IN PURSUIT OF JUSTICE, A LIFE OF LAW AND PUBLIC SERVICE: UNITED STATES DISTRICT COURT JUDGE AND BRIGADIER GENERAL (RETIRED) WAYNE E. ALLEY (U.S. ARMY, 1952–1954, 1959–1981)

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The Judges are probably the best known of all our public men. . . He is constantly brought into direct personal relations, not only with members of a large and active profession, but with men in all ranks of life, and on every sort of subject . . . The strongest impression that they leave in one's mind is the simplicity and unaffectedness of the Judge who, while displaying sometimes a keen sense of humour far reaching in its effects, have not allowed it to interfere in the least with the dignified and most powerful expression they have so often given to the public mind.[2]

—J. W. Norton-Kyshe

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[2] JAMES WILLIAM NORTON-KYSHE, ED., THE DICTIONARY OF LEGAL QUOTATIONS OR SELECTED DICTA OF ENGLISH CHANCELLORS AND CHIEF JUSTICES FROM THE EARLIEST PERIODS TO THE PRESENT TIME intro. (Lincolns Inn-London, 1904?), *available at* http://books.google.com/books?id=ILJJg6z3H-IC&pg=PR5&lpg=PR5dq=J.W+Norton-Kyshe+dictionary+of+legal&source=bl&ots=IbrH8TNexx&sig=0-4flupwFDnqSSdlnf_DTkpJKjQ&hl=en&sa=X&oi=book_result&resnum=9&ct=result#PPR3,M1 (last visited Dec. 8, 2011).

A Daniel come to judgment! yea, a Daniel!
O wise young judge, how I do honour thee![3]

—William Shakespeare, *The Merchant of Venice*

I. Introduction

Military judges, like all judges who serve as key arbiters of fact and law, are a central and often under-reported component in the administration of justice for the U.S. Armed Forces.[4] From the inception of the Republic, these men and women have played a crucial role across the spectrum of military criminal courts, including the notable trials of Major John Andre for spying during the American Revolution (1780), Confederate Captain Henry Wirz for the Andersonville War Crimes (1865), the insubordination case against General William "Billy" Mitchell (1925), and the My Lai massacre case against Lieutenant William Calley (1969). The role of military judges in more recent conflicts and combat zones in Iraq and Afghanistan continues this distinctive service.

Particularly notable in the *Calley*[5] case is the author of the opinion by the U.S. Army Court of Criminal Appeals (ACCA)[6]—Brigadier General (BG) (Retired) Wayne E. Alley, one of the Army's most distinguished jurists. What makes BG Alley more than a mere footnote in a case from one of the darker chapters in recent American military history is his truly remarkable life and career commitment to the legal profession—as an Army judge advocate, the Dean of the Oklahoma University College of Law, and as a federal judge in the U.S. District Court for the Western

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[3] WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE, act 4, sc. 1, ll. 223–24. This is a likely allusion to the biblical character Daniel who was attributed with fine powers of judgment. In *Daniel* 5:14 (New International Version), we find: "I have heard that the spirit of the gods is in you and that you have insight, intelligence and outstanding wisdom."

[4] *See generally* Uniform Code of Military Justice (UCMJ) Article 26, detailing the qualifications and requirements for service as a military judge. UCMJ art. 26 (2008).

[5] United States v. William F. Calley, 46 C.M.R. 1131 (1973) *affirmed*, 48 C.M.R. 19 (1973).

[6] In 1968 the U.S. Army criminal appellate court was renamed the U.S. Army Court of Military Review (ACMR). *See* Military Justice Act of 1968, Pub. L. No. 90-632, § 2(27), 82 Stat. 1335. The name of the court was changed again in 1994 to the Army Court of Criminal Appeals (ACCA), pursuant to the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-342, § 924, 110 Stat. 2663, 2871 (1994). This article refers to the respective court's current nomenclature.

District of Oklahoma. BG Alley is one of only two career Army judge advocate officers to later serve as a federal judge.[7]

Brigadier General Alley's profound engagement and personal commitment to the exercise of military justice and the Army judiciary throughout a highly successful twenty-four year military career is particularly notable for the fact that he abjured the conventional wisdom of what a judge advocate career should look like. As a trial judge in Vietnam, appellate judge on the Army Court of Military Review, Chief of the Criminal Law Division - Office of the Army Judge Advocate General, and Chief Trial Judge for the U.S. Army, BG Alley maintained a rare and steadfast commitment to military justice and the Army judiciary.

This is a distinctive departure from the common bias toward career enhancing leadership positions such as legal counsel to high-profile organizations, the staff judge advocate (senior legal counsel) for combat divisions and corps, large installations or task forces, or serving as counsel to the Army or Defense Department staff. Since BG Alley's retirement in 1981, there has been no Army judge advocate general officer with as substantive a career history of service on the trial and appellate courts.[8]

In peace and in war, as a soldier and a civilian, as a legal academic and practitioner, Wayne Alley dedicated his marked professional energies to the honest and fair application of law and the tireless pursuit of justice.

By any measure, BG Alley is among the best of his generation for the example he set as a military officer and lawyer who continuously sought excellence in the application of the law within the Army, and the extraordinary standard he established for others to follow. This article is a summary and analysis of key oral histories and interviews, and

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[7] *See* FED. JUDICIAL CTR., THE BIOGRAPHICAL DIRECTORY OF FEDERAL JUDGES, *available at* http:www.fjc.gov (last visited Dec. 19, 2011). Brigadier General (BG) Emory M. Sneeden, U.S. Army (1927–1987), served as the Army's Chief Appellate Judge before his retirement from active duty in 1975, and was later appointed by President Reagan to serve on the U.S. Court of Appeals for the Fourth Circuit from 1984–1986.

[8] E-mail from Colonel Frederic Borch (Retired), Regimental Historian & Archivist for the U.S. Army Judge Advocate Gen.'s Corps, The Judge Advocate Gen.'s Legal Ctr. & Sch., to Lieutenant Colonel George R. Smawley (2 Dec. 2009) (on file with author); U.S. Army General Officer Management Office (GOMO), *available at* https://www.gomo.army.mil/ext/portal/MainHome.aspx (last visited 3 January 2012).

endeavors to give voice to the narrative of BG Alley's life and career, detailing one man's remarkable life in the context of mid-twentieth century developments in military law and history.

II. Early Background and Education—Prologue for a Life of Learning[9]

A contented mind is a continual feast.[10]

—Thomas Hardy, *Jude the Obscure*

In his 2001 book, *Leadership: The Warrior's Art*, Colonel Christopher Kolenda observed that:

> The education of a leader must move beyond personal experience and draw on the boundless experience and insights of others. These opportunities for education lie in the pages of history, philosophy, theory, and the reflections of past and contemporary leaders. Personal experience, therefore, must be augmented by the records of others and synthesized by the insights of history. . . Such an approach broadens one's mind and richness of one's perspective, and leads ultimately to a much greater understanding of leadership.[11]

Kolenda's high regard for history and the "reflections of past and contemporary leaders" echoes the military's legendary emphasis on the

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[9] Captain John M. Fitzpatrick & Captain Robert Butler, An Oral History of Brigadier General Wayne E. Alley, U.S. Army (Ret.) 1 (Feb. 1986) [hereinafter Oral History 1st & 2d Session] (based on the two sets of independently enumerated interviews taken at Cambridge, Massachusetts, and Oklahoma City, Oklahoma, respectively] (unpublished manuscript, on file with The Judge Advocate Gen.'s Legal Ctr. & Sch. (TJAGLCS) Library, U.S. Army, Charlottesville, Va.). The manuscript was prepared as part of the Oral History Program of the Legal Research and Communications Department at TJAGLCS. The oral history of BG Alley is one of nearly four dozen personal histories on file with the TJAGLCS Library. They are available for viewing through coordination with the School Librarian, Mr. Daniel Lavering. *See also* Karen Kalnins, Oklahoma City University Law Library's Oral History Project, Interview Transcript for Judge Wayne Alley, in Norman, Okla. (Nov. 18, 2008) [hereinafter OCU Interview] (unpublished manuscript, on file with author).

[10] HARDY, THOMAS, JUDE THE OBSCURE 388 (Penguin Books Ltd., 1981).

[11] CHRISTOPHER D. KOLENDA, CHRISTOPHER D., LEADERSHIP: THE WARRIOR'S ART, at xvi (Army War College Foundation Press, 2001).

study of the past as prelude for the future. In the biographical study of individual leaders, those initial reflections rightfully start at the beginning and provide context for the personal motivations and seminal events that move people in one direction or another. In the case of BG Alley, that beginning starts in Portland, Oregon, amidst the depression of the 1930s. As Alley himself later remarked, "everything that happened then shaped my life."[12]

His father, Leonard D. Alley, was a school teacher who attended law school at night, and later opened a solo practice during a period of tremendous economic insecurity. Alley remembers "very, very straitened times" in which he "never experienced any real deprivation as a kid, but [recognized] pretty thin times all through the depression years."[13] The affluence he recalls from radio and advertisements were in direct contravention to the conditions of people he knew, and he credits the limitations of his family's situation as the genesis for a life-long desire to move beyond, to explore, and to travel:[14]

> I think that the limitations that I had as a kid affected my interests and career in later life. That is one reason I wanted to do something that would permit travel and kind of engage in some of the fantasies that I had as a kid fantasies I probably would not have had held if my family had been able to do some things, even on a limited scale.[15]

Among his earliest memories was the emphasis his parents placed on the value and virtue of reading, and of learning about the world at large, particularly the events surrounding World War II. He recalls, "[W]e had a world map in our house and followed the campaigns with pins, and looking back it was really an extraordinary geography lesson."[16] His love of learning led to many academic achievements, including the opportunity to skip 8th grade and advance directly to high school in recognition of demonstrated potential for higher learning, which he

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[12] Oral History (1st Session), *supra* note 9, at 1.
[13] *Id*. at 2.
[14] *Id*.
[15] *Id*.
[16] *Id*. at 4; Interview with the Hon. Wayne E. Alley (BG, U.S. Army (Ret.)), in Norman, Okla. (6 May 2009) [hereinafter Alley Interview] (notes on file with author).

"thought was wonderful because at that time elementary school was a real bore."[17]

So he entered high school at age twelve, and graduated before he was eligible for a driver's license. Along the way he served as the student body president of Washington High School, ran track, pursued music as the drum major of the band and played in the all-city orchestra as a timpanist.[18] Even at such an early age, it was clear that Alley had a unique intensity that set him apart from his peers. His father facilitated this through a passive but persistent emphasis on accomplishment, and for the young Alley to "do your best in everything: succeed–push–advance."[19] His mother, Hilda, an "intense and introspective" woman, sensed the stress:

> [She] detected, I think, that I was living with a great deal of strain—and I was. I couldn't tell at the time, but it didn't take too many years after high school to say—Christ, what should have been such a carefree and pleasant life was one of as hard work as any I've done since. So her . . . general approach to me was—slow down, de-intensify, smell the roses, don't push yourself and so forth. . . .[S]he was not down-playing good results and achievements. . . [only] that you probably would have the same results and the same achievements with less emotional investment if you just cooled it.[20]

The seriousness with which Alley applied himself found respite in his relationship with family, particularly his paternal grandmother. His grandparents owned and operated several small cottages along the Oregon coast where Alley and his brother spent many summers working to maintain the properties and otherwise assist. He recalls that his grandfather was "a scholar . . . who could read Latin and Greek" but retired at age 40, and "rose lounging around to an absolute art form."[21]

Accordingly, the family was supported by his grandmother who was the principal manager of the cottages in addition to her work as a

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[17] *Id*. at 6.
[18] *Id*. at 12–13.
[19] *Id*. at 13.
[20] *Id*. at 13–14.
[21] *Id*. at 16.

practical nurse and charwoman. Alley was exceptionally close to his grandmother: "She was as indulgent as my parents were strict . . . it was just a vacation from reality to go down there every summer."[22] They had a relationship that was in some ways was closer than the one he had with his parents, because of the indulgences she afforded him and the rare balance she brought to his life.[23]

In between the summers on the Oregon coast, Alley's sustained commitment and excellence in academics was readily acknowledged by all. During his junior year in high school, he was actively recruited by the distinguished Phillips Academy boarding school in Andover, Massachusetts.[24] The school offered him a full scholarship, including transportation from Oregon, educational expenses, and room and board.[25] Alley was excited for the opportunity; his parents, however, were not. He recalls:

> I was thrilled to death and ready to go and hot to trot and so forth, and [then] my parents intervened and after bitter, bitter quarrels and disputes [they] just vetoed it on the grounds that I was 14 . . . and that I was too young to go away and if I went to Andover I'd probably go to Harvard and I would be in the East and they'd never see me again.[26]

A. Stanford University

By the time he was considering colleges, Alley figured he would likely end up at a local Oregon school until a teacher—Mrs. Luella Metcalf—encouraged him to think about school further from home.[27] He remembers that she told him that "Stanford [University] was at that time like Andover . . . and was really trying to reach out and broaden its student body from the wealthy Californians to bring in more people from more places, and that [Alley] could probably receive a scholarship."[28]

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[22] *Id*. at 17.
[23] *Id*. at 17–18.
[24] *See generally* http://www.andover.edu/Pages/default.aspx (last visited Feb. 18, 2009).
[25] Oral History (1st Session), *supra* note 9, at 19.
[26] *Id*. at 20.
[27] *Id*. at 21.
[28] *Id*.

She even helped him fill out the application. He was subsequently accepted and received a full academic scholarship.[29]

Alley was thrilled; but again, his parents opposed him leaving Oregon in consideration of Stanford University's distance from their home in Portland. But this time, Mrs. Metcalf went out of her way to personally advocate to his parents for the opportunity posed by the school, and after much machination the opposition to Stanford ceased; the decision was made.[30] Alley notes:

> That was really a major turning point and there is no way I can overemphasize or even begin to describe the actual education experience at Stanford or the mileage that I got out of that Stanford degree. It was an excellent university. . . .[31]

Alley graduated number two in his high school class in May 1948, at age sixteen, and entered Stanford the following fall. The difference between schools and academic culture could not have been more striking. Alley remembers that in high school—despite his obvious accomplishments—success was not valued in the same way it would later be in college:

> I didn't study hard in high school because of other activities and was almost apologetic for it. A good student in my school was not an admired person and probably was even kind of suspect. . . . Well, at Stanford . . . It was like coming out of the closet . . . I could be as good a student as I wanted without embarrassment. . . ."[32]

Undergraduate school was a tremendous experience for Alley. Academics, certainly, played a pivotal role and were center stage in his focus and energies, but they were not alone. In his second year he pledged the Sigma Chi Fraternity, where he served as a hasher in the Fraternity dining room to supplement his income. Alley proudly covered nearly all his collegiate expenses without assistance from his parents

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[29] *Id*.
[30] *Id*. at 22.
[31] *Id*. at 23.
[32] *Id*. at 23–24. Alley recalls: "It was so much more sophisticated and engaging and demanding and interesting and fascinating than anything I'd done in high school that my first year there—even though I had fun—was caught up in the course work." *Id.*

through his part-time work and savings from a summer job at a dog racing track.[33]

Stanford is also where he was first introduced to the military via the Reserve Officer Training Corps (ROTC) program. His father, who "was too young for World War I, and just too old for World War II," had contemporaries who had served in the military. Their experiences confirmed in Leonard Alley's mind that if his sons were to be drafted then they would be drafted as officers.[34]

So Alley entered ROTC in the fall of 1948 with fifty-five others, frustrated by what he initially considered a "waste of time," and watched as the class increased to over 800 students eighteen months later with the advent of the Korean War in June 1950.[35] Alley recalls that early on ROTC "was a nuisance," but later thanked his father for leaning on him to join and for the prescience in knowing "that there was going to be another war . . . and that the Alleys would be in it."[36]

His feelings for the Army started to change in 1951 with his experience at ROTC summer camp held in Fort Lee, Virginia. Of the officer training camp, Alley recalls: "I had so much fun around the old World War II barracks with the people there. In our barracks we had contingents from Stanford, Cornell, and [the University of] Alabama. They were just terrific."[37]

Fortified by the positive experience and quality of people at Fort Lee, Alley returned to Stanford and completed his senior year with a major in medieval history, and in the summer of 1952 was promptly drafted on active duty as a Quartermaster Corps officer. He completed the officer basic course, where he was the class honor graduate, and remained on the faculty at the Quartermaster School, Fort Lee, from 1952-1954.[38] Looking back, Alley found the regimented life and environment of the Army very satisfying, and not unlike the family regime back in Portland:

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[33] *Id*. at 29.
[34] *Id*. at 30.
[35] *Id*. at 30–31.
[36] *Id*. at 31.
[37] *Id*. at 32.
[38] *Id*. at 34.

> There was a lot about [the Army] that [resembled] the way the way I grew up. It had structure—it had discipline—there were expectations of punctuality and performance—it was a hierarchy and that certainly was true in my family. . . . [N]otwithstanding that you could detect personal ambition and careerism . . . it was obvious that [professional officers] did have a sense of service and subordination of self and attachment to something beyond themselves and which in their view of the world was far more important than self, and these were messages too that I got from my family—especially my mother. So it was a very comfortable environment.[39]

In his final year at Stanford, Alley started to consider a future in academia, reasoning that the quality of life at the university level faculty was a much envied thing. While on active duty, he completed all the necessary applications for and was accepted to the Stanford masters program in history with follow-on plans to complete a Ph.D. at Princeton University.[40] The glow and glamour of university education, however, quickly faded under the brutal gaze of watching others go through the doctoral process. After leaving the Army, Alley entered the Stanford masters program, and there the love affair with higher education waned.

> So I got established in Vets Village. It was a World War II cantonment hospital [for] married student housing—$47 a month including all utilities except telephone. If you could see it now you'd think that this place needs federal funds. It was awful, but we accepted it at the time and I had about three weeks to rattle around there until commencing school. Well, up and down the rows in this hovel were Ph.D. students. Understand that when I was an undergraduate, I was looking *at* the professors. What a life! The contemplative life of the mind, surrounded by admiring students, publishing at leisure. Well, when I was in Vets Village, all I saw was the Ph.D. student who had been struggling along trying to learn Greek for five years, snot-nosed kids, absolutely indignant wife furious

[39] *Id*. at 41–42.
[40] *Id*. at 35. "In my last year in college I thought, geez, look at these professors around here. What a deal. God. Love to be like that. So I'm going to be a professor." *Id.* at 33.

> because she was [secondary] to his graduate work and so forth, and it was kind of like the scales falling from my eyes—I thought . . . I don't want to do that.[41]

Eventually, looking for a new direction, Alley went to the Veterans Administration where he participated in an aptitude test to identify interests and skills for a future career. The top result—the clergy;[42] number two—the law. With this in mind, he approached a friend on the Stanford Law School faculty for advice on what a future in the law could mean and for some mentoring on what to do next. That was on a Wednesday; by the following Monday, helped by his distinctive undergraduate performance, Alley was admitted to Stanford Law.[43] The only condition was that he take the LSAT to complete the process, which he did in the middle of his first year of law school.[44]

But it was not a happy affair, and from start to finish Alley, liked little about it. Mincing precious few words or emotions, he notes of his law school experience:

> I hated it. I despised it. I didn't have a happy day in law school course work. I liked the people. In fact, it was the most widely read intellectually stimulating capable group of people I've ever been with. . . . [But] I had a bad attitude. I didn't enter law school wanting to be a lawyer. I was invited to join the Law Review and declined because . . . the course work was bad enough and then to have to work on the Law Review was just more of the same distasteful type of experience. . . . when I finished that school I was elated. I used to sit around thinking in connection with some of the course work . . . I can't believe that grown-up people are sitting around here studying this. It's just ridiculous.[45]

More than anything, what Alley disliked about law school was the preponderance of abstraction in both rules and the reasons behind them.

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[41] *Id*. at 35–36 (emphasis added).
[42] *Id*. at 36. "[S]o I took those things and Number One, preacher—preacher—Christ, I'm not even religiously oriented as far as I could see." *Id.*
[43] *Id*. at 37.
[44] Alley Interview, *supra* note 16.
[45] Oral History (1st Session), *supra* note 9, at 43–44.

In a memorable and somewhat ironic reference to this period of his life, he notes:

> The study of law, I think, is something that results in your believing in the supernatural; that all problems are people problems and they are organized in different ways to do different things, and lawyers seem to think there is such a thing as a corporation, for example, which never answers the telephone when you call it and I just couldn't take [any of it] seriously.[46]

To move himself along at the quickest possible pace, Alley entered the law school's accelerated program to complete the curriculum six months early, graduating in December 1956.[47] Others in the program were like him—veterans, married, older, and eager to re-enter the workplace to support families and begin careers. Despite his pronounced dislike of the study of law, Alley graduated Stanford Law in 1957 with honors and near the top of his class.[48]

Two additional things happened during this time which presaged much of his professional life. The first was the opportunity to clerk for the Oregon State Supreme Court while he waited for his bar results, an experience Alley very much enjoyed —"It astonished me how much fun it was to be a law clerk for [the State Supreme Court] compared to how awful it was to be in law school."[49] The second was his serious consideration about a return to active duty. He recalls:

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[46] *Id*. at 45.
[47] *Id*.
[48] *Id*. at 48.
[49] *Id*. at 47. Alley learned a number of valuable lessons while clerking for the Supreme Court of Oregon; first and foremost among them was the importance of a defensible judicial opinion:

> It certainly has to be acceptable to the other justices. It has to be strong enough and well enough supported so that it could stand as precedent and wouldn't draw any jeers and sneers from the Bar. Cases that might draw jeers or sneers tended to be those in which a Justice had a strong personal feeling and got skewed maybe away from where the statutes and precedent would take him—and I say him; there were no women that time—and put out something that really indicated nothing but personal preferences to outcome or, as we learned in Law School, teleological.

OCU Interview, *supra* note 9, at 3.

> I thought about it a lot. Contrasting a positive and pleasurable experience in the Army with an unpleasant experience in the study of law, and then my dad—who was an awfully nice guy really—sprung the trap about. . . . well, come up here and work in the firm in which he was a member . . . So I agreed.[50]

But the arrangement was not meant to last. Alley rapidly came to realize that his father had a distinctly different and irreconcilable approach to the practice of law, and that working as an associate to the senior Alley, who was a partner, created an untenable tension, both personal and professional.

> [T]here were such temperamental difference in the way that people did business there . . . [my father] . . . just did things that drove me crazy, and vice versa. He was a rough and tumble night school law graduate—average or below average student—you could hide $100 bills in his law books and he'd never find them, but he was terrific on the phone; and he was a good settler—good negotiator—good with people, and pretty good in court although I always felt he was under-prepared; and he combined the procrastination of a lot of lawyers with rapid work when he ever did get around to it which was careless, I thought. . . . It was just too different worlds of practice. . . . [A]fter a very few months it was just obvious that I couldn't happily work there.[51]

So one day, Alley took the day off from work and drove from Portland to Fort Lewis, Washington, to visit the Staff Judge Advocate Office and generally look around and ask questions to see what they did there. That was all it took. He recalls of the people he met, "[T]hey were really outstanding people—friendly and receptive. . . . So I transferred my commission and sought a return to active duty and came back to active duty in February of '59."[52] But the decision was not without

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[50] Oral History (1st Session), *supra* note 9, at 47.
[51] *Id*. at 49–50.
[52] *Id*. at 50. Of his impressions of the Fort Lewis office, Alley recollects his positive impression of the nature and character of the work conducted there:

> It seemed to me that the criminal cases had substance and they had military affairs [administrative law] work. The guy in charge of that

controversy, especially from his first wife, who Alley remembers as being "bitter" over his move to return to the Army. "We went through many, many tearful sessions about all that was sacrificed."[53]

III. U.S. Army Judge Advocate General's Corps

In the summer of 1959, Alley completed the thirteen-week Judge Advocate Officer's Basic Course at its former facility in Clark Hall, at the University of Virginia.[54] The return to active duty suited him well and was in stark contrast to the brief experience in private practice; he later described himself as "relaxed, and happy, and full of grins, in contrast to the depression [of private practice]."[55] He immediately enjoyed the return to the structured and "collegial and collective environment" offered by the military,[56] and felt his desire for intellectual challenge was more than met as an Army Judge Advocate because "there was plenty in the practice of law to fully engage the mind."[57]

Although the current notion of judge advocates as "Soldier-Lawyers" had not yet become part of the culture of Army legal service,[58] it was clear to Alley and others that service as a uniformed military attorney was a comfortable blending of the best of military officership and the law, particularly as it applied to Army-client relationships.

> described himself as sort of the house counsel for the Fort Lewis division of the U.S. Army with interesting and important things to do, and it looked like it provided an abundance of food for the mind, as it turned out to be the case. . . [I] didn't think that entering the Army was a flight from the life of the mind at all.

Id. at 56.

[53] *Id.* at 50. At this time it was also required that all judge advocates attend one of the combat arms basic courses, a requirement Alley satisfied with his prior service in the Quartermaster Corps. *Id.* at 57.

[54] Preceding the Officer Basic Course, judge advocates at this time were required to complete the officer basic course for one of the combat arms, which Alley had satisfied by his prior military service. *Id.*

[55] *Id.* at 51.

[56] *Id.* at 54.

[57] *Id.* at 55.

[58] *See generally* Major George R. Smawley, *The Soldier-Lawyer: A Summary and Analysis of an Oral History of Major General Michael J. Nardotti, Jr., United States Army (Retired) (1969–1997)*, 168 MIL. L. REV. 1 (2001).

> We lived in an overlap of two professions, each with very strong conditions, and there is no contradiction [between loyalty as an officer and adherence to legal ethics concerning client relationships]. . . . As a Judge Advocate, you are an attorney within the Department of the Army serving the Army through its delegated leadership as their lawyer. Until they tell you [as in the case of criminal defense attorneys] that you are somebody else's lawyer in which event you are that person's lawyer for as long as that representation lasts, and when it is over you are the Army's lawyer. That just doesn't seem to me to contain the seeds of conflict at all.[59]

Alley graduated at the top of his Basic Course class, and in the summer of 1959 moved to his first duty assignment at Fort Sill, Oklahoma, where he was detailed as a legal assistance officer with additional duty as a criminal defense counsel.[60] This period predated the 1980 creation of U.S. Army Trial Defense Service as an independent activity within the Army Judge Advocate General's Corps.[61] As such, Alley and other criminal defense attorneys worked directly for the senior legal advisor who also supervised military prosecutors and advised court-martial convening authorities.

The conflict of interest—defense attorneys and prosecutors each working for the same supervisor—was rarely an issue in practice as it may have been in appearance. As Alley notes above, judge advocates worked for their detailed clients with rigor and fidelity, and generally saw little material conflict in working against the potential interests of supervisors and peers within the same office. It was, in some ways, a situation of professionalism rising above politics.

From this first sustained experience with criminal practice, Alley recalls that he orchestrated plea agreements for sixty percent of his defense clients, and achieved acquittals for half of those who ultimately went to trial.[62] Throughout, Alley remembers that the staff judge

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[59] Oral History (1st Session), *supra* note 9, at 56–57.
[60] *Id*. at 59.
[61] *See* the Trial Defense Mission, at https://www.jagcnet.army.mil/JAGCNETIntranet/Databases/TDS/USATDS.nsf/(JAGCNetDocID)/T+D+S+MISSION?OpenDocument (last visited Dec. 19, 2011).
[62] Oral History (1st Session), *supra* note 9, at 59.

advocate, Colonel Hembry, was "totally complimentary" and allowed Alley to move between both defense and prosecution case work. There were never any career recriminations against Alley's success in defense of soldiers prosecuted under Colonel Hembry's recommendation and supervision.

As for the law officer [military judge][63] at Fort Sill, Alley recalls a colorful Oklahoman, Colonel Curtis "Hogjowl" Williams, who operated out of a courtroom located in the post cantonment hospital. Alley fondly remembers his experience before Williams' court, and considered him a "tremendous and capable" jurist who was also a notable character—a senior officer who maintained a vegetable garden behind his office and who, "when he wasn't at trial, was out digging and watering tomatoes and tending his vines and pumpkins."[64]

He also found his fellow judge advocates to be competent opposing counsel, and thoroughly enjoyed his first year of military practice, recalling: "I loved it. I had interesting work and won a lot of cases, and felt that the other attorneys were capable—I wasn't walking over a bunch of patsies."[65] Alley's time at Fort Sill was cut short, however, when the opportunity arose for an assignment to Okinawa, Japan; remembering all his thoughts of foreign travel when he was a boy, he jumped at the chance to serve overseas.[66]

A. Okinawa, 1960–1964

Due to a housing shortage, Alley spent the first several months of the summer of 1960 in Okinawa alone while his family remained at home in Oregon. By this time, he and his wife had three children—Elizabeth, David, and John, who was born in February, 1961, shortly after the family arrived in Japan. His work was multifaceted, including practice in legal assistance, administrative law, and criminal prosecution.[67] The military justice mission was exceptionally active. Alley and Lieutenant Colonel (LTC) Richard R. Oliver, who was the principal defense attorney, tried cases in opposition to one another throughout Southwest

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[63] Military judges were known as "law officers" prior to the Military Justice Act of 1968.
[64] Oral History (1st Session), *supra* note 9, at 60.
[65] *Id*. at 61.
[66] *Id*. at 66.
[67] *Id*. at 67.

Asia, including Okinawa, Vietnam, the Philippines and Thailand.[68] During this period judge advocates were faced with the unique challenges of working in the complex legal environment of post-war Japan, including the civil administration of the United States and affiliated commands, including the one for the Ryukyu Islands.[69]

The Commanding Officer of the U.S. Civil Administration was a Lieutenant General by the name of Paul Caraway, notable also for being the son of Thaddeus and Hattie Caraway, both former U.S. Senators from Arkansas. His mother, Hattie Wyatt Caraway, was the first woman elected to the U.S. Senate. Alley notes that Lieutenant General Caraway inherited none of his parent's political acumen, and "was a bare your head and charge forward, crunch through the china closet kind of guy [who] viewed the [civilian] legal office of the U.S. Civil Administration as a bowl of mush."[70] Accordingly,

> he looked to his staff judge advocate to provide second opinions [at first] and then just removed whole areas of important business from [the] Civil Administration and simply gave it to the JAG office [where]. . . . we had only five or six attorneys at [the] time. . . . It was like being in an Attorney General's office in a populous state. [I]'d come to work in the morning and here would be prosecutions in large numbers and . . . piles of files two-three feet high of stuff that either I had to review from [the Civil Administration] or had to do as an original proposition—including legislative drafting.[71]

Alley had numerous accomplishments during this period. As the administrative law officer, he drafted the Auto Insurance Code for the islands, the Controlled Substances Act, the administrative regulations to implement both, as well as the "conceptual work" for the development of rules and regulations dealing with business activities and a professional code for attorneys. Alley remembers the weight, complexity, and

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[68] *Id*. at 89–90. "Richard R. Oliver—nicknamed "Bill"—[was] the greatest guy ever, with the greatest sense of humor ever, and he did almost all the defending when I did almost all the prosecuting. So for four years, day in and day out, we were in court together. . ." *Id*. at 89.

[69] *Id.* at 68. *See generally* U.S. Army Japan, at http://www.usarj.army.mil/history/index_army.aspx (last visited Dec. 8, 2011).

[70] *Id*. at 68–69.

[71] *Id*. at 69.

significance of legal support activities as "crushing—crushing work."[72] In addition, he was the principal criminal prosecutor for Okinawa, and this location served as the General Court-Martial Convening Authority for Vietnam and Army units throughout Southeast Asia.[73] In his final year in Okinawa, BG Alley and a team of five judge advocates tried more general courts-martial than all of the far larger 8th U.S. Army and all Army assets in Korea, with its twenty-five to thirty lawyers.[74]

Unlike today, and the vast technological resources available to judge advocates, the early 1960s required books which were housed in law libraries often shared with other organizations. In Okinawa, this necessarily included judge advocate use of the law library maintained by counsel for the U.S. Civil Administration. In large measure due to General Caraway's increasing reliance upon uniformed attorneys, this sharing of resources was not always easy and tended to exacerbate existing tensions between the military and civilian attorneys. While acknowledging that legal research materials were adequate, Alley nevertheless recalls that,

> the people in the Civil Administration became resentful and subsequently hostile because of the [judge advocates] taking their business away—a kind of silly reaction because we didn't want to. In fact, we were upset that we had to, but that was the way it was. So to use their library was a kind of unpleasant thing. You had to sneak in when nobody was around—and hell, they'd never loan you a book. . . .[75]

Another aspect of service in Okinawa during this period was its relative isolation from the rest of the Army, if not the world. While this was a dramatic time in American history, it seemed to Alley and others that the effect of being on an island with diminished communication capacities seemed to diminish hugely significant world events such as the Kennedy assassination, the Cuban Missile Crisis, and erection of the Berlin Wall. While generally aware of world events and alert to the movement of people and changes in various military posture, Alley

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[72] *Id*. at 69, 72.
[73] *Id*. at 70.
[74] *Id*. at 71.
[75] *Id*.

recalls his relationship to them as distant—"might as well [have been] on the moon."[76]

The exception, of course, was the escalation of military operations in Vietnam. Alley traveled to Saigon and Da Nang an average of every ninety days or so in support of military justice, and remembers "a low level of conflict unobservable in Saigon" in the period before refugees began to move from the countryside into the cities.[77] But there was still an undeniable and growing awareness in 1961–1962 that the conflict was spreading, and that American personnel were increasingly engaged in combat and dying as a result.[78] In particular, Alley recalls the activities of U.S. Special Forces revealed through military justice.

In one memorable case, a former legal assistance client of Alley's, Master Sergeant Troy Dillinger, was prosecuted for the death of an Air Force Noncommissioned Officer (NCO) arising from a party in Da Nang. Dillinger became intoxicated and released a grenade in a room full of partying military personnel, killing the NCO and "putting shrapnel into probably the better class of prostitutes in all of Da Nang, [resulting] in a manslaughter prosecution."[79] The case was significant because, almost immediately following the conclusion of the trial, two Special Forces witnesses against the accused died in combat. Alley, who prosecuted the case, remembers:

> Two of the witnesses against Sergeant Dillinger were a guy named Gabriel and a guy named Marchand. I think we finished [the case] on Wednesday and on Wednesday afternoon or Thursday morning they flew back to Vietnam to join their [Special Forces] team, and on Friday they were dead; and that was about the first sense of immediacy of U.S. combat operations [in Vietnam]. . . . There was [also] a judge advocate who got a Purple Heart [in Da Nang].[80]

Another case with relevance to the gradual increase in U.S. involvement in Vietnam concerned the Ninth Corps Deputy G-3 (Operations), who had "checked out the . . . ground plan for the

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[76] *Id*. at 73–74.
[77] *Id*. at 75.
[78] *Id*. at 78.
[79] *Id*. at 76–77.
[80] *Id*. at 78.

introduction of U.S. divisions in Vietnam in the event of a broader crossing by the Chinese and the North Vietnamese."[81] Evidently, he planned to take it back to his quarters, but along the way decided to stop for a few more drinks, became intoxicated, and left the plans in an Okinawan taxicab.[82] The plans eventually found their way back into American hands, and the loss triggered a court-martial. The interesting thing about it, as Alley recalls, "was thereafter [observing] the introduction of U.S. divisions into Vietnam which followed that plan completely."[83]

One can speculate those plans supported a strategy of measured gradualism in Vietnam that was at odds with many in the military at the time, including BG Alley. His qualified and frank perspective as an Army officer serving during the first crucial phases of President Kennedy's escalation of force in Vietnam, and the aftermath, is worth repeating:

> It was a romantic era concerning U.S. commitment to the cause of freedom wherever and whenever arising from [President Kennedy's idealism]. I [heard] grumbling within the military and was one of the grumblers—that from '63 and '64 it was evident that the basic approach to this gradual measured response…was a crock of crap if there ever was one and I never talked to a single experienced combat arms officer in Okinawa who disagreed. [They] thought no question about it, if we are going to fight a war down there it would require reserve mobilization and go in and hit it hard and with maximum air power and just—if we can't do it with an all out effort now, it can't be done. But the gradualism—the approach that we took—was the subject of embittered professional comment at the time and that, of course, persisted within the Army in the mid-60s and much of it directed at Secretary [of Defense] McNamara. . . . [T]he officers I knew thought it was a disaster [and it was].[84]

[81] *Id*. at 79.
[82] *Id*. at 79–80.
[83] *Id*. at 80.
[84] *Id*. at 80–81.

> [W]e have to start with this preposition: if you take the king's shilling you go where you are sent and you do what you are asked and personal opinions about things are immaterial. But I thought it was a bad mistake. . . . [I]t just seemed to me that we missed opportunities and the principal one was that in view of the relations we had with Ho Chi Minh in WWII, that with more adept diplomacy we could have made him the Tito of South East Asia. Which he subsequently became . . . but all those lives later . . . You could probably take ten Sergeants Major and put them in a war room and they could come up with a better plan for executing the war than General Westmoreland did. I lost friends in the war, and I just think it was a great American tragedy.[85]

B. The Judge Advocate Career Course, Charlottesville, Virginia, 1964

By the summer of 1964, BG Alley had been selected early for promotion to major and was reassigned to the Judge Advocate General's (TJAG) Corps Career Course, a ten-month period of advanced military legal education for field grade officers. There he came to know Professor Edwin W. Patterson, a scholar in residence at the University of Virginia School of Law and a retired member of the Columbia University Law School who was contracted by the Judge Advocate General's School to teach jurisprudence.[86] Patterson was author of one of the leading books on the subject at the time,[87] and Alley considered it a privilege to be a part of the class which, much to Patterson's surprise, was an exceptional academic experience.[88]

Alley, true to form, was the class's top student, and so impressed Patterson that he recommended Alley to Dean Hardy C. Dillard, Dean of the Law School at the University of Virginia, as a potential faculty

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[85] OCU Interview, *supra* note 9, at 10.
[86] Oral History (1st Session), *supra* note 9, at 83.
[87] *See* EDWIN W. PATTERSON, JURISPRUDENCE: MEN AND IDEAS OF LAW (1955).
[88] Another notable classmate in the jurisprudence course was Hugh Overholt, who later became The Judge Advocate General of the Army, and friend to BG Alley. Oral History (1st Session), *supra* note 9, at 98. For more on Major General (MG) Overholt, see Major George R. Smawley, *Shoeshine Boy to Major General: A Summary and Analysis of an Oral History of Major General Hugh G. Overholt, U.S. Army (Retired)* (1957–1989), 176 MIL. L. REV. 309 (2003).

member. After meeting Alley, Dean Dillard offered him a visiting professorship for the following academic year with strong prospects for subsequent tenured appointment to the university faculty.[89] This was remarkable for a man who had once considered and then abandoned a career in academia. Alley ultimately declined the offer, recalling that the idea "was very flattering . . . but that he just did not want to abandon the Army."[90]

In the spring of 1965, Alley was due to move to Washington, D.C., with an assignment to the Office of The Judge Advocate General, Headquarters, Department of the Army.[91] His wife took ill, however, and because her care was based in Charlottesville the Commandant of the School, Colonel John F. T. Murray, allowed him to remain at the school as a member of the Military Affairs Department faculty teaching claims, among other subjects.[92] He enjoyed the lecture podium, and found affinity with a small group of officers, many of whom later left the Army for careers in academia.

As a member of the Judge Advocate General's School faculty, Alley also took the time to consider the Army's institutional approach to legal education for both the active Army and the Reserve and National Guard components. He considered the management and education of Reserve component judge advocates a "perpetual problem," given their essential role in the Army.[93] He found that Reserve officers "brought . . . a fresh perspective and the practical sense of things,"[94] but that while the training they received in Charlottesville was superb, the *ad hoc* training they developed and executed within their units in the field was "very mediocre—in fact barely adequate."[95]

The solution—in Alley's view—was centralized training in Charlottesville, or an effort to send Judge Advocate School instructors out to regional conferences attended by Reserve personnel. After Alley left, a new commandant, Colonel J. Douglass, began a program of "on-

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[89] Oral History (1st Session), *supra* note 9, at 84.
[90] *Id*.
[91] In 1965 the office was known as the Military Affairs Division, Department of the Army.
[92] Oral History (1st Session), *supra* note 9, at 86–87.
[93] Oral History (2d Session), *supra* note 9, at 3.
[94] *Id*.
[95] *Id*.

site instruction" to address the issue, and this type of instruction continues today.[96]

Alley also observed that the JAG Corps, and the Army, might benefit from a program of sabbaticals for select officers who would spend a year or more in Charlottesville to consider broader issues of institutional relevance to the Army. It has often been said that when pressed, organizations cease future planning in deference to the urgencies of the moment. Alley recognized this, and thought the investment of a few officers with unencumbered time would benefit the JAG Corps. He recalls:

> The Corps was busy toward the time that I left [Charlottesville] in 1968. We had a lot of commitment in Vietnam, and the JAG School was busy. . . . But there wasn't any "think tank" down there . . . And why wouldn't it be possible out of all our assets to give a sabbatical to two or three of [our thoughtful officers] and bring them into the JAG School for a year where they'd just sit around and think about things. Nobody does that in the JAG Corps at all. . . . We do engage in long-range planning and the TJAGs have been influential in bringing about legislation and so forth, but even that's reactive and not reflexive.[97]

Later, as the Dean of the University of Oklahoma School of Law, Alley saw the value-added benefit to the institution—and the profession—of individuals who were able to step back from what they were doing and take on projects that might otherwise never be considered. Examples included one professor who compiled a bibliography from comparative literature of tort law, and another who won a grant to develop a state-wide appellate public defender program that was later implemented into law as a state agency.[98]

Alley thought that with its close association with the University of Virginia, the Judge Advocate General's School would benefit from "a grand opportunity to pick the brains of people in the sabbatical sense if

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[96] *Id*.
[97] *Id*. at 12–16.
[98] *Id*. at 15–16.

the Corps were willing to make the investment."[99] He maintained that such a program "would be rather refreshing" from an institutional perspective.[100]

While he did not directly participate in the teaching of military justice, Alley's interest in the area of criminal law was hardly diminished during his three years in Charlottesville. In 1968, as he prepared to go to Vietnam, he made it clear to the judge advocate personnel office that he wanted to be a military law officer—a military judge.[101]

C. Of Military Justice and the Uniform Code of Military Justice

Throughout its roughly 235 year history, the American military justice system has played a small but critical role in the nation's overall approach to treatment of its citizens through the administration of the Uniform Code of Military Justice (UCMJ).[102] The criminal codes, rules of evidence, composition of jury panels, and the primary role of commanders as convening authorities for courts-martial are all tailored to the special needs and requirements of the military in peace and in war.

The military justice paradigm has served the military and country well. But in many quarters this unique system retains elements and characteristics many Americans would find unrecognizable given the general public's understanding of civilian criminal proceedings. Of the UCMJ's origin and evolution, BG John Cooke, former Commander, U.S. Army Legal Services Agency/Chief Judge, U.S. Army Court of Criminal Appeals (ACCA), has written:

> The dissatisfaction with military justice during World War II and the reformation of the defense establishment led to the enactment of the Uniform Code of Military Justice in 1950. The UCMJ was clearly intended to limit the control of commanders over courts-martial; it increased the role of lawyers and established a number

[99] *Id*. at 13.
[100] *Id.*
[101] Oral History (1st Session), *supra* note 9, at 102.
[102] The UCMJ was enacted on May 5, 1950. Act of May 5, 1950, 64 Stat. 110 (codified as 10 U.S.C. § 801–940 (1959)); *see* DANIEL WALKER, MILITARY LAW (1954); JAMES SNEDEKER, MILITARY JUSTICE UNDER THE UNIFORM CODE (1953); James Snedeker, *The Uniform Code of Military Justice*, 2 HARV. L. REV. 1377 (1949).

> of important rights for Servicemembers, including extensive appellate rights. Among its most important features was the Court of Military Appeals, which was intended to play, and has played, a critical role in protecting the integrity of the system. At the same time, the code preserved many unique features of the old system that would remain responsive to the special needs and exigencies of the military. . . . *In essence, enacting the UCMJ was the beginning of an effort to erect a true judicial system within the body of the military organization*.[103]

Despite the institutional and systemic differences between military justice and its civilian counterpart, the overarching narrative of fairness, professionalism, and objectivity remain a central theme binding both. In her concurring opinion in one of the rare military cases to reach the court, *Weiss v. United States*, Supreme Court Justice Ginsberg acknowledged this evolution of standards and judicial competence of legal practice in the Armed Forces in a case specifically questioning the constitutionality of methods used to appoint military judges:

> The care the [Navy Marine Court of Military Review] has taken to analyze petitioner's claims demonstrates once again that men and women in the Armed Forces do not leave constitutional safeguards behind when they enter military service. Today's decision upholds a system notably more sensitive to due process concerns than the one prevailing through most of our country's history, when military justice was done without any requirement that legally-trained officers preside or even participate as judges. [104]

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[103] John S. Cooke, *The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20x*, 156 MIL. L. REV 1 (1998), *in* EUGENE FIDELL & DWIGHT SULLIVAN EDS., EVOLVING MILITARY JUSTICE 178 (Naval Institute Press, 2002) (emphasis added). Brigadier General John S. Cooke (U.S. Army Ret., 1972–1998) served over twenty-six years as an Army judge advocate, culminating in his assignment as Commander, U.S. Army Legal Services Agency/Chief Judge, U.S. Army Court of Criminal Appeals, Falls Church, Virginia.

[104] Cooke, *supra* note 103, at 179 (citing Weiss v. United States, 510 U.S. 163, 194 (1994)).

D. The Jump to the Judiciary—the Beginning of an Enduring Commitment to the Bench

After several years of successful developmental positions in the Judge Advocate General's Corps, Alley made the somewhat fateful decision in 1968 to leave the more typical course of leadership positions for the very different challenge of service as a military judge. The judiciary, at that time, was a road less traveled for a highly competitive officer like Alley, as he recalls:

> I told my assignments officer I would like to be a law officer or military judge. There really was *not* a great deal of impetus on the part of most people to get into that program. It was regarded as an interesting kind of work that provided no opportunity for promotion to the higher ranks . . . judges had a reasonable prospect for promotion to colonel, but that was the highest grade. . . . *The nature of the work and enjoyment of the work was always the most important thing*, and I'd observed that lots of other people carefully charted out the course of their lives, carefully tried to punch tickets [for a realistic prospect for promotion to general officer]. It didn't seem to me to be the kind of thing realistically that a person could plan for.[105]

His entry into the Army trial judiciary could not have come at a more challenging time. The Military Justice Act of 1968 did not become effective until mid-1969, and therefore most military trials presided over by law officers or judges were general courts-martial with panels, and there were no bench trials.[106] Second, his transition into the court would begin in the war-time camps and stations of Vietnam, where the stakes were high, the crimes serious, and environmental and logistical conditions harsh. Finally, Alley also carried the difficult weight of family concerns arising from his wife's ill health.[107]

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[105] Oral History (1st Session), *supra* note 9, at 102–03 (emphasis added).
[106] *Id*. at 104.
[107] *Id*.

IV. Vietnam, 1968–1969

Follow justice and justice alone. . .[108]

A. Impressions of a War-Time Judge

Alley arrived in Saigon in the spring of 1968. From that base of operation he routinely traveled to forward operating bases in Saigon and elsewhere, recalling, "We tried cases at division and brigade and support command headquarters. I think I calculated at the end of my year there I spent an average of four days *a month* in my own bed in Saigon, and the rest of the time was out trying cases in the field."[109] Alley's experience was common for judge advocates in Vietnam, where the workload for military justice practitioners during the mid and late 1960s was unprecedented. Of the high level of military justice cases worked in Vietnam in the late 1960s, Colonel Frederic Borch (U.S. Army Retired), Regimental Historian & Archivist for the U.S. Army Judge Advocate General's Corps notes:[110]

> The gross numbers tell the story. [US Army Vietnam] and its subordinate units conducted roughly 25,000 courts-martial between 1965 and 1969. Of these, 9,922

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[108] *Deuteronomy* 16:20 (New International Version). Deuteronomy is generally ascribed to Moses; the book itself is translated as "repetition of the law" and details enduring principles of what men and society expect of the law and those who adjudicate it. The complete passage addressing judges reads as follows:

> Appoint judges and officials for each of your tribes in every town the Lord your God is giving you, and they shall judge the people fairly. Do not pervert justice or show partiality. Do not accept a bribe, for a bribe blinds the eyes of the wise and twists the words of the righteous. Follow justice and justice alone, so that you may live and possess the land of the Lord your God is giving you.

Id. *Deuteronomy* 18-20.

[109] Oral History (1st Session), *supra* note 9, at 104 (emphasis added).

[110] FREDERIC L. BORCH III, JUDGE ADVOCATES IN COMBAT, ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI 29 (2001) [hereinafter BORCH, ARMY LAWYERS IN MILITARY OPERATIONS] (U.S. Army Center for Military History). *See id.* at 3–51 (providing a comprehensive overview of the role of Judge Advocates in military operations during Vietnam). *See also* FREDERIC BORCH, JUDGE ADVOCATES IN VIETNAM: ARMY LAWYERS IN SOUTHEAST ASIA 1959–1975 (2003) [hereinafter BORCH, JUDGE ADVOCATE IN VIETNAM] (U.S. Army Command & Gen. Staff Coll. Press, Combat Studs. Inst.), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/JAs_Vietnam.pdf (last visited Dec. 19, 2011).

> courts-martial were tried in 1969 alone, at the peak of the U.S. buildup, of which 377 were general courts, 7,314 were special courts, and 2,231 were summary courts. Similarly, a large number of Article 15s [non-judicial punishment] were administered between 1965 and 1969—66,702 in 1969 alone.[111]

Of the case load, BG Alley remembers:

> The cases were great—by and large the counsel were good—only the most serious cases were tried. We had nothing that was minor. It was all murder, rape, arson, kidnapping. I presided over 136 cases [in eleven months], virtually every one contested. We tried cases seven days a week—often from eight in the morning until midnight. We had to keep up with the docket because we were docketed at the various [combat] divisions . . . if you missed the flight and didn't get to the next place the domino effect on the docket was just horrible. So it was demanding for the judges who were out there. But the cases—heavy stuff.[112]

Against this backdrop were the harsh realities of his wife's illness, which in 1969 required Alley to take emergency leave to return home to tend to his family. Even in this, he could not escape the war itself as the interposition of anti-war feelings pervaded the very medical care he and his wife desperately sought. He remembers,

> My kids had been farmed out to three different families in Charlottesville and I collected them again in my own house. My wife was under the care of a psychiatrist who was a death-on war protester and extremely hostile to anything military and exhibited hostility and repugnance toward me when I showed up. . . . I would try to get him to talk about my wife and her diagnosis and her

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[111] *Id*. at 29 (citing Dennis R. Hunt, *Viet Nam Hustings*, JUDGE ADVOCATE J., NO. 44, July 1972, at 23).
[112] Oral History (1st Session), *supra* note 9, at 105.

> prospects and so forth and would have to listen to this diatribe about the war.[113]

B. Military Jurisdiction over Civilians

In this difficult personal circumstance, Alley presided over a full spectrum of serious crimes involving complex issues of fact and law. One of Alley's most significant decisions during this period came in *U.S. v. Averette*,[114] and the assertion of UCMJ Article 2 military jurisdiction over civilians.[115]

He recalls that the government would assert jurisdiction over certain civilians under the theory that they were accompanying the force in the field and offer the Gulf of Tonka Resolution and appropriations acts as evidence of Congressional intent, only to contest motions by defense counsel that Article 2 required a formal declaration of war by Congress.[116] Alley oversaw the trial of at least three civilians.[117] As circumstances would have it, one of them—*Averette*—was addressed by the appellate court which held a formal declaration of war by Congress was required as a predicate to military jurisdiction over civilians.[118]

Frederic Borch has summarized the issue this way:

> The increase in serious crimes committed by U.S. civilians . . . soon made criminal prosecutions appropriate. But who would prosecute? Although some American laws applied extraterritorially, only two practical possibilities existed: U.S. military or Vietnamese civilian authorities. While American

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[113] *Id*. at 104–06.
[114] United States v. Averette, 41 C.M.R. 363 (C.M.A. 1970). The U.S. Court of Military Appeals considered the matter of military jurisdiction over a civilian. The court noted that the operative determination laid in UCMJ Article 2(10) and the requirement that civilians accompany the military "in time of war." *Id.*
[115] *See generally* Colonel Kevan F. Jacobson, U.S. Army War College Strategy Research Project: Restoring UCMJ Jurisdiction over Civilian Employees During Armed Hostilities (Mar. 15, 2006) (unpublished manuscript), *available at* http://www.strategicstudiesinstitute.army.mil/pdffiles/ksil374.pdf (last viewed Dec. 8, 2011).
[116] Oral History (1st Session), *supra* note 9, at 107.
[117] Alley Interview, *supra* note 16.
[118] *Averette*, 41 C.M.R. at 365. The court found that "for a civilian to be triable by court-martial in 'time of war,' Article 2(10) means a war formally declared by Congress." *Id.*

> military authorities could exercise control over uniformed personnel using the Uniform Code of Military Justice or Military Assistance Command Vietnam (MACV) directives, their authority over civilians in Vietnam was tenuous at best. Although Article 2 of the Uniform Code did permit the courts-martial of civilians "accompanying an armed force in the field," that provision applied only "in time of war," and it was unclear as to whether the fighting in Vietnam legally constituted a "war." Additionally, even if such was the case, criminal jurisdiction over civilians extended only to those civilians accompanying U.S. forces "in the field." Consequently, while civilian employees of government contractors engaged on military projects, war correspondents with troops on combat missions, and merchant sailors unloading cargo in U.S. Army ports might be subject to criminal jurisdiction, the more than 6,000 U.S. civilian employees of private contractors, independent businessmen, and tourists in Vietnam were not . . . [and] the Vietnamese were either unable or unwilling to prosecute Americans.[119]

As a result, Alley and other judges presided over cases involving military assertions of jurisdiction over civilians accompanying the force, under the provisions of Article 2, UCMJ.[120]

To try to mitigate media concerns that correspondents could be subject to military justice, the U.S. Embassy in Saigon unilaterally prescribed conditions by which such jurisdiction could take place and limited them to serious felony-level offenses.[121] The policy articulated two key prerequisites to the assertion of military jurisdiction: first that the status of U.S. forces accompanying the force was very clear; and second, that the Vietnamese Foreign Ministry was consulted and consented to the exercise of jurisdiction.[122] Alley recalls, "[I]t was just

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[119] BORCH, ARMY LAWYERS IN MILITARY OPERATIONS, *supra* note 110, at 23.
[120] UCMJ, 10 U.S.C. § 802 (UCMJ art. 2); John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 70A Stat. 601 (2006). *See* Dan E. Stigall, *An Unnecessary Convenience: The Assertion of the Uniform Code of Military Justice ("UCMJ") over Civilians and the Implications of International Human Rights Law*, 17 CARDOZO J. INT'L & COMP. L. 59 (2009).
[121] Oral History (1st Session), *supra* note 9, at 109.
[122] *Id.*

luck of the draw; I tried the case in which such a motion was denied [which then went on to appellate review]."[123]

The *Averette* case involving a civilian contractor, Raymond Averette, convicted before a general court-martial of conspiracy to commit larceny and attempted larceny. BG Alley was the presiding judge, and denied the defense motion to dismiss for lack of jurisdiction. The central question at both the trial and appellate level was whether or not Averette was subject to the military court's jurisdiction by operation of Article 2's requirement for a "declared" war.[124] The Court of Appeals for the Armed Forces (CAAF)[125] took a literal construction approach to the language "in time of war" and so concluded that a Congressional declaration was required, effectively ending all future assertions of military jurisdiction over civilians.[126]

At the time *Averette* was tried, the idea that Vietnam was a war in name and sanction was entirely reasonable to those who were living the experience of the conflict first-hand. In a separate case of a civilian tried for manslaughter before a general court-martial, *United States v. Grossman*, Alley remembers the flight from Dong Tam to Long Bihn en-route to a motions argument where the helicopter incurred damage resulting from small arms fire:

> We took some hits in the tail assembly, but it didn't hit any vital part of the aircraft. So I grabbed my briefcase and I rushed into the courtroom and we started motions—the round of motions in Grossman's case in which his counsel argued artfully—there is no war in Vietnam—I thought was a great irony under the circumstances, and he was right, wasn't he—as the Court of Military Appeals subsequently decided.[127]

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[123] *Id*. at 107–10.

[124] United States v. Averette, 41 C.M.R. 363 (C.M.A. 1970).

[125] The Court of Military Appeals was first established in 1950 by Article 67, UCMJ. Comprised of five civilian judges, it is the highest appellate court within the military justice system. In 1994, Congress renamed the court the U.S. Court of Appeals for the Armed Forces (CAAF). *See generally* U.S. COURT OF APPEALS FOR THE ARMED FORCES, *About the Courts*, at http://www.armfor.uscourts.gov/Establis.htm (last visited Dec. 8, 2011).

[126] *Averette*, 41 C.M.R. at 365.

[127] Oral History (1st Session), *supra* note 9, at 110–09. Describing the nature of trying cases forward in the battlefield, he also recollects "four or five times being out trying a case when we had a mortar or rocket fire into the situs of the trial—either during the trial

The *Grossman* case ended when Alley found that the government had failed to meet the Embassy requirement for Vietnamese concurrence in the matter, but not before a truly memorable cross examination that contributed to the failure of the government's case. To prove the Vietnamese consultation and concurrence, the government used the testimony of Colonel (COL) Hank Ivey, the MACV Staff Judge Advocate, who testified on direct examination that he had personally garnered the approval from an official at the Foreign Ministry for military jurisdiction over Mr. Grossman. As Alley retells the story:

> [O]n cross-examination the defense counsel (D) asked COL Ivy (W) to speak Vietnamese.
>
> W: Well, I can't speak Vietnamese.
> D: Well, were you accompanied by an interpreter?
> W: Yes, I was, but I could communicate [with the Vietnamese official] by myself.
> D: How?
> W: In French. We both spoke French.
> D: Oh. Well, Colonel Ivey, was the conversation entirely in French?
> W: Yes it was.
> D: Well, tell us how you say in French—it is our intention to try Mr. Grossman. (Silence). Well can you?
> W: Well, no.
> D: Tell us in French how you would ask the question: Do you waive jurisdiction? (Silence). Well can you?
> W: Well, no.
>
> And it was one of those occasions that really don't happen often in life—a totally destructive cross-examination; and there was no question, Ivey couldn't speak French and it was impossible that a meaningful conversation could have been conducted in French. So I abated the proceedings, conceding on the record that I didn't really know where we were, but that the government had to prove jurisdiction, and it hadn't . . . Well, Ivey was furious. As a matter of fact his first response, according to his warrant officer with whom I

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or at night—usually at night—and two or three time in-flight when the aircraft had been hit. . . . " *Id.* at 113–14.

> was friendly, was to try and evict the law officers from their office in Saigon and relocate them in Long Bihn.[128]

In 2006, nearly four decades later and in response to military operations in Iraq and Afghanistan, Article 2 was ultimately amended to authorize a process by which commanders may assert military jurisdiction over civilians "serving with or accompanying an armed force in the field" under circumstance of a "declared war or *contingency operation*."[129] Two years later, Secretary of Defense Robert Gates set out processes and procedures for the assertion of jurisdiction over civilians, including notification to the Department of Justice and the option for the government to pursue the case in U.S. courts.[130]

C. The Murder Syndrome

More than most anything, Alley recalls the extraordinary number of murder cases brought before his courts: "[T]he cases were heavy stuff. I think I had . . . 35 contested cases [that year] in which the charge was [premeditated murder]."[131] Of these, the victims were "divided almost half and half between American victims and Vietnamese victims."[132] Alley notes that "in the case of Vietnamese victims the case was characteristically not a crime for gain, but was just a senseless shooting . . . like shooting bottles off a wall."[133] In a 1969 presentation at The Judge Advocate General's School, Alley noted the distinctive natures of the violent crimes committed against Americans and the local Vietnamese:

> I talked about the murder syndrome—that when there was a murder with the U.S. Forces victims there was a formula of fatigue, grudge, alcohol or drugs, and of course the accessibility of a weapon; and when those things collide, the object of the grudge lay dead on the

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[128] *Id*. at 111.
[129] UCMJ art. 2 (2008) (emphasis added).
[130] Memorandum from Robert M. Gates, Sec'y of Def., subject: UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving with or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations (Mar. 10, 2008).
[131] Oral History (1st Session), *supra* note 9, at 106.
[132] *Id*.
[133] *Id*.

> floor. [But] when there was a Vietnamese victim, when it wasn't robbery or something like that, the accused seemed to me to exhibit a thought or the lack of a thought that the victim was really a human being—just like shooting objects . . . soulless objects.[134]

In particular, Alley recalls telling the assembled audience, which included the incoming MACV Judge Advocate, Colonel Bruce C. Babbitt, that they "were going to be very lucky if there isn't some terrible war crime-type atrocity . . . And, in fact, it had already happened at My Lai, but no one knew about it."[135] Alley would revisit the My Lai Massacre cases four years later as the authoring appellate justice in the case of *U.S. v. William L. Calley*.[136]

D. The Importance of Trying Cases Forward

Despite chronic problems with Vietnam-era technology, particularly court reporter stenographic machines,[137] Alley was an avid advocate of trying military courts-martial cases in the middle of the environment in which the crimes occurred; in which the participates operated; and where the atmospherics of combat—the sometimes harsh realities in which soldiers lived, fought, and interacted with others—could best inform the process. For these reasons Alley strongly advocated on behalf of judicial integration in the battlefield.

> I think we should try cases forward so that judges should be out there traveling as far forward as they could be, and [that] they should be located in theater.[138] . . . There's an atmosphere. When a case is a combat refusal to join your unit in the line or refusal of an order in the field, or failure to do the utmost and so forth, the people who ought to be trying that case are officers of the division or the brigade. That's not a rear area case. If it's a case of a homicide in the field, in most instances where there was a U.S. service member victim, there was a lot

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[134] *Id.*
[135] *Id.* at 107.
[136] 46 C.M.R 1131 (1973); 1973 CMR LEXIS 843 (1973).
[137] Oral History (1st Session), *supra* note 9, at 114.
[138] *Id.*

> of extenuation and mitigation because of stress and fatigue operating to the benefit of the accused that I don't think could be appreciated from the perspective of a [garrison court]. I presided over tragic trials of people who had killed other Americans who were thoroughly worthwhile people who had hit a breaking point and broke. . . .[139]

As an example, Alley cites the case of a young African American soldier who had been a model leader in his unit; a reconciler at a time of racial tension, and a team builder who consistently sought to bring people together and by creating distractions that enabled soldiers to take a break from the stress of intense combat operations.[140] One day, on his birthday, the soldier uncharacteristically drank too much beer and endured a vicious and prolonged taunt by African American soldiers in a neighboring unit to the effect that his team-building efforts made him an "Uncle Tom . . . that he had sold out."[141] Over a period of several hours, and after complaining to his chain of command, the soldier went into his hooch, drew his weapon, came out, and shot three of his antagonists, killing them.[142]

Alley uses the case to highlight the atmospherics of military justice in combat, concluding:

> [The soldier] was guilty and he had to be convicted and punished, and he was punished in a clement way, and I just don't think we could remove a case like that from the setting in which it happened and have people understand it. So it is that kind of thing that ought to push the business [of courts-martial] forward.[143]

Another case, involving a soldier with a grudge against his captain, similarly makes the point.

> The accused lay in wait with an automatic weapon and fortunately was all beered up or certainly would have

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[139] *Id*. at 115–16.
[140] *Id*. at 117.
[141] *Id*.
[142] *Id*.
[143] *Id*.

> killed his captain because at fairly short range he let fly with a barrage of bullets and just stitched the captain's arm right off. The captain got medical assistance, subsequently a prosthetic and was doing pretty good under the circumstances. At trial. . . . the prosecutor brought the captain up to the point of the shooting, and said "[A]nd when you fell did you see anybody with a weapon in his hand?" "Yes" [the captain testified], "I saw Specialist so and so." "Is Specialist so and so present in this room?" "Yes," and he points to the accused with his [amputated] stump.[144]

The case, which was referred capital but resulted in a life sentence, is precisely the sort of matter best heard by those most familiar with the experience of war giving rise to the crime. The stress of combat, the impact of an officer severely wounded by one of his own (intoxicated) soldiers, and the sheer drama of the victim demonstrating the consequence of the crime, has intrinsic impact that may easily be internalized differently by those unfamiliar or unaccustomed to the operating environment of Vietnam.

During this period, nearly all general courts-martial were panel cases requiring members to travel to the seat of the trial.[145] Despite the obvious personal inconveniences and break in operations required by senior officers and non-commissioned officers to participate in criminal cases few, if any, ever balked at the responsibility to do so. Of the importance of participating in trials while forward deployed in a combat zone, Alley notes: "I think if you polled commanders at the Brigade and higher levels and asked them—is this the price you're willing to pay in order to dispose of business in your [Area of Operations], they would have said yes, without exception."[146]

Moreover, Alley not only found the intelligence and judgment of the panel members exceptionally good, but also reassuringly committed to exercising fair and thoughtful consideration of the facts as they found them in the context of the war itself. This sometimes flew in face of the formal analysis applied by the judge advocates involved and, in Alley's

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[144] OCU Interview, *supra* note 9, at 12.
[145] Oral History (1st Session), *supra* note 9, at 118.
[146] *Id.*

mind, could lead to a more rational, common sense reading of the underlying offenses.

> I thought the court members used superlative judgment. Their exercise of good sense was in many instances superior to that of the Staff Judge Advocate who tended to look at a [report of investigation] in a legalistic way—isolating out the elements of the offense—looking at the Table of Maximum Punishments—saying man, isn't this something, sending it to trial and then fortunately common sense prevailed.[147]

While the judicial offices and living accommodations in Vietnam were more than adequate,[148] the court facilities were often field-expedient and designed purely for efficiency over aesthetics. In the case of the 1st Infantry Division area, Alley remembers somewhat fondly that the

> [L]ittle court facility was a SEA [Southeast Asia] hut with the usual plywood walls up about five feet and then screening to the corrugated iron roof. The law officers' bench as you entered the courtroom from the spectator section was on the left by the screen and not six feet outside the building behind the screen was the Headquarters and Headquarters Company latrines . . . and trying a case there was like trying one in the middle of the Chicago stockyards.[149]

It is worth noting that forty years later many American soldiers had their cases tried in very similar facilities, despite more than eight years of conflict and an ever maturing theater of operations. The author recalls that trials at the U.S. Division–North (USD–N) headquarters on Contingency Operating Base Speicher was simply a converted utility shed with plywood walls, benches, witness stand, and judge's bench; the building lacked plumbing and was situated next to a set of portable latrines.[150] Functional, but hardly ideal.

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[147] *Id*. at 122; *see also* Alley Interview, *supra* note 16.
[148] Oral History (1st Session), *supra* note 9, at 118.
[149] *Id*. at 120.
[150] In 2009, the author served as the SJA for MND–N, later designated USD–N, and struggled, without success, to move the court facility into a more appropriate fixed structure.

E. Impressions on the Role and Status of Trial Defense Counsel in Vietnam

Another worthy footnote in the Vietnam experience was the quality and status of criminal defense attorneys. This was, as noted earlier, a period prior to the establishment in 1980 of the U.S. Army Trial Defense Service (TDS) with its accordant and extensive institutional support and leadership.[151] Alley specifically recalls the advantages a TDS-type organization would have brought to the military justice practice: "Looking back, I think that the Defense Services in Vietnam would have been—as good as they were and they were perfectly adequate—but they would have been better if there had been something like a TDS." [152]

Alley observed many of the problems that later became the rationale for the creation of a centralized, semi-autonomous defense services organization. Among them was the lack of flexibility to assign defense counsel across the Army units to which they were assigned. Because defense counsel originated from a particular staff judge advocate's office, their jurisdictions (for lack of a better term) were limited to that command regardless of the respective case loads and requirements elsewhere. A key advantage of present day TDS is the flexibility of Regional and Senior Defense Counsel to assign attorneys where they are most needed regardless of units of assignment.

A second concern was the lack of available mentors to guide and develop defense counsel, and assist them with their cases without creating conflicts of interest with the supervising staff judge advocate or compromising privileged client information. Alley recalls:

> When I traveled around it just seemed to be that a lot of the defense counsel were thirsty for somebody to talk [to]—"[H]ow am I doing and how do I do this, what do I do better," and all that sort of thing. I didn't encounter a single defense counsel who alleged interference in his work by his SJA . . . but they were not going to go there for their professional advice. So, in [future combat

[151] Lieutenant Colonel John R. Howell, *TDS: The Establishment of the U.S. Army Trial Defense Service*, 100 MIL. L. REV. 4 (1983).
[152] Oral History (1st Session), *supra* note 9, at 26.

> situations] I think the needs of the defense will be better met than they were [during Vietnam].[153]

F. The Law of Armed Conflict

In many respects, Vietnam was the first major American conflict in which notions of the law of armed conflict filtered down from the strategic level to the tactical level of small units and individual soldiers. Still fresh from the lessons of World War II, Nuremberg, and their progeny, the notion of international standards of conduct in combat were sorely tested in the late 1960s and early 1970s, with highly public cases such as *Calley* capturing the imagination of soldiers, lawyers, and the nation at large.

Quite naturally, Army judge advocates, including Alley, were often at the center of alleged war crimes, serving as legal counsel to commanders or investigators, government and defense counsel, or acting as judges in all manner of litigation against U.S. personnel accused of violations of the law of war. In most cases, Alley's personal observations of the success and interest of young Army lawyers in the topic was decidedly mixed. He recalls that individual judge advocates were consciously aware of the applicable rules and standards, but that they rarely moved beyond that to integrate their understanding into the training of individuals units.

> I suppose most JAGs were sufficiently sensitized to the law of war to know a violation when they say one, and most were good enough to have read the MACV Directive on the reporting and processing of suspected cases and maybe put out some local implementation, but I don't think many bestirred themselves to go beyond that, and I don't think that many trained [outside legal channels]. I don't think that they used their knowledge to train and sensitize units in which they were.[154]

Alley observed that what the Army needed then—and in subsequent decades actively adopted—was multi-tiered training interjected with senior leader emphasis and a very public acknowledgement that

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[153] *Id*. at 26–27.
[154] *Id*. at 131.

Americans who violate the law of war risk criminal exposure and possible trial by court-martial.[155] Interestingly, Alley sensed that in many instances young enlisted soldiers had a more keenly developed sense of internal right and wrong than did their superiors. He recalls:

> I think a lot of Soldiers have more conscience than their junior officers because the Soldiers—let's take Vietnam for example—the Soldiers might be bucking for [a promotion] but I don't know that they would particularly relate that to body count. But the captains [who were bucking for promotion to major] did . . . [and so] I felt that a lot of Soldiers had more sense about that than some of the officers. The Soldiers over whose cases I presided in Vietnam, who had slaughtered Vietnamese, knew they shouldn't have and they never defended on the basis of [not understanding the underlying criminality of the conduct]. Never—not once.[156]

G. Race Relations—Mirror of the Nation's Struggle with Civil Rights

One of Alley's lasting observations from the Vietnam War was the dire nature of race relations, imparted to some degree through his personal experience with the trials that followed from the 1968 mutiny at the U.S. Army Vietnam Installation Stockade at Long Binh.[157] The cases arose from an August 29, 1968, racially motivated riot at the stockade in which two prisoners were murdered.

Alley specifically recalls, "The mutineers burned the place down . . . I tried a lot of those cases and that was a sensitizing experience to try cases into matters of race relations in the Army. [It] really brought the subject to the fore starkly."[158] He specifically remembers that the racial divisions among soldiers in Vietnam remained stressed for the duration

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[155] Alley Interview, *supra* note 9; *see also* Oral History (1st Session), *supra* note 9, at 131–33.
[156] Oral History (1st Session), *supra* note 9, at 133.
[157] *See generally Long Binh Jail Riot During the Vietnam War*, *available at* http://www.historynet.com/long-binh-jail-riot-during-the-vietnam-war.htm (last visited Dec. 8, 2011) ("Voluntary social segregation became the norm. Black and Hispanic inmates stayed together, as did the whites. The environment was dangerous and frustrating for inmates and guards alike, with morale a daily challenge for both groups.") *Id*. *See also* BORCH, ARMY LAWYERS IN MILITARY OPERATIONS, *supra* note 110, at 40–41.
[158] Oral History (2d Session), *supra* note 9, at 19.

of his time there, and that they seemed even worse when he returned for a short-duration stay in 1971.[159]

> The drafted Army harbored a lot of resentments that you don't find now. [The] young people who were drafted had come out of urban communities that were experiencing these tremendous dislocations . . . Watts riots and problems in Chicago and the arsons in Washington after the [Dr. Martin Luther King] murder [in April 4, 1968]. It's just like drugs, I think. These young people didn't change when they came into the Army. They brought [with them all] they had previously experienced, and that was a great deal of embitterment.[160]

Of the ten or so contested cases Alley presided over arising from the Long Binh Stockade incident, he remembers: "The most striking thing . . . was the intelligence and the leadership abilities of the mutineers, and a sense of what a waste it is to the extent that there are race limitations . . . because of economic and other problems."[161] He also recalls that the senior Army leadership recognized both the challenges and the obvious need for action, both in the interest of the Army and as a moral imperative.

> It wasn't a lack of will. As a matter of fact, I think the best intentions were there. . . . the higher management of the Army was, first of all, sensitive to the human potential. As long as you have blacks in the Army, they have to be good Soldiers, so it's to our own advantage. And second, I think that most people had a feeling from a moral sense of the necessity to grapple with this problem and provide real opportunity and equality and high regard.[162]

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[159] *Id*.
[160] *Id*.
[161] *Id*. at 18.
[162] *Id*. at 20.

By the late 1970s, Alley noted a real difference in the tenor and tone of race relations in the Army, observing that "tensions had abated greatly" and attributed the change to

> [T]he volunteer Army and the underlying fact that most minority Soldiers were ambitious [to perform well], and ambition is a good thing, and [that] in the bigger society these problems had just quieted down a little bit. [The] Civil Rights legislation in the 60s accomplished a lot and it had both real and symbolic significance for black people.[163]

He also recalls the dramatic change that Civil Rights legislation had for African Americans in Charlottesville, Virginia, for example, where the U.S. Army Judge Advocate General's School was located.

> When I went to Charlottesville in 1964, before the Civil Rights Acts, in stores of white patronage, there wasn't one—not one single checker, clerk, ticket-taker at the movie . . . you name it, there wasn't one black employee in that city that dealt with direct customer service—not one. And blacks were not permitted in any accommodation . . . nor permitted patronage at restaurants—no blacks. . . . [T]he very next year the law was enacted and when I left in 1968 the most visible difference was in employment.[164]

H. Contrast to the Experience of Army Judges in Iraq

For the limited purpose of this article, it is perhaps worthwhile to briefly compare the experience of BG Alley and the Vietnam generation—the last time the nation maintained a large and sustained forward deployed military force during hostilities—to the conflicts in Iraq and Afghanistan, and to recognize the extraordinary ability and dedication of military legal practitioners to ensuring the fair and professional treatment and administration of military justice, regardless of their location.

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[163] *Id*. at 22.
[164] *Id*. at 23.

Military judges and the role of military justice in *Operation Iraqi Freedom*, *Operation Enduring Freedom*, and *Operation New Dawn* are worth mentioning because when the histories of these conflicts are finally written there should be a well earned place for the work done by military judges in their role in the system that ensured defendants' rights, guaranteed commanders the full spectrum of disciplinary options for the maintenance of good order and discipline, and protected soldiers who look to the Army for assurance against criminal activity.

Since the beginning of large-scale American hostilities in 2003 through the start of 2009, the Army judiciary handled over 650 general and special courts-martial cases *inside* combat zones and affiliated staging areas in Iraq, Afghanistan, and Kuwait, with Iraq cases making up the considerable majority of cases at 532.[165] The volume and complexity of cases were so great that the Army created a special senior supervisory position for the management of the large number of Trial Defense Service (criminal defense) counsel providing services throughout the region.[166]

However, in important contrast to their counterparts in Vietnam forty years earlier, the Army generally did not deploy active duty military judges for conventional service tours inside combat zones. Instead, through at least mid-2010, the Army drew military judges from throughout the judiciary on a rotating basis, with European and east coast judges carrying most of the burden in Iraq, Afghanistan and Kuwait.

This is surprising, given the permanent assignment of a military judge to Korea as part of the Army 4th Judicial Circuit. With a 2007 peak of over 170,000 personnel, the United States had nearly five times as many servicemen in Iraq as Korea, which had approximately 37,000 personnel. In the summer of 2010 the Army judiciary finally deployed a highly regarded and experienced active duty trial judge, Colonel Michael Hargis, to Kuwait in order to administer cases on a more integrated basis.

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[165] Colonel Stephen R. Henley, Chief Trial Judge, U.S. Army Legal Servs. Agency (USALSA), Briefing to Brigadier General Clyde J. Tate, II, Commander, USALSA and Chief Judge, U.S. Army Court of Criminal Appeals (14 Jan. 2009) (notes on file with author).

[166] Personnel, Plans & Training Office, OTJAG, Washington, D.C.

In the case of judicial presence in Vietnam, Frederic Borch notes in his seminal history on legal operations in Vietnam, *Judge Advocates in Vietnam: Army Lawyers in Southeast Asia, 1959-1975*,[167] that:

> The small number of general courts-martial tried in Vietnam in late 1965 and early 1966 meant that a law officer [military judge] traveled to Vietnam on temporary duty to judge the case. As general courts increased, however, a more permanent presence was needed in Vietnam and by 1967 there were two law officers assigned for duty in country. Lt. Col. Paul Durbin, who had been the first judge advocate in Vietnam from 1959 to 1961, was one of them . . . Col. James C. Waller [was the other]. Durbin and Waller tried cases seven days a week. Sometimes they used a chapel as their courtroom.[168]

One of the many Army judges to preside over courts-martial in the Iraq and Afghanistan theaters of operation was Colonel Denise R. Lind, currently the Circuit Judge for the First Judicial Circuit based in Arlington, Virginia.[169] Colonel Lind served as one of three full time military judges for the Army's Fifth Judicial Circuit based in the Federal Republic of Germany, from June 2004–June 2006. As the theaters of operation matured Iraq, Afghanistan, and Kuwait were made part of the Fifth Circuit, which detailed military judges to travel to hear cases as required and also as part of routinely scheduled trial terms.[170] Colonel Lind served in five such terms from 2005–2006, hearing cases from Tikrit to Doha, and from Bagram to Bagdad.

Of the conditions, she recalls that the courtroom at Camp Victory (Baghdad) was occasionally shelled because of its proximity to the Al Faw Palace and of the "ornate, but cheap interior" of Saddam Hussein's Water Palace in Tikrit.[171] The weather, too, offered its own set of challenges. In one case, a sandstorm delayed an arraignment and individual military counsel (IMC) request, forcing the accused, escorts, and the prosecuting trial counsel to collectively sleep in the courtroom,

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[167] BORCH, JUDGE ADVOCATES IN VIETNAM, *supra* note 110.
[168] *Id*. at 70 (citing an Interview with James C. Durbin, and author (1 July 1996)).
[169] Interview with Colonel Denise R. Lind, in Ballston, Virginia (29 Jan. 2009) [hereinafter Lind Interview] (on file with author).
[170] *Id.*
[171] *Id*.

an experience that also repeated itself in more modern Kuwait.[172] Of the facilities in Tikrit, COL Lind recounts from her experience there in 2005:

> From a distance it was rich and imposing, but the plumbing didn't work most of the time. The courtroom was in the command conference room; there was no dedicated court facility. Our chief challenge was getting the court reporter equipment to work under the dust and (un-air-conditioned) heat. All participants in the trials in Tikrit were armed—the military judge, panel (jury) members, and the witnesses. Only the accused was unarmed, an issue sometimes argued as a UCMJ Article 13 matter.[173] But despite the ad hoc court facilities reasonable accommodation was always made for all parties. It worked.[174]

In particular, COL Lind observed that the process worked in large measure due to the efficiency and ready availability of the latest information technology, which she describes as a "leap of light years" from fifteen years earlier when she was deployed to Saudi Arabia, December 1990–May 1991, in support of *Operation Desert Storm*.[175] She recalls back then that "the courtroom was in a general purpose utility tent; there was no email and poor telephone communications. If you needed to talk to someone more often than not you just had to go and physically find them."[176] But no longer.

> Automation today has made a great difference in our ability to responsibly administer courts and supervise trial litigation. The Military Judge's Benchbook, for example, which assists military judges in preparation of trial instructions is easily transported on a CD ROM and

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[172] *Id.*
[173] UCMJ art. 13 (2008) (Punishment prohibited before trial). Defense argued that disarming an accused in a combat zone made him vulnerable to attack and denied him the ability to defend himself; or, conversely, that the lack of a weapon was a negative stigma at the dining facility, where they were required.
[174] Lind Interview, *supra* note 168. Colonel Lind later recalled that when she returned to Tikrit again in 2006, the palace had been turned over to the Iraq government, and Contingency Operating Base Speicher was left with no dedicated court room. She recalls conducting three trials in a temporarily converted Morale, Welfare, and Recreation room. *Id.*
[175] *Id.*
[176] *Id.*

> was usually pre-loaded on laptop computer provided by the staff judge advocate for the general court martial convening authority. The technology has vastly enhance our ability to conduct pleadings, schedule cases, transmit records of trial and post-trial matters, receive motions . . . even coordination for transportation to and from hearings. It enabled military judges to focus on cases at hand without some of the distractions that could have come from logistics and administrative challenges.[177]

Colonel Lind was the military judge for a particularly dramatic 2005 case involving the 2004 mercy killing of a sixteen-year-old Iraqi civilian who was severely burned and suffered dire abdominal injuries sustained after an American convoy on night patrol in Baghdad's Sadr City engaged a suspicious dump truck carrying Iraqi civilians with small arms fire and 25 mm cannon fire, causing the truck to catch fire. There were several dead and wounded Iraqis in and around the truck. The sixteen-year-old was badly burned but still alive. He was shot several times in a conspiracy by American soldiers who argued they meant to ease the man's suffering because his wounds were untreatable.[178]

Another tragic case involved the negligent homicide of a contract interpreter, who was killed when two soldiers were casually mishandling a weapon in their billets and held the weapon up to the interpreter's head and pulled the trigger, not realizing the weapon was loaded.[179]

But in Lind's mind, nothing was worse than the trials back in Germany as returning servicemen went from deserved "war hero to discharge and jail" following post-redeployment misconduct upon their return from hostilities.[180] Lind also commented that "To watch as the great young men would make it back safely and then get into trouble with drugs, alcohol, and assaults after they had served and survived in Iraq . . . it was just heartbreaking."[181]

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[177] *Id.*
[178] *Id.* (with follow-up correspondence) (on file with author).
[179] *Id.*
[180] *Id.*
[181] *Id.*

I. Observations of the Army and the Judge Advocate General's Corps in Vietnam, 1968–1969[182]

From his service in Vietnam, BG Alley remembers a fighting Army and a "well disciplined force that was engaged in the field . . . People had something to do. There was very little drug usage—only two or three drug cases among the 136 cases" he tried.[183] He recalls that "it was a good Army; well led."[184] Juxtapose that experience with an extended tour or temporary duty two years later, in 1971, when he observed a sudden almost inexplicable change in the nature of the U.S. force characterized by a "deterioration of discipline . . . and pervasiveness of drugs."[185]

As for the Army JAG Corps, Alley recalls a legal presence in Vietnam that was adequate for the roles and missions it had at the time. There was sufficient manpower, albeit much of it borrowed from other branches of the Army in the form of licensed attorneys serving two-year commitments in the Field Artillery, Signal Corps, or Transportation Corps.[186] Alley recalls that judge advocates generally held four-year service commitments while the combat and service support branches of the Army only had two-year obligations.

> When the Justice Act of 1968 became effective in '69 our missions were much enhanced, especially in the military justice field [due to the detail of military judges to special courts-martial], and we needed more manpower and the Army staff had not approved the build-up of JAG [assets to] accommodate that. So units were borrowing the many, many lawyers who were needed in the other branches who had elected not to even apply [to the JAG Corps].[187]

Still, while the Army was able to meet the legal services requirement in the short run, the harder issue of retaining those officers was another matter entirely, a challenge found across the force during the difficult period of an unpopular war.[188] In Alley's mind, this was partially

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[182] *See generally* BORCH, JUDGE ADVOCATE IN VIETNAM, *supra* note 110.
[183] Oral History (1st Session), *supra* note 9, at 113.
[184] *Id.*
[185] *Id.*
[186] *Id.* at 127.
[187] *Id.*
[188] *Id.*; *see also* Alley Interview, *supra* note 16.

generational; a feature of a post-World War II culture that simply did not value traditional notions of military service—the selfless nobility of it—the same way previous generations had. This also applied to many unwilling military spouses, as Alley recalls:

> In the JAG Corps you could find people who just despised the Army and you'd find their wives who were even more vociferous[189] . . . One of the most disturbing things to observe during that period was the junior officer's wife who couldn't wait for the husband to get out of the Army. They all seemed to think that hubby would leave active duty and go out and immediately get a $60,000 job in Aiken, South Carolina or something like that. I thought they had tremendously inflated ideas of their husband's prospects. [R]elative to the welfare of others—the community, lower grade enlisted families - and financial difficulties and so forth, this generation—not uniformly, but far too many people exhibited just a flight of fancy—very self-centered, irresponsible attitude, and I'm glad it's over.[190]

Even so, Alley is quick to recognize the critical role and presence of a majority of young JAG officers—and their families—who fought and sacrificed mightily on behalf the nation's interests in Vietnam.[191] "There were many heroes in that war, JAGs and others, who spent each day risking everything to do what was right. Many lost their lives as a result."[192]

V. Command and General Staff College and the Trial Court at U.S. Army Hawaii, 1969–1972

In early 1969, Alley received word from Major General (MG) Kenneth Hodson, The Judge Advocate General, that he was selected as one of the four of judge advocates to attend the resident U.S. Army Command and General Staff College at Fort Leavenworth, Kansas, for

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[189] Oral History (1st Session), *supra* note 9, at 127.
[190] *Id*. at 128.
[191] Alley Interview, *supra* note 16.
[192] *Id*.

the 1969-1970 academic year.[193] Having mostly completed the correspondence course equivalent, Alley initially resisted attendance at the resident course,[194] but finally relented.

In the fall of that year he and his family moved to Kansas, where he enjoyed himself in what he later described as a "tremendous year":[195] "It was like sitting down and playing a board game for a whole year in a nice group of people, social, pleasant, relaxed."[196] Indeed, Alley found the year at Fort Leavenworth a bit of a lark, although he excelled in the academic program while quietly questioning the program's worth to Army lawyers.

> I don't think any one of the four of us learned anything that was of the slightest assistance in our subsequent careers in the Army . . . The acquaintances that we made I think are people we kept running into in later life and probably a personal acquaintance around the Pentagon or around [a] major command, that's helpful to have. [W]hether we were torches of pure light amidst the line officers so that they got a lot from us and our benign influence rubbed off on them so that they were changed, I couldn't begin to tell you. But that seemed to be part of the justification for sending us there.[197]

But even in the amenable academic environment of Fort Leavenworth, where he graduated on the Commandant's List,[198] Alley

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[193] Oral History (1st Session), *supra* note 9, at 120–21, 137. The other judge advocates were Hal Miller, Thomas Murdock, and Barney Brannen. *Id.*

[194] Alley did not think much of the correspondence course, which satisfied the technical requirements of the year—long resident program at Fort Leavenworth. He recalls:

> So I enrolled in [the correspondence course] and got about a third of the way through it—incidentally without understanding very much. This mysterious stuff had come in the mail and I would read it and just couldn't make any sense of it, and after awhile a multiple choice exam would come in the mail and I would poke holes on paper without knowing what I was doing. I never failed a course, but never had a sense that I really understood the course either.

Id. at 119.

[195] *Id*. at 105, 121.

[196] *Id*. at 134.

[197] *Id*. at 137–38.

[198] *Id*. at 134.

was planning his way back into the judiciary. With the selection of Colonel John J. Douglass as the Commandant of The Judge Advocate General's School, there would be an opening on the court down the road at Fort Riley, Kansas, a position Alley had been led to believe he would occupy upon graduation from Command and General Staff.[199] It was not to be.

U.S. Army Hawaii

In 1970, Alley was assigned to the U.S. Army Judiciary with duty at Schofield Barracks, Hawaii—not quite Kansas, but back on the bench nevertheless.[200] And what a bench it was. Built amidst the pineapple plantations of the mid-island Oahu planes, set against the backdrop of the Wainanae Range—the highest point on the island—and Mount Kaala, Schofield Barracks is justifiably considered one of the most picturesque and remarkable Army posts in the world.[201] At the time, the Army lacked the resources to fully reconstitute the 25th Infantry Division on Hawaii, and so the division consisted of a single Infantry brigade plus the Hawaii National Guard.[202] All of this made for a slow pace and a high quality of life; almost too good for the hard-working Alley.

> [I]n a busy month I might try ten cases and in an average month probably six to eight. . . . Nobody was checking up on my office hours, so at least two afternoons a week I went to the beach and played a lot of tennis, got to work late in the morning, and left early in the afternoon, and took long lunches, and after not too many months went by I got a little bit bored by that. So I wrote The Judge Advocate General [requesting to do other things]. Contract appeals, civil service dispute resolution—anything adjudicative, and you know—I never got a direct answer back. It just kind of hung in the air, even though I was told from time to time [they were thinking

[199] *Id*. at 135.
[200] *Id*. Alley remembers that he thought the assignment was "fabulous," a view not shared by his teenage daughter, who "broke into bitter tears—bitter tears—because she had assumed from [conversations] that we were going to stay at Fort Leavenworth, Kansas, which was so wonderful. How could it possibly be nice in Hawaii compared to this?" *Id.*
[201] *See generally* http://www.globalsecurity.org/military/facility/schofield-barracks.htm (last visited Dec. 8, 2011).
[202] Oral History (1st Session), *supra* note 9, at 136.

> about it]. I guess they were worried about the precedent.[203]

Instead, Alley found work throughout the Pacific region as a traveling judge in support of the judiciary in Alaska, Korea, and Vietnam. "As time went on I kept occupied and had a great time—just loved it. Who wouldn't?"[204]

VI. The Army Court of Criminal Appeals and *United States v. Calley*, 1972–1973[205]

Despite his best efforts, Alley would not linger long in the Pacific trial judiciary. As he memorably recalls:

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[203] *Id.*

[204] *Id.*

[205] United States v. Calley, 46 C.M.R 1131 (C.M.A. 1973). The Court of Military Appeals affirmed on December 21, 1973, United States v. Calley, 48 C.M.R. 19 (C.M.A. 1973), and denied a petition for reconsideration on February 4, 1974. The Secretary of the Army approved the findings and sentence of the court-martial on April 15, 1974. In a separate action, the Secretary commuted the confinement portion of the sentence to ten years. The President of the United States notified the Secretary of the Army on May 3, 1974, that he had reviewed the case and had determined that no further action would be taken. The U.S. Court of Appeals for the Fifth Circuit rejected Calley's *habeas corpus* petition on September 10, 1975. Calley v. Callaway, 519 F.2d 184 (1975). For an analysis of the legacy the *Calley* case and the My Lai massacre had on military justice generally, see Norman G. Cooper, *My Lai and Military Justice—To What Effect?*, 59 MIL. L. REV. 93 (1973). *See also* WILLIAM R. PEERS, SEC'Y OF THE ARMY, REPORT OF THE DEPARTMENT OF THE ARMY REVIEW OF THE PRELIMINARY INVESTIGATIONS INTO THE MY LAI INCIDENT (1970). *See also* WILLIAM R. PEERS, THE MY LAI INQUIRY (1979); Stanley R. Resor, Sec'y of the Army, *Official U.S. Report on My Lai Investigation*, U.S. NEWS & WORLD REP., Dec. 8, 1969, at 78–79; *Investigation of the My Lai Incident: Hearings Before the Armed Services Investigating Subcommittee of the House Committee on Armed Services*, 91st Cong., 2d Sess. (1970). It is worth noting that Calley was charged with common UCMJ violations: article 118 (premeditated murder) and article 134 (assault with intent to commit murder); he was not charged with war crimes. At the beginning of the *Calley* opinion, the court wrote that "all charges could have been laid as war crimes" and cited as support the Army field manual on land warfare. *Calley*, 46 C.M.R. at 1138 (citing U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 507b (18 July 1956)). Paragraph 507b itself is devoid of reference to black letter law on this point and states: "Violations of the law of war committed by persons subject to the military law of the United States will usually constitute violations of the Uniform Code of Military Justice and, if so, will be prosecuted under that Code." *Id.* Neither Calley nor the Army's field manual provides any further discussion on the amenability of U.S. personnel to trial by a military tribunal other than court-martial.

> I'm out in Hawaii plotting—how am I going to extend my three-year tour into a four-year tour having succumbed to the languorous pace of island life, having learned to like a month in which I'm only trying six cases, with occasional forays elsewhere. [Then] I received a call from Colonel Thomas Jones, administrative officer [to the Army] judiciary. . .[206]

The call was on behalf of MG Kenneth Hodson,[207] formerly The Judge Advocate General of the Army then serving as the Chief Judge of the Army appellate court. The subject was the *Calley* case currently under review, which was a matter of considerable interest both in and outside the Army requiring superior judicial expertise. Major General Hodson wanted the best, and Alley immediately came to mind. He recalls Colonel Jones explaining,

> I have been going through the UCMJ and we don't see anything whatsoever that would prohibit the assignment of a sitting trial judge to the [Army Court of Criminal Appeals] by designation paralleling the situation where a U.S. district court judge sits by designation on a U.S. Court of Appeals. General Hodson thought that you would do a good job on this case and he'd like to know would you take the appointment by designation to the ACMR for this case only?[208]

Brigadier General Alley responded with enthusiasm: "Love to—love to. I'm underemployed here and that will solve my problem of staying in Hawaii, but still having something to do."[209] So the court soon followed by sending approximately 50,000 pages of transcripts to assist him with the expected oral argument and associated proceedings.

But after about a month a second call came, again from Colonel Jones. The Judge Advocate General, MG George S. Prugh,[210] was

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[206] Oral History (1st Session), *supra* note 9, at 140.
[207] Major General Kenneth J. Hodson (1913–1995). The Judge Advocate General of the Army, 1967–1971; Chief Judge, U.S. Court of Military Review, 1971–1974.
[208] Oral History (1st Session), *supra* note 9, at 141.
[209] *Id*.
[210] U.S. Army, 1942–1975. *See generally* Lieutenant Colonel George R. Smawley, *The Past as Prologue: Major General George R. Prugh, Jr. (Ret.) (1942–1975)—Witness to*

increasingly concerned about the controversy surrounding the case and didn't want to create more issues with the designation of an appellate judge. Therefore, BG Alley was given a choice: remain in Hawaii and send the case materials back to the court, or agree to move to Washington and accept a formal assignment to the court with the understanding that he would sit on the *Calley* hearings. With barely a blink, Alley agreed to return to Washington.[211]

He formally joined the ACCA in July 1972. Oral arguments came in the spring of 1973, about the same time Alley was assigned a military commissioner named John T. Willis to assist with the case.[212] Willis, who was later extremely active in Democratic Party politics and served as the Maryland Secretary of State from 1995-2003, is given great credit for his extraordinary efforts and service in the preparation of the case and the timely publication of the opinion a few weeks after oral argument.[213]

A detailed case history of *Calley* is simply beyond the scope of this article. The facts of the case have been well reported, [214] and essentially concern U.S. Army Second Lieutenant William Calley's role in the March 16, 1968, slaughter of over 500 Vietnamese civilians at My Lai. Calley was ultimately convicted by military court-martial of "the premeditated murder of twenty-two infants, children, women, and old men, and of assault with intent to murder a child of about two years of age."[215]

Among the issues raised at trial and later upon appeal were whether Calley was justified in his perception that his actions were in response to the lawful orders of his superiors, that pre-trial media prejudiced his ability to receive a fair trial, and that certain instructions by the military judge, Colonel Reid W. Kennedy, violated his rights.

Insurgent War, The Law of War, and the Expanded Role of Judge Advocates in Military Operations, 187 MIL. L. REV. 96 (2006).

[211] Oral History (1st Session), *supra* note 9, at 142.

[212] *See generally* The Former Maryland Secretaries of State, at http://www.msa.md.gov/msa/mdmanual/08conoff/former/html/msa12062.html (last visited Dec. 19, 2011).

[213] Oral History (1st Session), *supra* note 9, at 144.

[214] *See* MICHAL BELKNAP, THE VIETNAM WAR ON TRIAL: THE MY LAI MASSACRE AND COURT-MARTIAL OF LIEUTENANT CALLEY (LANDMARK LAW CASES AND AMERICAN SOCIETY) (2002); DR. KENDRICK OLIVER, THE MY LAI MASSACRE IN AMERICAN HISTORY AND MEMORY (2006); DOUG LINDER, AN INTRODUCTION TO THE MY LAI COURTS-MARTIAL, *available at* http://www/law/umkc/edu/faculty/projects/ftrials/mylai/my1_intro.html (last visited Dec. 19, 2011).

[215] United States v. Calley, 48 C.M.R. 19 (C.M.A. 1973).

The trial court convicted Calley on March 31, 1971, and sentenced him to life in prison. The ACCA upheld the conviction on February 16, 1973; the CAAF concurred later that year on December 21, 1973. In a move widely considered political, the Secretary of the Army approved the findings and sentence of the court-martial on April 15, 1974, but by separate action commuted the confinement portion of the sentence to ten years.

From the appellate perspective, the *Calley* case was one of the court's most watched decisions in the Army's history and engendered considerable media and political interest within the tumult that consumed the nation during the final phases of U.S. involvement in Vietnam. The ACCA ultimately affirmed the court-martial of Lieutenant Calley, with Alley authoring the majority opinion. Looking back several years later, Alley viewed the convicted officer with disdain:

> I thought Calley was a person deficient in officer-like qualities who was dumber than the average guy; less well trained than the average guy; less will powered than the average guy; more child-like of a desire to please his superiors than the average guy; and without thinking at the time for a moment that he was legally justified, he slaughtered these people so as to win the approval of [his company commander] Captain [Ernest] Medina and if anybody had walked up to him and said "are you justified in doing this?" he would have said—"yeah," [but] that's beside the point. I think he did it and he liked it.[216]

Alley sat on the case as part of a three judge panel. The other two judges were Colonel Douglas Claus and Colonel William Vinette.[217] It was Alley's job to produce the draft decision which was circulated and adopted by the full panel. His reflections on the case and in particular how it was reported at the time are worth recalling, and afford an interesting perspective on the politicization of a dramatic crime during a polarizing period in American military history.

> Public discussion of the case, I think, reflected great misunderstandings of the facts. For example, in public

[216] Oral History (1st Session), *supra* note 9, at 144–45.
[217] *Id*. at 147.

discussions you kept encountering this: First, here is this guy in the horror of combat, fatigued and bled and so forth finally reaching his breaking point, etc. Well, Calley never had one day of combat—not one day. His platoon had been in operations and drawn fire and booby traps. He had never been with them when that happened and he was not a combat tried officer. [Certainly], there is a strain in being a platoon leader even if you never get shot at if you're serving in Vietnam, but he never got shot at. So I was highly critical of the press for circulating that when it was so wide off the factual mark.

Second, there were lots of editorial comments to the effect that since they were only examining the results in the My Lai cases, how come of all these people who have committed atrocities Calley is the only guy in the course of the war ever to be tried, convicted and sentenced for something like this? Well, now, that wasn't true. That was true out of the My Lai group, but it wasn't true out of the [Army's] experience of the war in general. Hell, I put all kinds of people away as a presiding judge.

Of course, the court members sentenced them, but for similar things as I mentioned and the other judges over there at the time had their share of lots and lots of convictions of people for this kind of thing. So Calley was not a scapegoat. The explanation for the differing verdicts in the My Lai trials is a very simple one. In some of the enlisted cases the defense of obedience to Calley's orders was a successfully invoked defense, and I think that [the] court-martial was very conscious about enlisted people and they'll buy that defense on the part of the average GI.

More legalistically, in some of the trials—I guess in fact in all of the trials before Calley's trial . . . there were only three or four—the presiding judge at trial ruled that the government could not offer the testimony of a witness where that witness had earlier been summoned to testify before a committee of the Congress and pursuant to its explicit constitutional authority the

> committee of the Congress had sealed that record and refused to make it available to the defense. Colonel Reid Kennedy [the military judge] in the *Calley* trial ruled to the contrary. He permitted the issuance of a subpoena to the custodian of the congressional records, who responded "no way."
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> But [Kennedy] said that first of all, this is not the Jencks Act because "Jencks" means ["]that which is available in the prosecution["] and this material is equally inaccessible to the prosecution as to the defense. You can't invoke the *Brady* case because God only knows what these people said to the Congress and the prosecution's responsibility is only to turn over exculpatory material and they can't do that if they don't know what it is. And in terms of any general due process right to the examination of other statements so as to assist in the preparation of cross-examination, "show it to me" says [Kennedy]. If you can't find it in *Brady* and if you can't find it in Jencks, it isn't there. So he permitted witnesses to testify when the other judges did not.
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> . . . In affirming [Kennedy] on that point—now . . . the court-martial is not an Article III court, but nevertheless its process ought to be treated as if it were. It should have the same independence. It should have the same sphere for decision-making, to the extent of its jurisdiction, as an Article III court. If you follow the point of view of the prior cases not permitting this list of witnesses to be offered at trial, that means that because of some political inspiration by a congressman, he [can] through his committee, schedule hearings, subpoena all the witnesses, take their testimony, seal the record and legislatively foreclose the trial; and in my opinion that was an impermissible violation of the principle of separation of powers. The result is essentially a legislative acquittal, and the difference of approach between Kennedy and the other [trial judges] explains a lot of the varying verdicts.[218]

[218] *Id*. at 148–51.

As for the court itself, Alley recalls enjoying the experience as one of the thirteen judges on the Army appellate court where he was the junior member and its only lieutenant colonel.[219] But Alley later acknowledged that he preferred the experience of being a trial judge—"in the mix with counsel and the excitement and intellectual rigor of watching the advocacy process unfold live, and to be a part of it."[220]

Still, there were interesting cases of huge institutional relevancy before the Army appellate court, and Alley readily acknowledged the role the court could have in shaping events and policy. Much to Alley's amazement, one such issue involved the Army's efforts to criminalize certain personal appearance and uniform issues for an Army at war. He recalls that

> I began to get hair cut cases and penny ante uniform cases, and it did make me wonder why the U.S. Army which began as a revolutionary Army and which wasn't doing well in combating other revolutionary Armies had become [a] kind of a Prussian Army. What was there about a haircut that was so important that we were willing to send people to prison because they didn't have the right haircuts? . . . It brought to mind—in Countess Longford's biography of Wellington, when he was in the Peninsular Wars—she wrote of an official of horse guards who came over and started criticizing the uniforms of Wellington's soldiers in the field who had been there a long time and had suffered a lot, and she quotes him as saying that Wellington replied, "Well, sir, you have descended from matters of effective discipline to mere nagging." [I thought] it just seemed like there was an awful lot of penny ante imposition of nagging type discipline that I could observe at Schofield Barracks . . . We were spending an awful lot of effort on trivia and destroying lives over trivia.[221]

[219] *Id*. at 146.
[220] Alley Interview, *supra* note 16.
[221] Oral History (1st Session), *supra* note 9, at 151–52.

VII. The First Military Judge Selected to Attend Senior Service College; Chief Trial Judge; Chief, Criminal Law, Office of The Judge Advocate General, 1974–1978

The Army, quite understandably, has long been an institution that rewards successful leadership of one kind or another in increasingly challenging hierarchal positions. For Army legal services, leadership generally manifests itself through assignments as a staff judge advocate or similar command counsel at the division, corps, or installation level, advising commanding generals and supervising large legal staffs,[222] or in similar supervisory positions within the Army JAG Corps itself. Judge advocates with proven leadership are highly competitive for advanced military schooling, including the senior service colleges.[223]

So, it was a bit surprising when, in 1974, The Judge Advocate General, MG Prugh, selected Alley—an officer who had never served as a staff judge advocate or similar command counsel—for attendance at the Industrial College of the Armed Forces (ICAF). This otherwise routine act of selecting a deserving officer for advance schooling was significant, because it was the first time a sitting military judge was identified as among the institution's key senior leaders. This was not lost on Alley, who suspected at the time that

> [B]y virtue of the Military Justice Act of '68 the judiciary was a statutory creature and it assumed greater importance in the JAG [Corps] because of the changes in the special courts-martial accomplished by the '69 [implementation] of the act. . . . Sitting on special courts vastly increased the judicial business and the importance of the judiciary in the JAG [Corps] scheme of things and I think General Prugh made his recommendation on the basis that, well, it's about time to recognize the judge. I was the first one…whose primary experience had been in the judiciary to be sent to the War College, and I think it was because of that.[224]

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[222] *See generally* U.S. DEP'T OF ARMY, FIELD MANUAL 1-104, LEGAL SUPPORT TO THE OPERATIONAL ARMY paras. 4-20 through 4-25 (15 Apr. 2009).

[223] These include the U.S. Army War College, the Industrial College for the Armed Forces, and the National War College, as well as the Navy and Air Force equivalents.

[224] Oral History (2d Session), *supra* note 9, at 28–29.

Although honored by his selection, it was not something he sought. "The decision that a person made then to have successive assignments in the judiciary meant that you were never going to be promoted to general. So if I'm not going to be promoted . . . I was already a colonel, [why] go to the War College?"[225] Nor, when he was finally enrolled in the resident course at the ICAF, did he particularly like it. Indeed, he considered it "the worst year [he'd] spent in the army" because the curriculum had little or no applicability to what he was interested in or what he was doing as a judge advocate.[226] Of course, that did not stop him from graduating on the Commandant's List and publishing a paper, *Determinants of Military Judicial Decisions*,[227] so the experience was not without quintessential accomplishment.[228]

By the time of Alley's graduation from ICAF in 1974, the Army had formally upgraded the Chief Judge of the service appellate court to a brigadier general billet, and he freely admitted that it was something he occasionally thought of over "a bourbon and soda."[229] Since his promotion in September 1973, it was Alley's view that he had effectively missed the time when he would be an appropriate selection for certain senior staff judge advocate positions.[230] It was no surprise, therefore, when TJAG returned Alley to the ACCA, confirming Alley's view that the war college selection was a gesture to the judiciary. He could not have been happier, recalling the U.S. Army Legal Services Agency *circa* 1974 as a "delightful place . . . with great atmosphere . . . a pleasant building . . . and the people there were fun."[231]

A. A Lonely Splendor . . . . Alley's Brief Return to the Trial Judiciary, 1975

Upon his return to the appellate bench, Alley noted some tensions between certain senior jurists and others in the JAG Corps. He attributed this to a misunderstanding of the roles and relationships between the

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[225] *Id*. at 32.
[226] *Id*. at 33.
[227] Wayne E. Alley, *Determinants of Military Judicial Decisions*, 65 MIL. L. REV. 85 (1974).
[228] Oral History (2d Session), *supra* note 9, at 34. Notes Alley, "Any lawyer who can write at all can write a paper that will absolutely dazzle the folks at ICAF." *Id.*
[229] *Id*. at 35.
[230] *Id*. at 36.
[231] *Id*.

military trial judiciary and its approximate peers in the civilian community, leading some on the court to assume an unattributed, defiant independence to the Army legal community.

> Military judges have a highly specialized function . . . . the worst things a military judge can do is to visualize himself as [an equivalent equal of] a real judge of a court of general jurisdiction because it's not the same thing at all, and the purposes are different.[232]

This, in part, led the Chief Judge at the time, BG Emory Sneeden, to seek out Alley as the future Chief Trial Judge for the Army trial judiciary and, perhaps, help make him competitive for the Chief Judge (BG billet) on the appellate court.[233] Both were well aware that Alley had not held a supervisory position in over eleven years; management of approximately 54 Army trial judges would change that.[234]

It is also worth noting that BG Sneeden was the first career judge advocate to be appointed to the federal court when President Reagan nominated him to sit on the 4th Circuit Court of Appeals, where he served from 1984-1986. Alley was the second.[235]

So in 1975, after a total of more than seven years in the judiciary, Alley assumed responsibilities as the Chief Trial Judge for the Army.[236] He relished the role. In particular, he strove mightily to recruit quality officers into the judiciary and made the case for service as a military judge:

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[232] *Id*. at 37.
[233] *Id.*
[234] OCU Interview, *supra* note 9, at 15.
[235] *Id*.; Alley Interview, *supra* note 16.
[236] Of his qualifications to serve as the Chief Trial Judge and his relationship with the other trial judges, Alley recalls:

> I'd had two assignments as a trial judge—including one in Vietnam. I'd had two interrupted assignments on [the Army Court of Military Review], and so relative to people who were senior to me in the judiciary, I think they regarded me as senior to them in experience. . . . I had a kind of a authority [and] platform that they would listen under the circumstances.

Oral History (2d Session), *supra* note 9, at 45.

> We are talking about two categories of people. For special court-martial judges who are quite senior captains and we hoped majors, I think they were attracted to the work and were dazzled by the title. By the time you get up to the senior lieutenant colonels, you'd better be a little more cynical than that and the appeal has to be in the nature of the work and a comparison of the advantages and disadvantages.
>
> [By comparison] A staff judge advocate is kind of a harassed guy in many ways and people call him up in the middle of the night, and he's off in the field, and his time isn't his own and he has to cope with stuff - frequently a staff who takes very different positions on things and so forth. I think an SJA's life is a pretty tough life, and I tried to present the judgeship when recruiting people in this kind of a life of lonely splendor . . . you never get a call from the Provost Marshal at midnight; you don't have to hustle over and see the general; the time is your own and the independence and the fascination of the work are advantages that make up for whatever disadvantages there are. . . . [To senior officers near retirement he would say. . .] Wouldn't it be fun to just give it a flyer for a couple of years?[237]

Alley was convinced that the Army JAG Corps did well by its judges professionally, and avoided the untenable situation where general court-martial judges felt concerned about the career implications of certain decisions or rulings. Still, he favored the idea of fixed tenures or appointments for military judges for a period of years to give them the confidence to learn their trade unencumbered by the idea that someone somewhere was second-guessing their work in unconstructive ways.[238]

Detailing himself to cases in Panama and the Southwestern United States, Alley reveled in the return to trial work and the chance to coach and mentor other judges. But it did not last. In the summer of 1975, Alley got the call from The Judge Advocate General, MG Persons, that the Chief of the Criminal Law Division, Office of The Judge Advocate General, had unexpectedly announced his retirement and that a

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[237] *Id.* at 39–40.
[238] *Id*. at 46.

replacement was needed almost immediately. Alley was chosen to fill the billet—one of the JAG Corps' most significant and prestigious—but a far cry from the judiciary he had come to enjoy so much.

B. Chief, Criminal Law Division, Office of The Judge Advocate General, 1975–1978

The move from the U.S. Army Legal Services Agency over to the Pentagon was sudden, but smooth. Alley remembers that the office was populated by a team of some of the Army's most gifted and energetic attorneys including: Thomas Murdock, James Kucera, John Bozeman, Michael Carmichael, Thomas Culman, Charles Giuntini, James Gravelle, James Smith, and Michael Cramer. Most went on to have distinguished careers as staff judge advocates and judges, and many had equally distinguished careers after leaving military service. Alley recalls that "if you have people like that, it's going to be a good division, and it was. It was an outstanding organization."[239]

Alley was just as enthusiastic about the JAG Corps leadership at the time, in particular his relationship with The Judge Advocate General, MG Wilton Persons, from July 1, 1975, through June 30, 1979. He remembers MG Persons as

> [A] man of wide interests . . . who read a lot and was attentive to culture and so forth, and whenever I got in there, why, we'd sit down and talk at length about matters other than the business at hand and his schedule would get behind and his secretary would be mad and so forth, but I found General Persons to be probably the most cultivated and broadly educated man in the Pentagon and it's a shame that the boss is the guy that's so busy and you can't just sit around and chew the fat with him.[240]

As for the job itself, Alley freely acknowledged that "the bulk of the work was response to correspondence—congressional complaints about courts-martial and staff papers that [float] around the other agencies in

[239] *Id*. at 54–55; *see also* Alley Interview, *supra* note 16.
[240] Oral History (2d Session), *supra* note 9, at 55.

the Pentagon . . . just putting out fires."[241] But he was quick to realize the potential the office had for meaningful contributions to the institutional JAG Corps and the general practice of military law.

One of Alley's first actions was the staffing of a short paper advocating the removal of The Judge Advocate General from the decision-making process of which cases from the Army appellate court made it to publication. Until then, the Office of The Judge Advocate General (OTJAG), Criminal Law, would review, on a weekly basis, the decisions from the ACCA and recommend to The Judge Advocate General which ones should be included in the published reports. Having served on the court, Alley opposed this as "intrusive on the proper independence of the judiciary," and the consequence of the change had "some profound implications on the way the judiciary regarded its own opinions."[242]

Of even greater enduring institutional importance was the role Alley played as Chairman of the Joint Services Committee on Military Justice. The Committee is comprised of the respective chiefs of criminal law among the military services and one non-voting representative each from the Office of the Department of Defense General Counsel and the Court of Military Appeals [now the CAAF] which collectively develop and coordinate policy proposals deemed important by the military services. The Committee also works to keep the UCMJ and the Manual for Courts-Martial current with respect to developments in both military and civilian jurisprudence.

As happened to be the situation at the time, the uniformed services and the Chief Judge of the Court of Military Appeals, Albert B. Fletcher, Jr., had competing legislative proposals that would significantly alter the nature and delivery of military justice.[243] It fell on Alley to manage the differences between the two.

One interesting idea championed by the Secretary of the Army and MG Persons concerned amending certain rights to counsel for non-judicial punishment when instituted in a designated combat zone, or else

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[241] *Id*. at 57.
[242] *Id*. at 57–58.
[243] *Id*. at 58–60. Albert B. Fletcher, Chief Judge of the Court of Military Appeals, April 3, 1975, to September 11, 1985. *See generally* www.armfor.uscourts.gov/judges.htm (last visited Dec. 8, 2011).

elect to decline the Article 15 and demand trial by court-martial. Alley endorsed the idea:

> [I]n any hostile fire zone or [Secretary of the Army] designated isolated area of service, the Article 15 rule would be the same as for a person on a vessel; in Vietnam it was so hard to Article 15 a guy it was ridiculous. But for some reason . . . the Navy and the Air Force were just kind of reluctant to buy that.[244]

Another idea endorsed by both the Army and Chief Judge Fletcher concerned the establishment of general courts as courts of permanent existence rather than *ad hoc* tribunals. Alley remembers that the other services "reacted with horror" at the idea:

> [B]ut then the Air Force TJAG, General Hague, got to thinking about the Air Force organization of its judiciary and when you really come down to it their courts, because they had less business, were [already] courts of permanent existence. Their courts were organized in teams, with a judge, and a judge's assistant and a trial and defense counsel co-located, and . . . if you could iron out some technical problems, why, it looked like what they already had.
>
> I thought it was a very advantageous proposal from the standpoint of justice administration; . . . the Navy, however, fought the idea bitterly. . . . [P]eople got upset about this idea of a permanent court because the next thing you know they'd be issuing writs and letting people out of jail and again acting like an Article III judge, presumptuously taking motions out of time and all that sort of thing.
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> From my standpoint it would have been a tremendous advantage in the disposition of work if a trial judge could hear motions before a case was referred to trial. Can you imagine how that would ease the referral

[244] Oral History (2d Session), *supra* note 9, at 60.

> decision? . . . But when General Persons . . . left[,] the Navy scuttled the idea . . . just vetoed it.[245]

C. Development of the Military Rules of Evidence

One of Alley's proudest initiatives to come out of the Joint Services Committee during his time there was the development and implementation of the Military Rules of Evidence (MRE).[246] Up until that time, under UCMJ Article 36, military practice was required to conform to the extent "practicable" to the Federal Rules of Evidence, but nothing more.

As the Chairman of the Joint Services Committee in 1975—the same year that President Ford signed the legislation establishing the Federal Rules of Evidence—Alley worked diligently to achieve a consensus among the military services regarding a parallel simplification of the evidentiary rules for the uniformed services. As then-Major Fredric Lederer, a member of the working group, recalls, Alley felt the project:

> [W]ould achieve three separate goals: first, it would meet the Article 36 requirement that [the military] generally apply federal rules; second, it was a discrete project that could be accomplished in one year's concerted effort, establishing a pattern of work that the Joint Service Committee could carry into the future; and third, the efficiencies in trial practice generated by the new rules would demonstrate to the services the benefits of serious attention to the law reform on a sustained basis.[247]

Lederer goes on to state:

> Colonel Alley's instructions not only made pragmatic sense, they incorporated a fundamental philosophical position:

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[245] *Id*. at 61–62.

[246] *See generally* Lieutenant Colonel Fredric Lederer, *The Military Rules of Evidence: Origins and Judicial Implementation*, 130 MIL. L. REV. 5 (1990). Lederer currently serves as Chancellor Professor of Law at William and Mary Law School. He served as one of the co-authors of the Military Rules of Evidence in his capacity as the Army's representative to the Joint Services Committee on Military Justice Working Group that developed them.

[247] *Id.* at 11.

> military evidentiary rules should be as similar to civilian law as possible. Military evidentiary law as found in the Manual for Courts-Martial had begun as nearly identical with the prevailing civilian federal law . . . Nevertheless, the process of incorporation of case rulings without periodic systemic revision had created a wide gap between civilian and military practice in some areas, a gap that the advent of the Federal Rules of Evidence broadened considerably. Colonel Alley intended not just that the codification reflect the Federal Rules of Evidence, but that all *future* military evidentiary law echo it as well, unless a valid military reason existed for departing from it.[248]

The new MRE were issued by President Carter in 1980. More than twenty years later, this effort remains widely recognized as a seminal development in the advancement military jurisprudence. Indeed, during a 1987 speech to the annual All-Services Military Judges' Conference, the General Counsel for the Department of Defense, H. Lawrence Garrett III, commended Wayne Alley as the "godfather" of the Joint Service Committee for the way in which he was able to move the Committee to achieve highly significant and lasting institutional results.[249] Alley justifiably regards the project to codify the MRE as his principal contribution during his tenure as the Chief of the Criminal Law Division and Chair of the Joint Services Committee on Military Justice.[250]

Finally, although the idea was born of MG Person's own vision and persistence, Alley spearheaded the effort leading to the establishment of the Trial Defense Service (TDS). Under his leadership, the Criminal Law Division conducted the various staff studies and managed the coordination within and between the stakeholders on the Army staff, including the Deputy Chief of Staff for Personnel (G-1) and the Army General Counsel.[251]

The TDS concept entered field testing in Europe in 1978, Alley's final year on the Army staff, and lasted until 1980. It was an immeasurable success then, and remains so today. It is a lasting

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[248] *Id.* at 14.
[249] The verbatim transcript of the presentation can be found in H. Lawrence Garrett, III, *Reflections on Contemporary Sources of Military Justice*, ARMY LAW., Feb. 1987, at 38.
[250] Oral History (2nd Session), *supra* note 9, at 63–64.
[251] *Id*. at 65.

testament to the vision of MG Persons and the creativity and determination of officers like Alley, who were the midwives to one of the Army's greatest institutional contributions to fair and professional exercise of military justice.

VIII. United States Army Europe

Following three exceptionally productive years on the Army Staff, Alley again received short notice of his next assignment as the Judge Advocate (the senior staff judge advocate) for United States Army Europe (USAREUR), headquartered in Heidelberg, Germany.[252] Despite only about two weeks' notice of the new assignment, it was a welcome event both personally and professionally. Alley had recently remarried; his second wife, Marie, was a German native who had immigrated to the United States in 1961, and was enthusiastic about the prospect of returning to Europe.[253] It seemed like the perfect fit, albeit a disquieting one for an officer who had never before served as a command legal counsel:

> A person who had been a staff judge advocate and who had been through those experience daily—going over to the commanding general and so forth—probably would have accepted this [position] without a blink, but I had never had those experiences. I'd never worked for a [non-JAG] general officer—ever, and all of a sudden here it's a four-star [commanding general] . . . So there were some anxieties; in fact a very high degree of anxiety. I'd never served in Europe. Imagine, I'd never been an SJA and never served in Europe. Put those two together and I'm the [senior] SJA in Europe.[254]

The USAREUR Combatant Commander in Europe at the time was General George Blanchard.[255] The services provided by the USAREUR Judge Advocate's office were far-ranging, but principally concerned just about everything that was new to Alley, including international affairs,

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[252] *Id*. at 78.
[253] *Id*. at 81.
[254] *Id*. at 83.
[255] *Id*.

contracting, and administrative and fiscal law.[256] Working closely with so many non-lawyers was also something relatively new, and the cast of characters was rich, including:

> [A] guy named General Crizer who came there with the reputation of really being a fearsome, smoke belching dragon. Actually a wonderful man . . . and the Chief of Staff, a man named Richard Groves—the son of General Leslie Groves who was the administrator of the Manhattan Project—a hard-driving "we'll do the job at all costs; lawyers are obstructionists; don't tell me no, and anyway I don't like your whole profession" kind of guy.[257]

Despite his generally good and productive relationship with General Blanchard, it was not without challenges. One example of the sort of issues staff judge advocates work through was Blanchard's initiative to turn USAREUR into a lighter, highly mobile fighting force with logistical responsibility exclusive to war-fighting units. Known as "USAREUR an Army Deployed" (UAD), the idea was to shift most other logistics and community sustainment functions to the host nations.[258] Alley recalls, with a bit of disdain, the enormous legal and practical complexities of executing the UAD concept:

> And so we would get rid of our civil servant[s] and we would contract out and we would relinquish our bases and we would get Germans or other people to contract our schools and would be nothing but a lean fighting force, and gee we had treaties, we had contracts, we had this, we had that, which you just couldn't shake.[259]

Perhaps Alley's greatest frustration, and the leading detractor for his overall professional satisfaction as the USAREUR Judge Advocate, was the strategic theory of defense against the Communist Warsaw Powers whereby European-stationed units would hold the defensive line long

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[256] *Id*. at 84.
[257] *Id*. Alley warmly remembers Crizer's successor, MG Robert Haldane, as a "genuine war hero" he knew fifteen years before and "who was a gem of a Chief of Staff—effective and supportive." Telephone Conversation with Brigadier General Alley and the author (Sept. 8, 2010) (notes on file with author).
[258] Oral History (2nd Session), *supra* note 9, at 86.
[259] *Id*.

enough for reinforcements to fly from the continental United States and then fall in on existing stocks of equipment—a program known as the Prepositioning of Materiel Configured in Unit Sets, or POMCUS.[260] Alley considered the entire strategic concept completely unworkable.

> [T]he screwiest thing I ever heard. . . . absolutely preposterous. For one thing, the notion that the POMCUS stocks would be undisturbed [was unrealistic]. [We] were worried that they would be bombed. Well, if that happens, then we'd go and use host nation equipment. That's just not going to happen . . . you'll have rioting Germans. You're going to have civil disturbances and sabotage and fifth column. Well, let the German police take care of that. Well, they can't take care of it. I mean it was absolutely ridiculous, and yet most of my professional life for three years [at USAREUR] was devoted to the care and feeding of the POMCUS concept, the acquisition of real estate and base rights agreements. The lack of professional satisfaction was that I didn't think it was toward an end that I could believe in at all.[261]

By contrast, one thing he did believe in—and perhaps his greatest success in USAREUR—was his enduring contribution to the establishment of the NATO Mutual Support Act of 1979,[262] consolidating and simplifying inter-governmental acquisition procedures. Alley traveled to Washington, D.C., and worked with a Senate Armed Services Committee staffer named Tom Hahn, and together with the Office of the Deputy Under Secretary of Defense for Policy, worked on a bill for introduction to the Senate.[263] Hahn later requested that the Department of Defense provide a senior USAREUR officer schooled in the legal and logistical implications of the proposed statute to testify before the Armed Services and Foreign Affairs Committees, which Alley did.[264]

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[260] *Id.* at 87.
[261] *Id.*
[262] North Atlantic Treaty Organization Mutual Support Action of 1979, Pub. L. No. 96-323, 94 Stat. 1159 (1980) (currently known as the Acquisition and Cross-Servicing Agreement (ACSA)).
[263] Oral History (2d Session), *supra* note 9, at 90.
[264] *Id.*

The final legislation provided simplified authority for acquiring NATO support in exchange for cash or in-kind replacement of equipment, and authorized the U.S. government to enter into agreements with NATO allies and subsidiary organizations to provide support free of many of the myriad domestic conditions, controls, and complexities otherwise present in the government contracting system.[265]

A. Promotion to Brigadier General, September 1, 1979

Commensurate with Alley's assignment as the USAREUR Judge Advocate, the Army made a key change to its manning structure for the USAREUR staff that upgraded the rank of the position from colonel to brigadier general. Alley arrived in August 1978; the billet was upgraded that November and a promotion selection board was convened the same month.[266] Shortly thereafter, in January 1979, he received a telephone call from MG Persons informing him that the selection board had selected three judge advocate officers for promotion to BG—Hugh Overholt,[267] Richard Bednar, and Wayne Alley.[268]

Alley recalls that "as is true for most matters of mere status, you know, it's a great thrill. It was the greatest thrill of my life up to that point for a few days and then it just kind of ceased to have any significance . . . [*sans* my daily work] . . . and that I started getting invited to [general officer parties]."[269] Looking back, despite sterling performance reviews and casual conversations with superiors about his general officer potential, Alley never convincingly felt as though either his career pattern or personal ambition would lead him to flag officer status:

> [A]t no time [as a military judge] did I ever have any particular ambitions to be a general officer. I had been around the Pentagon enough to have made the observation it didn't look like a particularly good job. . . .[270]

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[265] *Id*. at 88–91.
[266] *Id*. at 92.
[267] *See generally* Smawley, *supra* note 88, at 309.
[268] Oral History (2nd Session), *supra* note 9, at 94.
[269] *Id*.
[270] *Id*. at 32.

B. USAREUR as a Test Site for the Trial Defense Service, 1978–1980

Having earlier played an important role in shepherding MG Person's vision of a formalized, institutionally distinct criminal defense bar, Alley also derived particular satisfaction as the USAREUR Judge Advocate in securing Europe as the test site for the future Trial Defense Service. His association with the idea was well known by SJAs throughout Europe, and perhaps for that reason Alley thought that they "would be too tactful to raise hell about it."[271]

An officer by the name of Kevin McHugh was selected to serve as the supervising USAREUR defense counsel, with three subordinate regional senior counsels.[272] During an early conference with all USAREUR SJAs (where some initially "wished the whole thing would just blow away")[273] the principal concern was the carving and allocation of personnel from existing SJA staffs to create the new TDS offices. In particular, Alley and others were concerned that subordinate SJAs would inadvertently undermine the process by keeping their best and brightest at home while offering up others to serve in the new TDS billets:

> At the conference [COL Bob Clark] said, and I certainly reinforce this, that the recipe for disaster is for the SJAs to contribute their weakest and worst. . . . I [agreed] that it is going to be a personal disaster for [the SJAs] because your weakest and worst you have some control over now, and if [they] go into TDS and you have no control over them they are going to give you more fits than you can imagine.[274]

A key hurdle for the nascent TDS came shortly after the test program got underway, when unlawful command influence allegations resulted in the retrial of over 100 cases out of the 3rd Armor Division. Alley recalls that "we just had to make a theater-wide sweep of defense counsel to go up there and service [those cases], and with TDS it was a snap—just automatic." The alternative without TDS would have been for the SJA at the time, LTC William Eckhardt, to either detail the large number of

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[271] *Id*. at 99.
[272] *Id*. at 100.
[273] *Id*.
[274] *Id*.

counsel required from his own staff, or seek some sort of assistance from other SJAs.[275] With TDS, Alley recalls,

> [M]ysteriously people showed up to defend [the] cases and get them off his books. Thereafter, the program had a high degree of acceptance. I think there was such careful selection at the Regional Counsel [level] and such good and close cordial relationships between those people and the SJAs that a successful program like this started.

So in the end, despite some disappointing efforts by a few SJAs to shed from their offices less competitive officers into TDS, organization and manning of TDS in Europe got underway with real leadership from LTC Kevin McHugh and strong and capable judge advocates at every tier of the USAREUR organization. The Army's experiment with a semi-autonomous defense service was an absolute success.

C. Legal Obstructionism: A Lesson for Integrating Lawyers Early and Often

One of the first things Alley encountered as the USAREUR Judge Advocate were certain key leaders who were almost physiologically predisposed to think of lawyers as obstructionists—there to tell them "no" rather than contribute constructively to practical problem-solving. This was most often the case in complex procurement and fiscal law matters where projects had been planned and assumed in advance of legal review, which found them wanting for legal sufficiency.[276]

Alley's observation was that these criticisms were not entirely unfair, and that "there was a little something to the proposition that some lawyers are more obstructionist than they have to be."[277] When staff attorneys provided adverse opinions on matters of significant import to the command, it became apparent that the desired end state often could be achieved by different means. Additionally, failure to identify an alternative for the command was often a function of poor integration: lawyers who failed to get into the planning process early enough to

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[275] *Id*. at 101.
[276] *Id*. at 97.
[277] *Id*.

influence and shape law or policy. Alley advises lawyers, along with the staffs they serve, to integrate into any process as early as possible:

> [I]t's one thing to get an accomplished fact [legal] concurrence. You have to say yes or no. It's another to be involved in early planning where you can say when you come to these forks in the path, then we can keep you on the fork which will be trouble-free; and the only reason why you've detected legal obstructionism is timing.[278]

D. Support to African-American Soldiers Denied Access to Public Accommodations

One of Alley's important initiatives as the USAREUR Judge Advocate concerned support to African-American soldiers who were discriminated against by local European businesses. The problem came to his attention while he was placing a renewed emphasis upon substantive, programmatic improvements to the Black History Month activities, including the integration of a qualified historian to present the actual history of African Americans.[279]

Through this, Alley learned that African American soldiers had been denied entry to certain guesthouses and related establishments in Germany and elsewhere. So he had his administrative law office research the availability of funds normally used to hire host nation civilian defense counsel for soldiers being tried overseas. The question was whether the same authorization of money could be used to hire civilian counsel to pursue civil cases under local law for discrimination.[280]

The research quickly revealed that the authorizing statute simply said that the money was available to represent service members in overseas courts, and that the Secretary of Defense had discretion on how the fund was used.[281] So Alley forwarded a proposal to the Pentagon with a recommendation that the Secretary allow the money to be used to allow soldiers to hire local counsel to essentially sue discriminating businesses

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[278] *Id*. at 97–98.
[279] *Id*. at 103.
[280] *Id*. at 104.
[281] *Id*.

under the law of the host nation. His efforts garnered the endorsement of the Army, the U.S. Ambassador to Germany, the Justice Department's overseas litigation office, and finally from the Department of Defense General Counsel.[282] Alley recalls:

> [W]e finally got approval to use the funds for this purpose, and [the test case] was settled. [I was then] able to announce through German [channels] . . . that here is something to inform the good citizenry of your area, and that these cases are now going to be financed by the Army; and they just began to fritter away. I think that did a lot of good.[283]

E. Early Retirement from the Army

In the middle of his first assignment as a senior command legal advisor, BG Alley decided that it would also be his last. In the summer of 1980, after almost a quarter century of military service, he quietly began to notify friends and superiors of his surprising decision to retire the following year. His consideration was serious and thoughtful, and the reasons both professional and personal.

As noted earlier, Alley had worked among general officers before becoming one, and despite the obvious allure of the highly visible status and accordant vestiges of authority that go with flag status, the reality of what they actually *did* never captured his imagination as something particularly attractive. He observed,

> [W]hen I was at the Pentagon in the Criminal Law Division I had a great time. I enjoyed the work, I enjoyed the people. I disliked the Pentagon as a place, as most people do, but that's minor. We did enjoy living in Northern Virginia, but I didn't want to go back. . . . [I] thought that being Chief of a division there was the highest level which one can serve in the Pentagon and enjoy it. . . . [M]y boss didn't seem to have any fun. I couldn't see that TJAG and the rest—except General

[282] *Id*. at 104–05.
[283] *Id*. at 105.

> Williams, he always had fun everywhere—just didn't seem to like their work much.[284]

Alley was also dispirited by the prospect of working for certain members of the Judge Advocate General's Corps leadership.[285] But more important than the Pentagon or its personalities was the simple fact that for more than a decade he had privately thought that the best thing for him to do was retire while he was still young enough to have a second career beyond the military. In 1981, at age forty-nine, he had reached that milestone—without regret.[286]

> Not one—not one moment—nor any regrets of having served as long as I did; that is, I certainly would never want to be interpreted as leaving the Army with a feeling that it had let me down or that I had anything negative to say about it. It was superb. . . . The fact that it does come to an end when you are a relatively young man or woman is one of the strongest features of it.[287]

Almost thirty years later at Schofield Barracks, in a well received leadership lecture to the Army judge advocates, paralegals, and civilian legal professionals of Hawaii, Alley recalled with genuine humor and nostalgia his military service.[288] Despite all that would follow as a law school dean and federal judge, he forever considered his "real career" as that of a soldier and military jurist. "It was just the most wonderful personal and professional experience of my life. I commend it to anyone interested in intellectual pursuits, the almost indescribable sense of camaraderie, and the opportunity for adventure so hard to find in our profession of law."[289]

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[284] *Id*. at 111.
[285] *Id*. at 109–10, 112–16. Alley would have returned from Europe at the mid-point of MG Alton H. Harvey's tenure as The Judge Advocate General, and for personal reasons decided he did not want to work for him. *Id*. at 112. As it turned out, MG Harvey retired early on July 31, 1981, succeeded by MG Hugh L. Clausen (TJAG, August 1, 1981–July 31, 1985).
[286] *Id*.
[287] *Id*. at 117–18.
[288] Major General Wayne E. Alley, Address to U.S. Army Pacific Judge Advocates, Paralegals, and Civilians: Leadership—Military, Academic, and Collegial (29 Apr. 2010) [hereinafter Alley Leadership Lecture] (notes on file with author).
[289] *Id.*

IX. Dean, Oklahoma University School of Law, July 15, 1981

> *"The developed mind can part the shadows of chaos, disorder, and confusion to create a vision and pursue it with conviction, keeping the organization on the proper azimuth to achieve its purpose."*[290]

There is a career point at which many accomplished professionals lose the motivation to remain fully engaged in their chosen field, preferring instead to gravitate to a much deserved established reputation as an expert in their field and ease into a life of pedestrian-paced interests, ventures, and social relaxation. Not Wayne Alley.

Early on in his retirement planning, Alley had made the decision to seek an academic appointment more than two and half decades after he had once abandoned the idea of "[t]he contemplative life of the mind, surrounded by admiring students. . .".[291] He seamlessly transitioned from one to the other, and recalls simply that after "a long terminal leave—a terrible phrase, incidentally—we came to [Oklahoma] and I started working [at the Oklahoma University Law School] on 15 July 1981."[292]

But that road to Oklahoma from Heidelberg was also quite long. Like most other aspiring academics, Alley registered his resume with the Association of American Law Schools (AALS), for both administration and faculty positions.[293] These were distributed nationally to law schools seeking to fill various positions, and while he was able to avoid the AALS's annual hiring conference in December 1980—a "meat market," as Alley recalls—he was still required to interview with interested institutions.[294] From Heidelberg, he recollects now

> [S]elect[ing] from those people who were willing to see me—the American University, University of Virginia, Oklahoma University, Wake Forest, University of Pacific [McGeorge School], Southwestern in Los Angeles, Whittier, and the University of San Diego. Those eight places. So I came out from Heidelberg,

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[290] KOLENDA, *supra* note 11, 24–25.
[291] Oral History (2d Session), *supra* note 9, at 117–18.
[292] *Id*. at 118.
[293] *Id*. at 118–19; Alley Interview, *supra* note 16.
[294] Oral History (2d Session), *supra* note 9, at 119; *see also* Alley Interview, *supra* note 16.

> arriving in the states on a Saturday and I started with the American University . . . and just worked across the country in a two-week period, which believe me is a blur.[295]

In the end, five of the eight schools prepared to welcome Alley to their faculty when he decided to accept the offer made by his first preference—the Oklahoma University (OU) School of Law. Despite his preference for a professorial position, the University offered, and Alley accepted, the deanship of the law school:

> They got to my ego. You know, it's a nice title . . . One of the most flattering things in the world is to be told "we need you" and I heard that informally from some of the faculty members when I was there, and that was very strong in my [decision]. As the President [of the University, Bill Binowski] regarded it, the law school had been led by persons of superior scholarship which wasn't the need. That the leadership and setting goals, and motivating, and unifying and so forth, those were the needs which the University administration thought would probably not be satisfied by someone coming out of an academic background. So OU, they got to me. They presented a challenge and said that I had a background that fit their needs . . . [296]

Much of what the University saw in Alley was his demonstrated ability to help the law school achieve its institutional purpose—the preparation of superior lawyers for the practice of law in the state of Oklahoma, and to do so in the sober fiscal environment Oklahoma faced in the early 1980s when the predominant oil and gas industries nearly collapsed, along with the tax revenue they generated.[297] He recalls, "It may have been fortunate for OU that someone who had gone through the

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[295] Oral History (2d Session), *supra* note 9, at 120–21. A brief highlight of the trip came following the interview with American University, when a cab driver, having learned that Alley was retiring from the Army, made a curious but well meaning pitch extolling the many virtues of driving a cab as the ideal post-military retirement career, including walking Alley through the cab drivers' exam, providing the answers and identifying the trick questions, and offering his personal assistance to get him a job. It was the only effort anyone made to move him in a direction other than academics. *Id.* at 121–22.

[296] *Id*. at 126.

[297] Alley Interview, *supra* note 16.

experience of cuts . . . in the Army served at that time because in the University no one had ever experienced that, and it can lead to panic."[298] As any private or public leader will attest, "there is probably more intricacy in the management of austerity than in management of prosperity."[299]

Even so, despite restrained resources, Alley's leadership as the Dean of the OU Law School was well received by faculty and students alike and resulted in a number of important program and curriculum developments. Among them was a determined focus upon the moot court and forensic advocacy programs. Outstanding coaches and dedicated students were afforded the attention and opportunity to develop and demonstrate advocacy skill on an expanded scale, leading to regional and national championships and a genuine "morale stimulant" for the entire university.[300] It also assisted in the development of a group of superbly self-motivated students, nurturing an imagination for the art and science of litigation that endured throughout their careers.

Under Alley's direction, the law school also made a concerted effort to recruit high quality minority students, with lasting results.[301] It was clear to him from his experience in the Army that any worthwhile institution had to reach out to non-traditional groups for recruiting and matriculation. The potential and professional talent resident within minority groups for advanced study and career leadership at all levels was simply too great to ignore.[302]

In keeping with his own long-developed views on excellence in education and learning, Alley worked extremely hard to fortify a culture of academic excellence among the OU law faculty. He did so by restructuring the grant program for summer research projects, mostly involving writing. Rather than broadly distributed grants of modest amounts, the law school began a program of far fewer awards but of considerably larger pecuniary value: as much as three times more than in previous years. Alley made it worth their while and rewarded performance, and was unapologetic that the money would only go to the best people on merit alone.[303] The scholarly output that resulted during

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[298] Oral History (2nd Session), *supra* note 9, at 128.
[299] *Id.*
[300] *Id.* at 129.
[301] *Id.* at 130.
[302] Alley Interview, *supra* note 16 (notes on file with author).
[303] Oral History (2d Session), *supra* note 9, at 130.

this period was exceptional, and included significant work by Fred Miller and Alvin Harrell on the Oklahoma payments code, Joseph Long on Blue Sky Law, Mack Reynolds on local government law, and Frank Elkouri on arbitration. Alley recalls that these, and other works, "constituted the national standard [in] their field."[304]

Along the same lines, and perhaps the greatest legacy Alley left at OU, was the highly regarded legal writing program developed by retired Army Colonel Robert Smith. Smith had led the writing program at the U.S. Army Command and General Staff College at Fort Leavenworth, Kansas, and was recruited by Alley to do the same at the law school as the director of the legal research and writing program.[305] Alley remembers the resistance from some on the faculty on the grounds that Smith was a personal friend and that the appointment was unseemly for the appearance of personal favoritism.

> When [Bob Smith] came down we had of course faculty meetings . . . and there was carping and griping and [allegations of] cronyism and God damn it, is this going to be . . . another Fort Leavenworth. And I kept telling my friends and colleagues on the faculty that this *is* cronyism. It is blatant cronyism. There is no question about it, but there are capable cronies in this world [a]nd think about this—this guy is going to come here . . . to do something that nobody else wants to do. Ah. . . . By the time we go around to the faculty hiring meetings the next winter . . . [Bob Smith] was the first choice of all faculty members but one.[306] His program is now studied by many other schools for adoption and the legal publisher Butterworth is publishing all his materials commercially. . . .[307]

Additional accomplishments during Alley's tenure included increased fundraising ("a six-or seven-fold increase"), cultivation of alumni programs, development of clinical programs, and the establishment and resourcing of a number of professorships.[308] In all, the

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[304] *Id*. at 131.
[305] *Id*.
[306] *Id*. at 133 (emphasis added).
[307] *Id*. at 134.
[308] *Id*. at 134–35.

four years BG Alley and his wife Marie spent as an integral part of the OU community was highly rewarding and each remembers their time there with a sense of exceptional personal and professional loyalty that continues to this day.[309]

Part of that loyalty is due to the friendships that were forged from the tight fiscal constraints imposed on the school, many begun and developed through the active social life Alley and Marie engendered during his time at the school as a way to build relationships, mitigate conflicts, and help the faculty feel enfranchised. Alley recalls with humor a conversation he had with a fellow law school administrator regarding his approach to the faculty.

> I was at an [American Association of Law Schools] meeting when someone came up and said, "Gee, I understand the financial position of OK is desperate. What can you do for faculty morale under those circumstances?" An answer just popped out, and it was right—I said, "Free booze and shameless flattery. That's what you can do." So we had a lot of parties.[310]

Despite the fiscal challenges Alley experienced during his tenure, it nonetheless proved a special time to a man who decades earlier considered a life in academia, and allowed him to exercise his natural intellectual curiosity for learning with the practical leadership observed during his military service. He was able to move the profession forward through the education and preparation of a new generation of attorneys reflecting—to the degree to which deans can affect such things—his priorities for diversity, scholarship, legal writing, and the enduring institutional framework to support them into the future. In perhaps the final major chapter in an otherwise remarkable professional life, Alley would soon see the fruits of that new generation when he left the University after four years to his return to the sagacious life of the judicial bench.

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[309] Alley Interview, *supra* note 16.
[310] OCU Interview, *supra* note 9, at 20.

X. U.S. District Court for the Western District of Oklahoma

Coincidences played a large part in my life. I think [they] do for everybody. . .[311]

A. Appointment to the Federal Bench

Brigadier General Alley never really imagined he would return to the judiciary almost exactly ten years after departing as the Chief Trial Judge for the U.S. Army in 1975. He remembers, "It just wasn't something I thought would happen, as though it was a great chapter in my life forever closed. Until, completely unexpectedly, the opportunity arose once again through relationships forged as the OU dean."[312]

As Article III judges, federal district courts are filled through nominations by the President with the consent of the U.S. Senate. They are lifetime appointments.[313] Individuals come to the attention of the President through a number of means, quite commonly by the suggestion of U.S. Senators for vacancies arising in their states. Political affiliation helps.

In mid-1984, BG Alley came to the attention of Senator Donald Lee Nickles,[314] a Republican, through a merit search committee the Senator appointed to identify individuals for an opening on the Federal District Court for the Western District of Oklahoma. The chairman of that committee was a distinguished Oklahoma lawyer named Lee Thompson, also a graduate and key benefactor of the OU law school. Thompson was the father of District Court Judge Ralph Thompson, who served on the board of the OU law school alumni association and came to know Alley socially in his capacity as the law school dean.[315]

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[311] Oral History (2d Session), *supra* note 9, at 137.
[312] Alley Interview, *supra* note 16.
[313] *See generally* FED. JUDICIAL CTR., *How the Federal Courts Are Organized*, *available at* http://www.fjc.gov/federal/courts.nsf/autoframe!openform&nav=menu1&page=/federal/courts.nsf/page/183 (last visited Dec. 8, 2011).
[314] U.S. Senate, January 5, 1981, to January 3, 2005.
[315] Oral History (2d Session), *supra* note 9, at 137; *see also* Alley Leadership Lecture, *supra* note 287.

The judicial search committee, composed of a diverse group of thirteen individuals,[316] was supposed to make its recommendations to Senator Nickles in September 1984, but was dissatisfied with the quality and experience of those who had applied and, therefore, solicited one additional applicant—Wayne Alley. As he recalls, there could have been no greater surprise:

> [T]he phone rang and it was Ralph Thompson, who said "I have a question to ask and it's very difficult for me to ask it. I hate to ask it, but I have to . . . Are you a registered voter?" "Well" [Alley replied] "Sure." "Well, in what party?" "Republican." "Okay . . . I want to go ahead and discuss something. My dad from whose house I'm calling has expressed a great deal of disappointment with the 30 or so applications for this position. And [Federal District Court Judge David Russell] is here also, and when we consider your education, your accomplishments, your experience as a military judge . . . it just seems like you are absolutely perfect—I mean—this is absolutely perfect, if you could apply for this position."'[317]

Of course, Alley had not applied for the position because he never considered it a possibility: "No—hell, no—never thought about it. They're going to make me a federal judge? Have you ever heard of such a thing?"[318]

The next day, Alley sent a letter to Lee Thompson asking that his name and resumé be considered, belatedly, by the committee. The next day the Alleys left for a two-week holiday in Hawaii during which they walked up and down the beach, excited at the prospect of a federal judicial appointment but entirely at peace with the good life they had as part of the OU community.[319] They would be happy either way.

Upon their return to Oklahoma, Alley received a note from Lee Thompson requesting he come interview before the search committee the next day at nine o'clock in Oklahoma City. Of the interview, he recalls:

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[316] Oral History (2d Session), *supra* note 9, at 137.
[317] *Id*. at 138.
[318] *Id*.
[319] *Id*. at 139.

> Well, for heaven's sake, the committee included not only Lee Thompson, but three people with whom I had worked very closely in State Bar Committees and cordially, one of whom was a retired [judge advocate] reservist who was a mobilization designee to me when I was on active duty. I was his [commanding officer] so to speak as Chief Trial Judge. And then there was a black woman whose son, a black attorney, and daughter-in-law had been very helpful in our affirmative action efforts. . . . The committee asked questions that primarily went to the lack of civilian trial experience. That was their concern and a very legitimate one. . . . Interestingly, their concern seemed satisfied by the fact that I'd been in private practice [25] years before.[320]

Thereafter, Alley was asked to meet with Senator Nickles privately, during which the two discussed broadly the role of judges with regard to the legislature, "the responsibility of judges, departures from established principles of law, and the proper province of the Senate and Congress in their role as legislating on behalf of the country."[321] It was clear to Alley that, in keeping with the political environment of the mid 1980s, the Senator's central concern was judicial activism. On this, the Senator and future federal judge were in total agreement.

> Here in [the Reagan Administration] and temperamentally I agree with [the concerns of judges overreaching their authority] absolutely; there was no issue of appeasing the Senator. I think judicial activism has been a disaster in the country.[322]

A week or so later, Alley received a phone call from Senator Nickles informing him of his recommendation that Alley fill the vacancy on the court. Subsequent interviews followed with the Justice Department's Office of Legal Policy, a White House vetting committee, and an extensive review by the American Bar Association.[323] Following that, Senator Nickles again called Alley to inform him that Oklahoma's other senator, a centrist Democrat named David Lyle Boren, could effectively veto his nomination. That did not seem likely given that Alley was the

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[320] *Id*. at 140–41.
[321] *Id*. at 142.
[322] *Id*.
[323] *Id*. at 143; *see also* Alley Leadership Lecture, *supra* note 287.

dean of the law school from which Boren had graduated. Nickles also informed Alley that the next day he could expect a personal call from President Reagan.[324]

> [President Reagan indeed called, and said,] "This afternoon I would like to submit your name to the Congress as my nominee if this is in accordance with your wishes." Now I'd been warned about this, [that] he personally makes this last minute check because they'd gotten to this very point with a nominee up in Illinois who said–"The more I think about it, I don't think I can afford it"—and pulled out after the names had gone to Congress. . . . I replied, "Well, Mr. President, I view this just with tremendous enthusiasm as an opportunity in life, to serve in this way." "Well, very well [said Reagan]- I will make the nomination."[325]

The final step was Alley's appearance before the Senate Judiciary Committee, where certain members where considered "most antipathetic to the whole pattern of Reagan nominees."[326] But despite some initial trepidation the entire confirmation process moved along without issue, with Alley's military background considered most favorably by members of the committee.[327] He was later confirmed by the full Senate on July 10, 1985, and was sworn into the federal bench the following month.

An interesting personal footnote for the Alley family was that his first judicial act on the District Court was the admission of his second and current wife, Marie, for the purpose of her U.S. citizenship hearing.[328] Marie, a widow previously married to a well regarded judge advocate, came to America from Germany in 1961. She and Alley were married in 1978 just prior to his assignment in Europe. Like so many others, Marie retained her native citizenship for nearly a quarter century out of an allegiance to family and culture. But by 1985, she decided it was time, and who more appropriate to be a part of the process than her husband?[329]

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[324] Alley, *supra* note 287.
[325] Oral History (2d Session), *supra* note 9, at 144–45.
[326] *Id*. at 145.
[327] *Id*.
[328] Alley Interview, *supra* note 16.
[329] *Id*.

It is fair to say that Marie's role has been no less important to the narrative of Alley's life than any other single influence. The author has personally witnessed the youthful joy they continue to find in one another, and it is clear from the closing words of his Oral History that Alley is one of those blessed individuals who got two chances in life, both personal and professional. Referring to the challenges of his personal life early in his career, he shares that:

> Because of purely personal matters, I went through some very, very bleak days and despairing days, and did not exactly bless the gift of life because of the burdens at the time and yet those turned out to be temporary, although lengthy; and after I went through that period, can you believe it, I went through [it] and then remarried into a situation which is just bountifully happy and [then] got promoted, became a Dean, and now a federal judge, and I have the feeling of my life blossoming—just the sense of coming out of a winter into some glorious spring, belatedly and I think that potential is there for anyone who is in a tough situation.[330]

B. Comparison of the Military Judiciary to the Federal District Court

Alley's return to judicial life was an easy one, despite the considerable workload for the newly established judicial seat he now occupied.[331] Having served as both a military trial and appellate judge, the general atmospherics of the court came easily to him, as did the nuanced issues of court administration. Alley notes that the greatest advantage he had over an appointee with no prior experiences was the level of comfort he had in managing and administrating cases: "In some instances the military experience was inapplicable, but my overall comfort in managing cases was the main thing I brought to the federal bench. Case management is paramount over sitting a trial. My military experience in that regard was invaluable."[332]

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[330] Oral History (2d Session), *supra* note 9, at 156.
[331] Alley Interview, *supra* note 16.
[332] *Id.*

But the case work was something entirely new and covered matters of civil law that had no comparison in military jurisprudence.[333] Nor, for that matter, could military practice compare in terms of the relative experience of the civilian practitioners who appeared before him in the district court or the complex spectrum of disputed civil, criminal, and constitutional law:

> When I was a military judge I had incomparably more experience than anybody who appeared before me. It was easy to get the psychic jump on things better, [but in the federal district court] almost everybody that comes up knows vastly more about the subject than I do. . . The people who practice before me range—oh, for a lead counsel, probably age 35 to age 70, so I'm almost at the midpoint of age seniority; and that too is different. So I cannot equate [the federal court] with the military judge experience at all.[334]

On a more personal level, the federal bench afforded the sort of collegial work environment and considerable intellectual stimulation he very much enjoyed—the camaraderie of bright, engaging professionals who in many ways mirrored the selfless service observed in the Army. It also involved considerably more research, and a dependency on clerks and counsel to inform, substantiate, and qualify the disparate issues of law and fact brought before the court.[335] Alley, a man with boundless intellectual curiosity and always the quick study, found this aspect of the federal district court both challenging, and at times frustrating.

> This type of work . . . has a scholarly component. In fact, the principal frustration of [the federal trial bench] is the limited time. Any case that comes through [the court] is worth a month of study, and it doesn't get done; we can't do it.[336]

Alley assumed senior status on May 16, 1999,[337] after a rewarding and challenging fourteen-year tenure on the court. He volunteered to

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[333] Oral History (2nd Session), *supra* note 9, at 144–45; *see also* Alley Interview, *supra* note 16.
[334] Oral History (2d Session), *supra* note 9, at 30–31.
[335] Alley Interview, *supra* note 16.
[336] Oral History (2d Session), *supra* note 9, at 30–31.
[337] *See* 28 U.S.C. § 371(c) (2006). According to the website for U.S. Federal Courts,

serve an additional five years as a federal trial judge for cases throughout the country, retiring outright in September 2004.

A highly publicized footnote to his time on the district court included his very public recusal from the April 1995 Oklahoma City bombing cases involving Terry Nichols and Timothy McVeigh.[338] In that case, involving a *writ of mandamus*, the 10th Circuit Court specifically noted in its decision recusing Alley from the matter that:

> Beginning at age 65, a judge may retire at his or her current salary or take senior status after performing 15 years of active service as an Article III judge (65+15 = 80). A sliding scale of increasing age and decreasing service results in eligibility for retirement compensation at age 70 with a minimum of 10 years of service (70+10=80). Senior judges, who essentially provide volunteer service to the courts, typically handle about 15 percent of the federal courts' workload annually.

U.S. COURTS, *available at* http://www.uscourts.gov/Common/FAQS.aspx (last visited Dec. 8, 2011).

[338] *See* United States v. McVeigh, 153 F.3d 1166 (10th Cir. 1998) (providing factual background); *see generally* United States v. McVeigh, 918 F. Supp. 1467, 1471–72 (W.D. Okla. 1996) (citing 28 U.S.C. Section 455(a), which states that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned"). Timothy McVeigh (later followed by Terry Nichols) filed a motion for recusal of Judge Alley, who had been randomly assigned the Oklahoma bombing cases. By order dated September 14, 1995, Judge Alley denied both recusal motions. Mr. Nichols then filed a petition for *writ of mandamus* with the 10th Circuit Court of Appeals seeking disqualification of all judges of the Western District of Oklahoma (including Alley). The Circuit Court (*per curiam*) found:

> Judge Alley's courtroom and chambers were one block away from the epicenter of a massive explosion that literally rocked downtown Oklahoma City, heavily damaged the Murrah building, killed 169 people, and injured many others. The blast crushed the courthouse's glass doors, shattered numerous windows, ripped plaster from the ceiling, dislodged light fixtures, showered floors with glass, damaged Judge Alley's courtroom and chambers, and injured a member of his staff, as well as other court personnel and their families. Based on these circumstances, we conclude that a reasonable person could not help but harbor doubts about the impartiality of Judge Alley. Because Judge Alley's "impartiality might reasonably be questioned" in the instant case, 28 U.S.C. Section 455(a) mandates recusal.

Nichols v. Alley, 71 F.3d 347, 350 (10th Cir. 1995).

> In light of the settled principle that a judge has as strong an obligation not to recuse when the situation does not require as he has to recuse when it is necessary, we commend Judge Alley for his integrity in upholding what he sees as his clear judicial duty. There is certainly no allegation here of judicial impropriety; Judge Alley has conducted himself and these proceedings with true professionalism.[339]

Indeed, that professionalism during the tumult surrounding the early days of the Oklahoma Bombing cases surprised no one, and rather completely mirrored the steady hand and perspicacious approach to judicial review developed from his time on the military bench on forward.

XI. Closing Perspectives on Law, the Court, and Military Service

"I cannot help observing, that many of those who have written in support of our ancient system of jurisprudence, the growth of the wisdom of man for so many ages, are not as they are alleged by some to be men writing from their closets without any knowledge of the affairs of life, but persons mixing with the mass of society, and capable of receiving practical experience of the soundness of the maxims they inculcate."[340]

—Lloyd Kenyon, Lord Chief Justice of England

A. The Role and Relationship of Military Panels and Judges in Sentencing

Having served as a military judge in peace and in war, as well as a member of a federal district court, Alley developed an informed perspective on the UCMJ's provision that allows a criminal defendant to elect whether to be tried and sentenced by a military judge alone or by a panel comprised of officers alone or one augmented by enlisted service members. The process of sentencing, in particular, concerned Alley.

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[339] *Nichols*, 71 F.3d at 352.

[340] NORTON-KYSHE, *supra* note 2, at 127 (quoting Lord Kenyon, Chief Judge, King v. Waddington (1800)).

He found that cases tried in combat zones benefited from the participation of officers and enlisted personnel in the sentencing phase of a trial through their unique perspective of what soldiers experience under trying, austere circumstances. By contrast, in garrison, he found the situation to be reversed—in peacetime, military judges were better able to evaluate misconduct and dispense sentences that were consistent with and reflective of the broader scope of judicial outcomes.

> In Vietnam, in a combat situation, my feeling was that court members know more—the combat situation is internalized in them and they are better sentencers—and I felt that way even when I went back [in Vietnam to conduct a trial] after the Justice Act of 1968 when most of the trials I had were bench trials and I did the sentencing. However, when I served as a trial judge in peacetime—for instance in Schofield Barracks [Hawaii] or when I was the Chief Trial Judge in trying cases—I thought that the court members were overly lenient in many cases—in a couple of cases ridiculously so. [A]t that time I would have preferred to be able to sentence myself so that there would be comparability and appropriate severity.[341]

From this, Alley posits his recommendation for a legislative remedy vesting military judges with principal sentencing responsibility in courts-martial conducted in garrison, but defer to panels in wartime and contingency operations: "Perhaps it would be defensible to come up with a statute that the judge would [administer sentencing] except in the field in time of hostilities. . . "[342]

B. The Virtue of Brevity in the Trial Judiciary

Having moved from the military trial judiciary to the appellate court, Alley is uniquely qualified to consider the respective merits and approaches to judicial decision-making. In particular, he is a keen advocate of concise decision-making by the trial courts. Originally presented in remarks before the 1981 Homer Ferguson Conference on

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[341] Oral History (1st Session), *supra* note 9, at 125–26.
[342] *Id*. at 126.

Appellate Advocacy, sponsored by the CAAF,[343] he openly counseled that:

> The wise trial judge knows that brevity is the source of salvation. All his opinions and explanations, being subject to subsequent interpretation, may become grounds for reversal even when the ruling, standing alone, might have evoked no such display of appellate hostility. So, from this standpoint, the less said, the better.

While brevity and ingenuity by trial judges are important to avoid the pitfalls of appellate scrutiny, caution should not become a "paramount virtue" leading to a "risk avoidance syndrome," whereby judges seek the most innocuous view at the cost of due and appropriate consideration of justice, whether for the government or the defense.[344] "Caution," Alley maintains, "does not militate for rulings favoring [government] needs as opposed to those of the individual defendants."[345]

C. The Importance of Civility in the Legal Profession

If there was ever a single point of failure for counsel appearing before Judge Alley, it was any indicia of incivility. He had no patience for it, and long felt it was beneath the stature and dignity of the judicial process and, perhaps equally important, the practice of law. In an often cited observation from a case illuminating incivility among contending counsel, Alley is widely regarded for his written order noting: "If there is a hell to which disputatious, uncivil, vituperative lawyers go, let it be one in which the damned are eternally locked in discovery with other lawyers of equally repugnant attributes."[346]

In Alley's world view, a key fundamental attribute of the legal profession should be and must remain the sense of propitious civility able to rise above the often uncivil conflicts that are so frequently the

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[343] Brigadier General Wayne E. Alley, *Advocacy on Behalf of a Major Field Command: When It Begins, What It Should Accomplish, and Suggestions How It Should Be Done*, 94 MIL. L. REV. 5 (1981).
[344] *Id*. at 8.
[345] *Id*. at 9.
[346] Krueger v. Pelican Prod. Co., No. CIV-87-2385-A, slip op. (W.D. Okla. Feb. 24, 1989) (Judge Wayne E. Alley) (order denying motion to dismiss action).

core of our adversarial processes. The expansive milieu of interests resident before judicial forums—whether conflicts between parties or the state and its citizenry—quite naturally fuel a hyper-competitiveness in its actors. Alley, among many, finds such conduct disruptive and disreputable for the profession and its institutions. Recalling Shakespeare in *The Taming of the Shrew*, he feels that adversaries in law should "[s]trive mightily, but eat and drink as friends."[347]

> As a district court judge I took a very hard line on lawyers' conduct toward their opponents and in fact took a lot of nicks in lawyer evaluations because they thought this unduly harsh. In discovery disputes in civil cases judges absolutely hate that people can't work things out. Many would include in their briefs "my opponent is not acting in good faith and there is an attempted fraud on the court," and when I heard that word I would hold a recorded hearing and tell them that it is one thing to say that into a dictaphone, but a grounded suspicion of fraud requires the suspicious lawyer to report that to the bar association. So, you write a letter to the bar association on what basis you are accusing him of fraud and I want to see a copy of that letter on my desk by Monday. Well, they just panicked over this and finally stopped. I was regarded as a difficult judge by those that engaged in that sort of thing.[348]

For a former military judge and jurist who has experienced war and its effects first-hand, vigorous and zealous advocacy should never implicate the inherent decency and dignity of the bar or the bench. When it does, the product is rarely justice but common frustration with the legal community. It is a lesson for lawyers across the profession, military and civilian. "The best counsel," Alley notes, "Don't whine when they lose or crow when they win."[349]

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[347] WILLIAM SHAKESPEARE, THE TAMING OF THE SHREW, act 1, sc. 2, l. 275.
[348] Alley Interview, *supra* note 16.
[349] Alley, *supra* note 342, at 14.

D. The Military as a Career

As noted in the introduction, BG Alley is remarkable for the success he achieved doing non-traditional jobs to a truly exceptional standard. Service on military trial courts can be difficult, and at times intense. On occasion, this service is woefully unappreciated for the institutional impact it has on discipline within the force. As stated in the opening Norton-Kyshe quotation, judges are indeed *constantly brought into direct personal relations, not only with members of a large and active profession, but with men in all ranks of life, and on every sort of subject*.[350] Those direct personal relations may not always have the appeal of some other leadership positions, but—properly executed—they can lead to an extraordinarily satisfying military or civilian career. As Alley notes:

> I went through a pattern of assignments in mid-career different from that of the ambitious and motivated officer seeking higher grades and so on; and without exception, it was a lot of fun—I worked hard—I did the best I could in those assignments and developed a reputation [accordingly]. And I still think it is sound to take that approach.[351]
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> As General Williams used to say so often—saw the wood that is in front of you.[352]
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> [I told a fellow judge advocate once that] 98% of the time in the Army I have been perfectly happy—satisfied in every respect, with the professional experience as well—but I said the other 2% is when I'm feeling ambitious. Ambitions can make us miserable . . . I think the unhappy officer is the one who [goes down the list of fellow officers] and thinks, "I can get ahead of this guy," or "This guy is ahead of me, and I'm due to get this assignment"—and so forth, consigning [him] to a life of misery.[353]

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[350] NORTON-KYSHE, *supra* note 2 (emphasis added).
[351] Oral History (2d Session), *supra* note 9, at 149.
[352] *Id*. at 148.
[353] *Id*. at 151–52.

Throughout the varied positions he held during his more than twenty years of military service, Alley remains upbeat about nearly all of them because the overarching institution itself afforded him so much satisfaction. Certainly, he could have done other things; ability was never an issue. What sustained him was the same thing that brought him back into the Army in the first place: an emphasis on the Army's advantages over its disadvantages. The Army's variety of rich experiences and the company of superior people still won out over average pay, constant moves, and the risks inherent in combat service.

The rewards of military life were, in his view, about "the unique opportunity to just have a great time in life with a lot of professional stimulation and enjoyment, and enough money to get by."[354] There were good days and bad—personally and professionally—"But everything that is merely situational is just going to pass by."[355]

Toward the end of his career, he took a dim view of zero-defect attitudes and the "bitter edge" to the competitive evaluation system. He never wavered from the view that careerism and the often pernicious obsession regarding jobs and advancement "is a concern and an expenditure of energy [just] frittered away from more positive ends; and also makes one unhappy."[356] His message to young military attorneys and the law students he encountered at OU: pursue what you love, find your career passions, and make them the central focus of your professional life. The details will work themselves out over time.[357]

In his closing remarks at the Homer Ferguson Conference on Appellate Advocacy, made on the eve of his retirement from Army service, Alley reflected on all the military counsel he had observed over the years, and told the assembled audience: "[This] is a fit occasion to express gratitude toward, and affection for, the hundreds of counsel whose advocacy I have heard both at the trial level and on appeal and to remark that the professional practice of these men and women ornaments that most honorable title of 'judge advocate.'"[358]

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[354] *Id*. at 156.
[355] *Id*.
[356] *Id*. at 151–52.
[357] Alley Interview, *supra* note 16; *see also* Alley Leadership Lecture, *supra* note 287.
[358] Alley, *supra* note 342, at 14. Alley elaborates further during his 2008 OCU interview:

> It was wonderful being Dean. It was a great honor being a Federal Judge and I enjoyed it. I whistled on my way to work and so forth.

XII. Summary

Over its long and distinguished history, the military judiciary has steadfastly grown and evolved into a system with much of the character and functionality of its civilian counterpart. Its successful development—from a commander-based system to a paradigm more in keeping with civilian notions of judicial oversight of individual rights—has in large measure been due to the effort and success of judge advocates like Wayne Alley. Throughout his career, Alley championed the professionalization of military jurisprudence through careful adherence and enculturation of modern standards of judicial review.

Author, columnist, and former Reagan speechwriter Peggy Noonan, writing about the importance of clarity in describing leadership objectives, once recalled a story told by Clare Boothe Luce "about a conversation she had in 1962 in the White House with her old friend John F. Kennedy. She told him . . . that 'a great man is one sentence.' His leadership can be so well summed up in a single sentence that you don't have to hear his name to know who's been talked about."[359]

In the case of Wayne Alley, that sentence might look something like this: "A committed legal mind who stands among the most accomplished actors of Army jurisprudence, and who dedicated his professional life to the pursuit and exercise of a fair, modern, and responsive military judiciary and the advancement of law through practice, education, and justice." There are few others to whom such a sentence would apply.

Achievement and historical relevancy are hardly rare in the U.S. military, but among its lawyers the numbers are fewer; among its judges, fewer still. BG Alley stands out among those in that very special crowd, and will be remembered and—one hopes—emulated for his commitment to the practice of law: as a judge, a dean, and an officer in the U.S. Army.

> I've told friends and now you, you know when I die I'm going to be in Arlington Cemetery and it is not going to say Judge on my tombstone. That was my most satisfying work [but] General was my most satisfying title.

[358] Peggy Noonon, *To-Do List: A Sentence Is Not 10 Paragraphs*, WALL ST. J., (Saturday/Sunday), June 27–28, 2009, at A3.