Obligation and Responsibility of the Legal Profession to Provide Skilled Lawyers for the Armed Forces

Francis A. Darnieder

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr

Part of the Law Commons

Repository Citation
Francis A. Darnieder, Obligation and Responsibility of the Legal Profession to Provide Skilled Lawyers for the Armed Forces, 41 Marq. L. Rev. 1 (1957).
Available at: http://scholarship.law.marquette.edu/mulr/vol41/iss1/1
OBLIGATION AND RESPONSIBILITY OF THE LEGAL PROFESSION TO PROVIDE SKILLED LAWYERS FOR THE ARMED FORCES*

FRANCIS A. DARNIEDER**

Fellow members of the Bar:

The extensive development of military law since World War I, due to the enactment of the Uniform Code of Military Justice and the commitment of legal matters of a civil nature in important areas to the military, with the consequent great demand for skilled lawyers and career opportunities in the armed forces, which have been pointed out here this afternoon, are in a large measure the work of the legal profession.

During World War I, when the Army operated under the Articles of War, the services did not utilize lawyers, as lawyers, to any great extent. True a great many lawyers were commissioned but this was as officers of the line in the infantry and artillery, and many a lawyer served as an enlisted "doughboy." When the soldiers and sailors returned to civilian life from this war, they did not find much to criticize with respect to the administration of military justice. They were more concerned with their organization into the American Legion and other veterans organizations, with the large fortunes which had been accumulated and the high civilian pay during their absence, and they sought equalization by the Bonus, State and Federal. They were also concerned with the fact that the country had gone dry during their absence and aided in the repeal of the Eighteenth Amendment. Besides they were told that they had fought the war to end all wars, so why trouble themselves about military justice.

During World War II the great citizens' army had many lawyer defense counsel who fought for the individual rights of the accused. Many of these lawyers, upon their return to civilian life, criticized and voiced disapproval of the operation of the military judicial system. They insisted, through their veterans' organizations, that the rights of

*An address delivered at the mid-winter meeting of the Wisconsin State Bar Association.
**Professor of Law, Marquette University School of Law.
the accused before the trial, at the trial and during the appellate process, were not adequately protected. As a result of these criticisms, a committee of eminent civilian jurists was appointed by the President to study the overall problem of the administration of military justice and as a result of its recommendations, the Elston Act, of 1948, providing for a Code of Military Justice, was enacted. But, since this Act was applicable only to the Army and Air Force, another committee of jurists was appointed by Secretary of Defense Forrestal to formulate a military judicial code which would be applicable to all the services and would provide full protection to the rights of persons subject to the Code without undue interference with appropriate military discipline. This committee had as its chairman Edmund Morgan, Professor of Law, and as its Executive Secretary the Assistant General Counsel of the Secretary of Defense, who headed a working staff of fifteen lawyers composed of officers and representatives of the Army, Navy, Marine Corps and Coast Guard, including five civilian lawyers. The Uniform Code of Military Justice with its requirements of three qualified lawyers, the law officer, trial counsel and defense counsel and its hierarchy of courts, board of review and the United States Court of Military Appeals, with the consequent increase in the need for lawyers in the Armed Forces to fulfill the increased responsibilities, was the result of the study of this committee. The legal profession thus, being responsible for the increased demand for skilled lawyers in the armed forces, there would seem to be no question that it is the obligation and responsibility of the legal profession to provide these skilled lawyers. The only question open to discussion would seem to be: How should this obligation and responsibility be fulfilled? It has been proposed in a number of articles in legal journals and elsewhere that this obligation and responsibility rests, at least in part, with the law schools. One of the more convincing articles is one by Robert E. Joseph, Colonel, United States Army Retired, appearing in the Journal of Legal Education in 1954 and entitled "The Need for including a Course in Military Justice in the Law School Curriculum." But, whatever merit there may be in this proposal insomuch as the code for the first time mentions and in effect encourages the use of civilian attorneys whenever the serviceman so desires, so far as the training of career lawyers for the armed forces is concerned it has not been enthusiastically received. In fact, it is frowned upon in the Report of the Special Committee on Legal Services and Procedure to the 1956 mid-year meeting of the House of Delegates of the American Bar Association. This is, no doubt, in a large measure due to the fact that the American Bar Association on February 22, 1955, recognized the high standing and exceptional performance of the Army Judge Advocate General's School at Charlottesville, Virginia, by accrediting it on the
graduate school level, and the Bar Association Committee recommends that this specialized legal program be adhered to and that its facilities be opened to the Air Force, Navy and Marine Corps, which, I understand has been done. Furthermore, the report of the Advisor of the Council of the Section of Legal Education and Admissions to the Bar on visitation to the Judge Advocate General's School, after it had been accredited, has this to say with respect to the inclusion of military law in the law school curriculum. It should be noted, he says:

"... that it is not possible, even if it were desirable for the civilian law schools to recast their offerings to embrace the materials covered in the school. In the first place they are training for civilian practice primarily which dictates that instruction be given in basic subjects and fields of law indigenous to the area and in legal techniques... Moreover, the curricula are fashioned, in virtually all law schools, by the subject requirements of the state bar examinations... Finally, the civilian law schools have been much criticized by practitioners for their alleged failure to instruct in practical techniques. The recent years have witnessed the inclusion of even further courses, e.g. legal writing and drafting, trial techniques and office practice."

Also, reports from the Judge Advocate General's Corps indicate that the armed forces have no problem in procuring competent graduates of civilian law schools—the top men—who choose commissions as an alternative to being drafted for two years, and that the technical competence of these young lawyers has never been better. The problem is that the services are finding it increasingly difficult to retain young lawyers in active duty because of real or supposed better civilian opportunities or to put it another way, the problem is to procure young lawyers who have a real interest in military law, who are not motivated primarily by economic factors, who are dedicated men with a real desire to serve their country, and who will therefore stay in and make the armed services a career. Reports of the Judge Advocate General's Corps indicate that there is a turnover of about one-fourth of their entire legal staff every year due to young men leaving the service and seeking civilian careers. I am sure any lawyer here will realize that this is an alarming situation and that the legal profession should be vitally concerned with this problem, for obviously, if this turnover should go on, the armed services will suffer and the public good will suffer, both because of lack of the most effective administration of justice under the Uniform Code of Military Justice and the greater cost in tax dollars, billions of which are appropriated every year for the operation of the armed forces and are committed to the keeping of the lawyers in the Judge Advocate General's Corps by their handling of contracts, tort claims, patents, procurement and the
like. The question is: What can the legal profession do to help solve this problem? It would seem there are several ways.

First: Enliven a greater interest in military law and enhance its prestige, and the beginning could be made in the law schools. While the establishment of special courses in the various fields of military law is not desirable nor practicable; yet military law should not be treated at the law schools as though it did not exist or as something second rate to be followed only as an alternative to serving as enlisted men in the draft and afterwards only by those who would find it difficult to succeed in civilian life. At the very least the Uniform Code of Military Justice and basic concepts of military law should be called to the student's attention as well as the fact that law practice in the armed forces is not confined to criminal but includes highly specialized fields of the civil law, and they should be made aware what a real challenge military law can be. Perhaps the Judge Advocate General's Corps could aid the schools in this respect. The Report of the Advisor of the Council of the Section of Legal Education on visitation to the Judge Advocate's School from which quotation has already been made, after pointing out the excellence of the instructional materials used at the school, has this to say:

"At the present time, little, if any, citations and references are made in civilian law schools to the splendid materials prepared specially by the school, and it is to be hoped that these can be directed to their attention. They could well be used for illustrative purposes (In courses such as Criminal Law, Contracts and Torts). Such use would enliven a greater interest of the civilian students in military law."

Then, too, students and young lawyers should be made aware by their advisors that while civilian opportunities from the mere viewpoint of money may seem more attractive, yet this may prove in the end to be an illusion. The results of a nationwide survey published by the United States Department of Commerce, as reported in the American Bar News on January 15, 1957, showed that the average net income of all lawyers engaged in legal practice was $10,220 in 1954. However, significant differences were shown between regions; the Middle Eastern Region including New York and Pennsylvania ranked first with an average of $11,520, while the Northwest Region was low with an average of $8,420. Also, the survey showed that the median income—more typical of what the typical lawyer earned—was $7,830. Also, that maximum earnings were not attained until after 25 years of practice and that lawyers aged 55 to 59 were at their earning peak although income was relatively stable up to 65. Now, a judge advocate usually begins his career as a first lieutenant. True, his initial salary is approximately $400 a month, and that only if he is married. However, after a few
years of service, a judge advocate may anticipate promotion to captain with a substantial salary increase; and at the end of ten years of service, he will probably be serving as a major with a salary of more than $650 per month. After sixteen years of service, if the officer has reached the rank of lieutenant colonel, his total monthly salary will be in excess of $761 per month. After twenty-two years of service his salary as a colonel will be over $933 per month. Now, that does not seem to compare too unfavorably with what a lawyer makes in civilian practice according to the Department of Commerce Survey, especially when retirement advantages are considered. If an officer retires after twenty years of service, he will probably retire in the rank of lieutenant colonel at the age of about forty-five and his retirement pay will approximate $300 a month. If he retires after thirty years of service, he will probably retire in the rank of colonel at the age of about fifty-five with retirement pay of $608.40 per month and this retirement is good and secure as a bond of the United States.

Not only the schools but the profession as a whole should enliven interest and enhance the prestige of military law. That the Wisconsin Bar Association is conscious of this obligation and responsibility is shown by the establishment of this Section on Military Law among the purposes of which are the dissemination of "legal knowledge in its application to the armed forces," the promotion of the administration of military law "by persons of highest professional caliber; to keep before the State Bar in particular the need for adequately trained career lawyers in the armed forces." Other state bar associations and the American Bar should be urged to do likewise.

Secondly: It would seem that any program contrived to retain qualified lawyers in the service, be it a program of higher pay or speedier promotions, should have the wholehearted support of the whole legal profession. However, support of such programs is not enough. Unless the armed forces procure dedicated men—men not motivated primarily by economic factors but men who wish to lead a life dedicated to the service of their country—dissatisfactions because of pay and promotions will be recurrent. What could be done in the schools and by the legal profession as a whole is to place more emphasis on service and less emphasis on the dollar. It should be emphasized that as said by John Ruskin:

"The greatest reward of man's toil is not what he makes by it but what it makes of him."

The lofty ideals of the profession as expressed by our Chief Justice Ryan to the students of the Law School of the University of Wisconsin way back in 1873 should be frequently referred to. He said in part:
"The law is a jealous mistress and exacts devotion of life and heart . . . . Wealth, too, is a jealous god and those who worship at its shrine must surrender heart and life to their idol. . . . The lawyer indeed must live and receive his honorarium. But this is the incident, not the aim of professional life. The pursuit of the legal profession, for the mere wages of life, is a mistake alike of the means and of the end. It is a total failure of appreciation of the character of the profession."

Then, too, it should be emphasized that a lawyer in the Judge Advocate General's Corps is dedicating his life and talents to two of the oldest and most honored professions—the Armed Forces and the Law—contributing strength and effectiveness to the greatest material organization in the world—the organization dedicated to the preservation of peace, and victory in war, when war is forced upon us, and thus preserve the United States. Justice Holmes, who served his country with distinction in the Civil War and has been a source of great inspiration to the legal profession, though he hated war because he had really seen war and called it "an organized bore," near the end of a career in which he trod the ways of glory and honor is reported to have said: "After 1864 nothing of importance happened to me." And on the dull cold marble under which he sleeps at Arlington, at his request under his name are inscribed the words: "Captain, United States Army." This spirit, I believe, still lives in the legal profession and it will not fail in its obligation and responsibility to provide skilled lawyers for the Armed Forces.