

The First Year of the Judicial Council

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The Judge Advocate General of the Army

Article 50 of the revised Articles of War which became effective on 1 February 1949 created a Judicial Council to be composed of three general officers of The Judge Advocate General's Corps, with the provision that, under exigent circumstances, The Judge Advocate General may detail as members of the Council officers of the Corps of grades below that of general officer for periods not in excess of sixty days.

The Judicial Council is primarily a confirming authority with limited powers although it also exercises appellate review functions in regard to cases which must be confirmed by the President pursuant to Article 48—that is cases involving a sentence to death or those in which the accused is a general officer.

Under the 1920 Articles the confirming authority was exercised by the President or by a commanding general of the Army in the field in time of war. In 1945, under the First War Powers Act, the authority of the President to confirm cases other than death cases and cases involving general officers was conferred upon the Secretary of War or the Under Secretary of War during the duration of the war.

The necessity for relieving the President of the burden of considering the record of trial in every case requiring confirming action may readily be appreciated when one considers the magnitude and complexity of the Presidency and the relatively greater volume of court-martial cases

arising from the expansion of the Army as contrasted with the strength of the prewar Army.

In the early years of the United States when the officers corps was small it was not an undue burden upon the President to devote his personal attention to an occasional record of trial involving the dismissal of an officer. As late as the administration of Theodore Roosevelt, the President could devote his personal attention to most executive functions—and there was so little activity in The White House that the press did not deem it essential to provide for permanent White House coverage by the newspapers. Prior to Theodore Roosevelt's administration it was customary for the President to request the insertion of statements in the Congressional Record if he wished to get newspaper coverage for one of his acts. It is unnecessary to elaborate on how complicated the Presidency has become in this century.

The Judicial Council was created by Title II of the Selective Service Act of 1948. Among its purposes was the necessary relief of the President from a substantial time-consuming burden. It substituted, with the few exceptions noted herein, a body consisting of officers qualified and experienced both as soldiers and lawyers, who could devote to each case a detailed personal examination.

Cases Requiring Confirmation

Under the old Article 48 sentences respecting general officers, or sentences extending to dismissal of an

officer or cadet or suspension of a cadet, and cases in which a death sentence was adjudged required confirmation before they could be ordered into execution.

Under the revised Articles of War cases involving imprisonment for life have been added to those which may not be carried into execution without confirmation.

The President is still the only confirming authority in cases involving a sentence to death or in which a general officer is the accused. In such cases the Judicial Council examines the record of trial as an advisory body in addition to the examination by the Board of Review. In the event the Judicial Council, with the concurrence of The Judge Advocate General, holds the record of trial legally insufficient to support the findings of guilty and the entire sentence, the sentence is thereby vacated and no action by the President is required.

In all other cases in which a sentence requiring confirming action has been adjudged and approved—i. e. sentences to life imprisonment, dismissal of an officer or a cadet, or suspension of a cadet—confirming action is normally taken by the Judicial Council acting in conjunction with The Judge Advocate General. In case of disagreement between The Judge Advocate General and the Judicial Council, the Secretary of the Army becomes the confirming authority.

The Judicial Council may act as the confirming authority in other cases examined by the Board of Review under Article 50e. Such cases are those in which a sentence to dishonorable or bad conduct discharge or confinement in a penitentiary has

been adjudged. These cases require confirming action when The Judge Advocate General disagrees with the holding by the Board of Review or where either the Board of Review or The Judge Advocate General deem that the findings of guilty or the sentence—although legally sufficient—require modification in the interest of justice. The Judge Advocate General participates in the confirming action of these cases either when he directs that his participation is required or when the action of the Judicial Council is not unanimous.

Some lawyers have expressed difficulty in understanding the provisions requiring confirming action in Article of War 50e cases, held legally sufficient by the Board of Review but in which "modification of the findings of guilty or the sentence is by The Judge Advocate General or the Board deemed necessary to the ends of justice" (AW 50e(2)). The doubts so expressed are engendered by the fact that the Judicial Council is not among the authorities authorized under Article 51 to exercise the power to mitigate, remit or suspend. It has also been asked why the Board of Review would hold a record of trial legally sufficient to support a finding of guilty if it deems modification of the findings necessary to the ends of justice.

These difficulties are easily resolved when it is remembered that a confirming authority has wide discretionary powers and is not restricted in his action to a consideration of the record of trial proper as is a Board of Review. It sometimes happens that matters *de hors* the record of trial indicate that an injustice has been done. For example it may appear outside

the record that important witnesses have perjured themselves or that the accused was not mentally responsible at the time of his alleged offense. In such a case, the Board of Review has no alternative but to hold the record of trial legally sufficient, but it may invite the attention of the confirming authority to the matters which the Board could not legally consider in its holding. The Judicial Council may then properly consider the record of trial and all other pertinent matters in its consideration of the case.

Similarly it may sometimes happen that a sentence although legal, is too severe under all the circumstances of the case. Occasionally such a sentence cannot be corrected without commutation—that is a change in the nature of the sentence. For example a heavy fine might have been adjudged whereas a forfeiture would be more appropriate. Since changing a fine to a forfeiture involves a change in the nature of the punishment—such a change cannot be effected by the reviewing authority and requires the action of a confirming authority who has the power to commute. Perhaps a court has adjudged bad conduct discharge alone and the reviewing authority believes that such a sentence is disproportionate to the offense although some punishment is indicated. Since a sentence to a bad conduct discharge cannot be mitigated (changed to a lesser punishment of like nature), the reviewing authority may recommend that the sentence be commuted to a reprimand and a forfeiture. Only a confirming authority has the power to effect such a change. Article 50e(2) was intended to provide a convenient and regular way to cope with such extraordinary circum-

stances.

Confirmation in Overseas Theaters

Under the old Article 48 the commanding general of the Army in the field and certain other commanders had the power, in time of war, to confirm sentences to dismissal of officers below the grade of brigadier general and also certain death sentences subject to the provisions of Article of War 50½. Under the revised articles these commanding generals may no longer exercise the powers of confirmation. Even in time of war, death sentences and sentences involving general officers must be confirmed by the President. Other sentences may be confirmed in a Branch Office of The Judge Advocate General's Office—if one is established—by the Assistant Judge Advocate General in charge of the Branch Office and the Judicial Council therein.

Confirming Powers

Colonel Winthrop compared confirmation to "the judgment of a court of last resort." In reality the confirming power, partakes not only of judicial power but also of executive discretion. It involves a discretionary power in addition to the exercise of purely legal judgment. In short a confirming authority has the power to do with a sentence what he thinks ought to be done to effect a just and proper result under all the circumstances of the case. Thus it may either order a sentence as adjudged and approved into execution, or it may ameliorate it without regard to statutory minima and other restrictions which control the actions of civilian appellate courts.

Although a court-martial's discretion may be limited in adjudging a sentence upon conviction of the few

offenses for which a mandatory sentence is provided, there is no such limitation upon the confirming power. Similarly the limitations on the power to commute which restrict the action of reviewing authorities, do not affect a confirming authority.

Article 49 enumerates the powers incident to the powers to confirm. These include the power to approve, confirm or disapprove a finding of guilty or to confirm only so much of a finding of guilty as involves a finding of guilty of a lesser included offense; the power to confirm, disapprove, vacate, commute or reduce to legal limits the whole or any part of the sentence; the power to restore all rights, privileges and property affected by any finding or sentence disapproved or vacated; the power to order the sentence to be carried into execution; and the power to remand a case for rehearing.

It is to be noted that the power to mitigate, remit, or suspend a sentence is not among the powers incident to the power to confirm. These powers of clemency are reserved under Article 51 to the President, the Secretary of the Army, and any reviewing authority incidental to their power to order a sentence into execution. The Judge Advocate General may also remit, mitigate, or suspend a sentence in any case requiring appellate review except those requiring the confirmation or approval of the President. These powers are exercised by The Judge Advocate General under the direction of the Secretary of the Army.

Power to Weigh Evidence

Article of War 50g extended to all the appellate agencies in The Judge Advocate General's office the power

to weigh evidence, determine controverted issues of fact, and adjudge the credibility of witnesses. Such sweeping powers are not exercised by any civilian appellate court except that in a few states the appellate courts may weigh evidence in capital cases. When it is remembered that most appellate courts must sustain a finding of guilty or a sentence if there is sufficient legal evidence to support it and if there is no prejudicial error, regardless of the fact that the judges may not believe the evidence to be credible, it is readily apparent that this unique feature of military law is of great advantage to accused persons.

The Boards of Review and the Judicial Council realize, of course, that the court had an opportunity to hear and see the witnesses and is therefore in a better position to weigh evidence than those who examine the cold record. Nevertheless, it sometimes appears that an important witness has been impeached or relates such an improbable story, that even the cold record compels the appellate agency to reach a different result from all the evidence than did the court. On several occasions, during the first year of the revised Articles, the power to weigh evidence has been exercised in order to correct what appeared to have been an injustice.

Procedures of the Judicial Council

Until my appointment as The Judge Advocate General, I was the Chairman of the Judicial Council. The other members at various times were: Major General Franklin P. Shaw, Brigadier Generals James L. Harbaugh, Jr., and Claude B. Mickelwait, Colonels Edward H. Young and William P. Connally, Jr. At least one

member has been able to devote his full time to the work of the Council and the others have had ample time to study each record of trial. The present Council consists of Brigadier Generals Harbaugh, Robert W. Brown and Mickelwait.

Every record of trial referred to the Council is studied by each member and is discussed at a meeting of the Council. If the accused desires, his counsel may file a brief or appear before the Council to argue the case. Whether or not the accused is represented before the Council, every record is carefully studied and weighed for legal sufficiency and all possible errors are considered to determine whether they prejudicially affect the substantial rights of the accused regardless of whether the error was noted at the trial or assigned as error by counsel upon appellate review. If the Council finds that a record of trial is legally sufficient to support the findings of guilty and the sentence, it examines the allied papers and 201 file of the accused in connection with its determination of the propriety of the sentence. The Council does not write an opinion, except in a case requiring the confirmation of the President, if it is in substantial agreement with the opinion of the Board of Review. If the Council is not in agreement with the opinion of the Board of Review, it writes an opinion to accompany its confirming action indicating the reasons for its disagreement. Recommendations for clemency on the part of the Council are made directly to The Judge Advocate General.

Since 1 February 1949, when the revised Articles went into effect there have been referred to the Council 79

general court-martial cases and two special court-martial cases. Of these six were cases in which the death penalty had been adjudged, 61 were officers dismissal cases, nine were life imprisonment cases and five were cases involving dishonorable or bad conduct discharge wherein The Judge Advocate General withheld his concurrence from the action of the Board of Review. During its first year all of the Council's actions have been unanimous.

In the few cases in which The Judge Advocate General withheld his concurrence from the holding by the Board of Review, his reference of the case to the Judicial Council did not necessarily indicate a definite disagreement with the holding, but rather a desire that a novel proposition of law or case of first impression receive further consideration or that cases involving a diversity of views among the Boards of Review be resolved by the Council. The problem as to whether a special court-martial had jurisdiction to adjudge a bad conduct discharge for an offense committed before 1 February 1949, the effective date of the new Articles, was one of the problems in which the conflicting views of various Boards required reference to the Council in order to settle the law. Similarly, The Judge Advocate General has occasionally referred very close cases to the Judicial Council in order to insure that the interests of both the accused and the Government might be more carefully protected by additional appellate review.

Conclusion

A survey of the first year's operation of the Council demonstrates its usefulness. The attention which these

senior officers of The Judge Advocate General's Corps have been able to give each record affords the most thorough safeguards to the rights of the accused and to the Government and insures to an accused soldier or

officer that his case will be considered by military men fully qualified in the law, thoroughly cognizant of their military and judicial responsibilities, and who by reason of their training, are familiar with the cause and effect of military offenses.

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D. C. Members Honor General Brannon

Members of the Judge Advocates Association of the Metropolitan area of Washington, D. C. met at the Continental Hotel on January 30, 1950 in

a testimonial dinner in honor of Major General Ernest M. Brannon. Regular and Reserve Officers of all Services totaling about 150 attended the



The Judge Advocates General on the occasion of the Association's Dinner in honor of General Brannon in Washington on January 30th. Left to right: Admiral George L. Russell, USN, General Ernest M. Brannon, USA, and General Reginald C. Harmon, USAF.

—Signal Corps Photo.

