

# MILITARY LAW REVIEW

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**THE MILITARY LAW REVIEW:  
THE FIRST FIFTY YEARS (1958–2008)**

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## **Introduction**

Fifty years ago, in September 1958, The Judge Advocate General's School, U.S. Army (TJAGSA) published the first issue of the *Military Law Review (MLR)*. Its 136 pages contained three articles by Army lawyers on TJAGSA's faculty and staff. The topics of these articles—"Military Searches and Seizures," "Compatibility of Military and Other Public Employment," and "Legal Aspects of Non-Appropriated Fund Activities"—were relevant and important for military legal practitioners of the day; it would be hard to argue that these articles would be any less timely today.

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From 1980 until 2005, Mr. Borch was a career Army Judge Advocate. After retiring from active duty, he was the Clerk of Court, U.S. District Court, Eastern District of North Carolina. He resigned from that position in March 2006 to take his current position as Regimental Historian and Archivist.

Fred Borch is the author of a number of books and articles on legal and non-legal topics, including *JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI* (2001) and *JUDGE ADVOCATES IN VIETNAM* (2004), a history of Army lawyers in Southeast Asia from 1959 to 1975. He also is the co-author (with Daniel Martinez) of *KIMMEL, SHORT AND PEARL HARBOR: THE FINAL REPORT REVEALED* (Naval Inst. Press 2005).

Since this inaugural issue appeared fifty years ago, almost 200 individual volumes have been published; this issue is the 197th. The *MLR*'s fiftieth birthday is an appropriate occasion to examine its history and its impact on the practice of military law. This article first examines the origins of the *MLR*. It then looks at the men and women who have edited, formatted, and produced the *MLR*. This article also examines the content of this periodical, including special issues and those articles that have significantly impacted military jurisprudence or otherwise stood the test of time. Finally, this article offers some thoughts on the *MLR*'s future.

### Origin of the *Military Law Review*

In retrospect, it is clear that the impetus for the *MLR* resulted from TJAGSA's efforts to achieve the model of legal education set by the American Bar Association (ABA). As a result of the caliber of its students, its rigorous academic curriculum, and the personal efforts of the first Commandant, Colonel Charles L. "Ted" Decker,<sup>1</sup> in February 1955 TJAGSA became the first and only military law school in American history to receive accreditation from the ABA. While this ABA stamp of approval was important because TJAGSA was co-located with the University of Virginia's law school, ABA accreditation was part of a larger effort to obtain statutory authority for TJAGSA to grant degrees to students.<sup>2</sup>

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<sup>1</sup> In this article, the military rank of authors or editors is that which they held at the time they wrote their articles or served as editors—recognizing that many of these officers continued to serve and advance in rank.

<sup>2</sup> As early as March of 1956, "action was initiated to obtain statutory authority . . . to confer the Master of Laws degree for successful completion of the Advanced Program." NATHANIEL B. RIEGER, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, REPORT OF THE COMMANDANT 15 JUNE 1955–25 FEBRUARY 1957, at 1–2 (1957) (on file with author). Legislation drafted by the Office of The Judge Advocate General (OTJAG) was sent to the Congress later that year but was not enacted. Not until some thirty years had passed would officers be awarded an advanced degree at TJAGSA, when members of the 36th Graduate Course received their LL.M.s in May 1988. This successful effort was spearheaded by Lieutenant Colonel David E. Graham, head of TJAGSA's International Law Division (at the urging of Commandant Colonel Paul J. Rice and Assistant The Judge Advocate General Major General William K. Suter). Lieutenant Colonel Graham made the necessary coordination with the Department of Education and the essential academic accreditation organizations and drafted the legislation ultimately enacted by Congress in early 1988.

With ABA accreditation in hand—and looking for ways not only to preserve this accreditation but to enhance the reputation of military legal education—TJAGSA began publishing material on military law. A key publication in this early period was “A Chronicle of Recent Developments of Immediate Importance to Judge Advocates.” The TJAGSA’s Research, Planning and Publications Department, which was tasked with researching “military law and military legal education” and publishing its results “in periodicals, permanent publications, and films,”<sup>3</sup> produced the first *Chronicle Letter* in 1951. Distributed to all Judge Advocates, it contained recent developments in military law (digests of all cases from the Court of Military Appeals, selected opinions of the boards of review, decisions from federal and state courts, and opinions of The Judge Advocate General (TJAG), Attorney General and Comptroller General). Interestingly, TJAGSA began selling the *Chronicle Letter* in its book store on 1 January 1957—with “Reserve Officers and other interested parties” being the primary purchasers of subscriptions.<sup>4</sup>

But, while the *Chronicle Letter* certainly pushed information to the field—and was a valuable publication—every law school of consequence had a law review in which scholarly articles and comments were published. As the students in the Advanced Courses (the forerunner of today’s Judge Advocate Officer Graduate Course) were required to write a thesis as part of the curriculum, there existed a ready source of intellectually stimulating material for a law review-type publication.

In sum, it seems that at least three factors coalesced to produce the first *MLR*: a desire to enhance and preserve TJAGSA’s ABA accreditation; a ready source of theses from Advanced Course students that could be easily transformed into law review articles; and a publications and research department that had the mission of producing written materials that would help military legal professionals to be better practitioners.

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<sup>3</sup> *Id.* at 14.

<sup>4</sup> In December 1955, TJAGSA obtained permission to establish a bookstore “to provide a medium for distribution of the School’s publications and to serve the conveniences of students at the School.” CHRONICLE LETTER (Dec. 1955) (on file with author). The bookstore opened in January 1956 and sold “typewriters, stationery supplies, military insignia and uniform accessories.” *Id.* It also sold the *Chronicle Letter* on a subscription basis.

### Early Years of the *Military Law Review*

On 30 April 1958, a memorandum from the Office of the Judge Advocate General (OTJAG) announced that TJAG had “recently secured approval for the publication of a DA Pamphlet No. 27-100 series, entitled *Military Law Review*, to provide a medium for the military lawyer, active and reserve, to share the product of his experience and research with fellow lawyers in the Department of the Army.”<sup>5</sup> The announcement further solicited “articles, comments and notes treating subjects of import to the military” and requested that they be submitted “in duplicate” to TJAGSA in Charlottesville, Virginia.

The first issue of the *MLR* appeared as DA Pamphlet 27-100-1, dated 15 September 1958.<sup>6</sup> The lead article was by two members of TJAGSA’s faculty, Captain Cabell F. Cobbs and First Lieutenant Roberts S. Warren. Entitled “Military Searches and Seizures,” it had been adapted from a thesis written while the authors were members of the Fourth Advanced Course from 1955 to 1956. The second article, by Captain Dwan V. Kerig, was called “Compatibility of Military and Other Public Employment.” It also had originated as an Advanced Course thesis, and explored the many federal statutes governing military personnel (especially retirees) who sought to continue their service as U.S. civilian employees. The third and last article, “Legal Aspects of Non-Appropriated Fund Activities,” also had been a thesis and its author, Lieutenant Colonel Paul J. Kovar, likewise was a member of TJAGSA’s faculty.

While this first *MLR* was styled as a DA Pamphlet, it looked like any law school periodical. It was the same size and format, and followed the manner of citation in the Harvard *Blue Book* for civilian legal citations and the TJAGSA *Uniform System of Citation* for military citations. The inaugural September 1958 issue was well-received and a second volume appeared before the year was out. In 1959, the *MLR* established its publication schedule as quarterly (January, March, July, October) and, as would be expected of any civilian law review, was available for sale at \$.45 a copy or \$1.75 for a year’s subscription.

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<sup>5</sup> Memorandum from Colonel John E. O’Brien, Commandant, TJAGSA, to All Officers of the Judge Advocate General’s Corps, subject: A Chronicle of Recent Developments in Military Law of Immediate Importance to Army Judge Advocates 15 (30 Apr. 1958) (on file with author).

<sup>6</sup> As the second issue (Dep’t of the Army Pamphlet 27-100-2) is dated 17 September 1958, it is possible that the first issue appeared some months earlier.

### Editors and Staff

From the outset, the quality of the *MLR* depended on its editors and their staffs. But, while there was an *MLR* editor from the outset, no named editor appeared in the pages of the legal periodical until 1979, when Major Percival D. Park identified himself as the editor in an introductory preface to a symposium on international law.<sup>7</sup> It was not until Volume 95, however, which was published early in 1982, that the *MLR* had a masthead identifying Major Park as editor. This issue of the *MLR* also identified Ms. Eva F. Skinner as editorial assistant, the first time that a non-lawyer staff member had been listed in print.

Major Park had an amazing tenure at the *MLR*. After completing the 25th JA Advanced Course in May 1977, he took over as editor and did not give up this position until he completed Volume 95 (Winter 1982)—a nearly five-year tenure.

The next editor was Captain Connie S. Faulkner, who first appeared as an editor (but in an understudy status to Major Park) in Volume 95. Captain Faulkner is listed as editor in Volume 96 (Spring 1982), along with Captain Steven Kaczynski. He assisted Faulkner while serving primarily as editor for *The Army Lawyer*. Ms. Eva F. Skinner continued as editorial assistant.

Starting with Volume 101 (Summer 1983), Captain Kaczynski was promoted to be the editor of the *MLR*, with Captain Debra Boudreau listed as co-editor. Captain Boudreau, in fact, concentrated chiefly on editing *The Army Lawyer*. Kaczynski's editing finished with Volume 109 (Summer 1985) and, beginning with Volume 110 (Fall 1985), Captain Boudreau was the sole editor. Her last issue was Volume 113 (Summer 1986).

Major Thomas J. Feeney was the next editor (beginning with Volume 114), and he held the position until Captain Alan D. Chute took over as editor with the publication of Volume 120 (Spring 1988). Major Chute completed Volume 129 (Summer 1990) and passed the reins of the *MLR* to Captain Matthew E. Winter. In 1991, Major Winter won "Editor

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<sup>7</sup> 82 MIL. L. REV. 1, 2 (Fall 1978). Although Major Park was the first editor listed on the masthead, a photograph on file at TJAGLCS with the author states that "Captain Donald A. Donadio was the Chief, Publications Division and Editor, Military Law Review, in 1969."

of the Year” in an Army-wide competition to find the best editor of an Army publication. Winter’s tenure was relatively short; he edited issues 130 (Fall 1990) through 133 (Summer 1991).

In the fall of 1991, beginning with Volume 134, Captain Daniel P. Shaver took over as editor, with Ms. Skinner still identified as his assistant. Captain Shaver had also served as editor of *The Army Lawyer* from 1990 to 1991. Captain Shaver remained the editor until Volume 140 (Spring 1993), when Captain Stuart W. Risch took over as the sole *MLR* editor with the publication of Volume 141 (Summer 1993). Captain John B. Jones, Jr. joined Captain Risch as co-editor with the publication of Volume 146.

Captain Jones finished as sole editor with Volume 150 (Fall 1995) and Captain John B. Wells joined him as co-editor with the publication of Volume 151 (Winter 1996). After Ms. Skinner retired, Mr. Charles J. Strong was hired in December 1995 as editorial assistant. Mr. Strong would later be promoted to technical editor in 1998.

Captains Jones and Wells remained as co-editors through Volume 153 when the editorial staff expanded. Captain Albert R. Veldhuyzen was appointed senior editor with the publication of Volume 154 (October 1997), but Captain Wells and a new Judge Advocate, Captain Scott C. Murray, were also identified as editors.

Captain Murray was the sole editor for one issue, Volume 157 (October 1998). He was followed by then Captain Mary J. Bradley, who took over as senior editor with Volume 158 (December 1998) and continued her work through Volume 165 (September 2000). After editing *The Army Lawyer* for a year, Captain Todd S. Milliard took over as “senior editor” with Volume 166 (December 2000), although now Major Bradley remained on the masthead as editor.

The next editor was Captain Erik L. Christiansen, who assumed his duties with the publication of Volume 173 (September 2002) and continued his work through Volume 176 (June 2003). Starting with Volume 176, however, the *MLR* editorial board underwent a remarkable metamorphosis. There were two “editors-in-chief” (Captain Joshua B. Stanton and Captain Heather J. Fagan) and twelve “adjunct editors.” These are described as “professors at the School” and “Reserve officers

selected for their demonstrated academic excellence and legal research and writing skills.”<sup>8</sup>

With the publication of Volume 178 (Winter 2003), however, the number of editors decreased. Captain Andras M. Marton was now editor in-chief with Captain Fagan the assistant editor. Starting with Volume 180 (Summer 2004), Captain Anita Fitch was the chief editor, with Captain Fagan continuing as assistant editor. Captain Jennifer L. Crawford assumed the reins as editor with the publication of Volume 182 (Winter 2004), with Captain Anita J. Fitch moving to assistant editor and editor of *The Army Lawyer*.

Captain Colette E. Kitchel assumed the role of editor for Volume 185 (Fall 2005), with Captain Anita J. Fitch as assistant editor. Captain Kitchel continued her work through Volume 188 (Summer 2006), when she left active duty. Major Ann B. Ching is the current editor and, assisted by Mr. Strong and Captain Alison M. Tulud, is producing this Fiftieth Anniversary issue.

### **Content: Generally**

From the beginning, much of the content of the *MLR* came from work done by students in the Advanced and Graduate Courses. A well-written thesis on any topic was a candidate for publication, but so were scholarly papers of shorter length. Today, while student work continues to provide a steady source of *MLR* articles, scholarly pieces produced by civilian law school professors and civilian attorneys are also published. Reviews of books of interest to military law practitioners also have appeared in the pages of the *MLR* for many years.

While the *MLR*'s content over the past fifty years has been similar to what would be seen in a law review at any ABA-accredited law school, some key differences stand out. Until the creation of *The Army Lawyer* in August 1971 and the emergence of electronic publications like the “Quill and Sword” (published quarterly on JAGCNet since June 2005) provided other forums for Judge Advocate scholarship, the *MLR* was the only scholarly periodical produced at TJAGSA. This meant that articles

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<sup>8</sup> 177 MIL. L. REV. ii (Fall 2003).

were published that would not appear in the *MLR* today, such as a ten-page piece on Judge Advocate training in a logistical command exercise.<sup>9</sup>

The editors of the *MLR* also published articles that otherwise would not have been available—and arguably would have been lost—in the area of Regimental history. For example, the fourth *MLR*, published in March 1959, contained a general history article on the Corps.<sup>10</sup> Years later, Major Percival D. Park authored “The Army Judge Advocate General’s Corps, 1975 to 1982,”<sup>11</sup> which was an update to the Corps’ bicentennial history book, *The Army Lawyer: A History of the Judge Advocate General’s Corps, 1775–1975*.<sup>12</sup> This same *MLR* issue also contained a “finding aid” for *The Army Lawyer* compiled by Major Park. Since the original publication had been produced with only a table of contents and a bibliography (probably because the book was rushed into print for the Bicentennial celebrations of 1976), Major Park’s finding aid now provided readers with a detailed table of contents, list of illustrations and a subject-matter index—an invaluable tool for research.<sup>13</sup> Major Tom Feeney and Captain Margaret L. Murphy continued Major Park’s initiative when they published “The Judge Advocate General’s Corps, 1982–1987” in Volume 122.<sup>14</sup>

Other important legal history articles have been published over the years, including Frederick Bernays Wiener’s “The Seamy Side of the World War I Court Martial Controversy,” which examined the infamous struggle between TJAG Major General Enoch Crowder and the Acting TJAG Brigadier General Samuel Ansell over the extent of any reform to the Articles of War.<sup>15</sup> Wiener challenged the prevailing view<sup>16</sup> that this was a professional struggle, and insisted instead that Brigadier General Ansell had wronged his boss and was guilty of disloyalty. Another history article of note is Lieutenant Colonel John R. Howell’s “TDS:

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<sup>9</sup> John F. Wolf, *Judge Advocate Training in LOGEX*, 3 MIL. L. REV. 57 (1959).

<sup>10</sup> Colonel William F. Fratcher, *History of the Judge Advocate General’s Corps*, 4 MIL. L. REV. 89 (1959).

<sup>11</sup> 96 MIL. L. REV. 5 (Spring 1982).

<sup>12</sup> THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL’S CORPS, 1775–1975 (1975).

<sup>13</sup> 96 MIL. L. REV. 75 (1982).

<sup>14</sup> 122 MIL. L. REV. 1 (Fall 1988).

<sup>15</sup> 123 MIL. L. REV. 109 (Winter 1989).

<sup>16</sup> The prevailing historical view is to be found in Major Terry W. Brown, *The Ansell-Crowder Dispute: The Emergence of General Samuel T. Ansell*, 35 MIL. L. REV. 1 (1967).



The Establishment of the U.S. Army Trial Defense Service,”<sup>17</sup> which details the evolution of a separate stove-pipe legal organization for Army Judge Advocates serving as trial defense counsel at courts-martial. The establishment of the Trial Defense Service was a watershed event in military criminal law, and Lieutenant Colonel Howell’s piece captures it for posterity.

Over the years, hundreds of articles have appeared in the pages of the *MLR*. While most have focused on U.S. military law, the editors recognized from the outset that they should periodically publish articles on non-American military legal systems. In 1963, for example, there were three separate articles on Danish, Dutch and Swedish military law.<sup>18</sup> Three years later, Major Albert P. Blaustein authored an article on the military justice codes of Nigeria, Ghana and the Sudan.<sup>19</sup>

Finally, the *MLR* routinely published edited transcripts of lectures delivered at TJAGSA (now The Judge Advocate General’s Legal Center and School (TJAGLCS)) as part of the institution’s chaired lecture series. For example, the 25th Annual Kenneth J. Hodson lecture, presented by TJAG Major General Michael J. Nardotti, Jr. appears in Volume 151, as does the 2nd Annual Hugh J. Clausen Leadership Lecture presented by Lieutenant General Henry H. Shelton.<sup>20</sup> The *MLR* also has published transcripts of the first and second George S. Prugh Annual Lecture in Military Legal History.<sup>21</sup>

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<sup>17</sup> 100 MIL. L. REV. 4 (1983).

<sup>18</sup> Jozef Schuurmans, *A Review of Dutch Military Law*, 19 MIL. L. REV. 101 (1963); Soren B. Nyholm, *Danish Military Jurisdiction*, 19 MIL. L. REV. 113 (1963); Bengt Lindeblad, *Swedish Military Jurisdiction*, 19 MIL. L. REV. 123 (1963).

<sup>19</sup> Albert P. Blaustein, *Military Law in Africa: An Introduction to Selected Law Codes*, 32 MIL. L. REV. 43–79 (1966).

<sup>20</sup> Major General Michael J. Nardotti, Jr., *General Ken Hodson: A Thoroughly Remarkable Man*, 151 MIL. L. REV. 202–15 (1996); Lieutenant General Henry H. Shelton, *Attributes of a Leader*, 151 MIL. L. REV. 216–29 (1996). At the time, General Shelton was commander in chief of U.S. Special Operations Command. His next assignment (1997–2001) was Chairman of the Joint Chiefs of Staff.

<sup>21</sup> 190/191 MIL. L. REV. 153 (Winter 2006/Spring 2007); 196 MIL. L. REV. 187 (Summer 2008).

**Content: Specials Issues**

Just as this volume is a special commemoration of the *MLR*'s fifty years as a legal periodical, other important anniversaries and events have been honored with special issues.

The first, "A Symposium on Military Justice," was published in 1961 on the tenth anniversary of the enactment of the Uniform Code of Military Justice (UCMJ).<sup>22</sup> There were seven feature articles, a survey, or analysis, of the work done by the Court of Military Appeals, and three shorter comments. The emphasis was on the practical aspects of prosecuting and defending courts-martial under the UCMJ. As more than a few Judge Advocates then in the Corps had experience with the Articles of War, the ten years between 1951 and 1961 had been nothing short of revolutionary.

It is clear from the pages of Volume 12 that Judge Advocates were proud of the UCMJ. As TJAG Charles L. Decker said in his foreword, the code "was designed to provide greater uniformity among the several armed forces and to remedy conditions which had been the subject of much adverse criticism."<sup>23</sup> General Decker undoubtedly spoke for the majority when he wrote that he wanted "our system of military justice . . . [to] become the most modern, useful, and enlightened system extant."<sup>24</sup>

Not surprisingly, the articles in this symposium reflected the inchoate nature of this new military justice system. For example, Professor Robinson O. Everett, who would later serve as Chief Judge of the Court of Military Appeals, penned an article called "The Fast Changing Law of Military Evidence."<sup>25</sup> Captain Hugh Clausen, who subsequently served as TJAG from 1981 to 1985, authored a piece called "Rehearings Today in Military Law."<sup>26</sup>

This inaugural special issue in criminal law was followed the next year by a Symposium on Procurement Law.<sup>27</sup> A foreword by Brigadier

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<sup>22</sup> 12 MIL. L. REV. (1961).

<sup>23</sup> Major General Charles L. Decker, *Foreword to a Symposium on Military Justice*, 12 MIL. L. REV. v (1961).

<sup>24</sup> *Id.*

<sup>25</sup> 12 MIL. L. REV. 89 (1961).

<sup>26</sup> *Id.* at 145.

<sup>27</sup> 18 MIL. L. REV. (1962).

General Nathan J. Roberts, the Assistant JAG for Civil Law, explained that articles in this *MLR* had been chosen for their substantive value but also “to illustrate the controversy and the constant change that make the practice of procurement law the fascinating and demanding task that it is.”<sup>28</sup> Since one half of the Department of Defense’s annual budget was earmarked for procurement, Brigadier General Roberts emphasized that the role of the Army lawyer in ensuring that dollars were lawfully spent was of critical importance. There were articles on the judicial and non-judicial remedies of a government contractor, how to reduce state and local tax costs to compete more effectively for government contracts, and an examination of bid guarantees in federal procurement.

Other special issues followed, with the largest ever—at more than 650 pages—being published when the Corps celebrated its 200th birthday in 1975. This “Bicentennial Issue” reprinted seventeen articles that had “significantly influenced the development and administration of military law.”<sup>29</sup> The articles in this special issue fit into two categories. First, there were legal history essays that anticipated the development of military law and that consequently provided a socio-political context. These included General Henry W. Halleck’s “Military Tribunals and Their Jurisdiction,” which had first appeared in the *American Journal of International Law* in 1911.<sup>30</sup> Brigadier General Samuel T. Ansell’s *Cornell Law Quarterly* article on military justice also was included, no doubt because Ansell’s claims that military justice as it then existed was “archaic” and “un-American” reverberated for years and ultimately resulted in a uniform code of military criminal law in 1950.<sup>31</sup> But there were more recent historical pieces, such as Navy Judge Advocate Joseph E. Ross’ article on the historical background of the Military Justice Act of 1968.<sup>32</sup>

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<sup>28</sup> *Id.* at 1.

<sup>29</sup> MIL. L. REV. BICENT. ISSUE (1975).

<sup>30</sup> 5 AM. J. INT’L L. 958 (1911). Halleck, who served as General in Chief of the Union armies from 1862 to 1864, was a practicing lawyer and the first American whose writings were internationally known; his sponsorship of Francis Lieber’s codification of the laws of land warfare—which was published as General Orders No. 100 in 1863—remains an important milestone in the development of the law of armed conflict.

<sup>31</sup> MIL. L. REV. BICENT. ISSUE 53 (1975); Samuel T. Ansell, *Military Justice*, 5 CORNELL L.Q. (1919). Ansell served as acting Judge Advocate General of the Army from 1917 to 1919, while the JAG, Major General Enoch Crowder, was serving as Provost Marshal General and overseeing the operation of the first peacetime draft since the Civil War.

<sup>32</sup> MIL. L. REV. BICENT. ISSUE 273 (1975); Joseph E. Ross, *The Military Justice Act of 1968: Historical Background*, 23 JAG J. 125 (1969).

Essays for the practitioner comprised the second category of this special issue. For example, a *Tennessee Law Review* article on the constitutional basis for U.S. ownership of land (which included a lengthy analysis of the distinction made by the courts between the U.S. government's "sovereign" as opposed to "proprietary" interests) was included.<sup>33</sup> So too was an essay on the legal problems of non-appropriated funds<sup>34</sup>—an area of the law that continues to be of great interest to Judge Advocates.

Over the years, the *MLR* has published other special issues of note. In the spring of 1978, after a special panel discussion on new developments in the law of war was held at TJAGSA, the *MLR* published an edited transcript of this discussion along with a series of scholarly articles in a two-issue set, "International Law Symposium."<sup>35</sup> This was followed a few months later by a "Symposium on Administrative and Civil Law" that included articles on probate and the military and the origins of TJAG's civil authority.<sup>36</sup> The next issue was a "Symposium on Contract Law,"<sup>37</sup> followed by a "Symposium on Criminal Law"<sup>38</sup>

In the late 1980s and 1990s, volumes concentrating on particular areas of practice continued to be published. While the Corps had officially created an Army Legal Assistance Program during World War II, its increasing importance in military legal practice led to a series of issues devoted to this area of practice. The "First Legal Assistance Symposium" appeared in 1983; the "Second Legal Assistance Symposium" was published in 1986; and the "Third Legal Assistance Symposium" appeared in 1991.<sup>39</sup> Recently, the *MLR* published its "Fourth Legal Assistance Symposium."<sup>40</sup> Each addressed some aspect of family law, taxation, property law, or civil rights, with an emphasis on a pro-active approach to providing legal advice and counsel to Soldiers and their families.

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<sup>33</sup> MIL. L. REV. BICENT. ISSUE 513 (1975); Toxey H. Sewell, *The Government as a Proprietor of Land*, 35 TENN. L. REV. 287 (1968).

<sup>34</sup> MIL. L. REV. BICENT. ISSUE 357 (1975). *Legal Problems of Non-appropriated Funds: Hearings on S. 3263 Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 90th Cong. 201 (1968) (statement by Michael F. Noone).

<sup>35</sup> 82 MIL. L. REV. (Fall 1978); 83 MIL. L. REV. (Winter 1979).

<sup>36</sup> 85 MIL. L. REV. (Summer 1979).

<sup>37</sup> 86 MIL. L. REV. (Fall 1979).

<sup>38</sup> 88 MIL. L. REV. (Spring 1980).

<sup>39</sup> 102 MIL. L. REV. (Fall 1983); 112 MIL. L. REV. (Spring 1986); 132 MIL. L. REV. (Spring 1991).

<sup>40</sup> 177 MIL. L. REV. (Fall 2003).

### Content: Articles of Note

The past fifty years has seen an abundance of scholarly articles published in the *MLR*. Some had a marked impact on the development of military law; several are still cited by today's practitioners.

In the area of military criminal, Major Ron Holdaway's "Voir Dire—A Neglected Tool of Advocacy"<sup>41</sup> remains the single best analysis on the differences between voir dire in civilian and military courts, and the extent to which defense counsel may use voir dire to educate panel members about the case. Major Kevin Carter's *Fraternization* continues to be a key source for those interested in the topic.<sup>42</sup> His article traces the history of fraternization in the Army and provides hundreds of illustrative courts-martial. It remains the best historical treatment of the offense ever written.

In the area of death penalty litigation, Marine Captain Dwight H. Sullivan's *The Last Line of Defense: Federal Habeas Review of Military Death Penalty Cases*<sup>43</sup> remains the key article on this area of military criminal practice. With the recent decision by President George W. Bush to approve the first military death sentence in more than fifty years—and the fact that habeas review of this court-martial is near—Captain Sullivan's article has lost none of its relevance.<sup>44</sup>

Major William T. Barto's article on double jeopardy, lesser included offenses, and the problem of multiplicity remains the seminal article on this area of military criminal law. Practitioners continue to find it

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<sup>41</sup> 40 MIL. L. REV. 1 (1968). After serving on TJAGSA's staff and faculty from 1967 to 1969 (during which time his article on voir dire was published), Holdaway served in a variety of assignments, including: Staff Judge Advocate (SJA), 1st Cavalry Division, Vietnam; SJA, VII Corps, Germany; and Judge Advocate, Office of the Judge Advocate, U.S. Army Europe. He retired as a Brigadier General in 1989.

<sup>42</sup> 113 MIL. L. REV. 1 (1986).

<sup>43</sup> 144 MIL. L. REV. 1 (Spring 1994). Sullivan, who left active duty to take a position with the American Civil Liberties Union of Maryland, remained in the Marine Corps Reserve. He later served as the Chief Defense Counsel for the Office of Military Commissions from August 2005 to August 2007. See Captain Dwight H. Sullivan, *Playing the Numbers: Court Martial Panel Size and the Military Death Penalty*, 158 MIL. L. REV. 1 (1998); *Killing Time: Two Decades of Military Capital Litigation*, 189 MIL. L. REV. 1 (Fall 2006).

<sup>44</sup> On 28 July 2008, President Bush approved the death sentence in *United States v. Ronald A. Gray*. A former Army cook convicted of multiple rapes and murders, Gray has been on death row at the Disciplinary Barracks, Ft. Leavenworth, Kan., since April 1988.

valuable because of its helpfulness in determining proper charging at courts-martial.<sup>45</sup>

In the area of international and operational law, no article has been more widely read or more often cited than Major Mark S. Martins's "Rules of Engagement for Land Forces: A Matter of Training, not Lawyering."<sup>46</sup> Major Martins's article (also originally a thesis completed while he was a student at TJAGSA) was especially important because, for the first time, he suggested a comprehensive series of training scenarios and other practical tips for imparting rules of engagement to individual Soldiers and Marines. Major Martins's suggestions revolutionized the way in which Judge Advocates—and the commanders they served—thought about ROE and trained Soldiers on the use of force.

In the area of administrative and civil law, then Captain Holly Cook's 1996 article on affirmative action is still considered by many practitioners to be the best ever published on the subject.<sup>47</sup> Captain Cook examined the legality of Army programs granting minority employment preferences in the aftermath of the Supreme Court's decision in *Adarand Constructors, Inc. v. Peña*<sup>48</sup> and concluded that the Army needed to drastically modify, if not end, its current affirmative action efforts.<sup>49</sup> Although a number of cases have been decided since Captain Cook's article, it remains the starting point for legal research on the applicability of "strict scrutiny" to the Army's affirmative action programs.

Another *MLR* article that has stood the test of time was written by retired Lieutenant Colonels J. Mackey Ives and Michael J. Davidson. Their "Court-Martial Jurisdiction Over Retirees under Articles 2(4) and 2(6): Time to Lighten Up and Tighten Up?"<sup>50</sup> remains a valuable resource for Litigation Division attorneys wrestling with Regular and Reserve retiree recall issues.

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<sup>45</sup> Major William T. Barto, *Alexander the Great, the Gordian Knot, and the Problem of Multiplicity in the Military Justice System*, 152 MIL. L. REV. 1 (1996).

<sup>46</sup> 143 MIL. L. REV. 3 (1994).

<sup>47</sup> Holly O'G. Cook, *Affirmative Action: Should the Army Mend It or End It?*, 151 MIL. L. REV. 113 (1996).

<sup>48</sup> 515 U.S. 200, 229–31 (1995).

<sup>49</sup> Cook, *supra* note 47, at 193.

<sup>50</sup> 175 MIL. L. REV. 1 (2003).

### **Publishing the *MLR* Today and Tomorrow**

At present, TJAGLCS publishes the *MLR* both in paper and electronically as a portable document file (.pdf). About 5000 paper copies of each volume are published through a private printer obtained under contract through U.S. Army Publications and Printing Command, Rosslyn, Virginia. Some are mailed directly to subscribers, while others go to law libraries and other institutions. Starting in mid-July 2001, each new *MLR* volume also was published as a .pdf and posted to <http://www.jagcnet.army.mil/mlr>. Accessible by the general public, this website has .pdf versions of every volume since 1958.

To ensure that the *MLR* reaches the widest possible audience—and is available to those doing legal research—it is indexed in a variety of publications, including the Index to Legal Periodicals and Legal Resources Index. More importantly, as legal research is now heavily Internet-based, the publication is available in at least five computerized electronic databases: LEXIS, Westlaw, the Public Affairs Information Service, The Social Sciences Citation Index, and JAGCNet.

The *MLR* will continue to be published in paper for the foreseeable future, albeit possibly in smaller numbers. Regardless of advances in electronic publishing, however, these paper issues are unlikely to disappear; printed volumes will always be retrievable and readable, while electronic media formats change so rapidly that what is “published” electronically today may very well be unreadable within twenty-five years.

### **Conclusion**

The beginning of the twenty-first century has witnessed increasingly complex military operations around the globe. The multitude of ensuing legal issues will ensure that the *MLR* will continue to serve as a valuable resource, not just for military attorneys and paralegals, but for scholars, civilian practitioners, and jurists. As the *MLR* begins its next half century of service to the military legal community, General Decker’s vision of scholarly excellence in military legal writing will continue to shape its mission.