SELECTED OPINIONS—MILITARY AFFAIRS

J. A. G. S. TEXT NO. 9

The Judge Advocate General's School
ANN ARBOR, MICHIGAN

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The Judge Advocate General's School,
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FOREWORD

This text is a collection of opinions of the Military Affairs Division, Office of The Judge Advocate General, which are currently used in the program of instruction in Military Affairs at this School. The opinions have been selected to illustrate the practical application of certain substantive principles discussed in the textbook on Military Affairs, JAGS Text No. 3, and the collection constitutes a supplemental volume. The opinions are arranged in progressive order. The subjects covered and the scheme of development are indicated in the Table of Contents which follows.

The use made of these opinions is believed to be unique and to offer advantages not found in the methods of case study usually employed in law schools. Problems based on the opinions are assigned to the students for individual research and preparation of solution. The solutions are presented orally in seminar groups, several different problems relating to the same general subject matter being presented by different students at one seminar session. Following seminar discussion by the students, the opinions are distributed as approved solutions.

The seminar method has the advantage of giving the student more of a working familiarity with the statutes, Army regulations and digests, than could be derived from studying the opinions alone. At the same time, it affords actual experience in the solution of problems with the tools available to judge advocates in the field.

The group of opinions used for seminar purposes is not static. While many of the older opinions are retained because of the valuable discussion of fundamental principles contained therein, recent opinions of the Military Affairs Division are constantly added to reflect the problems currently arising in the field. Because of the changing character of the collection, distribution of the selected opinions is limited to students attending the School.

EDWARD H. YOUNG,
Colonel, JAGD,
Commandant.

The Judge Advocate General's School
United States Army
Ann Arbor, Michigan
1 February 1944.

SELECTED OPINIONS IN MILITARY AFFAIRS

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SPJGA 210.451 September 14, 1942

MEMORANDUM for The Judge Advocate General.

Subject: Right to decline appointment as officer in Army of the United States after entering upon duties of office.

1. By disposition form (AG 201 Boone, Robert M.) dated September 4, 1942, certain papers relative to the attempt of Captain Robert M. Boone, O-103687, to decline his appointment in the Army of the United States after entering upon active duty, were referred for decision as to his present status.

2. It appears that Robert M. Boone was appointed a captain in the Army of the United States on June 23, 1942; that he entered upon active duty on June 30, 1942, and reported at Fort Benjamin Harrison, Indiana, on the following day pursuant to special orders of the War Department dated June 27, 1942; that, upon arrival at that fort, he was assigned to the Finance Officer Replacement Pool for training, where he remained until July 17. On July 13, 1942, the War Department wrote (AG-201 Boone, Robert Martin (6-23-42)RQ) Captain Boone, in pertinent part, as follows:

> "The Oath of Office which you were requested to execute and return has not been received in this office. It is requested that you forward it as soon as practicable or in the event you do not desire the appointment that you so notify this office."

Upon receipt of this letter, Captain Boone formally advised The Adjutant General by letter dated July 17, 1942, and informally advised his commanding officer, that he was unable to accept his appointment because of his physical condition. It appears that Captain Boone's original application for appointment was acted upon unfavorably because his physical examination indicated that his heart action was very rapid, that, at his own request, he was twice reexamined, and that on both occasions his heart action was found to be normal. When he reported for duty on July 1, 1942, he signed a statement that he had not suffered any illness or injury since June 9, 1942, when he successfully passed his last final type physical examination. An intervening physical examination made on July 1 indicated no physical defect or heart disease. A notation dated July 14, 1942, on his physical record at Fort Benjamin Harrison, indicates that an electrocardiogram was taken on that date and that he was ordered to duty. It appears that Captain Boone has not executed an oath of office and that he returned his travel allowance to the Government on July 17, 1942.

3. In a recent opinion (SPJGA 0131, July 14, 1942) it was held that an appointment in the Army of the United States may be accepted by entering upon the duties of the office and that an appointment, thus accepted, cannot be declined later. In that case an applicant was appointed a second lieutenant, Army of the United States, on April 25, 1942. On May 11, he reported for duty pursuant to competent orders. On May 12, he stated that he wished a release from his appointment and that he would not take the oath of office. On May 15, he returned to his home. On May 22, he was sent a letter, as in this case, requesting him to forward the oath of office or notice that he did not desire the appointment. The opinion of this office stated, in pertinent part:

> "His acts in reporting for duty and the performance of official duties pursuant to proper orders effected a valid acceptance by conduct. The written declaration of his intention not to take the oath of office could have no effect upon the validity of his prior acceptance. Although execution of the oath of office is required by section 1757, Revised Statutes (act May 18, 1884, 23 Stat. 22; 5 U.S.C. 16), such execution is not a condition precedent to the acceptance of the appointment * * *."

In an opinion (JAG 210.451) dated April 11, 1923, it was held that a lawful appointment cannot be revoked by the appointee or the War Department after valid acceptance. In that case a civilian was appointed and commissioned a second lieutenant in the Army on October 22, 1918, and reported for duty on that date. On October 30, 1918, he stated that he could not accept his commission. Accordingly, the War Department purported to cancel his appointment and commission. The Judge Advocate General's opinion stated, in pertinent part:

> "* * * it appears that appointment was made on October 22, and that under that appointment Dr. O'Neal reported to the Commanding General at Camp Kearney, California, for duty. In consequence the office vested and the alleged declination of October 30, 1918, was without any legal force or effect. The office having vested the attempted revocation of the appointment * * * was without legal force or effect * * *."

It appears to be settled that an appointment may be accepted by entering upon the duties of an office, even though the required oath is not taken at that time (JAG 210.1, Apr. 21, 1923; MS Comp. Gen., B-23168, Feb. 16, 1942; 21 Comp. Gen. 819).

4. I conclude that Captain Boone's appointment was accepted by his entry upon active duty on June 30 and that, consequently, his later attempt to decline such appointment was ineffective. For the same reason, the letter dated July 13, 1942, by which Captain Boone was directed to notify the War Department in the event he did not desire the appointment, cannot be construed as a revocation of the original appointment or as an indication that it had not become effective. It is my view that the appointment in this case may not lawfully be set aside on any theory of fraud or mutual mistake because it appears that at the time of his appointment, both the Government and Captain Boone were cognizant of his physical condition.

5. It is therefore recommended that these papers be returned to The Adjutant General by disposition form entry, prepared for the signature of the Chief of Division, stating:

> It is the opinion of this office that Captain Robert Martin Boone, 0-103687, is an officer in the Army of the United States by virtue of his entry upon active duty on June 30, 1942, because such entry constituted an acceptance of his appointment. It appears from the inclosed papers and from the officers 201 file that at the time of Boone's appointment, both he and the Government were cognizant of his physical condition. Consequently, the appointment may not lawfully be vacated because of fraud or mistake. However, the mentioned officer may be discharged in the event such action is deemed advisable.

Charles W. West,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 1943/4045 March 25, 1943.

MEMORANDUM for The Judge Advocate General.

Subject: Status of Eugene Dean Woods.

1. By informal action sheet (AG 201-Woods, Eugene Dean) dated March 17, 1943, there was referred for opinion a file concerning the status of the mentioned Woods.

2. The file discloses the following pertinent facts:

Staff Sergeant (Pilot) Eugene Dean Woods, A.S.N. 7002208, 96th Fighter Squadron, 82nd Fighter Group, was appointed a second lieutenant, Army of the United States, on September 14, 1942, and by paragraph 20, Special Orders No. 250, War Department, September 15, 1942, addressed to him at Glendale, California, he was ordered to active duty, effective September 20, 1942, with "AAF, 4th AF, San Francisco, Calif TPA". Prior to receiving notice of his appointment Staff Sergeant Pilot Woods was transferred in grade to the Southern Pacific Area for duty with the "A.A.F. Sumac". Woods apparently had no notice, actual or constructive, of his appointment until November 13, 1942, and to that date had continued on duty as a staff sergeant (pilot), being at that time assigned to the 96th Fighter Group, Army Air Forces "Sumac". On November 15, 1942, he executed an oath of office which was duly forwarded to The Adjutant General and received December 30, 1942. A supplemental informal action sheet (AG 201-Woods, Eugene Dean), dated March 22, 1943, subsequently received in this office, states as follows:

> "Since forwarding Informal Action Sheet of March 17, 1943, this office is in receipt of radiogram from New Caledonia, dated March 19, 1943, stating substantially as follows:
>
> > "Eugene Dean Woods, Second Lieutenant, (O-496092), entered on active duty November 13, 1942 pursuant to WDSO 250/20."

Opinion was originally requested whether Woods legally may be considered to have entered on active duty November 15, 1942, under the mentioned special orders dated September 15, 1942. In view of the radiogram of March 19, 1943, above quoted, and the mentioned supplemental informal action sheet, it is assumed that the latter date, November 13, 1942, is the pertinent date in question.

3. As a general rule, irrespective of the effective date contained in an order, the status of a person in the military service

is not affected thereby until actual or constructive notice of the order has been received by the person concerned (SPJGA 1942/5085, Oct. 31, 1942; par. 14, AR 310-50, Aug. 8, 1942). In the case under consideration, Woods received no notice of his appointment until November 13, 1942, and on that date actually entered upon active duty as a second lieutenant, though he did not execute his oath of office until November 15, 1942. It is well settled that where an officer reports for duty and performs official duties pursuant to proper orders, he is deemed to have accepted his appointment and the execution of the oath of office is not a condition precedent to the acceptance of the appointment (SPJGA 210.451, Sept. 14, 1942). It has also been recognized by this office that the fact that an officer does not report for active duty until after the date specified in the order has no effect on the legality of his active duty status (SPJGA 1943/3560, March 7, 1943).

There remains the question whether Woods in entering upon active duty with the Army Air Forces, Sumac, at a foreign station, has complied with the mentioned Special Orders No. 250 which assigned him to duty with "AAF, 4th AF, San Francisco, Calif (TPA)". It was impossible, for the time being, for Woods to comply with the letter of the mentioned special orders. In fact, however, Woods did comply with the spirit of the order, by immediately entering upon active duty with the Army Air Forces, even though circumstances, not due to his fault, made it impossible for him to report to the station designated in the order. It is my opinion, therefore, that there was substantial compliance with the mentioned special orders placing him on active duty and that he legally may be considered as having entered upon active duty thereunder.

While it is well settled that a retroactive order may not presently be issued purporting to create and carry back a fact which in reality did not exist at a past date (SPJGA 1942/5238, Nov. 7, 1942), it is equally settled that an order may be issued to amend or correct a prior order so as to make it conform to the facts as they existed at a past date or to correct errors or omissions (SPJGA 1942/5005, Oct. 25, 1942; SPJGA 1942/6256, Dec. 31, 1942). It is therefore recommended that the mentioned Special Orders No. 250 be so amended by changing the "effective date of duty" and "date of rank" to "13 Nov.", and that the designated assignment thereon be changed to the organization and unit with which Woods was actually serving at the time he entered on active duty.

4. It is therefore recommended that this file be returned to The Adjutant General by informal action sheet entry, prepared for the signature of the Chief of Division, stating:

It is the opinion of this office that Eugene Dean Woods legally may be considered to have entered upon active duty on November 13, 1942, as a second lieutenant under Special Orders No. 250, War Department, September 15, 1942, for the reason that, under the circumstances stated, there was substantial compliance therewith. It is recommended, however, that the mentioned orders, so far as they pertain to Second Lieutenant Woods, be amended by changing the effective date thereof and date of rank to "November 13, 1942", and by changing the assignment designation to the unit or organization with which he was actually serving at the time he entered on active duty on November 13, 1942. It is also recommended that the amended orders recite the facts upon which based, namely, that notice of the previous orders was not communicated to Second Lieutenant Woods until November 13, 1942, on which date there was constructive acceptance of his appointment.

For The Judge Advocate General:

Charles W. West,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 1943/4619 April 1, 1943.

MEMORANDUM for The Judge Advocate General.

Subject: Necessity for Senate confirmation of appointments of graduates of United States Military Academy as second lieutenants, Regular Army.

1. By oral request on March 30, 1943, from the Chief, Legislative and Liaison Division, War Department General Staff (through Col. E. J. Walsh), an opinion was requested whether, for the period of the war, members of the graduating classes at the United States Military Academy may, in the absence of legislation authorizing such action, be commissioned as second lieutenants, Regular Army, without submitting to, and obtaining confirmation by, the Senate of their nominations to such offices.

2. The Constitution, article II, section 2, clause 2, provides in pertinent part:

> "* * * he [the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

Section 24e, National Defense Act (sec. 24, act June 4, 1920, 41 Stat. 774; sec. 7, act Apr. 3, 1939, 53 Stat. 557; 10 U.S.C. 484), provides for the appointment of graduates of the United States Military Academy as second lieutenants, Regular Army, but is silent as to the appointing authority. Likewise, the act of May 17, 1886 (24 Stat. 50; 10 U.S.C. 486), authorizes the commissioning of graduates of the academy as second lieutenants but is silent as to the appointing authority.

3. In passing upon the question as to the proper method for making an appointment to the office of assistant collector at the port of New York, in the absence of a statutory provision on the subject of appointment thereto, the Attorney General held the general rule deducible from the above-quoted constitutional pro-

vision to be that all appointments of officers of the United States belong to the President, by and with the advice and consent of the Senate, in cases where the appointments thereto are not otherwise provided for in the Constitution itself or by legislative enactment (18 Op. Atty. Gen. 98). Other decisions of the Attorney General are to the same effect (15 Op. Atty. Gen. 3; 17 Op. Atty. Gen. 504; 18 Op. Atty. Gen. 409; 6 Op. Atty. Gen. 1; 13 Op. Atty. Gen. 410). In Scully v. United States, 193 F. 185, it was said, at page 187:

> "When Congress creates an office, whether it be inferior or not, and omits to specify how the incumbent is to be appointed, it is one of that class designated in the Constitution as 'all other officers of the United States whose appointments are not herein otherwise provided for'; and in such cases the appointment must be made by the President by and with the advice and consent of the Senate. 18 Op. Atty. Gen. 409" (Underscoring supplied)

In view of the foregoing authorities, it is my opinion that in the absence of statutory provision with respect to the appointing authority by whom appointments to the office of second lieutenant, Regular Army, are to be made, and regardless of whether or not such office is an inferior office within the meaning of the pertinent constitutional provision, appointments thereto can legally be made only after nomination by the President and confirmation by the Senate of the appointees, which has been the long-established administrative practice.

4. It is therefore recommended that an opinion be rendered to the Chief, Legislative and Liaison Division, War Department General Staff, by memorandum, prepared for the signature of The Judge Advocate General, stating:

> In response to your oral request of March 30, 1943, through Colonel E. J. Walsh, it is my opinion that members of the graduating classes at the United States Military Academy may not, for the period of the war and in the absence of legislation authorizing such action, be commissioned as second lieutenants, Regular Army, without submitting to, and obtaining confirmation by, the Senate of their nominations to such offices.

Charles W. West,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 210.41 September 8, 1942

MEMORANDUM for The Judge Advocate General.

Subject: Posthumous Appointment to Commissioned Grade.

1. By disposition form (TAG) dated September 1, 1942, the inclosed papers relative to the posthumous appointment of Aviation Cadet Edwin Bruce LaRoche, 18,007,554, were referred "for opinion on which to base this and future similar appointments (posthumously) under Section 2, Public Law 680 - 77th Congress", approved July 28, 1942.

2. It appears (AG-201, LaRoche, Edwin B.) that Aviation Cadet LaRoche was in the military service of the United States after September 8, 1939; that he successfully completed a course at a training school for officers (Pan-American Airways School) at Coral Cables, Florida, on June 30, 1941; that he was recommended for appointment as a second lieutenant in the Air Corps Reserve by the officer commanding the Air Corps Advanced Flying School at Kelly Field, Texas, where he was to complete another course on November 1, 1941; that the recommendation for his appointment was approved by the Secretary of War, as is evidenced by the duly executed, and later canceled, letter of appointment (AG 201 LaRoche, Edwin Bruce, Jr. (9-12-41)RA) dated November 1, 1941, and commission (W.D., A.G.-O. Form No. 0550 C, Aug. 1, 1938) of the same date; and that Aviation Cadet LaRoche was unable to receive or accept such appointment by reason of his death in line of duty on October 28, 1941, at Kelly Field; and that the letter of appointment and commission were canceled on November 14, 1941, because of his death. It does not appear whether the Commandant of the Pan-American Airways School recommended Aviation Cadet LaRoche for appointment.

3. Section 2 of the act of June 28, 1942, supra, provides in pertinent part:

> "That the President be * * * authorized to issue * * * an appropriate appointment and commission in the name of any person who, while in the military * * * service of the United States at any time after September 8, 1939, shall have successfully completed the course at a training school for officers and shall have been recommended for appointment to a commissioned grade by the officer commanding or in charge of such school, and who shall have been unable to receive or accept such appointment by reason of his death in line of duty; and any such posthumous appointment and commission shall issue as of the date of such recommendation * * *."

Section 3 of the act provides in pertinent part:

> "That the President be * * * authorized to issue * * * an appropriate commission in the name of any person who, while in the military * * * service of the United States at any time after September 8, 1939, shall have been officially recommended for appointment * * * to a commissioned grade, which recommendation shall have been duly approved by the Secretary of War * * *, and who shall have been unable to receive or accept such appointment * * * by reason of his death in line of duty; and any such posthumous appointment * * * and commission shall issue as of the date of such approval * * *."

4. It is my view that Aviation Cadet LaRoche may be posthumously appointed a second lieutenant, Air Corps Reserve, under section 2 of the foregoing act, as of the date he was recommended for appointment by the officer commanding or in charge of the Pan-American Airways School at Coral Cables, Florida, if he was so recommended by that officer. Although he was recommended for appointment by the Commandant of the Air Corps Advanced Flying School at Kelly Field, Texas, he may not be posthumously appointed under section 2 as of the date of that recommendation, because he had not finished the course at that school at the time of his death. It is also my view that Aviation Cadet LaRoche may, in the alternative, be posthumously appointed under section 3 of the foregoing act as of the date the Secretary of War approved the recommendation upon which the appointment and commission were issued effective November 1, 1941. Under this section it does not appear to be necessary that the recommendation for appointment be made by the officer commanding or in charge of a training school for officers at which the appointee has successfully completed a course of training.

5. It is therefore recommended that these papers be returned to The Adjutant General by disposition form entry, prepared for the signature of the Chief of Division, stating:

> It is the opinion of this office that Aviation Cadet Edwin Bruce LaRoche, Jr., may be posthumously appointed a second lieutenant, Air Corps Reserve, under section 2 of the act of July 28, 1942 (Public Law 680, 77th Cong.), as of the date he was recommended for appointment by the officer commanding or in charge of the Pan-American Airways School at Coral Cables, Florida, if he was so recommended by that officer but that he may not be so appointed under such section upon the basis of a recommendation for appointment by the

Commandant of the Air Corps Advanced Flying School at Kelly Field because he had not finished the course at that school at the time of his death. He may also be appointed under section 3 of the act, whether or not he was recommended for appointment by the officer commanding or in charge of the Pan-American Airways School at Coral Cables, Florida, as of the date the Secretary of War approved the recommendation of the Commandant and other members of the Faculty Board of the Air Corps Advanced Flying School at Kelly Field.

C. B. Mickelwait,
Colonel, J. A. G. D.,
Chief of Military Affairs Division.

SPJGA 333.5 September 10, 1942

MEMORANDUM for The Judge Advocate General.

Subject: Posthumous appointment of civilian employee of the War Department to commissioned grade under act of July 28, 1942.

1. By disposition form (SPX 032.23 Caraway, Hattie W. (8-10-42)) dated September 7, 1942, an opinion was requested as to whether or not a posthumous commission may be issued in the name of Robert A. Turner, deceased, under the provisions of the act of July 28, 1942 (Public Law 680, 77th Cong.), providing for posthumous appointment to commissioned grades in certain cases.

2. The file shows that the said Robert A. Turner was at the time of his death, on July 1, 1942, employed by the War Department as a civilian ferry pilot at Long Beach, California; that his death resulted from an airplane accident in which he was involved while engaged in the performance of his duty as a civilian employee of the War Department; that the records of the Headquarters, Army Air Forces, reveal that he was recommended to The Adjutant General for a commission as a Second Lieutenant, Army of the United States, on July 23, 1942; that he was appointed a Second Lieutenant, Army of the United States, by paragraph 20, Special Orders No. 201, dated July 23, 1942; that a letter order purporting to revoke such appointment was issued under date of August 4, 1942; and that the first information which the Appointment and Procurement Division, Headquarters, Army Air Forces, obtained with respect to his death was furnished by the Civilian Components Branch, Adjutant General's Office, on August 6, 1942.

3. The first three sections of the act of July 28, 1942, supra, authorize the President to issue, or cause to be issued, commissions in the names of certain persons "who, while in the military or naval service of the United States at any time after September 8, 1939", have been duly appointed to commissioned grades or recommended for appointment to commissioned grades and have been prevented from receiving or accepting such appointments by reason of death in line of duty. Such act is entitled "An Act To provide for the posthumous appointment to commissioned or noncommissioned grade of certain enlisted men and the posthumous promotion of certain commissioned officers and enlisted men".

4. The use of the words "who, while in the military or naval service of the United States at any time after September 8, 1939", in the body of the act, taken in conjunction with the fact that the purpose of the act as set forth in its title was to

provide for the appointment to commissioned grade of certain enlisted men, precludes construction of its terms to apply to civilian employees of the War Department. Furthermore, in the present case, it appears that the recommendation for appointment and the appointment itself were not made until after the death of the deceased. Consequently, the case does not come within the conditions prescribed by the statute in any event, because the person recommended and appointed was not at the time in the service of the War Department in any sense. The foregoing views are consistent with those heretofore expressed by this office in an opinion (JAG 210.1, Oct. 28, 1926) involving the application of a similar statute (sec. 2, joint resolution Mar. 3, 1925, 43 Stat. 1256; 10 U.S.C. 489) to civilian employees of the War Department.

5. It is therefore recommended that these papers be returned to The Adjutant General by disposition form entry, prepared for the signature of the Acting Chief of Division, stating:

> It is the opinion of this office that the issuance of a posthumous commission in the name of Robert A. Turner, a deceased former civilian employee of the War Department, is not authorized by any of the provisions of the act of July 28, 1942 (Public Law 680, 77th Cong.).

Charles W. West,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 1943/4798 April 10, 1943

MEMORANDUM for The Judge Advocate General.

Subject: Liability of members of the Officers' Reserve Corps and of officers of the Army of the United States without component to retention in the active military service after termination of the present war.

1. By memorandum dated April 6, 1943, The Provost Marshal General requested an expression of opinion with respect to the above subject.

2. It appears that The Provost Marshal General has procurement authority to commission 2,500 persons in the Specialists Reserve Section of the Officers' Reserve Corps for military government duty. It is stated that because the normal term of Reserve commissions is five years whereas all commissions in the Army of the United States without component expire six months after the termination of the present war, a question has arisen, in connection with recruitment of the mentioned personnel, as to whether Reserve officers may be held to a longer period of active duty in occupied areas than may be imposed on officers without component.

3. Appointments in the Officers' Reserve Corps are made pursuant to the provisions of section 37, National Defense Act, as amended, which provides in pertinent part:

> "* * * Appointments in every case in the Officers' Reserve Corps shall be for a period of five years, but an appointment in force at the outbreak of war shall continue in force until six months after its termination: Provided, That an officer of the Officers' Reserve Corps shall be entitled to be relieved from active Federal service within six months after its termination if he makes application therefor.* * *"

Section 37a, National Defense Act, provides pertinently:

> "To the extent provided for from time to time by appropriations for this specific purpose, the President may order reserve officers to active duty at any time and for any period; but except in time of a national emergency expressly declared by Congress, no reserve officer shall be employed on active duty

for more than fifteen days in any calendar year without his own consent. * * *"

The act of September 22, 1941 (Public Law 252, 77th Cong.; 55 Stat. 728), authorizes the temporary appointment of qualified persons as officers in the Army of the United States without component and provides -

"* * * That any appointment made under the provisions of this Act * * *, if not sooner vacated, shall continue during the present emergency and six months thereafter * * *."

Section 2 of the act of December 13, 1941 (Public Law 338. 77th Cong.; 55 Stat. 799), provides in part:

"The periods of service, training and service, enlistment, appointment, or commission, of all members of the Army of the United States now or hereafter in or subject to active military service of the United States are extended /during the existence of any war in which the United States is engaged, and during the six months immediately following the termination of any such war/ * * *."

4. From the quoted portions of the mentioned statutes it is clear that under existing laws; a, Reserve commissions normally expire five years after they are issued; b, the commissions of all officers on active duty and those who may hereafter be placed on active duty have been extended to six months beyond the termination of the present war; c, periods of service have been similarly extended; d, except as indicated in c, above, Reserve officers cannot be kept on duty without their consent in time of peace for more than fifteen days in any calendar year; and, e, commissions of officers of the Army of the United States without component (AUS) expire six months after the end of the present war or emergency, whichever is later. Although it is impossible now to predict when either the war or the emergency will end, it seems reasonable to assume that both will end at approximately, if not exactly, the same time. Indulging in such an assumption it is clear that six months after that event officers without component will cease to have military status and consequently may not then be required to perform any military duty. At the same time Reserve officers who may then be on active duty will revert to an inactive status unless they consent to further active duty.

It should be borne in mind that a mere cessation of hostilities does not normally constitute the end of a war. Technically,

a state of war, once declared, continues until conclusion of the peace treaty, which may not come for several years after the last actual battle. Indeed, the peace treaty which officially ended the last World War was not agreed to until nearly three years after the armistice which put an end to all fighting. It thus appears likely that all commissioned personnel of the Army will be liable to continued active service for a considerable length of time beyond the termination of actual hostilities.

5. It is therefore recommended that a memorandum, prepared for the signature of The Judge Advocate General, be dispatched to The Provost Marshal General, stating:

> Reference is made to your memorandum dated April 6, 1943, whereby you requested an expression of my views with respect to the length of time during which members of the Officers' Reserve Corps and officers commissioned in the Army of the United States without component may be required to serve on active duty. Members of the Officers' Reserve Corps on active duty are liable for continued active service only until six months after the end of the war. Thereafter they may not, under existing law, be ordered to active duty for more than fifteen days in any calendar year without their consent. Under existing statutes the military status of those officers of the Army of the United States who do not belong to any particular statutory component thereof will terminate six months after the end of the present war or emergency, whichever is later, and consequently such officers cannot be kept longer in the active service.
>
> It seems appropriate to remark that a state of war, once declared, does not ordinarily end with a cessation of hostilities, but continues until the conclusion of a treaty of peace or until some date fixed by law. Thus, the state of war between the United States and Germany initiated by the declaration of April 6, 1917, continued until nearly three years after the armistice which put an end to the fighting, when it was terminated July 2, 1921, by act of Congress approved on that date (42 Stat. 105). It thus appears likely that all commissioned personnel of the Army will remain subject to continued active duty for some time after the cessation of actual hostilities. Furthermore, the liability of military personnel for active service during the period immediately following the present war may, of course, be affected by the enactment of new legislation.
>
> Charles W. West,
> Colonel, J.A.G.D.,
> Chief of Military Affairs Division.

SPJGA 1942/5961
(211)

December 18, 1942

MEMORANDUM for The Judge Advocate General.

Subject: Appointment of certain aviation cadets as Second Lieutenants, Air Corps Reserve.

1. By disposition form dated December 6, 1942, The Adjutant General requested an opinion whether there is any legal objection to the appointment under section 37, National Defense Act, as amended, of certain graduate aviation cadets as Second Lieutenants, Air Corps Reserve, directly from their status as aviation cadets. The graduate aviation cadets referred to are those who fall within one or the other of the following classes:

a. Appointed aviation cadets on or after July 8, 1942, (the date of approval of the Flight Officer Act, post), from enlistments for aviation cadet training entered into from civilian status prior to July 15, 1942.

b. Appointed aviation cadets on or after July 8, 1942, from enlisted status after having been found qualified for aviation cadet appointment by an Aviation Cadet Examining Board whose report of proceedings was dated prior to July 15, 1942.

2. It appears from the file that the Commanding General, Army Air Forces, desires that commissions as Second Lieutenant, Air Corps Reserve, be issued to the aviation cadets referred to above in order that such persons may, upon being graduated as aviation cadets, be accorded the commissioned status which at the time they sought aviation training they were led to believe they would receive under the Army Aviation Cadet Act (act June 3, 1941, 55 Stat. 239; 10 U.S.C. 297a, et seq.). Action has been taken to assure that such aviation cadets will receive commissions as Second Lieutenant, Army of the United States, under the provisions of the act of September 22, 1941 (Public Law 252, 77th Cong.). The Commanding General, Army Air Forces, by an inclosed memorandum dated December 7, 1942, has requested The Adjutant General to authorize representatives of The Adjutant General's Office on the staff of certain Air Forces units to issue commissions as Second Lieutenant, Air Corps Reserve, to the mentioned aviation cadets. It appears that The Adjutant General is of the opinion that considerable work and possible confusion will be avoided if the mentioned aviation cadets are commissioned as Second Lieutenants, Air Corps Reserve, directly from their status as aviation cadets rather than being first commissioned in the Army of the United States and then later commissioned in the Air Corps Reserve.

3. Pertinent portions of the Flight Officer Act (act July 8, 1942, Public Law 658, 77th Cong.) are as follows:

> "Sec. 2. The provisions of section 3 of the Army Aviation Cadet Act of June 3, 1941, are hereby suspended for the duration of the present war and for six months thereafter except as to any person who has enlisted or who has been appointed as an aviation cadet prior to the date of enactment of this Act. During such period and under such regulations as the Secretary of War may prescribe, male citizens of the United States may enlist as aviation cadets and men having an enlisted status in the Army of the United States may be appointed by the Secretary of War as aviation cadets. * * * Upon successful completion of the prescribed course of training and instruction and under such regulations with respect to selection as the Secretary of War may prescribe, each such cadet shall be commissioned as a second lieutenant in the Army of the United States under the provisions of the Act of September 22, 1941 (Public Law 252, Seventy-seventh Congress), or appointed as a flight officer in the Army of the United States. * * *
>
> "* * *
>
> "Sec. 5. Any person who has completed the prescribed course of training and instruction as an aviation cadet or aviation student and has served in time of war as a commissioned officer or flight officer in the Army of the United States may, under such regulations as the Secretary of War may prescribe, be appointed an officer in the Air Corps Reserve."

4. Section 2 of the Flight Officer Act, supra, suspends, except as to persons enlisted or appointed as aviation cadets prior to July 8, 1942, for the duration of the war and six months, the provisions of section 3, Army Aviation Cadet Act (act June 3, 1941; 55 Stat. 239; 10 U.S.C. 297), providing for the appointment as Second Lieutenant, Air Corps Reserve, of aviation cadets who successfully complete their training as such. The cadets involved in the instant inquiry were appointed on or after July 8, 1942. Consequently, they are not within the class to whom the exception is applicable. Section 2, Flight Officer Act, supra, provides that aviation cadets to which it is applicable, upon successful completion of their training, shall be commissioned as Second Lieutenants, Army of the United States, or appointed flight officers. Section 5 of the act provides that any person who has completed training as an aviation cadet and has served in time of war as a commissioned officer or flight officer in the Army of the United States may be commissioned in the Air Corps Reserve. Although it might be contended with some force that the Congress by

specifying the status to be accorded aviation cadets who successfully complete their training and by specifically providing that those who later serve during time of war as commissioned officers or flight officers may be commissioned in the Air Corps Reserve has precluded the issuance of commissions in the Air Corps Reserve to aviation cadets immediately upon completion of their training, it is unnecessary to decide that question in order to dispose of the instant case. Section 2, Flight Officer Act, supra, requires that aviation cadets to which it is applicable be either commissioned under the joint resolution of September 22, 1941 (55 Stat. 728), or appointed as flight officers. To commission such cadets in the Air Corps Reserve alone would not constitute compliance with section 2, supra. In reaching that conclusion, consideration has been given to the fact that it might be contended that a commission in the Reserve Corps is more valuable than either a commission in the Army of the United States without component or an appointment as a flight officer and that, consequently, one who is given a commission in the Reserve Corps could not complain because he was denied a commission in the Army of the United States without component or an appointment as a flight officer. However, such a contention ignores the fact that to some persons a commission in the Army of the United States without component or an appointment as a flight officer may be more desirable than a commission in the Reserve Corps, because the tenure under the first two is limited to the period of the war and six months while under the latter it is at least five years. The holder of a Reserve commission in the Air Corps must agree to serve at least three years on active duty (par. 2b, AR 140-23, July 30, 1942) and is subject to call for active duty for not more than fifteen days in any calendar year during the period of his commission (sec. 37a, National Defense Act, as amended).

As to the existence of authority under which commissions in the Air Corps Reserve may be issued to the aviation cadets to whom it is desired to issue such commissions, it is believed that in any event such authority exists under section 5, Flight Officer Act, supra. Although there is some evidence that the purpose of section 5 was to provide the necessary authority for post-war commissioning in the Air Corps Reserve of those who serve during the war under commissions in the Army of the United States or under appointments as flight officers (cf, H. Rept. 2314, 77th Cong., and Hearings before the Senate Committee on Military Affairs on S. 2533, 77th Cong.), the section is by its terms sufficiently broad to authorize the commissioning in the Air Corps Reserve of the aviation cadets whom it is desired to commission.

5. It is therefore recommended that these papers be returned to The Adjutant General by disposition form entry, prepared for the signature of the Chief of Division, stating:

It is the opinion of this office that section 2, Flight Officer Act (act July 8, 1942; Public Law 658, 77th Cong.) requires that the aviation cadets referred to in the inclosed memorandum dated December 7, 1942, from the Commanding General, Army Air Forces, be either commissioned as Second Lieutenants, Army of the United States, under the joint resolution of September 22, 1941 (55 Stat. 728), or appointed as flight officers in the Army of the United States. Consequently, it would be legally objectionalbe to commission such cadets as Second Lieutenants, Air Corps Reserve, directly from their status as aviation cadets and not to tender them commissions in the Army of the United States or appointments as flight officers. Section 5, Flight Officer Act, supra, specifically provides for the commissioning in the Air Corps Reserve of persons who have completed the prescribed course of training as aviation cadets and who have served in time of war as commissioned officers or flight officers in the Army of the United States. That section provides authority under which the aviation cadets whom it is desired to commission in the Air Corps Reserve may be commissioned after they have served any period of time under their commissions in the Army of the United States.

Charles W. West,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 1942/5673
(325.34)

December 1, 1942

MEMORANDUM for The Judge Advocate General.

Subject: Commissioned status of (Major) Victor L. Colson.

1. By memorandum (WDGAP 201 Colson, Victor L.) dated November 24, 1942, certain questions were submitted as to the commissioned status of Major Victor Lionel Colson, O-190613. It appears from the file that this officer on January 28, 1941, was promoted to the temporary grade of major with the proviso that this promotion would terminate automatically upon his relief from active Federal service, at which time he would revert to his "present status" (i.e. captain). He was subsequently relieved from active duty and transferred as a captain, to the Inactive National Guard. Effective April 20, 1942, he was ordered to extended active duty by the Commanding General, Sixth Corps Area, in the grade of major. He entered upon active duty on April 20, 1942, and has served since that time in the grade of major, and now has been recommended for promotion to lieutenant colonel.

2. The opinion of this office is requested on the following points:

> "a. Has subject officer held a constructive grade of major throughout his present tour of active duty?
>
> "b. Is he entitled to retain all of the pay and allowances he has received during this tour of duty?
>
> "c. May he now be appointed a Major and immediately promoted to Lieutenant Colonel? If so, should his appointment as Major be antedated to the date he commenced performing the duties of a Major under his current active duty orders?"

3. In a case where an officer was retired as a major, was subsequently promoted to the rank of colonel on the retired list under the act of June 21, 1930 (46 Stat. 793; 10 U.S.C.), and ordered to active duty with the rank of colonel, this office held (SPJGA 1942/1670, Apr. 28, 1942; id., 1942/2873, July 4, 1942), in substance, that although the orders under which he entered upon active duty inadvertently stated his rank as colonel, his status was that of a de jure major and a de facto colonel, Army of the United States, but that there was no legal objection to then appointing him a temporary colonel in the Army of the United

States with rank from the date he entered upon his current tour of active duty pursuant to orders. Applying the principles of that case to the present question, it may, in my opinion, properly be concluded that Major Colson's status on April 20, 1942, to the present time was that of a de jure captain and a de facto major, Army of the United States, and that he may at this time be appointed a temporary major in the Army of the United States to rank from April 20, 1942, the date he entered upon active duty and that thereafter he may properly be immediately promoted to the rank of lieutenant colonel.

It is a well settled principle of law that a de facto officer is entitled to retain such compensation as he may have received provided it does not exceed the rate of pay prescribed for the de facto grade (U.S. v. Boyer, 268 U.S. 394; Badeau v. U.S., 130 U.S. 439; SPJGA 1942/2083, May 21, 1942; SPJGA 1942/6238, Nov. 13, 1942).

4. It is therefore recommended that these papers be returned to the Assistant Chief of Staff, G-1, by memorandum, prepared for the signature of the Chief of Division, stating:

> Referring to your memorandum (WDGAP 201 Colson, Victor L.) dated November 24, 1942, relative to the above subject, under the facts presented it is the opinion of this office that:
>
> a. Major Victor L. Colson has been a de facto major, Army of the United States since the date he entered upon his present tour of active duty.
>
> b. Inasmuch as he has been paid for services actually rendered in an office held de facto he is entitled to retain all of the Army pay and allowances he has received during this tour of active duty.
>
> c. He may now be appointed a temporary major, Army of the United States, to rank from April 20, 1942, and may immediately thereafter be promoted to the rank of lieutenant colonel, Army of the United States. Although his date of rank may be antedated as indicated, the date of appointment may not be legally antedated.

Charles W. West,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 210.451 July 8, 1942

MEMORANDUM for The Judge Advocate General.

Subject: Relief from active duty of officer commissioned in Army of the United States and recall later under same appointment.

1. By telephone (Office of the Assistant Chief of Staff, G-1, Colonel Berry, WD Ext. 71414), on July 4, 1942, opinion was requested whether Brigadier General James Clauson Roop, commissioned in the Army of the United States, may lawfully be relieved from active duty under such an appointment without vacating his appointment, with a view to being called to active duty again under the same appointment at a later time, during the present war or within six months thereafter.

2. It was informally stated that General Roop was appointed from civilian life as a colonel in the Army of the United States, under Public Law 252, 77th Congress, on January 29, 1942. Thereafter, on March 2, 1942, he was appointed a brigadier general, Army of the United States, under the same statutory authority and has been on active duty since his original appointment. His services are no longer required for the particular duty for which he was appointed, but it is anticipated that he may be recalled to active duty at a later time if such procedure is feasible. It is desired to avoid the necessity of again requesting confirmation by the Senate of his appointment upon his re-entry on active duty.

3. The act of September 22, 1941 (Pub. Law 252, 77th Cong.), provides in pertinent part as follows:

> "* * * That during the present emergency, temporary appointments as officers in the Army of the United States may be made, under such regulations as the President may prescribe, from among qualified persons without appointing such persons as officers in any particular component of the Army of the United States. All persons so appointed as officers shall be commissioned in the Army of the United States and may be ordered into the active military service of the United States to serve therein for such periods of time as the President may prescribe. Such appointments in grades below that of brigadier general shall be made by the President alone, and general officers by and with the advice and consent of the Senate: Provided, That any appointment made under the pro-

visions of this Act may be vacated at any time by the President and, if not sooner vacated, shall continue during the present emergency and six months thereafter: * * * " (Underscoring supplied).

4. The second sentence of this act clearly indicates the congressional intent that the appointment and commissioning of an officer in the Army of the United States shall not be self-executing for the purpose of placing the officer concerned in an active-duty status. Such an officer does not acquire an active-duty status until "ordered into the active military service of the United States". That such an officer may be relieved from active duty and reordered to active duty without affecting his original appointment and commission appears to be evident from the phrase "to serve therein for such periods of time as the President may prescribe" (underscoring supplied). This view finds support, also, in the statutory duration of the appointment found in the first proviso, wherein it is provided that the appointment "shall continue during the present emergency and six months thereafter", if not sooner vacated by the President. Although the President is authorized, under the act, to vacate such an appointment at any time, relief from active duty, without more, is not tantamount to a vacation of the appointment or of the commission evidencing such an appointment. It follows that an appointment, validly made pursuant to the act of September 22, 1941, supra, continues in effect until vacated by the President, or until terminated by operation of law as therein provided. Accordingly, so long as such an appointment and commission continue in effect, the officer concerned may be relieved from active duty by appropriate action of the President and, thereafter, reordered to active duty without the necessity of a new appointment.

5. It is therefore recommended that reply be made by memorandum for the Assistant Chief of Staff, G-1 (attention: Colonel Berry), prepared for the signature of the Assistant to The Judge Advocate General, stating:

> In reply to your telephonic request of July 4, 1942, in connection with the above-mentioned subject, it is the opinion of this office that Brigadier General James Clauson Roop, commissioned in the Army of the United States pursuant to the act of September 22, 1941 (Public Law 252, 77th Cong.), may be relieved from active duty by appropriate action of the President without vacating his appointment as a brigadier general, Army of the United States. Thereafter, so long as his appointment continues in effect, i.e., without vacation by affirmative action of the President or termination by operation of law as provided in the mentioned act, General Roop may be reordered to active duty without the necessity of a new appointment.

C. B. Mickelwait,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 210/725 August 21, 1942

MEMORANDUM for The Judge Advocate General.

Subject: Relative Rank of Retired Officers Called to Active Duty.

1. By memorandum (AG 201.725 (8-8-42)OP) dated August 8, 1942, these papers were referred for opinion as to the method of determining the relative rank of two retired officers of the Regular Army called to active duty and now serving under temporary appointments as Lieutenant Colonels, Army of the United States.

2. Included in the file is a letter dated July 31, 1942, from Lieutenant Colonel J. T. Clement, the body of which reads as follows:

"Information is requested as to whether Lt. Colonel Joseph T. Clement, (014022), AUS, or Lt. Colonel Jack Greer, (011517), AUS, is senior in rank.

"Lt. Colonel Clement was promoted to the grade of Major, Infantry, Regular Army, on July 1, 1920, and was retired from active service with that rank on January 4, 1921, for disability due to wounds received in action. Since his retirement, Lt. Colonel Clement has had additional active duty from January 5, 1921, to January 25, 1922, and from April 1, 1941, to date. Including active duty as a Major (Temporary RA), and as a Major, Infantry, National Army, June 3, 1918, to February 21, 1920, Lt. Colonel Clement has had approximately four years and thirteen days active duty as a major. On April 1, 1941, when called to active duty, Lt. Colonel Clement had approximately three years, one month, and sixteen days active duty as a major. Lt. Colonel Clement was appointed a Lt. Colonel, AUS, by Paragraph 2, Special Order 51, War Department, February 27, 1942, with rank from February 1, 1942, and is now serving in that grade.

"Lt. Colonel Jack Greer, (011517), AUS, was promoted to the rank of Captain, Air Service, Regular Army on July 17, 1934, and was retired from active service with that rank on April 30, 1939, for physical disability. Since his retirement, Lt. Colonel Greer has had additional active duty from April 7, 1941, to date, and prior to being retired served as Major (Temporary), Air Service, from October 11, 1937, to April 30, 1939. Lt. Colonel Greer had approximately four years, nine months, and thirteen days active duty as a captain, his grade, when recalled to active duty on April 7, 1941. Subse-

quent to his recall to active duty, Lt. Colonel Greer became a major, and in a special order issued by the War Department--Subsequent to the War Department special order appointing Lt. Colonel Clement a Lt. Colonel, AUS, with rank from February 1, 1942--was appointed a Lt. Colonel, AUS, with rank from February 1, 1942.

"From the above, it is apparent that Lt. Colonel Clement was a Major, Regular Army, with approximately three years, one month, and sixteen days active duty as such when recalled to active duty as a major on April 1, 1941, and had approximately four years, thirteen days, active duty as a major when appointed Lt. Colonel, AUS, with rank from February 1, 1942, and that Lt. Colonel Greer had approximately four years, nine months and thirteen days active duty as a Captain, Regular Army, and one year, five months, and nineteen days active duty as a Major, (Temporary), when recalled to active duty as a Captain, Regular Army on April 7, 1941, some six days after the recall to active duty of Lt. Colonel Clement as a Major, Regular Army, on April 1, 1941."

3. The basis for determining the relative rank of any two or more officers is found in paragraph 8 of section 127a, the National Defense Act, as amended (act Feb. 2, 1925 (43 Stat. 1078; 10 U.S.C. 511)), which reads as follows:

"Unless special assignment is made by the President under the provisions of the one hundred nineteenth Article of War, all officers in the active service of the United States in any grade shall take rank according to date, which, in case of an officer of the Regular Army, is that stated in his commission or letter of appointment, and in the case of a reserve officer or an officer of the National Guard called into the service of the United States, shall precede that on which he is placed on active duty by a period equal to the total length of active Federal Service and service under the provisions of sections 94, 97, and 99 of this act which he may have performed in the grade in which called or any higher grade. When dates of rank are the same, precedence shall be determined by length of active commissioned service in the Army. When length of such service is the same, officers of the Regular Army shall take rank among themselves according to their places on the promotion list, preceding reserve and National Guard officers of the same date of rank and length of service, who shall take rank among themselves according to age."

This office has had occasion to construe the foregoing provisions of law (JAG 210.2, Dec. 27, 1938) in connection with the establishment of rules for determining the order of precedence of officers of the Regular Army, Reserve officers on active duty and National Guard officers in Federal service, when dates of rank are the same. The following views were expressed:

> "b. When dates of rank are the same, precedence shall be determined by length of active commissioned service in the Army.
>
> "(1) In the case of a Regular Army Officer, by the total time spent in active military service in any commissioned grade."

4. It appears that Lieutenant Colonels Joseph T. Clement and Jack Greer are both commissioned officers in the Regular Army and are now serving under temporary commissions in advanced grade in the Army of the United States. The date of rank specified under their present temporary appointments is February 1, 1942. In cases such as this, for purposes of determining order of precedence, officers of the Regular Army are entitled to count all time spent in active military service in any commissioned garde. The relative rank of the mentioned officers cannot be decided by this office on the present showing because the complete records of their active commissioned service does not appear in the file. However, the relative rank of the mentioned officers may be easily ascertained by applyting the above-stated rule.

5. It is therefore recommended that these papers be returned to The Adjutant General by memorandum, prepared for the signature of the Chief of Division, stating:

> Relative to your memorandum (AG 210.725 (8-8-42)OP) dated August 8, 1942, it is the opinion of this office that when dates of rank of officers are the same, precedence is to be determined by length of active commissioned service in the Army which in the instant case, both parties being Regular Army officers, is the total time spent in active military service in any commissioned grade.

C. B. Mickelwait,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 210.725 June 11, 1942

MEMORANDUM for The Judge Advocate General.

Subject: Relative Rank of a Retired Officer Called to Active Duty.

1. By disposition form (AG 201 - Heisse, John W. SPGA/10108-374) dated May 26, 1942, these papers were referred for remark and recommendation in connection with the relative rank of Captain John W. Heisse, United States Army, Retired, who was called to active duty as a captain on February 16, 1942.

2. It appears from the first indorsement (AG 201 - Heisse, John W. (5-8-42)OE) dated May 24, 1942, that the promotion of Captain Heisse from first lieutenant to captain, Regular Army, subject to physical examination required by law, with rank from July 1, 1920, was announced in the daily list of promotions on March 29, 1921. Upon Captain Heisse's failure to pass the physical examination, he was, pursuant to paragraph 6, Special Orders No. 79-C, War Department, Washington, D. C., dated April 6, 1921, retired as a captain for physical disability under the provisions "of an Act of Congress approved October 1, 1890, and section 32 of an Act of Congress approved February 2, 1901". It further appears that on October 19, 1921, there was transmitted to Captain Heisse a "commission issued after nomination to and confirmation by the Senate in evidence of /his/ appointment in the grade of Captain of Infantry before retirement". He was informed by The Adjutant General at that time that no acceptance of the commission by him was necessary. By telegram dated February 3, 1942, Captain Heisse was ordered to active duty effective February 16, 1942.

3. The question has arisen whether the active service performed by Captain Heisse during the period July 1, 1920, until the date of his retirement may be credited as active service in the grade of captain in determining his present relative rank.
* * * :

"* * *"

The statute (act Oct. 1, 1890, 26 Stat. 562) under which Captain Heisse was retired provides in pertinent part as follows:

"* * * That should the officer fail in his physical examination and be found incapacitated for service by reason of physical disability contracted in

line of duty he shall be retired with the rank to which his seniority entitled him to be promoted; * * *."

The statutory provision for promotion subject to examination is found in section 32, act of February 2, 1901 (31 Stat. 756; 10 U.S.C. 1940 ed. 556a), which provides as follows:

"That when the exigencies of the service of any officer who would be entitled to promotion upon examination require him to remain absent from any place where an examining board could be convened, the President is hereby authorized to promote such officer, subject to examination, and the examination shall take place as soon thereafter as practicable. If upon examination the officer be found disqualified for promotion, he shall, upon the approval of the proceedings by the Secretary of War, be treated in the same manner as if he had been examined prior to promotion."

In construing the last-mentioned statute this office has held that:

"For purposes of determining dated of relative rank in grade while on active duty, retired officers of the Regular Army should be credited only with the active service which they have performed under the commission or letter of appointment under which they are serving on active duty, including any active service in the same or any higher grade rendered under temporary appointment subsequent to the date of rank stated in said commission or letter of appointment." (JAG 210.725, Oct. 10, 1941).

4. It is believed that the commission under which Captain Heisse is now serving as captain is that which was transmitted to him on October 19, 1921, as having been issued pursuant to section 32, act of October 1, 1890, just prior to retirement. That commission cannot be the one under which he served from July 1, 1920, until his retirement because the promotion announced on March 29, 1921, was conditioned upon his being found physically qualified. This condition failing of fulfillment, that promotion is deemed not to have been finally consummated, and presumably, except for the provisions of section 32, act of October 1, 1890, supra, Captain Heisse would have been retired as a first lieutenant. Further, the mentioned statute, as is indicated from the wording of the act itself and from the fact that in practice an appointment is made, contemplates a new appointment (see JAG

210.851, Apr. 23, 1940). It is therefore evident, in view of the above-quoted approved opinion of October 10, 1941 (JAG 210.725), that the active service performed by Captain Heisse during the period in question may not properly be counted in determining his present relative rank. This conclusion is in harmony with that reached in the McCullough case (JAG 210.725, Sept. 23, 1941) and is believed to be justified by the facts.

5. It is, therefore, recommended that these papers be returned to the Director of Military Personnel, Services of Supply, by memorandum prepared for the signature of The Judge Advocate General, stating:

> Changing Captain Heisse's date of relative rank to May 3, 1941, as mentioned in paragraph 3, first indorsement (AG 201 - Heisse, John W. (5-8-42)OE) dated May 24, 1942, contemplates crediting him with service in the grade of captain for the time between July 1, 1920, when he was promoted subject to physical examination until, having failed to qualify physically for promotion, he was retired. As indicated, this action would require setting aside an approved opinion of this office (JAG 210.725, Sept. 23, 1941). It is also contrary to and would require setting aside another approved opinion of this office (JAG 210.725, Oct. 10, 1941) in which it was held that:
>
> > "For purposes of determining dates of relative rank in grade while on active duty, retired officers of the Regular Army should be credited only with the active service which they have performed under the commission or letter of appointment under which they are serving on active duty, including any active service in the same or any higher grade rendered under temporary appointment subsequent to the date of rank stated in said commission or letter of appointment."
>
> I regard both of the mentioned opinions as legally sound and therefore recommend that the mentioned action be not carried into effect.

C. B. Mickelwait,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 1942/4845
(210.29)

October 16, 1942.

MEMORANDUM for The Judge Advocate General.

Subject: Revocation of Promotion prior to Notification of Subject.

1. By disposition form (AG 210.2) dated September 30, 1942, there was referred for remarks the inclosed memorandum from The Adjutant General's office dated September 30, 1942, inquiring whether temporary promotions which have been announced in War Department special orders according to existing rules and regulations may be revoked and if such promotions are revoked whether the officers concerned would lose their military status.

2. The mentioned memorandum states that on September 16, 1942, the Commanding General, Headquarters Armored Force, recommended several second lieutenants for promotion to the grade of first lieutenant, Army of the United States. After the promotions had been duly accomplished and announced in War Department Special Orders No. 257, dated September 22, 1942, the Commanding General, Armored Force, notified The Adjutant General's office by radio that if two of these officers had not been promoted the recommendation should be disregarded and the names of these two officers should be deleted from the list. The Commanding General was notified that the promotions had been accomplished and announced in War Department special orders as stated above. On the same date the Commanding General, Armored Force, requested that the promotion be revoked. It appears from the 201 files of the mentioned officers that the recommendation for promotion was received by The Adjutant General's office on September 19, 1942; the request of the Commanding General, Armored Force, that the names of the officers in question be deleted was received in that office on September 22, 1942; on September 24, 1942, The Adjutant General's office notified the Commanding General that the promotions had been announced in War Department special orders; and the request for the revocation of the mentioned promotions was received in The Adjutant General's office on September 26, 1942. From additional information received informally (Lt. Col. Crotenrath, A.G.O.) by this office, it now appears that letters announcing the mentioned promotions were mailed under date of September 22, 1942, to the respective officers in care of their Commanding General. Inclosed in those communications were the required oaths of office to be executed by the officers. Instructions appearing on the reverse of that instrument state that in case of nonacceptance, the commission or notification of appointment will be returned to The Adjutant General by a letter indicating the fact of such nonacceptance. By wrapper indorsement (AG 201 Rogers, John I. (Off) X201 - Bucklew,

Harold S. (Off)) dated October 2, 1942, it appears that the mentioned notifications of promotions of the interested officers were returned in view of the radiogram of The Adjutant General's office (SPXBG) dated September 24, 1942, and radiogram from the Headquarters Armored Force dated November 26, 1942, which requested promotion of these officers be revoked.

3. The view has been expressed by this office that once an appointment has been made it may not be revoked by the appointing authority and the officer can be removed from office only by resort to the established procedure (JAG 210.1, Aug. 12, 1918; JAG 210.14, Nov. 23, 1918; JAG 210.14, May 29, 1920; JAG 210.14, Jan. 16, 1929; JAGC 22818, Apr. 21, 1908). In the cases cited, however, it appears that the appointments were actually completed.

The act of October 14, 1942 (Public Law 746, 77th Cong.), provides:

> "That every officer of the Army of the United States, or any component thereof, promoted to a higher grade at any time after December 7, 1941, shall be deemed for all purposes to have accepted his promotion to higher grade upon the date of the order announcing it unless he shall expressly decline such promotion, and shall receive the pay and allowances of the higher grade from such date unless he is entitled under some other provision of law to receive the pay and allowances of the higher grade from an earlier date. No such officer who shall have subscribed to the oath of office required by section 1757, Revised Statutes, shall be required to renew such oath or to take a new oath upon his promotion to a higher grade, if his service after the taking of such an oath shall have been continuous."

4. It is to be noted that under the express provisions of the above-quoted act, a promotion is deemed to have been accepted upon the date of the order announcing it unless the interested officer shall expressly decline such promotion. In the instant case the promotion was announced in War Department Special Orders No. 257, dated September 22, 1942. Although the file discloses that the oaths and announcements of the promotions which had been forwarded to the interested officers were returned to The Adjutant General's office, that action, under the circumstances of this case, is not regarded as having the effect of expressly declining such promotion. There is nothing else in the file indicating that the promotions were expressly declined. The provisions of the mentioned act, are retroactive to December 7, 1941, and it appears that the promotions in question are within its scope. Accordingly,

the officers in question are regarded as having been promoted to the higher grade as of the date of the announcement of such promotions in appropriate orders. Such being the case it is manifest that the promotions may not be revoked. Moreover, it appears that the only means of restoring the officers concerned to their former grade is to terminate their appointments as first lieutenants and reappoint them as second lieutenants.

5. It is therefore recommended that these papers be returned to The Adjutant General by action sheet entry, prepared for the signature of The Judge Advocate General, stating:

> The act of October 14, 1942 (Public Law 746, 77th Cong.), provides that every officer of the Army of the United States, or any component thereof, promoted to a higher grade at any time after December 7, 1941, shall be deemed for all purposes to have accepted his promotion to higher grade upon the date of the order announcing it unless he shall expressly decline such promotion. Nothing in the file in this case is regarded as indicating that the officers concerned expressly declined the promotions in question. Accordingly, under the provisions of the above-mentioned act, those promotions are regarded as having, in effect, been accepted on the date they were announced in War Department special orders. Such being the case, it is my opinion that such promotions may not be revoked. Moreover, it appears that the only means of restoring the officers involved to their former grade is to terminate their appointments in the higher grade and reappoint them in the lower grade.

Charles W. West,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 1943/7783 11 June 1943

MEMORANDUM for The Judge Advocate General.

Subject: Promotion of officer.

1. By informal action sheet (AG 201 Kennedy, Kenneth W. (3-25-43)PO-P) dated 29 May 1943, the inclosed papers were referred for an opinion whether it is legally possible to effect at this time the promotion of First Lieutenant Kenneth W. Kennedy, 0-23716, C.E., to the grade of captain, Army of the United States, effective as of 9 September 1942, with rank from that date, and further, if the mentioned promotion can be so accomplished, request is made for the draft of a letter order which would insure the officer of pay as a captain from 9 September 1942.

2. The file discloses that Lieutenant Kennedy, a Regular Army officer, entered upon active service 11 June 1941, as a second lieutenant, and on 8 April 1942, was promoted to first lieutenant with date of rank from 1 February 1942. On 14 July 1942, the Commanding Officer of the 591st Engineer Boat Regiment forwarded to the War Department recommendations for promotion to captain of several officers of that regiment, including Kennedy. Lieutenant Kennedy was one of ten first lieutenants so recommended who had not completed six months in grade, a prerequisite for such promotion under subparagraph 6b and c, Circular No. 161, War Department, 1942. Before reply had been received from the War Department as to any action on the promotion recommendations, the regiment started overseas on 6 August 1942. On 28 August 1942, the regimental commander again forwarded these recommendations for promotion to ETOUSA through the First Engineer Amphibian Brigade. These were received at ETOUSA on 14 September 1942. By 15 September 1942, nine first lieutenants of the regiment received letters from the War Department advising them of their promotion to the rank of captain effective 4 August 1942. Lieutenant Kennedy did not receive such a letter from the War Department. On 19 September 1942, Lieutenant Kennedy received a telephone call from Major Siverson, 531st Engineer Shore Regiment, informing him that his promotion was announced in a telegram from the First Engineer Amphibian Brigade. The telegram referred to was copy of a teletype order from ETOUSA dated 17 September 1942. Lieutenant Kennedy completed the oath of office and proceeded to fill the duties of the rank to which promoted. The brigade headquarters assumed that the promotion of Lieutenant Kennedy came from the War Department inasmuch as the second mentioned recommendation for his promotion was returned from ETOUSA on 14 September 1942, and was withdrawn from further consideration on the assumption that he had already been promoted. On 11 October 1942, a letter

from brigade headquarters to the II Army Corps announced Lieutenant Kennedy's promotion stating that the date of rank was unknown. The entire brigade entered the North African campaign and after landing in North Africa and learning that Lieutenant Kennedy had not received official confirmation of his promotion from the War Department, a letter was initiated by the First Engineer Amphibian Brigade asking confirmation. As a result of such request for confirmation, it was discovered that Lieutenant Kennedy's recommendation for promotion was returned on 3 August 1942, as unfavorably considered because of lack of time in grade, and that the mentioned promotion actually was that of Lester R. Kennedy, another officer. The commanding officer of the regiment states that Lieutenant Kennedy performed all the duties of a captain in a highly creditable manner, performed excellent work in the African campaign and had been recommended for promotion to major before it was discovered he had not yet been promoted to captain. It is now recommended that Lieutenant Kennedy be promoted to the grade of captain, Army of the United States, with date of rank from 9 September 1942. It is apparent that 9 September 1942, is a recurring clerical error, and that the date intended is 19 September 1942, the date Kennedy was erroneously notified of his promotion and took the oath of office.

3. There is no legal authority for the War Department to antedate appointments or promotions, although date of rank may be antedated. Thus the order of promotion in this case cannot be made effective as of 19 September 1942, but can only be made effective as of the date issued. It can, however, provide for the officer's date of rank to be officially fixed as of such prior date (J.A.G. 326.21, 30 Aug. 1929; SPJGA 1942/5238, 7 Nov. 1942; SPJGA 1942/5673, 1 Dec. 1942).

Clearly, under the facts appearing in the file Lieutenant Kennedy was a de jure first lieutenant and a de facto captain from 19 September 1942 (SPJGA 1942/2083, 21 May 1942). Although it is well settled that a de facto officer is entitled to retain such compensation as he may have received for the period of his de facto service, providing the prescribed rates for his de facto grade were not exceeded, he is not entitled to recover or receive pay, allowances or emoluments pertaining to the de facto office which he has not already received (J.A.G. 325.34, 11 Aug. 1941; id., 210.451, 30 Oct. 1941; id., 154, 14 Nov. 1941; SPJGA 1942/5238, 7 Nov. 1942; SPJGA 1942/5673, 1 Dec. 1942).

4. It is therefore recommended that these papers be returned to The Adjutant General by informal action sheet entry prepared for the signature of the Assistant Chief of Division, stating:

The War Department is without authority to antedate the promotion of Lieutenant Kennedy for pay purposes, but there is no legal objection to including in special orders a paragraph providing for his promotion to the grade of captain and antedating his rank to 9 September 1942 (or 19 September 1942, the date he purportedly took oath of office in that grade). As to the period from 19 September 1942, to the present (if Kennedy has continued to wear the uniform and perform the duties of a captain), it is the opinion of this office that he may be regarded as a de facto captain and that as such he is entitled to retain such pay and allowances of the higher grade as he has already received, but that he is not entitled to any pay or allowances for that period not already received in excess of the rates prescribed by law for the de jure grade held during that period, and cannot be given the right to such excess pay or allowances through the issuance of War Department orders.

Irvin Schindler,
Colonel, J.A.G.D.,
Assistant Chief of Military Affairs Division.

SPJGA 1943/8114 19 June 1943

MEMORANDUM for The Judge Advocate General.

Subject: Promotion of officer.

1. By informal action sheet (AG 201-Adams, Robert Eugene (6-3-43)PO-P) dated 3 June 1943, the inclosed papers were referred for an opinion whether Lieutenant Robert Eugene Adams (O-401720), Infantry Reserve, can be considered to be a de facto first lieutenant in view of the facts and circumstances stated in the file.

2. The facts appearing in the file are that Second Lieutenant Adams was ordered to active duty effective 1 July 1941, and on 8 June 1942, while on active duty with the 732d Military Police Battalion at Fort Custer, Michigan, was recommended by his battalion commander for promotion to first lieutenant. Subsequently, his commanding officer notified him that the recommendation had been approved at the Headquarters, Sixth Corps Area. In July 1942 the battalion moved to Camp McCoy, Wisconsin. On 14 August 1942, Lieutenant Adams was transferred to Grenier Field, New Hampshire, but before leaving was told by his commanding officer that the promotion would be coming soon as he had just telephoned Chicago. Lieutenant Adams states that a few days after he arrived at Grenier Field, telegrams and telephone calls were received by the "A.G.O., Grenier Field", from the Commanding General, Eastern Defense Command, contemplating ordering "First Lieutenant Adams" to duty at the University of Nebraska. Assuming that the promotion had been effected, and that the promotion orders would arrive soon, Adams was thereupon sworn in as a first lieutenant by the Base S-1. It was understood that the oath would be destroyed if the orders did not arrive. About 3 September 1942, the Base S-1 telegraphed The Adjutant General requesting the date of rank of First Lieutenant Adams. By first indorsement (AG 201 Adams, Robert Eugene (9-3-42)EF) dated 7 September 1942, The Adjutant General advised that there was no record of a recommendation in the War Department for the promotion of Second Lieutenant Adams.

On 12 September 1942, after the receipt of the letter dated 7 September 1942, Lieutenant Adams received a copy of Special Orders No. 240, War Department, 5 September 1942, paragraph 17 of which relieved "1st Lt. Robert E. Adams 0401720 * * *" from duty at Grenier Field, and assigned him to duty at the University of Nebraska. Lieutenant Adams thereupon proceeded to his new station pursuant to such orders. It is apparent that Adams was recognized as a first lieutenant at the Headquarters, Seventh Service Command, and by his commanding officer, the Professor of Military Science

and Tactics at the University of Nebraska, as evidenced by the following facts: By paragraph 19, Special Orders No. 282, Headquarters Seventh Service Command, 15 October 1942, "1ST LT ROBERT E. ADAMS * * *" was detailed assistant recruiting officer for the purpose of enlisting college students in the Enlisted Reserve Corps, and appointed summary court for the purpose of administering oaths. On 4 January 1943, and on 3 April 1943, Lieutenant Adams' commanding officer "recommended that ROBERT EUGENE ADAMS 1st Lieutenant O-401720 * * * be promoted to the temporary grade of CAPTAIN, Army of the United States". It is stated in the recommendations that Lieutenant Adams' date of rank in present grade was 1 July 1942. The file does not indicate where this date was obtained. The recommendations were evidently approved by the Commanding General, Seventh Service Command, on 3 May 1943, because by letter (AG 201-Adams, Robert Eugene (5-10-43)PO-P) dated 10 May 1943, from The Adjutant General to the Commanding General, Seventh Service Command, reference is made to a letter of 3 May 1943, recommending certain promotions and further stating that the recommendation for the promotion of Second Lieutenant Robert Eugene Adams was being returned without action as there was no record in the War Department of his having been promoted to the grade of first lieutenant. The Commanding General, Seventh Service Command, by fifth indorsement (SPKGQ 201-Adams, Robert E. (O)(5 May 43)) dated 30 May 1943, recommends the promotion of Adams to the grade of first lieutenant effective 1 September 1942. It is obvious that Lieutenant Adams upon the belief that he had been promoted to first lieutenant in September 1942, assumed that higher grade and thereafter performed the duties of a first lieutenant and continued to serve in that grade. Presumably he wore the uniform and insignia of a first lieutenant.

The specific question presented to this office is whether in view of the first indorsement dated 7 September 1942, from The Adjutant General to the Commanding Officer, Grenier Field, in which it was stated that there was no record of a recommendation in the War Department for the promotion of Lieutenant Adams, he may be considered a de facto first lieutenant.

3. It has been consistently held by this office that one who undertakes to function as an officer, being clothed with apparent authority to do so "under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiring, to submit to or invoke his action supposing him to be the officer he assumed to be", is at least a de facto officer in the grade so assumed (JAG 325.34, 25 Mar. 1941; JAG 325, 7 June 1941; JAG 207, 5 Aug. 1941; JAG 325.34, 11 Aug. 1941; SPJGA 1942/2085, 21 May 1942). On the basis of the stated legal premise

this office, in considering a case where a second lieutenant, National Guard of the United States, had been examined and found qualified for promotion to the grade of first lieutenant and while the findings of the examining board were in the Office of The Adjutant General, his unit was inducted and he improperly presented himself for duty as a first lieutenant and proceeded to function as such until he was subsequently notified by The Adjutant General of his actual promotion, held (JAG 325.34, 11 Aug. 1941) that he was inducted and served as a de facto first lieutenant.

In a case where an officer was retired as a major, was subsequently promoted to the rank of colonel on the retired list under the act of 21 June 1930 (46 Stat. 793; 10 U.S.C. 1028a), and ordered to active duty, this office held (SPJGA 1942/1670, 28 Apr. 1942; id., 1942/2673, 4 July 1942), in substance, that although the orders under which he entered upon active duty inadvertently stated his rank as colonel, his status was that of a de jure and a de facto colonel, Army of the United States (cf. SPJGA 1942/8373, 1 Dec. 1942).

Recently this office held (SPJGA 1943/7783) that a first lieutenant whose promotion to captain had been denied by the War Department because of insufficient time in grade, nevertheless upon being incorrectly advised by telephone that he had been promoted, erroneously assumed such higher grade and performed the duties of a captain, was a de jure first lieutenant and a de facto captain. The facts of that case are similar to the case now under consideration.

This office, in considering the status of a soldier who had completed a course as a candidate at an officers' training camp, had been determined to be qualified for a commission and was discharged to accept an appointment as a second lieutenant, and who, upon being erroneously told by someone that he had been so appointed, thereupon assumed the office of second lieutenant, held (JAG 210.451, 6 July 1921) that it is not essential to the status of a de facto officer that there should actually have been an appointment and that the man under consideration was a de facto officer. In that case it was stated:

> "3. Most cases are in accord with Prescott vs Hayes, 42 N.H. 56, in holding that in order to constitute an officer de facto, there must have been 'some color of right, some pretense or claim of title by some appointment or election,' since he who assumes to execute the duties of an officer without color of title is a mere usurper. Other cases go further than this and hold that even one who was at first a mere

usurper may by acquiescence become an officer de facto (Burke vs. Elliott, 26 N.C. 355, 42 Am. Dec. 142). In the case now under consideration Stanwood could hardly be regarded as a usurper. He had successfully completed a course at an officers' training camp and had been recommended for, and was expecting, the appointment which he says someone advised him had been made by The Adjutant General. He therefore entered upon the performance of the duties of Second Lieutenant under color of right, or at least under 'pretense or claim of title by some appointment.'"

4. From all the facts and circumstances of the present case, it is believed that as to the period subsequent to 12 September 1942, the status of Lieutenant Adams may properly be regarded as that of a de jure second lieutenant and a de facto first lieutenant.

5. It is therefore recommended that these papers be returned to The Adjutant General by action sheet entry, prepared for the signature of the Assistant Chief of Division, stating:

It is the opinion of this office, under all the facts and circumstances appearing in the inclosed file, that during the period from the date he assumed the rank of first lieutenant until he was actually notified pursuant to the letter dated 10 May 1943, from The Adjutant General to the Commanding General, Seventh Service Command, that he had not been appointed to that grade, Lieutenant Robert E. Adams may properly be regarded as a de facto first lieutenant and a de jure second lieutenant, Army of the United States.

Irvin Schindler,
Colonel, J.A.G.D.,
Assistant Chief of Military Affairs Division.

SPJGA 210.85 May 14, 1942

MEMORANDUM for The Judge Advocate General.

Subject: Withdrawal of request for retirement, Colonel Stephen W. Winfree, United States Army, Retired.

1. By first indorsement (AG 201 Winfree, Stephen W. (4-21-42) OG) dated April 27, 1942, a letter from Colonel Stephen W. Winfree, United States Army, Retired, concerning his attempted withdrawal of request for retirement, was referred for remark and recommendation, attention being directed to an approved opinion of this office (JAG 210.85, Oct. 14, 1933), with respect to a similar situation involving Lieutenant Colonel George W. Ewell, United States Army, Retired.

2. The facts in the instant case are as follows:

On September 18, 1941, Colonel Stephen W. Winfree, Cavalry, made application for voluntary retirement under the provisions of section 1, act of June 30, 1882 (22 Stat. 118; 10 U.S.C. 942), as set forth in paragraph 1a, Army Regulations 605-245, June 17, 1941, after more than 42 years' service, to become effective at the expiration of his accumulated leave beginning on or about October 1, 1941.

On September 19, 1941, pursuant to paragraph 3b, Army Regulations 605-245, June 17, 1941, the application was approved by the Commanding General, Headquarters Fourth Corps Area, and on October 2, 1941, the application was approved by direction of the President to take effect December 31, 1941. By paragraph 1, Special Orders 230, War Department, October 2, 1941, Colonel Winfree was granted two months and twenty-eight days of leave effective on or about October 3, 1941, and by paragraph 16, Special Orders 230, War Department, October 2, 1941, his retirement from active service was announced to take effect December 31, 1941, said order being amended by paragraph 4, Special Orders 232, War Department, October 4, 1941, announcing the effective date of the retirement of Colonel Winfree to be January 31, 1942. Leave of absence of three months and eight days, being the total accumulated leave to the credit of Colonel Winfree, was granted effective on or about October 3, 1941, by paragraph 6, Special Orders 236, War Department, October 9, 1941.

On December 7, 1941, Colonel Winfree addressed the following telegram to The Adjutant General:

"IN VIEW OF OPENING HOSTILITIES EARNESTLY
REQUEST MY VOLUNTARY APPLICATION FOR RETIREMENT

AFTER MORE THAN 42 YEARS SERVICE BE WITHDRAWN AND
THAT PRESENT ORDERS MAKING MY RETIREMENT EFFECTIVE
JANUARY 31ST 1942 BE REVOKED.
" * * * "

* * * He again requested a revocation of his retirement orders by telegram dated January 2, 1942, but on January 15, 1942, he was directed to comply with the existing retirement orders and advised that he would be recalled to active duty at a later date if his services were needed as there was not a suitable vacancy for him at that time.

* * * *

Colonel Winfree in paragraph 2c, of the letter here under consideration, asserts that when he officially withdrew his application for retirement and repeatedly expressed his desire to remain on the active list, the act of June 30, 1882, supra, automatically became inapplicable and the retirement orders based thereon legally could not be carried into effect. * * *

3. The act of June 30, 1882, supra, provides that when an officer has served forty years either as an officer or soldier in the regular or voluntary service, or both, he shall, if he makes application therefor to the President, be retired from active service and placed on the retired list.

It has been held (9 Comp. Dec. 20) that the statute last above mentioned is not self-executing but is addressed to the President, and that the retirement of an officer from active service requires affirmative action by the President through the Secretary of War. The record of such action appears in paragraph 16, Special Orders 230, War Department, October 2, 1941, as amended by the subsequent orders announcing the retirement of Colonel Winfree on January 31, 1942, at the expiration of all accumulated leave due him. Only the lapse of time remained for the action of the President to become final and irrevocable and this condition was fulfilled when the announced effective date of his retirement arrived without further action being taken by the President to set aside, revoke, or rescind his prior action.

4. The retirement of an officer removes him from the active list and creates a vacancy to be filled by the promotion of the officer next in rank, according to the established rule of the service. To reinstate such an officer on the active list is a new appointment which can only be made by the President, by and with the advice and consent of the Senate, in cases where vacancies on

the active list exist and can be lawfully filled (13 Op. Atty. Gen. 99; see also 8 Op. Atty. Gen. 223; 13 Op. Atty. Gen. 209).

Thus, it has been held that Army orders being regular and valid are not revocable after execution thereof, and the War Department has no power to revoke them so as to restore an officer retired thereunder to an active-duty status (Dig. Op. JAG 1912-17, p. 479). This office has also expressed the opinion that when an officer has once been retired pursuant to the requirements of the statute authorizing his retirement, the order by which such retirement was effected cannot be subsequently revoked or modified so as to make the retirement relate to other statutes even though the case was one to which more than one statute properly applied at the time when the retirement was accomplished (Dig. Op. JAG 1912, sec. IE., p. 992). * * *

* * * *

5. It may be said that the situation here considered is somewhat analogous to the case of the submission of a resignation. In the case of Himmack v. United States (97 U.S. 432), the Supreme Court said:

> "Nothing short of a written resignation to the President, or the proper executive department, by a commissioned officer of the army, navy, or marine corps, and the acceptance of the same duly notified to the incumbent of the office, in the customary mode, will of itself create a vacancy in such an office, or prevent the incumbent, if the President consents, from withdrawing the proposed resignation; in which event the rights, privileges, duties, and obligations of the officer remain just as if the resignation had never been tendered." (Underscoring supplied)

It will be noted that an officer may in the case of a resignation withdraw his resignation only with the consent of the President.

6. The conclusion reached in the opinion of this office referred to in paragraph 2, first indorsement dated April 27, 1942, relating to the withdrawal of a request for retirement of Lieutenant Colonel George W. Ewell, Quartermaster Corps (JAG 210.85, Oct. 14, 1933), is not wholly in point with relation to the case of Colonel Winfree for the reason that before the time fixed for the retirement of Colonel Ewell had arrived he, with the consent of the Secretary of War acting for the President, withdrew his request for retirement. However, in my view that opinion correctly states the rule governing the withdrawal of a request for retirement as follows:

"In matters of this nature, when the accomplishment of a change of status, such as retirement or separation by resignation, depends upon the voluntary act of the applicant therefor, addressed to the discretion of an official or body which may or may not grant the request, and such official or body has exercised that discretion, and nothing but lapse of time remains to make it effective, the applicant may not withdraw his request except with the consent or acquiescence of such official or body, and then only when no rights of other parties have intervened. (JAG 64-330-334, Jan. 27, 1913; Throop on Public Officers, p. 406; Mechem on Public Officers, sec. 417)

"In this case no new rights have intervened. Clearly the matter is within the control of the authority who approved the application for retirement and directed the issuance of the retirement order, i.e., the President or Secretary of War acting for him. He may, in his discretion, either rescind the order or allow it to stand."

In the present case no affirmative action was taken by the President personally, or through the Secretary of War, upon the request of Colonel Winfree for the revocation of retirement orders and the effective date of such retirement has now passed.

7. * * *

8. It is, therefore, recommended that these papers be returned to The Adjutant General by second indorsement prepared for the signature of the Chief of Division, stating:

It is the opinion of this office that the voluntary retirement of Colonel Winfree under the provisions of the act of June 30, 1882 (22 Stat. 118; 10 U.S.C. 942), was lawfully effected notwithstanding the fact that before the effective date of retirement, as provided in paragraph 16, S.O. 230, War Department, October 2, 1941, as amended by paragraph 4, S.O. 232, War Department, October 4, 1941, Colonel Winfree requested the revocation of such orders. The orders directing such retirement having been fully executed they cannot be modified or revoked. The file reveals no evidence that the retirement of Colonel Winfree was "illegally effected through administrative error in the War Department". It is recommended that reply be made to Colonel Winfree in harmony with the views hereinabove expressed.

C. B. Mickelwait,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 210.851 May 12, 1943

MEMORANDUM for The Judge Advocate General.

Subject: Eligibility of Colonel Bruce Palmer, O-1136, Cavalry, to advanced rank on retirement.

1. By requisition action sheet (AG 201-Palmer, Bruce (5-1-42)OG) dated May 6, 1942, there was referred for remark and recommendation a letter dated May 1, 1942, from Colonel Bruce Palmer, O-1136, Cavalry, requesting reconsideration of a decision by the Secretary of War (AG 201-Palmer, Bruce (1-29-41)O, February 27, 1941) to the effect that the officer concerned is ineligible for advanced rank on retirement, under the provisions of the act of June 13, 1940 (54 Stat. 382).

2. A copy of the mentioned decision (Incl. 3), addressed to General John J. Pershing, states in pertinent part:

> "An examination of Colonel Palmer's record discloses that he received the Distinguished Service Medal for services rendered during the World War. However, he was not officially recommended in writing for promotion to the grade of brigadier general during that period."

The foregoing decision was in reply to General Pershing's indorsement on a letter dated January 29, 1941 (Incl. 1), addressed to The Adjutant General, by Avery D. Andrews, formerly Brigadier General, General Staff, Assistant Chief of Staff, G-1, Headquarters American Expeditionary Force, in which he recommended the promotion of Colonel Palmer to the grade of brigadier general, and requested that "this recommendation be accepted as a part of my letter to the Chief of Staff, A.E.F., dated 6 January, 1919 and entitled 'Recommendations for Promotion'." By first indorsement (Incl. 2) dated February 16, 1941, General Pershing concurred in the recommendation and stated in part:

> "2. Colonel Palmer's services in the American Expeditionary Forces merited this promotion. But for ill health, necessitating his relief from duty in the A.E.F., he would have been included in the list of those recommended by General Andrews in his letter of January 6, 1919, to the Chief of Staff, A.E.F., entitled 'Recommendations for promotion,' and the recommendation would have been approved by me at that time."

3. The act of June 13, 1940, supra, provides, in pertinent part, as follows:

> "* * * That any commissioned officer of the Army below the grade of brigadier general, now retired or hereafter retired, except those retired under the provisions of section 24b of the Act of June 4, 1920, who for services rendered during the World War was officially recommended in writing for promotion to increased rank by a division commander or coordinate or higher authority or by the chief of a staff corps or department, and who has not attained said rank, and who as evidenced by bestowal of Medal of Honor or Distinguished Service Cross or Distinguished Service Medal rendered exceptionally meritorious services or demonstrated gallantry in action beyond the call of duty shall, upon application, be advanced one grade on the retired list * * *." (Underscoring supplied)

4. Whether the foregoing statutory authorization applies to Colonel Palmer depends primarily upon the interpretation of the underscored words, inasmuch as he received the Distinguished Service Medal for services rendered during the World War. It will be noted that the words, "was officially recommended in writing for promotion to increased rank", refer to a past event and contemplate official action by a division commander or other named authority while acting as such. This view is in accordance with the intent of Congress, as evidenced by the reports, respectively, of the Senate and House Committee on Military Affairs (Sen. Rep. No. 1378, 76th Cong., 3d Sess., April 5, 1940; H. of R. Rep. No. 2119, 76th Cong., 3d Sess., May 9, 1940) wherein it is stated in identical language that -

> "The purpose of this bill is to promote certain distinguished officers who were recommended for promotion during the World War as a result of special and proven efficiency during that war; but the war ended before the promotions could be made." (Underscoring supplied)

I conclude, therefore, that by the express terms of the act an official recommendation in writing for promotion to increased rank, made during the World War, is a condition precedent to the advanced rank on retirement authorized by the act of June 13, 1940, supra.

It is apparent on the present showing that Colonel Palmer is not within the scope and intendment of the literal terms

of the act. The omission of the recommendation in writing may not, in my view, now be supplied by a recommendation relating back to the World War period. When a statutory right is predicated upon the happening of a certain event at a specified earlier time, the condition precedent to granting the right may not be supplied by subsequent action. Any other construction would render such a statutory provision meaningless. It follows, in my opinion, that Colonel Palmer is ineligible for advanced rank on retirement under the provisions of the mentioned act.

* * * *

5. It is, therefore, recommended that these papers be returned to The Adjutant General by action sheet entry, prepared for the signature of the Chief of Division, stating:

> Advancement in grade on the retired list under authority of the act of June 13, 1940 (54 Stat. 382), is limited by the express terms of the act to officers who were, during the World War, officially recommended in writing by certain designated superior officers for promotion to increased rank, and this requirement is not fulfilled by a recommendation, subsequently made by a former staff officer, which purports to relate such recommendation to the World War. Accordingly, on the facts here disclosed, this office is of the opinion that Colonel Bruce Palmer on retirement is ineligible for advancement in grade under the provisions of the act of June 13, 1940, supra. The contention that his case is analogous to one previously considered by this office (JAG 210.851, Dec. 5, 1940) apparently arises from a misunderstanding of the facts of that case. In the mentioned former opinion it was held that certain recommendations, actually made in writing, constituted recommendations within the terms of the act; it is not authority for the contention that no recommendation in writing is required, or that the omission may be supplied by subsequent action. It is recommended that reply be made to Colonel Palmer in harmony with the foregoing remarks.

C. B. Mickelwait,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 210.455 September 2, 1942

MEMORANDUM for The Judge Advocate General.

Subject: Disability retirement pay of National Guard officer in inactive-duty status.

1. By disposition form (AG 201 McNeese, Oswald Wilson, Colonel, Inf. NGUS) dated August 20, 1942, an opinion was requested whether Colonel Oswald Wilson McNeese, Infantry, National Guard of the United States, may legally be certified to the Veterans Administration for retirement pay benefits, in view of the fact that as the result of the findings of an Army retiring board convened on February 4, 1942, it was determined that Colonel McNeese is incapacitated for unlimited active service, but not for limited service.

2. There is no statutory provision for the retirement of officers of the National Guard of the United States. However, such officers are officers of the Army of the United States, and the following statutory provision (sec. 5, act Apr. 3, 1939, 53 Stat. 557; act July 25, 1939, 53 Stat. 1079; 10 U.S.C. 456) which authorizes retirement pay is applicable to these officers under appropriate circumstances:

> "That all officers * * * of the Army of the United States, other than the officers * * * of the Regular Army, if called or ordered into the active military service by the Federal Government for extended military service in excess of thirty days, and who suffer disability or death in line of duty from disease or injury while so employed * * * shall be in all respects entitled to receive the same pensions, compensation, retirement pay, and hospital benefits as are now or may hereafter be provided by law or regulation for officers * * * of corresponding grades and length of service of the Regular Army."

The retirement of Regular Army officers for disability is governed by statute, and the following provisions are pertinent:

> "When a retiring board finds that an officer is incapacitated for active service, and that his incapacity is the result of an incident of the service, and such decision is approved by the President, said officer shall be retired from active service and

placed on the list of retired officers." (R.S. 1251; 10 U.S.C. 933)

"* * * "

War Department Circular No. 217, October 15, 1941, provides in part:

"1. * * * The determination of line of duty and fitness for active military service for all officer personnel (Army of the United States, except Regular Army) on active duty in excess of 30 days will be as prescribed for personnel of the Regular Army." (Insert supplied)

The mentioned circular also provides that an officer on extended active duty, found to be incapacitated for further active duty, will be ordered to appear before a retiring board, and if the officer is found to be incapacitated for active service, he will be relieved from active duty upon the termination of his accrued leave of absence and travel time.

War Department Circular No. 83, March 21, 1942, sets forth the policy of the War Department to utilize the service of all available officers; to waive physical defects for limited service with the supply arms and services; and to approve for extended active duty individuals qualified for limited assignments who have minor physical defects which will not interfere with the satisfactory performance of the duties contemplated.

3. On November 14, 1940, Colonel McNeese was examined for extended active duty, and entered upon such duty on November 25, 1940. Subsequently a retiring board found that he was incapacitated for active duty, but not for limited service; that the incapacity was an incident of the service; that "the defects are mildly progressive in character"; that the disability "is permanent"; and that "the defects are not likely to be aggravated by limited service with the Supply Arms or Services". The Surgeon General concurred in the finding of the retiring board and expressed the view "that the disabilities are the result of an incident of the service". It is also said that Colonel McNeese was relieved from active duty because of age.

Therefore, the question is whether Colonel McNeese is entitled to be certified for retirement pay when he is capable of performing only limited service duty. In similar circumstances an officer of the Regular Army may legally be retired and this office has expressed the view that the criteria for determining eligibil-

ity for the benefit of retirement are those provided by law or regulation for officers of corresponding grades and length of service of the Regular Army (JAG 210.01, Dec. 18, 1941; JAG 241.18, Apr. 22, 1942).

The remaining question is whether War Department Circular No. 83, March 21, 1942, affects Colonel McNesse's right to be certified for retirement pay. He is now in an inactive duty status. He was found to be unfit for unlimited active service as prescribed by the War Department procedure (W.D. Cir. No. 217, Oct. 15, 1941). The file indicates that the retiring board was properly constituted and that it met and conducted its proceedings in accordance with law and applicable regulations (SPJG 210.4551, Mar. 16, 1942). All the elements requisite to eligibility for retirement appear to have been duly determined. Moreover, the proceedings were finally consummated prior to the adoption by the War Department of the new policy of waiving physical defects for limited service assignments. It is therefore my view that there is no legal objection to the certification of this case to the Veterans Administration.

5. It is recommended that reply be made to The Adjutant General by disposition form entry, prepared for the signature of the Chief of Division, stating:

> It is the opinion of this office that upon the basis of the facts now disclosed Colonel Oswald Wilson McNeese, National Guard of the United States, may legally be certified to the Veterans' Administration for retirement pay benefits.

C. B. Mickelwait,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 210.801 August 31, 1942

MEMORANDUM for The Judge Advocate General.

Subject: Summary discharge of First Lieutenant Patsy Earl Gismondi from the Army of the United States.

1. By disposition form (office of The Adjutant General), dated August 24, 1942, there was referred for comment and concurrence a proposed letter (AG 201 - Gismondi, Patsy Earl (8-19-42) RP) dated August 24, 1942, from The Adjutant General to Congressman James A. Wright. The proposed letter is in reply to the Congressman's letter dated August 19, 1942, in the interest of Patsy Earl Gismondi (O-901866), formerly a first lieutenant, Army of the United States, and states that Mr. Gismondi was relieved from active duty and discharged from his commission because he falsely stated in his application for appointment in the Army of the United States that he had never been convicted by a civil court, whereas, he had been convicted for a violation of the prohibition laws. The proposed letter also states that Mr. Gismondi's case has been reviewed and that the action taken was considered warranted.

2. It appears that Mr. Gismondi was, by War Department letter (AG 201 Gismondi, Patsy Earl (3-30-42)RA), dated March 30, 1942, temporarily appointed in the Army of the United States as a first lieutenant. The letter stated that his commission was "to continue in force during the pleasure of the President of the United States for the time being, and for the duration of the present emergency and six months thereafter unless sooner terminated". By Special Orders No. 95, Headquarters Pine Bluff Arsenal, Pine Bluff, Arkansas, dated July 18, 1942, First Lieutenant Gismondi was relieved from active duty pursuant to War Department letter (AG 201-Gismondi, Patsy Earl (4-6-42)OG) dated July 16, 1942; and by War Department letter (AG 201 Gismondi, Patsy Earl (8-12-42)RS) dated August 12, 1942, First Lieutenant Gismondi was, by direction of the President and by order of the Secretary of War, summarily discharged from his temporary commission under conditions other than honorable. It appears (Memorandum to Col. Frazier, July 15, 1942) that First Lieutenant Gismondi was discharged at the request of the Chief of the Chemical Warfare Service, upon whose recommendation (CWS 201- Gismondi, Patsy Earl (3/24/42)) dated Mar. 24, 1942, Gismondi was originally appointed. The 24th question in the latter's Personnel Placement Questionnaire (W.D., A.G.O. Form No. 8050 (January 19, 1942)), which appears to be his application for

appointment, reads in pertinent part "Have you ever been convicted by a civil or military court?", and that question was answered "No". Although the papers submitted to this office contain no direct evidence that First Lieutenant Gismondi was convicted of violating the prohibition laws, it is assumed, for the purpose of this opinion, that he was.

3. The act of September 22, 1941 (55 Stat. 728; 10 U.S.C., Supp. I, 484, note), which authorizes the appointment of temporary officers in the Army of the United States, provides that appointments made thereunder may be vacated by the President at any time. Paragraph 25c, Army Regulations 605-10, December 10, 1941, provides that the discharge "of officers initially appointed in the Army of the United States will be accomplished in accordance with the laws and regulations governing the discharge or dismissal of personnel whose permanent retention in the active military service is not contemplated by law". It was held (JAG 324.24, Nov. 17, 1917) that a similar statute (sec. 9, act May 18, 1917, 40 Stat. 82; 50 U.S.C., App. 209) during the last war authorized the President to discharge temporary officers summarily, notwithstanding that certain general orders provided for a different method of discharge.

4. It appears (JAG 9028, Sept. 26, 1900; Reid v. U.S., 161 Fed. 469, 472, (writ of error dismissed, 211 U.S. 529)) that the President, or the Secretary of War in his behalf, possesses inherent power to designate the nature of discharges issued pursuant to his order, and that his action in such matters, because it is discretionary, is not subject to review. It also appears that a discharge of an officer for the good of the service (JAG 210.801, Dec. 7, 1920), or his summary dismissal on account of unfitness caused by his own fault (JAG 52-402, Mar. 21, 1892), is properly considered a discharge without honor. In an early case (JAG 52-402, supra), The Judge Advocate General stated in pertinent part:

> "There is, however, a discharge which is not honorable, nor in this technical sense dishonorable. In this class is the summary discharge before expiration of term of service of the enlisted man who by some fault of his has disqualified himself to fulfill his obligations to the United States, and the summary dismissal of the officer on account of an unfitness caused by his own fault. * * * I think it best that this discharge should be known as the 'discharge without honor.' This term covers the summary dismissal of officers as well as the summary discharge of enlisted men."

The discharge of an enlisted man for fraudulent enlistment is regarded as being under conditions other than honorable (par. 48, AR 615-360, Apr. 4, 1935; par. 1c(1)(c), AR 345-470, May 10, 1934).

5. It is my view that the act of September 22, 1941, supra, under which I assume Mr. Gismondi was appointed, authorizes the President to discharge summarily officers appointed thereunder without complying with Army regulations which provide for different methods of discharge; and it is my view that First Lieutenant Gismondi's discharge was legally accomplished because the action was taken at the direction of the President and by order of the Secretary of War. The authorities cited above indicate that the President, or the Secretary of War in his behalf, was authorized to terminate First Lieutenant Gismondi's commission under conditions other than honorable and that such a termination was appropriate under the circumstances of this case.

6. It is, therefore, recommended that these papers be returned to The Adjutant General by disposition form entry, prepared for the signature of The Judge Advocate General, stating:

> Assuming, as is stated in your proposed letter (AG 201-Gismondi, Patsy Earl (8-19-42)RP), dated August 24, 1942, to Congressman James A. Wright, that First Lieutenant Patsy Earl Gismondi (O-901866) was convicted of violating the prohibition laws, it is my opinion that his discharge from the Army of the United States was accomplished legally and that it was lawful to terminate his appointment under conditions other than honorable. Accordingly, I concur, as to legal aspects, in your proposed letter.

C. B. Mickelwait,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 326.21 May 4, 1942

MEMORANDUM for The Judge Advocate General.

Subject: Right of former reserve officer to have his discharge reconsidered with view to reinstatement; eligibility for re-appointment.

1. By informal action sheet (AG 201, Florance, Norman John) dated April 24, 1942, there was referred for review and recommendation a letter dated April 10, 1942, with inclosures, from Norman J. Florance, Valdosta, Georgia, requesting a review of his separation from the Officers' Reserve Corps with a view to reinstatment and active duty assignment. The memorandum of reference states that the Chief, Chemical Warfare Service, has requested that this former officer be commissioned for duty with that service and it is recommended that consideration be given to having the proceedings of a board of officers appointed under subparagraph 74c, Army Regulations 140-5, June 16, 1936, removed as a bar to such appointment (memo. by Col. E. R. Shugart).

2. The accompanying 201 file reveals that the person concerned was discharged on May 26, 1939, from his commission as Captain, Infantry-Reserve, Army of the United States, by direction of the President under authority of the National Defense Act, as amended, upon the approved recommendation of a board of officers (AG 201 Florance, Norman John (5-26-39)Res.). The board's findings and recommendations related to his actions and conduct while on active duty as an officer with the Civilian Conservation Corps.

The board proceedings were approved by the Commanding General, Sixth Corps Area. Upon a review of the proceedings, this office stated (JAG 210.8), May 19, 1939) that "Captain Florance was accorded the right to challenge, appeared with counsel of his selection, introduced witnesses, and, having been advised of his rights, elected to make a statement through counsel"; concluded that the evidence supported the findings of the board; and concurred in the recommendation that Captain Florance be not retained in the Officers' Reserve Corps.

Mr. Florence desires a review of the mentioned proceedings with a view to reinstatement of his commission without loss of time in grade or loss of privileges accorded other reserve officers. In support of his request, he submits certain exhibits which are substantially a duplication of evidence in his behalf previously considered by the board of officers.

3. Section 37 of the National Defense Act, as amended (act June 15, 1933, 48 Stat. 154; 10 U.S.C. 358), provides, in part, that an officer of the Officers' Reserve Corps "may be discharged at any time in the discretion of the President". Although subparagraph 74a, Army Regulations 140-5, authorizes, in the discretion of the corps area commander or when the officer concerned so requests, the convention of a board of officers to investigate reports of misconduct, inefficiency or other unfitness on the part of a reserve officer, board proceedings of this character are advisory only (JAG 326.21, June 21, 1938) and do not constitute a diminution of the power of the President summarily to discharge a reserve officer in any case. There is, therefore, no right which may be asserted by a discharged reserve officer to a review or a reexamination of the evidence upon which the advisory recommendations of a board of officers, so convened, are based.

There can be no revocation of a legally executed order of discharge of a reserve officer. The original discharge is an act done which cannot be undone, and the order, which is evidence of it, is incapable of revocation or recall. Once an officer is legally separated from the Army he can be returned to official status therein only by a new appointment (JAG 210.84, Mar. 22, 1929).

4. In view of the fact that the Chief of the Chemical Warfare Service is desirous of having this former officer commissioned for duty with that service, it is pertinent to determine whether his separation under the circumstances herein related constitutes a legal bar to his reappointment as a commissioned officer.

The act of September 22, 1941 (Pub. Law 252, 77th Cong.), authorizes, during the present emergency, temporary appointments as officers in the Army of the United States from among qualified persons, under such regulations as the President may prescribe. Pursuant thereto, Army Regulations 605-10, December 10, 1941, have been promulgated. Subparagraph 7h thereof, so far as material, provides:

> "7. Appointments not made from certain classes.--No person will be initially appointed in the Army of the United States from the following classes:
>
> * * *
>
> h. Former commissioned officers of any component of the Army of the United States, * * * whose commissions were terminated because of inefficiency or under other than honorable conditions. * * *."

It appears that the above-quoted regulations are applicable to this former officer and in effect prohibit his appointment and

commission as an officer of the Army of the United States under the authority of Public Law 252, supra. Inasmuch as the mentioned regulations are made pursuant to and in execution of that act, they are quasi-legislative in character and are of the same force as the statute itself. Accordingly they may not be waived in individual cases, except as the authority making them may alter, amend, modify, or revoke the same for prospective general application (21 Comp. Dec. 484; JAG 246.5, Dec. 21, 1938; JAG 210.711, May 27, 1935; JAG 524.21, Mar. 26, 1935; JAG 231.3, Jan. 18, 1934; JAG 524.21, Mar. 26, 1932; JAG 248.5, July 30, 1924).

There is no statutory restriction preventing the appointment in the Officers' Reserve Corps of a former member of that component whose commission was terminated under the circumstances here existing; nor do the provisions of the 7th paragraph of section 127a, National Defense Act, as amended, or Public Law 252, supra, have the effect of preventing appointments in the Officers' Reserve Corps during a period of war (JAG 210.1, Sept. 5, 1941). Subparagraph 19c(1), Army Regulations 140-5, June 17, 1941, provides that former members of the Officers' Reserve Corps may be recommissioned in that corps, "excepting in all cases those officers separated from the Army as a result of their own misconduct", but this eligibility requirement and the exception by express provision of the regulation, apply only in peacetime. By immediate action letter (AG 210.1 (10-8-41)RB-A) dated November 7, 1941, the Secretary of War ordered that all persons commissioned as officers during the present emergency will be appointed in the Army of the United States under the provisions of Public Law 252, with certain exceptions not here applicable. As this order was not issued in furtherance of any express statutory provision, its provisions may be waived by the Secretary of War in individual cases.

5. It is, therefore, recommended that these papers be returned to The Adjutant General by action sheet entry, prepared for the signature of the Chief of Division, stating:

> A legally executed order of discharge of a Reserve officer, discharged by direction of the President under the authority of section 37 of the National Defense Act, as amended, may not be revoked for the purpose of reinstating his commission. Subparagraph 7h, Army Regulations 605-10, has the effect of prohibiting the appointment of the person concerned in the Army of the United States, and these regulations may not be waived in individual cases because of their quasi-legislative character, having been promulgated in furtherance of express statutory authority contained in the act of September 22, 1941 (Pub. Law 252, 77th Cong.). There is, however, no legal objection to the appointment of Mr. Florance in the Officers'

Reserve Corps, provided he can now meet the professional qualifications prescribed by pertinent Army regulations, although attention is invited to the existing policy of the War Department, announced in immediate action letter dated November 7, 1941 (AG 210.1 (10-8-41)RB-A), which the Secretary of War may waive in individual cases.

C. B. Mickelwait,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 1943/7488 5 June 1943

MEMORANDUM for The Judge Advocate General.

Subject: Revocation of resignation of Lieutenant Isadore Appell.

1. By informal action sheet (AG 201-Appell, Isadore (5-19-43) PO-S) dated 22 May 1943, the inclosed papers were referred for remark in connection with subparagraph 1c, Army Regulations 605-275, 25 September 1928, with respect to the resignation of First Lieutenant Isadore Appell (O-283939), Quartermaster Corps, Reserve.

2. It appears from the file that Lieutenant Appell, a Reserve officer, entered upon extended active duty on 2 December 1940; that on or about 30 August 1941, after two prior assignments, he was assigned to Company "C", 84th Quartermaster Battalion, APO #306, Fort Bragg, North Carolina; that on 3 October 1941, after he had been notified that reclassification proceedings would be recommended in his case because of unsatisfactory performance of duties, he voluntarily submitted his resignation from the Officers' Reserve Corps, by letter addressed through channels to The Adjutant General, the body of which reads as follows:

> "I hereby tender my resignation as a First Lieutenant in the Officers Reserve Corps, and request that I be relieved from duty as a Commissioned Officer with the Army of the United States."

In the indorsement forwarding this letter, Appell's immediate commanding officer stated:

> "This officer has been notified that he has been recommended for reclassification. This resignation is voluntary and unconditional."

This mentioned letter was received in The Adjutant General's Office on 27 October 1941.

Even though the resignation obviously was submitted to forestall reclassification proceedings, Appell now contends that on the day following its submission, or 4 October 1941, he orally informed his battalion commander that he desired to withdraw the resignation because he felt that it might be misconstrued. Thereafter, in a letter to The Adjutant General (through channels) dated 9 October 1941, Appell stated:

"1. The undersigned hereby withdraws his letter of resignation and request for relief from active duty submitted on October 3, 1941."

This letter was received in The Adjutant General's Office on 10 October 1941.

Appell's resignation was accepted by the Secretary of War, who, in a letter to him dated 29 October 1941, stated in pertinent part as follows:

"1. Your resignation as First Lieutenant, Quartermaster Corps, Reserve, Army of the United States, contained in your letter dated October 3, 1941, Norman, North Carolina, is hereby accepted, by direction of the President, to take effect November 12, 1941, under honorable conditions."

The apparent basis for the impending reclassification proceedings was unsatisfactory performance of duty, which is indicated by paragraph 3, of a fifth indorsement, dated 1 November 1941, from the Commanding General, VI Army Corps, to the Commanding General, First Corps Area, stating:

"3. In case this officer's resignation is not accepted, recommend that his extended active duty be terminated on November 28, 1941, for the reason of unsatisfactory performance of active duty."

and by paragraph 2, of a fourth indorsement, dated 30 October 1941, from the Commanding Officer, 84th Quartermaster Battalion, to the Commanding General, VI Army Corps, reading:

"2. In the event that withdrawal of resignation is approved reclassification proceedings will be started immediately."

In a letter to The Adjutant General, dated 12 June 1942, Appell made a detailed statement purporting to set forth the facts in connection with his resignation and stated that he was desirous of being returned to service. In reply The Adjutant General, by letter dated 16 June 1942, stated the position of the War Department as follows:

"* * * there appears to be nothing more that can be done in your case since your resignation was voluntarily submitted according to the record, and

since your connection with the Army of the United States has been severed by that instrument. The case must therefore be considered closed."

In a letter dated 19 May 1943, to The Adjutant General, Appell requests that his record and status as a Reserve officer be amended by making the following determination:

"1. That a resignation of commission by a Reserve Officer dated October 3, 1941, and forwarded as a resignation under AR 605-230 not involving misconduct, may be withdrawn by the Officer submitting same before acceptance thereof; and where a withdrawal of such resignation has been submitted to the Adjutant General on October 9, 1941, an acceptance thereafter of such resignation (a) cannot be effected on October 29, 1941 (b) cannot affect status of Reserve Officer's commission, and (c) should be expunged.

"2. If a resignation under AR605-230 not involving misconduct may not be withdrawn by the submitting Officer before acceptance thereof, then a resignation and first endorsement thereof dated October 3, 1941, and not in the form prescribed by AR605-230 cannot thereafter be re-endorsed to conform with such regulation and re-submitted without the resigning officer's consent, and such resignation cannot then be accepted in its changed form.

"3. That a report that a Reserve Officer has performed services unsatisfactorily cannot be submitted without notice to the Officer concerned, with opportunity for reply, and where such a report is so submitted without due notice it should be expunged."

3. Initially it may be noted that even though Lieutenant Appell refers to his resignation as having been submitted under the provisions of Army Regulations 605-230, pertaining to the reclassification of commissioned officers, it appears actually to have been submitted with the view of avoiding proceedings under those regulations, and in effect is to be governed by Army Regulations 605-275, 25 September 1928, relating to the resignation of commissioned officers. Subparagraph 1c of the last-mentioned regulations provides as follows:

"c. A mere offer to resign or to tender resignation is revocable at any time before acceptance. An exception to this rule arises in the case of resignations to which conditions or qualifications are

attached, such as 'for the good of the service', in which instances the privileges of withdrawing a proffered resignation may be denied by the authority competent to accept it. After acceptance and before effect has been given to the same by notice, an offer can not be withdrawn or materially modified solely by the person concerned; the consent of the appointing power is necessary."

The form of resignation submitted by Appell did not expressly contain any conditions or qualifications, but it is apparent from the file that the officer's purpose in submitting it was, at least in part, to forestall reclassification proceedings which, in view of the circumstances mentioned, of which he may be presumed to have been aware, would most likely have resulted in action unfavorable to him. In a similar case this office held that such a resignation was one to which conditions or qualifications were attached and that it could not be withdrawn by the officer without the consent of the appointing power. In that case (JAG 210.83, 9 Jan. 1926) it was stated:

"* * * the substance rather than the form is controlling. As the record clearly indicates that Lieutenant Hultz tendered his resignation in order to avoid an investigation of his conduct and his fitness to hold his commission, the resignation should be deemed to have been tendered for the good of the service. It was so understood by the military authorities through whom it was transmitted to the War Department and who suspended the investigation pursuant to such understanding. It was, therefore, under the rule quoted above from AR 605-275, such a resignation as could not be withdrawn by Lieutenant Hultz without the consent of the appointing power. The record shows that the War Department, acting for the President, refused to comply with Lieutenant Hultz's request for the withdrawal of his resignation and immediately thereafter notified him of its acceptance. It follows, in the opinion of this office, that such acceptance was effective and that Lieutenant Hultz ceased to be an officer of the Army in the Officers' Reserve Corps on December 16, 1925. * * * "

Although the soundness of the mentioned opinion appears to have been questioned by The Judge Advocate General in 1941, as indicated by the informal note attached to the file copy, it has not been overruled, but appears in the Digest of Opinions of The Judge

Advocate General of the Army, 1912-1940 (p. 991). Moreover, it is believed to represent a proper construction of subparagraph 1c of Army Regulations 605-275, 25 September 1928, which is identical to the corresponding provision of the regulations in effect at the time of the earlier opinion.

Applying the principle of that former opinion it appears that the resignation of Appell may properly be regarded as having been one to which conditions or qualifications were attached, as contemplated by subparagraph 1c, Army Regulations 605-275, supra. It follows that the privilege of withdrawing his proffered resignation was properly denied.

4. It is therefore recommended that these papers be returned to The Adjutant General by informal action sheet entry, prepared for the signature of the Assistant Chief of Division, stating:

> From the facts disclosed by the inclosed file it appears that the privilege of withdrawing his resignation was properly denied Lieutenant Appell under the provisions of subparagraph 1c, Army Regulations 605-275, September 25, 1928, and that his status as a member of the Officers' Reserve Corps was lawfully terminated by the acceptance of his resignation.

Irvin Schindler,
Colonel, J.A.G.D.,
Assistant Chief of Military Affairs Division.

SPJGA 1943/8291 16 June 1943

MEMORANDUM for The Judge Advocate General.

Subject: Withdrawal of Federal recognition of National Guard officer.

1. By informal action sheet /AG 201, Danielson, Harold D., 2nd Lt., FA-NGUS/ dated 9 June 1943, the accompanying file was transmitted for "decision as to whether federal recognition of Second Lieutenant Harold D. Danielson may be legally terminated".

2. The file discloses that on 31 May 1941, Lieutenant Danielson was relieved from further active duty with the National Guard of the United States pursuant to the approved recommendation of a reclassification board which found him "totally unqualified in any Branch of the Service". (Lieutenant Danielson had previously tendered his resignation, which was not accepted.) In a letter dated 20 April 1943, Lieutenant Danielson was notified that the purported discharge from his National Guard of the United States commission was illegal and without effect and that his Federal recognition had been restored. On the same date, the Commanding General, Ninth Service Command, was directed to call Lieutenant Danielson before an efficiency board convened under the provisions of section 76, National Defense Act, as amended. However, it developed that Lieutenant Danielson had enlisted in the Enlisted Reserve Corps on 27 November 1942, and on 31 May 1943, was undergoing aviation cadet training at Montana State University, Missoula, Montana. By a third indorsement (SPKIC 201 Danielson, Harold D. (4-20-43)) dated 31 May 1943, to The Adjutant General, the Commanding General, Ninth Service Command, requested that "necessary action be taken with respect to discharge from the National Guard of the United States".

3. This case is similar to a case recently considered by this office (SPJGA 1943/8137, 12 June 1943) in which the view was expressed that Federal recognition of a National Guard officer may be effected only in the manner prescribed by section 76 of the National Defense Act (act 3 June 1916, 39 Stat. 202, as amended by act 15 June 1933, 48 Stat. 158; 32 U.S.C. 115) or section 93 thereof (act 3 June 1916, 39 Stat. 206; 32 U.S.C. 15), unless the officer concerned voluntarily submits his resignation from the National Guard of the United States (also see SPJG 210.01, 15 Nov. 1941; SPJGA 210.8, 8 Aug. 1942).

4. It is therefore recommended that these papers be returned to The Adjutant General by informal action sheet entry, prepared for the signature of the Assistant Chief of Division, stating:

> It is the view of this office that termination of the Federal recognition of Second Lieutenant Danielson may be effected in the manner prescribed by section 76 of the National Defense Act (act 3 June 1916, 39 Stat. 202, as amended by act 15 June 1933, 46 Stat. 158; 32 U.S.C. 115), or section 93 of that act (act 3 June 1916, 39 Stat. 206; 32 U.S.C. 15), or by acceptance of his voluntary resignation from the National Guard of the United States. It is suggested that he be afforded an opportunity to resign his commission before action is initiated toward withdrawal of Federal recognition under one of the mentioned sections of the National Defense Act.

Irvin Schindler,
Colonel, J.A.G.D.,
Assistant Chief of Military Affairs Division.

SPJGA 1943/12992 31 August 1943

MEMORANDUM for The Judge Advocate General.

Subject: Frank Howard Rediker, formerly Captain, A.C., A.U.S., O-905632.

1. By memorandum dated 21 August 1943, the Chief, Legislative and Liaison Division, Office of the Chief of Staff, requested an expression of opinion "as to whether the former officer whose name appears above is entitled to a Certificate of Service, and if so as to the form of the certificate to be issued".

2. It appears from the file that by letter dated 13 May 1942, Frank Howard Rediker was appointed a captain in the Army of the United States. His acceptance of that appointment was evidenced by his execution of the oath of office 14 May 1942. He was relieved from active duty by letter dated 24 October 1942, and was discharged from his temporary commission by letter dated 28 October 1942, which letter contained no indication that the discharge was other than honorable, and was delivered personally to him by a commissioned officer on that date.

3. Public Resolution No. 96, 76th Congress (54 Stat. 858), supplied the authority under which Reserve and National Guard personnel were ordered into the active military service. That act provided for the issuance of a certificate of service to any person who, in the judgment of those in authority over him, satisfactorily completes his period of service. The right to receive such a certificate was extended to officers temporarily commissioned in the Army of the United States by the act of 22 September 1941 (55 Stat. 728), which authorized the issuance of such commissions and provided that persons thus appointed in the Army should have the same rights, privileges and benefits as Reserve officers (see SPJGA 1943/11282, 19 Aug 1943). The existence of this right has been recognized by the promulgation of Changes No. 3, 16 April 1943, to Army Regulations 345-500, 18 July 1941. including such persons among the classes to whom certificates are issued.

Subparagraph 3a of the mentioned regulations provides:

> "Officers * * * will be entitled to the Certificate of Service unless the manner of performance of duty immediately preceding release from active duty has been unsatisfactory."

4. In the light of the foregoing considerations and in the absence of a showing that his service was unsatisfactory, it

appears that Rediker is entitled to a certificate of service under the provisions of the above-quoted subparagraph 3a. A form of certificate is set forth in paragraph 8, Army Regulations 345-500, and no reason is perceived why a deviation from that form should be made in the present case.

5. It is therefore recommended that response be made to the Chief, Legislative and Liaison Division, Office of the Chief of Staff, by memorandum, prepared for the signature of the Assistant Chief of Division, stating:

> Reference is made to your memorandum dated 21 August 1943, requesting an opinion whether Frank Howard Rediker, formerly Captain, A.C., A.U.S., is entitled to a Certificate of Service, and, if so, as to the form of the certificate to be issued. The facts presented contain no indication that Rediker's service was unsatisfactory. In the absence of such a showing it is the opinion of this office that he is entitled to a Certificate of Service, and that, unless there is compelling reason to the contrary, such certificate should be in the form prescribed in paragraph 8, Army Regulations 345-500, 18 July 1941.

Irvin Schindler,
Colonel, J.A.G.D.,
Assistant Chief of Military Affairs Division.

3 November 1943

SPJGA 1943/16195

MEMORANDUM for The Judge Advocate General.

Subject: Acceptance of resignation for the good of the service compared with dishonorable discharge.

1. By informal memorandum request was made for an opinion whether the separation of an officer from the service by acceptance of his resignation "for the good of the service" is equivalent to a dishonorable discharge.

2. It is to be noted at the outset that no provision is made, either by statute or Army regulation, for the dishonorable discharge of an officer. However, as noted in an opinion of this office (SPJGA 1943/6064) dated 3 May 1943:

> "* * * The traditional types of officers' discharges roughly correspond to the three types of enlisted men's discharges provided for in Army Regulations 345-470, May 10, 1934, and are (1) honorable (2) under conditions other than honorable and (3) dishonorable. In the case of officers, the third type has seldom if ever been used for the reason that conduct which would warrant dishonorable discharge is usually of such a serious character (e.g. moral turpitude, dishonesty or cowardice) as to result in trial by court-martial and dismissal. For the reasons indicated dismissal has come to be regarded as tantamount to dishonorable discharge. ***"

The view that dismissal of an officer is the equivalent of dishonorable discharge was reiterated in an opinion of this office dated 26 May 1943 (SPJGA 1943/7264). It follows, therefore, that if it can be established that the separation of an officer from the service by acceptance of his resignation "for the good of the service" is equivalent to dismissal, it is likewise equivalent to a dishonorable discharge.

3. It is indicated by the accompanying memorandum of the Assistant Judge Advocate General in charge of military justice matters that an expression of opinion is desired as to the effect of the act of 17 March 1943 (Public Law 10, 78th Cong.), and the provisions of section V, Circular No. 103, War Department, 15 April 1943. The cited act amends Veterans Regulation Numbered 10 (M.L., 1939, sec. 1144) so as to include veterans of World War II, includ-

ing members of the women's service organizations, within the term "veteran of any war" as used in various acts and regulations respecting benefits administered by the Veterans Administration. The cited section of War Department Circular No. 103, 1943, sets forth an interpretation of the effect of the act as it will relate to eligibility for domiciliary care and medical and hospital treatment and contains instructions with respect to applications for such benefits. Neither the act nor the circular effects a basic change in the qualifications therefor, nor does either change the qualification of "not dishonorably discharged", which is more fully discussed in paragraph 7 hereof.

4. The characteristics of the two mentioned types of separation appear to fall logically, for purposes of comparison, into two general categories. One of these, which may be described loosely as the theoretical, relates to the formalities by which the separation is accomplished, the manner of its characterization as being honorable or otherwise, and other similar factors such as the question whether a characterization once made may thereafter be altered. The other category relates to the practical results in the nature of benefits and disabilities which may flow from one type of separation as contrasted with another. The discussion which follows is divided roughly along the general lines just indicated.

5. In practice dismissal is now accomplished only by sentence of a general court-martial. (A discussion of possible dismissals under Article of War 118 is not believed necessary or advisable in this memorandum.) Dismissal is a severe punishment and is imposed only upon conviction of the more serious offenses.

Acceptance of a resignation "for the good of the service" invariably accomplishes a separation from the service under conditions other than honorable (SPJGA 1943/6194, 29 Dec 1942). This office has expressed the view that the discharge of an officer may be characterized administratively as being "under conditions other than honorable" (SPJGA 1942/4935, 21 Oct 1942). In the same opinion it was stated that if an erroneous designation of the character of a discharge has been made, there is no legal objection to amending the order to make it reflect the true nature of the discharge. In a word, a discharge may be characterized administratively as being under conditions other than honorable, and such a characterization also may be removed administratively. The United States District Court for the Southern District of New York dealt with this point in a case involving an enlisted man (Reid v. U.S. 161 Fed. 469, 472), in the following language:

"It is, however, further asserted that some infraction of law was wrought by forcing upon Reid a 'discharge without honor.' The phrase is not known to the statutes. It is found only in the army regulations, which are from time to time promulgated by the Secretary of War, but do not bind the Secretary that makes them, and much less the Commander in Chief. Smith v. U.S., 24 Ct. Cl. 209. The exact method of this soldier's discharge and the quantum or kind of character that should be given him, not being regulated by statute, must necessarily be left in the discretion of the executive officer having power to grant some kind of discharge. That it is beyond the power of the judicial branch to coerce or review the discretion of the executive is familiar doctrine, while that a discharge with a very bad character is not a punishment to the man discharged within the meaning of any federal statute is settled by U. S. v. Kingsley, 138 U.S. 87, 11 Sup. Ct. 286, 34 L. Ed. 896."

On the other hand, dismissal being imposed by sentence of a court-martial as punishment for the commission of an offense of which the individual has been found guilty, is judicial in nature, rather than administrative, and may not be removed or revoked administratively.

From the foregoing discussion it is to be seen that there exist certain fundamental differences between a separation by acceptance of a resignation for the good of the service and a dismissal.

6. On the practical side of the matter, a great majority of the statutes which provide benefits or preferential treatment for ex-service personnel do so only for those who have been honorably discharged. Under any such statute no distinction is drawn between persons who are separated under conditions other than honorable and those who are dishonorably discharged or dismissed. Therefore, former officers would appear to be subject to the same treatment with respect to the particular benefit whether separated from the service by acceptance of a resignation "for the good of the service" or by dismissal. For example:

As to burial in national cemeteries, the rights of a dismissed officer appear to be the same as those of an officer whose resignation has been accepted "for the good of the service" (41 Stat. 552; 24 U.S.C. 281; M.L., 1939, sec. 974).

The act of 24 February 1919 (40 Stat. 1151; M.L., 1939, sec. 1476), provided for the payment of a bonus to all persons serving in the military or naval forces of the United States during World War I "who have *** resigned or been discharged under honorable conditions *** or who at any time hereafter *** may resign or be discharged under honorable conditions ***".

Pursuant to the provisions of Veterans Regulation Numbered 1 (a), as set forth in section 1140, Supplement II to the Military Laws of the United States, 1939, pensions are payable to, among others, certain honorably discharged personnel.

Persons who in time of war have served honorably as officers of the Army and whose most recent service was terminated by an honorable discharge, muster out, or resignation are authorized by section 125 of the National Defense Act to wear upon occasions of ceremony the uniform of the highest grade they have held in the service.

Membership in certain veterans' organizations is restricted to persons "who served honorably" (Veterans of Foreign Wars, 49 Stat. 1391; 36 U.S.C. 115). Although no such requirement appears in the act authorizing formation of the American Legion (41 Stat. 285; 36 U.S.C. 45), it is understood that the by-laws of that organization make an honorable discharge a requirement for membership therein.

Section 8 of the Selective Training and Service Act of 1940 (54 Stat. 890; 50 U.S.C. App. 308) provides for certain reemployment benefits for any person who, upon separation from the service, has received a certificate certifying to the satisfactory termination of his services (Certificate of Service, AR 345-500, 18 Jul 1941, as changed).

The Director of Selective Service is charged by subsection 8g of the Selective Training and Service Act of 1940 (54 Stat. 891; 50 U.S.C. App. 308) with the duty of establishing a Personnel Division "to render aid in the replacement in their former positions of, or in securing positions for members of the reserve components of the land and naval forces of the United States who have satisfactorily completed any period of active duty, and persons who have satisfactorily completed any period of their training and service under this Act".

Any person "who has been discharged from the Army, Navy, Marine Corps, or Coast Guard with a form of discharge certificate other than honorable" is placed in Selective Service Class IV-F as being morally unfit (sec. 622.61, Selective Service Regulations).

. . . Honorably discharged soldiers, sailors and marines are entitled to have 5 points added to their earned rating in examinations for entrance into the classified Civil Service (Civil Service Regulations, Rule VI).

"Out-patient" care is made available pursuant to section 6 of the act of 20 March 1933, as amended, infra, and Veterans Regulation Numbered 7(a) by which the Administrator of Veterans Affairs is authorized to furnish to honorably discharged veterans of any war and to men honorably discharged for disabilities incurred in line of duty such medical, surgical and dental services as may be reasonably necessary for diseases or injuries incurred or aggravated in line of duty.

7. Although, as indicated above, most of the statutes conferring benefits make no distinction between officers who are dismissed and those who are separated "under conditions other than honorable", such is not true in all cases. Following are three instances in which dismissal by sentence of court-martial would deprive an officer of benefits to which one separated from the service by acceptance of his resignation "for the good of the service" might be entitled.

The act of 2 Mar. 1901 (31 Stat. 902; 10 U.S.C. 751; subpar. 1c, AR 35-4820, 19 Sep 1942), provides in part:

> "* * * That hereafter when an officer shall be discharged from the service, except by way of punishment for an offense, he shall receive for travel allowances from the place of his discharge to the place of his residence at the time of his appointment or to the place of his original muster into the service four cents per mile * * *."

It is now well recognized that an officer separated from the service is entitled to this payment unless his separation from the service was imposed upon him by judgment of a court as punishment for an offense (MS. Comp. Gen. A-16389, 3 Dec 1926; SPJGA 1943/7113, 22 May 1943; SPJGA 1943/7264, 26 May 1943; SPJGA 1943/13735, 28 Sep 1943). Clearly an officer whose resignation is accepted "for the good of the service" would be entitled to this travel pay, whereas an officer dismissed upon conviction of an offense would not.

Domiciliary care and medical and hospital treatment are provided by section 6 of the act of 20 March 1933, as amended (48

Stat. 9; 48 Stat. 301; 48 Stat. 525; 49 Stat. 729; 38 U.S.C. 706; M.L., 1939, sec. 1147), for "any veteran of any war who was not dishonorably discharged", as well as certain other mentioned ex-service personnel. The Veterans Administration (Mr. Chandler) has advised informally that an independent determination of whether the separation was dishonorable is made in cases involving an application for this type of care by an officer who was separated from the service by a resignation "for the good of the service". It thus appears that such a separation may or may not result in barring the individual concerned from such treatment, depending upon the facts peculiar to his case. It should also be noted that the mentioned benefits are funished in accordance with an order of preference set forth by Veterans Regulation Numbered 6(a) and that persons honorably discharged have the highest rating in that regard.

Title X of the Second War Powers Act (act of 27 Mar 1942, 56 Stat. 182, Bull. No. 18, W.D., 1942), provides a simplified procedure for the naturalization of aliens serving honorably in the armed forces of the United States during the present war. That act also specifically provides that the provisions of Title X thereof shall not apply to any person who during the present war is dishonorably discharged from the military or naval forces, and that, in addition to other grounds for revocation, citizenship granted pursuant to the provisions of the mentioned title may be revoked as to any person subsequently dishonorably discharged from the military or naval forces.

8. An opinion of this office dated 29 December 1942 (SPJGA 1942/6194, supra), considered the question whether a resignation "for the good of the service" is equivalent to a dishonorable discharge. It was there stated that:

> "* * * Stigma attaches both to a resignation for the good of the service and to the dismissal or discharge of a commissioned officer other than honorably. But a dismissal or discharge other than honorable is penal in nature, and various punitive consequences can and frequently do attach thereto. For example, when an officer is dismissed from the service for cowardice or fraud, the crime, punishment, name and place of abode of the delinquent shall be published in the newspapers in and about the camp and in the state from which the offender came or where he usually resides; and after such publication it shall be scandalous for an officer to associate with him (page 83, Manual for Courts-Martial,

1928). No such penal consequences attach to a resignation for the good of the service, other than the odium inevitably associated therewith."

9. In view of all of the foregoing considerations, it appears that there are substantial differences, in both theory and practice, between a separation from the service by acceptance of a resignation "for the good of the service" and a separation accomplished by dismissal. The latter being equivalent to a dishonorable discharge, it follows that acceptance of a resignation "for the good of the service" is not equivalent to a dishonorable discharge.

Irvin Schindler,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 342 May 28, 1942

MEMORANDUM for The Judge Advocate General.

Subject: Enlistments.

1. By disposition form (AG 22.8 (5-22-42)EA) dated May 22, 1942, opinion was requested whether the facts set out in the four inclosed basic letters with indorsements thereon from the 201 files of Harold Leroy Muncie, 15084853; Dorman Howard Birthwright, 15084691; Virgil C. Rinehardt, 15084205; and Martin Garber, 15085528, constituted valid enlistments.

2. In each case, it appears that the man concerned voluntarily presented himself at a recruiting station at Fort Benjamin Harrison, Indiana, and completed all necessary enlistment papers, including the signing of the printed form of oath on W.D. A.G.O. Form No. 22. It further appears that each of the four men changed his mind about enlisting and, after obtaining permission from inexperienced personnel at the recruiting office, departed, without having had the oath of enlistment administered to him. The fact of the departure of none of the men was communicated to the recruiting officer. In each of the four cases an indorsement of The Adjutant General states that the enlistment record is complete throughout. It is therefore assumed that the certificate of the recruiting officer to the effect that the oath was sworn to is also complete. No direct explanation of this indicated error is made, but it is possible that the recruiting officer signed the certificate under a mistaken belief that the men concerned were included with others to whom he had administered the oath. The reason for the departure of the men concerned is believed by the recruiting officer to have been the lack of a vacancy in the desired branch.

3. It is well settled that an enlistment is accomplished by executing the contract of enlistment and taking the oath of enlistment (JAG 342, Dec. 31, 1940; id. Apr. 25, 1941; JAG 220.451, May 14, 1941). Conversely, under the circumstances presented in these cases, the failure to take the oath of enlistment prevents the consummation of a formal enlistment.

4. It is therefore recommended that these papers be returned to The Adjutant General, by disposition form entry, prepared for the signature of the Chief of Division, stating:

> As a formal enlistment is not completed until the applicant takes the oath of enlistment, it is the opinion of this office that no valid enlistment was accomplished in any of the four cases submitted.

C. B. Mickelwait,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

Military Affairs
SPJG 220.451

April 2, 1942

MEMORANDUM for The Judge Advocate General.

Subject: Accomplishment of enlistment in the case of Daniel Edward Fisk.

1. By first indorsement (AG 201 Fisk, Dan (12-10-41)ER) dated February 2, 1942, a letter from the Commanding Officer, Moffett Field, California, dated November 27, 1941, together with inclosures, was referred for opinion whether enlistment was accomplished in the case of Danield Edward Fisk. By second indorsement (JAG 220.451, Feb. 13, 1942) this office returned the papers to The Adjutant General for further information as indicated in paragraph 3 of that indorsement. Further information has been supplied in the fifth and sixth indorsements as requested by this office and the original papers with additions thereto have again been referred to this office by the seventh indorsement of The Adjutant General, dated March 24, 1942.

2. After examination of the papers in reference, the factual situation with respect to Fisk may be stated as follows: Prior to October 31, 1941, there had been negotiations between Fisk, a graduate of the University of San Francisco and center on the All-Coast football team, and officers and enlisted personnel of the Air Corps at Moffett Field, with reference to his enlisting in the Air Corps and making application to become a flying cadet (6th Ind; Incl. 4). On October 30, 1941, Second Lieutenant Robert E. Agnew, Air Corps, was appointed summary court-martial for the purpose of administering oaths (Incl. 16). Lieutenant Agnew left Moffett Field by airplane for Salt Lake City, Utah, on the morning of October 31, 1941, under instructions tohave Fisk enlisted and examined at the Salt Lake Airdrome and to return with Fisk to Moffett Field (Incl. 2). A check of the recruiting records at Air Base Headquarters, Fort Douglas, Utah, Reception Center, and Recruiting Office, Salt Lake City, and the Salt Lake Airdrome has not revealed any record of Fisk being enlisted or examined (Incl. 2). An aircraft clearance report of the Salt Lake Airport, dated November 1, 1941, shows Fisk as a private and occupant of the plane with Lieutenant Agnew (Incl. 5). A canceled aircraft clearance report of Stockton Field, California, dated November 1, 1941, designates Fisk as "D.Fisk" (Incl. 7). The morning report of the Air Corps Advanced Flying School, Stockton Field, shows that on November 1, 1941, at 1:10 p.m., one enlisted man from Moffett Field wasattached for rations and quarters only and that on November 2, 1941, at 9:15 a.m., the enlisted man departed (Incl. 13). As shown by aircraft clearance report of Stockton Field, Lieutenant Agnew with "Fisk, Bill Pvt." departed on November 2, 1941, at 9:15 a.m., from that field (Incls. 11, 12). As a result of a plane crash about 9:55 a.m., November 2, 1941, near Niles Canyon, California, Lieutenant Agnew and Fisk were both

killed. On the assumption that Fisk's enlistment had been accomplished, his remains were handled in accordance with Army Regulations (Incl. 1 & 2.).

3. At the time of enlistment a soldier is required to take the oath of enlistment, which may be taken before any officer (act June 4, 1920, 41 Stat. 809; 10 U.S.C. 1581). "All recruiting officers will be appointed summary courts martial" (par. 5, AR 600-750, Apr. 10, 1939). As summary court-martial, Lieutenant Agnew would have been authorized to administer the oath of enlistment. Although there is no direct evidence that the oath was administered, in any event the taking of the oath is not essential to a constructive enlistment (Dig. Op. JAG, 1912-30, sec. 348).

4. This office has held that an individual was constructively enlisted for military service and became legally a member of the military establishment notwithstanding the fact that he was neither regularly enlisted nor drafted into the military service when he was carried as a member of a command, voluntarily submitted to military authority, performed duty, received pay or allowances and the Government exercised military authority over his person (JAG 342, July 2, 1921; JAG 220.451, Dec. 3, 1929). It has long been the view that enlistments should be construed pursuant to the principles of contract law (JAG 342, July 2, 1921). From the information disclosed, it is clear that Fisk intended to enlist in the Air Corps and likewise that the military authorities at Moffett Field intended to enlist him. That there was a meeting of the minds sufficient to sustain a contract of enlistment is indicated by the attending circumstances, especially when considered in connection with the subsequent acts of the man. As an occupant of the airplane operated by Lieutenant Agnew, he was subject to military authority and control of an officer of the Army and on the official records pertaining to the flight was carried as a private in the Army. Likewise, he appears to have received rations and quarters at Stockton Field as an enlisted man from Moffett Field and during such period was necessarily subject to military control. Although the morning report, referred to above, does not disclose the name of the enlisted man, it can be reasonably assumed from the other information that Fisk was the person referred to in the report. Without further consideration of the presumption that Lieutenant Agnew was acting in the proper discharge of his orders and duty, obeyed orders and made true reports and entries as to the military status of Fisk, it may reasonably be concluded that Fisk was on November 1, 1941, constructively enlisted in the military service of the United States, that being the date when he left the Salt Lake Airport in the airplane operated by Lieutenant Agnew and at the time of the fatal accident was a private in the United States Army.

5. It is, therefore, recommended that these papers be returned to The Adjutant General by eighth indorsement prepared for the signature of the Chief of Division, stating:

> It is the opinion of this office that, although the enlistment of Daniel Edward Fisk was not regularly and formally accomplished, on the basis of the information disclosed in the inclosed papers, he became legally a member of the military establishment by constructive enlistment on November 1, 1941.

C. B. Mickelwait,
Colonel, J.A.G.D.,
Chief of Division.

The foregoing memorandum having been approved by authority of The Judge Advocate General, action was taken as therein recommended.

SPJGA 325.34 July 18, 1942

MEMORANDUM for The Judge Advocate General.

Subject: Status of enlisted man discharged, not honorably, for conviction by civil court and recalled to duty.

1. By disposition form (AG 201 Gosney, George E. (6-18-42)EA) dated July 4, 1942, the inclosed papers which relate to Private George E. Gosney, 20633177, who was recalled to active duty after being discharged on October 6, 1941, not honorably, by reason of conviction by civil court of using an automobile without owner's consent, were referred for remark and recommendation.

2. The file shows that this soldier enlisted in the National Guard of the State of Michigan on June 19, 1940, and was inducted into Federal service, October 5, 1940, from which enlistment he was issued a Discharge Certificate, W.D., A.G.O. Form No. 56, at Camp Livingston, Louisiana. The discharge, not honorable, from service was ordered by reason of conviction and sentence of thirty days in jail by a civil court in September 1941, at Alexandria, Louisiana, for the offense of using an automobile without the owner's consent. This soldier was recalled to active duty on February 5, 1942, under the provisions of the War Department's letter (AG 220.31 ERC (12-18-42)EA) dated December 23, 1941, directing recall to active duty of certain enlisted men of reserve components, including National Guard, who had been released from active duty. He was on March 3, 1942, reported to be stationed with the 125th Infantry, at Pomona, California, and is now serving in Company B, 754th Military Police Battalion, Camp San Luis Obispo, California.

3. The legal effect of the discharge granted was to separate the soldier from the military service and make him a civilian (JAG 220.8, Aug. 17, 1918, Op. JAG, 1918, p. 677). His recall to active duty was unauthorized because the discharge terminated his liability for military service under the enlistment (JAG 342.06, Feb. 25, 1942, p. 21). Without being formally enlisted or drafted into the military service one may be constructively or impliedly enlisted where he tenders his services and voluntarily submits to military authority, is accepted and carried as a member of a command, performs military duties as a soldier and receives pay and allowances (JAG 342, July 2, 1921; JAG 220.451, Dec. 3, 1929; SPJG 220.451, April 2, 1942; SPJGA 220.451, July 16, 1942). Even where the service was not voluntarily tendered, but erroneously ordered, the acquiescence in the order, the serving as a soldier and the receiving of pay and allowances have been held to effect a constructive enlistment (JAG 220.6, May 7, 1918, Op. JAG 1918, p. 336; JAG C.2293, June 1896, Dig. Op. JAG 1912, p. 603, 1436).

4. It may be concluded from the foregoing authorities that the discharge of this soldier terminated his liability for military service under the original enlistment and that the order recalling him to active duty was unauthorized. However, his compliance with the order to active duty and his acquiescence therein, assumed from the absence of any objection, and his performance of military duties and receipt of pay and allowances for five months may reasonably be held to be such a meeting of the minds as to effect a constructive enlistment.

5. It is, therefore, recommended that the inclosed papers be returned to The Adjutant General, by disposition form entry, prepared for the signature of the Acting Chief of Division, stating:

> It is the opinion of this office that the discharge of Private George E. Gosney, 20633177, terminated his liability for military service under his original enlistment and that his recall to active duty was unauthorized. However, by complying with and acquiescing in the order to active duty, and by his performance of military duties and receipt of pay and allowances for five months, he may properly be regarded as having been constructively enlisted. It is recommended that if the soldier so desires he be discharged from the service for the convenience of the Government. However, there is no legal objection to his retention in the service in the event he does not desire a discharge.

Charles W. West,
Colonel, J.A.G.D.,
Acting Chief of Military Affairs Division.

SPJGA 1943/19499 3 January 1944

MEMORANDUM for The Judge Advocate General.

Subject: Discharge of minor under eighteen years of age notwithstanding prior written consent of head of family to enlistment.

1. By letter dated 21 December 1943, from Major Harry L. Logan, Jr., JAGD, Staff Judge Advocate, Headquarters 99th Infantry Division, APO 449, Camp Maxey, Texas, opinion was requested whether a soldier, now under eighteen years of age, may be discharged upon application of his mother (head of the family), notwithstanding her prior written consent to his enlistment.

2. The basic letter discloses that Private Arthur (NMI) Miller, 14151598, Headquarters Company, 394th Infantry, enlisted 12 November 1942, with the written consent of his mother, stating in his application that he was eighteen years of age, although he was in fact only fifteen years of age. The mother has now made request for the soldier's discharge under the provisions of section IV, Army Regulations 615-360, 26 November 1942, attaching to her application a certificate showing Private Miller to have been born 11 March 1927.

3. The pertinent provision of the act of 30 June 1921 (42 Stat. 74; 10 U.S.C. 653a), set forth in subparagraph 31a, Army Regulations 615-360, 26 November 1942, reads as follows:

> "* * * The Secretary of War shall discharge from the military service with pay and with the form of discharge certificate to which the service of each, after enlistment, shall entitle him, all enlisted men under the age of eighteen on the application of either of their parents or legal guardian. * * *"

The act of 12 February 1925 (43 Stat. 896; 10 U.S.C. 653) provides in part:

> "Upon the presentation of satisfactory evidence as to his age and upon application for discharge by his parent or guardian presented to the Secretary of War within six months after the date of his enlistment, any man enlisted after July 1, 1925, in the Army under twenty-one years of age who has enlisted without the written consent of his parent or guardian, if any, shall be discharged with the form of discharge certificate and

the travel and other allowances to which his service after enlistment shall entitle him."

Paragraph 32 of Army Regulations 615-360, 26 November 1942, under the heading "Application of laws" provides, in part, as follows:

"b. If the father is alive and has not lost control by judgment of a court, appointment of a guardian, desertion of family, or waiver, the consent of the mother for the enlistment, or induction in case of a selectee, of the enlisted man does not prevent discharge upon application by the father, nor does application by the mother for discharge have any effect if the father has consented to enlistment, or induction in case of a selectee.

"c. If the mother is alive a stepfather has no right to consent to enlistment or to apply for discharge unless he has adopted the minor or been appointed guardian.

"* * *

"e. Written consent of a parent or guardian given after enlistment, or induction in case of a selectee, is binding."

Section 5(i) added to the act of 16 September 1940 by section 4, act of 13 November 1942 (56 Stat. 1019; M.L. 1939, Sup. II, sec. 2225-5(i)) provides:

"Notwithstanding any other provisions of law, no person between the ages of eighteen and twenty-one shall be discharged from service in the land or naval forces of the United States while this Act is in effect because such person entered such service without the consent of his parent or guardian."

4. After presenting the facts involved, the basic communication states:

"2. It would seem that under the provisions of 10 USC 653a, as long as the soldier is under eighteen years of age he may be discharged regardless of the fact that at the time of his enlistment he presented the written consent of the head of his family. Paragraphs 32b, e, f, of AR 615-360 by implication suggest that prior written consent of the head of the family would preclude discharge, however, in my opinion such paragraphs are a carry over from 10 USC 653 and in so far as they cover prior consent as precluding discharge are inoperative due to section 5i added to Act of September 16, 1940 by section 4, Act of

November 13, 1942 (56 Statute 1019); Supplement II to Military Laws of the United States, section 2225(5i).

"3. In short, in my opinion:

a. The rule formerly was that all minors under eighteen years of age might be discharged regardless of prior consent of head of the family to the enlistment; that minors between eighteen and twenty-one could be discharged if application made by head of the family within six months following enlistment and if head of the family had not consented to the enlistment.

b. The rule now is that only minors under the age of eighteen may be discharged for minority, but that such discharge is in order regardless of the prior consent of the head of the family."

The opinion of Major Logan that a minor soldier under the age of eighteen may be discharged upon application of either of his parents, notwithstanding a prior written consent by such parent appears to be a correct statement of the law at the present time. The act of 30 June 1921, supra, is expressly applicable to enlisted men under eighteen years of age. It is mandatory in its directions and contains no reference to consent or nonconsent to enlistment by the parent-applicant. The mentioned act was not superseded by the act of 12 February 1925, supra (JAG 010.3, 20 Oct 1930, p. 61; JAG 300.3, 27 Jul 1925; id., 12 May 1927). The provisions of subparagraphs 32b, c, and e, Army Regulations 615-360, supra, were apparently intended to implement the act of 12 February 1925, supra, and should not be construed to impliedly preclude discharge under the act of 30 June 1921, supra, where there is prior written consent to the illegal enlistment. Section 4 of the act of 13 November 1942, supra, now prohibits the discharge of persons between the ages of eighteen and twenty-one based on nonconsent of the parent or guardian, and renders inoperative the provisions of the act of 12 February 1925, supra, while the Selective Training and Service Act of 1940, as amended, is in effect. This office has previously expressed the opinion that there is no legal objection by reason of the mentioned act of 13 November 1942, to the discharge of minors under the provisions of the act of 30 June 1921, supra (SPJGA 1942/5712, 4 Dec 1942).

There was recently referred to this office (AG 220.8 (25 Nov 43) PE-A), for concurrence and comment, a proposed revision of Army Regulations 615-360, 26 November 1942, as changed. As the revision was approved by this office (SPJGA 1943/17250, 13 Dec 43), subparagraph 32b of those regulations will be amended to omit all reference to consent of the parent or guardian and subparagraphs 32c and e will be stricken out. It therefore appears that the existing ambiguity which occasioned this inquiry will be removed.

This office was advised informally by the Enlisted Branch, Office of The Adjutant General (Lt. Col. Williams) that it is the established policy of the War Department to approve applications for discharge of enlisted men under eighteen years of age, notwithstanding prior consent of the parent or guardian and that office is in full accord with the views expressed herein.

5. It is therefore recommended that reply be made to Major Harry L. Logan, Staff Judge Advocate, Headquarters 99th Infantry Division, APO 449, Camp Maxey, Texas, by letter, prepared for the signature of the Chief of Division, stating:

Your letter of 21 December 1943, addressed to The Judge Advocate General, in which you inquire as to the propriety of ordering the discharge of an enlisted man under eighteen years of age, upon application of his mother, notwithstanding her prior written consent to his enlistment, has been referred to this division for reply.

This office concurs in the views expressed by you in paragraph three of your letter and is of the opinion that under the facts as set forth the discharge of Private Miller may properly be ordered. Informal inquiry at the Office of The Adjutant General discloses that the existing policy of the War Department is to approve applications for the discharge of enlisted men who are under eighteen years of age, notwithstanding the fact that their parents or guardians may have consented to enlistment.

There is presently being considered in the War Department a proposed revision of Army Regulations 615-360 which will, it is believed, among other things, clarify the ambiguity with which you are now concerned.

Irvin Schindler,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

November 4, 1942

SPJGA 1942/5148
(370.093)

MEMORANDUM for The Judge Advocate General.

Subject: Jurisdiction of military police over selectees while traveling.

1. By informal action sheet (SPAAM 250.1) dated October 24, 1942, there was referred for comment a letter from the Chief, Organization Branch, Military Police Division, Office of The Provost Marshal General, dated October 22, 1942, requesting information as to the authority and jurisdiction of military police on trains over selective service men en route from draft board assembly point to induction center and also from induction center to reception center.

2. The duties of the military police in civil communities are delineated in paragraph 6(10)b(1), Basic Field Manual 29-5, December 8, 1941, in pertinent part as follows:

> "To assist the civil police by maintaining order among military personnel, by minimizing difficulties between military personnel and civilians, and by enforcing observation of civil laws and ordinances by military personnel."

It will be noted that these duties are all with respect to military personnel. This office has made the following comment (JAG 300.7, Nov. 19, 1935) with regard to the authority of military police over civilians:

> "(a) The military police, as the term implies, are a part of the Army, and their authority over persons not subject to military law or martial rule is no greater than that of any other member of the military forces."

However, it must be remembered that all persons, including members of the military establishment have a legal right to arrest persons caught in the act of committing or attempting to commit a felony or a misdemeanor amounting to a breach of the peace (par. 4a, AR 600-355, July 17, 1942). Consideration of the foregoing rules leads to the conclusion that the jurisdiction and authority of the military police in civil communities, which are not under martial law, is restricted to military personnel except that they may arrest a perpetrator caught in the act of committing or attempting to commit a felony or misdemeanor amounting to a breach of the peace regardless of military status. Under the same principle they may properly warn persons believed to be contemplating such offenses

against the commission thereof. This rule appears applicable to military police assigned to duty on civilian trains.

3. As to the status of selective service men prior to actual induction at an Army induction center, the Comptroller General (20 C.G. 772-774) has said the following:

> "Unlike the Selective Service System created and administered under the act of May 18, 1917, 40 Stat. 77, and the regulations promulgated in pursuance thereof, under which each man in respect of whom notice to report had been posted or mailed 'shall be in the military service of the United States' from the time specified for reporting to the local board for military duty (see 26 Comp. Dec. 298) the present selective training and service act fixes the time when the status of the selectee is changed from civilian to military as the date of induction which is deferred until he is accepted by the land or naval forces. Prior to induction for training and service he is not entitled to the benefits provided by section 3 (d) of the act, 54 Stat. 886, and is not subject to the jurisdiction of military courts martial under section 11, 54 Stat. 894. * * *"

In view of their civil status prior to induction into the Army at an induction center it appears that the jurisdiction and authority of the military police over selective service personnel traveling by rail from a draft board assembly point to an induction center is limited to that of any citizen, who is authorized to arrest persons only where such persons are caught in the act of committing or attempting to commit a felony or misdemeanor amounting to a breach of the peace. A selective serviceman en route to a reception center after induction at an induction center is a member of the military establishment and hence subject to the jurisdiction and authority of the military police to the same extent as other military personnel.

4. It is therefore recommended that this letter be transmitted to the Chief, Organization Branch, Military Police Division, Office of The Provost Marshal General (Through Chief of Administrative Services, SOS) by first indorsement, prepared for the signature of the Chief of Division, stating:

> Subject to such further restrictions, if any, as shall have been imposed by competent orders or regulations, the authority and jurisdiction of military police over selective service men on trains:

a. En route from draft board assembly point to induction center is limited to that of any member of the military establishment or any civilian, which is to warn any such selective service man believed to be contemplating the commission of a felony or a misdemeanor amounting to a breach of the peace against the commission thereof, and to arrest such a selective service man only if detected in the act of committing or attempting to commit such an offense; and,

b. En route from induction center to reception center is the same as that which may be exercised over other military personnel.

Charles W. West,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 1943/11007 31 July 1943

MEMORANDUM for The Judge Advocate General.

Subject: Antedating induction.

1. By wrapper indorsement (SPX 201 Thomas, Henry (14 Jul 43) PR-I) dated 23 July 1943, there was referred for remark and recommendation a letter addressed to The Adjutant General, dated 14 July 1943, from the Commanding Officer, Headquarters 1229th Reception Center, Fort Dix, New Jersey, through the Commanding General, Second Service Command, A.S.F., Personnel Division, 50 Broadway, New York, New York, requesting that authority be granted to effect the induction of Henry Thomas, colored, now held at Fort Dix and to antedate that induction to 23 December 1942, under authority of paragraph 24a, Army Regulations 600-750, 30 September 1942, with 1 January 1943, as the effective date of orders to active duty. The latter officer, by first indorsement to The Adjutant General (SPKKE Thomas, Henry A.), dated 15 July 1943, recommended that the requested authority be granted.

2. The basic letter discloses in pertinent part that Henry Thomas of Brooklyn, New York, who had not completed induction processing upon being examined on 23 December 1942, at Grand Central Palace, New York, New York, erroneously reported for shipment to Fort Dix on 1 January 1943. His name not appearing on the list of those scheduled for shipment, it was assumed at the induction station that he had been categorized with the probable venereal disease cases and he was sent to the Station Hospital for treatment. Examination disclosed he was not a venereal case and on 11 February 1943, he was discharged to duty with the Reception Center. Inquiry of the Second Service Command revealed that a Henry Andrew Thomas (LS), ASN 32682553, had been inducted on 12 December 1942, from Local Board 47, New York, New York. Further inquiry revealed that Local Board No. 195, Brooklyn, New York, had recorded that Henry (NMI) Thomas had reported for induction 23 December 1942; that he was classified "Administrative reject" for not having completed induction procedure and his name had not appeared on special orders transferring him to the Enlisted Reserve or assigning him to active duty at Fort Dix. On the assumption that Henry Thomas was in fact a member of the armed forces, in compliance with a War Department directive that all men held over thirty (30) days must be paid, partial pay totalling one hundred twenty dollars ($120) has been made to him on two occasions. He has performed full military duty from the time of arrival at the 1229th Reception Center and it is recommended by his commanding officer that full pay and allowances be made retroactive to "23 December 1942".

3. Paragraph 24, Army Regulations 600-750, 30 September 1942, provides:

> "Date of enlistment; antedating enlistments.--
> a. General.--Except as hereinafter set forth, the date upon which the enlistment or reenlistment of an enlisted man is completed by administering the oath is the date of enlistment and it must be shown on the enlistment record above the signature of the officer who administers the oath. No enlistment will be antedated without prior approval by the War Department. Under no circumstances will an enlistment be postdated.
> "b. Exceptions.-- When the enlistment or reenlistment of an enlisted man is delayed through no fault of the enlisted man, but for the convenience of the Government, and it appears that the enlisted man has a well founded claim to have a prior date recorded as the date of enlistment, a full report of all the facts, with recommendations, will be made to The Adjutant General."

4. The Selective Training and Service Act of 1940 (54 Stat. 885; 50 U.S.C. 301, et seq.), contains no provision which expressly stipulates any moment at which a selectee is to be regarded as having been inducted. Induction is completed, generally speaking, upon full acceptance of the individual by the Government (JAG 327.36, 6 Jun 41). By way of analogy (Dig. Op. JAG 1912-40, sec. 467) it has been held that:

> "An enlistment in the military service of the United States may be constructively effected by operation of law when a person otherwise qualified to enlist tenders his services and the Government accepts them without condition, even though no oath of allegiance is taken. The performance of full military duty as a soldier under such circumstances may be binding as an implied contract of enlistment."

Although the quoted regulations and the mentioned opinion relate to persons who have enlisted in the Army, the status of a selectee, once he enters upon military duties, is identical, for the purpose here involved, with that of a person who has enlisted.

In the present case the soldier's commanding officer recommends that he be considered as entitled to pay from 23 December 1942. There is nothing in the file to indicate that

Thomas assumed a military status or performed any military duties until 1 January 1943, but from that date he has performed such military duties and, as of that date, may properly be regarded as coming within the principle set out in the mentioned regulation and the above-quoted opinion. It follows therefore that there was a constructive induction of Thomas as of 1 January 1943; that there is no legal objection to antedating his induction to that date; and that he is entitled to pay and allowances from that date.

5. It is therefore recommended that these papers be returned to The Adjutant General by second wrapper indorsement, prepared for the signature of the Chief of Division, stating:

> Although it is recommended by the commanding officer of Henry Thomas that he be considered as having been inducted on 23 December 1942, and entitled to pay and allowances from that date, there is nothing in the file to indicate that Thomas assumed a military status or performed any military duties until 1 January 1943. There was, however, a constructive induction as of the date last mentioned and there is no legal objection to completing his record so as to show induction as of 1 January 1943, from which date he is entitled to full pay and allowances. It is recommended that action be taken in accordance with the views above expressed.

Charles W. West,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 1943/3672 March 12, 1943

MEMORANDUM for The Judge Advocate General.

Subject: Liability of Captain William Avery Powell, Inf., NGUS, under the Selective Training and Service Act.

1. By informal action sheet (201/Powell, William Avery, Capt., Inf-NGUS/) dated March 6, 1943, there was transmitted for opinion a letter dated March 3, 1943, from the Director, Selective Service System, requesting an opinion of this office whether Captain William Avery Powell, Infantry, National Guard of the United States, "in his present status * * * is a commissioned officer of the federally recognized active National Guard, as the classification term is used in Section 5 (a) of the Selective Training and Service Act of 1940".

2. According to the inclosed letter and from an examination of the file it appears that Captain Powell was relieved from active Federal duty by paragraph 52, Special Orders No. 128, Headquarters Fourth Corps Area, dated May 29, 1942, effective July 2, 1942; subsequently registered for Selective Service; and, as of July 24, 1942, was classified 1A by his local board. The letter also states that "Federal recognition has not been withdrawn by the National Guard Bureau, and the officer's /Captain Powell's/ commission in the National Guard of the United States is still in full force and effect". The records of the National Guard Bureau disclose that effective July 19, 1942, Captain Powell was transferred to the North Carolina National Guard, Inactive, per paragraph 1, Special Orders No. 35, State of North Carolina, Adjutant General's Department, dated July 28, 1942. Pursuant to the last-mentioned orders the National Guard Bureau prepared and placed in the 201 file of the officer concerned Form No. 3-c N.G.B. dated August 1, 1942, which reads as follows:

"The records of the National Guard Bureau have been amended to show that the active assignment of William Avery Powell (O-330435) North Carolina National Guard, has been changed to Captain, Infantry Inactive National Guard. Formerly Company F, 120th Infantry

to date from 19 July 1942 Par. 1, SO 35, AG N.C., 1942."

3. Section 5(a) of the Selective Training and Service Act of

1940 (act Sept. 16, 1940; 54 Stat. 885; 50 U.S.C., App. 301-318), as amended, provides in pertinent part as follows:

> "Commissioned officers * * * of * * * the federally recognized active National Guard * * * shall not be required to be registered under section 2 and shall be relieved from liability for training and service under section 3(b)." (Underscoring supplied)

Section 71(a) of the National Defense Act, as amended by the act of June 15, 1933 (48 Stat. 157; 32 U.S.C. 4b), and section 77 of the mentioned act, as amended by the act of June 19, 1935 (49 Stat. 391; 32 U.S.C. 114) provide, respectively, in pertinent part as follows:

> "Sec. 71. * * *(a) 'National Guard' * * * means that portion of the Organized Militia of the several States * * * active and inactive, federally recognized as provided in this Act and organized, armed, and equipped * * * at Federal expense and officered and trained under paragraph 16, section 8, Article I of the Constitution." (Underscoring supplied)

> "Sec. 77. * * * under such regulations as the Secretary of War may prescribe, upon termination of service in the active National Guard, an officer of the National Guard of the United States may, if he makes application therefor, transfer to the inactive National Guard and remain in the National Guard of the United States in the same or lower grade. * * *" (Underscoring supplied)

4. Reference to the provisions of the National Defense Act above quoted readily demonstrates that there may exist within the several states both an active and inactive Federally recognized National Guard. However, that portion of section 5(a) of the Selective Training and Service Act of 1940, supra, above quoted exempts from registration and liability for training and service under the act only commissioned officers of the Federally recognized active National Guard. As the records disclose that Captain Powell is a member of the Federally recognized inactive National Guard, manifestly, the officer concerned does not come within the purview of the above exemptions and consequently is subject to the provisions of the Selective Training and Service Act of 1940, supra, requiring registration and service.

5. It is therefore recommended that these papers be returned to The Adjutant General by informal action sheet entry, prepared

for the signature of the Acting The Judge Advocate General, stating:

> The records of the National Guard Bureau disclose that pursuant to paragraph 1, Special Orders No. 35, State of North Carolina, Adjutant General's Department, dated July 28, 1942, Captain Powell was transferred from the active to the inactive North Carolina National Guard, effective July 19, 1942, and that the National Guard Bureau, on August 1, 1942, altered its records accordingly. Based upon this information, it is my opinion that the mentioned officer is not "a commissioned officer of the federally recognized active National Guard, as the classification term is used in section 5(a) of the Selective Training and Service Act of 1940" (act Sept. 16, 1940, 54 Stat. 885; 50 U.S.C., App. 301-318), as amended, and therefore is not exempted from the provisions of the mentioned act by the cited section thereof.

Charles W. West,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 1943/3052 February 26, 1943

MEMORANDUM for The Judge Advocate General.

Subject: Whether selectees are members of the Regular Army.

1. By informal action sheet (SPX 095 Wilkinson, Horace C. (2-4-43)OB-C) dated February 14, 1943, there was referred for remark a letter dated February 4, 1943, addressed to the Secretary of War, from Horace C. Wilkinson of the law firm of Wilkinson and Skinner, 608-612 Farley Building, Birmingham, Alabama, stating that the State of Alabama has a statute making members of the Regular Army ineligible to hold state office and requesting information as to any War Department ruling on the question whether a person inducted into the land forces of the United States under the Selective Training and Service Act of 1940 (54 Stat. 885; 50 U.S.C., App. 301, et seq.) is a member of the Regular Army.

2. Section 1(c) of the Selective Training and Service Act of 1940 provides in pertinent part:

> " * * * it is the intent of the Congress that whenever the Congress shall determine that troops are needed for the national security in excess of those of the Regular Army and those in active training and service under section 3(b), the National Guard of the United States, or such part thereof as may be necessary, shall be ordered to active Federal service and continued therein so long as such necessity exists."

Section 3 of the joint resolution of December 13, 1941 (55 Stat. 800; 10 U.S.C., Supp. 2), amended section 1 of the National Defense Act, as amended, in such manner as to include in the composition of the Army of the United States persons inducted into the land forces of the United States under the Selective Training and Service Act of 1940.

Section 2 of the National Defense Act, as amended (act June 4, 1920, 41 Stat. 759; 10 U.S.C. 4) states the composition of the Regular Army. Persons inducted into the land forces of the United States under the provisions of the Selective Training and Service Act of 1940 are not mentioned in that section. The last sentence of such section (10 U.S.C. 602) provides that except in time of war or similar emergency the number of enlisted men of the Regular Army shall not exceed 280,000.

3. The wording of the above-quoted portion of section 1(c) of the Selective Training and Service Act of 1940, distinguishing as

it does between troops of the Regular Army and troops in training and service under the provisions of that act, strongly indicates that the latter troops are not in the Regular Army. Likewise, the amendment of section 1 of the National Defense Act for the purpose of including selectees in the composition of the Army of the United States is a potent indication that they are not included in the Regular Army. If they were so included, the amendment would have been unnecessary, because section 1 of the National Defense Act already so defined the Army of the United States as to include the Regular Army. Certainly, it may not be presumed that the Congress performed a vain or superfluous act in the enactment of the amendment. The composition of the Regular Army, as fixed by section 2 of the National Defense Act, lends no support to any contention that selectees are members of the Regular Army. Although it is true that such section so defines the composition of the Regular Army as to include therein the various branches in which selectees may be serving, the enlisted strength of the branches themselves is so limited by other sections of the act as to preclude successful contention that selectees serving in a branch are actually included in the branch and therefore are in the Regular Army. This office has held (JAG 002, Sept. 16, 1940; id., Oct. 18, 1941; id., 1942/342, Feb. 2, 1942; SPJGA 1942/1619, Apr. 25, 1942) that persons inducted into the Army under the provisions of the Selective Training and Service Act of 1940 are not enlisted men on the active list of the Regular Army within the meaning of the act of February 13, 1936 (49 Stat. 1137; 24 U.S.C. 44a), providing for a monthly deduction from the pay of "each enlisted man * * * on the active list of the Regular Army" for the support of the United States Soldiers' Home. The Comptroller General has expressed concurrence in that view (MS. Comp. Gen. B-16450, June 7, 1941), and has later, in passing upon the question whether pay forfeited by a selectee who had deserted should be set apart for the support of the Soldiers' Home under the provisions of section 4818, Revised Statutes (21 U.S.C. 44), expressed the view that "inducted selectees are not members of the Regular Army" (MS. Comp. Gen. B-18804, Oct. 7, 1941).

In view of the foregoing discussion, it is my opinion that although the exact Army status of persons inducted into the land forces of the United States for training and service under the provisions of the Selective Training and Service Act of 1940 is not entirely clear, such persons are not, in their status as selectees, members of the Regular Army.

4. It is therefore recommended that these papers be returned to The Adjutant General by informal action sheet entry, prepared for the signature of the Assistant Chief of Division, stating:

> It is the view of this office that, so far as the War Department is concerned, persons inducted into the land forces of the United States for training and service under the provisions of the Selective Training and Service Act of 1940 (54 Stat. 885; 50 U.S.C., App. 301, et seq.), are not, by reason solely of their status as selectees, members of the Regular Army. Of course, it is possible that any particular person originally inducted as a selectee may by subsequent enlistment or appointment therein have acquired the status of a member of the Regular Army.

Irvin Schindler,
Colonel, J.A.G.D.,
Assistant Chief of Military Affairs Division.

SPJGA 1943/2382 February 7, 1943

MEMORANDUM for The Judge Advocate General.

Subject: Posthumous promotion of enlisted men.

1. By informal action sheet dated January 26, 1943, the accompanying papers were referred for opinion as to whether an enlisted man (Robert H. Rhees, ASN 37378136) may be posthumously promoted from the grade of private to that of sergeant.

2. It appears from the file that Robert H. Rhees of St. Louis, Missouri, was inducted into the Army at Jefferson Barracks, Missouri, on August 15, 1942. He was thereupon transferred to the Enlisted Reserve Corps pursuant to War Department letter dated May 15, 1942, and was ordered to and did report to that station for active duty on August 29, 1942. On September 5, 1942, he was transferred to the 758th Military Police Battalion (2/I), Camp Babler, Centaur, Missouri, and on September 18, 1942, while on authorized pass, he was killed when the automobile in which he was riding collided with a street car. At the time of his death he was a private. The file includes a radiogram dated October 2, 1942, and signed "GRAHAM" which states in part, "PVT H RHEEF POSTHUMOUSLY APPOINTED SGT * * *". Page 1 of the official report of death (W.D., A.G.O. Form No. 52) shows Rhees' grade as sergeant, while page 2 thereof shows his pay as being $50 monthly, which is the rate of an enlisted man of the seventh grade (private). His service record (W.D., A.G.O. Form No. 24) shows on page 5 (Military Record) that he was appointed a sergeant, September 19, 1942, by paragraph 3, Battalion Special Orders No. 14, and page 23 (Final Indorsement) shows his grade as sergeant. No other facts appear with respect to his purported posthumous appointment to the grade of sergeant.

3. Posthumous appointments and promotions of enlisted men to noncommissioned grades are authorized by the act of July 28, 1942 (Public Law 680, 77th Cong.; sec. III, W.D. Bull. 42, Aug. 11, 1942), section 4 of which provides:

> "That the Secretary of War and the Secretary of the Navy be, and they are hereby, severally authorized to issue, or cause to be issued, an appropriate warrant in the name of any person who, while in the military or naval service of the United States at any time after September 8, 1939, shall have been officially recommended for appointment or promotion to a noncommissioned grade and who shall have been unable to receive or accept such appointment or promotion by reason of his

death in line of duty; and any such posthumous appointment or promotion and warrant shall issue as of the date of such official recommendation and such person's name shall be carried upon the records of the War or Navy Department as having served in the grade and branch of the service to which he would have been appointed or promoted by such warrant from the date of such official recommendation to the date of his death."

It will be noted that the foregoing law authorizes the Secretary of War to issue appropriate warrants effecting the posthumous promotion of certain enlisted men, or to cause such warrants to be issued. The act specifies three conditions precedent to such action, namely, a, the person concerned must have been in the Army of the United States after September 8, 1939; b, he must have been officially recommended for appointment or promotion to a noncommissioned grade; and, c, he must have been unable to receive or accept such appointment or promotion by reason of his death in line of duty. The last-mentioned requirement, c, makes it clear that the required official recommendation for appointment or promotion must have been made during the lifetime of the soldier concerned.

The mentioned conditions a and c appear to be self-explanatory; but some examination into the meaning of the phrase "officially recommended for appointment or promotion to a noncommissioned grade", as employed in the law to state the second condition, b, appears necessary. Paragraph 5, Army Regulations 615-5, April 15, 1936, provided for certain recommendations as a part of the procedure to be followed in appointing and promoting noncommissioned officers. The provisions of that paragraph were rescinded and other provisions substituted therefor by paragraph 2, section III, War Department Circular No. 25, January 28, 1942, as amended by section III, War Department Circular No. 109, April 13, 1942, and section III, War Department Circular No. 140, May 11, 1942. It will be noted that the first of these amendments preceded the enactment of the above-quoted act by a period of approximately six months. As amended, and presently in force, Army Regulations 615-5 are silent with respect to official recommendations for appointment or promotion of enlisted personnel to noncommissioned grades.

* * * *

It has been informally ascertained from the Enlisted Men's Section, Enlisted Men's Branch, The Adjutant General's office (Capt. Ulmer and Miss McElroy, Room 2005, Munitions, Ext. 79177, 79623), that Army Regulations 615-5 are now being revised but that it is not contemplated that any provision with regard to recommendations for appointment or promotion to noncommissioned officer

grades will be incorporated therein. Further information from the same sources indicates that recommendations for promotion are presently made in a manner substantially similar to that heretofore employed and which is described in paragraph 5, Army Regulations 615-5, April 15, 1936 (now rescinded). Actual appointments and promotions are, of course, made in accordance with the provisions of paragraph 2, section III, War Department Circular No. 25, January 28, 1942, as amended, which provide:

"5. Who may appoint.--a. Except as prescribed in b, c, d, e, and f, below, the appointing authority for temporary noncommissioned officers and privates, first class, is shown below:

Grades	Units	By whom appointed
Noncommissioned officers.....	Regiment.....	Regimental commander. *
Noncommissioned officers.....	Detached or separate battalion.	Battalion commander.*
Privates, first class.....	Company.....	Company commander.
Noncommissioned officers.....	Separate or detached company..	Company commander.

* Except detached units as indicated.

"b. Corps area commanders may appoint within their jurisdiction, temporary noncommissioned officers and privates, first class, assigned to corps area headquarters detachments, Organized Reserve activities, Reserve Officers' Training Corps, National Guard activities, and recruiting services.

"c. (Rescinded by sec. III, Cir. 109, 1942.)

"d. Commanding officers of corps area signal service companies, signal service companies (aviation), and ordnance service companies will appoint temporary noncommissioned officers and privates, first class, in their units.

"e. Commanding generals of corps areas, air forces, Army Air Forces training centers and similar air commands, divisions and higher units, task forces, and oversea base commands will appoint noncommissioned officers of the first three grades, Finance Department, within their commands.

"f. Chiefs of arms and services and commanders of units higher than regiments may appoint tempor-

ary noncommissioned officers and privates, first class, of their offices or headquarters.

"g. Commanding officers of posts and other installations, in cases not specified above, will appoint temporary noncommissioned officers and privates, first class, under their jurisdiction."

Nothing to the contrary appearing, it may be presumed that at the time of its action the Congress had in contemplation the appointment and promotion machinery then in operation (and which is still functioning). It seems appropriate to note that the posthumous appointments and promotions authorized by sections 1, 2, and 3 of the act of July 28, 1942, supra, are restricted to cases in which the persons concerned have been recommended for such appointments or promotions and the recommendations have been transmitted to the authority competent to take final action thereon prior to the death of the individuals. It seems only logical to assume that there was no intention to impose any less stringent requirements in those cases coming within the purview of section 4 of the act. It is therefore concluded that the requirement (b above) that a person "shall have been officially recommended for appointment or promotion to a noncommissioned grade" incorporated in section 4 of the act of July 28, 1942, supra, means that such a recommendation must have been made through appropriate military channels to the officer authorized by current Army regulations to accomplish the recommended appointment.

4. It must be remembered that the Secretary of War is authorized by the act of July 28, 1942, supra, to "issue, or cause to be issued", an appropriate warrant evidencing posthumous appointment or promotion of an enlisted man to a noncommissioned grade when the three conditions discussed above have been satisfied. Informal inquiry of the Enlisted Men's Section, Enlisted Men's Branch, The Adjutant General's office (Capt. Ulmer and Miss McElroy, Ext. 79177, 79623) and the Publications Section, The Adjutant General's office (Miss Mazourek, Ext. 2041) reveals that neither rules nor regulations have been promulgated under which such posthumous action may be taken by subordinate authority. Pending the issuance of appropriate regulations the authority to take such action appears to be vested in the Secretary of War alone.

5. It is therefore recommended that the accompanying file be returned to The Adjutant General, by informal action sheet entry, prepared for the signature of the Chief of Division, stating:

1. Under the provisions of section 4, act of July 28, 1942 (Public Law 680, 77th Cong.), the Secretary of War is authorized to issue, or cause to be issued, an appropriate

warrant evidencing the posthumous appointment or promotion to a noncommissioned grade of any enlisted man who has satisfied the following three conditions:

a. He must have been in the Army after September 8, 1939;

b. He must have been officially recommended for appointment or promotion to a noncommissioned grade, and

c. He must have been unable to receive or accept such appointment or promotion by reason of his death in line of duty.

It is the view of this office that: Condition a needs no explanation; condition b is satisfied only when recommendation for appointment or promotion of the individual to a noncommissioned grade has been made through normal military channels to the authority competent to take final action thereon; and condition c requires that the individual concerned must have died in line of duty after having been officially recommended for such appointment or promotion.

2. Informal inquiry reveals that no regulations have been promulgated by the Secretary of War under which commanding officers may make posthumous promotions and appointments. It follows that the purported posthumous appointment of Private Rhees as a sergeant was not made by proper authority and is therefore void. The file does not disclose sufficient facts upon which to base a determination that the enumerated requirements of the statute were satisfied in this case thus rendering him eligible for the issuance of an appropriate warrant by the Secretary of War at the present time.

Charles W. West,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 220.26 April 8, 1942

MEMORANDUM for The Judge Advocate General,

Subject: Reduction of Noncommissioned Officers.

1. By second indorsement (AG 201 Roth, Robert P. (2-23-42)EA) dated March 31, 1942, there was referred for remark a letter dated February 23, 1942, from Lieutenant Colonel Walter B. Cramer, Commanding Officer, 1st Battalion, 228th Field Artillery, Camp Claiborne, Louisiana, to the Commanding General, IV Army Corps, Camp Beauregard, Louisiana, together with its inclosures, and an opinion of the Judge Advocate, IV Army Corps, relative to the legality of the reduction to the ranks of Robert P. Roth.

2. The papers referred reflect that Robert P. Roth, a master sergeant in Headquarters Battery, 1st Battalion, 157th Field Artillery, was assigned to duty as a clerk in the regimental adjutant's office. The adjutant considered Roth inefficient and so informed Roth's battery commander, who declined to recommend that he be reduced. Thereafter, the regiment left for maneuvers, but Roth was placed in the hospital. Upon his release from the hospital, after the lapse of several months, Roth was attached for duty to Casual Company G, Rear Detachment, 44th Infantry Division. When Roth was released from the hospital for duty, the commanding officer, 157th Field Artillery, upon the recommendation of his adjutant, reduced him to the grade of private for inefficiency under the provisions of paragraphs 11e(2) and 13a, Army Regulations 615-5, April 15, 1936.

The question whether Roth's reduction was legal was referred to the Staff Judge Advocate, 44th Infantry Division, who reached the conclusion that the order was void. He expressed the view that the regimental commander could not reduce Roth unless his inefficiency was reported to him by Roth's immediate commanding officer; that while Roth was on duty in his office, the adjutant was his immediate commanding officer for the purpose of making this report; but that when the order was issued, Roth was not on duty in his office.

Thereafter, the question was submitted to the Judge Advocate, IV Army Corps, who expressed the view that Roth's reduction was legal for the reason that, although the regimental commander could not reduce Roth except upon the recommendation of his immediate commanding officer, the regimental adjutant was Roth's immediate commanding officer.

3. Army Regulations 615-5, April 15, 1936, read in pertinent part as follows:

"5c. * * * the regimental commander will appoint all noncommissioned officers in the regiment upon the recommendation of the company commander.

* * *

"11c. * * * The authority competent to appoint may terminate an appointment -

* * *

(2) In grades other than that of private, first class, for misconduct or inefficiency as provided in paragraph 13.

"13a. * * * the misconduct or inefficiency believed to make termination of appointment necessary will be reported by the immediate commanding officer of the noncommissioned officer concerned through military channels to the appointing authority, who will carefully and expeditiously examine into the facts in the case, through a board of officers, or by other similar methods if he so elects, to determine the facts in connection with the alleged inefficiency or misconduct and whether or not there is just cause for the termination of the appointment."

This office has held that the above-quoted provisions of subparagraph 13a, Army Regulations 615-5, as to the report of the soldiers' immediate commander and investigation by the appointing authority in cases of reduction, are directory and not mandatory. "An omission of either or both of the requirements of the regulation is immaterial if the order of the appointing authority otherwise effects the reduction of the noncommissioned officer" (JAG 220.451, Oct. 18, 1941, citing JAG 220.26, June 11, 1936, and 15 Comp. Gen. 935).

4. It is therefore, recommended that these papers be returned to The Adjutant General by third indorsement, prepared for the signature of the Chief of Division, stating:

The reduction of Private Robert P. Roth from master sergeant to private was legal. His regimental commander had the authority to effect the reduction without a report of inefficiency from Roth's immediate commanding officer, the provision regarding such report being directory and not mandatory.

C. B. Mickelwait,
Colonel, J.A.G.D.,
Chief of Division.

The foregoing memorandum having been approved by authority of The Judge Advocate General, action was taken as therein recommended.

SPJGA 1943/368 January 14, 1943

MEMORANDUM for The Judge Advocate General.

Subject: Illegal reduction.

1. By disposition form (AG 201 Carter, Samuel A. (9-15-42) PE-A) dated January 5, 1943, the basic communication, with indorsements and accompanying papers, was transmitted and opinion requested as to the legality of the purported reduction of First Sergeant Samuel A. Carter.

2. It appears from the file that Carter was a first sergeant in one of the companies of the 100th Ordnance Battalion (Am), Camp Sutton, North Carolina, having been transferred in grade thereto from the 31st Ordnance Regiment. It was informally ascertained from the Headquarters Army Ground Forces (Major Rucks, G-3, section) that this is a separate battalion. On May 31, 1942, Sergeant Carter became ill in line of duty and was placed in the station hospital being subsequently transferred to Stark General Hospital, where he was a patient on September 15, 1942.

The 100th Battalion was in the process of activation and organization during May and June of 1942 and after Carter had been placed in the hospital the battalion headquarters issued an order requiring each company commander to enter the name and rank of each enlisted man on a "Manning" chart. Upon receipt of the completed charts a further order was published (SO No. 2, HQ, 100th Ord. Bat. (Am), July 1, 1942) assigning, on the basis of such charts, every man to an organization and establishing his definite rank. Apparently Carter was listed on the "Manning" chart as a private, either by his company commander or some other person, with the result that he was assigned as a private by the order of July 1, 1942. No copy of the mentioned order, which is alleged to have had the effect of reducing Carter from a first sergeant to a private, was included in the file.

Carter did not receive notice of this action until September 12, 1942, and thereupon he obtained a pass to go to Camp Sutton, to inquire about his status. His statement regarding the reason for the reduction is as follows:

> "Major Marshall Purvis and Lieut Bonson told me I was reduced in grade by reason that I was in Hospital and not with Command when they the Company left Camp Sutton,N.C. for Nashville Tenn. that is all the information I received."

As a result of Carter's activity an order was issued (SO No. 24, HQ, 100th Ord. Bat. (Am) Oct. 2, 1942) deleting from the order of July 1, 1942, that portion reducing him from first sergeant to private and continuing his original warrant as first sergonat without interruption.

The statement of the battalion adjutant concerning the reduction (5th Ind., Oct. 13, 1942) is as follows:

"* * *

"2. * * *. The large number of men involved precluded the possibility of checking each individual with the result that Sgt. Charters case was not discovered until he personally reported to this Hqrs. and made inquiries as to his status.

"3. After reviewing Sgt. Carters case, this office realized that the provisions of AR 615-5 had been violated and made an immediate attempt to rectify the error by publishing the special order quoted in Par. 1 above. * * *."

The Chief of Finance (12th Ind., Dec. 28, 1942) expressed the view that even though the purported reduction was not in accordance with the provisions of Army Regulations 615-5, April 15, 1936, as changed, still Carter is not entitled to pay of the higher grade if the reduction was actually made by competent authority, and invited attention to a decision of the Comptroller General to this effect (15 Comp. Gen. 935).

3. Army Regulations 615-5, supra, provides in pertinent part:

"* * *

"5. * * *

"d. * * * and, upon the recommendation of the company commander, the commanding officer of a separate battalion will appoint the noncommissioned officers of the * * * battalion.

" * * *

"11. * * *

"c. The authority competent to appoint.--The authority competent to appoint may terminate an appointment.--* * *.

"12. Reduction while sick in line of duty.--A noncommissioned officer will not be reduced because of absence due to sickness in line of duty. * * *."
(Underscoring supplied)

4. In view of the above regulation the battalion commander in the instant case was a proper person to effect the reduction of noncommissioned officers within his separated command. However, it appears that Sergeant Carter was purportedly reduced through mistake and because he was absent from his company, due to sickness in line of duty, at the time the "Manning" charts were prepared and at the time the assignments pursuant thereto were made. * * *

Paragraph 12, Army Regulations 615-5, supra, expressly prohibits the reduction of noncommissioned officers for this reason, and such prohibition appears to be mandatory. It is believed therefore that a reduction in violation thereof would be a nullity and absolutely void, regardless of the fact that the reduction was ordered by a person properly authorized under the provisions of the mentioned regulation.

The decision of the Comptroller General (15 Comp. Gen. 935) referred to by the Chief of Finance and opinions of this office involving the same point (SPJGA 220.451, July 3, 1942; SPJG 220.2[illegible], April 8, 1942) are not controlling in this instance as they deal primarily with irregularities in the manner determining the grounds for a reduction, and with the procedure for effecting it as obtained in paragraph 13 of the mentioned regulation, and express the view that the provisions of that paragraph are directory and not mandatory and that a failure to comply literally therewith would not void the reduction of the noncommissioned officers concerned. This view does not appear to be applicable in this instance in view of the express provisions of paragraph 12, which appear to be mandatory and not directory.

It is concluded therefore that the attempted reduction of Sergeant Carter, because of his absence due to sickness in line of duty was void, and he is entitled to the pay of his grade unless later reduced in strict accordance with Army Regulations 615-5, supra.

5. It is therefore recommended that these papers be returned to The Adjutant General by disposition form entry prepared for the signature of the Chief of Division, stating:

> The purported reduction of Sergeant Samuel A. Carter appears, from the evidence presented to this office, to have been made because of his absence while sick in line of duty, and it is concluded that such action was in violation of the mandatory provisions of paragraph 12, Army Regulations 615-5, April 15, 1936, and was therefore void.

Charles W. West,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 220.85 September 1, 1942

MEMORANDUM for The Judge Advocate General.

Subject: Retirement of enlisted man.

1. By seventh indorsement (AG 201 Mefford, Murrell (7-6-42) EA) dated August 13, 1942, there was referred for remark a letter dated July 6, 1942, from First Sergeant Murrell Mefford requesting that his retirement for disability pursuant to the act of June 30, 1941 (Public Law 140, 77th Cong.; 55 Stat. 394; 10 U.S.C. 656), be set aside and that in lieu thereof he be retired for length of service pursuant to Army Regulations 615-395.

2. The file shows that Sergeant Mefford enlisted in the Army on February 16, 1911, and served with slight interruptions until March 31, 1942, at which time he was retired for disability as indicated above. He served briefly in Panama and during his entire service was required to make good only one day. On December 10, 1941, he was hospitalized and on March 31, 1942, as a result of a medical board findings, his retirement for disability took effect. Prior thereto on December 26, 1941, he had completed thirty years' service and at the time of his disability retirement, his application for "Length of Service" retirement was pending. * * *

3. Section 1, act March 2, 1907 (34 Stat. 1217; 10 U.S.C. 947), provides:

> "* * * That when an enlisted man shall have served thirty years either in the Army, Navy, or Marine Corps, or in all, he shall, upon making application to the President, be placed upon the retired list * * *."

* * * *

4. The Court of Claims has repeatedly held that the right of an enlisted man to the benefits of retirement for thirty years' service is a vested right which becomes absolute upon the completion of the requisite length of service and application to the President to be placed on the retired list. This retirement right granted by Congress, once it has accrued, cannot thereafter be affected by any subsequent happening of an administrative or executive nature. It is the law and not a recommendation of a retiring board, even though supplemented by orders approved by the President, which fixes the right to retirement and the status of the enlisted man who has applied to the President for retirement after thirty years' service

(see Cloud v. U.S. 43 Ct. Cls. 69). Only an act of Congress can alter an enlisted man's right to retirement based on thirty years' service. "The act imposed on imperative duty and not a discretionary power." (Blackett v. U.S., 81 Ct. Cls. 884, 891)

In Done v. United States (89 Ct. Cls. 505) the court defines the nature of this retirement right as follows:

> "Under act of March 2, 1907, 34 Stat. 1217, the plaintiff had the absolute right when he had served thirty years, upon making application to the President, to be 'placed on the retired list, with seventy-five per centum of the pay and allowances he may then be in receipt of.' It has been frequently and repeatedly held by this court that the right of retirement is not subject to any discretion on the part of any superior officer, not even the Commander-in-Chief. As was said in the Blackett case, 81 C. Cls. 884, 891, 'the right granted by Congress was without condition and absolute.' * * *
>
> "Having completed thirty years' service on Dec. 6, 1914, the right of retirement became vested in plaintiff and he was entitled to be retired as of that date. * * *
>
> "The fact that other events took place after plaintiff's right of retirement had become absolute cannot affect that vested right. * * *"

* * * *

The foregoing interpretations of the statute providing for retirement of enlisted men after thirty years' service, to the effect that the soldier's right to be placed on the retired list is absolute, is not altered by existing legislation extending enlistments, periods of services, etc. This office has held (JAG 330.2, Jan. 3, 1942) that section 2 of the act of December 13, 1941 (Public Law 338, 77th Cong.; 55 Stat. 799; 50 U.S.C. App. 731-733), extending the periods of service, training and service, enlistment, appointment, or commission of all members of the Army of the United States now in active military service throughout the war and for six months thereafter does not affect:

> "* * * laws authorizing or directing the retirement of personnel of the Regular Army. Retirement of such personnel does not terminate their enlistments, appointments or commissions. They remain in the Regular Army, and subject to orders to active duty under prior enactments to the same extent as under Public

Law 338. In other words, action in conformity with those laws involves no violation of Public Law 338, and therefore the latter enactment does not suspend any of those retirement statutes."

By analogy other statutory provisions, such as section 55 of the National Defense Act (39 Stat. 195, 41 Stat. 780; 10 U.S.C. 425), continuing enlistments in force at the outbreak of war; Public Law 213, 77th Congress (55 Stat. 626; 50 U.S.C. App. 351-362), authorizing the President to extend the enlistment of enlisted men of the Regular Army; and Executive Order No. 8862, dated August 21, 1941, issued pursuant thereto; and Public Resolution No. 96, 76th Congress (54 Stat. 858, 50 U.S.C. App. 401-405), authorizing the President to order retired personnel into active service, do not affect the right of an enlisted man to be placed on the retired list, because such retirement does not terminate liability for active duty.

5. Upon completing thirty years' service on December 26, 1941, and having made application for retirement, Sergeant Mefford acquired an absolute right to be placed on the retired list for length of service. Therefore, the War Department Special Order dated March 31, 1942, retiring Sergeant Mefford for disability, was erroneous (Dene v. United States, supra), and having been predicated upon error may be amended to show retirement on that date for length of service instead of disability. Substantially similar procedure was recommended by this office in an analogous case in which a certificate of discharge based on fraudulent enlistment had been erroneously issued (JAG 220.813, Dec. 18, 1918).

6. It is therefore recommended that these papers be returned to The Adjutant General by eighth indorsement, prepared for the signature of the Chief of Division, stating:

It is the opinion of this office that the act of March 2, 1907 (34 Stat. 1212, 10 U.S.C. 947), gives to an enlisted man who has completed thirty years' service in the Army and who has made application for retirement to the President an absolute right to be placed on the retired list under that act. The record reveals that Sergeant Mefford complied with these conditions prior to his retirement for disability. Therefore, his retirement orders should be amended to show retirement as of March 31, 1942, under the authority of the act of March 2, 1907 (34 Stat. 1217; 10 U.S.C. 947).

C. B. Mickelwait,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 1943/7724 May 28, 1943

MEMORANDUM for The Judge Advocate General.

Subject: Validity of discharge of an enlisted man on account of conviction in a Federal District Court, in view of subsequent determination of want of jurisdiction of such court.

1. On May 22, 1943, the Chief, Military Justice Division, Office of The Judge Advocate General (through Lt. Col. W. J. Hughes, J.A.G.D.), made an oral request for an elaboration, in the light of certain further factual information which was to be obtained, of a prior informal memorandum of this division, approved by The Judge Advocate General May 13, 1943, with regard to the validity of the discharges of certain enlisted men on account of their conviction, in a United States District Court, of the crime of rape where a subsequent determination of want of jurisdiction of such court was made by the United States Supreme Court. * * *

2. At the time of the preparation of the mentioned informal memorandum it was stated, but it had not been definitely verified, that the soldiers had been discharged without honor on September 20, 1942, by appropriate orders issued by, or by authority of, the Commanding General, Western Defense Command, pursuant to section IX, Army Regulations 615-360, as amended, by reason of their conviction. * * * Further information subsequently received on May 28, 1943, through the facilities of the Office of The Adjutant General (copies of the pertinent correspondence being attached hereto) indicates that the discharges in fact were accomplished pursuant to orders issued by the Commanding General, Southern Land Frontier Sector, which is understood to be a territorial subdivision of the Western Defense Command. The question now presented is whether the discharges so ordered are valid and irrevocable notwithstanding the fact that they may have been ordered as a result of a mistake as to the jurisdiction of the trial court.

3. In certain prior opinions (JAG 1942/288, Jan. 28, 1942; par. 3c, JAG 1942/688, Feb. 25, 1942) this office has stated and quoted with approval the following principles with regard to discharges:

"A discharge from the Army is in many respects like a judgment of a court. If it is ordered by an

officer with plenary authority to discharge, it is irrevocable except for fraud (13 Op. Atty. Gen. 16; MS. Comp. Gen., 4285, Aug. 31, 1923; 4 Comp. Gen. 260; id., 773; 26 Comp. Dec. 712; Dig. Op. JAG, 1912, pp. 455-457; Dig. Op. JAG, 1912-30, pp. 135-140; JAG 220.821, May 26, 1927) and is not subject to collateral attack (Reid v. U.S., 161 Fed. 469; Nordmann v. Woodring, 28 F. Supp. 573; Davis v. Woodring, 111 F. (2d) 523). This is true even though the officer granting the discharge operated under a mistake of fact or erroneous opinion as to law, so long as the officer had power to order discharge (Op. cit. supra). Conversely, an officer with limited jurisdiction to discharge is like a court of special and limited jurisdiction: his acts are void unless within his authority. A discharge given by an officer with no power to grant discharges, or by an officer with limited power to discharge in a case not coming within his authority, is a nullity (U.S. v. Perkins, 116 U.S. 483; Ex parte Roach, 244 Fed. 625; 25 Comp. Dec. 667; JAG 26092, Jan. 18, 1910; JAG 220.815, June 17, 1941; JAG 220.813, Sept. 23, 1939)."

Thus, in the present case it must be determined first whether the Commanding General, Southern Land Frontier Sector, possessed "plenary" or "limited" jurisdiction to order the mentioned discharges.

With reference to the question as to what officers possess "plenary" power to order discharges the following views have been expressed (par. 9c, JAG 1942/688, Feb. 25, 1942):

"* * * Under the provisions of the 108th Article of War, the power to discharge enlisted men prior to the expiration of their terms of enlistment is vested in the President, the Secretary of War, and the commanding officers of departments or corps areas only (JAG 220.8, Mar. 16, 1940). The latter, although not specifically named in the second clause of the mentioned article of war, have been recognized for many years as synonymous with department commanders because the powers, duties, and authority of department commanders were vested in corps area commanders by War Department General Order No. 50, 1920 (JAG 220.803, Mar. 13, 1925; JAG 220.8, Mar. 16, 1940,

and op. cited therein), and subsequently treated in Army Regulations as synonymous (par. 1, AR 170-10, Oct. 10, 1939)."

As the Commanding General, Southern Land Frontier Sector, is not one of the officers listed above, it follows that he did not, on September 20, 1942, possess "plenary" power to order the discharges of the enlisted men concerned.

4. It remains to be considered whether the mentioned officer had "limited" power to order the discharges and, if so, whether such discharges were ordered within the scope of his authority. Section III, Circular No. 233, War Department 1941, as amended by section II, Circular No. 258, War Department, 1942, which was in effect on September 20, 1942, provided in pertinent part:

> "2. Pending the printing of pertinent changes in * * * AR 615-360, April 4, 1935; * * * the following instructions are published for the guidance of all concerned:
>
> "a. The authority now exercised by corps area commanders to discharge enlisted men prior to the expiration of their terms of service, under the provisions of AR 615-360 as changed * * * is, with respect to enlisted men of their commands, hereby extended to commanders of all units and installations commanded by general officers, except that when the unit or installation is not an administrative unit but tactical only, this authority will be exercised by the commander of the next higher administrative unit. * * * "

As it has been ascertained that the officer who ordered the mentioned discharges was a general officer in command of a unit which is understood to be administrative in character, it would seem that he possessed the power to order discharges conferred by the Army regulations cited in the above-quoted provision of the mentioned circular. Paragraph 57a, Army Regulations 615-360, April 4, 1935, as amended by section III, Circular No. 177, War Department, 1941, which was in effect on September 20, 1942, provided:

> "57a. The corps area commander is authorized within his discretion to discharge enlisted men who have been finally convicted by a civil court of -
>
> (1) An offense, the nature of which clearly

person, the subject-matter, or the place where the crime was committed."

The crime of which these men are accused is one which in time of war may be punished by death upon conviction by a court-martial (A.W. 92, 41 Stat. 805; 10 U.S.C. 1564). If the accused should contest the jurisdiction of such a court-martial by an application for a writ of habeas corpus in a civil court, such court reasonably may be expected to require the War Department to establish beyond question the fact of military jurisdiction over the accused. In determining whether such jurisdiction does exist the civil court undoubtedly would give substantial weight to the factors that discharge certificates in fact were issued by authority of a general officer in command of a sector embracing an area of considerable size, and that such action was taken for the purpose and with the presumed effect of separating the accused from the military service. Under these circumstances it is not unlikely that such civil court would hold that notwithstanding the legal considerations hereinabove discussed the purported discharges were effective to fulfill their intended purpose, and that military jurisdiction over the accused was terminated by such discharges.

6. It is therefore recommended that the Chief, Military Justice Division, be advised as follows: For the reasons stated in paragraphs 3 and 4 above, the mentioned discharges are believed to be void and hence military jurisdiction over the individuals concerned was not terminated by such purported discharges. However, if the War Department should assert jurisdiction to try the accused by court-martial for capital offenses, and such jurisdiction were to be challenged in a civil court upon an application for a writ of habeas corpus, it is not improbable that under the circumstances of this case the civil court would hold that the men concerned were effectively separated from the service and consequently that they are not now amenable to military jurisdiction.

Charles W. West,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

Note - The foregoing memorandum was approved by the Assistant The Judge Advocate General (General Llewellyn) on May 28, 1943.

SPJGF 1943/9781 20 July 1943

MEMORANDUM for The Judge Advocate General.

Subject: Status of Charles E. DuCharme

1. By second indorsement (AG 201 DuCharme, Charles E. (4 June 42) PE-A) dated 21 June 1943, remark and recommendation were requested with respect to the military status of Charles E. DuCharme.

2. It appears from the file that DuCharme, who had served as an officer of the Army in World War I, enlisted as a private in the Army of the United States on 13 March 1942, and was assigned to the 40th Ordnance Company (Training), Aberdeen Proving Ground, Maryland. He was appointed First Lieutenant, Army of the United States, on 9 April 1943, and accpeted the appointment 13 April. By paragraph 20, Special Orders No. 100, War Department, 10 April 1943, Lieutenant DuCharme wasordered to active duty at the Ordnance School, Aberdeen Proving Ground, effective 13 April. By telegram dated 10 April, The Adjutant General informed the Commanding Officer, 40th Ordnance Company (Training), of the appointment and active duty orders and directed that DuCharme be discharged as an enlisted man on 14 April. On 14 April, DuCharme was informed by someone at Aberdeen Proving Ground that he could not be discharged as an enlisted man because a physical examination given him at the Station Hospital, Aberdeen Proving Ground, on 13 April, incident to his contemplated discharge, had revealed that he had a hernia. He was not given a certificate of discharge and a special order of the Ordnance School directing his discharge, dated 13 April, was revoked on 14 April.

3. Lieutenant DuCharme reported for duty at the Ordnance School at 0800, 14 April 1943, in compliance with paragraph 20, Special Orders No. 100, War Department, 10 April 1943, wearing the insignia of a first lieutenant. The Acting Director, Personnel Branch, Ordnance School, required DuCharme to remove the insignia of his rank as an officer and he was not assigned to duty as an officer. By a letter dispatched at 1500, 15 April 1943, The Adjutant General informed DuCharme that paragraph 20, Special Orders No. 100, War Department, supra, was revoked, and the same information was sent simultaneously by radio to the Commanding Officer, 40th Ordnance Company (Training). DuCharme received the letter at 2000, 16 April, and was given a copy of the radiogram at 0600, 17 April. He left Aberdeen Proving Ground on 17 April, with a three-day pass issued to him as an enlisted man and remained away until he was arrested by military agents at his home, Bridgeport, Connecticut, as absent without leave, on 8 May 1943. DuCharme

has been under military control, treated by local military authorities as an enlisted man, since 8 May. He was honorably discharged as an officer, by reason of physical disqualification, on 14 May.

4. Although not given a formal discharge, an enlisted man in active service who accepts appointment as an officer and enters upon active duty thereunder is constructively discharged from his enlisted status (JAG 220.8, 26 Jan. 18, Op. JAG 1918, p. 58, and see JAG 322.011, 3 Dec. 18, Op. JAG 1918, p. 1034). Temporary officers, Army of the United States, are governed by the same rules as to entry upon active duty as members of the Officers' Reserve Corps (SPJGA 1942/2949, 8 Jul 42; SPJGA 1942/5110, 2 Nov 42; SPJGA 1943/2414, 10 Feb. 43). A Reserve officer enters upon an active duty status at the moment he actually and necessarily begins to comply with the order calling him to active duty (JAG 241, 28 Mar. 18, Op. JAG 1918, p. 220; JAG 241.19, 23 Nov 18; JAG 210.451, 6 Apr 23; JAG 210.456, 27 Feb. 25; JAG 326.21, 23 May 25; JAG 210.85, 27 May 30; JAG 241.19, 2 Aug. 32; JAG 210.46, 13 Aug. 41; SPJGA 1943/2414, 10 Feb. 43; 24 Comp. Dec. 331; 8 Comp. Gen. 69; MS Comp. Gen. B-20373, 13 Nov. 41). Subordinate military authority cannot revoke or suspend an order of the Secretary of War placing a Reserve officer on active duty (JAG 210.455, 27 Feb. 25). It follows that DuCharme's status as an enlisted man terminated at the moment he began to comply with paragraph 20, Special Orders No. 100, War Department, 10 April 1943, which unconditionally placed him on active duty as a first lieutenant, effective 15 April, and directed him to report for duty. As the subsequent orders purporting to revoke his active duty orders were not received by him, indeed were not issued by the War Department until after he had reported for active duty, the attempted revocation was legally ineffective as such.

5. It is therefore recommended that reply be made to The Adjutant General by third indorsement, prepared for my signature, stating:

> It is the opinion of this office that the enlisted status of Charles E. DuCharme was terminated by constructive discharge on 15 April 1943, when he reported for active duty pursuant to paragraph 20, Special Orders No. 100, War Department, 10 April 1943. As the subsequent War Department orders purporting to revoke the active-duty orders were not received by DuCharme until after he reported, the attempted revocation was legally ineffective as such, but may properly be given effect as relieving him from active duty. DuCharme's status from reporting on 15 April 1943, until 2000, 16 April 1943, when he first received official notification of the attempted revoca-

tion of the mentioned order, was that of a First Lieutenant, Army of the United States, on active duty. From 16 April until he received notice of his discharge as an officer, which was issued 14 May, DuCharme was a First Lieutenant, Army of the United States, in an inactive status. Since receiving such notice, DuCharme has been without military status either active or inactive. It is recommended that Lieutenant DuCharme be given a discharge certificate evidencing his discharge as an enlisted man on 15 April 1943, that he be released from military control and that any further action taken with respect to his case conform to views above expressed.

Fred W. Llewellyn,
Brigadier General, U. S. Army,
Assistant The Judge Advocate General.

SPJGA 1943/365 January 12, 1943

MEMORANDUM for The Judge Advocate General.

Subject: Status of Private Johnnie H. King.

1. By informal action sheet (AG 201 King, Johnnie H. (9-12-42) PE-A) dated January 5, 1943, these papers were referred for remark and recommendation concerning the pay status of Private Johnnie H. King (6935097), from April 2, 1942, to September 12, 1942.

2. The material facts as disclosed by the file are as follows: Private King enlisted on October 17, 1939, for a period of three years and was assigned to the 10th Field Artillery, Fort Lewis, Washington. He was apprehended by civilian authorities in July, 1941, at Puyallup, Washington, on charges of contributing to the delinquency of a minor, and was convicted and sentenced to one year's confinement in Pierce County Jail, Tacoma, Washington. While he was serving the sentence, his detachment was transferred to Fort Greely, Kodiak, Alaska. On or about February 4, 1942, his discharge "without honor" was issued by Headquarters Alaska Defense Command, Fort Richardson, Alaska, under the provisions of paragraph 57a(1), Army Regulations 615-360, April 4, 1935, as amended by War Department Circulars No. 177, August 21, 1941, and 270, December 27, 1941. His discharge certificate and final statement were mailed to him at Pierce County Jail, Tacoma, Washington, on or about February 4, 1942. King was released from civil prison on April 2, 1942, and was picked up at the prison by military police, who took him to the Second Replacement Battalion, Fort Lewis, Washington. By orders dated April 9, 1942, he was transferred to Fort Glenn, Alaska, and on August 24, 1942, was ordered from Fort Glenn to Fort Lewis, Washington, for the purpose of being released from the Army. On September 12, 1942, he was released and returned to civil life to await final disposition of his case. The file contains a sworn statement by King in which he states:

> "During the period of my confinement, I received no discharge papers and at no time since my release by civilian authorities did I receive any pay or allowances from the United States Army."

* * * *

3. This office has previously held that a discharge does not become effective until notice thereof, actual or constructive, has been served upon the soldier (Dig. Op. 1912-40, p. 1001; SPJGA 1942/5139, Nov. 4, 1942).

The file does not reveal whether King received any actual or constructive notice of the discharge but it is stated that the discharge certificate was mailed to him while he was in Pierce County Jail. In the event he did not receive actual or constructive notice of the discharge of February 4, 1942, it had no effect, he continued to be a member of the military service, and from the date of his return to military control he was entitled to pay and allowances, subject to lawful forfeitures and deductions, if any, and to a formal discharge certificate upon the termination of his military service (SPJGA 19[illegible]/3092, July 16, 1942).

4. Even assuming that King's discharge was effective it may be that he again became constructively enlisted if he voluntarily submitted to military control and if certain other conditions were met. In this connection the following was stated in a former opinion of this office (SPJGA 1942/3149, July 18, 1942):

> "The legal effect of the discharge granted was to separate the soldier from the military service and make him a civilian (JAG 220.8, Aug. 17, 1918, Op. JAG, 1918, p. 677). His recall to active duty was unauthorized because the discharge terminated his liability for military service under the enlistment (JAG 342.06, Feb. 25, 1942, p. 21). Without being formally enlisted or drafted into the military service one may be constructively or impliedly enlisted where he tenders his services and voluntarily submits to military authority, is accepted and carried as a member of a command, performs military duties as a soldier and receives pay and allowances (JAG 342, July 2, 1921; JAG 220.451, Dec. 3, 1929; SPJG 220.451, Apr. 2, 1942; SPJGA 220.451, July 16, 1942). Even where the service was not voluntarily tendered, but erroneously ordered, the acquiescence in the order, the serving as a soldier and the receiving of pay and allowances have been held to effect a constructive enlistment (JAG 220.6, May 7, 1918, Op. JAG, 1918, p. 336; JAG C. 2293, June 1896, Dig. Ops. JAG, 1912, p. 603, 1A3c)."

The file does not disclose the circumstances under which King served during the period between April 2 and September 12, 1942, other than that he was delivered to Fort Lewis, Washington, by the military police. He now states that he received no pay or allowances for that period, but it must be assumed that he received at least subsistence. If further investigation should reveal that during the period in question the other conditions mentioned in the above-quoted opinion were met it appears that he properly may be regarded as having been constructively enlisted and as entitled to such pay and allowances for that period as he has not already received, subject to lawful

forfeitures and deductions, if any, and to a formal discharge upon the termination of such service. However, if he was placed in confinement by the military authorities upon his release from civil prison and so held or otherwise retained under military control against his will, during the period in question he cannot be said to have voluntarily submitted to military authority. The foregoing discussion makes it obvious that various possible conclusions might be reached in this case, depending upon certain information which is not contained in the file.

5. It is therefore recommended that these papers be returned to The Adjutant General by action sheet entry, prepared for the signature of the Assistant Chief of Division, stating;

> In order for this office to determine whether the discharge of Private Johnnie H. King, dated February 4, 1942, was effective, it will be necessary to ascertain whether King received actual or constructive notice of the discharge prior to April 2, 1942. If not, he remained in the military service and is entitled to pay and allowances from the date he was returned to military control, subject to lawful forfeitures and deductions, if any, and is also entitled to a formal discharge. If it is ascertained that King's discharge became effective prior to April 2, 1942, by reason of his receiving notice, actual or constructive, it must then be ascertained whether his service after being returned to military control was voluntary, and whether orders given him, although possibly illegal, were acquiesced in by him. If such is found to be the case, then King may be considered to have been constructively enlisted, similarly entitled to receive pay and allowances for the period involved, and to a discharge certificate, upon termination of his military service. If the first discharge issued became effective through notice to him, and if he was held in confinement or under military control against his will, after being returned to Fort Lewis by the military police, he was not serving voluntarily and therefore may not be considered to have been enlisted constructively subsequent to his discharge, or to be entitled to any pay and allowances not already received by him for the period in question.

Irvin Schindler,
Colonel, J.A.G.D.,
Assistant Chief of Military Affairs Division.

SPJGA 220.456 April 24, 1942

MEMORANDUM for The Judge Advocate General.

Subject: Relief from active duty of selectees.

1. By informal request (Lt. Col. Charles F. Collier) at a conference on April 18, 1942, arranged by the Office of the Assistant Chief of Staff, G-1, opinion was requested in connection with the following questions:

a. May selectees legally be inducted directly into the Enlisted Reserve Corps?

b. If not, may selectees be relieved from active duty immediately after induction and transferred to the Enlisted Reserve Corps for the purpose of enabling them to return to their homes for a brief period to arrange their personal affairs before being recalled to active duty?

2. Section 55 of the National Defense Act (act June 3, 1916, 39 Stat. 195, amended by act, June 4, 1920, 41 Stat. 780; 10 U.S.C. 421, 423) provides in pertinent part:

"The Enlisted Reserve Corps shall consist of persons voluntarily enlisted therein. * * * Enlistments shall be limited to persons eligible for enlistment in the Regular Army who have had such military or technical training as may be prescribed by regulations of the Secretary of War * * *."

Section 3(a) of the Selective Training and Service Act of 1940 (act Sept. 16, 1940, 54 Stat. 885, amended by sec. 2, act Dec. 20, 1941, Pub. Law 360, 77th Cong.), provides in part as follows:

"Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of twenty and forty-five at the time fixed for his registration, or who attains the age of twenty after having been required to register pursuant to section 2 of this Act, shall be liable for training and service in the land or naval forces of the United States * * *." (Underscoring supplied)

Section 3(b) of the same act (54 Stat. 886) provides:

"Each man inducted under the provisions of subsection (a) shall serve for a training and service period of twelve consecutive months, unless sooner discharged, except that whenever the Congress has declared that the national interest is imperiled, such twelve-month period may be extended by the President to such time as may be necessary in the interests of national defense." (Underscoring supplied)

The statutory provision last quoted, with reference to a definite period of service of 12 months, is affected by sections 1 and 2 of the Service Extension Act of 1941 (act August 18, 1941, Pub. Law 213, 77th Cong.), authorizing the President to extend the periods of service of military personnel for not exceeding 18 months, and these sections, in turn, are impliedly suspended in this regard (JAG 330.2, Jan. 3, 1942) by section 2 of the act of December 13, 1941 (Pub. Law 338, 77th Cong.), which is as follows:

"The periods of service, training and service, enlistment, appointment, or commission, of all members of the Army of the United States now or hereafter in or subject to active military service of the United States are extended for the period stated in the preceding section /during the existence of any war in which the United States is engaged, and during the 6 months immediately following the termination of any such war/: Provided, That nothing in this section shall be construed to prevent the President from terminating such periods of service, training and service, enlistment, appointment or commission at an earlier date in any case."

Section 3(c) of the Selective Training and Service Act of 1940 (54 Stat. 886), as amended by section 5 of the Service Extension Act of 1941, supra, is in pertinent part, as follows:

"Each such man, after the completion of his period of training and service under subsection (b), shall be transferred to a reserve component of the land or naval forces of the United States * * *."

Section 4 of the Service Extension Act of 1941, supra, so far as material, provides:

"The Secretary of War shall, when not in conflict with the interests of national defense, release from active military service those persons who apply

therefor through the regular military channels and state their reasons for such release, and whose retention in active military service would, in the judgment of the Secretary of War, subject them or their wives or other dependents to undue hardship if retained on active military service. * * * Any person so released shall be transferred to, or remain in, as the case may be, a reserve component of the land forces for the same period and with the same rights, duties, and liabilities as any person transferred to a reserve component of the land forces under the provisions of section 3(c) of such act."

3. The Enlisted Reserve Corps is a reserve component of the Army of the United States (JAG 342.06, Feb. 25, 1942). The above-quoted provision of section 55, National Defense Act, supra, contemplates that the personnel of the Enlisted Reserve Corps will be secured solely by voluntary enlistment. Original enlistments in the corps, as distinguished from transfers thereto, are expressly limited to persons who have had previous military or technical training. As many of the persons subject to induction have had no previous military or technical training and some of them are undoubtedly of an age in excess of the limit provided for enlistments in the Regular Army, only a few prospective selectees could qualify for original enlistment in the Enlisted Reserve Corps.

The Selective Training and Service Act of 1940, with particular reference to the above-quoted sections 3(a), 3(b) and 3(c) thereof, as amended or impliedly suspended, contemplates that those coming within the terms of the act will be inducted for training and service in the land or naval forces of the United States; that, unless sooner discharged, the period of training and service of those who serve as members of the Army of the United States will be for the duration of the war and six months thereafter; and, that after the completion of such training and service they will be transferred to a reserve component of such forces. It is manifest that induction directly into the Enlisted Reserve Corps is not consistent with the express terms of that act. No other statute has been found which could be construed to authorize such action. It, therefore, appears that under present statutory provisions selectees may not be inducted directly into the Enlisted Reserve Corps.

4. The answer to the second question, here considered, depends on the continued applicability of section 4, act of August 18, 1941, supra, which provides that the Secretary of War shall

release from active military service those persons whose retention in the active military service would, in his judgment, subject them or their dependents to undue hardship, and, that persons so released shall be transferred to a reserve component of the land forces.

* Inasmuch as section 2, act of December 13, 1941 (Pub. Law 338, 77th Cong.), has been construed as temporarily suspending the provisions of section 2 of the act of August 18, 1941, supra (JAG 330.2, Jan. 3, 1942), for the reason that the extended period of service not exceeding 18 months provided for in the earlier act is in conflict with the indefinite period of extension provided in the later act, it is pertinent to inquire whether this section has a similar effect on section 4 of the act of August 18, 1941. It is an elementary rule of statutory construction that repeals by implication are not favored and the same is true of suspensions because suspensions are temporary repeals (JAG 330.2, supra). The extension of the period of training and service of selectees does not, of necessity, conflict with other statutory provisions authorizing a discharge or release of such personnel from active military service under certain conditions prior to the expiration of the extended period of service. Manifestly this is true, otherwise section 2 of the later act would operate during the war and six months thereafter to prohibit retirements, dishonorable discharges by court-martial sentence, and discharges for disability, dependency or minority, except by act of the President terminating such periods of service. Congress, of course, did not intend the enactment of this section to have the effect suggested. Accordingly, it may be concluded that section 2, act of December 13, 1941 (Pub. Law 338, 77th Cong.), does not operate as a repeal or suspension by implication of section 4 of the act of August 18, 1941 (Pub. Law 213, 77th Cong.).

In some cases, persons subject to induction postpone adjusting their personal affairs until after it has been ascertained that they are physically qualified for induction. The Secretary of War desires that induction of those found qualified be accomplished as soon as the physical examination is completed. Immediate transfer of such personnel to Reception Centers in the mentioned cases, without an opportunity to adjust their personal affairs, will usually result in undue hardship to the personnel concerned as well as to their dependents, if any. The power to relieve personnel from active military service for an indefinite period includes, of necessity, the power to do so for a short definite period. It thus appears that within the express terms of the statute, the Secretary of War may properly recognize the hardship affecting inductees involved in the cases above described; may authorize their release from active military service; direct their transfer to the

Enlisted Reserve Corps; and subsequently recall them to active duty.

5. * * *

6. It is, therefore, recommended that a memorandum be prepared for the signature of the Chief of Division, addressed to the Director of Military Personnel, Services of Supply, stating:

By informal reference, on April 18, 1942, Lieutenant Colonel Charles F. Collier, G-1, requested the opinion of this office in connection with the following questions:

a. May selectees legally be inducted directly into the Enlisted Reserve Corps?

b. If not, may selectees be relieved from active duty immediately after induction and transferred to the Enlisted Reserve Corps to enable them to return to their homes for a brief period to arrange their personal affairs before being recalled for active duty?

In the opinion of this office the first question should be answered in the negative. The second question may be answered in the affirmative in view of the provisions of section 4, act of August 18, 1941 (Pub. Law 213, 77th Cong.). It is recognized that the procedure suggested by the second question involves considerable administrative action. * * *

C. B. Mickelwait,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

The foregoing memorandum having been approved by authority of The Judge Advocate General, action was taken as therein recommended.

SPJGA 1943/10932 5 August 1943

MEMORANDUM for The Judge Advocate General.

Subject: Change in Army regulations.

1. By memorandum (WDGAP 210.1) dated 22 July 1943, the opinion of this office was requested as to the legal aspects of a proposal to amend existing Army regulations in such manner as to provide that enlisted men of the various components of the Army of the United States who are appointed to commissioned grades shall be transferred as enlisted men to a reserve or inactive status.

2. The memorandum indicates that the purpose of the proposal is to place the mentioned enlisted men in such a military status as will enable the Army, in the event of the termination of their commissions, to return them to their former enlisted status with or without loss of seniority.

3. The status of an officer commissioned in the Army of the United States under the provisions of the act of 22 September 1941 (55 Stat. 728; 10 U.S.C., Sup. 591a), is not incompatible with that of an enlisted member of a reserve component of the Army not on active duty (JAG 327.3, 23 Jan 1942; Dig. Op. JAG 1912-30, sec. 311), and whether an enlisted member of a reserve component so commissioned should be discharged is entirely a matter of administrative policy (JAG 327.3, 23 Jan 1942). Consequently, it follows that the proposal under consideration is legally unobjectionable so far as it relates to enlisted personnel who are members of a reserve component of the Army at the time of their appointment to commissioned grades. However, as many of the enlisted members of the Army of the United States do not have a status as members of a reserve component of the Army it does not follow from the above discussion that there is no legal objection to the proposal as a whole. Generally speaking and giving due consideration to the fact that there are individual cases which will constitute exceptions, it may be stated that the groups of enlisted men who do not in effect have a status as members of a reserve component of the Army are as follows:

a. Men enlisted in the Regular Army, other than members of the Regular Army Reserve.

b. Men enlisted in the Army of the United States without component.

c. Selectees who have not been transferred to the Enlisted Reserve Corps.

It has been informally ascertained from The Adjutant General's Office (Lt. Col. Blair, Enlisted Branch, Ext. 79068), that probably only about one percent of the selectees inducted since June 1942 fall in group c above. This results from the fact that a great majority of the selectees inducted since that time have availed themselves of the opportunity to return to their homes now provided for by paragraph 16, Army Regulations 615-500, 1 September 1942.

If, by a legal method, a reserve status may be given to those members of the groups of enlisted men listed above who are to be commissioned in the Army of the United States, it follows that the proposal under consideration, whatever its merits as a matter of policy, is legally unobjectionable. Conditioning appointments of the mentioned members to commissioned grades upon their prior voluntary enlistment in a reserve component of the Army is a readily apparent method of assuring that they have a reserve status. Objections of an administrative nature to this method might be based upon the fact that it is dependent upon the voluntary acts of individuals or upon the contention that it would be simpler from an administrative standpoint if such individuals could be transferred to a reserve component without the necessity for action by them. Likewise, it might be argued that this method is subject to the further objection that conditioning appointment to a commissioned grade upon prior voluntary enlistment would result in the loss by the Army of the services as officers of certain individuals who would be unwilling to enlist voluntarily in a reserve component. In answer to the latter objection, it may be observed that involuntary transfer to a reserve component would not necessarily make the services as officers of such individuals available, because, if they realized that transfer to a reserve component would follow the acceptance by them of appointments to commissioned grades, they might refuse to accept such appointments.

In view of the foregoing conclusion, it becomes unnecessary to consider the question whether authority exists whereby persons of the mentioned categories may be transferred to the Enlisted Reserve Corps without their consent.

4. It is therefore recommended that reply be made to the Assistant Chief of Staff, G-1, by memorandum, prepared for the signature of the Chief of Division, stating:

Reference is made to your memorandum (WDGAP 210.1) dated 22 July 1943, subject as above. There is no incompatibility between the status of an officer commissioned in the Army of the United States under the provisions of the act of 22 September 1941 (55 Stat. 728; 10 U.S.C., Sup. 591a), and that of an enlisted member of a reserve component of the Army not on active duty. Consequently, whether an enlisted member of a reserve component so commissioned should be discharged, or relieved from active duty as an enlisted reservist is entirely a matter of administrative policy; and there would be no legal objection to so changing pertinent Army regulations as to provide for the relief from active duty, rather than discharge, of such enlisted reservists. Generally speaking, however, there are three groups of enlisted men, namely, enlisted men of the Regular Army other than members of the Regular Army Reserve, men enlisted in the Army of the United States without component, and selectees who have not been transferred to a reserve component, who do not in effect have a status as members of a reserve component. In order to achieve uniformity in the application of the proposal under consideration it appears necessary that members of the mentioned groups who are commissioned should, prior to commissioning, acquire a status as enlisted reservists. A legally unobjectionable method of assuring that members of such groups who are commissioned do possess an enlisted reserve status would be to so change pertinent Army regulations as to condition their commissioning upon prior enlistment in a reserve component. In this connection, attention is invited to the act of 14 July 1939 (53 Stat. 1001; 10 U.S.C. 631a), and to subparagraph 19d, Army Regulations 600-750, as amended by Changes No. 7, 16 July 1943, which grant certain rights with respect to reenlistment to enlisted men discharged to accept commissions.

Charles W. West,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 1943/7729 June 5, 1943

MEMORANDUM for The Judge Advocate General.

Subject: Duties of warrant officers.

1. By informal action sheet (AG 211 W. O. (5-22-43)PR-R DAB-cms 4303) dated May 27, 1943, there was forwarded as a matter of primary interest a letter dated May 22, 1943, from Captain George A. Gray, A.C., Trial Judge Advocate, Army Air Forces Bombardier School, Childress Army Air Field, Childress, Texas, requesting information whether a warrant officer may be assigned to duty as a claims officer, assistant trial judge advocate, investigating officer, and assistant legal assistance officer.

2. Section 4 of the act of August 21, 1941 (55 Stat. 653; 10 U.S.C. Supp. I, 593) provides in part that warrant officers may be assigned to such duties as may be prescribed by the Secretary of War and that when such duties necessarily include those normally performed by commissioned officers they shall be vested with the power to perform such duties under regulations to be prescribed by the President.

The Secretary of War has not specifically prescribed that warrant officers may be assigned to perform the duties specified in paragraph 1 of this memorandum. Subparagraph 3b, Army Regulations 610-5, September 13, 1941, provides:

> "The duties to be assigned warrant officers are, in general for the purpose of relieving commissioned officers of a considerable burden of administrative and technical details. When warrant officers are assigned to duty normally performed by commissioned officers, they will be governed by regulations applicable to officers performing such duties."

Subparagraph 2f, Army Regulations 610-5, September 13, 1941, provides:

> "In general, warrant officers will be assigned in accordance with tables of allotment and Tables of Organization within the arms and services to classifications as follows: Administrative - clerical, fiscal (auditing and disbursing), and supply; technician specialists - aviation, construction and utilities, motor transport or motor mechanician,

munitions or armament, signal communication, tank, and topographic for Corps of Engineers."

Subparagraph 4a, Army Regulations 610-10, September 13, 1941, as changed, prescribes the classifications within the arms and services to which Regular Army warrant officers shall be appointed. Persons temporarily appointed warrant officers in the Army of the United States under authority of section 3 of the act of August 21, 1941, supra, are assigned to fill authorized vacancies in appropriate classifications as determined by final examination prescribed in subparagraph 6c(2)(a), Army Regulations 610-15, February 27, 1943, as changed, and except in emergencies and then only temporarily, warrant officers will not be assigned to duties foreign to their classifications (subpar. 9b, AR 610-15, Feb. 27, 1943). The mentioned classifications make no provision for warrant officers serving in any of the capacities mentioned in paragraph 1 of this memorandum.

3. Subparagraph 7c, Army Regulations 25-20, March 15, 1943, in pertinent part provides:

> "Within the United States, its territories, and territorial possessions, each commanding officer designated in (1), (2), and (3) below, and any other commanding officer who finds such action to be necessary, will designate in orders an officer of his command, if practicable one experienced in the conduct of investigations and preferably one with legal training, as the claims officer of the command * * *. Wherever necessary, in the discretion of the commanding officer, additional claims officers may be appointed. The order appointing the claims officer will specifically authorize him to act as the board of one officer in any case within the provisions of Article of War 105. * * *" (Underscoring supplied)

Colonel H. C. Clark, Chief of the Claims Division of this office, informally advises this division (Capt. Wearing) that the last-quoted regulations contemplate the appointment of commissioned officers only as claims officers. Inasmuch as a claims officer is also authorized to act as the board of one officer within the provisions of Article of War 105, he must of necessity be a commissioned officer because Article of War 1 (41 Stat. 787; 10 U.S.C. 1472) provides that wherever the word "officer" is used in the articles of war it shall be understood to refer to a "commissioned officer", unless the context indicates otherwise. It

is believed the context of Article of War 105 requires no different construction of the word "officer" than that given to it under Article of War 1. Consequently, it is believed that a warrant officer may not be assigned to duty as a claims officer under present Army regulations (cf. SPJGA 1943/7134, June 12, 1943, as to duties to which the Secretary of War legally may assign or detail warrant officers).

4. Article of War 11 (41 Stat. 789; 10 U.S.C. 1482) provides for the appointment of one or more assistant trial judge advocates for each general court-martial but does not specifically or by clear inference provide that the person so appointed must be a commissioned officer. Appointment of assistant trial judge advocates for special courts-martial is also impliedly authorized by a reading together of Articles of War 11, 19 and 114 (JAG 250.401, Jan. 16, 1941; SPJGJ 1943/4441, March 30, 1943), but likewise none of these articles of war specifically requires that such assistant trial judge advocate shall be a commissioned officer. Winthrop's Military Law and Precedents, Second Edition, 1920 Reprint, states (page 183) that there is no law which precludes the employment of enlisted men as judge advocates (the earlier term for what is now known as trial judge advocates) but that the usage of the service sanctions the appointment as such of commissioned officers only. This office has expressed the opinion (JAG 220.61, Jan. 3, 1919; Op. JAG 1919, p. 11) that although an Army field clerk may be eligible for appointment as assistant judge advocate of a general court-martial as a matter of policy, no one other than a commissioned officer should be appointed assistant judge advocate of a general court-martial. More recently in an opinion of this office (SPJGJ 1943/6445, May 15, 1943) it was said in pertinent part:

> "By custom of the service and long established War Department policy, trial judge advocates and their assistants must, likewise, be commissioned officers. The Manual for Courts-Martial clearly contemplates that the personnel of the prosecution shall consist of commissioned officers.
>
> * * * *
>
> "There are always a sufficient number of commissioned officers available for trial judge advocates and assistant trial judge advocates of all general and special courts functioning in the Army and there does not appear to be any reason for departing from the long established usage and policy that such prosecutors for the Government should have the advantage in the performance of their duties of being commissioned officers."

Accordingly it is believed that warrant officers under present custom, usage and policy may not be appointed assistant trial judge advocates.

5. Article of War 70 (41 Stat. 802 as amended by sec. 2, act Aug. 20, 1937, 50 Stat. 724; 10 U.S.C. 1542) in pertinent part provides:

> "No charge will be referred to a general court martial for trial until after a thorough and impartial investigation thereof shall have been made. * * *"

Although the above-cited article of war does not specifically prescribe that the investigation shall be conducted by a commissioned officer such fact is clearly contemplated. The Manual for Courts-Martial, 1928, paragraph 30c, as amended (par. 2, Cir. 105, W.D. 1943) in pertinent part provides:

> "In the ordinary case charges will be submitted and acted upon as follows:
>
> "* * *
>
> "First: No charge shall be recommended for trial by general court-martial unless, prior to such action, the thorough and impartial investigation thereof required by A.W. 70 (sec 35a) shall have been made by an officer.
>
> "Second: If he /officer having authority to appoint summary courts-martial/ also has general court-martial jurisdiction, he will refer no case for trial by general court-martial until the thorough and impartial investigation thereof required by A.W. 70 (sec. 35a) shall have been made by an officer * * *." (Underscoring supplied)

Paragraph 35a of the manual states that the investigating officer may require the testimony of witnesses to be under oath if he deems such action advisable or is so instructed and Article of War 114 (41 Stat. 810; 10 U.S.C. 1586 as amended by act Dec. 14, 1942, 56 Stat. 1050) authorizes "any officer detailed to conduct an investigation" to administer oaths for the purposes of the administration of military justice and for other purposes of military administration. As pointed out in paragraph 3 of this memorandum, Article of War 1, supra, provides that the word "officer" as used in the articles of war refers to commissioned officers unless the context indicates otherwise. Reading the above-cited articles of war and portions of the manual together, it is believed that a warrant officer may not be appointed to act

as an investigating officer in connection with the administration of military justice or as investigating officer for other purposes within the purview of the articles of war.

Claims officers are specifically authorized to act as the board of one officer in any case within the provisions of Article of War 105, supra, and with certain exceptions are now also the investigating officer, board of officers, or surveying officer, required by Army regulations for the investigation of any accident involving death, personal injury, or property loss or damage, the immediate responsibility of which rests upon the commanding officer by whom he is appointed (par. 7c, AR 25-20, Mar. 15, 1943). In paragraph 3 of this memorandum it was pointed out that a warrant officer could not be a claims officer because he could not legally be authorized to act as a board under Article of War 105, supra. Consequently, for the same reason, a warrant officer may not be appointed claims officer for the purpose of making investigations of accidents involving death, injury or property loss or damage.

6. Paragraph 5, Circular No. 74, War Department, 1943, provides that the legal assistance office of a particular command "will be operated by a qualified commissioned officer * * * who will be assigned to such duties and designated as 'legal assistance officer'". (Underscoring supplied) In the same paragraph of the mentioned circular provision is made under certain circumstances for the assignment of "Assistant legal assistance officers" and, although it is not expressly so provided, it is believed the context of the paragraph implies that they shall be commissioned officers. Except for the administrative and supervisory duties which devolve upon the legal assistance officer in the operation of the legal assistance office, this division has been advised by Major Milton J. Blake, J.A.G.D., Chief of the Legal Assistance Branch, J.A.G.O., that no reason is apparent why the qualifications of assistant legal assistance officers should be of any lesser degree than those of legal assistance officers. It is believed, therefore, that until there is an expression of War Department policy to the contrary only commissioned officers should be appointed assistant legal assistance officers.

7. It is therefore recommended that these papers be returned to The Adjutant General by action sheet entry prepared for the signature of the Chief of Division, stating:

It is the opinion of this office that under existing laws, regulations and War Department policy a warrant officer

may not be assigned to duty as Claims Officer, Assistant Trial Judge Advocate, Investigating Officer, or Assistant Legal Assistance Officer. It is recommended that Captain Gray be advised accordingly through appropriate channels and that his attention be directed to the pertinent provisions of Army regulations governing channels of military correspondence of this nature.

Charles W. West,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 1944/54 10 January 1944

MEMORANDUM for The Judge Advocate General.

Subject: Availability to Army nurses of benefits under Public Law 101, 78th Congress.

1. By urgent informal action sheet (AG 201-Gerding, Lulu N. (10 Dec. 43)PO-S) dated 1 January 1944, opinion is requested whether the benefits provided under the act of 29 June 1943 (Public Law 101, 78th Cong.) are available to members of the Army Nurse Corps.

2. The inclosed file discloses the following pertinent facts which are the basis for the requested opinion: First Lieutenant Lulu N. Gerding, N-700044, Chief Nurse, Army Nurse Corps, was retired from active service on 31 March 1938, under the provisions of section 1 of the act of 13 May 1926 (44 Stat. 531; 10 U.S.C. 1029) which among other things provides that Army nurses who have reached the age of fifty years, having served twenty years may, in the discretion of the Secretary of War, be retired from active service and be placed on the Nurse Corps Retired List. The mentioned nurse was recalled to and entered upon active duty on 9 October 1942, and was admitted to Halloran General Hospital, Staten Island, New York, on 8 October 1943. On 9 December 1943, a general hospital disposition board convened at the mentioned hospital found that Lieutenant Gerding was suffering from certain specified physical disabilities which were incurred in line of duty and which did not exist prior to her entry on active duty and that as a result of her disabilities she was unfit for any type of service. Accordingly, the board recommended that Lieutenant Gerding be ordered before a retiring board for Army nurses. By second indorsement (SPMCN 201. (Gerding, Lulu N.)N) dated 27 December 1943, to a letter (201-Lulu N. Gerding) dated 10 December 1943, transmitting the disposition board report to the Commanding General, Second Service Command, The Surgeon General approved the findings of the board and recommended that in order to determine whether the mentioned nurse's physical condition has been aggravated by the service, she should be ordered before a retiring board for Army nurses.

3. Sections 2 to 5 inclusive of Public Law 101, supra, provide specified disability benefits for certain officers of the Regular Army. The question is, therefore, whether an Army nurse is an "officer of the Regular Army" within the meaning of that phrase as used in Public Law 101. The Army Nurse Corps is a component part of the Medical Department of the Regular Army (act 9

Jul 1918; 40 Stat. 879; 10 U.S.C. 161) and the personnel thereof which includes all nurses and reserve nurses are members of the Regular Army (Thorsen v. U.S., 79 Ct. Cl. 282). Army nurses hold relative rank rather than actual rank "and as regards medical and sanitary matters and all other work within the line of their professional duties shall have authority in and about military hospitals next after the officers of the Medical Department." (act 4 Jun 1920; 41 Stat. 767; act 22 Dec. 1942; 56 Stat. 1073, 10 U.S.C. 164). However, the relative rank of Army nurses is only in relation to other nurses, enlisted personnel and civilian employees of the Medical Corps (21 Comp. Gen. 1073). Generally speaking Army nurses are not officers in the Army (13 Comp. Gen. 94; 21 id 1073; 22 id. 1049; MS. Comp. Gen., B-34053, 10 Aug. 1943). However, whether the word "officer" occurring in a statute is to be construed in a technical sense or in a broader, more popular sense is for determination from the intention of the Congress in each case (22 Comp. Gen. 1049). In the last-mentioned decision of the Comptroller General it was held that even though Army nurses are not officers of the Army of the United States, nevertheless they come within the intent and purpose of the act of 14 October 1942 (56 Stat. 787; 10 U.S.C. 558), which in pertinent part provides "That every officer of the Army of the United States, or any component thereof, promoted to a higher grade * * *, shall be deemed for all purposes to have accepted his promotion to a higher grade upon the date of the order announcing it * * *." (Underscoring supplied). However, it is evident that the principal reason for the result reached in the foregoing decision was not the fact that nurses were "officers" within the meaning of the statute construed but was the practical conclusion that the reason for enacting the statute was as equally applicable to nurses as it was to officers, namely "to obviate the necessity of obtaining a new oath of office from an officer each time he was promoted, and the virtual impossibility to get the necessary papers to the officer concerned or to have them returned as in the case of an officer in the field, an officer engaged in combat operations, or an officer in the hands of the enemy as a prisoner of war".

However, it is believed the reasons for enacting Public Law 101 do not warrant a construction of the term "officer of the Regular Army" as used in that law to include nurses. In expressing the view that the benefits of Public Law 101 were not available to specified categories of warrant officers, this office (SPJGA 1943/11220, 28 Aug. 1943) summarized the reasons for the enactment of the mentioned law as follows:

"The legislative history of the bill which became the act of 29 June 1943 (S. Rept. No. 4, H. Rept. No. 529,

78th Cong.; Daily Cong. Rec., 15 Feb. 1943, p. 959; id., 21 June 1943, pp. 6274-77; id., 22 June 1943, p. 6355), provides no affirmative indication that the act was intended to apply to warrant officers generally, but suggests on the contrary that such was not the purpose of Congress. The fact that the statute was designed specifically to 'eliminate injustice' theretofore existing with regard to 'officers of the Regular Army, National Guard * * * and the Officers' Reserve Corps' (see S. Rept. No. 4, H. Rept. No. 529, 78th Cong., supra), contrasted with the treatment accorded to officers appointed in the Army of the United States without regard to component, serves also to show that it was special legislation intended to apply only to commissioned officers of specifically described classes." (Underscoring supplied)

In view of the above-quoted summarization of the legislative history of Public Law 101 and the conclusion drawn therefrom it is concluded the term "officer of the Regular Army" as used in the law in question is to be construed in its strict technical sense and is not to be considered broad enough to include Army nurses by reason of the fact that they have relative rank of commissioned officers.

4. It is therefore recommended that these papers be returned to The Adjutant General (Separation Section) 1606 Munitions Building, by informal action sheet entry, prepared for the signature of the Chief of Division, stating:

It is the opinion of this office that members of the Army Nurse Corps are not eligible for any of the disability benefits provided by the act of 29 June 1943 (Public Law 101, 78th Cong.).

Irvin Schindler,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 1943/11276

MEMORANDUM for The Judge Advocate General.

Subject: Appointment of Band Leaders as Warrant Officers, Women's Army Corps.

1. By transmittal sheet (SPGAL/221 W/O (8 Jul 43)-210), dated 30 July 1943, there was referred by the Director, Military Personnel Division, Army Service Forces, Room 4-B-470, Pentagon Building, a file requesting an opinion whether a person enlisted in the Army of the United States under section 2, Public Law 110, 78th Congress, may be appointed a Warrant Officer, Army of the United States, under section 3, act of 21 August 1941 (55 Stat. 651, 652; 10 U.S.C. Sup. I, 1940, 591a), or under any other provision of law.

2. Inclosed with the file is a letter (210.1) from the Commandant, Third Women's Army Auxiliary Corps Training Center, Fort Oglethorpe, Georgia, dated 8 July 1943, to the Director, Women's Army Auxiliary Corps, Washington, D. C., requesting information whether /women/ band leaders who are graduates of the Army Music School, Fort Myer, Virginia, will be appointed warrant officers upon the effective date of the bill making the Women's Army Auxiliary Corps part of the Army. The basic letter refers to a copy of Proceedings of Board of Officers for Selection of Candidates for Temporary Appointment as Warrant Officers (Jr. Grade), Fort Myer, Virginia, dated 2 April 1943, inclosed therein, appertaining to Chief Leader Florence A. Love, A-402058, and Technician 4th Grade Margery L. Pickett, A-702119, both of whom are assigned to that training center. By first indorsement (SPWA 210.63 (8 Jul 43)0), dated 24 July 1943, the Director of the Women's Army Auxiliary Corps transmitted the mentioned letter and inclosure to the Military Personnel Division, Army Service Forces (Attention: Major Edmondson) for determination of the question upon which opinion is requested.

3. Section 2, Public Law 110, 78th Congress, provides:

> "The enlisted personnel of such corps shall consist of women of excellent character in good physical health, who are enlisted in the Army of the United States under the provisions of the last paragraph of section 127a of the National Defense Act, as amended (54 Stat. 213), and who are on the date of such enlistment citizens of the United States between the ages of twenty and fifty years. All laws and regu-

lations now or hereafter applicable to enlisted men or former enlisted men of the Army of the United States and their dependents and beneficiaries shall, in like cases and except where otherwise expressly provided, be applicable respectively to enlisted personnel and former enlisted personnel of such corps and their dependents and beneficiaries."

Section 3, act of 21 August 1941 (55 Stat. 651, 652; 10 U.S.C., Supp. I, 1940, 59a), in pertinent part, provides:

"In time of war or during the period of any national emergency declared by Congress or proclaimed by the President, the Secretary of War is authorized, under such regulations as he shall prescribe, to make temporary appointments in the grades of chief warrant officer and warrant officer (junior grade). Such temporary appointments shall be in the Army of the United States * * * and shall remain in effect at the pleasure of the Secretary of War, but in no case shall they continue beyond six months after the termination of the war or period of national emergency. * * * Such temporary appointee shall be entitled to the benefits of all existing laws and regulations governing retirement, pensions, and disability as are applicable to members of the Army of the United States where called or ordered into the active military service by the Federal Government under existing statutory authorizations. * * * "

4. The act of 1 July 1943, supra, establishes the Women's Army Corps as a component of the Army of the United States and provides for the enlistment, under a specific law relating thereto, of enlisted members of the corps, and for appointment, under a specific law, of commissioned officers of the corps. Undoubtedly enlisted men of the Army are eligible for appointment as warrant officers in the Army of the United States under the provisions of the act of 21 August 1941, supra, but without deciding whether, by virtue of the broad general provisions of section 2 of the act of 1 July 1943, enlisted members of the Women's Army Corps are eligible for other things for which enlisted men of the Army are eligible, it clearly appears that it was the intention of the Congress that the Women's Army Corps should consist only of commissioned officers and enlisted personnel. As warrant officers belong to neither class (Dig. Op. JAG 1912-40, sec. 130(1)) it follows that there is no authority for the appointment of warrant officers in the Women's Army Corps. Furthermore in view of the

decision of the Comptroller General (21 Comp. Gen. 1073) holding that express statutory authority must exist for the appointment of women in such cases, it follows that there is no authority for appointment as warrant officers of enlisted personnel of the Women's Army Corps in any other component of the Army of the United States.

5. It is therefore recommended that this file be returned to the Commanding General, Military Personnel Division, Army Service Forces, Room 4-B-470, Pentagon Building, by transmittal sheet entry, prepared for the signature of the Chief of Division, stating:

> It is the opinion of this office that a person enlisted in the Army of the United States under section 2, Public Law 110, 78th Congress, may not be appointed a warrant officer, Army of the United States, under section 3, act 21 August 1941 (55 Stat. 651, 652; 10 U.S.C. Sup. 1, 1940, 591a), or any other law, either in the Women's Army Corps or in any other component of the Army of the United States.

Charles W. West,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 1942/4333
(250.423)

September 19, 1942.

MEMORANDUM for The Judge Advocate General.

Subject: Trial by special court-martial of enlisted pilots.

1. On September 17, 1942, General Cramer received by long distance telephone, an inquiry from a Captain Evans, calling for Colonel Hutchinson, Commanding Officer, Army Air Base, Colorado Springs, Colorado, relative to the above subject.

2. It appears that one or more enlisted men of the grade of sergeant who are stationed at the Army Air Base, Colorado Springs, Colorado, and who are rated as pilots, have committed offenses which are regarded locally as constituting possible violations of Articles of War 61, 94 and 96. An opinion was requested on the following two questions:

a. Can such enlisted pilots be brought to trial before special courts-martial? and,

b. If, upon trial, such a "flying sergeant" is found guilty and reduced to the grade of private, can he retain his rating as a pilot?

3. An act approved June 3, 1941 (55 Stat. 241; 10 U.S.C. 298 a-1), provides:

> "That the Secretary of War be, and he is hereby, authorized, under such regulations as he may prescribe, to cause the detail of enlisted men of the Regular Army and of other components of the Army of the United States in active Federal service for training and instruction as aviation students, in their respective grades, in such numbers and schools as he shall direct: * * *." (Underscoring supplied,)

Subparagraph 1b, Army Regulations 95-60, August 20, 1942, provides:

> "Enlisted men of the Army of the United States who have demonstrated that they possess the required qualifications may, under such regulations as the Commanding General, Army Air Forces, prescribes, be rated by the Commanding General, Army Air Forces, or by such officer or officers of the Army Air Forces as he may designate as--
>
> "* * *

"(3) Pilot.
"* * *."

Paragraph 2, Army Air Forces Regulations 50-7, May 14, 1942, provides:

"The Commanding General, Army Air Forces, may award the following any aeronautical rating specified under conditions set forth in paragraph 3 below.

"* * *

"c. Enlisted men of the Army of the United States enlisted in, detailed or assigned to duty with the Army Air Forces."

Paragraph 3 of that regulation provides:

"3. RATINGS AND REQUIREMENTS FOR THE ATTAINMENT THEREOF:

"* * *

"c. Pilot.

"Individuals who graduate from a flying course at an Air Force Advanced Flying School prescribed for the training of heavier-than-air pilots and who are physically qualified for duty as pilot, Class I. * * *"

4. This office has heretofore held (SPJGA 211, Apr. 18, 1942; sec. 359 (7), Bull. J.A.G., Jan.-June, 1942) that men of the special enlisted grade of aviation cadet, as created by the Army Aviation Cadet Act (55 Stat. 239; 10 U.S.C. 297a), are not subject to trial by special courts-martial. That opinion was based upon the fact that by promulgating paragraph 14 of the Manual for Courts-Martial, 1928, the President exercised the authority conferred on him by Article of War 13 to exempt certain classes of personnel from the jurisdiction of special courts-martial, and thus exempted "* * * persons of actual, relative or assimilated rank above that of master sergeant". Aviation cadets being assigned a rank higher than that of master sergeant by paragraph 3, Army Regulations 600-15, December 10, 1941, as amended by section IV, War Department Circular No. 5, January 8, 1942, were held to be among those exempted.

However, the act authorizing the training of enlisted men as pilots (quoted above) specifically provides for their detail in their respective grades and neither the law nor the quoted regulations contemplates that any change in grade or rank shall accompany, or result from, the completion of the prescribed training. Enlisted men who become pilots under this act thus remain enlisted men and

because they are not assigned a rank above that of a master sergeant, they likewise remain subject to trial by special courts-martial.

5. Subparagraph 3c Army Air Forces Regulations 50-7, supra, provides that acquisition of the rating of pilot is dependent upon the demonstration of prescribed qualifications. These qualifications by their very nature are beyond the reach of any sentence of a court-martial. Rating as a pilot seems, for present purposes, to be analogous to a rating for qualification with weapons, and it could not be successfully contended that a court-martial could terminate a rating as an expert with the rifle.

A man possessing certain skills may of course be prevented administratively from exercising them. A pilot may be prevented from flying and thus be deprived of flying pay, but his abilities and his resultant rating as a pilot remain beyong the reach of a court-martial sentence. Because a court-martial cannot by its sentence remove the rating of pilot and because that rating is not dependent on the enlisted man's retention of a noncommissioned grade, it follows logically that a "flying sergeant" who is reduced in grade may retain his pilot's rating.

6. It is therefore recommended that a message, signed "Cramer", be dispatched to the Commanding Officer, Army Air Base, Colorado Springs, Colorado, by teletype, stating:

RE YOUR TELEPHONIC INQUIRY OF SEPTEMBER 17 ENLISTED PILOTS OTHER THAN AVIATION CADETS ARE SUBJECT TO TRAIL BY SPECIAL COURT MARTIAL. REDUCTION IN GRADE WILL NOT AFFECT PILOT RATING NOR CAN SUCH RATING BE TERMINATED BY COURT MARTIAL SENTENCE.

Charles W. West,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

(The foregoing message was transmitted by teletype September 19, 1942.)

SPJGA 1943/3861 March 17, 1943

MEMORANDUM for The Judge Advocate General.

Subject: Refusal of Corporal Harryman Dorsey to sign pay roll and accept compensation for his services with the Army.

1. By informal action sheet (AG 201 Dorsey, Harryman (2-0-43) PE-A) dated March 11, 1943, a file of papers was referred for remark and recommendation concerning the refusal of the mentioned soldier to sign the pay roll and to accept compensation for his services with the Army.

2. The file contains a letter dated January 28, 1943, from Corporal Harryman Dorsey (33447150), Headquarters Battery, 249th Coast Artillery, Fort Stevens, Oregon, to the personnel officer of that unit in which he states as follows:

> "I have declined to sign the payroll because I deem it my duty to accept no Governmental emolument for services with the Army so long as other sources of income are available to me."

The Personnel Officer, 249th Coast Artillery, stated that Corporal Dorsey has not accepted any pay since the date of his induction, November 4, 1942, and requested an opinion of the local finance officer as to the validity of this procedure. This request was forwarded to the Chief of Finance "for information in regard to procedure" and the file was transmitted by that officer to The Adjutant General by fourth indorsement, dated February 23, 1943, "as an administrative matter".

3. Although it has been held that a waiver of pay is not valid and enforceable (Dig. Op. JAG 1912-40, p. 994), there is no statute or regulation requiring a soldier to accept his pay. The applicable provisions of pay statutes involved give a right to pay, but there is nothing provided therein which directs that the person entitled to pay shall take physical possession of it or acknowledge that he has received it, when such is not the case. Even though the action of Corporal Dorsey may cause administrative difficulties, in the absence of any evidence of bad faith on his part, it is doubtful that such conduct, on the present showing, is punishable under Article of War 96, or, in any event, that this matter should be handled through disciplinary action.

4. It is therefore recommended that these papers be returned to The Adjutant General by informal action sheet entry, prepared for the signature of the Assistant Chief of Division, stating:

> There is no law which makes mandatory the acceptance of pay by an enlisted man. In any event disciplinary action does not appear to be appropriate on the present showing and it is recommended, as a matter of administrative expediency, that Corporal Dorsey be advised to sign the pay roll accept his pay and, if he so desires, to make periodic gifts of the money to the Government. If he is unwilling to follow this advice, it is recommended that the same procedure be followed as in cases where enlisted men are not present for payment.

Irvin Schindler,
Colonel, J.A.G.D.,
Assistant Chief of Military Affairs Division.

SPJGA 241.19 August 1, 1942

MEMORANDUM for The Judge Advocate General.

Subject: Flying Pay for Field Artillery Personnel.

1. By memorandum (WDGCT 241.14 (6-27-42)) dated July 3, 1942, as amended by memorandum (WDGCT 241.14 (6-27-42)) dated July 27, 1942, request was made for an opinion as to whether the officers and enlisted men detailed to the original observation test units (F.A.) are legally entitled to flying pay for any or all of the period January 15, 1942, to June 1, 1942. Request was further made that in the event it should be the opinion of this office that any of such officers or enlisted men are entitled to flying pay for any portion of such period advice be given as to the action necessary in order to authorize such flying pay.

2. From the accompanying file it appears that by letter (AG 320.2 (12-8-41)MT-C) dated December 10, 1941, subject: "Air observation", the Chief of Field Artillery was authorized to organize and conduct the initial training of two field artillery airplane observation test units and to designate the persons to fly the airplanes to be used in that connection. The necessary personnel, consisting of both officers and enlisted men, were assembled at the Field Artillery School, Fort Sill, Oklahoma. Pursuant to the directive, the following orders (par. 10, S.O. No. 12, Hq., F.A.S., Fort Sill, Okla., Jan. 15, 1942) were issued:

> "Under authority granted by paragraph 6, letter OCFA dated December 23, 1941, subject 'Air Observation', the persons listed below are, each with his own consent, designated as pilots for the purpose of flying light observation aircraft operated by the Field Artillery. The military personnel, though participating regularly and frequently in aerial flights, are not entitled to flying pay."

It further appears that twenty-one pilots successfully completed the training course on February 28, 1942, and that commencing March 1, 1942, they engaged in field tests of this project at Fort Bragg, Camp Blanding and Fort Sam Houston. More recently about half of the group has been engaged in a demonstration at Fort Benning, while the remainder were on duty at Fort Sill. The entire group have been required to fly regularly and frequently up to the present time. It is stated that flying pay for these

pilots in the future is assured by a memorandum from the Chief of Staff (WDGCT 320.2 (2-5-42)) dated June 6, 1942, but that this authority, apparently, does not provide flying pay for duties of that nature previously rendered.

3. Section 13a, National Defense Act, as amended (act June 4, 1920 (41 Stat. 768); act July 2, 1926 (44 Stat. 780)), provides in pertinent part as follows:

> "* * * Officers and enlisted men of the Army shall receive an increase of 50 per centum of their pay when by orders of competent authority they are required to participate regularly and frequently in aerial flights, and when in consequence of such orders they do participate in regular and frequent flights as defined by such Executive orders as have heretofore been, or may hereafter be, promulgated by the President: * * *"

Section 20, act June 10, 1922 (42 Stat. 632), as amended by section 6, act July 2, 1926 (44 Stat. 752), provides in pertinent part as follows:

> "* * * All officers, warrant officer, and enlisted men of all branches of the Army, * * * when by orders of competent authority they are required to participate regularly and frequently in aerial flights, and when in consequence of such orders they do participate in regular and frequent flights as defined by such Executive orders as have heretofore been, or may hereafter be, promulgated by the President, shall recieve the same increase of their pay * * * as are authorized for the performance of like duties in the Army. * * * Regulations in execution of the provisions of this section shall be made by the President and shall, whenever practicable in his judgment, be uniform for all the services concerned."

Executive Order No. 5865 of June 27, 1932, was in effect at the time the flights involved in the instant case were made. Paragraphs 2 to 9, both inclusive, of such Executive order specify the military personnel who shall or may be required to participate in regular and frequent aerial flights and also specify the officials to issue orders requiring such personnel to participate in such flights. Of such paragraphs, only paragraphs 5 and 6 appear to be applicable to any of the personnel involved in the instant case. Paragraph 5 of such Executive order is in pertinent part as follows:

> "Each officer, warrant officer, or enlisted man of the Army who is duly assigned to a course of instruction for qualification as aircraft pilot or aircraft observer, * * * shall be required to participate regularly and frequently in aerial flights; orders for such requirement shall be issued by the Chief of the Air Corps for the Army, * * *"

Paragraph 6 of such Executive order is in pertinent part as follows:

> "Each officer or warrant officer other than * * * those specified in paragraphs 2, 3, 4, and 5, may be required to participate regularly and frequently in aerial flights; orders for such requirement shall be issued by the Chief of the Air Corps for the Air Corps of the Army, the Secretary of War for other branches of the Army, * * * "

Paragraph 10 of the Executive order prescribes the requirements with respect to number of flights and total air time which must be met by those required to participate in regular and frequent aerial flights.

Paragra 14 of the Executive order is as follows:

> "14. Compliance with the foregoing requirements constitutes participation in regular and frequent aerial flights within the meaning of the act approved July 2, 1926 (44 Stat. 780), and no flight pay shall accrue to any person during any period in which the provisions of this order are not complied with."

4. Under the cited statutory provisions entitlement of military personnel to increased pay for participation in aerial flights is made dependent upon their being required "by orders of competent authority" to participate in regular and frequent flights and upon their participation in regular and frequent flights as defined in the applicable Executive order. Executive Order No. 5865 not only defined participation in regular and frequent serial flights as contemplated by both section 13a of the National Defense Act, as amended, supra, and section 20 of the act of June 10, 1922, as amended, supra, but also prescribed the competent authorities to issue orders to the various classes of military personnel requiring participation by them in regular and frequent aerial flights. Clearly, the designation by Executive order of the authorities competent to require participation in regular and frequent aerial flights is a valid regulation of the President, promulgated pursuant to the authority specifically conferred upon him by section

20 of the act of June 10, 1922, as amended, supra. Section 13b of Army Regulations 95-15, April 21, 1930, as amended by War Department Circular No. 137, 1940, provides that orders placing an individual on duty requiring participation in regular and frequent aerial flights may be issued only in accordance with the provisions of Executive Order No. 5865.

It is doubtful that the personnel here involved were during the period January 15, 1942, to February 28, 1942, "duly assigned to a course of instruction for qualification as aircraft pilot" within the meaning of paragraph 5 of the Executive order. However, if so, paragraph 5 prescribes that the orders to such personnel shall be issued by the Chief of the Air Corps. For the period March 1, 1942, to June 1, 1942, and probably for the period January 15, 1942, to February 28, 1942, paragraph 6 of the Executive order is the applicable paragraph with respect to the proper authority to have ordered the officers here involved to participate in aerial flights. That paragraph prescribes that the Secretary of War shall issue the orders to officers in branches of the Army other than the Air Corps. Except to the extent that it provides for ordering participation in aerial flights by enlisted men assigned to a course of instruction for qualification as aircraft pilot or aircraft observer, the Executive order contains no provisions prescribing a competent authority to order enlisted men in branches of the Army other than the Air Corps to duty requiring participation in regular and frequent aerial flights.

As the order, here considered, was not issued by the Secretary of War or the Chief of Air Corps, but by the commanding general of the Field Artillery School, it follows that none of the personnel here involved was for any part of the period January 15, 1942, to June 1, 1942, required "by orders of competent authority" to participate in regular and frequent aerial flights. Consequently, none of them is entitled to flight pay for any portion of such period.

5. It is therefore recommended that the file be returned to the Assistant Chief of Staff, G-3, by memorandum, prepared for the signature of the Acting Chief of Division, stating:

> With reference to your memorandum (WDGCT 241.14 (6-27-42)) dated July 3, 1942, as amended by your memorandum (WDGCT 241.14 (6-27-42)) dated July 27, 1942, it is the opinion of this office that none of the officers or enlisted men detailed to the original observation test units (F.A.)

is entitled to receive flying pay for the period January 15, 1942, to June 1, 1942, or for any portion of such period. In view of this conclusion it is unnecessary to consider the second question presented.

Charles W. West,
Colonel, J.A.G.D.,
Acting Chief of Military Affairs Division.

SPJGA 1942/6175
(241.19)

December 28, 1942

MEMORANDUM for The Judge Advocate General.

Subject: Eligibility of Captain Melvin Zais, to receive additional pay as a parachutist.

1. By tenth indorsement (AG 201 Zais, Melvin (0)(10/24/42) OP-M) dated December 15, 1942, the accompanying papers were referred for remark and recommendation respecting the right of Captain Melvin Zais, a rated parachutist, to receive additional pay as a parachutist for the period September 17-23, 1942, while assigned to Headquarters 82nd Airborne Infantry Division.

2. It appears from the file that Captain Zais was relieved from duty with the 501st Parachute Battalion, Panama Canal Department, and assigned to the 82nd Airborne Infantry Division, Camp Claiborne, Louisiana, effective September 17, 1942. He reported for duty, September 19, 1942, at Camp Claiborne and was assigned as Liaison Officer, Headquarters 82nd Airborne Infantry Division, on that date, whereupon he was granted leave of absence until October 4, 1942. While on leave Captain Zais was relieved from his original assignment and assigned to the 504th Parachute Infantry effective September 24, 1942. Captain Zais has filed a pay voucher for additional pay for parachute duty from September 17, 1942, to September 23, 1942, which is supported by certificate of the Commanding Officer, 504th Parachute Infantry, who states that Captain Zais has "received the rating as parachutist" and during the period in question had been assigned as a member of a parachute unit for whom parachute jumping is an essential part of his military duty; was engaged upon duty designated by the Secretary of War as parachute duty, and was not in flying pay status. The Finance Officer, 82nd Airborne Division, inclosed a request for advance decision of the Comptroller General as to the legality of payment of the voucher. The commanding general of that division in compliance with the request of the Commanding General, Army Ground Forces, for an administrative determination of Captain Zais' status during the period in question, states (7th Ind., Dec. 5, 1942) that Captain Zais' assignment during the period in question was "in a capactiy which in combat would require parachute jumping as an essential part of the performance of his duties but that he was not assigned in a capacity which had been indicated as parachute duty by the Table of Organization". He recommends favorable consideration of the officer's request for additional pay.

3. Section 18 of the Pay Readjustment Act of 1942 (Public Law 607, 77th Cong.; sec. I, Bull. No. 28, W.D., 1942) provides

in pertinent part:

> "Any officer, warrant officer, or enlisted man of the Army, * * * not in flying-pay status, who is assigned or attached as a member of a parachute unit, including parachute-jumping schools, and for whom parachute jumping is an essential part of his military duty and who, under such regulations as may be prescribed by the Secretary of War * * * has received a rating as a parachutist or is undergoing training for such a rating shall receive, while engaged upon duty designated by the head of the department concerned as parachute duty, additional pay of the rat of $100 per month in the case of any such officer * * *."

Paragraph 2, Army Regulations 35-1495, August 22, 1942, provides that a commanding officer of a parachute regiment may rate as a parachutist any officer who has completed a course of instruction in parachute jumping as prescribed by the Commanding General, Army Ground Forces, and paragraph 3(id.) sets forth the form of certificate required to be executed by the commanding officer in support of parachute pay vouchers. The certificate submitted by the Commanding Officer, 504th Parachute Infantry, to which organization the officer was subsequently assigned conforms with the foregoing regulations and the right of Captain Zais to receive parachutist's pay for the period in controversy would not be subject to question if he had been assigned to that unit during such period. Paragraph 4a(id.) provides that additional pay for parachute duty is authorized when officers are "assigned or attached to a parachute combat organization in a capactiy which requires parachute jumping as an essential part of the performance of their military duty as indicated by the Table of Organizations of the combat unit". Paragraph 4b of the same regulation permits an individual to receive this additional pay while absent on leave for not to exceed three months, if he is assigned to a unit as required in paragraph 4a.

4. The Pay Readjustment Act of 1942 and regulations issued thereunder by the Secretary of War establish three basic requirements before an officer or enlisted man can qualify for additional pay as a parachutist; a, he must be attached or assigned as a member of a parachute combat unit; b, he must be assigned in a capacity designated by the Secretary of War in the Table of Organizations as parachute duty; c, he must be rated as a parachutist or be undergoing training for such a rating. An examination of

the Table of Organizations for Headquarters Airborne Division (Infantry)(T/O 71-1, Sept. 5, 1942) discloses that no one in such a unit has been designated by the Secretary of War as being in a capacity which requires parachute jumping as an essential part of the performance of his military duty, and furthermore no parachute equipment is prescribed for such a unit (T/O 71-2, Sept. 5, 1942). In view of this fact, it is manifest that the headquarters of an airborne division has not been considered a parachute combat unit as contemplated by Army regulations. It follows that during the time Captain Zais was assigned to or on leave from the 82nd Airborne Infantry Division he could not while assigned to division headquarters, qualify for parachute pay under the first two prerequisites heretofore outlined, even though properly rated as a parachutist.

5. It is therefore recommended that these papers be returned by eleventh indorsement to The Adjutant General, prepared for the signature of the Chief of Division, stating:

> The Secretary of War pursuant to the Pay Readjustment Act of 1942, has prescribed in paragraph 4a of Army Regulations 35-1495, August 22, 1942, that in order to qualify for additional pay for parachute duty qualified parachutists must be assigned to a parachute combat organization in a capacity indicated by the Table of Organization of such unit as requiring parachute jumping as an essential part of their military duty. The Talbe of Organization (T/O 71-1, Sept. 5, 1942) for Headquarters of an Airborne (Infantry) Division does not designate any person assigned to this type of unit as being in such a capacity. It is, therefore, the opinion of this office that Captain Zais was not entitled to receive additional parachute pay for the period from September 17-23, 1942, while assigned to Headquarters, 82nd Airborne Infantry Division, even though he was qualified as a rated parachutist during that period. The fact that Captain Zais was on leave during such of the period in question is not of material concern as the same result would have obtained had he been on an active duty status throughout. It is recommended that the Chief of Finance be advised accordingly.

Charles W. West,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 242.19 September 3, 1942

MEMORANDUM for The Judge Advocate General.

Subject: Right of an enlisted man who received soldier's medal while serving in a fraudulent enlistment to receive the $2 a month additional compensation authorized to be paid to enlisted men who have been awarded such medal.

1. By third indorsement (SPX 201 Weakley, Melvin H. (5-27-42) LO) dated August 24, 1942, these papers were referred for opinion whether Melvin H. Weakley, ASN 19105319, who received the soldier's medal while serving in a prior fraudulent enlistment under a different name and serial number, is entitled to receive the $2 a month additional compensation authorized by law to be paid to enlisted men who have been awarded such medal.

2. It appears from the basic communication that the above-named enlisted man served in two fraudulent enlistments, from May 4, 1925, to May 3, 1928, and from September 26, 1933, to December 21, 1935, under the name of Edward L. Riley, ASN 6531471, and that on April 28, 1942, he volunteered for active service under his right name, Melvin H. Weakley, and was assigned ASN 19104319. According to the records of The Adjutant General, as set forth in the attached file, the soldier's medal was awarded to Private Edward L. Riley, ASN 6531471, Company A, 31st Infantry, Post of Manila, P. I., on March 15, 1934, for heroism displayed by him in rescuing a comrade from drowning in San Francisco Bay, California, October 28, 1933, while serving as a private, Infantry, Unassigned.

3. The pertinent provisions of the act of July 2, 1926 (44 Stat. 789; 10 U.S.C., 1428, 1430), read as follows:

> "Sec. 11. Under such rules and regulations as he may prescribe the President is hereby authorized to present, but not in the name of Congress, a medal to be known as the soldier's medal, of appropriate design, with accompanying ribbon, to any person, who, while serving in any capacity with the Army of the United States, including the National Guard and the Organized Reserves, shall hereafter distinguish himself, or herself, by heroism not involving actual conflict with an enemy.
>
> "* * *
>
> "Sec. 13. Each enlisted or enrolled man to whom there shall be awarded * * * the soldier's medal shall

be entitled to additional pay at the rate of $2 per month from the date of the act of heroism or extraordinary achievement on which the award is based * * * and said additional pay shall continue throughout his active service, whether such service shall or shall not be continuous."

4. Research fails to disclose that the mentioned legislation has heretofore been construed for purposes pertinent to the question involved in this case. Legislation of similar purport, however, has received consideration and will hereinafter be discussed.

In construing the character of a certificate of merit the Attorney General said:

"The statute enacts that when any private soldier shall distinguish himself, the President may grant him, on the recommendation of the commanding officer of the regiment, a 'certificate of merit which shall entitle him to additional pay at the rate of two dollars per month.' The merit is in the soldier, the certificate is to the man; the merit and the certificate thereof are attached to the man; the additional pay of two dollars per month, is in regard of the man and of the services which he performs monthly, and not of the paper which he signed at this time, or at that, by which he engaged to serve." (5 Op. Atty. Gen. 401.)

In holding that an enlisted man of the Marine Corps to whom there had been awarded the distinguished service cross while serving as an officer in the Army, was entitled to additional pay therefor at the rate of $2 per month for subsequent enlisted service in the Marine Corps, the Comptroller General said:

"The award is made to the individual and it would seem to be immaterial as affecting the question here presented whether such distinguished service was performed in the capactiy of an officer or in the capacity of an enlisted man." (7 Com. Gen. 544).

In an opinion of this office holding that an enlisted man, who was awarded a certificate of merit while serving a fraudulent enlistment under a different name, was entitled to receive $2 additional pay per month authorized by law then in effect to be

paid to an enlisted man to whom a certificate of merit had been granted, it was stated that:

> "* * * the award of the certificate is a transaction which is independent of the contract of enlistment * * * (C. 16644, July 25, 1904; Dig. Op. JAG, 1912, p. 610, 667)."

In the mentioned opinion of July 25, 1904, supra, the fraud was discovered and the enlisted man was restored to duty to serve the unexpired portion of his original enlistment. This office concluded, therefore, that the enlisted man was rendering legal service at the time he received the award. In the instant case the record does not disclose when the fraudulent enlistment of Weakley was discovered or the nature of the action, if any, which was taken in regard thereto. It is not believed, however, that this point is material. The fact remains that Weakley is now serving in the armed forces and the principal question for determination is one of identity, i.e., whether the soldier's medal in question was in fact awarded to the individual now known as Weakley, so as to entitle him to the additional compensation authorized by statute.

The Attorney General (33 Op. Atty. Gen. 404) and the Comptroller General (3 Comp. Gen. 61) have both held that periods of service under fraudulent enlistments should be included in the computation of retired pay even though the fraud was not discovered until after honorable discharge. Similarly, service in a fraudulent enlistment not voided by the Government may properly be counted for the purpose of longevity pay (par. 2b, AR 35-2360, Aug. 1, 1942). By analogy, the foregoing authorities impel the conclusion that one to whom the soldier's medal has been awarded during a fraudulent enlistment is entitled, during a subsequent valid enlistment, to receive the additional two dollars per month authorized for such award.

5. It is therefore recommended that these papers be returned to The Adjutant General, by fourth indorsement, prepared for the signature of the Chief of Division, stating:

> Because the soldier's medal is awarded for an act of heroism on the part of a particular individual, it is the opinion of this office that a person to whom such medal has been awarded during a fraudulent enlistment is entitled to receive the additional pay at the rate of $2 per month authorized by section 13 of the act of July 2, 1926 (44 Stat.

789; 10 U.S.C., 1430), during subsequent valid periods of service. It follows that Melvin H. Weakley is entitled to receive such additional compensation during his present period of service if it is clearly established that he is, in fact, the individual to whom the medal was awarded.

C. B. Mickelwait,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 1942/5913
(241.18)

December 16, 1942

MEMORANDUM for The Judge Advocate General.

Subject: Retirement pay benefits of a former officer of a reserve component of the Army under the Pay Readjustment Act of 1942.

1. By memorandum (AG 240. (12-4-42)PO-M) dated December 4, 1942, from The Adjutant General to The Judge Advocate General, with reference to a previous opinion of this office (SPJGA 1942/3399, July 31, 1942), there was presented the question:

> "Whether a former officer of a reserve component (i.e. officer separated from the military establishment by discharge subsequent to certification for Retirement Pay and prior to June 1, 1942) would be entitled to have his retirement pay benefits adjusted effective June 1, 1942?"

Informal advice received from the Office of The Adjutant General (Lt. Col. A. C. Kelly, A.G.D., Munitions Bldg., Room 1048) indicates that the question stated pertains to officers entitled to retirement pay under section 5, act of April 3, 1939 (53 Stat. 557, as amended; act July 25, 1939, 53 Stat. 1079; act Dec. 10, 1941, 55 Stat. 796; 10 U.S.C. Supp. I, 456), and to officers entitled to such pay under section 1, act of September 26, 1941 (55 Stat. 733; 10 U.S.C. Supp. I, 456a).

2. Section 5, act of April 3, 1939, as amended, supra, provides in pertinent part:

> "All officers * * * of the Army of the United States, other than the officers * * * of the Regular Army, if called or ordered into the active military service by the Federal Government for extended military service in excess of thirty days, other than for service with the Civilian Conservation Corps, and who suffer disability or death in line of duty from disease or injury while so employed shall be deemed to have been in the active military service during such period and shall be in all respects entitled to receive the same pensions, compensation, retirement pay, and hospital benefits as are now or may hereafter be provided by law or regulation

for officers * * * of corresponding grades and length of service of the Regular Army * * *."

Section 1, act of September 26, 1941, supra, provides:

> "Reserve officers, Army of the United States, who were called or ordered into the active military service by the Federal Government for extended military service in excess of thirty days on or subsequent to February 28, 1925, other than for service with the Civilian Conservation Corps, and who are now disabled from disease or injury contracted or received in line of duty while so employed, shall be deemed to have been in the active military service during such period and shall be in all respects entitled to receive the same retirement pay and hospital benefits as are now or may hereafter be provided by law or regulation for officers of corresponding grades and length of service of the Regular Army."

It may be noted that the two statutory provisions quoted are substantially similar in their substantive terms (SPJGA 1942/1552, April 22, 1942). So far as presently pertinent, they differ only in the following respects: a, The act of April 3, 1939, applies to officers of all reserve components of the Army of the United States, but the act of September 26, 1941, applies only to Reserve officers, and b, the act of April 3, 1939, which contains no terms giving it retrospective application, is effective from and after the date of its approval (JAG 210.85, Sept. 13, 1940), but the act of September 26, 1941, by its terms is made applicable to Reserve officers who entered upon extended active duty on or after February 28, 1925, and who were disabled prior to or on the date of its approval. Both acts were intended to confer upon officers eligible to receive the benefits provided the same retirement pay accorded to Regular Army officers of corresponding grades and length of service (JAG 1942/303, Jan. 29, 1942; SPJGA 1942/3399, July 31, 1942; SPJGA 1942/1235, April 2, 1942). Under section 15, Pay Readjustment Act of 1942 (act June 16, 1942, Public Law 607, 77th Cong.) retired officers of the Regular Army are entitled to have their retired pay computed, effective June 1, 1942, on the basis of pay provided by that act. In the opinion (SPJGA 1942/3399, July 31, 1942) mentioned in the basic memorandum (par. 1, supra), this office held, inter alia, that officers of the reserve components of the Army entitled to retirement pay under the act of April 3, 1939, supra, are entitled, effective June 1, 1942, to have such pay computed on the basis of pay provided by the Pay

Readjustment Act of 1942, supra, and it appears that the same principle is applicable equally to Reserve officers entitled to retirement pay under the act of September 26, 1941.

3. The question presented by the basic memorandum is whether the discharge, prior to June 1, 1942, of a former officer of a reserve component of the Army who theretofore had been determined to be eligible to receive retirement pay under the act of April 3, 1939, or under the act of September 26, 1941, operates to bar such officer from the readjustment of such pay, effective June 1, 1942, on the basis of the pay provided by the Pay Readjustment Act of 1942, supra. This office has held that entitlement to the benefits provided by the act of April 3, 1939, depends upon the status of the officer concerned at the time his disability was incurred (JAG 210.01, Dec. 18, 1941), and that the continued payment of such benefits is not affected by the subsequent discharge of such officer (JAG 241.18, June 4, 1941). In harmony with that conclusion it has been held also that continuation on the rolls of the Officers' Reserve Corps is not a prerequisite to the continued receipt of the benefits provided by the act of September 26, 1941 (JAG 241.18, Oct. 8, 1941; 210.01, Dec. 18, 1941; cf. SPJGA 1942/1235, April 2, 1942). From the opinions mentioned it may be concluded that the discharge, prior to June 1, 1942, of officers theretofore certified to be entitled to the benefits provided by the act of April 3, 1939, or by the act of September 26, 1941, does not bar the readjustment, effective June 1, 1942, of the quantum of such benefits on the basis of the pay provided by the Pay Readjustment Act of 1942. Accordingly, in my view the question presented in the basic memorandum should be answered in the affirmative.

4. In the opinion referred to in the basic memorandum (SPJGA 1942/3399, July 31, 1942) this office, in answer to question c, expressed the view that by reason of a controlling decision of the Comptroller General (M.S. Comp. Gen., B-27256, July 14, 1942) no Reserve officer certified for retirement pay effective prior to June 1, 1942, was entitled to a readjustment of his retirement pay on the basis of the next higher pay period unless, on the date on which he became eligible for retirement pay, he had active commissioned service which would have entitled him to pay of the next higher period under section 1, Pay Readjustment Act of 1942, supra, if that act had been in effect on that date. Attention is invited to section 1, act of December 2, 1942 (Public Law 785, 77th Cong.), which amends the eleventh paragraph of section 1, Pay Readjustment Act of 1942, to read in pertinent part:

> "In computing the service for all pay purposes of officers paid under the provisions of this section, such officers shall be credited with full time for

all periods during which they have held commissions as officers of any of the services mentioned in the title of this Act, or in the Organized Militia prior to July 1, 1916, or in the National Guard, or in the National Guard Reserve, or in the National Guard of the United States, or in the Officers' Reserve Corps * * *: Provided, That for officers in service on June 30, 1922, there shall be included in the computation, in addition to the service set forth above, all service which was then counted in computing longevity pay, and service as a contract surgeon serving full time * * *."

Section 4, act of December 2, 1942, supra, provides that such act shall become effective as of June 1, 1942, but that "no back pay or allowances for any period prior to such date shall accrue" by reason of its enactment.

In my view the answer to question c contained in the opinion of this office mentioned (SPJGA 1942/3399, July 31, 1942) now should be revised as follows to conform to the act of December 2, 1942. A Reserve officer certified for retirement pay effective prior to June 1, 1942, is entitled to a readjustment of his retirement pay on the basis of the next higher pay period, provided, on the date on which he became eligible for retirement pay, he had commissioned service in any of the services mentioned in the title to the Pay Readjustment Act of 1942, supra, or in any of the organizations enumerated in section 1, act of December 2, 1942, supra, which would have entitled him to pay of the next higher period under section 1, Pay Readjustment Act of 1942, as amended, by the mentioned act of December 2, 1942, if that act, as amended, had been in effect on the date on which the officer concerned became eligible for retirement pay. As stated in the earlier opinion of this office (SPJGA 1942/3399, July 31, 1942), the fact that he would have advanced thereafter to the next period prior to June 1, 1942, if he had been retained on active duty, does not entitle him to retirement pay based on the advanced pay period.

5. The letter (AG 240 (6-29-42)RC) dated June 29, 1942, answered by the earlier opinion of this office (SPJGA 1942/3399, July 31, 1942), requested an opinion on the following question:

"d. If the answer to c, above, is in the affirmative are temporary officers of the Army of the United States and officers of the National Guard of the United States entitled to the same retirement pay benefit adjustment."

In the former opinion of this office it was unnecessary to consider that question because the preceding question was answered in the negative. In my view the following answer should now be made in conformity with the act of December 2, 1942, supra. As the act of April 3, 1939, provides retirement pay benefits for "All officers * * * of the Army of the United States, other than the officers of the Regular Army, if called or ordered into the active military service by the Federal Government for extended military service in excess of thirty days, other than for service with the Civilian Conservation Corps", temporary officers of the Army of the United States and officers of the National Guard of the United States who suffer the requisite disability while employed in the service prescribed by that act are included within the class of officers described, and such officers, if otherwise eligible to receive such benefits, are entitled to a readjustment of their retirement pay benefits, effective June 1, 1942, upon the same conditions stated (par. 4, supra) with regard to Reserve officers.

6. It is therefore recommended that these papers be returned to The Adjutant General by memorandum, prepared for the signature of the Chief of Division, stating:

Informal advice received from the Office of The Adjutant General (Lt. Col. A. C. Kelly, A.G.D., Munitions Bldg., Room 1048) indicates that the question presented by memorandum (AG 240. (12-4-42)PO-M) dated December 4, 1942, pertains to officers entitled to retirement pay benefits under section 5, act of April 3, 1939 (53 Stat. 557, as amended; act July 25, 1939, 53 Stat. 1079; act Dec. 10, 1941, 55 Stat. 796; 10 U.S.C. Supp. I, 456), and to officers entitled to such benefits under section 1, act of September 26, 1941 (55 Stat. 733; 10 U.S.C. Supp. I, 456a). It is the opinion of this office that the discharge, prior to June 1, 1942, of officers theretofore certified to be entitled to the retirement pay benefits provided by either of those statutes does not bar the readjustment, as of that date, of the amount of such benefits on the basis of the pay provided by section 1, Pay Readjustment Act of 1942 (act June 16, 1942, Public Law 607, 77th Cong.). Accordingly, the question presented is answered in the affirmative.

With reference to the mentioned memorandum of this office (SPJGA 1942/3399, July 31, 1942), attention is invited to the provisions of section 1, act of December 2, 1942 (Public Law 785, 77th Cong.), which amends section 1, Pay Readjustment Act of 1942, supra. By reason of that amendment, the answer contained in paragraph c of the memorandum dated July 31, 1942, should now be modified to read as follows: A Reserve

officer certified for retirement pay effective prior to June 1, 1942, is entitled to a readjustment of his retirement pay on the basis of the next higher pay period, provided, on the date on which he became eligible for retirement pay, he had commissioned service in any of the services mentioned in the title to the Pay Readjustment Act of 1942, or in any of the organizations enumerated in section 1, act of December 2, 1942, supra, which would have entitled him to pay of the next higher period under section 1, Pay Readjustment Act of 1942, as amended by the mentioned act of December 2, 1942, if that act, as amended, had been in effect on the date on which the officer concerned became eligible for retirement pay. The fact that he would have advanced thereafter to the next period prior to June 1, 1942, if he had been retained on active duty, does not entitle him to retirement pay based on the advanced pay period. Subject to the qualification stated, the question is answered in the affirmative.

In view of the modification stated in the preceding paragraph, it is the opinion of this office that question d contained in letter (AG 240 (6-29-42)RC) dated June 29, 1942, should now be answered as follows: Temporary officers of the Army of the United States and officers of the National Guard of the United States who suffer disability within the meaning of the act of April 3, 1939, supra, as amended, while employed in the service prescribed by that act, are included within the class of officers described in section 5 of that act, and such officers, if otherwise eligible to receive such benefits, are entitled to a readjustment of their retirement pay benefits, effective June 1, 1942, upon the same conditions stated with regard to Reserve officers in the preceding paragraph of this memorandum. Subject to such conditions, the question is answered in the affirmative.

Inasmuch as the questions discussed involve pay, it is recommended that they be referred to the Chief of Finance and, if he deems it advisable, to the Comptroller General, for advance decision.

Charles W. West,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 1943/13735 28 September 1943

MEMORANDUM for The Judge Advocate General.

Subject: James W. B___, Jr. (former Army officer).

1. By memorandum dated 17 September 1943, the Under Secretary of War requested opinion whether former Lieutenant Colonel James W. B___, Jr., "is presently entitled to receive any additional amount from the War Department for his services as an officer, whether on account of accrued leave or otherwise".

2. From the memorandum of the Under Secretary and an opinion of this office written in connection with a previous consideration of B___'s activities (SPJGA 1942/1030, 21 Oct. 1942), it appears that by letter order dated 18 September 1942, B___ was discharged from his commission as Lieutenant Colonel, Adjutant General's Department Reserve, effective 19 September 1942. This order characterized his discharge as being "under conditions other than honorable". Subsequently, the Secretary of War's Personnel Board considered the facts in his case and found that the discharge was warranted and had been lawfully accomplished. The board recommended, however, that the unfavorable characterization be deleted from B___'s record and that he be given a Certificate of Service. The recommendations of the board were approved 7 May 1943.

3. It appears possible that circumstances leading to the present inquiry may have been influenced by the wording of subparagraph 10a, Army Regulations 605-115, 14 July 1942, which, as changed (C 3, 17 Apr 1943), provides:

> "10. Officers about to leave active service.—
> a. Resignation, dismissal, or discharge 'under other than honorable conditions.'—leave of absence will not be granted to officers upon separation or pending separation from the active list by resignation, dismissal, summary discharge from the service under the provisions of AR 605-10, or relief from active duty and discharge under the provisions of AR 605-230 when separation from service is recorded 'under other than honorable conditions.' Should any officer in one of these classes be on leave of absence at the time of approval of his separation from the active list the unexpired portion of his leave will be canceled."

4. That leave of absence for military personnel is not a matter of right and that its availability terminates upon separation from the active service, whether under honorable conditions or otherwise, are propositions too well established to admit of dispute.

The former is well stated in the Digest of Opinions of The Judge Advocates General of the Army, 1912, where, on page 7, it is said that:

> "A leave of absence is an indulgence which is or may be granted to an officer at the pleasure and in the discretion of a proper military superior. Held, that as it is not a privilege created by law it can not for that reason ever be demanded as a matter of legal right. C 13346, Dec. 8, 1903."

Other expressions of like import are contained in more recent opinions (JAG 210.711, 25 Feb. 1919; JAG 210.85, 14 Jan. 1941; JAG 210.711, 23 Jan 1941; SPJGA 1943/3233, 17 Feb. 1943). With respect to both of the mentioned propositions a recent opinion of this office (SPJGA 1943/[illegible]277, 7 Aug 1943) stated that:

> "* * * The leaves of absence with pay which may be granted to officers * * * are not vested rights of officers but privileges which may be granted to them in the discretion of military authorities and this conclusion is recognized by paragraph 2, Army Regulations 605-115, 13 November 1937 (now superseded by AR 605-115, 14 July 1942) * * *. Subparagraph 3b(5) of the same regulations provides that an officer separated from the active list ordinarily loses, upon such separation, his right to any accumulated leave and cites an opinion of this office (JAG 210.711, 26 Oct. 1921) in support thereof. The cited opinion states 'Leaves of absence are an attribute of active service'. Recently this office has held that a claim by a Reserve officer for payment for accumulated leave to his credit at the time of termination of his tour of active duty was not payable under existing laws and regulations (SPJGA 1943/3268, 27 Feb. 1943)."

5. The only payments to which an officer normally is entitled upon separation from the service are his active duty pay and allowances, including authorized allowances for transportation of himself, his dependents and baggage from the place of discharge to his home. It is manifest that the designation of an officer's separation from the service as being "under conditions other than honorable" does not operate to deprive him of pay and allowances already due him, and it follows that removal of that designation would not entitle him to additional pay or allowances. (Compare SPJGA 1943/4171, 23 Mar 1943; SPJGA 1943/6930, 13 May 1943; SPJGA 1943/7149, 18 May 1943). In this connection, subparagraph 6f, Army Regulations 35-1740, 1 June 1943, provides:

"An officer is entitled to be paid monthly notwithstanding the fact that he is awaiting final action on his tendered resignation, or on a sentence of dismissal with or without total forfeitures adjudged against him by a court martial, or that his discharge or dismissal is otherwise impending, * * *"

B__'s right to travel allowances was not affected by the original characterization of his discharge. Upon discharge an officer is entitled to travel pay unless his discharge is imposed as punishment for an offense (MS. Comp. Gen. A-16389, 3 Dec. 1926; SPJGA 1943/7113, 28 May 1943; SPJGA 1943/7264, 26 May 1943).

6. It is therefore recommended that reply be made to the Under Secretary of War by memorandum prepared for the signature of the Assistant Chief of Division, stating:

Referring to your memorandum, dated 17 September 1943, subject as above, an Army officer cannot be paid for accrued leave after separation from the service as the granting of leave to military personnel is a matter of indulgence and not one of statutory right. Assuming that Mr. B___ has received the payments on account of pay and allowances to which he was entitled under his discharge as originally characterized, there are no other payments from War Department appropriations to which Mr. B___ is entitled by virtue of the altered characterization of his discharge or due to his receipt of a Certificate of Service.

William T. Thurman,
Lieutenant Colonel, J.A.G.D.,
Assistant Chief of Military Affairs Division.

SPJGA 1943/4171 March 23, 1943

MEMORANDUM for The Judge Advocate General.

Subject: Pay status of Second Lieutenant Forrest W. Bigelow.

1. By first indorsement (AG 201, Bigelow, Forrest W. (Off)) dated February 26, 1943, from the Commanding General, Army Air Forces Training Command, Randolph Field, Texas, there was referred for consideration a letter dated February 20, 1943, from Lieutenant F.W. Bigelow, Midland, Texas.

2. In the mentioned letter Lieutenant Bigelow stated as follows:

"I have been court-martialed, sentenced and held for the result of my trial from Washington.

"I have received no pay or allowances since last May, nearly a year ago. I have absolutely nothing as I have borrowed on my life insurance up to the hilt. I'm broke and everything I've ever owned is in hock to keep me going.

"I've just been presented with two bills one from Big Springs hospital for $26.00 and the other from Midland Hospital for $104.00. I was held in both places against my will with a guard with a gun at my head. All my back pay and allowances have been taken away by court martial and I have never even received the $5.00 token payment I believe is made. I can't go out and work and I can't stay here and starve to death. The adjutant here states that Lumesa is still my station although I've never heard or seen anyone from there all during these long months. I don't believe any inqurys have been made by them regarding me.

"Will you please request Lumesa to see if something can't be done or make some decision there at the Training Command so I may at least eat."

In the mentioned first indorsement dated February 26, 1943, the following statement appears:

"This Headquarters is of the opinion that the Finance Officer can not make any payment pending final action in this case."

It appears from records of this office that Lieutenant

Bigelow was tried by general court-martial, found guilty of various charges and specifications involving absence without leave and making and uttering worthless checks, sentenced to be dismissed from the service and to forfeit all pay and allowances due or to become due, and that the sentence was approved by the reviewing authority and is now awaiting action by the President under Article of War 48.

The record of trial by general court-martial in the case in question indicates the following collateral facts with respect to Lieutenant Bigelow:

a. Paid to May 31, 1942, at Sheppard Field, Texas.
b. Reported to Lamesa Field, Texas, on June 3, 1942.
c. Transferred to the hospital at Army Air Forces Bombardier School, Midland, Texas, for treatment for venoral disease, June 5, 1942.
d. Discharged from hospital to duty status on July 6, 1942.
e. Absent without leave from July 7, 1942, to August 8, 1942.
f. Confined to quarters from August 8, 1942, to August 10, 1942.
g. Transferred to hospital at Midland, Texas, on August 10, 1942.
h. Transferred to hospital at El Paso, Texas, on August 11, 1942.
i. Absent without leave from August 29, 1942, to August 31, 1942.
j. Discharged from hospital to duty status on September 1, 1942.
k. Absent without leave from September 4, 1942, to September 24, 1942.

3. Paragraph 10b(4), Army Regulations 210-10, as amended by Changes No. 1, October 1, 1942, reads in pertinent part:

> "The post commander will, upon receipt of information that an officer within his command * * * is to be discharged or dismissed * * * notify the disbursing officer who regularly pays the officer concerned as to the officer's status. He will further inform the disbursing officer of the final action on the * * * discharge, or dismissal, * * *. He will issue certificates of nonindebtedness and statements of leaves of absence as prescribed in AR 35-3420, for Reserve officers * * * and certificates of nonindebtedness to all other officers who * * * are dismissed * * * as prescribed in AR 35-1740."

Paragraph 6c, Army Regulations 35-1740, as amended by Changes No. 1, September 1, 1942, reads in part:

> "After receipt of the notice of an officer's * * * dismissal as required by AR 210-10, no further payment will be made by the local disbursing officer until the final action is known, without specific authority from the Chief of Finance, and, if the * * * dismissal becomes effective, the instructions contained in a, b, c, and d above will be complied with."

The above-quoted paragraphs of Army Regulations 210-10 and 35-1740 are precautionary in character, designed to prevent unnecessary loss to the Government by putting the local finance officer on notice of the change or probable change in status of the officer and to give superior authority an opportunity to examine the accounts of the officer concerned and issue appropriate instructions to the local finance officer in the premises (JAG 241.3, Oct. 16, 1941).

Paragraph 5a, Army Regulations 35-1620, January 1, 1930, provides in part:

> "The separation from active service of an officer of the Army by * * * dismissal * * * can not be effected before the date on which the officer receives or becomes legally chargeable with notice of his * * * dismissal * * *. Separation from the active list in all cases will be the date of the delivery of the order to the officer * * *."

Paragraph 6, Army Regulations 35-1620, provides:

> "Where a sentence of court-martial passed upon an officer of the Army involves dismissal from the service but no forfeiture of pay, and there has been no absence without authority or on account of the officer's own misconduct, pay is due to the date the officer is chargeable with receipt of notice of dismissal."

Article of War 48, provides in part:

> "In addition to approval required by Article of War 46, confirmation by the President is required in the following cases before the sentence of a court-martial is carried into execution * * *.

"(b). Any sentence extending to the dismissal of an officer * * *."

In view of the absences from duty involved in this case, the following Army regulations may be pertinent:

Paragraph 3, Army Regulations 35-1420, December 15, 1939:

"Effect upon accrual of pay and allowances.--a. Neither pay nor allowances accrue to any person in the military service during unauthorized absences in excess of 24 hours, unless excused as unavoidable."

Paragraph 1, Army Regulations 35-1440, November 14, 1933:

"Statutory provisions. * * * That hereafter no person in active service in the military or naval service who shall be absent from his regular duties for more than one day at any one time on account of the direct effects of a venereal disease due to his own misconduct, shall, except as hereafter provided, be entitled to any pay, as distinguished from allowances, for the period of such absence: * * *."

4. This office has stated (JAG 241.11, August 19, 1919) that there is no regulation specifically applicable to officers which forbids their being paid while awaiting trial or the result of trial. Where, however, the officer awaiting trial or sentence is indebted to the United States or one of its agencies, and the preliminary investigation which resulted in preferring of charges may be regarded as a provisional finding of such indebtedness, it is legal and proper to withhold the pay of the officer to the amount thereof until the facts, including the amount of such indebtedness, if any, are definitely ascertained. Except for the reimbursement of the Government or its agencies, it is the view of this office that the withholding of the pay of an officer while awaiting trial and sentence is not warranted by either the law or regulations.

In a memorandum of this office (241.3, Aug. 3, 1930), based upon paragraph 6, Army Regulations 35-1620, it is stated:

"Unless it can be said that the foregoing provisions of the regulation was designed among other things, for the purpose of preventing the payment of an officer after the sentence of dismissal with forfeiture of pay had been adjudged against him, (a view not acceptable to me) in my judgment an officer,

under the circumstances, stated in the memorandum in reference, has a right to draw his pay and allowances on and for each payday occurring prior to the date of confirmation by the President, of the sentence including the forfeiture."

The mentioned Army regulations do not appear to have been changed. If it had been the intention of the War Department to prevent an officer from drawing his pay and allowances before final action under Article of War 48, it may be presumed that it would have been so stated. The pay and allowances of this officer are fixed and ordered paid by statute (42 Stat. 625; 45 Stat. 788; 37 U.S.C. 1) and cannot be withheld except as authorized by law (R.S. 1766; 5 U.S.C. 82). A search does not disclose any authority for the stoppage or withholding of pay of an officer while awaiting action on his sentence of a court-martial. Until a sentence adjudging a forfeiture has been confirmed when necessary by the proper authority, it is not final and conclusive (MS Comp. Gen. A-10999, March 11, 1926), and until such action has been taken there can be no stoppage or withholding of pay of an officer except for the reimbursement of the Government or its agencies. The rule is stated in Winthrop's Military Law and Precedents, Second Edition, page 429, as follows:

"Where, however, pay due is forfeited in connection with dismissal or dishonorable discharge imposed by the same sentence, the forfeiture is in general to be considered as intended to take effect simultaneously with the execution of the dismissal by which the military service of the party, and with it regularly -- his right to pay is terminated."

5. It is therefore recommended that these papers be returned to the Commanding General, Army Air Forces Gulf Coast Training Center, Randolph Field, Texas, by second indorsement, prepared for the signature of the Chief of Division, stating:

1. It is the opinion of this office that if Second Lieutenant Forrest W. Bigelow is not indebted to the Government and if there is no reason for withholding his pay or allowances other than the unconfirmed sentence of the general court-martial, payment may be made on specific authority from the Chief of Finance as provided by subparagraph 6c, Changes No. 1, Army Regulations 35-1740, September 1, 1942. As records of this office indicate that the mentioned officer was absent without leave and was absent from his regular duties while undergoing treatment for a venereal disease, attention is invited to the pertinent provisions of Army Regulations 35-1420,

December 15, 1939, in respect to accrual of pay and allowances during unathorized absences, and to Army Regulations 35-1440, November 14, 1933, in respect to accrual of pay during absences from regular duties because of venereal disease, which regulations may authorize withholding or stoppage of the mentioned officer's pay or allowances for any periods of absence involved.

2. It is recommended that appropriate action be taken under subparagraph 6e, Changes No. 1, Army Regulations 35-1740, September 1, 1942, with a view of obtaining specific authority from the Chief of Finance to make payment to Lieutenant Bigelow of so much of his pay and allowance as may not be withheld or stopped because of his absences or indebtedness to the Government.

Charles W. West,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

April 21, 1943

SPJGA 1943/6012

MEMORANDUM for The Judge Advocate General.

Subject: Right of enlisted man to pay while on duty status and under suspended dishonorable discharge.

1. By letter dated April 10, 1943, addressed and transmitted directly to The Judge Advocate General, Private Bill D. Roark, Serial No. 19033017, Battery F., 265 C.A. (HD) Fort Hancock, New Jersey, stated that he was sentenced to six months' confinement by a court-martial on June 16, 1942; was released from confinement November 15, 1942, at which time he was restored to duty; has not been paid since he was restored to duty; no one will tell him why he doesn't receive any pay; his battery officers do not give him any assistance; and he was last paid on May 31, 1942.

2. The record of trial by general court-martial (CM 223164, June 16, 1942) of Private Roark shows that he was found guilty of a violation of the 86th Article of War, by a general court-martial convened at Headquarters, Southern California Sector, Western Defense Command, and sentenced:

> "To be dishonorably discharged the service, to forfeit all pay and allowances due, or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for a period of two (2) years."

Sentence was adjudged June 16, 1942. The reviewing authority by General Court Martial Orders No. 27 of the mentioned headquarters, dated July 5, 1942, in pertinent part ordered as follows:

> "The sentence is approved but the period of confinement is reduced to six months. As thus modified, the sentence will be duly executed but the execution of that portion thereof adjudging dishonorable discharge is suspended. * * * "

3. The act of March 4, 1915 (38 Stat. 1065; 10 U.S.C. 876), in pertinent part provides:

> "* * * hereafter pay and allowances shall not accrue to a soldier under sentence of dishonorable discharge, during such period as the execution of

the sentence of discharge may be suspended under authority of the Act of Congress approved April twenty-seventh, nineteen hundred and fourteen,* * *"

The act of April 27, 1914 (38 Stat. 354), referred to in the last-cited act, provides in part:

"* * * the reviewing authority may suspend the execution of a sentence of dishonorable discharge until the soldier's release from confinement, but the order of suspension may be vacated at any time and the execution of the dishonorable discharge directed by the officer having general court-martial jurisdiction over the command in which the soldier is held, or by the Secretary of War."

The Comptroller General has held (15 Comp. Gen. 646) that the act of March 4, 1915, supra, is not applicable in the case of a soldier whose sentence to dishonorable discharge, forfeiture of all pay and allowances due and to become due and confinement is suspended by the reviewing authority and who is restored to duty with his organization. After quoting the above-quoted statutory provisions, the Comptroller General said:

"The quoted provision of the act of March 4, 1915, had for its purpose the covering back into the Treasury of funds theretofore accruing to the Soldiers' Home. The quoted provision of the act of April 27, 1914, has been largely superseded by the provisions of the fiftieth, fifty-first, fifty-second, and fifty-third articles of war. The language of the 1915 act is plain, however, in view of the specific reference to the act of 1914 in the cited quotation, that the provision that pay shall not accrue is addressed to cases where the soldier is serving a sentence of confinement and does not apply to a man on duty with his organization, although he may be under a suspended sentence to dishonorable discharge, confinement, and forfeiture of pay, for if pay does not accrue in such a case, the soldier would be required to serve on duty without pay. The reason for the provision is plain when its application is limited to prisoners serving sentences of confinement, usually in disciplinary barracks, the equivalent of confinement in a State penitentiary. Payment of the pay roll is authorized if otherwise correct."

Article of War 52 (act June 4, 1920, 41 Stat. 799; 10 U.S.C. 1524, as amended by Public Law 804, 77th Cong., Dec. 15, 1942)

in pertinent part provides:

> "The authority competent to order the exectuion of the sentence of a court-martial may, at the time of the approval of such sentence, suspend the execution, in whole or in part, of any such sentence as does not extend to death, and may restore the person under sentence to duty during such suspension; and the Secretary of War, the commanding officer holding general court-martial jurisdiction over any such offender, or the military authority competent to appoint, for the command * * * a court of the kind that imposed the sentence, may at any time hereafter, while the sentence is being served, suspend the execution, in whole or in part, of the balance of such sentence and restore the person under sentence to duty during such suspension."

This office has held (JAG CM No. 153810, Jan. 30, 1923) that a soldier sentenced to dishonorable discharge, total forfeitures and confinement, the execution of the dishonorable discharge being suspended until his release from confinement, is entitled to pay and allowances after his release from confinement and restoration to duty regardless of the fact that during such period duty status the dishonorable discharge remained suspended and unremitted. The conclusion stated in the foregoing opinion of this office was based in part on an earlier opinion of this office (JAG 250.473, Jan. 13, 1921) wherein it was said in pertinent part:

> "'It is the opinion of this office that a soldier whose sentence of dishonorable discharge, total forfeitures and confinement for a certain period has been suspended under authority and in pursuance of the Act of July 9, 1918 (A.W. 52), is entitled to pay and allowances. The only reason that a soldier, the execution of whose dishonorable discharge has been suspended under the Act of April 27, 1914, does not draw pay and allowances during the suspension, is the provision of the Act of March 4, 1915, that pay and allowances shall not accrue to a soldier under sentence of dishonorable discharge, the execution of which sentence has been suspended under the Act of April 27, 1914. This statute expressly limits itself to operation upon dishonorable discharges which have been suspended under the Act of April 27, 1914. This provision was designed to prevent soldiers serving sentences in the disciplinary barracks under a suspended sentence of dishonorable discharge, drawing pay and

allowances during their confinement. If, however, a sentence including dishonorable discharge is suspended by the reviewing authority under the Act of July 9, 1918, not "until the soldier's release from confinement," but indefinitely, it is clear that the provisions of the Act of March 4, 1915, have no application, as that act, to reiterate, applies only to dishonorable discharge suspended under the Act of April 27, 1914, "until the soldier's release from confinement."!"

4. Assuming that his statement that he has fully served his period of confinement and has been restored to duty is true and assuming that his pay is not subject to any other forfeiture, it is believed that Private Roark is entitled to receive his pay from the time he was returned to a duty status, regardless of the fact that his dishonorable discharge is merely suspended and not remitted. The War Department does not look with favor upon continuing indefinitely the suspension of a dishonorable discharge after the termination of a soldier's sentence of confinement (SPJGJ - CM 221871; CM 222034, June 12, 1942).

5. It is therefore recommended that these papers be transmitted to The Adjutant General, by first indorsement, prepared for the signature of the Assistant Chief of Division, stating:

The receipt of the foregoing letter has not been acknowledged. Assuming the truth of Private Roark's statement that he has fully served his period of confinement and has been restored to duty, and assuming that his pay is not subject to any other forfeiture, it appears that he is entitled to receive pay from the time he was returned to a duty status, regardless of the fact that his dishonorable discharge is still suspended and not remitted. It is suggested that Private Roark's letter be referred to the Commanding General, Fort Hancock, New Jersey, for investigation and appropriate action in harmony with the views above expressed.

Irvin Schindler,
Colonel, J.A.G.D.,
Assistant Chief of Military Affairs Division.

SPJGA 242.2

MEMORANDUM for The Judge Advocate General.

Subject: Determination as to pay status during confinement:

1. By disposition form (AG 201 Thomas, Luther D. (5-29-42)EA) dated July 8, 1942, there was referred for an opinion a memorandum (201 Thomas, Luther D.(Enl)(Cadre)) dated May 29, 1942, for the Commanding General, Quartermaster Replacement Training Center, Camp Lee, Viginia, from the Assistant Adjutant, Camp Lee, inquiring whether Technician 5th Grade Luther D. Thomas is entitled to pay for time during which he was held in military confinement awaiting trial by a civil court under indictment for "felony-murder" and whether the time spent in such confinement must be made good under Article of War 107.

2. The mentioned memorandum states that Thomas was indicted by the Circuit Court of the city of Hopewell for the murder of one Jesse Leon Bridgen, civilian. The day following the offense he was confined to the military police stockade awaiting trial by the Hopewell Circuit Court. Authority for the confinement from April 7, 1942, to May 3, 1942, is not shown. He was found guilty of assault and battery and sentenced to imprisonment for one year and costs of prosecution. That part of the sentence for confinement was suspended and he was immediately returned to duty.

3. Paragraph 10a, Army Regulations 35-1420, December 15, 1939, provides, in pertinent part, as follows:

"Officers and enlisted men in arrest and confinement by the civil authorities will receive no pay for the time of such absence. If released without trial or after trial and acquittal, their right to pay for the time of such absence is restored. * * * "

This office has construed this provision under an identical regulation in effect in the year 1916 (AR 1371 (par. 10, AR 35-1420); JAG 6-250, Dec. 4, 1916, Dig. Op. JAG, 1912-40, p. 887). There it was held that a soldier held in military confinement awaiting trial by civil court must be regarded as a prisoner held under civil jurisdiction and, hence, not entitled to pay for the time of absence caused thereby. The reasoning in that opinion is summarized as follows:

"It is a well-established general principle that a person holding an office or position is

entitled to pay whether he performs service or not, if he holds himself in readiness to perform services, and, on the other hand, that he is not entitled to pay for any time during which he voluntarily or through his own fault fails to hold himself in readiness to perform service. The above regulation is based upon this general principle. In the present case the soldier was held in confinement subject to the jurisdiction of the civil authorities, and he was not available for the service for which he was enlisted. His status must be regarded as that of a prisoner held under civil jurisdiction, and the jurisdiction of the military authorities was analogous to that of a jailor for the civil authorities in respect to the prisoner."

Corporal Thomas was held in confinement pending his civil trial through his own fault, as indicated by the verdict of guilty. No express military authority need be evidenced. It is apparent that he was being held for the civil authorities for an offense for which he later was convicted in lesser degree.

Inasmuch as his trial resulted in a conviction, although of a lesser included offense, manifestly he must make good the time lost during the period of his confinement, under Article of War 107.

4. It is therefore recommended that these papers be returned to The Adjutant General by disposition form entry, prepared for the signature of the Chief of Division, stating:

In the opinion of this office Technician 5th Grade Luther D. Thomas, in view of his conviction, is not entitled to pay for the time during which he was held in military confinement awaiting trial by a civil court. During that period his status was, in legal contemplation, that of a prisoner held under civil jurisdiction within the meaning of paragraph 10a, Army Regulations 35-1420, December 15, 1939. He is also subject to the provisions of Article of War 107 with respect to making good the time lost during such confinement.

C. B. Mickelwait,
Colonel, J.A.G.D.,
Chief of Military Affairs Divison.

SPJGA 1942/5986 December 19, 1942
(241.2)

MEMORANDUM for The Judge Advocate General.

Subject: Forfeiture of flying pay of commissioned officers under Article of War 104, and of such pay of aviation cadets.

1. By first indorsement (IG 241.2 - Pay Deductions) dated December 5, 1942, there was requested an opinion as to whether the forfeiture of one-half of the monthly pay for one month of an officer below the grade of major, under the pertinent provisions of Article of War 104, is limited to the base pay of such officer, or whether such forfeiture extends to the flying pay of the latter, and particularly to the flying pay of those officers in the Air Corps having flying status. The Office of The Inspector General (Col. Parkinson) has orally requested that such opinion be extended to embrace a like consideration of the forfeiture of flying pay of aviation cadets.

2. Article of War 104 (41 Stat. 808, 10 U.S.C. 1576) provides in pertinent part as follows:

> "* * * in time of war or grave public emergency a commanding officer of the grade of brigadier general or of higher grade may, under the provisions of this article, also impose upon an officer of his command below the grade of a major a forfeiture of not more than one-half of such officer's monthly pay for one month."

Section 18, act June 16, 1942 (Public Law 607, 77th Cong.), provides in pertinent part that --

> "Officers * * * and enlisted men * * * shall receive an increase of 50 per centum of their pay when by orders of competent authority they are required to participate regularly and frequently in aerial flights, and when in consequence of such orders they do participate in regular and frequent flights as defined by such Executive orders as have heretofore been, or may hereafter be, promulgated by the President; * * * Regulations in execution of the provisions of this paragraph shall be made by the President and shall, whenever practicable in his judgment, be uniform for all of the services concerned."

Section 10 of Executive Order No. 9195, July 7, 1942 (7 F.R. 5257), sets forth in detail the particular requirements constituting regular and frequent participation in aerial flights within the purview of the statute immediately above quoted. Section 14 of that order provides explicitly that compliance with such requirements "constitutes participation in regular and frequent aerial flights within the meaning of the act approved July 2, 1926 (44 Stat. 780), and the act approved June 18, 1942 (Public Law 607, 77th Cong., 2nd Sess.), and no flight pay shall accrue to any person during any period in which the provisions of this order are not complied with: Provided, that nothing herein contained shall affect the flying pay of non-flying officers who perform the number of aerial flights required by any applicable act of Congress".

Section 11 of this order sets up a similar schedule for members of the National Guard not in active military service.

Section 1, act June 3, 1941 (55 Stat. 239; 10 U.S.C. 297a) provides in pertinent part:

> "* * * the grade of aviation cadet is hereby created as a special and separate enlisted grade in the Air Corps, Regular Army, in substitution for the grade of flying cadet * * * Wherever, in any Act of Congress, the designation 'flying cadet' shall appear, it shall be construed to mean aviation cadet."

Section 4 of the act immediately above mentioned in pertinent part reads:

> "The base pay of any aviation cadet shall be $75 per month, which pay shall include extra pay for flying risk, as provided by law. Aviation cadets shall be paid, in addition, a money allowance for subsistence of $1 per day and shall, while undergoing training, be furnished quarters, medical care, and hospitalization, and shall be issued uniforms, clothing, and equipment at Government expense."

3. There appears to be no formal precedent in precise point anent forfeiture of the monthly pay of officers under Article of War 104, nor of the subject of forfeiture by courts-martial of the flying pay of officers entitled thereto. This is doubtless due, in part at least, to the circumstances that the provision of Article of War 104 authorizing the imposition of forfeiture against

officers in time of war or grave public emergency first appeared when the act of June 4, 1920 (41 Stat. 808; 10 U.S.C. 1576), went into effect (JAG 250.3, June 12, 1941). However, there is no lack of analogy or principle upon which to rest an opinion. It has been informally indicated to this office by Colonel E. H. Snodgrass, Air Judge Advocate, that it is his understanding that the practice in the Air Forces has been to regard as subject to forfeiture only base and longevity pay, and not the extra compensation received for flying status.

The Manual for Courts-Martial, U. S. Army, 1928, is silent upon the constituent elements of pay of officers which is subject to forfeiture. Such manual, however, is most explicit with reference to the forfeiture of pay of enlisted men. As the ultimate object in this field, whether in the cases of officers or of enlisted men, is the maintenance of discipline and military effectiveness, and since the underlying disciplinary factors in either case are identical, no valid reason of substance is seen for the adoption of dissimilar rules as between the two classes. To the contrary, all presently apparent considerations dictate a policy of uniformity in the construction of the term "pay" subject to forfeiture, wheresoever it may appear, unless such uniform construction is expressly or by necessary implication negatived by controlling authority.

Paragraph 104c, M.C.M., 1928, as amended by section II, paragraph 1, War Department Circular 59, 1941, reads in pertinent part as follows:

> "In computing what the maximum amount of forfeiture is in dollars and cents * * * the soldier's base pay * * * plus pay for length of service will be taken as the basis. The term 'base pay' comprehends no element of pay other than the minimum base pay of the grade or class within grade as fixed by statute and does not include specialists' pay or extra pay for any special qualification in the use of arms or incident to an award of a decoration of honor." (Underscoring supplied)

The initial portion of the first sentence of paragraph 104 of the manual reads, "The limits prescribed herein (104) will be applied by courts-martial in cases of enlisted men only, excluding flying cadets * * *". Insofar as such language may be deemed a possible limitation upon the language of said paragraph 104c above quoted, it is conceived that the limitation is upon personnel and extent of punishment rather than upon what in effect constitutes the elements of base pay.

Granting that forfeitures of pay of Army personnel operate upon base pay within the bounds above noted, the residual inquiry is whether flying pay is, in fact, base pay, or some other species of compensation. Patently, the flying pay of an officer is something other than "the minimum base pay" of the grade; it is of a type continuously and progressively contingent upon participation in regular and frequent flights as particularized in the Executive order above quoted, payable not by mere reason of military status in a certain rank or grade, but because of participation in such flights. It is extra pay, over and beyond the minimum base pay, the antithesis of the pay described in paragraph 104c.

The propriety of the conclusion here reached is emphasised by other opinions of this office. In the course of an opinion (JAG 242.4, Sept. 29, 1941) to the effect that the additional ten dollars payable to enlisted men under section 8 of the Service Extension Act of 1941 (act Aug. 18, 1941, Public Law No. 213, 77th Cong.) are subject to court-martial fines and forfeitures in the sense that they should be included in computation of pay for the purpose of determining maximum limitation on such fines and forfeitures, it was observed that the additional pay there involved is in the nature of longevity pay, and, therefore, should be regarded as "pay for length of service" within the meaning of the above-quoted portion of paragraph 104c of said manual. The pertinent provision of the act there in question reads, after describing the eligible recipient thereof, "shall, in addition to the amounts otherwise payable to such person * * * be entitled to receive the sum of $10 for each month of such training and service in excess of twelve". In this instance the additional pay is received by all members of a class who have completed a fixed tenure of service; once attained, the right accrues upon the basis of past rather than present or future performance.

In still another opinion (SPJGA 242.12, April 12, 1942), it was concluded that the twenty percent increase in the base pay of enlisted men authorized by section 18 of the act of March 7, 1942 (Public Law 490, 77th Cong.), for any period of service on duty in any place beyond the continental limits of the United States or in Alaska should be considered as included within the term "base pay" as used in the fourth subparagraph of said paragraph 104c of said manual, as amended. There, the statute in point in terms expressly increased the base pay of the persons involved; this led to the postulates that such increase was fixed by statute, and clearly fell within the quoted excerpt from manual: "The term 'base pay' comprehends no element of pay other than the minimum base pay of the grade or class within grade as fixed by statute * * * ", and that such pay was subject to courts-martial forfeitures. This

opinion significantly adheres to the policy that what is base pay is subject to forfeiture. Of negative interest, perhaps, is the fact that although this type of pay is in a sense contingent in that it depends upon duty in specified geographical areas, nevertheless the nature of the case makes it far more uniform and permanent than the case of a contingency based upon participation in flights as set forth hereinabove.

It is therefore concluded that flying pay is not "minimum base pay" of the rank or grade "as fixed by statute"; that uniformity in the administration of military justice requires the consistent usage of base pay and pay for length of service as the pay upon which forfeitures of less than all of the pay involved, are to be calculated, where controlling authority does not prescribe otherwise; and that the flying pay of officers, whether of the Air Forces or otherwise, is not subject to forfeiture under Article of War 104.

The foregoing considerations are also conclusive of the question as to the forfeiture of the flying pay of aviation cadets. Such cadets, as shown, are in a special and separate enlisted grade, which is a substitute for the former grade of flying cadet. Their flying pay is explicitly included in their base pay by the statute creating such pay, supra, and as a consequence their flying pay in this sense is subject to forfeiture. However, since aviation cadets are not officers (cf. Dig. Op. JAG, 1912-40, p. 165, sec. 359(7); id., pp. 250-251, sec. 402(7)), they are not subject to the forfeiture of one-half of their monthly pay for one month under Article of War 104.

4. It is therefore recommended that the basic communication be transmitted to The Inspector General, by second indorsement, prepared for the signature of the Chief of Division, stating:

> It is the opinion of this office that the increase of 50 per centum of their pay received by officers, whether of the Air Corps or otherwise, when by orders of competent authority they are required to participate regularly and frequently in aerial flights, and where in consequence of such orders they do participate in regular and frequent flights, in accordance with the provisions of section 10 of Executive Order No. 9195, July 7, 1942 (7 F.R. 5257; par. 2, AR 35-1480, Oct. 10, 1942), is not subject to forfeiture under the pertinent provisions of Article of War 104 (41 Stat. 808; 10 U.S.C. 1576) for the reason that such increase of pay is not part of the minimum base pay of officers as fixed by statute, such minimum base pay being, together with pay for length of service, with certain possible exceptions not here

material, the only type of pay subject to partial forfeiture; and further, that the flying pay of aviation cadets, being expressly included as part of their base pay, is subject to forfeitures in appropriate disciplinary instances. However, the pay of aviation cadets is not subject to forfeiture under Article of War 104, as such cadets are not officers.

Charles W. West,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 1943/6035 April 17, 1943

MEMORANDUM for The Judge Advocate General.

Subject: Refund by an Army officer of the cost of transportation secured on Government transportation request while a civilian employee of the Government.

1. By third indorsement (AG 201 - Chase, Fred M. (3-20-43) PO-M) dated April 13, 1943, these papers were referred for remark concerning a claim for refund against Captain F. M. Chase, Chicago Ordnance Department, Chicago, Illinois, for the cost of transportation secured on Government transportation request while he was a civilian employee of the War Production Board, Omaha, Nebraska.

2. The material facts as disclosed by the file are substantially as follows: Prior to entry in the Army, Captain Chase was a civilian employee of the War Production Board located at Omaha, Nebraska, and on December 6, 1941, was orally instructed by the Regional Administrative Officer to travel from Omaha, Nebraska, to Sioux Falls, South Dakota, relative to an appointment as acting manager of the office there. He was issued a Government transportation request for the purpose of travelling to his new official station. On January 19, 1943, the Regional Fiscal Officer, Office for Emergency Management, sent an invoice in the amount of $8.85 to Captain Chase for the travel involved, stating as the reason that the travel was not authorized by prior written authority in accordance with prescribed regulations. On January 22, 1943, Captain Chase declined to pay the invoice on the ground that the travel was ordered by his superior and that oral instructions were issued, as there was not sufficient time to obtain proper written authority. By letter dated February 13, 1943, from the Office for Emergency Management to The Adjutant General, request was made for assistance in collecting the money from Captain Chase. The matter was referred to Captain Chase for remark and he replied by second indorsement dated April 2, 1943, denying responsibility for the debt on the grounds stated above.

3. The determination whether the amount of $8.85 is owned by Captain Chase is governed by the regulations of the War Production Board and it would be manifestly improper for this office to express an opinion regarding a matter which is under the jurisdiction of an independent office of the Government. However, assuming, for the purposes of this case, that the determination made is valid, there is presented the question whether stoppage of the officer's

pay may be made to satisfy the debt. There are two pertinent statutes relating to stoppage of pay, one, the act of May 26, 1936 (49 Stat. 1374; 5 U.S.C. 46b), which authorizes withholding the pay of persons in the Executive branch of the Government whenever the statement of the account of the disbursing officer has been disallowed by the General Accounting Office; and, secondly, section 1766, Revised Statutes, as amended (5 U.S.C. 82), as restricted by the act of July 16, 1892 (27 Stat. 177; 10 U.S.C. 877), which prohibits payment to persons who are in arrears to the United States. The first act is obviously inapplicable because there has been no disallowance of the accounts of the disbursing officer. The second act, having been construed to apply only to persons who have received Government moneys for the purpose of disbursement and have failed to properly account therefor, is also inapplicable (SPJGA 1942/5934, Dec. 17, 1942; SPJGA 1942/4184, Sept. 12, 1942). It therefore appears that there is no authority for withholding the pay of Captain Chase under the stated circumstances.

4. It is therefore recommended that these papers be returned to The Adjutant General, by fourth indorsement, prepared for the signature of the Assistant Chief of Division, stating:

> The determination whether the amount of $8.85 is owed by Captain Chase is governed by regulations of the War Production Board or the Office for Emergency Management and thus beyond the province of the War Department. Assuming, however, that the amount claimed is due, there is no legal authority for withholding the pay of Captain Chase under the stated circumstances.

Irvin Schindler,
Colonel, J.A.G.D.,
Assistant Chief of Military Affairs Division.

SPJGA 1943/4640 April 6, 1943.

MEMORANDUM for The Judge Advocate General.

Subject: Withholding of pay of enlisted men to reimburse Post Office Department for loss sustained by reason of money order forgery.

1. By informal action sheet (AG 311.13 (3-26-43) AO-P) dated March 31, 1943, there was transmitted for data on which to base reply a letter dated March 26, 1943, from the Chief Inspector, Post Office Department, requesting advice concerning what "action the War Department may take to withhold the soldier's pay and allowances and reimburse the Post Office Department for the loss sustained in this and other cases of money order forgery".

2. The material facts of this case as disclosed by the inclosed letter appear to be substantially as follows: A letter containing two money orders totaling $125 addressed to Private Charles Brooks arrived at his station in Yakima, Washington, when he and all members of his detachment except Private Albert I_____ were absent on leave. The battalion mail clerk gave this letter, with other mail for the detachment, to I_____ for delivery. Subsequently both money orders were forged and cashed by I_____ at the Yakima Post Office.

The Commanding General, 44th Division, ordered that I_____ be confined in the Post Guard House, Fort Lewis, Washington, until such time as he might be turned over to the civil authorities for prosecution. It does not appear what, if any, action has been taken by those authorities.

The Chief Inspector expressed the opinion that the post office clerk who cashed the money orders was not negligent in that he relied upon the metal identification tag of the true payee, which was also stolen by I_____, as a basis of identification and, therefore, that he should not be held financially responsible. Accordingly, when no refund could be obtained from I_____ the postmaster at Yakima paid Brooks $125 out of official funds pending collection and settlement, thereby creating a deficit in such funds.

3. The act of May 22, 1928 (45 Stat. 698), as amended by the act of June 26, 1934 (48 Stat. 1222; 10 U.S.C. 875a), provides in pertinent part as follows:

"That under such regulations as the Secretary of War shall prescribe, when it has been administratively ascertained that an enlisted man of the Army is indebted to the United States or any of its instrumentalities, the amount of such indebtedness may be collected in monthly installments by deduction from his pay on current pay rolls: * * * And provided further, That the Secretary of War may cause to be remitted and canceled any part of such indebtedness remaining unpaid either on honorable discharge of the enlisted man from the service or prior thereto when in his opinion the interests of the Government are best served by such action: * * *"

4. This office has expressed the opinion that the word "instrumentalities" as used in the quoted statute embraces only instrumentalities of the United States under the control of the Secretary of War (SPJGA 1942/4052, Sept. 3, 1942; JAG 242.3, Aug. 22, 1941; JAG 242.3, Oct. 25, 1937; JAG 242.4, Aug. 6, 1937). Although in the case under consideration an executive department of the United States is concerned, rather than an instrumentality thereof, it appears that the reasoning of the cited opinions is applicable. In the opinion of August 6, 1937 (JAG 242.4), after a discussion of the history of the act under consideration, it was stated:

"5. It appears, therefore, that neither the Secretary of War nor the officials of the War Department sought authority which would permit the Secretary of War to make administrative ascertainment as to a soldier's indebtedness with respect to Government instrumentalities outside of the War Department, or with respect to damage of Government property not under control of the Secretary of War.

"6. The penultimate proviso of the act [quoted above] gives the Secretary of War authority to remit or cancel, in whole or in part, the administratively determined indebtedness of an enlisted man. This proviso must be read in conjunction with the entire bill in order to ascertain the true scope of the legislation. It is plain that the War Department sought no authority whereby the Secretary of War would be permitted to enter the boundaries of other departments and there make decisions respecting the cancellation of an indebtedness of an enlisted man of the Army to the agencies of that department. The administration of the law so interpreted would not be feasible for practical reasons. Obviously, the Congress did not intend to give the Secretary of War authority to cancel an enlisted man's contractual indebtedness to all Government agencies; e.g., Home Owner's

Loan Corporation, Federal Housing Administration, Reconstruction Finance Corporation, etc. It is believed that Congress intended this authority to extend to those instrumentalities of the Government which are by their nature dependent upon appropriated funds under the immediate control of the Secretary of War."

The Post Office Department, of course, is not an agency under the control and supervision of the Secretary of War. Accordingly, based upon the foregoing authorities, it is the opinion of this division that the pay of Private I_____ may not be stopped under authority of the quoted statute to satisfy an indebtedness to that department.

Similarly, under the view expressed in a recent opinion of this office (SPJGA 1942/5686, Dec. 2, 1942), the facts of which closely correspond to those of the case under consideration, there may be no stoppage of Private I_____'s pay under the provisions of Article of War 105.

5. It is therefore recommended that this file be returned to The Adjutant General, by informal action sheet entry, prepared for the signature of the Assistant Chief of Division, stating:

There is no law which authorizes the War Department to withhold from the pay of Private I_____ any money to reimburse the Post Office Department for its loss sustained by reason of his alleged forgery of the money orders in question. It is not apparent what action, if any, has been taken, or is contemplated, by the civil authorities to obtain reimbursement, but it is indicated that no recovery is expected through action of the civil courts. It appears, therefore, that, in the event Private I_____ is returned to a duty status, the most promising means of recovering from him would be by voluntary action on his part, the details of which might be arranged through his commanding officer.

Irvin Schindler,
Colonel, J.A.G.D.,
Assistant Chief of Military Affairs Division.

SPJGA 1943/4644 April 21, 1943

MEMORANDUM for The Judge Advocate General.

Subject: Shortages in accounts of Army mail clerks.

1. By memorandum (AG 322.06 Army Postal Service (3-23-43)AO-P) dated March 30, 1943, there was referred for advice the question "whether there is any manner in which the Post Office Department may be reimbursed for unpaid shortages, resulting from embezzlements, in the accounts of Army mail clerks except through demand on sureties".

2. According to the memorandum and the inclosed letter dated March 23, 1943, from the Chief Inspector, Post Office Department, the material facts appear to be substantially as follows: Staff Sergeant Frederick J. Miller, Army mail clerk, APO 839, New Orleans, Louisiana, misappropriated $439.25 of postal funds. He was convicted by court-martial, presumably for the embezzlement, and sentenced to confinement at hard labor for two years and total forfeiture of all pay and allowances due and to become due. Partial restitution by Miller reduced the shortage to $134.41. The Post Office Department desires that some arrangement be made by the War Department whereby this and similar unpaid shortages may be paid from "the forfeited pay and allowances of military personnel who embezzle postal funds".

The memorandum states that bonding companies are reluctant to furnish bonds for Army mail clerks and, consequently, that it is feared that any substantial number of collections from sureties would result in their failure to assume further risks of this character.

There is no record of the mentioned court-martial proceedings on file in this office, but, in view of the stated terms of the sentence, it is assumed that a dishonorable discharge was included, although there is no way of ascertaining, from the information available, whether the execution of such dishonorable discharge was ordered suspended.

3. It is to be noted at the outset that a stoppage of the soldier's pay under the provisions of the act of May 22, 1928 (45 Stat. 698, as amended; 10 U.S.C. 875a), is not permissible in view of the repeated holdings of this office that that act has no application where, as in this case, the indebtedness is to a Federal instrumentality other than the War Department or its agencies (see SPJGA 1943/4640, Apr. 6, 1943; JAG 242.3, Aug. 22, 1941; id., Oct. 25, 1937).

4. Section 1766, Revised Statutes, as amended (5 U.S.C. 82), provides in pertinent part, as follows:

> "No money shall be paid to any person for his compensation who is in arrears to the United States, until he has accounted for and paid into the Treasury all sums for which he may be liable. * * *"

The act of July 16, 1892 (27 Stat. 177; 10 U.S.C. 877), provides as follows:

> "The pay of officers of the Army may be withheld under section seventeen hundred and sixty-six of the Revised Statutes on account of an indebtedness to the United States admitted or shown by the judgment of a court, but not otherwise unless upon a special order issued according to the discretion of the Secretary of War."

The act of March 4, 1915 (38 Stat. 1065; 10 U.S.C. 876), provides, in pertinent part, as follows:

> "* * * pay and allowances shall not accrue to a soldier under sentence of dishonorable discharge, during such period as the execution of the sentence of discharge may be suspended. * * * "

Obviously, if a sentence of dishonorable discharge is ordered executed no pay and allowances would accrue subsequent to the date of such order.

5. Section 1766, Revised Statutes, supra, authorizes the withholding of the compensation of "any person" who, being in a relation of trust to the Government by reason of having in his hands sums or balances of public funds for which he is bound to render accounts and to turn the balance of money into the Treasury, is in arrears to the United States (26 Op. Atty. Gen. 77; 3 Op. Atty. Gen. 52; JAG 242.4, Jan. 20, 1928). The act of July 16, 1892, imposed certain limitations on stoppages with respect to pay of Army officers to the effect that "such stoppage shall not be made * * * unless the indebtedness in question is admitted, or shown by the judgment of a court, or the stoppage is made by the special order of the Secretary of War" (McCarl v. Pence, 18 F(2d) 809, 811 (1927)). There is no statute which imposes similar limitations with respect to the pay of other personnel of the Army in such cases.

The applicability of section 1766, Revised Statutes, supra, to enlisted men has been the subject of several prior opinions of this office. * * *

* * * * *

6. The views contained in the above-cited opinions dated March 17, 1916, and June 2, 1924, on the one hand, and April 5, 1922, and January 20, 1928, on the other, as to the applicability to enlisted men of section 1766, Revised Statutes, thus appear to be in conflict. Both views have been published in the Digest of Opinions of The Judge Advocate General of the Army (see Dig. Op. JAG 1912-30, sec. 612(2) and Dig. Op. JAG 1912-40, sec. 1516(3)).

The statements in question contained in the 1916 opinion are not reasoned, are regarded as obiter dictum, and in the opinion of this division are not legally sound. Accordingly, it is believed that the office should adhere to the view that section 1766, Revised Statutes, is applicable to enlisted men in proper cases and it is recommended that so much of the above-cited opinions of March 17, 1916, and June 2, 1924, as are in conflict with that view be expressly overruled.

7. On the basis that section 1766, Revised Statutes, is applicable to enlisted men in proper cases, it becomes necessary to determine whether Army mail clerks come within the class of persons subject thereto. Ordinarily, enlisted men are not charged with accountability for public property or public funds (subpar. 4d, AR 35-6520, Feb. 8, 1943). However, it appears that the arrangements with respect to Army mail clerks constitute an exception to this general rule. The designation of enlisted men as Army mail clerks is authorized by the act of August 21, 1941 (55 Stat. 656; 39 U.S.C. 138), and under the provisions of the mentioned act, in the performance of their postal duties, such clerks are governed by postal regulations. By the terms of these regulations they are accountable for public money which may come into their possession or control (see secs. 11, 22 and 33, The Army Mail Service, Instructions for the Guidance of Army Mail Clerks and Assistant Army Mail Clerks, dated Feb. 1, 1942, issued by the Postmaster General, with the concurrence of the Secretary of War). Such being the case it appears that they come within the provisions of section 1766, Revised Statutes.

8. Under the provisions of paragraph 10, Army Regulations 35-2440, May 21, 1942, authorized stoppages to reimburse the United States take precedence over court-martial forfeitures in adjusting the accounts of an enlisted man. It does not appear that any stoppage against the pay of Sergeant Miller was authorized prior to the forfeiture. However, it does appear that the shortage in question existed, in fact, prior to the forfeiture and, accordingly, it is believed that should a stoppage against the named soldier's pay be directed now, based upon such shortage, an adjustment may be

made with respect to his accrued pay as of the time of the final settlement of his account (SPJGA 1942/5819, Dec. 11, 1942). Such adjustment may be effected through application to the General Accounting Office (JAG 333.9, Nov. 22, 1938). In the event the amount of the accrued pay is insufficient to satisfy the shortage there appears to be no administrative method by which the War Department may collect from the pay of the soldier concerned the unpaid balance unless he is subsequently returned to a duty status.

9. It is therefore recommended that reply be made to The Adjutant General by memorandum, prepared for the signature of The Judge Advocate General, stating:

> Referring to your memorandum (AG 322.06 Army Postal Service (3-23-43)A0-P) dated March 30, 1943, subject as above, it appears that no recovery can be had under the act of May 22, 1928 (45 Stat. 698, as amended, 10 U.S.C. 875a) because that act has no application where, as in this case, the indebtedness is to a Federal instrumentality other than the War Department or its agencies. However, it is my opinion that under the provisions of section 1766, Revised Statutes, as amended (5 U.S.C. 82), the compensation of Army mail clerks may be withheld to reimburse the United States for unpaid shortages in their accounts resulting from embezzlements. Under the provisions of paragraph 10, Army Regulations 35-2440, May 21, 1942, authorized stoppages to reimburse the United States take precedence over court-martial forfeitures in adjusting the accounts of enlisted men. In the case of Staff Sergeant Frederick J. Miller, it is my opinion that if, in fact, the shortage existed prior to the effective date of his sentence involving total forfeitures, an order withholding the compensation due him at the time of such forfeiture may be made now which will take precedence in the manner indicated, and that his final account may be adjusted accordingly through application to the General Accounting Office. The amount of compensation which may be withheld to satisfy an unpaid shortage in cases involving a dishonorable discharge, either ordered executed or suspended, is limited to the accrued pay at the time the sentence is ordered executed. In the event such amount is insufficient to satisfy the shortage there appears to be no administrative method by which the War Department may collect from the pay of the soldier concerned the unpaid balance unless he is subsequently returned to a duty status.
>
> So far as the opinion of this office (JAG 242.4; Dig. Op. JAG 1912-30, sec. 612(2)), dated June 2, 1924, and the opinions therein cited, are in conflict herewith, they are hereby overruled.

Irvin Schindler,
Colonel, J.A.G.D.,
Assistant Chief of Military Affairs Division.

SPJGA 1943/6474 May 13, 1943

MEMORANDUM for The Judge Advocate General.

Subject: Assignment and termination of quarters and rental allowances.

1. By informal action sheet (AG 201 Schaeffer, Bertram (12-5-42) PO-M) dated April 27, 1943, there was referred for remark and recommendation a file containing a letter dated December 5, 1942, from the Commanding General, 4th Motorized Division, Camp Gordon, Georgia, with nineteen indorsements, the body of the final indorsement (AG 201-Schaeffer, Bertram (O)(12-5-43)) dated April 23, 1943, from the Commanding General, Fourth Service Command, to The Adjutant General, reading as follows:

> "It is the view of this Headquarters that provisions of AR 210-10 places the responsibility for assignment, adequacy, and termination of assignment of quarters on the commanding officer of the post and that such responsibility may not properly be delegated to the commanding officer of a division stationed at the post. Request decision."

2. It appears from the file that it is the policy at Camp Gordon "for the Post Commander to assign to a Division Commander or separate unit commanders all buildings required for the proper housing of his personnel. In the case of the Division, the Division Commander then reassigns the buildings to units of his command". The file contains a copy of General Orders No. 11, Headquarters, Camp Gordon, Georgia, dated December 19, 1941, reading in part as follows:

> "1. Authority to assign quarters is delegated to division and separate unit commanders. * * *
>
> "* * *
>
> "d. Orders assigning and terminating assignment of quarters will be made by the division and separate unit commanders concerned. Copies will be furnished this headquarters."

3. Prior to its amendment on March 6, 1943, the fourth paragraph of section 6 of the Pay Readjustment Act of 1942 (Public Law 607, 77th Cong.), effective June 1, 1942, reads in pertinent part as follows:

"No rental allowance shall accrue to an officer having no dependents while he is on field or sea duty, nor shall any rental allowance accrue to an officer with or without dependents who is assigned quarters at his permanent station unless a competent superior authority of the service concerned certifies that such quarters are not adequate for the occupancy of of the officer and his dependents, if any: * * * "

Pursuant to this act the President issued Executive Order No. 9255, dated October 13, 1942, effective June 1, 1942 (Sec. III, Bull. 51, WD, Oct. 16, 1942), governing the payment of rental allowances to officers. This order superseded Executive Order No. 4063 of August 13, 1924, which is embodied in Army Regulations 35-4220, November 19, 1941.

The first-mentioned Executive order reads in pertinent part as follows:

"I. Definitions. As used in these regulations or in regulations prescribed pursuant hereto:

"* * * (e) The terms 'competent superior authority' and 'competent authority' shall mean the officer required by regulations of the department concerned to assign public quarters. * * *

"II. Assignment of quarters. - (a) The assignment of quarters to an officer shall consist of the designation in accordance with regulations of the department concerned of quarters controlled by the Government for occupancy without charge by the officer and his dependents, if any. * * *

"III. * * * (b) No officer shall be paid a rental allowance for any period which he is assigned quarters at his permanent station which have been determined to be adequate in accordance with regulations prescribed by the head of the department concerned. * * * "

The fourth paragraph of section 6 of the Pay Readjustment Act of 1942, supra, was amended by the act of March 6, 1943 (Public Law 5, 78th Cong.), to read as follows:

"No rental allowance shall accrue to an officer having no dependents while he is on field duty unless his commanding officer certifies that he was necessarily required to procure quarters at his own expense, or while on sea duty, except for temporary periods of sea duty not exceeding three months, nor shall

any rental allowance accrue to an officer with or without dependents who is assigned quarters at his permanent station unless a competent superior authority of the service concerned certifies that such quarters are not occupied because of being inadequate for the occupancy of the officer and his dependents, if any, and such certifications shall be conclusive; Provided, That an officer although furnished with quarters shall be entitled to rental allowance as authorized in this section if by reason of orders of competent authority his dependents are prevented from occupying such quarters."

Forms of certificates are prescribed in section I, Circular No. 87, War Department, March 29, 1943 (rescinding sec. IV, Cir. No. 69, WD, Mar. 9, 1943).

Paragraph 13, Army Regulations 210-10, December 20, 1940, as changed by Changes No. 1, October 1, 1942, provides in pertinent part:

"13. Quarters. - a. General. - The post commander will make all assignments of quarters, * * *.

"b. For officers.

"(1) Assignments.

"(a) How made. - All assignments of quarters will be made in writing by the officer chargeable with such duty, giving precedence to officers in accordance with the military requirements as determined by the post commander.

"* * *

"(e) Appeal. - Any officer may appeal to the corps area commander, or, in the case of exempted stations, to the War Department, if he feels that the post commander has not properly determined his case, and the corps area commander, or the War Department, as the case may be, will confirm or change the assignment made by the post commander in such case. This action will be final. (Underscoring supplied)

"(2) Adequacy.

"(a) In determining the adequacy of quarters the post commander making assignment will give due consideration to the rank of the officer and to the number, age, and sex of dependents, if any.

"* * *

"(3) Termination.

"(a) An officer's assignment of quarters at his permanent station will be terminated by the post commander under the following conditions only: * * *"

4. It is to be noted that the pertinent Army regulations direct action by the post commander, in each instance, with respect to assingment, termination and determination of adequacy of quarters, and make no provision for the delegation of such authority by the post commander. As a general rule, in the absence of a prohibition against such action, authority to perform a purely administrative act may be delegated, whereas authority to perform an act involving the exercise of discretion may not. The pertinent regulations indicate clearly that the assignment and determination of adequacy of quarters in every case involves the exercise of discretion. Although quarters may be terminated only under enumerated conditions and the exercise of that authority in itself does not necessarily involve any discretion, it clearly appears that the regulations in question contemplate that action with respect to termination of assignment of quarters shall be taken only by the authority competent to assign them. It therefore follows that the authority to assign, terminate and determine the adequacy of quarters may not be delegated by the post commander to any other officer.

5. It is therefore recommended that these papers be returned to The Adjutant General by informal action sheet entry, prepared for the signature of the Assistant Chief of Division, stating:

The Commanding General, Fourth Service Command, is quite right in his view that, under existing law and regulations, the responsibility for assignment, termination of assignment and determination of adequacy of assigned quarters rests upon the post commander and the authority to take such actions may not be delegated by that officer to any other officer. The function of announcing such actions by order or command of the post commander, may, of course, be delegated

by the latter to any of his subordinates, either specifically, or under general instructions so defining the policy to be followed as to assure that the decision in each case will be that of the post commander. However, there would be no legal objection to amendment of the pertinent regulations to provide for delegation by post commanders of their powers in this respect, should the War Department regard such amendment advisable. It is recommended that such further action as may be taken in this connection conform to the views above expressed.

Irvin Schindler,
Colonel, J.A.G.D.,
Assistant Chief of Military Affairs Division.

SPJGA 1943/13122 11 September 1943.

MEMORANDUM for The Judge Advocate General.

Subject: Erroneous Payment of Rental Allowance.

1. By informal action sheet (AG 201-Burns, William C. (26 Jun 43) PO-M) dated 27 August 1943, there was again referred for remark and recommendation a file pertaining to the alleged indebtedness of First Lieutenant William C. Burns, CMP, to the Government in the amount of $323, which indebtedness it is claimed arises from erroneous payments of rental allowances received by Lieutenant Burns for the six months, August 1942 to January 1943, inclusive.

2. It appears that the mentioned officer, who was without dependents during the period covered by the alleged erroneous payments, occupied, at least on a part-time basis, assigned quarters at his permanent station, Fort Myer, Virginia, which were certified by the post commander as inadequate. Lieutenant Burns does not claim that he incurred any expense in connection with the maintenance of private quarters. The files of this office (SPJGA 1943/10736, 27 Jul 1943) disclose that this case was previously the subject of an opinion as to the validity of the rental allowances paid to Lieutenant Burns in which it was stated in pertinent part as follows:

> "As Lieutenant Burns does not make a showing that he incurred expense in connection with securing quarters elsewhere during the period in question, it appears that he was not entitled to rental allowances for the months from August 1942, through January 1943, inclusive, under laws and regulations existing at that time, notwithstanding the fact that the post commander may have properly certified that the quarters then assigned to him were inadequate. It is therefore recommended that the mentioned officer be advised accordingly and that he be again called upon to authorize deductions from his pay to liquidate this indebtedness."

No relevant facts additional to those previously considered are now submitted but it appears from the seventh indorsement to the basic letter that the mentioned officer was advised in accordance with the above opinion of this office. He replied by eighth indorsement that he did not consider the indebtedness finally determined because, (a) the matter was primarily a dispute between the War Department and the Commanding Officer, Fort Myer, Virginia, who made the certificate of inadequacy of quarters, and "is the individual responsible for such payments"; (b) the

Comptroller General will probably not challenge the payments because of his having approved voucher Form No. 336 of the War Department which did not require a showing that the officer incurred expense for private quarters; and (c) other officers had received rental allowances in similar situations and had not been required to repay them.

3. A reconsideration of this matter presents no reason for rechanging the view of this office previously expressed concerning the entitlement of the mentioned officer to rental allowances for the period in question (SPJGA 1943/10736, supra). The reasons and authorities for the views therein stated continue applicable. The additional contentions of the officer concerned are not well founded. It does not in any way appear that a dispute concerning this matter now exists or ever existed between the Commanding Officer, Fort Myer, Virginia, and the War Department or the Finance Department of the Army. On the contrary, an unanimity of opinion of all except Lieutenant Burns seems to exist. Furthermore, whether the original action of the commanding officer was in error is immaterial to the ultimate question whether the payments were erroneously made, and there is no denial that Lieutenant Burns received the allowances. Absence of any provision in voucher Form No. 336 of the War Department for certifying with respect to expenses for additional quarters does not affect the requirements of law and regulations in that connection. Subparagraph 20c, Army Regulations 35-4220, 19 November 1941, which was in effect during the period in question, required the officer making claim for rental allowance to certify that he maintained additional quarters at his own expense.

Refusal by the officer concerned to repay or arrange for payment of the unauthorized rental allowance received by him may not be the basis for stoppage of his pay under section 1766, Revised Statutes (5 U.S.C. 82), and the act of 16 July 1892 (27 Stat. 177; 10 U.S.C. 877), because the payments were not made to him as a contractor or disbursing officer to hold in trust nor did they represent balances of public money for which he was required to account (SPJGA 1943/6527, 15 May 1943; SPJGA 1942/5392A, 16 Nov 1942). Neither may stoppage of his pay be made at this stage of the matter under the act of 26 May 1936 (49 Stat. 1374; 5 U.S.C. 46b), inasmuch as it does not appear that the General Accounting Office has disallowed the items of rental allowance in the account of the finance officer who paid them (SPJGA 1943/6527, supra; SPJGA 1942/5392A, supra). Upon disallowance of these items by the General Accounting Office stoppage of the pay of Lieutenant Burns may be made without his consent under the act of 26 May 1936, supra. Furthermore, the administrative practice of stopping an officer's pay to reimburse the Government for the excess cost of shipping his household baggage when he does not make voluntary remittance is not believed to be applicable except in cases of

failure to pay the excess cost for such shipments (SPJGA 1943/7151, 6 Jun 1943).

This office recommended in connection with a case similar to the one under consideration (SPJGA 1942/5392A, supra) that the officer there concerned be given a final opportunity to make settlement and in the event he did not do so that the claim be transmitted to the Attorney General for collection by civil proceedings and the Comptroller General informed of the action taken.

Thus, action designed to collect the indebtedness directly appears to be limited to either civil suit, which may be instituted immediately, or to stoppage of pay, at some time in the future, under the act of 26 May 1936, supra. The suggestion of the Fiscal Director contained in tenth indorsement dated 16 August 1943, that disciplinary action be taken, would be appropriate upon a determination that the officer's conduct has been dishonorable, but such action would not necessarily result in payment of the indebtedness.

Although the above courses of action may be available, it is believed that before adoption of any the officer concerned should be advised that the entire matter has been reconsidered in the light of his contentions and should again be given an opportunity to arrange repayment.

4. It is therefore recommended that these papers be returned to The Adjutant General by informal action sheet entry, prepared for the signature of the Chief of Division, stating:

1. After further consideration of the file, this office adheres to the views previously expressed in entry SPJGA 1943/10736, 27 July 1943, to informal action sheet AG 201-Burns, William C. (26 Jun 43) PO-M, dated 17 July 1943, stating that as Lieutenant Burns does not show that he incurred any expense in connection with maintaining private quarters during the period in question, he was not entitled to rental allowances for that time under the laws and regulations then in effect, notwithstanding the fact that the post commander certified that the quarters then assigned to him were inadequate.

2. Although there is no statutory authority for stoppage of the pay of the officer concerned at this stage of the matter, such stoppage may be accomplished under the act of 26 May 1936 (49 Stat. 1374; 5 U.S.C. 46b), when and if the items of rental allowances are disallowed by the General Accounting Office in the account of the finance officer who made the payments. It is recommended that action be taken to secure such disallowance and that the stoppage be then applied.

Irvin Schindler,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 1943/6585 May 10, 1943

MEMORANDUM for The Judge Advocate General.

Subject: Quarters assignment.

1. By inter-office routing slip (SPGAL/245.81 Gen (4-11-43)-2) dated May 1, 1943, there was referred for remark and recommendation a file of papers relating to the assignment of quarters to officers and enlisted men of the first three grades.

2. According to the basic letter dated April 11, 1943, from the Commanding General, Fourth Air Force, to the Commanding General, Western Defense Command and Fourth Army, it appears that by reason of the restrictions on movement of household goods, as set forth in section VI, Circular No. 261, War Department, 1942, as amended by section II, Circular No. 279, War Department, 1942 "base commanders * * *, are confronted with the problem of officers refusing quarters due to the absence of furniture and requesting rental allowance in lieu thereof; the prohibitive cost of transporting furniture being responsible for the officer's inability to equip the quarters with their own furniture". The mentioned restrictions are to the effect that effective September 1, 1942, and for the duration of the present war, military personnel are permitted only one movement of their household goods at Government expense. Accordingly, information was requested "whether the absence of furniture is grounds for inadequacy and thereby making the alternative payment of rental allowance justifiable".

This request was transmitted to The Adjutant General, who forwarded it to the Chief of Finance for remark. The views of the Chief of Finance are set forth in the third indorsement (SPFDR 245.81/404411 (San Francisco, Calif.)) dated April 27, 1943, which reads as follows:

> "While the assignment of quarters is primarily an administrative matter, over which this office has no jurisdiction, it may be remarked that no authority is known under which an officer may refuse to accept quarters which are properly assigned to him by competent authority, and claim rental allowance in lieu thereof, basing such refusal on the restriction on transportation of household goods contained in Circular 261, War Department 1942. A disbursing officer would not be justified in making payment of rental allowance under such circumstances."

3. a. The basic relating to rental allowances of officers is contained in section 6 of the Pay Readjustment Act of 1942 (App. June 16, 1942, Public Law 607, 77th Cong.), as amended by the act of March 6, 1943 (Public Law 5, 78th Cong.), which reads, in pertinent part, as follows:

> "Except as otherwise provided in this section, each commissioned officer below the grade of brigadier general or its equivalent, in any of the services mentioned in the title of this Act, while either on active duty or entitled to active-duty pay shall be entitled at all times to a money allowance for rental of quarters.
>
> "* * *
>
> "No rental allowance shall accrue to an officer having no dependents while he is on field duty unless his commanding officer certifies that he was necessarily required to procure quarters at his own expense, or while on sea duty, except for temporary periods of sea duty not exceeding three months, nor shall any rental allowance accrue to an officer with or without dependents who is assigned quarters at his permanent station unless a competent superior authority of the service concerned certifies that such quarters are not occupied because of being inadequate for the occupancy of the officer and his dependents, if any, and such certifications shall be conclusive: Provided, That an officer although furnished with quarters shall be entitled to rental allowance as authorized in this section if by reason of orders of competent authority his dependents are prevented from occupying such quarters."

This section is implemented by Executive Order No. 9255, October 13, 1942, which does not deal specifically with the question raised.

b. The basic law relating to rental allowances of enlisted men of the first three grades is contained in section 10 of the Pay Readjustment Act of 1942, supra, which provides as follows:

> "Each enlisted man of the first, second, or third grade, in the active military, naval, or Coast Guard service of the United States having a dependent as defined in section 4 of this Act, shall, under such regulations as the President may prescribe,

be entitled to receive, for any period during which public quarters are not provided and available for his dependent, the monthly allowance for quarters authorized by law to be granted to each enlisted man not furnished quarters in kind: Provided, That such enlisted men shall continue to be entitled to this allowance although receiving the allowance provided in the first paragraph of this section if by reason of orders of competent authority his dependent is prevented from dwelling with him."

The regulations authorized by the statute just quoted are contained in Executive Order No. 9206, July 27, 1942, and Army Regulations 35-4520, February 24, 1943, neither of which deals specifically with the question now raised.

4. a. With respect to officers, the question presented is whether, in determining the adequacy of quarters at a permanent station, consideration may be given to the presence or absence of furniture therein. The determination of the adequacy of quarters in general is vested in the sound discretion of the authority authorized to make assignments thereof (SPJGA 1942/3213, July 22, 1942) whose decision thereon is conclusive. In making a determination regarding adequacy of quarters, such authority must consider each situation in the light of its own peculiar facts. Paragraph 13b(2), Army Regulations 210-10, December 20, 1940, sets forth certain rules for the guidance of the mentioned authority but it is clearly apparent that those rules are not intended to be exclusive. As the statutes governing quarters and rental allowances and regulations issued pursuant thereto are silent in this regard, it is believed that a determination, by proper authority, that quarters are not adequate by reason of the facts and circumstances relating to their furnishing, would not exceed the limits of the discretion vested in such authority. This conclusion is supported by recent decisions of the Court of Claims wherein it was inferentially held that unfurnished quarters are not necessarily adequate (Francis v. U. S., 89 Ct. Cl. 78; Larson v. U.S., 91 Ct. Cl. 304; Hartsel v. U.S., 92 Ct. Cl. 127).

It is recognized, as intimated in the basic letter, that the restrictions on the movement of household goods may bring about hardships in the cases of those officers who have exhausted their moves at Government expense and subsequently are assigned to unfurnished quarters at a permanent station, particularly those officers who have dependents. Whether a uniform policy designed to alleviate such hardships should be adopted by the War Department and notice thereof transmitted throughout the Military Establish-

ment for the information and guidance of officers required to make assignments of quarters, however, is a matter for consideration by the administrative authorities of the War Department.

b. Reference to the statute and regulations relating to the quarters of enlisted men of the first three grades fails to disclose any consideration of the adequacy thereof. It appears that under the provisions of subparagraph 13d, Army Regulations 210-10, December 20, 1940, the assignment of such quarters is discretionary with the post commander and no reason appears why the conclusion reached above with respect to officers is not equally applicable to enlisted men. Undoubtedly, the mentioned enlisted men are being subjected to the same hardships regarding quarters by reason of the restrictions on movement of household goods as are officers. Accordingly, it is believed that like consideration may be given by the War Department to the adoption of a policy relating to the assignment of quarters of such enlisted men as is suggested in paragraph 4a of this memorandum with respect to officers.

5. It is therefore recommended that this file be returned to the Director, Military Personnel Division, Army Service Forces, by memorandum, prepared for the signature of the Chief of Division, stating:

> Referring to your inter-office routing slip (SPGAL/245.81 Gen (4-11-43)-2), dated May 1, 1943, subject as above, it appears that the determination of the adequacy of officers' quarters rests in the sound discretion of the authority authorized to make assignments thereof. It is believed that in making a determination such authority may take into consideration (1) the amount of furniture, if any, in available quarters and (2) the facts and circumstances relating to their furnishing, arising out of the restrictions on the movement of household goods as set forth in section VI, Circular No. 261, War Department, 1942, as amended by section II, Circular No. 279, War Department, 1942, and that a determination based in part upon these factors, that quarters are inadequate, would not exceed the limits of the discretion vested in that authority. This is also applicable with respect to the assignment of quarters to enlisted men of the first three grades having one or more dependents. It is recommended that such action as may be taken in this connection conform to the views above expressed.

Charles W. West,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 1943/13270 17 September 1943

MEMORANDUM for The Judge Advocate General.

Subject: Payment of uniform allowances to Charles Edward DuCharme (formerly First Lieutenant, AUS, 0-119095).

1. By informal action sheet (201) dated 2 September 1943, the accompanying file was referred to this office for opinion whether Charles Edward DuCharme (formerly First Lieutenant, AUS, 0119095) is entitled to the payment of a uniform allowance.

2. The file discloses that DuCharme was a First Lieutenant, Army of the United States, on active duty from 0800, 15 April 1943, until 2000, 16 April 1943. From 2000, 16 April 1943, until notice of discharge as an officer, issued 14 May 1943, was received by him, DuCharme was a First Lieutenant, Army of the United States, in an inactive status (4th Ind., 5 Aug. 1943). A previous opinion of this office (SPJGA 1943/9761, 20 Jul 1943) contains a detailed statement of the facts upon which the foregoing conclusions were based. DuCharme performed no specific military tasks as an officer during the mentioned period of active duty and, so far as the file indicates, did not provide himself with an officer's uniform.

3. The answer to the question presented depends upon whether an allowance for uniform is an item of compensation to which the officer becomes entitled because he commences to serve on active duty or is in the nature of reimbursement for an expenditure he is required to make in order to serve on active duty. This distinction is indicated in the following quotation from Sherburne v. United States, 16 Ct. Cl. 491:

> "Pay is a fixed and direct amount given by law to persons in the military service, in consideration of and as compensation for their personal service. Allowances, as they are now called, or emoluments, as they were formerly termed, are indirect or contingent remuneration, which may or may not be earned, and which is sometimes in the nature of compensation, and sometimes in the nature of reimbursement."

The act of 4 December 1942 (56 Stat. 1039; 10 U.S.C. 904a, et seq.), in pertinent part, provides for the payment of an allowance of $250 for uniforms and equipment to commissioned

officers of the Army of the United States accepted for active duty as lieutenants or captains and entitled to the pay of any of the first three pay periods on or after 3 April 1939, and who serve on active duty on 4 December 1942, or after that date during the period of the wars in which the United States was engaged when the statute was enacted and six months thereafter.

It is believed that the mentioned allowance is designed to reimburse the officer for the expense of purchasing the uniform which his active duty status requires him to wear, for it is unreasonable to suppose that Congress intended to authorize the uniform allowance as a gratuity to an officer who had not purchased a uniform in preparation for or while on active duty. In this respect it is similar to the rental allowance, which, although there is no specific statutory requirement that the officer provide himself with quarters, unless on field duty (par. 6, act 16 June 1942, 56 Stat. 359) as amended (act 6 Mar. 1943, Public Law 5, 78th Cong.), is generally considered an item of reimbursement for expenditures for quarters (Frances v. U.S., 89 Ct. Cl. 78; Schuh v. U.S., 93 Ct. Cl. 145). In the case under consideration it appears that DuCharme reported for duty in the uniform of an enlisted man with the insignia of a first lieutenant and an officer's cap, and it does not appear that at any time before or during his active service he provided himself with any substantial part of the prescribed uniform of his official grade.

4. It is therfore recommended that these papers be returned to The Adjutant General by informal action sheet entry, prepared for the signature of the Assistant Chief of Division, stating:

> It is the opinion of this office that under the particular circumstances of this case DuCharme is not legally entitled to the uniform allowance.

William T. Thurman,
Lieutenant Colonel, J.A.G.D.,
Assistant Chief of Military Affairs Division.

September 11, 1942.

SPJGA 245.6

MEMORANDUM for The Judge Advocate General.

Subject: Payment of mileage to Captain Alphonse J. Brown, Air Corps.

1. By disposition form (AG 201 Brown, Alphonse J.) dated August 28, 1942, there were referred to this office for remark and recommendation the inclosed papers relating to the claim of Captain Brown for payment of mileage.

2. It appears that under competent orders Captain Brown and five other officers, together with three soldiers serving as drivers, proceeded in three Government motor vehicles from Camp Hulen, Texas, to Norman, North Carolina, being en route from October 27, 1941, to November 1, 1941. Pursuant to the original orders, the officers, upon arrival, acted as umpires during the course of one month of maneuvers, and the soldier-drivers and motor vehicles were used to augment the umpire transportation. In compliance with the original orders, on December 1, 1941, the party departed from Norman, North Carolina, and arrived at Camp Hulen, Texas, on December 6, 1941.

3. At the time the travel from Camp Hulen to Norman was performed, an officer of the Army traveling under competent orders without troops was entitled to mileage at the rate of eight cents per mile (sec. 12, act of June 10, 1922 (42 Stat. 631); act of June 1, 1926 (44 Stat. 680); 37 U.S.C. 20; M.L., 1939, sec. 1532), and it was provided that the Secretary of War might determine what should constitute travel without troops within the meaning of the laws governing the payment of mileage to officers of the Army (act of June 12, 1906 (34 Stat. 246); 10 U.S.C. 870; M.L., 1939, sec. 1532).

Army Regulations 35-4820, dated August 4, 1937, as in effect at the time the travel from Camp Hulen to Norman was performed, reads in pertinent part as follows:

"3. Travel with and without troops defined and determined.-- a. With troops.--Traveling with troops will be regarded as covering all cases of travel included.--

* * *

"(2) Under orders for movement of detachments, escorts, or stores, where the movement is made by marches or by transportation belonging to or especially hired for the purpose by the United States.

* * *

"b. Without troops.--Traveling without troops will be regarded as covering cases of--

* * *

"(3) Travel under circumstances especially determined by the Secretary of War in each case."

The Comptroller General has held that officers detailed as umpires, provided with command cars and chauffeurs, who proceed to a station other than their own to perform the ordered duties, utilizing the command cars as transportation while acting as umpires, and who then return to their home station, are officers traveling with troops, under the provisions of subparagraph 3a (2) of the pertinent regulations. In interpreting this subparagraph as applied to the foregoing facts, the Comptroller General stated:

"* * * If an officer is assigned to the performance of an Army duty with the use of an automobile and an enlisted driver--Army equipment--for its performance, the fact that movement is involved, whether it be at the immediate post or station or at a place more distant, will not constitute it travel, or travel without troops, for the purpose of payment of mileage. The regulations quoted intend to negative payment of mileage for the performance of Army duty where Army equipment is furnished for the necessary movement to perform the assigned duty." (21 Comp. Gen. 178)

The same conclusion was reached in a later decision of the Comptroller General (MS. Comp. Gen. B-22431, Dec. 24, 1941). In a case similar to the one here considered this office has recently advised that a claim for mileage would be unavailing (SPJGA 245.6, Sept. 8, 1942).

In view of the foregoing opinions, it is believed that Captain Brown's travel from Camp Hulen to Norman will not support a claim for mileage.

4. Before the return trip was begun, the above-mentioned regulations were changed by section II, War Department Circular No. 244, November 25, 1941, which reads in pertinent part as follows:

"Pending the revision of AR 35-4820, August 4, 1937, paragraph 3 of these regulations is rescinded and the following substituted therefor:

"3. Travel with and without troops defined and determined.--a. With troops.--Traveling with troops will be regarded as covering all cases of travel included--

"(1) Under orders for movement, in whatever manner, of a body of 50 or more men (exclusive of officers) traveling together; or a separate group of men of lesser number who are rationed in kind instead of on a commuted, per diem, or meal ticket basis.

"(2) Under orders directing officers to accompany troops (as defined in (1) above).

"b. Without troops.--Traveling without troops will be regarded as covering--

"(1) Cases not included in a above. * * *

* * *

"c. Under special circumstances travel may be determined by the Secretary of War as without troops regardless of the definitions contained in a and b above."

On the return trip there were less than fifty enlisted men in the group. The travel order states that the enlisted men will receive an advance monetary allowance in lieu of rations, which makes clear that they were not rationed in kind. The officers were not directed to accompany troops. Therefore the return travel performed by Captain Brown does not fall within the definition of travel with troops as defined in subparagraph 3a. Under the provisions of subparagraph 3b(1) traveling without troops is regarded as covering cases not included in 3a. This appears to define the return travel of Captain Brown as travel without troops, and consequently, it is believed that he may properly claim mileage for the travel from Norman to Camp Hulen.

In summation, the Chief of Finance should be advised that Captain Brown does not appear to be entitled to the payment of mileage for the travel from Camp Hulen to Norman, North Carolina, but that because of the change in the pertinent regulations effected on November 25, 1941 (W.D. Cir. 244), he may properly claim mileage for the travel from Norman, North Carolina, to Camp Hulen, Texas.

As to the request of the Office of the Chief of Finance (par. 4, 6th Ind.) that that office be advised as to what action should be taken in similar cases, it is believed that no such advice should be given. Any legal opinion must necessarily depend upon the facts in each given case. The Comptroller General, in a long series of opinions, has drawn such minute distinctions in mileage cases that any opinion rendered should be based upon a particular set of facts.

5. It is therefore recommended that these papers be returned to The Adjutant General by disposition form entry, prepared for the signature of the Chief of Division, stating:

In view of prior decisions of the Comptroller General (21 Comp. Gen. 178; MS. Comp. Gen. B-22431, Dec. 24, 1941) it appears that Captain Brown may not successfully make a claim for payment of mileage for travel from Camp Hulen, Texas, to Norman, North Carolina. The Comptroller General has consistently held such travel to be travel with troops under the provisions of subparagraph 3a(2), Army Regulations 35-4820, August 4, 1937, in effect at the time the travel was performed. It is believed, however, that Captain Brown may successfully make a claim for the payment of mileage for travel from Norman, North Carolina, to Camp Hulen, Texas, that travel having been performed subsequent to the promulgation of War Department Circular No. 244, November 25, 1941, whereby the above-mentioned regulation was changed so as to bring Captain Brown's travel between those points within the definition of travel without troops. As to the action to be taken in similar cases, each such case must be decided by the application of the law to the particular facts involved and therefore no general course of action should be taken with respect to all similar cases. It is recommended that the Chief of Finance be advised in accordance with the foregoing views.

Charles W. West,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 1942/4407
(243)

September 24, 1942.

MEMORANDUM for The Judge Advocate General.

Subject: Execution of Waiver of Dependency (DSS Form 175) in relation to the Servicemen's Dependents Allowance Act of 1942.

1. By letter dated September 15, 1942, from Mr. Edmund T. Manwell, Association Government Appeal Agent, Local Board No. 21, Yuba County, Marysville, California, opinion was requested --

> "* * * whether the execution of a Waiver of Dependency DSS Form 175, to attend Officers' Training School precludes the registrants and/or the dependent's right to apply for and receive an allotment under the Service Men's Dependents Allowance Act."

There was inclosed with the mentioned letter a copy of a letter dated August 18, 1942, from the State Director of Selective Service for California to Selective Service Headquarters, Local Board No. 21, supra, stating in part:

> "It is the opinion of this Headquarters that the execution of a Waiver of Dependency, DSS Form 175, to attend Officers Candidate School does not preclude the registrant's right to apply for and receive an allotment under the Service Men's Dependents Allowance Act."

2. The Waiver of Dependency (DSS Form 175) with respect to the part thereof to be executed by the registrant provides in pertinent part:

> "* * * the registrant does specifically waive all claim for deferment from military service by reason of persons dependent upon him for support."

That part of the same form to be executed by dependents of the registrant over eighteen years of age in part reads as follows:

> "We, * * *, each for himself, specifically waive claim for deferment of the registrant from

military service by reason of dependence upon the registrant for support."

3. It is clear from the quoted sections of the Waiver of Dependency that the waiver, either on the part of the registrant applying for officer candidate training, or on the part of his dependents, expressly applies only to deferment of the registrant from military service by reason of dependency. In any event, eligibility for the benefits afforded by the Servicemen's Dependents Allowance Act of 1942 (act June 23, 1942; Public Law 625, 77th Cong.) accrues to Class A dependents, as therein defined, solely by reason of their status, actual dependency not being a matter to be considered (SPJGA 1942/3474, Aug. 4, 1942).

4. It is therefore recommended that the inclosed papers be referred to The Adjutant General, by first indorsement, prepared for the signature of the Chief of Division, stating:

The receipt of the foregoing letter dated September 15, 1942, from Mr. Edmund T. Manwell, Associate Government Appeal Agent, Local Board No. 21, Yuba County, Marysville, California, has not been acknowledged. It is the opinion of this office that the execution of the Waiver of Dependency (DSS Form 175), either on the part of the registrant applying for officer candidate training, or on the part of his dependents, does not affect the right to apply for or to receive the benefits afforded by the Servicemen's Dependents Allowance Act (act June 23, 1942; Public Law 625, 77th Cong.). Such waiver expressly applies only to the deferment of the registrant from military service by reason of dependency. Furthermore, eligibility for the benefits afforded by the mentioned act accrues to Class A dependents, as therein defined, solely by reason of their status, actual dependency not being a matter to be considered. It is recommended that reply be made to the basic letter through the Director of Selective Service, in harmony with the foregoing views and, as the matter appears to be one of general interest, it is suggested that appropriate War Department instructions in this connection be published to the field.

Charles W. West,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 1943/3049 February 27, 1943

MEMORANDUM for The Judge Advocate General.

Subject: Proposed revision of paragraph 13, W.D., Circular No. 225, July 11, 1942.

1. By disposition form (SPGAL/220.7 Gen. (2-2-43) -3) dated February 13, 1943, the accompanying file was transmitted (Attention (1) Military Affairs Div., and (2) Military Justice Div.) for remark and recommendation relative to a proposed amendment of paragraph 13, War Department Circular No. 225, July 11, 1942.

2. In contrast with existing provisions it is proposed to amend the mentioned paragraph to read as follows:

> "13. Payments of monthly family allowance will terminate at the end of the month in which notice is received by the ~~Allowance and Allotment Branch~~ Office of Dependency Benefits, A.G.O., of an enlisted man's conviction of desertion or when he has been absent ~~in desertion~~ without leave 3 months, whichever occurs first. If the enlisted man is later restored to duty, such allowances may be reinstated as of the first of the month next succeeding that in which such restoration occurs."

The proposed amendment of that portion of the paragraph changing the name to "Office of Dependency Benefits" is in accord with Services of Supply Administrative Memorandum No. 53, dated October 12, 1942, which created the Office of Dependency Benefits within The Adjutant General's Office.

The amendment relative to discontinuing payment of the family allowance after an enlisted man has been absent without leave for a period of three months rather than after an absence in desertion for a like period appears to be prompted by the recent change in War Department policy concerning administrative determinations of desertion embodied in AR 615-300, January 30, 1943.

Under prior regulations the procedure for many years, in cases of unauthorized absences, was for the enlisted man's commanding officer to drop him as a deserter under certain conditions (par. 2a, AR 615-300, June 4, 1942), and to make appropriate entries on the organization records to that effect. It

was informally ascertained from The Adjutant General's Office (Lieutenant West, Legal Branch, Office of Dependency Benefits) that family allowance payments have heretofore been discontinued, prior to the January 30, 1943, revision of AR 615-300, upon receiving advice from a particular enlisted man's commanding officer that such enlisted man had been carried as absent in desertion for a period of three months, as above determined. Under these regulations as now in effect, which apply primarily within the continental United States (par. 3a), an enlisted man who is wrongfully absent is no longer dropped as a deserter, except upon conviction by a court-martial, but is carried as "A.W.O.L." for a period of one year, unless sooner returned to military control. At the expiration of one year the absentee is dropped from the rolls of his organization and his records are completed and forwarded to The Adjutant General (par. 6). This change in the administrative procedure with regard to such absentees nullified the portion in question of paragraph 13 of the mentioned circular and necessitated an appropriate amendment thereof. It will be noted that the proposed amendment provides for termination of family allowance payments when the enlisted man has been absent without leave three months.

3. The Servicemen's Dependents Allowance Act of 1942 (Public Law 625, 77th Cong.), provides in pertinent part as follows:

> "Sec. 110. (a) Any family allowance granted under the provisions of this title to the dependent or dependents of any enlisted man shall continue to be paid irrespective of the pay accruing to such enlisted man.
>
> "(b) In case of the desertion or imprisonment of any enlisted man to the dependent or dependents of whom a family allowance has been granted under the provisions of this title, the family allowance thereafter payable to such dependent or dependents and the reduction of or charge to pay of such enlisted man shall be determined in accordance with such regulations as may be prescribed by the Secretary of the department concerned. * * *
>
> "Sec. 112. The determination of all facts, * * *, which it shall be necessary to determine in the administration of this title shall be made by the Secretary of the department concerned and such determination shall be final and conclusive for all purposes * * *." (Underscoring supplied)

4. Section 110 of the above-quoted act appears to contemplate the continued payment of the benefits provided for therein regardless of the pay accruing to the enlisted man concerned, except that

such benefits are to be discontinued in cases of desertion or imprisonment. In cases of this character the Secretary of the department concerned is authorized to prescribe rules and regulations to govern the payment of allowances to dependents. There appears to be nothing in the wording of the act, however, which permits the cessation of the payments thereunder in cases involving only "absence without leave", or which authorizes the Secretary of the department concerned to promulgate any rule or regulation to that effect. Accordingly, the portion in question of the proposed amendment is regarded as legally objectionable in its present form.

5. However, it is to be noted that section 112 of the act in question provides that the determination of all facts necessary to be determined in the administration of the act shall be made by the Secretary of War, so far as the War Department is concerned. Desertion is regarded as a fact to be so determined. The practice in the Army for many years has been to show an enlisted man as a deserter on the records of his organization after his unauthorized absence for a stated period (par. 4, AR 615-300, July 20, 1942). Such action constituted an administrative determination of desertion and was the determination upon which cessation of family allowance payments in such cases was based under paragraph 13 of the mentioned Circular No. 225 prior to the effective date of Army Regulations 615-300, January 30, 1943. In view of the mentioned long-standing practice of making administrative determinations of desertion it may be presumed that Congress intended by its use of the word "desertion" to include not only cases where convictions had been obtained but also cases where such administrative determinations of desertion had been made. Moreover, the question of desertion is regarded as one of fact to be determined by the Secretary of War under the provisions of section 112 of the act.

6. Provision may be made in paragraph 13 of the circular in question for an administrative determination that persons who have been absent without leave for three months are in desertion within the meaning of that word as used in the Servicemen's Dependents Allowance Act of 1942, by changing the paragraph to read as follows:

> Payments of monthly family allowance will terminate at the end of the month in which notice is received by the Office of Dependency Benefits, A.G.O., of an enlisted man's conviction of desertion or when he has been absent in desertion for three months, whichever occurs first. Any enlisted man who has been absent without leave for three months will be deemed to be a deserter for the purpose of terminating payments of

family allowance. If the enlisted man is later restored to duty, such allowances may be reinstated as of the first of the month next succeeding that in which such restoration occurs.

7. It is therefore recommended that these papers be transmitted to the Director, Military Personnel Division, Services of Supply, by disposition form entry, prepared for the signature of the Acting The Judge Advocate General, stating:

The Servicemen's Dependents Allowance Act of 1942 (Public Law 625, 77th Cong.), provides for payment of the benefits due thereunder regardless of the pay accruing to the enlisted man concerned, and only authorizes the Secretary of War to prescribe by regulation for the discontinuance of such benefits in cases involving the desertion or imprisonment of such an enlisted man. The proposed amendment to paragraph 13, War Department Circular No. 225, July 11, 1942, purports to authorize the cessation of benefits due to the dependant or dependents of an enlisted man who has either been convicted of desertion or has been absent without leave for three months. In view of the express provisions of the mentioned act, it is concluded that the provision with respect to absence without leave in the proposed amendment is legally objectionable. However, desertion is regarded as a fact to be determined by the Secretary of War under the provisions of section 112 of the act and in view of the long-standing practice of making administrative determinations of desertion (par. 4, AR 615-300, July 20, 1942), it is my view that the Secretary of War may properly make such determinations for the purposes of the act in question. Provision for such determinations may be made in paragraph 13 of the circular in question by changing it to read as follows:

Payments of monthly family allowance will terminate at the end of the month in which notice is received by the Office of Dependency Benefits, A.G.O., of an enlisted man's conviction of desertion or when he has been absent in desertion for three months, whichever occurs first. Any enlisted man who has been absent without leave for three months will be deemed to be a deserter for the purpose of terminating payments of family allowance. If the enlisted man is later restored to duty, such allowances may be reinstated as of the first of the month next succeeding that in which such restoration occurs. *

Irvin Schindler,
Colonel, J.A.G.D.,
Assistant Chief of Military Affairs Division.

* See Cir. 69, WD, March 9, 1943.

SPJGA 1942/4332
(243)

September 19, 1942

MEMORANDUM for The Judge Advocate General.

Subject: Servicemen's Dependents Allowance Act of 1942 (act of June 23, 1942 (Public Law 625, 77th Cong.)).

1. By letter dated August 31, 1942, Lieutenant Colonel Frederick H. Hauser, Staff Judge Advocate, Headquarters New York - Philadelphia Sector, Fort Hamilton, New York, requested opinion whether a claim for a family allowance under the provisions of the act of June 23, 1942 (Public Law 625, 77th Cong.), could be made successfully by the wife of a soldier sentenced to total forfeiture of pay, confinement at hard labor for one year, and dishonorable discharge (suspended).

2. It appears from the letter that Private L. W. Weiner, Battery K, 245th Coast Artillery (HD), was tried and found guilty of a violation of Article of War 86, and that he is now serving an approved sentence of confinement at hard labor for one year, total forfeiture of all pay and allowance due and to become due, and dishonorable discharge (which is suspended until the soldier's release from confinement).

It further appears that Weiner's wife, by letter dated August 17, 1942, has requested information from Lieutenant Colonel Hauser as to how she may obtain an allowance as a Class A dependent. He states that he proposes to answer Mrs. Weiner's request by advising her to apply for her dependent's allowance by writing to the Allowance and Allotment Branch of the Adjutant General's Office. He further states that he has concluded that the Congress, in enacting the pertinent legislation, intended to insure the dependent the designated allowance as a matter of right in all cases except those wherein the soldier has been convicted of desertion, has been absent in desertion at least three months, or has been convicted of a crime in the civil courts and sentenced to imprisonment for more than three months. Lieutenant Colonel Hauser concludes that the dependent is not only entitled to her Class A allowance of twenty-eight dollars, but that she is also entitled to twenty-two dollars to be deducted from her husband's pay; and that Weiner's sentence to total forfeiture applies only to forfeiture of pay and allowances to which he is entitled "and that the twenty-two dollars ($22.00) allotment can neither be computed nor forfeited".

3. Section 101 of the act of June 23, 1942, supra, provides that the dependent or dependents of any enlisted man in the grades and services named in the act shall be entitled to receive a monthly family allowance for any period during which such enlisted man is in the active military service on or after June 1, 1942, during the existence of any war declared by Congress and for six months thereafter.

Section 102 provides that the monthly family allowance shall consist of the Government's contribution to the allowance and the reduction in or charge to the pay of the enlisted man.

The wife of an enlisted man is a Class A dependent (sec. 103). For any month for which the allowance is paid to the dependent of an enlisted man "the monthly pay of such enlisted man shall be reduced by, or charged with, the amount of $22" (sec. 106(a)).

Section 110 of the act reads as follows:

> "(a) Any family allowance granted under the provisions of this title to the dependent or dependents of any enlisted man shall continue to be paid irrespective of the pay accruing to such enlisted man.
>
> "(b) In case of the desertion or imprisonment of any enlisted man to the dependent or dependents of whom a family allowance has been granted under the provisions of this title, the family allowance thereafter payable to such dependent or dependents and the reduction of or charge to pay of such enlisted man shall be determined in accordance with such regulations as may be prescribed by the Secretary of the department concerned."

War Department Circular No. 225, July 11, 1942, provides that the payment of monthly family allowances shall cease at the end of the month in which an enlisted man is reported to the Allowance and Allotment Branch, Adjutant General's Office, as having been convicted of desertion or as having been absent in desertion for three months, whichever occurs first (par. 13). It is further provided that if an enlisted man is convicted of crime by a civil court and sentenced to imprisonment by such court for a term exceeding three months, payment of monthly family allowances to his dependents shall cease as of the date of receipt by the Allowance and Allotment Branch of notice of conviction (par. 14). In case of the restoration to duty of a deserter, or of the return to full military duty of one convicted by a civil court, provision is made for resuming of the payment of allowances.

Paragraph 6, War Department Circular No. 288, August 28, 1942, reads in pertinent part as follows:

> "6. Class F deductions not affected by court-martial forfeiture of pay. -- Class F deductions required as the enlisted man's contribution to the family allowance will not be disturbed or affected by court-martial forfeiture of pay nor be included in the computation of the enlisted man's pay for the purpose of determining the amount of court-martial forfeiture that may be assessed. * * * The amount of the family allowance contribution, if any, will be entered on court-martial charge sheets."

4. Under the provisions of the act herein considered, and the pertinent provisions of the War Department circulars issued pursuant thereto, it does not appear to be contemplated that the payment of the family allowance shall cease upon the conviction of a soldier by a court-martial of an offense other than desertion. However, it is noted that none of the instructions issued pursuant to the statute deals with the effect of dishonorable discharge (suspended) and total forfeiture upon the payment of the allowance. The opinions of this office on this subject have not dealt specifically with cases wherein total forfeitures and dishonorable discharge were a part of the sentence (see SPJGA 242.4, July 5, 1942; id., July 8, 1942; id., July 9, 1942). In the most recent opinion of this office on this subject, it was recommended that previous instructions relative to the computation of enlisted men's pay for purpose of court-martial forfeiture be clarified by a radiogram reading in pertinent part as follows:

> "In cases not involving sentence of dishonorable discharge and total forfeitures, the correct application of instructions * * * is as follows: * * * Under paragraph 104, Manual for Courts Martial, the maximum forfeiture per month shall not exceed two-thirds of the balance remaining after deducting the amount of such contribution from the amount of the soldier's pay. * * *" (SPJGA 242.4, Aug. 21, 1942).

As to the continuance of the allowance upon sentence of confinement at hard labor, total forfeitures, and dishonorable discharge, the following provision of law must be considered:

> " * * * Provided, That hereafter pay and allowances shall not accrue to a soldier under sentence of dis-

honorable discharge, during such period as the execution of the sentence of discharge may be suspended * * *." (act March 4, 1915 (38 Stat. 1063))

The above-cited law seems to be in conflict with section 110(a) of the Servicemen's Dependents Allowance Act of 1942, herein considered, which provides that any family allowances granted under the provisions of the act shall continue to be paid irrespective of the pay accruing to the soldier. However, section 102 of the act provides that the family allowance shall consist of two definite components, (1) the Government's contribution, and (2) the reduction in or charge to the pay of the enlisted man. In case of a sentence of dishonorable discharge there is no reasonable expectation that a charge against the pay of the enlisted man will ever be satisfied, and the terms of section 102 of the act are not fulfilled in good faith if the charge to the pay of the enlisted man is one which will not be satisfied. It appears to be the intent of the Congress that the payment of the family allowance to dependents of enlisted men under sentence of confinement at hard labor and dishonorable discharge shall be governed by regulations promulgated by the Secretary of War pursuant to section 110(b) of the act, which provides that the payment of family allowances in cases of imprisonment shall be determined in accordance with such regulations as may be prescribed by the Secretary of the department concerned. Such a regulation has been promulgated by order of the Secretary of War and reads as follows:

> "If an enlisted man is convicted by a military court and sentenced to imprisonment and dishonorable discharge, whether suspended or not, payments of monthly family allowances under this Act will cease at the end of the month in which notice is received in the Allowance and Allotment Branch, A.G.O., of the approval of said sentence as evidenced by the general court-martial order. If he is later restored to duty such allowances may be reinstated as of the first of the month next succeeding that in which such restoration occurs."

The above-quoted regulations was promulgated by the Chief of the Allowance and Allotment Branch, Adjutant General's Office on September 12, 1942. Pursuant to section 111 of the act, the Secretary of War delegated authority to make regulations under this law to the Chief of that Branch in an approved memorandum to the Director, Military Personnel Division, S.O.S. (AG 243 (6-18-42)FA) dated June 18, 1942.

5. It is therefore recommended that reply be made to Lieutenant Colonel Frederick H. Hauser, Staff Judge Advocate, Headquarters New York - Philadelphia Sector, Fort Hamilton, New York, by letter, prepared for the signature of the Chief of Division, stating:

> Your letter to The Judge Advocate General dated August 31, 1942, wherein you inquire as to the right to a family allowance of the wife of a soldier now serving an approved sentence of confinement at hard labor, total forfeitures, and dishonorable discharge (suspended), has been referred to this division for reply.
>
> As you no doubt know, the Allowance and Allotment Branch, Adjutant General's Office, is charged with the administration of the pertinent statute, and all requests and claims for family allowances are passed upon by that branch. Therefore, your proposed action in referring Mrs. Weiner to the mentioned agency of the War Department was correct.
>
> However, because the particular legal question set forth does not appear to have been settled, this office has inquired into the matter. During the course of the inquiry, a regulation has been promulgated under section 110(b) of the mentioned act which reads as follows and appears to be determinative of the question presented:
>
> > "If an enlisted man is convicted by a military court and sentenced to imprisonment and dishonorable discharge, whether suspended or not, payments of monthly family allowances under this Act will cease at the end of the month in which notice is received in the Allowance and Allotment Branch, A.G.O., of the approval of said sentence as evidenced by the general court-martial order. If he is later restored to duty such allowances may be reinstated as of the first of the month next succeeding that in which such restoration occurs."
>
> Trusting that the foregoing information may prove helpful, I am,

Charles W. West,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 354.01 August 4, 1942.

MEMORANDUM for The Judge Advocate General.

Subject: Eligibility of members of Women's Army Auxiliary Corps to receive allowance under Servicemen's Dependents Allowance Act of 1942.

1. By informal action sheet (SPAAS 201 (7-20-42)) dated July 24, 1942, opinion was requested upon the questions presented by paragraphs 3a and 3b of first indorsement (W.A. 095, Pash, Evelyn (7-20-42)) as follows:

> "The question at issue at the moment is whether dependents of members of the W.A.A.C. may receive dependency allowances. Whether enrolled members of the W.A.A.C. may themselves receive dependency allowances is an entirely different question, and information is therefore requested as follows:
>
> "a. As the law stands at present may an enrolled member of the W.A.A.C. receive a dependency allowance.
>
> "b. Should the law referred to in paragraph 1 be amended so as to include the W.A.A.C., would an enrolled member be entitled to receive dependency allowance."

2. The pertinent provisions of the mentioned act (approved June 23, 1942, Public Law 625, 77th Cong.) read in part as follows:

> "Sec. 103. The dependents of such enlisted men to whom a family allowance is payable under the provisions of this title shall be divided into two classes to be known as 'Class A' and 'Class B' dependents. The Class A dependents of any such enlisted man shall include any person who is the wife, the child, or the former wife divorced of any such enlisted man. The Class B dependents of any such enlisted man shall include any person who is the parent, grandchild, brother, or sister of such enlisted man and who is found by the Secretary of the department concerned to be dependent upon such enlisted man for a substantial portion of his support." (Underscoring supplied)

> "Sec. 104. A monthly family allowance shall be granted and paid by the United States to the Class A

dependent or dependents of any such enlisted man upon written application to the department concerned made by such enlisted man or made by or on behalf of such dependent or dependents. A monthly family allowance shall be granted and paid by the United States to the Class B dependent or dependents of any such enlisted man upon written application * * *. The payment * * * to any Class B dependent * * * shall be terminated upon the recipt * * * of a written request by such enlisted man that such allowance be terminated."

In the Daily Congressional Record (June 4, 1942, p. 5080) the following appears in the discussion of the provisions of the bill which was later enacted as the Servicemen's Dependents Allowance Act of 1942;

"Mr. Johnson of Colorado. Mr. President, the bill provides for family allowances of men who are in the service. We divided all dependents into two classes, class A and class B. Class A consists of wives and children, generally speaking and class B of parents, brother, sisters, and other dependents. Class A dependents are involuntary, that is they are taken care of on petition by the enlisted man, by his family, or by some other person, but no dependency deductions are made from a soldier's pay for class B dependents.

"Mr. Pepper. There is no limitation in the bill to the effect that a wife or a dependent person may not work in order to get those benefits, is there? The allowances are independent of whether or not the dependent person is employed?

"Mr. Johnson of Colorado. Yes; they are independent. They do not go into the basis of need. The soldier, his wife, or dependents, or some outside person, may apply. That is not true, however, of class B dependency. In that case the soldier himself must make the application."

3. In view of the clear terms of the act and the discussion in the Congress as heretofore set out, it appears that eligibility for the benefits accrues to Class A dependents solely by reason of their status, actual dependency not being a matter to be considered. As there is no restriction on their employment it follows that members of the Women's Army Auxiliary Corps who are Class A dependents may receive the allowances under the terms of the Servicemen's Dependents Allowance Act of 1942. On the other

hand members of the Women's Army Auxiliary Corps may be classified as Class B dependents and receive the allowances as such only if they are found by the Secretary of War to be dependent upon the enlisted men concerned for a substantial portion of their support. Similar conclusions would be reached were the act amended solely to include the members of the Women's Army Auxiliary Corps within the class of persons for whose dependents the act provides family allowances.

4. It is therefore recommended that these papers be returned by second indorsement to the Chief of Administrative Services, Services of Supply, prepared for the signature of the Assistant to The Judge Advocate General:

> It is the opinion of this office that members of the Women's Army Auxiliary Corps may receive allowances under the provisions of the Servicemen's Dependents Allowance Act of 1942 (approved June 23, 1942, Public Law 625, 77th Cong.) if they qualify as Class A or Class B dependents, as defined by the act. Members classified as "Class A" dependents may receive such allowances irrespective of actual financial dependency. Members classified as "Class B" dependents may receive such allowances if found by the Secretary of War to be dependent upon the enlisted men concerned for a substantial portion of their support. The same results would obtain if the Servicemen's Dependents Allowance Act of 1942 should be amended only to the extent of including members of the Women's Army Auxiliary Corps within the class of persons for whose dependents the act provides family allowances.

Charles W. West,
Colonel, J.A.G.D.,
Acting Chief of Military Affairs Division.

SPJGA 1943/928 January 21, 1943

To The Adjutant General.

I am in agreement with the views expressed by Colonel Gilbert in his memorandum of January 9, 1943, to the effect that payment of the monthly family allowance is mandatory under the present law in the case of Class A dependents, and that the right of a wife or former wife divorced to receive such allowance cannot be defeated by the refusal of an enlisted man to consent thereto. That the effect of such mandatory provision received the consideration of Congress before the act was passed in its present form is indicated by the following excerpt from the Daily Congressional Record for June 8, 1942 (p. 5193), which is only one of a number of similar references to the matter appearing in the various records of Congress and its committees:

> "Mr. ROBSION of Kentucky. The gentleman from Texas made a spledid statement. As I understood his statement, if a man is legally married to a woman and she is dependent he will have to make the contribution. I wonder if there is any provision in the bill, or if the agency administering this law would have the right to do it, that would prevent a dissolute woman, say, although she may be poor and dependent, from receiving the benefit a soldier at the front is contributing to her.
> "Mr. EDMISTON. As long as she is legally his wife, he must make the allotment, as the bill is written, as I understand it."

Although it is true that in some cases, such as that of Corporal Kline, the present form of the statute may sometimes lead to undesirable results, it appears that the possibility of such results was foreseen by the Congress, and that that body preferred to accept that disadvantage rather than to impose a limitation that might entail even more undesirable consequences. A possible solution may be had in some such cases by resort to the courts for divorce. In Kline's case, for example, according to his own statement he had been aware of his wife's alleged misconduct for a period of between one and two years prior to his entry into the service, and there was ample opportunity for court action had he wished to pursue that course. Existing law does not authorize the War Department to withhold family allowances from wives or former wives divorced of enlisted men because of misconduct or immorality and, as stated by Colonel Gilbert, such authority could be granted

only by appropriate amendment of the law. Although the question whether an amendment of this character should be proposed is one of policy not ordinarily within the province of this office, it is my view that the administration of such a provision of law would be extremely difficult and would consume unwarranted amounts of the time and energy of military personnel. For that reason I believe that it would not be advisable for the War Department to seek such authority.

As to Kline's remarks relative to the fact that the allowance paid to his wife was made retroactive to June 1, 1942, this action is authorized by the provisions of section 107 of the act and accords with the provisions of paragraph 2, Circular No. 225, War Department, July 11, 1942.

Myron C. Cramer,
Major General,
The Judge Advocate General.

2 Incls.
n/c

SPJGA 291.1 July 28, 1942.

MEMORANDUM for The Judge Advocate General.

Subject: Marital Status of Ivan Anderson, an Enlisted Man.

1. By informal action sheet dated July 22, 1942, there was referred for remark and recommendation letter, dated July 3, 1942, from Second Lieutenant R. H. Wingo, Medical Administration Center, Unit Personnel Officer, Fort Douglas, Utah, inquiring as to the marital status of Ivan Anderson, an enlisted man, and inclosing letters from Lottie Anderson and Lovett K. Fraser, attorney at law.

2. The letter of Lottie Anderson dated February 24, 1942, reads in part as follows:

> "I wish for your good office Rinform me as to whether or not Ivan Anderson has registed as a single man. I am his wife and need help. I have no legal marriage license, but it is customary among us Indians to marry our own way, I have lived with him about 6 years and have begot two children for him."

The inclosed letter from Lovett K. Fraser, dated March 20, 1942, reads in part as follows:

> "In reference to your letter of March 8th, 1942, concerning Private Ivan Anderson, 39010663, Detachment Medical Section CASC Unit 1902, will state that I have know Private Anderson for some time. He was married to Lottie Downs through tribal marriage on June 21st, 1936, at Upper Lake, California, and they have lived together ever since as man and wife. They have had two children and both have died. All letters written by Private Anderson to his wife, are addressed to her as 'Mrs. Lottie Anderson'. * * *
>
> "I understand that the U. S. Government recognizes tribal marriage of Indians and that therefore, his wife should be given some help."

The letter of Lieutenant Wingo reads in part as follows:

> "Private Ivan Anderson, * * * claims that he is unmarried now, and has not been at any time married."

3. Concerning the specific inquiry as to Private Anderson's marital status, it may be stated that when a member of the military forces denies an obligation such as is advanced here, and the obligation has never been proved against him, determination of the question as to the existence or the validity of such obligation is a judicial function and may be decided only by a court of competent jurisdiction (JAG 250.1, March 16, 1932). However, if the sole purpose of the inquiry is to determine whether the alleged wife is entitled to any rights under the Servicemen's Dependents Allowance Act of 1942 (act June 23, 1942, Public Law 625, 77th Cong.), attention is invited to section 112 thereof, which reads in part as follows:

> "The determination of all facts, including the facts of dependency, which it shall be necessary to determine in the administration of this title shall be made by the Secretary of the department concerned and such determination shall be final and conclusive for all purposes and shall not be subject to review in any court or by any accounting officer of the Government."

4. Assuming that the sole purpose of determining the marital status of Private Anderson is to ascertain whether the person claiming to be his "lawful wife" is entitled to any benefits under the act, the language of the statute clearly indicates that such question may be determined by the Secretary of War. Application for such benefits may be made without consent of the soldier and should be directed in writing to the Allowance and Allotment Branch, The Adjutant General's Office, War Department, Washington, D. C. (JAG 242.4, July 11, 1942).

5. It is therefore recommended that these papers be returned to The Adjutant General, by action sheet entry prepared for the signature of the Acting Chief of Division, stating:

> In view of the controversy, as to the marital status of Pviate Anderson, the War Department cannot exercise the purely judicial function of deciding either the existence or the validity of the alleged marriage. However, section 112 of the Servicemen's Dependents Allowance Act of 1942 (act June 23, 1942, Public Law 625, 77th Cong.), provides that the Secretary of War shall determine all facts necessary in the administration of that act including the fact of dependency. It is therefore recommended that Lieutenant Wingo be advised that Lottie Anderson my make application as the dependent wife of Private Ivan Anderson to the Allowance and Allotment

Branch, the Adjutant General's Office, War Department, Washington, D. C. and the question as to her status may then be determined by the Secretary of War. Attention in this connection is invited to the provisions of Circular No. 225, War Department, July 11, 1942. It is suggested that an affidavit of the soldier concerned, setting forth all the facts and circumstances surrounding his alleged marriage, be secured and filed with pertinent War Department records for possible use in connection with such determination.

Charles W. West,
Colonel, J.A.G.D.,
Acting Chief of Military Affairs Division.

SPJGA 1942/5552
(220.804)

November 24, 1942

MEMORANDUM for The Judge Advocate General.

Subject: Investigation of Private Edmund B___'s application for dependency discharge.

1. By disposition form (AG 201 B___, Edmund (9-5-42)PE-A) dated November 10, 1942, recommendation was requested as to whether the matter of Private B___'s application for a dependency discharge should be referred to the Federal Bureau of Investigation for appropriate action.

2. It appears from the file in reference that until June 1941 Private B___, for physical reasons, was classified as 4F by his local draft board. At that time he was reclassified as 1A. Prior to such reclassification his father appeared before the draft board in support of a claim of dependency presenting evidence of his physical incapacity and inability to support himself and his wife. This evidence was rejected and the son was duly inducted into the Army. The day after the son's induction the father wrote a letter to the President stating "we are pleading as a heart broken sick father and mother that you may help us to have our boy sent back to us. Otherwise our means and hopes are gone forever and our small business will be lost for us". A similar letter was sent to the Commanding General, Second Corps Area, and two other letters to the President indicate that the induction of Private B___ has deprived his mother and father of their means of support, resulting in dire poverty. Before the son's entrance into the Army he and his father operated a small dying establishment under the son's name at 149 East 42nd Street, New York City. The books of the concern indicate that the business had been fairly successful. In marked contrast with the substance of the letters mentioned above a series of letters between the parents and the son at camp indicate that although the son was in the Army the business was having "the biggest season we ever had"; that checks from the business were being made payable to the mother who cashed them, placing the proceeds in a safe deposit box; that the mother was saving hundred dollar bills for the son upon his return; that the parents had sent the son a radio and a watch and contemplated purchasing a Buick automobile to be stored for him; that if the son could get a furlough the father would immediately wire him one hundred dollars; that "We don't tell anybody our business and you tear that letter and don't show it to no one"; that the son should

not talk to anyone about the family's affairs as the mother had misrepresented their financial condition to the Red Cross representative who had investigated them.

On July 1, 1942, Private B___ applied for a dependency discharge. His application set forth in substance, that the business he left upon entering the service was deteriorating because he was not present to conduct it and because his father's health was such that he could not continue the business without the son's assistance. This application was supported by three letters from customers who merely stated that the son was the only person capable of operating the business successfully. In addition are two letters, one dated July 7, 1942, from the Rev. K. A. Bishara, pastor of the Syrian Protestant Church, 201 Clinton Street, Brooklyn, New York, stating he has known the B___ family for twenty-three years and the mother and father's health was poor and that Private B___ was the sole support of the family; the other letter dated July 7, 1942, was from D. E. Abu-Khair, M.D., 195 Pacific Street, Brooklyn, New York, who states "Mr. S. A. B___, age 46, * * * had been and still under my constent care for his detrimental ill health. The present status according to the medical physical finding and X-ray report, Mr. B___ is helpless, in spite of the medical care which enables him to walk around". No X-ray pictures or other medical reports or analysis accompanied this letter. No affidavits or bank statements indicating the present financial status of the mother and father accompanied the application. On June 22, 1942, Private B___ applied for a family allowance for class "B" dependents under the provisions of the Servicemen's Dependents Allowance Act of 1942 (Public Law 625, 77th Cong.) as amended, and stated that both his mother and father were of a 75 per cent degree of dependency. The parents have received at least one payment under this allotment. On August 29, 1942, Private B___'s application for discharge because of dependency was disapproved.

The soldier's commanding officer stated (Wrapper Ind., Oct. 23, 1942) that upon disapproval of the soldier's dependency discharge application he attempted to cancel the dependency allotment previously made and the commanding officer recommended that this matter be referred to the Federal Bureau of Investigation for appropriate action.

3. The question is raised as to whether Private B___ and his mother and father have been guilty of such acts as to make them criminally liable under section 116, 117, 118 of the Servicemen's Dependents Allowance Act of 1942 (Public Law 625, 77th Cong., as amended by Public Law 705, 77th Cong., which provides:

"SEC. 116. Whoever shall obtain or receive any money, check, or family allowance under this title, without being entitled thereto and with intent to defraud, shall be punished by a fine of not more than $2,000, or by imprisonment for not more than one year, or both.

"SEC. 117. Whoever in any claim for family allowance or in any document required by this title or by regulation made under this title makes any statement of a material fact knowing it to be false, shall be guilty of perjury and shall be punished by a fine of not more than $5,000, or by imprisonment for not more than two years, or both.

"SEC. 118. Any person who has been entitled to payment of a family allowance under this title and whose entitlement to payment of such allowance has ceased shall, if he thereafter accepts payment of such allowance with the intent to defraud, be punished by a fine of not more than $2,000, or by imprisonment for not more than one year, or both."

4. Assuming that the facts disclosed by the intercepted letters from the parents of Private B___ to their son are true, it appears that the mother and father conceived and attempted to effect a fraudulent scheme to secure his discharge from the Army on the basis of their purported dependency. The letters to the President, the Commanding General, Second Corps Area, and the asserted misrepresentations to the Red Cross investigator all seem to be parts of this scheme. It may be inferred that Private B___'s action in making a class "B" dependency allowance, while his application for discharge was pending, falls with the same category. The latter inference is strengthened by the statements of B___'s commanding officer that the soldier had attempted to discontinue the allotment for dependents as soon as he learned of the disapproval of his application for discharge. There does not appear to be any reason for disbelieving the statements, relative to the family prosperity, contained in the intercepted letters. The parents had no reason to anticipate that these letters would be read by anyone except their son but even so they enjoined him to destroy the letters to prevent them from falling into other hands. The letters strongly indicate that parents and son were guilty of knowingly making false statements of material facts for the purpose of securing the payments provided for under the class "B" dependency allotment plan. The record discloses that payments under such a plan were actually made to the parents by the Govern-

ment. It is therefore concluded that the facts of this case, as set forth in the file, warrant the inference that the entire B___ family may have committed acts which sections 116, 117, and 118, supra, were designed to prevent and which are defined as constituting Federal offenses. It is believed, however, that, in order to secure the conviction of any of the persons involved, considerable additional investigation, by some appropriate Governmental agency, is necessary.

5. It is therefore recommended that the file in reference be returned to The Adjutant General by disposition form entry, prepared for the signature of the Chief of Division, stating:

> It is the opinion of this office that the facts of this case as indicated by the accompanying file warrant the inference that applying for a family allowance for class "B" dependents by Private Edmund B___, Company A, 81st Chemical Battalion, pursuant to the provisions of the Servicemen's Dependents Allowance Act of 1942 (Public Law 625, 77th Cong., as amended, Public Law 705, 77th Cong.) and the receipt of payments thereunder by his mother and father, may have constituted Federal criminal offenses in violation of sections 116, 117 and 118 of that act. It is recommended that this matter be referred to the Federal Bureau of Investigation or other appropriate governmental agency for further investigation and appropriate action.

Charles W. West,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 1943/3928 March 26, 1943

MEMORANDUM for The Judge Advocate General.

Subject: Complaint of nonsupport by the alleged common law wife of a commissioned officer.

1. By informal action sheet (AG 201-B___, Irving, C. (3/1/43) PO-M) dated March 12, 1943, there was referred for remark and recommendation a letter dated March 1, 1943, from Hilda Thorstensen B___, Chalcar Apartments, 220 Cooper Street, Camden, New Jersey, to The Adjutant General with inclosures, all relating to the alleged failure of Captain Irving C. B___, Enlisted Branch No. 5, Army Administration School, Arkansas State College, Jonesboro, Arkansas, to support her as his common law wife.

2. The Inspector General, in transmitting the papers to The Adjutant General by second indorsement (IG 333.9-B___, Irving C.) dated March 9, 1943, stated in pertinent part:

> "2. It is recommended that these papers be referred to The Judge Advocate General for advice and opinion as to whether or not the opinion cited in Section 417, p. 200, Digest of Opinions TJAG, 1912-1930, regarding the legal obligation of a husband to support his wife is applicable in this case and whether there is indicated in these papers an apparent violation of an Article of War on the part of Captain B___; that thereafter, these papers be returned to this office for its information and consideration as to the advisability of referring this matter to the Commanding General, Eighth Service Command, for investigation by an officer in the Inspector General's Department under his command."

The writer of the above mentioned letter claims to be the common law wife of Captain B___ whom she states she first met in December 1933, when he was a Staff Sergeant, 114th Infantry, stationed at Camden, New Jersey. Her contention is more fully set forth in a letter to the Commanding General, Eighth Service Command, dated March 1, 1943, a copy of which was inclosed in her letter to The Adjutant General of the same date. In substance she says that upon B___'s insistence and with money furnished by him she left a position in Minneapolis held by her since 1917 and went to live with him at Camden in November, 1939. She states:

"He repeatedly told me of his lonesome life in the Army, that he had been married before, but if I would stand by him and keep his home for him he would secure his divorce right away and we would be legally married."

It is also indicated that the parties continued to live in an apartment in Camden, New Jersey, where B___ represented to their acquaintances that she was his wife until he left her in May 1942. Meanwhile, he had been commissioned a captain in the Coast Artillery in February 1941.

There is no expression of Captain B___'s version of the inception of the asserted living arrangements except as contained in a copy of a letter dated October 5, 1942, addressed to his alleged common law wife, the original of which was also forwarded by her to the Commanding General, Eighth Service Command, and which in pertinent part reads:

"* * * You have no right to claim that you have duties and rights as a married woman. You were not married, you were kept. And I don't intend to keep you any longer * * *."

There is nothing in the file, except in the complainant's letter, to indicate whether Captain B___ was in fact married to another woman in November 1939, and if so married, whether such marriage relationship has since been terminated by death or divorce.

The exact purpose of the mentioned letter from Hilda Thorstensen B___ is somewhat obscure but apparently is to initiate disciplinary action against the officer because of his refusal to recognize the writer as his wife. She refers also, without giving specific dates or occasions, to alleged drunkenness and failure to pay bills on the part of B___, and "his bad army record".

3. While it is true that the military authorities may properly subject an officer, after investigation, to disciplinary action for a dishonorable failure to support his wife (SPJGA 1942/5606, Nov. 27, 1942) the file does not here indicate the existence of a marital status between Captain B___ and Hilda Thorstensen B___. There is no assertion or showing of a ceremonial marriage. Furthermore, while common law marriage in New Jersey appears to be recognized (Dig. Op. JAG 1912-40, sec 454 (18), (CM 120160 (1918); Yaern v. Horter (N.J.) 118 Atl. 774; Bey v. Bey (N.J.) 90 Atl. 684), still, even if all other elements necessary are present to constitute the relationship, it cannot prevail in the face of

a prior and valid marriage to which one of the persons concerned is a party (Yaern v. Horter, supra; SPJGA 1942/2043, May 18, 1942). Consequently, if Captain B___ was in fact validly married to another woman during the period beginning November 1939, no common law marriage can exist between himself and Hilda Thorstensen B___. The case stands in no different light, however, even if such a prior valid marriage did not exist. By the admissions of both parties their mutual intent at the inception of their cohabitation was not to enter into the matrimonial relationship but only to live together. This is not sufficient (38 C.J. sec. 89, p. 1316; 35 Am. Jr., sec. 42, p. 210). The fact that they represented themselves as man and wife, moreover, would not alone be sufficient in view of what appears to have been their actual intention to the contrary (38 C.J. sec. 89, p. 1316, sec. 96, p. 1320; 35 Am. Jur. sec. 41, pp. 209-210, sec. 29, p. 197, and sec. 42, p. 210), for a relationship meretricious in its beginning is presumed so to continue until the contrary is shown (38 C.J. sec. 96, supra; Bey v. Bey, supra; In re Franchi's Estate (N.J.), 182 Atl. 867). As a complete investigation of this matter obviously has not been made, it cannot be said with certainty that the complaining party might not conceivably be able to establish her contention in a civil court, but until this has been done or further facts are submitted, there appears to be no occasion for action by the military authorities so far as this angle of the case is concerned. Although the opinion (Dig. Op. JAG 1912-30, sec. 417, p. 200) referred to in the above-mentioned second indorsement clearly states the present view of this office, that the War Department will countenance no dishonorable evasion of an officer's legal and moral duty to support his wife, that rule, under the facts here presented, has no application by reason of the fact that Hilda Thorstensen B___, as above indicated, does not appear to be the wife of this officer, either by ceremonial or common law marriage.

This office has previously held, however, that where doubts are raised as to the marital status of an officer it is incumbent on the War Department to determine whether governmental funds have been improperly disbursed (SPJGA 1942/3787, Aug. 20, 1942; SPJGA 1942/2043, supra) or whether official records have been erroneously kept (JAG 241.3, Sept. 11, 1940). If vouchers were presented by Captain B___ on which payments were made in reliance upon false representations by him that he had a married status, this would clearly be chargeable under Article of War 94 (Dig. Op. JAG 1912-30, sec. 1531). As the facts presented are incomplete in many important particulars such as Captain B___'s actual marital status, the nature of his relationship with Hilda Thorstenson B___ and whether he has made false representations in connection with pay vouchers, service insurance applications, or other official records, the necessity for further investigation is apparent.

4. It is therefore recommended that the file of papers be returned to The Adjutant General by informal action sheet entry, prepared for the signature of the Assistant Chief of Division, stating:

> It is the policy of the War Department, as stated in the opinion of this office (Dig. Op. JAG 1912-30, sec. 417), cited in second indorsement (IG 333.9-B___, Irving C.) dated March 9, 1943, that no evasion by an officer of his legal or moral obligations toward his wife or dependents will be countenanced and that disciplinary action will be taken against offenders in this respect. If the parties here concerned are in fact husband and wife, which is not established by the present showing, the case comes within this policy. Otherwise it does not. If Captain B___ is unmarried but has represented himself otherwise in his pay vouchers or other official papers he is, of course, subject to disciplinary action for such misconduct. It is recommended that the file be referred to the Commanding General, Eighth Service Command, for investigation, appropriate action, and report, and that Hilda Thorstenson B___ be advised of such reference.

Irvin Schindler,
Colonel, J.A.G.D.,
Assistant Chief of Military Affairs Division.

SPJGA 1943/2750 February 12, 1943

MEMORANDUM for The Judge Advocate General.

Subject: Liability for support of stepchildren.

1. By fifth indorsement (AG 201-Kenton, Jack G. (1-25-43)PQ-M), dated February 5, 1943, the accompanying correspondence was referred for remark and recommendation concerning a controversy involving Second Lieutenant Jack G. Kenton, Army Air Forces Advanced Flying School, Craig Army Air Field, Selma, Alabama, and his wife, Ione C. Kenton, 7 Winfield Avenue, Colorado Springs, Colorado, with respect to the support of Mrs. Kenton and her two minor children.

2. The material facts appear from the file to be as follows: On September 30, 1942, Mrs. Kenton's attorney, Funston Clark, Esq., of Colorado Springs wrote The Adjutant General that Lieutenant Kenton refused to contribute in any manner to the support of his wife. The matter was apparently brought to his attention by military authorities at that time for shortly thereafter Lieutenant Kenton wrote to his wife saying that if she would come to Selma, Alabama, he would make a home for her. To this she agreed, with the provision that he assume the support of her two minor daughters. He replied that he was not legally responsible for them and would not support them.

On January 25, 1943, Mrs. Kenton dispatched the basic communication to the War Department. In that letter she reviewed the facts already set forth and went on to say that inasmuch as they have no other source of income she and her two daughters are forced to live on her salary from the Mountain States Telephone and Telegraph Company which amounts to "$80.00 after deductions". She pointed out that to leave the girls and go to Alabama would be a case of desertion of them on her part. Specifically, she requested that pressure be brought to require Lieutenant Kenton to send her at least a part of the allowances he receives on account of his dependents.

Mrs. Kenton's letter was referred to the Commanding Officer, Craig Field, Selma, Alabama, by first indorsement dated January 30, 1943, paragraph 1 of which set forth the War Department's view that proper support of dependents is both the legal and moral obligation of an officer until such time as he is duly relieved of that responsibility by competent authority. In response to this reference Lieutenant Kenton states in paragraph 2 of an undated third indorsement that he "proposes to write his wife inviting her

and her children to live with him in Selma, Alabama, if such action is satisfactory to the Adjutant General", and adds that he feels himself neither legally nor morally required to do more than he has already done toward the support of his wife and her children. He further states he has been advised by counsel that her refusal to "accept support which he offers" constitutes constructive desertion and exonerates him from any obligation for her support.

3. In an opinion dated July 17, 1942 (SPJGA 1942/3118) this office expressed the view that:

> "It is an almost universal rule that a stepfather, as such, is under no obligation to support the children of his wife by a former husband unless he has assumed an obligation to support them by taking the children into his family or under his care in such a way that he places himself in loco parentis (46 C.J. 1338; 39 Am. Jur. 699; Weedin v. Mon Hin, 4F (2d) 533). * * * There might also be circumstances under which an officer would not be legally responsible for support in such a case, but would, on the other hand, be morally bound to provide for the child or children."

4. The facts submitted do no show what relationship has existed between Lieutenant Kenton and his wife's children but, in view of his present attitude, it may reasonably be assumed that he has neither taken them into his family nor placed himself in loco parentis with respect to them. However, he is legally obligated to support his wife and by in effect refusing to contribute to her support unless she abandons her children, who are apparently quite young and are without other means of support, he has heretofore adopted a position which is thoroughly unreasonable and, so far as any showing made by him is concerned, unjustifiable. Such action is not consonant with the Army standard of honor.

It should be noted that Lieutenant Kenton now proposes to invite his wife and her children to come and live with him in Selma, Alabama. If this is done it would seem that his obligations toward his dependents would be satisfied.

5. It is therefore recommended that these papers be returned to The Adjutant General by sixth indorsement, prepared for the signature of the Chief of Division, stating:

In view of Lieutenant Kenton's proposal, as set forth in the preceding third indorsement, it is recommended that the papers be returned to him through channels by indorsement

stating in substance that if he promptly writes Mrs. Kenton as proposed, and, if she accepts, promptly furnishes her with funds to cover the necessary transportation of herself and the children, and otherwise carries out the proposal in good faith, no further action will be taken by the military authorities in this connection. It is further recommended that reply be made to Mrs. Kenton advising her of the proposal made by her husband, and of the War Department reply thereto.

Charles W. West,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 1943/3444 March 9, 1943

MEMORANDUM for The Judge Advocate General.

Subject: Disposition of personal effects of military personnel reported missing in action.

1. By memorandum (SPQEI 332.3) dated February 26, 1943, The Quartermaster General requested an opinion concerning the disposition of an automobile registered in the name of Sergeant Sterling Able Cox (R-2651570) reported missing in action on December 29, 1942, by the Hawaiian Department. Additional questions are presented concerning the procedure to be followed relative to the disposition of privately owned automobiles under Article of War 112, and the act of March 7, 1942 (Public Law 490, 77th Cong.).

2. The material facts as disclosed by the basic memorandum are substantially as follows:

The Effects Quartermaster, Kansas City Quartermaster Depot, received a radiogram dated February 21, 1943, from the Commanding General, Hawaiian Department, requesting authority to sell a 1941 model Ford sedan registered in the name of Sergeant Cox, who has been reported as missing in action, and to pay the balance of $302 due thereon, and remit the remainder to the soldier's mother who is designated as his beneficiary. It is the opinion of The Quartermaster General that there exists no authority for the sale of effects of persons reported as missing in action even though their designated beneficiary may consent thereto. It is his further opinion that after such person has been administratively declared dead there is no authority for the sale of his effects under Article of War 112, except in cases where none of the persons designated to receive the effects can be located.

The basic memorandum presents two collateral questions concerning the disposition of privately owned automobiles; First, whether Article of War 112 authorizes the transportation of privately owned automobiles, at Government expense, for delivery to the widow or legal representative of the deceased person, and secondly, whether the act of March 7, 1942, authorizes the transportation, at Government expense, of privately owned automobiles, to the official residence or place designated by the dependents of persons reported as missing in action, interned, captured, etc. The memorandum also invites attention to a prior opinion of The Judge Advocate General in which it was stated that a privately owned automobile is included in the term "effects" as used in

Article of War 112 (JAG 210.871, Mar. 24, 1931; Dig. Op. 1912-1930, p. 1127), and to the subsequent act of June 30, 1932, as amended (47 Stat. 405; 54 Stat. 174; 10 U.S.C. 824), which prohibits the transportation of automobiles at Government expense. The file includes an informal memorandum (SPTOT 201 GT) dated February 5, 1943, prepared for the Chief of Intelligence Division, which states that in view of the act of June 30, 1932, supra, and paragraph 9 of Army Regulations 30-960, there is no authority for the shipment of privately owned automobiles of persons designated in section 12 of the act of March 7, 1942, supra.

3. With reference to the question whether the automobile of Sergeant Cox may now be sold by the military authorities, section 12 of the act of March 7, 1942 (Public Law 490, 77th Cong.), provides as follows:

> "The dependents and household and personal effects of any person on active duty (without regard to pay grade) who is officially reported as injured, dead, missing as a result of military or naval operations, interned in a neutral country, or captured by the enemy, may be moved (including packing and unpacking of household effects) to the official residence of record for any such person, or, upon application by such dependents, to such other location as may be determined by the head of the department concerned or by such person as he may designate, by the use of either commercial or Government transportation: Provided, That the cost of such transportation, including packing and unpacking, shall be charged against appropriations currently available."

As the above-quoted act governs the disposition of the effects of persons reported missing, and neither that or any other law authorizes the sale of such effects, it follows that there is no authority for the sale of the automobile in question.

Moreover as stated by The Quartermaster General in paragraph 2 of his memorandum, even after a person missing in action has been administratively declared dead, Article of War 112 does not give a summary court the authority to sell any effect in his possession, except when none of the persons therein enumerated can be found, or when such person entitled to possession of the effect expressly authorizes and directs the sale (Dig. Ops. JAG 1912-1940, sec. 470 (10)).

4. Turning to the question whether the automobile of a deceased person may be transported to the widow or legal representa-

tive at Government expense under Article of War 112, the pertinent portions of that article provide in substance for the collection of all "effects" of the deceased, and after payment of his local obligations for the transmittal of such effects by the summary court through the Quartermaster Department, at Government expense, to the widow or legal representative, where either is known.

Section 209 of the act of June 30, 1932 (47 Stat. 405) provides:

> "Hereafter, no law or regulation authorizing or permitting the transportation at Government expense of the effects of officers, employees, or other persons, shall be construed or applied as including or authorizing the transportation of an automobile; Provided, That no more than $5000 in any fiscal year may be expended for such purposes by the War Department, * * *."

Paragraph 9 of Army Regulations 30-960, May 24, 1938, provides as follows:

> "9. Definition.--Authorized baggage consists of household goods and other personal property; but it does not include personal baggage carried free on tickets, professional books and papers, groceries, provisions, nor automobiles (see sec. 209, act June 30, 1932 (47 Stat. 405; U.S.C. 5;623a; sec. 1633a, M.L., 1929)). Privately owned automobiles may be shipped as excess baggage with the authorized change of station allowance of baggage by commercial means of transportation upon the agreement of the owner to bear any expense incident thereto from personal funds; collection will be made as prescribed in paragraph 24. Such automobiles may not be shipped as excess baggage or otherwise with the effects of deceased persons, nor with authorized baggage of Reserve officers or Army nurses on termination of active duty, or enlisted men of the first four grades of ten or more years of service discharged on account of disability."

The answer to the question stated above depends upon whether the Economy Act of 1932 (act of June 30, 1932, supra), which prohibits the transportation of automobiles at Government expenses, was intended to restrict the transportation of "effects" under Article of War 112. Section 209 of the mentioned act is

contained in Title II, Provisions Affecting Personnel, under the subheading "Permanent Reduction of Travel Allowances". The Senate report relating to section 209 of the act discussed the provision as follows:

> "Under existing laws and regulations, automobiles of officers and employees, on change of station, are being transported at Government expenses in the United States or abroad, * * *. The freight charges, together with the incidental expenses of preparation for shipment, etc., of the privately owned automobiles of officers and employees, in many cases, exceeds the value of the automobile transported, thus imposing on the Government an unreasonable burden. Furthermore, when an automobile is permitted to be transported with household effects, it gives rise to a tendency on the part of the officer or employee to include in the shipment, for the purpose of making up a carload lot, other articles which he otherwise would not transport. This provision should result in a substantial saving to the Government." (Senate Report No. 756, 72nd Cong., May 31, 1932, p. 9)

It is the view of this division that section 209 of the act of June 30, 1932, applies only in connection with the transportation of effects of military personnel upon change of station and is not applicable to the shipment of effects under Article of War 112, and that the prior opinion of The Judge Advocate General (JAG 210.871, supra) concerning the transportation of automobiles as "effects" under the terms of the mentioned article is unaffected by the act of June 30, 1932.

Even though paragraph 9 of Army Regulations 30-960, May 24, 1938, prohibits the transportation of automobiles as part of the effects of deceased persons, this portion of the regulations is not directed by statute and may be waived or changed (SPJGA 1942/4049, Sept. 3, 1942). In connection with the foregoing comment, it is noted that this paragraph is in the section dealing with authorized baggage on permanent change of station and that reference to the transportation of the effects of deceased persons need not be included therein.

6. It is therefore recommended that these papers be returned to The Quartermaster General, by memorandum, prepared for the signature of the Assistant Chief of Division, stating:

> 1. Reference is made to your memorandum (SPQEI 332.3) dated February 26, 1943, concerning the disposition of an

automobile registered in the name of Sergeant Cox who was reported as missing in action December 29, 1942. There is no provision of law under which the vehicle in question or the effects of any person reported only as "missing" or "missing in action" may be sold by the military authorities.

2. Referring to the statement in paragraph 2 of your memorandum, it is to be noted that under the provisions of Article of War 112, authority to sell the effects, even of deceased persons, is limited to cases where the persons designated to receive the effects cannot be located or the person entitled to the effects directs and expressly authorizes the sale.

3. With respect to the collateral question presented in your memorandum, it is the opinion of this office that section 209 of the act of June 30, 1932, as amended (47 Stat. 405; 54 Stat. 174; 10 U.S.C. 824), does not restrict the transportation of privately owned automobiles under Article of War 112, because that act applies only to transportation of automobiles of persons on change of station and not to the disposition of automobiles which are among the "effects" of deceased or missing persons. The current provisions of Army Regulations 30-969, May 24, 1938, prohibit the transportation of automobiles as part of the effects of deceased persons but such provisions may be waived or rescinded by the War Department.

Irvin Schindler,
Colonel, J.A.G.D.,
Assistant Chief of Military Affairs Division.

SPJGA 1942/6062
(248.18)

December 22, 1942

MEMORANDUM for The Judge Advocate General.

Subject: Allotment of pay by retired Army officer.

1. By disposition form (AG 201-Rice, Joseph) dated December 10, 1942, there was referred for comment and recommendation a letter dated November 20, 1942, from Esther Rice, 105 Balboa Street, San Francisco, California, inquiring whether she is entitled to and may receive a portion of the pay of her husband, First Lieutenant Joseph Rice, Retired, who was living in Marilao, Bulacan, Philippine Islands, at the outbreak of the present war and whose whereabouts is now unknown. Mrs. Rice states that although prior to the outbreak of the present war, her husband sent her a bank draft each month, she has received no remittance from him since that time. She further states that she believes she is entitled to some portion of her husband's retired pay until further information is received concerning his whereabouts.

2. The accompanying status form shows that Joseph Rice, First Lieutenant, Retired, was retired under the act of May 7, 1932 (Official Army Register, Jan. 1, 1942, p. 1326). His last known address as shown by his 201 file was Marilao Ricemills, Marilao, Bulacan, Philippine Islands. The mentioned status form lists Esther Rice, 105 Balboa Street, San Francisco, California, as Lieutenant Rice's beneficiary. No information appears on the status form as to whether Lieutenant Rice has been reported missing, missing in action or captured by the enemy, and the file contains no information as to whether Lieutenant Rice was recalled to active duty at the outbreak of war or at any time subsequent thereto.

There is attached to the file a routing slip wherein the opinion is expressed that no allotment of pay is available in this case under the provisions of act of March 7, 1942 (Public Law 490, 77th Cong.), relating to allotments for dependents of military personnel who are officially reported as missing, missing in action, interned in a neutral country or captured by an enemy.

3. Section 2 of the act of March 7, 1942, supra, in pertinent part provides:

> "Any person who is in active service and is officially reported as missing, missing in action, interned in a neutral country, or captured by an

enemy shall, while so absent, be entitled to receive or to have credited to his account the same pay and allowances to which such person was entitled at the time of the beginning of the absence or may become entitled to thereafter: * * * "

Subsection 1(a) of the mentioned act defines the word "person" to include commissioned officers. Subsection 1(b) of said act defines the term "active service" as used in the act to mean active service in the Army of the United States.

Section 3 of the above act, in pertinent part, provides:

"Any person entitled under section 2 of this Act to receive pay and allowances, and who has made an allotment of pay for the support of dependents * * *, shall be entitled to have such allotments for dependents * * * as he previously may have executed continued for a period of twelve months from date of commencement of absence, notwithstanding that the period for which the allotments had been executed may have expired during such twelve month's period, and the proper disbursing officer shall so continue the allotments during such absence: Provided, That in the absence of a previously executed allotment, or where the allotment made is not sufficient for reasonable support of a dependent * * *, the head of the department concerned may direct that an allotment * * *, shall be paid * * * to * * * such dependent as has been designated in official records, or, in the absence of such designation, to such person as may be determined by the head of the department concerned, * * * to be a bona fide dependent within the meaning of section 1(c): * * * "

It is manifest from the foregoing provisions of the cited act that Mrs. Rice is not entitled thereunder to an allotment from her husband's pay, because it does not appear that he was in the active service of the Army at or subsequent to the outbreak of the war.

4. Section 16, act March 2, 1899 (30 Stat. 981), as amended (act October 6, 1917, 40 Stat. 385; act May 16, 1938, 52 Stat. 354; 10 U.S.C. 894), in substance provides that the Secretary of War is authorized to permit officers, active or retired, to make allotments from their pay, under such regulations as he may prescribe, for the support of their families.

Pursuant to the authority granted in the last above-cited act, section II, paragraph 5a(1), Army Regulations 35-5520, March 4, 1941, as amended by Change No. 1, October 12, 1942, provides that:

> "Allotments to individuals for the support of the allotters' families or dependent relatives may be made by--
>
> "(1) Commissioned officers (including retired officers on active duty * * *), * * * — Only while serving or about to serve * * * outside the continental limits of the United States or in Alaska."

The inclusion in the foregoing regulation of retired officers on active duty as officers entitled to make allotments to their dependents by the usual rules of construction excludes retired officers who have not been ordered to active duty from making such an allotment. No other act or regulation has been found which specifically or by clear implication authorizes or permits a retired officer to make an allotment of his retired pay to his dependents.

The Office of the Chief of Finance (Mr. Cave, Ext. 3512) informally advises this office that it takes the position that a retired officer is not authorized to make an allotment for any purpose except for the payment of life insurance premiums.

5. Paragraph 17c, Army Regulations 35-1760, August 10, 1942, provides in part that a retired officer may request the proper disbursing officer to deposit his pay to his credit with a designated person, bank, or other institution. Paragraph 17d(1) of the mentioned regulations in part requires the retired officer, on the first of April and the first of October of each year, to report over his bona fide signature to the disbursing officer paying his account that he is alive. Paragraph 17d(2) thereof provides that a retired officer who has requested that his retired pay be deposited to his credit with any person, bank, or other institution or addressed in care of another person; or who is residing or traveling outside the continental limits of the United States or Philippine Department; or who has given a power of attorney to indorse his checks, will on or after the last day of each month, report over his bona fide signature to the disbursing officer paying his account that he is alive. Paragraph 17e of the regulations requires the monthly pay of a retired officer not on active

duty to be paid in full by one check drawn to his own order, or placed to his credit with a bank or other institution, as he may request.

The foregoing regulations provide a possible, though cumbersome, method whereby some of the retired pay of Lieutenant Rice may be made available to his wife. It is suggested that Mrs. Rice attempt to locate her husband through the facilities of the American and International Red Cross. In the event Mrs. Rice is successful in her search, it is further suggested that she attempt to secure through the same agencies a request from her husband to have his retired pay deposited to his credit with a bank in San Francisco as is provided by paragraph 17c, Army Regulations 35-1760, August 10, 1942, and that she also secure a power of attorney, or direction to such bank, from her husband authorizing her to draw against such deposited funds. It will also be necessary to the success of such a plan that the mentioned officer execute and forward to the Chief of Finance, or to such other disbursing officer as may make the payments of retired pay, the semi-annual and monthly statements that he is alive as is required by paragraph 17d(1) and (2), Army Regulations 35-1760, August 10, 1942, and that the Chief of Finance is willing to make payment of such retired pay in such manner despite the delay in receipt of such semi-annual and monthly statements. Inasmuch as this case involves a novel question of allotment of pay by a retired officer in an inactive status, it is suggested that this file be transmitted to the Chief of Finance for comment before reply is made to Mrs. Rice.

6. It is therefore recommended that these papers be returned to The Adjutant General, by disposition form entry, prepared for the signature of the Chief of Division, stating:

> An allotment of the retired pay of First Lieutenant Joseph Rice, Retired, is not authorized under the act of March 7, 1942 (Public Law 490, 77th Cong.) relating to allotments for dependents of military personnel who are officially reported as missing, missing in action, interned in a neutral country or captured by an enemy, because that act only permits allotments from the pay of persons in active service and it does not appear from the files that the mentioned retired officer was or is in active service. Furthermore, no allotment is authorized under section II, paragraph 5a(1), Army Regulations 35-5520, March 4, 1941, as amended by Change No. 1, October 12, 1942, promulgated under authority of section 16, act March 2, 1899 (30 Stat. 981), as amended

(act Oct. 6, 1917, 40 Stat. 385; act May 16, 1938, 52 Stat. 354; 10 U.S.C. 894), which provides that the Secretary of War is authorized to permit officers, active or retired, to make allotments from their pay, under such regulations as he may prescribe, for the support of their families, as the cited regulations do not authorize allotments to dependents from the retired pay of retired officers who have not been called to active duty. No other act or regulations appear to authorize or permit a retired officer of the mentioned category to make an allotment of his retired pay to his dependents. It is suggested that Mrs. Rice attempt to locate her husband through the facilities of the American and International Red Cross. In the event Mrs. Rice is successful in her search, it is further suggested that she attempt to secure through the same agencies a request from her husband to have his retired pay deposited to his credit with a bank in San Francisco as is provided by paragraph 17c, Army Regulations 35-1760, August 10, 1942, and that she also secure a power of attorney, or direction to such bank, from her husband authorizing her to draw monthly against such deposited funds up to such amount as he may fix. It will also be necessary to the success of such a plan that the mentioned officer execute and forward through the same medium to the Chief of Finance, or to such other disbursing officer as may make the payments of retired pay, the semi-annual and monthly statements that he is alive as is required by paragraphs 17d(1) and (2), Army Regulations 35-1760, August 10, 1942, and that the Chief of Finance is willing to make payment of such retired pay in such manner despite the delay in receipt of such semi-annual and monthly statements. Inasmuch as this case involves a novel question of allotment of pay by a retired officer, it is suggested that this file be transmitted to the Chief of Finance for his comment, before reply is made to Mrs. Rice.

Charles W. West,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 220.871 June 22, 1942.

MEMORANDUM for The Judge Advocate General.

Subject: Disposition of the effects of Jasper Van't Woudt, 6025051, deceased.

1. By informal action sheet (AG 201 Van't Woudt, Jasper) dated June 10, 1942, there was referred for remark and recommendation, with particular reference to the eighth indorsement, the attached correspondence relative to the disposition of certain personal effects of Sergeant Jasper Van't Woudt, 6025051, deceased, which are now in the custody of the Summary Court, Edgewood Arsenal, Maryland, under the authority of Article of War 112 (act June 4, 1920, 41 Stat. 809; act June 10, 1921, 42 Stat. 24; 10 U.S.C. 1584). In the eighth indorsement the summary court officer, here concerned, requests an opinion as to the advisability of asking the Orphans' Court of Monmouth County, New Jersey, to appoint, at once, a custodian of deceased's personal property to whom the effects now in the custody of the summary court may be delivered.

2. It appears that the deceased, a member of the band, Chemical Warfare Service Replacement Training Center, died on December 18, 1941 (Incl. 2'). The file does not reveal the nature or value of the effects secured by the summary court, except that $408.94 in cash was found in deceased's locker and has been deposited with Captain W. P. Larrabee, Finance Department (Incl. 3'). A safety deposit box rented by the deceased at the Atlantic Highlands National Bank, Atlantic Highlands, New Jersey, was opened in the presence of the summary court officer, revealing a purported will and several corporate stock certificates (Incl. 7'), which apparently remain in the custody of the bank. Certain other corporate stock certificates, a certificate of automobile title, an automobile liability and property damage insurance policy, a $10 bond coupon, thirty-seven cents in cash, postage stamps totaling sixty-eight cents, and two keys to the safety deposit box were delivered to the Atlantic Highlands National Bank by the summary court officer and receipt secured therefor (Incl. 6'), but it does not appear whether these effects were found in the safety deposit box or among the deceased's effects at Edgewood Arsenal. Deceased's automobile is in a garage at Aberdeen, Maryland, but it does not appear that the summary court has taken it into custody.

In a will, purportedly executed by "Jasper Van T. Woudt" on February 4, 1935 (Incl. 3), "the National Bank, at Atlantic Highlands, New Jersey", assumed to be the Atlantic Highlands National Bank, is named as sole executor. Certain alterations on the face of this instrument have necessitated a hearing on its admission to probate in

the Orphans' Court of Monmouth County, New Jersey, where the matter is now pending. One Anne Comte, Newark, New Jersey, is named in the purported will as a friend and beneficiary, but her name and bequest have been stricken out. According to hearsay information secured by the summary court, Anne Comte was an old friend who died about two years ago (Incl. 10'). The only other persons named in the will as beneficiaries are an aunt, Liona Kerkvyk; a newphew, Mariness Van T. Woud; and a niece, Gretta Roest, all indicated as residing in Amsterdam, Holland. Deceased's service record shows as emergency addressee, Gretrud Kuart, sister, of Hillegom, Holland (Incl. 10'). The summary court has also secured information that the deceased had been married, but that he was a widower at the time of his death, and there is no available evidence that he had any children (Incl. 10').

3. The term "legal representative", as used in Article of War 112, supra, has been held by this office to mean the duly authorized legal representative of the deceased; that is, an executor or administrator (JAG 220.8, Feb. 7, 1918; id., June 24, 1918; JAG 210.871, Sept. 22, 1923). A person, or other legal entity, designated in a will to act as executor of deceased's estate, does not acquire the capacity of a legal representative until he has qualified before a court of competent jurisdiction (JAG 220.872, May 8, 1922). Inasmuch as Article of War 112 specifically provides the method of procedure to be followed in the disposition of the effects of a deceased soldier, there must be a strict compliance with its terms (JAG 220.872, May 8, 1922), otherwise, the summary court officer may be subject to personal liability for any loss resulting from the improper disposition of deceased's effects. It follows that the summary court officer should deliver such effects to an executor named in the will only upon the presentation by the executor of a certified copy of letters testamentary (JAG 220.872, May 8, 1922).

4. In the instant case, the Atlantic Highlands National Bank apparently has not yet qualified as deceased's legal representative. The known relatives of the categories specified in Article of War 112, to whom delivery of the effects might be made, if found by the court, appear to reside in Holland. The current occupation of Holland by the enemy renders difficult, if not impossible, communication with the person, other than a legal representative, to whom the effects might be properly delivered. The same condition may also result in a considerable delay in the pending hearing on the admission of the purported will to probate.

As the estate consists in large part of corporate stock of fluctuating value, conservation of the estate may require the attention of a special or temporary administrator pending the qualification of an executor or administrator. The purported will of deceased has been referred to Snyder, Roberts & Pillsbury, Atlantic Highlands, New Jersey, attorneys for the named executor, for settlement of the estate and they have apparently undertaken probate proceedings (Incl. 9'). It is

recommended that the summary court officer here concerned be advised to communicate with the attorneys named, for the purpose of suggesting the possibility of proceedings to secure the appointment of a special or temporary administrator to whom deceased's effects might be delivered. In the event such an appointment is not desirable and no other legal representative qualifies in the near future, the summary court should treat the case as one in which "such persons or their addresses are not known to or readily ascertainable by said court" under Article of War 112, and dispose of the effects accordingly.

5. It is therefore recommended that these papers be returned to The Adjutant General by action sheet entry, prepared for the signature of the Chief of Division, stating:

> It appears that the attorneys for the Atlantic Highlands National Bank, Atlantic Highlands, New Jersey, named as executor in deceased's purported will, have undertaken probate proceedings in the matter of the estate of late Sergeant Jasper Van't Woudt, 6025051, and further that some time may elapse before the admission of the will to probate, and qualification in the usual fashion of a legal representative, if these events ever transpire. It is recommended that the summary court concerned be advised to communicate with the attorneys for the estate for the purpose of suggesting the possibility of proceedings to secure the appointment of a special or temporary administrator to conserve the estate, pending the hearing on the admission of the will to probate. If a special or temporary administrator is appointed and qualifies, the summary court may properly deliver the effects of the deceased soldier, now in its custody, to such administrator. In the event that a legal representative of the deceased does not qualify in the near future, the summary court should treat the case under Article of War 112 as one in which "such persons or their addresses are not known to or readily ascertainable by said court", and dispose of the effects accordingly. It is noted (Incl. 8') that the summary court has a receipt evidencing delivery of certain property, legal papers and stock certificates to the executor named in the will. If these items were found among deceased's effects in camp or quarters, the summary court has no authority to dispose of them by delivery to the named executor until such executor qualifies as such by issuance of letters testamentary by a court of competent jurisdiction. The bank may have been given custody of the items, however, for the purpose of safekeeping, but this does not relieve the summary court of its responsibility under Article of War 112. The summary court is not authorized or required to secure the custody of any effects not in camp or quarters, and, accordingly, should not attempt to dispose of any effects found in deceased's safety deposit box.

C. B. Mickelwait,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 210.871 April 22, 1942

MEMORANDUM for The Judge Advocate General.

Subject: Beneficiary (disposition of effects) of Second Lieutenant Denn W. Piatt, A.C. who was killed on January 18, 1942.

1. By informal action sheet (AG 201, Piatt, Denn W.) dated April 8, 1942, there was referred for remark and recommendation the file relative to the alleged marriage of Second Lieutenant Denn W. Piatt, O-433200, Air Corps (hereafter called deceased), and Clara Bell Parham (hereafter called claimant), of Orlando, Florida.

2. The file discloses that deceased was killed while on duty at Barksdale Field, Louisiana. Personnel records pertaining to him indicate that he was unmarried and had named his father as beneficiary. The following pertinent information is inclosed with the fifth indorsement:

Inclosures Nos. 7 and 8. Photostatic copies of affidavits of two justices of the peace of Buncombe County, North Carolina, that they had knowledge of the performance of a marriage ceremony between deceased and claimant at 4 p.m., August 14, 1939. However, the two affiants neither state that they witnessed the ceremony nor indicate how they secured their knowledge of the ceremony.

Inclosure No. 6, Photostatic copy of the duly authenticated death certificate of E. M. Mitchell, who, affiants and claimant allege, performed the marriage ceremony.

Inclosures Nos. 4 and 5. Letters from Red Cross investigators to the effect that there is no record of the issuance of a marriage license, nor of subsequent recording of the marriage according to law; that the local register of deeds and a local lawyer do not believe the affidavits of the two justices of the peace to be "valid"; that the local register of deeds has never known E. M. Mitchell, the purported celebrant, now deceased, to fail to return a marriage record for each ceremony performed during twenty-two years in office as justice of the peace.

Inclosures Nos. 9 and 10. Affidavits of claimant and her sister stating that subsequent to the alleged ceremony deceased and claimant cohabited as husband and wife until deceased's entry into the army. Claimant further states that the two justices of the peace in North Carolina witnessed the ceremony.

Inclosures Nos. 11 and 12. An "Order of No Administration" from the County Judge's Court, Orange County, Florida, and its due certification. The court finds true the facts alleged in claimant's petition (not recited) and decrees that claimant, "the sole heir at law" of deceased, is entitled to receive deceased's estate without letters of administration. There is no mention in the court order of notice to other parties in the proceeding.

3. Article of War 112 is not a statute of descent, nor one of administration of estates. It merely designates certain individuals to one or other of whom the effects left by a deceased soldier in camp should be delivered, and provides a method by which the War Department may be relieved of responsibility for such effects. It is the duty of the summary court to take such reasonable steps as may be necessary to satisfy itself that the person to whom the effects are transmitted comes within the purview of the article (JAG 220.871, Oct. 24, 1941). The beneficiary named by the deceased is not necessarily the beneficiary within the meaning of the article (JAG 220.871, Oct. 28, 1941). The article provides that the summary court may transmit effects to the widow or legal representative. The claimant here seeks to establish herself in both capacities.

The effect of the court order of no administration is limited. It does not purport to appoint a legal representative. The jurisdiction of the Florida court does not extend to property located in Louisiana. Because the order is not a final decree, because it is issued after an ex parte hearing without notice to possible or probable adversaries, and because the findings in the order do not become conclusive, even in Florida, until the lapse of one year (Section 1, Chapter 16992, Acts of 1935, Laws of Florida), it is not conclusive as to the martial status of the claimant and the deceased, even in Florida.

As to proof of the marriage of claimant and deceased, it is noted that claimant states that the two affiant justices of the peace witnessed the ceremony, although it is not so stated in their affidavits. Marriage may be proved by witnesses of the ceremony. The law of North Carolina provides that the consent of a male and female person who may lawfully marry, presently to take each other as man and wife, freely, seriously, and plainly expressed by both in the presence of each other and in the presence of a justice of the peace, and the consequent declaration by the officer that they were man and wife, shall be a valid and sufficient marriage (Section 2493, North Carolina Code, 1939). Although no minister or justice of the peace shall perform a marriage ceremony until

there is delivered to him a lawful license to do so, failure to procure a license to marry will not invalidate a marriage otherwise good (State v. Parker, 106 N.C. 711, 11 S.E. 517; Wooley v. Bruton, 184 N.C. 438, 114 S.E. 628). The only effect of marrying a couple without a legal license is to subject the officer or minister to the penalty of $200 prescribed by law (State v. Parker, 106 N.C. 711, 11 S.E. 517; Maggett v. Roberts, 112 N.C. 71, 74, 16 S.E. 919). If the claimant submits affidavits of two credible witnesses stating that said affiants witnessed the ceremony, this evidence, coupled with her own affidavit, would establish a prima facie marriage, provided such affidavits are prepared and duly authenticated in accordance with the laws of North Carolina.

There is no evidence in the file of any inquiry having been made of deceased's father, or of deceased's fellow flying cadets at Orlando Air Base, where deceased was stationed from February 7, 1941; until June 14, 1941, even though the claimant alleges marriage at that time. Further investigation may completely clarify the status of the claimant.

The summary court could prudently notify both the father and the claimant that if letters of administration are issued in a court of competent jurisdiction in Louisiana the property there would be turned over to an administrator so appointed. Such letters of administration are prima facie evidence of all they purport to show; and the jurisdiction of the court which issues them is not open to collateral attack (Dig. Op. JAG 1912-40, Sec. 470, (6)). If the suggested action is not taken by either party, and if the claimant fails to establish her marriage status to the satisfaction of the summary court within a reasonable time, the effects in Louisiana may be turned over to the father, if living, or if not, to the other relatives in the order named in Article of War 112.

4. It is therefore recommended that these papers be returned to The Adjutant General by action sheet entry, prepared for the signature of the Chief of Division, stating:

> It is the duty of the summary court appointed under Article of War 112 to take such reasonable steps as may be necessary to satisfy itself that the person to whom the effects are transmitted comes within the purview of the article. The papers inclosed do not establish with certainty the martial relationship of the claimant and deceased. The file discloses no inquiry as to the deceased's martial status either of the father of deceased or of fellow flying cadets who were at Orlando Air Base while the deceased was stationed there. Further investigation is therefore deemed advisable.

SPJGA 1943/3153 March 3, 1943

MEMORANDUM for The Judge Advocate General.

Subject: Disposition of effects of deceased military personnel under Article of War 112.

1. By informal action sheet (AG 201 Sharpe, Emanuel M., Sr. (1-16-43) PC-G), dated February 17, 1943, these papers were referred for opinion concerning the procedure being followed in connection with the disposition of the effects of Corporal Emanuel M. Sharpe, Sr. (34057144), whose designated beneficiary (wife) is being held by the civil authorities on the charge of murdering Corporal Sharpe.

2. In the basic letter dated January 16, 1943, from the Summary Court Officer, 24th Aviation Squadron, Eglin Field, Florida, it is stated that the service record of Corporal Sharpe shows that he designated his wife, Mrs. Mildred Sharpe, as his beneficiary, and his mother, Mrs. Mattie Sharpe, as alternate beneficiary; that in the event Mrs. Mildred Sharpe is convicted of the pending charge of murdering her husband she would not be entitled to receive his effects and they would be given to his mother; that at present all of the effects are being held by the Summary Court pending the outcome of the trial, and therefore War Department, A.G.O. Form No. 54 and the "Report of Findings of Summary Court" have not been forwarded to The Adjutant General. In first indorsement dated February 2, 1943, to The Adjutant General, the Commanding General AAF Proving Ground Command, Eglin Field, Florida, requested information whether the foregoing is the correct procedure in cases of this nature.

3. Article of War 112 provides, in substance, that in case of the death of any person subject to military law the commanding officer will permit the legal representative or widow of the deceased, if present, to take possession of all his effects; and if no legal representative or widow be present, the commanding officer shall direct a summary court to secure all effects, and after adjusting local debts, shall, as soon as practicable, transmit such effects, through the Quartermaster, to the widow or legal representative of the deceased.

4. The person designated as beneficiary or alternate beneficiary in a service record is not a "beneficiary" within the meaning of that term as used in Article of War 112. The term as used in the latter sense refers to a beneficiary designated by a will which the law recognizes as sufficient to dispose of property

(SPJGA 1942/2124, May 23, 1942). Such designation as is here involved would not affect the procedure to be followed by a summary court acting under the provisions of the mentioned article. Article of War 112 is not a statute of distribution or administration of estates and it does not confer upon the summary court officer authority to convey title to any effects collected by him. He is merely authorized to transmit such property to the person designated in the article of war, thereby relieving the War Department of responsibility for such effects (JAG 220.871, Oct. 28, 1941; JAG 210.872, Nov. 25, 1941). In the present case it does not appear that a legal representative has been appointed by a court of competent jurisdiction but it is probable that there are opposing claims by the wife and mother of the deceased. Were it not for the alleged charge of murder against the widow she would undoubtedly be the proper person to receive the effects. In a similar case where a wife was charged with the murder of her husband who was an officer in the Army, the question was presented whether the legal representative or the widow should be given his effects and in the opinion of The Judge Advocate General it was said:

> "It would seem in this case that there can be no question that the administrator should be given the preference. This conclusion, however, is not based on the reason that to deliver the effects to the widow would result in permitting one who murders her husband to make herself 'an heir in fact'. Such delivery would not and could not have any such effect, for it could not invest her with any title to the property, nor could the refusal to turn over the effects to her divest her of any title thereto, this matter being controlled solely by the statutes of descent and the court decisions of the proper state." (Dig. Op. 1912-1940, p. 389)

Even though no legal representative has been appointed in this case, under the circumstances it appears manifestly improper to deliver the effects to the widow until and unless she has been cleared of the charge of murdering her husband. In the event the mother or someone else were appointed legal representative there would be no objection to turning the property over to such person and allowing the interested parties to settle the title to the effects either by agreement or proper legal proceedings (SPJGA 1942/2124, supra). Pending the termination of the murder trial or the appointment of a proper legal representative of the deceased, the procedure adopted in this case appears proper and legal.

5. It is therefore recommended that these papers be returned

to The Adjutant General, by action sheet entry, prepared for the signature of the Assistant Chief of Division, stating:

> The procedure to be followed in this case is governed by Article of War 112, under which, generally, either the widow or the legal representative of the deceased would be the proper person to receive the effects. However, under the circumstances of this case the widow does not appear to be the proper person to receive the property of her husband unless and until she has been cleared of the charge of murdering him. In the event that a legal representative is appointed by a court of competent jurisdiction (and it should be noted that the designation of a person as beneficiary in a service record does not constitute such person the legal representative under Article of War 112) such legal representative would be authorized to receive the property for the person entitled thereto, as determined by agreement or by proper legal proceedings. It is the opinion of this office that until the termination of the murder trial or the appointment of a proper legal representative of the deceased, the procedure followed in this case is proper and that there is no legal objection to holding the effects pending further developments.

Irvin Schindler,
Colonel, J.A.G.D.,
Assistant Chief of Military Affairs Division.

SPJGA 1942/4738
(004.02)

October 11, 1942

MEMORANDUM for The Judge Advocate General.

Subject: Designation of Beneficiary eligible to receive death gratuity executed by an attorney in fact.

1. By disposition form dated September 29, 1942, the opinion of this office was requested as to the validity of a "Designation of Beneficiary" executed on behalf of an Army officer by his wife as attorney in fact.

2. The inclosures indicate that Captain Chauncey R. Parsons, Air Corps, executed a designation of beneficiaries on the prescribed form at Tulsa, Oklahoma, on August 24, 1942; that by letter from The Adjutant General, dated September 2, 1942, he was advised that the previously executed form was defective because he had not filled in the spaces provided for names of dependent relatives other than wife or child, that if there were no such relatives he should so state, and that the execution of a new form containing the omitted information was desired. In the interim Captain Parsons had proceeded to foreign duty, station unknown. His wife, Catherine A. Parsons, as attorney in fact, at Tulsa, Oklahoma, on September 9, 1942, executed a new beneficiary card and transmitted it to The Adjutant General accompanied by a power of attorney executed by "C. R. Parsons, Captain, A.C." as authority for her act in the premises.

3. Section I, act of December 17, 1919, provides in pertinent part as follows:

> " * * * hereafter, immediately upon official notification of the death from wounds or disease, not the result of his own misconduct, of any officer * * *, the (Chief of Finance) of the Army shall cause to be paid to the widow, and if there be no widow to the child or children, and if there be no widow or child to any other dependent relative of such officer * * * previously designated by him, an amount equal to six months pay * * *. The Secretary of War shall establish regulations requiring each officer * * * having no wife or child to designate the proper dependent relative to whom this amount shall be paid in case of his death. * * *" (Underscoring supplied) (41 Stat. 367; 10 U.S.C. 903; M.L., 1939, sec. 862)

Pursuant to the authority of the mentioned act, the Secretary of War promulgated Army Regulations 600-600, dated January 31,

1931, which provide that officers shall designate beneficiaries on Form 41, Adjutant General's Office, and Army Regulations 35-1540, dated March 15, 1937, paragraph 6c, of which reads as follows:

> "c. Submission for advance decision.--All cases wherein there are irregularities in the designation of beneficiaries will be submitted to the Chief of Finance for decision of the Comptroller General in accordance with paragraph 4b, AR 35-730, before making payment."

4. The act of December 17, 1919, supra, directs the Secretary of War to establish regulations requiring each officer having no wife or child to designate the proper dependent relative to whom the gratuity shall be paid. Such regulations are not required by the statute in the case of an officer who has a wife or child. Therefore, it is believed that so much of the regulation as requires an officer who has a wife and child to designate further beneficiaries is an administrative regulation as distinguished from regulations promulgated pursuant to a statute and thereby having the force and effect of law. In view of the foregoing, the designation of beneficiaries executed by Captain Parsons on August 24, 1942, is valid.

As to the designation of beneficiaries executed by Mrs. Parsons as attorney in fact, it is noted that on August 24, 1942, Captain Parsons executed his own designation of beneficiaries and also the power of attorney under which Mrs. Parsons acted, and that she executed the second designation of beneficiary on September 9, only sixteen days after Captain Parsons had acted in the same matter. It is believed that any payment made to a beneficiary designated by Mrs. Parsons as attorney in fact would first have to be submitted to the Comptroller General for advance decision in accordance with paragraph 6c, of Army Regulations 35-1540, supra. In an opinion dated September 21, 1942, the Assistant Comptroller General stated:

> "* * * notwithstanding the broad power of attorney, the principal has the right to act also in the matters in which the attorney in fact may act, thus making possible action both by the principal and the attorney in fact with respect to a given matter. Of course * * * action by the principal in a given matter would operate, at least pro tanto, to revoke the authority of the agent in that particular matter. The principal has not divested himself of authority to do any of the acts referred to and many matters referred to in the power of attorney can be performed by the principal while in foreign countries even during the war. Obviously, if recognized by the United States as to matters in which the United States is concerned, it

can only have effect as to matters which the principal cannot himself do while in foreign service." (MS Comp. Gen., B-28290, September 21, 1942).

Captain Parsons executed a designation of beneficiary only sixteen days before Mrs. Parsons, as attorney in fact, acted in the "given matter". The designation effected by Captain Parsons is legally sufficient to warrant payment to his wife or daughter if he dies in line of duty. The form which he executed is incomplete as to his designation of a dependent relative who will be eligible to take in the event of the decease or disqualification of his wife or child. It appears, however, that Captain Parsons could have declined to designate such a person and that this may well have been his intent. With no apparent change in the facts or circumstances, it is believed that the validity of the designation executed by Mrs. Parsons only sixteen days subsequent to her principal's action is questionable because he has acted thereon and has, perhaps, thereby excluded her exercise of power in the "given matter". It further appears that the correction of the deficiency in the original form is an act which Captain Parsons can accomplish while in foreign service, and that for this reason the designation executed by Mrs. Parsons might not be accepted by the Comptroller General.

The form prepared by Mrs. Parsons should be retained for submission to the Comptroller General for his determination of its validity in case Captain Parsons dies before he himself has completely filled out a new form and neither Mrs. Parsons nor the child are then able to qualify as beneficiaries.

5. It is therefore recommended that these papers be returned to The Adjutant General by disposition form entry, prepared for the signature of the Chief of Division, stating:

> It is the opinion of this office that the designation of beneficiary executed by Captain Parsons on August 24, 1942, is valid, and that in view of the circumstances in this particular case the designation executed by the attorney in fact on September 9, 1942, is of doubtful validity. It is therefore suggested that Captain Parsons himself be directed to complete and execute another designation of beneficiary, pending the receipt of which the document prepared by Mrs. Parsons should be retained lest Captain Parsons should die before executing another designation and his present wife and child are then dead or disqualified, in which event the document should be submitted to the Comptroller General, who is charged with the final administrative determination of the validity of irregular designations of beneficiary (par. 6c, AR 35-1540).

Charles W. West,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 247. September 4, 1942

MEMORANDUM for The Judge Advocate General.

Subject: Death gratuity benefit as affected by separation agreement.

1. By disposition form dated August 25, 1942, the Office of The Adjutant General, Officers Branch, requested an opinion as to the effectiveness of Major Arthur M. Tiber's designation of his mother and sister as beneficiaries for the six months' gratuity, in view of the fact that Major Tiber has a wife now living, from whom he has not been divorced.

2. The file indicates that Major Tiber and a Miss Cecil Berlin were married on April 29, 1929, in New York City. There were no children born of this marriage. The couple separated and have lived apart since October, 1932. In 1932 the husband instituted an action for separation on the ground of the wife's desertion. In the ensuing litigation a separation agreement was entered into, which agreement was approved by an order of the New York Supreme Court. In substance, the agreement provided that the parties could live apart; that each was entitled to retain certain personal property; that the husband would pay $12 per week for the support of the wife (it appears that this amount was subsequently reduced to $5 per week); that if the wife thereafter secured a divorce payments would cease; that if the husband thereafter obtained a divorce on the ground of the wife's adultery, payments would cease; that if the wife obtained a divorce on the ground of the husband's adultery, payments would continue; that the wife could dispose of her property by will as though the husband had predeceased her; that the husband could do likewise; that the provisions of the agreement for support could be enforced in equity; and that the agreement should be binding on the parties' heirs.

3. Major Tiber has designated his mother as beneficiary on his designation of beneficiary card (WD, AGO Form No. 41), and in the event of her death or disqualification has named his sister as beneficiary. On this card Major Tiber did not designate his wife as beneficiary but merely indicated he was legally separated.

In reply to a request from The Adjutant General dated August 9, 1942, that he state the name and address of his wife unless she was deceased or divorced, Major Tiber, by letter dated August 15, 1942, stated:

"4. In 1932 I instituted an action against my wife for a separation on the ground of desertion.

"5. In the ensuing litigation a settlement was arrived at and a formal separation agreement was entered into * * *.

* * *

"16. * * * I respectfully submit that the status of my wife with respect to this matter has considerably changed so as to bar her from the right to participate in any benefits which may have accrued to her by reason of her marriage to me, she having freely placed herself in the position equal to that of being divorced in so far as the question of her dependency is concerned and therefore is not entitled to be designated as beneficiary on the form above referred to."

4. Section 1, act of December 17, 1919 (41 Stat. 367, 10 U.S.C. 903), provides:

"That hereafter, immediately upon official notification of the death from wounds or disease, not the result of his own misconduct, of any officer * * *, the Quartermaster General of the Army shall cause to be paid to the widow, and if there be no widow to the child or children, and if there be no widow or child or any other dependent relative of such officer * * * previously designated by him, an amount equal to six months' pay at the rate received by such officer * * * at the date of his death. The Secretary of War shall establish regulations requiring each officer * * * having no wife or child to designate the proper dependent relative to whom this amount shall be paid in case of his death. * * * "

This office has held that the six months' gratuity can be paid only to the payees specified and according to the conditions fixed by the statute (JAG 210.873, Feb. 18, 1930). Only in the event an officer leaves no widow or minor child would a designation of any other beneficiary be effective. The wording of the act itself indicates that Congress intended that the War Department should provide regulations for the designation of beneficiaries only in the event the officer or enlisted man had no wife or child. In accord with this view this office has held that an officer may not designate a beneficiary so as to defeat the right of his lawful widow (JAG 247, Mar. 29, 1927).

5. The place of marriage of Major Tiber was the State of New York. As the file indicates that the residence of the parties

continued therein, the status of their marriage relationship is governed by the laws of that state. In New York a separation agreement does not dissolve the marital status, as is indicated by the fact that should a husband fail to fulfill his obligations under such an agreement the wife may elect either to sue on the agreement itself or upon the husband's marital duty to support his wife in the manner prescribed by law (Woods v. Bard, 285 New York 11, 32 N.E. 2nd 772; Sockman v. Sockman, 252 App. Div. (N.Y.) 914, 300 N.Y.S. 187).

It therefore appears, on the basis of the facts disclosed, that Major Tiber's marriage has not been legally dissolved by the separation agreement and that he has a wife living. Therefore he may not designate any person as a beneficiary so as to defeat, upon his death, the right of his lawful widow (JAG 247, Mar. 29, 1927). To the same effect see opinion of this office dated April 22, 1942 (SPJGA 291.1).

6. It is therefore recommended that these papers be returned to The Adjutant General by disposition form entry, prepared for the signature of the Chief of Division, stating:

> The act of December 17, 1919 (41 Stat. 367; 10 U.S.C. 903), as amended by the act of December 10, 1941 (55 Stat. 796; 10 U.S.C. 456), makes the widow and children of a deceased officer prior beneficiaries in the order named and an officer may not designate any other dependent relative as beneficiary so as to defeat the right of his lawful widow or children. Moreover, it should be noted that the statute does not require designation of the wife or children. Upon the facts disclosed by this file it appears that Major Tiber has a lawful wife, despite the separation agreement. It is, therefore, the opinion of this office that neither of the persons named as beneficiaries by Major Tiber on WD, AGO Form No. 41 will be eligible to receive the six months' gratuity, if Major Tiber has a wife living at the time of his death.

C. B. Mickelwait,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 1943/6639 May 17, 1943

MEMORANDUM for The Judge Advocate General.

Subject: Designation of Trustee to receive payment of death gratuity.

1. By informal action sheet (AG 201 Wellington, Russel H. (4-23-43) SPXPC-V, dated May 3, 1943) there was referred for comment a letter from Major R. H. Wellington, Ordnance Department, Headquarters Benicia Arsenal, Benicia, California, dated April 23, 1943, addressed to The Adjutant General of the Army, which requested information whether payment of the six months' death gratuity may legally be made to a named bank as trustee for his son.

2. Inclosed with the basic letter is W.D. A.G.O. Form Number 41, Designation of Beneficiary, which the writer has executed, naming as beneficiary thereon, his minor son, aged ten years, followed by the words "to be paid to Crocker First National Bank, San Francisco, California, as trustee". Major Wellington's mother and father are named as alternative beneficiaries. The writer states further that his divorced wife is the legal guardian of his son and that he has specifically directed in his will that she shall not share in his estate.

3. The act of December 17, 1919 (41 Stat. 367; 10 U.S.C. 903), as extended by the act of December 10, 1941 (55 Stat. 796; 10 U.S.C. 456), providing for payment of death gratuities to dependents of officers of the Regular Army, to apply to dependents of officers of the Army of the United States, provides in part, that -

> "* * * immediately upon official notification of the death from wounds or disease, not the result of his own misconduct, of any officer or enlisted man on the active list of the Regular Army or on the retired list when on active duty, the Chief of Finance of the Army shall cause to be paid to the widow, and if there be no widow to the child or children, and if there be no widow or child to any other dependent relative of such officer or enlisted man previously designated by him, an amount equal to six months' pay at the rate received by such officer or enlisted man at the date of his death. The Secretary of War shall establish regulations requiring each officer

and enlisted man having no wife or child to designate the proper dependent relative to whom this amount shall be paid in case of his death. * * *"

Army Regulations 35-1540, December 19, 1942, and Army Regulations 600-600, January 31, 1931, contain certain provisions relating to the administration of the cited act but none of such provisions expressly authorizes payment in the manner indicated in the basic letter.

4. The applicable statute is specific in that it provides for payment of the death gratuity to the surviving widow of an officer and if there be no widow, then to such child or children as may survive. In the case presented, upon the death of the officer, he having been divorced from his wife, the right to receive payment would immediately vest by operation of law in the minor son. It is an absolute right given without the necessity of a designation. It is only where no widow or child survive that a designation is required.

As the act does not provide for the designation of a trustee, such a designation is of doubtful validity. Where, for any reason, the child is not sui juris, the right to receive payment for the benefit of the child, would be in its guardian or other similar fiduciary appointed in accordance with the laws of its domicile. Therefore, as this right accrues by operation of law, it may not be defeated or restricted by the parent by a designation which seeks to vary the quantum or the nature of the estate which arises under the law (SPJGA 1942/5446, Nov. 19, 1942; see also JAG 210.873, Feb. 18, 1930). This question, however, is one which involves the disbursement of public funds and, therefore, is within the final jurisdiction of the Comptroller General.

5. It is therefore recommended that these papers be returned by informal action sheet entry to The Adjutant General (Attention: Casualty Branch), prepared for the signature of the Chief of Division, stating:

In the opinion of this office the designation by Major Wellington of a trustee to receive the six months death gratuity for the benefit of his minor son is not authorized by the act of December 7, 1919 (41 Stat. 367; 10 U.S.C. 903), and can have no legal effect. As the question presented involves the expenditure of public funds, however, the final determination of the matter presented rests with the Comptroller General of the United States.

Charles W. West,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 1942/4616
(013.2)

October 6, 1942

MEMORANDUM for The Judge Advocate General.

Subject: Jurisdiction of coroners in cases of deaths of military personnel.

1. By disposition form (SPX 095 Ganzhorn, Edwin C. (M.D.) (9-24-42)OB-C) dated September 29, 1942, there was referred for information upon which to base a reply a letter dated September 24, 1942, from Dr. Edwin G. Ganzhorn, coroner of Washtenaw County, Ann Arbor, Michigan, inquiring whether he has jurisdiction in cases involving deaths of military personnel in his county.

2. Article of War 113 provides that when at any post, fort, camp, or other place garrisoned by the military forces of the United States and under the exclusive jurisdiction of the United States, any person shall have been found dead under circumstances which appear to require investigation, the commanding officer will designate and direct a summary court-martial to investigate the circumstances attending the death.

Subparagraph 21a(1), Army Regulations 600-550, March 6, 1936, provides in certain cases for the convening by the commanding officer of a post, camp, station, or transport where a death has occurred, of a board of officers to investigate the circumstances and report the facts surrounding the death, and whether death occurred in line of duty and whether it resulted from misconduct of the deceased. Subparagraph 32a of the same regulations provides for an inquest by a summary court in the case of a person who dies, or is found dead, under circumstances which require investigation, at any post, camp, or station under the exclusive jurisdiction of the United States.

The laws of the State of Michigan impose a duty upon coroners to conduct inquests upon the dead bodies of such persons as shall have come to their deaths suddenly or by violence (Compiled Laws Michigan, 1929, secs. 17403 and 17414).

3. When deaths which are of the class that require investigation occur at a place over which the United States exercises "exclusive jurisdiction" the summary court designated by the commanding officer has exclusive jurisdiction to investigate the circumstances attending the death, regardless of the military or civilian status of the deceased, or the fact that the deceased resided in the coroner's county (JAG 680.2, July 30, 1932; JAG 707.2, July 29, 1935; SPJGA 013.35, Aug. 21, 1942). However, in one case,

this office recommended, under the circumstances presented therein, that as a matter of comity the coroner should be afforded a reasonable opportunity to make an investigation into the death of a civilian on a military reservation, having due regard to the protection of the Government's interests, particularly those of national defense (JAG 680.2, July 11, 1940). With respect to deaths of military personnel occurring outside the limits of military reservations, the view has been expressed that in cases in which such deaths occur in the performance of military duty coroners should not take jurisdiction but that in cases in which such deaths occur under other circumstances it is proper for coroners to take jurisdiction (JAG 013.2, Aug. 29, 1918). However, in a recent case (SPJGA 013.35, Aug. 21, 1942) it was stated that the scope of military investigations of deaths is limited to deaths of military personnel and to deaths of civilians occurring on military reservations over which the United States exercises exclusive jurisdiction and that in cases of deaths occurring elsewhere county coroners have exclusive jurisdiction to hold the statutory inquests provided for by state laws.

4. It is therefore recommended that these papers be returned to The Adjutant General by disposition form entry, prepared for the signature of the Chief of Division, stating:

It is suggested that reply to the basic communication be made embodying in substance the following:

Receipt is acknowledged of your letter dated September 24, 1942, inquiring whether or not cases involving sudden or violent death of military personnel in your county are within your jurisdiction as coroner.

Article of War 113 (10 U.S.C. 1585) provides that when at any post, fort, camp, or other place garrisoned by the military forces of the United States and under the exclusive jurisdiction of the United States, any person shall have been found dead under circumstances which appear to require investigation, the commanding officer will designate and direct a summary court-martial to investigate the circumstances attending the death. In such cases the jurisdiction of the summary court is exclusive regardless of whether the deceased person had a military or a civilian status. However, as a matter of comity, the War Department in exceptional cases has taken the postion that the commanding officer of a military reservation should afford the coroner reasonable opportunity to make an investigation into the death of a civilian on a reservation to the extent that such investigation does not confliot with the

with the Government's interests, particularly those of national defense.

In cases involving sudden or violent death of military personnel occurring at places over which the United States does not have exclusive jurisdiction, it is customary for the military authorities to make such investigations as appear to be warranted by the particular needs of the military service. However, the military authorities have no power to hold the inquests required in those cases by applicable state statutes, but may make only such investigations as are expressly or impliedly authorized or required by Federal laws or regulations. Whether compliance with the requirements of pertinent state laws may be relaxed or altogether dispensed with, in cases where an investigation has been conducted by the military authorities, is a question for determination by the appropriate state officials. However, it is not believed that a fixed rule of procedure which is applicable in all instances may be stated, as the matter is manifestly one to be determined under the circumstances of each case.

As to the extent of your jurisdiction in cases involving naval personnel, this department may not properly undertake to advise you. It is suggested that you communicate with the Navy Department for the purpose of obtaining such advice as you may desire relative thereto.

Charles W. West,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 220.46 July 29, 1942

MEMORANDUM for The Judge Advocate General.

Subject: Line-of-duty board in the case of Private Robert Prichard.

1. By informal action sheet (AG 201 Prichard, Robert) dated July 15, 1942, these papers were referred for remark and recommendation as to the line-of-duty status of Private Robert Prichard, 33018549, Battery "C", 3rd Battalion, 1st Training Regiment, Field Artillery Replacement Training Center, Fort Bragg, N.C., whose death occurred from a gunshot wound through the head, at Fort Bragg, on June 9, 1942.

2. The facts in the case appearing from the record of testimony taken before the board of officers are substantially as follows:

At about 6:00 p.m., June 9, 1942, Private Robert Prichard was on the second floor of his barracks, the quarters of the third platoon, Battery C, Third Battalion, Field Artillery Replacement Training Center, Fort Bragg, North Carolina. A shot and the sound of a falling body were heard by witnesses on the lower floor. The first witness to reach Prichard testified that the deceased was apparently alone in the room, lying on the floor, unconscious, with an Army rifle between his legs (B/P 3). Other witnesses stated that he was lying on his right side, the rifle between his bended knees with the muzzle pointing toward his head (B/P 23). A blood-stained hole appeared in the ceiling and roof immediately above the body, showing that the rifle was in a nearly vertical position at the time the shot was fired. No one was permitted near Prichard until a representative of the Medical Corps arrived. The rifle was found to be cocked when taken from the body (B/P 23).

Private Prichard was still breathing when medical aid arrived but died shortly after being placed in the ambulance. It was established by medical testimony that the bullet entered the skull just below the right eye, splitting the brain and emerging on the left side of the extreme back of the head, causing almost immediate death (B/P 16). Powder burns were visible near the right eye.

Precautions were taken to preserve the rifle in the exact condition it was found when removed from the body. Subsequent tests disclosed blood on the rifle but no finger prints. Examination of the rifle by an ordnance expert disclosed that the

only cartridge found in the rifle was an empty cartridge case in the breech. This cartridge, however, had not been fired by the rifle in question, nor had it been fired recently (B/P 1). The evidence does not disclose whether the rifle had been fired recently.

Assuming this rifle was fired by the deceased, the manner in which it was fired is wholly unexplained. According to the testimony of one witness, whose arm length was greater than that of the deceased, when he attempted to align his head with the muzzle of the rifle in such a manner as to allow the bullet to pursue the same course as it did in the deceased, it was impossible to reach the trigger with his hand (B/P 2). Deceased was wearing shoes and there is no evidence of a stick, string or similar device being found near his body.

No evidence was presented to indicate that the deceased was of unsound mind or under the influence of liquor when he died. A search of Private Prichard's foot locker, however, revealed two notes. One of these, a badly crumpled note read as follows:

> "Fort Bragg. June 9, 1942, Dear Bro. Just a Line to Say i have ask For Something Differt. They Say No To hell Withe Every Thing Now its The Best Way Out for me i cant Not Stand it Puts Me Crazy
>
> Your Bro
> Bob"

The second note read as follows:

> "Dear Brother
> And all Just a Line to say am Sent You five Dollars Which i do Not Need any More."

There was some evidence of a recent illness of the deceased. A hemorrhoidectomy was performed at Station Hospital, Fort Bragg, on May 14, 1942, following which he received a fourteen-day furlough for convalescence on May 27, 1942, returning to Fort Bragg on June 9, 1942. He also had had difficulty with recruit training due to asthma and a weakness of his legs. However, there is no evidence that he was brooding or morose because of his physical condition. Testimony was presented to the effect that the deceased had recently evinced in interest in the operation of the rifle and had, that afternoon, solicited instruction in its use from another soldier in the barracks (B/P 27).

The findings and recommendation of the board were as follows:

"1. a. That Private Robert Prichard ASN 33018549, Battery "C", Third Battalion, First Regiment, F.A.R.C., Fort Bragg, N.C. died while enroute to Hospital #2, Fort Bragg, N. C., as a result of an apparently self inflicted wound caused by a .30 caliber rifle bullet passing through his head on June 9, 1942 at or about 6:14 P.M. on the second floor of the Third Platoon, Battery "C", Third Battalion, First Regiment, F.A.R.C., Fort Bragg, N.C.

"b. That no explanation has been ascertained for certain conflicting points established by the evidence; specifically the fact that the rifle found with the deceased was noticed to be cocked when first handled by the Medical Department's representative and that upon investigation the following morning, the chamber of the rifle contained a cartridge which expert testimony indicates was neither fired by that rifle nor at a recent time. No motive for foul play has been discovered but the handwriting on the notes found among the personal effects of the deceased has been identified to be that of the deceased - establishing the possibility of suicide. The text of these notes is attached as Exhibit "C". The board has been unable to discover any indication that a weapon other than the rifle found with the deceased might have caused the fatal wound or that an accident when another person was present might have occurred.

"c. That the nature and extent of injury were as follows: Gunshot wound of head with disruption of cranial vault and marked laceration of the brain.

"d. The preponderance of the evidence indicates that Private Robert Prichard committed suicide.

"2. a. That the above death of Private Robert Prichard occurred while he was present for duty, and while he was on a line of duty status, but that the act of suicide was not the performance of authorized and directed duty.

"b. That Private Prichard was not of unsound mind as the result of any incident occurring while on line of duty in the Military Service.

"3. That Private Robert Prichard (ASN #33018549) was not under the influence of liquor at the time he committed suicide.

"4. It is the opinion of the board that the death of Private Robert Prichard occurred not in line of duty and as a result of his own misconduct.

"RECOMMENDATIONS:

"1. That if the reviewing or higher authority feels that the unexplained factors of this case should be conclusively determined a trained investigator familiar with the methods necessary be appointed to conduct such part of the investigation."

The findings and recommendations were approved by the Commanding General, F.A. Replacement Training Center, Fort Bragg, North Carolina.

3. It appears that the board predicated its findings of suicide upon the presence of the rifle on the body of the deceased, the notes among his personal effects, the recent interest evinced in the operation of the rifle and upon the absence of any motive for foul play, or any indication that another rifle might have caused the wound, or that an accident might have occurred when another person was present.

The presumption against suicide must be overcome by convincing affirmative evidence. Not only does this record fail to meet this burden but the following unexplained factors rebut the possibility of suicide: the manner in which the deceased could possibly have reached the trigger; the finding of this bolt-action rifle cocked when removed from the body; and the finding in the breech of an empty cartridge case which subsequent tests revealed was neither fired recently nor by that rifle.

The conduct of the deceased on the day of the shooting was not typical of a man harboring thoughts of self-destruction. At the request of another soldier, he had applied salve to that person's sunburned back (B/P 27). The soldier described him then as being agreeable, normal and making no remark about suicide. His first sergeant and all of the witnesses who conversed with the deceased that afternoon just an hour or two before his death, described the deceased as cheerful and apparently in good spirits.

Although the board may have relied on the deceased's request for instructions in the rifle mechanism as indicative of suicidal intent, it may be noted that Private Prichard had only about six weeks of recruit training and of this he had spent four weeks in the hospital and on convalescence furlough. Having been directed by his sergeant to turn out with his platoon on the next day it would be only natural for this inductee with as little recruit training as he had to solicit instruction from a fellow soldier who had superior knowledge in the mechanics of a rifle.

The statement of the board that the notes established "the possibility of suicide" is in itself a misconception of the proof required. The presumption against suicide must be overcome by convincing evidence. This rule was reiterated in a prior opinion of this office, in which the proceedings of a board of officers, finding a soldier's death from arsenic poison to be due to suicide, were disapproved (JAG 247, May 15, 1933) when no clear motive for suicide was established. The opinion states:

> "The presumption of the law is against suicide, and in the Federal courts and the courts of many, and probably all, of the States, this presumption is applied, Cf. Travelers Ins. Co. -v- Allen 237 Fed. Rep. 78. It is based upon the love of life and the human instinct of self-preservation. Even in cases where the death is self-inflicted the presumption against suicide stands until overthrown by convincing evidence. Evidence which establishes the mere possibility of suicide or raises a suspicion that death is due to suicide is not sufficient to overcome the presumption. In the instant case the evidence is not inconsistent with accident, or for that matter, with homicide. Under the circumstances the doubt must necessarily be resolved in favor of the deceased."

In the more recent case of the death of an enlisted man who was found hanging by bailing wire strung from the ring bolts at the entrance of a stall, the proceedings of the board of officers finding his death to be due to suicide were disapproved (JAG 220.46, June 28, 1942). The opinion states:

> "The facts disclosed by the original and supplemental reports of the board of officers in the case of Private Harold W. Marshall, deceased, make it possible that his death was self-inflicted as found by the board, but leave substantial doubts of the soundness of that theory. Although there was no definite evidence of intervention of any other person, the facts do not wholly exclude that possibility."

4. This office has repeatedly held that when the death of one in active military service results from other than natural causes, in the absence of evidence to the contrary, it will be presumed that such death occurred in line of duty and not as a result of the deceased's own misconduct. (Dig. Ops. JAG May 16, 1919, p. 201; JAG 220.46, Dec. 22, 1919; id. Oct. 27, 1919, June 28, 1919, Sept. 6, 1919; JAG 210.46, Jan. 6, 1932; 32 Ops. Atty. Gen. 195).

5. It is therefore recommended that these papers be returned to The Adjutant General by informal action sheet entry, prepared for the signature of the Acting Chief of Division, stating:

> The facts disclosed by the report of the board of officers in the case of Private Robert Prichard, deceased, make it possible that his death was self-inflicted as found by the board, but leave substantial doubts of the soundness of that theory. Although there was no definite evidence of the intervention of any other person, the facts do not wholly exclude that possibility. In view of these circumstances and the presumption that a sane person would not commit suicide, it is the view of this office that the death of Private Prichard should be regarded as having occurred in line of duty and not as the result of his own misconduct. It is recommended that the War Department adopt this view.

Charles W. West,
Colonel, J.A.G.D.,
Acting Chief of Military Affairs Division.

SPJGA 1943/653 January 13, 1943

MEMORANDUM for The Judge Advocate General.

Subject: Report of Line of Duty Board in the case of First Lieutenant Robert John Neal, 0427763, 57th Fighter Squadron, 54th Fighter Group.

1. By disposition form (AG 201 Neal, Robert John) dated December 30, 1942, there was referred for remark and recommendation the report of the proceedings of a board of officers convened at Air Base Headquarters, APO #980, under the provisions of paragraph 21a(1), Army Regulations 600-550, March 6, 1936, to investigate the circumstances and report whether the death of the above-mentioned officer occurred in line of duty and whether it was the result of his own misconduct.

2. The pertinent facts as disclosed by the record are as follows: The decedent just prior to his death, sometime between 10 and 12 o'clock in the forenoon of October 15, 1942, was on duty status in the pilots' alert tent, 42nd Fighter Squadron. He had already been on the first patrol that morning. A number of other officers were also present in the tent. First Lieutenant John W. Gaff brought his colt .45 caliber revolver into the tent after having cleaned and loaded it with one shell. He did not know whether the decedent was present when he loaded the gun. Lieutenant Neal jokingly referred to the rust on Lieutenant Gaff's gun and the manner in which it had been cleaned. He and another officer handled the gun and while the decedent had the gun pointed at his head, he pulled the trigger and discharged the gun, causing injuries that resulted in almost immediate death. Lieutenant Wallace R. Jordon, who was standing next to Lieutenant Neal at the time he discharged the gun, thought that Neal knew there was one shell in the chamber of the gun, but he did not think Neal intended to shoot himself. The witness mentioned no objective evidence to support his opinion that the decedent knew the gun was loaded. Captain Gerald B. Chamberlain testified that he did not think that Neal know the pistol was loaded. Lieutenant Barton T. Rhinehart testified that just prior to pointing the gun at his head, Lieutenant Neal made some remark about how to hold a gun. Captain Louis H. Bowman testified that Neal was looking at the gun and "fooling with it and snapping the trigger", and that "He put it to his head and the shot was fired".

Many of the witnesses had known the deceased officer for an appreciable length of time and expressed the opinion that

he was not insane nor temporarily insane at the time he discharged the gun. The decedent was described as a cheerful person, who was never despondent or moody. He was not addicted to the use of intoxicating liquor or narcotics and was not under the influence of either at the time in question. No one knew of any news or information which the deceased officer may have received which would create an impulse to commit suicide. None of the conversation among the officers, including the deceased, was such as to produce morbidity or suicidal impulses. The deceased was exceptionally well pleased with his assignment to the combat zone and was eager for action. Just prior to the events leading up to his death, the deceased officer expressed the desire to go to lunch but agreed to wait until other officers were ready to go.

The board found as follows:

"1. That Lt. Robert John Neal, 0427763, 57th Fighter Sqdn, 54th Fighter Group, died at approximately 10:30 AM, October 15, 1942 at APO 980, c/o Postmaster, Seattle, Washington.

"2. That the cause of Lt. Neal's death was shock, hemorrage, Cerebral Laceration and Skull fracture caused by .45 calibre bullet which entered the skull from the right side.

"3. That the shot was accidentally fired by Lt. Neal under the impression that the gun was not loaded.

"4. That the gun with which Lt. Neal was killed was a .45 calibre revolver belonging to 1st Lt. John W. Gaff, Jr., 54th Fighter Group.

"5. That at the time of his death Lt. Neal was not under the influence of intoxicating liquor or narcotics.

"6. That at the time of his death Lt. Neal was not insane nor temporarily insane.

"7. That Lt. Neal had no reason to commit suicide and that he did not intend to kill himself.

"8. That Lt. Neal was not addicted to the use of narcotics or intoxicants.

"9. That Lt. Neal at the time of his death was on a duty status.

"10. That Lt. Neal's death occurred when he was examining the pistol of Lt. John W. Gaff, Jr. That Lt. Neal did not think the gun to be loaded and that he pointed the gun at his head and pulled the trigger.

"11. That Lt. Neal's death occurred in the line of duty and not as the result of his own misconduct."

The report of the board was approved by the convening authority.

3. There is no credible evidence that Lieutenant Neal committed suicide while either sane or insane. Nor is there any evidence from which it can be legitimately inferred that this officer committed suicide while either sane or insane. The record is devoid of any evidence of a motive for suicide. In fact, the decedent was described as an extrovert, exceedingly cheerful, happy and well satisfied with his military assignment. This office has repeatedly recognized the presumption against suicide and has held that without some affirmative evidence of suicide, or of a condition of facts that would naturally lead one to commit suicide, or of physical or objective circumstances sufficient to overcome the presumption of accidental death, the issue must be resolved in favor of accident (SPJGA 1942/4942, Oct. 22, 1942, id., 1942/4103A, Sept. 7, 1942).

Concluding that firing of the shot which caused the death of the officer in question was accidental, the question remains whether such death was the result of his own misconduct. The record discloses no evidence that the deceased violated any standing orders in handling Lieutenant Gaff's revolver, or that the latter officer violated any such orders by having placed a shell in the chamber of his gun. Even if the latter act was in violation of orders there is no credible evidence that Lieutenant Neal had notice of any such violation by Lieutenant Gaff when he handled the gun. This office has often held that death may be found to be the result of misconduct only if by the fair preponderance of the evidence it is established that such misconduct is the proximate or moving and direct cause of death (SPJGA 1942/4942, Oct. 22, 1942). Two witnesses testified that the decedent at the time he pulled the trigger of the gun, had the gun pointed either at or toward his head. Despite the fact that there is no evidence that the deceased officer knew whether the gun was loaded, it cannot be denied that it was negligent and fool-hardy for him (a soldier who should well know the danger inherent in handling any weapon) to tamper with a gun or to pull its trigger before he had ascertained to a certainty that the gun was not loaded. However, if such actions are to be held to be misconduct per se then it is hard to determine that any death or injury resulting from the negligent handling of weapons is not misconduct. Under somewhat similar circumstances, wherein a soldier was shot while cleaning another soldier's rifle without first determining whether it was loaded, the opinion of this office (JAG 220.46, June 17, 1919) stated:

"The leaving of the cartridge in the gun was the act of another for which Pvt. Gonzoles was in no way responsible. Even if Private Gonzoles were guilty of negligence in not examining the chamber of, or in his handling the gun, this would not amount to wilful misconduct. Negligence alone does not remove a soldier from the line of duty."

In a similar case one Private Rankin went into a supply room to get some articles and while there picked up the revolver of the soldier in charge of the room, and was immediately warned by the supply officer that the gun was loaded. In spite of the warning, the soldier started "spinning" the revolver in his hand and as a result of such "spinning" the gun was discharged and the soldier received a wound from which he died. The opinion of this office (JAG 220.46, Oct. 18, 1919, Dig. Op. JAG, 1912-40, AR 345-415 (B-13)) disagreed with the finding of the board of officers that the soldier's death was the result of his own misconduct and held that while the decedent's disregard of the warning that the revolver was loaded was negligence, it was not such negligence as amounted to wilful misconduct.

In another case, one Private Locher picked up a one-pound shell, which he wanted for a souvenir, and tapped it on a rail to get out the powder. While he was taking the shell apart it exploded and killed him. This office in its opinion (JAG 220.46, June 17, 1919) as to whether such acts amounted to misconduct, said:

"There is no evidence that in picking up and handling the shell Pvt. Locher was violating any military order. He may have been guilty of negligence; but negligence alone does not amount to wilful misconduct."

In a recent opinion of this office (SPJGA 1942/4942, Oct. 22, 1942) the statement of facts reveals that a soldier was killed while apparently adjusting the sling on his rifle. No one saw the accident, but the physical facts warranted the inference that the gun was pointed at the decedent while he was adjusting the sling. This office held that there was a lack of evidence indicating that the deceased soldier was handling his rifle in a grossly negligent or careless manner, and in the absence of proof of such misconduct, it was necessary to conclude that his death did not result from his own misconduct. The only difference on the facts between the last-cited case and the present one is that here

witnesses saw the gun pointed at Lieutenant Neal while he was tampering with it. But aside from the witnesses to the event, the objective fact remains that in both cases, the decedents must have had the guns pointed toward them, while they were handling or adjusting them, otherwise the probabilities are they would not have been shot. A further point of difference is that the soldier in the last-cited opinion had a round of ammunition in the chamber of his own rifle "contrary to standing orders" which he must be presumed to have known, whereas, in the instant case the deceased was handling the gun of another and there is no credible evidence that he knew it was loaded. It is therefore concluded that while the deceased was negligent and foolhardy, there is not a preponderance of evidence to justify the finding that his actions constituted such gross negligence or a reckless or wilful disregard of common rules of safety as to overcome the presumption that his death did not result from his own misconduct.

4. It is therefore recommended that these papers be returned to The Adjutant General by disposition form entry, prepared for the signature of the Chief of Division, stating;

> It is the opinion of this office that the evidence is legally sufficient to sustain the findings of the board of officers, that the death of First Lieutenant Robert John Neal, O-427763, was incurred while in line of duty and not as a result of his own misconduct. Accordingly, it is recommended that the mentioned findings, as approved by the convening authority, be approved.

Charles W. West,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 1943/6502 May 19, 1943

MEMORANDUM for The Judge Advocate General.

Subject: Line of duty and misconduct status of Private Maryland J. Slone, ERC, at time of death.

1. By informal action sheet (AG 201 Slone, Maryland J.) dated April 28, 1943, the inclosed papers were referred for "remark and recommendation as to the line of duty and misconduct of" Private Maryland J. Slone, ASN 35435968, Enlisted Reserve Corps, on the date of his death. The file includes the report of the proceedings of a board of officers convened pursuant to paragraph 2, Special Orders No. 189, Headquarters, Fort Thomas, Kentucky, dated August 1, 1942, to investigate and report the circumstances connected with the incurrence of the injury by Private Slone, and also a report of investigation of death, dated April 19, 1943, with inclosures.

2. The report of the board of officers shows that Maryland J. Slone was inducted into the Army on July 11, 1942, at Huntington, West Virginia, and on the same day, by proper orders released from active duty and transferred to the Enlisted Reserve Corps. By the same orders he was, effective July 25, 1942, recalled to active duty and directed to report to the Commanding Officer, Recruit-Reception Center, Fort Thomas, Kentucky, for duty. On July 13, 1942, after he had returned to his and his mother's home at Raven, Kentucky, Slone shot himself through the left chest with a pistol. He had arrived home on July 12, 1942, seemed worried and complained to his mother "Ma, you don't know what I have to face". The shooting occurred in a hay house on the premises of his mother's farm. Slone was first treated by a private doctor, who stated that the patient was in a complete shock but that there was no evidence of liquor or drugs. He was then taken to the Stumbe Memorial Hospital, Lackey, Kentucky, where he was still a patient on August 1, 1942, when questioned by the board. Slone testified before the board of officers that "I do not /know/ how this happened. I had the gun in my right hand and I pulled the trigger. I don't know why I did it". Dr. Kelso, the attending physician at Stumbe Memorial Hospital, testified that Slone at the time of his admittance to the hospital was in a deep shock but conscious; was not under the influence of drugs or alcohol, and that he made no statement. Dr. Kelso when questioned as to Slone's mental condition, testified "Private Slone is reticent but not psychotic".

The report of investigation dated April 19, 1943, while not consistent in itself, in that it accepts the statement that the injury was accidentally incurred while cleaning a revolver, and includes the statement that Slone was not violating any civil, moral or military law, finally adopts the finding of the board of officers, by reference, and finds that the death was not in line of duty and was due to his own misconduct. The gunshot wound is clearly found to have been the cause of death. The report of investigation was approved by the Commanding Officer, Billings General Hospital.

3. This office recently considered a case where a man was inducted into the Army, was on the same day released from active duty and transferred to the Enlisted Reserve Corps, and by simultaneous orders was ordered to active duty effective fourteen days later. He became ill before the effective date of such orders and was unable to report for duty on that date. After such effective date he was taken to an Army hospital at the reception center where he subsequently died. In that case it was held (SPJGA 1943/6203, May 7, 1943) in effect that until such time as the enlisted reservist began compliance with his active duty orders he was in an inactive duty status. It follows, therefore, that Slone on the date of the injury which resulted in his death was not on an active duty status and thus the injury was not incurred in line of duty. The fact that death occurred several months after the injury is not material to the question.

As to the question of misconduct, this office has uniformly and consistently held that where an injury causing a death is self-inflicted with suicidal intent, such death will be regarded as having occurred as a result of such person's own misconduct and not in line of duty (1942/4103A, Sept. 7, 1942; JAG 220.46, Sept. 5, 1941). Subparagraph 21f(1), Army Regulations 600-550, March 6, 1936, as followed in Changes No. 4, November 10, 1942, provides:

> "Suicide is the deliberate and intentional destruction of his own life by a person of years of discretion and of sound mind. In such case death is due to the misconduct of the deceased, and therefore, if he was in the military service, not in line of duty."

The facts of the present case negative mental unsoundness. Although it is true that Slone was worrying about having no report for duty with the Army, it is apparent from all the facts that he was not so mentally unsound as to be unable to realize the moral and physical consequences of the act which caused his death. As

stated in subparagraph 21f(4), Army Regulations 600-550, Changes No. 4, November 10, 1942, a finding of mental unsoundness is not justified where there is evidence of a reasonable or natural, though normally unjustified motive, such as a desire to escape punishment or shame, disappointment in love, or loss of self respect due to bad habits, unless there is further proof of actual mental unsoundness. There being no substantial evidence of unsoundness of mind, it is necessary to conclude that Slone was not mentally irresponsible at the time he shot himself (JAG 210.46, April 16, 1941).

The facts also preclude a conclusion of accident. Slone's first statement was an admission, in effect, that he intentionally shot himself. This is borne out by the existence of powder burns at the entrance to the wound and the downward course taken by the bullet, which also traveled toward the center of the body. Then, the fact that the shooting occurred in the hay house of the farm, away from the residence or other place where a gun would ordinarily be cleaned is entirely inconsistent with the theory of an accident incident to cleaning the gun. Too, thirty days elapsed after the shooting before Slone first claimed that the shooting was accidental.

It is believed that the facts considered by the board of officers and the investigating officer clearly establish that the death of Private Slone was the result of suicide.

The fact that Private Slone received Army pay during a part of his period of hospitalization, whether properly or improperly, is not considered material to the question now under consideration.

4. It is therefore recommended that these papers be returned to The Adjutant General by informal action sheet entry, prepared for the signature of the Chief of Division, stating:

> It is the opinion of this office that the death of Private Maryland J. Slone, 35435968, occurred not in line of duty and as a result of his own misconduct.

Charles W. West,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 220.46 June 2, 1942

MEMORANDUM for The Judge Advocate General.

Subject: Report of Board of Officers in the case of Private Clement Scott, Jr.

1. By informal action sheet (AG 201, Scott, Clement, Jr., #31060362) dated May 21, 1942, there was referred for remark and recommendation the report of a board of officers convened at Camp Croft, South Carolina, under the provisions of subparagraph 1e(4), Army Regulations 345-415, November 23, 1933, to investigate the circumstances surrounding the injuries received by Private Clement Scott, Jr. (ASN 31060362), Company "B", 27th Infantry Training Battalion, on or about April 12, 1942, at Greenville, South Carolina.

2. It appears that on Saturday, April 11, 1942, Private Scott went to Greenville on an authorized pass and that he was due back at Camp Croft by midnight the following night. At about 6:00 p.m. on April 12, having found that his funds were insufficient to purchase return transportation, he attempted to board a freight train as it was leaving the railroad yards at Greenville to go to Spartanburg, near Camp Croft. He failed to secure a sufficient hold on the grab rods of the car and fell to the ground. Apparently as he fell his right arm crossed the rail and was passed over by the train. Private Scott believed that he tripped over a cross tie. The evidence indicates that the train was moving at a speed of six to seven miles per hour at the time. Private Scott testified that he had been drinking during the afternoon, but was not drunk. Witnesses who assisted him immediately after the accident were unable to say whether he was intoxicated, and the board apparently was not convinced that he was under the influence of liquor at the time of the accident. No military orders affecting Private Scott prohibited the boarding of moving freight trains. Although his attempted boarding of the train, if successful, would apparently have violated section 1707 of the Code of Laws of South Carolina, 1932 (1934 Supp.), that section is designed to prevent fraud against the railroads and is regarded as having little or no bearing on the line of duty status in this case. The board found that his injury was incurred in line of duty and was not the result of his own misconduct.

3. Private Scott's action in attempting to board the train having been contrary to no law or military order directed toward his safety, it appears that his injury did not result from mis-

conduct unless proximately caused by gross negligence on his part. The principle is well established that negligence which contributes to or causes death or injury does not constitute misconduct unless of such gross character as to amount in itself to misconduct (JAG 220.46, Apr. 3, 1940; see also JAG 220.46, Mar. 20, 1931; id., Oct. 25, 1921; id., July 2, 1919). As previously stated by this office, attempting to board a moving train is unquestionably attended with danger, the amount of which varies directly with the speed of the train. A soldier who boards a train just as it is starting to move is not to be considered so grossly negligent as to divest him of a line of duty status (JAG 54-022, Oct. 7, 1913). If, however, the train is moving at a speed so far in excess of that at which he might reasonably expect to board with any degree of safety, an attempt to board becomes an act of recklessness and out of the line of duty. This office has regarded fifteen miles per hour to be such an excessive rate of speed (JAG 220.46, Sept. 29, 1941; JAG 220.45, Sept. 15, 1920). Mere trespass will not remove an act from line of duty (JAG 210.46, Sept. 23, 1921; JAG 220.46, Mar. 20, 1931).

Private Scott testified that he had boarded freight trains before. The attempt resulting in his injury was made while the train was moving at a speed of six to seven miles per hour, only slightly faster than a man ordinarily walks. There is nothing to indicate that he could not reasonably have expected to board the train with safety. Indeed, he believed that his accident resulted from tripping over a cross tie which extended farther than usual. Accordingly, it is believed reasonable to conclude that his action did not consitute misconduct on the basis of negligence. Therefore, as he was on an authorized pass at the time and was violating neither military order nor any law directed toward his safety, it is the opinion of this division that the injury was incurred in line of duty and not due to his own misconduct.

4. It is therefore recommended that these papers be returned to The Adjutant General by action sheet entry, prepared for the signature of the Chief of Division, stating:

> The reported evidence in the case of Private Clement Scott, Jr., 31060362, discloses no misconduct which may properly be regarded as the proximate cause of his injury. It is therefore the view of this office that the injury was incurred in line of duty and not due to his own misconduct and it is recommended that the findings of the board of officers to like effect be approved.

C. B. Mickelwait,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 1943/526
(210.40)

January 8, 1943

MEMORANDUM for The Judge Advocate General.

Subject: Line-of-duty status of Major Van Allen Clarke, C.E.

1. By informal action sheet (AG 201 Clarke, Van Allen) dated December 16, 1942, there was referred for remark and recommendation the report of the proceedings of a board of officers appointed under the provisions of subparagraph 1c(4)(c), Army Regulations 345-415, November 23, 1933, as amended by paragraph 2, Circular No. 226, War Department, 1941 (and par. 5, sec. II, Cir. No. 18, WD, 1942), in the case of Major Van Allen Clarke (O-144084), C.E., Indiantown Gap Military Reservation, Pennsylvania.

2. The material facts as disclosed by the file appear to be substantially as follows: One Lieutenant Colonel Mark was the Post Engineer at Indiantown Gap Military Reservation for some time prior to September 18, 1942, or thereabouts. At that post, a Government-owned Ford automobile was assigned for the use of the Post Engineer, and it appears to have been the practice, authorized by Colonel Mark, for engineers of the post complement who had U.S. Army Motor Vehicle Operator's Permits to drive this car both on and off the post on official business. No special driver was provided for this car, and it was customarily driven by the officers themselves.

Under date of September 15, 1942, there was issued subparagraph 1d, section XXI, Post Standing Orders, Indiantown Gap Military Reservation, which read as follows:

> "Motor vehicles will be operated by officially designated drivers only. In this connection attention is invited to the fact that officers are not permitted to drive official cars."

Thereafter, however, there appears to have been no change in the custom of the post engineers in respect to the operation of this car.

On or about September 18, 1942, Major Louis D. Hubbard, C.E., became Post Engineer, evidently relieving Colonel Mark. He was asked if he wanted to carry on the practice with respect to the driving of this car as authorized by Colonel Mark. Major Hubbard

directed that the engineers should "continue doing like you have been doing until we can find out more about it". There is no evidence that the Commanding Officer of the post was not advised of, or that he objected to, the practices of the post engineer with respect to the car.

On the night of September 30, 1942, Major Clarke, an assistant post engineer who possessed an Army operator's permit, left the post at about 7:45 p.m. driving the car. He drove to nearby Pottsville, Pennsylvania, to attempt to hire some sheet metal workers for work required on the post, an undertaking which was considered as official business. As to the succeeding events Major Clarke testified as follows:

> "I left the Post on or about 7:45, in the evening, and drove to Pottsville for the purpose of trying to hire or find sheet metal workers of whom we were in great need, and who have been inaccessible or unavailable for hire at this Post. I discussed the question with quite a number of men, and on conclusion of my business remarked that I was coming home, at which time an enlisted man stepped up, in a very soldiery manner, saluted, and offered to drive me home, stating that he knew the way well, was a competent driver, and had not been drinking. As I was tired, I accepted his offer, especially because the road from Pottsville to the Gap is complicated, and there was at least one long detour, with which I was not well acquainted and I was afraid I would lose my way if I tried to drive without help. Feeling secure in his ability to get me back, I relaxed and must have dozed because I did not remember anything about the crash until I found myself in the Hospital. I think that is all."

Just outside of Pottsville on the road back to the post, at about 2:45 a.m., the automobile sideswiped the abutment of an underpass; and Major Clarke suffered fractures of the left humerus (upper arm) and clavicle (collar-bone), a moderate concussion and sundry wounds and abrasions.

The soldier who drove the car was observed after the accident helping Major Clarke from the wreck but then disappeared and no trace of him has been found. Major Clarke, asleep at the time of the collision and unconscious until after his removal to a hospital, was unable to testify as to how the accident took place. There were no eye witnesses of the accident.

Technician Carlton L. Tune, Headquarters Company, Services of Supply, Fort Meade, Maryland, who saw the car shortly after the accident, stated that "it appeared that it had tried to go through the underpass sideways, colliding simultaneously front and back with the sidewalls of the underpass". Second Lieutenant Bernard M. Meltzer, C.E., Indiantown Gap Military Reservation, examined the place where the accident occurred the day after the crash, and testified that at that spot, a sixty foot highway narrowed into a thirty foot highway which turned sharply to the left and went through an underpass and that the only sign marking the turn was just beyond it. The skid marks, in his opinion, indicated that the driver, believing the highway went straight ahead, continued on straight, then saw the sign pointing to the left, "and apparently made a very sharp turn, an unconscious reaction, and as a result the car came around and hit the abutment broadside". The peculiar road condition was, in Lieutenant Meltzer's opinion, "a very unique accident trap". Private William L. Peck, Pennsylvania Motor Police, Pottsville, investigated the accident shortly after the collision. He testified that there were no skid marks up to the point of impact but that they appeared only after the point of the collision. He was of the opinion that if the driver had known the road conditions, he would not have driven as fast as he did. He estimated that the car was going about 40 miles per hour and that, in view of road conditions, a safe speed was about 30. Examination of the car after the accident revealed that the right front, windshield, door and glass were smashed, that the motor was torn loose from the frame, and that there was considerable other damage, including damage to the steering mechanism.

Pertinent findings of the line-of-duty board, dated November 3, 1942, are as follows:

> "9. * * * The injury was not incurred in the line of duty and was incurred by Major Clarke's own misconduct based on the evidence adduced and substantiated by AR 850-15-7-3, AR 850-15-7-4, and by Section XXI, par. 1, Section D. Post Standing Orders * * *.
>
> "10. * * * the presence of the enlisted man * * * does not absolve Major Clarke from the responsibility he assumed contrary to regulations when he drove the car from the Post. For Major Clarke did not ascertain at any time whether the * * * driver had * * * /an Army operator's permit/ or was an authorized /post/ driver * * *. Major Clarke was not in any case authorized to delegate his responsibility.

> "11. * * * the official reason for the cause of the accident, as stated by Pennsylvania Motor Police Report, is excessive speed. * * * Major Clarke, having assumed the responsibility for said vehicle, should have commanded at all times the rate of speed of the automobile, and did not."

Under date of December 4, 1942, the board's findings were approved by the Commanding Officer, Headquarters Indiantown Gap Military Reservation.

3. a. The board, in speaking (par. 10, quoted supra) of "the responsibility he /Major Clarke/ assumed contrary to regulations when he drove the car from the Post" (underscoring supplied), evidenced a feeling that the officer had no authority to drive a military automobile from the post, even though on official business. In a number of instances, it has been determined that unauthorized use of a Government vehicle for personal business ipso facto removes a soldier from his line-of-duty status (SPJGA 1942/2423, June 9, 1942; JAG 220.46, Dec. 8, 1932; JAG 220.46, Sept. 28, 1928; JAG 220.46, Oct. 12, 1920). In the instant case, the only official pronouncement that might be considered a prohibition against the use of military cars by officers is the second sentence of that portion of the Post Standing Orders heretofore quoted. These words, however, do not of themselves constitute an order and it therefore appears that they must be in reference to some other instruction. The only instruction which may be applicable in this connection is the provision in the Army regulations then in effect (subpar. 16a, AR 850-15, Sept. 29, 1939) requiring that "all operators of military motor vehicles" have an Army operator's permit. The quoted standing order, viewed in the light of these regulations, indicates that officers are not permitted to drive official cars merely because of their status as such, but it does not appear to prohibit those officers who were "officially designated drivers" from operating official cars. It follows that, if the term "officially designated drivers" refers to persons to whom an Army operator's permit has been issued, there can be no basis to question Major Clarke's authority to take this car, as he possessed such a permit. There may have been some other method of officially designating drivers at this post but no evidence thereof appears in the record. Moreover, all the post engineers holding operator's permits were permitted to drive this car, on the authority of the post engineer, a situation which had prevailed for two weeks after the issuance of the quoted standing order. There is no evidence that this practice was carried on either in secret or over the objection of the post commander.

In view of the foregoing discussion, it may be concluded that Major Clarke was not out of line of duty for lack of authority to drive the car off the post.

b. The Army regulation heretofore cited and the standing order quoted above both appear to require that only such military personnel as possess Army operator's permits may operate military automobiles. It therefore appears that for Major Clarke to have entrusted the operation of this vehicle to an unidentified enlisted man without first ascertaining whether he had an operator's permit was a violation of regulations and standing orders amounting to misconduct. Ordinarily an injury growing out of misconduct is not regarded as the result thereof unless the misconduct was the proximate cause of the injury (SPJGA 1942/5817, Dec. 11, 1942). The violated regulations and standing orders were promulgated to prevent accidents caused by inept drivers. If, therefore, a preponderance of the evidence established that the soldier was an unauthorized driver and that the collision resulted solely from his lack of ability as a driver, Major Clarke's violation of orders might be regarded as a proximate cause of his injury (JAG 220.46, May 7, 1927). So far as the evidence shows, however, the soldier may in fact have been a well-qualified or even a duly authorized driver. The absence of any direct evidence as to the circumstances immediately surrounding the accident relegates determination of proximate causes to the realm of pure conjecture. The board's conclusion that the accident was caused by excessive speed is lifted bodily from the nebulous opinion of a highway patrolman that the driver must have been going too fast because, had he known the condition of the road, he would have gone slower. It is equally possible, however, to postulate circumstances compatible with the known facts under which the driver's conduct could not properly be regarded as a direct or proximate cause of the accident. For example, damages to the steering mechanism were found, and these may have occurred before, and been the direct cause of, the accident. Likewise, the car may have been sideswiped or crowded by another. In short the evidence does not exclude a reasonable possibility that the car was being driven by a qualified or skillful driver, when the crash occurred. In view of certain gaps in the evidence considered by the board, it cannot be said that the accident resulted proximately from any disqualification on the part of the driver or that the officer's misconduct in violating regulations and standing orders was the proximate cause of his injury.

c. It must finally be determined whether in accepting the services of another person as a driver and thereafter going to sleep, Major Clarke was guilty of gross negligence which

proximately caused his injury. This office has determined that it was not gross negligence for an officer to permit another person to drive his car and to ride along as a passenger (JAG 210.46, Sept. 21, 1939; cf., SPJGA 1942/3281, July 25, 1942). Moreover, especially as he was not driving, Major Clarke does not appear wantonly to have invited injury by falling asleep (cf. JAG 210.46, June 21, 1939). Accordingly, as the evidence does not reveal any peculiar facts requiring exceptional caution under the circumstances, the officer's conduct cannot be considered to have been grossly negligent.

4. It is therefore recommended that these papers be returned to The Adjutant General by informal action sheet entry, prepared for the signature of the Assistant Chief of Division, stating:

> It is the opinion of this office that the finding of a board of officers that Major Van Allen Clarke's injury was incurred not in line of duty and as a result of his own misconduct is not supported by the evidence, and that the injury should be regarded as having been incurred in line of duty and not as a result of his own misconduct. It is recommended that action be taken in harmony with these views.

Irvin Schindler,
Colonel, J.A.G.D.,
Assistant Chief of Military Affairs Division.

SPJGA 1942/5817
(210.46)

December 11, 1942

MEMORANDUM for The Judge Advocate General.

Subject: Line-of-duty status of Second Lieutenant James C. Cunningham at the time of his death.

1. By informal action sheet (AG 201 Cunningham, James C. (11-11-42)PC-G)) dated November 21, 1942, there was referred for remark and recommendation the accompanying files relating to the death on March 24, 1942, of Second Lieutenant James C. Cunningham (O-426689), A.C., who was found to have died not in line of duty but as a result of his own misconduct. The files include the report of a board of officers convened on April 30, 1942, under the provisions of paragraph 21, Army Regulations 600-550, March 5, 1936, to investigate the circumstances surrounding the death of Lieutenant Cunningham; his 201 file; and a confidential report of an investigation of this accident dated July 10, 1942, by Colonel Newton W. Speece, I.G.D., Inspector General, The Air Transport Command, A.A.F., Washington, D. C., incorporating, as Exhibit O, a copy of a Technical Report of Aircraft Accident Classification Committee, dated March 30, 1942.

2. The material facts surrounding the death of Lieutenant Cunningham as disclosed by these files appear to be substantially as follows: On March 22, 1942, by Operations Order 1461, Headquarters California Sector Domestic Wing, Ferrying Command, Long Beach, California, Lieutenants Cunningham, Wild, and Lindsay were directed to ferry three P-38E's to Bradley Field, Windsor Locks, Connecticut. The acting control officer at Long Beach, First Lieutenant William S. Barksdale, Jr., A.C., directed these officers to follow the southern route to Bradley Field through Phoenix, Tucson, El Paso, Dallas, Shreveport, Jackson, Montgomery, Atlanta, Richmond, Washington, and New York. The deceased asked Lieutenant Barksdale whether he might deviate from this route leaving Dallas for New York via Memphis and Nashville and he was informed that such deviation was strictly prohibited. The three planes proceeded along the designated route to Tucson. Lieutenant Lindsay's plane preceded the others by about fifteen minutes with the result that Lieutenant Lindsay was taking off for El Paso as Lieutenants Cunningham and Wild taxied in to Tucson. At Dallas, Cunningham and Wild, then flying alone, deviated from the prescribed route and flew their planes to Little Rock, Arkansas, arriving late in the afternoon of March 23, 1942. Both pilots spent the night at Little Rock retiring at 12:30 a.m. They did not partake of any

alcoholic beverages or drugs during the evening. At 8:30 a.m., March 24, 1942, at Little Rock, Lieutenant Cunningham was married to a Miss Reba Pierce. Shortly thereafter both officers took off in their respective planes for Memphis along the regular American Airlines route. The weather was clear with unlimited visibility. At about 9:35 a.m. two planes were seen flying east, the first at an altitude of about 2,000 feet, the second (Lieutenant Cunningham's) at an altitude of about 300-500 feet, Both motors of the latter plane seemed to be running but throttled down. The plane preceeded about two miles beyond the town of Brinkley and began, apparently with the wheels down, a tight 180 degree turn. At the completion of the turn the right wing dropped and the plane made another turn of approximately 130 degrees to the right and crashed into a wooded area one-half mile east of the Brinkley, Arkansas, airport at about 9:38 A.M., Lieutenant Cunningham was killed in the crash. The space in the report of the Aircraft Accident Classification Committee provided for conclusions as to the causes of the accident roads in pertinent part as follows (Committee conclusions, which were typed in, are underscored):

"

%	%	%	CAUSES
80 PERSONNEL	80 PILOT ERROR	40	Error of judgment,
		40	Poor technique,
			Disobedience of orders,
			Carelessness or negligence,
			Miscellaneous,

* * * *

20 MATERIEL	POWER PLANT 20		
		20	Undetermined,

"

The percentage of "pilot error" was estimated on the basis that even if the plane was in trouble an altitude of 1000-2000 feet could have been maintained as readily as an altituted of 300-500 feet thus enabling him to make a proper approach to the air-

port; that the turn should have been made in a wider arc; that the wheels should not have been dropped until final approach; that the terrain between Little Rock and Brinkley "would afford an emergency landing almost anywhere"; and that the pilot had failed to report his trouble by radio. It was also stated that "all indications show" that the pilot was "in trouble" some time before the crash. The Technical Report also contains the following notation:

> "A TWX received by Col. Spake from Memphis stated that the pilot was given 100% pilot error as cause of crash. The meaning of this is not clear and Col. Spake is investigating the source."

No further explanation of this entry in the record is given; and it apparently was not considered as being conclusive by the Aircraft Accident Classification Committee. The investigating officer, however, attached considerable importance to both this and the estimate of the percentage of pilot error as determined by the Committee. The Committee also recommended investigation of the plane's engines, but the file does not contain any report with respect to their condition.

Lieutenant Wild did not learn of his companion's death until arrival at Memphis. It appears that the only punishment given him for participation in this flight was a reprimand under Article of War 104 for disobeying the control officer's directive not to deviate from the southern route. Shortly thereafter he was recommended for promotion and was promoted to the grade of captain.

The line-of-duty board apparently did not make any personal examination of the wreckage of the plane or the scene of the accident or call any witnesses. On the basis of ex parte statements from Lieutenant Barksdale and Lieutenant Wild it found:

> "3. That Second Lieutenant James C. Cunningham was operating in direct disobedience to orders at the time of the crash. He was operating his airplane on unauthorized route from the time he left Dallas, Texas, * * * until the time of the crash, * * * and was therefore not on line of duty status at the time of his death.
>
> "4. That in the opinion of the board death was incurred not in line of duty and not due to his own misconduct."

On July 11, 1942, the report of Colonel Speece, I.G.D., the investigating officer, made after thorough investigation, was approved by the Commanding General, Headquarters Air Transport Command, Washington, D.C. In the report, it was concluded that:

" * * * While Lieutenant Cunningham's actions in deviating from the directed route cannot be definitely stated as the approximate cause of the accident, * * * all his actions and thoughts * * * can be considered contributing to the accident. It is only human to expect * * * that his mental and physical being was disturbed to the extent where he may have shown poor judgment and technique in overcoming any mechanical trouble he may have had just prior to the crash.

" * * * /He/ did wilfully and premeditately violate an order of a superior officer in the performance of his duties, * * * at the time of his death, this officer was where he had no right to be * * *. Therefore, it is concluded his death was not in line of duty and was a result of his own misconduct."

On August 27, 1942, an Adjutant General, War Department, by order of the Secretary of War, indorsed the report of the proceedings of the line-of-duty board as follows:

"1. APPROVED, except so much of finding No. 4, which states 'and not due to his own misconduct', which is DISAPPROVED.

"2. It is determined that death occurred not in line of duty and as a result of own misconduct."

Appropriate governmental departments were notified of this conclusion. Expressing doubt as to the legal propriety of this finding, the Air Judge Advocate, by letter dated November 11, 1942, addressed to The Adjutant General, recommended that the file be referred to The Judge Advocate General for review.

3. At the time of this accident, Lieutenant Cunningham was engaged in ferrying this plane in the execution of his military duties but, in violation of orders, was following an alternate and unauthorized course. In a case involving the line-of-duty status of Lieutenant Shelby Harper (SPJGA 1942/1373 (210.46), Apr. 11, 1942), this office determined that intentional deviation by a ferry pilot from the route which he was ordered to take did not constitute such misconduct as would remove the pilot from his line-of-duty status where the evidence did not establish that the disobedience of orders was the moving or proximate cause of death (cf. SPJGA 1942/4942 (220.46), Oct. 22, 1942; JAG 220.46, July 13, 1921). There is no evidence here of any circumstances peculiarly incident to Lieutenant Cunningham's violation of orders which

either were likely to increase the risk of accident, or in fact caused his death. The course flown by Lieutenant Cunningham, being that customarily followed by the American Airlines, apparently presented no greater hazards of terrain than did the route he was directed to take. Indeed, it appears that the area over which he flew "would afford an emergency landing almost anywhere". There is no substantial evidence that any of his activities while deviating from the prescribed route in any way decreased his efficiency as a pilot. At most, there can only be an assumption that he must have become somewhat excited because of his marriage, and this assumption appears unwarranted in view of the principle that all reasonable doubts should be resolved in favor of the pilot (SPJGA 1942/4942, supra). It must therefore be concluded that Cunningham's disobedience of orders was not a moving or proximate cause of his death.

The line-of-duty board does not appear to have considered whether this fatal crash was the result of negligent piloting. However, this issue is inferentially raised by the emphasis placed by the investigating officer upon the estimate of the Aircraft Accident Classification Committee that the accident was caused in material part by "pilot error" and the earlier estimate wired to Colonel Spake that the crash was due entirely to "pilot error". It may be stated generally that negligence which causes death does not constitute such misconduct as would remove a soldier from his line-of-duty status unless it is of a gross character (Dig. Op. JAG, 1912-40, pp. 952-953). If it be assumed that the foregoing estimates of pilot error may be accepted as opinion evidence, it must nevertheless be noted that the Aircraft Accident Classification Committee, with the earlier estimate before it, determined that this "pilot error" consisted only of poor judgment and faulty technique. Space was provided in the form employed by the Committee for an estimate of "Carelessness or negligence", but the Committee left this space blank. The Committee also concluded, and there is evidence to support this conclusion, that the crash was caused in part by some degree of motor failure. Although the facts revealed by the investigation justify the assumption that pilot Cunningham made some mistakes in judgment and technique when "in trouble", it is noteworthy that there is no showing that his "trouble" was the result of his errors or that he made any such errors prior to the time his plane became disabled. It is believed that action taken under the pressure of emergency, even though not in accordance with approved technique, cannot properly be considered evidence of gross negligence. If all substantial doubts are resolved in favor of the pilot, his actions in piloting this disabled plane cannot be considered to have been grossly negligent.

In view of the foregoing discussion, it is concluded that the approved findings of the board of officers convened in Lieutenant Cunningham's case, as supplemented by the findings of the investigating officer, are not substantiated by the evidence and that Lieutenant Cunningham's death should be regarded as having occurred in line of duty and not as a result of his own misconduct.

4. It is therefore recommended that these papers be returned to The Adjutant General by informal action sheet entry, prepared for the signature of The Judge Advocate General, stating:

> It is my opinion that the approved finding that Lieutenant Cunningham's death occurred not in the line of duty and as a result of his own misconduct is not supported by the evidence; and that his death should be regarded as having occurred in the line of duty and not as a result of his own misconduct.

Charles W. West,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 220.46 May 12, 1942

MEMORANDUM for The Judge Advocate General.

Subject: Review of board proceedings to determine line-of-duty status of Private Edd Fuston.

1. By informal action sheet (AG 201 Fuston, Edd) dated May 4, 1942, there was referred for remark and recommendation the report of a board of officers convened under paragraph 21a(1), Army Regulations 600-550, March 6, 1936, for the purpose of investigating the circumstances surrounding the death of Private Edd Fuston, Company H, 66th Armored Regiment, with respect to line-of-duty and misconduct status.

2. The testimony adduced at the hearing reveals that Private Fuston, who was then on pass, spent the time from about 10:00 a.m. April 5, 1942, until nearly 1:00 a.m. April 6, 1942, in a roadside tavern known as "Annie's Place" near Columbus, Georgia. During that period he drank some beer but there is conflicting evidence as to whether he was drunk. Some time between 12:30 and 1:00 a.m. two military policemen entered the establishment and, finding Fuston asleep at the bar, awakened him and took him from the building to an automobile outside. Private Lindsey, one of the military police, remained to guard the prisoner while his companion returned to the tavern.

The only evidence of what then transpired is the testimony of Private Lindsey. According to such testimony, Private Fuston sat quietly in the car for a few minutes and then stood up. Lindsey ordered him to sit down and upon refusal pushed him down. A struggle ensued during which Fuston knocked Lindsey against the car, and the latter retaliated with his blackjack. Lindsey then received a blow which sent him to his knees. He arose backing away and Fuston advanced. After telling Fuston three times to stop, Lindsey fired. The men were probably not more than ten feet apart at the time and the bullet struck Fuston in the stomach killing him almost instantly. He was found on his back about ten feet from the automobile.

The board found that Fuston was not drunk at the time of his death and that death occurred not in line of duty and as a result of his own misconduct.

3. This office has held that an injury received by a soldier in an affray in which he was the aggressor is the result of his own misconduct and not in line of duty (JAG 54-022.1, June 30, 1915, Dig. Op. JAG 1912-40, AR 345-415 (B-1), p. 953). Likewise it was held that the injury was not incurred in line of duty in a case in which mere horseplay went beyond the bounds of triviality (id, AR 345-415 (B-2), p. 954). When an officer was shot

while pounding on the door of a house to whose occupant he was entirely unknown, and his actions were due either to amnesia caused by the effects of alcohol or by alcoholic intoxication, this office held that his injury in either case was not in line of duty and was the result of his own misconduct (JAG 210.46, Oct. 4, 1937, Dig. Op. JAG 1912-40, AR 345-415 (B-3), p. 954). The death of a soldier who was shot while resisting arrest should be regarded as having occurred not in line of duty and as a result of his own misconduct (JAG 220.46, Nov. 1, 1919, Dig. Op. JAG 1912-40, AR 345-470 (E-2)).

The board neglected to make a required finding as to whether the soldier's absence from camp was with proper authority. There was, however, testimony to the effect that he had authority to be absent, and the failure to make the finding was not prejudicial in view of the other circumstances of the case.

4. All of the facts adduced from other witnesses indicate that the story of the killing as related by Lindsey and set forth above was substantially accurate. There is nothing in the report to show prior enmity between the two men but the other military policeman testified Fuston "was in an ugly mood". In any event Fuston's actions in the affray were, in my opinion, misconduct which was the proximate cause of his death. Therefore, his death occurred not in line of duty and as a result of his own misconduct.

5. It is therefore recommended that these papers be returned to The Adjutant General by informal action sheet entry, prepared for the signature of the Chief of Division, stating:

> Referring to the inclosed report of a board of officers which considered the line-of-duty status of Private Edd Fuston, Company "H", 66th Armored Regiment, Fort Benning, Georgia, it is the view of this office that the actions of Private Fuston constituted misconduct which was the proximate cause of the injury which resulted in his death. His death should therefore be regarded as having occurred not in line of duty and as a result of his own misconduct. It is recommended that the findings of the board be approved.

C. B. Mickelwait,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 220.46 July 25, 1942

MEMORANDUM for The Judge Advocate General:

Subject: Report of line of duty board in the case of Private Amos W. Thornton, Battery A, 51st Field Artillery Battalion.

1. By informal action sheet (AG 201 Thornton, Amos W. (7-16-42)EF) dated July 16, 1942, there was referred for opinion the report of a board of officers convened under the provisions of paragraph 21, Army Regulations 600-550, March 6, 1936, to investigate the circumstances surrounding the death of Private Amos W. Thornton, 6294410, Battery A, 51st Field Artillery Battalion, now at Fort Sill, Oklahoma, formerly at Fort Leonard Wood, Missouri.

2. The inclosed report of the board appointed by paragraph 7, Special Orders No. 120, Headquarters O'Reilly General Hospital, Springfield, Missouri, dated May 11, 1942, discloses that Private Thornton died at that hospital, at 6:30 A.M., May 10, 1942, from contusion of the brain. From the testimony taken by the board, it appears that Thornton with three other soldiers without passes left Fort Leonard Wood for a dance place known as Barkeley's; that the four soldiers consumed two quarts of whiskey and took possession of a taxicab at a place known as Waynesville; that the stolen taxicab was involved in an accident early in the morning of May 8, 1942, apparently near a place known as Marshfield, between Waynesville and Springfield, Missouri; and that the four soldiers were injured and taken by a private ambulance to the O'Reilly General Hospital. Additional features of the case revealed by the testimony are that the four soldiers were using passes borrowed or taken from other soldiers; that the taxicab in which they were riding was reported as stolen; and that a soldier by the name of Private Sydney S. Rosser claims to have been robbed of his money and clothing by three soldiers, who gave him a ride in a taxicab in the vicinity of Waynesville. There was no showing as to who was the driver of the taxicab at the time of the accident, or the circumstances surrounding the accident. According to information supplied by his battery commander, Private Thornton, when he left his post, was in a Class "B" status and should not have left the post.

The board found that the death of Private Thornton occurred not in line of duty and as a result of his own misconduct, which findings were approved by the Commanding Officer, O'Reilly General Hospital, the convening authority. The board originally

found that Thornton was under the influence of alcohol at the time he received his injuries, but that intoxication was a remote cause of his death. However, the board made a supplemental finding that Thornton was absent without a pass; that his intoxication was wilful misconduct; and that by leaving the post without a pass with the three other soldiers and drinking with them, he was equally "guilty" with reference to the "stealing" of the taxicab. The board's supplemental finding, which shows no action thereon by the commanding officer, is as follows:

> "It is the opinion of this Board that the Finding that Private Amos W. Thornton met his death not in Line of Duty, and as a result of his own misconduct is correct."

3. Injuries sustained while absent without leave must be regarded as having been incurred not in line of duty (Dig. Ops. JAG 1912-40, p. 971; SPGA 220.46, June 9, 1942). However, a finding that death or injury is the result of misconduct is proper and sustainable, only when it has been established that such misconduct was the proximate cause of the death or injury (JAG 220.46, July 6, 1933). In the present case, it is apparent that Private Thornton was absent without leave at the time he received the injuries resulting in his death, but there was no evidence to show that his intoxication or other misconduct was a contributing factor to or the proximate cause of the accident from which he received the injuries resulting in his death. There was no evidence that Thornton was the driver of the taxicab at the time of the accident and that his negligence or misconduct as the driver of the vehicle was the proximate cause of the accident.

4. It is therefore recommended that the inclosed papers be returned to The Adjutant General by informal action sheet entry, prepared for the signature of the Acting Chief of Division, stating:

> Referring to the inclosed report of a board of officers convened under the provisions of paragraph 21, Army Regulations 600-550, March 6, 1936, to investigate the circumstances surrounding the death of Private Amos W. Thornton, Battery A, 51st Field Artillery Battalion, it is the opinion of this office that the soldier's absence without leave at the time of the accident removes him from the status of line of duty. However, a finding that death resulted from the deceased's own misconduct is not proper unless the misconduct is shown to have been the proximate cause of his death. It is not

believed that the misconduct of Private Thornton was the proximate cause of the accident from which he received the injuries resulting in his death, as there was no evidence that he was the driver of the taxicab at the time the accident occurred, or that his negligence or misconduct caused the accident. Accordingly, it is recommended that the findings of the board of officers that death occurred as a result of the soldier's own misconduct be disapproved and that the War Department adopt a finding that the death occurred not in line of duty and not as a result of the deceased's own misconduct. It is noted that the report of the additional proceedings doesnot show the action of the commanding officer as required by subparagraph 21i of the mentioned Army regulations, as changed by section III, War Department Circular No. 120, 1941.

Charles W. West,
Colonel, J.A.G.D.,
Acting Chief of Military Affairs Division.

SPJGA 210.46 September 14, 1942

MEMORANDUM for The Judge Advocate General.

Subject: Line of duty board re death of Sergeant Ray J. Bowman, 6290502, Company "B", 2nd Engr. Bn.

1. By informal action sheet (AG 201 Bowman, Ray J., 6290502) dated September 1, 1942, there was referred for remark and recommendation the proceedings of a board of officers appointed under provisions of paragraph 21, Army Regulations 600-550, March 6, 1936, which met pursuant to paragraph 2, Special Orders No. 156, Headquarters Fort Sam Houston, Texas, dated July 4, 1942, to investigate the circumstances and report the facts leading up to and connected with the death of Sergeant Ray J. Bowman, 6290502, Company "B", 2nd Engineer Battalion.

2. The evidence presented is somewhat conflicting, but the essential facts reflected by the record may be summarized as follows:

Sergeant Bowman, approximately three months before his demise, started keeping company with one Mrs. Tula Haley, who, according to her testimony, was a divorcee, residing in San Antonio, Texas. It appears that for some eight months, but prior to the time that she began associating with Bowman, Mrs. Haley had lived with Loren R. Carroll, the assailant. There is no evidence that the deceased commenced going with Mrs. Haley before she and the assailant desisted in their intimate relationship. It appears further that Carroll was emotionally upset over the fact that the woman in question no longer associated with him, and on numerous occasions had threatened her life; and, according to the testimony of Carroll, he had warned the deceased not to see Mrs. Haley. On July 3, 1942, at about 7:30 o'clock P.M., the deceased, being absent from his post with authority, was walking with Mrs. Haley on St. Mary's Street, San Antonio, Texas, and perceived the assailant sitting in the doorway of a cafe some distance away. Upon noticing him, the deceased and Mrs. Haley proceeded hastily in the opposite direction. They were pursued by the assailant, who opened fire with a pistol, one bullet striking Sergeant Bowman in the head. There was no evidence that the deceased was armed, or that he was the aggressor. Carroll stated that the woman in question was his wife. In a number of respects, however, his statements were at variance with those of apparently reliable witnesses.

5. It is therefore recommended that these papers be returned to The Adjutant General by informal action sheet entry, prepared for the signature of the Chief of Division, stating:

In the opinion of this office the evidence is legally sufficient to sustain the findings of the board of officers, that the fatal injury of Sergeant Ray J. Bowman, 6290502, was incurred in line of duty and not as a result of his own misconduct. Accordingly, it is recommended that the mentioned findings, as approved by the convening authority, be approved.

Charles W. West,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 334.6 June 30, 1942

MEMORANDUM for The Judge Advocate General.

Subject: Retiring board proceedings in the case of First Lieutenant Charles Henry Rannells, Jr., Medical Corps Reserve.

1. By disposition form (AG 201) dated June 16, 1942, opinion was requested whether the Army retiring board which reconsidered the line of duty finding a previous board in the case of First Lieutenant Charles Henry Rannells, Med.-Res., was properly constituted.

2. It appears from the file that on April 16, 1942, Lieutenant Rannells appeared before an Army retiring board at Fort Bliss, Texas, which, both as appointed and as present at the time of this hearing, consisted of seven officers, of whom two were officers of the Medical Corps. This board found that Lieutenant Rannells was physically incapictated for active service by reason of acute bronchial asthma, and that the incapacity was an incident of the service. By letter (AG 201 (5-11-42) RC Rannells, Charles Henry, Jr.), dated May 11, 1942, The Adjutant General directed that the board be reconvened for reconsideration of the line of duty finding in the light of certain specified factors in the medical record of the officer concerned. Prior to the date of this letter a new board had been appointed. The original board was not reconvened. Instead the new board on May 28, 1942, convened to reconsider Lieutenant Rannells' case. At that time it consisted of eight officers, three of whom were officers of the Medical Corps, although there were present for this hearing only five officers, of whom two were members of the Medical Corps. Five of the seven officers of the original board were appointed on the second board, all of whom were present at the prior hearing, the remainder being new appointees. Three of the officers who participated as board members in the first hearing also participated as such at the second hearing. Lieutenant Rannells waived in writing his right to appear before the second board, and that board, after examining the proceedings of the previous board and the files pertaining to the case, but without hearing any witnesses, found that Lieutenant Rannells was permanently incapacitated for active service by reason of acute bronchial asthma, and that such incapacity was not an incident of the service.

3. Section 2146 of Revised Statutes provides, in pertinent part:

"The Secretary of War, under the direction of the President, shall, from time to time, assemble an Army retiring board, consisting of not more than nine or less

than five officers, two-fifths of whom shall be selected from the Medical Corps."

The provision that two-fifths of the members of the board must be medical officers was interpreted by this office to require a ratio of medical officers to other officers of as nearly two-fifths as mathematically possible, and that this ratio should be maintained both when the board is appointed and when it assembles (JAG 250.52, June 9, 1922; JAG 300.3, Dec. 19, 1923; id., Dec. 21, 1923). In accordance with this interpretation subparagraph 4b of Army Regulations 605-250, January 19, 1923, provides:

"When the board is to consist of five or six members, two officers of the Medical Corps will be detailed thereon; when the board is to consist of seven or eight members, three officers of the Medical Corps will be detailed thereon;***"

Paragraph 14 of the same regulations directs that:

"If at any time the * * * proportion of medical officers of the board present to the other members of the board present exceeds or is reduced below that prescribed in paragraph 4b,*** the president of the board shall at once suspend further proceedings and forthwith report, or direct the recorder to report, such fact to the convening authority, setting forth the reasons for the lack of a quorum."

4. The first board in the instant case, having only two officers of the Medical Corps amongst its seven members, did not comply with the provisions of section 1246, Revised Statutes, or Army Regulations 605-250, and was therefore not legally constituted (SPJGA 334.6, May 21, 1942).

5. This office has recently expressed the view that when the members of an illegally constituted Army retiring board actually consider the available evidence and reach conclusions based thereon, they have so formed their opinions regarding the merits of the case as to be less able to arrive at impartial findings upon a new hearing than are members of an entirely new board, and that, since their proceedings are judicial in nature, such proceedings should, when in the nature of a rehearing, be assimilated to those of a court-martial, where, under the provisions of Article of War 50½, the rehearing must take place before a court composed of officers not members of the court which first heard the case (SPJGA 334.7, June 2, 1942).

6. It is therefore recommended that these papers be returned to The Adjutant General by disposition form entry, prepared for the signature of the Chief of Division, stating:

The Army retiring board which first heard the case of First Lieutenant Charles Henry Rannells, Jr., was not legally constituted in that ratio of medical officers to other officers,

as the board was originally appointed as well as when it convened to hear the case in question, was not as prescribed in paragraphs 4b and 14, Army Regulations 605-250, January 19, 1924. The second board, as constituted for the rehearing, was composed in part of members of the original board mentioned above, It is the view of this office that because certain members of the second board had participated as board members in the prior hearing and thus necessarily had formed and expressed opinions on the merits of the case, those members were not properly qualified to participate as board members in a rehearing of the case by a second board. Accordingly, the second board also was not legally constituted for this case, and it is recommended that the case now be referred for rehearing to a third Army retiring board composed entirely of officers who did not participate as board members in either of the prior hearings, and otherwise legally constituted.

C. B. Mickelwait,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 210.85 August 8, 1942

MEMORANDUM for The Judge Advocate General.

Subject: Wording of retirement orders of Second Lieutenant Raymond Richards, Infantry.

1. By memorandum (AG 201 Richards, Raymond (6-1-42)OG) dated August 1, 1942, information was requested as to the proper wording of the retirement orders of Second Lieutenant Raymond Richards (O-23407), Infantry.

2. The mentioned memorandum states that Lieutenant Richards recently appeared before an Army retiring board which found that he was incapacitated for active service, that the incapacity was permanent, and was not an incident of the service. It appears that the War Department contemplates approving that part of the findings stating that the officer is incapacitated for active service and disapproving that part which states that the disability is not an incident of the service. The proposed order submitted for consideration is as follows:

> "Second Lieutenant Raymond Richards 023407 Infantry having been found by an Army Retiring Board incapacitated for active service on account of disability incident thereto and the President having approved the findings of the Board that the officer is incapacitated for active service but disapproved the findings that the disability is not an incident to the service, the retirement of Second Lieutenant Richards from active service on October 31, 1942, under the provisions of Section 1245 and 1251, R.S., and the Act of Congress approved April 23, 1930, is announced."

3. In the mentioned memorandum reference is made to two former opinions of this office (JAG 210.35, April 10, 1924; id., Mar. 7, 1928). In the earlier case (Lieutenant Jett) the finding that the incapacity was not an incident of service was disapproved by the President, and in the later case (Lieutenant Forrest) the finding that the disability was an incident of the service was disapproved. In passing it is noted that the mentioned memorandum erroneously states that in the Jett case the findings of the board "were incident to the service".

In the Jett case, sections 1245, 1249, 1250, 1251, and 1252 of the Revised Statutes were considered, and it was held that:

"b. In my judgment, relying upon Sections 1245, 1250, 1251 and 1252, Revised Statutes, the executive entry on the record of the proceedings of the retiring board may include an indication of concurrence in the finding of the board that the officer is incapacitated for active service and an indication of non-concurrence in the finding that the incapacity is not the result of any incident of service, provided the President has decided to place the officer on the retired list and directs action accordingly."

4. It is believed that the Jett case is controlling here and amply supports the contemplated executive disapproval of the finding that the incapacity of Lieutenant Richards is not an incident of the service.

5. An examination of the draft of the proposed order discloses that there is no direction by the President that the officer be retired from active service, and no reference is made to sections 1250 and 1252, Revised Statutes. The draft should be corrected in these particulars.

6. It is therefore recommended that these papers be returned to The Adjutant General by first indorsement, prepared for the signature of the Acting Chief of Division, stating:

As stated in a former opinion of this office (JAG 210.85, Apr. 10, 1924), the President, under the provisions of sections 1245, 1250, 1251 and 1252, Revised Statutes, may approve the finding of the board that the officer is incapacitated for active service and disapprove the finding that the incapacity is not an incident of service, provided the President has decided to place the officer on the retired list and directs action accordingly. It is recommended that the proposed retirement order read substantially as follows:

Second Lieutenant Raymond Richards (O-23407), Infantry, having been found by an Army retiring board incapacitated for active service on account of disability, and the President having approved the finding of the board that the officer is incapacitated for active service, and having disapproved the further finding of the board that the disability is not an incident of the service, Lieutenant Richards is retired from active service and placed on the list of retired officers, effective on October 31, 1942, by direction of the President, under the provisions of section 1245, 1250, 1251 and 1252, Revised Statutes, and the act of Congress approved April 23, 1930.

Charles W. West,
Colonel, J.A.G.D.,
Acting Chief of Military Affairs Division.

14 July 1943.

SPJGA 1943/9514

MEMORANDUM for The Judge Advocate General.

Subject: Authority to reverse findings made by Army retiring boards.

1. By memorandum (WDGAP 334 Retirement Bds (17 Dec. 42)) dated 16 June 1943, the following questions were presented:

"a. 'When a retiring board finds an officer incapacitated for further active duty, the disability being found to be "in line of duty", may the finding of "in line of duty" be reversed by the War Department acting for the President?'

"b. 'When a retiring board finds an officer incapacitated for further active duty, the disability being found to be "not in line of duty", may the finding of "not in line of duty" be reversed by the War Department acting for the President.?'"

2. The mentioned memorandum invites attention to an inclosed memorandum for the Assistant Chief of Staff, G-1 (AG 334. (11 June 1943) PO-S) dated 11 June 1943, subject, "Approval of Retiring Boards for Officers of the Civilian Components", which in turn makes reference to paragraph 5 of a memorandum, which is not inclosed, from the Chief of Staff, G-1, dated 17 December 1942, relative to the Secretary of War's Personnel Board making final decision on limited service assignments in connection with retiring board action.

The inclosed memorandum for the Assistant Chief of Staff, G-1, dated 11 June 1943, invites attention to the final decision required in cases of officers of the civilian components wherein the Surgeon General and the retiring board disagree as to whether the incapacity is, or is not, the result of an incident of the service and both adhere to their original views in the premises upon subsequent reconsideration. Under these circumstances the memorandum last mentioned states that a decision is necessary either to approve the findings of the board and grant the officer concerned retirement pay benefits under the act of 3 April 1939 (sec. 5, 53 Stat. 557, as amended; 10 U.S.C. Supp. I, 456) or to approve all of the findings except that part which states the incapacity is the result of an incident of the service, and thereby deny the officer the right to retirement pay benefits. The memorandum last mentioned further states that in view of the complexity of such cases and their importance to the individual concerned, information is requested whether final decision should rest with a, The Adjutant General, b, Military Personnel Division, A.S.F., c, Assistant Chief of Staff, G-1, or d, The Secretary of War's Personnel Board.

In paragraph 3 of the memorandum first mentioned (par. 1, above) the Assistant Chief of Staff, G-1, states that it appears that "the approval or disapproval of retirement proceedings applies to the recommendation that the individual be retired, that the duty status of disability is a fact to be determined by the board", and that the finding "in line of duty" appears to be similar in some respects to an acquittal by a court-martial. In this latter connection there is a memorandum for record at the foot of the memorandum for this office stating that it is the view of G-1 that a finding of "line of duty" may not be reversed whereas a finding of "not in line of duty" by a retiring board may be reversed.

It is to be noted that the questions referred to this office appear to be broader in scope than the issue presented in the inclosed memorandum for the Assistant Chief of Staff, G-1, dated 11 June 1943, which relates only to officers of the "civilian components". Although the questions presented employ the phrase "in line of duty", it may be presumed that they have reference also to determination whether disability is the result of "an incident of the service" as that phrase is employed in statutes pertaining to the retirement of Regular Army officers for disability.

3. Pertinent statutes with regard to the retirement of Regular Army officers for disability include the following: /R.S. 1245, 1248, 1249, 1250, 1251, and 1252/...

This office has held that section 1250, Revised Statutes, quoted above, contemplates that the President shall approve or disapprove the proceedings and decision of the retiring board, but that he may not alter or change such decision (C 29449, 19 Feb. 1912; C 22399, 22 Nov. 1907) ...

In the second opinion cited... it was stated, quoting from paragraph 2206, Digest of Opinions of The Judge Advocate General, 1901, in pertinent part:

> "The board finds the facts and the President approves or disapproves the finding, but the law does not empower him to modify the finding or to substitute a different one."

In harmony with this statement it has been held more recently that, although a minority report of a retiring board may be considered for the purpose of determining whether the report of the board should be approved or disapproved, such minority report calls for neither approval or disapproval (JAG 210.85, 25 June 1926).

4. Another line of opinions of this office appears to embody a conclusion contrary to that stated in the preceding paragraph. /The Acting Chief of Division here cites and quotes extensively from the Jett case (JAG 210.85, 10 Apr. 1924) and the Richards case (SPJGA 1942/3571, 8 Aug. 1942)/ ...

5... From the foregoing it may be concluded fairly that the Jett opinion does not purport to hold that sections 1251 or 1252, Revised Statutes, confer upon the President any power to substitute findings contrary to those made by the board. The result reached was attained instead by invoking section 1245, Revised Statutes, which was deemed to require retirement where incapacity for service had been shown, notwithstanding a failure to comply with the procedural requirements of sections 1251 and 1252, as in the event of the inability of the President and the board to concur in the findings required by the sections last mentioned. In other words, section 1245 was considered to impose an imperative mandate that disabled officers be retired -- a mandate which was competent to override procedural requirements acknowledged to exist in accomplishing retirement under section 1251 or 1252 standing alone ....

It remains to be considered whether ... section 1245, Revised Statutes, standing alone, does in fact impose such a mandate in the case of an officer found by the board to be incapacitated for active service where the President concurs in that finding but disapproves a finding as to the origin of the incapacity. It is true that section 1245 ... states that when any officer has become incapacitated he shall be retired by the President. If this were the full content of the section, the view expressed in the Jett case would be persuasive. However, the section goes on to state that such retirement shall be accomplished "as hereinafter provided", thereby making obvious reference to sections 1248, 1249, 1250, 1251, and 1252, which prescribe the manner in which and the conditions under which such retirement is to be accomplished... The mentioned sections comprise in their totality a unified body of law pertaining to retirement, and all had their origin in a single statute, namely the act of 3 August 1861 (12 Stat. 289), from which they were derived by the compilers of the Revised Statutes...

6... Accordingly, both of the mentioned questions should be answered in the negative with regard to officers of the Regular Army.

7. Coming now to the questions presented... with regard to Army personnel other than members of the Regular Army, ordered before Army retiring boards for the determination of eligibility to receive retirement pay benefits under the act of 3 April 1939 (sec. 5, 53 Stat. 557, as amended; 10 U.S.C. Supp. I, 456), it may be noted that by the terms of Executive Order No. 8099, 28 April 1939, as amended (4 F.R. 1725; 5 F.R. 2436; 7 F.R. 8390) final determination as to their eligibility for such benefits is to be made by the Secretary of War, or by some one designated by him in the War Department, and not by the President (pars. 3, 5, SPJGA 1943/4052, 5 May 1943). Thus, in such cases ultimate determination of the "line of duty" origin or disability within the meaning of the statute last cited is a function of the Secretary of War, and there is no statute which provides expressly that his action shall be limited to the approval or

disapproval of the findings of the retiring board. However, Executive Order No. 8099 does require that the power thereby conferred upon the Secretary of War shall be exercised "in the manner, and in accordance with the standards, provided by law, or regulations for Regular Army personnel" . . .

8. The foregoing discussion has been predicated upon the assumption that the word "reversed", as employed in the questions presented ... was used in the sense of the disapproval of findings of "in line of duty" or "not in line of duty" made by an Army retiring board, the substitution therefor of contrary findings by the President, or by the War Department acting for him, and the taking of action thereon as if such substituted findings had in fact been made by the board... ...

9. It is therefore recommended that reply be made to the Assistant Chief of Staff, G-1, by memorandum, prepared for the signature of The Judge Advocate General, stating:

> Reference is made to the questions presented in paragraph 4 of your memorandum... dated 16 June 1943, with regard to the reversal of findings of "in line of duty" or "not in line of duty" made by Army retiring boards. If, as suggested by paragraph 3 of the mentioned memorandum, those questions have reference to reversal in the sense of the disapproval of such findings, the substitution of contrary findings by the President, or by the War Department acting for him, and the taking of action thereon as if such substituted findings had been made by the board, it is my opinion that both of the mentioned questions should be answered in the negative. To the extent that a prior opinion of this office (JAG 210.85, 10 Apr.1924; Dig. Op. JAG 1912-40, sec. 324) may be inconsistent with the foregoing expression, such opinion is overruled. However, if the questions presented refer to the mere disapproval of such findings made by an Army retiring board, without the substitution of different findings and the taking of action thereon, it is my opinion that both of the mentioned questions should be answered in the affirmative. In the event of such disapproval the retirement proceedings are rendered inoperative and the status of the officer concerned remains unchanged, subject to the return of such proceedings to the board for reconsideration or rehearing, or to the possibility that he may be ordered to appear before another retiring board if such action is ordered by competent authority.

Irvin Schindler,
Colonel, J.A.G.D.,
Acting Chief of Military Affairs Division

SPJGA 334.6 July 24, 1942

MEMORANDUM for The Judge Advocate General.

Subject: Constitution of Reconvened Army Retiring Board.

1. By disposition form dated July 4, 1942, an opinion was requested whether the reconvened Army retiring board in the case of Captain Theodore Hart M'Calla, III, Inf-Res., may be considered as properly constituted.

2. The file discloses, that on April 27, 1942, Captain M'Calla appeared before an Army retiring board at Headquarters, Fourth Corps Area, Atlanta, Georgia, which board at the time of appointment consisted of eight officers, three of whom were medical officers. At the time of the hearing six members, two of whom were medical officers, were present. This board unanimously found that Captain M'Calla was incapacitated for active service, that the incapacity was permanent, and that it was an incident of service. The record and findings were referred to The Surgeon General, who disagreed with the findings of the board and recommended that the record be returned to the board for reconsideration of its findings that the incapacity is an incident of service.

By letter (AG 201 (5-21-42) RC, M'Calla, Theodore Hart, III) dated May 21, 1942, the Secretary of War directed that the board be reconvened for reconsideration of its findings that the incapacity is an incident of service.

At the time the board reconvened at Atlanta, Georgia, on June 2, 1942, it was composed of six officers, two of whom were medical officers. Five of the officers were members of the board and present at the original hearing, the sixth member being a medical officer, who, subsequent to the original hearing, had been appointed to the board to replace a relieved medical member who had been present at the earlier hearing. The files disclose that the new officer carefully read the report of the proceedings in the case. The board was then closed and, after deliberation, amended its findings to read as follows:

> "That Captain Theodore H. M'Calla, III (O-230812), Infantry Reserve, is incapacitated for active service, that the cause of said incapacity is: Constitutional psychopathic state, schizoid personality, (Unimproved), and that the incapacity originated prior to entry upon active duty on February 15, 1941. And the board further finds that said incapacity is not incident of service and that it is permanent."

The record does not disclose whether Captain M'Calla was notified or was present when the board convened or whether he was furnished a copy of the proceedings or waived any of his rights in the proceedings.

3. In Winthrop's Military Law and Precedents, second edition, 1920, reprint, at page 499, it is stated with respect to Army retiring boards:

> "Though Sec. 1250, Rev. Sts., refers to the findings as the 'decision of the board', and Sec. 1248 authorizes the board to 'determine the facts', it is clear, from these sections and Sec. 1249, that the finding is but in the nature of a recommendation, without force or effect unless approved by the President and acted upon by him accordingly. * * * the board may reconsider and modify its findings at any time before transmitting its 'proceedings and decision' to the Secretary of War, under Sec. 1250.
>
> "* * * In any case in which, in his judgment, the investigation has not been complete, or the finding is not justified by the facts, he may, before acting thereon, return the proceedings to the board for a further inquiry or hearing, or a correction of its conclusions, as in the case of a court-martial. But not being a court, and the inquiry not being a trial, the board, upon such revision, may, and should if so directed, reexamine former witnesses or take new testimony."

It is disclosed by the file that The Surgeon General and the Secretary of War disapproved the finding of the board, "that the incapacity is an incident of service", upon the ground that the report of the medical witnesses, as well as the disposition board, affirmatively showed that the incapacity existed prior to entry on active duty, and that the findings of the board were not justified by the facts and were inconsistent with the well-established principles of medical science. It was within the province of the President (R.S. 1250) to approve or disapprove the findings of the board or to order the proceedings returned to the board for reconsideration, calling their attention to the record and the well-established principles of medical science.

Although it is not indicated that Captain M'Calla was present or given an opportunity to be present when the board reconvened, it is not believed that any of his substantial rights were prejudiced even if he were not given an opportunity to be

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Although it is not indicated that Captain M'Calla was present or given an opportunity to be present when the board reconvened, it is not believed that any of his substantial rights were prejudiced even if he were not given an opportunity to be

present, because no new evidence was heard and the previous evidence which was examined by the new medical member consisted principally of technical medical testimony.

It is my opinion, therefore, that the board having been legally constituted in its inception was not rendered illegally constituted by the addition of a medical officer to replace a relieved medical member present at the former hearing, as the record discloses that he carefully read the record of the former hearing, before taking part in the reconsideration.

4. It is, therefore, recommended that these papers be returned to The Adjutant General by disposition form entry, prepared for the signature of the Acting Chief of Division, stating:

> It is the opinion of this office that the reconvened Army retiring board which met to reconsider its findings in the case of Captain Theodore Hart M'Calla, III, was properly constituted.

Charles W. West,
Colonel, J.A.G.D.,
Acting Chief of Military Affairs Division.

SPJGA 1942/4671 October 8, 1942.
(210.801)

MEMORANDUM for The Judge Advocate General.

Subject: Retiring Board Proceedings in the Case of Lieutenant Colonel John J. Ostrander.

1. My disposition form dated October 2, 1942, the 201 file of John J. Ostrander, formerly a lieutenant colonel, National Guard of the United States and a letter dated August 22, 1942, from Colonel Ostrander to Senator Prentiss M. Brown, were referred to this office by the Officers' Branch, Adjutant General's Office, with a request for an opinion as to whether Colonel Ostrander's rights were adversely affected by the fact that he was not afforded an opportunity to be present when the Army Retiring Board before which he appeared at the first hearing upon his case reconvened to further consider his case.

2. The inclosed 201 file discloses that Colonel Ostrander entered on active duty on October 13, 1940; that he entered the Station Hospital, Fort Benning, Georgia, in August 1941 for treatment for a disease later diagnosed as thyrotoxicosis: that he suffered an acute coronary thrombosis on September 22, 1941; that he was transferred to Lawson General Hospital, Atlanta, Georgia, on October 16, 1941; and that a thyroidectomy was performed on him on December 15, 1941. A disposition board which met at Lawson General Hospital on January 16, 1942, to consider Colonel Ostrander's case found that his thyrotoxicosis was cured but that he was incapacitated for further active duty by reason of arteriosclerosis, generalized, moderate, and coronary, severe, incurred not in line of duty and recommended that he be returned to an inactive status. By letter orders, Headquarters Fourth Corps Area, dated February 4, 1942, Colonel Ostrander was ordered to report in person to the President, Army Retiring Board, Fourth Corps Area, for examination by the board, at such time as designated by the President thereof. Colonel Ostrander, with counsel, appeared before the board on March 17, 1942. The board after hearing testimony of medical witnesses, who were cross-examined by Colonel Ostrander's counsel, found that Colonel Ostrander was incapacitated for active service, that the cause of such incapacity was "Arterio-sclerosis, Generalized, moderate and coronary, moderately severe", and that such incapacity was not incident of service. The record in the case of Colonel Ostrander was referred to The Surgeon General who by disposition form entry (SGO 201 Ostrander, John Joseph) dated April 4, 1942, concurred in the portion of the findings of the board to the effect that Colonel Ostrander was physically incapacitated for active service. However, with respect to the line of duty finding, The Surgeon General observed, that as Colonel Ostrander had shown no cardiovascular symptoms until September 22, 1941, eleven months after his entry on active duty, it appeared that the incapacity in his case might properly be considered as an incident of service. The Surgeon General recommended "that the record be returned to the retiring board for reconsideration of the line of duty finding

and that if the incapacity is still considered to be not of service origin, the record be amplified to show in detail the basis of such finding". By letter (AG 201 (4-3-42) RC Ostrander, John Joseph) dated April 9, 1942, the retiring board was requested to reconvene for reconsideration of its findings in accordance with the recommendation of The Surgeon General. On April 23, 1942, the board reconvened and heard the testimony of Colonel Elias E. Cooley, Medical Corps, who was called as an expert witness. Neither Colonel Ostrander nor his counsel was present at the hearing, and a telegram in the file from the president of the board states that the records of the board do not indicate that Colonel Ostrander was afforded an opportunity to be present before the reconvened board. Colonel Ostrander states that he "was not informed of the re-hearing until I received a copy of the Board proceedings". Two of the members of the reconvened board were not members of the original board. The reconvened board found that Colonel Ostrander's incapacity was not an incident of service. By disposition form entry (SPQCB 201 (Ostrander, John Joseph) dated May 7, 1942, The Surgeon General observed with respect the finding of the reconvened board:

> "This officer went on extended active duty October 15, 1940, and there is no record of any incapacity because of generalized or coronary arteriosclerosis prior to September 22, 1941, when he had an attack of pain in the upper abdomen and chest. In consideration of his length of service prior to the onset of cardiovascular symptoms it would appear that the disability might properly be considered as incident to the service. It is recognized, however, that the instrumentality provided by the Government for final decision in cases of this nature is the Action taken by retiring boards and in view of the proceeding of the retiring board in this case, no further action is recommended."

By paragraph 61, Special Orders No.69, Headquarters Fourth Corps Area, March 21, 1942, as amended by paragraph 25, Special Orders No. 82, same headquarters, dated April 6, 1942, Colonel Ostrander was relieved from active duty. By letter (AG 201 (5-20-42) RC Ostrander, John Joseph) dated May 20, 1942, Colonel Ostrander was informed that the findings of the Army Retiring Board convened in his case had been approved and that, because his incapacity was not incurred in line of duty, he was not entitled to retirement pay benefits under the act of April 3, 1939 (53 Stat. 557; 10 U.S.C. 456). By letter (AG 201 Ostrander, John Joseph (5-21-42) RS) dated May 21, 1942, Colonel Ostrander was honorably discharged from his commission in the National Guard of the United States. In the letter to Senator Prentiss M. Brown, Colonel Ostrander reviews his case in detail and requests that certain alleged irregularities of the retiring board proceedings be brought to the attention of the War Department.

3. Army Regulations 605-250, January 19, 1924, prior to their amendment by Changes No. 4, September 26, 1942, provided in pertinent parts as follows:

"13. Appearance of officer before board; counsel; failure to appear. -- a. Entitled to appear, counsel.-- An officer summoned before an Army retiring board is entitled to appear before the board, with counsel if desired, either civil or military, or both.

"b. Failure to appear.-- An officer duly summoned before the board who fails to appear, thereby waives the right to a hearing, and can not properly take exception to the conclusions arrived at in his absence. But unless the officer has waived his right to be present, the board shall not proceed in his absence. See Dig. Ops. J.A.G., 1912, p. 984 c (4).

"16. Right to challenge members.-- The statutory right to a full and fair hearing includes the right to a hearing by an impartial board, and therefore the right to challenge for cause stated to the board. The board shall determine the relevancy and validity of any challenge and shall not recieve a challenge to more than one member at a time.

* * *

"22. * * *

"c. Officer before board.-- An officer summoned before an Army retiring board may testify in his own behalf, if he so desires. When he does not desire retirement he can not be required to testify against himself, but may testify if he so desires. When testifying as a witness in his own behalf, he may be cross-examined as any other witness. He may introduce testimony of witnesses, and may cross-examine witnesses examined by the board. He may also cross-examine the medical members of the board if they shall have taken part in his physical examination and shall have indicated an opinion as to his physicial condition."

4. It will be noted that paragraph 15, Army Regulations 605-250, gives an officer summoned before an Army retiring board the right to appear before the board and prohibits the board from proceeding in his absence unless he has waived his right to be present. Paragraph 16 confers upon him the right to challenge members of the board for cause stated to the board and paragraph 22c authorizes him to cross-examine witnesses examined by the board. The file discloses that Colonel Ostrander was not even advised that the board would reconvene and consequently was not given the opportunity to appear before it. As Colonel Ostrander was not afforded an opportunity to appear before the reconvened board, it is manifest that he was deprived of his rights to challenge the members of the board and to cross-examine the expert witness who testified before the board. Whether or not Colonel Ostrander would, if afforded the opportunity, have challenged any of the members of the board is a matter which cannot be definitely determined. However, it should be borne in mind that two of the members of the reconvened board were not present at the original meeting of the board. With respect to the loss of the right to cross-examine the expert witness who testified before the reconvened board, it appears

pertinent to observe that at the original hearing Colonel Ostrander was represented by counsel who cross-examined a medical witness who testified at the original hearing. It seems altogether reasonable to believe that he would have been no less diligent in conducting the proceeding before the reconvened board. Likewise, it is reasonable to believe that Colonel Ostrander, if afforded the opportunity, might have had expert witnesses testify in his behalf before the reconvened board. The doubts twice expressed by The Surgeon General's Office with respect to the correctness of the board's finding that Colonel Ostrander's incapacity was not of service origin are conducive of the conclusion that Colonel Ostrander might have found one or more medical experts to testify in his behalf. In view of the foregoing observations, it is my opinion that an affirmative answer must be made to the inquiry as to whether Colonel Ostrander's rights were adversely affected by the fact that he was not afforded an opportunity to appear before the reconvened board. In reaching that conclusion consideration has been given to a recent opinion of this office (SPJGA 334.6, July 24, 1942) in which it was indicated that, even though an officer was not given an opportunity to be present before a reconvened retiring board, none of his substantial rights were prejudiced. However, that case is readily distinguishable from the instant case by the fact that no new evidence was heard.

5. It is therefore recommended that these papers be returned to The Adjutant General by disposition form entry, prepared for the signature of the Assistant The Judge Advocate General (General Llewellyn), stating:

> It is the opinion of this office that the rights of former Lieutenant Colonel John Joseph Ostrander, Infantry, National Guard of the United States, were adversely affected by the fact that he was not afforded an opportunity to be present when the Army retiring board reconvened further to consider his case.

Charles W. West,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 1942/4779
(210.801)

October 14, 1942

MEMORANDUM for The Judge Advocate General.

Subject: Findings of Army Retiring Board in case of Lieutenant Colonel John Joseph Ostrander, Infantry, N.G.U.S.

1. By disposition form (AG 201)(Ostrander, John Joseph)) dated October 10, 1942, the inclosed papers were referred for recommendation and opinion with reference to the question:

> "As the Army Retiring Board findings have been approved, would the findings (approved or disapproved) of a new retiring board, if convened, supercede the approved findings of the prior board."

2. The facts involved are fully stated and discussed in a recent opinion of this office (SPJGA 1942/4671) dated October 8, 1942, wherein it was stated:

> "It is the opinion of this office that the rights of former Lieutenant Colonel John Joseph Ostrander, Infantry, National Guard of the United States, were adversely affected by the fact that he was not afforded an opportunity to be present when the Army retiring board reconvened further to consider his case."

3. It is not deemed necessary or desirable to give an unqualified anser to the question as stated. If the approval of the existing findings of the retiring board are first set aside by the designated representative of the Secretary of War, it follows from the views expressed in a recent opinion of this office (SPJGA 1942/4222 (210.85)) dated September 14, 1942, that the question must, in effect, be answered in the affirmative.

4. It is therefore recommended that these papers be returned to The Adjutant General by disposition form entry, prepared for the signature of the Chief of Division, stating:

> If it should be administratively determined that this case should be referred to a new retiring board, the approval of the findings of the old ones should be set aside before taking such action. The findings of the prior retiring board will then have no legal effect and appropriate action may be taken upon the findings of the new retiring board.

Charles W. West,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 1942/5555
(210.801)

November 25, 1942

MEMORANDUM for The Judge Advocate General.

Subject: Retiring Board proceedings in the case of Captain Robert Husted Chambers.

1. By disposition form (AG 201 Chambers, Robert Husted, Captain, Cav. Res.) dated November 7, 1942, the report of the proceedings of an Army retiring board in the case of the above-named officer, together with accompanying papers, was referred for opinion whether certain matters alleged in a request for reconsideration adversely affected the officer's substantial rights.

2. It appears from the report of the proceedings and accompanying papers that Captain Chambers, pursuant to proper orders, appeared before an Army retiring board which convened at Fort Devens, Massachusetts, on August 18, 1942. At the conclusion of the hearing the board found that the mentioned officer was incapacitated for active service by reason of psychosis, unclassified, with episodes of excitement; that the incapacity manifested itself on or about May 14, 1942, less than six months after entering on active duty (Jan. 2, 1942); that it was due to a psychopathic personality which existed prior to his entrance on active duty; that it was a permanent condition and not an incident of service.

By letter (AG (9-12-42) OM Chambers, Robert Husted ACK/-JAR/TL-1014) dated September 12, 1942, Captain Chambers was advised as follows:

> "The Secretary of War directs me to inform you that the findings of the Army Retiring Board convened in your case have been approved. It having been determined that your physical incapacity was not incurred in line of duty while on active duty, you are not entitled to retirement pay benefits under the Act of April 3, 1939."

Thereafter, Captain Chambers was honorably discharged by letter (AG 201-Chambers, Robert Husted (10-5-42)PO-A FF/HHL/brr/1508) dated October 5, 1942, which reads in pertinent part as follows:

> "By direction of the President you are honorably discharged effective this date as Captain, Cavalry Reserve, by reason of physical disqualification."

By order of the Secretary of War:

/s/ A. C. Kelly
Adjutant General."

The request for reconsideration of the approval of the board's findings is contained in an indorsement dated October 26, 1942, on the letter of September 12, 1942, referred to above.

The allegations of error upon which Captain Chambers relies in part as affecting his substantial rights, and upon which opinion was requested, are as follows:

"1. Request re-consideration of approval findings Retiring Board, for the following reasons:-- * * *

"b. That the undersigned, while at Lovell General Hospital prior to his appearance before the Board, was repeatedly refused permission to inspect personally clinical, and other records pertaining to his case, by Col. Mueller, the Chief Medical Officer, and also president of the previous disposition Board, who appeared later against him in the case. And that material from those records was subsequently introduced by the medical examiners and witness.

"c. That the undersigned was not informed at any time of his rights to inspect these records, and has never inspected them. And that he could make no defense for this reason.

"d. That the above is contrary to provisions par. 23c (1) AR 605-250.

"e. That provisions par. 23c(2) were not fully complied with by the medical examiners, who had been previously also members of the Disposition Board, in that they were not impartial in their presentation of the case. That they evaded direct answers to questions both by medical counsel and by members of the Board, and frequently gave only partial and misleading answers to the questions asked them. That they introduced statements of opinion they did not support. That they withheld evidence. That at no time did they introduce any evidence other than that favorable to their own diagnosis, and to their previous findings at the Disposition Board, and unfavorable therefore to the undersigned, although they knew of such evidence."

3. The first three of the foregoing allegations concern the right of Captain Chambers to inspect certain records and may appropriately be considered together.

Subparagraph 23c(1), Army Regulations 605-250, January 19, 1924, is as follows:

"c. Papers received from The Adjutant General.

"(1) General.--Prior to the taking of testimony the recorder will submit to the board, in open session, all papers pertaining to the case which have been received from The Adjutant General's Office. The officer whose capacity is being inquired of and his counsel shall have the right to inspect all such papers during the hearing, and, upon reasonable request, before the hearing, if such papers are in the possession or under the control of the board, or the recorder thereof. It is not the practice of retiring boards to verify the correctness of these records under oath."

It is not disclosed what particular clinical or other record Captain Chambers contends he was not permitted to inspect. If he refers to records other than those received from The Adjutant General's Office, there is no basis for any reconsideration as the regulation requires that the officer whose incapacity is being inquired of and his counsel be permitted to inspect only the papers received from The Adjutant General's Office. As Captain Chambers refers in his application to subparagraph 23c(1) of the mentioned regulations, it may be inferred that these are the records complained about.

Subparagraph 23c(1) permits an inspection of these papers at the hearing, and prior thereto upon reasonable request. This appears to contemplate a request to the board or some member thereof, and not to the medical examiner who is only a witness before the board. Accordingly, it is my view that the request in the instant case, made to Colonel Mueller, was neither a proper nor reasonable one. Furthermore, such refusal by Colonel Mueller was not called to the attention of the board at the hearing, no objection was made thereto and such action, if irregular or erroneous, was waived by virtue of subparagraph 24b of Army Regulations 605-250, which provides that failure to make objections during the proceedings of a retirement board, to any testimony or action of the board amounts to a waiver of any objection that might have been made.

There is no requirement that the officer summoned before the board be informed of his right to inspect such records. It is therefore concluded that the allegations regarding this matter are without merit.

As to paragraph 1e of the request for reconsideration, a careful reading of the record of the proceedings indicates that the contentions are unwarranted. Captain Chambers had counsel who cross-examined all the witnesses, and he was given the opportunity to introduce any evidence available to refute the testimony of the medical examiners. Furthermore, no objection was made to any of the testimony presented and such failure amounted to a waiver of any objection that might have been made.

In view of the foregoing conclusions, I am of the view that the matters alleged in paragraph 1b, c, d, e of the request for reconsideration are without merit and should not be considered as affecting Captain Chamber's substantial rights.

5. It is therefore recommended that the file be returned to The Adjutant General, by disposition form entry, prepared for the signature of the Chief of Division, stating:

> In the opinion of this office the allegations in question are without merit and the record discloses no error or irregularity adversely affecting the substantial rights of the officer concerned.

Charles W. West,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 1942/5699
(210.85)

December 3, 1942

MEMORANDUM for The Judge Advocate General.

Subject: Review of action of Army retiring board with reference to Captain James D. Pendleton, Air Corps Reserve.

1. By disposition slip dated November 16, 1942, from the Administrative Assistant to the Secretary of War these papers were referred for remark and recommendation concerning an "Appeal from the Findings of Army Retiring Board", which findings were to the effect that Captain James D. Pendleton, Air Corps Reserve, is incapacitated for active service and that the incapacity was not an incident of service.

2. The record of the retiring board proceedings and related files did not accompany the papers upon the original reference, having been retained by The Adjutant General for use in drafting a reply to an inquiry concerning the case by Senator Robert R. Reynolds. By telephonic arrangement with the Office of The Adjutant General (Captain Koreman) however, the board proceedings and related papers were forwarded to this office for review in connection with the above-mentioned "Appeal".

The material facts as disclosed by the file appear to be substantially as follows: Captain Pendleton was a commissioned officer in the Army from January 30, 1918, to August 27, 1919, and subsequent to that time he was a member of the Officers' Reserve Corps. He served several tours of active duty and began his most recent period of active duty on September 30, 1940. Prior to reporting for active duty he was given a physical examination on July 13, 1940, and was recommended for active duty. He was examined again on October 2, 1940, and found physically fit for active duty, except for cardiac arrhythmia which was waived. He remained on duty in Washington until March 28, 1942, and was then sent to Liberia. While there he contracted malaria fever and was transferred to the United States and admitted to the station hospital at West Palm Beach, Florida, in the early part of July, 1942. While on sick leave from that hospital he was admitted to Walter Reed General Hospital on July 30, 1942. On August 28, 1942, he appeared before a disposition board at Walter Reed General Hospital, which board expressed the opinion that the diagnosis was thromboangiitis obliterans, lower extremities, chronic, and that the condition existed prior to entrance upon extended active duty. The disposition board recommended that he be relieved from further observation and treatment and brought before a retiring board.

The Army Retiring Board convened at Walter Reed Hospital on October 23, 1942, and Captain Pendleton and his counsel were present at the hearing.

The complete medical history of Captain Pendleton was presented to the board and Major Lewis and Captain Nalles, the medical witnesses, submitted their report and testified in connection therewith. The clinical records revealed that the officer noted pain in his left leg while walking to work soon after he entered the service. He admitted that he had cramps in his legs and went to the dispensary within a month after he reported for active duty but explained this as being due to the lack of exercise. He attributed his present condition to the malaria fever he contracted while on foreign duty. The medical officers who examined Captain Pendleton for the purpose of testifying before the board stated that his prior medical history of coronary thrombosis indicated that he had a similar process in the vessels of his legs. The diagnosis was thromboangiitis obliterans but it was stated that there was no definite way of determining when the condition started. It was the opinion of the medical officers that his condition was permanent and was slowly progressing but that he was capable of performing desk duty. The disposition board considered only his clinical record and made recommendation to the commanding officer of Walter Reed General Hospital that Captain Pendleton was capable of performing limited service but this recommendation was disapproved by the commanding officer and upon reconsideration the final recommendation by the board was that he appear before a retiring board. The Retiring Board found that the origin of the incapacity was about September, 1940, and was of a permanent nature and not an incident of military service. The disease was considered insidious and chronic and incapacitating for active service.

Subsequent to the recommendation by the retiring board, the file was submitted to The Surgeon General and his comments were in part as follows:

> "Since Captain Pendleton has a progressively disabling degenerative disease which manifested itself within one month after going on extended active duty, and because serious fulminating complications are likely to occur in his case due to the nature of his disease, professional judgment and medical experience in similar cases preclude any decision by the War Department except concurence with the findings of the retiring board convened at Walter Reed."

On October 24, 1942, War Department orders were issued relieving Captain Pendleton from active duty, effective December 15,

1942." The appeal filed by counsel on behalf of Captain Pendleton alleges irregularities on the part of the disposition board and challenges the findings of the retiring board on the ground that it is not supported by the evidence. The alleged irregularities of the disposition board are: (1) No physical examination of Captain Pendleton was undertaken by the disposition board and their decision was based solely upon medical records, (2) the findings of the disposition board were influenced by higher authorities as indicated by the fact that it first recommended limited service for the officer and finally recommended that because of incapacity the matter should be referred to a retiring board, (3) the fact that the medical examination immediately prior to entry on active duty and immediately after did not reveal the incapacity.

3. Paragraph 7 of Army Regulations 40-590, February 2, 1942, provides in pertinent part, as follows:

> "Unless directed by higher authority, the commanding officer of a hospital will not order a patient discharged or transferred from the hospital until, in such commanding officer's opinion, the discharge or transfer in question would not endanger the life of the patient concerned. The commanding officer may appoint a board composed of three or more medical officers, to be known as a disposition board, to advise him in such cases as he considers necessary. The report of the disposition board will be forwarded with his recommendations to higher authority in appropriate cases. * * *"

Paragraph 2b of War Department Circular No. 83, March 21, 1942, provides:

> "The provisions of Circular No. 217, War Department, 1941, insofar as they pertain to the ordering of officers, Army of the United States, except Regular Army, before Army retiring boards, are suspended during the present emergency, except for those officers who are recommended by disposition boards as incapacitated and unfit for limited service duty or who are found to have conditions not incident to the service which, though not disqualifying at that time, are nevertheless of such character that they are likely to progress or be aggravated by military service and later be made the basis for retirement in line of duty."

Paragraph 5a of the foregoing circular provides:

"No officer who has been assigned to general military service duties will be reassigned to limited service duties except upon report of a disposition board of a general hospital which has been approved by the corps area or similar commander under whose jurisdiction the report originated."

4. The so-called appeal from the retiring board appears to be directed primarily to the proceedings and findings of the disposition board. It is contended that the disposition board's unapproved recommendation that Captain Pendleton was physically fit for limited military service should prevail over its final, approved recommendation that his case be referred to a retiring board. This argument disregards the purely advisory purpose of a disposition board which is clearly set forth in paragraph 7, Army Regulations 40-590, supra. It is to be noted that the final recommendation of the board is in accord with the policy expressed in the quoted portions of War Department Circular No. 83.

An examination of the report of the retiring board indicates that the provisions of Army Regulations 605-250, January 19, 1924, were fully observed. Captain Pendleton was represented by counsel of his own choosing and there is nothing in the report to indicate that the case was not adequately presented in any particular. Consideration of the past medical history of the officer concerned as revealed by prior physical examinations was not legally objectionable and was clearly authorized by Army Regulations (AR 605-250, par. 23c(2)). Counsel for Captain Pendleton was given a full opportunity to present his testimony and, as he appears to have interposed no objections during the course of the proceedings, it may be concluded that he either had none or waived them (par. 24b, AR 605-250).

In view of the history of the disease and the testimony of the medical witnesses that it is insidious, it appears that the findings of the board are correct and in accord with the above-quoted views of The Surgeon General. The fact that the medical examination prior to entry upon active duty did not disclose the disease is not conclusive in the case of a disease of this nature. Moreover, complaint consistent with the ailment was made by the officer within a month after his entry upon active duty. The findings of the retiring board are regarded as adequately supported by the evidence. The file does not indicate that any of Captain Pendleton's substantial rights have been prejudiced.

5. It is therefore recommended that these papers be returned to the Administrative Assistant to the Secretary of War, by memorandum, prepared for the signature of the Chief of Division, stating:

1. Reference is made to the inclosed letter dated November 14, 1942, addressed to the Secretary of War by Lieutenant Colonel John Alvin Croghan, Air Corps, appealing from the findings of an Army retiring board in the case of Captain James D. Pendleton, Air Corps, which was transmitted to this office by your disposition slip dated November 16, 1942, for remark and recommendation. The appeal is based principally on certain alleged irregularities in the proceedings of the disposition board which recommended Captain Pendleton's appearance before a retiring board. The only stated ground for appeal from the findings of the retiring board is that those findings were contrary to the weight of the evidence.

2. It is apparent that in appealing from the findings of the disposition board, Colonel Croghan was not aware of the purely advisory functions of such a board, as set forth in paragraph 7, Army Regulations 40-590, February 2, 1942. The action of the disposition board in this case appears to have been entirely consistent with the provisions of that paragraph as well as with the policy expressed in subparagraphs 2b and 5a, War Department Circular No. 83, March 21, 1942.

3. With respect to the proceedings of the Army retiring board, it is the opinion of this office that the findings are adequately supported by the evidence and that none of Captain Pendleton's substantial rights has been prejudiced.

4. It is recommended that The Adjutant General be directed to make reply to Lieutenant Colonel Croghan's letter in harmony with the foregoing remarks. Attention in this connection is invited to the fact that the inclosed file contains a copy of a letter recently addressed by the Secretary of War to Senator Robert R. Reynolds, regarding this matter.

Charles W. West,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 1943/3685 March 13, 1943

MEMORANDUM for The Judge Advocate General.

Subject: Responsibility of Disbursing Officers for erroneous payment of public money.

1. By third indorsement (AG 201-Taylor, Alfred N. (2-2-43) PO-M) dated March 5, 1943, there was referred for consideration the report of a board of officers convened under provisions of Army Regulations 420-5, May 20, 1940, to investigate and fix the responsibility for improper payment of Government funds to one Private Tommy Harper, 16001013, upon his discharge from the military service on or about September 26, 1941.

2. The findings and recommendations of the mentioned board of officers read as follows:

"The Board having carefully considered the evidence before it finds that the voucher #2319, Final Statement of Tommy Harper, 16001013, Private, Company C, 9th QM Tng Regt, was computed for payment in the Finance Office by Staff Sergeant Stephen J. Pastva; that the error in computation was made by Sergeant Pastva through his apparent misunderstanding of the full meaning of General Court Martial Order #144, Headquarters, Third Corps Area, Baltimore, Maryland, dated July 18, 1941 and General Court Martial Order #185, Headquarters, Third Service Command, Baltimore, Maryland, dated August 30, 1941; that this misunderstanding caused him to figure the voucher in the excess amount of $135.00. The Board further finds that Staff Sergeant Pastva was assigned to duty in the Finance Office, Camp Lee, Virginia, under Lieutenant Colonel Alfred N. Taylor, the Finance Officer, and that it was customary and a part of Sergeant Pastva's assigned duties to compute such vouchers for the Finance Officer for payment; that the Finance Officer had full confidence in the ability, honesty, and integrity of Sergeant Pastva to perform such duties; that the voucher #2319 covering payment to Private Tommy Harper bears the initials of Sergeant Pastva as the one computing the amount to be paid on the voucher; further, that the Finance Officer is responsible for the errors and omissions of his subordinates made in the preparation and computation of vouchers submitted for payment.

"Recommendations:

"In view of the above findings the Board recommends that the Finance Officer, Lieutenant Colonel Alfred N. Taylor, F.D., be held responsible for the over payment in the amount of $135.00, voucher #2319, excess payment on the final statement of private Tommy Harper, 16001013, Company C, from the 9th Quartermaster Training Regiment."

Copies of the court-martial orders in question were attached to the voucher.

3. In a decision of the Comptroller General (9 Comp. Gen. 192, 193) it was stated:

"A disbursing officer having notice of sentence of a court-martial disrating an enlisted man of the Navy is not entitled to credit in his accounts for payments made in a higher rating than that legally held by the man, and it is immaterial whether notice of such change of rating was communicated by his commanding officer to the supply officer carrying his accounts. The facts in the court-martial sentence were sufficient notice to the disbursing officer to show change in the man's rating. 6 Comp. Gen. 730. A disbursing officer in possession of facts necessary to enable him to make proper adjustments in a pay account is responsible for any overpayment resulting from his failure to make the adjustment. 2 Comp. Gen. 244."

4. It appears from the record of the board proceedings that the Finance Officer, Lieutenant Colonel Alfred N. Taylor, F.D., or his subordinates had notice of the mentioned court-martial orders under which the pay status of the soldier was definitely fixed and that payment in any amount other than in accordance with such sentence was a mistake of law, neither entitling the soldier to the pay nor the disbursing officer to credit for such erroneous payment (6 Comp. Gen. 730, 732; par. 3a, AR 35-180, July 11, 1942). In this connection, it has been held by this office (SPJGA 1943/3259, Mar. 2, 1943) that a certifying officer is responsible for a miscalculation by his subordinate, and no difference, in this regard, is perceived between a certifying officer and a disbursing officer.

5. It is therefore recommended that these papers be returned to The Adjutant General, by fourth indorsement, prepared for the

signature of the Assistant Chief of Division, stating:

It is the opinion of this office that the evidence sustains the findings and recommendations of the board of officers and that the action of such board should be approved.

Irvin Schindler,
Colonel, J.A.G.D.,
Assistant Chief of Military Affairs Division.

SPJGA 1943/6333 May 14, 1943

MEMORANDUM for The Judge Advocate General.

Subject: Review of board proceedings re responsibility for alleged loss of ring of Private Arnold M. LaKritz.

1. By ninth indorsement (AG 201 LaKritz, Arnold M. (12-2-42)) dated April 21, 1943, there were referred for review and a decision relative to responsibility, the inclosed papers relating to the proceedings of a board of officers convened to investigate and report on the circumstances surrounding the alleged loss of a ring belonging to Private Arnold M. LaKritz.

2. It appears from the report of the board of officers, convened on August 12, 1942, pursuant to paragraph 1, Special Orders No. 18, Headquarters, 105th General Hospital, APO 923, dated August 8, 1942, that Private LaKritz entrusted the ring in question to Captain Joseph R. Frothingham, MC, Admitting Officer, 105th General Hospital, on August 6, 1942. Captain Frothingham's testimony before the board was not contradicted in any material respect and was substantially as follows:

"'I was admitting officer the 6th of August when Private LaKritz was admitted to the hospital. At the time of admission Private LaKritz gave into my custody a gold ring with engraving on the inner surface and the initials A.L. on the outer surface. After a short period had elapsed the patient turned over a blank check book for custody and later some personal papers and finally a prescription blank. I then placed all of these articles in an envelope which belonged to the patient and put the envelope, unsealed, on a desk, because my pockets were full of other patients' money and valuables, and at that time there was no receptacle available for the safe keeping of same. Because of the manner in which the patient turned in his valuables, the original receipt had to be destroyed and a new one issued a few minutes later, because the patient seemed uncertain about what he wished to turn in for safe keeping. There were about 15 other persons in the same room where the patient was admitted and they consisted of enlisted men of this organization and other patients in the process of being admitted to the hospital. These patients were passing the desk on which the envelope contain-

ing the ring was placed, and when I next picked up the envelope, about one-half hour after placing it on the desk, I noticed that the ring was missing. I then removed the envelope containing all the other effects mentioned above, to another desk. During the period in question I saw no one tamper with the envelope, though I was very busy at the time. The envelope containing the prescription blank, check book and personal papers were later turned over to Captain Kneisel, the Commanding Officer, Detachment of Patients, by me.

"Private LaKritz was questioned the same day and the following day was fluouroscoped and his clothing and possessions searched, but no ring could be found. Copies of receipts (Exhibits 'E' and 'C') are presented as evidence. Both are of Private La Kritz and myself, one for a finger ring and nothing else and a second for a blank check book, prescription blank, and personal papers.'"

In a "Claim for lost property" dated November 30, 1942, Private LaKritz stated the value of the ring to be $60.

The mentioned board of officers made the following findings and recommendation:

"The Board having carefully considered the evidence before it finds:

"1. That on or about 6th August 1942 a gold ring belonging to Pvt Arnold M. LaKritz was lost by or stolen from Captain Joseph R. Frothingham while the latter was in performance of his duties as Receiving and Disposition Officer of the 105th General Hospital.

"2. That Captain Joseph R. Frothingham was not grossly negligent in the loss of this ring.

"RECOMMENDATIONS:

"1. That Captain Joseph R. Frothingham not be held responsible for the loss of this ring under the 105th Article of War."

The convening authority approved the findings and recommendation of the board and directed that the proceedings be placed on file in the event a claim is made by Private LaKritz under the provisions of Army Regulations 35-7070 (now AR 25-70, Mar. 15, 1943).

Although the ninth indorsement, by which the case was transmitted to this office, requested no particular action, the second paragraph of the preceding eighth indorsement (SPMCA 123.-3 (Bushnell, Gen. H.)K), dated April 9, 1943, to The Adjutant General, states that Private LaKritz has requested additional review of the board proceedings and that it is, therefore, requested "that the board proceedings be reviewed by your office and decision rendered relative to responsibility". It is assumed that the case was referred to this office for review of the report of the board of officers.

3. Paragraph 8c(1), Army Regulations 40-590, February 2, 1942, provides in pertinent part:

> "(1) General. - Patients will be informed by the admitting officer that the hospital will receive, for safekeeping, money and valuables, including watches, trinkets, personal papers, keepsakes, etc., and that receipts will be given for such articles by a commissioned officer. * * * Money and valuables will be received and receipted for without condition or other evasion of complete responsibility by the commanding officer or by an officer designated by him. Money and valuables of considerable intrinsic value, such as watches and jewelry, will be deposited in a bank or locked in the hospital safe. Articles of lesser value may be stored in locked compartments in a well safeguarded storeroom. Enlisted men are forbidden to receive money or other valuables from patients for safekeeping. * * * "

Although the mentioned ring may have been deposited with the admitting officer in accordance with and pursuant to the foregoing quoted provisions of Army regulations, as indicated by the copy of the inclosed receipt, the question presented here is as to the personal liability or responsibility of that admitting officer under Article of War 105 or otherwise. Under the views of this office that Article of War 105 is generally limited in its application to acts of willful misconduct of the riotous nature denounced in Article of War 89 (SPJGD 5686, Dec. 2, 1942), it appears that Article of War 105 may not be invoked in this case. There is no other provision, statutory or otherwise, under which a stoppage of pay may be properly effected in such a case.

In the present case although it appears that Captain Frothingham exercised poor judgment and was careless in the preser-

vation of the ring, nevertheless he should not, under the circumstances of this case, be held personally responsible for the loss under Article of War 105. Notwithstanding his freedom from responsibility in that respect, however, his admissions seem to establish a civil liability for the loss under the law of bailments or depositories (8 C.J.S. Bailments 44; 6 Am. Jur. Bailments 243, 252; 26 C.J.S. Depositories 1 to 6). Although the record indicates some grounds for suspicion or doubt as to whether Private LaKritz actually sustained the loss of his ring in view of the circumstances under which it was deposited, such suspicions were not confirmed. Moreover, the ring was received and receipted for by Captain Frothingham and because it was received for safekeeping in accordance with the above-mentioned Army regulations the receiving officer is charged with a high degree of diligence and responsibility and the burden would naturally be upon the officer receipting for the ring to show that its safe return to its owner was not occasioned by his negligence. He failed in the discharge of that function and his dereliction imposes liability on him. Accordingly, even though the findings and recommendation of the board of officers are legally sound as to his responsibility under Articles of War 105, it appears that he is responsible under the civil law, applicable in such cases, and in view thereof, he should, in the absence of further showing of facts sufficient to excuse him, be required to make suitable adjustment of the claim. If he should fail in that respect, consideration should be given to appropriate disciplinary action. Irrespective of the fact that Private LaKritz might be able to file and maintain a claim under Army Regulations 25-70, March 15, 1943, it seems hardly equitable to shift the accountability for the loss to the Government.

The only evidence as to the value of the ring was the statement of LaKritz. In arriving at the value it is probable that he was influenced to some extent by his sentimental attachment to the ring. He states it was given to him by a jeweler eleven years prior to its loss, and was a yellow gold ring with platinum initials and a small diamond in one corner. Neither the gold content of the ring nor the size of the diamond is stated. The principle is well established that the measure of damages for the loss of personal property is its reasonable value at the time of its loss (25 C.J.S. 83, pg. 596). By "value", in common parlance, is meant "market value" which is no other than the fair value of property as between one who wants to purchase and another who desires to sell (Barnsdall Refining Corp. v. Cushman - Wilson Oil Co., 97 Fed. (2) 481, 4; Hetland v. Bilstad, 118 N.W. 422, 3). If, because of the personalized nature of the ring, bearing the initials of LaKritz, it has no market value, the proper measure of damages is generally its actual value. Recovery

cannot properly be had on the basis of a purely sentimental value or a fanciful price which the owner might for special reasons place thereon (15 Am. Jur., Damages § 125). Thus, in the present case, if Captain Frothingham and LaKritz cannot agree upon an equitable adjustment of the claim, then in fairness to the former, and before disciplinary action is instituted against him, the latter should be required to establish by reliable and competent evidence the true market or actual value of the ring at the time of its loss, without regard to his sentimental attachment thereto.

4. It is therefore recommended that these papers be returned to The Adjutant General, by tenth indorsement, prepared for the signature of the Assistant Chief of Division, stating:

> It is the opinion of this office, on the basis of the facts recited in the inclosed papers, that Captain Frothingham's pay may not be stopped under Article of War 105 for the value of the ring of LaKritz. However, Captain Frothingham's failure to exercise proper precautions, under the circumstances admitted by him, amounted to negligence, thus apparently rendering him legally and morally liable for the loss in question. It is therefore recommended that this file be referred to the commanding officer exercising immediate general court-martial jurisdiction over Captain Frothingham, with instructions to refer it to Captain Frothingham for such further statement of facts as he may desire to submit, with a statement of his action or intentions regarding adjustment of the claim, and upon return of the file to such commanding officer for such further action as he may deem appropriate. It should be noted however, that the only evidence of the value of the lost ring was the statement of LaKritz. Should Captain Frothingham and LaKritz fail to agree upon the true market or actual value of the ring, LaKritz should be required to establish the value thereof by competent proof.

Irvin Schindler,
Colonel, J.A.G.D.,
Assistant Chief of Military Affairs Division.

SPJGA 1943/4880 April 17, 1943

MEMORANDUM for The Judge Advocate General.

Subject: Determination as to what constitutes disability incurred in combat with an enemy of the United States.

1. By informal action sheet (AG 201 Holly, Austin James) dated April 8, 1943, there was transmitted a file of papers pertaining to Second Lieutenant Austin James Holly, Air-Res., O-430928, with request for an opinion on the following questions:

> "1. In certifying cases of officers of Reserve Components to the Veterans Administration for retirement benefits, that office has requested that we state whether or not the disability on which retirement benefits is based was incurred in combat with an enemy of the United States, or the result of an explosion of an instrumentality of war in line of duty. (Par. 16, AR 35-1760, August 10, 1942.)
>
> "* * *
>
> "4. Attention is invited to the attached case of Second Lieutenant Austin James Holly, and findings of retiring board proceedings. An opinion is requested whether or not the disability in this case may be considered as having been incurred in combat with an enemy of the United States.
>
> "5. As a guide for future action, a clarification is requested as to what may be considered as 'combat with an enemy of the United States' or whether all cases of this nature will require individual and separate determination."

2. The file indicates the following facts:

On March 1, 1942, while on active duty at Bankstown, N.S.W., Australia, Lieutenant Holly was injured when the fighter plane in which he was taking off alone on a scheduled flight crashed. The cause of the crash is undetermined. Disposition boards convened at Sydney, Australia, and at Hammond General Hospital, Modesto, California, determined that the injuries sustained by him were incurred in the line of duty. An Army retiring board convened at Letterman General Hospital, Presidio of San Francisco, California, on March 5, 1943, found that he is permanently incapacitated for active service, and that such incapacity

is an incident of service. Those findings were approved by the Secretary of War on April 1, 1943, and Lieutenant Holly will be relieved from active duty effective April 23, 1943, pursuant to orders of the Commanding General, Ninth Service Command. The file reveals nothing further as to the circumstances surrounding the crash, and does not disclose whether, at the time of the crash, Lieutenant Holly was in the presence of the enemy or en route to a region in which contact with the enemy was likely.

3. Paragraph 16, Army Regulations 35-1760, August 10, 1942, cited in paragraph 1 of the action sheet (par. 1, above), so far as pertaining to commissioned officers retired "for disability incurred in combat with an enemy of the United States or for disabilities resulting from an explosion of an instrumentality of war", relates to section 212, act June 30, 1932 (47 Stat. 406), as amended by section 3, act July 15, 1940 (54 Stat. 761; 5 U.S.C. 59a). The mentioned statute provides in pertinent part:

> "(a) After June 30, 1932, no person holding a civilian office or position * * * under the United States Government * * * shall be entitled, during the period of such incumbency, to retired pay from the United States for or on account of services as a commissioned officer in any of the services mentioned in Title 37, at a rate in excess of an amount which when combined with the annual rate of compensation from such civilian office or position, makes the total rate from both sources more than $3,000 * * *.
>
> "(b) * * * Provided, That this section shall not apply to regular or emergency commissioned officers retired for disability incurred in combat with an enemy of the United States or for disabilities resulting from an explosion of an instrumentality of war in line of duty during an enlistment or employment as provided in Veterans Regulation Numbered 1(a), part I, paragraph I."

4. Circular No. 21, War Department, 1942, directed that "All casualties as a result of enemy action will be designated as battle casualties and will be reported to The Adjutant General" in the manner prescribed. Section IV, Circular No. 329, War Department, 1942, provided that "It is the responsibility of the commander rendering casualty reports to determine whether or not death or injury was the result of enemy action", and contained the following statement of War Department policy with respect to whether death or injury is to be deemed the result of enemy action:

with an enemy", or whether cases of this nature will require individual determination. In many instances, the circumstances surrounding the incidence of disability will indicate clearly whether such disability was incurred in "combat with an enemy". In other instances, doubt will arise as to the precise nature of contact with the enemy which is necessary to fulfill the requirement of the act of June 30, 1932. In the mentioned prior opinion (SPJGA 1942/3729, Aug. 15, 1942) it was stated:

> "The present war is now being waged over such an extended area and under such novel and peculiar circumstances that it is most difficult to frame a general definition or state a general policy to be followed in determining what casualties are a result of enemy action. It is obvious that the phrase 'theatre of war' is more or less obsolete, in reference to the present war, because of the rapidity with which hostilities may arise in new areas, and be carried on openly or covertly, on land, in the air and on or beneath the surface of the sea, entailing casualties under the most extraordinary circumstances and /in/ regions not necessarily within any defined theatre. * * * Men are killed or injured daily as a result of bombs dropped from the air and other acts of the enemy where no opportunity is afforded them to retort or personally engage the enemy in combat. The wide diversity of the circumstances under which casualties may occur, including both those occurring while engaged in actual combat with the enemy and otherwise, is too obvious to require further discussion here."

For the foregoing reasons it is deemed inadvisable at this time to endeavor to formulate a rule of general application to define "combat with an enemy of the United States". If such a rule were to be adopted at this stage, subsequent experience undoubtedly would require frequent modification to meet the requirements of factual situations which had not been anticipated. Accordingly, it is deemed preferable to consider doubtful cases individually on their merits until a sufficient number of such cases have been determined to permit well-considered generalization.

6. It is therefore recommended that reply be made to The Adjutant General by informal action sheet entry, prepared for the signature of the Chief of Division, stating:

"a. Due to enemy action.--(1) When injury or death occurs as a direct result of engagement with an enemy force, or as a direct result of enemy action during an engagement or otherwise.

"(2) When injury or death occurs while immediately engaged in, going to, or returning from a combat mission, whether or not due directly to enemy action.

"b. Not due to enemy action.--(1) When injury or death occurs on purely training flights or missions, and not as the direct result of engagement with or hostile act by an enemy force.

"(2) All other cases not covered by a and b(1) above."

As stated in an opinion of this office (SPJGA 1942/3729, Aug. 15, 1942) commenting on the memorandum which resulted in the promulgation of section IV, Circular No. 329, 1942, the foregoing statement of policy is not intended as a construction of any particular statute or is it intended to attempt to bring any particular classes of persons within the provision of any specific statute. It is intended to lay down a general rule for making administrative determinations, with the realization that ultimately it will be necessary in many instances for applications for statutory benefits to be processed, considered, and determined on their own merits without regard to any prior determination under that general rule. Accordingly, the mentioned statement is not necessarily determinative of the question presented in paragraph 4 of the action sheet (par. 1, above).

The term "combat with an enemy" contained in the act of June 30, 1932 (par. 3, above) appears to be more limited in scope than the term "due to enemy action" contained in section IV, Circular No. 329, 1942. A prior opinion of this office (JAG 210.851, Aug. 18, 1932) suggests that "combat with an enemy" requires some actual contact with an enemy force, whereas the cited circular contemplates that under certain circumstances injury may be regarded as "due to enemy action" even though not incurred as a result of such direct contact. As the file contains no intimation that Lieutenant Holly was in contact with the enemy in any sense at the time his disability was incurred, or even that he was en route to a combat mission within the meaning of Circular No. 329, it may be concluded fairly that his disability was not incurred in combat with an enemy of the United States within the purview of the act of June 30, 1932, supra.

5. Paragraph 5 of the action sheet (par. 1, above) presents the question whether a general rule can be stated defining "combat

On the basis of the citation of paragraph 16, Army Regulations 35-1760, August 10, 1942, in paragraph 1 of the foregoing inquiry with regard to retirement board proceedings in the case of Second Lieutenant Austin James Holly, Air-Res., 0-430928, it is assumed that the questions presented involve a determination as to what constitutes "combat with an enemy of the United States" within the meaning of section 212, act June 30, 1932 (47 Stat. 406), as amended by section 3, act July 15, 1940 (54 Stat. 761; 5 U.S.C. 59a).

The mentioned term may be regarded as more limited in scope than the term "due to enemy action" contained in section IV, Circular No. 329, War Department, 1942, which states War Department policy with regard to the reporting of battle casualties, in that the former appears to require some actual contact with an enemy force, whereas the latter contemplates that under certain circumstances injury may be deemed "due to enemy action" although not incurred as a result of such direct contact. As the inclosed file contains no intimation that Lieutenant Holly was in contact with the enemy in any sense at the time his disability was incurred, or even that he was en route to a combat mission within the meaning of Circular No. 329, 1942, it is the opinion of this office that his disability was not incurred in "combat with an enemy of the United States" within the purview of the act of June 30, 1932, supra. Accordingly, upon the facts presented the question presented in paragraph 4 of the foregoing informal action sheet must be answered in the negative.

In many instances the circumstances surrounding the incidence of disability will indicate clearly whether such disability was incurred in "combat with an enemy", but in others doubt will arise as to the precise nature of contact with the enemy necessary to fulfill that requirement. Because of the wide diversity of the circumstances under which casualties may occur in combat with an enemy in the present war, it is the opinion of this office that it is inadvisable at this time to formulate a rule of general application to define the mentioned term as suggested in paragraph 5 of the foregoing informal action sheet, and that it is preferable to consider doubtful cases individually on their merits until a sufficient number of cases have been determined to permit valid generalization.

Charles W. West,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.