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Lore of the Corps

Special Edition

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Introduction

Rudyard Kipling once said, that, “if history were taught in the form of stories, it would never be forgotten.” Over the past eight years, Colonel (retired) Fred L. Borch has ensured that the history of the Judge Advocate General’s Corps will never be forgotten. Every month Mr. Borch’s Lore of the Corps’ captivates judge advocates, young and old, with the stories of our successes and our failures. Without his tireless efforts our history would be lost.

The Fourth biennial Lore of the Corps Edition is a collection of our rich history in story form. Through these articles you will learn how our Corps has evolved over the years and of the extraordinary individuals who helped shape that evolution. Please enjoy this special edition of *The Army Lawyer*.

John Cody Barnes
Editor, *The Army Lawyer*



Frederic L. Borch

Before becoming the JAG Corps’s first Regimental Historian and Archivist, Mr. Borch served as a judge advocate on active duty from 1980 until 2005. His assignments included trial counsel, trial defense attorney, professor of criminal law, and staff judge advocate. Mr. Borch’s last assignment before retiring from active duty was as chief prosecutor of the Department of Defense Office of Military Commissions, which oversaw the prosecution of alleged terrorists detained at Guantanamo Bay, Cuba. In 2006, Mr. Borch took on the duties of the JAGC Regimental Historian and Archivist. Most recently in 2012, Mr. Borch served as a Fulbright Scholar in the Netherlands as a visiting professor at the University of Leiden and as a visiting researcher at the Netherlands Institute of Military History. As the JAG Corps Regimental Historian, Mr. Borch diligently works to chronicle the special history that imbues our corps. In that endeavor, Mr. Borch created and maintains the JAG Corps Regimental History webpage on JAGCNet (<https://www.jagcnet.army.mil/history>). On this webpage, you can find information on the history of the JAG Corps, the Legal Center & School, and the Hall of Heroes; a historical collection of courts-martial and other military tribunals; historical photographs; and oral histories and interviews, among many other historical treasures.

Lore of the Corps

The United States Court of Military Appeals: The First Year (1951-1952)

By Fred L. Borch
Regimental Historian & Archivist

The United States Court of Military Appeals (COMA) was the three-judge forerunner of today's five-judge United States Court of Appeals for the Armed Forces (CAAF). This is the story of COMA's origins and its first year in operation.

As a result of a multitude of complaints about military justice during World War I, including controversial trials like the Houston Riots courts-martial,¹ Congress began modifying the Articles of War to give an accused more procedural and evidentiary rights at trial.



The first three COMA judges, 1951. Left to right are George W. Latimer, Robert E. Quinn, and Paul W. Brosman

In February 1919, Brigadier General Samuel T. Ansell, who had served as Acting Judge Advocate General during World War I, proposed that Congress create a "military appeals court of three judges, appointed by the President with lifetime tenure during good behavior."² The court would review every general court-martial in which the accused had been found guilty and sentenced to death, a dishonorable

discharge or dismissal, or imprisonment for more than six months. This idea was too radical for its time, however, and it could not overcome opposition from the military and the War Department.³

Some twenty years later, millions of Americans in uniform during World War II experienced firsthand—or else observed—that the military criminal legal system could be both arbitrary and capricious. Additionally, "The public became aware of many miscarriages of justice both through the press and from relatives in the armed forces."⁴

Their concerns soon reached Congress, which decided that "drastic modifications and improvements were necessary" in the military criminal legal system.⁵ The result was the end of the Articles of War, Rules for the Government of the Navy, and disciplinary laws of the Coast Guard—and the creation of a new Uniform Code of Military Justice (UCMJ) on May 5, 1950.⁶

This new UCMJ created a civilian court consisting of three judges appointed from civilian life by the President—by and with the advice and consent of the Senate—for terms of fifteen years. But, the law also provided that the terms of the original three appointees should be terms of fifteen, ten, and five years, respectively. Finally, the law also provided that not more than two of the judges would be appointed from the same political party.⁷

On May 22, 1951, President Harry S. Truman nominated Robert E. Quinn of Rhode Island, George W. Latimer of Utah, and Paul W. Brosman of Illinois.⁸ Quinn was appointed Chief Judge and received the fifteen-year term of office.⁹ Latimer was appointed an Associate Judge with a ten-year term; Brosman was appointed an Associate Judge with a five-year term. The Senate confirmed all three on June 19, 1951, and

¹ For more on the Houston Riots and their impact on military justice, see Fred L. Borch, "The Largest Murder Trial in the History of the United States": *The Houston Riots Courts-Martial of 1917*, *ARMY LAWYER*, Feb. 2011, at 1. See also, GARNAL CHRISTIAN, *BLACK SOLDIERS IN JIM CROW TEXAS 1899-1917* (1995).

² JUDGE ADVOCATE GENERAL'S CORPS, U.S. ARMY, *THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975*, at 134-35 (1975).

³ *Id.* at 136.

⁴ Pamphlet from the United States Court of Military Appeals 2 (1965) (on file with author) [hereinafter *Court of Military Appeals*].

⁵ *Id.*

⁶ 10 U.S.C. §§ 801-940 (1950).

⁷ *Court of Military Appeals, supra* note 4, at 2.

⁸ *Id.* at 3.

⁹ *Id.*

the following day, the first three COMA judges were administered the oath of office by Judge Matthew F. McGuire of the U.S. District Court for the District of Columbia.¹⁰

The court started operating on July 25, 1951. In its first open session, the COMA admitted forty-seven attorneys as the first members to its bar. Not surprisingly, among those admitted that first day were The Judge Advocate Generals of the Army, Navy, and the Air Force, and the Assistant General Counsel of the Department of the Treasury (the Coast Guard was part of the Treasury at this time).

As for its location? The COMA moved into a structure located at 5th and E Streets, Northwest, Washington, D.C., on October 31, 1952. This building had formerly been the home of the U.S. Court of Appeals for the District of Columbia and had been built and occupied in 1910. Today, the CAAF still occupies this historic structure on Judiciary Square.¹¹

What happened to the first three COMA judges? Latimer's term expired on May 1, 1961, and he returned to private practice.¹² Latimer later garnered considerable publicity as the lead defense counsel for Lieutenant William "Rusty" Calley.¹³ Brosman died suddenly of a heart attack in his chambers at the COMA on December 21, 1955. As for Chief Judge Quinn, he completed his full fifteen-year term and continued to be active on the court until 1971.¹⁴

Congress expanded the three-judge COMA to five judges in 1989, and in 1994, re-designated the institution as the Court of Appeals for the Armed Forces. But while the highest military appellate court may be different today, its prestige today rests on the foundation laid by COMA in its first year of operation.

¹⁰ *Id.*

¹¹ *Id.* at 6.

¹² *Id.* at 2.

¹³ For more on Latimer's role in the Calley court-martial, see RICHARD HAMMER, *THE COURT MARTIAL OF LT. CALLEY* (1971).

¹⁴ Court of Military Appeals, *supra* note 4, at 2; *Judges*, UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, <http://www.armfor.uscourts.gov/newcaaf/judges.htm> (last visited Feb. 29, 2016).

Lore of the Corps

From Private to Brigadier General to U.S. Court of Appeals Judge: Emory M. Sneed (1927-1987)

By Fred L. Borch
Regimental Historian & Archivist

Only one judge advocate in history has retired after an active duty career in the Corps and gone on to serve as an Article III federal appellate court judge: Brigadier General Emory M. Sneed.¹ This is his story.

Born in Wilmington, North Carolina, on May 30, 1927, Emory Marlin Sneed began his Army career in 1944 as a private in the 647th Parachute Field Artillery Battalion.² He served in the Pacific in World War II, and in 1946, he returned to civilian life.³ Emory then earned a Bachelor of Science degree from Wake Forest University in 1949.⁴

After graduation, Sneed began law school, but with the outbreak of the Korean War, he returned to active duty in January 1951.⁵ He first served at Fort Bragg with the 325th Infantry Regiment before deploying to the Korean peninsula where he earned the Korean Service Medal and the United Nations Service Medal.⁶ Captain Sneed left active duty after this combat tour and returned to Wake Forest University where he received his Bachelor of Laws degree in 1953.⁷ He was admitted to the South Carolina Bar that same year.⁸

Sneed transferred to The Judge Advocate General's Corps in 1955.⁹ In his early assignments, Sneed served in Japan and Korea where he was both a trial counsel and a defense counsel.¹⁰ He served on the faculty at The Judge Advocate General's School before being assigned to Germany as the Deputy Staff Judge Advocate for the Northern Area Command, then located in Frankfurt, Germany.¹¹ Major Sneed returned to the United States for duty as the Assistant Chief of the Career Management Division,¹² what is now referred to as the Personnel, Plans and Training Office.

In 1966, Lieutenant Colonel Sneed deployed to Vietnam where he assumed duties as the Staff Judge

Advocate, 1st Air Cavalry Division.¹³ He left in 1967 and returned to the United States for a year. Lieutenant Colonel Sneed then returned to Asia to become the Staff Judge Advocate, U.S. Army Japan.¹⁴



Brigadier General Emory M. Sneed, circa 1974.

Advocate after this assignment, he attended the U.S. Army War College where he graduated in 1970.¹⁵ Then, he returned to the Pentagon to be the Chief of the Personnel, Plans and

¹ U.S. CONST. art. III. Federal appellate judges exercise judicial power vested in the judicial branch by Article III of the U.S. Constitution. *See id.*

² U.S. Court of Military Appeals, In Memoriam Emory M. Sneed 9 (Oct. 14, 1987) (unpublished bulletin) (on file with author) [hereinafter In Memoriam Emory Sneed].

³ *Id.*

⁴ *Id.*

⁵ Nat'l Archives and Records Admin., NA Form 13164, Information Releasable Under the Freedom of Info. Act Regarding Emory M. Sneed (2015) (on file with author) [hereinafter FOIA Release].

⁶ *Id.*

⁷ In Memoriam Emory Sneed, *supra* note 2, at 6.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

Training Office (PP&TO).¹⁶ This was an especially difficult assignment, because at that time, the Vietnam War was winding down and the personnel picture of the Army was very turbulent.¹⁷ After one year at PP&TO, Colonel Sneed served as the Executive Officer to The Judge Advocate General.¹⁸

In 1972, Emory Sneed was selected to be the Staff Judge Advocate, XVIII Airborne Corps.¹⁹ He was the top airborne lawyer until June 1974, when he was selected for promotion to flag rank.²⁰ In his last assignment on active duty, Brigadier General Emory Sneed was the Chief Judge of the U.S. Army Court of Military Review and Chief, U.S. Army Legal Services Agency.²¹ He retired from active duty on December 31, 1975.²²

Given his strong connections to South Carolina—and to Senator Strom Thurmond, the senior senator from that state—Sneed immediately took up a new job as Thurmond’s legislative and administrative assistant.²³ At Senator Thurmond’s direction, Sneed also served as Chief Minority Counsel on the Senate Judiciary Subcommittee on Antitrust and Monopoly.²⁴ By the time he left that job in 1976, Sneed was known “as one of the foremost authorities on antitrust law in the District of Columbia.”²⁵ The University of South Carolina certainly recognized this expertise, as Sneed lectured in antitrust law at its law school and served as associate dean from 1978-1982.²⁶

In 1977, Sneed moved to the Judiciary Committee as its Chief Minority Counsel and, after the Republicans took control of the Senate, he served as the Chief Counsel for the Committee.²⁷ In 1981, Brigadier General Sneed left public service to become “of counsel” to the Washington, D.C., law firm of Randall, Bangert and Thelen.²⁸ He was also a member

of the Columbia, South Carolina law firm of McNair, Glenn, Konduros, Corley, Singletary, Porter and Dribble.²⁹

On August 1, 1984, Sneed was nominated by President Ronald Reagan to a newly-created seat on the U.S. Court of Appeals for the Fourth Circuit.³⁰ He was confirmed by the Senate less than ten weeks later, on October 4, 1984.³¹ This was the first and only time in military legal history that a retired Army lawyer joined an Article III appellate court. Sadly, ill health caused Judge Sneed to resign from the court on March 1, 1986.³² Honorable Emory M. Sneed died of cancer the following year, on September 24, 1987, in Durham, North Carolina.³³

Shortly after his untimely death at the age of 60 years, an associate familiar with Sneed’s “legacy of honest, important, fair and dedicated public service” observed that if Judge Sneed had not left the Circuit Court of Appeals when he did, he might have been nominated for the U.S. Supreme Court in 1987 instead of Judge Robert H. Bork.³⁴ Whether or not this is true is hard to know, but the observation indicates the incredibly high esteem in which Brigadier General Sneed was held by his fellow lawyers.

Brigadier General Sneed is also remembered by members of our Regiment who served with him: In May 1989, the Hanau (Germany) Legal Center, part of the 3d Armored Division’s operational area, dedicated its courtroom to his memory.³⁵

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* (Sneed was a senior parachutist).

²¹ *Id.*

²² *Id.*; see FOIA Release, *supra* note 5.

²³ In Memoriam Emory Sneed, *supra* note 2, at 6.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ Act of July 10, 1984, Pub. L. No. 98-353, § 201(a)(1), 98 Stat. 333, 346 (giving the President authority “to appoint, with advice and consent of Senate . . . one additional circuit judge for Fourth Circuit Court of Appeals”).

³¹ *Biographical Dictionary of Federal Judges*, FEDERAL JUDICIARY CENTER, <http://www.fjc.gov/servlet/nGetInfo?jid=2235&cid=999&ctype=na&instate=na> (last visited Apr. 1, 2016).

³² *Id.*

³³ *Id.*

³⁴ Charles A. White, *The Loss of a Friend*, NEWSLETTER (Friends of the Judge Advocate Gen.’s Sch. Comm.), Sept. 26, 1987. On July 1, 1987, President Reagan nominated Robert H. Bork to the U.S. Supreme Court. MARK GITENSTEIN, MATTERS OF PRINCIPLE: AN INSIDER’S ACCOUNT OF AMERICA’S REJECTION OF ROBERT BORK’S NOMINATION TO THE SUPREME COURT 53 (1992). After a hotly contested debate in the U.S. Senate, Bork was defeated by a vote of 58 to 42. *Id.* at 14. See also ROBERT H. BORK, THE TEMPTING OF AMERICA (1989).

³⁵ *Court Can Now Convene in Hanau*, HANAU HERALD (GERMANY), June 1, 1989, at 1.

Lore of the Corps

A Murder in Manila—and then a Hanging

By Fred L. Borch*

Regimental Historian & Archivist

“Army Officer Hanged For Killing His Fiancée” screamed the headline in the *Boston Daily Globe*¹ the article that followed described how, on March 18, 1926, 25-year old Second Lieutenant (2LT) John S. Thompson calmly “and without making any statement . . . walked to a scaffold” where a noose was placed around his neck. Moments later, when Thompson met his end, his death made history. He was the first American officer to be executed in peacetime² and the only graduate of the U.S. Military Academy to be executed for a crime.

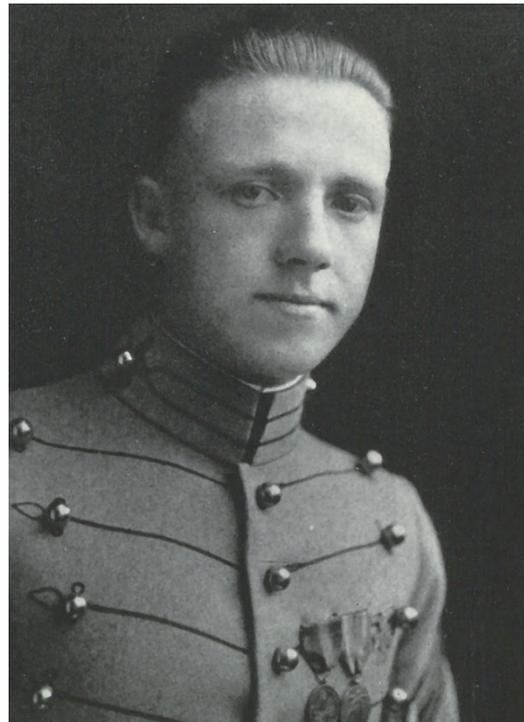
Born in Parnassus, Pennsylvania, in 1899, John Sewell “Tommy” Thompson did not enter West Point from civilian life as most cadets of this era. Instead, he enlisted in the Army in June 1917 and, on the basis of a competitive examination, obtained a spot as a cadet in 1920.³

After graduating in 1924 as a Second Lieutenant and receiving a commission as an officer in the Signal Corps, Thompson was assigned to the Philippines. He took the train from New York to San Francisco and then travelled by ship across the Pacific to the Philippines. He arrived at Fort William McKinley, located just outside Manila, in November 1924.⁴

In the Army of the 1920s, dinners and dancing were the focal point of many young, unmarried officers’ lives outside of work. Many service members traveled to Manila to meet up at the Army and Navy Club or the Manila Hotel to eat, drink, and socialize.⁵

Shortly after arriving in the Philippines, Thompson, then twenty-five years old, met Audrey Burley, the 16-year-old step-daughter of Captain Hamilton P. Calmes, an Army doctor serving in the islands⁶ at a party on a barge. She had “black, bobbed hair” and “pretty, bewitching eyes.”⁷ She was

five foot four inches tall and weighed about 110 pounds.⁸ While the records in Thompson’s case do not contain many details about Audrey, she seems to have been quite popular, despite (or perhaps because of) her youth. She had a wide circle of friends and enjoyed dinners and dances with friends. She seemed to have been quite extroverted and was interested in acting; she danced the hula-hula in an amateur theatrical performance the night of her death.⁹



Second Lieutenant John S. Thompson, 1924

* The author thanks Mr. Gordon Smith of Edmonton, Canada, for alerting him to the existence of the Thompson case. A version of this article was first published in the Winter 2015 edition of *Prologue*, the quarterly of the National Archives and Records Administration.

¹ *Army Officer Hanged For Killing His Fiancée*, BOSTON DAILY GLOBE, March 18, 1926, at A3.

² *Id.*

³ See Gen. Courts-Martial 168928, National Archives and Records Administration [hereinafter GCM 168928], Findings and Conclusion of Medical Board in the Case of 2d Lieut. John S. Thompson, at 7-8 (on file with the Records of the Judge Advocate General, Record Group 153).

⁴ GCM 168928, *supra* note 3, Memorandum from the Testimony of the Insanity Board.

⁵ See, e.g., JOSEPH P. MCCALLUS, *THE MACARTHUR HIGHWAY AND OTHER RELICS OF AMERICAN EMPIRE IN THE PHILIPPINES* (2010).

⁶ GCM 168928, *supra* note 3, Letter from Dwight Davis, Secretary of War, to President Calvin Coolidge 1, Examination of Lieut. John S. Thompson at 10.

⁷ GCM 168928, *supra* note 3, Letter, John S. Thompson to mother, May 25, 1925, at 1 [hereinafter Letter to Mother].

⁸ GCM 168928 *supra* note 3, Autopsy Report, Audrey C. Burleigh, April 6, 1925, at 1.

⁹ GCM 168928, *supra* note 3, Letter to Mother, *supra* note 6, at 6.

By February 1925, Thompson was infatuated with Burley. She was, he told his mother, “the most wonderful girl I ever met” and “the first girl to whom I ever said ‘I love you.’”¹⁰ After Audrey moved to Fort McKinley from Manila, she and Thompson became inseparable. He wrote to his mother:

We went out night after night just by ourselves, generally to the club or in back of it. It was wonderful with the tropical moonlight and Audrey’s eyes and lips, which were more wonderful than any moon lit up for lovers. Sometimes we would hire a car for an hour or so during the evening. We loved to perfection. As Audrey said later over the phone, there wasn’t any one could show us how to love.¹¹

By April 1925, however, Thompson had grown despondent. Congress had changed the rules on pay for Army officers with prior enlisted service, meaning that Thompson’s years of uniformed service prior to West Point would no longer count toward his salary.¹² This upset Thompson because he believed he could no longer afford to marry Audrey.¹³ In addition, Audrey’s mother had decided that her daughter should return to the United States at the end of April, and John Thompson was beside himself over this turn of events. While Audrey had promised to remain faithful to him—and apparently even promised that she would secretly marry him before returning to the United States—Thompson was convinced that her departure would mean the end of their relationship.¹⁴

Even by the standards of the 1920s, in which both men and women held what we today would view as quite conservative ideas about the role of females in society, Thompson’s views on women were out of step with his peers. As First Lieutenant W. H. Kendall put it in a sworn statement as part of the investigation into Burleigh’s murder, “Thompson seemed to have the idea that his duty was to safeguard the chastity of any women he liked. He had . . . very strong and puritanical ideas of the relations between men and women.”¹⁵ According to Kendall, Thompson “did not believe in sexual intercourse before marriage and even considered kissing to be immoral.”¹⁶ While many of Thompson’s contemporaries agreed with the former (at least in theory), his views on kissing were definitely out of step with the times.

John Thompson decided that there was only one way out of his predicament. Late in the evening on Saturday, April 4, 1925, he took a loaded Colt .45 caliber automatic pistol, which he had obtained from the arms room several months earlier, and hired a taxicab to take him to the Manila Hotel. He was looking for Audrey Burleigh, who had previously agreed to go to a dance with Thompson at the hotel.¹⁷

After arriving at the hotel, and learning that Audrey was at the Army and Navy Club, Thompson went by taxicab to that location, where he found and invited Audrey to go for a drive with him. As Thompson told his mother in a letter, written to her while he was locked up awaiting his trial by courts-martial, Thompson and Audrey began talking in the backseat of the taxicab.

I started asking her if she loved me. She said once she had but wouldn’t if I were going to act like this. . . . I was in a daze. . . . If she had only coaxed me like she always did to get me to do things and kissed me, I would have turned back. But she had no way of knowing my purpose, that I had lost control of myself.

She leaned forward and kicked at the back of the head of the dumb Filipino driving the car. I pulled the automatic out, never loving her more than I did then. I, mercifully, can remember nothing from then ‘til I saw her falling over on the seat, crying “I love you.”

Mother, that is what makes me want to be myself deprived of life I knew Audrey was wonderful and the best girl on the earth, but I didn’t know they made them that loving and brave. Five shots had entered her body causing eleven wounds and she told the one who had done it that she loved him.¹⁸

Thompson continued in this letter that he had turned the gun on himself and that he intended to shoot himself in the heart. But, when he pulled the trigger, the sixth cartridge had not fed into the chamber of the Colt .45 and there was no discharge. Thompson said his “nerves were gone” and, apparently distraught and confused, he made no attempt to reload the pistol and attempt once again to shoot himself.¹⁹

Thompson thought briefly about returning to his quarters on Fort McKinley to obtain more ammunition with which to

¹⁰ *Id.* at 1.

¹¹ *Id.*

¹² See Act of June 10, 1922, ch. 212, sec. 1, 42 Stat. 627.

¹³ *Id.* at 1–2.

¹⁴ GCM 168928, *supra* note 3, Letter from Dwight Davis, Secretary of War, to President Calvin Coolidge 2.

¹⁵ GCM 168928, *supra* note 3, Statement of First Lieutenant W. H. Kendall 1.

¹⁶ *Id.*

¹⁷ GCM 168928, *supra* note 3, Interview, Colonel C. H. Conrad of 2nd Lieutenant John Sewell Thompson, April 6, 1925, Government Exhibit No. 7, at 15 [hereinafter Interview].

¹⁸ Letter to Mother, *supra* note 6.

¹⁹ Interview, *supra* note 15, at 19.

commit suicide. He decided against this course of action, however, as he claimed to have forgotten where he had put the ammunition in his room. Consequently, he told the taxi driver to take him to the 15th Infantry Regiment's guardhouse at Fort McKinley. On the way over, he claimed to have "kissed Audrey on the cheek and held her hand."²⁰

Thompson arrived at 1:20 A.M. He got out of the automobile, walked up on the porch of the guard house and said to Corporal William M. Mamgun: "I am Lt. John S. Thompson, Qrs. 54, self-confessed slayer of Miss Audrey Burleigh. Lock me up, take her to the hospital."²¹

The following day, on the morning of April 6, Colonel (COL) C.H. Conrad, Jr. came to the guard house to question Lieutenant Thompson about the slaying of Audrey Burleigh. At this time, there was no requirement under either military or civilian law to advise a person suspected of a crime that he had a right to consult with a lawyer. Under the Articles of War, however, which set rules for the admissibility of evidence at courts-martial, any statement Thompson might make to Conrad could only be used at his trial if Thompson were told that he did not have to say anything. He also had to be informed that anything he might say could be evidence against him.²²

After Conrad advised Thompson of these rights, the young lieutenant decided to "make a full statement of the facts of the case." Conrad then put Thompson under oath and began questioning him.²³

19. Q - Are you happy?
A - Well, no.

20. Q - Are you contented?
A - I would say I am resigned.

21. Q - Has the Board treated you courteously and fairly?
A - Very.

22. Q - By what authority do you believe this Board was appointed?
A - Authority of the Commanding General.

23. Q - For what purpose do you believe the Board was appointed?
A - Inquiring into the sanity, temporary or permanent, of myself.

24. Q - Do you admit killing Miss Audrey Burleigh?
A - I do.

25. Q - What will follow completion of the investigation being made?
A - Trial by general court-martial.

26. Q - Do you have defense counsel?
A - I have.

27. Q - Who are they?
A - Defense counsel, Major Miller; Asst. defense counsel, Lt. Low; Individual Defense counsel, Lt. Lazarus.

28. Q - Did you ask for defense counsel?
A - I asked for individual defense counsel.

29. Q - What defense will they endeavor to establish?
A - I imagine they will endeavor to establish defense of insanity.

30. Q - Are you in sympathy with their efforts in your behalf?
A - Inssofar as establishing insanity, no.

31. Q - In what respects are you in sympathy with their efforts?
A - I am in sympathy with their efforts to the extent that they have had imposed upon them a military duty which they should fulfill.

32. Q - Having killed the girl you loved, do you wish to live on?
A - The question I will not answer.

33. Q - Why not?
A - I will not answer that question.

34. Q - Why did you not commit suicide?
A - I was frustrated by fate I guess.

35. Q - Had you intended to commit suicide?
A - I had.

36. Q - Did you ever discuss suicide with Audrey Burleigh?
A - I did not.

37. Q - Was there ever talk between you of dying together at your own hands?
A - No, sir.

Statement of Lieutenant Thompson April 18, 1925.

Thompson admitted that he had contemplated killing Audrey Burleigh as early as April 2. He explained that he truly loved Audrey, that she definitely loved him and that she said would marry him before leaving the Philippines. Nonetheless, he ultimately decided to end her life for two reasons. First, Thompson was upset about being deprived of longevity pay for service as an enlisted man and as a cadet at West Point—money that Thompson insisted he needed if he were to marry Audrey Burleigh. "My other reason," he told COL Conrad, "was fear of the loneliness to which I would be subject to the next two years without her, and the doubt as to whether things would be quite the same then as before."²⁴

The entire interview conducted by Conrad was recorded by a female typist, Miss Robertson, who typed out more than 200 questions and answers. Lieutenant Thompson then made minor pen-and-ink corrections to the statement, and signed it "John S. Thompson." At trial, this lengthy confession was admitted into evidence.²⁵

Thompson's trial by general courts-martial opened at Fort McKinley on May 4, 1925. Lieutenant Thompson faced a single charge:

²⁰ *Id.*

²¹ GCM 168928, *supra* note 3, Statement of Corporal William M. Mamgun, Board of Medical Officers, April 22, 1925.

²² Interview, *supra* note 15., at 14.

²³ *Id.*

²⁴ *Id.* at 18.

²⁵ *Id.*

In that Second Lieutenant John S. Thompson, Signal Corps, did, at Manila, Philippine Islands, on or about the 5th day of April, 1925, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one, Audrey Burleigh, a human being, by shooting her with a pistol.²⁶

The proceedings opened on May 4—only a month after the slaying—so that a number of witnesses, who were scheduled to soon leave the Philippines for the United States, could testify prior to departing. After they testified, the proceedings were adjourned for three months so that Thompson’s two defense counsel, 2LTs Frank L. Lazarus and Leslie E. Simon, who planned to defend Thompson using an insanity defense, could obtain depositions from the United States. The hope was that depositions from Thompson’s family and friends would address his mental condition and provide support for the insanity plea.²⁷

Based on Thompson’s confession to the crime, and his admission that he had contemplated killing Audrey days prior to the shooting, it was very likely that the prosecutor, Major (MAJ) Thomas A. Lynch, would prevail on the merits.²⁸ The only viable defense was some sort of insanity plea or diminished capacity at the time of the offense. Certainly Thompson’s explanation for murdering the young girl he professed to have loved made little sense to those who heard it, and his actions immediately after the slaying only underscored the belief—at least of some observers—that he was “not quite right.”²⁹

Based on the circumstances surrounding Audrey Burleigh’s homicide, the Army had already decided to look into Thompson’s “mental and physical condition.” Consequently, on April 18, a Board of Medical Officers consisting of three Army physicians, examined John Thompson. They unanimously concluded that he was sane at the time of the crime.³⁰ In July, this same board met a second time to again inquire into Thompson’s sanity because of the depositions obtained by Thompson’s defense counsel from the United States. After carefully examining the depositions, and re-examining the accused, the three Army physicians again concluded that “Lieutenant John S. Thompson did not at the time of the offense charged suffer from any mental defect or derangement” that prevented him from controlling his actions. The Board further concluded that, at the time of the murder, he was able to appreciate “right or wrong” and

that he was now able to understand the nature of the trial proceedings and cooperating in his own defense.³¹

Despite the opinion of the Board of Medical Officers, there was every reason to think that an insanity defense might still prevail at trial, given the unusual circumstances of the homicide and Thompson’s decidedly abnormal behavior. But Thompson would have none of it. When his court-martial reconvened three months later, on August 3, 1925, Thompson refused to allow his counsel to raise the insanity defense, even going so far as to threaten to fire them if they persisted in raising the defense. Thompson believed it would be dishonorable to claim insanity when he believed himself to be sane and that an insanity plea would bring shame and embarrassment to his family.³²

But, while Thompson refused to plead insanity, he did raise a new defense: that he could not be convicted of premeditated murder because he lacked the requisite malice. The defense now contended that the accused could not be found guilty as charged because Thompson had killed Audrey Burleigh while “in the grip of and because of passion or fear aroused by the thought of losing” her. This meant that he was guilty of manslaughter and not murder.³³

It was a novel defense but one that did not have much chance of success. It was elementary law in the 1920s, as it is today, that in order for a provocation of some type to reduce murder to manslaughter, that provocation must be sufficient “to excite uncontrollable passion in the mind of a reasonable man.”³⁴ Disappointment over a reduction in military pay and fear of losing the love of a sixteen-year-old girl simply was not going to be adequate provocation, as a matter of law.

Lieutenant Thompson’s trial lasted a total of four days: August 3 and 4, and September 1 and 2, 1925. On the last day, the court-martial panel adjourned for deliberations. When the panel members returned hours later, Brigadier General (BG) Charles J. Symmonds, the president of the court, announced that the jury, “upon secret written ballot,” had first voted on the accused’s sanity. Said Symmonds: “The accused was, at the time of the commission of the alleged offense, so far free from mental defect, disease, or derangement . . . both (1) to distinguish right from wrong and

²⁶ GCM 168928, *supra* note 3, U.S. War Department, Adjutant General’s Office Form No.594, Charge Sheet, April 8, 1925, at 2.

²⁷ United States v. John S. Thompson, No. 015589 (Sept. 29, 1925) 68.

²⁸ For more on the remarkable life and career of Lynch, see Fred L. Borch, *The Life and Career of Thomas A. Lynch: Army Judge Advocate in the Philippines and Japanese Prisoner of War*, ARMY LAW. March 2015, at 1.

²⁹ GCM 168928, *supra* note 3, Letter from Rev. Dr. J. Milton Thompson to Secretary of War Dwight F. Davis, Subject: 2nd Lieutenant John S. Thompson, Signal Corps, Court Martial Case, at 2.

³⁰ GCM 168928, *supra* note 3, Supplemental Proceedings, Special Orders No. 45, Aug. 1, 1925.

³¹ GCM 168928, *supra* note 3, Letter from Rev. Dr. J. Milton Thompson to Secretary of War Dwight F. Davis, Subject: 2nd Lieutenant John S. Thompson, Signal Corps, Court Martial Case, at 4.

³² *Id.*

³³ United States v. John S. Thompson, No. 015589 (Sept. 29, 1925) at 377.

³⁴ MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 443 (1921) [hereinafter MCM 1921].

(2) to adhere to the right.”³⁵ General Symmonds then stated that the court members had voted on the issue of guilt or innocence, and found Thompson guilty of premeditated murder. His sentence: to be hanged by the neck until dead.³⁶

**RECORD OF TRIAL BY GENERAL COURT-MARTIAL OF
SECOND LIEUTENANT JOHN S. THOMPSON, A. S. NO. 015589, SIGNAL CORPS.**

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Record of Trial, *United States v. John S. Thompson*.

Looking at the record in John Thompson’s case, it is not too difficult to understand the verdict. First of all, it is difficult to convince a jury that an accused was insane at the time he committed a crime, especially when that crime is one of extreme violence. But there were other factors that made the verdict of guilty highly likely. The victim was but sixteen years old, and the officers sitting in judgment of Thompson no doubt viewed her as an innocent young girl whose life had been taken from her for no good reason. Her status as the step-daughter of a fellow officer almost certainly influenced their decision too. Finally, there was no provocation, no lover’s quarrel that might have enraged Thompson. On the contrary, since the accused had admitted thinking about murdering his fiancée for some days prior to the shooting, BG Symmonds and his fellow jurors were likely to see

³⁵ *United States v. John S. Thompson*, No. 015589, Sept. 29, 1925, at 378.

³⁶ *Id.*

³⁷ GCM 168928, *supra* note 3, Judge Advocate General’s Department, Board of Review (1926).

³⁸ See UCMJ art. 71a (2012); MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1207 (2012).

Thompson’s actions as premeditated. Certainly the fact that Thompson fired five bullets from his Army pistol into Audrey meant this was no accident. Finally, for a second lieutenant to be brooding about a loss of pay, and using that as an excuse for murder, at least in part, would have engendered no sympathy.

Under the military criminal law of the 1920s, there was no appellate court that could hear an appeal from Thompson as would have occurred in a civilian criminal prosecution. On the contrary, Congress provided only that after Major General (MG) William Weigel, the Philippine Department commander who had convened the court-martial, took action on the findings and sentence, would a three-member “Board of Review” examine Thompson’s trial for any irregularities.³⁷ This board, consisting of three Army judge advocates who were experts in criminal law, was located at the War Department in Washington, D.C. Additionally, because Thompson had been condemned to death, this sentence must be personally approved by the president. This is still the rule today.³⁸

Consequently, the entire record in Thompson’s case went by boat from Manila to San Francisco, and then by train to Washington, D.C. It was first examined by the Board of Review. That board’s decision—and recommendation—went next to MG John A. Hull, The Judge Advocate General of the Army. The Army lawyers in his office studied the Thompson record and were the focal point for any correspondence from Thompson’s family, friends and the public relating to the case. After General Hull and his staff had completed their review of Thompson’s court-martial, Hull signed a memorandum containing a recommendation in the case for President Calvin Coolidge. Hull’s memo went to the president by way of Dwight F. Davis, the Secretary of War.³⁹

Thompson’s father, the Reverend Dr. J. Milton Thompson, was a prominent Presbyterian minister with a church on Long Island, New York. He had considerable influence, and immediately hired New York City attorney Newton W. Gilbert to advocate on behalf of his son. He also enlisted George W. Wickersham, who had served as U.S. Attorney General from 1909 to 1913, to appear personally before General Hull in his War Department office and plead for Lieutenant Thompson’s life.⁴⁰ Associates and colleagues of the Thompson family also wrote letters requesting clemency.⁴¹

³⁹ GCM 168928, *supra* note 3, 1st Ind., J. A. Hull, The Judge Advocate General to Dwight F. Davis, Secretary of War.

⁴⁰ GCM 168928, *supra* note 3, Letter from Rev. Dr. J. Milton Thompson to Major General John A. Hull, The Judge Advocate General, Re: Second Lieutenant John S. Thompson, Dec. 28, 1925, at 1.

⁴¹ GCM 168928, *supra* note 3, Letter from Newton W. Gilbert to Secretary of War, Jan. 13, 1926; *Id.* Letter, Officers, Members and Congregation of Sage Memorial Presbyterian Church, to Major General John A. Hull.

The gist of their argument—as Reverend Thompson put it in a December 28, 1925 letter to General Hull—was that while Lieutenant Thompson had shot and killed Audrey Burleigh, this murder was the direct result of an “uncontrollable impulse” arising out of “an adolescent complex.”⁴² The Thompson family—Reverend Thompson, his wife and his daughter—had been “amazed, astounded, perplexed and bewildered” by the “revolting nature” of the homicide. But they were convinced that the “abnormal” aspects of the slaying must indicate that their son and brother was insane; there could be no other explanation.⁴³

Major General Hull knew that Thompson’s mental state was the key to the proper recommendation. Consequently, he asked MAJ (Dr.) J. B. Anderson, then stationed at Walter Reed General Hospital, to look at the Thompson files and give his opinion as to the accused’s sanity and mental responsibility.⁴⁴

On January 7, 1926, MAJ Anderson wrote to Judge Advocate Major General Hull. Having “carefully examined the record . . . with special attention to the reports of the two Medical Boards and to the various affidavits furnished by his parents,” Hull concluded that “there is no evidence of insanity.” On the contrary, Anderson agreed with the psychiatrists who examined Thompson prior to his trial in Manila. They determined that Thompson exhibited “antisocial behavior” and “excessive jealousy,” and that he sought “gratification of personal desires without regard to the rights of others.”⁴⁵ What might today be labeled as ‘narcissism,’ however, did not mean that Thompson was insane—at least as a matter of law.

The Thompson papers reveal one other factor that almost certainly had some impact on his case. This factor was that another homicide had occurred in Manila about the same time as Thompson had murdered his fiancée.

As Colonel N. D. Ely, the Chief, Military Justice Division, explained in a memorandum, this was germane because a Private William M. Johnson had been sentenced to death—and hanged—for murdering a fellow Soldier. As Ely put it, Johnson was a Soldier “with little or no education and obviously of a low mental type” and, after a quarrel and fight with another Soldier, Johnson ambushed that Soldier and killed him. He was tried by general court martial, convicted of pre-meditated murder, and his death sentence carried out while Thompson’s case was under discussion. In Ely’s view,

⁴² GCM 168928, *supra* note 3, Letter from Rev. Dr. J. Milton Thompson to Major General John A. Hull, The Judge Advocate General, Re: Second Lieutenant John S. Thompson, Dec. 28, 1925, at 3.

⁴³ *Id.* at 2.

⁴⁴ GCM 168928, *supra* note 3, Memorandum to The Judge Advocate General of the Army from Major J.B. Anderson, Medical Corps, Jan. 7, 1926.

⁴⁵ *Id.*

⁴⁶ GCM 168928, *supra* note 3, Memorandum for The Judge Advocate General from Colonel N.D. Ely, Chief, Military Justice Section, Subject:

Thompson deserved to be executed for “firing five bullets . . . into . . . an innocent 16-year old girl, a member of a brother officer’s family.”⁴⁶ As he wrote,

I am convinced that if after a simple private soldier has been hanged for shooting another soldier, an officer of the same Division escapes with any less punishment after he has been convicted of the brutal murder of an innocent young girl, the effect on discipline and morale of the Philippine Division will be as bad as could possibly be imagined.

I have always maintained that the chief justification for punishment of crime is its deterrent effect on others and I think that this is a typical instance in which, under the circumstances . . . the death penalty should be inflicted, not only because it is fully merited but also for the further reason that the discipline of this particular Division and the Army as a whole require it. I believe if capital punishment is every justified in time of peace it is not only justified but actually demanded in this case.⁴⁷

The Thompson family knew about this other homicide, and they were worried that it would affect John Thompson’s case. This explains why Reverend Thompson wrote a letter to President Calvin Coolidge on January 20, 1926 in which he implored the president to distinguish between the two cases and not let “the question of discipline in the Army” and any desire for uniformity of result to influence Coolidge’s decision.⁴⁸

In a final six-page typed letter to President Coolidge, dated January 25, 1926, Reverend Thompson again stressed that his son’s life should be spared because he was “mentally incompetent.” The theme of this letter was that the younger Thompson was “abnormal” when it came to girls. “He would fall violently in love with some girl . . . and he assumed a propriety interest in her and attempted to direct every act of hers.” According to his father, this resulted in “a number of episodes which bear a great similarity to the situation in Manila.”⁴⁹ Reverend Thompson then told the president the following story about his son as a teenager:

He took out riding a young lady, Marian Andrews, in the early evening. He proposed to marry her immediately. She declined. He pulled a revolver

Record of Trial in the Case of Second Lieutenant John S. Thompson, Signal Corps.

⁴⁷ *Id.* at 2.

⁴⁸ GCM 168928, *supra* note 3, from Letter, rev. Dr. J. Milton Thompson to Honorable Calvin Coolidge, President of the United States, Re: The Case of Lieut. John S. Thompson, U.S.A., Jan. 20, 1926, at 1–2.

⁴⁹ GCM 168928, *supra* note 3, Memorandum for His Excellency, The President of the United States, from Rev. Dr. J. Milton Thompson, Jan. 25, 1926, at 1.

from his pocket and pointed it at her face and said she would marry him or he could kill her. She wisely said alright, she would marry him but she needed to go home first to get some things. She reached home, found her mother in great anxiety waiting outside the door and thereby escaped him.⁵⁰

Reverend Thompson then closed this story with this sentence: “He enlisted in the Army the next morning.”⁵¹

One has to wonder what President Coolidge and his advisors must have thought when they read about young Thompson and Marian Andrews. Rather than engendering sympathy for Lieutenant Thompson, it seems highly likely that Reverend Thompson’s disclosure caused the White House to conclude that he was a dangerous psychopath who had found refuge in the Army and managed to attend West Point and earn a commission. Was what happened to Audrey Burleigh foreseeable?

In the end, efforts to save John Thompson were all to no avail. In his one-page recommendation to Secretary of War Dwight Davis, General Hull wrote that “the undisputed facts in the case show a cruel and premeditated murder.” He further insisted that not only was there “no evidence of any psychosis, but that on the contrary Lieutenant Thompson . . . was sober, sane and fully responsible for his acts.” Davis, in his nine-page recommendation to President Coolidge, informed the president that Thompson was “guilty of the unprovoked and atrocious murder of an innocent young girl.”⁵²

On February 9, 1926, President Coolidge confirmed the death sentence in Lieutenant Thompson’s court-martial.⁵³ Slightly more than a month later, on March 18, 1926, John Sewell Thompson climbed the stairs to the gallows, which were located in a warehouse at Fort McKinley. He had no last words. After the hangman put a noose around his neck, and tied Thompson’s hands behind his back, the one officer and eight enlisted men present in the warehouse witnessed the trap door open and Thompson plunge to his death. He was the first American officer to be executed in peacetime and remains the only graduate of West Point to be hanged.⁵⁴



President Calvin Coolidge confirmed Lieutenant Thompson’s Death Sentence on February 9, 1926.

Whatever one may think of the merits of the Thompson murder case, the fact is that everyone involved in the trial and its aftermath died long ago. For obvious reasons, those related by blood or marriage to Lieutenant Thompson or to his victim, Audrey Burleigh, are unlikely to disclose any connection to them at this time. Similarly, the U.S. Military Academy at West Point prefers that this graduate remain forgotten—as would any institution of higher learning with a similarly situated alumni.

But *United States v. Thompson* is a case that should not be forgotten. It shows that human beings then, as now, are capable of making tragic decisions with horrific consequences. After all, a murder was committed in Manila for apparently no good reason—a homicide that caused much suffering in both the Burleigh and Thompson families for many years. The court-martial record with its many depositions and letters also provides a window into what life was like in the Army in the Philippine Islands in the 1920s. This, too, is what makes Thompson’s case worth reading about. Finally, for those interested in the history of the military criminal legal system, *United States v. Thompson* is a first-class example court-martial conducted in the Army in the years before World War II.

⁵⁰ *Id.* at 2.

⁵¹ *Id.*

⁵² GCM 168928, *supra* note 3, Letter from Dwight Davis, Secretary of War, to President Calvin Coolidge 1, Examination of Lieut. John S. Thompson at 9.

⁵³ GCM 168928, *supra* note 3, War Department, Gen. Court-Martial Orders No. 5, Feb. 9, 1926.

⁵⁴ *Army Officer Hanged for Killing His Fiancée*, *supra* note 1, at A3.

Lore of the Corps

The First Manual for Courts-Martial

By Fred L. Borch

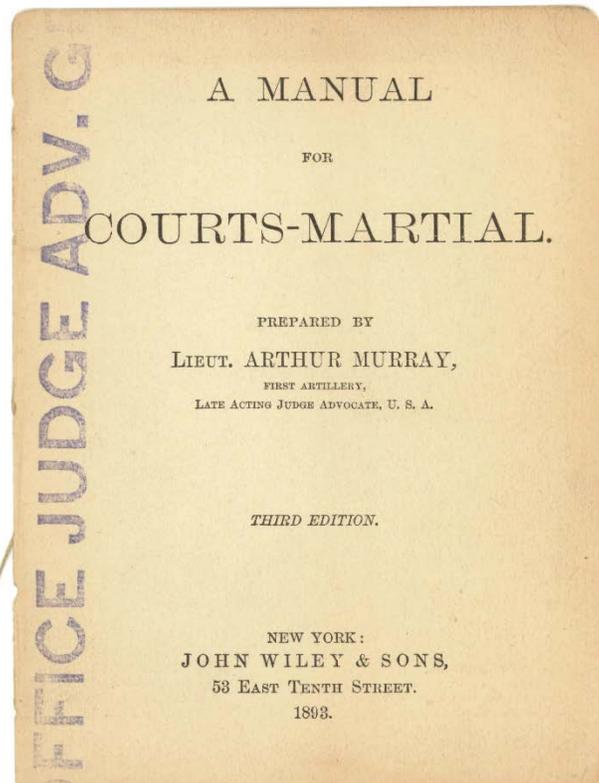
Regimental Historian & Archivist

While military legal practitioners today assume that there has always been a manual to guide those prosecuting, defending, and judging courts-martial, nothing could be further from the truth: It was not until 1895 that an official *Manual for Courts-Martial* was published by the Army. What follows is the history of that first *Manual*.

Although the Continental Congress adopted sixty-nine articles for the regulation of the Army during the Revolution, and the new U.S. Congress exercised its power under Article 1, Section 8 to enact the first American Articles of War in 1806, there was little in the way of written guidance or procedure that governed how a court-martial should operate. The 1863 Articles of War, for example, provided only that a general court-martial should consist of “any number of commissioned officers, from five to thirteen”¹ (with thirteen preferred) and that the judge advocate “shall prosecute in the name of the United States” but also “consider himself counsel” for the accused.² Persons giving evidence before the court were “to be examined on oath or affirmation,”³ and the judge advocate was required “to object to any leading questions” and to prevent the accused from answering questions “which might tend to criminate (sic) himself.”⁴ But there were no provisions in the Articles of War governing the admission of hearsay, or elements of proof in a

substantive offense, much less any guidance on how to draft a charge sheet or court-martial convening orders.

It was not until 1886, when then Lieutenant Colonel William Winthrop published his two-volume *Military Law and Precedents*, that judge advocates in the field had any authoritative source. However, Winthrop’s treatise was mostly about military law; it provided no practical guidance for the line officer tasked with prosecuting a court-martial or serving as a member at a general, garrison or regimental court. To meet this need, First Lieutenant (1LT) Arthur Murray, a Field Artillery officer stationed at Fort Leavenworth, wrote “Instructions for Courts-Martial and Judge Advocates,” which was published as Circular No. 8, Headquarters, Department of Missouri, on July 11, 1889.⁵ Murray had previously served as the Acting Judge Advocate for the Department of Missouri in 1887 and consequently had considerable experience with courts-martial and the Articles of War.⁶



A Manual for Courts-Martial, 1893.

In 1890, Murray turned his ‘Instructions’ into a small four-inch by-five-inch “pamphlet.”⁷ He then had it commercially published by a New York firm as “A Manual for Courts-Martial.” After rearranging and enlarging his original work, Murray published a second edition in 1891 and a third edition in 1893.⁸ These were greatly improved versions of his original manual, as he had obtained input from

¹ U.S. WAR DEP’T, ARTICLES OF WAR ART. 64 (Stackpole Books 2005) (1863).

² *Id.* at Art. 69.

³ *Id.* at Art. 73.

⁴ U.S. WAR DEP’T, *supra* note 2.

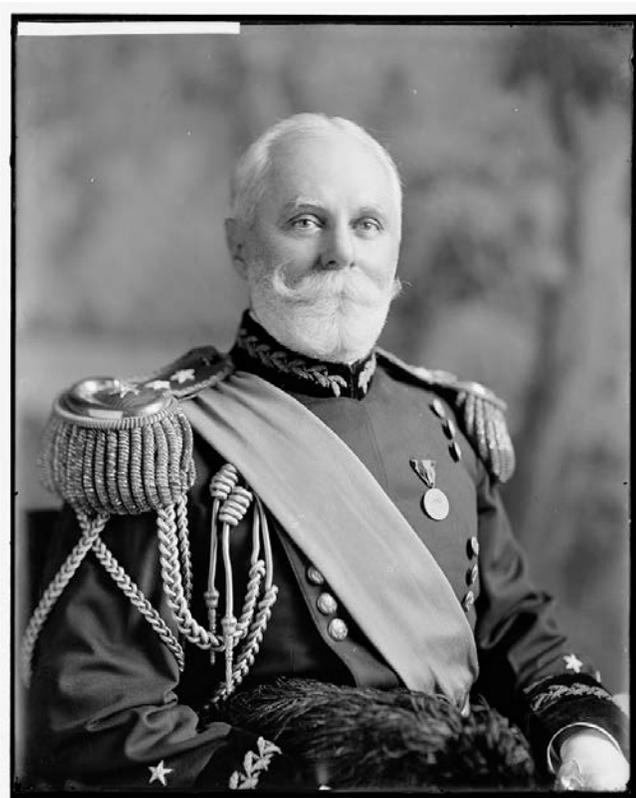
⁵ THE JUDGE ADVOCATE GEN.’S CORPS, THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL’S CORPS, 1775-1975, at 95 (1975).

⁶ ARTHUR MURRAY, A MANUAL FOR COURTS-MARTIAL pt. IV (3d ed. 1893), https://www.loc.gov/rr/frd/Military_Law/pdf/manual-1893.pdf.

⁷ *Id.* pt. III.

⁸ *Id.*

members of the Judge Advocate General's Department (JAGD), including Captain E. H. Crowder, Major George B. Davis, Colonel (COL) Thomas F. Barr, and COL G. Norman Lieber, the Acting Judge Advocate General (JAG).⁹ Since Crowder, Davis, and Barr later served at the highest ranks of the JAGD, Murray's manual was reaching an important and influential audience.¹⁰



Major General Arthur Murray

First Lieutenant Murray's 185-page *Manual* did not promise anything more than being a "handy source of legal guidance."¹¹ Moreover, the book's premise was that military law was primarily about discipline. It was intolerant of "legal niceties" in that the *Manual* advised that "the judge

advocate's opinion was rendered only when asked for" by the court.¹²

While there was no formal discussion of evidence, Murray did write that a court should always use the "best evidence obtainable" and he insisted that "hearsay evidence is inadmissible."¹³ He also advised that documentary evidence was "only admissible when its authenticity has been established by sworn testimony, or the seal of a court record, or when its authenticity is admitted by the accused."¹⁴ A *Manual for Courts-Martial* also had sections discussing credibility of witnesses,¹⁵ proof of intent,¹⁶ and findings¹⁷ and punishments.¹⁸ While there was no discussion of the elements of proof required for an offense, the "General Forms" at the back of the booklet provided sample specifications for common offenses such as larceny, desertion, fraudulent enlistment, drunk and disorderly, and conduct prejudicial to good order and military discipline.¹⁹ These sample specifications, like those in Part IV of today's *Manual for Courts-Martial* necessarily covered the elements that must be proved for a conviction.²⁰

Murray's *Manual* received high praise. Colonel Barr wrote that "its adoption and general distribution would be of great advantage to the service."²¹ As Acting JAG, Lieber explained, *A Manual for Courts-Martial* "had been carefully prepared, with the manifest object of giving in small compass and convenient form the established principles which are of common application in the administration of justice."²² Since Murray not only compiled "authoritative rules and decisions relating to courts-martial practice," but also included a "collection of forms for use in such practice," Lieber lauded the book as "a useful guide for courts-martial reviewing authorities, and officers of the army generally."²³

Perhaps 1LT Murray was a bit too successful in his writing of "The Murray Manual," because the War Department took his book and published it as *A Manual for Courts-Martial* in 1895, the first official manual for courts-martial.²⁴ While this first official version acknowledged Murray's role—it stated that the book was "prepared under the supervision of the Judge-Advocate General by First

⁹ *Id.* pt. VI, VII.

¹⁰ For more on Barr, see Fred L. Borch, *TJAG for a Day and TJAG for Two Days: Brigadier Generals Thomas F. Barr and John W. Clous*, ARMY LAW., April 2010, at 1-3. For a biography on Crowder, see DAVID A. LOCKMILLER, ENOCH H. CROWDER: SOLDIER, LAWYER AND STATESMAN (1955); See also Fred L. Borch, *The Greatest Judge Advocate in History? The Extraordinary Life of Major General Enoch H. Crowder (1859-1932)*, ARMY LAW., May 2012, at 1-3. For more on Davis, see Fred L. Borch, *From Frontier Cavalryman to the World Stage: The Career of Army Judge Advocate General George B. Davis*, ARMY HISTORY, Winter 2010, 6-19.

¹¹ THE JUDGE ADVOCATE GEN.'S CORPS, *supra* note 5.

¹² *Id.*

¹³ Murray, *supra* note 6, at 64.

¹⁴ *Id.*

¹⁵ *Id.* at 61-62.

¹⁶ *Id.* at 62-63.

¹⁷ *Id.* at 65-68.

¹⁸ *Id.* at 69-87.

¹⁹ *Id.* at 125-34.

²⁰ MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV (2012).

²¹ Murray, *supra* note 6, at VII.

²² *Id.*

²³ *Id.*

²⁴ THE JUDGE ADVOCATE GEN.'S CORPS, *supra* note 5, at 94.

Lieutenant Arthur Murray, Field Artillery”²⁵—Murray’s authorship was quickly forgotten. When the War Department published a second, revised edition in July 1898, it renamed the work *A Manual for Courts-Martial and of Procedure Under Military Law* and omitted any reference to an author.²⁶ What had started as a commercially printed guide for officers involved in courts-martial served as the model of every manual published by the War Department over the next fifteen years. The 1901, 1905, 1907, 1908, 1909, and 1910 editions were small, pocket-sized booklets similar to other manuals on infantry, drill and ceremonies, mess operations and other military subjects. Although the 1917 *Manual for Courts-Martial* was published in a larger format, it was not until 1921, after Congress had made significant revisions to the Articles of War, that wholesale changes were made to what 1LT Murray had originally assembled.²⁷

Unfortunately for Murray, the Army’s adoption of his manual “effectively deprived him of any royalties”²⁸ he would have received from the sale of his book. But there was nothing he could do, as it was not until 1960 that an author could sue the United States for copyright infringement in the U.S. Court of Claims.²⁹

In the end, however, Arthur Murray did well as a career Army officer: He was promoted to brigadier general and appointed Chief of Artillery in 1906 and retired as a major general in 1915. Murray was recalled to active duty during World War I and served as the Commander, Western Department, until retiring a second time in 1918. Major General Murray died in Washington, D.C., in 1925, at the age of 74.³⁰

²⁵ *Id.* at 95.

²⁶ WAR DEP’T, MANUAL FOR COURTS-MARTIAL AND OF PROCEDURE UNDER MILITARY LAW (1898), http://www.loc.gov/tr/frd/Military_Law/pdf/manual-1898.pdf.

²⁷ THE JUDGE ADVOCATE GEN.’S CORPS, *supra* note 5, at 95-96.

²⁸ *Id.* at 95.

²⁹ *Id.*

³⁰ ASSOCIATION OF GRADUATES OF THE UNITED STATES MILITARY ACADEMY AT WEST POINT, ANNUAL REPORT 115-17 (1930).

Lore of the Corps

From a Teenager in China to an Army Lawyer in America: The Remarkable Career of Judge Advocate General John L. Fugh (1934-2010)

By Fred L. Borch
Regimental Historian & Archivist

While many Army lawyers have rewarding careers, few match the achievements in uniform of John Liu Fugh. Born in Beijing, China in 1934, Fugh came to the United States as a teenager in 1949 and, after graduating from law school, joined the Judge Advocate General's Corps in 1960.¹ For the next thirty-two years, Fugh soldiered as a judge advocate, and made history in 1984 as the first American of Chinese ancestry to reach flag rank.² When Major General John Fugh retired from active duty in 1993, he was the top lawyer in the Army and one of only two Chinese-Americans to reach two-star rank. This is the story of his remarkable life and career.

John Liu Fugh was born Fu Liu-ren on September 12, 1934, in Peking, now Beijing, China.³ The Fugh family was related to Chinese royalty by blood, which meant that the family had a higher status in Chinese society. But they also were third-generation Christians and this explains why his father, Philip, became the private secretary to Dr. John Leighton Stuart, a well-known Presbyterian missionary and educator. Stuart was American (his family were southerners from Alabama), but he had been born in China and was fluent in Chinese. He needed a Chinese assistant, especially after founding a Christian university, called Yenching University, in 1919. Philip Fu was the perfect choice, for he had attended Yenching, spoke English well, and was a Christian. After traveling with Dr. Stuart to the United States in the 1920s—and to make it easier to get along in English-speaking America—Philip Fu added “gh” to the spelling of

the family name, so that it became “Fugh”.⁴ Philip remained with Stuart as Yenching grew into one of the top universities in China.

At the end of World War II, with the Communists and Nationalists in open conflict with each other after the surrender of the Japanese, General George C. Marshall, then serving as Secretary of State, was looking for a way to bring the two factions together. He recommended that Dr. Stuart be named the top diplomat in China and, when President Truman agreed, Philip Fugh became the private secretary to U.S. Ambassador Stuart. He accompanied Stuart to peace talks held in Nanjing (Nanking).

These talks failed and, in the civil war that followed, the Communists triumphed and the Nationalists fled to Taiwan. As for the Fugh family, 14-year old John Fugh and his mother were trapped in Beijing. Life was unbearable. The Communists, who knew about father Philip's relationship with Ambassador Stuart, would routinely visit the Fugh home at three or four in the morning, take John Fugh's mother, Sarah, away, and then pepper them with questions: “Where is your father? How much money do you have? Where are your guns and ammunition? Where are your secret documents?”⁵

Before the People's Republic of China was formally established in October 1949, the Fughs decided that their lives were in danger and that they had to get out of Beijing. Sarah and John managed to receive an exit visa for Hong



Sixteen-year-old John Fugh's entry visa.



Major General Fugh, the 33d Judge Advocate General.

¹ Memorandum from Lieutenant Colonel Richard Kuzma, for The Judge Advocate General, subject: Chinese-American Flag Officer (29 Dec. 1992).

² *Id.*

³ Adam Bernstein, *General Served as Army's Top Lawyer in Gulf War's Wake*, WASH. POST, May 12, 2010, at B5.

⁴ STEPHEN PATOIR & CHRISTIAN ROFRANO, AN ORAL HISTORY OF JOHN L. FUGH 2 (2001).

⁵ *Id.* at 3, 11-12.

Kong and, once present in this British colony, applied to come to the United States. They could only gain entry as “temporary visitors,” however, since Congress had imposed severe restrictions on the number of Asians permitted to immigrate.⁶

Having received permission to come to the United States, the Fughs in 1950 sailed by ship to Japan and Hawaii, and then reached San Francisco. John Fugh, by then 16 years-old, spoke little English. But his parents were determined to make a new life for him and placed him in a private school in New Rochelle, New York. He boarded with a woman and her daughter who lived near the school; it was a very lonely existence. Meanwhile, Fugh’s father and mother had settled in Washington, D.C., where Philip Fugh remained as Ambassador Stuart’s private secretary.⁷

Having learned enough English, young Fugh now enrolled in Western High School in the Georgetown neighborhood of Washington, D.C., and, after graduating in 1953, entered Georgetown University’s School of Foreign Service. Fugh’s plan was to remain a Chinese citizen and then join the Chinese diplomatic service. When he graduated with a B.S. degree in international relations in May 1957, however, Fugh realized that this was going to be impossible: The Communists were not about to welcome the son of a prominent Nationalist into their fold, and the Fughs no longer had connections to the government in Taiwan. A career as a U.S. diplomat was not open to him either, since applicants at the time had to have been citizens for at least ten years before they could take the Foreign Service examination.⁸

This citizenship conundrum existed because of the manner in which the Fugh family had come to the United States. Initially, they had been in a temporary visitor status and had to renew their visas every six months. In June 1952, however, with the help of Ambassador Stuart, Congress passed a private bill that gave Philip, Sarah and John Fugh “permanent residence” status starting the five-year period after which the Fughs could apply for citizenship. John Fugh did, in fact, become a naturalized citizen in 1957.⁹ But, not having being able to sit for the Foreign Service exam, and with no other practical skills, he decided to go to law school at George Washington University.¹⁰

Just before graduating in 1960, and with his student deferment years at an end, Fugh received an induction notice from the Selective Service; the peacetime draft was calling him to the profession of arms. After travelling to Fort Holabird, Md., for his pre-induction physical, 25-year-old

John Fugh realized that he did not want to serve two years as an enlisted soldier when he could serve as a lawyer—and as a commissioned officer. In 1960, he accepted a commission as a first lieutenant in the Army’s Judge Advocate General’s Corps. As Fugh put it in a 2001 oral history, he joined because he “had a sense of obligation. My family managed to come to this country, and I owed something for being here. Military service was a payback.”¹¹

In 1961, First Lieutenant Fugh completed eight weeks of Infantry officer training at Fort Benning, Ga., and then reported to The Judge Advocate General’s School, Charlottesville, Virginia, for the basic course in military law.¹² He graduated in May 1961 and went to his first assignment with the Sixth Army at the Presidio in San Francisco, California. He did the usual legal work for a young JAG officer, defending soldiers at courts-martial, reviewing reports of survey and conducting line of duty investigations.¹³

As for the unusual, Fugh was the legal advisor to a board of senior officers appointed to inquire into the capture of two Army aviators by the North Koreans. In early 1964, those two pilots, Captains Ben Stutts and Carlton Voltz, had been on a mission over the Demilitarized

Zone and had mistakenly crossed into North Korea. After developing engine trouble, the two men decided to land their helicopter—not realizing they were on North Korean soil. They were taken prisoner and, after being interrogated, gave much more information than name, rank and service number: They admitted under pressure that they had been on a spy mission. After their release several months later, the board investigated whether the two officers had violated the Code of Conduct while prisoners and whether any such violation was a criminal offense. It concluded after two months of testimony that the men had committed no crimes under the Uniform Code of Military Justice and were blameless.¹⁴



Fugh, left, with his three sisters in Beijing, 1944.

⁶ *Id.* at 4-5.

⁷ *Id.* at 5-6.

⁸ *Id.* at 7.

⁹ An Act for the Relief of Philip Fugh, Sarah Liu Fugh, and John Fugh, Priv. L. No. 82-745, 66 Stat. A112 (1952).

¹⁰ Patoir & Rofrano, *supra* note 3, at 6-7.

¹¹ *Id.* at 7-8.

¹² U.S. Dep’t of Army, DA Form 640-2-1, Officer Record Brief, John L. Fugh (July 1993).

¹³ Patoir & Rofrano, *supra* note 3, at 25-26.

¹⁴ *Id.* at 31-34.

Although Fugh relished the camaraderie in the legal office and liked the military lifestyle, the pay was low and Fugh left active duty at the end of his three-year commitment to take a job as an attorney with the Atomic Energy Commission in the San Francisco area.¹⁵

In July, 1960, Fugh married his wife, June, and had an infant daughter Justina. Civilian life in Berkeley was good for Fugh, but he found he missed the Army's "culture" and "cohesiveness and togetherness."¹⁶ After his old boss at Sixth Army encouraged him to return to the Army, Fugh did just that—returning of the JAG Corps in November, 1964 after a six-month break in service. He came back on active duty with a Regular Army commission and a tour of duty at U.S. Army, Europe, in Heidelberg, Germany.¹⁷



Fugh as a Major in 1968.

For the next three years, Captain Fugh worked as the recorder for officer elimination boards, and did some work as an action officer reviewing administrative law matters. But his favorite assignment was as the Deputy Chief for Procurement Law, and his main job was to try cases before the USAREUR Board of Contract Appeals. The jurisdictional limit of the Board at the time was \$50,000, or more than \$380,000 in today's dollars—a significant amount of money in the 1960s. By the time Major Fugh left Heidelberg in 1967 (with toddler son Jarrett joining daughter Justina), he had become an expert in both fiscal law and contract law, which he enjoyed because "it gets down to the bottom line—which is money."¹⁸

Fugh also had his first taste of working "at the international level" when he was selected to be the legal advisor to the U.S. Representative on the North Atlantic Treaty Organization (NATO) Missile Firing Installation Users Committee. Hawk missiles were being deployed to Europe and the NATO countries were constructing a missile firing site on the island of Crete. There was a User Countries meeting every six weeks, in either Paris or Athens, and Captain Fugh was required to attend, prepare position papers for the U.S. representative and coordinate with high-powered legal advisors from other countries. The most contentious

legal issue involved the Greek insistence that contracts for food and other supplies for the firing site go to local national businesses while the United States and other European representatives wanted competitive bidding. For Fugh, the chief "take-away" from this experience was that an officer often had to think like a diplomat. As he put it: "You can't always say what you think . . . in handling a situation that may be thorny."¹⁹

The only down-side to his Germany experience was that Fugh tired of being thought of as Japanese. There were still Germans of a certain mind-set who remembered that the Third Reich had been allied with Japan in World War II and, thinking that Fugh was of Japanese ancestry, would believe he was a kindred spirit. Initially Major Fugh, having suffered through the Japanese occupation of China as a boy, would correct these Germans and inform them that he was Chinese. After a while, however, he stopped.²⁰

In September, 1967, now Major Fugh returned to Charlottesville to attend the year-long Advanced Course for Army lawyers and, after graduating in May 1968, deployed to Vietnam. Assigned to U.S. Army, Vietnam (USARV), Fugh served as the Deputy Staff Judge Advocate and Chief, Civil Law Division. This latter position meant that he had overall responsibility for all legal matters at USARV except for military justice and foreign claims. Fugh advised on the Geneva Conventions, labor contracts, real estate and currency controls and personnel claims. The work tempo was fast; Fugh worked seven days a week, with only Sunday afternoons off.²¹

But Fugh understood that he had it easy compared with judge advocates in the field. On one occasion, he accompanied the USARV Staff Judge Advocate on a trip to the 101st Airborne Division, then located at Camp Eagle near the Demilitarized Zone. After the USARV lawyers arrived, they had difficulty finding their 101st counterparts, as there were no permanent structures at Camp Eagle apart from "a shack used as the PX."²² Finally, Fugh found the SJA office, which "was a CONEX container half buried in the ground with a tent in front of it."²³ There was a small wooden sign at the tent entrance that read "SJA." When Fugh walked in; it was impossible to tell who was an officer or who was enlisted, because everyone was bare-chested in the intense tropical heat. As Fugh remembered it, he had brought a six-pack of Coke, and this "small gift" was very much appreciated. "It was a poignant visit. Here I was sitting in air-conditioned USARV offices while my colleagues worked under these severe conditions."²⁴ To get a better understanding of what troops in the field were experiencing, Fugh also volunteered

¹⁵ *Id.* at 19, 37.

¹⁶ *Id.* at 20, 37, 63.

¹⁷ *Id.* at 20, 41-42.

¹⁸ *Id.* at 44.

¹⁹ *Id.* at 47-48.

²⁰ *Id.* at 45-46.

²¹ *Id.* at 68-69.

²² *Id.* at 69.

²³ *Id.*

²⁴ *Id.*

to serve as part of the aircrew on helicopters flying combat support missions. He was awarded the Air Medal for “actively participating in twenty-five aerial missions over hostile territory” between January and May 1969.²⁵

While his year in Vietnam was a positive experience, Fugh was bothered by “the way our troops viewed the Vietnamese.” Given his Chinese background, he did not like the term “gooks.” As he put it: “I understand we were fighting a war, but I think there was also a racial component.”²⁶ Fugh remembered one case where a soldier had killed a South Vietnamese civilian while driving recklessly—yet received only non-judicial punishment under the Uniform Code of Military Justice. In another case, soldiers on sentry duty saw an old Vietnamese man on a bicycle and decided “to take him out.” The men shot and wounded him; then they killed him. “They viewed the Vietnamese as though they were not even human. Being an Asian, that bothered me.”²⁷

After Vietnam, John Fugh got his dream assignment: the Military Assistance Advisory Group (MAAG) to the Republic of China. While in Vietnam, Fugh had been to Taiwan on temporary duty and, after arriving at the airport in Taipei, was surprised that he could understand everything that was being said by the Taiwanese officials, who spoke Chinese rather than Taiwanese. As a result, Fugh asked for an assignment to the MAAG. Initially, this request was refused because, as his assignments officer told Fugh: “We don’t send Frenchmen to France.”²⁸ This seemed to be a foolish perspective and Major General Lawrence Fuller, the second-highest ranking lawyer in the Army, thought so too. Fuller approved Fugh’s assignment to Taipei as the MAAG staff judge advocate. This was a big deal: The incumbent was a full colonel and Fugh would be replacing him, yet he was still only a major.²⁹

From the beginning, Fugh’s experience was quite remarkable. He not only understood the language, but the culture too. As for the Taiwanese, they were unsure about this American Army officer. At a cocktail party, for example, Fugh was talking with a Taiwanese woman in Mandarin. After some time, she said to him: “Tell me, are you with us or with them?” Fugh’s reply: “I’m with them.”³⁰ Later, when Fugh participated in negotiating sessions with the Taiwanese authorities, he realized that they were whispering among themselves because they were concerned that he might overhear their conversation.³¹

Although he was in Taipei to provide legal support, Major Fugh’s unique talents caused him to be heavily involved in negotiating a variety of agreements with the

Ministry of National Defense. Fugh also often accompanied the MAAG commander, who was an Army major general, when the latter would give a speech to ensure that the talk was translated accurately.³²

After three years in Taiwan, Fugh attended the Command and General Staff College. After graduating in May 1973, newly promoted Lieutenant Colonel Fugh reported to be the



Fugh serving with the First Cavalry at Camp Evans in 1968.

Staff Judge Advocate and Legal Counsel for the Ballistic Missile Defense Office in Arlington, Virginia. Until 1976, he worked on a variety of very high level procurement issues involving not only missiles, but also phased-array radar and supporting equipment, as well as installation facilities.³³

In 1976, Fugh returned to Germany as the Staff Judge Advocate, 3d Armored Division. This was a plum assignment, but Fugh was apprehensive because his expertise was in procurement, administrative and civil law and the division was a “heavy-duty military justice” operation. Additionally, while Fugh had previously served as the top Army lawyer in Taiwan, that assignment had been in a small office. The 3d Armored Division job involved providing legal services to some 29,000 soldiers and supervising one major and 30 captains in six different offices. Fugh, however, quickly established a good rapport with Major General Charles J. Simmons, the 3d Armored Division commander. In Fugh’s view, part of his success was due to his insistence—which he communicated at regular meetings to the captains in his legal operation—that they “do what’s right” and adhere to the highest professional and ethical standards. At the end of his assignment, Simmons frequently (and publicly) identified

²⁵ Headquarters, U.S. Dep’t of Army, Gen. Order No. 5641 (27 June 1970).

²⁶ Patoir & Rofrano, *supra* note 3, at 69-70.

²⁷ *Id.*

²⁸ *Id.* at 74.

²⁹ *Id.*

³⁰ *Id.* at 82.

³¹ *Id.*

³² *Id.* at 83.

³³ *Id.* at 89-91.

Fugh and his Inspector General as the two officers he valued the most on his staff.³⁴

After his job at the 3d Armored Division ended, Fugh attended the Army War College. After graduation in 1979, the Fugh family moved to Washington, D.C., where Fugh assumed duties as Special Assistant for Legislative and Legal Policy Matters, Office of the Assistant Secretary of Defense. It was the first time that Fugh had served in the Pentagon, but he excelled in this high profile position and worked a number of politically-sensitive issues. Those included whether the American Federation of Government Employees would be permitted to unionize the military, the extent to which former (usually civilian) spouses of military personnel were entitled to a portion of their military retired pay, and whether the services should have a uniform policy on administrative separations for homosexual conduct.³⁵ At this high level, Fugh worked to find a middle ground that was acceptable to as many interests as possible. As he put it:

I'm not saying that you've got to be political in giving an answer. What I'm saying is that your answer must be legally correct, but more important is how you present it. You can guide your listener to the right decision without sounding confrontational or argumentative about it.³⁶

In 1982, now Colonel Fugh became the Chief of the Army's Litigation Division. This was an immensely important job, and very challenging, as Fugh was representing the Secretary of the Army in federal court litigation. He had overall responsibility for ten divisions: contract law; civilian personnel law; litigation; procurement fraud (which he established); environmental law (which Fugh also stood up); contract appeals; defense appeals; trial defense service; regulatory law; and intellectual property.³⁷

Success in this position certainly accounts for Fugh being promoted to brigadier general on August 1, 1984. This was a historical first in the U.S. Army—the first time in history that an American of Chinese ancestry had reached flag rank.³⁸ Just as today, there were very few Chinese-Americans in uniform in the 1980s. According to Fugh, this was the result of a bias against military service in Chinese culture. Those Chinese who desired a career with the government in imperial China, for example, looked for positions as civil servants. “Good iron is not used to make a nail, nor a good man to become a soldier” was an old Chinese proverb, and Fugh believed this explained why a ‘good man’ would seek to be a civilian

official rather than a soldier. His military career, he readily admitted, was an anomaly.³⁹

With one star on each shoulder, Fugh now assumed duties as the Assistant Judge Advocate General for Civil Law. In this new job, he expanded the role of Army lawyers by helping establish a one-year fellowship program at the Department of Justice and arranging for experienced judge advocates to be appointed as Special Assistant U.S. Attorneys to prosecute felonies in U.S. District Courts near large Army posts, such as Fort Bragg, North Carolina.⁴⁰



Retired Major General Robert Murray with Fugh in 2008

In July 1988, Brigadier General Fugh returned to China for the first time since he had fled with his mother in 1949. He accompanied General Max Thurman, who was then commander of Training and Doctrine Command, and who would later serve as Army Vice Chief of Staff. The purpose of the trip was to have greater military-to-military contact with the People's Liberation Army. Just as he had experienced when assigned to the MAAG in Taiwan, the Chinese questioned Fugh's allegiance. In Shanghai, a young woman asked Fugh in Chinese why he was wearing an American uniform. “Are you a counterfeit? Are you a fraud? If there's a war between China and the United States, which side will you be on?” Fugh stopped, looked at her and replied, “Which side do you think I'll be on?” That was the end of the conversation.⁴¹

In May 1989, Fugh was nominated to be a major general and to serve as The Assistant Judge Advocate General. Major General William K. Suter, then serving as The Assistant Judge Advocate General, was nominated to be The Judge Advocate General.⁴²

³⁴ *Id.* at 97, 103-04.

³⁵ *Id.* at 116-17.

³⁶ *Id.* at 142.

³⁷ *Id.* at 122-26.

³⁸ Kuzma, *supra* note 1.

³⁹ Patoir & Rofrano, *supra* note 3, at 227.

⁴⁰ *Id.* at 133-34.

⁴¹ *Id.* at 146.

⁴² *Id.* at 182.

In the two years that followed, however, there was considerable personnel turbulence in the JAG Corps. As a result, in mid-1991, Fugh was a major general; he had been confirmed as the number two lawyer in the Army in late 1990. Major General Suter, however, who had been pending confirmation to be The Judge Advocate General, had not been confirmed; he retired after the Senate declined to advance him to the top spot in the JAG Corps. (Although his military career was at an end, Suter soon began a very prestigious second career as the Clerk of the U.S. Supreme Court—the top judicial administration job in the country.)⁴³

Personnel glitches at the brigadier general-level in the Corps also meant that when Fugh pinned on his second star, there were no more judge advocate one-stars. When Fugh had been nominated for a second star, this triggered the retirement of his fellow brigadier generals who had not been selected for promotion. But, as no colonels had had been selected and confirmed to be brigadier generals, Fugh was the lone active duty general officer in the Corps. Consequently, during operations Desert Shield and Desert Storm (which ran from August 1990 to February 1991), while officially acting as the number two lawyer in the Army, Fugh was wearing all the general officer ‘hats’ in the JAG Corps.⁴⁴

In the high operational tempo of combat operations in Southwest Asia, Major General Fugh got a number of novel questions—and got them at all hours. Late one evening, for example, the Deputy Chief of Staff for Personnel asked Fugh if there would be an “environmental problem” if the Iraqis used chemical or biological weapons against U.S. troops, and if the remains of those killed by such weapons were transported to the United States for burial. When an Army UH-60 was shot down over Iraq and its crew taken prisoner and paraded on Baghdad television, the Defense Department’s top lawyer called Fugh on Sunday morning to get advice on the applicability of the Geneva Conventions to this event.⁴⁵

Fugh was also asked about decisions made by judge advocates in the field. He received a telephone call in the middle of the night from a Marine brigadier general in Saudi Arabia. This officer was calling on behalf of General H. Norman Schwarzkopf, who was questioning legal advice provided by Colonel Raymond P. Ruppert, the top lawyer at U.S. Central Command. The issue was whether a statue of Saddam Hussein, located in a prominent park in Baghdad, could be targeted by U.S. Central Command aircraft. This was prior to the start of the ground war, but the air campaign was under way and there was a great desire on the part of “our

pilots” to “take it out.”⁴⁶ Ruppert, however, advised against destroying the statue; he argued that it was not militarily necessary and would arguably constitute a violation of the law of armed conflict.⁴⁷ ‘Was this good legal advice?’ asked the Marine general. As Fugh remembered it, when he arrived in the Pentagon a few hours later, he studied some aerial photographs of the statue in the park and the surrounding area. There was no question that Colonel Ruppert was correct. Fugh then made a telephone call to the Marine one-star to confirm both the legality and wisdom of Ruppert’s legal advice, but he made sure that this call was placed to Saudi Arabia in the middle of the night.⁴⁸

The 100-hour war with Saddam Hussein ended in February 1991; Fugh was elevated to be The Judge Advocate General on April 2, 1991. He subsequently implemented a number of changes to the JAG Corps. One was a new policy on term limits: judge advocates serving as either The Judge Advocate General or The Assistant Judge Advocate General (today’s Deputy Judge Advocate General) were limited to four year terms. That is, the Assistant TJAG could not ‘flight up’ to become the TJAG. Additionally, any judge advocate one-star not selected for promotion was required to retire. In Fugh’s view, these reforms were necessary to ensure that deserving colonels had opportunities for promotion to flag rank—opportunities that were limited when one person could be the number two lawyer in the Army and then move up to the top spot.⁴⁹

Fugh also decided that the time had come to better integrate Army Reserve lawyers into the active duty JAG Corps. There had been no overseas deployment of Army Reserve troops for many years (Reservists did not participate in the Vietnam conflict). Yet, of the more than 270 judge advocates who had deployed to the Persian Gulf region in 1990, one-third were from the Reserve. Recognizing the important contributions of these Reservists—and understanding that they would play an important role in future military operations—Major General Fugh directed that the Corps’ world-wide legal conference, previously restricted to active duty judge advocates, now include Army Reserve and National Guard lawyers.⁵⁰

⁴³ Michael Kirkland, *Under the U.S. Supreme Court: Bill Suter Stepping Down after 22 Years*, UPI, <http://www.upi.com/Under-the-US-Supreme-Court-Bill-Suter-stepping-down-after-22-years/95101358075280/> (last visited June 27, 2016).

⁴⁴ Patoir & Rofrano, *supra* note 3, at 186.

⁴⁵ *Id.*

⁴⁶ *Id.* at 201.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 193.

⁵⁰ *Id.* at 137.

Finally, for the first time in JAG Corps history, Fugh spearheaded efforts to create a vision for the Corps. He wanted “a succinct statement that would inspire, be clear and challenging, be about excellence, stand the test of time ... be a beacon to guide us, and empower our people.”⁵¹ As a result, in April 1991, Fugh approved the following vision for the Corps: “to be the most competent, ethical, respected, and client-supportive group of legal professionals in public service.”⁵² While wording has changed over the years, the spirit of Major General Fugh’s vision for the delivery of legal services in the Army very much remains in place more than 25 years later.⁵³

Fugh retired in 1993, after two years as The Judge Advocate General. He could have stayed in this position until 1995, but decided that “it was time to go because ... the JAG Corps needed new leadership.”⁵⁴

Fugh initially joined a large law firm but, after less than a year, was hired by McDonnell Douglas to head up its operations in China. It was the perfect position for John Fugh, given his background and expertise. He and his wife, June, took up residence in Beijing in August 1995, and Fugh began working with the Chinese aviation community. Since McDonnell Douglas wanted to sell passenger aircraft to the Chinese airlines, this was Fugh’s chief focus in his work.⁵⁵

After Boeing acquired McDonnell Douglas, Fugh left the aviation industry for a new job: Chairman of Enron-China. At the time, Enron was heavily involved in building natural gas pipelines and power stations in China. After returning to the United States in February 2000—after four and one half years in China—Fugh worked in Enron’s Washington, D.C. office, where he lobbied for trade legislation that would benefit the U.S. business community in China.⁵⁶

After his retirement from Enron in 2001, Fugh “deepened his involvement with the Committee of 100, an elite Chinese-American advocacy organization,”⁵⁷ and ultimately served as the chairman of the group. During this time, Fugh also worked to fulfill a long-held desire to have Ambassador Stuart’s ashes buried on Chinese soil. Since it was Stuart who had made it possible for the Fughs to begin a new life in America, John Fugh believed that it was only fitting that he work to repatriate Stuart’s remains to China—which Stuart himself desired since he had been born in China in 1876.⁵⁸

However, during Mao Zedong’s lifetime, such a repatriation was impossible. When Stuart died in 1962, the

Chinese insisted that no symbol of American imperialism could be buried on Chinese soil. But, working through the Committee of 100, John Fugh “won an audience with powerful Chinese Politburo members, who granted their approval” for the return of Stuart’s remains. “This is a promise that has been fulfilled after half a century,” John Fugh told the New York Times. “Now, Ambassador Stuart and my father can rest in peace.”⁵⁹



Fugh, left, with Ambassador Stuart and Fugh’s father in 1957.

John Fugh died at the National Naval Medical Center in Bethesda in May 2010, aged 75. Given his remarkable life—from teenager in China to the top uniformed lawyer in the Army—he is not likely to be forgotten. Major General Fugh will always be the first American of Chinese ancestry to reach the stars. He also will be remembered every other year at a two-day JAG Corps symposium named in his honor. At this gathering held at The Judge Advocate General’s Legal Center and School in Charlottesville, Virginia, scholars and practitioners from around the world come together to discuss current legal issues in military operations—a fitting acknowledgement of Fugh’s significant contributions to military law.⁶⁰

⁵¹ *Id.* at 211.

⁵² John L. Fugh, *Address to the JAG Regimental Workshop*, ARMY LAW., June 1991, at 3, 6.

⁵³ *JAGC Mission and Vision*, JAGCNET <https://www.jagcnet.army.mil/Sites/jagc.nsf/homeContent.xsp?open&documentId=DEE613DFEC84B73B852579BC006142CE> (last visited July 6, 2016).

⁵⁴ Patoir & Rofrano, *supra* note 3, at 212.

⁵⁵ *Id.* at 220-21.

⁵⁶ *Id.* at 59.

⁵⁷ Bernstein, *supra* note 2.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Jane Leung Larson, *Major General John L. Fugh Annual Symposium on Law and Military Operations*, COMMITTEE OF 100 (Aug. 2010), http://committee100.typepad.com/committee_of_100_newslett/2010/08/maj-or-general-john-l-fugh-annual-symposium-on-law-and-military-operations.html.

Lore of the Corps

The History of the Paperback Manual for Courts-Martial*

By Fred L. Borch
Regimental Historian & Archivist

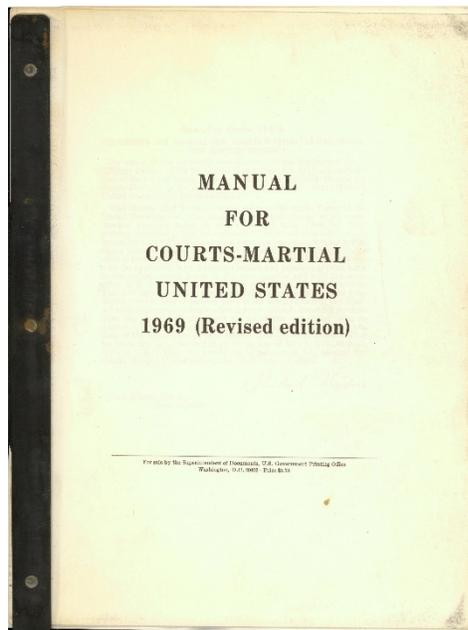
The paperback *Manual for Courts-Martial (MCM)* used by judge advocates, legal administrators, paralegals and civilian practitioners today has been in existence for twenty years. What follows is the story of how that happened—since the *MCM* was in either a hardcover book or hardcover loose-leaf format for the first 100 years of its existence.

For nearly seventy-five years, the *MCM*, first published in 1895, was a hardcover book. Even with the enactment of the Uniform Code of Military Justice (UCMJ) in 1950, the complementary *MCM* was issued as a six inch by nine inch hardcover book when published in 1951.¹

The first break with this tradition occurred in 1969, when the new *MCM* complementing the Military Justice Act of 1968 was published in a loose-leaf format. While still having a stiff board cover, the pages of the new *MCM* were hole-punched along the left side in three places and housed in a maroon-in-color three-post binder. The center post in this binder could be unscrewed and the book dissembled so that additional pages could be added to the *MCM*. As a result, in the 1970s and early 1980s, when legislative changes to the UCMJ or executive orders amending Rules for Courts-Martial or similar provisions were made, additional pages were printed and distributed to the field. Practitioners then slipped these changes into the *MCM* binder. Some judge advocates attempted to update the 1951 *MCM* by taping or pasting new provisions into their *MCMs*, but this was hardly an ideal situation.²

In 1984, when the armed forces published a new *MCM*, the loose-leaf format adopted in 1969 was continued. The only difference was that the 1984 *MCM* was now contained in a two-ring binder type hardcover notebook.³

In 1991, Colonel (COL) Francis A. Gilligan, then serving as the Chief, Criminal Law Division, in the Office of The Judge Advocate General (OTJAG), recognized that the *MCM* was not user-friendly. This was chiefly because there had been nineteen changes to the *MCM* since 1984, and it was now difficult to know for certain if all these changes had been posted correctly. Additionally, judge advocates in the field complained that the over-sized *MCM* (it measured ten inches wide by eleven inches tall by six inches in thickness) was too large to carry comfortably under either arm). It definitely would not fit into a standard size brief case. The result was that Army lawyers and other military justice practitioners began dividing the *MCM* in 1984 into two or more parts so that it was easier to carry and use. But this was also an undesirable situation. Finally, the 1984 edition of the *MCM* was expensive to produce: It cost roughly \$100 a copy.⁴



Colonel Gilligan was familiar with West Publishing's softcover *Federal Criminal Rules of Procedure*, which West published on a yearly basis and was used by United States Attorneys and criminal

law practitioners. He wondered if it would be possible to transform the *MCM* into a similar paperback format. After consulting with the Army Publications and Printing Command, then located in the Hoffman Building in Alexandria, Virginia, Gilligan learned that not only had electronic publishing advanced to the point where the Army could produce a paperback *MCM*, but it would result in a truly

* The author would like to thank retired Colonel Francis A. Gilligan for his help in preparing this *Lore of the Corps*.

¹ See A MANUAL FOR COURTS-MARTIAL, ETC. (1895); A MANUAL FOR COURTS-MARTIAL AND OF PROCEDURE UNDER MILITARY LAW (1898); A MANUAL FOR COURTS-MARTIAL, ETC. (1905); A MANUAL FOR COURTS-MARTIAL, ETC. (1908); A MANUAL FOR COURTS-MARTIAL, U.S. ARMY (1917); A MANUAL FOR COURTS-MARTIAL, U.S. ARMY (1921); A MANUAL

FOR COURTS-MARTIAL, U.S. ARMY (1928); MANUAL FOR COURTS-MARTIAL, UNITED STATES (1951).

² MANUAL FOR COURTS-MARTIAL, UNITED STATES (rev. ed. 1969).

³ MANUAL FOR COURTS-MARTIAL, UNITED STATES (1984).

⁴ Telephone interview with Francis A. Gilligan, Colonel Retired, U.S. Army, June 29, 2016 [hereinafter Telephone Interview].

phenomenal cost savings: It cost \$2 for a paperback *MCM* versus \$100 for the loose-leaf hardcover notebook *MCM*.⁵

Another advantage of the new softcover *MCM* would be that it would be more suitable for deployments, and the Army of the mid-1990s was very much aware after the Persian Gulf War of 1991 that the future required rapid deployments and that judge advocates deploying with their units would benefit from a smaller softcover book.

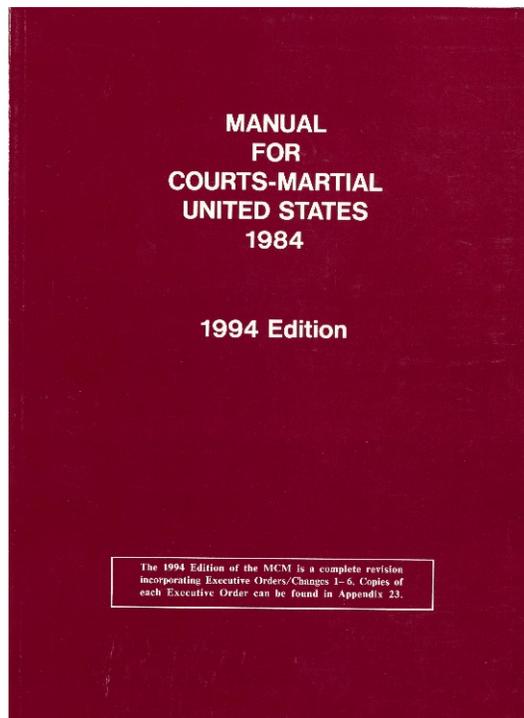
Colonel Gilligan, with the approval of the then Judge Advocate General, Major General John L. Fugh, proposed the metamorphosis of the *MCM* to the Joint Service Committee (JSC) on Military Justice. After obtaining unanimous approval from the five members of the JSC, the next step was the Office of the General Counsel (OGC), Department of Defense (DoD), since the new paperback *MCM* would need DoD GC approval. After Leigh Bradley, the Associate Deputy General Counsel with responsibility for military justice matters at the OGC's office, approved the concept, COL Gilligan began the *MCM* transformation process.⁶

While the Army Publications and Printing Command worked on the project, COL Gilligan left the Pentagon and OTJAG's Criminal Law Division and retired from active duty. His successors at OTJAG's Criminal Law Division, COLs Richard "Dick" Black and COL Charles "Charlie" E. Trant, pushed the project along. The details were worked out by the Joint Service Committee on Military Justice Working Group, which included Army Lieutenant Colonel Fred Borch, Air Force Major Regina Quinn, and Navy Lieutenant Kristen Henricksen.⁷ The working group took delivery of the first paperback *MCM*, 1984 (1994 edition) on September 28, 1994.⁸

Two weeks later, on October 11, 1994, Major General Michael J. Nardotti awarded now retired COL Gilligan the Department of the Army Commander's Award for Public Service. The citation for the award lauded Gilligan's great vision in developing a redesigned paperback *MCM*, and noted that the transformation from a hardcover notebook to a smaller softcover book had resulted in a savings of \$5.2 million dollars to the Department of the Army, Department of Defense, and the federal government.⁹

The plan was to annually publish a new *MCM* since it was the practice for the president to sign an executive order amending the *MCM* on a yearly basis and any statutory changes to it likewise occurred. But that has not happened, and the *MCM* has been re-published only every three or four

years. As a result, the current in-print version of the *MCM* is often out-of-date. Consequently, practitioners must consult the Internet to ensure that they have the most up-to-date version of a particular *MCM* provision. Despite this inconvenience, the paperback *MCM* has been a tremendous success and is likely to remain in this all-paper format for the foreseeable future.¹⁰



Manual for Courts-Martial, 1994 Edition

⁵ *Id.*

⁶ E-mail from Paul S. Koffsky, Deputy General Counsel (Personnel & Health Policy), Dep't of Def., to author (July 15, 2016) (on file with author).

⁷ The Joint Service Committee on Military Justice, established by Department of Defense Directive 5500.17, is responsible for conducting an annual review of the Manual for Courts-Martial in light of judicial and legislative developments in civilian and military practice. See *The Joint Service Committee on Military Justice*, U.S. DEP'T OF DEF.,

http://www.dod.gov/dodgc/images/jsc_mission.pdf (last visited July 25, 2016).

⁸ MANUAL FOR COURTS-MARTIAL, UNITED STATES (1994).

⁹ U.S. Dep't of Army, DA Form 5231, Commander's Award for Public Service, Colonel Francis A. Gilligan (Retired) (Oct. 11, 1994).

¹⁰ Telephone Interview, *supra* note 4.

Lore of the Corps

“Electric Ladyland”¹ in the Army:

The Story of Private First Class Jimi Hendrix in the 101st Airborne Division

By Fred L. Borch
Regimental Historian & Archivist

Despite the many years that have passed since the untimely death of musician James “Jimi” Hendrix in 1970, he is not forgotten by lovers of American music generally and rock-and-roll in particular. “Purple Haze,” “The Wind Cries Mary,” and “All Along the Watchtower” continue to get airplay. *Rolling Stone* considers him to be the greatest guitar player of all time.² But many who admire Hendrix’s skill with a guitar do not know that he served as a paratrooper in the 101st Airborne Division, and that he was able to cut short his three-year enlistment because of his knowledge of military law and regulation.

Born in Seattle, Washington the day after Thanksgiving in 1942, Jimi grew up poor and dropped out of high school. Some of his African-American male friends, who like Hendrix had few job opportunities, joined the armed forces.³ Jimi also thought about enlisting—especially after he was arrested by the local police twice within four days for riding in a stolen car. Facing up to ten years in jail, Jimi learned that the Seattle prosecutors often accepted a stint in the service as part of a plea bargain.⁴ As a result, Hendrix went to an Army recruiter in Seattle and asked if it was possible to join the 101st Airborne Division; he had read about the “Screaming Eagles” and wanted to be a paratrooper.⁵

Jimi’s instincts were good. On May 16, 1961, a public defender representing Hendrix struck a plea bargain with the

local district attorney: Jimi would receive a two-year suspended prison sentence on the condition that he enlist in the Army. The following day, Hendrix enlisted for three years as a supply clerk and shipped out to Fort Ord, California, for basic training.⁶



Jimi Hendrix

At first, Private Hendrix liked military life and, after two months at Fort Ord, he received orders to Fort Campbell, Kentucky. He arrived there on November 8, 1961, and immediately began airborne training. After earning his parachutist badge, now Private First Class Jimi Hendrix discovered that he liked the Army—and soldiering—less and less. This was because the military was interfering with his true love: rock-and-roll music. Hendrix had his guitar with him and he formed a band with his friends⁷ and they “got weekend gigs in Nashville and at military bases as far away as North Carolina.”⁸

Private Hendrix was a high school dropout, but he was no fool. He knew that he could not simply quit the Army, and if he went AWOL, he might be court-martialed and go to prison. In April 1962, having finished just ten months of his thirty-six-month enlistment, Jimi spoke to an Army psychiatrist at Fort Campbell. He told him that “he had developed homosexual tendencies and had begun fantasizing about his [male] bunkmates.”⁹ On a subsequent visit, Hendrix told the doctor that he was “in love” with a member of his squad.¹⁰

While these were fabricated claims about his sexuality, Jimi knew that under existing Army regulations, this was an

¹ “Electric Ladyland” was the name of the critically acclaimed album released by Jimi Hendrix and his band, “The Jimi Hendrix Experience,” in 1968. It showcased Hendrix’ incredible talents with the guitar and contained the hit cover of Bob Dylan’s “All Along the Watchtower.” See *Jimi Hendrix: Electric Ladyland*, ROLLING STONE (Nov. 9, 1968), <http://www.rollingstone.com/music/albumreviews/electric-ladyland-19681109>.

² *100 Greatest Guitarists*, ROLLING STONE (Dec. 18, 2015), <http://www.rollingstone.com/music/lists/100-greatest-guitarists-20111123>. After Jimi, the list names the next five greatest guitarists of all time as: Slash from Guns ‘N’ Roses, B.B. King, Keith Richards, Jimmy Page, and Eric Clapton. *Id.*

³ CHARLES L. CROSS, ROOM FULL OF MIRRORS: A BIOGRAPHY OF JIMI HENDRIX 78 (2005).

⁴ *Id.* at 82.

⁵ *Id.*

⁶ *Id.* at 82-83.

⁷ One such friend was Billy Cox, also assigned to Fort Campbell, who later played with Jimi on the “Band of Gypsies” album. *Id.* at 290.

⁸ *Id.* at 92.

⁹ *Id.* at 93.

¹⁰ *Id.*

exit strategy that could get him out of uniform. Under Army Regulation (AR) 635-89, *Personnel Separations—Homosexuals*, a homosexual Soldier was subject to separation because his presence in the Army “impairs the morale and discipline of the Army.”¹¹ According to the regulation, this unfitness to serve resulted from the fact that “homosexuality is a manifestation of a severe personality defect which appreciably limits the ability of such individuals to function effectively in society.”¹²

Under AR 635-89, a Soldier who, demonstrated “by behavior a preference for sexual activity with persons of the same sex,” could be discharged with a general or an undesirable discharge—although an honorable discharge might be given in exceptional cases.¹³ Private Hendrix was sufficiently familiar with the regulation that he knew what he needed to say and, as a result the Army finally gave in. In May 1962, Captain (Dr.) John Halbert administered a comprehensive medical examination to Hendrix. Halbert concluded that Jimi suffered from “homosexuality” and recommended that he be discharged because of his “homosexual tendencies.”¹⁴

Jimi Hendrix was discharged from the Army and began a red-hot career as a musician. He never admitted how he had used his knowledge of Army regulations to obtain an “early-out” and return to civilian life. On the contrary, he told his friends that he had broken his ankle on his twenty-sixth jump and had been discharged for this physical disability.¹⁵ Private First Class Hendrix must have received at least a general discharge under honorable conditions, as his final paycheck included “a bonus for twenty-one days of unused leave.”¹⁶

Had he lived longer, Jimi Hendrix likely would have been surprised at the changing attitudes about the lesbian, gay, bisexual, and transgender (LGBT) community in America, and in the Army in which he had soldiered. Unfortunately for Hendrix, his “reckless mixing of drugs and alcohol” at age twenty-seven resulted in his death on September 18, 1970.¹⁷

Jimi Hendrix is not the only musician—or celebrity—to have served in the armed forces. Johnny Cash served in the Air Force from 1950 to 1954 and Elvis Presley was in the Army from 1958 to 1960. But only Jimi Hendrix was a paratrooper, and it seems that his knowledge of the law and regulations got him back into civilian life earlier than might have been expected.¹⁸

¹¹ U.S. DEP’T OF ARMY, REG. 635-89, PERSONNEL SEPARATIONS—HOMOSEXUALS para. 2.a. (8 Sept. 1958).

¹² *Id.*

¹³ *Id.* para. 3.a.

¹⁴ Cross, *supra* note 3, at 94.

¹⁵ The Jimi Hendrix website owned and operated by members of the Hendrix family perpetuates the false story of Hendrix being “discharged

due to an injury he received in a parachute jump.” *James Marshall Hendrix*, JIMI HENDRIX, <http://www.jimihendrix.com/biography> (last visited Aug. 1, 2016).

¹⁶ Cross, *supra* note 3, at 94.

¹⁷ *Id.* at 333.

¹⁸ For more on celebrities in the armed forces, see Roger Di Silvestro, *Stars Who Served*, MILITARY HISTORY, Sept. 2016, at 40.

Lore of the Corps

“For Excellence” as a Junior Paralegal Specialist/Noncommissioned Officer: The History of the Sergeant Eric L. Coggins Award

“I only wish I could put on my uniform and soldier one more time.”¹

*Fred L. Borch
Regimental Historian and Archivist*

Those fourteen words above, spoken by Sergeant (SGT) Coggins shortly before his untimely death, speak volumes about both his character and his love for our Corps and our Army. These words also explain why the Sergeant Eric L. Coggins Award for Excellence was created in 1998.²

Born in May 1973 in Shelby, North Carolina, Eric L. Coggins was the son of John D. Coggins and the late Kwang Chayi Coggins, who John Coggins met while in the Army in Korea. Eric attended East Rutherford High School in Forest City, North Carolina, where his extracurricular activities included weight lifting, speech and debate. He was also active in the church youth group at the Tanner’s Grove United Methodist Church.³

When his father had to leave the area in 1989, Eric went to live with Carlton “Lee” and Janice Waugh. They were the parents of John Waugh, a high school classmate of Eric’s who also was a good friend. The Waughs became Eric’s foster parents and Eric soon considered himself to be a part of the Waugh family.⁴

After graduating from high school in 1991, Eric enlisted in the Army. He completed basic and advanced individual training, and earned his wings as a parachutist at Fort Benning, Georgia. After serving as an airborne Soldier at Fort Bragg, North Carolina, Coggins volunteered for a twelve month tour in the Republic of Korea. One of this reasons for choosing Korea was to be reunited with his mother, who had returned to her native home several years earlier. Unfortunately, she died a few months before now Specialist Four (SP4) Coggins arrived in Seoul.⁵

Assigned to the 2d Infantry Division at Camp Casey, SP4 Coggins soon demonstrated such truly outstanding abilities as a legal specialist (as paralegals were then called) as well as such superb leadership skills, that he was chosen to

be the noncommissioned officer-in-charge (NCOIC) of the 1st Brigade legal office.⁶

After his tour in South Korea, SGT Coggins volunteered for a deployment to Kuwait, and after arriving in March 1996, he became the NCOIC of the Camp Doha legal office. Despite the difficult conditions, he excelled in this assignment. When Iraq once again threatened Kuwait, SGT Coggins was among the first to volunteer for squad automatic weapons training and serve as a machine gunner on the Camp Doha perimeter. Later, Coggins also asked to be trained as a tank gunner. He became so proficient that he was selected as the gunner on the commander’s tank.⁷

Although his future as a Soldier was incredibly bright, SGT Coggins’ career was cut short in September 1996 when he was diagnosed with liver cancer. He was medically evacuated to Walter Reed Army Medical Center, where he learned that his cancer had metastasized and that his prognosis for recovery was grim.⁸

Major General (MG) Walter B. Huffman, then serving as The Judge Advocate General, visited SGT Coggins several times at Walter Reed. Major General Huffman was so impressed with Eric’s spirit and attitude that ten days before SGT Coggins was medically retired and left the hospital to return to Forest City, North Carolina, MG Huffman presented him with the Legion of Merit. This high level decoration, rarely if ever awarded to a junior noncommissioned officer, reflected the character of SGT Coggins’ service to our Corps and our Army. As might have been expected, Eric Coggins response to receiving the Legion of Merit was to tell MG Huffman: “I only wish I could put on my uniform again and Soldier one more time.”⁹

Eric Coggins spent his final days in the Waugh home, where his second family cared for him. He died in November 1996. Eric Coggins was just twenty-three-years-old.¹⁰

¹ TJAGSA Alumni Association, *SGT Eric Coggins: A Profile in JAG Corps Excellence*, REGIMENTAL REPORTER, Winter 1998, at 7 [hereinafter *SGT Eric Coggins*].

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

In 1998, convinced that SGT Coggins had been a model Soldier for all paralegals to emulate, MG Huffman established the Sergeant Eric L. Coggins Award for Excellence. The award was to be given annually to the junior “Legal Specialist/NCO who best approaches the standards of legal and Soldier excellence” for which Eric Coggins was known.¹¹

Today, any active, reserve, and National Guard Soldier who possesses the 27D Primary Military Occupational Specialty (PMOS), and is the grade of Specialist (E-4) through Staff Sergeant (E-6), is eligible for the award. That Soldier must “embody Army and JAG Corps’ values . . . and must demonstrate exceptional Soldier and paralegal skills.”¹² In this regard, the Soldier’s last two Army Physical Fitness Test scores must be 250 points or higher (although this may be waived for individuals with a valid medical profile). Finally, “a specific, noteworthy military or civic achievement may be an additional factor” in the selection of a recipient, but “will not be the sole reason for selection.”¹³ Nominations from the field are considered by a selection board appointed by The Judge Advocate General (TJAG). That board, one member of which must be the Regimental Command Sergeant Major of the JAG Corps, evaluates the nominations and makes a recommendation to TJAG, who determines the honoree.¹⁴

On June 15, 1998, MG Huffman and Sergeant Major (SGM) Howard Metcalf, then serving as the Regimental Sergeant Major, presented the first Coggins award to Staff Sergeant (SSG) Michelle Winston. At the time, SSG Winston was serving in the Office of the Staff Judge Advocate, III Corps and Fort Hood. She was presented with a plaque during the 9th Senior Legal NCO Management Course at The Judge Advocate General’s School. Coggins’ foster mother, Janice Waugh, also participated in the ceremony, along with SGT Coggins’ father, John Coggins.¹⁵

Today, the Coggins Award is presented during the Advanced Law for Paralegal and Law for Paralegal Courses, usually in May of each year. Whenever possible, TJAG makes the award personally. Mrs. Janice Waugh has been present, and participated in, every Coggins Award from its inception in 1998.¹⁶ Recipients receive a number of items, including an Army Commendation Medal awarded by TJAG, a challenge coin from the Sergeant Major of the Army, and a NCO sword from the Judge Advocate General Corps Retired NCO Association.

Sergeant Eric L. Coggins was the epitome of a Soldier and a paralegal, and his courage in the face of adversity has been an inspiration to all who hear his story. The Coggins Award ensures that he will not be forgotten and that paralegals who follow him have a model to emulate.

Since the inaugural award in 1998, the following paralegal specialists have been recipients of the SGT Coggins award:

| | |
|------|--|
| 1999 | SGT David Panian ¹⁷ |
| 2000 | SSG Michelle Browning ¹⁸ |
| 2001 | SGT Ryan L. Wischkaemper |
| 2002 | SSG Melissa Burke ¹⁹ |
| 2003 | SSG Osvaldo Martinez, Jr. ²⁰ |
| 2004 | SSG Troy D. Robinson |
| 2005 | SSG Joshua L. Quinton ²¹ |
| 2006 | no award |
| 2007 | SSG Francisco R. Ramirez ²² |
| 2008 | SSG Samuel R. Robles ²³ |
| 2009 | SSG Jose A. Velez ²⁴ |
| 2010 | SSG Juan C. Santiago ²⁵ |
| 2011 | SSG Margarita G. Abbott ²⁶ |
| 2012 | SSG Raymond E. Richardson, Jr. ²⁷ |

¹¹ TJAGSA Alumni Association, *First Coggins Award Presented*, REGIMENTAL REPORTER, Winter 1998, at 6 [hereinafter *Coggins Award Presented*].

¹² Memorandum from Command Sergeant Major (CSM) Joseph P. Lister, subject: Memorandum of Instruction, 2016 SGT Eric L. Coggins Award of Excellence (21 Dec. 2015).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *SGT Eric Coggins, supra* note 1.

¹⁶ *Coggins Award Presented, supra* note 11.

¹⁷ Sergeant Panian successfully completed the “green-to-gold” program and is now an active duty major. He serves as the Executive Officer, 11th Armored Cavalry Regiment

¹⁸ Staff Sergeant Browning (now Austin) retired as a legal administrator and Chief Warrant Officer Four.

¹⁹ Master Sergeant Burke is currently attending the Sergeant Majors Academy. She previously served as the First Sergeant at the noncommissioned officer (NCO) Academy at The Judge Advocate General’s Legal Center and School, U.S. Army (TJAGLCS).

²⁰ Sergeant Major Martinez served as First Sergeant, Judge Advocate Officer Basic Course (JAIBC) Student Detachment.

²¹ Master Sergeant Quinton served as First Sergeant, Judge Advocate Officer Basic Course Student Detachment, and is now the Paralegal non-commissioned officer-in-charge at XVIII Airborne Corps and Fort Bragg.

²² Sergeant First Class Ramirez now serves as a paralegal at 7th Special Forces Group, Eglin Air Force Base.

²³ Master Sergeant Robles now serves as senior military justice operations NCO at 82d Airborne Division.

²⁴ Master Sergeant Velez is now a senior military justice operations NCO at U.S. Army Europe, Wiesbaden, Germany.

²⁵ Chief Warrant Officer 2 Santiago is now serving as a legal administrator in Kabul, Afghanistan.

²⁶ After serving as a court reporter at the 82d Airborne Division, Abbott successfully completed Officer Candidate School at Fort Benning, Georgia. Second Lieutenant Abbott is currently stationed at Joint Base Lewis-McCord, Washington.

²⁷ After his promotion to Sergeant First Class, Richardson applied for an appointment as a warrant officer and is now in helicopter pilot training at Fort Rucker, Alabama.

2013 SSG Ana I. Hairston²⁸
2014 SSG Angelica Pierce²⁹
2015 SGT Maran E. Hancock³⁰
2016 SSG Cardia L. Summers³¹

²⁸ Sergeant First Class Hairston is now a paralegal at I Corps, Joint Base Lewis-McChord.

²⁹ Sergeant First Class Pierce is now a paralegal at I Corps, Joint Base Lewis-McChord.

³⁰ Sergeant Major Hancock now serves as a paralegal at the 2d Stryker Brigade Combat Team, 2d Infantry Division, Joint Base Lewis-McChord.

³¹ Staff Sergeant Summers is now serving as the Senior Paralegal, 207th Military Intelligence Brigade, Vicenza, Italy.

Lore of the Corps

Thirty Years of Service to the Regiment: Philip Byrd Eastham Jr. (1950-2016)

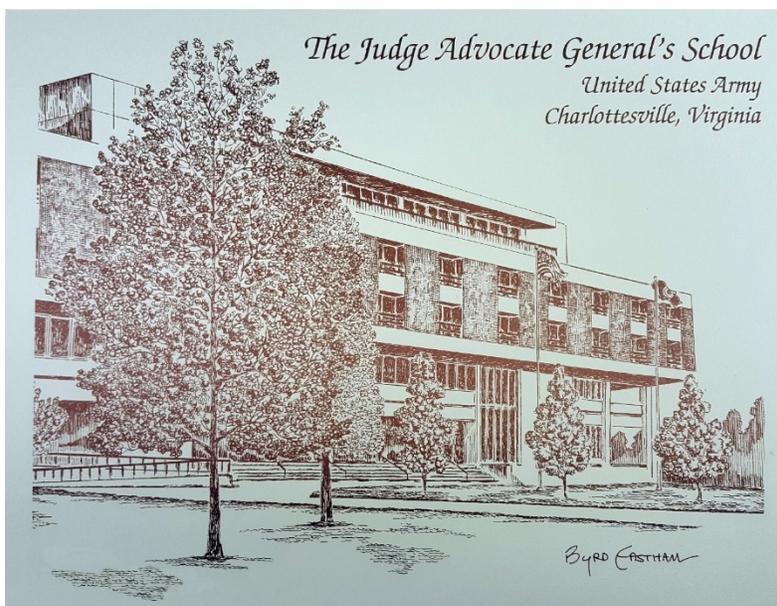
Fred L. Borch
Regimental Historian and Archivist

For thirty years, Philip Byrd Eastham, Jr. was a constant presence at The Judge Advocate General's Legal Center and School (TJAGLCS), and his contributions to our Regiment during those years were remarkable. This is his story.

Born in December 1950, Byrd grew up in rural Fauquier County, Va. He came from a long line of native Virginians, as his ancestors first arrived in what was then a British colony in 1629. In 1973, Mr. Eastham graduated Phi Beta Kappa from the College of William and Mary with a Bachelor of Arts. William and Mary also honored him with the Lord Botetourt Medal.¹ Byrd then studied in the United Kingdom, where he obtained a second Bachelor of Arts and also Master of Arts in Art History from Trinity College, Cambridge University.²

In 1976, then First Lieutenant Eastham, Adjutant General's Corps, was assigned to The Judge Advocate General's School, U.S. Army (TJAGSA), where he served as the Chief of the Visitor's Bureau. That same year, 1LT Eastham made his first long-lasting contribution to our Corps when he revived the TJAGSA Alumni Association's *Newsletter*. This publication (subsequently published as the *Regimental Reporter* after the Corps received 'Regimental' status in 1986),³ had fallen into a long hiatus. Byrd's revival of it ensured that alumni, and especially retirees, received news about both TJAGSA and the Corps.⁴

While serving in the Visitor's Bureau, 1LT Eastham "would occasionally be seen sketching at his desk" and, since his artistic skills were admired by TJAGSA's leadership, Byrd was hired as an artist/illustrator when he left active duty in 1981.⁵



From the beginning of his long tenure as an Army civilian employee, Mr. Eastham worked "closely with the faculty in developing a broad range of graphic arts products," including textbook and lecture program covers.⁶ Over the years, Byrd also designed a number of t-shirt logos celebrating the annual conferences held at TJAGSA (today's World Wide Continuing Legal

Education conference). He also did some of the artwork for the Regimental Distinctive Insignia adopted by the Corps in 1986,⁷ and developed the logo of the U.S. Army Claims Service. Finally, Mr. Eastham worked with faculty and visual media personnel to develop artwork incorporated into instructional videos.⁸

Mr. Eastham also was in charge of the design and layout of the School's "Annual Bulletin," which contained the Commandant's annual report, resident and non-resident course catalogues, and information about various academic

¹ The Lord Botetourt Medal is presented each year to the undergraduate student "who has most distinguished him- or herself in scholarship." *THE LORD BOTETOURT MEDAL*, COLLEGE OF WILLIAM & MARY, <http://www.wm.edu/sites/commencement/awards/lord-botetourt-medal/index.php> (last visited November 4, 2016). During the spring semester, academic department chairs are notified of undergraduate students whose academic records merit their consideration for the Botetourt Medal. *Id.* Those department chairs are asked to submit letters of recommendation on behalf of eligible students whom they wish to see considered for this singular honor. *Id.*

² *The Byrd-Man of TJAGSA*, REGIMENTAL REPORTER, Fall 1989, at 7.

³ For more on the Corps' status as a Regiment, see Fred L. Borch, *The Origin of the Corps Distinctive Insignia*, THE ARMY LAWYER, Oct. 2012, 1-3.

⁴ REGIMENTAL REPORTER, *supra* note 2.

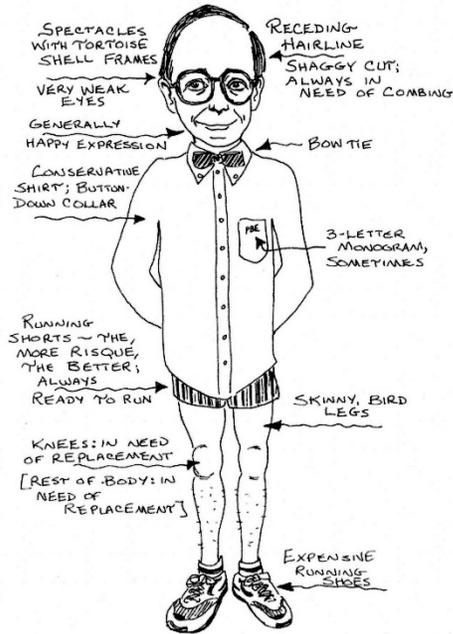
⁵ *Id.*

⁶ *Id.*

⁷ Borch, *supra* note 3.

⁸ REGIMENTAL REPORTER, *supra* note 2.

"THE BYRD MAN OF TJAGSA"
[A BYRD'S-EYE VIEW]



programs.⁹ This bulletin is still published on a yearly basis, although it now contains additional information on the activities of the Legal Center.

Byrd was an avid historian, especially when it involved the Charlottesville community and the University of Virginia. In 1987, he was commissioned by a New York publisher to develop a series of drawings for a book titled *Mr. Jefferson's Last Act*. Mr. Eastham's graphics have been used in promotional and educational materials for a variety of local sights, including: Ash Lawn, the home of President James Monroe; Monticello, the home of President Thomas Jefferson; and the University of Virginia's Bayly Museum of Art (renamed the Fralin Museum of Art in 2012).¹⁰

During the 1980s, Byrd's talents also were on display when his drawing of the building housing TJAGSA was reproduced and given as a gift to each departing member of the faculty and staff. Occasionally, Byrd also produced "an original sketch" that depicted the departing person "in a humorous manner." Accompanying this Lore of the Corps are both the drawing of the building and a self-portrait of Byrd. The latter exemplifies Mr. Eastham's self-deprecating sense of humor and drawing talents.¹¹

As the self-portrait suggests, Byrd was an avid runner. He ran two Marine Corps Marathons and participated in the

"Run for Your Life" program in which individuals at TJAGSA kept records of their weekly running mileage and then were recognized with a certificate signed by the TJAGSA commandant when they achieved certain running mileage goals. The accompanying photograph shows Byrd receiving a certificate attesting to his running abilities from Colonel Paul Jackson "Jack" Rice, about 1986.

Mr. Eastham retired in the summer of 2006, after a combined thirty years of military and civilian Federal Service. A few months later, in recognition of his many contributions to our Corps, Byrd Eastham was made an Honorary Member of the Regiment. This is an honor accorded very few men and women in history.¹²

In retirement, Byrd began a new career in the antiques business as the co-owner (with Ms. Jane deButts) of the Eternal Attic, a consignment shop located on Ivy Road in Charlottesville, Va. He left that business in 2011.¹³

After a long battle with Myeloma (cancer), Philip Byrd Eastham Jr. died at his home in Charlottesville on July 23, 2016. He was 65 years old. Byrd was survived by his spouse James Wootton; two brothers, and three nieces and a nephew. But he is not forgotten by those in the Corps who knew him, if for no other reason than Byrd was universally liked and admired by all.¹⁴



Byrd receives Running Award from Colonel Jack Rice

⁹ *Id.*

¹⁰ *Id.* Waldo Jaquith, *UVA Art Museum Renamed*, CVILLENEWS, <https://cvillenews.com/2012/05/22/uva-museum-renamed/> (last visited Nov. 3, 2016)

¹¹ REGIMENTAL REPORTER, *supra* note 2.

¹² Philip Byrd Eastham, Jr., DAILY PROGRESS, Aug. 1, 2016, B6.

¹³ *Id.*

¹⁴ *Id.*

Lore of the Corps

A Deserter and a Traitor: The Story of Lieutenant Martin J. Monti, Jr., Army Air Corps

By Fred L. Borch
Regimental Historian and Archivist

On October 2, 1944, Second Lieutenant (2LT) Martin J. Monti, Jr. deserted from his unit in Karachi, India. He was apprehended thousands of miles away, in Bari, Italy, on May 14, 1945, and was court-martialed for desertion and larceny three months later. An officer panel found him guilty and sentenced Monti to fifteen years confinement at hard labor.¹

A little more than three years later, in October 1948, Monti was indicted by a Federal grand jury for the crime of treason. In January 1949, he pleaded guilty to the offense in U.S. District Court in New York City, and was sentenced to 25 years imprisonment.² What follows is the amazing but true story of Monti's desertion and treason, and his trial by both court-martial and Federal civilian court.

Born near St. Louis, Missouri, in October 1921, Martin James Monti, Jr. was one of seven children. His parents, who were second generation Americans of Swiss-Italian and German ancestry, apparently raised him "in an environment later described as fervently religious, strongly anti-communist, laced with isolationist sentiments and opposed to the tenets of President Franklin D. Roosevelt's New Deal."³ Monti's views about life, people and politics also were shaped by Father Charles Coughlin. Known as the "Radio Priest" to his millions and millions of listeners, Coughlin broadcast weekly radio sermons in which he praised the leaders of Nazi Germany and Fascist Italy while blaming President Franklin D. Roosevelt, Jews, communists and capitalists for what ailed the United States.⁴ While there is no way to know whether Monti's subsequent treason was the direct result of his personal devotion to Coughlin, whom he visited in the summer of 1942, or his adherence to Coughlin's

worldview, these may be the best explanation for what happened.

In late November 1942, Monti enlisted as an aviation cadet in the U.S. Army Air Forces. He reported as an air cadet to Jefferson Barracks, Missouri, in February 1943 and eventually qualified as a fighter pilot in both the Lockheed P-38 Lightning and the Bell P-39 Airacobra.⁵ In August 1944, now Second Lieutenant (2LT) Monti reported for duty with the 126th Replacement Depot in Karachi, India.⁶

Sometime after arriving in India, Monti decided to desert and defect to the Germans. On October 2, 1944, the now 22-year-old Monti talked his way onto a C-46 transport plane and flew from Karachi to Cairo. Although he had no official travel orders, or any paperwork indicating he was assigned to a unit in Europe, 2LT Monti managed to get another flight from Egypt to Tripoli, and then still another flight to Naples, Italy. Naples had been captured by the Allies only ten days earlier.

Lieutenant Monti then went to the nearby Foggia airfield, which was now the headquarters of the US Army Air Force's 82d Fighter Group. He reported to the commander, insisted that he wanted to fly in combat, and requested a transfer from his Karachi-based unit to the 82d. Monti received a "discouraging reply," which he concluded was equivalent of 'no.'⁷

But Monti was persistent. He now went to another airfield near Naples, where the 354th Air Service Squadron was headquartered. This unit's mission was to repair and test aircraft before they were sent to air combat units.



Martin J. Monti, right, in light colored suit, is led from a federal court in Brooklyn after being sentenced to 25 years for treason.

¹ United States v. Monti, CM 291280, Records of the Office of the Judge Advocate General, Record Group (RG) 153, National Archives and Records Administration.

² United States v. Monti, 100 F. Supp. 209 (E.D.N.Y. 1951).

³ Ron Soodalter, *A Yank in the SS*, MILITARY HISTORY, Jan. 2017, at 40, 42.

⁴ *Id.*

⁵ Monti, *supra* note 1, at 31, U.S. War Dep't, Adj. Gen.'s Off. Form No. 115, Charge Sheet.

⁶ Today, Karachi is located in Pakistan. In 1944, however, Pakistan did not exist as an independent nation.

⁷ Monti, *supra* note 1, Statement, Captain Louis S. Wilkerson, Investigating Officer, Subject: Interrogation of 2LT Monti by U.S. CID Special Agent Anthony Cuomo, May 14, 1945.

Amazingly, 2LT Monti convinced the American military personnel at the 354th that he was a pilot from the nearby 82d and asked to take a Lockheed F-5E Lightning up for a “test flight.” When told he would need to get permission for such a flight, Monti instead simply climbed into the cockpit of an F-5E, taxied out the runway, and took off.⁸ Once in the air, Monti flew north to German-occupied Milan. He landed, surrendered to the Germans, and professed his unwavering allegiance to the Third Reich. The Germans were more than happy to have a brand-new American airplane (the F-5E was the reconnaissance version of the P-38), and the Luftwaffe removed the USAAF insignia, affixed German aircraft markings to the plane (including swastikas), and sent the plane to Germany for use there.⁹

As for Monti, while the Germans initially were suspicious of him, they soon decided that he was the ‘real deal.’ In November 1944, they sent Monti to Berlin, and enrolled him as an *SS-Untersturmführer* (Second Lieutenant) in *SS-Standarte Kurt Eggers*, a Waffen-SS propaganda unit.

Monti now began broadcasting English-language propaganda on the radio. Using his mother’s maiden name, he identified himself as “Captain Martin Wiehaupt,” and tried to persuade GIs listening to his broadcasts “all over the European theater” that the United States should be fighting with Germany against the Soviet Union, as Communist Russia was the “true enemy of world peace.”¹⁰

After a few broadcasts, however, the Germans were so unhappy with Monti’s lack of talent that “they pulled him off the air” and instead tasked him to write propaganda pamphlets destined for American POWs in German camps.¹¹

In April 1945, with defeat imminent and the Wehrmacht needing all its assets on the front-lines, *SS-Untersturmführer* Monti was ordered to join a combat unit in northern Italy. A month later, Monti surrendered to the U.S. Fifth Army in Milan.

In the weeks that followed, 2LT Monti was interrogated by a series of Army intelligence agents. He freely admitted that he had left his unit in Karachi, but claimed that “he had done so in order to wage a one-man war against the Germans.” Monti admitted that he had wrongfully appropriated the Lockheed F-5E Lightning, but only to take the fight to the Luftwaffe. As for the Waffen-SS uniform that he was wearing? Monti explained that he had been shot down and taken prisoner by the Germans. He claimed to have been in POW camps in Verona, Frankfurt and Wentzler. When he was being moved by train to yet another camp, he escaped.

He “roamed the countryside” and received help from Italian partisans, who dressed him in a German uniform so that he could more easily travel through Axis-held territory and return to Allied lines.¹²



The Lockheed P-38 Lightning flown by Monti repainted by the Luftwaffe with Germany markings

Monti may have thought that this story would get him out of trouble, but the Army was not pleased with his antics and, on May 31, 1945, charged him with desertion from October 2, 1944, to May 14, 1945, and with “wrongfully, knowingly and willfully” misappropriating “one P-38 aircraft.”¹³

On August 4, 1945, 2LT Monti was tried by a general court-martial convened by General Joseph T. McNarney, the Commanding General, Mediterranean Theater of Operations. The trial was held in Naples, Italy. At the end of a two day proceeding, Monti was found guilty of being absent without leave (instead of desertion) and wrongful appropriation. The panel of officers sentenced him to be dismissed from the service, to forfeit all pay and allowances and to be confined at hard labor for fifteen years.¹⁴

After Monti’s sentence was approved and after a brief period of confinement in Naples, Monti returned to the United States. He was imprisoned at the Eastern Branch, U.S. Disciplinary Barracks, located in Green Haven, New York.

But Monti did not stay idle for long in Green Haven. On the contrary, he was offered the opportunity to have his sentence remitted if he re-enlisted in the Army as a private. No doubt realizing that re-joining the Army was preferable to finishing his long sentence to confinement, Monti returned to the ranks in February 1946. He was assigned to Eglin Field, Florida¹⁵ and, two years later, was wearing sergeant’s stripes.

While Monti was serving his active duty in Florida, Army intelligence personnel were going through thousands and thousands of pages of captured German documents. Soon,

⁸ *Id.*

⁹ Soodalter, *supra* note 3, at 44.

¹⁰ *Id.*

¹¹ *Id.* at 46.

¹² *Monti, supra* note 7; Soodalter, *supra* note 3, at 46.

¹³ *Monti, supra* note 5.

¹⁴ Headquarters, Mediterranean Theater of Operations, Gen. Court-Martial Order No. 118 (18 Sept. 1945).

¹⁵ Today’s Eglin Air Force Base, located in the Florida panhandle near Panama City.

these men discovered references to *SS-Untersturmführer* Monti and his treasonous activities while in the *Waffen-SS*. With this evidence in hand, the Department of Justice moved quickly and, on October 14, 1948, Sergeant (SGT) Monti was indicted by a Federal grand jury in the Eastern District of New York for the crime of treason; the indictment alleged 21 overt acts.¹⁶

On November 1, 1947, the *Washington Post* revealed the story of Monti's desertion and treason and this caused the Army to immediately detain him.¹⁷ The Army now transferred SGT Monti from Eglin Field to Mitchel Field, located on Long Island, New York. On January 26, 1948, "immediately upon his receipt of a General Discharge Under Honorable Conditions,"¹⁸ Monti was taken into custody by U.S. civilian law enforcement authorities pursuant to a warrant of arrest for the crime of treason.¹⁹

On January 17, 1949, Monti appeared in U.S. District Court in Brooklyn, New York. He had previously entered a not guilty plea to the crime. Now, standing before Chief Judge Robert A. Inch, Monti withdrew this plea and informed the judge that he desired to plead guilty.²⁰

The U.S. Constitution states that "No Person shall be convicted of Treason unless on the Testimony of two witnesses to the same overt Act, or on Confession in open Court."²¹ Mindful of this requirement, "the defendant was advised of his rights, was duly sworn . . . took the stand, and in response to the questions propounded by the prosecuting attorney confessed in open court that he had voluntarily performed acts which constitute the crime of treason, including various of the overt acts alleged in the indictment."²²

During his testimony, Monti also acknowledged that he had read the indictment, understood it, and had discussed its contents with his two attorneys. Prior to imposing a sentence, Chief Judge Inch asked: "Now, Mr. Monti, do you want to say anything for yourself?" The accused replied: "No, sir." The judge then sentenced Monti to twenty-five years in jail and a \$10,000 fine.

Why did Monti withdraw his not guilty plea? Why did he not demand trial on the merits? It seems that Monti's counsel looked at a number of courses of action in preparing for trial, including offering psychiatric testimony about Monti's mental state at the time of his desertion and treason.

Ultimately, however, his lawyers decided "that overwhelming proof was available to the government to substantiate the allegations in the indictment," starting with Monti's 102-page written confession.²³

Monti's lawyers soon came to believe that if they went to trial, the defendant would likely be sentenced to death, or at least life imprisonment, given the facts and circumstances of the treason and the aggravating factor that Monti had been a commissioned officer in the Army. After "a consultation with the Trial Judge [Chief Judge Inch] and government counsel," Monti's two defense counsel told him that he should plead guilty and throw "himself on the mercy of the court." Such a course of action would avoid death or life imprisonment and, while Monti could expect a "severe" sentence, it would not be more than 30 years.²⁴ When Chief Judge Inch sentenced Monti to 25 years in jail, Monti should have understood that he had received good legal advice.

Within a short time of the trial results, and his arrival at the U.S. Penitentiary in Leavenworth, Kansas, Monti decided he was unhappy. He appealed his conviction on a variety of grounds, including a claim that he had been coerced by his lawyers to confess in open court. Monti also argued that his court-martial conviction barred his treason trial on double jeopardy grounds. His first appeal was denied in 1951²⁵ and a second appeal was denied in 1958.²⁶

Martin James Monti was paroled from Leavenworth in 1960, after serving eleven years of his sentence. He resettled in his home state of Missouri, and died there in 2000. He was 78 years old.

The court-martial of 2LT Monti, his restoration to active duty, and his subsequent treason trial in U.S. District Court are a unique set of events in military legal history. Additionally, his trial in Federal court stands out as probably the only American treason case involving a confession--the single exception to the two-witness rule in treason cases.²⁷

¹⁶ *Monti*, *supra* note 2, at 209.

¹⁷ Soodalter, *supra* note 3, at 47.

¹⁸ *United States v. Monti*, 168 F.Supp. 671, 672 (E.D.N.Y. 1958).

¹⁹ *Ex parte Monti*, 79 F.Supp. 651, 652 (E.D.N.Y. 1948).

²⁰ Robert A. Inch (1873-1961) served as the inaugural Chief Judge of the Eastern District of New York from 1948 to 1958.

²¹ U.S. CONST. art. III, § 3.

²² *Monti*, *supra* note 2, at 210.

²³ *Id.* at 212.

²⁴ *Id.* at 213.

²⁵ *Id.*

²⁶ *Id.* at 671.

²⁷ For another unusual treason case arising out of World War II, see Fred L. Borch, *Tried for Treason: The Court-Martial of Private First Class Dale Maple*, *ARMY LAW.*, Nov. 2010, at 4-6.

Lore of the Corps

The First Female Instructor in International Law and a Pioneer in Judge Advocate Recruiting: Michelle Brown Fladeboe (1948-2016)*

By Fred L. Borch
Regimental Historian and Archivist

Michelle B. Fladeboe (née Brown) was the first female instructor in the International Law Division at The Judge Advocate General's School, U.S. Army (TJAGSA). She was also the "face" of the Corps in early efforts to recruit more women to be Army lawyers. This is her story.

Born Michelle Bright Brown in Oak Ridge, Tennessee, on March 10, 1948, she graduated from Peabody Demonstration School in Nashville. Brown then started college at Emory University in Atlanta but transferred to the University of Colorado, from which she graduated Phi Beta Kappa in 1972. The following year, Michelle began law school at the University of Georgia. She developed an interest in public international law, and former Secretary of State Dean Rusk, then on the law school faculty, encouraged this interest.¹ Secretary Rusk also supported her efforts to get an advanced degree in the field. As a result, after graduating with honors from Georgia, Brown moved to the United Kingdom, where she completed an LL.M. in International Law at the London School of Economics in 1977.

After returning to the United States, Michelle applied for a direct commission in The Judge Advocate General's Corps, U.S. Army. She considered all the services, but was most attracted by the Army because it seemed to have the most opportunities to practice public international law. She also thought that the Army would be a good way to start a career in that field.²

After completing the 85th Judge Advocate Officer Basic Course (JAOBC) in December 1977,³ Captain (CPT) Michelle Brown was assigned to Heidelberg, Germany, where she assumed duties in the Office of the Judge Advocate, Headquarters, U.S. Army Europe (USAREUR) and 7th Army. At the time, with some 300,000 Soldiers stationed in Europe and the Cold War still very much a reality, the senior Army lawyer at USAREUR was Brigadier General Wayne Alley.⁴ There were a variety of international legal issues during

this time, and CPT Brown very much enjoyed working for Alley in the Opinions and Policy Branch of the International Affairs Division.⁵



Captain Michelle Brown, *ABA Journal*, September 1981.

* The author thanks Lieutenant Colonel Jan P. Fladeboe, U.S. Marine Corps (retired) for his help in preparing this Lore of the Corps.

¹ Born in Georgia in 1909, David Dean Rusk graduated from Davidson College (North Carolina) and St. Johns College, Oxford, where he was a Rhodes Scholar. He served in the Army during the Second World War and as Secretary of State during the Kennedy and Johnson Administrations (1961-1969). From 1970 to 1994, Rusk was a Professor of International Law at the University of Georgia Law School. Dean Rusk died in 1994. For more on Rusk's life and career, see DAVID DEAN RUSK, AS I SAW IT (1990).

² E-mail from Jan P. Fladeboe to author, Subject: Three Questions (Oct. 12, 2016, 2:58PM) (on file with author).

³ Personnel Data Sheet, Michelle B. Gottlieb, 85th Judge Advocate Officer Basic Course, Oct-Dec 1977.

⁴ After retiring from active duty, Brigadier General Wayne Alley became the Dean of the University of Oklahoma School of Law. He subsequently was nominated and confirmed as a U.S. District Judge for the District of Oklahoma, becoming only the second Army lawyer in history to retire from active duty and then serve as an Article III judge. For more on Alley's remarkable career, see George R. Smawley, *In Pursuit of Justice, A Life of Law and Public Service: United States District Court Judge and Brigadier General (Retired) Wayne E. Alley, U.S. Army, 1952-1954, 1959-1981*, 208 MIL. L. REV. 212 (2011).

⁵ Michelle Bright Brown, Staff and Faculty, 29th Graduate Class Directory, 1980-1981 [hereinafter 29th Graduate Class Directory].

She considered her time in Heidelberg to have been a “dream job” and was disappointed when the Corps cut short her tour in Germany by a year. But the Army decided that CPT Brown’s expertise could be best used in teaching others, and so Michelle returned to Charlottesville in May 1980 to be an instructor at TJAGSA.⁶



Captain Michelle Brown Gottlieb, 85th JAOCB, TJAGSA, ca. 1977.

As she departed Germany, her class work at USAREUR was recognized by the award of the Meritorious Service Medal, a high honor for a first-term captain who ordinarily might expect to receive an Army Commendation Medal.⁷

While not the first female judge advocate on the TJAGSA faculty,⁸ CPT Brown was the first female judge advocate to be a professor (then called an instructor) in the International Law Division. While certainly well-qualified with an LL.M. in international law and practical experience from her time in Heidelberg, Michelle’s assignment to the faculty was unusual in that she had less than three years in uniform and had only completed one tour of duty as an Army lawyer. She also had not completed the Graduate Course, the usual prerequisite for joining the TJAGSA faculty.⁹

For the next several years, CPT Brown served in the International Law Division and taught with a variety of more senior officers, including Majors Eugene D. (Gene) Fryer, David (Dave) R. Dowell, and Harold W. (Wayne) Elliott.

⁶ E-mail from Jan P. Flabeboe, *supra* note 2.

⁷ 29th Graduate Class Directory, *supra* note 5.

⁸ The first woman on the The Judge Advocate General’s School, U.S. Army (TJAGSA) faculty was Major Nancy Hunter, who taught criminal law in the early 1970s. Colonel Elizabeth Smith, Jr. had been the first female Army lawyer assigned to TJAGSA, but she had been on the staff in the 1960s.

⁹ Another example of a judge advocate whose expertise led to an early assignment on the faculty was Colonel (retired) David E. Graham. Then Captain (CPT) Graham was selected to stay and teach international law at TJAGSA after graduating from the Judge Advocate Officer Basic Course in 1971.

In early 1981, she was asked if she would be a part of the Army Judge Advocate General’s (JAG) Corps’ recruiting campaign. Captain Brown “was a bit unsure about it, but somehow was convinced to go up to New York City, where the Manhattan-based advertising firm of A. W. Ayer arranged a photo ‘shoot’ of her in uniform. A.W. Ayer is famous today having originated the Army’s phenomenally successful “Be All You Can Be” recruiting slogan, which was “the signature for all Army ads” for twenty years.¹⁰ Unfortunately, the firm’s success was overshadowed by its later legal troubles with the Army.¹¹

In any event, the JAG Corps was especially interested in attracting more female attorneys to its ranks, a process that had started ten years earlier with the creation of a Minority Lawyer Recruitment Program focusing on African-Americans and women.¹² Michelle Brown was a perfect



An Army Nurse Corps Recruiting Advertisement, ca. 1975

choice given her background and photogenic face, and a full-page recruiting advertisement identifying her as an “International Lawyer” appeared in a variety of publications, including the American Bar Association Journal in September 1981. While readers today might be surprised by obvious sex-appeal in the ad, it was very similar advertisements used by other Army branches, as shown in the accompanying recruiting photograph for the Army Nurse Corps.

Whether or not the advertisement brought more women (and men) into the Corps will never be known. But Michelle Brown “was a bit uncomfortable about the publicity that her ad received . . . she felt it detracted from her work on the

¹⁰ Tom Evans, *All We Could Be: How an Advertising Campaign Helped Remake the Army*, ON POINT, Jan. 2015, at 6-8.

¹¹ In late 1986, N.W. Ayer’s relationship with the Army collapsed when it was suspended (and then debarred) for procurement fraud. Ayer was found to have “engaged in time-card mischarging” between 1979 and 1983, and have conspired with its subcontractors to submit “collusive, rigged, noncompetitive bids.” Michael Isikoff, *N.W. Ayer Barred from U.S. Business*, WASH. POST, Nov. 26, 1986, at A1.

¹² In 1971, then CPT Kenneth Gray was asked to direct the inaugural Minority Lawyer Recruitment Program. His mission was to implement and coordinate the recruitment of all minority and women for the Corps. JUDGE ADVOCATE GENERAL’S CORPS, THE ARMY LAWYER 251 (1975). Gray later served as The Assistant Judge Advocate General of the Army and retired as a major general in 1997.

podium” at TJAGSA.¹³ As for the photo shoot itself, Brown remembered later that she had been “a bit nervous” and was given “a tot of whiskey to relax” before the photographs were taken of her.¹⁴

Captain Brown left active duty after marrying then-Major Jan P. Fladeboe, a U.S. Naval Academy graduate and Marine Corps lawyer whom she met while he was a student at TJAGSA. For several years, she remained in the Army Reserve as a judge advocate, serving with the 63d Army Command in California. She resigned her Reserve commission when her husband was assigned overseas to the Marine Corps Air Station in Iwakuni, Japan.

myeloid leukemia. Michelle B. Fladeboe died on February 2, 2016. She was 67 years old.¹⁵

She is survived by her husband, Jan Fladeboe, and two sons and one daughter. Michelle will not be forgotten by those who were in the Corps in the late 1970s and early 1980s, and this Lore of the Corps will bring her achievements—and her place in our history—to the attention of a new generation of judge advocates.



Captain Michelle Brown, TJAGSA Faculty, ca. 1981

After Lieutenant Colonel Fladeboe retired from active duty and joined the U.S. State Department, Michelle and their three children joined him at State Department postings in Moscow and Vienna.

After returning to American soil, the Fladeboes settled in Lake Monticello, Virginia. Michelle resumed her connections with the JAG Corps by sponsoring Egyptian student officers attending either the Basic or Graduate Courses at The Judge Advocate General’s Legal Center and School. She was especially interested in Egypt and had visited the country twice. She was working on a book about the people and the country when she was diagnosed with acute

¹³ 29th Graduate Class Directory, *supra* note 5.

¹⁴ *Id.*

¹⁵ E-mail from Jan P. Fladeboe, *supra* note 2.

Lore of the Corps

The Judge Advocate General's School at Fort Myer (1950-51)

By Fred L. Borch
Regimental Historian and Archivist

While many members of the Regiment know that The Judge Advocate General's School (TJAGSA) was located at the University of Michigan during World War II, few realize that TJAGSA re-opened its doors at Fort Myer, Virginia before moving to the University of Virginia in 1951. What follows is the story of TJAGSA's brief history in northern Virginia.

With the end of hostilities in Europe and the Pacific, and the reduced need for judge advocates (JAs) in a rapid demobilizing Army, TJAGSA closed at the University of Michigan on February 1, 1946.¹

With the outbreak of the Korean War in June 1950 and the enactment of a new Uniform Code of Military Justice (UCMJ) which took effect in May 1951, the Army needed more active duty lawyers. The result was that a large number of Reserve and National Guard JAs, almost all of whom had served in World War II, were recalled to active duty to supplement the 650 JAs already in uniform.² Almost immediately, the new Judge Advocate General, Major General Ernest M. "Mike" Brannon,³ realized that these Reserve and Guard JAs had 'rusty' military justice skills and, even if they were conversant with the Articles of War, this would not help them in working with the new provisions of new UCMJ. But those JAs already on active duty likewise knew nothing about the newly enacted UCMJ, and since

criminal law was the most important element of the Corps' practice in the 1950s, the best course of action was to re-open TJAGSA and provide updated education and training for Army lawyers.

On October 2, 1950, the new military law school opened in "temporary facilities" on South Post Fort Myer. Colonel (COL) Hamilton "Ham" Young,⁴ who had served as the first commandant of TJAGSA in Michigan, was re-appointed as commandant of the new school. But the understanding was that the school was in 'temporary facilities' because Colonel

(COL) Charles L. "Ted" Decker, who headed the Special Projects Division at the Office of The Judge Advocate General (OTJAG), was tasked with finding a "permanent" home for the school.⁵

Major General Brannon asked Colonel Young to start classes in the new school as soon as possible. But Young, who was then serving as Chief, War Crimes Division, OTJAG, replied that he needed an assistant. The result was that First Lieutenant Joseph B. Kelley (1LT), who had served



Faculty and Staff, TJAGSA, South Post Fort Myer, October 1950. Major Reed is second from the left; Major Horstman, First Lieutenant Kelly and Colonel Young are first, second and third from the right, respectively.

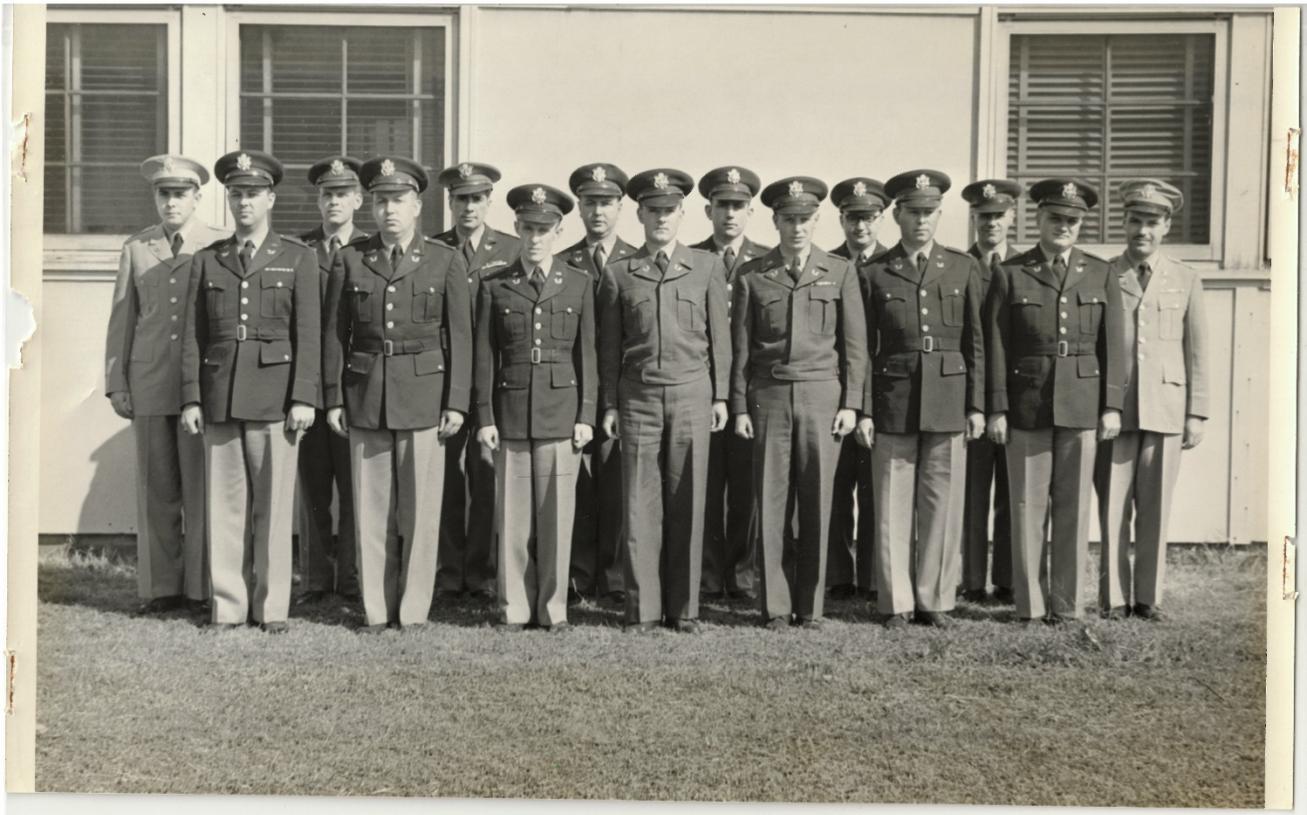
¹ JUDGE ADVOCATE GEN.'S CORPS, U.S. ARMY, *THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975*, at 209 (1975).

² *Id.*

³ Fred L. Borch, *From Infantryman to Contract Attorney to Judge Advocate General: The Career of Major General Ernest M. Brannon (1895-1982)*, ARMY LAW., Feb. 2013, at 1.

⁴ For more on Young, see Fred L. Borch, *From West Point to Michigan to China: The Remarkable Career of Edward Hamilton Young (1897-1987)*, ARMY LAW., Dec. 2012, at 1 [hereinafter *Career of Edward Hamilton Young*].

⁵ JUDGE ADVOCATE GEN.'S CORPS, *supra* note 1, at 217. Later, Major General Decker served as The Judge Advocate General from 1961 to 1963.



First Regular JA Class, South Post Fort Myer. The class began on October 2, 1950 and graduated on October 28, 1950.

in World War II as an artillery officer in Burma and China and had recently volunteered for active duty as a JA, was selected to be the new TJAGSA Adjutant.⁶

The new school opened in an empty building on South Post Fort Myer. This section of Fort Myer no longer exists today, but is now part of Arlington National Cemetery. During World War II, however, South Post was a billeting area for women working for the greatly expanded War Department. The Judge Advocate General's (JAG) Corps obtained one of these now empty buildings and converted the first floor from small dormitory rooms into one big classroom for students and offices for faculty. The second floor was used as a Bachelor Officers Quarter (BOQ) for students.⁷

In addition to COL Young as commandant and 1LT Kelly as adjutant and training officer, the faculty consisted of four other officers. Major (MAJ) Robert Reed taught 'Military Affairs' (today's Administrative and Civil Law) and MAJ John Horstman taught military justice. The two other officers taught claims and procurement law.⁸

The school operated for a year on South Post and graduated six JA "Regular" classes—as the four week long basic course was then called. There was no Advanced or Graduate course. No Continuing Legal Education courses were offered.⁹

In the meantime, COL Decker and his team had been scouting locations for a permanent TJAGSA. The University of Michigan once again offered its facilities to the Army as did the University of Tennessee. These offers, however, were both declined because COL Decker convinced Major General Brannon that the school should be closer to Washington, D.C. Decker advanced at least three reasons for this view. First, it would be easier to obtain guest speakers if TJAGSA were closer to the Pentagon. Second, it would be easier to develop other courses at TJAGSA if it were closer in proximity to OTJAG. Third and finally, Decker argued that it would be easier to hold "policy conferences" if the school were closer to the Pentagon.¹⁰

Ultimately, the Corps accepted an invitation from the University of Virginia (UVA) to move TJAGSA to its

⁶ Letter from Lieutenant Colonel Joseph B. Kelly, U.S. Army (Retired) to Colonel Gerard St. Amand, Commandant, The Judge Advocate Gen.'s Sch. (May 27, 1998) (on file with The Judge Advocate Gen.'s Legal Ctr. & Sch. Historian).

⁷ *Id.*

⁸ *Id.* Presumably, Decker was thinking of the annual world-wide conference for senior leaders in the Corps that had started during World War II and is still held today.

⁹ *Id.*; JUDGE ADVOCATE GEN.'S CORPS, *supra* note 1, at 217-18.

¹⁰ JUDGE ADVOCATE GEN.'S CORPS, *supra* note 1, at 217-18.

grounds. It seems that this invitation resulted, at least in part, from the efforts of two UVA law school professors who were on active duty for training at the Pentagon and were instrumental in persuading UVA to extend an invitation. But UVA was also attractive because it had the largest law library in the South (then 100,000 volumes) and was only two hours by automobile from Washington D.C. Finally, UVA had recently completed a brand-new dormitory building behind its law school on main ground, and President Colgate W. Darden Jr. offered this new building to the JAG Corps. Having been built to house more than 100 students, this new structure, which ultimately was named Hancock Hall, was big enough to provide office space for TJAGSA faculty and a BOQ for JA students who did not wish to live in town.¹¹

On August 25, 1951, TJAGSA at South Post Fort Myer moved by truck to Charlottesville. The move was completed without incident and all offices were up and running on August 27. Colonel Decker was also in charge as the new TJAGSA commandant.¹²

The first Regular course at the new TJAGSA, which began on September 11, 1951, was called the Seventh Regular Course.¹³ Some faculty and staff suggested that the numbering should be restarted, with the new course at UVA called the First Regular Course. This idea was resisted, however, by those who had taught at Fort Myer, and who still formed the majority of instructors for the first classes at UVA. They did not like the idea of restarting the numbering of classes. These instructors had a “pride and loyalty to The JAG School . . . at South Post Fort Myer and . . . did not want to see their efforts go unnoticed as the school began to put down permanent roots.”¹⁴ As a result, the first course taught on UVA’s grounds was the Seventh Regular Course.

More than sixty-five years later, TJAGSA (now The Judge Advocate General’s Legal Center and School), is still on the grounds of UVA. But the new school got its start at Fort Myer, and this history is worth remembering.

¹¹ Fred L. Borch, *Military Legal Education in Virginia: The Early Years of the Judge Advocate General’s School in Charlottesville, Virginia*, ARMY LAW., Mar. 2012, 48-51.

¹² *Id.*

¹³ There were thirty-eight Army officers in the class, including then 1LT Hugh Clausen, who would later serve as The Judge Advocate General

from 1981 to 1985. In November 1955, the Regular Course was renamed the “Special Course.” By the early 1960s, however, it had been designated the “Basic Course.” Today, three “Basic” courses are conducted per year.

¹⁴ See *Career of Edward Hamilton Young*, *supra* note 4.

Lore of the Corps

Military Justice in Turmoil: The Ansell-Crowder Controversy of 1917-1920

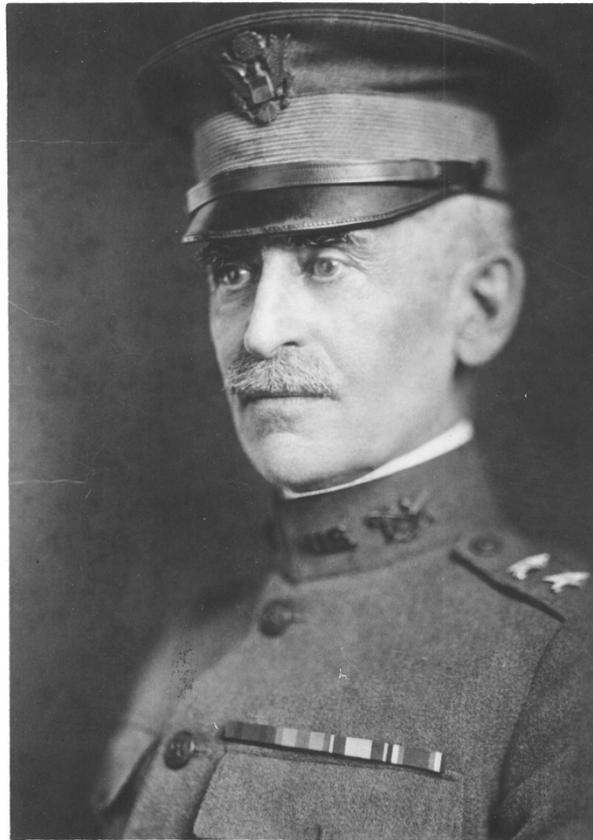
By Fred L. Borch

Regimental Historian and Archivist

While judge advocates today might think otherwise, calls for changes to the military justice system are nothing new. What follows is a brief look at the first major—and public—controversy about the proper role of the commander in the military criminal legal process and how courts-martial should be structured and operate. Major General Enoch H. Crowder, the Judge Advocate General (tJAG) between 1911 and 1923, generally favored the status quo, although he conceded that some changes to the Articles of War (the predecessor of the Uniform Code of Military Justice (UCMJ)) were necessary. Brigadier General Samuel T. Ansell, the Acting Judge Advocate General between 1917 and 1919, however, wanted radical reform. His fundamental disagreements with Crowder about the future of the court-martial system resulted in what has been called the ‘Crowder-Ansell Dispute.’¹

Shortly after the United States entered World War I in April 1917, the War Department appointed Major General Crowder to be the Provost Marshal General in addition to his duties as tJAG. As Provost Marshal General, Crowder was tasked with implementing the Selective Service Act of 1917, the first wartime draft since the Civil War.² This was a huge undertaking, and required Crowder to supervise the registration, classification and induction of nearly three million men into the armed services. Crowder soon decided, however, that he could not be both the Army’s top lawyer and what today would be called the Director of Selective Service. The result was that then Lieutenant Colonel (LTC) Samuel T. Ansell was promoted to

brigadier general and made the Acting Judge Advocate General of the Army. While Crowder remained tJAG, Ansell took over the day-to-day operations of the Office of the Judge Advocate General. He not only oversaw the delivery of legal service in the War Department, but wrestled with the rapid expansion of the JAG Department; from 17 judge advocates in 1917 to 426 officers by the end of 1918.³



Major General Enoch H. Crowder, The Judge Advocate General and Provost Marshal General, ca. 1919.

Within months of Ansell assuming duties as Acting tJAG, two courts-martial occurred that convinced him that changes to the Articles of War were required. In September 1917, a group of between twelve to fifteen enlisted Soldiers at Fort Bliss were court-martialed for mutiny when they refused an order to attend a drill formation. The accuseds, who had been “under arrest” for minor disciplinary infractions when ordered to drill, refused the order because an Army regulation provided that non-commissioned officers (NCOs) under arrest should not attend drill. The court-martial arose because a young officer insisted that the NCOs attend drill, and when they refused to obey the order, he had them court-martialed for mutiny. All were found guilty and sentenced to be

dishonorably discharged and given jail terms ranging from ten to twenty-five years.⁴

After the cases were reviewed, approved and ordered executed by the convening authority, the records of trial in these “Texas Mutiny Cases” were sent to the Office of the Judge Advocate General for review as required by section

¹ Terry W. Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell*, 35 MIL. L. REV. 1-45 (1967).

² Selective Service Act of May 18, 1917, ch. 15, 40 Stat. 76.

³ JUDGE ADVOCATE GEN.’S CORPS, U.S. ARMY, THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL’S CORPS, 1775–1975, at 116 (1975).

⁴ Brown, *supra* note 1, at 1, 4.

1199 of the Revised Statutes of 1878. That provision stated that:

the said Judge Advocate General shall receive, revise, and have recorded the proceedings of all courts-martial, courts-of-inquiry, and military commissions, and shall perform other such duties as have been heretofore performed by the Judge Advocate General of the Army.⁵

It was Brigadier General Ansell's view that section 1199 gave him the authority to set aside the findings and sentences in the Texas Mutiny Cases, based chiefly on his conviction that an Army regulation in fact prohibited enlisted soldiers 'in arrest' from performing drill. When Major General Crowder heard that Ansell was attempting to reverse the results of the Fort Bliss courts-martial, he told Secretary of War Newton Baker that section 1199 provided no such authority and that Ansell was wrong.⁶

While Ansell and Crowder disputed the true meaning of section 1199, a second court-martial, convened at Fort Sam Houston, Texas, brought the Ansell-Crowder controversy into sharper—and much more public—focus.

After the War Department decided to build a training camp near Houston, Texas, a battalion of Soldiers from the all-African American 24th Infantry Regiment were deployed to act as guards for the construction site. During the summer months of 1917, there were frequent confrontations between the black Soldiers and the white residents of Houston. From the outset, the Soldiers resented the "Whites Only" signage prevalent in Houston. They also were infuriated by the use of the N-word by white townspeople, and this slur provoked angry responses from the Soldiers. The troopers also came into conflict with the police, streetcar conductors, and other passengers when they refused to sit in the rear of Houston streetcars. More than a few Soldiers were arrested by the police as a result of these run-ins with local citizens, and often these arrests were accompanied by beatings or other mistreatment.⁷

On August 23, 1917, two black Soldiers were arrested by white police officers for disorderly conduct. While they were subsequently released, the rumor back at the training camp was that one Soldier had been killed by the police. Although their battalion commander urged them to remain calm and stay in the camp, the Soldiers were so angry that they took their Springfield rifles and marched toward Houston. When they entered the city, the infantrymen fought a series of running battles with the police, local citizens, and National Guardsmen, before disbanding, slipping out of town, and returning to camp.

After about two hours of rioting, fifteen white citizens were dead (including four Houston police officers); some of the dead had been mutilated by bayonets. Eleven other civilian men and women had been seriously injured. Four Soldiers also died. Two were accidentally shot by their fellow troopers. A third was killed after he was discovered hiding under a house after the riots. Finally, the leader of the alleged mutineers, a company acting first sergeant, apparently took his own life—most likely because he had some idea what faced him and the other African-American troopers who had taken part in the riot.⁸

A little more than two months later, on November 1, 1917, a general court-martial convened at Fort Sam Houston began hearing evidence against sixty-three Soldiers who allegedly had participated in the riot in Houston. All were charged with disobeying a lawful order (to remain in camp), assault, mutiny, and murder. The accused—all of whom



Brigadier General Samuel T. Ansell, Acting Judge Advocate General, ca. 1918.

Largest Murder Trial in the History of the United States": The Houston Riots Courts-Martial of 1917, ARMY LAW., Feb. 2011, at 1-3.

⁸ CHRISTIAN, *supra* note 7, at 153, 172.

⁵ Act of June 23, 1874, ch. 458, sec. 2, 18 Stat. 244.

⁶ JUDGE ADVOCATE GEN.'S CORPS, *supra* note 3, at 128-29.

⁷ GARNA L. CHRISTIAN, BLACK SOLDIERS IN JIM CROW TEXAS 1899-1917, at 145 (1995). For more on the Houston Riot cases, see Fred L. Borch, *The*

pleaded not guilty—were represented by a single defense counsel.⁹

The trial lasted twenty-two days and the court heard from 196 witnesses. The most damning evidence came from the testimony of a few self-confessed rioters, who took the stand against their fellow Soldiers in return for immunity from prosecution. The lone defense counsel (who was not a lawyer) argued that some of the men should be acquitted because they lacked the requisite *mens rea* required for murder or mutiny. He also argued that the government had failed to prove its case ‘beyond a reasonable doubt’ against some of the accuseds.¹⁰

When the trial finished in late November 1917, the court martial panel acquitted five accuseds. Of the remaining Soldiers, thirteen were sentenced to be hanged and forty-one were sentenced to life imprisonment. Only four Soldiers received lesser jail terms.¹¹

On December 9, 1917, the accuseds were informed that the convening authority had taken action in their court-martial, and that he had approved the sentences as adjudged. Two days later, on December 11, 1917, the thirteen condemned men were hanged at sunrise. It was the first mass execution since 1847.¹²

When the record of trial in the case reached General Ansell, he was outraged. As he later testified before the Senate Committee on Military Affairs,

The men were executed immediately upon the termination of the trial and before their records could be forwarded to Washington or examined by anybody, and without, so far as I can see, any one of them having had time or opportunity to seek clemency from the source of clemency [the convening authority], if he had been so advised.¹³

In the immediate aftermath of the Houston Riot cases, General Ansell insisted once again that Section 1199 gave him the authority to take “revisionary action on court-martial records.”¹⁴ He also stressed that the carrying out of thirteen death sentences on December 11, 1917, without any opportunity for the condemned men to ask for clemency or reconsideration, was proof that the War Department must take action to prevent any such future injustice. As a result of Ansell’s agitation, Secretary of War Newton Baker issued General Orders No. 7 on January 17, 1918. It prohibited the execution of any death sentence before a review and a

determination of legality the by Judge Advocate General. As a result of General Orders No. 7, General Ansell established Boards of Review, which had duties “in the nature of an appellate tribunal.”¹⁵ The Boards were tasked with reviewing records of trial in all serious general courts-martial, and while their opinions were advisory only, the Boards of Review were the first formal appellate structure in the court-martial process.¹⁶

While Ansell was pleased with General Orders No. 7, he saw this measure as only the first step of many that were needed to reform the military criminal justice system. Supported by Senator George E. Chamberlain of Oregon, “General Ansell launched his public campaign for revision of the Articles of War, establishing himself as the standard bearer for the reformation of military justice.”¹⁷

Among his many proposals—some of which were truly revolutionary for the time—were:

- Punitive provisions in the Articles of War should be rewritten to define each offense with “sufficient particularity;”¹⁸
- Statutory penalties should be specified for each offense;
- No charge should be referred for trial until the officer with summary court-martial jurisdiction over the accused had made an preliminary investigation of the charge, and gave the accused the right to make a statement or present evidence;
- No charge should be referred to trial unless an officer of the JAGD certified in writing that the charge was legally sufficient and there was *prima facie* proof of guilt.

At the time, the 1916 Articles of War did not clearly define the elements of an enumerated offense, and a court-martial panel had wide discretion when it came to punishing an accused. Ansell wanted more clarity and specified punishments. As for Ansell’s preliminary investigation proposal, the Articles of War did not require such an inquiry. While it was true that paragraph 76 of the 1917 Manual for Courts-Martial (MCM) stated that any charge should be “carefully” investigated prior to referral, this was an MCM provision only and consequently could be changed by the Secretary of War at any time; Ansell wanted the requirement

⁹ *Id.* at 162.

¹⁰ JOHN MINTON, THE HOUSTON RIOT AND COURTS-MARTIAL OF 1917, at 16 n.d (1990).

¹¹ JUDGE ADVOCATE GEN.’S CORPS, *supra* note 3, at 127.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 129.

¹⁵ *Id.* at 130.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Brown, *supra* note 1, at 35.

to be statutory.¹⁹ As for the last proposal, Ansell wanted to remove the commander as the sole decider as to when there should be a court-martial. He believed that inserting a lawyer into the process would prevent arbitrary and capricious decisions by a commander.²⁰

Other changes proposed by General Ansell included:

- General courts-martial would consist of eight members; special courts would have three members;
- Enlisted men would be tried by courts containing enlisted members; three on a general courts and one on a special court;
- The required vote for conviction would be increased from two-thirds to three quarters, with a unanimous verdict required before a death sentence could be imposed;
- A “court judge advocate” (a lawyer from the JAGD or else an officer specially qualified by reason of legal learning or judicial temperament) would sit with each court martial and would be akin to a civilian judge; he would rule on motions and questions of law, summarize the evidence and applicable law at the end of a case, and review findings for legal sufficiency, and impose any sentence.²¹

Under the 1916 Articles of War, a general court-martial could have between five and thirteen members, and a special court-martial between three and five members; Ansell wanted a fixed number of members because under the 1916 Articles of War, a convening authority could add (or remove) court members *during the proceedings*, if he so desired. Once again, Ansell thought a fixed number would guard against a commander’s manipulation of court membership during a trial.

The idea that enlisted personnel had a place on the panel was truly remarkable, as officer-only panels had been the rule since General Washington first convened courts-martial in the Continental Army during the Revolution. But Ansell thought that the time had come for an enlisted accused to have at least some enlisted members—his peers—sitting in judgment.

Just as revolutionary was General Ansell’s proposal that a court-martial needed a quasi-judicial official—and one who would have the power to impose a sentence. The ‘court judge

advocate’ proposal was yet another way to limit the power of the commander in the judicial process. Ansell did not think the existing judgeless court was fair to an accused, since the prosecutor-judge advocate—who worked for the commander—performed all the judicial functions. The legally-qualified court judge advocate would ensure that the proceedings were fuller and fairer.²² Additionally, by giving the power to sentence an accused to the court judge advocate, Ansell believed that justice would better served, and move courts-martial away from their focus on discipline at the expense of justice.²³

Two other proposals are worth mentioning. For the first time, General Ansell argued that the accused in a general or special court-martial had the right to be represented by military counsel *of his own choosing*. If the accused wanted to hire a civilian lawyer to represent him, and could not afford one, then the prosecutor-judge advocate would employ the civilian lawyer and pay his legal fees. If the accused were acquitted, he would owe nothing. If he were found guilty, however, Ansell proposed that the judge advocate “would be able to order a two-thirds deduction from the accused’s monthly pay.”²⁴

Finally, General Ansell proposed that Congress create a military appeals court of three civilian judges. This Court of Military Appeals (COMA) would consist of lawyers appointed by the President for life, with the pay and retirement equivalent to a judge on the U.S. Circuit Court of Appeals. The COMA would have limited jurisdiction, in that it could only hear general courts-martial cases in which the accused had been sentenced to death, a dishonorable discharge or dismissal, or confined for more than six months.²⁵ Ansell believed that lawyers who were not in the chain of command or otherwise part of the military establishment should be involved in reviewing court-martial convictions. His COMA not only established judicial review of serious courts-martial, but injected civilians into the process—a radical proposal given that the 1916 Articles of War contained no appellate structure whatsoever, much less any provision for civilian oversight of the military justice system.

All of General Ansell’s proposals were contained in Senator Chamberlain’s legislation to amend the 1916 Articles of War, which Chamberlain introduced in the Senate in late 1918. In a 1919 *Yale Law Journal* article, Professor Edmund Morgan described the reforms as follows:

Obviously the basic principle of the bill is the very antithesis of that of the existing court-

¹⁹ OFFICE OF THE JUDGE ADVOCATE GEN., WAR DEP’T, A MANUAL FOR COURTS-MARTIAL para. 76 (1917). It was not until the enactment of the Uniform Code of Military Justice in 1950, and the publication of a *uniform* Manual for Courts-Martial (MCM) in 1951, that the entire MCM was “prescribed” by the president via an executive order. President Harry S. Truman prescribed the Manual for Courts-Martial, United States, 1951, on February 8, 1951, when he signed Executive Order 10214.

²⁰ JUDGE ADVOCATE GEN.’S CORPS, *supra* note 3, at 132.

²¹ *Id.* at 133-34.

²² *Id.* at 134.

²³ Brown, *supra* note 1, at 23-24.

²⁴ JUDGE ADVOCATE GEN.’S CORPS, *supra* note 3, at 134.

²⁵ *Id.* at 135.

martial system. *The theory upon which the bill is framed is that the tribunal erected by Congress for the determination of guilt or innocence of a person subject to military law is a court, that is proceedings from beginning to end are judicial, and that questions properly submitted to it are to be judicially determined.* As the civil judiciary is free from the control of the executive, so the military judiciary must be untrammelled and uncontrolled in the exercise of its functions by the power of military command.²⁶

Hearings were held on the legislation before the Senate Committee on Military Affairs throughout most of 1919, but the Chamberlain bill did not get sufficient traction to become law. First, with the war over, and Army demobilization underway, public interest in reforming the court-martial process dissipated rapidly. Second, Major General Crowder and the War Department were very opposed to most of Ansell's proposal, and successfully blocked the legislation from getting a vote in the House and Senate.²⁷

But a few of Ansell's reforms did emerge as amendments to the Articles of War in 1920. Chief among these was the creation of "law member," who would be appointed to sit on a general court-martial and who would rule on interlocutory questions and instruct the court on the presumption of innocence and the burden of proof. But the law member's rulings were final only in regards the admissibility of evidence; in all other matters he could be overruled by a majority vote of the court. Another major change was that, for the first time, the Articles of War required the tJAG to establish Boards of Review consisting of three or more officers who would review general courts-martial in which a discharge, dismissal or imprisonment had been imposed at sentencing.²⁸ This statutory change—inserted as Article 50 1/2 of the Articles of War—was the first legislative basis for an appellate court, and consequently was the forerunner of the Army Court of Military Review and Army Court of Criminal Appeals.

A few of Ansell's other proposed reforms also were enacted. A pretrial investigation now was required by law, and the accused was permitted to present evidence at such an investigation. The recommendations of the investigating officer, however, were not binding on the convening authority. Additionally, while Ansell's idea for enlisted personnel on the court was not enacted, Congress did give clear guidance to the convening authority about the qualities

that a court member should possess: for the first time, the Articles of War required the commander to select officer panel members who were best qualified "by reason of age, training, experience, and judicial temperament."²⁹

The rest of Ansell's reform proposals—fixed numbers of members on courts, three quarters vote required to convict, enlisted personnel on panels, lawyer defense counsel for an accused, a civilian COMA—were rejected by the Congress. Crowder and the War Department had won; Ansell had lost. With Crowder now back as tJAG, Ansell was reduced to his permanent rank of lieutenant colonel in March 1919; he resigned his commission and left the Army a short time later.³⁰

Ansell's ideas about military justice were not forgotten. His firm belief that there must be more limits on the role of the commander in the system, and that civilians must play a part in the process, were accepted by the Congress when it established a three civilian judge COMA as part of the UCMJ in 1950, and when it later created the position of the military judge in the Military Justice Act of 1968. Most importantly, the requirement that courts-martial be more like civilian courts was enshrined in Article 36, UCMJ. This provision requires that court-martial mirror, if practicable, the pre-trial, trial, and post-trial procedures, including modes of proof, used in U.S. District Courts.³¹

In retrospect, Crowder won the battle in 1920, but it was Ansell who ultimately triumphed in the war over the future of military justice in the 20th century. Just how this happened, however, is a story for another *Lore of the Corps*.

²⁶ Edmund Morgan, *The Existing Court-Martial System and the Ansell Army Articles*, 29 YALE L. J., 52, 73-74 (1919) (emphasis added).

²⁷ JUDGE ADVOCATE GEN.'S CORPS, *supra* note 3, at 135-36.

²⁸ *Id.* at 136-37.

²⁹ 1920 Articles of War, art. 4, 41 stat. 787 (1920); OFFICE OF THE JUDGE ADVOCATE GEN., WAR DEP'T, A MANUAL FOR COURTS-MARTIAL para. 6.(c) (1921).

³⁰ Ansell believed that his reduction in rank was in retaliation for his "outspoken opposition to the Articles of War and the administration of military justice." Brown, *supra* note 1, at 43. This may or may not have been true. Given that World War I was at an end, the Army was rapidly reducing in size, and Crowder had returned to full time duties as tJAG, it is possible that Secretary of War Newton Baker and the War Department decided that since Ansell was no longer Acting tJAG, his temporary rank of brigadier general was no longer appropriate.

³¹ UCMJ art. 36.

Lore of the Corps

Native Americans in the Corps: A Very Short History of Judge Advocates with American Indian Ancestry

Fred L. Borch
Regimental Historian & Archivist

While Native Americans have been a part of Army history since the Revolutionary War,¹ the Corps has almost no information about Judge Advocates with American Indian ancestry. This ‘very short history’ seeks to change that situation by identifying three Army lawyers with Indian tribal affiliation.



Brigadier General Thomas S. Walker

Brigadier General (retired) Thomas S. “Tom” Walker, who served in the Army, Army Reserve and Oklahoma Army National Guard, is almost certainly the highest ranking Judge

Advocate with Native American ancestry. He is a citizen of the Cherokee Nation, as one of his grandmothers was Cherokee. One of his grandfathers was Wyandotte; both grandparents were born in Oklahoma Indian Territory.²

A graduate of Phillips University (1968) and the University of Oklahoma College of Law (1973), Brigadier General Walker was in private practice in Norman and Armore, Oklahoma before serving beginning a career as a District Judge in Oklahoma’s 20th Judicial District, a five county district in southern Oklahoma. He ultimately became the Chief Judge of that District and also held a concurrent assignment to Oklahoma’s Court of the Judiciary, which has the authority to remove Oklahoma judges from office.³ Brigadier General Walker is a member of the Oklahoma Indian Bar Association and also served as Chief Magistrate, Court of Indian Appeals, Southern Plains Region.⁴

As for his military career, Walker served as a soldier from 1968 to 2005. He enlisted in the Army as counterintelligence agent and served a 12-month tour of duty in Vietnam. After returning to Oklahoma and entering law school, Tom Walker joined the Oklahoma National Guard. He subsequently served in a variety of Guard assignments, including: Staff Judge Advocate and Rear Area Operations Commander, 45th Infantry Brigade; Command Judge Advocate, Oklahoma Army National Guard; and National Guard Assistant to The Judge Advocate General of the Army. Brigadier General Walker also was the first Judge Advocate in the Army to attend the Tactical Commanders Development Course. He retired from the Guard in August 2002.⁵

Colonel (COL) Robert Don “Bobby Don” Gifford, a judge advocate in the Army’s Individual Ready Reserve, is a tribal member of the Cherokee Nation. His great great grandfather signed the Dawes Rolls⁶ as a Cherokee, so he is a

¹ While some Native Americans, like the Cherokee, decided that their future was with Great Britain in 1775, most New England Indians fought with the colonists. They volunteered as Minutemen even before the outbreak of the fighting, “joined Washington’s army at the siege of Boston, and served in New York, New Jersey, and Canada” during the Revolution. Colin G. Calloway, *American Indians and the American Revolution*, NAT’L PARK SERV., https://www.nps.gov/revwar/about_the_revolution/american_indians.html (last visited Mar. 30, 2017). See also ANNIE H. ABEL, *THE AMERICAN INDIAN IN THE CIVIL WAR* (1993); JOHN D. SPENCER, *THE AMERICAN CIVIL WAR IN THE INDIAN TERRITORY* (2006).

² Telephone interview with Brigadier General Thomas Walker (Feb. 27, 2017) [hereinafter Walker].

³ *Biography, Brigadier General Thomas S. Walker*, NAT’L GUARD, <http://www.nationalguard.mil/Leadership/NGB-GOMO/bio-show/id/830/> (last visited Apr. 14, 2017) [hereinafter NAT’L GUARD].

⁴ Walker, *supra* note 2.

⁵ NAT’L GUARD, *supra* note 3.

⁶ The Commission to the Five Civilized Tribes was appointed by President Grover Cleveland in 1893 to negotiate land with the Cherokee, Creek, Choctaw, Chickasaw and Seminole tribes. *Dawes Rolls*, NATIONAL ARCHIVES, <https://www.archives.gov/research/native-americans/dawes/tutorial/intro.html> (last visited April 14, 2017). It is called the Dawes Commission, after its chairman, Henry L. Dawes, but officially is known as the “Final Rolls of the Citizens and Freedmen of the Five Civilized Tribes in Indian Territory.” *Id.* Tribe members were entitled to an allotment of land in return for abolishing their tribal governments and recognizing Federal laws. In order to receive the land, individual tribal members first had to apply and be deemed eligible by the Commission. *Id.* The first application process for enrollment began in 1896, but was declared invalid, and so the commission started all over again in 1898, forcing people to reapply. *Id.* The Commission accepted applications until 1907, with a few

direct descendant. Colonel Gifford's mother has Creek ancestry, "but her family did not sign the Rolls as a Creek member as it was frowned upon to be Indian at the time."⁷ While attending law school at the University of Oklahoma, Gifford was an editor for the American Indian Law Review and, before entering on active duty with the Corps in 1996, did legal work for the Cherokee Nation under Chief Wilma Mankiller. He also worked directly for the future Chief Chad Cortassel Smith.⁸



Colonel Robert Don Gifford

After leaving active duty in 2001, COL Gifford remained in the Army Reserve; his last Judge Advocate assignment was as the Commander, 3rd Legal Operations Detachment. As a civilian lawyer, Gifford served fifteen years as an Assistant U.S. Attorney (Western District of Oklahoma) before entering private practice. His specialty is Native American Law. Given this interest, it should come as no surprise that Colonel Gifford now serves as the Chief Judge for the Kaw Nation tribal court. He also is an Associate Justice for the Iowa Tribe's Supreme Court. As the Kaw and Iowa are completely separate tribes from the Cherokee, Gifford has no conflict of interest in serving in a legal position with either Nation.⁹

A third Army lawyer with Native American heritage is Colonel Paul P. McBride, an Active Guard Reserve officer in the Army Reserve. Born in Spain (his parents were both U.S. Navy officers), McBride received baccalaureate degrees (Biology and Chemistry) from the University of California,

additional people accepted by an Act of Congress in 1914. *Id.* The resulting lists of those who were accepted as eligible became known as the Dawes Rolls. *Id.*

⁷ E-mail from Robert D. Gifford to author (Mar. 31, 2017, 10:41 EST) (on file with author).

⁸ *Id.*

Irvine (1983), and his law degree from Loyola Law School in Los Angeles (1987).¹⁰

Colonel McBride has a criminal litigator background (as a civilian lawyer) but now is full time active duty at the Office of The Judge Advocate General in the Pentagon. He is the Chief, Reserve Component Management for the Corps and works out of the Personnel, Plans and Training Office.¹¹

Colonel McBride is registered with the Quinault Indian Nation in Washington State. The Quinault people reside on a 208,000 reservation in northwestern Grays Harbor County, on Washington's Olympic peninsula. Quinault tribal membership was 2,000 in 1990 and 2,453 in 1999.¹²

A final note. While he had no Indian blood (he was of Irish ancestry), one of the most famous soldiers with a Native American connection was Patrick J. Hurley. Hurley worked as a coal miner, mule driver, cowboy and lawyer before



Ambassador Patrick Jay Hurley

entering the Army in 1917. After serving with great distinction in Europe in World War I, Hurley left active duty--but remained in the Army Reserve and, during World War

⁹ *Id.*

¹⁰ E-mail from COL. Paul P. McBride to author (Feb.27, 2017, 16:51 EST) (on file with author).

¹¹ *Id.*

¹² QUINAULT INDIAN NATION, <http://www.quinaultindiannation.com/> (last visited April 14, 2017)

II, attained the rank of major general. But Hurley also served our Army as Secretary of War under President Herbert Hoover and served as U.S. Ambassador to China in the administrations of President Franklin D. Roosevelt and Harry S. Truman.

Hurley's connection to Native Americans is two-fold. First, he was born in Indian Territory (now Oklahoma). Second, he later provided legal advice to the Choctaw Nation. Born in January 1883, Hurley grew up very poor; his father worked in the coal fields for \$2.10 a day; young Pat joined his father in the mines when he was eleven years old. For a nine-and-one-half hour day, the boy received seventy-five cents.¹³

Later, when the coal mines closed for a time and young Hurley was without work, he spent his days in the company of Native American members of the Choctaw Nation who, along with the Creeks and Cherokees, were the most important Indian tribes in the territory. His friendship with Choctaw Victor Locke would open professional doors after Hurley became a lawyer.

Pat Hurley was still working as a cowhand when a ranch owner who had taken a liking to him arranged for Hurley to attend Indian University (today's Bascome University). He excelled as a student and obtained his bachelor degree in 1905. In 1907, Pat Hurley's friends convinced him that he should go to law school and get a degree. Hurley moved to Washington, D.C., enrolled in National University (today's George Washington University), and obtained his Bachelor of Laws degree in 1908. He was just twenty-five years old.

Returning to Oklahoma, Hurley passed the Oklahoma bar and built a successful practice in Tulsa (oil had been discovered there in 1901). In 1911, President William H. Taft appointed Hurley's boyhood friend, Victor Locke, to be the Principal Chief of the Choctaws. The new chief now appointed Patrick J. Hurley, then serving as the president of the Tulsa Bar Association, as the new National Attorney for the Choctaw Nation of Indians, at an annual salary of \$6,000.¹⁴ Since the average American earned \$750 a year during this era, this was a huge amount of money for a twenty-eight year old Oklahoma lawyer.¹⁵

At the time, there were about 28,000 men, women and children in the Choctaw Nation and real estate held communally by the tribe was worth as much as \$160 million. Since the most valuable item in that tribal property was coal and asphalt lands, Hurley's job was to ensure that any contracts involving the lease or sale of those lands were fair to the Choctaw and that any proceeds were fairly distributed to members of the Choctaw nation.¹⁶

Unscrupulous businessmen and politicians had engaged in systematic fraud against the tribe for years, mostly by making contracts with individual Indians that purported to dispose of property held communally by the tribe. Once Hurley became the Choctaw's attorney, however, he successfully fought against these and other fraudulent contracts in court. He also protected the rights of the Choctaws under various treaties with the United States, insisting that the government had a legal responsibility to protect Indian resources. Hurley was so successful that he could have remained as the Choctaw Attorney for many years.¹⁷

The Regimental Historian welcomes additional information on Judge Advocates with American Indian ancestry. Please contact him directly at frederic.l.borch.civ@mail.mil.

¹³ DON LOHBECK, PATRICK J. HURLEY 28 (1956).

¹⁴ *Id.* at 45.

¹⁵ Meryl Baer, *The History of American Income*, EHOW, http://www.ehow.com/info_7769323_history-american-income.html (last visited Oct. 15, 2013).

¹⁶ LOHBECK, *supra* note 13, at 56, 60.

¹⁷ *Id.* at 57.

Lore of the Corps

Defending Soldiers at Early Courts-Martial

Fred L. Borch
Regimental Historian & Archivist

While Army lawyers today provide a thorough and zealous defense for a soldier facing court-martial proceedings, defense services for a soldier being prosecuted in the early years of the Army were markedly different.

George Washington's Continental Army and the Army of the newly created United States tried thousands of courts-martial, yet there are no complete records of trial from the 18th century because a fire destroyed all War Department files in November 1800.¹

The earliest known example of a court-martial record dates to 1808 and, while it identifies the members of the panel, the judge advocate, the charges and specifications, the questions and answers of the witnesses, the decision of the court and the action of the convening authority, the record says nothing about how the accused defended himself.²

A record of trial from the following year, however, reveals that there were significant restrictions on the representation of an accused at a court-martial. In *United States v. William Wilson*, the accused, who was an Artillery officer, had the services of a Mr. William Thompson as his individual counsel. While Thompson may or may not have had legal qualifications as an attorney, he certainly knew how to conduct a vigorous defense, as he examined witnesses, made objections, and read a statement written by the accused.

While Wilson was convicted and sentenced by the panel, the reviewing authority, General James Wilkinson, was exceedingly unhappy with the defense counsel's participation in the proceedings. Consequently, he disapproved the court-martial and wrote the following in his action:

[T]he General [Wilkinson] owes it to the Army . . . not only to disapprove the proceedings and sentence of this general [court] martial, but to exhibit the Causes of his disapproval.

The main points of exception . . . are the admission of Counsel for the defense of the

prisoner . . . Shall Counsel be admitted . . . to appear before General Court-Martial [and] to interrogate, to except, to plead, to tease, perplex & embarrass by legal subtilties [sic] & abstract sophistical Distinctions?

However various the opinions of professional men on this Question, the honor of the Army & the Interests of the service forbid it . . . Were Courts-Martial thrown open to the Bar the officers of the Army would be compelled to direct their attention from the military service & the Art of War, to the study of Law.

No one will deny to a prisoner, the aid of Counsel who may suggest Questions or objections to him, to prepare his defense in writing—but he is not to open his mouth in Court.³

General Wilkinson's sentiments in the *Wilson* trial reflected the prevailing view that courts-martial were courts of discipline, and not justice.⁴ Consequently, permitting lawyers to transform these disciplinary proceedings into law courts was anathema—and would not be tolerated. After all, Article 69 of the Articles of War of 1806 provided what was then thought to be enough to guarantee that the accused received a fair hearing:

The judge advocate . . . shall prosecute in the name of the United States, but shall so far consider himself *as counsel for the prisoner*, after the said prisoner shall have made his plea, as to object to any leading question to any of the witnesses or any question to the prisoner, the answer which might tend to criminate himself. (Emphasis supplied)⁵

As Colonel William Winthrop explains in his authoritative *Military Law and Precedents*, Article 69 was “a most imperfect and ineffective provision,” if for no other reason than “objecting to leading questions” is just one function of a defense counsel.⁶

¹ JUDGE ADVOCATE GENERAL'S CORPS, *THE ARMY LAWYER* 29 (1975).

² *Id.*

³ *Id.*

⁴ For another court-martial involving General Wilkinson and an officer who refused to cut his pigtail, see Fred L. Borch, *The True Story of a Colonel's Pigtail and a Court-Martial*, *ARMY LAW.*, Mar. 2010, at 3.

⁵ WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS*, 982 (2nd ed. 1920).

⁶ *Id.* at 197.

It would be many more decades before the Army—and lawyers wearing uniforms—were willing to accept that courts-martial should operate more like civilian courts, and that the accused should have a robust—and legally qualified—defense. In fact, not until the enactment of the Uniform Code of Military Justice in 1950 did an accused have the absolute right to legally qualified counsel, and then only at general courts-martial.⁷

The evolution of this right to counsel, and the development of the defense function at courts-martial however, is a story for another Lore of the Corps.

⁷ Article 27, Uniform Code of Military Justice.

Lore of the Corps

Ranger Cleary and the Law

Fred L. Borch*

Regimental Historian & Archivist

On May 23, 1962, First Lieutenant (1LT) John Joseph Cleary, Judge Advocate General's Corps, U.S. Army, made history as the first Army lawyer in history to graduate from Ranger training at Fort Benning, Georgia, and earn the black and yellow "Ranger Tab."¹ The following year, then Captain (CPT) Cleary became the first Judge Advocate to be assigned to the U.S. Army Special Warfare Center (SWC) at Fort Bragg, North Carolina, where he served as its Staff Judge Advocate.² In early 1964, Cleary made history a third time when he became the first Army lawyer graduate of SWC's High-Altitude-Low-Opening or "HALO" Parachute course. This is his story.



Captain John Cleary during High Altitude, Low Opening (HALO) parachute jump, 1964.

After graduating from high school, Cleary entered Loyola University in Chicago, where he joined the Army Reserve Officer Training Corps. He was commissioned as a Second Lieutenant (2LT) in the MP Corps in June 1958.

At the time of his commissioning, Cleary had finished his first year of law school at Loyola (he had completed the course work for his undergraduate degree in 1957). He now joined the Army Reserve's 302d Special Forces Group in Cicero, Illinois, and in July 1958, 2LT Cleary completed basic parachutist school at Fort Benning, Georgia. His first jump was his second time in an airplane.⁵

Born in Illinois in 1936, John Cleary was very much a child of the World War II era. In January 1952, while he was in his second year of high school, then fifteen-year-old Cleary lied about his age (he claimed that he was eighteen years old) and enlisted in the Illinois National Guard. Cleary did so at the urging of his police officer father, who had been told by a colleague that with the Korean War now in full swing, the Army National Guard needed motivated young men as never before. Cleary subsequently qualified as an assistant gunner on a quad .50 Browning machine gun.³ After a summer camp with his unit at Camp Ripley, Minnesota; however, then Specialist Cleary decided that he preferred another military occupation and so he became a military policeman (MP).⁴

After graduating from law school and passing the District of Columbia and Illinois bar examinations in 1960, 2LT Cleary began a tour of active duty as a MP. In late 1960, deciding that he preferred to serve the Army as a lawyer, Cleary applied for a commission in the Judge Advocate General's (JAG) Corps. On the last day of 1960, he took his oath as a 1LT and Judge Advocate. While waiting for the Judge Advocate Officer Basic Course to begin in Charlottesville, 1LT Cleary was temporarily assigned to the 82d Airborne Division, Fort Bragg, North Carolina. His mentor was then Major Reid Kennedy, who would later achieve a measure of fame as the trial judge in *United States v. Calley*.⁶ Kennedy, who had been the first Judge Advocate to qualify as a Jumpmaster, arranged for 1LT Cleary to attend

* The author thanks Mr. John Cleary for his help in preparing this Lore of the Corps.

¹ The cloth ranger tab was introduced for wear on the upper left sleeve in January 1953. This was the only authorized insignia for those who had successfully completed Ranger training until November 1984, when the Army Chief of Staff approved a small metal and enamel version for wear on the pocket flaps of the blue and white uniforms. WILLIAM K. EMERSON, UNITED STATES ARMY BADGES, 1921-2006, at 82 (2006).

² The U.S. Army Special Warfare Center (SWC) started at Fort Riley, Kansas, as the U.S. Army Psychological Warfare Center and School. It moved to Fort Bragg in 1952 and was renamed the U.S. Army Center for Special Warfare in 1956. After President John F. Kennedy's assassination, SWC became the U.S. Army John F. Kennedy Special Warfare Center and School (USAJFKSWCS). Today, USAJFKSWCS or SWC is part of U.S. Army Special Operations Command. U.S. ARMY SPECIAL OPERATIONS CTR. FOR EXCELLENCE, <http://www.soc.mil/swcs/about.html> (last visited June 20, 2017).

³ The "quad .50 caliber" (nicknamed the "meat chopper") was a weapon mounting on the back of a half track. The word "quad" comes from "M45 quadmount"—which consisted of four heavy barrel .50 caliber Browning machine guns mounted on sides of an electrically-powered turret. It was used throughout World War II and Korea. See M45 "Quadmount," ROBERTS ARMORY, <http://www.robertsarmory.com/quad.htm> (last visited June 26, 2017).

⁴ E-mail from John Cleary to author, subject: Your history (June 2, 2017, 2:52 PM) (on file with author).

⁵ E-mail from John Cleary to author, subject: National Guard question (June 14, 2017, 10:53 AM) (on file with author).

⁶ The trial of First Lieutenant (1LT) William L. "Rusty" Calley was the most high-profile court-martial of the Vietnam War. Calley and his men were accused of murdering more than 350 Vietnamese civilians at the hamlet of My Lai. Calley was prosecuted for premeditated murder at Fort Benning in 1971; then Colonel Reid Kennedy was the trial judge at the general court-martial. A panel found Calley guilty as charged and

the division's one-week-long course, from which Cleary graduated in early 1961.⁷

While at Fort Bragg, 1LT Cleary also had his first experience with military justice. An officer, who was married but had several girlfriends, wanted a vasectomy so that there would be no possibility of any unwanted pregnancy. He asked a sergeant medic to perform the vasectomy on him; apparently the officer was convinced that this was a simple medical procedure and that the medic was capable of doing it safely. The chain-of-command, however, was unhappy when it learned of this unauthorized medical event and the sergeant who had performed the vasectomy was prosecuted at a court-martial. At trial, the accused remained silent, and the officer refused to answer any questions. When the only other witness to the event—another medic—claimed to have seen nothing, the court acquitted the accused. Now very unhappy with the entire episode, the command preferred a charge of perjury against the medic who had testified previously that he had seen nothing. First Lieutenant Cleary was the prosecutor. The court convicted the accused of perjury. Looking back, John Cleary felt the entire proceeding had been unfair. The sergeant who had performed the operation had been found not guilty, and the officer involved had been administratively discharged. The by-stander medic, however, who had foolishly lied under oath, now paid a heavy price with a court-martial conviction.⁸

After completing the 34th Judge Advocate Officer Basic Course (then called the Special Course) in May 1961, 1LT Cleary reported for duty at Fort Campbell, Kentucky. During this period, the 101st (along with the 82d), was on airborne status. Consequently, Cleary continued to jump and qualified as a senior parachutist in January 1962.

While at the 101st, 1LT Cleary wrote a letter to The Judge Advocate General, Major General Charles E. "Ted" Decker,⁹ requesting that Decker permit him to attend the Army's Ranger School. Cleary believed that he would be a better officer—and a better judge advocate—if he took part in this rigorous combat arms training. A short time later, Cleary got a notification that he had a slot for the school. As he remembers it:

Ranger School was and is a real personal challenge. With [my] active duty experience, I was better prepared, but still underestimated the rigorous demands. Sleep deprivation made

you punchy and cranky and tested your endurance.

The motto of the class was 'cooperate and graduate,' for you had to work well with others. Once on an all-night patrol in a swamp during the Florida phase, I fell asleep standing up resting on a BAR [Browning Automatic Rifle]. I did not know I slept, for I thought I only blinked. In that instant in the darkness of the early morning, I noticed a sharp increase in the beginning of daylight. I checked my watch. An hour had elapsed, and the 24-man patrol was gone. If you got lost in Ranger School, you were out. I ran as fast as I could and caught up with the patrol. My buddy told the instructor I was somewhere on the flank when he noticed I was missing.

The instructor immediately made me the patrol leader, and I did not have a clue of where we were going or what the plan of assault was for our objective. The two student squad leaders covered for me by making it appear that the instructions they gave in the instructor's presence came from me. They must have liked me.¹⁰

On May 24, 1962, 1LT Cleary pinned the yellow and black Ranger tab on the sleeve of his shirt. About forty-five students finished with him in Ranger Class No. 7; he was the first Army lawyer in history to become Ranger-qualified. Many of this fellow graduates would later serve in Vietnam; more than a few were killed or wounded in action.¹¹

Cleary returned to Fort Campbell and the 101st Airborne Division. In the days before the Vietnam War, there were few overseas deployments, but 1LT Cleary did serve overseas as a Judge Advocate in brigade exercises in Okinawa and the Philippines. During training in the Philippines, a nineteen-year-old Soldier was shot by another Soldier. Apparently, the victim was on duty as the charge of quarters when he learned that the shooter had brought a privately-owned .22 caliber pistol with him. As Soldiers had been told that privately-owned weapons could not be brought on the deployment, the charge of quarters demanded that the Soldier turn over the pistol to him. What happened next was very much in dispute. The shooter claimed that, when he pulled the pistol out of his uniform pocket, it had accidentally fired. The victim, however,

sentenced him to confinement at hard labor for life. For more on the Calley trial, see *United States v. Calley*, 46 C.M.R. 1131 (A.C.M.R. 1973), *aff'd* 48 C.M.R. 19 (C.M.A. 1973). See also *Calley v. Calloway*, 382 F. Supp. 650 (1974); *Calley v. Hoffman*, 510 F. 2d 814 (1975), *cert. denied*, 425 U.S. 911 (1976). For a good narrative of the event, see RICHARD HAMMER, *THE COURT MARTIAL OF LT. CALLEY* (1971).

⁷ E-mail, John Cleary to author, *supra* note 4.

⁸ E-mail, John Cleary to author, subject: Revision of article (June 15, 2017, 10:38 AM) (on file with author).

⁹ Charles E. Decker served as The Judge Advocate General (TJAG) from 1961 to 1963. He had previously been a key player in the decision to establish The Judge Advocate General's School in Charlottesville in 1951. For more on General Decker, see *THE JUDGE ADVOCATE GENERAL'S CORPS, THE ARMY LAWYER* 233-35 (1975).

¹⁰ E-mail, John Cleary to author, subject: Ranger School (May 18, 2017, 3:21 PM) (on file with author).

¹¹ *Id.*



Captain John Cleary, 101st Airborne Division, on maneuvers with his division in South Carolina, summer 1962.

insisted that the shooter had taken “it out of his pocket, aimed it, and deliberately fired it at him.” The bullet had struck the charge of quarters in the spleen and, while 1LT Cleary thought that the man might die from this serious wound, Cleary was assured by the treating physician that “it was a clean wound” and that the victim would recover.¹²

Cleary was not so sure. Consequently, he interviewed the wounded Soldier and took a statement from him. At the time, 1LT Cleary realized that this interview might qualify as a “dying declaration” and an exception to the hearsay rule if the victim acknowledged that he was making his statement in the belief that he might die of his wound. But Cleary was uncomfortable about asking the victim if he would acknowledge that he might die of the gunshot wound, chiefly because he felt that if he “advised him, even in a subtle way of the chance of death, I might be taking away from him his will to live.” Cleary never asked the nineteen-year-old Soldier if he thought he might die and, as a result, the statement was not used at a later time—when the victim died of his wound. As Cleary remembers, the shooter “got off” with a very light punishment.¹³

In 1963, CPT Cleary became the first Staff Judge Advocate at the SWC at Fort Bragg, North Carolina (it would not be known as the John F. Kennedy SWC until after President Kennedy’s death). Then Brigadier General William P. Yarborough, the unit’s commander, assigned him to the 6th Special Forces Group so that he could remain on jump status. In early 1964, CPT Cleary made history yet again when he graduated from SWC’s High Altitude, Low Opening or

HALO course of instruction. As the accompanying certificate shows, he completed “14 free fall jumps, reaching a maximum of 95 seconds.” His highest jump was from 20,000 feet.



High Altitude, Low Opening (HALO) Parachute Certificate awarded to CPT John Cleary, 1964

After leaving active duty for the Army Reserve in 1964, Cleary remained active in sport parachuting clubs. He also made over 600 descents by parachute, of which more than 550 were free-fall jumps. In March 1966, he managed to spend two weeks active duty for training with the U.S. Army Sport Parachute Team, the “Golden Knights” at Fort Bragg.¹⁴

¹² E-mail, John Cleary to author, *supra* note 4.

¹³ *Id.* For the current rule on statements made under belief of impending death, see MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 804(b)(2).

¹⁴ E-mail, John Cleary to author, *supra* note 4.

After taking off his Army uniform, John Cleary first worked as the deputy director of the National Defender Project. The goal of the project, which was underwritten by the Ford Foundation, was to implement the Supreme Court's 1963 decision in *Gideon v. Wainwright*. General Decker, who had recently retired as The Judge Advocate General (TJAG), was the director of the National Defender Project, and he hired Cleary as his deputy. Cleary later went into private practice as a defense attorney in San Diego. Today, at eighty-one years of age, he works at San Diego State University (SDSU) organizing trips to China for SDSU students and bringing Chinese students to SDSU for training in basic trial advocacy.

John Cleary's story is worth telling for several reasons. First, it shows that even before the Corps' institutional development of operational law in the 1980s and 1990s—our *raison d'être* today—there were individual Judge Advocates who were looking for ways to better serve commanders. Cleary's successful completion of Ranger and HALO training opened the door for him to join the special warfare community as a lawyer, thereby ensuring that these operators had the services of a judge advocate. Second, John Cleary's life experiences after the Army demonstrate that his historical "firsts" as a judge advocate were not a fluke, as his continued to lead a full and rewarding life as a civilian.

A final note. Shortly after Cleary completed Ranger training, a second judge advocate, CPT Hunter Clarke, who had served with Cleary at the 101st Airborne Division, also completed the Ranger course and earned the Ranger tab.¹⁵ Over the years, other Army lawyers have also completed Ranger training. In the early 1980s, Captain Philip Lindley and Martin Healy, both assigned to the Office of the Staff Judge Advocate, Fort Benning, Georgia, earned the Ranger tab. Other Judge Advocates who have successfully completed Ranger training while members of the Corps include Colonel George Smawley and Major John Doyle.

¹⁵ E-mail, John Cleary to author, *supra* note 10.

Lore of the Corps

A Letter to President Richard M. Nixon

By Fred L. Borch

Regimental Historian and Archivist

On March 29, 1971, First Lieutenant William L. “Rusty” Calley was found guilty by a general court-martial of the premeditated murder of 22 Vietnamese civilians—infants, children, women, and old men—at the small hamlet of My Lai 4. He also was convicted of assault with intent to murder a child of about two years. Two days later, the court-martial panel of six officers, five of whom had served in Vietnam, sentenced Calley to dismissal from the Army, total forfeiture of all pay and allowances, and confinement at hard labor for life.¹

What happened the following day, as Calley was confined in the post stockade awaiting transfer to the Disciplinary Barracks at Fort Leavenworth, was unprecedented in military legal history: President Richard M. Nixon announced that he would personally review Lieutenant Calley’s case before the sentence took effect. In the interim, Calley would be released from the stockade and placed under house arrest in his on-post quarters.² Nixon’s intervention, occurring as it did before the court reporter had even finished typing the record of trial, much less before the convening authority had taken any action in the proceedings, greatly upset the two Army judge advocates who had prosecuted Calley. They were so disturbed by the President’s involvement in the judicial process that they each wrote a letter to Nixon—protesting his interference in the court-martial. This Lore of the Corps article is about those letters, and their importance in military legal history.

On March 16, 1968, Lieutenant Calley and Soldiers in Company C, 1st Battalion, 20th Infantry, 11th Infantry Brigade (Light) of the 23d (Americal) Division massacred between 300 and 500 Vietnamese civilians. The war crime went undiscovered because of a cover-up perpetrated by the brigade and division staffs.³

A year later, the Army’s Criminal Investigation Division and a formal Army Regulation 15-6 inquiry conducted by Lieutenant General William R. Peers, finally brought the incident into the open. General Peers’ report identified 30 individuals, mostly officers, who knew about the murders at My Lai 4.⁴ Ultimately, however, only fourteen Soldiers were charged with crimes. For a variety of reasons, charges were either dismissed or the accused was found not guilty at trial. Lieutenant Calley, the most junior ranking officer, was the

only soldier to be convicted, but for fewer murders than actually had been committed.

Before and during Calley’s trial, Americans from many different walks of life expressed their displeasure with the case. Immediately after he was convicted, this unhappiness increased; a public opinion poll found that “nearly 80 percent were bitterly opposed to the finding” of guilty.⁵ Some insisted that Calley, even if guilty, was being made a scapegoat. Others insisted that he was innocent because he had done nothing more than kill the enemy. Draft boards in Arkansas, Florida, Kansas, Michigan, Montana and Wyoming resigned—insisting that they would not draft young American men for duty in Vietnam. Some state governors flew the American flag at half-mast. Veterans groups like the American Legion and Veterans of Foreign Wars protested against the verdict and demanded clemency. One woman, who had been part of a crowd outside the Fort Benning courtroom when the sentence was announced, had screamed that Calley had “been crucified”, and instead of being punished for killing Communists, “should get a medal” and “be promoted to general.”⁶



First Lieutenant William L. Calley

On April 1, 1971, the day after the court members announced the sentence in *United States v. Calley*, President Nixon directed that Calley be released from the stockade on Fort Benning and moved to his on-post quarters, where he would be under house arrest. While this presidential interference was surprising because it was so unprecedented, participants and observers of the *Calley* proceedings were even more startled two days later. This was because, after “waking in the middle of the night in turmoil over the Calley case and his responsibilities to the nation about it,” Nixon proclaimed that he would personally review “Captain Calley’s” [sic] case before the sentence took effect and decide

¹ *United States v. Calley*, 46 C.M.R. 1131 (A.C.M.R. 1973). See also *Calley v. Hoffman*, 519 F.2d 184, (5th Cir. 1975) cert. denied, 425 U.S. 911 (1976) (No. 75-773); *Calley v. Calloway*, 382 F. Supp. 650 (M.D. Ga. 1974); *United States v. Calley*, 22 U.S.C.M.A. 534, 48 C.M.R. 19 (1973).

² RICHARD HAMMER, THE COURT-MARTIAL OF LT. CALLEY 380 (1971).

³ WILLIAM R. PEERS, THE MY LAI INQUIRY 199-209 (1979).

⁴ *Id.* at 212-216.

⁵ Hammer, *supra* note 2, at 374.

⁶ *Id.* at 369.

whether the panel that had found him guilty had done the right thing.⁷



Captain Aubrey Daniel III

Captain (CPT) Aubrey M. Daniel III had been the lead trial counsel in *United States v. Calley*. As the most experienced trial attorney at Fort Benning, Daniel had done most of the direct and cross-examination of witnesses in the trial, including Calley.⁸ Together with his assistant trial counsel, CPT John P. Partin, the

two Army lawyers had worked hundreds of hours preparing for trial. At least for Partin, the trial had been all consuming; from the day he reported for duty at Fort Benning in September 1969, until April 1971, John Partin's "sole concern" was the Calley trial.⁹

Both CPT's Daniel and Partin were distressed by President Nixon's actions. As a result, each judge advocate wrote a letter to the President in which they argued that the President not only had been wrong to intervene in the court proceedings but that his actions were both harmful and immoral. Aubrey Daniel began his lengthy letter as follows:

Sir:

It is very difficult for me to know where to begin this letter as I am not accustomed to writing letters of protest. I can only hope that I can find the words to convey to you my feelings as a United States citizen, and as an attorney, who believes that respect for law is one of the fundamental bases upon which this nation is founded.

On November 26, 1969, you issued the following statement through your press secretary, Mr. Ronald Ziegler, in referring to the My Lai incident . . . as in direct violation not only of United States military policy, but also abhorrent to the conscience of all the American people.

Daniel continued his letter by reminding President Nixon that on December 8, 1969, after being asked to comment on the My Lai case at a press conference, that Nixon had called it "a massacre" and said that "under no circumstances was it justified." After all, explained Nixon, "[o]ne of the goals we are fighting for in Vietnam is to keep the people of South Vietnam from having imposed on them a government which has atrocity against civilians as one of its policies. We cannot ever condone or use atrocities against civilians to accomplish that goal." Daniel continued:

These expressions of what I believed to be your sentiment were truly reflective of my own feelings when I was given the assignment of prosecuting the charges which had been preferred against Lieutenant Calley.

Throughout the proceedings there was criticism of the prosecution but I lived with the abiding conviction that once the facts and the law had been presented there would be no doubt in the mind of any reasonable person about the necessity for the prosecution of this case and the ultimate verdict. I was mistaken.

Daniel's letter goes on to explain how Calley got a fair trial and that the six officers serving on the court-martial panel had "performed their duties in the very finest tradition of the American legal system." He wrote that, after the verdict in the trial was announced, he was "totally shocked and dismayed at the reaction of many people across the nation." He continued:

I would have hoped that all leaders of this nation, which supposed to be a leader within the international community for the protection of the weak and the oppressed regardless of nationality, would have either accepted and supported the enforcement of the laws of this country as reflected by the verdict of the court or not made any statement concerning the verdict until they had had the same opportunity to evaluate the evidence that the members of the jury had.

In view of your previous statements . . . I have been particularly shocked and dismayed at your decision to intervene in these proceedings in the midst of public clamor. . . Your intervention has, in my opinion, damaged the military judicial system and lessened any respect it may have gained as a result of the proceedings.

⁷ *Id.* at 380.

⁸ A 1963 graduate of the University of Virginia, Aubrey Daniel received his law degree from the University of Richmond. He accepted a direct commission in the Corps in 1967, after receiving a draft notice. Hammer, *supra* note 2, at 51.

⁹ A 1966 Vanderbilt University graduate, John Partin completed law school at the University of Virginia in May 1969 and entered the Corps the next month. Mr. Partin spoke about his experiences in *United States v. Calley* when he delivered the 11th Annual George S. Prugh Lecture in Military Legal History on April 25, 2017. *Id.* at 52.

Not only has respect for the legal process been weakened . . . [but] support has been given to those people who have so unjustly criticized the six loyal and honorable officers who have done this country a great service by fulfilling their duties as jurors so admirably. Have you considered those men in making your decision?

I would expect that the President of the United States, a man whom I believed should and would provide the moral leadership for this nation, would stand fully behind the law of this land on a moral issue which is so clear and about which there can be no compromise.

For this nation to condone the acts of Lieutenant Calley is to make us no better than our enemies and make any pleas by this nation for the human treatment of our own prisoners meaningless.

I truly regret having to have written this letter and wish that no innocent person had died at My Lai on March 16, 1968. But innocent people were killed under circumstances that will always remain abhorrent to my conscience.

While in some respects what took place at My Lai has to be considered a tragic day in the history of our nation, how much more tragic would it have been for this country to have taken no action against those who were responsible.

That action was taken, but the greatest tragedy of all will be if political expediency dictates the compromise of such a fundamental moral principle as the inherent lawlessness of the murder of innocent persons, making the action and the courage of six honorable men who served their country so well meaningless.

About the same time that CPT Daniel sent his letter to the White House, CPT Partin typed a three and one half page, single-spaced letter. This letter is dated April 4, 1971, and was mailed to Washington, D.C. shortly after it was written.¹⁰

Partin's letter opens with this sentence: "Dear Mr. President: 1 April 1971 was the most discouraging night of my life."

After explaining that Calley had received an exceptionally fair trial, Partin wrote that it was wrong for President Nixon "to carve out a new set of rules for Lt. Calley" that applied only to Calley. This was because the rules released Calley from confinement in the post stockade

but left some 200 soldiers confined there, "none of whom were even charged with capital offenses." Partin continued:

At a time when there is an enormous need for respect for the [law], this case could have served as a true vehicle for the respect in the military justice system which is so badly needed.

It was reported on 4 April that you would personally review this case after the appeal system operated. Sir, you were reported as wanting to wait . . . because it would be interfering to act before then. It is my belief that any action which makes this case extraordinary is interfering and unwarranted.

Expediency and politics are not going to provide the backbone for a rejuvenation of the spirit of America which you have said you wanted for this country. These actions can only delay that much needed rejuvenation.



President Richard M. Nixon

Although the White House received both letters, President Nixon never replied to either CPT Daniel or CPT Partin. Nixon also never took any further action in Rusty Calley's case, although one occasionally hears erroneous claims in the media that Nixon 'pardoned' Calley. In fact, nothing of the sort occurred since, on May 3, 1974, President Nixon notified the Secretary of the Army that he had reviewed the proceedings and would take no action in the matter.¹¹ But some might conclude that the president's very public pronouncements were command influence that definitely affected the results.

On August 21, 1971, the Commanding General, Third U.S. Army, took action as the general court-martial convening authority. He approved the findings of premeditated murder against Calley but reduced his sentence of confinement to twenty years. In April 1974, after the Army Court of Military Review (the forerunner of today's Army Court of Criminal Appeals) and the Court of Military Appeals (the forerunner of today's U.S. Court of Appeals for the Armed Forces) had rejected Calley's appeals and affirmed both the findings and sentence, the Secretary of the Army, Howard H. Calloway,

were completed; the U.S. Fifth Circuit did not decide Calley's *habeas corpus* petition until September 1975 and the U.S. Supreme Court did not deny *certiorari* in the case until 1976.

¹⁰ Letter from CPT John P. Partin to President. Richard M. Nixon (4 April 1971) (on file with author).

¹¹ Calley v. Calloway, 519 F.2d. 184 (5th Cir. 1975). President Nixon resigned in August 1974, long before judicial proceedings in the Calley case

reduced his sentence further to ten years. Calley, who had been in house arrest the entire time since April 1971, was now transferred to Fort Leavenworth, Kansas. But he was eligible for parole in six months—because he had served one-third of his ten year sentence. As a result, after a short time behind bars, Calley was paroled in November 1974.¹²

The *Calley* verdict should have been an opportunity for national self-examination—an opportunity for Americans to look within themselves and to reaffirm that the systematic killing of a large number of defenseless old men, women and children was a horrific event and that the American soldiers who committed this war crime must be held responsible. As Lieutenant General Peers put it, Calley was not an innocent scapegoat and the evidence of his guilt was “overwhelming.” Consequently, his trial should have reminded “the American people of this country’s obligation to punish those who commit war crimes.”¹³

Instead, the decision was viewed by more than a few American citizens as an attack on the United States and themselves. Rightly or wrongly, these men and women believed that condemning Calley was to condemn every American who had fought in Vietnam and to condemn every soldier who had simply tried to do his duty under very difficult circumstances. This is the chief reason that the letters written by Captains Aubrey Daniel and John Partin are so important in our legal history—because the letters reflect that both prosecutors were men of principle who recognized that Calley not only had committed horrendous crimes deserving of punishment but that Nixon’s interference was harming the rule of law and damaging America’s moral authority.

Today, Americans are not surprised when a fellow citizen sends an email or twitter message to the White House, or even takes the time to write a letter to the president. In the early 1970s, however, members of the public were more reticent about making their views known. It certainly was unheard of for an active duty Army officer to write a letter to the President, much less a letter that criticized him and questioned his morality. Yet Daniel and Partin, believing the military justice system required them to speak up, took the time to write these letters. Members of The Judge Advocate General’s Corps can be proud of them.

¹² United States v. Calley, 46 C.M.R. 1131 (A.C.M.R. 1973). *See also* Calley v. Hoffman, 519 F.2d 184, (5th Cir. 1975) *cert. denied*, 425 U.S. 911 (1976) (No. 75-773); Calley v. Calloway, 382 F. Supp. 650 (M.D. Ga. 1974); United States v. Calley, 22 U.S.C.M.A. 534, 48 C.M.R. 19 (1973).

¹³ Peers, *supra* note 3, at 254.

Lore of the Corps:

A Commander and the Law in Vietnam:

Major General George L. Mabry, Jr. and “The Case of the Green Berets”

By Fred L. Borch

Regimental Historian and Archivist*

Judge advocates will be interested in Major General George L. Mabry’s Army career for at least three reasons. First, he was a Soldier who very much stood out in the million-man Army of his era, since he had been awarded every single combat valor decoration that a Soldier may receive, including the Medal of Honor. Second, his involvement as the convening authority in the infamous Green Beret murder case, a textbook example of a commander who insisted on ‘doing the right thing’ in a court-martial despite the dark shadow that the case cast upon the Army in Vietnam. Finally, our Corps has a personal connection with Major General Mabry: his daughter, Abigail “Gail” Ferrick, has been a civilian member of our Regiment at Fort Jackson, South Carolina for almost 25 years.

Born in Stateburg, South Carolina, in September 1917, George Lafayette Mabry Jr. worked as a farm manager for 14 months and played semi-professional baseball for a year before graduating from Presbyterian College in 1940. He had been a member of his school’s Reserve Officer Training Corps, and consequently was commissioned as a second lieutenant in June 1940.

With war on the horizon, Mabry began his Army career the following month with an assignment to the 4th Infantry Division, which had just been activated and was then training at Fort Benning, Georgia. Mabry joined the 8th Infantry Regiment, and remained with that unit until 1945. He deployed to England in January 1944, and waded ashore with other Soldiers of the 4th Infantry Division on Utah Beach. For his gallantry in Normandy on D-Day, then Captain Mabry was awarded the Distinguished Service Cross, second only to the Medal of Honor in the Army’s pyramid of combat decorations.¹ A short time later, Mabry also was awarded the Silver Star for heroism in combat.²

On November 20, 1944, in recognition of his conspicuous bravery during an attack through the Huertgen Forest near Schevenhutte, Germany, Major Mabry, as battalion commander, was awarded the Medal of Honor. He had singlehandedly prepared a path through a German minefield, captured three enemy bunkers, and killed three Germans, shooting two of them and bayoneting another who

was trying to kill him with a pistol. With his rifle butt, he injured another German soldier (putting him out of action), and captured nine more enemy soldiers. As if this was not enough combat heroism, Mabry then led his battalion across 300 yards of fire-swept terrain to seize high ground upon which he established a defensive position which menaced the enemy on both flanks.³

Mabry finished World War II as a lieutenant colonel in the same regiment in which he had started as a second lieutenant. It had been a remarkable five years of soldiering, as Mabry had seen 299 days of combat in Normandy, Northern France, Belgium, Luxembourg, and Germany. During that



Lieutenant Colonel George L. Mabry Jr.

time he served as a platoon leader, company commander, battalion operations officer (S-3), battalion executive officer, and battalion commander. In addition to his Medal of Honor, Distinguished Service Cross and Silver Star, Mabry was also awarded the Bronze Star Medal with V-for-valor device and the Purple Heart.

Most historians believe that the 3rd Infantry Division’s Audie Murphy, who was immortalized in the book and movie *To Hell and Back*, is the most decorated Soldier of World War II.⁴ It is highly likely, however, that Mabry is a close second, as he also was awarded every single decoration that may be awarded a Soldier for valor in combat.

At the end of World War II in 1945, then Lieutenant Colonel Mabry decided that he liked soldiering, and he decided to make the Army a career. The next year, he completed the Infantry Officers’ Advanced Course at Fort Benning, Georgia, and then remained on the staff and faculty of the Infantry School. Two years later, he was sent to

* The author thanks Ms. Gail Ferrick and Lieutenant Colonel (retired) George Mabry III for their help in preparing this article in their father.

¹ Headquarters, First U.S. Army, Gen. Order No. 32, (1944).

² Headquarters, Fourth Infantry Division, Gen. Order No. 43 (1944).

³ Headquarters, War Dep’t, Gen. Order No. 77 (1945); Medal of Honor Recipients, World War II (Recipients M-S), <http://www.history.army.mil/moh/wwII-m-s.html> (last visited July 24, 2017).

⁴ AUDIE MURPHY, *TO HELL AND BACK* (1949); *TO HELL AND BACK* (UNIVERSAL PICTURES 1955).

Command and General Staff College, Fort Leavenworth, Kansas, from which he graduated in September 1950.

The Korean War had begun a few months earlier and, like most of his classmates, Mabry wanted to go where the 'action' was.. But it was not to be and instead Mabry was sent to Fort Kobbe in the Canal Zone, where he joined the 33d Infantry Regiment and served as a battalion commander and later as Regimental Executive Officer. In June 1952, LTC Mabry left command and joined the Operations Branch (G-3) of U.S. Army Forces Caribbean at Fort Amador, Canal Zone. During this period, he was a key player in establishing the Army's Jungle Warfare Training Center. Thousands and thousands of Soldiers earned the distinctive Jungle Warfare patch, which they proudly wore on the right pocket of their fatigues. One Soldier who successfully completed the training was John Nolan, who would later serve as the first Sergeant Major of the Corps.



John Nolan wearing the Jungle Warfare patch.

Mabry returned to the United States in July, 1953, and, after graduating from the Armed Forces Staff College, served as a staff officer in Headquarters, Continental Army Command. In January 1956, Colonel Mabry was assigned to Korea, where he first served as commander of the 31st Infantry Regiment before becoming the G-3 of I Corps. Colonel Mabry returned to the American soil in 1957 where, after a brief time as the commander of the Third Training Regiment at Fort Jackson, he attended the National War College, from which he graduated in 1958.

After two assignments in the Pentagon, one with the Army and one on the Joint Chiefs of Staff, Mabry returned to the Canal Zone in 1962. He was the J-3 (Plans and Operations Officer) of the Unified Command Headquarters and, in that assignment, was in charge of developing and maintaining up-to-date plans to protect and defend the Canal.

In 1964, when the Panamanians rioted against the Canal Zone, now Brigadier General Mabry was the first U.S. military officer to arrive on scene and he directed the deployment of U.S. troops. Ultimately, the rioters were evicted from the Canal Zone and order was restored.

In August 1965, while still wearing a single star on his collar, Mabry took command of the 1st Armored Division at Fort Hood, Texas. But it was a short-lived command; in January 1966, Army Chief of Staff General Harold K. Johnson selected Mabry to head an evaluation team of 100 officers and civilians. The team's mission was to study the combat effectiveness of four types of maneuver battalions in Vietnam and its nine-volume report became known as the "ARCOV Report."⁵

After returning from Vietnam in April 1966 and resuming command of the 1st Armored Division for three months, Mabry became commanding general of the U.S. Army Combat Developments Experimentation Command at Fort Ord, California.

In April, 1969, now Major General Mabry (he had received his second star in November 1966) deployed to Vietnam, where he served as Chief of Staff and Assistant Deputy Commanding General for U.S. Army Vietnam (USARV). He also assumed command of the Support Troops, (USARV). It was during this tour of duty in Vietnam that MG Mabry faced his greatest legal challenge as the convening authority, in what *Time*, *Newsweek* and *U.S. News and World Report* would call "The Case of the Green Berets."⁶

On a moonless night in June 1969, "three men in unmarked camouflage uniforms backed a small boat out of a slip and turned down a dark slow river toward the South China Sea."⁷ The men were all Green Berets assigned to an intelligence unit in the 5th Special Forces Group. In the boat they had a fourth man. He was Thai Khac Chuyen, a 31-year old Vietnamese civilian whom they had abducted. The Americans suspected that this individual was a North Vietnamese double agent and, under the belief that they were acting on behalf of the U.S. Central Intelligence Agency (CIA), the three Green Berets shot the man in the head with a .45 caliber pistol and tossed him overboard. Since they had attached thick steel chains and two iron wheel rims to him prior to throwing him over, their victim sank immediately.

This murder was uncovered when the CIA station chief in Saigon informed General Creighton Abrams, the top uniformed officer in Vietnam, that some Green Berets probably had executed a Vietnamese agent they suspected was working for Hanoi.⁸ When Abrams questioned Colonel Robert "Bob" Rheault, the senior Green Beret in Vietnam, about the killing, Rheault lied to Abrams. Although he knew otherwise, he denied that any Green Berets had been involved in killing Chuyen. Rather, said Rheault, the man was in Cambodia on a mission and would return "in a few days."⁹

After learning that Rheault had lied to him, an incensed General Abrams directed the Army's Criminal Investigation

⁵ U.S. ARMY CTR. OF MIL. HIST., PUB. 70-105-1, HISTORY OF OPERATIONS RESEARCH IN THE UNITED STATES ARMY, VOLUME II: 1961-1973 (2008). ARCOV is an acronym for Army Combat Operations in Vietnam.

⁶ JEFF STEIN, A MURDER IN WARTIME 324 (1992).

⁷ *Id.* at 3.

⁸ *Id.* at 137.

⁹ *Id.* at 143.

Division (CID) to look into the case. After CID had gathered evidence of wrongdoing, an investigation pursuant to Article 32, Uniform Code of Military Justice, concluded that the Green Berets had murdered Chuyen, and that in addition to the three Soldiers in the boat, there was sufficient evidence to charge three more men with complicity in the killing—for a total of six Soldiers being charged.

There was no doubt that the Americans had killed Chuyen, as they admitted to the murder. But, the Green Berets insisted, they had done so on the orders of the CIA. In Major General Mabry's opinion, as the general court-martial convening authority, this 'the CIA ordered us to do it' was nonsense, especially when the CIA denied having given the Green Berets any such directive. Mabry saw the event as a clear-cut case of murder—the killing of a prisoner of war in violation of the Law of Armed Conflict—and he was going to do the right thing and press on with prosecuting, even though more than a few senior leaders in the Army thought that it might be smarter to let the case quietly disappear.

Major General Mabry referred the case to trial by general court-martial, with proceedings set to begin on September 18, 1969. Colonel Wilton B. Persons, the Staff Judge Advocate at USARV, advised the defense counsel that there would be two trials. The first would be of the three lower level Soldiers, followed by a second trial of the three more senior Soldiers, including Colonel Rheault.¹⁰

But it was not to be. Congressman Peter Rodino had previously proclaimed on the floor of the House of Representatives that the Green Berets were “being sacrificed simply to protect the image of career military commanders and CIA officials.”¹¹ According to Rodino, the Army had “mishandled” the case “from the beginning,” and the Soldiers being accused were simply “scapegoats.”¹²

As public support for the Green Berets grew, Congressman Medel Rivers of South Carolina, Chairman of the House Armed Services Committee, threatened to withhold money for President Nixon's planned antiballistic missile construction program and to hold up other much needed funding for the Army.¹³

When the CIA balked at cooperating with the prosecution—by declining to provide any witnesses requested

by the defense—it was all over. On September 29, 1969, Secretary of the Army Stanley Resor announced that “the Central Intelligence Agency, though not directly involved in the incident, has determined that in the interests of national security,” it would not make any of its personnel available for trial.¹⁴ Concluding that the accused Soldiers could not receive a fair trial without CIA cooperation, Resor announced that he was directing that the charges be dismissed immediately.

Major General Mabry was “shocked” and General Abrams was equally dismayed.¹⁵ But there was nothing else to be done. In any event, there was no doubt that the Army was responsible for the death of Chuyen; his widow later received a “death gratuity” of \$6,472, which was equivalent to three years of Chuyen's salary.¹⁶

In December 1970, Major General Mabry left Vietnam and returned to the Canal Zone, where he headed the U.S. Army Southern

Command. During this assignment, he had a professional military association with the President of Panama, Omar Torrijos, under whom Manuel Noriega, served as, the chief of Panamanian military intelligence.¹⁷ Mabry's final assignment began in January 1975, when he took command of U.S. Army Readiness Region V, Fort Sheridan,



Major General George L. Mabry, Jr

Ill. He retired in August and moved to Columbia, South Carolina., where he was active in a variety of community activities. He was an especially strong supporter of youth and veterans groups, and often spoke about his experiences in World War II and current events. Major General Mabry died on July 13, 1990.

His son, George L. Mabry III, followed his father into the Infantry, and retired in 1992 as a lieutenant colonel. Today, he continues to serve our Army as a civilian contractor as part

¹⁰ *Id.* at 350. Colonel Persons was promoted to major general in 1975, and served as The Judge Advocate General until retiring in 1979.

¹¹ *Id.* at 355.

¹² *Id.* at 350. First elected in 1948, Peter Rodino served forty years in the House of Representatives. He is perhaps best known for his time as chairman of the House impeachment hearings that “induced Richard M. Nixon to resign as president.” See generally Michael T. Kauffman, Former Rep. Peter W. Rodino Jr. Is Dead at 95; Led House Watergate Hearings, N.Y. TIMES, May 9, 2005, <http://www.nytimes.com/2005/05/09/nyregion/former-rep-peter-w-rodino-jr-is-dead-at-95-led-house-watergate.html?mcubz=1>.

¹³ Stein, *supra* note 6, at 350.

¹⁴ *Id.* at 374.

¹⁵ *Id.* at 373.

¹⁶ *Id.* at 386.

¹⁷ General Manuel A. Noriega subsequently became the “Maximum Leader” of Panama and, on December 15, 1989, announced that a state of war existed between the United States and Panama. This proclamation led directly to Operation *Just Cause* and the overthrow of Noriega by U.S. forces. Noriega subsequently was arrested, flown to Florida, and convicted of various drug trafficking offenses. He died in May, 2017.

of the Army National Guard's training program for brigade and battalion commanders and their staffs.¹⁸

The Corps' personal connection with Major General Mabry is through his daughter, Abigail "Gail" M. Ferrick, who is a claims examiner in the Office of the Staff Judge Advocate, Fort Jackson, South Carolina. Ms. Ferrick began her career as a Department of the Army civilian employee at Fort Jackson in June 1981, and transferred to the post's legal office nearly 25 years ago. She has "no plans to retire."

I still love working with all of these smart young active duty attorneys and our great team of civilian attorneys. They keep me on my toes. Plus I love putting money back into the U.S. Treasury and into military treatment facilities. It is the best job and it is a pleasure to come to work each morning.¹⁹

¹⁸ E-mail from George L. Mabry, to author (May 24, 2017) (on file with author).

¹⁹ E-mail from Abigail M. Ferrick, to author (May 24, 2017) (on file with author).

Lore of the Corps:

An Army Lawyer's Canteen:

A Remarkable Relic of Captivity in the Philippines, Formosa, and Manchuria in World War II

Fred L. Borch
Regimental Historian & Archivist

One of the most interesting items on display in the Legal Center and School is a canteen that belonged to Colonel (COL) Thomas A. Lynch, a Philippine Division judge advocate who was taken prisoner by the Japanese in 1942.

The canteen is a remarkable piece of our Regiment's history. Lynch carried it from the time he was captured until he was liberated from a prisoner of war (POW) camp in August 1945. There is little doubt that the canteen was critical to Tom Lynch's survival as a POW and arguably was his most valuable possession since nothing was more important in a POW camp than having readily available clean water to drink. But what makes the canteen so interesting is that Lynch (or more likely a fellow POW with some artistic talent) engraved it with the names and dates of every location in which Lynch spent any time from December 1941 through June 1943, including POW camps in which he been held captive. This Lore of the Corps article is about that canteen, and the details engraved upon its surface.

As an article about COL Lynch has already appeared in the pages of *The Army Lawyer*, only a very brief recap of his career is necessary.¹ Born in Chicago, Illinois on March 2, 1882, Thomas Austin "Tom"

Lynch graduated from high school at age 19. He seems to have worked in Chicago as an office clerk for the Chicago and New Hampshire Railroad before enlisting in the 17th Infantry Regiment on March 28, 1904. After a short period of service in Cuba, he sailed with his unit to the Philippines. Lynch subsequently served as a private, corporal, sergeant and first sergeant in Company "F" of that Regular Army unit.



Tom Lynch was a talented Soldier of proven ability. He not only participated in campaigns against Filipino insurgents on Mindanao in 1904-1905 (his records reflect one year, seven months of "combat" duty)² but his superiors were sufficiently impressed with Lynch that he was offered a commission in the Philippine Scouts.³ After slightly more than seven years in the ranks, Lynch took his oath of office as a second lieutenant on February 16, 1912. A year later, he was serving as the "Presidente of Parang and Deputy District Governor" of Cabato, Mindanao.⁴

After being promoted to major (MAJ) on July 1, 1920, Lynch continued to work as an Army lawyer. He wore the crossed quill-and-sword insignia on his collar and served as a "Law Member"⁵ at general courts-martial convened in the Philippines. Lynch also performed duties as a trial counsel

¹ Fred L. Borch, *The Life and Career of Thomas A. Lynch: Army Judge Advocate in the Philippines and Japanese Prisoner of War*, THE ARMY LAWYER. (Mar. 2016), 40-45.

² War Department Adjutant General's Corps Form No. 66-1, Officer's and Warrant Officer's Qualification Card, Lynch, Thomas A. (9 Sep. 1945).

³ Created by the Army in 1899, the Philippine Scouts were recruited from the indigenous population of the Islands and used to suppress the increasingly vicious insurgency led by Emilio Aquinaldo against the new American colonial regime. In 1901, Congress made the Scouts part of the Regular Army, and assumed responsibility for their pay and entitlements. The Scouts were now a "military necessity" as congressional authorization for the U.S. volunteer army had expired, leaving only U.S. Regular troops and the fifty companies of Scouts (about 5,000 men) to maintain law and order in the Philippines. PAUL A. KRAMER, *THE BLOOD OF GOVERNMENT* 113-14 (2006). By the time 2d Lt. Lynch accepted a commission in the Scouts in 1912, the Scouts were an important military force the Philippines. While Soldiers enlisting in the Scouts were exclusively native-born recruits, many Scout officers also were Filipino—in contrast to Lynch. A significant number also were U.S. Military Academy graduates, as West Point had begun admitting Filipinos in 1908; by 1941, 16 of 38 native Scout officers were USMA graduates. See JEROLD E. BROWN, *HISTORICAL DICTIONARY OF THE UNITED STATES ARMY* 366-67 (2001).

⁴ Lynch was stationed on Mindanao because guerilla activity persisted on that island—and the Islands of Samar, Cebu and Jolo—until 1913, when then Brigadier General John J. Pershing and troops of the 8th Infantry finally defeated Moro insurgents at the battle of Bud Bagsak on Jolo Island. JERRY KEENAN, *ENCYCLOPEDIA OF THE SPANISH-AMERICAN AND PHILIPPINE-AMERICAN WARS* 52 (2001).

⁵ While the law member was the forerunner of today's military judge, his role and authority were markedly different in the 1920s. The law member was tasked with ruling "in open court" on all "interlocutory questions." These were defined by the 1921 *Manual for Courts-Martial* as "all questions of any kind arising at any time during the trial" except those relating to challenges, findings and sentence. But the law member's rulings were only binding on the court when the interlocutory question concerned admissibility of evidence. On all other interlocutory questions, the law member's decision could be overturned by a majority vote of the members. Interestingly, the law member also participated in all votes taken by the members, including findings and sentencing. *MANUAL FOR COURTS-MARTIAL, UNITED STATES* pt. 89a(2),(3),(6) (1921).

at general courts,⁶ reviewed court-martial records and prepared legal opinions. But this was not a full-time position, as his military records show that MAJ Lynch also served as an “Athletic officer,” “Salvage officer,” “Assistant to the Post Quartermaster” and “Regimental Adjutant” between 1920 and 1922.⁷

By 1925, MAJ Lynch was devoting his time exclusively to legal matters as Assistant Department Judge Advocate in Manila. His duties included “preparation of opinions, examinations of G.C.M. records, writing reviews, giving advice on legal questions, and [serving] as trial judge advocate.”

After returning to U.S. soil in 1926, Lynch served a four year tour of duty at the Office of the Judge Advocate General in Washington, D.C. He worked in the Military Affairs Section, which is akin to today’s Administrative and Civil Law Division. According to his military records, he did well in the War Department. “He demonstrated resourcefulness and power of close analysis” and was “a very helpful assistant in the solution of a variety of legal questions.”⁸

In November 1930, MAJ Lynch returned to the Philippine islands, and resumed his work as the Assistant Department Judge Advocate. Slightly less than four years later, in August 1934, he retired from active duty. But he liked living in the Philippines and decided to remain there. Having moved out of Army housing, Lynch and his family acquired a home in Manila, and he established a private law practice in downtown Manila.⁹

Six years later, with war on the horizon after the German attacks on Poland in 1939, and the Low Countries and France in 1940, Lynch was recalled to active duty in the Philippine Department Judge Advocate’s office. He was now 58 years old, well beyond the normal age for soldiering, but a war was coming and his services as a lawyer in uniform were needed. The good news for Lynch was that he had been recalled as a lieutenant colonel (LTC), and now wore silver oak leaves.

When the Japanese invaded the Philippines on December 8, 1941, LTC Lynch was in Manila and, as the American-Filipino defense of the islands got underway, took on a number of non-legal duties. He also saw combat and, on December 29, 1941, was wounded in action by bomb fragments (lower left leg and left hand) from Japanese artillery fire. He was later awarded the Purple Heart for these combat injuries.¹⁰

Corregidor, a rocky, two-mile-square Island that sits astride the entrance to Manila Bay, was the final defensive position for American and Filipino forces. As units began moving onto the island, Lynch was placed in command of Cabcaban Pier, which was the major off-loading point for materiel coming onto the island. He handled “all unloadings” between December 31, 1941, and January 4, 1942.

Lynch had been promoted to colonel on March 28, 1942, and re-assigned as Staff Judge Advocate, U.S. Forces in the Philippine Islands. In this position he provided the full range of legal advice to Lieutenant General Jonathan “Skinny” Wainwright, the senior most Army officer in the Philippines after General Douglas MacArthur left for Australia in March 1942.¹¹ When Wainwright surrendered all U.S. forces on Corregidor on May 6, 1942, he and Tom Lynch went into Japanese captivity.¹²

Lynch almost certainly did not start the engraving process on his canteen until after he was a POW. In fact, it is likely that the engraver was not Lynch, as a crudely lettered LYNCH on the reverse (concave side) of the canteen was probably done by him. After all, the lettering done on the convex part of the canteen shows a certain artistic flair and, since the last entry on the canteen is dated June 8, 1943, it is likely that the engraving was done in mid-1943.



In any event, Lynch remembered exactly where he had been prior to the surrender of all U.S. and Philippine armed forces on May 6, 1942. As the accompanying photograph shows, Tom Lynch’s canteen identifies him by name, and then traces his location in the Philippines with the following details, including his identity. Note that H.P.D.—U.S.F.I.P. is an abbreviation for “Headquarters, Philippine Department—U.S. Forces in [the] Philippines.” The engraver used a nail or other similar sharp

⁶ U.S. War Department, Form No. 711, Efficiency Report, Lynch, Thomas A. (1 Feb. 1922).

⁷ U.S. War Department, Form No. 711, Efficiency Report, Lynch, Thomas A. (7 Sep. 1921).

⁸ U.S. War Department, Adjutant General’s Office (AGO) Form No. 67, Efficiency Report, Lynch, Thomas A. (1 Jul. 1928).

⁹ Borch, *supra* note 1.

¹⁰ Headquarters, U.S. Forces in the Philippines, Gen. Order No. 26 (13 Apr 1942).

¹¹ Jonathan Mayhew Wainwright “was a tough, professional soldier” whose heroic defense of the Philippines “became a symbol of defiance at a time of national calamity.” He was awarded the Medal of Honor after his release from captivity in 1946. His nickname, “Skinny,” came from his gaunt, gangly physique. JOHN C. FREDRIKSEN, AMERICAN MILITARY LEADERS VOL. II 842 (1999)

¹² Lynch avoided the so-called Bataan Death March, as he was on Corregidor; the Bataan Death March had occurred a month earlier, on 9 April 1942.

object to place the following on the convex portion of the canteen:

COLONEL
THOMAS A. LYNCH
JUDGE ADVOCATE
H.P.D.—U.S.F.I.P.

CORREGIDOR, DEC. 24-26.
MANILA DEC. 27 28.
CORREGIDOR, DEC. 28-29
BATAAN, DEC. 30.
CABCABAN PIER, DEC.
31, '42- JAN. 4, '42. H.P.D.
BATAAN, JAN.4- MAR. 20.
CORREGIDOR MAR 20 - MAY6.

After Wainwright surrendered on May 6, Lynch's canteen records where he was held as a POW:

92ND GARAGE MAY 11-18.
HOSPITAL MAY 18-JULY 2.
BILIBID JULY 2-11
TARLAC JULY.11-AUG. 11 [1942]

The "92nd Garage" was "a flat ten-acre area" that "got its name because it was a motor pool for the 92nd Coast Artillery." As Lynch and his fellow POWs marched to the area, "they saw the bodies of Americans and Filipinos along the way." Eventually, some 12,000 men would be held in the area.¹³

On May 23, 1942, the Japanese began moving POWs from the 92nd Garage to Bilibid prison. But Lynch's canteen shows that he was in the "hospital" from May 18 to July 2, so he did not go to Bilibid until July 2. Nine days later, he was transferred to a POW camp for senior officers (generals and colonels) in the old cadre barracks of the Philippine Army at Tarlac, near Manila. This explains why the canteen is engraved "TARLAC JULY 11-AUG 11."

Lynch left the Philippines for Formosa (today's Taiwan) in August 1942, where he was confined in a POW camp in Karenko. That explains why the canteen is engraved:

TAIWAN <FORMOSA> AUG. 14 –
KARENKO PRISON CAMP AUG. 17- '42 JUN 7 '43

While a POW on Formosa, "Judge" Lynch (as he was known to his comrades-in-arms), rescued a fellow officer, COL Abe Garfinkle, who "slipped and almost fell into the forbidden

pool."¹⁴ According to a book of cartoons about daily life as a POW life drawn by a fellow POW, COL Malcolm Fortier, and miraculously preserved throughout his captivity, Judge Lynch saved Garfinkle by grabbing his foot, thereby preventing his fall into the liquid. It is not clear what was "forbidden" about the pool but it seems to have been a place to be avoided.

In June 1943, COL Lynch and his fellow POWs were moved to a new camp near Shirakawa, Formosa, and the canteen is engraved:

SHIRAKAWA CAMP JUNE 8 '43

This is the last engraved entry on the canteen. But Lynch's military personnel records show where he was held captive after Shirakawa. He remained on Formosa until October 1944, when he and other POWs were transported by ship to Manchuria. The prisoners then travelled by railway to a camp in Mukden. This was a tough experience for Lynch and his fellow POWs, as they had been living in a tropical climate on Formosa and were now in "sub-Arctic weather (47 degrees)" below zero Fahrenheit.¹⁵

During his captivity, COL Lynch—like his fellow POWs—was chiefly concerned with survival. There was never enough food to eat, although the men did begin to receive Red Cross food parcels at some point and this no doubt helped. Nonetheless, at the end of the captivity, the POWs were eating anything they could find, including "green" sunflower seeds and tree snails. Some men lost 20 lbs. in the last month of their imprisonment; when COL Lynch was liberated by advancing Soviet troops on August 20, 1945, he weighed 116 lbs.¹⁶

Tom Lynch was a lucky man; many Americans had not survived captivity. Additionally, the Japanese High Command had given orders that all POWs in various camps in the Mukden area—including the camp where Lynch was imprisoned—were to be killed. This explains why a small team of Office of Strategic Services (OSS) agents parachuted from a low-flying bomber on August 15, 1945, and moved to the Mukden camp area to prevent the massacre of American and Allied POWs.¹⁷

Repatriated to the United States in early September 1945, COL Lynch had a period of "rest and recuperation" before appearing before an "Army retiring board" on January 26, 1946. A medical examination had previously "found [Lynch] to be permanently incapacitated" as a result of severe arteriosclerosis. As the board concluded that this physical infirmity was the direct result of his captivity as a POW, the board directed that Lynch

¹³ Defenders of the Philippine, http://philippine-defenders.lib.wv.us/html/92nd_garage.html (last visited August 17, 2017)

¹⁴ MALCOLM VAUGHN FORTIER, THE LIFE OF A P.O.W. UNDER THE JAPANESE 46 (1946).

¹⁵ *Id.*, at 110.

¹⁶ *Id.* at 124.

¹⁷ For more on this Office of Strategic Services mission, see HAL LEITH, POWS OF JAPANESE: RESCUED! (2004). While the intent of the OSS was to rescue high-ranking officers like Lieutenant General Wainwright, COL Tom Lynch and his fellow POWs also were beneficiaries of this rescue mission.

“be relieved from active duty . . . at the expiration of his rest and recuperation leave” and retired as a colonel.¹⁸

When Tom Lynch died in 1962, at the age of 80, he still had the canteen that had kept him alive as a POW. Thanks to the generosity of his son, Tom Lynch, and his daughter, Susan Lynch, this remarkable relic is on loan to the Corps and is on display for all in the Regiment to see.



¹⁸ Memorandum for the Secretary of War's Personnel Board, subj: Benefits under Public Law 101-78th Congress, Lynch, Thomas A. (26 Feb. 1946).

Lore of the Corps

The History of the ‘Tomb of the Unknown JAG’

By Fred L. Borch
Regimental Historian & Archivist

The Hall of Heroes at The Judge Advocate General’s Legal Center and School (TJAGLCS) is a frequent site for award, promotion, reenlistment and retirement ceremonies.¹ Those who have been in the Hall have probably noticed the blue-and-gold JAG Corps branch insignia imbedded in the linoleum tiles of the floor. This is the story of that floor insignia, known affectionately by some as the ‘Tomb of the Unknown JAG.’

In the 1960s, when The Judge Advocate General’s School



Hancock Hall housed TJAGSA from 1951-1975

(TJAGSA) was housed in Hancock Hall on the main grounds of the University of Virginia (UVA), it had an Officers Club on the third floor of the building. In the linoleum floor of that Officers Club was

the brown-and-black JAGC branch insignia depicted in the accompanying photograph. When TJAGSA moved to its current location on UVA’s North Grounds in 1975, that branch insignia was left behind in Hancock Hall. Some faculty and staff wanted to remove the imbedded insignia and move it to the new TJAGSA, but were told that the linoleum tile was “too fragile” and would be irreparably damaged if someone attempted to dig it out of the floor and move it.²

With this as background, when the members of the 29th Graduate Class were looking for a ‘class gift’ to present to

TJAGSA when they graduated, “someone on the faculty” suggested that the students fund a new floor insignia—to be imbedded in an appropriate space in the new TJAGSA.³

As then Major Richard “Dick” Black,⁴ who was the class leader, remembers it, the 29th Graduate Class gift committee looked at the idea, liked it, and recommended to him that the class raise money for a JAGC branch insignia to be placed in the tile floor—but in that area of the building where ceremonies were conducted. After the new TJAGSA commandant, then Colonel (COL) William K. Suter,⁵ approved the gift and its placement in the space that today is the Hall of Heroes, a blue-and-yellow JAGC insignia was designed, manufactured, and imbedded in the floor. Unlike the old insignia in Hancock Hall, which never indicated its origins, the new insignia was surrounded by the words: Gift of the 29th Graduate Class 1980-81 (top) and TJAGSA Alumni Association (bottom).

Almost immediately, the faculty, staff and students referred to the new insignia as the ‘Tomb of the Unknown JAG,’ as it reminded these men and women of the tombs that



often serve as memorials for fallen Soldiers, Sailors, Airmen and Marines. For many years, there was a rope barrier around the tile insignia, which prevented daily foot traffic from

¹ For more on the history of the Hall of Heroes, and those who have been honored as “fallen heroes,” see <https://www.jagcnet2.army.mil/8525736A005BE1BE/0/692C13785F682DE485257360007198CA?opendocument&noly=1> (last visited September 27, 2017).

² E-mail from Major General (retired) William K. Suter, to author (July 28, 2017, 1000 EST) (on file with author).

³ Telephone Interview with Colonel (retired) Richard H. Black (September 25, 2017).

⁴ Richard H. Black had a distinguished military career. Born in 1944, he enlisted in the U.S. Marine Corps in 1963 and, after being commissioned in 1965, qualified as a Marine aviator. The following year, Black deployed to Vietnam, where he flew 269 combat missions as a pilot in the H-34 helicopter. Mid-tour, he volunteered to serve as a ground-based Forward Air Controller with the 1st Marine Regiment. When then Captain Black left Vietnam in 1967, he had seen combat with seven different infantry companies and been awarded the Navy Marine Corps Commendation Medal with “V” device, the Purple Heart (for wounds in action in ground

combat), thirteen Air Medals, and the Combat Action Ribbon. Black left active duty in 1970 and subsequently completed his B.A. and J.D. at the University of Florida. In 1977, then Marine Reserve Major Black transferred to the Army, and entered the Judge Advocate General’s Corps as a major. As a judge advocate, Black served three tours as a staff judge advocate (Fort Leonard Wood, Fort Ord and Fort Lewis). His last tour of duty was as the Chief, Criminal Law Division, Office of The Judge Advocate General. After retiring in 1994, COL Black began a second career in Virginia politics; today he serves as a state senator for Virginia’s 13th District. BLACK VIRGINIA SENATE, <http://www.senatorblack.com/> (last visited September 28, 2017).

⁵ Then Colonel Suter had assumed duties as Commandant on March 31, 1981. Suter would later serve as The Assistant Judge Advocate General from 1985 to 1989 and as the acting, The Judge Advocate General from 1989 to 1991. After retiring from active duty, he served as the Clerk, U.S. Supreme Court for the next 22 years. Suter retired from the court in 2013. E-mail Suter, *supra* note 2.

damaging the insignia. Some years ago, however, that rope barrier was removed, and the insignia is no worse for wear today.

But this is not the end of the history of the ‘Tomb of the Unknown JAG.’



Judge advocates eating lunch in Hancock Hall, ca. 1969; the Corps insignia is visible in the floor

On the contrary, no sooner was the new insignia in place than Major (MAJ) Thomas P. “Tom” DeBerry, the Chief of Non-Resident Instruction at TJAGSA, approached COL

Suter about preserving the original JAGC branch insignia still imbedded in Hancock Hall. Although a few ‘experts’ told DeBerry that the tile “was brittle and couldn’t be moved,” DeBerry found “one contractor who said that if the seal was packed with dry ice for an extended period, the tiles could be removed.”⁶

DeBerry got permission from the new occupants of Hancock Hall to try to remove the insignia. Since these new occupants had no idea why the Corps’ insignia was in the floor, much less what it signified, they had no reason to resist MAJ DeBerry’s attempt to remove it. The tiles were packed with dry ice and then “carefully removed” without mishap. Each piece was then cleaned, polished, then glued to a board. Originally, the old insignia was displayed outside Room 130; today, the insignia hangs on the wall adjacent to the Hall of Heroes.⁷



Corps insignia removed from Hancock Hall and now on display in TJAGLCS

⁶ E-mail Suter, *supra* note 2.

⁷ Id.

Lore of the Corps

Major General Walter A. Bethel:

The first *The Judge Advocate General in Army History*

By Fred L. Borch
Regimental Historian & Archivist



BG Walter Bethel February 1923

In January 1924, Major General Walter A. Bethel, who had been serving as *the Judge Advocate General (tJAG)* for less than a year, made history as the first *The Judge Advocate General (TJAG)*. While this Lore of the Corps article is about that unique—and lasting—change in the title of the senior ranking uniformed lawyer in the Army, it is also about the career of TJAG Bethel. He was the top lawyer in General John J.

Pershing's

American Expeditionary Force (AEF) in World War I and, as this year (2017) is the 100th anniversary of America's entry into that armed conflict, it is only appropriate to make Bethel the subject of this short legal history vignette.

Born in Ohio in November 1866, Bethel was the oldest of four children (two boys and two girls). After graduating from high school, he worked as a public school teacher until he happened to read in a notice in the local newspaper that a competitive examination was about to be held to choose a candidate for an appointment to the U.S. Military Academy. Like many men of his era, Bethel wanted a college education but did not have the financial means to pursue it. Realizing that West Point would give him the education he desired, Bethel took the exam with about twenty other young men. He finished second in the final standing and was named the first alternate. When it was discovered that the man who had finished first in the exam was five days over the maximum age limit for admission to West Point, 19-year old Bethel was given the appointment instead.¹

He graduated four years later, ranked 14th in a class of 49, and was commissioned as second lieutenant of Artillery.² While at West Point, Bethel got the nickname "Peribo." Peribo, which was the name of a dog in a story that Bethel's French class was reading. One day the instructor, calling upon Bethel to recite, said "Monsieur Peribo" instead of "Mr. Bethel" and after that Peribo was his nickname for the rest of his days in uniform—at least among his classmates.

Bethel served fourteen years as a line officer in various locations, but found time to study law in his off-duty hours. While at Fort McPherson, he entered Atlanta Law School, with the intent of joining the Judge Advocate General's Department (JAGD) after graduation. He was reassigned to Washington, D.C., before he could finish his law studies in Georgia but Bethel did manage to complete his degree in 1894 at Columbia (now George Washington) law school.³

From 1895 to 1900, Bethel—still an Artillery officer—served as an instructor of chemistry, history and law at West Point. He left his teaching position for a few months to serve briefly in Puerto Rico during the Spanish American War but then returned to New York. Bethel's follow-on assignment after West Point was at Vancouver Barracks, near Portland, Oregon. It was during this tour of duty that Bethel was finally able to join the JAGD. During this period, the entire Department consisted of one brigadier general, two colonels, three lieutenant colonels, six majors, and one acting judge advocate captain "for each geographic department or tactical division not provided with a judge advocate."⁴ Consequently, while Bethel certainly had been qualified to join the JAGD since 1894, competition was fierce for a place in such a small organization and it was not until July 15, 1903 that he obtained an appointment as a judge advocate major. After pinning the crossed-pen-and-sword insignia to his collar, MAJ Bethel served in a variety of locations, including another tour at West Point (where he was a Professor of Law from 1909 to 1914) and overseas in the Philippines and Puerto Rico.⁵

Bethel was a good athlete and, as a young officer began playing tennis. He was so good that, in 1903, he won

¹ Obituary of Walter A. Bethel 1889, <https://externalapps.westpointaog.org/Memorials/Article/3295/> (hereinafter Obituary).

² Major General Thomas H. Green, *History of the Judge ADVOC. GEN.'S DEP'T, THE ARMY LAWYER*, June 1975, at 15.

³ Obituary, *supra* note 1.

⁴ Green, *supra* note 2, at 92.

⁵ Obituary, *supra* note 1.

the Pacific Northwest Championships in both singles and doubles, and for a number of years was nationally ranked.⁶

In 1917, when General Pershing took command of the American Expeditionary Forces (A.E.F.), then Lieutenant Colonel Bethel joined his staff as the judge advocate for A.E.F. This job came with a temporary promotion to brigadier general and as a result Bethel wore one star on his collar from October 1917 until June 1920, when he reverted to his permanent rank of colonel.

Brigadier General Bethel served in France as the top lawyer in the A.E.F. until August 15, 1920. He took part in the Meuse-Argonne offensive and in the occupation of the St. Die Sector. For his service in France, Bethel was awarded the Distinguished Service Medal in 1919. His citation reads:

As judge advocate of the American Expeditionary Force, he organized this important department and administered its affairs with conspicuous efficiency from the date of the arrival in France of the first American combat troops. His marked legal ability and sound judgment were important factors in the splendid work of his department, and he at all times handled with success the various military and international problems that arose as a result of the operation of our armies.⁷

There is little doubt that Bethel's superb performance in the A.E.F. raised his stature in the Army and, when Major General Enoch Crowder retired as the Judge Advocate General (tJAG) in February 1923, after 46 years of active duty, COL Bethel succeeded him as the top lawyer in the Army.

For the next 22 months, until "a case of severe eye strain"⁸ required his early retirement for physical disability, Major General Bethel's tenure as tJAG was marked by two important historical events. The first involves his title as the Army's top uniformed attorney; the second involves the insignia worn by judge advocates.

Prior to Major General Bethel, the senior lawyer in the Army was known as "the Judge Advocate of the Army" or "the Judge Advocate General," depending on the wording of the congressional statute creating the position. In 1924, however, the War Department announced that the "heads or chiefs" of the Inspector General's Department, the Judge Advocate General's Department, the Quartermaster Department and the Medical Department would now have "The" in the title of their positions capitalized. As a result, the Inspector General became *The* Inspector General, the Judge Advocate General became *The* Judge Advocate

General, the Quartermaster General became *The* Quartermaster General and the Surgeon General became *The* Surgeon General.⁹ This change has remained the rule in the Army, which means that since Bethel's tenure, we refer to the senior uniformed lawyer as TJAG and not tJAG.

The second event of historical importance during Major General Bethel's tour of duty as TJAG was his attempt to change the branch insignia for Army lawyers. All judge advocates had worn the 'crossed-pen-and-sword, wreathed' insignia since 1890. Bethel, however, did not like this insignia. Apparently he did not think that it was "sufficiently symbolic" of a judge advocate's duties. Consequently, TJAG Bethel pushed for the adoption of a new design: "A balance upheld by a Roman sword and ribbon blindfold." The scales and sword hilt were to be gold in color; the blade and ribbon were to be silver colored.¹⁰

The proposed JAGD insignia was supposed to be effective in July 1924, but implementation was delayed. As a result, when Major General Bethel retired in November 1924, the new TJAG, Major General John A. Hull, asked members of the JAGD if they liked the proposed "balance-and-sword." When Hull learned that most did not, he obtained the Army's permission to rescind the unpopular insignia. The result was the retention of the 'crossed-pen-and-sword, wreathed' insignia still worn today by judge advocates, legal administrators and paralegals. Anticipating that the 'balance-and-sword,' would be adopted, however, some judge advocates purchased the new insignia.¹¹

A photograph of the obverse and reverse of this insignia—which is quite rare—is shown here.



After retiring, Walter Bethel was appointed to the American-Mexican Claims Commission. This organization had been created by treaty in the early 1920s to permit citizens of the United States to file claims for losses or injuries

⁶ *Id.*

⁷ War Department General Orders No. 12, (1919).

⁸ Obituary, *supra* note 1.

⁹ War Department, General Orders No. 2, (31 Jan. 1924).

¹⁰ Green, *supra* note 2, at 141-42.

¹¹ *Id.*

resulting from the “revolutionary disturbances” that had occurred in Mexico in the early 1900s. Bethel’s chief duty was to represent various companies and individuals who were filing claims for money damages with the Commission. Bethel presented their claims to the Commission, and received compensation based on the successful adjudication and settlement of those claims. He worked with the American-Mexican Claims Commission for more than 20 years; Bethel finished his last case in 1947.¹²

Major General Walter A. Bethel died in Washington, D.C. in January 1954. He was 87 years old and was survived by his wife and three daughters; the oldest two girls were twins.¹³

¹² Obituary, *supra* note 1. For more on the Commission, see Reports of International Arbitral Awards, General Claims Commission, United Mexican States and United States of America, September 8, 1923,

http://legal.un.org/riaa/cases/vol_IV/7-320.pdf (accessed November 4, 2017).

¹³ Obituary, *supra* note 1.

Lore of the Corps

A New School at the University of Virginia:

Building The New Judge Advocate General's School, 1973-1975

By Fred L. Borch

On Thursday, April 12, 1973, Major General George S. Prugh, then serving as The Judge Advocate General, joined University of Virginia (UVA) President Edgar F. Shannon in “turning a symbolic shovel of dirt” at an isolated location on UVA’s North Grounds.¹ This was the groundbreaking ceremony for the new Judge Advocate General’s School (TJAGSA) that, when completed two years later, became the Corps’ new home in Charlottesville. What follows is a brief history of that construction project, and what the completed structure was like.

The Army’s law school first arrived on the Grounds of UVA in August 1951, when Colonel Charles L. “Ted” Decker, the TJAGSA commandant, accompanied by his faculty and staff, moved by truck from Fort Myer, Virginia to new leased facilities on the main Grounds of the University. Classes for judge advocates were taught in Clark Hall, where UVA’s law school was located, which meant that TJAGSA’s faculty shared classroom space with UVA’s law school faculty. But Colonel Decker and his faculty and staff had their offices in Hancock Hall, which was located directly behind Clark Hall and was exclusively for their use.



Hancock Hall (Circa 1970)

By the early 1970s, however, UVA decided that Clark Hall was no longer adequate for the university’s law school. A new facility would be built on the new North Grounds location. But, as the university wanted TJAGSA to remain part of its academic village, it proposed building a new structure for Army lawyers adjacent to the new university law school. The Corps would give up Hancock Hall but would get its own structure with its own classrooms and office space. In the end, UVA’s “graduate school complex” on North

Grounds included the law and graduate business school along with TJAGSA.

The Army accepted UVA’s offer and planning began for the new TJAGSA. The architect designing the new facility worked closely with Colonel John Jay Douglass, who had been the TJAGSA Commandant since 1970. Douglass explained what the Corps needed in a new facility. He had six basic requirements. First, the new building needed a Bachelor Officers Quarters (BOQ) like the BOQ in Hancock Hall. Hotel rooms in town were relatively few and they were expensive; the Army wanted to house its students in the new building, especially those officers coming for the relatively short Judge Advocate Officer Basic Course (JAOBC). Second, there must be one large auditorium (capable of seating 250 for the annual JAG Corps conference) and some smaller classrooms with enough space for the year-long Advanced Course (today’s Graduate Course), the much shorter JAOBC, and the shorter still Continuing Legal Education instruction offered by TJAGSA. Third, there must be room for a bookstore and Post Exchange (staffed by the larger Army and Air Force Exchange Service located at Fort Lee). Fourth, there must be adequate space for a Consolidated Club (officer and enlisted), where breakfast, lunch and dinner might be obtained by students, faculty and staff and social events held on occasion. Fifth, Douglass wanted a special room for VIPs to be able to stay in when they visited Charlottesville. He had established a “Tudor Suite” in Hancock Hall and he wanted a similar VIP suite in the new building. Sixth and finally, Douglass wanted the Commandant’s office to be located in that part of the building where it would have a view of Monticello from its office windows. Of course, COL Douglass also stressed that there must be sufficient office space for the faculty and staff.² In the end, the “new JAG School facility . . . had offices, living quarters, VIP suites, four classrooms, twelve conference rooms, two moot courtrooms, an auditorium, and a 50,000 volume library with individual study carrels.”³



Colonel John Jay Douglas Commandant.
Jun 1970 - Jan 1974

¹ *Ground Breaking For New JAG School Building* (JAG School Alumni Association, Alumni Newsletter, Charlottesville, VA), July 15, 1973, at 1. (hereinafter Alumni).

² Telephone Interview with COL John Jay Douglass (RET), (21 November 2017);

³ Alumni, *supra* note 1.

Two years later, on June 25, 1975, the new \$5 million TJAGSA was officially dedicated. Under Secretary of the Army Norman A. Augustine delivered the dedication address. With him at the ceremony was the new UVA president, Dr. Frank L. Hereford, Jr., and TJAG Major General George S. Prugh. The new Commandant, COL William S. Fulton, Jr., also attended.⁴



New TJAGSA, North Grounds,
(circa 1975)

The Criminal Law Division, Procurement Law Division (today's Contract and Fiscal Law Department), and the International Law Division (today's International and Operational Law Department) were located off the "Academic Hall" corridor. A parallel corridor, named the "Hall of Allies," was decorated with some of the gifts and mementos given to TJAGSA by the many allied judge advocates who attended courses in the school. This hallway also contained a faculty lounge and, opposite that space, four small seminar rooms. Today's most of this space belongs to the Legal Administrator and Paralegal Studies Department.

As for the Administrative and Civil Law Division (today's Department), its new home was on the other side of the new structure. Today, that space belongs to the Legal Center and School's G-1, G-2, G-3/5/7, and G-8. The current "Hall of Heroes" was known as the "Hall of Flags" in 1975, and was a reception and lounge dedicated to judge advocates of the Army Reserve and Army National Guard. It contained the fifty state flags of the United States.



MAJ Dennis Corrigan teaching the Advanced Course (circa 1976)

The library was "a new and magnificent feature" as Hancock Hall had not had a library; judge advocates had utilized the UVA law school library in Clark Hall. The concept was for the new TJAGSA library to serve as a military legal research center for the armed forces, and it had a capacity for 35,000 volumes. With UVA's law school library having 250,000 volumes, the two libraries provided

more than enough research opportunities for TJAGSA students on North Grounds.⁵

Finally, the third and fourth floors of the new TJAGSA contained a BOQ and the fifth floor housed the Consolidated Club. This fifth floor also had a balcony with a wonderful view of Monticello and the surrounding countryside.

Fifteen years later, when then Colonel William K. Suter was TJAGSA Commandant, the Corps began planning a building expansion, as the facility completed in 1975 was now too small. But that story of how TJAGSA expanded to its present footprint is a history for another day.



Consolidated Club on 5th floor of new TJAGSA (circa 1980)

⁴ Alumni, *supra* note 1.

⁵ *Id.* at 2.

Lore of the Corps

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By the early 1970s, however, UVA decided that Clark Hall was no longer adequate for the university’s law school. A new facility would be built on the new North Grounds location. But, as the University wanted TJAGSA to remain part of its academic village, it proposed building a new structure for Army lawyers adjacent to the new university law school. The Corps would give up Hancock Hall but would get its own structure with its own classrooms and office space. In the end, UVA’s “graduate school complex” on North

Grounds included the law and graduate business school along with TJAGSA.

The Army accepted UVA’s offer and planning began for the new TJAGSA. The architect designing the new facility worked closely with Colonel John Jay Douglass, who had been the TJAGSA Commandant since 1970. Douglass explained what the Corps needed in a new facility. He had six basic requirements. First, the new building needed a Bachelor Officers Quarters (BOQ) like the BOQ in Hancock Hall. Hotel rooms in town were relatively few and they were expensive; the Army wanted to house its students in the new building, especially those officers coming for the relatively short Judge Advocate Officer Basic Course (JAOBC). Second, there must be one large auditorium (capable of seating 250 for the annual JAG Corps conference) and some smaller classrooms with enough space for the year-long Advanced Course (today’s Graduate Course), the much shorter JAOBC, and the shorter still Continuing Legal Education instruction offered by TJAGSA. Third, there must be room for a bookstore and Post Exchange (staffed by the larger Army and Air Force Exchange Service located at Fort Lee). Fourth, there must be adequate space for a Consolidated Club (officer and enlisted), where breakfast, lunch and dinner might be obtained by students, faculty, and staff and social events held on occasion. Fifth, Douglass wanted a special room for VIPs to be able to stay in when they visited Charlottesville. He had established a “Tudor Suite” in Hancock Hall and he wanted a similar VIP suite in the new building. Sixth and finally, Douglass wanted the Commandant’s office to be located in that part of the building where it would have a view of Monticello from its office windows. Of course, Colonel Douglass also stressed that there must be sufficient office space for the faculty and staff.² In the end, the “new JAG School facility . . . had offices, living quarters, VIP suites, four classrooms, twelve conference rooms, two moot courtrooms, an auditorium, and a 50,000 volume library with individual study carrels.”³



Colonel John Jay Douglass
Commandant. Jun 1970 – Jan 1974

¹ *Ground Breaking For New JAG School Building* (JAG School Alumni Association, Alumni Newsletter, Charlottesville, VA), July 15, 1973, at 1. (hereinafter Alumni).

² Telephone Interview with COL John Jay Douglass (RET), (21 November 2017).

³ Alumni, *supra* note 1.

Two years later, on June 25, 1975, the new \$5 million TJAGSA was officially dedicated. Under Secretary of the Army Norman A. Augustine delivered the dedication address. With him at the ceremony was the new UVA president, Dr. Frank L. Hereford, Jr., and TJAG Major General George S. Prugh. The new Commandant, COL William S. Fulton, Jr., also attended.⁴



New TJAGSA, North Grounds,
(circa 1975)

The Criminal Law Division, Procurement Law Division (today's Contract and Fiscal Law Department), and the International Law Division (today's International and Operational Law Department) were located off the "Academic Hall" corridor. A parallel corridor, named the "Hall of Allies," was decorated with some of the gifts and mementos given to TJAGSA by the many allied judge advocates who attended courses in the school. This hallway also contained a faculty lounge and, opposite that space, four small seminar rooms. Today, most of this space belongs to the Legal Administrator and Paralegal Studies Department.

As for the Administrative and Civil Law Division (today's Department), its new home was on the other side of the new structure. Today, that space belongs to the Legal Center and School's G-1, G-2, G-3/5/7, and G-8. The current "Hall of Heroes" was known as the "Hall of Flags" in 1975, and was a reception and lounge dedicated to judge advocates of the Army Reserve and Army National Guard. It contained the fifty state flags of the United States.



MAJ Dennis Corrigan teaching the Advanced Course
(circa 1976)

The library was "a new and magnificent feature" as Hancock Hall had not had a library; judge advocates had utilized the UVA law school library in Clark Hall. The concept was for the new TJAGSA library to serve as a military legal research center for the armed forces, and it had a capacity for 35,000 volumes. With UVA's law school library having 250,000 volumes, the two libraries provided

more than enough research opportunities for TJAGSA students on North Grounds.⁵

Finally, the third and fourth floors of the new TJAGSA contained a BOQ and the fifth floor housed the Consolidated Club. This fifth floor also had a balcony with a wonderful view of Monticello and the surrounding countryside.

Fifteen years later, when then Colonel William K. Suter was TJAGSA Commandant, the Corps began planning a building expansion, as the facility completed in 1975 was now too small. But that story of how TJAGSA expanded to its present footprint is a history for another day.



Consolidated Club on 5th floor of new TJAGSA (circa
1980)

⁴ *Id.* at 1.

⁵ *Id.* at 2.

Lore of the Corps

Command Influence ‘Back in the Day’

By Fred L. Borch

Every judge advocate is soon familiar with the prohibition on “unlawfully influencing [the] action of [a] court” contained in Article 37, Uniform Code of Military Justice (UCMJ). That provision spells out in clear language that it is a criminal offense for any person (subject to the UCMJ) to try “to coerce, or by any unauthorized means, influence the action of a court-martial or other military tribunal.”¹ Over the years, military appellate courts have handed down scores of decisions on unlawful command influence, and its presence in our military justice system continues to bedevil practitioners.² But it was not always so, and this Lore of the Corps examines command influence ‘back in the day’—in this case World War II, when command influence was exerted from the highest possible level in the Army.

On March 5, 1943, Major General James A. Ulio, The



Major General James A. Ulio, The Adjutant General.

Adjutant General, issued a “confidential” memorandum. While directly addressed to “All officers exercising general court-martial jurisdiction” in the United States, General Ulio wrote that that the “policies” announced in the memorandum were “intended for general application throughout the Army.” In fact, “information copies” went to the commanding generals of

Army Ground Forces, Army Air Forces, and Services of Supply—which meant that every senior leader in the Army and Army Air Force received Ulio’s confidential missive.³

The subject of the memorandum was “Uniformity of sentences adjudged by general court-martial” and Major General Ulio signed the memorandum “By order of the Secretary of War.” Ulio began by stating that there was a “highly undesirable disparity in general court-martial

sentences . . . [and that] many of these sentences serve little or no disciplinary purposes but do arouse unnecessary anxiety in relatives of the individual in question.”⁴

Consequently, The Adjutant General wrote that “no case should be referred to a general court-martial unless the offense charged warrants [a] dishonorable discharge.” Additionally, convening authorities were advised that if a Soldier was punished with a dishonorable discharge, then there must be a sufficient “period of confinement” adjudged with that discharge that would ensure that the accused “will remain in confinement until the end of the war.” Otherwise, “the sentence amounts to immunity against risk of battle and is to that extent [a] reward instead of punishment.”⁵

Major General Ulio realized—as did every commander in the European and Pacific Theater—that some Soldiers might be tempted to commit crimes in order to get out of combat. As a result, Ulio added the following guidance: “Although it is impossible to predict with certainty the end of hostilities . . . sentences of not less than five years confinement . . . are considered appropriate.”⁶

As far as The Adjutant General was concerned—and he was speaking for the Secretary of War—Soldiers should not be tried by general courts-martial unless the convening authority understood that a dishonorable discharge and five years’ imprisonment was the expected punishment.

Major General Ulio’s memorandum also contains some clear guidance for specific offenses. “Desertion,” he wrote, “is a serious and cowardly offense.” Consequently, confinement of “not less than five years is considered appropriate [and] ten years is not an unreasonable sentence in aggravated cases.” But Ulio’s “observations” did not apply to desertion “in a theater of operation or in the face of the enemy.”⁷ In those situations, longer periods of confinement or even the death penalty might be warranted, as Private Eddie Slovik would learn in January 1945 when he was “shot to death by musketry” for deserting from his unit while in France.⁸

As for the striking of a commissioned officer, Ulio’s memorandum states that this “grave and serious offense”

¹ UCMJ art. 37 (2016).

² See *United States v. Charette*, 15 M.J. 197 (C.M.A. 1983); *United States v. Cortes*, 29 M.J. 946 (A.C.M.R. 1990). See also MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 104 (2016).

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⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 2.

⁸ See JUDGE ADVOCATE GENERAL’S CORPS, THE ARMY LAWYER 192-94 (1975). See also, Fred L. Borch, *Shot by Firing Squad: The Trial and Execution of Pvt. Eddie Slovik*, THE ARMY LAW., May 2010, at 1.

requires a severe punishment. “Five years’ confinement would be appropriate, with ten years as a probable maximum. But Major General Ulio was not without some understanding of officer-enlisted relationships. This explains why, when discussing the appropriate punishment for “deliberate disobedience of a commissioned officer,” The Adjutant General wrote that while the offense ordinarily called for a “severe punishment,” a general court-martial “may be unwarranted in case the offense be *due wholly or partly to faulty judgment or leadership on the part of the officer.*”⁹

Major General Ulio wanted to be certain that all general court-martial convening authorities understood their responsibilities. Consequently, while reminding these officers that courts-martial panels imposed their sentences by “secret, written ballot” and “according to the evidence and the dictates of their conscience,” Ulio recommended that “commanders take positive steps to inculcate proper conceptions and standards of court-martial procedure.” As The Adjutant General put it, “division commanders and other general courts-martial convening authorities” should: (1) “personally interview” new court members; (2) “discuss principles” of good order and discipline; (3) “and review past errors on the part of courts-martial.”¹⁰

The bottom line, as the memorandum explained, was that a convening authority should “devote his efforts to instructing a court before it tries cases, rather than criticize its actions after a case has been tried.” Major General Ulio did advise, however, that discussions with court-members be “general in nature and in no sense connected with a pending case.”¹¹

Presumably, more than a few commanders met personally with court members and orally discussed the contents of Major General Ulio’s memorandum. But at least one convening authority took a different approach. At the Ninth Service Command, Fort Douglas, Utah, the general court-martial convening authority, Major General Joyce, directed that a copy of Ulio’s letter be given to each member of the general court. When that panel member was relieved from his court-martial duties, he was to surrender the letter “to the Post Commander for delivery to a new member appointed as a replacement.”¹²

Today, judge advocates would be alarmed to see a memorandum like Ulio’s published and distributed to convening authorities. In 1943, however, the Articles of War were silent on the issue of influencing court-members. There was no Article 37 equivalent and there was nothing illegal about Ulio’s memorandum, which presumably had been shown to (and coordinated with) judge advocates in the Office of The Judge Advocate General.

When one also remembers that Army lawyers did not, as a general rule, participate in courts-martial proceedings *at any level*, except when serving as law members at general courts-

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Finally, the War Department and the Army and Army Air Force of the World War II era was simply a very different institution. By 1945, there were eight million men and women wearing Army uniforms and, between 1941 and 1945, more than one million courts-martial were tried in the Army alone. When one considers that the Army tried fewer than 700 courts-martial total last year, perhaps Ulio’s memorandum—at least at first glance—makes some sense. In any event, that was command influence ‘back in the day.’

⁹ Uniformity Memo, *supra* note 3.

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Lore of the Corps

The First Judge Advocates in Afghanistan: Who, When, and Where?

By Fred L. Borch
Regimental Historian & Archivist

Judge advocates often ask: who was the first Army lawyer in _____ (fill in the blank)? Vietnam? Lieutenant Colonel (LTC) Paul Durbin (June 1959).¹ Grenada (Operation *Urgent Fury*)? Lieutenant Colonel Quentin Richardson (October 1983).² How about the first female judge advocate to deploy to Southwest Asia at the start of the Persian Gulf War? Captain (CPT) Patricia A. Martindale (later Ham), August 1990. Now that the Army has been in Afghanistan for more than 15 years, it is time to ask: Who were the first Judge Advocates to deploy to Afghanistan (and nearby countries) as part of Operation *Enduring Freedom*? When did they get there? Where were they located?

After the al Qaeda-sponsored suicide terrorist attacks on the World Trade Center and the Pentagon on September 11, 2001, President George W. Bush decided that U.S. military forces would be sent to Afghanistan, since al Qaeda was based primarily in that country. Afghanistan, however, is “an immense, land-locked country approximately the size of Texas,”³ and the rough terrain and minimal road and rail facilities meant that the first U.S. troops to deploy as part of Operation *Enduring Freedom* set up operations in Uzbekistan, a country situated about 200 miles northwest of Kabul. The Americans were physically located at an old Soviet airbase near Karshi Kandabad (quickly nicknamed “K-2” by those who were there) in south-central Uzbekistan.⁴

One of the first units deployed to Uzbekistan was the 5th Special Forces Group (Airborne) from Fort Campbell, Kentucky. Ultimately, these Army Special Forces personnel formed the nucleus of Joint Special Operations Task Force NORTH, called Task Force DAGGER, along with the headquarters element of the U.S. Air Force’s 16th Special Operations Wing. Aviators from the 160th Special Operations Aviation Regiment (SOAR), also from Fort Campbell, and Air Force special operations personnel (Combat Tactical Air Controllers) and AC-130s from

Hurlburt Field, Florida, also were part of Task Force DAGGER.⁵

To support these Special Operations forces, and provide a quick reaction force of heavily armed infantryman, the 1st Battalion, 87th Infantry, 10th Mountain Division (Light), also deployed to Karshi Kandabad—in October 2001.⁶ (Note: The 10th Mountain Division headquarters—and additional division personnel along with Major General Franklin L. “Buster” Hagenbeck—did not arrive in Karshi Kandabad until 12 December 2001).⁷

Task Force DAGGER sent its first personnel across the border into Afghanistan in mid-October, when a 12-man Special Forces team landed by helicopter near the key city of Mazar-e Sharif on 19 October 2001. That same night, 199 Rangers of the 3d Battalion, 75th Ranger Regiment, conducted airborne and air assault operations against several sites in Kandahar, Afghanistan.

The first “conventional” troops did not enter Afghanistan until late November 2001, when a company-size Quick Reaction Force from the 87th Infantry was sent to provide security at Quali Jangi fortress in Mazar-e Sharif.⁸ Eventually, elements of the 87th would be stationed at Bagram, where they provided base security and were a Quick Reaction Force.

Soldiers from the 3d Brigade, 101st Airborne Division (Air Assault), deployed to Afghanistan in January 2002, and set up operations at Kandahar’s airport.⁹ They were organized as Task Force RAKKASAN, as ‘Rakkasan’ is the nickname of the 187th Infantry Regiment, the core component of the 3d Brigade Combat Team.¹⁰

So what about judge advocates in the early days of *Enduring Freedom*?

¹ FREDERIC L. BORCH, JUDGE ADVOCATES IN VIETNAM: ARMY LAWYERS IN SOUTHEAST ASIA 1-12 (2003).

² FREDERIC L. BORCH, JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI 63-64(2001).

³ RICHARD W. STEWART, CTR. OF MIL. HIST. (U.S.ARMY), THE U.S. ARMY IN AFGHANISTAN: OPERATION ENDURING FREEDOM, OCTOBER 2001-MARCH 20027 (2004).

⁴ *Id.* at 8.

⁵ Those serving in Headquarters, Task Force Dagger between 6 October 2001 and 28 February 2002 were subsequently awarded the Joint

Meritorious Unit Award by the Chairman, of the Joint Chiefs. The 5th Special Forces Group (Airborne) was awarded the Presidential Unit Citation for its operations in Afghanistan during this same period.

⁶ *Id.* at 10.

⁷ *Id.* at 20.

⁸ *Id.* at 18.

⁹ SPENCER C. TUCKER, U.S. CONFLICTS IN THE 21ST CENTURY 230 (2015).

¹⁰ 187TH INFANTRY REGIMENT “RAKKASANS”, <http://www.campbell.army.mil/Units/Pages/3BCT.aspx> (last visited Jan. 28, 2018).

The first Army judge advocate to provide legal services in Afghanistan was then CPT Chris Soucie, a 10th Mountain Division asset. He deployed to Sheberghan for the first time on Christmas night (25 December) for a three-week mission. After returning to Karshi Khanabad, Soucie remained in Uzbekistan until permanently relocating to Bagram on 17 February 2002.¹¹

The second Army judge advocate in Afghanistan was LTC Kathryn Stone, the Staff Judge Advocate, 10th Mountain Division. She deployed to Uzbekistan on 1 or 2 December 2001 and, while LTC Stone spent most of her time at Karshi Kandabad, she did fly to Bagram on a mission on 31 December for two days. After returning to Uzbekistan, Stone flew again to Bagram on 2 January 2002 for two days, before returning to Karshi Kandabad. Her final trip to Bagram was on 18 February 2002; she remained there until re-deploying to Fort Drum.¹²

Then CPT J. Harper Cook arrived in Kandahar on 4 January 2002.¹³ Then CPT Nicholas "Nick" Lancaster joined Cook in Kandahar about 23 or 24 January.¹⁴ Then CPT Dean Whitford, who had arrived in Uzbekistan on 9 October 2001, was the Staff Judge Advocate for Task Force DAGGER. As the primary legal advisor for the command, his focus on providing legal advice on all targeting, detainee and operational law issues, meant that Whitford did not cross the border into Afghanistan until 11 January, when he deployed on a week-long mission to Mazar-e Sharif and Quali Jangi Fortress. Whitford would later return to Afghanistan on 26 February to participate in Operation *Anaconda* (2-19 March 2002). He returned to Karshi Kandabad after *Anaconda* and redeployed to Fort Campbell in March 2002.¹⁵

Two notes: Army Judge Advocate LTC G. John Taylor was in the area of operations in the early days of Operation *Enduring Freedom* but he was serving as a Task Force headquarters commandant and not providing legal advice. Then Colonel Dana K. Chipman was also occasionally seen in the area of operations, but only for short periods.

Since CPT Soucie's deployment to Afghanistan, hundreds of judge advocates have provided legal services to commanders and their staffs as part of Operation *Enduring Freedom* and its follow-on operations. The history of Army lawyers in Afghanistan, however, is a story for another day.



Captains Nick Lancaster (left) and Harper Cook (right), Kandahar International Airport, ca. 2002. Now COL Lancaster is the Director, Legal Center, TJAGLCS; COL Cook is a military judge assigned to Fort Leavenworth.



CPT Dean Whitford at Quali Jangi Fortress Afghanistan 12 Jan 2002.

¹¹ E-mail from Kathryn Stone to Mr. Fred L. Borch, (Aug. 13, 2014, 12:17 EST) (on file with author). The first judge advocate in Afghanistan was then Air Force Maj Vance Spath, who deployed to Kabul from Karshi Kanabad on 2 December 2001 to provide legal advice in connection with an investigation into missing sensitive items. Two Army 27D paralegals, then Staff Sergeant J.D. Klein and then Sergeant Francisco "Frank" Ramirez, also deployed from Karshi Kanabad in and out of Afghanistan in late November or early December, becoming the first paralegals in Afghanistan. E-mail from COL Dean Whitford to Mr. Fred L. Borch (Jan. 28 2018, 18:18 EST) (on file with author); E-mail from COL Dean Whitford to Mr. Fred L. Borch (Feb. 7, 2018, 17:37EST). (on file with author).

¹² E-mail from Kathryn Stone to Mr. Fred L. Borch (Feb. 16, 2018, 10:29 EST) (on file with author).

¹³ 187TH INFANTRY REGIMENT "RAKKASANS", *supra* note 10.

¹⁴ *Id.*

¹⁵ E-mail from COL Dean Whitford to Mr. Fred L. Borch (Jan. 28, 2018, 18:18 EST) (on file with author). For more on *Anaconda*, see Stewart, *supra* note 3, at 30-45.

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