Lore of the Corps

Lawyering in the Empire of the Shah: A Brief History of Judge Advocates in Iran

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Given current relations with the government of Iran, it is easy to forget that American military personnel once had close ties with Tehran and that more than a few judge advocates (JAs) had rewarding tours of duty in the Empire of the Shah.

While U.S. Army personnel first arrived in Iran in September 1942 (to help train and organize the Iranian Army during World War II), the U.S. Army Mission to the Imperial Iranian Armed Forces (ARMISH) was officially created by bi-lateral agreement in October 1947. Five years later, the United States and Iran formed a separate Military Assistance Advisory Group-Iran (MAAG). These separate ARMISH and MAAG organizations were merged into a tri-service (Army, Navy, Air Force) ARMISH-MAAG in 1958.

Just when the first Army lawyer arrived in Tehran to provide legal advice to the ARMISH-MAAG is not clear, but it seems likely that JAs were first assigned to the U.S. Army Element, ARMISH-MAAG Iran in 1958, when the tri-service configuration was first adopted. The Army considered the assignment to be an important one, as the "Legal Advisor" was a lieutenant colonel on the ARMISH-MAAG Joint Table of Distribution (JTD). This legal advisor was supported by a second JA, who was a major (MAJ) on the JTD, but was most often a JA captain (CPT). Rounding out the Judge Advocate Office at ARMISH-MAAG was a local national civilian paralegal who spoke Farsi and so could also act as a translator, an MOS 71D legal clerk, a U.S. civilian secretary and a local national secretary. The office had three vehicles, and the Iranian Army provided two drivers for them.

The primary mission of the Army lawyers in Tehran was to advise the Imperial Iranian Judiciary Department (IIJD), which was headed by an Iranian lieutenant general. This meant advising the IIJD on legal education and training. To further this goal, Iranian military lawyers began attending the JA Career Course (today's Graduate Course) at The Judge Advocate General's School. The first to study in Charlottesville were Colonel (COL) Mos H. Ekhterai and COL Khajeh-Noori, who attended the Fourteenth Career Class from 1965 to 1966.[1]

Advising the IIJD also meant assisting the Iranians in "updating Iranian military law or drafting new laws." At the time, Iranian civil law followed the French (Napoleonic) codal system and Iranian military law had the same codal framework, with one exception: military courts could try civilians for certain offenses against the State, such as bank robbery or drug trafficking. This explains why, in the early 1970s, the JAs in Tehran helped their Iranian counterparts draft "hijacking laws" that were implemented in "Regulations and Laws Section" of the Imperial Iranian Armed Forces.[2]

While advising IIJP was the focus of the Judge Advocate Office in Tehran, the two Army lawyers in country also provided legal advice to the U.S. Army Mission to the Gendarmerie, known by the acronym GENMISH. In addition to these advisor roles, the JAs in Teheran provided more traditional legal advice to the command in the areas of criminal and civil law, claims, contracts, legal assistance, and international law.

There was relatively little to do in the criminal law arena because no courts-martial could be convened; the United States was precluded by its agreements with Iran from holding any judicial proceedings on Iranian soil. Since there was no Status of Forces Agreement (SOFA) with Iran, ARMISH-MAAG and GENMISH personnel were technically subject to Iranian criminal law, and subject to arrest and questioning by local police and judicial officials. Consequently, the JAs in Tehran had to maintain a working relationship with the Iranian Gendarmerie.

The high quality of U.S. personnel assigned for duty in Iran meant that disciplinary incidents were rare. But, when a crime did occur, usually involving a traffic accident, the Iranian authorities would release U.S. personnel from liability under Iranian law only after a civil settlement (involving the payment of money damages) was reached between the aggrieved Iranian and the U.S. offender. As a practical matter, the JAs in Tehran were always able to convince the Iranians to release Americans from detention;

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[1] THE JUDGE ADVOCATE GENERAL'S SCHOOL, THE JUDGE ADVOCATE GENERAL'S SCHOOL, 1951–1968, at 10 (1968). First Lieutenant Ahmad R. Kheradmand was a student in the Sixteenth Advanced Course from 1967 to 1968 (by which time the name had changed from "Career" to "Advanced"). Major Ali-Akbar Naderian was a student in the 19th Advanced Course from 1970 to 1971. Major Feraidoon H. Tehrani attended the 21st Advanced Course from 1972 to 1973. These Iranian officers did not survive the 1979 Revolution; they were executed.

[2] James J. McGowan, Jr., *SJA Spotlight—Iran*, ARMY LAW., Oct. 1972, at 14, 14.

these U.S. personnel were quickly put on a military aircraft leaving the country.

Civil law issues chiefly involved the interpretation of Air Force and Navy regulations, with which Army lawyers had to be familiar since Airmen and Sailors also were assigned to ARMISH-MAAG.

Claims were a major area of practice. The most important claims arose out of vehicular accidents when Iranian civilians were killed by American drivers. Since the JAs in Iran handled, on average, about nine such vehicular death claims a year, this was no small matter. Moreover, Iranian law provided that the offending U.S. citizen would be detained or prohibited from leaving the country. This so-called "body arrest" would end only upon the satisfactory negotiation of a civil settlement with the victim's family. The lack of a SOFA meant that there was no international agreement covering the payment of claims filed by local nationals. Therefore, the U.S. Army Claims Service, Europe, which had supervisory authority over Iran, appointed foreign claims commissions empowered to settle claims. The skills of the civilian Farsi-speaking paralegal in the JA office were critical in resolving the vehicular homicide cases. Usually, the family was satisfied with a $1,000 payment, the maximum settlement that could be authorized by a one-person commission (consisting of a single Army lawyer). A three-man commission, consisting of two JAs and one officer from the command, could settle a wrongful death claim (or other claims) for up to $5,000.

The JAs in Tehran also paid a number of claims by U.S. personnel for theft of personal property. Apparently "a typical modus operandi" was for a thief to visit an American's home while he and his family were away. The thief then informed the Iranian "maid" that he had come to pick up the refrigerator, television, washing machine, or other item of property "for repair." The domestic servant, "not having been cautioned otherwise," let the thief pick up the items, which were never seen again. After an investigation to ensure that the American claimant had not left his property unsecured, or was otherwise at fault, Army lawyers paid these claims.[3]

There were even claims for maneuver damage. An Army lawyer was the claims officer for Operation Delovar, a joint exercise involving Imperial Iranian forces and a brigade from the 101st Airborne Division. Claims were paid to Iranian landowners for damage to their wheat fields caused by U.S. paratroopers dropping from the sky. While a severe drought in the area made it seem that the claimed damage was "imaginary," the JA claims officer nonetheless tasked several young 101st Soldiers who had grown up on farms with estimating the yield of the damaged wheat fields. The Farsi-speaking civilian paralegal then went to the local market and ascertained the price of wheat. The Iranian claims were ultimately settled over tea in a tent.[4]

Contracting law issues were important because the contracting officer for ARMISH-MAAG was the Embassy Contracting Officer. As this embassy employee was not a lawyer, he relied heavily on the JA office for procurement law advice. By 1970, the JA office was reviewing all military contracts to ensure that they were legally sufficient.[5]

For legal assistance, the office usually had one JA who could speak Farsi, which he had learned after spending a year at the Defense Language Institute at the Presidio of Monterey. This language skill was critical because, while the Farsi-speaking local national civilian paralegal drew up the leases used by ARMISH-MAAG personnel to rent homes on the local economy and could help negotiate a settlement to a landlord-tenant dispute, having a Farsi-conversant JA insured that American interests were always well served. Domestic relations, taxation and other legal assistance issues also were part of the workload in the JA office. At the request of the U.S. Embassy, "unofficial" legal assistance also went to U.S. citizens who were not entitled to legal advice because they were not attached to any U.S. government entity; these were most often American women married to Iranians who were trying to flee the country with their children.[6]

Finally, international law questions arose in the interpretation of the 1947 ARMISH and 1950 MAAG agreements, and the application of the privileges enjoyed by ARMISH-MAAG personnel. One of the most difficult issues involved "the meaning and intent of the duty free privilege granted to members of the Mission" in the ARMISH agreement signed in 1947. The Iranian Ministry of Foreign Affairs was concerned about U.S. personnel selling items to Iranians that had been brought into the country without having been subject to customs duties.[7]

Retired JA COL Richard S. "Dick" Hawley, who served two tours in Tehran, had more time in Iran than any other member of the Corps.[8] Hawley remembers that one morning

[3] *Id.*

[4] E-mail from Colonel (Retired) Richard S. Hawley, to author (1 Feb. 2012, 03:41:00 EST) (on file with author).

[5] McGowan, *supra* note 2, at 16.

[6] E-mail from Colonel Hawley, to author, subject: "Your time in Iran" (17 June 2011, 20:08:00) (on file with author).

[7] McGowan, *supra* note 2, at 16.

[8] Hawley served in Iran from 1963 to 1965 and from 1968 to 1970. Born on 15 January 1930 at Fort Sill, Oklahoma (his father was a cavalry officer), Hawley grew up on a variety of Army installations in the United States and overseas. He graduated from the University of Michigan in 1952, and

in early 1962, COL Kenneth Hodson, then in charge of assignments in the Personnel and Plans Office, asked him: "Do you know where Iran is?" When then-CPT Hawley said that he did, Hodson asked him if he would like to be assigned to the MAAG in Tehran. The result was that CPT Hawley left in the summer of 1962 for the Defense Language Institute in California. After an intensive year learning Farsi, Hawley and his family left for a two-year assignment in the Shah's empire.

From 1963 to 1965, CPT Hawley worked on the Iranian Army's Abassabad compound in Teheran, and lived "on the economy" in the city. Tehran had been the capital of Iran since 1785 and, with some three million inhabitants,[9] was a dynamic and bustling city. Hawley found a nice place to live. The only drawback was that, in his first tour, he had to bring drinking water from the American Embassy (water in Tehran was not potable until Hawley's second tour) and there was no central heat in the home on either tour (space heaters were needed in the winter, especially when it snowed). But Tehran was an exciting place to live, for the culture and history of Persia (the old name for Iran) was thousands of years old and so there was much to see and do in the city and in the countryside.

Hawley remembered that during both his tours in Iran (he returned to Tehran as a lieutenant colonel from 1968 to 1970), the ARMISH-MAAG Legal Advisor had several unusual, if not unique, roles: he served as Acting Provost Marshal, which meant that Army lawyers had oversight of criminal investigations being conducted by Air Force Office of Special Investigations (the equivalent of the Army's CID), which had agents at the ARMISH-MAAG. Army lawyers also were called upon to advise the U.S. Embassy, since the ambassador and his staff did not have a legal officer. Informal opinions were the rule, often involving the interpretation of the ARMISH and MAAG agreements.

One of the last JAs to serve in Tehran was then-CPT James J. "Jim" McGowan, Jr., who arrived in Tehran in June 1970 and departed in May 1972. He described Iran "as a land of legendary romance, immortalized in verses of the Persian Poets." Tehran was "a near-modern metropolis with tree-lined streets clogged with automobiles and taxis, traffic circles, shop windows tastefully displayed, impressive public buildings, neon-lighted theater marquees, and double-decker busses."[10] McGowan also remembered that there was "a difference in the basic motivations of the American and Iranian societies." As McGowan saw it, when an Iranian said he would promise to do something "faardah" (tomorrow), this likely meant "sometime within several weeks." And, when the deed was finally done, it would be "with a shrug of his shoulders" and "the time-honored Persian phrase 'Inshallah,' or if 'God wills.'"[11] For JAs in the Corps today who have experienced deployments to Afghanistan or Iraq, McGowan's observation will come as no surprise.

Judge advocate assignments to Iran apparently ended in the mid-1970s; the *1975 JAGC Personnel Directory* shows that MAJ Holman J. Barnes, Jr., and CPTs Stanley T. Cichowski and John E. Dorsey were the last Army lawyers to serve in Iran. As for the American presence in the empire of the Shah? The ARMISH-MAAG disappeared with the fall of the Shah and dissolution of Iran's imperial government on 11 February 1979. It seems highly unlikely that JAs will return to serve in Iran anytime soon.

More historical information can be found at

The Judge Advocate General's Corps
Regimental History Website

Dedicated to the brave men and women who have served our Corps with honor, dedication, and distinction.

https://www.jagcnet.army.mil/8525736A005BE1BE

having participated in the Army Reserve Officer Training Corps, was commissioned an infantry second lieutenant. He then deployed to Japan and joined the 1st Cavalry Division. Hawley hoped to see combat, but the Korean War ended before he could get to the Korean peninsula. Returning to the United States, Hawley was released from active duty and entered the University of Michigan's law school. After graduating in 1956, Hawley successfully passed the Foreign Service examination and joined the State Department. He was the Vice Consul in Genoa, Italy, when he decided to return to active duty. Then–Captain Hawley transferred from the Infantry (Army Reserve) to the Judge Advocate General's Corps in 1958. In addition to his two tours in Iran, then Lieutenant Colonel Hawley served in Vietnam as the Staff Judge Advocate (SJA), 101st Airborne Division, from 1970 to 1971, and in Germany as the SJA, 8th Infantry Division from, 1972 to 1974. He retired as a colonel in 1979 and then worked for Litton Industries in Saudi Arabia for fifteen years. JUDGE ADVOCATE PERSONNEL DIRECTORY (1963); JUDGE ADVOCATE PERSONNEL DIRECTORY (1968); JUDGE ADVOCATE PERSONNEL DIRECTORY (1971); JUDGE ADVOCATE PERSONNEL DIRECTORY (1974); e-mail from Colonel Hawley, to author, subject: "Your bio" (3 Feb. 2012, 22:16:00) (on file with author).

[9] Today, Tehran has about 7.5 million inhabitants. Iran's population was about thirty million in 1970; today it is more than seventy million. FED. RESEARCH DIV., LIBRARY OF CONG., IRAN: A COUNTRY STUDY 88–89 (Glenn E. Curtis & Eric Hooglund, eds., 2008), *available at* http://lcweb2.loc.gov/frd/cs/irtoc.html.

[10] McGowan, *supra* note 2.

[11] *Id.* (The phrase is Arabic in origin.)

The Greatest Judge Advocate in History? The Extraordinary Life of Major General Enoch H. Crowder (1859–1932)

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

While Crowder has been called "Judge Advocate *Extraordinaire*,"[1] no one would have predicted from his humble beginnings that he was destined for greatness. Born on 11 April 1859, in a "boarded-over" log cabin in Grundy County, Missouri, Crowder grew up in a farming family. But young "Bert" Crowder "preferred reading to plowing"[2] and he attended a local academy, from which he graduated when he was sixteen.

Crowder then began working on a nearby farm for twenty-five cents a day (plus board) but soon decided that there must be easier ways to earn a living than manual labor. His success as a student in high school helped Crowder to obtain a position as a teacher in a nearby rural school. While he liked teaching, Crowder wanted an advanced education. His preference was to attend the state university in Columbia but it was impossible to save enough money for tuition, room, and board on a monthly salary of fifteen dollars. This explains why young Bert Crowder did what so many Americans have done when they lacked the funds for college but wanted higher education: he took the competitive West Point examination held in his congressional district, won an appointment, and, on 1 September 1877, took his oath of office as a cadet.[3]

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

But Crowder never saw any fighting while in Texas, and instead spent his time scouting the Rio Grande frontier for cattle thieves and supervising troopers engaged in target practice and routine marches. Crowder also decided that he had sufficient time to study law, which had interested him greatly while he was a cadet. He borrowed law books from a local attorney and, after learning enough of the statutes and procedures of Texas, was "examined by a committee of the bar" and admitted to practice in Texas in April 1884.[4]

Shortly after becoming an attorney in Texas, Crowder was assigned to Jefferson Barracks, near St. Louis, Missouri. This installation was one of the oldest military establishments in the United States, having been founded in 1826. In Crowder's day, it was a recruit depot where newly enlisted men "were received and trained for thirty-six days before being assigned to regiments."[5] While supervising the basic training of new Soldiers took considerable effort, 2LT Crowder still found time to study for and pass the Missouri Bar. He was now licensed as a lawyer in two states and in the Federal courts.

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

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[1] U.S. ARMY, JUDGE ADVOCATE GENERAL'S CORPS, THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS 1775–1975, at 104 (1975).

[2] DAVID A. LOCKMILLER, ENOCH H. CROWDER: SOLDIER, LAWYER AND STATESMAN 21 (1955).

[3] *Id.* at 24. For example, Dwight D. Eisenhower, arguably the most successful West Point graduate to come out of World War II, pursued an appointment to the U.S. Military Academy not because he desired to soldier, but because he wanted a free education. STEPHEN E. AMBROSE, EISENHOWER: SOLDIER, GENERAL OF THE ARMY, PRESIDENT-ELECT 1890–1952, at 38–39 (1983).

[4] LOCKMILLER, *supra* note 2, at 38.

[5] *Id.* at 40.

His timing could not have been better as the next month, five days after being promoted to first lieutenant (1LT), Crowder was ordered to return to his regiment as a troop commander in the Geronimo campaign. After the Apache warrior and his men surrendered, 1LT Crowder returned to the University of Missouri, where he resumed his teaching assignment as professor of military science. Three years later, Crowder rejoined the 8th Cavalry at Fort Yates, Dakota Territory, and participated in the final campaign against the Sioux.

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

Crowder excelled in his new job as legal advisor to Brigadier General John R. Brooke, Commander of the Department of the Platte. Captain Crowder "made investigations, prosecuted and reviewed court-martial cases, and prepared contracts and other legal papers." He also authored speeches and reports for his boss, "earning a splendid reputation from his ability to turn out vast quantities of paperwork in a relatively short time."[6]

Crowder's hard work paid off: on 11 January 1895, he was chosen over fifty other applicants to receive a permanent appointment in the JAGD. This meant a permanent transfer from the Cavalry and a promotion from CPT to major (MAJ). Crowder was thirty-six-years old and, as he was now the youngest officer in the JAGD, had a bright future.[7]

When the Spanish-American War began in 1898, now-lieutenant colonel (LTC) Crowder was in the Philippines. Although he did not see combat (much to his regret), Crowder distinguished himself in a variety of assignments during the days and months that followed. Crowder was a member of the commission that arranged final terms for the surrender of Manila and the Spanish Army; he later worked closely with Major General Arthur MacArthur, the Provost Marshal General, to establish a new government for Manila.[8]

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

At the same time, LTC Crowder was also serving on the Philippine Supreme Court; he had been appointed an associate justice of the civil division in May 1899. Crowder and his fellow justices not only heard civil and criminal appeals, but also reorganized the Philippine court system. Crowder personally authored the new *Philippine Code of Criminal Procedure*. The existing Spanish colonial framework was imperfect and was no longer functioning well. Crowder's code, which was "remarkable for its brevity and clearness," replaced that regime. According to Crowder's biographer, his code (with some amendments) continued to be the foundation of criminal justice in the Philippines until at least the 1950s.[9]

In May 1900, Major General MacArthur became the military governor of the Philippines. Remembering Crowder from their earlier time together when MacArthur was Provost Marshal General, MacArthur immediately transferred Crowder from his Supreme Court duties and made Crowder his military secretary and legal advisor. This meant that LTC Crowder was now the "civil administrator of the Philippines and actually, if not in rank, the second in command." Departments and bureaus under Crowder's direct control included: the Treasury and Customs Departments; Forestry, Mining and Civil Service Bureaus; Patent and Copyright Office; Department of Public Works; and Judicial Department. Crowder also had direct responsibility for all municipal and provincial governments in the islands.[10]

The military government of the Philippines was replaced by a civilian administration in July 1901, and Major General MacArthur, LTC Crowder, and other military administrators left the islands for the United States. Crowder's performance, however, had been so impressive that President Theodore Roosevelt rewarded him with an appointment as a brigadier general in the Volunteer Army. This promotion occurred on 20 June 1901 but only lasted ten days: when the military government ceased at the end of the month, Crowder reverted to his permanent rank of LTC and had to remove the silver stars from his shoulders.[11] It was, however, a unique event in judge advocate history: the first time that an Army lawyer other than the Judge Advocate General (TJAG)[12] had worn general officer rank. The promotion had been very much deserved.

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[6] *Id.* at 59.

[7] *Id.* at 61.

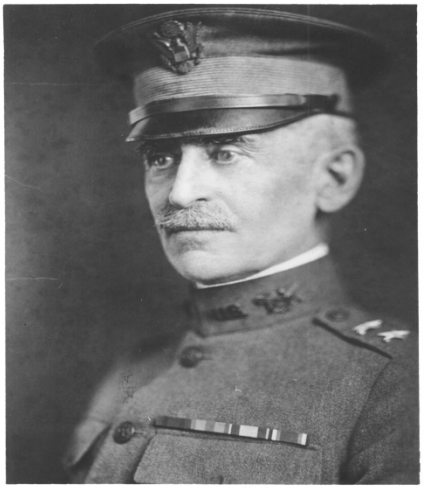
[8] *Id.* at 71.

[9] *Id.* at 78.

[10] *Id.* at 80.

[11] *Id.* at 84.

[12] Prior to 31 January 1924, the top uniformed lawyer in the Army was "the Judge Advocate General," or tJAG. On that day, however, War Department



Major General MacArthur said that he could not remember any time in American history "any instance in which a purely military officer had discharged such a variety of civil duties in a manner so entirely beneficial to the public interests." The future president, William Howard Taft, was just as effusive in his praise: Crowder "did, to my personal knowledge, an enormous amount of very hard work, and he did it well."[13]

Crowder then returned to Washington, D.C., where TJAG, Brigadier General George Davis, appointed him as a deputy in the Judge Advocate General's Office. In this position, LTC Crowder assisted Davis in receiving and reviewing the proceedings of all courts-martial, courts of inquiry, and military commissions. He also served as legal advisor to the Secretary of War and other officials of the War Department. Finally, Crowder and other judge advocates "made inspections, prepared all sorts of legal papers, and rendered opinions on questions of military law."[14]

In April 1903, Crowder was promoted to colonel (COL), and subsequently chosen to be "chief of the First Division of the Chief of Staff." This position, the forerunner to today's Deputy Chief of Staff for Personnel (G-1), had been created as a result of Congress's decision to create an Army General Staff. Crowder's new job required him to study and report on pending military legislation, reorganization plans, and general administrative matters affecting the Army. Colonel Crowder again excelled in this non-lawyer assignment. When the Japanese attacked Russian units in 1904, Crowder's boss, Army Chief of Staff Lieutenant General A. R. Chaffee, decided that Crowder was the best man to send to the Far East. As a result, COL Crowder was the senior American observer with the Imperial Japanese Army during the Russo-Japanese War of 1904–1905. He witnessed first-hand the battles fought between Japanese and Russian armies in Manchuria, including the fighting around strategic city Mukden, where a Japanese force of 460,000 defeated 360,000 Russians.[15]

Colonel Crowder returned to the United States in June 1905 and reported for duty in Washington, D.C. Slightly more than a year later, William Howard Taft, now the Secretary of War, personally selected Crowder to be the legal advisor to the U.S.-sponsored Provisional Government of Cuba. From October 1906 to January 1909, COL Crowder was in Havana, where he made his biggest contribution as chairman of the Advisory Law Commission. This body, which consisted of nine Cubans and three U.S. citizens, drafted a municipal law that organized municipalities and gave them independence in local matters. Crowder and his fellow commissioners also drafted an electoral code that recognized universal manhood suffrage, "but restricted eligibility for public office to Cubans who could read and write." Finally, the Advisory Law Commission also created a judicial law that overhauled the legal system in Cuba; its major achievement was to free the judiciary from the executive, to which it had been subordinate under Spanish colonial law.[16]

When COL Crowder left Havana in January 1909, his "brilliant intellect and indefatigable industry" were lauded by both Cubans and Americans.[17] He returned to the Office of the Judge Advocate General, but within months, was detailed by now-President Taft (who knew him well from their years in the Philippines and knew of his talents as a diplomat) to be a member of the U.S. delegation to the Fourth Pan American Conference. Crowder represented the United States in Buenos Aires, Argentina, before making official visits to Chile, Colombia, Ecuador, Panama, and Peru.

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

Crowder returned to Washington, D.C., in late 1910. Major General George Davis was scheduled to retire as TJAG in February and had recommended COL Crowder to

General Orders No. 2 announced that the position would now be known as "The Judge Advocate General," or TJAG.

[13] LOCKMILLER, *supra* note 2, at 85.

[14] *Id.* at 87.

[15] *Id.* at 92–93, 100–08.

[16] *Id.* at 115–16.

[17] *Id.* at 118.

succeed him. Given this endorsement and Crowder's relationship with President Taft, no one was surprised when, on 11 February 1911, the president nominated COL Crowder to be TJAG with the rank of brigadier general. When he was confirmed by the Senate a short time later, Brigadier General Crowder made history again as the first in the West Point Class of 1881 to become a general officer.[18]

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

Crowder also was the driving force behind major reforms in the operation of prisons in the Army. It was Brigadier General Crowder who, after lengthy consultation with sociologists and penologists, convinced the Army—and the Congress—to create the U.S. Disciplinary Barracks at Fort Leavenworth, Kansas. For the first time, the Army embraced the idea that "the primary purpose" of the Army prison system should be to identify incarcerated Soldiers who could be rehabilitated and restored to duty.[19]

The American entry into World War I shifted Crowder's focus away from military law and lawyers. He was appointed Provost Marshal General by the Army's leadership and quickly took charge of the Army's transformation from a small professional all-volunteer service to a wartime force consisting largely of civilian draftees. Starting in May 1917, after the Congress passed America's first Selective Service Act (prepared by General Crowder and his assistants), he supervised the registration, classification and induction of over 2.8 million men into the armed forces. Crowder's "especially meritorious and conspicuous service as Provost Marshal General in the preparation and operation of the draft laws of the Nation during the War" was later recognized with the award of the Army Distinguished Service Medal.[20]

Now-Major General Crowder (legislation enacted by Congress in 1916 made TJAG a two-star position) was so successful in implementing the wartime draft that, in the summer of 1918, a provision "was inserted in the Army Appropriation Bill" to promote him to three-star rank.[21] Crowder already was the first judge advocate to wear two stars; if this 1918 provision had become law, he would be have been the first judge advocate to reach the rank of lieutenant general. But, uncomfortable with the idea of being a "swivel chair" lieutenant general, Crowder refused the promotion and instead—unsuccessfully—asked for a field command in France.[22]

After World War I ended, Major General Crowder found himself, along with the entire military justice system, under attack for being "un-American." Brigadier General Samuel T. Ansell, a friend and fellow Army lawyer who had served as Acting Judge Advocate General and performed much of the Army's legal work while Crowder focused on the draft, charged that courts-martial were "patently defective" and needed immediate revision by Congress. While Crowder vigorously defended the system against attacks by Ansell and others, he nonetheless recommended certain reforms to Congress. These included greater protections for the accused and a new authority in the President to reverse or alter any court-martial sentence found by him to have been adjudged erroneously.[23]

On 14 February 1923, after forty-six years of service, General Crowder retired from active duty. That same day, he topped off his remarkable career as a Soldier by immediately accepting an appointment as the first U.S. Ambassador to Cuba. This was a highly unusual event, because active and retired Army and Navy officers are prohibited by law from holding any appointment in the Diplomatic and Consular Service.[24] The result was that, on 22 January 1923, Congress enacted special legislation so that Crowder could accept this diplomatic post,[25] which he held

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[18] *Id.* at 132.

[19] *Id.* at 136–37.

[20] War Department, Gen. Orders No. 144 (18 Nov. 1919).

[21] LOCKMILLER, *supra* note 2, at 191.

[22] THE ARMY LAWYER, *supra* note 1, at 105.

[23] ENOCH J. CROWDER, MILITARY JUSTICE DURING THE WAR 64 (1919), *available at* http://www.loc.gov/rr/frd/Military_Law/MJ_during_war.html. In this sixty-page letter to the Secretary of War, Major General Crowder made his defense of the American military justice system and his recommendations for Congressional and executive reform of that system. As noted in that letter, Major General Crowder had previously asked the Secretary to implement three-man Boards of Review, "for the purpose of equalizing punishment through recommendations for clemency." *Id.* at 42. His recommendations for reform included the institution of a "law member," that is, a lawyer from the Judge Advocate General's Department to serve as a panel member and give legal advice to the panel in "serious, difficult, and complicated cases." *Id.* (Previously the panel had received its legal advice from the prosecuting judge advocate.) This reform was implemented and the "law member" was the forerunner of today's Military Judge. *See* Fred L. Borch, III, *The Trial by Court-Martial of Colonel William "Billy" Mitchell*, ARMY LAW., Jan. 2012, at 1, 2 n.9. For more on the controversy over reforming the Articles of War, see Terry W. Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell*, 35 MIL. L. REV. 1 (1967); JOHN M. LINDLEY, A SOLDIER IS ALSO A CITIZEN: THE CONTROVERSY OVER MILITARY JUSTICE, 1917–1920 (1990).

[24] Revised Statutes, sec. 1223 (1923).

[25] 42 Stat. 1160 (1923). While Congress acceded to President Harding's request that Crowder be made an ambassador, the legislation denied Crowder his military retired pay during the period of this diplomatic appointment. He earned $17,500 a year as ambassador.

until leaving Havana in 1927. Crowder settled in Chicago, where he practiced civilian law until he died in 1932, aged seventy-three years. He never married and left the bulk of his estate to his sisters.

Crowder has not been forgotten. On the contrary, he was the first Judge Advocate General to have a full-length biography.[26] But was Major General Crowder the "greatest" judge advocate in history? He certainly had a remarkable life and an equally remarkable career, and no one in our Regiment's history has ever accomplished more as an Army lawyer.

More historical information can be found at

The Judge Advocate General's Corps
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https://www.jagcnet.army.mil/8525736A005BE1BE

[26] In addition to Crowder, Brigadier General Joseph Holt, who served as the Judge Advocate General from 1862 until 1875, has been the subject of biographers. Two biographies have been published, both in 2011: JOSHUA E. KASTENBERG, LAW IN WAR, WAR AS LAW: BRIGADIER GENERAL JOSEPH HOLT AND THE JUDGE ADVOCATE GENERAL'S DEPARTMENT IN THE CIVIL WAR AND EARLY RECONSTRUCTION, 1861–1865 (2011); ELIZABETH D. LEONARD, LINCOLN'S FORGOTTEN ALLY: JUDGE ADVOCATE GENERAL JOSEPH HOLT OF KENTUCKY (2011).

Lore of the Corps

The Military Rules of Evidence: A Short History of Their Origin and Adoption at Courts-Martial

Fred L. Borch
Regimental Historian & Archivist

The Military Rules of Evidence (MRE) have been a permanent feature of courts-martial practice for more than thirty years. While practitioners today are comfortable with the rules and accept their permanence in military criminal trials, their adoption in 1980 was the end result of a long and contentious struggle. This is the story of the origin of the MRE and their adoption at courts-martial.

Prior to 1975, when the Congress enacted legislation establishing the Federal Rules of Evidence (FRE), the admissibility of evidence in U.S. courts was governed by Federal common law. Similarly, evidentiary rules at courts-martial were governed by a common law of evidence that had emerged from successive decisions from the Court of Military Appeals (COMA) and, to a lesser extent, the inferior service courts. The 1969 Manual for Courts-Martial (MCM), contained these judicial decisions, but it was difficult to know whether the MCM was adopting these "decisions as positive law or merely setting them forth for the edification of the reader."[1]

Under the Uniform Code of Military Justice (UCMJ), Article 36, courts-martial "shall, so far as . . . practicable, apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts."[2] Recognizing that the codification of the Federal common law rules of evidence meant that the Armed Forces should consider codifying military evidentiary rules, Colonel (COL) Wayne E. Alley, the then-Chief of Criminal Law in the Office of The Judge Advocate General, decided that "Military Rules of Evidence" should be created and adopted by the Armed Forces.

With the concurrence of Major General Wilton B. Persons, The Army Judge Advocate General, COL Alley put his idea in a written memorandum, which he submitted to the Department of Defense (DoD) Joint Service Committee on Military Justice (known colloquially as the "JSC").[3] Colonel Alley, who had recently assumed the chairmanship of the JSC, "formally proposed" that the services "revise the Manual for Courts-Martial to adopt, to the extent practicable, the new civilian rules."[4]

Colonel Alley's chief argument was that Article 36 required a codification of the military rules to bring courts-martial practice in line with federal civilian practice under the new FRE. A second important reason, as already indicated, was that the evidentiary language contained in the 1969 MCM was not necessarily binding, making its usefulness doubtful. But Alley also had a third reason, which grew out of his experience as a military judge wrestling with evidentiary issues at trial. In a recent e-mail, he explained:

> I was the only [JSC] member whose mid-career years were spent in the judiciary. I dealt with evidentiary issues on an almost daily basis. I found the best source of

[1] Fredric I. Lederer, *The Military Rules of Evidence: Origins and Judicial Implementation*,, 130 MIL. L. REV. 5, 8 (1990). Lederer is now the Chancellor Professor of Law and Director, Center for Legal and Court Technology, College of William and Mary; he also is a retired reserve judge advocate colonel.

[2] UCMJ art. 36(a) (2008).

[3] The Joint Service Committee on Military Justice (JSC) consists of an Army, Navy, Air Force, Coast Guard, and Marine Corps representative, usually in the grade of O-6. Department of Defense Directive 5500.17, which governs the operation of the JSC, sets out the committee's duties and responsibilities. Its principal mission is to "conduct an annual review of the Manual for Courts-Martial (MCM) in light of judicial and legislative developments in civilian and military practice." As a practical matter, this means deciding if changes are needed to the Military Rules of Evidence (MRE)—and the Punitive Offenses and Rules for Courts-Martial—in light of changes in civilian criminal law. U.S. DEP'T OF DEF., DIR., THE ROLES AND RESPONSIBILITIES OF THE JOINT SERVICE COMMITTEE ON MILITARY JUSTICE (3 May 2003), *available at* http://www.dod.gov/dodgc/images/jsc_mission.pdf (last visited Jan. 13, 2012).

[4] Lederer, *supra* note 1, at 6.

> helpful case law was in Article III court decisions, which, I believed, *would be less and less helpful for military judges as the cases came more and more to be explications of FREs.* This was particularly important because of the FRE clarity about the necessity to preserve issues by timely objection. Military practice was wishy-washy as to this, and military case law seemed to support bailing out counsel who didn't do his objecting job.[5]

Despite COL Alley's arguments, the Navy opposed the idea of creating MRE. "If it isn't broken, don't fix it" seems to have been the basic reason for the sea service's opposition, but the Office of the Judge Advocate General of the Navy later articulated at least four reasons why "relatively low priority" should be "given to [the FRE's] quick implementation in the military." First, the MCM's rules of evidence were "a well thought out set of rules located in one convenient place." Second, new MRE necessarily would result in "a substantial amount of litigation." Third, it would be difficult to transform the FRE into MRE because these "civilian rules would have to be scrutinized and adapted" to the needs of the military. Fourth and finally, the Navy argued that creating the MRE probably would require special training in order to educate judge advocates about the new rules—training that would be unnecessary if the services simply retained the existing MCM evidentiary rules with which practitioners were already familiar and comfortable.[6]

It is likely that opposition to implementing the FRE at courts-martial also grew out of a general unhappiness with the increasing "civilianization" of the UCMJ advocated by the COMA Chief Judge, Albert B. Fletcher, Jr., and others. The Military Justice Act of 1968 had already introduced extraordinary changes into the UCMJ, and it may have seemed to the Navy that adopting the FRE in military practice was too much civilianization, and too soon. Those opposed to this continued civilianization believed that it ultimately would remove the military character of the military justice system—which they believed was essential if the system was to remain a tool of discipline for commanders.

Since the JSC operates on consensus, the Navy's opposition to COL Alley's idea meant that his proposal went nowhere. By 1977, little had been done on the project. But, as is often the case in a bureaucracy, a new personality's arrival resulted in the revival of a shelved idea. A new DoD General Counsel, Ms. Deanne C. Siemer, had recently arrived in the Pentagon[7] and began asking questions about military justice. Colonel Alley quickly capitalized on Siemer's newfound interest to "break the logjam" and recommended to her that the FRE be adopted, with suitable changes, into the MCM as MRE.[8]

The DoD General Counsel embraced COL Alley's idea, created an "Evidence Project as a DoD requirement," and tasked the JSC with drafting a comprehensive MRE package. Beginning in early 1978, the JSC Working Group, consisting of lower-ranking judge advocate representatives from all the services, two attorneys from COMA, and a member of the DoD General Counsel's office, began drafting the rules. Colonel Alley's instructions to the Working Group were that it "was to adopt each Federal Rule of Evidence verbatim, making only the necessary wording changes needed to apply it to military procedure . . . ."[9]

While COL Alley departed for a new military assignment in mid-1978,[10] his earlier instructions continued to be followed by the Working Group, as its members generally embraced the philosophy that each FRE should be adopted as an MRE "unless it is either contra to military law . . . or was so poorly drafted as to make its adoption almost an exercise in futility."[11] Although many judge advocates were involved in drafting the new proposed rules, the principal co-author was then-Major (MAJ) Fredric I. Lederer, who was the Army representative on the JSC Working Group.[12]

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[5] E-mail from Brigadier General (Retired) Wayne E. Alley, to Fred L. Borch, Regimental Historian and Archivist, The Judge Advocate General's Legal Ctr. & Sch., (7 Dec. 2011, 11:23:00 EST) (emphasis added) (on file with author).

[6] Lederer, *supra* note 1, at 8 (quoting Memorandum from William M. Trott, to Code 20, JAG:204.1: WMT:lkb (17 Mar. 1975)).

[7] Deanne C. Siemer was nominated by President Carter to be the DoD General Counsel. After her confirmation by the Senate, she served from April 1977 to October 1979, http://csis.org/files/publication/111129_DOD_PAS_Women_History.pdf (last visited Jan. 13, 2012).

[8] Lederer, *supra* note 1, at 10.

[9] *Id.* at 13.

[10] Alley had been promoted to Brigadier General (BG) and reassigned to be the Judge Advocate, U.S. Army Europe and 7th Army. He retired four years later to become the Dean, University of Oklahoma School of Law. Brigadier General Alley subsequently was nominated and confirmed as a U.S. District Judge for the District of Oklahoma, becoming only the second Army lawyer in history to retire from active duty and then serve as an Article III judge. For more on Alley's remarkable career, see Colonel George R. Smawley, *In Pursuit of Justice, A Life of Law and Public Service: United States District Court Judge and Brigadier General (Retired) Wayne E. Alley, U.S. Army, 1952–1954, 1959–1981*, 208 MIL. L. REV. 213 (2011).

[11] Lederer, *supra* note 1, at 14 n.33.

[12] Others who deserve credit for drafting the proposed MREs are Navy Commander Jim Pinnell, Army Major John Bozeman, Air Force Major James Potuck, and Coast Guard Lieutenant Commander Tom Snook. Mr. Robert Mueller and Ms. Carol Scott, both civilian attorneys at COMA and Captain (CPT) Andrew S. Effron, then assigned to the DoD General Counsel's office, also participated in the drafting. Captain Effron was the principal drafter of the proposed privilege rules (MRE Section V). He later served on the Court of Appeals of the Armed Forces and retired as its Chief Judge in 2011. *Id.* at 11 n.21. *See also* MANUAL FOR COURTS-MARTIAL, UNITED STATES app. 22, sec. 1 (2012) [hereinafter MCM]. Lederer was the primary drafter of the original analysis to the MREs. *Id.*

The end result was that some FRE were adopted without change, while others were modified to fit better with military practice. Military Rules of Evidence 803(6) and (8), for example, were both modified to "adapt" them "to the military environment" so as to permit the admissibility of laboratory reports as an exception to the hearsay rule.[13]

The largest difference between the FRE and MRE was the creation of Sections III and V, which for the first time codified, in binding form, evidentiary rules on search and seizure, confessions and interrogations, eyewitness identification, and privileges. All of these rules had to be created from scratch, as there was no FRE counterpart.[14]

As the MRE drafting process continued, the services continued to disagree strenuously about adopting some of the FRE. The Air Force, for example, considered FRE 507, Political Vote, (today's MRE 508) to be "ridiculous" and "unnecessary."[15] It also bitterly opposed the codification of search and seizure rules ultimately adopted as MRE 311–317. The Air Force argued that these rules should be rejected because "in the military environment, search and seizure is a very fluid area of the law," and the adoption of MRE governing search and seizure might bind the Air Force more restrictively than case law. The Air Force's objections ultimately were overruled by a majority of the JSC; the DoD General Counsel also approved the proposed MRE 311–317 as written by the Working Group.[16]

Ms. Siemer forwarded the completed MRE to the Office of Management and Budget on 12 September 1979. That office, in turn, shared the MRE with the Department of Justice (DOJ) and the Department of Transportation (DOT) (under whose auspices the Coast Guard then operated). After the DOJ and DOT gave their approval, President Jimmy Carter signed an executive order promulgating the new MRE on 12 March 1980.

The new MRE became effective on 1 September 1980, which meant a significant revision of criminal law instruction. This included a round-the-world series of trips by MAJ Lederer and Commander Pinnell to explain the new MRE to Army, Navy, Marine Corps, and Coast Guard judge advocates in the field. At the Army's The Judge Advocate General's School in Charlottesville, Virginia, the teaching of evidence was revamped; the 94th Judge Advocate Officer Basic Course, which started in October 1980, was the first class to receive instruction in the new MRE. While newly minted judge advocates readily accepted the MRE as a permanent part of court-martial practice, it took some time for seasoned practitioners, especially in the judiciary, to accept them.

The COMA wrestled with the new rules in a number of cases. In *Murray v. Haldeman*, for example, the COMA ruled that it was "*not necessary—or even profitable—to try to fit compulsory urinalysis*" into the MRE.[17] This was simply wrong: the COMA should have found that the fruits of the compulsory urinalysis were lawful under MRE 313, as it would do seven years later in *United States v. Bickel.*[18]

But, while avoiding the application of MRE 313 in *Murray v. Haldeman*, the court did correctly conclude that the results of the urinalysis were admissible under MRE 314(k) as a new type of search.

Similarly, in *United States v. Miller*, the Air Force Court of Military Review examined MRE 614(b)'s requirement that court members who desire to question a witness "shall submit their questions to the military judge in writing." The Air Force court said that the rule was only a suggestion, and a foolish suggestion at that.[19]

Military judges in the field were no different. The author remembers an attempted rape prosecution at Fort Benning, Georgia in the early 1980s. The military judge, a senior colonel with extensive experience on the bench, was uncomfortable with the trial counsel's explanation that the crying victim's claim of sexual assault was admissible as an excited utterance under MRE 803(2). Instead, ignoring trial counsel's rationale, the judge ruled that the statements were admissible as "fresh complaint" under paragraph 142*b* of the 1969 MCM. While this trial judge understood that the MRE were in effect, he nevertheless frequently told counsel in other courts-martial—but off the bench and off the record—that he did not like the MRE and would continue to look to the 1969 MCM for guidance on the admissibility of evidence.

This Fort Benning-based judge was not alone in his view. Other trial judges comfortable with the pre-MRE rules also resisted following the MRE, with sometimes disastrous results for the government. But this disinclination to follow the MRE—and any incorrect evidentiary ruling that adversely affected the prosecution's case—went unchecked until government appeals were permitted by the Military Justice Act of 1983.

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[13] MCM, *supra* note 12, MIL. R. EVID. 803 (6), (8) analysis.

[14] While Section III had to be created from scratch, there was a proposed Federal Rules of Evidence (FRE) Section V that CPT Effron and his colleagues could use for some of the proposed provisions in MRE Section V. While the FRE Section V had been rejected by Congress when it enacted the FREs in 1975, this did not prevent its use by the JSC Working Group. *See id.* app. 22, sec. V, analysis, at A22-38 (Privileges).

[15] Lederer, *supra* note 1, at 13 n.32.

[16] *Id.* at 16 n.45; s*ee id.* at 15–19 (providing more on opposition to specific MREs).

[17] 16 M.J. 74, 82 (C.M.A. 1983) (emphasis added).

[18] 30 M.J. 277 (C.M.A. 1990).

[19] 14 M.J. 924, 925 n.1 (A.F.C.M.R. 1982) (The court held that the military judge, at his discretion, may permit oral questions by the court members and sarcastically stated that the new rule "improves efficiency only to the extent that it discourages questions from court members . . . .").

Judge advocates today are comfortable with the MRE, and also accept that the rules will be modified on a regular basis to conform to changes in both the FRE and case law from the U.S. Supreme Court and Court of Appeals for the Armed Forces. But while practitioners today are sanguine about the MRE, history shows that their origins and early years were somewhat tumultuous.

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An Officer Candidate School for Army Lawyers? The JAG Corps Experience (1943–1946)

Fred L. Borch
Regimental Historian & Archivist

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

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

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

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

A more significant problem, however, was the limited number of instructors. By June 1943, TJAGSA had trained ten officer classes (consisting of more than 500 men) with an instructional staff of only seventeen men (fifteen judge advocates and two infantry officers) in ten months.

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

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

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

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

[5] *Id.*

[6] *Id.*

[7] *Id.* at 3.

Consequently, although very much overburdened with work, some of these TJAGSA instructors now also had to begin teaching JAGOCS classes when the first candidates arrived on 7 June 1943. Ultimately, the solution was to select JAGOCS graduates to become instructors—but this could be done only after several JAGOCS classes had graduated. To alleviate the shortage of instructors in the meantime, TJAGSA arrived at a practical solution: combining officer classes with officer candidate classes "for a substantial amount of instruction."[8] While some were concerned about the impact on good order and discipline that might result from "mixing" officers and enlisted personnel, the "similarity in background and ability of the officers and officer candidates" seems to have precluded any problems.[9]

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

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

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

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

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

There was considerable study of the Law of War and the applicability of the Geneva Convention of 1929 relating to the treatment of prisoners of war, the status of U.S. military

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[8] *Id.* at 6.

[9] *Id.* at 7.

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

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

[12] *Id.* at 9.

[13] *Id.* at 10.

[14] *Id.*

[15] *Id.*

[16] *Id.* at 12–13.

[17] *Id.* at 13.

[18] *Id.*

[19] *Id.* at 14.

[20] *Id.* at 17–20.

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

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

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

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

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

More historical information can be found at

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https://www.jagcnet.army.mil/8525736A005BE1BE

[21] *Id.* at 22.

[22] *Id.* at 22–23.

[23] *Id.* at 24.

[24] *Id.*

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

Contracting in China: The Judge Advocate Experience, 1944–1947

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Regimental Historian & Archivist

While procurement law has been an important component of judge advocate practice for many years, few men and women today know that Army lawyers were involved in the negotiation and supervision of contracts in China during World War II and the immediate post-war period. What these contract law attorneys did and how they did it is a story worth telling.

While American troops had been stationed in China prior to World War II, the Japanese attack on Pearl Harbor caused the United States to greatly strengthen its relationship with the Chinese, if for no other reason than to keep China in the war against Japan. Recognizing that strengthening General Chiang Kai-shek's army could inflict considerable damage on their common enemy, the War Department created the China-Burma-India (CBI) Theater in 1942. As one of its lines of effort against Japan, the United States supplied the Chinese Army with weapons, ammunitions, food and other supplies by using the Burma Road, until the Japanese disrupted its use in 1942, and by airlifts flown over "the Hump," the air route over the 14,000 foot Himalayas Mountains located between India and southern China. While a total of 650,000 tons of supplies would eventually be airlifted to China, the limitations on what could be flown and how much could be flown meant that essential supplies still had to be purchased in local markets. Fuel was the single most important item for purchase. Army officers negotiated contracts for gasoline for aircraft and alcohol for use in motor vehicles. But contracts also were signed for fresh fruits and vegetables and other supplies that could not be brought into China via the Burma Road or over "the Hump."[1]

The first judge advocates apparently arrived in China in mid-1944 and were headquartered at U.S. Forces, China Theater, under the command of Lieutenant General Albert C. Wedemeyer in Chungking.[2] From that time until mid-1947, some twenty judge advocates served at U.S. Forces, China Theater, and its successor commands, U.S. Army Forces China, Nanking Headquarters Command, and Army Advisory Group, China. At any one time, the maximum number of Army lawyers in the country was twelve, and all judge advocates apparently had departed China by June 1947.[3]

While most were involved in supervising courts-martial, investigating war crimes, processing claims, and providing legal assistance, a small number of Army lawyers supervised the preparation of procurement contracts and reviewed existing contracts for legal sufficiency.

The most difficult issue for judge advocates involved in the negotiation of contracts (and leases for real estate, in which Army lawyers also participated) was the requirement that "Chinese National Currency will be the medium of exchange in all fiscal matters."[4] At first, this requirement was not a problem, as the Chinese yuan held its value but, by early 1945, the currency was rapidly losing its value. As Colonel (COL) Edward H. "Ham" Young[5] explained in his report on legal operations in China, this exchange rate fluctuation presented serious difficulties:

> Since most procurement contracts called for large advance payments to enable the local contractors to purchase raw materials, and since most leases provided for large advance payments, the fluctuation of the currency necessitated frequent modifications of contracts . . . . By agreement between the governments of the United States and China, the rate of exchange between the Chinese Yuan and

[1] CENTER OF MILITARY HISTORY, U.S. ARMY CAMPAIGNS IN WORLD WAR II: CHINA OFFENSIVE 4 (1992).

[2] Albert Coady Wedemeyer, appointed by President Franklin D. Roosevelt as the Commanding General of the U.S. Forces in the China Theater and the Chief of Staff to Chiang Kai-shek, arrived in China on 31 October 1944. Wedemeyer had served in China from 1930 to 1934, and consequently had the perspective and experience necessary for success. *See* ALBERT C. WEDEMEYER, WEDEMEYER REPORTS! (1958) (providing more information on Wedemeyer's life as a Soldier).

[3] EDWARD H. YOUNG, REPORT OF THE JUDGE ADVOCATE, UNITED STATES FORCES, CHINA THEATER, UNITED STATES ARMY FORCES CHINA, NANKING HEADQUARTERS COMMAND, AND ARMY ADVISORY GROUP CHINA, 1 JANUARY 1945 TO 10 JUNE 1947, at ii (1948).

[4] HEADQUARTERS, U.S. FORCES CHINA THEATER, CIR. NO. 37, PURCHASING AND PROCUREMENT POLICIES—CHINA THEATER para. K (17 Feb. 1946).

[5] Edward Hamilton "Ham" Young was one of the most well-known and admired judge advocates of his generation. A graduate of the U.S. Military Academy, Young was serving as an infantry officer when the Army sent him to law school so that he could return to West Point to teach. Young liked law and, after being detailed to the Judge Advocate General's Department, obtained his law degree from New York University's law school. During World War II, Colonel Young served as the first Commandant of The Judge Advocate General's School and is widely credited with creating the educational curriculum that transformed civilian lawyers into judge advocates. *See* Colonel Edward H. Young, *The Judge Advocate General's School (1944)*, DETROIT B.Q., Jan. 1944, *reprinted in* ARMY LAW., Sept. 1975, at 29.

> the U.S. dollar was fixed . . . . However, contracts were entered into with individuals to whom this fixed rate did not apply and who made the open market and black market rates of exchange the basis for the determination of the costs of their services rendered or materials furnished.[6]

As COL Young observed, if American negotiators and their judge advocate supervisors tried to deal with the local suppliers on the basis of the fixed yuan-dollar exchange rate, U.S. units would be unable to obtain essential materials. No wonder Young reported that this meant that procurement in the China Theater was done in accordance with "local conditions."[7]

In addition to currency fluctuation, inflation presented challenges for Americans stationed in China. When "sky-rocketing prices in local commercial establishments" made it difficult for U.S. troops to obtain necessary goods and services, Army Special Services opened snack bars, barber shops, and gift shops. Chinese concessionaires operated these establishments, but judge advocates were "called upon to develop procedure and to draft contracts to meet each particular situation."[8]

Inflation and currency fluctuation also affected the hiring of local Chinese personnel. Employment contracts for cooks, clerks, guards, drivers and other similar laborers contained provisions requiring pay adjustments when changes in the monthly cost-of-living index occurred. The Shanghai Municipal Government, for example, issued a monthly index that covered various items such as rent, clothing, and food. This index had been created using prices that existed in 1939, prior to the Japanese occupation of Shanghai. By 1944, however, variations in the monthly cost-of-living index occurred so frequently that judge advocates "worked closely with all Purchasing and Contracting Officers" in drafting payments clauses. These clauses modified existing contracts in such a way to adjust pay when changes in the index occurred without having to amend each employment contract each month.

Contracts for real estate presented equally thorny issues for judge advocates. One unusual situation involved the use of facilities owned by the Methodist Missionary Society in Chungking. When Lieutenant General Wedemeyer opened his new China Theater Headquarters in that city in October 1944, the society offered the use of its privately owned middle school compound for the military headquarters. General Wedemeyer accepted this offer because the society did not want any rent for its use. Prior to taking occupancy of the facilities, however, the United States requested that the Chinese Government make "large scale repairs" and build additional structures on the property, which the Chinese did.[9]

The Methodist Missionary Society then asked the Chinese Government to execute a written instrument guaranteeing that the school compound would be returned to the society at the end of the war, when American forces presumably would leave China. When the Chinese Government refused to give any such written assurances, the society looked to Lieutenant General Wedemeyer and the Americans for support. Colonel Young and his judge advocates advised that, regardless of whether the Chinese ultimately returned the property to the Methodist Missionary Society, the use of the property by the United States would create a quasi-contractual relationship between the Army and the society and potentially expose the United States to a claim for the fair market value of the rental property. Based on this legal advice, COL Young and his lawyers "conducted a series of conferences with all parties involved" and, as a result of these negotiations, the Chinese Government agreed that the premises would be returned to the Methodist Missionary Society. In return, the society "executed a general release in favor of United States forces exempting the United States from all future claims 'which may have attended its occupancy.'"[10]

As for real estate leases generally, judge advocates working in Shanghai and other locations in China quickly learned that "transfers of property to and between the Japanese during the regime of the Puppet Government . . . threatened to involve the U.S. military authorities in lengthy litigation."[11] This was because more than one Chinese national would claim to be the rightful owner of the same leased premises, and demand that the moneys due under the lease be paid to him. Fortunately, a close working relationship with Chinese authorities "overcame most of these difficulties."[12] One solution was for the Chinese to take over the property in question and then permit the U.S. Army to use it until the true owner was found or determined. While this ensured that U.S. personnel had use of the premises—an important point—it only postponed the ownership issue and ultimately, the Americans paid a claim for the full value of the leased property to the rightful owner.

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[6] YOUNG, *supra* note 3, at 19.

[7] *Id*.

[8] *Id*. at 20.

[9] *Id*. at 18.

[10] *Id*. at 19.

[11] *Id*. at 20.

[12] *Id*.

When COL Young, who served as the senior judge advocate in China from 1 January 1945 to 10 June 1947, returned home to the United States, he lauded the "ability, versatility and loyalty" of the "relatively small group of judge advocates" and others who had served alongside him in China. As this short history of contracting in China shows, Young certainly included his contract law attorneys in this group.[13]

More historical information can be found at

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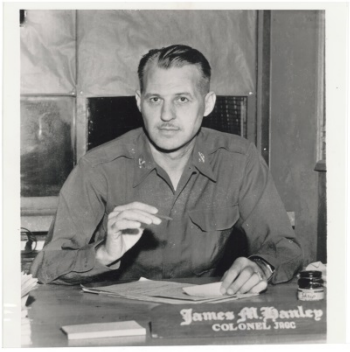
https://www.jagcnet.army.mil/8525736A005BE1BE

[13] *Id*. at iii.

Investigating War Crimes: The Experiences of Colonel James M. Hanley During the Korean War

Fred L. Borch
Regimental Historian & Archivist

While most Army lawyers know that the United States prosecuted hundreds of war crimes in the aftermath of World War II, few know that the Judge Advocate General's Corps (JAGC) contemplated conducting similar trials after hostilities between Chinese, North Korean, and United Nations forces ended on the Korean peninsula. The investigation of these war crimes, and why no prosecutions occurred, is best told through the experiences of Colonel (COL) James M. Hanley, who served as an Army lawyer in Korea from 1951 to 1952.



"Jim" Hanley had an unusual career for an Army lawyer. Although an attorney (Bachelor's Degree in Law, University of Chicago, 1931) with considerable experience in private practice as well as in government practice as an assistant attorney general for North Dakota, Hanley served as an infantry officer in World War II. He was in the thick of combat in Europe as a battalion commander in the famous 442d "Go for Broke" Regimental Combat Team, which consisted almost entirely of Japanese-American Soldiers. Then-Lieutenant Colonel (LTC) Hanley led his battalion with great distinction in Italy, France, and then Italy again. When the war ended, he had spent thirty-nine months in Europe and had been decorated with the Legion of Merit, Bronze Star Medal, French Croix de Guerre, and Italian Cross of Valor. He also proudly wore the Combat Infantryman Badge.[1]

Hanley was demobilized in July 1946, but his return to civilian life was brief. Hanley had applied for and was offered a Regular Army commission—in the Judge Advocate General's Department. As he was a lawyer, Hanley must have thought that being a judge advocate would be interesting, and perhaps a better use of his talents as he re-started his career as a Soldier. Consequently, when Hanley returned to active duty in June 1947, it was as an Army lawyer in the Office of The Judge Advocate General, Washington, D.C.[2]

When the Korean War began in June 1950, LTC Hanley was still in Washington, D.C., where he was serving as a member of the Armed Services Board of Contract Appeals. Some three months later, however, Hanley was in Japan with the Far East Command (FECOM), where he joined the Office of the Staff Judge Advocate (SJA) in Tokyo. Given Hanley's background, it must have been no surprise to him when the SJA, COL George W. Hickman, Jr., decided that Hanley would be a contract attorney in the office.

At the outbreak of the Korean War, General Douglas MacArthur announced that, although the United States had yet to ratify them, the United Nations Command (UNC) would follow the new 1949 Geneva Conventions. Not surprisingly, as MacArthur began to receive reports that North Korean soldiers had murdered wounded South Korean soldiers during fighting around Seoul, he publicly called on the North Korean People's Army (KPA) to adhere to the new Conventions as well. Nevertheless, the KPA continued to torture and kill captured U.S. and South Korean military personnel. MacArthur directed that evidence of these war crimes be collected, with the view toward prosecuting the offenders at the end of the war.

As a result of MacArthur's directive, COL Hickman established a "War Crimes Division" in FECOM and, perhaps given LTC Hanley's extensive combat experience, selected Hanley to take charge of this new organization. As Hanley remembered it, his mission "was to document war crimes revealed in the interrogation of prisoners of war . . . [and by] investigations in the field," with the intent to use this documentation "in postwar trials of perpetrators."[3]

[1] War Department Form 53, Certificate of Service, James J. Hanley, Block 29 (Decorations and Citations) (7 July 1946); U.S. Dep't of Army, DA Form 66, Officer Qualification Record, James M. Hanley, Block 21 (Awards and Decorations) (14 Apr. 1955).

[2] U.S. Dep't of Army, DD Form 66, Officer Qualification Record, James M. Hanley, Block 18 (Records of Assignments) (14 Apr. 1955) [hereinafter DD Form 66].

[3] JAMES M. HANLEY, A MATTER OF HONOR: A MEMOIRE 107 (1995).

Consisting of twenty-seven officers, two civilians, and fifteen enlisted personnel, the War Crimes Division quickly went to work. Hanley set out the organization's priorities in investigating war crimes in his "Field Memorandum No. 1."[4] The first task was to gather information about those who had killed or mistreated prisoners of war (POWs). The second priority was "to identify those Koreans who had committed crimes against defenseless civilians."[5] Third was to learn the identity of those who had used POWs for propaganda or, in the case of South Korean POWs, had forced them to join the KPA.

Hanley's war crimes investigations teams exhumed bodies of suspected victims and interviewed U.S. and South Korean soldiers. The best source of war crimes information, however, was the 120,000 North Korean prisoners of war held on Koje-do Island and the southwestern mainland. According to Korean War historian Allan R. Millett, "Hanley's operatives infiltrated the POW groups and recruited informers; Koreans eager to sever ties with the South Korean Labor (Communist) Party and the KPA proved willing converts and informers."[6]

As a result of their work, Hanley and his War Crimes Division determined that, between November 1950 and November 1951, the North Koreans had killed 147 American POWs and executed "at least 25,000 South Koreans and at least 10,000 northern Korean 'reactionaries.'"[7] Hanley's evidence also showed that the Chinese (who had entered the war in October 1950) had killed 2,513 U.S. POWs, "and in addition, 10 British soldiers, 40 Turks, 5 Belgians and 75 UN soldiers of unknown nationality."[8]

On 14 November 1951, Hanley revealed what he knew about North Korean and Chinese atrocities at a press conference held in Pusan. In addition to revealing that the War Crimes Division had been investigating atrocities committed by North Koreans and Chinese, Hanley released information on specific war crimes. He disclosed, for example, that some 1,250 U.S. Soldiers had been murdered near the Yalu River by North Koreans between 16 and 18 September 1950. The men had been transported from a prison camp near Pyongyang and then "shot in groups after being fed rice and wine."[9] Hanley also revealed that the Chinese had committed war crimes, including the killing of 200 U.S. Marine prisoners near Sinhung, ordered by a Chinese regimental commander.[10]

The intent of Hanley's remarks was to dispel any notion amongst the UNC forces that the Chinese forces adhered to the Geneva Conventions.[11] The Chinese People's Volunteer Force claimed that it treated UNC personnel captured on the battlefield in accordance with the Geneva Conventions. The claim was even implied in "an 8th Army training directive and reports in *Stars and Stripes* . . . ."[12] Hanley thought that the UNC forces had to be informed of the "true nature of Chinese military" in its treatment of POWs[13] and thought that revealing evidence of Chinese and North Korean war crimes "would squash a notion that the Chinese would treat POWs well and thus improve the Allied will to fight."[14]

Hanley's oral statements to the press were also released as a written memorandum. When this document reached America's major newspapers, it caused a huge public uproar—especially in families with Soldiers fighting on the Korean peninsula. The "Hanley Report" suggested that the hundreds of American Soldiers who had been reported as "missing in action" in fact had been captured and murdered by the Chinese and North Koreans.[15] The United Nations was already in sensitive armistice negotiations with the Communists at Panmunjom and now the reverberations from the "Hanley Report" threatened to disrupt these talks.[16] Although COL Hanley had obtained approval from the FECOM Public Information Officer prior to releasing his reports on the enemy war crimes, General Matthew Ridgway, who replaced General MacArthur as the Supreme Commander of UN forces in April 1951, defused the situation by downplaying Hanley's claims. As Ridgway explained, until the Chinese released a definitive list of American and Allied POWs, no one could possibly know for certain who was actually being held captive, much less whether they had survived.[17]

By 1952, the War Crimes Division had identified 936 POWs who could be tried for war crimes; two-thirds of them were North Koreans. The problem was that most of these criminal cases were built around confessions and corroboration was lacking for most. This explains why the

[4] ALLAN R. MILLETT, THEIR WAR FOR KOREA 228 (2002).

[5] *Id* .

[6] *Id*.

[7] *Id* at 229.

[8] HANLEY, *supra* note 3, at 112.

[9] *Id.* at 113.

[10] *Id.*

[11] *Id.* at 110.

[12] MILLETT, *supra* note 4, at 229.

[13] HANLEY, *supra* note 3, at 110.

[14] MILLETT, *supra* note 4, at 229.

[15] *Id.*

[16] *Id.* at 230.

[17] The three-page "Hanley Report" is reproduced in its entirety in Hanley's memoir. HANLEY, *supra* note 3, at 112a14.

division's staff reviewed 1,185 "confessions" but could find supporting evidence for only seventy-three.

As the war on the Korean peninsula continued, the Army decided that any war crimes trials, if they were to be held, should be conducted by the United Nations or some other international authority; "the U.S. Army did not want to return to the war crimes trials business."[18] But just who should conduct these trials, and where they should be held, was never decided.

It was, however, the repatriation of Chinese and North Korean POWs in 1952 that ended any chance for war crimes prosecutions in Korea. The problem was that if the Americans retained suspected Chinese and North Korean war criminals for trial, then the Chinese and North Koreans would "hold back their own self-defined Allied 'war criminals,' principally air crewmen and intelligence agents."[19]

As the negotiations continued through 1952, the War Crimes Division was reduced in both size and importance. By September 1952, there were only seven officers, thirteen enlisted Soldiers and eight interpreters in the organization—about half of its already reduced authorized strength. When it closed its doors in May 1954, the War Crimes Division had concluded that the Chinese and North Koreans "had killed between 5,600 to 6,100 American POWs and ten times more [South] Korean servicemen."[20] But it made no difference in the end because, "with the tacit approval of the [South] Korean government," the UNC issued a blanket amnesty in August 1953 to suspected war criminals . . . as part of the armistice process."[21] The result was, while there were sufficient evidence to support dozens of war crime prosecutions, there would be no trials like those that had occurred in the aftermath of World War II. Politics—the desire to end the Korean conflict—had trumped accountability for war crimes.

As for COL Hanley, he seems to have decided that being an Army lawyer was not for him. Perhaps his experience as the Chief, War Crimes Division, had been too frustrating. Or perhaps he simply missed being an infantry officer. In any event, while still in Korea, and in charge of the War Crimes Division, Hanley requested to be transferred from the JAGC back to the Infantry. After this transfer was approved in March 1952, COL Hanley held several staff assignments at Headquarters, FECOM, before returning to the United States in July 1953. He subsequently served as a regimental commander at Camp Atterbury, Indiana, and Fort Carson, Colorado. His last assignment before retiring in 1960 was in Washington, D.C. as a member of the Army Panel, Armed Services Board of Contract Appeals, the very same board on which he served his first judge advocate assignment.[22] Hanley died in June 1998 at the age of 93. Until the end of his life, he "never lost his conviction that Communist war criminals—meaning the murderers of POWs and helpless civilians—should be held accountable in some fashion."[23] But it was not to be.

The author thanks Professor Allan R. Millett, Ambrose Professor of History and Director, Eisenhower Center for American Studies, University of New Orleans, for alerting him to the Hanley story and the challenges of investigating war crimes during the Korean War.

More historical information can be found at

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https://www.jagcnet.army.mil/8525736A005BE1BE

[18] MILLETT, *supra* note 4, at 230.

[19] *Id.* at 231.

[20] *Id.* at 232.

[21] *Id.*

[22] DD Form 66, *supra* note 2.

[23] MILLETT, *supra* note 4, at 230.

Lore of the Corps

The Origin of the Corps' Distinctive Insignia

Fred L. Borch
Regimental Historian & Archivist

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

In the years when the Army was re-building after Vietnam, senior leaders looked for novel ways to enhance morale and esprit de corps among Soldiers. One initiative, approved by the Chief of Staff in 1981, was to create a "U.S. Army Regimental System" in which Soldiers in the combat arms were affiliated with a "regiment" and then were expected to serve recurring assignments with that regiment.[1] While the regimental affiliation idea naturally worked best with infantry, armor, and artillery, the Army expected combat support, combat service support, and special branches like the Judge Advocate General's Corps (JAGC) to also carry "on the activities and traditions of a regiment."[2]

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

When Major General Overholt announced that the Corps was now also a regiment, he also revealed that "formal affiliation ceremonies" would take place during the Corps' "Worldwide" annual conference in October 1986 in Charlottesville, Virginia.[5] The planning for this "Regimental Activation Ceremony" had been underway for some time, because "accouterments" for the new "JAG Corps Regiment" were required for the ceremony, including an RDI to be worn by Soldiers to show their regimental affiliation.

Initially, the Corps' leadership considered adopting the Distinctive Unit Insignia used by The Judge Advocate General's School as the RDI. Ultimately, however, this idea was rejected in favor of designing a new RDI. This explains why an article in *The Army Lawyer* announced that there would be a Corps-wide "competition" to design the RDI. This competition was "open to all members of the JAGC (active, Reserve, and retired)" and "suggested crest designs" had to be submitted "by the end of June 1986."[6] While a number of drawings were submitted, it seems that the winning design came from Colonel (COL) Richard "Dick" McNeely and Major (MAJ) Ronald Riggs, both of whom were assigned to the International Law Division in the Office of The Judge Advocate General (OTJAG). As then-MAJ David Graham remembers, he was at lunch in the Pentagon one day and heard MAJ Riggs say to COL McNeely: "Hey, we can win this competition." McNeely agreed, and the two men sat down and sketched out a design on a small piece of paper, perhaps a napkin, with a ball point pen. They then submitted the design to OTJAG for consideration.[7]

The McNeely-Riggs design—consisting of a shield upon which the crossed-pen-and-sword insignia was centered, with the letters "JAGC" above the insignia and the numerals "1775" below it—won the competition. Then-MAJ Michael Marchand[8] took the design to The Institute of Heraldry for that office to use in creating the Corps' RDI.

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

[2] AR 600-82, *supra* note 1, para. 2-3f.

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

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

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

[6] *Id.*

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

[8] Michael J. Marchand had a thirty-two-year career as a judge advocate. He served in a variety of important assignments, including Assistant Judge Advocate General for Civil Law and Litigation (1997–1998) and Commander, U.S. Army Legal Services Agency & Chief Judge, U.S. Army

The Institute's initial proposed RDI design, however, deviated significantly from the McNeely-Riggs drawing. On 28 July 1986, the Institute proposed to Major General Overholt that the RDI consist of a dark blue shield containing *both* a "balance" and the crossed-pen-and-sword insignia. The balance—or weighing scales—would be *above* the crossed-pen-and-sword and both would be centered on the shield.[9] The Institute design also did not have the letters "JAGC." It did, however, have the numerals "1775" on a scroll at the base of the shield.

Major General Overholt did not like the scales in the proposed RDI design and asked the Institute to redesign the RDI without them. The result was that, on 13 August 1986, the Institute returned to Major General Overholt with two proposed designs: the pen and sword in *silver* on a blue shield with the numerals "1775," and the pen and sword in *gold* on a blue shield with the numerals "1775." After Major General Overholt selected the gold pen and sword design on 21 August, the Corps had its "Regimental Distinctive Insignia."[10] In the words of the Institute, the official description and symbolism of the new RDI were:

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

On its website, the Institute added that the motto "1775" "indicates the anniversary of the Corps."[11] More accurately, "1775" reflects the year that the Continental Congress appointed William Tudor as the first Judge Advocate General of the Army—thus marking the beginnings of the Corps in the Army.

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

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

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

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Court of Criminal Appeals (1998–2001). Major General Marchand completed his service in uniform as The Assistant Judge Advocate General (2001–2005). After retiring from active duty, Major General Marchand was appointed as the President of the Center for American and International Law located in Dallas, Texas.

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

[10] Graham Interview, *supra* note 7.

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

Mexican Soldiers in Texas Courts in 1916: Murder or Combat Immunity?

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The Mexican Revolution began in 1910 and, in the bloody decade that followed, violence occasionally spilled over the border onto U.S. soil. One violent episode occurred on 15 June 1916, two months after Brigadier General John J. Pershing and his 5,000-man Punitive Expedition entered Mexico to chase the Mexican revolutionary fighter Francisco "Pancho" Villa and his *Villistas* (Villa's men). On that Thursday in June, under cover of darkness, Mexican government troops crossed the Rio Grande and attacked U.S. cavalry troops guarding the border at San Ygnacio, a small Texas town located about forty miles south of Laredo. In the thirty-minute firefight, the Americans drove off their attackers, but at the cost of three U.S. soldiers killed and six more wounded. Six Mexican soldiers were also killed and more than a few wounded.[1] At least six Mexicans were captured, including Jose Antonio Arce, Vicente Lira, Pablino Sanchez, and Jesus Serda.

The Army handed its Mexican captives over to civilian law enforcement authorities in Webb County, Texas. Shortly thereafter, a grand jury indicted Arce, Lira, Sanchez, and Serda for the murder of Corporal William Oberlies, who had died of his wounds after the attack on San Ygnacio. A Webb County District Court jury convicted the four accused of homicide and sentenced them to death. On appeal to the Court of Criminal Appeals of Texas, the four condemned soldiers insisted that their convictions must be reversed because they were members of the Mexican armed forces and, as soldiers participating in a war between Mexico and the United States, could not be convicted of murder. What follows is the story of *Arce v. State*,[2] and how the legal opinion of the Army Judge Advocate General helped determine the outcome of this most unusual state criminal case.

At the time of the attack, there had been no declaration of war by either Mexico or the United States. The widespread revolutionary violence in Mexico made a declaration of war by that country unlikely. As for the United States, it was just as unlikely that Congress would declare war on its southern neighbor; with the possibility of being drawn into the ongoing war between the Allied and Central Powers in Europe, President Woodrow Wilson was reluctant to get involved in a conflict with Mexico.[3]

But the Mexican Revolution—which was transformed "from a revolt against the established order into a multisided civil war"[4] by 1915—greatly affected American security: between July 1915 and June 1916, there were thirty-eight cross-border raids in which eleven American civilians and twenty-six Soldiers were killed.[5] This explains why, after Pancho Villa and at least 300 *Villistas* raided Columbus, New Mexico, on 9 March 1916, President Wilson ordered Brigadier General Pershing and his troops into Mexico to capture or kill Villa—but not to wage war against the de facto Mexican government led by Venustiano Carranza.[6]

Regardless of what Wilson may have wanted, the presence of six U.S. Army regiments (four cavalry and two infantry), along with two field artillery batteries and various support units, naturally provoked a response from Mexican forces. The most serious incident—prior to the attack on San Ygnacio—occurred just after noon on 12 April 1916, when Mexican soldiers began firing on 13th U.S. Cavalry troopers outside the town of Parral. A "running battle, during which two Americans were killed and six wounded," lasted late into the afternoon and "developed into a standoff between U.S. and Mexican forces that threatened to propel the nations to the verge of war."[7] Since Parral was 516 miles inside Mexican territory, it should have been no surprise to Pershing and his American troopers that the Mexican government did not look favorably on their military operations deep inside Mexico—even if the Mexicans considered Pancho Villa to be their enemy too. There is every reason to conclude that the Mexican attack on San Ygnacio two months later was a signal from the Mexicans to

[1] *Mexican Raiders Kill Three in Texas*, N.Y. TIMES, June 15, 1916, at 15.

[2] 202 S.W. 951 (Tex. Crim. App. 1918).

[3] Wilson's decision to avoid an all-out war with Mexico was prudent, since the United States ultimately did enter the war on the Allied side in April 1917, ten months after the fight at San Ygnacio.

[4] ALEJANDRO DE QUESADA, THE HUNT FOR PANCHO VILLA 5 (2012).

[5] *Id.* at 23.

[6] For more on President Wilson's decision to send Pershing to Mexico, see HERBERT M. MASON JR., THE GREAT PURSUIT 65–73 (1970). Most scholars believe Wilson's dispatch of Pershing's expedition was lawful as "extra-territorial law enforcement in self defense," as Mexican authorities were "powerless" to stop raids by bandits across the U.S.-Mexican border, and there was no other available remedy. YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE 218 (3d ed. 2001).

[7] DE QUESADA, *supra* note 4, at 48.

Washington, D.C., that there were consequences for the Americans if Pershing persisted in his pursuit of Villa.

After the trial and conviction of Jose Antonio Arce and his fellow soldiers, their defense counsel appealed to the Texas Court of Criminal Appeals. Although the defense raised a number of appellate issues, the court focused on a single question, which it saw would be dispositive: whether "a state of warfare" existed between Mexico and the United States. If so, reasoned the court, the question of any punishment for the defendants would be "within the jurisdiction of the United States and not the courts of Texas."[8]

Under customary international law and the 1907 Hague Convention III at the time, two nations would not commence hostilities until there had been a declaration of war. As stated before, there had been no such pronouncement between Mexico and the United States. Nevertheless, the Texas court looked to the facts of the case to determine if there was a state of war between the two nations. The court noted that the Mexican soldiers who attacked U.S. cavalrymen at San Ygnacio were commanded by Carranza officers and that one of these officers, a lieutenant colonel, was killed in the fight. The four defendants had testified at their trial in Webb County that they "belonged to the Constitutionalist Army of Mexico; that the band that attacked San Ygnacio consisted of seventy-five men; and that they were publicly organized and equipped in Monterey and Jarita, with the full knowledge of the de facto government of Mexico."[9]

The Texas court then examined the issue of whether a state of war existed and cited the "official opinion" of Brigadier General Enoch H. Crowder, the Judge Advocate General of the Army, in its discussion of the question.[10] Crowder had written:

> It is thus apparent that under the law there need be no formal declaration of war, but that under the definition of Vattel a state of war exists so far as concerns the operations of the United States troops in Mexico by reason of the fact that the United States is prosecuting its rights by force of arms and in a manner in which warfare is usually conducted . . . I am therefore of the opinion that the actual conditions under which the field operations in Mexico are being conducted are those of actual war. That within the field of operations of the expeditionary force in Mexico, it is a time of war within the meaning of the fifty-eighth article of war.[11]

After concluding that the defendants had participated in military operations at the behest of the Mexican government, and that a state of war existed between Mexico and the United States, the court reversed the convictions for murder. Judge P.J. Davidson, who wrote the opinion for the Texas Court of Criminal Appeals, did not rule that the defendants were lawful combatants entitled to combat immunity for their lawful acts on the battlefield. On the contrary, his stated rationale for reversing the conviction was simply that the Texas courts had no jurisdiction over Mexican soldiers participating in a war with the United States and that legal proceedings against the Mexican defendants, if appropriate, must be brought in federal court. Wrote Davidson:

> [U]nder the general rules with reference to warfare, the Mexican column that attacked the troops at San Ygnacio came within those rules, and that, if they were to be dealt with for crossing the river and fighting our troops, it should be done by the United States government and not by the Texas courts. Texas has no authority to declare war against Mexico nor create a state of war.[12]

Judge Davidson most likely did not know about the principle of combat immunity. If he had known about it, his opinion could have discussed how the Mexican defendants, participating in an otherwise lawful attack on U.S. Soldiers, had an absolute defense to a charge of murder. But Davidson did understand that, because wars occur between nation-states, the issue of whether Mexican soldiers could be

[8] Arce v. State, 202 S.W. 951, 952 (Tex. Crim. App. 1918).

[9] *Id*.

[10] For more on Crowder, see DAVID A. LOCKMILLER, ENOCH H. CROWDER: SOLDIER, LAWYER AND STATESMAN 21 (1955). *See also* Fred L. Borch, *The Greatest Judge Advocate in History? The Extraordinary Life of Major General Enoch H. Crowder (1859–1932)*, ARMY LAW., May 2012, at 1.

[11] LOCKMILLER, *supra* note 10, at 952. Crowder had written this opinion in response to the question of whether Article 58 of the Articles of War applied to Pershing's operations in Mexico. Under the Articles of War as existed in 1916, a court-martial had no subject-matter jurisdiction over common law crimes such as murder, rape, or robbery unless the offense occurred "in time of war." Crowder's reasoning was entirely logical, and gave Pershing the expanded jurisdiction granted by Article 58. His official opinion also followed earlier case law enunciated in Winthrop's *Military Law and Precedents* (2d ed. 1920) ("a declaration of war by Congress is not absolutely necessary to the legal existence of a status of foreign war"). WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 668 (2d ed. 1920). Despite its logic, and longstanding precedent, Crowder's reasoning was rejected during the Vietnam era by the Court of Military Appeals in *United States v. Averette*, 41 C.M.R. 363 (1970) (holding that "time of war" means declared war). Crowder's reference to "Vattel" was a nod to Swiss jurist Emmerich de Vattel, whose 1758 *Le Droit de Gens ou Principe de la Loi Naturelle* was considered to be an authoritative text by lawyers of Crowder's era.

[12] *Arce*, 202 S.W. at 953.

charged with murder (or any criminal offense) was a question for the United States, and not Texas authorities.

While Davidson did not discuss combat immunity, he did appreciate that the mens rea required for murder might have been affected by the fact that Jose Antonio Arce and his fellow soldiers were acting under orders at San Ygnacio. Davidson wrote:

> [S]oldiers must obey the orders of their superiors, and failure to do so would subject them to discipline which rates from minor punishment to death . . . . When a soldier is ordered to fight, it is his duty to do so, and he may forfeit his life on refusal to do so . . . . These Mexican soldiers were ordered by their officers, commanded by their officers, headed by their officers to make the fight; the officers led them into the battle, and they fought. Some were killed; others escaped and fled. Some were wounded, one of whom was captured is under sentence in this case . . . . One at least of the defendants claimed to have been forced to go into battle by his commanding officer. He did not desire to fight, but under the rules of warfare if he deserted he would be tried and would be shot, or if he disobeyed orders and failed to engage in the fight he might forfeit his life.[13]

Davidson also noted that in fighting between Pershing's Punitive Expedition and Mexican government troops in Mexico, U.S. Soldiers captured on the field of battle "were not tried by the Mexican courts, but were turned over to the United States."[14] His conclusion was that if these American Soldiers were not prosecuted in Mexican courts, Mexican soldiers in the case before the court deserved the same treatment. This is why Judge Davidson's final words in the opinion were that even "if the state courts had jurisdiction of these defendants, we are of the opinion the conviction is erroneous."[15] While reversing the conviction on jurisdictional grounds, the court also recognized that, *even if the state courts had jurisdiction*, a conviction would have been unsupported in law for the following reasons: the four Mexican soldiers were acting under orders; Mexico had not prosecuted the captured U.S. Soldiers; or both. In any event, for the convicted Mexicans, the result was the same: they escaped the hangman's noose and returned to their homes in Mexico.

A final note. In August 1917, New Mexico state authorities prosecuted seventeen *Villistas* for the infamous 9 March 1916 raid on Columbus that had triggered Pershing's Punitive Expedition. The defendants pleaded guilty to second degree murder and "were sentenced to serve from 70 to 80 years in the [state] penitentiary."[16] In 1920, New Mexico Governor Octaviano A. Larrazolo pardoned fifteen of the seventeen convicted *Villistas*. He cited *Arce* as one basis for his decision.[17] More recently, attorneys representing John Phillip Walker Lindh, the infamous "American Taliban," cited *Arce* in a brief filed on their client's behalf in the Eastern District of Virginia in 2002. The relevance? That *Arce* was precedent for the proposition that the United States and Afghanistan were engaged in an international armed conflict and that Lindh consequently had combat immunity for his actions "as a foot soldier on behalf of the government of Afghanistan."[18] While Lindh's argument failed, that failure did not undercut the continued validity of *Arce*: that a de facto armed conflict between Mexico and the United States existed in 1916 and that combat immunity protected Mexican soldiers from a prosecution for murder in Texas state court.

More historical information can be found at

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https://www.jagcnet.army.mil/8525736A005BE1BE

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[13] *Id*.

[14] Davidson was almost certainly thinking of the 21 June 1916 "Battle of Carrizal," where an "impetuous" American officer, Captain Charles T. Boyd, violated orders to avoid a confrontation with Mexican government troops and instead attacked a detachment of Mexican soldiers in Carrizal. In the firefight that followed, Boyd was killed, his unit was routed, and at least twenty-three men were taken prisoners. ANDREW J. BIRTLE, U.S. ARMY COUNTERINSURGENCY AND CONTINGENCY OPERATIONS DOCTRINE 205 (1998). Ten days later, the Mexicans delivered these American prisoners to U.S. forces in El Paso, Texas. DE QUESADA, *supra* note 4, at 57.

[15] *Arce*, 202 S.W. at 953.

[16] DE QUESADA, *supra* note 4, at 65. They most likely entered pleas of guilty to avoid a death sentence; the seventeen men knew that four of their fellow *Villistas* had been convicted of murder and hanged in Deming, New Mexico, less than four months after the Columbus raid.

[17] *Id*. at 67. For more on Larrazolo's pardon, see Michael Miller, *Pardon of the Villistas—1917*, N.M. STATE RECORDS CTR. & ARCHIVES, http://www.newmexicohistory.org/filedetails.php?fileID=22053 (last visited May 13, 2012).

[18] Memorandum of Points and Authorities in Support of Motion to Dismiss Count One of the Indictment for Failure to State a Violation of the Charging Statute (Combat Immunity), at 1, 7–8, United States v. Lindh, 212 F. Supp. 2d 541) (E.D. Va. 2002) (No. 02-37-A). For more on the legal status of Taliban fighters under the law of armed conflict, see GARY D. SOLIS, THE LAW OF ARMED CONFLICT 211–16 (2010).

From West Point to Michigan to China: The Remarkable Career of Edward Hamilton Young (1897–1987)

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Prior to World War II, there was no such thing as military legal education, and uniformed lawyers serving in The Judge Advocate General's Department (JAGD) learned "on the job." The rapid expansion of the Army after the Japanese attack on Pearl Harbor—from 1.6 million Soldiers to a force of 8 million men and women—caused a complementary explosion in the number of Army judge advocates, and a realization that "on the job" legal education was too slow and inconsistent for wartime. As a result, Major General Myron C. Cramer, who had assumed duties as The Judge Advocate General (TJAG) just one week prior to the Pearl Harbor Attack, established a Judge Advocate General's School, U.S. Army (TJAGSA) at the University of Michigan. Cramer also selected Colonel (COL) Edward "Ham" Young, who had previously taught law at West Point, to take charge of this first-ever school for the education and training of Army lawyers. This is the story of Young's remarkable three year tour as the first TJAGSA Commandant, and his equally remarkable follow-on assignment as the theater judge advocate for all U.S. military personnel in China.

Born in Milwaukee, Wisconsin on 16 June 1897, Edward Hamilton "Ham" Young spent a few years in San Francisco before moving with his parents to Washington, D.C. After attending elementary and high school in D.C., Young wanted to follow his older brother, Cassin, to the U.S. Naval Academy (USNA).[1] He applied for an appointment as a midshipman, but was rejected "because he had flat feet and wouldn't be able to stand watch."[2] As a result, Ham Young applied to the U.S. Military Academy (USMA) at West Point. Apparently the Navy's view on Young's feet was not dispositive, since he was admitted as a cadet in June 1917. When he was later commissioned as an infantry second lieutenant, Young's naval officer brothers (a younger sibling also was a USNA graduate) teased him about being unfit to stand watch on a ship's bridge but nonetheless sufficiently healthy to go to the field.[3]

Upon graduating from West Point, then–Second Lieutenant Young deployed to Europe, where "he served as an observer of Belgian, French, and Italian battle fronts and visited the Army of Occupation in Germany."[4] When he returned from Europe, Young completed the Basic Infantry Officers Course at Fort Benning, Georgia, and then served in a variety of company, battalion, and regimental assignments in the Philippines and the United States.

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[1] Cassin Young had a distinguished career as a naval officer and was awarded the Medal of Honor for his "distinguished conduct in action, outstanding heroism and utter disregard of his own safety" while commanding officer of the U.S. Ship (USS) *Vestal* at Pearl Harbor on 7 December 1941. His citation reads, in part:

> Commander Young proceeded to the bridge and later took personal command of the three-inch antiaircraft gun. When blown overboard by the blast of the forward magazine explosion of the USS *Arizona*, to which the USS *Vestal* was moored, he swam back to his ship. The entire forward part of the USS *Arizona* was a blazing inferno with oil afire on the water between the two ships; as a result of several bomb hits, the USS *Vestal* was afire in several places, was settling and taking on a list. Despite severe enemy bombing and strafing at the time, and his shocking experience of having been blown overboard, Commander Young, with extreme coolness and calmness, moved his ship to an anchorage distant from the USS *Arizona*, and subsequently beached the USS *Vestal* upon determining that such action was required to save his ship. Although he survived the Japanese attack on Hawaii, Cassin Young was killed in action at Guadalcanal less than a year later, in November 1942.

Medal of Honor Recipients, World War II (T–Z), Ctr. of Military History, *available at* http://www.history.army.mil/html/moh/wwII-t-z.html (last visited Aug. 14, 2012).

[2] M.S. Young, *Edward Hamilton Young*, ASSEMBLY, Sept. 1990, at 154.

[3] *Id.*

[4] *Id.*

In 1929, Young was given command of the Army War College Detachment in Washington, D.C., with the additional duty of White House aide. After serving in the White House in both Calvin Coolidge's and Herbert Hoover's administrations, Young was sent to Governors Island, New York, where he was the aide-de-camp to Major General Dennis E. Nolan, the commanding general of First Army.

In 1933, the same year that he married Ellen Nolan, his boss's daughter, Young was sent to New York University School of Law, where he took a course in law and then went to West Point to be an instructor. As Brigadier General (Retired) Patrick Finnegan explains in his study of USMA's legal education, not all Law Department instructors were lawyers. On the contrary, some were line officers like Young. But to "ensure high standards of teaching, the Law Department began sending its officers who were not lawyers to receive training at law schools."[5] This explains why Young took a course of law in New York City before joining the Law Department faculty. While at West Point, Young showed a keen interest in legal research and writing, and authored two textbooks on constitutional law. His *Constitutional Powers and Limitations* was later adopted as "the official text on constitutional law at the Academy."[6]

In 1936, Young was detailed to the JAGD and sent to New York to complete his law degree. After graduating in 1938, and passing the New York bar, Young returned to West Point's Law Department to resume his duties as an Assistant Professor of Law. At the conclusion of his USMA tour of duty, now–Lieutenant Colonel Young was reassigned to Washington, D.C., where he joined The Judge Advocate General's Office as the deputy chief of the Military Affairs Division.[7] He was promoted to COL in early 1942.

With the entry of the United States into World War II, and the expansion of the JAGD, the Army approved the opening of TJAGSA on the campus of the National University School of Law located on Thirteenth Street, Washington, D.C. Given COL Young's recent teaching experiences at West Point, and his presence in Washington, it made perfect sense for Major General Cramer[8] to select Young to be the first commandant of the school.

While TJAGSA opened on 9 February 1942, Major General Cramer and others soon realized that D.C. "was not an ideal wartime location" for "basic, specialized and refresher training for active duty military personnel . . . ."[9] The chief problem was insufficient classroom space and, as a result, TJAGSA moved to the University of Michigan's "Law Quadrangle" in September 1942. Colonel Young went with it and now was consumed with setting up a "regular program of instruction . . . to train attorneys in all areas of military law and to introduce those who were coming directly from their civilian professions to military life."[10] Since no school for Army lawyers had existed previously, Young had no standards or precedents to guide him. Yet he successfully planned, organized and administered a comprehensive course of instruction. Between February 1942, when COL Young arrived in Ann Arbor, and December 1944, when he turned over the school to a new commandant, Young and his faculty trained more than 1,700 officers and officer candidates to be judge advocates. As this constituted two-thirds of the active duty strength of the JAGD,[11] it was a remarkable achievement by any measure and explains, at least in part, why the news media referred to TJAGSA as the "Lawyers' West Point."[12] The legal profession also recognized COL Young's contribution to the law, as evidenced by his being awarded the honorary degree of Doctor of Laws by the University of Miami (Coral Gables, Florida).[13]

While serving as the commandant, COL Young was also appointed Professor of Military Science and Tactics at the University of Michigan by the commanding general of the Sixth Service Command. As a result, Young "enjoyed the distinction of being one of the few officers in the JAGD to exercise functions of command over troops other than those of the Department."[14]

In December 1944, COL Young left Michigan for Nanking, China, where he assumed duties as the theater judge advocate for the U.S. Forces in China and legal advisor to the U.S. Embassy. As the United States and its Pacific allies began investigating Japanese civilian and military personnel for war crimes, COL Young also became the legal advisor to the Far East United Nations War Crimes Commissions. Young remained in China until November 1947, when he returned to the United States. His tenure in China had been unique in the history of the Corps, as no other judge advocate had served as theater judge advocate

[5] Patrick Finnegan, *The Study of Law as a Foundation of Leadership and Command: The History of Law Instruction at the United States Military Academy at West Point*, 181 MIL. L. REV. 112, 120 (2004).

[6] Young, *supra* note 2, at 154.

[7] Captain George P. Forbes, Jr., *The Judge Advocate General's School*, JUDGE ADVOCATE J., Mar. 1945, at 48.

[8] JUDGE ADVOCATE GENERAL'S CORPS, U.S. ARMY, THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775—1975, at 161 (1975) (providing more information on Major General Myron C. Cramer).

[9] *Id.* at 186.

[10] *Id.* at 187.

[11] *Id.*

[12] Forbes, *supra* note 7, at 48.

[13] *Id.*

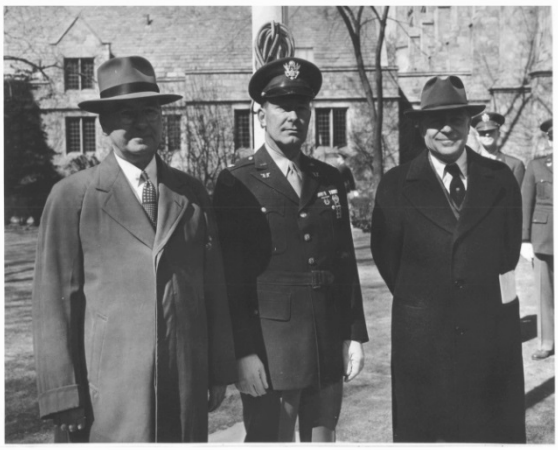
[14] *Id.*

before Young—and no one followed him in the assignment. When he left China, COL Young made history again as the only Army lawyer to be awarded three Chinese decorations: the Special Collar of the Order of Brilliant Star, Special Breast Order of the Cloud and Banner, and Special Breast Order of Pao Ting.[15] Young's report on his experiences in China remains the only official record of Army legal operations in the Far East during this turbulent period in history.[16]

Assigned to the Office of The Judge Advocate General in the Pentagon, Young served first as Chief, War Crimes Branch, Civil Affairs Division. Slightly more than a year later, in January 1949, Young left the Pentagon for Fort Meade, Maryland, where he was assigned as the Staff Judge Advocate (SJA), Second Army. He picked up an additional duty the following year, when TJAGSA was re-activated at Fort Myer, Virginia. TJAGSA had closed its doors in Ann Arbor in 1946, but with the outbreak of the Korean War, Major General Ernest M. "Mike" Brannon, then serving as TJAG, decided to re-start the school and asked COL Young to serve as its commandant.

Colonel Ham Young retired as Second Army SJA in August 1954. Given that he had graduated from USMA in November 1918, he had served more than thirty-five years on active duty—an unusual length of service for an officer who did not reach flag rank.

In retirement, Young served as the secretary to the Board of Commissioners, U.S. Soldiers Home, Washington, D.C. After leaving this position in 1965 and enjoying his retirement in Virginia until 1972, COL Young and his wife moved to Vero Beach, Florida. He died at his home there in November 1987 and is interred in Arlington National Cemetery.[17] Today, Young has not been forgotten and his vision of an educational curriculum that transforms civilian attorneys into officers and military lawyers continues at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia.



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[15] Young, *supra* note 2, at 155.

[16] EDWARD H. YOUNG, REPORT OF THE JUDGE ADVOCATE, UNITED STATES FORCES, CHINA THEATER, UNITED STATES ARMY FORCES CHINA, NANKING HEADQUARTERS COMMAND, AND ARMY ADVISORY GROUP CHINA, 1 JANUARY 1945 TO 10 JUNE 1947 (1948).

[17] Young, *supra* note 2, at 155.

Lore of the Corps

The Trial of a Korean War "Turncoat": The Court-Martial of Corporal Edward S. Dickenson

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On 4 May 1954, a court-martial sitting at Fort McNair, Virginia, convicted Corporal (CPL) Edward S. Dickenson of "collaborating with the Reds"[1] while held as a prisoner of war (POW) in North Korea. Dickenson was also found guilty of "informing on his prison camp buddies"[2] while a POW. As a result of this conviction for aiding the enemy and misconduct while a POW, Dickenson was sentenced to ten years confinement at hard labor, total forfeitures, and a dishonorable discharge. Dickenson's trial was the first court-martial of a Soldier for misconduct as a POW to come out of the Korean War, and the proceedings received widespread coverage in the media. While this alone makes it a story worth telling, *United States v. Dickenson* also is worth examining for a second reason: for the first time in military legal history, an accused sought an acquittal on the basis that he had been so mistreated and "brainwashed" while a POW that he was not responsible for any acts of collaboration with the enemy.

Born and raised in Cracker's Neck, Virginia, Edward S. Dickenson enlisted in the Army on 31 March 1950. He might have hoped for a tour as a peace-time Soldier but this was not to be, as some 75,000 North Korean People's Army troops crossed the 38th parallel into the Republic of Korea on 25 June 1950. For Dickenson, this meant that after completing basic training, he shipped out to join the fight on the Korean peninsula. Arriving on 22 September 1950, just a week after successful Allied amphibious landings at Inchon, Dickenson joined Company K, 8th Cavalry Regiment. Less than two months later, on 4 November 1950, he was captured by the enemy. He spent the remainder of the Korean War as a POW at a Chinese-run camp in North Korea.[3]

After fighting in Korea ceased, however, Dickenson did not immediately return to U.S. control. On the contrary, during *Operation Big Switch*, when Allied prisoners were repatriated, CPL Dickenson was one of a group of American Soldiers who refused to return, preferring instead "to throw in their lot with the Communists."[4] Two months later, however, twenty-three-year old Dickenson "changed his mind about staying with the Reds."[5] On 21 October 1953, he "appeared at a United Nations camp"[6] and asked to be sent home. He was the first of twenty-three Americans who initially decided to stay behind with their Chinese captors, but then changed their minds and asked to return home.[7] Dickenson was finally returned to U.S. control on 20 November 1953.

On 22 January 1954, Dickenson was charged with committing various offenses while being held as a POW. About 500 U.S. military personnel had been held captive in the same camp as Dickenson and statements about their POW experience were taken from each of them after they were repatriated. Some ninety-five[8] of these statements mentioned the accused and this provided the basis for charging him with a variety of offenses under the Uniform Code of Military Justice (UCMJ) Articles 104 and 105,[9] including "aiding the enemy to influence prisoners of war to accept communism," "corresponding with the enemy by informing him of a fellow prisoner's failure to sign a peace petition," and "reporting escape plans of fellow prisoners of war for the purpose of securing favorable treatment." [10] Since the UCMJ had only been in effect since 1951, Dickenson was the first Soldier to be charged under the new military criminal code with the military equivalent of treason.[11]

When trial began at Fort McNair on 19 April 1954, Colonel (COL) Walter J. Wolfe presided over the eight-member panel of officers;[12] they were assisted with legal

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[1] *Dickenson Is Guilty; Gets 10 Years in Jail*, WASH. POST, May 5, 1954, at 1.

[2] *Id.*

[3] Dickenson was held at Camp Number Five, Pyoktong, Korea. United States v. Dickenson, 17 C.M.R. 438, 443 (C.M.A. 1954).

[4] *Army Orders Dickenson to Stand Trial*, WASH. POST, Feb. 19, 1954, at 12.

[5] *Id.*

[6] Dickenson v. Davis, 245 F.2d 317 (10th Cir. 1957).

[7] *Dickenson*, 17 C.M.R. at 443.

[8] *Id.* at 444.

[9] *Id.* at 441–43.

[10] *Id.* at 438–40.

[11] Treason is not an enumerated offense under the Uniform Code of Military Justice (UCMJ); the closest similar offense is aiding the enemy, Article 104. *See* Fred L. Borch, *Tried for Treason: The Court-Martial of Private First Class Maple*, ARMY LAW., Nov. 2010, at 4.

[12] The members of the panel were: Colonel (COL) Wolfe (president); COLs Alcorn B Johnson and Ralph R. Burr, Lieutenant Colonel (LTC) Owen D. Boorom; Majors Paul M. Martin, Edwin D. Bowman and John W. Reser; and Captain Harold H. Hartstein. Note that although the new UCMJ permitted Dickenson to have a court-martial panel consisting of at least one-

matters by COL Richard F. Scarborough, the judge advocate law officer. The lead trial counsel was COL C. Robert Bard, a West Point graduate who had gained considerable court experience from prosecuting war crimes trials in Heidelberg after World War II.[13] Assisting Bard were two judge advocates: Captain (CPT) Harvey S. Boyd and First Lieutenant Andrew K. McColpin.

While the prosecution was formidable, the defense team was no less impressive. Dickenson-lead defense counsel was civilian attorney R. Guy Emery. A West Point graduate, Emery was a decorated Soldier who had lost a leg in combat. After the war, he had graduated from the University of Virginia's law school and was practicing law in the District of Columbia when he was retained by Dickenson to represent him.[14] Emery was assisted by Lieutenant Colonel William Fleischaker and CPT Wilton B. "Will" Persons Jr. For Persons, who had only recently graduated from Harvard Law School but had considerable experience prosecuting and defending special courts as an armored cavalry officer in post-war Austria and Germany, it was a memorable event: *United States v. Dickenson* was the first general court-martial that Persons had seen. As the junior defense lawyer on the team, Persons interviewed witnesses, including some of Dickenson's fellow POWs, and did legal research.[15]

The prosecution's case was fairly straightforward; it relied chiefly on the testimonies of Dickenson's fellow POWs. The evidence presented showed that during his three years as a POW, Dickenson repeatedly relayed information about his fellow POWs to his captors in order to get cigarettes and better food. One witness told the eight-officer panel that Dickenson was "sneaky" and a "rat." Others testified that Dickenson had told the Chinese about the escape plans of fellow POW Edward M. Gaither. As a result of this information, Gaither was severely beaten with clubs and "was placed by the enemy before a mock firing squad on three occasions." Gaither also spent seven months in solitary confinement.[16]

As for aiding the enemy, one witness testified that Dickenson asked his fellow POWs to sign a "peace petition" critical of American involvement on the Korean peninsula and that Dickenson had tried to convince at least eight fellow POWs "to accept and follow the philosophies and tenets of Communism."[17] The prosecution also introduced evidence that Dickenson had recorded pro-communist speeches intended for later radio broadcasts to United Nations forces. This evidence complemented testimony from CPL Billy L. Rittenberry, who related under oath that Dickenson had pledged to "overthrow the United States Government so that it would follow socialist principles."[18]

To counter this evidence of misconduct, R. Guy Emery adopted a two-pronged strategy. First, Emery hoped to generate sympathy for his client by showing that Dickenson, an uneducated farm boy who hailed from the hill country of Virginia, had suffered greatly as a POW. He had not only been exposed to bitter cold and "starvation rations" but also had been threatened with death if he did not cooperate with his Chinese captors.[19] Additionally, Dickenson's seventy-eight year old father and his mother (said to be in her forties) attended the trial at Fort McNair, and their presence let the panel members see that they stood by their son. Both father and mother also gave statements to the press. The older Dickenson indicated that he believed his son's three years of captivity was punishment enough. Dickenson's mother insisted that her son, whom she described as "the little fellow," was sick. She certainly did not believe that her son had sought favorable treatment at the expense of his fellow POWs. "I don't understand what he could have done to any of them boys," she told a newspaper reporter.[20]

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third enlisted members, Dickenson elected to have an all-officer panel hear his case. There was no possibility for trial by judge alone; this option did not exist until enactment of the Military Justice Act of 1968.

[13] Born in New York in February 1907, Charles Robert Bard graduated from the U.S. Military Academy in 1931 and was commissioned in the Coast Artillery Corps. He transferred to the Judge Advocate General's Department prior to World War II, and subsequently served as Staff Judge Advocate (SJA), XV Corps, and SJA, 7th Army, in the European Theater of Operations. Colonel Bard was serving in the Office of The Judge Advocate General when he was assigned to prosecute the *Dickenson* case. Bard retired from active duty in 1958 and died in 1980. ASS'N OF GRADUATES, REGISTER OF GRADUATES (1992) (Class of 1931).

[14] Born in North Dakota in July 1909, Russell Guy Emery graduated from West Point in 1930 and qualified for his wings in the Army Air Corps. He then transferred to the Infantry, and was serving as the commander of an infantry regiment in Luxembourg in January 1945 when he lost a leg and was awarded the Silver Star for saving a fellow Soldier from a minefield. After being medically retired with the rank of colonel, Emery entered law school at the University of Virginia and, after graduating in 1949, was recalled to active duty to serve as an Assistant Professor of Law at West Point. He remained on active duty until 1952, when he retired a second time and moved to the District of Columbia. From 1953 to 1958, he was associated with the firm of Ansell and Ansell (the same Ansell who had been a Judge Advocate brigadier general and served as acting The Judge Advocate General during World War I). In 1958, Emery left that firm to create his own firm, Emery and Wood. Emery "died quite suddenly at his home" in Falls Church, Virginia, in November 1964. He was fifty-five-years old. *Guy Emery*, ASS'N OF GRADUATES, ASSEMBLY 96 (Spring 1965) [hereinafter ASSEMBLY].

[15] Telephone Interview with Major General (Retired) Wilton B. Persons Jr. (Feb. 11, 2013) [hereinafter Persons Telephone Interview]. As assistant defense counsel, Persons interviewed Corporal (CPL) Claude J. Bachelor, who was subsequently court-martialed for similar prisoner of war (POW) misconduct. *See* United States v. Bachelor, 19 C.M.R. 452 (C.M.A. 1955). For more on Persons, see Michael E. Smith, *Major General Wilton Burton Persons, Jr. United States Army (Retired) The Judge Advocate General of the Army (1975–1979)*, 153 MIL. L. REV. 177 (1996).

[16] United States v. Dickenson, 17 C.M.R. 442 (C.M.A. 1954).

[17] *Id.*

[18] *Dickenson Acquitted on One Charge That He Informed on Fellow Prisoner*, WASH. POST, Apr. 27, 1954, at 1.

[19] Don Olesen, *2 Doctors Say Reds Could Break Anyone*, WASH. POST, Apr. 29, 1954, at 3.

[20] *Dickenson Family 'Shocked' at News of Ed's Arrest*, WASH. POST, Jan. 24, 1954, at M4.

While sympathy for Dickenson would almost certainly benefit him at sentencing, Emery realized that it might also help his client on the merits, as the second prong of the defense case, to show that Dickenson's freedom of will had been so overcome by "brainwashing" and mistreatment that the young Soldier lacked the mens rea necessary to support a conviction under Articles 104 and 105. Emery certainly had good reason to believe he might be successful: Colonel Scarborough would later instruct the panel that it must acquit Dickenson if it found that "the Reds forced him to collaborate with them" and that "mental irresponsibility" was a "complete defense" to the charges.[21]

This explains why Emery presented expert testimony from psychiatrists who had examined the accused. Dr. Morris Kleinerman, who had been a psychiatrist at hospitals in Belgium, England, and the United States during World War II, testified that Dickenson had a "passive-aggressive personality" and was "basically emotionally unstable." He also was the kind of person who was "easily intimidated." Kleinerman's testimony buttressed the defense theory that Dickenson was not responsible for his actions while a POW because his long period of imprisonment made him "interested solely in his own survival." Similarly, Dr. Winfred Overholser, the superintendent of St. Elizabeth's Hospital in Washington, D.C., testified that the treatment Dickenson had received from his Chinese captors "could be pushed to a point where almost anyone would submit."[22]

At the close of an eleven-day trial, and after the accused declined to take the stand on his own behalf, the panel heard arguments from both sides. Colonel Bard argued that Dickenson was a "willing collaborator" who had aided the enemy because of inherent "character defects."[23] In an argument of "nearly two hours," R. Guy Emery countered the government's case was "plainly contemptible" in that it "created an atmosphere of assumed guilt." For Emery, the court-martial was "not so much a trial of law as preparation for a crucifixion."[24] Dickenson had been "mentally incapable of resisting Red pressure in Korea" and consequently lacked the criminal intent necessary to support a finding of guilty.[25] Interestingly, Emery told the panel that Dickenson had not testified in his own behalf because he had suffered too much "mental damage" in Korea—damage from which he had not yet recovered.[26] Certainly Dickenson looked the part; then–CPT Persons remembered that he "looked scared to death" sitting at the defense table and reminded Persons of a "whipped dog."[27]

After instructions from the law officer, the court closed to deliberate. The following day, after a total of ten and one-half hours behind closed doors, COL Wolfe and the members were back with a verdict: guilty of one specification of aiding the enemy in violation of Article 104, and guilty of one specification of misconduct as a POW, in violation of Article 105, UCMJ.[28] While the maximum penalty was death, the panel sentenced Dickenson to ten years confinement at hard labor, total forfeitures of all pay and allowances, and a dishonorable discharge.

The Army Board of Review and the Court of Military Appeals affirmed the findings and sentence. R. Guy Emery, "without a fee, and often at his own expense, fought the decision to the Supreme Court on what he considered to be a matter of principle."[29] While Dickenson's writ of habeas corpus was quashed by the U.S. District Court for the District of Kansas, and Dickenson's appeal from that order was denied by the Tenth Circuit Court of Appeals, Emery did get some relief for his client: Dickenson was paroled after serving five years of his ten-year sentence. Dickenson, who was married, re-entered civilian life and raised a family. He died in 2002.[30]

The story of Korean War "turncoat" CPL Edward S. Dickenson is now almost forgotten. But the issues raised by his case and others[31]—most notably the effect of enemy coercion and propaganda on free will—greatly concerned the Army, resulting in a number of official studies and the creation of formal guidance on how U.S. POWs should conduct themselves in captivity.[32] The issues raised by

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[21] *Dickenson Verdict Debate Is Recessed*, WASH. POST, May 4, 1954, at 7.

[22] Olesen, *supra* note 19.

[23] *Dickenson Verdict Debate Is Recessed*, *supra* note 21, at 7.

[24] Don Olesen, *Attorney Accuses Army of 'Crucifying' Dickenson*, WASH. POST, May 1, 1954, at 3.

[25] Olesen, *supra* note 19.

[26] *Dickenson Family 'Shocked' at News of Ed's Arrest*, *supra* note 20.

[27] Persons Telephone Interview, *supra* note 15.

[28] The law officer had previously entered a finding of not guilty to a second specification alleging a violation of Article 105 at the close of the government's case-in-chief; apparently COL Scarborough determined that the government's evidence was insufficient to support the specification alleging that Dickenson had informed on fellow POW CPL Martin Christensen by telling the Chinese that Christensen had a hidden .45 caliber pistol. Arthur Kranish, *Dickenson Acquitted on One Charge That He Informed on Fellow Prisoner*, WASH. POST, Apr. 27, 1954, at 1.

[29] ASSEMBLY, *supra* note 14.

[30] Dickenson was married during the trial. *Psychiatrist Testifies in Dickenson Defense*, ASSOCIATED PRESS, Apr. 28, 1954.

[31] The Army ultimately court-martialed a total of fourteen Soldiers for misconduct while POWs in North Korea. Eleven were convicted and three were acquitted. *See* EUGENE KINKAID, IN EVERY WAR BUT ONE (1959).

[32] Julius Segal, *Factors Related to the Collaboration and Resistance Behavior of U.S. Army PW's in Korea*, HUM. RESOURCES RES. OFFICE TECHNICAL REP. 33 (1956); Exec. Order No. 10,631, 3 C.F.R. 266 (1954–1958), *available at* http://www.archives.gov/federal-register/codification/executive-order/10631.html (establishing the Code of Conduct for U.S. servicemembers), *amended by* Exec. Order No. 12,633, 3 C.F.R. 561 (1988) [hereinafter Code of Conduct]; U.S. DEP'T OF ARMY, PAM. 360-512, CODE OF THE U.S. FIGHTING FORCE (1 June 1998) [hereinafter DA PAM. 360-512]

Dickenson were again relevant during the Vietnam War, when some Americans held as POWs by the Viet Cong and North Vietnamese collaborated with their captors to the detriment of their fellow POWs.[33] But that story, and how the U.S. Government handled allegations of misconduct by Vietnam War POWs, must be told another day.[34]

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(providing the Code of Conduct as well as setting forth its principles and standards).

[33] *See, e.g.*, United States v. Garwood, 16 M.J. 863 (N.M.C.M.R. 1983), *aff'd* 20 M.J. 148 (C.M.A. 1985). While Garwood was the only POW to be court-martialed for misconduct committed while a POW, more than a few were investigated for violating Articles 104 and 105.

[34] For an overview of the problem of POW misconduct and an analysis of the Code of Conduct, see Rodney R. LeMay, Collaboration or Self-Preservation: The Military Code of Conduct (unpublished M.A. thesis, Louisiana State University, 2002). *See also* Captain Charles L. Nichols, *Article 105, Misconduct as a POW*, 11 A.F. L. REV. 393 (1969).

From Infantryman to Contract Attorney to Judge Advocate General: The Career of Major General Ernest M. Brannon (1895–1982)

Fred L. Borch
Regimental Historian & Archivist

The expertise required to be a first-rate procurement lawyer in the Corps, necessarily acquired through study and practice over a long period of time, probably best explains why judge advocates specializing in contracting historically have been less likely to reach the very top of the Corps. There have been exceptions, however, and Ernest M. Brannon, who served as The Judge Advocate General (TJAG) from 1950 to 1954, is perhaps the most noteworthy. His remarkable career—which began at West Point and ended in Washington, D.C.—included overseas service in China and the Philippines, as well as tours in Ohio, New York and Texas. As TJAG, he oversaw the doubling of the number of uniformed lawyers in the Corps, as well as the inauguration of the Uniform Code of Military Justice (UCMJ) and the reactivation of The Judge Advocate General's School (TJAGSA) in Charlottesville, Virginia—all of which occurred while the Army was at war in Korea.

Born in Ocoee, Florida, on December 21, 1895, Ernest Marion "Mike" Brannon spent his childhood in Ocoee, where he went to grammar school. After attending Marion Institute, a college preparatory school located in Marion, Alabama, Brannon entered the University of Florida. He also worked at a local bank. After World War I began in Europe, and as "war tension" in the United States increased, young Brannon "became interested in the regular Army." He obtained an "alternate appointment" to the U.S. Military Academy (USMA) and left Gainesville for West Point in June 1917.[1]

Since the United States had entered World War I in April 1917, Brannon and the Class of 1917 were graduated early—on 1 November 1918. Ten days later, the war ended in Europe and Second Lieutenant Brannon and his officer classmates returned to West Point as student officers and a second graduation six months later, in June 1919. The entire class then sailed for Europe, where they toured battlefields in France and Italy as guests of the French and Italian governments.

After returning to the United States, Brannon and his fellow Infantry officers made history as members of the first regular class at the newly established Infantry School at Fort Benning, Georgia.[2] After graduation in June 1920, Brannon reported to the 3rd Infantry Regiment, then located at Eagle Pass, Texas. When his regiment moved to Camp Sherman, Ohio, now First Lieutenant (1LT) Brannon went with it.

In January 1921, 1LT Brannon returned to New York City to marry his girlfriend from his West Point days, Marjorie Devitt. He and Marjorie then returned to Ohio, only to be informed that they were to relocate to Tientsin, China, where Mike was to join the 15th Infantry Regiment. While aboard an Army transport ship taking them to China, however, Brannon was diverted to Camp Eldridge in Laguna Province in the Philippines, where he served as battalion and post adjutant.

In November 1922, now Captain (CPT) Brannon joined the 15th Regiment in Tientsin, where he served as assistant adjutant. As in any career, timing and luck are often important. Although Brannon did not know it at the time, the arrival of a new officer in the regiment, Lieutenant Colonel (LTC) George C. Marshall, was an important event. Marshall served as the unit's executive officer and, in this position, had frequent contact with the regiment's assistant adjutant. While there is no way to know if this future Army Chief of Staff and General of the Army had anything to say about CPT Brannon's future, LTC Marshall was an excellent leader who took note of promising young officers—and Brannon certainly fit into this category.[3]

[1] *Ernest Marion Brannon*, ASSEMBLY 123 (Mar. 1984).

[2] Fort Benning was established following World War I, when the Army bought land in 1919 and created a military reservation named in honor of Confederate Brigadier General Henry L. Benning. The Infantry School was created the following year. John M. Wright, Jr., *Fort Benning 1918–1968*, INFANTRY, Sept.–Oct 1968, at 4–11.

[3] General of the Army George C. Marshall was one of the most remarkable men of his generation. A graduate of the Virginia Military Institute, he served in the Army from 1901 to 1945. After retiring as Army Chief of Staff, Marshall served as Secretary of State under Harry S. Truman. His

In May 1925, Brannon was ordered to return to the United States to attend Columbia Law School for a year—in preparation to be an instructor at the USMA Law Department. Brannon subsequently served on West Point's faculty from 1926 to 1931, returning each summer to resume his studies at Columbia. It was a long process: after leaving West Point in 1931, Brannon completed his final year at Columbia and was awarded his LL.B. in 1932.

After being detailed to The Judge Advocate General's Department in 1931, Brannon's first assignment was in the Contracts Division in the Office of The Judge Advocate General (OTJAG). It was in this job that "he developed a life-long interest in the legal aspects of Army procurement."[4] Then–Major Brannon applied to attend the Army Industrial College (today's Industrial College of the Armed Forces), was accepted and, after graduating, was assigned to the Planning Branch, Office of the Assistant Secretary of the Army. In this position, MAJ Brannon assisted with planning for industrial mobilization in the event of war. He also was one of the War Department's representatives during Senate Committee investigations of the munitions industry, the so-called Nye Committee.

In 1936, MAJ Brannon returned to New York as Assistant Judge Advocate of the 2d Corps Area, located on Governors Island. After gaining some experience with courts-martial (and golf), he returned with his family to Washington, D.C. He was assigned to the Contracts Division, OTJAG. He later became chief of that division and was soon recognized as an expert in government procurement. Such was his authority that he taught Government Contract Law at Georgetown Law School from 1941 to 1943. Now–LTC Brannon also was given the additional duty of Chief of the OTJAG Tax Division.

In 1943, then–Colonel (COL) Brannon sailed for England, where he was assigned as the Judge Advocate, First U.S. Army, then located in Bristol. For his outstanding service as the top lawyer in that unit's headquarters between 20 October 1943 and 31 May 1944, Brannon was decorated with the Bronze Star Medal.[5]

On 11 June 1944, COL Brannon waded ashore at Omaha Beach with First Army as it entered combat in France. It was D+5 and Brannon would remain with the unit as it fought its way across France and Belgium and then into Germany. After Victory-in-Europe or "V-E" Day in May 1945, COL Brannon returned to the United States with First Army and began preparing to deploy to the Pacific, since the First was scheduled to join the fight against the Japanese.

The dropping of two atomic bombs on Japan ended the need for COL Brannon to deploy to the Pacific and he now returned to Washington, D.C., to become the "Procurement Judge Advocate" at Headquarters, Army Service Forces. This was an important position, which explains why the Office of the Procurement Judge Advocate was transferred to the War Department in 1946. The following year, however, the position was transferred again: to OTJAG. Brigadier General Brannon (he had been recently promoted) now became the Assistant Judge Advocate General (Procurement).

During his tenure as the AJAG (Procurement), Brannon was heavily involved in the drafting and passage of the Armed Services Procurement Act of 1947. During the war, the government had used the negotiation method of procurement and this legislation now required the government to return to the "formal advertising and competitive bidding that had been customary in time of peace."[6]

On 26 January 1950, Brigadier General Brannon was confirmed by the Senate as TJAG.[7] Any hopes he may have had for a quiet tenure as the Army's top lawyer were dashed almost immediately, as the United States was plunged into war on the Korean peninsula in June 1950. Major General Brannon now became a war-time TJAG and faced a number of significant challenges.

First, the Army, Navy, and newly created Air Force had only recently finished work on the Manual for Courts-Martial, 1949, and were beginning with its implementation. But this work was now completely preempted with the enactment of the Uniform Code of Military Justice. Since the new UCMJ would take effect on 31 May 1951, Major General Brannon now had to oversee the production of yet another Manual for Courts-Martial—based on a criminal statute that was radically different from the Articles of War that had governed military justice in the Army since the Revolution.

Second, the outbreak of the Korean War had triggered the re-call of hundreds of Army Reserve judge advocates, most of whom had served in World War II. Brannon and others realized that these returning judge advocates knew nothing about the new UCMJ and that some sort of instruction on the new Code was necessary—as well as re-fresher training on other legal subjects. The result was that Major General Brannon directed that The Judge Advocate

"Marshall Plan"—a massive economic aid package—is widely credited with bringing about the revival of Europe after the devastation of World War II. For more on Marshall, see ED CRAY, GENERAL OF THE ARMY: GEORGE C. MARSHALL, SOLDIER AND STATESMAN (1990).

[4] *Ernest Marion Brannon*, *supra* note 1.

[5] Headquarters, First United States Army, Gen. Orders No. 22 (June 6, 1944).

[6] E. M. Brannon, *The Armed Services Procurement Act of 1947*, JUD. ADV. J., BULL. NO. 1, Dec. 1948, at 12.

[7] JUDGE ADVOCATE GENERAL'S CORPS, U.S. ARMY, THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775–1975, at 200 (1975).

General's School be re-activated at Fort Myer, Virginia. Within months, Major General Brannon decided that a more permanent location for TJAGSA be found. Consequently, it was Brannon who ultimately decided that the school should be located at the University of Virginia, and it was Major General Brannon who selected the school's first commandant, COL Charles E. "Ted" Decker and ensured that TJAGSA had the funding and support that it needed to flourish.

Finally, Major General Brannon was TJAG when the Corps doubled in size. The demands of the Korean War and the additional legal responsibilities imposed by the UCMJ resulted in a large number of Reserve judge advocates being called to active duty. The Corps went from 650 judge advocates (350 Regulars, 300 Reservists) to over 1200 officers, of whom about two-thirds were Reserve officers. Major General Brannon reported in 1952 that 750 of these 1200 judge advocates "were engaged full-time in criminal justice activities."[8] In any event, the personnel challenges that accompanied this huge increase in Army judge advocates required a senior officer with vision.

When Major General Brannon retired on 26 January 1954, he left a Corps that was radically different from the one he had entered in the 1930s—and which had markedly changed during his four years as TJAG. When Major General Brannon retired on 26 January 1954, he was immediately recalled to active duty to serve one year as executive secretary of President Eisenhower's Commission on Veteran's Benefits, the so-called Bradley Commission. While other TJAGs have been recalled to active duty, it is a rare event in the Corps' history.[9] After retiring a second time, MG Brannon continued to serve for some years as a consultant to the Defense Department in the field of industrial security.[10]

Those who served with Major General Brannon in the Corps remembered him as "a man of great patience who took time to understand and care for the people around him."[11] As Major General (Retired) Wilton B. Persons put it: "Some Judge Advocates were afraid of him [Brannon] because he was gruff and no nonsense . . . but he was very sharp, on the ball and much liked and admired in the Corps."[12]

General Brannon's ideas about service in the Army were passed on to his grandson, Patrick J. O'Hare, who was a judge advocate for more than 20 years. After retiring as a colonel in 2005, "Pat" O'Hare continues to serve our Corps as the Deputy Director of the Legal Center at TJAGLCS.

As for Major General Brannon, he has not been forgotten: each year, the Contract and Fiscal Law Department at The Judge Advocate General's Legal Center and School awards the "Major General Ernest M. Brannon Award" to the Graduate Course student with the highest standing in government procurement law.

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[8] *Id*. at 209.

[9] Other The Judge Advocate Generals (TJAGs) recalled to active duty are: Major General Blanton Winship, recalled to active duty to serve as a member of the military commission that tried the German U-boat saboteurs during World War II; Major General Myron Cramer, recalled to serve as the lone American judge on the Tokyo War Crimes tribunal; and Major General Kenneth Hodson, recalled to serve as the first Chief Judge on the Army Court of Military Review (today's Army Court of Criminal Appeals).

[10] *Ernest Marion Brannon*, *supra* note 1, at 123.

[11] *Id*.

[12] Telephone Interview with Major General (Retired) Wilton B. Persons, Jr. (Feb. 8, 2013). Major General Persons served as TJAG from 1975 to 1979.

War Crimes in Sicily: Sergeant West, Captain Compton, and the Murder of Prisoners of War in 1943

Fred L. Borch
Regimental Historian and Archivist

> Q: "Do you know anything about some prisoners shot on July 14, near the Biscari Airfield?"
> A (Captain Compton): "Yes, sir."
>
> . . . .
>
> Q: "What order did you give concerning the shooting of these prisoners?"
> A (Captain Compton): "I told my [lieutenant (Lt.)] to take care of it."
>
> . . . .
>
> Q: "What did you tell him?"
> A (Captain Compton): "I told the Lt. to tell the [sergeant (Sgt)] to execute the prisoners."[1]

On 14 July 1943, about 1300, near the Biscari airport in Sicily, Captain (CPT) John T. Compton, a company commander serving in the 180th Infantry Regiment, 45th Infantry Division, ordered his men to execute thirty-six prisoners of war (POWs). Only three hours earlier, Sergeant (SGT) Horace T. West, also serving in the 180th, committed a similar war crime when he murdered thirty-seven Italian and German POWs by shooting them with a Thompson submachine gun. This is the story of those two events, the courts-martial of West and Compton for murder, and the very different outcomes of those trials.

Operation Husky, the Allied invasion of Sicily, kicked off on 10 July 1943, when British and Canadian forces landed on the southeastern corner of the island. The following day, Soldiers belonging to Lieutenant General George S. Patton's Seventh Army and Lieutenant General Omar N. Bradley's II Corps waded ashore, some miles to the west, at Licata and Gela, respectively. Driving northward, the Americans, British, and Canadians ran into ten Italian and two German panzer divisions but, after fierce fighting, had seized the southern quarter of Sicily on 15 July.[2]

While this was good news for the invaders, the murder of German and Italian POWs the previous day cast a dark cloud over the sunny skies of Sicily. No one doubted that the killings had occurred or that they had happened during "a sharp struggle for control of the airfield north of Biscari."[3] Rather, the question was why it had occurred, who was responsible, and what should be done.

The facts were that, on 14 July 1943, troopers serving in the 180th Infantry Regiment overcame enemy resistance and, by about 1000, had gathered together a group of forty-eight prisoners. Forty-five were Italian and three were German. Major Roger Denman, the Executive Officer in the 1st Battalion, 180th Infantry, ordered a noncommissioned officer (NCO), thirty-three year old SGT Horace T. West, to take the POWs "to the rear, off the road, where they would not be conspicuous, and hold them for questioning."[4]

After SGT West, several other U.S. Soldiers assisting him, and the forty-eight POWs had marched a mile, West halted the group. He then directed that "eight or nine" POWs be separated from the larger group and that these men be taken to the regimental intelligence officer (S-2) for interrogation.

As the official investigation conducted by Lieutenant Colonel (LTC) William O. Perry, the division inspector general (IG), revealed, West then took the remaining POWs "off the road, lined them up, and borrowed a Thompson Sub-Machine Gun" from the company first sergeant (1SG). When that NCO asked West what he intended to do, "SGT West replied that he was going to kill the 'sons of bitches.'" After telling the Soldiers guarding the POWs to "turn around if you don't want to see it," SGT West then singlehandedly murdered the disarmed men by shooting them. The bodies of the dead were discovered about thirty minutes later by the division chaplain, LTC William E. King. King later told the division IG that every dead POW had been "without shoes or shirts." This was expected, because it was common practice to remove a captured soldier's shoes and shirt to discourage escape. But King also told the IG that each POW "had been shot through the heart," which was unexpected but indicated that they had been killed at close range. Investigators subsequently learned that, after emptying his

[1] Office of the Inspector Gen., Headquarters, 45th Infantry Div., Report of Investigation, subj: Shooting of Prisoners of War under direction of Captain John T. Compton 5 (5 Aug. 1943) [hereinafter Compton Report of Investigation].

[2] ALBERT N. GARLAND & HOWARD MCGRAW, U.S ARMY IN WORLD WAR II, THE MEDITERRANEAN THEATER OF OPERATIONS, SICILY AND THE SURRENDER OF ITALY 141–42 (1965).

[3] James J. Weingartner, *Massacre at Biscari: Patton and an American War Crime*, HISTORIAN, Nov. 1989, at 24, 25.

[4] Office of the Inspector Gen., Headquarters, 45th Infantry Div., Report of Investigation of Shooting of Prisoners of War by Sgt. Horace T. West 1 (5 Aug. 1943) [hereinafter West Report of Investigation].

submachine gun into the POWs, West had "stopped to reload, then walked among the men in their pooling blood and fired a single round into the hearts of those still moving."[5]

Three hours later, twenty-five year old CPT John T. Compton, then in command of Company A, 180th Infantry, was with his unit in the vicinity of the same Biscari airfield. After the Americans encountered "sniping . . . from fox holes and dugouts occupied by the enemy,"[6] a Soldier managed to capture thirty-six enemy soldiers. When CPT Compton learned of the surrender, he "immediately had a detail selected" from his company to execute the POWs. According to LTC Perry, who investigated both shootings, Compton gave the following answers to Perry's questions:

> Q. How did you select the men to do the firing?
> A. I wished to get it done fast and very thoroughly, so I told them to get automatic weapons, the BAR [Browning Automatic Rifle] and Tommy Gun.
> Q. How did you get the men? Did you ask for volunteers?
> A. No, sir. I told the [SGT] to get the men.
> Q. Do you remember exactly what you told him?
> A. I don't remember exactly.
> Q. What formation did you get them in before they were shot?
> A. Single file on the edge of a ridge.
> Q. Were they facing the weapons or the other side?
> A. They were in single file, in a column, rifle fire from the right.
> Q. Were the prisoners facing the weapons or the other side?
> A. They were facing right angle of fire.
> Q. What formation did you have the firing squad (sic)?
> A. Lined 6 foot away, about 2 yards apart, on a line.
> Q. Did you give any kind of a firing order?
> A. I gave a firing order.
> Q. What was your firing order?
> A. Men, I am going to give ready fire and you will commence firing on the order of fire.[7]

Since Compton had lined his firing squad up so that the POWs presented a target in enfilade, there was little doubt that he intended to kill the POWs.

The following day, after knowledge of Compton's execution of the enemy travelled up the chain of command, Lieutenant General Bradley personally questioned the junior officer about his actions. As CPT Compton told Bradley, he "had been raised fair and square as anybody else and I don't believe in shooting down a man who has put up a fair fight." But, said Compton, these enemy soldiers "had used pretty low sniping tactics against my men and I didn't consider them as prisoners." Perhaps most importantly, CPT Compton added the following to his official statement:

> During the Camberwell operation in North Africa, [Lieutenant] George S. Patton, in a speech to assembled officers, stated that in the case where the enemy was shooting to kill our troops and then that we came close enough on him to get him, decided to quit fighting, he must die. Those men had been shooting at us to kill and had not marched up to us to surrender. They had been surprised and routed, putting them, in my belief, in the category of the General's statement.[8]

What was to be done about these two massacres at Biscari? According to Carlo D'Este's *Bitter Victory: The Battle for Sicily 1943*, General Bradley "was horrified" when he learned what West and Compton had done, and "promptly reported them to Patton," his superior commander. Patton not only "cavalierly dismissed the matter as 'probably an exaggeration,'" but told Bradley "to tell the officer responsible for the shootings to certify that the dead men were snipers or had attempted to escape or something, as it would make a stink in the press, so nothing can be done about it."[9]

But Bradley was a man of principle, and refused to follow Patton's suggestion.[10] On the contrary, Bradley directed that West and Compton be tried for murder. As a result, Major General Troy H. Middleton, the 45th Infantry Division commander, convened a general court-martial to try SGT West for "willfully, deliberately, feloniously, unlawfully" killing "thirty-seven prisoners of war, none of whose names are known, each of them a human being, by shooting them and each of them with a Thompson Sub-Machine gun."[11] As for CPT Compton, he also faced a general court-martial convened by Middleton. The charge was the same, except that Compton was alleged to have killed "with premeditation . . . thirty-six prisoners of war . . .

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[5] RICK ATKINSON, THE DAY OF BATTLE 118 (2007).

[6] Compton Report of Investigation, *supra* note 1, at 1.

[7] *Id.* at 3 (statement by Captain John T. Compton (July 1943)).

[8] *Id.*

[9] CARLO D'ESTE, BITTER VICTORY: THE BATTLE FOR SICILY 318 (1988).

[10] While Patton initially was not interested in a trial for West and Compton, D'Este notes that he later changed his mind. *Id.* at 319. Atkinson writes that this change of heart occurred after the 45th Division's IG found "no provocation on the part of the prisoners . . . . They had been slaughtered." Patton then said: "Try the bastards." ATKINSON, *supra* note 5, at 119.

[11] United States v. West, No. 250833 (45th Inf. Div., 2–3 Sept. 1943), at 4 [hereinafter *West* Record of Trial].

by ordering each of them shot with Browning Automatic Rifles and Thompson Sub-Machine Guns."[12]

Sergeant West was the first to be tried. His court-martial began on 2 September 1943 and concluded the next day. West pleaded not guilty, and his counsel (none of whom were lawyers) portrayed him as "fatigued and under extreme emotional distress" at the time of the killings. This "temporary insanity defense," in fact, had been suggested by the division IG, who found that "in light of the combat experience of the sergeant and the unsettled mental condition that he was probably suffering from, a very good question arises as to his sanity at the time of the commission of the acts."[13] West also testified that he had seen the enemy murder two American Soldiers who had been taken prisoners, an experience which filled him with rage and made him want "to kill and watch them [the enemy] die, see their blood run."[14] The problem with this defense was that the killings had not occurred in the heat of battle, or near in time to the alleged murder of the two Americans, but rather long after the fighting had ceased and SGT West was escorting the POWs to the rear for interrogation.

Sergeant West also advanced a second rationale for what he had done at Biscari: he had been following the orders of General Patton who, insisted West, had announced prior to the invasion of Sicily that prisoners should be taken only under limited circumstances. Colonel Forest E. Cookson, the 180th Infantry's regimental commander, testified for the defense and confirmed that Patton had proclaimed he wanted the 45th Infantry Division to be a "division of killers," and that if the enemy continued to resist after U.S. troops had come within two hundred yards of their defensive positions, then the surrender of these enemy soldiers need not be accepted.[15] While Cookson testified further that he had repeated Patton's words "verbatem" (sic) to the Soldiers of his regiment, West's problem with claiming a defense based on following Patton's order was that the POWs he had killed had already surrendered and were in custody. Consequently, while West raised Patton's order in his trial, he did not really offer it as a defense.

The panel members clearly gave more weight to the testimony of 1SG Haskell Y. Brown, who testified that West had "borrowed" his Thompson "plus one clip of thirty rounds" and then had killed the Italians and Germans in cold blood.[16] The panel did not believe West was temporarily insane, and found him guilty of premeditated murder under Article 92 of the Articles of War.

In an unusual twist, however, the panel of seven officers sentenced West to "life imprisonment" only. They did not adjudge forfeitures or a dishonorable discharge. Perhaps this was because of SGT West's good military character. West had served almost continuously with Company A, 180th Infantry Regiment since his induction in September 1940, was "exceptionally dependable," and had "fought bravely and courageously since the invasion of Sicily."[17] But a life sentence nevertheless sent the message that such a war crime would not be condoned, and the convening authority directed that West be confined in the "Eastern Branch, United States Disciplinary Barracks, Beekman, New York."[18]

The general court-martial of CPT Compton was a very different affair. While it was true that a number of Soldiers had carried out the executions, only Compton was being tried for murder. This was almost certainly because Field Manual (FM) 27-10, *Rules of Land Warfare*, which had been published in October 1940—more than a year before the United States entered World War II—provided that a Soldier charged with committing a war crime had a valid defense if he was acting pursuant to a superior's orders. In discussing the "Penalties for Violations of the Laws of War," paragraph 347 stated, in part:

> Offenses by armed forces. The principal offenses of this class are: Making use of poisoned and otherwise forbidden arms and ammunition; killing of the wounded; *. . . ill-treatment of prisoners of war. Individuals of the armed forces will not be punished for these offenses in case they are committed under orders or sanction of their government or commanders.* The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall.[19]

This language meant that the Soldiers who had been ordered by Compton to shoot the POWs had a complete defense to murder. But Compton's defense was that he, too, had been acting pursuant to orders—orders from General Patton. Compton claimed that he remembered, almost word for word, a speech given by Patton in North Africa to the

[12] Headquarters, 45th Infantry Div., Gen. Court-Martial Order No. 84, (13 Nov. 1943), *in* United States v. Compton, No. 250835 (45th Inf. Div., 23 Oct. 1943).

[13] Compton Report of Investigation, *supra* note 1, at 2.

[14] *West* Record of Trial, *supra* note 11, at 101.

[15] *Id.* at 58–59; Weingartner, *supra* note 3, at 28.

[16] *West* Record of Trial, *supra* note 11, at 8.

[17] West Report of Investigation, *supra* note 4, at 2.

[18] Headquarters, 45th Infantry Div., Gen. Court-Martial Order No. 86 (4 Nov. 1943).

[19] U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, RULES OF LAND WARFARE para. 347 (1 Oct. 1940) (emphasis added).

officers of the 45th Infantry Division. According to Compton, Patton had said:

> When we land against the enemy, don't forget to hit him and hit him hard. We will bring the fight home to him. We will show him no mercy. He has killed thousands of your comrades, and he must die. If you company officers in leading your men against the enemy find him shooting at you and, when you get within two hundred yards of him and he wishes to surrender, oh no! That bastard will die! You will kill him. Stick him between the third and fourth ribs. You will tell your men that. They must have the killer instinct. Tell them to stick him. He can do no good then. Stick them in the liver. We will get the name of killers and killers are immortal. When word reaches him that he is being faced by a killer battalion, a killer outfit, he will fight less. Particularly, we must build up that name as killers and you will get that down to your troops in time for the invasion.[20]

A Soldier in Compton's company testified that he was "told that General Patton said that if they don't surrender until you get up close to them, then look for their third and fourth ribs and stick it in there. Fuck them, no prisoners!"[21] An officer testified that Patton had said that the "more prisoners we took, the more we'd have to feed, and not to fool with prisoners."[22]

Compton did not waver in insisting that he had been following orders. The POWs he had ordered shot had resisted at close quarters and had forfeited their right to surrender. Additionally, Compton claimed that the executed men had been snipers (and that some were dressed in civilian clothes) and that this was yet another reason that they deserved to be shot—because sniping is dishonorable and treacherous. As Compton put it: "I ordered them shot because I thought it came directly under the General's instructions. Right or wrong a three star general's advice, who has had combat experience, is good enough for me and I took him at his word."[23]

On 23 October 1943, after the prosecution declined to make a closing argument in Compton's trial, the court closed to deliberate. When the members returned, the president of the panel announced that the court had found CPT Compton not guilty of the charge of murder and its specification.

When LTC William R. Cook, the 45th Infantry's Staff Judge Advocate, reviewed the *West* and *Compton* records of trial in November 1943, he immediately recognized that he had two problems. The first was that, when charged with very similar war crimes, an NCO had been convicted while an officer had been acquitted and, since that NCO had been sentenced to life imprisonment, this might be perceived as unfair.

But perhaps more troubling was that Compton had been acquitted because he claimed that his execution of POWs had been sanctioned by General Patton's orders. Cook did not want to criticize the court members directly, and he acknowledged that Patton's speech to the 45th's officers provided both a moral and a legal basis for the panel's conclusion that Compton had acted pursuant to superior orders. Lieutenant Colonel Cook also conceded that the 1928 *Manual for Courts-Martial* provided that the "general rule is that the acts of a subordinate officer or soldier, done in good faith . . . in compliance with . . . superior orders, are justifiable, unless such acts are . . . such that a man of ordinary sense and understanding would know to be illegal."[24] But, focusing on this last phrase, Cook wrote that he believed that an order to execute POWs was illegal. As he wrote in the "Staff Judge Advocate's Review" of Compton's trial:

> My own opinion on the matter is . . . the execution of unarmed individuals without the sanction of some tribunal is so foreign to the American sense of justice, that an order of that nature would be illegal on its face, and being illegal on its face could not be complied with under a claim of good faith. However, that opinion is my personal interpretation of the law, and being without adequate means of research, I am not prepared to state that it is an opinion founded on good authority.[25]

Lieutenant Colonel Cook did not address the language contained in paragraph 347 of FM 27-10, discussed above, which provided yet another legal basis for the panel to have acquitted CPT Compton.

As James J. Weingartner shows in his study of the *West* and *Compton* trials, the "Biscari cases made the U.S. Army and the War Department acutely uncomfortable. Both feared the impact on U.S. public opinion and the possibility

[20] United States v. Compton, No. 250835 (45th Inf. Div., 23 Oct. 1943), at 58–59.

[21] *Id.* at 55.

[22] *Id.* at 48.

[23] *Id.* at 63.

[24] MANUAL FOR COURTS-MARTIAL, UNITED STATES para. 148a (1928).

[25] Staff Judge Advocate's Review, *in West* Record of Trial, *supra* note 11, at 3.

of enemy reprisals should details of the incidents become common knowledge."[26] To keep what had happened from public view, both records of trial were classified "Secret" and the media was kept in the dark about the two episodes.

Captain Compton, who had been reassigned to another unit after his acquittal, was killed in combat on 8 November 1943. Like it or not, his death solved the problem of keeping his case confidential.

Not so with West. He was alive and, instead of being returned to the United States, where his presence in a federal penitentiary would likely bring unwanted publicity to him and his crime, West was shipped to a confinement facility in North Africa. Keeping West under Army control no doubt made it less likely that the Germans and Italians would learn of the Biscari killings.

In any event, after reviewing West's record of trial, Eisenhower decided to "give the man a chance" after he had served enough of his life sentence to demonstrate that he could be returned to duty.[27] After West's brother wrote to both the Army and to his local member of Congress asking about the case—raising the possibility again that the public would learn about what had happened at Biscari—the Army moved to resolve the worrisome matter.

In February 1944, the War Department's Bureau of Public Relations recommended that West be given some clemency, but "that no publicity be given to this case because to do so would give aid and comfort to the enemy and would arouse a segment of our own citizens who are so distant from combat that they do not understand the savagery that is war."[28] Six months later, on 23 November 1944, Lieutenant General Joseph McNarney, the deputy commander of Allied Forces Headquarters, then located in Caserta, Italy, signed an order remitting the unexecuted portion of West's sentence. Private West was restored to active duty and continued to serve as a Soldier until the end of the war, when he was honorably discharged.

But secrecy remained paramount in the *West* and *Compton* cases. A 1950 memorandum for Major General Ernest M. "Mike" Brannon, The Judge Advocate General of the Army, advised that all copies of the records of trial were under lock and key in the Pentagon; the records apparently were not declassified until the late 1950s.[29]

Three final points about the courts-martial of SGT West and CPT Compton. First, the War Department Inspector General's Office launched an investigation into the Biscari killings, and General Patton was questioned about the speech that Compton and others had insisted was an order to kill POWs. Patton told the investigator that his comments had been misinterpreted and that nothing he had said "by the wildest stretch of the imagination" could have been considered to have been an order to murder POWs. The investigation ultimately cleared Patton of any wrong-doing.

Second, on 15 November 1944, slightly more than five months after Allied landings in Normandy, and more than a year after the *West* and *Compton* trials, the War Department published Change 1 to FM 27-10. That change added this new paragraph:

> Liability of offending individual.—Individuals and organization who violate the accepted laws and customs of war may be punished therefor. However, the fact that *the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defense or in mitigation of punishment*. The person giving such orders may also be punished.[30]

Would the result in the Compton trial have been different if Change 1 had been in effect in October 1943?[31]

Finally, in *Hitler's Last General*, two British historians argued that if the legal principles used to convict SS-troops for the massacre of American POWs at Malmedy had been applied to the Biscari killings, then Patton[32] would have been sentenced to life imprisonment and Bradley to ten years. As for Colonel Cookson, who had commanded the 180th

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[26] Weingartner, *supra* note 3, at 38.

[27] ATKINSON, *supra* note 5, at 20.

[28] *Id.* at 39.

[29] Memorandum from Lieutenant Colonel W. H. Johnson, Judge Advocate Gen.'s Corps Exec., for Gen. Brannon, subj: Records of Trial [Compton & West] (26 May 1950).

[30] U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, RULES OF LAND WARFARE para. 345.1 (1 Oct. 1940) (C1, 15 Nov. 1944) (emphasis added).

[31] For more on the Army's decision to remove superior orders as an absolute defense to a war crime, see GARY D. SOLIS, THE LAW OF ARMED CONFLICT 354–55 (2009). Today, paragraph 509a of Field Manual 27-10 provides that "the fact that the law of war has been violated pursuant to an order of a superior authority . . . does not deprive the act in question of its character as a war crime, nor does it constitute a defense in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful." U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 509a (July 1956).

[32] As for George S. Patton, widely regarded as one of the best combat commanders of all time, General Eisenhower said it best: "His emotional range was very great and he lived at either one end or the other of it." SOLIS, *supra* note 31, at 386. Assuming that Eisenhower was correct, what does this say about Patton's responsibility for West's and Compton's actions in Sicily?

Infantry Regiment, he would have been sentenced to death.[33] Whether one agrees with this assessment or not, it is arguable that, in light of the principle of command responsibility for war crimes, some culpability may well have attached to senior American commanders in Sicily.

Remembering that military criminal law and the law of armed conflict today are much different than they were in World War II, what are the lessons to be learned from the events at Biscari? One might conclude that an officer serving in 1943 could expect different treatment at a court-martial from an enlisted Soldier being prosecuted for a similar offense. Another lesson might be that culpability for war crimes very much depends on who wins the war (so-called "victor's justice"). But perhaps the most important lesson is that commanders must be careful when giving a speech designed to instill aggressiveness and a "warrior" spirit in their subordinates. Word choice does matter, and Soldiers do listen to what commanders say to them.

More historical information can be found at

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Dedicated to the brave men and women who have served our Corps with honor, dedication, and distinction.

https://www.jagcnet.army.mil/History

[33] IAN SAYER & DOUGLAS BOTTING, HITLER'S LAST GENERAL (1989). For more on the Malmedy murders, see CHARLES WHITING, MASSACRE AT MALMEDY (1971). *See also* DANNY S. PARKER, FATAL CROSSROADS (2012); JAMES J. WEINGARTNER, A PECULIAR CRUSADE (2000). For a short legal analysis of the Malmedy trial, see Fred L. Borch, *The 'Malmedy Massacre' Trial: The Military Government Court Proceedings and the Controversial Legal Aftermath*, ARMY LAW., Jan. 2011, at 3.

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

Fred L. Borch
Regimental Historian & Archivist

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

It's A Grand Old School
(sung to tune of the University of South Dakota Field Song)[1]

(verse one)

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

(verse two)

Quote that note, quote by rote, give better than they send,
Never yield, on Ferry field, fight to the bitter end,
No retreat, on Tappan Street, safe from the Krauts and Japs,[2]
We can't lose, we get the news, from Pollock and his maps.

(verse three)

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

(verse four)

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

(verse five)

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

When was this song written? Since the "Cramer" in verse one is a reference to Major General Myron C. Cramer, The Judge Advocate General between 1941 and 1945, and the "Miller" in verse three refers to Lieutenant Colonel Reginald C. Miller, who assumed command of TJAGSA in December 1944, it seems likely that this ditty was composed in early 1945. It would have been performed at social events at TJAGSA or at skits during a dining-in or similar event in Ann Arbor, Michigan. It is highly likely that this song was composed by candidates in TJAGSA's Officer Candidate School (OCS), since it refers to the "gold bars" of a second lieutenant—the rank received by those who successfully

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

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

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

completed OCS.[3] Sung to the tune of South Dakota Field Song, a South Dakota lawyer probably spearheaded the writing of the song. Other words and phrases are fairly easily discerned: "Ferry Field" is a multi-purpose sport stadium on the Michigan campus and seems to have been where judge advocate students conducted military drills; "Tappan Street" (actually Tappan Avenue) is the street adjacent to Michigan's law school in Ann Arbor, where TJAGSA was then located; and "Pollock" and "Farr" refer to two members of the faculty and staff. Since TJAGSA closed in Michigan in February 1946, this song is largely forgotten today.

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

(verse one)

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

(chorus)

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

(verse two)

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

(chorus)

(verse three)

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

(chorus)

This song is clearly a riff on Barry Sadler's popular *Ballad of the Green Berets*, which sold over one million copies and reached No. 1 on the Billboard Hot 100 in mid-1966.[4] But while Sadler's song was intensely patriotic and about an elite combat unit, the *Ballad of the SJA* could not have been more different, with its light-hearted focus on Army lawyers "manning" desks in an office and focused on coffee cups and football pools. Much has changed in the Corps since this song was written in the late 1960s. The emergence of operational law in the 1980s and 1990s meant that judge advocates were deploying with units on military operations and advising commanders in the field; the days of the work in an office in the division or corps "rear" were in the past. But, just as The Adjutant General's Corps once had a ditty about its branch insignia that reflected a rear-echelon mentality ("Twinkle, twinkle little shield, save me from the battlefield")[5], so too Army lawyers in the Vietnam era saw themselves as attorneys who were far removed from the battlefield. Being a judge advocate 'back in the day' was almost exclusively about lawyering, with little thought given to soldiering.

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

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

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

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

Civilian Lawyers Join the Department: The Story of the First Civilian Attorneys Given Direct Commissions in the Corps

Fred L. Borch
Regimental Historian & Archivist

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

On 17 June 1917, just two months after Congress declared war and the Army prepared to draft 600,000 young Americans to fight in what would become the American Expeditionary Force (AEF), the War Department announced that it was also commissioning twenty civilian attorneys to be JAs. These attorneys were to "be assigned to a division of the Army and . . . all of them would be Majors (MAJs) on the staff of the Judge Advocate General in the field."[1] Just a year earlier, the authorized strength of the JAGD had been thirteen JAs. Consequently, adding twenty majors more than doubled the size of the Department—bringing the total number of men wearing the crossed pen-and-sword on their collars to thirty-two.[2]

The Army of this period did not have a formal education program for officers or enlisted personnel in any branch or field. Everything was "on the job" training, which meant that Brigadier General Enoch Crowder,[3] who had been serving as the Judge Advocate General (tJAG) since 1911, wanted to select the best possible lawyers for these new positions. After America's entry into World War I, there was no shortage of applicants; patriotism, and with it a desire to serve, swept the country.

According to the War Department, "a great many distinguished lawyers and legal professors, men of national standing," applied to be Army lawyers. There were so many "highly qualified" applicants, said the Army, that it was "hard . . . to select a few from so much good material."[4] That said, the Army's Committee on Public Information announced that the following had been selected to be directly commissioned as majors:

Henry L. Stimson, former Secretary of War;
Professor Eugene Wambaugh, Harvard Law School;
Professor Felix Frankfurter, Harvard Law School;
Dr. James Brown Scott, leading authority on international law;
Professor John H. Wigmore, Dean of Northwestern University;
Gaspar G. Bacon, son of Robert Bacon, former U.S. Ambassador to France;
Frederick Gilbert Bauer of Boston, Massachusetts;
George S. Wallace of Huntington, West Virginia;
Nathan W. MacChesney of Chicago, Illinois;
Lewis W. Call of Garrett, Maryland;
Burnett M. Chiperfield, former congressman from Chicago, Illinois;
Joseph Wheless of St. Louis, Missouri;
George P. Whitsett of Kansas City, Kansas;
Victor Eugene Ruehl of New York, New York;
Thomas R. Hamer of St. Anthony, Idaho;
Joshua Reuben Clark, Jr., of Washington, D.C.;
Charles B. Warren of Detroit, Michigan;
Edwin G. Davis of Boise, Idaho; and
Hugh Bayne of New York, New York.[5]

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

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

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

[2] Congress authorized the twenty additional majors when it enacted legislation reorganizing the Judge Advocate General Department on 3 June 1916. That legislation provided that the Judge Advocate General was to be a brigadier general, and that his Department also would have four colonels and seven lieutenant colonels. JUDGE ADVOCATE GENERAL'S CORPS, U.S. ARMY, THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775–1975, at 107 (1975).

[3] Crowder was promoted to major general in October, when Congress increased the top Army lawyer's rank and pay. For a biography of Crowder, see DAVID A. LOCKMILLER, ENOCH H. CROWDER: SOLDIER, LAWYER AND STATESMAN (1955). *See also* Fred L. Borch, *The Greatest Judge Advocate in History? The Extraordinary Life of Major General Enoch H. Crowder (1859–1932)*, ARMY LAW., May 2012, at 1–3.

[4] Scott, *supra* note 1, at 651.

[5] *Id.*

> into the danger zone just as often as other specialized commissioned men, medical officers, for instance. The large percentage of casualties among army doctors fighting in France will stand as a convincing argument that military surgeons are not spared when the general assault begins.[6]

Of the twenty attorneys identified in the War Department's press release, all but one—Gaspar G. Bacon[7]—ultimately accepted direct commissions as majors in the JAGD Reserve. Additionally, while the Army had insisted that these new lawyers in uniform would be part of the actual fighting force, only about half of the men chosen by the Department joined the AEF and deployed to Europe; the remainder did not leave U.S. soil. But their service in the JAGD was exemplary, and many went on to make even greater contributions in their lives after the Army.

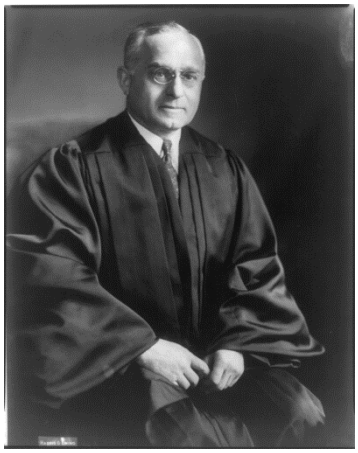
Henry L. Stimson. After accepting a commission on 22 May 1917 in the Judge Advocate General's Reserve Corps, MAJ Stimson was assigned to the Army War College (then located at Fort McNair), where he served in the Intelligence Section. Three months later, however, Stimson transferred to the Field Artillery with the rank of lieutenant colonel (LTC). He deployed to France in December and remained in the AEF until August 1918. He left active duty as a colonel (COL). Stimson had previously served as Secretary of War (1911 to 1913) under President William H. Taft. He would later join President Herbert Hoover's cabinet as Secretary of State (1929 to 1933) and serve yet again as Secretary of War (1940 to 1945) in the Roosevelt and Truman administrations in World War II. Stimson was a remarkable lawyer and public servant; he is the only individual to have served in four presidents' cabinets.[8]

Eugene Wambaugh. Major Wambaugh, who accepted his commission on 8 November 1916, had been a Harvard professor since 1892. He had a national reputation as a constitutional law expert, which explains why tJAG Crowder appointed him to be the Chief of the Constitutional and International Law Division, Office of the Judge Advocate General. Wambaugh had previous government experience, having "worked on war problems while serving as the special counsel to the State Department in 1914," and having been "the American member of the Permanent International Commission under the treaty with Peru in 1915."[9] Major Wambaugh was promoted to LTC in February 1918 and pinned silver eagles on his uniform in July of that same year. Wambaugh was sixty-two years old when he was honorably discharged from active duty and returned to teaching law at Harvard's law school.

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

> The reason I didn't want to go into uniform was because I knew enough about doings in the War Department to know that every pipsqueak Colonel would feel he was more important than a Major . . . . As a civilian I would get into the presence of a General without saluting, clicking my heels, and having the Colonel outside say, 'You wait. He's got a Colonel in there.'"[10]

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



Professor Felix Frankfurter, Harvard Law School

[6] *Id.*

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

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

[9] THE ARMY LAWYER, *supra* note 2, at 118.

[10] *Id.*

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

John Henry Wigmore. When MAJ John Henry Wigmore was called to active duty in 1917, he "was at the peak of his career."[11] His widely acclaimed and authoritative text, *A Treatise on the System of Evidence in Trials at Common Law*, was in print, and he was the dean of Northwestern University Law School. He also was the president of the Association of American University Professors. When Wigmore arrived in Washington, tJAG Crowder, who was also serving as the Provost Marshal General, decided that Wigmore's skills could best be used in administering the Selective Service Act of 1917. Crowder, who had overall responsibility implementing the war-time draft that ultimately would induct three million men in to the armed forces, appointed MAJ Wigmore as the "Chief, Statistical Division, Office of The Provost Marshal General." In this position, Wigmore "originated and placed into execution the general plan of statistical tables" used to screen and classify over ten million men.[12] Major Wigmore also "did liaison work with nearly every government agency in Washington" and authored a chapter on evidence for the 1917 *Manual for Courts-Martial*. In recognition of his work, he was promoted to LTC in early 1918. He was later promoted to full COL that same year. Although COL Wigmore left active duty on 8 May 1918, he retained his status as a Reserve officer. He signed his last oath of office in 1940, when he was seventy-seven years old.

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

George S. Wallace. A native of Albemarle County, Virginia, George Selden Wallace received his law degree from the University of West Virginia in 1897. He started his own law firm in Charleston, West Virginia, the same year and, after the outbreak of the Spanish American War in 1898, served as Divisional Quartermaster, 2d West Virginia Volunteer Infantry. At the time he accepted a commission as a Reserve major in November 1916, Wallace was the Judge Advocate General of the State of West Virginia and had achieved considerable fame in prosecuting labor radical Mary Harris "Mother" Jones after the Cabin Creek riots of 1912.[13] After a brief period of service in Washington, D.C., Wallace was promoted to LTC in June 1918 and sent to France as senior assistant of the Judge Advocate General for the AEF. Wallace left active duty in June 1919 and resumed an active legal, business, and political career in West Virginia.

George S. Wallace's uniform

Nathan William MacChesney. Nathan William MacChesney accepted his direct commission in November 1916. Prior to being ordered to active duty in June 1917, MacChesney had practiced law in Chicago, served as Illinois's special assistant attorney general from 1913 to 1918, and was the president of the Illinois State Bar Association. With prior service in the National Guard of California, Arizona, and Illinois, MAJ MacChesney had considerable military experience. He remained in the United States during the war, however, and did not deploy to France until after the fighting had ended. Ultimately, he served briefly in the Office of the Acting Judge Advocate General, AEF, where he "served as chief of the section which reviewed dishonorable discharge cases in France."[14] After the Armistice, MacChesney represented the Army before the Supreme Court in the case of *Stearns v. Wood*, which held that the Secretary of War had the power to control the military forces of a state by executive order. In 1932,

[11] *Id.* at 119.

[12] *Id.*

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

[14] THE ARMY LAWYER, *supra* note 2, at 122.

President Herbert Hoover appointed MacChesney as Envoy Extraordinary and Minister Plenipotentiary (the chief of U.S. diplomatic mission) to Canada and, when MacChesney presented his credentials, he wore the full dress uniform of a COL, JAGD Reserve; however, the Senate never confirmed him.[15] MacChesney later also served as Counsel General to Thailand. He retired as a Reserve brigadier general in 1951.[16]

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

Burnett M. Chiperfield. Major Burnett M. Chiperfield was an Illinois attorney and only just retired as an Illinois National Guard COL before he applied for a Reserve commission as a judge advocate. Having been elected to the House of Representatives in March 1915, Chiperfield also was a member of Congress at the time he pinned JAGD insignia on his uniform collar in November 1916; his term in the House ended in March 1917. Called to active duty on 2 May 1917, MAJ Chiperfield assisted tJAG Crowder in implementing the Selective Service Act in the Office of the Provost Marshal General. He returned to Illinois to coordinate the work of various draft boards in the greater Chicago area before assuming duties as Judge Advocate, 33d (Illinois) Division, in August 1917. He accompanied the division to France and was subsequently cited by Major General George Bell, Jr., the commanding general, for performing duty "of great responsibility beyond that required by his office." According to Bell, when Chiperfield was serving as a liaison officer with the 80th and 29th Divisions north of Verdun in October 1918, Chiperfield was "constantly under hostile artillery fire" and "voluntarily and frequently [went] to the front line for information." He was in the thick of the action since, "on several occasions," Chiperfield opened "serious and extensive traffic blocks under shell fire."[17] In March 1919, then-LTC Chiperfield was still on active duty in Europe, where he was with the Army of Occupation in Koblenz, and was serving as the Judge Advocate, III Army Corps, AEF. In this position, Chiperfield was in charge of all civil affairs for that part of Germany occupied by the Corps: which meant that not only did he operate a "Provost Court" to prosecute German civilian offenders, but he also supervised "all the cities, Burgermeistereis, and political units located within the Corps area."[18]

Joseph Wheless. Commissioned on 25 November 1916, Joseph Wheless was living in Chicago at the time he was called to active duty, and this probably explains why he was assigned as Assistant Judge Advocate, Central Department, Chicago, Illinois. Wheless was an international law expert and a specialist in South American law. He spoke Portuguese and Spanish and, while practicing law in Mexico City, wrote an officially authorized two-volume *Compendium of the Laws of Mexico*.[19] He also was the author of several legal texts on Tennessee law. Wheless never left American soil during his time as an Army lawyer and was honorably discharged on 15 December 1917—only a month after the fighting in France ended. In later life, Wheless's views on religion made him a controversial figure. A self-professed atheist, he insisted that the Bible was a fraud, no man named Jesus ever lived, and that Christianity as a religion "was based on and maintained by systematic persecution and murder."[20]

George P. Whitsett. Born in Missouri in 1871, George P. Whitsett received his law degree from the University of Michigan in 1892 and then practiced law until the outbreak of the Spanish-American War in 1898. He then joined the 5th Missouri Volunteer Infantry and deployed to the Philippines, where his legal skills resulted in his being first assigned as a Judge of the Inferior Provost Court and later as a Judge of the Superior Provost Court of Manila.[21] It seems likely that this prior lawyering in the Philippines made him an attractive applicant for a Reserve commission. Major Whitsett accepted his appointment in May 1917 and then sailed to France, where he served as the Judge Advocate for the AEF's 5th Army Corps. Whitsett was wounded in action during the Argonne offensive in October 1918. After the Armistice, then LTC Whitsett remained in Europe with the Army of Occupation. He returned to the United States in June 1919.

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

[16] *Id.*

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

[18] *Id*.

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

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

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

Victor Eugene Ruehl. Major Victor Eugene Ruehl, a graduate of the University of Indiana's law school, had both service as a Soldier and considerable experience as an attorney when he accepted his direct commission as a Reserve officer on 3 January 1917. Ruehl had served as a Soldier in the Army's Hospital Corps in the Philippine Islands from May 1899 to May 1904. After being honorably discharged, he completed law school and, after practicing for several years in Indiana, moved to New Jersey. From 1907 to 1917, Ruehl was the law editor of *Corpus Juris*, a legal encyclopedia,[22] and the editor-in-chief of *The New York Annotated Digest*, Volumes 5-18. After being called to active duty, Ruehl served in the Office of the Provost Marshal General, where he assisted with the implementation of the Selective Service Act. On New Year's Day 1918, MAJ Ruehl joined the 35th Division and deployed with it to France in May 1918.

Victor Eugene Ruehl of New York, New York

Thomas Ray Hamer. Thomas Ray Hamer of St. Anthony, Idaho, also had a remarkable pedigree as a lawyer. Born in Vermont, Illinois, in May 1864, Hamer had moved to Idaho in 1893 and then served as county attorney and as a member of the Idaho legislature. When the Spanish-American War began, Hamer was a captain (CPT) in the 1st Idaho Volunteer Infantry and deployed to the Philippines with his regiment in June 1898. He subsequently served as a judge on the first Provost Court organized in the Philippines under military occupation. In February 1899, Hamer was wounded at the Battle of Caloochan but the injury must have been slight since he was mustered out of his state regiment and commissioned as a LTC in the 37th U.S. Volunteer Infantry. Lieutenant Colonel Hamer then assumed duties as Military Governor and Commander, District of Cebu until the reorganization of the Supreme Court of the Philippine Islands, when he was appointed as one of the two Military Justices on that court. Honorably discharged in 1901, Hamer returned to Idaho and resumed his law practice. He served as Receiver of Public Monies, U.S. Land Office, Blackfoot, Idaho, and was elected to the U.S. House of Representatives in 1908. On active duty, MAJ Hamer served in the Office of the Judge Advocate, Western Department, before being reassigned to the Office of the Judge Advocate General in Washington, D.C. Hamer also served briefly as the Judge Advocate, Camp Gordon, Georgia, and Judge Advocate, Camp Sheridan, Alabama. He left active duty as a LTC and moved from Idaho to Portland, Oregon, where he practiced law until retiring in 1943.

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

> [F]rom June 1917 until September 1918 . . . he rendered conspicuous services in the compilation and publication of an extremely valuable and comprehensive edition of the laws and analogous legislation pertaining to the war powers of our Government since its beginning. From September 1918 to December 1918, as executive officer of the Provost Marshal General's Office, he again rendered services of an inestimable value in connection with the preparation and execution of complete regulations governing the classification and later the demobilization of several million registrants.[23]

After leaving active duty in December 1918, Clark resumed an active legal and political career. A prominent and active leader in the Church of Jesus Christ of Latter Day Saints, Clark nonetheless found time to serve as an Under Secretary of State in the Coolidge administration and as U.S.

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

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

Ambassador to Mexico. The J. Reuben Clark Law School at Brigham Young University is named after him.[24]

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

Charles B. Warren. When Charles Beecher Warren accepted a commission as a Reserve major in July 1917, he already was well-known in government legal circles: he had represented the United States as an associate counsel in hearings before the Joint High Commission to adjudicate claims of British subjects arising out of the Bering Sea controversy of 1896–97, and had served as counsel for the United States before the Permanent Court in The Hague in the Canadian Fisheries Arbitration between the United States and Great Britain in 1910. After being called to active duty, Warren was assigned to the Provost Marshal General's Office, where he served as tJAG Crowder's chief of staff and "formulated and directed regulations administering the Selective Service Act."[25] In July 1918, then COL Warren (he had been promoted to LTC in February and COL in July) deployed to Europe, where he oversaw the classification (and exemption) of Americans living in France and England. For his "administration of the selective service law during the war . . . [and his] unselfish devotion, tireless energy, and extraordinary executive ability," Warren was decorated with the Distinguished Service Medal in 1920.[26] After World War I, Warren was active in the Republican Party and, during the administration of President Calvin Coolidge, served as U.S. Ambassador to Japan (1921-1922) and U.S. Ambassador to Mexico (1924). Warren made the cover of *Time* magazine in January 1925[27] and shortly thereafter, President Coolidge nominated him to be U.S. Attorney General. Warren, however, "was never confirmed due to political controversy between the Senate and President Coolidge."[28]

Edwin G. Davis. Edwin Griffith Davis accepted his appointment as a Reserve officer on 14 May 1917, at the age of forty-three. Born in Idaho, Davis graduated from the U.S. Military Academy in 1900 then served in the Philippines with the 5th Infantry. In 1903, he returned to West Point and was assigned as an instructor in Law and History. During that time, Davis studied law and, two years later, was admitted to the bar in the District of Columbia. In 1907, then-CPT Davis was reassigned to Fort Baker, California, where he served as District Adjutant, Artillery District of San Francisco. In 1910, "he retired due to a physical disability contracted in the line of duty."[29] Davis then practiced law in Boise, Idaho, and, after becoming involved in politics, served in the Idaho state legislature and as Assistant Attorney General of Idaho from 1913 to 1915. Called to active duty in May 1917, then MAJ Davis was the Chief of the Military Justice Division in Washington, D.C., and, upon promotion to LTC, was reassigned to be the JAGD representative on the War Department General Staff. Davis's greatest contribution during World War I, however, was his work with Professor John Henry Wigmore, one of the other Reserve direct commissionees. Together, the two officers wrote the Soldiers' and Sailors' Civil Relief Act of 1918, which provided significant legal protections for Americans serving in the Army, Navy, and Marine Corps during the war.[30] For his "exceptionally meritorious and distinguished service," COL Davis (he was promoted in July 1918) was awarded the Distinguished Service Medal. His citation lauds his work as "chief of the disciplinary division . . . [where] he contributed a most helpful means of avoiding serious errors in the administration of military justice during the war."[31] In October 1919, Davis returned to civilian life. From 1922 to 1925, he served as the U.S. Attorney for Idaho, but he resigned from this position to become a special assistant to the U.S. Attorney General to handle war fraud cases. He "settled and adjusted many questions growing out of war contracts" and, at the close of a month-long trial in New York City in 1926, "won the only conviction secured by the Department of Justice in a criminal case growing out of war frauds."[32] In 1929, Davis joined the legal department

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

[25] THE ARMY LAWYER, *supra* note 2, at 122.

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

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

[28] THE ARMY LAWYER, *supra* note 2, at 122.

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

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

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

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

of the National Surety Company and, in 1934, was in U.S. District Court in Atlanta, Georgia, and "had just finished arguing a case" on behalf of the company "when he collapsed in the court room, and died before medical attention could be secured."[33] He was only sixty years old.

Hugh A. Bayne. The last of the twenty lawyers offered a Reserve commission in the JAGD was Hugh Aiken Bayne of New York. Born in New Orleans in 1870, Bayne graduated from Yale University in 1892 and then returned to Louisiana and obtained a law degree from Tulane University. He practiced law in New Orleans from 1894 to 1898 and in New York City from 1898 to 1917. After being commissioned as a Reserve officer in May 1917, MAJ Bayne joined General John J. Pershing's staff and sailed with him to Europe just nine days later. Bayne then served as the Judge Advocate, Services of Supply, Counsel for the U.S. Prisoners of War Commission, and as Judge Advocate, 80th Division. During the Meuse-Argonne Offensive from 1–11 November 1918, now-LTC Bayne was a liaison officer with attacking units of the division. At the end of World War I, LTC Bayne was honorably discharged. Some years later, he was awarded the Distinguished Service Medal for displaying "untiring zeal, rare professional ability, and intellectual qualities of a high order." According to the citation for this decoration, Bayne's "special knowledge of the French language and the laws of France enabled him to render . . . services of immeasurable value and contributed markedly to the successes of the American Expeditionary Force."[34] Bayne did not return to the United States after leaving active duty. Rather, he remained in Paris, France, where he served as a member of the Franco-American Liquidation Commission. In the 1920s, he also was an arbitrator on the Inter-Allied Reparations Commission established by the Paris Peace Conference. This commission determined the amount of reparations to be extracted from the Central Powers and paid to the Allies. Bayne participated in a number of significant cases, including a 1926 decision involving the commission's appropriation of twenty-one oil tankers owned by a German subsidiary of Standard Oil to pay for German reparations. Standard Oil fought the decision, but lost.[35]

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

More historical information can be found at

The Judge Advocate General's Corps
Regimental History Website

Dedicated to the brave men and women who have served our Corps with honor, dedication, and distinction.

https://www.jagcnet.army.mil/History

[33] *Id.*

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

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

Crime in Germany "Back in the Day": The Four Courts-Martial of Private Patrick F. Brennan

Fred L. Borch
Regimental Historian & Archivist

Fifty years ago, judge advocates (JAs) stationed in Germany participated in more than a few courts-martial involving undisciplined Soldiers. But military justice "back in the day" was quite different from what one would see today because, under the Uniform Code of Military Justice (UCMJ) as it then existed, there was no JA participation at special courts-martial.[1] Rather, line officers served as trial and defense counsel and, as there also was no military judge or other similar judicial official at special courts, every court-martial was heard by a panel and the senior officer on the panel ran the court.[2] More than anything else, special courts were courts of discipline (although justice certainly was done), but sometimes a Soldier's inability to adhere to the Army's standards could not be solved with a special court-martial—as illustrated by the case of nineteen-year-old Private (PVT) Patrick F. Brennan. The story that follows is that of a teenaged GI who managed to accumulate five convictions by three special courts-martial in just ninety days—topped off by a trial by general court-martial.

Private Brennan's troubles began late in 1962 when he was convicted at a special court-martial of disrespect to a non-commissioned officer (NCO) and disorderly conduct in the barracks. The panel members sentenced him to thirty days hard labor without confinement, which was an authorized sentence under the UCMJ at the time and usually involved manual labor on some menial project. As a consequence of this court-martial conviction, Brennan's commander revoked his pass privileges. Unmarried junior enlisted Soldiers in this era lived in the barracks on post and could not leave their installation without having in their possession a card showing that they were authorized to go off post.[3]

To Brennan's dismay, his commander failed to restore his pass privilege at the end of his thirty-day hard labor sentence. A month later, with his "pass" still "under lock and key," PVT Brennan absented himself without leave (AWOL).[4] As he later explained, "I don't think the Army's pass policy is right. A pass is a right, not a privilege—except when it's withdrawn for disciplinary reasons." As Brennan saw it, since he had completed his sentence, he should have his pass card returned to him. The special court panel hearing the evidence, however, disagreed. It found him guilty and sentenced PVT Brennan to another stint in the stockade.

Shortly after completing this punishment for his AWOL, PVT Brennan was court-martialed the third time for "assaulting a SP5 [Specialist Five/E-5] and disobeying an order." According to a newspaper report in the European edition of *Stars and Stripes*, PVT Brennan served his sentence for this third court-martial at the stockade located at William O. Darby Kaserne, Fürth, Germany.[5]

Just two weeks before nineteen-year-old Brennan was scheduled to be discharged from the Army with a general discharge under honorable conditions, he committed yet another act of indiscipline. Sergeant (SGT) Sylvester J. Williams, then serving as guard commander, was marching a group of prisoners, including PVT Brennan, to eat "chow." As SGT Williams talked to the prisoners, PVT Brennan evidenced a lack of interest, and told Williams "to shut [his] damn mouth." Then, when SGT Williams directed Brennan "to step out of the ranks," an angry PVT Brennan not only stepped over to Williams, but "poked the sergeant in the face without any preliminaries."[6] The "astonished prisoners looked on" while other guards "rushed into the fray to help Williams." Specialist Four William S. Minnich, who weighed over 200 lbs., quickly took charge of Brennan. Brennan not only went along quietly, but asked Minnich to "lock him up so he couldn't hurt anyone else."[7]

Private Brennan's chain-of-command had had enough of him. His upcoming separation from active duty was cancelled and PVT Brennan instead found himself before a general court-martial convened by the VII Corps

[1] MANUAL FOR COURTS-MARTIAL, UNITED STATES ch. III, ¶ 6c (1951) [hereinafter 1951 MCM], *available at* http://www.loc.gov/rr/frd/Military_Law/CM-manuals.html (requiring that the appointment orders for trial and defense counsel to address whether counsel are "legally qualified lawyers" or not and, if a trial counsel is a qualified attorney, the defense counsel be a qualified attorney as well).

[2] There was no requirement for legally trained counsel at special courts until the enactment of the Military Justice Act in 1968, when an accused for the first time was "afforded the opportunity to be represented" at a special court by a lawyer. Consequently, absent extraordinary circumstances, convening authorities convened special courts, selected panels, appointed line officers as trial and defense counsel, and took action on findings and sentence without any JA participation. For more on the changes resulting from the Military Justice Act of 1968, see JUDGE ADVOCATE GENERAL'S CORPS, U.S. ARMY, THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775–1975, at 243–51 (1975).

[3] *GI Discharged; Slugged Guard*, STARS & STRIPES, Aug. 1963.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

commander. The trial was held in Nurnberg. The trial counsel was Captain Quinlan J. Shea Jr. and the defense counsel was Captain Harry F. Goldberg. Both were fairly recent members of the Corps and were on their first tours as JAs. Shea was a Rhode Island attorney who had graduated in May 1961 from the 34th Special Class (as the Judge Advocate Officer Basic Course was then called). Goldberg was a Massachusetts lawyer who had graduated from the 36th Special Class in early 1962.

Brennan was charged with one specification under Article 91—striking an NCO while that NCO was in the execution of his office. At the time, the authorized maximum penalty for this offense was one year confinement at hard labor, forfeiture of all pay and allowances, reduction to the lowest enlisted grade, and a dishonorable discharge (DD).[8] Brennan testified at his own trial, and admitted that he had struck SGT Williams. He "confessed" that he "wasn't rational at all." Not surprisingly, Brennan was convicted by the VII Corps panel of the specification and the charge.[9]

On sentencing, CPT Goldberg tried to put the best possible spin on his client's situation. "If what Private Brennan did was a senseless act, we feel it was an emotional outburst." Goldberg then quoted Supreme Court Justice Oliver Wendell Holmes's famous quip that "even a dog distinguishes between being kicked and stumbled upon." Goldberg added: "We feel this was more a case of being stumbled upon."[10]

Trial counsel CPT Shea responded when it was his turn to argue: "I believe this adds up to five convictions prior to this general court-martial." Continued Shea: "Sometimes we feel that deterrence is a dirty word. But the evidence presented by the defense asks you almost to reward Brennan for his offense. The Government is confident that you are not going to reward him." Captain Shea then asked the panel to impose the maximum sentence. As the *Stars and Stripes* reported, the nine member panel "went along with everything but the discharge, substituting a BCD [Bad Conduct Discharge] for the DD."[11]

United States v. Brennan is not reported as a case considered by the Army Board of Review. The Court of Military Appeals also did not hear an appeal. Consequently, it seems likely that Brennan simply served his confinement and then returned to civilian life. Today, this teenaged Soldier would be nearly seventy years of age. One wonders what, if anything, he learned from his time as a Soldier in Germany "back in the day."

As for Captains Shea and Goldberg? Goldman was released from active duty in December 1964. Captain Shea remained on active duty for another ten years; his last known assignment was in the Military Justice Division, Office of the Judge Advocate General. Then Major Shea left active duty in 1972.[12]

More historical information can be found at

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https://www.jagcnet.army.mil/History

[8] 1951 MCM, *supra* note 1, ch. XXV, ¶ 127c, tbl., at 221.

[9] *GI Discharged; Slugged Guard*, *supra* note 3.

[10] *Id.*

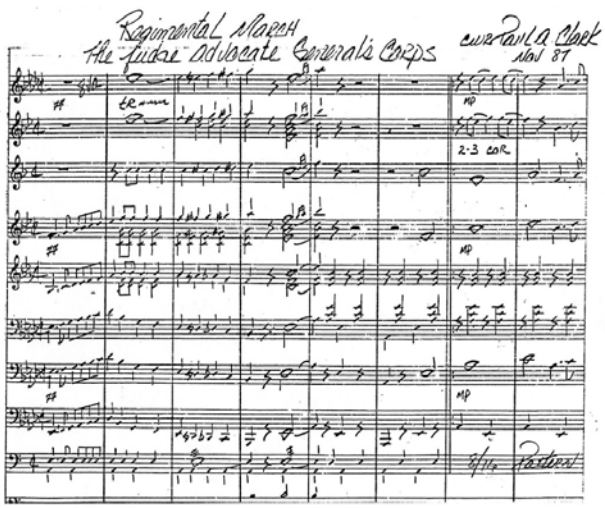
[11] *Id.*

[12] OFFICE OF THE JUDGE ADVOCATE GENERAL, JAGC PERSONNEL AND ACTIVITY DIRECTORY (Aug. 1963); OFFICE OF THE JUDGE ADVOCATE GENERAL, JAGC PERSONNEL AND ACTIVITY DIRECTORY (Sept. 1973).

Lore of the Corps

Our Regimental March

Fred L. Borch
Regimental Historian & Archivist



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

After the Army created a "Regimental System" in 1981, the Corps applied for regimental status, which was granted in May 1986.[1] But even before members of the Corps had any regimental affiliation, Major General Hugh R. Overholt, then serving as The Assistant Judge Advocate General, was thinking of ways to build pride and camaraderie within the new Judge Advocate General Corps (JAGC) Regiment. Ultimately, there would be a new regimental flag and a "Distinctive Insignia" (DI) that all members of the Corps would wear on their uniforms. But Major General Overholt also looked beyond the obvious accouterments of a regiment and decided that a march—brisk music suitable for troops marching in a military parade—would be a good idea.

In early 1985, Major General Overholt approached then Lieutenant Colonel (LTC) Ronald P. Cundick, who was serving as Chief, Personnel, Plans and Training Division, Office of the Judge Advocate General. As then LTC Cundick remembers it, Major General Overholt said to him, "Ron, you are a musician, you play the piano, why don't you compose us a regimental march?"[2] There was no timeframe or deadline to accomplish this task, but Cundick assumed that Major General Overholt was serious (which was not always the case with comments from Major General Overholt, who was known for mischievous nature and wry sense of humor).

In July 1985, Major General Overholt assumed duties as The Judge Advocate General and now Colonel (COL) Cundick departed Washington, D.C., for Fort Lewis, Washington, where he assumed duties as the Staff Judge Advocate, I Corps. In this new job, COL Cundick attended a variety of official functions, including those of the 9th Infantry Division (ID), which was part of I Corps. On more than one occasion, COL Cundick heard the 9th ID band perform, and was "impressed with the quality and variety of its music."[3] Most division bands he had observed previously "were pretty thin on talent and their repertoire was somewhat limited." The 9th Division Band, however, was different, and COL Cundick "was particularly impressed with the enthusiasm and professionalism" of its bandmaster, Chief Warrant Officer Two (CW2) Paul Clark.[4]

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

Within two or three months, CW2 Clark had written a score titled "Regimental March, The Judge Advocate General's Corps." The original sheet music is dated November 1987 and includes a variety of instruments, including flute (piccolo), clarinet, alto saxophone, horn, trombone, tuba and drums (percussion). On 16 December 1987, Clark sent the score and a tape recording of it

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

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

[3] *Id.*

[4] *Id.*

(performed by the 9th Infantry Division Band), to COL Cundick. The bandmaster also applied for a copyright for the Regimental March, which subsequently was issued by the U.S. Copyright Office, Library of Congress, on 26 May 1988.

The Regimental March was first performed for a judge advocate audience at the 1988 JAGC Regimental Ball.[5] Since that time, it apparently has only been performed on one other occasion: by the Fort Lee band on 19 March 2012, during the activation ceremony of Advanced Individual Training for Military Occupational Specialty (MOS) 27D Paralegals at Fort Lee, Virginia.

Whether this recent revival of the Regimental March signals renewed interest in this piece of martial music is an open question. However, it does seem that a Regimental March was only one aspect of Major General Overholt's concept for regimental music. Major General Overholt "also wanted to adopt a Regimental Bluegrass song," and selected "Bringing Mary Home."[6] For two years, Judge Advocate Reserve Brigadier General Thomas "Tom" O'Brien played the tune at the Regimental ball. Major General Overholt reminisced: "I think most folks, other than me, where kind of glad when it went away."[7]

In addition to the Regimental March and the Regimental Bluegrass song, Major General Overholt, encouraged by Major General William K. Suter, The Assistant Judge Advocate General, also identified a Regimental "Fish" and a Regimental "Pizza." There was also a Regimental "Hot Dog Cooker." The history behind these three regimental accouterments, however, will have to wait for another day.[8]

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[5] E-mail from Major General (Retired) Hugh R. Overholt, to Regimental Historian & Archivist, subj: JAGC Regimental March (16 July 2013, 17:31 EST).

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

I was driving down a lonely road on a dark and stormy night
When a little girl by the road side showed up in my head lights
I stopped and she got in the back and in a shaky tone
She said my name is Mary please won't you take me home

She must have been so frightened all alone there in the night
There was something strange about her cause her face was deathly white
She sat so pale and quiet there in the back seat all alone
I never will forget that night I took Mary home

I pulled into the driveway where she told me to go
Got out to help her from the car and opened up the door
But I just could not believe my eyes the back seat was bare
I looked all around the car but Mary wasn't there

A small light shown from the porch a woman opened up the door
I asked about the little girl that I was looking for
Then the lady gently smiled and brushed a tear away
She said it sure was nice of you to go out of your way

But thirteen years ago today in a wreck just down the road
Our darling Mary lost her life and we still miss her so
So thank you for your trouble and the kindness you have shown
You're the thirteenth one who's been here bringing Mary home

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

[7] E-mail from Major General (Retired) Hugh R. Overholt, to Regimental Historian & Archivist, subj: More on the Regimental March (17 July 2013, 10:02 EST).

[8] *Supra* note 5.

The Cease-Fire on the Korean Peninsula: The Story of the Judge Advocate Who Drafted the Armistice Agreement that Ended the Korean War

Fred L. Borch
Regimental Historian & Archivist

Over sixty years ago this year, on 27 July 1953, an armistice agreement ended the fighting between United Nations (UN) forces and Chinese and North Korean armies on the Korean peninsula. This armistice, or cease-fire agreement, had been drafted the year before by forty-four-year old Lieutenant Colonel (LTC) Howard S. Levie, a career judge advocate (JA) assigned to the UN Command Armistice Delegation. What follows is the story of how, while "dozens of voices . . . harangued more than nine months in trying to reach an armistice in Korea," the pact itself was "written mostly by one man."[1]

The Korean War started on 25 June 1950 when about 10,000 North Korean People's Army (NPKA) soldiers, supported by artillery, aircraft and tanks, crossed the 38th parallel into the Republic of Korea (ROK). While the ROK army was about the same size as the NPKA, its soldiers lacked combat experience. As a result, ROK resistance collapsed quickly and Seoul, the ROK capital, fell to the Communists on the third day of fighting.[2]

Under a UN Security Council Resolution, however, American air, naval and ground units joined the battle.[3] After General Douglas MacArthur's brilliant amphibious landings at Inchon, UN forces (now including Australian, British, Dutch, Turkish and many other UN member states) drove into North Korea, capturing the North Korean capital, Pyongyang, in October. By the end of 1950, however, Chinese Red Army troops had entered the war and, joining forces with the NPKA, drove the UN forces out of North Korea; the enemy re-captured Seoul. The Eighth U.S. Army, first commanded by Lieutenant General Matthew B. Ridgway and then by Lieutenant General James Van Fleet, pushed back against the Communists. Badly hurt by losses in both men and materiel, the Chinese and North Koreans suggested peace talks on 23 June 1951, and the UN accepted.[4]

In July 1951, then LTC Levie was serving in General MacArthur's Far East Command in Tokyo. A Cornell law school graduate who had transferred from the Coast Artillery Corps to The Judge Advocate General's Department in 1946, Levie had been the Chief, War Crimes Division, since September 1950. In this position, he supervised the review of records of trial in which a death sentence had been adjudged against a Japanese accused. One day, while reviewing a trial record, LTC Levie was informed that he was to report the following day to the UN Command Armistice Delegation, and that he would serve as a "Monitor" on the Delegation Working Group. His superiors—involved in the actual negotiations—included four Americans: Vice Admiral C. Turner Joy; Major General Henry I. Hodes; Rear Admiral Arleigh A. Burke; Major General Laurence C. Craigie; and one ROK officer, Major General Paik Sun Yup.[5]

Negotiations opened on 10 July 1951 in Panmunjom and when Levie arrived there, he learned that while the Communist and UN delegations would approve the principles to be contained in the truce agreement, it was going to be his job—as the only lawyer—to draft proposed provisions for the implementation of those principles. The result was that, over a nine-month period, while dozens of individuals argued about the principles to be contained in the cease-fire, Levie drafted the actual language for those provisions suggested by the UN Command.

After LTC Levie drafted each specific provision, he would "have an in-house review and discussion by the delegation and staff."[6] After any changes or modifications were agreed upon, the proposed Armistice provisions were "sent to Washington [D.C.] for approval."[7] After approval, the provisions were translated into Chinese and Korean. As Levie remembered,

> in the beginning, it was thought that each side would draft the specific provisions; rarely did we receive a draft proposal from

[1] *Dozens Argue at Panmunjom, But One Man is Writing Pact*, EVENING STAR (Wash., D.C.), Apr. 14, 1952, at A7.

[2] CENTER OF MILITARY HISTORY, U.S. ARMY, KOREA—1950, at 9–10, 14 (1997).

[3] S.C. Res. 82, U.N. SCOR, U.N. Doc. S/RES/82 (June 25, 1950). The resolution passed because the Soviet Union's representative was boycotting that organization; had he been present, he could have vetoed the resolution.

[4] JOHN MILLER, JR., OWEN J. CARROLL & MARGARET E. TACKLEY, KOREA 1951–1953, at 3–10, 115–17 (1997).

[5] *Id.* at 115, 160.

[6] Written Questions for Colonel Levie (n.d.) (*The Army News Service* provided a list of questions for Colonel Howard S. Levie to answer in order to publish a story about him in *The Army News Service* in December 2008.) (on file with Regimental Historian).

[7] *Id.*

> the Communists. We quickly learned that no matter how perfect the translation of a proposal would be, the Communists would never accept it without demanding some change or changes; changes that were frequently completely meaningless. We then adopted the practice of deliberately inserting a few more or less obvious errors. The Communists would insist on correcting those errors and would otherwise accept the document.[8]

This drafting job was without precedent, as no JA had previously been tasked with authoring a truce agreement. Lieutenant Colonel Levie, however, was familiar with the 1936 cease-fire agreement between Bolivia and Paraguay, and he borrowed paragraphs from this agreement for the Korean armistice.[9] He also looked at "other armistice agreements of modern times on the paragraphs dealing with a demilitarized zone."[10]

By April 1952, LTC Levie's armistice agreement had "been overhauled seven times" and was "26 legal size typewritten pages containing 63 paragraphs, many with subparagraphs."[11] Provisions in the document covered a variety of purely military topics, including the creation of a military demarcation line and demilitarized zone, the establishment of a military armistice commission, and specific details governing the implementation of the cease fire. When negotiations stalled over the issue of repatriating prisoners of war (POWs),[12] the original members of the delegation and staff departed Panmunjom in May 1952.

Lieutenant Colonel Levie left the following month but his precise, clear, grammatically correct agreement remained in place. Consequently, when negotiations resumed the following year—with an agreement on POW exchanges—what both sides signed on 27 July 1953 essentially was what Levie had written.[13] It was a remarkable achievement by any measure. At the time, no one realized that this truce document would be so important, since there was every reason to believe that the parties subsequently would sign a formal peace treaty ending the Korean War. But this has never occurred and, as a result, Levie's agreement—which required both sides to withdraw two kilometers from the truce line to establish a Demilitarized Zone—is what maintains a sometimes uneasy peace today.[14]

As for LTC Levie? After leaving Korea in July 1952, he returned to Japan until the following year when he departed for the United States. After briefly serving as the Staff Judge Advocate (SJA), Fort Leavenworth, Kansas, LTC Levie was transferred to the Pentagon, where he served as the first chief of the newly created International Affairs Division (IAD) in the Office of The Judge Advocate General. Promoted to colonel shortly after becoming the head of IAD, Levie remained in the Pentagon until 1958, when he was transferred to Europe. He served first as the SJA, Southern European Task Force, and subsequently as the Legal Advisor, U.S. European Command. After retiring in 1963, COL Levie began a second—and extraordinarily successful—career as professor of international law at St. Louis University and at the Naval War College.[15]

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[8] *Id.*

[9] From 1932 to 1935, Bolivia and Paraguay fought a territorial war over the Gran Chaco region, an area over which both countries claimed ownership. At least 90,000 to 100,000 men died, and total casualties may have exceeded 250,000. For more on the Chaco War, which ended with a truce in January 1936, see A. DE QUESADA, THE CHACO WAR 1932–1935: SOUTH AMERICA'S GREATEST CONFLICT (2011).

[10] *Supra* note 1.

[11] *Id.*

[12] The UN Command insisted on "voluntary repatriation"—insisting that every POW had the right to make a personal, voluntary decision to return to the country in whose armed forces he had been serving at the time of his capture. The Communists, however, were adamant that all Chinese and North Korean POWs must be returned to their control, regardless of their personal desires. Howard S. Levie, *How It All Started—And How It Ended: A Legal Study of the Korean War*, 35 AKRON L. REV. 205, 223 (2002).

[13] The 27 July 1953 Armistice Agreement was signed by Lieutenant General William K. Harrison, Jr., Senior Delegate, UN Command Delegation and General Nam Il, Senior Delegate, Korean People's Army and Chinese People's Volunteers. For the full text of the Korean War Armistice Agreement, see http://news.findlaw.com/cnn/docs/ korea/kwarmagr072753. html (last visited Aug. 15, 2013).

[14] In the late 1990s, there were attempts to convene a conference in Geneva in order to negotiate a final peace treaty but nothing was achieved. Levie, *supra* note 10, at 225. In fact, starting in 1996, North Korea has announced its withdrawal from the Armistice Agreement on at least six occasions. *Chronology of Major North Korean Statements on the Korean War Armistice*, YONHAP NEWS, May 28, 2009, *available at* http://english.yonhapnews.co.kr/northkorea/2009/05/28/46/0401000000AEN20090528004200315F.HTML.

[15] Richard J. Grunawalt, *Professor Howard Levie and the Law of War*, *in* MICHAEL N. SCHMITT & LESLIE C. GREEN (EDS.), LEVIE ON THE LAW OF WAR, at xv (1998), *available at* https://www.usnwc.edu/getattachment/f70ec02c-8f8e-4f54-aa15-3c71030c6231/Professor-Howard-Levie-and-the-Law-of-War.aspx.

Howard Levie's many writings on the Law of Armed Conflict—he wrote seven books and more than fifty articles and edited thirteen volumes—continue to be used by international legal scholars. The Corps recognized his many contributions when it made him a Distinguished Member of the Regiment in 1995. But COL Levie has yet another unique place in our history: he is the first and only member of the Corps to reach the "century" mark, and he later celebrated his 101st birthday on 19 December 2008. Levie died at his home in Rhode Island the following year.[16]

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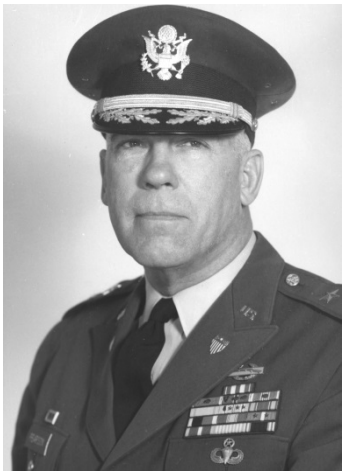
https://www.jagcnet.army.mil/History

[16] Elizabeth M. Collins, *Armistice Author Turns 101*, ARMY NEWS SERV., Dec. 29, 2008.

The Governor Versus the Adjutant General: The Case of Major General George O. Pearson, Wyoming National Guard

Fred L. Borch[*]
Regimental Historian & Archivist

On Tuesday, 1 December 1964, Major General George O. Pearson, Adjutant General of the Wyoming National Guard, angrily denied charges made against him by Wyoming Governor Clifford P. Hansen. In a front-page story in *The Billings (Montana) Gazette*, Pearson insisted that he had never "misappropriated state funds and diverted them to his personal use."[1] Not only was he completely innocent of any wrongdoing, but the sixty-one-year old Pearson claimed that he would "explicitly refute each and every charge made against [him]."[2] What follows is the story of the legal fight between the Governor of Wyoming and the highest military official of that state; a conflict that resulted in a Wyoming Supreme Court decision and Pearson's court-martial, a unique event in the history of the Army National Guard and military criminal law.



Born in Sheridan, Wyoming, on 15 August 1903, George Oliver Pearson had a remarkable career as a Soldier. When he was sixteen years old, he enlisted as a private in the 1st Wyoming Cavalry Regiment. Later, while a student at the University of Minnesota, Pearson also served in the 151st Field Artillery Regiment, Minnesota National Guard. Major General Pearson obtained an officer's commission in 1928, and when the United States entered World War II, then Major Pearson deployed to the Pacific. He saw heavy combat as the commander of the famous 187th Airborne Infantry Regiment[3] in the Philippines and was decorated for gallantry in action with the Silver Star.[4] After the Japanese surrender in 1945, then Colonel Pearson participated in the initial occupation of Japan. He subsequently served as Commander of the 508th Regimental Combat Team in Berlin, Germany, before retiring from active duty in 1958 and returning to Wyoming. On 1 June 1959, Colonel Pearson joined the staff and administration of the Wyoming National Guard. Two years later, he transferred from the Infantry to the Adjutant General's Corps and was promoted to brigadier general. A year later on 23 July 1962, Pearson pinned on a second star after being appointed The Adjutant General by Governor Jack R. Gage. Major General Pearson was still serving as the top military officer in Wyoming when that state's voters defeated Gage's bid for re-election and chose Republican Clifford Hansen to be their chief executive in November 1962.[5]

In late November 1964, Governor Hansen confronted Major General Pearson with evidence that Pearson had "turned in false travel vouchers" and "charged personal long distance telephone calls to the state." Convinced that Pearson was guilty of criminal misconduct, but that the matter should be handled administratively, the governor apparently offered Pearson two choices: submit his resignation or be fired. When Pearson "declined to resign because he was innocent,"[6] Governor Hansen exercised his authority as "Governor and Commander in Chief" to relieve Pearson as "The Adjutant General, State of Wyoming, effective 25 November 1964."[7] In his stead, Governor Hansen appointed Brigadier General Roy E. Cooper as Acting Adjutant General.[8] As for Pearson, he retained his rank but was in an "inactive and unassigned" status. In a 20 February 1965 letter addressed "To All units of the Wyoming Army and Air National Guard," Governor Hansen

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[*] The author thanks Lieutenant Colonel Francisco L. Romero, Staff Judge Advocate, Wyoming National Guard, for his help in preparing this article.

[1] *Can Prove Hansen Charges False*, BILLINGS GAZETTE (Montana), Dec. 1, 1964, at 1.

[2] *Id*.

[3] The 187th Airborne Infantry Regiment is today known by the moniker Rakkasans. In Japanese, Rakkasan means "man falling under umbrella"; the unit received the moniker while in occupation duty in Japan after World War II. *See The Rakkasans, 187th Infantry Regiment*, RAKKASAN ASS'N, http://www.rakkasan.net/history.html (last visited Oct. 16, 2013).

[4] U.S. Dep't of Army, DA Form 66, Officer Qualification Record, George O. Pearson, block 21 (Awards and Decorations) (17 Aug. 1966).

[5] *Id*. block 12 (Appointments).

[6] *Supra* note 1.

[7] Wyo. Adjutant Gen.'s Office Exec. Order No. 66 (Nov. 26, 1964) (copy on file with author).

[8] Wyo. Adjutant Gen.'s Office, Special Order No. 222 (Nov. 26, 1964) (copy on file with author).

informed all personnel that "under no circumstances" could Major General Pearson "participate in Wyoming National Guard activities or exercise any authority."[9]

While Hansen insisted that he had the authority to remove Pearson from office and strip him of all military authority, the latter very much disagreed, and filed suit in Wyoming's highest court to block the governor's action. Major General Pearson argued that a Wyoming statute, which provided "that no state appointed person serving in a military capacity can be removed without a hearing,"[10] meant that Hansen's action was a nullity.

On 12 May 1965, in *The State of Wyoming ex rel. Pearson v. Hansen et al.*, the Supreme Court of Wyoming agreed with Pearson. While acknowledging that Governor Hansen held "the sole power" to appoint the state's Adjutant General, the court unanimously concluded that Wyoming Statute 19-56 required "a court-martial or efficiency board" as a prerequisite to removing a military officer from office. Consequently, the Court held that "the Governor exceeded his powers" in removing Pearson from office and granted summary judgment for him on the complaint.[11]

So what was Governor Hansen to do? Since the highest court of the state had indicated in its opinion that there was no reason that the governor could not convene a court-martial to hear the evidence against Major General Pearson, Hansen took action. Two months later, on 12 July 1965, acting under his authority as "Governor and Commander-in-Chief," Hansen "relieved" Pearson from "Command and Duties as Adjutant General . . . during the pendency of the court-martial proceedings which have been instituted against him."[12]

On 12 November 1965, again under his authority as "Commander-in-Chief," Governor Hansen convened a general court-martial at the New Armory, Cheyenne, Wyoming, "for the trial of Major General George O. Pearson."[13]

On 6 December 1965, a panel consisting of Colonel Theron F. Stimson as president, eight lieutenant colonels and two majors, convened to hear the evidence against Pearson.[14] He was charged with a number of travel-related offenses under Articles 80, 107, 121, 133, and 134, Uniform Code of Military Justice (UCMJ). Although two charges alleged that he had falsely claimed payments for personal long distance telephone calls, the remaining charges and specifications revolved around falsely claiming reimbursement for airline tickets, limousine, and taxi expenses. The prosecution's evidence was that General Pearson had travelled on Wyoming National Guard aircraft to various locations, but filed vouchers claiming that he had flown on commercial aircraft, requesting money as reimbursement for these commercial airline tickets and related per diem and travel expenses.

Defense counsel first objected to the presence of Mr. George W. Latimer as Assistant Trial Counsel, perhaps because of Latimer's considerable military legal experience.[15] This objection was overruled by the court.

Defense counsel then argued to the panel that it lacked jurisdiction over General Pearson. The gist of the argument apparently was that as the Wyoming legislature had not formally adopted the UCMJ, there could be no court-martial. After the law officer[16] ruled that there was jurisdiction, Pearson and his counsel filed a writ of prohibition with the Wyoming Supreme Court, seeking to halt the proceedings on this same jurisdictional basis. On 14 January 1966, the court denied the writ.[17]

Major General Pearson's trial resumed on 24 January 1966, and concluded on 3 February. He was convicted of one specification of filing a false claim and one specification of conduct unbecoming an officer and gentlemen. He was sentenced to a reprimand.[18]

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[9] Letter from Clifford P. Hansen, to To All units of the Wyoming Army and Air National Guard (20 Feb. 1965).

[10] *Guard Dispute: Attorney General Asks Suit Dismissal*, BILLINGS GAZETTE (Montana), Dec. 25, 1964, at 21.

[11] State of Wyoming *ex rel.* Pearson v. Hansen, 401 P.2d 954 (1965). Cooper was named as a defendant because Hanson had appointed him as Adjutant General after removing Pearson from the office.

[12] Wyo. Office of the Governor and Commander-in-Chief Exec. Orders No. 34 (12 July 1965).

[13] Headquarters, Wyo. Nat'l Guard, Office of the Commander-in-Chief, Gen. Court-Martial Appointing Order No. 1 (12 Nov. 1965).

[14] Under Article 25(d)(1), Uniform Code of Military Justice (UCMJ), a member may be junior in rank to the accused when that cannot be "avoided." Since Pearson was the highest-ranking officer in the Wyoming National Guard, selecting members junior to him could not be avoided. UCMJ art. 25(d)(1) (2012).

[15] A distinguished lawyer with a strong military background (he had enlisted in the Utah National Guard in 1917 and served as a colonel in the 40th Infantry Division in World War II) George W. Latimer was one of the original three judges on the Court of Military Appeals (today's Court of Appeals for the Armed Forces). Lattimer served on that court from 1951 to 1961. *Judges*, U.S. COURT OF APPEALS FOR THE ARMED FORCES, http://www.armfor.uscourts.gov/newcaaf/judges.htm (last visited Oct. 9, 2013). Some years after the Pearson court-martial, Latimer defended Lieutenant William F. "Rusty" Calley in the infamous My Lai massacre court-martial. RICHARD HAMNER, THE COURT MARTIAL OF LT. CALLEY 61–62 (1971).

[16] Prior to the Military Justice Act of 1968, when Congress created the position of "military judge," all general courts-martial had a "law officer" detailed to them by the convening authority. The law officer was a quasi-judicial official, and was certified by The Judge Advocate General as legally qualified to instruct the panel members on the elements of the offense, the presumption of innocence, and the burden of proof. The law officer also ruled on interlocutory questions of law. UCMJ art. 26 (1951).

[17] State *ex rel.* Pearson v. Hansen, 409 P.2d 769 (1966). The court had previously held that the legislature had enacted sufficient legislation to allow for trials of state military personnel under the UCMJ.

[18] Memorandum from Wyo. Nat'l Guard, Office of the Staff Judge Advocate, subject: Opinion, Review, and Recommendations, Trial of

Perhaps Governor Hansen hoped that the court-martial panel would have sentenced Pearson to a dismissal so that he then would have a clear basis to order his removal as Adjutant General. But this was not to be and, in the absence of a dismissal, it seems that Hansen was stuck with Pearson. This is the best explanation for why Governor Hansen rescinded his earlier order prohibiting Pearson from participating in National Guard matters. A 4 June 1966 letter from Hansen to Major General Pearson restored his authority as Wyoming's top military officer.[19]

Almost three months later, on 29 August 1966, Governor Hanson approved the court-martial findings and sentence.[20] On 3 October 1966, he took his final action in the case by issuing a written reprimand to Major General Pearson. It read, in part:

> You were found guilty by a General Court Martial of conduct unbecoming an officer and gentleman, and of conduct such as to bring discredit upon the Armed Forces of the State of Wyoming, and sentenced to a reprimand. As it is my duty to carry out that sentence, I shall proceed to do so.
>
> The Office of Adjutant General is a high position in the organization of the State of Wyoming. It is so, because it carries with it not only the responsibility for the conduct of State business, but also the leadership of a department steeped in military traditions, based upon honor and moral duty as well as the best of discipline.
>
> . . .
>
> You have violated the trust which you were given by the people of this great State. Government falls into disrepute when its highest officers depart from honesty and follow an unacceptable path. It is regrettable that by your conduct you have brought upon yourself the humiliation and overwhelming sense of shame you must feel when facing your fellow officers and men, in having failed to set for them the example which they expect and to which they are entitled.[21]

So ended the fight between Governor Hansen and his Adjutant General. The governor had made his point, and General Pearson must have felt uncomfortable in his presence—and that of his fellow Guardsmen. But he remained as the Adjutant General until the following year when, aged sixty-four years, Pearson reached mandatory retirement. Amazingly, Pearson was awarded the Wyoming National Guard Distinguished Service Medal "for long and exceptionally distinguished service to the State of Wyoming and the United States of America" before retiring. The citation lauds his "exceptional foresight and leadership in directing the training and administration" of the Guard and his "steadfast devotion to duty."[22] Since Governor Hansen approved the award to Pearson, one must conclude that Hansen harbored no ill feelings toward his Adjutant General. In any event, the Pearson-Hansen dispute did have a lasting impact: at least in Wyoming until 1977, the Adjutant General could not be removed except by a court-martial.[23]

What happened to Major General Pearson after 1967? Instead of going quietly into retirement, Pearson went to Vietnam, where he worked for Pacific Architects and Engineers as a civilian contractor at Cam Ranh Bay. He returned to the United States in 1970 and settled in Sheridan, Wyoming. George Pearson died there in March 1998. As for Governor Hansen? He completed his service as Wyoming's chief executive and was elected to the U.S. Senate in 1967. He served two terms and retired in 1978 when he declined to run for a third. Clifford P. Hansen died in Wyoming in 2009 at the age of ninety-seven.[24]

More historical information can be found at

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Major General George O. Pearson, Adjutant Gen., State of Wyo. 5 (29 Aug. 1966).

[19] Letter from Governor Hansen, to Major General Pearson (4 June 1966).

[20] *Supra* note 17, at 8.

[21] Letter from Governor Clifford P. Hansen, to Major General George O. Pearson, subj: Reprimand (3 Oct. 1966).

[22] Wyo. Adjutant Gen.'s Office, Gen. Orders No. 18 (10 June 1967).

[23] In 1977, almost certainly in response to the Hansen-Pearson controversy, the Wyoming legislature revised state law to provide for the removal of the Adjutant General, as with all other gubernatorial appointees, at the pleasure of the governor. WYO. STAT. ANN. §§ 19-7-103(a), 9-1-202(a) (1977). While this means that the governor may remove the Adjutant General from the state position, this would not constitute a dismissal action with respect to dual status membership in the Reserves or state militia.

[24] *Obituary, Clifford P. Hansen, 1912–-2009*, WYOMING TRI. EAGLE, http://www.wyomingnews.com/articles/2009/10/24/obituaries/01obit_10-24-09.prt (last visited Aug. 20, 2013).

From Cowboy and Tribal Lawyer to Judge Advocate and Secretary of War: The Remarkable Career of Patrick J. Hurley

Fred L. Borch
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Secretary of War Patrick J. Hurley (in civilian suit) with foreign military attaches, March 1929

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

Born in the Choctaw Nation, Indian Territory (now Oklahoma), in January 1883, Patrick J. Hurley grew up in poverty. His father worked in the coal fields as a day laborer for $2.10 a day; young Pat joined his father in the mines when he was eleven years old. For a nine-and-one-half hour day, the boy received seventy-five cents.[1]

Later, when the coal mines closed for a time and young Hurley was without work, he spent his days in the company of Native American members of the Choctaw Nation who, along with the Creeks and Cherokees, were the most prominent Indian tribes in the territory. His friendship with Choctaw Victor Locke would open professional doors after Hurley became a lawyer. But first the teenager returned to the coal mines, where he worked as a mule skinner, "driving the animals as they hauled cars full of coal out of the pits."[2] Hurley subsequently left the mines to work as a cowboy, "herding and feeding cattle belonging to a local butcher."[3] While punching cattle, Hurley teamed up with a cowboy named Will Rogers—the same Will Rogers who would achieve national fame as an actor and humorist.[4] The two men formed a lifelong friendship that only ended with Rogers' untimely death.

Hurley was still working as a cowhand—sometimes for as little as $1.00 a day[5]—when a ranch owner who had taken a liking to him arranged for Hurley to attend Indian University (today's Bacone College). He excelled as a student and obtained his A.B. in 1905. Hurley then took a job as an office clerk and began studying law in his spare time. His intent was to sit for the Indian Territory bar examination when he felt he had studied enough law to pass. In 1907, however, friends in Muskogee convinced Hurley that he should obtain a law degree. As a result, Pat Hurley journeyed to Washington, D.C., enrolled in National University, and obtained his LL.B. in 1908. He was just twenty-five years old.

Returning to Oklahoma, he passed the Oklahoma bar and built a successful practice in Tulsa (oil had been discovered there in 1901). In 1911, President William H. Taft appointed Hurley's boyhood friend, Victor Locke, as the Principal Chief of the Choctaws. The new chief now appointed Patrick J. Hurley, then serving as president of the Tulsa Bar Association, as the new National Attorney for the Choctaw Nation of Indians, at an annual salary of $6,000.[6] Since the average American earned $750 a year during this

[1] DON LOHBECK, PATRICK J. HURLEY 28 (1956).

[2] *Id.* at 30.

[3] *Id.*

[4] Williams Penn Adair "Will" Rogers (1879–1935) was one of America's best known celebrities in the 1920s and 1930s. He was a vaudeville performer, humorist, social commentator, and film actor. He had a newspaper column that was read daily by forty million people. He is still remembered today for his timeless and entertaining quotes ("I don't make jokes. I just watch the government and report the facts."). For more on Rogers, see BEN YAGODA, WILL ROGERS: A BIOGRAPHY (2000).

[5] LOHBECK, *supra* note 1, at 33.

[6] *Id.* at 45.

era, this was a huge amount of money for a twenty-eight year old Oklahoma lawyer.[7]

At the time, there were about 28,000 men, women, and children in the Choctaw Nation, and real estate held communally by the tribe was worth as much as $160 million. Since the most valuable item in that tribal property was coal and asphalt lands, Hurley's job was to ensure that any contracts involving the lease or sale of those lands were fair to the Choctaw and that any proceeds were fairly distributed to members of the Choctaw Nation. Unscrupulous businessmen and politicians had engaged in "systematic, planned fraud" against the tribe for years, mostly by making contracts with individual Indians that purported to dispose of property held communally by the tribe.[8] Once Hurley became the Choctaw's attorney, however, he successfully fought against these and other fraudulent contracts in court. He also protected the rights of the Choctaws under various treaties with the United States, insisting that the government had a legal responsibility to protect Indian resources.[9] Hurley was so successful that he could have remained as the Choctaw Attorney for as long as he desired.

In May 1917, however, one month after Congress declared war on Germany and the Central Powers, Hurley resigned and travelled to Washington, D.C., where he accepted a commission as a captain (CPT) in the JAGD. Hurley was no stranger to soldiering, having served as a private, corporal, sergeant, lieutenant and captain in the Muskogee (Oklahoma) Militia from 1903 to 1916 and in the Oklahoma National Guard from 1916 to 1917; in this last position, Hurley served on the U.S.-Mexican border with Guard personnel who were tasked with preventing Mexican warlord Pancho Villa from conducting raids into the United States.[10] Now, however, Hurley was going to soldier as an Army lawyer.

After arriving in Washington, D.C., CPT Hurley initially helped in the preparation of administration of the Selective Service Act of 1917. After some months, he tired of working in "a small office in the grim War, State & Navy Building,"[11] and pestered Judge Advocate General Enoch Crowder to permit him to transfer to combat duty. Finally, in April 1918, now Major (MAJ) Hurley "went overseas with the first detachment of American artillery to go to France."[12] He subsequently served as the Judge Advocate, Army Artillery, First Army, where he not only prosecuted a number of courts-martial,[13] but also found time to assume the duties of the Army Artillery's Acting Adjutant General and Acting Inspector General.

While wearing crossed-pen-and-sword insignia, Hurley took part in the battles of Aisne-Marne, St. Mihiel, and Meuse-Argonne. During the last battle, the newly promoted lieutenant colonel (LTC) was cited "for distinguished and exceptional gallantry at Forest de Woevre on 10 November 1918."[14] The following day—the last day of World War I—LTC Hurley was commended for his gallantry in action while conducting a reconnaissance under heavy enemy fire near Louppy, France."[15] This meant that Hurley was issued the Silver Star medal when that decoration was created by the Army in 1932.[16]

After the Armistice, LTC Hurley was appointed by General John J. Pershing to be the Judge Advocate, 6th Army Corps. In this position, he successfully negotiated an agreement with the Grand Duchy of Luxemburg for the use of its roads and railroads by U.S. troops as they marched across that country on their way to occupy Germany. Originally, General John J. Pershing had planned to simply requisition the necessary trains, and use Luxemburg roads as if Luxemburg were occupied enemy territory on the theory that, as Germany had marched into Luxemburg and occupied it from 1914 to 1918, the Grand Duchy could be treated as if it were conquered enemy territory. Hurley pointed out, however, that regardless of Germany's actions, Luxemburg still had a neutral status under the 1907 Hague Convention and that Pershing's proposed course of action would violate international law. After Brigadier General Walter A. Bethel,[17] the senior judge advocate on Pershing's staff, admitted that Hurley was correct, General Pershing tasked LTC Hurley with arriving at a diplomatic solution. The result was an agreement in which the Americans agreed to pay for the use of railroad cars and pay for the upkeep of roads used by U.S. troops. They also agreed to pay rent for property used for military purposes, including housing used to billet American Soldiers.[18] At the end of his service in Luxemburg, LTC Hurley was awarded the Distinguished Service Medal, with the following citation:

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

[8] LOHBECK, *supra* note 1, at 56, 60.

[9] *Id.* at 57.

[10] *Id.* at 66, 69.

[11] *Id.* at 70. Known today as the "Executive Office Building;" it is located near the White House in Washington, D.C. *Id.*

[12] *Id.* at 71.

[13] As a major, Hurley served as the prosecutor in *United States v. Buckner*, in which an African-American Soldier was prosecuted for raping a French civilian. *See* Fred L. Borch, *Anatomy of a Court-Martial: The Trial and Execution of Private William Buckner in World War I*, ARMY LAW., Oct. 2011, at 1.

[14] LOHBECK, *supra* note 1, at 72.

[15] *Id.*

[16] *Id.*

[17] Bethel would later be promoted to major general and serve as the Judge Advocate General from 1923 to 1924.

[18] LOHBECK, *supra* note 1, at 72–74.

> Assigned as Judge Advocate, Army Artillery, First Army, he rendered services of marked ability, performing, in addition to his manifold duties, the duties of adjutant general and inspector general. Later, as Judge Advocate General (sic) of the Sixth Army Corps, he ably conducted the negotiations arising between the American Expeditionary Forces and the Grand Duchy of Luxemburg wherein he displayed sound judgment, marked zeal and a keen perception of existing conditions. He has rendered services of material worth to the American Expeditionary Forces.[19]

After leaving active duty in May 1919, Hurley entered private practice, but returned in March 1929 to be Assistant Secretary of War under President Herbert Hoover. When the sitting Secretary of War died in November, Hoover nominated Hurley to replace him. The U.S. Senate unanimously confirmed him to the office the following month, "making Pat Hurley, now forty-six years old, the first cabinet officer from the State of Oklahoma, and the only Secretary of War to have served in the armed forces with the rank of private."[20] Hurley was also the first Secretary of War to have previously served as an Army judge advocate.[21]

Hurley left office with the election of Franklin D. Roosevelt, but returned to public service with the start of World War II. Promoted to brigadier general in 1942 (Hurley had remained in the Army Reserve and was a colonel at the start of the conflict), he was ordered to the Southwest Pacific and placed in charge of "efforts to run the Japanese blockade of the Philippines with supplies for General MacArthur's beleaguered forces on Bataan peninsula."[22]

While Hurley was able to assemble ships and crews in Australia, only a few vessels managed to breach the Japanese blockade; for every ship that arrived, two were lost. But Hurley's efforts did ensure that the American defenders of the Philippines were never short of ammunition.[23] As for Brigadier General Hurley, he experienced Japanese aggression first-hand when he was wounded in the head by shrapnel in a Japanese bombing attack on Port Darwin, Australia.[24]

After a quick recovery from this injury, Hurley was appointed U.S. Minister to New Zealand. On 1 April 1942, he assumed duties in Wellington as the top American diplomat in the country. But Hurley was unhappy being in a civilian suit instead of serving alongside Soldiers and, when President Roosevelt asked him if he would like to visit Moscow as a special emissary, Brigadier General Hurley readily agreed. After arriving in the Soviet Union and meeting with Stalin, Hurley and his entourage spent ten days with the Red Army in combat operations, including time with front-line troops then encircling the German army at Stalingrad.[25]

Later, Brigadier General Hurley participated in both the Cairo and Tehran conferences where he held the rank of ambassador. After being promoted to major general in December 1943, Hurley went to Chungking as U.S. Ambassador to China in the summer of 1944. In addition to his diplomatic duties, Hurley also served as Roosevelt's (and later President Harry S. Truman's) "personal representative on military matters" until he left China in September 1945.[26]

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

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

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[19] Headquarters, War Dep't, Gen. Orders No. 68 (2 Sept. 1920).

[20] LOHBECK, *supra* note 1, at 86.

[21] Though Hurley was a judge advocate *before* serving as Secretary of War, he was not the first Secretary of War who also served as a judge advocate; that first belongs to Joseph Holt, who became a judge advocate *after* serving as Secretary of War. Holt served briefly as Secretary of War in the administration of President James Buchanan. President Abraham Lincoln then appointed Holt, who had no military experience, as Judge Advocate General of the Army. In the modern era, the only judge advocate to have served in the Army's most senior civilian position is Togo D. West, Jr. West served as a captain in our Corps from 1969 to 1973 and then entered private practice in Washington, D.C. He returned to public service as Secretary of the Army from 1993 to 1997. For more on West, see CATHERINE REEF, AFRICAN AMERICANS IN THE MILITARY 241–43 (2010).

[22] JUDGE ADVOCATE GENERAL'S CORPS, U.S. ARMY, THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775–1975, at 121 (1975).

[23] LOHBECK, *supra* note 1, at 164.

[24] *Id.* at 163.

[25] *Id.* at 174–83.

[26] *Id.* at 386, 417.

A Deserter in France from 1944 to 1958:

The Strange but True Case of Private Wayne E. Powers

Fred L. Borch
Regimental Historian & Archivist

On 22 March 1958, French police discovered a man concealed under the stairs in a home in Mont d'Origny, France. The man was soon revealed to be Private (PVT) Wayne E. Powers, an American Soldier who had deserted from his unit in mid-December 1944. Since that time, Powers had been hiding out in France and, over the next thirteen years, had fathered five children with the French owner of the home in which he had been caught. What follows is the story of PVT Powers's 1958 trial by court-martial for desertion and its rather surprising aftermath.

Born in Chillicothe, Missouri, on 14 March 1921, Wayne Eldridge Powers had worked as a farmer prior to being drafted in May 1943. After completing basic training in El Paso, Texas, he spent a brief time at Army installations in California and New York before shipping out to England in early 1944. According to the sworn statement that Powers gave in French to an Army criminal investigator after his apprehension in March 1958, he remembered landing in Normandy on "9 or 10 June 1944." Powers explained that he had been a truck driver in France for "five or six months" when, while on his way to an Army depot in Cherbourg, he had picked up a hitchhiker wearing an American uniform. According to Powers, this hitchhiker later robbed him—at gunpoint—of both his truck and its contents. When Powers subsequently showed up without his truck, he was apprehended by agents belonging to the Army's Criminal Investigation Division (CID). According to Powers, these agents accused him of being a "German spy" and beat him during questioning over the next several weeks.[1]

Powers claimed to have been released by CID investigators in mid-December 1944. Apparently unable to find his truck company to re-join it, he had started hitchhiking toward Mont d'Origny, a small town located about forty miles from the Belgian border. The previous month, Powers had met this "dark-haired French girl" named Yvette Bleuse in a bar in town and, although Powers spoke no French and Yvette spoke no English, "she gave him a woman's smile after months of murderous combat."[2] As a result, when Powers showed up at Bleuse's door in Mont d'Origny "approximately one week prior to Christmas in 1944, while the Battle of the Bulge was being fought," she took him into her home. The two lived together for the next thirteen years.[3]

During this time period, Yvette Bleuse worked at a factory to support Powers and the five children they had together. As for Powers, he "remained in the house during the daytime" and only went out at night "for a walk and some fresh air." Occasionally, the French police would visit the Bleuse home, as there were rumors that an American deserter was living there. Powers would avoid these gendarmes by hiding in a secret compartment under the stairs in the home—which he also did whenever other strangers would come for a visit.[4]

After the French police turned Powers over to U.S. military authorities in March 1958, CID investigators asked him if he had intended to desert from the Army during the Battle of the Bulge. Powers denied that he had such an intent. When then asked why he did not return to military control when "U.S. forces came back to France" after the war, or notify the American embassy after 1945 that he was living in France, PVT Powers explained that he "was scared." He also said that if he had given himself up to the American authorities, this would have made his "companion" and "children whom I love very much . . . unhappy."[5]

Since Powers claimed to have lost the ability to speak English (he claimed only to be able to understand it), and

[1] U.S. Dep't of the Army, DA Form 19-24, Statement, 1 June 1954, Powers, Wayne, at 1–3 (26 Mar. 1958) [hereinafter Powers Statement].

[2] CHARLES GLASS, THE DESERTERS: A HIDDEN HISTORY OF WORLD WAR II, xv (2013).

[3] United States v. Powers, CM 400435 (2 Aug. 1958) (Review of the Staff Judge Advocate (12 Aug. 1958)) [hereinafter Review of Staff Judge Advocate].

[4] Powers Statement, *supra* note 1, at 1–3.

[5] *Id.* at 3.

since Powers had not written to his father or his wife[6] in Missouri for some thirteen years, the Army naturally concluded that he intended to remain away permanently from his unit and charged him with desertion.

On 1 August 1958, Powers was tried by a general court-martial convened by Brigadier General Robert J. Fleming, Jr., Commanding General, U.S. Army Communications Zone, Advance Section (COMZ-ADSEC), Verdun, France. There was but a single charge: desertion terminated by apprehension in violation of the 58th Article of War.[7]

The proceedings held at the Maginot Caserne in Verdun were quite short, since Powers's defense counsel, judge advocate First Lieutenants (1LT) Leon S. Avakian, Jr. and James A. Stapleton, had advised Powers to enter into a pre-trial agreement with the convening authority. In return for Powers's plea of guilty to the charge and its specification, Brigadier General Fleming agreed that he would disapprove any sentence to confinement at hard labor exceeding six months. Any other lawful punishment imposed by the panel deciding the case, however, could be approved.[8]

At trial, the judge advocate trial counsel, 1LT James D. McKeithan, offered no evidence on the merits and PVT Powers offered no evidence on sentencing; the panel had only a stipulation of fact and argument from trial and defense counsel to consider. Based on the accused's plea and his military record (which included two previous convictions by courts-martial),[9] the panel sentenced Powers to forfeit all pay and allowances, to be reduced to the lowest enlisted grade, to be confined for ten years, and to be dishonorably discharged.[10] Colonel Edgar R. Minnich, the COMZ-ADSEC Staff Judge Advocate, reviewed the record of trial and recommended to Brigadier General Fleming that he adhere to the pre-trial agreement. As a result, Fleming approved the sentence as adjudged, except that he reduced the ten years in jail to six months in the local stockade.[11]

From the Army's perspective, good order and discipline required that Powers be tried by a general court-martial. After all, nearly 50,000 Americans had deserted from the Army (and Army Air Force), Navy, Marine Corps, and Coast Guard during World War II,[12] and many had been court-martialed and received lengthy prison sentences for intentionally leaving their units during wartime. But French public opinion—and even some Americans—did not see it that way, and the Powers case became a "cause célèbre" in both Europe and the United States. The public overwhelmingly viewed this case not as a crime, but as a love story with a fateful ending.

The American embassy in Paris received some 60,000 letters about the Powers case. Virtually all expressed support for the American deserter and pleaded for his immediate release.[13] Newspapers in France and Germany, as well as in the United States, also covered the story. A number of letters and telegrams from foreign nationals and U.S. citizens arrived at the Pentagon, Congress, and the White House; a handful of these are contained in the allied papers of *United States v. Powers*.

Some of the correspondence asked for clemency for the accused so that he could return to Yvette Bleuse (whom he now desired to marry) and his five children. A high school classmate (Chillicothe High School Class of 1938) sent a telegram to President Dwight D. Eisenhower "urgently" requesting "commutation" of Powers's sentence. "Our class," wrote Mr. Clark Summers, "had several immortal heroes who would not wish to see this boy persecuted for his very mortal sin."[14] Similarly, a telegram to the Secretary of the Army from Edward C. Dean of Rockville, Connecticut, "protested" the ten-year sentence given Powers.[15]

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[6] Powers had been married when he entered the Army in 1943; his wife, Ruth Killian Powers, filed for divorce in November 1949 on the grounds that Powers had "absented himself for more than one year without just cause." Ruth Powers was granted a divorce in January 1950. She subsequently remarried and moved to Texas.; United States v. Powers, CM 400435, Exh. G (1 Aug. 1958) (providing a Telex message from Commanding Gen., Fort Leavenworth, Kan., to Commanding Gen., Army Commc'ns Zone, Advance Section, Verdun, France (1 May 1958)).

[7] Private (PVT) Powers could not be prosecuted under the Uniform Code of Military Justice because his crime had been committed prior to its enactment in 1950.

[8] Although PVT Eddie Slovik had been executed by firing squad for deserting during the Battle of the Bulge, Brigadier General Fleming apparently never considered the death penalty as a punishment in referring Wayne Powers's case to trial. For more on Slovik, see Fred L. Borch, *Shot by Firing Squad: The Trial and Execution of Pvt. Eddie Slovik*, ARMY LAW., May 2010, at 3.

[9] Powers had been convicted by a special court-martial for having absented himself without authority from his unit for eight days in January 1944; he also had a conviction by summary court-martial for being drunk and disorderly in uniform in a public place in April 1944. United States v. Powers, CM 400435 (1 Aug. 1958) (Review of the Staff Judge Advocate (12 Aug. 1958)).

[10] *Id.*; Headquarters, U.S. Dep't of Army, U.S. Army Commc'ns Zone, Advance Section, Verdun, France, APO 122, Court-Martial Appointing Order No. 11 (1 July 1958).

[11] Review of the Staff Judge Advocate, *supra* note 2.

[12] GLASS, *supra* note 1, at xi.

[13] E-mail from John Brebbia, to author (17 Oct. 2013, 11:13 A.M.) (on file with The Judge Advocate Gen.'s Legal Ctr. & Sch., Charlottesville, Va., Historian's files).

[14] United States v. Powers, CM 400435 (1 Aug. 1958) (providing a copy of a telegram from Clark Summers, to The President (Eisenhower)).

[15] *Id.* (providing a copy of a telegram from Edward C. Dean, to the Sec'y of the Army (1 Aug. 1958)).

In a letter to The Judge Advocate General, C. L. King of La Habra, California, complained that it was "inconceivable" to him that the Army had any authority over Powers. King wrote that although he had "spent nearly 5 years in the [N]avy during World War II," he "could not even agree to a six month sentence" for Powers. Powers's "capture was pure kidnapping" and the "army has done enough damage already . . . [and it should] wash its hands of the whole affair and not antagonize millions more Americans and French." King closed his letter with these words: "All the drunken, arrogant, incompetent officers of this man's division are now out on pension or else getting fat somewhere on an army post. Are they any better than he?"[16]

The Army even received a letter from an attorney acting on behalf of a Hollywood screenwriter. As this lawyer explained, he wanted a copy of the record of trial in the case because his client thought that the Wayne Powers story might be of "possible value for motion picture adaptation and presentation."[17]

On the other hand, some letters expressed a decidedly negative view of PVT Powers. Paul Lutz of Tyler, Texas, insisted that the "ten year sentence was far too light," and he asked why the Army had made a "deal" with a "cowardly deserter." Since Powers had deserted during the Battle of the Bulge, Lutz insisted that "some may have died because this man was not there. Yet we are to feel sorry for this man who deserted his comrades and country for a lover."[18]

A letter written by Chester Missahl of Duluth, Minnesota, who had soldiered during World War II, described Powers as a "dirty, stinking coward and war-time deserter." Missahl complained bitterly about Brigadier General Fleming's decision to reduce Powers's sentence to six months' confinement. Wrote Missahl:

> It would seem the original ten year sentence as pronounced by the court-martial was sufficiently light for a traitor whose deserved punishment is a bullet in the back; and such molly-coddling is difficult to believe. Certainly General Fleming should be cashiered at once for such brazen disregard for the rights of the millions who did not turn traitor. If this be a fair sample of today's Army, God help us in the next war."[19]

Although Brigadier General Fleming had approved a six-month sentence of confinement, the Army apparently had had enough of Powers—and the adverse publicity surrounding his case. As a result, after the Board of Review (the forerunner of today's Army Court of Criminal Appeals) approved the findings and sentence in *United States v. Powers*, and after Powers declined to petition the Court of Military Appeals (today's Court of Appeals for the Armed Forces) for a grant of review, Brigadier General Fleming remitted the unexecuted portion of PVT Powers's sentence on 2 October 1958.[20]

The accused was immediately released from confinement in the Verdun Stockade and dishonorably discharged. Since the French government had consented to his remaining in France after his separation from active duty, thirty-seven-year-old Powers remained on French soil and returned to Mont d'Origny and Yvette Bleuse.[21]

So ended the court-martial of the Soldier who had deserted and hidden in France for more than thirteen years. But what happened to Wayne E. Powers? While the record of trial does not answer this question, he apparently did marry Yvette two years after being released from jail. The couple also had a sixth child together.[22] It seems highly likely that Monsieur and Madame Powers lived out the remainder of their days together in Mont d'Origny, France.

More historical information can be found at

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[16] *Id.* (Letter from C. L. King, to The Judge Advocate Gen. (11 Aug. 1958)).

[17] *Id.* (Letter from Michael A. Wyatt, to the Office of the Judge Advocate Gen., Military Justice Div. (25 July 1961)).

[18] *Id.* (Letter from Paul V. Lutz, to Neil McElroy, Sec'y of Def. (4 Aug. 1958)).

[19] *Id.* (Letter from Chester Missahl, to Sec'y of Def. (6 Aug. 1958)).

[20] Headquarters, U.S. Army Commc'ns Zone, Advance Section, Verdun, France, APO 122, U.S. Forces, Gen. Court-Martial Order No. 22 (2 Oct. 1958).

[21] Memorandum from Major General George W. Hickman, Jr., The Judge Advocate Gen., to Sec'y of the Army, subject: Report on Current Status of Private Wayne E. Powers (9 Sept. 1958).

[22] GLASS, *supra* note 1, at xv.

Legal Education for Commanders: The History of the General Officer Legal Orientation and Senior Officer Legal Orientation Courses

Fred L. Borch
Regimental Historian and Archivist

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

As the war in Vietnam ended and the Army re-organized, Major General George S. Prugh, who had become The Judge Advocate General (TJAG) in July 1971, looked for ways to increase the visibility of the Corps. For Prugh, this was especially important because judge advocates were not popular with commanders. Rightly or wrongly, they were seen as "naysayers" who did not support the mission, but instead seemed more interested in telling commanders what they could not do. Prugh called this a "Crisis in Credibility" and he tasked Colonel (COL) John Jay Douglass, who had been the Commandant at The Judge Advocate General's School (TJAGSA) since June 1970, "to look at the problem and come up with a solution;"[1] or, as COL Douglass put it in a recent interview: "Commanders were very negative about lawyers and Prugh wanted us to be more loved."[2]

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

At that time in Army history, it was not unusual for officers to reach the rank of colonel and higher without having anything other than brief (and informal) contact with a uniformed lawyer. This was because the Uniform Code of Military Justice (UCMJ) did not require any judge advocate involvement at SPCMs until 1969, which meant that an Army one-or two-star general assuming duties as a GCM convening authority for the first time in the early 1970s, having been a battalion and brigade commander in the 1960s, had handled virtually all military justice matters without the assistance of an Army lawyer. Additionally, since a division in the 1960s was authorized only five judge advocates,[3] all of whom focused their efforts on delivering legal services to the GCM convening authority, uniformed lawyers simply did not have much contact with brigade or battalion commanders or their staffs, much less provide legal advice to them.

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

Apparently, the GOLO program was established first. Douglass's idea was that general officers assuming duties as GCM convening authorities not only would receive education on the newly enacted Military Justice Act of 1968, which had greatly altered the UCMJ,[4] but also be briefed on

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

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

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

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

administrative and contract law issues that might arise while they were in command.[5] As retired TJAG Hugh R. Overholt, who was then serving at The Judge Advocate General's School, U.S. Army (TJAGSA) as a lieutenant colonel and the Chief, Criminal Law Division, remembers it, the focus was on areas where "GOs [General Officers] had gotten into trouble," such as the Anti-Deficiency Act.[6] One high-profile case that Overholt remembered being discussed in the GOLO involved Quartermaster Corps officials at Fort Lee, Virginia. In the late 1950s, after being denied military construction program funds, senior leaders on that installation had constructed an airstrip "using funds appropriated for operation and maintenance and labor of troops." This illegal construction project had been uncovered and House Hearings held into the matter had harshly criticized Major General Alfred B. Denniston and other Army officers at Fort Lee for having "willfully violated the law of the land."[7] After the Fort Lee airfield fiasco, no senior commander wanted to run afoul of the Anti-Deficiency Act, much less be called to testify before the House of Representatives for fiscal wrongdoing.

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

During their day-long visit to Charlottesville, each officer receives briefings tailored to his particular needs based on his orders and upcoming assignment. For example, when Brigadier General Maria R. Gervais, the new Deputy Commanding General, U.S. Army Cadet Command, came for her GOLO, she received briefings on sexual harassment, the proper handling of sex assault allegations and cases, administrative investigations, standards of conduct, fiscal law, unlawful command influence, improper relationships and fraternization, non-judicial punishment, government contracting, adverse administrative actions, and the law of federal employment.[8]

Within months of initiating the GOLO course of instruction, Douglass began putting together the SOLO program. The idea was to teach "senior non-JAG officers at the special court-martial level [about] the legal problems they [would] face with suggested solutions."[9] After the TJAGSA faculty put together a program of instruction, selected faculty members took the classes "on the road to Fort Sill [Oklahoma] and Fort Lewis [Washington] as field tests for courses to be presented in Charlottesville."[10]

After receiving positive feed-back from these two "road shows," COL Douglass and Lieutenant Colonel David A. Fontanella, the Chief, Civil Law Division, flew in Fontanella's private airplane to Carlisle Barracks, Pennsylvania, for a meeting with the Army War College (AWC) commandant.[11] After Douglass and Fontanella explained what the SOLO course was and how it could enhance the educational experience of AWC students, the commandant agreed to have TJAGSA faculty travel to Carlisle Barracks to present the SOLO course. The first course was conducted in May 1972, and the second in April 1973. Senior Officer Legal Orientation instruction was also conducted in the field. Courses were held at Fort Sill in December 1971, Fort Hood in March 1972, and Fort Lewis in April 1972; these were not "road shows," but the full SOLO program of instruction.[12]

The goal, however, was to have the program of instruction done exclusively at TJAGSA, and the *first* three-day SOLO course *held in Charlottesville* was on 15–17 November 1971; the second SOLO class at TJAGSA was held 6–8 March 1972.[13] Instruction in the field ceased shortly thereafter.

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

> A three-day course for commanding officers in the grade of Lieutenant Colonel and above designed to acquaint these senior commanders with legal problems

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

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

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

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

[9] DOUGLASS, *supra* note 1, at 180.

[10] *Id.*

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

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

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

> they are likely to encounter in the areas of both criminal and civil law. Civil law instruction will include installation management, labor-management relations, military personnel law, nonappropriated funds, investigations, legal assistance and claims and litigation. Criminal law instruction will include options available to commanders, search and seizure, confessions and convening authorities' duties before and after trial. The course will be presented using seminar techniques, and outlines and textual material suitable for future use will be utilized. Staff Judge Advocates are urged to make this course availability and utility known to commanders they serve and advise.[14]

More than forty years later, very little has changed about the SOLO, in the sense that the course continues to be designed for lieutenant colonels and colonels going into assignments where they will perform duties as special court-martial convening authorities. The SOLO course is four-and-one-half days long and is held four times a year (March, June, August, and November). In the 229th SOLO course held at TJAGLCS from 4 to 8 November 2013, the students received instruction on more than twenty subjects, including: fiscal law; consumer law; improper superior/subordinate relationships and fraternization; the commander's role in military justice and unlawful command influence; handling sexual harassment complaints; sexual assault investigations and cases; administrative investigations, nonjudicial punishment and summary courts; means and methods of warfare; the law of federal employment; and military personnel law.[15]

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

In fact, the GOLO and SOLO courses so impressed Sergeant Major of the Army Raymond F. Chandler III that he requested that TJAGLCS establish a legal education course for senior Army non-commissioned officers. Lieutenant General Dana K. Chipman, then serving as TJAG, supported this request and the result was a new course: the Command Sergeant Major Legal Orientation (CSMLO).[16] It seems that senior leaders at all levels in the Army have a desire for legal education—which Army judge advocates will be more than willing to deliver.

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[14] ANNUAL REPORT, *supra* note 12, at 25.

[15] 229th SOLO Course Schedule, 4–8 Nov. 2013 (17 Oct. 2013).

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

Tried by Military Commission and Hanged for Murder: *United States v. Franz Strasser*

Fred L. Borch[*]
Regimental Historian and Archivist

In mid-December 1945, a Signal Corps photographer stamped the following caption on the reverse of a photograph he had taken a few days earlier: "10 Dec 45, 3rd Army. Big Finale—The body of Former Nazi Official Franz Strasser, accused of killing two American Fliers forced down in Germany, swings and twitches at the end of the gallows rope."[1] What follows is the story of forty-six-year-old Franz Strasser, whose misconduct in December 1944 resulted in his prosecution by a military commission, a conviction for murder, and death at the end of a rope.

On the afternoon of 9 December 1944, an American bomber made a forced landing near Zahdelesdorg, Czechoslovakia. The pilot, co-pilot, and three crew members voluntarily surrendered to the local authorities and "were loaded into a truck for the ostensible purpose of transporting them to Kaplitz, [Czechoslovakia]".[2] Two automobiles accompanied the truck: one contained Nazi Party official Franz Strasser, the Kreisleiter of Kreis Kaplitz,[3] and the other car contained Captain Lindemeyer, the Kaplitz chief of police.

When the convoy got to the top of a hill on the road to Kaplitz, Strasser, who was in the lead vehicle, stopped his car. The truck containing the unarmed American fliers also stopped. Strasser then walked back to the truck and shot and killed one airman with his machine pistol. When the driver of the truck tried to protect a second American airman by allowing him to take refuge in the truck cab, Strasser threatened to kill the driver if he continued to interfere.[4]

Strasser then shot this second American and, when the American was prostrate on the ground, "raked the airman from head to foot with his machine pistol."[5] As for the other three airmen? They were shot and killed by Captain Lindemeyer.

On 24 August 1945, Franz Strasser was tried by a military commission sitting in Dachau, Germany.[6] He was charged as follows:

> Charge I: Violation of the Laws and Usages of War.
>
> Specification: In that on or about 9 December 1944, FRANZ STRASSER, Kreisleiter of Kreis Kaplitz, an Austrian National, did at or near Kaplitz, Czechoslovakia, wrongfully and unlawfully kill an American airman, whose name, rank and serial number are unknown, by shooting him with a machine pistol.
>
> Charge II: Violation of the Laws and Usages of War.
>
> Specification: In that on or about 9 December 1944, FRANZ STRASSER, Kreisleiter of Kreis Kaplitz, an Austrian National, did at or near Kaplitz, Czechoslovakia, wrongfully and unlawfully shoot an American airman, whose name, rank and serial number are unknown.[7]

At trial, Strasser pleaded not guilty. He did not deny that he had participated in the shooting of the five American

[*] The author thanks Lieutenant Colonel (LTC) Virginia Griffin Beakes, Judge Advocate, U.S. Army Reserve, for alerting him to the existence of the Strasser photographs, and Lieutenant General (Retired) Thomas N. Griffin, Jr., U.S. Army, for allowing him to borrow them for this article. General Griffin's father, then LTC Thomas N. Griffin, was the 3d Army Provost Marshal who supervised the execution of Franz Strasser.

[1] 3242 Signal Photo Co., Signal Corps photograph no. 00842-HQ-A9-10 Dec 45-3rd Army (Herod) (Regimental Historian's files, The Judge Advocate General's Legal Center and School).

[2] U.S. Forces European Theater, Deputy Theater Judge Advocate's Office, War Crimes Branch, Review and Recommendations, *United States v. Franz Strasser*, Case No. 8-27, at 2 (14 Oct. 1945), http://www.jewishvirtual-library.org/jsource/Holocaust/dachautrial/fs17.pdf (last visited Dec. 7, 2013) (follow Home; The Library; History; Modern Jewish History/World War II; Post-war/War Crimes; War Crimes Trials and Results/Dachau Trials; The Cases/U.S. POW Cases; Other Prisoner of War Cases/Case No. 8-5 (U.S. vs. Harra Kielsinger) Tried 24 Oct. 47) (the document is mislabeled on the webpage).

[3] In Nazi Germany, a "Kreisleiter" was a "county leader" and was the highest Nazi Party official in a "kreis" or county municipal government. Today, Kreis Kaplitz is in the Czech Republic. In 1944, however, it was part of Germany, having been annexed as part of German-speaking Sudetenland in October 1938.

[4] *Strasser*, Case No. 8-27, at 6.

[5] *Id.*

[6] Headquarters, Third U.S. Army, Special Orders No. 229 (19 Aug. 1945). For more on war crimes trials at Dachau, see JOSHUA M. GREENE, JUSTICE AT DACHAU (2003). Strasser and Lindemeyer were apprehended and charged after the Army conducted an investigation into the deaths of the five airmen soon after 8 May 1945 (Victory in Europe (VE) Day). JACK R. MYERS, SHOT AT AND MISSED: RECOLLECTIONS OF A WORLD WAR II BOMBARDIER 298–99 (2004).

[7] *Strasser*, Case No. 8-27, at 1.

prisoners. Rather, Strasser admitted that he and Lindemeyer had killed the men, but insisted "that the shooting was justifiable because it was necessary to prevent the escape of the prisoners."[8] According to Strasser, he had stopped his car at the top of the mountain to wait for the truck which, because of poor road conditions and the steepness of the incline, was having "difficulty in negotiating the hill."[9] Then, after the truck had stopped, and the Americans attempted to escape, Strasser—and Lindemeyer—had shot them to prevent them from fleeing.

Captain Lindemeyer, who had committed suicide prior to the trial, was not in court to give evidence on this point. The whereabouts of the two other participants in the war crime, who had been in the automobile with Strasser on the day in question, were unknown. Consequently, there was no testimony from them to either prove or disprove Strasser's defense.[10]

But the driver of the truck, a man named Pusch, did testify at Strasser's trial and, unfortunately for Strasser, his testimony was devastating. Pusch testified that Strasser had "signaled to him to stop the truck" at the summit of the hill.[11] He also testified that the airmen were unarmed and that they had not attempted to escape. While Pusch did testify that "some shots were fired before Strasser arrived at the truck,"[12] Pusch insisted that Strasser had shot one airman dead and then threatened Pusch with death if he interfered with the execution of the second American flier. After the shootings, Strasser and Lindemeyer discussed their handiwork, with Strasser claiming "credit" for two of the murders; Lindemeyer took credit for killing three of the airmen.[13]

Additional evidence presented by the government supported the theory that Strasser and Lindemeyer had "a previously conceived plan" to kill the Americans fliers, no doubt in revenge for the suffering inflicted upon the Third Reich by the Allied bombing of Germany. This made sense, as Strasser was a Kreisleiter and Lindemeyer a police official. In mid-1943, the Nazis began insisting that "all bombardment of the civil population was to be regarded as terrorism" and, on 10 August 1943, Heinrich Himmler, the head of the Gestapo, instructed both the Secret Service and police officers that it was "not the task of the police to interfere in clashes between Germans and the English and American terror fliers who have baled [sic] out."[14] When other Nazi Party officials similarly announced that the police were not to protect Allied airmen "against the fury of the people," the result was that "many were lynched by the populace or shot by the police" during 1944 and 1945.[15] With this as background, it seems that the war crimes committed by Strasser and Lindemeyer were very much a reflection of official Nazi policy.

At the end of the one-day trial, having considered the evidence before them, the members of the military commission found Franz Strasser guilty as charged and sentenced him "to be hanged by the neck until dead."[16] On 14 October 1945, Judge Advocate Major (MAJ) Ford R. Sargent[17] conducted a legal review of the Strasser case for the Commanding General, U.S. Forces, European Theater, who now had to take final action in the proceedings.

Sargent wrote that "the essential facts [in the case] were established by the direct testimony of eyewitnesses."[18] He also concluded that there were "no irregularities in the proceedings or trial which prejudiced any substantial rights of the accused."[19] As MAJ Sargent put it, the accused "was given a fair trial, consistent with Anglo-Saxon conceptions, and there is no doubt whatsoever as to his guilt."[20] Since Sargent was willing to state that the evidence went far beyond the reasonable doubt standard applicable to war crimes trials,[21] it is worth quoting his comments about the appropriateness of the death sentence for Strasser:

> The offense in this case was particularly heinous because it involved the cold-blooded murder of absolutely defenseless prisoners of war. No mercy whatsoever was exhibited by the accused. The offense

[8] *Id.* at 5.

[9] *Id.*

[10] *Id.* at 4.

[11] *Id.* at 6.

[12] Perhaps by Lindeman or one of the men accompanying him, although this is unclear from the record.

[13] *Strasser*, Case No. 8-27, at 6.

[14] EDWARD F. L. RUSSELL (LORD RUSSELL OF LIVERPOOL), SCOURGE OF THE SWASTIKA 39 (2002).

[15] *Id.* at 40.

[16] *Strasser*, Case No. 8-27, at 1.

[17] A native of Saginaw, Michigan, Ford R. Sargent entered The Judge Advocate General's Department after graduating from the 11th Officer Course held at The Judge Advocate General's School, Ann Arbor, Michigan. THE JUDGE ADVOCATE GENERAL'S SCHOOL, STUDENT AND FACULTY DIRECTORY 42 (1946).

[18] *Strasser*, Case No. 8-27, at 8.

[19] *Id.*

[20] *Id.*

[21] While the official legal view of the Judge Advocate General's Department was that "the rule in American municipal criminal law as to reasonable doubt and presumption of innocence *was not applicable as such to war crimes trials*, in the absence of a suitable prescribed standard, the rule requiring that an accused be presumed innocent until proven guilty and that proof of guilt be established beyond a reasonable doubt *was adhered to in war crimes trials*" in the European Theater (emphasis added). REPORT OF THE DEPUTY JUDGE ADVOCATE FOR WAR CRIMES, EUROPEAN COMMAND, JUNE 1944 TO JULY 1948, at 67 (1948).

> closely approximated common law murder. Murder is the unlawful killing of a human being with malice aforethought. The usual penalty among civilized peoples for murder is life imprisonment or death. There are no extenuating circumstances in the instant case to warrant changing the penalty of death imposed by the Commission. The evidence is overwhelming that the offenses were committed by STRASSER in accordance with a preconceived plan to murder five American airmen. The sentence of the Commission and the action of the Reviewing Authority thereon are just, and commensurate with the nature of the offense committee by the accused.[22]

Three days later, on 17 October 1945, Colonel Claude B. Mickelwait, the Deputy Theater Judge Advocate, concurred with MAJ Sargent's review and recommended that the sentence be confirmed. General Dwight D. Eisenhower, Commanding General, U.S. Forces, European Theater, accepted the recommendation of his senior military lawyer, and ordered the sentence be carried out.[23]

At the time his case was heard by a military commission, Strasser was married and had three children. He testified that his fourth child was "expected in September" and presumably this baby had been born at the time forty-six-year-old Strasser climbed the gallows steps at the Landsberg Punishment Prison on 10 December 1945.

As photographs taken by a Signal Corps photographer show, Strasser received last rites from a Catholic priest just minutes before he was hanged, but whether or not this soothed his conscience will be forever unknown.[24]

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https://www.jagcnet.army.mil/History

[22] *Strasser*, Case No. 8-27, at 8.

[23] *Id.* Claude B. Mickelwait had a lengthy and distinguished career as an Army lawyer. Born in Iowa in July 1894, he later moved to Twin Falls, Idaho and graduated from the University of Idaho in 1916. He entered the Army as a first lieutenant in 1917 and served in a variety of infantry assignments until obtaining a law degree in 1935 from the University of California School of Jurisprudence and transferring to The Judge Advocate General's Department.

With the invasion of North Africa in 1942, Mickelwait was stationed in Casablanca as Judge Advocate, Atlantic Base Section. He subsequently served as Judge Advocate, Fifth Army, in both North Africa and Italy. In March 1944, Colonel (COL) Mickelwait became Acting Theater Judge Advocate of the North African Theater of Operations. Two months later, he was the Judge Advocate of First Army Group in England and, in July 1944, deployed to France as the Judge Advocate of the 12th U.S. Army Group.

In August 1945, COL Mickelwait was appointed Deputy Theater Judge Advocate of the U.S. Forces in the European Theater and in May 1946, he assumed duties as Theater Judge Advocate of those forces. Colonel Mickelwait returned to the United States when he was promoted to brigadier general in April 1947. He was promoted to major general and appointed as The Assistant Judge Advocate General in May 1954. Major General Mickelwait retired from active duty in 1956. *General Promotions—Army JAG*, JUDGE ADVOCATE J., June 1954, at 4–5.

[24] Short video clips about the military tribunal of Strasser are available at http://www.t3licensing.com/license/clip/49312041_033.do and http://www.ushmm.org/online/film/display/detail.php?file_num=2062.

Misbehavior Before the Enemy and Unlawful Command Influence in World War II: The Strange Case of Albert C. Homcy

Fred L. Borch
Regimental Historian and Archivist

Question (Trial Counsel): "Do you recall, sir, whether you were receiving enemy fire at this time?"

Lieutenant Colonel (LTC) Bird: "Yes, sir."

Question: "Were you in contact with the enemy?"

LTC Bird: "You bet we were."

Question: "On or about 27 August 1944, did you give the accused a mission to accomplish?"

LTC Bird: "Yes."

Question: "What was that mission?"

LTC Bird: "That mission was to accompany a patrol to seek out and destroy one or more self-propelled guns or tanks."

* * * *

Question: "Did the accused carry out this mission as ordered?"

LTC Bird: "No, sir."[1]

On 27 August 1944, LTC William A. Bird, the commanding officer of the 1st Battalion, 141st Infantry Regiment, 36th Infantry Regiment, was in his battalion's command post, located near Concourdia, France. Bird and his staff were under fire from German tanks or self-propelled artillery, and something had to be done to stop the murderous fire. Lieutenant Colonel Bird assigned the mission to seek out and destroy these German guns to 28-year-old Second Lieutenant (2LT) Albert C. Homcy, an anti-tank platoon leader in his battalion. Homcy was to accompany a hastily assembled unit of cooks, bakers and orderlies on a "strong patrol" to "destroy, with bazookas or grenades, those guns or whatever they were, as soon as possible."[2]

Lieutenant Homcy refused LTC Bird's order and, despite entreaties from Bird, 2LT Homcy persisted in declining to obey him. As a result, 2LT Homcy was relieved from command and court-martialed for "misbehavior before the enemy." On 19 October 1944, a panel of five officers convicted him as charged and sentenced him to be dismissed from the Army, to forfeit all pay and allowances, and to be confined at hard labor for fifty years.[3]

What follows is the story of Homcy's court-martial, the role played by unlawful command influence in it, and the strange resolution of his case many years later.

Born on 25 April 1916 in New Jersey, Albert C. Homcy was a high school graduate who was working as a forester and machinist when he enlisted in the New Jersey Army National Guard on 25 January 1938. After Congress authorized the induction of reservists in August 1940 and enacted the nation's first peacetime draft the following month, Homcy was called into federal service.[4]

In November 1942, after satisfactorily completing Officer Candidate School, then Sergeant Homcy was discharged to accept a commission as a 2LT. Almost one year later, on 21 August 1943, Homcy landed with the 36th Infantry Division in North Africa. He performed well in combat and, while in Italy in December 1943, was "commended for exceptionally meritorious conduct."[5] According to the official citation, 2LT Homcy "was second in command of a group assigned the task of carrying ammunition, food, water and clothing to front-line troops." Despite being "subjected to almost constant enemy artillery and mortar fire, sometimes crawling on their hands and knees to achieve their objective," Homcy and his men accomplished their mission "without losing a single load of vital supplies."[6] In July 1944, Homcy's regimental commander, Colonel Paul D. Adams, likewise lauded Homcy's "exemplary courage and determination" in combat, which Adams acknowledged had contributed "materially to the success of our operation."[7]

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[1] Transcript of Record at 8, United States v. Albert C. Homcy, CM 271489 (19 Oct. 1944) (on file with Regimental Historian).

[2] *Id.*

[3] Headquarters, Mediterranean Theatre, Promulgating Order No. 92 (21 Nov. 1944) [hereinafter Promulgating Order No. 92].

[4] *Id.*

[5] *Id.* Commendation, 2d Lt. Albert C. Homcy, Headquarters, 36th Infantry Division (n.d.) (Allied Papers).

[6] Transcript of Record at 8, *supra* note 1. Commendation, 2d Lt. Albert C. Homcy, Headquarters, 36th Infantry Division (n.d.) (Allied Papers). Until the creation of the Bronze Star Medal in late 1944, Soldiers like Homcy who committed acts of bravery for exceptionally meritorious conduct in combat received written commendations from their regimental or higher commanders.

[7] 1st Indorsement, Colonel Paul D. Williams, to 2d Lt. Albert C. Homcy (14 July 1944) (Clemency Matters).

On 15 August 1944, 2LT Homcy and the 36th Infantry Division landed in southern France as part of Operation Dragoon. Twelve days later, on 27 August, Homcy was with the division as it advanced through the Rhone River Valley. According to testimony presented at his general court-martial, Homcy was the battalion's anti-tank officer and had received an order from LTC Bird, relayed to Homcy through the battalion adjutant, Captain (CPT) John A. Berquist, to accompany eleven or twelve Soldiers on a patrol. Their mission: locate and then use bazookas to destroy German guns firing on the battalion command post.

Homcy refused to obey this order. He explained his reasons in his sworn statement at trial:

> Q: Did you have a conversation with Colonel Bird on this date?
>
> A: Yes, sir. I called Colonel Bird by telephone approximately forty-five minutes after I received the initial order from Captain Berquist and I told Colonel Bird that I couldn't take those men on patrol as they weren't qualified to do the work and I didn't think they were capable. He said he would have to prefer charges and placed me under arrest.
>
> Q: Are you sure you told him that you couldn't take those particular men?
>
> A: Yes, I am positive. I told him I didn't think those men were qualified and I couldn't take those particular men.
>
> Q: So as far as you know, had any of these men who came from the kitchen—the cooks and orderlies—done any patrolling?
>
> A: They had never done any patrolling to the best of my knowledge.
>
> Q: With those men under those conditions did you believe it was possible for you to accomplish your mission?
>
> A: No, sir. It was quite impossible. The mission itself was quite impossible but with men like that it made it so much more impossible.[8]

Under cross-examination, 2LT Homcy further explained that the cooks, bakers, ammunition handlers, and orderlies that he had been ordered to lead into combat were so unqualified that he "would jeopardize their lives if I took them on a patrol of that nature."[9] Since he did not want to take Soldiers on a patrol where "they would get killed doing something they knew nothing about," 2LT Homcy refused to obey LTC Bird's order.[10]

The fluid tactical situation meant that it was not until 10 September 1944 that LTC Bird preferred a single charge of misbehavior before the enemy against 2LT Homcy. Major General John E. Dahlquist, the 36th Infantry Division commander, referred the charge to trial by general court-martial on 18 September and, on 19 October 1944, a five-officer panel consisting of one major, three captains, and one first lieutenant convened to hear the evidence. While the trial counsel, CPT John M. Stafford, was a member of the Judge Advocate General's Department, the defense counsel, Major Benjamin F. Wilson, Jr.,[11] was not a lawyer. But this was not unusual and, in any event, legally qualified counsel for an accused was not required by the Articles of War.[12] The charge and its specification read as follows:

> Violation of the 75th Article of War.
>
> In that 2d Lt. Albert C. Homcy . . . did, in the vicinity of La Concourdia, France, on or about 27 August 1944, misbehave himself while before the enemy, by refusing to lead a patrol on a mission to detect the presence of two enemy tanks or self-propelled guns, after being ordered to do so by Lt. Col. William A. Bird, his superior officer.[13]

While testimony about LTC Bird's order was uncontradicted, 2LT Homcy sealed his own fate when he admitted, under oath, that he had intentionally disobeyed the order to lead the combat patrol. Not only did he refuse Bird's order, but Homcy admitted to a most aggravating factor:

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[8] Transcript of Record at 26, *supra* note 1.

[9] *Id.*

[10] *Id.* at 27.

[11] Benjamin F. Wilson, Jr., was a Field Artillery officer and had completed two years of law school prior to entering the Army. He had considerable experience, especially when measured by today's standards of practice. Before defending Second Lieutenant Homcy, Major (MAJ) Wilson had served as a panel member in more than 100 general and special courts-martial. He had been detailed as the defense counsel at between 50 and 100 general courts-martial and between 50 and 100 special courts-martial. Finally, Wilson also had served as the prosecutor at between 50 and 100 special courts-martial. Transcript of Record, *supra* note 1, Questionnaire for Benjamin F. Wilson, Jr. (25 Apr. 1968), United States v. Albert C. Homcy, CM 271489 (19 Oct. 1944) (Allied Papers).

[12] Articles of War, 2 Stat. 359 (1806), *reprinted in* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 976 (2d ed. 1920 reprint).

[13] *Id.* at 4.

> Q: Lieutenant . . . is it not true that you received an order to accompany a patrol of men on a mission to detect the presence of two enemy tanks or self-propelled guns?
>
> A: I received an order to take certain men up on a patrol after certain self-propelled guns.
>
> Q: Is it not true that having received this order that you refused to obey the order *in the presence of the enemy*?[14]
>
> A: Yes, sir.[15]

Homcy's trial, which had started at 1450 on 19 October, finished just two-and-one-half hours later, at 1735. The panel found 2LT Homcy guilty as charged. The members sentenced him to forfeit all pay and allowances and to be dismissed from the service. They also sentenced him to fifty years' confinement at hard labor.[16] Although the record does not reflect Homcy's reaction, the twenty-eight year old officer must have been shocked at the lengthy term of imprisonment.

But then a curious thing happened. On 23 October 1944, all five panel members signed a letter requesting clemency for 2LT Homcy, which they forwarded to Major General Dahlquist. The panel members wrote that Homcy's "announcement on the witness stand that he did in fact commit the offense" meant that the punishment that they had imposed was "commensurate with the offense."[17] But, the panel nevertheless believed that 2LT Homcy could "be rehabilitated" and could "be of value to the Service." Consequently, the members recommended to Dahlquist that he reduce Homcy's confinement to ten years and that Dahlquist suspend the execution of the sentence so that Homcy could be "returned to a duty status through reassignment in a non-combat unit."[18]

Lieutenant Colonel Stephen J. Brady, the division's staff judge advocate, reviewed Homcy's record of trial on 23 October 1944. In a memorandum for Major General Dahlquist, LTC Brady agreed "that the sentence adjudged is unnecessarily severe." But, wrote the staff judge advocate, "even if activated by the desire to protect his untrained men," 2LT Homcy's misbehavior before the enemy in refusing to obey a lawful order to lead a combat patrol required that "some punishment should be given." Consequently, LTC Brady recommended that Dahlquist approve the sentence as announced by the court-martial panel, except that the fifty years' confinement be reduced to ten years' imprisonment.[19] Major General Dahlquist concurred with Brady's recommendation when he took action on Homcy's case the next day. Shortly thereafter, Homcy was shipped to Oran, Algeria, where he was confined in the Army's Disciplinary Training Center located there. A three-member Board of Review subsequently confirmed the findings and sentence on 21 November 1944 with the result that, on 5 December 1944, Homcy ceased to be an officer of the Army.

Shortly thereafter, "General Prisoner" Homcy left Algeria and was confined at the U.S. Disciplinary Barracks in Stormville, New York. Unhappy with his circumstances, he began to look for ways to overturn his court-martial conviction. On 27 July 1945, Mr. A.S. Hatem wrote to the Secretary of War on Homcy's behalf, insisting that Homcy had been wrongfully convicted because he "had no knowledge of his trial and was unable to make any preparations for his defense."[20] After an investigation, the War Department replied to Hatem that the record in Homcy's case showed that Homcy "was ably defended at his trial" and that "there is no indication of any inability in his part to prepare properly for trial."[21]

Homcy's fortunes did change somewhat in January 1946 when, as part of a comprehensive decision by the Army to reduce the sentences of certain categories of prisoners, Homcy received additional clemency "by direction of the President." In return for agreeing to re-enlist as a private in the Army, the government would remit the unserved portion of his confinement. No doubt wanting to avoid serving any more time in jail, Homcy reenlisted on 7

[14] Under the 75th Article of War, a conviction for "misbehavior before the enemy" required some nexus between the accused's acts and the enemy forces. In discussing the offense, the 1928 *Manual for Courts-Martial* (*MCM*), which controlled the proceedings in Homcy's case, noted that "whether a person is 'before the enemy' is not a question of definite distance, but is one of tactical relation." MANUAL FOR COURTS-MARTIAL, UNITED STATES para. 141a discussion (1928) (emphasis added). Consequently, explained the *Manual*, where an accused was in the rear echelon of his battery (some 12–14 kilometers from the front line), if the forward echelon of his battery was engaged with the enemy, the accused was guilty of misbehavior before the enemy if he left the rear echelon without authority—even though this rear echelon was not actually under fire. It follows that when Homcy admitted that he had been in the "presence of the enemy" at the time he disobeyed LTC Bird's order, Homcy was admitting to an element of the offense. *Id.*

[15] Transcript of Record at 4, *supra* note 1.

[16] Promulgating Order No. 92, *supra* note 3.

[17] Transcript of Record, *supra* note 1, Letter, Major Harry B. Kelton, CPTs Isadore Charkatz, Elden R. McRobert, Lowell E. Sutton, & 1LT Charles Hickox, to Commanding General, 36th Infantry Division, subject: Clemency (24 Oct. 1944), United States v. Albert C. Homcy, CM 271489 (19 Oct. 1944) (Allied Papers).

[18] *Id.*

[19] *Id.* Memorandum to Accompany the Record of Trial in the Case of 2d Lt. Albert C. Homcy (23 Oct. 1944) (Allied Papers).

[20] *Id.* Letter A.S. Hatem, to Sec'y of War Robert P. Patterson (27 July 1945) (Allied Papers).

[21] *Id.* Letter from Edward S. Greenbaum, to A.S. Hatem (14 Aug. 1945) (Allied Papers).

January 1946.[22] He was honorably discharged eight months later, on 24 August 1946, and returned home to Clifton, New Jersey, and life as a civilian.

In the years that followed, Mr. Homcy began a lengthy struggle to clear his military record. In May 1951, he hired a Washington, D.C., attorney to file a petition asking that the findings be set aside and that he receive a new trial. Homcy's principal argument was that the findings were "contrary to the weight of the evidence" and that he was not "legally responsible for his acts" because he did not "comprehend and understand the meaning of the order" given by LTC Bird.[23]

Major General Ernest M. Brannon, The Judge Advocate General, denied Homcy's petition on 5 August 1951. As Brannon explained in his decision:

> It appears from the record of trial, and it is not now denied, that the accused willfully violated the order of his battalion commander while his unit was in contact with the enemy on the field of battle. The legality of the order is not questioned, and there is presented no persuasive evidence which would indicate that the petitioner was not responsible for his refusal to obey the order.
>
> * * * *
>
> The entire record of trial has been carefully reviewed, but there is disclosed no error prejudicial to the substantial rights of the accused. The court had jurisdiction over the petitioner and over the offense of which he was convicted, the evidence in the record supports the findings and sentence, and the sentence is not excessive.[24]

Major General Ernest M. "Mike" Brannon

Unwilling to surrender to the Army's legal bureaucracy, Homcy wrote to the Secretary of the Army on 29 May 1951, complaining that he "was brought to trial by an IMCOMPETENT, tried and convicted by an illegal, unfair and unjust courts-martial [sic] on foreign soil."[25] The gist of Homcy's argument was that absence of a "law member"[26] at his court-martial meant that the proceedings were illegal and should be overturned. The Army informed Homcy that it had been within Major General Dahlquist's discretion as the general court-martial convening authority "not to specifically direct the presence of a law member during the trial proceedings."[27] Consequently, Homcy again did not see any relief.

On 21 June 1961, after filing an application with the Army Board for Correction of Military Records (ABCMR), Mr. Homcy appeared in person before the Board. Assisted by counsel furnished by the American Legion, Homcy once again argued that he had not been ably defended, lacked adequate time to prepare for trial, and that his court-martial conviction was unjust. His requested relief was that the ABCMR substitute an honorable discharge for the dismissal imposed by the general court-martial. The ABCMR denied his application. As Francis X. Plant, the special assistant to the ABCMR, wrote:

[22] Headquarters, E. Branch, U.S. Disciplinary Barracks, Green Haven, N.Y., Special Orders No. 7 (7 Jan. 1946).

[23] Transcript of Record, *supra* note 1, Letter from Thomas H. King, to Major General E. M. Brannon (9 July 1951) (Allied Papers); NME Form 219, Petition for New Trial Under Article of War 53, Albert C. Homcy (4 May 1951) (Allied Papers).

[24] Transcript of Record, *supra* note 1, E.M. Brannon, Action Upon Application of Albert C. Homcy for Relief under Article of War 53 (6 Aug. 1951) (Allied Papers).

[25] *Id.* Letter from Albert C. Homcy, to Sec'y of the Army (29 May 1959) (Allied Papers) (all capital letters in original).

[26] The law member was a quasi-judicial officer under the Articles of War and was the forerunner of the law officer created by the Uniform Code of Military Justice in 1950 and the military judge created by the Military Justice Act of 1968. His powers were limited in that, while he advised the court-martial panel on the law, this advice was binding on that panel. Articles of War, art. 8 41 Stat. 788 (1920); MANUAL FOR COURTS-MARTIAL, UNITED STATES paras. 40, 51*d* (1928).

[27] Transcript of Record, *supra* note 1, Letter from Francis X. Plant, Special Assistant, Undersecretary of the Army, to Sen. Harrison A. Williams, Jr. (15 Nov. 1965), United States v. Albert C. Homcy, CM 271489 (19 Oct. 1944) (Allied Papers).

> [Homcy] was given every opportunity to argue his contentions and to present all additional evidence available to him. Apparently feeling that the evidence was indisputable that he refused to obey an order from his superior officer while in the presence of the enemy and that he fully understood the consequences of his actions, the Board voted unanimously to deny Mr. Homcy's application.[28]

On 1 March 1967, the ever-persistent Homcy filed yet another application with the ABCMR. This time, however, he alleged new grounds for relief: unlawful command influence (UCI). Homcy apparently had first become aware of UCI in his case in January 1966, when gathering affidavits from officers who had participated in his court-martial in 1944. Two of the five panel members claimed UCI. Then CPT Elden R. McRobert, who had served as a panel member, alleged that Major General Dahlquist "called all the members of the General Court-Martial Board for our division . . . and there gave all of us a very strong verbal reprimand for the way in which we had been fulfilling our responsibilities as members of the Board."[29] Another panel member, then CPT Lowell E. Sitton, wrote in a 20 January 1966 affidavit that "severe pressures were applied to court-martial boards in his division at or about the time of [Homcy's] trial to make findings of guilty 'for the good of the service' without regard to the rights of the individual or the merits of the particular case in question."[30] But the claimed UCI was not specifically directed toward 2LT Homcy, since neither McRobert or Sitton remembered participating in the case.

As to UCI generally, however, Homcy learned from the trial counsel who had prosecuted him, then CPT John M. Stafford, that:

> There was command pressure on the Court-Martial Boards of the 36th Division, as there were in many of the Divisions at the time. Usually the pressure was not to make findings of "guilty," but went to the matter of the sentences given.
>
> * * * *
>
> After the 36th Division was committed to combat, [Dahlquist], the Commanders, and members of the Court-Martial Board had a feeling that when a person was guilty of misbehavior before the enemy, that he should receive a severe sentence. This was a general feeling. The combat troops also had this view. At the time I prosecuted Lt. Homcy, I had no doubt he was guilty of direct disobedience of orders and misbehavior before the enemy.[31]

Despite this new evidence indicating UCI, the ABCMR denied Homcy's application without a hearing on 27 April 1967. Having failed once more to get relief from the Army, Homcy now took his campaign into the courts. On 22 December 1967, he filed suit against the Secretary of the Army in the U.S. District Court for the District of Columbia, seeking a declaratory judgment that his court-martial lacked jurisdiction (and that his conviction should be overturned) and a mandatory injunction ordering the ABCMR to correct his military records. Just as he had claimed in his latest ABCMR application, Homcy alleged in his suit against the Secretary of the Army that constitutional defects in his 1944 court-martial meant he had been deprived of a fair trial.[32]

Presumably so as to have an administrative record upon which to base its response to Homcy's civil suit, the Army now ordered a formal hearing before the ABCMR on Homcy's application. In April 1968, at the request of the Board, COL Waldemar A. Solf, then Chief, Military Justice Division, Office of The Judge Advocate General, examined the legal issues raised by Homcy in his latest application. Solf, in line with earlier legal opinions, rejected Homcy's claim that the absence of a law member had adversely affected his trial. Colonel Solf also rejected any asserted denial of effective assistance of counsel. On the issue of UCI, however, Solf carefully considered the affidavits provided by then CPTs McRobert and Sitton. Since Homcy had "made a full and unambiguous judicial confession" to misbehavior before the enemy, Solf concluded that there was no UCI issue as to findings. On the contrary, the real issue was whether "unlawful command control infected the sentence adjudged in Homcy's case."[33]

As Solf noted, however, the "standard to be applied is the law as recognized in 1944" and not the test for UCI that

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[28] *Id.*

[29] *Id.* Questionnaire from Captain (CPT) Elden R. McRobert, Petition for Correction of Military Record from Albert C. Homcy, to Army Bd. for Correction of Military Records (1 Mar. 1967) (included in the allied papers) (on file with Regimental Historian).

[30] *Id.* Sworn Statement of CPT E. Lowell (20 Jan. 1966) (on file with Regimental Historian).

[31] *Id.* Questions for John M. Stafford, Assistant Staff Judge Advocate and Trial Counsel (26 Mar. 1968), United States v. Albert C. Homcy, CM 271489 (19 Oct. 1944) (Allied Papers).

[32] *Id.* Petition for Correction of Military Record from Albert C. Homcy, to Army Bd. for Correction of Military Records (1 Mar. 1967) (Allied Papers) (on file with Regimental Historian).

[33] *Id.* Memorandum from The Judge Advocate Gen., for Army Board for Correction of Military Records (Waldemar A. Solf), subject: Comment and Legal Opinion, Albert C. Homcy, JAGJ 1967/8153, at 5 (1 May 1968) (Allied Papers).

exists under the UCMJ.[34] After discussing the law on UCI as it existed in 1944, Solf wrote:

> In 1944, it was lawful for the convening authority, before any case was referred to trial, to provide court-martial members with information as to the state of discipline of the command, as to the prevalence of offenses which had impaired discipline, and command measures which had been taken to prevent offenses. Such instruction could also lawfully present the view of the War Department as to what were regarded as appropriate sentences for designated classes of offenses.[35]

Colonel Solf ultimately concluded in his memorandum that the evidence on the issue of UCI in Homcy's trial was "not conclusive" and it was up to the ABCMR to find the facts in the case.

Colonel Waldemar "Wally" Solf

So what did the Board do? After holding a formal hearing in Homcy's case on 10 July 1968, the ABCMR again recommended denying his application and the Under Secretary of the Army so directed on 20 August 1968.

In early 1969, while his case was pending in the U.S. District Court, Homcy filed a "prayer for relief" with the Court of Military Appeals (COMA), arguing yet again that the absence of a law member at his court-martial meant that the proceedings were defective and that he also had been denied the effective assistance of counsel. Homcy also raised the issue of UCI before COMA insisting, as he had in his last ABCMR application, that the court members in his case had been "subjected to severe command pressure by the convening authority." The Court of Military Appeals, however, did not reach the merits of Homcy's petition, ruling that it lacked jurisdiction over Homcy's court-martial because the proceedings in his case were finalized before 31 May 1951, the effective date of the Uniform Code of Military Justice (UCMJ).[36]

With the ABCMR decision before him as the agency's administrative record (and with COMA's decision behind him), U.S. District Court Judge John Smith now considered Homcy's case. The Army had moved for dismissal or, alternatively, for summary judgment. Homcy also had filed a motion for summary judgment based on the record of the ABCMR.

After considering all the evidence presented to him, Judge John Smith agreed with Homcy, and entered summary judgment in his favor. Judge Smith held that Homcy had been denied effective assistance of counsel. Relying on the affidavits from McRobert, Sitton, and Stafford, the judge also held that Homcy's court-martial sentence "was illegal because it was based on improper command influence."[37]

Interestingly, Judge Smith did not overturn the court-martial conviction. Rather, he only granted a limited records correction—and the ABCMR, acting pursuant to the district court's order, corrected Homcy's military records to show an honorable discharge. Later, the Court of Appeals (D.C. Circuit), affirmed in *Homcy v. Resor*, but solely on the basis of improper command influence.[38]

Amazingly, this success in federal court was not enough for Albert Homcy. He now filed a claim with the Army Finance Office for back pay, allowances, and other benefits—which had been taken from him as the result of the total forfeitures punishment imposed by the court-martial panel on 19 October 1944. In particular, Homcy argued that he was due pay and allowances from the date Major General Dahlquist took action in his case. The Army referred Homcy's claim to the Comtroller General. The General Accounting Office subsequently denied Homcy's claim, reasoning that Homcy had received everything he had requested from the U.S. District Court. Homcy now went back into Judge Smith's court and moved to reopen his case

[34] *Id.*

[35] *Id.* at 7.

[36] *Id.* United States v. Homcy, Misc. Docket 69-35, Memorandum Opinion and Order (15 Aug. 1969) (Allied Papers). In *United States v. Sonnenschein*, 1 C.M.R. 64 (C.M.A. year) and *United States v. Musick*, 12 C.M.R. 196 (C.M.A. year), COMA ruled that it had no jurisdiction to review court-martial proceedings completed prior to the effective date of the UCMJ.

[37] Homcy v. Resor, 455 F. 2d 1345, 1348 (D.C. Cir. 1971).

[38] *Id.* at 1345. The Court of Appeals rejected the District Court's finding that Homcy had been deprived of fair trial because his defense counsel was ineffective. It noted that the Articles of War did not require defense counsel to be a "licensed attorney" and, based on Major Wilson's considerable experience, concluded that Wilson in fact was "much better qualified to defend an accused in a court-martial proceeding than many fully licensed lawyers." *Id.* at 1347.

in order to obtain a judgment for back pay. The district court denied the motion 12 October 1973.[39]

Homcy then "shifted his efforts to the United States Court of Claims" and hired the Washington, D.C., law firm of Spaulding, Reiter and Rose to attempt to obtain back pay. On 16 June 1976, that court put an end to Homcy's lengthy battle with the Army when it ruled that his claim was barred by the statute of limitations. Homcy's claim for relief, ruled the Court of Claims, "initially accrued on the date he was improperly dismissed from the service."[40] Since that date was 5 December 1944, he had only six years to file any money damage claim. The court expressly declined to revive Homcy's money damage claims based on his recent success at the district court and ABCMR.[41]

So ended the strange case of 2LT Albert C. Homcy. An amazing legal saga that demonstrates, at least in part, that the old saying "persistence wins the prize" very much has some truth in it. Or, as Winston Churchill put it in a speech he gave in October 1941: "Never, never, in nothing great or small, large or petty, never give in except to convictions of honour and good sense. Never yield to force; never yield to the apparently overwhelming might of the enemy."[42] There is no question that Homcy "never gave in." But whether or not justice was served as a result of his success in civilian court is very much an open question.

As for Albert C. Homcy? He spent his last days living in Washington, D.C., at the Soldiers' and Airmens' Home. He died when his heart stopped beating on 1 April 1987. Homcy was 71 years old.[43]

More historical information can be found at

The Judge Advocate General's Corps
Regimental History Website

Dedicated to the brave men and women who have served our Corps with honor, dedication, and distinction.

https://www.jagcnet.army.mil/History

[39] *Id.* at 1357.

[40] Homcy v. United States, 536 F. 2d 360, 363 (Ct. Cl. 1976).

[41] *Id.*

[42] THE CHURCHILL CENTRE, http://www.winstonchurchill.org/learn/speeches/quotations/quotes-faq (last visited Feb. 21, 2014).

[43] Bart Barnes, *World War II Army Officer Albert C. Homcy Dies at 71*, WASH. POST, Apr. 3, 1987.

Lore of the Corps

The Shooting of Major Alexander P. Cronkhite: Accident? Suicide? Murder?

Fred L. Borch
Regimental Historian and Archivist

At lunchtime on 25 October 1918, while his Soldiers were on a break and "at mess,"[1] Major (MAJ) Alexander P. Cronkhite, the training officer for the 213th Engineer Regiment, decided that he would do some informal target shooting with his .45 caliber pistol. Cronkhite was an excellent marksman and, although regulations prohibited off-range shooting, he apparently concluded that firing a few rounds at an old tobacco can atop a post could not do much harm. Major Cronkhite's first two shots missed, but after firing a third time, Cronkhite turned around and said to Captain (CPT) Robert Rosenbluth, who had accompanied him, "I got it that time, Rosie."

What happened after that is not entirely clear except that a fourth shot rang out, and Cronkhite fell to the ground. His last words were "My God, I'm shot." In a matter of minutes, MAJ Cronkhite was dead; the bullet had passed through his right shoulder, hit both his lungs, and severed the aorta.[2] Rosenbluth and Sergeant (SGT) Roland Pothier, who was standing nearby and was Cronkhite's orderly, must have been shocked; the twenty-five-year old Army officer was dead.

Was this an accident? Was it murder? Could it even have been suicide? On 30 October 1918, an Army investigation determined that it was a tragic accident. But the deceased's father, Major General Adelbert Cronkhite, refused to accept this explanation and forced the re-opening of the case. Almost six years later, as the direct result of pressure from the elder Cronkhite and others, CPT Rosenbluth and SGT Pothier were indicted by a federal grand jury for MAJ Cronkhite's murder. What follows is the story of the Cronkhite shooting and its remarkable legal aftermath—including a surprising and pivotal role played by a future Judge Advocate General.

Alexander Pennington "Buddy" Cronkhite was a remarkable officer by any measure. Born in September 1893, he entered the U.S. Military Academy in 1911. Cronkhite was a handsome and popular cadet; his "natural genius for studies" and his "capacity for hard work placed him well up toward the top of his class."[3] Consequently, when he graduated in June 1915, far ahead of his classmates Dwight D. Eisenhower and Omar N. Bradley, Cronkhite was commissioned as a Second Lieutenant of Engineers.[4]

He then served with the 1st Engineer Regiment in Washington, D.C., and did map work in Georgia and Texas. Cronkhite had "almost perfect efficiency ratings," and at the same time, had "an informality and friendliness that made him popular with subordinates, officers, and enlisted."[5] Once the United States entered World War I, Cronkite made rank quickly: he was promoted to first lieutenant in July 1916, captain in June 1917, and major in December that same year. In May 1918, MAJ Cronkhite joined the 213th Engineer Regiment and traveled with that unit to Camp Lewis, Washington, in September.[6]

After his death in October, a board of inquiry consisting of the three senior officers from the 213th Engineers, Lieutenant Colonel William J. Howard, MAJ Henry Tucker, and MAJ John F. Zajicek, conducted an investigation into the facts and circumstances surrounding the shooting. The board heard from CPT Rosenbluth, who testified that MAJ Cronkhite's pistol must have slipped from his hand when he turned after firing the third bullet and "when his fingers had instinctively tightened to straighten the twisted gun—which had a lighter trigger pull than most such weapons—it discharged."[7]

Cronkhite apparently prided himself on being able "to cock and fire a pistol with one continuous, sweeping motion," and the theory was that this "flourish had cost the major his life."[8] In this era, officers and enlisted men in the field wore the "smokey-the-bear" campaign hat (worn exclusively by Army drill sergeants today) and some thought this hat was perhaps the best explanation of what had happened. The belief was that, as Cronkhite quickly cocked, raised, and then brought his pistol down to fire on the tobacco can, the .45's barrel had brushed his hat, which caused it to twist toward his body. As Cronkhite tried to recover his grip on the weapon, he hit the trigger, causing the hammer to drop and fire the bullet that killed him.

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[1] *Ex-Soldier Admits He Killed Major*, N.Y. TIMES, Mar. 20, 1921, at 1.

[2] Bill Wood, *Death at Ft. Lewis: The Cronkhite Case*, ARMY, Feb. 1984, at 62.

[3] ALEXANDER PENNINGTON CRONKHITE, FIFTY-FIRST ANNUAL REPORT OF THE ASSOCIATION OF GRADUATES, U.S. MILITARY ACADEMY 50 (1920).

[4] Cronkhite was 7th in a class of 164; Bradley finished 44th and Eisenhower was 61st. ASSOCIATION OF GRADUATES, REGISTER OF GRADUATES 192–95 (1992), (Class of 1915). This class is sometimes called the "Class the Stars Fell on" because so many graduates reached flag rank.

[5] Wood, *supra* note 2.

[6] CRONKHITE, *supra* note 3.

[7] Wood, *supra* note 2, at 62.

[8] *Id.* at 63.

Sergeant Pothier corroborated Rosenbluth's claim that the shooting was accidental. Since there were no other Soldiers who had witnessed the event (they were too far away), the board concluded its work fairly quickly and ruled that MAJ Cronkhite's death was a tragic accident.

While this was the official explanation, a few Soldiers in the 213th speculated that Cronkhite might have committed suicide. He had only recently been released from the hospital where he had been bedridden with the flu. The influenza epidemic of 1918 had sickened millions of Americans, including Cronkhite. He had recovered, however, while hundreds of thousands were dead.[9] Some Soldiers thought that Cronkhite's illness might have had a depressive affect, and that the shooting was self-inflicted. But it was so out of character that virtually everyone rejected this theory.

Regardless of what the board of inquiry had concluded or what Soldiers who knew MAJ Cronkhite thought, the dead Soldier's father, Major General Cronkhite, was convinced otherwise. After relinquishing command of the 80th Division and returning from Europe in 1919, the senior Cronkhite refused to accept that his son's death had been accidental. He had the body exhumed and another autopsy performed. When doctors told Cronkhite that the bullet path in the body was such that his son could not have shot himself, Major General Cronkhite was convinced that Buddy had been murdered.

Major General Cronkhite hired a team of private detectives and soon "accused the War Department of covering up both a slipshod inquiry and a conspiracy by senior officers at Camp Lewis to murder his son."[10] When asked to explain why such a conspiracy would exist, Cronkhite insisted that it was part of a plot to smear his reputation. Central to Major General Cronkite's reasoning was that, since no West Point graduate would knowingly violate a regulation against off-range shooting, foul-play was the only possible explanation for his son's death.

While Major General Cronkhite, now in command of the Army's Third Corps Area, and stationed in Baltimore, Maryland, agitated for justice for his dead son, ultra-conservative newspapers joined his efforts by publishing stories insisting that CPT Rosenbluth was guilty of murder. Automobile manufacturer Henry Ford's *Dearborn (Michigan) Independent*, for example, insisted that Rosenbluth was a "dirty German Jew spy." After Rosenbluth, now out of the Army and working for President Herbert Hoover's American Relief Administration, visited the Soviet Union, the *Independent* "speculated that he might have committed the murder in his capacity of Bolshevist Jew agitator."[11] No wonder at least one historian has called Rosenbluth "the American Dreyfus," after the French Army officer whose Jewish background figured prominently in his being wrongfully convicted of treason in the 1890s.

These anti-Semitic rants, combined with Major General Cronkhite's efforts, ultimately caused the Department of Justice to investigate the shooting. According to the *New York Times*, "federal agents" located former SGT Roland Pothier in Providence, Rhode Island where, having left active duty, he was working as a railroad brakeman. Pothier was arrested in March 1921 and, while in police custody, "broke down and admitted that he shot Major Cronkite."[12] But the shooting had been an accident; Pothier explained "that the shot was fired accidentally as he was cleaning his pistol."[13]

Later, reported the *Times*, Pothier also "confessed to federal authorities" while still in jail "that he was ordered by his superior officer, Captain Robert Rosenbluth, to bring out a loaded gun and 'get' Cronkhite." The newspaper reported that Pothier had made the following statement:

> [Captain Rosenbluth] said, "I want to get Major Cronkite." When I asked him what he meant he said, "I want to kill him." I asked him what his reasons were for wanting to kill the Major, and he said: "Because we want him out of the way."
> . . .
> I joined Major Cronkhite on the maneuver grounds at Camp Lewis and when about two feet behind him, I loaded my revolver with three shells. I fired one shot into the open field and as the Major was turning around in my direction, I fired my second shot at the Major, hitting him in the right breast.[14]

When former CPT Robert Rosenbluth, then staying at the Willard Hotel in Washington, D.C., was asked by the *New York Times* correspondent about Pothier's statements, Rosenbluth exclaimed—one would imagine rather hotly—

[9] World War I claimed some sixteen million lives; the influenza pandemic that swept the globe in 1918 killed as many as fifty million people. In the United States, 25 percent of the U.S. population was infected and, in one year, the average life expectancy in the United States dropped by twelve years. For an excellent account of the event, see JOHN M. BERRY, THE GREAT INFLUENZA: THE STORY OF THE DEADLIEST PANDEMIC IN HISTORY (2005).

[10] Wood, *supra* note 2, at 63.

[11] Gene Smith, *The American Dreyfus*, AM. HERITAGE MAG. (Nov. 1994), www.americanheritage.com/print/58543?nid=58543.

[12] *Pothier Is Acquitted of Cronkhite Murder*, SEATTLE DAILY TIMES, 12 Oct. 1924, at 1.

[13] *Ex-Soldier Admits He Killed Major*, *supra* note 1.

[14] *Says He Shot Major on Captain's Order*, N.Y. TIMES, Apr. 17, 1921.

that "Pothier is either an outrageous liar or he is crazy, or he has been induced to say this."[15]

Based on Pothier's admissions and confessions, both he and Rosenbluth were indicted for murder in U.S. District Court in Tacoma, Washington; both men were arraigned in September 1924.

Roland Pothier's trial began on 30 September 1924. Two of his three signed confessions, all of which contradicted each other and which Pothier had repudiated prior to trial, were suppressed after the men questioning Pothier "admitted they obtained them under 'undue duress.'"[16] The jury did, however, consider a third confession made by Pothier, the substance of which was that he and Rosenbluth had "planned the shooting."[17] The problem for the government was that no witness could provide a motive for either Pothier or Rosenbluth to want MAJ Cronkhite dead. While motive is not an element of proof for any offense, the inability of the prosecution to answer "why" certainly hurt the government's case, especially after other witnesses testified that Pothier was known to tell "far-fetched stories."[18]

The gist of the government's case was that the wound suffered by the deceased could not have been self-inflicted. A medical expert, who was paid $250 a day to testify at the trial in Tacoma—a huge sum of money for the day—insisted that "the only way the major could have shot himself was with his thumb on the trigger and his revolver held at arm's length. Obviously, he would not have done this accidentally." A second prosecution witness, an expert in firearms, concurred with the medical expert.

In rebuttal, Pothier's defense counsel called CPT Eugene M. Caffey, a friend of MAJ Cronkhite's and a future Judge Advocate General of the Army, to the stand. His testimony on direct did not add much to what had already been presented. But then the Assistant U.S. Attorney (AUSA) made a mistake. Handing the .45 caliber pistol to Caffey, the prosecutor asked Caffey to show how Cronkhite could have shot himself.

Caffey raised the pistol, cocked it with his thumb and then showed how it could have swung around. When the pistol was aimed at Caffey's chest, the AUSA demanded: "Now try to pull the trigger one-half inch!"

The click that followed as the hammer fell forward was a shock to one and all in the courtroom. And, with that "snap," the case against Pothier collapsed. The jury found him not guilty the following day. Pothier, who had been in jail for more than two years, was released and went home to Rhode Island.[19]

The murder charge against Rosenbluth was dismissed shortly thereafter and he, too, returned to civilian life. In the years that followed, Rosenbluth married and had two sons. He worked as assistant commissioner of social welfare in New York before settling in Chicago, Illinois. As for CPT Caffey, he remained in the Army. His final assignment on active duty was as The Judge Advocate General.[20]

So ends the remarkable story of a shooting and its highly unusual legal aftermath.

Place of MAJ Cronkhite's untimely death.

More historical information can be found at

The Judge Advocate General's Corps
Regimental History Website

Dedicated to the brave men and women who have served our Corps with honor, dedication, and distinction.

https://www.jagcnet.army.mil/History

[15] *Rosenbluth Calls It a Lie*, N.Y. TIMES, Apr. 17, 1921.

[16] Wood, *supra* note 2, at 64.

[17] *Pothier Is Acquitted of Cronkhite Murder*, *supra* note 12.

[18] *Rosenbluth Calls It a Lie*, *supra* note 15.

[19] *Pothier Is Acquitted*, *supra* note 12.

[20] Born in Decatur, Georgia, in 1895, Eugene Mead Caffey graduated from the U.S. Military Academy in 1918 and then served in the Engineer Corps. After completing law school in 1933, then Captain Caffey transferred to the Judge Advocate General's Department (JAGD). He was a judge advocate until February 1941, when he returned to the Engineers. After World War II, then Colonel Caffey returned to the JAGD. He was promoted to brigadier general in 1953 and to major general in 1954. Caffey served as The Judge Advocate General, U.S. Army, from 1954 to 1956, when he retired. Major General Caffey died in New Mexico in 1961. JUDGE ADVOCATE GENERAL'S CORPS, U.S. ARMY, THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775–1975, at 218–20 (1975).