing by one the number of officers qualified for unrestricted line duties. By restoring the Law PG Program, reasoned the committee, the Navy could stem this sapping of general service line officers while still maintaining a legal organization.[12-46]

In making its recommendation to restore the Law PG Program, the committee appears to have overlooked totally the augmented mission that the Office of the Judge Advocate General had taken on in the decade of the 1950s, for it treated the Navy lawyer's role as that of administering

---

12-45. The Franke Committee's discussion of the restricted line officer issue appears at Section H of the report, pages 113-22.

12-46. Ward pointed out the fallacy in this thinking. To man 500 legal billets with general service line officers on a normal sea-duty/shore-duty rotation basis would require the law school training of 1,500 of such officers, all of whom would be removed from their naval duties for a period of three years. Any time spent thereafter in legal duties would also take them away from service in the line where technical advances and increasingly complex weapons systems required almost continuous application. Judge Advocate General's Conference on the Report of the Committee on Organization of the Department of the Navy, 1959, at Washington, D.C., 24 March 1959.

Digitized by Google

discipline only.[12-47] In doing so it reverted to the Nunn-Holloway school

---

12-47. In a later rebuttal to the committee's recommendation, Ward noted that during the past few years the workload of his office had doubled and even tripled in many of the traditional disciplines handled by the uniformed lawyer. He claimed that less than a tenth of the action items received in his office during the past year related to military law, with the balance involving international law, admiralty, claims, litigation, petroleum law, retirements, investigations, administrative law, legal assistance, and the newly emerging fields of space law, operational law, and nuclear weaponry and propulsion problems. "Nature and Extent of Law Specialists' Work," attachment to Memorandum [from the Judge Advocate General of the Navy] for the Assistant Secretary of the Navy (Personnel and Reserve Forces), Subject: "Report of the Committee on Organization of the Department of the Navy, 1959," 6 April 1959, at 1; Judge Advocate General's Conference, 24 March 1959.

Some Law Specialist supporters disagreed with Ward as to the scope of his responsibilities (arguing that the Law Specialists had really not expanded their legal horizons significantly since World War II), but maintained that this was even more reason for opposing the return of the Law PG Program. Among these was Richard L. Tedrow, chief commissioner to the Court of Military Appeals. Tedrow nevertheless was bewildered by the Franke Committee's recommendation:

> I have read what purports to be the Franke Report on Navy Specialists. Insofar as it affects the lawyer in the Navy I have difficulty in deciding whether it is ridiculous or outrageous. As a very practical matter the basic purpose is to amend the [*Uniform Code of Military Justice*] and return legal matters to the Annapolis man who will be a part time lawyer after being educated in law at government expense. . . .
>
> I am unable to understand how the Navy can persist in its gross error. The practices it now attempts to revive were a direct cause, if not the only cause, of the Navy JAG losing about 90% of the Navy legal business. This started back in about 1942 when [the Procurement Legal Division] came into being because the Line officer [was] not capable of handling general legal matters. Since that time the civil law branch of the Navy has grown and taken over more and more legal activities. As a practical matter the Navy JAG now "controls" little law business other than courts-martial, courts of inquiry, etc., and various retiring boards (pro forma only).

(continued...)

Digitized by Google

of thought that justice could not be administered except as an adjunct to command discipline:

> Present legislation restricts the use of appropriated funds for postgraduate education of line officers in law. The Committee considers this an unfortunate restriction. The Committee endorses the concept that the administration of justice is a fundamental of discipline and therefore a function of command. It cannot be exercised to the full benefit of the Navy as an isolated specialty. A naval law specialist must have a thorough knowledge of the organization and mission of the Navy and be indoctrinated from the outset with the problems of naval command. A line officer already possessing this background and given postgraduate education in law will meet these criteria.[12-48]

Despite its emphasis on restoration of the Law PG Program, and its conclusion that communications was the only specialty that could not be handled by line officers with postgraduate training, the Franke Committee *had* proposed a corps for those officers presently classified as specialists

---

12-47. (...continued)
Richard L. Tedrow, Memorandum to the Court [of Military Appeals], 1 April 1959.
With regard to the recommendation to restore the Law PG Program, it may be useful to note the committee's composition. In addition to Under Secretary Franke, the membership included two other civilians: Fred A. Bantz, the Assistant Secretary of the Navy for Material, and Mr. John H. Dillon. The balance of the membership comprised senior military officers: Lieutenant General Matthew B. Twining, USMC; Admiral James S. Russell, USN; Rear Admiral Ephraim P. Holmes, USN; and Rear Admiral Thomas H. Moorer, USN.

12-48. The committee noted that the Office of General Counsel provided legal advice and services in matters of business and commercial law, and agreed that the "magnitude, variety, and complexity of the Department's contractual affairs with industry emphasize the need for legal specialists in these fields."

Digitized by Google

or restricted line officers, including the Law Specialists. But the committee proposed not a separate corps for each of these groups, but rather a catch-all "Naval Technical Corps" into which all specialist groups would be poured. Individual specialties therein would be identified by separate designators, but they would all wear the same uniform device, assuredly not the star of the line, but rather one "distinguishing them from the members of the line and the members of the other staff corps of the Navy."[12-49] Those officers presently in restricted line billets, including the Law Specialists, would be given the choice either of transferring to the line, or of continuing their careers as specialists in the Naval Technical Corps. The committee did not consider the question of how those lawyers wishing to transfer to the line might acquire the necessary competencies in operational skills. Nor did it explain how persons not designated as Law Specialists, as would be the case with the Law PGs, could meet the client representation requirements of the *Uniform Code* which required trial and defense counsel at Navy general courts martial to be officers designated for special duty in the field of law.

Perhaps the most startling aspect of the committee's recommendation was a point that went unsaid. Since the unrestricted line officers, as they became legally trained, were to take over all legal functions, there would in time be no need for the Law Specialists.[12-50] The legal system of the United States Navy would revert to the *status quo ante bellum* of 1938. The committee offered this proposal as its solution to the lawyer recruiting and retention problems in the Navy.

The report was released by Secretary of the Navy Gates on 19 March 1959. Although comprising only a fraction of the entire report, the section on proposed changes to the restricted line was so controversial–and so reactionary– as to draw disproportionate coverage in both the military and

---

12-49. The proposed Naval Technical Corps would have included the specialties of design engineering and research, aerology, communications, hydrography, naval intelligence, photography, psychology, public information, and law.

12-50. Presumably the same would hold true for all other specialties in the Naval Technical Corps, save communications. Followed to its logical conclusion, the Naval Technical Corps would eventually have comprised only communications specialists, unless other unique technical groups were subsequently identified and merged into it.

Digitized by Google

general press. Secretary Gates attempted to allay a growing uneasiness with a message to all Navy commands:

> I now have under study recommendations of a committee on reorganization of the Department of the Navy. A part of this report pertains to those officers who are in a "restricted duty" or "specialist category" within the line of the Navy. . . .
>
> I want to assure all officers affected that the recommendations concerning personnel will receive my personal attention and most detailed study.[12-51]

In a contemporaneous press release, Gates stated that he was considering the recommendations made in the report and would be receiving suggestions as to their implementation during the next six weeks. He stated that he would announce his decisions as to all recommendations on approximately 1 May 1959.[12-52] He thereupon designated the Assistant Secretary of the Navy for Personnel and Reserve Forces, Richard Jackson, to canvass representative special duty officers to get their opinions on the Franke Committee recommendations.[12-53] Among those solicited was Chester Ward, the Judge Advocate General of the Navy. Ward submitted an extensive memorandum to Assistant Secretary Jackson on 6 April 1959. He was forthright in his position:

> I find myself in complete disagreement with the lawyer staffing concept recommended [by the Franke Committee]. It is demonstrably uneconomical, inefficient, retrogressive and

---

12-51. Secretary of the Navy, Notice 5400 to all Navy commands, 20 March 1959.

12-52. Department of Defense , Office of Public Information, News Release No. 306-59, 20 March 1959.

12-53. "SDO Views on Franke to be Aired," *Navy Times*, 11 April 1959.

Digitized by Google

impractical. History records that it has been tried and found wanting. . . .

The unsound economics of the law postgraduate program was one of the main factors which caused the Congress to prohibit expenditure of funds for this purpose in 1952.

. . .

[R]eference to the history of the Office of the Judge Advocate General will demonstrate beyond argument that reliance on law postgraduates over the years has resulted in:

a. Poor advice to the client–the Navy.
b. Loss of business to *qualified* lawyers.
c. Severe criticism of the Navy legal organization by both the Congress and the public. . . .

[T]he members of the Court [of Military Appeals] have gone out of their way to inform me, as a member of the Code Committee, that having read the Franke Report they will solidly and actively oppose its concepts with respect to lawyers . . . .

I am of the opinion, as expressed to the Dornin Board . . . that a separate Judge Advocate General's Corps best meets [the needs of the Navy and is acceptable to the Congress and the people]. Not only is such a Corps favored by the Dornin Board and the Hobbs Board[12-54] within the Navy but by practically every group which has considered

12-54. "Hobbs Board" was the informal name given to a study group comprising members from the Office of the Chief of Naval Operations and the Bureau of Naval Personnel. Its official title was "OPNAV/BUPERS Personnel Monitoring Group." The recommendation for a legal corps of which Ward speaks was probably contained in its July 1958 report titled "Requirements of a Naval Officer Corps in the Post 1970 Era." Despite diligent efforts, no copy of the Hobbs Board report could be located. The title of the report was referenced at page 2 of the Dornin Board report.

Digitized by Google

> the problem outside the Navy. While all outside boards have not recommended a Corps per se they have been unanimous in recommending full time professional lawyers.
>
> . . .
>
> I strongly recommend establishment of a JAG Corps and that specialization in the field of law be restricted only to those officers who are planning to make a full time career in law.[12-55]

In taking a position in favor of a legal corps, Ward became the first Judge Advocate General since George R. Clark in 1919 to do so.[12-56] Assistant Secretary Jackson was persuaded by the logic of Ward's argument. His report to Secretary Gates included the following finding:

> I concur with the opinions expressed by those who have closely studied this question, [*a reference to such studies as the Second Hoover Commission and the Dornin Board–ED.*] and tend to believe that the law group is more closely related to a staff corps organization in size and function, than it is to the restricted line.[12-57]

12-55. Memorandum [from the Judge Advocate General of the Navy] for the Assistant Secretary of the Navy (Personnel and Reserve Forces), Subject: "Report of the Committee on Organization of the Department of the Navy, 1959," 6 April 1959. This memorandum was the product of a task force headed by Mack Greenberg.

12-56. Clark had proposed a "corps of judges advocate," officers with military justice training to sit as non-voting advisers at courts martial. There was no suggestion that they be professionally-trained lawyers or that their duties extend beyond courts martial. See text beginning at page 310.

12-57. This and the following excerpt from Assistant Secretary Jackson's report to Secretary Gates were found among the Dornin Board papers in the Office of the Judge Advocate General. The full report could not be located.

Digitized by Google

Having made his maximal recommendation, Jackson left open the door to legal training for the general service line officer:

> I am not saying that line officers should not receive legal education. I agree with [former Judge Advocate General] Russell and others that training in the law is of tremendous value for positions of high responsibility and would be of immense assistance to a Commanding Officer or flag officer in the handling of problems of international affairs and of high governmental policy.[12-58]

Secretary Gates acted quickly on Jackson's recommendations. In a directive issued on 13 May 1959, he stated that the basic officer structure of the Navy, comprising the line, the restricted line, and the several staff corps, would remain in place. And, as recommended by Jackson, with legislative approval *the staff corps were now to include a Judge Advocate General's Corps*.[12-59] Secretary of the Navy Thomas Gates, in

---

12-58. Even Ward gave qualified approval to the postgraduate legal training of line officers:

> I have no objections to the law postgraduate officers in reasonable numbers and performing appropriate duties. There is no question in my mind it's good for the Navy and good for the officer corps to have that sort of leavening, but to do it on a wholesale scale with the idea of replacing professional lawyers is, to me, completely illogical.

Judge Advocate General's Conference, 24 March 1959.

12-59. Secretary of the Navy Notice 5400 to All Ships and Stations, Subject: "Report of the Committee on Organization of the Department of the Navy," 13 May 1959, at 4-5. In the same note, Gates stated that he would concurrently request authority to permit unrestricted line officers "in modest numbers" to take postgraduate training in law. Outside the corners of the notice, Gates made it clear
(continued...)

Digitized by Google

1959, thus became only the second Secretary in the 160-year history of the Navy Department to advocate a corps of lawyers for the Navy.[12-60] Assistant Secretary Jackson was assigned responsibility for implementing the plan. He, in turn, directed Judge Advocate General Ward to prepare the draft legislation. At the same time he directed the Ferguson Committee (see page 640) to resume its deliberations on the number of Law Specialists needed in the Navy, in light of Gates's directive.

Almost predictably, the Ferguson Committee split in its determination, the two line officers, Ferguson and Christensen, at odds with the Law Specialist, Greenberg. What was not predictable was that the majority report filed by Ferguson and Christensen recommended a *reduction of thirty-nine billets* in the number of Law Specialists on active duty.[12-61] On 9 July 1959, Greenberg filed a minority report in which he challenged the methodology of the majority, and recommended an increase in billet strength of 124 Law Specialists.[12-62] The Chief of Naval Personnel concluded that the Ferguson Committee had not "produced a paper upon which definitive action may be based" and that no attempt had been made to reconcile the differences between the parties. He appointed Captain William T. Nelson, USN, to review the divergent reports and to submit a report to him "on the number and location of [Law Specialist]

12-59. (...continued)
that such training was intended not for the replacement of full-time Law Specialists, but to better fit the line officers for some general line billets. He felt, for good cause, that any other approach would be totally unacceptable to Congress. Richard Jackson, Assistant Secretary of the Navy, memorandum for the Chief of Naval Personnel, Subject: "Actions Pursuant to SecNav Notice 5400," 9 June 1959.

12-60. Secretary of the Navy John D. Long had suggested a lawyer-staffed "judge-advocates corps" in 1898. See text beginning at page 246.

12-61. Captain Glover T. Ferguson, USN, letter to Chief of Naval Personnel, Subject: "Study of Navy Billet Structure for the Employment of Law Specialists and Officers of Other Categories who are Qualified for Law Duty," 19 June 1959.

12-62. Greenberg's recommendation would have put total Law Specialist strength at 589, while the minority view would have set it at 424. The current strength at the time was 465 Law Specialists. Greenberg, letter to Chief of Naval Personnel, 9 July 1959.

Digitized by Google

billets required in the Navy so as to permit the furnishing of necessary legal services to the naval service."[12-63]

Nelson filed his report with the Chief of Naval Personnel on 29 September 1959. He essentially recommended no change from the current billet strength of 465 in the number of Law Specialist billets required. The following reveals Nelson's perspective, as well as a bias that was neither valid nor relevant to the question at hand:

> The line . . . should strongly resist any lessening of command responsibility in the important area of discipline and leadership and should take positive steps to see that line officers are, by education and training, fully qualified to administer Military Justice at the command level. *The participation of the legal specialists should be restricted to the review function, as envisioned by the law, and to advice and consultation services.*[12-64] (Italics added.)

Also notable in Nelson's report was his opinion that it was no more necessary for Law Specialists to serve with the sea-going forces than, for example, for Civil Engineer Corps officers to do so;[12-65] that the austere manning level of the fleet precluded the establishment of "unnecessary"

12-63. Chief of Naval Personnel, letter to Captain William T. Nelson, USN, Subject: "Study of Navy Billet Structure for the Employment of Law Specialists and Officers of Other Categories who are Qualified for Law Duty," 30 July 1959.

12-64. Rear Admiral William T. Nelson, USN, letter to Chief of Naval Personnel, Subject: "Study of Navy Billet Structure for the Employment of Law Specialists," 29 September 1959. Nelson had been promoted to rear admiral since the time of his appointment to review the Ferguson recommendations.

12-65. Compare Nelson's opinion with the results of the Ward-Greenberg survey of ship commanders at footnote 12-39. By 1967, each of the sixteen attack carriers in the fleet had a Law Specialist assigned as part of its ship's company. Muse, report to the Under Secretary of the Navy, 12 June 1967, Section XIII, at 66.

Digitized by Google

shipboard billets solely for the indoctrination of Law Specialists to sea duty; and that there was no justification for maintaining existing billets or establishing new ones to provide "gratuitous legal assistance" to individual naval personnel or their dependents. It is also perhaps worthy of note that Nelson refused a request from Mack Greenberg on behalf of the Judge Advocate General for a copy of his report. (Greenberg subsequently obtained a copy of the Nelson report from the Office of the Chief of Naval Operations.)

Harold P. Smith, the Chief of Naval Personnel, fully concurred in Nelson's report, considering it "an excellent study" that took into account "the philosophy concerning specialization heretofore set forth in the Franke Report." He recommended approval by the Chief of Naval Operations, and forwarding to Assistant Secretary of the Navy Jackson.[12-66] In so concurring, Admiral James S. Russell, USN, the Vice Chief of Naval Operations, stated that "Increasing the restricted line and staff corps can only result in decreasing the number of unrestricted line officers. . . . [F]urther decreases are not possible.[12-67] Russell forwarded

---

12-66. Chief of Naval Personnel, letter endorsement to Chief of Naval Operations, Subject: "Law Specialist Billets and Strength, Increase in; Request for," 2 October 1959.

12-67. Chief of Naval Operations, letter endorsement to Assistant Secretary of the Navy for Personnel and Reserve Affairs, Subject: "Law Specialist Billets and Strength, Increase in; Request for," 17 October 1959.

Russell's comment was at the heart of the issue of increasing the number of Law Specialist billets. The problem lay in the fact that the Navy had a finite overall authorized strength, so that the Law Specialist billets had to come from some other "community," most likely the general service line where their services were mainly requested. At the fleet level the commanders–who were, after all, the best judges of their needs–were more than willing to relinquish a line officer billet in exchange for a Law Specialist. It was at the policy-making level where the concept was rejected. The following is a typical comment from an operational commander who sought to replace a line officer with a lawyer:

> The scope and volume of the legal work which must be performed on this Base necessitates the services of an officer qualified as a legal specialist, rather than the presently allowed code 1100 [unrestricted line officer].

Commanding Officer, U.S. Naval Amphibious Base, Little Creek, Norfolk,

(continued...)

Digitized by Google

the report to Assistant Secretary Jackson, who did not view it as the definitive document that Vice Admiral Smith considered it to be:

> It was my purpose . . . to obtain a comprehensive and specific study of legal billet requirements to be used in implementing the Secretary's decision to establish a JAG Corps. The [Nelson] Report . . . is not sufficiently specific or detailed, particularly with respect to the actual requirements for legal services of commanders afloat, ashore, and overseas. A more concrete basis will be necessary for my purposes. . . .
>
> The underlying concept of the study emphasizes the theory that increasing the number of law specialists can be accomplished only at the expense of the line, and that the over-all need for unrestricted line officers precludes further decreases. Existing over-all shortages in unrestricted line strengths are not alleviated by maintaining unrestricted line billets for legal officers who, while professionally qualified for line duties, are not professionally qualified as lawyers. This is especially true for commands who have *need for professionally qualified lawyers*. Continuing the practice can only result in unrealistic requirements for both line officers and law specialists.
>
> I desire, therefore, that commands be polled . . . . The results of the poll should reflect the Navy's need for professional legal services and should provide one of the means on which more realistic requirements can be

12-67. (...continued)
Virginia, letter to the Chief of Naval Operations, 6 June 1958.

Digitized by Google

> computed. We may not be able to afford all of what we need, but until we conduct an objective study to determine our needs we will not be in a position to say what we should do with the resources we can afford. I think it is time we stopped theorizing about the needs of the Navy and started a new evaluation based on actual requirements determined on the basis of specific command experience . . . .[12-68]

Jackson promptly signed a Secretary of the Navy notice on 29 December 1959, directing a poll of all naval commands as to their requirements for "qualified legal officers." Then, two days later, at the urging of Arleigh Burke, he just as promptly withdrew it.[12-69] Burke had requested that he, as Chief of Naval Operations, be permitted to do the polling, following which he would appoint yet another study group to interpret the data obtained. A poll of 190 commands was thereupon conducted by a confidential letter of 23 January 1960.[12-70] The commands responded by recommending an increase of 163 in the Law Specialists'

12-68. Richard Jackson, memorandum for the Chief of Naval Operations, Subject: "Study of Navy Billet Structure for the Employment of Law Specialists," 24 December 1959.

The content of Jackson's memorandum to the Chief of Naval Operations was influenced by the substance of a conference he held, at his request, with Chester Ward on 8 December 1959, which was memorialized in a memorandum to Jackson of the same date. Ward, in addition to suggesting the polling of all commands to determine needs, methodically dissected Nelson's report point-by-point. No doubt Mott assisted him in preparing it.

12-69. Richard Jackson, Assistant Secretary of the Navy, memorandum for the Chief of Naval Operations, Subject: "Study of Navy Billet Structure for the Employment of Law Specialists," 31 December 1959.

12-70. Judge Advocate General of the Navy, memorandum for the Vice Chief of Naval Operations, Subject: "*Ad Hoc* Committee's Law Specialists Billet Recommendations, Comments Concerning," 16 January 1961. Although 190 commands and activities were solicited, the poll conducted by the Chief of Naval Operations was flawed in that it did not solicit responses from any ships or minor afloat commands.

Digitized by Google

numbers.[12-71] Following receipt of these responses, on 11 May 1960, Burke appointed Captain Willard E. Hastings, USN, senior member of an *ad hoc* committee to examine the total Navy requirements for Law Specialist billets, taking into consideration the results of the survey. The Hastings Committee was to conduct its study without reference to any existing or contemplated ceiling for Law Specialist billets. Included on the five-man committee were two Law Specialists, Captain Herbert S. Schwab, USN, and Captain Saul Katz, USN. (The Under Secretary of the Navy, Paul B. Fay, Jr., later pointed out that neither Schwab nor Katz participated in the committee's deliberations as a representative of the Judge Advocate General. Schwab was assigned to the Bureau of Naval Personnel, while Katz was assigned to the Office of the Chief of Naval Operations.)[12-72]

The Hastings Committee filed a unanimous report on 23 September 1960. Notable among its recommendations was the following:

> The committee considers that there is no justified need for the inclusion of a law specialist billet in the allowance of any individual ship. It is clear to the committee, however, that a need exists for the indoctrination of newly procured law specialists in the workings of the forces afloat and the operating commands. . . . As a consequence, the committee recommends the establishment of ten junior law specialist billets for allocation to forces afloat. . . .
>
> The committee found that, in most cases, the billets of law specialist officers are properly distributed and appropriate in number. In some instances, changes in the

---

12-71. Under Secretary of the Navy, memorandum for the Chief of Naval Operations, Subject: "Report of the *Ad Hoc* Committee to Examine Navy Requirements for Law Specialist Billets," 29 March 1961.

12-72. Under Secretary of the Navy, memorandum for the Chief of Naval Operations, 29 March 1961.

Digitized by Google

> size and mission of individual commands have indicated the desirability of corresponding changes in the number of legal billets assigned. In others, a shift of the legal billet from one command to another in the same geographical area has been recommended to provide more effective utilization of personnel.[12-73]

Despite the results of the poll, the committee recommended an increased need for only twelve Law Specialist billets throughout the entire Naval Establishment, ten of which were to be in the Office of the Judge Advocate General, one of the activities polled. For the other 189 commands and activities in the survey, the Hastings Committee determined a net need for only two more Law Specialists.[12-74]

The Judge Advocate General, now Bill Mott, was asked by Arleigh Burke, the Chief of Naval Operations, to comment on the report prior to the latter making his recommendations on it to the Assistant Secretary.[12-75] In a memorandum to Burke, Mott noted that the report did not include the data obtained from the poll of naval commands on the number of lawyers

---

12-73. Captain Willard E. Hastings, USN, letter to Chief of Naval Operations, Subject: "Report of the *Ad Hoc* Committee to Examine Navy Requirements for Law Specialist Billets, 23 September 1960.

12-74. This figure does not include the ten training billets recommended for allocation to forces afloat. Because they were created to introduce the uninitiated Law Specialist to sea duty, and not to benefit the ships to which they were assigned, the Hastings Committee did not consider them as "needed" by the fleet.

12-75. Mott had become Judge Advocate General on 1 August 1960. He chose as his Deputy and Assistant Judge Advocate General, Captain Robert D. Powers, Jr., USN. Powers had served as one of the few L-V(S) officers during World War II, first as legal officer to the naval operating base at Trinidad, in the British West Indies, then as counsel for the naval court of inquiry to investigate the Japanese attack on Pearl Harbor, and later as the Secretary of the Navy's designee to prepare reports to Congress on the Port Chicago, California, explosion. *JAG Journal* (October 1960), 52. He was appointed to the rank of rear admiral on a "while so serving" basis, under authority of a World War II statute (10 U.S.C. § 5787) providing for temporary promotions in time of war or national emergency. He thus became the first deputy to serve in the grade of rear admiral.

Digitized by Google

that each command felt it needed to meet requirements; did not set forth the facts upon which its conclusions and recommendations were based; nor had such facts been made available to him, making it difficult for him to evaluate the report's merit. He nevertheless pointed out areas with which he disagreed, generally noting that there was an insufficient increase in the number of billets recommended. (Mott noted that to perform virtually identical legal functions, the Navy had 6.2 uniformed lawyers per 10,000 military population, while the Army had 10.6 and the Air Force 11.6.)[12-76] In a subsequent memorandum to the Vice Chief of Naval Operations, after obtaining the data upon which the report was based, Mott recommended an increase in Law Specialist billets for field commands of seventy-three lawyers, for a total of 583.[12-77] On 13 February 1961, the Vice Chief forwarded the Hastings report and Mott's recommendation to Under Secretary of the Navy Paul B. Fay, Jr., who had taken cognizance over the billet study from Assistant Secretary Jackson. Fay determined that the field commands should receive an additional fifty-six Law Specialist billets, and that the total authorized strength in Law Specialists (and the total strength of the Judge Advocate General's Corps, should it be established), should be 566, seventeen less than recommended by Mott, but fifty-four more than the mere two billets recommended by the Hastings Committee. "Steps," he directed, "should be taken expeditiously to bring the Law group to this authorized strength."[12-78] The line balked. Within two weeks, Arleigh Burke had addressed a memorandum to Under Secretary Fay asking that he rescind

---

12-76. Judge Advocate General, letter to the Chief of Naval Operations, Subject: "Report of the *Ad Hoc* Committee to Examine Navy Requirements for Law Specialist Billets," 26 October 1960.

12-77. Judge Advocate General, memorandum for the Vice Chief of Naval Operations, Subject: "*Ad Hoc* Committee's Law Specialists Billet Recommendations, Comments Concerning," 16 January 1961. To allow his figures to comport with those of the Hastings Committee, Mott omitted the ten shipboard training billets and the ten additional billets in the Office of the Judge Advocate General.

12-78. Under Secretary of the Navy, memorandum for the Chief of Naval Operations, Subject: "Report of the *Ad Hoc* Committee to Examine Navy Requirements for Law Specialist Billets," 8 March 1961.

Digitized by Google

his determination and approve a Law Specialist billet ceiling of 512, the number recommended by the Hastings Committee.[12-79]

The Under Secretary declined Burke's request. He noted that the commanders in the field had collectively recommended an increase in the Law Specialist ceiling of 163 lawyers. He suggested to Burke that the members of the Hastings Committee, who had recommended an increase of only two, could "hardly be considered . . . to be better qualified, more experienced, or more mature than the commanders polled, *i.e.*, Fleet, Force and Type Commanders, district Commandants, and Commanding Officers of major activities."

Fay then made an important pronouncement, setting a course which would begin to move the Navy leadership once and for all away from its notion that the line officer with legal training could and should be the mainstay of the Navy's legal organization. He began by addressing

---

12-79. Chief of Naval Operations, memorandum for the Under Secretary of the Navy, Subject: "Report of the *Ad Hoc* Committee to Examine Navy Requirements for Law Specialist Billets," 21 March 1961.

Arleigh Burke's memorandum indicates that it was drafted by Captain Hastings. One passage is particularly unkind to the Law Specialists, and indicates that the lawyer in the Navy still had a long way to go toward acceptance:

> [T]he line officer is the backbone of our Navy. Accordingly, it is unsound militarily to deplete our already insufficient numbers of line officers to augment a special duty group. And while law specialists are admittedly necessary, they do not add directly to the combat effectiveness of the Navy.

Under Secretary of the Navy, Paul B. Fay, Jr., in a reply to Burke, specifically addressed this portion of the memorandum:

> I . . . agree that law specialists, while necessary, do not add *directly* to the combat effectiveness of the Navy; but . . . neither do line officers while performing legal duties. . . . [E]xisting over-all shortages in line strengths are not alleviated by maintaining billets designated for unrestricted line in which unrestricted line officers must perform legal duties to fulfill the mission of the command.

Under Secretary of the Navy, memorandum for the Chief of Naval Operations, 29 March 1961.

Digitized by Google

Burke's grievance that it was an unsound personnel practice to augment the Law Specialists when the unrestricted line was being reduced in number:[12-80]

> I do not agree with your statement . . . . [The augmentation of Law Specialist billets] would be of concern only if we were sure that past strengths were proper and that present strengths were not justified by present conditions. If results of the poll of our commanders in the field are believed, the legal work is there to be done and is being done by unrestricted line officers in a manner which does not serve the best interests of the Navy as well as though it were being done by legal specialists. . . . If we are having our legal work in this regard performed by amateurs rather than professionally qualified lawyers we are getting less competent advice and service than we need and deserve.

Fay then addressed, head on, the unstated, but perhaps most deep-seated source of hostility toward the increase in numbers:

> The lawyers are not, in my opinion, trying to "take over," as I have heard some suggest. The existing situation and the legal workload are being imposed by external forces and pressures acting upon the Navy as part of the

---

12-80. Burke had protested that, since 1954, there had been a five percent reduction in the number of line officer billets (from 55,789 to 53,154), while Law Specialist billets would, if Fay's directive were implemented, grow by twenty-eight percent (from 442 to 566). Note that the increase of fifty-six Law Specialists recommended by Under Secretary Fay amounted to one-tenth of one percent of the line force.

Digitized by Google

> increasing complexity and regulation of our society.

The Under Secretary closed by declining to rescind his decision to add fifty-six officers to the Law Specialist ranks:

> [W]here our qualified, experienced and mature commanders in the field have stated a positive need for the law specialists and indicated a willingness to make a compensatory reduction in [unrestricted line officer billets], we have a logical, reasonable and justifiable basis for adding to the law specialist strength.[12-81]

The Law Specialists had won their increased numbers. With the compulsory military service (draft) law still in place, it would have no trouble recruiting them. It still had to figure out how to retain them.

Regardless of the retention problem, resolution of the Law Specialist billet issue was vital to the pending matter of a Navy Judge Advocate General's Corps, for the Congress would demand to know the size of any new corps it was being asked to authorize. Chester Ward, as Judge Advocate General, had completed the draft of a proposed corps bill in June 1959, shortly after Secretary Gates had approved its creation. Assistant Secretary Jackson had received the comments of interested bureaus and offices throughout the Navy Department, resolved certain differences, and forwarded a re-drafted bill to the new Secretary of the Navy, William B. Franke (1959-1961) in November 1959. Although he had chaired the committee that had recommended the hodge-podge "Naval Technical Corps," and restoration of the Law PG Program earlier that year (see text beginning at page 640), Franke was now foursquare behind the corps concept and gave the re-drafted bill his quick approval. Clearance by the Department of Defense and the Bureau of the Budget followed. In May 1960, the first Navy-backed Judge Advocate General's Corps bill

---

12-81. Under Secretary of the Navy, memorandum for the Chief of Naval Operations, 29 March 1961.

Digitized by Google

was introduced into the second session of the Eighty-sixth Congress by Chairman Vinson of the House Armed Services Committee.[12-82] For reasons described vaguely as the "complexity" of the bill, however, it failed to be acted upon and died at the close of the second session.[12-83]

The following year, 1961, saw a change of administration as John F. Kennedy succeeded Dwight D. Eisenhower as President. William Franke was succeeded by John B. Connally (1961) as Secretary of the Navy. Despite differences in the political philosophies of the old and new administrations, the corps legislation, bolstered by resolution of the Law Specialist billet strength issue, received the full support of the new Secretary. With minor changes Vinson, in May 1961, re-introduced his bill of the previous session into the first session of the Eighty-seventh

---

12-82. Briefly, the bill (H.R. 12347) provided that the President should appoint, with the advice and consent of the Senate, a Judge Advocate General, Deputy Judge Advocate General, and Assistant Judge Advocate General, each for a term of three years. The appointees were to be members of the bar, graduates of accredited law schools, and were to have a minimum of eight years' experience as members of the Judge Advocate General's Corps immediately prior to their appointment. (Service as Law Specialists prior to appointment apparently would qualify until the corps had been in existence for at least eight years.) They were to hold the rank of rear admiral while serving in office. There were also to be two rear admiral billets in the inactive Reserve.

Original appointments were to be made in the rank of lieutenant (junior grade).

The process of selecting lawyers for promotion by boards of line officers would be discontinued. Selection boards for the promotion of Judge Advocate General's Corps officers were to be composed of members of the Judge Advocate General's Corps.

For reasons not explained, women were to be totally precluded from affiliation with the Judge Advocate General's Corps. This included affiliation in any status; Regular or Reserve, active or inactive, regardless of the woman's current status. Had this bill passed, the three women Law Specialists in the Navy, including Mary McDowell who was a commander at the time and one of the relatively few general court martial law officers (see text at page 525), would presumably have had to revert to a non-specialty WAVE designation or leave the service.

12-83. Captain Mitchell K. Disney, USN, Director, Legislative Division, Office of the Judge Advocate General of the Navy, memorandum to Rear Admiral Robert H. Hare, USN, Deputy and Assistant Judge Advocate General of the Navy, Subject: "Legislative History and Background of Navy Judge Advocate's General Corps," 1965?, at 2.

Digitized by Google

Congress.[12-84] But notwithstanding the active support of the American Bar Association and several state bar associations, Congress again adjourned without Vinson moving the bill forward. Representative Philip Philbin of Massachusetts, a member of the House Armed Services Committee and a strong supporter of the Navy Judge Advocate General's Corps movement, once remarked that Carl Vinson did not always give the Navy everything it wanted, but he never let his committee give it something it did not want.[12-85] In 1961, despite the official backing of the Navy Department and the Department of Defense, there was still considerable residual opposition among the Navy line to a legal corps. Given Vinson's proclivity to avoid giving the Navy something it really did not want, it is not surprising that the bill failed to move in Congress.

Whether Vinson intentionally delayed action on the bill or not, another factor intervened to thwart its movement in the Eighty-seventh Congress. In May 1961, a committee appointed by the Secretary of Defense to recommend legislation to coordinate the appointment, promotion, and separation of officers in the Army, Navy, and Air Force, submitted its report. Known as the "Bolte Committee" after its chairman, retired Army general Charles L. Bolte, the group had been set up in June 1960. Although the Bolte Committee had not been tasked with review of the Navy corps proposal, and had given it no consideration in its deliberations, Secretary of the Navy Fred Korth (1962-1963), who succeeded Connally, believed that a corps bill stood a better chance of passage if it did not compete with the Bolte legislation. He thus suggested that authorization for the corps be included in the forthcoming Bolte legislative package rather than as a separate bill. Despite misgivings among some in the Defense Department, a completely re-written Navy Judge Advocate General's Corps proposal was placed in the Bolte draft legislation and submitted for consideration to the first session of the Eighty-eighth Congress in March 1963.[12-86]

12-84. The bill (H.R. 6889) was virtually identical to Vinson's earlier bill (H.R. 12347), except that the number of inactive Reserve rear admiral billets was to be reduced from two to one.

12-85. Mack K. Greenberg, letter to author, 26 June 1992.

12-86. Because of provisions in the Bolte legislative package designed to reduce or eliminate distinctions between line and staff corps personnel policies, Assistant (continued...)

Digitized by Google

The pro-corps forces now started to enjoy–or perhaps endure is a more apt description–an abundance of bills to establish a corps. First among these was a "military rights" bill by Senator Sam J. Ervin, Jr., of North Carolina, one of a package of eighteen bills introduced into the Eighty-eighth Congress in August 1963.[12-87] This was paralleled in the

---

12-86. (...continued)
Secretary of Defense Norman S. Paul questioned the wisdom of establishing a Navy Judge Advocate General's Corps at all. Once again the need for a corps came under attack:

> [U]nder Bolte the distinction between a corps status for the lawyers and restricted line status would be very minor indeed, so minor that it would be extremely difficult to justify the change either as separate legislation or as a part of Bolte. In view of the insistence by the Bureau of the Budget that our draft provide for the simplification of the Navy specialist structure the creation of a JAG Corps would be incongruous, to say the least. . . .
>
> I seriously question the wisdom of forwarding a JAG Corps bill.

Assistant Secretary of Defense, memorandum for the Secretary of the Navy, Subject: "Relationship of Navy JAG Corps Bill to Bolte Legislation," 5 November 1962.

The legislative proposal as finally written was "based largely on the intangible factors which affect the personnel involved," namely "a sound organizational structure to meet the . . . demand for legal services," conformity with the Army and Air Force legal organizations, and the promotion of "professional pride and cohesiveness, to the end that the quality of legal service in the Navy will always be maintained at the required level of excellence." Assistant Secretary of Defense, memorandum for the Secretary of the Navy, Subject: "Inclusion in Officer Personnel Legislation of Provisions Pertaining to a Navy Judge Advocate General's Corps," 7 December 1962; Secretary of the Navy, memorandum to the Assistant Secretary of Defense for Manpower, Subject: "Inclusion in Officer Personnel Legislation of Provisions Pertaining to a Navy Judge Advocate General's Corps," 7 December 1962.

12-87. Senator Ervin, as chairman of the Constitutional Rights Subcommittee of the Senate Committee on the Judiciary, had introduced the legislation, "Constitutional Rights of Military Personnel," as a package intended to revamp (continued...)

Digitized by Google

House by a bill (H.R. 8575) introduced by Congressman Victor Wickersham of Oklahoma in September. Because of hoped-for movement on the Bolte legislation (which still had not been introduced as a bill), the Department of Defense recommended no action on either the Ervin or Wickersham bills. Although both bills were re-introduced the following year (1964) in the second session of the Eighty-eighth Congress, neither was called up for hearings.[12-88] Once again momentum had stalled for the Navy lawyers. Bill Mott, for all that he had done to advance the cause of the Law Specialists, had been virtually powerless on the corps issue in the face of Defense Department infatuation with the Bolte legislation, and Congressional accession to Defense's position. On 1 April 1964, Mott stepped down as Judge Advocate General of the Navy, succeeded by Captain Wilfred A. Hearn, USN, who assumed the rank of rear admiral upon taking office.

Hearn had been a Reserve officer during World War II, serving as a legal officer and later in the military government program. Following the war he became a Law Specialist, and served several tours in the Office of the Judge Advocate General as a division director and as Assistant Judge Advocate General for International and Administrative Law. At the time of his selection as Judge Advocate General, he was serving as commanding officer of the School of Naval Justice.[12-89] Despite these excellent credentials, Hearn's selection was something of a surprise. He was not an "insider," and Mott had indicated a preference for Ed Kenny

---

12-87. (...continued)
military justice. The Navy Judge Advocate General's Corps proposal was S. 2016. In addition to the Navy corps bill, the legislation included changes to the *Uniform Code of Military Justice*, administrative discharge procedures, and correction of military records. Generous, *Swords and Scales*, 187-88; Commander Clare J. Streinz, USNR, "The Judge Advocate General's Corps of the Navy–Historical Background," (research paper prepared at the direction of Rear Admiral Wilfred A. Hearn, USN, Judge Advocate General of the Navy, 1968?). Commander Streinz was a Law Specialist at the time she prepared the research paper.

12-88. Disney, memorandum to Hare, 1965?, at 2.

12-89. *JAG Journal* (May 1964), 263.

Digitized by Google

as his successor.[12-90] Hearn, however, had an influential ally–Captain Robert H. Hare, USN, a Law Specialist with a cause.

Rear Admiral Wilfred A. Hearn, USN, Judge Advocate General of the Navy, 1964 to 1968. (U.S. Naval Historical Center collection)

12-90. Rear Admiral William C. Mott, USN (Ret.), interview with Commander George E. Erickson, Jr., JAGC, USNR, 19 February 1991; Helen O. Hare, interview with author, 1 November 1991.

Digitized by Google

Bob Hare's cause was to leave a Judge Advocate General's Corps as his legacy,[12-91] and he sensed that the moment was at hand. But he needed the prestige and authority of rank and title to make it happen. He was too junior in seniority to be the Judge Advocate General, but the post of Deputy and Assistant Judge Advocate General would serve him just as well. He struck a deal with Will Hearn. He would use his considerable influence to have Hearn selected as the next Judge Advocate General. In return, Hearn would appoint him as his Deputy and Assistant Judge Advocate General.[12-92]

Hare was from South Carolina. His father had been a Congressman, and had held the seat that, in 1964, was occupied by L. Mendel Rivers, chairman of the House Armed Services Committee.[12-93] Before World War II he had served as a county attorney in South Carolina, and as a U.S. Commissioner for the Western District of South Carolina. He was now a close friend of Congressman Rivers. He was also a next-door neighbor of Senator Harry F. Byrd of Virginia. It was more than coincidence that after Wilfred Hearn was selected to be the next Judge Advocate General, Hare was selected as his Deputy and Assistant Judge Advocate General. Upon taking office, Hare assumed the rank of rear admiral pursuant to World War II emergency legislation, just as Powers before him.

In January of the following year (1965), Senator Ervin re-introduced his military rights package, including the Navy Judge Advocate General's Corps bill (now known as S. 746). The Bolte package, which had stalled in the Eighty-eighth Congress because of its size and complexity, was resubmitted to the Eighty-ninth Congress in March 1965. The outcome was no better; the Bolte legislation was still not introduced. Nevertheless, the Department of Defense continued to oppose a Navy bill apart from Bolte, and the Ervin bill languished. Finally, however, in January 1966, the Defense Department abandoned Bolte. There was no longer any official reason to delay consideration of a separate Navy corps bill. Early in 1966, at the outset of the second session of the Eighty-ninth Congress,

12-91. Rear Admiral Richard L. Slater, JAGC, USN (Ret.), interview with author, 17 January 1991.

12-92. Captain Louis L. Milano, JAGC, USN (Ret.), interview with author, 26 September 1991.

12-93. Rivers had succeeded Carl Vinson as chairman of the House Armed Services Committee.

Digitized by Google

Senator Ervin's Subcommittee on Constitutional Rights, and a Special Subcommittee of the Senate Armed Services Committee, commenced joint hearings on Senator Ervin's military rights bills, including the Navy Judge Advocate General's Corps bill.[12-94] This marked only the second time in a long and tortuous legislative path that hearings had been held on Navy Judge Advocate General's Corps legislation.[12-95]

In January, 1966, Hearn appeared before Senator Ervin's subcommittee. Questioned on the impact that a separate Judge Advocate General's Corps bill might have on the Bolte proposal, Hearn stated that he was not familiar with the Bolte plan, and deferred to a witness from the Secretary of Defense's office. Subsequent written answers to the subcommittee's interrogatories indicated that both the Navy Department and the Department of Defense favored the corps proposal in Ervin's bill over that in the Bolte package, although certain changes to the Ervin bill were desirable since the Navy had not had input into its drafting.[12-96] Hearn stressed the career incentives that would flow from establishment of a corps; he said that in a recent query of fifty young Navy lawyers who did not wish to make the Navy a career, almost forty percent gave as a reason the lack of professional identity.[12-97]

12-94. Streinz, "The Judge Advocate General's Corps of the Navy–Historical Background." In July of 1966, H.R. 16115, a companion bill to the Ervin legislative proposals, which included provision for a Navy legal corps, was introduced by Congressman Charles E. Bennett of Florida in the House.

12-95. Hearings had been held before Senator Ervin's subcommittee in 1962. U.S. Congress, Senate Committee on Armed Services, *Hearings on H.R. 12910 to Establish a Judge Advocate General's Corps in the Navy*, 90th Cong., 1st sess. (1967), 5.

12-96. U.S. Congress, Senate Subcommittee on Constitutional Rights of the Committee on the Judiciary, and Special Committee of the Committee on Armed Services, *Joint Hearings on Bills to Improve the Administration of Justice in the Armed Services*, 89th Cong., 2d sess. (1966), *passim*. The Assistant Secretary of Defense for Manpower, and the Judge Advocate General of the Navy, provided answers to the subcommittee's written interrogatories.

12-97. Between January and November 1966, the number of Law Specialists on active duty dropped from 614, the highest it had ever been, to 563. Clearly

(continued...)

Digitized by Google

Following Hearn's appearance before the Senate subcommittee, personnel of the Office of the Judge Advocate General, under the direction of Deputy and Assistant Judge Advocate General Hare, worked with Ervin's staff to develop a bill satisfactory both to Congress and the Navy Department.[12-98] This effectively ended consideration of Ervin's bills in the Eighty-ninth Congress. Both houses adjourned without taking action on either a Navy Judge Advocate General's Corps bill, or the broader-scope military rights bills. During the Congressional adjournment, Hare's staff and Ervin's staff drafted an agreeable corps provision.

The opening session of the Ninetieth Congress in 1967 saw the focus shift back to the House. Representative Charles Bennett of Florida re-introduced a military rights bill he had presented in the previous session.[12-99] With a delay in movement in the Senate, Hearn was able to prevail upon Bennett to include the corps provision worked out with Ervin's staff as the Navy Judge Advocate General's Corps proposal in Bennett's bill.[12-100]

Even as Bennett's bill was being introduced, another in the procession of committees to examine the requirements of the Navy and Marine Corps for legal services by uniformed lawyers was formed by Under Secretary

---

12-97. (...continued)
something had to be done to stem such a dramatic rate of attrition. Department of the Navy, Office of the Judge Advocate General, *Directory of Navy Law Specialists*, NAVSO P-2422 (Washington, D.C.: 1 January 1966; 1 November 1966).

The principal reason given for leaving active duty was inadequate pay. Other reasons included lack of professional freedom, practice confined to administrative matters, and disruptions to family life. Muse, report to the Under Secretary of the Navy, 12 June 1967, appendix 33.

12-98. Streinz, "The Judge Advocate General's Corps of the Navy–Historical Background."

12-99. Bennett had introduced the bill in the previous session as H.R. 16115. See footnote 12-94. The bill introduced in the Ninetieth Congress was known as H.R. 226.

12-100. The draft of Bennett's bill had included a Navy corps proposal prepared by his staff. Hearn was able to substitute the proposal that had been drafted by his office in collaboration with Senator Ervin's staff, in place of the proposal originally contained in the Bennett bill. Streinz, "The Judge Advocate General's Corps of the Navy–Historical Background."

Digitized by Google

of the Navy Robert H.B. Baldwin. Chartered on 5 May 1967, under the chairmanship of Rear Admiral George R. Muse, U.S.N., the delegate of the Chief of Naval Operations, the committee comprised representatives of the Under Secretary, the Chief of Naval Personnel, the Judge Advocate General of the Navy, and the Commandant of the Marine Corps. It was directed to take into account Congressional enactments, pending legislation, court decisions, increased need for legal assistance, and "all other factors which contribute to the requirement for legal services in the Navy and Marine Corps."[12-101] On 12 June 1967 the Muse Board, as it was called, presented its report.[12-102]

Heading the board's list of recommendations, and securing the unqualified approval of the Under Secretary,[12-103] was a proposal that the number of uniformed lawyer billets–Navy and Marine Corps–be increased by 159. Although fewer than the Judge Advocate General had requested, this would bring his total force of uniformed lawyers to 975, the minimum considered necessary to handle the ever-increasing workload. Assuming the lawyers were available (at the time of the Muse Board's recommendations, with high draft calls in place, there was no problem in attracting an abundance of highly qualified lawyer recruits), this would solve the immediate manning problem.[12-104] Retention, however, was

---

12-101. Under Secretary of the Navy, memorandum for Chief of Naval Operations, Commandant of the Marine Corps, Chief of Naval Personnel, and Judge Advocate General, Subject: "Uniformed Officer-Lawyer Personnel; Requirements, Retention and Recruitment," 5 May 1967. The reader will recall a number of similar studies conducted in the late 1950s and early 1960s. See text beginning at page 634.

12-102. Muse, report to the Under Secretary of the Navy, 12 June 1967. The full citation to the report appears in footnote 12-4.

12-103. Under Secretary of the Navy, memorandum for the Chief of Naval Operations, the Commandant of the Marine Corps, and the Judge Advocate General of the Navy, Subject: "Uniformed Officer-Lawyer Personnel; Requirements, Retention and Recruitment," 13 September 1967.

12-104. Looking ahead to a reduction–or even elimination–of the draft, the committee recommended several other devices to enhance recruiting. Many were eventually adopted, although not precisely in the form suggested. Among these were creation of a legal clerk program for enlisted personnel (the Legalman Program—see (continued...)

Digitized by Google

another concern. To address that issue the board suggested several measures, among them a proposal that the Secretary of the Navy *administratively* form the Navy lawyers into a corps-like organization, while continuing efforts toward establishment of a Judge Advocate General's Corps by legislation. In his action on this recommendation the Under Secretary directed the Judge Advocate General to develop and present a plan for adoption of those elements of a corps which were

---

12-104. (...continued)
Appendix Q); a legal technician program for warrant officers and/or limited duty officers (see Appendix Q); re-establishment of a law postgraduate program, but with the important modification that graduates were to become Law Specialists with six additional years of obligated service devoted exclusively to legal duties (the Funded Legal Education Program); and opening of the law programs to women lawyers. Of this last recommendation the board stated:

> An additional possible small procurement source, and one with a relatively high retention potential, lies in women law graduates. Although it is current policy not to utilize women as law specialists, several reserve women lawyers have served a full career in the legal organization of the Navy. In the Navy and to a lesser extent in the Marine Corps, law would appear to be a career field suitable for women officers on a basis of almost complete comparability with male officers.

Muse, report to the Under Secretary of the Navy, 12 June 1967, at 42. The Marine Corps already had a program in place for commissioning women lawyers. Commandant of the Marine Corps, memorandum for the Under Secretary of the Navy, Subject: "Uniformed Officer-Lawyer Personnel; Requirements, Retention and Recruitment," 24 July 1967. As of the time of the Muse report there was one woman Marine Corps officer-lawyer on active duty–a lieutenant. Muse, report to the Under Secretary of the Navy, 12 June 1967, appendix 27.

For a brief discussion of women in the Navy Judge Advocate General's Corps, see Appendix O.

Digitized by Google

permissible under current law without the need for legislation.[12-105] The frustration level was clearly rising.

Many factors, all previously discussed, had worked before to thwart passage of the corps legislation. We have seen, especially, the open and tenacious opposition of the Navy line. Not so obvious was the opposition of the Marine Corps. The Marine was, first and foremost, a fighting man. He could be a lawyer as well (in fact, a graduate degree in law was often advantageous for promotion),[12-106] but only if it did not interfere with his combat skills. A Navy Judge Advocate General's Corps threatened this balance, for it could lead to a requirement that Marine lawyers devote themselves *exclusively* to legal duties, or turn over all legal responsibilities to the Navy lawyers. Either was unacceptable. But with Navy and Defense Department opposition to corps legislation gone, the threat to the Marines could be neutralized only if the bill could be kept

---

12-105. To create this "pseudo-corps," the Muse Board suggested that the Secretary could:

- Authorize the wearing of a uniform sleeve device other than the star; one which would connote legal duties. The committee suggested using the insignia of the Army Judge Advocate General's Corps. (On 18 July 1967, Judge Advocate General Hearn sent a letter to all Law Specialists soliciting ideas for the design of such a device. A brief discussion of the way in which the device was selected, and its derivation, appears at Appendix K.)
- Call all Law Specialists, "judge advocates."
- Simply use the name "Judge Advocate General's Corps" to describe collectively those Navy officers designated as Law Specialists.

The board did offer a word of caution, lest such unilateral action be misinterpreted as an affront to the Congress, or an acceptable alternative to legislative action. It suggested that "prior concurrence of the appropriate congressional leaders would be desirable before making even the administrative change." Muse, report to the Under Secretary of the Navy, 12 June 1967, at 51-52.

12-106. "Back in my time, half of the Marine Corps generals were Law PGs. It helped them in their careers. They stood a little above the rest of their peers." Chapman, interview, 17 July 1991.

Digitized by Google

bottled up. And the bill could be kept bottled up if the House Armed Services Committee did not hold hearings on it. The key lay in Mendel Rivers or, more precisely, in Rivers's top aide, the general counsel to the House Armed Services Committee, John Russell Blandford. Russ Blandford was a retired major general in the Marine Corps Reserve, and he was sympathetic to the Marine position:[12-107]

> The Marine Corps wanted no part of a JAG Corps bill. It did not care for specialties of any kind. This reflected the "Every Marine is a Rifleman" attitude. There was concern that a JAG Corps would lead to legal specialization in the Marine Corps. General Shoup, the Marine commandant, wanted to eliminate all Marine Corps limited and special duty officers.[12-108]

12-107. Reference to Blandford's World War II experience can be found at footnote 9-37 and accompanying text.

12-108. Major General John Russell Blandford, USMCR (Ret.), interview with Commander George E. Erickson, Jr., JAGC, USNR, 24 June 1992. In addition to his perspective on the Marine Corps opposition, General Blandford revealed a further dimension behind the Navy line's opposition to the corps legislation. He said that it reflected a strong concern about who would represent the Navy's views before Congress: the new Judge Advocate General's Corps, or the Bureau of Naval Personnel, *i.e.*, Navy line officers. The Navy line was very concerned about maintaining its personal contacts with Congressmen and senators. In times past, much of this had been done by providing Navy line escort officers for Congressional travel, especially where naval vessels were used. After World War II, the use of aircraft increased substantially, and the Air Force took over much of the escort business. This made retaining control over legislative liaison even more important. The line was afraid that legislative liaison would become a "legal" matter which would be usurped by the new Judge Advocate General's Corps, and that judge advocates would take over both formal and informal dealings with Congress, leaving the line only a minor role.

Blandford also noted the line's concern about losing flag billets to the new corps. Because of a limitation on the number of flag officers who could serve on active duty at any given time, provision for additional lawyer-admirals would necessitate taking from another Navy community, probably the line.

Digitized by Google

Rear Admiral Robert H. Hare, USN, Deputy and Assistant Judge Advocate General of the Navy, 1964 to 1968. (U.S. Naval Historical Center collection)

It had been twelve years since the first of many corps bills had been introduced in Congress, and none of them was yet to emerge from committee–indeed, substantive hearings had been held only twice in all that time. Hare's term as Deputy and Assistant Judge Advocate General was due to expire in a few months, and he did not intend to move up to the top spot.[12-109] Although Senator Ervin had re-introduced his military

---

12-109. According to his widow, Hare declined a proposal by Secretary of the Navy Paul H. Nitze (1963-1967) that he assume the post of Judge Advocate General after (continued...)

Digitized by Google

rights bills in June, containing the corps provision that had been worked out between his staff and Hare's staff, there were no hearings scheduled on either the Ervin bill or the one that Representative Bennett had introduced earlier in the year. If Bob Hare was to make his mark on history, now was the time to act. He paid a visit on Mendel Rivers, and later told his wife what had transpired. According to Mrs. Hare:

> They talked about several matters, and finally Bob asked Congressman Rivers about the bill. He told him that it would be impossible to keep an adequate number of qualified lawyers in the Navy without a Judge Advocate General's Corps.
>
> Rivers asked his aide, Russell Blandford, where the bill was. Blandford pulled a copy out of a drawer. Congressman Rivers told Bob that he would see to it that the bill was passed.[12-110]

How long Blandford might have kept the bill out of the hearing room had not Hare interceded is conjectural, given the momentum building for the Navy corps. That he had blocked it for a time, however, seems certain.

12-109. (...continued)
Hearn stepped down, feeling that it would have blocked promotion opportunities to the top position for too long, since he had already served for four years as Deputy and Assistant Judge Advocate General. By stepping aside, two people could be promoted to rear admiral; if he stayed on, there could be only one promotion. Hare felt this was bad for morale, since it limited promotion opportunities. Helen O. Hare, interview, 1 November 1991. Secretary Nitze was succeeded by Paul R. Ignatius (1967-1969) on 1 September 1967, before Hare's term expired.

12-110. Helen O. Hare, interview with author, 12 October 1991.
According to Dick Slater, the fact of Blandford's obstructionism was too widely asserted not to be true. Rear Admiral Richard L. Slater, JAGC, USN (Ret.), interview with author, 5 August 1992. Blandford himself has no specific recollection of the Hare-Rivers meeting, but agreed that it probably occurred as told by Helen Hare, and acknowledged that he would almost surely have been present. He pointed out that committee chairmen at that time had full power to hold or promote a bill, and that staff members could do likewise. Blandford, interview, 24 June 1992.

Digitized by Google

But following the Hare-Rivers meeting, Representative Philip Philbin, chairman of Subcommittee Number 1 of the House Armed Services Committee and next in line to succeed Rivers, scheduled hearings for 14 September 1967 on that portion of the Bennett bill providing for establishment of a Navy Judge Advocate General's Corps, the very bill that Blandford had sequestered in a drawer.[12-111]

The bill laid before Subcommittee Number 1 disposed of the Marine Corps's objections. It made no attempt to include Marine lawyers as part of the Navy Judge Advocate General's Corps, nor to restrict them to legal duties only, but it did authorize their designation as "judge advocates" in order to permit them to perform all functions of uniformed lawyers contemplated by the *Uniform Code of Military Justice*. (Navy Law Specialists were likewise to be designated as judge advocates, in keeping with the terminology used by the Army and the Air Force.) Further, the proposed bill established the position of Deputy Judge Advocate General as second in authority to the Judge Advocate General, and provided that Marine lawyers were eligible for appointment to the post, with the rank of major general while so serving.[12-112] (The statutory provision for appointment to the top post of Judge Advocate General had, since the seminal designation of Marine Corps Captain William B. Remey, always provided that it could be filled by an officer of the Navy or the Marine Corps. It remained unchanged in the new bill.) There was also to be a statutory position of Assistant Judge Advocate General as third in

---

12-111. Representative Philbin, from Massachusetts, was a friend of Mack Greenberg's and was "pro-Navy JAG Corps from the outset." He determined to do everything within his power to get the corps legislation through the House. Once Rivers made his commitment to Hare to move the bill, Philbin's position as next in line to head the House Armed Services Committee made for a formidable ally. Philbin died in 1968, but not until after he had played a key role in securing passage of the corps legislation. Greenberg, letter to author, 26 June 1992.

12-112. A Navy lawyer appointed to the position of Deputy Judge Advocate General would hold the temporary rank of rear admiral.

Digitized by Google

authority. This position could also be held by either a Navy or Marine Corps lawyer.[12-113]

Judge Advocate General Hearn testified before the subcommittee, stressing the benefits a corps would bring in enhanced professional status which, in turn, would lead to improved retention. Although the subcommittee was generally receptive, Hearn was not without his skeptics:

12-113. Marine Corps support of the bill was expressed before the subcommittee by a Colonel Sevier, from the discipline branch of the personnel department of Headquarters, Marine Corps. Colonel Sevier also took the opportunity to reinforce the Marine position of maintaining a respectful distance from too much specialization:

> It is not contemplated that Marine Corps officer-lawyers would be members of the Navy Judge Advocate General's Corps, but the Judge Advocate General of the Navy is the Judge Advocate General of the naval service, and . . . the Marine Corps is a part of the naval service, and we, as Marine officers, are privileged to serve in the Navy Judge Advocate General's office.
>
> The bill would assist the Marine Corps lawyer in that he could be designated by the Commandant as a judge advocate when doing legal duties, which would then give the Marine officer the same recognition as an officer-lawyer in the military service.
>
> But the Marine Corps, by its philosophy and history, and the very . . . few numbers of Marine officer-lawyers, would not desire to participate in this, so the Marine officer-lawyer would still be dependent on his assignments from the Commandant of the Marine Corps, and could still do other type of duty as he is permitted to do now. (Partially edited to correct syntactical errors.)

U.S. Congress, Subcommittee No. 1 of the House Committee on Armed Services, *Hearing [on H.R. 226] to Establish a Navy Judge Advocate General's Corps*, 90th Cong., 1st sess. (1967), 5232-33.

A brief discussion of the development of the Marine Corps's legal organization appears in Appendix H.

Digitized by Google

> MR. RANDALL. What we are gaining is simply a new uniform or something of this kind. I don't like to be tedious. I would like it spelled out. What are we gaining here?
>
> ADMIRAL HEARN. We are gaining a statutory flag billet for the Deputy Judge Advocate General. We are creating a greater esprit de corps among the lawyers.
>
> MR. RANDALL. Billets, esprit de corps?
>
> ADMIRAL HEARN. We are gaining retention and augmentation into regular service, which is one of the reasons the young lawyers said they wanted to return to civilian life, as opposed to making the Navy a career.
>
> MR. RANDALL. In other words, you are saying you hope this will keep the young fellows around?
>
> ADMIRAL HEARN. We hope so. We think so, yes, sir.[12-114]

It was Captain Anthony J. DeVico, USN, commanding officer of the Naval Justice School, also appearing at the hearing, who best expressed the sentiment for a Judge Advocate General's Corps:

> I believe that a JAG Corps, making us staff officers, would more accurately describe our duties. Ours is a staff-type mission. Establishment of such a corps would be professional recognition of the individual as a staff officer; that is, an officer-lawyer. In other words, a JAG Staff Corps would identify us for what we are–officer-lawyers. It would

12-114. Subcommittee No. 1 of the House Committee on Armed Services, *Hearing to Establish a Navy Judge Advocate General's Corps*, 90th Cong., 1st sess. (1967), 5236.

Digitized by Google

> grant us a professional identity–a status, if you will. It would make the officer-lawyer part of a professional staff corps and identified and recognized as such.[12-115]

Prior iterations of corps bills had contained provision for as many as four flag officer positions, a totally defensible proposal,[12-116] but one which served only to breed opposition from other Navy communities, thus jeopardizing the basic corps concept itself. The cause of this disquiet was the so-called "Stennis ceiling," a limit on the number of flag or general officers who could serve on active duty at any given time.[12-117] For a fledgling Navy Judge Advocate General's corps to acquire more than the two flag billets it presently held, some other part of the Navy would have to offer up one or more of its own. This would not be done willingly or voluntarily, and the bill that lay before the subcommittee, having been modified by Department of Defense recommendations, reflected this reality. Judge Advocate General Hearn was careful in his testimony not to offend the other Navy communities and thus jeopardize the corps itself:

12-115. Subcommittee No. 1 of the House Committee on Armed Services, *Hearing to Establish a Navy Judge Advocate General's Corps*, 90th Cong., 1st sess. (1967), 5238.

12-116. The Army Judge Advocate General's Corps, and the Air Force Judge Advocate General's Department, each had five general officers in its ranks. Further, the Navy and Marine Corps, with a total of 845 officer-lawyers, were by custom and practice entitled to flag and general officers equal to one-half of one percent of their number, *i.e.* four. U.S. Congress, House Committee on Armed Services, [*Report on Establishing a Judge Advocate General's Corps in the Navy*], 90th Cong., 1st sess., 27 September 1967, H. Rept. 710.

12-117. "Stennis Ceiling" was the popular name attached to what appears to have been an accord among members of the Senate Armed Services Committee not to recommend to the full Senate the confirmation of flag or general officers for any of the services beyond agreed-upon numbers, regardless of more permissive statutory authorization. See statement of Senator Richard B. Russell of Georgia during hearings before the Senate Armed Services Committee, at page 680. We may assume, of course, that Senator John C. Stennis of Mississippi, a member of the Senate Armed Services Committee, was the moving force behind the limitation.

Digitized by Google

> The Department of Defense report on the bill . . . recommended only the establishment of two flag billets, for the reason that an additional flag billet, in view of the ceiling set by Senator Stennis on the number of flag officers would have to come out of some other part of the Navy community. And on the basis that it would be at the expense of another part of the Navy, I do not feel that I want to have the Navy pay that price to get the third flag billet.[12-118]

Following this testimony, Representative Philbin moved that the subcommittee vote out a "clean bill" (*i.e.*, a bill separate from the military rights provisions of the omnibus bill sponsored by Bennett), and recommend it to the full House Armed Services Committee. The motion passed without objection. On 26 September 1967, H.R. 12910, as Bennett's clean bill was then called, was considered by the full committee under the gavel of L. Mendel Rivers. Notwithstanding Hearn's prior testimony before the Philbin subcommittee regarding the Navy's sensitivity to additional flag officers for a Navy Judge Advocate General's Corps, Representative Philbin himself moved to amend the bill to provide not one but *two* Assistant Judge Advocates General, one Marine and one Navy, to hold general and flag rank respectively. In so doing he stated that it had been brought to his attention after his subcommittee had concluded its hearings that there was "a serious lack of flag rank officers at the head of the [proposed] Judge Advocate General's Corps."[12-119]

Rear Admiral Hare represented the Judge Advocate General before the full committee. In the space of a few minutes, partially occupied by

---

12-118. Subcommittee No. 1 of the House Committee on Armed Services, *Hearing to Establish a Navy Judge Advocate General's Corps*, 90th Cong., 1st sess. (1967), 5230.

12-119. U.S. Congress, House Committee on Armed Services, *Consideration of H.R. 12910 [to Establish a Navy Judge Advocate General's Corps]*, 90th Cong., 1st sess. (1967), 5298. While certainly desirable from the lawyers' standpoint, the bill could not survive in this form.

Digitized by Google

some personally complimentary remarks directed to Hare by Rivers, and only three questions–two concerning the status of the Deputy Judge Advocate General, and one concerning the Law PG Program–Rivers declared the Bennett bill approved without objection and directed that it be placed upon the House calendar for a floor vote.[12-120] On 2 October 1967 the Bennett bill, including the Philbin flag/general-officer amendment, was passed by the House without opposing debate.[12-121]

On 9 November 1967, the Senate Armed Services Committee, under the chairmanship of Senator Richard B. Russell of Georgia, held hearings on the Bennett bill. Senator Ervin, a member of the committee, made a strong statement in support of a Navy Judge Advocate General's Corps. Rear Admiral Hearn appeared as the only witness, before a very friendly committee. The matter of the additional flag/general officer billets was briefly raised in a single question addressed to Hearn by Chairman Russell:

> In its present form the bill provides for four statutory flag general [*sic*] officer billets in the Navy JAG. There are only two flag billets now . . . .
>
> My understanding is that the Department of Defense does not support additional flag or general officer billets in the JAG Corps unless this committee will increase the number of flag and general officer positions for which it is willing to recommend confirmation.
>
> Is my understanding of the Department's position correct?[12-122]

12-120. House Committee on Armed Services, *Consideration of H.R. 12910*, 90th Cong., 1st sess. (1967), 5297-99.

12-121. *Congressional Record*. 90th Cong., 1st sess., 1967. Vol. 113 (H 12793, 2 October 1967).

12-122. Senate Committee on Armed Services, *Hearings to Establish a Judge Advocate General's Corps in the Navy*, 90th Cong., 1st sess. (1967), 64.

Digitized by Google

Judge Advocate General Hearn responded that Russell's understanding was indeed correct, and the hearing moved on. The entire proceeding took less than an hour. On 14 November 1967, the bill was reported favorably to the Senate.[12-123] It had been amended to provide that there would be only one Assistant Judge Advocate General, but still with flag or general rank, and with no modification to the "Stennis ceiling" to accommodate the increase. Although Senator Stennis was present at the hearing, he asked no questions nor did he challenge the additional flag/general officer provision in the bill.

Immediately, protests were voiced by the line communities of the Navy and Marine Corps. The bill was in danger. Hearn went to Ervin and asked him to sponsor an amendment to the bill when it came to the Senate floor for a vote. Ervin agreed, and Hearn provided him with a draft of the desired amendment. While it again provided for two Assistant Judge Advocates General, one a Navy officer and one a Marine Corps officer, with flag and general rank respectively, it made the detail of officers to the positions *permissive* rather than mandatory. If and when the services' flag and general officer situation eased, the positions could be filled–but not until.[12-124]

On 16 November 1967, the bill was brought to the Senate floor. Senator Ervin offered the amendment, stating, in part, as follows:

> I have agreed to sponsor an amendment that establishes the two new statutory positions of Assistant Judge Advocate General of the Navy on a permissive basis instead of requiring that they be filled by a flag officer of the Navy or a general officer of the Marine Corps. If those in power in the Navy and the Marine Corps are later persuaded that additional flag or general officer positions should be filled by uniformed

12-123. U.S. Congress, Senate Committee on Armed Services [*Report on Establishing a Judge Advocate General's Corps in the Navy*], 90th Cong., 1st sess., 14 November 1967, S. Rept. 748.

12-124. Streinz, "The Judge Advocate General's Corps of the Navy–Historical Background."

Digitized by Google

> lawyers, the authority for flag and general officer grade for the occupants of these offices will exist.
>
> My personal view is that the powers that be in the Navy and the Marine Corps are being somewhat shortsighted in their unwillingness to share the flag and general officer positions with uniformed lawyers. This unwillingness will undoubtedly make it more difficult for the Navy to attract and retain an adequate number of uniformed lawyers with the desired competence and qualifications.
>
> Hence, I hope the Navy may alter its present position and share its prescribed flag and general officer positions with uniformed lawyers.[12-125]

On the vote, the bill, as amended by Ervin, passed unopposed.[12-126] It was then returned to the House for concurrence on the question of the flag/general officer provisions. Representative Philbin, who spoke for the bill, asked that the House accept the Senate amendment as a necessary expedient in order to get the Navy Judge Advocate General's Corps established as soon as possible. His request was approved without opposition.[12-127] It had been almost too easy. In the space of a few weeks following the Hare-Rivers meeting, both houses of Congress, by unanimous consent, had approved a Judge Advocate General's Corps for the Navy.

On 8 December 1967 President Lyndon Bains Johnson, the same person who, as a Congressman almost a quarter-century before had been one of the first and sharpest critics of the Navy's haphazard, Law

---

12-125. *Congressional Record.* 90th Cong., 1st sess., 1967. Vol. 113 (S 16553-54, 16 November 1967).

12-126. *Congressional Record.* 90th Cong., 1st sess., 1967. Vol. 113 (S 16554, 16 November 1967).

12-127. *Congressional Record.* 90th Cong., 1st sess., 1967. Vol. 113 (H 15566, 20 November 1967).

Digitized by Google

PG-oriented legal organization, signed the Bennett bill creating the Navy Judge Advocate General's Corps.[12-128] Two errors in his accompanying statement do not detract from its importance to the Navy/Marine Corps legal community:

> I have today signed H.R. 12910 to establish a Judge Advocate General's Corps in the Navy.
>
> This does not mean the Navy is hiring lawyers for the first time. Legal officers have served in the Navy for more than a century.[12-129] More than 900 serve today in the Navy and Marine Corps.
>
> This act gives them a new professional status and organization. For the first time it creates a staff corps comparable to the Judge Advocate General's Corps in the Army and Air Force. It gives Navy lawyers the same professional recognition accorded to doctors, dentists, chaplains, and others who perform specialized duties.
>
> At a time when the Navy's need for legal services is increasing, this measure will help attract and retain good lawyers.
>
> I also note, for the better half of our population, that this act–for the first time–permits women to serve as lawyers in the Navy.[12-130]

12-128. An edited and abridged copy of the act appears in Appendix R.

12-129. The actual length of time was more like a half-century. Uniformed lawyers did not begin serving in the Navy until approximately 1913, following the advent of the informal Law PG Program set up by Judge Advocate General Russell in 1910.

12-130. Although section 11 of the act specifically mentioned women, and eliminated all distinctions between male and female officers for purposes of service in the Navy Judge Advocate General's Corps, it did not, in fact, "permit women to serve as lawyers in the Navy" for the first time. Women had served in the Navy as

(continued...)

Digitized by Google

Almost two centuries after the Continental Navy first hired civilian lawyers to "manage its maritime causes"; a century after the Navy hired its first civilian solicitor to ferret out fraud in contracting; seven decades after a Navy Secretary first called for a "judge-advocates corps"; and a

Rear Admiral Joseph B. McDevitt, Judge Advocate General of the Navy (1968-1972) with the pen used by President Lyndon B. Johnson to sign the legislation creating a Navy Judge Advocate General's Corps. (Office of the Judge Advocate General of the Navy)

12-130. (...continued)
lawyers since World War II, and even as Johnson spoke, three women were serving in the Navy as Law Specialists: Captain Mary McDowell, Commander Corise Varn, and Commander Clare Streinz. See Appendix O.

Digitized by Google

half-century after the Navy began training line officers to be part-time lawyers, a Judge Advocate General's Corps for the Navy had finally become reality.

Digitized by Google

Digitized by Google

EPILOGUE

The establishment of the Navy Judge Advocate General's Corps in 1967 marked the end of a struggle for recognition, and the beginning of a new chapter in legal administration in the Navy. The Navy and Marine Corps judge advocate of today is a multi-talented, multi-disciplined attorney, equally at home on either side of the counsel table, as well as with disciplines ranging from taxation, to environmental law, to security measures, to international and operational law, and a host of others. No longer is the judge advocate exclusively a prosecutor, nor are his skills confined to disciplinary matters. He is, in the words of former Navy Judge Advocate General John E. "Ted" Gordon, "the conscience of all the military department leadership, both civilian and military."

The Navy and Marine Corps judge advocate has grown in the past thirty years to occupy a position of strategic importance to command. No longer confined to the courtroom or office, he can be found alongside commanders serving aboard ships, in operational theaters, and in far-flung outposts throughout the world. He has become a recognized and respected professional, validating the "corps concept" that so many worked so hard to achieve in mid-century.

While the theme of this book is devoted to the events leading to the establishment of the Corps in 1967, some events of the thirty years after its founding ought not to be overlooked. In several of the appendices that follow, the author has traced the evolution of selected institutions within the Navy Judge Advocate General's Corps during the three decades of its existence.

Other appendices describe topics that do not fit neatly into the chronological format of the text, while the remainder set out the content of various documents referred to in the text. A listing of United States presidents, with the Navy Secretaries and Judge Advocates General who served with them, immediately follows as the first appendix.

Digitized by Google

Digitized by Google

APPENDICES

Digitized by Google

Digitized by Google

APPENDIX A

Chronological Listing of Presidents of the United States, Secretaries of the Navy, and Judge Advocates General of the Navy

PRESIDENT OF THE UNITED STATES	SECRETARY OF THE NAVY	JUDGE ADVOCATE GENERAL OF THE NAVY
George Washington 1789-1797	Benjamin Stoddert 18 JUN 1798-31 MAR 1801	N.A.
John Adams 1797-1801	Benjamin Stoddert (31 MAR 1801)	N.A.
Thomas Jefferson 1801-1809	Robert Smith 27 JUL 1801-07 MAR 1809	N.A.
James Madison 1809-1817	Paul Hamilton 15 MAY 1809-31 DEC 1812	N.A.
	William Jones 19 JAN 1813-01 DEC 1814	N.A.
	Benjamin W. Crowninshield 16 JAN 1815-30 SEP 1818	N.A.
James Monroe 1817-1825	Benjamin W. Crowninshield (30 SEP 1818)	N.A.
	Smith Thompson 01 JAN 1819-31 AUG 1823	N.A.
	Samuel L. Southard 16 SEP 1823-03 MAR 1829	N.A.
John Q. Adams 1825-1829	Samuel L. Southard (03 MAR 1829)	N.A.

Digitized by Google

PRESIDENT OF THE UNITED STATES	SECRETARY OF THE NAVY	JUDGE ADVOCATE GENERAL OF THE NAVY
Andrew Jackson 1829-1837	John Branch 09 MAR 1829-12 MAY 1831	N.A.
	Levi Woodbury 23 MAY 1831-30 JUN 1834	N.A.
	Mahlon Dickerson 01 JUL 1834-30 JUN 1838	N.A.
Martin Van Buren 1837-1841	Mahlon Dickerson (30 JUN 1838)	N.A.
	James K. Paulding 01 JUL 1838-03 MAR 1841	N.A.
William H. Harrison 1841	George E. Badger 06 MAR 1841-11 SEP 1841	N.A.
John Tyler 1841-1845	George E. Badger (11 SEP 1841)	N.A.
	Abel P. Upshur 11 OCT 1841-23 JUL 1843	N.A.
	David Henshaw 24 JUL 1843-18 FEB 1844	N.A.
	Thomas W. Gilmer 19 FEB 1844-28 FEB 1844	N.A.
	John Y. Mason 26 MAR 1844-10 MAR 1845	N.A.
James K. Polk 1845-1849	George Bancroft 11 MAR 1845-09 SEP 1846	N.A.
	John Y. Mason 10 SEP 1846-07 MAR 1849	N.A.

Digitized by Google

PRESIDENT OF THE UNITED STATES	SECRETARY OF THE NAVY	JUDGE ADVOCATE GENERAL OF THE NAVY
Zachary Taylor 1849-1850	William B. Preston 08 MAR 1849-22 JUL 1850	N.A.
Millard Fillmore 1850-1853	William A. Graham 02 AUG 1850-30 JUN 1852	N.A.
	John P. Kennedy 26 JUL 1852-03 MAR 1853	N.A.
Franklin Pierce 1853-1857	James C. Dobbin 08 MAR 1853-06 MAR 1857	N.A.
James Buchanan 1857-1861	Isaac Toucey 07 MAR 1857-06 MAR 1861	N.A.
Abraham Lincoln 1861-1865	Gideon Welles 05 MAR 1861-04 MAR 1869	Nathaniel Wilson[A-1] JAN? 1864-JAN? 1865
Andrew Johnson 1865-1869	Gideon Welles (04 MAR 1869)	William E. Chandler[A-2] 06 MAR 1865-10 JUL 1865
		John A. Bolles[A-3] JUL? 1865-25 MAY 1878
Ulysses S. Grant 1869-1877	Adolf E. Borie 09 MAR 1869-25 JUN 1869	John A. Bolles
	George M. Robeson 26 JUN 1869-12 MAR 1877	John A. Bolles

A-1. Wilson, a civilian, never officially held the title "Judge Advocate General of the Navy," nor the title "Solicitor."

A-2. Chandler's title was "Solicitor and Naval Judge Advocate General." Chandler, like Wilson, was a civilian.

A-3. Bolles, also a civilian, held the title "Solicitor and Naval Judge Advocate General" from 1865 to 1870 while the office was attached to the Navy Department. His title became "Naval Solicitor" on 1 July 1870 when the office was transferred to the Department of Justice.

Digitized by Google

PRESIDENT OF THE UNITED STATES	SECRETARY OF THE NAVY	JUDGE ADVOCATE GENERAL OF THE NAVY
Rutherford B. Hayes 1877-1881	Richard W. Thompson 13 MAR 1877-20 DEC 1880	John A. Bolles (25 MAY 1878)
		Colonel William B. Remey, USMC[A-4] 02 JUL 1878-04 JUN 1892
	Nathan Goff, Jr. 07 JAN 1881-06 MAR 1881	Colonel William B. Remey, USMC
James A. Garfield 1881	William H. Hunt 07 MAR 1881-16 APR 1882	Colonel William B. Remey, USMC
Chester A. Arthur 1881-1885	William H. Hunt (16 APR 1882)	Colonel William B. Remey, USMC
	William E. Chandler 17 APR 1882-06 MAR 1885	Colonel William B. Remey, USMC
Grover Cleveland 1885-1889	William C. Whitney 07 MAR 1885-05 MAR 1889	Colonel William B. Remey, USMC
Benjamin Harrison 1889-1893	Benjamin F. Tracy 06 MAR 1889-06 MAR 1893	Colonel William B. Remey, USMC (04 JUN 1892)
		Captain Samuel C. Lemly, USN 08 JUN 1892-03 JUN 1904
Grover Cleveland 1893-1897	Hilary A. Herbert 07 MAR 1893-05 MAR 1897	Captain Samuel C. Lemly, USN
William McKinley 1897-1901	John D. Long 06 MAR 1897-30 APR 1902	Captain Samuel C. Lemly, USN

A-4. Remey's title was "acting Judge Advocate" from 2 July 1878 to 8 June 1880. On 9 June 1880 it became "Judge Advocate General of the Navy."

Digitized by Google

PRESIDENT OF THE UNITED STATES	SECRETARY OF THE NAVY	JUDGE ADVOCATE GENERAL OF THE NAVY
Theodore Roosevelt 1901-1909	John D. Long (30 APR 1902)	Captain Samuel C. Lemly, USN
	William H. Moody 01 MAY 1902-30 JUN 1904	Captain Samuel C. Lemly, USN (03 JUN 1904)
	Paul Morton 01 JUL 1904-30 JUN 1905	Captain Samuel W.B. Diehl, USN 24 JUN 1904-12 NOV 1907
	Charles J. Bonaparte 01 JUL 1905-16 DEC 1906	Captain Samuel W.B. Diehl, USN
	Victor H. Metcalf 17 DEC 1906-30 NOV 1908	Captain Samuel W.B. Diehl, USN (12 NOV 1907)
	Truman H. Newberry 01 DEC 1908-05 MAR 1909	Captain Edward H. Campbell, USN 12 NOV 1907-04 NOV 1909
William H. Taft 1909-1913	George von L. Meyer 06 MAR 1909-04 MAR 1913	Captain Edward H. Campbell, USN (04 NOV 1909)
		Captain Robert L. Russell, USN 04 NOV 1909-05 NOV 1913
Woodrow Wilson 1913-1921	Josephus Daniels 05 MAR 1913-05 MAR 1921	Captain Robert L. Russell, USN (05 NOV 1913)
		Captain Ridley McLean, USN 05 NOV 1913-02 DEC 1916
		Captain William C. Watts, USN 06 JAN 1917-15 APR 1918
		Rear Admiral George R. Clark, USN 20 JUL 1918-30 APR 1921

Digitized by Google

PRESIDENT OF THE UNITED STATES	SECRETARY OF THE NAVY	JUDGE ADVOCATE GENERAL OF THE NAVY
Warren G. Harding 1921-1923	Edwin Denby 06 MAR 1921-10 MAR 1924	Rear Admiral George R. Clark, USN (30 APR 1921)
		Rear Admiral Julian L. Latimer, USN 30 APR 1921-29 APR 1925
Calvin Coolidge 1923-1929	Edwin Denby (10 MAR 1924)	Real Admiral Julian L. Latimer, USN (29 APR 1925)
	Curtis D. Wilbur 19 MAR 1924-04 MAR 1929	Rear Admiral Edward H. Campbell, USN 30 APR 1925-29 APR 1929
Herbert Hoover 1929-1933	Charles F. Adams 05 MAR 1929-04 MAR 1933	Rear Admiral Edward H. Campbell, USN (29 APR 1929)
		Rear Admiral David F. Sellers, USN 14 JUN 1929-01 AUG 1931
		Rear Admiral Orin G. Murfin, USN 01 AUG 1931-01 JUN 1934
Franklin D. Roosevelt 1933-1945	Claude A. Swanson 04 MAR 1933-07 JUL 1939	Rear Admiral Orin G. Murfin, USN (01 JUN 1934)
		Rear Admiral Claude C. Bloch, USN 01 JUN 1934-01 JUN 1936
		Rear Admiral Gilbert J. Rowcliff, USN 01 JUN 1936-20 JUN 1938

Digitized by Google

PRESIDENT OF THE UNITED STATES	SECRETARY OF THE NAVY	JUDGE ADVOCATE GENERAL OF THE NAVY
Franklin D. Roosevelt 1933-1945	Charles Edison 02 JAN 1940-24 JUN 1940	Rear Admiral Walter B. Woodson, USN[A-5] 20 JUN 1938-01 SEP 1943
	Frank Knox 11 JUL 1940-28 APR 1944	Rear Admiral Thomas L. Gatch, USN 01 SEP 1943-16 NOV 1945
	James V. Forrestal 19 MAY 1944-17 SEP 1947	Rear Admiral Thomas L. Gatch, USN
Harry S. Truman 1945-1953	James V. Forrestal (17 SEP 1947)	Rear Admiral Thomas L. Gatch, USN (16 NOV 1945)
	John L. Sullivan 18 SEP 1947-24 MAY 1949	Rear Admiral Oswald S. Colclough, USN 16 NOV 1945-18 JUN 1948
	Francis P. Matthews 25 MAY 1949-31 JUL 1951	Rear Admiral George L. Russell, USN 18 JUN 1948-18 JUN 1952
	John A. Kimball 31 JUL 1951-20 JAN 1953	Rear Admiral Ira H. Nunn, USN 18 JUN 1952-18 JUN 1956
Dwight D. Eisenhower 1953-1961	Robert B. Anderson 04 FEB 1953-02 MAY 1954	Rear Admiral Ira H. Nunn, USN (18 JUN 1956)
	Charles S. Thomas 03 MAY 1954-01 APR 1957	Rear Admiral William R. Sheeley, USN (Acting) 18 JUN 1956-03 AUG 1956

A-5. Rear Admiral Woodson, a line officer, was the first Judge Advocate General of the Navy to hold a law degree.

Digitized by Google

PRESIDENT OF THE UNITED STATES	SECRETARY OF THE NAVY	JUDGE ADVOCATE GENERAL OF THE NAVY
Dwight D. Eisenhower 1953-1961	Thomas S. Gates, Jr. 01 APR 1957-07 JUN 1959	Rear Admiral Chester Ward, USN[A-6] 03 AUG 1956-01 AUG 1960
	William B. Franke 08 JUN 1959-20 JAN 1961	Rear Admiral William C. Mott, USN 01 AUG 1960-31 MAR 1964
John F. Kennedy 1961-1963	John B. Connally 20 JAN 1961-20 DEC 1961	Rear Admiral William C. Mott, USN
	Fred Korth 04 JAN 1962-01 NOV 1963	Rear Admiral William C. Mott, USN
Lyndon B. Johnson 1963-1969	Paul H. Nitze 29 NOV 1963-30 JUN 1967	Rear Admiral William C. Mott, USN (31 MAR 1964)
	Paul R. Ignatius 01 SEP 1967-24 JAN 1969	Rear Admiral Wilfred A. Hearn, JAGC, USN[A-7] 01 APR 1964-31 MAR 1968
		Rear Admiral Joseph B. McDevitt, JAGC, USN 01 APR 1968-31 MAR 1972
Richard M. Nixon 1969-1974	John H. Chafee 31 JAN 1969-04 MAY 1972	Rear Admiral Joseph B. McDevitt, JAGC, USN (31 MAR 1972)
	John W. Warner 04 MAY 1972-08 APR 1974	Rear Admiral Merlin H. Staring, JAGC, USN 01 APR 1972-31 JAN 1975

A-6. Rear Admiral Ward was the first Judge Advocate General of the Navy to have been a "Law Specialist," a restricted category of line officer whose duties involved legal matters exclusively.

A-7. Rear Admiral Hearn was the first Judge Advocate General of the Navy to have been a member of the Navy Judge Advocate General's Corps, which was established on 8 December 1967.

Digitized by Google

PRESIDENT OF THE UNITED STATES	SECRETARY OF THE NAVY	JUDGE ADVOCATE GENERAL OF THE NAVY
Gerald R. Ford 1974-1977	J. William Middendorf II 10 JUN 1974-20 JAN 1977	Rear Admiral Merlin H. Staring, JAGC, USN (31 JAN 1975)
		Rear Admiral Horace B. Robertson, JAGC, USN 13 FEB 1975-31 JUL 1976
		Rear Admiral William O. Miller, JAGC, USN 01 AUG 1976-31 JUL 1978
James E. Carter, Jr. 1977-1981	W. Graham Claytor, Jr. 14 FEB 1977-26 JUL 1979	Rear Admiral William O. Miller, JAGC, USN (31 JUL 1978)
	Edward Hidalgo 27 JUL 1979-29 JAN 1981	Rear Admiral Charles E. McDowell, JAGC, USN 01 AUG 1978-01 SEP 1980
		Rear Admiral John S. Jenkins, JAGC, USN 01 SEP 1980-30 SEP 1982
Ronald Reagan 1981-1989	John F. Lehman, Jr. 05 FEB 1981-10 APR 1987	Rear Admiral John S. Jenkins, JAGC, USN (30 SEP 1982)
		Rear Admiral James J. McHugh, JAGC, USN 01 OCT 1982-31 OCT 1984
		Rear Admiral Thomas E. Flynn, JAGC, USN 01 NOV 1984-31 JUL 1986

Digitized by Google

PRESIDENT OF THE UNITED STATES	SECRETARY OF THE NAVY	JUDGE ADVOCATE GENERAL OF THE NAVY
Ronald Reagan 1981-1989	James H. Webb, Jr. 10 APR 1987-23 FEB 1988	Rear Admiral Hugh D. Campbell, JAGC, USN 01 NOV 1986-31 OCT 1988
	William L. Ball III 24 MAR 1988-15 MAY 1989	Rear Admiral Everette D. Stumbaugh,JAGC,USN 01 NOV 1988-31 OCT 1990
George H.W. Bush 1989-1993	H. Lawrence Garrett III 15 MAY 1989-26 JUN 1992	Rear Admiral Everette D. Stumbaugh,JAGC,USN (31 OCT 1990)
		Rear Admiral John E. Gordon, JAGC, USN 01 NOV 1990-31 OCT 1992
	Sean O'Keefe 07 JUL 1992-20 JAN 1993	Rear Admiral William L. Schachte, Jr., JAGC, USN (Acting) 01 NOV 1992-30 SEP 1993
William J. Clinton 1993-	John H. Dalton 22 JUL 1993-	Rear Admiral William L. Schachte, Jr., JAGC, USN (Acting) (30 SEP 1993)
		Rear Admiral Harold E. Grant, JAGC, USN (Acting) 01 OCT 1993-16 MAR 1994
		Rear Admiral Harold E. Grant, JAGC, USN 17 MAR 1994-

Digitized by Google

APPENDIX B

Statutes and Administrative Pronouncements Relating to Duties of the Judge Advocate General of the Navy, the Naval Solicitor, and the General Counsel of the Navy

Act of 2 March 1865

An Act to establish the Office of Solicitor and Naval Judge-Advocate.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President be, and he is hereby, authorized to appoint, by and with the advice and consent of the Senate, for service during the rebellion and one year thereafter, an officer in the Navy Department, to be called the "Solicitor and Naval Judge-Advocate General," at an annual salary of three thousand five hundred dollars, and that until the close of the fiscal year ending June thirtieth, eighteen hundred and sixty-six, the salary herein provided for shall be paid from any money in the treasury not otherwise appropriated.

SEC. 2. *And be it further enacted,* That the fees for record in naval courts-martial shall not in any one case exceed the sum of two hundred dollars.

APPROVED, March 2, 1865

Circular of 14 March 1877

All cases involving questions of law and regulations shall be immediately referred to the Naval Solicitor and Judge Advocate of the Department, who will promptly consider them and render his opinion as early as possible, together with a brief of same, to the Secretary.

Digitized by Google

Circular of 2 July 1878

1. All matters submitted to the Secretary of the Navy involving questions of law or regulations will be referred by him or by the chief clerk of the Department, acting under his order, to the proper Bureau, or clerk, for the ascertainment and report of the facts in the case, and on the receipt of a written report of the facts the Secretary of the Navy will refer the matter to the acting Judge Advocate for a report on the question of law, or regulation, which may be involved.

2. All summary and general courts-martial will be briefed by the proper clerk and laid before the acting Judge Advocate for examination, report, and recommendation to the Secretary of the Navy.

3. Reports of examining and retiring boards will be referred to the acting Judge Advocate for report to the Secretary of the Navy, whether they are correct in form and substance, and whether the evidence sustains the finding.

Act of 8 June 1880

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States be, and he is hereby, authorized to appoint, for the term of four years, by and with the advice and consent of the Senate, from the officers of the Navy or the Marine Corps, a judge-advocate-general of the Navy, with the rank, pay, and allowances of a captain in the Navy or a colonel in the Marine Corps, as the case may be. And the office of the said judge-advocate-general shall be in the Navy Department, where he shall, under the direction of the Secretary of the Navy, receive, revise, and have recorded the proceedings of all courts-martial, courts of inquiry, and boards for the examination of officers for retirement and promotion in the naval service, and perform such other duties as have heretofore been performed by the solicitor and naval judge-advocate-general.

Digitized by Google

Circular of 28 June 1880

The Circular issued by the Department under date of July 2, 1878, in relation to the office of Acting Judge Advocate, is hereby rescinded; and the following rules for the transaction of the business appertaining to the office of the Judge Advocate General of the Navy, as established by the Act of June 8, 1880, will hereafter be observed:

1. All matters submitted to the Secretary of the Navy, involving questions of law or regulation will be referred by him, or by the chief clerk of the Department acting under his order, to the Judge Advocate General for examination and report.

2. The Chiefs of the several Bureaus and other offices connected with the Navy Department, and the clerks in the Secretary's office, will furnish the Judge Advocate General, upon his application, by reference of papers or otherwise, with all such facts and information from the books or records bearing upon any case or cases under consideration by him as he may require.

3. The records of all general and summary courts-martial, courts of inquiry, and boards for the examination of officers for retirement and promotion will be filed in the office of the Judge Advocate General.

Digitized by Google

General Order No. 250 of 28 June 1880

The following act of Congress, approved June 8, 1880, establishing the Office of Judge Advocate General of the Navy, is published for the information of the naval service:

AN ACT to authorize the President to appoint an officer of the Navy or the Marine Corps to perform the duties of solicitor and judge-advocate-general, and so forth, and to fix the rank and pay of such officer.

***Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the President of the United States be and he is hereby, authorized to appoint, for the term of four years, by and with the advice and consent of the Senate, from the officers of the Navy or the Marine Corps, a judge-advocate-general of the Navy, with the rank, pay, and allowances of a captain in the Navy or a colonel in the Marine Corps, as the case may be. And the office of the said judge-advocate-general shall be in the Navy Department, where he shall, under the direction of the Secretary of the Navy, receive, revise and have recorded the proceedings of all courts-martial, courts of inquiry, and boards for the examination of officers for retirement and promotion in the naval service, and perform such other duties as have heretofore been performed by the solicitor and naval judge-advocate-general.**

In accordance with the law above quoted, and with a view of defining more particularly the duties and functions of the Office of Judge Advocate General of the Navy, it is hereby ordered—

First. The Judge Advocate General shall receive, revise, report upon, and have recorded, the proceedings of all Courts-Martial, Courts of Inquiry, and Boards for the examination of officers for retirement and promotion in the naval service, and perform such other duties as have heretofore been performed by the Solicitor and Naval Judge Advocate General.

Second. The proceedings of all General and Summary Courts Martial, Courts of Inquiry, and Boards for the examination of officers for promotion, after action thereon by the reviewing authority, will be forwarded direct to, and filed in, the Office of the Judge Advocate General.

The presiding officers of General Courts-Martial, Courts of Inquiry, and Boards for the examination of officers for retirement and promotion, convened by order of the Secretary of the Navy, will forward the proceedings of such Courts and Boards direct to the Judge Advocate General.

Third. All communications pertaining to questions of law arising before Courts-Martial, Courts of Inquiry, and Boards for the examination of officers for retirement and promotion or to the proceedings thereof, which may require the action of the Department, will be addressed to the "Judge Advocate General of the Navy, Navy Department."

Digitized by Google

General Order No. 372 of 25 June 1889

It shall be the duty of the Judge-Advocate-General, under the direction of the Secretary of the Navy, to revise, report upon, and have recorded the proceedings of all courts-martial, courts of inquiry, and boards for the examination of officers for retirement and promotion in the naval service; to prepare the charges and specifications and the necessary orders convening general courts-martial in cases where such courts are ordered by the Secretary of the Navy; to prepare general orders promulgating the final action of the reviewing authority in general court-martial cases; to prepare the necessary orders convening courts of inquiry, boards for the examination of officers for promotion and retirement, and for the examination of candidates for appointment in the medical corps, and to conduct all official correspondence relating to courts-martial, courts of inquiry, and such boards.

It shall also be the duty of the Judge-Advocate-General to examine and report upon claims of every description filed in the Department, including those resulting from collisions between vessels of the Navy and other vessels, and those arising under contracts with the Department or the Bureaus and requiring the Department's action; to conduct the departmental correspondence relating to the business connected with the increase of the Navy, including the preparation of advertisements inviting proposals for the construction of new vessels, or for furnishing materials for use in their construction, of forms of proposals to be used by bidders in offering to construct such vessels or furnish such materials, and forms of contracts to be entered into and bonds to be furnished by such bidders on the acceptance of their proposals, and including also the departmental correspondence relating to the plans, specifications, and materials of new vessels and to proposed changes in the same.

It shall also be the duty of the Judge-Advocate-General to consider and report upon all matters which may be referred to him involving questions of law, regulations, and discipline, and requiring the Department's action; all questions relating to the meaning or construction of the general regulations of the Navy, which may be referred to him, including those relating to rank or precedence, or to appointments, commissions, promotions, and retirement, and those relating to the validity of proceedings in courts-martial cases; to conduct the correspondence with the Attorney-General relative to questions of statutory construction submitted for his opinion thereon; [to conduct the correspondence with the Attorney-General relative] to the institution of suits, at the instance of the Navy Department, and to the defense of suits brought by private parties against the officers or agents of the Department; to answer calls from the Department of Justice and the Court of Claims for information and papers relating to cases pending in that court and affecting the Navy Department; to examine and report upon the official bonds of pay officers, and all questions presented to the

Digitized by Google

Department relating to pay and traveling expenses of officers; to attend to all correspondence relating to the care of naval prisons and prisoners; and to consider and act upon applications for the removal of the mark of desertion standing against the names of enlisted men of the Navy or Marine Corps.

Navy Regulations, 1909, Articles 12 and 13
Duties of Judge Advocate General and Solicitor

Judge Advocate General

12. (1) The duties of the Judge Advocate General of the Navy shall be as follows: To revise, report upon, and have recorded the proceedings of all courts-martial, courts of inquiry, boards of investigation, inquest, and boards for the examination of officers for retirement and promotion in the naval service; to prepare charges and specifications for courts-martial, and the necessary orders convening courts-martial, in cases where such courts are ordered by the Secretary of the Navy; to prepare general orders promulgating the final action of the reviewing authority in court-martial cases; to prepare the necessary orders convening courts of inquiry and boards for the examination of officers for promotion and retirement, and for the examination of candidates for appointment as commissioned officers in the Navy other than midshipmen, and to conduct all official correspondence relating to such courts and boards.

(2) It shall also be the duty of the Judge Advocate General to examine and report upon all questions relating to the construction of the regulations, including those relating to rank and precedence, promotions and retirements, and those relating to the validity of the proceedings in court-martial cases; all matters relating to the supervision and control of naval prisons and prisoners; the removal of the mark of desertion; the correction of records of service and reporting thereupon in the regular or volunteer navy; certification of discharge in true name; pardons; bills and resolutions introduced in Congress relating to the personnel and referred to the Department for report; references to the Comptroller of the Treasury with regard to pay and allowances of the personnel; questions involving points of law concerning the personnel; and to conduct the correspondence respecting the foregoing duties.

Digitized by Google

Solicitor

13. (1) It shall be the duty of the Solicitor to examine and report upon questions of law, including the drafting and interpretations of statutes, and matters submitted to the accounting officers, not relating to the personnel; preparation of advertisements, proposals, and contracts; insurance; patents; the sufficiency of official, contract, and other bonds and guarantees; acquisition of and questions affecting lands; proceeding in the civil courts by or against the Government or its officers; claims by or against the Government; questions submitted to the Attorney-General; bills and Congressional resolutions and inquiries not relating to the personnel and not elsewhere assigned; and to conduct the correspondence respecting the foregoing duties. Opinions relating to the personnel shall, when received, be referred by the Solicitor to the Bureau of Navigation via the Office of the Judge Advocate General.

(2) He shall be charged under the special instructions of the Secretary of the Navy with the purchase, sale, transfer, and other questions affecting lands and buildings pertaining to the Navy, and with the care and preservation of all muniments of title to land acquired for naval uses.

(3) He shall also render opinion upon any matter or question of law when directed to do so by the Secretary of the Navy.

Digitized by Google

Navy Regulations, 1920, Articles 469 and 470
As amended by Change Number 2, 1 November 1921
The Judge Advocate General

SECTION 1. DUTIES OF THE JUDGE ADVOCATE GENERAL

469.

(1) The Judge Advocate General of the Navy shall, in accordance with the statute creating his office, have cognizance of all matters of law arising in the Navy Department and shall perform such other duties as may be assigned him by the Secretary of the Navy.

(2) The duties of the Judge Advocate General of the Navy shall be to revise and report upon the legal features of and to have recorded the proceedings of all courts-martial, courts of inquiry, boards of investigation and inquest, and boards for the examination of officers for retirement and promotion in the naval service; to prepare charges and specifications for courts-martial, and the necessary orders convening courts-martial, in cases where such courts are ordered by the Secretary of the Navy; to prepare courts-martial orders promulgating the final action of the reviewing authority in general courts-martial cases, except those of enlisted men convened by officers other than the Secretary of the Navy; to prepare the necessary orders convening courts of inquiry and boards for the examination of officers for promotion and retirement, for the examination of all candidates for appointment as officers in the naval service, other than midshipmen, and in the Naval Reserve Force, where such courts and boards are ordered by the Secretary of the Navy, and to conduct all official correspondence relating to such courts and boards.

(3) It shall also be the duty of the Judge Advocate General of the Navy to examine and report upon all questions relating to rank and precedence, to promotions and retirements, and to the validity of the proceedings in court-martial cases, all matters relating to the supervision and control of naval prisons and prisoners, including prisoners of war; the removal of the mark of desertion; the correction of records of service of the naval personnel; certification of discharge in true name; pardons; the interpretation of statutes; references to the general accounting officers of the Treasury; proceedings in the civil courts by or against the Government or its officers; preparation of advertisements, proposals, and contracts; insurance; patents; the sufficiency of official contracts, and other bonds and guarantees; claims by or against the Government; and to conduct the correspondence respecting the foregoing duties, including the preparation for submission to the Attorney General of all questions which the Secretary of the Navy may direct to be so submitted.

Digitized by Google

(4) It shall be the duty of the Judge Advocate General of the Navy to examine and report upon all bills and resolutions introduced in Congress and referred to the department for report; to draft all proposed legislation arising in the Navy Department; and to conduct the correspondence in connection with these duties.

(5) The study of international law is assigned to the office of the Judge Advocate General of the Navy. He shall examine and report upon questions of international law as may be required.

(6) He shall be charged, under the special instructions of the Secretary of the Navy, with the searching of titles, purchase, sale, transfer, and other questions affecting lands and buildings pertaining to the Navy, and with the care and preservation of all muniments of title to land acquired for naval uses.

470.

All requests for opinions or decisions to be rendered on any subject by the Judge Advocate General of the Navy shall be formally submitted in writing to the Secretary of the Navy for approval and reference to that officer. Only formal opinions or decisions in writing shall be rendered thereon when such requests are referred. Such opinions or decisions shall be the basis of official action by any bureau or any office or officer of the Navy Department or Marine Corps only after the approval of such opinion or decision by the Secretary of the Navy. No oral or informal opinions shall be rendered by the Office of the Judge Advocate General of the Navy.

Digitized by Google

Navy Regulations, 1948, Articles 0460 and 0461
The Judge Advocate General

0460. Duties and Responsibilities.

The Judge Advocate General of the Navy shall be responsible for the following, except as otherwise prescribed in these regulations or by the Secretary of the Navy:

1. Advising the Secretary of the Navy, the Civilian Executive Assistants, and the Naval Professional Assistants on matters of law arising within the Navy Department.

2. Reviewing and reporting to the Secretary of the Navy upon the legal features of, and causing to be recorded, the proceedings of all courts martial, courts of inquiry, boards of investigation and inquest, and boards for the examination of officers for retirement and promotion in the naval service.

3. Conducting official correspondence relating to courts and boards ordered by the Secretary of the Navy, together with the preparation for the Secretary's signature of the following:

(*a*) Charges and specifications for courts martial, and the necessary orders convening courts martial.

(*b*) Orders convening courts of inquiry, boards of investigation, boards for the examination of officers for promotion and retirement, and boards for the examination of candidates for appointment as officers in the naval service, other than midshipmen, and in the Naval and Marine Corps Reserve.

4. Preparing orders promulgating the final action of the reviewing authorities in general court-martial cases, except those of enlisted persons convened by officers other than the Secretary of the Navy.

5. Upon request, preparing opinions and rendering such other legal services as may be required in the conduct of the official business of the Naval Establishment.

6. Examining and reporting on all bills and resolutions introduced into Congress and referred to the Secretary of the Navy for report; drafting all proposed legislation arising in the Navy Department; and conducting the correspondence in connection with these duties.

0461. Opinions.

Formal opinions shall be rendered by the Judge Advocate General only upon written request. Informal opinions shall not be utilized as a basis for official action without the approval of the Judge Advocate General.

Digitized by Google

Act of 10 August 1956
10 United States Code § 5148

§ 5148. Office of the Judge Advocate General: Judge Advocate General; appointment, term, emoluments, duties

(a) There is in the executive part of the Department of the Navy the Office of the Judge Advocate General of the Navy. The Judge Advocate General shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. He shall be appointed from officers of the Navy or the Marine Corps who are members of the bar of a Federal court or the highest court of a State or Territory and who have had at least eight years of experience in legal duties as commissioned officers.

(b) The Judge Advocate General of the Navy is entitled to the same rank, pay, allowances, and privileges of retirement as provided for chiefs of bureaus in section 5133 of this title.

(c) The Judge Advocate General of the Navy, under the direction of the Secretary of the Navy, shall—

(1) perform duties relating to legal matters arising in the Department of the Navy as may be assigned to him;

(2) perform the functions and duties and exercise the powers prescribed for the Judge Advocate General in chapter 47 of this title;

(3) receive, revise, and have recorded the proceedings of boards for the examination of officers of the naval service for promotion and retirements; and

(4) perform such other duties as may be assigned to him.

Digitized by Google

Secretary of the Navy Instruction 5430.25
2 February 1955
Duties of the General Counsel of the Navy

From: Secretary of the Navy
To: Distribution List

Subj: Office of the General Counsel for the Department of the Navy; Legal Services in the Field of Business and Commercial Law

Ref: (a) SECNAV Instruction 5430.18 of 30 Apr 54
(b) SECNAV ltr (PLD/HSH:jhf A3-1/EN) of 13 Dec 42
(c) SECNAV ltr (OGC/IIBC:mrl) of 26 Jun 48, NPD 20-402a
(d) SECNAV ltr (PLD/RGMcC:11) of 23 Sep 43, NPD 20-402a

1. Purpose. In implementation of reference (a), this Instruction restates and delineates the organization, duties and responsibilities of the Office of the General Counsel for the Department of the Navy.

2. Effect on Other Directives. References (b), (c) and (d) are hereby superseded and canceled. Reference (a) shall continue in effect.

3. Organization of the Office of the General Counsel. The head of the Office of the General Counsel shall be designated the General Counsel for the Department of the Navy, shall be appointed by and be responsible to the Secretary of the Navy, and shall report to him via the Under Secretary of the Navy. The General Counsel is hereby authorized to appoint, with the approval of the Secretary of the Navy, three Assistant General Counsels. The Office of the General Counsel shall include the Offices of Counsel for the Commandant of the Marine Corps and for each Bureau and Office of the Navy Department, as defined below, and such Offices of Counsel for their respective field activities and such Branch or Regional Offices as have been or may hereafter be established. The term "Bureau and Office" as used in this Instruction includes the Military Sea Transportation Service, the Office of Naval Research, the Armed Services Petroleum Purchasing Agency and the Office of the Comptroller of the Navy, and all Bureaus except the Bureau of Medicine and Surgery.

The General Counsel shall furnish or arrange to furnish legal services for which the Office of the General Counsel is assigned responsibility by paragraph 4, below, to other Bureaus and Offices when it is mutually agreed such services are required.

Digitized by Google

4. Responsibilities of the Office of the General Counsel. The Office of the General Counsel shall, except as otherwise provided below, be responsible throughout the Department of the Navy for providing legal services in the field of business and commercial law, including all legal services relating to:

a. The acquisition, custody, management, transportation, taxation, and disposition of real and personal property, and the procurement of services, including the fiscal, budgetary and accounting aspects thereof; excepting, however, tort claims and admiralty claims arising independently of contract, and matters relating to the Naval Petroleum Reserves;

b. Operations of the Military Sea Transportation Service, excepting tort and admiralty claims arising independently of contract;

c. The Office of the Comptroller of the Navy;

d. Patents, inventions, trade-marks, copyrights, royalty payments and similar matters; and

e. Industrial security.

The Office of the General Counsel shall be responsible for liaison and relations with the other departments and agencies of the Government with respect to the foregoing matters.

5. Counsel for the Marine Corps, Bureaus and Offices. For the Commandant of the Marine Corps and each Bureau and Office, as defined in paragraph 3, there shall be a single Office of Counsel which shall be responsible, except as otherwise provided in paragraph 6, to provide in the Marine Corps or in such Bureau or Office all legal services for which the Office of the General Counsel is assigned responsibility by paragraph 4, above. Each such Office of Counsel shall be headed by a Counsel who shall be appointed by the Secretary of the Navy upon the Joint recommendation of the General Counsel and the Commandant of the Marine Corps or the head of the Bureau or Office concerned, as appropriate. Such Counsel shall report directly to the Commandant of the Marine Corps or the head of such Bureau or Office, as appropriate, and shall also report, via the General Counsel, to the Secretary of the Nary.

6. Lawyers in the Office of the General Counsel. The lawyers in the Office of Counsel for the Commandant of the Marine Corps and for each Bureau and Office, including their respective field lawyers, shall be selected by the General Counsel subject to the approval of the Commandant of the Marine Corps or of the head of such Bureau or Office, as appropriate. The General Counsel shall prepare, or assign responsibility for the preparation of, performance rating reports for all lawyers in the Office of the General Counsel, and shall review all such reports. Personnel actions involving lawyers in the Office of the General Counsel, including lawyers in the Office of the Patent Counsel for the Navy and lawyers for field activities, such as changes in grade, transfers or terminations of services, and the establishment or elimination of position descriptions shall in all instances be subject to the approval of the General Counsel. The General

Digitized by Google

Counsel, with the approval of the Secretary of the Navy, may establish Regional or Branch offices of the Office of the General Counsel; and the General Counsel shall select and designate the Counsel and other lawyers therein.

7. Patent Legal Services. Except as the General Counsel may otherwise determine with the approval of the Chief of Naval Research, legal services throughout the department of the Navy in the field of patents, inventions, trademarks, copyrights, royalty payments and similar matters will be furnished by the Office of the Patent Counsel for the Navy under the direction and supervision of the General Counsel.

8. Uniformity, Integration and Supervision. The legal services to be rendered by the Office of Counsel for the Commandant of the Marine Corps, each Bureau and Office, the Office of the Patent Counsel for the Navy, the Counsel for Branch or Regional Offices, and all other lawyers in the Office of the General Counsel, both departmental and in the field, shall be integrated, coordinated, and supervised by the General Counsel. The General Counsel shall also be responsible for achieving and maintaining, so far as practicable, uniformity in the application of legal principles with regard to matters for which the Office of the General Counsel is assigned responsibility by paragraph 4, above.

9. Legal Documents. Contracts and amendments thereto, modifications thereof, and other documents pertaining to matters for which the Office of the General Counsel is responsible shall be submitted to the appropriate lawyer or lawyers of that Office for an opinion as to form legality and for any additional pertinent comment or advice prior to execution.

10. Revision of Navy Regulations and General Orders. Appropriate amendments to U.S Navy Regulations and Navy Department General Orders to reflect this instruction shall be initiated by the Office of the General Counsel.

C.S. THOMAS

Digitized by Google

Secretary of the Navy Instruction 5430.27
21 February 1955
Duties of the Judge Advocate General of the Navy

From: Secretary of the Navy
To: Distribution List

Subj: Responsibility of the Judge Advocate General for supervision of legal services

Ref: (a) SECNAV Instruction 5430.18 of 30 Apr 1954 to SNDL A
(b) SECNAV Instruction 5430.25 of 2 Feb 1955 (NOTAL)

1. Purpose. The purpose of this instruction is to provide, pursuant to reference (a), the responsibility of the Judge Advocate General of the Navy for the supervision of legal services in the Department of the Navy in addition to those performed in the Office of the Judge Advocate General.

2. Cognizance. In addition to military justice and military law, the Judge Advocate General has cognizance of all legal duties and services throughout the Department of the Navy other than those specifically assigned to the General Counsel for the Department of the Navy in reference (b).

3. Supervision of Legal Services. Chiefs of bureaus and offices and other cognizant authorities will furnish the Judge Advocate General such information as he may require in matters within his jurisdiction as herein prescribed relating to the duties performed by attorneys, military or civilian, within the Department of the Navy. The Judge Advocate General will make provision for appropriate supervision of legal services and for such liaison as may be deemed to be essential between his office and legal activities located elsewhere within the Department of the Navy.

4. Attorneys within the Cognizance of the Judge Advocate General. Attorneys, military and civilian, performing duties within the cognizance of the Judge Advocate General will report to the chiefs of bureaus or offices or heads of other activities to which attached and will be responsible to them for their performance of duties subject to such supervision as may be exercised by the Judge Advocate General in accordance with paragraph 3 hereof. Appointments, promotions, and similar personnel actions affecting civilian attorneys employed by the Department of the Navy who perform legal functions within the general cognizance of the Judge Advocate General shall only be effected with the concurrence of the Judge Advocate General.

Digitized by Google

5. Exceptions. The foregoing shall not apply to the Board for the Correction of Naval Records or to the Navy Board of Contract Appeals.

THOMAS S. GATES, JR.
Under Secretary of the Navy

Digitized by Google

APPENDIX C

Letter from Secretary of the Navy R.W. Thompson to Hon. J.R. McPherson, Chairman of the Senate Committee on Naval Affairs, in support of H.R. 2788, the bill to create the office of Judge Advocate General of the Navy

NAVY DEPARTMENT
Washington, January 7, 1880

SIR: I have the honor to enclose herewith House bill No. 2788, which was introduced at my request by Mr. WHITTHORNE, chairman of the Committee on Naval Affairs of the House, and to ask that a similar bill may be introduced in the Senate.

In anticipation of such introduction I take the liberty of expressing my views on the subject as follows:

This bill (H.R. 2788) proposes to authorize the President to appoint, by and with the advice and consent of the Senate, from the officers of the Navy or the Marine Corps, a judge-advocate-general of the Navy, with the rank, pay, and allowances of a captain in the Navy, or a colonel in the Marine Corps, as the case may be: that the office of the judge-advocate- general shall be in the Navy Department, where he shall, under the direction of the Secretary of the Navy, receive, revise, and have recorded the proceedings of all courts-martial, courts of inquiry, and boards for the examination of officers for retirement and promotion in the Navy and Marine Corps, and examine all questions of law, regulations, and practice arising therein, and report the same with recommendations to the Secretary: and also examine matters generally involving questions of law or regulations, and claims presented to the Navy Department for investigation, and submit reports and recommendations thereon for the information and action of the Secretary of the Navy.

The object of this bill is to provide for the appointment by authority of law of a competent officer of the Navy or Marine Corps to discharge the important duties of judge-advocate-general of the Navy as well as the duties which were formerly performed by the naval solicitor. But it is not proposed to revive the office of naval solicitor, which, as it existed in connection with the Department of Justice up to the year 1878, when it was abolished, was not suited to the requirements of the military or naval service.

Digitized by Google

The necessity of having an officer familiar with the practice of courts-martial, the rules, regulations, and customs of the Navy, of practical experience in the naval service, and with proper legal attainments to discharge the duties of judge-advocate-general, has been recognized by preceding administrations of this Department: and in the absence of a provision of law for that office such as is contemplated by this bill the difficulty has been partially met by the temporary detail of a suitable officer by the Secretary of the Navy to act in that capacity.

In view of the changes to which such office is subjected by these temporary assignments, it is important and necessary to the best interests of this branch of the public service that Congress should fix a status for such officer by a provision for said office for the Navy analogous to that which has long been established in the Army. There can be no question as to the propriety of such a measure as is presented in this bill, and the necessity for such an officer to systematize the details of administration of law and justice in the Navy is regarded as equally urgent with that of a similar position already established for the military service under the War Department. Public business of the same character devolving upon the War Department is discharged by an officer of the Army under the direction of the Secretary of War, who holds the position of Judge-Advocate-General, with the rank and pay of a higher relative grade than that proposed by this bill for the officer who may be appointed to discharge similar duties as judge-advocate-general of the Navy, under the direction of the Secretary of the Navy.

The peculiar nature of the duties pertaining to that office in the Navy Department requires of the officer appointed to it an acquaintance with the practical application of the law and regulations to the rank, grade, ratings, etc., of the various classes of officers and enlisted men of the naval service, and renders it eminently proper and advisable that provision be thus made for the appointment of such an officer to aid the Secretary in transacting this branch of the public business devolving upon the Department, and to which he, in the midst of the other varied and important duties, cannot be expected to give the attention that its importance demands.

Impressed with the necessity of the proposed legislation in relation to the office of judge-advocate-general of the Navy, I respectfully commend the provisions of the bill in its present form to the favorable consideration of the Committee on Naval Affairs, and earnestly recommend its passage by Congress.

Very respectfully,
R.W. THOMPSON,
Secretary of the Navy

Hon. J.R. MCPHERSON,
Chairman of the Committee on Naval Affairs,
United States Senate.

Digitized by Google

The above letter appears in the *Congressional Record*, Vol. 10, for the 46th Congress, 2d session, 4 June 1880, at 4133-34. Other letters written by Secretary Thompson in support of the bill to create the office of a Judge Advocate General of the Navy can be found on microfilm in "Letters Sent to Members of Congress, 1878-1880, 'Thompson Letters,'" Naval Records Collection, Record Group 45, National Archives, Washington, D.C.

Digitized by Google

Digitized by Google

Appendix D

House Report No. 459,
Solicitor and Judge-Advocate-General
of Navy and Marine Corps

46TH CONGRESS }	HOUSE OF REPRESENTATIVES	{ REPORT
2d Session }		{ No. 459

SOLICITOR AND JUDGE-ADVOCATE-GENERAL OF NAVY AND MARINE CORPS.

March 10, 1880—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

Mr. GOODE, from the Committee on Naval Affairs, Submitted the following

REPORT
[To accompany bill H.R. 2788.]

The Committee on Naval Affairs, to whom was referred the bill (H.R. 2788) "to authorize the President to detail an officer of the Navy or the Marine Corps to perform the duties of Solicitor and Judge-Advocate-General, and to fix the rank and pay of such officer," beg leave to report the same back to the House with a favorable recommendation.

The bill proposes to authorize the President to appoint, by and with the advice and consent of the Senate, from the officers of the Navy or the Marine Corps, a Judge-Advocate-General of the Navy, with the rank, pay, and allowances of a captain in the Navy or a colonel in the Marine Corps, as the case may be. It provides that the office of the Judge-Advocate-General shall be in the Navy Department, and that it shall be his duty, under the direction of the Secretary of the Navy, to receive, revise, and have recorded the proceedings of all courts-martial, courts of inquiry, and boards for the examination of officers for retirement and promotion in the naval service. He shall also perform such other duties as have heretofore been performed by the Solicitor and Naval Judge-Advocate-General. The committee believe it to be important and necessary to the

Digitized by Google

best interests of the naval service that the legislation proposed by this bill should be adopted by Congress, for the following reasons:

1. The duties required to be performed under this bill are among the most important branches of the public business which have been confided to the Navy Department.

2. The business which it is proposed to assign to this office consists of the records of all courts-martial, courts of inquiry, boards for the examination of officers for retirement and promotion, the preparation of charges and specifications for courts-martial, the organization of courts and boards, the various claims filed for investigation, numerous questions of law, regulation, and other matters. The records of proceedings of the various courts and examining boards, many of them being voluminous, require careful reading and examination preliminary to action thereon by the Secretary. The claims filed for investigation, and the questions of law and regulation arising in the department, necessitate a thorough examination and consideration of the statutes, regulations, and established customs of the service relating thereto; and the business generally of the office being so extensive, it is impossible for the Secretary, in the midst of the other varied and important duties required of him, to give to this branch of the public business the attention and consideration that its importance demands.

3. Owing to the peculiar nature of the duties pertaining to the office of Judge-Advocate-General in the Navy Department, it seems to be absolutely necessary that the officer appointed to said office should be familiar with the law, forms, and practice of court-martials, the rules, regulations, and established customs of the Navy; that he should have practical experience in the naval service and an acquaintance with the application of the law and regulations to the rank, grade, ratings, and of the various classes of officers and enlisted men in the service, and that he should possess proper legal attainments to enable him to discharge satisfactorily the duties of that office.

4. The necessity of having any officer of the service possessing these qualifications to perform the duties of Judge-Advocate-General of the Navy has been recognized by preceding administrations of the department, and in the absence of a provision of law for that office, such as is contemplated by this bill, the difficulty has been partially met by the detail of a suitable officer by the Secretary of the Navy to act in that capacity. But in view of the changes to which such office is subjected by their temporary assignments, it is important that Congress should fix the status of such officer by a provision for the Navy analogous to that which has long been established for the Army. There can be no question as to the necessity of having such an officer to systematize the details of administration of law and justice in the Navy, and that such officer is as necessary to this branch of the service as is the officer authorized by law and bearing the same relation to the military service. Public business of the same character devolving upon the War Department is discharged by officers of the Army under the direction of the Secretary of War, there being a provision of law for their appointment to this service under that department, the senior officer so appointed

Digitized by Google

holding the position of Judge-Advocate-General with the rank and pay of a brigadier-general, and his assistants that of majors. Thus the rank and pay of the Judge-Advocate-General of the Army are of a higher relative grade than that proposed by this bill for the officer who may be appointed to discharge similar duties as Judge-Advocate-General of the Navy under the direction of the Secretary of the Navy.

5. It is not proposed in this bill to revive the office of Naval Solicitor, which as it existed in connection with the Department of Justice, was unsuited to the requirements of the naval service. But the object of the bill is to confer upon the President the power to appoint a Judge-Advocate-General of the Navy from the officers of the Navy or Marine Corps; if from the former, with the rank and pay of captain in the Navy; and if from the latter, that of colonel in the Marine Corps, which is the same relative grade as that of captain in the Navy.

6. All other executive departments of the government are provided by law with an officer to perform the duties therein similar to those required of the officer who may be appointed to the office of Judge-Advocate-General of the Navy; and it is not only just and proper, but it seems to be due to the head of the Navy Department, that Congress should provide equal facilities for the transaction of the business in that department by adopting a measure such as is proposed by this bill.

The committee file with this report a letter from the Secretary of the Navy, from which it will be seen that he earnestly recommends the passage of the bill.

The above report appears in the *Congressional Record*, Vol. 10, for the 46th Congress, 2d session, 10 March 1880, at 2454-55.

Digitized by Google

Digitized by Google

APPENDIX E

The Navy Appellate Review Process

The first appellate-like tribunal in the Navy, a board of review, was administratively established in the Office of the Judge Advocate General on 10 March 1945.[E-1] This was a nonstatutory board composed of three officers, set up to serve in an advisory capacity. The board's original precept provided that it had been created for the purpose of "reviewing and examining such records of trial by courts martial as may be referred to it by the Judge Advocate General or the Assistant Judge Advocate General."[E-2]

This precept was soon expanded to provide that the board would review *any* matter properly referred to it. It thus acted as a sounding board, reviewing, in addition to records of courts martial, administrative reports, investigations, recommendations for changes to *Naval Courts and Boards* and the *Articles for the Government of the Navy*, and opinions provided by the Judge Advocate General to the Naval Sentence Review and Clemency Board. Unlike the statutory boards later created under the *Uniform Code of Military Justice*, there was no requirement for mandatory review of court martial sentences, regardless of their severity. Nor was the board open to appeal on the initiative of a service member

---

E-1. Department of the Navy, *Annual Report of the Judge Advocate General of the Navy to the Secretary of the Navy*, 1948, unpaginated. Establishment of the board of review was one of the few reform initiatives undertaken by the Office of the Judge Advocate General without Congressional or Secretarial goading. Both McGuire and Ballantine later recommended that such boards be established. Provision for boards of review was included in Snedeker's proposed revision to the *Articles for the Government of the Navy*.

E-2. Bureau of Naval Personnel, *Office of the Judge Advocate General—Duties, Organization and Administration*, NAVPERS 10843 (Washington, D.C.: Bureau of Naval Personnel, 1949), 21.

Digitized by Google

convicted at trial by court martial.[E-3] The subject and scope of review rested totally in the discretion of the Judge Advocate General and his assistant.[E-4]

The court martial review process which existed in the Navy at the end of World War II has been described as follows:

> Every record of trial by general court-martial is reviewed in the Office of the Judge Advocate General. Such review is limited to the legality of the proceedings and to the legal sufficiency of the record to support the findings and sentence. Normally, the review is made in [the] Military Law Division, by an officer, who examines the record and submits his review to the chief of the section, who approves it for the Judge Advocate General. More difficult cases, cases in which the reviewing officer has some doubts as to legality, or cases involving controversial issues of fact or law, are,

---

E-3. Note that there was simply no right of appeal either within or without the Naval justice system. "Appeals" to civil courts were generally limited to *habeas corpus* proceedings in federal court, where the sole inquiry was as to the jurisdiction of the court martial. "[T]he civil courts exercise no supervisory or correcting power over the proceedings of a court-martial .... The single inquiry, the test, is jurisdiction." *Hiatt v. Brown*, 339 U.S. 103, 111, (1950), citing *In re Grimley*, 137 U.S. 147, 150 (1890). Obviously the average sailor lacked the means to muster such an appeal.

E-4. The first board of review in the United States military originated in the Army as an outgrowth of the notorious "Houston Riot" courts martial in 1917, where sixty-three black soldiers were tried for mutiny in time of war. After a trial of approximately five weeks, thirteen of the defendants were sentenced to death. They were all hanged the following morning in a mass execution. Although in accordance with regulations, the public, and indeed the War Department, were harshly critical of this summary and precipitous process. Army General Order No. 7, promulgated on 17 January 1918, mandated that henceforth a review be conducted by the Office of the Judge Advocate General before sentences involving death or the dismissal of an officer could be executed. This led to the establishment of a board of review in the Office of the Judge Advocate General of the Army, with duties "in the nature of an appellate tribunal," although its opinions to the Judge Advocate General were advisory only. For a discussion of the Houston Riot cases see U.S. Army Judge Advocate General's School, *The Army Lawyer: A History of the Judge Advocate General's Corps, 1775-1975*, comp. Paul F. Hill (Washington, D.C.: Government Printing Office, 1975), 125-30. The board of review concept found its way into the 1920 revisions to the *Articles of War* (see footnote 7-93), and became more definitively established under the "Elston Act" of 24 June 1948, 62 Stat. 635. See also William T. Generous, Jr., *Swords and Scales, The Development of the Uniform Code of Military Justice* (Port Washington, N.Y., Kennikat Press, 1973), ch. 3.

Digitized by Google

after initial review in [the] Military Law Section and by the Assistant Judge Advocate General, referred to a board of review, which has been established within the Office of the Judge Advocate General. This board reviews the case, much as a civilian court of appeal would do, and submits its conclusions and recommendations to the Judge Advocate General. However, it is not created by statute, and its recommendations are not binding upon the Judge Advocate General. The final responsibility for the legal sufficiency of every case rests upon the Judge Advocate General himself. . . .

If the Judge Advocate General finds the record legally sufficient, it is transmitted to the Chief of Naval Personnel (or to the Commandant of the Marine Corps) for comment and recommendations on the disciplinary features of the sentences. In thus transmitting the record, the Judge Advocate General sometimes invites attention to mitigating circumstances disclosed by the record. [*If either of these commands believed that a sentence should be reduced, it made an appropriate recommendation to the Secretary of the Navy. Otherwise, the case was returned to the Judge Advocate General for filing, without being referred to the Secretary. Thus, only when an action which might benefit the accused was recommended, did the case go to the Secretary of the Navy, except for a death penalty case.—ED.*]

. . .

If the Judge Advocate General felt that a case had legal impediments, he referred it to the Secretary of the Navy who might approve the proceedings in full, set them aside in whole or in part, or approve the proceedings but reduce the sentence.

Digitized by Google

There was no further review beyond the Secretary, except in cases where the death penalty had been adjudged, in which case the record went to the President for final action.[E-5]

In 1951 the *Uniform Code of Military Justice* established a statutory requirement for boards of review, with mandatory review functions independent of the Judge Advocate General.[E-6] The Judge Advocate General of the Navy originally formed seven boards, with three lawyers on each. Four were headed by senior captains and three by senior colonels, with a civilian on each board.[E-7] Each acted separately from the other, with no provision for *en banc* consideration of cases.[E-8]

By 1953 the boards were reviewing 9,542 cases annually.[E-9] This dropped, however, to 7,196 cases the following year, and by August 1955 the number of

---

E-5. Department of the Navy, *Report and Recommendations of the General Court-Martial Sentence Review Board on Court-Martial Procedures and Policies* (1947), 21-23, 208.

E-6. The requirement was contained in article 66(a):

> The Judge Advocate General of each of the armed forces shall constitute in his office one or more boards of review, each composed of not less than three officers or civilians, each of whom shall be a member of the bar of a Federal court or of the highest court of a State of the United States.

E-7. Rear Admiral Donald D. Chapman, JAGC, USN (Ret.), letter to author, 11 February 1994.

E-8. The boards acquired *en banc* powers in 1968, when they became panels of the newly-designated Navy Court of Military Review. As initially constituted, however, the court could hear cases *en banc* only on an initial hearing; there was no authority to reconsider *en banc* a case first heard by a panel, even if the panel's decision was tentative. See, for example, *United States v. Seelke*, 45 C.M.R. 73 (C.M.A. 1972). In 1984, Congress amended article 66 of the *Uniform Code* to permit the military review courts to reconsider cases *en banc* regardless of the manner in which they had first considered them.

E-9. As proof of the impact of the *Uniform Code of Military Justice*, the single board in the Office of the Judge Advocate General in 1947 had reviewed 469 records (proceedings of trials, military commission proceedings, administrative reports, investigations, and courts of inquiry). The following year, only 295 were reviewed. Department of the Navy, *Annual Report of the Judge Advocate General of the Navy to the Secretary of the Navy*, 1947, unpaginated; Department of the Navy, *Annual Report of the Judge Advocate General of the Navy to the Secretary of the Navy*, 1948, unpaginated.

Digitized by Google

boards had been reduced to five, although there were plans to increase to six by the following month.[E-10] Despite this reduction in workload, the work was unevenly distributed. A substantial portion of the cases reviewed originated on the West Coast, in the Pacific Fleet, and in the Far East. Nevertheless, all came to the Office of the Judge Advocate General in Washington for review, causing serious delays in processing time. To relieve this choke point, establishment of the "Office of the Judge Advocate General of the Navy, West Coast," was approved by the Under Secretary of the Navy on 2 November 1955.[E-11] In early 1956, two boards of review and one supporting unit were transferred to San Bruno, California.[E-12] Because the Judge Advocate General did not have to take action on board of review matters, the West Coast office operated almost autonomously.[E-13] The office was disestablished in 1965, when it was determined that operations should be again centralized in Washington.[E-14]

E-10. Judge Advocates Association, *Minutes of the Ninth Annual Meeting* (Report by Captain Sanford B.D. Wood, USN, Assistant Judge Advocate General of the Navy), 23 August 1955.

E-11. *JAG Journal* (December 1955), 2. The purpose of the West Coast office was

> to reduce the number of personnel in the Washington, D.C., area and to facilitate more expeditious handling of matters from the Pacific Coast and Pacific Ocean commands where action by boards of review is necessary. Approximately 40% of the courts-martial cases heretofore reviewed by boards in JAG emanate from such commands, and it is estimated that the location of two boards of review on the West Coast will be adequate to handle this 40%.

The boards were formally established by Secretary of the Navy Notice 5450 of 9 December 1955.

E-12. Chief of Naval Operations, memorandum to Chief of Naval Personnel, Subject: "Transfer of Two Boards of Review to San Francisco," 14 December 1955.

E-13. Chapman, letter to author, 11 February 1994. On 28 September 1956 the boards were placed under a director, and were transferred from their original subordinate military command relationship under the Commandant, Twelfth Naval District, to a direct military command relationship under the Judge Advocate General. Secretary of the Navy Notice 5450, 28 September 1956.

E-14. Secretary of the Navy Notice 5450, 18 March 1965, disestablished the West Coast office. This same notice established the Navy Appellate Review Activity, now the (continued...)

Digitized by Google

In 1968, by amendment to article 66 of the *Uniform Code*,[E-15] the title "Navy Board of Review" was changed to "Navy Court of Military Review."[E-16] The 1968 amendment to article 66 appeared to most commentators at the time to comprise a relatively modest administrative change.[E-17] Modest perhaps in tone, but not in application. During the next twenty years the Navy's appellate tribunal, now a "court," struggled to determine its identity.

The court wrestled with questions as to the scope of its judicial authority until finally, in 1988, in the case of *U.S. Navy-Marine Corps Court of Military Review v. Carlucci*,[E-18] the United States Court of Military Appeals (now the United States Court of Appeals for the Armed Forces) held that the 1968 legislation had created "a court established by Congress pursuant to its power under Article I, Section 8, clause 14 of the United States Constitution, to provide rules for the government and regulation of the land and naval forces . . . ." As a Congressionally established tribunal, the Navy-Marine Corps Court of Military Review was thus recognized as exercising broad powers over the military justice

---

E-14. (...continued)
Navy-Marine Corps Appellate Review Activity, which provides government and defense appellate lawyers for all cases before the Navy-Marine Corps Court of Criminal Appeals, and the United States Court of Appeals for the Armed Forces.

E-15. Military Justice Act of 1968, Act of 24 October 1968, 82 Stat. 1335.

E-16. In 1981 it was again changed, to "Navy-Marine Corps Court of Military Review," to recognize the coordinate role played by the Marine Corps in the appellate process. Most recently, in 1994, the title became "Navy-Marine Corps Court of Criminal Appeals."

E-17. See Homer E. Moyer, *Justice and the Military* (Washington, D.C., Public Law Education Institute, 1972), 2:770. The pertinent wording of the amended article 66(a) was as follows:

> Each Judge Advocate General shall establish a Court of Military Review which shall be composed of one or more panels . . . . For the purpose of reviewing court-martial cases, the Court may sit in panels or as a whole . . . . Appellate military judges who are assigned to a Court of Military Review may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or the highest court of a State. The Judge Advocate General shall designate as Chief Judge one of the appellate military judges of the court of Military Review established by him. . . .

E-18. 26 M.J. 328, 330 (C.M.A. 1988).

Digitized by Google

system in the Navy and Marine Corps subject, of course, to appellate oversight by the United States Court of Appeals for the Armed Forces and the United States Supreme Court.[E-19]

Unique among appellate tribunals, the court shares with its sister service courts the "awesome, plenary, *de novo* power"[E-20] of fact-finding at the appellate level on the basis of the entire record. In considering the record, the court "may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses."[E-21]

In every case over which the court has jurisdiction, the appellant has the right to request representation by a Navy or Marine Corps appellate lawyer, or to retain private counsel.

E-19. The United States Court of Appeals for the Armed Forces was established as the Court of Military Appeals in 1951 under the *Uniform Code of Military Justice,* for the primary purpose of affording a civilian review forum to which military personnel could appeal court martial convictions. Not all convictions can be appealed. Article 67 of the *Uniform Code* requires a review by the court in all cases reviewed by a lower appellate court in which a death sentence is affirmed, or which the Judge Advocate General orders sent to the court. (A provision requiring automatic review of all cases in which the sentence affected a general or flag officer was removed in 1983.) Review is discretionary with the court in all other cases. For those that are allowed, however, the appellant service member is provided with representation by a military lawyer at no cost. He or she may, of course, retain private counsel at his or her own expense. *Uniform Code of Military Justice*, art. 70.

The court was, at the time it was established and for thirty-two years thereafter, for all intents and purposes "the court of last resort" for military personnel. Since 1983 there has been a limited right of appeal from military convictions to the United States Supreme Court by writ of certiorari. See *Uniform Code of Military Justice.*, art. 67a.

The court was established with three judges. In 1990 the number of judges was increased to five. Each judge is appointed by the President, subject to Senate confirmation, to a fifteen year term. *Uniform Code of Military Justice*, art. 142.

E-20. *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990).

E-21. *Uniform Code of Military Justice*, art. 66(c).

Digitized by Google

Digitized by Google

APPENDIX F

The Scarlet Letter
Rear Admiral Ira H. Nunn, USN
to the
Law Specialists
(Facsimile of Copy Sent to Captain William C. Mott, USN,
Showing Mott's Original Marginal Notations in Brackets)

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON 25, D. C.

IN REPLY REFER TO

15 October 1955

PRIVATE - OFFICIAL

Dear Captain Mott:

One of the major disadvantages faced by any officer occupying the office of Judge Advocate General of the Navy is the lack of opportunity to address personally, [why didn't he come to Newport?] at any one time, all officers under his cognizance. That disadvantage is made particularly striking by the instant letter, the subject of which lends itself best to discussion between us but which, for lack of an opportunity so to do, I must handle by the present means. In reading the thoughts herein expressed, however, I want you to consider that I am speaking with you and to feel free to respond with your views in the matter. [and what happens then?]

By almost any standard, the law specialist group in the Navy is young -- a fact from which it draws much of its strength and yet, paradoxically, from which stems its major weakness. The establishment of this new group immediately following World War II, a group made up of relatively young, able attorneys who had determined to pursue careers as naval officers, served to

Digitized by Google

bring to the naval service a multitude of fresh, and often excellent ideas, ideas created and developed by the legal mind. Many of these ideas, translated to action, aided immeasurably in maintaining the Navy at a high level through the post-war period of adjustment and the Korean conflict and continue to aid the service at the present time. These products of the law specialist group reflect its strength and are decidedly on the credit side.

Reviewing the brief history of the law specialist group, an examination of the debit side of the ledger discloses no inordinate defect but, rather, an assortment of doubts characteristic of almost any new organization during its formative years. These doubts have related, and continue to relate, to the future of the law specialist group and what that future may hold for the group, for its members, and for the naval service. It is the primary purpose of this letter to dispel [!] these doubts and to define again the purpose toward which the legal arm of the Navy must strive.

There have been urged on me, as there were urged on my predecessors, a number of recommendations concerning what specific structure would best serve the interests of the law specialist group. Action has been initiated promptly [nuts] in such of those recommendations where the best interests of the Navy would also be served. Conversely, where action has been recommended favoring the law specialist group to the detriment of the naval service, I have resisted, and shall continue to resist, the adoption of such a recommendation. It is into this latter category that the establishment of a Judge Advocates Corps, now urged by some senior [!] law specialists, is considered to fall.

The Corps Concept

What is the corps concept, how would it work, and what purpose would it serve?

Establishment of a corps would serve to set the law specialist group apart from the line of the Navy. The corps would function more or less as a law firm retained, as counsel, by the Navy, as client. Administration within the corps (the law firm), would be independent of administration within the Navy (the client), and the Navy's business, like that of any client, would be prosecuted exclusively by its executive branch, the

Digitized by Google

line, and not in any way by its counsel, the corps. [nonsense]

Arguments Favoring a Corps

The arguments put forth in behalf of the corps concept are, in substance, that the legal arm of the Navy would thus be removed from any command influence, [nonsense] and that greater career opportunities would be opened to the members of the law specialist group. I have viewed these arguments, and the result they seek to achieve, in the light of two criteria only: would the interests of the Navy so be best served; would the interests of the law specialists so be best served. Upon concluding such an examination, not only do I find the arguments invalid on both counts but I find them fundamentally fallacious as well.

Command Influence

Basically, under the corps concept, there would be a direct chain of responsibility leading from the law specialist in the field to the Judge Advocate General. [nuts, no—no more than now] This chain would sometimes parallel, but always be independent of, the military chain of command. The theory underlying this concept is that in this manner, in a particular case, the legal officer concerned would be isolated from his commanding officer and, therefore, would be free of any command influence. This freedom would be further enhanced, it is said, by the fact that the official appraisal of performance of duty of the particular legal officer would be made by a legal officer senior in the legal chain and not by the commanding officer of the legal officer concerned. [not true now]

"Command influence" is a term used with considerably more frequency than accuracy. It constitutes a charge that, under a variety of labels, has been levelled at various officials from baseball umpires to the justices of various high courts. Implicit in the charge is the suggestion that justice is being thwarted by the arbitrary actions or wishes of someone in authority.

The system of justice under which we in the Navy operate is not far different from that in civilian life and has been developed over the years to insure, as far

Digitized by Google

as possible, that an accused receives a fair trial. There have been in the Navy, and there probably still are, individuals who have attempted to, or attempt to, abuse their authority as court members or commanding officers. In more than thirty years as a commissioned officer, however, there have come to my attention very few instances of this abuse of authority, the so-called exercise of command influence. In this, my experience is not unlike that of most others, regular and reserve, lawyer and non-lawyer. Further, under the Uniform Code of Military Justice, the effective exercise of command influence to the substantial prejudice of an accused, even on the part of the few who would knowingly attempt such an exercise, is practically impossible. As evidence that our court procedures and legal opinions are approached and followed in good faith by those in authority is the fact that, among the multitude of cases received in the office of the Judge Advocate General, less than twenty a year disclose disagreement between the legal officer and convening authority to an extent where the provisions of paragraph 85c of the Manual for Courts Martial, United States, 1951, are invoked.

There can be no double standard of integrity so far as naval officers are concerned. The legal officer who, by virtue of his amenability to adverse action by his commanding officer, fails to assert and defend his views in good conscience and in the best interests of justice, is neither a good lawyer nor a good officer. Nor do I believe that transferring such an officer into a corps will affect favorably his performance of duty. [!] So far as the able officer of unquestioned integrity is concerned, it is my belief, based on actual observation, that his performance free from any influence by command will remain unvaried regardless of his status relative to line or corps. In the light of these views, I must conclude that so far as the alleged effect of command influence and its removal are concerned, the establishment of a corps would serve only to obscure the marked differences otherwise readily apparent between our top quality law specialists and their competitors. [!]

Career Opportunities Within a Corps

It is argued that establishment of a Judge Advocate's Corps will open wide and bright career opportunities. The question is, for whom?

Officers who progress fastest in the Navy are those

Digitized by Google

to whom any task can be assigned with confidence that it will be done well. The same pattern is characteristic of the civilian bar where instances are rare of an attorney turning away a client because the attorney does not desire, or feels he is not equipped, to deal with the matter involved. Relating these principles to the future of the law specialist, it is obvious that the more we limit the usefulness and adaptability of our legal officers, the less will be their role in the business of the Navy.

It is common practice in civilian life for outstanding attorneys, representing large corporations, to prove of such great value to their clients as to be raised to directorships and executive positions [!] in the corporations they represent. A study of the rosters of General Electric, General Motors, Chrysler Corporation, any of the big business houses, discloses a high percentage of executives and directors who started either with counsel for the company or in the company's own legal office. Had these men been confined to the courtroom or law library, the measure of their success would have been considerably smaller.

Much of the same reasoning as above applies to our law specialists. If their field of endeavor is to be limited by the confines of the corps envisioned to the trial and review of courts martial, their value to the Navy is cut in half and, with it, so are the opportunities offered to them. As noted below in this letter, opportunities are constantly opening for the law specialist group as it comes of age; to shut the door on those opportunities at this stage and advocate a withdrawal to the limits of a corps would deprive the Navy of highly valuable services and act as a dis-service to the law group.

The three most vigorous proponents of the corps concept urge that its immediate effect would be the appointment of three flag officers from among their group. Upon what facts this is premised, I am not prepared to state. [Hoover Commission] Nor has there been mentioned to me any forecast of how the careers of the other law specialists would be affected. The following table is, therefore, considered particularly pertinent to any discussion, on the merits, of the corps proposal. The table shows the percentage distribution, by grade, of USN officers of the law specialist group, the Supply Corps, and the Civil Engineer Corps, as of the date of this letter:

Digitized by Google

	Line (1620)	Supply Corps	Civil Engineer Corps
Flag	.4	.5	.8
CAPT	14.9	3.0	9.6
CDR	59.8	19.0	28.2
LCDR	4.2	24.0	13.1
LT	11.9	30.5	36.3
LT(jg)	8.8	12.0	9.9
ENS	0	11.0	2.1
	100.0%	100.0%	100.0%

Leaving aside for the moment a discussion of the flag officer percentages, it will be noted that three-quarters of the law specialists are in the grades of captain and commander as opposed to less than one-quarter in the Supply Corps and less than two-fifths in the Civil Engineer Corps.

Much of the imbalance of the law specialist rank structure can be attributed to the effect of the constructive service credit originally given to assist in establishing the law specialist group on an equitable basis. [and upon his reluctance to expand and fair out the group] But despite the imablance [*sic*] so effected, the promotion rate of law specialists thereafter has been maintained apace with the unrestricted line. This was effected not only as a matter of policy and of equitable treatment, but in keeping with the provisions of Section 308(a)(7) of the Officer Personnel Act of 1947, 34 USCA 306c(a)(7), which provides, in effect, that the rate of attrition for line officer specialists may not be greater than the rate of attrition for unrestricted line officers.

Were a corps of judge advocates to be established to replace the law specialists, legislation seeking such an establishment would probably be written so as to prevent any loss of rank. But would such a saving clause be adequate?

Looking at the table above, it is obvious that were any reasonable attempt made to bring the rank structure of the law specialist into line with that of a corps, officers of the grade of commander would stagnate for an unduly long period of years prior to promotion and those of the grade of lieutenant commander would be eligible for retirement long before they would become eligible for commander. Only lieutenants, senior and

Digitized by Google

junior grade, would be relatively unaffected.

The danger of stagnation noted above is not the only hurdle to be faced by the law specialists upon transfer to a corps status. There is, as well, the insidious danger of an inequitable selection system.

Part of the corps parcel, urged also as eliminating "command influence", is the concept of having a legal officer, senior in the chain of legal responsibility, execute the fitness reports of those law specialists below him. In other words, the commander for whom a law specialist would work would not be that law specialist's reporting senior; the reporting senior would be another law specialist somewhere up the line. Stated in terms of the civilian bar, this mode of procedure would have an attorney's merits evaluated not by his clients but by his competitors at the bar. It would be interesting were such a system to be recommended to any group of practising attorneys.

The insidiousness of the foregoing is not only readily apparent from the marking aspect but is further emphasized when we consider that, in a corps, the selection boards are made up exclusively of corps members. Hence, within a group as small as the law specialists, the prospects of selection for any particular officer could be controlled by one officer or very few from beginning, the fitness report, to end, the selection board. This is vastly different than the procedure now followed wherein the commander receiving services from his law specialist evaluates those services officially and that evaluation, along with many others, is used by a board of impartial officers in making selections.

Thus far I have dwelt on the arguments made in behalf of a corps, as those arguments are known to me. What does the other side of the picture show and why maintain the line officer specialist concept?

The Line Officer Specialist Concept

The line officer specialist concept came into being immediately following World War II, when it was recognized how complex and needful of specialization the maintenance of an operating Navy had become. At the time the various specialities were first considered, a great deal of thought was given to bringing the lawyer into the Navy as a member of a corps. When exploration

Digitized by Google

of this problem had been completed it was determined to place the lawyer in the line, as a specialist, because by so doing he would be a member of the operating team of the Navy and, as such, his services would be of greater scope and value. Those principles, valid then, continue their validity today.

The law specialist has made his name in the Navy as much by his contributions outside the field of law as by the contributions he has made within his specialty. Based on individual capabilities, law specialists have been utilized by various commands in any number of capacities, including those relating directly to high-level operational and policy determinations. As evidence that such officers have proven their worth to their commands in the performance of non-legal, as well as legal, functions, is the fact that they have been assigned on a collateral duty basis to such jobs as Flag Secretary, Force Intelligence Officer, Assistant Chief of Staff for Administration, and Fleet Public Information Officer at major commands afloat and ashore. These are but a few of such assignments as are known to me but they are sufficient to demonstrate the complete integration of the law specialist into the line of the Navy. [hogwash] The star worn by a law specialist on his sleeve is identical with that worn on the sleeve of the Chief of Naval Operations and is entitled to the same respect. In like fashion the contributions of each, the specialist and the unrestricted line officer, furnish the drive that makes the Navy forge ahead.

Career Opportunities of the Specialist

Unrestricted by the confines of a corps, the law specialist on independent duty in the field can make of his job pretty much what his energy and capabilities dictate. Admittedly he can sit out the tour with an occasional court martial review, or he can inject himself into the main stream of his command [how!] and, by so doing, contribute in large degree to the improvement of the Navy. It seems to me that the lawyer, by the very nature of his obligations as such, would derive considerably more satisfaction from performing in this latter fashion than by disbarring himself from all matters not strictly legal. In this, my views are shared by a number of law specialists with whom I have talked. [who?]

Digitized by Google

Apart from the intangible benefit touched on briefly above, the sense of doing an important job, the devotion to duty, what are the tangible benefits accruing under the specialist concept? Set forth below is a resume of the advances the specialist group has made. Some of these would be retained regardless of line or corps establishments, but others would be irretrievably lost in exchange for the nebulous benefits urged in behalf of a corps.

Training

The programs outlined hereunder, all aimed at the purpose of increasing the value of the law specialists to the Navy, as lawyers and as line officers, have been approved for establishment and, in some cases, officers have actually commenced training. In cases where training has not actually commenced, action has been undertaken to provide inputs during the coming year.

a. Enrollment of selected law specialists in the Judge Advocate General's School (Army), Charlottesville, Virginia, for the one year course. [a corps school]

b. Allocation of selected billets at sea for training junior law specialists in regular deck and division duties so as to better equip them as naval officers. [nuts!]

c. Allocation of billets for enrollment of law specialists in the course of instruction at the General Line School, Monterey, California.

d. Allocation of billets for enrollment of law specialists in the course of instruction at the Armed Forces Staff College, Norfolk, Virginia.

e. Allocation of billets for enrollment of law specialists in the Command and Staff Course and the Senior Course at the Naval War College, Newport, Rhode Island.

In addition to the foregoing schooling, the admiralty training program has been maintained by a steady input and is now showing real results.

Apart from the approved programs noted above, there is under study the feasability [*sic*] of enrolling law specialists at the National War College, the Industrial

Digitized by Google

College of the Armed Forces, and at the Fletcher School of Law and Diplomacy, Tufts University, Boston, Massachusetts.

Duty Assignments

Law specialists are now serving at practically every major command in the Navy, afloat and ashore, abroad and in the continental United States. The adaptability of a number of these officers to changing tasks and missions and their availability, as line officers, for assignment to tasks other than those strictly limited to the law, have permitted the law specialists to build and maintain highly desirable jobs, both personally and professionally.

Opportunities for Promotion

As noted in this letter, the law specialists have kept pace with the unrestricted line in promotions up to, and including, the grade of captain. Also as noted herein, that progress will continue under the present specialist concept. In this connection it is particularly pertinent to note that planned inputs, at the bottom, in the law specialist program are resulting in a sound spread of officers through the promotional year groups so that the imbalance now hampering the program will eventually disapper [*sic*]. These considerations notwithstanding, the ambitious officer quite rightfully still ponders his chances of making flag rank, his opportunities for reaching the top.

The law specialists now have within their group one flag officer, recently selected. While this is below the minimum of two flag officers that I believe should, and will, be allocated to the law specialists, it is, nevertheless, a rather remarkable achievement when we consider that the group is less than ten years of age. Despite the selection noted, however, I am well aware that the law specialists rightfully aspire to having one of their number at the top as Judge Advocate General of the Navy.

I have always believed that when the law specialist group enjoyed enough experience and prestige to take its place on a level with other professional groups in the Navy, it should be accorded that place by the assignment of one of its number as Judge Advocate General of the Navy. My only reservation on this point has related solely to whether any member of the group had

Digitized by Google

qualified himself sufficiently to fill the job so as to protect and further the best interests of the Navy.

Based upon my observations since assuming office, I am convinced that there are now several officers among the law specialists well qualified for appointment as Judge Advocate General. As a consequence, and insofar as it is proper for me so to do, I propose to recommend that when I am relieved I be relieved by a law specialist and, specifically, by the law specialist considered best qualified for the job.

This letter is somewhat of a departure from naval custom in being addressed to you personally rather than officially via the chain of command. In this regard, however, I have not been unmindful, as a lawyer, of the characteristic desire on the part of my fellow members at the bar to grasp the facts in a particular case first hand and to provide the answers themselves by the exercise of their individual intellects. If you feel that you can add to the thoughts expressed herein, in either direction, you are free to address a reply to me personally with the assurance that it will receive full consideration.

In closing I want to thank you again for your contributions to the Navy in the duties to which you are now assigned and to wish you continued success in the execution of that assignment.

Sincerely yours,

IRA H. NUNN
Rear Admiral, U.S. Navy

CAPT William C. Mott, USN
District Legal Officer
Ninth Naval District
U.S. Naval Training Center
Great Lakes, Illinois

Digitized by Google

Digitized by Google

APPENDIX G

Reply to The Scarlet Letter
Captain William C. Mott, USN
to
Rear Admiral Ira H. Nunn, USN

HEADQUARTERS
NINTH NAVAL DISTRICT
GREAT LAKES, ILLINOIS

In Reply Refer To:

1 December 1955

Rear Admiral Ira H. Nunn, U.S. Navy
Judge Advocate General of the Navy
Pentagon Building
Washington 25, D.C.

Dear Admiral Nunn:

It is difficult for one who was brought up in and by the Navy to express disagreement with the views of a flag officer even when issued an invitation "to feel free to respond with your views in the matter ... in either direction". It has taken me a month and a half of soul searching to decide to answer your invitation because I find myself in almost complete disagreement with the conclusions reached in your letter of 15 October and with the reasoning on which those conclusions are based.

Before documenting my reasons for disagreement, let me hasten to state that I am motivated by no other desire than what I conceive to be in the best interest of the Navy--a service which I love and which my record will disclose to even the most jaundiced eye--I have served faithfully and loyally. Seventeen flag officers, including five of our [*sic*] star rank, have tes-

Digitized by Google

tified to that loyal service officially. I have no way of knowing whether you categorize me as one of the "three most vigorous proponents of a corps" because you have never asked me where I stood on the issue. I am happy to state my position for the record as being in favor of a corps. For many years I was little more than neutral on the subject, but close observation of the law specialist concept and its operation have convinced me that a corps is best both for the Navy and the naval lawyer.

As you know, when the law specialist group was formed in 1946, there was much corps talk, pro and con. Most transferees didn't care much one way or another--they only wanted to serve and were willing to "try out" the specialist concept. I was one of those who didn't give much thought to the problem. In fact, it wasn't until I was ordered to command the School of Naval Justice in late 1950 that I was forced to recognize even the existence of a problem. For nearly three years I sat at a crossroads listening to the views of all the law specialists who passed through the School and observing and comparing the legal organizations of our sister services. I discovered, as the Hoover Commission was later to find as a fact, that morale among law specialists was bad. This is not a figment of anyone's imagination. The Judge Advocate General himself in January 1949 stated by memorandum to the Chief of Naval Personnel:

> "The recent submission of resignation [*sic*] by several capable law specialist officers indicates that the problem of morale in the legal establishment of the Navy is approaching a critical stage."

The same Judge Advocate General reiterated his concern over the morale situation among law specialists in another memorandum to the Chief of Naval Personnel dated 29 August 1950. I began to look for the underlying reasons for this bad morale. In my position at the School, those reasons were not hard to find.

Admiral Russell, the Judge Advocate General who repeatedly expressed concern over the morale situation among law specialists, had a solution for the problem, which, if it had been adopted, probably would have reversed a trend. He recognized that you cannot attract good young lawyers into an organization and keep them unless you provide reasonable career opportunities and a chance to progress to the top in their chosen

Digitized by Google

profession. Whatever else lawyers may be called, they are not stupid. Given a gree [*sic*] choice, they will pick an organization where they will be most likely to succeed. In 1949 both the Army and Air Force offered much greater career opportunities in the law field than the Navy, both in training and in chances to reach the top. Each of those services had four or five general officer billets in their legal organizations restricted for career lawyers and they each offered better opportunities for professional schooling. The Navy could not then and cannot now compete with them for outstanding young lawyers.

The solution recommended by Admiral Russell will be found in the provisions of H.R. 4733 of the 81st Congress and the "Speaker letter" of 4 May 1949 which accompanied that proposed legislation. Briefly, H.R. 4733 called for a substantial increase in the number of regular law specialists, for constructive service and for two flag billets in the legal organization of the Navy, in addition to the Judge Advocate General. Only the constructive service feature was enacted into law because the Navy Department, after approving the other features (JAG, BuPers, CNO and SecNav all approved), withdrew its support. No law specialist knows why that support was withdrawn, nor has anyone taken the trouble to explain. The action was, however, a serious blow to already low morale. All law specialists approved when they read the words of the then Acting Secretary of the Navy to the Speaker of the House. They approved because at last it seemed they were to be given a professional status approaching that of the Judge Advocate General's Corps of the Army or the Judge Advocate General's Department of the Air Force. The Acting Secretary of the Navy put it this way:

> "The proposed Uniform Code of Military Justice, in addition to requiring a substantial expansion in the number of law specialist officers, would also impose vastly increased functions and responsibilities upon the Judge Advocate General. To meet these new high-level responsibilities and to make possible the type of uniform administration which the Congress would by necessary implication command through the enactment of a uniform code, the proposed bill would provide for an assistant to the Judge Advocate General in addition to the assistant already authorized under existing law.

Digitized by Google

"The proposed bill would authorize the President, by and with the advice and consent of the Senate, to designate not to exceed two assistants to the Judge Advocate General of the Navy, one to be designated the Assistant Judge Advocate General, to have grade, pay and allowances while so serving equivalent to those of the Assistant Judge Advocate General of the Army, and the other to be designated Assistant to the Judge Advocate General and to have grade, pay and allowances while so serving equivalent to those of the officer in the Judge Advocate General's Corps of the Army next junior to the Assistant Judge Advocate General. Existing law authorizes five general officers with permanent rank as such for top-level administration in the Judge Advocate General's Corps of the Army. This proposed bill would authorize not to exceed three officers to hold flag rank temporarily for the same purposes in the Navy. Uniformity with the Army to at least this extent is considered essential to permit the achievement of uniform administration of military justice and thus enable the Navy to carry out the mandate embodied in the Uniform Code of Military Justice now pending before the Congress."

The withdrawal of the above-mentioned legislation prompted the Judge Advocate General to propose new legislation in his memo of 29 August 1950 above referred to. Nothing came of this proposal except the creation of further dissillusionment [*sic*] among law specialists.

The uninitiated would be apt to infer from your letter of 15 October that only three or four senior law specialists are in favor of a corps and they, only because it would offer a chance of immediate advancement among their group. To draw such an inference would, of course, fly in the face of facts. One has only to examine the record of hearings on the Uniform Code of Military Justice to discover that witnesses who appeared before both the House and Senate Armed Services Committee [*sic*] were practically unanimous in favor of a legal corps for the Navy. The House Armed Services Committee Report puts it this way:

"<u>Practically every witness who testified before our committee, except departmental witnesses, urged that such corps be adopted</u>. Even though there were no provisions on this matter in the

> bill, our committee gave a great deal of consideration to the proposal. The Navy and the Air Force strenuously opposed the establishment of Judge Advocate Corps in their services. We came to the conclusion that since we now have a Judge Advocate Corps in the Army and since the Court of Military Appeals will have an opportunity to review the comparative results of the Army with its corps as against the Navy and the Air Force without such a corps, that we should permit the services to operate under their present different plans until such time as we may be able to factually determine the best method of operation. In spite of this decision we have reached the conclusion that the Navy and the Air Force are not giving adequate recognition to their law specialists and judge advocate officers, respectively." (Underlining mine.)

It is interesting to note that the Committee members, individually and collectively, stated that they not only would re-examine the question after several years of operation, but would rely heavily in reaching a later decision on whether the Navy should have a corps or retain its law specialist organization on the opinion of the Judges of the Court of Military Appeals. (See excerpt from House Report above quoted and Index and Legislative History, pages 1118 & 1119.) I cannot speak for Judge Quinn, Judge Latimer or Judge Brosman, but it might be interesting for you to ask the judges for their opinion as to how they might testify in the light of their experience and observation of the three legal organizations of the Army, Navy and Air Force. The Congress will certainly ask them, not only because individual members forecast that they would, but because it makes good sense. Here are three impartial civilians who sit at the apex of our military judicial system with absolutely no axe to grind and a chance to observe the performance of each organization. Their opinions, for or against a corps, should be entitled to great weight.

After Admiral Russell's abortive attempt to secure professional recognition for law specialists, nothing was done until you became Judge Advocate General in the summer of 1952. You will remember that there was considerable opposition to your nomination by representatives of the American Bar Association and other bar associations, chiefly because they felt that, as the Report of the Subcommittee states, "it was the intent of the law that the Judge Advocate General should be

Digitized by Google

selected from this group of law specialists.... Members of the Committee were impressed with the testimony of the witnesses appearing in opposition to the nomination that a good corps of legal specialists could not be built up unless an opportunity was afforded for their selection to be the senior legal officer. Secretary Kimball agreed that this policy should be followed as soon as a more substantial group of legal specialists becomes eligible." No legal specialist, to my knowledge, had anything to do with the opposition to your appointment. As you know, I actively supported your nomination for which I received your thanks in writing.

In late 1952 or early 1953 a high level board was convened in the Navy Department to study the Engineering Duty, Aeronautical Engineering Duty and Specialist structure. Admiral Low was Chairman of that board and you, I am informed, were its recorder. The report, when it came out in March 1953, did nothing to improve the morale of law specialists--in fact, if one report more than any other is responsible for the low morale among law specialists, it is the report of the Low Board. It is important to note that not one single law specialist was ever called to give testimony before this board, and yet its recommendations would have made radical changes in our existing structure. Of course, I recognize that the Navy does not have to consult members of a group before it recommends alteration of their career pattern, but we're examining the reasons for poor morale and this lack of consultation was, and has continued to be, one of them. The recommendations of the report caused such a flurry of resentment that all copies were withdrawn from circulation. I haven't seen the report to this day, but those law specialists who did, felt that its recommendations, far from improving their lot, would reduce them further down the scale of poor relationship to their colleagues in both the Navy and the legal organizations of the Army and Air Force.

This was the state of affairs when you called a three day conference of some sixty-three law specialists at Newport in the Spring of 1954. We all hoped that you would appear hefore us to explain the recommendations of the Low Board. In fact, Admiral, the legal specialists as a group regret as much as you the "lack of opportunity" to meet with you periodically to discuss common problems. The Army and Air Force JAGs conduct such periodic regional and national conferences as do the District Intelligence Officers and the Dis-

Digitized by Google

trict Public Information Officers of the Navy. We have been together only once during the last three years at the aforementioned Newport Conference. When it became clear that you were not coming to that Conference, the Panel on General Policy composed of four captains and three commanders adopted (unanimously) an additional agenda item which answered the following question:

> "What measures should be adopted to insure that there will be continually available to the Navy skilled and able lawyers capable of rendering to the Navy the highest caliber of legal services?"

The right answer to this question is, of course, what both the Navy and its law specialists are seeking. The panel answered it with the following recommendation:

> "Development of a regular program for the recruitment of law specialists, establishment of additional flag billets in the law field or, in the alternative the establishment of a law specialist corps."

The recruitment and the creation of additional flag billets are, of course, interrelated. The full conference adopted this recommendation with almost universal acclaim. I say almost because one law specialist (not, by the way, a Captain) felt that we were making a mistake not to vote for the alternative of a corps alone. The rest of us felt that you should be given a free hand to seek a solution by either method.

Your official answer (JAG letter of 1 March 1955) to this agenda item was:

> "Legislation proposed by the Bureau of Naval Personnel providing for a flag billet for 1620 officers on a while-so-serving basis has been approved by the Department of the Navy and transmitted to the Department of Defense for inclusion in the legislative program."

This proposition was, of course, an implementation of the Low Board recommendations, the very proposition which had caused sixty-three law specialists to adopt their additional agenda item in the first place. It was also a complete rejection of their recommendation without even the satisfaction of an explanation. Of course, as I said earlier, no explanation is due, as a matter of right, unless one's interested in getting at the causes of low morale.

Digitized by Google

When I saw the proposed Speaker letter and a draft of legislation to implement the Low Board recommendations, I could not help wondering whether the subject matter had been staffed by appropriate legal specialists in the Office of the Judge Advocate General and received their concurrence. I am informed that a number of law specialists advised against forwarding such proposed legislation reasoning that it was bound to further lower morale among our group. Thus, it appears that all law specialists would be interested in the rationale behind the proposed Low legislation in the form it was forwarded and approved by the Judge Advocate General. The apparent failure of legal specialists to be consulted on proposed legislation that affects them personally is another reason why so many of them testified as they did before the Hoover Commission Task Force which was investigating the legal structure of the Navy about this time. Before leaving this legislation, I would like to mention one reason given in the Speaker letter for its necessity--a reason to which I shall allude later:

> "The present provision which establishes an over-all limitation on rear admirals for engineering duty, aeronautical engineering duty, and special duty has not proven satisfactory in that it does not assure meeting the needs of the service and does not provide equal opportunity for officers in those categories. Under the present provisions any selections to flag rank of restricted duty line officers, other than engineering duty and aeronautical engineering duty officers, must be absorbed within the 13 per cent allowed to the entire group. Since 1947 only two officers designated for special duty have been selected for promotion to flag rank. <u>It can not be assumed that in the future selection boards will maintain five flag officers in the special duty group</u>." (Underlining mine.)

One other Navy Department Study became common knowledge to law specialists early in 1954, although it was classified as confidential. That was the Duke Report of January 27, 1954. A passage which was declassified on 14 September 1954 reads as follows:

> "The lumping of specialized and limited duty officers in the 'Line' and permitting such officers to wear a star has reduced the prestige of those in line to command at sea. It has thus

Digitized by Google

> removed the historical distinction of being a member of the sea-going Navy. It has lessened the pride that shipboard officers had, since similar uniforms make them indistinguishable from large numbers of shorebased specialists. The definition of a "Line officer" should be changed to include only those in line to command at sea, and the star should be reserved as a sacred emblem of membership in this group. Officers of other qualifications should wear other emblems." (Emphasis supplied by Admiral Duke.)

I mention this passage to illustrate that many unrestricted line officers are of the opinion that "the star worn by the law specialist on his sleeve" may be "identical with that worn on the sleeve of the Chief of Naval Operations" but it should be removed. Law specialists hear this from many sources besides the Duke report. Frankly, I think they'd rather be honest with a Blackstone's Commentaries on their sleeve than with a star which is resented by a large segment of unrestricted line officers.

As you are aware, sir, a Hoover Commission Task Group was directed early in 1954 to survey "legal services within the armed forces", i.e., the study of the organizational structure of legal services and problems of personnel in the Departments of Defense, Army, Navy and Air Force. As is well recognized, the Hoover Commission has established a reputation and a record for detached objectivity. The members of Task Group 5 comprised three distinguished members of the bar: David W. Peck, Presiding Justice, Appellate Division, Supreme Court of New York, Cody Fowler of Florida, former President of the American Bar Association and Judge James M. Douglas, former Chief Justice of St. Louis, Missouri. The task group was assisted by an able professional staff.

To insure independent and objective thinking in answers to questionnaires and interviews the Secretary of Defense issued a memorandum to the three Service Secretaries which reads:

> "In order to cooperate fully with the Commission, it is requested that you authorize and direct the various military and civilian officers performing legal work within your department and their subordinates to furnish Task Group 5 and its staff complete data, including

Digitized by Google

> suggestions and observations for the betterment of the legal services in the defense establishment. All personnel should be encouraged to express personal viewpoints and suggestions." (Emphasis supplied.)

It is necessary for me to detail the method of operation of a Hoover Commission Task Group to correct any misimpression that a corps for law specialists is urged merely by "some senior Law specialists" or by only "three ... vigorous proponents of a corps concept". My own contacts with scores of law specialists of all ranks lead me to conclude that sentiment in favor of a corps is simply overwhelming, but let us examine how the full Hoover Commission came to conclude

> "The morale of officers in the Navy legal service is low, due largely to the practice of categorizing Navy lawyers as "restricted line officers" and denying them opportunity to attain flag rank or to belong to a professional corps. Other professions in the Navy have their staff units, such as physicians, dentists, civil engineers and chaplains.
>
> "The only way in which a strong professional spirit can be regained by lawyers in the Navy, with consequent benefit to the service, is by establishing a staff corps for Navy officers whose primary duties shall be legal. It is particularly important that the Judge Advocate General and his assistants be selected from the corps." (Emphasis supplied.)

Please note that Mr. Herbert Hoover, in putting his seal of approval on the above (as well as other recommendations), stated in his letter of transmittal that:

> "The recommendations of the Commission .... include the results of independent investigation by the Commission's staff and experience of the members of the Commission."

I need not relate to you the distinguished composition of the full Hoover Commission beyond mentioning that, in addition to Mr. Hoover, it included the Attorney General of the United States and Mr. Robert G. Storey, another past president of the American Bar Association.

Digitized by Google

The Task Force went into even greater detail putting their emphasis on professional status:

> "The furnishing of legal services within the military forces is a highly specialized function. Important personal rights are involved in the enforcement of military laws. A democratic society cannot tolerate arbitrary procedures in any segment of that society. It is as vital that men in uniform be given due process of law when charged with military offenses as it is that civilians be accorded fair trials, with procedural safeguards, when charged with the commission of crimes. <u>If this highly specialized function is</u> to be performed in a professional manner, the officers to whom the function is committed should have professional status. In the opinion of the task force each of the three military departments should have its own Judge Advocate General's Corps.
>
> "In the Navy, however, lawyers are not accorded any real professional status. The Navy utilizes lawyers in the capacity of 'line officers on special duty' known as 'law specialists.' Many officers performing command functions, and law specialists generally, favor incorporation of the Naval lawyer in a special staff corps similar to those existing for doctors, dentists, chaplains, civil engineers, and supply officers. <u>The lawyer is the only professional in the Navy who does not have a separate corps for promotion and career assignment</u> ...
>
> "It is essential to the development and maintenance of a body of military lawyers on a sound professional basis that a separate Judge Advocate General's Corps be established in each of the military departments, assuring the members thereof a proper status of professional independence and rank, promotion, and compensation in accordance with professional experience and performance." (Emphasis supplied.)

Now, how did the Commission and the Task Force reach such a unanimous conclusion? I think the best answer to that question is to quote from a forthcoming article by Mr. Henry Shine, consultant to the Task Group and a Naval Reserve lawyer himself. His article is entitled "A Judge Advocates Corps for the Navy?"

Digitized by Google

"As of November 1954, the Task Group interviewed 37 high ranking civilian and military personnel in the Department of the Navy and received reports from 32 different offices of that Department. Particularly concerned with the role of the law specialists and the operations of the Judge Advocate General's Washington office (and related field offices) were some 24 Naval officers of whom 22 were 'law specialists'. Eight different reports were filed by law specialists .....

"Inquiries into the organization of legal services of the Department of the Navy, specifically those services performed by "law specialists" revealed that their morale was decidedly low. Because Naval officers of any category have a great pride in the Navy, they are traditionally averse to criticizing the operating practices of their Service. This condition prevailed when a survey was conducted into the location, duties and personnel problems of Naval attorneys. However, once the rank and file of uniformed attorneys, in Washington and in the field, became convinced of the sincerity of the Task Group to ascertain "personal viewpoints and suggestions", the overwhelming number recommended a "Legal Corps". The Task Group, for purposes of ready identity and uniformity used the term "JAG Corps" which was, as noted above, unanimously adopted by the entire membership of the Task Force and the Commission. (Underlining mine.)

"Lest one believe that the actions of law specialists were of a self-serving nature, it should be hastily noted that many favored a JAG Corps only after years of reflecting on the problem."

Surely, sir, it would appear from the above that there is abundant and reliable evidence that (1) morale is low among law specialists and (2) they are in favor of a corps.

While I am certain the Hoover Commission Task Group would not disclose the identity of any of its informants, I am almost equally certain that they would be happy to disclose to an impartial board why they reached their conclusions and why they think their proposed remedy would be good for both the Navy and law

Digitized by Google

specialists. I venture to suggest that they will be willing to do so to a Congressional Committee upon request. This would be unfortunate as our own Chief of Naval Operations has recently suggested that we should wash our dirty linen in private.

With the above background, I now turn to a detailed consideration of some of the points raised in your letter of 15 October 1955. First, let me say I am delighted you wrote the letter because it will give some law specialists an opportunity to make their views on the subject known; not all law specialists, or even many, for reasons which must be obvious. There is a natural reluctance, especially among junior officers, to take views in opposition to those of the Judge Advocate General. I know of this feeling not only among junior officers who have asked my advice on replying to the letter, but because it is a very distasteful task even for one who has already expressed his views to Undersecretary Gates. Only strongest considerations of principle lead me to write this letter and it is the first of its type I have ever written in nineteen years of service, with or without invitation. Moreover, many of these law specialists have already expressed their views to the Hoover Commission with results which have been made public. I do not believe, therefore, that you should ever take silence on this matter as acquiescence or approval. The only way to really find out how law specialists feel would be for the Chief of Naval Operations or the Secretary to appoint a board of distinguished civilians to hear them out in absolute privacy. I might suggest, for instance, such people as Professor Edward [*sic*] Morgan, the Chairman of the Committee which drafted the Uniform Code of Military Justice, Professor Arthur Sutherland of Harvard, a man with a distinguished background in both the law and military service (Army) and a member of the Court Committee (U.S.C.M.A.), Felix Larkin, former General Counsel of the Department of Defense and a Naval Reserve officer, Frank Nash, former Assistant Secretary of Defense, John Kenney, former Assistant Secretary of the Navy or Mr. John L. Sullivan, former Secretary of the Navy. Of course, such a board should be necessary only if doubt remains as to the validity of the Hoover Commission findings.

The Corps concept which you have set forth in your letter completely mystifies not only me but those who are familiar with the operation of Corps already in existence. I am certain that the Judge Advocate General of the Army would testify that the Army's Corps

Digitized by Google

did not operate in the fashion you have set forth, either organizationally or functionally. I know that the Medical, Dental, Chaplain, Civil Engineer, and Supply Corps of the Navy do not so operate; nor do the members of those Corps consider that they are non-contributors to the "drive that makes the Navy forge ahead". I referred your letter to the senior members in this area of all the Corps mentioned above for advice on a subject on which I am admittedly not versed in detail. All of them (including two flag officers) were at a loss to recognize the Corps concept set forth in your letter.

Let's examine, for instance, your statement that:

> "Basically, under the corps concept, there would be a direct chain of responsibility leading from the law specialist in the field to the Judge Advocate General. This chain would sometimes parallel, but always be independent of, the military chain of command. The theory underlying this concept is that in this manner, in a particular case, the legal officer concerned would be isolated from his commanding officer, and therefore, would be free of any command influence. This freedom would be further enhanced, it is said, by the fact that the official appraisal of performance of duty of the particular legal officer would be made by a legal officer senior in the legal chain and not by the commanding officer of the legal officer concerned."

Now where does such a concept come from? It couldn't come from Corps in existence because according to the above-mentioned officers, none of our Navy Corps operate that way. The fitness reports of the District Medical Officer, Dental Officer, Chaplain, Civil Engineer, and Supply Officer are all made out by the Commandant and they are responsible to him (i.e., Command) for their performance of duty. They are not in any sense independent of the chain of command. That, I know, is true on a Commandant's staff as well as on every type of staff in the Navy.

It couldn't come either from the Army or the Air Force legal organizations (which the Hoover Commission says are equivalent to each other but not to the Navy's legal organization). I've checked with my opposite numbers in this area and their fitness reports are made out by their respective Commanding Generals. They are

Digitized by Google

not any more independent of Command than I now am. Of course, as you know, we all enjoy the right to correspond directly with our respective Judge Advocates General under Article 6, UCMJ. I have never found it necessary to invoke the privilege of that Article and doubt that I ever will. There never has been any doubt in my mind that my first loyalty runs to my military Commander, and I don't think my loyalty concepts would change if the designator on my sleeve were different. Staff Corps officers are all in the same Navy or Army or Air Force. Furthermore, many staff corps officers consider that they are in the "main stream of command". For instance, the Civil Engineer on ComNine's staff recently was Assistant Chief of Staff for Logistics for CinCSouth in the Mediterranean. I note that the Assistant Chiefs of Staff for Logistics in both the First and Sixth Naval Districts are Supply Corps officers. Until recently, the Assistant Chief of Staff for Logistics at ComEight was a Civil Engineer. I have no doubt other staff corps officers in other commands similarly function.

You state in your letter that law specialists have been assigned such collateral duty jobs "as Flag Secretary, Force Intelligence Officer, Assistant Chief of Staff for Administration, and Fleet Public Information Officer". The inference is that these assignments would no longer be open to them if the star came off their sleeves and a corps designator was substituted. Not only does this inference fail by the experience of other corps officers who have filled and are filling similar posts, but I can't believe that the Navy would waste talent because of such a narrow concept. I don't, for instance, think it would make the slightest difference to my Commandant what designator I wore so long as I could perform the job assigned, which is, by the way, Assistant Chief of Staff for Administration. Surely, the Navy would be cutting off its nose to spite its face if it failed to use talents where it found them, regardless of designator. I might add that during the war, even though I carried an intelligence designator, there was no hesitancy in employing me either as a watch stander, flag secretary or Assistant Chief of Staff. Such compartmentation as you suggest is completely artificial when there is a job to be done, and I take it the Navy as a whole still has a job which requires the use of everyone's experience in billets for which fitted.

Does the corps concept you have depicted in your letter come, then, from the Hoover Commission Report?

Digitized by Google

I think not. There is some language in an unrelated part of the report to the effect that lawyers are best qualified to judge the work of other lawyers, but there is nothing in Recommendation 18 or the supporting data therefor which makes it mandatory or even suggests that lawyers' fitness reports should be made out only by other lawyers. I have also searched in vain the proposed legislation to establish a Judge Advocate General's Corps for the Navy for any such suggestion or for any suggestion that the members of such a corps should be "always indipendent [*sic*] of the military chain of command".

Does your corps concept then come from that advanced by any legal specialist? I know of no such proposal, and I believe I have examined every proposal put forward by a law specialist. We realize full well that there can be no uniformed officer who is outside the military chain of command. So does the Congress; and for that reason, I do not believe any of us needs to fear that the "imaginary horrible" you have outlined will ever come to pass. Admiral Russell disposed of that concept when in his statement to the House Armed Services Committee he said:

> "If a corps were to be imposed upon Navy lawyers (sic) taking them out of their present status of officers of the line; their fitness reports would still, as a matter of practical necessity, have to be made out by the commanding officer who had actual contact with the Navy lawyer reported on. This is the present practice, based upon the entire experience of administration of the Supply Corps, Medical Corps, Dental Corps and Civil Engineer Corps assigned to their commands." (Emphasis Added) Index and Legislative History, UCMJ, page 1299.

It is true that a few witnesses before the House and Senate Armed Services Committees testified in hearings on the Uniform Code of Military Justice that there should be a corps cast in the image of the concept you have set forth. The Congress rejected any such notion but did promise in dozens of places throughout the Committee testimony and on the floor of the House to re-evaluate the operation of the Corps-Department-Law Specialist organizations of the three services. I agree that the problem of command control is not a serious one in the Navy, at least not at the general court-martial level. Moreover, forming a corps separate from command would be ineffective to stamp out

Digitized by Google

whatever isolated instances of command control have occurred. The corps concept which you have outlined, therefore, falls of its own weight and would never be accepted by the Congress; nor, has it been advanced by any law specialist or the Hoover Commission. I doubt very much that the Bar Associations would seriously advocate such a concept in the light of experience of all Services under the Code. As you know, the Judge Advocates Association has already passed a resolution approving Hoover Commission Recommendation 18 which would establish a corps without the offensive provisions which are the basis of one of your major arguments against a corps.

I turn now to the section of your letter headed Career Opportunities Within a Corps. Here again we start off with fundamentally differing philosophies. You state:

> "If their /law specialists'/ field of endeavor is to be limited by the confines of the corps envisioned to the trial and review of courts martial, their value to the Navy is cut in half and, so are the opportunities offered to them."

I can't understand where such a vision comes from. As you know, I have been legal officer on the staff of two fleet commanders. During that entire period of duty I never tried a court-martial and never reviewed one. I doubt that legal officers for other fleet commanders spend five per cent of their time in either function. They do lots of other things though--write speeches, render legal opinions, manage military government, keep the commander advised on matters of international law, and otherwise find themselves injected by law itself into the main stream of command. As you will remember, it was one of my jobs while serving as legal officer to Admiral Radford to help the witnesses in the B-36 investigation prepare their testimony for delivery before the House Armed Services Committee. Would any of these assigned tasks be dropped today if Captain Chester Ward (now Legal Officer to CinCPacFlt) were to become a member of a Corps? The answer must be, quite obviously, "no". Any withdrawal of opportunity for law specialists to serve would have to come from the Navy itself, a possibility I cannot envisage. Please note that Section 209 of the bill to establish a Judge Advocate General Corps in the Navy states:

> "Officers of the Judge Advocate General's Corps shall be eligible to command, and to succeed to

Digitized by Google

command, in accordance with such regulations as the Secretary of the Navy shall proscribe."

Your next point under this general subhead of Career Opportunities infers that senior law specialists favor a corps solely because "its immediate effect would be the appointment of three flag officers from among their group". There is a statement which follows: "Nor has there been mentioned to me any forecast of how the careers of the other law specialists would be affected". I believe such statements do an injustice to loyal senior law specialists whose records belie any such careless lack of consideration for their juniors or the legal specialist group as a whole.

Let me tell you a story, sir, to illustrate my point that senior law specialists constantly bear in mind the effect of proposed legislation on law specialists of all ranks. Various drafts of legislation to effectuate the Hoover Commission recommendations were widely circulated among law specialists prior to the adoption by the Task Group of their own draft, which is now incorporated in H.R. 6172 introduced in this Congress by Mr. Vinson. I know that junior law specialists of all ranks were consulted as to their views on such legislation. I believe every one of the lawyers who works for me will testify that I informed them:

(1) If you object to corps legislation, don't hesitate to make your views known to the Hoover Commission. It's your organization and you'll be living with it longer than I will.

(2) If you have concrete suggestions for change, make them. Insure that this legislation will be fair and equitable for all ranks. Absolutely no pressure will be brought to bear on you.

I quote from a letter written by me in 1954 to a member of the Hoover Commission Task Group staff (pursuant to authority of the aforementioned directive of Secretary Wilson):

"As I told you over the telephone, I have been very busily involved this past week in a small crisis here at Com 9 and have been unable to give personal attention to the proposed amendments to your bill submitted by (another <u>group</u> of law specialists). I therefore turned the

Digitized by Google

problem over to a committee consisting of ....
(4) .... lawyers, Regular (1620) and Reserve
(1625). They have spent a great deal of time on
the problem and I gather have generated considerable heat in discussion. In sum they approve
of all of the proposed amendments except ...."

Their exceptions, by the way, were adopted in toto.

One of the junior officers who worked on proposed amendments to the basic bill which was eventually introduced into Congress as H.R. 6172 is Lieutenant Commander Z.W. Neff, U.S. Naval Reserve, now a Commissioner for Chief Judge Quinn. He is an officer with an outstanding record of service and devotion to the Navy, both as an aviator (Navy Cross) and a lawyer. He has authorized me to tell you that he is available at any time to discuss the corps concept and how junior law specialists feel about it. His love for the Navy is a fact established by his record. If he has been misled in subscribing to our corps concept, he, like any other lawyer, is always open to logical argument. I might add that there are scores of Reserve lawyers who share his feelings.

The figures set forth in your letter demonstrate little except that the Supply Corps and Civil Engineer Corps have a certain structure developed over the years. To demonstrate that it doesn't seem to make much difference to the Navy to have a temporary imbalance in corps' structures, I have prepared some figures to show the rank distribution in the medical and dental corps taking into account recent promotions. These figures are compiled from the Navy Register and, therefore, may be slightly inaccurate, but not by more than one or two percent.

Dental Corps			Medical Corps		
No.		%	No.		%
5	RADM	.7	13	RADM	1.1
385	CAPT	54.5	6333	CAPT	54.9
139	CDR	19.7	165	CDR	14.4
8	LCDR	1.1	106	LCDR	9.1
141	LT	20.0	223	LT	19.4
28	LTJG	4.0	9	LTJG	.8

Note: Does not include selections from Lieutenant to Lieutenant Commander as board is now meeting.

Digitized by Google

It is apparent from these figures that the already existing imbalance of the Medical and Dental Corps did not prevent recent accelerated promotions in those Corps, nor should the present imbalance in the law specialist structure make promotion any slower because the members of the law specialist group are transferred into a corps. I cannot see any reason why officers of the grade of commander "would stagnate for an unduly long period of years prior to promotion", nor why "those of the grade of lieutenant commander would be eligible for retirement long before they would become eligible for commander".

H.R. 6172 provides:

"(1) That the authorized number of Judge Advocates in each rank shall be prescribed by the Secretary of the Navy so as to provide a reasonable flow of promotions, but such numbers shall not, after ten years after the date of enactment of this Act, exceed the following percentages. ..."

With a corps we should be able to fair out our structure in ten years as well as we can fair out our present imbalance; easier, in fact, because we can, under H.R. 6172, transfer to the Regular Navy some of our <u>proven</u> Reserves in the junior ranks <u>and</u> attract more and better people at the bottom.

Incidentally, the Hoover Commission Task Group proposed legislation (H.R. 6172), besides providing for integration of outstanding Reserves (on active and inactive duty) to fair out our rank structure, would readjust the ranks of our already transferred Reserves to correct what they believe to be an injustice. As you know, our transferred Reserves lost precedence in the transfers while regular unrestricted line officers who transferred to become legal specialists did not. This method of transfer of Reserves had the effect of denying them not only constructive service for law school education but also of imposing an additional penalty. The Hoover Commission recognized this situation as inequitable and, in Section 204(a) of H.R. 6172, proposed a remedy. This remedy would eliminate another cause of low morale among our junior law specialists. Moreover, if we don't soon make some provisions for integrating our outstanding Reserve lawyers without loss of rank, we will lose them as we have lost many in the past.

Digitized by Google

If, as you suggest, the saving clauses of H.R. 6172 proved inadequate to protect the promotional opportunities of Judge Advocates, I cannot conceive of a Judge Advocate General or a Navy Department that would fail to seek remedial legislation. Such a situation actually developed in the Judge Advocate General's Corps of the Army and was promptly remedied in the last Congress by legislation initiated by the Army Judge Advocate General and sponsored by the Department of the Army.

I have already disposed of the fitness report objection which is again brought up in this section of your letter. I believe that virtually all law specialists would rather have their fitness for promotion passed upon by lawyer officers on the selection boards. In fact, the Officer Personnel Act so provides at present, subject only to ratification by the full board. I trust you do not mean to suggest when you mention that under the present system selection of law specialists is made by "a board of impartial officers" that law specialists (or Judge Advocates) themselves would ever be less than impartial or that present selection boards among existing Navy Corps are composed of officers who are not impartial?

You next discuss Career Opportunities of the specialist and reiterate the theory that once they become members of a corps those opportunities will be substantially lessened. As I have before stated, I can't imagine a corps member sitting "out /a/ tour /of duty/ with an occasional court-martial review", with nothing else to occupy his mind or to contribute to the Navy. Nor, can I imagine the unrestricted line leaders of the Navy allowing such a situation to come to pass. I doubt that there are few, if any, collateral duties which law specialists perform today that they could not perform (the Navy willing) as members of a corps. Any lawyer who tries to inject himself into the main stream of command today, without invitation, is in for trouble. He can contribute to that main stream, however, by proving his capabilities no matter what sleeve device he wears.

You next discuss the advances which the law specialist group has made with the inference, of course, that such advances would not be possible under a corps. I can't believe that the policy makers in the Navy Department would ever adopt such a concept. As you know, I and other law specialists of all ranks, have long advocated the assignment of lawyers to service schools. The benefits are obvious to both the lawyers

Digitized by Google

and the unrestricted line. Over three years ago, as Commanding Officer of the School of Naval Justice, I placed the following endorsement on a request by a law specialist to attend the Naval War College:

"ND(726)/P16-3
Ser: 1218-WCM/mon
21 October 1952

"FIRST ENDORSEMENT on request of Commander H.S. COFIELD, 154899/1620, USN, dtd 21 October 1952

From: Commanding Officer, U.S. Naval School (Naval Justice)
To: Chief of Naval Personnel
Via: The Judge Advocate General of the Navy

Subj: Assignment as student at U.S. Naval War College; request for

1. Forwarded. The following considerations justify a recommendation that the basic request be granted:

(a) Line officers are given postgraduate training in law because such training is considered to be beneficial in better equipping them for the performance of primary duties. A corollary should be that post-graduate training of law specialists in line functions equips the law specialist to better apply legal principles to the needs of the Navy. Through the curriculum of the Naval War College, a law specialist should acquire knowledge of what is involved in the development and execution of operational problems; he should understand more clearly what the commander of a force requires of his legal officer, and as a result, he should more fully and capably discharge such duties when ordered to the staff of a Fleet Commander.

Digitized by Google

(b) The student body of the Naval War College consists not only of naval officers of the Line, medical officers and dental officers, but also includes officers from the other armed services, representatives from the State Department, The Central Intelligence Agency, Navy Operations Evaluation Group and the Coast Guard. The War College catalog states:

'Because of the wealth of knowledge and information represented in this body, students are at all times encouraged to learn from each other and from each other's experience.'

The law specialist is in a position to contribute to this important interchange of information and knowledge by pointing out latent legal implications and by assisting in the evaluation of the gravity of obvious legal situations. As the medical officer contributes expert knowledge upon the evacuation of sick and wounded from combat areas, so the law specialist could provide expert knowledge on the complexities of conflicting jurisdiction over personnel involved in joint operations with allied governments as well as other legal principles bearing upon the problems under consideration.

(c) A year's association in academic pursuits by a law specialist with unrestricted line officers would tend to give the law specialist a greater perspective of the over-all mission of the Navy and a greater sense of pride in that realization that he has an integral part to play in such mission.

(d) It is desired to draw attention to the fact that legal specialists are not at the present time deemed eligible for Naval postgraduate training of any sort. In contrast, the Army Judge Advocate General's Corps is authorized school quotas as follows:

Digitized by Google

Army War College	2
Industrial College of the Armed Forces	1
Armed Forces Staff College	2
Command and General Staff College	3
Army Language College	1

W.C. MOTT"

This endorsement is self explanatory. The request was turned down by both the Judge Advocate General and the Bureau of Personnel. The Bureau gave as reasons for turning down the request:

(1) the shortage of law specialists;

(2) lack of quotas for special schooling for law specialists.

Law specialists knew, of course, that there was a regular postgraduate training program for lawyers in the Army and the Air Force. I believe this is one other factor which swung them in favor of a corps. As you know, at least one young, able law specialist resigned on 17 February 1953 giving as one of his reasons the following:

> "There is no program for training law specialists in any kind of postgraduate work in either service or civilian schools. This contrasts unfavorably with the Army and Air Force practice."

His contrast referred to one of many announcements by the Judge Advocate General of the Army of the eligibility of Army Judge Advocates for special language schools:

> "This planned training of judge advocates /in the Army/ is part of a long range, over-all program of specialized training which is intended to provide a reservoir of officers of the <u>corps</u> who are qualified to fill some of the many assignments calling for a general knowledge of international law and affairs as well as a specialized knowledge of a particular area." (Underlining mine.)

Digitized by Google

Thus, law specialists know, from observing the operation of the Army, that members of a corps are not barred from postgraduate training merely because they are corps judge advocates. The fact is not one single law specialist was ever sent to any service school (except the School of Naval Justice--a seven week refresher course) until after the Hoover Commission Report came out. The decision to seek billets in such schools as you cite in your letter came about only after a conference called by Undersecretary Gates with five senior law specialists who cited the above statistics to him when be asked them to state some of the causes for poor morale among law specialists. The directive to seek the billets soon thereafter flowed down from the civilian secretarial level.

I am pleased, of course, as are all law specialists, to read of the _planned_ training program. It is certainly a step in the right direction and one which was taken for other corps years ago. I am unable to accept the implied thesis that such training or even a part of it would have to be abandoned for members of a Judge Advocates' Corps.

Some comment is necessary on the recent selection of a law specialist to flag rank. Nothing I say about this matter should be construed as any reflection on the selectee, Rear Admiral Bill Sheeley. The fact remains, however, that detached observers are commenting that this selection was made to make more difficult the adoption of the Hoover Commission plan for selection and tenure of three rear admirals in the proposed Judge Advocates' Corps. Thus, Mr. Henry Shine (of the Hoover Commission Task Group staff) states in his forthcoming article:

> "An equitable distribution of flag rank would have provided at least 3 rear admirals for the law specialist category. As this article is being written, it is learned that twelve law specialist captains have been notified of the regular Admiral's selection board on July 5. They have been advised that one of their number is certain to become the first law specialist rear admiral. Interestingly this announcement was issued after release of the Commission and Task Force Reports had developed considerable internal pressure for better promotional safeguards for the law specialist. The writer is hopeful that this improved flag rank status will not deter the law specialists from courageously

Digitized by Google

> insisting on the formation of a Corps, nor that the totally unsatisfactory practice of having an unrestricted line officer (1100 designator) as Judge Advocate General will be continued by the "safety valve" gesture of promoting one law specialist to flag rank to act as <u>Assistant</u> Judge Advocate General."

It seems to many law specialists inconsistent in the extreme that the Navy would sponsor such legislation as that envisaged by the Low Board, giving as a reason in the "Speaker" letter that:

> "The present provision which establishes an over-all limitation on rear admirals for engineering duty, aeronautical engineering duty, and special duty <u>has not proven satisfactory</u> in that it does not assure meeting the needs of the service and does not provide equal opportunity for officers in those categories. Under the present provisions any selections to flag rank of restricted duty line officers, other than engineering duty and aeronautical engineering duty officers, must be absorbed within the 13 per cent allowed to the entire group. Since 1947 only two officers designated for special duty have been selected for promotion to flag rank. <u>It cannot be assumed that in the future selection boards will maintain five flag officers in the special duty group</u>." (Underlining mine.)

After making that statement, the Navy Department reversed itself within weeks and selected a flag officer under the Officer Personnel Act. That selection took place pursuant to the very provisions of the Act which the Low Board and the proposed legislation to implement its recommendations had said should be repealed! I believe the Low Board felt, as do many law specialists, that the selection of specialists under the present provisions of the Officer Personnel Act would stagnate chances for promotion for a period of at least five years. Indeed, that is what is happening in the Communications Specialist group since the selection of Rear Admiral Wenger in 1951 and in the Intelligence Specialist group since the selection of Rear Admiral Layton in 1953. These admirals, as well as Admiral Sheeley, will stay on active duty for at least five years and, if then retained, until they reach age 62. This effectively blocks all promotion to flag rank unless the Secretary finds need for another billet in a

Digitized by Google

given specialist group. The Hoover Commission, after exhaustive study of the problem and consultation with many law specialists, hit upon a formula which would involuntarily retire one Judge Advocate admiral every three years, thus providing incentive for able Judge Advocates in the senior ranks. As I have pointed out, selection under the Officer Personnel Act stagnates promotion to the rank of Rear Admiral for at least five years. It is unfortunate that consideration was not given to the Hoover Commission recommendations before an abrupt and inconsistent change in position was adopted by the Navy Department.

I was pleased to read that you intend to recommend a law specialist to become Judge Advocate General as your relief. I hope, however, that this recommendation will not be made until the Navy Department and the Congress have given thorough consideration to the Hoover Commission recommendations and their proposed methods of appointment and selection. Your observations on this subject are in consonance with the view expressed by the following distinguished Congressman:

(1) Senator Stennis reporting on your nomination on 22 May 1952.

"Members of the committee were impressed with the testimony of the witnesses appearing in opposition to the nomination to the effect that a good corps of legal specialists could not be built up in the Navy unless an opportunity was afforded for their selection to be the senior legal officer. Secretary Kimball agreed that this policy should be followed as soon as a more substantial group of legal specialists becomes eligible. The following is Secretary Kimball's statement with respect to this policy:

It is my belief that the interests of the Navy and of the Nation require the selection of the best-qualified persons to fill all positions as they become vacant. The best qualified for any post of responsibility in the Navy may well be found in any eligible group of commissioned officers. I can envision

Digitized by Google

> a situation after the group of eligible legal specialists in the Navy has become larger, when there would be little or nothing to choose between the qualifications and eligibility of several persons. In that event it would be our policy to give preference in the selection of a Judge Advocate General to a law specialist in order to give encouragement and provide incentive to younger officers of the specialist group. Such a situation does not exist at present but can come about within a few years.

While the committee believes that the appointment of the Judge Advocate General of the Navy should normally be selected from the legal specialists group and not a line officer trained in the law, because of the limited number of eligible legal specialists at this time, the committee unanimously recommends the nomination of Admiral Ira H. Nunn as Judge Advocate General of the Navy be confirmed by the Senate." (Underlining mine.)

(2) Congressman Brooks explaining the Uniform Code of Military Justice on the floor of the House, 5 May 1949:

"It is to be hoped however that neither the Navy or the Air Force will continue to relegate their legal personnel to positions of lesser importance and dignity than their counterparts in the line. We /presumably the House Armed Services Committee/ think it entirely sound and proper that the judge advocates general be chosen from those who have sacrificed the prerogatives of the line officer in order to follow a legal career in the services. We hope to see some revised thinking on this subject and will view future developments with interest." (Underlining mine.)

Digitized by Google

The Hoover Commission, of course, in a quota [*sic*] I have given on Page 8 of this letter, reiterated the opinions above expressed in even more certain language. I have been informed that a proposed Department of Defense directive would make the selection of a law specialist as the next Judge Advocate General mandatory in this language:

> "Recommendations by the Secretary of each military department for nomination of the Judge Advocate General shall be made from among personnel who have been legal specialists for a minimum of eight years immediately preceding the nomination."

As you point out in the penultimate paragraph of your letter, it "is somewhat of a departure from naval custom". All replies, therefore, must share that departure. It is indeed regrettable that an opportunity has not been made by you to discuss the subject of your letter in person with law specialists or that you have not constituted a committee of representative law specialists to find facts, give opinions and make recommendations on structural organization and morale problems.

You state as a reason for departure from naval custom, in writing your letter, that you are mindful "of the characteristic desire on the part of /your/ fellow members of the bar to grasp the facts in a particular case first hand and to provide the answers themselves by the exercise of their individual intellects".

I share your confidence that law specialists are peculiarly able, by reason of their training and profession, to sift facts and reach conclusions of their own. Would you consider then duplicating this response and distributing it to all law specialists so they may have an opportunity to sift and conclude? If I have misstated any fact, I would appreciate, too, a correction.

You invited frank comment in reply to your letter. In response to such an invitation I've learned no other course except to speak the truth as I see it. Admiral Radford taught me in my long association with him that a naval officer should never hesitate to give his honest views when requested, even though he had reason to believe those views were in opposition to those of his superiors. I have tried to follow that precept. In

Digitized by Google

the meantime, no matter what decision is made with respect to law specialist organization, I shall continue to serve the Navy and my Commander to the best of my ability.

Very respectfully,

W.C. MOTT
Captain, U.S. Navy

Digitized by Google

APPENDIX H

Marine Corps Judge Advocates

We have seen in Chapter 7 that Marine Corps line officers began to receive postgraduate legal training at the same time as Navy line officers, approximately 1910. The philosophy behind the Marine Corps training was similar to that of the Navy—to provide line officers with law degrees in order to broaden their understanding of legal disciplines. In the case of the Marines, emphasis was more on criminal procedures, since these had a clear (but by no means direct) relationship to military justice matters, a field in which Marines had been preeminent in the naval service for much of the nineteenth century, and the area to which they were most often assigned during tours of duty in the Office of the Judge Advocate General. Like their Navy brethren, Marine "Law PGs" served two or three tours in the field as line officers, then received a "desk" tour in the Office of the Judge Advocate General of the Navy.

Because of their relatively small numbers and their primary focus on military justice matters, and because responsibility for the full range of legal matters had resided with the Navy, Marine officer-lawyers did not suffer the severe criticism that befell the Navy at the outset of World War II. Nor was there any strong sentiment after the war to organize Marine lawyers into a professional cadre similar to the Navy Law Specialists. Rather, the Marines continued to utilize the dual-role Law PGs as their primary source of lawyers, while Navy lawyers began their drive toward complete professional specialization. This organizational scheme was disrupted in 1952 when Congress terminated Law PG funding for all the armed services. The Marine Corps, cut off from its traditional source of lawyers, had to look to the recruiting of civilian law school graduates to fill its ranks. A legal career in the Marine Corps, however, was even less attractive than one in the Navy. Marine Corps lawyers were being increasingly eased into "legal specialty" roles, called upon to act as legal advisers to commanders in the field in addition to their tours in the Office of the Judge Advocate General, to the detriment of their line proficiency. Without a "legal-service-only" cadre similar to the Law Specialists of the Navy, the Marine lawyer was in no position to compete with his line brother for promotion. As a result, the Marine Corps experienced lawyer retention problems even greater than those of the Navy. Gary Solis, author of an excellent account of Marine lawyers in Vietnam, has included in his book the following analysis of the personnel and administrative problems

Digitized by Google

facing the Marine Corps's legal organization at that time (Solis's endnotes and footnotes have been omitted; the footnotes appearing are those of the author):

> In the [Discipline Branch of the Personnel Department at Headquarters Marine Corps] plans were formulated for eventually moving [legal affairs] from [the] Personnel [Department] and making "legal" a separate division. . . .
>
> The problems . . . were daunting. Should lawyers be assigned only legal duty? If so, that would reduce the number of lawyers required and probably ensure "green suit" (Marine), rather than "blue suit" (Navy) lawyers. Legislation to this effect was proposed in 1958, but then withdrawn for fear of establishing a single-skill, JAG-type corps in the Marines. Instead, in 1962, a Marine Corps order established the compromise policy that regular officers would not have to perform solely legal duties if they did not wish to, but could if they wanted; on the other hand, Reserve lawyers (usually captains and lieutenants) could serve only in legal billets. A later modification established the policy that lieutenant and captain lawyers would serve one tour of duty out of three in a nonlegal billet. Presumably, this would ensure that every Marine would continue to be a rifleman. Another issue was the lawyers' continuing concern that they might not receive consideration by promotion boards equal to that of line officers. In 1964 that, too, was addressed by Marine Corps order. . . .[H-1]

H-1. Marine Corps regulations were changed in 1958 to permit line officers to hold a primary Military Occupational Specialty as lawyers, thus ensuring equal promotion opportunity for those officers who chose to devote their military careers to the legal field. Colonel Robert J. Chadwick, USMC, "Judge Advocate of the Marine Corps—An Old Corps Billet Answers a New Corps Challenge," *The Judge Advocate Journal* (4 July 1976), 51.

In commenting on this change in regulations, Chester Ward, the Navy Judge Advocate General in 1957, stated that the Marine Corps had come around to the view that it was not possible for its lawyers to do two jobs equally well. Marine lawyers were serving a minimum of one out of three tours in legal billets, and in some instances were serving three or four tours as legal officers during their careers. This severely jeopardized their chances for advancement, since they were technically line officers competing with other

(continued...)

Digitized by Google

> The number of lawyers being commissioned in the Marine Corps was not sufficient to meet the needs of a Service expanding to meet the Vietnam War. Nor did the pressure of the draft entirely close the lawyer manpower gap. A solution came in 1961, when a traditional source of officer accessions, the Platoon Leaders' Class (PLC), was expanded to embrace law student candidates as well as undergraduates who intended to pursue a law degree following graduation. The PLC (Law) program allowed prospective officers between college graduation and law school to be commissioned as second lieutenants. . . . The PLC (Law) program, by committing lawyers to Marine Corps service before law school, addressed the shortage of lieutenants and captains.[H-2] However, the continuing paucity of midlevel lawyers, majors and lieutenant colonels, was a retention problem which was to burden the Marine Corps for the entire [Vietnam] War.[H-3]

By 1968, the Marine Corps had the worst lawyer career-retention rate of any of the services, at 5.1 percent.[H-4] Some relief had been promised in the previous

---

H-1. (...continued)
line officers for promotion. In Ward's opinion, the Marine Corps had decided that its lawyers were doing an essential job. Therefore, assignments to legal billets, which were for the good of the Corps, should not prejudice their careers. Judge Advocates Association, Minutes of the Eleventh Annual Meeting (Report by Rear Admiral Chester Ward, USN, Judge Advocate General of the Navy), 1957.

H-2. During the 1960s, the PLC (Law) program provided eighty percent of the Marine Corps's lawyer accessions. U.S. Congress, House Committee on Armed Services, *Hearings Before and Special Reports Made by Committee on Armed Services of the House of Representatives on Subjects Affecting the Naval and Military Establishments*, 91st Cong., 1st sess. (1969), 4415.

H-3. Gary D. Solis, *Marines and Military Law in Vietnam: Trial by Fire* (Washington, D.C.: Government Printing Office, 1989), 13.

H-4. House Committee on Armed Services, *Hearings Before and Special Reports . . . on Subjects Affecting the Naval and Military Establishments*, 91st Cong., 1st sess.
(continued...)

Digitized by Google

year, with initiation of the Excess Leave Program, providing a means of sending career-motivated line officers on active duty to law school. The Law Education Program, instituted in 1974, promised still further relief (see footnote 11-159).

The Marine Corps had recognized the specialized role of its lawyers by the late 1950s. There had been, however, no sympathies at Headquarters or in the ranks for a legal corps, with its preclusive assignment to legal duties. In fact, the Marines opposed a legal corps both for themselves and for the Navy. They opposed a legal corps for themselves, because they clung to the belief that a Marine could be both a fighting man and a lawyer. And they opposed a legal corps for the Navy which might lead to that service taking exclusive control over legal matters, and preclude Marine Corps lawyers from attaining general-grade rank. Against this backdrop the Corps sought to obtain its own general-grade legal billet.

By custom, the senior lawyer in the Marine Corps, a colonel, served as the legal adviser to the Commandant. In 1966, Commandant Wallace M. Greene, Jr., proposed to Congress that his legal adviser be a general-grade officer. Congress acceded and the position was established as a general-grade billet. The first general officer selected under this authorization was Colonel James F. Lawrence, USMC, then serving on the staff of the Secretary of Defense as Deputy Assistant Secretary for Legislative Affairs.[H-5]

Even as these events were taking place, in December 1967, the Navy Judge Advocate General's Corps was established by law. A portion of the statutory authorization, section 5587a of title 10, United States Code, directly affected Marine lawyers:

> With the approval of the Secretary of the Navy, any officer on the active list of the Marine Corps who is qualified [as a military attorney] may, upon his application, be designated as a judge advocate.

With establishment of the Navy Judge Advocate General's Corps, a change to the *Uniform Code of Military Justice* now provided that only "judge advocates" could act as military attorneys for the Navy or Marine Corps. It became incumbent upon those Marine attorneys who wished to specialize in the

---

H-4. (...continued)
(1969), 4395.

H-5. Chadwick, "Judge Advocate of the Marine Corps," 51. Ironically, because of his value to the Secretary, Lawrence was never released from his billet and thus never served as legal adviser to the Commandant.

Digitized by Google

legal field to seek designation as judge advocates. The Marine Corps again reviewed its legal organization. On 17 April 1968, the Discipline Branch at Headquarters, Marine Corps, was removed from the Personnel Department and designated as the Judge Advocate Division, a separate organization to be headed by the Marine Corps's general-grade lawyer, with responsibility for supervision of the Corps's judge advocates. In August 1969, Colonel Duane Faw, USMC, was promoted to brigadier general and assumed the title of "Director, Judge Advocate Division."[H-6] Unlike the endless years of agony that accompanied the establishment of the Navy Judge Advocate General's Corps, the birth of the Marine Corps's Judge Advocate Division was accomplished entirely as a matter of staff reorganization within Headquarters.

The Director, Judge Advocate Division, acts as coordinator of all legal activity throughout the Corps. In his hat as legal adviser to the Commandant, he holds the title of Staff Judge Advocate to the Commandant. In this role he acts as legal advisor in all areas of law except business and commercial affairs, the latter being handled by the Office of the General Counsel of the Navy. He also serves as legal adviser to the Commandant in those matters requiring the Commandant's personal action under the *Uniform Code of Military Justice*, and advises and assists the Commandant and his staff in all matters relating to military law and its administration throughout the Marine Corps. As the Marine Corps's senior judge advocate, he maintains liaison with the Judge Advocate General of the Navy to ensure coordination in the administration of military law and the development of policies relating thereto.

The Marine judge advocates of today, men and women alike, are an integral part of the Corps. Like their predecessors, today's Marine Corps judge advocates look exactly like every other Marine. Although called judge advocates, there is no distinctive collar device or sleeve insignia to distinguish Marine attorneys from their line counterparts. They achieve and maintain the confidence and respect of their clients—be that client rifleman, battalion commander, or

---

H-6. Chadwick, "Judge Advocate of the Marine Corps," 52. Chadwick opines that the designation "Director, Judge Advocate Division," rather than "Judge Advocate of the Marine Corps," was selected out of deference to the fact that the senior judge advocate in the Department of the Navy was, and is, the "Judge Advocate General of the Navy." Chadwick, 52.

We have seen in Chapter 5 that the Marine Corps recognized its senior judge advocate as far back as the mid-nineteenth century. Captain William Butler Remey, USMC, served two tours of duty in the 1870s as "Judge Advocate of the Marine Corps," before his subsequent designation as Judge Advocate General of the Navy. There was, of course, one vital distinction between Remey, as "Judge Advocate of the Marine Corps," and today's "Director, Judge Advocate Division"; Remey was not an attorney.

The billet of Judge Advocate of the Marine Corps has been long-discontinued, probably disappearing around the time that Remey became Judge Advocate General of the Navy.

Digitized by Google

Commandant—because they have been there with them: in training, in war, and in peace.[H-7]

H-7. The last three paragraphs of this appendix have been taken, with some editing, from the Chadwick article.

Digitized by Google

APPENDIX I

Naval Reserve Multiple Address Letter No. 15-48
Establishing the Volunteer Naval Reserve Law Program
(edited and abridged)

5 March 1948

To: Commandants all Naval Districts (less 10, 15, 17) and Potomac River Naval Command
Subject: Volunteer Naval Reserve Law Program

1. Commandants of Naval Districts and River Commands are hereby authorized and directed to activate the Volunteer Naval Reserve Law Program in accordance with the general plan set forth in paragraph 2, below.
2. General plan for the Volunteer Naval Reserve Law Program:
   I. Mission. To provide a force of Reserve officers with legal training and experience who shall be readily available for mobilization in the event of an emergency.
   II. Organization. The organization shall be in the form of volunteer law units. Membership in such units shall be on a voluntary basis.
      (a) Quotas. No quotas of units or numbers of personnel have been established because of the relatively small number of Legal Specialists required by current needs. However, it is considered desirable that all Naval Reserve officers with legal training and experience be encouraged to enroll in the law units, provided they reside in the vicinity of established units, so that an adequate trained force of Reserve officers with Naval legal training will he available to meet the mobilization needs of the Naval Establishment.
      (b) Distribution. It is considered essential to establish volunteer law units in major cities, and desirable in any other location where sufficient personnel to create a law unit can be enrolled.

Digitized by Google

(c) Composition. Volunteer law unit personnel shall consist of Reserve Law Specialists, and those Reserve officers not classified as Law Specialists, but with legal training and experience, whose duties upon mobilization may include the performance of legal functions.

III. Training.

(a) Correspondence courses, now in process of preparation, will be prescribed when available to provide specialized legal training. In addition, basic training and indoctrination courses will be prescribed to provide general Naval training.

(b) Periods of training duty, including annual 14-day training duty with pay, will be conducted, within the limits of funds available, in the Naval Districts, River Commands, the Office of the Judge Advocate General, and at the special two-week course in military law at the United States Naval School (Naval Justice), Port Hueneme, California.

(c) Lectures and other additional material will be prepared by the Office of the Judge Advocate General and the District Legal Offices for dissemination to the volunteer law units.

(d) Information regarding current changes in Naval law will be made available through the *JAG Journal* or other Naval publications.

IV. Administration.

(a) District Commandants will be responsible for the supervision and administration of the Volunteer Naval Reserve Law Program, with particular reference to integration with the over-all Naval Reserve program.

(b) District Legal Officers are directly responsible to the District Commandants in liaison with the District Directors of Naval Reserve and the District Directors of Training for the activation, operation, maintenance, and training of the Volunteer Naval Reserve law units.

3. Further instructions and data pertaining to training will be issued at a later date.

J. W. Roper
Deputy Chief of Naval Personnel

Digitized by Google

APPENDIX J

The Naval Reserve Law Program: 1954 to Date

This appendix is based on an unpublished historical account of the Naval Reserve Law Program titled "History of Naval Reserve Law Programs," prepared by Commander Morell E. Mullins, JAGC, USNR, and Captain Donald J. Gavin, JAGC, USNR, in 1976. The reader is referred to that work for additional information. The footnote citations in this appendix are those appearing in the Mullins and Gavin work. They have been edited to conform to the style of this text, but have not been verified for accuracy.

We have seen in Chapter 10 of the main text the many problems that beset the Reserve Law Program in the early 1950s. By the end of the decade these problems had grown even worse. The requirement that Naval Reserve lawyers have World War II experience had precluded the recruiting of younger members, and was stagnating the program. With the great majority of its membership now approaching retirement eligibility, the potential attrition of World War II-era officers became fact, outstripping the input of replacements, and threatening the very existence of the Reserve Law Program.[J-1] The situation was further aggravated by the promotion climate. Opportunity for selection, both on active duty and in the inactive Reserve, was extremely limited, and had been so for several years. In fiscal year 1962, with approximately 700 officers in the program, the quota for promotion to commander was seven; in 1963, it was five.[J-2] This lack of promotion opportunities for Reservists had a crippling effect on retention for two obvious reasons: first, it forced the involuntary retirement of

J-1. It was estimated that approximately sixty-two percent of the World War II Naval Reserve Law Specialists would be lost to the program by 1968. Director, Naval Reserve Division, memorandum to Assistant for Administration, Subject: "Annual Report to the Judge Advocate General," 16 July 1965.

J-2. Captain Daniel Flynn, USN, letter to Lieutenant William Dunbar, USNR, 18 December 1962.

Digitized by Google

officers who failed of selection, and second, it had a highly negative impact on morale.[J-3]

The need for an infusion of new members was obvious, paralleling the augmentation and retention needs on the active duty side, and ultimately being served by them. For, as additional billets were added to the active duty legal organization, a new generation of Navy lawyers with Reserve commissions was recruited to fill them. With elimination of the World War II service requirement in the late 1950s, a number of these newly-recruited Law Specialists found their way into the Reserve Law Program at the end of their obligated active duty tours.[J-4] The active duty procurement drive in the late 1950s, combined with elimination of the World War II service requirement, marked a watershed of sorts in the development of the Naval Reserve Law Program, for it created for the first time a source for the replenishment of its membership.[J-5] Only with this build-up of personnel on the active duty side was the trend toward loss of Reserve officers reversed, permitting some stabilization in the number of law companies. But there was still a problem in attracting Reserve Law Specialists to the law companies at the end of their active duty tours, for law company billets were non-pay billets. And whereas there were non-pay law company billets, there were also non-law company pay billets; units not affiliated with the Reserve Law Program, offering drill pay. The majority of young lawyers returning to civilian life opted to join these pay units, and were thus lost to the Reserve Law Program.[J-6] It is further testament to the dedication of those Reserve lawyers who did affiliate with the non-pay law companies to note that even when they

J-3. See Captain Daniel Flynn, memorandum to Assistant for Administration, Subject: "Annual Report of the Judge Advocate General," 7 June 1962; Captain Eugene J. Harmon, memorandum to Assistant for Administration, Subject: "Annual Report to the Judge Advocate General," 14 July 1964; 10 United States Code, sec. 6389.

J-4. Recruiting Service Note No. 91-57, as modified by RSN 96-57; Bureau of Personnel Instruction 1120.28.

J-5. By February 1958, the active duty recruiting program had been revised to provide that prospective Law Specialists could be pre-designated during their last six months in law school. Under this program, enrollment at Officer Candidate School was conditional upon obtaining a law degree from an accredited law school, and admission to the bar was a prerequisite for commissioning. *JAG Journal* (February 1958), 16; *JAG Journal* (March 1958), 19.

J-6. Captain Daniel Flynn, memorandum to Assistant for Administration, Subject: "Annual Report to the Judge Advocate General," 7 June 1962.

Digitized by Google

performed annual active duty training, only forty percent of them did so with pay.[J-7]

Recognizing the plight of the Naval Reserve Law Program, Rear Admiral William C. Mott, USN, Judge Advocate General of the Navy, commissioned a study to report on the procurement and training of Naval Reserve Law Specialists.[J-8] The report, issued in the summer of 1961, found that the need for an adequate pool of qualified Reserve Law Specialists was greater than ever. Law companies, however, which would be used as the main source of Reserve Law Specialists in the event of mobilization, were being disestablished due to lack of membership. The flow of younger Law Specialists into the Reserve Law Program was patently inadequate. A new and substantial influx of junior officers was essential.

As a short-term measure, the report suggested that line-officer Reservists with law degrees be approached to join law companies. As a long-term solution, law students and young lawyers had to be recruited. To enhance recruiting, the report suggested commissioning lawyers prior to Officer Candidate School training, and modifying the Officer Candidate School curriculum to accommodate lawyers. It also suggested that young, practicing lawyers, be offered a modified

---

J-7. There were two primary types of active duty training for Naval Reserve lawyers during the 1960s. First in importance were the regional "law seminars," initially convened in 1956, and held thereafter on an annual basis. These seminars were held for West Coast, East Coast, and Gulf Coast regions. They utilized a two-week format: the first week covered civil law, Naval Reserve Law Program updates, and professional development; the second week included intensive refresher training in military justice given by Naval Justice School instructors. Second in importance to the seminar training was refresher training in military justice at a specially-designed Naval Justice School course presented exclusively to lawyers. Institution of the law seminar program has been credited to Commander Louis Gard, USN, during his tenure as head of the Naval Reserve Law Program and Legal Assistance Branch in the Office of the Judge Advocate General. See Captain R.K. Stacer, USNR, correspondence to Captain Robert H. Keehn, USN, 10 June 1966.

While the law seminars and the Naval Justice School course were the most widely used forms of training, they did not comprise the limits of the active duty training program. Other opportunities existed at activities within most naval districts, at fleet and type command headquarters on both coasts, and at various subordinate commands. Assignment to these activities was generally arranged through naval district law program officers in the district legal offices. See, *e.g.*, *JAG Journal* (April 1958), 16. In addition, logistical exercises occasionally used Law Program Reservists to staff legal section billets during command post and map maneuver exercises conducted for technical and administrative service schools. See Judge Advocate General of the Navy, letter to Commander, Fifth Naval District, 31 December 1962. Finally, there were on-the-job training opportunities in the Office of the Judge Advocate General.

J-8. "Report of Committee on Preparation of Program for Procurement and Training of Naval Reserve Legal Specialists," (unpublished, 11 August 1961).

Digitized by Google

When unique training opportunities presented themselves, Reserve lawyers were quick to seize them. Here a group of Reserve lawyers receives a briefing at a logistical exercise conducted at Fort Lee, Virginia, in 1967. The exercise dealt with the maintenance of continuous logistical and administrative support under wartime conditions. (Office of the Judge Advocate General of the Navy)

form of direct commission whereby, upon commissioning, they would serve on temporary active duty for sixty days, with subsequent assignment to law companies. The report also suggested that consideration and study be given to the commissioning of women lawyers into the Naval Reserve Law Program. Although few of the recommendations were immediately implemented, the report represented a candid assessment and far-sighted evaluation of the needs of the Naval Reserve Law Program. In one form or another, most of the recommendations were ultimately adopted.

The tenuous nature of the Reserve Law Program at this time (1962) was candidly summarized by the Director of the Judge Advocate General's Naval Reserve Division:

> [T]he prospects are not good for holding the law companies together. [The Bureau of Naval Personnel] is beginning to terminate the

Digitized by Google

> membership of a number of Lieutenant Commanders who have twenty years commissioned service and have twice failed of selection. Beginning next year, a number of our officers will be eligible for retirement and will drop out of the companies. In other words, the Law Companies may soon die of age. The majority of membership is composed of World War II's.
>
> . . . There has not been much success in recruitment. Where there is a law company, there are other Reserve units with drill pay. Most young lawyers going back to civilian life join one of the units where they can earn drill pay . . . the young lawyers can use the extra money . . . .[J-9]

Future mobilization requirements would be impossible to meet without a sufficient pool of qualified officers. In 1963 there were more Law Specialist mobilization billets than there were officers to fill them. It became clear that there was only one feasible solution to the personnel problem, unprecedented in the Reserve Law Program. That solution was a direct commissioning program, as had been suggested in the 1961 report to Judge Advocate General Mott.[J-10]

Such a proposal was subject to criticism and reservation. Concerns, particularly within the Bureau of Naval Personnel, were raised about the prospect of commissioning officers with no naval or military experience. Apart from the impact on the morale of officers who had obtained their commissions through traditional channels, questions were raised as to the ability to train adequately directly-commissioned officers in the areas of naval tradition, customs, courtesy, and bearing. With the prospect of increased involvement in the Vietnam conflict at this time, arguments were also raised to the effect that a direct commissioning program for Reserve Law Specialists might be viewed as a device for avoidance of the draft. And, of course, doubts were raised concerning the competence of directly-commissioned officers to fill mobilization billets if ordered to active duty.

J-9. Director, Naval Reserve Division, memorandum to Assistant for Administration, Subject: "Annual Report of the Judge Advocate General," 7 June 1962. See also, "Report to Commander, Naval Reserve Training Command, Annual Evaluation Report on the State of Training and Readiness of the Naval Reserve, Fiscal Year 1966," Part III, at 33, which indicated that the attrition situation was not limited to the Law Programs.

J-10. See Commander, Naval Reserve Training Command, letter 401/525030, of 20 September 1962, first endorsement by Director, Naval Reserve Division, 11 October 1962.

Digitized by Google

These arguments notwithstanding, the need for junior officers to fill mobilization billets was critical. The Office of the Judge Advocate General set about to develop a proposed training plan to overcome this opposition. The plan comprised a training and orientation program which emphasized an early tour of active duty for training, followed by intensive orientation instruction on a one-to-one basis by senior officers within the law companies. To meet the draft-avoidance criticism, the program would be closed to individuals classified "1-A," the top priority draft category. These proposals were accepted, and a direct commissioning program for Reserve Law Specialists went into effect in October 1963.[J-11] The tide of erosion of the Reserve Law Program began to turn; the law companies immediately began to show new life. By 1 July 1965, over 100 lawyers had received direct appointments into the Reserve Law Program.[J-12] Despite this success, however, still more officers were needed to offset the loss of older members. Thus, in addition to the direct commissioning program, increased emphasis was to be placed on locating and reactivating Reserve officers who had become members of the bar since completing active duty, and on forming new law companies in areas where pools of potential recruits were found.

In 1967 the entire Naval Reserve took on a new organizational structure, broadly dividing itself into Selected Reserve programs and Phased Forces Reserve programs. Selected Reserve programs were those identified with mobilization requirements for the first day of mobilization (M-Day), and were drill-pay programs. Phased Forces programs were those identified with mobilization requirements sometime after M-Day, and were all non-drill-pay programs except for a limited number of pay billets authorized for administration and instruction purposes. The entire Naval Reserve Law Program became a Phased Forces, or non-pay, program.[J-13]

J-11. *JAG Naval Reserve News Letter*, No. 1-66 (March 1966), 1. Although these directly-commissioned officers were well-qualified in civilian law matters, substantial training was needed in the specialized areas of military law such as naval justice, claims, investigations, admiralty, and international law. In addition, they required indoctrination in such areas as naval customs and traditions, seamanship, weaponry, orientation, and naval organization. District law program officers were encouraged to set up career planning schedules for these new officers, and special orientation subjects were offered at the annual law seminars. It was anticipated that they would be fully qualified as Law Specialists within two or three years. Director, Naval Reserve Division, "Annual Report to the Judge Advocate General," 16 July 1965.

J-12. *JAG Naval Reserve News Letter*, No. 1-65 (September 1965), 2.

J-13. Chief of Naval Operations Instruction 1001.7B; Director, Naval Reserve Division, memorandum to Assistant for Administration, Subject: "Annual Report to the Judge Advocate General," 15 August 1967.

Digitized by Google

Despite its non-pay status, recruitment goals for the Reserve Law Program were met. All mobilization billets were filled to the point where there were Reserve judge advocates in the program without mobilization assignments.[J-14] While the percentage of World War II Reserve Law Specialists now comprised only thirty-four percent of the program personnel, this was still a comfortable nucleus to provide a leadership and training resource. Therefore, procurement through direct commissions and designator changes was slowed in order to create a better balance between mobilization billets and the number of Reserve officers in the program. Direct commissions dropped from 193 in 1966 to seventy-nine in 1967; designator changes from sixty-seven to forty-nine.[J-15] This pattern continued during fiscal year 1968, when ninety-five direct commissions and thirty-two designator changes were effected.[J-16] At this point World War II-era Reserve judge advocates represented only ten percent of the personnel in the program. In August 1969, the Bureau of Naval Personnel closed the direct commissioning program to most individuals through draft category 1-D, and the direct commissioning flow was reduced to a trickle.[J-17] Nevertheless, the process had yielded several hundred lawyers for the Reserve Law Program, and had given it a solid infusion of new blood. Of the 800 Reserve judge advocates drilling in non-pay law companies, more than fifty percent were under the age of thirty. The Reserve Law Program had reached a crest of membership that would enable it to continue as a viable structure for the foreseeable future. Moreover, the input of Reserve judge advocates released from active duty during and after the Vietnam conflict had not even fairly begun, and would further swell the program. The

---

J-14. The statute establishing the Navy Judge Advocate General's corps (see Appendix R) had redesignated all Navy Law Specialists as judge advocates.

J-15. Director, Naval Reserve Division, memorandum to Assistant for Administration, Subject: "Annual Report to the Judge Advocate General," 15 August 1967, *passim*.

J-16. Memorandum, Subject: "Annual Report to the Judge Advocate General," 10 July 1968, at 3. In fiscal year 1970, the Navy awarded direct commissions as Reserve judge advocates to eighty-four lawyers who incurred no obligation to serve on active duty, and granted seventeen others a change of designator. In fiscal year 1971, only ten such direct commissions were awarded, with the number of designator changes remaining fairly constant at nineteen. Memorandum, Subject: "Annual Report," 14 July 1971, at 3.

J-17. By 1984, the Judge Advocate General no longer needed to resort to direct appointments of Reserve judge advocates. He requested that the quota for the Reserve direct commissioning program be set at zero for fiscal year 1984. "Accessions for the Ready Reserve program in the Judge Advocate General's Corps are more than adequately met by Reserve officers being released from active duty and seeking to participate in the Ready Reserve program." Judge Advocate General of the Navy, letter to OP-130R2, of 16 January 1984.

Digitized by Google

Judge Advocate General's Corps could legitimately boast that, of all the Reserve programs, the Naval Reserve Law Program was the most impressive in the quality and youth of its officer membership.[J-18]

Ironically, however, even as the number of personnel increased, funds to support the Phased Forces programs dramatically decreased. In fiscal year 1969, funding cuts virtually precluded the performance of training duty with pay by commanders and captains. Only one law seminar was held, attended principally by newly-commissioned officers.

The early 1970s saw a dramatic change in the organization of the Reserve Law Program, with introduction of the concept of "contributory support." The law companies were supplanted in part by newly-created units of Reserve lawyers that were paired with active duty units to provide direct support to the active component during both drills and active duty training periods. Reserve judge advocates also affiliated with non-Law Program units in "independent" legal billets, serving as command advisers to line or other staff communities. Gone was the static training of the stand-alone law companies. By working "on the job," Reservists contributed while they trained, sharing the active duty workload while enhancing their mobilization readiness. Equally important to morale, recruiting, and retention, all of these newly-created billets were in the "Selected Reserve," which meant that they were *pay* billets. This reordering of mission implemented the directive of Rear Admiral George Muse, Commander, Naval Reserve Training Command:

> Concepts are changing as to the functions of units in the Naval Reserve. Increasing emphasis is being placed upon the concept of Naval Reserve Units actively supporting the active duty forces within their respective capabilities.[J-19]

Rear Admiral Muse further noted that the Military Justice Act of 1968 had fostered increased demands for contributory support from Reserve lawyers. Response among members of the Naval Reserve Law Program was enthusiastic, for it afforded an opportunity to provide direct and meaningful support to the active duty establishment.

J-18. Memorandum, Subject: "Annual Report," 30 June 1970, at 2.

J-19. Commander, Naval Reserve Training Command, letter 321/bm 1500, ser. 2756, of 18 August 1969.

Digitized by Google

Prior to loss of funding in the late 1960s, many Naval Reserve lawyers received their annual training through seminars conducted tri-annually for east, west and Gulf states regions. These Reservists are attending an East Coast Law Seminar at Naval Air Station, Jacksonville, Florida in 1967. (Office of the Judge Advocate General of the Navy)

With specific missions and tasks now identified, Reserve judge advocates had the necessary focus needed for mobilization readiness and professional development. The Reserve Law Program prospered and grew. The number of Selected Reserve billets for judge advocates increased. In 1973, the first inactive-Reserve judge advocate flag billet was established. Captain Hugh H. Howell, Jr., JAGC, USNR, was selected as the program's first rear admiral, and assumed the title of Director, Naval Reserve Law Programs.[J-20]

J-20. This title fell out of favor with Commander, Naval Surface Reserve Force, the officer who oversees the Reserve Law Program, and was changed to "Monitor, Naval Reserve Law Program." This second title fared no better than the first, and by the late 1980s, the incumbent had no approved title at all, despite the fact that he was (and is) the acknowledged leader of all inactive-duty Naval Reserve lawyers. In 1991 the title "Naval

(continued...)

Digitized by Google

A reorganization of the Naval Reserve in 1974 shifted a number of Reserve judge advocate drill pay billets, and created a number of new ones. Fiscal year 1975, however, saw severe financial constraints placed upon the entire Naval Reserve. The law companies lost their few drill pay billets. In addition, many of the non-Law-Program Naval Reserve units that had held drill pay billets for Reserve judge advocates were disestablished or reorganized, resulting in the loss of a number of pay billets for Reserve judge advocates. This was offset, however, by the addition of new units with pay billets for the Reserve Law Program, which emerged from 1975 restructured, and with a more meaningful mission than it had ever before seen. Rear Admiral Merlin H. Staring, JAGC, USN, the Judge Advocate General of the Navy at the time, wrote in 1975:

> The Naval Reserve Law Program was a bellwether in the restructuring of the entire Naval Reserve organization, with its 31 [restructured units] now well established and operating according to plan—giving us a far more usable cadre of Reserve judge advocates and almost five times the number of Reserve pay billets [than] we had a year ago.[J-21]

In 1977, the Naval Reserve Law Program was again restructured, with the addition of enlisted billets in the legalman, yeoman, and personnelman ratings. The thirty-six law companies existing at that time were consolidated into twenty-nine "Volunteer Training Units-Law" (VTU-Law units). Training activities and unit functions of the VTU-Law units remained unchanged from those of the law companies.[J-22] Notwithstanding the reorganization and perceived importance of the Reserve Law Program, however, less than 300 of approximately 750 drilling Reserve judge advocates held pay billets.[J-23]

The 1980s saw a strengthening of the Reserve Law Program. Reserve lawyers, serving as staff judge advocates, became integral members of readiness commands and other major Reserve command structures, providing legal counsel

---

J-20. (...continued)
Reserve Senior Judge Advocate" was adopted.

J-21. Rear Admiral Merlin H. Staring, JAGC, USN, "A Personal Message From the Judge Advocate General," *Off The Record* (14 January 1975), 5.

J-22. *Off The Record* (21 April 1977), 13-14.

J-23. Judge Advocate General of the Navy, letter to Rear Admiral Frederick F. Palmer, USN, Chief of Naval Reserve, 8 September 1978.

Digitized by Google

and command advice. The Judge Advocate General's direct involvement in the recommendation of billet assignments of Naval Reserve judge advocates under Article 6 of the *Uniform Code of Military Justice* gave unity and direction to the Reserve Law Program. The mission of the Reserve Law Program (now designated as "Program 36" in the organizational structure of the Chief of Naval Reserve) was stated as follows:

> [T]o provide mission-capable task-performing units available for immediate mobilization . . . to meet immediate and most crucial needs for the Office of the Judge Advocate General, Naval Legal Service Offices and the Navy-Marine Corps Trial Judiciary, or as otherwise dictated by the contingency. The secondary mission, in recognition of the total force concept, [is] to assist the Judge Advocate General's Corps, the Naval Legal Service Offices, and the Navy-Marine Corps Judiciary, in the performance of their missions as adjunct to the training function.[J-24]

1984 was a watershed year of initiative and change. The Reserve Affairs office in the Office of the Judge Advocate General began work on a plan to make the Reserve Law Program more responsive to the needs of the active duty judge advocates.[J-25] The plan dealt with standardization, manpower, professional development, and integration of resources. The rationale behind this extensive planning initiative was described in a report to the field:

> The Reserve Law Program has developed in patchwork fashion. [The Reserve Affairs office] has in the past responded to ideas or suggestions without resort to a well defined master plan, and

---

J-24. Chief of Naval Reserve Instruction 1510.7A, 20 May 1982, sec. V, chap. 36.

J-25. Deputy Judge Advocate General for Reserve Affairs, "Memorandum for Readiness Command Staff Judge Advocates, Commanding Officers of Law Program 36 Units, and Commanding Officers of NR VTU (Law) Units," 23 January 1984.

Digitized by Google

> with mixed success. As a consequence, the foundations of our program are somewhat shaky.[J-26]

The plan was designed to develop and institutionalize uniform policies and procedures governing the Reserve Law Program. It resulted in three policy initiatives:

- ‡ A mutual support program involving Reservists in active-force tasks, with realignment of existing Reserve law units to provide better support to gaining activities:[J-27]

> The Mutual Support Program requires Commanding Officers of [active-duty Naval Legal Service Offices] and supporting [Naval Reserve units] to coordinate the duty assignments of Reservists to ensure each is trained to perform effectively as a judge advocate. This requires training in all basic legal functions, not just legal assistance and claims. . . . [The Reserve Affairs office in the Office of the Judge Advocate General] is the point of contact for units needing the support of Reserve judge advocates and the procedures to be followed for obtaining additional Reserve support.[J-28]

J-26. Deputy Judge Advocate General for Reserve Affairs (Reserve Law Program Technical Manager), "Memorandum to All to Readiness Command Staff Judge Advocates and Commanding Officers of Reserve Law Program Units," 5 April 1984.

J-27. A gaining activity is the active duty command which drilling Reservists augment in time of mobilization, and with which they coordinate their training program. Pursuant to the realignment directives of the standardization plan, Reserve units were relocated nearer to their gaining commands to allow emphasis to be placed on mutual support activities. This would increasingly involve Reserve units in on-the-job training, contributing to the missions of their gaining commands. Part of the plan was for members of Reserve law units to become involved, both professionally and socially, with the personnel of the gaining commands, thereby lending credence to the "One-Navy" concept. *Off The Record* (15 October 1984), 4.

J-28. Judge Advocate General of the Navy/Commander, Naval Legal Service Command Instruction 1520.1, of 1 October 1984.

Digitized by Google

⚓ A billet rotation program to improve readiness and permit pay billets to be equitably distributed:

> Except in extraordinary circumstances, Judge Advocates will rotate from [pay billets] to [non-pay billets] after serving in [a pay billet] for two years.[J-29]

⚓ Clarification of the duties and functions of the Director, Naval Reserve Law Program.[J-30]

A certain amount of tension between the need for training of Reserve judge advocates, and their expanded support role under the "One-Navy" concept, was inevitable and continues to this day. On the one hand, the performance of real-time legal work has always been recognized, to a greater or lesser degree, as itself constituting valuable training. On the other hand, the goal of being fully trained requires systematic development of a wide range of professional skills and educational activities in addition to mutual support.[J-31]

The mutual support policy serves important mission, policy, and operational functions. It helps ensure that Reserve judge advocates are a real mobilization asset, "equipped to assume the duties" of active duty judge advocates in case of mobilization. Even if not mobilized, "the Reservists have assets that can be utilized by [Naval Legal Service Office] and other [Judge Advocate General's Corps] commands. In order to use these services, the [Naval Legal Service Offices] must become involved in training of the Reserve units. . . . The only way that the 'One-Navy' concept can work is to institutionalize" communication

---

J-29. Judge Advocate General of the Navy/Commander, Naval Legal Service Command Instruction 1301.1, of 1 October 1984.

J-30. Among the duties and functions assigned were: (1) providing advice concerning the Naval Reserve Law Program to Commander, Naval Reserve Force, and to the Judge Advocate General; (2) recommending billet assignments for inactive duty Reserve judge advocates and legalmen pursuant to Article 6 of the *Uniform Code of Military Justice*; (3) recommending Reserve training locations with particular emphasis on supporting Naval Legal Service Offices; (4) monitoring professional training programs for Reserve judge advocates and legalmen; (5) ensuring coordination between Reserve and active-duty judge advocates; and (6) such other duties and functions as might be assigned. *Office of the Judge Advocate General Directory of Active Status Reserve Judge Advocates*, "Summary," 1986.

J-31. Captain C.T. Dupuis, JAGC, USNR, Reserve Panel Report to the Judge Advocate General, Subject: "Report on Training of Inactive Reserves," (1985).

Digitized by Google

between the drilling Reserve Judge Advocate General's Corps community and the active duty component. "The active duty [judge advocates] are transient; therefore a mechanism must be established to allow for consistent communication between the [Naval Legal Service Offices] and the Reserve units regardless of the personnel involved. . . . The [Naval Legal Service Offices] also must utilize the Reservists to their maximum capabilities. This entails giving the Reservists meaningful work . . . . They [should] be utilized in the military justice, claims, and other areas."[J-32]

Another component of the Naval Reserve in which Reserve judge advocates came to play a crucial role are the personnel mobilization teams. These teams are involved in processing personnel from volunteer training units, as well as non-drilling and stand-by Reservists, in the event of mobilization. In addition to a line-officer complement, personnel mobilization teams include a chaplain, a doctor, a Supply Corps officer, and two judge advocates. The primary role of the judge advocates assigned to personnel mobilization teams is to assist in conducting hearings for Reservists seeking delays in mobilization due to problems affecting their ability to be mobilized.[J-33]

By the late 1980s, budget cuts in the active duty forces increased their need for augmentation and support from the Reserves. To achieve this, the Judge Advocate General assumed an expanded role in the assignment of inactive-duty judge advocates to Reserve billets, particularly those of staff judge advocates and unit commanding officers.[J-34] Reserve judge advocates were strongly encouraged to apply for billets wherever they might be located, a procedure intended to ensure that the best judge advocates were placed where they were needed most.[J-35] The Judge Advocate General also delegated authority to the Naval Reserve Senior Judge Advocate to oversee the Reserve Law Program's readiness, professional training, and curricula; to oversee the assignment of judge advocates (other than staff judge advocates and commanding officers), and the assignment of legalmen; and to establish an awards program. He also assigned the Naval Reserve Senior Judge Advocate additional duty as Special Assistant to the Judge

---

J-32. Captain Matthew Gormley, JAGC, USN, Reserve Panel Report to the Judge Advocate General, Subject: "Utilization of Reserves," (1985).

J-33. Commander J.G. Wallace, JAGC, USNR, and Lieutenant Commander J.T. Murphy, JAGC, USNR, Reserve Panel Report to the Judge Advocate General, Subject: "Issues of Major Importance to Reserve Judge Advocates," (1985).

J-34. See Judge Advocate General of the Navy Instruction 1301.2 (series); *Uniform Code of Military Justice*, article 6.

J-35. *Off The Record* (23 August 1990), 20-22.

Digitized by Google

Advocate General for Reserve Legal Services, and specified his mobilization billet as Assistant Judge Advocate General (Operations and Management), integrating the Reserve flag billet firmly into the active duty structure.[J-36]

Seven Judge Advocate General's Corps Reservists have held the rank of rear admiral (and served as the Senior Reserve Judge Advocate) since flag rank for Reserve judge advocates was first authorized in 1973. Pictured here in 1988 are (l. to r.) Rear Admiral Gerald E. Gilbert (1988-1992), Rear Admiral Julian R. Benjamin (1980-1984), Rear Admiral Penrose L. Albright (1976-1980), Rear Admiral Hugh J. Howell (1973-1976), and Rear Admiral Robert E. Wiss (1984-1988). Two Reserve lawyers have since assumed the rank of rear admiral: F. Stephen Glass (1992-1996), and Clifford J. Sturek (1996-). (Office of the Judge Advocate General of the Navy)

The early 1990s saw a revival of the law seminar concept in the form of regional workshops, strengthened by a new alliance between the Reserve Law Program and the Naval Justice School. The primary goal of these workshops was to ensure that Reserve judge advocates and legalmen were trained and kept

J-36. Judge Advocate General of the Navy, letter to Rear Admiral Gerald E. Gilbert, JAGC, USNR, 31 October 1990.

Digitized by Google

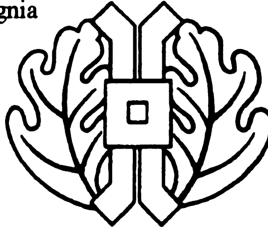
up-to-date in the practice of military law, substantive law, administrative law, and procedure.

In the Persian Gulf War of 1991, Reserve judge advocates and legalmen played a major role, providing pre-mobilization counseling, and preparing hundreds of wills and powers of attorney for sailors and Marines deploying to the battle zone. Fifty Reserve judge advocates were recalled to active duty for periods of up to one year, and another twenty-seven served on shorter "training" assignments overseas to augment short-handed active duty forces. These judge advocates served in billets ranging from legal assistance officers to international law advisors, and truly made the "One-Navy" total force concept a reality in the Judge Advocate General's Corps. Today, the Naval Reserve Law Program includes more than 700 judge advocates and 143 legalmen serving in scores of units throughout the country, giving direct support to both the active and Reserve Navy communities.

Digitized by Google

APPENDIX K

The Navy Judge Advocate General's Corps Insignia



Selection of the insignia for the Navy Judge Advocate General's Corps had its origins in a 1967 recommendation of the Muse Board, an advisory committee appointed by the Secretary of the Navy. The Muse Board had recommended to the Secretary that he administratively authorize the wearing of a uniform sleeve device for Law Specialists other than the star (see text beginning at page 668). The Secretary accepted the recommendation, and thereupon directed the Judge Advocate General to "proceed without delay to design a sleeve Corps device."[K-1] On 18 July 1967, Judge Advocate General Hearn sent the following memorandum to all Law Specialists in the Navy:

> It is requested that if you . . . have any thoughts concerning such a Corps device that a design be roughed out and sent to me by 9 August 1967. A committee will be formed to select a design from among those suggested.

A week later, Hearn appointed a committee of five Law Specialists "to consider all designs which may be suggested and submit to me the five (5) best in their order of preference." Captain Thomas P. Smith, Jr., USN, was appointed chairman of the committee.[K-2] Within two weeks of his initial memorandum, Hearn had received approximately twenty-five suggested designs. Neither he nor the committee was impressed. Therefore, on 2 August 1967, Hearn sent a letter to the commanding officer of the Army's Institute of Heraldry at Cameron Station, Alexandria, Virginia, confirming a previously reached agreement by which the

K-1. Judge Advocate General of the Navy, "Memorandum for all Law Specialists," 18 July 1967.

K-2. Judge Advocate General of the Navy, memorandum, 25 July 1967.

Digitized by Google

Army heraldry personnel would research and develop an appropriate insignia for the Navy:

> It is requested that several sketches of appropriate designs be prepared and submitted for consideration preliminary to selection of the final design and its preparation in finished form.[K-3]

Hearn also asked for a preliminary estimate of cost. The following day, he was advised by Colonel E.V. Hendren, Jr., AGC, USA, commanding officer of the Heraldry Institute, that the cost of design and development of a sleeve device would run approximately $4,000.[K-4] This was a substantial sum, considering that legislation to establish a Navy Judge Advocate General's Corps was still in committee, with no absolute assurance of passage. Colonel Hendren was advised to proceed no further, "pending a decision on the allocation of funds."[K-5]

By mid-September, almost a hundred design suggestions had been received from the field, still to no effect. All centered on traditional themes such as the scales of justice, sword and quill, blind justice, stars, anchors, tridents, fasces, etc., and were felt to be too trite, or to have additional connotations that made them unacceptable. The "device committee" was hopelessly split on the form a design should take.[K-6] Hoping to attract fresh ideas, the search was expanded to include the Naval Reserve Law Companies.[K-7]

K-3. Judge Advocate General of the Navy, letter to Commanding Officer, Institute of Heraldry, Department of the Army, Subject: "JAG Corps sleeve device; preparation of," 2 August 1967.

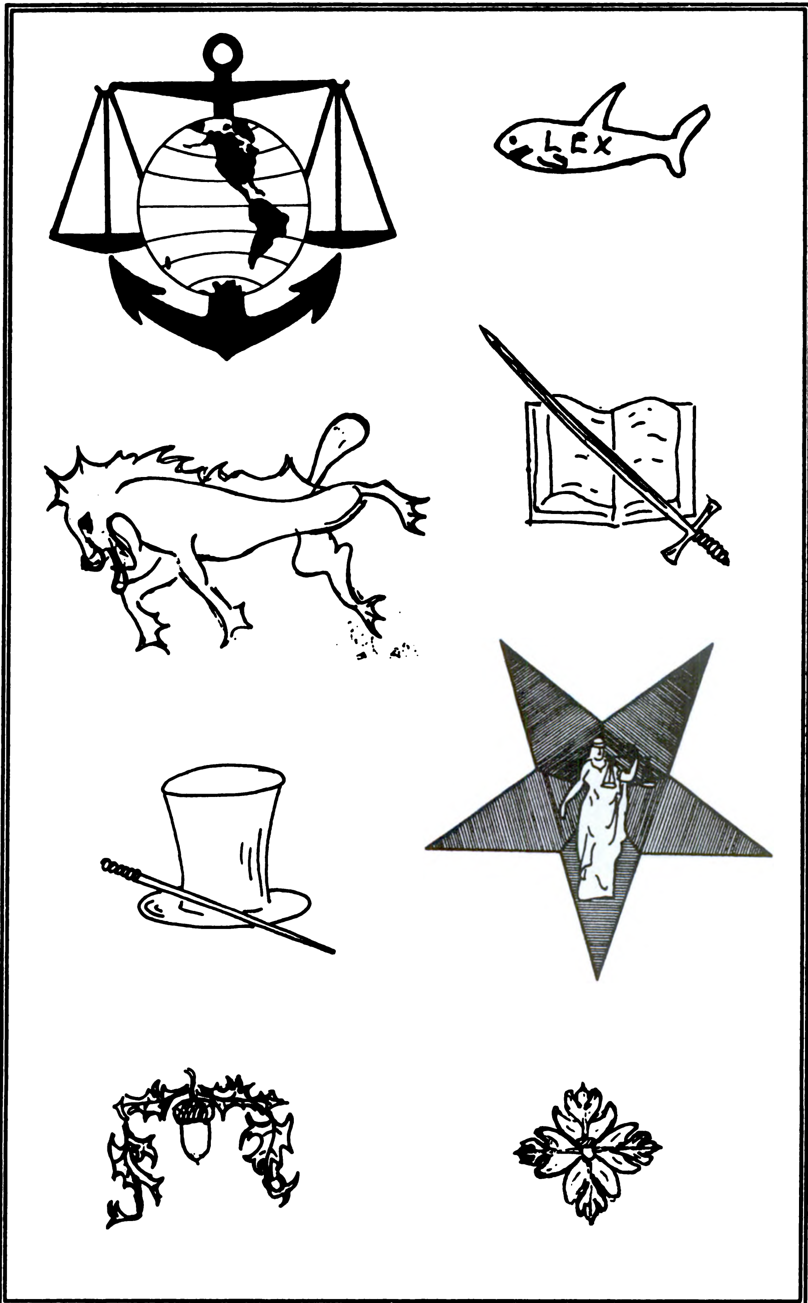
K-4. Commanding Officer, Institute of Heraldry, Department of the Army, letter to Judge Advocate General [of the Navy], Subject: "JAG Corps device," 3 August 1967.

K-5. Judge Advocate General [of the Navy], letter to Commanding Officer, Institute of Heraldry, Department of the Army, Subject: "U.S. Navy JAG Corps sleeve device," 17 August 1967.

K-6. Captain Richard K. Stacer, JAGC, USN (Ret.), letter to Rear Admiral John F. Gordon, JAGC, USN [Judge Advocate General of the Navy], 13 April 1992.

K-7. Captain R.K. Stacer, USN, Memorandum for Commanding Officers of Law Companies, 13 September 1967.

Digitized by Google



Some suggested designs for the Navy Judge Advocate General's Corps insignia. (Office of the Judge Advocate General of the Navy)

Digitized by Google

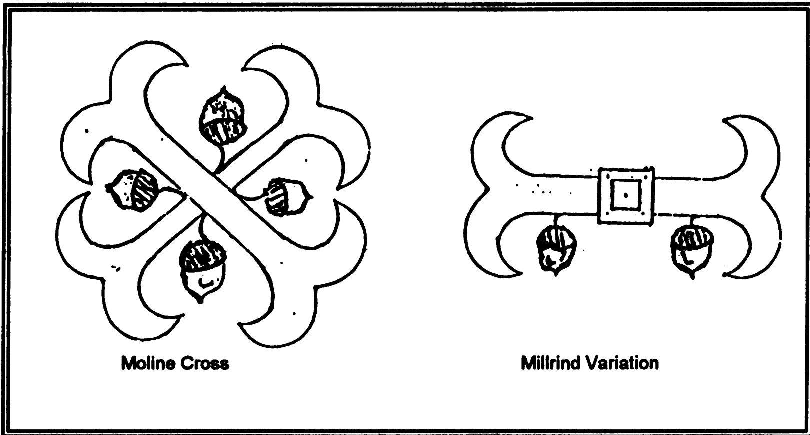
At about this same time (mid-September 1967), Lieutenant Commander Sidney N. ("Newt") Feldman, USNR, a Reserve Law Specialist, arrived at the Office of the Judge Advocate General for a two-weeks' tour of active duty for training. He was assigned to assist the device committee in selecting an appropriate insignia. Feldman paid a visit on Colonel Hendren at the Army's Heraldry Institute. Since the Army had stopped work on the project due to the Judge Advocate General's lack of funding, Hendren suggested that Feldman take on the task of searching through the Army's heraldry books in a bootstrap effort to find appropriate themes or designs for consideration by the device committee. Feldman was thus assigned to the task. Recognizing that none of the traditional themes yet submitted had been acceptable, Feldman, after discussion with the staff at the Heraldry Institute, came to the conclusion that it would be best to develop an abstract symbol unlike anything in use in any of the services. An Anglophile, he focused on the Inns of Court, the organizations around which English trial lawyers are organized. In a memorandum, Feldman suggested several symbols for consideration. The one that he clearly favored was called a "Moline Cross," also known as a "Cross Moline":

> In the writer's opinion . . . a variation on the Moline Cross, two possibilities of which appear below, would, if combined with the acorn (and/or oak leaf) as shown, come closest to what is being sought.[K-8]

Feldman incorporated the following two sketches into his memorandum. The one on the left he labeled a "Moline Cross"; the one on the right a "Millrind Variation" of the Moline Cross.

K-8. Lieutenant Commander Feldman's role in the selection of the sleeve device is set out in a memorandum of 6 October 1967 from him to Captain Richard K. Stacer, USN, summarizing his activities during his two-week tour of active duty for training. The accuracy of his account is substantiated by Captain Paul A. Wille, JAGC, USN (Ret.), a member of the corps device selection committee. Captain Paul A. Wille, JAGC, USN (Ret.), telephone interview with Commander Lawrence K. Bamberger, JAGC, USNR, n.d.

Digitized by Google



Lieutenant Commander Feldman's suggestions for a Navy Judge Advocate General's Corps insignia. (Office of the Judge Advocate General)

Quoting from the ancient Bossewell's, *Armories of Honor*, Feldman explained that "The Cross Moline is in the form of the iron upon the nether [*lower—Ed.*] stone of a mill [*which, interjected Feldman, accounted for the variation called the millrind cross—Ed.*] which beareth and guideth the upper stone equally in its course and is a fit bearing for judges and magistrates who should carry themselves equally to all men in giving justice." Feldman also stated that the millrind form appeared in the coat of arms of Lincoln's Inn, one of the four English Inns of Court.

Captain Wille of the device committee picked up on Feldman's suggestion and presented it to the full panel. Tom Smith, the chairman, was not overly enthusiastic. But Wille persisted and finally persuaded Smith and the other members of the committee to suggest the "millrind" to Judge Advocate General Hearn.[K-9] The facts are not totally clear at this point, but it seems that Hearn had in fact been to Lincoln's Inn in London, where he had been photographed beneath a stone arch bearing what he understood to be a carved millrind. When Smith and Wille approached him with their suggestion, Hearn retrieved the photograph from his files. Hearn's enthusiasm, rather than Wille's persuasive powers, may

K-9. Wille, telephone interview with Bamberger, n.d.

Digitized by Google

have been the determinant in the committee's subsequent proposals to incorporate a "millrind" in several designs for the new corps device.[K-10]

Another member of the device committee, Captain Richard K. Stacer, JAGC, USN (Ret.), recalls that as the committee reviewed the various suggestions, its "focus was redirected by Captain Tom Smith and [Rear Admiral] Hearn to the English Mill Rynd (also rind) which was reported to be associated with Lincoln's Inn":

> In fact, we were shown a picture of a gateway arch with many mill rinds on it and there was also a picture of [Rear Admiral] Hearn at the gate with one large mill rind up over his head.
>
> Maybe the mill rind was [Rear Admiral] Hearn's favorite design because of his familiarity with Lincoln's Inn.[K-11]

Following these events, but still lacking money to proceed, an arrangement was struck with the Army to use the "millrind" theme and prepare several preliminary sketches of a sleeve device for $300.[K-12] On 8 November 1967, Tom Smith sent each member of the committee an extensive packet of excerpts from arcane publications on heraldry, dating from 1572, with the admonition that it was forwarded "in the hopes of stimulating further ideas on a corps device."

K-10. Rear Admiral Richard L. Slater, JAGC, USN (Ret.), interview with author, 5 August 1992.

K-11. Stacer, letter to Gordon, 13 April 1992.

There are several variations on this anecdote describing the way in which Judge Advocate General Hearn came to endorse the "millrind" design, but all generally confirm the fact that it took place. Only Tom Smith disputes its accuracy, having no recollection of its occurrence. Captain Thomas P. Smith, Jr., JAGC, USN (Ret.), telephone interview with author, 19 September 1991.

Apocryphal or not, the Hearn-photograph story has become part of Navy Judge Advocate General's Corps lore, further perpetuated by Joseph McDevitt shortly after he became Judge Advocate General of the Navy. The facing-page photograph shows Judge Advocate General McDevitt beneath a gateway arch at Lincoln's Inn, London. Above him is a carving in stone of a griffin holding a shield emblazoned with the "millrind" device.

K-12. Judge Advocate General [of the Navy], letter to Commanding Officer, Institute of Heraldry, Department of the Army, Subject: "JAG Corps sleeve device; preparation of," 19 October 1967.

Digitized by Google

Rear Admiral Joseph B. McDevitt, JAGC, USN, Judge Advocate General of the Navy, at Lincoln's Inn, Inns of Court, London (probably summer of 1968). Note the "millrind" cross on the shield held by the griffin in the stone carving above the arch. (Office of the Judge Advocate General)

Time ran on, and establishment of a Judge Advocate General's Corps for the Navy became certain. A bare two days before the Congress approved the corps legislation, the device committee submitted five final designs to Judge Advocate General Hearn for his consideration.[K-13] All had been drawn by Army Heraldry Institute personnel, pursuant to suggestions received from the committee. Not surprisingly, three of the designs incorporated the "millrind" symbol. The device

K-13. Captain Thomas P. Smith, Jr., USN, Memorandum to the Judge Advocate General of the Navy, Subject: "JAG Corps device," 6 December 1967.

Digitized by Google

receiving the most support from the committee, and approved by Judge Advocate General Hearn, is reproduced at the beginning of this appendix and is the same as the one in use today.[K-14]

To many, including future Judge Advocate General of the Navy Thomas E. Flynn, the English symbol came as a total surprise:

> Most of my friends, who were very innocent and remote from Washington, D.C., were astounded at the selection of the millrind as the corps device, because in the American culture it was not a very easily recognized symbol for an attorney. So I think most of us were rather shocked to see what it was and it had to be explained in great detail to all of us because we sure as heck didn't know what it was supposed to be the symbol of.
>
> I remember coming to Washington, D.C., right after the corps was established. We had a JAG conference over at the old Skyline Motel on South Capital Street, and a whole group of us was going up in the elevator wearing our brand new shiny devices, and a little old lady asked us if we were members of the Navy band![K-15]

On 28 December 1967, Judge Advocate General Hearn sent a letter to the president of the Navy Uniform Board, requesting "favorable consideration" of the insignia proposed for the new Navy Judge Advocate General's Corps. Enclosed with the letter was the following explanation describing the symbolism embodied in the insignia:

> The oak leaf, denoting a corps, symbolizes strength, particularly the strength of the hulls of ships of the early American Navy which were oak timbered. Such ships were often referred to as having "hearts of oak."

K-14. Wille, telephone interview with Bamberger, n.d.

K-15. Rear Admiral Thomas E. Flynn, JAGC, USN (Ret.), interview at U.S. Army Judge Advocate General's School, 4 February 1987.

Digitized by Google

> In this device the two counterbalancing oak leaves are identical and connote the scales upon which justice is weighed.
>
> Surmounted between these oak leaves is a "Mill Rinde" sometimes referred to as the link or iron cramp of a mill stone, also referred to as a fer-de-moline. The "Mill Rinde" is an instrument (always pierced square in the center) which over the centuries has been centered in the lower of the two mill stones. Its purpose is to bear and guide the upper mill stone equally and directly in its course—to prevent it from inclining too much on either side—to minister to every part equally. Bossewell in 1572 in his *Workes of Armorie* writes that a form of this device "might, conveniently be assigned and given to Judges, Justices and to such others, who have jurisdiction of the law, as a sign, or token for them to bear in their arms. That is to say, as the aforesaid instrument is there placed, to direct the mill stone equally, and without guile, so all Judges are 'bounden' and 'tied in conscience,' to give equally to every man, that which is his right." Other heraldry authorities universally support this concept.
>
> Fifteen such mill rindes are inscribed on the shield of Lincoln's Inn in allusion to the allegory of equal justice. Lincoln's Inn is one of the four inns of court to which members of the legal profession in England are admitted. The mill rinde thus acquired the connotation of advocacy at least six centuries ago.[K-16]

Based on this tangled explanation of the function and symbolism of the millrind, the Navy Uniform Board approved the design on 24 February 1968.[K-17] What its members could not appreciate, however, was a significant flaw in the

---

K-16. Judge Advocate General of the Navy, letter to President, Navy Uniform Board, Subject: "Judge Advocate General's Corps; insignia for," 28 December 1967.

K-17. President, Navy Uniform Board, letter to Chief of Naval Operations, Subject: "Judge Advocate General's Corps Insignia; recommendation for approval of," 24 February 1968.

Digitized by Google

explanation provided to them; it did not describe a millrind. Nor, in fact, was the symbol selected by the Navy Judge Advocate General's Corps for its official insignia a millrind.

The first revelation that the millrind was not a millrind came from a respected repository of milling lore, Old Sturbridge Village, in Sturbridge, Massachusetts. A gentleman by the name of William K. Bassett had sent a copy of the above explanation of the "millrind's" genealogy to one of the millers at Old Sturbridge Village, perhaps to demonstrate how resourceful the lawyers had been in their choice of insignia.[K-18] Bassett must have been astonished at the reply:

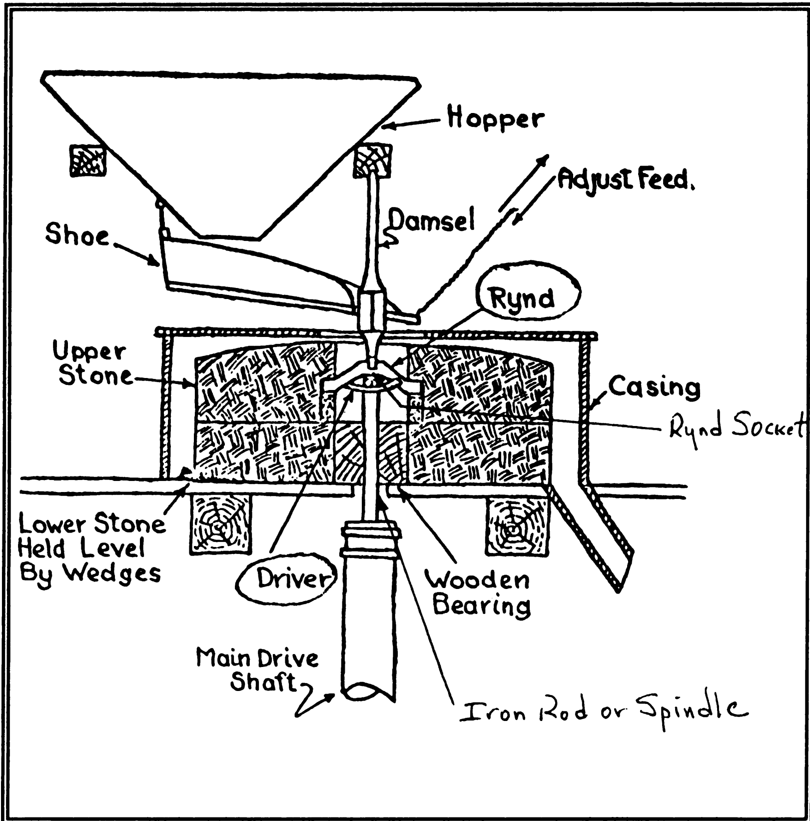
> The [equalizing] function of the rinde is well described in the copies you sent, but raises a question in other ways. In American gristmills, at least, the rinde seems *always* to have been set in the *upper* . . . stone and was its only support. . . .
>
> . . . [S]ince at least the 17th century, the rynd has belonged in the *upper* stone and the *driver* has been the part which was "pierced square."[K-19]

Since the millrind sat in the *upper* stone, the device described by Bossewell as sitting in the *lower* stone could not be a millrind. Also, the millrind is not pierced, although the driver, which *does* sit in the lower stone, *is* pierced. The implication is clear that the insignia selected by the device committee and approved by the Navy Uniform Board was a *driver*, and not a millrind. The following illustration may aid in understanding:

K-18. The purpose of Bassett's correspondence to Old Sturbridge Village is unclear, as is his relationship to the Navy Judge Advocate General's Corps. His letter to Sturbridge Village indicates that he had a Navy connection, but is not specific in that regard. He does not appear in the Judge Advocate General's directory of Law Specialists from 1955 to 1968, nor could he be located in the *Naval Register*.

K-19. Ralph Hodgkinson, Director of Craft Demonstrations, Old Sturbridge Village, letter to William K. Bassett, 6 November 1968.

Digitized by Google



A typical milling configuration showing two millstones, with the upper stone supported and balanced by a millrind. (HAMILTON: THE VILLAGE MILL IN EARLY NEW ENGLAND, OLD STURBRIDGE VILLAGE, STURBRIDGE, MASSACHUSETTS)

There the matter lay, undisturbed and unresolved, for more than twenty years. Then in 1991, the genealogy of the corps device was again questioned. The authority consulted this time was Michael J. LaForest, publisher of the *Old Mill News*, a newsletter of the Society for the Preservation of Old Mills. Mr. LaForest was straightforward in his assessment:

> There can be no doubt that the centerpiece of the corps' insignia is a "driver" and not a balance rinde (or rynd, or rind). . . .
>
> . . . The rynd is most usually a horseshoe shaped iron . . . .

Digitized by Google

> Keyed firm to the spindle is another mill iron (fer-de-moline) called a "driver." . . .[K-20]
>
> I now want to refer to the narrative description of your insignia. The 4th paragraph states, "The mill rinde is an instrument (always pierced in the center) which over the centuries has been centered in the lower of the two millstones." This must have been written by a person who did not fully grasp the principles involved. First, the rynd is never pierced. It is a solid piece of metal—piercing it would only weaken it. The driver, however, could be considered "pierced" since it fits over or around the spindle. Secondly, I have plainly demonstrated that the balance rynd is leaded into the *upper* of the two millstones, not the lower.[K-21]

Bossewell, apparently, had confused a millrind with a driver in 1572, and the error was perpetuated through abstract heraldic symbols, thought to portray millrinds but in fact depicting drivers. But whether millrind or driver, the insignia of the Navy Judge Advocate General's Corps, by virtue of those who wear it, has come to be recognized and respected as a symbol of integrity, competence, and service.

K-20. Note that Judge Advocate General Hearn represented to the Uniform Board that the symbol he had submitted for approval as the corps device was sometimes called a "fer-de-moline." See page A-119.

K-21. Michael J. LaForest, letter to Lieutenant Commander Kurt A. Johnson, JAGC, USN, 11 December 1991.

A further explanation of heraldry and milling is beyond the scope of this appendix, but the reader who wishes to explore more fully would profit by consulting the following articles: Bossewell, *Workes of Armorie* (1572); John Guillim, *A Display of Heraldrie*, 4th ed. (1660); James Coats, *A New Dictionary of Heraldry* (1725); A. Nisbet, *System of Heraldry* (1804); Rev. William Wood Seymour, *The Cross in Tradition, History and Art* (G.P. Putnam's Sons, 1898); Lee G. Holmes, "A Visit to the Inns of Court," *American Bar Association Journal* 55 (January 1969): 51; John Reynolds, *Windmills & Watermills* (New York, Praeger Publishers, 1970); B.W. Dedrick, *Practical Milling*, 1st ed. (Chicago, Ill., National Miller); Edward P. Hamilton, *The Village Mill in Early New England*, Old Sturbridge Village, Sturbridge, Massachusetts.

Digitized by Google

APPENDIX L

The Naval Legal Service Command:
District Legal Offices to Law Centers to Naval Legal Service Offices

The district legal offices, created in 1941, had, for the first time, placed uniformed lawyers in the field to perform legal duties (see text beginning at page 439). This organizational structure, with the district commandants and type commanders supervising legal officers and determining the allocation of legal resources to fleet and support activities, persisted virtually without change for twenty-five years.[L-1] Then, in January 1966, the Alford Board, a commission

---

L-1. The organization and function of the district legal offices were described in 1955 as follows:

> The district legal offices furnish legal services to the District Commandants and members of the District staff; they are responsible for the review and processing of general courts-martial cases; for furnishing trial and defense counsel and law officers for the general courts-martial convened by the Commandant; for the review of inferior courts-martial; for the processing of claims arising under the Tort Claims Act and the settlement of such claims where the amount involved is less than $1,000; for handling all admiralty matters affecting the District; for preparing appointing orders for investigations and boards of various types; for providing legal assistance to naval personnel; and for furnishing defense counsel for personnel appearing before physical evaluation boards. They likewise furnish legal advice and services on any questions of the type handled by the divisions of the Office of the Judge Advocate General of the Navy. A typical organization of a District Legal Office is as follows:
>
> District Legal Officer
> Assistant District Legal Officer
> Law Officer
> Trial Counsel
> Defense Counsel

(continued...)

Digitized by Google

L-1. (...continued)

Claims Officer
Legal Assistance Officer
Admiralty Officer
Court-martial Review Officer

> The number assigned for any particular function might be increased or reduced depending upon the volume of business being handled.

Captain Sanford B.D. Wood, USN, memorandum for Mr. Scott Heuer, Subject: "Office of the Judge Advocate General of the Navy - history of legal services," 18 April 1955, at 5.

The organization of the district legal offices changed little over the years. Former Judge Advocate General of the Navy Flynn described his personal experience in the Twelfth Naval District Legal Office in 1965:

> The trials were basically all done at the district level and the commandant of the district had the responsibility. He convened the general courts martial. . . . We did the claims, and we did the legal assistance, and we did all of the general courts martial . . . . That was prior to the time when you were required to have lawyers in special courts martial, so there were a lot of non-lawyer court martial mills. The naval station used to have people who were assigned just to prosecute and defend special courts martial, but they were not lawyers and they churned out all of the special cases. We got very, very few of the special court martial cases. We did mainly general courts martial. . . .
>
> You had a trial shop and you had a defense shop, and you had a military justice coordinator. You had the claims division and you had a legal assistance branch and probably one of the biggest differences was you had a review section which did the review work. You talk about being incestuous, I mean we were all right there in the same building. We had a commander, a senior commander doing the review work, but we all worked for the commandant, although I'm sure that the commandant wouldn't have known most of us if he had fallen over us. . . .
>
> Legal assistance was done much more on kind of a hit-or-miss basis. . . . everybody in the office did legal

(continued...)

Digitized by Google

appointed by the Secretary of the Navy to study Navy and Marine Corps personnel retention, recommended that lawyers serving in areas of high concentrations of ships, personnel, and shore activities, be consolidated in a single office to be called a "law center," whereby they could perform expanded consultant services for an increased number of activities, perform duties as trial and defense counsel and as presidents of special courts martial, and directly supervise the preparation of records of trial.[L-2] The Alford Board reasoned correctly that such an organization would be more efficient than the uncoordinated array of legal officers assigned to fragmented commands, and would be able to provide greater and better legal services at no appreciably greater cost. The board concluded that the law center concept would provide a more professional and efficient legal administration in the naval service that would, in turn, improve retention.[L-3] Less than a month after the board reported, in February 1966, the Secretary of the Navy approved the following recommendation of the Alford Board and directed its implementation as quickly as possible:

> Establish law centers in areas where there are large concentrations of Navy personnel to provide professional assistance in trying, recording, and

---

L-1. (...continued)

> assistance. We were much more flexible than we are today. I did trials as a trial counsel as well as serving as a defense counsel and nobody really thought very much of that at all. If the trial counsel was overloaded, I would do some trial work, but basically my assignment was as a defense counsel. We didn't have the very definite distinctions that we have now between the defense shop and the trial shop.

Rear Admiral Thomas E. Flynn, JAGC, USN (Ret.), interview at Army Judge Advocate General's School, 4 February 1987.

District legal personnel were detailed to their duties by the Bureau of Naval Personnel, and supervised in their duties by the district commandants. The Judge Advocate General had no control over these functions.

L-2. Note the similarity to the Dockside Court Program introduced by Captain Mack Greenberg in 1957. See text beginning at page 627.

L-3. A portion of the material in this appendix was extracted, some verbatim, from an article written by Captain Richard J. Selman, JAGC, USN, titled "The Military Justice Act of 1968: Some Problems and Practical Solutions." The article appeared in the May-June 1969 issue of the *JAG Journal*, at 147-53.

Digitized by Google

> preparing records of courts-martial and assistance and advice on all legal matters.[L-4]

In June 1966 the first Navy law center was authorized for Norfolk, Virginia. It was formally opened on 3 November of that year. Speaking at the dedication ceremony, Judge Advocate General Hearn said:

> The Law Center is the Navy's response to the "legal explosion" which both the military and civilian communities are experiencing. By this I have reference to the increasing demands for counsel brought about by legislation, judicial decisions and a generally increased awareness on the part of the citizenry of the availability of legal services.[L-5]

The mission of the law center, noted Hearn, was to provide prompt, efficient, and comprehensive legal services to all commands, in those fields of law where the individual commands could not efficiently provide their own legal services.

The law centers, not being commands, were placed under the immediate supervision of a director. The first director of the prototype Norfolk Law Center was Captain Max D. Wiviott, JAGC, USN:

> When I was picked to run the law center I knew nothing about the concept they were trying to set up. Even after I got there I wasn't quite sure what was supposed to be done or what was expected of me. But that was good. It gave me a free hand in establishing what I thought might be a good concept for the law center.[L-6]

L-4. Secretary of the Navy Notice 5420 of 14 February 1966.

L-5. "Navy Law Center Dedicated in Norfolk," *JAG Journal* (December 1966-January 1967), 77.

L-6. Captain Max D. Wiviott, JAGC, USN (Ret.), interview with author, 13 October 1991. Within a year, Wiviott had a staff of thirty to thirty-five lawyers, the majority of whom were assigned directly from the Naval Justice School. This was five times the size of the district legal office staff.

Digitized by Google

The law center was not intended to, nor did it supplant the district legal office. In fact, Wiviott served both as director of the law center, and assistant district legal officer. Nor did the Judge Advocate General of the Navy acquire operational control over the law centers. In the case of the Norfolk prototype, the Commandant, Fifth Naval District, maintained command control over both the law center and the district legal office.

Initially the concept encountered resistance, particularly from type commanders who feared losing their disciplinary authority as well as their command lawyers, the staff judge advocates. The staff judge advocates also resisted, fearing the loss of their autonomy to a centralized activity.[L-7] But as the concept evolved it became clear that the type commands still warranted their "in house" counsel to complement the law center functions and attend to the many legal matters outside the military justice sphere. Once this was understood, support for the law centers began to grow rapidly. As Max Wiviott notes:

> I explained to the various commanders that the purpose of the law center was not to interfere in their operational command or interfere with any legal services they were getting, but to improve the legal services available to them and relieve the operational line officers from the onerous task of conducting courts martial. I was very careful to note that we were not taking disciplinary authority away from the commands, that discipline was a command function. We were there to assist the commands in administering discipline. We would assist them in writing up charges and specifications for all courts-martial. We would supply them with a trial team. They no longer had to look for somebody to be defense counsel. We would send over the entire trial team including the court reporter, make up the record and type it all up, not

---

L-7. Speaking of this resistance from among the line commanders and their lawyers, Joe McDevitt, the Judge Advocate General at the time, commented:

> The biggest problem was getting the cooperation of the line officers, the line commands, to really give the law center the kind of latitude that it needed. Norfolk was a hot bed, no question about it. We had to knock heads.

Rear Admiral Joseph B. McDevitt, JAGC, USN (Ret.), interview with author, 23 March 1992.

Digitized by Google

> for our action but for the commanding officer's action. He was still the convening authority of the court. I made it clear that the commanding officer retained the prerogatives of command with respect to discipline within his command, which was very important. We had no intention of diluting that authority.[L-8]

The law center was divided into departments. Some officers were thrown right into the courtroom as soon as they arrived from Naval Justice School. Eventually they all moved through the several areas of the law center, such as investigations, claims, and legal assistance, as well as being assigned to work with the admiralty officer at the Fifth Naval District. Previous to the law center's establishment, these functions had been spread out among the various commands in the Norfolk area.[L-9]

The following year the law center concept received further support in the Muse Board report of June 1967, which recommended the placement of law centers in other areas additional to Norfolk.[L-10] In May 1968, pursuant to this recommendation, the Chief of Naval Operations directed establishment of a

---

L-8. Wiviott, interview 13 October 1991. Captain Wiviott noted that at the time the law center was established, the commander of the Atlantic Fleet Service Force had been processing general courts martial for most of the area shore commands. The law center relieved the Service Force commander of this task.

L-9. While it was not considered essential to contain all personnel assigned to a law center under one roof, it was considered essential to assign most of the legal personnel in a given geographic area to one command. This provided efficiency of scale, and allowed rotation of personnel among various billets in order to maximize training, supervision, utilization in the performance of legal duties, and improvement of professional skills.

L-10. The Muse Board had been established by Under Secretary of the Navy Robert H.B. Baldwin. to study uniformed officer-lawyer personnel requirements, retention, and recruitment (see text beginning at page 668). The Under Secretary's 13 September 1967 decision memorandum on the Muse Board report, addressed to the Chief of Naval Operations, the Commandant of the Marine Corps, and the Judge Advocate General of the Navy, directed the Judge Advocate General to identify other areas outside of Norfolk that could be served by law centers, and to ensure that there were no unnecessary "house counsel" in commands served by any law center.

The Muse Board's recommendation was no doubt influenced by the landmark Supreme Court case of *Miranda v. Arizona*, 384 U.S. 436 (1966) as applied to the military by *U.S. v. Tempia*, 37 C.M.R. 829 (C.M.A. 1967). These cases, taken together, established a requirement for the assistance of counsel at virtually all stages of court martial proceedings.

Digitized by Google

second prototype law center at San Diego, California. This second law center was made permanent in December 1968, after a six-month trial period.[L-11]

The law center was quickly proving its worth. In October 1968, the Chief of Naval Operations advised his flag officers that, in his opinion, the law center concept was "a sound management tool which must be implemented as early as possible in several locations." Speaking before the Judge Advocate General's Conference on 15 October 1968, he restated this opinion:

> In the current high tempo and technically complex Navy-wide environment, there is a management thesis which I strongly endorse. It is the thesis that the principal responsibility of senior executives today is the successful "management of change" itself. Nothing in this age in which we live is static. . . . Our legal framework is no exception to this rule, although it is probably somewhat more stable. The new *Uniform Code of Military Justice* Manual and the law center concept are representative of the changes coming about in our legal business methods. Incidentally, the law center concept has my unqualified support. It was while I was [Commander in Chief of the Atlantic Fleet] down in Norfolk that we opened one of the first law centers.[L-12]

In June 1969 the Chief of Naval Operations ordered the activation of thirty law centers around the globe, including two in Vietnam. The driving force behind the activation was "to provide for increased lawyer participation in special courts-martial as required under the [Military Justice] Act [of 1968]."[L-13] There

---

L-11. The Norfolk Law Center had been placed on a permanent basis in July 1967.

L-12. Selman, "The Military Justice Act of 1968," *at* 149.

L-13. Chief of Naval Operations Instruction 5800.6 to All Ships and Stations, Subject: "Law Centers; activation of," 18 June 1969.

The Military Justice Act of 1968 (Act of 24 October 1968, 82 Stat. 1335), became effective on 1 August 1969 and imposed significant demands upon the Navy's legal system. The major provisions of the act provided that (1) an accused had an absolute right to refuse trial by summary court martial; (2) with few exceptions, an accused had to be afforded the opportunity to be represented by a certified lawyer-defense counsel in any special court martial, failing which no bad conduct discharge could be imposed; (3) with

(continued...)

Digitized by Google

was, however, no additional funding provided, nor was there to be any until fiscal year 1971.[L-14]

With the establishment of the law centers, Navy Judge Advocate General's Corps personnel found themselves organized into four areas: staff and activity judge advocates; a training component; the law centers; and the Office of the Judge Advocate General. In only the last of these did the Judge Advocate General exercise personnel, funding, and operational authority. He had no command or control over the lawyers who staffed the law centers. This lack of authority seriously impeded the Judge Advocate General's ability to provide coordinated legal services to the operational forces and support activities of the Navy.

This changed dramatically in 1973. On 3 October of that year, following extensive study, the Secretary of the Navy approved the establishment of the Naval Legal Service, giving the Judge Advocate General of the Navy authority that he had lacked from the outset of his office in 1880: responsibility for the administration and management of Navy lawyers outside the Office of the Judge Advocate General.[L-15] In so doing, the law centers were redesignated as naval legal service offices. The first law center targeted for redesignation was the one in Newport, Rhode Island. The conversion was to take effect not later than 1 April 1974, with the law center director to be redesignated as an officer in charge.

L-13. (...continued)
limited exceptions, a bad conduct discharge could not be imposed at a special court martial unless a lawyer certified as a military judge had presided; and (4) an accused could waive trial by a panel of members, and elect to be tried by a military judge alone. Note that these last two provisions radically altered the structure of Navy courts martial. No longer would there be a law officer presiding over a general court martial, nor, in many cases, a non-lawyer president officiating at a special court martial. A newly-created judicial officer, the military judge, had come onto the scene.

The establishment of law centers almost three years before the Military Justice Act of 1968 went into effect was both coincidental and fortuitous. By late 1969 there were thirty law centers in operation, significantly ameliorating the demands imposed by the 1968 act. In ordering the activation of the thirty law centers in 1969, the Chief of Naval Operations noted that he had solicited and received comments from major commanders regarding implementation of the requirements of the Military Justice Act of 1968, and that based on those comments, activation of law centers throughout the world was considered to be "the best means to provide for increased lawyer participation in special courts-martial . . . ."

L-14. Chief of Naval Operations Instruction 5800.6 of 18 June 1969.

L-15. Judge Advocate General Robertson, writing in 1976, termed this event an "evolutionary milestone" in the Navy's legal organization, similar in importance to the 1967 formation of the Navy Judge Advocate General's Corps. Rear Admiral Horace B. Robertson, Jr., JAGC, USN, "A Personal Message from the Judge Advocate General," *Off the Record* (20 January 1976), 1.

Digitized by Google

The other law centers, including Norfolk, were to follow. Describing the reorganization, Judge Advocate General Merlin H. Staring wrote as follows:

> I am glad to announce that the Secretary of the Navy . . . approved the JAG plan to place Navy law centers under the authority, administration, and management of JAG. The law centers will be retitled Naval Legal Service Offices, each under an officer in charge who will report to the Judge Advocate General as the Director of the Naval Legal Service—a command under the [Chief of Naval Operations]. . . . The plan further provides that command and activity judge advocates will function solely as staff judge advocates for their commands [*contrary to past practice where law center directors were sometimes assigned additional duty as staff judge advocates—ED.*].[L-16]

Although not stated in his letter, a basic purpose in placing all legal service office lawyers under the direct authority of the Judge Advocate General was to remove the defense counsel of these activities from the chain of command of the district commandants, who were normally the local general court martial convening authorities. The intent was to remove the perception of command influence that arose with the convening authority, by whose order a court martial had been assembled, being in a position to influence the defense counsel whom he had appointed to represent the accused before that court martial.[L-17] In the process, trial counsel were removed from the convening authority's command as well.

The impetus to remove defense counsel from the convening authority's chain of command had not originated with the Judge Advocate General. In fact, he had opposed it. Rather, a requirement to implement such a structure "flowed from the 1972 report of the [Secretary of Defense] Task Force on the Administration of Military Justice, which found that the subordination of defense counsel to the authority of the convening authority and his staff judge advocate was widely

---

L-16. Judge Advocate General of the Navy, correspondence to Distribution List, Subject: "Navy law center organization modification," 19 October 1973.

L-17. For similar reasons, military judges, who also fell under the supervisory control of the convening authority, had been removed from that control and organized into the independent "U.S. Navy-Marine Corps Judiciary Activity" in 1962. See Appendix M.

Digitized by Google

'perceived' as command influence. As a member of that task force, the Judge Advocate General of the Navy dissented from that particular finding."[L-18]

On 3 December 1973, by Notice 5450, the Chief of Naval Operations officially established the Naval Legal Service. The new organization was given the following mission:

> To administer the legal services program and provide command direction for all Naval Legal Service activities and resources as may be assigned; and to perform such other functions or tasks as may be related to the Naval Legal Service as directed by the Chief of Naval Operations.[L-19]

One of the first orders of business for the Naval Legal Service was to designate a new Assistant Judge Advocate General for Personnel, a hitherto needless position, but one now essential to the management of the several hundred Navy lawyers assigned to the new naval legal service offices throughout the world.

L-18. "Establishment of the Naval Legal Service," *Naval Reserve Lawyers Association Newsletter*, Spring 1975, at 6.

L-19. "Establishment of the Naval Legal Service," *Naval Reserve Lawyers Association Newsletter*, Spring 1975, at 6. The Naval Legal Service was initially authorized seventeen naval legal service offices throughout the world. Chief of Naval Operations Notice 5450, Subject: "Establishment of Naval Legal Service Offices," 10 May 1974.

The Norfolk office, because of its size and location, occupied a premier position in the legal service office hierarchy. Betty D. Overfelt worked at the Norfolk office from the time it was a district legal office in 1962, until her retirement as secretary to the commanding officer over thirty years later. Shortly after the Naval Legal Service plan was implemented in 1974, Ms. Overfelt was serving as secretary to the then-assistant officer in charge, Commander Hugh Don Campbell, JAGC, USN, later to become Judge Advocate General of the Navy. One habit of Commander Campbell's baffled Ms. Overfelt. In her words:

> For ever so long I wondered what in the world the brown, foamy stuff in his coffee cup was. I would empty it, scrub the cup, smell it, and wonder what it was—until one day, to my dismay, I discovered he used his coffee cup as a spittoon. That also solved the mystery of his pouchy cheeks.

Betty D. Overfelt, letter to author, 26 February 1991.

Digitized by Google

While the establishment of the Naval Legal Service and its concomitant control over the naval legal service offices gave the Judge Advocate General significantly enhanced authority and responsibility, one piece of the organizational structure envisioned by the Judge Advocate General was missing. A proposal to designate the naval legal service offices as commands, headed up by commanding officers, had been tabled during the organizational discussions with the Chief of Naval Operations. In the euphoria of the newly-created Naval Legal Service, assembly of the administrative apparatus to start it, and the growing pains that followed, the proposal lay dormant for several years. Late in 1979, however, representatives from the Office of the Judge Advocate General renewed discussions with the Chief of Naval Operations on the question. Anticipating resistance, they were surprised to find a warm reception for their proposal. The line officers in the Office of the Chief of Naval Operations charged with reviewing the proposal, ever mindful of Navy protocol and usage, felt it unseemly and organizationally untenable to call both a branch office head, and his senior in the parent legal service office, an "officer in charge." Unquestionably, if there was an officer in charge at the branch office, his superior *must* be a commanding officer. As a result, on 4 January 1980, the Director, Naval Legal Service, became the Commander, Naval Legal Service Command, while officers in charge at the naval legal service offices became commanding officers.[L-20] Thus was the number of commands in the Navy Judge Advocate General's Corps increased overnight from one (the Naval Justice School) to more than twenty.[L-21]

Although the legal service office arrangement had served well to separate defense counsel from convening authorities, and thus defuse the command influence criticism, other criticisms of the legal organization remained. With both trial and defense counsel assigned to the same activity, a single reporting senior—the officer in charge, and later the commanding officer—evaluated the performance of both, more often than not against each other. There was a perception that a zealous defense counsel, fighting to keep his client from the administration of naval discipline, might incur disfavor with his reporting senior. There was also concern that the goals of trial and defense counsel, sharing

---

L-20. The branch offices became detachments, and the branch office heads became officers in charge.

L-21. Rear Admiral Charles E. McDowell, JAGC, USN, "A Personal Message from the Judge Advocate General," *Off the Record* (14 April 1980), 1; McDevitt, interview, 23 March 1992. The Naval Legal Service was officially redesignated as the Naval Legal Service Command. Its mission remained identical to that of the Naval Legal Service that it had replaced (see page A-132).

When established, the Naval Legal Service Command was headed by the Judge Advocate General of the Navy. In 1988 the Deputy Judge Advocate General was assigned this function. *Annual Report of the Judge Advocate General of the Navy, Pursuant to the Uniform Code of Military Justice, for Fiscal Year 1989*, at CXXXVII.

Digitized by Google

common facilities and working for a common organization, might become blurred. The Judge Advocate General had considered a plan at the time the Naval Legal Service was established in 1973 that would have created a separate defense counsel organization. Economics, however, intervened. Such a plan would have required approximately thirty additional lawyers on active duty, and an equal number of support personnel, at a time when the Navy Judge Advocate General's Corps was facing a personnel reduction of five percent. Further, it was felt that such a plan would splinter "a single, narrow element of the Navy's legal business into a separate command."[L-22] Legal service offices were admonished, however, to "[e]nsure that the defense counsel assigned to represent accused persons before courts-martial . . . are qualified and that they remain free from any improper influence in the conduct of their cases."[L-23]

Misgivings over the independence of defense counsel persisted, however, and came to a head with a complaint to the American Bar Association from a Navy judge advocate assigned to a legal service office.[L-24] Following discussions with the American Bar Association, Judge Advocate General James McHugh established a pilot trial defense counsel organization in the summer of 1983, despite funding and personnel shortages. The independent "Naval Legal Service Trial Defense Activity," as it was called, was stood up in Charleston, South Carolina. McHugh held out great promise for its success:

> I have looked forward to our pilot study on an independent defense activity for some time and consider it one of the most important undertakings we are engaged in currently. I am hopeful that this study will demonstrate that an independent defense activity fosters an even higher level of trial

---

L-22. "Establishment of the Naval Legal Service," *Naval Reserve Lawyers Association Newsletter*, Spring 1975, at 6.

L-23. Chief of Naval Operations Instruction 5450.189, Subject: "Naval Legal Service, Washington, D.C.; mission and functions of," 6 May 1974.

L-24. Rear Admiral James M. McHugh, JAGC, USN (Ret.), interview with Rear Admiral Robert E. Wiss, JAGC, USNR (Ret.), 5, 7 August 1989. The gravamen of the judge advocate's complaint was that the milieu of a legal service office, where trial and defense counsel used the same facility, shared the same secretaries, used the same file cabinets, and were also housed with the military judge, was inherently susceptible to conflicts of interest.

Digitized by Google

> advocacy on the defense and government sides of the equation than we presently have.[L-25]

The following year the trial defense pilot study was expanded, with the main office moving to Jacksonville, Florida, and detachments set up in Charleston, South Carolina, and Orlando and Key West, Florida.[L-26] Within another year, however, the entire program had been abandoned.[L-27] Judge Advocate General Flynn explained:

> [T]he increase of administrative overhead inherent in such a two-command structure would seriously tax the already limited number of senior and middle grade personnel available to serve in supervisory positions throughout the Naval Legal Service Command. Navy-wide implementation would also require the establishment of several remote trial defense detachments staffed by only one or two junior defense counsel. The professional development of these isolated defense counsel would necessarily suffer without the benefit of on-scene guidance from more experienced senior judge advocates. In sum, because we lack the resources to do the job right on a Navy-wide basis, I recommended to the Secretary of the Navy that he not continue the separate trial defense structure beyond its trial period.
>
> It is important to note that concern over the independence of defense counsel was not a factor in the decision to establish or disestablish the pilot program. The Naval Legal Service Command,

---

L-25. Rear Admiral James J. McHugh, JAGC, USN, "A Personal Message from the Judge Advocate General," *Off the Record* (15 October 1983), 1.

L-26. *Annual Report of the Judge Advocate General of the Navy, Pursuant to the Uniform Code of Military Justice, for Fiscal Year 1984*, at CXLIX. "The purpose of this move was to bring the headquarters into closer geographic proximity with the majority of the Defense Activity's components, which are located at naval facilities throughout the State of Florida." Judge Advocate General of the Navy, "Report to the American Bar Association," August 1984, at 7.

L-27. *Annual Report of the Judge Advocate General of the Navy, Pursuant to the Uniform Code of Military Justice, for Fiscal Year 1985*, at CXLVI.

Digitized by Google

> with subordinate naval legal service offices, has been an effective means of insulating defense counsel from improper external influences.[L-28]

Flynn noted, however, that the project had demonstrated that a separate trial defense command could improve the supervision, training, and professional development of junior defense counsel. To retain the momentum generated by the trial defense project, he instituted several important initiatives:

- ⚓ The Naval Justice School was tasked with the responsibility of developing and implementing an advanced training program directed at enhancement of trial skills for both trial and defense counsel, with particular emphasis on defense skills.
- ⚓ The Appellate Defense Division of the Navy-Marine Corps Appellate Review Activity established a program designed specifically to provide substantive and procedural advice to defense counsel, including staffing a daily telephone-watch duty section to respond to field inquiries.
- ⚓ The Navy Judge Advocate General's Corps Inspector General was specifically directed to investigate and report directly to the Judge Advocate General any allegations of improper influences on defense counsel.[L-29]

L-28. Rear Admiral Thomas E. Flynn, JAGC, USN, "A Personal Message from the Judge Advocate General," *Off the Record* (April 1985), 2.

L-29. Rear Admiral Thomas E. Flynn, JAGC, USN, "A Personal Message from the Judge Advocate General," *Off the Record* (January 1986), 1-2.

Despite his lack of options and the pragmatism of his decision in disestablishing the Trial Defense Activity, Flynn later had second thoughts:

> I had convinced the Secretary of the Navy that we should abandon the test program and not go to an independent defense command, because the naval legal service offices already provided the isolation from command that was required by Congressional mandates. But I wish, as I look back, that I had somehow found the resources to go ahead with an independent defense command. I wish that I had been able to find a way to satisfy my concerns about the small activity where you had a very junior defense counsel and the pressures that he would be subjected to and had gone to an independent

(continued...)

Digitized by Google

Ten years later the concept of a separation of trial and defense counsel was resurrected, but with a reversal in methodology; this time the trial attorneys were organized into a separate command. In 1995 a pilot "Trial Services Office" within the Naval Legal Service Command was established at Mayport, Florida. Officer, enlisted, and civilian personnel performing trial counsel and court reporting functions were split away, both physically and administratively, from existing naval legal service offices in the South and Gulf Coast areas, and organized into a separate command, reporting directly to the Commander, Naval Legal Service Command. The organizational plan for the Trial Service Office calls for full implementation by 1998-1999, at which time worldwide responsibility for all prosecution functions will have been transferred to trial services offices. Defense personnel will remain with the naval legal service offices, which will continue to provide defense services. Trial and defense counsel thus will have different reporting seniors for fitness report purposes, with the Commander, Naval Legal Service Command, being the common superior to both.[L-30]

Thus from a handful of lawyers assigned to naval district offices during World War II has evolved a worldwide organization of uniformed Navy lawyers, the Naval Legal Service Command.

L-29. (...continued)

> defense command. I think in the long run it's probably the way to go. I wish that I had had the resources of people and money to do it. I think looking back on it, from hindsight, that I should have found them some place, especially having thought about it longer and seen some of the things that I have seen since then.

Flynn, interview, 4 February 1987.

L-30. Commander, Naval Legal Service Command Instruction 5450.15, Subject: "Mission and Functions of Naval Legal Service Command Trial Service Office," 7 December 1994; Naval Reserve Legal FLAG★GRAM (August-September 1994).

Digitized by Google

Digitized by Google

APPENDIX M

The Navy-Marine Corps Trial Judiciary

The Navy-Marine Corps Trial Judiciary, an activity under the direct authority of the Judge Advocate General of the Navy, is the umbrella command for the military judges of the Navy and Marine Corps who preside over general and special courts martial. The Trial Judiciary has its origins in the U.S. Navy-Marine Corps Judiciary Activity, first organized in 1962.[M-1] Its purpose was to remove the general court martial law officers from the command structure of the district commandants who convened most of the general courts martial over which they presided, and place them in an independent activity under the direct supervision of the Judge Advocate General of the Navy.[M-2] An independent activity would also permit the more efficient administration and assignment of law officers to general courts martial.[M-3]

M-1. Judge Advocate General of the Navy, letter to Administrative Assistant to the Secretary of the Navy, Subject: "Orientation Program—Up-dating of Briefings," 12 November 1963.

Generous tells us that the Army Judge Advocate General had established a "Field Judiciary Division" in 1958, appointing his lawyers to permanent duty as law officers responsible only to the Judge Advocate General, who rated them on the basis of their procedural performance. William T. Generous, Jr., *Swords and Scales, The Development of the Uniform Code of Military Justice* (Port Washington, N.Y.: Kennikat Press, 1973), 117. On 1 January 1961, the Navy implemented an independent "circuit rider" system of its own, on a pilot basis. Independent judiciary units were established for the Washington, D.C., and Norfolk, Virginia, areas. The Marines had established a similar program the previous September. *Off the Record* (December 1960), 1.

M-2. Rear Admiral Merlin H. Staring, JAGC, USN (Ret.), interview with Rear Admiral Robert E. Wiss, JAGC, USNR (Ret.), 17 October 1989.

M-3. In simplest terms, a law officer was a lawyer who presided over a court martial in a non-voting capacity. The first law officers in the Navy and Marine Corps date from the inception of the *Uniform Code of Military Justice*, in 1951 (see text at page 502). The *Uniform Code* contained a requirement that a law officer preside over all general courts martial. Prior to that time the president of a general court martial was generally a non-lawyer line officer. The Judge Advocate General was responsible for certification of law officers.

Digitized by Google

The Military Justice Act of 1968 (see discussion in Appendix L) redesignated the law officer as a "military judge," and extended the requirement that military judges preside over most special courts martial. Navy and Marine Corps law officers thus became general court martial military judges, while at the same time assuming a secondary duty as military judges for special courts martial.[M-4] Other Navy judge advocates, not assigned to the Judiciary Activity, were certified by the Judge Advocate General to perform duties as military judges for special courts martial only. Unlike the general court martial military judges, they continued to perform other functions in addition to their assignments from time-to-time as military judges.[M-5]

In 1974, the Secretary of the Navy determined that all special courts martial, as well as general courts martial, should be tried, insofar as possible, by full-time military judges. The U.S. Navy-Marine Corps Judiciary Activity was redesignated the Navy-Marine Corps Trial Judiciary. It was reorganized and expanded to include both general and special court martial judges. With certain exceptions, only Navy and Marine Corps judge advocates assigned to the Trial Judiciary were to be certified as military judges.[M-6] The Judge Advocate General of the Navy was assigned command of the Trial Judiciary, and authorized to organize, administer, assign, and re-assign functions to it. The mission of the Navy-Marine Corps Trial Judiciary was

> [t]o provide certified military judges for all general courts-martial convened within the naval service and all special courts-martial convened on board a Navy ship, station, or activity (except those special courts-martial for which the utilization of a certified military judge, not assigned to the Trial Judiciary, is authorized pursuant to directions of the Judge Advocate General), and to perform such other

---

M-4. Captain Richard J. Selman, JAGC, USN, "The Military Justice Act of 1968: Some Problems and Practical Solutions," *JAG Journal* (May-June 1969), 150.

M-5. Judge Advocate General of the Navy Instruction 5817.1 to All Ships and Stations, Subject: "Military Judges; Certification of," 14 July 1969.

M-6. Judge Advocate General of the Navy Instruction 5817.1A, to All Ships and Stations, Subject: "Military Judges; Certification of," 31 July 1974; Rear Admiral Merlin H. Staring, "A Personal Message from the Judge Advocate General," *Off the Record* (14 January 1975), 5.

Digitized by Google

> functions as may be assigned under the direction of the Judge Advocate General.[M-7]

Branch offices of the Trial Judiciary were designated "judicial circuits," with a military judge in charge. It was recognized that the staff of the Trial Judiciary would not be sufficient to permit it to furnish military judges for all special courts martial convened on board all ships, stations, and activities of the Navy. Because of this the cognizant circuit military judge was authorized to detail a judge advocate not assigned to the Trial Judiciary, but certified as a military judge, for the trial of special courts martial "as may reasonably be required under the attendant circumstances."[M-8]

Closely related to the Trial Judiciary, although not a part of it, is the Navy-Marine Corps Military Magistrate Program, an institution dictated by the United States Court of Military Appeals. A 1976 decision of that court, *Courtney v. Williams*,[M-9] mandated that "a neutral and detached magistrate should determine, in each case of a service member who has been confined pending trial by court-martial, whether such service member 'could be detained and if he should be detained.'"[M-10] All officers exercising general court martial jurisdiction over shore activities having a naval place of confinement within the Navy and Marine Corps were required to appoint one or more military magistrates. Navy appointees were required to be judge advocates; Marines were not. The military magistrate could not be connected with law enforcement or the prosecutorial or defense function, nor could he or she be a member of the Navy-Marine Corps Trial Judiciary or the Marine Corps Special Court-Martial Judiciary. The function of the military magistrate was to determine whether pre-trial

---

M-7. Secretary of the Navy Instruction 5813.6B to All Ships and Stations, Subject: "Navy-Marine Corps Trial Judiciary; mission, organization, functions, and support," 18 June 1974. Marine Corps judge advocates were organized into a separate "Marine Corps Special Court-Martial Judiciary" to try Marine Corps special courts martial. Secretary of the Navy Instruction 5813.7 to All Ships and Stations, Subject: "Marine Corps Special Court-Martial Judiciary; mission, organization, functions, and support," 18 June 1974.

M-8. Secretary of the Navy Instruction 5813.6B, 18 June 1974.

M-9. 1 M.J. 267 (C.M.A. 1976).

M-10. Secretary of the Navy, message to All Navy Activities, Subject: "Establishment of Navy-Marine Corps Military Magistrate Program," 13 April 1976, quoting from *Courtney v. Williams*. The procedures set forth in the message were later incorporated into Secretary of the Navy Instruction 1640.10, and ultimately into a 1984 revision to the *Manual for Courts Martial*. They now appear as Rule 305i of the *Manual*, "Procedures for Review of Pretrial Confinement."

Digitized by Google

confinement, ordered by the convening authority, was appropriate for a service member accused of a violation of the *Uniform Code of Military Justice*. In theory and in fact, a junior-officer judge advocate could countermand the confinement order of a flag-officer. Recognizing the enormous potential for harm to the command structure if extended too far, the Secretary drew the line at the gangway:

> The operational readiness of ships at sea would be diminished significantly if the traditional authority of the commanding officer to order pretrial confinement could be countermanded by another aboard. In those cases, however, in which pretrial confinement is ordered at sea, the commanding officer of the ship shall make arrangements for the transfer of the service member as soon as practicable to the nearest command ashore having an approved confinement facility.[M-11]

In fiscal year 1996, judges of the Navy-Marine Corps Trial Judiciary officiated at 529 general courts martial and 2,787 special courts martial. Of these, 2,906 (88%) were tried by military judge alone, at the request of the defendant; proof that the Navy-Marine Corps Trial Judiciary, together with the military magistrate program, provide the naval-service defendant with strong guarantees of due process and fairness in adjudication.

M-11. Secretary of the Navy, message, 13 April 1976. The Secretary's recognition of the near-absolute authority of a commander at sea is a telling reminder that even to the present day are the unwritten "customs of the sea" observed.

Digitized by Google

APPENDIX N

The Naval Justice School: 1950 to Date

As noted in the text, 1950 saw the dedication of the "U.S. Naval School (Naval Justice)" as a tenant command at the U.S. Naval Base in Newport, Rhode Island, following its move from Port Hueneme, California (see text beginning at page 504).[N-1] The school was controlled, not by the Judge Advocate General of the Navy, but by the Bureau of Naval Personnel. The Judge Advocate General served only as the school's "technical manager."

The Naval Justice School occupied a semi-autonomous position at the Newport Naval Base, not falling within the sphere of the extensive Naval Schools Command that controlled the vast majority of the training facilities there. It was not long before an attempt was made to alter this arrangement. In March 1955, the Schools Command proposed to the Secretary of the Navy that the school be incorporated into its ambit. The Chief of Naval Personnel, who managed the school, successfully opposed the plan, stating that the school was "essential . . . if the complex Code of Military Justice [was] to be administered in [a] manner which will reflect credit upon the Navy."[N-2] A few months later the same proposal

---

N-1. The school retained the title "U.S. Naval School (Naval Justice)" until 1961, when it became the "Naval Justice School." Secretary of the Navy Notice 5450 of 9 May 1961. For ease of reference it will be referred to throughout this appendix as the "Naval Justice School" or the "Justice School."

N-2. U.S. Naval Justice School, "Significant Dates in the History of the Naval Justice School," n.d. In expressing his views as to why the Naval Justice School should be operated separately from the rest of the school system at Newport, the Chief of Naval Personnel stated "[t]he School of Naval Justice is operated under the technical control of the Judge Advocate General and is the only Navy training activity which conducts an organized resident course in Military Justice. It is a professional school which requires the prestige of a Commanding Officer and the nature of the training offered is such that it does not fit into the pattern of other training conducted within the Naval Schools Command at Newport. The interposition of the Schools Command, without professionally qualified lawyer-officers, between the School and the Bureau of Naval Personnel which exercises management control, would conceivably complicate the local administration of the School without a corresponding improvement in management or supervision of the activity. It would appear desirable for the Naval Justice School to remain outside of the Schools Command, Newport." Chief of Naval Personnel, memorandum to Assistant Secretary of (continued...)

Digitized by Google

arose again, this time in a First Naval District survey that recommended that "[the Chief of Naval Operations] in conjunction with [the Bureau of Naval Personnel] and [the Judge Advocate General] reassign the U.S. Naval School (Naval Justice), Newport, R.I., as a component of the U.S. Naval Schools Command, Newport, R.I., and adjust personnel allowances and assignments accordingly."[N-3] The rationale behind this recommendation was that coordinating and consolidating the administration of the school would result in considerable economy and efficiency "particularly in the centralization of officer and enlisted personnel records and other administrative procedures." In response, the acting commanding officer of the Justice School, Lieutenant Richard Bacharach, USNR, articulated several reasons why consolidation was ill-advised and why predicted savings were unrealistic and unsupported. Lieutenant Bacharach also pointed out that the proposal was not a new one, but rather one which had been made and rejected repeatedly in the past and the third such suggestion in the last eighteen months.[N-4] The Commandant, First Naval District, agreed with Bacharach's position, and no further action was taken.

With the struggle over jurisdiction settled for the moment, the Justice School turned its attention to its primary mission, training. By 1955 the school had added a senior officer course for Naval War College students, and a Reserve-lawyer refresher course, and had expanded into a second building.[N-5] While there was still no course for Navy lawyers, the school was providing training in the *Uniform Code* to significant numbers of general service line officers each year.[N-6] The school seemed finally on an even keel.

N-2.(...continued)
the Navy for Personnel and Reserve Forces, 17 March 1955.

N-3. Commandant, First Naval District, letter, ser: 0635NDOD4, of 17 November 1955.

N-4. Commanding Officer, U.S. Naval School (Naval Justice), letter to Naval Inspector General (OP-008), 23 November 1955.

N-5. U.S. Naval Justice School, "Significant Dates in the History of the Naval Justice School," n.d.

N-6. The Hoover Commission Task Force noted with approval the Navy's program of giving training in military law to non-legal personnel, stating "Were [more] senior ranking non-JAG officers trained in requirements of the [*Uniform Code of Military Justice*], there would be a more realistic appreciation of it and less unfounded generalized attacks against it." Task Force on Legal Services and Procedure, ***Report on Legal Services and Procedure*** (Prepared for the Commission on Organization of the Executive Branch of the Government), March 1955, at 107.

Digitized by Google

Then, in a reversal of his prior support for an independent Naval Justice School, the Chief of Naval Personnel, in 1970, recommended that the school be disestablished as a separate command and transferred to a new Naval Education and Training Center command being established at Newport as one of several schools of the new command. Such a proposal would result in the school being headed by a director, instead of a commanding officer, and being placed under an additional layer of local command. Rear Admiral Joseph McDevitt, the Judge Advocate General, vigorously opposed the plan:

> [L]et me make absolutely clear that visibility of the JAG Corps, although involved, is not my prime concern. What is involved is a matter of vitally important and current interest to the Navy—the image of military justice. At a time when charges of command control are being levied in increasing numbers and we are facing undesirable Congressional actions, which would purport to remedy it, this consolidation would move precisely 180 degrees in the wrong direction—in the direction of appearance of command control. It could not help but receive highly unfavorable publicity.[N-7]

Rear Admiral McDevitt further questioned the purported savings that would result if consolidation were to take place, and noted that the Naval Justice School building plan, which had recently been revised to include an additional floor to house the Newport Law Center, would effect savings "far in excess of the contemplated $52,000.00 of the present plan." He suggested two alternatives to the contemplated consolidation: (1) continue the present arrangement, or (2) transfer the Naval Justice School to the command of the Judge Advocate General as a field activity. In support of the latter proposal he pointed out that virtually all of the professional and specialized training for medical department personnel was conducted at schools and activities under the management control of the Chief, Bureau of Medicine and Surgery.

McDevitt's opposition bought time, but the proposal resurfaced only a few months later. In a letter to the Secretary of the Navy, Rear Admiral McDevitt

---

N-7. Judge Advocate General, letter, to Secretary of the Navy, Subject: Consolidation of U.S. Naval Justice School with the Officer Candidate School and the Naval Schools Command, Newport, Rhode Island, 18 November 1970.

Digitized by Google

restated his strong opposition.[N-8] Referring to his earlier letter, McDevitt pointed out that some of the deleterious effects he had predicted if such a consolidation were to take place had begun to surface. For instance, whereas previously the job of commanding officer of the Naval Justice School was one of the most desirable Judge Advocate General's Corps captain billets available, none of the twelve candidates under consideration to replace the present commanding officer was interested unless he could be assured that the school would retain its command status. "Officers of the caliber we need in this key billet are simply not attracted to the position if it is to be diminished to a subordinate administrative stature." Pointing out that the Naval Justice School was the only command in the Navy to which a lawyer could aspire as a commanding officer, McDevitt stated that such a loss of command opportunity would have a substantial negative effect on retention at a time when all efforts were being expended to try to reverse an unfavorable trend in that area. "This effect will by no means be limited to officers in a position to aspire *now* to assignment [as Naval Justice School commanding officer], but will be felt as well among young officers who examine future prospects and opportunities as they consider their career decisions."

McDevitt also pointed out that consolidation would result in a de-emphasis of military justice, as the school would become only one of a number of subordinate elements of the Naval Officer Training Center, whose mission would be extremely broad and make no mention of providing high quality instruction in the administration of the naval disciplinary system:

> Whatever assurances might be given regarding the continued quality and importance of the Justice School despite its organizational de-escalation, the disestablishment of the School as a separate command and the disappearance of its official mission statement would be regarded as an indication of de-emphasis. I believe that it would rightly be so regarded, and that the damaging effect on the Judge Advocate General's Corps and on the administration of military justice in the Navy would be both real and substantial.[N-9]

N-8. Judge Advocate General, Memorandum for the Secretary of the Navy, Subject: Consolidation of U.S. Naval Justice School with the Officer Candidate School and the Naval Schools Command, Newport, Rhode Island, 24 April 1971.

N-9. Judge Advocate General, Memorandum for the Secretary of the Navy, 24 April 1971.

Digitized by Google

McDevitt won the day. In June 1971, Acting Secretary of the Navy John W. Warner approved the establishment of the Naval Education and Training Center, Newport, but excluded the Naval Justice School from its scope:

> The reasons militating against the inclusion of the Naval Justice School . . . are compelling. The Naval Justice School will therefore continue under the command of a commanding officer from the Judge Advocate General's Corps. In view of the necessity of effecting substantial dollar savings in all areas, however, it is directed that the Naval Justice School arrange to effect an annual saving of at least $26,000, or half of the annual saving which it is estimated would be effected through the inclusion of the School in the proposed consolidation.[N-10]

Despite this strong statement by Secretary Warner, not two years had passed before the consolidation plan resurfaced. In October 1973, the Judge Advocate General, now Rear Admiral Merlin H. Staring, wrote to the Secretary of the Navy to express his strong opposition to consolidation.[N-11] While first acknowledging the importance of the school's visibility to the Judge Advocate General's Corps, which enhanced *esprit de corps* and career motivation for judge advocates, Staring wrote that the prime consideration in maintaining the school's autonomy was

> the image of military justice in the naval service. Charges of command control over military justice continue to be levied, both in Congress and in the civilian community. The proposed consolidation moves in a direction exactly opposite to one which would aid in dispelling those charges, and it is contrary to our efforts to prevent even an appearance of the evil of command influence. Instead of assisting in raising the administration of military justice above the possibility of criticism, it lowers its status by relegating our specialized

---

N-10. Secretary of the Navy, memorandum for the Chief of Naval Operations, 23 June 1971.

N-11. Judge Advocate General, letter to the Secretary of the Navy, 15 October 1973.

Digitized by Google

> professional training facility to a lower level of command—as a department within a command charged with general officer-training responsibilities.[N-12]

Rear Admiral Staring reiterated many of the concerns expressed by his predecessor, noting that the school's mission would be "subordinated to and submerged within a general training function . . . [t]he necessary liaison, intercourse, and exchange of ideas between commands and the Naval Justice School as an entity would be lost; and the visible, official emphasis on a fair and impartial system of justice would be submerged from view."[N-13] Once again, consolidation had been avoided, although control of the school still lay beyond the Judge Advocate General.

Up to this time, while there had been attempts to grasp control of the school, there had been no effort to remove it from Newport. That changed several years later, in the most bizarre incident yet in the struggle for the soul of the Naval Justice School.

The University of Mississippi, in Oxford, Mississippi, had formed a committee in November 1978, "to consider the desirability and feasibility of attracting the United States Naval Justice School to the University of Mississippi," in an association similar to that between the U.S. Army and the University of Virginia. The committee had recommended to the dean that he take "immediate action to bring this matter to the attention of the Chancellor of the University and urge him to accord it high priority."[N-14]

Either the dean, or the chancellor, or both, failed to share the committee's sense of urgency, for nothing happened for over a year. Then, in February 1980, apparently acting without further authority from the dean, the chancellor, or the committee, the committee chairman sent a memorandum to Captain I.K.

N-12. In discussing the matter of career motivation, Rear Admiral Staring had emphasized the fact that the Naval Justice School was the single command in the Navy to which a lawyer could aspire as commanding officer. "For that reason, its very existence is a motivating factor for both junior and senior judge advocates in terms of career aspirations and challenging duty. The commanding-officer billet further provides broad training for higher assignment; two of the last four [Judge Advocates General] have been former [commanding officers] of the Naval Justice School." Judge Advocate General, letter to Secretary of the Navy, Subject: "SER Proposal for disestablishment of the Naval Justice School as a separate command," 15 October 1973, at 3.

N-13. Judge Advocate General letter to Secretary of the Navy, 15 October 1973, at 3.

N-14. University of Mississippi Naval Justice School Committee, memorandum to Dean Parham Williams, 3 November 1978.

Digitized by Google

Heyward, USN, the commanding officer of the Naval Reserve Officers Training Corps unit at the University of Mississippi, seeking to enlist his aid in the proposal. Heyward required little persuasion, immediately contacting Judge Advocate General of the Navy Charles E. McDowell, who in turn directed him to the Chief of Naval Education and Training who had management cognizance over the Justice School. Heyward thereupon sent an "official" letter to the Chief of Naval Education and Training, requesting statistics and other information regarding the Naval Justice School.[N-15] On the following day he sent a second, handwritten letter, explaining why he had sent the first letter. In the second letter, Heyward was particularly careful to point out that the university's new law center, facing excess capacity, was actively seeking an alliance with the Navy in order to retain its legislative funding which operated on a per capita enrollment basis. He explained that the law center had a capacity for 1,000 students, but that the current enrollment was only 510, with a projected rise to only 600 in the next twenty years. In addition, Heyward stated, there were several empty dormitories that could be renovated or replaced, and land was available for expansion. He stated that the university might also pursue the proposal through Congressional channels, mentioning Senator John C. Stennis, and Representatives "Sonny" Montgomery, and Jamie Whitten of the Mississippi delegation. Finally, he mentioned the possibility of speaking with a General Wilson, Admiral Means Johnston, and a General "Dusty" Miller, all retired and residing in Mississippi.[N-16] The Judge Advocate General of the Navy received copies of both letters.

The Judge Advocate General's response came in the form of a memorandum from Captain Gardiner M. Haight, JAGC, USN, commanding officer of the Naval Justice School, addressed to the staff judge advocate on the staff of the Chief of Naval Education and Training.[N-17] Captain Haight pointed out that, unlike the Army Judge Advocate General's School, which conducts training almost exclusively for lawyers, of the approximately 2,000 students trained annually by the Naval Justice School, fewer than 200 of them were lawyers. "This minimizes the necessity or desirability of locating the Naval Justice School at a state law school," noted Captain Haight. He also stated that the proposal that the Naval Justice School would have the use of classrooms at the University of Mississippi

---

N-15. Commanding Officer, NROTC Unit, The University of Mississippi, letter to Chief of Naval Education and Training, Subject: "Possible relocation of U.S. Navy [*sic*] Justice School; request for information concerning," 14 February 1980.

N-16. Commanding Officer, NROTC Unit, The University of Mississippi, handwritten letter to Admiral Gibbons [Chief of Naval Education and Training], 15 February 1980.

N-17. Commanding Officer, Naval Justice School, memorandum to Staff Judge Advocate, Chief of Naval Education and Training, Subject: "Proposal by University of Mississippi that Naval Justice School be moved from Newport, Rhode Island to Oxford, Mississippi; comments concerning," 18 March 1980.

Digitized by Google

only during the time that they were not otherwise being used was unacceptable, and further, that the Justice School would require a dedicated building or wing for its exclusive use. He then enumerated the Naval Justice School's specific requirements, the substance of which showed clearly that "Ole Miss" had not done its homework.[N-18]

Noting that at the time there was no local airport in Oxford, Mississippi, Captain Haight predicted that considerable logistic and financial problems might be imposed. "It seems inescapable that a move away from Newport would amount to increased costs for the transportation and per diem to students. Funding constraints require less travel expense, not more."[N-19]

The following month Haight paid a visit to the University of Mississippi. He had discussed the trip in advance with both the Judge Advocate General and the Deputy Judge Advocate General, and they had decided that he would travel "incognito" and unannounced, his only contact with the university being Captain I.K. Heyward, who was requested to provide an appropriate "cover." Despite this careful planning, and the fact that the school was on spring recess, when Haight arrived at the naval science building to meet Heyward he was greeted by and introduced (by Heyward) to a Navy lieutenant named Jamie Barnett who was attending law school there, who just happened to be at the naval science building,

---

N-18. These included four, fifty-seat classrooms, one equipped with electrical outlets for fifty typewriters and recording devices; six seminar/moot court rooms; a twenty-seat conference room; a 200-seat auditorium; an executive suite with offices for the commanding officer, executive officer, curriculum director, and their secretaries; individual offices for each of eighteen instructors; office space for administration and fiscal personnel; space for a print shop; store rooms for audio-visual equipment and printing supplies; a military law library convenient to instructor offices and classrooms, with sufficient space for library tables or carrels for student use; military commissary and exchange facilities; medical facilities; recreational facilities; dedicated telephone lines; a military travel office; military purchasing office services; military disbursing and finance office services; and a military personal property office for staff and student household moves and claims. Commanding Officer, Naval Justice School, memorandum to Staff Judge Advocate, Chief of Naval Education and Training, 18 March 1980.

N-19. Captain Haight also pointed out the significant training loss that such a move would create, listing all the local Newport commands which currently receive on site Naval Justice School training at no cost, *e.g.*, Naval War College, Surface Warfare Officers School, Chaplains School, Naval Academy Preparatory School, and the Submarine School. Finally, Captain Haight noted that "[a] quick assessment of feeling on the staff reveals that Oxford, Mississippi would not be considered as desirable a duty station as Newport, Rhode Island. Consequently, it might be expected that assignment to the staff of the Naval Justice School would not be considered the desirable duty that it now is." Commanding Officer, Naval Justice School, memorandum to Staff Judge Advocate, Chief of Naval Education and Training, 18 March 1980.

Digitized by Google

and who just happened to be the nephew of former Mississippi governor Ross Barnett.[N-20]

Haight's visit confirmed his belief that moving the Naval Justice School to Oxford, Mississippi, would be costly and not in the Navy's best interest.[N-21] Apparently the concept was abandoned by "Ole Miss," for no formal proposal was ever submitted to the Judge Advocate General or the Chief of Naval Education and Training.

A significant milestone was reached in October 1983, when full responsibility for and authority over the Naval Justice School was finally transferred to the Judge Advocate General, with the "claimancy" being shifted from the Chief of Naval Education and Training to the Commander, Naval Legal Service Command. Forty years after Lieutenant (junior grade) Chalmers Lones distributed his first course outline at the Naval Courts and Boards Training Course in Port Hueneme, California, the Judge Advocate General of the Navy had assumed full control over the teaching of naval justice.

On 1 March 1984, the school moved from its World War II wooden buildings into its present facility, Bradley Hall, a 27,000 square foot building formerly used as a barracks, which had been totally rehabilitated and equipped specifically for Naval Justice School purposes.[N-22] Seven years later, in June 1991, a new wing was dedicated, vastly increasing the size, capacity, and technical capabilities of the school. Named Helton-Morrison Hall, the wing was named in memory of Legalman First Class Michael William Helton, and

---

N-20. Of this "coincidence," Haight commented: "I [found it] a bit disquieting and rather counter to my agreement with CAPT Heyward, but [I] may be guilty of reading too much into [it]." Commanding Officer, Naval Justice School, memorandum to Staff Judge Advocate, Chief of Naval Education and Training, Subject: "Orientation visit to Oxford, Mississippi; report of," 17 April 1980.

N-21. In his after-trip report, Captain Haight related his findings and impressions in detail, and not without a touch of sardonic humor. He described the university as sitting in "rural isolation." He noted that the inadequate gymnasium was so crowded that intramural teams sometimes must schedule basketball games as late as 10:30 p.m. He described the new law center building as "modern monolithic" or "fortress" style, and noted that there were two large, terraced cavities, apparently intended as "conversation pits," at its center, into which several persons had fallen ("nothing like building a new law building with built-in torts"). When he asked Captain Heyward about message traffic, the response was that they didn't have much, "and what they did have they picked up at the drugstore." "After that," said Haight, "I let the subject drop." Commanding Officer, Naval Justice School, memorandum to Staff Judge Advocate, Chief of Naval Education and Training, 17 April 1980.

N-22. U.S. Naval Justice School, "Significant Dates in the History of the Naval Justice School," n.d.

Digitized by Google

Legalman First Class Robert Kenneth Morrison, two sailors who lost their lives in the explosion on board the battleship *Iowa* in April 1989.

Today's Naval Justice School curriculum continues its dual dedication to the training of both lawyers and non-lawyers in the essentials of military justice. Navy, Marine Corps, and even Coast Guard lawyers receive in-depth training in military justice and other fields in which they will practice. Reserve lawyers receive refresher training in the same areas. There are courses for staff judge advocates, basic and advanced courses for legalmen, courses for court reporters, and courses in the law of naval operations. In addition to a course for collateral-duty legal officers, senior-officer non-lawyers receive military justice training in courses offered around the world. Training in military justice has become recognized as an essential requirement for those slated for command; at the Surface Warfare Officers School, military justice training is part of the curriculum for prospective commanding officers, executive officers, and department heads. Justice School instructors also provide training to students attending Officer Indoctrination School, the Chaplain's School, the Navy War College, and the Senior Enlisted Academy. A knowledge of military justice and operational law are recognized today as essential tools throughout the Navy and Marine Corps. The Naval Justice School is providing the men and women of the naval service with that knowledge.

Digitized by Google

APPENDIX O

Women in the Navy Judge Advocate General's Corps

Notwithstanding any other provision of law, all provisions of law applicable to a male officer in the Judge Advocate General's Corps of the Navy, including the Naval Reserve, are applicable to a woman officer in that corps.—PUBLIC LAW 90-179, SEC. 11, ESTABLISHING THE NAVY JUDGE ADVOCATE GENERAL'S CORPS

The first large-scale opportunity for women to serve in the Navy came during World War II. On 30 July 1942, Congress authorized establishment of the Women Accepted for Volunteer Emergency Service Program, known better by its acronym, "WAVES." The WAVES constituted a Reserve organization of the Navy for women, separate from all other naval communities, comprising both officer and enlisted ranks.[O-1]

As with the men called to duty during World War II, a law degree meant little with regard to duty assignments. Although it is not known how many of the initial WAVES volunteers were lawyers, only three were ordered to duty in the Office of the Judge Advocate General.[O-2] They were the very first female lawyers in the Navy detailed to perform legal duties exclusively. They were assigned during their tours to the ship, ordnance, and facilities contracting section; the public works contracting section; the federal and state tax section; and the on-going project to revise the *Laws Relating to the Navy, Annotated.* None remained on

O-1. See Julius Augustus Furer, *Administration of the Navy Department in World War II* (Washington, D.C.: Department of the Navy, Naval History Division, 1959), 987. The Marine Corps Women's Reserve had been organized on 13 February 1942. Furer, 989.

O-2. The three were Ensign Lucille Fryer, USNR, Ensign Irene Kuchinskas, USNR, and Ensign Louisa R. Pearson, USNR. They were assigned to the Office of the Judge Advocate General in 1943. Richard G. McClung, Office of the Under Secretary of the Navy, unaddressed memorandum, Subject: "Divisions III and IV of the Office of the Judge Advocate General," 10 April 1943, at 7, 9.

Digitized by Google

active duty after the War.[O-3] Other WAVES lawyers, not assigned to the Office of the Judge Advocate General, served in a variety of capacities during World War II, but rarely did they perform legal duties, even in a collateral role. Their usual assignments were in the fields of personnel and supply. Virtually all returned to civilian practice or other civilian jobs at war's end.[O-4]

At the time the Law Specialist Program was established in 1947, there were two WAVES lawyers serving in the Office of the Judge Advocate General: Lieutenant J.R. Garrison, USNR, and Lieutenant D. Salipante, USNR.[O-5] They were likely the only women in the Navy at that time performing legal duties, and certainly the only ones performing legal duties exclusively. Although both applied, neither was accepted into the Law Specialist Program, and by 1955 both had left active duty.

A few women lawyers were voluntarily recalled to active duty during the Korean War (1950-1951), but not to perform legal work.[O-6] During the course of the next decade, however, three of these women managed to become Law Specialists, although none was permitted to augment to the Regular Navy.[O-7] When the Judge Advocate General's Corps was formed in 1967, only one of the three, Mary McDowell, affiliated with it.[O-8] As previously noted in the text (see page 526), McDowell went on to become the first woman to serve as a captain in the Navy Judge Advocate General's Corps. Corise Varn and Clare Streinz

---

O-3. Commander Elvera Wollitz Smith, USNR (Ret.), interview with Captain Paul K. Costello, JAGC, USNR, 1 April 1991.

O-4. Smith, interview, 1 April 1991; Captain Mary Louise McDowell, JAGC, USNR (Ret.), interview with Captain Paul K. Costello, 4 April 1991.

O-5. *JAG Journal* (June 1948), "Directory," 10, 12.

O-6. See the account of Mary McDowell starting at page 525 of the main text.

O-7. The three were Mary L. McDowell, Corise P. Varn, and Clare J. Streinz. McDowell, interview, 4 April 1991.

About this time the American Bar Association began collecting statistics on the number of women in law schools. In 1963, women comprised 3.7 percent of the law school enrollment in ABA accredited law schools. By way of comparison, the three women in the Law Specialist Program in 1963 comprised 0.006 percent of the Law Specialists on active duty. By 1992, accredited law schools were enrolling 42.5 percent of their student body as women. The percentage of women in the Navy Judge Advocate General's Corps at that time was 18.3. (Data obtained from Office of the Judge Advocate General of the Navy, Military Personnel Division.)

O-8. Note that early versions of the Navy Judge Advocate General's Corps bill specifically excluded women from affiliating with it. See footnote 12-82.

Digitized by Google

chose to remain with the WAVES.[O-9] Several other woman lawyers on active duty at this time were serving as restricted line officers (WAVES), not

Mary Louise McDowell receives congratulations from Rear Admiral W.P. Mack, USN (otherwise unidentified) upon her promotion to captain in 1967. (U.S. Navy photograph)

performing legal duties.[O-10] None of them affiliated with the Navy Judge Advocate General's Corps.

O-9. Rear Admiral Donald D. Chapman, JAGC, USN (Ret.), interview with author, 17 July 1991.

O-10. McDowell, interview, 4 April 1991.

Digitized by Google

The decade of the 1960s had witnessed a broadly changing role of women in society. Riding the crest of civil rights reforms, and fueled by the efforts of female activists, dramatic progress was achieved toward equal rights and equal opportunities. Change extended even to the military services, which were becoming more democratic as they moved to an all-volunteer force. Reflective of this change was the Task Force on the Administration of Military Justice in the Armed Forces, a commission created by the Department of Defense on 5 April 1972. The task force was charged, in part, with recommending ways to strengthen the military justice system and to "enhance the opportunity for equal justice for every American service man *and woman*."[O-11] (Italics added.)

On 30 November 1972 the task force submitted its report to the Secretary of Defense. One conclusion it reached was that the military services were being influenced by broad societal practices, including those of affirmative action and equal opportunity.[O-12] It recommended, among other things, that servicewomen be included as active participants in equal opportunity and human relations programs.[O-13]

Rear Admiral Merlin H. Staring, JAGC, USN, the Navy Judge Advocate General, who had served on the task force together with the Judge Advocates General of the other services, immediately undertook conscious and concentrated efforts to increase the representation of women in the Navy Judge Advocate General's Corps. Concerned with issues that created barriers to women in military service such as pregnancy discharges and discharges of women with dependent children, Staring initiated a study aimed toward proposed revisions to the United States Code which would eliminate discrimination on the basis of sex.[O-14] Issues of equal opportunity became priority topics.[O-15] His efforts met

---

O-11. *Report of Task Force on the Administration of Military Justice in the Armed Forces*, v. 1, 1972, at 1.

O-12. Rear Admiral Merlin H. Staring, JAGC, USN (Ret.), interview with Rear Admiral Robert E. Wiss, JAGC, USNR (Ret.), 17 October 1989.

O-13. *Report of Task Force on the Administration of Military Justice in the Armed Forces*, v. 1, at 112-25.

O-14. Judge Advocates Association, *Minutes of the Twenty-sixth Annual Meeting* (Report by Rear Admiral Merlin H. Staring, JAGC, USN, Judge Advocate General of the Navy), 14 August 1972.

O-15. Rear Admiral Merlin H. Staring, JAGC, USN (Ret.), letter to author, 28 September 1992; Staring, interview, 17 October 1989.

Digitized by Google

with some degree of success; the number of women in the Navy Judge Advocate General's Corps increased almost four-fold during his tenure.[O-16]

Staring's initiatives were carried forward by his successor, Rear Admiral Charles E. McDowell, JAGC, USN (no relation to Mary McDowell). In 1978, at the annual meeting of the Judge Advocates Association, Judge Advocate General McDowell stated that the Navy Judge Advocate General's Corps's "ability to be selective in [its] accession program has not . . . caused [it] to ignore [its] responsibility in recruiting . . . women judge advocates."[O-17] This matter of the recruiting and retention of women in the Navy Judge Advocate General's Corps had become a recurring topic of interest and discussion at Judge Advocates Association meetings.[O-18]

Several years later, during his term as Judge Advocate General, Tom Flynn assessed the status of women in the Navy Judge Advocate General's Corps, and in addition highlighted a problem apart from the discrimination issue—that of marriage between active duty judge advocates:

> My concern is that in the past we have had very few women in senior positions in our corps. As a matter of fact, we only have one 0-6. We have one commander. We have—I don't know how many lieutenant commanders, but not a large number. The vast majority of our women officers are in the lieutenant (junior grade) and lieutenant

---

O-16. At the time I came in as Deputy Judge Advocate General, and then as Judge Advocate General, I believe that there were relatively few women in the organization. I don't know exactly how many women officers there were. If I had to guess, I would say that the number might have been a dozen or thereabouts, at the most—that's my recollection. We did make a concerted effort to interest women officers and to recruit women officers who were interested in becoming JAG Corps officers, and I think we had a fair degree of success at that. I think the number of women lawyers in the JAG Corps, by the time I departed, would have been perhaps three or four times the number that were there when I entered those offices.

Staring, interview, 17 October 1989.

O-17. Judge Advocates Association, *Minutes of the Thirty-second Annual Meeting* (Report by Rear Admiral Charles E. McDowell, JAGC, USN, Judge Advocate General of the Navy), 7 August 1978.

O-18. Rear Admiral Thomas E. Flynn, JAGC, USN (Ret.), interview at U.S. Army Judge Advocate General's School, 4 February 1987.

Digitized by Google

range. Now we're getting more people into the lieutenant commander and senior lieutenant commander and commander zone. . . .

We don't have a lot of afloat billets. We don't have a lot of billets that women would be precluded from serving in, and it should not really seriously hamper their promotion opportunity. I never served in any billet that a woman could not have served in. Admiral Campbell never served in any billet that a woman couldn't serve in. Admiral McHugh never served in any billet that a woman couldn't serve in. Admiral Jenkins never served in any billet that a woman couldn't serve in. I don't really see that it has the career impact on us that it does in the line community.[O-19]

But there are other problems that are associated with it. . . . As we have more and more married couples in our community making the decision that they both want to have a career and stay on active duty, our ability to station them together and to give each one of them the kind of challenging, upwardly mobile job that they want, is going to reach a point quickly where we can't do it anymore, where we cannot assign them both together and give them those kinds of jobs. If you look, for example, at our 0-6 structure, there are really only three or four locations in the world where we can have married 0-6s: Washington, D.C.; Norfolk, Virginia; San Diego; basically, that's it. Newport, you could probably do it. But that's about the end of the places where we could

---

O-19. Reflecting on the importance of this factor twenty years earlier, Don Chapman had a different perspective:

> In those days [*1960s—ED.*] there was a detailing problem with the women who were Law Specialists, because you couldn't send them out to the ships and certain other commands. As a result their careers were somewhat hampered. Mary McDowell survived, but most of the others retired as commanders and believe me they were yelling discrimination in the military.

Chapman, interview, 17 July 1991.

Digitized by Google

> put two 0-6s who were married and not have them in positions that created a conflict of interest. When you go down to commanders it's a little easier, but you're going to find the same thing. We have the added restriction imposed on our community because of the nature of the work we do. There are professional restrictions upon us. You can't have a judge with a spouse practicing before the judge. There is also the competition that takes place in a Naval Legal Service Office. You can't have defense counsel against trial counsel where they're married. You can't have a senior marking his spouse or her spouse for promotion purposes. There are a lot of restrictions that are built into where you can assign these people.[O-20]

There can be little doubt that opportunities for women in the Navy Judge Advocate General's Corps, and certainly as Law Specialists, have in the past been far fewer than those for men. But progress has assuredly been made. The graph below, compiled from data provided by the Office of the Navy Judge Advocate General's Military Personnel Division, shows a pattern of marked improvement from 1983 to 1997:

HIGHEST FOUR RANKS	1983 WOMEN/TOTAL % WOMEN/TOTAL	1991 WOMEN/TOTAL % WOMEN/TOTAL	1997 WOMEN/TOTAL % WOMEN/TOTAL
REAR ADMIRAL	0/3 0.0%	0/3 0.0%	0/2 0.0%
CAPTAIN	0/71 0.0%	0.77 0.0%	3/69 4.3%
COMMANDER	1/151 0.7%	8/120 6.7%	18/102 17.6%
LIEUTENANT COMMANDER	10/210 4.8%	33/187 17.6%	41/170 24.1%
TOTAL ALL RANKS	118/1,013 11.65%	166/907 18.3%	182/818 22.2%

O-20. Flynn, interview, 4 February 1987.

Digitized by Google

Women judge advocates today serve in command positions and other posts of high responsibility, with opportunities virtually equal to those of the men in the corps. A woman as Judge Advocate General of the Navy? It's no longer beyond the realm of possibility.

Digitized by Google

APPENDIX P

African-Americans, Hispanic-Americans, and Other Ethnic Minorities in the Navy Judge Advocate General's Corps

African-Americans

The achievements of today's African-American lawyers in the Navy Judge Advocate General's Corps can best be appreciated by tracing the role of African-Americans in the Navy itself over the course of its history. While it is impossible to determine precisely when African-Americans first served in the Navy, one researcher claims that blacks made up fifteen to twenty percent of the naval force shortly after the Revolutionary War.[P-1] Although political pressures caused the Navy Department to ban the enlistment of African-Americans by the time of the Quasi-War with France in 1798, the subsequent need for manpower in the War of 1812 led to a reversal of this policy, and blacks constituted twelve percent of the Navy's enlisted force during that war, with the number increasing thereafter.[P-2] By 1839 sentiment against the employment of blacks once again peaked, causing Isaac Chauncy, the Acting Secretary of the Navy, to issue a circular directing recruiting officers not to enlist more than five percent "blacks and other colored persons . . . and in no instance and under no circumstances whatever to enter a slave."[P-3]

Once enlisted, African-Americans appear to have been treated as well—or as poorly—as white sailors. In Valle's words:

P-1. "Life in the Old Navy was not for All," *Navy Times*, 19 August 1991, discussing the research of Christopher McKee on enlisted life in the Navy from 1798 to 1860.

P-2. James E. Valle, *Rocks & Shoals, Order and Discipline in the Old Navy, 1800-1861* (Annapolis: Naval Institute, 1980), 19-20; "Life in the Old Navy," *Navy Times*, 19 August 1991.

P-3. *Navy Department Circular*, 13 September 1839, found at Navy Department, *Regulations, Circulars, Orders & Decisions, for the Guide of Officers of the Navy of the United States, 1851* (Washington, D.C., C. Alexander, Printer, 1851), 6.

Digitized by Google

> the Old Navy treated [blacks] and everybody else with a fine impartiality that was dictated by extremely close and crowded conditions and the monotonous unison labor that was required to run a sailing man-of-war. Pay, privileges, and promotions were scanty at best, but what existed was shared out equally among all hands.[P-4]

Strong evidence of this egalitarian treatment is found in an 1840 inquiry by Secretary of the Navy Paulding to the Attorney General of the United States. In it, the Secretary asked for an opinion as to whether the testimony of two African-American seamen, which had been admitted against an officer in a court martial held in the territorial waters of Florida, had been validly admitted (the testimony of blacks against whites being inadmissible at the time in civilian courts under the laws of the Territory of Florida).[P-5] The inquiry appeared as follows:

P-4. Valle, *Rocks & Shoals*, 20.

Those African-Americans enlisted by the Navy appear to have suffered the same disciplinary rigors—no more, no less—as their white counterparts. An example is the court martial trial for desertion of Augustus Anderson, held at the New York Navy Yard on 5 December 1866. "Records of Proceedings of General Courts Martial, February 1866-November 1940," Naval Records Collection, Record Group 125, National Archives, Case No. 4506 (*U.S. v. Augustus Anderson, Colored Landsman*). H.H. Goodman was the judge advocate; there was no counsel for the accused. Defense witnesses were questioned by the accused "through the Judge Advocate." A written defense statement was signed by the accused with his mark, an "X". Anderson was found guilty and sentenced to a year's confinement. Several other cases recorded in the mid-nineteenth century were found by the author with the word "Colored" modifying the rate of the accused.

P-5. The letter was found in "Letters Sent by the Secretary of the Navy to the President and Executive Agencies, 1821-1886," Naval Records Collection, Record Group 45, Microfilm Publication M472, National Archives, Washington, D.C. Unfortunately, the Attorney General's reply could not be located.

Digitized by Google

H. D. Gilpin Esq.
Atty. Gen'l. of the U. States

Navy Department
11th April 1840

Sir,

On the trial of an Officer of the Navy before a Court Martial recently held on board the Frigate Macedonian in the bay of Pensacola, two negroes, who belonged to that or some other ship of the West India Squadron, were produced as witnesses against him. The admission of such testimony was objected to by the Officer on the grounds that by the laws of Florida such persons are not competent to testify against a white man and he therefore contended that they should in like manner be excluded from testifying on Courts Martial.

The Court overruled the objection and allowed the negroes to be sworn and examined.

It is respectfully requested of you to state whether, in your opinion, the objection raised was valid, and whether the admission of the testimony of the Negroes would be a sufficient cause for setting aside the proceedings in the case.

I am very respectfully
Your Obt. Servt.
J.K. Paulding

Letter from Secretary of the Navy Paulding to Attorney General Gilpin. (National Archives)

Digitized by Google

The five percent limitation on the recruitment of free blacks contained in Chauncy's 1839 circular was incorporated into the 1841 *General Regulations for the Navy and Marine Corps*, and carried forward until 1862. In that year, as the Civil War erupted, Secretary of the Navy Gideon Welles lifted the ban on the enlistment of slaves, but concurrently instituted segregation in living quarters, a policy that was to continue for almost a century.[P-6] According to Valle, the end of the Civil War saw a few ships manned entirely by blacks, with four African-American seamen having received the Navy's medal of honor.[P-7]

Despite these early instances of service by blacks, it was almost a century later, in 1944, that the first African-Americans were permitted to serve in the officer ranks. In March of that year, thirteen African-Americans were commissioned as officers in the United States Navy.[P-8] Another twenty years would pass, however, before any African-American lawyer would be commissioned for legal service.

The emergence of African-American lawyers in the Navy mirrors their entry into the legal profession generally, coincident with the dramatic social changes that occurred in the 1960s. These changes were shaped by the civil rights movement of that decade, the turbulent and divisive Vietnam War, civil unrest that extended into the 1970s, burgeoning litigation that reflected the confidence—and the impatience—of members of minority groups, and changes in societal values. All of these factors contributed to changes in the presence and

---

P-6. Valle, *Rocks & Shoals*, 20.

Welles did not hesitate to employ runaway slaves in order to fill his ranks. In the words of one commentator, a "source of manpower [that Welles] tapped early in the [Civil] war and at some risk to his position was fugitive blacks. Whereas Lincoln strictly disciplined various Army commanders who attempted to enlist fugitives before 1863, he let the Navy recruit as many as it needed." John Niven, "Gideon Welles," ed. and comp. Paolo E. Coletta, *American Secretaries of the Navy*, 2 v. (Annapolis: Naval Institute, 1980), 1:350.

P-7. Valle, *Rocks & Shoals*, 20-21.

P-8. Paul Stillwell, ed., *The Golden Thirteen: Recollections of the First Black Naval Officers—A Long-Overdue Tribute to the Men Who Desegregated the U.S. Naval Officer Corps* (Annapolis: Naval Institute Press, 1993).

In September 1943, there were 60,000 African-Americans in the United States Navy, and not a single one was an officer. The "Golden Thirteen" obtained their commissions through the V-12 program, that took qualified men from the enlisted ranks and gave them a combined (and compressed) liberal arts and naval science education. The personal intervention of President Franklin D. Roosevelt was required to permit blacks to take the competitive tests for places in the program. Of the 125,000 men who entered the V-12 program, only seventy-five were blacks. Of that number, nine served in the Marine Corps, and the remainder in the Navy. James G. Schneider, "Negroes Will Be Tested!'—FDR," *Naval History* 7 (Naval Institute, Spring 1993): 11.

Digitized by Google

roles of minorities in the legal profession generally, and in the Navy Judge Advocate General's Corps in particular. African-American representation began to increase significantly in the 1960s and 1970s.[P-9] The following illustration demonstrates this trend:

YEAR	TOTAL U.S. LAWYER POPULATION	NUMBER OF AFRICAN-AMERICAN LAWYERS	PERCENT OF TOTAL U.S. LAWYER POPULATION
1940	177,643	1,052	0.59
1950	180,461	1,450	0.80
1960	209,684	2,440	1.16
1970	264,752	3,406	1.29

Participation of African-American Lawyers in the United States Legal Profession, 1940 to 1970. LITTLEJOHN AND RUBINOWITZ, "BLACK ENROLLMENT IN LAW SCHOOLS."[P-10]

The earliest African-Americans to serve on active duty as lawyer-officers in the Navy were so few in number as to be readily identified. The first was Franklin D. Cleckley, commissioned in 1965 as a Law Specialist.[P-11] He was followed by a thin trickle of others, there seldom being more than one serving at

P-9. See Dannye Holley and Thomas Kleven, "Minorities and the Legal Profession: Current Platitudes, Current Barriers," *Thurgood Marshall Law Review* 12 (Summer 1987): 299-345; L. Darnell Weeden, "Black Law Schools and the Affirmative Action Rationale," *Thurgood Marshall Law Review* 12 (Summer 1987): 395-413; Edward J. Littlejohn and Leonard S. Rubinowitz, "Black Enrollment in Law Schools: Forward to the Past?" *Thurgood Marshall Law Review* 12 (Summer 1987): 415-55.

P-10. Law school enrollment shows a similar pattern. In 1971, when the American Bar Association began collecting statistics on minority enrollment, ethnic minorities comprised 6.1 percent of law school enrollment. By 1991-1992, minority enrollment had increased to 15 percent. Holley and Kleven, "Minorities and the Legal Profession"; Weeden, "Black Law Schools"; Littlejohn and Rubinowitz, "Black Enrollment in Law Schools"; Henry J. Reske, "Fewer Law School Applicants," *American Bar Association Journal*, 78 (August 1992), 32.

P-11. Franklin D. Cleckley, Navy biography.

Digitized by Google

a time, or at best a small overlap. Cleckley served from 1965 to 1968.[P-12] Owen L. Heggs followed, from 1967 to 1970.[P-13] Then came Alphonso Christian, serving from 1969 to 1972,[P-14] followed by Trevor Bryan, whose tour ran from 1971 to 1974.[P-15] Bryan was succeeded by Henry Wingate, who served from 1973 to 1976,[P-16] and Samuel Y. Botts, who served a five-year tour, from 1973 to 1978.[P-17] Willie Smith, Jr., and Charles Prentise, who had been on active duty as line officers, entered the Navy Judge Advocate General's Corps via the Excess Leave Program in 1972. They completed law school in 1975, becoming Navy lawyers that same year.[P-18]

Even as these pioneering African-Americans were entering the Navy Judge Advocate General's Corps, the Navy itself was examining and revamping its minority policies. In 1967, the Deputy Secretary of Defense for Manpower had published equal opportunity goals for the Department of Defense. The Bureau of Naval Personnel established a minority recruiting office the same year. By 1970, the Navy had made significant progress in institutionalizing its initiatives for social change.[P-19] In that same year Admiral Elmo R. Zumwalt, Jr., the Chief

---

P-12. Cleckley, Navy biography.

P-13. Owen L. Heggs, interview with Captain Caliph Johnson, JAGC, USNR, 30 July 1992.

P-14. Alphonso A. Christian, II, interview with Captain Caliph Johnson, JAGC, USNR, 4 August 1992.

P-15. Trevor Bryan, interview with Captain Caliph Johnson, JAGC, USNR, 21 October 1992.

P-16. Henry Wingate, interview with Captain Caliph Johnson, JAGC, USNR, 30 July 1992.

P-17. Samuel L. Botts, Navy biography; Samuel L. Botts, interview with Captain Caliph Johnson, JAGC, USNR, 24 July 1992.

P-18. Willie Smith, Jr., interviews with Captain Caliph Johnson, JAGC, USNR, 23 July 1992, 27 October 1992; Willie Smith, Jr., Navy biography.

P-19. Department of the Navy, *Black Americans in the Navy* (Philadelphia, Pa., Naval Publications and Forms Center, 1978?), 13.

Digitized by Google

of Naval Operations, ordered the establishment of command human relations councils, and directed the appointment of special assistants for minority affairs.[P-20]

Although progress was being made, it was still not enough to avert the ravaging internal conflict that was to come. On bases and aboard ships in 1972, near-mutinous uprisings dramatically demonstrated the need for an in-depth study of the Navy's equal opportunity practices and policies.[P-21] The major incidents occurred in October and November on the carriers *Kitty Hawk* and *Constellation*, but sporadic, lesser incidents also occurred aboard *Saratoga*, *Intrepid*, *Ranger*, *Sumpter*, *Hassayampa* and *Inchon*. There were also conflicts at Naval Station Midway, and the Naval Correction Center in Norfolk, Virginia.[P-22] In the wake of these disturbances, the Task Force on the Administration of Military Justice in the Armed Forces submitted its report on 30 November.[P-23]

P-20. The directive appointing special assistants for minority affairs was one in the series of "Z-Grams," Admiral Zumwalt's informal term for the many directives he issued during his tenure in office. This Z-Gram, which established policies for equal opportunity in the Navy, was officially designated "NAVOP Z-66."

P-21. Vice Admiral Samuel L. Gravley, Jr., USN (Ret.), interview with Captain Caliph Johnson, JAGC, USNR, 26 June 1992; Stanley P. Hebert, "Sketches from a 'Navy Log'," speech delivered at National Naval Officers Association, San Francisco Bay Area Chapter, Annual Black History Celebration Brunch, 24 February 1991; Paul B. Ryan, "*USS Constellation* Flare-up: Was it Mutiny?" *U.S. Naval Institute Proceedings*, 102 (January 1976): 47.

P-22. Ryan, 47; "Racial Incidents Prompt Judicial Congressional Responses," *Military Law Reporter*, 1 (March-April 1973): 1014.

P-23. The Task Force on the Administration of Military Justice in the Armed Forces had been commissioned by Secretary of Defense Melvin R. Laird in April 1972. The submission of its report in November 1972, hard upon the series of uprisings, was fortuitous, but coincidental.

The Task Force had been asked to do the following:

± Determine the nature and extent of racial discrimination in the administration of military justice.
± Assess the impact of factors contributing to disparate punishment.
± Judge the impact of racially-related practices on the administration of military justice and respect for law.
± Recommend ways to strengthen the military justice system and "enhance the opportunity for equal justice for every American service man and woman."

Included in the membership of the task force were Rear Admiral Merlin H.

(continued...)

Digitized by Google

Among the conclusions reached by the task force was a finding that the military services were influenced by broad societal practices, including racial discrimination. The task force made several recommendations including the following:

- Staff judge advocates should be included as active participants in equal opportunity and human relations programs.
- Any service member being processed for administrative elimination should be required to consult with counsel at the outset of such processing.
- The respondent in an administrative elimination proceeding should have the right to legal counsel furnished by the government throughout the proceedings.
- Participation by legally-qualified officers in administrative elimination review procedures should be ensured.
- The stature of counsel and judicial functions should be increased.[P-24]

Rear Admiral Merlin H. Staring, JAGC, USN, the Judge Advocate General of the Navy from 1972 to 1975, made concerted efforts during his tour to implement the task force recommendations and to increase ethnic minority representation in the Navy Judge Advocate General's Corps. Among his efforts was an intensified minority recruiting program. He was assisted in this by one of the very African-Americans so recruited, District of Columbia Superior Court Judge, John D. Fauntleroy.[P-25]

Judge Fauntleroy was actually recruited into the Navy Judge Advocate General's Corps by Ralphine Staring, Rear Admiral Staring's wife. Mrs. Staring, a lawyer, had appeared before Judge Fauntleroy frequently, as a *pro bono* advocate on behalf of neglected or abused children. On one occasion the judge, who had been enlisted in the Army during World War II, expressed an interest in the Navy. Mrs. Staring relayed this interest to her husband. Through Rear

---

P-23. (...continued)
Staring, the Navy Judge Advocate General, and the Judge Advocates General of the other services.

Department of Defense, *Report of Task Force on the Administration of Military Justice in the Armed Forces*, vol. 1, 1972.

P-24. *Report of Task Force on the Administration of Military Justice in the Armed Forces*, vol. 1, at 112-25.

P-25. Rear Admiral Merlin H. Staring, JAGC, USN, interview, with Rear Admiral Robert E. Wiss, JAGC, USNR (Ret.), 17 October 1989.

Digitized by Google

Admiral Staring's efforts, Judge Fauntleroy was offered, and accepted, a commission as a commander in the Naval Reserve Judge Advocate General's Corps. Secretary of the Navy, John W. Warner, tendered the commission in person.

Judge John D. Fauntleroy receives his commission as a commander in the Naval Reserve Judge Advocate General's Corps from Secretary of the Navy John W. Warner, December 1973. Looking on as Judge Advocate General of the Navy Merlin H. Staring reads the commission are Judge Fauntleroy's wife and mother. (U.S. Navy photograph)

Commander Fauntleroy brought with him tremendous enthusiasm for the Navy and the Navy Judge Advocate General's Corps. He became extremely active in the Naval Reserve, representing the Navy at historically black colleges and universities, and at law schools with predominant or significant African-American enrollment, to recruit African-Americans into the Navy Judge Advocate General's Corps. He persuaded many African-Americans and other minorities of the opportunities, the advantages, and the desirability of entering the naval service. He was instrumental in attracting a substantial number of minority candidates to the Navy Judge Advocate General's Corps, both active duty and Reserve, thereby making a major contribution to the success of the corps's

Digitized by Google

minority recruiting program. Commander Fauntleroy's affiliation with the Naval Reserve ended in 1983, due to age restrictions. He died in October 1989.[P-26]

Staring's minority recruiting program yielded other successes. In 1975, the four African-American Navy judge advocates then on active duty, Botts, Wingate, Prentise and Smith, were joined by three others: Mary L. Burks (who served from 1975 to 1978), the first African-American woman commissioned in the Navy Judge Advocate General's Corps (see Appendix O);[P-27] Edward R. Dyson, Jr. (1975 to 1978);[P-28] and Anthony W. Vaughn (1975 to 1978).[P-29]

A year earlier, in 1974, Richard Stewart had become the first African-American to be selected for the Navy's Law Education Program.[P-30] He graduated from Loyola University Law School in 1976 and joined the two other former line officers then on active duty (Charles Prentise and Willie Smith), to become the first African-American career Navy Judge Advocate General's Corps officers. In 1990 Stewart became the first African-American Navy judge advocate to attain the rank of captain.[P-31]

By 1977, the numbers of African-Americans serving in the Navy Judge Advocate General's Corps had become significant enough to create a meaningful presence. Most of these officers, however, served one term and left the Navy.[P-32]

P-26. Staring, interview, 17 October 1989; Rear Admiral Merlin H. Staring, JAGC, USN (Ret.), letter to author, 28 September 1992.

P-27. "Howard Grad Becomes First Black Female Navy Lawyer," *Jet* (10 April 1975), 29; Mary L. Burks, interview with Captain Caliph Johnson, JAGC, USNR, 31 July 1992.

P-28. Edward R. Dyson, Navy biography.

P-29. Anthony W. Vaughn, Navy biography; Anthony W. Vaughn, interview with Captain Caliph Johnson, JAGC, USNR, n.d.

P-30. Captain Richard G. Stewart, Jr., JAGC, USN, Navy biography.

P-31. Stewart, Navy biography. Willie Smith had been the first African-American to reach the rank of commander, the rank at which he retired. Smith, interviews, 23 July 1992 and 27 October 1992; Smith, Navy biography. Charles Prentise retired as a lieutenant commander.

P-32. Stewart, Navy biography.

Digitized by Google

Hispanic-Americans

In addition to its recommendations concerning African-Americans, the 1972 Task Force on the Administration of Military Justice in the Armed Forces had made specific recommendations regarding other ethnic minorities. Among these were the following related to Hispanic Americans:

± Racial and ethnic classifications should be changed to provide the specific classification "Americans of Spanish Descent" to denote Mexicans, Puerto Ricans, Cubans, Central and Latin Americans, or others of Spanish-speaking origin, with a distinct and separate classification for Mexican-Americans and Puerto Ricans who were also native Americans.

± Specific data should be gathered and developed to identify the number and location of Chicanos, Puerto Ricans, Cubans, and others of Spanish descent presently in the services, and programs should be established to achieve their fair representation at all levels in the armed services.

± Greater efforts should be made to recruit Americans of Spanish descent, particularly doctors, psychiatrists, *lawyers*, judges, teachers, and persons with expertise in the Spanish language and culture.

Like the first African-American, the first Hispanic-American to serve on active duty as a Navy Law Specialist did so in 1965. José Martinez, commissioned in that year, served three years on active duty and was released in 1968. He entered the Naval Reserve Law Program, and was promoted to the rank of captain in 1984.[P-33]

By 1988, a significant number of Hispanic-Americans were serving in the Navy Judge Advocate General's Corps. Particularly noteworthy among them was Duvall M. Williams. Commissioned in 1968, Williams remained on active duty as a career officer.[P-34] In 1990 he assumed command of the Naval Investigative Service, and was promoted to the rank of rear admiral, a singular achievement for any naval officer.[P-35]

P-33. Captain José E. Martinez, JAGC, USNR, Navy biography; Captain José E. Martinez, JAGC, USNR, interview with Captain Caliph Johnson, 25 October 1992.

P-34. Rear Admiral Duvall M. Williams, Jr., JAGC, USN (Ret.), Navy biography.

P-35. Williams, Navy biography.

Digitized by Google

Summary

The following illustrations, compiled from data provided by the Military Personnel Division of the Office of the Judge Advocate General, show the progression of ethnic minority groups in the Navy Judge Advocate General's Corps during the period from 1988 to 1997. The column headed "Other" includes Native Americans, Hispanic-Americans, Filipinos, and others.

RANK	JAGC TOTAL	TOTAL MINORITY	AFRICAN-AMERICAN	HISPANIC-AMERICAN	OTHER
RADM	3	0	0	0	0
CAPT	84	3	0	1	2
CDR	142	2	1	0	1
LCDR	200	7	4	1	2
LT	590	71	39	24	8
LTJG	30	8	5	3	0
TOTAL	1,049	91	49	29	13
PERCENT OF TOTAL	100.00	8.67	4.67	2.76	1.24

Ethnic Minority Officers in the Navy Judge Advocate General's Corps
30 September 1988

Digitized by Google

RANK	JAGC TOTAL	TOTAL MINORITY	AFRICAN-AMERICAN	HISPANIC-AMERICAN	OTHER
RADM	3	1	0	1	0
CAPT	77	0	0	0	0
CDR	120	4	1	1	2
LCDR	187	10	3	3	4
LT	472	69	38	27	4
LTJG	48	14	7	4	3
TOTAL	907	98	49	36	13
PERCENT OF TOTAL	100.00	10.80	5.40	3.97	1.43

Ethnic Minority Officers in the Navy Judge Advocate General's Corps
30 September 1991

RANK	JAGC TOTAL	TOTAL MINORITY	AFRICAN-AMERICAN	HISPANIC-AMERICAN	OTHER
RADM	2	0	0	0	0
CAPT	71	2	0	0	2
CDR	110	8	2	3	3
LCDR	179	20	10	10	0
LT	350	70	28	20	22
LTJG	31	18	7	8	3
TOTAL	743	118	47	41	30
PERCENT OF TOTAL	100.00	15.88	6.33	5.52	4.04

Ethnic Minority Officers in the Navy Judge Advocate General's Corps
31 January 1997

Without question the number and status of minority lawyers in the Navy have changed since the mid-1960s. Most, however, continue to leave the Navy Judge Advocate General's Corps at the end of their initial tours. Retention of these officers continues to present a serious issue yet to be resolved.

Digitized by Google

Digitized by Google

APPENDIX Q

Legalmen and Limited Duty Officers (Law)

We have seen in the text some of the means used to obtain clerical and paralegal assistance in conducting the legal affairs of the Navy. In the field, the judge advocate or recorder, an officer, was himself charged with recording the proceedings of courts and boards, only occasionally being authorized to employ a professional stenographer. Secretaries of the Navy early-on employed civilian clerks, some with legal training, to assist in the commercial affairs of the Navy, and no doubt in the administration of disciplinary matters as well. The author can attest, from the first-hand review of documents at the National Archives, to employment by the Secretary of scriveners to transcribe the proceedings of general courts martial in flowery long-hand. The introduction of the typewriter in the 1880s, coincident with establishment of the Office of the Judge Advocate General, required no such calligraphic skill, thus permitting a more efficient, and no doubt less costly, means of record-keeping.

Precisely when enlisted naval personnel were first employed in clerical duties in the Office of the Judge Advocate General is unclear, as is their replacement of judge advocates to record the proceedings of courts martial and boards. We know that World War I mobilization led to the use of Navy yeomen, both male and female, by all offices of the Navy Department to supplement their civilian clerical forces (see text beginning at page 301).[Q-1] By World War II, civilian clerks were again being supplemented by Navy yeoman as well as by other administrative ratings. As more formality attached to courts martial, requiring full attention to the recording of proceedings, the judge advocate was relieved of this function and enlisted personnel took it over.

Q-1. The Army, apparently, did not feel the need to call upon women for assistance as clerks. Perhaps this was because Army clerks were also assigned to field duties:

> Instructions issued in 1918 directed the addition of enlisted men to the [Army] Judge Advocate General's Department for service as law clerks in the War Department and in the field . . . .

U.S. Army Judge Advocate General's School, *The Army Lawyer: A History of the Judge Advocate General's Corps, 1775-1975*, comp. Paul F. Hill (Washington, D.C.: Government Printing Office, 1975), 116

Digitized by Google

Immediately following World War II, and as an adjunct to establishment of the Law Specialist Program, formal training in legal proceedings was instituted for enlisted personnel for the first time.[Q-2] The course, offered by the U.S. Naval School (Naval Justice) at Port Hueneme, California, offered instruction for yeomen in drafting of charges and specifications, as well as advanced typing and shorthand, designed to give them the legal and technical knowledge required to serve as court reporters (see text beginning at page 478).

By 1967, when the Navy Judge Advocate General's Corps came into being, procedures for acquiring and training enlisted personnel for "legal duties" were well-established. The term "legal duties," however, was extremely narrow, comprising only court reporting functions, and clerical skills related to disciplinary proceedings. Training was limited to yeomen, who attended either a court reporting or legal clerk course at the Naval Justice School. Upon successful completion, they were assigned a Naval Enlisted Code indicating their qualifications.[Q-3]

This arrangement had several failings. At a time when the legal community was being pressed to assume responsibility in more and more areas, yeoman were parochially trained only to record court proceedings or administer disciplinary matters. Further, even with the demand for court reporting assets, those trained in the field were not effectively utilized. Writing in 1969, Captain Richard J. Selman opined that nine out of ten court reporters were assigned to jobs where their talents were not used, creating a perception of personnel shortages that did not exist.[Q-4] But the most unfortunate aspect of the process was its impact on the yeomen themselves. A yeoman who was used exclusively for court reporting for three or four years at a law center could not possibly compete for advancement with his brothers who had been doing general yeoman duties during that time. Further, he was unqualified to serve aboard ship as a personnel yeoman, because he had been away from the job for so long. Court reporting for yeomen was a virtual dead end. For many, the only way out was to leave the Navy for civilian court reporting jobs, where the financial rewards were greater.

Recognizing these problems, Judge Advocate General Joseph B. McDevitt, in 1970, proposed the creation of a new enlisted rate, to be called "legal mates." A legal mate would combine court reporting and legal clerk skills. His duties, and qualifications for advancement, would be exclusively related to his employment as a court reporter and legal clerk. Initial reaction to the proposal

---

Q-2. "Planning and Organization Counsel," *JAG Journal* (August 1947), 4.

Q-3. Master Chief Legalman Maurice L. Connor, Jr., USN, interview with author, 23 October 1991 and 14 November 1991.

Q-4. Captain Richard J. Selman, JAGC, USN, "The Military Justice Act of 1968: Some Problems and Practical Solutions," *JAG Journal* (May-June 1969), 147-51.

Digitized by Google

at a preliminary, informal meeting, between representatives of the Judge Advocate General and the Bureau of Naval Personnel Rating Review Board, was not encouraging.[Q-5] That was not, however, the last word.

Probably not by coincidence, less than a month after the informal meeting, Chief Judge Robert E. Quinn of the Court of Military Appeals addressed a letter to Secretary of Defense, Melvin R. Laird, citing delays in the military justice system, and attributing them in great part to personnel shortages. Judge Quinn closed with the following:

> [I]t is imprudent and unwise not to provide the court reporters and other personnel needed to keep abreast of the greatly increased [military justice] caseload . . . .[Q-6]

Judge Quinn's letter had the desired effect. Laird circulated the letter and requested responses from the several military secretaries. Secretary of the Navy John H. Chafee responded, in part, that delays in processing court martial cases in the Navy and Marine Corps were directly attributable to a lack of sufficiently qualified court reporters.[Q-7] In a separate memorandum to the Chief of Naval Personnel and the Judge Advocate General of the Navy, Chafee stated:

> As I understand it, personnel presently . . . qualified [as court reporters] are with few exceptions in the yeoman rating and are often assigned to duties other than court reporting. It seems to me that there

Q-5. The Review Board representatives suggested that the current system could function quite well if (1) under-qualified personnel were expunged; (2) the Judge Advocate General exercised some control over court reporter assignments; and (3) incentive pay were obtained for court reporters. Commander J.H. Baum, JAGC, USN, memorandum to Assistant Judge Advocate General for Military Justice, Subject: "Legal Mate Rate," 14 October 1970.

Q-6. Robert E. Quinn, letter to Honorable Melvin R. Laird, Secretary of Defense, 10 November 1970.

Q-7. John H. Chafee, letter to Secretary of Defense, Subject: "Delays in processing court-martial cases at trial and review levels," 9 December 1970.

Digitized by Google

> is merit in establishing a separate rating in the Navy for court reporters.[Q-8]

Chafee requested the Chief of Naval Personnel to study the feasibility of establishing a separate rating for court reporters. While the study was going on, Commander Joseph H. Baum, JAGC, USN, of the Judge Advocate General's Office, met with the full Rating Review Board to discuss the proposal. Baum pointed out that enlisted legal personnel were yeomen first and court reporters and legal clerks second; that there was no assurance that such persons would be assigned to legal billets; and that there was no incentive for yeomen to seek legal billets because they had to acquire skills in other areas for advancement. Baum stated that what was needed was a professional assistant for the Navy lawyer, someone who could free the lawyer from burdensome administrative and clerical matters so that he could devote full-time to services requiring his professional knowledge and skills. What the Navy needed, said Baum, was a "Judge Advocate's Mate."[Q-9]

On 10 February 1971 the Chief of Naval Personnel answered the Secretary's request to explore the feasibility of establishing a separate court reporter rating. While stating that establishment of a rating with duties limited to court reporting was not warranted, he noted that the Rating Review Board was considering a proposal to establish a "judge advocate's mate" rating "to cover a broad spectrum of duties including: court reporters and legal clerks with expertise in military justice, administrative discharges, legal assistance, claims, fact-finding bodies, administrative law and admiralty." It was felt that "such personnel would be qualified to relieve lawyers of many administrative duties which are not required to be performed by lawyers."[Q-10]

Studies of the proposal continued. The Rating Review Board polled the major Navy commands for their opinion as to the desirability of establishing the judge advocate's mate rating. Then, sensing that there might be some dissatisfaction with the name "judge advocate's mate," the Review Board solicited recommendations for a different name for the rating, if established.

Q-8. John H. Chafee, Memorandum for the Chief of Naval Personnel and the Judge Advocate General, Subject: "Delays in processing court-martial cases at trial and review levels," 9 December 1970.

Q-9. *Record of Proceedings of the Rating Review Board, Thirty-Sixth Meeting*, 21 January 1971.

Q-10. Chief of Naval Personnel, Memorandum for the Secretary of the Navy, Subject: Delays in processing court-martial cases at trial and review levels," 10 February 1971.

Digitized by Google

On 12 October 1971 the Rating Review Board met again. It noted that, with but one exception, all commanders, commands, and commandants solicited had recommended establishment of the new rating. It thereupon made the following findings:

- A rating dedicated solely to support of the Navy Judge Advocate General's Corps was justified.
- A general rating extending from pay grade E-4 through E-9 was preferable to all other combinations.
- The Judge Advocate General's recommended name for the rating "judge advocate's assistant," was inappropriate. It recommended the title "legalman" and the abbreviation "LN".[Q-11]

On 4 January 1972, Secretary Chafee approved establishment of the legalman rating, extending from second class petty officer (E-5), to master chief petty officer (E-9):

> The scope of the new rating will provide Judge Advocates with personnel trained in court reporting, claims matters, investigations, legal assistance, military justice matters and competence to prepare and submit necessary records and reports, while performing legal research of pertinent information for evaluation. This scope is in consonance with the new concept in the civilian legal community where many areas of legal services can be provided by competent trained personnel under the supervision of a lawyer.[Q-12]

Q-11. *Record of Proceedings of the Rating Review Board, Forty-Seventh Meeting*, 30 September 1971.

Q-12. Chief of Naval Personnel, Memorandum for the Secretary of the Navy, Subject: "Legalman (LN) enlisted rating; recommendation for establishment of," 27 December 1971.

Judge Advocate General Merlin H. Staring noted that the Navy was the first service to adopt the legal assistant concept in such a formal and comprehensive fashion. *Report of the Navy Judge Advocate General to the Judge Advocate's Association*, 1972, at 23.

Digitized by Google

On 5 June 1972, Bureau of Naval Personnel Notice 1440 announced a selection board, to convene in August, 1972, that would select the initial input of personnel (E-5 and above) for the legalman rating. While the primary source rating was to be yeoman, personnel in virtually all ratings would be considered. An initial group of 275 was selected and sent to a seven-week legalman conversion class at the Naval Justice School. The curriculum included three weeks of legal clerk training and four weeks of court reporter training.[Q-13] By September 1975, the legalman community had been authorized 409 billets, although it was able to fill only 362 of them.

In March 1976, Judge Advocate General Horace B. Robertson suggested establishment of a command master chief petty officer billet, to serve as the primary enlisted adviser to the Judge Advocate General, represent the legalman community to the Judge Advocate General, and serve as the legalman liaison to the Chief of Naval Personnel and other commands. On 5 August 1976 a board was convened to make the selection. Master Chief (select) Legalman William H. Milner, Jr., USN, was chosen as the first Master Chief Petty Officer of the Command.

While the legalman program was clearly an improvement over utilization of yeoman as court reporters and legal clerks, it was not without its problems. Full manning has never been achieved. Recruiting and retention efforts constantly fell short, resulting in serious personnel shortages. Because of clerical demands, many legalmen spent virtually all their time at clerical duties, rarely being called upon to perform paralegal functions.[Q-14] Detailing was (and remains to this day) a function of the Bureau of Naval Personnel, with only occasional—and informal—input from the Judge Advocate General in the person of the Command Master Chief.[Q-15] Legalmen who aspired to officer status faced a Hobson's choice: the warrant officer program as a ship's clerk, or the limited duty officer program as an administrative officer. Both emphasized sea duty; neither credited legal experience.[Q-16] Addressing these problems in 1981, Judge Advocate General John S. Jenkins said:

Q-13. Connor, interview, 23 October 1991 and 14 November 1991.

Q-14. Legalmen were not alone in the performance of clerical duties. Because of shortages of clerical personnel, lawyers also were called upon for these tasks. "The relative abundance of lawyers and anomalous lack of support personnel has created a situation where, overall, personnel assets are being squandered. Tasks which should be performed by more cost-effective assets are being performed by our most expensive personnel." *Five-Year Plan of the Judge Advocate General*, 5 April 1982, at 14.

Q-15. Connor, interview, 23 October 1991 and 14 November 1991.

Q-16. Connor, interview, 23 October 1991 and 14 November 1991; *Five-Year Plan of the Judge Advocate General*, 5 April 1982, at 17.

Digitized by Google

> I want to discuss a problem that may be the most serious internal issue now facing us—the plight of our legalmen. The LN rating structure, as presently constituted, is seriously deficient. The absence of E-3's and E-4's in the rating means that our present legalmen must perform a number of clerical and housekeeping chores inconsistent with their status as (mostly senior) petty officers. At the other end of the scale, legalmen who desire to continue their careers as officers receive a designator which emphasizes sea duty and de-emphasizes their paralegal expertise.[Q-17]

At least for those desiring to become officers, a solution was at hand. A limited duty officer program specifically for legalmen was in the process of implementation. Successful applicants would be commissioned as ensigns, complete six weeks of officer indoctrination school, then attend the non-lawyer course at the Naval Justice School. The focus of the program was to develop a cadre of technical managers for duty in the administration of naval legal service offices.[Q-18] Limited duty officers in the legal program could advance to the rank of commander.[Q-19]

The first group of limited duty officers (law)—five legalmen and two warrant officers—was selected in October 1982. Plans called for the selection of several applicants each year, until a total of about fifty-five was reached.[Q-20] By 1985 there were seventeen.

Q-17. Rear Admiral John S. Jenkins, JAGC, USN, Judge Advocate General of the Navy, "A Personal Message from the Judge Advocate General," *Off the Record* (29 December 1981), 5.

Q-18. Judge Advocate General of the Navy, *Report to the American Bar Association*, July 1985; Rear Admiral Thomas E. Flynn, JAGC, USN, Judge Advocate General of the Navy, "A Personal Message from the Judge Advocate General," *Off the Record* (April 1985), 1.

Q-19. Master Chief Legalman Bill M. Childers, USN, Master Chief Petty Officer of the Command, "From the Desk of the Command Master Chief for the Judge Advocate's [*sic*] Corps," *Off the Record* (29 December 1981; Master Chief Legalman Bill M. Childers, USN, Master Chief Petty Officer of the Command, "From the Desk of the Command Master Chief for the Judge Advocate General's Corps," *Off the Record* (15 October 1983.

Q-20. "Doing the Best for Both Sides," *All Hands* (January-February 1984), 8.

Digitized by Google

Although little improvement was seen in the recruitment and retention of legalmen, changes in their employment came about in the mid-1980s. Due process and speedy trial concerns led to increased scrutiny of disciplinary proceedings by the Court of Military Appeals. Revisions to the *Uniform Code of Military Justice* in 1983 imposed still further legal requirements on commands. While it was impossible—and unnecessary—to station a lawyer at every command, it *was* becoming necessary to provide commands with more assistance in the military justice area. The solution was the "independent-duty legalman." Legalmen with sufficient experience and motivation would be assigned to commands that did not warrant assignment of a lawyer. These legalmen were given the same non-lawyer legal officer training at the Naval Justice School as officers, and sent to commands where they functioned as legal officers.[Q-21] The program remains in place today, with some fifty independent-duty legalmen assigned to ships, construction battalion (Seabee) units, shore facilities, and other commands. They do all the paperwork to prepare for courts martial, captains' masts, and investigations. They run the legal affairs of the command short of giving legal advice. The normal prerequisites to becoming a command independent-duty legalman are to have had a tour at a naval legal service office, and a tour with a court martial convening-authority-level staff judge advocate.[Q-22]

In August 1990, because of an excess of senior personnel in the legalman program, conversions at the E-6 level were stopped, but the rating was opened to E-4s. While accessions from administrative ratings predominate (particularly yeoman), the program is open to virtually all, and half of all applications are typically from non-traditional ratings.[Q-23]

The career path for legalmen today includes the conversion course at Naval Justice School, followed by field tours that generally include sea duty and duty at a naval legal service office. Then follows a return to Naval Justice School for the

---

Q-21. "Legal officer" is a term of art. It is applied to officers not professionally qualified as lawyers, who administer the legally-related affairs of a command, primarily disciplinary matters.

In addition to training for legal officers, the Naval Justice School offers a course for "legal clerks," where yeomen and personnelmen can learn to do the administrative work for captain's masts and courts-martial in commands where there is no legalman.

Q-22. Connor, interview, 23 October 1991 and 14 November 1991.

Q-23. Connor, interview, 23 October 1991 and 14 November 1991; "JAG advocates continuing legal education," *Navy Times*, 19 August 1991. A roughly parallel program exists in the Naval Reserve. Upon successful completion of the Naval Justice School conversion course, legalmen are assigned to duty with a Naval Reserve Judge Advocate General's Corps unit.

Digitized by Google

senior legalman management course.[Q-24] Duty with a staff judge advocate, and an independent-duty tour are also highly desirable.[Q-25]

Efficient utilization of legalmen continues to be a problem, due to the never-ceasing demand for clerical assistance. The majority of a legalman's work today, however, is in the military justice area, covering everything from the preliminary paperwork through the transmission of the record of court martial proceedings. Often today court reporting duties are handled by civilians, with legalmen being utilized for courts martial overseas or aboard ship.

In the area of administrative discharges, legalmen may do not only the preparation work and transcribe the record, but may actually act as the recorder, relieving lawyers and line officers of doing these jobs.

Legalmen are also involved in claims work. They may review files, prepare analyses of claims, make recommendations as to their disposal, and in some cases negotiate settlements. Legalmen are also being used as investigators, not only in claims matters but in disciplinary cases as well.

As of 1 January 1997, the Navy Judge Advocate General's Corps had 647 legalmen and 31 limited duty officers. The highest-ranking limited duty officer, Commander Gregory Hlinka, USN, was serving as a Deputy Assistant Judge Advocate General for Investigations.

Q-24. In 1991 a new wing was added to the Naval Justice School. It was named "Helton-Morrison Hall," dedicated to two legalmen, Legalman First Class Michael William Helton, and Legalman First Class Robert Kenneth Morrison, who died at their battle stations in the gun-mount explosion aboard the *USS Iowa* in 1989. The suggestion to dedicate the building in their memory originated with Master Chief Legalman of the Command Maurice L. Connor, Jr., USN.

Q-25. Connor, interview, 23 October 1991 and 14 November 1991; "JAG advocates continuing legal education," *Navy Times*, 19 August 1991.

Digitized by Google

Digitized by Google

APPENDIX R

The Act of 8 December 1967
Establishing a Navy Judge Advocate General's Corps
(Edited and Abridged)

An Act

To establish a Judge Advocate General's Corps in the Navy, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 47 of title 10, United States Code, is amended as follows:

. . .

"Law Specialist" means a commissioned officer of the Coast Guard designated for special duty (law).

. . .

"Judge advocate" means an officer of the Judge Advocate General's Corps of the Army or the Navy or an officer of the Air Force or the Marine Corps who is designated as a judge advocate.

. . .

The assignment for duty of judge advocates of the Army, Navy, and Air Force and law specialists of the Coast Guard shall be made upon the recommendation of the Judge Advocate General of the armed force of which they are members. The assignment for duty of judge advocates of the Marine Corps shall be made by direction of the Commandant of the Marine Corps.

. . .

Digitized by Google

SEC. 2. Section 5148 is amended . . . by amending the catchline to read:

§5148. Judge Advocate General's Corps: Office of the Judge Advocate General; Judge Advocate General; appointment, term, emoluments, duties

. . .

and inserting the following new subsection:

(a) The Judge Advocate General's Corps is a Staff Corps of the Navy, and shall be organized in accordance with regulations prescribed by the Secretary of the Navy.

. . .

Section 5149 is amended to read as follows:

§5149. Office of the Judge Advocate General; Deputy Judge Advocate General; Assistant Judge Advocates General

(a) A judge advocate of the Navy or Marine Corps who has the qualifications prescribed for the Judge Advocate General . . . shall be detailed as Deputy Judge Advocate General of the Navy. While so serving he is entitled to the rank and grade of rear admiral (upper half) or major general, as appropriate, unless entitled to a higher rank or grade under another provision of law. The Deputy Judge Advocate General is entitled to the same privileges of retirement as provided for chiefs of bureaus . . . .

(b) An officer of the Judge Advocate General's Corps who has the qualifications prescribed for the Judge Advocate General . . . may be detailed as Assistant Judge Advocate General of the Navy. While so serving he is entitled to the rank and grade of rear admiral (lower half), unless entitled to a higher rank or grade under another provision of law. An officer who is retired while serving as Assistant Judge Advocate General of the Navy under this subsection or who, after serving at least twelve months as Assistant Judge Advocate General of the Navy, is retired after completion of that service while serving in a lower rank or grade, may, in the discretion of the President, be retired with the rank and grade of rear admiral (lower half). If he is retired as a rear admiral, he is entitled to retired pay in the lower half of that grade, unless entitled to higher pay under another provision of law.

(c) A judge advocate of the Marine Corps who has the qualifications prescribed for the Judge Advocate General . . . may be detailed as Assistant Judge Advocate General of the Navy. While so serving he is entitled to the rank and grade of brigadier general, unless entitled to a higher rank or grade under another provision of law. An officer who is retired while serving as Assistant Judge Advocate General of the Navy under this subsection or who, after serving at least twelve months as Assistant Judge Advocate General of the Navy, is retired after completion of that service while serving in a lower rank or grade, may, in the discretion of the President, be retired with the rank and grade of brigadier general.

Digitized by Google

If he is retired as a brigadier general, he is entitled to retired pay in the lower half of that grade, unless entitled to higher pay under another provision of law.

(d) When there is a vacancy in the Office of the Judge Advocate General, or during the absence or disability of the Judge Advocate General, the Deputy Judge Advocate General shall perform the duties of the Judge Advocate General until a successor is appointed or the absence or disability ceases.

(e) When subsection (d) cannot be complied with because of the absence or disability of the Deputy Judge Advocate General, the Assistant Judge Advocates General, in the order directed by the Secretary of the Navy, shall perform the duties of the Judge Advocate General.

SEC. 3. . . .

SEC. 4. . . .

SEC. 5. The following new section is added . . .:

§5578a. Regular Navy; Judge Advocate General's Corps

(a) Original appointments to the active list of the Navy in the Judge Advocate General's Corps may be made from persons who—

(1) are at least twenty-one and under thirty-five years of age;

(2) are graduates of an accredited law school or are members of the bar of a Federal court or the highest court of a State; and

(3) have physical, mental, and moral qualifications satisfactory to the Secretary of the Navy.

For the purposes of determining lineal position, permanent grade, seniority in permanent grade, and eligibility for promotion, an officer appointed in the Judge Advocate General's Corps shall be credited with the amount of service prescribed by the Secretary of the Navy, but not less than three years.

(b) Under such regulations as the Secretary of the Navy may prescribe, appointments to the active list of the Navy in the Judge Advocate General's Corps may be made from officers of the Navy, including the Naval Reserve, in the line or in another staff corps. Notwithstanding any other law, an officer appointed under this subsection shall have a running mate assigned to him under regulations to be prescribed by the Secretary of the Navy.

The following new section is added . . .:

§5587a. Regular Marine Corps: judge advocates

(a) With the approval of the Secretary of the Navy, any officer on the active list of the Marine Corps who is qualified under section 827(b) of this title may, upon his application, be designated as a judge advocate.

(b) For the purposes of determining lineal position, permanent grade, seniority in permanent grade, and eligibility for promotion, a person appointed to

Digitized by Google

the active list of the Marine Corps with a view to designation as a judge advocate may be credited with the amount of service prescribed by the Secretary of the Navy, but not more than three years.

SEC. 6. The following new subsection is added [to section 5762 of title 10, United States Code]:

(f) The Secretary shall furnish the appropriate selection board . . . with the number of officers that may be recommended for promotion to the grade of captain or commander in the Judge Advocate General's Corps. . . .

SEC. 7. The following new subsection is added [to section 202 of title 37, United States Code]:

(k) Unless appointed to a higher grade under another provision of law, an officer of the Navy or Marine Corps serving as Assistant Judge Advocate General of the Navy is entitled to the basic pay of a rear admiral (lower half) or brigadier general, as appropriate.

SEC. 8. All law specialists in the Navy are redesignated as judge advocates in the Judge Advocate General's Corps of the Navy. Each law specialist of the Navy who is on a promotion list on the day before the effective date of this Act shall be placed on the appropriate promotion list for the Judge Advocate General's Corps and shall be eligible for promotion when the officer who is to be his running mate in the next higher grade becomes eligible for promotion in that grade.

SEC. 9. . . .

SEC. 10. . . .

SEC. 11. Notwithstanding any other provision of law, all provisions of law applicable to a male officer in the Judge Advocate General's Corps of the Navy, including the Naval Reserve, are applicable to a woman officer in that corps.

SEC. 12. . . .

Digitized by Google

INDEX

Aas, Oliver S. 456
Adams, John 21, 22, 32
Adams, John Quincy 66
Admiralty, Black Book of the 14
Admiralty, Board of 26
Adolphus, Gustavus 8
American Bar Association
  Committee on War Work (World War II) 435
  initiation of legal assistance in World War II 435
  Resolution No. 6 . . . . . 596, 601
  support for Navy Judge Advocate General's Corps 591, 596
American Legion
  Special Committee on the Uniform Code of Military Justice 565
  support for Ward as Judge Advocate General of the Navy 606
Army Discipline and Regulation Act, 1879 9
Army Judge Advocate General's School 477
Assistant Judge Advocate General of the Navy, establishment of position . 675
Attorney General of the United States
  act creating office of 37
  as legal adviser to Secretary of the Navy 42, 43, 45, 50, 61, 66
  77, 98, 99, 124, 131
  133, 204, 296

Badger, George E. 64
Baldwin, Robert H.B. 669
Ballantine, Arthur A. 413
  Ballantine Report, 1946 466
  Ballantine Report, criticism of, 1946 473
  report to Secretary of the Navy on discipline in World War II 442
Bancroft, George 45, 74
Barbary pirates 31
Bell, Griffin 145

Digitized by Google

Benét, Stephen Vincent . . . 92
Bennett, Charles . . . 668, 675
Blandford, John Russell . . . 433, 672
Bloomfield, Joseph . . . 26
Blue Book (Rules, Regulations, and Instructions, etc., 1818) . . . 59
Bolles, John Augustus . . . 110, 130, 151, 156, 166, 167, 170
Bolte Committee . . . 662, 666
Bonaparte, Charles J. . . . 256
Borie, Adolf E. . . . 126
Brandenberg, Howard H. . . . 506
Bureau system
    and naval procurement . . . 348, 349, 366, 382, 398
    establishment of, 1842 . . . 72
Burke, Arleigh A. . . . 432, 563, 590
    opposed to increase in Law Specialists . . . 657
    opposed to Navy Judge Advocate General's Corps . . . 591
    poll of naval commands to determine need for legal services . . . 654
    support for Ward as Judge Advocate General of the Navy . . . 602
Burke, D. Barlow . . . 426
Burke, Robert G. . . . 584
Burns v. Wilson . . . 1
Butler, Henry M. . . . 279

Cabal, the . . . 544, 551
    meeting with Under Secretary of the Navy . . . 556
Cádiz, Spain, British expedition to . . . 16
Campbell, Edward Hale . . . 264, 339
Carney, Robert B. . . . 533
Chandler, William Eaton . . . 117, 120, 201
Chapman, Donald D.
    and implementation of the Uniform Code of Military Justice . . . 507, 512
    duties during World War II . . . 430
Chief of Naval Personnel, ad hoc study group of, 1957 . . . 621
Cinque Ports, Admiral of . . . 14
Circular No. 3 . . . 136
Circular No. 5 . . . 138
Circular of 28 June 1880 . . . 185
Civil War
    fraud prosecutions arising out of . . . 102, 111, 113, 120, 124
    impact on Navy procurement and discipline . . . 102
    naval decline after . . . 132

Digitized by Google

Civilian attorneys
Army practice not to use as judge advocates 90
as advisers to Secretary of the Navy . 43, 57, 61, 91, 124, 131, 133, 259
as judge advocates 37, 54, 56, 81, 90, 98, 122, 143, 151
Civilian bar
activities during World War II 434
support for Navy Judge Advocate General's Corps 591, 593
Clark, George Ramsay 309
Class D-V(S) officers 428
Class L-V(S) officers 424
Clerks
as assistants to Judge Advocate General of the Navy 200, 210, 222
as assistants to Secretary of the Navy 134, 164
chief clerk for Office of Judge Advocate General of the Navy . . 244, 300
law and contract clerks 244
law school graduates as 296
Cleveland, Grover 220
Colclough, Oswald S. 476, 481
Command influence (on court martial proceedings) 449, 450, 464
Commission on Organization of the Executive Branch, 1953 553
recommendation for Navy Judge Advocate General's Corps . . . 554, 558
Confederation, Articles of 27
Congress, Continental 21
Connally, John B. 661
Constitutio Carolina Criminalis (Carolina) 7
Continental Troops, Rules and Articles for the government of 9
Counsel for defendant
assigned to represent 444, 447
right to have at court martial 53, 55, 62, 64, 70, 87, 108
136, 162, 229, 317
Court of Military Appeals
dissatisfaction with Navy Law Specialist Program 534
established by Uniform Code of Military Justice 502
to evaluate effectiveness of Navy Law Specialist Program 496
Cromwell Protectorate 17
Cromwell's Articles 35
Crowninshield, Benjamin 56
Customs of the sea 13, 15, 17, 22, 34, 36, 49 53, 78
80, 96, 106, 139, 159, 181, 217

Digitized by Google

Daniels, Josephus 295, 327
Deck court 254, 281
DeHart, William C. 83
as author of Observations on Military Law 139
Denby, Edwin 330
Deputy Judge Advocate General of the Navy
establishment of position 675
flag rank for 632
DeVico, Anthony J. 677
Diehl, Samuel Willauer Black 254
Dobbin, James 77
Dockside Court Program 627
Dornin Board 634
Dowling, Noel T. 414
Duke, Irving T. 571
Duke Report 571
DuPont, Samuel Francis 78
Dynes v. Hoover 54

Edwards, Thomas 26
Egerton, Graham 279, 301, 304, 325
Elston Act (revision to Articles of War, 1948) 494
Ervin, Sam J., Jr. 663, 666
Excess Leave Program 613
Executive Order No. 2877 302

Fay, Paul B., Jr. 657
Federal Tort Claims Act 619
Ferguson Committee 640, 650
Finn, John J. 473
Fitch, Robert A. 542
as member of the "cabal" 545
Flogging 46, 61, 74, 75, 78, 106
Forms of Procedure for Courts-martial, Etc. (trial guide) 240, 282
Forrestal, James V.
and establishment of Procurement Legal Division 381, 386
and procurement procedures in World War II 359, 365, 375
as Secretary of the Navy 404
as Under Secretary of the Navy 357
Forshee, F.L. 527

Digitized by Google

Fowler, Cody 600
Fox, G.V. 114
Franke, William B. 640, 660
  Franke Committee 660
Frauds Act of 2 March 1863 . . . . . 113, 121, 122
Gatch, Thomas L. 396
Gates, Thomas S., Jr. 556, 640
General Counsel of the Navy, Office of
  jurisdiction of 618
  origins of, in World War II 394, 396, 398, 399, 404
  statutory establishment of, 1986 407
General Court Martial Sentence Review Board, 1947 . . . . . 34, 451, 469
General Order No. 250 186
General Order No. 72 265
George III, Rules and Articles of, 1765 9
Gilpin, Charles 120
Goodman, H.H. 115, 151
Graham, William 75
Grant, Ulysses S. 126
Greenberg, Mack K. 433, 508
  as member of the "cabal" 545

Hagan, William R. 4
Hallgarten, Kurt 3
Hamilton, Paul 135
Hanna, Edwin P. 244, 249, 251, 271
Hansa Ordinance, 1482 11
Hanse Towns, Laws of, 1597 12
Harding, Warren G. 330
Hare, Robert H.
  and Navy Judge Advocate General's Corps legislation 674
  as Hearn's Deputy and Assistant Judge Advocate General 665
  testimony on Navy Judge Advocate General's Corps legislation 679
  with L. Mendel Rivers 674
Harwood, Andrew A. 140
  as author of Law and Practice of
    United States Naval Courts-Martial 140
Hastings Committee 655
Hayler, Robert W. 505
Hearn, Wilfred A.
  successor to Mott as Judge Advocate General of the Navy 664
  testimony on Navy Judge Advocate General's Corps legislation . 667, 676
    680

Digitized by Google

Hensel, H. Struve
and Procurement Legal Division in World War II 365
as Assistant Secretary of the Navy 405
as first general counsel of the Navy 404
as special assistant to Forrestal 361
critical of Judge Advocate General in World War II 370
Herbert, Hilary A. 220
Hobbs Board 647
Hodgson, Patrick H. 405
Hogan, William 432, 511, 606
Holloway, James L., Jr. 556, 563
Holt, Joseph 109
Holtzoff, Alexander 463
Hoover, Herbert 553
advised of the "kiss-of-death" fitness reports 567
Second Hoover Commission, 1953 553
Hopkins, Esek 25
Horne, Frederick J.J. 384
House Report No. 459 188
Hunt, William H. 178

Incentive (professional) pay for Law Specialists 630, 634

Jackson, Richard 646, 653
JAG Journal 483
Japanese War Crimes Commission (1945-1949) 475
Johnson, Andrew 123
Johnson, Lyndon B. 391, 612
and Navy Judge Advocate General's Corps legislation, 1967 682
Johnson, Tristam B. 279
Jones, John Paul 23
Jones, William 58
Judge advocate
Marine Corps officers as 37, 38, 139, 422
original usage of term 34
Judge Advocate General of the Army 26, 109, 147, 148, 182
Judge Advocate General of the Navy
act creating office of, 8 June 1880 178
acting Judge Advocate of the Navy, 1878 173
civil law duties of 257, 282
duties of, following World War I 335, 338
early duties of 190, 193, 196, 201, 208, 223, 227, 297

Digitized by Google

Judge Advocate General of the Navy (continued):
first lawyer as . . . 343
first request to Congress for, 1842 . . . 68
first uniformed officer to serve as . . . 180
legal assistance responsibility during World War II . . . 436
professional (legal) requirements to serve as . . . 497, 518
rank of rear admiral authorized for, 1918 . . . 309
Judge Advocate General of the Navy, Office of
act creating, 8 June 1880 . . . 178
Assistant to the Judge Advocate General . . . 299
civilian lawyers in . . . 261, 307, 333, 373
commercial affairs handled by . . . 345, 354
commercial affairs removed from . . . 363, 365, 383, 386, 408
consulting attorney to . . . 339
criticized by House Naval Affairs Subcommittee, 1943 . . . 410, 418
law library of . . . 200, 242
organization of, into divisions, 1917 . . . 308
organization of, 1923 . . . 334
organization of, 1928 . . . 341, 342
organization of, 1956 . . . 626
Judge Advocate General's Corps, Army
establishment of, 1948 . . . 494
foundation for . . . 110
Judge Advocate General's Corps, Navy
Congressional sentiment for, 1948 . . . 494
discussed, 1914 . . . 288
discussed, 1943 . . . 452
first Navy-backed legislation for, 1960 . . . 660
legislation for, 1961 . . . 662
legislation for, 1963 . . . 662, 663
legislation for, 1965 . . . 666
legislation for, 1967 . . . 668, 675, 679, 681
legislation for, enacted, 1967 . . . 682
opposed, by Ballantine Board, 1946 . . . 469
opposed, by Judge Advocate General, 1952-1956 . . . 568
opposed, by Navy line officers, 1946 . . . 471
opposition to, by Marine Corps . . . 671
recommendation for Law Specialists instead of, 1946 . . . 469
recommendation for Naval Technical Corps in place of, 1959 . . . 645
recommendation for, by Dornin Board, 1958 . . . 636
recommendation for, by Judge Advocate General, 1908 . . . 267
recommendation for, by Judge Advocate General, 1909 . . . 271
recommendation for, by Judge Advocate General, 1919 . . . 310
recommendation for, by Judge Advocate General, 1958 . . . 635

Digitized by Google

Judge Advocate General's Corps, Navy (continued):
recommendation for, by Judge Advocate General, 1959 648
recommendation for, by McGuire Committee, 1945 464
recommendation for, by Second Hoover Commission, 1955 554
recommendation for, by Secretary of the Navy, 1898 246
recommendation for, by Secretary of the Navy, 1959 649
recommendation for, in opposition to Ballantine Report, 1946 473
suggested by Court of Military Appeals, 1955 534
Judge Advocates Association 584, 599
Judiciary Act of 1789 37
Justice, Department of
act creating 37, 151
critical of Judge Advocate General of the Navy 388
establishment of 144, 147
restrictions on Navy's employment of civilian attorneys 157, 234

Kauffman, Draper 588
Keeffe, Arthur John 451
Kennedy, John F. 661
Kennedy, John Pendleton 75
Kimball, Dan A. 516
King's Regulations and Admiralty Instructions, 1731 18
King's Regulations and Instructions, 1772 19
"Kiss-of-death" fitness reports 557, 567
Knox, Frank 356, 365
Korean War 507
Korth, Fred 662

Latimer, George W.
attempt to reform Uniform Code of Military Justice, 1956 561
critical of Law Specialist Program 536, 593
Latimer, Julian Lane 330
Lauchheimer, Charles H. 239
as author of Forms of Procedure for Courts-martial, Etc. 282
Laurance, John 26
Law and Courts-Martial, proposal for Office of, 1943 396
Law Education Program 614
Law member
Army practice regarding 444
defined 314
of general court martial, proposal for 313, 443

Digitized by Google

Law officer
distinguished from law member ... 444
established by Uniform Code of Military Justice ... 502
first woman to qualify as ... 525
Law postgraduate training for line officers (Law PG Program) ... 285, 339
after World War II ... 468, 474, 481, 484, 499, 509
attacked by Congress ... 392
attacked by Hensel ... 372
attempts to restore, after termination by Congress ... 532, 533, 637, 642
efficacy of, during World War II ... 423
end of Law PGs as Judge Advocates General of the Navy ... 613
start of, by Judge Advocate General Russell, 1909 ... 274, 277
terminated by Congress, 1952 ... 509
Law Specialists
establishment of program, 1946 ... 475, 483
increase in number of, during Korean War ... 514
increase in number of, 1961 ... 657
Newport, Rhode Island, meeting of, 1954 ... 549, 599
no need for, aboard ships ... 655
procurement of officers to serve as ... 481
recommendation to establish, 1946 ... 469
recruiting and retention problems with ... 523, 531, 538, 622, 669
solicitation of Reserve officers to serve as ... 472
to become Judge Advocate General of the Navy ... 520, 576, 594, 612
women discouraged from serving as ... 525
Laws Relating to the Navy, Annotated ... 292
Legal assistance to servicemen
Forrestal's directive of 26 June 1943 ... 437
origin of program in World War II ... 434, 461
Legal duties, assignment to during World War II ... 420, 422, 424
427, 429, 447
Legalmen ... 669
Lemly, Samuel C. ... 213, 215
as author of Forms of Procedure for Courts-martial, Etc. ... 282
incapacity for service of ... 253
Letter of intent (procurement device) ... 357
Limited duty officers (law) ... 670
Lincoln, Abraham ... 109, 122
Lones, Chalmers E. ... 456
as first officer in charge of Naval Justice School ... 476
Naval Justice (trial guide) ... 461
Long Parliament ... 8, 17
Long, John D. ... 237
Louis XIV, Marine Ordinances of, 1681 ... 12

Digitized by Google

Low Board Report 523, 540
Lurie, Jonathan 562

Mackenzie, Alexander Slidell 94
Macomb, Alexander 81
Manual for Courts Martial 503
Marine Committee 24
Marine Corps
    forerunner of 23
    Judge Advocate of 176
    opposition to Navy Judge Advocate General's Corps 671
    re-establishment of, 1798 33
    School of Application, 1892 217
Marine, Agent of 28
Marine, Secretary of 27
Marshall, John 26
Mast, meritorious 322
McDevitt, Joseph B.
    as Judge Advocate General of the Navy 684
    duties during World War II 430
    testimony regarding retention of Navy lawyers 634
McDowell, Mary Louise 429, 525
    as first woman to qualify as law officer 525
McGuire, Matthew F. 463
    McGuire Report, 1945 463
McLean, Ridley 286
Melling, George 292
    as author of Laws Relating to the Navy, Annotated 292
    as consulting attorney 342
Metcalf, Victor H. 263
Meyer, George von L. 270
Milano, Louis L. 433
Military law
    defined 1
    instruction in, at Naval Academy, 1895 236
    instruction in, at Naval Academy, 1910 282
    instruction in, at Naval Academy, 1916 294
    instruction in, by Marine Corps School of Application, 1892 217
    investigation of Army administration of during World War II 492
    investigation of Navy administration of during World War II . . . 413, 415
451, 463
Miller, Harry W. 279
Morgan, Edmund M. 38

Digitized by Google

Morris, Robert 27
Morton, Paul 255
Mott, William C.
and Arthur A. Radford 547, 557, 617
as member of the "cabal" 545
as Ward's Deputy and Assistant Judge Advocate General 626
biographical background of 536
ordered to Philippines at Nunn's request 557
recommendation to increase number of Law Specialists 657
reply to the "Scarlet Letter" 584
with President Truman in Hawaii 547
Munster, Joe H., Jr. 541
as member of the "cabal" 546
Murphy, John D. 475
Muse, George R. 669
Muse Board 668
Mutiny Acts 9

Naval Committee 21
Naval Courts and Boards (trial guide) 160, 240, 293, 316, 317, 322, 334
replaced by Manual for Courts Martial 503
Naval Courts and Boards Training Course 457
Naval Digest 292
Naval district legal offices, role of, in World War II 422, 439
Naval Justice (trial guide) 461
Naval Justice School
as only command for Law Specialists 476
established at Port Hueneme, California, 1945 . . . . . 459, 476
move to Newport, Rhode Island, 1950 504
origins of, 1943 453
role in implementing Uniform Code of Military Justice 504, 508
Naval law, defined and compared with military law 2
Naval Technical Corps 645
Navigation, Bureau of 124, 151, 211, 254
Navy and Marine Corps, General Regulations for, 1841 64
Navy Board 24
Navy Commissioners, Board of 58, 64
Navy of the United Colonies, Rules for 22
Navy Regulations (see also "Navy, United States") 104, 135, 228
1909 . . . . . 280, 283
1913 317
1920 . . . . . 328, 334, 374
Navy Summary Courts-martial (trial guide) 211

Digitized by Google

Navy, Continental . . . 21
Navy, United States
    Act for the Better Government of, 1800 . . . 35
    Act for the better Government of, 1862 . . . 105
    Act for the Government of, 1799 . . . 33
    Act to provide a more Efficient Discipline for, 1855 . . . 78
    Appropriations Act of 1862 . . . 103
    Articles for the Government of . . . 18, 298
    Articles for the Government of, proposed revision to, 1945 . . . 464
    Articles for the Government of, replaced, 1950 . . . 504
    Articles for the Government of, report on, 1946 . . . 465
    Code of Regulations for (proposed) 1858 . . . 94
    decline of, after Civil War . . . 132
    establishment of bureau system, 1842 . . . 72
    Method for Classifying Offenses and Punishments, 1870 . . . 160
    Naval Regulations, 1802 . . . 36
    Orders and Instructions for, 1853 . . . 76, 105
    Orders, Regulations, and Instructions, 1870 . . . 160
    Regulations for, 1833 . . . 62
    Rules, Regulations and Instructions, 1818 . . . 59
Neagle, Pickens . . . 251, 267, 273, 279, 332
Neff, Ziegel W. "Ziggy" . . . 536, 566
Nelson Report . . . 650
Newport Resolution (of Law Specialists) . . . 550
Ninety-Day Wonder . . . 430
Norris, William H. . . . 91, 98
Nunn, Ira Hudson . . . 501
    as author of the "Scarlet Letter" . . . 568
    as Judge Advocate General of the Navy . . . 528
    Congressional hearings on nomination as Judge Advocate General . . 516
    opposition to Uniform Code of Military Justice . . . 529
    presentation before American Bar Association . . . 597
    proposal to restore Law PG Program, 1955 . . . 532
    recommendations of, upon leaving office . . . 619

Ochstein, Max . . . 505
Olcott, H.S. . . . 111
Oleron, Laws of . . . 6, 11
Operation Tapecut . . . 628
Overman Act (Act of 20 May 1918) . . . 302, 331

Digitized by Google

Parker v. Levy . . . 1
Paulding, James . . . 64
Permanent courts martial . . . 446, 505
Perry, Oliver Hazard . . . 51
Philbin, Philip . . . 675
Pirnie, Alexander . . . 634
Port Hueneme, California . . . 456
Powers, Robert D., Jr. . . . 583
Procurement Legal Division (World War II) . . 363, 366, 375, 380, 390, 398
Procurement procedures
    prior to World War II . . . 348, 357
    role of Bureau of Supplies and Accounts . . . 352, 355
    role of Judge Advocate General criticized by Congress . . . 390
Public Law 671 (World War II emergency shipbuilding program) . . 354, 357

Quinn, Robert E. . . . 561, 611

Radford, Arthur A. . . . 546
    as Chairman of the Joint Chiefs of Staff . . . 617
    support for Ward as Judge Advocate General of the Navy . . . 602
Raleigh, Sir Walter, orders of, 1617 . . . 17
Rayburn, Sam . . . 559
Remey, William Butler
    as acting Judge Advocate of the Navy . . . 174
    as first uniformed Judge Advocate General of the Navy . . . 180
    insanity of . . . 213
Reserve, Naval
    Law Program of . . . 488, 510, 526
    recall of lawyers in, for Korean War . . . 512
    service during World War I . . . 300, 301, 307
    service during World War II . . . 424
    solicitation of Law Specialists from . . . 472
Rhodes, Sea Law of . . . 6
Richard I, Ordinance of, 1190 . . . 6
Richard II, Articles of War of, 1385 . . . 7
Rivers, L. Mendel
    and Robert H. Hare . . . 674
    as chairman of the House Armed Services Committee 666, 672, 674
Robertson, Horace B., Jr. . . . 515
Robeson, George M. . . . 154
Rush, Richard . . . 43
Russell, George L. . . . 486, 496

Digitized by Google

Russell, Richard B. 680
Russell, Robert Lee 274, 277, 282

Scarlet Letter 569, 598
Schwab, Herb 546
Second Deficiency Appropriation Act, 1941 378
Sheeley, William R.
as Acting Judge Advocate General of the Navy 608
as first Law Specialist selected for flag rank 575
as Nunn's Deputy and Assistant Judge Advocate General 577
challenged by Ward for succession to
post of Judge Advocate General of the Navy 594, 602, 605
Shine, Henry M., Jr.
as author of "A Judge Advocate General's Corps for the Navy?" 566
with Herbert Hoover 567
Smith, Elvera 429
Snedeker, James M. 3, 463
Soldiers' and Sailors' Civil Relief Act of 1940 435
Solicitor and Naval Judge-Advocate General 119, 125, 130, 147
abolishment of office of, 1878 167
duties of 187
first appointment of 117, 119
transfer to Department of Justice 150, 164
Solicitor, Naval 151, 164, 165, 168
appointment of, 1900 251
as assistant to Judge Advocate General of the Navy 249, 251
as independent from Judge Advocate General of the Navy . 264, 278, 330
attempt by Judge Advocate General to abolish office, 1909 273
call for revival of office, 1943 394
disappearance of office of, 1929 333
duties of 252, 286, 295, 301, 327
returned to Office of Judge Advocate General, 1921 331
transferred to Department of Justice, 1918 303
Somers Affair 94
Spanish-American War 245
Spencer, Philip 95
Sprague, Mansfield T. 603
Stennis ceiling 678, 681
Stoddert, Benjamin 32
performing legal work for Department of the Navy 36
Sullivan, George A., as member of the "cabal" 546

Digitized by Google

Task Forces (legal), East and West Coast . . . 627
Task Group on Legal Services within the Armed Forces, 1954 . . . 553
Taylor, John . . . 26
Tedrow, Richard L. . . . 473
Thomas, Charles S. . . . 602, 607
Thompson, Frank . . . 559
Thompson, Richard W. . . . 167, 173
Tilton, McLane . . . 163
    Order of Procedure in Naval General Courts Martial . . . 163
Torrey, F.N. . . . 48
Toucey, Isaac . . . 45
Tracy, Benjamin F. . . . 209
Truman, Harry S. . . . 547
Tudor, William . . . 25
Tyne, George Henry . . . 490

Uniform Code of Military Justice . . . 2, 468, 492
    Code Committee of . . . 561
    enacted, 1950 . . . 501
    establishing requirements for military lawyers . . . 501
    proposals for amendment to, 1955 . . . 560
Upshur, Abel . . . 51, 64, 97

Vinson, Carl . . . 559
    as chairman of the House Armed Services Committee . . . 661, 662
    opposed to appointment of Ward as Judge Advocate General . . . 604

"W.F.C." (adviser to Secretary of the Navy) . . . 202
Wales, Philip S. . . . 206
Walker, Philip A.
    as Ward's Deputy and Assistant Judge Advocate General . . . 615, 618
    death of, in office . . . 626
Walkup, Homer A. . . . 5, 428
War of 1812 . . . 57, 135
War, Articles of . . . 10, 24, 314, 318, 320
    Massachusetts Articles . . . 9
    revision to, 1948 . . . 468, 494
War, Secretary of . . . 27

Digitized by Google

Ward, Chester C. 498
as first Law Specialist Judge Advocate General of the Navy . . . 612, 615
as member of the "cabal" 546
considered for appointment as Judge Advocate General 590, 602
opposition to Franke Committee report 646
Watts, William Carleton 294
Welles, Gideon 110
performing legal work for Department of the Navy 132
Welles, Thomas G. 152
White, Robert J. 564
Whitney, William C. 206
Wiener, Frederick Bernays 4, 56
reaction to the "Scarlet Letter" 586
Wilson, Charles E. 553
Wilson, Nathaniel 112
Wilson, Woodrow 302
Winthrop, William 7
Wisbuy, Laws of 11
Wise, Henry A. 66
Women
as lawyers in the Marine Corps 670
as lawyers in the Navy 429, 485, 525, 670
first woman general court martial law officer in the Navy 525
in the Navy 301
in the Navy Judge Advocate General's Corps 683
in the Navy, discipline of 454
WAVES Program 429
Wood, Sanford B.D. 498
as member of the "cabal" 546
as Nunn's Assistant Judge Advocate General of the Navy 522
Woodbury, Levi 61
Rules of the Navy Department 61
Woodson, Walter Browne 343, 345
and procurement during World War II 348, 364
first lawyer as Judge Advocate General of the Navy 343
opposition to establishment of Procurement Legal Division 368, 376
380, 390
World War I
increase in workload of Judge Advocate General 305
naval expansion before 197, 210, 220
preparation for 295, 299

Digitized by Google

World War II
courts martial during 409, 416, 454
emergency shipbuilding program (Public Law 671) 354, 357
outbreak of 383
post-war legal plans for 402, 404, 405, 481, 488
preparation for 356
Second Deficiency Appropriation Act, 1941 378

Yeowomen 301

Digitized by Google

ISBN 0-16-049135-5
90000
9 780160 491351

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google