LORE OF THE CORPS

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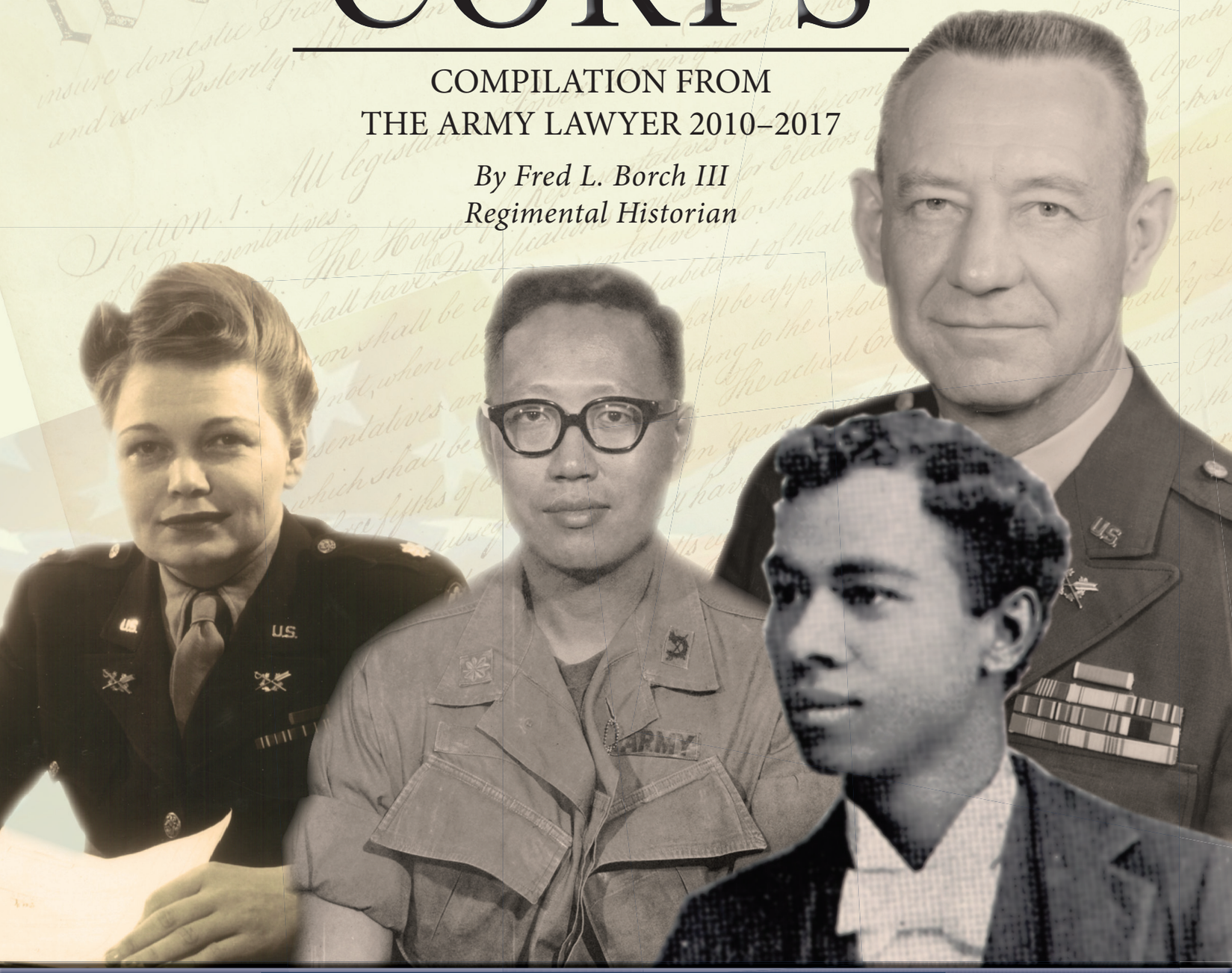
THE ARMY LAWYER 2010–2017

By Fred L. Borch III
Regimental Historian



JUDGE ADVOCATE GENERAL'S CORPS

1775

Lore of the Corps

Foreword

General (GEN) George Washington rode from our second assembled Congress in Philadelphia to Boston, arriving on the 2d of July, 1775. A mere four weeks later, at GEN Washington's urging, the Congress would elect William Tudor—and GEN Washington would thereupon appoint—our first Judge Advocate General.

Lieutenant Colonel (LTC) William Tudor was truly an "Army of One." Our first Judge Advocate General was paid a handsome $20 a month as he traversed the disparate units and supervised the innumerable courts-martial. Indeed, on the very page of General Orders announcing his appointment is an Order publishing news of the acquittal of a Soldier for "stealing a common cartridge of powder." Tudor would become a terribly busy, and vocal, Judge Advocate attending to these trials. The urgency of Washington's request for a Judge Advocate, after only four weeks in command, is a testament that from the earliest days of our Army the role of the Army Lawyer was central to the proper functioning of the Army.

As the oldest law firm in our Nation, uniformed lawyers continue to play an increasingly important role in our Army's history. This collection of articles about military legal history will, therefore, interest not only members of The Judge Advocate General's Corps, but also anyone who wants to better understand the role played by the law and judge advocates in our Army.

Each of the more than eighty "Lore of the Corps" articles in this compilation originally appeared in *The Army Lawyer*, a monthly journal published by The Judge Advocate General's Legal Center and School, Charlottesville, Virginia. The articles are wide ranging, touching not only distant 'institutional memories' and events, like the terrible massacre of American prisoners at Malmedy in 1944 and high-profile murder trials in the Philippines and Vietnam, but these articles also illuminate the lives of important legal leaders, like Major Generals Enoch Crowder and Allen Gullion, who served as Judge Advocates General in the first half of the twentieth century. There also are narratives about judge advocates who served in Ethiopia and Iran in the 1960s and 1970s, as well as articles about the development of our distinctive branch insignia (the crossed-quill-and-sword) in the 1890s and the emergence of our Regimental crest in the 1980s.

The history of our Corps is as rich and exciting as that of our Army. This book is an essential tool for Soldiers and civilians—within and without the Army—to appreciate the role of law, *the rule of law*, and the imperative to understand our past in order to better understand the present and the future.

1775!

Charles N. Pede
Lieutenant General, U.S. Army
The Judge Advocate General

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Introduction

People make history and not the other way around—Harry S. Truman

History is a people's memory—Malcolm X

History is a set of lies agreed upon—Napoleon Bonaparte

As these words from men who did make history show, there are very different ideas about history—what it is, how it is made, and who makes it. My own opinion is that history in our society is like memory for an individual. Like memory, history may be faulty or incomplete, but we cannot live without memory—or without history. If human beings did not have memories, we would not know how to plan our daily activities. Only if we know what we did yesterday can we decide what to do today, and plan our future existence. Similarly, by learning about, and studying and analyzing, what our nation or our society has done in the past, we can perhaps make better decisions when choosing courses of action—for today and the future. While it is easy to ignore history, we do so at our peril.

With this in mind, learning about the history of the Judge Advocate General's Corps, and what men and women who have served in it have done, may provide insights into how better to provide legal support to our Army today. This is not to say one should study history because one can learn lessons for future application. History does not repeat itself, but it does seem that many issues faced by judge advocates in years past are strikingly similar to the challenges faced by Army lawyers today. It follows that those men and women in our Corps today should read about what their predecessors did in two World Wars and Korean, and Vietnam and the Persian Gulf War, because this may provide shortcuts to solving challenging legal issues today. But another reason to read about lawyers and lawyering in our Army is that much of what has been done and who has done it is simply fascinating.

The goal of the "Lore of the Corps" articles, which have been published in every The Army Lawyer (TAL) since March 2010, is to bring our Corps' rich and varied history to a wider audience—so that readers will better appreciate the important role that our Corps has played in our Army since the American Revolution.

The idea for this "Lore of the Corps" belongs to then Captain (CPT) Ron Alcala, who was serving as the editor of TAL in early 2010. He asked me if I would write a short monthly history article for publication in TAL. As Ron put it, he wanted a 'hook' that would make readers of TAL more likely to pick up the periodical and he thought a few pages on our Regiment's history could be just such a 'hook.'

The first "Lore of the Corps," as Ron Alcala titled it, was published in March 2010. It was about the prosecution of Lieutenant Colonel (LTC) Thomas Butler, Jr., who was court-martialed in 1805 for refusing to cut his hair. More than eighty similar history articles have been published since then on a variety of topics, including war crimes committed by U.S. Soldiers in World War II and Vietnam and courts-martial for murder, rape, larceny, and desertion. There also have been Lore of the Corps pieces on JAG Corps promotion policies, the establishment of The Judge Advocate General's School in Charlottesville in 1951, and the rationale for creating a JAG Corps personnel directory in 1963. Whether or not these history vignettes have been the hook that Ron Alcala wanted them to be is an open question. There is no doubt, however, that at least some members of the Regiment have read them, and found them to be informative, if not entertaining.

All the editors of TAL deserve my gratitude in producing these monthly Lore of the Corps articles; their helpful comments and criticisms improved each piece that I wrote for publication. But I want to single out two individuals for special praise, because they are most responsible for making this book a reality: Major (MAJ) Laura A. O'Donnell and Mrs. Danielle M. McGuffin.

Major O'Donnell spent many many hours—days, nights, and weekends—creating this book. She took each individual article, reformatted it, and then organized it with other similar topics by chapter. Had it not been for Laura, there would be no book. While she has left active duty for the Army Reserve and the private practice of law, her excellence as an editor

and author has not gone unrecognized: the Army honored her as one of its "editors of the year" in 2017. Similarly, Mrs. McGuffin, a graphic and web developer at The Judge Advocate General's Legal Center and School, spent many hours transforming the completed manuscript into a ready-to-publish digital format. Her talents as an artist also helped bring this book to life; Danielle gets the credit for designing the book's cover.

Fred L. Borch III
Regimental Historian and Archivist
The Judge Advocate General's Corps,
U.S. Army
February 2018

Chapter 1
General History

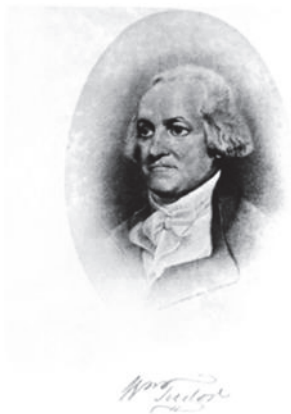
"It's a Family Affair:" A History of Fathers, Daughters and Sons, Brothers, and Grandfathers and Grandsons in the Corps

(Originally published in the October 2014 edition of *The Army Lawyer.*)

The recent promotion to colonel of Nicholas F. "Nick" Lancaster by his father, Colonel (COL) (Ret.) Steve Lancaster, both Army lawyers, raises the question of just how many fathers and daughters and sons, as well as brothers and sisters, and even grandfathers and grandsons, have served as lawyers in our Corps. What follows is a quick look at our version of "It's a Family Affair."

Earliest Family Relationships

Truly the most remarkable family connection in our Corps' history is that of the first Army lawyer, William Tudor, and his direct descendant, Thomas S. M. Tudor.



William Tudor was The Judge Advocate General from 1775 to 1777: his great-great-great grandson, Tom Tudor, served as an Army lawyer from 1975 to 1978

Colonel William Tudor was the first Judge Advocate General and served under General (GEN) George Washington from 1775 to 1777.[1] Two hundred years later, in 1975, his great-great-great grandson, Captain (CPT) Thomas "Tom" Tudor, joined our Corps. Captain Tudor served one tour of duty with 3d Armored Division in Germany and left active duty in 1978. Tudor subsequently joined the U.S. Air Force Judge Advocate General's Corps. He served as an Air Force lawyer from 1980 to 2002.[2]

Another early family connection in our history is Columbia Law School professor Francis Lieber, author of the famous General Orders No. 100 ("Lieber Code"), and his son, Guido Norman Lieber, who served first as the Acting Judge Advocate General (1884 to 1895) and then as the Judge Advocate General (1895 to 1901). Although the Liebers technically do not qualify for this *Lore of the Corps* since Francis Lieber was a civilian law school professor who never wore an American uniform, they are worth mentioning because of their significance in the history of Army law.[3]

Fathers and Daughters

Major General George S. Prugh was already retired (he left active duty in 1975) when his daughter, Virginia "Patt" Prugh, entered the Corps (she retired as a LTC in 2006)

The earliest father and daughter pair is Major General (MG) George S. Prugh and his daughter, Lieutenant Colonel (LTC) (Ret.) Virginia "Patt" Prugh. General Prugh's distinguished career culminated with his service as TJAG from 1971 to 1975.[4] His daughter served in the Corps from 1982 to 2006. After retiring from active duty, she joined the U.S. State Department, where she serves today.

Colonel (Ret.) LeRoy F. "Lee" Foreman and COL Mary M. "Meg" Foreman are the first father-daughter pair to reach the rank of colonel as judge advocates. Lee Foreman served on active duty from 1963 to 1992, including overseas assignments in Germany, Vietnam, and Korea. His daughter graduated from the U.S. Military Academy (USMA) in 1988 and entered the Corps through the Funded Legal Education Program (FLEP).[5] Colonel Meg Foreman is now assigned to the Department of

Defense General Counsel's Office.

Colonel LeRoy "Lee" Foreman and Colonel Mary "Meg" Foreman

Finally, Brigadier General (BG) (Ret.) M. Scott Magers, who entered the Corps in 1968 and retired from active duty in 1995, and his daughter, Eleanor Magers (later Eleanor Vuono), served on active duty at the same time at the Pentagon. Then—Captain (CPT) Magers has the unique distinction of being the only judge advocate to begin her career in the Army General Counsel's Honors Program[6] and then switch to active duty after completing the Judge Advocate Basic Course. Eleanor left active duty from Fort Carson, Colorado, in 2000.

Other father-and-daughter combinations include Michael B. "Brett" Buckley, who served as a captain in the Corps in the early 1980s and his daughter, Captain (CPT) Michele B. Buckley, now on active duty at Fort Bragg, North Carolina. Similarly, Keith W. Sickendick, who served as a captain at the Defense Appellate Division in the late 1980s, has a daughter, Captain (CPT) Katherine E. Sickendick. She also is now on active duty at Fort Bragg, North Carolina.

Fathers and Sons

There are at least nineteen father-and-son pairs. In alphabetical order, known pairs include: John and John E. "Jeb" Baker; Steven E. and John T. Castlen; Dean Dort, Sr., and Dean Dort, Jr.; Charles P. and Douglas A. Dribben; Gregory and Cameron Edlefsen; Thomas and John T. Jones; Ward and Ward D. King; Steven F. and Nicholas F. Lancaster; Thomas and Dustin J. Lujan; John and Kevin Ley; James Edgar, Jr., and James Ennis Macklin; Talbot Nicholas and Talbot Nicholas, Jr.; William S. and William J. Ostan; Joseph and Edward Piasta; Robert S. Poydasheff and Robert S. Poydasheff, Jr.; Paul A., Jr. and Paul A., Sr., Robblee; James "Jim" and Frank Rosenblatt; Samuel J. Smith, Sr., and Samuel J. Smith, Jr.; and Gary and Gary Thorne.

John Baker, a 1942 USMA graduate, entered the Corps after graduating from Yale's law school in 1951. His career as an Army lawyer took him to a variety of assignments and locations, including service as Staff Judge Advocate, U.S. Army South, U.S. Canal Zone, from 1966 to 1969. When Colonel (COL) Baker retired in 1970, he returned to the Canal Zone to serve as a U.S. magistrate judge until 1982.[7] His son, John E. "Jeb" Baker, also received his commission through USMA (Class of 1972) and started his career as a judge advocate in 1979 with the 193d Infantry Brigade in the U.S. Canal Zone (his father was still serving as a U.S. magistrate judge). The younger Baker retired as a colonel in 2002.[8]

Colonel John Baker (shown here as Coast Artillery Corps captain) is one of only a handful of judge advocate colonels to have a son (Colonel "Jeb" Baker) reach the rank of colonel in the Corps

Steve Castlen entered the Corps in the 1980s. He retired as a colonel and his last assignment was with the Army Trial Judiciary. His son, CPT John T. Castlen, is currently serving in Germany.

Colonel Dean Dort, Sr., and his son, Dean Dort, Jr., both served in the Corps. While the elder Dort stayed for a career and retired as a colonel, the junior Dort resigned his commission when he was a major (MAJ).

Charles P. Dribben retired as a colonel; his last assignment was with the U.S. Army Judiciary. His son, Douglas A. "Doug" Dribben, entered the Corps in 1990 through the FLEP; the younger Dribben had graduated from USMA in 1983. Major (MAJ) Doug Dribben retired in 2003.[9]

Lieutenant Colonel Gregory Lee Edlefsen served in the Corps from 1971 until he retired in 1993. His last assignment was Staff Judge Advocate, 7th Signal Command, Fort Ritchie, Maryland. His son, MAJ Cameron R. "Cam" Edlefsen, is on active duty and currently serves as a trial attorney, Contract & Fiscal Law Division, U.S. Army Legal Services Agency. The younger Edelfsen graduated from the USMA in 2000 and entered the Corps in 2007 through the FLEP.

Colonel Charles Grimm and his son Paul Grimm both served in the Corps. The senior Grimm served his entire career as an active duty Army lawyer, whereas the younger Grimm served some active duty and retired as Reserve lieutenant colonel. He is now a U.S. District Court judge in Maryland.

Colonel John Thomas Jones graduated from USMA in 1946 and entered our Corps after completing law school at Columbia University. He was a judge on the Army Court of Military Review before retiring in 1982.[10] His son, John Thomas Jones, Jr., served in the Corps in the 1980s and '90s and retired as a lieutenant colonel; the younger Jones' area of expertise was contract law, and he headed the Contract Law Division at The Judge Advocate General's School, U.S. Army (TJAGSA) prior to his retirement.

Colonel Ward King and his son Ward D. King both served in the Corps. The younger King graduated from the USMA in 1971 and, after service as a Field Artillery officer, completed law school at the University of Texas and entered the Corps in 1977. Lieutenant Colonel (LTC) King retired in 1996.[11]

John P. Ley, Jr., entered the Corps in 1977. He served in a variety of locations, including overseas duty in Germany, Italy, and Korea. When COL Ley retired in 2008, he was serving as the Acting Commander, The Judge Advocate General's Legal Center and School (TJAGLCS). His son, MAJ Kevin M. Ley, serves in the Corps today.

Colonel (Ret.) Thomas R. Lujan served more than twenty-five years before retiring in 1998. His son, CPT Dustin Lujan, was commissioned as an Infantry officer and later entered the Corps through the FLEP. He is now stationed at Fort Hood, Texas.

James Edgar Macklin, Jr., a USMA graduate who entered the Corps in 1955 after graduating from Columbia Law School, retired as a colonel. His son, James E. Macklin, was commissioned after graduating from USMA in 1980 and entered the Corps through the FLEP. He retired as a lieutenant colonel.[12]

Colonel (COL) Talbot Nicholas and his son, Talbot Nicholas, Jr., both served in the Corps. The younger Nicholas left active duty as a captain.

The senior William Ostan served at Fort Dix, New Jersey from 1976 to 1979; his son, CPT "Bill" Ostan, entered the Corps in 2007 and is on active duty today.

Colonel Joseph Piasta and his son, Edward Piasta, both served in the Corps.

Colonel (Ret.) Robert S. "Bob" Poydasheff served in a variety of assignments in the Corps from 1961 to 1979. When he retired from active duty, Poydasheff was the Staff Judge Advocate at Fort Benning, Georgia. His son, Robert S. Poydasheff, Jr., served in the Corps from 1986 to 1991, when he left active duty.

Colonel Paul A. Robblee and his son, Colonel Paul Robblee, both served full careers as Army lawyers and retired as colonels. The senior Robblee received his law degree from the Minnesota College of Law in 1935 and, after serving as an Infantry officer in World War II, entered our Corps in 1947. He retired in the 1960s.[13] The junior Robblee first served as an Infantry officer in Vietnam (with the 101st Airborne Division) before going to law school at Washington and Lee University. He entered the Corps in 1972 and then served in a variety of assignments including Deputy Staff Judge Advocate, 82d Airborne Division and Staff Judge Advocate, U.S. Army Japan and Third U.S. Army. The younger Robblee retired in 1992. The Robblees were the first father-son pair in our Corps' history to both attain the rank of colonel.

Then-Captain Paul A. Robblee, Jr. (left) and Colonel Paul A. Robblee, Sr. (right), c. 1970

Colonel James "Jim" (but also called "Rosey" by those who knew him well) Rosenblatt retired after a distinguished career and was the Dean, Mississippi College of Law for many years. His son, MAJ Franklin Rosenblatt, entered the Corps through the FLEP and is on active duty in Hawaii today.

Colonel Gary Thorne served as a judge advocate in the 1950s; his son, also named Gary, served as a captain in our Corps in the 1970s. The younger Thorne "is one of the most recognizable voices in sports broadcasting, having covered Major League Baseball, the National Hockey League, the Olympics, NCAA basketball, football and hockey" during a more than a thirty-five-year broadcasting career.[14]

A final father-son pair, albeit like the Liebers, not exactly in the category of father-son judge advocates, is William S. Fulton, Jr. and Sherwin Fulton. Colonel Fulton served as a judge advocate for many years (after seeing combat as an Infantryman in World War II and Korea), and finished his service to our Corps as an Army civilian employee and Clerk of the Army Court of Criminal Review (the forerunner of today's Army Court of Criminal Appeals). His son, Sherwin, was a paralegal in our Corps and retired in 1995 as a sergeant first class.

Captain Samuel J. Smith Sr. and Colonel Samuel J. Smith, Jr. In 1961, the senior Smith was an Infantry first lieutenant in the 3d Armored Division in Germany. He was passionate about baseball and was the coach of the Combat Command C "Cougars" and the assistant coach of the 3d Armored Division "Spearheads" baseball teams. In the early 1960s, baseball (and other sports) played by Army teams both in the United States and overseas were a major morale and recreational outlet for thousands of soldiers. First Lieutenant (1LT) Smith was proud of his time as a coach for the 3d Armored team, especially as the division commander, Major General (MG) Creighton Abrams,[15] was an avid baseball fan and took a personal interest in young Sam Smith. But 1LT Smith wanted to go to law school and, when the Army announced a new Excess Leave Program[16] for officers who wanted to be uniformed lawyers, Smith applied and was accepted. He was one of the first individuals to participate in the Excess Leave Program, and he exchanged his crossed rifles for the crossed-sword-and-quill insignia when he started law school at Washington and Lee in September 1961. When Smith later resigned his commission and left active duty, he was a captain in the Corps.

Then First Lieutenant Samuel J. Smith, Sr. (center), Coach, Combat Command C Cougars Baseball Team, 3d Armored Division, Germany, 1959

His son, COL Sam Smith, was commissioned through the Reserve Officer Training Corps (ROTC) program at James Madison University in 1984, and received his Juris Doctor (J.D.) from George Washington University in 1987. He entered the Corps the next year and has served in a variety of positions, including Staff Judge Advocate, U.S. Army Training and Doctrine Command. Today, he is a professor at National Defense University.[17]

Brothers

There have been at least ten sets of brothers in the Corps: the Camerons, Comodecas, Cooleys, Goetzkes, Hudsons, Lederers, Mackeys, Russells, Warners and Woodruffs.

Dennis S. Cameron served in the 1970s and his brother Michael K. Cameron was on active duty in the Corps in the 1980s and 1990s.

The Comodeca brothers, Peter J. (senior) and Michael P. (junior), were on active duty at the same time in the late 1980s. Pete Comodeca graduated from USMA in 1977 and entered the Corps through the FLEP after completing law school at Harvard. He resigned his commission in 1990. His brother, Mike, likewise graduated from USMA (class of 1979) and entered the Corps through the FLEP. Lieutenant Colonel (LTC) Mike Comodeca retired in 2000.[18]

Robert and Howard Cooley were brothers who served in the Corps in the 1970s and 1980s. Robert "Bob" Cooley left active duty after several tours of duty and began a career as a state court judge in Virginia. His younger brother, Howard, remained in

the Corps for a career and retired as a colonel. The Cooleys are apparently the only African-American brothers to have served as judge advocates in our Corps.

Karl M. and Kenneth H. Goetzke, Jr., both served in the Corps at the same time. Karl retired as a colonel; Ken left active duty as a major.

William A. "Bill" Hudson, Jr., and Walter M. "Walt" Hudson both served in the Corps at the same time. Bill Hudson entered the Corps in 1984 and retired as a colonel. His younger brother Walt is on active duty in the Corps today.

Colonel (U.S. Army Reserve Retired) Fredric I. "Fred" Lederer and his younger brother, COL (Ret.) Calvin M. "Cal" Lederer likewise were on active duty at the same time in the 1970s. The older Lederer finished his active duty at TJAGSA (teaching in the Criminal Law Division) before beginning an academic career as a law school professor at the College of William and Mary. His younger brother, Cal Lederer, served a full career as an Army lawyer and retired from active duty in 2002. He then assumed duties as the Deputy Chief Counsel for the U.S. Coast Guard. When the Coast Guard became a part of the Department of Homeland Security in 2003, the Secretary of that department designated Cal Lederer as Deputy Judge Advocate General for the U.S. Coast Guard.[19]

Patrick J. and Richard J. Mackey were identical twins who entered the Corps in 1974 and served full careers; both retired as colonels. They are likely the only identical twins to have served in our Regiment.

George and Richard "Rich" Russell both served in the Corps at the same time; both retired as colonels. George was the older sibling and is deceased.

Colonel (Ret.) Karl K. "Kasey" and LTC (Ret.) Andrew M. "Mac" Warner entered the Corps in the 1980s. Both were USMA graduates who pinned the crossed-sword-and-quill insignia on their collars after completing the FLEP. Kasey Warner retired in 2001; Mac Warner retired in 2000.[20]

Colonel (Ret.) William A. "Woody" Woodruff and his younger brother Joseph A. Woodruff both served on active duty in the Corps. The older Woodruff joined the Corps in 1974 and retired as a colonel. He is now on the law faculty at Campbell University's law school in Raleigh, North Carolina.

The younger Woodruff entered the Corps after graduating from the University of Alabama's law school. He left active duty as a major and now practices law in Tennessee. A final note: Cedric Woodruff, their father, served as a warrant officer in the Corps from 1962 to 1972 and retired as a Chief Warrant Officer Three.

Finally, CPT Robert L. Davenport, Jr., and CPT Darius K. A. Davenport. Both Robert and Darius graduated from Norfolk State University and were commissioned through the ROTC program. Both then received their J.D. degrees from the University of Wisconsin in Madison. Robert Davenport then served an active duty tour in the Army General Counsel Office (as part of the Honors Program). He left that office in 2006, having transitioned to a civilian attorney position. Today, he is the District Counsel for the Norfolk District Army Corps of Engineers.

Darius Davenport graduated from the 158th Judge Advocate Basic Course in 2002 and subsequently served at XVIII Airborne Corps and at TRADOC until leaving active duty in 2006. Today, he is in private practice in Norfolk and also works as the Director, Career and Alumni Services, Regent University Law School.[21]

Since the older Davenport never wore the crossed-sword-and-quill insignia, one might argue that the Davenports do not qualify for inclusion in this "It's a Family Affair" addendum. Your Regimental Historian, however, believes that their service deserves mention.

Captain Robert L. Davenport (left) and Captain Darius K.A. Davenport (right), with their sister, Staff Sergeant Joy Davenport Grooms, 2004 (Staff Sergeant Grooms served in Operation Desert Storm and in Operation Iraqi Freedom before retiring from the Army Reserve)

Grandfathers and Grandsons

To date, there have been two situations where a grandfather and his grandson were Army lawyers. Major General Ernest M. "Mike" Brannon served as TJAG from 1950 to 1954.[22] Almost thirty years later, his grandson, Patrick D. "Pat" O'Hare, entered the Corps on active duty. The younger O'Hare retired as a colonel in 2005 and now serves as the Deputy Director of the Legal Center at TJAGLCS.

Colonel Edward W. Haughney was a judge advocate from 1949 until his retirement in 1972. He subsequently joined the faculty at the Dickenson School of Law and taught for more than thirty years. His grandson, LTC Chris Jenks, recently retired from the Corps after twenty years on active duty.

Just as this Lore of the Corps gave a 'tip of the hat' to the Liebers, who do not quite fit the mold, it is only appropriate and fair to mention a father and daughter-in-law: Brigadier General (Ret.) Richard "Dick" Bednar and his daughter-in-law, MAJ Yolanda A. Schillinger.

Brigadier General Bednar entered the Corps in 1954 and retired from active duty in 1983; Major Schillinger recently completed the 62d Graduate Course and remains on active duty. The only thing missing from this 'family affair' story is mothers, sons, and daughters, and sisters. With the ever increasing number of female judge advocates in the Corps, however, the day will soon come when sons and daughters join their mothers in wearing JAG brass on their collars, along with sisters.

Uncle and Nephew

Lieutenant Colonel (LTC) Kevin Flanagan and CPT James M. Flanagan. Kevin Flanagan graduated from the U.S. Military Academy in 1971 and was accepted into the Excess Leave Program two years later. After the creation of the Funded Legal Education Program (FLEP) in 1974, then CPT Flanagan was in the first group of officers accepted into the FLEP for the last two years of law school. After obtaining his J.D. from the University of Oklahoma and graduating from the 81st Judge Advocate Officer Basic Course in 1976, Flanagan served in a variety of assignments and locations, including: 3rd Infantry Division, Schweinfurt, Germany; Litigation Division, Office of The Judge Advocate General (OTJAG); and Procurement Fraud Division, OTJAG. After retiring in 1991, LTC Flanagan continued to serve as a civilian attorney and was appointed to the Senior Executive Service in 1999 as the Deputy General Counsel (Inspector General), Department of Defense. He served as General Counsel, Defense Threat Reduction Agency from 2004 to 2014, when he retired.

His nephew, CPT James M. Flanagan, graduated from the University of Georgia in 2005 and Catholic University's law school in 2008. He then accepted a direct commission as a first lieutenant in the Corps and, after completing the 178th Judge Advocate Officer Basic Course in 2009, was assigned to 10th Mountain Division, Fort Drum, New York.[23]

JAG Corps Couples: A Short History of Married Lawyers in the Corps

(Originally published in the July 2014 edition of *The Army Lawyer.*)

For some years now, "JAG Corps Couples"—Army lawyers married to each other—have been a part of our Corps. Today, this is nothing unusual, since the Corps is twenty-six percent female,[24] and more than a few judge advocates are married to other current or former judge advocates. In the early 1970s, however, with a gender-segregated Army still in existence (the Women's Army Corps was not abolished until 1978) and with fewer than ten women total in the entire Corps in mid-1972,[25] *husband-and-wife* attorneys who entered the Corps *at the same time* were both a novelty and a rarity.[26]

The first "JAG Corps couples" were members of the 65th Judge Advocate Officer Basic Course. This class, which was in session at The Judge Advocate General's School (TJAGSA) from August 21 to October 13, 1972, had "the first two JAG husband-and-wife lawyer teams to serve together."[27] They were Captains (CPTs) Joyce E. and Peter K. Plaut and CPTs Joseph W. and Madge Casper. The Plauts were graduates of the University of Michigan's law school in 1971 and 1972, respectively. The Caspers were 1971 graduates of Case Western Reserve University School of Law. When the two couples graduated, the Caspers were assigned to the Washington, D.C., area, while the Plauts went to Germany.[28] When CPTs Joyce Platt and Madge Casper pinned the crossed-pen-and-sword insignia on their collars in 1972, the total number of female judge advocates jumped from nine to eleven. Only one of the two women remained in the Corps for a career: Joyce Plaut, later Joyce Peters. She retired as a colonel in 1994.[29]

Captains Madge (right) and Joseph W. Casper (left) were members of the 65th Basic Course

Captains Peter K. (3rd row, far right) and Joyce E. Plaut (front row, middle) (later Joyce Peters) were members of the 65th Basic Course

Other "JAG Corps Couples" followed. Captains Nancy M. and Frank D. Giorno were members of the 71st Basic Course, which was in session from January 7 to March 1, 1974.[30] The Giornos had both graduated from the University of Baltimore School of Law in 1973.[31] Captains Coral C. and James H. Pietsch, both 1974 graduates of Catholic University Law School, were members of the 74th Basic Course. Captain Pietsch would later make history as the first female brigadier general in the Corps and the first Asian-American female Army officer to wear stars. She also is the first half of a JAG Corps couple to reach flag rank, as her judge advocate spouse also transferred to the Army Reserve after completing his tour of active duty. Brigadier General (BG) Pietsch was the Chief Judge (Individual Mobilization Augmentee) at the Army Court of Criminal Appeals when she retired from the Army Reserve in July 2006.[32]

History was made again on October 22, 1974, when the 75th Basic Course began and *three* husband-and-wife teams joined their fellow students in the class. They were Captains Myrna A. and Robert W. Stahman, Cherie L. and Robert R. Shelley, and Vicky and Jack J. Schmerling. When the course graduated on December 18, 1974, the Stahmans left Charlottesville for Germany, while the Shelleys went to Fort Ord, California. As for the Schmerlings, they had their initial assignments at Fort Meade, Maryland.[33]

The 75th Basic Course, which began on October 22, 1974 and finished on December 18, 1974, had three married couples in it: Captains Myrna A. and Robert W. Stahman (left), Cherie L. and Robert R. Shelley (center), and Vicky and Jack J. Schmerling (right).

Other married couples who entered the Corps in the 1970s include: Captains Albert R. and Cathy S. Cook, members of the 80th Basic Course (both of whom were 1975 graduates of the University of Florida School of Law),[34] and Captains Connie S. and Sanford W. Faulkner and Michelle D. and Scott O. Murdoch, who were members of the 85th Basic Course.

Over the years, many more JAG Corps Couples have entered our ranks. One is worth mentioning in closing: First Lieutenant Flora D. Darpino and First Lieutenant Christopher J. O'Brien, who were married to each other when they received direct commissions on December 21, 1986 and entered the 112th Basic Course in January 1987. Both graduated from Gettysburg College and completed law school at the University of Rutgers-Camden. Both stayed for a full career, with Lieutenant General Darpino assuming duties as the Army's 39th Judge Advocate General in 2013. While she represents a number of historical firsts, for purposes of this article, Lieutenant General Darpino is important as the first half of a JAG Corps Couple to wear three stars in our Corps.

A final historical note: From the beginning, there was never any intentional recruiting or soliciting of married couples to join the Corps.[35] On the contrary, the entry of husband-and-wife attorney teams resulted from a combination of factors. First, the end of the all-male draft in the 1970s and a recognition that the Army could not meet its future manpower needs without female Soldiers naturally led to an increased emphasis on inviting women to don Army green—and the Corps similarly was increasingly interested in filling its ranks with women. Second, the rise of feminism in American society, and increased opportunities for women in business and the professions, resulted in many more women attorneys (today, in fact, almost fifty percent of law degrees are earned by women).[36] Since some of these female attorneys were married to male attorneys, this inevitably led to both husband and wife signing up for a tour of duty as "JAGs" in the 1970s.

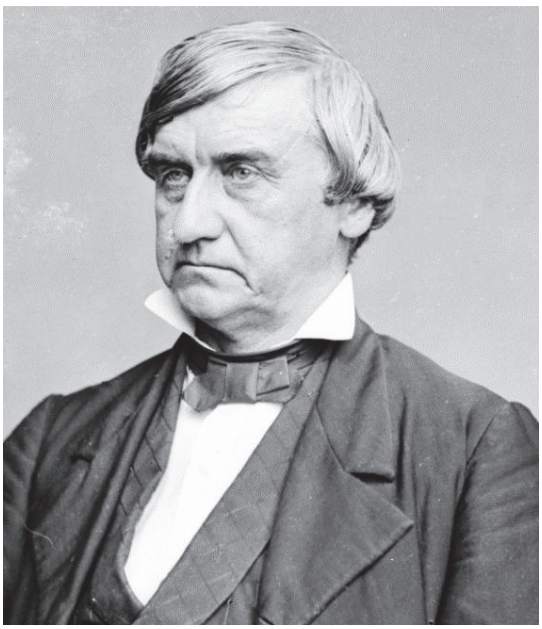
As the Corps moves through the second decade of the 21st century, the existence of "JAG Corps Couples" might seem like a "dog bites man" story. But it was not always so. While married couples do continue to join the Corps at the same time, a more likely scenario is the one that occurred in the 169th Basic Course. In this class, which began on January 2, 2006 and graduated on April 7, 2006, three single male and three single female judge advocates who met each other in the class were married after graduation. They were: Marcus Misinec and Laura O'Donnell, Melissa Dasgupta-Smith and Graham Smith, and Patrick and Elizabeth Gilman. No wonder some judge advocates refer to the 169th as the "love class."

Epaulettes and Shoulder Knots for Judge Advocates: A History of Branch Insignia for Army Lawyers in the 19th Century

(Originally published in the July 2015 edition of *The Army Lawyer.*)

While Army officers today wear their branch insignia on the lapels of their service uniforms, in the 19th century they wore this insignia (along with their insignia of rank) on their "epaulettes" and "shoulder knots." What follows is a brief history of epaulettes and shoulder knots for judge advocates in the 19th century.

On July 29, 1775, the Continental Congress selected William Tudor as "Judge Advocate of the Army;" slightly more than a year later, the Congress changed Tudor's title to "Judge Advocate General." But neither Tudor nor any military lawyer who followed him in the late 18th century or early years of the 19th century wore any insignia identifying him as a judge advocate, much less as the Judge Advocate General. In fact, Army regulations published in 1825 provided that "chaplains, judge advocates, commissaries of purchases and storekeepers have no uniform."[37] This meant, of course, they wore civilian clothes.



Brigadier General Joseph Holt, TJAG from 1862 to 1875, never wore a uniform despite his status as the top lawyer in the Army

Not until 1851 did judge advocates have a device that set them apart from other staff officers: a white pompon that they wore on their caps. But the wear of an Army uniform, much less the white pompon, does not seem to have been particularly important: witness the civilian attire of Judge Advocate General Joseph Holt. Then Brigadier General (BG) Holt, who served from 1862 to 1875, never wore a uniform while on active duty.

Sometime between 1861 and 1865, judge advocates who did wear Union uniforms were authorized epaulettes that distinguished them by the use of the Old English letters "JA."[38] The photograph below illustrates epaulettes for a judge advocate captain. These were a graduation gift to the Corps from the members of the 62d Graduate Course in 2014, and are now on display at The Judge Advocate General's Legal Center and School.

Epaulettes worn by Bureau of Military Justice captain (Civil War period to 1872)[39]

In 1872, the shoulder knot replaced the epaulette on the full dress uniform, and those prescribed for judge advocates had the letters "JA" in Old English characters embroidered on them.[40]

In 1890, the Judge Advocate General's Department (JAGD), which had been established six years earlier, adopted a new insignia for Army lawyers. General Orders No. 53 described it as "a sword and pen crossed and wreathed . . . embroidered in silver on the cloth of the pad (except for a Colonel . . . who will wear the device made of solid silver on the knot midway between the upper fastening and the pad)."[41]

Shoulder knot on left worn by Bureau of Military Justice colonel or JAGD colonel (1872–1890); shoulder knot on right worn by JAGD colonel from 1890 to 1903

Shoulder knots with the sword-and-quill insignia (worn 1890–1903) were no longer permitted after that date, because the Army revised its uniform regulations and changed the style of shoulder knots to the pattern worn on dress uniforms today. As a result, judge advocates now wore the crossed sword and pen insignia on the collars of their service coats—a practice that continues to this day.

Crossed Sword and Pen:
The History of the Corps' Branch Insignia

(Originally published in the April 2011 edition of *The Army Lawyer.*)

While there have been judge advocates (JAs) in the Army since the Revolution, they did not have any distinguishing insignia until 1857, and the crossed sword and pen familiar to Army lawyers today did not exist until 1890. But the story of that insignia is an important one, since it is the trademark of the Corps and is today proudly worn by JAs, legal administrators, and paralegals.

Some will be surprised to learn that for many years, JAs did not wear a uniform. While William Tudor, the first Judge Advocate General (JAG), had the military rank of lieutenant colonel, he did not wear a uniform, and neither did his successors. Army regulations published in 1825 explicitly stated that JAs (along with chaplains) "have no uniform."[42]

Not until 1857 did the Army authorize a distinguishing item for JA wear: a white pompon.[43] Judge advocates were to wear this pompon—"a tuft of cloth material which looked like an undersized tennis ball and protruded from the hat"[44]—whenever they wore the standard staff officer uniform with epaulettes. But, as there was but one JA of the Army during this period in history, and JAs in the field all held commissions in other branches, it is likely that the white pompon was infrequently worn, if at all.[45] When the Army subsequently revised its uniform regulations in 1862, any mention of the white pompon was omitted, suggesting that it was not a popular uniform item.[46]

When the Civil War began in April 1861, the Regular Army consisted of 15,000 enlisted men and 1100 officers, most of whom were on duty on the western frontier. By the end of the war, however, 2.2 million men had served in Union blue uniforms, but not the JAG.[47] On the contrary, Brigadier General (BG) Joseph Holt, who served as the JAG from 1862 to 1875, never wore a uniform; he wore only civilian clothing.[48] Some officers who worked for Holt in the Bureau of Military Justice (the forerunner of today's Corps) also wore civilian clothes. Others, who had started their careers as line officers, did wear Union blue out of habit, but there was nothing to distinguish them as Army JAs.

It was not until 1872 that Army JAs were first authorized to wear special uniforms with distinctive insignia, and that the letters "JA" in Old English letters were embroidered on each shoulder knot.[49] The term "shoulder knot" describes insignia consisting of gold wire or rope that is twisted in a series of loops. These shoulder knots are still worn by officers on the Army blue mess uniform jacket.[50]

The "JA" letters worn on each shoulder disappeared in 1890, and were replaced with the insignia familiar to Soldiers today—the crossed pen and sword.[51] General Order No. 53 provided that the following insignia for officers in the Judge Advocate General's Department (JAGD) (a "Department" had been created in 1884 and remained so until becoming a Corps in 1947) was to be worn on shoulder knots:

> [O]f gold cord, one-fourth of an inch in diameter . . . on dark blue cloth ground; insignia of rank embroidered on the cloth ground of the pad . . . with sword and pen crossed and wreathed, according to pattern, embroidered in silver on the cloth ground of the pad (except for a colonel and assistant judge advocate general, who will wear the device made of solid silver on the knot midway between the upper fastening of the pad).[52]

According to the Quartermaster General's Heraldic Section, the pen denoted the recording of testimony and the sword symbolized the military character of the JA mission. The wreath was part of the insignia because it was the traditional symbol of accomplishment. In the 1890s and early 1900s, the crossed-pen-and-sword was required to be worn on all shoulder knots. By World War I, however, shoulder knots disappeared from service dress uniforms, and JAs wore a one-inch dark brown metal crossed sword and pen insignia on the standing collar of the olive drab uniform coat. When the Army transitioned to olive-colored coats with lapels in the 1920s, the crossed-pen-and-sword insignia moved from the standing collar to the lapel, where it remains today.[53]

In February 1924, a major change occurred when Major General (MG) Walter A. Bethel, The Judge Advocate General (TJAG), authorized a new branch insignia for Army lawyers. The crossed

sword-and-pen was out, and in its place was a gold-colored "balance" or scale, which rested on the point of a one-inch high silver Roman sword with a gold grip. A silver ribbon completed the design.[54]

Major General Bethel and others did not like the crossed-sword-and-pen for several reasons. First, the insignia was thought to be too similar to the collar brass worn by the Inspector General's Department (IGD), especially as both the JAGD and the IGD insignia featured a wreath. While this might not seem to be a problem, more than a few JAs resented being mistaken for an inspector. Some Army lawyers apparently suggested to the IGD that it should change its insignia so that there would be no confusion between the two branches, but this suggestion was rebuffed.[55]

There was, however, a more fundamental reason to create a new insignia: the crossed sword and pen was not believed by MG Bethel and others to be "sufficiently symbolic" of the JA function.[56] The result: MG Bethel consulted with Major (MAJ) G. M. Chandler, a member of the Quartermaster General's Heraldic Section, and asked him to create a new branch insignia. Chandler chose a sword to indicate the military character of the JA's practice. He used a Roman sword because the Romans were great law-givers.

As for the balance, Chandler recognized that it was a symbol of justice in antiquity, and he actually based his design on the bronze zodiac signs in the floor of the main reading room at the Library of Congress.[57]

Judge advocates hated the change: "the immediate reaction to the new insignia ranged from open hostility to ridicule, and the officers were almost unanimous in their opinion that the new device was no improvement."[58] The outcry had an impact: in November 1924, MG Bethel canvassed JAs for their views on the new insignia, and most told him that they did not like it. Shortly thereafter, MG Bethel retired unexpectedly due to poor health. The new TJAG, MG John A. Hull, quickly moved to restore the old crossed-sword-and-pen insignia, but the Adjutant General rescinded the new insignia in December 1924.[59] As a result, the Roman balance insignia was out before many were produced for wear. Consequently, it is an extremely rare item and highly sought after by collectors of U.S. military insignia. As for the crossed sword and pen, it has remained the branch insignia of the Corps without change since that time.

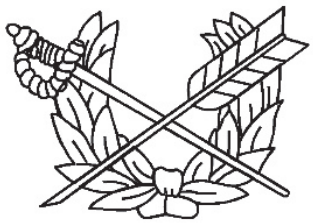
Enlisted personnel—yesterday's legal clerks, today's paralegals—wore the crossed sword and pen briefly in World War I, when the Army authorized enlisted men to join the JAGD "for the period of the existing emergency."[60] The Army authorized bronze collar disks from May 1918 through March 1920 but, after Congress restricted the JAGD to officers only in June 1920, enlisted personnel could no longer wear the crossed sword and pen. Although some legal clerks wore domed (convex) bronze disks with the crossed sword and pen in the 1950s and 1960s, these were unauthorized insignia. It was not until February 1968 that enlisted personnel assigned to staff judge advocate offices were *officially* allowed to wear gold-colored disks with the crossed sword and pen on their shirt collars and uniform lapels.[61]

Warrant officers were the last uniformed community in the Corps to adopt the crossed sword and pen as their insignia. This occurred in 2004, when legal administrators gave up their distinctive eagle rising insignia and began wearing branch insignia worn by the Corps' JAs. The rationale for the change was that if warrant officers were to be fully integrated into the branch-based systems of the larger Army officer corps, they should adopt both the branch insignia and the branch colors of their respective primary military occupation specialty. For legal administrators, this meant wearing the crossed sword and pen on their lapels and adopting the Corps' blue-and-white colors on their dress uniforms. It also meant exchanging the eagle rising on their service caps for the eagle worn by commissioned officers on their caps.[62]

MG Bethel's short-lived JAGD Insignia, c. 1924

Today, JAs, legal administrators, and paralegals throughout the Army are identified by the "gold-colored sword and pen, crossed and wreathed,"[63] which they wear both as insignia of branch and as Regimental distinctive insignia. There is every reason to believe that this unique badge of office will

identify the members of the Corps for many years to come.



Current JAGC Insignia

The Story of the First Civilian Attorneys Given Direct Commissions in the Corps

(Originally published in the May 2013 edition of *The Army Lawyer*.)

Today, it is not unusual to find judge advocates (JAs) who entered the Corps from civilian life, as directly commissioned officers. Nearly one hundred years ago, however, it was a radical idea to invite civilian attorneys, who had no military experience, to don uniforms and join the Judge Advocate General's Department (JAGD). This is the story of the first selection from civil life of twenty JAs in World War I—lawyers who were at the top of the American legal profession in the early 20th century and some of whom remain larger than life personalities in American law.

On June 17, 1917, just two months after Congress declared war and the Army prepared to draft 600,000 young Americans to fight in what would become the American Expeditionary Force (AEF), the War Department announced that it was also commissioning twenty civilian attorneys to be JAs. These attorneys were to "be assigned to a division of the Army and . . . all of them would be Majors (MAJs) on the staff of the Judge Advocate General in the field."[64] Just a year earlier, the authorized strength of the JAGD had been thirteen JAs. Consequently, adding twenty majors more than doubled the size of the Department—bringing the total number of men wearing the crossed pen-and-sword on their collars to thirty-two.[65]

The Army of this period did not have a formal education program for officers or enlisted personnel in any branch or field. Everything was "on the job" training, which meant that Brigadier General (BG) Enoch Crowder,[66] who had been serving as the Judge Advocate General (TJAG) since 1911, wanted to select the best possible lawyers for these new positions. After America's entry into World War I, there was no shortage of applicants; patriotism, and with it a desire to serve, swept the country.

According to the War Department, "a great many distinguished lawyers and legal professors, men of national standing," applied to be Army lawyers. There were so many "highly qualified" applicants, said the Army, that it was "hard . . . to select a few from so much good material."[67] That said, the Army's Committee on Public Information announced that the following had been selected to be directly commissioned as majors:

- Henry L. Stimson, former Secretary of War;
- Professor Eugene Wambaugh, Harvard Law School;
- Professor Felix Frankfurter, Harvard Law School;
- Dr. James Brown Scott, leading authority on international law;
- Professor John H. Wigmore, Dean of Northwestern University;
- Gaspar G. Bacon, son of Robert Bacon, former U.S. Ambassador to France;
- Frederick Gilbert Bauer of Boston, Massachusetts;
- George S. Wallace of Huntington, West Virginia;
- Nathan W. MacChesney of Chicago, Illinois;
- Lewis W. Call of Garrett, Maryland;
- Burnett M. Chiperfield, former congressman from Chicago, Illinois;
- Joseph Wheless of St. Louis, Missouri;
- George P. Whitsett of Kansas City, Kansas;
- Victor Eugene Ruehl of New York, New York;
- Thomas R. Hamer of St. Anthony, Idaho;
- Joshua Reuben Clark, Jr., of Washington, D.C.;
- Charles B. Warren of Detroit, Michigan;
- Edwin G. Davis of Boise, Idaho; and
- Hugh Bayne of New York, New York.[68]

The Army insisted—and well may have intended—that these twenty new judge advocates would see action in France. As the Committee on Public Information explained:

> It would be well to disabuse the public mind of any superstition to the effect that the applicants under the legal branch of the army are looking for a "snap" or for a "silk stocking" position far in the rear of the actual fighting. The officers acting on the staff of the Judge Advocate General will be

> members of the actual fighting force, and, in the pursuit of duty, will be brought into the danger zone just as often as other specialized commissioned men, medical officers, for instance. The large percentage of casualties among army doctors fighting in France will stand as a convincing argument that military surgeons are not spared when the general assault begins.[69]

Of the twenty attorneys identified in the War Department's press release, all but one—Gaspar G. Bacon[70]—ultimately accepted direct commissions as majors in the JAGD Reserve. Additionally, while the Army had insisted that these new lawyers in uniform would be part of the actual fighting force, only about half of the men chosen by the Department joined the AEF and deployed to Europe; the remainder did not leave U.S. soil. But their service in the JAGD was exemplary, and many went on to make even greater contributions in their lives after the Army.

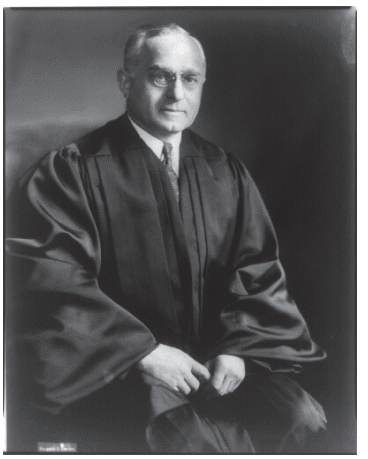
Henry L. Stimson. After accepting a commission on May 22, 1917 in the Judge Advocate General's Reserve Corps, MAJ Stimson was assigned to the Army War College (then located at Fort McNair), where he served in the Intelligence Section. Three months later, however, Stimson transferred to the Field Artillery with the rank of lieutenant colonel (LTC). He deployed to France in December and remained in the AEF until August 1918. He left active duty as a colonel (COL). Stimson had previously served as Secretary of War (1911 to 1913) under President William H. Taft. He would later join President Herbert Hoover's cabinet as Secretary of State (1929 to 1933) and serve yet again as Secretary of War (1940 to 1945) in the Roosevelt and Truman administrations in World War II. Stimson was a remarkable lawyer and public servant; he is the only individual to have served in four presidents' cabinets.[71]

Eugene Wambaugh. Major Wambaugh, who accepted his commission on November 8, 1916, had been a Harvard professor since 1892. He had a national reputation as a constitutional law expert, which explains why TJAG Crowder appointed him to be the Chief of the Constitutional and International Law Division, Office of the Judge Advocate General. Wambaugh had previous government experience, having "worked on war problems while serving as the special counsel to the State Department in 1914," and having been "the American member of the Permanent International Commission under the treaty with Peru in 1915."[72] Major Wambaugh was promoted to LTC in February 1918 and pinned silver eagles on his uniform in July of that same year. Wambaugh was sixty-two years old when he was honorably discharged from active duty and returned to teaching law at Harvard's law school.

Felix Frankfurter. Major Frankfurter, who accepted his Reserve commission on January 6, 1917, spent his entire tour of duty in Washington, D.C., where he was assigned to Office of the Secretary of War. He worked a variety of issues, including the legal status of conscientious objectors, and wartime relations with labor and industry. He refused to wear a uniform while on active duty but, as Frankfurter was close friends with TJAG Crowder, he apparently was allowed to wear only civilian clothes. In his memoirs, Frankfurter explained why:

> The reason I didn't want to go into uniform was because I knew enough about doings in the War Department to know that every pipsqueak Colonel would feel he was more important than a Major . . . . As a civilian I would get into the presence of a General without saluting, clicking my heels, and having the Colonel outside say, "You wait. He's got a Colonel in there."[73]

After leaving active duty, Frankfurter continued a stellar career. He declined to be Solicitor General in 1933, but accepted President Roosevelt's nomination to the U.S. Supreme Court in 1939. Frankfurter served as an associate justice until retiring in 1962.



Professor Felix Frankfurter, Harvard Law School

James B. Scott. Canadian-born James Brown Scott was fifty years old when he accepted a commission as a Reserve Corps major on November 8, 1916. A graduate of Harvard University, he had been a law professor at Columbia University from 1903 to 1906 and lecturer in international law at Johns Hopkins University from 1909 to 1916. Despite the War Department's insistence that these directly commissioned officers would be in the field, Scott too remained in Washington after being called to active duty on May 15, 1917. His expertise, however, was critical after the fighting in Europe ended; MAJ Scott was the technical advisor to the American Commission to Negotiate Peace and technical delegate of the United States to the Paris Peace Conference from 1918 to 1919.

John Henry Wigmore. When MAJ John Henry Wigmore was called to active duty in 1917, he "was at the peak of his career."[74] His widely acclaimed and authoritative text, *A Treatise on the System of Evidence in Trials at Common Law*, was in print, and he was the dean of Northwestern University Law School. He also was the president of the Association of American University Professors. When Wigmore arrived in Washington, TJAG Crowder, who was also serving as the Provost Marshal General, decided that Wigmore's skills could best be used in administering the Selective Service Act of 1917. Crowder, who had overall responsibility implementing the war-time draft that ultimately would induct three million men in to the armed forces, appointed MAJ Wigmore as the "Chief, Statistical Division, Office of The Provost Marshal General." In this position, Wigmore "originated and placed into execution the general plan of statistical tables" used to screen and classify over ten million men.[75] Major Wigmore also "did liaison work with nearly every government agency in Washington" and authored a chapter on evidence for the 1917 *Manual for Courts-Martial*. In recognition of his work, he was promoted to lieutenant colonel in early 1918. He was later promoted to full colonel that same year. Although COL Wigmore left active duty on May 8, 1918, he retained his status as a Reserve officer. He signed his last oath of office in 1940, when he was seventy-seven years old.

Frederick Gilbert Bauer. Major Bauer, who was commissioned as a major in the Reserve Corps on June 3, 1916, received his A.B. in 1900 from Harvard *summa cum laude*, and his LL.B. in 1903 from Harvard *cum laude*. He had been in private practice in Boston prior to World War I and had been an officer in the Massachusetts National Guard since 1910. After being ordered to active duty in July 1917, Bauer served stateside as the Division Judge Advocate, 6th Division, until deploying to France. When he joined the AEF—only three weeks before the fighting in Europe ended—Bauer was put in charge of the General Law Section. He left active duty as a lieutenant colonel.

George S. Wallace. A native of Albemarle County, Virginia, George Selden Wallace received his law degree from the University of West Virginia in 1897. He started his own law firm in Charleston, West Virginia, the same year and, after the outbreak of the Spanish American War in 1898, served as Divisional Quartermaster, 2d West Virginia Volunteer Infantry. At the time he accepted a commission as a Reserve major in November 1916, Wallace was the Judge Advocate General of the State of West Virginia and had achieved considerable fame in prosecuting labor radical Mary Harris "Mother" Jones after the Cabin Creek riots of 1912.[76] After a brief period of service in Washington, D.C., Wallace was promoted to LTC in June 1918 and sent to France as senior assistant of the Judge Advocate General for the AEF. Wallace left active duty in June 1919 and resumed an active legal, business, and political career in West Virginia.

George S. Wallace's uniform

Nathan William MacChesney. Nathan William MacChesney accepted his direct commission in November 1916. Prior to being ordered to active duty in June 1917, MacChesney had practiced law in Chicago, served as Illinois's special assistant attorney general from 1913 to 1918, and was the president of the Illinois State Bar Association. With prior service in the National Guard of California, Arizona, and Illinois, MAJ MacChesney had considerable military experience. He remained in the United States during the war, however, and did not deploy to France until after the fighting had ended. Ultimately, he served briefly in the Office of the Acting Judge Advocate General, AEF, where he

"served as chief of the section which reviewed dishonorable discharge cases in France."[77] After the Armistice, MacChesney represented the Army before the Supreme Court in the case of *Stearns v. Wood*, which held that the Secretary of War had the power to control the military forces of a state by executive order. In 1932, President Herbert Hoover appointed MacChesney as Envoy Extraordinary and Minister Plenipotentiary (the chief of U.S. diplomatic mission) to Canada and, when MacChesney presented his credentials, he wore the full dress uniform of a colonel, JAGD Reserve; however, the Senate never confirmed him.[78] MacChesney later also served as Counsel General to Thailand. He retired as a Reserve brigadier general in 1951.[79]

Lewis W. Call. Born in Ohio in 1858, Lewis W. Call was fifty-eight years old when he was ordered to active duty as a Reserve major in August 1917. An 1889 graduate of Columbian (now George Washington) University's law school, Call had extensive service as a civilian employee in the JAGD. He had been a law clerk, chief clerk, and solicitor in the Department from 1889 to 1914 and, at the time he accepted a commission, was serving as a law officer for Bureau of Insular Affairs. This extensive legal experience in TJAG's office probably explains not only why Call was offered a commission but also why he remained in Washington, D.C., for the entire war. His performance of duty must have been exemplary; Call was promoted to lieutenant colonel in February 1918 and colonel in July 1918.

Burnett M. Chiperfield. Major Burnett M. Chiperfield was an Illinois attorney and only just retired as an Illinois National Guard colonel before he applied for a Reserve commission as a judge advocate. Having been elected to the House of Representatives in March 1915, Chiperfield also was a member of Congress at the time he pinned JAGD insignia on his uniform collar in November 1916; his term in the House ended in March 1917. Called to active duty on May 2, 1917, MAJ Chiperfield assisted TJAG Crowder in implementing the Selective Service Act in the Office of the Provost Marshal General. He returned to Illinois to coordinate the work of various draft boards in the greater Chicago area before assuming duties as Judge Advocate, 33d (Illinois) Division, in August 1917. He accompanied the division to France and was subsequently cited by Major General (MG) George Bell, Jr., the commanding general, for performing duty "of great responsibility beyond that required by his office." According to Bell, when Chiperfield was serving as a liaison officer with the 80th and 29th Divisions north of Verdun in October 1918, Chiperfield was "constantly under hostile artillery fire" and "voluntarily and frequently [went] to the front line for information." He was in the thick of the action since, "on several occasions," Chiperfield opened "serious and extensive traffic blocks under shell fire."[80] In March 1919, then—LTC Chiperfield was still on active duty in Europe, where he was with the Army of Occupation in Koblenz, and was serving as the Judge Advocate, III Army Corps, AEF. In this position, Chiperfield was in charge of all civil affairs for that part of Germany occupied by the Corps: which meant that not only did he operate a "Provost Court" to prosecute German civilian offenders, but he also supervised "all the cities, Buergermeistereis, and political units located within the Corps area."[81]

Joseph Wheless. Commissioned on November 25, 1916, Joseph Wheless was living in Chicago at the time he was called to active duty, and this probably explains why he was assigned as Assistant Judge Advocate, Central Department, Chicago, Illinois. Wheless was an international law expert and a specialist in South American law. He spoke Portuguese and Spanish and, while practicing law in Mexico City, wrote an officially authorized two-volume *Compendium of the Laws of Mexico*.[82] He also was the author of several legal texts on Tennessee law. Wheless never left American soil during his time as an Army lawyer and was honorably discharged on December 15, 1917—only a month after the fighting in France ended. In later life, Wheless's views on religion made him a controversial figure. A self-professed atheist, he insisted that the Bible was a fraud, no man named Jesus ever lived, and that Christianity as a religion "was based on and maintained by systematic persecution and murder."[83]

George P. Whitsett. Born in Missouri in 1871, George P. Whitsett received his law degree from the University of Michigan in 1892 and then practiced law until the outbreak of the Spanish-American War in 1898. He then joined the 5th Missouri Volunteer Infantry and deployed to the Philippines, where his legal skills resulted in his being first assigned as a Judge of the Inferior Provost Court and later as a Judge of the Superior Provost Court of Manila.[84] It seems likely that this prior lawyering in the Philippines made him an attractive applicant for a Reserve commission. Major Whitsett accepted his appointment in May 1917 and then sailed to France, where he served as the Judge Advocate for the AEF's 5th Army Corps. Whitsett was wounded in action

during the Argonne offensive in October 1918. After the Armistice, then-LTC Whitsett remained in Europe with the Army of Occupation. He returned to the United States in June 1919.

Victor Eugene Ruehl. Major Victor Eugene Ruehl, a graduate of the University of Indiana's law school, had both service as a Soldier and considerable experience as an attorney when he accepted his direct commission as a Reserve officer on January 3, 1917. Ruehl had served as a Soldier in the Army's Hospital Corps in the Philippine Islands from May 1899 to May 1904. After being honorably discharged, he completed law school and, after practicing for several years in Indiana, moved to New Jersey. From 1907 to 1917, Ruehl was the law editor of *Corpus Juris*, a legal encyclopedia,[85] and the editor-in-chief of *The New York Annotated Digest*, Volumes 5-18. After being called to active duty, Ruehl served in the Office of the Provost Marshal General, where he assisted with the implementation of the Selective Service Act. On New Year's Day 1918, MAJ Ruehl joined the 35th Division and deployed with it to France in May 1918.

Thomas Ray Hamer. Thomas Ray Hamer of St. Anthony, Idaho, also had a remarkable pedigree as a lawyer. Born in Vermont, Illinois, in May 1864, Hamer had moved to Idaho in 1893 and then served as county attorney and as a member of the Idaho legislature. When the Spanish-American War began, Hamer was a captain (CPT) in the 1st Idaho Volunteer Infantry and deployed to the Philippines with his regiment in June 1898. He subsequently served as a judge on the first Provost Court organized in the Philippines under military occupation.

Victor Eugene Ruehl of New York, New York

In February 1899, Hamer was wounded at the Battle of Caloochan, but the injury must have been slight since he was mustered out of his state regiment and commissioned as a LTC in the 37th U.S. Volunteer Infantry. Lieutenant Colonel Hamer then assumed duties as Military Governor and Commander, District of Cebu until the reorganization of the Supreme Court of the Philippine Islands, when he was appointed as one of the two Military Justices on that court. Honorably discharged in 1901, Hamer returned to Idaho and resumed his law practice. He served as Receiver of Public Monies, U.S. Land Office, Blackfoot, Idaho, and was elected to the U.S. House of Representatives in 1908. On active duty, MAJ Hamer served in the Office of the Judge Advocate, Western Department, before being reassigned to the Office of the Judge Advocate General in Washington, D.C. Hamer also served briefly as the Judge Advocate, Camp Gordon, Georgia, and Judge Advocate, Camp Sheridan, Alabama. He left active duty as a LTC and moved from Idaho to Portland, Oregon, where he practiced law until retiring in 1943.

J. Reuben Clark, Jr. Major Joshua Reuben Clark, Jr. already had a distinguished legal career before accepting a commission in February 1917. After graduating from the University of Utah (where he was valedictorian and student body president) and Columbia University, Clark served in a variety of important government positions, including: Assistant Solicitor and Solicitor, U.S. Department of State; Chairman, American Preparatory Committee for the Third Hague Conference; General Counsel of the United States, American-British Claims Arbitration; and Counsel for the Cuban government. After being called to active duty in June 1917, Clark was detailed as a special assistant to the U.S. Attorney General. He later assisted TJAG Crowder with the implementation of the Selective Service Act. His "zeal, great industry, and eminent legal attainments" in both assignments were rewarded with the Distinguished Service Medal. Clark's citation reads, in part:

> [F]rom June 1917 until September 1918 . . . he rendered conspicuous services in the compilation and publication of an extremely valuable and comprehensive edition of the laws and analogous legislation pertaining to the war powers of our Government since its beginning. From September 1918 to December 1918, as executive officer of the Provost Marshal General's Office, he again rendered

> services of an inestimable value in connection with the preparation and execution of complete regulations governing the classification and later the demobilization of several million registrants.[86]

After leaving active duty in December 1918, Clark resumed an active legal and political career. A prominent and active leader in the Church of Jesus Christ of Latter Day Saints, Clark nonetheless found time to serve as an Under Secretary of State in the Coolidge administration and as U.S. Ambassador to Mexico. The J. Reuben Clark Law School at Brigham Young University is named after him.[87]

Joshua Reuben Clark, Jr., of Washington, D.C is sworn in as Under Secretary of State by William McNeir

Charles B. Warren. When Charles Beecher Warren accepted a commission as a Reserve major in July 1917, he already was well-known in government legal circles: he had represented the United States as an associate counsel in hearings before the Joint High Commission to adjudicate claims of British subjects arising out of the Bering Sea controversy of 1896–97, and had served as counsel for the United States before the Permanent Court in The Hague in the Canadian Fisheries Arbitration between the United States and Great Britain in 1910. After being called to active duty, Warren was assigned to the Provost Marshal General's Office, where he served as TJAG Crowder's chief of staff and "formulated and directed regulations administering the Selective Service Act."[88] In July 1918, then—Colonel (COL) Warren (he had been promoted to lieutenant colonel in February and colonel in July) deployed to Europe, where he oversaw the classification (and exemption) of Americans living in France and England. For his "administration of the selective service law during the war . . . [and his] unselfish devotion, tireless energy, and extraordinary executive ability," Warren was decorated with the Distinguished Service Medal in 1920.[89] After World War I, Warren was active in the Republican Party and, during the administration of President Calvin Coolidge, served as U.S. Ambassador to Japan (1921–1922) and U.S. Ambassador to Mexico (1924). Warren made the cover of *Time* magazine in January 1925[90] and shortly thereafter, President Coolidge nominated him to be U.S. Attorney General. Warren, however, "was never confirmed due to political controversy between the Senate and President Coolidge."[91]

Edwin G. Davis. Edwin Griffith Davis accepted his appointment as a Reserve officer on May 14, 1917, at the age of forty-three. Born in Idaho, Davis graduated from the U.S. Military Academy in 1900, then served in the Philippines with the 5th Infantry. In 1903, he returned to West Point and was assigned as an instructor in Law and History. During that time, Davis studied law and, two years later, was admitted to the bar in the District of Columbia. In 1907, then—CPT Davis was reassigned to Fort Baker, California, where he served as District Adjutant, Artillery District of San Francisco. In 1910, "he retired due to a physical disability contracted in the line of duty."[92] Davis then practiced law in Boise, Idaho, and, after becoming involved in politics, served in the Idaho state legislature and as Assistant Attorney General of Idaho from 1913 to 1915. Called to active duty in May 1917, then MAJ Davis was the Chief of the Military Justice Division in Washington, D.C., and, upon promotion to LTC, was reassigned to be the JAGD representative on the War Department General Staff. Davis's greatest contribution during World War I, however, was his work with Professor John Henry Wigmore, one of the other Reserve direct commissionees. Together, the two officers wrote the Soldiers' and Sailors' Civil Relief Act of 1918, which provided significant legal protections for Americans serving in the Army, Navy, and Marine Corps during the war.[93] For his "exceptionally meritorious and distinguished service," COL Davis (he was promoted in July 1918) was awarded the Distinguished Service Medal. His citation lauds his work as "chief of the disciplinary division . . . [where] he contributed a most helpful means of avoiding serious errors in the administration of military justice during the war."[94] In October 1919, Davis returned to civilian life. From 1922 to 1925, he served as the U.S. Attorney for Idaho, but he resigned from this position to become a special assistant to the U.S. Attorney General to handle war fraud cases. He "settled and adjusted many questions growing out of war contracts" and, at the close of a month-long trial in New York City in 1926, "won the only conviction

secured by the Department of Justice in a criminal case growing out of war frauds."[95] In 1929, Davis joined the legal department of the National Surety Company and, in 1934, was in U.S. District Court in Atlanta, Georgia, and "had just finished arguing a case" on behalf of the company "when he collapsed in the court room, and died before medical attention could be secured."[96] He was only sixty years old.

Hugh A. Bayne. The last of the twenty lawyers offered a Reserve commission in the JAGD was Hugh Aiken Bayne of New York. Born in New Orleans in 1870, Bayne graduated from Yale University in 1892 and then returned to Louisiana and obtained a law degree from Tulane University. He practiced law in New Orleans from 1894 to 1898 and in New York City from 1898 to 1917. After being commissioned as a Reserve officer in May 1917, MAJ Bayne joined General John J. Pershing's staff and sailed with him to Europe just nine days later. Bayne then served as the Judge Advocate, Services of Supply, Counsel for the U.S. Prisoners of War Commission, and as Judge Advocate, 80th Division. During the Meuse-Argonne Offensive from November 1–11, 1918, now-LTC Bayne was a liaison officer with attacking units of the division. At the end of World War I, LTC Bayne was honorably discharged. Some years later, he was awarded the Distinguished Service Medal for displaying "untiring zeal, rare professional ability, and intellectual qualities of a high order." According to the citation for this decoration, Bayne's "special knowledge of the French language and the laws of France enabled him to render . . . services of immeasurable value and contributed markedly to the successes of the American Expeditionary Force."[97] Bayne did not return to the United States after leaving active duty. Rather, he remained in Paris, France, where he served as a member of the Franco-American Liquidation Commission. In the 1920s, he also was an arbitrator on the Inter-Allied Reparations Commission established by the Paris Peace Conference. This commission determined the amount of reparations to be extracted from the Central Powers and paid to the Allies. Bayne participated in a number of significant cases, including a 1926 decision involving the commission's appropriation of twenty-one oil tankers owned by a German subsidiary of Standard Oil to pay for German reparations. Standard Oil fought the decision, but lost.[98]

It is hard to imagine a more impressive group of attorneys offered direct commissions. From law school professors and practicing attorneys to politicians and a future Supreme Court justice, these judge advocates provided great service to the JAGD and the Army during a time of war. They continued to serve the legal profession and their communities with great distinction long after taking off their uniforms—and are yet another example of our Regiment's rich and varied history.

Legal Aid for Soldiers

(Originally published in the December 2010 edition of *The Army Lawyer.*)

While Army lawyers have undoubtedly helped Soldiers and their families with their personal legal problems from the earliest days of the Republic, such assistance was both *ad hoc* and unofficial for many years. In fact, prior to World War II, Soldiers who had personal legal questions or who wanted to execute a will or obtain a power of attorney had to retain a civilian lawyer at their own expense. When, how, and why that changed—and how it resulted in the establishment of an Army Legal Assistance Program that continues to this day—is a history worth telling.

After the Japanese attack on Pearl Harbor and America's entry into World War II, millions of young men either enlisted or were drafted into the Armed Forces. Many of these citizen-Soldiers quickly deployed overseas for an extended period of time and, consequently, had little time to arrange their personal affairs. In 1940, Congress passed the Soldiers' and Sailors' Civil Relief Act (SSCRA),[99] which provided men and women in uniform with much needed legal protections. However, the Army soon realized that Soldiers needed access to legal help in order to protect their interests under the SSCRA and other laws.

At first, Army lawyers worked with the American Bar Association (ABA) to help Soldiers "resolve unsettled legal problems and unsatisfied legal needs" at the time of their induction.[100] Judge advocates (JAs) worked with state and local bar associations to assist Soldiers with subsequent legal problems by referring them to civilian lawyers in their local areas.

This cooperative, and successful, arrangement continued until March 16, 1943, when the Army published War Department Circular No. 74, *Legal Advice and Assistance for Military Personnel*.[101] This circular announced that, for the first time in history, the Army was creating "an official, uniform, and comprehensive system for making legal advice and assistance available to military personnel and their dependents in regard to their personal legal affairs."[102]

On March 22, 1943, a "Legal Assistance Branch" was organized in the Office of The Judge Advocate General to supervise the newly instituted legal aid system throughout the Army.[103] By the end of 1943, there were six hundred legal assistance offices in the Army, and by the end of World War II, that number had grown to sixteen hundred.[104] Each office was issued a "basic legal assistance library" or "field kit" containing reference materials of various kinds, including pamphlets or "compendiums" on marriage *in absentia*, wills, and divorce.[105]

While the workload varied from office to office, legal assistance officers were busy; in the first year of the official program, JAs handled a total of 298,825 cases. Of these, 35 percent were taxation issues; 21% concerned powers of attorney; 20% dealt with wills; 5% involved domestic relations; and the remaining 19% concerned affidavits, citizenship, estates, insurance, real and personal property, and torts.[106] By the end of World War II, Army legal assistance officers had handled five and a half million cases—a tremendous amount considering the program had not started until March 1943.

After World War II, Army legal assistance continued as a permanent program, but in the 1950s and early 1960s it was "little more than a referral program in which Army lawyers provided general legal counseling, but referred most of the actual legal work, including wills and powers of attorney, to civilian lawyers."[107]

During the Vietnam era, many of the restrictions on providing legal assistance fell away, and JAs looked for new ways to help their Soldier-clients and their families. A wide range of legal services became the norm, from drafting and executing wills and powers of attorney, to preparing tax returns and negotiating with landlords and creditors. Army lawyers also did limited in-court representation—they appeared in civilian court on behalf of junior enlisted Soldiers on routine legal matters—and helped Soldiers who wished to proceed *pro se*.

A major turning point in the evolution of the legal assistance program occurred on December 12, 1985 when a civilian airliner carrying 248 Soldiers crashed on takeoff in Gander, Newfoundland. All the Soldiers aboard, who were returning from a six-month deployment to the Sinai, were killed, and their tragic deaths became a catalyst for change. For the first time, Army JAs realized that there must be a model for mass casualty legal support. Additionally, legal assistance officers now understood that it was critical for them to ensure the legal preparedness of Soldiers; that it was harmful to elect the "by-law"

designation on Servicemen's Group Life Insurance forms; that Reserve Component JAs were critical in situations requiring a surge in legal assistance; and that legal assistance services must be available to the next-of-kin to resolve estate issues of deceased Soldiers.[108]

The Gander air crash tragedy also showed Army commanders that a robust legal assistance program was critical to the health and welfare of Soldiers—and good for the command. As a result, in 1986, Army Chief of Staff, General (GEN) John Wickham, instituted the first Chief of Staff Award for Excellence in Legal Assistance. Its intent was to recognize those active Army legal assistance offices that consistently demonstrated excellence in providing legal support. In 1996, a separate award category was created to recognize Reserve Component legal assistance offices.

The role of information technology in the Army Legal Assistance Program also has increased in importance over the last twenty-five years. In the 1980s, the Judge Advocate General's Corps developed simple will preparation software, including the Minuteman and Patriot Will Programs. In 1999, the Army ceased developing its own software and began purchasing commercially prepared software for wills. In 2001, however, the Legal Assistance Policy Division in the Pentagon did create its own software for the preparation of powers of attorney, separation agreements, and SSCRA (now called the Servicemembers Civil Relief Act) letters. These in-house created software programs continue to be used.

Today's Army Legal Assistance Program[109] provides top quality legal aid to Soldiers and their families for personal legal problems. While wills and estate planning remain the largest area of legal assistance practice (about 30 percent), in recent years, family law—marriage, legal separation and divorce, paternity, non-support, child custody, adoption, and the like—has grown to almost the same level.

Our Regimental Cannons

(Originally published in the April 2014 edition of *The Army Lawyer.*)

Every visitor to the Legal Center and School (LCS) must walk past two bronze cannons "guarding" the entrance to the building. These naval weapons have been "members" of our Regiment for more than fifty years, and what follows is a brief historical note on the two cannons and how they came to join our Corps in Charlottesville.

The cannons were officially presented to The Judge Advocate General's School (TJAGSA) by Rear Admiral (RADM) Chester C. Ward,[110] the Judge Advocate General of the Navy, in a ceremony on February 21, 1957. Colonel (COL) Nathaniel B. Rieger, then serving as Commandant of TJAGSA, accepted the cannons on behalf of the Corps.

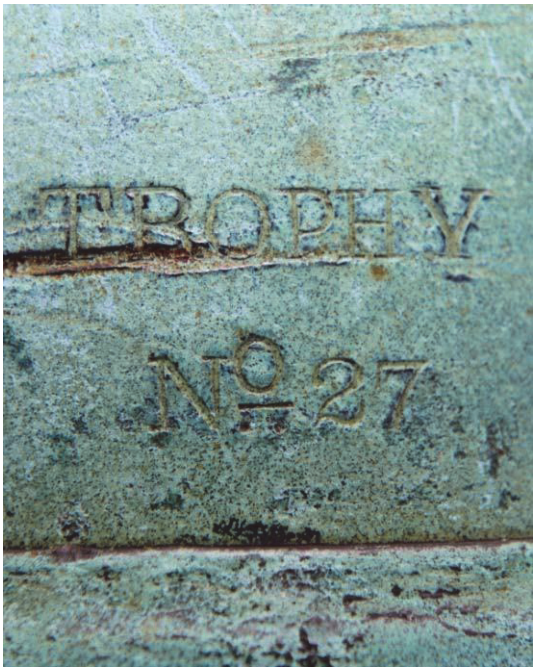
The cannon on the left as one faces the building is an English-made weapon. It is a four-pounder with a 3.12 inch bore. It was captured from the Royal Navy during the War of 1812 and taken to Norfolk, Virginia. At the outbreak of the Civil War, the cannon was moved from Norfolk to the U.S. Naval Gun Factory, Washington, D.C., so that it would not fall into Confederate hands.

The cannon on the right as one faces the building is a French bronze gun with a 3.5 inch bore. The name and date, "Frerejean Freres Lyon, 1795," indicate that it was cast by a foundry in Lyon, France, after the Revolution of 1789—which makes sense, given the inscription "Libertie Egalité" stamped near the muzzle of the piece. It is not known how this gun came into the U.S. Navy's possession, but it is stamped "Trophy No. 27."

Rear Admiral Chester C. Ward

According to an undated memo in the Regimental Archives, "the cannons are symbolic, first of the traditions of the Armed Forces which strongly influence the role of the military lawyer, and second of the close coordination between the Armed Forces in the operation of The Judge Advocate General's School."[111] It seems reasonable to conclude that this language was the justification for the Navy's gift of the cannons to our Regiment.

Only a few hours after the ceremony in 1957, the English cannon was "abducted" by persons unknown. It was discovered three days later on an Albemarle County estate.[112] After returning to Army control at Hancock House on the main grounds of the University of Virginia (UVA), this cannon—and its French counterpart—were firmly anchored on concrete pillars. But not firmly enough: during the Vietnam War in the early 1970s, both cannons were stolen. They were returned a few days later. While the identity of those individuals who took, or returned, the cannon was never discovered, members of the TJAGSA staff and faculty assumed the culprits were UVA students opposed to U.S. involvement in the war in Southeast Asia.



When TJAGSA moved to its present location on North Grounds in the mid-1970s, the cannons were transported as well—and remain on guard outside the LCS to this day.

"It's A Grand Old School" and "The Ballad of the SJA:" Two Songs from the Corps of Yesteryear

(Originally published in the April 2014 edition of *The Army Lawyer.*)

While some members of the Corps know that there is a *Regimental March* (approved by Major General (MG) Hugh Overholt as the Corps's official marching tune in 1987), few know that the Corps also has had a number of legal-related songs. While these have not been sung for some years, they are worth knowing about because the words to these songs, although intended to be light-hearted and humorous, nevertheless reflect attitudes about military law and judge advocates in the era in which they were composed (and performed). *It's A Grand Old School* dates from World War II and was composed by students at The Judge Advocate General's School (TJAGSA) in Ann Arbor, Michigan. *The Ballad of the SJA* dates from the 1960s, when judge advocates saw themselves as far removed from combat, much less the front lines. Both tunes provide insights into the attitudes and perspectives of judge advocates of the past.

It's A Grand Old School
(sung to tune of the University of South Dakota Field Song)[113]

(verse one)

Dear Old JAG School, School of lawyers, School of soldiers true,
For our gold bars we aspire and perspire too
Thanking humbly General Cramer and the faculty
Glad of jobs that are much tamer than the infantry.

(verse two)

Quote that note, quote by rote, give better than they send,
Never yield, on Ferry field, fight to the bitter end,
No retreat, on Tappan Street, safe from the Krauts and Japs,[114]
We can't lose, we get the news, from Pollock and his maps.

(verse three)
'Cross the drink, we'll shed our ink, we'll louse up each review,
For our sins, there'll be no skins, no matter what we do.
Through the years, we'll give three cheers, for from the Board we're free
Hail to Miller, he's a killer, so's the J-A-G.

(verse four)

O snug harbor, in Ann Arbor, free from stress and storm,
Bless thy staff, and mimeograph, and keep their mem'ry warm.
Gothic Cloister, that's our oyster, sword shall bow to pen,
Alma Mater of the Blotter, Mother-in-law of men.

(verse five)

Hit that writ! Hit that writ! We're groggy, Major Farr
On the ball to study hall, file every damn AR,
Had no short arms, had no port arms, learning JAG techniques,
On our chassis, in your classes, seventeen long weeks.

When was this song written? Since the "Cramer" in verse one is a reference to MG Myron C. Cramer, The Judge Advocate General between 1941 and 1945, and the "Miller" in verse three refers to Lieutenant Colonel (LTC) Reginald C. Miller, who assumed command of TJAGSA in December 1944, it seems likely that this ditty was composed in early 1945. It would have been performed at social events at TJAGSA or at skits during a dining-in or similar event in Ann Arbor, Michigan. It is highly likely that this song was composed by candidates in TJAGSA's Officer Candidate School (OCS), since it refers to the "gold bars" of a second lieutenant—the rank received by those who successfully completed OCS.[115] Sung to the tune of South Dakota Field Song, a South Dakota lawyer probably spearheaded the writing of the song. Other words and phrases are fairly easily discerned: "Ferry Field" is a multi-purpose sport stadium on the Michigan campus and seems to have been where judge advocate students conducted military drills; "Tappan Street" (actually

Tappan Avenue) is the street adjacent to Michigan's law school in Ann Arbor, where TJAGSA was then located; and "Pollock" and "Farr" refer to two members of the faculty and staff. Since TJAGSA closed in Michigan in February 1946, this song is largely forgotten today.

The Ballad of the SJA
(sung to the tune of Barry Sadler's *Ballad of the Green Berets*)

(verse one)

Bringing justice to the groups
of America's fighting troops
They tell the Generals yes or nay
Those clever men of the SJA

(chorus)

Coffee cups upon their desks
Trained for mental arabesques
They will distort what others say
Those clever men of the SJA

(verse two)

Trained in logic of a sort
'Midst regulations they cavort
The Federal law is just child's play
For those clever men of the SJA

(chorus)

(verse three)

In the office clients wait
While attorneys cogitate
Those lawyers sit, so calm and cool
Picking scores for the football pool

(chorus)

This song is clearly a riff on Barry Sadler's popular *Ballad of the Green Berets*, which sold over one million copies and reached No. 1 on the Billboard Hot 100 in mid-1966.[116] But while Sadler's song was intensely patriotic and about an elite combat unit, the *Ballad of the SJA* could not have been more different, with its light-hearted focus on Army lawyers "manning" desks in an office and focused on coffee cups and football pools. Much has changed in the Corps since this song was written in the late 1960s. The emergence of operational law in the 1980s and 1990s meant that judge advocates were deploying with units on military operations and advising commanders in the field; the days of the work in an office in the division or corps "rear" were in the past. But, just as The Adjutant General's Corps once had a ditty about its branch insignia that reflected a rear-echelon mentality ("Twinkle, twinkle little shield, save me from the battlefield"),[117] so too Army lawyers in the Vietnam era saw themselves as attorneys who were far removed from the battlefield. Being a judge advocate 'back in the day' was almost exclusively about lawyering, with little thought given to soldiering.

Songs, tunes, and ditties will always be a part of the culture of our Corps, and future members of the Regiment will likewise look back at songs being written today to get an insight into what soldiering was like in the Corps in the early 21st century.

Camaraderie After the Corps: A History of the Retired Army Judge Advocate Association

(Originally published in the April 2015 edition of *The Army Lawyer.*)

For every lawyer who decides to make a career of The Judge Advocate General's Corps (JAGC), retirement—from the Regular component, Army Reserve, or National Guard—is inevitable. Retirement does not mean, however, that friendships and associations with other Army lawyers are at an end. On the contrary, the desire of judge advocates to continue to foster camaraderie in retirement resulted in the establishment of the Retired Army Judge Advocate Association (or "RAJA" as it is colloquially known) in 1976. What follows is a short history of RAJA, including the impetus for its creation and some details on its activities over the last 40 years.

In early 1976, the Korean embassy in Washington, D.C., contacted Colonel (COL) (Ret.) Waldemar "Wally" A. Solf,[118] who was then working as a civilian attorney in the International Affairs Division[119] at the Office of The Judge Advocate General. As part of a number of events commemorating the 25th anniversary of the start of the Korean War, the government in Seoul was interested in inviting a select group of judge advocates who had served in Korea during the conflict to make a return visit.[120]

As a result, a small number of judge advocates who had served in Korea in the 1950s received telephone calls from the Korean embassy. Each was asked whether he would be interested in making a trip with his spouse as part of the Korean Service Veterans Revisit Program, and was informed that it would be an all-expense paid six-day trip. This phone call was followed up by a written invitation signed by the president of the Seoul (South Korea) Bar Association.

In July 1976, a small group of retired Army lawyers and their wives met in Los Angeles and flew to Seoul. Some knew each other from prior tours of duty together while others knew each other only from "JAG Conferences."[121] Major General (MG) Lawrence "Larry" J. Fuller had served as the SJA at Eighth U.S. Army after the Korean War; his wife Mary accompanied him.[122] Brigadier General (BG) Clio "Red" E. Straight (and wife Betty) and Brigadier General Bruce C. Babbitt (and wife Betty) also were in attendance. Straight, who had served as a judge advocate in both World War II and Korea, had retired from the Corps in June 1961.[123]

Babbitt, who had served as an Infantry officer in World War II, had been a judge advocate during the Korean War. While serving in the 2d Infantry Division in the early months of the conflict, then-Major (MAJ) Babbitt made history when he became the first (and only) judge advocate to command a rifle battalion; his unit was deployed in defensive positions along the division's main supply route.[124]

Brigadier General Clio E. Straight

The other attendees were no less distinguished. Colonel (Ret.) Burton "Burt" F. (and Dee) Ellis,[125] COL (Ret.) Howard (and Blanche) Levie,[126] COL (Ret.) Leonard "Lenny" (and Ruth) Petkoff,[127] COL (Ret.) John Jay (and Margaret "Papoose") Douglass,[128] and COL (Ret.) Thomas "Tom" F. (and Marie) Meagher.

At a breakfast toward the end of this visit to Korea, the Babbitts, Petkoffs, and Douglasses all agreed that this reunion in Korea had been "a great event" and that a group should be formed that "could bring the JAGs together for some kind of annual reunion."[129] According to COL Douglass, the name of this organization—Retired Army Judge Advocate Association—was born high over the Pacific on the return flight from Seoul to the United States.[130]

Brigadier General Bruce C. Babbitt

Bruce Babbitt, who was now in private practice in Florida, incorporated RAJA in Florida, with retired judge advocate COLs Dave Chase and Tom Oldham[131] as incorporators. John Jay Douglass was the president and Bruce Babbitt was the Secretary-Treasurer.

Colonel (Ret.) John Jay Douglass was the first President of RAJA

By early 1977, plans were underway for the first RAJA gathering at The Judge Advocate General's School in Charlottesville, Virginia. With the help of COL Barney L. Brannen, Jr., then serving as Commandant, about 70 retired judge advocates and spouses attended the "first annual RAJA conference" in the summer of 1977.[132]

In what has been called a "democratic" decision, the members of RAJA decided that they would invite only one active duty Army lawyer—TJAG—to address their first gathering, but he would be limited to 25 seconds for any remarks he might wish to make at the RAJA banquet held on Saturday evening. Major General Wilton Persons, then serving as TJAG, apparently used only 20 seconds of his allotted time.[133]

Since this inaugural event, the sitting TJAG has always been invited to RAJA's annual gathering. He or she continues to be restricted to 25 seconds for any banquet speech. But there is no restriction on how long TJAG may address RAJA at the annual business meeting, and TJAG's remarks generally have followed a "State of the Corps" format. Over the years, the TJAGSA (now TJAGLCS) Commandant also has been invited to attend RAJA, and usually makes brief remarks about the "State of the School (or LCS)." But the members of RAJA still pride themselves on having the shortest possible annual "business meetings," with the goal of accomplishing all business in less than ten minutes.[134]

After the 1977 event in Charlottesville, the retired Army lawyers next gathered in San Antonio, Texas (1978), and San Francisco, California (1979). By the time RAJA met in Williamsburg, Virginia, in 1980, the organization had grown to over 200 members and had determined that future meetings would "repeat the geographic pattern of East Coast, Mid-America, and West Coast in subsequent years."[135] As a result, RAJA met in the following locations after Williamsburg: Colorado Springs, Colorado (1981); Monterey, California (1982); Atlanta, Georgia (1983); Louisville, Kentucky (1984); Las Vegas, Nev. (1985); Savannah, Georgia (1986); Austin, Tex. (1987); San Diego, California (1988); Newport, Rhode Island (1989); Pensacola, Florida (1990); Honolulu, Hawaii (1991); Charlottesville, Virginia (1992); San Antonio, Texas (1993); Reno, Nevada (1994); and Charleston, South Carolina (1995). At the Charleston gathering, RAJA members elected COL (Ret.) Jim Mundt as president and COL (Ret.) Don Pierce as Secretary; Douglass and Babbitt (who had both served 20 years) stepped down from their inaugural leadership positions.[136]

In 1996, RAJA met in Colorado Springs and in Palm Springs in 1997. It met in the following

locations in succeeding years: Cocoa Beach, Florida (1998); Kansas City, Missouri (1999); Sacramento, California (2000); Williamsburg, Virginia (2001); San Antonio, Texas (2002); Las Vegas, Nevada (2003); Portsmouth, New Hampshire (2004); and Columbus, Georgia (2005). At this meeting, Colonel (COL) (Ret.) Tim Naccarato replaced Jim Mundt as RAJA president; Mundt had served ten years in the position.

The following year, RAJA was in Rapid City, South Dakota, and then held meetings in the following locations: Scottsdale, Arizona (2007); Atlanta, Georgia (2008); New Orleans, Louisiana (2009); Indianapolis, Indiana (2010); Charlottesville, Virginia (2011); Fort Worth, Texas (2012); Honolulu, Hawaii (2013); Baltimore, Maryland (2014); Colorado Springs, Colorado (2015); Tucson, Arizona (2016); and Savannah, Georgia (2017). The RAJA meeting is scheduled for Las Vegas, Nevada, in 2018.[137]

Over the years, RAJA has implemented a number of changes affecting its membership. Initially, Babbitt and Douglass wanted to restrict membership to Regular Army retirees. In 1999, however, recognizing the increased contributions of Reserve judge advocates to the Army and the Corps, RAJA members unanimously passed a motion opening RAJA membership to retired Army Reservist and National Guard judge advocates. The first retired reserve judge advocate to attend a RAJA event was Colonel (COL) (Ret.) Ernest "Ernie" Auerbach; he was at the 2000 event in Sacramento, California. In 2007, RAJA opened membership to the Corps' legal administrator community, too. As with the earlier decision to open RAJA to Army Reserve and National Guard judge advocate retirees, extending membership to retired judge advocate warrant officers made sense given their contributions to the Corps over the years.

Today, RAJA has more than 300 members. Any commissioned or warrant officer who has retired from the regular component of the Army, the Army Reserve or the National Guard is eligible for membership. Associate members are widows and widowers of regular members; today there are about 35 members in this "associate member" category.[138]

A final note: In addition to RAJA, there are other organizations for retired members of our Corps. Similar in purpose to RAJA, the Judge

Colonel (Ret.) Ernest Auerbach was the first retired Reserve JA to attend RAJA; this photograph was taken of him in Vietnam in 1966

Advocate General's Corps Retired Noncommissioned Officer Association (JAGCRNCOA) began informally in 1999 but did not have its first formal meeting (to draft a constitution and by-laws) until 2003. From the initial 36 "founding members" of JAGCRNCOA, the organization has grown to more than 85 retired regular and reserve non-commissioned officers who served as legal clerks, legal specialists or paralegals in the Corps. It has an annual reunion in various locations throughout the United States.[139] Finally, Army officers who served in Vietnam as judge advocates or who soldiered in any capacity in Vietnam but later served in the Corps are eligible to attend the biannual "JAGs in Vietnam" get-together. The impetus for this reunion of Vietnam veterans came from Chuck Spradling of Anniston, Alabama, who served as a judge advocate in Vietnam from 1971–1972. He is assisted in planning the event—which always takes place in northern Virginia—by Major General (MG) (Ret.) William K. Suter and COL (Ret.) Barry Steinberg. About 75 officers and their spouses attended the reunion in 2013. The last reunion was held in September 2015, in Washington, D.C.; JAGs in Vietnam was discontinued in early 2017 due to declining interest, principally due to the increasing age of eligible attendees.[140]

Who Is Where and What Are They Doing? A History of the JAGC Personnel Directory

(Originally published in the June 2011 edition of *The Army Lawyer.*)

Today's JAG PUB 1-1, *JAGC Personnel and Activity Directory and Personnel Policies*,[141] appears every October and is eagerly anticipated by more than a few Army lawyers. Why? Because it shows who is in charge at a particular location or command, other judge advocates (JAs) assigned there, their contact information, when individuals might be scheduled to depart, and a host of other details. The directory also is handy for calculating who is eligible for promotion, and when, and who must retire. But while JAs in the field use it for these purposes, the history of the directory reveals that its original purpose was very different.

Prior to 1963, there was no directory. But then again, the Career Management Division (CMD) for the Corps (as today's Personnel, Plans and Training Office (PP&TO) was then known) did not have much in the way of procedures for managing Army lawyers. In the first place, it "was staffed almost exclusively with civilian employees . . . and there were only two lawyers," both of whom were captains.[142] While the head of the CMD was a lieutenant colonel, it was clear that it was the civilian personnel who were in charge of managing Corps personnel. Consequently, when then–Lieutenant Colonel (LTC) George S. Prugh arrived in the Pentagon in June 1962 to be the new Chief, CMD, he was shocked to learn the process in place for assigning JAs throughout the Army. As Prugh explained in 1975:

> I found that assignments were being made by the chief clerk, a civilian named Eileen Burns, who was well known throughout the Corps. I decided in my own mind that it was wrong for a civilian to be assigning the lawyers. A lawyer could and should assign other lawyers, because he knows best what sort of requirements are needed at particular jobs. I was horrified on two or three occasions early in that game, going to visit with Miss Burns to see The Judge Advocate General [MG Charles L. "Ted" Decker], when she would make an assignment on a senior officer, a colonel, for example, and in discussing [the officer] would say, "Oh! He has a mediocre record," or some other slighting remark that would be clearly devastating to that man's position with respect to The Judge Advocate General who apparently didn't know many of the officers below the rank of colonel.[143]

Prugh quickly put a stop to Miss Burns' role in managing JA careers (she was called "General Burns" behind her back and the CMD in her day was affectionately known as the "Career Manglement Division"). But, while assignments of Army lawyers began to be made, or at least controlled, by other uniformed attorneys, Prugh discovered that getting control of the JA assignment process was difficult, because the CMD did not have a roster of active duty JAs, their current assignments, or locations. Other than pulling the actual paper file on a particular Army attorney, there was no way to know many details about who was in the Corps, much less how long a particular JA had been in a particular assignment, or who was up for promotion to the next grade.

What the CMD did have was a large table (known by the moniker "bun warmer"), and when this table was opened (it had a rolling top), there was an organization chart that showed which Army commands and units had JAs assigned to them. But there was still nothing more than a name and rank. This made managing people difficult, because there was not enough information to match JAs with assignments, ensuring that those best suited for a particular job got that job. Additionally, when a JA with special qualifications was needed, it was "an impossible situation." As Prugh explained, "if we wanted, say, a captain with five years of experience, who could speak Spanish and was an international law expert, we would have one heck of a time trying to find out who this was."[144]

Realizing that the management of personnel in the Corps had to be done better, LTC Prugh directed that two rosters be created of JAs and legal administrative technicians (as warrant officers (WOs) in the Corps were then called). The first list, called the "Station Roster," listed each location where JAs and WOs were assigned, and then listed each individual by name, grade, Regular Army or

other active duty status. For organizations in the Continental United States (CONUS), the date that each individual was assigned to the organization was shown. For overseas organizations, the date listed was the "projected normal reassignment date." The second roster was an alphabetical listing of all JAs and warrant officers, listing name, service number, rank, and assignment location.

After LTC Prugh and the personnel in the CMD completed these rosters, Prugh decided that the information should be published and disseminated to the field. The result was the August 1963 publication of the first "JAGC Personnel and Activity Directory." On the cover of this 89-page, 8½-by-11-inch stapled paperback was a drawing of a JA in his Class A uniform and the Corps' crossed pen and sword branch insignia. The directory included the names of all Regular and Reserve JAs on active duty, all warrant officers on active duty, and all civilian attorneys. It also listed all Army officers attending law school on the excess leave program (the Funded Legal Education Program did not yet exist).

The "Foreword" to this first directory announced that "it is planned to publish the directory annually."[145] In fact, yearly publication did occur; a new directory has been published every year since 1963. For more than thirty years, release of the directory coincides with the annual World Wide Continuing Legal Education conference held the first week of October in Charlottesville, Virginia.

From the beginning, the directory was a handy reference for personnel working in the Career Management Office and its successor organization at Office of The Judge Advocate General (OTJAG), PP&TO. First, the directory was a quick guide to see who was pending a "PCS" (permanent change of station) or "DEROS" (date eligible for return from overseas). Second, the directory was the starting point to check the number of personnel actually assigned against an SJA office's "TOA" (table of allowances) or "TDA" (table of distribution and allowances)—which PP&TO had to monitor to ensure authorizations matched the actual number and grade of officers assigned to an office. Finally, the directory was the "JAG Corps Phonebook" in the era when the only possible real-time communication was by telephone. From 1983 to 1985, for example, when then–LTC Raymond P. Ruppert served as the assignment officer at PP&TO for captains, majors, and lieutenant colonels, Ruppert used the directory to find a telephone number when he wanted to speak with a JA about an assignment. Ruppert also had a copy of the directory at home, which he used when placing late night telephone calls through the Pentagon switchboard to JAs assigned in Korea who needed new assignments in the Corps.[146]

While the importance of the directory to the management of the Corps is clear, Army lawyers in the field found it just as valuable in their careers. From the beginning, JAs have used the directory for at least four purposes. First, to determine who is where and, if that location is desirable, when that person might be departing in order to request that person's assignment. Second, to identify who is in a particular promotion zone and who is likely to be promoted. Third, when promotion lists are announced, to go through the date of rank roster and place a "P" next to the promotable person's name, thereby tracking career progression of other JAs. Fourth, when they needed to make contact with other organizations, to find a legal point of contact (POC) and talk lawyer-to-lawyer before approaching outside commanders directly. As long as there is a personnel directory, this is likely to continue.

Over the years, the size of the directory—and its contents—have increased greatly. In the late 1970s, for example, PP&TO published its first "JAGC Personnel Policies" handbook. This booklet contained basic Army personnel policies for officers, but also added the important JAGC-specific policies, e.g., assignment of husband-wife JAs. This separate publication was merged with the Personnel Directory in the 1980s and today is contained in an appendix to JAG PUB 1-1.

Another major addition to the directory also occurred in the late 1970s, when PP&TO created an alphabetical listing of personnel by grade. Until this occurred, it was impossible to find where a JA CPT was stationed, for example, without going through the entire station roster or date of rank roster. Other additions over the years include a roster of all Reserve Component JAs and WOs, and a roster of all military occupational specialty (MOS) 27D enlisted personnel in the Corps. As a result, the 89-page booklet started by Prugh is now more than 500 pages.

While the first directory had a white paper cover, subsequent issues began to change color on an annual basis: red, yellow, blue, buff, tan, green, and so forth. When then—LTC Barry Steinberg was the Chief, PP&TO, however, he had a special issue of the directory published with pink covers for distribution to the few female judge advocates

assigned to OTJAG. Five copies were printed. One was presented to The Judge Advocate General, Major General Hugh Clausen, who accepted it in the humorous spirit it was intended. One was given to each of the three female JAs in OTJAG. One was saved in PP&TO. It is hard to know whether the three female JAs who received pink copies thought their special edition was humorous, but one told Steinberg she did not think having a pink directory was funny.[147] Whether any of Steinberg's special issue directories have survived is unknown, but PP&TO no longer has a copy. For the last several years, the JAG PUB 1-1 has abandoned the old solid- color binding and the cover is now illustrated with photographs.

Beginning in the 1980s, as JAs began to be assigned to clandestine units in the Army, those individuals would disappear from the directory—for as long as they were in these "black" jobs. This continues to be the practice: a JA will disappear for two or three years and then reappear in the pages of JAG PUB 1-1.

In the 1960s, 1970s, and 1980s, the directory was known as the "stud book," and this moniker is still heard today. Officially, however, the directory is called the "JAGC Personnel and Activity Directory."

How long *The Directory*, as the 2010-2011 issue of JAG PUB 1-1 is titled, will be published in paper, and on an annual basis, is an open question.[148] Advances in electronic media and in portable document files make it likely that an all-electronic directory will soon replace the paperback version that has been the norm since 1963. But even the emergence of a paperless directory will not change the reason that a directory is still necessary as a management tool to show who is where and what they are doing.

The History of Separate Boards for Judge Advocate Field Grade Officers

(Originally published in the October 2010 edition of *The Army Lawyer.*)

In March 1976, *The Army Lawyer* announced that the Secretary of the Army had "approved a separate promotion list for the Judge Advocate General's Corps."[149] This was a significant event because, prior to this announcement, every judge advocate field grade officer on active duty, or in the Reserve or Guard, was selected for promotion by the yearly Army Promotion Board—and consequently directly competed for promotion to higher rank with infantry, artillery, armor, engineer, and transportation officers, as well as officers of other Army branches. The story of how that changed— how the Corps obtained the authority to hold its own, separate promotion board—is worth telling.

By the mid-1970s, the grade structure of the Corps began to change as more and more young judge advocates elected to stay on active duty and make the JAG Corps a career. This was a marked change from the 1960s and early 1970s when, with the Army fighting an unpopular war in Southeast Asia, the vast majority of lawyers came into the Corps, stayed for one or two assignments, and then departed for civilian life. But the end of the war and the return of peacetime soldiering meant that more judge advocate captains were staying in the service.

Judge advocates assigned to the Personnel Plans and Training Office (PP&TO) in the Office of The Judge Advocate General (OTJAG) understood that increased retention was going to make it increasingly difficult to manage the Corps' grade structure. "There was no way," wrote Brigadier General (Ret.) Ronald Holdaway, who served as the Chief, PP&TO, in the mid-1970s, "that we could reliably match judge advocate promotions with judge advocate vacancies under the Army Promotion List system where promotions Army-wide were matched with Army-wide vacancies and one branch might get 80 percent promotions while another got 60 percent."[150]

As Holdaway further explained, the quality of judge advocates meant that the Corps had fared well in the Army Promotion List system on percentages in the past. However, these field grade promotion results had not made much difference to the Corps since the lack of retention meant that the Corps was already "way out of balance when it came to field grades." Holdaway states, "We had acute shortages of field grade officers," and "many of us were serving in billets one or even two grades above our rank."[151] In fact, the low retention rate in the JAG Corps meant that it had a deficit of almost forty-five percent in field grade officers in the late 1960s and early 1970s.[152] The shortage of majors, lieutenant colonels, and colonels to fill field grade billets in the Corps, though, also meant that field grade officer selection rates under the Army Promotion List system had been of little worry.

However, with retention increasing in peacetime, it was clear by 1975 that the Corps' grade structure would be out of balance unless something was done. The solution: a separate JAG Corps promotion list for majors, lieutenant colonels, and colonels that would allow the Corps to manage its structure by matching JAG Corps promotions with projected JAG Corps vacancies.

At the direction of The Judge Advocate General (TJAG), Major General (MG) Wilton B. Persons, then-LTC Holdaway prepared a decision paper for TJAG's signature that requested the Deputy Chief of Staff for Personnel (DCSPER) give the Corps separate field grade promotion boards. Holdaway personally wrote the decision paper on two consecutive weekends so that he had the office to himself and was "not disturbed by the chaos that was PP&TO during the work week."[153]

When the Secretary of the Army approved the concept, on the recommendation of the DCSPER, the next step was implementation.[154] Holdaway remembers that his lieutenant colonel and colonel counterparts at DCSPER thought that a five-person board consisting of three line officers and two judge advocates would be best for a small branch like the JAG Corps. While Holdaway was willing to go along with this proposal, MG Lawrence H. Williams, The Assistant Judge Advocate General (TAJAG), was adamant that more judge advocates—if not a majority—should sit on the promotion boards. Major General Persons agreed with MG Williams, and the final decision from DCSPER acceded to the views of TJAG and TAJAG.[155]

Today, all JAGC promotion boards for field grade officers consist of six officers. A judge

advocate brigadier general serves as the president of the board, and two other field grade judge advocates sit on the board as members. The other three board officers are non-special branch officers whose grades vary depending on the promotion level being considered.

Judge advocates today assume that the Corps has separate promotion boards for field grades because, given the relatively small number of judge advocates, the Corps is better able to make promotion selections than the Army Promotion Board. While that may be true, that was not the reason that the Corps asked for—and obtained—separate promotion board authority in 1976.

The Origin of the Corps' Distinctive Insignia

(Originally published in the October 2012 edition of *The Army Lawyer.*)

When wearing the Army Service Uniform, every judge advocate, legal administrator, and paralegal wears the Corps' "Regimental Distinctive Insignia" (RDI) above the top right pocket flap of the blouse. But this is a fairly recent development, as the Corps had no such insignia until 1986. Just how a small blue enamel shield with a gold-colored crossed-pen-and-sword came to be the Corps' RDI is an interesting piece of our lore.

In the years when the Army was re-building after Vietnam, senior leaders looked for novel ways to enhance morale and esprit de corps among Soldiers. One initiative, approved by the Chief of Staff in 1981, was to create a "U.S. Army Regimental System" in which Soldiers in the combat arms were affiliated with a "regiment" and then were expected to serve recurring assignments with that regiment.[156] While the regimental affiliation idea naturally worked best with infantry, armor, and artillery, the Army expected combat support, combat service support, and special branches like the Judge Advocate General's Corps (JAGC) to also carry "on the activities and traditions of a regiment."[157]

On May 30, 1986, the Department of the Army announced that the Corps "is placed under the U.S. Army Regimental System effective 29 July 1986."[158] This explains why on that day in July—on the 211th birthday of the JAGC—Major General Hugh R. Overholt, The Judge Advocate General (TJAG), announced that the Corps had joined the Army's new regimental system. As the *Army Times* reported a few days later, the JAGC was the seventh "branch-oriented organization" to join the system and, at the time, consisted of 3,730 active-duty Soldiers, 4,278 National Guardsmen, and 1,772 Army Reservists.[159]

When Major General Overholt announced that the Corps was now also a regiment, he also revealed that "formal affiliation ceremonies" would take place during the Corps' "Worldwide" annual conference in October 1986 in Charlottesville, Virginia.[160] The planning for this "Regimental Activation Ceremony" had been underway for some time, because "accouterments" for the new "JAG Corps Regiment" were required for the ceremony, including an RDI to be worn by Soldiers to show their regimental affiliation.

Initially, the Corps' leadership considered adopting the Distinctive Unit Insignia used by The Judge Advocate General's School as the RDI. Ultimately, however, this idea was rejected in favor of designing a new RDI. This explains why an article in *The Army Lawyer* announced that there would be a Corps-wide "competition" to design the RDI. This competition was "open to all members of the JAGC (active, Reserve, and retired)" and "suggested crest designs" had to be submitted "by the end of June 1986."[161] While a number of drawings were submitted, it seems that the winning design came from Colonel (COL) Richard "Dick" McNeely and Major (MAJ) Ronald Riggs, both of whom were assigned to the International Law Division in the Office of The Judge Advocate General (OTJAG). As then-MAJ David Graham remembers, he was at lunch in the Pentagon one day and heard MAJ Riggs say to COL McNeely: "Hey, we can win this competition." McNeely agreed, and the two men sat down and sketched out a design on a small piece of paper, perhaps a napkin, with a ball point pen. They then submitted the design to OTJAG for consideration.[162]

The McNeely-Riggs design—consisting of a shield upon which the crossed-pen-and-sword insignia was centered, with the letters "JAGC" above the insignia and the numerals "1775" below it—won the competition. Then-MAJ Michael Marchand[163] took the design to The Institute of Heraldry for that office to use in creating the Corps' RDI.

The Institute's initial proposed RDI design, however, deviated significantly from the McNeely-Riggs drawing. On July 28, 1986, the Institute proposed to Major General Overholt that the RDI consist of a dark blue shield containing *both* a "balance" and the crossed-pen-and-sword insignia. The balance—or weighing scales—would be *above* the crossed-pen-and-sword and both would be centered on the shield.[164] The Institute design also did not have the letters "JAGC." It did, however, have the numerals "1775" on a scroll at the base of the shield.

Major General Overholt did not like the scales in the proposed RDI design and asked the Institute to redesign the RDI without them. The result was that, on August 13, 1986, the Institute returned to Major

General Overholt with two proposed designs: the pen and sword in *silver* on a blue shield with the numerals "1775," and the pen and sword in *gold* on a blue shield with the numerals "1775." After Major General Overholt selected the gold pen and sword design on 21 August, the Corps had its "Regimental Distinctive Insignia."[165] In the words of the Institute, the official description and symbolism of the new RDI were:

> DESCRIPTION
>
> A silver color medal and enamel device 1 1/8 inches in height consisting of a shield blazoned as follows: argent, an escutcheon azure (dark blue) charged with a wreath of laurel surmounted by a sword bendwise point to base and a quill in saltire all gold. Attached below the shield is a dark blue scroll with the numerals "1775" in silver.
>
> SYMBOLISM
>
> The quill and sword symbolize the mission of the Corps, to advise the Secretary of the Army and supervise the system of military justice throughout the Army. Dark blue and silver (white) are the colors associated with the Corps. Gold is for excellence.[166]

On its website, the Institute added that the motto "1775" "indicates the anniversary of the Corps."[167] More accurately, "1775" reflects the year that the Continental Congress appointed William Tudor as the first Judge Advocate General of the Army—thus marking the beginnings of the Corps in the Army.

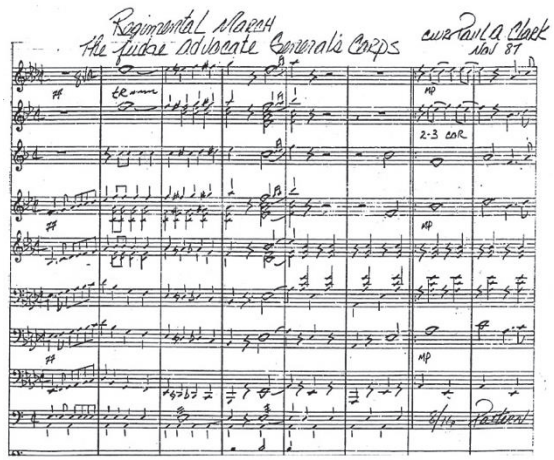
On October 9, 1986, Major General (Ret.) Kenneth Hodson and Sergeant Major (SGM) (Ret.) John Nolan, the first Honorary Colonel of the Corps and first Honorary SGM of the Corps, respectively, unveiled the approved design for the RDI. In the months that followed, MAJ Marchand worked closely with the Institute of Heraldry to see that the RDI was manufactured. Actual production of the RDI did not begin until mid-1987, when the Institute of Heraldry authorized insignia manufacturers N.S. Meyer (hallmark M22) and Vanguard (hallmark V21) to produce the RDI for commercial sale.

While members of the Regiment immediately began wearing the new RDI on the Army Green Service Uniform (more often called the "Class A" uniform), there was some resistance to wearing the RDI on the "Class B" light green uniform shirt. Following the Air Force example, the Army had transitioned from a Class B khaki shirt and trousers to a light green short sleeve uniform shirt on which medals and decorations were not (at least initially) authorized to be worn. This uncluttered look pioneered by the Air Force was popular and some judge advocates, legal administrators and legal clerks did not want to wear the RDI on their shirts. This attitude changed, however, after a directive from OTJAG signaled that the new RDI would be worn by all.

Almost twenty-five years later, the distinctive Regimental insignia continues to be an integral part of the uniform of all members of the JAGC Regiment—a proud symbol of who we are and what we do.

Our Regimental March

(Originally published in the July 2013 edition of *The Army Lawyer.*)



While the Regiment does not have a "JAG Corps song," there is a "Regimental March." Although it was composed and first performed in 1987, little is known about it today, if for no other reason than it is heard infrequently.

After the Army created a "Regimental System" in 1981, the Corps applied for regimental status, which was granted in May 1986.[168] But even before members of the Corps had any regimental affiliation, Major General Hugh R. Overholt, then serving as The Assistant Judge Advocate General, was thinking of ways to build pride and camaraderie within the new Judge Advocate General Corps (JAGC) Regiment. Ultimately, there would be a new regimental flag and a "Distinctive Insignia" (DI) that all members of the Corps would wear on their uniforms. But Major General Overholt also looked beyond the obvious accouterments of a regiment and decided that a march—brisk music suitable for troops marching in a military parade—would be a good idea.

In early 1985, Major General Overholt approached then Lieutenant Colonel (LTC) Ronald P. Cundick, who was serving as Chief, Personnel, Plans and Training Division, Office of the Judge Advocate General. As then LTC Cundick remembers it, Major General Overholt said to him, "Ron, you are a musician, you play the piano, why don't you compose us a regimental march?"[169] There was no timeframe or deadline to accomplish this task, but Cundick assumed that Major General Overholt was serious (which was not always the case with comments from Major General Overholt, who was known for mischievous nature and wry sense of humor).

In July 1985, Major General Overholt assumed duties as The Judge Advocate General and now Colonel (COL) Cundick departed Washington, D.C., for Fort Lewis, Washington, where he assumed duties as the Staff Judge Advocate, I Corps. In this new job, COL Cundick attended a variety of official functions, including those of the 9th Infantry Division (ID), which was part of I Corps. On more than one occasion, COL Cundick heard the 9th ID band perform, and was "impressed with the quality and variety of its music."[170] Most division bands he had observed previously "were pretty thin on talent and their repertoire was somewhat limited." The 9th Division Band, however, was different, and COL Cundick "was particularly impressed with the enthusiasm and professionalism" of its bandmaster, Chief Warrant Officer Two (CW2) Paul Clark.[171]

After a year at Fort Lewis, COL Cundick decided that Major General Overholt's idea for a Regimental March might be realized if CW2 Clark could be persuaded to author it. Colonel Cundick approached CW2 Clark. He asked the bandmaster "if he would be interested in composing and arranging a Regimental March for the JAGC, and whether he would have time to do it." Colonel Cundick felt strongly that CW2 Clark not only had the talent to compose a march, but he also felt that any march for the Corps "should be composed by someone who was serving in or had served in the military." Chief Warrant Officer Two Clark replied that he would be "honored" to take on the project. Colonel Cundick then contacted Major General Overholt to confirm Major General Overholt's desire for a Regimental March. When the latter assured COL Cundick that he in fact did want a march, CW2 Clark began composing it.

Within two or three months, CW2 Clark had written a score titled "Regimental March, The Judge Advocate General's Corps." The original sheet music is dated November 1987 and includes a variety of instruments, including flute (piccolo), clarinet, alto saxophone, horn, trombone, tuba and drums (percussion). On December 16, 1987, Clark sent the score and a tape recording of it (performed by the 9th Infantry Division Band) to COL Cundick. The bandmaster also applied for a copyright for the

Regimental March, which subsequently was issued by the U.S. Copyright Office, Library of Congress, on May 26, 1988.

The Regimental March was first performed for a judge advocate audience at the 1988 JAGC Regimental Ball.[172] Since that time, it apparently has only been performed on one other occasion: by the Fort Lee band on March 19, 2012, during the activation ceremony of Advanced Individual Training for Military Occupational Specialty (MOS) 27D Paralegals at Fort Lee, Virginia.

Whether this recent revival of the Regimental March signals renewed interest in this piece of martial music is an open question. However, it does seem that a Regimental March was only one aspect of Major General Overholt's concept for regimental music. Major General Overholt "also wanted to adopt a Regimental Bluegrass song," and selected "Bringing Mary Home."[173] For two years, Judge Advocate Reserve Brigadier General Thomas "Tom" O'Brien played the tune at the Regimental ball. Major General Overholt reminisced: "I think most folks, other than me, were kind of glad when it went away."[174]

In addition to the Regimental March and the Regimental Bluegrass song, Major General Overholt, encouraged by Major General William K. Suter, The Assistant Judge Advocate General, also identified a Regimental "Fish" and a Regimental "Pizza." There was also a Regimental "Hot Dog Cooker." The history behind these three regimental accouterments, however, will have to wait for another day.[175]

[1] For more on the first Judge Advocate General, *see* JUDGE ADVOCATE GENERAL'S CORPS, U.S. ARMY, THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775–1975, at 7–10 (1975) [hereinafter THE ARMY LAWYER].

[2] The lineage for this remarkable Tudor connection is as follows: William Tudor (1750–1819); Frederic Tudor (1783–1864); Frederic Tudor (1845– 1902); Rosamund Tudor (1878–1949); Tasha Tudor (1915–2010); and Thomas Tudor (1945–present). E-mail, Thomas Tudor, to author, (Sept. 8, 2014, 09:58 EST) (on file with author).

[3] For more on Dr. Francis Lieber and his son, *see* THE ARMY LAWYER, *supra* note 1, at 61–62, 84–86 (1975). While Francis Lieber never served in the U.S. Army, he did see combat as a soldier in the Prussian Army during the Napoleonic wars. He was badly wounded during the Waterloo campaign, and was left for dead on the battlefield. *See* http://www.loc.gov/rr/frd/Military_Law/Lieber_Collection/pdf/francisbio-more.pdf (last visited Sept. 25, 2014).

[4] For more on Major General George S. Prugh, *see* THE ARMY LAWYER, *supra* note 1, at 256–57.

[5] U.S. DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES ch. 14 (Jan. 24, 2017).

[6] The Army General Counsel's Honors Program provides young attorneys with a unique opportunity to help advise the Department of the Army's senior civilian and military leadership on a wide variety of legal and policy issues. These attorneys generally apply for the program in their third year of law school. If selected, they are invited to work alongside highly experienced career civilian and military attorneys in one of our four main practice groups. OFFICE OF THE ARMY GENERAL COUNSEL, http://ogc.hqda.pentagon.mil/Careers/honors_program.aspx (last visited Oct. 9, 2014).

[7] ASS'N OF GRADUATES, REGISTER OF GRADUATES AND FORMER CADETS 3–77 (2004).

[8] *Id.* at 3–398.

[9] *Id.* at 3–562.

[10] *Id.* at 3–126.

[11] *Id.* at 3–385.

[12] *Id.* at 403, 786 (1992).

[13] DEPARTMENT OF THE ARMY, ARMY REGISTER (1961).

[14] Baseball Assistance Team, MLB.ORG, http://www.mlbcommunity.org/programs/baseball_assistance_team.jsp?content=new_board_2014 (last visited Aug. 27, 2014).

[15] General Creighton W. Abrams (1914–1974) was one of the most well-known officers of his generation. A distinguished combat commander in World War II (General George S. Patton considered Abrams to be his best tank commander), Abrams finished his career as Army Chief of Staff (1972–1974). His untimely death from cancer while still on active duty cut short a life of devoted service to our Army and our nation. For an excellent biography of Abrams, see LEWIS SORLEY, THUNDERBOLT (1992).

[16] Prior to the establishment of a Funded Legal Education Program in 1974, active-duty officers "were authorized to go into an extended leave status without pay and attend a civilian law school of their choice, but at their personal expense." More than a few judge advocates who came into the Corps in the 1960s did so through the Excess Leave Program; in 1965, for example, there were 144 officers in the program. THE ARMY LAWYER, *supra* note 1, at 238.

[17] Email from Colonel Samuel J. Smith, Jr. to author, (Feb. 15, 2015, 11:23 EST) (on file with author).

[18] ASS'N OF GRADUATES, *supra* note 7, at 3-471, 3-501.

[19] Calvin Lederer, *U.S. Coast Guard, Dep't of Homeland Security*, http://www.uscg.mil/flag/biography/CalvinLederer.pdf (last visited Aug. 27, 2014).

[20] ASS'N OF GRADUATES, *supra* note 7, at 3–434, 3–472.

[21] Email from Robert L. Davenport, Jr. to author, (Mar. 27, 2015, 17:32 EST) (on file with author).

[22] For more on Major General Brannon, see THE ARMY LAWYER, *supra* note 1, at 200–02.

[23] THE JUDGE ADVOCATE GENERAL'S SCHOOL, 178TH JUDGE ADVOCATE OFFICER BASIC COURSE, 2009; Email from James M. Flanagan to author (Feb. 17, 2015, 12:05 PM) (on file with author).

[24] E-mail from Colonel Corey Bradley, to author (May 30, 2014 16:52 EST).

[25] *Id.* By comparison, the active component Corps had 511 female judge advocates as of June 2014; this constitutes 26 percent of the total active JAGC.

[26] While there have been—and will continue to be—judge advocates married to each other, this article focuses on those who entered the Corps at the same time, and were already married to each other.

[27] ALUMNI NEWSLETTER, THE JUDGE ADVOCATE GEN.'S SCHOOL, Oct. 1, 1972, at 4.

[28] Two other judge advocates of note in the 65th Basic Course were Coast Guard Lieutenant Winona G. Dufford and Army Captain Fredric I. Lederer. Dufford was one of the two women lawyers then in the U.S. Coast Guard. A graduate of the University of Connecticut's law school, she was stationed in New Orleans after graduation. Lederer, a 1971 Columbia Law School graduate, later taught criminal law at The Judge Advocate Gen's School, U.S. Army and was principal author of the Military Rules of Evidence promulgated in 1980. After leaving active duty to take a teaching position at William and Mary's law school, Lederer remained active in the Army Reserve. He retired as a colonel and was made a Distinguished Member of the Regiment in 1998.

[29] Colonel Joyce E. Peters was the first female judge advocate to serve as a Corps Staff Judge Advocate (I Corps, 1992–93) and the only judge advocate in history to serve as the Senior Military Advisor to the Secretary of the Army (1993–1994). She was the first female Army lawyer to be decorated with the Distinguished Service Medal, the Army's highest award for service. *See* Oral History of Colonel (Ret.) Joyce E. Peters (May 2012) (on file with Regimental Historian, TJAGLCS).

[30] Captain John D. Altenburg, Jr., who would later be promoted to major general and serve as The Assistant Judge Advocate General from 1997 to 2001, also was a member of this class.

[31] THE JUDGE ADVOCATE GENERAL'S SCHOOL, 71ST BASIC CLASS DIRECTORY 15 (1974).

[32] In May 2012, the U.S. Senate confirmed Brigadier General (Ret.) Pietsch to serve as Judge, U.S. Court of Appeals for Veterans Claims.

[33] THE JUDGE ADVOCATE GENERAL'S CORPS, JAGC PERSONNEL AND ACTIVITY DIRECTORY, Oct. 1, 1976, at 61–62.

[34] Captain Andrew S. Effron, who would later serve as Chief Judge, U.S. Court of Appeals for the Armed Forces, was a classmate of the Cooks.

[35] E-mail from Major General (Ret.) William K. Suter, to author (May 27, 2014, 13:40 EST) (on file with author) (The subject of the e-mail was JAG Corps Couples.).

[36] AM. BAR ASS'N, *A Current Glance at Women in the Law*, http://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_feb2013.authcheckdam.pdf (last visited June 10, 2014).

[37] THE ARMY LAWYER, *supra* note 1, at 140.

[38] Other branches also adopted this style of letters to designate their officers. For example, officers in the Inspector General's Department wore shoulder insignia with the letters "ID" and those in the Adjutant General's Department wore the letters "AD." WILLIAM K. EMERSON, ENCYCLOPEDIA OF UNITED STATES ARMY INSIGNIA AND UNIFORMS 167 (1996).

[39] These epaulettes were a class gift from the 62nd Graduate Class and are on display in the library at TJAGLCS.

[40] War Department, Adjutant General's Office, Gen. Orders No. 92 (October 26, 1872).

[41] EMERSON, *supra* note 38, at 250; Headquarters, U.S. Dep't of Army, Gen. Order No. 53 (May 23, 1890).

[42] WAR DEP'T, REG. OF 1825, para. 865.

[43] WAR DEP'T, REG. OF 1857, para. 1430.

[44] Edward F. Huber, *Crossed Sword and Pen*, JUD. ADV. J, Mar. 1945, at 43.

[45] THE ARMY LAWYER, *supra* note 1, at 34–55.

[46] Whatever one may think of the white pompon as a badge of office, the Cavalry (the forerunner of today's Armor Branch) could claim the most unique identification in the mid-19th century: From 1841 to 1857, Army regulations provided "mustaches" or "moustaches" would not be worn, *except by cavalry regiments*, "on any pretense whatsoever." Huber, *supra* note 44, at 43.

[47] JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM 313 (1988).

[48] THE ARMY LAWYER, *supra* note 1, at 54–55.

[49] LEON W. LAFRAMBOISE, HISTORY OF THE ADMINISTRATIVE AND TECHNICAL SERVICES BRANCH OF SERVICE INSIGNIA 349 (1986).

[50] *See* U.S. DEP'T OF ARMY, REG. 670-1, WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA para. 24-5 & fig. 24-11 (Feb. 3, 2005).

[51] LAFRAMBOISE, *supra* note 49.

[52] War Dep't, General Orders No. 53 (May 23, 1890).

[53] Huber, *supra* note 44, at 44–45.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.* at 45 n.32.

[58] EMERSON, *supra* note 38, at 251–52.

[59] *Id.*

[60] War Dep't, General Orders No. 27, para. XII (Mar. 22, 1918).

[61] EMERSON, *supra* note 38, at 252.

[62] Message, 021111 Mar 04, U.S. DEP'T OF ARMY, subj: Changes to CW5 Rank and Warrant Officer Branch Insignia and Colors.

[63] AR 670-1, *supra* note 50, para. 28-10.*b*.(9).

[64] James Brown Scott, *Judge Advocates in the Army*, AM. J. INT'L L. 650 (1917).

[65] Congress authorized the twenty additional majors when it enacted legislation reorganizing the Judge Advocate General Department on June 3, 1916. That legislation provided that the Judge Advocate General was to be a brigadier general, and that his Department also would have four colonels and seven lieutenant colonels. THE ARMY LAWYER, *supra* note 1, at 107.

[66] Crowder was promoted to major general in October, when Congress increased the top Army lawyer's rank and pay. For a biography of 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.

[67] Scott, *supra* note 64, at 651.

[68] *Id.*

[69] *Id.*

[70] While he could have served in the JAGD, Gaspar Griswold Bacon (1886–1947) decided instead to serve as a Field Artillery officer during World War I. He was a member of the 81st Division and left active duty as a major. During World War II, Bacon obtained a commission as a major in the Army Air Forces and took part in the D-Day landings in Normandy on June 6, 1944. He was honorably discharged as a colonel in 1945. Parkman Dexter Howe, *Gaspar Griswold Bacon*, PROCEEDINGS OF THE MASSACHUSETTS HISTORICAL SOCIETY (OCT. 1947–MAY 1950) 426–28 (1950).

[71] For more on Stimson, *see* HENRY L. STIMSON, ON ACTIVE SERVICE IN PEACE AND WAR (1947); RICHARD H. CURRENT, SECRETARY STIMSON (1954); ELTING E. MORRISON, TURMOIL AND TRADITION: A STUDY OF THE LIFE AND TIMES OF HENRY L. STIMSON (2003).

[72] THE ARMY LAWYER, *supra* note 1, at 118.

[73] *Id.*

[74] *Id.* at 119.

[75] *Id.*

[76] *See* Fred L. Borch, *The Trial by Military Commission of "Mother Jones,"* ARMY LAW., Feb. 2012, at 1–4.

[77] THE ARMY LAWYER, *supra* note 1, at 122.

[78] *Nathan William MacChesney (1878-1954)*, U.S. DEP'T OF STATE OFFICE OF THE HISTORIAN, http://history.state.gov/departmenthistory.state.gov/departmenthistory/people/macchesney-nathan-william (last visited July 15, 2013).

[79] *Id.*

[80] Letter from Lieutenant Colonel Burnett M. Chiperfield to Colonel William S. Weeks, Exec. Officer, JAGD (March 30, 1919) (on file with the National Archives and Records Administration, Record Group, 153, Records of the Office of the Judge Advocate General, Entry 45).

[81] *Id*.

[82] JOSEPH WHELESS, COMPENDIUM OF THE LAWS OF MEXICO (1910).

[83] JOSEPH WHELESS, FORGERY IN CHRISTIANITY 238 (1930).

[84] GEORGE B. DAVIS, HEADQUARTERS, DIVISION OF THE PHILIPPINES, REPORT ON THE MILITARY GOVERNMENT OF THE CITY OF MANILA, P.I., 1898 TO 1901, at 256 (1901).

[85] *Law Library of Congress*, LIBRARY OF CONGRESS, http://memory.loc.gov/ammem/awhhtml/awlaw3/legal.html (last visited July 16, 2013).

[86] U.S. War Dep't, Gen. Orders No. 49 (Nov. 25, 1922).

[87] As an aside, Clark's son-in-law, U.S. Navy Captain Mervyn S. Bennion, was killed in action while commanding the U.S.S. *West Virginia* on December 7, 1941; Bennion was posthumously awarded the Medal of Honor. *World War II (Recipients A-F)*, US ARMY CTR. OF MILITARY HIST., http://www.history.army.mil/html/moh/wwII-a-f.html (last visited July 16, 2013).

[88] THE ARMY LAWYER, *supra* note 1, at 122.

[89] U.S. War Dep't, Gen. Orders No. 10 (Apr. 2, 1920).

[90] *Charles B. Warren Jan. 26, 1925*, TIME, http://www.time.com/time/covers/0,16641,19250126,00.html (last visited July 16, 1925).

[91] THE ARMY LAWYER, *supra* note 1, at 122.

[92] *Edwin G. Davis*, REGISTER OF GRADUATES AND FORMER CADETS 1–36 (2000).

[93] Today, this legislation is familiar to judge advocates as the Servicemembers Civil Relief Act. 50 U.S.C. §§501–597b (2011). The original legislation authored by Davis and Wigmore expired after World War I, but was renewed in 1940 and has been in effect since that time.

[94] U.S. War Dep't, Gen. Orders No. 111 (Sept. 2 1919).

[95] *Edwin Griffith Davis*, ASS'N OF GRADUATES ANNUAL REPORT 216 (1936).

[96] *Id.*

[97] U.S. War Dep't, Gen. Orders No. 15 (Apr. 5, 1923).

[98] For the decision of the Reparations Commission, *see* Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers (U.S. v. Reparations Comm'n), 2 R.I.A.A. 777 (1926), http://untreaty.un.org/cod/riaa/cases/vol_II/777-795.pdf.

[99] Soldiers' and Sailors' Civil Relief Act of 1940, 54 Stat. 1178, 50 U.S.C. app. 501.

[100] Colonel Alfred F. Arquilla, *The New Army Legal Assistance Regulation*, ARMY LAW., May 1993, at 4.

[101] WAR DEP'T, CIRCULAR NO. 74, LEGAL ADVICE AND ASSISTANCE FOR MILITARY PERSONNEL (Mar. 16, 1943).

[102] MILTON J. BLAKE, LEGAL ASSISTANCE FOR SERVICEMEN: A REPORT OF THE SURVEY OF THE LEGAL PROFESSION 9 (1951).

[103] OFFICE OF THE JUDGE ADVOCATE GENERAL, LEGAL WORK OF THE DEPARTMENT JULY 1, 1940–MARCH 31, 1945, at 13 (1945).

[104] *Id.* at 214.

[105] *Id.* at 207.

[106] *Id.* at 215–16.

[107] Arquilla, *supra* note 100, at 5.

[108] Memorandum for The Judge Advocate General, subject: Gander After-Action Report, Legal Assistance (Apr. 8, 1987) (on file with Legal Assistance Policy Division, Office of The Judge Advocate General).

[109] U.S. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM (Feb. 21, 1996).

[110] Born in Washington, D.C., in 1907, Rear Admiral Chester C. Ward became a naval aviation cadet in 1927, and after receiving his wings the following year, served in a variety of naval aviation assignments until leaving active duty in 1930. He subsequently graduated from The George Washington University Law School in 1935, and then remained on the faculty, first as an instructor and then as an Assistant Professor of Law. Admiral Ward was still teaching law when he returned to active duty in 1941. During World War II, he performed Navy legal duties in a variety of assignments, including Chief, General Law Division. In that position, then Captain Ward was responsible for all admiralty, taxation, international law, legal assistance, and claims matters for the Navy. Admiral Ward remained on active duty after the war ended, and during the Korean War, served as the top legal officer on the staff of the Commander in Chief, Pacific, and Commander in Chief, U.S. Pacific Fleet. Admiral Ward took the oath as the Judge Advocate General of the Navy in August 1956. He retired four years later, at the age of fifty-two. THE JAG JOURNAL, Sept.–Oct. 1956, at 3–4.

[111] THE JUDGE ADVOCATE GENERAL'S SCHOOL, HISTORICAL NOTE ON CANNONS (n.d.).

[112] THE JUDGE ADVOCATE GENERAL'S SCHOOL, THE JUDGE ADVOCATE GENERAL'S SCHOOL, 1951–1961, at 26 (1961).

[113] The *Field Song* of the University of South Dakota was written about 1938 by J. Hyatt Downing with music by Francelia Feary. The song begins:

> South Dakota, Land of Empire, Land of Sunshine, too
> For your glory we conspire; All our Hearts are True
> Thanking humbly our Creator, Loyal we will be
> Proud to call you Alma Mater . . . .

[114] Derogatory terms for German and Japanese soldiers used during World War II.

[115] For more on the Officer Candidate School at The Judge Advocate General's School, U.S. Army, *see* Fred L. Borch, *An Officer Candidate School for Army Lawyers? The JAG Corps Experience (1943–1946)*, ARMY LAW., July 2012, at 1–3.

[116] *Mar 5, 1966: Staff Sergeant Barry Sadler Hits #1 with "Ballad Of The Green Berets,"* HISTORY, http://www.history.com/this-day-in-history/staff-sergeant-barry-sadler-hits-1-with-quotballad-of-the-green-beretsquot (last visited June 24, 2013).

[117] *MIL TERMS: AG*, COMBAT, THE LITERARY EXPRESSION OF BATTLEFIELD TOUCHSTONES, http://www.combat.ws/S4/MILTERMS/MT-A.HTM (last visited July 15, 2013).

[118] Waldemar A. Solf (1913–1987) was an expert in the Law of Armed Conflict (LOAC). A 1937 graduate of the University of Chicago's law school, he served as an Artillery officer in France and Germany in World War II before transferring to the Judge Advocate General's Department in 1946. Solf subsequently had a distinguished career as a judge advocate, including service as a military judge in Korea and as the Staff Judge Advocate, Eighth U.S. Army. After retiring in 1968, Wally Solf served as the Chief, International Affairs Division from 1971 to 1977 and then as Special Assistant to The Judge Advocate General (TJAG) from 1977 to 1979. It was Solf who, in 1974, suggested that a Defense Department-level Law of War program be created. Major General George S. Prugh, then serving as TJAG, concurred with this suggestion, and the result was that the Army became the executive agent for all law of war matters in the Defense Department—and Army lawyers were tasked with ensuring that all U.S. military operations complied with LOAC. Solf's 1974 suggestion was the starting point for the emergence of today's Operational Law framework familiar to all judge advocates. From 1975 to 1977, Solf was a Delegate to the Diplomatic Conference on the Reaffirmation and Development of Humanitarian Law in Armed Conflict in Geneva and was heavily involved in the drafting of what became the 1977 Protocols Additional. While the United States did not ratify the Protocols, their impact on the development of LOAC has been immense.

[119] Today's International and Operational Law Division.

[120] JOHN JAY DOUGLASS, A SHORT HISTORY OF RAJA, 1976 TO 2004 (unpublished monograph), at 1–2.

[121] Today this event is known as the World Wide Continuing Legal Education conference.

[122] Born in 1914, Lawrence J. Fuller served in World War II and Korea. His last assignment in the Corps was as The Assistant Judge Advocate General (today's Deputy Judge Advocate General). Fuller retired as a major general in 1971 and died in 1998.

[123] Born in 1904, Clio Edwin Straight graduated from the University of Iowa's law school in 1930 and served in the Corps in World War II. In 1945, he was sent to Europe where he assumed duties as the Deputy Theater Judge Advocate for War Crimes, U.S. Forces European Theater. In this position, he had overall responsibility for the prosecution of German Army personnel for war crimes. When he retired from the Army in June 1961, he was a brigadier general and the Assistant Judge Advocate General for Civil Law. He subsequently joined Champion International Corporation, where he worked as a lawyer until 1972, when he joined the law firm of Frost & Jacobs in Cincinnati, Ohio. Straight retired from the practice of law in 1977. He died in 1991 and is buried in Arlington National Cemetery. U.S. DEP'T OF ARMY, U.S. ARMY REGISTER VOLUME III, RETIRED LISTS 51 (1968).

[124] Bruce C. Babbitt (1920–1999) was a remarkable judge advocate by any measure. He was decorated with the Silver Star in World War II and, after completing his law degree in 1947, joined the Corps. In 1952, Babbitt graduated first in his class at the inaugural Advanced Course (today's Graduate Course). He was the SJA, 3d Infantry Division in the 1950s (when the division was stationed in Germany) and later served as SJA, Military Assistance Command, Vietnam. Babbitt was the Assistant Judge Advocate General for Civil Law when he retired in 1973. For more on Babbitt, *see* JAGCNET, https://www.jagcnet.army.mil/852736A005BF2E1/0/10421739EA80CE98525749F00561BD7/$file/Bruce%20Babbitt%20bio.pdf (last visited Apr. 6, 2015).

[125] Born in Idaho in 1903, Burton "Burt" French Ellis graduated from the University of Idaho's law school and entered the Corps late in World War II; then Major Ellis graduated from TJAGSA's eight-week 21st Officer Course in March 1945. George P. Forbes, Jr., *The Judge Advocate General's School*, JUDGE ADVOCATE J., Summer 1945, at 60. Ellis is best known as the prosecutor of SS Lieutenant Colonel Jochen Peiper and other SS personnel for war crimes committed during the Battle of the Bulge. This trial, known today as the "Malmedy Massacre," was one of the most famous trials to come out of World War II. Ellis retired from the regular Army in November 1958. He lived the next 41 years in Merced, California, where he died in 2000 at the age of 97. Ellis left a $6 million bequest to the University of Idaho's law school; at the time, this was the largest individual gift to the school in its history. Ellis is buried in Arlington National Cemetery. DOUGLASS, *supra* note 120, at 15. For more on the Malmedy Massacre prosecution and Ellis' role in it, see DANNY S. PARKER, HITLER'S WARRIOR: THE LIFE AND WARS OF SS COLONEL JOCHEN PEIPER 159-171 (2014).

[126] Born in 1907, Howard S. Levie graduated from Cornell University's law school in 1930. After service in the Coast Artillery in World War II (mostly in the Pacific), he transferred to the JAG Department in 1946. Levie had a successful career until retiring in 1963 and beginning a second career as a law school professor at St. Louis University. An expert in war crimes and prisoner of war matters, Levie is most famous for having authored the words of the armistice agreement that stopped the fighting in Korea in 1953—the agreement that is in effect today. Levie celebrated his 100th birthday in December 2007, and is the only Army judge advocate to reach the century mark. He died in 2009, at the age of 101. For more on Levie, *see* Fred L. Borch, *The Cease-Fire on the Korean Peninsula: The Story of the Judge Advocate Who Drafted the Armistice Agreement that Ended the Korean War*, ARMY LAW., Aug. 2013, 1-3.

[127] Born in 1916, Leonard Petkoff graduated from New York University's law school in 1940 and served in World War II, Korea, and Vietnam before retiring from the Corps in 1972. He was the SJA, U.S. Forces, Korea, in the 1950s. After leaving active duty, Petkoff was the Chief Trial Attorney for the Washington Metropolitan Area Transit Authority. He died in Melbourne, Florida in 2008, aged 91 years. He is buried in Arlington National Cemetery. FIND A GRAVE, http://www.findagrave.com/cgi-bin /fg.cgi?page=gr&G Rid=28920156 (last visited April 7, 2015).

[128] Born in 1922, John Jay Douglass had a long and distinguished career as an Army officer and judge advocate. He served as an Infantry officer from 1944 to 1946. Then, after graduating from the University of Michigan's law school in 1952, he returned to active duty as a judge advocate. Douglass subsequently served in Japan and Korea (1953-1954) and Vietnam (1968-1969). His final assignment was as Commandant, The Judge Advocate General's School, in 1970. Colonel Douglass retired from active duty in 1974. JOHN JAY DOUGLASS, MEMOIRS OF AN ARMY LAWYER (n.d.)

[129] DOUGLASS, *supra* note 120, at 3.

[130] *Id.*

[131] Then Lieutenant Colonel Thomas Oldham served as COL John Jay Douglass' deputy when Douglass was the staff judge advocate, U.S. Army, Vietnam, from 1968 to 1969. Interview with John Jay Douglass, Apr. 7, 2015 (on file with author).

[132] DOUGLASS, *supra* note 120, at 3.

[133] *Id.*

[134] *Id.* at 10.

[135] *Id.* at 4.

[136] *Id.* at 10.

[137] *Id.* at 23.

[138] RETIRED ARMY JUDGE ADVOCATES ASSOCIATION, www.rajaassn.com (last visited Apr. 8, 2015).

[139] E-mail from Master Sergeant (Ret.) Rick Cox, to author (Apr. 7, 2015, 15:01 EST) (on file with author).

[140] E-mail from Major General (Ret.) William K. Suter, to author (Apr. 7, 2015, 15:52 EST) (on file with author).

[141] OFFICE OF THE JUDGE ADVOCATE GENERAL, JAGC PERSONNEL AND ACTIVITY DIRECTORY, at i (Aug. 1963) [hereinafter JAG PUB. 1-1].

[142] U.S. Army Military History Institute, Senior Officers Debriefing Program: Conversations Between Major General (MG) George S. Prugh and Major (MAJ) James A. Badami 2 (June 18, 1975) [hereinafter Prugh Oral History] (unpublished manuscript, on file with The U.S. Army Judge Advocate General's Legal Center and School (TJAGLCS) Library, Charlottesville, Virginia). For more on MG Prugh, *see* George R. Smawley, *The Past as Prologue: Major General George S. Prugh, Jr. (Ret.) (1942–1975)—Witness to Insurgent War, the Law of War, and the Expanded Role of Judge Advocates in Military Operations*, 187 MIL. L. REV. 96 (2006).

[143] *Id.* at 3.

[144] *Id.* at 4–5.

[145] JAG PUB. 1-1, *supra* note 141, at i.

[146] E-mail from Colonel (Ret.) Raymond P. Ruppert to author (May 17, 2011, 12:14:00 EST) (on file with Regimental Historian, TJAGLCS).

[147] E-mail from Colonel (Ret.) Barry Steinberg to author (May 15, 2011, 16:05:00 EST) (on file with Regimental Historian, TJAGLCS).

[148] When Lieutenant General Chipman assumed duties as TJAG in 2013, he directed that *The Directory* be published only in electronic format, with a searchable database. This continues today.

[149] *Separate JAGC Promotion List*, ARMY LAW., Mar. 1976, at 29.

[150] E-mail from Brigadier General (Ret.) Ronald Holdaway to author (May 17, 2010) (on file with author) [hereinafter Holdaway E-mail]

[151] *Id.*

[152] *Separate JAGC Promotion List*, *supra* note 149.

[153] E-mail from Brigadier General (Ret.) Ronald Holdaway to author (May 16, 2010) (on file with author).

[154] *Separate JAGC Promotion List*, *supra* note 149, at 29.

[155] Holdaway E-mail, *supra* note 150.

[156] Although regiments have existed in the American Army since the Revolution, the idea for a regimental system in which Soldiers spent most of their service in one unit became increasingly popular in the post-Vietnam era. For more on the concept, *see* U.S. DEP'T OF ARMY, REG. 600-82, THE U.S. ARMY REGIMENTAL SYSTEM (June 5, 1990) [hereinafter AR 600-82].

[157] *Id.*, para. 2-3f.

[158] Headquarters, U.S. Dep't of Army, Gen. Order No. 22, para. 3 (May 30, 1986) (This general order also formally established "Charlottesville, Virginia" as the "home" of the JAGC.).

[159] These total numbers included 4,639 commissioned officers, 197 warrant officers, and 4,944 enlisted Soldiers. Jim Tice, *Legal Specialists Join Regimental System*, ARMY TIMES, Aug. 1986, at 2.

[160] *JAGC Regimental Activation*, ARMY LAW., May 1986, at 16.

[161] *Id.*

[162] Interview with Colonel (Ret.) David E. Graham, Executive Dir., The Judge Advocate Gen.'s Legal Ctr. & Sch. (TJAGLCS), in Charlottesville, Va. (Apr. 6, 2012) [hereinafter Graham Interview]. Mr. Graham had a distinguished career as a judge advocate, and served in a variety of important assignments including Staff Judge Advocate, U.S. Army Southern Command (1990–1992) and Chief, International and Operational Law Division, Office of the Judge Advocate General (1994–2002). Mr. Graham was the Executive Director, TJAGLCS, from 2003–2016.

[163] Michael J. Marchand had a thirty-two-year career as a judge advocate. He served in a variety of important assignments, including Assistant Judge Advocate General for Civil Law and Litigation (1997–1998) and Commander, U.S. Army Legal Services Agency & Chief Judge, U.S. Army Court of Criminal Appeals (1998–2001). Major General Marchand completed his service in uniform as The Assistant Judge Advocate General (2001–2005). After retiring from active duty, Major General Marchand was appointed as the President of the Center for American and International Law located in Dallas, Texas.

[164] This design is somewhat similar to the short-lived judge advocate insignia adopted by Major General Walter A. Bethel in 1923. *See* Fred L. Borch, *Crossed Sword and Pen: The History of the Corps' Branch Insignia*, ARMY LAW., Apr. 2011, at 3–5.

[165] Graham Interview, *supra* note 162.

[166] EMERSON, *supra* note 38, at 250.

[167] *Judge Advocate General*, INST. OF HERALDRY, http://www.tioh.hqda.pentagon.mil/UniformedServices/Branches/JAG.aspx (last visited Aug. 9, 2012).

[168] On May 30, 1986, the Department of the Army announced that the Corps was "placed under the US Army Regimental System effective 29 July 1986." Headquarters, U.S. Dep't of the Army, Gen. Order No. 22, at para. 3 (May 30, 1986).

[169] Letter from Colonel (Ret.) Ronald Cundick to Fred L. Borch, Regimental Historian & Archivist (July 17, 2013).

[170] *Id.*

[171] *Id.*

[172] E-mail from Major General (Ret.) Hugh R. Overholt to author, subj: JAGC Regimental March (July 16, 2013, 17:31 EST).

[173] E-mail from Major General (Ret.) Hugh R. Overholt to author, subj: Seeing Mary Home or Bringing Mary Home (July 24, 2013, 08:57 EST). Major General Overholt was especially taken with the song as performed by Mac Wiseman (known as "The Voice With a Heart"). The lyrics follow:

> I was driving down a lonely road on a dark and stormy night
> When a little girl by the road side showed up in my head lights
> I stopped and she got in the back and in a shaky tone
> She said my name is Mary please won't you take me home
>
> She must have been so frightened all alone there in the night
> There was something strange about her cause her face was deathly white
> She sat so pale and quiet there in the back seat all alone
> I never will forget that night I took Mary home
>
> I pulled into the driveway where she told me to go
> Got out to help her from the car and opened up the door
> But I just could not believe my eyes the back seat was bare
> I looked all around the car but Mary wasn't there
>
> A small light shown from the porch a woman opened up the door
> I asked about the little girl that I was looking for
> Then the lady gently smiled and brushed a tear away
> She said it sure was nice of you to go out of your way
>
> But thirteen years ago today in a wreck just down the road
> Our darling Mary lost her life and we still miss her so
> So thank you for your trouble and the kindness you have shown
> You're the thirteenth one who's been here bringing Mary home

From: http://www.metrolyrics.com/bringing-mary-home-lyrics-red-sovine.html (last visited July 24, 2013).

[174] E-mail from Major General (Ret.) Hugh R. Overholt to author, subj: More on the Regimental March (July 17, 2013, 10:02 EST).

[175] E-mail from Major General (Ret.) Hugh R. Overholt to author, *supra* note 173.

Chapter 2
Legal Education and Training

An Officer Candidate School for Army Lawyers? The JAG Corps Experience

(Originally published in the July 2012 edition of *The Army Lawyer.*)

Officer Candidate Class c. 1943

On June 29, 1943, the *Michigan Daily* featured a small article on eighty-three enlisted men attending the first-ever officer candidate school operated by the Judge Advocate General's Department (JAGD) on the campus of the University of Michigan.[1] This is the story of that officer candidate program—and its place as a unique educational episode in our Regiment's history.

Within days of the Japanese attack on Pearl Harbor, the JAGD began calling Reserve officers to active duty as the United States mobilized for war with the Axis powers. Initially, these lawyers received on-the-job training; however, Major General (MG) Myron C. Cramer, The Judge Advocate General (TJAG), quickly realized that this "slow process of apprenticeship" was "impractical" to meet the wartime demands and that the Army must establish a school for refresher training "to afford the proper orientation and indoctrination for bridging the gap between civil and Army life."[2] The first class convened on February 2, 1942 at National University Law School,[3] Washington, D.C., but it became apparent that larger facilities were required.[4] The Judge Advocate General's School, U.S. Army (TJAGSA) was activated at the University of Michigan on August 5, 1942.

As the supply of Reserve judge advocates dwindled, the JAGD decided to directly commission civilian lawyers and enlisted personnel who were attorneys. The War Department, however, informed TJAG Cramer in early 1943 that it was curtailing the authority of all branches in the Army to offer direct commissions except in the rarest cases.[5] Faced with this quandary, the JAGD decided to activate an officer candidate school so that qualified attorneys serving in the enlisted ranks could enter the JAGD as judge advocates. As a result, the Secretary of War established the Judge Advocate General's Officer Candidate School (JAGOCS) on March 24, 1943. The Judge Advocate General received the "authority to accept or reject applicants" and "was further authorized to recommend fifty percent of the graduates . . . for immediate promotion to the grade of first lieutenant." This promotion authority was unique: all other officer candidate programs in the Army commissioned their graduates as second lieutenants; only the JAGOCS program was allowed the immediate promotion of one half of a graduating class.[6] The first JAGOCS candidates reported to the University of Michigan on June 7, 1943.

From the outset, the mission of JAGOCS "was to train officer candidates for service as judge advocates in tactical and administrative units of the Army . . . ,"[7] but exactly how to accomplish this mission was very much an open question. The JAGD had never operated an officer candidate program, and there was no time to experiment. The obvious solution was to model at least some parts of JAGOCS after other officer candidate schools already in operation, and this in fact occurred.

A more significant problem, however, was the limited number of instructors. By June 1943, TJAGSA had trained ten officer classes (consisting of more than 500 men) with an instructional staff of only seventeen men (fifteen judge advocates and two infantry officers) in ten months. Consequently, although very much overburdened with work, some of these TJAGSA instructors now also had to begin teaching JAGOCS classes when the first candidates arrived on June 7, 1943. Ultimately, the solution was to select JAGOCS graduates to become instructors—but this could be done only after several JAGOCS classes had graduated. To alleviate the shortage of instructors in the meantime, TJAGSA arrived at a practical solution: combining officer classes with officer candidate classes "for a substantial amount of instruction."[8] While some were concerned about the impact on good order and discipline that might result from "mixing" officers and enlisted personnel, the "similarity in background and ability of the officers

and officer candidates" seems to have precluded any problems.[9]

As for the candidates, who was selected to attend JAGOCS? A civilian attorney who had voluntarily enlisted or had been drafted was eligible to apply for the officer candidate program at the University of Michigan, provided he "had attained his 28th birthday" and was "a graduate of a law school." Additionally, "at least 4 years practice of law is desirable, but not essential."[10] Since certain states did not require law school as a prerequisite for being admitted to the practice of law, the JAGD waived this requirement for JAGOCS where the applicant had been a civilian attorney for a significant period of time or had otherwise demonstrated exceptional professional competence. Similarly, the four years of practice requirement was waived in exceptional cases. According to the *History of Military Training of Officer Candidates* published by TJAGSA in 1944, the age requirement was never waived.[11]

To apply for JAGOCS, enlisted applicants had to be provisionally approved by the local command screening boards. Then, each application was sent to the Judge Advocate General's Office, Military Personnel and Training Division (MPTD) (the forerunner of today's Personnel, Plans and Training Office). The MPTD "screened the papers and made judgments as to the prima facie excellence and desirability of the applicant."[12] When the "character and capability" of applicants were "deemed to be worthy of further consideration," the MPTD then investigated each applicant by asking for letters from "lawyers, institutional and municipal officials, and others of recognized standing."[13] After passing this investigation, their files went to a "selection board composed of a general officer and other high ranking members" of the JAGD.[14] This board then made selection recommendations to Major General Cramer, "who personally passed on each applicant before he was [finally] selected."[15]

Each JAGOCS class was seventeen weeks long (as compared to the TJAGSA officer class, which was twelve weeks in length). Each week consisted of sixty-two hours of education and training. There were thirty-five hours of classroom work and thirteen hours of military and physical training; the remaining fourteen hours were "night time supervised study."[16] It seems, however, that there was considerable OCS candidates' resistance to this regime; the cadre, "after some experimentation with the schedule," decided that "best academic efficiency was obtained by not making assignments for study on Wednesday and Saturday nights."[17] Those who wanted to continue to review or study on their own were obviously free to do so, but it seems that most candidates found other activities in Ann Arbor to keep them engaged during these two nights.

Officer candidates studied to "perform all the duties of a staff judge advocate."[18] This made sense given that a combat division was authorized only one judge advocate during World War II. *The 1928 Manual for Courts-Martial* was the key classroom text, supplemented by TJAGSA books containing common forms and materials relating to military justice in the field. The Judge Advocate General's School, U.S. Army also incorporated three training films in JAGOCS training, including a special film devoted to absence without leave and desertion.[19]

Officer candidates also studied administrative and civil law topics, including line of duty determinations, citizenship and naturalization, and claims. Government contracting was also an extremely important area of practice, which included the formation of contracts, bids and awards, modification, breach, implied contracts and disputes. In 1945, with the end of the war in sight, the contract law curriculum shifted from the War Department procurement to contract termination.[20]

There was considerable study of the Law of War and the applicability of the Geneva Convention of 1929 relating to the treatment of prisoners of war, the status of U.S. military personnel in friendly countries, war crimes, the legal rights and duties arising out of a military occupation of foreign territory, and "the traditional problems arriving out of the conduct of hostilities (Hague Conventions of 1899 and 1907.)"[21] Field Manual 27-10, *Rules of Land Warfare*, which had been published by the War Department on October 1, 1940, was especially helpful in the JAGOCS curriculum, as it was an easy-to-use reference that fit easily in a uniform pocket.

The 1929 conventions were relatively new, and there had been no major war since their ratification. Consequently, TJAGSA and JAGOCS cadre undertook a number of research projects and produced "definitive texts" on the Law of Land Warfare and the Law of Belligerent Occupation. The focus was on Italy, Germany, and Japan, with "the emphasis on each decreasing or increasing as the war progressed." After Italy joined the Allies in September 1943, "background material" on that country ceased to be part of JAGOCS instruction.[22]

Military training included instruction on "the development of military bearing, precision in marching, and the exercise of voice and command."[23] There also were classes in map reading and defense against air, airborne and chemical attacks. Some hours also were "devoted to familiarization with various infantry weapons including assembly, disassembly, functioning, care, and cleaning of the U.S. Carbine caliber .30 M1, Browning Automatic Rifle, caliber .30, Browning Machine Gun, caliber .30, Thompson Submachine Gun, caliber .30, and the Automatic Pistol caliber .45."[24]

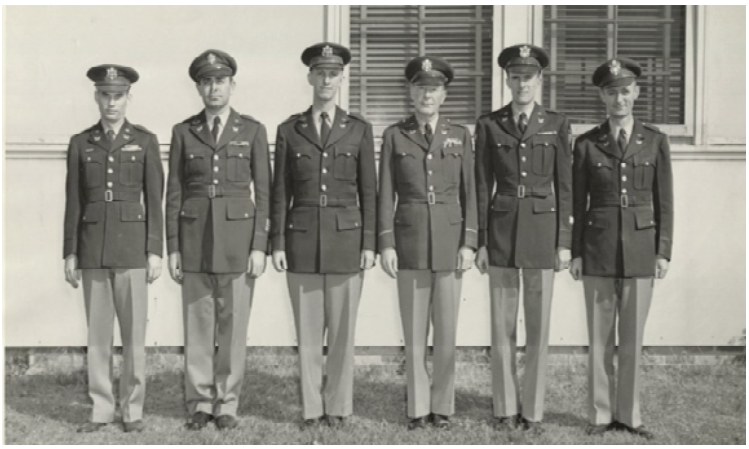
The first JAGOCS class graduated on August 28, 1943, when seventy-nine students took their oaths as either second or first lieutenants in the JAGD. What determined their rank? Those who graduated in the top half of the class were commissioned as first lieutenants; the remainder of the class was commissioned as second lieutenants. It was certainly an incentive to perform as well as one could. The newly commissioned judge advocates went to a variety of locations. First Lieutenant (1LT) Ralph E. Becker was assigned as an assistant staff judge advocate in an infantry division in Europe, while 1LT Floyd Osborne was a part of a division "on the front" at Monte Casino, Italy. First Lieutenant Leo Bruck was in Teheran, Iran, with Headquarters, Persian Gulf Command, while 1LT Richard Kent was with "a fighter command in England." Kent found his Army Air Force assignment "most interesting. Aside from a little legal assistance, military justice is the bread and meat of my work . . . [I] perform all the functions of a JA—reviewing charges and referring them to the proper court, trial judge advocate, law member, and reviewing the record of trial."[25] Other JAGOCS graduates had similar experiences in Europe and the Pacific, while others were assigned to the Pentagon and other U.S. locations.

The second JAGOCS class was already underway before the first class had graduated (it had started on July 26, 1943 and all future OCS classes were staggered so that a class was always in session). By the time TJAGSA ceased operating in Michigan at the end of January 1946, a total of fifteen JAGOCS classes had graduated, and more than one thousand enlisted Soldiers had been transformed into judge advocates. It had been an overwhelmingly successful episode in military legal education, but given the configuration of today's Army and our Corps, is unlikely to be repeated again.

The Judge Advocate General's School at Fort Myer

(Originally published in the February 2017 edition of *The Army Lawyer*.)

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.



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.

With the end of hostilities in Europe and the Pacific, and the reduced need for judge advocates (JAs) in a rapidly demobilizing Army, TJAGSA closed at the University of Michigan on February 1, 1946.[26]

With the outbreak of the Korean War in June 1950 and the enactment of a new Uniform Code of Military Justice (UMCJ), 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.[27] Almost immediately, the new Judge Advocate General, Major General (MG) Ernest M. "Mike" Brannon,[28] 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 the 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,[29] 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 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.[30]

Major General Brannon asked COL 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. As a result, First Lieutenant (1LT) Joseph B. Kelley, who had served 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.[31]

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

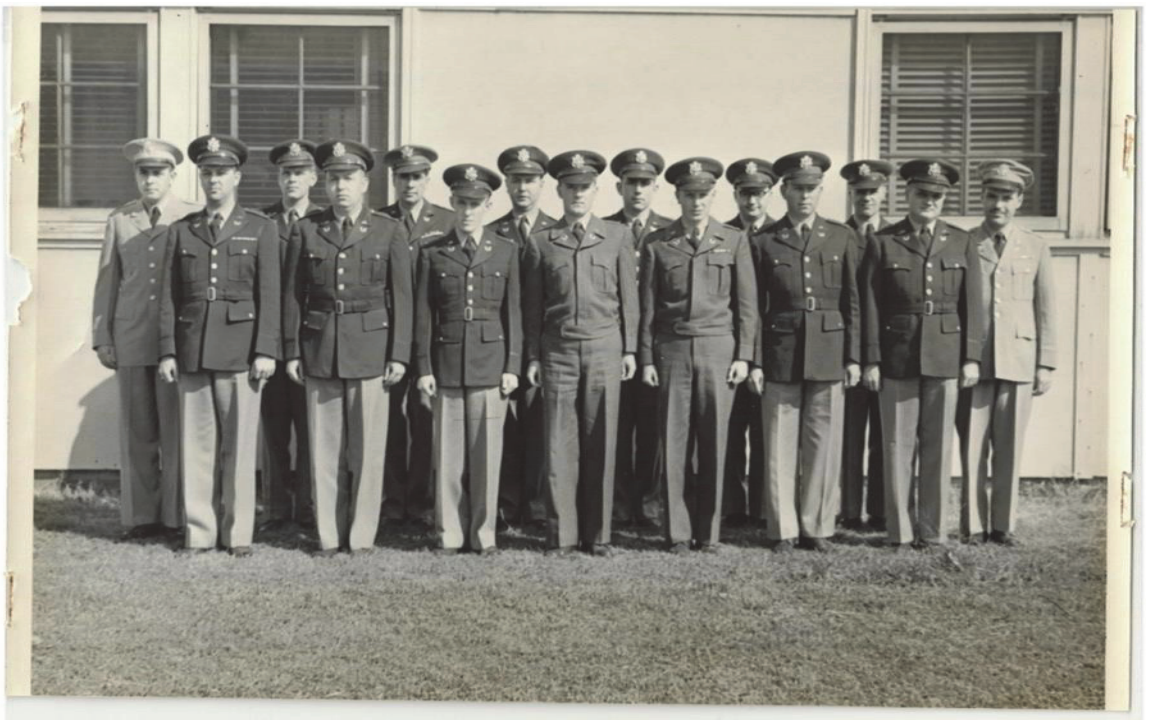
one of these now-empty buildings and converted the first floor from small dormitory rooms into one big classroom for students and offices for faculty. The second floor was used as a Bachelor Officers Quarter (BOQ) for students.[32]

In addition to COL Young as commandant and 1LT Kelley 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.[33]

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.[34]

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.[35]

Ultimately, the Corps accepted an invitation from the University of Virginia (UVA) to move TJAGSA to its 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 the main grounds, 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.[36]



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

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.[37]

The first Regular course at the new TJAGSA, which began on September 11, 1951, was called the Seventh Regular Course.[38] 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."[39] 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.

Military Legal Education in Virginia: The Early Years of The Judge Advocate General's School in Charlottesville

(Originally published in the August 2011 edition of *The Army Lawyer.*)

In August 2011, The Judge Advocate General's School, U.S. Army (TJAGSA), now a principal component of The Judge Advocate General's Legal Center and School (TJAGLCS), celebrated its Diamond Jubilee—sixtieth birthday—in Charlottesville, Virginia. How military legal education came to be in Virginia and what happened in the early years of TJAGSA on the grounds of the University of Virginia (UVA) is important and worth telling.

After the Japanese attack on Pearl Harbor, and the rapid expansion of the Army in the weeks and months that followed America's entry into World War II, the Judge Advocate General's Department (JAGD) recognized that the old way of preparing lawyers for service as judge advocates (JAs) would no longer work; "on the job training" took too long and the hundreds of new lawyers entering the Department had to be ready in the shortest possible time to serve in a variety of locations at home and overseas. These new JAs had to know something about international law, procurement law, the Articles of War, and the practice of courts-martial, as well as the law governing claims for and against the government. These new military lawyers also had to understand military organization and procedures, so that they would be efficient and effective staff officers. The result was the opening of TJAGSA at the University of Michigan in 1942. While the JAGD no doubt would have preferred to keep TJAGSA open at the end of World War II, the rapid de-mobilization of the Army—and the greatly reduced need for lawyers in uniform—led to the school closing in 1946. But not before the value of having a TJAGSA had been proven—since hundreds of lawyers had passed successfully through its classrooms and had been given the specialized education and training needed to serve commanders and soldiers both in garrison and in the field.

In June 1950, North Korean troops attacked U.S. and South Korean forces, and the Judge Advocate General's Corps began recalling Reserve JAs to serve during the rapidly escalating Korean crisis. Since these officers needed a refresher course on military law, the Corps obtained a temporary building at Fort Myer, Virginia, and assigned Colonel (COL) Edward H. "Ham" Young (who had led the school in Michigan) and a handful of Active-Duty JAs to serve as instructors. When TJAGSA reopened on October 2, 1950, the bulk of the teaching at Fort Myer focused on the new Uniform Code of Military Justice (UCMJ), which had been enacted by Congress in 1950 and was scheduled to take effect in 1951. Since the UCMJ was a revolutionary change from the Articles of War that had been in use during World War II—and with which Reserve JAs were familiar—this made sense.

At the same time, recognizing that a permanent TJAGSA was needed—a school that would continue after the crisis on the Korean peninsula ended—Major General (MG) Ernest M. "Mike" Brannon, who had only recently begun serving as The Judge Advocate General (TJAG), directed COL Charles E. "Ted" Decker "to plan for and locate a permanent Judge Advocate General's School."[40] This meant that COL Decker was to propose an organization for the new school as well as find a suitable location.

Organization of the New TJAGSA

Decker and the other members of the "Special Projects Division"[41] ultimately decided that the new TJAGSA should consist of three parts: "a resident school, non-resident school, and a research, planning and publications unit."[42] The concept for the resident school was that it would offer a "basic" or "regular" course of instruction, and an advanced course. All new JAs would attend the regular course and would be given basic instruction in military legal matters. Colonel Decker saw the advanced course lasting a full academic year, and believed that "officers with eight to twelve years of military law practice who had outstanding records" should be invited to attend. Significantly, the advanced course was not for every JA, but only for the best. The concept for the advanced course was that it would be a "thorough and comprehensive 'rounding out' in all military law subjects." Additionally, each student in the advanced course would be required to write a research thesis on some "facet or some phase of military law." The non-resident school would provide instruction to Army Reserve and National Guard JAs not on active duty in two ways: "group schooling for those officers in larger communities, extension courses for the officers in smaller communities." Finally, the research, planning and publication unit would research novel legal questions and disseminate its

questions and disseminate its findings to JAs in the field. It would also prepare all legal texts for Army-wide distribution and publish periodic updates to keep JAs abreast of recent developments in military law. [43]

Location of the New TJAGSA

Finding the right location for the new school was not an easy task, but COL Decker had a number of requirements to guide him. First, it seemed desirable for the school to be located no more than two hundred miles from Washington, D.C. Consequently, while COL Decker and the Special Projects Branch considered locations as far away as Fort Rodman, Maine, and Fort Crockett, Texas, and actually considered renovating an abandoned brewery at Fort Holabird, Maryland, and a former ordnance shop at Fort Benjamin Harrison, Indiana, Decker and his team ultimately concluded that there was no "feasible site" on a military installation.[44]

A second factor—of great importance in the 1950s—was the recognition that the new TJAGSA must have a first-class law library. Colonel Decker in particular noted that if the permanent TJAGSA were located at an existing law school, such a location would provide a law library and "save an enormous sum of money."[45]

By late spring in 1951, the Corps had decided that only two civilian law schools were suitable for a permanent TJAGSA: the University of Tennessee and UVA. It is probable that the latter got the nod for two reasons: first, UVA was less than 125 miles from the Pentagon, and this satisfied the Corps' desire that the new school be geographically close to Washington, D.C. Second, UVA President Colgate W. Darden, Jr., offered the Army a new dormitory (identified as "Building No. 9" but later named "Hancock Hall") that would be ready for occupancy in August 1951. Having been built as a dormitory for more than 100 students, this new structure was large enough to provide office space for TJAGSA faculty and staff as well as housing for Army students who did not desire to live in town.

Additionally, UVA's law school was adding a new wing to its existing building, and UVA offered to lease the Corps classroom space in this new structure. As President Darden wrote to COL Decker on June 19, 1951:

> This will confirm our [telephone] conversation of this morning. Should the Judge Advocate General's Office decide to use the facilities of the University of Virginia in connection with the school which they now have under consideration, I should be glad to recommend to the Board [of Visitors] that Building No. 9, and such space in the Law School as is required for the conduct of classes, be rented to the Army at the price paid by it for like space in other parts of Virginia. Arrangements can be made to have your students receive the medical service now offered students of the University. They will be free to use the restaurants and recreation facilities around the University on the same basis as to the students.[46]

President Darden closed his letter with another incentive to choose UVA: "Maid and janitor service for the occupants of Building No. 9 can be furnished by the University at cost, plus 10% to cover overhead. We can arrange for such furnishings as are desired as soon as we know your needs."[47]

The Army liked this last idea because it eliminated the use of enlisted personnel for maintenance and also reduced the need for a large administrative operation.[48] In any event, the Army accepted UVA's offer, and signed a lease on July 30, 1951. It was a year-to-year tenancy for $46,000 per year.[49] The Army signed its first multi-year lease—for five years—in the summer of 1954. The rent was $53,354 per annum for 36,212 square feet of floor space, joint use of additional rooms and library facilities at UVA's law school in Clark Hall, "and parking space for 30 automobiles."[50]

On August 2, 1951, the Department of the Army announced in General Orders that TJAGSA had been established at UVA and that the school at Fort Myer would close on 25 August.[51] The move to Charlottesville was made by truck on 25 August. As COL Decker later wrote, the move "was completed and all offices were in operation on the afternoon of August 27, 1951. There was no founding ceremony; we just went to work—there was a lot to be done."[52] There were twenty officers on the first day of TJAGSA's operation; a month later, the school had hired fifteen civilian employees. By 1955, the staff and faculty consisted of over seventy officers and civilians. The commandant, faculty and staff offices were in Hancock Hall (known colloquially as "The JAG School"); classes were held in UVA's law school in Clark Hall, which was located across a parking lot from Hancock Hall.[53]

In the early years of TJAGSA, the school consisted of an Executive Office (which handled all administration and supply issues and also served as the registrar's office) and an Academic Department with four teaching divisions: Military Justice, Military Affairs, Civil Affairs and Military Training. Military Justice provided instruction in courts-martial practice, while Military Affairs covered administrative and civil law (except for claims). The Civil Affairs Division taught contract law and claims. As for the Military Training Division, it was responsible for instructing JAs in military courtesy and discipline, staff functions, weapons, and map reading. The first change to this organization occurred in 1953, when the Procurement Law Division was formed from the personnel of the Civil Affairs Division.

Resident Regular and Advanced Courses

When TJAGSA began operating in Charlottesville in 1951, the regular course for all new JAs (about 60 were in each class) was eight weeks long. In early 1952, the instruction was increased to twelve weeks. Then, in early 1954, the Army opened an eight-week special basic leadership course for newly commissioned officers at Fort Benning, Georgia, and JAs began reporting to Benning's Infantry School for this instruction prior to starting the regular course in Charlottesville. But, as newly commissioned Army lawyers had already spent eight weeks at Fort Benning, the JA regular course was reduced to eleven weeks. Today, the Regular course—now called the Basic Course—consists of two weeks at Fort Lee, Virginia, and ten weeks in Charlottesville.[54] After graduating, the new JAs attend the six-week Direct Commissioned Officer Course at Fort Benning before reporting to their first assignments.

As for the advanced course, the number of students attending in the early years of TJAGSA was quite small; a total of 64 JAs attended the first three advanced courses and TJAGSA planned on about 25 JAs per advanced class in the mid-1950s. The seven month long course (1360 hours in the early 1950s) covered international law, procurement law, military justice, military affairs (today's administrative and civil law), claims, legal assistance, lands, and comparative law. Instruction was chiefly "through the use of seminar, panel, problem and other methods of group instruction."[55] The first non-Army JAs to attend the Advanced Course were naval officers, who joined the 4th Advanced Course in 1955. A naval officer, Lieutenant Commander (LCDR) Owen Cedarburg, was also the first non-Army faculty member.[56] The advanced course, renamed the Career Course in 1960[57] and the Graduate Course in the 1970s, continues to be the jewel in the crown of military legal education, especially since its graduates now earn an LL.M.[58]

Non Resident Instruction

The Non-Resident Schools Division had two branches: the Text Preparation Branch and the Extension and U.S. Army Reserve (USAR) School Operating Branch. Initially, it had five officers and six civilians; by 1955, the branch had grown to thirteen officers and twelve civilians.

In addition to preparing texts for "extension courses" for non-active-duty JAs, the division operated a USAR non-resident school basic course. Students enrolled in the program took extension courses created by the Text Preparation Branch and then completed the USAR basic course by attending a "USAR summer school encampment" run by each of the six continental armies.[59] Reserve JA instructors (trained at TJAGSA) presented legal instruction.[60]

Short Courses

The first "short course" at TJAGSA was the contract termination law course, which was first conducted in August 1953. The impetus for this course came with the end of the Korean War, when the "tapering-off of certain procurement activities" meant that many contracts needed to be terminated for the convenience of the government. Judge advocates and lawyers at other federal agencies needed special instruction in this area—and TJAGSA rose to the occasion by creating a short course. A three-week procurement law course followed in 1954. Over the years, hundreds of different short courses have been offered in Charlottesville, and today the school provides some 6000 students a year with "continuing legal education."

Research, Planning and Publications

The intent of the Research, Planning and Publications Division was to provide adequate research tools for JAs. As the UCMJ had just gone into effect, Army lawyers in the field needed help in deciphering the more "foggy areas" of the new code. The creation of a new civilian appellate court—the Court of Military Appeals—meant that the division had to collect and analyze opinions being handed down by the court. The division also was busy

producing 16-milimeter black-and-white training films, including "Uniform Code of Military Justice," "Non-Judicial Punishment," "The Investigating Officer," "The General Court-Martial," "The Special Court-Martial," and "The Summary Court-Martial."[61]

Annual Conference

Starting in 1952, TJAGSA began hosting an annual conference for senior JAs, with attendance averaging between 100 and 120. Interestingly, the Research, Planning, and Publications Division (which ran the conference) solicited JAs in the field to advise it of legal topics that they wanted covered at the conference and, after getting input from the field, scheduled those subjects that were the most requested. Except for 2001, when the conference was cancelled in the aftermath of the 9/11 attacks,[62] the Corps has continued to hold an annual gathering of senior JA leaders in Charlottesville. Today, the conference is called the "World Wide Continuing Legal Education Conference" and is held during September every year.[63]

Court-Reporter Training

The school also took the first step in enlisted education when it began training Corps enlisted personnel in modern electronic court reporting. The first class was held in January 1955 and "consisted of 18 enlisted men, representing 16 general court-martial jurisdictions in the continental United States." Those who completed the six-week course could take down court-martial proceedings "at more than 200 words per minute" using the electronic recorder-producer device equipped with a steno mask. They also could "prepare and assemble records [of trial] in a minimum of time."[64]

Court reporter training remained at TJAGSA until November 1959, when the course was transferred to the Naval Justice School in Newport, Rhode Island. It returned to Charlottesville in January 2000. Today, TJAGSA does initial court reporter training for court reporters in both the Army and Air Force.

When he completed his tour as TJAGSA's first commandant on June 15, 1955, COL Decker noted that the American Bar Association (ABA) had been enthusiastic in supporting Army legal education in Charlottesville, and that an ABA inspection of the school revealed that new JAs "came, on average, from the upper fifteen percent of their classes in law school and that roughly six to ten percent had stood first [in their class] or had been law journal editors."[65] Not surprisingly, the ABA's House of Delegates approved accreditation for TJAGSA on February 22, 1955. In COL Decker's opinion, this date was only fitting, as it was the anniversary of George Washington's birthday—and it was Washington who had been on the first committee to draw up Articles of War for the Army and, as Continental Army commander, had petitioned Congress to appoint the first Army Judge Advocate in 1775.[66]

Today, TJAGSA remains in Charlottesville, albeit as part of a larger TJAGLCS. Additionally, military legal education at UVA now includes warrant officer legal administrators and noncommissioned officer paralegals. Despite the many changes, what COL Decker and the Special Projects Division started sixty years ago remains: the oldest and the only ABA-accredited military law school in the world.

From Advanced Course to Career Course to Advanced Course (Again) to Graduate Course

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On October 11, 1952, nineteen Army lawyers began attending classes at The Judge Advocate General's School (TJAGSA) as part of the first Advanced Course.[67] This was a radical development in military legal education, as it was the first time in history that any service had established a program of instruction that would go beyond the basics of military law. More than sixty years later, as the members of the 62d Graduate Class complete their studies, it is time to take a brief look at the history of the Advanced Course and its evolution from a 32-week long program for 19 career Army judge advocates to today's 41-week long Graduate Course for 118 uniformed lawyers from the Army, Navy, Air Force, Marine Corps, and Coast Guard as well as four international military students.

The impetus for the Advanced Course was the recognition that the Corps did not have any education and training for those judge advocates that elected to remain in the Army for a career.[68] The Judge Advocate General's School, which had re-opened in 1950 with the start of the Korean War, had an eight-week Regular Course (now called the Judge Advocate Officer Basic Course) for new Army lawyers. But that course was devoted almost exclusively to courts-martial practice—which made sense given that the bread-and-butter of the Army lawyer in the 1950s was military justice. As for other legal disciplines—contract and procurement law, administrative and civil law, legal assistance, international law and the like—judge advocates generally learned "on-the-job" (OJT).[69]

This *ad hoc* nature of OJT education for career Judge Advocates, however, could not ensure that when members of the Corps advanced in rank and began to assume duties as staff judge advocates, they were prepared for the various legal issues that might arise at a post, camp, or station. Recognizing this shortcoming in the education of Army lawyers, Colonel (COL) Charles L. "Ted" Decker, TJAGSA's commandant, proposed that an Advanced Course be added to the curriculum. A small number of career-oriented judge advocates would be selected to come to Charlottesville for an academic year of graduate-level legal education, where they would have "the opportunity and incentive to engage in scholarly research" and further their "intellectual development."[70] The proposed course would provide "for a thorough and detailed study . . . [of] all aspects of the specialized field of military law." The end result? A graduate of the Advanced Course would be able to provide significant contributions to the future development of military law while being better prepared to assume more senior leadership positions in the Corps.

The first Advanced Course consisted of nineteen student officers: one colonel, three lieutenant colonels (LTCs), ten majors (MAJs), and five captains (CPTs). When the class graduated on May 25, 1953, its Honor Graduate was MAJ Bruce C. Babbitt.[71] Given its focus on developing staff judge advocates, the second and third Advanced Courses likewise consisted of relatively senior officers. There were eight lieutenant colonels out of twenty-three students in the second Course (which graduated on May 21, 1954), and seven lieutenant colonels out of twenty-two students in the third Course (which graduated on May 27, 1955).[72]

In 1955, the Advanced Course underwent a transformation when, for the first time, Navy officers were assigned as students. Since the Navy did not yet have a Judge Advocate General's Corps, the four Navy commanders (lieutenant colonel equivalents) who attended the Fourth Advanced Course were known as legal specialists, not judge advocates.[73]

That same year, TJAGSA also reached a milestone when the American Bar Association (ABA) reported that the curriculum of the Regular and Advanced Courses made TJAGSA "the outstanding specialist graduate law school in the nation." The ABA concluded that TJAGSA, having "attained an excellence unsurpassed by the programs of any other school," had earned "provisional accreditation." Full approval as a law school was granted on February 25, 1958, with the Advanced Course "fully approved . . . as a graduate program in law."[74] As a result, TJAGSA became the first—and is still the only—ABA-accredited military law school in the United States.

In August 1956, beginning with the Fifth Advanced Course, instruction was increased from 32 to 35 weeks, and the number of hours of instruction was increased from 1405 to 1556. According to the

Commandant's *Annual Report*, this "enabled the School to provide more academic time for the student thesis program."[75] By the end of the 1950s, every student was required to write a thesis, and about 300 hours of scheduled time was allotted for preparation and oral presentation of each student's thesis. These three additional weeks also provided more time for "LOGEX" instruction and participation—LOGEX being "a command post exercise" that focused on logistical issues arising under simulated field conditions.[76]

In the late 1950s, the curriculum of the Advanced Course underwent periodic revision—but any changes were "grounded upon the premise that the objective of the [Course] was and continues to be to provide leaders for the military legal profession."[77] In 1959, for example, the Advanced Course added twelve hours of instruction on jurisprudence, eight hours of instruction on military psychiatry, and nine hours of instruction on navigable waters. These additions required a corresponding reduction in the amount of time devoted to civil emergencies and military justice instruction.[78]

A final note about the Advanced Course in the 1950s: foreign military officers joined the Advanced Course for the first time, with LTC Eladio G. Samson, Philippine Army, attending the Sixth Advanced Course and Major Win Phe, Burmese Army, attending the Seventh Advanced Course. By the end of the 1950s, a total of three Burmese and three Filipino officers had attended the Advanced Course.

With the start of a new decade, the Advanced Course "was redesignated, by the Continental Army Command, as the Judge Advocate Officer Career Course."[79] This name change seems to have been more form than substance, as the curriculum remained very similar in content. According to the 1962 *Annual Report of the Commandant*, the thirty-four-week course "thoroughly immersed" the student in legal history, jurisprudence, admiralty, military justice, military administrative law, procurement law, international law, comparative law, claims, civil affairs, legal assistance, military reservations, military training and counterinsurgency. Additionally, each career class student was required to write a thesis on a "significant problem area in military law."[80] Topics included: "Legality of Orders," "Water Rights on Military Reservations," "Powers and Duties of Sentencing and Sentence Reviewing Authorities," and "Dishonorable Failure to Pay Debts."[81]

Students in seminar, 11th Career Course (1962–63)

The Corps made history once again with the Twelfth Career Course, which began on September 3, 1963. This is because, for the first time, there were two female Army judge advocates in attendance: MAJ Ann Wansley and MAJ Mary L. Attaya. Class size was still relatively small (by today's standards), with twenty-six Army lawyers (including Wansley and Attaya) and two Navy legal specialists. The number of foreign lawyers, however, had greatly increased: two judge advocates from Turkey, one from the Philippines, and one from Thailand.[82]

By this time, the Advanced Course was configured in the two-semester framework familiar to judge advocates today. In the first semester, the four teaching departments—Military Justice, Military Affairs (today's Administrative and Civil Law), Procurement Law, and International and Comparative Law—were assigned a period of time in which that division taught its material and then administered a four-hour final examination at the end of its instruction. During the second semester, the students spent the first month concentrating on researching and writing their theses. They also attended four seminars twice a week. The following elective-type seminars were offered to the students in the class:

- Commander's Problems in Installation Administration
- Constitutional Law and the Armed Forces
- Research in Foreign and Comparative Law
- Problem Areas in International Relations
- Legal Control of International Conflict
- The Right to Counsel
- Model Penal Code and the UCMJ
- Wiretapping and Electronic Eavesdropping
- The Effect of Sovereignty on Government Contracts
- Factors Affecting Competition in Government

- Procurement
- Government Contract Administration[83]

Finally, the students in the class took several field trips during their year at TJAGSA. There was a trip to the Army's Engineer School, then located at Fort Belvoir, Virginia, for the purpose of getting instruction in mine warfare and nuclear weapons.[84] The class also travelled to Washington, D.C., where fifteen of the students were admitted to the U.S. Supreme Court on motion of then—COL George S. Prugh, who was serving as the Executive, Office of The Judge Advocate General.[85]

Army, Navy, and Marine Corps students, 13th Career Course (1964–65)

In 1966, the Career Course changed its name—back to the Advanced Course—and the Fifteenth Advanced Course began on September 6, 1966.[86] The goal of the course—still thirty-four weeks long—was the same: to "deepen and broaden a philosophical appreciation of the role of law in its application to all phases of military life and to prepare the officer student to render legal services to higher commanders."[87] The course consisted of twenty-eight students: twenty-five Army judge advocates, one Navy law specialist, and two Marine Corps legal specialists. Two students who would later reach flag rank were in this class: CPT William K. Suter, who would later wear two stars and serve as Acting The Judge Advocate General from 1989 to 1991 before becoming the Clerk of the U.S. Supreme Court, and CPT Dulaney L. O'Roark, Jr., who briefly served as TJAGSA's commandant before being promoted to brigadier general in 1985.

In keeping with the times, as the Army began deploying personnel to Southeast Asia, there was a new course offering called "legal aspects of counterinsurgency." The students took a field trip to Fort Bragg, North Carolina, where they attended "Exercise Blue Chip" and saw a demonstration of weapons, tactics, and equipment.[89]

In the late 1960s and early 1970s, as American involvement in the Vietnam war increased and opposition to the war grew in U.S. society, the desire of many Americans to enter the Army—much less the JAG Corps—decreased markedly. This explains, at least in part, why the Advanced Course was relatively small: the Corps was not retaining officers who were interested in staying on active duty and receiving advanced legal education. But a bigger issue, as explained by COL (Ret.) John Jay Douglass,[90] was that there was little incentive for judge advocates to attend the Advanced Course. First, attendance was not a requirement for promotion, much less being selected for a particular assignment and, in any event, those who did not wish to attend in residence could complete the Advanced Course by correspondence.

Second, Charlottesville was not considered to be a good duty assignment—at least for an academic year. There was no commissary or post exchange in the area and, in this era of relatively small pay checks for officers, this was a significant issue. Finally, there was the feeling that going to the Advanced Course to study law and engage in academic discourse was a waste of time for a career Army lawyer—time that could be better spent in the field doing legal work. There was a reasonable basis for this view, since many senior leaders in the Corps had never attended the Advanced Course—Major Generals (MGs) Kenneth Hodson (TJAG from 1967 to 1971), George Prugh (TJAG from 1971 to 1975), and Wilton B. Persons (TJAG from 1971 to 1975). Prugh and Persons had not even attended a basic course.

Colonel Douglass, who served as TJAGSA Commandant from 1970 to 1974, was determined to enhance the prestige of the Advanced Course—and increase the number of students attending it. To this end, Douglass began soliciting younger judge advocates to come to Charlottesville to attend the course, which worked to some degree, but increased numbers only incrementally. Douglass also added some new features to the course. The students in the Nineteenth Advanced Course, for example, which was now thirty-six weeks in length, holding its first class on August 31, 1970, conducted a three-day field

trip to the United Nations in New York City. The thirty-eight students in the class, which included military lawyers from Ethiopia, Iran, and South Vietnam, "received detailed briefings from both United States, United Nations, and foreign diplomats and legal advisors, including talks by Arab and Israeli representatives on the Middle East situation."[91] Since the upheaval resulting from the overwhelming Israeli victory in the Six Day War (June 1967) was still very much in the news, this focus on the Middle East should come as no surprise.

The Nineteenth Class also traveled by military aircraft to Fort Riley and Fort Leavenworth, Kansas. They toured the Correctional Training Facility at Riley and the U.S. Disciplinary Barracks at Fort Leavenworth, and were also given a tour and briefing at the Command and General Staff College in Kansas.[92] Similar field trips occurred for the next several years, as well. Understandably, Advanced Course attendance became more attractive in nature.

By the late 1970s, the Advanced Course consisted of between fifty and sixty students from the Army, Navy, and Marine Corps. According to the *Annual Bulletin 1977–1978*, "all students are attorneys with four to eight years of experience as practitioners" and selection to attend the course was "competitive"—at least for the Army judge advocates, who were selected by a board of officers convened by The Judge Advocate General of the Army."[93]

The 26th Advanced Course, for example, which began in August 1977 and ran forty-one weeks in length, consisted of core courses in the first semester and electives in the second semester. Each student was required to take "at least fourteen electives ranging from Law of the Sea to Legal Assistance."[94] The thesis was no longer required, but a student could write a "research paper" in lieu of six electives, provided that the paper was suitable for publication and on "a legal topic acceptable to the School's writing committee."[95] Another option was to substitute electives offered by TJAGSA with "graduate courses at the University of Virginia Law School."[96] These changes in the Advanced Course curriculum, however, had not altered the goal of the course—preparing "lawyers for duties as staff judge advocates and legal advisors at all levels."[97]

The fifty-seven students who completed the 26th Advanced Class, including officers from Ghana, the Republic of China (Taiwan), and Zaire, were the last to complete an advanced course, as the program was renamed the Graduate Course in 1978. The decision to re-designate the program was made by then Commandant COL Barney L. Brannon, who served in that position from 1976 to 1979. Regardless of the name of the course, however, the fundamentals remained the same.

By the mid-1980s, the option not to attend the Graduate Course by completing it by correspondence was no longer available, and every judge advocate who desired to make the Corps a career was required to attend the Graduate Course. The *Annual Bulletin 1984–1985* describes the course as consisting "of between 75 and 85 students selected from the Army, Navy and Marine Corps."[98] The course, now forty-two weeks long, "was conducted over a two-semester academic year."[99] The first semester was a core curriculum of "criminal law, administrative and civil law, international law, contract law, military subjects, and communications."[100] Students were required to take electives in the second semester.[101]

A major development in the history of the Advanced/Career/Graduate Course occurred in 1988, when Congress enacted legislation authorizing TJAGSA to award a "Masters of Law" in military law. This degree first went to the 36th Graduate Course, when its members graduated in May 1988. Captain Elyce Santerre, who had the highest overall academic standing in the class, was the first to walk across the stage and consequently was the first judge advocate to be awarded the LL.M.[102]

In the 1990s and the 2000s, the curriculum of the Graduate Course changed—with some courses deleted and others added—depending on changes in the law and the needs of the Army. The course also now operates on the quarter system and, while the bulk of the core curriculum is taught during the first two quarters, electives are now offered in the second quarter. Another major development over the past twenty years has been the presence of Air Force judge advocates in the Graduate Course, with the first Air Force attorney, Captain Bruce T. Smith, attending the 39th Graduate Course in 1990. Since that time, there have been Air Force officers in every Graduate Class.

The latest Graduate Course—the 62d—which began on August 12, 2013, had 114 uniformed judge advocates: seventy-seven active Army, five Army Reserve, two Army National Guard, ten Air Force, fifteen Marine Corps, four Navy, and one Coast Guard. Four international law students, from Egypt, Israel, Korea, and Turkey, rounded out the class of 118. As with the 61st Graduate Course, the size of the class required that it be divided into two parts

(Sections A & B). One section receives its core instruction in the morning, with the other section being taught the same material in the afternoon.

While the content of the instruction remains similar to that delivered to earlier Advanced, Career, and Graduate Courses, the method of delivering this instruction is remarkably different, given the prevalence of information technology in the class room. For example, while the Graduate Classes in the 1990s were taught from paper outlines, today's students have their instructional materials delivered to them electronically via Blackboard.

The 62d Graduate Course also continued the now traditional trip to the U.S. Supreme Court, where those who so desired were admitted to the Court. While a trip to New York City or Kansas is no longer part of the curriculum, the students of the 62d Graduate Course did travel to Gettysburg, Pennsylvania, for a two-day staff ride that focused on leadership issues during the Battle of Gettysburg—an event inaugurated in the 54th Graduate Class in April 2006.

When the 62d Graduate Course graduated on May 22, 2014, its members returned to the field and other judge advocate assignments better educated in military law and better prepared to be future leaders. Consequently, while much has changed in the manner in which advanced legal education is taught at The Judge Advocate General's Legal Center and School over the years, the fundamental purpose of that education remains the same.

The Story Behind the Master of Laws in Military Law

(Originally published in August 2010 edition of *The Army Lawyer.*)

Every year in May, career military officers who have successfully completed the Graduate Course at The Judge Advocate General's School, U.S. Army (TJAGSA),[103] are awarded a Master of Laws (LL.M.) in Military Law. This unique LL.M.—no other law school in the world awards such a degree—from the world's only American Bar Association–accredited military law school has been conferred since 1988. But the story behind that degree—how and why it came to be—is not well known.

In 1951, TJAGSA moved from Fort Myer, Virginia to the grounds of the University of Virginia (UVA) in Charlottesville. From the outset, the School's first Commandant, then-Colonel (COL) Charles L. "Ted" Decker, understood that TJAGSA's affiliation with UVA meant that the Army's curriculum must achieve the standard of legal education set by the American Bar Association (ABA). As a result of the caliber of its students, its rigorous academic curriculum, and Decker's personal efforts, TJAGSA became the first and only military law school in American history to receive accreditation from the ABA, in February 1955.

A year later, in March 1956, "action was initiated to obtain statutory authority . . . to confer the Master of Laws degree for successful completion of the Advanced Program."[104] Legislation drafted by the Office of The Judge Advocate General (OTJAG) was sent to Congress in late 1956 but was not enacted.

The Corps, however, did not give up its desire for an LL.M. at TJAGSA, and this explains why, in February 1958, the School sought—and obtained—ABA approval for TJAGSA's 42-week-long Advanced Course as a graduate law program. While the ABA stamp of approval and ABA accreditation of the Advanced Course put it on par with UVA's graduate law program, in fact, the Corps believed that ABA accreditation would enhance its chances of obtaining statutory authority from Congress to grant an LL.M. degree.

Despite lack of progress toward obtaining authority to grant the degree, the JAG Corps did not drop its wish for the LL.M. in the 1960s and 1970s. On the contrary, COL Kenneth Crawford, who served as Commandant from 1967 to 1970, routinely lobbied his counterparts at UVA's law school for their support for a Masters of Laws degree—but these efforts came to naught. Colonel John Jay Douglass, who followed Crawford as TJAGSA Commandant, tried a different approach. In November 1971, Douglass wrote to Edgar F. Shannon, then serving as UVA's president, and requested that the university work with TJAGSA to create a "program . . . whereby students in the Judge Advocate Officer Advanced Course could earn an advanced degree conferred by the University of Virginia."[105] While correspondence from Shannon to Douglass proves that UVA carried out "preliminary discussions" with the JAG Corps on the possibility of a UVA-granted LL.M., nothing happened.

It took another fifteen years before TJAGSA gained the right to award a graduate legal degree. This ultimately successful effort was spearheaded by then Lieutenant Colonel (LTC) David E. Graham, head of TJAGSA's International Law Division—at the urging of the Commandant, COL Paul "Jack" Rice and Major General (MG) William K. Suter, The Assistant Judge Advocate General.

The first step toward obtaining accreditation for the degree involved winning the support of the Army and the the Defense Department for an LL.M. Building on work started in January 1986 by then-LTC Daniel E. Taylor, Graham's predecessor in the International Law Division at TJAGSA, Graham modeled the JAG Corps's bid to obtain an LL.M. on an initiative the Defense Intelligence School (DIS) used to win authority to award a graduate degree in strategic intelligence.[106] Graham assembled a packet for TJAGSA's LL.M. that included proposed legislation and coordinated his efforts with a variety of interested parties. Then, in November 1986, Graham obtained approval from Mr. Delbert Spurlock, a former Army General Counsel who was then working as the Assistant Secretary of the Army (Manpower and Reserve Affairs). Approval from the Office of the Assistant Secretary of Defense (Military Manpower and Personnel Policy) followed—no doubt helped by the fact that an Army judge advocate, COL Fred K. Green, was assigned to that office at the time.

The next step was to gain the Secretary of Education's approval for the degree. United States law requires that any federal agency wishing to

obtain degree-granting status must obtain a positive recommendation from the Department of Education before it may forward any proposed legislation to Congress.

On December 1, 1986, COL Rice and U.S. Court of Military Appeals Chief Judge Robinson Everett (representing the ABA) appeared before the Education Department's National Advisory Committee on Accreditation and Institutional Eligibility. They showed a five-minute film about TJAGSA—developed by Graham with assistance from Mr. Dennis L. Mills in TJAGSA's media services branch—and delivered a forty-minute presentation explaining why the School wanted the authority to award an LL.M. In his prepared remarks, Rice emphasized the Army's belief that "the existence of a graduate degree program . . . will prove to be *an invaluable* asset in retaining the *best* qualified and most *highly* motivated individuals as career military attorneys."[107] He also stressed that the uniqueness of TJAGSA's curriculum meant "the graduate degree we propose to grant [a Master of Laws in Military Law] cannot be obtained at other non-Federal educational institutions."

The accreditation review committee voted 15-0 in favor of TJAGSA's LL.M. proposal, and Secretary of Education William J. Bennett concurred on March 18, 1987. The next step was to introduce legislation in both the House and the Senate. On March 23, 1987, Representative Les Aspin introduced H.R. 1748, which contained legislation giving the "Commandant of the Judge Advocate General's School of the Army . . . upon recommendation of the faculty of such school" the power to "confer the degree of master of laws (LL.M.) in military law." Identical legislation was introduced in the Senate and, on December 3, 1987, Congress enacted Public Law 100-180, giving TJAGSA's Commandant the authority to award the LL.M.[108]

The first judge advocates to be awarded the LL.M. were the members of the 36th Graduate Course, who graduated in May 1988. The first recipient of the LL.M. was Captain (CPT) Elyse K. Santerre who, having finished first in the class was the first to walk across the stage at graduation and the first to be handed the new LL.M. diploma.

Probably the thorniest issue raised in the aftermath of the successful LL.M. initiative was retroactivity: Should past graduates of the Advanced and Graduate Courses—especially those in the 35th Graduate Class whose curriculum was used as the basis for the LL.M. legislative package—be retroactively awarded the LL.M? While the legislation enacted by Congress was silent on the issue of retroactivity, the ABA had no doubts in the matter: The answer was no, an opinion to which The Judge Advocate General, MG Hugh Overholt, reluctantly acceded.

Today, the Commandant, TJAGLCS continues to award the LL.M. to those career military attorneys who successfully complete the Graduate Course—and it continues to be a truly unique degree.

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Legal Education for Commanders

(Originally published in the December 2013 edition of *The Army Lawyer.*)

Any judge advocate advising a general court-martial convening authority soon learns that this commander has attended the one-day General Officer Legal Orientation (GOLO) Course held at The Judge Advocate General's Legal Center and School (TJAGLCS). Similarly, any Army lawyer advising a brigade commander knows that most of these men and women have been students in the Senior Officer Legal Orientation (SOLO) Course conducted at TJAGLCS. How the GOLO and SOLO courses originated, and why this legal education for Army commanders continues to be important for the Corps and the Army, is a story worth telling.

As the war in Vietnam ended and the Army re-organized, Major General (MG) George S. Prugh, who had become The Judge Advocate General (TJAG) in July 1971, looked for ways to increase the visibility of the Corps. For Prugh, this was especially important because judge advocates were not popular with commanders. Rightly or wrongly, they were seen as "naysayers" who did not support the mission, but instead seemed more interested in telling commanders what they could not do. Prugh called this a "Crisis in Credibility" and he tasked Colonel (COL) John Jay Douglass, who had been the Commandant at The Judge Advocate General's School (TJAGSA) since June 1970, "to look at the problem and come up with a solution;"[109] or, as COL Douglass put it in a recent interview: "Commanders were very negative about lawyers and Prugh wanted us to be more loved."[110]

Douglass decided that one way to achieve Prugh's goal of improving the image of judge advocates in the Army would be to create a legal education program for lieutenant colonels and colonels about to assume duties as special court-martial (SPCM) convening authorities, and brigadier generals and major generals programmed to serve as general court-martial (GCM) convening authorities.

At that time in Army history, it was not unusual for officers to reach the rank of colonel and higher without having anything other than brief (and informal) contact with a uniformed lawyer. This was because the Uniform Code of Military Justice (UCMJ) did not require any judge advocate involvement at SPCMs until 1969, which meant that an Army one- or two-star general assuming duties as a GCM convening authority for the first time in the early 1970s, having been a battalion and brigade commander in the 1960s, had handled virtually all military justice matters without the assistance of an Army lawyer. Additionally, since a division in the 1960s was authorized only five judge advocates,[111] all of whom focused their efforts on delivering legal services to the GCM convening authority, uniformed lawyers simply did not have much contact with brigade or battalion commanders or their staffs, much less provide legal advice to them.

Colonel Douglass saw that it would be helpful to these newly promoted brigadier and major generals—about to fulfill duties as GCM convening authorities—if they were given a two-day program of instruction at TJAGSA. He also saw that it would be helpful if lieutenant colonels and colonels about to assume duties as SPCM convening authorities likewise had a similar course of instruction.

Apparently, the GOLO program was established first. Douglass's idea was that general officers assuming duties as GCM convening authorities not only would receive education on the newly enacted Military Justice Act of 1968, which had greatly altered the UCMJ,[112] but also be briefed on administrative and contract law issues that might arise while they were in command.[113] As retired TJAG Hugh R. Overholt, who was then serving at The Judge Advocate General's School, U.S. Army (TJAGSA) as a lieutenant colonel and the Chief, Criminal Law Division, remembers it, the focus was on areas where "GOs [General Officers] had gotten into trouble," such as the Anti-Deficiency Act.[114] One high-profile case that Overholt remembered being discussed in the GOLO involved Quartermaster Corps officials at Fort Lee, Virginia. In the late 1950s, after being denied military construction program funds, senior leaders on that installation had constructed an airstrip "using funds appropriated for operation and maintenance and labor of troops." This illegal construction project had been uncovered and House Hearings held into the matter had harshly criticized Major General Alfred B. Denniston and other Army officers at Fort Lee for having "willfully violated the law of the land."[115] After the Fort Lee airfield fiasco, no senior commander wanted to run afoul of the Anti- Deficiency Act, much less be called to testify before the House of Representatives for fiscal wrongdoing.

Today, the GOLO continues to be an important part of the curriculum at TJAGLCS. The Department of the Army's General Officer Management Office notifies TJAGLCS when it has a general officer (including a colonel selected for promotion to brigadier general) who is either deploying as an individual or is going to a unit where she will serve as a GCMCA. These men and women then come to Charlottesville for a one-day GOLO.

During their day-long visit to Charlottesville, each officer receives briefings tailored to his particular needs based on his orders and upcoming assignment. For example, when Brigadier General (BG) Maria R. Gervais, the new Deputy Commanding General, U.S. Army Cadet Command, came for her GOLO, she received briefings on sexual harassment, the proper handling of sex assault allegations and cases, administrative investigations, standards of conduct, fiscal law, unlawful command influence, improper relationships and fraternization, non- judicial punishment, government contracting, adverse administrative actions, and the law of federal employment.[116]

Within months of initiating the GOLO course of instruction, Douglass began putting together the SOLO program. The idea was to teach "senior non-JAG officers at the special court-martial level [about] the legal problems they [would] face with suggested solutions."[117] After the TJAGSA faculty put together a program of instruction, selected faculty members took the classes "on the road to Fort Sill [Oklahoma] and Fort Lewis [Washington] as field tests for courses to be presented in Charlottesville."[118]

After receiving positive feedback from these two "road shows," COL Douglass and Lieutenant Colonel (LTC) David A. Fontanella, the Chief, Civil Law Division, flew in Fontanella's private airplane to Carlisle Barracks, Pennsylvania, for a meeting with the Army War College (AWC) commandant.[119] After Douglass and Fontanella explained what the SOLO course was and how it could enhance the educational experience of AWC students, the commandant agreed to have TJAGSA faculty travel to Carlisle Barracks to present the SOLO course. The first course was conducted in May 1972, and the second in April 1973. Senior Officer Legal Orientation instruction was also conducted in the field. Courses were held at Fort Sill in December 1971, Fort Hood in March 1972, and Fort Lewis in April 1972; these were not "road shows," but the full SOLO program of instruction.[120]

The goal, however, was to have the program of instruction done exclusively at TJAGSA, and the *first* three-day SOLO course *held in Charlottesville* was on November 15–17, 1971; the second SOLO class at TJAGSA was held March 6–8, 1972.[121] Instruction in the field ceased shortly thereafter.

The first course offered at TJAGSA in 1971 was described as follows:

> A three-day course for commanding officers in the grade of Lieutenant Colonel and above designed to acquaint these senior commanders with legal problems they are likely to encounter in the areas of both criminal and civil law. Civil law instruction will include installation management, labor-management relations, military personnel law, nonappropriated funds, investigations, legal assistance and claims and litigation. Criminal law instruction will include options available to commanders, search and seizure, confessions and convening authorities' duties before and after trial. The course will be presented using seminar techniques, and outlines and textual material suitable for future use will be utilized. Staff Judge Advocates are urged to make this course availability and utility known to commanders they serve and advise.[122]

More than forty years later, very little has changed about the SOLO, in the sense that the course continues to be designed for lieutenant colonels and colonels going into assignments where they will perform duties as special court-martial convening authorities. The SOLO course is four-and-one-half days long and is held four times a year (March, June, August, and November). In the 229th SOLO course held at TJAGLCS from 4 to 8 November 2013, the students received instruction on more than twenty subjects, including: fiscal law; consumer law; improper superior/subordinate relationships and fraternization; the commander's role in military justice and unlawful command influence; handling sexual harassment complaints; sexual assault investigations and cases; administrative investigations, nonjudicial punishment and summary courts; means and methods of warfare; the law of federal employment; and military personnel law.[123]

So, have the GOLO and SOLO courses achieved their goals? As COL Douglass might ask, do commanders in the Army "love" judge advocates more today as a result of these two legal education programs? This is difficult to know, but it is certainly correct to say that commanders appreciate what Army lawyers bring to a command and routinely seek out judge advocates for advice and counsel. In any event, given the demonstrated success of GOLO and SOLO for more than forty years, there is no doubt that the programs of instruction will continue. This is particularly true given today's increasingly complex legal issues facing commanders deployed overseas or in garrison at home or abroad.

In fact, the GOLO and SOLO courses so impressed Sergeant Major of the Army (SMA) Raymond F. Chandler III that he requested that TJAGLCS establish a legal education course for senior Army non-commissioned officers. Lieutenant General (LTG) Dana K. Chipman, then serving as TJAG, supported this request and the result was a new course: the Command Sergeant Major Legal Orientation (CSMLO).[124] It seems that senior leaders at all levels in the Army have a desire for legal education—which Army judge advocates will be more than willing to deliver.

A History of *The Army Lawyer*

(Originally published in the January 2015 edition of *The Army Lawyer.*)

When The Judge Advocate General's School (TJAGSA) opened in Charlottesville in 1951, and the first Advanced Class (today's Graduate Class) arrived later that year, it was only natural that the faculty would look for ways to enhance legal research and writing. As a result, the *Military Law Review* began publishing in 1958 and, for more than fifty-five years now, that legal periodical has contained in-depth, comprehensive, analytical articles akin to those published in other law school journals in the United States.

The Army Lawyer, which began publishing in August 1971, originated for very different reasons and, with this 500th issue, it is now appropriate to examine its history and its impact on our Corps. This *Lore of the Corps* looks first at the origins of *The Army Lawyer*. It then looks the evolution of the monthly periodical from the 1970s to the present, and identifies some of the men and women who have edited, formatted, and produced it through the years. Finally, this article offers some thoughts on the future of *The Army Lawyer*.

The first issue of *The Army Lawyer* announced why it was being created as "a monthly publication" of TJAGSA:

> Its purpose is to provide practical, how-to-do-it information to Army lawyers. Thus, *The Army Lawyer* will fill the gap between the *Judge Advocate Legal Service*[125] and the *Military Law Review*, and at the same time consolidate other publications in a single, convenient source. *The Army Lawyer* replaces, in part, the Procurement Legal Service, the *Legal Assistance Bulletin*, the *PP&TO Newsletter*, the *Claims Administrative Newsletters*, and the non-case materials of JALS, except those of interest to reservists and those which must have immediate distribution to the field.[126]

In short, *The Army Lawyer* was going to be practical and informative, and it was going to consolidate the many existing newsletters produced throughout the Corps so that judge advocates would need look only at one source for the latest best legal practices. In fact, this first issue announced that future issues would contain "comments on recent developments in the law and provide a forum for short articles from the field." It would also "carry items of current general interest to Army lawyers."[127]

But there was more to *The Army Lawyer*'s origins than what appeared in the printed text of Volume 1, Number 1. As Colonel (COL) (Ret.) John Jay Douglass remembers, there were a number of other important reasons to create a monthly legal periodical—the chief one being that no one in the Corps really knew what TJAGSA had to offer in the way of education and training. This was particularly true for the many hundreds of Reservists in the Corps who, as Douglass puts it, "really had no contact with the active duty guys."[128]

Colonel John Jay Douglass, who served as Commandant, The Judge Advocate General's School, from 1970 to 1974, played a major role in the creation of The Army Lawyer

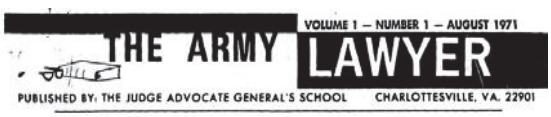
Why would Douglass be concerned with the Reserve legal community? The answer was simple. The year before he assumed duties as Commandant in 1970, The Judge Advocate General's Office (or "JAGO" as it was called in everyday conversation) "had transferred all the JAG Reservist responsibilities to the School." This meant that it was now COL Douglass' responsibility to keep in contact with Reserve judge advocates and he saw that publishing a monthly journal that was distributed to them by mail would be a way to accomplish this goal. In the 1970s, virtually all wide-spread commu-

nication in the Army was by written letter or other printed publication—delivered by the U.S. post office—so this concept makes sense.

While Douglass says that this desire to have contact with the Reserve judge advocate community was a major impetus behind the creation of *The Army Lawyer*, he also identifies a second important reason: active component judge advocates really did not understand what TJAGSA did, or what it offered in the way of legal education and training, and this ignorance meant the School was both underutilized and underappreciated.

This state of affairs existed because while every lawyer who entered the Corps was required to attend the Judge Advocate Officer Basic Course, there was no requirement to attend the Advanced Course—or any other instruction being offered in the way of shorter courses. Additionally, since more than a few successful senior officers—including Major Generals (MGs) George S. Prugh and Harold E. Parker, then serving as The Judge Advocate General and The Assistant Judge Advocate General, respectively— had never attended either the Basic or Advanced Courses, Douglass discovered that there was considerable resistance to coming to TJAGSA for a year of graduate legal education from senior captains and majors who intended to make the Corps a career. As they reasoned, why should a young officer uproot his family for a year at TJAGSA if that was not necessary to reach flag rank. But, thought Douglass, a monthly publication would showcase the short course offerings at TJAGSA and, as uniformed attorneys came to Charlottesville for a week (for example) of procurement law instruction, might encourage these Army lawyers to attend the Advanced Course when offered the opportunity.

Colonel Douglass' goal—which he said repeatedly to all within earshot—was to make TJAGSA "The Home of the Army Lawyer." Every judge advocate, in his view, must believe that he must come to Charlottesville to be successful in the Corps. Consequently, when it came time to select a name for the new monthly publication, it was logical for it to be christened *The Army Lawyer*.



When the first issue was published in August 1971, it contained reports on the new "Pilot Legal Assistance Program" in New Jersey (where Judge Advocates, with the approval of the New Jersey State Bar Association, provided in-court representation in civil matters for Soldiers in the grades of E-4 and below) and from the Army Trial Judiciary (court-martial statistics, and recurring errors and irregularities). There was an article from the Army Claims Service titled "Suggestions for a Successful Recovery Program" and from the Litigation Division on various pending cases and decisions of interest. The School's Procurement Law Division (today's Contract and Fiscal Law Division) discussed recent decisions from the Court of Claims and Board of Contract Appeals. On a truly practical level, the Legal Assistance Division at the Office of The Judge Advocate General (OTJAG) offered tips on "telephone etiquette" that should be observed by those answering calls coming to a legal assistance office in the field. Helpful advice included refraining from telling the caller that the judge advocate with whom he wished to speak was "out playing golf" or had "left early." Finally, there was a brief article written by a civilian attorney at Third U.S. Army, Fort McPherson, Georgia. It focused on the legal issues arising in a court-martial of a Marine Corps Reservist who willfully disobeyed the order of his superior commissioned officer to get a haircut and who rejected Article 15 punishment in favor of trial by court-martial.

This inaugural issue of *The Army Lawyer* finished with sections called "Personnel Actions," "Books of Interest to Lawyers," and "Military Affairs Opinions." The first, provided by the Personnel, Plans and Training Office (PP&TO), OTJAG, was almost certainly the first section read by those who received the new publication because it contained the names of those officers and warrant officers who were retiring from active duty or being promoted. It also contained a list of all upcoming assignments of colonels, lieutenant colonels, majors, captains, lieutenants, and warrant officers. As for the second section, this listed books of professional interest to lawyers, such as Anthony Lewis' *Gideon's Trumpet* (about the celebrated *Gideon v. Wainwright* decision) and Catherine Bowen's *Yankee from Olympus* (about Supreme Court Justice Oliver W. Holmes). Finally, the last section contained opinions from OTJAG's Military Affairs Division (today's Administrative Law Division). With a view toward practicality, these opinions were printed in *The Army Lawyer* in a 3-inch-by-5-inch format, so that a reader could "clip" and paste them on 3 x 5 cards and so build a card reference library. The opinions covered civilian pursuits by retired officers, the privileges enjoyed by children of remarried and divorced Army widows, whether "bowling score sheets" could be accepted as gifts by a military bowling lane located on a military reserva-

tion, and whether military personnel could carry concealed weapons while off- duty.

By the time it was in its second year of publication, *The Army Lawyer* had expanded to include new features in addition to articles, reports, and practical legal information. The Personnel Section began listing the names of all judge advocates receiving military awards, information on volunteering for overseas assignments, policies on attending civil schools at Government expense, and job openings for "DA Civilian Attorney Positions."[129] There was a new section called "JAG School Notes" which provided information on staff and faculty at TJAGSA and even solicited readers to contribute to a newly formed "beer mug collection to be displayed in the [TJAGSA] Open Mess."[130] Finally, a section called "Bar Notes" announced upcoming American Bar Association, Federal Bar Association, and Judge Advocate Association news items.[131]

Starting in November 1971, *The Army Lawyer* began publishing the schedule of courses offered at TJAGSA, along with "scopenotes" for these offerings—thereby fulfilling COL Douglass' goal of letting Judge Advocates in the field know what was available in the way of legal education. Courses listed included the 62d Basic Course, 20th Advanced Course, 2d Staff Judge Advocate Course, 1st Legal Assistance Course, and 5th Law of Federal Employment Course.[132] *The Army Lawyer* continued to list available courses in the 1980s, 1990s, and 2000s; today readers interested in Continuing Legal Education (CLE) offerings are directed to the "Legal Center and School" website for a schedule of courses.

In the early 1980s, the content of *The Army Lawyer* began evolving toward what might be called a "mini-law review" in that information on personnel (promotions, reassignments, school selection, and awards) and other similar non-legal news items were no longer carried. The last PP&TO section, for example, appeared in February 1982. Apparently this occurred because the Army Publications and Printing Command changed its policy on what could be published in a Department of the Army Pamphlet (DA Pam) and informed TJAGSA that non-legal items were no longer permissible. Since *The Army Lawyer* had become a DA Pam in March 1973, it had to follow this new guidance—which meant the end of information on promotions, awards, reassignments, and similar items.[133] This prohibition, however, does not seemed to have prevented the occasional insert of information from PP&TO; the January 1994 *Army Lawyer* contained an announcement on the importance of official photographs for promotions and information on filing "commendatory matters" in the Official Military Personnel File.[134]

From the 1990s to the present, *The Army Lawyer*'s content has been relatively stable, with a number of notable exceptions. First, beginning in the 1990s, the editors began devoting entire issues to one topic. As a result, there were special issues devoted to contract and fiscal law[135] and criminal law,[136] usually on an annual basis. *The Army Lawyer* also began publishing "TJAGSA Practice Notes" in which faculty members from all the teaching departments provided short articles on current developments in the law. In November 1997, for example, 'practice notes' included information on the application of the Major Fraud Act to government contracts and the Taxpayer Relief Act of 1997.[137] The following month contained 'practice notes' on the Child Support Recovery Act and the Uniformed Services Employment and Reemployment Rights Act.[138]

Second, starting with the October 2004 issue, the editors began publishing book reviews. Written mostly by Graduate Course students as part of their writing curriculum, these now appear in virtually every issue.

Third, at the suggestion of then-Captain (CPT) Ronald P. "Ron" Alcala, who was editing *The Army Lawyer* in 2010, a monthly history feature called the "Lore of the Corps" began appearing as the lead article. Two to four pages in length, and covering a variety of topics (courts-martial, personalities, war crimes and general history), these have been a regular monthly feature for nearly five years. Alcala's other adopted suggestion was a newly designed blue-and-gold-colored cover for *The Army Lawyer*, featuring the Regimental crest. The new cover first appeared in December 2010.

From its inception in 1972 until the present, a number of judge advocates have served as editors of *The Army Lawyer*. The first to serve were CPTs Stephen L. Buescher (editor) and Donald N. Zillman (articles editor). They were followed by the following *primary* editors:[139] CPT Paul F. Hill (October 1973 through November 1975); CPT Charles P. Goforth, Jr. (December 1975 through August 1978), Major (MAJ) Percival D. Park (September 1978); CPT Frank G. Brunson, Jr. (October 1978 through September 1980); CPT

Connie S. Faulkner (October 1980 through May 1982); CPT Stephen J. Kaczynski (June 1982 through August 1983); CPT Debra L. Boudreau (September 1983 through July 1985); CPT David R. Getz (August 1985 through March 1988); MAJ Thomas J. Feeney (April 1988 through June 1988); CPT Matthew E. Winter (July 1988 through August 1990); CPT Daniel P. Shaver (September 1990 through May 1993); CPT John B. Jones, Jr. (June 1993 through August 1995); CPT John B. Wells (September 1995 through August 1996); CPT Albert R. Veldhuyzen (September 1996 through June 1998); CPT Scott B. Murray (July 1998); CPT Mary J. Bradley (August 1998 through September 1998); CPT Kenneth D. Chason (October 1998 through June 1999); CPT Mary J. Bradley (July 1999 through August 1999); CPT Drew A. Swank (September 1999 through July 2000); CPT Todd S. Milliard (August 2000 through November 2000); CPT Gary P. Corn (December 2000 through July 2001); CPT Todd S. Milliard (August 2001 through October 2001); CPT Erik L. Christiansen (November 2001 through August 2002); CPT Joshua B. Stanton (October 2002 through August 2003); CPT Heather B. Fagan (September 2003 through May 2004); CPT Anita J. Fitch (June 2004 through February 2007); CPT Alison M. Tulud (March 2007 through August 2009); CPT Ronald T. P. Alcala (September 2009 through November 2010); CPT Madeline Yanford (later Gorini) (December 2010 through May 2011); CPT Joseph D. Wilkinson II (June 2011 through May 2012); CPT Takashi Kagawa (June 2012 through June 2013); CPT Marcia Reyes Steward (July 2013 through August 2014); CPT Michelle E. Borgnino (September 2014 through August 2015); and CPT Cory Scarpella (July 2015 through July 2017).

Of all these editors, two deserve additional mention: MAJ Matthew E. "Matt" Winter and CPT John B. Jones, Jr. This is because both received "Army Editor of the Year" honors for their work on *The Army Lawyer*. In a Pentagon ceremony on November 15, 1990, Secretary of the Army Michael P.
W. Stone presented Winter with his award. The citation for the award noted that MAJ Winter made *The Army Lawyer* "easier to read, understand and use." Secretary Stone also noted that Winter's initiatives while editor had "broadened the scope of legal subjects covered . . . encouraged submission of articles, . . . eliminated printing errors, and substantially cut the production cycle" of the monthly periodical.[140]

Four years later, on November 10, 1994, Secretary of the Army Togo D. West, Jr., himself a former member of the Corps, presented Captain John B. Jones, Jr. with the award. According to the citation for Jones' award, he had prepared "approximately 3750 pages of manuscript for twelve issues" and "moved up the production cycle thirty days to ensure that *The Army Lawyer* was published and distributed by its cover date."[141]

While these editors had overall responsibility for producing the monthly periodical, they could not have accomplished their work without the support of administrative assistants. Initially, Mrs. Helena Daidone and Miss Dorothy "Dottie" Gross, both long-time civilian employees at TJAGSA, provided administrative support to *The Army Lawyer* editors. Miss Gross left the position for another job in TJAGSA after a short period, but Mrs. Daidone continued to support *The Army Lawyer'*s editors through the August 1979 issue.

A new Administrative Assistant, Ms. Eva F. Skinner, came on board in November 1979. She had been an employee in TJAGSA's Academic Department (today's Office of the Dean) since August 1973 but transferred to the Developments, Doctrine and Literature Department (or "DDL" as it was known colloquially) to become an "Editorial Assistant." Since DDL oversaw the production of both *The Army Lawyer* and *The Military Law Review*, Skinner began supporting the editors of both publications. When she retired in January 1995, Ms. Skinner had "trained fifteen different editors and coordinated the production of . . . 200 issues of *The Army Lawyer*."[142]

Charles J. "Chuck" Strong replaced Skinner as "Editorial Assistant" in November 1995. His recent retirement as "Technical Editor"[143] in January 2015 means that *The Army Lawyer* will be without administrative support for the near future.

When one compares today's *Army Lawyer* to the inaugural issue, it is clear that the content of the periodical has changed considerably. Certainly the original intent to have a practical, how-to-do-it periodical that would also trumpet TJAGSA's educational offerings in Charlottesville has given way to a more scholarly journal.

One sometimes hears the complaint that *The Army Lawyer* is just a smaller version of *The Military Law Review*. When one considers, however, that the former contains a much greater variety of articles than the latter, and that many of the authors writing for *The Army Lawyer* are seeking to provide helpful guidance to the practitioner in the field, this is not a criticism that should be taken too seriously.

As for the future? There seems little doubt that *The Army Lawyer* will continue to be published on a monthly basis, although the number of print copies will certainly decrease over time as the Army—and the Corps—moves increasingly to electronic only publishing. In fact, the on-line version of *The Army Lawyer* (posted on www.jagcnet.army.mil) already appears weeks before the print version is available. But, as long as *The Army Lawyer* is offered by the Government Printing Office as an "individual paid subscription"—currently priced at $50 per year—it would seem likely that a print version will remain in existence.

The Army Lawyer, like its sister, the *Military Law Review*, is part of the Army JAG Corps' "brand." When readers see it, they have no doubt that it is connected to lawyering in the Army and to legal education at the only American Bar Association accredited military law school in the world.

[1] G. P. Forbes, *1st OCS Class in History of JAGD Is Training Here*, MICH. DAILY, June 29, 1943. First Lieutenant George P. Forbes, Jr., a graduate of The Judge Advocate General's School, U.S. Army's (TJAGSA), 10th Officer Course, was on TJAGSA faculty when he submitted this article for publication.

[2] Inzer B. Wyatt, *The Army's School for Its Lawyers*, 29 A.B.A. J. 135, 136 (1943).

[3] *About GW Law,* GEO. WASH. UNIV. LAW SCH., http://www.law. gwu.edu/school/pages/history.aspx (last visited July 31, 2012).

[4] THE JUDGE ADVOCATE GEN.'S SCH., HISTORY OF MILITARY TRAINING OF OFFICER CANDIDATES—JUDGE ADVOCATE GENERAL'S DEPARTMENT, MARCH 24, 1943–JUNE 30, 1944, at 2 (n.d.) [hereinafter HISTORY OF MILITARY TRAINING OF OFFICER CANDIDATES].

[5] *Id.*

[6] *Id.*

[7] *Id.* at 3.

[8] *Id.* at 6.

[9] *Id.* at 7.

[10] U.S. DEP'T OF ARMY, REG. 625-5, OFFICER CANDIDATE SCHOOLS para. 33*c*(10) (Nov. 26, 1942) (C6, Mar. 31, 1943), *as reprinted in* HISTORY OF MILITARY TRAINING OF OFFICER CANDIDATES, *supra* note 4, at 5.

[11] HISTORY OF MILITARY TRAINING OF OFFICER CANDIDATES, *supra* note 4, at 10.

[12] *Id.* at 9.

[13] *Id.* at 10.

[14] *Id.*

[15] *Id.*

[16] *Id.* at 12–13.

[17] *Id.* at 13.

[18] *Id.*

[19] *Id.* at 14.

[20] *Id.* at 17–20.

[21] *Id.* at 22.

[22] *Id.* at 22–23.

[23] *Id.* at 24.

[24] *Id.*

[25] Notes, *1st Officer Candidate Class*, JUDGE ADVOCATE J., Sept. 15, 1944, at 50–51.

[26] 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).

[27] *Id.*

[28] 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.

[29] 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*].

[30] JUDGE ADVOCATE GEN.'S CORPS, *supra* note 26, at 217. Major General Decker served as The Judge Advocate General from 1961 to 1963.

[31] Letter from Lieutenant Colonel (Ret.) Joseph B. Kelly, U.S. Army, to Colonel Gerard St. Amand, Commandant, The Judge Advocate Gen.'s Sch. (May 27, 1998) (on file with author).

[32] *Id.*

[33] *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.

[34] *Id.*; JUDGE ADVOCATE GEN.'S CORPS, *supra* note 26, at 217–18.

[35] JUDGE ADVOCATE GEN.'S CORPS, *supra* note 26, at 217–18.

[36] 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.

[37] *Id.*

[38] 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.

[39] *See* Borch, *supra* note 29.

[40] Charles E. Decker, "A History of the Development of the Judge Advocate General's School," at 4 (June 15, 1955) (unpublished monograph) (on file in TJAGLCS Library).

[41] The Special Projects Division had been created in 1950 to draft the new *Manual for Courts-Martial* needed after the enactment of the Uniform Code of Military Justice. As Decker was the Chief of the Special Projects Division, it was logical for The Judge Advocate General (TJAG) to task him (and the other division members) with the special project of organizing and locating a permanent Judge Advocate General's School, U.S. Army (TJAGSA). *See* supra note 26, at 217.

[42] Decker, *supra* note 40, at 5.

[43] *Id*.

[44] *Id.* at 6.

[45] *Id.* at 7.

[46] Letter from Colgate W. Darden, Jr. to Colonel Charles L. Decker (June 19, 1951) (on file with Regimental Historian, TJAGLCS).

[47] *Id*.

[48] The fact that the University of Virginia (UVA) had hosted the Army's School of Military Government during World War II, and that some students attending the school were judge advocate (JAs) (who likely would have reported favorably to TJAG about their experiences in Charlottesville), apparently had no impact on the decision to move TJAGSA to UVA.

[49] THE JUDGE ADVOCATE GEN.'S SCH., U.S. ARMY, ANNUAL REPORT, 1951–61, at 3 [hereinafter ANNUAL REPORT].

[50] Memorandum from Franklin G. Floete, Adm'r, Gen. Servs. Admin., to the Chief of Eng'rs, U.S. Army (June 4, 1954) (on file with Regimental Historian, TJAGLCS).

[51] Headquarters, U.S. Dep't of Army, Gen. Order No. 71 (Aug. 2, 1951).

[52] Decker, *supra* note 40, at 7.

[53] *Id.* at 9.

[54] Today, all new judge advocates attend the Direct Commission Course at Fort Benning prior to reporting for legal education in Charlottesville.

[55] *Id.* at 11.

[56] Darden, *supra* note 46, at 10.

[57] *Id.* at 9.

[58] For the history of the LL.M. at TJAGSA, *see* Fred L. Borch, *Lore of the Corps: Master of Laws in Military Law, The Story Behind the LL.M. Awarded by The Judge Advocate General's School*, ARMY LAW., Aug. 2010, at 2–3.

[59] At the time, I Army, V Army, etc. were known as "continental armies."

[60] Decker, *supra* note 40, at 15.

[61] *Id.* at 18.

[62] Ultimately, the 2001 conference was held in Spring 2002.

[63] The World Wide Continuing Legal Education Conference (WWCLE) used to be held the first week of October. However, it was cancelled in 2013 because of Congress's delay in approving the budget. As result, the WWCLE was moved to September.

[64] *First Enlisted Men Training as Court Martial Reporters*, ARMY TIMES, Jan. 29, 1955, at 8.

[65] Decker, *supra* note 40, at 20.

[66] After leaving TJAGSA in 1955, Colonel "Ted" Decker returned to Washington, D.C. From 1957 to 1961, then-Brigadier General Decker served as the Assistant Judge Advocate General for Military Justice. He was promoted to major general and assumed duties as TJAG on January 1, 1961. Decker retired on December 31, 1963.

[67] THE JUDGE ADVOCATE GEN.'S SCH., U.S. ARMY, ANNUAL REPORT, 1951–61, at 65 [hereinafter ANNUAL REPORT].

[68] In the 1950s, other Army branches also developed an Advanced Course for their officer personnel. In the combat arms, for example, all commissioned officers were required to attend "a branch specific advanced course between their selection for promotion to captain and taking company-level command, normally prior to completing nine years of commissioned service." JEROLD E. BROWN, HISTORICAL DICTIONARY OF THE U.S. ARMY 4 (2001). Successful completion of an Advanced Course was a prerequisite for selection to attend Command and General Staff College at Fort Leavenworth, Kansas. *Id.* Today, the Advanced Course is known as the Captains Career Course. Infantry and Armor officers, for example, attend a twenty-two-week Maneuver Captains Career Course at Fort Benning, Georgia. *Student Information*, U.S. ARMY MANEUVER CENTER OF EXCELLENCE, https://www.benning.army.mil/mcoe/dot/mc3/StudentInformation.html (last visited June 4, 2014).

[69] When The Judge Advocate General's School, U.S. Army (TJAGSA) began to offer instruction in non-military justice subjects, it did so with special stand-alone courses, with the first course (on contract termination) offered in August 1953. ANNUAL REPORT, *supra* note 49, at 71.

[70] *Id.* at 7.

[71] Bruce C. Babbitt was a unique judge advocate and Soldier. He was decorated with the Silver Star for gallantry in action while serving as an infantry officer in the Philippines in 1944 and commanded a rifle battalion while a judge advocate during the Korean War. Then Colonel Babbitt served as the Staff Judge Advocate, Military Assistance Command, Vietnam, from 1969 to 1970. Selected for brigadier general in 1970, Babbitt served as the Assistant Judge Advocate General for Civil Law until he retired from active duty in 1973. Brigadier General Babbitt died in 1999. *Who's Who in U.S. Army JAG Corps History*, THE JUDGE ADVOCATE GENERAL'S CORPS REGIMENTAL HISTORY, https://www.jagcnet.army.mil/8525736A005BE1BE/0/5C2BEB1224678F5D852577AE00521D86?open document&noly=1 (last visited June 4, 2014).

[72] ANNUAL REPORT, *supra* note 49.

[73] *Id.*

[74] *Id.* at 8.

[75] *Id.*

[76] *Id.* at 10.

[77] *Id.* at 8.

[78] *Id.* at 9.

[79] *Id.*

[80] THE JUDGE ADVOCATE GEN.'S SCH., U.S. ARMY, ANNUAL REPORT, FISCAL YEAR 1962, at 2.

[81] *Id.* at 63–65.

[82] THE JUDGE ADVOCATE GEN.'S SCH., U.S. ARMY, ANNUAL REPORT, FISCAL YEAR 1963, at 12.

[83] THE JUDGE ADVOCATE GEN.'S SCH., U.S. ARMY, ANNUAL REPORT, FISCAL YEAR 1964, at 14.

[84] *Id.* at 15.

[85] Executive is today's Executive Officer, Office of The Judge Advocate General. Major General Prugh was The Judge Advocate General from 1971 to 1975. For more on Prugh, see JUDGE ADVOCATE GEN.'S CORPS, *supra* note 26, at 256–57 (1975).

[86] THE JUDGE ADVOCATE GEN.'S SCH., U.S. ARMY, ANNUAL REPORT, FISCAL YEAR 1967, at 10 [hereinafter 1967 ANNUAL REPORT].

[87] *Id.* at 9.

[88] For more on Major General (Ret.) William K. Suter, *see New Clerk for Supreme Court*, N.Y. TIMES, Jan. 28, 1991, at A3. *See also Retiree Spotlight*, MILITARY OFFICER, Aug. 2010, at 28; FRED L. BORCH, JUDGE ADVOCATES IN VIETNAM: ARMY LAWYERS IN SOUTHEAST ASIA 1959–75, at 85, 95–96, 111.

[89] 1967 ANNUAL REPORT, *supra* note 86, at 10–11.

[90] Colonel (Ret.) John Jay Douglass, who served in the Corps from 1953 to 1974, finished his military legal career as TJAGSA's commandant. It was Colonel Douglass who oversaw the design and construction of a new TJAGSA building on the University of Virginia's North Grounds. Douglass also originated the General Officer Legal Orientation and Senior Officer Legal Orientation Courses. *See generally* JOHN JAY DOUGLASS, MEMOIRS OF AN ARMY LAWYER (2012); *see also* Fred L. Borch, *Legal Education for Commanders: The History of the General Officer Legal Orientation and Senior Officer Legal Orientation Courses*, ARMY LAW., Dec. 2013, at 1.

[91] THE JUDGE ADVOCATE GEN.'S SCH., U.S. ARMY, ANNUAL REPORT, 1970–71, at 23.

[92] *Id.*

[93] THE JUDGE ADVOCATE GEN.'S SCH., U.S. ARMY, ANNUAL BULL., 1977–78, at 9. The "Annual Report" was renamed the "Annual Bulletin" in 1977.

[94] *Id.*

[95] *Id.*

[96] *Id.* at 10.

[97] *Id.*

[98] THE JUDGE ADVOCATE GEN.'S SCH., U.S. ARMY, ANNUAL BULL. 1984–85, at 13.

[99] *Id.*

[100] *Id.*

[101] *Id.* at 13.

[102] For more on the LL.M., *see* Fred L. Borch, *Master of Laws in Military Law: The Story Behind the LL.M. Awarded by The Judge Advocate General's School,* ARMY LAW., Aug. 2010, at 1.

[103] The Judge Advocate General's School, U.S. Army, became The Judge Advocate General's Legal Center and School (TJAGLCS) in 2003.

[104] NATHANIEL B. RIEGER, THE JUDGE ADVOCATE GEN.'S SCH., U.S. ARMY, REPORT OF THE COMMANDANT, JUNE 15, 1955–FEBRUARY 25, 1957, at 1–2 (1957).

[105] Letter from Edgar F. Shannon, Jr., President, Univ. of Va., to John Jay Douglass, Commandant, The Judge Advocate Gen.'s Sch., U.S. Army (Nov. 26, 1971) (on file with Regimental Historian, TJAGLCS).

[106] In 1980, DIS had obtained the authority to award a Master of Science in Strategic Intelligence degree. Pub. L. 96-450, Oct.14, 1980; 10 U.S.C. § 2161.

[107] Colonel Paul J. Rice, Commandant, The Judge Advocate Gen.'s Sch., U.S. Army, Presentation to Nat'l Advisory Comm. on Accreditation and Inst'l Eligibility (Dec. 1987) (on file with Regimental Historian, TJAGLCS) (emphasis in original).

[108] 10 U.S.C.§ 4315 (2006).

[109] JOHN JAY DOUGLASS, MEMOIRS OF AN ARMY LAWYER: THE LIFE OF JOHN JAY DOUGLASS 180 (2013).

[110] Telephone Interview with Colonel (Ret.) John Jay Douglass (Aug. 9, 2010) [hereinafter Douglass Telephone Interview].

[111] By contrast, today's division is authorized thirteen judge advocates, along with one legal administrator and twelve paralegals.

[112] The Military Justice Act of 1968 radically altered the manner in which military justice was administered in the Army. For the first time in history, a military judge presided over courts-martial, and an accused had the option to elect trial by judge alone. The new legislation also required that an accused "be afforded the opportunity to be represented at trial" by a lawyer. As a result of this and other legislative changes, judge advocates began appearing regularly as both trial and defense counsel at special courts-martial. Uniformed lawyers also began advising special court-martial convening authorities on military justice—and other legal issues—as a matter of routine.

[113] Apparently, there was little to no international law instruction, since legal concepts such as "rules of engagement" and "operational law" did not yet exist, and judge advocates did not advise commanders on the conduct of military operations.

[114] Telephone Interview with Major General (Ret.) Hugh R. Overholt (Oct. 21, 2013).

[115] *Illegal Actions in the Construction of the Airfield at Fort Lee, Va.*: *Hearings by the House Committee on Government Operations*, 87th Cong., 2d Sess. 36 (1962).

[116] *Compare* Gen. Officer Legal Orientation Schedule, Brigadier Gen. Maria R. Gervais, Sept. 26, 2013 (Sept. 25, 2013), *with* Gen. Officer Legal Orientation Schedule, Major General Leslie C. Smith, Aug. 19, 2013 (Aug. 14, 2013). Major General Smith received briefings on sexual harassment, the proper handling of sexual assault allegations and cases, administrative investigations, standards of conduct, fiscal law, unlawful command influence, improper relationships and fraternization, law of federal employment, domestic support to civil authorities, freedom of information and privacy act, and federal labor-management relations. Major General Smith, at the time of his GOLO, had just taken command of Mission Support Center of Excellence & Fort Leonard Wood, MO. *Id.*

[117] DOUGLASS, *supra* note 109, at 180.

[118] *Id.*

[119] *Id.*; Douglass Telephone Interview, *supra* note 2.

[120] THE JUDGE ADVOCATE GEN.'S SCH., U.S. ARMY, ANNUAL REPORT, 1971–1972, at 56 (1972) [hereinafter ANNUAL REPORT].

[121] *The Judge Advocate Gen.'s School, U.S. Army, TJAGSA Schedule of Courses*, ARMY LAW., Nov. 1971, at 24.

[122] ANNUAL REPORT, *supra* note 120, at 25.

[123] 229th SOLO Course Schedule, 4–8 Nov. 2013 (Oct. 17, 2013).

[124] The first Command Sergeant Major Legal Orientation was held at The Judge Advocate General's School January 29–31, 2013; the second course was held September 16–19, 2013. The Command Sergeants Major (CMSs) who attend were selected by Sergeant Major of the Army Chandler, and the subjects taught reflected what he believed that CSMs operating at the general-officer level and higher level in the Army needed to know.

[125] Published between March 1959 and November 1975, the *Judge Advocate Legal Service* (JALS) was initially published on a *weekly* basis, providing field Judge Advocates with the latest appellate decisions from the Court of Military Appeals (the forerunner of the Court of Appeals of the Armed Forces) and the Comptroller General. In the 1960s, JALS expanded its content to contain other information of interest to Army lawyers, including information on claims, procurement, international law, and military affairs. After the creation of *The Army Lawyer*, however, JALS limited its content to military criminal law. It ceased publication in 1975.

[126] ARMY. LAW., Aug. 1971, at 1.

[127] *Id.*

[128] Telephone interview, author with Colonel (Ret.) John J. Douglass (Dec. 8, 2014) (on file with author).

[129] ARMY LAW., Sept. 1972, at 30.

[130] *Id.* at 27.

[131] ARMY LAW., Oct. 1972, at 26.

[132] ARMY LAW., Nov. 1971, at 24–25.

[133] As a result, this information was not officially available, although individual members of the Corps routinely prepared unofficial assignment lists through the years. Additionally, *The Regimental Reporter*, the newsletter of the TJAGSA Alumni Association, usually published lists of assignments when these became known. Not until the Corps created an electronic newsletter called the *Quill and Sword* did assignment lists once again become officially available.

[134] *Personnel, Plans and Training Office Notes*, ARMY LAW., Jan. 1994, at 44.

[135] *E.g.*, *Contract Law Developments of 1996—The Year in Review*, ARMY LAW., Jan. 1997; *Contract and Fiscal Law Developments of 2006—The Year in Review*, ARMY LAW., Jan. 2007.

[136] *E.g.*, *50th Anniversary of the UCMJ Series*, ARMY LAW., July 2000; *Military Justice Symposium I*, ARMY LAW., May 2004; *Military Justice Symposium II*, ARMY LAW., July 2004.

[137] *TJAGSA Practice Notes*, ARMY LAW., Nov. 1997, at 31–44.

[138] *TJAGSA Practice Notes*, ARMY LAW., Dec. 1997, at 26–34.

[139] This Lore of the Corps lists only *primary* editors as, on occasion, the masthead of *The Army Lawyer* lists "assistant editors." For example, CPT Jennifer Crawford is listed as an assistant editor for the November 2004 through May 2005 issues; CPT Colette E. Kitchel is listed as an assistant editor for the July 2005 through March 2007 issues. The March 2007 issue shows CPT Alison M. Tulud as the editor, with MAJ Anita J. Fitch and CPT Colette E. Kitchel as assistant editors. Similarly, the August 2009 *Army Lawyer* shows MAJ Tulud as editor with MAJ Ann B. Ching and CPT Ronald T. P. Alcala as assistant editors.

[140] *Major Winter Selected Army Editor of the Year*, THE REGIMENTAL REPORTER, Spring 1991, at 4.

[141] *Captain Jones Selected Army Editor of the Year*, THE REGIMENTAL REPORTER, Spring 1995, at 8.

[142] *Eva Skinner Retires After Lifetime of Service*, THE REGIMENTAL REPORTER, Spring 1995, at 10.

[143] The position was upgraded and renamed "Technical Editor" in January 2000, chiefly because the job had expanded to require the incumbent to use new electronic software in formatting both *The Army Lawyer* and the *Military Law Review* for publication. Additionally, the Technical Editor now was required to ensure that all legal citations followed the uniform system contained in Harvard Law School's *The Bluebook: A Uniform System of Citation*.

Chapter 3
Leadership and Personalities

TJAG for a Day and TJAG for Two Days

(Originally published in the April 2010 edition of *The Army Lawyer.*)

The large poster of drawings and photographs of The Judge Advocate Generals (TJAG) past and present—updated every four years and a ubiquitous presence in virtually all SJA offices—contains the portraits of two Army lawyers who served as TJAG for truly brief periods: Brigadier General (BG) Thomas F. Barr was TJAG for a day and BG John W. Clous for two days. This is the story of these two Soldiers, both of whom finished their military careers with amazingly short tenures as the top uniformed lawyer in the Army.

Born in West Cambridge, Massachusetts, in November 1837, Thomas Francis Barr studied law in Lowell, Massachusetts, and was admitted to the bar of that state in October 1859. Although one might have expected him to have enlisted in the Union Army at the outbreak of the Civil War—as did many men of his generation—Barr instead moved to Washington City (as Washington, D.C., was then called) in 1861 to join the Federal Government as a civil servant.

In October 1864, he resigned his civilian position and briefly engaged in the practice of law as a civilian. In February 1865, however, Barr donned an Army blue uniform for the first time when he accepted a direct appointment as a major and judge advocate.[1]

During the next thirty-six years, Barr served in a variety of important assignments. For example, he served as a judge advocate at the court of inquiry that investigated whether Major (MAJ) Marcus A. Reno had been guilty of cowardice at Little Big Horn in June 1876. Assigned as Judge Advocate, Department of Dakota, with duty in St. Paul, Minnesota,[2] then-MAJ Barr arranged for the appearance of witnesses and otherwise assisted court members at the inquiry, which was held in Chicago, Illinois, in early 1879. The members ultimately concluded that although MAJ Reno had had little respect for Lieutenant Colonel (LTC) George A. Custer's ability as a Soldier, Reno was no coward. In fact, the court of inquiry cleared MAJ Reno of all wrongdoing at Little Big Horn.[3]

Although he was a judge advocate and did do legal work (like the Reno inquiry), Barr served over twenty-one years—from 1873 to 1894—in a non-lawyer job as Commissioner of the U.S. Disciplinary Barracks at Ft. Leavenworth, Kansas. Additionally, from 1879 until 1891, then-LTC Barr also served as "Military Secretary" to four different Secretaries of War: Alexander Ramsey, Robert Todd Lincoln (the son of the murdered president), William C. Endicott, and Redfield Proctor. In this capacity, he acted as personal advisor to these men on military matters.[4]

When LTC Barr returned to Washington permanently in 1895, he was promoted to colonel and appointed Assistant Judge Advocate General. On May 21, 1901, Colonel (COL) Barr traded his silver eagles for the stars of a BG and assumed duties as TJAG. The following day, May 22, he retired. That same day, COL John W. Clous was promoted to BG and assumed duties as TJAG. While COL Clous lasted twice as long as Barr—he served two days as TJAG—he quickly retired as well, on May 24, 1901.

Born in Wurttemberg, Germany in June 1837, John Walter Clous immigrated to the United States as a teenager in 1855. Two years later, then 19-year-old Clous enlisted as a private and musician in Company K, 9th Infantry. He remained with this Regular Army unit until 1860, when then-Sergeant (SGT) Clous transferred to the 6th Infantry. After the Civil War broke out in April 1861, SGT Clous saw considerable combat and received a commission as a second lieutenant in November 1862. He was twice cited for gallant and meritorious service at the Battle of Gettysburg in July 1863 and finished the war as a first lieutenant.[5]

Sometimes called "The Dutchman" by his contemporaries (an epithet often used for those of German descent), Clous remained in the Regular Army after the war ended in 1865. In 1867, he obtained a promotion to captain by transferring to the 38th Infantry, one of the original all-African-American regiments created by Congress in 1866.[6] Two years later, Clous transferred again, this time to the all-black 24th Infantry. Major Clous subsequently served on the Frontier with that regiment and, during an 1872 engagement with Native American tribes, Clous was again cited for gallantry in combat.[7]

In 1881, while serving in the Department of Texas, Clous, who had previously studied law, was detailed as the judge advocate in the infamous court-

martial of Lieutenant (LT) Henry O. Flipper, the first African-American graduate of the U.S. Military Academy. Flipper, who had been the acting commissary officer at Fort Davis, Texas, had been charged with embezzlement and conduct unbecoming an officer and gentlemen arising from a shortage of funds at Fort Davis. Major Clous prosecuted the case but failed to convince the court that Flipper was guilty of the first charge. However, the panel did find that Flipper had committed a crime by concealing the shortage of monies, and this conviction required that he be dismissed from the service. Secretary of War Lincoln and President Chester Arthur subsequently approved the verdict and sentence of the court.[8]

Amazingly, it was not until after the Flipper court-martial, when Clous had twenty-four years of service as a line officer, that he obtained an appointment as a major and judge advocate in 1886.

From 1890 to 1895, Clous served as a professor and the Head of the Law Department at the U.S. Military Academy at West Point. After the Spanish-American War began in 1898, then-COL Clous received an appointment as a brigadier general of Volunteers. He subsequently served on the staff of Major General Nelson A. Miles and as Secretary and Recorder of the Commission for the Evacuation of Cuba.[9] In 1899, COL Clous was back in Washington, D.C.—he had relinquished his appointment as a volunteer general officer—and was serving as Deputy Judge Advocate General when he was promoted to TJAG.

What explains the amazingly short tenures of Barr and Clous as TJAG? It all resulted from Secretary of War Elihu Root's decision to give old Civil War veterans a "farewell present of the next higher rank," provided they promised to retire the next day.[10] Barr and Clous were selected for this honor. This explains why Barr served a day as TJAG, and, while it does not explain why Clous managed to serve twice as long, both men did honor their promises to retire shortly after reaching general officer rank.

The practice of allowing Civil War veterans to be promoted to the next higher rank was not restricted to the Judge Advocate General Department. Various other departments of the Army General Staff also implemented Root's idea. Consequently, the list of retired generals became so long that Congress passed legislation in 1906 prohibiting the practice.[11]

The extraordinarily brief service of BG Barr and BG Clous as TJAG has earned them a unique place in our Regimental history as two individuals who were almost literally "king-for-a-day."

Marine Was First Navy Judge Advocate General

(Originally published in the August 2015 edition of *The Army Lawyer.*)

As strange as it may seem, the first *uniformed* Judge Advocate General of the Navy was a Marine colonel.

Marine Colonel William Butler Remey was the first Judge Advocate General of the Navy. He served from 1880 to 1892. Photo credit: U.S. Marine Corps

When Congress authorized a Judge Advocate General (JAG) for the Army in July 1862, it provided that this position would have the rank and pay of a colonel.[12] But Congress created no such counterpart for the Navy and it was not until the month prior to the end of hostilities in the Civil War, in March 1865, that Congress finally got around to creating the office of "Solicitor and Naval Judge Advocate General" for the Navy. Even then, however, the job was filled by a civilian lawyer who earned a yearly salary of $3,500. Ultimately, this position disappeared in 1870, when Congress abolished it.[13]

In July 1878, Secretary of the Navy Richard W. Thompson "administratively created" the position of "acting Judge Advocate."[14] As Jay M. Siegel explains in his authoritative *Origins of the United States Navy Judge Advocate General's Corps*, Thompson's idea was to appoint a uniformed lawyer as acting Judge Advocate and task that individual with providing legal advice on "all matters submitted to the Secretary of the Navy involving questions of law or regulations." This acting Judge Advocate was also responsible for reviewing records of summary and general courts-martial, and making recommendations on their disposition to the Secretary of the Navy.[15]

To fill this new position of acting Judge Advocate, Secretary Thompson selected thirty- six-year-old William Butler Remey, a captain in theU.S. Marine Corps. This was a logical choice, in that Marine Corps officers in the Navy of the 1870s "handled the lion's share of court-martial prosecutorial duties" and consequently were far more experienced than their naval counterparts in court-martial procedure.[16]

Born in 1842, Remey was commissioned as a second lieutenant in 1861 at the age of 19. He almost certainly tried enlisted Sailors and Marines at courts-martial during the Civil War and, after hostilities ended, prosecuted courts-martial at California's Mare Island Naval Shipyard and at the Washington Navy Yard. Lieutenant (LT) Remey so impressed his superiors he was appointed acting Judge Advocate of the Marine Corps in 1870 and, after a tour of duty embarked upon the USS *Colorado*, was made Judge Advocate of the Marine Corps in 1875.[17]

After assuming duties as the Navy's acting Judge Advocate in 1878, Captain (CPT) Remey focused exclusively on disciplinary questions. He reviewed the records of courts of inquiry and courts-martial for evidentiary, jurisdictional, and procedural errors. (Other legal issues—involving contracts, claims, personnel, real estate, and admiralty—were handled by the U.S. Attorney General).[18]

Remey worked hard in his new duty assignment and apparently made valuable political and social connections in the Washington, D.C. establishment. According to his nephew, "Uncle Will . . . was very popular socially. . . . He drove a snappy one horse high trap in the late afternoons and was quite a figure about town."[19] This social prominence no doubt helped when Remey lobbied for his temporary position to be made permanent, on the theory that naval law was now so complex that it required a *uniformed* officer—familiar with sea service customs and culture—to oversee naval

discipline. Congress agreed with Remey (and the Secretary of the Navy) and, on June 8, 1880, enacted legislation authorizing the president "to appoint, for the term of four years . . . from the officers of the Navy or the Marine Corps, a judge-advocate-general of the Navy, with the rank, pay and allowances of a captain in the Navy or colonel in the Marine Corps, as the case may be."[20]

The next day, on June 9, President Rutherford B. Hayes appointed Remey to be the first uniformed Judge Advocate General of the Navy and, after the Senate confirmed this appointment, now-Colonel (COL) Remey (he exchanged his captain's bars for a colonel's eagle) began what would be a twelve-year assignment.[21]

Between 1880 and 1892, when Colonel Remey retired from active duty, he received and examined all records involving courts-martial, courts of inquiry, and "boards for the examination of officers for retirement and promotion in the naval service." He also investigated complaints by his fellow officers of alleged violations of naval regulations; these complaints were typically accompanied by a request from the complainer that the Secretary of the Navy convene a general court-martial to try the offender. Colonel Remey also reviewed pay and promotion questions, retirement, and other personnel matters. He examined claims from civilians who wanted to be paid for work or travel they had done for the Navy, or who wanted to be reimbursed for damage to their property caused by the Navy. For example, a Navy lieutenant commander filed a claim asking to be reimbursed for his clothing and bedding, both of which had been destroyed to prevent the spread of yellow fever: Remey recommended that the Navy pay the claim.[22]

Remey offered legal advice on a breach of contract question and also provided legal analysis on a patent infringement claim. It seems that he was willing—and able—to answer even those inquiries that more properly should go to the U.S. Attorney General. When the commanding officer of the naval station located at Beaufort, South Carolina, asked the Secretary of the Navy if state civil authorities had the legal authority to board a naval vessel and arrest and take from the ship a sailor wanted for a crime, Remey drafted the telegram that replied: "In the case cited in your letter . . . they have. See Statutes South Carolina."[23]

But not all of Remey's legal issues were of great importance: the Secretary tasked Remey with determining whether a midshipman third rate was entitled to his choice of bunks on the starboard side of starboard steerage quarters because of his seniority.[24]

In early 1891, Remey fell ill. His doctors determined it was the result of too much hard work. They prescribed rest, so Remey left Washington and spent the summer in the mountains of Maryland. He returned to work in the fall but, in early 1892, began showing signs of mental illness. He subsequently had a complete physical and mental breakdown. Not surprisingly, when his third four-year term as Navy Judge Advocate General ended in June 1892, Remey voluntarily retired from active duty. Sadly, he died of pneumonia less than three years later, in January 1895, in a sanatorium in Sommerville, Massachusetts.[25]

Colonel Remey's place in naval legal history remains unique: the first uniformed lawyer to serve as Navy Judge Advocate General and also—at least to date—the only Marine to serve as the top uniformed lawyer in the Navy.

The Greatest Judge Advocate in History? The Extraordinary Life of Major General Enoch H. Crowder

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Who is the greatest judge advocate in history? If "greatest" is defined as "most accomplished while in uniform," then Major General (MG) Enoch Herbert Crowder, The Judge Advocate General (TJAG) from 1911 to 1923, is arguably the most deserving of the accolade. Crowder served an unprecedented forty-six years on active duty, was the first Army lawyer to wear two stars on his shoulders, and was TJAG for twelve years. Crowder also was the Provost Marshal General during World War I, and while serving as the Army's top law enforcement officer, prepared the Selective Service Act of 1917 and supervised America's first draft since the Civil War—successfully inducting over 2.8 million men into the armed services. But these achievements, noteworthy as they may be, are only a small part of what Crowder accomplished during his truly superlative career as a Soldier.

While Crowder has been called "Judge Advocate *Extraordinaire*,"[26] no one would have predicted from his humble beginnings that he was destined for greatness. Born on April 11, 1859, in a "boarded-over" log cabin in Grundy County, Missouri, Crowder grew up in a farming family. But young "Bert" Crowder "preferred reading to plowing"[27] and he attended a local academy, from which he graduated when he was sixteen.

Crowder then began working on a nearby farm for twenty-five cents a day (plus board) but soon decided that there must be easier ways to earn a living than manual labor. His success as a student in high school helped Crowder to obtain a position as a teacher in a nearby rural school. While he liked teaching, Crowder wanted an advanced education. His preference was to attend the state university in Columbia but it was impossible to save enough money for tuition, room, and board on a monthly salary of fifteen dollars. This explains why young Bert Crowder did what so many Americans have done when they lacked the funds for college but wanted higher education: he took the competitive West Point examination held in his congressional district, won an appointment, and, on 1 September 1877, took his oath of office as a cadet.[28]

After graduation in 1881 (ranking thirty-first in a class of fifty-four), then-Second Lieutenant (2LT) Crowder joined the 8th U.S. Cavalry at Fort Brown, near Brownsville, Texas. He must have been pleased, as "cavalry appointments were especially sought after by West Pointers . . . because they offered service on the frontier." Since the death of Custer and his men at the Battle of the Little Big Horn had only occurred five years earlier, Crowder and officers like him knew that combat with Native American warriors was very possible.

But Crowder never saw any fighting while in Texas, and instead spent his time scouting the Rio Grande frontier for cattle thieves and supervising troopers engaged in target practice and routine marches. Crowder also decided that he had sufficient time to study law, which had interested him greatly while he was a cadet. He borrowed law books from a local attorney and, after learning enough of the statutes and procedures of Texas, was "examined by a committee of the bar" and admitted to practice in Texas in April 1884.[29]

Shortly after becoming an attorney in Texas, Crowder was assigned to Jefferson Barracks, near St. Louis, Missouri. This installation was one of the oldest military establishments in the United States, having been founded in 1826. In Crowder's day, it was a recruit depot where newly enlisted men "were received and trained for thirty-six days before being assigned to regiments."[30] While supervising the basic training of new Soldiers took considerable effort, 2LT Crowder still found time to study for and pass the Missouri Bar. He was now licensed as a lawyer in two states and in the Federal courts.

Crowder now seems to have decided that he needed a law degree to have any luck in obtaining a transfer from the cavalry to the Judge Advocate General's Department (JAGD). Consequently, he asked to be transferred from Jefferson Barracks to the state university in Columbia, where he would serve as professor of military science and tactics—and enroll as a law school student. The War Department granted Crowder's request and he joined the university faculty in July 1885. Less than a year later, in June 1886, 2LT Crowder was awarded an LL.B.

His timing could not have been better as the next month, five days after being promoted to first lieutenant (1LT), Crowder was ordered to return to

his regiment as a troop commander in the Geronimo campaign. After the Apache warrior and his men surrendered, 1LT Crowder returned to the University of Missouri, where he resumed his teaching assignment as professor of military science. Three years later, Crowder rejoined the 8th Cavalry at Fort Yates, Dakota Territory, and participated in the final campaign against the Sioux.

In 1891, Crowder asked to be "detached" from the Cavalry for service with the JAGD. This request was granted, undoubtedly because 1LT Crowder had been a licensed attorney since 1884 and had a law degree. He joined the Department, and was appointed as captain and acting judge advocate in the Department of the Platte, Omaha, Nebraska.

Crowder excelled in his new job as legal advisor to Brigadier General (BG) John R. Brooke, Commander of the Department of the Platte. Captain Crowder "made investigations, prosecuted and reviewed court-martial cases, and prepared contracts and other legal papers." He also authored speeches and reports for his boss, "earning a splendid reputation from his ability to turn out vast quantities of paperwork in a relatively short time."[31]

Crowder's hard work paid off: on January 11, 1895, he was chosen over fifty other applicants to receive a permanent appointment in the JAGD. This meant a permanent transfer from the Cavalry and a promotion from captain to major. Crowder was thirty-six years old and, as he was now the youngest officer in the JAGD, had a bright future.[32]

When the Spanish-American War began in 1898, now-lieutenant colonel (LTC) Crowder was in the Philippines. Although he did not see combat (much to his regret), Crowder distinguished himself in a variety of assignments during the days and months that followed. Crowder was a member of the commission that arranged final terms for the surrender of Manila and the Spanish Army; he later worked closely with Major General Arthur MacArthur, the Provost Marshal General, to establish a new government for Manila.[33]

In April 1899, Crowder was named the president of the Board of Claims and in that position oversaw claims for money damages filed by Filipino citizens against the United States. Most of the claims were for damages to or loss of livestock, horses, supplies, and buildings. Some were fraudulent and some were excessive, but all had to be heard. Crowder and the three other Army officers on the board rejected claims that were incident to American combat operations with Spanish troops, but recommended the payment of hundreds of meritorious claims.

At the same time, LTC Crowder was also serving on the Philippine Supreme Court; he had been appointed an associate justice of the civil division in May 1899. Crowder and his fellow justices not only heard civil and criminal appeals, but also reorganized the Philippine court system. Crowder personally authored the new *Philippine Code of Criminal Procedure*. The existing Spanish colonial framework was imperfect and was no longer functioning well. Crowder's code, which was "remarkable for its brevity and clearness," replaced that regime. According to Crowder's biographer, his code (with some amendments) continued to be the foundation of criminal justice in the Philippines until at least the 1950s.[34]

In May 1900, Major General MacArthur became the military governor of the Philippines. Remembering Crowder from their earlier time together when MacArthur was Provost Marshal General, MacArthur immediately transferred Crowder from his Supreme Court duties and made Crowder his military secretary and legal advisor. This meant that LTC Crowder was now the "civil administrator of the Philippines and actually, if not in rank, the second in command." Departments and bureaus under Crowder's direct control included: the Treasury and Customs Departments; Forestry, Mining, and Civil Service Bureaus; Patent and Copyright Office; Department of Public Works; and Judicial Department. Crowder also had direct responsibility for all municipal and provincial governments in the islands.[35]

The military government of the Philippines was replaced by a civilian administration in July 1901, and Major General MacArthur, LTC Crowder, and other military administrators left the islands for the United States. Crowder's performance, however, had been so impressive that President Theodore Roosevelt rewarded him with an appointment as a brigadier general in the Volunteer Army. This promotion occurred on June 20, 1901 but only lasted ten days: when the military government ceased at the end of the month, Crowder reverted to his permanent rank of lieutenant colonel and had to remove the silver stars from his shoulders.[36] It was, however, a unique event in judge advocate history: the first time that an Army lawyer other than the Judge Advocate General (TJAG)[37] had worn general officer rank. The promotion had been very much deserved.

Major General Crowder
c. 1918

Major General MacArthur said that he could not remember any time in American history "any instance in which a purely military officer had discharged such a variety of civil duties in a manner so entirely beneficial to the public interests." The future president, William Howard Taft, was just as effusive in his praise: Crowder "did, to my personal knowledge, an enormous amount of very hard work, and he did it well."[38]

Crowder then returned to Washington, D.C., where TJAG, Brigadier General George Davis, appointed him as a deputy in the Judge Advocate General's Office. In this position, LTC Crowder assisted Davis in receiving and reviewing the proceedings of all courts-martial, courts of inquiry, and military commissions. He also served as legal advisor to the Secretary of War and other officials of the War Department. Finally, Crowder and other judge advocates "made inspections, prepared all sorts of legal papers, and rendered opinions on questions of military law."[39]

In April 1903, Crowder was promoted to colonel (COL), and subsequently chosen to be "chief of the First Division of the Chief of Staff." This position, the forerunner to today's Deputy Chief of Staff for Personnel (G-1), had been created as a result of Congress's decision to create an Army General Staff. Crowder's new job required him to study and report on pending military legislation, reorganization plans, and general administrative matters affecting the Army. Colonel Crowder again excelled in this non-lawyer assignment. When the Japanese attacked Russian units in 1904, Crowder's boss, Army Chief of Staff Lieutenant General (LTG) A. R. Chaffee, decided that Crowder was the best man to send to the Far East. As a result, COL Crowder was the senior American observer with the Imperial Japanese Army during the Russo-Japanese War of 1904–1905. He witnessed first-hand the battles fought between Japanese and Russian armies in Manchuria, including the fighting around the strategic city of Mukden, where a Japanese force of 460,000 defeated 360,000 Russians.[40]

Colonel Crowder returned to the United States in June 1905 and reported for duty in Washington, D.C. Slightly more than a year later, William Howard Taft, now the Secretary of War, personally selected Crowder to be the legal advisor to the U.S.-sponsored Provisional Government of Cuba. From October 1906 to January 1909, COL Crowder was in Havana, where he made his biggest contribution as chairman of the Advisory Law Commission. This body, which consisted of nine Cubans and three U.S. citizens, drafted a municipal law that organized municipalities and gave them independence in local matters. Crowder and his fellow commissioners also drafted an electoral code that recognized universal manhood suffrage, "but restricted eligibility for public office to Cubans who could read and write." Finally, the Advisory Law Commission also created a judicial law that overhauled the legal system in Cuba; its major achievement was to free the judiciary from the executive, to which it had been subordinate under Spanish colonial law.[41]

When COL Crowder left Havana in January 1909, his "brilliant intellect and indefatigable industry" were lauded by both Cubans and Americans.[42] He returned to the Office of the Judge Advocate General, but within months, was detailed by now-President Taft (who knew him well from their years in the Philippines and knew of his talents as a diplomat) to be a member of the U.S. delegation to the Fourth Pan American Conference. Crowder represented the United States in Buenos Aires, Argentina, before making official visits to Chile, Colombia, Ecuador, Panama, and Peru.

From South America, COL Crowder took a steamer to Europe, where he studied the military penal systems of England and France with the view that examining British and French courts-martial might suggest improvements or reforms in the Articles of War that governed military justice in the Army.

Crowder returned to Washington, D.C., in late 1910. Major General George Davis was scheduled to retire as TJAG in February and had recommended COL Crowder to succeed him. Given this endorsement and Crowder's relationship with President Taft, no one was surprised when, on February 11, 1911, the president nominated COL Crowder to be TJAG with the rank of brigadier general. When he was confirmed by the Senate a short time later, Brigadier General Crowder made history again as the first in the West Point Class of 1881 to become a general officer.[43]

As TJAG, Crowder implemented a number of far-reaching changes. He directed that JAG opinions be published regularly and disseminated to the field. Crowder also decided that all opinions issued since 1862 would be collected and published as a new digest; this occurred in 1912. Crowder also convinced the War Department to create a program for line officers to be sent to law school at government expense—the forerunner of today's Funded Legal Education Program.[44] Finally, Brigadier General Crowder oversaw the revision of the Articles of War (they had not been revised since 1874) and directed the revision and publication of a new *Manual for Courts-Martial*.

Crowder also was the driving force behind major reforms in the operation of prisons in the Army. It was Brigadier General Crowder who, after lengthy consultation with sociologists and penologists, convinced the Army—and Congress—to create the U.S. Disciplinary Barracks at Fort Leavenworth, Kansas. For the first time, the Army embraced the idea that "the primary purpose" of the Army prison system should be to identify incarcerated Soldiers who could be rehabilitated and restored to duty.[45]

The American entry into World War I shifted Crowder's focus away from military law and lawyers. He was appointed Provost Marshal General by the Army's leadership and quickly took charge of the Army's transformation from a small, professional, all-volunteer service to a wartime force consisting largely of civilian draftees. Starting in May 1917, after Congress passed America's first Selective Service Act (prepared by General Crowder and his assistants), he supervised the registration, classification and induction of over 2.8 million men into the armed forces. Crowder's "especially meritorious and conspicuous service as Provost Marshal General in the preparation and operation of the draft laws of the Nation during the War" was later recognized with the award of the Army Distinguished Service Medal.[46]

Now-Major General Crowder (legislation enacted by Congress in 1916 made TJAG a two-star position) was so successful in implementing the wartime draft that, in the summer of 1918, a provision "was inserted in the Army Appropriation Bill" to promote him to three-star rank.[47] Crowder already was the first judge advocate to wear two stars; if this 1918 provision had become law, he would have been the first judge advocate to reach the rank of lieutenant general. But, uncomfortable with the idea of being a "swivel chair" lieutenant general, Crowder refused the promotion and instead— unsuccessfully—asked for a field command in France.[48]

After World War I ended, Major General Crowder found himself, along with the entire military justice system, under attack for being "un-American." Brigadier General Samuel T. Ansell, a friend and fellow Army lawyer who had served as Acting Judge Advocate General and performed much of the Army's legal work while Crowder focused on the draft, charged that courts-martial were "patently defective" and needed immediate revision by Congress. While Crowder vigorously defended the system against attacks by Ansell and others, he nonetheless recommended certain reforms to Congress. These included greater protections for the accused and a new authority in the President to reverse or alter any court-martial sentence found by him to have been adjudged erroneously.[49]

On February 14, 1923, after forty-six years of service, General Crowder retired from active duty. That same day, he topped off his remarkable career as a Soldier by immediately accepting an appointment as the first U.S. Ambassador to Cuba. This was a highly unusual event, because active and retired Army and Navy officers are prohibited by law from holding any appointment in the Diplomatic and Consular Service.[50] The result was that, on January 22, 1923, Congress enacted special legislation so that Crowder could accept this diplomatic post,[51] which he held until leaving Havana in 1927. Crowder settled in Chicago, where he practiced civilian law until he died in 1932, aged seventy-three years. He never married and left the bulk of his estate to his sisters.

Crowder has not been forgotten. On the contrary, he was the first Judge Advocate General to have a full-length biography.[52] But was Major General Crowder the "greatest" judge advocate in

history? He certainly had a remarkable life and an equally remarkable career, and no one in our Regiment's history has ever accomplished more as an Army lawyer.

From Cowboy and Tribal Lawyer to Judge Advocate and Secretary of War

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Secretary of War Patrick J. Hurley (in the middle wearing a civilian suit) with foreign military attaches, March 1929

One of the most interesting judge advocates in history was Patrick J. Hurley, who worked as a coal miner, mule driver, and cowboy before becoming a lawyer and entering the Judge Advocate General's Department (JAGD) in 1917. After serving with great distinction in Europe in World War I, Hurley left active duty. He remained in the Army Reserve and, during World War II, attained the rank of major general. But Hurley also served in our Army as Secretary of War under President Herbert Hoover and served as U.S. Ambassador to China in the administrations of Presidents Franklin D. Roosevelt and Harry S. Truman. What follows is the story of a truly remarkable Army lawyer.

Born in the Choctaw Nation, Indian Territory (now Oklahoma), in January 1883, Patrick J. Hurley grew up in poverty. His father worked in the coal fields as a day laborer 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.[53]

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 prominent Indian tribes in the territory. His friendship with Choctaw Victor Locke would open professional doors after Hurley became a lawyer. But first the teenager returned to the coal mines, where he worked as a mule skinner, "driving the animals as they hauled cars full of coal out of the pits."[54] Hurley subsequently left the mines to work as a cowboy, "herding and feeding cattle belonging to a local butcher."[55] While punching cattle, Hurley teamed up with a cowboy named Will Rogers—the same Will Rogers who would achieve national fame as an actor and humorist.[56] The two men formed a lifelong friendship that only ended with Rogers' untimely death.

Hurley was still working as a cowhand—sometimes for as little as $1.00 a day[57]—when a ranch owner who had taken a liking to him arranged for Hurley to attend Indian University (today's Bacone College). He excelled as a student and obtained his A.B. in 1905. Hurley then took a job as an office clerk and began studying law in his spare time. His intent was to sit for the Indian Territory bar examination when he felt he had studied enough law to pass. In 1907, however, friends in Muskogee convinced Hurley that he should obtain a law degree. As a result, Pat Hurley journeyed to Washington, D.C., enrolled in National University, and obtained his LL.B. in 1908. He was just twenty-five years old.

Returning to Oklahoma, he 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, as the Principal Chief of the Choctaws. The new chief now appointed Patrick J. Hurley, then serving as president of the Tulsa Bar Association, as the new National Attorney for the Choctaw Nation of Indians, at an annual salary of $6,000.[58] 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.[59]

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 items in that tribal property were 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.

Unscrupulous businessmen and politicians had engaged in "systematic, planned fraud" against the tribe for years, mostly by making contracts with individual Indians that purported to dispose of property held communally by the tribe.[60] 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.[61] Hurley was so successful that he could have remained as the Choctaw Attorney for as long as he desired.

In May 1917, however, one month after Congress declared war on Germany and the Central Powers, Hurley resigned and travelled to Washington, D.C., where he accepted a commission as a captain (CPT) in the JAGD. Hurley was no stranger to soldiering, having served as a private, corporal, sergeant, lieutenant and captain in the Muskogee (Oklahoma) Militia from 1903 to 1916 and in the Oklahoma National Guard from 1916 to 1917; in this last position, Hurley served on the U.S.-Mexican border with Guard personnel who were tasked with preventing Mexican warlord Pancho Villa from conducting raids into the United States.[62] Now, however, Hurley was going to soldier as an Army lawyer.

After arriving in Washington, D.C., CPT Hurley initially helped in the preparation of administration of the Selective Service Act of 1917. After some months, he tired of working in "a small office in the grim War, State & Navy Building,"[63] and pestered Judge Advocate General Enoch Crowder to permit him to transfer to combat duty. Finally, in April 1918, now-Major (MAJ) Hurley "went overseas with the first detachment of American artillery to go to France."[64] He subsequently served as the Judge Advocate, Army Artillery, First Army, where he not only prosecuted a number of courts-martial,[65] but also found time to assume the duties of the Army Artillery's Acting Adjutant General and Acting Inspector General.

While wearing crossed-pen-and-sword insignia, Hurley took part in the battles of Aisne-Marne, St. Mihiel, and Meuse-Argonne. During the last battle, the newly promoted lieutenant colonel (LTC) was cited "for distinguished and exceptional gallantry at Forest de Woevre on November 10, 1918."[66] The following day—the last day of World War I—LTC Hurley was commended for his gallantry in action while conducting "a reconnaissance under heavy enemy fire near Louppy, France."[67] This meant that Hurley was issued the Silver Star medal when that decoration was created by the Army in 1932.[68]

After the Armistice, LTC Hurley was appointed by General (GEN) John J. Pershing to be the Judge Advocate, 6th Army Corps. In this position, he successfully negotiated an agreement with the Grand Duchy of Luxemburg for the use of its roads and railroads by U.S. troops as they marched across that country on their way to occupy Germany. Originally, General John J. Pershing had planned to simply requisition the necessary trains, and use Luxemburg roads as if Luxemburg were occupied enemy territory on the theory that, as Germany had marched into Luxemburg and occupied it from 1914 to 1918, the Grand Duchy could be treated as if it were conquered enemy territory. Hurley pointed out, however, that regardless of Germany's actions, Luxemburg still had a neutral status under the 1907 Hague Convention and that Pershing's proposed course of action would violate international law. After Brigadier General Walter A. Bethel,[69] the senior judge advocate on Pershing's staff, admitted that Hurley was correct, General Pershing tasked LTC Hurley with arriving at a diplomatic solution. The result was an agreement in which the Americans agreed to pay for the use of railroad cars and pay for the upkeep of roads used by U.S. troops. They also agreed to pay rent for property used for military purposes, including housing used to billet American Soldiers.[70] At the end of his service in Luxemburg, LTC Hurley was awarded the Distinguished Service Medal, with the following citation:

> Assigned as Judge Advocate, Army Artillery, First Army, he rendered services of marked ability, performing, in addition to his manifold duties, the duties of adjutant general and inspector general. Later, as Judge Advocate General (sic) of the Sixth Army Corps, he ably conducted the negotiations arising between the American Expeditionary Forces and the Grand Duchy of Luxemburg wherein he displayed sound judgment, marked zeal and a keen perception of existing conditions. He has rendered services of material worth to the American Expeditionary Forces.[71]

After leaving active duty in May 1919, Hurley entered private practice, but returned in March 1929

to be Assistant Secretary of War under President Herbert Hoover. When the sitting Secretary of War died in November, Hoover nominated Hurley to replace him. The U.S. Senate unanimously confirmed him to the office the following month, "making Pat Hurley, now forty-six years old, the first cabinet officer from the State of Oklahoma, and the only Secretary of War to have served in the armed forces with the rank of private."[72] Hurley was also the first Secretary of War to have previously served as an Army judge advocate.[73]

Hurley left office with the election of Franklin D. Roosevelt, but returned to public service with the start of World War II. Promoted to brigadier general in 1942 (Hurley had remained in the Army Reserve and was a colonel at the start of the conflict), he was ordered to the Southwest Pacific and placed in charge of "efforts to run the Japanese blockade of the Philippines with supplies for General MacArthur's beleaguered forces on Bataan peninsula."[74]

While Hurley was able to assemble ships and crews in Australia, only a few vessels managed to breach the Japanese blockade; for every ship that arrived, two were lost. But Hurley's efforts did ensure that the American defenders of the Philippines were never short of ammunition.[75] As for Brigadier General (BG) Hurley, he experienced Japanese aggression first-hand when he was wounded in the head by shrapnel in a Japanese bombing attack on Port Darwin, Australia.[76]

After a quick recovery from this injury, Hurley was appointed U.S. Minister to New Zealand. On April 1, 1942, he assumed duties in Wellington as the top American diplomat in the country. But Hurley was unhappy being in a civilian suit instead of serving alongside Soldiers and, when President Roosevelt asked him if he would like to visit Moscow as a special emissary, Brigadier General Hurley readily agreed. After arriving in the Soviet Union and meeting with Stalin, Hurley and his entourage spent ten days with the Red Army in combat operations, including time with front-line troops then encircling the German army at Stalingrad.[77]

Later, Brigadier General Hurley participated in both the Cairo and Tehran conferences where he held the rank of ambassador. After being promoted to major general in December 1943, Hurley went to Chungking as U.S. Ambassador to China in the summer of 1944. In addition to his diplomatic duties, Hurley also served as Roosevelt's (and later President Harry S. Truman's) "personal representative on military matters" until he left China in September 1945.[78]

After the war, Hurley moved to New Mexico, where he was active in both business and politics. He ran unsuccessfully for U.S. Senate as a Republican (1946, 1948, and 1952). Hurley died in Santa Fe, New Mexico, in July 1963. He was eighty years old.

Major General (MG) Hurley's remarkable achievements as an Army lawyer and public servant have not been forgotten by the Corps: the courtroom at Headquarters, U.S. Army Fires Center of Excellence and Fort Sill, Oklahoma, is named in his honor.

Adam E. Patterson: The First African-American Judge Advocate

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The first African-American lawyer to join our Corps—then known as the Judge Advocate General's Department—was Adam E. Patterson. He had practiced law in Oklahoma and Illinois for more than fifteen years before being appointed as a Major, Division Judge Advocate, 92d Division, American Expeditionary Force, by General John J. Pershing on October 5, 1918. What follows is the story of a remarkable lawyer and judge advocate.

Born in Walthall, Mississippi, on December 23, 1876, Adam E. Patterson went to high school in Kansas City, Kansas, and Pueblo, Colorado. After graduating in 1897, he attended the University of Kansas and earned his LL.B.[79] in 1900.[80]

After being admitted to the bar, 24-year-old Patterson began practicing law in Cairo, Illinois. Five years later, he moved to Muskogee, Oklahoma. Active in Democratic Party politics, he was "conspicuous" in supporting Woodrow Wilson in the 1912 elections.[81] As a reward, once he was elected, President Wilson nominated Patterson to be Register of the U.S. Treasury on July 24, 1913. Two days later, however, after two prominent senators from Mississippi and South Carolina and their followers "served notice" on Wilson that the nomination of an African-American "could not be confirmed," Wilson withdrew Patterson's nomination.[82] Secretary of State Williams Jennings Bryan subsequently offered Patterson the position of "Minister to Liberia," but Patterson apparently declined this appointment and returned to Illinois in 1914.[83]

In Chicago, Patterson continued his involvement in politics. He was elected president of the National Colored Democratic League and, in 1916 "managed the national campaign for [the] Democratic Party among colored voters."[84] He also had an active civil and criminal law practice and took on a number of high-profile cases. On one occasion, Patterson worked alongside the famous lawyer Clarence Darrow[85] in defending Oscar S. De Priest, a black Republican and Chicago alderman, who was being prosecuted for graft; De Priest was acquitted.[86]

In 1917, after America's entry into World War I, Patterson joined the Officers Training Camp at Fort Des Moines, Iowa. He spent ten months as a captain of Infantry and was an instructor in the 4th Officers Training Camp, Camp Dodge, Iowa. On October 5, 1918, Patterson was promoted to major and appointed Division Judge Advocate for the 92d Division.

Adam E. Patterson as a student at the University of Kansas, c. 1900

This all-African-American division, which had been created by General (GEN) John J. Pershing as part of the American Expeditionary Force in 1917, had four infantry battalions, three field artillery battalions, and three machine gun battalions. It also had an engineer regiment, an engineer train, a signal corps, and a trench mortar battery.[87] While most officers in the division were African-American, black officers could not outrank white officers—meaning black officers generally were unable to attain a rank higher than lieutenant. This meant that Patterson was truly unique; one of only a handful of African-American majors in the Army and the first African-American lawyer to wear the crossed quill-and-sword insignia on his collar.

At the time of his appointment as Division Judge Advocate, the 92d Division was already in existence. Consequently, Patterson sailed to France, joined the unit, and then remained in France at least until February 1919.[88] Assisting him with his legal duties were Captain (CPT) Austin T. Walden, the

Assistant Judge Advocate, and two enlisted men.[89] As for what he did as the senior lawyer in the division, Patterson wrote in 1925 that he "personally handled all offenses committed by the soldiers from A.W.O.L. to murder."[90] Additionally, he would have provided legal advice to commanders and their staffs, and almost certainly was available if Soldiers in the 92d needed legal assistance.

After returning to Chicago from France in 1919, Patterson "became a major figure in the city's Democratic Party." He also established "The Committee of One Hundred," composed mostly of African-American war veterans, working for "civic racial uplift" in Chicago.[91]

Patterson also was very active in refuting an organized campaign by General Robert L. Bullard and other senior white Army officers to discredit the contributions of African-Americans in World War I, especially those of the 92d Division.[92] As General Pershing had lauded the exploits of the division in France, Patterson and other black Americans who had served in the 92d took Bullard's criticisms "as a personal affront."[93]

In the 1920s and 1930s, Patterson served as assistant corporation counsel for the City of Chicago, a prestigious and high-paying position. In this job, Patterson defended the city in civil suits for money damages. He continued to use his military rank during this time, and is routinely identified in books and newspaper stories as "Major (MAJ) Adam Patterson."[94]

Patterson probably remained in Chicago for the remainder of his life but your Regimental Historian has been unable to find an obituary for him that would confirm this assumption—though one must exist given his prominence in the community. In any event, it is unquestionable that Adam E. Patterson was inordinately proud of his service as a Judge Advocate and that he deserves to be remembered.

From Infantry Officer to Judge Advocate General to Provost Marshal General and More

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Allen W. Gullion was an extraordinary Soldier by any measure. He saw combat in the Philippines, served on the border with Mexico, and joined the Judge Advocate General's Department shortly before the United States entered World War I. After a number of significant assignments as a lawyer, he became The Judge Advocate General (TJAG) in 1937. When he retired from his position as TJAG on December 1, 1941, Major General (MG) Gullion assumed full-time duties as the Army's Provost Marshal General—a position that had not existed since World War I. He subsequently supervised the handling of all Axis prisoners of war, both in the United States and overseas. He also was the chief architect of the Army's framework for the post-World War II occupation of Austria, Germany, Japan, and Korea. In early 1944, Major General Gullion accepted an invitation from General (GEN) Dwight D. Eisenhower to join his staff as the Chief, Displaced Persons Branch. In this unique job, Major General Gullion oversaw Allied efforts involving the repatriation of millions of refugees and other civilians displaced by the chaos of World War II. With basic plans for this project completed, Gullion retired in December 1944. He died eighteen months later, in June 1946. What follows is the story of his remarkable career—unique in the history of the U.S. Army and The Judge Advocate General's Corps.

Born in New Castle, Kentucky, on December 14, 1880, Allen Wyant Gullion graduated with a Bachelor of Arts from Centre College, Danville, Kentucky, in 1901. As a student, he excelled in the subjects of Greek, Latin, and oratory (he won the school's prize in oratory),[95] but decided to pursue a career as an Army officer. Consequently, he obtained an appointment to the U.S. Military Academy at West Point, and after graduating in 1905, he was commissioned as a second lieutenant (2LT) in the Infantry branch.[96]

After service with the 2nd U.S. Infantry Regiment at Fort Logan, Colorado, 2LT Gullion sailed to the Philippines in 1906.[97] He served two years in the Philippine Islands, where he saw combat in military operations against Filipino insurgents.[98]

After returning to the United States in 1908, Gullion was assigned to Fort Thomas, Kentucky.[99] In

Major General Allen W. Gullion, The Judge Advocate General, U.S. Army, 1937

1911, he was promoted to first lieutenant and transferred to the 20th U.S. Infantry Regiment.[100] Gullion was then detailed as a Professor of Military Science and Tactics at the University of Kentucky, and during his two-year assignment, he attended law school, earning a Bachelor of Law degree in 1914.[101]

When National Guard units were sent to the Mexican border in 1916, Gullion accepted a commission as a colonel in the 2nd Kentucky Infantry.[102] He served on the border until May 1917, then gave up this rank and position in order to accept an appointment as a Regular Army major (MAJ) in the Judge Advocate General's Department.[103]

As the United States began mobilizing for World War I, MAJ Gullion was ordered to Washington for duty as Assistant Executive Officer and Chief of the Mobilization Division in the Provost Marshal General's Office. Major General Enoch H. Crowder, who had been the Army's Judge Advocate General since 1911, took a leave of absence from this

position to become the Provost Marshal General and oversee the implementation of the first wartime draft since the Civil War.[104] Gullion assisted Crowder in administering the new Selective Service Act, and as a result of his superlative performance of duty, Gullion—who had been previously promoted to Lieutenant Colonel—was awarded the Distinguished Service Medal.[105] His citation read, in part:

> As chief of publicity and information under the provost marshal general, he successfully conducted the campaign to popularize selective service. Later, as acting executive officer to the provost marshal general, he solved many intricate problems with firmness, promptness, and common sense. Finally, as the first chief of mobilization, division of the provost marshal general's office, he supervised all matters relating to the making and filling of calls and the accomplishment of individual inductions. To each of his varied and important duties he brought a high order of ability and remarkable powers of application. His services were of great value in raising our National Army.[106]

In March 1918, Lieutenant Colonel (LTC) Gullion deployed to France, where he served as a member of the General Staff, American Expeditionary Force and as Judge Advocate, Advance Session and III Corps.[107] After the end of hostilities, Gullion remained in Europe and marched with III Corps into Germany as part of the Allied occupation.[108]

Allen Gullion returned to the United States in early 1919 and was assigned to Governors Island, New York.[109] For the next five years, he was the legal advisor to Lieutenant General (LTG) Robert L. Bullard, a distinguished Soldier who had successfully commanded a brigade before taking charge of the First Division, III Corps, and Second Army in World War I.[110] Since Gullion had been Bullard's lawyer while Bullard commanded III Corps from September 1918 to October 1918, it is likely that the two Soldiers had forged a strong professional relationship during wartime that continued in peacetime in New York.[111]

In June 1924, LTC Gullion was transferred to the Office of the Judge Advocate General in Washington, D.C.[112] The next year, he earned accolades for his performance in the court-martial of World War I aviation hero Colonel (COL) William "Billy" Mitchell.[113] In September 1925, after two aeronautical accidents involving the loss of a Navy dirigible and three Army Air Corps aircraft, Mitchell claimed in a press conference that these air disasters were "the direct result of the incompetency, criminal negligence, and almost treasonable administration of our national defense by the Navy and War Departments."[114]

The White House and leaders in the Navy and War Departments were outraged by Mitchell's intemperate words, and he was ordered to stand trial by general court-martial. At a high-profile trial that was featured on the front page of virtually every American newspaper for weeks, Mitchell was found guilty of insubordination, conduct to the prejudice of good order and military discipline, and bringing discredit on the War Department.[115] But, while the court-martial left Billy Mitchell's reputation in tatters, Gullion emerged as "one of the most skilled and aggressive prosecutors" in the Army.[116] His withering cross-examination of Mitchell's testimony had been featured in newspaper stories throughout the country, and Gullion's closing argument on findings and sentencing likewise brought him to the attention of both the public and the Army's leadership.[117] He certainly seemed destined for higher rank and positions of greater responsibility.

Major General Gullion (left) and Colonel Myron C. Cramer (right), December 1941. Colonel Cramer replaced Major General Gullion as The Judge Advocate General, U.S. Army

But Gullion was also recognized by his contemporaries as an eccentric.[118] Although "he played polo and enjoyed watching boxing matches, he smoked heavily (always with a cigarette holder) and thought exercise could be bad for his health."[119]

When reading the newspaper in bed, he wore "white gloves so the print wouldn't soil his hands."[120] On car trips from Washington back to Kentucky, he would stop at each railroad crossing and order his son out to inspect the track both ways and then signal him to pass over it.[121]

Like many officers of the period, Gullion was intensely apolitical.[122] He never voted in an election, believing that officers must stay out of politics.[123] Finally, officers who acted in an ungentlemanly or unprincipled manner deeply offended him.[124] Certainly, COL Billy Mitchell fell into this category.

In 1929, LTC Gullion was selected to represent the United States as the senior War Department representative at an international conference in Geneva, Switzerland.[125] This gathering of forty- seven nations came together to formulate a code for prisoners of war and revise the Geneva Convention of 1906.[126] The result of this conference were two new international treaties on July 27, 1929: The Geneva Convention Relative to the Treatment of Prisoners of War (GPW) and the Geneva Convention for the Amelioration of the Wounded and Sick of Armies in the Field.[127] According to a War Department press release, Gullion was "chiefly responsible for the creation of" the 1929 GPW and, in May 1944, benefited personally from his work.[128] This was because the American Prisoner of War Bureau, created in compliance with U.S. obligations under the GPW, informed him that his youngest son, an Army Air Forces officer, had been captured by the Germans in France and was a prisoner of war (POW).[129]

In 1930, the War Department sent LTC Gullion to the Army War College, located at Fort Myer, Virginia.[130] After graduating in 1931, the War Department sent him to advanced schooling at the Naval War College, from which he graduated in 1932.[131] Gullion then sailed for Hawaii, where he assumed duties as the top military lawyer in the Hawaiian Department.[132]

In late 1934, in an unusual turn of events, LTC Gullion took off his uniform to become the civilian administrator of the National Recovery Administration (NRA) for the Territory of Hawaii.[133] Congress created the NRA in 1933 as a way to stem, at least in part, the deflation of the Great Depression in October 1929.[134] The goal of the NRA, which adopted a blue eagle as its symbol and "We Do Our Part" as its slogan, was to bring industry and labor together to create codes of "fair practice" and set prices that would raise consumer purchasing power and increase employment.[135]

Hugh S. Johnson, who had been a member of the Judge Advocate General's Department in World War I, was the first Director of the NRA.[136] Johnson selected administrators like Gullion, whom he knew from his years as a judge advocate, to implement NRA goals.[137] These included: a minimum wage of between twenty and forty-five cents per hour and a maximum work week of thirty-five to forty-five hours.[138] For the next year, Gullion and his staff drafted and implemented rules and regulations that governed almost every aspect of the economy in the islands.[139] Within months, he was so popular in the community that the local newspapers reported that Gullion was considered to be a possible future governor of the Territory.[140] But Gullion was abruptly out of a job in 1935, after the U.S. Supreme Court declared the NRA unconstitutional in *Schechter Poultry Corp. v. United States.*[141] He then returned to Washington, D.C., to become the Chief, Military Affairs Division, in the Office of the Judge Advocate General.[142]

Colonel Gullion became Assistant Judge Advocate General in 1936, and the following year, after the retirement of Major General Arthur W. Brown in November 1937, Gullion was promoted to Major General and became TJAG.[143]

The following year, Major General Gullion was the delegate of the United States at an international conference of judicial experts in Luxembourg.[144] At the conference, Gullion spoke "on the subject of protection of civil populations from bombardment from the air."[145] Given the role of airpower in World War II and the destruction wrought by aerial bombardment, his remarks must have been prescient. After Luxembourg, Major General Gullion continued to participate in high-profile events. In 1941, he represented the War Department and the American and Federal Bar Associations at the first convention of the Inter-American Bar Associations in Havana, Cuba.[146]

In September 1939, after the outbreak of war in Europe and as the U.S. Army began preparing for war, Gullion and his staff were heavily involved in drafting legislation to transform the Army into a wartime body.[147] However, as TJAG, Gullion was apparently most proud that during his tenure, the general court-martial rate was reduced "to its lowest rate in the peacetime history of the Army."[148]

Major General and Provost Marshal General Gullion, Provost Marshal General School, Arlington, Virginia March 1942

On July 3, 1941, five months before his four-year term as TJAG ended, Major General Gullion was appointed as the Provost Marshal General (PMG).[149] Shortly after Gullion assumed his new position, he took on responsibility for manning and training the new Military Police Corps, soon universally known as "MPs," which was created by the Secretary of War in September 1941.[150] Under Major General Gullion's guidance, the Military Police Corps of World War II "emerged as a trained specialist equipped to handle the difficult task of law enforcement."[151]

As PMG, Gullion did much more than oversee law enforcement operations in the Army; he was in charge of handling all Axis prisoners of war and was responsible for developing the framework for occupying liberated and conquered Axis territories.[152] This was a significant responsibility.[153] By the end of World War II, approximately 425,000 Axis POWs were living and working in 700 camps in the United States, and the Office of the PMG was responsible for every detail of POW welfare, from food, pay, and housing to medical care, mail, and recreation.[154]

As for military occupation, Gullion and his staff formulated the policies for military governance adopted by President Franklin D. Roosevelt, including an important 1943 revision to Field Manual (FM) 27-5, *Military Government*.[155] The FM ultimately was seen as the bible for all those involved in civil affairs and military occupation duties because "it provided guidance on how to train, to plan, and eventually implement military government."[156] Major General Gullion also established a Military Government School at the University of Virginia.[157] In "a tough 16-week course," Army "civil affairs officers" were "thoroughly grounded in Army organization, international law, and public administration"[158] so that the United States could effectively and efficiently govern in Germany, Italy, and Japan. Later, on Gullion's recommendation, the Army also created a Civil Affairs Division (as part of the War Department General Staff), to utilize the military personnel (some of whom were judge advocates) being educated at the University of Virginia.[159]

In May 1944, Gullion was offered the chance to join General Dwight D. Eisenhower in France as the Chief, Displaced Persons (DPs) Branch.[160] Major General Gullion accepted the position, and "he was relieved [of his duties as PMG] at his own request in order to accept the appointment."[161] In his new assignment, Gullion consulted and coordinated with other Allied governments (most of which were "in exile" in London) regarding repatriating nationals who had been displaced by the war.[162] Since at least 15 million Europeans had been displaced (war refugees, political prisoners, forced laborers, deportees, civilian internees, concentration camp inmates, ex-POWs, and stateless persons) returning them to their homes, or otherwise finding a country that would accept them, was a huge task.[163] Within months, however, Major General Gullion and his staff were able "to develop the framework of the organization" [164] for the rehabilitation and return of these DPs. Although this must have given Gullion great satisfaction, he certainly must have been frustrated since in November 1944 poor health required him to be "invalided at home."[165] He retired "because of disability incident to the service" December 31, 1944.[166]

Eighteen months later, on June 19, 1946, Major General Gullion died of a heart attack at his son's home. At the time of his death, he and his son were listening to a radio broadcast of the heavyweight boxing championship bout between Joe Louis and Billy Conn.[167] Guillion was 65 years old.

Allen W. Gullion served nearly forty years as a Soldier. With more than ten years as an Infantry officer, nearly twenty-five years as an Army lawyer,

and World War II service as Provost Marshal General and a member of Eisenhower's staff in France, he was a truly remarkable Soldier by any measure.

The Life and Career of Thomas A. Lynch: Army Judge Advocate in the Philippines and Japanese Prisoner of War

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Little is known about the officers who served in The Judge Advocate General's Department (JAGD) prior to World War II, if only because there were relatively few lawyers in uniform in the "Old Army."[168] Even less is known about men who served in the JAGD of the Philippine Scouts in the 1920s and 1930s. But one lawyer who served as a judge advocate prior to World War II, and spent the majority of his time as a military attorney in the Philippines, was Thomas A. Lynch. He served in the Philippine Islands as a private, corporal, and sergeant in the early 1900s and ultimately retired as a major in the JAGD of the Philippine Scouts in 1934. Recalled from retirement in 1940, Lynch was the Staff Judge Advocate, U.S. Forces in the Philippine Islands, when he was taken prisoner by the Japanese in 1942. He survived captivity and retired from the Army a second time in 1946.

Born in Chicago, Illinois on March 2, 1882, Thomas "Tom" Austin Lynch graduated from high school at age 19.[169] 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.[170] After a short period of service in Cuba, he sailed with his unit to the Philippines where he subsequently served as a private, corporal, sergeant, and First Sergeant of Company "F" of that Regular Army unit.

His military records show that he was five foot, six inches tall and weighed 140 lbs. when he enlisted. He had blue eyes and brown hair. He also had a tattoo of a butterfly (on his left forearm and upper right arm), which he most likely obtained while soldiering in the Philippines. Lynch also picked up some knowledge of Spanish while serving in Cuba and the Philippines, although his records indicate that he spoke it poorly.

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)[171] but his superiors were sufficiently impressed with Lynch that he was offered a commission in the Philippine Scouts.[172] 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.[173]

In 1915, when he was 33 years old, Lynch enrolled in correspondence courses offered by the Hamilton College of Law.[174] His military records from May of 1919 show that he studied law by correspondence for three years but did not graduate. These legal studies, were apparently sufficient for Lynch to begin practicing Army law as there was no requirement for a judge advocate to be a law school graduate, or be admitted to the practice of law in any court.[175]

In any event, after serving as Adjutant for Philippine Scouts stationed at Camp Claudio, now Captain (CPT) Lynch was transferred to Fort Santiago in Manila and given his first work as an Army attorney. His Special Efficiency Report for April to September 1919 identifies Lynch as "Assistant to the [Philippine] Department Judge Advocate." His job? "Assisting in court-martial reviews, etc., looking up law citations and writing of legal opinions."[176]

While marked as "above average" rather than "superior" when it came to "physical energy and endurance, judgment and common sense, and attention to duty," this seems to have been a fairly standard grade on an efficiency report for a Philippine Scout officer. After all, in writing "a brief general estimate" of Lynch, Lieutenant Colonel (LTC) Dennis P. Quinlan, his immediate superior, described him as a "fairly well educated officer . . . an intelligent, sober, zealous, well-ballasted man" (although precisely what his rater meant by that last term is not clear). Quinlan further described Lynch as "a loyal subordinate, thoroly [sic] conscientious, all-round officer, competent to command [a] regiment in an emergency."[177] This would appear to have been high praise for the era.

After being promoted to major (MAJ) on July 1, 1920, Lynch continued his work as an Army lawyer. He wore the crossed-quill-and-sword insignia on his collar and served as a "Law Member"[178] at general courts-martial convened in the Philippines. Lynch also performed duties as a trial counsel at general courts,[179] 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.[180]

Major Thomas A. Lynch, Manila, Philippine Islands, 1924.

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." His rater, Lieutenant Colonel (LTC) A. R. Stallings, the Philippine Department Judge Advocate, described MAJ Lynch as follows in his November 1925 evaluation of him:

> This officer is a careful competent reliable sound lawyer. Has no habits that interfere with his duties. Familiar with the manual [for courts-martial] and an excellent trial J[udge] A[dvocate]. Courteous, and of splendid disposition. Conscientious, capable and fair. Has just been admitted to practice in Philippine Courts. Is very loyal and dependable and an all round experienced lawyer.[181]

The following year, LTC Hugh C. Smith, who had replaced Stallings as Department Judge Advocate, also lauded Lynch's abilities as an attorney. He was, wrote Smith, "particularly valuable . . . on account of his long service here and his knowledge of Philippine laws and customs and his knowledge of precedents and policies pertaining to questions arising in this office."[182] Although some Anglo-American legal principles had been injected into the Philippine legal system by U.S. authorities after the Spanish-American War, much of Philippine law still was chiefly based on Spanish civil and penal codes, a holdover from the Spanish colonial rule of the archipelago.

In August 1926, MAJ Lynch sailed from Manila to San Francisco, California, and then took leave in New York City. In November, at the end of this authorized absence, he reported for duty at the Office of the Judge Advocate General in Washington, D.C. For the next four years, Lynch served in the Military Affairs Section. Akin to today's Administrative and Civil Law Division at the Office of The Judge Advocate General, military attorneys working in the Military Affairs Section were busy with all manner of non-criminal work involving the Army. 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."[183]

In November 1930, MAJ Lynch returned to the Philippine Islands, and resumed his work as the Assistant Department Judge Advocate. His new boss, Colonel (COL) William Taylor, praised him as "superior" in nine of ten categories, including intelligence, judgment and common sense, and leadership. As Taylor put it, MAJ Lynch was "eminently qualified to serve as a judge advocate anywhere, but especially in the Philippine Islands." This was because he was "thoroughly familiar with all the conditions and laws in force in the Philippines" and was "alive to his surroundings and can be relied upon in any and all situations." But not everyone agreed with Taylor's assessment. Major General John L. Hines, then commanding the Philippine Department, wrote this "indorsement" to MAJ Lynch's report: "An excellent officer, but this report is entirely too enthusiastic in its praise."[184]

Hines had previously served as Army Chief of Staff (from 1924 to 1926)[185] and so his opinion

certainly carried some weight—but one wonders if Hines really was able to judge MAJ Lynch's value to the Philippine Department. After all, Lynch's next report card stated the following:

> He is especially valuable here because of his familiarity with local laws and conditions. He is a mature man of exceptionally high ideals and he lives in accord with them. He has spent a great portion of his mature life in the Philippines and has acquired an unusual fund of information about the administration and laws of the insular government. He is studious and strong minded.[186]

Major Lynch retired from the Regular Army on August 31, 1934, with slightly more than 30 years of active duty. This was the minimum period of time required for retirement before World War II, and it seems that, having satisfied the number of years needed for a military pension, MAJ Lynch decided it was time to retire from active service. 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.[187]

Six years later, with war on the horizon after the German attacks on Poland in 1939, the Low Countries and France in 1940, an alarmed Congress authorized the induction of Reservists. It passed America's first peacetime draft the following month. As the Army began expanding, retired officers with special talents and abilities were recalled to active duty. Recognizing that a judge advocate of MAJ Lynch's experience would be valuable in the Philippines, he was recalled on November 15, 1940, and promoted to lieutenant colonel.[188] 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.

In early 1941, LTC Lynch assumed duties as Executive Officer to the Philippine Department Judge Advocate. As the threat of a Japanese attack became more likely, his wife Grace, and youngest son, William, were evacuated to the United States.[189] But Lynch remained in Manila and was still serving as Executive Officer when the Imperial Japanese Army invaded the archipelago on December 8, 1941. As the American-Filipino defense of the islands got underway, Lynch took on a number of non-legal duties. He was the Chairman of the Enemy Alien Board in Manila and the Liaison Officer to the Civil Government in Bataan Province. In the former position, he oversaw the detention process of Japanese citizens residing in the Philippines. Since there were a large number of Japanese nationals living and working in the islands, this was no small undertaking. In the latter position, LTC Lynch was involved in the handling of refugees fleeing the advancing Japanese Army.

During the retreat of American and Filipino forces from central Luzon into Bataan, LTC Lynch also assumed duties as Transportation Assistant to the Quartermaster. He 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.[190]

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 going onto the island. He handled "all unloadings" between December 31, 1941 and January 4, 1942.

Lynch was 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 (LTG) Jonathan "Skinny" Wainwright, the senior most Army officer in the Philippines after General Douglas MacArthur left for Australia in March 1942.[191] When Wainwright surrendered all U.S. forces on Corregidor on May 6, 1942, he and Tom Lynch went into Japanese captivity.[192]

Colonel Lynch's records do not reveal where he was initially confined as a Prisoner of War (POW) but he probably was at a camp for senior officers (generals and colonels) in the old cadre barracks of the Philippine Army at Tarlac, near Manila. In August 1942, he seems to have been transported along with other generals and colonels to Formosa (today's Taiwan). While in a POW camp in Karenko 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."[193] According to a book of cartoons about daily life as a POW life drawn by a fellow prisoner of war, 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. The following year, in October 1944, the POWs were transported by ship to Manchuria. They then travelled by railway to their new camp in Mukden. This was a tough experience for Lynch and his fellow POWs, as they had been living in a tropical climate on Taiwan and were now in "sub-Arctic weather (47 degrees)" [below zero Fahrenheit.][194]

During his captivity from 1942 to 1945, 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 their 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.[195]

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.[196]

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 "be relieved from active duty . . . at the expiration of his rest and recuperation leave" and retired as a colonel.[197]

Shortly thereafter, the War Department awarded Lynch the Legion of Merit in recognition of

Colonel (Ret.) Thomas A. Lynch, Bethesda, Maryland, 1952

his six months of difficult service on Bataan and Corregidor. His citation reads:

> Colonel Thomas A. Lynch distinguished himself by exceptionally meritorious conduct in the performance of outstanding services from December 1941 to May 1942, on Bataan and Corregidor, Philippine Islands. In the several capacities as Executive to the Philippine Department Judge Advocate, President of the Enemy Alien Board, Transportation Assistant to the Quartermaster during the movement into Bataan, Liaison Officer with the Bataan Civil Government and as Judge Advocate for U.S. Forces in the Philippines, he displayed superior political and legal knowledge in his sound advice to his superiors which assisted in solving many pressing problems.[198]

When he retired, 63-year-old COL Lynch lived in Bethesda, Maryland. In 1949, his wife, Grace, died. Two years later, in June 1951, he married Marietta Wilmot. They subsequently had a daughter and son—which means that Lynch was a new father when he was in his early 70s.

Colonel (Ret.) Thomas A. Lynch with his step-son and youngest son, Bethesda, Maryland, 1956

Colonel Tom Lynch was an outstanding Army lawyer. He also was a remarkably resilient and tough individual; his survival in the tropics, under fire in battle, and as a POW from 1942 to 1945 proves this to be the case. His medical condition at the end of his POW experience, while serious, did not prevent him from living a full life as a retired judge advocate. Colonel Lynch died of pneumonia at Walter Reed General Hospital on December 18, 1962. He was 80 years old. Lynch was buried with full military honors at Arlington National Cemetery, and both of his wives are buried next to him.[199]

From Infantryman to Contract Attorney to Judge Advocate General

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The expertise required to be a first-rate procurement lawyer in the Corps, necessarily acquired through study and practice over a long period of time, probably best explains why judge advocates specializing in contracting historically have been less likely to reach the very top of the Corps. There have been exceptions, however, and Ernest M. Brannon, who served as The Judge Advocate General (TJAG) from 1950 to 1954, is perhaps the most noteworthy. His remarkable career—which began at West Point and ended in Washington, D.C.—included overseas service in China and the Philippines, as well as tours in Ohio, New York, and Texas. As TJAG, he oversaw the doubling of the number of uniformed lawyers in the Corps, as well as the inauguration of the Uniform Code of Military Justice (UCMJ) and the reactivation of The Judge Advocate General's School (TJAGSA) in Charlottesville, Virginia—all of which occurred while the Army was at war in Korea.

First Lieutenant Brannon
1926

Born in Ocoee, Florida, on December 21, 1895, Ernest Marion "Mike" Brannon spent his childhood in Ocoee, where he went to grammar school. After attending Marion Institute, a college preparatory school located in Marion, Alabama, Brannon entered the University of Florida. He also worked at a local bank. After World War I began in Europe, and as "war tension" in the United States increased, young Brannon "became interested in the regular Army." He obtained an "alternate appointment" to the U.S. Military Academy (USMA) and left Gainesville for West Point in June 1917.[200]

Since the United States had entered World War I in April 1917, Brannon and the Class of 1917 were graduated early—on November 1, 1918. Ten days later, the war ended in Europe and Second Lieutenant (2LT) Brannon and his officer classmates returned to West Point as student officers and a second graduation six months later, in June 1919. The entire class then sailed for Europe, where they toured battlefields in France and Italy as guests of the French and Italian governments.

After returning to the United States, Brannon and his fellow Infantry officers made history as members of the first regular class at the newly established Infantry School at Fort Benning, Georgia.[201] After graduation in June 1920, Brannon reported to the 3rd Infantry Regiment, then located at Eagle Pass, Texas. When his regiment moved to Camp Sherman, Ohio, now-First Lieutenant (1LT) Brannon went with it.

In January 1921, 1LT Brannon returned to New York City to marry his girlfriend from his West Point days, Marjorie Devitt. He and Marjorie then returned to Ohio, only to be informed that they were to relocate to Tientsin, China, where Mike was to join the 15th Infantry Regiment. While aboard an Army transport ship taking them to China, however, Brannon was diverted to Camp Eldridge in Laguna Province in the Philippines, where he served as battalion and post adjutant.

In November 1922, now-Captain (CPT) Brannon joined the 15th Regiment in Tientsin, where he served as assistant adjutant. As in any career, timing and luck are often important. Although Brannon did not know it at the time, the arrival of a new officer in the regiment, Lieutenant Colonel (LTC) George C. Marshall, was an important event. Marshall served as the unit's executive officer and, in this position, had frequent contact with the regiment's assistant adjutant. While there is no way to know if this future Army Chief of Staff and General of the Army had anything to say about CPT

Brannon's future, LTC Marshall was an excellent leader who took note of promising young officers—and Brannon certainly fit into this category.[202]

In May 1925, Brannon was ordered to return to the United States to attend Columbia Law School for a year—in preparation to be an instructor at the USMA Law Department. Brannon subsequently served on West Point's faculty from 1926 to 1931, returning each summer to resume his studies at Columbia. It was a long process: after leaving West Point in 1931, Brannon completed his final year at Columbia and was awarded his LL.B. in 1932.

After being detailed to The Judge Advocate General's Department in 1931, Brannon's first assignment was in the Contracts Division in the Office of The Judge Advocate General (OTJAG). It was in this job that "he developed a life-long interest in the legal aspects of Army procurement."[203] Then-Major (MAJ) Brannon applied to attend the Army Industrial College (today's Industrial College of the Armed Forces), was accepted and, after graduating, was assigned to the Planning Branch, Office of the Assistant Secretary of the Army. In this position, MAJ Brannon assisted with planning for industrial mobilization in the event of war. He also was one of the War Department's representatives during Senate Committee investigations of the munitions industry, the so-called Nye Committee.

In 1936, MAJ Brannon returned to New York as Assistant Judge Advocate of the 2d Corps Area, located on Governors Island. After gaining some experience with courts-martial (and golf), he returned with his family to Washington, D.C. He was assigned to the Contracts Division, OTJAG. He later became chief of that division and was soon recognized as an expert in government procurement. Such was his authority that he taught Government Contract Law at Georgetown Law School from 1941 to 1943. Now-LTC Brannon also was given the additional duty of Chief of the OTJAG Tax Division.

In 1943, then-Colonel (COL) Brannon sailed for England, where he was assigned as the Judge Advocate, First U.S. Army, then located in Bristol. For his outstanding service as the top lawyer in that unit's headquarters between October 20, 1943 and May 31, 1944, Brannon was decorated with the Bronze Star Medal.[204]

On June 11, 1944, COL Brannon waded ashore at Omaha Beach with First Army as it entered combat in France. It was D+5 and Brannon would remain with the unit as it fought its way across France and Belgium and then into Germany. After Victory-in-Europe or "V-E" Day in May 1945, COL Brannon returned to the United States with First Army and began preparing to deploy to the Pacific, since the First was scheduled to join the fight against the Japanese.

The dropping of two atomic bombs on Japan ended the need for COL Brannon to deploy to the Pacific and he now returned to Washington, D.C., to become the "Procurement Judge Advocate" at Headquarters, Army Service Forces. This was an important position, which explains why the Office of the Procurement Judge Advocate was transferred to the War Department in 1946. The following year, however, the position was transferred again: to OTJAG. Brigadier General Brannon (he had been recently promoted) now became the Assistant Judge Advocate General (Procurement).

During his AJAG tenure, Brannon was heavily involved in the drafting and passage of the Armed Services Procurement Act of 1947. During the war, the government had used the negotiation method of procurement and this legislation now required the government to return to the "formal advertising and competitive bidding that had been customary in time of peace."[205]

On January 26, 1950, Brigadier General (BG) Brannon was confirmed by the Senate as TJAG.[206] Any hopes he may have had for a quiet tenure as the Army's top lawyer were dashed almost immediately, as the United States was plunged into war on the Korean peninsula in June 1950. Major General (MG) Brannon now became a war-time TJAG and faced a number of significant challenges.

First, the Army, Navy, and newly created Air Force had only recently finished work on the *Manual for Courts-Martial, 1949*, and were beginning with its implementation. But this work was now completely preempted with the enactment of the Uniform Code of Military Justice (UCMJ). Since the new UCMJ would take effect on May 31, 1951, Major General Brannon now had to oversee the production of yet another *Manual for Courts-Martial*—based on a criminal statute that was radically different from the Articles of War that had governed military justice in the Army since the Revolution.

Second, the outbreak of the Korean War had triggered the re-call of hundreds of Army Reserve

judge advocates, most of whom had served in World War II. Brannon and others realized that these returning judge advocates knew nothing about the new UCMJ and that some sort of instruction on the new Code was necessary—as well as refresher training on other legal subjects. The result was that Major General Brannon directed that The Judge Advocate General's School be re-activated at Fort Myer, Virginia. Within months, Major General Brannon directed that a more permanent location for TJAGSA be found. Consequently, it was Brannon who ultimately decided that the school should be located at the University of Virginia, and it was Major General Brannon who selected the school's first commandant, COL Charles E. "Ted" Decker, and ensured that TJAGSA had the funding and support that it needed to flourish.

Finally, Major General Brannon was TJAG when the Corps doubled in size. The demands of the Korean War and the additional legal responsibilities imposed by the UCMJ resulted in a large number of Reserve judge advocates being called to active duty. The Corps went from 650 judge advocates (350 Regulars, 300 Reservists) to over 1200 officers, of whom about two-thirds were Reserve officers. Major General Brannon reported in 1952 that 750 of these 1200 judge advocates "were engaged full-time in criminal justice activities."[207] In any event, the personnel challenges that accompanied this huge increase in Army judge advocates required a senior officer with vision.

When Major General Brannon retired on January 26, 1954, he left a Corps that was radically different from the one he had entered in the 1930s—and which had markedly changed during his four years as TJAG. When Major General Brannon retired on January 26, 1954, he was immediately recalled to active duty to serve one year as executive secretary of President Eisenhower's Commission on Veteran's Benefits, the so-called Bradley Commission. While other TJAGs have been recalled to active duty, it is a rare event in the Corps' history.[208] After retiring a second time, MG Brannon continued to serve for some years as a consultant to the Defense Department in the field of industrial security.[209]

Those who served with Major General Brannon in the Corps remembered him as "a man of great patience who took time to understand and care for the people around him."[210] As Major General (Ret.) Wilton Persons put it: "Some Judge Advocates were afraid of him [Brannon] because he was gruff and no nonsense . . . but he was very sharp, on the ball and much liked and admired in the Corps."[211]

Major General Brannon visits U.S. Army, Europe 1951

General Brannon's ideas about service in the Army were passed on to his grandson, Patrick J. O'Hare, who was a judge advocate for more than 20 years. After retiring as a colonel in 2005, "Pat" O'Hare continues to serve our Corps as the Deputy Director of the Legal Center at TJAGLCS.

As for Major General Brannon, he has not been forgotten: each year, the Contract and Fiscal Law Department at The Judge Advocate General's Legal Center and School awards the "Major General Ernest M. Brannon Award" to the Graduate Course student with the highest standing in government procurement law.

From Private to Brigadier General to U.S. Court of Appeals Judge

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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[212] federal appellate court judge: Brigadier General (BG) Emory M. Sneeden. This is his story.

Born in Wilmington, North Carolina, on May 30, 1927, Emory Marlin Sneeden began his Army career in 1944 as a private in the 647th Parachute Field Artillery Battalion.[213] He served in the Pacific in World War II, and in 1946, he returned to civilian life. Emory then earned a Bachelor of Science degree from Wake Forest University in 1949.[214]

Brigadier General Emory M. Sneeden
c. 1974

After graduation, Sneeden began law school, but with the outbreak of the Korean War, he returned to active duty in January 1951. 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 United Nations Service Medal.[215] Then Captain Sneeden left active duty after this combat tour and returned to Wake Forest University where he received his Bachelor of Laws degree in 1953.[216] He was admitted to the South Carolina Bar that same year.[217]

Sneeden transferred to The Judge Advocate General's Corps in 1955. In his early assignments, Sneeden served in Japan and Korea where he was a trial and defense counsel.[218] 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.[219] Then Major (MAJ) Sneeden returned to the United States for duty as the Assistant Chief of the Career Management Division (today's Personnel, Plans and Training Office).[220]

In 1966, Lieutenant Colonel (LTC) Sneeden deployed to Vietnam where he assumed duties as the Staff Judge Advocate, 1st Air Cavalry Division.[221] He left in 1967, returned to the United States for a year, and then returned to Asia to become the Staff Judge Advocate, U.S. Army Japan.[222]

After this assignment, he attended the U.S. Army War College where he graduated in 1970.[223] Then, he returned to the Pentagon to be the Chief of the Personnel, Plans and Training Office (PP&TO).[224] 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. After one year at PP&TO, Colonel (COL) Sneeden served as Executive Officer to The Judge Advocate General.[225]

In 1972, Sneeden was selected to be the Staff Judge Advocate, XVIII Airborne Corps.[226] He was the top airborne lawyer (Sneeden was a Senior Parachutist) until June 1974, when he was selected for promotion to flag rank.[227] In his last assignment on active duty, Brigadier General Sneeden was the Chief Judge of the U.S. Army Court of Military Review and Chief, U.S. Army Legal Services Agency.[228] He retired from active duty on December 31, 1975.[229]

Given his strong connections to South Carolina—and to Senator Strom Thurmond, the senior senator from that state—Sneeden immediately took up a new job as Thurmond's legislative and administrative assistant.[230] At Senator Thurmond's direction, Sneeden also served as Chief Minority Counsel on the Senate Judiciary Subcom-

mittee on Antitrust and Monopoly.[231] By the time he left this job in 1976, Sneeden was known "as one of the foremost authorities on antitrust law in the District of Columbia."[232] The University of South Carolina certainly recognized this expertise, as Sneeden lectured in antitrust law at its law school and served as associate dean from 1978–1982.[233]

In 1977, Sneeden 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.[234] In 1981, Brigadier General Sneeden left public service to become "of counsel" to the Washington, D.C., law firm of Randall, Bangert and Thelen. He also was a member of the Columbia, South Carolina law firm of McNair, Glenn, Konduros, Corley, Singletary, Porter and Dribble.[235]

On August 1, 1984, Sneeden was nominated by President Ronald Reagan to the newly created seat on the U.S. Court of Appeals for the Fourth Circuit.[236] He was confirmed by the Senate less than ten weeks later, on October 4, 1984.[237] 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 Sneeden to resign from the court on March 1, 1986.[238] Honorable Emory M. Sneeden died of cancer the following year, on September 24, 1987, in Durham, North Carolina.[239]

Shortly after his untimely death at the age of 60, an associate familiar with Sneeden's "legacy of honest, important, fair and dedicated public service" observed that if Judge Sneeden 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.[240] Whether or not this is true is hard to know, but the observation indicates the incredibly high esteem in which Brigadier General Sneeden was held by his fellow lawyers.

Brigadier General Sneeden also has been 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.[241]

A Butler in FDR's White House, Combat Infantryman in Italy, and Judge Advocate in the Corps: Rufus Winfield Johnson

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Rufus Winfield Johnson served as a butler in the White House in the 1930s and saw fierce combat as an officer in the 92d Infantry Division in World War II. He also defended Soldiers at courts-martial during the Korean War and, after transferring to the Judge Advocate General's Corps in 1959, finished his Army career as a Reserve lieutenant colonel. While Johnson sometimes faced prejudice because of his ethnicity, he did not let racism prevent him from having a superb career as a Soldier and lawyer—or from making legal history.

Born on a farm in Montgomery County, Maryland, on May 1, 1911, Johnson was the seventh son of a seventh son. After his mother died when Johnson was four years old, he was raised by an aunt and uncle in Coatesville, Pennsylvania. According to an obituary published in 2007, Johnson first faced racial discrimination when he was a Boy Scout: he needed a swimming badge to make Eagle Scout, but could not earn that badge because African-Americans were prohibited from using the local whites-only swimming pool.[242]

After finishing high school in 1928, Johnson attended Howard University in Washington, D.C., graduating in 1934. He subsequently completed law school at Howard in 1939 and then went to work at the White House. Although he was relatively short at five feet six inches, Johnson was exceptionally athletic and had qualified as a lifeguard while participating in the Army Reserve Officer Training Corps (ROTC) program in college. That explains why he was asked to watch over President Franklin D. Roosevelt as he exercised his polio-afflicted legs in the White House pool. Later, Johnson served as White House butler. He liked to tell about the time he spilled soup on Roosevelt yet kept his job. According to Johnson, the president, "seeking an advantage while dining with a political adversary," reached up to the butler tray Johnson was carrying "and calmly tripped a bowl of soup into his own lap, talking all the while, as his dining companions looked on, horrified."[243]

Eleanor Roosevelt took a liking to Johnson and, when the president's wife learned that he was studying for the bar exam at the end of his twelve-hour workday at the White House, she arranged for Johnson to serve her tea in the afternoons. She then instructed Johnson that he was to use these two hours to study. Her kindness meant that Johnson was able to take the District of Columbia bar exam in October 1941.[244]

The following month, Johnson was ordered to active duty. Having been commissioned as a Reserve infantry officer in 1934 (through ROTC at Howard), First Lieutenant (1LT) Johnson reported to Fort Dix, New Jersey. After a short assignment at that location—and promotion to the next rank—Johnson reported to the all-African-American 92d Infantry Division. When that unit sailed for Italy in 1944, Captain (CPT) Johnson was with it.

A member of the 3d Battalion, 371st Infantry Regiment, CPT Johnson excelled as an infantry officer and took command of Company I in early 1945. According to a questionnaire he completed in 1997, Johnson remembered telling newly arrived Soldiers:

> I am Capt. Johnson, your new company commander. My job is getting the enemy killed and you home in one piece. I can get these two things done only if you follow my orders promptly, without hesitation, or question, and use everything you were taught to do during your training.[245]

Johnson saw hard combat in the Rome-Arno River, North Apennine, and Po Valley campaigns. At one point during his tenure as a company commander, CPT Johnson was ordered by the division commander, Major General Edward "Ned" Almond, to attack a hill held by the Germans. Johnson later remembered that it was a "suicide mission"[246] and only a few men survived. Johnson was near the top of the hill when he found himself alone with a sergeant, who had been shot in the arm and both legs. Johnson shot and killed a German about to throw a grenade. Then, while under fire, Johnson picked up the injured man and carried him to safety.[247]

In his questionnaire, Johnson explained that he became so enraged by what had happened on the hill that, when he returned to camp, he charged into Almond's tent and berated him for endangering his men. Apparently there was some pushing and

shoving and Almond threatened to court-martial Johnson. While that did not occur, Johnson believed that Almond took his revenge at a later date by destroying a recommendation that Johnson be awarded the Silver Star for his gallantry during the Po Valley campaign. Johnson did, however, receive the Bronze Star Medal and Purple Heart.

While his duties as an infantry officer took the majority of his time in Italy, Johnson served as counsel at a number of courts-martial held in Italy. He "personally defended 11 cases involving capital crimes including 5 murders and three rapes."[248]

Johnson was discharged from the Army in February 1946. He was excited to be back on American soil, but this homecoming was bittersweet:

> Released from active duty in Virginia; refused service at lunch counter in every bus station on way to D.C.; had to ride in the back of the bus; upon arrival in D.C., I tried to buy a milk shake at the lunch counter in my uniform as a captain; was told, "Sorry, but we don't serve colored." That was in the Greyhound bus station.[249]

After a short association with another Washington, D.C., lawyer, Johnson opened his own office. His specialty was criminal law, and he "handled every type of case individually from minor police infractions to and including manslaughter, rape and robbery."[250] He also was "associate counsel" on several murder cases.[251]

In 1949, Johnson moved to San Bernardino, California, took and passed the bar exam, then opened a private law practice. A year later—in October 1950—he was recalled to active duty as part of a general mobilization of reservists during the Korean War. Captain Johnson was assigned briefly to Fort Knox, Kentucky, where he was a battalion executive officer and summary court officer. Although still an infantry officer, his legal background soon came to the attention of his superiors and resulted in Johnson being detailed to serve as trial and defense counsel at both general and special courts-martial. He also worked as an "Assistant Legal Assistance Officer."[252]

After CPT Johnson was assigned to the Far East Command and deployed to Korea in September 1951, he was appointed an Assistant Staff Judge Advocate at Headquarters, 2d Logistical Command. In this duty position, Johnson reviewed general court-martial records, examined boards and reports, and also conducted staff visits to units.[253] He also served as a defense counsel at special courts-martial held in Korea. Johnson was successful in this defense work—he obtained a number of acquittals for his clients—and consequently requested a transfer to the Judge Advocate General's Corps. But his request was denied because the Infantry Branch wanted to retain him as a combat unit commander.

Despite the Army's decision to keep crossed rifles on CPT Johnson's collar, his superiors permitted him to continue working as a lawyer: in his last assignment before leaving active duty in April 1953, Johnson served as "Assistant Staff Judge Advocate and Assistant Legal Assistance Officer" for Headquarters, III Corps and Fort MacArthur, located in Los Angeles, California. He was also the Chief of the Military Justice Branch. His rater, Colonel (COL) Doane F. Kiechel, then serving as III Corps Staff Judge Advocate, wrote the following on Johnson's Officer Efficiency Report:

> One of the finest officers and gentlemen of my acquaintance. Possesses unimpeachable character and integrity, high intelligence and a broad background of military-legal training and experience. Has a fine sense of ethical values. Outstanding in loyalty and devotion, with a particular aptitude for working calmly and efficiently under stress.[254]

His senior rater, COL Norman B. Edwards, wrote: "An outstanding officer. Well liked, competent, efficient, courteous and hard working. I concur fully with the comment of the rating officer."[255]

After leaving active duty, CPT Johnson remained in the Army Reserve and, during his yearly two weeks of active duty for training, served as an instructor for the Advanced JAGC Course at the Presidio of San Francisco. Major (MAJ) Johnson was finally able to transfer to the JAG Corps—on February 20, 1959—becoming one of the few African-American judge advocates in the Army.[256] After he completed the USAR School Associate Judge Advocate Advanced Officer Course in 1961, MAJ Johnson received "equivalent credit" for the JA Officer Advanced Course.[257] He served another ten

years in the Army Reserve before retiring as a lieutenant colonel in 1971.

During these years, Johnson made legal history. In April 1962, a group of Navajos met in the California desert and performed "a religious ceremony which included the use of peyote." Police officers, who had watched part of the ceremony, arrested them for illegally possessing the substance, which was outlawed because of its hallucinogenic qualities. The Navajos were later convicted in state court and they appealed to the California Supreme Court—with Johnson representing them on appeal.[258]

Johnson argued that the possession of peyote by his client, Jack Woody, and the other Navajos should be lawful because the peyote was being used for bona fide religious reasons, and consequently was protected by the First Amendment. The California Supreme Court agreed with Johnson, ruling that any state interest in proscribing the use of peyote was insufficient to overcome the right to religious freedom guaranteed by the U.S. Constitution. On August 24, 1964, the court, sitting *en banc* and by a vote of six to one, announced that it was reversing Woody's criminal conviction. *People v. Woody* continues to be cited in legal cases involving Native American religious freedom, and the name "Rufus W. Johnson, Anaheim, for defendants and appellants" will forever be associated with this decision.[259]

Johnson closed his law practice in 1978 and moved to Fayetteville, Arkansas. In 1995, he moved to Mason, Texas, to live with his step-daughter. He remained proud of his time as a Soldier and was a life member of the American Legion, Veterans of Foreign Wars, and Military Order of the Purple Heart. As he explained in 1977, he had joined these organizations because "they are noble, charitable, and patriotic . . . and were the '*heart*' of a real nation."[260]

Lieutenant Colonel (LTC) Johnson died on July 1, 2007. He was ninety-six years old. In accordance with his wishes, he was buried at Arlington National Cemetery. This made perfect sense, as Johnson loved the Army and believed in it as an institution. As he put it, "the military is the one segment of American life that Martin Luther King Jr.'s dream has come closest to reaching a reality."[261]

Colonel Walter T. Tsukamoto: No Judge Advocate Loved America or the Army More

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Shortly after the December 1941 attack on Pearl Harbor, Walter T. Tsukamoto, a civilian lawyer and judge advocate (JA) captain (CPT) in the Army Reserve, requested that the War Department order him to active duty. His request was denied. Tsukamoto made another request for active duty. It also was denied. He then applied a third and fourth time for active duty: denied again each time. Finally, when Tsukamoto applied a fifth time in early 1943, the Army relented and, on March 10, 1943, CPT Tsukamoto—a native-born U.S. citizen of Japanese ancestry—became the first Asian-American to serve on active duty in the Judge Advocate General's Department (JAGD). What follows is a remarkable story of an Army lawyer whose love for America and the Army never wavered despite the fact that this affection was not always reciprocated.

Born in Molokai, Hawaii, on September 15, 1904, Walter "Walt" Takeo Tsukamoto moved with his parents from Hawaii to Nevada when he was only a few months old. When Walt was seven years old, his parents moved from Nevada to California and settled in Sacramento. Young Tsukamoto soon proved to be an excellent student and, after graduating from high school in 1923, entered the University of California at Berkeley.

Tsukamoto graduated with a law degree (LL.B.) in 1929, passed the California bar examination, and began practicing law in Sacramento. He had a general practice that included probate, civil, and criminal law. Tsukamoto's specialty, however, was alien property law. This area of law was of great importance to Japanese immigrants living in California in the 1930s because the state had enacted legislation in 1913 prohibiting non-citizens from owning land in California.[262] Since U.S. law during this time did not permit Asian immigrants to become naturalized citizens,[263] a native-born American (known as a "Nisei" in Japanese) like Tsukamoto could own real estate in California while his parents, who were born in Japan, could not. Men and women in the same predicament as Tsukamoto's parents visited Tsukamoto for advice on how to lawfully acquire real estate, especially farmland, which many Japanese immigrants in California were interested in purchasing.

Tsukamoto also was politically active in his local community and routinely lobbied the largely antagonistic California legislature on behalf of Japanese-Americans. Particularly noteworthy was his success, achieved almost singlehandedly in the mid-1930s, in defeating legislation that would have prohibited Americans of Japanese ancestry from engaging in the fishing industry.[264] Tsukamoto also was a force in national politics. He had joined the Japanese American Citizens League (JACL) as a young Sacramento attorney and was elected to serve a two-year term as national president in 1938.[265]

In addition to his law practice, Walter Tsukamoto pursued a career as a Soldier. Having participated in the Reserve Officer Training Corps program at Berkeley, where he had attained the rank of cadet major, Tsukamoto was commissioned as an Army Reserve infantry officer on May 10, 1927. Assigned to the 361st Infantry, 91st Division, then-Second Lieutenant (2LT) Tsukamoto took Army correspondence courses in map and aerial photography reading, customs and courtesies, and scouting and patrolling. After transferring to the Reserve JAGD on July 29, 1937, now—CPT Tsukamoto also took correspondence courses in administrative law, military justice, and the rules of land warfare. He was the first Nisei to wear the crossed-sword-and-pen insignia on his collar and was almost certainly the first Asian-American JA.

When the Japanese surprise attack on Pearl Harbor occurred, Tsukamoto was shocked and angry. As a patriot and Reservist, he immediately volunteered for active duty. The Army, however, refused to act on his December 1941 application; apparently the War Department was uncertain about whether a thirty-seven-year-old Nisei Reserve officer should be activated.

On February 19, 1942, as Tsukamoto waited to hear from the Army—he did not know that the War Department had refused to take action on his request for active duty—President Franklin D. Roosevelt signed Executive Order 9066. This order authorized the Army to designate military areas from which "any or all persons may be excluded"[266] and to provide transportation, food, and shelter for persons so excluded. Shortly thereafter, Lieutenant General (LTG) John L. DeWitt, commander of the Western

Defense Command, issued proclamations dividing Arizona, California, Oregon, and Washington into military areas and ordering the re-location of Japanese-Americans into camps.

On March 24, 1942, recognizing that he was subject to LTG DeWitt's order and believing that he would soon be called to active duty, Tsukamoto requested that he be exempted from any forced re-location and that he be permitted to remain in his home in Sacramento. Not only did the Army deny Tsukamoto's request, but Tsukamoto, his wife, their five children, his father, and his mother, were sent to a camp near Tule Lake on the California-Oregon border.[267] Ultimately, 120,000 men, women, and children of Japanese ancestry, two-thirds of whom were U.S. citizens, were involuntarily settled in ten camps located in desolate areas west of the Mississippi.

Despite his internment at Tule Lake, Tsukamoto's desire to serve his country as a Soldier did not diminish. On April 8, 1942, he wrote to the Army a second time and requested active duty. In this letter, Tsukamoto stressed that he had "special qualifications in the knowledge of the Japanese language" and could "serve the Army in its evacuation and resettlement program of the Japanese."[268]

On April 15, 1942, Tsukamoto received this reply from Headquarters, First Military Area, Presidio of San Francisco: "[O]fficers of the JAG Department are ordered to active duty . . . to fill vacancies when and where needed. . . . [Y]our tender of service is appreciated and same has been made a matter of record."[269] The message was clear: There would be no active duty for CPT Tsukamoto.

On October 15, 1942, Tsukamoto asked to be called to active duty a third time. In his request, he wrote that he was "most anxious to serve in the defense and prosecution of the present war against the Axis nations, particularly Japan." The Army rejected this request a month later, on November 10, 1942; Tsukamoto was informed that there was "no appropriate assignment . . . to which you might be assigned."

Deciding that perhaps he should look outside the JAGD, Tsukamoto applied for active duty with the Military Intelligence Service (MIS) Language School located in Minnesota; this application also was rejected.

Then, on January 28, 1943, Secretary of War Henry L Stimson announced that American citizens of Japanese extraction would be allowed to volunteer for service in the Army. This was the opportunity that Tsukamoto had been waiting for and the next day, on January 29, 1943, he requested active duty a fifth time. As he put it:

> I have been a reserve officer continuously for the past 16 years and have at all times prepared myself to serve my country in time of need. I desire above all else to be permitted to serve in the present crisis and therefore respectfully and urgently request active duty assignment, either in my present branch or in any other branch in which I may be most useful to the United States.[270]

As a follow-up to this request, Tsukamoto sent a telegram a week later to the War Department in Washington D.C. The telegram was addressed to Secretary of War Stimson and read as follows:

> I HAVE REQUESTED IMMEDIATE ACTIVE DUTY ASSIGNMENT TO MY COMMANDING GENERAL FIVE TIMES SINCE THE WAR BUT WAS ADVISED THAT MY JAPANESE ANCESTRY PRECLUDED SUCH ASSIGNMENT. I HAVE BEEN A RESERVE OFFICER CONTINUOUSLY SINCE 1927 AND MY SOLE REASON FOR BECOMING AN OFFICER WAS OF COURSE TO SERVE MY COUNTRY IN TIME OF NEED. MAY I BEG OF YOU TO BRING ABOUT MY IMMEDIATE ASSIGNMENT. MY WIFE AND 5 CHILDREN, ALL LOYAL AMERICANS, JOIN WITH ME IN THIS REQUEST.[271]

Apparently it was this telegram that finally made a difference, as on February 10, 1943, Walt Tsukamoto received a letter from the War Department acknowledging receipt of his telegram and informing him that his request was being considered.[272]

While Tsukamoto was waiting to hear from the Army, other Japanese-Americans living alongside

Tsukamoto and his family in the relocation camp, who despised him for his pro-American attitude, began making threats against him and his family.[273] Believing that both he and his family were in danger, the re-location camp authorities allowed Tsukamoto to re-locate to Cincinnati, Ohio, on February 27, 1943. His family followed shortly thereafter.

On March 3, 1943, having only just arrived in Cincinnati, Tsukamoto received the message he had been hoping for: a telegram from the War Department ordering him to report for a physical exam. Two days later, he was on active duty in the JAGD and reported for duty to the University of Michigan, where he joined the 10th Judge Advocate Officer Course as a student. Tsukamoto was the only Asian-American student in his class and, as a relatively senior CPT, outranked many of his classmates.

When he graduated in June 1943, Tsukamoto was assigned as the Legal Officer at the MIS Language School, Fort Snelling, Minnesota. He reported for duty on June 10, 1943. Because the personnel at the MIS Language School were principally Nisei who were being trained for interrogation, interpretation, and translation duty in the Pacific, and because Walter Tsukamoto spoke fluent Japanese, it made perfect sense for the JAGD to assign him there. For the next two years, Tsukamoto performed a wide variety of legal duties, including preparing and reviewing court-martial cases and serving as a claims officer. Tsukamoto's expertise in alien property rights was especially valuable "in the preparation of wills, powers of attorneys, real property and other legal matters for military personnel prior to the departure for overseas assignment."[274] As his military records indicate, providing legal advice was "complex . . . since dependents of the enlisted men of Japanese descent have been evacuated from the Pacific Coast States."[275]

Tsukamoto excelled as a JA at Fort Snelling. His December 31, 1944 efficiency report described him as "a quiet, well-mannered officer who carries out his tasks well and faithfully. He has a pleasant personality and combines ability with tact and courtesy . . . [and] can always be depended upon to do his job well and without supervision."[276] His efficiency report for the following year likewise lauded his "tact and charm" and noted that Tsukamoto took "a whole-hearted personal interest in the welfare of the enlisted men of the command."[277]

Having been promoted to major (MAJ) in 1944, and with glowing efficiency reports, Tsukamoto was able to remain on active duty after World War II when many other JAs were discharged and returned to civilian life. After a brief assignment at the Presidio of Monterey, MAJ Tsukamoto deployed to the General Headquarters, Far East Command, in Tokyo, where he was assigned to the Military Affairs Division. For the next several years, he handled administrative and civil law matters and drafted legal opinions for his JA superiors. However, Tsukamoto also served as the law member (the forerunner of today's military judge) on general courts-martial and reviewed records of trial by military commissions in which death sentences had been imposed.[278]

His efficiency report for the period June 1947 to June 1948 reveals that, despite his sterling performance as an Army lawyer, his loyalty as an American citizen was still questioned by some of his fellow Soldiers. Brigadier General (BG) Franklin Shaw, the Staff Judge Advocate (SJA) of the Far East Command, and the "endorsing officer" (today's Senior Rater) wrote the following:

> A neat, clean cut officer, of good appearance and address, professionally able. His standards of conduct and citizenship, his legal ability, thoroughness, tact and sound judgment make him an exceptionally valuable judge advocate. *A Nisei who is a credit to his kind and the service. Long separation from his civil professional contacts, plus special problems confronting the American of Japanese antecedents in Japan, especially dependents, have had some discouraging effect, but he has met them manfully and I consider him outstanding as a citizen and soldier nevertheless.*[279]

While BG Shaw's words might seem patronizing to today's reader, their meaning is clear: Despite his proven loyalty as an American and outstanding performance in uniform as a JA, Tsukamoto continued to suffer from racism and prejudice.

When MAJ Tsukamoto finished his tour in Tokyo in September 1950, his rater lauded him as "a mature officer. . . of good moral character. Friendly, intelligent, industrious, and exercises good judgment."[280] Colonel (COL) George W. Hickman, who would later serve as The Judge Advocate

General (TJAG), wrote the following endorsement: "I agree with all remarks [of the rater] but also note that this Nisei officer is *intensely loyal* and ambitious."[281]

While Tsukamoto was in Tokyo, the North Koreans had moved into South Korea and war was raging on the Korean peninsula. He then deployed to Korea and joined X Corps in early October and, within a month of arriving, earned his first combat decoration: the Bronze Star Medal. The citation for this award covers the period of October 2 to November 2, 1950, and notes Tsukamoto's superb performance "as executive officer to the Corps Judge Advocate"[282] and "his invaluable assistance in forming and operating a War Crimes Division.."[283] While it was not unusual for a line officer to be awarded the Bronze Star Medal for merit for a short time period during the Korean War, Tsukamoto's Bronze Star Medal for a thirty-day period of work as a staff officer is unusual.

Promoted to lieutenant colonel (LTC) on December 12, 1950, Walter Tsukamoto once again made history as the first Asian-American to reach this rank in the JAG Corps (JAGC). He remained in Korea until October 16, 1951. As a senior ranking JA at X Corps, he "performed all duties of the Staff Judge Advocate and act[ed] in his place in his absence."[284] Lieutenant Colonel Tsukamoto also served as a law member at general courts-martial. While Tsukamoto did not participate in any fighting, he was close to the front lines and, consequently, was exposed to danger. In any event, when he returned to the United States, Tsukamoto left with a second Bronze Star Medal for meritorious service and another outstanding Officer Efficiency Report (OER).

Assigned to Sixth Army at the Presidio of San Francisco, Tsukamoto assumed duties as the Chief, Military Affairs Division. For the next four years, he prepared or supervised the preparation of opinions on such varied subjects as taxation, public utilities matters affecting the Army, and other similar civil and administrative law matters. But LTC Tsukamoto also spent considerable time as a law officer, as the new Uniform Code of Military Justice (UCMJ) was now in effect. His raters lauded his "versatile, logical mind" and his "sound knowledge of the rules of evidence, judicial temperament free of bias," and his "clear and logical thinking." His endorsers praised Tsukamoto as "loyal" and "likeable" and noted that his work was "uniformly of high caliber."[285]

In June 1955, LTC Tsukamoto travelled to Heidelberg, Germany, where he joined the JAGD, Headquarters, U.S. Army, Europe (USAREUR). He served as Executive Officer, worked in the Military Affairs and International Law Branch, and also served as a law officer at general courts-martial.

In February 1957, the Army notified now fifty-two-year old Tsukamoto that when he reached the mandatory retirement age of fifty-five, he would be released from active duty. This was a great blow to him because he had fewer than fifteen years of active duty and could not reach twenty years of active duty by the time he was fifty-five years old. Tsukamoto's superiors in the Corps, however, did not want to lose an officer of his talents. Consequently, they encouraged him to apply for an exception to the retirement age rule. He did and was informed by the Pentagon that he could remain on active duty until he had the twenty years necessary for retirement.

By this time, LTC Tsukamoto was widely known for his judicial bearing, temperament, and legal talents in court as a law officer. Consequently, in January 1958, when the JAGC established a pilot "law officer program" to see if a more formal judicial organization should be created, Tsukamoto was one of fourteen senior JAs selected for the program. When this program was formalized as the "Field Judiciary Division" in January 1959, LTC Tsukamoto remained with it.

It was an extremely busy time for military justice practitioners in USAREUR—and for law officers like LTC Tsukamoto. From May 25, 1959 to July 17, 1959, for example, he served as the law officer on nineteen general courts-martial tried in Western Germany, France, and Italy.[286] Despite the long hours of travel and many extra hours in court, Tsukamoto performed his duties in an exemplary manner. Not surprisingly, when he received his first OER as a member of the Field Judiciary, his rater, COL Edward T. Johnson, wrote:

> I consider Lt Col Tsukamoto to be the most outstanding officer of the entire group. He has a wonderful grasp of the technical aspects of his duty and his personality is such that he is able to carry out his judicial role without arousing the resentment of the prosecution, defense or command, but nevertheless insure a fair and impartial trial.[287]

Major General (MG) Stanley W. Jones, The Assistant Judge Advocate General, endorsed Tsukamoto's OER. He wrote: "I concur in everything the rating officer has said. [Tsukamoto] is a man of rare intelligence and splendid character. He is highly respected by all who know him for his extremely highly professional skill as a law officer."[288]

On October 25, 1960, Tsukamoto was promoted to full colonel, the first Asian-American to reach that rank in the Corps. His many years of loyal service had been rewarded and Tsukamoto no doubt looked forward to more years of service as an Army lawyer.

But it was not to be. His last OER had noted that LTC Tsukamoto "has a heart condition that somewhat limits his physical capability,"[289] although the OER went on explain that this health issue "has not interfered in any manner with his performance"[290] as a judicial official. Unfortunately, his ailment was more serious than anyone imagined because, on January 20, 1961, COL Tsukamoto died of a heart attack in Germany. He was fifty-six-years old and his death was a shock to all who knew him, especially his wife and five children, who had remained in the United States while Tsukamoto was serving overseas.

In COL Tsukamoto's final OER, the Chief of the Field Judiciary wrote that Tsukamoto "was, in every respect, the most outstanding . . . officer in the judicial field." The Assistant Judge Advocate General, MG Robert H. McCaw, who endorsed the OER, wrote but a single sentence: "With Colonel Tsukamoto's death, the Army has lost one of its finest officers." In appreciation of his service to the Corps, MG McCaw recommended that Tsukamoto be posthumously awarded the Legion of Merit. This decoration was approved by the Army's Deputy Chief of Staff for Personnel and was presented to his widow, Mrs. Tomoye Tsukamoto, in a ceremony at the Presidio of San Francisco in June 1961. A Soldier to the end, COL Tsukamoto was buried with full military honors at the military cemetery at the Presidio of San Francisco.

Looking back at COL Tsukamoto's sterling career in the Corps, it is clear that no JA loved America or the Army more. Today, when we celebrate the diversity of the United States, it is important to remember that Japanese-Americans like Tsukamoto suffered from prejudice, yet Tsukamoto apparently bore no ill will and was unwavering in his devotion to the United States and its promise of equality for all.

The author thanks Air Force judge advocate COL Derek Hirohata for alerting him to the story of COL Walter Tsukamoto, and his help in preparing this Lore of the Corps article. A special thanks also to Mrs. Doris Tsukamoto Kobayashi for ensuring the accuracy of the personal details about her father.[291]

Battlefield Promotion and a "Jumping JAG" Too

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While many judge advocates (JAs) have soldiered well in combat, few equal the achievements of Nicholas E. Allen, who entered the Judge Advocate General's Department (JAGD) as a second lieutenant (2LT) in 1942 and, when the fighting in Europe ceased in May 1945, was a lieutenant colonel (LTC) and the Division Judge Advocate, 82d Airborne Division. This is not because Allen made rank so quickly, although progressing from gold bars to silver oak leaves in such a short time is noteworthy. Rather, Allen stands apart from all other JAs in history because his superlative performance in combat earned him a battlefield promotion from major to LTC in November 1944—making Allen the only JA in history to have received such a distinction. Additionally, then LTC Allen made history again in March 1945 when he became the first JA to complete basic airborne training and earn the Army parachutist badge.[292]

Born in Atlanta, Georgia, on July 24, 1907, Nicholas Eugene "Nick" Allen graduated Phi Beta Kappa from Princeton University in 1929 and went straight to law school at Harvard. After passing the New Jersey bar in 1932, Allen went into private practice until 1936, when he took a job as an attorney in the Department of Labor in Washington, D.C.

After America's entry into World War II, Allen applied for a commission in the JAGD and, on April 1, 1942, was sworn in as an Army Reserve 2LT. He then worked in the contracts division in The Judge Advocate General's Office in Washington, D.C. His officer efficiency report from this period describes him as "a pleasant, likeable, quietly efficient officer; gentlemanly in bearing, conscientious, loyal, very willing and always ready to do any job that needs to be done."[293]

After attending the Eleventh Officer's Class at The Judge Advocate General's School in Ann Arbor, Michigan, from April to July 1943, Allen accepted a Regular Army commission and was promoted to captain. He then served briefly in Texas before being promoted to major (MAJ) in January 1944 and sailing for England. There, he worked in the Military Justice Division in the Branch Office of the Judge Advocate General, where he was the chief examiner of court-martial records of trial. His boss, Brigadier General (BG) E. C. McNeil, lauded Allen as "keen, alert, adaptable, loyal, cooperative, thorough . . . a top notch officer in every way."[294]

With a little more than two years in uniform, Allen was then chosen to join the 82d Airborne Division as its one and only lawyer. Although MAJ Allen had superb legal skills, he had never served as a legal advisor to a division commander. He had no combat experience, much less time with paratroopers who had waded ashore in North Africa in May 1943 and subsequently experienced hard and bloody combat in Italy and France. Finally, at thirty-seven years of age, Allen was an old man in comparison to most of the officers and enlisted men in the division. One can only imagine that he knew that this job was going to be both a mental and physical challenge.

When Allen reported to the 82d Airborne in August, the division was only a month away from major combat operations as part of Operation *Market Garden*. This daring plan, which started on September 17, 1944, involved nearly 5000 aircraft and more than 2500 gliders. It called for a large American-British airborne force to parachute deep behind enemy lines and seize key bridges and roads in the Netherlands. Despite fierce German counterattacks, the 82d succeeded in capturing and holding the bridge over the Maas River at Grave. Three days later, in exceptionally brutal combat near Nijmegen, elements of the 82d captured a key bridge across the Waal River. Despite the division's success, the defeat of other Allied units at Arnhem meant overall failure and, after fifty-six days of combat, the 82d was withdrawn to France.

During the early weeks of *Market Garden*, Allen was not in direct combat. On October 7, 1944, however, he joined the most forward elements of the 82d in Holland. Allen then coordinated and supervised investigations into claims for money made by Dutch civilians for damage or loss to their property caused by American paratroopers. Of course, the Army would not pay for property losses arising out of combat. But when there was no fighting and an American Soldier damaged a Dutchman's home or requisitioned food or some other item of personal property, a claim could be paid.

When it became clear that the 82d Airborne would be in Holland longer than had been expected and, not wanting the administration of justice to be interrupted by combat, Allen arranged for paratroopers in Belgium awaiting trial by court-martial to be flown to the Netherlands so that they could be tried there.

Allen also took on the additional duty of "voting officer." The War Department, at the urging of President Roosevelt, wanted as many Soldiers as possible to be able to cast a vote in the November 1944 presidential election. This meant that Allen had to enter the "Combat Zone" (as it was then called), deliver paper absentee ballots to paratroopers fighting on the front lines, and then collect these ballots and arrange for their return to the United States in time for the election.

Major General (MG) James "Jumping Jim" Gavin, the Division Commander, later wrote that Allen's work "enabled the Division to extend the voting privilege to combat troops actually in the forward lines under conditions that subjected [him] to hazards ordinarily alien to the exercise of his duties as Judge Advocate General [sic]."[295]

While *Market Garden* ultimately failed, and the 82d Airborne was pulled out of the Netherlands, MG Gavin was so impressed with Allen's performance during the heavy fighting that he did something that no other commander had ever done before, or has done since that time: on November 13, 1944, he recommended a "battlefield promotion" for Allen. According to the recommendation for promotion, MG Gavin thought Allen should be wearing silver oak leaves because his JA had enhanced mission success by arranging for Soldiers to vote, investigating claims, and ensuring that military discipline was enforced through the courts-martial process. In short, Allen had gone beyond what was ordinarily expected of a lawyer—even one who was in uniform.

Under Army Regulation 405-12, which governed officer promotions, MG Gavin could recommend a promotion for any officer who had "clearly demonstrated his fitness of promotion by his outstanding performance in actual combat."[296] Such a recommendation for a battlefield promotion had to be for superlative duty performance in combat and there had to be a vacancy in the manpower organization of the division. As the 82d Airborne was short one LTC, MG Gavin could have selected any one of a number of officers to be promoted. But he chose Nicholas Allen, and MG Matthew Ridgway, the XVIII Airborne Corps commander, approved the choice. Major Allen was promoted to LTC on December 7, 1944.

While the 82d Airborne enjoyed a brief period of rest and relaxation after its withdrawal from the Netherlands, it was back in action again in December, when the Germans launched a surprise attack in the Ardennes forest of eastern Belgium. Thrown into battle, the paratroopers fought hard over the next month in what is now popularly known as the Battle of the Bulge.

During the bloody fighting and bitterly cold conditions, Allen proved that Gavin's trust and confidence in him had not been misplaced. The citation for the Bronze Star Medal, awarded to Allen in June 1945, says it all:

> In the Ardennes campaign, Lt. Col. Allen voluntarily went into the Combat Zone to expedite the work of his section, at time entering the forward CP [Command Post] of the Division. The devotion to duty, competence, and indifference to danger shown by Lt. Col. Allen in the prosecution of his activities reflects great credit upon him and is in the highest traditions of the military service.[297]

Other governments also recognized LTC Allen's contributions to the Allied cause. For his service in the Netherlands, the Dutch Government awarded him the Military Order of William. The Belgian Government decorated Allen with their "Fourragere 1940" for his efforts in the Battle of the Bulge.[298]

After the Germans were defeated in the Ardennes, the 82d went back on the offensive. The division moved through the Hurtgen Forest, passed through the Siegfried Line, and was on the Roehr River in February. At the end of April 1945, the 82d conducted an assault across the Elbe River near Blekede, Germany, and, on May 2, 1945, MG Gavin accepted the surrender of 150,000 German troops. The following week, after six campaigns and 442 days in combat, the war ended for the paratroopers of the 82d Airborne Division.[299]

Allen had remained as the Division Judge Advocate (DJA) the entire time; he did not leave for a new assignment until June 30, 1945. His final

officer efficiency report from MG Gavin contained the following words:

> This officer is a hard-working and thoroughly informed Judge Advocate. His work has been outstanding. Coming into this Division after it had been overseas and through combat might have presented a serious problem to another officer, but he succeeded in quickly establishing a wholesome respect from the unit commanders and a feeling of confidence throughout the entire staff.[300]

Lieutenant Colonel Allen's officer efficiency report also indicated that he was now a "qualified parachutist" and he had, in fact, completed the Division's ten-day parachute school in March 1945. An April 1945 article published in *The Advocate* gives some of the details of this event, which had come from a dispatch from the public relations officer of the 82d Airborne. It seems that Allen had volunteered for jump training even though his job as DJA was "usually considered strictly 'chairborne.'" The article continues:

> The jump school course included a grueling physical conditioning program, instruction in manipulation of parachute harness and control of the 'chute in the air, and the correct manner of leaving the door of a plane.
>
> During the course, COL Allen made five jumps, two of which were made clad in full combat equipment worn for jumping over enemy territory. He finished the course with a night jump into inky blackness, and later received his jump wings from Maj. Gen. James M. Gavin, division commander.[301]

On the last day of June 1945, LTC Allen left the 82d Airborne Division for a new job with the 78th Infantry Division. That unit was in Berlin as part of the occupation forces, and Allen assumed duties as Staff Judge Advocate, U.S. Headquarters, Berlin. Six months later, he became the executive officer at the Judge Advocate Division, U.S. Forces European Theater. Allen left Europe to return to the United States in June 1946 and was released from active duty at the end of the year.

What happened to Allen? He worked briefly in private practice before becoming a civilian attorney in the Office of the General Counsel, Department of the Air Force, in 1948. As the Air Force had only recently become an independent service, Allen was involved in formulating legal policy and handling issues for a brand-new military organization. He remained with the Air Force as an associate general counsel until 1951, when he moved to the Department of Commerce to accept an appointment as acting assistant secretary for international affairs. In 1953, Allen left the Government to enter private practice. He had clients in Maryland and the District of Columbia and continued to practice law until shortly before his death.

As for his military career, Allen remained in the Army Reserve after World War II but, in June 1949, requested a transfer to the Air Force Judge Advocate General's Department. His rationale was that as he was then working in the Air Force General Counsel's office, it made sense for him to be an Air Force Reserve JA should an emergency arise that would require Allen to be called to active duty. The Army and Air Force agreed, and Allen was appointed a colonel in the Air Force Reserve in 1949. Not surprisingly, he excelled as an Air Force lawyer and, in March 1961, Allen was promoted to brigadier general. He retired in August 1967, with more than twenty-five years of total service in the Army and the Air Force. Nicholas E. Allen died in Maryland in 1993.

From West Point to Michigan to China: The Remarkable Career of Edward Hamilton Young

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Prior to World War II, there was no such thing as military legal education, and uniformed lawyers serving in The Judge Advocate General's Department (JAGD) learned "on the job." The rapid expansion of the Army after the Japanese attack on Pearl Harbor—from 1.6 million Soldiers to a force of 8 million men and women—caused a complementary explosion in the number of Army judge advocates, and a realization that "on the job" legal education was too slow and inconsistent for wartime. As a result, Major General (MG) Myron C. Cramer, who had assumed duties as The Judge Advocate General (TJAG) just one week prior to the Pearl Harbor Attack, established a Judge Advocate General's School, U.S. Army (TJAGSA) at the University of Michigan. Cramer also selected Colonel (COL) Edward "Ham" Young, who had previously taught law at West Point, to take charge of this first-ever school for the education and training of Army lawyers. This is the story of Young's remarkable three-year tour as the first TJAGSA Commandant, and his equally remarkable follow-on assignment as the theater judge advocate for all U.S. military personnel in China.

Born in Milwaukee, Wisconsin on June 16, 1897, Edward Hamilton "Ham" Young spent a few years in San Francisco before moving with his parents to Washington, D.C. After attending elementary and high school in D.C., Young wanted to follow his older brother, Cassin, to the U.S. Naval Academy (USNA).[302] He applied for an appointment as a midshipman, but was rejected "because he had flat feet and wouldn't be able to stand watch."[303] As a result, Ham Young applied to the U.S. Military Academy (USMA) at West Point. Apparently the Navy's view on Young's feet was not dispositive, since he was admitted as a cadet in June 1917. When he was later commissioned as an infantry second lieutenant, Young's naval officer brothers (a younger sibling also was a USNA graduate) teased him about being unfit to stand watch on a ship's bridge but nonetheless sufficiently healthy to go to the field.[304]

Upon graduating from West Point, then-Second Lieutenant (2LT) Young deployed to Europe, where "he served as an observer of Belgian, French, and Italian battle fronts and visited the Army of Occupation in Germany."[305] When he returned from Europe, Young completed the Basic Infantry Officers Course at Fort Benning, Georgia, and then served in a variety of company, battalion, and regimental assignments in the Philippines and the United States.

Colonel Edward H. "Ham" Young at the University of Michigan, c. 1943

In 1929, Young was given command of the Army War College Detachment in Washington, D.C., with the additional duty of White House aide. After serving in the White House in both Calvin Coolidge's and Herbert Hoover's administrations, Young was sent to Governors Island, New York, where he was the aide-de-camp to Major General Dennis E. Nolan, the commanding general of First Army.

In 1933, the same year that he married Ellen Nolan, his boss's daughter, Young was sent to New York University School of Law, where he took a course in law and then went to West Point to be an instructor. As Brigadier General (BG) (Ret.) Patrick Finnegan explains in his study of USMA's legal education, not all Law Department instructors were lawyers. On the contrary, some were line officers like Young. But to "ensure high standards of teaching, the Law Department began sending its officers who were not lawyers to receive training at

law schools."[306] This explains why Young took a course of law in New York City before joining the Law Department faculty. While at West Point, Young showed a keen interest in legal research and writing, and authored two textbooks on constitutional law. His *Constitutional Powers and Limitations* was later adopted as "the official text on constitutional law at the Academy."[307]

In 1936, Young was detailed to the JAGD and sent to New York to complete his law degree. After graduating in 1938, and passing the New York bar, Young returned to West Point's Law Department to resume his duties as an Assistant Professor of Law. At the conclusion of his USMA tour of duty, now-Lieutenant Colonel (LTC) Young was reassigned to Washington, D.C., where he joined The Judge Advocate General's Office as the deputy chief of the Military Affairs Division.[308] He was promoted to COL in early 1942.

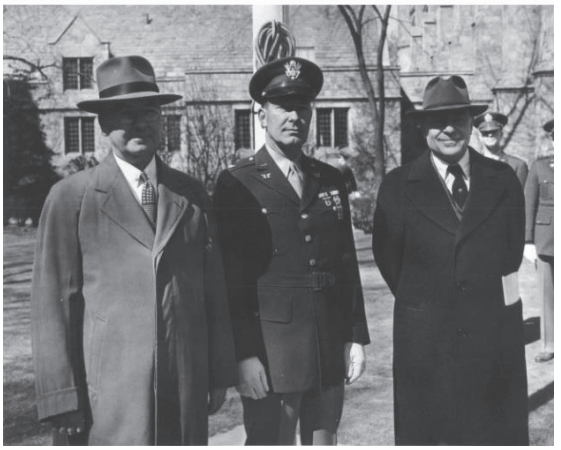
With the entry of the United States into World War II, and the expansion of the JAGD, the Army approved the opening of TJAGSA on the campus of the National University School of Law located on Thirteenth Street, Washington, D.C. Given COL Young's recent teaching experiences at West Point, and his presence in Washington, it made perfect sense for Major General Cramer[309] to select Young to be the first commandant of the school.

While TJAGSA opened on February 9, 1942, Major General Cramer and others soon realized that D.C. "was not an ideal wartime location" for "basic, specialized and refresher training for active duty military personnel . . . ."[310] The chief problem was insufficient classroom space and, as a result, TJAGSA moved to the University of Michigan's "Law Quadrangle" in September 1942. Colonel Young went with it and now was consumed with setting up a "regular program of instruction . . . to train attorneys in all areas of military law and to introduce those who were coming directly from their civilian professions to military life."[311] Since no school for Army lawyers had existed previously, Young had no standards or precedents to guide him. Yet he successfully planned, organized and administered a comprehensive course of instruction. Between February 1942, when COL Young arrived in Ann Arbor, and December 1944, when he turned over the school to a new commandant, Young and his faculty trained more than 1,700 officers and officer candidates to be judge advocates. As this constituted two-thirds of the active duty strength of the JAGD,[312] it was a remarkable achievement by any measure and explains, at least in part, why the news media referred to TJAGSA as the "Lawyers' West Point."[313] The legal profession also recognized COL Young's contribution to the law, as evidenced by his being awarded the honorary degree of Doctor of Laws by the University of Miami (Coral Gables, Florida).[314]

While serving as the commandant, COL Young was also appointed Professor of Military Science and Tactics at the University of Michigan by the commanding general of the Sixth Service Command. As a result, Young "enjoyed the distinction of being one of the few officers in the JAGD to exercise functions of command over troops other than those of the Department."[315]

In December 1944, COL Young left Michigan for Nanking, China, where he assumed duties as the theater judge advocate for the U.S. Forces in China and legal advisor to the U.S. Embassy. As the United States and its Pacific allies began investigating Japanese civilian and military personnel for war crimes, COL Young also became the legal advisor to the Far East United Nations War Crimes Commissions. Young remained in China until November 1947, when he returned to the United States. His tenure in China had been unique in the history of the Corps, as no other judge advocate had served as theater judge advocate before Young—and no one followed him in the assignment. When he left China, COL Young made history again as the only Army lawyer to be awarded three Chinese decorations: the Special Collar of the Order of Brilliant Star, Special Breast Order of the Cloud and Banner, and Special Breast Order of Pao Ting.[316] Young's report on his experiences in China remains the only official record of Army legal operations in the Far East during this turbulent period in history.[317]

Assigned to the Office of The Judge Advocate General in the Pentagon, Young served first as Chief, War Crimes Branch, Civil Affairs Division. Slightly more than a year later, in January 1949, Young left the Pentagon for Fort Meade, Maryland, where he was assigned as the Staff Judge Advocate (SJA), Second Army. He picked up an additional duty the following year, when TJAGSA was re- activated at Fort Myer, Virginia. TJAGSA had closed its doors in Ann Arbor in 1946, but with the outbreak of the Korean War, Major General Ernest M. "Mike" Brannon, then serving as TJAG, decided to re-start the school and asked COL Young to serve as its commandant.



Colonel Young (middle) at the University of Michigan, 1944

Colonel Ham Young retired as Second Army SJA in August 1954. Given that he had graduated from USMA in November 1918, he had served more than thirty-five years on active duty—an unusual length of service for an officer who did not reach flag rank.

In retirement, Young served as the secretary to the Board of Commissioners, U.S. Soldiers Home, Washington, D.C. After leaving this position in 1965 and enjoying his retirement in Virginia until 1972, COL Young and his wife moved to Vero Beach, Florida. He died at his home there in November 1987 and is interred in Arlington National Cemetery.[318] Today, Young has not been forgotten and his vision of an educational curriculum that transforms civilian attorneys into officers and military lawyers continues at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia.

Three Unique Medals to an Army Lawyer: The Chinese Decorations Awarded to Colonel Edward H. "Ham" Young

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While it is not unusual for a judge advocate in today's Army to be awarded a foreign *badge* for proficiency in parachuting, marksmanship, or physical prowess, the award of foreign decorations and medals is another matter, if for no other reason than these are rarely presented to judge advocates. Additionally, because of the constitutional prohibition on any "Person holding any Office" from accepting "any present . . . or Title, of any kind whatever, from any King, Prince, or foreign state," the Army has traditionally been reticent about permitting servicemembers to accept and wear foreign medals—especially during peacetime.[319]

With this as background, the award of not one or two, but three foreign military decorations to Colonel (COL) Edward H. "Ham" Young is a story worth telling. Young was awarded all three decorations by the Chinese government, in recognition of his outstanding service as the senior Army lawyer in China, from 1944 to 1947.

Born in Milwaukee, Wisconsin, in June 1897, Edward Hamilton "Ham" Young entered the U.S. Military Academy in June 1917.[320] Since the Army needed officers badly as it expanded during World War I, Young and his classmates graduated in November 1918, just 18 months after arriving as cadets. Commissioned in the Infantry, Second Lieutenant (2LT) Young was immediately sent to Europe, where he visited the Belgian, French, and Italian battle fronts and also observed the American Army in occupation duties in Germany.[321] After returning from Europe, Young served in a variety of company, battalion, and regimental assignments in the Philippines and the United States in the 1920s and early 1930s.[322]

In 1933, Young was sent to New York University School of Law, where he took a course in law, then went to West Point to be an instructor in the academy's law department.[323] Three years later, he joined the Judge Advocate General's Department, and in 1938, finally completed his law studies and passed the New York Bar Exam.[324]

When the United States entered World War II, Young was in Washington, D.C., where he was the deputy chief of the Military Affairs Division. Then, in February 1942, Major General (MG) Myron C. Cramer, The Judge Advocate General, selected Colonel Young to be the first commandant of The Judge Advocate General's School, United States Army (TJAGSA), then located at the National University Law School.[325]

Colonel Edward H. "Ham" Young, circa 1947

Shortly thereafter, when TJAGSA moved to the campus of the University of Michigan in Ann Arbor, Young went with it.[326] Working with a small group of Army lawyers, Young successfully planned, organized, and administered a comprehensive course of instruction. During his tenure as commandant, TJAGSA trained more than 1700 officers and officer candidates to be judge advocates.[327] As this constituted two-thirds of the active-duty strength of the entire Judge Advocate General's Department,[328] it was a remarkable achievement by any measure.

In December 1944, Colonel Young was transferred to the China, Burma, India Theater where he assumed duties in China as the Theater Judge Advocate, U.S. Forces in China.[329] He was also the legal advisor to the U.S. Embassy and the Far East United Nations War Crimes Commission.[330] After the Japanese surrender in August 1945, Colonel Young remained in China as the Staff Judge

Advocate, Nanking Headquarters Command and Advisory Group.[331]

When he left China in June 1947, Colonel Young's tenure had been unique in the history of the Corps, as no other judge advocate had served as Theater Judge Advocate before him—and no one followed Young in the assignment.[332] He was decorated by his boss with the Legion of Merit for his extraordinary service.[333] But the Nationalist Chinese government of General Chiang Kai-shek also saw Young's service as worthy of recognition, and decorated him with three medals: the Special Collar of the Order of the Brilliant Star, the Special Breast Order of the Cloud and Banner, and the Special Breast Order of Pao Ting. He is the only judge advocate in history to be awarded all three Chinese military decorations.[334]

Order of the Brilliant Star Award to Colonel Young

Founded in February 1941 as an award for outstanding merit, the Order of the Brilliant Star was created in nine classes or grades. Colonel Young received the Third Class or "Special Collar" class of the decoration with its purple neck ribbon. Very few awards of the Order of the Brilliant Star have been awarded; by 1968, the Nationalist Chinese government (relocated to the island of Taiwan in 1949) had only made 875 awards of the decoration.[335]

Order of the Cloud and Banner Awarded to Colonel Young

The Order of the Cloud and Banner was created in 1935 as an award for exceptional acts of bravery by members of the Chinese armed forces. By World War II, however, its award to foreigners also was permitted. Like the Order of the Brilliant Star, the Order of the Cloud and Banner also came in nine classes or grades. Colonel Young received the Fourth Class award with its wide blue stripe edged in narrow red/orange and bordered in white.[336]

Order of Precious Tripod Awarded to Colonel Young

Finally, Colonel Young was awarded the Special Breast Order of Tao Ping or "Precious Tripod." Created by Chiang Kai-shek in 1929, for either valor or outstanding service by a member of the Chinese armed forces or foreigners, the medal features a green and white tripod in its center. Colonel Young received the Fourth Class of the award, as evidenced by the white enamel band

surrounding the tripod, and the blue and white ribbon.[337]

The obverse of each Chinese medal is depicted in this "Lore of the Corps," along with Colonel Young's original ribbon bar from his dress uniform. Note that the three Chinese decorations follow all Young's American medal ribbons (Distinguished Service Medal, Legion of Merit, American Defense Service Medal, Army of Occupation of Germany Medal, World War I Victory medal, American Campaign Medal, Asiatic-Pacific Campaign Medal, and World War II Victory Medal).[338]

Ribbon Bar Worn by Colonel Young

"Ham" Young retired from active duty in 1954 and died in Florida in 1987.[339] He is interred in Arlington National Cemetery.[340] As for his Chinese decorations, they were donated to the Judge Advocate General's Corps by Colonel Young's descendants, and are part of the historical collection at The Judge Advocate General's Legal Center and School, United States Army.

From Camp Judge Advocate to War Crimes Prosecutor: The Career of Captain Frank H. Morrison II, Judge Advocate General's Department

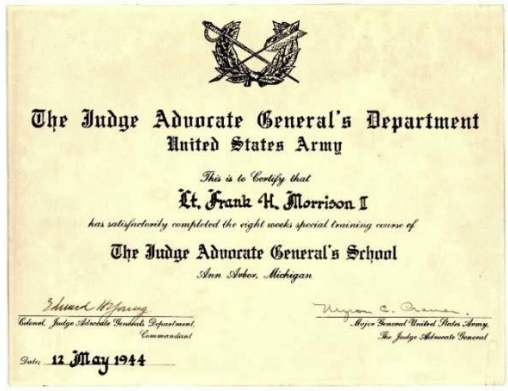
(Originally published in the September 2015 edition of *The Army Lawyer.*)

Even attorneys who served briefly as Army lawyers in World War II had remarkable experiences, as illustrated by the two-year judge advocate career of Frank H. Morrison II. After "satisfactorily" completing "the eight week special training course" at The Judge Advocate General's School (TJAGSA) in May 1944,[341] First Lieutenant (1LT) Morrison served as the lone "Camp Judge Advocate" at Camp Van Dorn in Mississippi until he was transferred to the Legal Section of General Douglas MacArthur's General Headquarters, Southwest Pacific Area, in February 1945.[342] For the next eighteen months, until he was discharged from active duty and returned to civilian life, now Captain (CPT) Morrison investigated war crimes in the Philippines and Japan. He also assisted in the prosecution of more than 300 Japanese war criminals, and was part of the "prosecution staff which sent Generals Yamashita and Homma to the gallows."[343] This is the story of his time as an Army lawyer in World War II.

Born on June 18, 1912, in Nashville, Tennessee, Frank Hamilton Morrison II graduated from Boys' High School in Atlanta, Georgia, in 1931 and earned his law degree from Emory University in 1937. He was certainly popular with his classmates, as he was voted "wittiest" boy in his high school class and elected president of the law school while at Emory. Morrison also was a good athlete and was passionate about tennis.[344]

After passing the Georgia bar, Morrison joined the law firm of Howard, Camp and Tiller in Atlanta, where he practiced law until being inducted into the Army in October 1942. Morrison subsequently attended the 16th Officer Class at TJAGSA and, after receiving a diploma signed by Colonel (COL) Edward H. "Ham" Young, TJAGSA Commandant, and Major General Myron C. Cramer, The Judge Advocate General, reported for duty at Camp Van Dorn, Mississippi, in May 1944.

For the next eight months, 1LT Morrison served as the "Camp Judge Advocate." He was the lone Army lawyer and consequently was responsible for the delivery of all legal services at Camp Van Dorn. This small installation, commanded by a colonel and


The Judge Advocate General's Department
United States Army

This is to Certify that

Lt. Frank H. Morrison II

has satisfactorily completed the eight weeks special training course of

The Judge Advocate General's School

Ann Arbor, Michigan

Colonel, Judge Advocate General's Department, Commandant

Major General, United States Army, The Judge Advocate General

Date: 12 May 1944

located near Centreville, Mississippi, began training troops in November 1942. When Morrison arrived, the 63d Infantry "Blood and Fire" Division was still in training; the unit left Camp Dorn for New York in November 1944.[345] Prior to the departure of that division, however, 1LT Morrison was incredibly busy.

First Lieutenant Frank Morrison with a client at the Camp Van Dorn Judge Advocate Office, 1944

Some of his work involved advising on military justice matters and reviewing courts-martial for legal sufficiency. Camp Van Dorn's commander was a special court-martial convening authority, and he convened about fifty courts-martial a year.[346] But it seems that the majority of 1LT Morrison's time was devoted to legal assistance matters.

According to an article published in the Camp Van Dorn newspaper in September 1944, the "Office of the Camp Judge Advocate" was heavily involved

in providing legal counsel to Soldiers stationed at the installation. The office had "over 250 divorce cases . . . pending in almost every state in the union." [347] But Morrison also assisted "in the naturalization of approximately 15 to 25 aliens a month." He had this large number of naturalization cases because of wartime changes made by Congress to the laws governing citizenship. In 1942, desiring to ease the naturalization process for non-U.S. citizens serving in the U.S. Armed Forces, Congress eliminated age, race, and residence requirements for American citizenship. [348] As if this were not sufficient incentive for non-citizen men and women in uniform to fill out naturalization paperwork, Congress went even further in 1944, removing any requirement to prove that one had lawfully entered the United States.[349]

With this as background, 1LT Morrison's unusual, if not amusing, experiences with naturalization make sense. In one case, a Chinese national serving in the Army at Camp Van Dorn was filling out a form so that his petition for naturalization could be submitted to the local U.S. District Court. The Chinese soldier, however, spoke poor English and had only been in the United States for a short time. First Lieutenant Morrison needed an interpreter but the only person he could find was a Russian "who had a very meager knowledge of the Chinese language."[350] As a newspaper article explained:

> When asked how he entered the United States, the Russian informed Lt. Morrison that the Chinaman stated he swam in. Lt. Morrison, feeling that certainly the Russian had misunderstood, repeated the question several times and gesticulated with his arms and used all manner of sign language to elucidate the proper answer from the Chinese and the answer always came back that he swam in.
>
> After approximately one hour of cross examination on this one particular question . . . it was learned that this [Chinese] alien had been a cook on an oil tanker which had been torpedoed off the Atlantic coast and that he actually swam into this country. So the answer as it appears in his petition for naturalization to the question asked is "I swam into the United States."
>
> Needless to say, this petition was acted on favorably and the man is now a fully naturalized American citizen.[351]

First Lieutenant Morrison (far right) at the Camp Van Dorn Officers Club, 1944

In February 1945, with training operations at Camp Van Dorn winding down, Morrison was reassigned to the Pacific Theater. He "was one of the first members of General (GEN) MacArthur's staff to investigate Japanese atrocities at Cabanatuan Prison and during the Bataan Death March."[352]

Now-CPT Morrison started his work in Manila as part of a five-man team; this eventually grew to be a staff of 150. As Morrison explained to a newspaper reporter in May 1946, the "hardest part of the job in connection with the war crimes activities was to find those responsible for the atrocities, tortures, and other crimes and then apprehend them."[353] The American soon discovered, however, that Japanese soldiers suspected of war crimes would commit suicide rather than allow themselves to be apprehended by the Americans. After Japanese Emperor Hirohito was directed to order accused Japanese military personnel to report for hearings, however, these suicides ceased. As Morrison explained, "the Japanese believed hari-kari was honorable, but if they were ordered to report by the Emperor, they would obey rather than face disgrace and the wrath of their dead ancestors for refusing to comply with an order from their ruler."[354]

After months of investigative work in the Philippines—interviewing witnesses and visiting crime scenes—CPT Morrison served on the military commission prosecution teams that tried General Tomoyuki Yamashita, whose moniker was the "Tiger of Malaya," and General Masaharu Homma. These men were tried in Manila in late 1945 by a

commission consisting of five general officers. Convicted of failing to provide effective control over his troops, who were committing horrific war crimes in the Philippines in late 1944, Yamashita was sentenced to be hanged. The sentence was carried out in 1946.[355] Homma, who was the commander in the Philippines at the time of the infamous Bataan Death March, was likewise convicted by a military commission; he was found guilty of allowing members of his command to commit "brutal atrocities and other high crimes."[356] Homma was executed by firing squad in April 1946.

Captain Morrison at his desk in Yokohama, Japan

Sometime after the Yamashita and Homma trials in Manila, CPT Morrison was reassigned to General Douglas MacArthur's General Headquarters in Tokyo, Japan. According to an article in *The Emory Alumnus*, Morrison was "selected by the chief of General MacArthur's legal section to assist in the prosecution of more than 300 accused war criminals in Yokohama."[357]

As a result of his exemplary work as a war crimes prosecutor from May 1945 to March 1946, CPT Morrison was later awarded the Bronze Star Medal for meritorious achievement by the Commander in Chief, U.S. Forces, Pacific.[358]

After being released from active duty in mid-1946, Frank Morrison returned to Atlanta, where he rejoined his old law firm.[359] He tried his hand at politics, and ran unsuccessfully for the Fulton County seat in the Georgia State Legislature in 1948.[360]

Captain Morrison's identification card used during war crimes investigations

Shortly after Christmas in 1958, Morrison suddenly took ill. He died a week later on January 3, 1959, of cirrhosis of the liver.[361] He was only 46 years old. It was an untimely end for a man who had a remarkable career as an Army lawyer in World War II and who likely would have had an equally distinguished career as a civilian attorney in Atlanta.

The Cease-Fire on the Korean Peninsula

(Originally published in the August 2013 edition of *The Army Lawyer.*)

Over sixty years ago, on July 27, 1953, an armistice agreement ended the fighting between United Nations (UN) forces and Chinese and North Korean armies on the Korean peninsula. This armistice, or cease-fire agreement, had been drafted the year before by forty-four-year-old Lieutenant Colonel (LTC) Howard S. Levie, a career judge advocate (JA) assigned to the UN Command Armistice Delegation. What follows is the story of how, while "dozens of voices . . . harangued more than nine months in trying to reach an armistice in Korea," the pact itself was "written mostly by one man."[362]

The Korean War started on June 25, 1950 when about 10,000 North Korean People's Army (NPKA) soldiers, supported by artillery, aircraft, and tanks, crossed the 38th parallel into the Republic of Korea (ROK). While the ROK army was about the same size as the NPKA, its soldiers lacked combat experience. As a result, ROK resistance collapsed quickly, and Seoul, the ROK capital, fell to the Communists on the third day of fighting.[363]

Under a UN Security Council Resolution, however, American air, naval, and ground units joined the battle.[364] After General (GEN) Douglas MacArthur's brilliant amphibious landings at Inchon, UN forces (now including Australian, British, Dutch, Turkish, and many other UN member states) drove into North Korea, capturing the North Korean capital, Pyongyang, in October. By the end of 1950, however, Chinese Red Army troops had entered the war and, joining forces with the NPKA, drove the UN forces out of North Korea; the enemy re-captured Seoul. The Eighth U.S. Army, first commanded by Lieutenant General (LTG) Matthew B. Ridgway and then by Lieutenant General James Van Fleet, pushed back against the Communists. Badly hurt by losses in both men and materiel, the Chinese and North Koreans suggested peace talks on June 23, 1951, and the UN accepted.[365]

In July 1951, then-LTC Levie was serving in General MacArthur's Far East Command in Tokyo. A Cornell law school graduate who had transferred from the Coast Artillery Corps to The Judge Advocate General's Department in 1946, Levie had been the Chief, War Crimes Division, since September 1950. In this position, he supervised the review of records of trial in which a death sentence had been adjudged against a Japanese accused. One day, while reviewing a trial record, LTC Levie was informed that he was to report the following day to the UN Command Armistice Delegation, and that he would serve as a "Monitor" on the Delegation Working Group. His superiors—involved in the actual negotiations—included four Americans: Vice Admiral (VADM) C. Turner Joy; Major General (MG) Henry I. Hodes; Rear Admiral (RADM) Arleigh A. Burke; Major General Laurence C. Craigie; and one ROK officer, Major General Paik Sun Yup.[366]

Negotiations opened on July 10, 1951 in Panmunjom, and when Levie arrived there, he learned that while the Communist and UN delegations would approve the principles to be contained in the truce agreement, it was going to be his job—as the only lawyer—to draft proposed provisions for the implementation of those principles. The result was that, over a nine-month period, while dozens of individuals argued about the principles to be contained in the cease-fire, Levie drafted the actual language for those provisions suggested by the UN Command.

After LTC Levie drafted each specific provision, he would "have an in-house review and discussion by the delegation and staff."[367] After any changes or modifications were agreed upon, the proposed Armistice provisions were "sent to Washington [D.C.] for approval."[368] After approval, the provisions were translated into Chinese and Korean. As Levie remembered,

> [I]n the beginning, it was thought that each side would draft the specific provisions; rarely did we receive a draft proposal from the Communists. We quickly learned that no matter how perfect the translation of a proposal would be, the Communists would never accept it without demanding some change or changes; changes that were frequently completely meaningless. We then adopted the practice of deliberately inserting a few more or less obvious errors. The Communists would insist on correcting those errors and would otherwise accept the document.[369]

This drafting job was without precedent, as no JA had previously been tasked with authoring a truce agreement. Lieutenant Colonel Levie, however, was familiar with the 1936 cease-fire agreement between Bolivia and Paraguay, and he borrowed paragraphs from this agreement for the Korean armistice.[370] He also looked at "other armistice agreements of modern times on the paragraphs dealing with a demilitarized zone."[371]

Lieutenant Colonel Howard Levie (middle) investigates war crimes in South Korea, c. 1952

By April 1952, LTC Levie's armistice agreement had "been overhauled seven times" and was "26 legal size typewritten pages containing 63 paragraphs, many with subparagraphs."[372] Provisions in the document covered a variety of purely military topics, including the creation of a military demarcation line and demilitarized zone, the establishment of a military armistice commission, and specific details governing the implementation of the cease fire. When negotiations stalled over the issue of repatriating prisoners of war (POWs),[373] the original members of the delegation and staff departed Panmunjom in May 1952.

Lieutenant Colonel Levie left the following month, but his precise, clear, grammatically correct agreement remained in place. Consequently, when negotiations resumed the following year—with an agreement on POW exchanges—what both sides signed on July 27, 1953 essentially was what Levie had written.[374] It was a remarkable achievement by any measure. At the time, no one realized that this truce document would be so important, since there was every reason to believe that the parties subsequently would sign a formal peace treaty ending the Korean War. But this has never occurred and, as a result, Levie's agreement—which required both sides to withdraw two kilometers from the truce line to establish a Demilitarized Zone—is what maintains a sometimes uneasy peace today.[375]

As for LTC Levie? After leaving Korea in July 1952, he returned to Japan until the following year when he departed for the United States. After briefly serving as the Staff Judge Advocate (SJA), Fort Leavenworth, Kansas, LTC Levie was transferred to the Pentagon, where he served as the first chief of the newly created International Affairs Division (IAD) in the Office of The Judge Advocate General. Promoted to colonel shortly after becoming the head of IAD, Levie remained in the Pentagon until 1958, when he was transferred to Europe. He served first as the SJA, Southern European Task Force, and subsequently as the Legal Advisor, U.S. European Command. After retiring in 1963, Colonel (COL) Levie began a second—and extraordinarily successful—career as professor of international law at St. Louis University and at the Naval War College.[376]

Howard Levie's many writings on the Law of Armed Conflict—he wrote seven books and more than fifty articles and edited thirteen volumes—continue to be used by international legal scholars. The Corps recognized his many contributions when it made him a Distinguished Member of the Regiment in 1995. But COL Levie has yet another unique place in our history: he is the first and only member of the Corps to reach the "century" mark, and he later celebrated his 101st birthday on December 19, 2008. Levie died at his home in Rhode Island the following year.[377]

The Remarkable—and Tempestuous—Career of a Judge Advocate General: Eugene Mead Caffey

(Originally published in the May 2014 edition of *The Army Lawyer*)

Eugene M. Caffey, who served as The Judge Advocate General (TJAG) from 1954 to 1956, had a remarkable career as an Army lawyer. He apparently is the only judge advocate in history to transfer from his basic branch to the Judge Advocate General's Department (JAGD),[378] and then return to his basic branch before returning to the JAGD once again—to finish out his career as the Army's top lawyer. Caffey also is unique as the only World War II-era judge advocate to have been decorated with both the Distinguished Service Cross and Silver Star—awards for combat heroism that are outranked only by the Medal of Honor. Finally, Caffey is the only judge advocate in modern history to go from colonel to brigadier general to major general (and TJAG) in just six months. Yet despite his outstanding service as a judge advocate and combat commander, Major General (MG) Caffey's career was tempestuous because he was unable (or unwilling) to get along with his superiors and was unable (or unwilling) to keep his opinions to himself.

Major General Eugene M. Caffey's official portrait April 1956

Born in Decatur, Georgia, on December 21, 1895, Eugene Mead Caffey entered the U.S. Military Academy in 1915.[379] His father had retired as an Infantry colonel and young "Gene" Caffey, having spent his "boyhood on various Army posts in the West, the Philippines and China," likewise wanted a life as a Soldier.[380]

After the United States entered World War I, classes at West Point were accelerated, with the result that Caffey graduated on June 12, 1918 and was commissioned a second lieutenant and a first lieutenant (temporary)—on that same day.[381] Two months later, he was promoted to captain, and when the fighting ended in Europe in November 1918, Captain (CPT) Caffey was a company commander in the 213th Engineer Regiment, Camp Lewis, Washington.[382]

Caffey subsequently served with the Panama Canal Department and with the Tacna-Arica Plebiscite Commission in Chile. After completing his tour of duty in Chile, First Lieutenant (1LT) Caffey (who had lost his captain's rank with the end of World War I) travelled to Managua, Nicaragua, in July 1928. There, he served as the assistant to the Secretary, American Electoral Mission in Nicaragua. Caffey also served as a member of a survey team, and assisted in exploring an alternative canal route in Nicaragua. This survey expedition was considered to be of great importance in the late 1920s because, despite the existence of the Panama Canal (completed in 1914), "dreams of a canal through Nicaragua persisted in the United States and elsewhere."[383] When Caffey left South America, his boss lauded him as "an alert, energetic officer of pleasing personality with the ability to adapt himself to a wide range of duties and discharge them in an excellent manner."[384]

After returning to the United States, 1LT Caffey applied for detail with the Judge Advocate General's Department. He was accepted and moved with his family to Charlottesville, Virginia, as he had been admitted to the University of Virginia's law school. First Lieutenant Caffey was a brilliant student, and finished first in his class. He was elected to Phi Beta Kappa, the Raven Society, and the Order of the Coif.[385]

After being admitted to the Virginia bar, Caffey was promoted to captain on July 1, 1933. He then served his first tour as a judge advocate at Fort Bliss, Texas, where he was the "Assistant to the Division Judge Advocate."[386] In June 1934, Caffey was

reassigned to Washington, D.C., where he was placed on "detached service" with the Army's Bureau of Insular Affairs. For the next four years, Caffey defended the interests of the War Department in U.S. courts when those interests involved the Philippine government. In one particularly important piece of litigation—lasting two years— Caffey's skills resulted in the defeat of six suits filed in U.S. District Court for the Southern District of New York. Plaintiffs in these suits had sought to force The Chase National Bank of New York City to pay between six and eight million dollars of Philippine government funds, on deposit in the bank, to the plaintiffs.[387] "The loss of such a sum would have shaken the financial position of the [Philippine] government, have seriously threatened the value of its currency, and introduced serious political and administrative problems into the relationship between the United States and the Commonwealth."[388] No wonder that Philippine government officials praised Caffey's skills as an Army attorney—and requested that a Distinguished Service Medal be awarded CPT Caffey in recognition of his fine work.[389]

But not everyone was happy with CPT Caffey's work. A letter written by Major General Allen W. Gullion, then serving as TJAG, and filed in Caffey's official military records in September 1938, indicates why. According to Gullion, Caffey had come to his office sometime between November 1937 and April 1938 and told Gullion that:

> [Captain Caffey] wanted to keep [Guillion] from getting in trouble, that the Secretary of War was becoming dissatisfied because [Captain Caffey] wasn't being allowed a free enough hand in Philippine matters. [Guillion] replied somewhat as follows: "I don't know whether you are trying to bluff me, Captain Caffey, but if the Secretary of War is dissatisfied with me he will let me know and I don't think he will employ you as his medium."[390]

As if this were not bad enough, Gullion continued: the Army Chief of Staff had stated "that a Congressman had complained that Captain Caffey and another officer had been trying to induce Congressmen to support legislation to which the War Department was opposed." When confronted with this statement, Caffey "did not deny it, but minimized it and said he would desist from further activities along the lines complained of."[391]

Major General Gullion's unhappiness with Caffey resulted in Gullion *personally* writing Caffey's Efficiency Report. After checking "unsatisfactory" when it came to "cooperation," Gullion wrote that while Caffey was an "officer of strong intellectual ability," his "value to the service is lessened by reluctance to accept the decisions of superior authority when he thinks such decisions involve a diminution of his prestige." Major General Gullion concluded by stating that Caffey's "General Value to the Service" was "doubtful."[392]

Captain Caffey subsequently wrote a twelve-page rebuttal to this adverse Efficiency Report. Caffey went into considerable detail to explain his actions, and counter the adverse information that Major General Gullion had relied upon in writing the Efficiency Report. Perhaps Caffey was right in some respects, but this is hard to know. The Judge Advocate General, however, declined to change his views on Caffey. As Gullion put it, he "had no personal animosity in this case" and what he had written was "only intended to convey a fair estimate of this officer."[393]

So what was Caffey to do? An official history of The Judge Advocate General's Corps published in 1975 states that "by early 1941, it became obvious that war was imminent," and now Major (MAJ) Caffey "traded his JAGD brass for the engineer castle and 'Essayons' buttons." The clear suggestion is that Caffey returned to the Corps of Engineers because he was a "man of action" who wanted to be in the thick of any future fighting.[394] But this is simply untrue; Caffey requested a transfer back to his basic branch because he believed his career as a judge advocate was at an end. Since Major General Gullion was so displeased with MAJ Caffey, and had reflected this unhappiness in writing, Caffey was probably correct. After all, if TJAG considered Caffey's "General Value to the Service" to be "doubtful," a transfer from the JAGD to the Corps of Engineers was the best course of action. Certainly Caffey must have thought that he stood a better chance to undo the damage to his career if returned to his basic branch.

On February 14, 1941, Caffey became an Engineer again. "Timing is everything," and this saying was certainly true for MAJ Caffey. Assigned to the 20th Engineer Combat Regiment as its executive officer, now Colonel (COL) Caffey deployed to North Africa with *Operation Torch*. After landing in French Morocco, he saw combat in Tunisia in early 1943 and was awarded the Silver

Star for gallantry in action and the Purple Heart for wounds received when the jeep in which he was riding ran over a German landmine. In May 1943, COL Caffey took command of the 30,000-man 1st Engineer Special Brigade and participated in the Allied invasions of Sicily and mainland Italy. He was still in command of that unit when it took part in the American, British, and Canadian landings at Normandy in June 1944. Caffey was one of the first Soldiers to wade ashore onto Omaha Beach and, in the hours and days that followed, demonstrated his superlative abilities as combat commander. For his extraordinary heroism on D-Day 1944, Caffey was awarded the Distinguished Service Cross with the following citation:

> Colonel Caffey landed with the first wave of the forces assaulting the enemy-held beaches. Finding that the landing had been made on other than the planned beaches, he selected appropriate landing beaches, redistributed the area assigned to shore parties of the 1st Engineer Special Brigade, and set them at work to establish routes inland through the sea wall and minefields to reinsure the rapid landing and passage inshore of the following waves. He frequently went on the beaches under heavy shell fire to force incoming troops to disperse and move promptly off the shore and away from the water sides to places of concealment and greater safety further back. His courage and his presence in the very front of the attack, coupled with his calm disregard of hostile fire, inspired the troops to heights of enthusiasm and self-sacrifice. Under his experienced and unfaltering leadership, the initial error in landing off-course was promptly overcome, confusion was prevented, and the forces necessary to a victorious assault were successfully and expeditiously landed and cleared from the beaches with a minimum of casualties. He thus contributed, in a marked degree, to the seizing of the beachhead in France.[395]

This well-written and descriptive citation demonstrates that Caffey was a remarkable Soldier and, assuming that the film *Saving Private Ryan* accurately depicts the horrific events of June 6, 1944, COL Caffey's "presence in the very front of the attack, coupled with his calm disregard of hostile fire," must have truly inspired the Soldiers who saw him in action. In any event, Caffey remained in Normandy for the rest of the war and, when the fighting ceased in Europe in May 1945, was in command of the Normandy Base Section. Since that Base Section had from 70,000 to 150,000 troops during the last six months of the war, COL Caffey had significant command responsibility.[396]

When COL Caffey returned to the United States in early 1946, he was a respected and highly decorated officer—having also been awarded three Legions of Merit and a Bronze Star Medal. He almost certainly was destined for general officer rank in the Corps of Engineers and his official records show that he was being considered for promotion to brigadier general.[397] Despite this bright future in the Corps of Engineers, COL Caffey decided to request a transfer to the Judge Advocate General's Department. As he explained in his official request:

> The reason underlying this request is that the [JAGD] is becoming increasingly short-handed. By reason of service in and with the [JAGD] for over ten years (September 1930 to March 1941), I am qualified for duty in it and am probably one of the very few older regular officers (not now a member of it) who is so qualified. The logic of the situation is that I should serve where, as I understand it, officers of my qualifications are needed and extremely hard to find.[398]

Interestingly, the Corps of Engineers initially resisted Caffey's request for a transfer. Correspondence in his records shows that the Engineers were considering Caffey for command of the 2d Engineer Special Brigade located at Fort Ord, California, and believed that "the importance of the duties" of the unit made it "imperative that a capable officer be in command."[399] But the Corps of Engineers relented when Caffey again insisted that he wanted to transfer to the JAGD and when Major General Thomas H. Green, who had recently assumed duties as TJAG, wrote that he had "previously recommended approval of Colonel Caffey's transfer and would be pleased to have him as a member of [his] Department."[400]

As a result, Caffey pinned on the crossed-pen-and-sword insignia on May 23, 1947. When one considers that the JAGD was losing hundreds of officers (who were returning to civilian life) as the

Army demobilized after World War II and recognizing that the creation of a new and independent Air Force meant that many experienced Army judge advocates would be exchanging Army green uniforms for Air Force blue suits, it seems likely that TJAG Green personally solicited COL Caffey to resume his career as a judge advocate. Additionally, as Caffey's nemesis, Major General Gullion, was no longer on active duty, there was no reason for COL Caffey to think that his skills as an attorney would not be appreciated.

After returning to our Corps, COL Caffey served first as the Executive Officer and Chief, Administrative Division, Office of The Judge Advocate General. In August 1948, he assumed duties as the Staff Judge Advocate, Third Army, Fort McPherson, Georgia. Since Caffey had been born in nearby Decatur, he must have been pleased to return to familiar surroundings.

By May 1953, however, Caffey had had enough of active duty and requested that he be retired the following month, on June 30, 1953. As he wrote in his letter to The Adjutant General, he would "have completed over thirty-five years' service as a commissioned officer in the Regular Army, including service in World War I prior to November 12, 1918."[401] Caffey's request for retirement, however, contains a lengthy explanation for his desire to leave active duty. In light of his earlier conflict with TJAG Gullion in the 1930s, and because Caffey's words provide some insight into his temperament, what he wrote is worth setting forth in its entirety:

> Throughout my service in the Army, the pay, allowances and perquisites of officers have undergone a steady decline: actually, in terms of purchasing power, and relatively, as compared with the emoluments of civilians of education and positions of responsibility. The net result of the decline, in my case, is that after spending my Army income and a good many thousands of dollars besides in order to sustain a moderate existence and educate my children, I approach the end of my useful life without resources sufficient to acquire even a simple house on the wrong side of the tracks in which to pass my remaining years. The prospect is not cheerful. On the other hand, at this time I have an attractive business opportunity of the sort which will not likely be open to me again. Such an opportunity, if I can take advantage of it, gives strong indication that it will clear away the dismal financial future which now confronts me.
>
> Besides the financial side just discussed, the Army seems to have undergone numerous changes which to me are unacceptable and to which I do not and will not subscribe. These changes, so far as I am concerned, have rendered my status as an officer undesirable and have destroyed the attractiveness of the military service as a profession. My own self-respect will cause me faithfully to discharge my duty so long as I continue in the service but having reached the point where I feel but faint pride and slight satisfaction in being an officer of the Army, it seems to me that the interest of the service would be well served were I to pass from active service.

One would think that that language of this kind would not go down well in the Pentagon and that, having revealed that he felt but "faint pride and slight satisfaction in being an officer," COL Caffey would quietly fade away.[402] But that did not happen because COL Caffey withdrew his request to retire from active duty; it was returned to him "without action" on July 3, 1953. Why? Because he must have received word from Washington, D.C. that retirement at this time was not in his best interest. Colonel Caffey did the right thing in deciding to remain on active duty as, on July 23, 1953, the Secretary of the Army announced that he was promoted to brigadier general.[403]

Brigadier General Caffey returned to the Pentagon in August 1953, where he assumed duties as the Assistant Judge Advocate General for Civil Law.[404] Amazingly, he was in that position for less than six months as, on January 22, 1954, President Dwight D. Eisenhower nominated him to be TJAG with the rank of major general. When Caffey was confirmed by the Senate on February 5, 1954, he made history, as no judge advocate in the modern era has gone from colonel to major general in just six months. Given that Caffey had expressed such unhappiness with his lot as a Soldier in May 1953, it seems incredible that he now was the Army's top lawyer.

General Matthew Ridgway, Army Chief of Staff congratulating the new TJAG, Major General Caffey, February 1954

Major General Caffey's rise to the top of the Corps was remarkable, and his outstanding record as an attorney and Soldier no doubt explain his rise. But one has to ask what judge advocates who had served in the JAGD during World War II thought of a colleague who had left the Corps prior to the outbreak of war, spent the entire conflict as an Engineer, and then returned in 1947—and was now TJAG. As Major General Caffey's contemporaries passed from the scene long ago, however, there is no way to know.

In late January 1956—after two years as TJAG—Caffey gave a speech on the floor of the Georgia Legislature. Just why he was in Atlanta, and why he was talking to the Georgia House (presumably by invitation), is not entirely clear. But Major General Caffey praised a speech given by U.S. Representative Jack Flynt (D-Ga.), in which Flynt defended racial segregation and "urged support" of those Southerners who wanted "to avoid desegregating public schools in line with the Supreme Court's ruling."[405] Said Caffey to the Georgia lawmakers: "If I were going to make a speech I would hope to make one like that." Some time later, Major General Caffey "told the Georgia Senate the speech contained 'a lot of meat' and added, 'I, for one, admire it.'"[406]

In the uproar that followed, the National Association for the Advancement of Colored People called for Caffey to "be dismissed or disciplined" for his comments. Representative Adam C. Powell (D-N.Y.) "demanded in a telegram to President Eisenhower that Caffey be dismissed."[407] Caffey's response was that Representative Flynt "is a friend of mine. But nothing I said was an endorsement of anyone or anything. I simply paid tribute to Jack Flynt's ability to make a speech."[408]

Was Major General Caffey being disingenuous? According to Major General Wilton B. Persons, who served as TJAG from 1975 to 1979, Secretary of the Army Wilbur M. Brucker thought that Caffey was and, according to Persons, told Caffey that it was time for him to retire. This explains why, despite having been appointed to a four-year term as TJAG, Caffey retired on December 31, 1956. As TJAG Persons remembers, Secretary Brucker "didn't like Caffey personally and after Caffey endorsed the segregationist speech, that was the last straw. [Brucker] called Caffey into his office and told him he was finished and was retiring. Caffey did not resist."[409] This explains why TJAG Caffey's last Officer Efficiency Report contains the following language from General (GEN) W. Bruce Palmer, the Vice Chief of Staff of the Army: "An able, aggressive, outspoken man, who has amassed a fine record of achievement in his varied career. *His lack of tact sometimes tends to arouse needless controversy*."[410]

Colonel Ted Decker (left), Judge Walter M. Bastian (center) TJAG Caffey (right), JAG Conference. Charlottesville, Virginia, September 1954

General Caffey and his wife Catherine moved to Las Cruces, New Mexico, where he grew a full beard "like a Civil War general"[411] and practiced law.[412] Unfortunately, this private practice was relatively short-lived, as Caffey died in Las Cruces on May 1961, at the age of 65. One of his partners, Edwin L. Mechem, who would serve four terms as Governor of New Mexico, remembered Caffey as "one of the finest . . . men I have ever met . . . . [A] gentleman and a great patriot." Another of his law partners said, "Eugene Mead Caffey desired a simple and uncomplicated life . . . . [F]ew among his closest

friends in New Mexico had any idea until after his death of his spectacular career in the Army."[413]

There is no doubt that Major General Caffey had a truly remarkable career. He was a first-class lawyer in every respect. He was an outstanding combat commander. But Caffey's inability to get along with TJAG Gullion in the 1930s, and with the Secretary of the Army in the 1950s, means that he also had a tempestuous career. Some of this conflict seems to have been caused by Major General Caffey's unwillingness (or inability) to keep his opinions to himself. On at least one occasion (when he submitted his retirement request in 1953), his outspokenness had no adverse impact. His comments on the floor of the Georgia legislature in 1956, however, very much affected his military career.

A Remarkable Judge Advocate by Any Measure: Colonel Hubert Miller

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War hero, two-time Olympian, outstanding judge advocate (JA)—Colonel (COL) Hubert "Hube" Miller was all of these. He was decorated with the Distinguished Service Cross for extraordinary heroism in France in 1944, competed in the four-man bobsled event in the 1952 and 1956 Winter Olympics, and served twenty years as an Army lawyer in a variety of important positions.

Born at Saranac Lake, New York, on February 24, 1918, Hube Miller graduated from high school in 1935. He was a superb athlete and, while attending St. Lawrence University from 1936 to 1938, was a member of the school's skiing, wrestling, and football squads.

After completing his studies in 1938, Miller entered Albany Law School, from which he graduated in 1941 with an LL.B. He then worked in Boston, Massachusetts for the Liberty Mutual Insurance Company. After the Japanese attack on Pearl Harbor, Miller left civilian life and enlisted in the Army.

In February 1942, Private Miller reported for duty at Fort Benning, Georgia. After completing training as an infantryman, Miller applied for and was accepted into Officer Candidate School. On October 8, 1942, Miller pinned on the gold bars of a second lieutenant and, after more than a year at Fort Jackson, South Carolina, he sailed for Europe.

After arriving in England in April 1944, now-First Lieutenant (1LT) Miller joined the 358th Infantry Regiment, 90th Infantry Division. The "Tough 'Ombres" landed in Normandy at Utah Beach on D- Day plus 2 and immediately saw hard fighting against the Germans.[414] Miller, who served first as a platoon leader and then as a company commander, excelled as a combat Soldier. Proof that Miller was the epitome of the young infantry officer came the following month, when Miller's battalion was heavily engaged. As the citation for his Distinguished Service Cross explains:

> On July 12, 1944, near La Valaissere, France, while the 3rd Battalion, 358th Infantry was attacking through hedgerows, Lieutenant Miller, as Commanding Officer of Company "I," was severely and painfully wounded when the battalion was pinned down by intense enemy machine gun fire. Learning that all other officers of Companies "I," "K," and "L" had become casualties, Lieutenant Miller refused to be evacuated and took command of the reorganization of the three companies under heavy enemy fire. With disregard of his injuries and personal safety, he then moved forward in direct line of fire from the enemy and brought back to safety a severely wounded enlisted man. Lieutenant Miller remained in command of his troops until relieved by another officer some three hours later. The gallant example set by this officer inspired the troops which he commanded to strive more aggressively for success in all their combat missions.[415]

Miller's wounds were so severe that he was evacuated to England on 13 July. He returned to the United States in January 1945 and then served as a training company commander and regimental operations officer until October, when now Captain (CPT) Miller was released from active duty.

Returning to the private practice of law in Saranac Lake, New York, Miller also was actively involved in New York State's Division of Veteran Affairs as a Veterans' Counselor. He also entered local politics and was elected to his county's Board of Supervisors.

A year after the Korean War broke out, Miller was recalled to active duty as an infantry officer. But CPT Miller did not deploy to the Far East. On the contrary, the Army sent him to Fort Dix, New Jersey, to serve as an infantry training company commander. While in this assignment, Miller arranged some temporary duty at Lake Placid, New York, where he tried out for the U.S. Olympic four- man Bobsled Team. He made the team, and participated in the 1952 Winter Olympic Games in Oslo, Norway.

Shortly thereafter, CPT Miller was assigned to Garmisch, Germany, where he assumed duties as the post Recreational Services Officer. In this assign-

ment, Miller was responsible for all recreational and entertainment programs and activities for the Army recreation center in Garmisch. He supervised about 300 military and civilian personnel and oversaw the operation of ski tours, ice shows, sports clinics, golf courses, bowling alleys, theaters, and dance bands. But Miller also continued to train. His hard work paid off: Miller was a member of the four-man U.S. bobsled team that won the World Championships in Garmisch in 1953.

After returning to the United States in early 1955, Miller decided it was time to put his legal training to good use. He was detailed to the Judge Advocate General's Corps in December and immediately assumed duties as Chief of Military Justice in the Office of the Staff Judge Advocate (SJA) at Fort Dix, New Jersey. Promoted to major in April 1955, Miller was selected to attend the Fourth Advanced Course and he began his classes at The Judge Advocate General's School (TJAGSA) in Charlottesville, Virginia in August.

Interestingly, Miller took a short break from his classes in January 1956, when he travelled to Cortina, Italy to once again join the U.S. Olympic Team in the four-man bobsled event. Miller is the only TJAGSA student in history to participate in the Olympic Games as a student. Unfortunately, Miller did not make history as the only Army JAG Corps officer to participate in the Olympic Games because he did not formally transfer to the Corps until March 1956 (shortly before he graduated from the Advanced Course).

As an Army lawyer, Miller served in a variety of assignments and locations, to include Staff and Faculty, Criminal Law Department, TJAGSA; Deputy SJA, 101st Airborne Division; SJA, 1st Cavalry Division; SJA, Air Defense Command; and SJA, Army Air Defense Center.

But Miller made history while serving as the SJA, 1st Logistical Command, from June 1966 to June 1967. With over 60,000 personnel assigned to it, this was the largest single command in Vietnam. Now COL Miller was the principal legal advisor and he "and his legal staff of ten military attorneys handled criminal, procurement, real estate, international and maritime law."[416]

Ninety percent of the workload for the attorneys at the 1st Logistical Command involved general courts-martial. Few of these trials, however, were for military offenses. Rather, most were for murders, rapes, and robberies. While this Soldier—related misconduct was bad, a bigger problem was the rise in civilian misconduct in areas falling under the command's jurisdiction. Since the South Vietnamese were unwilling to prosecute American civilians for criminal offenses, Miller decided to prosecute a civilian offender at a summary court- martial.

After a civilian merchant seaman named Bruce was caught stealing from a ship in Cam Ranh Bay, Miller conferred with Major General (MG) Charles W. Eifler, the Commanding General, 1st Logistical Command. Miller prepared a memorandum, which Eifler signed on December 8, 1966, in which Eifler stated that "in view of the conditions now prevailing in Vietnam, I have determined that 'time of war' within the meaning of the UCMJ exists in this area of operations."[417] First Logistical Command Special Orders were then published detailing JA CPT Bernard Radosh as summary court officer. Radosh travelled to Cam Ranh Bay, heard the evidence against Bruce, and convicted him. The punishment was a reprimand, a fine, and restriction to the ship. Miller reviewed the abbreviated record of the summary court and MG Eifler approved the findings and sentence.

In addition to prosecuting the first civilian in Vietnam, the 1st Logistical Command also processed the first enlisted resignation in lieu of court-martial. A sergeant (SGT) and some other men had stolen a jeep and radio, dug a hole, and buried them, planning to retrieve the property later. The SGT's misconduct was discovered, and charges were preferred against him for larceny of government property.

Prior to trial by general court-martial, Miller suggested to the accused's defense counsel that the Soldier consider submitting a resignation in lieu of trial under Army Regulation (AR) 635-200.[418] This was a new provision, and the defense counsel had never heard of it. But the accused submitted the resignation, and Miller took it to MG Eifler. The latter also was unfamiliar with the new provision, but he took Miller's recommendation and approved the accused's request. The accused had a good record, and so Eifler gave him a break, approving a general discharge rather than the bad conduct or dishonorable discharge the accused likely would have been given at trial.

Interestingly, it was Miller who had first proposed creating an enlisted resignation in lieu of

court-martial when he was working in the Pentagon at Office of the Judge Advocate General's Military Justice Branch from 1960 to 1963. Under then existing law, an officer could resign in lieu of court-martial, but enlisted Soldiers had no comparable mechanism to avoid trial. Believing that the enlisted ranks should have the same right as officers, then Lieutenant Colonel (LTC) Miller sent his proposal forward for staffing, but no action was taken. During a later visit with then Brigadier General (BG) Kenneth Hodson, the Assistant Judge Advocate General for Military Justice, Miller again suggested that creating this enlisted resignation mechanism was a good idea. Hodson agreed, picked up the telephone, and spoke personally with The Adjutant General, requesting speedy approval of Miller's proposal. The new provision appeared in the July 1966 revised version of AR 635-200.[419]

After retiring from active duty in 1975, Miller and his wife settled in Elberta, Alabama, where he lived until his death in 2000.

The Corps has not forgotten COL Hubert Miller. At Fort Bliss, Texas, where Miller had his final assignment as the Army Air Defense Center SJA, the command recently named their new courtroom in his honor.

For Heroism in Combat While Paying Claims: The Story of the Only Army Lawyer to be Decorated for Gallantry in Vietnam

(Originally published in the September 2010 edition of *The Army Lawyer.*)

In May 1968, Major General (MG) John J. Tolson, the Commanding General, 1st Cavalry Division (Airmobile), awarded the Bronze Star Medal with "V" for valor device to his Staff Judge Advocate (SJA), then Lieutenant Colonel (LTC) Zane E. Finkelstein. Finkelstein is the only Army lawyer to be decorated for gallantry in action in Vietnam—and almost certainly will be the only judge advocate (JA) in history to be awarded a decoration for combat heroism while investigating and paying claims.

On December 14, 1967, Finkelstein travelled by helicopter to a Vietnamese village that had been mistakenly bombed by the U.S. Air Force in order to investigate and pay claims to civilians who had been injured or whose property had been damaged in the attack. While the JAG Corps had centralized claims processing in Saigon, Finkelstein decided he would have more flexibility in the field if he were able to pay foreign claims. As a result, he obtained an appointment as a one-man Foreign Claims Commission, and, since the bombed village was not too far from Finkelstein's location near Camp Evans, South Vietnam, he decided to organize an expedition to investigate, adjudicate, and pay these foreign claims on his own.

Accompanying Finkelstein that day was a warrant officer from the Finance Corps. This individual was the Class B agent who would pay substantiated claims in Vietnamese piasters after Finkelstein investigated and approved them. A platoon of infantry also went with them—to provide security.

After dropping the Americans off at the village, the three UH-1H helicopters departed. The infantrymen then set up a defensive perimeter, and Finkelstein began investigating and processing claims from the Vietnamese civilians.[420]

The Americans believed there were no Viet Cong in the area but, unbeknownst to them, the guerillas were not only still in the village, but were, in fact, inside the perimeter. After the Viet Cong "popped out of the holes in the ground in which they had been hiding," a furious firefight erupted. Finkelstein stopped his legal work and, using both his .38 caliber revolver and M-16 rifle, joined the infantrymen in repelling the attack.[421] He also called in air support on the radio—but got artillery fire instead.

After a brief engagement, the Viet Cong fled and Finkelstein returned to his claims work. The helicopters arrived sometime later and the Americans departed for the trip back to Camp Evans—and relative safety. As the official citation for his Bronze Star Medal for Valor explains, Finkelstein was recognized for a "display of personal bravery and devotion to duty" in "continually exposing himself to enemy fire" and having "efficiently investigated, processed and paid 51 claims."[422]

Born in Knoxville, Tennessee, on June 24, 1929, Finkelstein received both his A.B. (May 1950) and LL.B. (December 1952) from the University of Tennessee. He excelled in law school, where he served as Editor-in-Chief of the law review and was inducted into the Order of the Coif.

Colonel Zane E. Finkelstein, c. 1969

Finkelstein was drafted into the Army in April 1953 and completed basic training at Fort Jackson, South Carolina. After receiving word that he had passed the Tennessee bar examination, then Private (PVT) Finkelstein transferred to the JAG Corps that

same year. In addition to serving in Vietnam as the SJA, 1st Cavalry Division (1967–68), Finkelstein also served as the SJA, Eighth U.S. Army Korea (1975– 77). He also saw overseas duty as an Army lawyer in Berlin, Federal Republic of Germany, (1954–57) and Taipei, Taiwan, (1961–63). Then-LTC Finkelstein also served as the Chief, Military Justice Division at The Judge Advocate General's School, U.S. Army (the forerunner of today's Criminal Law Division) (1968–71). Perhaps his most noteworthy assignment was as the first Army Legal Advisor and Legislative Assistant to the Chairman of the Joint Chiefs of Staff (1971–75). Finkelstein retired as a colonel in 1983 and lived in Carlisle, Pennsylvania until he passed away in December, 2012.

While a number of Soldiers who later served as JAs were decorated for combat heroism in Vietnam—for example, both MG (Ret.) Michael Nardotti and Colonel (COL) (Ret.) John Bozeman were awarded Silver Stars—Finkelstein is the only JA to have been decorated for gallantry in action while serving as an Army lawyer in Vietnam.

From West Point and Armored Cavalry Officer to Harvard Law and The Judge Advocate General: The Life and Career of Wilton B. Persons

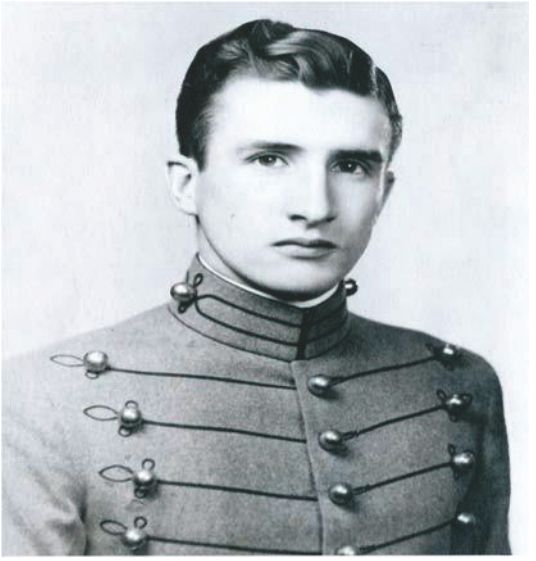
(Originally published in the May 2015 edition of *The Army Lawyer.*)

While serving as an Armored Cavalry officer in Austria in the late 1940s, then-Lieutenant (LT) Wilton B. Persons, Jr., "decided that there must be something more interesting than being in an orderly room of a cavalry troop."[423] Since he "liked doing" the special courts-martial that were then the sole responsibility of line officers in the Army, and since the Army was advertising that it would send a small group of officers to law school—all expenses paid—Persons applied to Harvard, Yale, and the University of Virginia. He ended up going to Harvard's law school and, when he graduated in 1953, began what would be a remarkable and rewarding career as an Army lawyer. When Major General (MG) Persons retired as The Judge Advocate General in 1979, he had accomplished a great deal in the Corps, and left a lasting legacy for the Army lawyers who followed him.

Born in Tacoma, Washington, on December 2, 1923 (his father was stationed at Fort Lewis), Wilton "Will" Burton Persons, Jr., spent his childhood in Kansas before attending a preparatory school in Montgomery, Alabama. In 1941, when seventeen-year-old Persons had enough credits to begin college, he enrolled at Alabama Polytechnic Institute.[424] He wanted to fly airplanes and applied for aviation cadet training, but his poor eyesight prevented him from flying. In the meantime, Persons also applied several times for an appointment to the U.S. Military Academy, and ultimately gained admission to West Point in July 1943.[425]

Wilton Persons, Alabama Polytechnic, 1941

When he graduated in 1946, Second Lieutenant (2LT) Persons chose Armor as his branch. His first assignment was with the 24th Constabulary Squadron in occupied Austria. He spent eighteen months in Austria and then moved to Germany, where he joined the newly formed 6th Armored Cavalry Regiment in Landshut, Bavaria.



Cadet Wilton Persons, USMA, 1946

Persons liked the Army—and he still had a service obligation from his time at West Point—but he thought he should look for another line of work because he "was sort of in a dead end job."[426] As he remembered it:

> After the war, the Army started putting out circulars and announcements [offering] to send officers to different graduate schools—engineering, law, and foreign languages. I was in the Armored Cavalry and I decided that there must be something more interesting than being in an orderly room in a cavalry troop. I'd done a lot of courts-martial as a line officer; we did trials on the weekends and in the evenings because that was the only time we had to do them. We were working during the day. I like the law and

I enjoyed the court work, so I decided to apply to law school. I also applied to go to Engineering school and Journalism school.

I went to Frankfurt and took the LSAT in 1949. I was then selected to go to Harvard Law School just before the Korean War started.[427]

Lieutenant Wilton Persons, Austria, 1946

Lieutenant Wilton Persons, U.S. Army Europe & 7th Army, Heidelberg, Germany, 1949

Persons began his studies in 1950 and graduated from Harvard in 1953. He "worked 18 hours a day for the first year in law school and finished in the top ten percent."[428] During his summers, he worked at a civilian law firm in Boston. This was normal for the time; the JAG Corps' Career Management Office[429] encouraged officers attending law school at Army expense to "apply for a legal related job" during their summer breaks.[430]

Captain (CPT) Persons began his judge advocate career in The Judge Advocate General's Office, or "JAGO" as it was then called. He worked first in the Military Affairs Division and later in the Administrative Law Division. Probably the highlight of this Pentagon tour was his time as the assistant defense counsel in *United States v. Dickenson*. Persons's work on this high-profile case of a Korean war "turncoat" was his first introduction to the new Uniform Code of Military Justice that had replaced the Articles of War under which he had practiced law as a line officer.[431]

After four years in the Pentagon, Persons was selected to attend Command and General Staff College. He was promoted to major (MAJ) shortly before graduating in June 1958 and then travelled to Germany, where he joined the 8th Infantry Division. He worked first as a defense counsel, and then served as a claims attorney and administrative law attorney before becoming the Deputy Staff Judge Advocate for the division.

Major Wilton Persons, 8th Infantry Division, Germany, 1961

When MAJ Persons left in July 1961, he was on his way to Charlottesville and was a very unhappy officer. This was because he had requested that his next assignment be at an Army installation like Fort Huachuca or Fort Bliss, where Persons hoped to do

procurement law. But Major General Charles "Ted" Decker, the new Judge Advocate General, informed Persons in a letter that he would instead "take over as chief of the Procurement Law Division at the JAG School."[432]

Persons was distressed. He simply had no interest in a job at The Judge Advocate General's School (TJAGSA). Perhaps this is understandable since he had not attended either the Basic Course or the Advanced Course and consequently had little or no appreciation of what TJAGSA was all about.[433] As Persons remembered, he was so upset that:

> I contemplated jumping out the window—it was not economically feasible for me to resign at that point, and I could not very well, at least it never occurred to me, to write back to General Decker and tell him that he got it all wrong. . . . So we gritted our teeth and went off to Charlottesville.[434]

When MAJ Persons arrived at TJAGSA, however, he was given a completely different job: School Secretary. He was in this position, similar to today's TJAGLCS Executive Officer, for a year when he moved to be an instructor in the Military Justice Division. After a year teaching evidence, now-Lieutenant Colonel (LTC) Persons (he had been promoted in January 1963) became TJAGSA's top criminal law instructor as Chief, Military Justice Division.[435]

While at TJAGSA, LTC Persons developed some firm opinions about the institution's place in the Corps—some of which were at odds with the views of the Corps' leadership. General Decker, for example, was attempting to get authority for TJAGSA to award an LL.M. Persons, however, was not really convinced that this was necessary. In his view, the school's role "was to turn out people who could immediately function in the Army" and this meant that TJAGSA was a "service school first and a graduate school second."[436]

He also formed some definite opinions about administration in the schoolhouse. Persons disliked faculty meetings because they were a waste of time. As for student evaluations, only those from the Advanced Course (today's Graduate Course) were valuable. Faculty evaluations from basic course students were of little consequence. As Persons put it: "[T]o take seriously what they thought should be in the curriculum and who should teach it seemed to me to be pretty silly." When asked by Colonel (COL) John F. T. Murray, then serving as TJAGSA Commandant, what should be done with evaluations from the Basic Class, LTC Persons replied: "Throw them in the waste basket. Don't even read them."[437]

While Persons believed that his time at TJAGSA was professionally rewarding, he "was becoming bored with teaching" by the end of this tour of duty. But obviously his record was good, as he was selected to attend the Army War College with only 18 months in grade as a lieutenant colonel.[438]

After graduating from the course at Carlisle Barracks, LTC Persons returned to Washington, D.C., for an assignment as Chief, General Law Branch. He subsequently served as Assistant Chief and then Chief, Military Affairs Division. During this tour in the Pentagon, LTC Persons was the legal advisor to the Army's Civil Disturbance Liaison Committee. Racial unrest in the late 1960s had resulted in the Army's involvement "in the civil disturbance business in a big way,"[439] and Persons was heavily involved in advising on the drafting of model proclamations, operations plans, and rules of engagement. Additionally, when the White House decided that Soldiers should be deployed to the location of a riot or other civil disturbance, a judge advocate went with them. On more than a few occasions, these Army lawyers "reached back" to LTC Persons for advice and counsel.[440]

In July 1969, now-Colonel Persons (he had been promoted in November 1967) assumed duties as the Staff Judge Advocate (SJA), U.S. Army, Vietnam (USARV). The Military Justice Act of 1968, which had created the new position of military judge and, as a practical matter, also took line officers out of special courts-martial, had just become effective. Implementing these two major changes to courts-martial practice was a significant challenge, as commanders were not at all happy with the new reality that a military judge was now in charge of proceedings at special courts, much less that judge advocates were now serving as trial counsel and defense counsel at these courts. Colonel Persons, however, was successful in convincing commanders in Vietnam that lawyers were not "taking over the system" and that commanders "still made the key decisions" in the system.[441] During this same tour of duty, COL Persons also wrestled with the high profile court-martial of Army Special Forces personnel charged with the murder of suspected Vietnamese double agent. This case generated intense media interest and took most of

Persons time during the first three months of his year in Saigon.[442]

Colonel Wilton Persons, Staff Judge Advocate, U.S. Army Vietnam, 1969

After his year in Vietnam, COL Persons reported for duty as the SJA, U.S. Army Pacific. During his ten months in Hawaii, he thought seriously about retiring from active duty. Persons had twenty-five years of active service and realized that if he retired, he was still young enough for a second career in a law firm. But retirement became a non-issue when Persons was selected for brigadier general and was sent to Heidelberg as the Judge Advocate, U.S. Army Europe and Seventh Army.

After arriving in Germany, Persons made history as the first judge advocate to be frocked to a higher rank. General Michael S. Davison, the USAREUR commander, believed that Persons would be more successful in his dealings with the German authorities if he were wearing stars, and received permission from the Pentagon to frock him. As a result, Persons pinned a single star on his collar in September 1971. His official promotion to brigadier general occurred six months later, in February 1972.[443]

Brigadier General (BG) Persons's tour of duty in USAREUR was a tough one. There were many complicated legal issues that arose during his four-year tenure. These included: improving race relations between black and white soldiers (by establishing equal opportunity staff officers in each unit); creating a Military Magistrate Program (giving a judge advocate magistrate the responsibility to review every case of pre-trial confinement); and replacing command-line court-martial jurisdiction with so-called area jurisdiction (which made better sense given that some units were widely dispersed in Germany).[444]

But the most serious challenge involved the command's aggressive crackdown on illegal drug use among soldiers, especially in the barracks. A drug abuse prevention plan was published in USAREUR *Circular 600-85*, and it included provisions "permitting the dissemination of drug information to nonmilitary government agencies" and prohibiting "the display on barracks walls of posters and other items" condoning illegal drug use. When a group of Soldiers assigned to USAREUR filed a class action suit in Washington, D.C., challenging this drug abuse prevention plan, both General (GEN) Davison and Brigadier General Persons were surprised when U.S. District Court Judge Gerhard A. Gesell certified the class as "representing all soldiers in the European Command with ranks of E-1 through E-5." They were shocked, however, when Gesell held that "the existing USAREUR drug plan [was] so interlaced with constitutional difficulties that *Circular 600-85* must be withdrawn and cancelled, along with all earlier related orders and instructions."[445] It should come as no surprise that the European edition of the *Stars and Stripes* newspaper trumpeted that Judge Gesell had stopped the "Drug War in Its Tracks."[446]

Fortunately for General Davison and Brigadier General Persons, Judge Gesell stayed his order pending the Army's appeal of his ruling. But Gesell required USAREUR to keep very detailed records of any and all soldiers disciplined for drug offenses while the appeal was pending, and this requirement, "along with other litigation support efforts, required an enormous amount of effort and many overtime hours."[447] Ultimately, the Court of Appeals for the D.C. Circuit, in a unanimous decision, reversed Judge Gesell. But this did not occur until September 1975, some 28 months after the plaintiffs had filed their complaint.[448]

In 1975, Brigadier General Persons was selected to succeed Major General George S. Prugh as the next Judge Advocate General. For the next four years, until he retired from active duty in 1979, Major General Persons was the top uniformed

lawyer in the Army. He wrestled with a number of legal issues, including the so-called "West Point Cheating Scandal" and attempts to unionize the armed forces. The former involved collusion on a take-home electrical engineering exam. Of a reported 117 cadets suspected of having cheated on the test, 50 were later discharged. The event resulted in a reexamination of the Cadet Honor Code and reforms to the Military Academy's adjudication process. The latter involved efforts by two federal employee unions to give Soldiers safeguards "against oppressive and unlawful actions by their commanders."[449] Ultimately, this attempt to unionize the Army was resolved when Congress enacted legislation prohibiting uniformed personnel from joining organized labor.

Major General Wilton Person, The Judge Advocate General of the Army, 1975

Major General Person's most important action as TJAG—and certainly his longest-lasting contribution—was his decision to create a separate and independent Trial Defense Service (TDS). Persons had long been concerned that the existing system—whereby SJAs supervised both trial and defense counsel and rated their performance—led inexorably to a perception of unfairness. Others in the Corps had voiced similar concerns over the years. The end result was that, in March 1977, TJAG Persons directed then-COL Wayne E. Alley "to assign and take the actions necessary to establish a separate [trial] defense organization."[450] Ultimately, the details of the framework for the new defense organization fell to COL Robert B. Clark. Clark interviewed commanders in preparing the proposed trial defense service and Major General Persons was pleased with the end product.

The Army Chief of Staff, General Bernard W. Rogers, however, was not convinced that a separate TDS was a good idea. On the contrary, Rogers apparently believed "that defense counsel were already out of control and that under a separate system they would become even more out of control."[451] The solution was to suggest to General Rogers that, rather than creating a "full-fledged" Trial Defense Service, the Army conduct "a test program first." General Rogers approved the test program and, in November 1980, after a two-year Army-wide test, "TDS was given permanent organizational status."[452] Major General Persons had retired the year before, but the creation of TDS remains a lasting legacy of his tenure as TJAG.

In retirement, Persons settled in Savannah, Georgia, and "enjoyed a long, wonderful retirement" with his wife Christine. He danced, drank Maker's Mark bourbon, and amassed an "impressive hat and necktie" collection.[453]

Will Persons was proud that he never again worked for money but instead was able to do volunteer work in a variety of organizations. These included: the Skidaway Island Division, Southside Fire Department (where he served as assistant chief and ultimately as board president); Skidaway Island Yacht Club (where he served as commodore); Savannah Symphony (where he served as president); and U.S. Fish and Wildlife Service (where he served as a volunteer guide and wildlife interpreter).[454]

Major General Persons once said in an interview: "My father never thought I would amount to much. . . ."[455] In an oral history, Persons mused in retrospect that this might have been his father's way of motivating his son—by telling young Will Persons that he was not "strong enough or smart enough."[456] Regardless of why the senior Persons had this opinion, history proves that he could not have been more wrong about his son. When Persons died at the age of 91 on April 3, 2015, he had lived a rich life filled with personal and professional accomplishments.[457]

Major General (ret) Persons (left) and Major General (ret) William K. Suter, at the Retired Association of Judge Advocates gathering at TJAGLCS, June 2011

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

(Originally published in the July 2016 edition of *The Army Lawyer*.)

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.[458] 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.[459] When Major General (MG) 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.

(THIS SPACE FOR USE OF AMERICAN CONSUL)

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Sixteen-year-old John Fugh's entry visa

John Liu Fugh was born Fu Liu-ren on September 12, 1934, in Peking, now Beijing, China.[460] 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."[461] 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?"[462]

Major General Fugh,
the 33rd Judge Advocate General

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 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.[463]

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.[464]

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.[465]

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.[466] 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.[467]

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, Maryland, 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."[468]

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

In 1961, First Lieutenant (1LT) Fugh completed eight weeks of Infantry officer training at Fort Benning, Georgia, and then reported to The Judge Advocate General's School, Charlottesville, Virginia, for the basic course in military law.[469] 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.[470]

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 (CPTs) 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.[471]

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.[472]

In July, 1960, Fugh married his wife, June, and had a daughter, Justina. Civilian life in Berkeley was good for Fugh, but he found he missed the Army's "culture" and "cohesiveness and togetherness."[473] After his old boss at Sixth Army encouraged him to return to the Army, Fugh did just that—returning to 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.[474]

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 (MAJ) 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."[475]

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."[476]

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.[477]

In September, 1967, 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.[478]

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."[479] Finally, Fugh found the SJA office, which "was a CONEX container half buried in the ground with a tent in front of it."[480] 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."[481] To get a better understanding of what troops in the field were experiencing, Fugh also volunteered 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.[482]

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."[483] Fugh remembered one case in which 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."[484]

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."[485] This seemed to be a foolish perspective and Major General (MG) 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.[486]

Fugh serving with the First Cavalry at Camp Evans in 1968

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."[487] 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.[488]

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.[489]

After three years in Taiwan, Fugh attended the Command and General Staff College. After graduating in May 1973, newly promoted Lieutenant Colonel (LTC) Fugh reported to be the 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.[490]

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 and 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 Fugh and his Inspector General as the two officers he valued the most on his staff.[491]

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.[492] At this high level, Fugh worked to find a middle ground that was acceptable to as many interests as possible:

> 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.[493]

In 1982, now—Colonel (COL) 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.[494]

Retired Major General Robert Murray with Fugh (right) in 2008

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.[495] 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.[496]

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.[497]

In July 1988, Brigadier General (BG) Fugh returned to China for the first time since he had fled with his mother in 1949. He accompanied General (GEN) 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.[498]

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.[499]

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.)[500]

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 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.[501]

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.[502]

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."[503] 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.[504] '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.[505]

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 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.[506]

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.[507]

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."[508] 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."[509] 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.[510]

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."[511]

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.[512]

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-a-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.[513]

After his retirement from Enron in 2001, Fugh "deepened his involvement with the Committee of 100, an elite Chinese-American advocacy organization,"[514] 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.[515]

Fugh (left) with Ambassador Stuart and Fugh's father in 1957

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."[516]

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.[517]

From Graduate Class Student to Army Major General to King of Okpe

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It will come as no surprise to judge advocates that international officers attending the Basic and Graduate Courses often excel as students. Israeli Captain Gal Asael, for example, was the number one student in the 56th Graduate Course. Similarly, the high caliber of these international officers means that they often return to their home countries and go on to have stellar careers. For example, Major Michael D. "Mike" Conway attended the 124th Basic Course; today, he is a major general and the Judge Advocate General of the British Army.

But arguably the most remarkable international officer to have studied here is Felix Mujakperuo of Nigeria. He graduated from the 36th Graduate Course in 1988, returned home, and subsequently retired as a major general in the Nigerian Army. In 2006, Mujakperuo reached even loftier rank when he was crowned Orhue I of the Okpe Kingdom in Nigeria.[518] No one in our Corps history has previously achieved the title of "His Royal Majesty," and this alone makes the story of Felix A. Mujakperuo worth telling.

The Orodje of Okpe Kingdom, His Royal Majesty, Major General Felix A. Mujakeruo (Ret.).

In July 1987, then-Lieutenant Colonel (LTC) Mujakperuo arrived in Charlottesville to attend the 36th Graduate Class. A soft-spoken, distinguished-looking officer, Mujakperuo had been born in 1946 and, after graduating from Urhobo College, had joined the Nigerian Defense Academy as an "Officer Cadet" in October 1968. In March 1971, he graduated as "Best All-Round Cadet" and was commissioned in the Infantry. Mujakperuo subsequently served as a company commander (1971–1973), instructor at the Nigerian Army's Infantry School (1976–1978), and battalion commander (1978–1986). While in this last assignment, he had also been a student at the University of Lagos and the Nigerian Law School, from which he obtained law degrees in 1985 and 1986, respectively. Now that he was a lawyer, it made sense for the Nigerian Army to appoint him as the Director, Army Legal Services. He had served in that assignment for a year when he arrived in Charlottesville in 1987 to attend the year-long Graduate Course.[519]

According to other biographical details that LTC Mujakperuo submitted to The Judge Advocate General's School (TJAGSA), he was married and had five children (three daughters and two sons). Additionally, this was not the first time that he had attended a U.S. Army school; Mujakperuo had previously graduated from Fort McClellan's Military Police Officer Advanced Course in 1986.

If his distinguished educational and military background was not sufficient to set LTC Mujakperuo apart from his classmates, his remarks during the first week of class, when he introduced himself in a five-minute presentation were unforgettable. After talking briefly about his family and his career in the Nigerian Army, LTC Mujakperuo told his classmates that one of the greatest challenges of his career had occurred recently. As he explained, there had been an attempted coup against the government and, after those responsible for the rebellion had been apprehended, tried, and convicted, it had been his responsibility to see that the death sentences imposed against these coup-plotters were carried out. According to Mujakperuo, this assignment had been made even more difficult because some of those who were executed had been his friends. As then–Captain (now Colonel (Ret.)) Richard E. "Dick" Gordon remembers, the matter-of-fact manner in which LTC Mujakperuo related this story only made it more shocking to his fellow Graduate Course students.[520]

When LTC Mujaperuo graduated on May 20, 1988, he received the newly authorized LL.M. in Military Law, setting him apart from all other international student officers who had previously attended the Graduate Class.[521] He then returned to Nigeria, where he resumed his military career.

More than ten years later, in July 1999, now-Major General Mujakperuo was in Freetown, Sierra Leone, as part of the United Nations Mission in Sierra Leone (USOMSIL). He was the Commander of the Military Observer Group of the Economic Community (ECOMOG) of West African States. The United Nations Security Council had established the UNOMSIL as a peacekeeping mission in June 1998. A rebellion against the Sierra Leone government had resulted in much bloodshed and damage to civilian property, and the ECOMOG, operating alongside UNOMSIL, was attempting to restore a semblance of order.[522]

United Nations Secretary-General Kofi Annan (2d from left) visits with Major General Felix A. Mujakperuo (3d from left) in Freetown, Sierra Leone, July 8, 1999. Mujakperuo was the Commander, Military Observer Group, Economic Community of West African States

After retiring from the Army in 1999, Mujakperuo apparently began working as a senior partner in a law firm in Lagos. His life took a new direction in 2008, however, when he was selected by the Orhue Ruling House Chieftaincy Selection Committee to be the next king of the Okpe Kingdom.[523] The previous king, His Royal Majesty Orhoro I, had died in early 2004 and, to avoid any "controversy" about who would be the next king, the Supreme Council of Okpe had "empanelled a committee . . . to examine the issue [of royal succession] and advise accordingly."[524] The end result was that, on July 8, 2008, Felix A. Mujakperuo was elected as Orhue I, the Orodje (King) of the Okpe Kingdom.[525]

He was officially installed on Saturday, July 29, 2006, in Orerokpe, the headquarters of the Okpe Kingdom. To this day, Mujakperuo continues his reign as His Royal Majesty Orhue I.[526]

Certainly no one would have contemplated that when LTC Mujakperuo was studying Government Information Practices, Fiscal Law, and Legal Assistance (among other topics) in the 36th Graduate Class that he would one day be a monarch ruling a kingdom. On the other hand, perhaps the LL.M. he was awarded in 1988 was the key to his future success.

"Electric Ladyland" in the Army: The Story of Private First Class Jimi Hendrix in the 101st Airborne Division

(Originally published in the September 2016 edition of *The Army Lawyer*.)

Jimi Hendrix

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.[527] 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.[528] 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.[529] 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.[530]

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.[531]

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 (PFC) 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; he formed a band with his friends[532] and they "got weekend gigs in Nashville and at military bases as far away as North Carolina."[533]

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."[534] On a subsequent visit, Hendrix told the doctor that he was "in love" with a member of his squad.[535]

While these were fabricated claims about his sexuality, Jimi knew that under existing Army regulations, this was an 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."[536] 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."[537]

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.[538] 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 (CPT) (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."[539]

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.[540] 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."[541]

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.[542]

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.

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

(Originally published in the October 2016 edition of *The Army Lawyer.*)

"I only wish I could put on my uniform and soldier one more time."[543]

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.[544]

Born in May 1973 in Shelby, North Carolina, Eric L. Coggins was the son of John D. Coggins and the late Kwang Chayi Coggins, whom 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 weightlifting, speech, and debate. He was also active in the church youth group at the Tanner's Grove United Methodist Church.[545]

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.[546]

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 his 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.[547]

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.[548]

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.[549]

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.[550]

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."[551]

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.[552]

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.[553]

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."[554] 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."[555] 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.[556]

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.[557]

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.[558] 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 an 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	SSG SGT David Panian[559]
2000	SSG Michele Browning[560]
2001	SGT Ryan L. Wischkaemper
2002	SSG Melissa Burke[561]
2003	SSG Osvaldo Martinez,Jr.[562]
2004	SSG Troy D. Robinson
2005	SSG Joshua L. Quinton[563]
2006	no award
2007	SSG Francisco R.Ramirez[564]
2008	SSG Samuel R. Robles[565]
2009	SSG Jose A. Velez[566]
2010	SSG Juan C. Santiago[567]
2011	SSG Margarita G. Abbott[568]
2012	SSG Raymond E. Richardson, Jr.[569]
2013	SSG Ana I. Hairston[570]
2014	SSG Angelica Pierce[571]
2015	SGT Maran E. Hancock[572]
2016	SSG Cardia L. Summers[573]
2017	SSG Sarah Hawley[574]

Thirty Years of Service to the Regiment: Philip Byrd Eastham Jr.

(Originally published in the November 2016 edition of *The Army Lawyer*.)

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, Virginia. 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.[575] 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.[576]

In 1976, then-First Lieutenant (1LT) 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)[577] 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.[578]

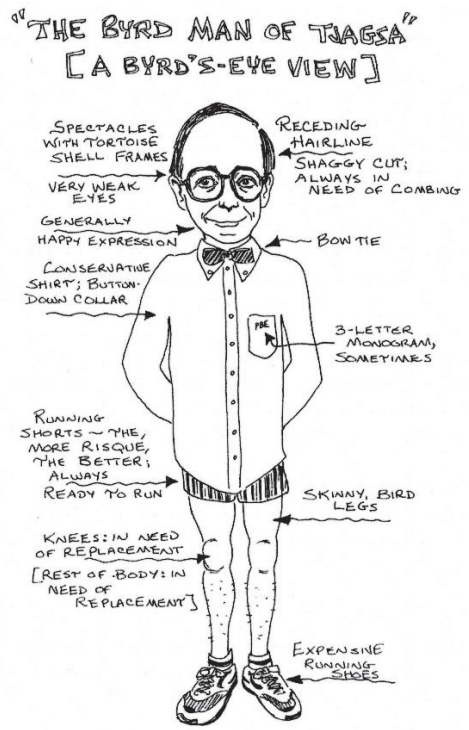
While serving in the Visitor's Bureau, 1LT Eastham "would occasionally be seen sketching at his desk" and, since his artistic skills were admired by TJAGSA's leadership, Byrd was hired as an artist/illustrator when he left active duty in 1981.[579]

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.[580] 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,[581] 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.[582]

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 programs.[583] 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).[584]

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. Some of his sketches are on display in the library at TJAGLCS. 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.[585]



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 (COL) 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.[586]

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, Virginia. He left that business in 2011.[587]

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.[588]

Byrd receives Running Award from Colonel Jack Rice

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

(Originally published in the January 2017 edition of *The Army Lawyer*.)

Captain Michelle Brown,
ABA Journal, September 1981

Michelle B. Fladeboe (neé 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.[589] 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 to 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.[590]

After completing the 85th Judge Advocate Officer Basic Course (JAOBC) in December 1977,[591] 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 (BG) Wayne Alley.[592] There were a variety of international legal issues during this time, and Captain (CPT) Brown very much enjoyed working for Alley in the Opinions and Policy Branch of the International Affairs Division.[593]

She considered her time in Heidelberg to have been a "dream job" and was disappointed when the Corps cut short her tour

Captain Michelle Brown, 85th JAOBC,
TJAGSA, c. 1977

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.[594]

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.[595]

While not the first female judge advocate on the TJAGSA faculty,[596] 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.[597]

An Army Nurse Corps Recruiting Advertisement, c. 1975

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

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 N.W. Ayer arranged a photo shoot of her in uniform. N.W. Ayer is famous today for 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.[598] Unfortunately, the firm's success was overshadowed by its later legal troubles with the Army.[599]

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.[600] Michelle Brown was a perfect 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 podium" at TJAGSA.[601] 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.[602]

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.

Captain Michelle Brown, TJAGSA Faculty, c. 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 myeloid leukemia. Michelle B. Fladeboe died on February 2, 2016. She was 67 years old.[603]

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.

[1] JOHN W. LEONARD & ALBERT N. MARQUIS, WHO'S WHO IN AMERICA, 1908–1909, at 98 (1908).

[2] BUREAU OF MIL. JUST., WAR DEP'T, A SKETCH OF THE HISTORY AND DUTIES OF THE JUDGE ADVOCATE GENERAL'S DEPARTMENT 19 (1878).

[3] For more on the Reno court of inquiry, see RONALD H. NICHOLS, IN CUSTER'S SHADOW: MAJOR MARCUS RENO (1999).

[4] U.S. ARMY, THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775–1975, at 92 (1975) [hereinafter THE ARMY LAWYER].

[5] LEONARD & MARQUIS, *supra* note 1, at 366.

[6] LOUISE BARNETT, UNGENTLEMANLY ACTS: THE ARMY'S NOTORIOUS INCEST TRIAL 70 (2000).

[7] THE ARMY LAWYER, *supra* note 4, at 92.

[8] For more on the Flipper court-martial, *see* CHARLES M. ROBINSON, THE COURT MARTIAL OF LIEUTENANT HENRY FLIPPER (1994).

[9] LEONARD & MARQUIS, *supra* note 1, at 366.

[10] THE ARMY LAWYER, *supra* note 4, at 92.

[11] *Id.*

[12] Act of July 17, 1862, 12 Stat. 597, 598; JUDGE ADVOCATE GENERAL'S CORPS, THE ARMY LAWYER 49–50 (1975).

[13] JAY M. SIEGEL, ORIGINS OF THE NAVY JUDGE ADVOCATE GENERAL'S CORPS 119–20, 151 (1997).

[14] *Id.* at 173.

[15] *Id.* at 174.

[16] *Id.* at n 5-4.

[17] *Id.* at 175-76, n 5-6.

[18] *Id.* at 177.

[19] *Id.* at 178, n 5-13; CHARLES M. REMEY, REMINISCENCES OF COLONEL WILLIAM BUTLER REMEY, UNITED STATES MARINE CORPS, 1842-1894, AND LIEUTENANT EDWARD WALLACE REMEY, UNITED STATES NAVY, 14–28 (1955).

[20] *Id.* at 178–79.

[21] *Id.* at 180.

[22] *Id.* at 195.

[23] *Id.* at 195–96.

[24] *Id.* at 195.

[25] *Id.* at 211–13.

[26] THE ARMY LAWYER, *supra* note 4, at 104.

[27] DAVID A. LOCKMILLER, ENOCH H. CROWDER: SOLDIER, LAWYER AND STATESMAN 21 (1955).

[28] *Id.* at 24. For example, Dwight D. Eisenhower, arguably the most successful West Point graduate to come out of World War II, pursued an appointment to the U.S. Military Academy not because he desired to soldier, but because he wanted a free education. STEPHEN E. AMBROSE, EISENHOWER: SOLDIER, GENERAL OF THE ARMY, PRESIDENT-ELECT 1890–1952, at 38–39 (1983).

[29] LOCKMILLER, *supra* note 27, at 38.

[30] *Id.* at 40.

[31] *Id.* at 59.

[32] *Id.* at 61.

[33] *Id.* at 71.

[34] *Id.* at 78.

[35] *Id.* at 80.

[36] *Id.* at 84.

[37] Prior to January 31, 1924, the top uniformed lawyer in the Army was "the Judge Advocate General," or TJAG. On that day, however, War Department General Orders No. 2 announced that the position would now be known as "The Judge Advocate General," or TJAG.

[38] LOCKMILLER, *supra* note 27, at 85.

[39] *Id.* at 87.

[40] *Id.* at 92–93, 100–08.

[41] *Id.* at 115–16.

[42] *Id.* at 118.

[43] *Id.* at 132.

[44] U.S. DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES (Jan. 24, 2017).

[45] *Id.* at 136–37.

[46] War Department, Gen. Orders No. 144 (Nov. 18, 1919).

[47] LOCKMILLER, *supra* note 27, at 191.

[48] THE ARMY LAWYER, *supra* note 4, at 105.

[49] ENOCH J. CROWDER, MILITARY JUSTICE DURING THE WAR 64 (1919), http://www.loc.gov/rr/frd/Military_Law/MJ_during_war.html. In this sixty-page letter to the Secretary of War, Major General Crowder made his defense of the American military justice system and his recommendations for congressional and executive reform of that system. As noted in that letter, Major General Crowder had previously asked the Secretary to implement three-man Boards of Review, "for the purpose of equalizing punishment through recommendations for clemency." *Id.* at 42. His recommendations for reform included the institution of a "law member," that is, a lawyer from the Judge Advocate General's Department to serve as a panel member and give legal advice to the panel in "serious, difficult, and complicated cases." *Id.* (Previously, the panel had received its legal advice from the prosecuting judge advocate.) This reform was implemented and the "law member" was the forerunner of today's Military Judge. *See* Fred L. Borch, III, *The Trial by Court-Martial of Colonel William "Billy" Mitchell*, ARMY LAW., Jan. 2012, at 1, 2 n.9. For more on the controversy over reforming the Articles of War, *see* Terry W. Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell*, 35 MIL. L. REV. 1 (1967); JOHN M. LINDLEY, A SOLDIER IS ALSO A CITIZEN: THE CONTROVERSY OVER MILITARY JUSTICE, 1917–1920 (1990).

[50] Revised Statutes, sec. 1223 (1923).

[51] 42 Stat. 1160 (1923). While Congress acceded to President Harding's request that Crowder be made an ambassador, the legislation denied Crowder his military retired pay during the period of this diplomatic appointment. He earned $17,500 a year as ambassador.

[52] In addition to Crowder, Brigadier General Joseph Holt, who served as the Judge Advocate General from 1862 until 1875, has been the subject of biographers. Two biographies have been published, both in 2011: JOSHUA E. KASTENBERG, LAW IN WAR, WAR AS LAW: BRIGADIER GENERAL JOSEPH HOLT AND THE JUDGE ADVOCATE GENERAL'S DEPARTMENT IN THE CIVIL WAR AND EARLY RECONSTRUCTION, 1861–1865 (2011); ELIZABETH D. LEONARD, LINCOLN'S FORGOTTEN ALLY: JUDGE ADVOCATE GENERAL JOSEPH HOLT OF KENTUCKY (2011).

[53] DON LOHBECK, PATRICK J. HURLEY 28 (1956).

[54] *Id.* at 30.

[55] *Id.*

[56] Williams Penn Adair "Will" Rogers (1879–1935) was one of America's best known celebrities in the 1920s and 1930s. He was a vaudeville performer, humorist, social commentator, and film actor. He had a newspaper column that was read daily by forty million people. He is still remembered today for his timeless and entertaining quotes ("I don't make jokes. I just watch the government and report the facts."). For more on Rogers, *see* BEN YAGODA, WILL ROGERS: A BIOGRAPHY (2000).

[57] LOHBECK, *supra* note 57, at 33.

[58] *Id.* at 45.

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

[60] LOHBECK, *supra* note 57, at 56, 60.

[61] *Id.* at 57.

[62] *Id.* at 66, 69.

[63] *Id.* at 70. Known today as the "Executive Office Building;" it is located near the White House in Washington, D.C. *Id.*

[64] *Id.* at 71.

[65] As a major, Hurley served as the prosecutor in *United States v. Buckner*, in which an African-American Soldier was prosecuted for raping a French civilian. *See* Fred L. Borch, *Anatomy of a Court-Martial: The Trial and Execution of Private William Buckner in World War I*, ARMY LAW., Oct. 2011, at 1.

[66] LOHBECK, *supra* note 57, at 72.

[67] *Id.*

[68] *Id.*

[69] Bethel would later be promoted to major general and serve as the Judge Advocate General from 1923 to 1924.

[70] LOHBECK, *supra* note 57, at 72–74.

[71] Headquarters, War Dep't, Gen. Orders No. 68 (Sept. 2, 1920).

[72] LOHBECK, *supra* note 57, at 86.

[73] Though Hurley was a judge advocate *before* serving as Secretary of War, he was not the first Secretary of War who also served as a judge advocate; that first belongs to Joseph Holt, who became a judge advocate *after* serving as Secretary of War. Holt served briefly as Secretary of War in the administration of President James Buchanan. President Abraham Lincoln then appointed Holt, who had no military experience, as Judge Advocate General of the Army. In the modern era, the only judge advocate to have served in the Army's most senior civilian position is Togo D. West, Jr. West served as a captain in our Corps from 1969 to 1973 and then entered private practice in Washington, D.C. He returned to public service as Secretary of the Army from 1993 to 1997. For more on West, *see* CATHERINE REEF, AFRICAN AMERICANS IN THE MILITARY 241–43 (2010).

[74] THE ARMY LAWYER, *supra* note 4, at 121.

[75] LOHBECK, *supra* note 57, at 164.

[76] *Id.* at 163.

[77] *Id.* at 174–83.

[78] *Id.* at 386, 417.

[79] A bachelor of laws, which was the basic degree awarded to an individual upon the completion of law school until the late 1960s.

[80] Questionnaire for the Judge Advocates Record of the War, Adam E. Patterson, National Archives and Records Administration, Record Group (RG) 153, Records of the Office of The Judge Advocate General, Entry 45, Box 4. [hereinafter NARA]

[81] THE CRISIS, Sept. 1913, at 227.

[82] *First Negro for Register: Opposition in Senate to President's Nomination of Patterson,* N.Y. TIMES, July 27, 1913, at 4.

[83] NARA, *supra* note 80.

[84] *Id.*

[85] *See* IRVING STONE, CLARENCE DARROW FOR THE DEFENSE: A BIOGRAPHY (1941). Clarence Darrow (1857–1938) is perhaps the most famous trial lawyer in U.S. history and was known for taking unpopular cases. He gained national prominence when defending John T. Scopes at the so-called "Scopes Monkey Trial" in Tennessee in 1925. *Id.*

[86] UNITED STATES HOUSE OF REPRESENTATIVES, HISTORY, ART & ARCHIVES, *De Priest, Oscar Stanton*, http://history.house.gov/People/Detail/12155? ret=True#biography (last visited Jan. 26, 2015). Oscar Stanton De Priest (1871–1951) was the first African-American to be elected to Congress from outside the southern states. He served as a Republican in the House of Representatives from 1929 to 1935; he was the only African-American in Congress during these years. *Id.*

[87] STEVEN D. SMITH & JAMES A. ZEIDLER, A HISTORIC CONTEXT FOR THE AFRICAN-AMERICAN MILITARY EXPERIENCE 156 (1998).

[88] NARA, *supra* note 80.

[89] Walden was the second African-American lawyer to join the Army as a judge advocate. He was commissioned as a captain on November 15, 1918 and ordered to duty as the Assistant Judge Advocate, 92d Division. Born at Fort Valley, Georgia in 1885, Walden received his law degree from the University of Michigan in 1911 and practiced law in Macon, Georgia prior to joining the Army in 1917. Walden returned to Georgia after World War I and became a prominent member of the African-American community in the Atlanta area. He also was active in politics, and when appointed to a judgeship on the Atlanta Municipal Court in 1964, he became the first black judge in Georgia since Reconstruction. Walden died in 1965. NARA *supra* note 80; A. T. Walden (1885–1965), (NEW GEORGIA ENCYCLOPEDIA) http://www.georgiaencyclopedia.org/articles/history-archaeology/t-walden-1885-1965 (last visited Jan. 27, 2015).

[90] *92d Division Officer Nails Bullard's Lie*, CHICAGO DEFENDER, Jun. 13, 1925, at 3.

[91] CHAD LOUIS WILLIAMS, TORCHBEARERS OF DEMOCRACY: AFRICAN AMERICAN SOLDIERS IN THE WORLD WAR I ERA 322 (2010).

[92] General Bullard, commander of the 2d American Army, insisted that African-American soldiers were "hopelessly inferior" and had been cowards in battle. Historians today view condemnations by Bullard and others to have been "attempts to cover their own failures in combat and pitiful efforts to promote their own belief in black inferiority." SMITH & ZEIDLER, *supra* note 87, at 179.

[93] WILLIAMS, *supra* note 91. Pershing told the members of the 92d that the "Division stands second to none in the record you have made since your arrival in France …. I commend the 92d Division for its achievements not only in the field, but on the record its men have made in their individual conduct." SMITH & ZEIDLER, *supra* note 87, at 178–179.

[94] WALLACE B. WEST, PASSIONATELY HUMAN, NO LESS DIVINE 178 (2005); *Lays Cornerstone of $50,000 Church*, CHICAGO DEFENDER, Jul 31, 1937, at 4.

[95] DOUGLAS WALLER, A QUESTION OF LOYALTY 222 (2004).

[96] THE ARMY LAWYER, *supra* note 4, at 155 (1975).

[97] WALLER, *supra* note 95, at 222.

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] J.T. White et al., *Allen Wyant Gullion*, WHITE'S BIOGRAPHY 254 (1949).

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] For a biography of Crowder, *see* LOCKMILLER, *supra* note 27. *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.

[106] War Dep't, Gen. Order No. 9 (1923).

[107] WALLER, *supra* note 95, at 222.

[108] THE ARMY LAWYER, *supra* note 4, at 195.

[109] *Id.*

[110] For more on Robert Lee Bullard, *see* ALLAN R. MILLETT, THE GENERAL: ROBERT L. BULLARD AND OFFICERSHIP IN THE UNITED STATES ARMY (1975).

[111] III Corps took part in the Meuse-Argonne offensive in September and October 1918, the largest U.S. operation in World War I. LAURENCE STALLINGS, THE DOUGHBOYS: THE STORY OF THE AEF, 1917–1918 293–95 (1963).

[112] J.T. White et al., *supra* note 101, at 254.

[113] *Id.*

[114] WALLER, *supra* note 1, at 222.

[115] *Id*.

[116] *Id*. at 221–22.

[117] For more on the legal aspects of the Mitchell court-martial, *see* Borch, *supra* note at 1.

[118] WALLER, *supra* note 95, at 222.

[119] *Id*.

[120] *Id*.

[121] *Id*.

[122] *Id*.

[123] *Id*.

[124] *Id*.

[125] J.T. et al., *supra* note 101, at 254.

[126] *Id*.

[127] *Id*.

[128] *Id*.

[129] Press Release, War Department, Bureau of Public Relations, Maj. Gen. Allen W. Gullion Retires, 1 (Jan. 1, 1945) (on file with author). Gullion's son, Allen Wyant Gullion Jr., graduated from the U.S. Military Academy in 1943. Commissioned in the Air Corps, he was a pilot assigned to the 416th Bombardment Group when he was shot down and taken prisoner. After being released from captivity in 1945, he remained on active duty and served in a variety of Air Force assignments until retiring as a lieutenant colonel in 1966. He died in Cadiz, Spain, in 1985. U.S. MIL. ACAD., WEST POINT, THE REGISTER OF GRADUATES & FORMER CADETS 352 (1992).

[130] J.T. White et al., *supra* note 101, at 254.

[131] *Id*.

[132] *Id*.

[133] *Id*.

[134] *Id*.

[135] For more on the National Rifle Association, *see* JOHN K. OHL, HUGH S. JOHNSON AND THE NEW DEAL (1985).

[136] *Id*.

[137] J.T. White et al., *supra* note 101, at 254.

[138] *Id*.

[139] *Id*.

[140] *Gullion for Governor?*, HONOLULU STAR BULLETIN, Sept. 24, 1938.

[141] A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[142] J.T. White et al., *supra* note 101, at 254.

[143] *Id*.

[144] War Dep't., Bureau of Public Relations, *supra* note 129.

[145] *Id*.

[146] *Id*.

[147] THE ARMY LAWYER, *supra* note 4, at 156.

[148] *Id*.

[149] *Id*.

[150] *Id*.

[151] *Id*.

[152] *Id*.

[153] *Our Growing Prison Camps: How U.S. Treats War Captives*, NAT'L WEEKLY, May 28, 1943, at 22. For more on German and Italian Prisoners of War (POWs) in the United States during World War II, *see* ARNOLD KRAMMER, NAZI PRISONERS OF WAR IN AMERICA (1979).

[154] *Id.*

[155] WALTER M. HUDSON, ARMY DIPLOMACY 72 (2015).

[156] *Id*.

[157] *Id*. at 135–55.

[158] *When the Yanks Take Over*, LOOK, July 13, 1943.

[159] HUDSON, *supra* note 155, at 135–55.

[160] War Department, Bureau of Public Relations, *supra* note 129.

[161] *Id*.

[162] For more on displaced persons, *see* MARK WYMAN, DPS: EUROPE'S DISPLACED PERSONS, 1945–1951 (1998).

[163] *Id*.

[164] THE ARMY LAWYER, *supra* note 4, at 156.

[165] *Gen. Gullion Retires*, ARMY NAVY J., Jan. 1945.

[166] *Id.*

[167] *Maj. Gen. Allen Gullion Dies While Hearing Fight*, THE NEWS DEMOCRAT (Carrolton, Kentucky), June 20, 1946; *Louis Stops Conn in Eighth Round and Retains Title*, N.Y. TIMES, June 20, 1946, at 1. Before the Louis-Conn fight, Louis was asked whether Conn might "outpoint" him because of Conn's hand and foot speed. In a reply that still is remembered today, Louis quipped: "He can run, but he can't hide." The Louis-Conn bout, held at Yankee Stadium, was seen by more than 45,000 fans. The bout also was televised by the NBC network and was the first televised world Heavyweight championship fight ever. It was watched by 146,000 people, which set a record for the most viewed world Heavyweight bout in history. *Id*. Thousands more—like Gullion—listened to the fight on their radios.

[168] For old soldiers and veterans, the term "Old Army" refers to an army of an earlier period, usually before the last war. Most military historians consider the "Old Army" to be the peacetime Army before World War II, and this Lore of the Corps uses the words in that manner. For more on this phrase, *see* EDWARD M. COFFMAN, THE OLD ARMY (1986). Lawyers in the Old Army were relatively few, but this is understandable given that, from 1922 to 1935, the Army's strength never exceeded 150,000. In the late 1930s, the JAGD had a total of 90 uniformed lawyers, 36 of whom were in Washington, D.C., *supra* note 4, at 156.

[169] Thomas A. Lynch may have been born on June 2, 1885, and not June 2, 1882. According to one of his granddaughters, he gave the Army an earlier date of birth (DOB) because he was not old enough to enlist. This may be true, but all of Lynch's military records reflect his DOB as June 2, 1882. Additionally, since Lynch enlisted on March 28, 1904, he was already 18 years of age and, as he had reached the age of majority, there would have been no need to falsify his DOB. His actual birthday remains a mystery. E-mail, Elizabeth Lynch Pitt to author (Dec. 17, 2014, 21:40 EST) (on file with author).

[170] War Department Adjutant General's Corps Form No. 66-1, Officer's and Warrant Officer's Qualification Card, Lynch, Thomas A. (Sept. 9, 1945), Block (9) War Service.

[171] *Id.*

[172] 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).

[173] 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).

[174] Located in Chicago, Illinois, the Hamilton College of Law advertised that it was "absolutely the ONLY law school of its kind in America" and the "only law school giving a full 3-year University Law course by mail." Lynch probably knew about the Hamilton College of Law because he was from Chicago, but the institution also advertised in magazines that Lynch would have seen in the Philippines. *See* COSMOPOLITAN MAGAZINE (Dec. 1914), 26.

[175] In the 19th and early 20th century, it was quite typical for men to become lawyers through self-study and apprenticeship. President Abraham Lincoln, for example, who had but a single year of formal education, was admitted to the Illinois Bar after a period of "reading for the Bar."

[176] U.S. War Department, Form No. 711, Efficiency Report, Lynch, Thomas A. (Nov. 25, 1919) (covering period September 16, 1919 to Nov. 25, 1919).

[177] U.S. War Department, Form No. 706, Special Efficiency Report for Regular Officers, Lynch, Thomas A. (Sept. 3, 1919) (covering from April 4, 1919 to September 1, 1919).

[178] 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 ¶ 89a(2), (3), (6) (1921).

[179] U.S. War Department, Form No. 711, Efficiency Report, Lynch, Thomas A. (Feb. 1, 1922) (covering period Oct. 14, 1921 to Jan. 31, 1922).

[180] U.S. War Department, Form No. 711, Efficiency Report, Lynch, Thomas A. (Sept. 7, 1921) (covering period Jul. 1, 1921 to Aug. 15, 1921).

[181] U.S. War Department, Efficiency Report, Lynch, Thomas A. (Nov. 7, 1925) (covering July 1, 1925 to Nov. 7, 1925).

[182] U.S. War Department, Efficiency Report, Lynch, Thomas A. (Jun. 30, 1926) (covering period Nov. 7, 1925 to June 30, 1926).

[183] U.S. War Department, Adjutant General's Office Form No. 67, Efficiency Report, Lynch, Thomas A. (Jul. 1, 1928) (covering July 1, 1927 to June 30, 1928).

[184] U.S. War Department, Adjutant General's Office Form No. 67, Efficiency Report, Lynch, Thomas A. (Oct. 13, 1931) (covering July 1, 1931 to Oct. 12, 1931).

[185] John Leonard Hines was a remarkable man by any measure. Born in West Virginia in May 1868, he was an 1891 graduate of the U.S. Military Academy. Commissioned as an Infantry officer, Hines served in the Santiago de Cuba campaign (1898), Philippine Insurrection (1899–1902), and Punitive Expedition into Mexico (1916). In World War I, Hines served first as a regimental commander, and then as the commanding general of a brigade, division, and corps in the American Expeditionary Force. This put him into the history books, as Hines was the only Army officer in World War I to command a regiment, brigade, division and corps in combat. The recipient of the Distinguished Service Cross, Distinguished Service Medal, and Silver Star, Hines served first as Deputy Chief of Staff (1922–1924), and then as Chief of Staff. He retired in 1932 as a major general but was advanced to four-star rank in 1940. Hines died five months after celebrating his 100th birthday, and is buried in Arlington National Cemetery. In 2000, the U.S. Postal Service issued a postage stamp honoring him. ARLINGTON NATIONAL CEMETERY WEBSITE, http://www.arlingtoncemetery.net /jlhines.htm (last visited Mar. 4, 2015)

[186] War Department, Adjutant General's Office Form No. 67, Efficiency Report, Lynch, Thomas A. (July 9, 1932) (covering period Oct. 13, 1931 to June 30, 1932).

[187] War Department Form 66-1, *supra* note 170.

[188] *Id.*

[189] Lynch and his wife, Grace, had four sons and one daughter; all were born in the Philippines while he was serving with the Philippine Scouts. By 1941, his two oldest sons, Robert and Douglas, were adults and were working in the United States. His third son, James, was studying to be an engineer in Indiana, and his daughter, Helen, was married to a U.S. Navy officer stationed outside the Philippines. William was the only child still at home with him and his wife. War Department Form 66-1, *supra* note 170.

[190] Headquarters, U.S. Forces in the Philippines, Gen. Orders No. 26 (Apr. 13, 1942).

[191] 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).

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

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

[194] *Id.* at 110.

[195] *Id.* 124.

[196] 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.

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

[198] Lynch, Military Personnel File. Lynch's Legion of Merit was approved by the War Department on July 1, 1946.

[199] Department of the Army, Form DD 1300, Report of Casualty, Lynch, Thomas A. (Dec. 19, 1962).

[200] *Ernest Marion Brannon*, ASSEMBLY 123 (Mar. 1984).

[201] Fort Benning was established following World War I, when the Army bought land in 1919 and created a military reservation named in honor of Confederate Brigadier General Henry L. Benning. The Infantry School was created the following year. John M. Wright, Jr., *Fort Benning 1918–1968*, INFANTRY, Sept.–Oct. 1968, at 4–11.

[202] General of the Army George C. Marshall was one of the most remarkable men of his generation. A graduate of the Virginia Military Institute, he served in the Army from 1901 to 1945. After retiring as Army Chief of Staff, Marshall served as Secretary of State under Harry S. Truman. His "Marshall Plan"—a massive economic aid package—is widely credited with bringing about the revival of Europe after the devastation of World War II. For more on Marshall, *see* ED CRAY, GENERAL OF THE ARMY: GEORGE C. MARSHALL, SOLDIER AND STATESMAN (1990).

[203] *Ernest Marion Brannon*, *supra* note 200.

[204] Headquarters, First United States Army, Gen. Orders No. 22 (June 6, 1944).

[205] E. M. Brannon, *The Armed Services Procurement Act of 1947*, JUD. ADV. J., BULL. NO. 1, Dec. 1948, at 12.

[206] THE ARMY LAWYER, *supra* note 4, at 200.

[207] *Id.* at 209.

[208] Other Judge Advocate Generals recalled to active duty are: Major General Blanton Winship, recalled to active duty to serve as a member of the military commission that tried the German U-boat saboteurs during World War II; Major General Myron Cramer, recalled to serve as the lone American judge on the Tokyo War Crimes tribunal; and Major General Kenneth Hodson, recalled to serve as the first Chief Judge on the Army Court of Military Review (today's Army Court of Criminal Appeals).

[209] *Ernest Marion Brannon*, *supra* note 200, at 123.

[210] *Id.*

[211] Telephone Interview with Major General (Ret.) Wilton B. Persons, Jr. (Feb. 8, 2013). Major General Persons served as TJAG from 1975 to 1979.

[212] 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.*

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

[214] *Id.*

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

[216] In Memoriam Emory Sneeden, *supra* note 1, at 6.

[217] *Id.*

[218] *Id.*

[219] *Id.*

[220] *Id.*

[221] *Id.*

[222] *Id.*

[223] *Id.*

[224] *Id.*

[225] *Id.*

[226] *Id.*

[227] *Id.*

[228] *Id.*

[229] *Id.*; *see* FOIA Release, *supra* note 215.

[230] In Memoriam Emory Sneeden, *supra* note 216, at 6.

[231] *Id.*

[232] *Id.*

[233] *Id.*

[234] *Id.*

[235] *Id.*

[236] 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").

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

[238] *Id.*

[239] *Id.*

[240] 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).

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

[242] Patricia Sullivan, *Lawyer and Lt. Col. Rufus W. Johnson*, WASH. POST, July 10, 2007, at B6.

[243] *Id*.

[244] Johnson learned in 1942 that he had passed the bar examination but, since he was no longer in Washington, D.C., he was not able to personally appear in court and be admitted to practice until he was released from active duty in 1946.

[245] Rufus W. Johnson, Questionnaire, U.S. Mil. Hist. Inst., Carlisle Barracks, Pa. 6 (Aug. 20, 1977) [hereinafter Johnson Questionnaire].

[246] *Id*. at 22.

[247] Sullivan, *supra* note 242.

[248] U.S. Dep't of Army, DA Form 1056, Legal Experience Statement, The Judge Advocate Gen. Admin. Div., Johnson, Rufus W. block 16 (May 24, 1951) [hereinafter DA Form 1056].

[249] Johnson Questionnaire, *supra* note 245, at 14.

[250] DA Form 1056, *supra* note 248, block 16.

[251] *Id.*

[252] U.S. Dep't of Army, DA Form 67-2, Officer Efficiency Report, Johnson, Rufus W. (Mar. 7, 1951 to Jul. 18, 1951). Note that the Articles of War were still in effect during this period, which explains why a non-Judge Advocate was permitted to serve as counsel at general courts-martial. *See* MANUAL FOR COURTS-MARTIAL UNITED STATES 277 (1949) (Eleventh Article of War: "[T]he trial judge advocate and defense counsel of each general court-martial shall, if available, be members of the Judge Advocate General's Corps *or* officers who are members of the bar of a Federal court or of the highest court of a State. . . ." (*emphasis* added)).

[253] U.S. Dep't of Army, DA Form 67-2, Officer Efficiency Report, Johnson, Rufus, W. (Sept. 18, 1951 to Jan. 8, 1952).

[254] U.S. Dep't of Army, DA Form 67-2, Officer Efficiency Report, Johnson, Rufus W. (Mar. 1, 1953 to Apr. 19, 1953).

[255] *Id*.

[256] Johnson was promoted to major on October 1, 1953. U.S. Dep't of Army, DA Form 66, Officer Qualification Record, Johnson, Rufus W. block 12.

[257] Certificate of Completion, The Judge Advocate Gen.'s Sch., U.S. Army, Johnson, Rufus W. (Aug. 1, 1961).

[258] People v. Woody, 394 P.2d 813, 814 (1964).

[259] *Id*. at 815–22. The court admitted the State's power to proscribe the use of peyote, and stated that "[a]lthough the prohibition against infringement of religious belief is absolute, the immunity afforded religious practices by the First Amendment is not so rigid." However, the court found that the State had not demonstrated a "compelling state interest" sufficient to outweigh the defendants' interest in religious freedom. Part of this finding rested on expert opinion that peyote did not cause any "permanent deleterious effects" to its users.

[260] Johnson Questionnaire, *supra* note 245, at 19 (emphasis in original).

[261] *Id*. at 9.

[262] California's Alien Land Law, enacted in 1913, prohibited persons ineligible to become U.S. citizens from owning land in the state or from leasing land for more than three years. The law was intended to prevent Japanese immigrants from purchasing farmland. Asian and other non- white immigrants were prohibited from owning land in the state until the California Supreme Court ruled in 1952 that the restriction was unconstitutional.

[263] President Calvin Coolidge signed the Immigration Act of 1924, 43 Stat. 153, which continued the ban on further Japanese immigration. In fact,U.S. law continued to curtail Japanese immigration until 1952, although the Japanese brides of U.S. servicemen were permitted entry onto U.S. soil after World War II.

[264] For more on the attempts to exclude Japanese Americans from California's fishing industry and Walt Tsukamoto's involvement, *see* Donald H. Estes, *"Offensive Stupidity" and the Struggle of Abe Tokunoske*, J. SAN DIEGO HISTORY, *available at* http://www.sandiegohistory.org/journal/82fall/offensive.htm.

[265] Founded in 1929, the Japanese American Citizens League was established as a pro-American organization working for civil rights on behalf of Japanese-Americans. Today, it is the largest and oldest Asian-American civil rights organization in the United States. *See* JAPANESE AMERICAN CITIZENS LEAGUE (May 20, 2011), www.jacl.org.

[266] Exec. Order No 9066, *C.F.R.* 1092–1093 (1942).

[267] The Tule Lake camp was the largest of the relocation camps. Opened on May 26, 1942, it eventually held some 18,700 Japanese-Americans. The camp operated under martial law for a time (November 4, 1943 to January 15, 1944) and was the last to close, on March 28, 1946.

[268] Letter from Walter T. Tsukamoto to Headquarters, 1st Military Area, Presidio of San Francisco, subject: Extended Active Duty (Apr. 8, 1942) (on file with Regimental Historian, TJAGLCS)).

[269] Letter from Captain Jeff J. Smith, Adjutant, Headquarters, 1st Military Area, Presidio of San Francisco, to CPT Walter T. Tsukamoto, subject: Active Duty (Apr. 15, 1942) (on file with Regimental Historian, TJAGLCS).

[270] Letter from Walter T. Tsukamoto to Headquarters, Ninth Service Command, subject: Request of Immediate Active Duty (Jan. 29, 1943) (on file with Regimental Historian, TJAGLCS).

[271] Telegram from Captain Walter T. Tsukamoto to Sec'y of War Henry Stimson (Feb. 8, 1943) (on file with Regimental Historian, TJAGLCS).

[272] Letter from Adjutant Gen., War Dep't, to Commanding General, Ninth Service Command, subject: Active Duty (Walter Takeo Tsukamoto) (Feb. 10, 1942) (on file with Regimental Historian, TJAGLCS).

[273] Many of these antagonistic Japanese Americans, known as Kibeis, were native-born Americans who had been sent to Japan by their parents as children. Consequently, when they returned to the United States as young men and women, their sympathies were Japanese rather than American. However, some Nisei were also antagonistic toward Walt Tsukamoto and his pro-American outlook because they were angry about having been involuntarily removed from their homes and transported to re-location camps.

[274] Memorandum for The Adjutant Gen. from Major General Clayton Bissell, subject: Recommendation for Promotion to Major of Captain Walter T. Tsukamoto tab A (Dec. 12, 1944).

[275] *Id.*

[276] War Dep't Adjutant Gen. Office Form 67, Efficiency Report, Walter T. Tsukamoto, July 1, 1944 to Dec. 31, 1944 (Dec. 31, 1944) (on file with Regimental Historian, TJAGLCS).

[277] War Dep't Adjutant Gen. Office Form 67, Efficiency Report, Walter T. Tsukamoto, July 1, 1945 to Dec. 31, 1945 (Dec. 31, 1945) (on file with Regimental Historian, TJAGLCS).

[278] Between February 1946 and October 1949, the U.S. Army tried 996 accused at military commissions in Yokohama, Japan; 854 were convicted. Major Tsukamoto reviewed some of the records of trial in which these accused were sentenced to be hanged. PHILIP R. PICCAGALLO, THE JAPANESE ON TRIAL 90 (1979).

[279] U.S. Dep't of Army, Adjutant Gen.'s Office, AGO Form 67-1, Officer Efficiency Report, Walter T. Tsukamoto, June 23, 1947 to Apr. 30, 1948 (Apr. 23, 1948) (on file with Regimental Historian, TJAGLCS) (emphasis added).

[280] U.S. Dep't of Army, Adjutant Gen.'s Office, AGO Form 67-1, Officer Efficiency Report, Walter T. Tsukamoto, May 1, 1950 to Sept. 30, 1950 (Sept. 30, 1950) (on file with Regimental Historian, TJAGLCS).

[281] *Id.* (emphasis added).

[282] Headquarters, X Corps, Gen. Order No. 26 (Feb. 11, 1951).

[283] *Id.*

[284] U.S. Dep't of Army, Adjutant Gen.'s Office, AGO Form 67-2, Officer Efficiency Report, Walter T. Tsukamoto, Oct. 1, 1950 to May 15, 1951 (on file with Regimental Historian, TJAGLCS).

[285] U.S. Dep't of Army, Adjutant Gen.'s Office, AGO Form 67-2, Officer Efficiency Report, Walter T. Tsukamoto, Nov. 18, 1951 to May 31, 1952; U.S. Dep't of Army, Adjutant Gen.'s Office, AGO Form 67-2, Officer Efficiency Report, Walter T. Tsukamoto, June 1, 1954 to July 28, 1954 (on file with Regimental Historian, TJAGLCS).

[286] Letter of Commendation from Colonel Laurence W. Lougee, Area VII Judicial Officer, through Chief, Field Judiciary Division, to Lieutenant Colonel Walter T. Tsukamoto (Aug. 17, 1959) (on file with Regimental Historian, TJAGLCS).

[287] U.S. Dep't of Army, DA Form 67-4, Officer Efficiency Report, LTC Walter T. Tsukamoto, May 1, 1959 to Apr. 30, 1960 (on file with Regimental Historian, TJAGLCS).

[288] *Id.*

[289] *Id.*

[290] *Id.*

[291] *See Colonel Walter Takeo Tsukamoto*, JAPANESE AM. VETERANS ASS'N, http://www.javadc.org/tsukamoto.htm (last visited May 24, 2011).

[292] A longer version of Nicholas Allen's storied career appeared in print in 2007. *See* Fred L. Borch, *The 82d Airborne's 'Jumping JAG': The Incredible Wartime Career of Nicholas E. Allen*," PROLOGUE 18–25 (Summer 2007).

[293] War Dep't Adjutant Gen.'s Office (AGO) Form 67, Efficiency Report, Nicholas E. Allen, July 1, 1942 to Dec. 31, 1942 (on file with Regimental Historian, TJAGLCS).

[294] War Dep't AGO Form 67, Efficiency Report, Nicholas E. Allen, January 1, 1944 to June 30, 1944 (on file with Regimental Historian, TJAGLCS).

[295] Memorandum from Major General James Gavin to Commanding General, XVIII Airborne Corps, subject: Battlefield Promotion of Officer (Nov. 13, 1944) (on file with Regimental Historian, TJAGLCS).

[296] Memorandum from Office of the Division Command, Headquarters, 82d Airborne Division (Forward), subject: Battlefield Promotion of Officer (Nov. 13, 1944) (on file with Regimental Historian, TJAGLCS).

[297] Headquarters, 82d Airborne Division, Gen. Orders No. 84 (June 4, 1945).

[298] War Dep't AGO Form 53-98, Military Record and Report of Separation/Certificate of Service, Nicholas E. Allen para. 29 (Nov. 21, 1946) (on file with Regimental Historian, TJAGLCS).

[299] For more on the 82d division in World War II, *see* FORREST W. DAWSON, SAGA OF THE ALL AMERICAN (1946). *See also* GERARD M. DEVLIN, PARATROOPER! (1979).

[300] War Dep't AGO Form 67, Efficiency Report, Nicholas E. Allen, July 1, 1944 to December 31, 1944 (on file with Regimental Historian, TJAGLCS).

[301] *First JAG Parachutist*, THE ADVOCATE (Apr. 13, 1945).

[302] Cassin Young had a distinguished career as a naval officer and was awarded the Medal of Honor for his "distinguished conduct in action, outstanding heroism and utter disregard of his own safety" while commanding officer of the U.S. Ship (USS) *Vestal* at Pearl Harbor on December 7, 1941. His citation reads, in part:

> Commander Young proceeded to the bridge and later took personal command of the three-inch antiaircraft gun. When blown overboard by the blast of the forward magazine explosion of the USS *Arizona*, to which the USS *Vestal* was moored, he swam back to his ship. The entire forward part of the USS *Arizona* was a blazing inferno with oil afire on the water between the two ships; as a result of several bomb hits, the USS *Vestal* was afire in several places, was settling and taking on a list. Despite severe enemy bombing and strafing at the time, and his shocking experience of having been blown overboard, Commander Young, with extreme coolness and calmness, moved his ship to an anchorage distant from the USS *Arizona*, and subsequently beached the USS *Vestal* upon determining that such action was required to save his ship. Although he survived the Japanese attack on Hawaii, Cassin Young was killed in action at Guadalcanal less than a year later, in November 1942.

Medal of Honor Recipients, World War II (T–Z), CTR. OF MIL. HISTORY, *available at* http://www.history.army.mil/html/moh/wwII-t-z.html (last visited Aug. 14, 2012).

[303] M.S. Young, *Edward Hamilton Young*, ASSEMBLY, Sept. 1990, at 154.

[304] *Id.*

[305] *Id.*

[306] Patrick Finnegan, *The Study of Law as a Foundation of Leadership and Command: The History of Law Instruction at the United States Military Academy at West Point*, 181 MIL. L. REV. 112, 120 (2004).

[307] Young, *supra* note 303, at 154.

[308] Captain George P. Forbes, Jr., *The Judge Advocate General's School*, JUDGE ADVOCATE J., Mar. 1945, at 48.

[309] THE ARMY LAWYER, *supra* note 4, at 161 (providing more information on Major General Myron C. Cramer).

[310] *Id.* at 186.

[311] *Id.* at 187.

[312] *Id.*

[313] Forbes, *supra* note 308, at 48.

[314] *Id.*

[315] *Id.*

[316] Young, *supra* note 2, at 155.

[317] EDWARD H. YOUNG, REPORT OF THE JUDGE ADVOCATE, UNITED STATES FORCES, CHINA THEATER, UNITED STATES ARMY FORCES CHINA, NANKING HEADQUARTERS COMMAND, AND ARMY ADVISORY GROUP CHINA, JANUARY 1, 1945 TO JUNE 10, 1947 (1948).

[318] Young, *supra* note 303, at 155.

[319] U.S. CONST., art. 1, § 9, cl. 8. After the Persian Gulf War, for example, a small number of high ranking Soldiers, including Generals Colin L. Powell and H. Norman Schwarzkopf, were awarded the Knight Commander, Order of the British Empire (KBE) by the U.K. government. *List of Honorary British Knights and Dames*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_honorary_British_knights_and_dames#Military (last visited Dec. 14, 2015). Ordinarily, recipients of the KBE are entitled to be addressed as "Sir" (as in "Sir Colin" or "Sir Norman"), but because of the constitutional prohibition in Article 1, Section 9, Generals Powell and Schwarzkopf were not permitted to accept this honorific. U.S. CONST., art. 1, § 9.

Despite the constitutional obstacles to accepting a title accompanying a foreign decoration like the KBE, the Congress began enacting legislation in World War I that gave blanket authority to "any and all members of the military forces of the United States . . . to accept . . . decorations" awarded to them by Allied governments. U.S. DEP'T OF ARMY REG. 600-45, AWARD AND SUPPLY OF DECORATIONS FOR INDIVIDUALS (Mar. 9, 1922). Similar legislation was enacted during World War II, Korea, and Vietnam so that judge advocates serving in those conflicts were permitted to accept (and wear) Belgian, British, Dutch, French, Italian, Korean, and Vietnamese decorations and medals. *See* Act of Aug. 1, 1947, Pub. L. No. 80-314 (authorizing the acceptance of decorations, orders, medals, and emblems by officers and enlisted men of the armed forces of the United States tendered them by governments of cobelligerent nations, neutral nations, or other American Republics); Act of May 8, 1954, Pub. L. No. 83-354 (authorizing certain members of the Armed Forces to accept and wear decorations of certain foreign nations); Act of Oct. 19, 1965, Public L. No. 89-257 (authorizing certain members of the Armed Forces to accept and wear decorations of certain foreign nations (codified as 5 U.S.C. § 7342 (2015))).

Today, Army Regulation 600-8-2, *Military Awards*, paragraph 9-3, provides that a foreign decoration which has been awarded in recognition of "active field service in connection with combat operations," or which has been awarded "for outstanding or unusually meritorious performance," may be accepted and worn upon receiving the approval of Commander, U.S. Army Human Resources Command (HRC), Awards and Decorations Branch, Fort Knox, Kentucky. U.S. DEP'T OF ARMY REG. 600-8-2, MILITARY AWARDS para. 9-3 (June 25, 2015). To ease the approval process, however, paragraph 9-27 provides that any foreign decoration listed in Appendix E of the regulation is pre-approved by Human Resources Command (HRC) for acceptance, provided it is approved by a commander who is a brigadier general or a commander who is a colonel with general court-martial convening authority. *Id.* para. 9-27, App. E. A decoration not listed in App. E cannot be accepted or worn without HRC approval. *Id.* para. 9-27.

[320] 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.

[321] *Id.*

[322] M.S. Young, *Edward H. Young 1919*, ASSEMBLY, Sept. 1990, at 154. For more on Young, *see* Borch, *supra* note 320.

[323] Borch, *supra* note 320, at 1.

[324] *Id.* at 2.

[325] THE ARMY LAWYER, *supra* note 4, at 188. Founded in 1869, the National University Law School merged with the George Washington University School of Law in 1954. *History*, THE GEORGE WASHINGTON UNIVERSITY, http://www.law.gwu.edu/School/Pages/History.aspx (last visited Dec. 1, 2015).

[326] THE ARMY LAWYER, *supra* note 4, at 188.

[327] *Id.* at 187.

[328] *Id.* at 169.

[329] Borch, *supra* note 320, at 2.

[330] *Id.*

[331] For more on Young's service in China, *see* Fred L. Borch, *Contracting in China: The Judge Advocate Experience, 1944–1947*, ARMY LAW., Aug. 2012, at 1.

[332] Borch, *supra* note 320, at 2.

[333] Young, *supra* note 322, at 154.

[334] *Id.*

[335] ROBERT WERLICH, ORDERS AND DECORATIONS OF ALL NATIONS 86 (1990).

[336] *Id*. at 88.

[337] *Id*. at 87.

[338] JOHN E. STRANDBERG & ROGER JAMES BENDER, THE CALL OF DUTY: MILITARY AWARDS AND DECORATIONS OF THE UNITED STATES OF AMERICA (2004).

[339] Borch, *supra* note 320, at 3.

[340] *Id.*

[341] Diploma of Lieutenant Frank H. Morrison, II (May 12, 1944). The author thanks Ms. Margaret "Nan" Morrison for her help in preparing this Lore of the Corps about her father.

[342] *Frank H. Morrison II, Atlanta Attorney, Dies*, ATLANTA CONSTITUTION, Jan. 5, 1959, at 7.

[343] *Id*.

[344] Email from Margaret Morrison to author (June 24, 2015, 15:46 EST) (on file with author).

[345] For more on the 63d Infantry at Camp Van Dorn, *see* 63D INFANTRY DIVISION, www.63rdinfdiv.com.

[346] HISTORICAL AND PICTORIAL REVIEW OF CAMP VAN DORN 2 (1944).

[347] *Van Dorn's Mr. Anthony*, THE VAN-GUARD (Vol. 1, No. 46), Sept. 9, 1944, at 2. From 1935 until 1953, millions of radio listeners tuned in to a popular show hosted by John J. Anthony. The show's format was for listeners to call in to the show to ask about family problems, and each show began with the preamble, "Mr. Anthony, I've got a problem . . . ." The phrase was a popular American saying during World War II, and the headline about 1LT Morrison's legal assistance work being akin to Mr. Anthony's show would have struck a responsive chord with readers. *See* Bob Thomas, *Radio's Mr. Anthony Has New Problem*, MIAMI NEWS, July 13, 1966, at 8.

[348] U.S. Citizenship and Immigration Services, Military Naturalization During WWII, http://www.uscis.gov/history-and-genealogy/our-story/agencyhistory/military-naturalization-during-wwii (last visited June 22, 2015).

[349] *Id.*

[350] *Van Dorn's Mr. Anthony*, *supra* note 347.

[351] *Id*.

[352] *Frank H. Morrison II, supra* note 342, at 7.

[353] *Obedience to Will of Emperor Halted Wave of Jap Suicides*, ATLANTA CONSTITUTION, May 20, 1946.

[354] *Id.*

[355] ALLAN A. RYAN, YAMASHITA'S GHOST-WAR CRIMES, MACARTHUR'S JUSTICE, AND COMMAND ACCOUNTABILITY (2012).

[356] GARY D. SOLIS, THE LAW OF ARMED CONFLICT 384 (2010) (quoting Theater Staff Judge Advocate's Review of the Record of Trial by Military Commission of General Masaharu Homma, Mar. 5, 1946, at 1).

[357] *Emory Soldier-Lawyers Prosecute Jap Thugs*, THE EMORY ALUMNUS, Mar. 1946, at 13; *see also Capt. Morrison Aids Prosecutor in Jap Trial*, ATLANTA JOURNAL, Jan. 7, 1946, at 5.

[358] *Georgians Get Army Awards for Service*, ATLANTA JOURNAL, Aug. 18, 1946.

[359] Although released from active duty in 1946, Morrison was not discharged from his Army Reserve obligation until 1950. Email from Margaret Morrison, *supra* note 344.

[360] *Frank H. Morrison II, supra* note 347.

[361] *Id*.

[362] *Dozens Argue at Panmunjom, But One Man is Writing Pact*, EVENING STAR (Wash., D.C.), Apr. 14, 1952, at A7.

[363] CTR. OF MIL. HIST., U.S. ARMY, KOREA 1950, at 9–10, 14 (1997).

[364] S.C. Res. 82, U.N. SCOR, U.N. Doc. S/RES/82 (June 25, 1950). The resolution passed because the Soviet Union's representative was boycotting that organization; had he been present, he could have vetoed the resolution.

[365] JOHN MILLER, JR., OWEN J. CARROLL & MARGARET E. TACKLEY, KOREA 1951–1953, at 3–10, 115–17 (1997).

[366] *Id.* at 115, 160.

[367] Written Questions for Colonel Levie (n.d.) (*The Army News Service* provided a list of questions for Colonel Howard S. Levie to answer in order to publish a story about him in *The Army News Service* in December 2008.) (on file with Regimental Historian, TJAGLCS).

[368] *Id.*

[369] *Id.*

[370] From 1932 to 1935, Bolivia and Paraguay fought a territorial war over the Gran Chaco region, an area over which both countries claimed ownership. At least 90,000 to 100,000 men died, and total casualties may have exceeded 250,000. For more on the Chaco War, which ended with a truce in January 1936, *see* A. DE QUESADA, THE CHACO WAR 1932–1935: SOUTH AMERICA'S GREATEST CONFLICT (2011).

[371] *Supra* note 367.

[372] *Id.*

[373] The UN Command insisted on "voluntary repatriation"—insisting that every POW had the right to make a personal, voluntary decision to return to the country in whose armed forces he had been serving at the time of his capture. The Communists, however, were adamant that all Chinese and

North Korean POWs must be returned to their control, regardless of their personal desires. Howard S. Levie, *How It All Started—And How It Ended: A Legal Study of the Korean War*, 35 AKRON L. REV. 205, 223 (2002).

[374] The July 27, 1953 Armistice Agreement was signed by Lieutenant General William K. Harrison, Jr., Senior Delegate, UN Command Delegation and General Nam Il, Senior Delegate, Korean People's Army and Chinese People's Volunteers. For the full text of the Korean War Armistice

Agreement, *see* http://news.findlaw.com/cnn/docs/ korea/kwarmagr072753.html (last visited Aug. 15, 2013).

[375] In the late 1990s, there were attempts to convene a conference in Geneva in order to negotiate a final peace treaty but nothing was achieved. Levie, *supra* note 373, at 225. In fact, starting in 1996, North Korea has announced its withdrawal from the Armistice Agreement on at least six occasions. *Chronology of Major North Korean Statements on the Korean War Armistice*, YONHAP NEWS, May 28, 2009, *available at* http://english.yon-hapnews.co.kr/northkorea/2009/05/28/46/0401000000AEN20090528004200315F.HTML.

[376] Richard J. Grunawalt, *Professor Howard Levie and the Law of War*, *in* MICHAEL N. SCHMITT & LESLIE C. GREEN (EDS.), LEVIE ON THE LAW OF WAR, at xv (1998), https://www.usnwc.edu/getattachment/f70ec02c-8f8e-4f54-aa15-3c71030c6231/Professor-Howard-Levie-and-the-Law-of-War.aspx.

[377] Elizabeth M. Collins, *Armistice Author Turns 101*, ARMY NEWS SERV., Dec. 29, 2008.

[378] Before June 24, 1948, the JAG Corps was known as the JAG Department. JUDGE ADVOCATE GENERAL'S CORPS, U.S. ARMY, THE ARMY LAWYER, *supra* note 4 at 198 (1975).

[379] At least one source (http://www.20thengineers.com/ww2-caffey.html (accessed April 21, 2014)) claims that Caffey entered West Point in 1914, but this is incorrect. His military records correctly reflect that Caffey matriculated in 1915. U.S. Dep't of Def., DD Form 214, Armed Forces of the U.S. Report of Transfer or Discharge, Eugene Mead Caffey, block 32 (Nov. 1, 1955).

[380] *Eugene Mead Caffey*, ASSEMBLY 83 (Fall 1961).

[381] U.S. Dep't of Army, DA Form 66, Eugene Mead Caffey, block 12 (Nov. 1, 1954) (Appointments).

[382] For details on Caffey's unusual involvement in a homicide prosecution, *see* Fred L. Borch, *The Shooting of Major Alexander P. Cronkhite: Accident? Suicide? Murder?*, ARMY LAW., Mar. 2014, at 81–83.

[383] Michael J. Brodhead, "*A Wet, Nasty Job": Army Engineers and the Nicaragua Canal Survey of 1929–1931*, FED. HIST. J., Jan. 2013, at 15, 18.

[384] War Dep't, Adjutant Gen.'s Office, AGO Form 67, Efficiency Report, First Lieutenant Eugene M. Caffey, block R (Mar. 9, 1929) (covering July 1, 1928 to 20 Dec. 1928).

[385] ASSEMBLY, *supra* note 380, at 84.

[386] War Dep't, Adjutant Gen.'s Office, AGO Form 67, Efficiency Report, Captain Eugene M. Caffey, blocks E (Duties), H (Performed) (June 8, 1934) (covering Aug. 27, 1933 to June 6, 1934).

[387] Berger v. Chase Nat'l Bank, 105 F. 2d 1001 (2d Cir. 1939). The plaintiffs were five liquidators of closed national banks.

[388] Letter, J. M. Elizalde, Resident Comm'r of the Philippines to the United States, to Major General Arthur W. Brown, The Judge Advocate Gen. (Apr. 8, 1940).

[389] *Id.*

[390] Letter, Major General Gullion, to The Adjutant Gen., 3d Wrapper Endorsement (Aug. 12, 1938).

[391] *Id.*

[392] War Dep't, Adjutant Gen.'s Form 67, Efficiency Report, Captain Eugene M. Caffey (Aug. 15, 1938) (covering period Aug. 1, 1937 to Nov. 14, 1937).

[393] Letter, Major General Gullion, to The Adjutant Gen., 7th Wrapper Endorsement para. 2 (Dec. 7, 1938).

[394] THE ARMY LAWYER, *supra* note 4, at 220.

[395] Headquarters, European Theater of Operations, Gen. Orders No. 161 (May 4, 1945).

[396] Special Rating of General Officers, Colonel Eugene M. Caffey para. 7 (May 26, 1945).

[397] Major General Edward F. Witsell, The Adjutant Gen., to Colonel Caffey, subj: General Officers' Eligible List (Mar. 26, 1946).

[398] Letter, Colonel Eugene M. Caffey to The Adjutant Gen., Wash., D.C., subj: Transfer (Dec. 27, 1946).

[399] Memorandum from W.H. Biggerstaff, to The Adjutant Gen., subj: Transfer from Engineers to JAG, cmt. no. 10 (Mar. 12, 1947).

[400] Disposition Form, subj: Transfer cmt. 4 (Feb. 12, 1947).

[401] Letter, Colonel Eugene M. Caffey to The Adjutant Gen., subj: Voluntary Retirement (May 7, 1953).

[402] While this cannot be said with certainty, and Caffey does not identify the "numerous changes" that he found "unacceptable," it seems likely that in light of Caffey's speech to the Georgia Legislature in 1956, he was dissatisfied with certain policy changes in the Armed Forces, such as President Truman's 1948 executive order directing desegregation. Since the Army had been racially segregated since 1866, there were more than a few white men and women in uniform who did not like Truman's decision to end institutional racism: Caffey may have been one of them. *See infra* note 405 and accompanying text.

[403] Letter, The Adjutant Gen. to Colonel Eugene M. Caffey, subj: Promotion (July 23, 1953).

[404] As the Assistant Judge Advocate General for Civil Law, Brigadier General Caffey supervised the Military Affairs (today called Administrative and Civil Law), Government Appellate Division, Defense Appellate Divisions, and Army Legal Assistance. U.S. Dep't of Army, DA Form 67-3, Officer Efficiency Report, Brigadier General Eugene M. Caffey (Jan. 26, 1954) (covering the period of Aug. 5, 1953 to Jan. 26, 1954).

[405] *Army's Chief Legal Officer May Be Asked to Explain Integration Stand*, STAR-BANNER (Ocala, Fla.), Feb. 1, 1956, at 1. The Supreme Court's 1954 decision in *Brown v. Board of Education* was very unpopular with many white Southerners, and this would explain Representative Jack Flynt's speech.

[406] *Id.*

[407] *Id.*

[408] *Id.*

[409] Telephone Interview with Major General Wilton B. Persons (Apr. 8, 2014) [hereinafter Persons Telephone Interview] (on file with author).

[410] U.S. Dep't of Army, DA Form 67-3, Officer Efficiency Report, Major General Eugene M. Caffey, block 12 (July 3, 1956) (emphasis added).

[411] Persons Telephone Interview, *supra* note 409.

[412] The Caffeys also had "five tall sons and four lovely daughters": Eugene Mead, Catherine Howell, Lochlin Willis, Hester Washburn, Benjamin Franklin, Francis Gordon, Helen Mead, Mary Winn, and Thurlow Washburn. ASSEMBLY, *supra* note 380, at 84. One son, Lochlin Willis Caffey, attended West Point and graduated in 1945. Like his father, Lochlin was commissioned in the Corps of Engineers; he retired as a colonel. ASS'N OF GRADUATES, REGISTER OF GRADUATES (1992), Class of 1945, Lochlin Willis Caffey, No. 14438.

[413] ASSEMBLY, *supra* note 380, at 84.

[414] The red "T-O" on the shoulder sleeve insignia of the 90th Division stood for "Texas-Oklahoma"—indicating its origins as a National Guard division. But the Soldiers of the 90th liked to believe that the letters on the patch stood for "Tough 'Ombres."

[415] Headquarters, Third U.S. Army, Gen. Order No. 89, para. 2 (Nov. 12, 1944).

[416] FREDERIC L. BORCH, JUDGE ADVOCATES IN VIETNAM 68 (2003).

[417] Memorandum from the Commanding General, 1st Logistical Command, for Commanding General, U.S. Army Support Command, Cam Ranh Bay, subject: Jurisdiction over Civilians (Dec. 8, 1966)

[418] U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS, ch. 10 (Dec. 19, 2016)

[419] BORCH, *supra* note 416, at 70.

[420] David S. Franke, Finkelstein Oral History, April 1989, 168–71 (on file with Regimental Historian, TJAGLCS).

[421] Telephone Interview with Zane E. Finkelstein (Mar. 15, 2010) (on file with author).

[422] Headquarters, 1st Cavalry Division (Airmobile), Gen. Orders No. 2780 (May 3, 1968).

[423] Interview with Major General (Ret.) Wilton B. Persons (May 8, 2013) [hereinafter May Interview].

[424] In 1960, Alabama Polytechnic Institute was granted university status by the Alabama state legislature, and renamed Auburn University.

[425] Michael E. Smith, *Major General Wilton Burton Persons, Jr. United States Army (Ret.) The Judge Advocate General of the Army 1975- 1979*, 153 MIL. L. REV. 177, 181 (1996). This excellent biographical sketch of Persons relies primarily on two oral histories done in 1985.

[426] Interview with Major General (Ret.) Wilton B. Persons (June 5, 2012) [hereinafter June Interview].

[427] May Interview, *supra* note 423.

[428] June Interview, *supra* note 426. *See also* Smith, *supra* note 425, at 184.

[429] Today's Personnel, Plans and Training Office, Office of The Judge Advocate General.

[430] May Interview, *supra* note 423.

[431] For more on Dickenson, and Persons's role in the case, *see* Fred L. Borch*, The Trial of a Korean War "Turncoat": The Court-Martial of Corporal Edward S. Dicksenson*, ARMY LAW., Jan. 2013. *See also United States v. Dickenson*, 20 C.M.R. 154, 6 U.S.C.M.A. 438 (1955).

[432] Smith, *supra* note 425, at 189.

[433] Persons did not attend any course at TJAGSA until the summer of 1969, when he was a full colonel and student in the 'SJA course' prior to deploying to Vietnam. *Id.* at 195, fn. 133.

[434] *Id*.

[435] *Id.* 190–191. Department of the Army (DA) Form 2-1, Wilton B. Persons, para. 12, Appointments.

[436] Smith, *supra* note 425, at 191. For more on the efforts to obtain authority for TJAGSA to award an LL.M, see Fred L. Borch, *Masters of Laws in Military Law: The Story Behind the LL.M. Awarded by The Judge Advocate General's School,* ARMY LAW. (August 2010), 1.

[437] *Id*. at 190.

[438] *Id*. at 191.

[439] *Id*. at 192.

[440] *Id*. at 193.

[441] *Id*. at 197.

[442] For more on the Green Beret murder case, *see* JEFF STEIN, A MURDER IN WARTIME (1992).

[443] Smith, *supra* note 425, at 205, fn. 207; DA Form 2 & 2-1, *supra* note 435.

[444] Smith, *supra* note 425, at 210–217.

[445] *Committee for G.I. Rights v. Calloway*, 370 F. Supp. 934 (D.D.C. 1974).

[446] Smith, *supra* note 425, at 209.

[447] *Id*.

[448] *Committee for G.I. Rights v. Calloway*, 518 F. 2d 446 (D.C. Cir. 1975).

[449] Smith, *supra* note 425, at 230.

[450] *Id*. at 237. For more on Wayne E. Alley, *see* George R. Smawley, *In Pursuit of Justice, A Life of Law and Public Service: United States District Court Judge and Brigadier General (Ret.) Wayne E. Alley (U.S. Army 1952–1954, 1959–1981)*, 208 MIL. L. REV. 213-306 (Summer 2011).

[451] *Id*. at 238.

[452] *Id*.

[453] *Wilton Persons (1923–2015)*, SAVANNAH (GA.) MORNING NEWS, Apr. 7, 2015.

[454] *Id*.

[455] May Interview, *supra* note 423.

[456] Smith, *supra* note 425, at 181–182.

[457] Major General Persons is survived by his wife of 69 years, Christine (nee Smith); his children Charlotte Persons, Alice Persons, and Wilton B. Persons III; grandsons David and Stephen Blomeyer, and many nieces and nephews.

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

[459] *Id.*

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

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

[462] *Id*. at 3, 11–12.

[463] *Id.* at 4–5.

[464] *Id.* at 5–6.

[465] *Id.* at 7.

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

[467] Patoir & Rofrano, *supra* note 461, at 6–7.

[468] *Id.* at 7-8.

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

[470] Patoir & Rofrano, *supra* note 461, at 25–26.

[471] *Id.* at 31–34.

[472] *Id.* at 19, 37.

[473] *Id.* at 20, 37, 63.

[474] *Id.* at 20, 41–42.

[475] *Id.* at 44.

[476] *Id.* at 47–48.

[477] *Id.* at 45–46.

[478] *Id.* at 68–69.

[479] *Id.* at 69.

[480] *Id.*

[481] *Id.*

[482] Headquarters, U.S. Dep't of Army, Gen. Order No. 5641 (June 27, 1970).

[483] Patoir & Rofrano, *supra* note 461, at 69–70.

[484] *Id.*

[485] *Id.* at 74.

[486] *Id.*

[487] *Id.* at 82.

[488] *Id.*

[489] *Id.* at 83.

[490] *Id.* at 89–91.

[491] *Id.* at 97, 103–04.

[492] *Id.* at 116–17.

[493] *Id.* at 142.

[494] *Id.* at 122–26.

[495] Kuzma, *supra* note 458.

[496] Patoir & Rofrano, *supra* note 461, at 227.

[497] *Id.* at 133–34.

[498] *Id.* at 146.

[499] *Id.* at 182.

[500] 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).

[501] Patoir & Rofrano, *supra* note 461, at 186.

[502] *Id.*

[503] *Id.* at 201.

[504] *Id.*

[505] *Id.*

[506] *Id.* at 193.

[507] *Id.* at 137.

[508] *Id.* at 211.

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

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

[511] Patoir & Rofrano, *supra* note 461, at 212.

[512] *Id.* at 220–21.

[513] *Id.* at 59.

[514] Bernstein, *supra* note 460.

[515] *Id.*

[516] *Id.*

[517] 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/major-general-john-l-fugh-annual-symposium-on-law-and-military-operations.html.

[518] *See* OKPENATION, ORHUE1, *available at* www.okpenation.org/doc/ORHUE%I.pdf (last visited Nov. 14, 2014).

[519] THE JUDGE ADVOCATE GENERAL'S SCHOOL, 36TH GRADUATE CLASS DIRECTORY 42 (1987) [hereinafter 36TH GRADUATE COURSE DIRECTORY] (entry for Felix Mujakperuo).

[520] E-mail from Colonel (Ret.) Richard E. Gordon to author (Oct. 1, 2014, 11:14 EST) (on file with author). In addition to Colonel Gordon, who had a distinguished career as an Army lawyer, another member of the 36th Graduate Class who excelled after graduating was Malinda E. Dunn, who became the first active component female brigadier general in the history of the Corps. Brigadier General Dunn retired in 2009.

[521] In addition to LTC Mujakperuo, two other international students were the recipients of the first LL.M.s: Major Sadi Cayci, Turkish Army and Major Seong Jae Lee, Korean Army. 36TH GRADUATE COURSE DIRECTORY, *supra* note 519.

[522] UNITED NATIONS MISSION IN SIERRA LEONE—BACKGROUND, http://www.un.org/en/peacekeeping/missions/past/unamsil/background.html (last visited Nov. 13, 2014).

[523] The Opke kingdom is located in Delta State, Nigeria. For more on the Okpe kingdom, see ISAAC S. MEBITAGHAN, A BRIEF HISTORY OF OKPE KINGDOM (2001).

[524] OKPENATION, *supra* note 518.

[525] *Id.*

[526] *Id.*

[527] *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.*

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

[529] *Id.* at 82.

[530] *Id*.

[531] *Id.* at 82–83.

[532] 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.

[533] *Id.* at 92.

[534] *Id.* at 93.

[535] *Id.*

[536] U.S. DEP'T OF ARMY, REG. 635-89, PERSONNEL SEPARATIONS—HOMOSEXUALS para. 2.*a*. (Sept. 8, 1958).

[537] *Id.*

[538] *Id.* para. 3.*a*.

[539] Cross, *supra* note 528, at 94.

[540] 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).

[541] Cross, *supra* note 528, at 94.

[542] *Id.* at 333.

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

[544] *Id.*

[545] *Id.*

[546] *Id.*

[547] *Id.*

[548] *Id.*

[549] *Id.*

[550] *Id.*

[551] *Id.*

[552] *Id.*

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

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

[555] *Id.*

[556] *Id.*

[557] *SGT Eric Coggins*, *supra* note 543.

[558] *Coggins Award Presented*, *supra* note 553.

[559] 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.

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

[561] 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).

[562] Sergeant Major Martinez served as First Sergeant, Judge Advocate Officer Basic Course (JAOBC) Student Detachment. In 2017, he was appointed the Regimental Command Sergeant Major of the Corps.

[563] 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.

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

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

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

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

[568] 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.

[569] 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.

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

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

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

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

[574] Staff Sergeant Hawley is the first U.S. Army Reserve Soldier to win the Coggins award and is a court reporter and training NCO at Legal Command.

[575] 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 Nov. 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.*

[576] *The Byrd-Man of TJAGSA,* REGIMENTAL REPORTER, Fall 1989, at 7.

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

[578] REGIMENTAL REPORTER*, supra* note 576.

[579] *Id.*

[580] *Id.*

[581] Borch, *supra* note 577.

[582] REGIMENTAL REPORTER*, supra* note 576.

[583] *Id.*

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

[585] REGIMENTAL REPORTER, *supra* note 576.

[586] *Philip Byrd Eastham, Jr.*, DAILY PROGRESS, Aug. 1, 2016, B6.

[587] *Id.*

[588] *Id.*

[589] 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).

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

[591] Personnel Data Sheet, Michelle B. Gottlieb, 85th Judge Advocate Officer Basic Course, Oct.–Dec. 1977.

[592] After retiring from active duty, Brigadier General Wayne Alley become 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 (Ret.) Wayne E. Alley, U.S. Army, 1952–1954, 1959–1981*, 208 MIL. L. REV. 212 (2011).

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

[594] E-mail from Jan P. Fladeboe, *supra* note 590.

[595] 29th Graduate Class Directory, *supra* note 593.

[596] 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.

[597] Another example of a judge advocate whose expertise led to an early assignment on the faculty was Colonel (Ret.) 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.

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

[599] 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.

[600] 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. THE ARMY LAWYER, *supra* note 4, at 251. Gray later served as The Assistant Judge Advocate General of the Army and retired as a major general in 1997.

[601] 29th Graduate Class Directory, *supra* note 593.

[602] *Id.*

[603] E-mail from Jan P. Fladeboe, *supra* note 590.

Chapter 4
Legal Operations Overseas

Contracting in China: The Judge Advocate Experience, 1944–1947

(Originally published in the August 2012 edition of *The Army Lawyer.*)

While procurement law has been an important component of judge advocate practice for many years, few men and women today know that Army lawyers were involved in the negotiation and supervision of contracts in China during World War II and the immediate post-war period. What these contract law attorneys did and how they did it is a story worth telling.

While American troops had been stationed in China prior to World War II, the Japanese attack on Pearl Harbor caused the United States to greatly strengthen its relationship with the Chinese, if for no other reason than to keep China in the war against Japan. Recognizing that strengthening General Chiang Kai-shek's army could inflict considerable damage on their common enemy, the War Department created the China-Burma-India (CBI) Theater in 1942. As one of its lines of effort against Japan, the United States supplied the Chinese Army with weapons, ammunitions, food, and other supplies by using the Burma Road, until the Japanese disrupted its use in 1942, and by airlifts flown over "the Hump," the air route over the 14,000-foot Himalayas Mountains located between India and southern China. While a total of 650,000 tons of supplies would eventually be airlifted to China, the limitations on what could be flown and how much could be flown meant that essential supplies still had to be purchased in local markets. Fuel was the single most important item for purchase. Army officers negotiated contracts for gasoline for aircraft and gasoline for use in motor vehicles. But contracts also were signed for fresh fruits and vegetables and other supplies that could not be brought into China via the Burma Road or over "the Hump."[1]

The first judge advocates apparently arrived in China in mid-1944 and were headquartered at U.S. Forces, China Theater, under the command of Lieutenant General Albert C. Wedemeyer in Chungking.[2] From that time until mid-1947, some twenty judge advocates served at U.S. Forces, China Theater, and its successor commands, U.S. Army Forces China, Nanking Headquarters Command, and Army Advisory Group, China. At any one time, the maximum number of Army lawyers in the country was twelve, and all judge advocates apparently had departed China by June 1947.[3]

While most were involved in supervising courts-martial, investigating war crimes, processing claims, and providing legal assistance, a small number of Army lawyers supervised the preparation of procurement contracts and reviewed existing contracts for legal sufficiency.

The most difficult issue for judge advocates involved in the negotiation of contracts (and leases for real estate, in which Army lawyers also participated) was the requirement that "Chinese National Currency will be the medium of exchange in all fiscal matters."[4] At first, this requirement was not a problem, as the Chinese yuan held its value but, by early 1945, the currency was rapidly losing its value. As Colonel (COL) Edward H. "Ham" Young[5] explained in his report on legal operations in China, this exchange rate fluctuation presented serious difficulties:

> Since most procurement contracts called for large advance payments to enable the local contractors to purchase raw materials, and since most leases provided for large advance payments, the fluctuation of the currency necessitated frequent modifications of contracts . . . . By agreement between the governments of the United States and China, the rate of exchange between the Chinese Yuan and the U.S. dollar was fixed . . . . However, contracts were entered into with individuals to whom this fixed rate did not apply and who made the open market and black market rates of exchange the basis for the determination of the costs of their services rendered or materials furnished.[6]

As COL Young observed, if American negotiators and their judge advocate supervisors tried to deal with the local suppliers on the basis of the fixed yuan-dollar exchange rate, U.S. units would be unable to obtain essential materials. No wonder Young reported that this meant that procurement in the China Theater was done in accordance with "local conditions."[7]

In addition to currency fluctuation, inflation presented challenges for Americans stationed in China. When "sky-rocketing prices in local commercial establishments" made it difficult for U.S. troops to obtain necessary goods and services, Army Special Services opened snack bars, barber shops, and gift shops. Chinese concessionaires operated these establishments, but judge advocates were "called upon to develop procedure and to draft contracts to meet each particular situation."[8]

Inflation and currency fluctuation also affected the hiring of local Chinese personnel. Employment contracts for cooks, clerks, guards, drivers, and other similar laborers contained provisions requiring pay adjustments when changes in the monthly cost-of-living index occurred. The Shanghai municipal government, for example, issued a monthly index that covered various items such as rent, clothing, and food. This index had been created using prices that existed in 1939, prior to the Japanese occupation of Shanghai. By 1944, however, variations in the monthly cost-of-living index occurred so frequently that judge advocates "worked closely with all Purchasing and Contracting Officers" in drafting payments clauses. These clauses modified existing contracts in such a way to adjust pay when changes in the index occurred without having to amend each employment contract each month.

Contracts for real estate presented equally thorny issues for judge advocates. One unusual situation involved the use of facilities owned by the Methodist Missionary Society in Chungking. When Lieutenant General Wedemeyer opened his new China Theater Headquarters in that city in October 1944, the society offered the use of its privately owned middle school compound for the military headquarters. General Wedemeyer accepted this offer because the society did not want any rent for its use. Prior to taking occupancy of the facilities, however, the United States requested that the Chinese government make "large scale repairs" and build additional structures on the property, which the Chinese did.[9]

The Methodist Missionary Society then asked the Chinese government to execute a written instrument guaranteeing that the school compound be returned to the society at the end of the war, when American forces presumably would leave China. When the Chinese government refused to give any such written assurances, the society looked to Lieutenant General Wedemeyer and the Americans for support. Colonel Young and his judge advocates advised that, regardless of whether the Chinese ultimately returned the property to the Methodist Missionary Society, the use of the property by the United States would create a quasi-contractual relationship between the Army and the society and potentially expose the United States to a claim for the fair market value of the rental property. Based on this legal advice, COL Young and his lawyers "conducted a series of conferences with all parties involved" and, as a result of these negotiations, the Chinese government agreed that the premises would be returned to the Methodist Missionary Society. In return, the society "executed a general release in favor of United States forces exempting the United States from all future claims 'which may have attended its occupancy.'"[10]

As for real estate leases generally, judge advocates working in Shanghai and other locations in China quickly learned that "transfers of property to and between the Japanese during the regime of the Puppet Government. . . threatened to involve the U.S. military authorities in lengthy litigation."[11] This was because more than one Chinese national would claim to be the rightful owner of the same leased premises, and demand that the moneys due under the lease be paid to him. Fortunately, a close working relationship with Chinese authorities "overcame most of these difficulties."[12] One solution was for the Chinese to take over the property in question and then permit the U.S. Army to use it until the true owner was found or determined. While this ensured that U.S. personnel had use of the premises—an important point—it only postponed the ownership issue and ultimately, the Americans paid a claim for the full value of the leased property to the rightful owner.

When COL Young, who served as the senior judge advocate in China from January 1, 1945 to June 10, 1947, returned home to the United States, he lauded the "ability, versatility and loyalty" of the "relatively small group of judge advocates" and others who had served alongside him in China. As this short history of contracting in China shows, Young certainly included his contract law attorneys in this group.[13]

Judge Advocates in the Empire of Haile Sellasie

(Originally published in the July 2010 edition of *The Army Lawyer.*)

While judge advocates currently serve in a variety of locations, from Afghanistan, Germany, and Honduras to Iraq, Italy, and Japan, few in our Corps today remember that Army lawyers also once served in Africa—in the Empire of Ethiopia.

In the early 1970s, Army lawyers served on the horn of Africa at the U.S. Army Security Agency Field Station in Asmara, Ethiopia.[14] Asmara's geographic location near the equator and its altitude (7600 feet above sea level) made it the ideal location for a Cold War era "listening station" to monitor Soviet-bloc radio traffic—which explains why there were roughly 3500 Americans in Asmara at "Kagnew Station" in the early 1970s.

The lawyers assigned to the "Judge Advocate Office" in Asmara, Ethiopia, from 1971 to 1972 were Major (MAJ) Raymond K. Wicker, Captain (CPT) Michael P. Miller, and CPT Nathaniel P. Wardwell.[15] Wicker was the "Judge Advocate" while Miller and Wardwell were "Assistant Judge Advocates." All three lawyers provided legal advice to "clients" located at the Army Security Agency (which ran Kagnew Station). In addition, these judge advocates advised American uniformed and civilian personnel assigned to the Navy and Air Force communications stations, State Department communications center, and the Air Force Post Office.

The volume of work and the variety of issues were considerable. Military justice advice to the special court-martial convening authority at Kagnew Station consisted chiefly of advice on Article 15 punishment, but there were also some summary courts-martial. The limited jurisdiction of the convening authority, however, caused some problems. For example, CPT Wardwell wrote at the time that a number of special courts-martial tried in Ethiopia during his tour of duty there "would probably be referred as general courts-martial elsewhere."[16] In any event, the joint nature of command resulted in some unusual, if not unique, military justice actions: one special court-martial "involved the trial of a Navy radioman, who was prosecuted and defended by Army attorneys, before an Army judge, and with a Navy court reporter."[17] Not only was this an "interesting example of interservice cooperation," but since the court-martial occurred in Africa, it likely was a unique event in the history of the Uniform Code of Military Justice.

As far as local criminal and civil matters were concerned, an Ethiopian-U.S. executive agreement relating solely to Kagnew Station, signed in 1953, provided that members of the U.S. forces were "immune from the criminal jurisdiction of the Ethiopian courts and, in matters arising from the performance of their official duties, from the civil jurisdiction of the Ethiopian courts."[18] While this might seem to have been a good situation, it was not necessarily so. For example, if the manager of the Kagnew Station post exchange embezzled funds, or if a military spouse killed her husband at Kagnew Station, no court would have had subject-matter jurisdiction over the offenses.

The same Ethiopian-U.S. agreement also triggered other international legal issues. The station's exemption from Ethiopian taxes was one such issue. After the Imperial Ethiopian Government (IEG) negotiated a loan from the U.S. Agency for International Development, the Ethiopians began to question the validity of exemptions that had been traditionally granted to Kagnew Station. As a result, MAJ Wicker and CPTs Miller and Wardwell spent considerable time visiting with Ethiopian government officials to explain and justify tax waiver provisions in the executive agreement. Additionally, these Army lawyers helped implement measures that aided the IEG tax officials. For example, a color dye was added to duty-free gasoline sold on post so that the Ethiopian police could more easily catch persons using duty-free gas who were not entitled to make duty-free purchases![19]

The judge advocates in Ethiopia also oversaw a busy claims operation. First, a Foreign Claims Commission (created under the authority of Army Regulation 27-40, *Claims*) sitting at Kagnew Station had authority to pay claims up to $5,000. Ethiopians who were injured or killed, or whose property was damaged, lost, or destroyed by members of the U.S. Armed Forces could be compensated, and the Foreign Claims Commission paid about a hundred claims a year; the larger claims involved motor vehicle accidents. In the event of a fatality, a solatium payment also was made "according to local

custom—a cow and two barrels of *sua*, the local beer."[20]

Wicker, Miller, and Wardwell also provided legal advice in other areas, including the review of local contracts; advice to the post commander and commanders of tenant units; and advice to various clubs and non-appropriated fund instrumentalities.

Perhaps not surprisingly, the largest part of an Army lawyer's time in Ethiopia was spent providing legal assistance. Apparently the isolated nature of the base meant that an "unusually large number of marriages ended in separations . . . so marriage counseling normally consumed several hours per week." Additionally, as "many Americans wished to adopt Ethiopian children and marry Ethiopian wives," there were complex immigration and family law matters to handle.[21]

Life for judge advocates in the empire of Haile Sellasie was challenging and apparently rewarding. But it ended abruptly: when post-Vietnam budget cuts caused the Army's withdrawal from Asmara in 1973, the judge advocate presence went with it; MAJ Wicker, CPT Miller, and CPT Wardwell were the last Army lawyers to serve in Ethiopia.

As for Haile Selassie, who had ruled as emperor since 1930, his thirty-four-year imperial reign came to an end in 1974, when a Soviet-backed military coup, led by Mengistu Haile Mariam, ousted him and established the People's Democratic Republic of Ethiopia.

Lawyering in the Empire of the Shah

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Given current relations with the government of Iran, it is easy to forget that American military personnel once had close ties with Tehran and that more than a few judge advocates (JAs) had rewarding tours of duty in the Empire of the Shah.

While U.S. Army personnel first arrived in Iran in September 1942 (to help train and organize the Iranian Army during World War II), the U.S. Army Mission to the Imperial Iranian Armed Forces (ARMISH) was officially created by bilateral agreement in October 1947. Five years later, the United States and Iran formed a separate Military Assistance Advisory Group-Iran (MAAG). These separate ARMISH and MAAG organizations were merged into a tri-service (Army, Navy, Air Force) ARMISH-MAAG in 1958.

Just when the first Army lawyer arrived in Tehran to provide legal advice to the ARMISH-MAAG is not clear, but it seems likely that JAs were first assigned to the U.S. Army Element, ARMISH-MAAG Iran in 1958, when the tri-service configuration was first adopted. The Army considered the assignment to be an important one, as the "Legal Advisor" was a lieutenant colonel on the ARMISH-MAAG Joint Table of Distribution (JTD). This legal advisor was supported by a second JA, who was a major (MAJ) on the JTD, but was most often a JA captain (CPT). Rounding out the Judge Advocate Office at ARMISH-MAAG was a local national civilian paralegal who spoke Farsi and so could also act as a translator, an MOS 71D legal clerk, a U.S. civilian secretary, and a local national secretary. The office had three vehicles, and the Iranian Army provided two drivers for them.

The primary mission of the Army lawyers in Tehran was to advise the Imperial Iranian Judiciary Department (IIJD), which was headed by an Iranian lieutenant general. This meant advising the IIJD on legal education and training. To further this goal, Iranian military lawyers began attending the JA Career Course (today's Graduate Course) at The Judge Advocate General's School. The first to study in Charlottesville were Colonel (COL) Mos H. Ekhterai and COL Khajeh-Noori, who attended the Fourteenth Career Class from 1965 to 1966.[22]

Advising the IIJD also meant assisting the Iranians in "updating Iranian military law or drafting new laws." At the time, Iranian civil law followed the French (Napoleonic) codal system and Iranian military law had the same codal framework, with one exception: military courts could try civilians for certain offenses against the State, such as bank robbery or drug trafficking. This explains why, in the early 1970s, the JAs in Tehran helped their Iranian counterparts draft "hijacking laws" that were implemented in "Regulations and Laws Section" of the Imperial Iranian Armed Forces.[23]

While advising IIJP was the focus of the Judge Advocate Office in Tehran, the two Army lawyers in country also provided legal advice to the U.S. Army Mission to the Gendarmerie, known by the acronym GENMISH. In addition to these advisor roles, the JAs in Teheran provided more traditional legal advice to the command in the areas of criminal and civil law, claims, contracts, legal assistance, and international law.

There was relatively little to do in the criminal law arena because no courts-martial could be convened; the United States was precluded by its agreements with Iran from holding any judicial proceedings on Iranian soil. Since there was no Status of Forces Agreement (SOFA) with Iran, ARMISH-MAAG and GENMISH personnel were technically subject to Iranian criminal law, and subject to arrest and questioning by local police and judicial officials (as the bilateral agreement did not address these matters). Consequently, the JAs in Tehran had to maintain a working relationship with the Iranian Gendarmerie.

The high quality of U.S. personnel assigned for duty in Iran meant that disciplinary incidents were rare. But, when a crime did occur, usually involving a traffic accident, the Iranian authorities would release U.S. personnel from liability under Iranian law only after a civil settlement (involving the payment of money damages) was reached between the aggrieved Iranian and the U.S. offender. As a practical matter, the JAs in Tehran were always able to convince the Iranians to release Americans from detention; these U.S. personnel were quickly put on a military aircraft leaving the country.

Civil law issues chiefly involved the interpretation of Air Force and Navy regulations, with which Army lawyers had to be familiar since Airmen and Sailors also were assigned to ARMISH-MAAG.

Claims were a major area of practice. The most important claims arose out of vehicular accidents when Iranian civilians were killed by American drivers. Since the JAs in Iran handled, on average, about nine such vehicular death claims a year, this was no small matter. Moreover, Iranian law provided that the offending U.S. citizen would be detained or prohibited from leaving the country. This so-called "body arrest" would end only upon the satisfactory negotiation of a civil settlement with the victim's family. The lack of a SOFA meant that there was no international agreement covering the payment of claims filed by local nationals. Therefore, the U.S. Army Claims Service, Europe, which had supervisory authority over Iran, appointed foreign claims commissions empowered to settle claims. The skills of the civilian Farsi-speaking paralegal in the JA office were critical in resolving the vehicular homicide cases. Usually, the family was satisfied with a $1,000 payment, the maximum settlement that could be authorized by a one-person commission (consisting of a single Army lawyer). A three-man commission, consisting of two JAs and one officer from the command, could settle a wrongful death claim (or other claims) for up to $5,000.

The JAs in Tehran also paid a number of claims by U.S. personnel for theft of personal property. Apparently "a typical modus operandi" was for a thief to visit an American's home while he and his family were away. The thief then informed the Iranian "maid" that he had come to pick up the refrigerator, television, washing machine, or other item of property "for repair." The domestic servant, "not having been cautioned otherwise," let the thief pick up the items, which were never seen again. After an investigation to ensure that the American claimant had not left his property unsecured, or was otherwise at fault, Army lawyers paid these claims.[24]

There were even claims for maneuver damage. An Army lawyer was the claims officer for Operation Delovar, a joint exercise involving Imperial Iranian forces and a brigade from the 101st Airborne Division. Claims were paid to Iranian landowners for damage to their wheat fields caused by U.S. paratroopers dropping from the sky. While a severe drought in the area made it seem that the claimed damage was "imaginary," the JA claims officer nonetheless tasked several young 101st Soldiers who had grown up on farms with estimating the yield of the damaged wheat fields. The Farsi- speaking civilian paralegal then went to the local market and ascertained the price of wheat. The Iranian claims were ultimately settled over tea in a tent.[25]

Contracting law issues were important because the contracting officer for ARMISH-MAAG was the Embassy Contracting Officer. As this embassy employee was not a lawyer, he relied heavily on the JA office for procurement law advice. By 1970, the JA office was reviewing all military contracts to ensure that they were legally sufficient.[26]

For legal assistance, the office usually had one JA who could speak Farsi, which he had learned after spending a year at the Defense Language Institute at the Presidio of Monterey. This language skill was critical because, while the Farsi-speaking local national civilian paralegal drew up the leases used by ARMISH-MAAG personnel to rent homes on the local economy and could help negotiate a settlement to a landlord-tenant dispute, having a Farsi-conversant JA ensured that American interests were always well served. Domestic relations, taxation, and other legal assistance issues also were part of the workload in the JA office. At the request of the U.S. Embassy, "unofficial" legal assistance also went to U.S. citizens who were not entitled to legal advice because they were not attached to any U.S. government entity; these were most often American women married to Iranians who were trying to flee the country with their children.[27]

Finally, international law questions arose in the interpretation of the 1947 ARMISH and 1950 MAAG agreements, and the application of the privileges enjoyed by ARMISH-MAAG personnel. One of the most difficult issues involved "the meaning and intent of the duty free privilege granted to members of the Mission" in the ARMISH agreement signed in 1947. The Iranian Ministry of Foreign Affairs was concerned about U.S. personnel selling items to Iranians that had been brought into the country without having been subject to customs duties.[28]

Retired JA COL Richard S. "Dick" Hawley, who served two tours in Tehran, had more time in Iran than any other member of the Corps.[29] Hawley remembers that one morning in early 1962, COL Kenneth Hodson, then in charge of assignments in the Personnel and Plans Office, asked him: "Do you know where Iran is?" When then-CPT Hawley said that he did, Hodson asked him if he would like to be assigned to the MAAG in Tehran. The result was that CPT Hawley left in the summer of 1962 for the

Defense Language Institute in California. After an intensive year learning Farsi, Hawley and his family left for a two-year assignment in the Shah's empire.

From 1963 to 1965, CPT Hawley worked on the Iranian Army's Abassabad compound in Teheran, and lived "on the economy" in the city. Tehran had been the capital of Iran since 1785 and, with some three million inhabitants,[30] was a dynamic and bustling city. Hawley found a nice place to live. The only drawback was that, in his first tour, he had to bring drinking water from the American Embassy (water in Tehran was not potable until Hawley's second tour) and there was no central heat in the home on either tour (space heaters were needed in the winter, especially when it snowed). But Tehran was an exciting place to live, for the culture and history of Persia (the old name for Iran) was thousands of years old and so there was much to see and do in the city and in the countryside.

Hawley remembered that during both his tours in Iran (he returned to Tehran as a lieutenant colonel from 1968 to 1970), the ARMISH-MAAG Legal Advisor had several unusual, if not unique, roles: he served as Acting Provost Marshal, which meant that Army lawyers had oversight of criminal investigations being conducted by Air Force Office of Special Investigations (the equivalent of the Army's CID), which had agents at the ARMISH-MAAG. Army lawyers also were called upon to advise the U.S. Embassy, since the ambassador and his staff did not have a legal officer. Informal opinions were the rule, often involving the interpretation of the ARMISH and MAAG agreements.

One of the last JAs to serve in Tehran was then-CPT James J. "Jim" McGowan, Jr., who arrived in Tehran in June 1970 and departed in May 1972. He described Iran "as a land of legendary romance, immortalized in verses of the Persian Poets." Tehran was "a near-modern metropolis with tree-lined streets clogged with automobiles and taxis, traffic circles, shop windows tastefully displayed, impressive public buildings, neon-lighted theater marquees, and double-decker busses."[31] McGowan also remembered that there was "a difference in the basic motivations of the American and Iranian societies." As McGowan saw it, when an Iranian said he would promise to do something "faardah" (tomorrow), this likely meant "sometime within several weeks." And, when the deed was finally done, it would be "with a shrug of his shoulders" and "the time-honored Persian phrase 'Inshallah,' or if 'God wills.'"[32] For JAs in the Corps today who have experienced deployments to Afghanistan or Iraq, McGowan's observation will come as no surprise.

Judge advocate assignments to Iran apparently ended in the mid-1970s; the *1975 JAGC Personnel Directory* shows that MAJ Holman J. Barnes, Jr., and CPTs Stanley T. Cichowski and John E. Dorsey were the last Army lawyers to serve in Iran. As for the American presence in the empire of the Shah? The ARMISH-MAAG disappeared with the fall of the Shah and dissolution of Iran's imperial government on February 11, 1979. It seems highly unlikely that JAs will return to serve in Iran anytime soon.

Lawyering in the Empire of the Shah—"The Rest of the Story"

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In April 2012, *The Army Lawyer* published a *Lore of the Corps* about judge advocates who had served in Iran in the 1960s and 1970s. That article ended by stating that the assignment of Army lawyers "to Iran apparently ended in the mid-1970s."[33] This was incorrect. The truth is that military attorneys continued to be stationed in Tehran until 1979; the last judge advocate in-country departed on July 15, 1979, only months before a group of Iranian students seized the U.S. Embassy and took fifty-two Americans hostage for 444 days. What follows is the 'rest of the story' about lawyering in the Empire of the Shah. It focuses on three of the last Army attorneys in Tehran: Captains (CPTs) Kenneth J. "Ken" Densmore, Theodore F.M. "Ted" Cathey, and Thomas G. "Tom" Fierke.[34]

From the mid-1970s until late January 1979, when the Shah fled Iran and large-scale evacuations of U.S. personnel began, there were roughly 45,000 Americans living in Iran. Most were military and civilian technicians and their dependents.[35] Of these, about 1,500 were Department of Defense personnel assigned to the U.S. Embassy, the U.S. Military Mission with the Iranian Army, or the U.S. Military Assistance Advisory Group to Iran (MAAG).[36] Most of these U.S. military and civilian personnel were involved in training Imperial Iranian forces on the aircraft, warships, and other military hardware sold to Iran by the United States under the Foreign Military Sales program.[37] This was a lucrative arrangement for the United States in the 1970s, since Iran "paid cash for its arms purchases and covered the expenses" of American technical advisors "indispensable for weapons operations and maintenance."[38]

There were a variety of legal issues arising out of these foreign military sales contracts and the "down country" technical assistance field teams associated with them.[39] This explains why judge advocates serving in Tehran during this period were heavily involved in contract matters—in addition to the various administrative and civil law, claims, and legal assistance issues that naturally arose in a military and civilian community of 5,000.[40] Since courts-martial could not be convened in Iran, there was little in the way of a criminal law practice.[41]

This was certainly the case with CPT Densmore, who was stationed in Iran from April 1976 to July 1978. Densmore was intimately familiar with Armed Services Procurement regulations and Army implementing regulations, as he had prior experience in procurement law at the Army Missile Command, Redstone, Alabama.[42] This no doubt explains why, shortly after arriving in Tehran, Densmore was informed by Colonel (COL) Milton Sullivan, Commander, U.S. Support Activity-Iran (USSA-I), that he was the new Contracting Officer (KO) for the command.

Since the mission of the USSA-I was to support the MAAG and its down-country teams, this meant that CPT Densmore would not only do a legal review of contract solicitations and awards but, as the KO, would also be administering (and interpreting) the many contracts already in place. Since USSA-I also ran the club system, the Morale, Welfare and Recreation program, the commissary, and the hospital, Densmore also was involved with contracts for these operations. His KO warrant was for $100,000 and, while this does not seem like much money today, it was adequate to do most of the work of the USAA-I. As Densmore remembers, most of the contracts he awarded "were for minor construction projects in and around the military facilities in Tehran," such as plumbing, electrical and carpentry work.[43]

Densmore took a special interest in the hospital, which was located on the U.S. Embassy compound, especially after his youngest son was born there in 1978. As for his two years in Tehran, Densmore remembers that "my KO duties quickly overwhelmed me and I was not of much further utility in the JAG office."[44] At least, that is, for non-contract issues.

In July 1978, as CPT Densmore was leaving after slightly more than two years in Iran,[45] CPT Ted Cathey was just arriving—to replace Major (MAJ) Warren H. Taylor and assume duties as the Staff Judge Advocate (SJA) for the MAAG. As Cathey remembers, he and his youngest son arrived on a Pan American flight at the Mehrebad airport near Tehran. But it was "not a good sign because tires were burning on the runway" and Iranians in the streets were shouting "Death to the Shah" and "Yonky [sic] go Home."[46] Prior to volunteering for duty in Tehran, Cathey had been an instructor in contract law at The Judge Advocate General's School, U.S. Army.

Just as CPT Densmore had discovered, CPT Cathey also quickly learned that the many issues arising from the sale of American military equipment to the Shah's armed forces meant that procurement law was an important component of the delivery of legal services to the MAAG.

Army Colonel Keith Barlow presents Captain Ken Densmore with the Meritorious Service Medal, Tehran, Iran, 1977

While Cathey was the senior military lawyer in Iran, he had a Deputy SJA, CPT Charles L. Duke, and two more judge advocates on his staff: CPTs Tom Fierke and Mark H. Rutter. Rounding out his legal office were two legal clerks, Sergeant First Class (SFC) Bobby Saucier and Specialist Six Paul Burch. There also were two Iranian advisors, two local national drivers, and a translator who ensured accurate transcription of Farsi and English language documents, especially private residential leases.

But "legal business as usual" was short-lived. The Shah's government had imposed martial law (which included a curfew) on September 7, 1978, and by November 1978, with insurgent activity putting Americans and their families in danger, the MAAG began preparing evacuation plans for family members.[47] After military personnel in Iran began receiving hostile fire pay in early December 1978, it was only a matter of time before evacuations would begin.[48]

Captain Cathey and his office prepared a legal annex to the MAAG's evacuation plan, and did periodic briefings to family members on the legal aspects of evacuation. These briefings occurred in the auditorium on the "Gulf District" compound upon which USSA-I was located. Cathey remembers that the briefings advised family members that they were being evacuated to a 'safe haven' for thirty to sixty days, with return to Tehran to occur as soon as the situation had stabilized. But they were advised to have up-to-date wills and powers of attorney, and to make a complete inventory of their household goods. At the time, the Army paid no more than $15,000 for any claim for missing or damaged household goods, which meant that Americans in Iran were advised to consult their insurance companies to see if they could obtain additional coverage.[49]

Some Americans, recognizing that they might depart Iran and never return, began mailing personal items (photographs, papers) and high-value items (jewelry, antiques, collectibles) to the United States through the Army Post Office system. Some of these mailings were successful; others were not. Cathey's wife had left Iran in December; she never returned because of the increasing instability. The following month, CPT Cathey and his three children boarded a C-141 and flew from Tehran to Athens, Greece, to Rhein-Main, Germany. They then flew on a civilian charter to McGuire Air Force Base, New Jersey, and, after landing there, CPT Cathey took his children to Charlottesville for a rendezvous with his wife. Cathey then returned to Tehran.[50]

Near the end of his tour of duty in Tehran, CPT Cathey was heavily involved in arranging for "termination for the convenience" or "T4C" of the U.S. government contracts with the Iranian government. The Pentagon's 'czar' for military assistance, Erich von Morbod,[51] flew to Iran and sat down with CPT Cathey to T4C a whole host of contracts for equipment that had been sold to the Iranians.[52] Much of the hardware—artillery, tanks, ships—had been paid for and these terminated contracts were later the subject of much litigation involving the United States and the new Iranian government that emerged after the Shah fled Iran in January 1979.[53] In addition to these contracts, CPT Cathey also was involved in the termination of rental leases—as the American tenants had been evacuated and would not be returning. When CPT Cathey left Tehran in February 1979, it was "pandemonium," and Cathey thought he would be the last judge advocate out of Iran; after all, CPTs Mark Rutter and Tom Fierke had already departed.[54]

But he was not: CPT Fierke, who had been the Chief of Administrative Law and Claims, had volunteered to return to Iran on temporary duty. Fierke had previously been in Iran from June 1978 until February 19, 1979, when he and CPT Rutter boarded a Pan Am Boeing 747 and flew to Frankfurt. Now, on March 18, 1979, he returned to Tehran because the MAAG and USSA-I commanders needed an experienced claims Judge Advocate to

help wind down the American military presence in Iran.[55]

Initially, Fierke was one of roughly fifteen American military and State Department personnel during this twilight of the U.S. presence in the Shah's empire. In the following days and weeks, however, the numbers of Americans in Iran did increase until there were more than fifty.[56]

An Iranian national (left) with then-Captain Tom Fierke (right) in front of the U.S. Embassy gate, Tehran, 1979.

After arriving in Tehran—carrying a "black" diplomatic passport and immediately hearing the sound of gunfire and revolutionary fervor—Fierke lived on the fifteenth floor of the Royal Tehran Hilton. This was considered to be the safest location for the American military personnel still in-country because its height offered the best protection from sniper fire.[57]

Within days of his arrival in Tehran, Fierke was the "Staff Judge Advocate, USSA-I." But he also had the title of "Chief Legal Counsel, MAAG/U.S. Embassy." His mission was to "insure proper conclusion of all lease and procurement contracts" with the Iranians. This included the settlement of private leases between Americans and their Iranian landlords. As the Defense Department saw it, these leases could not be terminated until household goods were removed from the premises and any damages to the premises could be assessed. Consequently, CPT Fierke became the USSA-I "operations" and "transportation" officer who, with a small staff, arranged for the packing and pick-up of household goods and their movement to U.S. custody. In June 1979, for example, Fierke was arranging for the pick-up of six sets of household goods a day, six days a week.

In the ever-present turmoil on the streets of Tehran, this was a difficult mission to accomplish: there were no street maps of Tehran, which made it difficult to locate the apartments and houses that had been rented by American personnel. Additionally, the Revolutionary Guards, landlords, and movers were tempted to steal the household goods of the now departed U.S. personnel if they had the opportunity. Fierke also had much difficulty in negotiating for the lease terminations with the Iranian landlords, as many were not inclined to be reasonable in their dealings with the U.S. government.[58]

In addition to these landlord-tenant and household goods issues, Fierke had to close out a variety of contracts between the Iranians and the American government. He had an unlimited warrant as a Termination Contracting Officer (TCO) for the Department of Defense, Department of State, and several agencies conducting classified intelligence work. As a result, it was CPT Fierke who terminated the multi-multi-million-dollar contract that the Imperial Armed Forces had with the Bell helicopter subsidiary in Iran.[59]

Fierke also had a smaller dollar warrant as a TCO for lower dollar value contracts involving Iranian nationals. A major problem with terminating these contracts for the convenience of the government was that many local nationals were unable to gain access to him and other U.S. Embassy personnel in the "Gulf District" (where the procurement office was located) in order to demand payment.[60] Captain Fierke worked long days; his typical workday was 6:00 A.M. to 7:00 P.M., seven days a week.[61] Additionally, as the only American government attorney in post-Revolutionary Iran, Fierke advised not only Defense Department personnel, but also the U.S. ambassador to Iran and his staff.

Fierke also faced considerable personal danger. He was arrested four times. On one occasion, he was stopped while driving a pick-up truck, pulled from the vehicle at gunpoint, and then handcuffed and blindfolded. Three hours later, he was released. Apparently his offense had been driving the truck without license plates.[62] Fierke also heard gunfire on a routine basis while in Tehran, and some of the bullets came very close to him.

Tom Fierke left Tehran on July 15, 1979; he flew "first class" on a Swiss Air airliner to Frankfurt, Germany. As Air Force Major General (Maj G) Philip C. Gast,[63] the Chief, MAAG-Iran, put it, CPT Fierke had "braved the hostility in Iran after the Revolution with calm and resolution" and was a

"man of unflagging devotion to duty."[64]

With CPT Fierke's departure, the judge advocate presence in Iran ceased. Timing is everything; Fierke made it out. The fifty-plus Americans in the U.S. Embassy were not so lucky: After being taken captive by Iranian students in November, they did not see freedom for another 444 days.[65]

[1] CTR. OF MIL. HISTORY, U.S. ARMY CAMPAIGNS IN WORLD WAR II: CHINA OFFENSIVE 4 (1992).

[2] Albert Coady Wedemeyer, appointed by President Franklin D. Roosevelt as the Commanding General of the U.S. Forces in the China Theater and the Chief of Staff to Chiang Kai-shek, arrived in China on October 31, 1944. Wedemeyer had served in China from 1930 to 1934, and consequently had the perspective and experience necessary for success. *See* ALBERT C. WEDEMEYER, WEDEMEYER REPORTS! (1958) (providing more information on Wedemeyer's life as a Soldier).

[3] EDWARD H. YOUNG, REPORT OF THE JUDGE ADVOCATE, UNITED STATES FORCES, CHINA THEATER, UNITED STATES ARMY FORCES CHINA, NANKING HEADQUARTERS COMMAND, AND ARMY ADVISORY GROUP CHINA, JANUARY 1, 1945 TO JUNE 10, 1947, at ii (1948).

[4] HEADQUARTERS, U.S. FORCES CHINA THEATER, CIR. NO. 37, PURCHASING AND PROCUREMENT POLICIES—CHINA THEATER para. K (Feb. 17, 1946).

[5] Edward Hamilton "Ham" Young was one of the most well-known and admired judge advocates of his generation. A graduate of the U.S. Military Academy, Young was serving as an infantry officer when the Army sent him to law school so that he could return to West Point to teach. Young liked law and, after being detailed to the Judge Advocate General's Department, obtained his law degree from New York University's law school. During World War II, Colonel Young served as the first Commandant of The Judge Advocate General's School and is widely credited with creating the educational curriculum that transformed civilian lawyers into judge advocates. *See* Colonel Edward H. Young, *The Judge Advocate General's School (1944)*, DETROIT B.Q., Jan. 1944, *reprinted in* ARMY LAW., Sept. 1975, at 29.

[6] YOUNG, *supra* note 3, at 19.

[7] *Id*.

[8] *Id*. at 20.

[9] *Id*. at 18.

[10] *Id*. at 19.

[11] *Id*. at 20.

[12] *Id*.

[13] *Id*. at iii.

[14] Asmara today is located in Eritrea, which gained its independence from Ethiopia in 1993. While this "Lore of the Corps" column concerns judge advocates serving in Asmara in the early 1970s, Corps personnel had been assigned to Ethiopia for some years previously. The first "JAGC Personnel and Activity Directory" (today's JAG PUB 1-1) published in August 1963, shows that a judge advocate lieutenant colonel and captain were assigned to Asmara. This suggests that Army lawyers were serving in Ethiopia prior to 1963 (perhaps as early as the 1950s).

[15] OFFICE OF THE JUDGE ADVOCATE GENERAL, JAGC PERSONNEL AND ACTIVITY DIRECTORY 19 (Sept. 1972).

[16] N. P. Wardwell, *SJA Spotlight—Military Legal Practice in Ethiopia*, ARMY LAW., Mar. 1972, at 12.

[17] *Id.*

[18] *Id.*

[19] *Id.* at 13.

[20] *Id.*

[21] *Id.*

[22] THE JUDGE ADVOCATE GENERAL'S SCHOOL, THE JUDGE ADVOCATE GENERAL'S SCHOOL, 1951–1968, at 10 (1968). First Lieutenant Ahmad R. Kheradmand was a student in the Sixteenth Advanced Course from 1967 to 1968 (by which time the name had changed from "Career" to "Advanced"). Major Ali-Akbar Naderian was a student in the 19th Advanced Course from 1970 to 1971. Major Feraidoon H. Tehrani attended the 21st Advanced Course from 1972 to 1973. These Iranian officers did not survive the 1979 Revolution; they were executed.

[23] James J. McGowan, Jr., *SJA Spotlight—Iran*, ARMY LAW., Oct. 1972, at 14.

[24] *Id.*

[25] E-mail from Colonel (Ret.) Richard S. Hawley to author (Feb. 1, 2012, 03:41:00 EST) (on file with author).

[26] McGowan, *supra* note 23, at 16.

[27] E-mail from Colonel Richard S. Hawley to author, subject: "Your time in Iran" (June 17, 2011, 20:08:00) (on file with author).

[28] McGowan, *supra* note 23, at 16.

[29] Hawley served in Iran from 1963 to 1965 and from 1968 to 1970. Born on January 15, 1930 at Fort Sill, Oklahoma (his father was a cavalry officer), Hawley grew up on a variety of Army installations in the United States and overseas. He graduated from the University of Michigan in 1952, and having participated in the Army Reserve Officer Training Corps, was commissioned an infantry second lieutenant. He then deployed to Japan and joined the 1st Cavalry Division. Hawley hoped to see combat, but the Korean War ended before he could get to the Korean peninsula. Returning to the United States, Hawley was released from active duty and entered the University of Michigan's law school. After graduating in 1956, Hawley successfully passed the Foreign Service examination and joined the State Department. He was the Vice Consul in Genoa, Italy, when he decided to return to active duty. Then–Captain Hawley transferred from the Infantry (Army Reserve) to the Judge Advocate General's Corps in 1958. In addition to his two tours in Iran, then Lieutenant Colonel Hawley served in Vietnam as the Staff Judge Advocate (SJA), 101st Airborne Division, from 1970 to 1971, and in Germany as the SJA, 8th Infantry Division from, 1972 to 1974. He retired as a colonel in 1979 and then worked for Litton Industries in Saudi Arabia for fifteen years. JUDGE ADVOCATE PERSONNEL DIRECTORY (1963); JUDGE ADVOCATE PERSONNEL DIRECTORY (1968); JUDGE ADVOCATE PERSONNEL DIRECTORY (1971); JUDGE ADVOCATE PERSONNEL DIRECTORY (1974); e-mail from Colonel Richard S. Hawley to author, subject: "Your bio" (Feb. 3, 2012, 22:16:00) (on file with author).

[30] Today, Tehran has about 7.5 million inhabitants. Iran's population was about thirty million in 1970; today it is more than seventy million. FED. RESEARCH DIV., LIBRARY OF CONG., IRAN: A COUNTRY STUDY 88–89 (Glenn E. Curtis & Eric Hooglund, eds., 2008), *available at* http://lcweb2.loc.gov/frd/cs/irtoc.html.

[31] McGowan, *supra* note 23.

[32] *Id.* (The phrase is Arabic in origin.)

[33] Fred L. Borch, *Lawyering in the Empire of the Shah*, ARMY LAW., Apr. 2012, at 3. With a 'tip of the hat' to conservative talk show host Paul Harvey, whose "The Rest of the Story" was a Monday-through-Friday radio program that aired from 1976 until Harvey's death in 2009. *Paul Harvey, Talk-Radio Pioneer, Dead at 90*, http://www.nytimes.com/2009/03/01/nyregion/01harvey.html?_r=0 (last visited Oct. 27, 2014) Each broadcast ended with the phrase, "And now you know the rest of the story." PAUL HARVEY, http://www.paulharvey.com/ (last visited Oct. 27, 2014).

[34] In addition to Densmore, Cathey, and Fierke, the following judge advocates served in Tehran between 1975 and 1979: Majors (MAJ) Holman J. "Jim" Barnes, Jr. and Warren Taylor (who replaced Barnes), and Captain's Stanley T. "Stan" Cichowski, John E. Dorsey, Charles L. Duke, Stephen Moore, and Mark H. Rutter. Rutter was the last judge advocate to arrive in country. OFFICE OF THE JUDGE ADVOCATE GENERAL, PERSONNEL DIRECTORY (1975); Telephone Interview with Theodore F. M. Cathey (Oct. 27, 2014) (on file with author).

[35] http://www.country-data.com/cgi-bin/query/r-6526.html (last visited Oct. 28, 2014).

[36] *Id.* In addition to these 1,500 personnel, there were another roughly 3,500 family members, for a total official community of about 5,000 individuals. In 1978, the U.S. military mission in Iran was the largest in the world.

[37] The Foreign Military Sales (FMS) program is a form of security assistance authorized by the Arms Export Control Act (AECA) and a fundamental tool of U.S. foreign policy. Defense Security Cooperation Agency, Foreign Military Sales, http://www.dsca.mil/programs/foreign-military-sales-fms (last visited Oct. 30, 2014) [hereinafter FMS]; Arms Export Control Act, 22 U.S.C. ch. 39 (2012). Under the Act, the U.S. may sell defense articles and services to foreign countries and international organizations when the President formally finds that to do so will strengthen the security of the U.S. and promote world peace. FMS, *supra* note 37. Under FMS the U.S. Government and a foreign government enter into a government- to-government sales agreement. The State Department determines which country will have a FMS program while the Defense Department executes the program. *Id.*

[38] FMS, *supra* note 37. Iran could pay cash because of moneys it earned from the export of oil. The Shah's government bought F-4 "Phantom" fighter bombers, C-130 "Hercules" cargo airplanes, M-60 "Patton" main battle tanks, AH-1 "Cobra" helicopters, radar equipment, mortars and machine guns.

[39] The term "down country" referred to geographic location of these technical teams; they were located south of Tehran or 'down' on a map of Iran.

[40] Although judge advocates in Iran supported the mission of the U.S. Military Assistance Advisory Group to Iran (MAAG), they were not a part of it. Rather, they were assigned to the U.S. Support Activity-Iran (USSA-I), a part of U.S. Army, Europe.

[41] As explained in *Lawyering in the Empire of the Shah*, the United States was prevented by its agreements with Iran from holding any judicial proceedings on Iranian soil. Judge advocates in Tehran did, however, advise commanders on the imposition of non-judicial punishment under Article 15, Uniform Code of Military Justice. Most of these Article 15s were for blackmarketing, i.e., the improper sale (or transfer) to Iranians of goods purchased through the Army and Air Force Exchange Service. *See* Borch, *supra* note 33, at 1.

[42] E-mail from Kenneth J. Densmore, to author (Oct. 30, 2014, 4:46 PM) (on file with author).

[43] *Id.*

[44] E-mail from Colonel (Ret.) Kenneth J. Densmore to author (Sept. 25, 2012, 8:47PM) (on file with author).

[45] After departing from Iran, Densmore left active duty and transferred to the Army Reserve. He subsequently served with the 350th Civil Affairs Brigade, and deployed with it to Bosnia-Herzegovinia in 1996 as part of Operation Joint Endeavor/Constant Guard. In 1998, now COL Densmore assumed command of the 2d Legal Services Organization, New Orleans, Louisiana. Coincidentally, CPT Fierke, discussed infra, had previously commanded this same unit. Densmore relinquished command in 2001 and retired from the Army Reserve in 2002. Today, Densmore serves as Counsel, Naval Education and Training Command, Pensacola, Florida (the Navy's close equivalent to Army Training and Doctrine Command). He has 44 years of civilian and military service.

[46] Interview with Cathey, *supra* note 34.

[47] *Id.*

[48] Colonel Thomas G. Fierke, Recollections (of the Last JAG in Tehran 1978–1979), at 52 (1999) (unpublished thesis, U.S. Army War College Strategy Research Project) (on file with author). All military personnel received hostile fire pay in December 1978 and January and February 1979. The evacuations of Defense Department and State Department family members and other U.S. civilians ultimately occurred in December 1978, and January and February 1979.

[49] The statutory aggregate maximum for the loss of household goods was $15,000. No private insurance company, however, would pay claims for household goods lost in the Iranian Revolution of 1979. The event was considered to be a 'war' or 'civil disturbance' excluded from policy coverage.

[50] Interview with Cathey, *supra* note 34.

[51] From 1978 to 1981, von Marbod was the Deputy Director, Defense Security Assistance Administration. In this position, he was the senior U.S. Defense Department representative to Iran, and was a key player in the Shah's purchase of American weaponry. JOSEPH J. TRENTO, PRELUDE TO TERROR: EDWIN P. WILSON AND THE LEGACY OF AMERICA'S PRIVATE INTELLIGENCE NETWORK 262 (2005).

[52] Interview with Cathey, *supra* note 34.

[53] *Id.*

[54] For their work in support of the December 1978 evacuations, CPTs Cathey, Duke, Fierke and Rutter were awarded the Humanitarian Service Medal.

[55] Fierke, *supra* note 48, at 61.

[56] Letter from Captain Thomas G. Fierke, U.S. Defense Representatives IRAN, to Colonel Wayne E. Alley, Judge Advocate, Headquarters, U.S. Army–Europe & 7th Army, APO N.Y. 09403 and Colonel James A Mounts, Chief, USA Claims Service, Fort Meade, Md. 20755 (June 11, 1979) (The subject of the letter was Iran Judge Advocate update).

[57] Letter from Captain Thomas G. Fierke, U.S. Dep't of Army, Office of the Staff Judge Advocate, Fort Devens, Mass., to Headquarters, U.S. Dep't of the Army, ATTN: DAJA-PT (LTC Barry P. Steinberg), subj: Iranian Adventure: FIERKE, Thomas G., CPT JAGC, at 4 (Apr. 3, 1980).

[58] Fierke, *supra* note 48, at 77.

[59] E-mail from Colonel (Ret.) Thomas G. Fierke, to author (Nov. 9, 2014, 7:29 PM) (on file with author).

[60] *Id.*

[61] Fierke, *supra* note 48, at 81.

[62] *Id.* at 5.

[63] Philip C. Gast retired as a lieutenant general in 1987. He had a long and distinguished career as an airman, including a Silver Star for downing a North Vietnamese MiG fighter during the war in Southeast Asia.

[64] U.S. Dep't of Army, DA Form 67-7, Officer Evaluation Report, FIERKE, Thomas G., pt. VII.b (Indorser) (Jan. 15, 1980). After earning an engineering degree and a regular Army commission through Reserve Officer Training Corps at Iowa State University in 1971, Fierke received a J.D. from the University of Minnesota in 1974 and a LL.M. (tax) from Boston University in 1978. Initially, CPT Fierke served as a trial counsel and administrative law officer in the Office of the Staff Judge Advocate, Fort Devens, Massachusetts. At the same time, he was the Group Judge Advocate, 10th Special Forces Group (Airborne). Fierke was one of the first judge advocates to complete the resident Special Forces (SF) Officers Course, earning the SF "long tab" in 1978. In 1980, he left active duty and transferred to the Army Reserve. In 1991, Fierke deployed to Saudi Arabia with the Third U. S. Army; he subsequently served with U.S. Army Forces, U.S. Central Command, during the first Gulf War. When COL Fierke retired in 2002, he had more than thirty years of active and Reserve service and had been the SJA, 377th Theater Support Command, New Orleans, for four years. He recently retired as the General Counsel, Lockheed Martin Manned Space Systems, where he was involved with America's space program for twenty-eight years.

[65] For more on the take over of the U.S. Embassy in Tehran, *see* MARK BOWDEN, GUESTS OF THE AYATOLLAH (2006).

Chapter 5
Law of Armed Conflict and War Crimes

Indians as War Criminals? The Trial of Modoc Warriors by Military Commission

(Originally published in the June 2010 edition of *The Army Lawyer.*)

Early in the morning of Good Friday, April 11, 1873, Brigadier General (BG) Edward R.S. "Richard" Canby stepped out of his tent, which was pitched near Tule Lake on the California-Oregon border. Canby, a 56-year-old West Point graduate and veteran of the Civil War, was the commander of the Department of the Columbia, which consisted of the State of Oregon and the Territories of Washington, Idaho, and Alaska. He was near Tule Lake that day to negotiate a peaceful settlement to the war that had broken out between a band of Modoc Indians and U.S. Army troops and territorial militia. Although he did not know it, Canby's attempt at negotiation was destined for utter failure. Within hours he was dead—shot in the head and back by the Modoc Chief Kientpoos. Also dead was another member of Canby's peace commission, and two more men were badly injured.[1]

The brutal murders shocked Americans, and the Army's Commander-in-Chief, Major General (MG) William T. Sherman, exclaimed that the Modoc treachery fully justified their "utter extermination."[2] In any event, on June 1, 1873, Kientpoos and his fellow Modocs were in Army custody. But what was to be done? Should these assassins be summarily dealt with? Should they be turned over to civilian authorities for prosecution? After considerable discussion, the U.S. government decided that the Modocs responsible for murdering Canby and his fellow commissioner should be tried by military commission. As a result, on July 1, 1873, Kientpoos and five other Modoc warriors stood trial for the war crime of violating a flag of truce by committing murder during a suspension of hostilities. It was the only time in U.S. history that Native Americans were tried by an Army court for war crimes.

In October 1864, the Modoc tribe had signed a treaty with the United States in which the tribe agreed to give up ancestral lands on the Oregon-California border and move thirty miles north to the Klamath Indian Reservation. Within a short time, however, the Modocs regretted their decision. In early 1870, they left the reservation and returned to their ancestral home. Led by their chief, Kientpoos, better known as "Captain Jack," the tribe of 371 men, women, and children set up camp in an area near Tule Lake.

The Army's mission was to force the Modocs to return to the reservation. The Modocs resisted and were only defeated, on January 29, 1873, after months of fighting. In an attempt to negotiate an end to this small war, the Secretary of the Interior appointed a special "peace commission" headed by BG Canby. The other members of the peace commission were the Reverend Eleasar Thomas, L.S. Dyar, and Alfred Meacham.

On Good Friday, April 11, 1873, the four commissioners went to meet Captain Jack and the Modocs. All agreed to come unarmed. There were some warning signs that the commissioners might be in danger, but Canby insisted that the negotiations proceed because he thought the presence of so many Soldiers in the area would intimidate Captain Jack.

Soon after the men began to parley, they reached an impasse. Then, on a signal from Captain Jack, two Modoc warriors in hiding began firing at the commissioners. Captain Jack then pulled out a pistol and shot Canby in the face, killing him instantly. Thomas was also killed in the gunfire. Dyar and Mecham survived, although the latter was badly wounded. As for Captain Jack and his accomplices, they escaped but were soon captured.

The U.S. government was incensed that Canby had been killed while "under a flag of truce," and his status as a Regular Army officer and Civil War veteran only heightened this anger. Local civilian authorities wanted to prosecute the Modocs for murder, but U.S. Attorney General George H. Williams and BG Joseph Holt, then serving as The Judge Advocate General, opined that a military commission should hear the case. They reasoned that the Modoc tribe was akin to a foreign nation, that a state of war existed between the tribe and the United States, and that the killing of Canby during peace negotiations was a war crime.[3]

On July 1, 1873, a military commission consisting of five Army officers heard evidence against Captain Jack and five other Modocs. All were found guilty of murder. Captain Jack and three others were sentenced to be hanged by the neck until dead. Once President Ulysses S. Grant approved their sentences, the accused were hanged at Fort Klamath, Oregon, on October 3, 1873.

Measured against today's court-martial procedure, the Modoc military commission was flawed. The accused did not have the assistance of defense counsel, and the trial lasted only four days. Perhaps most importantly, the five officers who decided the case were not impartial or unbiased; all knew Canby, and all admired him. However, this military commission was a unique event in our military legal history: the only time the Army ever prosecuted Native Americans for violating the law of armed conflict.

Mexican Soldiers in Texas Courts in 1916: Murder or Combat Immunity?

(Originally published in the November 2012 edition of *The Army Lawyer.*)

The Mexican Revolution began in 1910, and, in the bloody decade that followed, violence occasionally spilled over the border onto U.S. soil. One violent episode occurred on June 15, 1916, two months after Brigadier General (BG) John J. Pershing and his 5,000-man Punitive Expedition entered Mexico to chase the Mexican revolutionary fighter Francisco "Pancho" Villa and his *Villistas* (Villa's men). On that Thursday in June, under cover of darkness, Mexican government troops crossed the Rio Grande and attacked U.S. cavalry troops guarding the border at San Ygnacio, a small Texas town located about forty miles south of Laredo. In the thirty-minute firefight, the Americans drove off their attackers, but at the cost of three U.S. soldiers killed and six more wounded. Six Mexican soldiers were also killed and more than a few wounded.[4] At least six Mexicans were captured, including Jose Antonio Arce, Vicente Lira, Pablino Sanchez, and Jesus Serda.

The Army handed its Mexican captives over to civilian law enforcement authorities in Webb County, Texas. Shortly thereafter, a grand jury indicted Arce, Lira, Sanchez, and Serda for the murder of Corporal William Oberlies, who had died of his wounds after the attack on San Ygnacio. A Webb County District Court jury convicted the four accused of homicide and sentenced them to death. On appeal to the Court of Criminal Appeals of Texas, the four condemned soldiers insisted that their convictions must be reversed because they were members of the Mexican armed forces and, as soldiers participating in a war between Mexico and the United States, could not be convicted of murder. What follows is the story of *Arce v. State*,[5] and how the legal opinion of the Army Judge Advocate General helped determine the outcome of this most unusual state criminal case.

At the time of the attack, there had been no declaration of war by either Mexico or the United States. The widespread revolutionary violence in Mexico made a declaration of war by that country unlikely. As for the United States, it was just as unlikely that Congress would declare war on its southern neighbor; with the possibility of being drawn into the ongoing war between the Allied and Central Powers in Europe, President Woodrow Wilson was reluctant to get involved in a conflict with Mexico.[6]

But the Mexican Revolution—which was transformed "from a revolt against the established order into a multisided civil war"[7] by 1915—greatly affected American security: between July 1915 and June 1916, there were thirty-eight cross-border raids in which eleven American civilians and twenty-six Soldiers were killed.[8] This explains why, after Pancho Villa and at least 300 *Villistas* raided Columbus, New Mexico, on March 9, 1916, President Wilson ordered Brigadier General Pershing and his troops into Mexico to capture or kill Villa—but not to wage war against the de facto Mexican government led by Venustiano Carranza.[9]

Regardless of what Wilson may have wanted, the presence of six U.S. Army regiments (four cavalry and two infantry), along with two field artillery batteries and various support units, naturally provoked a response from Mexican forces. The most serious incident—prior to the attack on San Ygnacio—occurred just after noon on April 12, 1916, when Mexican soldiers began firing on 13th U.S. Cavalry troopers outside the town of Parral. A "running battle, during which two Americans were killed and six wounded," lasted late into the afternoon and "developed into a standoff between U.S. and Mexican forces that threatened to propel the nations to the verge of war."[10] Since Parral was 516 miles inside Mexican territory, it should have been no surprise to Pershing and his American troopers that the Mexican government did not look favorably on their military operations deep inside Mexico—even if the Mexicans considered Pancho Villa to be their enemy too. There is every reason to conclude that the Mexican attack on San Ygnacio two months later was a signal from the Mexicans to Washington, D.C., that there were consequences for the Americans if Pershing persisted in his pursuit of Villa.

After the trial and conviction of Jose Antonio Arce and his fellow soldiers, their defense counsel appealed to the Texas Court of Criminal Appeals. Although the defense raised a number of appellate issues, the court focused on a single question, which it saw would be dispositive: whether "a state of warfare" existed between Mexico and the United States. If so, reasoned the court, the question of any punishment for the defendants would be "within the

jurisdiction of the United States and not the courts of Texas."[11]

Under customary international law and the 1907 Hague Convention III at the time, two nations would not commence hostilities until there had been a declaration of war. As stated before, there had been no such pronouncement between Mexico and the United States. Nevertheless, the Texas court looked to the facts of the case to determine if there was a state of war between the two nations. The court noted that the Mexican soldiers who attacked U.S. cavalrymen at San Ygnacio were commanded by Carranza officers and that one of these officers, a lieutenant colonel, was killed in the fight. The four defendants had testified at their trial in Webb County that they "belonged to the Constitutionalist Army of Mexico; that the band that attacked San Ygnacio consisted of seventy-five men; and that they were publicly organized and equipped in Monterey and Jarita, with the full knowledge of the de facto government of Mexico."[12]

The Texas court then examined the issue of whether a state of war existed and cited the "official opinion" of Brigadier General Enoch H. Crowder, the Judge Advocate General of the Army, in its discussion of the question.[13] Crowder had written:

> It is thus apparent that under the law there need be no formal declaration of war, but that under the definition of Vattel a state of war exists so far as concerns the operations of the United States troops in Mexico by reason of the fact that the United States is prosecuting its rights by force of arms and in a manner in which warfare is usually conducted . . . I am therefore of the opinion that the actual conditions under which the field operations in Mexico are being conducted are those of actual war. That within the field of operations of the expeditionary force in Mexico, it is a time of war within the meaning of the fifty-eighth article of war.[14]

After concluding that the defendants had participated in military operations at the behest of the Mexican government, and that a state of war existed between Mexico and the United States, the court reversed the convictions for murder. Judge P.J. Davidson, who wrote the opinion for the Texas Court of Criminal Appeals, did not rule that the defendants were lawful combatants entitled to combat immunity for their lawful acts on the battlefield. On the contrary, his stated rationale for reversing the conviction was simply that the Texas courts had no jurisdiction over Mexican soldiers participating in a war with the United States and that legal proceedings against the Mexican defendants, if appropriate, must be brought in federal court. Wrote Davidson:

> [U]nder the general rules with reference to warfare, the Mexican column that attacked the troops at San Ygnacio came within those rules, and that, if they were to be dealt with for crossing the river and fighting our troops, it should be done by the United States government and not by the Texas courts. Texas has no authority to declare war against Mexico nor create a state of war.[15]

Judge Davidson most likely did not know about the principle of combat immunity. If he had known about it, his opinion could have discussed how the Mexican defendants, participating in an otherwise lawful attack on U.S. Soldiers, had an absolute defense to a charge of murder. But Davidson did understand that, because wars occur between nation-states, the issue of whether Mexican soldiers could be charged with murder (or any criminal offense) was a question for the United States, and not Texas authorities.

While Davidson did not discuss combat immunity, he did appreciate that the mens rea required for murder might have been affected by the fact that Jose Antonio Arce and his fellow soldiers were acting under orders at San Ygnacio. Davidson wrote:

> [S]oldiers must obey the orders of their superiors, and failure to do so would subject them to discipline which rates from minor punishment to death . . . . When a soldier is ordered to fight, it is his duty to do so, and he may forfeit his life on refusal to do so . . . . These Mexican soldiers were ordered by their officers, commanded by their officers, headed by their officers to make the fight; the officers led them into the battle, and they fought. Some were killed; others escaped and fled. Some were wounded, one of whom was captured is under sentence in this case . . . . One

> at least of the defendants claimed to have been forced to go into battle by his commanding officer. He did not desire to fight, but under the rules of warfare if he deserted he would be tried and would be shot, or if he disobeyed orders and failed to engage in the fight he might forfeit his life.[16]

Davidson also noted that in fighting between Pershing's Punitive Expedition and Mexican government troops in Mexico, U.S. Soldiers captured on the field of battle "were not tried by the Mexican courts, but were turned over to the United States."[17] His conclusion was that if these American Soldiers were not prosecuted in Mexican courts, Mexican soldiers in the case before the court deserved the same treatment. This is why Judge Davidson's final words in the opinion were that even "if the state courts had jurisdiction of these defendants, we are of the opinion the conviction is erroneous."[18] While reversing the conviction on jurisdictional grounds, the court also recognized that, *even if the state courts had jurisdiction,* a conviction would have been unsupported in law for the following reasons: the four Mexican soldiers were acting under orders; Mexico had not prosecuted the captured U.S. Soldiers; or both. In any event, for the convicted Mexicans, the result was the same: they escaped the hangman's noose and returned to their homes in Mexico.

A final note. In August 1917, New Mexico state authorities prosecuted seventeen *Villistas* for the infamous March 9, 1916 raid on Columbus that had triggered Pershing's Punitive Expedition. The defendants pleaded guilty to second degree murder and "were sentenced to serve from 70 to 80 years in the [state] penitentiary."[19] In 1920, New Mexico Governor Octaviano A. Larrazolo pardoned fifteen of the seventeen convicted *Villistas*. He cited *Arce* as one basis for his decision.[20] More recently, attorneys representing John Phillip Walker Lindh, the infamous "American Taliban," cited *Arce* in a brief filed on their client's behalf in the Eastern District of Virginia in 2002. The relevance? That *Arce* was precedent for the proposition that the United States and Afghanistan were engaged in an international armed conflict and that Lindh consequently had combat immunity for his actions "as a foot soldier on behalf of the government of Afghanistan."[21] While Lindh's argument failed, that failure did not undercut the continued validity of *Arce*: that a de facto armed conflict between Mexico and the United States existed in 1916 and that combat immunity protected Mexican soldiers from a prosecution for murder in Texas state court.

War Crimes in Sicily: Sergeant West, Captain Compton, and the Murder of Prisoners of War in 1943

(Originally published in the March 2013 edition of *The Army Lawyer*.)

> Q: "Do you know anything about some prisoners shot on July 14, near the Biscari Airfield?
> A (Captain Compton): Yes, sir.
>
> . . . .
>
> Q: What order did you give concerning the shooting of these prisoners?
> A (Captain Compton): I told my [lieutenant (Lt.)] to take care of it.
>
> . . . .
>
> Q: What did you tell him?
> A (Captain Compton): I told the Lt. to tell the Sgt to execute the prisoners."[22]

On July 14, 1943, about 1300, near the Biscari airport in Sicily, Captain (CPT) John T. Compton, a company commander serving in the 180th Infantry Regiment, 45th Infantry Division, ordered his men to execute thirty-six prisoners of war (POWs). Only three hours earlier, Sergeant (SGT) Horace T. West, also serving in the 180th, committed a similar war crime when he murdered thirty-seven Italian and German POWs by shooting them with a Thompson submachine gun. This is the story of those two events, the courts-martial of West and Compton for murder, and the very different outcomes of those trials.

Operation Husky, the Allied invasion of Sicily, kicked off on July 10, 1943, when British and Canadian forces landed on the southeastern corner of the island. The following day, Soldiers belonging to Lieutenant General (LTG) George S. Patton's Seventh Army and LTG Omar N. Bradley's II Corps waded ashore, some miles to the west, at Licata and Gela, respectively. Driving northward, the Americans, British, and Canadians ran into ten Italian and two German panzer divisions but, after fierce fighting, had seized the southern quarter of Sicily on 15 July.[23]

While this was good news for the invaders, the murder of German and Italian POWs the previous day cast a dark cloud over the sunny skies of Sicily. No one doubted that the killings had occurred or that they had happened during "a sharp struggle for control of the airfield north of Biscari."[24] Rather, the question was why it had occurred, who was responsible, and what should be done.

The facts were that, on July 14, 1943, troopers serving in the 180th Infantry Regiment overcame enemy resistance and, by about 1000, had gathered together a group of forty-eight prisoners. Forty-five were Italian and three were German. Major Roger Denman, the Executive Officer in the 1st Battalion, 180th Infantry, ordered a noncommissioned officer (NCO), thirty-three-year-old SGT Horace T. West, to take the POWs "to the rear, off the road, where they would not be conspicuous, and hold them for questioning."[25]

After SGT West, several other U.S. Soldiers assisting him, and the forty-eight POWs had marched a mile, West halted the group. He then directed that "eight or nine" POWs be separated from the larger group and that these men be taken to the regimental intelligence officer (S-2) for interrogation.

As the official investigation conducted by Lieutenant Colonel (LTC) William O. Perry, the division inspector general (IG), revealed, West then took the remaining POWs "off the road, lined them up, and borrowed a Thompson Sub-Machine Gun" from the company first sergeant (1SG). When that NCO asked West what he intended to do, "SGT West replied that he was going to kill the 'sons of bitches.'" After telling the Soldiers guarding the POWs to "turn around if you don't want to see it," SGT West then singlehandedly murdered the disarmed men by shooting them. The bodies of the dead were discovered about thirty minutes later by the division chaplain, LTC William E. King. King later told the division IG that every dead POW had been "without shoes or shirts." This was expected, because it was common practice to remove a captured soldier's shoes and shirt to discourage escape. But King also told the IG that each POW "had been shot through the heart," which was unexpected but indicated that they had been killed at close range. Investigators subsequently learned that, after emptying his submachine gun into the POWs, West had "stopped to reload, then walked among the

men in their pooling blood and fired a single round into the hearts of those still moving."[26]

Three hours later, twenty-five-year-old CPT John T. Compton, then in command of Company A, 180th Infantry, was with his unit in the vicinity of the same Biscari airfield. After the Americans encountered "sniping . . . from fox holes and dugouts occupied by the enemy,"[27] a Soldier managed to capture thirty-six enemy soldiers. When CPT Compton learned of the surrender, he "immediately had a detail selected" from his company to execute the POWs. According to LTC Perry, who investigated both shootings, Compton gave the following answers to Perry's questions:

Q. How did you select the men to do the firing?
A. I wished to get it done fast and very thoroughly, so I told them to get automatic weapons, the BAR [Browning Automatic Rifle] and Tommy Gun.
Q. How did you get the men? Did you ask for volunteers?
A. No, sir. I told the [SGT] to get the men.
Q. Do you remember exactly what you told him?
A. I don't remember exactly.
Q. What formation did you get them in before they were shot?
A. Single file on the edge of a ridge.
Q. Were they facing the weapons or the other side?
A. They were in single file, in a column, rifle fire from the right.
Q. Were the prisoners facing the weapons or the other side?
A. They were facing right angle of fire.
Q. What formation did you have the firing squad (sic)?
A. Lined 6 foot away, about 2 yards apart, on a line.
Q. Did you give any kind of a firing order?
A. I gave a firing order.
Q. What was your firing order?
A. Men, I am going to give ready fire and you will commence firing on the order of fire.[28]

Since Compton had lined his firing squad up so that the POWs presented a target in enfilade, there was little doubt that he intended to kill the POWs.

The following day, after knowledge of Compton's execution of the enemy travelled up the chain of command, LTG Bradley personally questioned the junior officer about his actions. As CPT Compton told Bradley, he "had been raised fair and square as anybody else and I don't believe in shooting down a man who has put up a fair fight." But, said Compton, these enemy soldiers "had used pretty low sniping tactics against my men and I didn't consider them as prisoners." Perhaps most importantly, CPT Compton added the following to his official statement:

> During the Camberwell operation in North Africa, [LTG] George S. Patton, in a speech to assembled officers, stated that in the case where the enemy was shooting to kill our troops and then that we came close enough on him to get him, decided to quit fighting, he must die. Those men had been shooting at us to kill and had not marched up to us to surrender. They had been surprised and routed, putting them, in my belief, in the category of the General's statement.[29]

What was to be done about these two massacres at Biscari? According to Carlo D'Este's *Bitter Victory: The Battle for Sicily 1943*, General Bradley "was horrified" when he learned what West and Compton had done, and "promptly reported them to Patton," his superior commander. Patton not only "cavalierly dismissed the matter as 'probably an exaggeration,'" but told Bradley "to tell the officer responsible for the shootings to certify that the dead men were snipers or had attempted to escape or something, as it would make a stink in the press, so nothing can be done about it."[30]

But Bradley was a man of principle, and refused to follow Patton's suggestion.[31] On the contrary, Bradley directed that West and Compton be tried for murder. As a result, Major General (MG) Troy H. Middleton, the 45th Infantry Division commander, convened a general court-martial to try SGT West for "willfully, deliberately, feloniously, unlawfully" killing "thirty-seven prisoners of war, none of whose names are known, each of them a human being, by shooting them and each of them with a Thompson Sub-Machine gun."[32] As for CPT Compton, he also faced a general court-martial convened by Middleton. The charge was the same, except that Compton was alleged to have killed "with premeditation . . . thirty-six prisoners of war . . . by ordering them and each of them shot with Browning

Automatic Rifles and Thompson Sub-Machine Guns."[33]

Sergeant West was the first to be tried. His court-martial began on September 2, 1943 and concluded the next day. West pleaded not guilty, and his counsel (none of whom were lawyers) portrayed him as "fatigued and under extreme emotional distress" at the time of the killings. This "temporary insanity defense," in fact, had been suggested by the division IG, who found that "in light of the combat experience of the sergeant and the unsettled mental condition that he was probably suffering from, a very good question arises as to his sanity at the time of the commission of the acts."[34] West also testified that he had seen the enemy murder two American Soldiers who had been taken prisoners, an experience which filled him with rage and made him want "to kill and watch them [the enemy] die, see their blood run."[35] The problem with this defense was that the killings had not occurred in the heat of battle, or near in time to the alleged murder of the two Americans, but rather long after the fighting had ceased and SGT West was escorting the POWs to the rear for interrogation.

Sergeant West also advanced a second rationale for what he had done at Biscari: he had been following the orders of General Patton who, insisted West, had announced prior to the invasion of Sicily that prisoners should be taken only under limited circumstances. Colonel (COL) Forest E. Cookson, the 180th Infantry's regimental commander, testified for the defense and confirmed that Patton had proclaimed he wanted the 45th Infantry Division to be a "division of killers," and that if the enemy continued to resist after U.S. troops had come within two hundred yards of their defensive positions, then the surrender of these enemy soldiers need not be accepted.[36] While Cookson testified further that he had repeated Patton's words "verbatem" (sic) to the Soldiers of his regiment, West's problem with claiming a defense based on following Patton's order was that the POWs he had killed had already surrendered and were in custody. Consequently, while West raised Patton's order in his trial, he did not really offer it as a defense.

The panel members clearly gave more weight to the testimony of First Sergeant (1SG) Haskell Y. Brown, who testified that West had "borrowed" his Thompson "plus one clip of thirty rounds" and then had killed the Italians and Germans in cold blood.[37] The panel did not believe West was temporarily insane, and found him guilty of premeditated murder under Article 92 of the Articles of War.

In an unusual twist, however, the panel of seven officers sentenced West to "life imprisonment" only. They did not adjudge forfeitures or a dishonorable discharge. Perhaps this was because SGT West's good military character. West had served almost continuously with Company A, 180th Infantry Regiment since his induction in September 1940, was "exceptionally dependable," and had "fought bravely and courageously since the invasion of Sicily."[38] But a life sentence nevertheless sent the message that such a war crime would not be condoned, and the convening authority directed that West be confined in the "Eastern Branch, United States Disciplinary Barracks, Beekman, New York."[39]

The general court-martial of CPT Compton was a very different affair. While it was true that a number of Soldiers had carried out the executions, only Compton was being tried for murder. This was almost certainly because Field Manual (FM) 27-10, *Rules of Land Warfare*, which had been published in October 1940—more than a year before the United States entered World War II—provided that a Soldier charged with committing a war crime had a valid defense if he was acting pursuant to a superior's orders. In discussing the "Penalties for Violations of the Laws of War," paragraph 347 stated, in part:

> Offenses by armed forces. The principal offenses of this class are: Making use of poisoned and otherwise forbidden arms and ammunition; killing of the wounded; . . . *ill-treatment of prisoners of war. Individuals of the armed forces will not be punished for these offenses in case they are committed under orders or sanction of their government or commanders.* The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall.[40]

This language meant that the Soldiers who had been ordered by Compton to shoot the POWs had a complete defense to murder. But Compton's defense was that he, too, had been acting pursuant to orders—orders from General Patton. Compton claimed that he remembered, almost word for word, a speech given by Patton in North Africa to the officers of the 45th Infantry Division. According to Compton, Patton had said:

> When we land against the enemy, don't forget to hit him and hit him hard. We will bring the fight home to him. We will show him no mercy. He has killed thousands of your comrades, and he must die. If you company officers in leading your men against the enemy find him shooting at you and, when you get within two hundred yards of him and he wishes to surrender, oh no! That bastard will die! You will kill him. Stick him between the third and fourth ribs. You will tell your men that. They must have the killer instinct. Tell them to stick him. He can do no good then. Stick them in the liver. We will get the name of killers and killers are immortal. When word reaches him that he is being faced by a killer battalion, a killer outfit, he will fight less. Particularly, we must build up that name as killers and you will get that down to your troops in time for the invasion.[41]

A Soldier in Compton's company testified that he was "told that General Patton said that if they don't surrender until you get up close to them, then look for their third and fourth ribs and stick it in there. Fuck them, no prisoners!"[42] An officer testified that Patton had said that the "more prisoners we took, the more we'd have to feed, and not to fool with prisoners."[43]

Compton did not waver in insisting that he had been following orders. The POWs he had ordered shot had resisted at close quarters and had forfeited their right to surrender. Additionally, Compton claimed that the executed men had been snipers (and that some were dressed in civilian clothes) and that this yet another reason that they deserved to be shot—because sniping is dishonorable and treacherous. As Compton put it: "I ordered them shot because I thought it came directly under the General's instructions. Right or wrong a three star general's advice, who has had combat experience, is good enough for me and I took him at his word."[44]

On October 23, 1943, after the prosecution declined to make a closing argument in Compton's trial, the court closed to deliberate. When the members returned, the president of the panel announced that the court had found CPT Compton not guilty of the charge of murder and its specification.

When LTC William R. Cook, the 45th Infantry's Staff Judge Advocate, reviewed the *West* and *Compton* records of trial in November 1943, he immediately recognized that he had two problems. The first was that, when charged with very similar war crimes, an NCO had been convicted while an officer had been acquitted and, since that NCO had been sentence to life imprisonment, this might be perceived as unfair.

But perhaps more troubling was that Compton had been acquitted because he claimed that his execution of POWs had been sanctioned by General Patton's orders. Cook did not want to criticize the court members directly, and he acknowledged that Patton's speech to the 45th's officers provided both a moral and a legal basis for the panel's conclusion that Compton had acted pursuant to superior orders. Lieutenant Colonel Cook also conceded that the 1928 *Manual for Courts-Martial* provided that the "general rule is that the acts of a subordinate officer or soldier, done in good faith . . . in compliance with . . . superior orders, are justifiable, unless such acts are . . . such that a man of ordinary sense and understanding would know to be illegal."[45] But, focusing on this last phrase, Cook wrote that he believed that an order to execute POWs was illegal. As he wrote in the "Staff Judge Advocate's Review" of Compton's trial:

> My own opinion on the matter is . . . the execution of unarmed individuals without the sanction of some tribunal is so foreign to the American sense of justice, that an order of that nature would be illegal on its face, and being illegal on its face could not be complied with under a claim of good faith. However, that opinion is my personal interpretation of the law, and being without adequate means of research, I am not prepared to state that it is an opinion founded on good authority.[46]

Lieutenant Colonel Cook did not address the language contained in paragraph 347 of FM 27-10, discussed above, which provided yet another legal basis for the panel to have acquitted CPT Compton.

As James J. Weingartner shows in his study of the *West* and *Compton* trials, the "Biscari cases made the U.S. Army and the War Department acutely uncomfortable. Both feared the impact on U.S. public opinion and the possibility of enemy reprisals should details of the incidents become common

knowledge."[47] To keep what had happened from public view, both records of trial were classified "Secret" and the media was kept in the dark about the two episodes.

Captain Compton, who had been reassigned to another unit after his acquittal, was killed in combat on November 8, 1943. Like it or not, his death solved the problem of keeping his case confidential.

Not so with West. He was alive and, instead of being returned to the United States, where his presence in a federal penitentiary would likely bring unwanted publicity to him and his crime, West was shipped to a confinement facility in North Africa. Keeping West under Army control no doubt made it less likely that the Germans and Italians would learn of the Biscari killings.

In any event, after reviewing West's record of trial, Eisenhower decided to "give the man a chance" after he had served enough of his life sentence to demonstrate that he could be returned to duty.[48] After West's brother wrote to both the Army and to his local member of Congress asking about the case— raising the possibility again that the public would learn about what had happened at Biscari— the Army moved to resolve the worrisome matter.

In February 1944, the War Department's Bureau of Public Relations recommended that West be given some clemency, but "that no publicity be given to this case because to do so would give and aid and comfort to the enemy and would arouse a segment of our own citizens who are so distant from combat that they do not understand the savagery that is war."[49] Six months later, on November 23, 1944, LTG Joseph McNarney, the deputy commander of Allied Forces Headquarters, then located in Caserta, Italy, signed an order remitting the unexecuted portion of West's sentence. Private West was restored to active duty and continued to serve as a Soldier until the end of the war, when he was honorably discharged.

But secrecy remained paramount in the *West* and *Compton* cases. A 1950 memorandum for MG Ernest M. "Mike" Brannon, The Judge Advocate General of the Army, advised that all copies of the records of trial were under lock and key in the Pentagon; the records apparently were not declassified until the late 1950s.[50]

Three final points about the courts-martial of SGT West and CPT Compton. First, the War Department Inspector General's Office launched an investigation into the Biscari killings, and General Patton was questioned about the speech that Compton and others had insisted was an order to kill POWs. Patton told the investigator that his comments had been misinterpreted and that nothing he had said "by the wildest stretch of the imagination" could have been considered to have been an order to murder POWs. The investigation ultimately cleared Patton of any wrong-doing.

Second, on November 15, 1944, slightly more than five months after Allied landings in Normandy, and more than a year after the *West* and *Compton* trials, the War Department published Change 1 to FM 27-10. That change added this new paragraph:

> Liability of offending individual.— Individuals and organization who violate the accepted laws and customs of war may be punished therefor. However, the fact that *the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defense or in mitigation of punishment*. The person giving such orders may also be punished.[51]

Would the result in the Compton trial have been different if Change 1 had been in effect in October 1943?[52]

Finally, in *Hitler's Last General*, two British historians argued that if the legal principles used to convict SStroops for the massacre of American POWs at Malmedy had been applied to the Biscari killings, then Patton[53] would have been sentenced to life imprisonment and Bradley to ten years. Colonel Cookson, who had commanded the 180th Infantry Regiment, would have been sentenced to death.[54] Whether one agrees with this assessment or not, it is arguable that, in light of the principle of command responsibility for war crimes, some culpability may well have attached to senior American commanders in Sicily.

Remembering that military criminal law and the law of armed conflict today are much different than they were in World War II, what are the lessons to be learned from the events at Biscari? One might conclude that an officer serving in 1943 could expect different treatment at a court-martial from an enlisted Soldier being prosecuted for a similar offense. Another lesson might be that culpability for

war crimes very much depends on who wins the war (so-called "victor's justice"). But perhaps the most important lesson is that commanders must be careful when giving a speech designed to instill aggressiveness and a "warrior" spirit in their subordinates. Word choice does matter, and Soldiers do listen to what commanders say to them.

The "Malmedy Massacre" Trial

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On December 17, 1944, at a road intersection near Malmedy, Belgium, German Waffen-SS troops shot and killed more than seventy American prisoners of war (POWs) who laid down their arms. Several weeks after the "Malmedy Massacre," even more American POWs and a smaller number of unarmed Belgian civilians were also shot and killed by German troops during the Ardennes Offensive, commonly known as the "Battle of the Bulge."

Seventy-four Germans were later tried by a U.S. military government court for the murders committed at Malmedy and other locations between December 16, 1944 and January 13, 1945. Seventy-three were eventually found guilty following the trial, which began on May 16, 1946, at Dachau, Germany. Forty-three were sentenced to be hanged; twenty-two received life imprisonment; and the remainder were sentenced to jail terms between ten and twenty years. However, no one was actually put to death, and by Christmas 1956, all the convicted men had been released from prison.

Lieutenant Colonel (LTC) Burton F. Ellis, a member of the Judge Advocate General's Department (JAGD), served as the chief prosecutor at the Malmedy Massacre trial, but despite his success in court, controversy dogged the proceedings for years after the trial. Today, the truth about the Malmedy massacre, and whether justice was served by the military government court that heard the evidence, still provokes disagreement among those who study the episode.

There is no doubt that U.S. POWs and Belgian civilians were shot, machine-gunned, or mistreated at Malmedy and other nearby locations by SS troops in a *Kampfgruppe* (a regimental-sized "battle group") under the command of SS-Colonel (COL) Joachim Peiper. Survivors of the events bore witness to these facts. At Malmedy, for example, then-First Lieutenant (1LT) Virgil P. Lary witnessed American POWs being killed by machine-gun fire; Lary survived by falling down face first in the muddy meadow and playing dead until he could escape. Lary later testified that he saw German troops kicking the bodies of the fallen Americans and then "double-tapping" those who flinched.[55]

The exact number of American and allied civilian victims will never be known and the prosecution avoided the issue by charging the seventy-four German SS accused as follows:

> In that did, at or in the vicinity of Malmedy, Honsfeld, Bullingen, Ligneauville, Stoumont, La Gelize, Cheneus, Petit Their, Trois Ponts, Stavelot, Wanne, and Lutre-Bois, all in Belgium, at sundry times between December 16, 1944 and January 13, 1945, willfully, deliberately, and wrongfully permit, encourage, aid, abet and participate in the killings, shooting, ill treatment, abuse, and torture of members of the Armed Forces of the United States of America, then at war with the then-German Reich, who were then and there surrendered and unarmed prisoners of war in the custody of the then-German Reich, the exact names and numbers of such persons being unknown but aggregating several hundred, and of unarmed allied civilian nationals, the exact names and numbers of such persons being unknown.[56]

In any case, the killings and mistreatment of the POWs violated article 4 of the 1907 Hague Convention[57] (requiring humane treatment of POWs) and article 2 of the 1929 Geneva Convention Relative to the Treatment of Prisoners of War[58] (mandating both humane treatment and requiring that POWs be protected "against violence, insults and public curiosity"), both of which governed the conduct of German troops in general and Peiper's *Kampfgruppe* in particular at Malmedy.

On May 16, 1946, some seventeen months after the killings at Malmedy, a "military government court" consisting of eight officers and convened by Headquarters, U.S. Third Army, began hearing evidence against the German accused. While styled as a military government court in the convening orders, the tribunal was more akin to a military commission in that it operated with relaxed rules of evidence and procedure (e.g., hearsay was admissible and there was no presumption of innocence) and required only a two-thirds majority for a death sentence. While the senior member of the

panel, Brigadier General (BG) Josiah T. Dalbey, wielded considerable power as court president, a law officer, COL Abraham H. Rosenfeld, was responsible for interpreting the law and ruling on procedural and evidentiary matters. Meanwhile, although Rosenfeld was a Yale-educated attorney, he was not a judge advocate. Similarly, the chief defense counsel, COL Willis M. Everett, Jr., was a lawyer[59] but not a judge advocate, and only one of his five assistant defense counsel, 1LT Wilbert J. Wahler, was a member of the JAGD.[60] However, the other four members of the defense team were attorneys. The Trial Judge Advocate who prosecuted the case, LTC Ellis, was apparently the only other attorney who wore the crossed-pen-and-sword insignia of the JAGD on his uniform.[61]

The court proceedings, held in Dachau within sight of the infamous concentration camp of the same name, began with Ellis's opening statement and his assertion that the government would prove that "538 to 749" American POWs and "over 90" Belgian civilians had been murdered.[62] Over the next three weeks, the prosecution called members of Peiper's Kampfgruppe, who had not been charged with crimes, to testify that Peiper and other SS officers and noncommissioned officers had instructed their men to ignore the rules of war governing prisoners. For example, SS-Private First Class (PFC) Fritz Geiberger stated under oath that his platoon leader had given "a blanket order requiring the shooting of prisoners of war."[63] SS-Corporal (CPL) Ernst Kohler testified that his platoon was ordered to "show no mercy to Belgian civilians" and to "take no prisoners," as this would avenge German women and children killed in Allied air raids.[64]

Additional testimony came from Malmedy survivors 1LT Lary and an ex-military policeman named Homer Ford, who had heard the American wounded "moaning and crying" and watched the Germans "either shoot them or hit them with the butts of their guns."[65] A number of Belgian civilians also declared under oath that they had witnessed the brutal and unjustified killing of unarmed civilians by SS troops. The testimony, especially of the German witnesses, was designed to prove that the killing of the American POWs and Belgian civilians was premeditated because it had been part of a conspiracy or common design.

The bulk of the prosecution's evidence, however, was not live testimony. Nearly one hundred written sworn statements linked each of the SS accused "with crimes that were described in exhaustive detail."[66] If BG Dalbey and the seven other panel members took these statements at face value, the accused would almost certainly be convicted.

Everett and the defense counsel soon learned, however, that there were problems with some of the sworn statements. Their German clients insisted that many of their statements were the result of trickery, deceit, and in some cases, coercion. Peiper claimed that one of his fellow accused had been beaten for nearly an hour by American investigators seeking a confession—although apparently no incriminating statement was obtained. Two other German accused claimed that ropes had been placed around their necks during questioning. This act, they believed, was preparatory to hanging. However, the most prevalent interrogation technique had been the use of a "mock trial," where the accused was brought before a one-person tribunal. While he sat with his "defense counsel," the "court" rushed through the proceedings before informing the surprised accused that, as he was to be hanged the next day, he "might as well write up a confession and clear some of the other fellows [co-accused] seeing as he would be hanged."[67] Just how many sworn statements were obtained through the use of these fake tribunals, which Army investigators admitted they had used at times, and which they called a "schnell (or fast) procedure," will never be known, but no doubt some of the statements introduced at trial resulted from their use. On the other hand, as some statements from the SS accused had been obtained after "one or two brief and straightforward interrogation sessions," it is equally true that subsequent claims of widespread coercive interrogation are false.[68]

Everett was sufficiently alarmed by his clients' claims of abuse to report the alleged prosecutorial misconduct to COL Claude B. Mickelwaite, the Deputy Theater Judge Advocate in Wiesbaden, Germany. Mickelwaite, who had overall

responsibility for the prosecution of war crimes in Germany, sent a subordinate, LTC Edwin Carpenter, to Dachau to investigate. Carpenter concluded that mock courts and other psychological stratagems had, in fact, been used by Army investigators, but Carpenter also concluded that none of the sworn statements obtained from the accused were the product of physical violence.[69]

After the prosecution rested, the defense presented its evidence. Everett argued that the Malmedy massacre was an unfortunate event that had occurred in the midst of fast-moving and very fluid combat operations during the Battle of the Bulge. To support his argument, Everett called a number of German officers to testify that there had been no formal orders to murder POWs. Everett also managed to locate a West Point graduate and regular Army officer, LTC Harold D. McCown, who testified under oath that he had been captured by Peiper's *Kampfgruppe* and had been well-treated while a POW.[70] Everett and his defense team also argued that the nearly one hundred sworn statements introduced into evidence by the prosecution were unreliable products of coercion.

But it was a tough road for the defense, especially when Peiper testified on his own behalf. While denying that he had pre-existing orders from his superiors to kill POWs, or that he had directed troops under his command to kill combat captives, the forty-two-year-old Peiper did admit that it was "obvious" to experienced commanders that POWs sometimes must be shot "when local conditions of combat require it."[71] Under cross-examination by LTC Ellis, Peiper also admitted to misconduct that, while uncharged, was devastating. Peiper, who had served as Reichsfuhrer-SS Heinrich Himmler's adjutant from 1938 to 1941, admitted that he had been with Himmler at a demonstration where human beings had been gassed.[72]

On July 11, 1946, after a two-month trial, BG Dalbey and the panel retired to consider the evidence. Two hours and twenty minutes later, they were back with a verdict: All seventy-three accused[73] were found guilty of the "killing, shooting, ill-treatment, abuse and torture of members of the armed forces of the United States of America and of unarmed Allied civilians."

During sentencing, BG Dalbey and his fellow panel members heard oral statements from more than half the convicted men. While one third of those who addressed the court denied the charges against them, a small number admitted their guilt. For example, a nineteen-year-old SS man confessed to killing two civilians but claimed the defense of superior orders. Another accused admitted he had shot and killed an American POW while acting under orders. A sergeant also admitted he had killed a POW but insisted that "the heat of combat, superior orders, and incitement by his comrades" was to blame.[74]

On July 16, 1946, the panel announced that forty-three convicted SS troops, including Peiper, were sentenced to death. Twenty-two received life sentences, and the rest were sentenced to jail terms of ten to twenty years in duration.

While the Army no doubt hoped that the verdict and sentences meant the end of the Malmedy proceedings, that was not to be. On the contrary, after leaving active duty in June 1947 and returning home to Atlanta, Georgia, Willis Everett continued to work tirelessly as a defense counsel for Peiper and his seventy-two co-accused.

Recognizing that there was no formal avenue of appeal from the Malmedy verdict, Everett instead began a vocal and public letter writing campaign. Everett argued that "80 to 90 percent of the confessions had been obtained illegally"[75] and that this prosecutorial misconduct had deprived Peiper and his seventy-two fellow SS troops of justice. Everett also insisted that it had been impossible for him and his team to mount an effective defense because the court's desire for vengeance made the Malmedy verdict a foregone conclusion.

In the meantime, COL James L. Harbaugh, the European Command (EUCOM) Staff Judge Advocate, was reviewing the Malmedy record of trial and preparing a recommendation for General (GEN) Lucius Clay, then serving as Military Governor of the American Zone of Occupation (Germany). Harbaugh's legal review concluded that the evidence was insufficient to sustain some convictions and that many of the death sentences were inappropriate. As a result, on March 20, 1948, General Clay reduced thirty-one of the forty-three death sentences to life imprisonment, but confirmed the remaining twelve death sentences, including Peiper's. General Clay also disapproved the findings in several cases, which freed thirteen other men.

Everett remained convinced that the remaining accused required a new trial, and on May 14, 1948, he filed a 228-page motion and petition with the U.S. Supreme Court. In that motion, he requested leave to file a petition for a writ of habeas corpus for relief from the sentences of the Malmedy trial. The Supreme Court denied the motion, but it was a close decision: The Court split four to four (with Justice Robert Jackson disqualifying himself because of his work as Chief Prosecutor at Nuremberg).[76]

Undeterred, Everett now looked for other ways to help the German accused. Unfortunately, he began to lie about how the Malmedy accused had been treated prior to trial, insisting that Peiper and the troops of the *Kampfgruppe* had been routinely beaten, starved, and tortured to compel them to confess to crimes. Everett also suggested that mock trials had been "the rule rather than the exception."[77] Everett convinced two Democratic members of Congress from Georgia, Congressman James "Jim" Davis and Senator Walter F. George, to meet with Secretary of Defense James V. Forrestal and Secretary of the Army Kenneth C. Royall on the issue. Secretary Royall was so upset by Everett's allegations of prosecutorial misconduct that he ordered a stay of all executions pending further review.[78] In July 1948, Royall named his own three-person commission, chaired by Texas Supreme Court Justice Gordon Simpson, to review not only the Malmedy trial death sentences but also the 127 capital sentences imposed in other war crimes trials conducted at Dachau. Everett's allegations of unfairness and foul play at the Malmedy trial "had clearly put the Army on the defense," [79] and his claims threatened to undermine the validity of the Army's entire war crimes trial program in Germany. After all, if coercive interrogation techniques had been used to obtain convictions in other trials at Dachau, the fairness of all German war crimes trials in U.S. Army military courts would be called into question.

With the press in the United States trumpeting Everett's claims of malfeasance, a number of Catholic and Protestant bishops in Germany now joined the dialogue. Cardinal Josef Frings of Cologne and Bishop Johannes Neuhausler both launched vociferous campaigns against the Dachau war crimes trials. Frings "strongly opposed the entire concept of bringing the perpetrators to justice," and insisted that the Allies had followed a "pagan and naïve" optimism for taking it upon themselves to make judgments about Nazi guilt.[80] Neuhausler, encouraged by criticism of the Malmedy trial, "intensively lobbied American authorities on behalf of convicted war criminals."[81] In March 1948, he also wrote to five members of Congress demanding that they investigate the "torture, mistreatment and calculated injustice" committed by Army personnel investigating the Malmedy war crimes.[82]

Fortunately for the Army—and the JAGD—the Simpson commission concluded in September 1948 that the war crimes trials being conducted in Germany were "essentially fair" and that there was no "systematic use of improper methods to secure prosecution evidence."[83] However, the Malmedy trial was different; the use of mock trials had cast "sufficient doubt" on the proceedings to make it "unwise" to carry out the remaining death sentences.[84] Although GEN Clay still had the authority to affirm the death sentences, there was little doubt that the Simpson commission findings meant Peiper and the others would escape the gallows.

Shortly after the Simpson commission delivered its report to Secretary Royall, a Senate Armed Services Committee subcommittee chaired by Senator Raymond Baldwin began hearings on the Malmedy case. Beginning in March 1949, the subcommittee heard from 108 witnesses and examined thousands of pages of documents. Baldwin also invited Senator Joseph McCarthy to participate as a visiting member of the subcommittee. McCarthy's participation was intended to "gain additional credibility and quiet the more radical Army critics,"[85] but inviting McCarthy turned out to be a disaster. He dominated the subcommittee hearings for almost a month and "sharply attacked the Army."[86] McCarthy had a particularly "heated confrontation" with now—COL Ellis, whom McCarthy accused of grave misconduct at the Malmedy trial.[87]

In October 1949, the subcommittee published a 1700-page report. It unanimously concluded that the allegations of physical mistreatment and torture were false and that the claims that violence had been used to obtain confessions were without merit.[88] However, the report did find that Army investigators had employed mock trials "in not more than 12 cases of the several hundred suspects interrogated by the war crimes investigative teams."[89] The subcommittee criticized these mock trials as a "grave mistake" because the use of psychological trickery was unnecessary and had ultimately been exploited by critics of the war crimes trial program. Significantly, the subcommittee found that "American authorities have unquestionably leaned over backward in reviewing any cases affected by the mock trials . . . . [I]t appears many sentences have been commuted that otherwise might not have been changed."[90]

In the end, it was all too much for American military decision-makers in Germany, and on January 31, 1951, GEN Thomas T. Handy, who succeeded Clay, commuted the death sentences of Peiper and the remaining Malmedy accused. Handy followed the advice of COL Damon Gunn, the new Theater Judge Advocate, who had counseled that a major reason to commute the death sentences was "the probable negative congressional reaction to additional executions."[91] By Christmas 1956, all the Malmedy accused had been released from prison.

Measured by today's standards, and with the benefit of hindsight, the Malmedy court proceedings were certainly flawed. First, the prosecution's use of fake judicial proceedings and coercive interrogation techniques to obtain statements from the accused compromised their reliability and consequently tainted the entire prosecution effort. As evidenced by Secretary Royall's decision to have a commission look at *all* the death penalty cases tried at Dachau, flaws in the Malmedy prosecution subsequently spilled over to other war crimes trials, which became subject to Congressional scrutiny.

On the other hand, there is no doubt that American POWs were murdered at Malmedy and that few of the Malmedy survivors could identify the SS troops who had opened fire on them. It is likely that government investigators felt justified in using trickery and deceit to obtain evidence from the German accused because there was no other way to obtain proof; confessions were required if justice was to be obtained for the dead.

Second, the single trial of more than seventy accused, represented by six American defense counsel, smacks of unfairness, especially as each accused faced a death sentence. As there was no presumption of innocence at the trial and the panel members spent less than three hours deliberating before returning with a finding of guilty, it is difficult to conclude that there was a deliberative process instead of a rush to judgment. On the other hand, when the panel members heard about Peiper's activities as Heinrich Himmler's adjutant and heard him admit that "local conditions" sometimes demanded that POWs be executed, it was reasonable for these same panel members to find that Peiper had either ordered the execution of Americans or had condoned the killings. Alternatively, the panel members could have concluded that Peiper was guilty as charged because he had failed to control the members of his *Kampfgruppe*, failed to take action to prevent future killings, and failed to discipline the culpable parties whom he should have known had killed POWs and unarmed civilians. Additionally, as the panel members had access to nearly one hundred sworn statements linking each accused to the charged offenses, there arguably was sufficient evidence to support the court's verdict.

While the killings at Malmedy were homicides, there was no credible evidence that the killings were ordered, deliberate, or pre-planned. Some historians believe that the impetus for the killings occurred when Georg Fleps, a twenty-one-year-old SS trooper, opened fire of his own volition. Once he began shooting, others armed with machine guns joined in.[92] Consequently, although these murders qualify as war crimes, the event preceding the murders could very well have been spontaneous. But the Malmedy court failed to adequately address the *mens rea* of the seventy-three SS troops it convicted; a fairer determination of that criminal intent could have resulted in fewer death sentences, and perhaps some acquittals.

As for Everett, he had never spent even a day in combat and had arrived in Europe only after the fighting was over. Despite the lack of first-hand knowledge about military operations, especially against Waffen-SS units, Everett consistently made pro-German statements that showed a marked insensitivity to the suffering that many had experienced under the German Reich. For example, Everett insisted that it was wrong for the United States to prosecute Germans for war crimes when American military personnel had committed similar offenses in the heat of battle.[93] Given the extent of the Holocaust—and the participation of Waffen-SS officers like Peiper in it—such a claim made Everett appear to be either disingenuous, foolish, or both. Additionally, Everett's own prejudices hurt his case. He repeatedly railed against COL Rosenfeld, the "Jew Law Member" at Malmedy and "Jewish pressure . . . demanding blood and death penalties."[94] While studying in New York City in 1945, Everett was upset to see "two black negroes" in the choir at an all-white church, as this "spoiled the service." He also wrote to his wife that he could not "stomach" sharing a bathroom with a male African-American student at Columbia University.[95]

But there can be no dispute about one fact: Everett was an effective defense counsel, and his unwavering support of the Malmedy accused and unending agitation on their behalf is the chief reason all were spared the hangman's noose. At least one of the accused, however, could not escape a final reckoning. On July 14, 1976, then-sixty-one-year- old Peiper was living in Traves, France, when his home was fire-bombed. He died in the resulting blaze. Because the attack occurred on Bastille Day, historians think it likely that Peiper was assassinated by former members of the French Resistance.

Today, the Malmedy Massacre remains an example of the difficulties involved in prosecuting war crimes. Although American POWs had been murdered by SS troops, the use of trickery and deceit to obtain evidence against the German accused called into question the validity of the trial, allowed critics to paint the accused as victims of American injustice, and cast a shadow on the proceedings that exists to this day.

Tried by Military Commission and Hanged for Murder: *United States v. Franz Strasser*

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In mid-December 1945, a Signal Corps photographer stamped the following caption on the reverse of a photograph he had taken a few days earlier: "10 Dec 45, 3rd Army. Big Finale—The body of Former Nazi Official Franz Strasser, accused of killing two American Fliers forced down in Germany, swings and twitches at the end of the gallows rope."[96] What follows is the story of forty-six-year-old Franz Strasser, whose misconduct in December 1944 resulted in his prosecution by a military commission, a conviction for murder, and death at the end of a rope.

On the afternoon of December 9, 1944, an American bomber made a forced landing near Zahdelesdorg, Czechoslovakia. The pilot, co-pilot, and three crew members voluntarily surrendered to the local authorities and "were loaded into a truck for the ostensible purpose of transporting them to Kaplitz," Czechoslovakia.[97] Two automobiles accompanied the truck: one contained Nazi Party official Franz Strasser, the Kreisleiter of Kreis Kaplitz,[98] and the other car contained Captain (CPT) Lindemeyer, the Kaplitz chief of police.

When the convoy got to the top of a hill on the road to Kaplitz, Strasser, who was in the lead vehicle, stopped his car. The truck containing the unarmed American fliers also stopped. Strasser then walked back to the truck and shot and killed one airman with his machine pistol. When the driver of the truck tried to protect a second American airman by allowing him to take refuge in the truck cab, Strasser threatened to kill the driver if he continued to interfere.[99]

Strasser then shot this second American and, when the American was prostrate on the ground, "raked the airman from head to foot with his machine pistol."[100] As for the other three airmen? They were shot and killed by Captain Lindemeyer.

On August 24, 1945, Franz Strasser was tried by a military commission sitting in Dachau, Germany.[101] He was charged as follows:

> Charge I: Violation of the Laws and Usages of War.
>
> Specification: In that on or about December 9, 1944, FRANZ STRASSER, Kreisleiter of Kreis Kaplitz, an Austrian National, did at or near Kaplitz, Czechoslovakia, wrongfully and unlawfully kill an American airman, whose name, rank and serial number are unknown, by shooting him with a machine pistol.
>
> Charge II: Violation of the Laws and Usages of War.
>
> Specification: In that on or about December 9, 1944, FRANZ STRASSER, Kreisleiter of Kreis Kaplitz, an Austrian National, did at or near Kaplitz, Czechoslovakia, wrongfully and unlawfully shoot an American airman, whose name, rank and serial number are unknown.[102]

At trial, Strasser pleaded not guilty. He did not deny that he had participated in the shooting of the five American prisoners. Rather, Strasser admitted that he and Lindemeyer had killed the men, but insisted "that the shooting was justifiable because it was necessary to prevent the escape of the prisoners."[103] According to Strasser, he had stopped his car at the top of the mountain to wait for the truck which, because of poor road conditions and the steepness of the incline, was having "difficulty in negotiating the hill."[104] Then, after the truck had stopped, and the Americans attempted to escape, Strasser—and Lindemeyer—had shot them to prevent them from fleeing.

Captain Lindemeyer, who had committed suicide prior to the trial, was not in court to give evidence on this point. The whereabouts of the two other participants in the war crime, who had been in the automobile with Strasser on the day in question, were unknown. Consequently, there was no testimony from them to either prove or disprove Strasser's defense.[105]

But the driver of the truck, a man named Pusch, did testify at Strasser's trial and, unfortunately for Strasser, his testimony was devastating. Pusch testified that Strasser had "signaled to him to stop the

truck" at the summit of the hill.[106] He also testified that the airmen were unarmed and that they had not attempted to escape. While Pusch did testify that "some shots were fired before Strasser arrived at the truck,"[107] Pusch insisted that Strasser had shot one airman dead and then threatened Pusch with death if he interfered with the execution of the second American flier. After the shootings, Strasser and Lindemeyer discussed their handiwork, with Strasser claiming "credit" for two of the murders; Lindemeyer took credit for killing three of the airmen.[108]

Additional evidence presented by the government supported the theory that Strasser and Lindemeyer had "a previously conceived plan" to kill the Americans fliers, no doubt in revenge for the suffering inflicted upon the Third Reich by the Allied bombing of Germany. This made sense, as Strasser was a Kreisleiter and Lindemeyer a police official. In mid-1943, the Nazis began insisting that "all bombardment of the civil population was to be regarded as terrorism" and, on August 10, 1943, Heinrich Himmler, the head of the Gestapo, instructed both the Secret Service and police officers that it was "not the task of the police to interfere in clashes between Germans and the English and American terror fliers who have baled [sic] out."[109] When other Nazi Party officials similarly announced that the police were not to protect Allied airmen "against the fury of the people," the result was that "many were lynched by the populace or shot by the police" during 1944 and 1945.[110] With this as background, it seems that the war crimes committed by Strasser and Lindemeyer were very much a reflection of official Nazi policy.

At the end of the one-day trial, having considered the evidence before them, the members of the military commission found Franz Strasser guilty as charged and sentenced him "to be hanged by the neck until dead."[111] On October 14, 1945, Judge Advocate Major (MAJ) Ford R. Sargent[112] conducted a legal review of the *Strasser* case for the Commanding General, U.S. Forces, European Theater, who now had to take final action in the proceedings.

Sargent wrote that "the essential facts [in the case] were established by the direct testimony of eyewitnesses."[113] He also concluded that there were "no irregularities in the proceedings or trial which prejudiced any substantial rights of the accused."[114] As MAJ Sargent put it, the accused "was given a fair trial, consistent with Anglo-Saxon conceptions, and there is no doubt whatsoever as to his guilt."[115] Since Sargent was willing to state that the evidence went far beyond the reasonable doubt standard applicable to war crimes trials,[116] it is worth quoting his comments about the appropriateness of the death sentence for Strasser:

> The offense in this case was particularly heinous because it involved the cold-blooded murder of absolutely defenseless prisoners of war. No mercy whatsoever was exhibited by the accused. The offense closely approximated common law murder. Murder is the unlawful killing of a human being with malice aforethought. The usual penalty among civilized peoples for murder is life imprisonment or death. There are no extenuating circumstances in the instant case to warrant changing the penalty of death imposed by the Commission. The evidence is overwhelming that the offenses were committed by STRASSER in accordance with a preconceived plan to murder five American airmen. The sentence of the Commission and the action of the Reviewing Authority thereon are just, and commensurate with the nature of the offense committee by the accused.[117]

Three days later, on October 17, 1945, Colonel (COL) Claude B. Mickelwait, the Deputy Theater Judge Advocate, concurred with MAJ Sargent's review and recommended that the sentence be confirmed. General Dwight D. Eisenhower, Commanding General, U.S. Forces, European Theater, accepted the recommendation of his senior military lawyer, and ordered the sentence be carried out.[118]

Strasser prepares to climb the stairs to his fate.

At the time his case was heard by a military commission, Strasser was married and had three children. He testified that his fourth child was "expected in September" and presumably this baby had been born at the time forty-six-year-old Strasser climbed the gallows steps at the Landsberg Punishment Prison on December 10, 1945.

Stasser receiving his last rites.

As photographs taken by a Signal Corps photographer show, Strasser received last rites from a Catholic priest just minutes before he was hanged, but whether or not this soothed his conscience will be forever unknown.[119]

Misbehavior Before the Enemy and Unlawful Command Influence in World War II

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> Question (Trial Counsel): Do you recall, sir, whether you were receiving enemy fire at this time?
>
> Lieutenant Colonel (LTC) Bird: Yes, sir.
>
> Question: Were you in contact with the enemy?
>
> LTC Bird: You bet we were.
>
> Question: On or about 27 August 1944, did you give the accused a mission to accomplish?
>
> LTC Bird: Yes.
>
> Question: What was that mission?
>
> LTC Bird: That mission was to accompany a patrol to seek out and destroy one or more self-propelled guns or tanks.
>
> * * * *
>
> Question: Did the accused carry out this mission as ordered?
>
> LTC Bird: No, sir.[120]

On August 27, 1944, LTC William A. Bird, the commanding officer of the 1st Battalion, 141st Infantry Regiment, 36th Infantry Regiment, was in his battalion's command post, located near Concourdia, France. Bird and his staff were under fire from German tanks or self-propelled artillery, and something had to be done to stop the murderous fire. Lieutenant Colonel Bird assigned the mission to seek out and destroy these German guns to 28-..year-old Second Lieutenant (2LT) Albert C. Homcy, an anti-tank platoon leader in his battalion. Homcy was to accompany a hastily assembled unit of cooks, bakers and orderlies on a "strong patrol" to "destroy, with bazookas or grenades, those guns or whatever they were, as soon as possible."[121]

Lieutenant Homcy refused LTC Bird's order and, despite entreaties from Bird, 2LT Homcy persisted in declining to obey him. As a result, 2LT Homcy was relieved from command and court-martialed for "misbehavior before the enemy." On October 19, 1944, a panel of five officers convicted him as charged and sentenced him to be dismissed from the Army, to forfeit all pay and allowances, and to be confined at hard labor for fifty years.[122]

What follows is the story of Homcy's court-martial, the role of unlawful command influence in it, and the strange resolution of his case many years later.

Born on April 25, 1916 in New Jersey, Albert C. Homcy was a high school graduate who was working as a forester and machinist when he enlisted in the New Jersey Army National Guard on January 25, 1938. After Congress authorized the induction of reservists in August 1940 and enacted the nation's first peacetime draft the following month, Homcy was called into federal service.[123]

In November 1942, after satisfactorily completing Officer Candidate School, then-Sergeant (SGT) Homcy was discharged to accept a commission as a 2LT. Almost one year later, on August 21, 1943, Homcy landed with the 36th Infantry Division in North Africa. He performed well in combat and, while in Italy in December 1943, was "commended for exceptionally meritorious conduct."[124] According to the official citation, 2LT Homcy "was second in command of a group assigned the task of carrying ammunition, food, water and clothing to front-line troops." Despite being "subjected to almost constant enemy artillery and mortar fire, sometimes crawling on their hands and knees to achieve their objective," Homcy and his men accomplished their mission "without losing a single load of vital supplies."[125] In July 1944, Homcy's regimental commander, Colonel (COL) Paul D. Adams, likewise lauded Homcy's "exemplary courage and determination" in combat, which Adams acknowledged had contributed "materially to the success of our operation."[126]

On August 15, 1944, 2LT Homcy and the 36th Infantry Division landed in southern France as part of Operation Dragoon. Twelve days later, on 27 August, Homcy was with the division as it advanced through the Rhone River Valley. According to testimony presented at his general court-martial, Homcy was the battalion's anti-tank officer and had received an order from LTC Bird, relayed to Homcy through the battalion adjutant, Captain (CPT) John A. Berquist,

to accompany eleven or twelve Soldiers on a patrol. Their mission: locate and then use bazookas to destroy German guns firing on the battalion command post.

Homcy refused to obey this order. He explained his reasons in his sworn statement at trial:

> Q: Did you have a conversation with Colonel Bird on this date?
>
> A: Yes, sir. I called Colonel Bird by telephone approximately forty-five minutes after I received the initial order from Captain Berquist and I told Colonel Bird that I couldn't take those men on patrol as they weren't qualified to do the work and I didn't think they were capable. He said he would have to prefer charges and placed me under arrest.
>
> Q: Are you sure you told him that you couldn't take those particular men?
>
> A: Yes, I am positive. I told him I didn't think those men were qualified and I couldn't take those particular men.
>
> Q: So as far as you know, had any of these men who came from the kitchen—the cooks and orderlies—done any patrolling?
>
> A: They had never done any patrolling to the best of my knowledge.
>
> Q: With those men under those conditions did you believe it was possible for you to accomplish your mission?
>
> A: No, sir. It was quite impossible. The mission itself was quite impossible but with men like that it made it so much more impossible.[127]

Under cross-examination, 2LT Homcy further explained that the cooks, bakers, ammunition handlers, and orderlies that he had been ordered to lead into combat were so unqualified that he "would jeopardize their lives if I took them on a patrol of that nature."[128] Since he did not want to take Soldiers on a patrol where "they would get killed doing something they knew nothing about," 2LT Homcy refused to obey LTC Bird's order.[129]

The fluid tactical situation meant that it was not until September 10, 1944 that LTC Bird preferred a single charge of misbehavior before the enemy against 2LT Homcy. Major General John E. Dahlquist, the 36th Infantry Division commander, referred the charge to trial by general court-martial on September 18 and, on October 19, 1944, a five-officer panel consisting of one major, three captains, and one first lieutenant convened to hear the evidence. While the trial counsel, CPT John M. Stafford, was a member of the Judge Advocate General's Department, the defense counsel, Major (MAJ) Benjamin F. Wilson, Jr.,[130] was not a lawyer. But this was not unusual and, in any event, legally qualified counsel for an accused was not required by the Articles of War.[131] The charge and its specification read as follows:

> Violation of the 75th Article of War. In that 2d Lt. Albert C. Homcy . . . did, in the vicinity of La Concourdia, France, on or about 27 August 1944, misbehave himself while before the enemy, by refusing to lead a patrol on a mission to detect the presence of two enemy tanks or self-propelled guns, after being ordered to do so by Lt. Col. William A. Bird, his superior officer.[132]

While testimony about LTC Bird's order was uncontradicted, 2LT Homcy sealed his own fate when he admitted, under oath, that he had intentionally disobeyed the order to lead the combat patrol. Not only did he refuse Bird's order, but Homcy admitted to a most aggravating factor:

> Q: Lieutenant . . . is it not true that you received an order to accompany a patrol of men on a mission to detect the presence of two enemy tanks or self-propelled guns?
>
> A: I received an order to take certain men up on a patrol after certain self-propelled guns.
>
> Q: Is it not true that having received this order that you refused to obey the order *in the presence of the enemy*?[133]
>
> A: Yes, sir.[134]

Homcy's trial, which had started at 1450 on 19 October, finished just two-and-one-half hours later, at 1735. The panel found 2LT Homcy guilty as charged. The members sentenced him to forfeit all pay and allowances and to be dismissed from the service. They also sentenced him to fifty years' confinement at hard labor.[135] Although the record does not reflect Homcy's reaction, the twenty-eight-year-old officer must have been shocked at the lengthy term of imprisonment.

But then a curious thing happened. On October 23, 1944, all five panel members signed a letter requesting clemency for 2LT Homcy, which they forwarded to Major General (MG) Dahlquist. The panel members wrote that Homcy's "announcement on the witness stand that he did in fact commit the offense" meant that the punishment that they had imposed was "commensurate with the offense." [136] But the panel nevertheless believed that 2LT Homcy could "be rehabilitated" and could "be of value to the Service." Consequently, the members recommended to Dahlquist that he reduce Homcy's confinement to ten years and that Dahlquist suspend the execution of the sentence so that Homcy could be "returned to a duty status through reassignment in a non-combat unit."[137]

Lieutenant Colonel Stephen J. Brady, the division's staff judge advocate, reviewed Homcy's record of trial on October 23, 1944. In a memorandum for Major General Dahlquist, LTC Brady agreed "that the sentence adjudged is unnecessarily severe." But, wrote the staff judge advocate, "even if activated by the desire to protect his untrained men," 2LT Homcy's misbehavior before the enemy in refusing to obey a lawful order to lead a combat patrol required that "some punishment should be given." Consequently, LTC Brady recommended that Dahlquist approve the sentence as announced by the court-martial panel, except that the fifty years' confinement be reduced to ten years' imprisonment.[138] Major General Dahlquist concurred with Brady's recommendation when he took action on Homcy's case the next day. Shortly thereafter, Homcy was shipped to Oran, Algeria, where he was confined in the Army's Disciplinary Training Center located there. A three-member Board of Review subsequently confirmed the findings and sentence on November 21, 1944 with the result that, on December 5, 1944, Homcy ceased to be an officer of the Army.

Shortly thereafter, "General Prisoner" Homcy left Algeria and was confined at the U.S. Disciplinary Barracks in Stormville, New York. Unhappy with his circumstances, he began to look for ways to overturn his court-martial conviction. On July 27, 1945, Mr. A.S. Hatem wrote to the Secretary of War on Homcy's behalf, insisting that Homcy had been wrongfully convicted because he "had no knowledge of his trial and was unable to make any preparations for his defense."[139] After an investigation, the War Department replied to Hatem that the record in Homcy's case showed that Homcy "was ably defended at his trial" and that "there is no indication of any inability in his part to prepare properly for trial."[140]

Homcy's fortunes did change somewhat in January 1946 when, as part of a comprehensive decision by the Army to reduce the sentences of certain categories of prisoners, Homcy received additional clemency "by direction of the President." In return for agreeing to re-enlist as a private in the Army, the government would remit the unserved portion of his confinement. No doubt wanting to avoid serving any more time in jail, Homcy re-enlisted on January 7, 1946.[141] He was honorably discharged eight months later, on August 24, 1946, and returned home to Clifton, New Jersey, and life as a civilian.

In the years that followed, Mr. Homcy began a lengthy struggle to clear his military record. In May 1951, he hired a Washington, D.C., attorney to file a petition asking that the findings be set aside and that he receive a new trial. Homcy's principal argument was that the findings were "contrary to the weight of the evidence" and that he was not "legally responsible for his acts" because he did not "comprehend and understand the meaning of the order" given by LTC Bird.[142]

Major General Ernest M. Brannon, The Judge Advocate General, denied Homcy's petition on 5 August 1951. As Brannon explained in his decision,

> It appears from the record of trial, and it is not now denied, that the accused willfully violated the order of his battalion commander while his unit was in contact with the enemy on the field of battle. The legality of the order is not questioned, and there is presented no persuasive evidence which would indicate that the petitioner was not responsible for his refusal to obey the order. . .

> The entire record of trial has been carefully reviewed, but there is disclosed no error prejudicial to the substantial rights of the accused. The court had jurisdiction over the petitioner and over the offense of which he was convicted, the evidence in the record supports the findings and sentence, and the sentence is not excessive.[143]

Major General Ernest M. "Mike" Brannon

Unwilling to surrender to the Army's legal bureaucracy, Homcy wrote to the Secretary of the Army on May 29, 1951, complaining that he "was brought to trial by an IMCOMPETENT, tried and convicted by an illegal, unfair and unjust courts-martial [sic] on foreign soil."[144] The gist of Homcy's argument was that absence of a "law member"[145] at his court-martial meant that the proceedings were illegal and should be overturned. The Army informed Homcy that it had been within Major General Dahlquist's discretion as the general court-martial convening authority "not to specifically direct the presence of a law member during the trial proceedings."[146] Consequently, Homcy again did not see any relief.

On June 21, 1961, after filing an application with the Army Board for Correction of Military Records (ABCMR), Mr. Homcy appeared in person before the Board. Assisted by counsel furnished by the American Legion, Homcy once again argued that he had not been ably defended, lacked adequate time to prepare for trial, and that his court-martial conviction was unjust. His requested relief was that the ABCMR substitute an honorable discharge for the dismissal imposed by the general court-martial. The ABCMR denied his application. As Francis X. Plant, the special assistant to the ABCMR, wrote:

> [Homcy] was given every opportunity to argue his contentions and to present all additional evidence available to him. Apparently feeling that the evidence was indisputable that he refused to obey an order from his superior officer while in the presence of the enemy and that he fully understood the consequences of his actions, the Board voted unanimously to deny Mr. Homcy's application.[147]

On March 1, 1967, the ever-persistent Homcy filed yet another application with the ABCMR. This time, however, he alleged new grounds for relief: unlawful command influence (UCI). Homcy apparently had first become aware of UCI in his case in January 1966, when gathering affidavits from officers who had participated in his court-martial in 1944. Two of the five panel members claimed UCI. Then-CPT Elden R. McRobert, who had served as a panel member, alleged that Major General Dahlquist "called all the members of the General Court-Martial Board for our division . . . and there gave all of us a very strong verbal reprimand for the way in which we had been fulfilling our responsibilities as members of the Board."[148] Another panel member, then-CPT Lowell E. Sitton, wrote in a January 20, 1966 affidavit that "severe pressures were applied to court-martial boards in his division at or about the time of [Homcy's] trial to make findings of guilty 'for the good of the service' without regard to the rights of the individual or the merits of the particular case in question."[149] But the claimed UCI was not specifically directed toward 2LT Homcy, since neither McRobert or Sitton remembered participating in the case.

As to UCI generally, however, Homcy learned from the trial counsel who had prosecuted him, then-CPT John M. Stafford, that:

> There was command pressure on the Court-Martial Boards of the 36th Division, as there were in many of the Divisions at the time. Usually the pressure was not to make findings of "guilty," but went to the matter of the sentences given. . .

> After the 36th Division was committed to combat, [Dahlquist], the Commanders, and members of the Court-Martial Board had a feeling that when a person was guilty of misbehavior before the enemy, that he should receive a severe sentence. This was a general feeling. The combat troops also had this view. At the time I prosecuted Lt. Homcy, I had no doubt he was guilty of direct disobedience of orders and misbehavior before the enemy.[150]

Despite this new evidence indicating UCI, the ABCMR denied Homcy's application without a hearing on April 27, 1967. Having failed once more to get relief from the Army, Homcy now took his campaign into the courts. On December 22, 1967, he filed suit against the Secretary of the Army in the U.S. District Court for the District of Columbia, seeking a declaratory judgment that his court-martial lacked jurisdiction (and that his conviction should be overturned) and a mandatory injunction ordering the ABCMR to correct his military records. Just as he had claimed in his latest ABCMR application, Homcy alleged in his suit against the Secretary of the Army that constitutional defects in his 1944 court- martial meant he had been deprived of a fair trial.[151]

Presumably so as to have an administrative record upon which to base its response to Homcy's civil suit, the Army now ordered a formal hearing before the ABCMR on Homcy's application. In April 1968, at the request of the Board, COL Waldemar A. Solf, then Chief, Military Justice Division, Office of The Judge Advocate General, examined the legal issues raised by Homcy in his latest application. Solf, in line with earlier legal opinions, rejected Homcy's claim that the absence of a law member had adversely affected his trial. Colonel Solf also rejected any asserted denial of effective assistance of counsel. On the issue of UCI, however, Solf carefully considered the affidavits provided by then-CPTs McRobert and Sitton. Since Homcy had "made a full and unambiguous judicial confession" to misbehavior before the enemy, Solf concluded that there was no UCI issue as to findings. On the contrary, the real issue was whether "unlawful command control infected the sentence adjudged in Homcy's case."[152]

As Solf noted, however, the "standard to be applied is the law as recognized in 1944" and not the test for UCI that exists under the UCMJ.[153] After discussing the law on UCI as it existed in 1944, Solf wrote:

> In 1944, it was lawful for the convening authority, before any case was referred to trial, to provide court-martial members with information as to the state of discipline of the command, as to the prevalence of offenses which had impaired discipline, and command measures which had been taken to prevent offenses. Such instruction could also lawfully present the view of the War Department as to what were regarded as appropriate sentences for designated classes of offenses.[154]

Colonel Solf ultimately concluded in his memorandum that the evidence on the issue of UCI in Homcy's trial was "not conclusive" and it was up to the ABCMR to find the facts in the case.

Colonel Waldemar "Wally" Solf

So what did the Board do? After holding a formal hearing in Homcy's case on July 10, 1968, the ABCMR again recommended denying his application and the Under Secretary of the Army so directed on August 20, 1968.

In early 1969, while his case was pending in the U.S. District Court, Homcy filed a "prayer for relief" with the Court of Military Appeals (COMA), arguing yet again that the absence of a law member at his court-martial meant that the proceedings were defective and that he also had been denied the effective assistance of counsel. Homcy also raised the issue of UCI before COMA, insisting, as he had in his last ABCMR application, that the court members in his case had been "subjected to severe

command pressure by the convening authority." The Court of Military Appeals, however, did not reach the merits of Homcy's petition, ruling that it lacked jurisdiction over Homcy's court-martial because the proceedings in his case were finalized before May 31, 1951, the effective date of the Uniform Code of Military Justice (UCMJ).[155]

With the ABCMR decision before him as the agency's administrative record (and with COMA's decision behind him), U.S. District Court Judge John Smith now considered Homcy's case. The Army had moved for dismissal or, alternatively, for summary judgment. Homcy also had filed a motion for summary judgment based on the record of the ABCMR.

After considering all the evidence presented to him, Judge John Smith agreed with Homcy, and entered summary judgment in his favor. Judge Smith held that Homcy had been denied effective assistance of counsel. Relying on the affidavits from McRobert, Sitton, and Stafford, the judge also held that Homcy's court-martial sentence "was illegal because it was based on improper command influence."[156]

Interestingly, Judge Smith did not overturn the court-martial conviction. Rather, he only granted a limited records correction—and the ABCMR, acting pursuant to the district court's order, corrected Homcy's military records to show an honorable discharge. Later, the Court of Appeals (D.C. Circuit), affirmed in *Homcy v. Resor*, but solely on the basis of improper command influence.[157]

Amazingly, this success in federal court was not enough for Albert Homcy. He now filed a claim with the Army Finance Office for back pay, allowances, and other benefits—which had been taken from him as the result of the total forfeitures punishment imposed by the court-martial panel on October 19, 1944. In particular, Homcy argued that he was due pay and allowances from the date Major General Dahlquist took action in his case. The Army referred Homcy's claim to the Comptroller General. The General Accounting Office subsequently denied Homcy's claim, reasoning that Homcy had received everything he had requested from the U.S. District Court. Homcy now went back into Judge Smith's court and moved to reopen his case in order to obtain a judgment for back pay. The district court denied the motion October 12, 1973.[158]

Homcy then "shifted his efforts to the United States Court of Claims" and hired the Washington, D.C., law firm of Spaulding, Reiter and Rose to attempt to obtain back pay. On June 16, 1976, that court put an end to Homcy's lengthy battle with the Army when it ruled that his claim was barred by the statute of limitations. Homcy's claim for relief, ruled the Court of Claims, "initially accrued on the date he was improperly dismissed from the service."[159] Since that date was December 5, 1944, he had only six years to file any money damage claim. The court expressly declined to revive Homcy's money damage claims based on his recent success at the district court and ABCMR.[160]

So ended the strange case of 2LT Albert C. Homcy. An amazing legal saga that demonstrates, at least in part, that the old saying "persistence wins the prize" very much has some truth in it. Or, as Winston Churchill put it in a speech he gave in October 1941: "Never, never, in nothing great or small, large or petty, never give in except to convictions of honour and good sense. Never yield to force; never yield to the apparently overwhelming might of the enemy."[161] There is no question that Homcy "never gave in." But whether or not justice was served as a result of his success in civilian court is very much an open question.

As for Albert C. Homcy? He spent his last days living in Washington, D.C., at the Soldiers' and Airmens' Home. He died when his heart stopped beating on April 1, 1987. Homcy was 71 years old.[162]

Investigating War Crimes: The Experiences of Colonel James M. Hanley During the Korean War

(Originally published in the September 2012 edition of *The Army Lawyer.*)

While most Army lawyers know that the United States prosecuted hundreds of war crimes in the aftermath of World War II, few know that the Judge Advocate General's Corps (JAGC) contemplated conducting similar trials after hostilities between Chinese, North Korean, and United Nations forces ended on the Korean peninsula. The investigation of these war crimes, and why no prosecutions occurred, is best told through the experiences of Colonel (COL) James M. Hanley, who served as an Army lawyer in Korea from 1951 to 1952.

Colonel Hanley, c. 1951

"Jim" Hanley had an unusual career for an Army lawyer. Although an attorney (Bachelor's Degree in Law, University of Chicago, 1931) with considerable experience in private practice as well as in government practice as an assistant attorney general for North Dakota, Hanley served as an infantry officer in World War II. He was in the thick of combat in Europe as a battalion commander in the famous 442d "Go for Broke" Regimental Combat Team, which consisted almost entirely of Japanese-American Soldiers. Then-Lieutenant Colonel (LTC) Hanley led his battalion with great distinction in Italy, France, and then Italy again. When the war ended, he had spent thirty-nine months in Europe and had been decorated with the Legion of Merit, Bronze Star Medal, French Croix de Guerre, and Italian Cross of Valor. He also proudly wore the Combat Infantryman Badge.[163]

Hanley was demobilized in July 1946, but his return to civilian life was brief. Hanley had applied for and was offered a Regular Army commission—in the Judge Advocate General's Department. As he was a lawyer, Hanley must have thought that being a judge advocate would be interesting, and perhaps a better use of his talents as he re-started his career as a Soldier. Consequently, when Hanley returned to active duty in June 1947, it was as an Army lawyer in the Office of The Judge Advocate General, Washington, D.C.[164]

When the Korean War began in June 1950, LTC Hanley was still in Washington, D.C., where he was serving as a member of the Armed Services Board of Contract Appeals. Some three months later, however, Hanley was in Japan with the Far East Command (FECOM), where he joined the Office of the Staff Judge Advocate (SJA) in Tokyo. Given Hanley's background, it must have been no surprise to him when the SJA, COL George W. Hickman, Jr., decided that Hanley would be a contract attorney in the office.

At the outbreak of the Korean War, General Douglas MacArthur announced that, although the United States had yet to ratify them, the United Nations Command (UNC) would follow the new 1949 Geneva Conventions. Not surprisingly, as MacArthur began to receive reports that North Korean soldiers had murdered wounded South Korean soldiers during fighting around Seoul, he publicly called on the North Korean People's Army (KPA) to adhere to the new Conventions as well. Nevertheless, the KPA continued to torture and kill captured U.S. and South Korean military personnel. MacArthur directed that evidence of these war crimes be collected, with the view toward prosecuting the offenders at the end of the war.

As a result of MacArthur's directive, COL Hickman established a "War Crimes Division" in FECOM and, perhaps given LTC Hanley's extensive combat experience, selected Hanley to take charge of this new organization. As Hanley remembered it, his mission "was to document war crimes revealed in the interrogation of prisoners of war . . . [and by]

investigations in the field," with the intent to use this documentation "in postwar trials of perpetrators."[165]

Consisting of twenty-seven officers, two civilians, and fifteen enlisted personnel, the War Crimes Division quickly went to work. Hanley set out the organization's priorities in investigating war crimes in his "Field Memorandum No. 1."[166] The first task was to gather information about those who had killed or mistreated prisoners of war (POWs). The second priority was "to identify those Koreans who had committed crimes against defenseless civilians."[167] Third was to learn the identity of those who had used POWs for propaganda or, in the case of South Korean POWs, had forced them to join the KPA.

Hanley's war crimes investigations teams exhumed bodies of suspected victims and interviewed U.S. and South Korean soldiers. The best source of war crimes information, however, was the 120,000 North Korean prisoners of war held on Koje-do Island and the southwestern mainland. According to Korean War historian Allan R. Millett, "Hanley's operatives infiltrated the POW groups and recruited informers; Koreans eager to sever ties with the South Korean Labor (Communist) Party and the KPA proved willing converts and informers."[168]

As a result of their work, Hanley and his War Crimes Division determined that, between November 1950 and November 1951, the North Koreans had killed 147 American POWs and executed "at least 25,000 South Koreans and at least 10,000 northern Korean 'reactionaries.'"[169] Hanley's evidence also showed that the Chinese (who had entered the war in October 1950) had killed 2,513 U.S. POWs, "and in addition, 10 British soldiers, 40 Turks, 5 Belgians and 75 UN soldiers of unknown nationality."[170]

On November 14, 1951, Hanley revealed what he knew about North Korean and Chinese atrocities at a press conference held in Pusan. In addition to revealing that the War Crimes Division had been investigating atrocities committed by North Koreans and Chinese, Hanley released information on specific war crimes. He disclosed, for example, that some 1,250 U.S. Soldiers had been murdered near the Yalu River by North Koreans between 16 and 18 September 1950. The men had been transported from a prison camp near Pyongyang and then "shot in groups after being fed rice and wine."[171] Hanley also revealed that the Chinese had committed war crimes, including the killing of 200 U.S. Marine prisoners near Sinhung, ordered by a Chinese regimental commander.[172]

The intent of Hanley's remarks was to dispel any notion amongst the UNC forces that the Chinese forces adhered to the Geneva Conventions.[173] The Chinese People's Volunteer Force claimed that it treated UNC personnel captured on the battlefield in accordance with the Geneva Conventions. The claim was even implied in "an 8th Army training directive and reports in *Stars and Stripes* . . . ."[174] Hanley thought that the UNC forces had to be informed of the "true nature of Chinese military" in its treatment of POWs[175] and thought that revealing evidence of Chinese and North Korean war crimes "would squash a notion that the Chinese would treat POWs well and thus improve the Allied will to fight."[176]

Hanley's oral statements to the press were also released as a written memorandum. When this document reached America's major newspapers, it caused a huge public uproar—especially in families with Soldiers fighting on the Korean peninsula. The "Hanley Report" suggested that the hundreds of American Soldiers who had been reported as "missing in action" in fact had been captured and murdered by the Chinese and North Koreans.[177] The United Nations was already in sensitive armistice negotiations with the Communists at Panmunjom and now the reverberations from the "Hanley Report" threatened to disrupt these talks.[178] Although COL Hanley had obtained approval from the FECOM Public Information Officer prior to releasing his reports on the enemy war crimes, General (GEN) Matthew Ridgway, who replaced General MacArthur as the Supreme Commander of UN forces in April 1951, defused the situation by downplaying Hanley's claims. As Ridgway explained, until the Chinese released a definitive list of American and Allied POWs, no one could possibly know for certain who was actually being held captive, much less whether they had survived.[179]

By 1952, the War Crimes Division had identified 936 POWs who could be tried for war crimes; two-thirds of them were North Koreans. The problem was that most of these criminal cases were built around confessions and corroboration was lacking for most. This explains why the division's staff reviewed 1,185 "confessions" but could find supporting evidence for only seventy-three.

As the war on the Korean peninsula continued, the Army decided that any war crimes trials, if they

were to be held, should be conducted by the United Nations or some other international authority; "the U.S. Army did not want to return to the war crimes trials business."[180] But just who should conduct these trials, and where they should be held, was never decided.

It was, however, the repatriation of Chinese and North Korean POWs in 1952 that ended any chance for war crimes prosecutions in Korea. The problem was that if the Americans retained suspected Chinese and North Korean war criminals for trial, then the Chinese and North Koreans would "hold back their own self-defined Allied 'war criminals,' principally air crewmen and intelligence agents."[181]

As the negotiations continued through 1952, the War Crimes Division was reduced in both size and importance. By September 1952, there were only seven officers, thirteen enlisted Soldiers, and eight interpreters in the organization—about half of its already reduced authorized strength. When it closed its doors in May 1954, the War Crimes Division had concluded that the Chinese and North Koreans "had killed between 5,600 to 6,100 American POWs and ten times more [South] Korean servicemen."[182] But it made no difference in the end because, "with the tacit approval of the [South] Korean government," the UNC issued a blanket amnesty in August 1953 to suspected war criminals . . . as part of the armistice process."[183] The result was, while there were sufficient evidence to support dozens of war crime prosecutions, there would be no trials like those that had occurred in the aftermath of World War II. Politics—the desire to end the Korean conflict—had trumped accountability for war crimes.

As for COL Hanley, he seems to have decided that being an Army lawyer was not for him. Perhaps his experience as the Chief, War Crimes Division, had been too frustrating. Or perhaps he simply missed being an infantry officer. In any event, while still in Korea, and in charge of the War Crimes Division, Hanley requested to be transferred from the JAGC back to the Infantry. After this transfer was approved in March 1952, COL Hanley held several staff assignments at Headquarters, FECOM, before returning to the United States in July 1953. He subsequently served as a regimental commander at Camp Atterbury, Indiana, and Fort Carson, Colorado. His last assignment before retiring in 1960 was in Washington, D.C., as a member of the Army Panel, Armed Services Board of Contract Appeals, the very same board on which he served his first judge advocate assignment.[184] Hanley died in June 1998 at the age of 93. Until the end of his life, he "never lost his conviction that Communist war criminals—meaning the murderers of POWs and helpless civilians—should be held accountable in some fashion."[185] But it was not to be.[186]

"I Want That Man Shot": A War Crime in Vietnam?

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On September 22, 1968, a wounded and unarmed Vietnamese man who had been captured by a patrol of troopers from the 82d Airborne Division, and was thought to be a Viet Cong (VC) guerrilla, was shot and killed. The shooting occurred after the company commander, Captain (CPT) John Kapranopoulos, made this radio transmission to the Soldiers holding the man: "Damn it, I don't care about prisoners; I want a body count. I want that man shot."[187]

About the same time, Kapranopoulos sent out a second patrol to intercept another suspected VC insurgent. When asked by one Soldier in that patrol what he wanted them to do if the Vietnamese man did not have identification papers proving that he was an innocent civilian, Kapranopoulos replied: "Are you shitting me?" As a result, after capturing this suspected VC and apparently failing to find proof that their prisoner was a civilian, the American Soldiers shot and killed him, too.[188]

What follows is the story of CPT Kapranopoulos's general court-martial for the premeditated murder of these two Vietnamese civilians, a two-day affair that occurred shortly after Thanksgiving 1968 at the "Plantation" compound located east of Long Binh, Vietnam.[189]

The accused, twenty-seven-year-old CPT John Kapranopoulos, was described in a contemporary newspaper as "short" and "bespectacled."[190] He was called "Captain K" by his men, as they apparently found his Greek surname too complicated to pronounce. At the time of the killings, Kapranopoulos was in command of Company A, 2d Battalion, 505th Infantry, 82d Airborne Division, and had a reputation as a "gung ho infantry commander [who was] loved by his men and admired by his superiors."[191] This was his second tour in Vietnam; Kapranopoulos had previously served with the 173d Airborne Brigade in 1966, and been awarded the Purple Heart after being wounded in action.[192]

The facts presented at trial, which began on Friday, November 29, and finished the following day, were that on September 22, 1968, A Company troopers "spotted four Vietnamese with packs on their backs entering a woodline in the vicinity of Pho Loc."[193] Since the four men had backpacks and since Pho Loc was "in Charlie-infested country"[194] near the city of Hue, CPT Kapranopoulos ordered artillery fire into the woods. Moments later, the four Vietnamese emerged from the woods. They no longer were carrying their packs, and they started running from the artillery.

First Lieutenant (1LT) Ralph Loomis, a platoon leader in the company, was ordered by CPT K to pursue the fleeing Vietnamese with a squad of men. Two escaped. The third man, however, fell back "and tried to cut across behind" Loomis and his Soldiers while the fourth Vietnamese, who was faster, tried to make his getaway by outrunning the Americans chasing him.

Kapranopoulos, who was observing the pursuit from the top of a nearby hill, ordered 1LT Loomis to leave two of his Soldiers behind to capture the straggler while the rest of the squad chased the faster man. In pursuing the faster man, the Americans fired several rounds from their M-16 rifles, wounding the fleeing Vietnamese in the left hand. First Lieutenant Loomis testified at trial that "the injured man dived behind a bush," but as the GIs got closer, "he came out with his hands up."[195]

As Loomis related under oath, he then radioed Kapranopoulos "and told the captain that we had the man captured, that he was wounded and unarmed." As Loomis testified, Kapranopoulos replied as follows: "Damn it. I don't care about prisoners. I want a body count. I want that man shot."[196] Since the troopers in A Company wore buttons on their jungle fatigues emblazoned with the slogan "Wine, Women, Body Count,"[197] one might think that CPT Kapranopoulos's order was simply a reflection of the mindset in his unit.

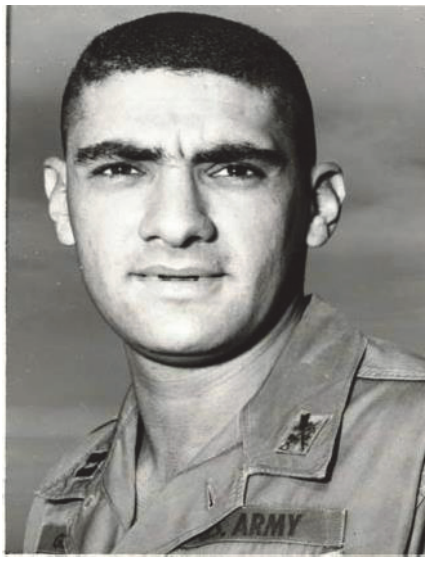
Despite CPT K's order to kill the unarmed prisoner, 1LT Loomis instructed his men not to fire. But Private First Class (PFC) Joseph Mattaliano, who was serving as the radio-telephone operator or "RTO" and had heard Kapranopoulos's order, began firing his weapon. As Loomis remembered: "The first couple [of rounds] missed. The others hit the man in the neck and rib cage."[198]

As for the second Vietnamese, who had fallen back and attempted to evade 1LT Loomis and his men, he was captured not by the two men that

Loomis had left behind but by a squad led by Sergeant (SGT) Teofilo Colon. Captain Kapranopoulos had sent Colon and his men to intercept this second man who, Kapranopoulos thought, might succeed in evading Loomis's men.[199]

At trial, 1LT Joe E. Harris, an artillery forward observer assigned to Kapranopoulos' company, testified that he had been standing next to CPT K and had heard all the radio transmissions from Kapranopoulos to 1LT Loomis; Harris' in-court testimony consequently corroborated what Loomis told the panel. Additionally, 1LT Harris testified that he used a pair of binoculars to watch Colon's squad in action. According to Harris, he saw that Colon's men had captured the suspected VC guerrilla, and that the man was on his knees on the ground with his hands tied behind his back. As Harris watched, "a GI in the squad fired a short execution burst, followed a few seconds later by another. The Vietnamese fell dead."[200]

As Harris put it, he put down the binoculars, turned to CPT Kapranopoulos, and said: "If I were you, I'd untie him." Captain K then "radioed instructions to Colon that the ropes should be removed from the corpse's wrists."[201]



Captain Herbert J. Green

After the trial counsel, Captain Herbert J. Green, presented the testimony of 1LT Loomis and 1LT Harris, the defense counsel, Major (MAJ) Jon N. Kulish, presented his case.

Specialist Five (SP5) John Thielemann, a medic who had been with 1LT Loomis' men when they captured the wounded and unarmed Vietnamese man, testified that he had slipped while jumping a gully and dropped his weapon. Private First Class Mattaliano then testified that after Thielemann had dropped his rifle, the Vietnamese in their custody "made a suspicious move toward [the weapon], so he opened fire to protect his buddy." In any event, Mattaliano said, there had been no radio transmission from CPT K; there had been no orders to kill any prisoner.[202]

As for the Vietnamese captured by Colon's squad? Sergeant Colon testified that this man had been killed during the chase and that there had never been any order from CPT Kapranopoulos that prisoners were not to be taken in combat. Several other men who had participated in the capture of the two suspected VC insurgents also testified that "they didn't hear any orders to kill [prisoners]."[203]

Lieutenant Colonel (LTC) Robert Hurley, CPT K's battalion commander, testified that Kapranopoulos was "the best company leader 'I've seen in my 19 ½ years of military service."[204] Hurley also undercut 1LT Loomis's credibility with the panel hearing the case when he testified that Loomis once told him "he wasn't sure he could kill anyone or have anyone killed." This statement, said Hurley, "was a real shock to me." It likely was somewhat surprising to the panel members as well, given their professions and current location. Hurley's good character evidence was buttressed by the testimony of Brigadier General (BG) Alexander R. "Bud" Bolling, the commander of the 82d Airborne Division's 3d Brigade. Bolling, who testified before Hurley took the stand, told the panel that Kapranopoulos "was one of the most outstanding company commanders I've ever had in my command."[205]

Not surprisingly, Major Kulish called CPT K to the stand to testify on his own behalf. After swearing to tell the whole truth and nothing but the truth, Kapranopoulos "told the court that he never said a word to Loomis or Colon about killing the prisoners." As for 1LT Loomis, CPT Kapranopoulos said that he "was a lousy platoon leader" and had fabricated the story of a radio transmission. Since a number of Soldiers, in addition to LTC Hurley, testified that "Loomis had a mighty funny attitude toward combat because he didn't like to kill people," this probably undercut 1LT Loomis' credibility with the panel.[206] There was, however, no attack on 1LT Harris' veracity, and his testimony about the substance of CPT K's radio transmissions was unrebutted.

After Colonel (COL) Jack Crouchet, the law officer assigned to the court-martial, instructed the panel, the court closed for deliberation. The eight officer members spent just thirty minutes before returning with their verdict: not guilty of the charge and its two specifications of premeditated murder. Kapranopoulos, who would have been sentenced to life imprisonment if he had been convicted as charged, walked out of the small, air-conditioned courtroom as a free man.[207]

Had CPT K been found guilty, the government intended to try PFC Mattaliano for his part in the shooting. After the acquittal, however, the case against Mattaliano was dropped.

What explains the result in *United States v. Kapranopoulos*? Did a war crime occur? Was the evidence sufficient for a finder of fact to conclude—beyond a reasonable doubt—that the accused was guilty of ordering the unlawful killing of two prisoners? If so, why would the panel of officers acquit him?

The evidence—testimony from two lieutenants who had no motivation to lie or concoct a story incriminating CPT Kapranopoulos—was overwhelming. But from the outset, the senior Army lawyer involved in the case knew a successful prosecution would be problematic. The Tet Offensive of January 1968—in which vicious, coordinated VC and North Vietnamese attacks had been defeated but with heavy U.S. and Army of Vietnam (ARVN) losses—was still fresh in everyone's mind and attitudes toward the enemy had hardened.[208] Additionally, at this time, all courts-martial were heard by panels (there was no option for trial by military judge until 1969) and, for trials held in Vietnam, this meant panels consisting, at least in part, of combat commanders—men who had seen hard fighting and consequently not only would be sympathetic to CPT K's predicament but would be loath to find him guilty of war-related misconduct.

This explains, at least in part, why MAJ Barney L. Brannen, Jr., the Staff Judge Advocate at II Field Force, told the convening authority, Lieutenant General (LTG) Walter T. "Dutch" Kerwin that, although he (Brannen) believed Kapranopoulos would be found not guilty, "we had no choice but to try him anyway."[209] In Brannen's view, there was no question that CPT Kapranopoulos had ordered the killings and was guilty; this alone was sufficient reason to try him by general court-martial. But an additional reason for prosecuting him was that Captain K's "we don't take prisoners in combat" order was now common knowledge, and failing to prosecute him would send the message that such an attitude was acceptable in the II Field Force. General Kerwin saw it the same way, and so the case went to trial.[210]

Major General Kenneth J. Hodson and Major Barney L. Brannen, Jr.

Later, after the acquittal of CPT Kapranopoulos, the president of the court-martial told MAJ Brannen that "we [the panel] thought CPT K was guilty, but we just couldn't find him guilty." Just why this officer told Brannen that the panel had engaged in an act of jury nullification is an open question, but the man apparently felt comfortable in sharing this information.[211]

Time magazine later pointed to the result in *Kapranopoulos* as proof that "military courts sometimes follow the unofficial 'mere gook' rule, which devalues Vietnamese lives."[212] According to *Time*, "atrocities" like the killings in the CPT K court-martial occurred because "the tension of being feared and hated in a remote, racially different Asian country . . . pushed many Americans toward a tribalistic logic—all "gooks" are enemies and therefore killable."[213]

What became of some of the players in this event? Walter T. "Dutch" Kerwin, Jr. reached four-star rank and was the Army Vice Chief of Staff before retiring in 1978. He died in 2008. Alexander R. "Bud" Bolling finished his distinguished career as a major general. He retired in 1973 and died in 2011. The II Field Force Staff Judge Advocate, MAJ Barney Brannen, retired as a colonel in 1979; he finished his career in our Corps as the Commandant of The Judge Advocate General's School. The trial counsel, Captain Herbert "Herb" Green, is perhaps best remembered for his many years as a trial judge.

He retired as a colonel in 1994 and now works as an administrative law judge for the Social Security Administration. As for then-CPT Kapranopoulos? A quick Internet search shows that he apparently retired as a lieutenant colonel and today lives in Arizona.

A Forgotten Legal Episode from the Massacre at My Lai

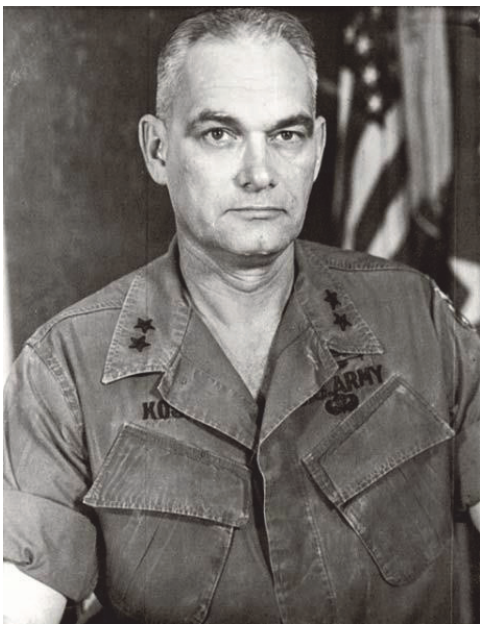
(Originally published in the November 2015 edition of *The Army Lawyer.*)

In March 1970, Lieutenant General (LTG) William R. Peers completed his official investigation into the murders committed by Lieutenant (LT) William F. "Rusty" Calley and his platoon at the South Vietnamese sub-hamlet of My Lai 4 in March 1968.[214] On the basis of Peers's scathing report about what has become known as the "My Lai Massacre," Major General (MG) Samuel W. Koster, who was in command of the 23d Infantry "Americal" Division at the time, and to which Calley and his men had been assigned, was charged with failure to obey lawful regulations and dereliction of duty in covering up the massacre.[215] While Koster was never prosecuted at a court-martial,[216] Secretary of the Army Stanley R. Resor took administrative action against him: Stanley vacated Koster's temporary promotion as a major general, reducing him to his permanent rank of brigadier general, and he revoked the Distinguished Service Medal (DSM) that Koster had been awarded as Americal Division commander.[217] He also directed the filing of a Letter of Censure in Koster's official military personnel records.[218]

But Koster fought back in the courts, and what follows is the story of that struggle—*Samuel W. Koster v. The United States*—an episode in military legal history that today is mostly forgotten.[219]

Born in December 1919, Samuel William Koster graduated from the United States Military Academy in 1942 and was commissioned in the Infantry.[220] He subsequently had a stellar career, which included substantial wartime experience. Koster served as a company and battalion commander in World War II (earning a Silver Star, two Bronze Stars, and the Purple Heart) and was the commanding officer of the Eighth Army's guerilla warfare unit during the Korean War.[221] He also had significant peacetime experience as an instructor at West Point, and in various assignments at Fort Benning, Georgia, in the Pacific, and at the Pentagon.[222]

By late 1968, Koster held the permanent rank of brigadier general and the temporary rank of major general.[223] While wearing two stars, Koster commanded the 23d Infantry Division in Vietnam. This was "a difficult assignment because of the conglomerate make-up of the Division and its very large area of operations."[224] After returning from Vietnam, while still holding the temporary two-star rank, Koster served as the Superintendent of the United States Military Academy, a high honor and an assignment that indicated that Koster had not yet reached the end of this career as an Army general officer.[225]



Major General Samuel W. Koster, c. 1968

On March 16, 1968, Lieutenant William "Rusty" Calley and his platoon, members of Major General Koster's command, murdered at least 300 Vietnamese civilians near the village of My Lai.[226] Shortly after this massacre of non-combatant civilians, Koster "came to know of at least four irregularities that should have spurred him to call for a fuller investigation and for a report of the results to be made to higher authority"[227] as required by regulations promulgated by the Military Assistance Command, Vietnam (MACV).[228] First, Koster learned that there were "unusual" body count figures for the day, in that 128 enemy soldiers were reported killed yet only two friendly soldiers killed and eleven wounded. Second, he learned that "an unusually large number" of Vietnamese civilians had been killed by artillery fire. Third, Koster "received personally a watered-down version of the report by a U.S. helicopter pilot who tried to stop the killing at My Lai."[229] Finally, a month later, Major General Koster learned about a Viet Cong leaflet claiming

that U.S. troops had massacred "some 500 civilians" near the hamlet of My Lai.[230]

Lieutenant Calley at trial, Fort Benning, Georgia

While the subsequent investigation into the My Lai Massacre done by LTG William R. Peers revealed that Koster did make some inquiries, Peers ultimately concluded that Major General Koster had not done enough. As Peers put it, Koster was one of thirty persons who had knowledge of the war crimes committed at My Lai "but had not made official reports, had suppressed relevant information, had failed to order investigations, or had not followed up on the investigations that were made."[231]

As a result of these failures, while serving as division commander, charges were preferred against Koster in March 1970.[232] The charges, which had been drafted by Colonel (COL) Hubert Miller,[233] then a judge advocate assigned to the Office of the Judge Advocate General, alleged that Koster had failed to obey orders and regulations and had been derelict in the performance of his duty, a violation of Article 92, Uniform Code of Military Justice (UCMJ).[234]

An investigation conducted pursuant to Article 32, UCMJ, "acknowledged" that Koster "may have been remiss" in not ordering a proper investigation into the alleged war crimes, but recommended dismissal of the court-martial charges against him.[235] The result was that charges were dismissed by Lieutenant General Jonathan O. Seaman in January 1971.[236]

In May 1971, on the recommendation of General (GEN) William C. Westmoreland, then serving as Army Chief of Staff, Secretary of the Army Resor took the following administrative actions against Major General Koster. First, he vacated Koster's appointment as a temporary major general, so that Koster reverted to his permanent rank of brigadier general.[237] Second, he directed that a Letter of Censure, which criticized Koster's failure to report known civilian casualties to higher headquarters and his failure to ensure that a proper investigation was conducted into killings at My Lai, be placed in Koster's military personnel file.[238] Finally, Secretary Resor directed the withdrawal of the Distinguished Service Medal awarded to Koster for his service as Americal Division commander.[239]

Instead of leaving the Army after his loss of a star, Koster became deputy commander of the Army's Test and Evaluation Command at Aberdeen Proving Ground, Maryland.[240] He hoped to be promoted to the permanent grade of major general, but adverse information in his Officer Efficiency Reports apparently prevented any such promotion. Additionally, when Koster retired from active duty in 1973, Secretary of the Army Callaway, who had succeeded Secretary Resor, refused to find that Koster had performed satisfactorily in the grade of major general.[241] Under the law as it then existed, Koster could have received retired pay as a major general if Callaway had determined that he had served satisfactorily as a two-star for six months.[242] When Callaway declined to make this determination, Koster's retired pay was computed based on his permanent rank as a one-star.[243]

For the next ten years, Brigadier General (BG) Koster fought to clear his name. He insisted that the Army's censure of him was "unfair and unjust" and based on "faulty conclusions."[244] He admitted that he had been "under the impression that only about 20 civilians had been 'inadvertently killed' by artillery, helicopter guns and 'some small-arms fire'" at My Lai, but insisted that this was an insufficient basis to impose administrative "punishments" upon him.[245]

In January 1974, Koster filed a petition with the Army Board for Correction of Military Records (ABCMR).[246] He alleged that he was improperly retired as a brigadier general and that his records should be corrected to reflect retirement as a two-star.[247] Koster also requested removal of the Letter of Censure from his military personnel records and the restoration of his Distinguished Service Medal.[248]

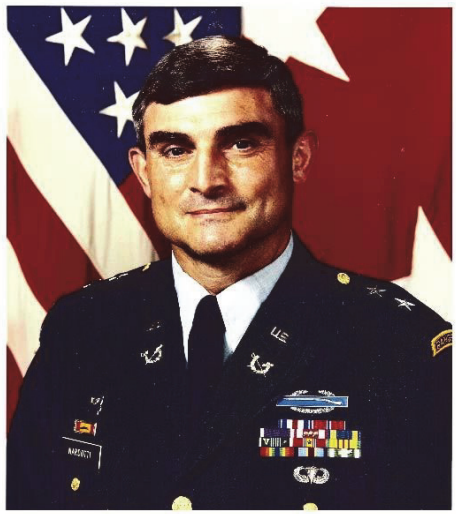
Three years later, in January 1977, Brigadier General Koster also filed a petition in the U.S. Court of Claims.[249] Since his petition with ABCMR was still pending, Koster apparently filed his petition with the Court of Claims so as to avoid the running of the statute of limitations in his case. This also explains why Koster concurrently petitioned the Court to suspend proceedings until the ABCMR had acted in his case.[250]

For reasons that are not clear from the legal records in the proceedings, it took Brigadier General Koster more than five years to submit a 415-page brief with seventy-five exhibits to the ABCMR.[251] This explains why it was not until March 1980 that the ABCMR was able to act upon Koster's January 1974 petition. In an "extensive memorandum," the Board ruled against Brigadier General Koster, concluding that the administrative sanctions imposed by the Secretary of the Army—the Letter of Censure, termination of his temporary appointment as a major general, and withdrawal of his DSM—were "justified on the record of evidence and were not arbitrary or capricious."[252]

With the ABCMR decision now final, it was time for the Court of Claims to examine Koster's petition. The Civil Division of the Department of Justice (DOJ), representing the government, filed a motion for summary judgment on July 7, 1981.[253] While DOJ attorneys filed the 100-page brief with the court, it was authored by then-Major (MAJ) Michael J. Nardotti, Jr., a relatively young judge advocate assigned to the Litigation Division, Office of the Judge Advocate General.[254]

Nardotti presented a number of reasons in support of the motion for summary judgment. First, he argued that plaintiff Koster's failure to submit a brief to the ABCMR for more than five years after filing his original petition meant that Koster's claim had "excessive and inexcusable delay." The government was prejudiced by this delay and the court, argued Nardotti, should dismiss Koster's petition as barred by the doctrine of laches.[255]

Alternatively, argued MAJ Nardotti, as the Court of Claims had jurisdiction over only money claims against the government, it had no jurisdiction to review the Secretary of the Army's decision to vacate Koster's temporary appointment to major general or to review Koster's claim for retirement at two-star rank. It also had no jurisdiction over the Letter of Censure or the revocation of Koster's DSM.[256]



Major General Michael J. Nardotti, Jr., The Judge Advocate General, U.S. Army, 1993-1997

The Court of Claims agreed that it lacked the power to resolve the issue of the letter and the decoration, but it found that the vacation of his temporary appointment to two-star rank and his reduced retirement pay as a brigadier general did "colorably involve money" and consequently gave the court jurisdiction over these issues.[257]

But the court agreed with MAJ Nardotti's argument that the only issue was whether the ABCMR's decision in Koster's case was "arbitrary, capricious, unsupported by substantial evidence, in bad faith or contrary to law or regulation."[258] After carefully examining the administrative record created by the ABCMR and considering the written and oral arguments presented by both sides, the Court of Claims ruled against Koster.[259] On July 28, 1982, it held that it "was not able to conclude that the decision of the ABCMR should be overturned."[260] The court granted the government's motion for summary judgment and it denied Koster's cross-motion for summary judgment.[261]

[1] For the details on Canby's life, *see* (MAX L. HEYMAN, JR., PRUDENT SOLDIER: A BIOGRAPHY OF MAJOR GENERAL E.R.S. CANBY (1959)).

[2] Wilfred P. Deac, *Indian Fortress Assailed*, WILD WEST, Feb. 1991, at 39.

[3] For more on the decision to try the Modocs by military commission, *see* Doug Foster, "*Imperfect Justice: The Modoc War Crimes Trial of 1873*," 100 OREGON HISTORICAL Q., Fall 1999, at 246–87.

[4] *Mexican Raiders Kill Three in Texas*, N.Y. TIMES, June 15, 1916, at 15.

[5] 202 S.W. 951 (Tex. Crim. App. 1918).

[6] Wilson's decision to avoid an all-out war with Mexico was prudent, since the United States ultimately did enter the war on the Allied side in April 1917, ten months after the fight at San Ygnacio.

[7] ALEJANDRO DE QUESADA, THE HUNT FOR PANCHO VILLA 5 (2012).

[8] *Id*. at 23.

[9] For more on President Wilson's decision to send Pershing to Mexico, *see* HERBERT M. MASON JR., THE GREAT PURSUIT 65–73 (1970). Most scholars believe Wilson's dispatch of Pershing's expedition was lawful as "extra-territorial law enforcement in self defense," as Mexican authorities were "powerless" to stop raids by bandits across the U.S.-Mexican border, and there was no other available remedy. YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE 218 (3d ed. 2001).

[10] DE QUESADA, *supra* note 7, at 48.

[11] Arce v. State, 202 S.W. 951, 952 (Tex. Crim. App. 1918).

[12] *Id.*

[13] For more on Crowder, *see* DAVID A. LOCKMILLER, ENOCH H. CROWDER: SOLDIER, LAWYER AND STATESMAN 21 (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.

[14] LOCKMILLER, *supra* note 13, at 952. Crowder had written this opinion in response to the question of whether Article 58 of the Articles of War applied to Pershing's operations in Mexico. Under the Articles of War as existed in 1916, a court-martial had no subject-matter jurisdiction over common law crimes such as murder, rape, or robbery unless the offense occurred "in time of war." Crowder's reasoning was entirely logical, and gave Pershing the expanded jurisdiction granted by Article 58. His official opinion also followed earlier case law enunciated in Winthrop's *Military Law and Precedents* (2d ed. 1920) ("a declaration of war by Congress is not absolutely necessary to the legal existence of a status of foreign war"). WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 668 (2d ed. 1920). Despite its logic, and longstanding precedent, Crowder's reasoning was rejected during the Vietnam era by the Court of Military Appeals in *United States v. Averette*, 41 C.M.R. 363 (1970) (holding that "time of war" means declared war). Crowder's reference to "Vattel" was a nod to Swiss jurist Emmerich de Vattel, whose 1758 *Le Droit de Gens ou Principe de la Loi Naturelle* was considered to be an authoritative text by lawyers of Crowder's era.

[15] *Arce*, 202 S.W. at 953.

[16] *Id.*

[17] Davidson was almost certainly thinking of the June 21, 1916 "Battle of Carrizal," where an "impetuous" American officer, Captain Charles T. Boyd, violated orders to avoid a confrontation with Mexican government troops and instead attacked a detachment of Mexican soldiers in Carrizal. In the firefight that followed, Boyd was killed, his unit was routed, and at least twenty-three men were taken prisoners. ANDREW J. BIRTLE, U.S. ARMY COUNTERINSURGENCY AND CONTINGENCY OPERATIONS DOCTRINE 205 (1998). Ten days later, the Mexicans delivered these American prisoners to U.S. forces in El Paso, Texas. DE QUESADA, *supra* note 7, at 57.

[18] *Arce*, 202 S.W. at 953.

[19] DE QUESADA, *supra* note 7, at 65. They most likely entered pleas of guilty to avoid a death sentence; the seventeen men knew that four of their fellow *Villistas* had been convicted of murder and hanged in Deming, New Mexico, less than four months after the Columbus raid.

[20] *Id.* at 67. For more on Larrazolo's pardon, *see* Michael Miller, *Pardon of the Villistas—1917*, N.M. STATE RECORDS CTR. & ARCHIVES, http://www.newmexicohistory.org/filedetails.php?fileID=22053 (last visited May 13, 2012).

[21] Memorandum of Points and Authorities in Support of Motion to Dismiss Count One of the Indictment for Failure to State a Violation of the Charging Statute (Combat Immunity), at 1, 7–8, United States v. Lindh, 212 F. Supp. 2d 541 (E.D. Va. 2002) (No. 02-37-A). For more on the legal status of Taliban fighters under the law of armed conflict, *see* GARY D. SOLIS, THE LAW OF ARMED CONFLICT 211–16 (2010).

[22] Office of the Inspector Gen., Headquarters, 45th Infantry Div., Report of Investigation, subj: Shooting of Prisoners of War under direction of Captain John T. Compton 5 (Aug. 5, 1943) [hereinafter Compton Report of Investigation].

[23] ALBERT N. GARLAND & HOWARD MCGRAW, SICILY AND THE SURRENDER OF ITALY (U.S ARMY IN WORLD WAR II. THE MEDITERRANEAN THEATER OF OPERATIONS 141–42 (1965).

[24] James J. Weingartner, *Massacre at Biscari: Patton and an American War Crime*, HISTORIAN, Nov. 1989, at 24, 25.

[25] Office of the Inspector Gen., Headquarters, 45th Infantry Div., Report of Investigation of Shooting of Prisoners of War by Sgt. Horace T. West 1 (Aug. 5, 1943) [hereinafter West Report of Investigation].

[26] RICK ATKINSON, THE DAY OF BATTLE 118 (2007).

[27] Compton Report of Investigation, *supra* note 22, at 1.

[28] *Id.* at 3 (statement by Captain John T. Compton (July 1943)).

[29] *Id.*

[30] CARLO D'ESTE, BITTER VICTORY: THE BATTLE FOR SICILY 318 (1988).

[31] While Patton initially was not interested in a trial for West and Compton, D'Este notes that he later changed his mind. *Id*. at 319. Atkinson writes that this change of heart occurred after the 45th Division's IG found "no provocation on the part of the prisoners . . .They had been slaughtered." Patton then said: "Try the bastards." ATKINSON, *supra* note 26, at 119.

[32] United States v. West, No. 250833 (45th Inf. Div., 2–3 Sept. 1943), at 4 [hereinafter *West* Record of Trial].

[33] Headquarters, 45th Infantry Div., Gen. Court-Martial Order No. 84 (Nov. 13, 1943), in United States v. Compton, No. 250835 (45th Inf. Div., Oct. 23, 1943).

[34] Compton Report of Investigation, *supra* note 22, at 2.

[35] *West* Record of Trial, *supra* note 32, at 101.

[36] *Id.* at 58–59; Weingartner, *supra* note 24, at 28.

[37] *West* Record of Trial, *supra* note 32, at 8.

[38] *West* Report of Investigation, *supra* note 25, at 2.

[39] Headquarters, 45th Infantry Div., Gen. Court-Martial Order No. 86 (Nov. 4, 1943).

[40] U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, RULES OF LAND WARFARE para. 347 (Oct. 1, 1940) (emphasis added).

[41] United States v. Compton, No. 250835 (45th Inf. Div., Oct. 23, 1943), at 58–59.

[42] *Id.* at 55.

[43] *Id.* at 48.

[44] *Id.* at 63.

[45] MANUAL FOR COURTS-MARTIAL, UNITED STATES para. 148a (1928).

[46] Staff Judge Advocate's Review, *in West* Record of Trial, *supra* note 32, at 3.

[47] Weingartner, *supra* note 24, at 38.

[48] ATKINSON, *supra* note 26, at 20.

[49] *Id.* 39.

[50] Memorandum from Lieutenant Colonel W. H. Johnson, Judge Advocate Gen.'s Corps Exec., for Gen. Brannon, subj: Records of Trial [Compton & West] (May 26, 1950).

[51] U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, RULES OF LAND WARFARE para. 345.1 (Oct. 1, 1940) (C1, Nov. 15, 1944) (emphasis added).

[52] For more on the Army's decision to remove superior orders as an absolute defense to a war crime, see GARY D. SOLIS, THE LAW OF ARMED CONFLICT 354–55 (2009). Today, paragraph 509a of Field Manual 27-10 provides that "the fact that the law of war has been violated pursuant to an order of a superior authority … does not deprive the act in question of its character as a war crime, nor does it constitute a defense in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful." U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 509a (July 1956).

[53] As for George S. Patton, widely regarded as one of the best combat commanders of all time, General Eisenhower said it best: "His emotional range was very great and he lived at either one end or the other of it." SOLIS, *supra* note 52, at 386. Assuming that Eisenhower was correct, what does this say about Patton's responsibility for West and Compton's actions in Sicily?

[54] IAN SAYER & DOUGLAS BOTTING, HITLER'S LAST GENERAL (1989). For more on the Malmedy murders, *see* CHARLES WHITING, MASSACRE AT MALMEDY (1971). *See also* DANNY S. PARKER, FATAL CROSSROADS (2012); JAMES J. WEINGARTNER, A PECULIAR CRUSADE (2000). For a short legal analysis of the Malmedy trial, *see* Fred L. Borch, *The 'Malmedy Massacre' Trial: The Military Government Court Proceedings and the Controversial Legal Aftermath*, ARMY LAW., Jan. 2011, at 3.

[55] CHARLES WHITING, MASSACRE AT MALMEDY 52–53 (1971). "Double-tapping" is the practice of shooting wounded or apparently dead soldiers to insure that they are dead. Some also call it a "dead check." Under customary international law and the Geneva Conventions of 1929, however, double tapping was—and remains—a war crime because it is unlawful to kill the wounded. *See* SOLIS, *supra* note 21, at 327.

[56] JAMES J. WEINGARTNER, A PECULIAR CRUSADE: WILLIS M. EVERETT AND THE MALMEDY MASSACRE 53 (2000).

[57] Convention (IV) Respecting the Laws and Customs of War on Land art. 4, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.

[58] Convention Relative to the Treatment of Prisoners of War art. 2, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343.

[59] While he had been an attorney since graduating from Atlanta Law School in 1924, Everett had very little, if any, trial experience. His official military records show that his law practice focused on "titles, estates, investments, corporation and civil law." TJAGLCS Historian's Files, WD AGO Form 66-4, Main Civilian Occupation (Dec. 1, 1944). Given the relaxed rules of evidence and procedure in the Malmedy trial, however, Everett's lack of litigation experience did not hurt his effectiveness as a defense counsel.

[60] Wahler graduated from the 13th Officer Candidate Class at The Judge Advocate General's School in late 1945. JUDGE ADVOCATE GENERAL'S SCHOOL, STUDENT AND FACULTY DIRECTORY 79 (1946) [hereinafter DIRECTORY].

[61] Ellis graduated from the 21st Officer Class at the Judge Advocate General's School in 1944. *Id.* at 14. Like Everett, he too had little criminal litigation experience: Ellis had been a corporate tax attorney in civilian life. *See* WEINGARTNER, *supra* note 56, at 40.

[62] WEINGARTNER, *supra* note 56, at 54.

[63] *Id*. at 58.

[64] *See* WHITING, *supra* note 55, at 191.

[65] *Id.* at 194.

[66] *See* WEINGARTNER, *supra* note 56, at 71.

[67] *Id.* at 42.

[68] *Id*. at 74.

[69] *Id.* at 44.

[70] *See* WHITING, *supra* note 55, at 195; WEINGARTNER, *supra* note 56, at 84–85.

[71] *See* WEINGARTNER, *supra* note 56, at 91. Joachim Peiper had extensive combat experience and was highly decorated. Born in Berlin in January 1915, he joined the SS in 1934 and was commissioned after completing officer candidate school. After the outbreak of World War II, Peiper fought in Poland and France. He then moved east with Waffen-SS forces as part of Operation Barbarossa. In March 1943, Peiper was awarded the Knight's Cross for heroism near Charkov, Russia, and he was decorated a second time—with the Knight's Cross with Oakleaves—in January 1944 for his bravery on the Eastern Front. On January 11, 1945, shortly after the Malmedy killings, Peiper was decorated a third time—with the Knights Cross with Oakleaves and Swords—for his actions during the defensive withdrawal of German forces in France after the D-Day landings. (While the Knight's Cross was Germany's highest decoration for combat valor in World War II, it is more akin to the Army Distinguished Service Cross than the Medal of Honor.) *See* JOHN R. ANGOLIA, ON THE FIELD OF HONOR 228 (1979).

[72] *Id.* at 92.

[73] The seventy-fourth accused originally arraigned was released to French authorities before the panel retired to reach a verdict. He was a French citizen, and the French exercised jurisdiction in his case. *See* WEINGARTNER, *supra* note 56, at 103.

[74] *Id*. at 105.

[75] FRANK M. BUSCHER, U.S. WAR CRIMES TRIAL PROGRAM IN GERMANY, 1946–1955, at 38 (1989).

[76] Everett v. Truman, 334 U.S. 824 (1948); *see* BUSCHER, *supra* note 75, at 38.

[77] *See* WEINGARTNER, *supra* note 56, at 151.

[78] *See* BUSCHER, *supra* note 75, at 38–39. Royall's actions almost certainly were influenced by his own experience with military commissions. In 1942, then-COL Royall had served as one of three defense counsel for the eight U-boat saboteurs being prosecuted before a military tribunal convened by Franklin D. Roosevelt. (Royall was not a member of the JAGD, but he had received a direct commission as a colonel, Army General Staff, in 1942.) Believing that Roosevelt lacked the constitutional authority to convene a secret military commission to try his clients, Royall aggressively challenged the lawfulness of the tribunal before the U.S. Supreme Court. Although he ultimately did not prevail, Royall insisted that "to preserve our own system of government," it was important that the military commission not trample on the rights of the German defendants. As Royall put it: the United States would have "an empty victory" if it failed to adopt procedures at the military commission that reflected "fair administration of law." The real test of a system of justice "is not when the sun is shining but when the weather is stormy." LOUIS FISHER, MILITARY TRIBUNALS AND PRESIDENTIAL POWER 113–14 (2005).

[79] *See* BUSCHER, *supra* note 75, at 38.

[80] *Id.* at 93.

[81] *Id.*

[82] *Id.*

[83] *See* BUSCHER, *supra* note 75, at 39; WEINGARTNER, *supra* note 56, at 177.

[84] *See* BUSCHER, *supra* note 75, at 39.

[85] *Id.*

[86] *See* BUSCHER, *supra* note 75, at 40.

[87] *Id.* at 41. Joseph Raymond McCarthy (1909–1957) served as U.S. Senator from Wisconsin from 1946 to 1957. While McCarthy was relatively unknown at the time of the Malmedy hearings, he soon became a high-profile national figure after claiming in February 1950 that he had a list of Communist Party members who were employed by the U.S. State Department. McCarthy subsequently charged that Communists (and Soviet spies) had infiltrated other parts of the U.S. Government, including the U.S. Army. By December 1954, however, McCarthy's tactics and his inability to prove claims of subversion resulted not only in a loss of popularity but also a vote of censure by his fellow senators. McCarthy died at Bethesda Naval Hospital in May 1957. He was forty-eight years old. However, his impact on America has not been forgotten. The term "McCarthyism" (coined by his opponents) continues to mean the "political practice of publicizing accusations of disloyalty or subversion with insufficient regard to evidence." AMERICAN HERITAGE DICTIONARY 809 (1979).

[88] MALMEDY MASSACRE REPORT, SUBCOMMITTEE OF THE COMMITTEE ON ARMED SERVICES, U.S. SENATE, 81ST CONG., 1ST SESS. 6–7 (1949).

[89] *Id.* at 7.

[90] *Id.* at 8.

[91] *Id.* at 40.

[92] *See* WHITING, *supra* note 55, at 51–52; WEINGARTNER, *supra* note 56, at 62; *see also* Michael Reynolds, *Massacre at Malmedy During the Battle of the Bulge*, WORLD WAR II, Feb. 2003, at 16–21.

[93] *See* WEINGARTNER, *supra* note 56, at 151.

[94] *Id.* at 68, 206.

[95] *Id.* at 30–31.

[96] 3242 Signal Photo Co., Signal Corps photograph no. 00842-HQ-A9-10 Dec 45-3rd Army (Herod) (on file with Regimental Historian, TJAGLCS).

[97] U.S. Forces European Theater, Deputy Theater Judge Advocate's Office, War Crimes Branch, Review and Recommendations, *United States v. Franz Strasser*, Case No. 8-27, at 2 (Oct. 14, 1945), http://www.jewishvirtual-library.org/jsource/Holocaust/dachautrial/fs17.pdf (last visited Dec. 7, 2013) (follow Home; The Library; History; Modern Jewish History/World War II; Post-war/War Crimes; War Crimes Trials and Results/Dachau Trials; The Cases/U.S. POW Cases; Other Prisoner of War Cases/Case No. 8-5 (U.S. vs. Harra Kielsinger) Tried Oct. 24, 47) (the document is mislabeled on the webpage).

[98] In Nazi Germany, a "Kreisleiter" was a "county leader" and was the highest Nazi Party official in a "kreis" or county municipal government. Today, Kreis Kaplitz is in the Czech Republic. In 1944, however, it was part of Germany, having been annexed as part of German-speaking Sudetenland in October 1938.

[99] *Strasser*, Case No. 8-27, at 6.

[100] *Id*.

[101] Headquarters, Third U.S. Army, Special Orders No. 229 (Aug. 19, 1945). For more on war crimes trials at Dachau, *see* JOSHUA M. GREENE, JUSTICE AT DACHAU (2003). Strasser and Lindemeyer were apprehended and charged after the Army conducted an investigation into the deaths of the five airmen soon after May 8, 1945 (Victory in Europe (VE) Day). JACK R. MYERS, SHOT AT AND MISSED: RECOLLECTIONS OF A WORLD WAR II BOMBARDIER 298–99 (2004).

[102] *Strasser*, Case No. 8-27, at 1.

[103] *Id.* at 5.

[104] *Id.*

[105] *Id.* at 4.

[106] *Id.* at 6.

[107] Perhaps by Lindeman or one of the men accompanying him, although this is unclear from the record.

[108] *Strasser*, Case No. 8-27, at 6.

[109] EDWARD F. L. RUSSELL (LORD RUSSELL OF LIVERPOOL), SCOURGE OF THE SWASTIKA 39 (2002).

[110] *Id.* at 40.

[111] *Strasser*, Case No. 8-27, at 1.

[112] A native of Saginaw, Michigan, Ford R. Sargent entered The Judge Advocate General's Department after graduating from the 11th Officer Course held at The Judge Advocate General's School, Ann Arbor, Michigan. THE JUDGE ADVOCATE GEN.'S SCH., STUDENT AND FACULTY DIRECTORY 42 (1946).

[113] *Strasser*, Case No. 8-27, at 8.

[114] *Id.*

[115] *Id.*

[116] While the official legal view of the Judge Advocate General's Department was that "the rule in American municipal criminal law as to reasonable doubt and presumption of innocence was not applicable as such to war crimes trials, in the absence of a suitable prescribed standard, the rule requiring that an accused be presumed innocent until proven guilty and that proof of guilt be established beyond a reasonable doubt was adhered to in war crimes trials" in the European Theater (emphasis added). REPORT OF THE DEPUTY JUDGE ADVOCATE FOR WAR CRIMES, EUROPEAN COMMAND, JUNE 1944 TO JULY 1948, at 67 (1948).

[117] *Strasser*, Case No. 8-27, at 8.

[118] *Id.* Claude B. Mickelwait had a lengthy and distinguished career as an Army lawyer. Born in Iowa in July 1894, he later moved to Twin Falls, Idaho and graduated from the University of Idaho in 1916. He entered the Army as a first lieutenant in 1917 and served in a variety of infantry assignments until obtaining a law degree in 1935 from the University of California School of Jurisprudence and transferring to The Judge Advocate General's Department.

With the invasion of North Africa in 1942, Mickelwait was stationed in Casablanca as Judge Advocate, Atlantic Base Section. He subsequently served as Judge Advocate, Fifth Army, in both North Africa and Italy. In March 1944, Colonel (COL) Mickelwait became Acting Theater Judge Advocate of the North African Theater of Operations. Two months later, he was the Judge Advocate of First Army Group in England and, in July 1944, deployed to France as the Judge Advocate of the 12th U.S. Army Group.

In August 1945, COL Mickelwait was appointed Deputy Theater Judge Advocate of the U.S. Forces in the European Theater and in May 1946, he assumed duties as Theater Judge Advocate of those forces. Colonel Mickelwait returned to the United States when he was promoted to brigadier general in April 1947. He was promoted to major general and appointed as The Assistant Judge Advocate General in May 1954. Major General Mickelwait retired from active duty in 1956. *General Promotions—Army JAG*, JUDGE ADVOCATE J., June 1954, at 4–5.

[119] Short video clips about the military tribunal of Strasser are available at http://www.t3licensing.com/license/clip/49312041_033.do and http://www.ushmm.org/online/film/display/detail.php?file_num=2062.

[120] Transcript of Record at 8, United States v. Albert C. Homcy, CM 271489 (Oct. 19, 1944) (on file with Regimental Historian, TJAGLCS).

[121] *Id.*

[122] Headquarters, Mediterranean Theatre, Promulgating Order No. 92 (Nov. 21, 1944) [hereinafter Promulgating Order No. 92].

[123] *Id.*

[124] *Id.* Commendation, 2d Lt. Albert C. Homcy, Headquarters, 36th Infantry Division (n.d.) (Allied Papers).

[125] Transcript of Record at 8, *supra* note 120. Commendation, 2d Lt. Albert C. Homcy, Headquarters, 36th Infantry Division (n.d.) (Allied Papers). Until the creation of the Bronze Star Medal in late 1944, Soldiers like Homcy who committed acts of bravery for exceptionally meritorious conduct in combat received written commendations from their regimental or higher commanders.

[126] 1st Indorsement, Colonel Paul D. Williams, to 2d Lt. Albert C. Homcy (July 14, 1944) (Clemency Matters).

[127] Transcript of Record, *supra* note 120, at 26.

[128] *Id.*

[129] *Id.* at 27.

[130] Benjamin F. Wilson, Jr., was a Field Artillery officer and had completed two years of law school prior to entering the Army. He had considerable experience, especially when measured by today's standards of practice. Before defending Second Lieutenant Homcy, Major (MAJ) Wilson had served as a panel member in more than 100 general and special courts-martial. He had been detailed as the defense counsel at between 50 and 100 general courts-martial and between 50 and 100 special courts-martial. Finally, Wilson also had served as the prosecutor at between 50 and 100 special courts-martial. Transcript of Record, *supra* note 120, Questionnaire for Benjamin F. Wilson, Jr. (Apr. 25, 1968), United States v. Albert C. Homcy, CM 271489 (Oct. 19, 1944) (Allied Papers).

[131] Articles of War, 2 Stat. 359 (1806), *reprinted* in WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 976 (2d ed. 1920 reprint).

[132] *Id.* at 4.

[133] Under the 75th Article of War, a conviction for "misbehavior before the enemy" required some nexus between the accused's acts and the enemy forces. In discussing the offense, the 1928 *Manual for Courts-Martial (MCM)*, which controlled the proceedings in Homcy's case, noted that "whether a person is 'before the enemy' is not a question of definite distance, but is one of tactical relation." MANUAL FOR COURTS-MARTIAL, UNITED STATES para. 141a discussion (1928) (emphasis added). Consequently, explained the *Manual*, where an accused was in the rear echelon of his battery (some 12–14 kilometers from the front line), if the forward echelon of his battery was engaged with the enemy, the accused was guilty of misbehavior before the enemy if he left the rear echelon without authority—even though this rear echelon was not actually under fire. It follows that when Homcy admitted that he had been in the "presence of the enemy" at the time he disobeyed LTC Bird's order, Homcy was admitting to an element of the offense. *Id.*

[134] Transcript of Record, *supra* note 120, at 4.

[135] Promulgating Order No. 92, *supra* note 122.

[136] Transcript of Record, *supra* note 120, Letter, Major Harry B. Kelton, CPTs Isadore Charkatz, Elden R. McRobert, Lowell E. Sutton, & 1LT Charles Hickox, to Commanding General, 36th Infantry Division, subject: Clemency (Oct. 24, 1944), United States v. Albert C. Homcy, CM 271489 (Oct. 19, 1944) (Allied Papers).

[137] *Id.*

[138] *Id.* Memorandum to Accompany the Record of Trial in the Case of 2d Lt. Albert C. Homcy (Oct. 23, 1944) (Allied Papers).

[139] *Id.* Letter A.S. Hatem to Sec'y of War Robert P. Patterson (July 27, 1945) (Allied Papers).

[140] *Id.* Letter from Edward S. Greenbaum to A.S. Hatem (Aug. 14, 1945) (Allied Papers).

[141] Headquarters, E. Branch, U.S. Disciplinary Barracks, Green Haven, N.Y., Special Orders No. 7 (Jan. 7, 1946).

[142] Transcript of Record, *supra* note 120, Letter from Thomas H. King, to Major General E. M. Brannon (July 9, 1951) (Allied Papers); NME Form 219, Petition for New Trial Under Article of War 53, Albert C. Homcy (May 4, 1951) (Allied Papers).

[143] Transcript of Record, *supra* note 120, E.M. Brannon, Action Upon Application of Albert C. Homcy for Relief under Article of War 53 (Aug. 6, 1951) (Allied Papers).

[144] *Id.* Letter from Albert C. Homcy to Sec'y of the Army (May 29, 1959) (Allied Papers) (all capital letters in original).

[145] The law member was a quasi-judicial officer under the Articles of War and was the forerunner of the law officer created by the Uniform Code of Military Justice in 1950 and the military judge created by the Military Justice Act of 1968. His powers were limited in that, while he advised the court-martial panel on the law, this advice was binding on that panel. Articles of War, art. 8, 41 Stat. 788 (1920); MANUAL FOR COURTS-MARTIAL, UNITED STATES paras. 40, 51*d* (1928).

[146] Transcript of Record, *supra* note 120, Letter from Francis X. Plant, Special Assistant, Undersecretary of the Army, to Sen. Harrison A. Williams, Jr. (Nov. 15, 1965), United States v. Albert C. Homcy, CM 271489 (Oct. 19, 1944) (Allied Papers).

[147] *Id.*

[148] *Id.* Questionnaire from Captain (CPT) Elden R. McRobert, Petition for Correction of Military Record from Albert C. Homcy, to Army Bd. for Correction of Military Records (Mar. 1, 1967) (included in the allied papers) (on file with Regimental Historian, TJAGLCS).

[149] *Id.* Sworn Statement of CPT E. Lowell (Jan. 20, 1966) (on file with Regimental Historian, TJAGLCS).

[150] *Id.* Questions for John M. Stafford, Assistant Staff Judge Advocate and Trial Counsel (Mar. 26, 1968), United States v. Albert C. Homcy, CM 271489 (Oct. 19, 1944) (Allied Papers).

[151] *Id.* Petition for Correction of Military Record from Albert C. Homcy, to Army Bd. for Correction of Military Records (Mar. 1, 1967) (Allied Papers) (on file with Regimental Historian, TJAGLCS).

[152] *Id.* Memorandum from The Judge Advocate Gen., for Army Board for Correction of Military Records (Waldemar A. Solf), subject: Comment and Legal Opinion, Albert C. Homcy, JAGJ 1967/8153, at 5 (May 1, 1968) (Allied Papers).

[153] *Id.*

[154] *Id.* at 7.

[155] *Id.* United States v. Homcy, Misc. Docket 69-35, Memorandum Opinion and Order (Aug. 15, 1969) (Allied Papers). In *United States v. Sonnenschein*, 1 C.M.R. 64 (C.M.A. 1969) and *United States v. Musick*, 12 C.M.R. 196 (C.M.A. 1969), COMA ruled that it had no jurisdiction to review court-martial proceedings completed prior to the effective date of the UCMJ.

[156] Homcy v. Resor, 455 F. 2d 1345, 1348 (D.C. Cir. 1971).

[157] *Id.* at 1345. The Court of Appeals rejected the District Court's finding that Homcy had been deprived of fair trial because his defense counsel was ineffective. It noted that the Articles of War did not require defense counsel to be a "licensed attorney" and, based on Major Wilson's considerable experience, concluded that Wilson in fact was "much better qualified to defend an accused in a court-martial proceeding than many fully licensed lawyers." *Id.* at 1347.

[158] *Id.* at 1357.

[159] Homcy v. United States, 536 F. 2d 360, 363 (Ct. Cl. 1976).

[160] *Id.*

[161] THE CHURCHILL CENTRE, http://www.winstonchurchill.org/learn/speeches/quotations/quotes-faq (last visited Feb. 21, 2014).

[162] Bart Barnes, *World War II Army Officer Albert C. Homcy Dies at 71*, WASH. POST, Apr. 3, 1987.

[163] War Department Form 53, Certificate of Service, James J. Hanley, Block 29 (Decorations and Citations) (July 7, 1946); U.S. Dep't of Army, DA Form 66, Officer Qualification Record, James M. Hanley, Block 21 (Awards and Decorations) (Apr. 14, 1955).

[164] U.S. Dep't of Army, DD Form 66, Officer Qualification Record, James M. Hanley, Block 18 (Records of Assignments) (Apr. 14, 1955) [hereinafter DD Form 66].

[165] JAMES M. HANLEY, A MATTER OF HONOR: A MEMOIRE 107 (1995).

[166] ALLAN R. MILLETT, THEIR WAR FOR KOREA 228 (2002).

[167] *Id* .

[168] *Id.*

[169] *Id.* at 229.

[170] HANLEY, *supra* note 165, at 112.

[171] *Id.* at 113.

[172] *Id.*

[173] *Id.* at 110.

[174] MILLETT, *supra* note 166, at 229.

[175] HANLEY, *supra* note 165, at 110.

[176] MILLETT, *supra* note 166, at 229.

[177] *Id.*

[178] *Id.* at 230.

[179] The three-page "Hanley Report" is reproduced in its entirety in Hanley's memoir. HANLEY, *supra* note 165, at 112.

[180] MILLETT, *supra* note 166, at 230.

[181] *Id.* at 231.

[182] *Id.* at 232.

[183] *Id.*

[184] DD Form 66, *supra* note 164.

[185] MILLETT, *supra* note 166, at 230.

[186] The author thanks Professor Allan R. Millett, Ambrose Professor of History and Director, Eisenhower Center for American Studies, University of New Orleans, for alerting him to the Hanley story and the challenges of investigating war crimes during the Korean War.

[187] *Looies Claim CO Ordered Unarmed Men Killed—'I Want That Man Shot*,' OVERSEAS WKLY. (PAC. EDITION), Dec. 21, 1968, at 3. [hereinafter *Looies Claim*].

[188] *Id.*

[189] Telephone Interview with Colonel (Ret.) Herbert J. Green (July 10, 2014).

[190] *Looies Claim*, *supra* note 187.

[191] *Id.*

[192] *Id.* Kapranopoulos had enlisted in the Army and was subsequently commissioned in the Infantry after graduating from Officer Candidate School at Fort Benning, Georgia.

[193] *Id.*

[194] "Charlie" was a moniker attached by U.S. troops to the Viet Cong guerrillas—the "Charlie" originating from the radio alphabet as in "Victor Charlie."

[195] *Looies Claim*, *supra* note 187.

[196] At this time during the Vietnam war, the Army was pursuing an attrition strategy——the theory being that the enemy could be defeated if sufficient numbers of his personnel were wounded or killed. This led to battlefield success being measured in terms of "body count," i.e. the higher the number of enemy bodies, the more successful a fight with the enemy was considered to have been. For more on the attrition strategy, see JOHN PRADOS, VIETNAM 181–82 (2009).

[197] Telephone Interview with Colonel Green, *supra* note 189.

[198] *Looies Claim*, *supra* note 187.

[199] *Id.*

[200] *Id.*

[201] *Id.*

[202] *Id.*

[203] *Id.*

[204] *Id.*

[205] *Id.*

[206] *Id.*

[207] *Id.* Jack Crouchet, the judge advocate who served as law officer in the trial (the law officer was the forerunner of today's military judge), later included the *Kapranopoulos* court-martial in a book he authored about his experiences in Vietnam. According to Crouchet, "there was great rejoicing" in CPT K's unit when news of his acquittal reached the Soldiers. JACK CROUCHET, VIETNAM STORIES 134 (1997). Since Crouchet changed the names of the participants in his book, his re-telling of the event is somewhat different from the version reported in *Overseas Weekly*.

[208] On January 30, 1968, the beginning of the lunar New Year (or Tet), VC and their North Vietnamese allies launched a series of coordinated attacks designed to destroy the ARVN and encourage the civilian population to rise up against the South Vietnamese government. The VC and North Vietnamese struck five major cities, thirty-six provincial capitals, sixty-four district capitals, and fifty villages. They also attacked Ton Son Nhut Air Base outside Saigon and successfully penetrated the U.S. Embassy grounds in Saigon. Although the enemy forces were decisively defeated (more than 50,000 VC and North Vietnamese were killed or wounded), U.S. and ARVN losses were heavy (20,000 killed or wounded in action). For more on Tet, *see* ERIC M. HAMMEL, FIRE IN THE STREETS (1991).

[209] E-mail from Colonel (Ret.) Barney L. Brannen, Jr., to author (July 23, 2014, 5:53 PM) (on file with author).

[210] *Id.*

[211] *Id.*

[212] *Legal Orders*, TIME, Apr. 12, 1971, at 18.

[213] *Id.* "Gook" was a pejorative moniker for all Vietnamese (and Asians) used by GIs during the war in Southeast Asia.The derogatory term originated during the Spanish-American War, when U.S. troops in the Philippines began using it to refer to Filipinos. PAUL DICKSON, WAR SLANG 29 (2007).

[214] WILLIAM R. PEERS, THE MY LAI INQUIRY 213 (1979).

[215] Koster v. United States, 685 F.2d 407, 409 (Cl. Ct. 1982).

[216] *Id.* Charges against Koster were dismissed on January 28, 1971. *Id*.

[217] *Id.* at 409–10.

[218] RICHARD HAMMER, THE COURT-MARTIAL OF LT. CALLEY 35, 43 (1971).

[219] *Koster*, 685 F.2d at 408.

[220] David Stout, *Gen. S.W. Koster, 86, Who Was Demoted After My Lai, Dies*, NEW YORK TIMES, Feb. 11, 2006.

[221] *Koster*, 685 F.2d at 408–09.

[222] Stout, *supra* note 220.

[223] Prior to the enactment of the Defense Personnel Management Act in 1980, commissioned officers in the Regular Army (RA) had both permanent and temporary ranks. Title 10, United States Code, Section 3442, provided that a regular commissioned officer might hold, in addition to his "regular" or permanent grade, a temporary grade in the Army of the United States (AUS). 10 U.S.C. § 3442 (1956) (repealed 1980). Consequently, an officer might hold an RA appointment as a captain and an AUS appointment as a lieutenant colonel. The appointments in the RA and AUS were independent of each other and selections for promotion to higher grades in each status were also independent of each other. *Id.* As a practical matter, almost every RA officer in the Army during Koster's era had a more senior temporary rank.

[224] *Koster*, 685 F.2d at 408. The 23d Division was created in Vietnam in September 1967 by combining three separate brigades that were already "in country." Consequently, it was a unique unit in that it was the only combat division formed outside the United States. The division was deactivated after its withdrawal from Vietnam in November 1971.

[225] Stout, *supra* note 220.

[226] HARRY G. SUMMERS, JR., HISTORICAL ATLAS OF THE VIETNAM WAR 140 (1995). In addition to the killings at My Lai, Calley and his men "raped and sodomized" women and children, set houses on fire, and bayonetted the inhabitants of the village as they attempted to escape. *Id.*

[227] *Koster*, 685 F.2d at 409.

[228] MILITARY ASSISTANCE COMMAND, VIETNAM (MACV) DIR. 20-4, INSPECTIONS AND INVESTIGATIONS, WAR CRIMES (May 18, 1968) *reprinted in* GEORGE F. PRUGH, LAW AT WAR (1975), App. F (requiring the reporting of all war crimes committed by or against U.S. forces). For more on the evolution of the policy requiring the reporting of war crimes, *see* FRED L. BORCH, JUDGE ADVOCATES IN VIETNAM (2004), 34–36.

[229] *Koster*, 685 F.2d at 409. The helicopter pilot was Warrant Office Hugh C. Thompson who, while piloting a Hiller OH-23 Raven observation helicopter, witnessed the killings at My Lai. Thompson landed his OH-23 and then directed Bell UH-1 Iroquois utility helicopter gunships under his command to land and evacuate some of the civilians facing death at My Lai. PEERS, *supra* note 214, at 66–76 (1979).

[230] *Koster*, 685 F.2d at 409.

[231] PEERS, *supra* note 214, at 212.

[232] *Koster*, 685 F.2d at 409.

[233] PEERS, *supra* note 214, at 214. For more on Hubert Miller, *see* Fred L. Borch, *A Remarkable Judge Advocate by Any Measure: Colonel Hubert Miller (1918–2000)*, ARMY LAW., Mar. 2011, at 2.

[234] PEERS, *supra* note 214, at 212.

[235] *Id.* at 223.

[236] *Koster*, 685 F.2d at 409. Lieutenant General Jonathan O. Seaman was the Commander, First Army. He was the General Court-Martial Convening Authority for twelve of the fourteen individuals against whom charges were preferred as a result of their involvement in the My Lai Massacre. PEERS, *supra* note 214, at 221. Born in 1911, Seaman was a graduate of the U.S. Military Academy (Class of 1934). *Lt. Gen. Jonathan Seaman, 74, Dies; Commanded Army Troops in Vietnam*, WASH. POST, Feb. 26, 1986, at B6. He had a distinguished career as a combat Soldier, including command of the 1st Infantry Division in Vietnam. *Id.* After 37 years of active duty, Seaman retired as a lieutenant general. *Id.* He died in South Carolina in 1986. *Id.*

[237] *Koster*, 685 F.2d at 409-10.

[238] *Id.*

[239] *Id.* at 411. *See* Defendant's Motion for Summary Judgment at 32, Koster v. United States 685 F.2d 407 (Cl. Ct. 1982) (No. 65-77) (on file with Regimental Historian, TJAGLCS).

[240] Stout, *supra* note 220; *see Koster*, 685 F.2d at 412.

[241] *Koster*, 685 F.2d at 410.

[242] *Id.*

[243] Stout, *supra* note 220.

[244] *Id.*

[245] *Id.*

[246] *Koster*, 685 F.2d at 410.

[247] *Id.*

[248] *Id.*

[249] *Id.* at 408.

[250] *Id.* at 411.

[251] *Id.*

[252] *Id.* at 413.

[253] Defendant's Motion for Summary Judgment at 32, Koster v. United States, 685 F.2d 407 (Cl. Ct. 1982) (No. 65-77) (on file with Regimental Historian, TJAGLCS).

[254] Nardotti is identified as "of counsel" on the brief. *Id.*

[255] Defendant's Motion for Summary Judgment at 57, Koster v. United States, 685 F.2d 407 (Cl. Ct. 1982) (No. 65-77) (on file with Regimental Historian, TJAGLCS).

[256] *Id.* at 60–62.

[257] *Koster*, 685 F.2d at 413.

[258] *Id.* at 411.

[259] *Id.* at 409.

[260] *Id.*

[261] *Id.*

Chapter 6

Military Criminal Law

The True Story of a Colonel's Pigtail and a Court-Martial

(Originally published in the March 2010 edition of *The Army Lawyer.*)

In July 1805, Lieutenant Colonel (LTC) Thomas Butler, Jr. was court-martialed for refusing an order to crop his hair short and for "mutinous conduct" in appearing publicly in command of troops with his hair in a pig-tail or "queue" as it was called. He was found guilty of both charges and sentenced to a year's suspension from command and of pay. What follows is the true story of how Butler—a senior officer who had fought in the Revolutionary War and had spent nearly thirty years in uniform—was prosecuted for refusing to cut off his pigtail.

Hairstyles in the Army have usually reflected the civilian fashion of the period. In the late 1960s, for example, most young men had long hair (whites had hair over their ears; African-Americans wore the popular "Afro"). Moustaches and beards were popular, too. More than a few Soldiers—many of whom were draftees—who wanted to look like their civilian counterparts faced the wrath of their First Sergeant (1SG), who usually sported a crew-cut. Those who did not listen to "Top" and get their hair cut shorter always had the option to appear before their company commander for an Article 15.

The Army of the Revolutionary War era was no different. Soldiers in General (GEN) George Washington's Continental Army wore their hair in accordance with the longish styles of the day. This explains why Continental Army General Orders published by Washington's headquarters required Soldiers "to wear their hair short or plaited (braided) up." But a Soldier also had the option to wear his long hair "powdered and tied."[1]

Continental Army personnel who did powder and tie their hair did so with a mixture of flour and tallow, a hard animal fat. Powdered hair was usually tied in a pigtail or queue. According to Randy Steffen in *The Horse Soldier 1776–1943*, cavalrymen preferred a "clubbed" hairstyle in which hair, gathered at the back of the neck, was tied in a firm bundle, folded to the side, and then tied again in a club. Mounted Soldiers liked the club because it "was likely to stay in place during the excitement and violent action of a mounted fight."[2]

The practice of wearing long hair—tied in a club or simple queue—continued in the Army after the Revolutionary War. By the early 1800s, shorter hairstyles had become fashionable in civilian America, but Soldiers continued to prefer to wear their hair in a pigtail. According to an article published in *Infantry Journal* in 1940, this fashion was considered by some Soldiers "almost as a prerogative—a badge of their caste."[3]

Imagine their horror and dismay when, on April 30, 1801, the Army's Commanding General, Major General (MG) James Wilkinson, announced in General Orders that all hair would be "cropped, without exceptions of persons." The practice of wearing a queue, club, or pigtail had been abolished.

At least one historian has speculated that Wilkinson's decision to end the wearing of long hair in powdered queues, clubs, and other types of pigtails was motivated by a desire to curry favor with then-President Thomas Jefferson, who wore his own hair short and not powdered.[4] However, this is merely speculation, and it is just as likely that Wilkinson simply believed 18th century aristocratic hair styles were ill-suited to the new United States, where every male citizen was asked to reject old European (and aristocratic) fashions and adopt a true republican lifestyle—and shorter hair.

Regardless of Wilkinson's motivation in directing U.S. Soldiers to cut their hair short, his order provoked considerable resistance. Some Soldiers were outraged because they considered the hair order to be nothing short of required self-mutilation. Others did not want to serve in an Army that infringed on their natural rights. For example, Captain (CPT) Daniel Bissell wrote his brother, "I was determined not to cut my hair . . . . I wrote my Resignation & showed it, but . . . the Col. was not impowered [sic] to accept, nor was the pay Master here."[5] It seems that Bissell could only resign his commission if he traveled 1800 miles (Bissell was located on a remote frontier post in Wilkinsonville, Georgia) to Washington, D.C., and submitted his resignation papers personally. Being unable to make such a journey, Bissell "was obliged to submit to the act that [he] despised" and cut his hair short.[6]

While the rank-and-file and officers like Bissell eventually acquiesced and cut their queues, there was a lone hold-out: LTC Thomas Butler. He adamantly refused to cut off his pigtail. Initially, at his own request and "in consideration of his infirm

health,"[7] Butler obtained an exemption from the cropping order, but the reprieve, which Butler had obtained from Wilkinson personally, was short-lived. The Secretary of War, Dr. William Eustis, rescinded the exemption.

Butler, his feelings hurt and his honor insulted, refused to comply with the Secretary's order. As a result, Butler appeared before a general court-martial in Fredericktown (now Frederick), Maryland, in November 1803. He was found guilty of disobeying the April 1801 hair order and was sentenced to be reprimanded.

In authoring the reprimand MG Wilkinson wrote that "rank & responsibility go hand in hand. . . . [T]hey are inseparable." While the actions of a younger officer might be excused, "gray hairs" should know better, and while such "gray hairs, wounds, scars & a broken constitution present strong claims to our compassion . . . they illy [sic] apply to the vindications of military trespasses."[8]

Butler, however, continued to resist. After he repeatedly refused to cut off his queue, he was court-martialed a second time in July 1805. This time, a general court-martial sitting in New Orleans, Louisiana, convicted him of two charges: disobedience of a lawful order (to cut his hair) and "mutinous conduct by appearing publicly in command of troops with his hair cued."[9] Knowing that the reprimand imposed by the first court-martial had not corrected Butler's conduct, the second court-martial sentenced him to be suspended from command and of pay for twelve months. This was a severe punishment, given Butler's seniority and three decades of service. Major General Wilkinson, then on duty in St. Louis, Missouri, approved this sentence on September 20, 1805.

Unknown to Wilkinson, however, Butler had died thirteen days earlier in New Orleans, probably of yellow fever. He was unrepentant to the end, having refused to crop his hair. In fact, when Butler was near death, he asked his friends to "bore a hole through the bottom of my coffin right under my head, and let my queue hang through it, that the damned old rascal (Wilkinson) may see that, even when dead, I refused to obey his orders."[10] As a result, Butler was in fact buried in a coffin with a hole that allowed his queue to protrude through it—for all to see and to report to MG Wilkinson.

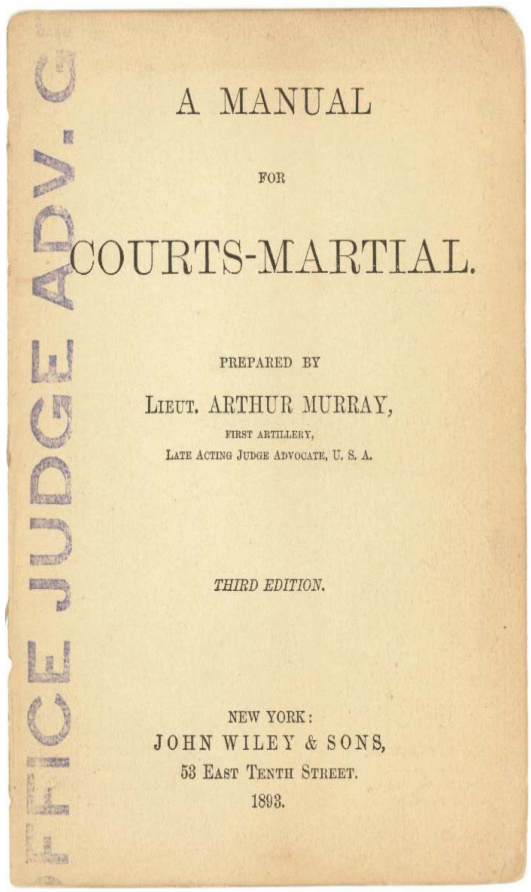
So ends the true story of a colonel's pigtail and a court-martial. Twice defeated in life, LTC Butler was seemingly victorious in death.

The First Manual for Courts-Martial

(Originally published in the June 2016 edition of *The Army Lawyer*.)

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"[11] (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.[12] Persons giving evidence before the court were "to be examined on oath or affirmation,"[13] 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."[14] 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.


A MANUAL

FOR

COURTS-MARTIAL.

PREPARED BY

LIEUT. ARTHUR MURRAY,

FIRST ARTILLERY,

LATE ACTING JUDGE ADVOCATE, U. S. A.

THIRD EDITION.

NEW YORK:

JOHN WILEY & SONS,

53 EAST TENTH STREET.

1893.

FFICE JUDGE ADV. G

A Manual for Courts-Martial, 1893

It was not until 1886, when then-Lieutenant Colonel (LTC) 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.[15] 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.[16]

In 1890, Murray turned his "Instructions" into a small, four-inch-by-five-inch "pamphlet."[17] 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.[18] These were greatly improved versions of his original manual, as he had obtained input from members of the Judge Advocate General's Department (JAGD), including Captain (CPT) Enoch H. Crowder, Major (MAJ) George B. Davis, Colonel (COL) Thomas F. Barr, and COL G. Norman Lieber, the Acting Judge Advocate General (JAG).[19] Since Crowder, Davis, and Barr later served at the highest ranks of the JAGD, Murray's manual was reaching an important and influential audience.[20]

Major General Arthur Murray

First Lieutenant Murray's 185-page *Manual* did not promise anything more than being a "handy source of legal guidance."[21] 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.[22]

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."[23] 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."[24] A *Manual for Courts-Martial* also had sections discussing credibility of witnesses,[25] proof of intent,[26] and findings[27] and punishments.[28] 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.[29] 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.[30]

Murray's *Manual* received high praise. Colonel Barr wrote that "its adoption and general distribution would be of great advantage to the service."[31] 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."[32] 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."[33]

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.[34] 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 Lieutenant Arthur Murray, Field Artillery"[35]—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.[36] 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.[37]

Unfortunately for Murray, the Army's adoption of his manual "effectively deprived him of any

royalties"[38] 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.[39]

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.[40]

The Trial by Military Commission of Queen Liliuokalani

(Originally published in the August 2014 edition of *The Army Lawyer.*)

On February 8, 1896, Queen Liliuokalani, the last monarch of Hawaii, was escorted into the Throne Room of what had once been her Royal Palace in Honolulu. Two Hawaiian policemen stood behind her as she took a seat on a high-backed chair. Seated in front of the queen, at a long table in the middle of the room, were the eight members of a military commission. This military tribunal had been convened to try Liliuokalani for "misprision of treason," as it was alleged that the queen had concealed knowledge of a treasonous plot to overthrow the Republic of Hawaii—the newest name of the government that had taken power since the overthrow of Liliuokalani in January 1893. What follows is the story of how the last ruler of the Kingdom of Hawaii came to be prosecuted before a military commission—a largely forgotten episode in military legal history.[41]

Queen Liliuokalani (shown here as Crown Princess), c. 1887

Queen Liliuokalani's predicament had begun some twenty years earlier when her brother, King David Kalakaua, was the reigning monarch in the Kingdom of Hawaii. Businessmen and Christian missionaries, who had come to the islands from the United States and Europe, did not like the absolutist nature of the Hawaiian monarchy, preferring instead a constitutional monarchy where the king (or queen) had significantly less power.[42] Additionally, as the amount of Hawaiian land sown to sugar cane increased dramatically, and sugar mills (including the largest and most modern steam-powered facility in the world) were built, the white businessmen who dominated the sugar-growing industry were increasingly unhappy with the Hawaiian system of government. In 1887, after King Kalakaua attempted to further dilute the power of the white businessmen and missionaries in the islands, these "white money men" took action against the king.[43]

Sanford B. Dole, President of the Provisional Government and Republic of Hawaii

Led by Sanford B. Dole,[44] these men created the "Hawaiian League" and forced King Kalakaua to sign a new constitution that reduced his powers as a sovereign while increasing the authority of the legislature (where men like Dole were serving as members of the Reform Party). This same constitution also disenfranchised many Asians and native Hawaiians by requiring land ownership and literacy. But it expanded the franchise to wealthy non-citizens living in Hawaii, and allowed these same men to stand for election to the legislature. As a result, "only wealthy, educated whites, who made up just three percent of the population of 90,000 people, could stand for election."[45] Since King Kalakaua had been forced to accept the constitution by the threat of violence, it was known as the "Bayonet Constitution."[46]

Kalakaua died in 1891 and his sister, Liliuokalani, succeeded him on the throne. When she proposed revising the existing constitution so that it would restore her powers as a monarch and extend voting rights to native Hawaiians, thirteen white businessmen and sugar planters—some of whom had been members of the Hawaiian League— now acted once more against the monarchy. They formed a "Committee of Safety" and began organizing a coup to overthrow the kingdom. The committee's ultimate goal, driven by the strong economic, political, and family ties of its members to the United States, was American annexation of the Hawaiian Islands.[47]

On January 17, 1893, a militia created by the Committee of Safety assembled near Queen Liliuokalani's Iolani Palace in Honolulu. They were joined by 162 Sailors and Marines from the cruiser *USS Boston*, which was moored in Honolulu Harbor. These American personnel had been ordered by John L. Stevens, the U.S. Minister to Hawaii, "to protect the lives and property of American citizens," including the members of the Committee of Safety.[48] Although no one will ever know what would have happened if the queen had decided to resist the coup, Liliuokalani wanted to avoid violence and consequently surrendered peacefully.

The Committee of Safety now established a "Provisional Government" and elected Sanford Dole as president.[49] In the United States, President Grover Cleveland refused to recognize the Dole government and insisted that Queen Liliuokalani be restored to her throne. Dole and his fellow coup members, however, refused to give up power and instead proclaimed the Republic of Hawaii on July 4, 1894.[50]

Six months later, on January 6, 1895,Hawaiians loyal to Queen Liliuokalani launched a counter-coup. They hoped to oust the Dole government and restore the Kingdom of Hawaii. A royalist force of some one hundred men occupied Punchbowl Hill, and men loyal to the queen also occupied the Diamond Head crater. But the uprising failed and some three hundred royalists were taken into custody by Dole's republican government.[51] Queen Liliuokalani was apprehended as well.

Since the Dole Government had declared martial law, it now decided to crush royalist resistance by using military commissions to prosecute those men loyal to Queen Liliuokalani—and the queen herself—for treason in plotting to overthrow the Republic of Hawaii.

The first royalists were tried on January 17, 1896. The proceedings were held in the Throne Room and, "to save time, the commission tried the accused in batches."[52] Apparently, all were charged with treason and open rebellion. Some pleaded guilty, some did not. When the commission finished its business after 35 days, it had heard evidence against 191 accused. Very few were found not guilty. Some were sentenced to hang.

On 24 January, Queen Liliuokalani, who had been locked up in an "improvised cell directly above the improvised courtroom,"[53] signed a "formal declaration" prepared by the Dole Government. In this document, she abdicated her throne and called upon all her subjects to recognize the Republic of Hawaii as the nation's legitimate government. Liliuokalani initially had strenuously resisted signing the declaration, but did so after receiving representations that, if she signed the instrument, the military trials would come to a halt and those who had already been tried and convicted would be immediately released.[54]

As Queen Liliuokalani soon discovered, her signature had no impact on her case or that of other royalists: the trials continued and death sentences continued to be meted out. Her own trial began at 1000 on 8 February. The judge advocate on the case was Captain (CPT) William A. Kinney, an attorney who had only recently been commissioned in the Republic of Hawaii's Army. The senior member of the military tribunal was Colonel (COL) William A. Whiting, a Harvard Law School graduate who had resigned as one of Hawaii's circuit court judges to accept a commission as a colonel and an appointment to the military commission.

Queen Liliuokalani had initially been charged with the capital offense of treason. Under pressure from the U.S. and British governments, however, the Dole Government dismissed that charge and instead tried the Hawaiian monarch for misprision of treason, which was not a death penalty offense.[55]

The prosecution decided to prove that Liliuokalani had known about the counter-coup and, in fact, had encouraged it. None of the coup leaders had implicated their queen in any statement, and there was no evidence that Liliuokalani had any part in financing the uprising. But two royal officials did admit that they had spoken with the queen about the coup in early January, and the military commission consequently could conclude that she "had known of some act against the government was in motion."[56] The more damning evidence, however, were the

rifles and explosives found buried in the flowerbeds of the queen's personal residence in Honolulu and entries in Liliuokalani's diary, which indicated that she knew about the counter-coup.[57] The queen denied all knowledge of any plot against the Republic of Hawaii, although it was clear that she sympathized with the aims of those who sought to restore her kingdom.

On February 27, 1896, Queen Liliuokalani was found guilty as charged. She was sentenced to be confined *to hard labor* for five years and to pay a $5,000 fine.[58] The following day, President Sanford Dole, acting as Commander in Chief, commuted most of the death sentences that had been adjudged by the military commission. In fact, no hangings were ever carried out, and most of those who had been convicted served only short prison sentences. Dole also cancelled the hard labor portion of the queen's sentence. She subsequently was confined to a small room in Iolani Palace; she was guarded by military personnel at all times. Eight months later, Dole released Liliuokalani from confinement, and she returned to her private residence, where she remained under house arrest. A year later, she was given a full pardon and informed that she was now able to travel freely.

In May 1897, delegates from the Republic of Hawaii traveled to Washington, D.C., to negotiate the annexation of Hawaii to the United States. There was considerable congressional opposition from those with anti-imperialist views, which was buttressed by Liliuokalani, who had journeyed to Washington, D.C., with a petition containing "thousands of signatures from Hawaiians opposed to annexation."[59]

For a time, it looked as if annexation efforts might fail. After the *USS Maine* blew up in Havana on February 15, 1898, however, "patriotic anger and jingoistic fervor" gripped the United States.[60] After the House of Representatives Foreign Relations Committee reported that Hawaii was "an essential base for U.S. operations against the Spanish in the Philippines and Guam,"[61] events moved rapidly. A joint resolution for the annexation of the islands passed the Senate on 15 June and the House on 6 July. President William McKinley signed into law the annexation on July 7, 1898. Hawaii remained a territory until 1959, when it became the 50th state.[62]

In 1993, Congress passed a joint resolution apologizing to the people of Hawaii for the U.S. government's role in the overthrow of Queen Liliuokalani.[63] But no mention was made of the queen's trial by military commission—proving that it remains a forgotten event in military legal history.

As for Queen Liliuokalani? She spent her remaining days in Honolulu. She died in 1917 due to complications from a stroke. She was seventy-nine years old.

The Trial by Military Commission of "Mother Jones"

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In March 1913, Mary Harris Jones, better known as "Mother Jones," and forty-seven other civilians were tried by a military commission in West Virginia. Governor William E. Glasscock had declared martial law in the aftermath of violent and bloody strikes by coal miners in the Paint and Cabin Creek areas of Kanawha County, and the Judge Advocate of the West Virginia National Guard was now prosecuting Jones and other civilians for murder and conspiracy to commit murder. Why and how "Mother Jones" came to be prosecuted by this military tribunal almost 100 years ago is an unusual story that is worth telling.

Labor unrest during the Progressive Era of the early 20th century was common and Soldiers were repeatedly called upon to suppress violence between striking workers and their employers. While Federal troops were sometimes called out to intervene in labor disputes, state National Guard forces usually were sufficient to quell violence between management and labor.[64] This explains why, when armed clashes between guards employed by coal mine operators and striking miners occurred in the Paint Creek district of West Virginia in April 1912, the state National Guard was sent in to restore order.

The Paint Creek strike resulted when the United Mine Workers of America (UMWA) demanded higher wages for the coal miners it was representing in contract negotiations with the Kanawha Coal Operators Association (KCOA). Union labor had been used in KCOA mines since 1904, and so it was neither unusual nor unexpected for the UMWA to press for increased pay. But the negotiations between the two sides broke down in April 1912. Some KCOA members hired armed guards, evicted strikers from company-owned houses, and hired non-union workers to mine coal. The displaced strikers responded by attacking both guards and replacement workers.

The violence only increased when Mother Jones, who joined the striking mineworkers in the Paint Creek area in July, persuaded the workers at nearby Cabin Creek to join the strike. Although she was over eighty years old, Jones was a powerful and dynamic speaker who organized both rallies and marches. By August, she had not only convinced the Cabin Creek miners to join their brothers on Paint Creek, but also got many of the non-union Cabin Creek workers to join the UMWA.

As historian Edward M. Steel explains, mine operators in the Paint and Cabin Creek districts and Charleston businessmen with a financial interest in the coal mines initially looked to the civilian courts to control the violence, but local Kanawha County officials "insisted that they could not rely on either grand or petit jurors to be fair in cases arising out of the strike."[65] This distrust of civilian law enforcement was well-founded. In the early weeks of the strike, a group of guards and miners opened fire on each other; one striker was killed and another wounded. But when the guards asked the local grand jury to return an indictment for assault against the strikers, the grand jury instead indicted the guards. While the county prosecutor declined to pursue the case, the message was clear: the civilian courts were unlikely to punish the strikers and this meant labor violence would continue.

As for Mother Jones, she was either a dangerous radical whose fiery revolutionary rhetoric threatened to turn the world upside down or a grandmotherly "miners' angel" who simply sought a decent wage for working men. Born in Ireland in August 1837, Mary Harris Jones immigrated with her family to Canada before settling in the United States. She married and was living in Tennessee with her husband and four children (all under the age of five) when tragedy struck in 1867: a yellow fever epidemic killed her entire family, leaving her alone. She never remarried.

Jones now moved to Chicago and opened a dressmaking business. Four years later, she lost her shop and all her possessions in the Great Chicago Fire of 1871. The hardship she suffered in this second loss was apparently a catalyst for her to join the Knights of Labor, an early union organization. In the 1890s, Jones also joined the Populist and Socialist Labor Parties and participated in a variety of political activities. When the Knights of Labor disbanded, Jones joined the UMWA. In 1900, that union hired her as an organizer, the only woman to be so employed. Over the next few years, "Mother Jones" (she adopted the moniker in the late 1890s) organized thousands of coal and copper miners in Colorado, Montana, and Pennsylvania. She also assisted striking workers in the textile, telegraph,

garment, and railroad sectors.[66] Jones was famous for her speaking skills and for turning a phrase; she once exhorted her followers to "pray for the dead and fight like hell for the living."[67]

Mother Jones's arrival in Kanawha County in July 1912 and the resulting increase in violence, coupled with the inability of civilian law enforcement to preserve the peace, ultimately caused Governor Glasscock to declare that a "state of war" existed in the Paint Creek and Cabin Creek districts and that he was imposing martial law.[68] No governor had previously made such a declaration, and Glasscock apparently did so reluctantly. West Virginia National Guard troops quickly moved into the military zone and confiscated all weapons (from both guards and strikers). Glasscock then "set up a military commission to try offenders in the martial law zone," with Lieutenant Colonel (LTC) George S. Wallace, the Judge Advocate of the National Guard, as the prosecutor.[69]

Born in Albemarle County, Virginia, in September 1871, George Selden Wallace graduated from the University of Virginia's law school in 1897 and then moved to Huntington, West Virginia, where he established a thriving private practice. He served as a second lieutenant in the 2d West Virginia Volunteers in the Spanish American War and then joined the West Virginia National Guard. His service as a prosecuting attorney in Cabell County from 1904 to 1908 and his military status in the Guard made Wallace the ideal choice to serve as prosecutor.[70] While Wallace tried most of the more than 200 civilians prosecuted by military commission over the next seven months, his most celebrated case involved Mother Jones.[71]

Jones and her fellow defendants were charged with conspiracy "to inflict bodily injury . . . with intent to maim, disfigure, disable and kill," and with the murder of Fred Bobbitt and W. R. Vance. Both victims were non-union "scabs" hired by coal operators to replace the striking coal miners. All forty-eight defendants also were charged with being accessories after the fact in that they had helped those who had murdered Bobbitt and Vance to escape.[72]

The charges arose out of a 9–10 February 1913 incident in which about fifty armed strikers clashed with a detachment of guards and non-union workers manning a machine gun near the town of Mucklow. The strikers attempted to steal the weapon and, in the course of this attempt, killed Bobbitt and Vance. As many as 150 strikers and guards had participated in what was being called the "battle of Mucklow" and, although Mary Jones was not present at the fight, she was charged as a conspirator because her inflammatory speeches had incited the miners to violence. She had, for example, urged the strikers "to get their guns and shoot them [the guards] to hell."[73]

The military commission proceedings began in the Odd Fellows Hall in Pratt, West Virginia, on Friday, March 7, 1913. From the beginning, the trial was acrimonious. Some accused refused to enter pleas, arguing that the military commission had no jurisdiction over them and that any trial must be in a civilian court. As for Mary Jones, she immediately proclaimed that she had "no defense to make" and that her activities in and around Paint and Cabin Creek were simply one battle in a long campaign. Said Jones: "Whatever I have done in West Virginia, I have done it all over the United States, and when I get out, I will do it again."[74]

The military commission followed the procedure and rules of evidence then in use in West Virginia's state courts, although the members themselves ruled on all objections made by any party to the trial.[75] Some of the defendants hired civilian counsel to represent them, and the commission appointed two military officers, Captains (CPTs) Edward B. Carskadon and Charles R. Morgan, to represent those accused who did not hire attorneys. Both captains were lawyers.[76]

The trial of Mother Jones lasted a week, and LTC Wallace presented mostly testimony from coal mine guards and National Guard troopers about the Mucklow battle. Most of the witnesses proved nearly useless to the prosecution, admitting that they heard shooting but not which side shot first, and being unable to identify specific individuals with any particularity. Lieutenant Colonel Wallace often found himself cross-questioning his own witnesses about the answers they had given in pretrial interviews.[77] However, he was able to get substantive testimony from Frank Smith, a detective from the J. W. Burns agency. Mr. Smith had come to the area posing as a UMWA member on the day of the incident, and was able to identify several accused as planning to attack arriving National Guard troops. He also testified about a speech given by Mother Jones, but the worst he reported her saying was:

> [T]hat every time the guards beat them up they came to her crying and she said if she was a guard she

> would beat them up because they stand for it; that they didn't have to fight and she told them they have a yellow streak; that it was their own fault what they did. . . . They ought to get their members in Colorado and get some nerve injected into them. . . .[78]

The trial was briefly interrupted when Mary Jones and two other defendants, assisted by UMWA attorneys, petitioned West Virginia's highest court for a writ of habeas corpus. Jones argued that the military commission was depriving her of the right to a trial by jury and that, as the civilian courts were open and functioning, the military tribunal had no jurisdiction over them as civilians. On March 21, 1913, however, the Supreme Court of West Virginia ruled that, as Governor Glasscock had lawfully proclaimed a state of war because of the insurrection occurring in the Paint and Cabin Creek districts, Jones and her fellow accused were "technically enemies of the state," and consequently could be prosecuted at a military tribunal.[79] With this favorable ruling in hand, the military commission reconvened and Wallace completed his case in chief. The defense then presented a very brief case and both sides argued to the military commission. Wallace called upon the panel members to "do [their] duty" and convict the accused.[80] As for Mother Jones, however, LTC Wallace conceded that while she had "largely contributed to this trouble" in that her speeches had incited the strikers, "whether or not this evidence will connect her up with this conspiracy, it is more difficult to say." Wallace concluded by saying that he left it up to the commission members to reach the appropriate verdict, but added: "I do not think the evidence is very strong against her."[81]

Exactly what verdicts were reached by the commission is not known; the members determined their findings and sentences in secret and then submitted a sealed report to Governor Henry D. Hatfield, who had recently replaced Glasscock as governor and consequently was the new convening authority. But results were not long in coming. On March 20, 1913, Hatfield released ten of the accused from the military guard house where they had been jailed; another fifteen were released the following day. On 22 March, still more defendants were freed, but Jones and eleven other defendants remained incarcerated. All were transferred to the state penitentiary except for Jones, who remained confined in the guard house in Pratt. They were not released until Governor Hatfield had worked out a settlement of the strike that restored coal production.[82]

Mother Jones was released on May 7, 1913. The bad publicity from the strike, which reached a national audience as a U.S. Senate subcommittee held hearings on the labor unrest in West Virginia, caused Governor Hatfield to realize that the continued imprisonment of an elderly woman was ill advised and was not helping West Virginia's image. Mother Jones was now eighty-one years old, and it also would not be good if she were to die while confined in the military guard house in Pratt.[83]

After her release, Jones immediately resumed her UMWA activities. Unrepentant and undeterred by her ordeal, she travelled to Colorado a few months later, where she called upon coal miners to strike. Jones was arrested and imprisoned by the Colorado National Guard after a melee between strikers and company guards in Ludlow, Colorado. While she spent some weeks in jail, Colorado authorities did not prosecute her.[84]

Of all the participants in this unusual trial, only Mary Harris Jones is widely remembered. She has been the subject of a number of folk songs: Gene Autry, famous as "The Singing Cowboy" on radio and television from the 1930s to 1960s, recorded a song called "The Death of Mother Jones," and "The Spirit of Mother Jones" was recorded by the Irish singer Andy Irvine in 2010.[85] The magazine *Mother Jones* also is named after her. With a paid circulation of over 200,000, it publishes stories on topics that would have resonated with Jones, such as corporate corruption, workers' rights, community service, and feminism.[86]

The trial of Mother Jones was a highly unusual event in military legal history. It may even be unique as the only National Guard military commission to try an American woman for murder and conspiracy to commit murder.[87]

"The Largest Murder Trial in the History of the United States": The Houston Riots Courts-Martial of 1917

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On the night of August 23, 1917, about 100 African-American Soldiers assigned to the 24th Infantry Regiment marched from their nearby camp into Houston, Texas. They were armed with Springfield rifles, and were enraged because they believed that one of their fellow Soldiers had been killed by the local police. As the troopers moved through Houston, they fought a running battle with civilians, Houston police officers, and elements of other military units stationed in the city. When the riot ended, fifteen white men had been killed. Sixty-three African-American Soldiers believed to be responsible for the riot—and the deaths—were subsequently court-martialed in the "largest murder trial in the history of the United States."[88] While the story of the Houston riots trial is worth knowing, the impact of the tragic event on the evolution of the military justice system is what makes it important in our Corps' history.

After America entered World War I in April 1917, a battalion of the all-black 24th Infantry Regiment was sent to Houston, Texas to guard the construction of a new training facility called Camp Logan. While the local white citizens of Houston welcomed the economic prosperity that they believed that Camp Logan would bring to their community, they loudly protested the decision to station African-American Soldiers in Houston. In racially segregated Texas—with its Jim Crow culture—white people did not like the idea of well-armed African-American Soldiers in their midst. Some whites also feared that these troops might bring ideas and attitudes that "would cause local blacks to 'forget their place.'"[89]

From the outset, the Soldiers of the 24th Infantry resented the "Whites Only" signage prevalent in Houston. Several troops also came into conflict with the police, streetcar conductors, and other passengers when they refused to sit in the rear of the streetcar. Finally, there were many incidents in which Soldiers took offense at epithets directed at them by white townspeople. The use of the "N-word," in particular, infuriated African-American Soldiers who heard it, and the slur "was invariably met by angry responses, outbursts of profanity and threats of vengeance."[90] More than a few Soldiers were arrested or beaten, or both, as a result of these run-ins with local citizens.[91]

Matters came to a head on 23 August, when a white Houston police officer beat two African-American Soldiers in two separate incidents; the second beating occurred when the Soldier-victim was questioning the policeman about the earlier assault. When this second victim did not return to camp, a false rumor began that he had been "shot and killed by a policeman."[92] Although this second victim ultimately did return—proving that he had not been killed—his fellow infantrymen were so upset that they decided to take matters into their own hands.

Despite entreaties from their commander, Major (MAJ) Kneeland S. Snow, to remain in camp and stay calm, about 100 men mutinied and departed for Houston.[93] Having seized their Springfield rifles and some ammunition, the Soldiers' intent was to kill the policeman who had beaten their fellow Soldiers—and as many other policemen as they could locate.

Once inside the city, the infantrymen fought a series of running battles with the Houston police, local citizens, and National Guardsmen, before disbanding, slipping out of town, and returning to camp. While the riot had lasted merely two hours, it ultimately left fifteen white citizens 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 Soldiers. A third was killed when he was found hiding under a house after the riots. Finally, the leader of the alleged mutineers, a company acting first sergeant named Vida Henry, apparently took his own life—most likely because he had some idea what faced him and the other Soldiers who had participated in the mutiny and riot.[94]

In the days that followed the Houston riots, Coast Artillery Corps personnel and Soldiers from the 19th Infantry Regiment were deployed to restore order and disarm the suspected mutineers. Those believed to have participated in the mutiny were sent to the stockade at Fort Bliss, Texas, to await trial.

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 from the 24th Infantry. All were

charged with disobeying a lawful order (to remain in the camp), assault, mutiny, and murder arising out of the Houston riots. The accused—all of whom pleaded not guilty—were represented by a single defense counsel, MAJ Harry H. Grier. At the time he was detailed to the trial, Grier was the Inspector General, 36th Division. While he had taught law at the U.S. Military Academy and almost certainly had considerable experience with court-martial proceedings, Grier was not a lawyer.[95]

The prosecution was conducted by MAJ Dudley V. Sutphin, a judge advocate in the Army Reserve Corps.[96] Interestingly, there was additional legal oversight of the trial. This is because Major General (MG) John W. Ruckman, who convened the court-martial as the Commander, Southern Department, detailed judge advocate Colonel (COL) John A. Hull to supervise the proceedings to ensure the lawfulness of the court-martial.[97]

The trial lasted twenty-two days, and the court heard 196 witnesses. The most damning evidence against the accused came from the testimony of "a few self-confessed participants who took the stand in exchange for immunity."[98] Grier, the lone defense counsel, despite the inherent conflict presented by representing multiple accused, argued that some of the men should be acquitted because they lacked the mens rea required for murder or mutiny. He also insisted that because the prosecution had failed in a number of cases to prove guilt beyond a reasonable doubt, the accused should be found not guilty. Finally, while acknowledging that some of the accused were culpable, Grier blamed the Houston police for failing to cooperate with military authorities to keep the peace between white Houstonians and the African-American Soldiers.[99]

When the trial finished in late November, the court members agreed with the defense and acquitted five of the accused. The remaining Soldiers were not as fortunate: thirteen Soldiers were condemned to death and forty-one men were sentenced to life imprisonment. Only four Soldiers received lesser terms of imprisonment.

The thirteen accused who had been sentenced to death requested that they be shot by firing squad. The court members, however, condemned them to death by hanging and informed the accused on 9 December that they would suffer this ignominious punishment.

Two days later, on the morning of 11 December, the thirteen condemned men were handcuffed, transported by truck to a hastily constructed wooden scaffold, and hanged at sunrise. It was the first mass execution since 1847.

Although the Articles of War permitted these death sentences to be carried out immediately because the United States was at war, the lawfulness of these hangings did not lessen the outcry and criticism that followed. Brigadier General (BG) Samuel T. Ansell, then serving as acting Judge Advocate General, was particularly incensed. As he later explained:

> 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, if he had been so advised.[100]

Ansell quickly moved to prevent any future similar occurrence. General Orders No. 7, promulgated by the War Department on January 17, 1918, prohibited the execution of the sentence in any case involving death before a review and a determination of legality could be done by the Judge Advocate General.[101]

But there was an even more important result: as a result of General Orders No. 7, the Judge Advocate General created a Board of Review with duties "in the nature of an appellate tribunal."[102] The Board was tasked with reviewing records of trial in all serious general courts-martial. While its opinions were advisory only—field commanders ultimately made the decision in courts-martial they had convened—the Board of Review was the first formal appellate structure in the Army. When Congress revised the Articles of War in 1920, it provided the first statutory basis for this review board. This legislative foundation still exists, and is the basis for today's Army Court of Criminal Appeals.

The Houston Riots Courts-Martial of 1917—and a number of other instances of injustice during the World War I era—ultimately led to other far reaching reforms in the military justice system.[103] But the history of those reforms, which culminated in the enactment of the Uniform Code of Military Justice in 1950, is another story for another day.

The Shooting of Major Alexander P. Cronkhite: Accident? Suicide? Murder?

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At lunchtime on October 25, 1918, while his Soldiers were on a break and "at mess,"[104] Major (MAJ) Alexander P. Cronkhite, the training officer for the 213th Engineer Regiment, decided that he would do some informal target shooting with his .45 caliber pistol. Cronkhite was an excellent marksman and, although regulations prohibited off-range shooting, he apparently concluded that firing a few rounds at an old tobacco can atop a post could not do much harm. Major Cronkhite's first two shots missed, but after firing a third time, Cronkhite turned around and said to Captain (CPT) Robert Rosenbluth, who had accompanied him, "I got it that time, Rosie."

What happened after that is not entirely clear except that a fourth shot rang out, and Cronkhite fell to the ground. His last words were "My God, I'm shot." In a matter of minutes, MAJ Cronkhite was dead; the bullet had passed through his right shoulder, hit both his lungs, and severed the aorta.[105] Rosenbluth and Sergeant (SGT) Roland Pothier, who was standing nearby and was Cronkhite's orderly, must have been shocked; the twenty-five-year-old Army officer was dead.

Was this an accident? Was it murder? Could it even have been suicide? On October 30, 1918, an Army investigation determined that it was a tragic accident. But the deceased's father, Major General (MG) Adelbert Cronkhite, refused to accept this explanation and forced the re-opening of the case. Almost six years later, as the direct result of pressure from the elder Cronkhite and others, CPT Rosenbluth and SGT Pothier were indicted by a federal grand jury for MAJ Cronkhite's murder. What follows is the story of the Cronkhite shooting and its remarkable legal aftermath—including a surprising and pivotal role played by a future Judge Advocate General.

Alexander Pennington "Buddy" Cronkhite was a remarkable officer by any measure. Born in September 1893, he entered the U.S. Military Academy in 1911. Cronkhite was a handsome and popular cadet; his "natural genius for studies" and his "capacity for hard work placed him well up toward the top of his class."[106] Consequently, when he graduated in June 1915, far ahead of his classmates Dwight D. Eisenhower and Omar N. Bradley, Cronkhite was commissioned as a Second Lieutenant of Engineers.[107]

He then served with the 1st Engineer Regiment in Washington, D.C., and did map work in Georgia and Texas. Cronkhite had "almost perfect efficiency ratings," and at the same time, had "an informality and friendliness that made him popular with subordinates, officers, and enlisted."[108] Once the United States entered World War I, Cronkite made rank quickly: he was promoted to first lieutenant in July 1916, captain in June 1917, and major in December that same year. In May 1918, MAJ Cronkhite joined the 213th Engineer Regiment and traveled with that unit to Camp Lewis, Washington, in September.[109]

After his death in October, a board of inquiry consisting of the three senior officers from the 213th Engineers, Lieutenant Colonel (LTC) William J. Howard, MAJ Henry Tucker, and MAJ John F. Zajicek, conducted an investigation into the facts and circumstances surrounding the shooting. The board heard from CPT Rosenbluth, who testified that MAJ Cronkhite's pistol must have slipped from his hand when he turned after firing the third bullet and "when his fingers had instinctively tightened to straighten the twisted gun—which had a lighter trigger pull than most such weapons—it discharged."[110]

Cronkhite apparently prided himself on being able "to cock and fire a pistol with one continuous, sweeping motion," and the theory was that this "flourish had cost the major his life."[111] In this era, officers and enlisted men in the field wore the "smokey-the-bear" campaign hat (worn exclusively by Army drill sergeants today) and some thought this hat was perhaps the best explanation of what had happened. The belief was that, as Cronkhite quickly cocked, raised, and then brought his pistol down to fire on the tobacco can, the .45's barrel had brushed his hat, which caused it to twist toward his body. As Cronkhite tried to recover his grip on the weapon, he hit the trigger, causing the hammer to drop and fire the bullet that killed him.

Sergeant Pothier corroborated Rosenbluth's claim that the shooting was accidental. Since there were no other Soldiers who had witnessed the event (they were too far away), the board concluded its

work fairly quickly and ruled that MAJ Cronkhite's death was a tragic accident.

While this was the official explanation, a few Soldiers in the 213th speculated that Cronkhite might have committed suicide. He had only recently been released from the hospital where he had been bedridden with the flu. The influenza epidemic of 1918 had sickened millions of Americans, including Cronkhite. He had recovered, however, while hundreds of thousands were dead.[112] Some Soldiers thought that Cronkhite's illness might have had a depressive affect, and that the shooting was self-inflicted. But it was so out of character that virtually everyone rejected this theory.

Regardless of what the board of inquiry had concluded or what Soldiers who knew MAJ Cronkhite thought, the dead Soldier's father, Major General Cronkhite, was convinced otherwise. After relinquishing command of the 80th Division and returning from Europe in 1919, the senior Cronkhite refused to accept that his son's death had been accidental. He had the body exhumed and another autopsy performed. When doctors told Cronkhite that the bullet path in the body was such that his son could not have shot himself, Major General Cronkhite was convinced that Buddy had been murdered.

Major General Cronkhite hired a team of private detectives and soon "accused the War Department of covering up both a slipshod inquiry and a conspiracy by senior officers at Camp Lewis to murder his son."[113] When asked to explain why such a conspiracy would exist, Cronkhite insisted that it was part of a plot to smear his reputation. Central to Major General Cronkite's reasoning was that, since no West Point graduate would knowingly violate a regulation against off-range shooting, foul play was the only possible explanation for his son's death.

While Major General Cronkhite, now in command of the Army's Third Corps Area, and stationed in Baltimore, Maryland, agitated for justice for his dead son, ultra-conservative newspapers joined his efforts by publishing stories insisting that CPT Rosenbluth was guilty of murder. Automobile manufacturer Henry Ford's *Dearborn (Michigan) Independent*, for example, insisted that Rosenbluth was a "dirty German Jew spy." After Rosenbluth, now out of the Army and working for President Herbert Hoover's American Relief Administration, visited the Soviet Union, the *Independent* "speculated that he might have committed the murder in his capacity of Bolshevist Jew agitator."[114] No wonder at least one historian has called Rosenbluth "the American Dreyfus," after the French Army officer whose Jewish background figured prominently in his being wrongfully convicted of treason in the 1890s.

These anti-Semitic rants, combined with Major General Cronkhite's efforts, ultimately caused the Department of Justice to investigate the shooting. According to the *New York Times*, "federal agents" located former SGT Roland Pothier in Providence, Rhode Island where, having left active duty, he was working as a railroad brakeman. Pothier was arrested in March 1921 and, while in police custody, "broke down and admitted that he shot Major Cronkite."[115] But the shooting had been an accident; Pothier explained "that the shot was fired accidentally as he was cleaning his pistol."[116]

Later, reported the *Times*, Pothier also "confessed to federal authorities" while still in jail "that he was ordered by his superior officer, Captain Robert Rosenbluth, to bring out a loaded gun and 'get' Cronkhite."[117] The newspaper reported that Pothier had made the following statement:

> [Captain Rosenbluth] said, "I want to get Major Cronkite." When I asked him what he meant he said, "I want to kill him." I asked him what his reasons were for wanting to kill the Major, and he said: "Because we want him out of the way."
> . . .
> I joined Major Cronkhite on the maneuver grounds at Camp Lewis and when about two feet behind him, I loaded my revolver with three shells. I fired one shot into the open field and as the Major was turning around in my direction, I fired my second shot at the Major, hitting him in the right breast.[118]

When former CPT Robert Rosenbluth, then staying at the Willard Hotel in Washington, D.C., was asked by the *New York Times* correspondent about Pothier's statements, Rosenbluth exclaimed—one would imagine rather hotly—that "Pothier is either an outrageous liar or he is crazy, or he has been induced to say this."[119]

Based on Pothier's admissions and confessions, both he and Rosenbluth were indicted for murder in U.S. District Court in Tacoma, Washington; both men were arraigned in September 1924.

Roland Pothier's trial began on September 30, 1924. Two of his three signed confessions, all of which contradicted each other and which Pothier had repudiated prior to trial, were suppressed after the men questioning Pothier "admitted they obtained them under 'undue duress.'"[120] The jury did, however, consider a third confession made by Pothier, the substance of which was that he and Rosenbluth had "planned the shooting."[121] The problem for the government was that no witness could provide a motive for either Pothier or Rosenbluth to want MAJ Cronkhite dead. While motive is not an element of proof for any offense, the inability of the prosecution to answer "why" certainly hurt the government's case, especially after other witnesses testified that Pothier was known to tell "far-fetched stories."[122]

The place of MAJ Cronkhite's untimely death.

The gist of the government's case was that the wound suffered by the deceased could not have been self-inflicted. A medical expert, who was paid $250 a day to testify at the trial in Tacoma—a huge sum of money for the day—insisted that "the only way the major could have shot himself was with his thumb on the trigger and his revolver held at arm's length. Obviously, he would not have done this accidentally." A second prosecution witness, an expert in firearms, concurred with the medical expert.

In rebuttal, Pothier's defense counsel called CPT Eugene M. Caffey, a friend of MAJ Cronkhite's and a future Judge Advocate General of the Army, to the stand. His testimony on direct did not add much to what had already been presented. But then the Assistant U.S. Attorney (AUSA) made a mistake. Handing the .45 caliber pistol to Caffey, the prosecutor asked Caffey to show how Cronkhite could have shot himself.

Caffey raised the pistol, cocked it with his thumb, and then showed how it could have swung around. When the pistol was aimed at Caffey's chest, the AUSA demanded: "Now try to pull the trigger one-half inch!"

The click that followed as the hammer fell forward was a shock to one and all in the courtroom. And, with that "snap," the case against Pothier collapsed. The jury found him not guilty the following day. Pothier, who had been in jail for more than two years, was released and went home to Rhode Island.[123]

The murder charge against Rosenbluth was dismissed shortly thereafter and he, too, returned to civilian life. In the years that followed, Rosenbluth married and had two sons. He worked as assistant commissioner of social welfare in New York before settling in Chicago, Illinois. As for CPT Caffey, he remained in the Army. His final assignment on active duty was as The Judge Advocate General.[124]

So ends the remarkable story of a shooting and its highly unusual legal aftermath.

Anatomy of a Court-Martial: The Trial and Execution of Private William Buckner in World War I

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"I am not guilty of raping Georgette Thiebaux. She consented to the intercourse."[125] These thirteen words, spoken by Private (PVT) William Buckner late in the afternoon on September 5, 1918, could not save him from the fate that awaited him. A little more than twelve hours later, at 6 a.m. on September 6, PVT Buckner "ascended the scaffold" that had been erected in a field near Arrentierres, France. A "black cap was placed on his head" and a noose placed around his neck.[126] Minutes later, he was dead. He was buried in France and is buried there still.

Accused of "forcibly and feloniously . . . having carnal knowledge of one Georgette Thiebaux"[127] on July 2, 1918, Buckner had been tried by a general court-martial that began hearing evidence on 27 July—less than a month after the alleged offense. Found guilty on 30 July of raping this twenty-three-year-old French woman, the efficiency of the court-martial process, and the limited character of the appellate process, were such that Buckner's capital sentence was carried out just five weeks after being announced in open court.[128]

What follows is an anatomy of a court-martial that was both typical and atypical for World War I. Typical in that the accused apparently had no legally qualified counsel to defend him. Typical in that the capital offense of rape[129] was heard by a general court-martial. But atypical in that the accused was an African-American Soldier, the only such Soldier convicted of rape or executed for any offense in Europe in World War I.[130] And atypical in that a lawyer from the Judge Advocate General's Department was present (though typical in that this lawyer was the prosecutor, that the other "judge advocates" present were from other branches of service, and that they may not have been lawyers at all).

Some facts were not in dispute. Both the accused and the victim testified that they had had sexual intercourse. This sex occurred in an oat field near the town of Arrentieres, about 9:30 p.m. on July 2, 1918. Private Buckner and Ms. Thiebaux also agreed that they were not married.[131] The problem for the accused was that the young French woman testified that the sex was against her will.[132]

On July 27, 1918, Georgette Thiebaux took the witness stand, swore to tell the truth, and then told the court members that she had been walking along the road when she was accosted by the accused, whom she had never seen before. He seized her and, despite her screams and struggles, threw her down, dragged her into the field, choked her, stuffed a handkerchief in her mouth, and then raped her. On cross-examination, she insisted that she had been raped and that while she did her "best to resist and defend myself . . . fear took my strength from me . . . I was afraid of only one thing, that he would kill me."[133] This testimony was important in light of the instructions on consent drawn from the 1917 *Manual for Courts-Martial* (*MCM*). These were read to the court by Major (MAJ) Patrick J. Hurley, the Judge Advocate, who served both as prosecutor and legal advisor to the members-only court:[134]

> There is no consent where . . . the woman is insensible . . . or where her apparent consent was extorted by violence to her person or fear of sudden violence. . . .
>
> Mere verbal protestations and a pretense of resistance do not of course show a want of consent, but the contrary, and where a woman fails to take such measures to frustrate the execution of the man's design as she is able to and are called for by the circumstances the same conclusion may be drawn. . . .
>
> It has been said of this offense that "it is true that rape is a most detestable crime. . . but it must be remembered that it is an accusation easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent."[135]

A telling point for the defense came out on cross-examination, and the alleged victim's prior sexual history was almost raised:

> Q [by defense counsel]. Did the intercourse with the accused pain you?
>
> A. I never felt anything.
>
> Q. This had never happened to you before?
>
> Prosecution: I believe we should give the defense the widest latitude in examining the witness, but this is getting into a personal matter, the bearing of which, on this case, I do not understand. However, I will not object if counsel considers the virginity of the witness a matter of importance in this case.
>
> Defense: I withdraw the question.[136]

To corroborate Mmse. Thiebaux's testimony, MAJ Hurley called two French soldiers as witnesses. These men testified that they had been walking along the road when they heard some screams. They then saw the accused and Ms. Thiebaux coming out of the oat field. When she saw them, the two Frenchmen testified that she ran toward them and exclaimed, "Kill him, he has raped me." They further testified that she was agitated, "looked like a mad woman," and that her clothing was disheveled. Hurley also called a local French gendarme to the stand. The gendarme testified that Ms. Thiebaux reported the rape to the police authorities the following morning and that, when they examined the crime scene, the gendarmes had found the alleged victim's hair comb, breast pin, and the heel of her shoe.[137] Major Hurley also provided Mmse. Thiebaux's bloody clothes for the court's examination (though he did not enter them as exhibits, because they would not travel well with a paper record). Moreover, one of Private Buckner's comrades testified that Private Buckner had boasted about "doing business" with a lady he met on the road, and that this lady had run away, but that he had caught her and dragged her into a wheat field before he "did business to her."[138]

Nineteen-year-old PVT Buckner told a radically different story. He had only been in the Army since February 1918, and after completing basic training had been assigned to the 313th Labor Battalion of the American Expeditionary Force (AEF) in France.[139] After being called to the stand, Buckner testified that he had met Georgette Thiebaux at a grocery store and that they had later met several times. They had drunk wine together and also exchanged gifts: she had given her photograph and some prayer beads to him; he had given her his watch.

Private Buckner testified that he and Ms. Thiebaux had had consensual sexual relations on 30 June and on 1 July, and had such relations again on 2 July. Specifically, he said he "had connection" with her three times in the oat field that day and that she had not struggled or screamed during the sex acts. But then things had gone awry. Said Buckner: "When we got through she caught me by the arm and she had my watch and she broke a minute hand off it. Then I took the watch away from her."[140] As this was the watch that Buckner had previously given to her, "she got mad." After telling him "me and you are finish," Ms. Thiebaux left the oat field and, once on the road, told two French soldiers walking nearby that she had been raped. Buckner also testified that shortly after his arrest on 5 July, he had gone with Captain (CPT) R. B. Parker, his defense counsel, to see MAJ Hurley. Private Buckner had then told Hurley the whole story of his relationship with Georgette Thiebaux. The three Soldiers—Buckner, Parker, and Hurley—had visited the town and other locations where the accused said he had met the victim and had relations with her.[141]

In rebuttal, the prosecution called witnesses who testified that Mmse. Thiebaux could not have been with the accused on 30 June and 1 July— because she was at hparents' home and at the residence of her sister. Contradicting Private Buckner's testimony that he had conversed with Mmse. Thiebaux in English on these prior occasions, several French witnesses (including her father) testified that she spoke no English; her father also testified that she had never possessed the prayer beads Private Buckner claimed to have gotten from her. The picture he claimed to have gotten from her was damaged, was inscribed "modern dancers" (Mmse. Thiebaux worked in a dry goods store), and could not be identified as hers in court, though a friend of Private Buckner said it had previously depicted Mmse. Thiebaux. No witnesses corroborated their prior meetings. The sister of the owner of the café where Private Buckner said Mmse. Thiebaux had given him wine testified that he, Private Buckner, had been there on the day of the incident, but that Mmse. Thiebaux had not been with him. The alleged victim's parents and the town's mayor also testified "as to her deplorable conditions at the time she reached her home" after the alleged rape.[142]

At the close of the evidence, both sides presented argument. Captain Parker, the defense counsel, went first. He argued a number of factors that, he stressed, indicated consent. When the gendarmes first saw PVT Buckner and Mmse. Thiebaux together, they appeared to be talking together, until she saw them. Mmse. Thiebaux had testified that her clothes had gotten bloody during a struggle with the accused, and that she thought most of the blood was his. But there were "no marks of any character on the accused," there was "not a spot of blood" on his clothes (either the ones he wore or the ones in his barracks bag), and his clothes were not torn: evidence that there had not been a struggle. She claimed to have "felt nothing" during repeated forcible intercourse. The defense counsel pointed out several inconsistencies in the prosecution evidence (such as differing accounts of what Mmse. Thiebaux did after PVT Buckner left the scene), and reminded the court of PVT Buckner's conduct in speaking freely to the prosecutor and showing him where the intercourse had taken place. The defense counsel closed with the following statement:

> In summing up, I would say, that it is the opinion and the firm belief of the counsel for the defense that the one who has made the accusation, Georgette Thiebaux, who has accused William Buckner, made no resistance but consented to intercourse with him. And so we firmly believe, after working upon this case, that William Buckner is not guilty of the charge.[143]

As for the prosecution, MAJ Hurley argued that since the accused admitted that he had sexual intercourse with Ms. Thiebaux, "the only element of rape left to be proved is that the carnal knowledge was had by force and without the consent of Georgette Thiebaux." In Hurley's view, the evidence he had introduced— particularly her screams during the incident and her conduct right after—showed that "she was assaulted forcefully and violently" and that the "uncorroborated word of the accused" was the only evidence to the contrary.[144]

Having heard the witnesses, and having had an opportunity to evaluate their credibility under oath, the thirteen members of the court closed for deliberation.[145] When they reconvened, they found the accused guilty as charged. After MAJ Hurley stated that "he had no evidence of previous convictions" of the accused to submit as evidence, the court closed to vote on a sentence. When the panel members reconvened, Colonel (COL) Edward P. O'Hern, the president of the court-martial, announced that PVT William Buckner was "to be hanged by the neck until dead" and that "two thirds of the members of the court concurred in the sentence."[146]

Under the Articles of War and the 1917 *MCM*, there was no requirement for PVT Buckner to be represented by a lawyer. Rather, Article 17 stated that "the accused shall have the right to be represented before the court by counsel of his own selection of his defense, if such counsel be reasonably available" ("counsel" in this context did not imply "legally trained counsel"). However, the prosecutor, MAJ Hurley, was an attorney and a member of the Judge Advocate General's Department (JAGD) and that may explain why Buckner had two counsel representing him: Captain R. B. Parker and First Lieutenant (1LT) A. C. Oliver. Interestingly, CPT Parker was a Medical Reserve Corps officer and 1LT Oliver was an Army chaplain (both were present for the execution, and 1LT Oliver gave PVT Buckner his last spiritual comfort). Although the Judge Advocate was charged with the duty of prosecuting a case, the 1917 *MCM* also required him to "do his utmost to preserve the whole truth of the matter in question," and to "oppose every attempt to suppress facts or to distort them."[147] In keeping with this duty, MAJ Hurley raised almost no objections to the defense conduct of the case—preferring a polite inquiry about the relevance of Mmse. Thiebaux's virginity, to which the defense responded by withdrawing the question.

Was there sufficient evidence to find the accused guilty as charged? The accused having admitted under oath that he had had sexual intercourse with the victim, the only element in dispute was whether the sex was by force and without consent. Since the victim was adamant that she had been raped, and there was considerable evidence of "fresh complaint," the court members had enough evidence before them. Ultimately, they weighed the credibility of the French victim against the American accused in making their decision. Doubtless the corroborating details for her story—such as the screams, the blood, his admissions to a fellow Soldier, and the locals' insistence that she spoke no English—assisted them in making this determination, as did the comparative lack of corroboration for his story.

What about the defense? Was it adequate? The apparent lack of legally trained defense counsel meant that the accused was at a serious disadvantage

at trial—a disadvantage amplified by the fact that the prosecutor was a lawyer and judge advocate. But the two defense counsel mounted a spirited defense, which included a vigorous cross-examination of the victim that highlighted inconsistencies in her testimony. Their arguments were cogent, making a logical, fact-based argument for consent in the face of a strong prosecution case. It is difficult to imagine how their strategy could have been much improved, even by seasoned defense counsel. Private Buckner had already admitted the sex to a fellow Soldier, so having him keep quiet and fighting the identification case would not likely have helped.[148] The defense's decision to bring MAJ Hurley along while investigating the case in town seems strange, but is understandable under the circumstances. Captain Parker's client had presumably told him the tale of the prior relationship, and said where the witnesses were who would back him up. If they *had* backed him up in front of MAJ Hurley, the entire prosecution might have been dropped. When they did not, the defense was still able to argue that Private Buckner's cooperative behavior bespoke his innocence.[149]

In the wake of the disastrous Houston Riots courts-martial, the promulgation of General Orders No. 7 meant that Buckner's case was reviewed for legal sufficiency by a Board of Review consisting of three senior judge advocates in the Office of the Acting Judge Advocate General (JAG) for the AEF in Europe. [150] After the convening authority approved the sentence on August 8, 1918, Buckner's case was forwarded to the AEF commander, General (GEN) John J. Pershing, for action. Under Article 48, only Pershing could confirm the death sentence and, while Pershing did confirm the sentence on August 17, 1918, it was held in abeyance pending review by the Board.

The report of the three officers who reviewed the proceedings, signed by Brigadier General (BG) Edward A. Kreger,[151] the Acting JAG, is contained in the allied papers. This report cited several specific pieces of evidence that supported the verdict.[152] The Board of Review concluded that the "conflict of testimony" between Buckner and Thiebaux "presented a question for determination by the court." The Board also found that the "record is without suggestion of substantial error, or of any irregularity justifying comment." Finally, the three judge advocates concluded that "the record in the case is legally sufficient to support the sentence adjudged, approved and confirmed."[153] Kreger's signature reflected that, as the senior-ranking judge advocate in Europe, he concurred with the Board's opinion.

Measured by modern standards of due process, PVT Buckner's trial was seriously flawed. First, the prosecutor was a lawyer from the Judge Advocate General's Department while the defense counsel were not, so that MAJ Hurley was much more adept at trying courts-martial. As a military lawyer, Hurley doubtless had more credibility with the members than his opponents.[154] Second, the death penalty was imposed by a less than unanimous vote and without evidence presented in extenuation or mitigation; and the case was prepared and tried at a breakneck pace that would be unthinkable for a capital case now. Third, the panel that heard the case consisted only of officers; the accused had no right to enlisted members. Fourth, there was no military judge (or other legally trained officer) to rule on evidentiary matters or otherwise ensure procedural due process at the trial; the panel received its instructions from the prosecutor. Fifth, while the accused's case was reviewed by a Board of Review, he did not have counsel representing him in that quasi-appellate forum, though the prosecutor's own review was before them. Nor did he have the opportunity, much less the right, to present evidence to that Board.[155]

These shortcomings aside, a final question remains. Was it possible for an African-American Soldier on trial for raping a white woman to get a full and fair hearing in the Army in 1918? After all, this was a racially segregated Army where racist attitudes toward Black Soldiers were official policy. Army Expeditionary Force authorities issued orders forbidding African-American Soldiers "from conversing or associating with French women, attending social functions, or visiting French homes."[156] The French liaison officer at AEF headquarters advised his countrymen "to prevent any expression of intimacy between white women and black soldiers," as this would "deeply affront white Americans."[157] Given this racial climate, did the panel that heard PVT Buckner's case weigh the evidence fairly? Would a white Soldier have been found guilty—and sentenced to death—under the same facts?

A sad postscript to this case is contained in the record's allied papers: on March 11, 1919, Buckner's mother wrote to the "Adjutant General, U.S. Army" about her son, whom she believed had been killed in action. She had expected to get some Army life insurance proceeds after her son had died but, as she wrote:

> I have been informed . . . that the circumstances surrounding the death of my son . . . was such as to cancel the insurance. I wrote . . . and asked . . . to tell me the circumstances. In reply, they refer me to you.
>
> Will you please write to me at once, telling me about it?
>
> Yours truly,
> Mary Buckner
> 316 Seventh Street
> Henderson, KY.

There is no record in the Buckner file of any reply to his mother.

The Trial by Court-Martial of Colonel William "Billy" Mitchell

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On September 1, 1925, three Navy seaplanes flying from Los Angeles to Hawaii crashed into the Pacific Ocean. Two days later, the Navy dirigible USS *Shenandoah* fell from the skies—killing fourteen men, including its skipper. Constructed at a cost of $2.7 million, the *Shenandoah* was a "national treasure" and its destruction, and the death of so many men, was front-page news.[158] Americans everywhere asked how these air disasters could have happened and who was responsible for the loss of men and materiel.

On September 5, 1925, Colonel (COL) William "Billy" Mitchell invited six newspaper reporters into his quarters in San Antonio and handed them a nine-page, single-spaced typewritten statement. This was Mitchell's answer to the question on the lips of Americans everywhere:

> I have been asked from all parts of the country to give my opinion about the reasons for the frightful aeronautical accidents and the loss of life, equipment and treasure that has occurred during the last few days. My opinion is as follows: These incidents are the direct result of the incompetency, criminal negligence, and almost treasonable administration of our national defense by the Navy and War Departments."[159]

Mitchell's incendiary words were read by millions of Americans. A headline in the *Chicago Tribune* screamed "[Mitchell] Brands Air Rule 'Criminal.'" "Flyers Killed by Stupid Chiefs' Propaganda Schemes, Col. Mitchell Charges" proclaimed the *Washington Star*.[160] Since Mitchell was known as "a dashing war hero and unreserved advocate of airpower,"[161] his criticisms of the Army and Navy were believed by many and public opinion was solidly behind him. In the War Department, Army leaders were "stunned" by Mitchell's words, which they considered to be "outrageous"[162]—and insubordinate. Believing that his remarks had brought "discredit upon the military service" in violation of the Articles of War, the Army ordered COL Mitchell to Washington, D.C. to stand trial. What follows is the story of Mitchell's court-martial and the judge advocates who played important roles in it.

Born in Nice, France, in December 1879, William Lendrum "Billy" Mitchell was the oldest of ten children. After his American parents moved back to their home state of Wisconsin when Mitchell was three years old, he lived a privileged life in a wealthy and politically prominent family.

When the Spanish-American War broke out in 1898, Mitchell dropped out of Columbian University (today's George Washington University) and enlisted as a private in the infantry. Seven days later, he was a Signal Corps second lieutenant. He subsequently served in Cuba and the Philippines. In 1915, then-Captain (CPT) Mitchell was assigned to the aerial section of the Signal Corps. The following year, he learned to fly—and began his remarkable career as the Army's "first truly vocal supporter of airpower and its role on the battlefield."[163]

After the United States entered World War I in April 1917, Mitchell was appointed air officer of the American Expeditionary Force (AEF) and promoted to lieutenant colonel. He later became the first U.S. officer to fly over enemy lines and the first to be awarded the French Croix de Guerre. In September 1918, now-COL Mitchell led a raid of 1500 airplanes against the St. Mihiel salient. A month later, after being promoted to the temporary rank of brigadier general (BG), Mitchell led additional massed bombing raids against German units during the Meuse-Argonne offensive.

After the war, BG Mitchell returned to Washington, D.C., where he was assistant chief of the Air Corps. This position, which allowed him to retain his temporary one-star rank, also served as a platform for Mitchell to begin lobbying for an independent U.S. air force. Mitchell insisted that the next war would be fought in the air—not on the ground or at sea. Mitchell believed that success in future wars would come to those nations that adopted strategic bombing as their principal method of warfare. Moreover, as the corresponding development of military aviation meant that the Army and Navy would be vulnerable without airplanes as the first line of defense, only the unified control of air power in a separate and distinct air force could provide the required defense. In Mitchell's view, the only logical course of action was to establish an American air force akin to Great Britain's Royal Air Force.

Mitchell proved that even large ships could be destroyed from the air (four captured enemy ships, including one battleship, were sunk in a demonstration off Norfolk, Virginia, in 1921) and some senior Army and Navy leaders agreed with Mitchell that airpower had altered the nature of war. But Mitchell "was viewed by many as a vain, egotistical, self-publicizing grandstander, and his fiery temperament eventually alienated him from nearly all whom he hoped to influence. "[164]

When Mitchell made his intemperate remarks in September 1925, he was serving as the air officer of the VIII Corps in San Antonio, Texas—and wearing eagles on his collar. This was because when Mitchell left his job in Washington, D.C., as assistant air chief—a one-star billet that permitted Mitchell to continue to wear stars as a temporary BG—and was sent to Fort Sam Houston, Mitchell reverted to his permanent grade of colonel. This is why Mitchell was wearing colonel's rank when he appeared before a court-martial in Washington, D.C., on October 28, 1925.

While the War Department had hoped for minimum publicity, the Mitchell "trial was the biggest media event in the country . . . [P}ress tables were jammed . . . with about forty reporters and photographers."[165] Additionally, some five hundred people lined up to get some of the few courtroom seats available for members of the public.

Due to Mitchell's seniority, twelve generals had been chosen by the War Department to sit on the panel, including Major General (MG) Douglas MacArthur, who would later serve as Army Chief of Staff and achieve great fame in World War II and Korea. The "law member," the forerunner of today's military judge,[166] was COL Blanton Winship, who had been decorated with the Distinguished Service Cross and Silver Star for combat heroism in 1918. Like MacArthur, Winship also had a bright future: he would serve as The Judge Advocate General from 1931 to 1933 and Governor of Puerto Rico from 1934 to 1939.[167] These panel members all knew Mitchell, some personally (including Winship and MacArthur), and some had publicly expressed opinions on his airpower theories. They were hardly impartial or neutral in their attitudes. Two were excused for bias and one on a peremptory challenge—leaving nine general officers (plus COL Winship) to hear the evidence against Mitchell.[168]

The trial judge advocate was COL Sherman Moreland, a fifty-seven-year-old judge advocate who was "mild mannered and polite to a fault in a courtroom."[169] He was assisted by Lieutenant Colonel (LTC) Joseph McMullen, a Virginia lawyer who had joined the Judge Advocate General's Department after World War I. Moreland and McMullen were joined later by Major (MAJ) Allen Gullion, who was "one of the most skilled and aggressive prosecutors" in the Army. Gullion, too, was destined for greatness as a judge advocate: he served as TJAG from 1937 to 1941 and as Army Provost Marshal General from 1941 to 1945. But:

> Gullion was a bit of an eccentric. Though he played polo and enjoyed watching boxing matches, he smoked heavily (always with a cigarette holder) and thought exercise could be bad for his health. He read the newspaper in bed wearing white gloves so the print wouldn't soil his hands. On car trips from Washington back to Kentucky, he would stop at each railroad crossing and order his son out to inspect the track both ways and then signal him to pass over it . . . Officers who acted in an ungentlemanly or unprincipled manner deeply offended him. He came down hard on them in court—something he would now do with Mitchell.[170]

As for Mitchell's defense team, he was represented by civilian lawyer and Congressman Frank R. Reid and judge advocate COL Herbert Arthur "Artie" White. Reid, a largely unknown representative from Illinois who was in his second term in Congress, agreed to defend Mitchell for free—chiefly because Reid "knew the trial would quickly make him a national figure."[171] White, "a soft-spoken Iowan,"[172] had been serving as a judge advocate at Fort Sam Houston; the Army transferred White to Washington to serve as Mitchell's military defense counsel. Rounding out the defense team were Frank Plain, an Illinois state judge and friend of Reid's who was an expert on constitutional law, and William Webb, a young lawyer who did legal research and kept track of the thousands of pages of documents in the case.

Mitchell was charged with eight specifications of violating the Ninety-sixth Article of War, which made criminal "all disorders and neglects to the prejudice of good order and military discipline" and "all conduct of a nature to bring discredit upon the military service." The gist of the specifications was that Mitchell's September 5 statement about the

causes of the seaplane and *Shenandoah* disasters, and follow-up comments he made to the media on 9 September, constituted insubordination and consequently conduct prejudicial to good order and discipline in violation of Article 96.[173] Trial began on October 28, less than two months after the statements were made.

Mitchell's lead defense counsel, Frank Reid, first argued that the entire case should be thrown out because his client's statements were protected by the First Amendment. The law member, COL Winship, however, agreed with the trial judge advocate that Mitchell's military status made the First Amendment inapplicable, and denied Reid's motion to dismiss the charge and its specifications.[174] After the panel members agreed with Winship's ruling, the case moved to the merits. The prosecution case-in-chief took less than a day, and consisted simply of proof that Mitchell had made the statements and written the articles in question. On cross-examination, one government witness (the commander of VIII Corps) agreed that the publication of Mitchell's statements had not caused any "lack of discipline or insubordination" in his command. The defense then moved for a finding of not guilty,[175] claiming that the prosecution had not proven the statements were contrary to good order and discipline—that, for aught the evidence had shown, they were instead public-spirited efforts to *benefit* good order and discipline "by correcting the evils which [were] admittedly destroying it in the air service and in the War Department." On Winship's advice, the panel denied the motion.[176]

The same day the government rested its case, the defense presented the government with an extensive list of witnesses (more than seventy) and documents (thousands of pages) that it wanted produced. The court recessed for a week while witnesses and documents were gathered. The defense case then began—with Reid now arguing to the panel that Mitchell should be exonerated because his criticisms of the War and Navy Department were true. The court consistently declined to rule on whether this evidence was relevant on the subject of guilt, or only as mitigation.[177]

To prove that the military hierarchy was incompetent—as Mitchell had claimed—Reid called a number of prominent individuals to the stand, including then-MAJ Henry A. "Hap" Arnold and New York Congressman Fiorello H. La Guardia, both of whom had flown in combat in World War I.[178] Both men testified about the large number of fatal accidents in the Army Air Service and how "foreign countries" like France, Italy, and Sweden were moving toward a "unified air force."[179] They also "testified to the unwarranted denigration of air power by the military hierarchy."[180]

Toward the end of the defense case, Mitchell took the stand himself, and was subjected to a full day of cross-examination. Questioned closely on specific details, such as the accident rates for fliers in different countries' air services or the cost of his proposed reforms, Mitchell did not know the numbers.[181] Major Gullion questioned Mitchell about a paper he had written on the "versatility of the Japanese submarine," and his statement that such submarines could carry "any size" of gun for surface warfare. This exchange followed:

> Mitchell: That was my opinion.
>
> Gullion: That was your opinion?
>
> Mitchell: That was my opinion.
>
> Gullion: Is that your opinion now?
>
> Mitchell: Yes.
>
> Gullion: Then, any statement—there is no statement of fact in your whole paper?
>
> Mitchell: No.[182]

Mitchell's credibility was severely damaged. To exploit the damage, the government presented a three-week case in rebuttal, calling veteran fliers (including Arctic explorer Richard Byrd), surviving crewmen from the *Shenandoah*, the chief of the Army's Air Service, and the Army's Deputy Chief of Staff to dispute Mitchell's claims.[183] In his closing argument to the panel, which was about to consider both findings and sentence,[184] Major Gullion hammered home how Mitchell's opinions reflected both his arrogance and unfitness to serve:

> Is such a man a safe guide? Is he a constructive person or is he a loose-talking imaginative megalomaniac cheered by the adulation of his juniors who see promotion under his banner . . . and intoxicated by the ephemeral applause of the people whose fancy he has for the moment caught?
>
> Is this man a Moses, fitted to lead the people out of a wilderness which is his

> creation, only? Is he of the George Washington type, as [defense] counsel would have you believe? Is he not rather of the all-too-familiar charlatan and demagogue type?
>
> Sirs, we ask the dismissal of the accused for the sake of the Army whose discipline he has endangered and whose fair name he has attempted to discredit . . . [W]e ask it in the name of the American people whose fears he has played upon, hysteria he has fomented, whose confidence he has beguiled, and whose faith he has betrayed.[185]

At the end of a seven-week court-martial, COL Mitchell was found guilty of all specifications and the charge. His sentence: to be suspended from rank, command, and duty, and to forfeit all pay and allowances for five years.[186] Despite the result, the Mitchell court-martial stands alone, or nearly so, in court-martial history for the extent to which the defense was able to use the trial as a forum to debate policy questions and attack current military practice.[187]

Crushed by the trial results, Mitchell resigned from the Army on February 1, 1926. Newspapers that had favored his cause cooled in their support or turned against him. The public largely lost interest.[188] Mitchell, who died in 1936, did not live long enough to see many of his ideas and predictions about the importance of airpower come to fruition. In the long run, however, he won his case in the court of public opinion—especially after the Japanese attack on Pearl Harbor, and American unpreparedness for it fulfilled some of his prophecies. Men who had testified for him at trial won renown in World War II and in the (finally independent) United States Air Force.

Today, the public generally, and American airpower advocates in particular, laud Billy Mitchell as one of the greatest airmen in history. There has, however, never been any formal exoneration of him—but not for want of trying. In March 1956, William L. Mitchell Jr., encouraged by the Air Force Association, filed a petition with the Air Force Board for the Correction of Military Records to "render null and void the proceedings, findings, and sentence" of his father's court-martial. As Mitchell's son put it: "I sincerely believe that a gross injustice was done to my father. History has vindicated him. I believe the United States Air Force cannot do less."[189] Apparently "top Army officials fiercely fought"[190] this petition from Billy Jr., arguing in part that the Air Force was a separate service and should not reverse a thirty-year-old Army conviction.

Despite the Army's opposition, the Air Force Board recommended to Secretary of the Air Force James Douglas that COL Mitchell's court-martial conviction be set aside. In March 1958, however, Douglas declined to follow this recommendation, and no further legal action has ever been taken to overturn the proceedings in his case.[191]

A Murder in Manila—And Then a Hanging

(Originally published in the May 2016 edition of *The Army Lawyer*.)

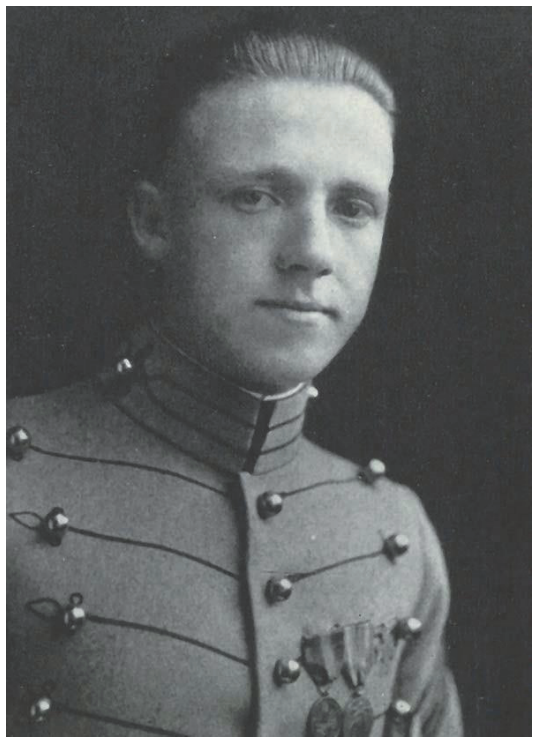
"Army Officer Hanged For Killing His Fiancée" screamed the headline in the *Boston Daily Globe*;[192] the article that followed described how, on March 18, 1926, 25-year-old Second Lieutenant (2LT) John S. Thompson calmly "and without making any statement . . . walked to a scaffold" where a noose was 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 peacetime[193] and the only graduate of the U.S. Military Academy to be executed for a crime.

Born in Pernassus, 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.[194]

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.[195]

In the Army of the 1920s, dinners and dancing were the focal point of many young, unmarried officers' lives outside of work. Many servicemembers traveled to Manila to meet up at the Army and Navy Club or the Manila Hotel to eat, drink, and socialize.[196]

Shortly after arriving in the Philippines, Thompson, then twenty-five years old, met Audrey Burleigh, the 16-year-old step-daughter of Captain (CPT) Hamilton P. Calmes, an Army doctor serving in the Islands,[197] at a party on a barge. She had "black, bobbed hair" and "pretty, bewitching eyes."[198] She was five-foot-four- inches tall and weighed about 110 pounds.[199] 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.[200]



Second Lieutenant John S. Thompson, 1924

By February 1925, Thompson was infatuated with Burleigh. 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.'"[201] 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.[202]

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.[203] This upset Thompson because

he believed he could no longer afford to marry Audrey.[204] 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.[205]

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 (1LT) 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."[206] According to Kendall, Thompson "did not believe in sexual intercourse before marriage and even considered kissing to be immoral."[207] 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.[208]

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 court-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.[209]

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 re-load the pistol and attempt once again to shoot himself.[210]

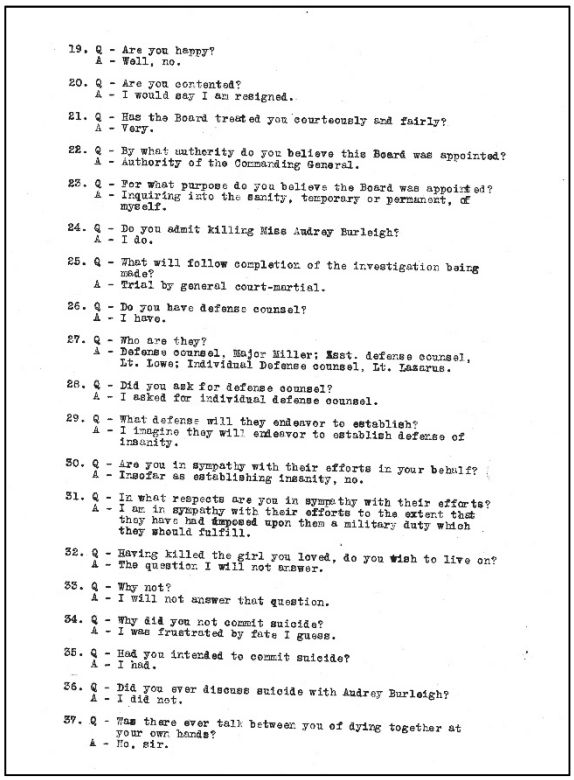
Thompson thought briefly about returning to his quarters on Fort McKinley to obtain more ammunition with which to commit suicide. He decided against this course of action, however, as he claimed to have forgotten where he had put the ammunition in his room. Consequently, he told the taxi driver to take 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."[211]

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 (CPL) 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."[212]

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 have made to Conrad could only be used at his trial if Thompson were told that he did not have to saying anything. He also had to be informed that anything he might say could be evidence against him.[213]

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.[214]



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. Lowe; 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 - Insofar 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."[215]

The entire interview conducted by Conrad was recorded by a 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.[216]

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

> 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.[217]

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.[218]

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.[219] 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."[220]

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.[221] In July, this same board met a second time to again inquire into Thompson's sanity because of the depositions obtained by Thompson's

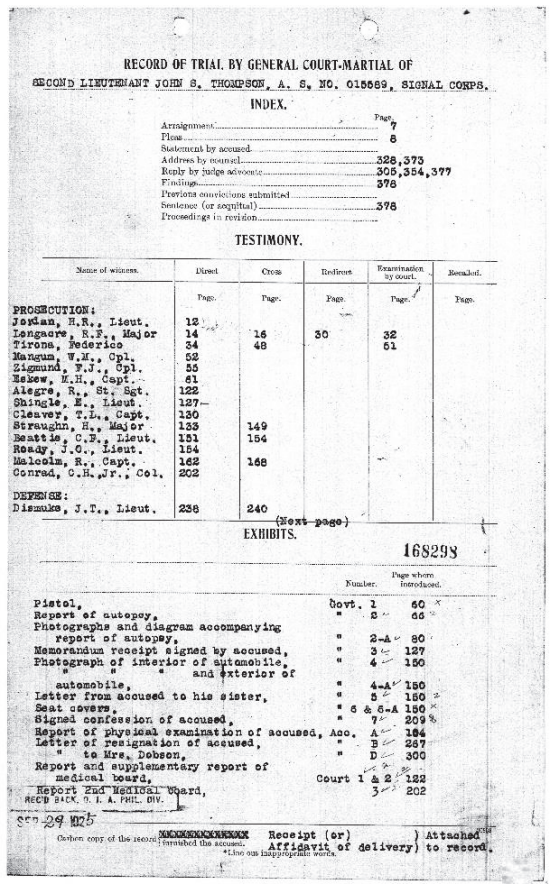
defense counsel from the United States. After carefully examining the depositions, and re-examining the accused, the three Army physicians again concluded that "Lieutenant John S. Thompson did not at the time of the offense charged suffer from any mental defect or derangement" that prevented him from 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 cooperate in his own defense.[222]

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.[223]

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.[224]

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."[225] 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 (2) to adhere to the right."[226] 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.[227]



RECORD OF TRIAL BY GENERAL COURT-MARTIAL OF
SECOND LIEUTENANT JOHN S. THOMPSON, A. S. NO. 015669, SIGNAL CORPS.

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SEP 29 1925

Carbon copy of the record XXXXXXXXXXXXX furnished the accused. Receipt (or) Affidavit of delivery) Attached to record.

*Line out inappropriate words.

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 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 that only 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.[228] 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.[229]

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.[230]

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.[231] Associates and colleagues of the Thompson family also wrote letters requesting clemency.[232]

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."[233] 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.[234]

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.[235]

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."[236] 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, Thompson deserved to be executed for "firing five bullets. . . into . . . an innocent 16-year old girl, a member of a brother officer's family."[237] 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 ever justified in time of peace it is not only justified but actually demanded in this case.[238]

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.[239]

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."[240] 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 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.[241]

Reverend Thompson then closed this story with this sentence: "He enlisted in the Army the next morning."[242]

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."[243]

On February 9, 1926, President Coolidge confirmed the death sentence in Lieutenant Thompson's court-martial.[244] 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.[245]

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 alumnus.

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 of a court-martial conducted in the Army in the years before World War II.

An Army Lawyer Tried and Convicted by Court-Martial: *United States v. Joseph I. McMullen*

(Originally published in the February 2016 edition of *The Army Lawyer.*)

While there have been a handful of courts-martial in which an Army lawyer was the accused, including one involving a former Judge Advocate General,[246] the high-profile trial of Colonel (COL) Joseph I. McMullen in February 1936 has long been forgotten. But the case is worth remembering for two reasons: First, McMullen was well-known as one of the prosecutors in the court-martial of Colonel William "Billy" Mitchell in the 1920s, and so the story of his trial was carried in the newspaper of the day.[247] Second, the misconduct for which McMullen was convicted was a classic violation of professional ethics: engaging in the private practice of law and accepting money and other gratuities from civilian corporations that were doing business with the government. What follows is the story of Joseph I. McMullen's place in military legal history.

Joseph Irving McMullen began his military career in April 1896, when he enlisted in the 6th Cavalry at the age of 22.[248] Five years later, he obtained a commission as a Second Lieutenant (2LT).[249] McMullen then remained on active duty until 1906, when he "was retired on account of physical disability in line of duty."[250]

Ten years later, 2LT McMullen was recalled to active duty, and after America's entry into World War I, he was quickly promoted to first lieutenant, captain, then major.[251] In August 1921, now—Lieutenant Colonel (LTC) McMullen transferred to the Judge Advocate General's Department; he had been admitted to the bar in Idaho and California sometime prior to World War I and so was well-qualified to serve as an Army lawyer.[252] Additionally, McMullen seems to have been an expert in patent law, which would explain why he was the Chief of the Patents Section, Judge Advocate General's Office, from 1921 until 1935.[253]

In this important legal assignment, McMullen had much contact with businessmen and corporations doing business with the Army. By all accounts, he was a superb attorney "who discharged his duties in an excellent manner and did nothing . . . to impair . . . the rights of the War Department in patent matters."[254] But, perhaps believing that his good work entitled him to more than his military pay and allowances, McMullen engaged in "gravely unethical conduct."[255]

Judge Advocate Colonel Joseph I. McMullen (center) stands with his son, Bruce McMullen (left), and defense counsel, William Leahy (right), after his conviction by general court-martial for dishonorable conduct on February 20, 1936.

A 1935 investigation conducted by the Army Inspector General (IG) revealed that in 1932, newly-promoted COL McMullen had received $3,000 from the Cuban-American Manganese Corporation. At the time, Congress was considering legislation that would impose a one-cent tax on manganese imports from Cuba, and such a tax would have a substantial and adverse impact on the company's profits given that manganese ore coming from Cuba was free of duty at the time.[256]

The Cuban-American Manganese Corporation approached McMullen and asked him to help the company stop this import tax, and in May 1932, Congress in fact rejected the proposed one-cent tax. This was a victory for the company, and because McMullen had "led the company to believe that he had favorably influenced high government officials" to prevent the tax from being imposed, the Cuban-American Manganese Corporation wanted to reward McMullen for his good work.[257] According to the IG, McMullen had in fact "accomplished no such . . . results" for the company, but he collected $3,000 from the Cuban-American Manganese Corporation because the company's officers believed that he had successfully lobbied for them.[258] At that time, $3,000 was nearly twice the annual income of the average American family, and considering that the United States was in the middle of the Great Depression, this was a sizeable gratuity.[259]

This same IG investigation also disclosed that in January 1934, while acting as a legal advisor to the Assistant Secretary of War, COL McMullen had accepted two round-trip railroad tickets from Joseph Silverman Jr.[260] Silverman was a second-hand clothing dealer in New York City who operated "under a number of different firm names" and who sought to buy "surplus [clothing] goods" from the War Department.[261] In any event, Silverman had "continuing business dealings with the War Department," and at the time McMullen took the tickets from Silverman, he had been giving legal advice on the latter's clothing contracts with the War Department.[262]

As a result of his ethical lapses, McMullen was tried by general court-martial at Walter Reed General Hospital in January and February 1936. He was charged with violating the 96th Article of War, which was the equivalent of today's Article 134 of Uniform Code of Military Justice.[263] As it was concerned that much of McMullen's criminal behavior was outside the statute of limitations, the War Department decided only to court-martial McMullen for having "wrongfully and dishonorably" accepted the two round-trip railroad tickets from Mr. Silverman given "with the intent to have [McMullen's] decision and action on [Silverman's] contract . . . influenced thereby."[264]

Colonel McMullen pleaded not guilty but was convicted. He was sentenced "to be reduced in rank to the foot of the list of officers of his grade," to be reprimanded, and to forfeit $150 per month for twenty-four months.[265]

When McMullen's record of trial was reviewed by the Board of Review, the forerunner of today's Army Court of Criminal Appeals, he got lucky: The three-judge appellate body determined there was "reasonable doubt" in McMullen's case.[266] According to the Board members, there was "a doubt as to whether the [train] tickets were a gift" from Mr. Silverman. Consequently, the Board recommended to The Judge Advocate General that he advise the convening authority that the evidence was "legally insufficient" and that the finding of guilty and the sentence be set aside.[267]

Based on this recommendation, Major General (MG) Arthur W. Brown, then serving as The Judge Advocate General, advised the convening authority to take no action in McMullen's case, and so his court-martial—as a practical matter—had no legal effect.[268] But this was not the end of the story because McMullen had been indicted in U.S. District Court for the District of Columbia for his unethical dealings with the Cuban-American Manganese Company in 1932. This was because the three-year statute of limitations applicable to courts-martial did not apply to Title 18 offenses prosecuted in federal civilian court, and so McMullen could be indicted for taking $3,000 from the Cuban-American Manganese Corporation.[269]

On April 26, 1936, a civilian jury convicted him of receiving (in violation of a federal statute[270]) "compensation for services rendered by him while still an officer of the United States in behalf of one of his clients in relation to a proceeding in which the United States was interested," i.e., lobbying against the proposed tax on manganese imported into the United States by the Cuban-American Manganese Company.[271] McMullen was sentenced to six months in jail and fined $1,000.[272]

McMullen appealed his conviction. He argued that it should be set aside because the trial court denied his motion for a bill of particulars in the case.[273] According to McMullen, the indictment was legally insufficient to support his conviction because it did not clearly state whether McMullen had received "a thing of value" or "money." As a result, he had been deprived of a fair trial because in denying his motion for a bill of particulars, the jury had been "in doubt" as to what McMullen had actually received from the Cuban-American Manganese Corporation.[274]

On March 21, 1938, the U.S. Court of Appeals for the District of Columbia agreed. It reversed McMullen's conviction and "remanded for a new trial."[275] Lest any lawyer reading its opinion be mistaken, the court wrote that "forms and procedure still have their place and purpose in the administration of the law; without them we would have chaos."[276] The court continued: "Much impatience is being shown with the technicalities of the law . . . [but] the requirement that an indictment . . . must state the crime with which a defendant is charged, and the particular act constituting the crime is more than a mere technicality; it is a fundamental, a basic principle of justice . . . ."[277]

So what happened next? Despite the fact that the Court of Appeals had set aside McMullen's conviction in the U.S. District Court, the Army, "[a]s a result of the conviction" and relying on "an opinion from the Attorney General of the United States," notified McMullen that he "was dropped from the rolls of the Army and . . . that he ceased to be an officer of the Army as of May 8, 1938."[278] The

Attorney General's rationale was that, having been convicted of a crime involving the acceptance of a gratuity, McMullen "became immediately incapable of holding any office of honor, trust, or profit under the Government of the United States,"[279] and so must be separated from the Army.

Shortly thereafter, the Department of Justice (DOJ) decided that it had enough of the "McMullen affair";[280] on June 30, 1939, the DOJ declined to take any further criminal action against him.[281]

But while the Army and the Justice Department may have believed they were finished with COL Joseph I. McMullen, he was not finished with them. On September 11, 1940, McMullen filed a complaint in the U.S. Court of Claims. In his suit for money, he maintained that because his federal conviction had been reversed (and the case *nolle prosequi* by DOJ), he "never was legally separated from the service" and consequently was entitled to recover as much as $25,000 in back pay.[282]

What happened to McMullen's suit in the U.S. Court of Claims? On December 6, 1943, that court ruled that the War Department had acted lawfully in permanently separating McMullen from the Regular Army after his 1935 conviction in U.S. District Court.[283] In their opinion, the three judges deciding McMullen's claim acknowledged that his conviction at trial had been reversed.[284] They conceded that it might seem unfair that he was being penalized after this conviction was overturned. But, said the court, the Army had correctly dismissed McMullen because of the immediate "harm to the public service" resulting from his conviction, and his subsequent "vindication" was insufficient reason to award him any back pay.[285]

The Court of Claims expressly rejected McMullen's argument that once the Court of Appeals had set aside his conviction in U.S. District Court, he should be treated as if he had never been convicted of any crime, and "be paid the salary and allowances" of an Army colonel.[286] The Court of Claims dismissed McMullen's petition; he recovered nothing.[287]

So ended the "McMullen affair"—a largely forgotten but fascinating piece of our military legal history.

Hangings and Death by Musketry in the Pacific: Death Penalty Courts-Martial in Australia, Hawaii, and India

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In April 2001, the *Honolulu Advertiser* published an article titled, "Mysterious Schofield Plot Filled with Untold Stories."[288] Those who took the time to read the piece learned that the six-acre Schofield Barracks Post Cemetery in Hawaii has a special plot containing the remains of seven Soldiers who were tried, convicted, and executed either by hanging or by firing squad. What follows is the story of five of those seven courts-martial, which occurred either in Australia, Hawaii, or India. They are examined in chronological order.[289]

United States v. Private Edward J. Leonski
Australia 1942

Twenty-four-year-old Leonski "paid with his life for three brutal murders which chilled the blood."[290] The victims, all Australian females residing in Melbourne, were killed by the accused on three different days in May 1942. The accused, a private (PVT) assigned to the 52d Signal Battalion, Camp Pell, Melbourne, Australia, was apprehended and confessed to the murders. He was charged with premeditated murder of all three victims in that Leonski "willfully, deliberately, feloniously, [and] unlawfully" strangled each woman "with his hands."[291] Tried by general court-martial in July, he was found guilty of the triple homicide and sentenced to death.

Given that Leonski had confessed to the killings when questioned by an Australian police detective, the panel members did not have trouble finding him guilty. But the accused was a heavy drinker, and evidence was presented at trial that he had consumed prodigious amounts of alcohol prior to each murder. Prior to the last homicide on 18 May, for example, PVT Leonski drank "25-30 glasses of beer, followed by five one-ounce whiskeys."[292] The defense suggested that the accused's drinking was evidence of "mental derangement," but the panel rejected this theory, as did Lieutenant Colonel (LTC) John A. Stagg in his Staff Judge Advocate's Review of the case.[293] Leonski in fact "had acquired a reputation for his drinking ability," and the members necessarily concluded that he was able to form the requisite intent to support their findings.[294]

On October 26, 1942, the Board of Review, Branch Office of The Judge Advocate General, then sitting in Melbourne, Australia, concluded in a thirty-page opinion that the record was "legally sufficient to support the findings of guilty . . . and the sentence."[295] Events moved quickly after the board's work was completed. General Douglas MacArthur, as Commander-in-Chief, Southwest Pacific Area, ordered the death sentence to be carried out on November 4, 1942, and Leonski went to the gallows five days later. Leonski initially was interred in Ipswich, Australia, but his remains were subsequently transported to the Schofield Barracks Post Cemetery, probably shortly after World War II ended.

United States v. Herman Perry
India 1944–45

On March 15, 1945, Private Herman Perry, 849th Engineer Aviation Battalion, was hanged in New Delhi, India. He had been convicted of murder, desertion, and willful disobedience of a lawful command of a superior officer.[296]

On March 4, 1944, the accused failed to report for duty and, when told that he consequently was under arrest and "was going to the guard house," killed a lieutenant who was attempting to apprehend him.[297] Private Perry then fled into the surrounding jungle. When apprehended by a "raiding party" sent to search for him on July 20, 1944—more than four

months later—he was discovered to be married to a local Indian woman and was operating a small farm with her. At first the accused denied that he was Herman Perry, but "later admitted his identity."[298]

At trial, the accused admitted that he had disobeyed orders and deserted. But he claimed that he had been justified in shooting the lieutenant because the officer had "jumped at" him. The panel members, however, saw it otherwise. After the Acting Staff Judge Advocate, Major (MAJ) Charles Richardson Jr., wrote that "this is a case of cold-blooded, deliberate, and brutal murder of a brave young officer of the United States Army," and that the death penalty was "the only fitting punishment for this offender," there was little doubt that the Commanding General, U.S. Army Forces, China, Burma, and India Theater, would order the execution to be carried out.[299]

United States v. Jesse D. Boston
Hawaii 1945

Thirty-five-year-old Private First Class (PFC) Boston killed a woman by striking her in the head with a "cement weight." He was executed by firing squad on August 1, 1945—the only Soldier to be "executed by musketry" in Hawaii in World War II.[300]

Why a firing squad? This was the actual punishment adjudged by the panel deciding Boston's case. Under the Articles of War then in effect, the members had the option of selecting hanging as a punishment, but did not.[301] Presumably, the convening authority could have altered the means of execution, but he did not. Boston was shot by musketry shortly before the hanging of Cornelius Thomas, discussed below, which meant Boston was part of the only double execution to occur in Hawaiian history.

Boston's trial by general court-martial was held in Hawaii from April 20–24, 1945. Evidence showed that the accused was stationed on the island of Maui at the time of the crime, and on February 15, he entered the home of Shizue Saito, a civilian, with the intent to "take her money if she had any." Private Boston walked up behind Saito and he hit her in the head with a "rock or brick or something of the sort." He likely hoped that the victim would be rendered unconscious, but when she began yelling for help, his plan went awry. When Boston left the victim's home, she was alive. Unfortunately for the accused, her skull had been fractured and she died before midnight that same night. After being advised of his rights, Boston admitted to having killed Mrs. Saito while attempting to rob her.[302]

After being convicted of premeditated murder and sentenced to be dishonorably discharged, to forfeit all pay and allowances, and to be shot by musketry, the Board of Review, U.S. Army Forces Pacific Ocean Areas, affirmed both the findings and sentence. The Commanding General, U.S. Army Forces Pacific Ocean Areas, then ordered the execution to be carried out.

United States v. Cornelius Thomas
Hawaii 1945

Twenty-two-year-old Thomas killed a man by shooting him with a .45 caliber pistol. He was hanged on August 1, 1945, shortly after Jesse D. Boston was shot by firing squad.[303]

On June 11, 1944, PVT Thomas, a member of the 3297th Quartermaster Service Company, then located on the island of Maui, absented himself without leave from his camp. He walked to the home of Francis T. Silva, where Silva, his wife, and nine-month-old child were sleeping. The accused cut a rear screen door and went into the Silva's bedroom. Although PVT Thomas did not know the Silvas, his intent was to awaken Mrs. Silva and "compel her to come outside for the purpose of having sexual relations with him." But when Thomas touched her leg to awaken her, she screamed. Perhaps the accused panicked, but he had a .45 caliber pistol with him that he raised and fired. The bullet hit the third finger of Mrs. Silva's right hand and then passed into the chest of her husband, killing him. According to the evidence presented at trial, PVT Thomas left the Silva home and, "after wandering about for some two hours and breaking into several other houses with a view to committing rape, returned to his camp."[304]

The members had no difficulty in finding Thomas guilty as charged. He had given a "voluntary written statement" in which he admitted entering the Silva home "with the intent to commit rape." Private Thomas also admitted to "firing a shot at the deceased." The defense objected to the admissibility of this statement on the grounds that it was involuntary, but the objection was overruled, and the defense counsel offered no additional evidence at trial.[305]

Major General (MG) Myron C. Cramer, then serving as The Judge Advocate General, recommended to President Franklin D. Roosevelt that the "sentence of death be confirmed and ordered executed." As Cramer put it, PVT Thomas was "a confirmed criminal and a menace to society."[306] On March 20, 1945, Roosevelt agreed and ordered the execution to be carried out. The record of trial is not clear why it took nearly four months for the War Department to publish General Court-Martial Orders ordering the hanging of PVT Thomas to occur, but they were published on July 11, 1945.[307] Slightly more than two weeks later, Thomas met the hangman's noose.

United States v. Private Garlon Mickles
Hawaii 1946-1947

Mickles was the last Soldier hanged in Hawaii: the "trap was strung" on April 22, 1947, at 7:01 a.m., and Mickles was "pronounced dead" twenty minutes later.[308]

On April 3, 1946, nineteen-year-old Private Garlon Mickles was assigned to the 2280th Quartermaster Truck Company, then located on Guam, Marianas Islands. According to the evidence presented at his general court-martial, Mickles entered the barracks room of a sleeping female civilian at about 10:30 p.m. on April 3, 1946. He was carrying "a coral rock about the size of a grapefruit," which he used to strike the woman in the head. When she did not "make any sound . . . he proceeded to have intercourse with her for about fifteen minutes." Just before leaving her room, Mickles noticed that his victim was wearing an expensive wristwatch on her right arm. He took it from her arm, put it in his pocket, and left.[309]

When the victim awoke, she knew she had been raped but was unable to provide any information about her assailant. Consequently, the crime remained unsolved until early May, when Mickles attempted to sell the wristwatch to some local civilians. The accused was apprehended, and the rape victim identified the watch as hers. Private Mickles subsequently gave a statement in which he "admitted all the essential elements of proof required" for rape and larceny.[310]

The question of Mickles's sanity was hotly contested at trial, but after an Army psychiatrist testified that the accused was sane at the time he committed the offenses, the panel did not have much trouble finding him guilty. At the time, rape was a capital offense under the Articles of War, and the panel certainly had little sympathy for the accused. The twenty-seven-year-old victim testified that she woke up "to find herself in great pain about the face and head, and unable to open her eyes."[311] She was fortunate not to have been killed when struck in the head with the coral rock. Additionally, although he was only nineteen years old, the accused had two prior convictions by courts-martial. The accused was African-American, and the victim was white. While race may have been a factor at trial given that black Soldiers were segregated from white Soldiers and faced discrimination on a daily basis, the extent to which race played a role will never be known.

On June 11, 1946, Private Mickles was found guilty of rape and larceny and sentenced to be dishonorably discharged, to forfeit all pay and allowances, and to be hanged by the neck until dead. After the convening authority took action, the case went to The Judge Advocate General, Major General Thomas Green, for his recommendation, and then via the Undersecretary of War to President Harry S. Truman for a final decision on the death sentence. The National Association for the Advancement of Colored People, and other interested parties, lobbied the Army and the White House for clemency for Mickles, but their efforts were to no avail. Truman ordered the hanging to proceed. While Mickles had been tried in Guam, he would be executed in Hawaii on April 22, 1947. He was the last Soldier hanged in Hawaii.

A final note on Mickles. The War Department Adjutant General's Office Form 52-1, Report of Death, states that his "cause of death" was "due to Judiciary strangulation."[312] Your Regimental historian has not previously seen this legal term in use.

A final note about the burials of these executed men. The graves are "hidden behind a hedge [and] separated from the main cemetery."[313] This is because it was considered wrong to bury them alongside men and women who served honorably and faithfully. Additionally, as the executed men had dishonored the Army and the Nation, they were buried "with their heads toward their individual tombstones, thus facing away from the post cemetery flag." This is significant as, of roughly 1800 people buried in the Schofield Barracks Post Cemetery, only these men are so interred; every other buried person faces toward the flag.[314]

There were, of course, other Soldiers tried by courts-martial and sentenced to death in Asia and the Pacific during World War II; their stories must wait until another day. But at least the history of five men executed and interred at the Schofield Barracks Post Cemetery is now better known to readers of *The Army Lawyer*.

Tried for Treason: The Court-Martial of Private First Class Dale Maple

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On April 24, 1944, at a general court-martial convened deep inside the U.S. Disciplinary Barracks at Fort Leavenworth, Private First Class (PFC) Dale Maple was found guilty of desertion and lending aid to the enemy. His sentence: to be hanged by the neck until dead. But Maple did not know that he had been sentenced to death, because the court-martial panel, which had conducted its proceedings in secret, had been ordered by the War Department to keep its verdict secret as well—even from the accused. What follows is the true story of the trial of PFC Maple, the first American-born Soldier in the history of the Army "ever to be found guilty of a crime that fits the Constitutional definition of treason."[315]

Born in San Diego, California, in September 1920, Maple was fifteen years old when he graduated from high school, first in his class. A "musical prodigy" with "many recitals to his credit," Maple also was an accomplished equestrian, surfer, and swimmer.[316] He decided to continue his education at Harvard, and continued to excel as a student: Maple graduated Phi Beta Kappa with an A.B., *magna cum laude* at age nineteen. His strength was languages. Dale Maple spoke, "with varying degrees of proficiency," Russian, Polish, Hungarian, Italian, French, Spanish, Portuguese, Danish, Swedish, Icelandic and Dutch. But his first love was German, and, while studying it at Harvard and associating with other students studying German, Maple soon gained the reputation of being a German cultural sympathizer. After he sang the Nazi Party's Horst Wessel Song at the Harvard German Club in the fall of 1940, however, and loudly and publicly declared that National Socialism was "infinitely preferable to democracy," the local media proclaimed that Maple "was the recognized Nazi leader of Boston."[317] While Maple would later insist at his court-martial that these pro-Nazi statements were nothing more than attempts to curry favor with the German government in order to obtain a scholarship to study at the University of Berlin, no one else saw it that way at the time.

Hitler's declaration of war on the United States in December 1941 dashed Maple's hopes for post-graduate work in Germany. He now decided that he should enlist in the Army, and he did, on February 27, 1942. For more than a year, he was an instructor in radio at Fort Meade, Maryland. Then, without any explanation, Maple was re-assigned to the 620th Engineer General Service Company, and he found himself living in barracks at Camp Hale, Colorado. The roughly two hundred Soldiers assigned along with Maple to the 620th were all men whom the Army believed were "unsympathetic, if not downright opposed, to the war aims of the Allies."[318] Some of these allegedly disloyal Soldiers were native born, like Maple. Others were naturalized U.S. citizens; a few were aliens; many were German or of German ancestry.

Maple was assigned to the unit because the Army believed that the pro-Nazi statements he had made at Harvard made him unsuitable for the sensitive radio work he had been doing in Maryland. That also explains why Maple and the other Soldiers assigned to the 620th did work of a menial, and insensitive, nature: cutting wood, digging ditches, and making camouflage netting. Maple was unhappy about this work, which he felt was oppressive, and about his assignment to the 620th, which he viewed as degrading.

Maple soon learned that he and his fellow Americans were not alone at Camp Hale. On the contrary, residing nearby were several hundred German prisoners of war (POWs). These were men from Rommel's vaunted Afrika Korps who, after being captured in North Africa, were now sitting out the war in Colorado.

Maple was soon fraternizing with these German POWs, and his fluency in their language and knowledge of their culture made him a popular figure. Within a short period of time, Maple was talking about helping some of these Afrika Korpsmen to escape. He initially decided to help ten Germans escape. Ultimately, however, Maple chose to help two German sergeants flee to Mexico. Maple purchased an automobile and a pistol, borrowed money from his parents, and, on February 15, 1944, drove from Camp Hale with the two enemy POWs. There was no fence around Camp Hale; Army investigators later concluded that the Germans simply slipped away from their work detail when the guard was not paying attention and walked away to their rendezvous with Maple.

Maple and the two German POWs, having discarded their uniforms and now dressed in civilian clothing, began driving south. After covering more

than six hundred miles, the men were but seventeen miles from the border with Mexico when their car ran out of gas. Maple and the two Germans then walked the rest of the way. On February 18, 1944, they were three miles inside Mexico when they were apprehended by a suspicious Mexican customs officer.

Maple and the two Germans were returned to U.S. authorities within days. The Germans were not punished because, under the law of armed conflict, they had a right to escape. For PFC Maple, however, it was a different story. He was taken into custody by the Federal Bureau of Investigation, indicted on the charge of treason, and arraigned in U.S. District Court in New Mexico. But the criminal proceedings against Maple in federal court went nowhere, since the Army decided that it should prosecute Maple. The result was that Maple was charged with desertion under the 58th Article of War and with two specifications of "aiding the enemy" by "harboring and protecting escaped prisoners of war . . . and affording them shelter and automobile transportation in his private automobile."[319] The Army could not try Maple for treason because, under the Articles of War, treason was not enumerated as a crime. Consequently, Maple was charged under the 81st Article of War, which made it a crime to relieve, correspond with, or aid the enemy. That article was the "military statute that most nearly approximate[d] the civil treason law."[320]

On April 17, 1944, a general court-martial convened at Fort Leavenworth heard Maple's case. The twelve members selected by the convening authority were almost certainly the highest-ranking panel in history to hear a case involving a private first class: a major general (MG) (president of the court), a brigadier general, seven colonels, and three lieutenant colonels. The trial judge advocate (JA)—as the prosecutor was then called—was not a member of the Judge Advocate General's Department (JAGD). He had, however, practiced law in Texas before World War II.

Maple had three defense counsel: a major who was not a lawyer, a lieutenant who was a lawyer (but not a member of the JAGD), and civilian counsel, whom Maple had hired three days before his trial started. Maple had made a good choice in selecting this civilian lawyer, as the man had previously served as a JAGD captain and consequently was very familiar with court-martial proceedings and the Articles of War.

The proceedings were closed to the public, and the secret nature of the trial meant that Maple's father and mother were not permitted to attend. After Maple entered pleas of not guilty to all charges and specifications, the trial JA presented the Government's case. Testimony from the two German POWs, who testified through interpreters, and the Mexican customs official who had apprehended the accused and the two escapees, left little doubt as to the accused's guilt. Additionally, after an Army psychiatrist testified that Maple had an I.Q. of 152 and, in his expert opinion, understood without question that his actions were treasonous, the likelihood of a guilty verdict must have seemed strong to all in the courtroom.[321]

After the Government rested, Maple took the stand. Under oath, he made a 7000-word statement in which he explained that he had no intent to desert the 620th. Rather, he had left his unit with the two German POWs hoping that he would be caught and tried for treason at a public trial in federal court. Maple insisted that this public forum would give him an opportunity to publicize the abusive and degrading treatment he had suffered in the 620th.

After closing arguments from both sides, the panel adjourned to consider the evidence. On April 24, 1944, the members unanimously concluded that Maple was guilty and that he should be hanged by the neck until dead. But, since the War Department had instructed the court-martial panel that it was not to announce its findings and sentence in court, Maple did not know that he had been sentenced to death. Not until seven months later did Maple learn that he had escaped the hangman's noose when he was informed that President Roosevelt had commuted his sentence to life imprisonment at hard labor, forfeiture of all pay and allowances, and a dishonorable discharge.[322]

It seems that The Judge Advocate General of the Army, MG Myron C. Cramer, was responsible for saving Maple's life. In reviewing the record of trial and providing a post-trial recommendation for the White House, Cramer wrote that:

> On the face of the record there appears to be little or nothing to suggest mitigation. But the accused is only 24 years of age, and is inexperienced. While he is undoubtedly legally sane and responsible for his despicable acts, under all the circumstances I am

> unable to escape the impression that justice does not require this young man's life. I feel that the ends of justice will better be served by sparing his life so that he may live to see the destruction of tyranny, the triumph of the ideals against which he sought to align himself, and the final victory of the freedom he so grossly abused.[323]

In November 1944, Roosevelt took action in Maple's case—likely influenced by Cramer's recommendation that the condemned man be spared. Maple was then transferred from the Army's Disciplinary Barracks to the nearby U.S. Penitentiary in the town of Leavenworth. In April 1946, the Army decided unilaterally to drastically reduce all sentences imposed by courts-martial during World War II, and it cut Maple's sentence to ten years. He was paroled in early 1951.[324] While Maple's case is almost forgotten today, his place in history is assured as the first native-born American Soldier to be court-martialed for the military equivalent of treason.

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

(Originally published in the December 2016 edition of *The Army Lawyer*.)

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.[325]

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.[326] 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."[327] 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.[328] 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.[329] In August 1944, now—Second Lieutenant (2LT) Monti reported for duty with the 126th Replacement Depot in Karachi, India.[330]

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

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 U.S. 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 the equivalent of "no."[331]

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.

Amazingly, Second Lieutenant Monti convinced the American military personnel at the 354th Air Service Squadron 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.[332] 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.[333]

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."[334]

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.[335]

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.[336]

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."[337]

On August 4, 1945, 2LT Monti was tried by a general court-martial convened by General Joseph T. McNarney, the Commanding General (CG), 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.[338]

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, Florida,[339] and, two years later, was wearing sergeant's stripes.

While Monti was serving on active duty in Florida, Army intelligence personnel were going through thousands and thousands of pages of captured German documents. Soon, 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.[340]

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.[341] 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,"[342] Monti was taken into custody by U.S. civilian law enforcement authorities pursuant to a warrant of arrest for the crime of treason.[343]

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.[344]

The U.S. Constitution states, "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."[345] 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."[346]

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.[347]

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.[348] 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 1951[349] and a second appeal was denied in 1958.[350]

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.[351]

Shot by Firing Squad: The Trial and Execution of Private Eddie Slovik

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"Squad, ready. Aim. FIRE." With that last command, a party of twelve American Soldiers fired their rifles at an Army private tied to a wooden post. It was January 31, 1945, and Private (PVT) Eddie D. Slovik, his head covered by a black hood as required by military regulations, was killed instantly. His death by firing squad in France was the only execution of an American for a purely military offense since the Civil War.[352]

Born in Detroit in February 1920, Slovik grew up in a poor home environment. He quit school at the age of fifteen and was repeatedly in trouble with the law. In the late 1930s, Slovik was convicted of embezzlement in state court and sentenced to six months to ten years in prison.

Slovik was still incarcerated when the United States entered World War II and, when released in April 1942, was classified "4-F" as an ex-convict. This meant he had initially escaped the draft, as the Army had sufficient manpower and did not need to draft convicted felons. In late 1943, however, facing an increased need for able-bodied young men, the War Department reclassified Slovik as "I-A" (available and fit for general military service) and inducted him.

After completing basic training at Camp Wolters, Texas, PVT Slovik shipped out to Europe in August 1944. Assigned to the 109th Infantry Regiment, a part of the Pennsylvania National Guard 28th Infantry Division, Slovik and other replacements were on their way to their unit in Elbeuf, France, when they were attacked by German forces. Slovik intentionally avoided combat and walked away. He then joined up with a Canadian unit and did odd jobs, including cooking, for the next forty-five days. Slovik was returned to U.S. authorities on October 4, 1944 and reported back to the 109th Infantry three days later.

When questioned by his company commander, Captain (CPT) Ralph O. Grotte, about this absence, Slovik told Grotte that he was "too scared, too nervous" to serve with a rifle company and would desert again if ordered to fight.[353] Slovik was then ordered to remain in the company area. Shortly thereafter, he returned to CPT Grotte and asked: "If I leave now, will it be desertion?"[354] When Grotte said yes, Slovik left without his weapon.

The next day, PVT Slovik surrendered to a nearby unit and handed a cook a signed, hand- printed note that said, in part:

> I Pvt. Eddie D. Slovik confess to the Desertion of the United States Army. . . . I told my commanding officer my story. I said that if I had to go out their again Id run away. He said there was nothing he could do for me so I ran away again AND ILL RUN AWAY AGAIN IF I HAVE TO GO OUT THEIR.[355]

After being returned to the 109th Infantry on 9 October, Slovik's commander told him that the written note was damaging to his case and that he should take it back and destroy it. Slovik refused and was confined to the division stockade.

On 19 October, Slovik was charged with two specifications of desertion, in violation of the 58th Article of War. Both specifications alleged that he deserted "with intent to shirk hazardous duty and shirk important action, to wit: action against the enemy" on two different occasions: his forty-five day desertion from August 25 to October 4, 1944 and his one-day desertion from 8 to 9 October 1944.

On 26 October, Lieutenant Colonel (LTC) Henry P. Sommer, the division judge advocate, offered Slovik a deal: if he would go into the line—that is, accept a combat assignment—he could escape court- martial. Slovik refused this offer and on 29 October his case was referred to trial by general court- martial.

On November 11, 1944, Slovik was tried for desertion. He pleaded not guilty and elected to remain silent. At the end of a two-hour trial, a nine-member panel found Slovik guilty and sentenced him to death.[356]

After Slovik was confined to the Army stockade in Paris, France, Sommer reviewed the record of trial. He recommended to Major General (MG) Norman "Dutch" Cota, the division commander, that the findings and sentence be approved. Cota approved the findings and sentence on November 27.

From December 1, 1944 to January 6, 1945, Brigadier General (BG) E. C. McNeil, the senior Army lawyer in the European Theater, and lawyers on McNeil's staff, reviewed Slovik's case. McNeil wrote:

> This is the first death sentence for desertion which has reached me for examination. It is probably the first of its kind in the American Army for over eighty years—there were none in World War I. In this case, the extreme penalty of death appears warranted. This soldier had performed no front line duty. He deserted from his group of about fifteen when about to join the infantry company to which he had been assigned. His subsequent conduct shows a deliberate plan to secure trial and incarceration in a safe place. The sentence adjudged was more severe than he anticipated, but the imposition of a less severe sentence would only have accomplished the accused's purpose in securing his incarceration and consequent freedom from the dangers which so many of our armed forces are required to face daily. His unfavorable civilian record indicates that he is not a worthy subject of clemency.[357]

On January 23, 1945, Eisenhower ordered Slovik's execution by firing squad and directed that the shooting occur in the 109th's "regimental area." Note that General Eisenhower did not simply decline to intervene in the Slovik case. On the contrary, he *ordered* that Slovik be shot. As for MG Cota, he understood that Slovik's execution required his personal involvement—if for no other reason than to underscore the gravity of the situation. That explains why "Dutch" Cota personally informed Slovik that he was to be executed by firing squad, and why Cota then stood in the snow in the courtyard, faced Slovik, saw him shot, and reported to Eisenhower that the order had been carried out.[358] While 142 American Soldiers were executed—for murder, rape, and murder-rape—during World War II, Slovik's was the only execution for desertion in the face of the enemy.

In the years after Slovik's death, his widow campaigned relentlessly for his records to be changed so that she could receive the proceeds of his $10,000 life insurance policy. While many were sympathetic, she and her supporters were unsuccessful.

Today, most historians believe that Slovik might have escaped a firing squad had his timing been better. However, the 28th Infantry Division was engaged in bloody fighting in Huertgen Forest at the time of his trial, and the court-martial panel was in no mood for leniency. Additionally, when Eisenhower acted on Slovik's case, the Battle of the Bulge was raging and American forces were in serious trouble in the face of a German surprise offensive. The possibility of leniency was outweighed by the view that maintaining discipline in the face of the enemy required that Slovik be executed.

Theft of Crown Jewels Led to High-Profile Courts-Martial

(Originally published in the July 2011 edition of *The Army Lawyer.*)

In the aftermath of World War II, the theft of gold, silver, and jewels belonging to the German aristocratic House of Hesse triggered an intensive criminal investigation and resulted in three high-profile courts-martial. When it was all over, Colonel (COL) Jack W. Durant, Major (MAJ) David Watson, and Captain (CPT) Kathleen Burke Nash were all in jail.[359]

In February 1946, less than a year after war had ended in Germany, Princess Sophie of Greece was preparing to marry Prince George Wilhelm of Hanover. The bride was to wear the Hesse family jewels during the ceremony but, when a servant was sent to retrieve the jewels from their hiding place in the Hesse family castle, Schloss Friedrichshof at Kronberg, they were gone—and presumed stolen.

Countess Margaretha, the reigning matriarch of the Hesse family, knew that all property in Kronberg castle was personal family property and so could not be seized like the assets of defeated Nazi Germany. Consequently, she went to the provost marshal in Frankfurt, and shortly thereafter the Army's Criminal Investigation Division launched an investigation. It soon discovered that a year before, when General (GEN) George S. Patton's 3rd Army had been in the area, a Women's Army Corps officer, CPT Kathleen Burke "Katie" Nash, had been assigned to manage the castle as an officers' club. In November 1945, while exploring the massive structure, Nash saw a fresh patch of concrete on the floor of the wine cellar. Apparently she also had heard a rumor that jewels, gold, and silver were buried in a secret place in the castle. In any event, when Nash and two members of her staff chipped through the concrete, Nash discovered a zinc-lined box filled with small, neatly wrapped packets containing gold, silver and jewels. It was literally a discovery of buried treasure—worth more than $2.5 million.

Nash retrieved some of the loot. She also shared her secret with "J.W." Durant and Watson. Together the three officers then conspired to steal the remainder of the tiaras, bracelets, and other valuables. Realizing that they would likely be caught if they tried to smuggle the treasure back to the United States in its present form, the three conspirators removed the precious stones from their settings and set them aside to be sold later; they sold or pawned the gold and silver mountings. Watson travelled to Northern Ireland in November and December 1945, where he "pawned a large quantity of gold; he also gave a few baubles to a former girlfriend in Belfast."[360] Durant and Nash did their part in January 1946 by journeying to Switzerland and selling gold and jewels in Bern, Basel, and Zurich.

As for what they had decided to keep for themselves, the trio used the Army post office system. Watson mailed a sterling silver pitcher home to his parents in California. Nash sent a thirty- six-piece solid-gold table service—as well as a large number of jewels—to her sister in Wisconsin. Durant sent jewels and other valuables using envelopes stamped "Official" and by diplomatic pouch; most went to his brother in Falls Church, Virginia. All in all, some thirty boxes of treasure were sent to the United States.[361]

By May 1946, the Criminal Investigation Division agents had caught up with the three culprits. Watson was apprehended in Germany. Durant and Nash, who had married on 28 May, were arrested at the luxury La Salle hotel in Chicago on 2 June. The timing of their marriage was not a coincidence: both Durant and Nash understood that a husband and wife could refuse to testify against each other in court-martial proceedings. But Nash also hoped to escape trial because she was expecting to be honorably discharged. Unbeknownst to Nash, however, the Army had cancelled her separation orders and so she remained on active duty and subject to court-martial jurisdiction.

A few days later, nearly a million dollars in recovered Hesse family treasure—which the Army insisted was "a mere pittance" compared to the total value of the missing property—was displayed at the Pentagon. Shortly thereafter, the Durants were flown to Frankfurt, Germany, where they both faced trial by general court-martial.

Katie Nash Durant was the first to stand trial. Charged with being absent without leave, larceny, fraud against the government, conduct unbecoming an officer and gentleman, and bringing discredit upon the military service, she appeared before the court panel in a uniform without any insignia, and refused to enter a plea. Her defense counsel, CPT Glenn Brumbaugh, insisted that the court lacked *in personam* jurisdiction because the Army had

rescinded her separation orders solely to maintain jurisdiction over her. He also argued that, even if the court-martial had jurisdiction over her person, Nash was not guilty of any offenses involving the Hesse crown jewels because the Hesse family had abandoned the treasures or, alternatively, that the jewels were legitimate spoils of war. Major Joseph S. Robinson, the trial counsel, countered:

> It is our obligation to see to it that private property in enemy territory we occupy be respected, and that any interference with such private property for personal gains be justly punished.[362]

The court agreed. It found Nash guilty and sentenced her to five years in jail and a dismissal.

Watson was next. His defense was that looting was common in Germany and that, as the treasure belonged either to dead Nazis or S.S. members, the property could not be returned to them. In any event, argued Watson, he lacked the criminal intent to steal anything. In his summary to the panel, CPT Abraham Hyman, the trial counsel, reminded the court that it could not blind itself to the fact there were people who took advantage of abnormal conditions in occupied Germany. However, there is also the precedent of millions of Soldiers who went through the war without yielding to the temptation to take things that did not belong to them.[363]

The court of ten colonels agreed with Watson, at least in part. But, while they found him not guilty of larceny, the panel members convicted him of the remaining offenses, including receiving stolen property. He was sentenced to three years in jail and a dismissal.

"J.W." Durant was the last to go to trial. In a court-martial convened in Frankfurt but concluded in Washington, D.C., COL Durant was found guilty of all charges. He was sentenced to fifteen years' confinement at hard labor and a dismissal.

On August 1, 1951, Headquarters, European Command Army, announced:

> The Department of the Army, in cooperation with the Department of the Treasury, today returned to their owners the Hesse jewels, which have been in the custody of the United States since 1946. . . . Involved in the turnover were jewels filling 22 cubic foot Army safes and consisting of more than 270 items. Among the jewels were: a platinum bracelet encrusted with 405 diamonds, a platinum watch and bracelet with 606 diamonds, a sapphire weighing 116.20 carats, a group of diamonds weighing 282.77 carats, a gold bracelet with 27 diamonds, 54 rubies and 67 emeralds. [364]

Despite this press release, more than half the Hesse crown jewels, and most of the gold and silver that had been hidden in the wine cellar, were never recovered. To this day, no one knows what happened to this missing treasure.

As for Nash, Watson, and Durant, they served their sentences at the Disciplinary Barracks, Fort Leavenworth, Kansas, and were then released. Watson was the first to be freed; he was paroled in 1947. When he died in 1984, he was "still petitioning for a presidential pardon."[365] Nash and Durant were both released in 1952; they spent their remaining days together before dying in the mid- 1980s.

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

(Originally published in the March 2016 edition of *The Army Lawyer*.)

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,[366] 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 (BG) 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."[367] 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.[368]

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, "[t]he public became aware of many miscarriages of justice both through the press and from relatives in the armed forces."[369]

Their concerns soon reached Congress, which decided that "drastic modifications and improvements were necessary" in the military criminal legal system.[370] 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.[371]

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.[372]

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.[373] Quinn was appointed Chief Judge and received the fifteen-year term of office.[374] Latimer was appointed an Associate Judge with a ten-year term; Brosman was an Associate Judge with a five-year term. The Senate confirmed all three on June 19, 1951, and 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.[375]

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.[376]

What happened to the first three COMA judges? Latimer's term expired on May 1, 1961, and he returned to private practice.[377] Latimer later garnered considerable publicity as the lead defense counsel for Lieutenant (LT) William "Rusty" Calley.[378] 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.[379]

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.

The Trial of a Korean War "Turncoat": The Court-Martial of Corporal Edward S. Dickenson

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On May 4, 1954, a court-martial sitting at Fort McNair, Virginia, convicted Corporal (CPL) Edward S. Dickenson of "collaborating with the Reds"[380] while held as a prisoner of war (POW) in North Korea. Dickenson was also found guilty of "informing on his prison camp buddies"[381] while a POW. As a result of this conviction for aiding the enemy and misconduct while a POW, Dickenson was sentenced to ten years' confinement at hard labor, total forfeitures, and a dishonorable discharge. Dickenson's trial was the first court-martial of a Soldier for misconduct as a POW to come out of the Korean War, and the proceedings received widespread coverage in the media. While this alone makes it a story worth telling, *United States v. Dickenson* also is worth examining for a second reason: for the first time in military legal history, an accused sought an acquittal on the basis that he had been so mistreated and "brainwashed" while a POW that he was not responsible for any acts of collaboration with the enemy.

Born and raised in Cracker's Neck, Virginia, Edward S. Dickenson enlisted in the Army on March 31, 1950. He might have hoped for a tour as a peace-time Soldier, but this was not to be, as some 75,000 North Korean People's Army troops crossed the 38th parallel into the Republic of Korea on June 25, 1950. For Dickenson, this meant that after completing basic training, he shipped out to join the fight on the Korean peninsula. Arriving on September 22, 1950, just a week after successful Allied amphibious landings at Inchon, Dickenson joined Company K, 8th Cavalry Regiment. Less than two months later, on November 4, 1950, he was captured by the enemy. He spent the remainder of the Korean War as a POW at a Chinese-run camp in North Korea.[382]

After fighting in Korea ceased, however, Dickenson did not immediately return to U.S. control. On the contrary, during *Operation Big Switch*, when Allied prisoners were repatriated, CPL Dickenson was one of a group of American Soldiers who refused to return, preferring instead "to throw in their lot with the Communists."[383] Two months later, however, twenty-three-year-old Dickenson "changed his mind about staying with the Reds."[384] On October 21, 1953, he "appeared at a United Nations camp"[385] and asked to be sent home. He was the first of twenty-three Americans who initially decided to stay behind with their Chinese captors, but then changed their minds and asked to return home.[386] Dickenson was finally returned to U.S. control on November 20, 1953.

On January 22, 1954, Dickenson was charged with committing various offenses while being held as a POW. About 500 U.S. military personnel had been held captive in the same camp as Dickenson and statements about their POW experience were taken from each of them after they were repatriated. Some ninety-five[387] of these statements mentioned the accused and this provided the basis for charging him with a variety of offenses under Uniform Code of Military Justice (UCMJ) Articles 104 and 105,[388] including "aiding the enemy to influence prisoners of war to accept communism," "corresponding with the enemy by informing him of a fellow prisoner's failure to sign a peace petition," and "reporting escape plans of fellow prisoners of war for the purpose of securing favorable treatment." [389] Since the UCMJ had only been in effect since 1951, Dickenson was the first Soldier to be charged under the new military criminal code with the military equivalent of treason.[390]

When trial began at Fort McNair on April 19, 1954, Colonel (COL) Walter J. Wolfe presided over the eight-member panel of officers;[391] they were assisted with legal matters by COL Richard F. Scarborough, the judge advocate law officer. The lead trial counsel was COL C. Robert Bard, a West Point graduate who had gained considerable court experience from prosecuting war crimes trials in Heidelberg after World War II.[392] Assisting Bard were two judge advocates: Captain (CPT) Harvey S. Boyd and First Lieutenant Andrew K. McColpin.

While the prosecution was formidable, the defense team was no less impressive. Dickenson's lead defense counsel was civilian attorney R. Guy Emery. A West Point graduate, Emery was a decorated Soldier who had lost a leg in combat. After the war, he had graduated from the University of Virginia's law school and was practicing law in the District of Columbia when he was retained by Dickenson to represent him.[393] Emery was assisted by Lieutenant Colonel William Fleischaker and CPT

Wilton B. "Will" Persons Jr. For Persons, who had only recently graduated from Harvard Law School but had considerable experience prosecuting and defending special courts as an armored cavalry officer in post-war Austria and Germany, it was a memorable event: *United States v. Dickenson* was the first general court-martial that Persons had seen. As the junior defense lawyer on the team, Persons interviewed witnesses, including some of Dickenson's fellow POWs, and did legal research.[394]

The prosecution's case was fairly straightforward; it relied chiefly on the testimonies of Dickenson's fellow POWs. The evidence presented showed that during his three years as a POW, Dickenson repeatedly relayed information about his fellow POWs to his captors in order to get cigarettes and better food. One witness told the eight-officer panel that Dickenson was "sneaky" and a "rat." Others testified that Dickenson had told the Chinese about the escape plans of fellow POW Edward M. Gaither. As a result of this information, Gaither was severely beaten with clubs and "was placed by the enemy before a mock firing squad on three occasions." Gaither also spent seven months in solitary confinement.[395]

As for aiding the enemy, one witness testified that Dickenson asked his fellow POWs to sign a "peace petition" critical of American involvement on the Korean peninsula and that Dickenson had tried to convince at least eight fellow POWs "to accept and follow the philosophies and tenets of Communism."[396] The prosecution also introduced evidence that Dickenson had recorded pro-communist speeches intended for later radio broadcasts to United Nations forces. This evidence complemented testimony from CPL Billy L. Rittenberry, who related under oath that Dickenson had pledged to "overthrow the United States Government so that it would follow socialist principles."[397]

To counter this evidence of misconduct, R. Guy Emery adopted a two-pronged strategy. First, Emery hoped to generate sympathy for his client by showing that Dickenson, an uneducated farm boy who hailed from the hill country of Virginia, had suffered greatly as a POW. He had not only been exposed to bitter cold and "starvation rations," but also had been threatened with death if he did not cooperate with his Chinese captors.[398] Additionally, Dickenson's seventy-eight-year-old father and his mother (said to be in her forties) attended the trial at Fort McNair, and their presence let the panel members see that they stood by their son. Both father and mother also gave statements to the press.

The older Dickenson indicated that he believed his son's three years of captivity was punishment enough. Dickenson's mother insisted that her son, whom she described as "the little fellow," was sick. She certainly did not believe that her son had sought favorable treatment at the expense of his fellow POWs. "I don't understand what he could have done to any of them boys," she told a newspaper reporter.[399]

While sympathy for Dickenson would almost certainly benefit him at sentencing, Emery realized that it might also help his client on the merits, as the second prong of the defense case, to show that Dickenson's freedom of will had been so overcome by "brainwashing" and mistreatment that the young Soldier lacked the mens rea necessary to support a conviction under Articles 104 and 105. Emery certainly had good reason to believe he might be successful: Colonel Scarborough would later instruct the panel that it must acquit Dickenson if it found that "the Reds forced him to collaborate with them" and that "mental irresponsibility" was a "complete defense" to the charges.[400]

This explains why Emery presented expert testimony from psychiatrists who had examined the accused. Dr. Morris Kleinerman, who had been a psychiatrist at hospitals in Belgium, England, and the United States during World War II, testified that Dickenson had a "passive-aggressive personality" and was "basically emotionally unstable." He also was the kind of person who was "easily intimidated." Kleinerman's testimony buttressed the defense theory that Dickenson was not responsible for his actions while a POW because his long period of imprisonment made him "interested solely in his own survival." Similarly, Dr. Winfred Overholser, the superintendent of St. Elizabeth's Hospital in Washington, D.C., testified that the treatment Dickenson had received from his Chinese captors "could be pushed to a point where almost anyone would submit."[401]

At the close of an eleven-day trial, and after the accused declined to take the stand on his own behalf, the panel heard arguments from both sides. Colonel Bard argued that Dickenson was a "willing collaborator" who had aided the enemy because of inherent "character defects."[402] In an argument of "nearly two hours," R. Guy Emery countered the government's case was "plainly contemptible" in that it "created an atmosphere of assumed guilt." For Emery, the court-martial was "not so much a trial of law as preparation for a crucifixion."[403] Dickenson had been "mentally incapable of resisting Red pressure in Korea" and consequently lacked the

criminal intent necessary to support a finding of guilty.[404] Interestingly, Emery told the panel that Dickenson had not testified in his own behalf because he had suffered too much "mental damage" in Korea—damage from which he had not yet recovered.[405] Certainly Dickenson looked the part; then-CPT Persons remembered that he "looked scared to death" sitting at the defense table and reminded Persons of a "whipped dog."[406]

After instructions from the law officer, the court closed to deliberate. The following day, after a total of ten-and-one-half hours behind closed doors, COL Wolfe and the members were back with a verdict: guilty of one specification of aiding the enemy in violation of Article 104, and guilty of one specification of misconduct as a POW, in violation of Article 105, UCMJ.[407] While the maximum penalty was death, the panel sentenced Dickenson to ten years' confinement at hard labor, total forfeitures of all pay and allowances, and a dishonorable discharge.

The Army Board of Review and the Court of Military Appeals affirmed the findings and sentence. R. Guy Emery, "without a fee, and often at his own expense, fought the decision to the Supreme Court on what he considered to be a matter of principle."[408] While Dickenson's writ of habeas corpus was quashed by the U.S. District Court for the District of Kansas, and Dickenson's appeal from that order was denied by the Tenth Circuit Court of Appeals, Emery did get some relief for his client: Dickenson was paroled after serving five years of his ten-year sentence. Dickenson, who was married, re-entered civilian life and raised a family. He died in 2002.[409]

The story of Korean War "turncoat" CPL Edward S. Dickenson is now almost forgotten. But the issues raised by his case and others[410]—most notably the effect of enemy coercion and propaganda on free will—greatly concerned the Army, resulting in a number of official studies and the creation of formal guidance on how U.S. POWs should conduct themselves in captivity.[411] The issues raised by *Dickenson* were again relevant during the Vietnam War, when some Americans held as POWs by the Viet Cong and North Vietnamese collaborated with their captors to the detriment of their fellow POWs.[412] But that story, and how the U.S. government handled allegations of misconduct by Vietnam War POWs, must be told another day.[413]

The Strange But True Case of Private Wayne E. Powers

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On March 22, 1958, French police discovered a man concealed under the stairs in a home in Mont d'Origny, France. The man was soon revealed to be Private (PVT) Wayne E. Powers, an American Soldier who had deserted from his unit in mid-December 1944. Since that time, Powers had been hiding out in France and, over the next thirteen years, had fathered five children with the French owner of the home in which he had been caught. What follows is the story of PVT Powers's 1958 trial by court-martial for desertion and its rather surprising aftermath.

Private Wayne E. Powers, c. 1958

Born in Chillicothe, Missouri, on March 14, 1921, Wayne Eldridge Powers had worked as a farmer prior to being drafted in May 1943. After completing basic training in El Paso, Texas, he spent a brief time at Army installations in California and New York before shipping out to England in early 1944. According to the sworn statement that Powers gave in French to an Army criminal investigator after his apprehension in March 1958, he remembered landing in Normandy on "9 or 10 June 1944." Powers explained that he had been a truck driver in France for "five or six months" when, while on his way to an Army depot in Cherbourg, he had picked up a hitchhiker wearing an American uniform. According to Powers, this hitchhiker later robbed him—at gunpoint—of both his truck and its contents. When Powers subsequently showed up without his truck, he was apprehended by agents belonging to the Army's Criminal Investigation Division (CID). According to Powers, these agents accused him of being a "German spy" and beat him during questioning over the next several weeks.[414]

Powers claimed to have been released by CID investigators in mid-December 1944. Apparently unable to find his truck company to re-join it, he had started hitchhiking toward Mont d'Origny, a small town located about forty miles from the Belgian border. The previous month, Powers had met this "dark-haired French girl" named Yvette Bleuse in a bar in town and, although Powers spoke no French and Yvette spoke no English, "she gave him a woman's smile after months of murderous combat."[415] As a result, when Powers showed up at Bleuse's door in Mont d'Origny "approximately one week prior to Christmas in 1944, while the Battle of the Bulge was being fought," she took him into her home. The two lived together for the next thirteen years.[416]

During this time period, Yvette Bleuse worked at a factory to support Powers and the five children they had together. As for Powers, he "remained in the house during the daytime" and only went out at night "for a walk and some fresh air." Occasionally, the French police would visit the Bleuse home, as there were rumors that an American deserter was living there. Powers would avoid these gendarmes by hiding in a secret compartment under the stairs in the home—which he also did whenever other strangers would come for a visit.[417]

After the French police turned Powers over to U.S. military authorities in March 1958, CID investigators asked him if he had intended to desert from the Army during the Battle of the Bulge. Powers denied that he had such an intent. When then asked why he did not return to military control when "U.S. forces came back to France" after the war, or notify the American embassy after 1945 that he was living in France, PVT Powers explained that he "was scared." He also said that if he had given himself up to the American authorities, this would have made his "companion" and "children whom I love very much . . . unhappy."[418]

Since Powers claimed to have lost the ability to speak English (he claimed only to be able to understand it), and since Powers had not written to his father or his wife[419] in Missouri for some thirteen years, the Army naturally concluded that he intended to remain away permanently from his unit and charged him with desertion.

On August 1, 1958, Powers was tried by a general court-martial convened by Brigadier General (BG) Robert J. Fleming, Jr., Commanding General, U.S. Army Communications Zone, Advance Section (COMZ-ADSEC), Verdun, France. There was but a single charge: desertion terminated by apprehension in violation of the 58th Article of War.[420]

The proceedings held at the Maginot Caserne in Verdun were quite short, since Powers's defense counsel, judge advocate First Lieutenants (1LT) Leon S. Avakian, Jr. and James A. Stapleton, had advised Powers to enter into a pre-trial agreement with the convening authority. In return for Powers's plea of guilty to the charge and its specification, Brigadier General Fleming agreed that he would disapprove any sentence to confinement at hard labor exceeding six months. Any other lawful punishment imposed by the panel deciding the case, however, could be approved.[421]

At trial, the judge advocate trial counsel, 1LT James D. McKeithan, offered no evidence on the merits and PVT Powers offered no evidence on sentencing; the panel had only a stipulation of fact and argument from trial and defense counsel to consider. Based on the accused's plea and his military record (which included two previous convictions by courts-martial),[422] the panel sentenced Powers to forfeit all pay and allowances, to be reduced to the lowest enlisted grade, to be confined for ten years, and to be dishonorably discharged.[423] Colonel (COL) Edgar R. Minnich, the COMZ-ADSEC Staff Judge Advocate, reviewed the record of trial and recommended to Brigadier General Fleming that he adhere to the pre-trial agreement. As a result, Fleming approved the sentence as adjudged, except that he reduced the ten years in jail to six months in the local stockade.[424]

From the Army's perspective, good order and discipline required that Powers be tried by a general court-martial. After all, nearly 50,000 Americans had deserted from the Army (and Army Air Force), Navy, Marine Corps, and Coast Guard during World War II,[425] and many had been court-martialed and received lengthy prison sentences for intentionally leaving their units during wartime. But French public opinion—and even some Americans—did not see it that way, and the Powers case became a "cause célèbre" in both Europe and the United States. The public overwhelmingly viewed this case not as a crime, but as a love story with a fateful ending.

The American embassy in Paris received some 60,000 letters about the Powers case. Virtually all expressed support for the American deserter and pleaded for his immediate release.[426] Newspapers in France and Germany, as well as in the United States, also covered the story. A number of letters and telegrams from foreign nationals and U.S. citizens arrived at the Pentagon, Congress, and the White House; a handful of these are contained in the allied papers of *United States v. Powers*.

Some of the correspondence asked for clemency for the accused so that he could return to Yvette Bleuse (whom he now desired to marry) and his five children. A high school classmate (Chillicothe High School Class of 1938) sent a telegram to President Dwight D. Eisenhower "urgently" requesting "commutation" of Powers's sentence. "Our class," wrote Mr. Clark Summers, "had several immortal heroes who would not wish to see this boy persecuted for his very mortal sin."[427] Similarly, a telegram to the Secretary of the Army from Edward C. Dean of Rockville, Connecticut, "protested" the ten-year sentence given Powers.[428]

In a letter to The Judge Advocate General, C. L. King of La Habra, California, complained that it was "inconceivable" to him that the Army had any authority over Powers. King wrote that although he had "spent nearly 5 years in the [N]avy during World War II," he "could not even agree to a six month sentence" for Powers. Powers's "capture was pure kidnapping" and the "army has done enough damage already . . . [and it should] wash its hands of the whole affair and not antagonize millions more Americans and French." King closed his letter with these words: "All the drunken, arrogant, incompetent officers of this man's division are now out on pension or else getting fat somewhere on an army post. Are they any better than he?"[429]

The Army even received a letter from an attorney acting on behalf of a Hollywood screenwriter. As this lawyer explained, he wanted a copy of the record of trial in the case because his client thought that the Wayne Powers story might be of "possible value for motion picture adaptation and presentation."[430]

On the other hand, some letters expressed a decidedly negative view of PVT Powers. Paul Lutz of Tyler, Texas, insisted that the "ten year sentence was far too light," and he asked why the Army had made a "deal" with a "cowardly deserter." Since Powers had deserted during the Battle of the Bulge, Lutz insisted that "some may have died because this man was not there. Yet we are to feel sorry for this

man who deserted his comrades and country for a lover."[431]

A letter written by Chester Missahl of Duluth, Minnesota, who had soldiered during World War II, described Powers as a "dirty, stinking coward and war-time deserter." Missahl complained bitterly about Brigadier General Fleming's decision to reduce Powers's sentence to six months' confinement. Wrote Missahl:

> It would seem the original ten year sentence as pronounced by the court-martial was sufficiently light for a traitor whose deserved punishment is a bullet in the back; and such molly-coddling is difficult to believe. Certainly General Fleming should be cashiered at once for such brazen disregard for the rights of the millions who did not turn traitor.
>
> If this be a fair sample of today's Army, God help us in the next war."[432]

Although Brigadier General Fleming had approved a six-month sentence of confinement, the Army apparently had had enough of Powers—and the adverse publicity surrounding his case. As a result, after the Board of Review (the forerunner of today's Army Court of Criminal Appeals) approved the findings and sentence in *United States v. Powers*, and after Powers declined to petition the Court of Military Appeals (today's Court of Appeals for the Armed Forces) for a grant of review, Brigadier General Fleming remitted the unexecuted portion of PVT Powers's sentence on October 2, 1958.[433]

The accused was immediately released from confinement in the Verdun Stockade and dishonorably discharged. Since the French government had consented to his remaining in France after his separation from active duty, thirty-seven-year-old Powers remained on French soil and returned to Mont d'Origny and Yvette Bleuse.[434]

So ended the court-martial of the Soldier who had deserted and hidden in France for more than thirteen years. But what happened to Wayne E. Powers? While the record of trial does not answer this question, he apparently did marry Yvette two years after being released from jail. The couple also had a sixth child together.[435] It seems highly likely that Monsieur and Madame Powers lived out the remainder of their days together in Mont d'Origny, France.

Crime in Germany "Back in the Day": The Four Courts-Martial of Private Patrick F. Brennan

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Fifty years ago, judge advocates (JAs) stationed in Germany participated in more than a few courts-martial involving undisciplined Soldiers. But military justice "back in the day" was quite different from what one would see today because, under the Uniform Code of Military Justice (UCMJ) as it then existed, there was no JA participation at special courts-martial.[436] Rather, line officers served as trial and defense counsel and, as there also was no military judge or other similar judicial official at special courts, every court-martial was heard by a panel and the senior officer on the panel ran the court.[437] More than anything else, special courts were courts of discipline (although justice certainly was done), but sometimes a Soldier's inability to adhere to the Army's standards could not be solved with a special court-martial—as illustrated by the case of nineteen-year-old Private (PVT) Patrick F. Brennan. The story that follows is that of a teenaged GI who managed to accumulate five convictions by three special courts-martial in just ninety days—topped off by a trial by general court-martial.

Private Brennan's troubles began late in 1962 when he was convicted at a special court-martial of disrespect to a non-commissioned officer (NCO) and disorderly conduct in the barracks. The panel members sentenced him to thirty days' hard labor without confinement, which was an authorized sentence under the UCMJ at the time and usually involved manual labor on some menial project. As a consequence of this court-martial conviction, Brennan's commander revoked his pass privileges. Unmarried junior enlisted Soldiers in this era lived in the barracks on post and could not leave their installation without having in their possession a card showing that they were authorized to go off post.[438]

To Brennan's dismay, his commander failed to restore his pass privilege at the end of his thirty-day hard labor sentence. A month later, with his "pass" still "under lock and key," PVT Brennan absented himself without leave (AWOL).[439] As he later explained, "I don't think the Army's pass policy is right. A pass is a right, not a privilege—except when it's withdrawn for disciplinary reasons." As Brennan saw it, since he had completed his sentence, he should have his pass card returned to him. The special court panel hearing the evidence, however, disagreed. It found him guilty and sentenced PVT Brennan to another stint in the stockade.

Shortly after completing this punishment for his AWOL, PVT Brennan was court-martialed the third time for "assaulting a SP5 [Specialist Five/E-5] and disobeying an order." According to a newspaper report in the European edition of *Stars and Stripes*, PVT Brennan served his sentence for this third court-martial at the stockade located at William O. Darby Kaserne, Fürth, Germany.[440]

Just two weeks before nineteen-year-old Brennan was scheduled to be discharged from the Army with a general discharge under honorable conditions, he committed yet another act of indiscipline. Sergeant (SGT) Sylvester J. Williams, then serving as guard commander, was marching a group of prisoners, including PVT Brennan, to eat "chow." As SGT Williams talked to the prisoners, PVT Brennan evidenced a lack of interest, and told Williams "to shut [his] damn mouth." Then, when SGT Williams directed Brennan "to step out of the ranks," an angry PVT Brennan not only stepped over to Williams, but "poked the sergeant in the face without any preliminaries."[441] The "astonished prisoners looked on" while other guards "rushed into the fray to help Williams." Specialist Four (SP4) William S. Minnich, who weighed over 200 lbs., quickly took charge of Brennan. Brennan not only went along quietly, but asked Minnich to "lock him up so he couldn't hurt anyone else."[442]

Private Brennan's chain-of-command had had enough of him. His upcoming separation from active duty was cancelled and PVT Brennan instead found himself before a general court-martial convened by the VII Corps commander. The trial was held in Nurnberg. The trial counsel was Captain (CPT) Quinlan J. Shea Jr. and the defense counsel was Captain Harry F. Goldberg. Both were fairly recent members of the Corps and were on their first tours as JAs. Shea was a Rhode Island attorney who had graduated in May 1961 from the 34th Special Class (as the Judge Advocate Officer Basic Course was then called). Goldberg was a Massachusetts lawyer who had graduated from the 36th Special Class in early 1962.

Brennan was charged with one specification under Article 91—striking an NCO while that NCO was in the execution of his office. At the time, the authorized maximum penalty for this offense was one year of confinement at hard labor, forfeiture of all pay and allowances, reduction to the lowest enlisted grade, and a dishonorable discharge (DD).[443] Brennan testified at his own trial and admitted that he had struck SGT Williams. He "confessed" that he "wasn't rational at all." Not surprisingly, Brennan was convicted by the VII Corps panel of the specification and the charge.[444]

On sentencing, CPT Goldberg tried to put the best possible spin on his client's situation. "If what Private Brennan did was a senseless act, we feel it was an emotional outburst." Goldberg then quoted Supreme Court Justice Oliver Wendell Holmes's famous quip that "even a dog distinguishes between being kicked and stumbled upon." Goldberg added: "We feel this was more a case of being stumbled upon."[445]

Trial counsel CPT Shea responded when it was his turn to argue: "I believe this adds up to five convictions prior to this general court-martial." Continued Shea: "Sometimes we feel that deterrence is a dirty word. But the evidence presented by the defense asks you almost to reward Brennan for his offense. The Government is confident that you are not going to reward him." Captain Shea then asked the panel to impose the maximum sentence. As the *Stars and Stripes* reported, the nine-member panel "went along with everything but the discharge, substituting a BCD [Bad Conduct Discharge] for the DD."[446]

United States v. Brennan is not reported as a case considered by the Army Board of Review. The Court of Military Appeals also did not hear an appeal. Consequently, it seems likely that Brennan simply served his confinement and then returned to civilian life. Today, this teenaged Soldier would be nearly seventy years of age. One wonders what, if anything, he learned from his time as a Soldier in Germany "back in the day."

As for Captains Shea and Goldberg? Goldman was released from active duty in December 1964. Captain Shea remained on active duty for another ten years; his last known assignment was in the Military Justice Division, Office of the Judge Advocate General. Then-Major (MAJ) Shea left active duty in 1972.[447]

The Governor Versus the Adjutant General: The Case of Major General George O. Pearson, Wyoming National Guard

(Originally published in the September 2013 edition of *The Army Lawyer.*)

On Tuesday, December 1, 1964, Major General (MG) George O. Pearson, Adjutant General of the Wyoming National Guard, angrily denied charges made against him by Wyoming Governor Clifford P. Hansen. In a front-page story in *The Billings (Montana) Gazette*, Pearson insisted that he had never "misappropriated state funds and diverted them to his personal use."[448] Not only was he completely innocent of any wrongdoing, but the sixty-one-year old Pearson claimed that he would "explicitly refute each and every charge made against [him]."[449] What follows is the story of the legal fight between the Governor of Wyoming and the highest military official of that state; a conflict that resulted in a Wyoming Supreme Court decision and Pearson's court-martial, a unique event in the history of the Army National Guard and military criminal law.

Major General George O. Pearson, c. 1964

Born in Sheridan, Wyoming, on August 15, 1903, George Oliver Pearson had a remarkable career as a Soldier. When he was sixteen years old, he enlisted as a private in the 1st Wyoming Cavalry Regiment. Later, while a student at the University of Minnesota, Pearson also served in the 151st Field Artillery Regiment, Minnesota National Guard. Major General Pearson obtained an officer's commission in 1928, and when the United States entered World War II, then-Major (MAJ) Pearson deployed to the Pacific. He saw heavy combat as the commander of the famous 187th Airborne Infantry Regiment[450] in the Philippines and was decorated for gallantry in action with the Silver Star.[451] After the Japanese surrender in 1945, then-Colonel (COL) Pearson participated in the initial occupation of Japan. He subsequently served as Commander of the 508th Regimental Combat Team in Berlin, Germany, before retiring from active duty in 1958 and returning to Wyoming. On June 1, 1959, Colonel Pearson joined the staff and administration of the Wyoming National Guard. Two years later, he transferred from the Infantry to the Adjutant General's Corps and was promoted to brigadier general. A year later on July 23, 1962, Pearson pinned on a second star after being appointed The Adjutant General by Governor Jack R. Gage. Major General Pearson was still serving as the top military officer in Wyoming when that state's voters defeated Gage's bid for re-election and chose Republican Clifford Hansen to be their chief executive in November 1962.[452]

In late November 1964, Governor Hansen confronted Major General Pearson with evidence that Pearson had "turned in false travel vouchers" and "charged personal long distance telephone calls to the state." Convinced that Pearson was guilty of criminal misconduct, but that the matter should be handled administratively, the governor apparently offered Pearson two choices: submit his resignation or be fired. When Pearson "declined to resign because he was innocent,"[453] Governor Hansen exercised his authority as "Governor and Commander in Chief" to relieve Pearson as "The Adjutant General, State of Wyoming, effective November 25, 1964."[454] In his stead, Governor Hansen appointed Brigadier General (BG) Roy E. Cooper as Acting Adjutant General.[455] As for Pearson, he retained his rank but was in an "inactive and unassigned" status. In a February 20, 1965 letter addressed "To All units of the Wyoming Army and Air National Guard," Governor Hansen informed all personnel that "under no circumstances" could Major General Pearson "participate in Wyoming National Guard activities or exercise any authority."[456]

While Hansen insisted that he had the authority to remove Pearson from office and strip him of all

military authority, the latter very much disagreed, and filed suit in Wyoming's highest court to block the governor's action. Major General Pearson argued that a Wyoming statute, which provided "that no state appointed person serving in a military capacity can be removed without a hearing,"[457] meant that Hansen's action was a nullity.

On May 12, 1965, in *The State of Wyoming ex rel. Pearson v. Hansen et al.*, the Supreme Court of Wyoming agreed with Pearson. While acknowledging that Governor Hansen held "the sole power" to appoint the state's Adjutant General, the court unanimously concluded that Wyoming Statute 19-56 required "a court-martial or efficiency board" as a prerequisite to removing a military officer from office. Consequently, the Court held that "the Governor exceeded his powers" in removing Pearson from office and granted summary judgment for him on the complaint.[458]

So what was Governor Hansen to do? Since the highest court of the state had indicated in its opinion that there was no reason that the governor could not convene a court-martial to hear the evidence against Major General Pearson, Hansen took action. Two months later, on July 12, 1965, acting under his authority as "Governor and Commander-in-Chief," Hansen "relieved" Pearson from "Command and Duties as Adjutant General . . . during the pendency of the court-martial proceedings which have been instituted against him."[459]

On November 12, 1965, again under his authority as "Commander-in-Chief," Governor Hansen convened a general court-martial at the New Armory, Cheyenne, Wyoming, "for the trial of Major General George O. Pearson."[460]

On December 6, 1965, a panel consisting of Colonel Theron F. Stimson as president, eight lieutenant colonels and two majors, convened to hear the evidence against Pearson.[461] He was charged with a number of travel-related offenses under Articles 80, 107, 121, 133, and 134, Uniform Code of Military Justice (UCMJ). Although two charges alleged that he had falsely claimed payments for personal long distance telephone calls, the remaining charges and specifications revolved around falsely claiming reimbursement for airline tickets, limousine, and taxi expenses. The prosecution's evidence was that General Pearson had travelled on Wyoming National Guard aircraft to various locations, but filed vouchers claiming that he had flown on commercial aircraft, requesting money as reimbursement for these commercial airline tickets and related per diem and travel expenses.

Defense counsel first objected to the presence of Mr. George W. Latimer as Assistant Trial Counsel, perhaps because of Latimer's considerable military legal experience.[462] This objection was overruled by the court.

Defense counsel then argued to the panel that it lacked jurisdiction over General Pearson. The gist of the argument apparently was that as the Wyoming legislature had not formally adopted the UCMJ, there could be no court-martial. After the law officer[463] ruled that there was jurisdiction, Pearson and his counsel filed a writ of prohibition with the Wyoming Supreme Court, seeking to halt the proceedings on this same jurisdictional basis. On January 14, 1966, the court denied the writ.[464]

Major General Pearson's trial resumed on January 24, 1966, and concluded on 3 February. He was convicted of one specification of filing a false claim and one specification of conduct unbecoming an officer and gentlemen. He was sentenced to a reprimand.[465]

Perhaps Governor Hansen hoped that the court-martial panel would have sentenced Pearson to a dismissal so that he then would have a clear basis to order his removal as Adjutant General. But this was not to be, and, in the absence of a dismissal, it seems that Hansen was stuck with Pearson. This is the best explanation for why Governor Hansen rescinded his earlier order prohibiting Pearson from participating in National Guard matters. A June 4, 1966 letter from Hansen to Major General Pearson restored his authority as Wyoming's top military officer.[466]

Almost three months later, on August 29, 1966, Governor Hanson approved the court-martial findings and sentence.[467] On October 3, 1966, he took his final action in the case by issuing a written reprimand to Major General Pearson. It read, in part:

> You were found guilty by a General Court Martial of conduct unbecoming an officer and gentleman, and of conduct such as to bring discredit upon the Armed Forces of the State of Wyoming, and sentenced to a reprimand. As it is my duty to carry out that sentence, I shall proceed to do so.

> The Office of Adjutant General is a high position in the organization of the State of Wyoming. It is so, because it carries with it not only the responsibility for the conduct of State business, but also the leadership of a department steeped in military traditions, based upon honor and moral duty as well as the best of discipline. . . .
>
> You have violated the trust which you were given by the people of this great State. Government falls into disrepute when its highest officers depart from honesty and follow an unacceptable path. It is regrettable that by your conduct you have brought upon yourself the humiliation and overwhelming sense of shame you must feel when facing your fellow officers and men, in having failed to set for them the example which they expect and to which they are entitled.[468]

So ended the fight between Governor Hansen and his Adjutant General. The governor had made his point, and General Pearson must have felt uncomfortable in his presence—and that of his fellow Guardsmen. But he remained as the Adjutant General until the following year when, aged sixty-four years, Pearson reached mandatory retirement. Amazingly, Pearson was awarded the Wyoming National Guard Distinguished Service Medal "for long and exceptionally distinguished service to the State of Wyoming and the United States of America" before retiring. The citation lauds his "exceptional foresight and leadership in directing the training and administration" of the Guard and his "steadfast devotion to duty."[469] Since Governor Hansen approved the award to Pearson, one must conclude that Hansen harbored no ill feelings toward his Adjutant General. In any event, the Pearson-Hansen dispute did have a lasting impact: at least in Wyoming until 1977, the Adjutant General could not be removed except by a court-martial.[470]

What happened to Major General Pearson after 1967? Instead of going quietly into retirement, Pearson went to Vietnam, where he worked for Pacific Architects and Engineers as a civilian contractor at Cam Ranh Bay. He returned to the United States in 1970 and settled in Sheridan, Wyoming. George Pearson died there in March 1998. As for Governor Hansen? He completed his service as Wyoming's chief executive and was elected to the U.S. Senate in 1967. He served two terms and retired in 1978 when he declined to run for a third. Clifford P. Hansen died in Wyoming in 2009 at the age of ninety-seven.[471]

The Army Court of Military Review: The First Year

(Originally published in the October 2015 edition of *The Army Lawyer.*)

On October 24, 1968, President Lyndon B. Johnson signed the Military Justice Act of 1968. This legislation, which became effective on August 1, 1969, made revolutionary changes to military criminal law.

At the trial level, judge advocates began serving as trial and defense counsel at special courts-martial; previously, these duties were performed by non-lawyer line officers. Additionally, a military judge presided over the proceedings. Also, for the first time in history, it was possible for an accused to elect to be tried by military judge alone. Prior to August 1, 1969, every court-martial was heard by a panel.

At the appellate level, the Military Justice Act likewise resulted in significant changes to the military criminal legal system. In the Army, the Army Boards of Review were renamed the Army Courts of Military Review (ACMR) and the members of the new appellate court were redesignated as military judges. The newly constituted courts were different from their predecessors in that there was now *one court* with a number of panels rather than a number of separate boards.[472] This change was designed to "foster more consistence and a higher quality of legal decision;" apparently the separate and distinct Boards of Review were not always uniform in their decision-making.[473]

What follows is a brief history of the first year of the ACMR, and the judge advocates who served on it as appellate judges.

On August 1, 1969, Major General (MG) Kenneth J. Hodson, then serving as The Judge Advocate General, appointed a total of twelve jurists to the new ACMR. Colonel (COL) George F. Westerman was appointed as the Chief Judge. The other judges on the court were: COLs Joseph L. Bailey, Joseph L. Chalk, Rodney J. Collins, John S. Folawn, Jacob Hagopian, Winchester Kelso Jr., William W. Kramer, Arthur D. Porcella, Granville I. Rouillard, and Edward L. Stevens. Rounding out the court was the lone lieutenant colonel: Abraham Nemrow.[474]

Depending on the composition of the three-judge panels, one or more of these colonels might be designated as a "Senior Judge," and cases decided by the new ACMR in August and September 1969 reflect the following served in this capacity: COLs Edward L. Stevens, Joseph L. Chalk, and Arthur D. Porcella.[475]

Members of the United States Army Court of Military Review are shown on August 1, 1970, the first anniversary of the establishment of the Court. Pictured left to right are: First row (seated): Senior Judge Marvin G. Krieger; Chief Judge George F. Westerman; Senior Judge Joseph L. Chalk. Second row (standing): Judge Zane E. Finklestein; Judge John S. Folawn; Senior Judge Winchester Kelso Jr.; Judge Abraham Nemrow; Senior Judge Arthur Arthur D. Procella; Judge Joseph L. Bailey; Judge Rodney J. Collins; Judge I. Granville Rouillard; Judge George O. Taylor Jr.

One of the first cases to be heard by the new ACMR was *United States v. Motes*.[476] In this case, decided on August 11, 1969, the court ruled that an accused could not plead guilty to, and be convicted of, eight specifications of wrongful sale of military property where those specifications had been "lined through" on the charge sheet.[477] While this was hardly an earth-shattering decision, it was the first ACMR case to be published in the Court-Martial Reports. It also was the first time that the judge advocates serving on this appellate court signed a published opinion as "Appellate Military Judges." Prior to August 1, 1969, military lawyers serving on the Army Board of Review signed their opinions as "Judge Advocates."[478]

Between August 1, 1969 and July 31, 1970, the ACMR judges decided some 200 appellate cases, many of which resulted in published opinions. Noteworthy cases included *United States v. Averette*, in which the court ruled that a court-martial had

jurisdiction over a civilian employee of a government contractor working in Saigon, Vietnam. The accused, who was the supervisor of an Army motor pool housing vehicles, had been convicted of conspiracy to steal 36,000 motor vehicle batteries.[479] Averette argued that the court-martial lacked jurisdiction over him as a civilian because the on-going armed conflict in Vietnam did not meet the "in time of war" requirement for the exercise of court-martial jurisdiction over civilians as set out in Article 2, Uniform Code of Military Justice. While the ACMR ruled against Averette in this early decision, he ultimately prevailed when the Court of Military Appeals heard his appeal the next year.[480]

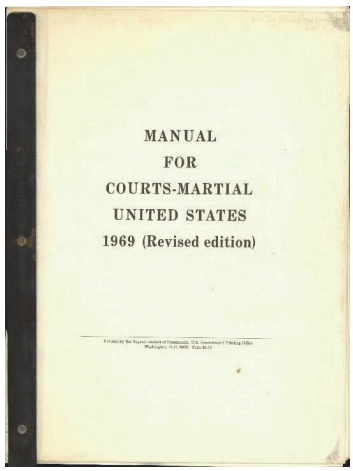
Within the first twelve months of the ACMR's existence, COLs Hagopian, Kramer, and Stevens left the court. They were replaced by COLs William T. Rogers and Marvin G. Krieger, and LTC Zane E. Finklestein.[481]

More than 45 years later, the ACMR continues to perform a key role in the court-martial appellate process, albeit under its new name, the Army Court of Criminal Appeals.[482] Scores of senior judge advocates have served on this first-line appellate court during this period and will continue to serve.

The History of the Paperback Manual for Courts-Martial

(Originally published in the August 2016 edition of *The Army Lawyer*.)

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.


MANUAL
FOR
COURTS-MARTIAL
UNITED STATES
1969 (Revised edition)

Manual for Courts-Martial United States, 1969

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-by-nine-inch hardcover book when published in 1951.[483]

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.[484]

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.[485]

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.[486]

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 phenomenal cost savings: It cost $2 for a paperback *MCM* versus $100 for the loose-leaf hardcover notebook *MCM*.[487]

Another advantage of the new softcover *MCM* would be that it is more suitable for deployments, and the Army of the mid-1990s was aware after the Persian Gulf War of 1991 that the future required rapid deployments and that

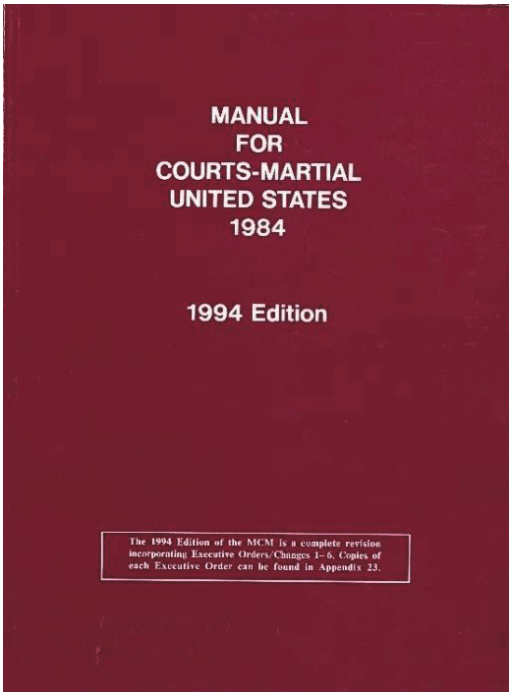
judge advocates deploying with their units would benefit from a smaller softcover book.

Colonel Gilligan, with the approval of the then-Judge Advocate General, Major General (MG) 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.[488]

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, COL 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 (LTC) Fred Borch, Air Force Major (MAJ) Regina Quinn, and Navy Lieutenant (LT) Kristen Henricksen.[489] The working group took delivery of the first paperback *MCM*, *1984* (1994 edition) on September 28, 1994.[490]

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, DoD, and the federal government.[491]

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.[492]



Manual for Courts-Martial 1984, 1994 Edition

A "Fragging" in Vietnam: The Story of a Court-Martial for Attempted Murder and Its Aftermath

(Originally published in the November 2011 edition of *The Army Lawyer.*)

On January 12, 1973, Staff Sergeant (SSG) Alan G. Cornett pleaded guilty to attempting to murder Lieutenant Colonel (LTC) Donald F. Bongers, the Executive Officer of Advisory Team 40, "by means of throwing an M-26 fragmentation grenade into a bunker which the said Lieutenant Colonel Bongers occupied."[493] Cornett also pleaded guilty to having .16 grams of heroin in his possession. The following day, he was sentenced by a panel of seven officers.[494] This is the story of his court-martial and its aftermath.

The evidence presented at the Article 32 investigation and the stipulation of fact introduced at trial revealed that the accused, a Ranger-qualified Special Forces medic who had served six-and-one-half years in Vietnam, was assigned to Military Assistance Command, Vietnam (MACV) Advisory Team 40. This team, located at Duc My, Vietnam, provided support to the Vietnamese Army.

For several months, SSG Cornett and his victim, LTC Bongers, had not been getting along. Cornett believed that Bongers was harassing him because the accused was married to a Vietnamese woman. The senior advisor in Team 40, Colonel (COL) Gilligan, who was Bongers's boss, had told other Soldiers that he did not like "mixed marriages" and would not approve a Soldier's request to marry a Vietnamese national. Bongers also had stated publicly that it was "morally wrong" for Americans to associate with Vietnamese women, and had called the accused's wife a "prostitute."[495] Not content to simply voice their views, Gilligan and Bongers had prohibited the accused from bringing his wife onto the Team 40 compound. This was embarrassing to the accused and put considerable strain on his marriage.

On November 30, 1972, at about 1545, LTC Bongers entered one of the team's commo bunkers, where the accused was on radio watch. After watching the accused open a can of beer, Bongers relieved him for drinking on duty, and then told him to leave the commo bunker. Lieutenant Colonel Bongers then took over the accused's radio watch duties.

Staff Sergeant Cornett went back to his hootch and began drinking more alcohol. As he told the Criminal Investigation Division (CID) later that day, he "drank a half a case of Budweiser beer, 12 cans, and also had about a pint of rum." About an hour later, Cornett took an M-26 fragmentation grenade off his web belt and put it on his refrigerator. As Cornett explained to the CID agent:

> I kept looking at it and wondering if it was worth it. . . . I took the tape off from around the grenade, pulled the safety pin, walked over to the commo bunker, stood there for about fifteen minutes deciding if I should kill him or just throw a scare into him. I decided not to kill him, but to scare him. I threw the grenade down the steps of the bunker . . . I stayed there until the smoke cleared.[496]

Lieutenant Colonel Bongers was a lucky man that day. He saw the grenade roll into the commo bunker toward his chair, "got up and ran up the stairs and as he reached the second step the grenade exploded."[497] Fortunately for Bongers, he was not injured in the blast.

As for SSG Cornett, he initially feigned ignorance about who had thrown the grenade but, when another Soldier told him that Bongers had accused him of trying to 'frag' him, the accused ran out of the orderly room and returned with his M-16. He then told another soldier in the orderly room: "If that is what LTC Bongers thinks, then I'll kill him for sure."[498] Cornett was quickly disarmed, and taken into custody.

On 4 December, the accused was brought to the Saigon Military Police (MP) station and held in a detention cell until he could be moved to the stockade at Long Binh. A routine strip search of Cornett's person by the MPs "uncovered 9 packets containing .16 grams of heroin." The packets had been sewn into the hems around Cornett's upper shirt pockets.

Almost certainly on the advice of his two defense counsel (the accused had hired a civilian lawyer, Mr. Richard Muri, but also had Captain (CPT) William H. Cunningham as his detailed defense counsel), SSG Cornett entered into a pre-trial agreement with the convening authority. He

agreed that, in exchange for pleading guilty to attempted murder and possession of heroin, his sentence would be capped at a dishonorable discharge, thirty years' confinement at hard labor, total forfeitures of all pay and allowances, and reduction to the lowest enlisted grade. The pre-trial agreement, however, contained one curious provision: the convening authority also agreed that "the sentence in excess . . . of confinement at hard labor for one year . . . [would] be suspended for such period of time as the Convening Authority deems appropriate."[499] The parties apparently intended that no matter how much jail time might be imposed—and both SSG Cornett and his defense counsel must have thought it would be considerable—Cornett would not serve more than one year behind bars.

During his guilty plea inquiry with COL Ralph B. Hammack, the military judge, Cornett agreed that he intended to kill Bongers. He also admitted that he had possessed a small amount of heroin. But Cornett denied being a drug user and told the judge that a "friend" might have sewn the heroin in his uniform pockets so that Cornett could say that he was "on drugs" at the time of the incident and perhaps not responsible for his actions.[500]

While Cornett's plea was accepted, and findings were entered by COL Hammack, events at sentencing did not proceed as expected. Rather, at least from the government's perspective, the case went very much awry. The trial counsel, CPT John G. Karjala, called LTC Bongers to testify how the accused had tried to kill him. One would think that this would be sufficient aggravation, and convince the panel that a severe sentence was warranted. But the accused called a number of officers and noncommissioned officers (NCOs) who testified that he was a good Soldier who had been mistreated by his superiors. Lieutenant Colonel Thomas C. Lodge testified that Cornett was "an outstanding medic."[501] Captain Terrance W. Hoffman testified that the accused had been "treated unfairly" by COL Gilligan and LTC Bongers when they denied his request to bring his wife onto the Team 40 compound. Other witnesses testified that both COL Gilligan and LTC Bongers had, on more than one occasion, voiced their prejudices against Vietnamese women to the accused and to other Soldiers.[502]

Staff Sergeant Cornett also testified in his own behalf. He had been in Vietnam six-and-one-half years (with a return to the United States only for two three-month periods in 1966 and 1970) and had served as a Special Forces reconnaissance medic, trained Vietnamese Montanyards tribesmen to fight the Viet Cong, and participated as an intelligence analyst in Project Phoenix. He also had served as a platoon medic in the 101st Airborne Division. Cornett had been wounded in combat and his counsel introduced into evidence his citations for the Silver Star, Bronze Star, and Vietnamese Cross of Gallantry. His citation for the Silver Star lauded his gallantry under fire while providing first aid to a Vietnamese soldier who had been wounded in a firefight with the North Vietnamese and Viet Cong. Cornett had also participated in "charges against the determined enemy" and his "dedicated and courageous example" had broken the enemy's counterattack.

After deliberating on an appropriate sentence, the all-officer panel sentenced SSG Cornett to be reduced to the lowest enlisted grade, forfeit all pay and allowances, and be confined at hard labor for one year. There was no punitive discharge.

Major General (MG) M. G. Roseborough took action on Cornett's case on March 1, 1973, when he approved the sentence as adjudged. The accused, who had been in the stockade at Long Binh, was shipped to the Disciplinary Barracks at Fort Leavenworth, Kansas. Since he had not been sentenced to a punitive discharge, and had not received more than a year's confinement, Cornett was offered the opportunity to go to the U.S. Army Retraining Brigade at Fort Riley, Kansas. As Cornett tells it, he was told that the brigade "housed soldiers who had made mistakes and were given the opportunity to make amends. If they straightened out, they could stay in the Army."[503]

After completing nine weeks of "retraining," Cornett was offered a choice: either an honorable discharge or restoration to active duty. He chose to stay in the Army as a medic. He remained at Fort Riley at the Irwin Army Hospital and, if Cornett is to be believed, it took him only six months "to recapture the grade of E-6."[504]

In order to re-enlist, SSG Cornett had to obtain a waiver from the Department of the Army. With the support of his chain of command, he applied for and was granted a waiver. He then re-enlisted for six more years. After five years in Kansas, SSG Cornett had tours in Germany and at Fort Benning, Georgia, where he was an instructor in the Pathfinder Department and played football on the "Doughboys" team. Cornett also was an extra in the movie *Tank* (starring James Garner), which was filmed at Fort Benning.

Shortly after being promoted to sergeant first class, Cornett was sent to 10th Special Forces Group, Bad Tolz, Germany. While serving as the senior medic in this unit, Cornett was selected "below the zone" for promotion to master sergeant. After completing the First Sergeant's Academy in Munich, Cornett was made First Sergeant, U.S. Army Special Operations Forces, Europe. Cornett retired as an E-8 with more than twenty years of active-duty service.[505]

In retrospect, it is apparent that the court members, despite the serious nature of the "fragging" and drug charges, were impressed with Cornett's soldiering. It was not unusual for career Soldiers in the Vietnam era to have two or even three one-year tours in Southeast Asia but it was extremely rare for any GI to have more than six years in South Vietnam—all in dangerous, high-profile combat-related assignments. Additionally, evidence that Cornett was airborne, Ranger, and Special Forces-qualified, and had been wounded and decorated for gallantry in action meant that the panel was loath to give him a punitive discharge that would stain his past record. But it must be assumed that the panel members would have been surprised to hear that, having served a year's confinement, Cornett was eligible for retraining and restoration to active duty. They probably would have been more surprised to hear that the Soldier they had imprisoned for attempting to kill a superior commissioned officer ultimately retired as a senior NCO.

A final note: three other judge advocates of note were involved in the Cornett case. They were then-COL Joseph N. Tenhet, Jr., then-Major (MAJ) Robert E. Murray, and then-CPT Dennis M. Corrigan. Tenhet was the MACV and U.S. Army, Vietnam Staff Judge Advocate (SJA); he retired as a brigadier general in 1978. Murray, who worked for COL Tenhet, signed the charge sheet referring the case to trial by general court-martial; he would later serve as The Assistant Judge Advocate General and retired as a major general in 1993. Corrigan, who twice served as the SJA, 1st Infantry Division (Forward) and finished his career as the senior military assistant to the Department of Defense General Counsel, retired as a colonel in 1996.

As for Cornett, his "uncensored unvarnished tale of one Soldier's seven years in Vietnam" was published by Ballantine Books in 2000.[506]

The Military Rules of Evidence: A Short History of Their Origin and Adoption at Courts-Martial

(Originally published in the June 2012 edition of *The Army Lawyer.*)

The Military Rules of Evidence (MRE) have been a permanent feature of court-martial practice for more than thirty years. While practitioners today are comfortable with the rules and accept their permanence in military criminal trials, their adoption in 1980 was the end result of a long and contentious struggle. This is the story of the origin of the MRE and their adoption at courts-martial.

Prior to 1975, when Congress enacted legislation establishing the Federal Rules of Evidence (FRE), the admissibility of evidence in U.S. courts was governed by federal common law. Similarly, evidentiary rules at courts-martial were governed by a common law of evidence that had emerged from successive decisions from the Court of Military Appeals (COMA) and, to a lesser extent, the inferior service courts. The 1969 *Manual for Courts-Martial* (*MCM*), contained these judicial decisions, but it was difficult to know whether the *MCM* was adopting these "decisions as positive law or merely setting them forth for the edification of the reader."[507]

Under the Uniform Code of Military Justice (UCMJ), Article 36, courts-martial "shall, so far as . . . practicable, apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts."[508] Recognizing that the codification of the federal common law rules of evidence meant that the Armed Forces should consider codifying military evidentiary rules, Colonel (COL) Wayne E. Alley, the then-Chief of Criminal Law in the Office of The Judge Advocate General, decided that "Military Rules of Evidence" should be created and adopted by the Armed Forces.

With the concurrence of Major General Wilton B. Persons, The Army Judge Advocate General, COL Alley put his idea in a written memorandum, which he submitted to the Department of Defense (DoD) Joint Service Committee on Military Justice (known colloquially as the "JSC").[509] Colonel Alley, who had recently assumed the chairmanship of the JSC, "formally proposed" that the services "revise the *Manual for Courts-Martial* to adopt, to the extent practicable, the new civilian rules."[510]

Brigadier General Wayne E. Alley

Colonel Alley's chief argument was that Article 36 required a codification of the military rules to bring courts-martial practice in line with federal civilian practice under the new FRE. A second important reason, as already indicated, was that the evidentiary language contained in the 1969 *MCM* was not necessarily binding, making its usefulness doubtful. But Alley also had a third reason, which grew out of his experience as a military judge wrestling with evidentiary issues at trial. In a recent e-mail, he explained:

> I was the only [JSC] member whose mid-career years were spent in the judiciary. I dealt with evidentiary issues on an almost daily basis. I found the best source of helpful case law was in Article III court decisions, which, I believed, *would be less and less helpful for military judges as the cases came more and more to be explications of FREs.* This was particularly important because of the FRE clarity about the necessity to preserve issues by timely objection. Military practice was wishy-washy as to this, and military case law seemed to support bailing out counsel who didn't do his objecting job.[511]

Despite COL Alley's arguments, the Navy opposed the idea of creating MRE. "If it isn't broken, don't fix it" seems to have been the basic reason for the sea service's opposition, but the Office of the Judge Advocate General of the Navy later articulated at least four reasons why "relatively low priority" should be "given to [the FRE's] quick implementation in the military." First, the *MCM*'s rules of evidence were "a well thought out set of rules located in one convenient place." Second, new MRE necessarily would result in "a substantial amount of litigation." Third, it would be difficult to transform the FRE into MRE because these "civilian rules would have to be scrutinized and adapted" to the needs of the military. Fourth and finally, the Navy argued that creating the MRE probably would require special training in order to educate judge advocates about the new rules—training that would be unnecessary if the services simply retained the existing *MCM* evidentiary rules with which practitioners were already familiar and comfortable.[512]

It is likely that opposition to implementing the FRE at courts-martial also grew out of a general unhappiness with the increasing "civilianization" of the UCMJ advocated by the COMA Chief Judge, Albert B. Fletcher, Jr., and others. The Military Justice Act of 1968 had already introduced extraordinary changes into the UCMJ, and it may have seemed to the Navy that adopting the FRE in military practice was too much civilianization, and too soon. Those opposed to this continued civilianization believed that it ultimately would remove the military character of the military justice system—which they believed was essential if the system was to remain a tool of discipline for commanders.

Since the JSC operates on consensus, the Navy's opposition to COL Alley's idea meant that his proposal went nowhere. By 1977, little had been done on the project. But, as is often the case in a bureaucracy, a new personality's arrival resulted in the revival of a shelved idea. A new DoD General Counsel, Ms. Deanne C. Siemer, had recently arrived in the Pentagon[513] and began asking questions about military justice. Colonel Alley quickly capitalized on Siemer's newfound interest to "break the logjam" and recommended to her that the FRE be adopted, with suitable changes, into the *MCM* as MRE.[514]

The DoD General Counsel embraced COL Alley's idea, created an "Evidence Project as a DoD requirement," and tasked the JSC with drafting a comprehensive MRE package. Beginning in early 1978, the JSC Working Group, consisting of lower-ranking judge advocate representatives from all the services, two attorneys from COMA, and a member of the DoD General Counsel's office, began drafting the rules. Colonel Alley's instructions to the Working Group were that it "was to adopt each Federal Rule of Evidence verbatim, making only the necessary wording changes needed to apply it to military procedure . . . ."[515]

While COL Alley departed for a new military assignment in mid-1978,[516] his earlier instructions continued to be followed by the Working Group, as its members generally embraced the philosophy that each FRE should be adopted as an MRE "unless it is either contra to military law . . . or was so poorly drafted as to make its adoption almost an exercise in futility."[517] Although many judge advocates were involved in drafting the new proposed rules, the principal co-author was then-Major (MAJ) Fredric I. Lederer, who was the Army representative on the JSC Working Group.[518]

The end result was that some FRE were adopted without change, while others were modified to fit better with military practice. Military Rules of Evidence 803(6) and (8), for example, were both modified to "adapt" them "to the military environment" so as to permit the admissibility of laboratory reports as an exception to the hearsay rule.[519]

The largest difference between the FRE and MRE was the creation of Sections III and V, which for the first time codified, in binding form, evidentiary rules on search and seizure, confessions and interrogations, eyewitness identification, and privileges. All of these rules had to be created from scratch, as there was no FRE counterpart.[520]

As the MRE drafting process continued, the services continued to disagree strenuously about adopting some of the FRE. The Air Force, for example, considered FRE 507, Political Vote, (today's MRE 508) to be "ridiculous" and "unnecessary."[521] It also bitterly opposed the codification of search and seizure rules ultimately adopted as MRE 311–317. The Air Force argued that these rules should be rejected because "in the military environment, search and seizure is a very fluid area of the law," and the adoption of MRE governing search and seizure might bind the Air Force more restrictively than case law. The Air Force's objections ultimately were overruled by a majority of the JSC; the DoD General Counsel also

approved the proposed MRE 311–317 as written by the Working Group.[522]

Ms. Siemer forwarded the completed MRE to the Office of Management and Budget on September 12, 1979. That office, in turn, shared the MRE with the Department of Justice (DOJ) and the Department of Transportation (DOT) (under whose auspices the Coast Guard then operated). After the DOJ and DOT gave their approval, President Jimmy Carter signed an executive order promulgating the new MRE on March 12, 1980.

The new MRE became effective on September 1, 1980, which meant a significant revision of criminal law instruction. This included a round-the-world series of trips by MAJ Lederer and Commander Pinnell to explain the new MRE to Army, Navy, Marine Corps, and Coast Guard judge advocates in the field. At the Army's Judge Advocate General's School in Charlottesville, Virginia, the teaching of evidence was revamped; the 94th Judge Advocate Officer Basic Course, which started in October 1980, was the first class to receive instruction in the new MRE. While newly minted judge advocates readily accepted the MRE as a permanent part of court-martial practice, it took some time for seasoned practitioners, especially in the judiciary, to accept them.

The COMA wrestled with the new rules in a number of cases. In *Murray v. Haldeman*, for example, the COMA ruled that it was "*not necessary—or even profitable—to try to fit compulsory urinalysis*" into the MRE.[523] This was simply wrong: the COMA should have found that the fruits of the compulsory urinalysis were lawful under MRE 313, as it would do seven years later in *United States v. Bickel*.[524]

But, while avoiding the application of MRE 313 in *Murray v. Haldeman*, the court did correctly conclude that the results of the urinalysis were admissible under MRE 314(k) as a new type of search.

Similarly, in *United States v. Miller*, the Air Force Court of Military Review examined MRE 614(b)'s requirement that court members who desire to question a witness "shall submit their questions to the military judge in writing." The Air Force court said that the rule was only a suggestion, and a foolish suggestion at that.[525]

Military judges in the field were no different. The author remembers an attempted rape prosecution at Fort Benning, Georgia, in the early 1980s. The military judge, a senior colonel with extensive experience on the bench, was uncomfortable with the trial counsel's explanation that the crying victim's claim of sexual assault was admissible as an excited utterance under MRE 803(2). Instead, ignoring trial counsel's rationale, the judge ruled that the statements were admissible as "fresh complaint" under paragraph 142*b* of the 1969 *MCM*. While this trial judge understood that the MRE were in effect, he nevertheless frequently told counsel in other courts-martial—but off the bench and off the record—that he did not like the MRE and would continue to look to the 1969 *MCM* for guidance on the admissibility of evidence.

This Fort Benning-based judge was not alone in his view. Other trial judges comfortable with the pre-MRE rules also resisted following the MRE, with sometimes disastrous results for the government. But this disinclination to follow the MRE—and any incorrect evidentiary ruling that adversely affected the prosecution's case—went unchecked until government appeals were permitted by the Military Justice Act of 1983.

Judge advocates today are comfortable with the MRE, and also accept that the rules will be modified on a regular basis to conform to changes in both the FRE and case law from the U.S. Supreme Court and Court of Appeals for the Armed Forces. But while practitioners today are sanguine about the MRE, history shows that their origins and early years were somewhat tumultuous.

[1] RANDY STEFFEN, 1 THE HORSE SOLDIER 1776–1943 35 (1977).

[2] *Id*.

[3] Frederick P. Todd, *The Ins and Outs of Military Hair*, INFANTRY JOURNAL 166 (March–April 1940).

[4] Frederick B. Wiener, *The Colonel's Queue*, ARMY 39 (Feb. 1973).

[5] *Id.*

[6] *Id*.

[7] *Id.*

[8] *Id.*

[9] Dorothy van Woerkom, *Colonel Butler's Queue*, AMERICAN HISTORY ILLUSTRATED 25 (February 1973).

[10] *Id*.

[11] U.S. WAR DEP'T, ARTICLES OF WAR ART. 64 (Stackpole Books 2005) (1863).

[12] *Id.* at Art. 69.

[13] *Id.* at Art. 73.

[14] *Id*.

[15] THE JUDGE ADVOCATE GEN.'S CORPS, THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775–1975 95 (1975).

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

[17] *Id.* pt. III.

[18] *Id.*

[19] *Id.* pt. VI, VII.

[20] 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.

[21] THE JUDGE ADVOCATE GEN.'S CORPS, *supra* note 15.

[22] *Id.*

[23] MURRAY, *supra* note 16, at 64.

[24] *Id.*

[25] *Id.* at 61–62.

[26] *Id.* at 62–63.

[27] *Id.* at 65–68.

[28] *Id.* at 69–87.

[29] *Id.* at 125–34.

[30] MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV (2012).

[31] MURRAY, *supra* note 16, at vii.

[32] *Id.*

[33] *Id.*

[34] THE JUDGE ADVOCATE GEN.'S CORPS, *supra* note 15, at 94.

[35] *Id.* at 95.

[36] WAR DEP'T, MANUAL FOR COURTS-MARTIAL AND OF PROCEDURE UNDER MILITARY LAW (1898), http://www.loc.gov/rr/frd/Military_Law/pdf /manual-1898.pdf.

[37] THE JUDGE ADVOCATE GEN.'S CORPS, *supra* note 15, at 95–96.

[38] *Id.* at 95.

[39] *Id.*

[40] ASS'N OF GRADUATES OF THE U.S. MIL. ACAD. AT WEST POINT, ANNUAL REPORT 115–17 (1930).

[41] The author thanks Major M. Eric Bahm for suggesting the idea for this "Lore of the Corps" article.

[42] The Hawaiian monarch was virtually absolute in his powers, although the kingdom did have a "House of Nobles" and "Legislative Assembly." These two bodies, however, had little power in the day-to-day running of the islands. In contrast to most monarchies, however, where blood lines determine who is a king or a queen, the Legislative Assembly, consisting mostly of men of Hawaiian native blood, elected the monarch. STEPHEN DANDO-COLLINS, TAKING HAWAII 33 (2012).

[43] *Id.* at 53.

[44] Born in Honolulu in 1844, Sanford Ballard Dole (his parents had come to Hawaii in 1840 from Maine) left the islands to attend law school, but returned in 1867 to establish a successful law practice. In 1886, he was appointed to the Kingdom of Hawaii's Supreme Court as an Associate Justice. After the overthrow of the monarchy in 1893, Dole was elected as president of the Provisional Government. After the Provisional Government declared itself the Republic of Hawaii in 1894, Dole and his allies in the new republic lobbied Congress to annex the islands. After annexation was accomplished in 1898, President William McKinley appointed Dole as the first governor of the new Territory of Hawaii. Dole later served as a U.S. District Court Judge from 1903 to 1916. Sanford B. Dole died in Honolulu in 1926. *Sanford Ballard Dole (1844–1926)*, HAWAIIHISTORY.ORG, http://www.hawaiihistory.org/index.cfm? fuseaction=ig.page&PageID=407 (last visited July 10, 2014); s*ee also* HELENA G. ALLEN, SANFORD BALLARD DOLE: HAWAII'S ONLY PRESIDENT, 1844–1926 (1998).

[45] *Id.* at 50.

[46] *Id.* at 52.

[47] *Id.* at 122; *see* WILLIAM ADAM RUSS, THE HAWAIIAN REPUBLIC (1894–1898) AND ITS STRUGGLE TO WIN ANNEXATION (1992).

[48] DANDO-COLLINS, *supra* note 42, at 148.

[49] *A Revolution in Hawaii*, N. Y. TIMES, Jan. 28, 1893, at 1.

[50] *Republic of Hawaii Formally Proclaimed*, N. Y. TIMES, July 28, 1894, at 1.

[51] DANDO-COLLINS, *supra* note 42, at 299.

[52] *Id.* at 305.

[53] *Id.*

[54] *Id.* at 306, 308.

[55] *Id.* at 308.

[56] *Id.*

[57] *Id.* at 309.

[58] *Id.* at 311.

[59] *Id.* at 317.

[60] *Id.*

[61] *Id.*

[62] *The U.S. Occupation*, HAWAII KINGDOM, http://www.hawaiiankingdom .org/us-joint-resolution-1898.shtml (last visited July 21, 2014).

[63] To acknowledge the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawaii, and to offer an apology to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii, Pub. L. No. 103-150, 107 Stat. 1510 (1993), http://www.gpo.gov/fdsys/pkg/STATUTE-107/pdf/STATUTE-107-Pg1510.pdf (last visited July 29, 2014). The resolution identifies the role of U.S. Minister Stevens (who supported the Committee of Safety and extended diplomatic recognition to Dole's Provisional Government) and the unlawful landing of Sailors and Marines from the *USS Boston* as the basis for the apology.

[64] For an excellent discussion of military intervention in labor disputes in the early years of the 20th century, *see* CLAYTON D. LURIE & RONALD G. COLE, THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1877–1945 (1996); *see Use of Military Force in Domestic Disturbances,* 45 YALE L.J. 879(1936).

[65] EDWARD M. STEEL, JR., THE COURT-MARTIAL OF MOTHER JONES 6 (1995). Note that while the title of Steel's book refers to Jones's trial as a court-martial, this is a misnomer as she was in fact tried by a military commission. Steel's book includes the complete trial transcript, *id.* at 99–306, omitting only the verdict and sentence. As he explains, the record of trial does not contain this information. *Id.* at 55, 306.

[66] *Id.* at 3–5. *See* MARY HARRIS JONES, THE AUTOBIOGRAPHY OF MOTHER JONES (1925), *available at* http://www.marxists.org/subject/women/authors/jones/index.html (last visited Feb. 25, 2012); DALE FETHERLING, MOTHER JONES, THE MINERS' ANGEL: A PORTRAIT (1974).

[67] U.S. Dep't of Labor, Workers Memorial Day Poster (Apr. 28, 2010).

[68] *Ex parte* Jones, 77 S. E. 1029, 1030 (W. Va. 1913).

[69] STEEL, *supra* note 65, at 7.

[70] *Id.* Wallace remained in the West Virginia National Guard after completing his duties as prosecutor. Shortly before the United States entry in World War I, he was commissioned as a major in the Judge Advocate General's Reserve Corps and, when hostilities ended in November 1918, Wallace had spent six months in France and achieved the rank of lieutenant colonel in the National Army.

[71] *Id.* at xi.

[72] *Id.* at 100–02.

[73] *Id.* at 40. Steel cites a newspaper report for this statement. It is unclear whether evidence of this statement came up at trial; none of the witnesses mentioned it. At one point five of Mother Jones's speeches were introduced as exhibits, but these are not included in Steel's book. *Id.* at 142–43.

[74] *Id.* at 100.

[75] Colonel Charles F. Jolliette, the president of the five-member commission, was a lawyer and his opinion almost certainly carried great weight with his fellow commission members. *Id.* at 38, 76.

[76] *Id.* at 25, 51. This compares favorably with the due process available in true courts-martial of the same era, where the accused were typically represented by non-lawyers, and a court of non-lawyers got all its legal advice from the prosecuting Judge Advocate. *See* Fred L. Borch, III, *"The Largest Murder Trial in the History of the United States": The Houston Riots Courts-Martial of 1917*, ARMY LAW., Feb. 2011, at 1, 2; *see also* Fred L. Borch, III, *Anatomy of a Court-Martial: The Trial and Execution of Private William Buckner in World War I*, ARMY LAW., Oct. 2011, at 1, 2, n.10.

[77] *See, e.g.*, STEEL, *supra* note 65, at 104–05, 112, 116.

[78] *Id.* at 185. Some witnesses testified that Mother Jones had advised them not to give up their guns, and that if she had had money she would have bought them more guns. *Id.* at 114–15, 248–50, 252, 256. Others testified that she had denounced the governor, the mine guards, and the mine clerks. *Id.* at 156, 252. One said that she had expressed disdain at low-class militia "coming in to butcher up their people" and that "they ought to fight; they had a just cause." *Id.* at 252. On the other hand, a militia captain reported that he had heard her make only a "very reasonable speech," advising the miners to continue with the strike but not to "waste money on guns," as the National Guard was now present "and would protect them." *Id.* at 201.

[79] *Ex parte* Jones, 77 S. E. 1029, 1045 (W. Va. 1913).

[80] STEEL, *supra* note 65, at 306.

[81] *Id.* at 302.

[82] *Id.* at 74–75. While some diehard socialists felt this settlement was a sell-out, Mother Jones herself described it as the best the miners could get. *Id.* at 82. Interestingly, she described Governor Glasscock, who had imposed martial law and ordered the tribunal, as a "good, weak man," but described Governor Hatfield, who made the settlement and ordered the release of all the prisoners, as "dictatorial with the instincts of a brute." *Id.* at 81.

[83] *See id.* at 59–60. For more on the Senate hearings, *see* U.S. SENATE, CONDITIONS IN PAINT CREEK DISTRICT, WEST VIRGINIA (1913). This was the first congressional subcommittee to examine a labor dispute. For more on coal mine unrest in West Virginia, *see* DAVID CORBIN, LIFE, WORK, AND REBELLION IN THE COAL FIELDS: THE SOUTHERN WEST VIRGINIA COAL MINERS 1880–1922 (1981).

[84] For more on the Ludlow massacre of 1914 and Jones's involvement, *see* Caleb Cain, *There Was Blood*, NEW YORKER, Jan. 19, 2009, at 76.

[85] *Death of Mother Jones*, MOTHER JONES MUSEUM, http://motherjonesmuseum.org/Death_of_Mother_Jones.htm (last visited Feb. 25, 2012);

Abocurragh, ANDY IRVINE, www.andyirvine.com/albums/abocurragh.html (last visited Apr. 9, 2012).

[86] *About Us*, MOTHER JONES, http://motherjones.com/about (last visited Apr. 9, 2012).

[87] Governor Hatfield ultimately declined to approve the findings of the military commission convened in Pratt, West Virginia, and either released or pardoned all those who had been convicted. Hatfield's actions meant that West Virginia avoided litigation in the federal courts. It also meant that the constitutionality of the military tribunal that convicted Mother Jones and others has never been examined by the federal courts. However, in other cases, the Supreme Court repudiated the central holding of *Ex parte Jones*—that the governor had plenary power to determine that a given area was in insurrection, and to declare martial law, without having his decision challenged in federal court. Duncan v. Kahanamoku, 327 U.S. 304, 321 n.18 (1946) (citing Sterling v. Constantin, 287 U.S. 378, 401 (1932), *cited in* Anthony F. Rezzo, *Making a Burlesque of the Constitution: Military Trials of Civilians in the War Against Terrorism*, 31 VT. L. REV. 447, 489 n.202 (2007)).

[88] THE JUDGE ADVOCATE GEN.'S CORPS, *supra* note 15, at 125, fig.37 (1975) (photograph caption "Largest Murder Trial in the History of the United States").

[89] JOHN MINTON, THE HOUSTON RIOT AND COURTS-MARTIAL OF 1917, at 13 (n.d.). In 1917, municipal legislation in Houston mandated racially separate YMCAs, libraries, and streetcar seating. Some streets also were specified as "whites only" for the watching of parades. GARNA L. CHRISTIAN, BLACK SOLDIERS IN JIM CROW TEXAS 1899–1917 145 (1995).

[90] *Id.* at 149.

[91] THE JUDGE ADVOCATE GEN.'S CORPS, *supra* note 15, at 126; Transcript of Proceedings of a General Court-Martial at 8, United States v. Robert Tillman et al. (n.d.) (No. 114575).

[92] Transcript of Proceedings of a General Court-Martial at 33, United States v. Robert Tillman et al.

[93] *Id.* at 4.

[94] CHRISTIAN, *supra* note 89, at 153, 172.

[95] Harry Surgisson Grier (1880–1935) graduated from the U.S. Military Academy in 1903 and was commissioned in the infantry. Over the next thirty-two years, he served in a variety of assignments and locations, including two tours in the Philippine Islands, service with Pershing's Punitive Expedition in Mexico, and World War I duty with the American Expeditionary Force (AEF) in France and Germany. Grier also had a tour as an Instructor and Assistant Professor of Law at West Point. "Harry Surgisson Grier," ANNUAL REPORT, ASSEMBLY OF GRADUATES, at 243 (June 11, 1936).

[96] Born in Dayton, Ohio, in October 1875, Sutphin graduated from Yale University in 1897 and received his LL.B. from the University of Cincinnati in 1900. Sutphin then practiced law in Cincinnati. He specialized in trial work and served as a judge of the Superior Court of Cincinnati for a short period. After the United States entered World War I, Sutphin left his civilian law practice to accept a commission as a major (MAJ), Judge Advocate General's Reserve Corps. After a brief period of service at Headquarters, Central Department, Chicago, Illinois, Sutphin was reassigned to San Antonio, Texas, where he served as Trial judge advocate in the Houston Riot court-martial. Sutphin subsequently sailed to France where he served as judge advocate, 83d Division, AEF. In 1919, Sutphin left active duty as a lieutenant colonel and returned to his law practice in Ohio.

[97] Hull served as The Judge Advocate General (TJAG) from 1924 to 1928. Born in Bloomfield, Iowa in 1874, he earned his Ph.D. from the University of Iowa in 1894; a year later, Hull received his law degree from Iowa. During the Spanish-American War and the Philippine Insurrection, Hull served as a Judge Advocate of Volunteers. Then, when he was twenty-six years old, Hull was appointed as a MAJ and judge advocate in the Regular Army. He soon became widely known as the "Boy Major." At the beginning of World War I, Hull was the Judge Advocate, Central Department, Chicago, Illinois. Soon thereafter he was placed on special duty with the Southern Department, where he supervised the prosecution of the Houston Riot courts-martial. In February 1918, then Colonel Hull sailed for France, where he organized and became the Director of the Rents, Requisitions and Claims Service, AEF, located at Tours. He later served as the chief, Finance Bureau, AEF. After returning to the United States in August 1919, Hull served in a variety of assignments in Washington, D.C. before being promoted to major general and TJAG in 1924. After retiring from active duty in 1928, Hull served several years as an associate justice on the Supreme Court of the Philippine Islands.

[98] MINTON, *supra* note 89, at 16.

[99] CHRISTIAN, *supra* note 89, at 162.

[100] THE JUDGE ADVOCATE GEN'S CORPS, *supra* note 15, at 127.

[101] As a result of this general orders, the verdicts in two follow-on general courts-martial—involving an additional fifty-four African-American Soldiers who were convicted of rioting in Houston—were reviewed in Washington, D.C. As a result of this review, ten of sixteen death sentences imposed by these follow-on courts-martial were commuted to life imprisonment. By the end of the 1920s, however, all those who had been jailed as a result of the Houston riots courts-martial had been paroled. MINTON, *supra* note 89, at 26.

[102] THE JUDGE ADVOCATE GEN'S CORPS, *supra* note 15, at 130.

[103] *See e.g.,* Terry W. Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell*, 35 MIL. L. REV. 1 (1967); Frederick B. Wiener, *The Seamy Side of the World War I Court-Martial Controversy*, 123 MIL. L. REV. 109 (1989).

[104] *Ex-Soldier Admits He Killed Major*, N.Y. TIMES, Mar. 20, 1921, at 1.

[105] Bill Wood, *Death at Ft. Lewis: The Cronkhite Case*, ARMY, Feb. 1984, at 62.

[106] *Alexander Pennington Cronkhite*, FIFTY-FIRST ANNUAL REPORT OF THE ASS'N OF GRADUATES, U.S. MIL. ACAD. 50 (1920).

[107] Cronkhite was 7th in a class of 164; Bradley finished 44th and Eisenhower was 61st. ASS'N OF GRADUATES, REGISTER OF GRADUATES 192–95 (1992), (Class of 1915). This class is sometimes called the "Class the Stars Fell on" because so many graduates reached flag rank.

[108] Wood, *supra* note 105.

[109] *Cronkhite*, *supra* note 106.

[110] Wood, *supra* note 105, at 62.

[111] *Id.* at 63.

[112] World War I claimed some sixteen million lives; the influenza pandemic that swept the globe in 1918 killed as many as fifty million people. In the United States, 25 percent of the U.S. population was infected and, in one year, the average life expectancy in the United States dropped by twelve years. For an excellent account of the event, *see* JOHN M. BERRY, THE GREAT INFLUENZA: THE STORY OF THE DEADLIEST PANDEMIC IN HISTORY (2005).

[113] Wood, *supra* note 105, at 63.

[114] Gene Smith, *The American Dreyfus*, AM. HERITAGE MAG. (Nov. 1994), www.americanheritage.com/print/58543?nid=58543.

[115] *Pothier Is Acquitted of Cronkhite Murder*, SEATTLE DAILY TIMES, Oct. 12, 1924, at 1.

[116] *Ex-Soldier Admits He Killed Major*, *supra* note 104.

[117] *Says He Shot Major on Captain's Order*, N.Y. TIMES, Apr. 17, 1921.

[118] *Id.*

[119] *Rosenbluth Calls It a Lie*, N.Y. TIMES, Apr. 17, 1921.

[120] Wood, *supra* note 105, at 64.

[121] *Pothier Is Acquitted of Cronkhite Murder*, *supra* note 115.

[122] *Rosenbluth Calls It a Lie*, *supra* note 119.

[123] *Pothier Is Acquitted*, *supra* note 115.

[124] Born in Decatur, Georgia, in 1895, Eugene Mead Caffey graduated from the U.S. Military Academy in 1918 and then served in the Engineer Corps. After completing law school in 1933, then Captain Caffey transferred to the Judge Advocate General's Department (JAGD). He was a judge advocate until February 1941, when he returned to the Engineers. After World War II, then Colonel Caffey returned to the JAGD. He was promoted to brigadier general in 1953 and to major general in 1954. Caffey served as The Judge Advocate General, U.S. Army, from 1954 to 1956, when he retired. Major General Caffey died in New Mexico in 1961. THE JUDGE ADVOCATE GEN'S CORPS, at 218–20 (1975).

[125] Letter from Captain Herbert E. Watkins, to Chief of Artillery, First Army, American Expeditionary Force (AEF), subject: Report of Execution of Private William Buckner (Sept. 6, 1918) (on file with the Records of the Judge Advocate General, Record Group 153, Box 8942, General Courts-Martial 121766.

[126] *Id*. According to the report, the execution was not performed in full view of the company (as would normally have been the case), because of "military necessity." As the execution took place during the allied "Hundred Days Offensive" that ended the war, this is unsurprising.

[127] Under the Articles of War, rape was a criminal offense under Article 92. The 1917 *Manual for Courts-Martial* (*MCM*) defined it as "the having of unlawful carnal knowledge of a woman by force and without consent" (in keeping with the common law definition). This is why the specification uses the words "carnal knowledge" instead of "rape." MANUAL FOR COURTS-MARTIAL, UNITED STATES 251 (1917) [hereinafter 1917 *MCM*] (Punitive Articles (Rape)).

[128] Under Article 92 of the Articles of War, "any person subject to military law" who was found guilty by a court-martial of "murder or rape" was required to be sentenced to either "death or imprisonment for life." *Id.* at 248. Having found Private (PVT) Buckner guilty, the court chose the more severe punishment of death by hanging. Note that Article 92, which became effective on 29 August 1916, also provided that, in time of peace, no person could be court-martialed for a murder or rape committed "in the States of the Union and the District of Columbia." *Id.* Of course, this provision did not apply to Buckner, because he was overseas and Congress had declared war

[129] Rape was a capital offense in many U.S. jurisdictions, including the military, until *Coker v. Georgia*, 433 U.S. 584 (1977). *Coker* held that the death penalty is "grossly disproportionate and excessive punishment for the rape of an adult woman," and is "therefore forbidden by the Eighth Amendment as cruel and unusual punishment." *Id*. at 592 (plurality opinion).

[130] JACK D. FONER, BLACKS AND THE MILITARY IN AMERICAN HISTORY 124 (1974). While Buckner apparently was the sole African-American Soldier executed in Europe, a number of Black Soldiers were hanged after being convicted by courts-martial held in the United States during World War I. *See* Fred L. Borch, *The Largest Murder Trial in the History of the United States: The Houston Riots Court-Martial of 1917*, ARMY LAW., Feb. 2011, at 1–3.

[131] Under the Articles of War, marriage was a complete defense to rape (because an element of the crime was that the intercourse had to be "unlawful," i.e., not between husband and wife). As a matter of law, a husband who forcibly and without consent had carnal knowledge of his wife was not guilty of rape. 1917 *MCM*, *supra* note 127, ch. XVII, sec. VI. This was also the prevailing law in civilian jurisdictions. *See Criminal Responsibility of Husband for Rape, or Assault to Commit Rape, on Wife*, 18 A.L.R. 1063 (1922). The husband might still be guilty of assault, but not rape, of his wife. *See* State v. Dowell, 11 S.E. 525, 526 (N.C. 1890) (Merrimon, C.J., dissenting); Bailey v. People, 130 P. 832, 835–36 (Colo. 1913) (denying the right of a husband "to control the acts and will of his wife by physical force," collecting cases). *See also* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 718, n.52, 731(2d ed. 1920) (open abuse, including assault, of a servicemember's wife could be punished under the general article, or as conduct unbecoming an officer and gentleman).

[132] Georgette Thiebaux testified in French; her statements were translated into English by a French Army lieutenant who had been sworn as an interpreter. As shown below, her inability to speak English was a material issue at trial.

[133] Record of Trial at 15–16, United States v. William Buckner (Courts-Martial No. 121766) [hereinafter Buckner ROT].

[134] 1917 *MCM*, *supra* note 127, at 47–49. The Judge Advocate of a court-martial (or Trial Judge Advocate) served both as prosecutor and legal advisor to the court, which consisted of commissioned officers only. Enlisted panels and Military Judges did not yet exist. Major Hurley's "assistant judge advocate," 1LT Lee C. Knotts, was a Coast Artillery officer. Buckner ROT, *supra* note 133, at 2. Major Hurley is listed as a member of the Judge Advocate Reserve Corps; whether 1LT Knotts or Private Buckner's defense counsel had any legal background is unclear from the record. According to Major General E.H. Crowder, Judge Advocate General of the Army in 1919, "[w]hile no direct proof by statistics can be adduced, it is common knowledge that the commanding generals in the assignment of counsel . . . have sought to utilize the services of those officers who have already had legal experience." U.S. ARMY OFFICE OF THE JUDGE ADVOCATE GENERAL, MILITARY JUSTICE DURING THE WAR: A LETTER FROM THE JUDGE ADVOCATE GENERAL OF THE ARMY TO THE SECRETARY OF WAR 28 (1919) [hereinafter CROWDER]. According to Major General (MG)

Crowder, the trial judge advocate was normally not a lawyer from the Judge Advocate General's Department "except in a few special cases." *Id.* at 27. The *MCM* did not require the trial judge advocate to be a lawyer, but did require that the judge advocate of a general court-martial have experience as a court member or assistant judge advocate. 1917 *MCM*, *supra* note 127, at 47–48.

[135] Buckner ROT, *supra* note 133, at 6. The defense explicitly relied on these instructions in making the case for consent. *Id.* at 152. The instructions on rape were read to the court-martial *before* any evidence was taken, and were less than a page in length. *Id.* at 6. There were no opening statements; after the Judge Advocate read the charge and the instructions, the president of the court-martial instructed him to "plead the case," and testimony began.

[136] *Id.* at 16. Under the rape instructions read by the Judge Advocate, Mmse. Thiebaux's sexual past would not have been a defense to rape, since "the offense may be committed on a female of any age, on a man's mistress, or on a common harlot." *Id.* at 6. However, over half a century before "rape shield" rules, it might have been allowed to show Mlle. Thiebaux's general propensity to have sex with near-strangers, or even with black men in particular. *See* Story v. State, 59 So. 480, 482–83 (Ala. 1912) (*Story* overturned the conviction of a black man for raping a white prostitute, because the defense had not been allowed to introduce evidence that the prostitute had a reputation for consorting with black men; its brief but explicit discussion of relations between the "dominant" and "inferior" races must be read to be believed.).

[137] Buckner ROT, *supra* note 133, at 21–22, 51–52.

[138] *Id.* at 45.

[139] About 200,000 African-American Soldiers served in the American Expeditionary Force (AEF), of whom 160,000 served as laborers in the Service of Supplies. "They worked night and day, twelve to sixteen hours at a stretch, performing many difficult and necessary tasks." Those in labor battalions, like PVT Buckner, "built and repaired roads, railroads, and warehouses and performed general fatigue duty." FONER, *supra* note 130, at 121.

[140] Buckner ROT, *supra* note 133, at 110.

[141] *Id.* at 103–12.

[142] *Id.* at 155–56. This article can give only highlights from the evidence. In all, twenty-five witnesses testified, and the verbatim transcript fills 187 legal-sized pages.

[143] *Id.* at 153–54.

[144] *Id.* at 155. Like most lawyers faced with inconsistencies in their own sides' testimony, MAJ Hurley had a rehearsed argument as to how common this is in human affairs: "It would be passing strange if such minor conflicts did not exist. The four Gospels are in hopeless conflict on certain minor details, but they all corroborate the salient facts of the incident concerning which they were written." *Id.* at 154.

[145] Convened by Special Orders No. 173, Headquarters Army Artillery, 1st Army, dated 26 July 1918, the court consisted of thirteen officers: two colonels, one lieutenant colonel, two majors, two captains, five first lieutenants and one second lieutenant. Buckner ROT, *supra* note 133, allied papers. The large number of panel members was not an accident, as Article 5 of the Articles of War, stated that while a general court-martial "may consist of any number of officers from five to thirteen," it should "not consist of less than thirteen when that number can be convened without manifest injury to the service." Given that PVT Buckner was facing the death penalty, the convening authority likely believed that having thirteen court members was prudent. 1917 *MCM*, *supra* note 127, Articles of War, art. 5.

[146] Buckner ROT, *supra* note 133, at 157.

[147] 1917 *MCM*, *supra* note 127, at 49. Major General Crowder also stated that a trial judge advocate was supposed "to conduct the prosecution, not indeed with the ruthless partisanship frequently to be observed in civil prosecuting attorneys, yet with the thoroughness suitable to the proper performance of his duties." CROWDER, *supra* note 134, at 27. *See also* WINTHROP, *supra* note 131, at 185 (discussing qualifications of the trial judge advocate: "While an officer may readily make himself familiar with the routine of the prosecution of a brief and simple trial, a special training and a considerable body of legal knowledge are required . . . in a case of real difficulty and importance").

[148] Had the accused kept quiet from the beginning, the dynamics of the case might have changed dramatically. On cross-examination, Mlle. Thiebaux admitted that she had not looked at her assailant's face, stating, "He was so ugly that I would not look at him . . . I say he is ugly because he is a [negro] and [negroes] are disgusting." Buckner ROT, *supra* note 133, at 14. While she had later picked him out of his all-black unit a few days later, the alleged attack occurred in the evening, the gendarmes who saw PVT Buckner were not able to identify him, he was not arrested until three days later, and a serious case for doubt might have been made.

[149] *Id.* at 152. A more cautious strategy would have been to distrust the client and talk to the witnesses *before* involving the prosecution, but this strategy would have had limited value. When the witnesses failed to back up the accused, the defense would still have been fighting a corroborated story with an uncorroborated one in the face of a damning admission by the client.

[150] War Dep't, Gen. Orders No. 7 (Jan. 17, 1918). This general order required that any death sentence be suspended pending review of its legality in the Office of the Judge Advocate General, although the reviewing authority was free to disregard any opinion or advice resulting from such review. Given the distance of the AEF in France from Washington, D.C., Acting JAG Kreger established a three-man Board of Review for the AEF, and this body examined PVT Buckner's record.

[151] Edward A. Kreger had a remarkable career as an Army lawyer. Born in Iowa in May 1868, he was admitted to the Iowa state bar in the 1890s and practiced law until the Spanish American War. In May 1898, he entered the 52d Iowa Volunteer Infantry as a captain and subsequently saw combat against insurgents in the Philippine Insurrection. In February 1911, Kreger was appointed a major and judge advocate and his subsequent career reflected his amazing talents as a lawyer: Professor of Law at West Point; legal advisor in the Department of State and Justice of the Government of Cuba; Acting Judge Advocate General of the AEF in France; and Acting Judge Advocate General in Washington, D.C. Kreger was appointed The Judge Advocate General in 1928 and retired in 1931. He died in San Antonio, Texas, in May 1955. THE JUDGE ADVOCATE GEN.'S CORPS, supra note 15, at 148–49 (1975).

[152] The allied papers also include a two-page review by MAJ Hurley for his commander, with arguments and page cites to the record for each item of evidence that supports the conviction, and this prosecution-oriented summary may have influenced the board. He appears to have done this in his capacity as staff judge advocate. *See* CROWDER, *supra* note 134, at 134. No brief for the defense (except the transcript of their closing argument) appears in the file.

[153] Since the Board had been created by a War Department regulation, its powers were advisory only; the Board did not have factfinding power (as do the courts of criminal appeals under Article 66, UCMJ) and a convening authority was under no obligation to follow any opinion issued by the Board.

[154] Major Hurley may have carried extra credibility for other reasons. His citation for the Distinguished Service Medal (when he was a lieutenant colonel) states that he also served as Judge Advocate, Adjutant General, and Inspector General for Army Artillery, 1st Army during the war, and skillfully conducted negotiations between the AEF and the Grand Duchy of Luxembourg. He was awarded the Silver Star for gallantry in action on the last day of the war for "voluntarily making a reconnaissance under heavy enemy fire." *Hall of Valor: Patrick J. Hurley*, MILITARY TIMES, http://militarytimes.com/citations-medals-awards/recipient.php?recipientid=17723 (last visited Dec. 5, 2011).

[155] On the other hand, the instructions on rape, which required some kind of resistance by the victim to prove non-consent, and the rules of evidence, which did not exclude her sexual past, were friendlier to the defense than the current rules.

[156] FONER, *supra* note 130, at 122.

[157] *Id*. Such racial attitudes were then common the civilian world, see *Story v. State*, 59 So. 480, 482 (Ala. 1912), and perhaps even in France, as evinced by Mlle. Thiebaux's testimony that she found all black men "ugly" and "disgusting."

[158] DOUGLAS WALLER, A QUESTION OF LOYALTY 11 (2004).

[159] *Supra* note 15, at 144–45.

[160] WALLER, *supra* note 158, at 24.

[161] Rebecca Maksel, *The Billy Mitchell Court-Martial*, AIR & SPACE MAG., July 2009, at 46.

[162] WALLER, *supra* note 158, at 25–26.

[163] *William "Billy" Mitchell 321 (1879–1936)*, HISTORICAL DICTIONARY OF THE U.S. ARMY (Jerold E. Brown ed., 2001).

[164] John Lehman, *Rank Insubordination*, WASH. POST, Oct. 31, 2004, at 5.

[165] WALLER, *supra* note 158, at 46–47.

[166] While the law member was indeed the forerunner of the military judge, his role and authority were markedly different in 1925. The law member was tasked with ruling "in open court" on all "interlocutory questions." The 1921 *Manual for Courts-Martial*, paragraph 9a(5), defined "interlocutory questions" 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 the court when the interlocutory question concerned the admissibility of evidence. On all other interlocutory questions, the decision of the law member could be overturned by a majority vote of the members. MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 89a(2), (3) (1921) [hereinafter MCM 1921]. But note: since the law member also had "the duties and privileges of other members of the court," he participated in all votes taken by the members, including findings and sentencing. Thus, Colonel (COL) Winship participated in *all* votes in the Mitchell general court-martial. *Id.* ¶ 89(a)(6). In 1925, the law member was the result of a recent reform in favor of the accused; during the First World War, a court-martial panel had received its legal advice from the prosecutor, who might be the only lawyer in the room. WALLER, *supra* note 158, at 86; MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 99 (1917); *see* Fred L. Borch, III, *Anatomy of a Court- Martial: The Trial and Execution of Private William Buckner in World War I*, ARMY LAW., Oct. 2011, at 1 n.1.

[167] Winship is the only judge advocate in history to be awarded the Distinguished Service Cross (DSC) while an Army lawyer. While serving as the Judge Advocate of the 1st Army, COL Winship was given command of the 110th and 118th Infantry Regiments, 28th Division. His DSC was for "extraordinary heroism in action near Lachaussee, France, November 9, 1918." Headquarters, War Dep't, Gen. Orders No. 9 (1923).

[168] WALLER, *supra* note 158, at 53–60.

[169] *Id*. at 51.

[170] *Id.* at 222.

[171] *See id.* at 37. Reid had served on the House Aircraft Committee, where he had seriously criticized the government's handling of the aircraft industry, and had expressed strong support for Mitchell's views on the need for an independent air force. *Id.* at 37–38.

[172] *Id.* at 52. Born in 1870, White entered the U.S. Military Academy (USMA) in 1891 and graduated four years later; he ranked eighth in a class of fifty-two cadets. Commissioned as a second lieutenant in the cavalry, White served in a variety of locations, including China and the Philippines. After completing the Army War College in 1912, he transferred to the Judge Advocate General's Department (White had previously received a law degree while stationed at Fort Myer, Virginia, as a cavalry officer). White and Mitchell had previously met each other at Fort Leavenworth, Kansas, in 1904 and, when he was ordered to Washington, D.C., to stand trial in 1925, Mitchell requested White as his defense counsel. "Artie" White retired in 1929 and then worked for a number of years for the United Services Automobile Association (USAA), first as USAA's attorney-in-fact and later as the organization's secretary-treasurer. White died at Fort Sam Houston, Texas, in December 1947. He was seventy-seven years old. *Herbert Arthur White*, ASSEMBLY, Jan. 1955, at 45.

[173] This punitive article, the forerunner of Uniform Code of Military Justice (UCMJ) Article 134, permitted punishment "at the discretion of the court." MCM 1921, *supra* note 166, app. 1, at 529. *See also* WALLER, *supra* note 158, at 37, 87–89.

[174] *Id.* at 85.

[175] *See* MCM 1921, *supra* note 166, ¶ 158c (providing for such motions). In modern practice, such a motion would be made under RCM 917.

[176] WALLER, *supra* note 158, at 110–16.

[177] *Id.* at 117, 261, 315. Under MCM 1921, findings and sentencing were decided at the same time; there was no announcement of findings in open court prior to deliberation on sentencing. MCM 1921, *supra* note 166, ¶¶ 294, 332a, Thus, the evidence would have been heard before findings regardless of how the court ruled on the question.

[178] Henry A. "Hap" Arnold (1886–1950) graduated from the USMA in 1907 and served as an infantry officer until transferring to the Signal Corps and learning to fly with the Wright brothers. He served on the Air Service staff in Washington during World War I, but his lack of combat experience in France did not harm his career: Arnold was appointed chief of the newly created Army Air Forces in 1941 and finished World War II as a five-star general. Fiorella H. La Guardia (1882–1947) served as an Army Air Service major on the Italian-Austrian front in World War I, where he commanded a unit of Caproni Ca.44 bombers. La Guardia is best known, however, for his service as the mayor of New York City from 1934 to 1945.

[179] WALLER, *supra* note 158, at 181.

[180] THE JUDGE ADVOCATE GEN'S CORPS, *supra* note 15, at 145.

[181] WALLER, *supra* note 158, at 245, 248.

[182] THE JUDGE ADVOCATE GEN'S CORPS, *supra* note 15, at 145.

[183] WALLER, *supra* note 158, at 260–314. Major General Mason Patrick, Chief of the Army Air Service and an airpower advocate in his own right, gave mixed answers, sometimes favoring Mitchell's views and sometimes disagreeing. *Id.* at 300–04. By its nature this must have hurt Mitchell more than it helped; it showed him not as a speaker of truth to power, but as a man taking sides in controversies, and as such less justified in taking his case to the public.

[184] *Supra* note 161.

[185] ARMY LAWYER, *supra* note 15, at 146.

[186] The result offers an interesting parallel to the case of Lieutenant Colonel George Armstrong Custer in 1867. Custer, like Mitchell, was a flamboyant wartime general returned to a lower rank after the war and accused of indiscipline. He was tried for purely military offenses—absence without leave from his command, and several specifications of "conduct to the prejudice of good order and military discipline." And his sentence was a suspension without pay for one year. Unlike Mitchell, Custer did not resign his commission during his period of suspension, and went on to command troops in several Indian campaigns. *See* LAWRENCE A. FROST, THE COURT-MARTIAL OF GENERAL GEORGE ARMSTRONG CUSTER 99–100, 246 (1968).

[187] The usual fate of such efforts is complete failure. *See* United States v. New, 55 M.J. 95, 105–07 (C.A.A.F. 2001) (lawfulness of order to wear U.N. accoutrements was question of law for the judge; defense was not allowed to present any evidence on the subject to the panel in prosecution for disobeying that order); United States v. Huet-Vaughn, 43 M.J. 105, 114–15 (C.A.A.F. 1995) (accused attempted to defend against a desertion charge by contesting legality of the war; defense was not allowed to litigate that issue at trial); *see also* United States v. Rockwood, 48 M.J. 501, 507–09 (A. Ct. Crim. App. 1998) (accused claimed duty under international law to investigate human rights abuses at a civilian prison instead of being at his place of duty; trial court permitted expert testimony on the subject, but appellate court found this defense deficient as a matter of law).

[188] WALLER, *supra* note 158, at 328–29, 331, 334–35.

[189] Edmund F. Hogan, *The Case of Billy Mitchell*, A.F. MAG. (July 1957), http://www.airforce-magazine.com/MagazineArchive/Pages/1957/July %201957/0757billy.aspx.

[190] WALLER, *supra* note 158, at 358.

[191] Roscoe Drummond, *Where An Apology Is Due*, DESERET NEWS, Mar. 11, 1958, at 18A; WALLER, *supra* note 158, at 358.

[192] *Army Officer Hanged For Killing His Fiancée*, BOSTON DAILY GLOBE, Mar. 18, 1926, at A3.

[193] *Id.*

[194] *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).

[195] *Id.* Memorandum from the Testimony of the Insanity Board.

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

[197] GCM 168928, *supra* note 194, Letter from Dwight Davis, Secretary of War, to President Calvin Coolidge 1, Examination of Lieut. John S. Thompson, at 10.

[198] *Id.* Letter, John S. Thompson to Mother, May 25, 1925, at 1 [hereinafter Letter to Mother].

[199] *Id.* Autopsy Report, Audrey C. Burleigh, Apr. 6, 1925, at 1.

[200] *Id.* Letter, John S. Thompson to Mother, *supra* note 198, at 6.

[201] *Id.* at 1.

[202] *Id.*

[203] *See* Act of June 10, 1922, ch. 212, sec. 1, 42 Stat. 627.

[204] *Id.* at 1–2.

[205] *Id*. Letter from Dwight Davis, Secretary of War, to President Calvin Coolidge, at 2.

[206] *Id*. Statement of First Lieutenant W. H. Kendall, at 1.

[207] *Id.*

[208] Id. Interview, Colonel C. H. Conrad of 2nd Lieutenant John Sewell Thompson, Apr. 6, 1925, Government Exhibit No. 7, at 15 [hereinafter Interview].

[209] Letter to Mother, *supra* note 198.

[210] Interview, s*upra* note 208, at 19.

[211] *Id.*

[212] GCM 168928, *supra* note 194, Statement of Corporal William M. Mamgun, Board of Medical Officers, Apr. 22, 1925.

[213] Interview, *supra* note 208, at 14.

[214] *Id.*

[215] *Id.* at 18.

[216] *Id*.

[217] GCM 168928, *supra* note 194, U.S. War Dep't, Adjutant Gen.'s Office Form No.594, Charge Sheet, Apr. 8, 1925, at 2.

[218] United States v. John S. Thompson, No. 015589 (Sept. 29, 1925), at 68.

[219] 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. Mar. 2015, at 1.

[220] GCM 168928, *supra* note 194, 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.

[221] GCM 168928, *supra* note 194, Supplemental Proceedings, Special Orders No. 45, Aug. 1, 1925.

[222] GCM 168928, *supra* note 194, 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.

[223] *Id.*

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

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

[226] United States v. John S. Thompson, No. 015589, Sept. 29, 1925, at 378.

[227] *Id.*

[228] GCM 168928, *supra* note 194, Judge Advocate General's Department, Board of Review (1926).

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

[230] GCM 168928, *supra* note 194, 1st Ind., J. A. Hull, The Judge Advocate General to Dwight F. Davis, Secretary of War.

[231] GCM 168928, *supra* note 194, 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.

[232] GCM 168928, *supra* note 194, 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.

[233] GCM 168928, *supra* note 194, 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.

[234] *Id.* at 2.

[235] GCM 168928, *supra* note 194, Memorandum to The Judge Advocate General of the Army from Major J.B. Anderson, Medical Corps, Jan. 7, 1926.

[236] *Id.*

[237] GCM 168928, *supra* note 194, Memorandum for The Judge Advocate General from Colonel N.D. Ely, Chief, Military Justice Section, Subject: Record of Trial in the Case of Second Lieutenant John S. Thompson, Signal Corps.

[238] *Id.* at 2.

[239] GCM 168928, *supra* note 194, Letter, from 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.

[240] GCM 168928, *supra* note 194, Memorandum for His Excellency, The President of the United States, from Rev. Dr. J. Milton Thompson, Jan. 25, 1926, at 1.

[241] *Id.* at 2.

[242] *Id.*

[243] GCM 168928, *supra* note 194, Letter from Dwight Davis, Secretary of War, to President Calvin Coolidge 1, Examination of Lieut. John S. Thompson, at 9.

[244] GCM 168928, *supra* note 194, War Department, Gen. Court-Martial Orders No. 5, Feb. 9, 1926.

[245] *Army Officer Hanged for Killing His Fiancée*, *supra* note 192, at A3.

[246] In 1884, Brigadier General David D. Swaim, who had been serving as Judge Advocate General since 1881, was tried for "improprieties" arising out of "his conduct of a business transaction," including fraud and conduct unbecoming an officer. *Supra* note 15, at 79–82. After an unprecedented fifty-two days of trial time, Swaim was found guilty and sentenced to be suspended from rank, duty, and pay for three years. *Id.* Unhappy with this result, however, President Chester A. Arthur returned the case to the court for "revision," which was permitted under the Articles of War at that time. *Id.* As a result, the members "adjusted" Swaim's sentence to suspension from rank for twelve years and to forfeiture of one half of his monthly pay for every month for twelve years. *Id.*

[247] *Colonel McMullen on Trial before Court Martial, Charged with Accepting Railroad Tickets as Reward for Advice*, LEWISTON DAILY SUN, Feb. 15, 1936, at 12; WALLER, *supra* note 158, at 51. For more on the legal aspects of the Mitchell court-martial, *see* Fred L. Borch, *The Trial by Court-Martial of Colonel William "Billy" Mitchell*, ARMY LAW., Jan. 2012, at 1.

[248] McMullen v. United States, 100 Ct. Cl. 323, 324 (1943).

[249] *Id*.

[250] *Id*.

[251] *Id.*

[252] *Id*. at 325. *See* WALLER, supra note 158, at 51.

[253] JUDGE ADVOCATE GENERAL'S DEPARTMENT, BOARD OF REVIEW CM 204639, UNITED STATES V. MCMULLEN 26 (1936) [hereinafter OPINION, BOARD OF REVIEW].

[254] Memorandum from Major General J. F. Preston, Inspector Gen., for Sec'y of War, subject: Investigation of Colonel Joseph I. McMullen, JAGD, Judge Advocate General's Office, at 1 (Apr. 13, 1935).

[255] *Id.*

[256] McMullen v. United States, 96 F.2d 574 (D.C. Cir. 1938).

[257] Memorandum from Major General J. F. Preston, *supra* note 254, at 5.

[258] *Id.*

[259] The average U.S. family income between 1934 and 1936 was $1,574. *100 Years of U.S. Consumer Spending*, U.S. BUREAU OF LAB. STAT. 35 (2006), http://www.bls.gov/opub/uscs/1934-36.pdf.

[260] Memorandum from Major General J. F. Preston, *supra* note 254.

[261] GEORGE P. PERROS, RECORDS OF THE MILITARY AFFAIRS COMMITTEE OF THE HOUSE OF REPRESENTATIVES RELATING TO AN INVESTIGATION OF THE WAR DEPARTMENT (1934–1936), at 4 (1955).

[262] Memorandum from Major General J. F. Preston, *supra* note 254, at 5.

[263] OPINION, BOARD OF REVIEW, *supra* note 253, at 1.

[264] *Id*. at 2.

[265] *Id*. at 4. In the Army of the 1930s, a loss of seniority by date-of-rank was a lawful punishment at a court-martial, and for McMullen, this meant he would be the junior-ranking colonel in the Regular Army. MANUAL FOR COURTS-MARTIAL, UNITED STATES ARMY ch. XXIII, para. 103h. (1928) ("Loss of rank is accomplished by a sentence directing that the accused . . . be reduced in rank to the foot of the list of officers of his grade."). As for the $3,600 forfeiture of pay, this was significant: In the 1930s, an Army colonel with twenty-four years of service earned $408.00 a month; a colonel with thirty years of service earned $500 a month. Military Pay Chart 1922-1942, NAVY CYBER SPACE, https://www.navycs.com/charts/1922-officer-pay-chart.html (last visited Feb. 18, 2016).

[266] OPINION, BOARD OF REVIEW, *supra* note 253, at 26.

[267] *Id*.

[268] McMullen v. United States, 100 Ct. Cl. 323, 332 (1943).

[269] ARTICLES OF WAR, 41 stat. 787, art. 39 (1920); letter from George H. Dern, Secretary of War, to John J. McSwain, Chairman, Military Affairs Division, Apr. 16, 1935 (on file with author).

[270] 18 U.S.C. § 203 (2015).

[271] McMullen v. United States, 96 F.2d 574, 575 (D.C. Cir. 1938).

[272] *Id.*

[273] *Id.* at 576.

[274] *Id*. at 575.

[275] *Id*. at 579.

[276] *Id.*

[277] *Id*.

[278] Memorandum from Colonel James E. Morrisette, Chief, Military Justice Division, Office of The Judge Advocate General, to General Malin Craig, no subject (Nov. 8, 1942) (on file with author).

[279] Status of Army Officer Removed Because of Conviction, 39 Op. Att'y Gen. 437, 438 (1941).

[280] McMullen v. United States, 96 F.2d 574, 575 (D.C. Cir. 1938).

[281] Memorandum: Re: Colonel Joseph I. McMullen v. United States; Court of Claims No. 45242. Suit filed September 11, 1940; amount involved around $25,000 counting interest, undated, at 1 (on file with author).

[282] *Id*.

[283] McMullen v. United States, 100 Ct. Cl. 323, 343 (1943).

[284] *Id.* at 323, 324.

[285] *Id.* at 343.

[286] *Id.* at 338.

[287] *Id*. at 343.

[288] Will Hoover, *Mysterious Schofield Plot Filled with Untold Stories*, HONOLULU ADVERTISER, Apr. 22, 2001.

[289] The author thanks Colonel William D. Smoot, Staff Judge Advocate, 25th Infantry Division, for alerting him to the existence of this piece of military legal history. He also thanks Chief Warrant Officer Four Jennifer D. Young, Senior Legal Administrator, Fort Shafter, Hawaii, for photographing the gravestones of the executed Soldiers buried in the Schofield Barracks Post Cemetery.

[290] *Leonski in Life and Death: Full Story*, THE SUN NEWS (Melbourne, Australia), no date. This article was published shortly after Leoniski's execution on November 4, 1942.

[291] Gen. Court-Martial Order No. 1, Gen. Headquarters, Southwest Pacific Area (Nov. 4, 1942).

[292] United States v. Private Edward J. Leonski, CM 267174, 16 (Board of Review, Oct. 26, 1942) (record is located at the National Archives and Records Administration, National Archives at St. Louis, Record Group 153).

[293] Review of the Staff Judge Advocate, Branch Office of The Judge Advocate General 30 (Sept. 29, 1942) (United States v. Edward J. Leonski, CM 267174, 16 (Board of Review, Oct. 26, 1942)).

[294] *Id.*

[295] *Leonski*, CM 267174 at 30.

[296] United States v. Private Herman Perry, CM 307871 (Board of Review, Sept. 4, 1944) (record is located at National Archives and Records Administration, National Archives at St. Louis, Record Group 153).

[297] Review of the Staff Judge Advocate 2 (Sept. 21, 1944) (United States v. Perry, CM 307871 (Board of Review, Sept. 4, 1944) (Allied Papers)).

[298] *Id.* at 3.

[299] *Id.*

[300] Gen. Court-Martial Orders No. 19, Headquarters, U.S. Army Forces Pacific Ocean Areas (June 19, 1945); United States v. Jesse D. Boston, CM 307533 (Board of Review, Apr. 24, 1945).

[301] Under the Manual for Courts-Martial then in effect, the panel members were required to "prescribe" the method of execution, "whether by hanging or shooting." While the Manual stated that shooting usually was prescribed for military offenses, this was not required. MANUAL FOR COURTS-MARTIAL, UNITED STATES, para. 103c (1928).

[302] *Boston*, CM 307533 at 8 (Allied Papers).

[303] United States v. Thomas, CM 267174 (Board of Review, Aug. 9, 1944) (record is located at National Archives and Records Administration, National Archives at St. Louis, Record Group 153).

[304] *Boston*, CM 307533.

[305] Review of the Staff Judge Advocate, Headquarters, Central Pacific Base Command 2 (Sept. 14, 1944) (United States v. Thomas, CM 267174 (Board of Review, Aug. 9, 1944)).

[306] Memorandum from Myron C. Cramer, The Judge Advocate General, to Major General Edwin M. Watson, subject: Private Cornelius Thomas, 3297th Quartermaster Service Company (Jan. 25, 1945).

[307] Gen. Court-Martial Order No. 333, War Department (July 11, 1945).

[308] War Department, Message from Commanding General Army Forces Pacific to War Department 4 (Apr. 22, 1947) (United States v. Mickles, CM 31502 (Board of Review, June 11, 1946) (Allied Papers)).

[309] Review of the Staff Judge Advocate, Headquarters, Twentieth Air Force 1 (June 28, 1946) (United States v. Mickles, CM 31502 (Board of Review, June 11, 1946)).

[310] *Id.* at 2.

[311] Statement of Captain (Dr.) Leonard W. Charvet, 204th General Hospital, Guam, Marianas Islands 1 (May 14, 1946) (United States v. Mickles, CM 31502 (Board of Review, June 11, 1946) (Allied Papers)).

[312] War Department Adjutant General's Office Form 52-1, Report of Death, Garlon Mickles (United States v. Mickles, CM 31502 (Board of Review, June 11, 1946) (Allied Papers)).

[313] Post Cemetery, Schofield Barracks, n.d. (visitor's brochure) (on file with Regimental Historian, TJAGLCS).

[314] Hoover, *supra* note 288.

[315] E. J. Kahn, Jr., *Annals of Crime: The Philologist (Part IV)—Who Wants to Go to Germany in Wartime*, NEW YORKER, Apr. 1, 1960, 62, at 66.

[316] Lieutenant Colonel Bernard A. Brown, Judge Advocate Gen. Dep't., Assistant Judge Advocate, Post Trial Review, *United States v. Dale Maple*, CM 257165, at 18 (May 21, 1944); E. J. Kahn, Jr., *Annals of Crime: The Philologists (Part I)—A Trip to Old Palomas*, NEW YORKER, Mar. 11, 1950, 35, 36.

[317] Kahn, *supra* note 315, at 72.

[318] *Id.* at 62.

[319] U.S. Dep't of Def., DD Form 458, Charge Sheet, *United States v. Maple*, CM 257165 (Mar. 28, 1944).

[320] Kahn, *supra* note 316, at 48.

[321] Kahn, *supra* note 315, at 77.

[322] War Dep't, Gen. Court-Martial Order No. 639 (Nov. 28, 1944).

[323] Kahn, *supra* note 315, at 78.

[324] *Id.*

[325] United States v. Monti, CM 291280, Records of the Office of the Judge Advocate General, Record Group (RG) 153, Nat'l Archives and Records Admn.

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

[327] Ron Soodalter, *A Yank in the SS*, MIL. HIST., Jan. 2017, at 40, 42.

[328] *Id.*

[329] Monti, *supra* note 325, at 31, U.S. War Dep't, Adj. Gen.'s Off. Form No. 115, Charge Sheet.

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

[331] Monti, *supra* note 325, Statement, Captain Louis S. Wilkerson, Investigating Officer, Subject: Interrogation of 2LT Monti by U.S. CID Special Agent Anthony Cuomo, May 14, 1945.

[332] *Id.*

[333] Soodalter, *supra* note 327, at 44.

[334] *Id.*

[335] *Id.* at 46.

[336] Monti, *supra* note 325; Soodalter, *supra* note 327, at 46.

[337] Monti, *supra* note 325.

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

[339] Today's Eglin Air Force Base, located in the Florida panhandle near Panama City.

[340] Monti, *supra* note 326, at 209.

[341] Soodalter, s*upra* note 327, at 47.

[342] United States v. Monti, 168 F.Supp, 671, 672 (E.D.N.Y. 1958).

[343] Ex parte Monti, 79 F.Supp. 651, 652 (E.D.N.Y. 1948).

[344] Robert A. Inch (1873–1961) served as the inaugural Chief Judge of the Eastern District of New York from 1948 to 1958.

[345] U.S. CONST. art. III, § 3.

[346] Monti, *supra* note 326, at 210.

[347] *Id.* at 212.

[348] *Id.* at 213.

[349] *Id.*

[350] Ex parte Monti, 79 F.Supp. 651, 671 (E.D.N.Y. 1948).

[351] 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.

[352] WILLIAM B. HUIE, THE EXECUTION OF PRIVATE SLOVIK 210–14 (1970); *see supra* note 15, at 192–94 (1975).

[353] HUIE, *supra* note 352, at 127.

[354] *Id.* at 128.

[355] *Id.* at 120.

[356] *Id.* at 110.

[357] OTJAG, Criminal Law Division, Information Paper, subject: Private Eddie Slovik, USA (deceased) (Dec. 10, 1981) (on file with author).

[358] HUIE, *supra* note 352, at 103.

[359] United States v. Kathleen Nash Durant, CM 317327; United States v. David F. Watson, CM 319747; United States v. Jack W. Durant, CM 324235 (on file with Records of the Office of the Judge Advocate General, Record Group (RG) 153, M1899).

[360] Stephen Harding, *Soldiers of Fortune: The Hesse Jewel Heist*, WORLD WAR II (March 2009), http://www.historynet.com/soldiers-of- fortune.htm (last visited July 19, 2011).

[361] JUDGE ADVOCATE GEN.'S CORPS, *supra* note 15, at 172.

[362] *Id.* at 173.

[363] *Id.*

[364] Court-Martial Case Files Relating to the "Hesse Crown Jewels Case," 1944–1952 (on file with Records of the Office of the Judge Advocate General (Army), Record Group 153, Pub. No. M1899, Nat'l Archives, Washington, D.C.).

[365] Harding, *supra* note 360.

[366] For more on the Houston Riots and their impact on military justice, *see* Borch, *supra* note 76. *See also*, GARNA L. CHRISTIAN, BLACK SOLDIERS IN JIM CROW TEXAS 1899–1917 (1995).

[367] JUDGE ADVOCATE GEN.'S CORPS, *supra* note 15, at 134–35 (1975).

[368] *Id*. at 136.

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

[370] *Id.*

[371] 10 U.S.C. §§ 801–940 (1950).

[372] Court of Military Appeals, *supra* note 369, at 2.

[373] *Id.* at 3.

[374] *Id.*

[375] *Id.*

[376] *Id.* at 6.

[377] *Id.* at 2.

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

[379] Court of Military Appeals, *supra* note 369, at 2; *Judges*, UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, http://www.armfor.uscourts.gov/newcaaf/judges.htm (last accessed Feb. 29, 2016).

[380] *Dickenson Is Guilty; Gets 10 Years in Jail*, WASH. POST, May 5, 1954, at 1.

[381] *Id.*

[382] Dickenson was held at Camp Number Five, Pyoktong, Korea. United States v. Dickenson, 17 C.M.R. 438, 443 (C.M.A. 1954).

[383] *Army Orders Dickenson to Stand Trial*, WASH. POST, Feb. 19, 1954, at 12.

[384] *Id.*

[385] Dickenson v. Davis, 245 F.2d 317 (10th Cir. 1957).

[386] *Dickenson*, 17 C.M.R. at 443.

[387] *Id.* at 444.

[388] *Id.* at 441–43.

[389] *Id.* at 438–40.

[390] Treason is not an enumerated offense under the Uniform Code of Military Justice (UCMJ); the closest similar offense is aiding the enemy, Article 104. *See* Fred L. Borch, *Tried for Treason: The Court-Martial of Private First Class Maple*, ARMY LAW., Nov. 2010, at 4.

[391] The members of the panel were: Colonel (COL) Wolfe (president); COLs Alcorn B Johnson and Ralph R. Burr, Lieutenant Colonel (LTC) Owen D. Boorom; Majors Paul M. Martin, Edwin D. Bowman and John W. Reser; and Captain Harold H. Hartstein. Note that although the new UCMJ permitted Dickenson to have a court-martial panel consisting of at least one-third enlisted members, Dickenson elected to have an all-officer panel hear his case. There was no possibility for trial by judge alone; this option did not exist until enactment of the Military Justice Act of 1968.

[392] Born in New York in February 1907, Charles Robert Bard graduated from the U.S. Military Academy in 1931 and was commissioned in the Coast Artillery Corps. He transferred to the Judge Advocate General's Department prior to World War II, and subsequently served as Staff Judge Advocate (SJA), XV Corps, and SJA, 7th Army, in the European Theater of Operations. Colonel Bard was serving in the Office of The Judge Advocate General when he was assigned to prosecute the *Dickenson* case. Bard retired from active duty in 1958 and died in 1980. ASS'N OF GRADUATES, REGISTER OF GRADUATES (1992) (Class of 1931).

[393] Born in North Dakota in July 1909, Russell Guy Emery graduated from West Point in 1930 and qualified for his wings in the Army Air Corps. He then transferred to the Infantry, and was serving as the commander of an infantry regiment in Luxembourg in January 1945 when he lost a leg and was awarded the Silver Star for saving a fellow Soldier from a minefield. After being medically retired with the rank of colonel, Emery entered law school at the University of Virginia and, after graduating in 1949, was recalled to active duty to serve as an Assistant Professor of Law at West Point. He remained on active duty until 1952, when he retired a second time and moved to the District of Columbia. From 1953 to 1958, he was associated with the firm of Ansell and Ansell (the same Ansell who had been a Judge Advocate brigadier general and served as acting The Judge Advocate General during World War I). In 1958, Emery left that firm to create his own firm, Emery and Wood. Emery "died quite suddenly at his home" in Falls Church, Virginia, in November 1964. He was fifty-five-years old. *Guy Emery*, ASS'N OF GRADUATES, ASSEMBLY 96 (Spring 1965) [hereinafter ASSEMBLY].

[394] Telephone Interview with Major General (Ret.) Wilton B. Persons Jr. (Feb. 11, 2013) [hereinafter Persons Telephone Interview]. As assistant defense counsel, Persons interviewed Corporal (CPL) Claude J. Bachelor, who was subsequently court-martialed for similar prisoner of war (POW) misconduct. *See* United States v. Bachelor, 19 C.M.R. 452 (C.M.A. 1955). For more on Persons, *see* Michael E. Smith, *Major General Wilton Burton Persons, Jr. United States Army (Ret.) The Judge Advocate General of the Army (1975–1979)*, 153 MIL. L. REV. 177 (1996).

[395] United States v. Dickenson, 17 C.M.R. 442 (C.M.A. 1954).

[396] *Id.*

[397] *Dickenson Acquitted on One Charge That He Informed on Fellow Prisoner*, WASH. POST, Apr. 27, 1954, at 1.

[398] Don Olesen, *2 Doctors Say Reds Could Break Anyone*, WASH. POST, Apr. 29, 1954, at 3.

[399] *Dickenson Family 'Shocked' at News of Ed's Arrest*, WASH. POST, Jan. 24, 1954, at M4.

[400] *Dickenson Verdict Debate Is Recessed*, WASH. POST, May 4, 1954, at 7.

[401] Olesen, *supra* note 398.

[402] *Dickenson Verdict Debate Is Recessed, supra* note 400, at 7.

[403] Don Olesen, *Attorney Accuses Army of 'Crucifying' Dickenson*, WASH. POST, May 1, 1954, at 3.

[404] Olesen, *supra* note 398.

[405] *Dickenson Family 'Shocked' at News of Ed's Arrest, supra* note 399.

[406] Persons Telephone Interview, *supra* note 394.

[407] The law officer had previously entered a finding of not guilty to a second specification alleging a violation of Article 105 at the close of the government's case-in-chief; apparently COL Scarborough determined that the government's evidence was insufficient to support the specification alleging that Dickenson had informed on fellow POW CPL Martin Christensen by telling the Chinese that Christensen had a hidden .45 caliber pistol. Arthur Kranish, *Dickenson Acquitted on One Charge That He Informed on Fellow Prisoner*, WASH. POST, Apr. 27, 1954, at 1.

[408] ASSEMBLY, *supra* note 393.

[409] Dickenson was married during the trial. *Psychiatrist Testifies in Dickenson Defense*, ASSOCIATED PRESS, Apr. 28, 1954.

[410] The Army ultimately court-martialed a total of fourteen Soldiers for misconduct while POWs in North Korea. Eleven were convicted and three were acquitted. *See* EUGENE KINKAID, IN EVERY WAR BUT ONE (1959).

[411] Julius Segal, *Factors Related to the Collaboration and Resistance Behavior of U.S. Army PW's in Korea*, HUM. RESOURCES RES. OFFICE TECHNICAL REP. 33 (1956); Exec. Order No. 10,631, 3 C.F.R. §266 (1954–1958), *available at* http://www.archives.gov/federal-register/codification/executive-order/10631.html (establishing the Code of Conduct for U.S. servicemembers), *amended by* Exec. Order No. 12,633, 3 C.F.R. §561 (1988) [hereinafter Code of Conduct]; U.S. DEP'T OF ARMY, PAM. 360-512, CODE OF THE U.S. FIGHTING FORCE (June 1, 1998)[hereinafter DA PAM. 360-512] (providing the Code of Conduct as well as setting forth its principles and standards).

[412] *See, e.g.*, United States v. Garwood, 16 M.J. 863 (N.M.C.M.R. 1983), *aff'd* 20 M.J. 148 (C.M.A. 1985). While Garwood was the only POW to be court-martialed for misconduct committed while a POW, more than a few were investigated for violating Articles 104 and 105.

[413] For an overview of the problem of POW misconduct and an analysis of the Code of Conduct, *see* Rodney R. LeMay, Collaboration or Self-Preservation: The Military Code of Conduct (unpublished M.A. thesis, Louisiana State University, 2002). *See also* Captain Charles L. Nichols, *Article 105, Misconduct as a POW*, 11 A.F. L. REV. 393 (1969).

[414] U.S. Dep't of the Army, DA Form 19-24, Statement, June 1, 1954, Powers, Wayne, at 1–3 (Mar. 26, 1958) [hereinafter Powers Statement].

[415] CHARLES GLASS, THE DESERTERS: A HIDDEN HISTORY OF WORLD WAR II xv (2013).

[416] United States v. Powers, CM 400435 (Aug. 2, 1958) (Review of the Staff Judge Advocate (Aug. 12, 1958)) [hereinafter Review of Staff Judge Advocate].

[417] Powers Statement, *supra* note 414, at 1–3.

[418] *Id.* at 3.

[419] Powers had been married when he entered the Army in 1943; his wife, Ruth Killian Powers, filed for divorce in November 1949 on the grounds that Powers had "absented himself for more than one year without just cause." Ruth Powers was granted a divorce in January 1950. She subsequently remarried and moved to Texas, United States v. Powers, CM 400435, Exh. G (Aug. 1, 1958) (providing a Telex message from Commanding Gen., Fort Leavenworth, Kan., to Commanding Gen., Army Commc'ns Zone, Advance Section, Verdun, France (May 1, 1958)).

[420] Private (PVT) Powers could not be prosecuted under the Uniform Code of Military Justice because his crime had been committed prior to its enactment in 1950.

[421] Although PVT Eddie Slovik had been executed by firing squad for deserting during the Battle of the Bulge, Brigadier General Fleming apparently never considered the death penalty as a punishment in referring Wayne Powers's case to trial. For more on Slovik, *see* Fred L. Borch, *Shot by Firing Squad: The Trial and Execution of Pvt. Eddie Slovik*, ARMY LAW., May 2010, at 3.

[422] Powers had been convicted by a special court-martial for having absented himself without authority from his unit for eight days in January 1944; he also had a conviction by summary court-martial for being drunk and disorderly in uniform in a public place in April 1944. United States v. Powers, CM 400435 (Aug. 1, 1958) (Review of the Staff Judge Advocate (Aug. 12, 1958)).

[423] *Id.*; Headquarters, U.S. Dep't of Army, U.S. Army Commc'ns Zone, Advance Section, Verdun, France, APO 122, Court-Martial Appointing Order No. 11 (July 1, 1958).

[424] Review of the Staff Judge Advocate, *supra* note 416.

[425] GLASS, *supra* note 415, at xi.

[426] E-mail from John Brebbia to author (Oct. 17, 2013, 11:13 EST) (on file with Regimental Historian, TJAGLCS).

[427] United States v. Powers, CM 400435 (Aug. 1, 1958) (providing a copy of a telegram from Clark Summers, to The President (Eisenhower)).

[428] *Id.* (providing a copy of a telegram from Edward C. Dean, to the Sec'y of the Army (Aug. 1, 1958)).

[429] *Id.* (Letter from C. L. King to The Judge Advocate Gen. (Aug. 11, 1958)).

[430] *Id.* (Letter from Michael A. Wyatt to the Office of the Judge Advocate Gen., Mil. Just. Div. (July 25, 1961)).

[431] *Id.* (Letter from Paul V. Lutz to Neil McElroy, Sec'y of Def. (Aug. 4, 1958)).

[432] *Id.* (Letter from Chester Missahl to Sec'y of Def. (Aug. 6, 1958)).

[433] Headquarters, U.S. Army Commc'ns Zone, Advance Section, Verdun, France, APO 122, U.S. Forces, Gen. Court-Martial Order No. 22 (Oct. 2, 1958).

[434] Memorandum from Major General George W. Hickman, Jr., The Judge Advocate Gen., to Sec'y of the Army, subject: Report on Current Status of Private Wayne E. Powers (Sept. 9, 1958).

[435] GLASS, *supra* note 415, at xv.

[436] MANUAL FOR COURTS-MARTIAL, UNITED STATES ch. III, 6c (1951) [hereinafter 1951 MCM], available at http://www.loc.gov/rr/frd/ Military _Law/CM-manuals.html (requiring that the appointment orders for trial and defense counsel to address whether counsel are "legally qualified lawyers" or not and, if a trial counsel is a qualified attorney, the defense counsel be a qualified attorney as well).

[437] There was no requirement for legally trained counsel at special courts until the enactment of the Military Justice Act in 1968, when an accused for the first time was "afforded the opportunity to be represented" at a special court by a lawyer. Consequently, absent extraordinary circumstances, convening authorities convened special courts, selected panels, appointed line officers as trial and defense counsel, and took action on findings and sentence without any JA participation. For more on the changes resulting from the Military Justice Act of 1968, *supra* note 15, at 243–51 (1975).

[438] *GI Discharged; Slugged Guard*, STARS & STRIPES, Aug. 1963.

[439] *Id.*

[440] *Id*.

[441] *Id*.

[442] *Id*.

[443] 1951 MCM, *supra* note 436, ch. XXV, 127c, tbl., at 221.

[444] *GI Discharged; Slugged Guard*, *supra* note 438.

[445] *Id*.

[446] *Id*.

[447] OFFICE OF THE JUDGE ADVOCATE GENERAL, JAGC PERSONNEL AND ACTIVITY DIRECTORY (Aug. 1963); OFFICE OF THE JUDGE ADVOCATE GENERAL, JAGC PERSONNEL AND ACTIVITY DIRECTORY (Sept. 1973).

[448] *Can Prove Hansen Charges False*, BILLINGS GAZETTE (Montana), Dec. 1, 1964, at 1.

[449] *Id*.

[450] The 187th Airborne Infantry Regiment is today known by the moniker Rakkasans. In Japanese, Rakkasan means "man falling under umbrella"; the unit received the moniker while in occupation duty in Japan after World War II. *See* The Rakkasans, 187th Infantry Regiment, RAKKASAN ASS'N, http://www.rakkasan.net/history.html (last visited Oct. 16, 2013).

[451] U.S. Dep't of Army, DA Form 66, Officer Qualification Record, George O. Pearson, block 21 (Awards and Decorations) (Aug. 17, 1966).

[452] *Id*. block 12 (Appointments).

[453] BILLINGS GAZETTE, *supra* note 448.

[454] Wyo. Adjutant Gen.'s Office Exec. Order No. 66 (Nov. 26, 1964) (copy on file with author).

[455] Wyo. Adjutant Gen.'s Office, Special Order No. 222 (Nov. 26, 1964) (copy on file with author).

[456] Letter from Clifford P. Hansen to All units of the Wyoming Army and Air National Guard (Feb. 20, 1965).

[457] *Guard Dispute: Attorney General Asks Suit Dismissal*, BILLINGS GAZETTE (Montana), Dec. 25, 1964, at 21.

[458] State of Wyoming *ex rel.* Pearson v. Hansen, 401 P.2d 954 (1965). Cooper was named as a defendant because Hanson had appointed him as Adjutant General after removing Pearson from the office.

[459] Wyo. Office of the Governor and Commander-in-Chief Exec. Orders No. 34 (July 12, 1965).

[460] Headquarters, Wyo. Nat'l Guard, Office of the Commander-in-Chief, Gen. Court-Martial Appointing Order No. 1 (Nov. 12, 1965).

[461] Under Article 25(d)(1), Uniform Code of Military Justice (UCMJ), a member may be junior in rank to the accused when that cannot be "avoided." Since Pearson was the highest-ranking officer in the Wyoming National Guard, selecting members junior to him could not be avoided. UCMJ art. 25(d)(1) (2012).

[462] A distinguished lawyer with a strong military background (he had enlisted in the Utah National Guard in 1917 and served as a colonel in the 40th Infantry Division in World War II), George W. Latimer was one of the original three judges on the Court of Military Appeals (today's Court of Appeals for the Armed Forces). Lattimer served on that court from 1951 to 1961. *Judges*, U.S. COURT OF APPEALS FOR THE ARMED FORCES, http://www.armfor.uscourts.gov/newcaaf/judges.htm (last visited Oct. 9, 2013). Some years after the Pearson court-martial, Latimer defended Lieutenant William F. "Rusty" Calley in the infamous My Lai massacre court-martial. RICHARD HAMNER, THE COURT MARTIAL OF LT. CALLEY 61–62 (1971).

[463] Prior to the Military Justice Act of 1968, when Congress created the position of "military judge," all general courts-martial had a "law officer" detailed to them by the convening authority. The law officer was a quasi-judicial official, and was certified by The Judge Advocate General as legally qualified to instruct the panel members on the elements of the offense, the presumption of innocence, and the burden of proof. The law officer also ruled on interlocutory questions of law. UCMJ art. 26 (1951).

[464] State *ex rel.* Pearson v. Hansen, 409 P.2d 769 (1966). The court had previously held that the legislature had enacted sufficient legislation to allow for trials of state military personnel under the UCMJ.

[465] Memorandum from Wyo. Nat'l Guard, Office of the Staff Judge Advocate, subject: Opinion, Review, and Recommendations, Trial of Major General George O. Pearson, Adjutant Gen., State of Wyo. 5 (Aug. 29, 1966).

[466] Letter from Governor Hansen to Major General Pearson (June 4, 1966).

[467] Memorandum from Wyo. Nat'l Guard, *supra* note 465, at 8.

[468] Letter from Governor Clifford P. Hansen to Major General George O. Pearson, subj: Reprimand (Oct. 3, 1966).

[469] Wyo. Adjutant Gen.'s Office, Gen. Orders No. 18 (June 10, 1967).

[470] In 1977, almost certainly in response to the Hansen-Pearson controversy, the Wyoming legislature revised state law to provide for the removal of the Adjutant General, as with all other gubernatorial appointees, at the pleasure of the governor. WYO. STAT. ANN. §§ 19-7-103(a), 9-1-202(a) (1977). While this means that the governor may remove the Adjutant General from the state position, this would not constitute a dismissal action with respect to dual status membership in the Reserves or state militia.

[471] *Obituary, Clifford P. Hansen, 1912–2009*, WYOMING TRI. EAGLE, http://www.wyomingnews.com/articles/2009/10/24/obituaries/01obit_10- 24-09.prt (last visited Aug. 20, 2013).

[472] When enacted by Congress on May 5, 1950, Article 66, Uniform Code of Military Justice, required The Judge Advocate General (TJAG) to "constitute in his office one or more boards of review." Under the new Military Justice Act, however, Article 66 was amended so that TJAG "shall establish a Court of Military Review which shall be composed of one or more panels, and each panel shall be composed of not less than three appellate judges."

[473] JUDGE ADVOCATE GEN.'S CORPS, *supra* note 15, at 247.

[474] OFFICE OF THE JUDGE ADVOCATE GEN., JUDGE ADVOCATE GEN.'S CORPS (JAGC) PERSONNEL AND ACTIVITY DIRECTORY, at 4 (1969) [hereinafter JAG PUB. 1-1].

[475] *Id.*

[476] United States v. Motes, 40 C.M.R. 876 (A.C.M.R. 1969).

[477] *Id.* at 879.

[478] *See*, *e.g.*, United States v. Coonrod, 40 C.M.R. 873 (A.B.R. 1969). The *Coonrod* case was decided on July 31, 1969—the last day the Army Boards of Review existed in the military criminal legal system.

[479] United States v. Averette, 40 C.M.R. 891 (A.C.M.R. 1969).

[480] United States v. Averette, 41 C.M.R. 363 (C.M.A. 1970).

[481] JAG PUB 1-1 (1970), at 4.

[482] This name change, which was made by legislation effective in October 1994, did not otherwise alter the nature of the institution. *See* UCMJ art. 66 (2012).

[483] *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, UNITED STATES 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).

[484] MANUAL FOR COURTS-MARTIAL, UNITED STATES (rev. ed. 1969).

[485] MANUAL FOR COURTS-MARTIAL, UNITED STATES (1984).

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

[487] *Id.*

[488] 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).

[489] 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).

[490] MANUAL FOR COURTS-MARTIAL, UNITED STATES (1994).

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

[492] Telephone Interview, *supra* note 486.

[493] Record of Trial, United States v. Cornett. No. CM429339, Charge Sheet (1973) [hereinafter Cornett ROT].

[494] The panel consisted of two colonels, one lieutenant colonel, two majors, one lieutenant and one chief warrant officer two. *Id.* at 23–30.

[495] *Id*. at 79–80, 82–83.

[496] *Id.* Sworn Statement of SSG Alan Gentry Cornett.

[497] *Id.* Prosecution Exhibit 1 (Stipulation of Fact).

[498] *Id.*

[499] *Id.* Appellate Exhibit I (Offer to Plead Guilty).

[500] *Id.* at 81. Cornett testified that he and his friends had discussed the possibility that, if he had heroin in his possession, he could testify that he was under the influence of drugs when he threw the grenade and so was not responsible. However, he testified that he did not actually ask anyone to provide him with heroin, and was surprised to find the packets had been sewn into his uniform by persons unknown. (He was still able to plead guilty to knowing possession because he said he did not get rid of the packets once he found them.).

[501] *Id.* Review of the Staff Judge Advocate.

[502] *Id*. at 5.

[503] ALAN G. CORNETT, GONE NATIVE 268–69 (2000).

[504] *Id*. at 269.

[505] *Id*. at 270–75.

[506] *Id.* (front-cover description by publisher).

[507] Fredric I. Lederer, *The Military Rules of Evidence: Origins and Judicial Implementation*, 130 MIL. L. REV. 5, 8 (1990). Lederer is now the Chancellor Professor of Law and Director, Center for Legal and Court Technology, College of William and Mary; he also is a retired reserve judge advocate colonel.

[508] UCMJ art. 36(a) (2008).

[509] The Joint Service Committee on Military Justice (JSC) consists of an Army, Navy, Air Force, Coast Guard, and Marine Corps representative, usually in the grade of O-6. Department of Defense Directive 5500.17, which governs the operation of the JSC, sets out the committee's duties and responsibilities. Its principal mission is to "conduct an annual review of the Manual for Courts-Martial (MCM) in light of judicial and legislative developments in civilian and military practice." As a practical matter, this means deciding whether changes are needed to the Military Rules of Evidence (MRE)—and the Punitive Offenses and Rules for Courts-Martial—in light of changes in civilian criminal law. U.S. DEP'T OF DEF., DIR., THE ROLES AND RESPONSIBILITIES OF THE JOINT SERVICE COMMITTEE ON MILITARY JUSTICE (May 3, 2003), *available at* http://www.dod.gov/dodgc/images/jsc mission.pdf (last visited Jan. 13, 2012).

[510] Lederer, *supra* note 507.

[511] E-mail from Brigadier General (Ret.) Wayne E. Alley, to author (Dec. 7, 2011, 11:23:00 EST) (emphasis added) (on file with author).

[512] Lederer, *supra* note 507, at 8 (quoting Memorandum from William M. Trott).

[513] Deanne C. Siemer was nominated by President Carter to be the DoD General Counsel. After her confirmation by the Senate, she served from April 1977 to October 1979, http://csis.org/files/publication/111129_DOD_PAS_Women_History.pdf (last visited Jan. 13, 2012).

[514] Lederer, *supra* note 507, at 10.

[515] *Id.* at 13.

[516] Alley had been promoted to Brigadier General (BG) and reassigned to be the Judge Advocate, U.S. Army Europe and 7th Army. He retired four years later to become the Dean, University of Oklahoma School of Law. Brigadier General Alley 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* Colonel George R. Smawley, *In Pursuit of Justice, A Life of Law and Public Service: United States District Court Judge and Brigadier General (Ret.) Wayne E. Alley, U.S. Army, 1952–1954, 1959–1981*, 208 MIL. L. REV. 213 (2011).

[517] Lederer, *supra* note 507, at 14 n.33.

[518] Others who deserve credit for drafting the proposed MREs are Navy Commander Jim Pinnell, Army Major John Bozeman, Air Force Major James Potuck, and Coast Guard Lieutenant Commander Tom Snook. Mr. Robert Mueller and Ms. Carol Scott, both civilian attorneys at COMA and Captain (CPT) Andrew S. Effron, then assigned to the DoD General Counsel's office, also participated in the drafting. Captain Effron was the principal drafter of the proposed privilege rules (MRE Section V). He later served on the Court of Appeals of the Armed Forces and retired as its Chief Judge in 2011. *Id.* at 11 n.21. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES app. 22, sec. 1 (2012) [hereinafter MCM]. Lederer was the primary drafter of the original analysis to the MREs. *Id.*

[519] MCM, *supra* note 518, MIL. R. EVID. 803 (6), (8) analysis.

[520] While Section III had to be created from scratch, there was a proposed Federal Rules of Evidence (FRE) Section V that CPT Effron and his colleagues could use for some of the proposed provisions in MRE Section V. While the FRE Section V had been rejected by Congress when it enacted the FREs in 1975, this did not prevent its use by the JSC Working Group. *See id.* app. 22, sec. V, analysis, at A22-38 (Privileges).

[521] Lederer, *supra* note 507, at 13 n.32.

[522] *Id.* at 16 n.45; *see id.* at 15–19 (providing more on opposition to specific MREs).

[523] 16 M.J. 74, 82 (C.M.A. 1983) (emphasis added).

[524] 30 M.J. 277 (C.M.A. 1990).

[525] 14 M.J. 924, 925 n.1 (A.F.C.M.R. 1982) (The court held that the military judge, at his discretion, may permit oral questions by the court members and sarcastically stated that the new rule "improves efficiency only to the extent that it discourages questions from court members . . . .").

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Front cover: Left to right, Major (later Lieutenant Colonel) Phyllis Propp Fowle, the first female judge advocate; Major (later Major General) John L. Fugh, The Judge Advocate General 1991-1993 and the first American of Chinese ancestry to reach general officer rank in the Army; Major Adam Patterson, the first African-American judge advocate in history; Major General Kenneth J. Hodson, The Judge Advocate General 1967-1971 and the first general officer to serve as the Chief Judge, Army Court of Military Review.

Back cover: Top, Hancock Hall, University of Virginia, was the location of "The JAG School" from 1951 to 1975. Left, Major General Myron C. Cramer, The Judge Advocate General speaks to the 3rd Officer Class National University, Washington, D.C., 1942. Right, Captain (later Brigadier General) Malinda E. Dunn, UN Multinational Force and Observers, Sinai, 1984.

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