

The True Story of a Colonel's Pigtail and a Court-Martial

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In July 1805, Lieutenant Colonel (LTC) Thomas Butler, Jr. was court-martialed for refusing an order to crop his hair short and for “mutinous conduct” in appearing publicly in command of troops with his hair in a pig-tail or “queue” as it was called. He was found guilty of both charges and sentenced to a year’s suspension from command and of pay. What follows is the true story of how Butler—a senior officer who had fought in the Revolutionary War and had spent nearly thirty years in uniform—was prosecuted for refusing to cut off his pigtail.

Hairstyles in the Army have usually reflected the civilian fashion of the period. In the late 1960s, for example, most young men had long hair (whites had hair over their ears; African-Americans wore the popular “Afro”). Moustaches and beards were popular, too. More than a few Soldiers—many of whom were draftees—who wanted to look like their civilian counterparts faced the wrath of their First Sergeant, who usually sported a crew-cut. Those who did not listen to “Top” and get their hair cut shorter always had the option to appear before their company commander for an Article 15.

The Army of the Revolutionary War era was no different. Soldiers in General George Washington’s Continental Army wore their hair in accordance with the longish styles of the day. This explains why Continental Army General Orders published by Washington’s headquarters required Soldiers “to wear their hair short or plaited (braided) up.” But a Soldier also had the option to wear his long hair “powdered and tied.”<sup>1</sup>

Continental Army personnel who did powder and tie their hair did so with a mixture of flour and tallow, a hard animal fat. Powdered hair was usually tied in a pigtail or queue. According to Randy Steffen in *The Horse Soldier 1776-1943*, cavalrymen preferred a “clubbed” hairstyle in which hair, gathered at the back of the neck, was tied in a firm bundle, folded to the side, and then tied again in a club. Mounted Soldiers liked the club because it “was likely to stay in place during the excitement and violent action of a mounted fight.”<sup>2</sup>

The practice of wearing long hair—tied in a club or simple queue—continued in the Army after the

Revolutionary War. By the early 1800s, shorter hairstyles had become fashionable in civilian America, but Soldiers continued to prefer to wear their hair in a pigtail. According to an article published in *Infantry Journal* in 1940, this fashion was considered by some Soldiers “almost as a prerogative—a badge of their caste.”<sup>3</sup>

Imagine their horror and dismay when, on 30 April 1801, the Army’s Commanding General, Major General (MG) James Wilkinson, announced in General Orders that all hair would be “cropped, without exceptions of persons.” The practice of wearing a queue, club, or pigtail had been abolished.

At least one historian has speculated that Wilkinson’s decision to end the wearing of long hair in powdered queues, clubs, and other types of pigtails was motivated by a desire to curry favor with then-President Thomas Jefferson, who wore his own hair short and not powdered.<sup>4</sup> However, this is merely speculation, and it is just as likely that Wilkinson simply believed 18th century aristocratic hair styles were ill-suited to the new United States, where every male citizen was asked to reject old European (and aristocratic) fashions and adopt a true republican lifestyle—and shorter hair.

Regardless of Wilkinson’s motivation in directing U.S. Soldiers to cut their hair short, his order provoked considerable resistance. Some Soldiers were outraged because they considered the hair order to be nothing short of required self-mutilation. Others did not want to serve in an Army that infringed on their natural rights. For example, Captain Daniel Bissell wrote his brother, “I was determined not to cut my hair . . . I wrote my Resignation & showed it, but . . . the Col. was not impowered [sic] to accept, nor was the pay Master here.”<sup>5</sup> It seems that Bissell could only resign his commission if he traveled 1800 miles (Bissell was located on a remote frontier post in Wilkinsonville, Georgia) to Washington, D.C., and submitted his resignation papers personally. Being unable to make such a journey, Bissell “was obliged to submit to the act that [he] despised” and cut his hair short.<sup>6</sup>

<sup>3</sup> Frederick P. Todd, *The Ins and Outs of Military Hair*, INFANTRY J. 166 (Mar.–Apr. 1940).

<sup>4</sup> Frederick B. Wiener, *The Colonel’s Queue*, ARMY 39 (Feb. 1973).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>1</sup> RANDY STEFFEN, 1 THE HORSE SOLDIER 1776–1943, at 35 (1977).

<sup>2</sup> *Id.*

While the rank-and-file and officers like Bissell eventually acquiesced and cut their queues, there was a lone hold-out: LTC Thomas Butler. He adamantly refused to cut off his pigtail. Initially, at his own request and “in consideration of his infirm health,”<sup>7</sup> Butler obtained an exemption from the cropping order, but the reprieve, which Butler had obtained from Wilkinson personally, was short-lived. The Secretary of War, Dr. William Eustis, rescinded the exemption.

Butler, his feelings hurt and his honor insulted, refused to comply with the Secretary’s order. As a result, Butler appeared before a general court-martial in Fredericktown (now Frederick), Maryland, in November 1803. He was found guilty of disobeying the April 1801 hair order and was sentenced to be reprimanded.

In authoring the reprimand MG Wilkinson wrote that “rank & responsibility go hand in hand. . . . [T]hey are inseparable.” While the actions of a younger officer might be excused, “gray hairs” should know better, and while such “gray hairs, wounds, scars & a broken constitution present strong claims to our compassion . . . they illy [sic] apply to the vindications of military trespasses.”<sup>8</sup>

Butler, however, continued to resist. After he repeatedly refused to cut off his queue, he was court-martialed a second time in July 1805. This time, a general court-martial sitting in New Orleans, Louisiana, convicted him of two charges: disobedience of a lawful order (to cut his hair) and “mutinous conduct by appearing publicly in command of troops with his hair cued.”<sup>9</sup> Knowing that the reprimand imposed by the first court-martial had not corrected Butler’s conduct, the second court-martial sentenced him to be suspended from command and of pay for twelve months. This was a severe punishment, given Butler’s seniority and three decades of service. Major General Wilkinson, then on duty in St. Louis, Missouri, approved this sentence on September 20, 1805.

Unknown to Wilkinson, however, Butler had died thirteen days earlier in New Orleans, probably of yellow fever. He was unrepentant to the end, having refused to crop his hair. In fact, when Butler was near death, he asked his friends to “bore a hole through the bottom of my coffin right under my head, and let my queue hang through it, that the damned old rascal (Wilkinson) may see that, even when dead, I refused to obey his orders.”<sup>10</sup> As a result, Butler was in fact buried in a coffin with a hole that allowed his queue to protrude through it—for all to see and to report to MG Wilkinson.

So ends the true story of a colonel’s pigtail and a court-martial. Twice defeated in life, LTC Butler was seemingly victorious in death.

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Dorothy van Woerkom, *Colonel Butler’s Queue*, AM. HIST. ILLUSTRATED 25 (Feb. 1973).

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<sup>10</sup> *Id.*

**TJAG for a Day and TJAG for Two Days:  
Brigadier Generals Thomas F. Barr and John W. Clous**

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

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

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

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

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

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

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

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

<sup>1</sup> JOHN W. LEONARD & ALBERT N. MARQUIS, *WHO'S WHO IN AMERICA*, 1908–1909, at 98 (1908).

<sup>2</sup> BUREAU OF MILITARY JUSTICE, WAR DEPARTMENT, *A SKETCH OF THE HISTORY AND DUTIES OF THE JUDGE ADVOCATE GENERAL'S DEPARTMENT* 19 (1878).

<sup>3</sup> For more on the Reno court of inquiry, see RONALD H. NICHOLS, *IN CUSTER'S SHADOW: MAJOR MARCUS RENO* (1999).

<sup>4</sup> U.S. ARMY, *THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775–1975*, at 92 (1975) [hereinafter *THE ARMY LAWYER*].

<sup>5</sup> LEONARD & MARQUIS, *supra* note 1, at 366.

<sup>6</sup> LOUISE BARNETT, *UNGENTLEMANLY ACTS: THE ARMY'S NOTORIOUS INCEST TRIAL* 70 (2000).

engagement with Native American tribes, Clous was again cited for gallantry in combat.<sup>7</sup>

In 1881, while serving in the Department of Texas, Clous, who had previously studied law, was detailed as the judge advocate in the infamous court-martial of Lieutenant Henry O. Flipper, the first African-American graduate of the U.S. Military Academy. Flipper, who had been the acting commissary officer at Fort Davis, Texas, had been charged with embezzlement and conduct unbecoming an officer and gentlemen arising from a shortage of funds at Fort Davis. Major Clous prosecuted the case but failed to convince the court that Flipper was guilty of the first charge. However, the panel did find that Flipper had committed a crime by concealing the shortage of monies, and this conviction required that he be dismissed from the service. Secretary of War Lincoln and President Chester Arthur subsequently approved the verdict and sentence of the court.<sup>8</sup>

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

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

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

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

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

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<sup>7</sup> THE ARMY LAWYER, *supra* note 4, at 92.

<sup>8</sup> For more on the Flipper court-martial, see CHARLES M. ROBINSON, THE COURT MARTIAL OF LIEUTENANT HENRY FLIPPER (1994).

<sup>9</sup> LEONARD & MARQUIS, *supra* note 1, at 366.

<sup>10</sup> THE ARMY LAWYER, *supra* note 4, at 92.

<sup>11</sup> *Id.*

## Lore of the Corps

### Shot by Firing Squad: The Trial and Execution of Pvt. Eddie Slovik

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“Squad, ready. Aim. FIRE.” With that last command, a party of twelve American Soldiers fired their rifles at an Army private tied to a wooden post. It was 31 January 1945 and Private (PVT) Eddie D. Slovik, his head covered by a black hood as required by military regulations, was killed instantly. His death by firing squad in France was the only execution of an American for a purely military offense since the Civil War.<sup>1</sup>

Born in Detroit in February 1920, Slovik grew up in a poor home environment. He quit school at the age of fifteen and was repeatedly in trouble with the law. In the late 1930s, Slovik was convicted of embezzlement in state court and sentenced to six months to ten years in prison.

Slovik was still incarcerated when the United States entered World War II and, when released in April 1942, was classified “4-F” as an ex-convict. This meant he had initially escaped the draft, as the Army had sufficient manpower and did not need to draft convicted felons. In late 1943, however, facing an increased need for able-bodied young men, the War Department reclassified Slovik as “I-A” (available and fit for general military service) and inducted him.

After completing basic training at Camp Wolters, Texas, PVT Slovik shipped out to Europe in August 1944. Assigned to the 109th Infantry Regiment, a part of the Pennsylvania National Guard 28th Infantry Division, Slovik and other replacements were on their way to their unit in Elbeuf, France, when they were attacked by German forces. Slovik intentionally avoided combat and walked away. He then joined up with a Canadian unit and did odd jobs, including cooking, for the next forty-five days. Slovik was returned to U.S. authorities on 4 October 1944 and reported back to the 109th Infantry three days later.

When questioned by his company commander, Captain (CPT) Ralph O. Grotte, about this absence, Slovik told Grotte that he was “too scared, too nervous” to serve with a rifle company and would desert again if ordered to fight.<sup>2</sup> Slovik was then ordered to remain in the company area. Shortly thereafter, he returned to CPT Grotte and asked: “If

I leave now, will it be desertion?”<sup>3</sup> When Grotte said yes, Slovik left without his weapon.

The next day, PVT Slovik surrendered to a nearby unit and handed a cook a signed, hand-printed note that said, in part:

I Pvt. Eddie D. Slovik confess to the Desertion of the United States Army. . . . I told my commanding officer my story. I said that if I had to go out their again Id run away. He said there was nothing he could do for me so I ran away again AND ILL RUN AWAY AGAIN IF I HAVE TO GO OUT THEIR.<sup>4</sup>

After being returned to the 109th Infantry on 9 October, Slovik’s commander told him that the written note was damaging to his case and that he should take it back and destroy it. Slovik refused and was confined to the division stockade.

On 19 October, Slovik was charged with two specifications of desertion, in violation of the 58th Article of War. Both specifications alleged that he deserted “with intent to shirk hazardous duty and shirk important action, to wit: action against the enemy” on two different occasions: his forty-five day desertion from 25 August to 4 October 1944 and his one-day desertion from 8 to 9 October 1944.

On 26 October, Lieutenant Colonel Henry P. Sommer, the division judge advocate, offered Slovik a deal: if he would go into the line—that is, accept a combat assignment—he could escape court-martial. Slovik refused this offer and on 29 October his case was referred to trial by general court-martial.

On 11 November 1944, Slovik was tried for desertion. He pleaded not guilty and elected to remain silent. At the end of a two-hour trial, a nine-member panel found Slovik guilty and sentenced him to death.<sup>5</sup>

After Slovik was confined to the Army stockade in Paris, France, Sommer reviewed the record of trial. He recommended to Major General (MG) Norman “Dutch”

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<sup>1</sup> WILLIAM B. HUIE, *THE EXECUTION OF PRIVATE SLOVIK* 210–14 (1970); see also, U.S. ARMY, *THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL’S CORPS, 1775–1975*, at 192–94 (1975).

<sup>2</sup> HUIE, *supra* note 1, at 127.

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<sup>3</sup> *Id.* at 128.

<sup>4</sup> *Id.* at 120.

<sup>5</sup> *Id.* at 110.

Cota, the division commander, that the findings and sentence be approved. Cota approved the findings and sentence on 27 November.

From 1 December 1944 to 6 January 1945, Brigadier General E. C. McNeil, the senior Army lawyer in the European Theater, and lawyers on McNeil's staff, reviewed Slovik's case. McNeil wrote:

This is the first death sentence for desertion which has reached me for examination. It is probably the first of its kind in the American Army for over eighty years—there were none in World War I. In this case, the extreme penalty of death appears warranted. This soldier had performed no front line duty. He deserted from his group of about fifteen when about to join the infantry company to which he had been assigned. His subsequent conduct shows a deliberate plan to secure trial and incarceration in a safe place. The sentence adjudged was more severe than he anticipated, but the imposition of a less severe sentence would only have accomplished the accused's purpose in securing his incarceration and consequent freedom from the dangers which so many of our armed forces are required to face daily. His unfavorable civilian record indicates that he is not a worthy subject of clemency.<sup>6</sup>

On 23 January 1945, Eisenhower ordered Slovik's execution by firing squad and directed that the shooting occur in the 109th's "regimental area." Note that General Eisenhower did not simply decline to intervene in the Slovik case. On the contrary, he *ordered* that Slovik be shot. As for MG Cota, he understood that Slovik's execution required his personal involvement—if for no other reason than to underscore the gravity of the situation. That explains why "Dutch" Cota personally informed Slovik that he was to be executed by firing squad, and why Cota then stood in the snow in the courtyard, faced Slovik, saw him shot, and reported to Eisenhower that the order had been carried out.<sup>7</sup> While 142 American Soldiers were executed—for murder, rape, and murder-rape—during World War II, Slovik's was the only execution for desertion in the face of the enemy.

In the years after Slovik's death, his widow campaigned relentlessly for his records to be changed so that she could receive the proceeds of his \$10,000 life insurance policy. While many were sympathetic, she and her supporters were unsuccessful.

Today, most historians believe that Slovik might have escaped a firing squad had his timing been better. However, the 28th Infantry Division was engaged in bloody fighting in Huertgen Forest at the time of his trial, and the court-martial panel was in no mood for leniency. Additionally, when Eisenhower acted on Slovik's case, the Battle of the Bulge was raging and American forces were in serious trouble in the face of a German surprise offensive. The possibility of leniency was outweighed by the view that maintaining discipline in the face of the enemy required that Slovik be executed.

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<sup>6</sup> OTJAG, Criminal Law Division, Information Paper, subject: Private Eddie Slovik, USA (deceased) (10 Dec. 1981) (on file with author).

<sup>7</sup> HUIE, *supra* note 1, at 103.

## Lore of the Corps

### Indians as War Criminals? The Trial of Modoc Warriors by Military Commission

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Early in the morning of Good Friday, 11 April 1873, Brigadier General (BG) Edward R.S. “Richard” Canby stepped out of his tent, which was pitched near Tule Lake on the California-Oregon border. Canby, a 56-year-old West Point graduate and veteran of the Civil War, was the commander of the Department of the Columbia, which consisted of the State of Oregon and the Territories of Washington, Idaho, and Alaska. He was near Tule Lake that day to negotiate a peaceful settlement to the war that had broken out between a band of Modoc Indians and U.S. Army troops and territorial militia. Although he did not know it, Canby’s attempt at negotiation was destined for utter failure. Within hours he was dead—shot in the head and back by the Modoc Chief Kientpoos. Also dead was another member of Canby’s peace commission, and two more men were badly injured.<sup>1</sup>

The brutal murders shocked Americans, and the Army’s Commander-in-Chief, Major General William T. Sherman, exclaimed that the Modoc treachery fully justified their “utter extermination.”<sup>2</sup> In any event, on 1 June 1873, Kientpoos and his fellow Modocs were in Army custody. But what was to be done? Should these assassins be summarily dealt with? Should they be turned over to civilian authorities for prosecution? After considerable discussion, the U.S. Government decided that the Modocs responsible for murdering Canby and his fellow commissioner should be tried by military commission. As a result, on 1 July 1873, Kientpoos and five other Modoc warriors stood trial for the war crime of violating a flag of truce by committing murder during a suspension of hostilities. It was the only time in U.S. history that Native Americans were tried by an Army court for war crimes.

In October 1864, the Modoc tribe had signed a treaty with the United States in which the tribe agreed to give up ancestral lands on the Oregon-California border and move thirty miles north to the Klamath Indian Reservation. Within a short time, however, the Modocs regretted their decision. In early 1870, they left the reservation and returned to their ancestral home. Led by their chief, Kientpoos, better known as “Captain Jack,” the tribe of 371 men, women, and children set up camp in an area near Tule Lake.

The Army’s mission was to force the Modocs to return to the reservation. The Modocs resisted and were only defeated, on 29 January 1873, after months of fighting. In an attempt to negotiate an end to this small war, the Secretary of the Interior appointed a special “peace commission” headed by BG Canby. The other members of the peace commission were the Reverend Eleasar Thomas, L.S. Dyar, and Alfred Meacham.

On Good Friday, 11 April 1873, the four commissioners went to meet Captain Jack and the Modocs. All agreed to come unarmed. There were some warning signs that the commissioners might be in danger, but Canby insisted that the negotiations proceed because he thought the presence of so many Soldiers in the area would intimidate Captain Jack.

Soon after the men began to parley, they reached an impasse. Then, on a signal from Captain Jack, two Modoc warriors in hiding began firing at the commissioners. Captain Jack then pulled out a pistol and shot Canby in the face, killing him instantly. Thomas was also killed in the gunfire. Dyar and Meacham survived, although the latter was badly wounded. As for Captain Jack and his accomplices, they escaped but were soon captured.

The U.S. Government was incensed that Canby had been killed while “under a flag of truce,” and his status as a Regular Army officer and Civil War veteran only heightened this anger. Local civilian authorities wanted to prosecute the Modocs for murder, but U.S. Attorney General George H. Williams and BG Joseph Holt, then serving as The Judge Advocate General, opined that a military commission should hear the case. They reasoned that the Modoc tribe was akin to a foreign nation, that a state of war existed between the tribe and the United States, and that the killing of Canby during peace negotiations was a war crime.<sup>3</sup>

On 1 July 1873, a military commission consisting of five Army officers heard evidence against Captain Jack and five other Modocs. All were found guilty of murder. Four were sentenced to be hanged by the neck until dead. Once President Ulysses S. Grant approved their sentences, the accused were hanged at Fort Klamath, Oregon, on 3 October 1873.

<sup>1</sup> For the details on Canby’s life, see Max L. Heyman, Jr., *Prudent Soldier: A Biography of Major General E.R.S. Canby* (1959).

<sup>2</sup> Wilfred P. Deac, *Indian Fortress Assailed*, WILD WEST, Feb. 1991, at 39.

<sup>3</sup> For more on the decision to try the Modocs by military commission, see Doug Foster, “*Imperfect Justice: The Modoc War Crimes Trial of 1873*,” 100 OREGON HISTORICAL Q., Fall 1999, at 246–87.

Measured against today's court-martial procedure, the Modoc military commission was flawed. The accused did not have the assistance of defense counsel, and the trial lasted only four days. Perhaps most importantly, the five officers who decided the case were not impartial or unbiased; all knew Canby, and all admired him. However, this military commission was a unique event in our military legal history: the only time the Army ever prosecuted Native Americans for violating the law of armed conflict.

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## Lore of the Corps

### Judge Advocates in the Empire of Haile Sellasie: Army Lawyers in Ethiopia in the Early 1970s

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While judge advocates currently serve in a variety of locations, from Afghanistan, Germany, and Honduras to Iraq, Italy, and Japan, few in our Corps today remember that Army lawyers also once served in Africa—in the Empire of Ethiopia.

In the early 1970s, Army lawyers served on the horn of Africa at the U.S. Army Security Agency Field Station in Asmara, Ethiopia.<sup>1</sup> Asmara's geographic location near the equator and its altitude (7600 feet above sea level) made it the ideal location for a Cold War era "listening station" to monitor Soviet-bloc radio traffic—which explains why there were roughly 3500 Americans in Asmara at "Kagnew Station" in the early 1970s.

The lawyers assigned to the "Judge Advocate Office" in Asmara, Ethiopia, from 1971 to 1972 were Major (MAJ) Raymond K. Wicker, Captain (CPT) Michael P. Miller, and CPT Nathaniel P. Wardwell.<sup>2</sup> Wicker was the "Judge Advocate" while Miller and Wardwell were "Assistant Judge Advocates." All three lawyers provided legal advice to "clients" located at the Army Security Agency (which ran Kagnew Station). In addition, these judge advocates advised American uniformed and civilian personnel assigned to the Navy and Air Force communications stations, State Department communications center, and the Air Force Post Office.

The volume of work and the variety of issues were considerable. Military justice advice to the special court-martial convening authority at Kagnew Station consisted chiefly of advice on Article 15 punishment, but there were also some summary courts-martial. The limited jurisdiction of the convening authority, however, caused some problems. For example, CPT Wardwell wrote at the time that a number of special courts-martial tried in Ethiopia during his tour of duty there "would probably be referred as general courts-martial elsewhere."<sup>3</sup> In any event, the joint nature of

command resulted in some unusual, if not unique, military justice actions: one special court-martial "involved the trial of a Navy radioman, who was prosecuted and defended by Army attorneys, before an Army judge, and with a Navy court reporter."<sup>4</sup> Not only was this an "interesting example of interservice cooperation," but since the court-martial occurred in Africa, it likely was a unique event in the history of the Uniform Code of Military Justice.

As far as local criminal and civil matters were concerned, an Ethiopian-U.S. executive agreement relating solely to Kagnew Station, signed in 1953, provided that members of the U.S. forces were "immune from the criminal jurisdiction of the Ethiopian courts and, in matters arising from the performance of their official duties, from the civil jurisdiction of the Ethiopian courts."<sup>5</sup> While this might seem to have been a good situation, it was not necessarily so. For example, if the manager of the Kagnew Station post exchange embezzled funds, or if a military spouse killed her husband at Kagnew Station, no court would have had subject-matter jurisdiction over the offenses.

The same Ethiopian-U.S. agreement also triggered other international legal issues. The station's exemption from Ethiopian taxes was one such issue. After the Imperial Ethiopian Government (IEG) negotiated a loan from the Agency for International Development, the Ethiopians began to question the validity of exemptions that had been traditionally granted to Kagnew Station. As a result, MAJ Wicker and CPTs Miller and Wardwell spent considerable time visiting with Ethiopian government officials to explain and justify tax waiver provisions in the executive agreement. Additionally, these Army lawyers helped implement measures that aided the IEG tax officials. For example, a color dye was added to duty-free gasoline sold on post so that the Ethiopian police could more easily catch persons using duty-free gas who were not entitled to make duty-free purchases.<sup>6</sup>

The judge advocates in Ethiopia also oversaw a busy claims operation. First, a Foreign Claims Commission (created under the authority of Army Regulation 27-40, *Claims*) sitting at Kagnew Station had authority to pay claims up to \$5,000. Ethiopians who were injured or killed, or whose property was damaged, lost, or destroyed by

<sup>1</sup> Asmara today is located in Eritrea, which gained its independence from Ethiopia in 1993. While this "Lore of the Corps" column concerns judge advocates serving in Asmara in the early 1970s, Corps personnel had been assigned to Ethiopia for some years previously. The first "JAGC Personnel and Activity Directory" (today's JAG PUB 1-1) published in August 1963, shows that a judge advocate lieutenant colonel and captain were assigned to Asmara. This suggests that Army lawyers were serving in Ethiopia prior to 1963 (perhaps as early as the 1950s).

<sup>2</sup> OFFICE OF THE JUDGE ADVOCATE GENERAL, JAGC PERSONNEL AND ACTIVITY DIRECTORY 19 (Sept. 1972).

<sup>3</sup> N. P. Wardwell, *SJA Spotlight—Military Legal Practice in Ethiopia*, ARMY LAW., Mar. 1972, at 12.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 13.

members of the U.S. Armed Forces could be compensated, and the Foreign Claims Commission paid about a hundred claims a year; the larger claims involved motor vehicle accidents. In the event of a fatality, a solatium payment also was made “according to local custom—a cow and two barrels of *sua*, the local beer.”<sup>7</sup>

Wicker, Miller, and Wardwell also provided legal advice in other areas, including the review of local contracts; advice to the post commander and commanders of tenant units; and advice to various clubs and non-appropriated fund instrumentalities.

Perhaps not surprisingly, the largest part of an Army lawyer’s time in Ethiopia was spent providing legal assistance. Apparently the isolated nature of the base meant that an “unusually large number of marriages ended in separations . . . so marriage counseling normally consumed several hours per week.” Additionally, as “many Americans wished to adopt Ethiopian children and marry Ethiopian wives,” there were complex immigration and family law matters to handle.<sup>8</sup>

Life for judge advocates in the empire of Haile Sellasie was challenging and apparently rewarding. But it ended abruptly: when post-Vietnam budget cuts caused the Army’s withdrawal from Asmara in 1973, the judge advocate presence went with it; MAJ Wicker, CPT Miller, and CPT Wardwell were the last Army lawyers to serve in Ethiopia.

As for Haile Selassie, who had ruled as emperor since 1930, his thirty-four-year imperial reign came to an end in 1974, when a Soviet-backed military coup, led by Mengistu Haile Mariam, ousted him and established the People’s Democratic Republic of Ethiopia.

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

## Lore of the Corps

### Master of Laws in Military Law The Story Behind the LL.M. Awarded by The Judge Advocate General's School

*Fred L. Borch III*  
*Regimental Historian & Archivist*

Every year in May, career military officers who have successfully completed the Graduate Course at The Judge Advocate General's School, U.S. Army (TJAGSA),<sup>1</sup> are awarded a Master of Laws (LL.M.) in Military Law. This unique LL.M.—no other law school in the world awards such a degree—from the world's only American Bar Association-accredited military law school has been conferred since 1988. But the story behind that degree—how and why it came to be—is not well known.

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

A year later, in March 1956, "action was initiated to obtain statutory authority . . . to confer the Master of Laws degree for successful completion of the Advanced Program."<sup>2</sup> Legislation drafted by the Office of The Judge Advocate General (OTJAG) was sent to Congress in late 1956 but was not enacted.

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

Despite lack of progress toward obtaining authority to grant the degree, the JAG Corps did not drop its wish for the LL.M. in the 1960s and 1970s. On the contrary, COL

Kenneth Crawford, who served as Commandant from 1967 to 1970, routinely lobbied his counterparts at UVA's law school for their support for a Masters of Laws degree—but these efforts came to naught. Colonel John Jay Douglass, who followed Crawford as TJAGSA Commandant, tried a different approach. In November 1971, Douglass wrote to Edgar F. Shannon, then serving as UVA's president, and requested that the university work with TJAGSA to create a "program . . . whereby students in the Judge Advocate Officer Advanced Course could earn an advanced degree conferred by the University of Virginia."<sup>3</sup> While correspondence from Shannon to Douglass proves that UVA carried out "preliminary discussions" with the JAG Corps on the possibility of a UVA-granted LL.M., nothing happened.

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

The first step toward obtaining accreditation for the degree involved winning the support of the Army and the Defense Department for an LL.M. Building on work started in January 1986 by then-LTC Daniel E. Taylor, Graham's predecessor in the International Law Division at TJAGSA, Graham modeled the JAG Corps's bid to obtain an LL.M. on an initiative the Defense Intelligence School (DIS) used to win authority to award a graduate degree in strategic intelligence.<sup>4</sup> Graham assembled a packet for TJAGSA's LL.M. that included proposed legislation and coordinated his efforts with a variety of interested parties. Then, in November 1986, Graham obtained approval from Mr. Delbert Spurlock, a former Army General Counsel who was then working as the Assistant Secretary of the Army (Manpower and Reserve Affairs). Approval from the Office of the Assistant Secretary of Defense (Military Manpower and Personnel Policy) followed—no doubt helped by the fact that an Army judge advocate, COL Fred K. Green, was assigned to that office at the time.

<sup>1</sup> The Judge Advocate General's School, U.S. Army, became The Judge Advocate General's Legal Center and School (TJAGLCS) in 2003.

<sup>2</sup> 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).

<sup>3</sup> Letter from Edgar F. Shannon, Jr., President, Univ. of Va., to John Jay Douglass, Commandant, The Judge Advocate Gen.'s Sch., U.S. Army (Nov. 26, 1971) (on file with Regimental Historian, The Judge Advocate General's Corps).

<sup>4</sup> In 1980, DIS had obtained the authority to award a Master of Science in Strategic Intelligence degree. Pub. L. § 96-450, Oct. 14, 1980; 10 U.S.C. § 2161 (2006).

The next step was to gain the Secretary of Education's approval for the degree. United States law requires that any federal agency wishing to obtain degree-granting status must obtain a positive recommendation from the Department of Education before it may forward any proposed legislation to Congress.

On 1 December 1986, COL Rice and U.S. Court of Military Appeals Chief Judge Robinson Everett (representing the ABA) appeared before the Education Department's National Advisory Committee on Accreditation and Institutional Eligibility. They showed a five-minute film about TJAGSA—developed by Graham with assistance from Mr. Dennis L. Mills in TJAGSA's media services branch—and delivered a forty-minute presentation explaining why the School wanted the authority to award an LL.M. In his prepared remarks, Rice emphasized the Army's belief that “the existence of a graduate degree program . . . will prove to be *an invaluable* asset in retaining the *best* qualified and most *highly* motivated individuals as career military attorneys.”<sup>5</sup> He also stressed that the uniqueness of TJAGSA's curriculum meant “the graduate degree we propose to grant [a Master of Laws in Military Law] cannot be obtained at other non-Federal educational institutions.”

The accreditation review committee voted 15-0 in favor of TJAGSA's LL.M. proposal, and Secretary of Education William J. Bennett concurred on 18 March 1987. The next step was to introduce legislation in both the House and the Senate. On 23 March 1987, Representative Les Aspin introduced H.R. 1748, which contained legislation giving the “Commandant of the Judge Advocate General's School of the Army . . . upon recommendation of the faculty of such school” the power to “confer the degree of master of laws (LL.M.) in military law.” Identical legislation was introduced in the Senate and, on 3 December 1987, Congress enacted Public Law 100-180, giving TJAGSA's Commandant the authority to award the LL.M.<sup>6</sup>

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

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

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

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<sup>5</sup> Colonel Paul J. Rice, Commandant, The Judge Advocate Gen.'s School, U.S. Army, Presentation to Nat'l Advisory Comm. on Accreditation and Institutional Eligibility (Dec. 1987) (on file with Regimental Historian, The Judge Advocate General's Corps) (emphasis in original).

<sup>6</sup> 10 U.S.C. § 4315 (2006).

## Lore of the Corps

### For Heroism in Combat While Paying Claims: The Story of the Only Army Lawyer to be Decorated for Gallantry in Vietnam

*Fred L. Borch III*  
*Regimental Historian & Archivist*

In May 1968, Major General (MG) John J. Tolson, the Commanding General, 1st Cavalry Division (Airmobile), awarded the Bronze Star Medal with “V” for valor device to his Staff Judge Advocate (SJA), then Lieutenant Colonel (LTC) Zane E. Finkelstein. Finkelstein is the only Army lawyer to be decorated for gallantry in action in Vietnam—and almost certainly will be the only judge advocate (JA) in history to be awarded a decoration for combat heroism while investigating and paying claims.

On 14 December 1967, Finkelstein travelled by helicopter to a Vietnamese village that had been mistakenly bombed by the U.S. Air Force in order to investigate and pay claims to civilians who had been injured or whose property had been damaged in the attack. While the JAG Corps had centralized claims processing in Saigon, Finkelstein decided he would have more flexibility in the field if he were able to pay foreign claims. As a result, he obtained an appointment as a one-man Foreign Claims Commission, and, since the bombed village was not too far from Finkelstein’s location near Camp Evans, South Vietnam, he decided to organize an expedition to investigate, adjudicate, and pay these foreign claims on his own.

Accompanying Finkelstein that day was a warrant officer from the Finance Corps. This individual was the Class B agent who would pay substantiated claims in Vietnamese piasters after Finkelstein investigated and approved them. A platoon of infantry also went with them—to provide security.

After dropping the Americans off at the village, the three UH-1H helicopters departed. The infantrymen then set up a defensive perimeter, and Finkelstein began investigating and processing claims from the Vietnamese civilians.<sup>1</sup>

The Americans believed there were no Viet Cong in the area but, unbeknownst to them, the guerillas were not only still in the village, but were, in fact, inside the perimeter. After the Viet Cong “popped out of the holes in the ground in which they had been hiding,” a furious firefight erupted. Finkelstein stopped his legal work and, using both his .38 caliber revolver and M-16 rifle, joined the infantrymen in

repelling the attack.<sup>2</sup> He also called in air support on the radio—but got artillery fire instead.

After a brief engagement, the Viet Cong fled and Finkelstein returned to his claims work. The helicopters arrived sometime later and the Americans departed for the trip back to Camp Evans—and relative safety. As the official citation for his Bronze Star Medal for Valor explains, Finkelstein was recognized for a “display of personal bravery and devotion to duty” in “continually exposing himself to enemy fire” and having “efficiently investigated, processed and paid 51 claims.”<sup>3</sup>

Born in Knoxville, Tennessee, on 24 June 1929, Finkelstein received both his A.B. (May 1950) and LL.B. (December 1952) from the University of Tennessee. He excelled in law school, where he served as Editor-in-Chief of the law review and was inducted into the Order of the Coif.

Finkelstein was drafted into the Army in April 1953 and completed basic training at Fort Jackson, South Carolina. After receiving word that he had passed the Tennessee bar examination, then Private Finkelstein transferred to the JAG Corps that same year. In addition to serving in Vietnam as the SJA, 1st Cavalry Division (1967–68), Finkelstein also served as the SJA, Eighth U.S. Army Korea (1975–77). He also saw overseas duty as an Army lawyer in Berlin, Federal Republic of Germany, (1954–57) and Taipei, Taiwan, (1961–63). Then-LTC Finkelstein also served as the Chief, Military Justice Division at The Judge Advocate General’s School, U.S. Army (the forerunner of today’s Criminal Law Division) (1968–71). Perhaps his most noteworthy assignment was as the first Army Legal Advisor and Legislative Assistant to the Chairman of the Joint Chiefs of Staff (1971–75). Finkelstein retired as a colonel in 1983 and lives today in Carlisle, Pennsylvania.

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<sup>1</sup> David S. Franke, Finkelstein Oral History, April 1989, 168–71 (on file with The Judge Advocate General’s Legal Center and School (TJAGLCS) Library).

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<sup>2</sup> Telephone Interview with Zane E. Finkelstein (Mar. 15, 2010) (on file with author).

<sup>3</sup> Headquarters, 1st Cavalry Division (Airmobile), Gen. Orders No. 2780 (3 May 1968).

While a number of Soldiers who later served as JAs were decorated for combat heroism in Vietnam—for example, both MG (Ret.) Michael Nardotti and Colonel (Ret.) John Bozeman were awarded Silver Stars—Finkelstein is the only JA to have been decorated for gallantry in action while serving as an Army lawyer in Vietnam.

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**Promotions to Major, Lieutenant Colonel, and Colonel in the Corps:  
The History of Separate Boards for Judge Advocate Field Grade Officers**

*Fred L. Borch III*  
*Regimental Historian & Archivist*

In March 1976, *The Army Lawyer* announced that the Secretary of the Army had “approved a separate promotion list for the Judge Advocate General’s Corps.”<sup>1</sup> This was a significant event because, prior to this announcement, every judge advocate field grade officer on active duty, or in the Reserve or Guard, was selected for promotion by the yearly Army Promotion Board—and consequently directly competed for promotion to higher rank with infantry, artillery, armor, engineer, and transportation officers, as well as officers of other Army branches. The story of how that changed—how the Corps obtained the authority to hold its own, separate promotion board—is worth telling.

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

Judge advocates assigned to the Personnel Plans and Training Office (PP&TO) in the Office of The Judge Advocate General (OTJAG) understood that increased retention was going to make it increasingly difficult to manage the Corps’s grade structure. “There was no way,” wrote Brigadier General (Retired) Ronald Holdaway, who served as the Chief, PP&TO, in the mid-1970s, “that we could reliably match judge advocate promotions with judge advocate vacancies under the Army Promotion List system where promotions Army-wide were matched with Army-wide vacancies and one branch might get 80 percent promotions while another got 60 percent.”<sup>2</sup>

As Holdaway further explained, the quality of judge advocates meant that the Corps had fared well in the Army Promotion List system on percentages in the past. However, these field grade promotion results had not made much difference to the Corps since the lack of retention meant that the Corps was already “way out of balance when it came to field grades.” Holdaway states, “We had acute shortages of field grade officers,” and “many of us were serving in billets

one or even two grades above our rank.”<sup>3</sup> In fact, the low retention rate in the JAG Corps meant that it had a deficit of almost forty-five percent in field grade officers in the late 1960s and early 1970s.<sup>4</sup> The shortage of majors, lieutenant colonels, and colonels to fill field grade billets in the Corps, though, also meant that field grade officer selection rates under the Army Promotion List system had been of little worry.

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

At the direction of The Judge Advocate General (TJAG), Major General (MG) Wilton B. Persons, then-LTC Holdaway prepared a decision paper for The Judge Advocate General’s signature that requested the Deputy Chief of Staff for Personnel (DCSPER) give the Corps separate field grade promotion boards. Holdaway personally wrote the decision paper on two consecutive weekends so that he had the office to himself and was “not disturbed by the chaos that was PP&TO during the work week.”<sup>5</sup>

When the Secretary of the Army approved the concept, on the recommendation of the DCSPER, the next step was implementation.<sup>6</sup> Holdaway remembers that his lieutenant colonel and colonel counterparts at DCSPER thought that a five-person board consisting of three line officers and two judge advocates would be best for a small branch like the JAG Corps. While Holdaway was willing to go along with this proposal, MG Lawrence H. Williams, The Assistant Judge Advocate General (TAJAG), was adamant that more judge advocates—if not a majority—should sit on the promotion boards. Major General Persons agreed with MG Williams, and the final decision from DCSPER acceded to the views of TJAG and TAJAG.<sup>7</sup>

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

<sup>4</sup> *Separate JAGC Promotion List*, *supra* note 1.

<sup>5</sup> E-mail from Brigadier General (Ret.) Ronald Holdaway to author 16 May 2010 (on file with author).

<sup>6</sup> *Separate JAGC Promotion List*, *supra* note 1, at 29.

<sup>7</sup> Holdaway E-mail, *supra* note 2.

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<sup>1</sup> *Separate JAGC Promotion List*, ARMY LAW., Mar. 1976, at 29.

<sup>2</sup> E-mail from Brigadier General (Ret.) Ronald Holdaway to author (17 May 2010) (on file with author) [hereinafter Holdaway E-mail]

Today, all JAGC promotion boards for field grade officers consist of six officers. A judge advocate brigadier general serves as the president of the board, and two other field grade judge advocates sit on the board as members. The other three board officers are non-special branch officers whose grades varies depending on the promotion level being considered.

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

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## Lore of the Corps

### Tried for Treason: The Court-Martial of Private First Class Dale Maple

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Regimental Historian & Archivist

On 24 April 1944, at a general court-martial convened deep inside the U.S. Disciplinary Barracks at Fort Leavenworth, Private First Class (PFC) Dale Maple was found guilty of desertion and lending aid to the enemy. His sentence: to be hanged by the neck until dead. But Maple did not know that he had been sentenced to death, because the court-martial panel, which had conducted its proceedings in secret, had been ordered by the War Department to keep its verdict secret as well—even from the accused. What follows is the true story of the trial of PFC Maple, the first American-born Soldier in the history of the Army “ever to be found guilty of a crime that fits the Constitutional definition of treason.”<sup>1</sup>

Born in San Diego, California, in September 1920, Maple was fifteen years old when he graduated from high school, first in his class. A “musical prodigy” with “many recitals to his credit,” Maple also was an accomplished equestrian, surfer, and swimmer.<sup>2</sup> He decided to continue his education at Harvard, and continued to excel as a student: Maple graduated Phi Beta Kappa with a B.A., *magna cum laude* at age nineteen. His strength was languages. Dale Maple spoke, “with varying degrees of proficiency,” Russian, Polish, Hungarian, Italian, French, Spanish, Portuguese, Danish, Swedish, Icelandic and Dutch. But his first love was German, and, while studying it at Harvard and associating with other students studying German, Maple soon gained the reputation of being a German cultural sympathizer. After he sang the Nazi Party’s Horst Wessel Song at the Harvard German Club in the fall of 1940, however, and loudly and publicly declared that National Socialism was “infinitely preferable to democracy,” the local media proclaimed that Maple “was the recognized Nazi leader of Boston.”<sup>3</sup> While Maple would later insist at his court-martial that these pro-Nazi statements were nothing more than attempts to curry favor with the German government in order to obtain a scholarship to study at the University of Berlin, no one else saw it that way at the time.

Hitler’s declaration of war on the United States in December 1941 dashed Maple’s hopes for post-graduate work in Germany. He now decided that he should enlist in the Army, and he did, on 27 February 1942. For more than a year, he was an instructor in radio at Fort Meade, Maryland. Then, without any explanation, Maple was re-assigned to the 620th Engineer General Service Company, and he found himself living in barracks at Camp Hale, Colorado. The roughly two hundred Soldiers assigned along with Maple to the 620th were all men whom the Army believed were “unsympathetic, if not downright opposed, to the war aims of the Allies.”<sup>4</sup> Some of these allegedly disloyal Soldiers were native born, like Maple. Others were naturalized U.S. citizens; a few were aliens; many were German or of German ancestry.

Maple was assigned to the unit because the Army believed that the pro-Nazi statements he had made at Harvard made him unsuitable for the sensitive radio work he had been doing in Maryland. That also explains why Maple and the other Soldiers assigned to the 620th did work of a menial, and insensitive, nature: cutting wood, digging ditches, and making camouflage netting. Maple was unhappy about this work, which he felt was oppressive, and about his assignment to the 620th, which he viewed as degrading.

Maple soon learned that he and his fellow Americans were not alone at Camp Hale. On the contrary, residing nearby were several hundred German prisoners of war (POWs). These were men from Rommel’s vaunted Afrika Korps who, after being captured in North Africa, were now sitting out the war in Colorado.

Maple was soon fraternizing with these German POWs, and his fluency in their language and knowledge of their culture made him a popular figure. Within a short period of time, Maple was talking about helping some of these Afrika Korpsmen to escape. He initially decided to help ten Germans escape. Ultimately, however, Maple chose to help two German sergeants flee to Mexico. Maple purchased an automobile and a pistol, borrowed money from his parents, and, on 15 February 1944, drove from Camp Hale with the two enemy POWs. There was no fence around Camp Hale; Army investigators later concluded that the Germans simply slipped away from their work detail when the guard was not

<sup>1</sup> E. J. Kahn, Jr., *Annals of Crime: The Philologist (Part IV)—Who Wants to Go to Germany in Wartime*, NEW YORKER, Apr. 1, 1960, 62, at 66.

<sup>2</sup> Lieutenant Colonel Bernard A. Brown, Judge Advocate Gen. Dep’t., Assistant Judge Advocate, Post Trial Review, *United States v. Dale Maple*, CM 257165, at 18 (21 May 1944); E. J. Kahn, Jr., *Annals of Crime: The Philologists (Part I)—A Trip to Old Palomas*, NEW YORKER, Mar. 11, 1950, 35, 36.

<sup>3</sup> Kahn, *supra* note 1, at 72.

<sup>4</sup> *Id.* at 62.

paying attention and walked away to their rendezvous with Maple.

Maple and the two German POWs, having discarded their uniforms and now dressed in civilian clothing, began driving south. After covering more than six hundred miles, the men were but seventeen miles from the border with Mexico when their car ran out of gas. Maple and the two Germans then walked the rest of the way. On 18 February 1944, they were three miles inside Mexico when they were apprehended by a suspicious Mexican customs officer.

Maple and the two Germans were returned to U.S. authorities within days. The Germans were not punished because, under the law of armed conflict, they had a right to escape. For PFC Maple, however, it was a different story. He was taken into custody by the Federal Bureau of Investigation, indicted on the charge of treason, and arraigned in U.S. District Court in New Mexico. But the criminal proceedings against Maple in federal court went nowhere, since the Army decided that it should prosecute Maple. The result was that Maple was charged with desertion under the 58th Article of War and with two specifications of “aiding the enemy” by “harboring and protecting escaped prisoners of war . . . and affording them shelter and automobile transportation in his private automobile.”<sup>5</sup> The Army could not try Maple for treason because, under the Articles of War, treason was not enumerated as a crime. Consequently, Maple was charged under the 81st Article of War, which made it a crime to relieve, correspond with, or aid the enemy. That article was the “military statute that most nearly approximate[d] the civil treason law.”<sup>6</sup>

On 17 April 1944, a general court-martial convened at Fort Leavenworth heard Maple’s case. The twelve members selected by the convening authority were almost certainly the highest ranking panel in history to hear a case involving a private first class: a major general (MG) (president of the court), a brigadier general, seven colonels, and three lieutenant colonels. The trial judge advocate (JA)—as the prosecutor was then called—was not a member of the Judge Advocate General’s Department (JAGD). He had, however, practiced law in Texas before World War II.

Maple had three defense counsel: a major who was not a lawyer, a lieutenant who was a lawyer (but not a member of the JAGD), and civilian counsel, who Maple had hired three days before his trial started. Maple had made a good choice in selecting this civilian lawyer, as the man had previously served as a JAGD captain and consequently was

very familiar with court-martial proceedings and the Articles of War.

The proceedings were closed to the public, and the secret nature of the trial meant that Maple’s father and mother were not permitted to attend. After Maple entered pleas of not guilty to all charges and specifications, the trial JA presented the Government’s case. Testimony from the two German POWs, who testified through interpreters, and the Mexican customs official who had apprehended the accused and the two escapees, left little doubt as to the accused’s guilt. Additionally, after an Army psychiatrist testified that Maple had an I.Q. of 152 and, in his expert opinion, understood without question that his actions were treasonous, the likelihood of a guilty verdict must have seemed strong to all in the courtroom.<sup>7</sup>

After the Government rested, Maple took the stand. Under oath, he made a 7000 word statement in which he explained that he had no intent to desert the 620th. Rather, he had left his unit with the two German POWs hoping that he would be caught and tried for treason at a public trial in federal court. Maple insisted that this public forum would give him an opportunity to publicize the abusive and degrading treatment he had suffered in the 620th.

After closing arguments from both sides, the panel adjourned to consider the evidence. On 24 April 1944, the members unanimously concluded that Maple was guilty and that he should be hanged by the neck until dead. But, since the War Department had instructed the court-martial panel that it was not to announce its findings and sentence in court, Maple did not know that he had been sentenced to death. Not until seven months later did Maple learn that he had escaped the hangman’s noose when he was informed that President Roosevelt had commuted his sentence to life imprisonment at hard labor, forfeiture of all pay and allowances, and a dishonorable discharge.<sup>8</sup>

It seems that The Judge Advocate General of the Army, MG Myron C. Cramer, was responsible for saving Maple’s life. In reviewing the record of trial and providing a post-trial recommendation for the White House, Cramer wrote that

On the face of the record there appears to be little or nothing to suggest mitigation. But the accused is only 24 years of age, and is inexperienced. While he is undoubtedly legally sane and responsible for his despicable acts, under all the circumstances I am unable to escape the impression that justice does not require this young man’s life. I feel that the ends

<sup>5</sup> U.S. Dep’t of Def., DD Form 458, Charge Sheet, *United States v. Maple*, CM 257165 (28 Mar. 1944).

<sup>6</sup> Kahn, *supra* note 2, at 48.

<sup>7</sup> Kahn, *supra* note 1, at 77.

<sup>8</sup> War Department, Gen. Court-Martial Order No. 639 (28 Nov. 1944).

of justice will better be served by sparing his life so that he may live to see the destruction of tyranny, the triumph of the ideals against which he sought to align himself, and the final victory of the freedom he so grossly abused.<sup>9</sup>

In November 1944, Roosevelt took action in Maple's case—likely influenced by Cramer's recommendation that the condemned man be spared. Maple was then transferred from the Army's Disciplinary Barracks to the nearby U.S.

Penitentiary in the town of Leavenworth. In April 1946, the Army decided unilaterally to drastically reduce all sentences imposed by courts-martial during World War II, and it cut Maple's sentence to ten years. He was paroled in early 1951.<sup>10</sup> While Maple's case is almost forgotten today, his place in history is assured as the first native-born American Soldier to be court-martialed for the military equivalent of treason.

Addendum to "Tried for Treason: The Court-Martial of Private First Class Dale Maple" (The Army Lawyer, November 2010)

What happened to Dale Maple after his trial by court-martial?

According to an article by Allen Best in *Colorado Central Magazine* (February 2004), while incarcerated at Leavenworth, Maple taught classes in trigonometry, public speaking, and other subjects. He also worked in the prison bakery, trained a prizefighter, and led the church choir. Still fascinated by languages, Maple also researched Old Bulgarian before being paroled in February 1951 at age 30.

According to the Harvard University Archives, the 1996 reunion report for the Class of 1941 listed Maple as a resident of El Cajon, California (a suburb of San Diego). As Maple had grown up in southern California, his return to that geographic area after his release from prison makes sense. But what Maple did after his release from prison is still a mystery. The 2005 Harvard Alumni Directory indicates that Maple died in El Cajon on May 28, 2001.

*More historical information can be found at*

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<sup>9</sup> Kahn, *supra* note 1, at 78.

<sup>10</sup> *Id.*

## Lore of the Corps

### Legal Aid for the Soldier: The History of the Army Legal Assistance Program

Fred L. Borch III  
Regimental Historian & Archivist

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

After the Japanese attack on Pearl Harbor and America's entry into World War II, millions of young men either enlisted or were drafted into the Armed Forces. Many of these citizen-Soldiers quickly deployed overseas for an extended period of time and, consequently, had little time to arrange their personal affairs. In 1940, Congress passed the Soldiers' and Sailors' Civil Relief Act (SSCRA),<sup>1</sup> which provided men and women in uniform with much needed legal protections. However, the Army soon realized that Soldiers needed access to legal help in order to protect their interests under the SSCRA and other laws.

At first, Army lawyers worked with the American Bar Association (ABA) to help Soldiers "resolve unsettled legal problems and unsatisfied legal needs" at the time of their induction.<sup>2</sup> Judge advocates (JAs) worked with state and local bar associations to assist Soldiers with subsequent legal problems by referring them to civilian lawyers in their local areas. This cooperative, and successful, arrangement continued until 16 March 1943, when the Army published War Department Circular No. 74, *Legal Advice and Assistance for Military Personnel*.<sup>3</sup> This circular announced that, for the first time in history, the Army was creating "an official, uniform, and comprehensive system for making legal advice and assistance available to military personnel and their dependents in regard to their personal legal affairs."<sup>4</sup>

On 22 March 1943, a "Legal Assistance Branch" was organized in the Office of The Judge Advocate General to supervise the newly instituted legal aid system throughout the Army.<sup>5</sup> By the end of 1943, there were six hundred legal assistance offices in the Army, and by the end of World War II, that number had grown to sixteen hundred.<sup>6</sup> Each office was issued a "basic legal assistance library" or "field kit" containing reference materials of various kinds, including pamphlets or "compendiums" on marriage *in absentia*, wills, and divorce.<sup>7</sup>

While the workload varied from office to office, legal assistance officers were busy; in the first year of the official program, JAs handled a total of 298,825 cases. Of these, 35% were taxation issues; 21% concerned powers of attorney; 20% dealt with wills; 5% involved domestic relations; and the remaining 19% concerned affidavits, citizenship, estates, insurance, real and personal property, and torts.<sup>8</sup> By the end of World War II, Army legal assistance officers had handled five and a half million cases—a tremendous amount considering the program had not started until March 1943.

After World War II, Army legal assistance continued as a permanent program, but in the 1950s and early 1960s it was "little more than a referral program in which Army lawyers provided general legal counseling, but referred most of the actual legal work, including wills and powers of attorney, to civilian lawyers."<sup>9</sup>

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

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<sup>1</sup> Soldiers' and Sailors' Civil Relief Act of 1940, 54 Stat. 1178, 50 U.S.C. app. 501.

<sup>2</sup> Colonel Alfred F. Arquilla, *The New Army Legal Assistance Regulation*, ARMY LAW., May 1993, at 4.

<sup>3</sup> WAR DEP'T, CIRCULAR NO. 74, LEGAL ADVICE AND ASSISTANCE FOR MILITARY PERSONNEL (16 Mar. 1943).

<sup>4</sup> MILTON J. BLAKE, LEGAL ASSISTANCE FOR SERVICEMEN: A REPORT OF THE SURVEY OF THE LEGAL PROFESSION 9 (1951).

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<sup>5</sup> OFFICE OF THE JUDGE ADVOCATE GENERAL, LEGAL WORK OF THE DEPARTMENT 1 JULY 1940 – 31 MARCH 1945, at 13 (1945).

<sup>6</sup> *Id.* at 214.

<sup>7</sup> *Id.* at 207.

<sup>8</sup> *Id.* at 215–16.

<sup>9</sup> Arquilla, *supra* note 2, at 5.

A major turning point in the evolution of the legal assistance program occurred on 12 December 1985 when a civilian airliner carrying 248 Soldiers crashed on takeoff in Gander, Newfoundland. All the Soldiers aboard, who were returning from a six-month deployment to the Sinai, were killed, and their tragic deaths became a catalyst for change. For the first time, Army JAs realized that there must be a model for mass casualty legal support. Additionally, legal assistance officers now understood that it was critical for them to ensure the legal preparedness of Soldiers; that it was harmful to elect the “by-law” designation on Servicemen’s Group Life Insurance forms; that Reserve Component JAs were critical in situations requiring a surge in legal assistance; and that legal assistance services must be available to the next-of-kin to resolve estate issues of deceased Soldiers.<sup>10</sup>

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

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

Today’s Army Legal Assistance Program<sup>11</sup> provides top quality legal aid to Soldiers and their families for personal legal problems. While wills and estate planning remain the largest area of legal assistance practice (about 30%), in recent years, family law—marriage, legal separation and divorce, paternity, non-support, child custody and the like—has grown to almost the same level.

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<sup>10</sup> Memorandum for The Judge Advocate General, subject: Gander After-Action Report, Legal Assistance (8 Apr. 1987) (on file with Legal Assistance Policy Division, Office of The Judge Advocate General).

<sup>11</sup> U.S. DEP’T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM (21 Feb. 1996).

**The “Malmedy Massacre” Trial:  
The Military Government Court Proceedings and the Controversial Legal Aftermath**

*Fred L. Borch III*  
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On 17 December 1944, at a road intersection near Malmedy, Belgium, German Waffen-SS troops shot and killed more than seventy American prisoners of war (POWs) who laid down their arms. Several weeks after the “Malmedy Massacre,” even more American POWs and a smaller number of unarmed Belgian civilians were also shot and killed by German troops during the Ardennes Offensive, commonly known as the “Battle of the Bulge.”

Seventy-four Germans were later tried by a U.S. military government court for the murders committed at Malmedy and other locations between 16 December 1944 and 13 January 1945. Seventy-three were eventually found guilty following the trial, which began on 16 May 1946, at Dachau, Germany. Forty-three were sentenced to be hanged; twenty-two received life imprisonment; and the remainder were sentenced to jail terms between ten and twenty years. However, no one was actually put to death, and by Christmas 1956, all the convicted men had been released from prison.

Lieutenant Colonel (LTC) Burton F. Ellis, a member of the Judge Advocate General’s Department (JAGD), served as the chief prosecutor at the Malmedy Massacre trial, but despite his success in court, controversy dogged the proceedings for years after the trial. Today, the truth about the Malmedy massacre, and whether justice was served by the military government court that heard the evidence, still provokes disagreement among those who study the episode.

There is no doubt that U.S. POWs and Belgian civilians were shot, machine-gunned, or mistreated at Malmedy and other nearby locations by SS troops in a *Kampfgruppe* (a regimental-sized “battle group”) under the command of SS-Colonel (COL) Joachim Peiper. Survivors of the events bore witness to these facts. At Malmedy, for example, then-First Lieutenant (1LT) Virgil P. Lary witnessed American POWs being killed by machine gun fire; Lary survived by falling down face first in the muddy meadow and playing dead until he could escape. Lary later testified that he saw German troops kicking the bodies of the fallen Americans and then “double-tapping” those who flinched.<sup>1</sup>

The exact number of American and allied civilian victims will never be known and the prosecution avoided the issue by charging the seventy-four German SS accused as follows:

In that \_\_\_\_\_ did, at or in the vicinity of Malmedy, Honsfeld, Bullingen, Ligneauville, Stoumont, La Gelize, Cheneus, Petit Their, Trois Ponts, Stavelot, Wanne, and Lutre-Bois, all in Belgium, at sundry times between 16 December 1944 and 13 January 1945, willfully, deliberately, and wrongfully permit, encourage, aid, abet and participate in the killings, shooting, ill treatment, abuse, and torture of members of the Armed Forces of the United States of America, then at war with the then German Reich, who were then and there surrendered and unarmed prisoners of war in the custody of the then German Reich, the exact names and numbers of such persons being unknown but aggregating several hundred, and of unarmed allied civilian nationals, the exact names and numbers of such persons being unknown.<sup>2</sup>

In any case, the killings and mistreatment of the POWs violated article 4 of the 1907 Hague Convention<sup>3</sup> (requiring humane treatment of POWs) and article 2 of the 1929 Geneva Convention Relative to the Treatment of Prisoners of War<sup>4</sup> (mandating both humane treatment and requiring that POWs be protected “against violence, insults and public curiosity”), both of which governed the conduct of German troops in general and Peiper’s *Kampfgruppe* in particular at Malmedy.

On 16 May 1946, some seventeen months after the killings at Malmedy, a “military government court” consisting of eight officers and convened by Headquarters, U.S. Third Army, began hearing evidence against the German accused. While styled as a military government

<sup>1</sup> CHARLES WHITING, *MASSACRE AT MALMEDY* 52–53 (1971). “Double-tapping” is the practice of shooting wounded or apparently dead soldiers to insure that they are dead. Some also call it a “dead check.” Under customary international law and the Geneva Conventions of 1929, however, double tapping was—and remains—a war crime because it is unlawful to kill the wounded. See GARY D. SOLIS, *LAW OF ARMED CONFLICT* 327–32 (2010).

<sup>2</sup> JAMES J. WEINGARTNER, *A PECULIAR CRUSADE: WILLIS M. EVERETT AND THE MALMEDY MASSACRE* 53 (2000).

<sup>3</sup> Convention (IV) Respecting the Laws and Customs of War on Land art. 4, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.

<sup>4</sup> Convention Relative to the Treatment of Prisoners of War art. 2, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343.

court in the convening orders, the tribunal was more akin to a military commission in that it operated with relaxed rules of evidence and procedure (e.g., hearsay was admissible and there was no presumption of innocence) and required only a two-thirds majority for a death sentence. While the senior member of the panel, Brigadier General (BG) Josiah T. Dalbey, wielded considerable power as court president, a law officer, COL Abraham H. Rosenfeld, was responsible for interpreting the law and ruling on procedural and evidentiary matters. Meanwhile, although Rosenfeld was a Yale-educated attorney, he was not a judge advocate. Similarly, the chief defense counsel, COL Willis M. Everett, Jr., was a lawyer<sup>5</sup> but not a judge advocate, and only one of his five assistant defense counsel, 1LT Wilbert J. Wahler, was a member of the JAGD.<sup>6</sup> However, the other four members of the defense team were attorneys. The Trial Judge Advocate who prosecuted the case, LTC Ellis, was apparently the only other attorney who wore the crossed pen and sword insignia of the JAGD on his uniform.<sup>7</sup>

The court proceedings, held in Dachau within sight of the infamous concentration camp of the same name, began with Ellis's opening statement and his assertion that the Government would prove that "538 to 749" American POWs and "over 90" Belgian civilians had been murdered.<sup>8</sup> Over the next three weeks, the prosecution called members of Peiper's *Kampfgruppe*, who had not been charged with crimes, to testify that Peiper and other SS officers and noncommissioned officers had instructed their men to ignore the rules of war governing prisoners. For example, SS-Private First Class Fritz Geiberger stated under oath that his platoon leader had given "a blanket order requiring the shooting of prisoners of war."<sup>9</sup> SS-Corporal Ernst Kohler testified that his platoon was ordered to "show no mercy to Belgian civilians" and to "take no prisoners," as this would avenge German women and children killed in Allied air raids.<sup>10</sup>

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<sup>5</sup> While he had been an attorney since graduating from Atlanta Law School in 1924, Everett had very little, if any, trial experience. His official military records show that his law practice focused on "titles, estates, investments, corporation and civil law." TJAGLCS Historian's Files, WD AGO Form 66-4, Main Civilian Occupation (1 Dec. 1944). Given the relaxed rules of evidence and procedure in the Malmedy trial, however, Everett's lack of litigation experience did not hurt his effectiveness as a defense counsel.

<sup>6</sup> Wahler graduated from the 13th Officer Candidate Class at The Judge Advocate General's School in late 1945. JUDGE ADVOCATE GENERAL'S SCHOOL, STUDENT AND FACULTY DIRECTORY 79 (1946) [hereinafter DIRECTORY].

<sup>7</sup> Ellis graduated from the 21st Officer Class at the Judge Advocate General's School in 1944. DIRECTORY, *supra* note 6, at 14. Like Everett, he too had little criminal litigation experience: Ellis had been a corporate tax attorney in civilian life. See WEINGARTNER, *supra* note 2, at 40.

<sup>8</sup> WEINGARTNER, *supra* note 2, at 54.

<sup>9</sup> *Id.* at 58.

<sup>10</sup> See WHITING, *supra* note 1, at 191.

Additional testimony came from Malmedy survivors 1LT Lary and an ex-military policeman named Homer Ford, who had heard the American wounded "moaning and crying" and watched the Germans "either shoot them or hit them with the butts of their guns."<sup>11</sup> A number of Belgian civilians also declared under oath that they had witnessed the brutal and unjustified killing of unarmed civilians by SS troops. The testimony, especially of the German witnesses, was designed to prove that the killing of the American POWs and Belgian civilians was premeditated because it had been part of a conspiracy or common design.

The bulk of the prosecution's evidence, however, was not live testimony. Nearly one hundred written sworn statements linked each of the SS accused "with crimes that were described in exhaustive detail."<sup>12</sup> If BG Dalbey and the seven other panel members took these statements at face value, the accused would almost certainly be convicted.

Everett and the defense counsel soon learned, however, that there were problems with some of the sworn statements. Their German clients insisted that many of their statements were the result of trickery, deceit, and in some cases, coercion. Peiper claimed that one of his fellow accused had been beaten for nearly an hour by American investigators seeking a confession—although apparently no incriminating statement was obtained. Two other German accused claimed that ropes had been placed around their necks during questioning. This act, they believed, was preparatory to hanging. However, the most prevalent interrogation technique had been the use of a "mock trial," where the accused was brought before a one-person tribunal. While he sat with his "defense counsel," the "court" rushed through the proceedings before informing the surprised accused that, as he was to be hanged the next day, he "might as well write up a confession and clear some of the other fellows [co-accused] seeing as he would be hanged."<sup>13</sup> Just how many sworn statements were obtained through the use of these fake tribunals, which Army investigators admitted they had used at times, and which they called a "*schnell* (or fast) procedure," will never be known, but no doubt some of the statements introduced at trial resulted from their use. On the other hand, as some statements from the SS accused had been obtained after "one or two brief and straightforward interrogation sessions," it is equally true that subsequent claims of widespread coercive interrogation are false.<sup>14</sup>

Everett was sufficiently alarmed by his clients' claims of abuse to report the alleged prosecutorial misconduct to COL Claude B. Mickelwaite, the Deputy Theater Judge Advocate in Wiesbaden, Germany. Mickelwaite, who had

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<sup>11</sup> *Id.* at 194.

<sup>12</sup> See WEINGARTNER, *supra* note 2, at 71.

<sup>13</sup> *Id.* at 42.

<sup>14</sup> *Id.* at 74.

overall responsibility for the prosecution of war crimes in Germany, sent a subordinate, LTC Edwin Carpenter, to Dachau to investigate. Carpenter concluded that mock courts and other psychological stratagems had, in fact, been used by Army investigators, but Carpenter also concluded that none of the sworn statements obtained from the accused were the product of physical violence.<sup>15</sup>

After the prosecution rested, the defense presented its evidence. Everett argued that the Malmedy massacre was an unfortunate event that had occurred in the midst of fast-moving and very fluid combat operations during the Battle of the Bulge. To support his argument, Everett called a number of German officers to testify that there had been no formal orders to murder POWs. Everett also managed to locate a West Point graduate and regular Army officer, LTC Harold D. McCown, who testified under oath that he had been captured by Peiper's *Kampfgruppe* and had been well-treated while a POW.<sup>16</sup> Everett and his defense team also argued that the nearly one hundred sworn statements introduced into evidence by the prosecution were unreliable products of coercion.

But it was a tough road for the defense, especially when Peiper testified on his own behalf. While denying that he had pre-existing orders from his superiors to kill POWs, or that he had directed troops under his command to kill combat captives, the forty-two-year-old Peiper did admit that it was "obvious" to experienced commanders that POWs sometimes must be shot "when local conditions of combat require it."<sup>17</sup> Under cross-examination by LTC Ellis, Peiper also admitted to misconduct that, while uncharged, was devastating. Peiper, who had served as Reichsführer-SS Heinrich Himmler's adjutant from 1938 to 1941, admitted that he had been with Himmler at a demonstration where human beings had been gassed.<sup>18</sup>

On 11 July 1946, after a two month trial, BG Dalbey and the panel retired to consider the evidence. Two hours

and twenty minutes later, they were back with a verdict: All seventy-three accused<sup>19</sup> were found guilty of the "killing, shooting, ill-treatment, abuse and torture of members of the armed forces of the United States of America and of unarmed Allied civilians."

During sentencing, BG Dalbey and his fellow panel members heard oral statements from more than half the convicted men. While one third of those who addressed the court denied the charges against them, a small number admitted their guilt. For example, a nineteen-year-old SS man confessed to killing two civilians but claimed the defense of superior orders. Another accused admitted he had shot and killed an American POW while acting under orders. A sergeant also admitted he had killed a POW but insisted that "the heat of combat, superior orders, and incitement by his comrades" was to blame.<sup>20</sup>

On July 16, 1946, the panel announced that forty-three convicted SS troops, including Peiper, were sentenced to death. Twenty-two received life sentences, and the rest were sentenced to jail terms of ten to twenty years in duration.

While the Army no doubt hoped that the verdict and sentences meant the end of the Malmedy proceedings, that was not to be. On the contrary, after leaving active duty in June 1947 and returning home to Atlanta, Georgia, Willis Everett continued to work tirelessly as a defense counsel for Peiper and his seventy-two co-accused.

Recognizing that there was no formal avenue of appeal from the Malmedy verdict, Everett instead began a vocal and public letter writing campaign. Everett argued that "80 to 90 percent of the confessions had been obtained illegally"<sup>21</sup> and that this prosecutorial misconduct had deprived Peiper and his seventy-two fellow SS-troops of justice. Everett also insisted that it had been impossible for him and his team to mount an effective defense because the court's desire for vengeance made the Malmedy verdict a foregone conclusion.

In the meantime, COL James L. Harbaugh, the European Command (EUCOM) Staff Judge Advocate, was reviewing the Malmedy record of trial and preparing a recommendation for General (GEN) Lucius Clay, then serving as Military Governor of the American Zone of Occupation (Germany). Harbaugh's legal review concluded that the evidence was insufficient to sustain some convictions and that many of the death sentences were inappropriate. As a result, on March 20, 1948, GEN Clay

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<sup>15</sup> *Id.* at 44.

<sup>16</sup> See WHITING, *supra* note 1, at 195; WEINGARTNER, *supra* note 2, at 84–85.

<sup>17</sup> See WEINGARTNER, *supra* note 2, at 91. Joachim Peiper had extensive combat experience and was highly decorated. Born in Berlin in January 1915, he joined the SS in 1934 and was commissioned after completing officer candidate school. After the outbreak of World War II, Peiper fought in Poland and France. He then moved east with Waffen-SS forces as part of Operation Barbarossa. In March 1943, Peiper was awarded the Knight's Cross for heroism near Charkov, Russia, and he was decorated a second time—with the Knight's Cross with Oakleaves—in January 1944 for his bravery on the Eastern Front. On 11 January 1945, shortly after the Malmedy killings, Peiper was decorated a third time—with the Knights Cross with Oakleaves and Swords—for his actions during the defensive withdrawal of German forces in France after the D-Day landings. (While the Knight's Cross was Germany's highest decoration for combat valor in World War II, it is more akin to the Army Distinguished Service Cross than the Medal of Honor.) See JOHN R. ANGOLIA, ON THE FIELD OF HONOR 228 (1979).

<sup>18</sup> *Id.* at 92.

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<sup>19</sup> The seventy-fourth accused originally arraigned was released to French authorities before the panel retired to reach a verdict. He was a French citizen, and the French exercised jurisdiction in his case. See WEINGARTNER, *supra* note 2, at 103.

<sup>20</sup> *Id.* at 105.

<sup>21</sup> FRANK M. BUSCHER, U.S. WAR CRIMES TRIAL PROGRAM IN GERMANY, 1946–1955, at 38 (1989).



reduced thirty-one of the forty-three death sentences to life imprisonment, but confirmed the remaining twelve death sentences, including Peiper's. General Clay also disapproved the findings in several cases, which freed thirteen other men.

Everett remained convinced that the remaining accused required a new trial, and on May 14, 1948, he filed a 228-page motion and petition with the U.S. Supreme Court. In that motion, he requested leave to file a petition for a writ of habeas corpus for relief from the sentences of the Malmedy trial. The Supreme Court denied the motion, but it was a close decision: The Court split four to four (with Justice Robert Jackson disqualifying himself because of his work as Chief Prosecutor at Nuremberg).<sup>22</sup>

Undeterred, Everett now looked for other ways to help the German accused. Unfortunately, he began to lie about how the Malmedy accused had been treated prior to trial, insisting that Peiper and the troops of the *Kampfgruppe* had been routinely beaten, starved, and tortured to compel them to confess to crimes. Everett also suggested that mock trials had been "the rule rather than the exception."<sup>23</sup> Everett convinced two Democratic members of Congress from Georgia, Congressman James "Jim" Davis and Senator Walter F. George, to meet with Secretary of Defense James V. Forrestal and Secretary of the Army Kenneth C. Royall on the issue. Secretary Royall was so upset by Everett's allegations of prosecutorial misconduct that he ordered a stay of all executions pending further review.<sup>24</sup> In July 1948, Royall named his own three-person commission, chaired by Texas Supreme Court justice Gordon Simpson, to review not only the Malmedy trial death sentences but also the one hundred and twenty-seven capital sentences imposed in other war crimes trials conducted at Dachau. Everett's allegations of unfairness and foul play at the Malmedy trial "had clearly put the Army on the defense,"<sup>25</sup> and his claims threatened to undermine the validity of the Army's entire

war crimes trial program in Germany. After all, if coercive interrogation techniques had been used to obtain convictions in other trials at Dachau, the fairness of all German war crimes trials in U.S. Army military courts would be called into question.

With the press in the United States trumpeting Everett's claims of malfeasance, a number of Catholic and Protestant bishops in Germany now joined the dialogue. Cardinal Josef Frings of Cologne and Bishop Johannes Neuhausler both launched vociferous campaigns against the Dachau war crimes trials. Frings "strongly opposed the entire concept of bringing the perpetrators to justice," and insisted that the Allies had followed a "pagan and naïve" optimism for taking it upon themselves to make judgments about Nazi guilt.<sup>26</sup> Neuhausler, encouraged by criticism of the Malmedy trial, "intensively lobbied American authorities on behalf of convicted war criminals."<sup>27</sup> In March 1948, he also wrote to five members of Congress demanding that they investigate the "torture, mistreatment and calculated injustice" committed by Army personnel investigating the Malmedy war crimes.<sup>28</sup>

Fortunately for the Army—and the JAGD—the Simpson commission concluded in September 1948 that the war crimes trials being conducted in Germany were "essentially fair" and that there was no "systematic use of improper methods to secure prosecution evidence."<sup>29</sup> However, the Malmedy trial was different; the use of mock trials had cast "sufficient doubt" on the proceedings to make it "unwise" to carry out the remaining death sentences.<sup>30</sup> Although GEN Clay still had the authority to affirm the death sentences, there was little doubt that the Simpson commission findings meant Peiper and the others would escape the gallows.

Shortly after the Simpson commission delivered its report to Secretary Royall, a Senate Armed Services Committee subcommittee chaired by Senator Raymond Baldwin began hearings on the Malmedy case. Beginning in March 1949, the subcommittee heard from 108 witnesses and examined thousands of pages of documents. Baldwin also invited Senator Joseph McCarthy to participate as a visiting member of the subcommittee. McCarthy's participation was intended to "gain additional credibility and quiet the more radical Army critics,"<sup>31</sup> but inviting McCarthy turned out to be a disaster. He dominated the subcommittee hearings for almost a month and "sharply

<sup>22</sup> *Everett v. Truman*, 334 U.S. 824 (1948); see BUSCHER, *supra* note 21, at 38.

<sup>23</sup> See WEINGARTNER, *supra* note 2, at 151.

<sup>24</sup> See BUSCHER, *supra* note 21, at 38–39. Royall's actions almost certainly were influenced by his own experience with military commissions. In 1942, then-COL Royall had served as one of three defense counsel for the eight U-boat saboteurs being prosecuted before a military tribunal convened by Franklin D. Roosevelt. (Royall was not a member of the JAGD, but he had received a direct commission as a colonel, Army General Staff, in 1942.) Believing that Roosevelt lacked the constitutional authority to convene a secret military commission to try his clients, Royall aggressively challenged the lawfulness of the tribunal before the U.S. Supreme Court. Although he ultimately did not prevail, Royall insisted that "to preserve our own system of government," it was important that the military commission not trample on the rights of the German defendants. As Royall put it: the United States would have "an empty victory" if it failed to adopt procedures at the military commission that reflected "fair administration of law." The real test of a system of justice "is not when the sun is shining but when the weather is stormy." LOUIS FISHER, *MILITARY TRIBUNALS AND PRESIDENTIAL POWER* 113–14 (2005).

<sup>25</sup> See BUSCHER, *supra* note 21, at 38.

<sup>26</sup> *Id.* at 93.

<sup>27</sup> *Id.*

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

<sup>29</sup> See BUSCHER, *supra* note 21, at 39; WEINGARTNER, *supra* note 2, at 177.

<sup>30</sup> See BUSCHER, *supra* note 21, at 39.

<sup>31</sup> *Id.*

attacked the Army.”<sup>32</sup> McCarthy had a particularly “heated confrontation” with now-COL Ellis, whom McCarthy accused of grave misconduct at the Malmedy trial.<sup>33</sup>

In October 1949, the subcommittee published a 1700-page report. It unanimously concluded that the allegations of physical mistreatment and torture were false and that the claims that violence had been used to obtain confessions were without merit.<sup>34</sup> However, the report did find that Army investigators had employed mock trials “in not more than 12 cases of the several hundred suspects interrogated by the war crimes investigative teams.”<sup>35</sup> The subcommittee criticized these mock trials as a “grave mistake” because the use of psychological trickery was unnecessary and had ultimately been exploited by critics of the war crimes trial program. Significantly, the subcommittee found that “American authorities have unquestionably leaned over backward in reviewing any cases affected by the mock trials . . . [I]t appears many sentences have been commuted that otherwise might not have been changed.”<sup>36</sup>

In the end, it was all too much for American military decision-makers in Germany, and on 31 January 1951, GEN Thomas T. Handy, who succeeded Clay, commuted the death sentences of Peiper and the remaining Malmedy accused. Handy followed the advice of COL Damon Gunn, the new Theater Judge Advocate, who had counseled that a major reason to commute the death sentences was “the probable negative congressional reaction to additional executions.”<sup>37</sup> By Christmas 1956, all the Malmedy accused had been released from prison.

Measured by today’s standards, and with the benefit of hindsight, the Malmedy court proceedings were certainly flawed. First, the prosecution’s use of fake judicial proceedings and coercive interrogation techniques to obtain statements from the accused compromised their reliability

and consequently tainted the entire prosecution effort. As evidenced by Secretary Royall’s decision to have a commission look at *all* the death penalty cases tried at Dachau, flaws in the Malmedy prosecution subsequently spilled over to other war crimes trials, which became subject to Congressional scrutiny.

On the other hand, there is no doubt that American POWs were murdered at Malmedy and that few of the Malmedy survivors could identify the SS troops who had opened fire on them. It is likely that government investigators felt justified in using trickery and deceit to obtain evidence from the German accused because there was no other way to obtain proof; confessions were required if justice was to be obtained for the dead.

Second, the single trial of more than seventy accused, represented by six American defense counsel, smacks of unfairness, especially as each accused faced a death sentence. As there was no presumption of innocence at the trial and the panel members spent less than three hours deliberating before returning with a finding of guilty, it is difficult to conclude that there was a deliberative process instead of a rush to judgment. On the other hand, when the panel members heard about Peiper’s activities as Heinrich Himmler’s adjutant and heard him admit that “local conditions” sometimes demanded that POWs be executed, it was reasonable for these same panel members to find that Peiper had either ordered the execution of Americans or had condoned the killings. Alternatively, the panel members could have concluded that Peiper was guilty as charged because he had failed to control the members of his *Kampfgruppe*, failed to take action to prevent future killings, and failed to discipline the culpable parties whom he should have known had killed POWs and unarmed civilians. Additionally, as the panel members had access to nearly one hundred sworn statements linking each accused to the charged offenses, there arguably was sufficient evidence to support the court’s verdict.

While the killings at Malmedy were homicides, there was no credible evidence that the killings were ordered, deliberate, or pre-planned. Some historians believe that the impetus for the killings occurred when Georg Fleps, a twenty-one-year old SS-trooper, opened fire of his own volition. Once he began shooting, others armed with machine guns joined in.<sup>38</sup> Consequently, although these murders qualify as war crimes, the event preceding the murders could very well have been spontaneous. But the Malmedy court failed to adequately address the *mens rea* of the seventy-three SS troops it convicted; a fairer determination of that criminal intent could have resulted in fewer death sentences, and perhaps some acquittals.

<sup>32</sup> See BUSCHER, *supra* note 21, at 40.

<sup>33</sup> *Id.* at 41. Joseph Raymond McCarthy (1909–1957) served as U.S. Senator from Wisconsin from 1946 to 1957. While McCarthy was relatively unknown at the time of the Malmedy hearings, he soon became a high-profile national figure after claiming in February 1950 that he had a list of Communist Party members who were employed by the U.S. State Department. McCarthy subsequently charged that Communists (and Soviet spies) had infiltrated other parts of the U.S. Government, including the U.S. Army. By December 1954, however, McCarthy’s tactics and his inability to prove claims of subversion resulted not only in a loss of popularity but also a vote of censure by his fellow senators. McCarthy died at Bethesda Naval Hospital in May 1957. He was forty-eight years old. However, his impact on America has not been forgotten. The term “McCarthyism” (coined by his opponents) continues to mean the “political practice of publicizing accusations of disloyalty or subversion with insufficient regard to evidence.” AMERICAN HERITAGE DICTIONARY 809 (1979).

<sup>34</sup> MALMEDY MASSACRE REPORT, SUBCOMMITTEE OF THE COMMITTEE ON ARMED SERVICES, U.S. SENATE, 81ST CONG., 1ST SESS. 6–7 (1949).

<sup>35</sup> *Id.* at 7.

<sup>36</sup> *Id.* at 8.

<sup>37</sup> *Id.* at 40.

<sup>38</sup> See WHITING, *supra* note 1, at 51–52; WEINGARTNER, *supra* note 2, at 62; see also Michael Reynolds, *Massacre at Malmedy During the Battle of the Bulge*, WORLD WAR II, Feb. 2003, at 16, 16–21.

As for Everett, he had never spent even a day in combat and had arrived in Europe only after the fighting was over. Despite the lack of first-hand knowledge about military operations, especially against Waffen-SS units, Everett consistently made pro-German statements that showed a marked insensitivity to the suffering that many had experienced under the German Reich. For example, Everett insisted that it was wrong for the United States to prosecute Germans for war crimes when American military personnel had committed similar offenses in the heat of battle.<sup>39</sup> Given the extent of the Holocaust—and the participation of Waffen-SS officers like Peiper in it—such a claim made Everett appear to be either disingenuous, foolish, or both. Additionally, Everett’s own prejudices hurt his case. He repeatedly railed against COL Rosenfeld, the “Jew Law Member” at Malmedy and “Jewish pressure . . . demanding blood and death penalties.”<sup>40</sup> While studying in New York City in 1945, Everett was upset to see “two black negroes” in the choir at an all white church, as this “spoiled the service.” He also wrote to his wife that he could not “stomach” sharing a bathroom with a male African-American student at Columbia University.<sup>41</sup>

But there can be no dispute about one fact: Everett was an effective defense counsel, and his unwavering support of the Malmedy accused and unending agitation on their behalf is the chief reason all were spared the hangman’s noose. At least one of the accused, however, could not escape a final reckoning. On 14 July 1976, then sixty-one-year-old Peiper was living in Traves, France, when his home was fire-bombed. He died in the resulting blaze. Because the attack occurred on Bastille Day, historians think it likely that Peiper was assassinated by former members of the French Resistance.

Today, the Malmedy Massacre remains an example of the difficulties involved in prosecuting war crimes. Although American POWs had been murdered by SS troops, the use of trickery and deceit to obtain evidence against the German accused called into question the validity of the trial, allowed critics to paint the accused as victims of American injustice, and cast a shadow on the proceedings that exists to this day.

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<sup>39</sup> See WEINGARTNER, *supra* note 2, at 151.

<sup>40</sup> *Id.* at 68, 206.

<sup>41</sup> *Id.* at 30–31.

**“The Largest Murder Trial in the History of the United States”:  
The Houston Riots Courts-Martial of 1917**

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On the night of 23 August 1917, about 100 African-American Soldiers assigned to the 24th Infantry Regiment marched from their nearby camp into Houston, Texas. They were armed with Springfield rifles, and were enraged because they believed that one of their fellow Soldiers had been killed by the local police. As the troopers moved through Houston, they fought a running battle with civilians, Houston police officers and elements of other military units stationed in the city. When the riot ended, fifteen white men had been killed. Sixty-three African-American Soldiers believed to be responsible for the riot—and the deaths—were subsequently court-martialed in the “largest murder trial in the history of the United States.”<sup>1</sup> While the story of Houston riots trial is worth knowing, the impact of the tragic event on the evolution of the military justice system is what makes it important in our Corps’ history.

After America entered World War I in April 1917, a battalion of the all-black 24th Infantry Regiment was sent to Houston, Texas to guard the construction of a new training facility called Camp Logan. While the local white citizens of Houston welcomed the economic prosperity that they believed that Camp Logan would bring to their community, they loudly protested the decision to station African-American Soldiers in Houston. In racially segregated Texas—with its Jim Crow culture—white people did not like the idea of well-armed African-American Soldiers in their midst. Some whites also feared that these troops might bring ideas and attitudes that “would cause local blacks to ‘forget their place.’”<sup>2</sup>

From the outset, the Soldiers of the 24th Infantry resented the “Whites Only” signage prevalent in Houston. Several troops also came into conflict with the police, streetcar conductors and other passengers when they refused to sit in the rear of the streetcar. Finally, there were many incidents in which Soldiers took offense at epithets directed at them by white townspeople. The use of the “N-word,” in particular infuriated African-American Soldiers who heard it, and the slur “was invariably met by angry responses,

outbursts of profanity and threats of vengeance.”<sup>3</sup> More than a few Soldiers were arrested or beaten, or both, as a result of these run-ins with local citizens.<sup>4</sup>

Matters came to a head on 23 August, when a white Houston police officer beat two African-American Soldiers in two separate incidents; the second beating occurred when the Soldier-victim was questioning the policeman about the earlier assault. When this second victim did not return to camp, a false rumor began that he had been “shot and killed by a policeman.”<sup>5</sup> Although this second victim ultimately did return—proving that he had not been killed—his fellow infantrymen were so upset that they decided to take matters into their own hands.

Despite entreaties from their commander, Major (MAJ) Kneeland S. Snow, to remain in camp and stay calm, about 100 men mutinied and departed for Houston.<sup>6</sup> Having seized their Springfield rifles and some ammunition, the Soldiers’ intent was to kill the policeman who had beaten their fellow Soldiers—and as many other policemen as they could locate.

Once inside the city, the infantrymen fought a series of running battles with the Houston police, local citizens and National Guardsmen, before disbanding, slipping out of town, and returning to camp. While the riot had lasted merely two hours, it ultimately left fifteen white citizens dead (including four Houston police officers); some of the dead had been mutilated by bayonets. Eleven other civilian men and women had been seriously injured. Four Soldiers also died. Two were accidentally shot by their fellow Soldiers. A third was killed when he was found hiding under a house after the riots. Finally, the leader of the alleged mutineers, a company acting first sergeant named Vida Henry, apparently took his own life—most likely because he had some idea what faced him and the other Soldiers who had participated in the mutiny and riot.<sup>7</sup>

In the days that followed the Houston riots, Coast Artillery Corps personnel and Soldiers from the 19th

<sup>1</sup> THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL’S CORPS 125, at fig.37 (1975) (photograph caption “Largest Murder Trial in the History of the United States”).

<sup>2</sup> JOHN MINTON, THE HOUSTON RIOT AND COURTS-MARTIAL OF 1917, at 13 (n.d.). In 1917, municipal legislation in Houston mandated racially separate YMCAs, libraries, and streetcar seating. Some streets also were specified as “whites only” for the watching of parades. GARN L. CHRISTIAN, BLACK SOLDIERS IN JIM CROW TEXAS 1899–1917, at 145 (1995).

<sup>3</sup> *Id.* at 149.

<sup>4</sup> THE ARMY LAWYER, *supra* note 1, at 126; Transcript of Proceedings of a General Court-Martial at 8, United States v. Robert Tillman et al. (n.d.) (No. 114575).

<sup>5</sup> Transcript of Proceedings of a General Court-Martial at 33, United States v. Robert Tillman et al.

<sup>6</sup> *Id.* at 4.

<sup>7</sup> CHRISTIAN, *supra* note 2, at 153, 172.

Infantry Regiment were deployed to restore order and disarm the suspected mutineers. Those believed to have participated in the mutiny were sent to the stockade at Fort Bliss, Texas to await trial.

A little more than two months later, on 1 November 1917, a general court-martial convened at Fort Sam Houston began hearing evidence against sixty-three Soldiers from the 24th Infantry. All were charged with disobeying a lawful order (to remain in the camp), assault, mutiny, and murder arising out of the Houston riots. The accused—all of whom pleaded not guilty—were represented by a single defense counsel, MAJ Harry H. Grier. At the time he was detailed to the trial, Grier was the Inspector General, 36th Division. While he had taught law at the U.S. Military Academy and almost certainly had considerable experience with courts-martial proceedings, Grier was not a lawyer.<sup>8</sup>

The prosecution was conducted by MAJ Dudley V. Sutphin, a judge advocate in the Army Reserve Corps.<sup>9</sup> Interestingly, there was additional legal oversight of the trial. This is because Major General (MG) John W. Ruckman, who convened the court-martial as the Commander, Southern Department, detailed judge advocate Colonel (COL) John A. Hull to supervise the proceedings to ensure the lawfulness of the court-martial.<sup>10</sup>

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<sup>8</sup> Harry Surgisson Grier (1880–1935) graduated from the U.S. Military Academy in 1903 and was commissioned in the infantry. Over the next thirty-two years, he served in a variety of assignments and locations, including two tours in the Philippine Islands, service with Pershing's Punitive Expedition in Mexico, and World War I duty with the American Expeditionary Force (AEF) in France and Germany. Grier also had a tour as an Instructor and Assistant Professor of Law at West Point. "Harry Surgisson Grier," ANNUAL REPORT, ASSEMBLY OF GRADUATES, at 243 (June 11, 1936).

<sup>9</sup> Born in Dayton, Ohio, in October 1875, Sutphin graduated from Yale University in 1897 and received his LL.B. from the University of Cincinnati in 1900. Sutphin then practiced law in Cincinnati. He specialized in trial work and served as a judge of the Superior Court of Cincinnati for a short period. After the United States entered World War I, Sutphin left his civilian law practice to accept a commission as a major (MAJ), Judge Advocate General's Reserve Corps. After a brief period of service at Headquarters, Central Department, Chicago, Illinois, Sutphin was reassigned to San Antonio, Texas, where he served as Trial judge advocate in the Houston Riot court-martial. Sutphin subsequently sailed to France where he served as judge advocate, 83d Division, AEF. In 1919, Sutphin left active duty as a lieutenant colonel and returned to his law practice in Ohio.

<sup>10</sup> Hull served as The Judge Advocate General (TJAG) from 1924 to 1928. Born in Bloomfield, Iowa in 1874, he earned his Ph.D. from the University of Iowa in 1894; a year later, Hull received his law degree from Iowa. During the Spanish-American War and the Philippine Insurrection, Hull served as a Judge Advocate of Volunteers. Then, when he was twenty-six years old, Hull was appointed as a MAJ and judge advocate in the Regular Army. He soon became widely known as the "Boy Major." At the beginning of World War I, Hull was the Judge Advocate, Central Department, Chicago, Illinois. Soon thereafter he was placed on special duty with the Southern Department, where he supervised the prosecution of the Houston Riot courts-martial. In February 1918, then Colonel Hull sailed for France, where he organized and became the Director of the Rents, Requisitions and Claims Service, AEF, located at Tours. He later served as the chief, Finance Bureau, AEF. After returning to the United States in August 1919, Hull served in a variety of assignments in Washington, D.C.

The trial lasted twenty-two days, and the court heard 196 witnesses. The most damning evidence against the accused came from the testimony of "a few self-confessed participants who took the stand in exchange for immunity."<sup>11</sup> Grier, the lone defense counsel, despite the inherent conflict presented by representing multiple accused, argued that some of the men should be acquitted because they lacked the *mens rea* required for murder or mutiny. He also insisted that because the prosecution had failed in a number of cases to prove guilt beyond a reasonable doubt, the accused should be found not guilty. Finally, while acknowledging that some of the accused were culpable, Grier blamed the Houston police for failing to cooperate with military authorities to keep the peace between white Houstonians and the African-American Soldiers.<sup>12</sup>

When the trial finished in late November, the court members agreed with the defense and acquitted five of the accused. The remaining Soldiers were not as fortunate: thirteen Soldiers were condemned to death and forty-one men were sentenced to life imprisonment. Only four Soldiers received lesser terms of imprisonment.

The thirteen accused who had been sentenced to death requested that they be shot by firing squad. The court members, however, condemned them to death by hanging and informed the accused on 9 December that they would suffer this ignominious punishment.

Two days later, on the morning of 11 December, the thirteen condemned men were handcuffed, transported by truck to a hastily constructed wooden scaffold, and hanged at sunrise. It was the first mass execution since 1847.

Although the Articles of War permitted these death sentences to be carried out immediately because the United States was at war, the lawfulness of these hangings did not lessen the outcry and criticism that followed. Brigadier General Samuel T. Ansell, then serving as acting Judge Advocate General, was particularly incensed. As he later explained:

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

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before being promoted to major general and TJAG in 1924. After retiring from active duty in 1928, Hull served several years as an associate justice on the Supreme Court of the Philippine Islands.

<sup>11</sup> MINTON, *supra* note 2, at 16.

<sup>12</sup> CHRISTIAN, *supra* note 2, at 162.

<sup>13</sup> THE ARMY LAWYER, *supra* note 1, at 127.

Ansell quickly move to prevent any future similar occurrence. General Orders No. 7, promulgated by the War Department on 17 January 1918, prohibited the execution of the sentence in any case involving death before a review and a determination of legality could be done by the Judge Advocate General.<sup>14</sup>

But there was an even more important result: as a result of General Orders No. 7, the Judge Advocate General created a Board of Review with duties “in the nature of an appellate tribunal.”<sup>15</sup> The Board was tasked with reviewing records of trial in all serious general courts-martial. While its opinions were advisory only—field commanders ultimately made the decision in courts-martial they had convened—the Board of Review was the first formal

appellate structure in the Army. When Congress revised the Articles of War in 1920, it provided the first statutory basis for this review board. This legislative foundation still exists, and is the basis for today’s Army Court of Criminal Appeals.

The Houston Riots Courts-Martial of 1917—and a number of other instances of injustice during the World War I era—ultimately led to other far reaching reforms in the military justice system.<sup>16</sup> But the history of those reforms, which culminated in the enactment of the Uniform Code of Military Justice in 1950, is another story for another day.

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<sup>14</sup> As a result of this general orders, the verdicts in two follow-on general courts-martial—involving an additional fifty-four African-American Soldiers who were convicted of rioting in Houston—were reviewed in Washington, D.C. As a result of this review, ten of sixteen death sentences imposed by these follow-on courts-martial were commuted to life imprisonment. By the end of the 1920s, however, all those who had been jailed as a result of the Houston riots courts-martial had been paroled. MINTON, *supra* note 2, at 26.

<sup>15</sup> THE ARMY LAWYER, *supra* note 1, at 130.

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<sup>16</sup> See e.g., Terry W. Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell*, 35 MIL. L. REV. 1 (1967); Frederick B. Wiener, *The Seamy Side of the World War I Court-Martial Controversy*, 123 MIL. L. REV. 109 (1989).

## Lore of the Corps

### A Remarkable Judge Advocate By Any Measure: Colonel Hubert Miller (1918–2000)

*Fred L. Borch III*  
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War hero, two-time Olympian, outstanding judge advocate (JA)—Colonel (COL) Hubert “Hube” Miller was all of these. He was decorated with the Distinguished Service Cross for extraordinary heroism in France in 1944, competed in the four-man bobsled event in the 1952 and 1956 Winter Olympics, and served twenty years as an Army lawyer in a variety of important positions.

Born at Saranac Lake, New York on 24 February 1918, Hube Miller graduated from high school in 1935. He was a superb athlete and, while attending St. Lawrence University from 1936 to 1938, was a member of the school’s skiing, wrestling, and football squads.

After completing his studies in 1938, Miller entered Albany Law School, from which he graduated in 1941 with an LL.B. He then worked in Boston, Massachusetts for the Liberty Mutual Insurance Company. After the Japanese attack on Pearl Harbor, Miller left civilian life and enlisted in the Army.

In February 1942, Private Miller reported for duty at Fort Benning, Georgia. After completing training as an infantryman, Miller applied for and was accepted into Officer Candidate School. On 8 October 1942, Miller pinned on the gold bars of a second lieutenant and, after more than a year at Fort Jackson, South Carolina, he sailed for Europe.

After arriving in England in April 1944, now First Lieutenant Miller joined the 358th Infantry Regiment, 90th Infantry Division. The “Tough ‘Ombres” landed in Normandy at Utah Beach on D-Day plus 2 and immediately saw hard fighting against the Germans.<sup>1</sup> Miller, who served first as a platoon leader and then as a company commander, excelled as a combat Soldier. Proof that Miller was the epitome of the young infantry officer came the following month, when Miller’s battalion was heavily engaged. As the citation for his Distinguished Service Cross explains:

On 12 July 1944, near La Valaisiere, France, while the 3rd Battalion, 358th Infantry was attacking through hedgerows, Lieutenant Miller, as Commanding Officer

of Company “I,” was severely and painfully wounded when the battalion was pinned down by intense enemy machine gun fire. Learning that all other officers of Companies “I,” “K,” and “L” had become casualties, Lieutenant Miller refused to be evacuated and took command of the reorganization of the three companies under heavy enemy fire. With disregard of his injuries and personal safety, he then moved forward in direct line of fire from the enemy and brought back to safety a severely wounded enlisted man. Lieutenant Miller remained in command of his troops until relieved by another officer some three hours later. The gallant example set by this officer inspired the troops which he commanded to strive more aggressively for success in all their combat missions.<sup>2</sup>

Miller’s wounds were so severe that he was evacuated to England on 13 July. He returned to the United States in January 1945 and then served as a training company commander and regimental operations officer until October, when now Captain (CPT) Miller was released from active duty.

Returning to the private practice of law in Saranac Lake, New York, Miller also was actively involved in New York State’s Division of Veteran Affairs as a Veterans’ Counselor. He also entered local politics and was elected to his county’s Board of Supervisors.

A year after the Korean War broke out, Miller was recalled to active duty as an infantry officer. But CPT Miller did not deploy to the Far East. On the contrary, the Army sent him to Fort Dix, New Jersey, to serve as an infantry training company commander. While in this assignment, Miller arranged some temporary duty at Lake Placid, New York, where he tried out for the U.S. Olympic four-man Bobsled Team. He made the team, and participated in the 1952 Winter Olympic Games in Oslo, Norway.

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<sup>1</sup> The red “T-O” on the shoulder sleeve insignia of the 90th Division stood for “Texas-Oklahoma”—indicating its origins as a National Guard division. But the Soldiers of the 90th liked to believe that the letters on the patch stood for “Tough ‘Ombres.”

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<sup>2</sup> Headquarters, Third U.S. Army, Gen. Order No. 89, para. 2 (12 Nov. 1944).

Shortly thereafter, CPT Miller was assigned to Garmisch, Germany, where he assumed duties as the post Recreational Services Officer. In this assignment, Miller was responsible for all recreational and entertainment programs and activities for the Army recreation center in Garmisch. He supervised about 300 military and civilian personnel and oversaw the operation of ski tours, ice shows, sports clinics, golf courses, bowling alleys, theaters, and dance bands. But Miller also continued to train. His hard work paid off: Miller was a member of the four-man U.S. bobsled team that won the World Championships in Garmisch in 1953.

After returning to the United States in early 1955, Miller decided it was time to put his legal training to good use. He was detailed to the Judge Advocate General's Corps in December and immediately assumed duties as Chief of Military Justice in the Office of the Staff Judge Advocate (SJA) at Fort Dix, New Jersey. Promoted to major in April 1955, Miller was selected to attend the Fourth Advanced Course and he began his classes at The Judge Advocate General's School (TJAGSA) in Charlottesville, Virginia in August.

Interestingly, Miller took a short break from his classes in January 1956, when he travelled to Cortina, Italy to once again join the U.S. Olympic Team in the four-man bobsled event. Miller is the only TJAGSA student in history to participate in the Olympic Games as a student. Unfortunately, Miller did not make history as the only Army JAG Corps officer to participate in the Olympic Games because he did not formally transfer to the Corps until March 1956 (shortly before he graduated from the Advanced Course).

As an Army lawyer, Miller served in a variety of assignments and locations, to include Staff and Faculty, TJAGSA; Deputy SJA, 101st Airborne Division; SJA, 1st Cavalry Division; SJA, Air Defense Command; and SJA, Army Air Defense Center.

But Miller made history while serving as the SJA, 1st Logistical Command, from June 1966 to June 1967. With over 60,000 personnel assigned to it, this was the largest single command in Vietnam. Now COL Miller was the principal legal advisor and he "and his legal staff of ten military attorneys handled criminal, procurement, real estate, international and maritime law."<sup>3</sup>

Ninety percent of the workload for the attorneys at the 1st Logistical Command involved general courts-martial. Few of these trials, however, were for military offenses. Rather, most were for murders, rapes and robberies. While this Soldier-related misconduct was bad, a bigger problem was the rise in civilian misconduct in areas falling under the

command's jurisdiction. Since the South Vietnamese were unwilling to prosecute American civilians for criminal offenses, Miller decided to prosecute a civilian offender at a summary court-martial.

After a civilian merchant seaman named Bruce was caught stealing from a ship in Cam Ranh Bay, Miller conferred with Major General (MG) Charles W. Eifler, the Commanding General, 1st Logistical Command. Miller prepared a memorandum, which Eifler signed on 8 December 1966, in which Eifler stated that "in view of the conditions now prevailing in Vietnam, I have determined that 'time of war' within the meaning of the UCMJ exists in this area of operations."<sup>4</sup> First Logistical Command Special Orders were then published detailing JA CPT Bernard Radosh as summary court officer. Radosh travelled to Cam Ranh Bay, heard the evidence against Bruce, and convicted him. The punishment was a reprimand, a fine, and restriction to the ship. Miller reviewed the abbreviated record of the summary court and MG Eifler approved the findings and sentence.

In addition to prosecuting the first civilian in Vietnam, the 1st Logistical Command also processed the first enlisted resignation in lieu of court-martial. A sergeant (SGT) and some other men had stolen a jeep and radio, dug a hole, and buried them, planning to retrieve the property later. The SGT's misconduct was discovered, and charges were preferred against him for larceny of government property.

Prior to trial by general court-martial, Miller suggested to the accused's defense counsel that the Soldier consider submitting a resignation in lieu of trial under Army Regulation (AR) 635-200. This was a new provision, and the defense counsel had never heard of it. But the accused submitted the resignation, and Miller took it to MG Eifler. The latter also was unfamiliar with the new provision, but he took Miller's recommendation and approved the accused's request. The accused had a good record, and so Eifler gave him a break, approving a general discharge rather than the bad conduct or dishonorable discharge the accused likely would have been given at trial.

Interestingly, it was Miller who had first proposed creating an enlisted resignation in lieu of court-martial when he was working in the Pentagon at Office of the Judge Advocate General's Military Justice Branch from 1960 to 1963. Under then existing law, an officer could resign in lieu of court-martial, but enlisted Soldiers had no comparable mechanism to avoid trial. Believing that the enlisted ranks should have the same right as officers, then Lieutenant Colonel Miller sent his proposal forward for staffing, but no action was taken. During a later visit with then Brigadier General Kenneth Hodson, the Assistant Judge

<sup>3</sup> FREDERIC L. BORCH, JUDGE ADVOCATES IN VIETNAM 68 (2003).

<sup>4</sup> Memorandum from the Commanding General, 1st Logistical Command, for Commanding General, U.S. Army Support Command, Cam Ranh Bay, subject: Jurisdiction over Civilians (8 Dec. 1966)



Advocate General for Military Justice, Miller again suggested that creating this enlisted resignation mechanism was a good idea. Hodson agreed, picked up the telephone, and spoke personally with The Adjutant General, requesting speedy approval of Miller's proposal. The new provision appeared in the July 1966 revised version of AR 635-200.<sup>5</sup>

After retiring from active duty in 1975, Miller and his wife settled in Elberta, Alabama, where he lived until his death in 2000.

The Corps has not forgotten COL Hubert Miller. At Fort Bliss, Texas, where Miller had his final assignment as the Army Air Defense Center SJA, the command recently named their new courtroom in his honor.

*More historical information can be found at*

The Judge Advocate General's Corps  
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<sup>5</sup> BORCH, *supra* note 3, at 70.

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

*Fred L. Borch III*  
*Regimental Historian & Archivist*

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

Some will be surprised to learn that for many years, JAs did not wear a uniform. While William Tudor, the first Judge Advocate General (JAG), had the military rank of lieutenant colonel, he did not wear a uniform, and neither did his successors. Army regulations published in 1825 explicitly stated that JAs (along with chaplains) "have no uniform."<sup>1</sup>

Not until 1857 did the Army authorize a distinguishing item for JA wear: a white pompon.<sup>2</sup> Judge advocates were to wear this pompon—"a tuft of cloth material which looked like an undersized tennis ball and protruded from the hat"<sup>3</sup>—whenever they wore the standard staff officer uniform with epaulettes. But, as there was but one JA of the Army during this period in history, and JAs in the field all held commissions in other branches, it is likely that the white pompon was infrequently worn, if at all.<sup>4</sup> When the Army subsequently revised its uniform regulations in 1862, any mention of the white pompon was omitted, suggesting that it was not a popular uniform item.<sup>5</sup>

When the Civil War began in April 1861, the Regular Army consisted of 15,000 enlisted men and 1100 officers, most of whom were on duty on the western frontier. By the end of the war, however, 2.2 million men had served in Union blue uniforms, but not the JAG.<sup>6</sup> On the contrary, Brigadier General Joseph Holt, who served as the JAG from 1862 to 1875, never wore a uniform; he wore only civilian

clothing.<sup>7</sup> Some officers who worked for Holt in the Bureau of Military Justice (the forerunner of today's Corps) also wore civilian clothes. Others, who had started their careers as line officers, did wear Union blue out of habit, but there was nothing to distinguish them as Army JAs.

It was not until 1872 that Army JAs were first authorized to wear special uniforms with distinctive insignia, and that the letters "JA" in Old English letters were embroidered on each shoulder knot.<sup>8</sup> The term "shoulder knot" describes insignia consisting of gold wire or rope that is twisted in a series of loops. These shoulder knots are still worn by officers on the Army blue mess uniform jacket.<sup>9</sup>

The "JA" letters worn on each shoulder disappeared in 1890, and were replaced with the insignia familiar to Soldiers today—the crossed pen and sword.<sup>10</sup> General Order No. 53 provided that the following insignia for officers in the Judge Advocate General's Department (JAGD) (a "Department" had been created in 1884 and remained so until becoming a Corps in 1947) was to be worn on shoulder knots:

of gold cord, one-fourth of an inch in diameter . . . on dark blue cloth ground; insignia of rank embroidered on the cloth ground of the pad . . . with sword and pen crossed and wreathed, according to pattern, embroidered in silver on the cloth ground of the pad (except for a colonel and assistant judge advocate general, who will wear the device made of solid silver on the knot midway between the upper fastening of the pad).<sup>11</sup>

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<sup>1</sup> WAR DEP'T, REG. OF 1825, para. 865.

<sup>2</sup> WAR DEP'T, REG. OF 1857, para. 1430.

<sup>3</sup> Edward F. Huber, *Crossed Sword and Pen*, JUD. ADV. J, Mar. 1945, at 43.

<sup>4</sup> JUDGE ADVOCATE GENERAL'S CORPS, THE ARMY LAWYER 34-35 (1975) [hereinafter THE ARMY LAWYER].

<sup>5</sup> Whatever one may think of the white pompon as a badge of office, the Cavalry (the forerunner of today's Armor Branch) could claim the most unique identification in the mid-19th century: from 1841 to 1857, Army regulations provided that "mustaches" or "moustaches" would not be worn, *except by cavalry regiments*, "on any pretense whatsoever." Huber, *supra* note 3, at 43.

<sup>6</sup> JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM 313 (1988).

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<sup>7</sup> THE ARMY LAWYER, *supra* note 4, at 54-55.

<sup>8</sup> LEON W. LAFRAMBOISE, HISTORY OF THE ADMINISTRATIVE AND TECHNICAL SERVICES BRANCH OF SERVICE INSIGNIA 349 (1986).

<sup>9</sup> See U.S. DEP'T OF ARMY, REG. 670-1, WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA paras. 24-5 & fig.24-11 (3 Feb. 2005).

<sup>10</sup> LAFRAMBOISE, *supra* note 8.

<sup>11</sup> War Dep't, General Orders No. 53 (23 May 1890).

According to the Quartermaster General's Heraldic Section, the pen denoted the recording of testimony and the sword symbolized the military character of the JA mission. The wreath was part of the insignia because it was the traditional symbol of accomplishment. In the 1890s and early 1900s, the crossed-pen-and-sword was required to be worn on all shoulder knots. By World War I, however, shoulder knots disappeared from service dress uniforms, and JAs wore a one-inch dark brown metal crossed sword and pen insignia on the standing collar of the olive drab uniform coat. When the Army transitioned to olive-colored coats with lapels in the 1920s, the crossed pen and sword insignia moved from the standing collar to the lapel, where it remains today.<sup>12</sup>

In February 1924, a major change occurred when Major General (MG) Walter A. Bethel, the new Judge Advocate General (TJAG), authorized a new branch insignia for Army lawyers. The crossed sword and pen was out, and in its place was a gold-colored "balance" or scale, which rested on the point of a one-inch high silver Roman sword with a gold grip. A silver ribbon completed the design.<sup>13</sup>

Major General Bethel and others did not like the crossed sword and pen for several reasons. First, the insignia was thought to be too similar to the collar brass worn by the Inspector General's Department (IGD), especially as both the JAGD and the IGD insignia featured a wreath. While this might not seem to be a problem, more than a few JAs resented being mistaken for an inspector. Some Army lawyers apparently suggested to the IGD that it should change its insignia so that there would be no confusion between the two branches, but this suggestion was rebuffed.<sup>14</sup>

There was, however, a more fundamental reason to create a new insignia: the crossed sword and pen was not believed by MG Bethel and others to be "sufficiently symbolic" of the JA function.<sup>15</sup> The result: MG Bethel consulted with Major G. M. Chandler, a member of the Quartermaster General's Heraldic Section, and asked him to create a new branch insignia. Chandler chose a sword to indicate the military character of the JA's practice. He used a Roman sword because the Romans were great law-givers.

As for the balance, Chandler recognized that it was a symbol of justice in antiquity, and he actually based his design on the bronze zodiac signs in the floor of the main reading room at the Library of Congress.<sup>16</sup>

Judge advocates hated the change: "the immediate reaction to the new insignia ranged from open hostility to ridicule, and the officers were almost unanimous in their opinion that the new device was no improvement."<sup>17</sup> The outcry had an impact: in November 1924, MG Bethel canvassed JAs for their views on the new insignia, and most told him that they did not like it. Shortly thereafter, MG Bethel retired unexpectedly due to poor health. The new TJAG, MG John A. Hull, quickly moved to restore the old crossed sword and pen insignia, but the Adjutant General rescinded the new insignia in December 1924.<sup>18</sup> As a result, the Roman balance insignia was out before many were produced for wear. Consequently, it is an extremely rare item and highly sought after by collectors of U.S. military insignia. As for the crossed sword and pen, it has remained the branch insignia of the Corps without change since that time.

Enlisted personnel—yesterday's legal clerks, today's paralegals—wore the crossed sword and pen briefly in World War I, when the Army authorized enlisted men to join the JAGD "for the period of the existing emergency."<sup>19</sup> The Army authorized bronze collar disks from May 1918 through March 1920 but, after Congress restricted the JAGD to officers only in June 1920, enlisted personnel could no longer wear the crossed sword and pen. Although some legal clerks wore domed (convex) bronze disks with the crossed sword and pen in the 1950s and 1960s, these were unauthorized insignia. It was not until February 1968 that enlisted personnel assigned to staff judge advocate offices were *officially* allowed to wear gold-colored disks with the crossed sword and pen on their shirt collars and uniform lapels.<sup>20</sup>

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<sup>12</sup> Huber, *supra* note 3, at 44–45.

<sup>13</sup> *Id.*

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

<sup>15</sup> *Id.*

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<sup>16</sup> *Id.* at 45 n.32.

<sup>17</sup> WILLIAM K. EMERSON, *ENCYCLOPEDIA OF U.S. ARMY INSIGNIA AND UNIFORMS* 251–52 (1966).

<sup>18</sup> *Id.*

<sup>19</sup> War Dep't, General Orders No. 27, para. XII (22 Mar. 1918).

<sup>20</sup> EMERSON, *supra* note 17, at 252.

Warrant officers were the last uniformed community in the Corps to adopt the crossed sword and pen as their insignia. This occurred in 2004, when legal administrators gave up their distinctive eagle rising insignia and began wearing branch insignia worn by the Corps' JAs. The rationale for the change was that if warrant officers were to be fully integrated into the branch-based systems of the larger Army officer corps, they should adopt both the branch insignia and the branch colors of their respective primary military occupation specialty. For legal administrators, this meant wearing the crossed sword and pen on their lapels and adopting the Corps' blue and white colors on their dress uniforms. It also meant exchanging the eagle rising on their service caps for the eagle worn by commissioned officers on their caps.<sup>21</sup>



MG Bethel's short-lived JAGD insignia, ca 1924

Today, JAs, legal administrators and paralegals throughout the Army are identified by the "gold-colored sword and pen, crossed and wreathed"<sup>22</sup> which they wear both as insignia of branch and as Regimental distinctive insignia. There is every reason to believe that this unique badge of office will identify the members of the Corps for many years to come.



Current JAGC insignia

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<sup>21</sup> Message, 021111 Mar 04, U.S. DEP'T OF ARMY, subj: Changes to CW5 Rank and Warrant Officer Branch Insignia and Colors.

<sup>22</sup> AR 670-1, *supra* note 9, para. 28-10.b.(9).

Colonel Walter T. Tsukamoto: No Judge Advocate Loved America or the Army More

Fred L. Borch III  
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Shortly after the December 1941 attack on Pearl Harbor, Walter T. Tsukamoto, a civilian lawyer and judge advocate (JA) captain (CPT) in the Army Reserve, requested that the War Department order him to active duty. His request was denied. Tsukamoto made another request for active duty. It also was denied. He then applied a third and fourth time for active duty: denied again each time. Finally, when Tsukamoto applied a fifth time in early 1943, the Army relented and, on 10 March 1943, CPT Tsukamoto—a native-born U.S. citizen of Japanese ancestry—became the first Asian-American to serve on active duty in the Judge Advocate General's Department (JAGD). What follows is a remarkable story of an Army lawyer whose love for America and the Army never wavered despite the fact that this affection was not always reciprocated.

Born in Molokai, Hawaii, on 15 September 1904, Walter "Walt" Takeo Tsukamoto moved with his parents from Hawaii to Nevada when he was only a few months old. When Walt was seven years old, his parents moved from Nevada to California and settled in Sacramento. Young Tsukamoto soon proved to be an excellent student and, after graduating from high school in 1923, entered the University of California at Berkeley.

Tsukamoto graduated with a law degree (LL.B.) in 1929, passed the California bar examination, and began practicing law in Sacramento. He had a general practice that included probate, civil, and criminal law. Tsukamoto's specialty, however, was alien property law. This area of law was of great importance to Japanese immigrants living in California in the 1930s because the state had enacted legislation in 1913 prohibiting non-citizens from owning land in California.<sup>1</sup> Since U.S. law during this time did not permit Asian immigrants to become naturalized citizens,<sup>2</sup> a native-born American (known as a "Nisei" in Japanese) like

Tsukamoto could own real estate in California while his parents, who were born in Japan, could not. Men and women in the same predicament as Tsukamoto's parents visited Tsukamoto for advice on how to lawfully acquire real estate, especially farmland, which many Japanese immigrants in California were interested in purchasing.

Walt Tsukamoto also was politically active in his local community and routinely lobbied the largely antagonistic California legislature on behalf of Japanese-Americans. Particularly noteworthy was his success, achieved almost singlehandedly in the mid-1930s, in defeating legislation that would have prohibited Americans of Japanese ancestry from engaging in the fishing industry.<sup>3</sup> Tsukamoto also was a force in national politics. He had joined the Japanese American Citizens League (JACL) as a young Sacramento attorney and was elected to serve a two-year term as national president in 1938.<sup>4</sup>

In addition to his law practice, Walter Tsukamoto also pursued a career as a Soldier. Having participated in the Reserve Officer Training Corps program at Berkeley, where he had attained the rank of cadet major, Tsukamoto was commissioned as an Army Reserve infantry officer on 10 May 1927. Assigned to the 361st Infantry, 91st Division, then-Second Lieutenant Tsukamoto took Army correspondence courses in map and aerial photography reading, customs and courtesies, and scouting and patrolling. After transferring to the Reserve JAGD on 29 July 1937, now-CPT Tsukamoto also took correspondence courses in administrative law, military justice, and the rules of land warfare. He was the first Nisei to wear the crossed-sword-and-pen insignia on his collar and was almost certainly the first Asian-American JA.

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<sup>1</sup> California's Alien Land Law, enacted in 1913, prohibited persons ineligible to become U.S. citizens from owning land in the state or from leasing land for more than three years. The law was intended to prevent Japanese immigrants from purchasing farmland. Asian and other non-white immigrants were prohibited from owning land in the state until the California Supreme Court ruled in 1952 that the restriction was unconstitutional.

<sup>2</sup> President Calvin Coolidge signed the Immigration Act of 1924, 43 Stat. 153, which continued the ban on further Japanese immigration. In fact, U.S. law continued to curtail Japanese immigration until 1952, although the Japanese brides of U.S. servicemen were permitted entry onto U.S. soil after World War II.

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<sup>3</sup> For more on the attempts to exclude Japanese Americans from California's fishing industry and Walt Tsukamoto's involvement, see Donald H. Estes, "Offensive Stupidity," *And the Struggle of Abe Tokunoske*, J. SAN DIEGO HISTORY, available at <http://www.sandiegohistory.org/journal/82fall/offensive.htm>.

<sup>4</sup> Founded in 1929, the Japanese American Citizens League was established as a pro-American organization working for civil rights on behalf of Japanese-Americans. Today, it is the largest and oldest Asian-American civil rights organization in the United States. See JAPANESE AMERICAN CITIZENS LEAGUE (May 20, 2011), [www.jacl.org](http://www.jacl.org).

When the Japanese surprise attack on Pearl Harbor occurred, Tsukamoto was shocked and angry. As a patriot and Reservist, he immediately volunteered for active duty. The Army, however, refused to act on his December 1941 application; apparently the War Department was uncertain about whether a thirty-seven-year-old Nisei Reserve officer should be activated.

On 19 February 1942, as Tsukamoto waited to hear from the Army—he did not know that the War Department had refused to take action on his request for active duty—President Franklin D. Roosevelt signed Executive Order 9066. This order authorized the Army to designate military areas from which “any or all persons may be excluded”<sup>5</sup> and to provide transportation, food, and shelter for persons so excluded. Shortly thereafter, Lieutenant General (LTG) John L. DeWitt, commander of the Western Defense Command, issued proclamations dividing Arizona, California, Oregon, and Washington into military areas and ordering the re-location of Japanese-Americans into camps.

On 24 March 1942, recognizing that he was subject to LTG DeWitt’s order and believing that he would soon be called to active duty, Walt Tsukamoto requested that he be exempted from any forced re-location and that he be permitted to remain in his home in Sacramento. Not only did the Army deny Tsukamoto’s request, but Tsukamoto, his wife, their five children, his father, and his mother, were sent to a camp near Tule Lake on the California-Oregon border.<sup>6</sup> Ultimately, 120,000 men, women, and children of Japanese ancestry, two-thirds of whom were U.S. citizens, were involuntarily settled in ten camps located in desolate areas west of the Mississippi.

Despite his internment at Tule Lake, Tsukamoto’s desire to serve his country as a Soldier did not diminish. On 8 April 1942, he wrote to the Army a second time and requested active duty. In this letter, Tsukamoto stressed that he had “special qualifications in the knowledge of the Japanese language” and could “serve the Army in its evacuation and resettlement program of the Japanese.”<sup>7</sup>

On 15 April 1942, Tsukamoto received this reply from Headquarters, First Military Area, Presidio of San Francisco: “[O]fficers of the JAG Department are ordered to active duty . . . to fill vacancies when and where needed. . . . [Y]our tender of service is appreciated and same has been made a matter of record.”<sup>8</sup> The message was clear: There would be no active duty for CPT Tsukamoto.

On 15 October 1942, Tsukamoto asked to be called to active duty a third time. In his request, he wrote that he was “most anxious to serve in the defense and prosecution of the present war against the Axis nations, particularly Japan.” The Army rejected this request a month later, on 10 November 1942; Walt Tsukamoto was informed that there was “no appropriate assignment . . . to which you might be assigned.”

Deciding that perhaps he should look outside the JAGD, Tsukamoto applied for active duty with the Military Intelligence Service (MIS) Language School located in Minnesota; this application also was rejected.

Then, on 28 January 1943, Secretary of War Henry L. Stimson announced that American citizens of Japanese extraction would be allowed to volunteer for service in the Army. This was the opportunity that Tsukamoto had been waiting for and the next day, on 29 January 1943, he requested active duty a fifth time. As he put it:

I have been a reserve officer continuously for the past 16 years and have at all times prepared myself to serve my country in time of need. I desire above all else to be permitted to serve in the present crisis and therefore respectfully and urgently request active duty assignment, either in my present branch or in any other branch in which I may be most useful to the United States.<sup>9</sup>

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<sup>5</sup> Exec. Order No 9066, C.F.R. 1092–1093 (1942).

<sup>6</sup> The Tule Lake camp was the largest of the relocation camps. Opened on 26 May 1942, it eventually held some 18,700 Japanese-Americans. The camp operated under martial law for a time (4 November 1943 to 15 January 1944) and was the last to close, on 28 March 1946.

<sup>7</sup> Letter from Walter T. Tsukamoto, to Headquarters, 1st Military Area, Presidio of San Francisco, subject: Extended Active Duty (Apr. 8, 1942) (Historian’s files, The Judge Advocate General’s Legal Center and School (TJAGLCS)).

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<sup>8</sup> Letter from Captain Jeff J. Smith, Adjutant, Headquarters, 1st Military Area, Presidio of San Francisco, to CPT Walter T. Tsukamoto, subject: Active Duty (Apr. 15, 1942) (Historian’s files, TJAGLCS).

<sup>9</sup> Letter from Walter T. Tsukamoto, to Headquarters, Ninth Service Command, subject: Request of Immediate Active Duty (Jan. 29, 1943) (Historian’s files, TJAGLCS).

As a follow-up to this request, Tsukamoto sent a telegram a week later to the War Department in Washington D.C. The telegram was addressed to Secretary of War Stimson and read as follows:

I HAVE REQUESTED IMMEDIATE ACTIVE DUTY ASSIGNMENT TO MY COMMANDING GENERAL FIVE TIMES SINCE THE WAR BUT WAS ADVISED THAT MY JAPANESE ANCESTRY PRECLUDED SUCH ASSIGNMENT. I HAVE BEEN A RESERVE OFFICER CONTINUOUSLY SINCE 1927 AND MY SOLE REASON FOR BECOMING AN OFFICER WAS OF COURSE TO SERVE MY COUNTRY IN TIME OF NEED. MAY I BEG OF YOU TO BRING ABOUT MY IMMEDIATE ASSIGNMENT. MY WIFE AND 5 CHILDREN, ALL LOYAL AMERICANS, JOIN WITH ME IN THIS REQUEST.<sup>10</sup>

Apparently it was this telegram that finally made a difference, as on 10 February 1943, Walt Tsukamoto received a letter from the War Department acknowledging receipt of his telegram and informing him that his request was being considered.<sup>11</sup>

While Tsukamoto was waiting to hear from the Army, other Japanese-Americans living alongside Tsukamoto and his family in the relocation camp, who despised him for his pro-American attitude, began making threats against him and his family.<sup>12</sup> Believing that both he and his family were in danger, the re-location camp authorities allowed Tsukamoto to re-locate to Cincinnati, Ohio, on 27 February 1943. His family followed shortly thereafter.

On 3 March 1943, having only just arrived in Cincinnati, Tsukamoto received the message he had been hoping for: a telegram from the War Department ordering him to report for a physical exam. Two days later, he was on active duty in the JAGD and reported for duty to the University of Michigan, where he joined the 10th Judge Advocate Officer Course as a student. Tsukamoto was the

only Asian-American student in his class and, as a relatively senior CPT, outranked many of his classmates.

When he graduated in June 1943, Tsukamoto was assigned as the Legal Officer at the MIS Language School, Fort Snelling, Minnesota. He reported for duty on 10 June 1943. Because the personnel at the MIS Language School were principally Nisei who were being trained for interrogation, interpretation, and translation duty in the Pacific, and because Walter Tsukamoto spoke fluent Japanese, it made perfect sense for the JAGD to assign him there. For the next two years, Tsukamoto performed a wide variety of legal duties, including preparing and reviewing court-martial cases and serving as a claims officer. Tsukamoto's expertise in alien property rights was especially valuable "in the preparation of wills, powers of attorneys, real property and other legal matters for military personnel prior to the departure for overseas assignment."<sup>13</sup> As his military records indicate, providing legal advice was "complex . . . since dependents of the enlisted men of Japanese descent have been evacuated from the Pacific Coast States."<sup>14</sup>

Tsukamoto excelled as a JA at Fort Snelling. His 31 December 1944 efficiency report described him as "a quiet, well-mannered officer who carries out his tasks well and faithfully. He has a pleasant personality and combines ability with tact and courtesy . . . [and] can always be depended upon to do his job well and without supervision."<sup>15</sup> His efficiency report for the following year likewise lauded his "tact and charm" and noted that Tsukamoto took "a whole-hearted personal interest in the welfare of the enlisted men of the command."<sup>16</sup>

Having been promoted to major (MAJ) in 1944, and with glowing efficiency reports, Tsukamoto was able to remain on active duty after World War II when many other JAs were discharged and returned to civilian life. After a brief assignment at the Presidio of Monterey, MAJ Tsukamoto deployed to the General Headquarters, Far East Command, in Tokyo, where he was assigned to the Military Affairs Division. For the next several years, he handled administrative and civil law matters and drafted legal opinions for his JA superiors. However, Tsukamoto also served as the law member (the forerunner of today's military judge) on general courts-martial and reviewed records of

<sup>10</sup> Telegram from Captain Walter T. Tsukamoto, to Sec'y of War Henry Stimson (Feb. 8, 1943) (Historian's files, TJAGLCS).

<sup>11</sup> Letter from Adjutant Gen., War Dep't, to Commanding General, Ninth Service Command, subject: Active Duty (Walter Takeo Tsukamoto) (10 Feb. 1942) (Historian's files, TJAGLCS).

<sup>12</sup> Many of these antagonistic Japanese Americans, known as Kibei, were native born Americans who had been sent to Japan by their parents as children. Consequently, when they returned to the United States as young men and women, their sympathies were Japanese rather than American. However, some Nisei were also antagonistic toward Walt Tsukamoto and his pro-American outlook because they were angry about having been involuntarily removed from their homes and transported to re-location camps.

<sup>13</sup> Memorandum for The Adjutant Gen., from Major General Clayton Bissell, subject: Recommendation for Promotion to Major of Captain Walter T. Tsukamoto tab A (12 Dec. 1944)

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

<sup>15</sup> War Dep't Adjutant Gen. Office Form 67, Efficiency Report, Walter T. Tsukamoto, 1 July 1944 to 31 December 1944 (31 Dec. 1944) (Historian's files, TJAGLCS).

<sup>16</sup> War Dep't Adjutant Gen. Office Form 67, Efficiency Report, Walter T. Tsukamoto, 1 July 1945 to 31 December 1945 (31 Dec. 1945) (Historian's files, TJAGLCS).

trial by military commissions in which death sentences had been imposed.<sup>17</sup>

His efficiency report for the period June 1947 to June 1948 reveals that, despite his sterling performance as an Army lawyer, his loyalty as an American citizen was still questioned by some of his fellow Soldiers. Brigadier General (BG) Franklin Shaw, the Staff Judge Advocate (SJA) of the Far East Command, and the “endorsing officer” (today’s Senior Rater) wrote the following:

A neat, clean cut officer, of good appearance and address, professionally able. His standards of conduct and citizenship, his legal ability, thoroughness, tact and sound judgment make him an exceptionally valuable judge advocate. *A Nisei who is a credit to his kind and the service. Long separation from his civil professional contacts, plus special problems confronting the American of Japanese antecedents in Japan, especially dependents, have had some discouraging effect, but he has met them manfully and I consider him outstanding as a citizen and soldier nevertheless.*<sup>18</sup>

While BG Shaw’s words might seem patronizing to today’s reader, their meaning is clear: Despite his proven loyalty as an American and outstanding performance in uniform as a JA, Walter Tsukamoto continued to suffer from racism and prejudice.

When MAJ Tsukamoto finished his tour in Tokyo in September 1950, his rater lauded him as “a mature officer . . . of good moral character. Friendly, intelligent, industrious, and exercises good judgment.”<sup>19</sup> Colonel (COL) George W. Hickman, who would later serve as The Judge Advocate General (TJAG), wrote the following endorsement: “I agree with all remarks [of the rater] but also note that this Nisei officer is *intensely loyal* and ambitious.”<sup>20</sup>

<sup>17</sup> Between February 1946 and October 1949, the U.S. Army tried 996 accused at military commissions in Yokohama, Japan; 854 were convicted. Major Tsukamoto reviewed some of the records of trial in which these accused were sentenced to be hanged. PHILIP R. PICCAGALLO, *THE JAPANESE ON TRIAL* 90 (1979).

<sup>18</sup> U.S. Dep’t of Army, Adjutant Gen.’s Office, AGO Form 67-1, Officer Efficiency Report, Walter T. Tsukamoto, 23 June 1947 to 30 April 1948 (23 Apr. 1948) (Historian’s files, TJAGLCS) (emphasis added).

<sup>19</sup> U.S. Dep’t of Army, Adjutant Gen.’s Office, AGO Form 67-1, Officer Efficiency Report, Walter T. Tsukamoto, 1 May 1950 to 30 September 1950 (30 Sept. 1950) (Historian’s files, TJAGLCS).

<sup>20</sup> *Id.* (emphasis added).

While Tsukamoto was in Tokyo, the North Koreans had invaded South Korea and war was raging on the Korean peninsula. He then deployed to Korea and joined X Corps in early October and, within a month of arriving, earned his first combat decoration: the Bronze Star Medal. The citation for this award covers the period of 2 October to 2 November 1950, and notes Tsukamoto’s superb performance “as executive officer to the Corps Judge Advocate”<sup>21</sup> and “his invaluable assistance in forming and operating a War Crimes Division.”<sup>22</sup> While it was not unusual for a line officer to be awarded the Bronze Star Medal for merit for a short time period during the Korean War, Tsukamoto’s Bronze Star Medal for a thirty-day period of work as a staff officer is unusual.

Promoted to lieutenant colonel (LTC) on 12 December 1950, Walter Tsukamoto once again made history as the first Asian-American to reach this rank in the JAG Corps (JAGC). He remained in Korea until 16 October 1951. As a senior ranking JA at X Corps, he “performed all duties of the Staff Judge Advocate and act[ed] in his place in his absence.”<sup>23</sup> Lieutenant Colonel Tsukamoto also served as a law member at general courts-martial. While Tsukamoto did not participate in any fighting, he was close to the front lines and, consequently, was exposed to danger. In any event, when he returned to the United States, Tsukamoto left with a second Bronze Star Medal for meritorious service and another outstanding Officer Efficiency Report (OER).

Assigned to Sixth Army at the Presidio of San Francisco, Tsukamoto assumed duties as the Chief, Military Affairs Division. For the next four years, he prepared or supervised the preparation of opinions on such varied subjects as taxation, public utilities matters affecting the Army, and other similar civil and administrative law matters. But LTC Tsukamoto also spent considerable time as a law officer, as the new Uniform Code of Military Justice (UCMJ) was now in effect. His raters lauded his “versatile, logical mind” and his “sound knowledge of the rules of evidence, judicial temperament free of bias,” and his “clear and logical thinking.” His endorsers praised Tsukamoto as “loyal” and “likeable” and noted that his work was “uniformly of high caliber.”<sup>24</sup>

<sup>21</sup> Headquarters, X Corps, Gen. Order No. 26 (11 Feb. 1951).

<sup>22</sup> *Id.*

<sup>23</sup> U.S. Dep’t of Army, Adjutant Gen.’s Office, AGO Form 67-2, Officer Efficiency Report, Walter T. Tsukamoto, 1 October 1950 to 15 May 1951 (Historian’s files, TJAGLCS).

<sup>24</sup> U.S. Dep’t of Army, Adjutant Gen.’s Office, AGO Form 67-2, Officer Efficiency Report, Walter T. Tsukamoto, 18 November 1951 to 31 May 1952; U.S. Dep’t of Army, Adjutant Gen.’s Office, AGO Form 67-2, Officer Efficiency Report, Walter T. Tsukamoto, 1 June 1954 to 28 July 1954 (Historian’s files, TJAGLCS).



In June 1955, LTC Tsukamoto travelled to Heidelberg, Germany, where he joined the JAGD, Headquarters, U.S. Army, Europe (USAREUR). He served as Executive Officer, worked in the Military Affairs and International Law Branch, and also served as a law officer at general courts-martial.

In February 1957, the Army notified now fifty-two-year old Tsukamoto that when he reached the mandatory retirement age of fifty-five, he would be released from active duty. This was a great blow to him because he had fewer than fifteen years of active duty and could not reach twenty years of active duty by the time he was fifty-five years old. Tsukamoto's superiors in the Corps, however, did not want to lose an officer of his talents. Consequently, they encouraged him to apply for an exception to the retirement age rule. He did and was informed by the Pentagon that he could remain on active duty until he had the twenty years necessary for retirement.

By this time, LTC Tsukamoto was widely known for his judicial bearing, temperament, and legal talents in court as a law officer. Consequently, in January 1958, when the JAGC established a pilot "law officer program" to see if a more formal judicial organization should be created, Tsukamoto was one of fourteen senior JAs selected for the program. When this program was formalized as the "Field Judiciary Division" in January 1959, LTC Tsukamoto remained with it.

It was an extremely busy time for military justice practitioners in USAREUR—and for law officers like LTC Tsukamoto. From 25 May 1959 to 17 July 1959, for example, he served as the law officer on nineteen general courts-martial tried in Western Germany, France, and Italy.<sup>25</sup> Despite the long hours of travel and many extra hours in court, Tsukamoto performed his duties in an exemplary manner. Not surprisingly, when he received his first OER as a member of the Field Judiciary, his rater, COL Edward T. Johnson, wrote:

I consider Lt Col Tsukamoto to be the most outstanding officer of the entire group. He has a wonderful grasp of the technical aspects of his duty and his personality is such that he is able to carry out his judicial role without arousing the resentment of the prosecution, defense or command, but nevertheless insure a fair and impartial trial.<sup>26</sup>

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<sup>25</sup> Letter of Commendation from Colonel Laurence W. Lougee, Area VII Judicial Officer, through Chief, Field Judiciary Division, to Lieutenant Colonel Walter T. Tsukamoto (17 Aug. 1959) (Historian's files, TJAGLCS).

<sup>26</sup> U.S. Dep't of Army, DA Form 67-4, Officer Efficiency Report, LTC Walter T. Tsukamoto, 1 May 1959 to 30 April 1960 (Historian's files, TJAGLCS).

Major General (MG) Stanley W. Jones, The Assistant Judge Advocate General, endorsed Tsukamoto's OER. He wrote: "I concur in everything the rating officer has said. [Tsukamoto] is a man of rare intelligence and splendid character. He is highly respected by all who know him for his extremely highly professional skill as a law officer."<sup>27</sup>

On 25 October 1960, Tsukamoto was promoted to full colonel, the first Asian-American to reach that rank in the Corps. His many years of loyal service had been rewarded and Tsukamoto no doubt looked forward to more years of service as an Army lawyer.

But it was not to be. His last OER had noted that LTC Tsukamoto "has a heart condition that somewhat limits his physical capability,"<sup>28</sup> although the OER went on explain that this health issue "has not interfered in any manner with his performance"<sup>29</sup> as a judicial official. Unfortunately, his ailment was more serious than anyone imagined because, on 20 January 1961, COL Tsukamoto died of a heart attack in Germany. He was fifty-six-years old and his death was a shock to all who knew him, especially his wife and five children, who had remained in the United States while Tsukamoto was serving overseas.

In COL Tsukamoto's final OER, the Chief of the Field Judiciary wrote that Tsukamoto "was, in every respect, the most outstanding . . . officer in the judicial field." The Assistant Judge Advocate General, MG Robert H. McCaw, who endorsed the OER, wrote but a single sentence: "With Colonel Tsukamoto's death, the Army has lost one of its finest officers." In appreciation of his service to the Corps, MG McCaw recommended that Tsukamoto be posthumously awarded the Legion of Merit. This decoration was approved by the Army's Deputy Chief of Staff for Personnel and was presented to his widow, Mrs. Tomoye Tsukamoto, in a ceremony at the Presidio of San Francisco in June 1961. A Soldier to the end, COL Tsukamoto was buried with full military honors at the military cemetery at the Presidio of San Francisco.

Looking back at COL Walt Tsukamoto's sterling career in the Corps, it is clear that no JA loved America or the Army more. Today, when we celebrate the diversity of the United States, it is important to remember that Japanese-Americans like Tsukamoto suffered from prejudice, yet Tsukamoto apparently bore no ill will and was unwavering in his devotion to the United States and its promise of equality for all.

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<sup>27</sup> *Id.*

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

<sup>29</sup> *Id.*

The author thanks Air Force judge advocate Col. Derek Hirohata for alerting him to the story of COL Walter Tsukamoto, and his help in preparing this Lore of the Corps

article. A special thanks also to Mrs. Doris Tsukamoto Kobayashi for ensuring the accuracy of the personal details about her father.<sup>30</sup>

Addendum to “Colonel Walter T. Tsukamoto: No Judge Advocate Loved America or the Army More” (The Army Lawyer, May 2011)

As a result of the publicity generated by this article, COL Tsukamoto’s family learned that he qualifies for the Congressional Gold Medal authorized for “Nisei Soldiers of World War II.” Tsukamoto is the first and only judge advocate in history whose service has been recognized with a Congressional Gold Medal.

*More historical information can be found at*  
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<https://www.jagcnet.army.mil/8525736A005BE1BE>

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<sup>30</sup> See also Colonel Walter Takeo Tsukamoto, JAPANESE AM. VETERANS ASS’N, <http://www.javadc.org/tsukamoto.htm> (last visited May 24, 2011).

Who is Where and What are They Doing? A History of the JAGC Personnel Directory

Fred L. Borch III  
Regimental Historian & Archivist

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

Prior to 1963, there was no directory. But then again, the Career Management Division (CMD) for the Corps (as today's Personnel, Plans and Training Office (PP&TO) was then known) did not have much in the way of procedures for managing Army lawyers. In the first place, it "was staffed almost exclusively with civilian employees . . . and there were only two lawyers," both of whom were captains.<sup>2</sup> While the head of the CMD was a lieutenant colonel, it was clear that it was the civilian personnel who were in charge of managing Corps personnel. Consequently, when then-Lieutenant Colonel (LTC) George S. Prugh arrived in the Pentagon in June 1962 to be the new Chief, CMD, he was shocked to learn the process in place for assigning JAs throughout the Army. As Prugh explained in 1975:

I found that assignments were being made by the chief clerk, a civilian named Eileen Burns, who was well known throughout the Corps. I decided in my own mind that it was wrong for a civilian to be assigning the lawyers. A lawyer could and should assign other lawyers, because he knows best what sort of requirements are needed at particular jobs. I was horrified on two or three occasions early in that game, going to visit with Miss Burns to see The Judge Advocate General [MG Charles L. "Ted" Decker], when she would make an

assignment on a senior officer, a colonel, for example, and in discussing [the officer] would say, "Oh! He has a mediocre record," or some other slighting remark that would be clearly devastating to that man's position with respect to The Judge Advocate General who apparently didn't know many of the officers below the rank of colonel.<sup>3</sup>

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

What the CMD did have was a large table (known by the moniker "bun warmer") and when this table was opened (it had a rolling top) there was an organization chart that showed which Army commands and units had JAs assigned to them. But there was still nothing more than a name and rank. This made managing people difficult, because there was not enough information to match JAs with assignments, ensuring that those best suited for a particular job got that job. Additionally, when a JA with special qualifications was needed, it was "an impossible situation." As Prugh explained, "if we wanted, say, a captain with five years of experience, who could speak Spanish and was an international law expert, we would have one heck of a time trying to find out who this was."<sup>4</sup>

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

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

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

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

<sup>4</sup> *Id.* at 4-5.

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

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

The “Foreword” to this first directory announced that “it is planned to publish the directory annually.”<sup>5</sup> In fact, yearly publication did occur; a new directory has been published every year since 1963. For more than thirty years, release of the directory coincides with the annual World Wide Continuing Legal Education conference held the first week of October in Charlottesville, Virginia.

From the beginning, the directory was a handy reference for personnel working in the Career Management Office and its successor organization at Office of The Judge Advocate General (OTJAG), PP&TO. First, the directory was a quick guide to see who was pending a “PCS” (permanent change of station) or “DEROS” (date eligible for return from overseas). Second, the directory was the starting point to check the number of personnel actually assigned against an SJA office’s “TOA” (table of allowances) or “TDA” (table of distribution and allowances)—which PP&TO had to monitor to ensure authorizations matched the actual number and grade of officers assigned to an office. Finally, the directory was the “JAG Corps Phonebook” in the era when the only possible real-time communication was by telephone. From 1983 to 1985, for example, when then-LTC Raymond P. Ruppert served as the assignment officer at PP&TO for captains, majors, and lieutenant colonels, Ruppert used the directory to find a telephone number when he wanted to speak with a JA about an assignment. Ruppert also had a copy of the directory at home, which he used when placing late night telephone calls through the Pentagon switchboard to JAs assigned in Korea who needed new assignments in the Corps.<sup>6</sup>

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<sup>5</sup> JAG PUB. 1-1, *supra* note 1, at i.

<sup>6</sup> E-mail from Colonel (Ret.) Raymond P. Ruppert, to author (17 May 2011, 12:14:00 EST) (on file with Historian’s files, TJAGLCS).

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

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

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

While the first directory had a white paper cover, subsequent issues began to change color on an annual basis: red, yellow, blue, buff, tan, green, and so forth. When then LTC Barry Steinberg was the Chief, PP&TO, however, he had a special issue of the directory published with pink covers for distribution to the few female judge advocates assigned to OTJAG. Five copies were printed. One was presented to The Judge Advocate General, Major General Hugh Clausen, who accepted it in the humorous spirit it was intended. One was given to each of the three female JAs in OTJAG. One was saved in PP&TO. It is hard to know whether the three female JAs who received pink copies thought their special edition was humorous, but one told Steinberg she did not think having a pink directory was funny.<sup>7</sup> Whether any of Steinberg’s special issue directories have survived is unknown, but PP&TO no longer has a copy. For the last several years, the JAG PUB 1-1 has

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<sup>7</sup> E-mail from Colonel (Ret.) Barry Steinberg, to author (15 May 2011, 16:05:00 EST) (on file with Historian’s files, TJAGLCS).

abandoned the old solid-color binding and the cover is now illustrated with photographs.

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

In the 1960s, 1970s and 1980s, the directory was known as the “stud book,” and this moniker is still heard today.

Officially, however, the directory is called the “JAGC Personnel and Activity Directory.”

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

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Theft of Crown Jewels Led to High Profile Courts-Martial

Fred L. Borch III  
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In the aftermath of World War II, the theft of gold, silver and jewels belonging to the German aristocratic House of Hesse triggered an intensive criminal investigation and resulted in three high profile courts-martial. When it was all over, Colonel (COL) Jack W. Durant, Major (MAJ) David Watson and Captain (CPT) Kathleen Burke Nash were all in jail.<sup>1</sup>

In February 1946, less than a year after war had ended in Germany, Princess Sophie of Greece was preparing to marry Prince George Wilhelm of Hanover. The bride was to wear the Hesse family jewels during the ceremony but, when a servant was sent to retrieve the jewels from their hiding place in the Hesse family castle, Schloss Friedrichshof at Kronberg, they were gone—and presumed stolen.

Countess Margaretha, the reigning matriarch of the Hesse family, knew that all property in Kronberg castle was personal family property and so could not be seized like the assets of defeated Nazi Germany. Consequently, she went to the provost marshal in Frankfurt, and shortly thereafter the Army's Criminal Investigation Division launched an investigation. It soon discovered that a year before, when General George S. Patton's 3rd Army had been in the area, a Women's Army Corps officer, CPT Kathleen Burke "Katie" Nash, had been assigned to manage the castle as an officers' club. In November 1945, while exploring the massive structure, Nash saw a fresh patch of concrete on the floor of the wine cellar. Apparently she also had heard a rumor that jewels, gold and silver were buried in a secret place in the castle. In any event, when Nash and two members of her staff chipped through the concrete, Nash discovered a zinc-lined box filled with small, neatly wrapped packets containing gold, silver and jewels. It was literally a discovery of buried treasure—worth more than \$ 2.5 million.

Nash retrieved some of the loot. She also shared her secret with "J.W." Durant and Watson. Together the three officers then conspired to steal the remainder of the tiaras, bracelets and other valuables. Realizing that they would likely be caught if they tried to smuggle the treasure back to the United States in its present form, the three conspirators removed the precious stones from their settings and set them aside to be sold later; they sold or pawned the gold and silver mountings. Watson travelled to Northern Ireland in November and December 1945, where he "pawned a large

quantity of gold; he also gave a few baubles to a former girlfriend in Belfast."<sup>2</sup> Durant and Nash did their part in January 1946 by journeying to Switzerland and selling gold and jewels in Bern, Basel and Zurich.

As for what they had decided to keep for themselves, the trio used the Army post office system. Watson mailed a sterling silver pitcher home to his parents in California. Nash sent a thirty-six-piece solid-gold table service—as well as a large number of jewels—to her sister in Wisconsin. Durant sent jewels and other valuables using envelopes stamped "Official" and by diplomatic pouch; most went to his brother in Falls Church, Virginia. All in all, some thirty boxes of treasure were sent to the United States.<sup>3</sup>

By May 1946, the Criminal Investigation Division agents had caught up with the three culprits. Watson was apprehended in Germany. Durant and Nash, who had married on 28 May, were arrested at the luxury La Salle hotel in Chicago on 2 June. The timing of their marriage was not a coincidence: both Durant and Nash understood that a husband and wife could refuse to testify against each other in court-martial proceedings. But Nash also hoped to escape trial because she was expecting to be honorably discharged. Unbeknownst to Nash, however, the Army had cancelled her separation orders and so she remained on active duty and subject to court-martial jurisdiction.

A few days later, nearly a million dollars in recovered Hesse family treasure—which the Army insisted was "a mere pittance" compared to the total value of the missing property—was displayed at the Pentagon. Shortly thereafter, the Durants were flown to Frankfurt, Germany, where they both faced trial by general court-martial.

Katie Nash Durant was the first to stand trial. Charged with being absent without leave, larceny, fraud against the government, conduct unbecoming an officer and gentleman, and bringing discredit upon the military service, she appeared before the court panel in a uniform without any insignia, and refused to enter a plea. Her defense counsel, CPT Glenn Brumbaugh, insisted that the court lacked *in personam* jurisdiction because the Army had rescinded her separation orders solely to maintain jurisdiction over her. He also argued that, even if the court-martial had jurisdiction

<sup>1</sup> United States v. Kathleen Nash Durant, CM 317327; United States v. David F. Watson, CM 319747; United States v. Jack W. Durant, CM 324235 (on file with Records of the Office of the Judge Advocate General, Record Group (RG) 153, M1899).

<sup>2</sup> Stephen Harding, *Soldiers of Fortune: The Hesse Jewel Heist*, WORLD WAR II (March 2009), <http://www.historynet.com/soldiers-of-fortune.htm> (last visited July 19, 2011).

<sup>3</sup> JUDGE ADVOCATE GENERAL'S CORPS, THE ARMY LAWYER 172 (1975).

over her person, Nash was not guilty of any offenses involving the Hesse crown jewels because the Hesse family had abandoned the treasures or, alternatively, that the jewels were legitimate spoils of war. Major Joseph S. Robinson, the trial counsel, countered:

It is our obligation to see to it that private property in enemy territory we occupy be respected, and that any interference with such private property for personal gains be justly punished.<sup>4</sup>

The court agreed. It found Nash guilty and sentenced her to five years in jail and a dismissal.

Watson was next. His defense was that looting was common in Germany and that, as the treasure belonged either to dead Nazis or SS members, the property could not be returned to them. In any event, argued Watson, he lacked the criminal intent to steal anything. In his summary to the panel, CPT Abraham Hyman, the trial counsel, reminded the court that it could not blind itself to the fact there were people who took advantage of abnormal conditions in occupied Germany. However, there is also the precedent of millions of Soldiers who went through the war without yielding to the temptation to take things which did not belong to them.<sup>5</sup>

The court of ten colonels agreed with Watson, at least in part. But, while they found him not guilty of larceny, the panel members convicted him of the remaining offenses, including receiving stolen property. He was sentenced to three years in jail and a dismissal.

“J.W.” Durant was the last to go to trial. In a court-martial convened in Frankfurt but concluded in Washington, D.C., COL Durant was found guilty of all charges. He was sentenced to fifteen years confinement at hard labor and a dismissal.

On 1 August 1951, Headquarters, European Command Army, announced that:

The Department of the Army, in cooperation with the Department of the Treasury, today returned to their owners the Hesse jewels, which have been in the custody of the United States since 1946 . . . Involved in the turnover were jewels filling 22 cubic foot Army safes and consisting of more than 270 items. Among the jewels were: a platinum bracelet encrusted with 405 diamonds, a platinum watch and bracelet with 606 diamonds, a sapphire weighing 116.20 carats, a group of diamonds weighing 282.77 carats, a gold bracelet with 27 diamonds, 54 rubies and 67 emeralds. . . .<sup>6</sup>

Despite this press release, more than half the Hesse crown jewels, and most of the gold and silver that had been hidden in the wine cellar, were never recovered. To this day, no one knows what happened to this missing treasure.

As for Nash, Watson and Durant, they served their sentences at the Disciplinary Barracks, Fort Leavenworth, Kansas, and were then released. Watson was the first to be freed; he was paroled in 1947. When he died in 1984, he was “still petitioning for a presidential pardon.”<sup>7</sup> Nash and Durant were both released in 1952; they spent their remaining days together before dying in the mid-1980s.

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<sup>4</sup> *Id.* at 173.

<sup>5</sup> *Id.*

<sup>6</sup> Court-Martial Case Files Relating to the “Hesse Crown Jewels Case,” 1944–1952 (on file with Records of the Office of the Judge Advocate General (Army), Record Group 153, Pub. No. M1899, Nat'l Archives, Washington, D.C.).

<sup>7</sup> Harding, *supra* note 2.

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

*Fred L. Borch III  
Regimental Historian & Archivist*

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

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

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

At the same time, recognizing that a permanent TJAGSA was needed—a school that would continue after the crisis on the Korean peninsula ended—Major General (MG) Ernest M. "Mike" Brannon, who had only recently begun serving as The Judge Advocate General (TJAG), directed COL Charles E. "Ted" Decker "to plan for and locate a permanent Judge Advocate General's School."<sup>1</sup> This meant that COL Decker was to propose an organization for the new school as well as find a suitable location.

**Organization of the New TJAGSA**

Decker and the other members of the "Special Projects Division"<sup>2</sup> ultimately decided that the new TJAGSA should consist of three parts: "a resident school, non-resident school, and a research, planning and publications unit."<sup>3</sup> The concept for the resident school was that it would offer a "basic" or "regular" course of instruction, and an advanced course. All new JAs would attend the regular course and would be given basic instruction in military legal matters. Colonel Decker saw the advanced course lasting a full academic year, and believed that "officers with eight to twelve years of military law practice who had outstanding records" should be invited to attend. Significantly, the advanced course was not for every JA, but only for the best. The concept for the advanced course was that it would be a "thorough and comprehensive 'rounding out' in all military law subjects." Additionally, each student in the advanced course would be required to write a research thesis on some "facet or some phase of military law." The non-resident school would provide instruction to Army Reserve and National Guard JAs not on active duty in two ways: "group schooling for those officers in larger communities, extension courses for the officers in smaller communities." Finally, the research, planning and publication unit would research novel legal questions and disseminate its findings to JAs in

<sup>1</sup> Charles E. Decker, "A History of the Development of the Judge Advocate General's School," at 4 (June 15, 1955) (unpublished monograph) (on file in TJAGLCS Library).

<sup>2</sup> The Special Projects Division had been created in 1950 to draft the new *Manual for Courts-Martial* needed after the enactment of the Uniform Code of Military Justice. As Decker was the Chief of the Special Projects Division, it was logical for The Judge Advocate General (TJAG) to task him (and the other division members) with the special project of organizing and locating a permanent Judge Advocate General's School, U.S. Army (TJAGSA). See U.S. ARMY JUDGE ADVOCATE GENERAL'S CORPS, THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775–1975, at 217 (1975).

<sup>3</sup> Decker, *supra* note 1, at 5.



the field. It would also prepare all legal texts for Army-wide distribution and publish periodic updates to keep JAs abreast of recent developments in military law.<sup>4</sup>

### Location of the New TJAGSA

Finding the right location for the new school was not an easy task, but COL Decker had a number of requirements to guide him. First, it seemed desirable for the school to be located no more than two hundred miles from Washington, D.C. Consequently, while COL Decker and the Special Projects Branch considered locations as far away as Fort Rodman, Maine and Fort Crockett, Texas, and actually considered renovating an abandoned brewery at Fort Holabird, Maryland and a former ordnance shop at Fort Benjamin Harrison, Indiana, Decker and his team ultimately concluded that there was no “feasible site” on a military installation.<sup>5</sup>

A second factor—of great importance in the 1950s—was the recognition that the new TJAGSA must have a first-class law library. Colonel Decker in particular noted that if the permanent TJAGSA were located at an existing law school, such a location would provide a law library and “save an enormous sum of money.”<sup>6</sup>

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

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

This will confirm our [telephone] conversation of this morning. Should the Judge Advocate General’s Office decide to use the facilities of the University of Virginia in connection with the school

which they now have under consideration, I should be glad to recommend to the Board [of Visitors] that Building No. 9, and such space in the Law School as is required for the conduct of classes, be rented to the Army at the price paid by it for like space in other parts of Virginia. Arrangements can be made to have your students receive the medical service now offered students of the University. They will be free to use the restaurants and recreation facilities around the University on the same basis as to the students.

President Darden closed his letter with another incentive to choose UVA: “Maid and janitor service for the occupants of Building No. 9 can be furnished by the University at cost, plus 10% to cover overhead. We can arrange for such furnishings as are desired as soon as we know your needs.”<sup>7</sup>

The Army liked this last idea because it eliminated the use of enlisted personnel for maintenance and also reduced the need for a large administrative operation.<sup>8</sup> In any event, the Army accepted UVA’s offer, and signed a lease on 30 July 1951. It was a year-to-year tenancy for \$46,000 per year.<sup>9</sup> The Army signed its first multi-year lease—for five years—in the summer of 1954. The rent was \$53,354 per annum for 36,212 square feet of floor space, joint use of additional rooms and library facilities at UVA’s law school in Clark Hall, “and parking space for 30 automobiles.”<sup>10</sup>

On 2 August 1951, the Department of the Army announced in General Orders that TJAGSA had been established at UVA and that the school at Fort Myer would close on 25 August.<sup>11</sup> The move to Charlottesville was made by truck on 25 August. As COL Decker later wrote, the move “was completed and all offices were in operation on the afternoon of 27 August 1951. There was no founding ceremony; we just went to work—there was a lot to be done.”<sup>12</sup> There were twenty officers on the first day of TJAGSA’s operation; a month later, the school had hired fifteen civilian employees. By 1955, the staff and faculty

<sup>7</sup> Letter from Colgate W. Darden, Jr. to Colonel Charles L. Decker (June 19, 1951) (on file with Historian, TJAGLCS).

<sup>8</sup> The fact that the University of Virginia (UVA) had hosted the Army’s School of Military Government during World War II, and that some students attending the school were judge advocate (JAs) (who likely would have reported favorably to TJAG about their experiences in Charlottesville), apparently had no impact on the decision to move TJAGSA to UVA.

<sup>9</sup> THE JUDGE ADVOCATE GENERAL’S SCHOOL, U.S. ARMY, THE JUDGE ADVOCATE GENERAL’S SCHOOL, 1951–1961, at 3 (1961).

<sup>10</sup> Memorandum from Franklin G. Floete, Adm’r, Gen. Servs. Admin., to the Chief of Eng’rs, U.S. Army (June 4, 1954) (on file with Historian, TJAGLCS).

<sup>11</sup> Headquarters, U.S. Dep’t of Army, Gen. Order No. 71 (2 Aug. 1951).

<sup>12</sup> Decker, *supra* note 1, at 7.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 6.

<sup>6</sup> *Id.* at 7.

consisted of over seventy officers and civilians. The commandant, faculty and staff offices were in Hancock House (known colloquially as “The JAG School”); classes were held in UVA’s law school in Clark Hall, which was located across a parking lot from Hancock House.<sup>13</sup>

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

### Resident Regular and Advanced Courses

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

As for the advanced course, the number of students attending in the early years of TJAGSA was quite small; a total of 64 JAs attended the first three advanced courses and TJAGSA planned on about 25 JAs per advanced class in the mid-1950s. The seven month long course (1360 hours in the early 1950s) covered international law, procurement law, military justice, military affairs (today’s administrative and civil law), claims, legal assistance, lands, and comparative law. Instruction was chiefly “through the use of seminar, panel, problem and other methods of group instruction.”<sup>14</sup> The first non-Army JAs to attend the Advanced Course were naval officers, who joined the 4th Advanced Course in 1955.

<sup>13</sup> *Id.* at 9.

<sup>14</sup> *Id.* at 11.

A naval officer, Lieutenant Commander Owen Cedarburg, was also the first non-Army faculty member.<sup>15</sup> The advanced course, renamed the Career Course in 1960<sup>16</sup> and the Graduate Course in the 1970s, continues to be the jewel in the crown of military legal education, especially since its graduates now earn an LL.M.<sup>17</sup>

### Non Resident Instruction

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

In addition to preparing texts for “extension courses” for non-active-duty JAs, the division operated a USAR non-resident school basic course. Students enrolled in the program took extension courses created by the Text Preparation Branch and then completed the USAR basic course by attending a “USAR summer school encampment” run by each of the six continental armies.<sup>18</sup> Reserve JA instructors (trained at TJAGSA) presented legal instruction.<sup>19</sup>

### Short Courses

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

### Research, Planning and Publications

The intent of the Research, Planning and Publications Division was to provide adequate research tools for JAs. As

<sup>15</sup> Darden, *supra* note 7, at 10.

<sup>16</sup> *Id.* at 9.

<sup>17</sup> For the history of the LL.M. at TJAGSA, see Fred L. Borch, *Lore of the Corps: Master of Laws in Military Law, The Story Behind the LL.M. Awarded by The Judge Advocate General’s School, ARMY LAW.*, Aug. 2010, at 2–3.

<sup>18</sup> At the time, I Army, V Army, etc. were known as “continental armies.”

<sup>19</sup> Decker, *supra* note 1, at 15.

the UCMJ had just gone into effect, Army lawyers in the field needed help in deciphering the more “foggy areas” of the new code. The creation of a new civilian appellate court—the Court of Military Appeals—meant that the division had to collect and analyze opinions being handed down by the court. The division also was busy producing 16-milimeter black-and-white training films, including “Uniform Code of Military Justice,” “Non-Judicial Punishment,” “The Investigating Officer,” “The General Court-Martial,” “The Special Court-Martial,” and “The Summary Court-Martial.”<sup>20</sup>

### Annual Conference

Starting in 1952, TJAGSA began hosting an annual conference for senior JAs, with attendance averaging between 100 and 120. Interestingly, the Research, Planning, and Publications Division (which ran the conference) solicited JAs in the field to advise it of legal topics that they wanted covered at the conference and, after getting input from the field, scheduled those subjects that were the most requested. Except for 2001, when the conference was cancelled in the aftermath of the 9/11 attacks,<sup>21</sup> the Corps has continued to hold an annual gathering of senior JA leaders in Charlottesville. Today, the conference is called the “World Wide Continuing Legal Education Conference” and is held the first week of October every year.

### Court-Reporter Training

The school also took the first step in enlisted education when it began training Corps enlisted personnel in modern electronic court reporting. The first class was held in January 1955 and “consisted of 18 enlisted men, representing 16 general court-martial jurisdictions in the continental United States.” Those who completed the six week course could take down court-martial proceedings “at more than 200 words per minute” using the electronic recorder-producer device equipped with a steno mask. They also could “prepare and assemble records [of trial] in a minimum of time.”<sup>22</sup>

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

When he completed his tour as TJAGSA’s first commandant on 15 June 1955, COL Decker noted that the American Bar Association (ABA) had been enthusiastic in supporting Army legal education in Charlottesville, and that an ABA inspection of the school revealed that new JAs “came, on average, from the upper fifteen percent of their classes in law school and that roughly six to ten percent had stood first [in their class] or had been law journal editors.”<sup>23</sup> Not surprisingly, the ABA’s House of Delegates approved accreditation for TJAGSA on 22 February 1955. In COL Decker’s opinion, this date was only fitting, as it was the anniversary of George Washington’s birthday—and it was Washington who had been on the first committee to draw up Articles of War for the Army and, as Continental Army commander, had petitioned Congress to appoint the first Army Judge Advocate in 1775.<sup>24</sup>

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

*More historical information can be found at*

The Judge Advocate General’s Corps  
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*Dedicated to the brave men and women who have served our Corps with honor, dedication, and distinction.*

<sup>20</sup> *Id.* at 18.

<sup>21</sup> Ultimately, the 2001 conference was held in Spring 2002.

<sup>22</sup> *First Enlisted Men Training as Court Martial Reporters*, ARMY TIMES, Jan. 29, 1955, at 8.

<sup>23</sup> Decker, *supra* note 1, at 20.

<sup>24</sup> After leaving TJAGSA in 1955, Colonel “Ted” Decker returned to Washington, D.C. From 1957 to 1961, then-Brigadier General Decker served as the Assistant Judge Advocate General for Military Justice. He was promoted to major general and assumed duties as TJAG on 1 January 1961. Decker retired on 31 December 1963.

## Lore of the Corps

### A Battlefield Promotion and a “Jumping JAG” Too: The Amazing Story of Nicholas E. Allen in World War II (1924–1993)

Fred L. Borch III  
Regimental Historian & Archivist

While many judge advocates (JAs) have soldiered well in combat, few equal the achievements of Nicholas E. Allen, who entered the Judge Advocate General's Department (JAGD) as a second lieutenant (2LT) in 1942 and, when the fighting in Europe ceased in May 1945, was a lieutenant colonel (LTC) and the Division Judge Advocate, 82d Airborne Division. This is not because Allen made rank so quickly, although progressing from gold bars to silver oak leaves in such a short time is noteworthy. Rather, Allen stands apart from all other JAs in history because his superlative performance in combat earned him a battlefield promotion from major to LTC in November 1944—making Allen the only JA in history to have received such a distinction. Additionally, then LTC Allen made history again in March 1945 when he became the first JA to complete basic airborne training and earn the Army parachutist badge.<sup>1</sup>

Born in Atlanta, Georgia on 24 July 1907, Nicholas Eugene “Nick” Allen graduated Phi Beta Kappa from Princeton University in 1929 and went straight to law school at Harvard. After passing the New Jersey bar in 1932, Allen went into private practice until 1936, when he took a job as an attorney in the Department of Labor in Washington, D.C.

After America's entry into World War II, Allen applied for a commission in the JAGD and, on 1 April 1942, was sworn in as an Army Reserve 2LT. He then worked in the contracts division in The Judge Advocate General's Office in Washington, D.C. His officer efficiency report from this period describes him as “a pleasant, likeable, quietly efficient officer; gentlemanly in bearing, conscientious, loyal, very willing and always ready to do any job that needs to be done.”<sup>2</sup>

After attending the Eleventh Officer's Class at The Judge Advocate General's School in Ann Arbor, Michigan, from April to July 1943, Allen accepted a Regular Army commission and was promoted to captain. He then served briefly in Texas before being promoted to major (MAJ) in

January 1944 and sailing for England. There, he worked in the Military Justice Division in the Branch Office of the Judge Advocate General, where he was the chief examiner of court-martial records of trial. His boss, Brigadier General E. C. McNeil, lauded Allen as “keen, alert, adaptable, loyal, cooperative, thorough . . . a top notch officer in every way.”<sup>3</sup>

With a little more than two years in uniform, Allen was then chosen to join the 82d Airborne Division as its one and only lawyer. Although MAJ Allen had superb legal skills, he had never served as a legal advisor to a division commander. He had no combat experience, much less time with paratroopers who had waded ashore in North Africa in May 1943 and subsequently experienced hard and bloody combat in Italy and France. Finally, at thirty-seven years of age, Allen was an old man in comparison to most of the officers and enlisted men in the division. One can only imagine that he knew that this job was going to be both a mental and physical challenge.

When Allen reported to the 82d Airborne in August, the division was only a month away from major combat operations as part of Operation *Market Garden*. This daring plan, which started on 17 September 1944, involved nearly 5000 aircraft and more than 2500 gliders. It called for a large American-British airborne force to parachute deep behind enemy lines and seize key bridges and roads in the Netherlands. Despite fierce German counterattacks, the 82d succeeded in capturing and holding the bridge over the Maas River at Grave. Three days later, in exceptionally brutal combat near Nijmegen, elements of the 82d captured a key bridge across the Waal River. Despite the division's success, the defeat of other Allied units at Arnhem meant overall failure and, after fifty-six days of combat, the 82d was withdrawn to France.

During the early weeks of *Market Garden*, Allen was not in direct combat. On 7 October 1944, however, he joined the most forward elements of the 82d in Holland. Allen then coordinated and supervised investigations into claims for money made by Dutch civilians for damage or loss to their property caused by American paratroopers. Of course, the Army would not pay for property losses arising out of combat. But, when there was no fighting, and an American Soldier damaged a Dutchman's home or

<sup>1</sup> A longer version of Nicholas Allen's storied career appeared in print in 2007. See Fred L. Borch, *The 82d Airborne's 'Jumping JAG': The Incredible Wartime Career of Nicholas E. Allen*, PROLOGUE 18–25 (Summer 2007).

<sup>2</sup> War Dep't Adjutant Gen.'s Office (AGO) Form 67, Efficiency Report, Nicholas E. Allen, 1 July 1942 to 31 December 1942 (Historian's files, The Judge Advocate Gen.'s Legal Ctr. & Sch. (TJAGLCS)).

<sup>3</sup> War Dep't AGO Form 67, Efficiency Report, Nicholas E. Allen, 1 January 1944 to 30 June 1944 (Historian's files, TJAGLCS).

requisitioned food or some other item of personal property, a claim could be paid.

When it became clear that the 82d Airborne would be in Holland longer than had been expected and, not wanting the administration of justice to be interrupted by combat, Allen arranged for paratroopers in Belgium awaiting trial by court-martial to be flown to the Netherlands so that they could be tried there.

Allen also took on the additional duty of ‘voting officer.’ The War Department, at the urging of President Roosevelt, wanted as many Soldiers as possible to be able to cast a vote in the November 1944 presidential election. This meant that Allen had to enter the ‘Combat Zone’ (as it was then called), deliver paper absentee ballots to paratroopers fighting on the front lines, and then collect these ballots and arrange for their return to the United States in time for the election.

Major General (MG) James “Jumping Jim” Gavin, the Division Commander, later wrote that Allen’s work “enabled the Division to extend the voting privilege to combat troops actually in the forward lines under conditions that subjected [him] to hazards ordinarily alien to the exercise of his duties as Judge Advocate General [sic].”<sup>4</sup>

While *Market Garden* ultimately failed, and the 82d Airborne was pulled out of the Netherlands, MG Gavin was so impressed with Allen’s performance during the heavy fighting that he did something that no other commander had ever done before, or has done since that time: on 13 November 1944, he recommended a “battlefield promotion” for Allen. According to the recommendation for promotion, MG Gavin thought Allen should be wearing silver oak leaves because his JA had enhanced mission success by arranging for Soldiers to vote, investigating claims, and ensuring that military discipline was enforced through the courts-martial process. In short, Allen had gone beyond what was ordinarily expected of a lawyer—even one who was in uniform.

Under Army Regulation 405-12, which governed officer promotions, MG Gavin could recommend a promotion for any officer who had “clearly demonstrated his fitness of promotion by his outstanding performance in actual combat.”<sup>5</sup> Such a recommendation for a battlefield promotion had to be for superlative duty performance in combat and there had to be a vacancy in the manpower organization of the division. As the 82d Airborne was short

one LTC, MG Gavin could have selected any one of a number of officers to be promoted. But he chose Nicholas Allen, and MG Matthew Ridgway, the XVIII Airborne Corps commander, approved the choice. Major Allen was promoted to LTC on 7 December 1944.

While the 82d Airborne enjoyed a brief period of rest and relaxation after its withdrawal from the Netherlands, it was back action again in December, when the German launched a surprise attack in the Ardennes forest of eastern Belgium. Thrown into battle, the paratroopers fought hard over the next month in what is now popularly known as the Battle of the Bulge.

During the bloody fighting and bitterly cold conditions, Allen proved that Gavin’s trust and confidence in him had not been misplaced. The citation for the Bronze Star Medal, awarded to Allen in June 1945, says it all:

In the Ardennes campaign, Lt. Col. Allen voluntarily went into the Combat Zone to expedite the work of his section, at time entering the forward CP [Command Post] of the Division. The devotion to duty, competence, and indifference to danger shown by Lt. Col. Allen in the prosecution of his activities reflects great credit upon him and is in the highest traditions of the military service.<sup>6</sup>

Other governments also recognized LTC Allen’s contributions to the Allied cause. For his service in the Netherlands, the Dutch Government awarded him the Military Order of William. The Belgian Government decorated Allen with their “Fourragere 1940” for his efforts in the Battle of the Bulge.<sup>7</sup>

After the Germans were defeated in the Ardennes, the 82d went back on the offensive. The division moved through the Hurtgen Forest, passed through the Siegfried Line, and was on the Roer River in February. At the end of April 1945, the 82d conducted an assault across the Elbe River near Blekede, Germany and, on 2 May 1945, MG Gavin accepted the surrender of 150,000 German troops. The following week, after six campaigns and 442 days in combat, the war ended for the paratroopers of the 82d Airborne Division.<sup>8</sup>

Allen had remained as the Division Judge Advocate (DJA) the entire time; he did not leave for a new assignment

<sup>4</sup> Memorandum from Major General James Gavin, to Commanding General, XVIII Airborne Corps, subject: Battlefield Promotion of Officer (13 Nov. 1944) (Historian’s files, TJAGLCS).

<sup>5</sup> Memorandum from Office of the Division Command, Headquarters, 82d Airborne Division (Forward), subject: Battlefield Promotion of Officer (13 Nov. 1944) (Historian’s files, TJAGLCS).

<sup>6</sup> Headquarters, 82d Airborne Division, Gen. Orders No. 84 (4 June 1945).

<sup>7</sup> War Dep’t AGO Form 53-98, Military Record and Report of Separation/Certificate of Service, Nicholas E. Allen para. 29 (21 Nov. 1946) (Historian’s files, TJAGLCS).

<sup>8</sup> For more on the 82d division in World War II, see FORREST W. DAWSON, *SAGA OF THE ALL AMERICAN* (1946). See also GERARD M. DEVLIN, *PARATROOPER!* (1979).

until June 30, 1945. His final officer efficiency report from MG Gavin contained the following words:

This officer is a hard-working and thoroughly informed Judge Advocate. His work has been outstanding. Coming into this Division after it had been overseas and through combat might have presented a serious problem to another officer, but he succeeded in quickly establishing a wholesome respect from the unit commanders and a feeling of confidence throughout the entire staff.<sup>9</sup>

Lieutenant Colonel Allen's officer efficiency report also indicated that he was now a "qualified parachutist" and he had, in fact, completed the Division's ten-day parachute school in March 1945. An April 1945 article published in *The Advocate* gives some of the details of this event, which had come from a dispatch from the public relations officer of the 82d Airborne. It seems that Allen had volunteered for jump training even though his job as DJA was "usually considered strictly 'chairborne.'" The article continues:

The jump school course included a grueling physical conditioning program, instruction in manipulation of parachute harness and control of the 'chute in the air, and the correct manner of leaving the door of a plane.

During the course, Col. Allen made five jumps, two of which were made clad in full combat equipment worn for jumping over enemy territory. He finished the course with a night jump into inky blackness, and later received his jump wings from Maj. Gen. James M. Gavin, division commander.<sup>10</sup>

On the last day of June 1945, LTC Allen left the 82d Airborne Division for a new job with the 78th Infantry Division. That unit was in Berlin as part of the occupation forces, and Allen assumed duties as Staff Judge Advocate, U.S. Headquarters, Berlin. Six months later, he became the executive officer at the Judge Advocate Division, U.S. Forces European Theater. Allen left Europe to return to the United States in June 1946 and was released from active duty at the end of the year.

What happened to Allen? He worked briefly in private practice before becoming a civilian attorney in the Office of the General Counsel, Department of the Air Force, in 1948. As the Air Force had only recently become an independent service, Allen was involved in formulating legal policy and handling issues for a brand-new military organization. He remained with the Air Force as an associate general counsel until 1951, when he moved to the Department of Commerce to accept an appointment as acting assistant secretary for international affairs. In 1953, Allen left the Government to enter private practice. He had clients in Maryland and the District of Columbia and continued to practice law until shortly before his death.

As for his military career, Allen remained in the Army Reserve after World War II but, in June 1949, requested a transfer to the Air Force Judge Advocate General's Department. His rationale was that as he was then working in the Air Force General Counsel's office, it made sense for him to be an Air Force Reserve JA should an emergency arise that would require Allen to be called to active duty. The Army and Air Force agreed, and Allen was appointed a colonel in the Air Force Reserve in 1949. Not surprisingly, he excelled as an Air Force lawyer and, in March 1961, Allen was promoted to brigadier general. He retired in August 1967, with more than twenty-five years total service in the Army and the Air Force.

Nicholas E. Allen died in Maryland in 1993.

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<sup>9</sup> War Dep't AGO Form 67, Efficiency Report, Nicholas E. Allen, 1 July 1944 to 31 December 1944 (Historian's files, TJAGLCS).

<sup>10</sup> *First JAG Parachutist*, THE ADVOCATE (13 Apr. 1945).

**Anatomy of a Court-Martial:  
The Trial and Execution of Private William Buckner in World War I**

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"I am not guilty of raping Georgette Thiebaut. She consented to the intercourse."<sup>1</sup> These thirteen words, spoken by Private (PVT) William Buckner late in the afternoon on 5 September 1918, could not save him from the fate that awaited him. A little more than twelve hours later, at 6 a.m. on 6 September, PVT Buckner "ascended the scaffold" that had been erected in a field near Arrentieres, France. A "black cap was placed on his head" and a noose placed around his neck.<sup>2</sup> Minutes later, he was dead. He was buried in France and is buried there still.

Accused of "forcibly and feloniously . . . having carnal knowledge of one Georgette Thiebaut"<sup>3</sup> on 2 July 1918, Buckner was tried by a general court-martial that began hearing evidence on 27 July—less than a month after the alleged offense. Found guilty on 30 July of raping this twenty-three-year-old French woman, the efficiency of the court-martial process, and the limited character of the appellate process, were such that Buckner's capital sentence was carried out just five weeks after being announced in open court.<sup>4</sup>

What follows is an anatomy of a court-martial that was both typical and atypical for World War I. Typical in that the accused apparently had no legally qualified counsel to

defend him. Typical in that the capital offense of rape<sup>5</sup> was heard by a general court-martial, and that the accused was one of a handful of African-American Soldiers tried and executed in Europe in World War I.<sup>6</sup> But atypical in that a lawyer from the Judge Advocate General's Department was present (though typical in that this lawyer was the prosecutor, that the other "judge advocates" present were from other branches of service, and that they may not have been lawyers at all).

Some facts were not in dispute. Both the accused and the victim testified that they had had sexual intercourse. This sex occurred in an oat field near the town of Arrentieres, about 9:30 p.m. on 2 July 1918. Private Buckner and Ms. Thiebaut also agreed that they were not married.<sup>7</sup> The problem for the accused was that the young French woman testified that the sex was against her will.<sup>8</sup>

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<sup>1</sup> Letter from Captain Herbert E. Watkins, to Chief of Artillery, First Army, American Expeditionary Force (AEF), subject: Report of Execution of Private William Buckner (6 Sept. 1918) (on file with the Records of the Judge Advocate General, Record Group 153, Box 8942, General Courts-Martial 121766).

<sup>2</sup> *Id.* According to the report, the execution was not performed in full view of the company (as would normally have been the case), because of "military necessity." As the execution took place during the allied "Hundred Days Offensive" that ended the war, this is unsurprising.

<sup>3</sup> Under the Articles of War, rape was a criminal offense under Article 92. The 1917 *Manual for Courts-Martial (MCM)* defined it as "the having of unlawful carnal knowledge of a woman by force and without consent" (in keeping with the common law definition). This is why the specification uses the words "carnal knowledge" instead of "rape." *MANUAL FOR COURTS-MARTIAL UNITED STATES 251 (1917)* [hereinafter 1917 *MCM*] (Punitive Articles (Rape)).

<sup>4</sup> Under Article 92 of the Articles of War, "any person subject to military law" who was found guilty by a court-martial of "murder or rape" was required to be sentenced to either "death or imprisonment for life." *Id.* at 248. Having found Private (PVT) Buckner guilty, the court chose the more severe punishment of death by hanging. Note that Article 92, which became effective on 29 August 1916, also provided that, in time of peace, no person could be court-martialed for a murder or rape committed "in the States of the Union and the District of Columbia." *Id.* Of course, this provision did not apply to Buckner, because he was overseas and Congress had declared war.

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<sup>5</sup> Rape was a capital offense in many U.S. jurisdictions, including the military, until *Coker v. Georgia*. 433 U.S. 584 (1977). *Coker* held that the death penalty is "grossly disproportionate and excessive punishment for the rape of an adult woman," and is "therefore forbidden by the Eighth Amendment as cruel and unusual punishment." *Id.* at 592 (plurality opinion).

<sup>6</sup> *Inquiry Gets Record of Army Executions*, N.Y. TIMES, Dec. 9, 1921, available at <http://query.nytimes.com/mem/archive-free/pdf?res=F60E17F83E5D14738DDDA00894DA415B818EF1D3>; see also JACK D. FONER, BLACKS AND THE MILITARY IN AMERICAN HISTORY 124 (1974). A number of Black Soldiers were also hanged in the United States after being convicted by courts-martial during World War I. See Fred L. Borch, *The Largest Murder Trial in the History of the United States: The Houston Riots Court-Martial of 1917*, ARMY LAW., Feb. 2011, at 1–3.

<sup>7</sup> Under the Articles of War, marriage was a complete defense to rape (because an element of the crime was that the intercourse had to be "unlawful," i.e., not between husband and wife). As a matter of law, a husband who forcibly and without consent had carnal knowledge of his wife was not guilty of rape. 1917 *MCM*, *supra* note 3, ch. XVII, sec. VI (Punitive Articles (Rape)). This was also the prevailing law in civilian jurisdictions. See *Criminal Responsibility of Husband for Rape, or Assault to Commit Rape, on Wife*, 18 A.L.R. 1063 (1922). The husband might still be guilty of assault, but not rape, of his wife. See *State v. Dowell*, 11 S.E. 525, 526 (N.C. 1890) (Merrimon, C.J., dissenting); *Bailey v. People*, 130 P. 832, 835–36 (Colo. 1913) (denying the right of a husband "to control the acts and will of his wife by physical force," collecting cases). See also WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 718 & n.52, 731 (2d ed. 1920) (open abuse, including assault, of a servicemember's wife could be punished under the general article, or as conduct unbecoming an officer and gentleman).

<sup>8</sup> Georgette Thiebaut testified in French; her statements were translated into English by a French Army lieutenant who had been sworn as an interpreter. As shown below, her inability to speak English was a material issue at trial.

On 27 July 1918, Georgette Thiebaut took the witness stand, swore to tell the truth, and then told the court members that she had been walking along the road when she was accosted by the accused, whom she had never seen before. He seized her and, despite her screams and struggles, threw her down, dragged her into the field, choked her, stuffed a handkerchief in her mouth, and then raped her. On cross-examination, she insisted that she had been raped and that while she did her “best to resist and defend myself . . . fear took my strength from me . . . I was afraid of only one thing, that he would kill me.”<sup>9</sup> This testimony was important in light of the instructions on consent drawn from the 1917 *Manual for Courts-Martial (MCM)*. These were read to the court by Major (MAJ) Patrick J. Hurley, the Judge Advocate, who served both as prosecutor and legal advisor to the members-only court.<sup>10</sup>

There is no consent where . . . the woman is insensible . . . or where her apparent consent was extorted by violence to her person or fear of sudden violence. . . .

Mere verbal protestations and a pretense of resistance do not of course show a want of consent, but the contrary, and where a woman fails to take such measures to frustrate the execution of the man’s design as she is able to and are called for by the circumstances the same conclusion may be drawn. . . .

It has been said of this offense that “it is true that rape is a most detestable crime . . . but it must be remembered that it is an accusation easy to be made, hard to be proved, but harder

to be defended by the party accused, though innocent.”<sup>11</sup>

A telling point for the defense came out on cross-examination, and the alleged victim’s prior sexual history was almost raised:

Q [by defense counsel]. Did the intercourse with the accused pain you?

A. I never felt anything.

Q. This had never happened to you before?

Prosecution: I believe we should give the defense the widest latitude in examining the witness, but this is getting into a personal matter, the bearing of which, on this case, I do not understand. However, I will not object if counsel considers the virginity of the witness a matter of importance in this case.

Defense: I withdraw the question.<sup>12</sup>

To corroborate Mmse. Thiebaut’s testimony, MAJ Hurley called two French soldiers as witnesses. These men testified that they had been walking along the road when they heard some screams. They then saw the accused and Ms. Thiebaut coming out of the oat field. When she saw them, the two Frenchmen testified that she ran toward them and exclaimed, “Kill him, he has raped me.” They further testified that she was agitated, “looked like a mad woman,” and that her clothing was disheveled. Hurley also called a local French gendarme to the stand. The gendarme testified that Ms. Thiebaut reported the rape to the police authorities the following morning and that, when they examined the crime scene, the gendarmes had found the alleged victim’s hair comb, breast pin, and the heel of her shoe.<sup>13</sup> Major Hurley also provided Mmse. Thiebaut’s bloody clothes for

<sup>9</sup> Record of Trial at 15–16, *United States v. William Buckner* (Courts-Martial No. 121766) [hereinafter *Buckner ROT*].

<sup>10</sup> 1917 *MCM*, *supra* note 3, at 47–49. The Judge Advocate of a court-martial (or Trial Judge Advocate) served both as prosecutor and legal advisor to the court, which consisted of commissioned officers only. Enlisted panels and Military Judges did not yet exist. Major Hurley’s “assistant judge advocate,” First Lieutenant (1LT) Lee C. Knotts, was a Coast Artillery officer. *Buckner ROT*, *supra* note 9, at 2. Major Hurley is listed as a member of the Judge Advocate Reserve Corps; whether 1LT Knotts or Private Buckner’s defense counsel had any legal background is unclear from the record. According to Major General (MG) E.H. Crowder, Judge Advocate General of the Army in 1919, “[w]hile no direct proof by statistics can be adduced, it is common knowledge that the commanding generals in the assignment of counsel . . . have sought to utilize the services of those officers who have already had legal experience.” U.S. ARMY OFFICE OF THE JUDGE ADVOCATE GENERAL, *MILITARY JUSTICE DURING THE WAR: A LETTER FROM THE JUDGE ADVOCATE GENERAL OF THE ARMY TO THE SECRETARY OF WAR* 28 (1919) [hereinafter *CROWDER*]. According to MG Crowder, the trial judge advocate was normally not a lawyer from the Judge Advocate General’s Department “except in a few special cases.” *Id.* at 27. The *MCM* did not require the trial judge advocate to be a lawyer, but did require that the judge advocate of a general court-martial have experience as a court member or assistant judge advocate. 1917 *MCM*, *supra* note 3, at 47–48.

<sup>11</sup> *Buckner ROT*, *supra* note 9, at 6 (quoting 1917 *MCM*, *supra* note 3, at 252). The defense explicitly relied on these instructions in making the case for consent. *Id.* at 152. The instructions on rape were read to the court-martial *before* any evidence was taken, and were less than a page in length. *Id.* at 6. There were no opening statements; after the Judge Advocate read the charge and the instructions, the president of the court-martial instructed him to “plead the case,” and testimony began.

<sup>12</sup> *Id.* at 16. Under the rape instructions read by the Judge Advocate, Mmse. Thiebaut’s sexual past would not have been a defense to rape, since “the offense may be committed on a female of any age, on a man’s mistress, or on a common harlot.” *Id.* at 6. However, over half a century before “rape shield” rules, it might have been allowed to show Mmse. Thiebaut’s general propensity to have sex with near-strangers, or even with black men in particular. See *Story v. State*, 59 So. 480, 482–83 (Ala. 1912) (*Story* overturned the conviction of a black man for raping a white prostitute, because the defense had not been allowed to introduce evidence that the prostitute had a reputation for consorting with black men; its brief but explicit discussion of relations between the “dominant” and “inferior” races must be read to be believed.).

<sup>13</sup> *Buckner ROT*, *supra* note 9, at 21–22, 51–52.



the court's examination (though he did not enter them as exhibits, because they would not travel well with a paper record). Moreover, one of Private Buckner's comrades testified that Private Buckner had boasted about "doing business" with a lady he met on the road, and that this lady had run away, but that he had caught her and dragged her into a wheat field before he "did business to her."<sup>14</sup>

Nineteen-year old PVT Buckner told a radically different story. He had only been in the Army since February 1918, and after completing basic training had been assigned to the 313th Labor Battalion of the American Expeditionary Force (AEF) in France.<sup>15</sup> After being called to the stand, Buckner testified that he had met Georgette Thiebaut at a grocery store and that they had later met several times. They had drunk wine together and also exchanged gifts: she had given him her photograph and some prayer beads; he had given her his watch.

Private Buckner testified that he and Ms. Thiebaut had had consensual sexual relations on 30 June and on 1 July, and had such relations again on 2 July. Specifically, he said he "had connection" with her three times in the oat field that day and that she had not struggled or screamed during the sex acts. But then things had gone awry. Said Buckner: "When we got through she caught me by the arm and she had my watch and she broke a minute hand off it. Then I took the watch away from her."<sup>16</sup> As this was the watch that Buckner had previously given to her, "she got mad." After telling him "me and you are finish," Ms. Thiebaut left the oat field and, once on the road, told two French soldiers walking nearby that she had been raped. Buckner also testified that shortly after his arrest on 5 July, he had gone with Captain (CPT) R. B. Parker, his defense counsel, to see MAJ Hurley. Private Buckner had then told Hurley the whole story of his relationship with Georgette Thiebaut. The three Soldiers—Buckner, Parker, and Hurley—had visited the town and other locations where the accused said he had met the victim and had relations with her.<sup>17</sup>

In rebuttal, the prosecution called witnesses who testified that Mmse. Thiebaut could not have been with the accused on 30 June and 1 July—because she was at her parents' home and at the residence of her sister. Contradicting Private Buckner's testimony that he had

conversed with Mmse. Thiebaut in English on these prior occasions, several French witnesses (including her father) testified that she spoke no English; her father also testified that she had never possessed the prayer beads Private Buckner claimed to have gotten from her. The picture he claimed to have gotten from her was damaged, was inscribed "modern dancers" (Mmse. Thiebaut worked in a dry goods store), and could not be identified as hers in court, though a friend of Private Buckner said it had previously depicted Mmse. Thiebaut. No witnesses corroborated their prior meetings. The sister of the owner of the café where Private Buckner said Mmse. Thiebaut had given him wine testified that he, Private Buckner, had been there on the day of the incident, but that Mmse. Thiebaut had not been with him. The alleged victim's parents and the town's mayor also testified "as to her deplorable conditions at the time she reached her home" after the alleged rape.<sup>18</sup>

At the close of the evidence, both sides presented argument. Captain Parker, the defense counsel, went first. He argued a number of factors that, he stressed, indicated consent. When the gendarmes first saw PVT Buckner and Mmse. Thiebaut together, they appeared to be talking together, until she saw them. Mmse. Thiebaut had testified that her clothes had gotten bloody during a struggle with the accused, and that she thought most of the blood was his. But there were "no marks of any character on the accused," there was "not a spot of blood" on his clothes (either the ones he wore or the ones in his barracks bag), and his clothes were not torn: evidence that there had not been a struggle. She claimed to have "felt nothing" during repeated forcible intercourse. The defense counsel pointed out several inconsistencies in the prosecution evidence (such as differing accounts of what Mmse. Thiebaut did after PVT Buckner left the scene), and reminded the court of PVT Buckner's conduct in speaking freely to the prosecutor and showing him where the intercourse had taken place. The defense counsel closed with the following statement:

In summing up, I would say, that it is the opinion and the firm belief of the counsel for the defense that the one who has made the accusation, Georgette Thiebaut, who has accused William Buckner, made no resistance but consented to intercourse with him. And so we firmly believe, after working upon this case, that William Buckner is not guilty of the charge.<sup>19</sup>

As for the prosecution, MAJ Hurley argued that since the accused admitted that he had sexual intercourse with Ms. Thiebaut, "the only element of rape left to be proved is that

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<sup>14</sup> *Id.* at 45.

<sup>15</sup> About 200,000 African-American Soldiers served in the American Expeditionary Force (AEF), of whom 160,000 served as laborers in the Service of Supplies. "They worked night and day, twelve to sixteen hours at a stretch, performing many difficult and necessary tasks." Those in labor battalions, like PVT Buckner, "built and repaired roads, railroads, and warehouses and performed general fatigue duty." FONER, *supra* note 6, at 121.

<sup>16</sup> Buckner ROT, *supra* note 9, at 110.

<sup>17</sup> *Id.* at 103–12.

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<sup>18</sup> *Id.* at 155–56. This article can give only highlights from the evidence. In all, twenty-five witnesses testified, and the verbatim transcript fills 187 legal-sized pages.

<sup>19</sup> *Id.* at 153–54.

the carnal knowledge was had by force and without the consent of Georgette Thiebaut.” In Hurley’s view, the evidence he had introduced – particularly her screams during the incident and her conduct right after – showed that “she was assaulted forcefully and violently” and that the “uncorroborated word of the accused” was the only evidence to the contrary.<sup>20</sup>

Having heard the witnesses, and having had an opportunity to evaluate their credibility under oath, the thirteen members of the court closed for deliberation.<sup>21</sup> When they reconvened, they found the accused guilty as charged. After MAJ Hurley stated that “he had no evidence of previous convictions” of the accused to submit as evidence, the court closed to vote on a sentence. When the panel members reconvened, Colonel Edward P. O’Hern, the president of the court-martial, announced that PVT William Buckner was “to be hanged by the neck until dead” and that “two thirds of the members of the court concurred in the sentence.”<sup>22</sup>

Under the Articles of War and the 1917 *MCM*, there was no requirement for PVT Buckner to be represented by a lawyer. Rather, Article 17 stated that “the accused shall have the right to be represented before the court by counsel of his own selection of his defense, if such counsel be reasonably available” (“counsel” in this context did not imply “legally trained counsel”). However, the prosecutor, MAJ Hurley, was an attorney and a member of the Judge Advocate General’s Department (JAGD) and that may explain why Buckner had two counsel representing him: Captain R. B. Parker and First Lieutenant (1LT) A. C. Oliver. Interestingly, CPT Parker was a Medical Reserve Corps officer and 1LT Oliver was an Army chaplain (both were present for the execution, and 1LT Oliver gave PVT Buckner his last spiritual comfort). Although the Judge Advocate was charged with the duty of prosecuting a case, the 1917 *MCM* also required him to “do his utmost to preserve the whole truth of the matter in question,” and to

“oppose every attempt to suppress facts or to distort them.”<sup>23</sup> In keeping with this duty, MAJ Hurley raised almost no objections to the defense conduct of the case – preferring a polite inquiry about the relevance of Mmse. Thiebaut’s virginity, to which the defense responded by withdrawing the question.

Was there sufficient evidence to find the accused guilty as charged? The accused having admitted under oath that he had had sexual intercourse with the victim, the only element in dispute was whether the sex was by force and without consent. Since the victim was adamant that she had been raped, and there was considerable evidence of “fresh complaint,” the court members had enough evidence before them. Ultimately, they weighed the credibility of the French victim against the American accused in making their decision. Doubtless the corroborating details for her story—such as the screams, the blood, his admissions to a fellow Soldier, and the locals’ insistence that she spoke no English—assisted them in making this determination; as did the comparative lack of corroboration for his story.

What about the defense? Was it adequate? The apparent lack of legally trained defense counsel meant that the accused was at a serious disadvantage at trial—a disadvantage amplified by the fact that the prosecutor was a lawyer and judge advocate. But the two defense counsel mounted a spirited defense, which included a vigorous cross-examination of the victim that highlighted inconsistencies in her testimony. Their arguments were cogent, making a logical, fact-based argument for consent in the face of a strong prosecution case. It is difficult to imagine how their strategy could have been much improved, even by seasoned defense counsel. Private Buckner had already admitted the sex to a fellow Soldier, so having him keep quiet and fighting the identification case would not likely have helped.<sup>24</sup> The defense’s decision to bring MAJ Hurley along while investigating the case in town seems strange, but is understandable under the circumstances. CPT Parker’s client had presumably told him the tale of the prior

<sup>20</sup> *Id.* at 155. Like most lawyers faced with inconsistencies in their own sides’ testimony, MAJ Hurley had a rehearsed argument as to how common this is in human affairs: “It would be passing strange if such minor conflicts did not exist. The four Gospels are in hopeless conflict on certain minor details, but they all corroborate the salient facts of the incident concerning which they were written.” *Id.* at 154.

<sup>21</sup> Convened by Special Orders No. 173, Headquarters Army Artillery, 1st Army, dated 26 July 1918, the court consisted of thirteen officers: two colonels, one lieutenant colonel, two majors, two captains, five first lieutenants and one second lieutenant. Buckner ROT, *supra* note 9, allied papers. The large number of panel members was not an accident, as Article 5 of the Articles of War stated that while a general court-martial “may consist of any number of officers from five to thirteen,” it should “not consist of less than thirteen when that number can be convened without manifest injury to the service.” Given that PVT Buckner was facing the death penalty, the convening authority likely believed that having thirteen court members was prudent. 1917 *MCM*, *supra* note 3, Articles of War, art. 5.

<sup>22</sup> Buckner ROT, *supra* note 9, at 157.

<sup>23</sup> 1917 *MCM*, *supra* note 3, at 49. Major General Crowder also stated that a trial judge advocate was supposed “to conduct the prosecution, not indeed with the ruthless partisanship frequently to be observed in civil prosecuting attorneys, yet with the thoroughness suitable to the proper performance of his duties.” CROWDER, *supra* note 10, at 27. See also WINTHROP, *supra* note 7, at 185 (discussing qualifications of the trial judge advocate: “While an officer may readily make himself familiar with the routine of the prosecution of a brief and simple trial, a special training and a considerable body of legal knowledge are required . . . in a case of real difficulty and importance”).

<sup>24</sup> Had the accused kept quiet from the beginning, the dynamics of the case might have changed dramatically. On cross-examination, Mmse. Thiebaut admitted that she had not looked at her assailant’s face, stating, “He was so ugly that I would not look at him . . . I say he is ugly because he is a [negro] and [negroes] are disgusting.” Buckner ROT, *supra* note 9, at 14. While she had later picked him out of his all-black unit a few days later, the alleged attack occurred in the evening, the gendarmes who saw PVT Buckner were not able to identify him, he was not arrested until three days later, and a serious case for doubt might have been made.

relationship, and said where the witnesses were who would back him up. If they *had* backed him up in front of MAJ Hurley, the entire prosecution might have been dropped. When they did not, the defense was still able to argue that Private Buckner's cooperative behavior bespoke his innocence.<sup>25</sup>

In the wake of the disastrous Houston Riots court-martial, the promulgation of General Orders No. 7 meant that Buckner's case was reviewed for legal sufficiency by a Board of Review consisting of three senior judge advocates in the Office of the Acting Judge Advocate General (JAG) for the AEF in Europe.<sup>26</sup> After the convening authority approved the sentence on 8 August 1918, Buckner's case was forwarded to the AEF commander, General John J. Pershing, for action. Under Article 48, only Pershing could confirm the death sentence and, while Pershing did confirm the sentence on 17 August 1918, it was held in abeyance pending review by the Board.

The report of the three officers who reviewed the proceedings, signed by Brigadier General Edward A. Kreger,<sup>27</sup> the Acting JAG, is contained in the allied papers. This report cited several specific pieces of evidence that supported the verdict.<sup>28</sup> The Board of Review concluded that the "conflict of testimony" between Buckner and Thiebaut "presented a question for determination by the

court." The Board also found that the "record is without suggestion of substantial error, or of any irregularity justifying comment." Finally, the three judge advocates concluded that "the record in the case is legally sufficient to support the sentence adjudged, approved and confirmed."<sup>29</sup> Kreger's signature reflected that, as the senior ranking judge advocate in Europe, he concurred with the Board's opinion.

Measured by modern standards of due process, PVT Buckner's trial was seriously flawed. First, the prosecutor was a lawyer from the Judge Advocate General's Department while the defense counsel were not, such that MAJ Hurley was much more adept at trying courts-martial. As a military lawyer, Hurley doubtless had more credibility with the members than did his opponents.<sup>30</sup> Second, the death penalty was imposed by a less than unanimous vote and without evidence presented in extenuation or mitigation; and the case was prepared and tried at a breakneck pace that would be unthinkable for a capital case now. Third, the panel that heard the case consisted only of officers; the accused had no right to enlisted members. Fourth, there was no military judge (or other legally trained officer) to rule on evidentiary matters or otherwise ensure procedural due process at the trial; the panel received its instructions from the prosecutor. Fifth, while the accused's case was reviewed by a Board of Review, he did not have counsel representing him in that quasi-appellate forum, though the prosecutor's own review was before them. Nor did he have the opportunity, much less the right, to present evidence to that Board.<sup>31</sup>

These shortcomings aside, a final question remains. Was it possible for an African-American Soldier on trial for raping a white woman to get a full and fair hearing in the Army in 1918? After all, this was a racially segregated Army where racist attitudes toward Black Soldiers were official policy. Army Expeditionary Force authorities issued orders forbidding African-American Soldiers "from conversing or associating with French women, attending

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<sup>25</sup> *Id.* at 152. A more cautious strategy would have been to distrust the client and talk to the witnesses *before* involving the prosecution, but this strategy would have had limited value. When the witnesses failed to back up the accused, the defense would still have been fighting a corroborated story with an uncorroborated one in the face of a damning admission by the client.

<sup>26</sup> War Dep't, Gen. Orders No. 7 (17 Jan. 1918). This general order required that any death sentence be suspended pending review of its legality in the Office of the Judge Advocate General, although the reviewing authority was free to disregard any opinion or advice resulting from such review. Given the distance of the AEF in France from Washington, D.C., Acting JAG Kreger established a three-man Board of Review for the AEF, and this body examined PVT Buckner's record.

<sup>27</sup> Edward A. Kreger had a remarkable career as an Army lawyer. Born in Iowa in May 1868, he was admitted to the Iowa state bar in the 1890s and practiced law until the Spanish American War. In May 1898, he entered the 52d Iowa Volunteer Infantry as a captain and subsequently saw combat against insurgents in the Philippine Insurrection. In February 1911, Kreger was appointed a major and judge advocate and his subsequent career reflected his amazing talents as a lawyer: Professor of Law at West Point; legal advisor in the Department of State and Justice of the Government of Cuba; Acting Judge Advocate General of the AEF in France; and Acting Judge Advocate General in Washington, D.C. Kreger was appointed The Judge Advocate General in 1928 and retired in 1931. He died in San Antonio, Texas, in May 1955. U.S. ARMY JUDGE ADVOCATE GENERAL'S CORPS, THE ARMY LAWYER 148-49 (1975).

<sup>28</sup> The allied papers also include a two-page review by MAJ Hurley for his commander, with arguments and page cites to the record for each item of evidence that supports the conviction, and this prosecution-oriented summary may have influenced the board. He appears to have done this in his capacity as staff judge advocate. See CROWDER, *supra* note 10, at 27. No brief for the defense (except the transcript of their closing argument) appears in the file.

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<sup>29</sup> Since the Board had been created by a War Department regulation, its powers were advisory only; the Board did not have factfinding power (as do the courts of criminal appeals under Article 66, UCMJ) and a convening authority was under no obligation to follow any opinion issued by the Board.

<sup>30</sup> Major Hurley may have carried extra credibility for other reasons. His citation for the Distinguished Service Medal (when he was a lieutenant colonel) states that he also served as Judge Advocate, Adjutant General, and Inspector General for Army Artillery, 1st Army, during the war, and skillfully conducted negotiations between the AEF and the Grand Duchy of Luxembourg. He was awarded the Silver Star for gallantry in action on the last day of the war for "voluntarily making a reconnaissance under heavy enemy fire." *Hall of Valor: Patrick J. Hurley*, MILITARY TIMES, <http://militarytimes.com/citations-medals-awards/recipient.php?recipientid=17723> (last visited Dec. 5, 2011).

<sup>31</sup> On the other hand, the instructions on rape, which required some kind of resistance by the victim to prove non-consent, and the rules of evidence, which did not exclude her sexual past, were friendlier to the defense than the current rules are.

social functions, or visiting French homes.”<sup>32</sup> The French liaison officer at AEF headquarters advised his countrymen “to prevent any expression of intimacy between white women and black soldiers,” as this would “deeply affront white Americans.”<sup>33</sup> Given this racial climate, did the panel that heard PVT Buckner’s case weigh the evidence fairly? Would a white Soldier have been found guilty—and sentenced to death—under the same facts?

A sad postscript to this case is contained in the record’s allied papers: on 11 March 1919, Buckner’s mother wrote to the “Adjutant General, U.S. Army” about her son, whom she believed had been killed in action. She had expected to get some Army life insurance proceeds after her son had died but, as she wrote:

I have been informed . . . that the circumstances surrounding the death of my son . . . was such as to cancel the insurance. I wrote . . . and asked . . . to tell me the circumstances. In reply, they refer me to you.

Will you please write to me at once, telling me about it?

Yours truly,

Mary Buckner  
316 Seventh Street  
Henderson, Ky.

There is no record in the Buckner file of any reply to his mother.

*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.*

<sup>32</sup> FONER, *supra* note 6, at 122.

<sup>33</sup> *Id.* Such racial attitudes were then common in the civilian world, see *Story v. State*, 59 So. 480, 482 (Ala. 1912), and perhaps even in France, as evinced by Mmse. Thiebaut’s testimony that she found all black men “ugly” and “disgusting.”

## Lore of the Corps

### A “Fragging” in Vietnam: The Story of a Court-Martial for Attempted Murder and Its Aftermath

Fred L. Borch  
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*In a cold killing rage, I went to my hootch and grabbed a grenade, walked back to the bunker the XO was in, pulled the pin on the grenade, threw it into the bunker, closed the bunker door, and started back to the hootch. As I was walking back, I heard the explosion of the grenade.<sup>1</sup>*

*Some CID officers interviewed me, asking me why I tried to kill the executive officer. I was really tired of the bullshit, and I told them he was an asshole who deserved to die.<sup>2</sup>*

On 12 January 1973, Staff Sergeant (SSG) Alan G. Cornett pleaded guilty to attempting to murder Lieutenant Colonel (LTC) Donald F. Bongers, the Executive Officer of Advisory Team 40, “by means of throwing an M-26 fragmentation grenade into a bunker which the said Lieutenant Colonel Bongers occupied.”<sup>1</sup> Cornett also pleaded guilty to having .16 grams of heroin in his possession. The following day, he was sentenced by a panel of seven officers.<sup>2</sup> This is the story of his court-martial and its aftermath.

The evidence presented at the Article 32 investigation and the stipulation of fact introduced at trial revealed that the accused, a Ranger-qualified Special Forces medic who had served six and one-half years in Vietnam, was assigned to Military Assistance Command, Vietnam (MACV) Advisory Team 40. This team, located at Duc My, Vietnam, provided support to the Vietnamese Army.

For several months, SSG Cornett and his victim, LTC Bongers, had not been getting along. Cornett believed that Bongers was harassing him because the accused was married to a Vietnamese woman. The senior advisor in Team 40, Colonel (COL) Gilligan, who was Bongers’ boss, had told other Soldiers that he did not like “mixed marriages” and would not approve a Soldier’s request to marry a Vietnamese national. Bongers also had stated publicly that it was “morally wrong” for Americans to associate with Vietnamese women, and had called the accused’s wife a “prostitute.”<sup>3</sup> Not content to simply voice their views, Gilligan and Bongers had prohibited the accused from bringing his wife onto the Team 40 compound. This was embarrassing to the accused and put considerable strain on his marriage.

On 30 November 1972, at about 1545, LTC Bongers entered one of the team’s commo bunkers, where the accused was on radio watch. After watching the accused open a can of beer, Bongers relieved him for drinking on duty, and then told him to leave the commo bunker. Lieutenant Colonel Bongers then took over the accused’s radio watch duties.

Staff Sergeant Cornett went back to his hootch and began drinking more alcohol. As he told the Criminal Investigation Division (CID) later that day, he “drank a half a case of Budweiser beer, 12 cans, and also had about a pint of rum.” About an hour later, Cornett took an M-26 fragmentation grenade off his web belt and put it on his refrigerator. As Cornett explained to the CID agent:

I kept looking at it and wondering if it was worth it . . . I took the tape off from around the grenade, pulled the safety pin, walked over to the commo bunker, stood there for about fifteen minutes deciding if I should kill him or just throw a scare into him. I decided not to kill him, but to scare him. I threw the grenade down the steps of the bunker . . . I stayed there until the smoke cleared.<sup>4</sup>

Lieutenant Colonel Bongers was a lucky man that day. He saw the grenade roll into the commo bunker toward his chair, “got up and ran up the stairs and as he reached the second step the grenade exploded.”<sup>5</sup> Fortunately for Bongers, he was not injured in the blast.

As for SSG Cornett, he initially feigned ignorance about who had thrown the grenade but, when another Soldier told him that Bongers had accused him of trying to ‘frag’ him, the accused ran out of the orderly room and returned with his M-16. He then told another soldier in the orderly room: “If

<sup>1</sup> ALAN G. CORNETT, GONE NATIVE: AN NCO’S STORY 266 (2000).

<sup>2</sup> *Id.* at 277.

<sup>3</sup> Record of Trial, United States v. Cornett. No. CM429339, Charge Sheet (1973) [hereinafter Cornett ROT].

<sup>4</sup> The panel consisted of two colonels, one lieutenant colonel, two majors, one lieutenant and one chief warrant officer two. *Id.* at 23–30.

<sup>5</sup> *Id.* at 79–80, 82–83.

<sup>4</sup> *Id.* Sworn Statement of SSG Alan Gentry Cornett.

<sup>5</sup> *Id.* Prosecution Exhibit 1 (Stipulation of Fact).

that is what LTC Bongers thinks, then I'll kill him for sure.”<sup>6</sup> Cornett was quickly disarmed, and taken into custody.

On 4 December, the accused was brought to the Saigon Military Police (MP) station and held in a detention cell until he could be moved to the stockade at Long Binh. A routine strip search of Cornett's person by the MPs “uncovered 9 packets containing .16 grams of heroin.” The packets had been sewn into the hems around Cornett's upper shirt pockets.

Almost certainly on the advice of his two defense counsel (the accused had hired a civilian lawyer, Mr. Richard Muri, but also had Captain (CPT) William H. Cunningham as his detailed defense counsel), SSG Cornett entered into a pre-trial agreement with the convening authority. He agreed that, in exchange for pleading guilty to attempted murder and possession of heroin, his sentence would be capped at a dishonorable discharge, thirty years confinement at hard labor, total forfeitures of all pay and allowances and reduction to the lowest enlisted grade. The pre-trial agreement, however, contained one curious provision: the convening authority also agreed that “the sentence in excess . . . of confinement at hard labor for one year . . . [would] be suspended for such period of time as the Convening Authority deems appropriate.”<sup>7</sup> The parties apparently intended that no matter how much jail time might be imposed—and both SSG Cornett and his defense counsel must have thought it would be considerable—Cornett would not serve more than one year behind bars.

During his guilty plea inquiry with COL Ralph B. Hammack, the military judge, Cornett agreed that he intended to kill Bongers. He also admitted that he had possessed a small amount of heroin. But Cornett denied being a drug user and told the judge that a “friend” might have sewn the heroin in his uniform pockets so that Cornett could say that he was “on drugs” at the time of the incident and perhaps not responsible for his actions.<sup>8</sup>

While Cornett's plea was accepted, and findings were entered by COL Hammack, events at sentencing did not proceed as expected. Rather, at least from the government's perspective, the case went very much awry. The trial counsel, CPT John G. Karjala, called LTC Bongers to testify how the accused had tried to kill him. One would think that this would be sufficient aggravation, and convince the panel

that a severe sentence was warranted. But the accused called a number of officers and noncommissioned officers (NCOs) who testified that he was a good Soldier who had been mistreated by his superiors. Lieutenant Colonel Thomas C. Lodge testified that Cornett was “an outstanding medic.”<sup>9</sup> Captain Terrance W. Hoffman testified that the accused had been “treated unfairly” by COL Gilligan and LTC Bongers when they denied his request to bring his wife onto the Team 40 compound. Other witnesses testified that both COL Gilligan and LTC Bongers had, on more than one occasion, voiced their prejudices against Vietnamese women to the accused and to other Soldiers.<sup>10</sup>

Staff Sergeant Cornett also testified in his own behalf. He had been in Vietnam six-and-one-half years (with a return to the United States only for two three-month periods in 1966 and 1970) and had served as a Special Forces reconnaissance medic, trained Vietnamese Montanyards tribesmen to fight the Viet Cong, and participated as an intelligence analyst in Project Phoenix. He also had served as a platoon medic in the 101st Airborne Division. Cornett had been wounded in combat and his counsel introduced into evidence his citations for the Silver Star, Bronze Star and Vietnamese Cross of Gallantry. His citation for the Silver Star lauded his gallantry under fire while providing first aid to a Vietnamese soldier who had been wounded in a firefight with the North Vietnamese and Viet Cong. Cornett had also participated in “charges against the determined enemy” and his “dedicated and courageous example” had broken the enemy's counterattack.

After deliberating on an appropriate sentence, the all-officer panel sentenced SSG Cornett to be reduced to the lowest enlisted grade, forfeit all pay and allowances and be confined at hard labor for one year. There was no punitive discharge.

Major General M. G. Roseborough took action on Cornett's case on 1 March 1973, when he approved the sentence as adjudged. The accused, who had been in the stockade at Long Binh, was shipped to the Disciplinary Barracks at Fort Leavenworth, Kansas. Since he had not been sentenced to a punitive discharge, and had not received more than a year's confinement, Cornett was offered the opportunity to go to the U.S. Army Retraining Brigade at Fort Riley, Kansas. As Cornett tells it, he was told that the brigade “housed soldiers who had made mistakes and were given the opportunity to make amends. If they straightened out, they could stay in the Army.”<sup>11</sup>

After completing nine weeks of “retraining,” Cornett was offered a choice: either an honorable discharge or restoration to active duty. He chose to stay in the Army as a

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* Appellate Exhibit I (Offer to Plead Guilty).

<sup>8</sup> *Id.* at 81. Cornett testified that he and his friends had discussed the possibility that, if he had heroin in his possession, he could testify that he was under the influence of drugs when he threw the grenade and so was not responsible. However, he testified that he did not actually ask anyone to provide him with heroin, and was surprised to find the packets had been sewn into his uniform by persons unknown. (He was still able to plead guilty to knowing possession because he said he did not get rid of the packets once he found them.).

<sup>9</sup> *Id.* Review of the Staff Judge Advocate.

<sup>10</sup> *Id.* at 5.

<sup>11</sup> Cornett, *supra* note 1, at 268–69.

medic. He remained at Fort Riley at the Irwin Army Hospital and, if Cornett is to be believed, it took him only six months “to recapture the grade of E-6.”<sup>12</sup>

In order to re-enlist, SSG Cornett had to obtain a waiver from the Department of the Army. With the support of his chain of command, he applied for and was granted a waiver. He then re-enlisted for six more years. After five years in Kansas, SSG Cornett had tours in Germany and at Fort Benning, Georgia, where he was an instructor in the Pathfinder Department and played football on the “Doughboys” team. Cornett also was an extra in the movie *Tank* (starring James Garner), which was filmed at Fort Benning.

Shortly after being promoted to sergeant first class, Cornett was sent to 10th Special Forces Group, Bad Tolz, Germany. While serving as the senior medic in this unit, Cornett was selected “below the zone” for promotion to master sergeant. After completing the First Sergeant’s Academy in Munich, Cornett was made First Sergeant, U.S. Army Special Operations Forces, Europe. Cornett retired as an E-8 with more than twenty years of active duty service.<sup>13</sup>

In retrospect, it is apparent that the court members, despite the serious nature of the “fragging” and drug charges, were impressed with Cornett’s soldiering. It was not unusual for career Soldiers in the Vietnam era to have two or even three one-year tours in Southeast Asia but it was extremely rare for any GI to have more than six years in South Vietnam—all in dangerous, high-profile combat-

related assignments. Additionally, evidence that Cornett was airborne, Ranger and Special Forces-qualified, and had been wounded and decorated for gallantry in action meant that the panel was loath to give him a punitive discharge that would stain his past record. But it must be assumed that the panel members would have been surprised to hear that, having served a year’s confinement, Cornett was eligible for retraining and restoration to active duty. They probably would have been more surprised to hear that the Soldier they had imprisoned for attempting to kill a superior commissioned officer ultimately retired as a senior NCO.

A final note: three other judge advocates of note were involved in the Cornett case. They were then-COL Joseph N. Tenhet, Jr., then-MAJ Robert E. Murray and then-CPT Dennis M. Corrigan. Tenhet was the MACV and U.S. Army, Vietnam Staff Judge Advocate (SJA); he retired as a brigadier general in 1978. Murray, who worked for COL Tenhet, signed the charge sheet referring the case to trial by general court-martial; he would later serve as The Assistant Judge Advocate General and retired as a major general in 1993. Corrigan, who twice served as the SJA, 1st Infantry Division (Forward) and finished his career as the senior military assistant to the Department of Defense General Counsel, retired as a colonel in 1996.

As for Cornett, his “uncensored unvarnished tale of one Soldier’s seven years in Vietnam” was published by Ballantine Books in 2000.<sup>14</sup>

*More historical information can be found at*

The Judge Advocate General’s Corps  
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<sup>12</sup> *Id.* at 269.

<sup>13</sup> *Id.* at 270–75.

<sup>14</sup> *Id.* (front-cover description by publisher).

**A Butler in FDR's White House, Combat Infantryman in Italy, and Judge Advocate in the Corps:  
Rufus Winfield Johnson (1911–2007)**

*Fred L. Borch III*  
*Regimental Historian and Archivist*

Rufus Winfield Johnson served as a butler in the White House in the 1930s and saw fierce combat as an officer in the 92d Infantry Division in World War II. He also defended Soldiers at courts-martial during the Korean War and, after transferring to the Judge Advocate General's Corps in 1959, finished his Army career as a Reserve lieutenant colonel. While Johnson sometimes faced prejudice because of his ethnicity, he did not let racism prevent him from having a superb career as a Soldier and lawyer—or from making legal history.

Born on a farm in Montgomery County, Maryland, on 1 May 1911, Johnson was the seventh son of a seventh son. After his mother died when Johnson was four years old, he was raised by an aunt and uncle in Coatesville, Pennsylvania. According to an obituary published in 2007, Johnson first faced racial discrimination when he was a Boy Scout: he needed a swimming badge to make Eagle Scout, but could not earn that badge because African-Americans were prohibited from using the local whites-only swimming pool.<sup>1</sup>

After finishing high school in 1928, Johnson attended Howard University in Washington, D.C., graduating in 1934. He subsequently completed law school at Howard in 1939 and then went to work at the White House. Although he was relatively short at five feet six inches, Johnson was exceptionally athletic and had qualified as a lifeguard while participating in the Army Reserve Officer Training Corps (ROTC) program in college. That explains why he was asked to watch over President Franklin D. Roosevelt as he exercised his polio-afflicted legs in the White House pool. Later, Johnson served as White House butler. He liked to tell about the time he spilled soup on Roosevelt yet kept his job. According to Johnson, the president, “seeking an advantage while dining with a political adversary,” reached up to the butler tray Johnson was carrying “and calmly tripped a bowl of soup into his own lap, talking all the while, as his dining companions looked on, horrified.”<sup>2</sup>

Eleanor Roosevelt took a liking to Johnson and, when the president's wife learned that he was studying for the bar exam at the end of his twelve-hour workday at the White House, she arranged for Johnson to serve her tea in the afternoons. She then instructed Johnson that he was to use

these two hours to study. Her kindness meant that Johnson was able to take the District of Columbia bar exam in October 1941.<sup>3</sup>

The following month, Johnson was ordered to active duty. Having been commissioned as a Reserve infantry officer in 1934 (through ROTC at Howard), First Lieutenant Johnson reported to Fort Dix, New Jersey. After a short assignment at that location—and promotion to the next rank—Johnson reported to the all-African-American 92d Infantry Division. When that unit sailed for Italy in 1944, Captain (CPT) Johnson was with it.

A member of the 3d Battalion, 371st Infantry Regiment, CPT Johnson excelled as an infantry officer and took command of Company I in early 1945. According to a questionnaire he completed in 1997, Johnson remembered telling newly arrived Soldiers:

I am Capt. Johnson, your new company commander. My job is getting the enemy killed and you home in one piece. I can get these two things done only if you follow my orders promptly, without hesitation, or question, and use everything you were taught to do during your training.<sup>4</sup>

Johnson saw hard combat in the Rome-Arno River, North Apennine, and Po Valley campaigns. At one point during his tenure as a company commander, CPT Johnson was ordered by the division commander, Major General Edward “Ned” Almond, to attack a hill held by the Germans. Johnson later remembered that it was a “suicide mission”<sup>5</sup> and only a few men survived. Johnson was near the top of the hill when he found himself alone with a sergeant, who had been shot in the arm and both legs. Johnson shot and killed a German about to throw a grenade. Then, while under fire, Johnson picked up the injured man and carried him to safety.<sup>6</sup>

<sup>3</sup> Johnson learned in 1942 that he had passed the bar examination but, since he was no longer in Washington, D.C., he was not able to personally appear in court and be admitted to practice until he was released from active duty in 1946.

<sup>4</sup> Rufus W. Johnson, Questionnaire, U.S. Military History Inst., Carlisle Barracks, Pa. 6 (20 Aug. 1977) [hereinafter Johnson Questionnaire].

<sup>5</sup> *Id.* at 22.

<sup>6</sup> Sullivan, *supra* note 1.

<sup>1</sup> Patricia Sullivan, *Lawyer and Lt. Col. Rufus W. Johnson*, WASH. POST, July 10, 2007, at B6.

<sup>2</sup> *Id.*



In his questionnaire, Johnson explained that he became so enraged by what had happened on the hill that, when he returned to camp, he charged into Almond's tent and berated him for endangering his men. Apparently there was some pushing and shoving and Almond threatened to court-martial Johnson. While that did not occur, Johnson believed that Almond took his revenge at a later date by destroying a recommendation that Johnson be awarded the Silver Star for his gallantry during the Po Valley campaign. Johnson did, however, receive the Bronze Star Medal and Purple Heart.

While his duties as an infantry officer took the majority of his time in Italy, Johnson served as counsel at a number of courts-martial held in Italy. He "personally defended 11 cases involving capital crimes including 5 murders and three rapes."<sup>7</sup>

Johnson was discharged from the Army in February 1946. He was excited to be back on American soil, but this homecoming was bittersweet:

Released from active duty in Virginia; refused service at lunch counter in every bus station on way to D.C.; had to ride in the back of the bus; upon arrival in D.C., I tried to buy a milk shake at the lunch counter in my uniform as a captain; was told, "Sorry, but we don't serve colored." That was in the Greyhound bus station.<sup>8</sup>

After a short association with another Washington, D.C., lawyer, Johnson opened his own office. His specialty was criminal law, and he "handled every type of case individually from minor police infractions to and including manslaughter, rape and robbery."<sup>9</sup> He also was "associate counsel" on several murder cases.<sup>10</sup>

In 1949, Johnson moved to San Bernardino, California, took and passed the bar exam, then opened a private law practice. A year later—in October 1950—he was recalled to active duty as part of a general mobilization of reservists during the Korean War. Captain Johnson was assigned briefly to Fort Knox, Kentucky, where he was a battalion executive officer and summary court officer. Although still an infantry officer, his legal background soon came to the attention of his superiors and resulted in Johnson being detailed to serve as trial and defense counsel at both general

and special courts-martial. He also worked as an "Assistant Legal Assistance Officer."<sup>11</sup>

After CPT Johnson was assigned to the Far East Command and deployed to Korea in September 1951, he was appointed an Assistant Staff Judge Advocate at Headquarters, 2d Logistical Command. In this duty position, Johnson reviewed general court-martial records, examined boards and reports, and also conducted staff visits to units.<sup>12</sup> He also served as a defense counsel at special courts-martial held in Korea. Johnson was successful in this defense work—he obtained a number of acquittals for his clients—and consequently requested a transfer to the Judge Advocate General's Corps. But his request was denied because the Infantry Branch wanted to retain him as a combat unit commander.

Despite the Army's decision to keep crossed rifles on CPT Johnson's collar, his superiors permitted him to continue working as a lawyer: in his last assignment before leaving active duty in April 1953, Johnson served as "Assistant Staff Judge Advocate and Assistant Legal Assistance Officer" for Headquarters, III Corps and Fort MacArthur, located in Los Angeles, California. He was also the Chief of the Military Justice Branch. His rater, Colonel (COL) Doane F. Kiechel, then serving as III Corps Staff Judge Advocate, wrote the following on Johnson's Officer Efficiency Report:

One of the finest officers and gentlemen of my acquaintance. Possesses unimpeachable character and integrity, high intelligence and a broad background of military-legal training and experience. Has a fine sense of ethical values. Outstanding in loyalty and devotion, with a particular aptitude for working calmly and efficiently under stress.<sup>13</sup>

His senior rater, COL Norman B. Edwards, wrote: "An outstanding officer. Well liked, competent, efficient, courteous and hard working. I concur fully with the comment of the rating officer."<sup>14</sup>

<sup>7</sup> U.S. Dep't of Army, DA Form 1056, Legal Experience Statement, The Judge Advocate Gen. Admin. Div., Johnson, Rufus W. block 16 (24 May 1951) [hereinafter DA Form 1056].

<sup>8</sup> Johnson Questionnaire, *supra* note 4, at 14.

<sup>9</sup> DA Form 1056, *supra* note 7, block 16.

<sup>10</sup> *Id.*

<sup>11</sup> U.S. Dep't of Army, DA Form 67-2, Officer Efficiency Report, Johnson, Rufus W. (7 March 1951 to 18 July 1951). Note that the Articles of War were still in effect during this period, which explains why a non-Judge Advocate was permitted to serve as counsel at general courts-martial. See MANUAL FOR COURTS-MARTIAL UNITED STATES 277 (1949) (Eleventh Article of War: "[T]he trial judge advocate and defense counsel of each general court-martial shall, if available, be members of the Judge Advocate General's Corps or officers who are members of the bar of a Federal court or of the highest court of a State. . . ." (emphasis added)).

<sup>12</sup> U.S. Dep't of Army, DA Form 67-2, Officer Efficiency Report, Johnson, Rufus W. (18 September 1951 to 8 January 1952).

<sup>13</sup> U.S. Dep't of Army, DA Form 67-2, Officer Efficiency Report, Johnson, Rufus W. (1 March 1953 to 19 April 1953).

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

After leaving active duty, CPT Johnson remained in the Army Reserve and, during his yearly two weeks of active duty for training, served as an instructor for the Advanced JAGC Course at the Presidio of San Francisco. Major (MAJ) Johnson was finally able to transfer to the JAG Corps—on 20 February 1959—becoming one of the few African-American judge advocates in the Army.<sup>15</sup> After he completed the USAR School Associate Judge Advocate Advanced Officer Course in 1961, MAJ Johnson received “equivalent credit” for the JA Officer Advanced Course.<sup>16</sup> He served another ten years in the Army Reserve before retiring as a lieutenant colonel in 1971.

During these years, Johnson made legal history. In April 1962, a group of Navajos met in the California desert and performed “a religious ceremony which included the use of peyote.” Police officers, who had watched part of the ceremony, arrested them for illegally possessing the substance, which was outlawed because of its hallucinogenic qualities. The Navajos were later convicted in state court and they appealed to the California Supreme Court—with Johnson representing them on appeal.<sup>17</sup>

Johnson argued that the possession of peyote by his client, Jack Woody, and the other Navajos should be lawful because the peyote was being used for bona fide religious reasons, and consequently was protected by the First

Amendment. The California Supreme Court agreed with Johnson, ruling that any state interest in proscribing the use of peyote was insufficient to overcome the right to religious freedom guaranteed by the U.S. Constitution. On 24 August 1964, the court, sitting *en banc* and by a vote of six to one, announced that it was reversing Woody’s criminal conviction. *People v. Woody* continues to be cited in legal cases involving Native American religious freedom, and the name “Rufus W. Johnson, Anaheim, for defendants and appellants” will forever be associated with this decision.<sup>18</sup>

Johnson closed his law practice in 1978 and moved to Fayetteville, Arkansas. In 1995, he moved to Mason, Texas, to live with his step-daughter. He remained proud of his time as a Soldier and was a life member of the American Legion, Veterans of Foreign Wars, and Military Order of the Purple Heart. As he explained in 1977, he had joined these organizations because “they are noble, charitable, and patriotic . . . and were the ‘heart’ of a real nation.”<sup>19</sup>

Lieutenant Colonel Johnson died on 1 July 2007. He was ninety-six years old. In accordance with his wishes, he was buried at Arlington National Cemetery. This made perfect sense, as Johnson loved the Army and believed in it as an institution. As he put it, “the military is the one segment of American life that Martin Luther King Jr.’s dream has come closest to reaching a reality.”<sup>20</sup>

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<sup>15</sup> Johnson was promoted to major on 1 October 1953. U.S. Dep’t of Army, DA Form 66, Officer Qualification Record, Johnson, Rufus W. block 12.

<sup>16</sup> Certificate of Completion, The Judge Advocate Gen.’s Sch., U.S. Army, Johnson, Rufus W. (1 Aug. 1961).

<sup>17</sup> *People v. Woody*, 394 P.2d 813, 814 (1964).

<sup>18</sup> *Id.* at 815–22. The court admitted the State’s power to proscribe the use of peyote, and stated that “[a]lthough the prohibition against infringement of religious belief is absolute, the immunity afforded religious practices by the First Amendment is not so rigid.” However, the court found that the State had not demonstrated a “compelling state interest” sufficient to outweigh the defendants’ interest in religious freedom. Part of this finding rested on expert opinion that peyote did not cause any “permanent deleterious effects” to its users.

<sup>19</sup> Johnson Questionnaire, *supra* note 4, at 19 (emphasis in original).

<sup>20</sup> *Id.* at 9.

The Trial by Court-Martial of Colonel William “Billy” Mitchell

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On 1 September 1925, three Navy seaplanes flying from Los Angeles to Hawaii crashed into the Pacific Ocean. Two days later, the Navy dirigible USS *Shenandoah* fell from the skies—killing fourteen men, including its skipper. Constructed at a cost of \$2.7 million, the *Shenandoah* was a “national treasure” and its destruction, and the death of so many men, was front page news.<sup>1</sup> Americans everywhere asked how these air disasters could have happened and who was responsible for the loss of men and materiel.

On 5 September 1925, Colonel (COL) William “Billy” Mitchell invited six newspaper reporters into his quarters in San Antonio and handed them a nine-page single-spaced typewritten statement. This was Mitchell’s answer to the question on the lips of Americans everywhere:

I have been asked from all parts of the country to give my opinion about the reasons for the frightful aeronautical accidents and the loss of life, equipment and treasure that has occurred during the last few days. My opinion is as follows: These incidents are the direct result of the incompetency, criminal negligence, and almost treasonable administration of our national defense by the Navy and War Departments.”<sup>2</sup>

Mitchell’s incendiary words were read by millions of Americans. A headline in the *Chicago Tribune* screamed “[Mitchell] Brands Air Rule ‘Criminal.’” “Flyers Killed by Stupid Chiefs’ Propaganda Schemes, Col. Mitchell Charges” proclaimed the *Washington Star*.<sup>3</sup> Since Mitchell was known as “a dashing war hero and unreserved advocate of airpower,”<sup>4</sup> his criticisms of the Army and Navy were believed by many and public opinion was solidly behind him. In the War Department, Army leaders were “stunned” by Mitchell’s words, which they considered to be “outrageous”<sup>5</sup>—and insubordinate. Believing that his remarks had brought “discredit upon the military service” in violation of the Articles of War, the Army ordered COL

Mitchell to Washington, D.C. to stand trial. What follows is the story of Mitchell’s court-martial and the judge advocates who played important roles in it.

Born in Nice, France, in December 1879, William Lendrum “Billy” Mitchell was the oldest of ten children. After his American parents moved back to their home state of Wisconsin when Mitchell was three years old, he lived a privileged life in a wealthy and politically prominent family.

When the Spanish-American War broke out in 1898, Mitchell dropped out of Columbian University (today’s George Washington University) and enlisted as a private in the infantry. Seven days later, he was a Signal Corps second lieutenant. He subsequently served in Cuba and the Philippines. In 1915, then-Captain Mitchell was assigned to the aerial section of the Signal Corps. The following year, he learned to fly—and began his remarkable career as the Army’s “first truly vocal supporter of airpower and its role on the battlefield.”<sup>6</sup>

After the United States entered World War I in April 1917, Mitchell was appointed air officer of the American Expeditionary Force (AEF) and promoted to lieutenant colonel. He later became the first U.S. officer to fly over enemy lines and the first to be awarded the French Croix de Guerre. In September 1918, now-COL Mitchell led a raid of 1500 airplanes against the St. Mihiel salient. A month later, after being promoted to the temporary rank of brigadier general (BG), Mitchell led additional massed bombing raids against German units during the Meuse-Argonne offensive.

After the war, BG Mitchell returned to Washington, D.C., where he was assistant chief of the Air Corps. This position, which allowed him to retain his temporary one-star rank, also served as a platform for Mitchell to begin lobbying for an independent U.S. air force. Mitchell insisted that the next war would be fought in the air—not on the ground or at sea. Mitchell believed that success in future wars would come to those nations that adopted strategic bombing as their principal method of warfare. Moreover, as the corresponding development of military aviation meant that the Army and Navy would be vulnerable without airplanes as the first line of defense, only the unified control of air power in a separate and distinct air force could provide the required defense. In Mitchell’s view, the only logical

<sup>1</sup> DOUGLAS WALLER, A QUESTION OF LOYALTY 11 (2004).

<sup>2</sup> U.S. ARMY JUDGE ADVOCATE GENERAL’S CORPS, THE ARMY LAWYER 144–45 (1975) [hereinafter ARMY LAWYER].

<sup>3</sup> WALLER, *supra* note 1, at 24.

<sup>4</sup> Rebecca Maksel, *The Billy Mitchell Court-Martial*, AIR & SPACE MAG., July 2009, at 46.

<sup>5</sup> WALLER, *supra* note 1, at 25–26.

<sup>6</sup> William “Billy” Mitchell 321 (1879–1936), HISTORICAL DICTIONARY OF THE U.S. ARMY (Jerold E. Brown ed., 2001).

course of action was to establish an American air force akin to Great Britain's Royal Air Force.

Mitchell proved that even large ships could be destroyed from the air (four captured enemy ships, including one battleship, were sunk in a demonstration off Norfolk, Virginia in 1921) and some senior Army and Navy leaders agreed with Mitchell that airpower had altered the nature of war. But Mitchell "was viewed by many as a vain, egotistical, self-publicizing grandstander, and his fiery temperament eventually alienated him from nearly all whom he hoped to influence."<sup>7</sup>

When Mitchell made his intemperate remarks in September 1925, he was serving as the air officer of the VIII Corps in San Antonio, Texas—and wearing eagles on his collar. This was because when Mitchell left his job in Washington, D.C., as assistant air chief—a one-star billet that permitted Mitchell to continue to wear stars as a temporary BG—and was sent to Fort Sam Houston, Mitchell reverted to his permanent grade of colonel. This is why Mitchell was wearing colonel's rank when he appeared before a court-martial in Washington, D.C., on 28 October 1925.

While the War Department had hoped for minimum publicity, the Mitchell "trial was the biggest media event in the country . . . press tables were jammed . . . with about forty reporters and photographers."<sup>8</sup> Additionally, some five hundred people lined up to get some of the few courtroom seats available for members of the public.

Due to Mitchell's seniority, twelve generals had been chosen by the War Department to sit on the panel, including Major General (MG) Douglas MacArthur, who would later serve as Army Chief of Staff and achieve great fame in World War II and Korea. The "law member," the forerunner of today's military judge,<sup>9</sup> was COL Blanton Winship, who

had been decorated with the Distinguished Service Cross and Silver Star for combat heroism in 1918. Like MacArthur, Winship also had a bright future: he would serve as The Judge Advocate General from 1931 to 1933 and Governor of Puerto Rico from 1934 to 1939.<sup>10</sup> These panel members all knew Mitchell, some personally (including Winship and MacArthur), and some had publicly expressed opinions on his airpower theories. They were hardly impartial or neutral in their attitudes. Two were excused for bias and one on a peremptory challenge—leaving nine general officers (plus COL Winship) to hear the evidence against Mitchell.<sup>11</sup>

The trial judge advocate was COL Sherman Moreland, a fifty-seven year old judge advocate who was "mild mannered and polite to a fault in a courtroom."<sup>12</sup> He was assisted by Lieutenant Colonel (LTC) Joseph McMullen, a Virginia lawyer who had joined the Judge Advocate General's Department after World War I. Moreland and McMullen were joined later by Major (MAJ) Allen Gullion, who was "one of the most skilled and aggressive prosecutors" in the Army. Gullion, too, was destined for greatness as a judge advocate: he served as TJAG from 1937 to 1941 and as Army Provost Marshal General from 1941 to 1945. But

Gullion was a bit of an eccentric. Though he played polo and enjoyed watching boxing matches, he smoked heavily (always with a cigarette holder) and thought exercise could be bad for his health. He read the newspaper in bed wearing white gloves so the print wouldn't soil his hands. On car trips from Washington back to Kentucky, he would stop at each railroad crossing and order his son out to inspect the track both ways and then signal him to pass over it . . . Officers who acted in an ungentlemanly or unprincipled manner deeply offended him. He came down hard on them in court—something he would now do with Mitchell.<sup>13</sup>

<sup>7</sup> John Lehman, *Rank Insubordination*, WASH. POST, Oct. 31, 2004, at 5.

<sup>8</sup> WALLER, *supra* note 1, at 46–47.

<sup>9</sup> While the law member was indeed the forerunner of the military judge, his role and authority were markedly different in 1925. The law member was tasked with ruling "in open court" on all "interlocutory questions." The 1921 *Manual for Courts-Martial*, paragraph 9a(5), defined "interlocutory questions" as "all questions of any kind arising at any time during the trial" except those relating to challenges, findings and sentence. But the law member's rulings were only binding the court when the interlocutory question concerned the admissibility of evidence. On all other interlocutory questions, the decision of the law member could be overturned by a majority vote of the members. MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 89a(2), (3) (1921) [hereinafter MCM 1921]. But note: since the law member also had "the duties and privileges of other members of the court," he participated in all votes taken by the members, including findings and sentencing. Thus, Colonel (COL) Winship participated in *all* votes in the Mitchell general court-martial. *Id.* ¶ 89a(6). In 1925, the law member was the result of a recent reform in favor of the accused; during the First World War, a court-martial panel had received its legal advice from the prosecutor, who might be the only lawyer in the room. WALLER, *supra* note 1, at 86; MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 99 (1917); see also Fred L. Borch, III, *Anatomy of a Court-Martial: The Trial and*

*Execution of Private William Buckner in World War I*, ARMY LAW., Oct. 2011, at 1 n.1.

<sup>10</sup> Winship is the only judge advocate in history to be awarded the Distinguished Service Cross (DSC) while an Army lawyer. While serving as the Judge Advocate of the 1st Army, COL Winship was given command of the 110th and 118th Infantry Regiments, 28th Division. His DSC was for "extraordinary heroism in action near Lachaussee, France, November 9, 1918." Headquarters, War Dep't, Gen. Orders No. 9 (1923).

<sup>11</sup> WALLER, *supra* note 1, at 53–60.

<sup>12</sup> *Id.* at 51.

<sup>13</sup> *Id.* at 222.

As for Mitchell's defense team, he was represented by civilian lawyer and Congressman Frank R. Reid and judge advocate COL Herbert Arthur "Artie" White. Reid, a largely unknown representative from Illinois who was in his second term in Congress, agreed to defend Mitchell for free—chiefly because Reid "knew the trial would quickly make him a national figure."<sup>14</sup> White, "a soft-spoken Iowan,"<sup>15</sup> had been serving as a judge advocate at Fort Sam Houston; the Army transferred White to Washington to serve as Mitchell's military defense counsel. Rounding out the defense team were Frank Plain, an Illinois state judge and friend of Reid's who was an expert on constitutional law, and William Webb, a young lawyer who did legal research and kept track of the thousands of pages of documents in the case.

Mitchell was charged with eight specifications of violating the Ninety-sixth Article of War, which made criminal "all disorders and neglects to the prejudice of good order and military discipline" and "all conduct of a nature to bring discredit upon the military service." The gist of the specifications was that Mitchell's 5 September statement about the causes of the seaplane and *Shenandoah* disasters, and follow-up comments he made to the media on 9 September, constituted insubordination and consequently conduct prejudicial to good order and discipline in violation of Article 96.<sup>16</sup> Trial began on 28 October, less than two months after the statements were made.

Mitchell's lead defense counsel, Frank Reid, first argued that the entire case should be thrown out because his client's statements were protected by the First Amendment. The law member, COL Winship, however, agreed with the trial judge advocate that Mitchell's military status made the First Amendment inapplicable, and denied Reid's motion to dismiss the charge and its specifications.<sup>17</sup> After the panel

members agreed with Winship's ruling, the case moved to the merits. The prosecution case-in-chief took less than a day, and consisted simply of proof that Mitchell had made the statements and written the articles in question. On cross-examination, one government witness (the commander of VIII Corps) agreed that the publication of Mitchell's statements had not caused any "lack of discipline or insubordination" in his command. The defense then moved for a finding of not guilty,<sup>18</sup> claiming that the prosecution had not proven the statements were contrary to good order and discipline—that, for aught the evidence had shown, they were instead public-spirited efforts to *benefit* good order and discipline "by correcting the evils which [were] admittedly destroying it in the air service and in the War Department." On Winship's advice, the panel denied the motion.<sup>19</sup>

The same day the government rested its case, the defense presented the government with an extensive list of witnesses (more than seventy) and documents (thousands of pages) that it wanted produced. The court recessed for a week while witnesses and documents were gathered. The defense case then began—with Reid now arguing to the panel that Mitchell should be exonerated because his criticisms of the War and Navy Department were true. The court consistently declined to rule on whether this evidence was relevant on the subject of guilt, or only as mitigation.<sup>20</sup>

To prove that the military hierarchy was incompetent—as Mitchell had claimed—Reid called a number of prominent individuals to the stand, including then-MAJ Henry A. "Hap" Arnold and New York Congressman Fiorello H. La Guardia, both of whom had flown in combat in World War I.<sup>21</sup> Both men testified about the large number of fatal accidents in the Army Air Service and how "foreign countries" like France, Italy and Sweden were moving toward a "unified air force."<sup>22</sup> They also "testified to the unwarranted denigration of air power by the military hierarchy."<sup>23</sup>

<sup>14</sup> See *id.* at 37. Reid had served on the House Aircraft Committee, where he had seriously criticized the government's handling of the aircraft industry, and had expressed strong support for Mitchell's views on the need for an independent air force. *Id.* at 37–38.

<sup>15</sup> *Id.* at 52. Born in 1870, White entered the U.S. Military Academy (USMA) in 1891 and graduated four years later; he ranked eighth in a class of fifty-two cadets. Commissioned as a second lieutenant in the cavalry, White served in a variety of locations, including China and the Philippines. After completing the Army War College in 1912, he transferred to the Judge Advocate General's Department (White had previously received a law degree while stationed at Fort Myer, Virginia, as a cavalry officer). White and Mitchell had previously met each other at Fort Leavenworth, Kansas, in 1904 and, when he was ordered to Washington, D.C., to stand trial in 1925, Mitchell requested White as his defense counsel. "Artie" White retired in 1929 and then worked for a number of years for the United Services Automobile Association (USAA), first as USAA's attorney-in-fact and later as the organization's secretary-treasurer. White died at Fort Sam Houston, Texas, in December 1947. He was seventy-seven years old. *Herbert Arthur White*, ASSEMBLY, Jan. 1955, at 45.

<sup>16</sup> This punitive article, the forerunner of Uniform Code of Military Justice (UCMJ) Article 134, permitted punishment "at the discretion of the court." MCM 1921, *supra* note 9, app. 1, at 529. See also WALLER, *supra* note 1, at 37, 87–89.

<sup>17</sup> *Id.* at 85.

<sup>18</sup> See MCM 1921, *supra* note 9, ¶ 158c (providing for such motions). In modern practice, such a motion would be made under RCM 917.

<sup>19</sup> WALLER, *supra* note 1, at 110–16.

<sup>20</sup> *Id.* at 117, 261, 315. Under MCM 1921, findings and sentencing were decided at the same time; there was no announcement of findings in open court prior to deliberation on sentencing. MCM 1921, *supra* note 9, ¶¶ 294, 332a. Thus, the evidence would have been heard before findings regardless of how the court ruled on the question.

<sup>21</sup> Henry A. "Hap" Arnold (1886–1950) graduated from the USMA in 1907 and served as an infantry officer until transferring to the Signal Corps and learning to fly with the Wright brothers. He served on the Air Service staff in Washington during World War I, but his lack of combat experience in France did not harm his career: Arnold was appointed chief of the newly created Army Air Forces in 1941 and finished World War II as a five-star general. Fiorella H. La Guardia (1882–1947) served as an Army Air Service major on the Italian-Austrian front in World War I, where he commanded a unit of Caproni Ca.44 bombers. La Guardia is best known, however, for his service as the mayor of New York City from 1934 to 1945.

<sup>22</sup> WALLER, *supra* note 1, at 181.

<sup>23</sup> ARMY LAWYER, *supra* note 2, at 145.

Toward the end of the defense case, Mitchell took the stand himself, and was subjected to a full day of cross-examination. Questioned closely on specific details, such as the accident rates for fliers in different countries' air services or the cost of his proposed reforms, Mitchell did not know the numbers.<sup>24</sup> Major Gullion questioned Mitchell about a paper he had written on the "versatility of the Japanese submarine," and his statement that such submarines could carry "any size" of gun for surface warfare. This exchange followed:

Mitchell: That was my opinion.

Gullion: That was your opinion?

Mitchell: That was my opinion.

Gullion: Is that your opinion now?

Mitchell: Yes.

Gullion: Then, any statement—there is no statement of fact in your whole paper?

Mitchell: No.<sup>25</sup>

Mitchell's credibility was severely damaged. To exploit the damage, the Government presented a three-week case in rebuttal, calling veteran fliers (including Arctic explorer Richard Byrd), surviving crewmen from the *Shenandoah*, the chief of the Army's Air Service, and the Army's Deputy Chief of Staff to dispute Mitchell's claims.<sup>26</sup> In his closing argument to the panel, which was about to consider both findings and sentence,<sup>27</sup> Major Gullion hammered home how Mitchell's opinions reflected both his arrogance and unfitness to serve:

Is such a man a safe guide? Is he a constructive person or is he a loose-talking imaginative megalomaniac cheered by the adulation of his juniors who see promotion under his banner . . . and intoxicated by the ephemeral applause of the people whose fancy he has for the moment caught?

Is this man a Moses, fitted to lead the people out of a wilderness which is his creation, only? Is he of the George Washington type, as [defense] counsel would have you believe? Is he not rather of the all-too-familiar charlatan and demagogue type?

Sirs, we ask the dismissal of the accused for the sake of the Army whose discipline he has endangered and whose fair name he has attempted to discredit . . . we ask it in the name of the American people whose fears he has played upon, hysteria he has fomented, whose confidence he has beguiled, and whose faith he has betrayed.<sup>28</sup>

At the end of a seven-week court-martial, COL Mitchell was found guilty of all specifications and the charge. His sentence: to be suspended from rank, command, and duty and to forfeit all pay and allowances for five years.<sup>29</sup> Despite the result, the Mitchell court-martial stands alone, or nearly so, in court-martial history for the extent to which the defense was able to use the trial as a forum to debate policy questions and attack current military practice.<sup>30</sup>

Crushed by the trial results, Mitchell resigned from the Army on 1 February 1926. Newspapers that had favored his cause cooled in their support or turned against him. The public largely lost interest.<sup>31</sup> Mitchell, who died in 1936, did not live long enough to see many of his ideas and predictions about the importance of airpower come to fruition. In the long run, however, he won his case in the court of public opinion—especially after the Japanese attack on Pearl Harbor, and American unpreparedness for it, fulfilled some of his prophecies. Men who had testified for him at trial won renown in World War II and in the (finally independent) United States Air Force.

Today, the public generally and American airpower advocates in particular laud Billy Mitchell as one of the greatest airmen in history. There has, however, never been

<sup>24</sup> WALLER, *supra* note 1, at 245, 248.

<sup>25</sup> ARMY LAWYER, *supra* note 2, at 145.

<sup>26</sup> WALLER, *supra* note 1, at 260–314. Major General Mason Patrick, Chief of the Army Air Service and an airpower advocate in his own right, gave mixed answers, sometimes favoring Mitchell's views and sometimes disagreeing. *Id.* at 300–04. By its nature this must have hurt Mitchell more than it helped; it showed him not as a speaker of truth to power, but as a man taking sides in controversies, and as such less justified in taking his case to the public.

<sup>27</sup> See *supra* note 20.

<sup>28</sup> ARMY LAWYER, *supra* note 2, at 146.

<sup>29</sup> The result offers an interesting parallel to the case of Lieutenant Colonel George Armstrong Custer in 1867. Custer, like Mitchell, was a flamboyant wartime general returned to a lower rank after the war and accused of indiscipline. He was tried for purely military offenses—absence without leave from his command, and several specifications of "conduct to the prejudice of good order and military discipline." And his sentence was a suspension without pay for one year. Unlike Mitchell, Custer did not resign his commission during his period of suspension, and went on to command troops in several Indian campaigns. See LAWRENCE A. FROST, *THE COURT-MARTIAL OF GENERAL GEORGE ARMSTRONG CUSTER* 99–100, 246 (1968).

<sup>30</sup> The usual fate of such efforts is complete failure. See *United States v. New*, 55 M.J. 95, 105–07 (C.A.A.F. 2001) (lawfulness of order to wear U.N. accoutrements was question of law for the judge; defense was not allowed to present any evidence on the subject to the panel in prosecution for disobeying that order); *United States v. Huet-Vaughn*, 43 M.J. 105, 114–15 (C.A.A.F. 1995) (accused attempted to defend against a desertion charge by contesting legality of the war; defense was not allowed to litigate that issue at trial); see also *United States v. Rockwood*, 48 M.J. 501, 507–09 (A. Ct. Crim. App. 1998) (accused claimed duty under international law to investigate human rights abuses at a civilian prison instead of being at his place of duty; trial court permitted expert testimony on the subject, but appellate court found this defense deficient as a matter of law).

<sup>31</sup> WALLER, *supra* note 1, at 328–29, 331, 334–35.

any formal exoneration of him—but not for want of trying. In March 1956, William L. Mitchell Jr., encouraged by the Air Force Association, filed a petition with the Air Force Board for the Correction of Military Records to “render null and void the proceedings, findings, and sentence” of his father’s court-martial. As Mitchell’s son put it: “I sincerely believe that a gross injustice was done to my father. History has vindicated him. I believe the United States Air Force cannot do less.”<sup>32</sup> Apparently “top Army officials fiercely fought”<sup>33</sup> this petition from Billy Jr., arguing in part that the Air Force was a separate service and should not reverse a thirty-year old Army conviction.

Despite the Army’s opposition, the Air Force Board recommended to Secretary of the Air Force James Douglas that COL Mitchell’s court-martial conviction be set aside. In March 1958, however, Douglas declined to follow this recommendation, and no further legal action has ever been taken to overturn the proceedings in his case.<sup>34</sup>

*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.*

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<sup>32</sup> Edmund F. Hogan, *The Case of Billy Mitchell*, A.F. MAG. (July 1957), <http://www.airforce-magazine.com/MagazineArchive/Pages/1957/July%201957/0757billy.aspx>.

<sup>33</sup> WALLER, *supra* note 1, at 358.

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<sup>34</sup> Roscoe Drummond, *Where An Apology Is Due*, DESERET NEWS, Mar. 11, 1958, at 18A; WALLER, *supra* note 1, at 358.

The Trial by Military Commission of “Mother Jones”

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In March 1913, Mary Harris Jones, better known as “Mother Jones,” and forty-seven other civilians were tried by a military commission in West Virginia. Governor William E. Glasscock had declared martial law in the aftermath of violent and bloody strikes by coal miners in the Paint and Cabin Creek areas of Kanawha County, and the Judge Advocate of the West Virginia National Guard was now prosecuting Jones and other civilians for murder and conspiracy to commit murder. Why and how “Mother Jones” came to be prosecuted by this military tribunal almost 100 years ago is an unusual story that is worth telling.

Labor unrest during the Progressive Era of the early 20th century was common and soldiers were repeatedly called upon to suppress violence between striking workers and their employers. While Federal troops were sometimes called out to intervene in labor disputes, state National Guard forces usually were sufficient to quell violence between management and labor.<sup>1</sup> This explains why, when armed clashes between guards employed by coal mine operators and striking miners occurred in the Paint Creek district of West Virginia in April 1912, the state National Guard was sent in to restore order.

The Paint Creek strike resulted when the United Mine Workers of America (UMWA) demanded higher wages for the coal miners it was representing in contract negotiations with the Kanawha Coal Operators Association (KCOA). Union labor had been used in KCOA mines since 1904, and so it was neither unusual nor unexpected for the UMWA to press for increased pay. But the negotiations between the two sides broke down in April 1912. Some KCOA members hired armed guards, evicted strikers from company-owned houses, and hired non-union workers to mine coal. The displaced strikers responded by attacking both guards and replacement workers.

The violence only increased when Mother Jones, who joined the striking mineworkers in the Paint Creek area in July, persuaded the workers at nearby Cabin Creek to join the strike. Although she was over eighty years old, Jones was a powerful and dynamic speaker who organized both rallies and marches. By August, she had not only convinced the Cabin Creek miners to join their brothers on Paint Creek,

but also got many of the non-union Cabin Creek workers to join the UMWA.

As historian Edward M. Steel explains, mine operators in the Paint and Cabin Creek districts and Charleston businessmen with a financial interest in the coal mines initially looked to the civilian courts to control the violence, but local Kanawha County officials “insisted that they could not rely on either grand or petit jurors to be fair in cases arising out of the strike.”<sup>2</sup> This distrust of civilian law enforcement was well-founded. In the early weeks of the strike, a group of guards and miners opened fire on each other; one striker was killed and another wounded. But, when the guards asked the local grand jury to return an indictment for assault against the strikers, the grand jury instead indicted the guards. While the county prosecutor declined to pursue the case, the message was clear: the civilian courts were unlikely to punish the strikers and this meant labor violence would continue.

As for Mother Jones, she was either a dangerous radical whose fiery revolutionary rhetoric threatened to turn the world upside down or a grandmotherly “miners’ angel” who simply sought a decent wage for working men. Born in Ireland in August 1837, Mary Harris Jones immigrated with her family to Canada before settling in the United States. She married and was living in Tennessee with her husband and four children (all under the age of five) when tragedy struck in 1867: a yellow fever epidemic killed her entire family, leaving her alone. She never remarried.

Jones now moved to Chicago and opened a dressmaking business. Four years later, she lost her shop and all her possessions in the Great Chicago Fire of 1871. The hardship she suffered in this second loss was apparently a catalyst for her to join the Knights of Labor, an early union organization. In the 1890s, Jones also joined the Populist and Socialist Labor Parties and participated in a variety of political activities. When the Knights of Labor disbanded, Jones joined the UMWA. In 1900, that union hired her as an organizer, the only woman to be so employed. Over the next few years, “Mother Jones” (she adopted the moniker in the late 1890s) organized thousands of coal and copper miners in Colorado, Montana, and Pennsylvania. She also assisted

<sup>1</sup> For an excellent discussion of military intervention in labor disputes in the early years of the 20th century, see CLAYTON D. LURIE & RONALD H. COLE, *THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1877–1945* (1996); see also *Use of Military Force in Domestic Disturbances*, 45 YALE L.J. 879 (1936).

<sup>2</sup> EDWARD M. STEEL, JR., *THE COURT-MARTIAL OF MOTHER JONES* 6 (1995). Note that while the title of Steel’s book refers to Jones’s trial as a court-martial, this is a misnomer as she was in fact tried by a military commission. Steel’s book includes the complete trial transcript, *id.* at 99–306, omitting only the verdict and sentence. As he explains, the record of trial does not contain this information. *Id.* at 55, 306.



striking workers in the textile, telegraph, garment, and railroad sectors.<sup>3</sup> Jones was famous for her speaking skills and for turning a phrase; she once exhorted her followers to “pray for the dead and fight like hell for the living.”<sup>4</sup>

Mother Jones’s arrival in Kanawha County in July 1912 and the resulting increase in violence, coupled with the inability of civilian law enforcement to preserve the peace, ultimately caused Governor Glasscock to declare that a “state of war” existed in the Paint Creek and Cabin Creek districts and that he was imposing martial law.<sup>5</sup> No governor had previously made such a declaration, and Glasscock apparently did so reluctantly. West Virginia National Guard troops quickly moved into the military zone and confiscated all weapons (from both guards and strikers). Glasscock then “set up a military commission to try offenders in the martial law zone,” with Lieutenant Colonel (LTC) George S. Wallace, the Judge Advocate of the National Guard, as the prosecutor.<sup>6</sup>

Born in Albemarle County, Virginia, in September 1871, George Selden Wallace graduated from the University of Virginia’s law school in 1897 and then moved to Huntington, West Virginia, where he established a thriving private practice. He served as a second lieutenant in the 2d West Virginia Volunteers in the Spanish American War and then joined the West Virginia National Guard. His service as a prosecuting attorney in Cabell County from 1904 to 1908 and his military status in the Guard made Wallace the ideal choice to serve as prosecutor.<sup>7</sup> While Wallace tried most of the more than 200 civilians prosecuted by military commission over the next seven months, his most celebrated case involved Mother Jones.<sup>8</sup>

Jones and her fellow defendants were charged with conspiracy “to inflict bodily injury . . . with intent to maim, disfigure, disable and kill,” and with the murder of Fred Bobbitt and W. R. Vance. Both victims were non-union “scabs” hired by coal operators to replace the striking coal miners. All forty-eight defendants also were charged with being accessories after the fact in that they had helped those who had murdered Bobbitt and Vance to escape.<sup>9</sup>

The charges arose out of a 9–10 February 1913 incident in which about fifty armed strikers clashed with a detachment of guards and non-union workers manning a machine gun near the town of Mucklow. The strikers attempted to steal the weapon and, in the course of this attempt, killed Bobbitt and Vance. As many as 150 strikers and guards had participated in what was being called the “battle of Mucklow” and, although Mary Jones was not present at the fight, she was charged as a conspirator because her inflammatory speeches had incited the miners to violence. She had, for example, urged the strikers “to get their guns and shoot them [the guards] to hell.”<sup>10</sup>

The military commission proceedings began in the Odd Fellows Hall in Pratt, West Virginia, on Friday, 7 March 1913. From the beginning, the trial was acrimonious. Some accused refused to enter pleas, arguing that the military commission had no jurisdiction over them and that any trial must be in a civilian court. As for Mary Jones, she immediately proclaimed that she had “no defense to make” and that her activities in and around Paint and Cabin Creek were simply one battle in a long campaign. Said Jones: “Whatever I have done in West Virginia, I have done it all over the United States, and when I get out, I will do it again.”<sup>11</sup>

The military commission followed the procedure and rules of evidence then in use in West Virginia’s state courts, although the members themselves ruled on all objections made by any party to the trial.<sup>12</sup> Some of the defendants hired civilian counsel to represent them, and the commission appointed two military officers, Captains Edward B. Carskadon and Charles R. Morgan, to represent those accused who did not hire attorneys. Both captains were lawyers.<sup>13</sup>

The trial of Mother Jones lasted a week, and LTC Wallace presented mostly testimony from coal mine guards and National Guard troopers about the Mucklow battle. Most of the witnesses proved nearly useless to the prosecution, admitting that they heard shooting but not

<sup>3</sup> *Id.* at 3–5. See also MARY HARRIS JONES, THE AUTOBIOGRAPHY OF MOTHER JONES (1925), available at <http://www.marxists.org/subject/women/authors/jones/index.html> (last visited Feb. 25, 2012); DALE FETHERLING, MOTHER JONES, THE MINERS’ ANGEL: A PORTRAIT (1974).

<sup>4</sup> U.S. Department of Labor, Workers Memorial Day Poster (28 Apr. 2010).

<sup>5</sup> *Ex parte Jones*, 77 S. E. 1029, 1030 (W. Va. 1913).

<sup>6</sup> STEEL, *supra* note 2, at 7.

<sup>7</sup> *Id.* Wallace remained in the West Virginia National Guard after completing his duties as prosecutor. Shortly before the United States entry in World War I, he was commissioned as a major in the Judge Advocate General’s Reserve Corps and, when hostilities ended in November 1918, Wallace had spent six months in France and achieved the rank of lieutenant colonel in the National Army.

<sup>8</sup> *Id.* at xi.

<sup>9</sup> *Id.* at 100–02.

<sup>10</sup> *Id.* at 40. Steel cites a newspaper report for this statement. It is unclear whether evidence of this statement came up at trial; none of the witnesses mentioned it. At one point five of Mother Jones’s speeches were introduced as exhibits, but these are not included in Steel’s book. *Id.* at 142–43.

<sup>11</sup> *Id.* at 100.

<sup>12</sup> Colonel Charles F. Jollette, the president of the five-member commission, was a lawyer and his opinion almost certainly carried great weight with his fellow commission members. *Id.* at 38, 76.

<sup>13</sup> *Id.* at 25, 51. This compares favorably with the due process available in true courts-martial of the same era, where the accused were typically represented by non-lawyers, and a court of non-lawyers got all its legal advice from the prosecuting Judge Advocate. See Fred L. Borch, III, “The Largest Murder Trial in the History of the United States”: The Houston Riots Courts-Martial of 1917, ARMY LAW., Feb. 2011, at 1, 2; see also Fred L. Borch, III, *Anatomy of a Court-Martial: The Trial and Execution of Private William Buckner in World War I*, ARMY LAW., Oct. 2011, at 1, 2 & n.10.

which side shot first, and being unable to identify specific individuals with any particularity. Lieutenant Colonel Wallace often found himself cross-questioning his own witnesses about the answers they had given in pretrial interviews.<sup>14</sup> However, he was able to get substantive testimony from Frank Smith, a detective from the J. W. Burns agency. Mr. Smith had come to the area posing as a UMW member on the day of the incident, and was able to identify several accused as planning to attack arriving National Guard troops. He also testified about a speech given by Mother Jones, but the worst he reported her saying was

that every time the guards beat them up they came to her crying and she said if she was a guard she would beat them up because they stand for it; that they didn't have to fight and she told them they have a yellow streak; that it was their own fault what they did. . . . they ought to get their members in Colorado and get some nerve injected into them. . . .<sup>15</sup>

The trial was briefly interrupted when Mary Jones and two other defendants, assisted by UMW attorneys, petitioned West Virginia's highest court for a writ of habeas corpus. Jones argued that the military commission was depriving her of the right to a trial by jury and that, as the civilian courts were open and functioning, the military tribunal had no jurisdiction over them as civilians. On 21 March 1913, however, the Supreme Court of West Virginia ruled that, as Governor Glasscock had lawfully proclaimed a state of war because of the insurrection occurring in the Paint and Cabin Creek districts, Jones and her fellow accused were "technically enemies of the state," and consequently could be prosecuted at a military tribunal.<sup>16</sup> With this favorable ruling in hand, the military commission reconvened and Wallace completed his case in chief. The defense then presented a very brief case and both sides argued to the military commission. Wallace called upon the panel members to "do [their] duty" and convict the accused.<sup>17</sup> As for Mother Jones, however, LTC Wallace conceded that while she had "largely contributed to this trouble" in that her speeches had incited the strikers,

"whether or not this evidence will connect her up with this conspiracy, it is more difficult to say." Wallace concluded by saying that he left it up to the commission members to reach the appropriate verdict, but added: "I do not think the evidence is very strong against her."<sup>18</sup>

Exactly what verdicts were reached by the commission is not known; the members determined their findings and sentences in secret and then submitted a sealed report to Governor Henry D. Hatfield, who had recently replaced Glasscock as governor and consequently was the new convening authority. But results were not long in coming. On 20 March 1913, Hatfield released ten of the accused from the military guard house where they had been jailed; another fifteen were released the following day. On 22 March, still more defendants were freed, but Jones and eleven other defendants remained incarcerated. All were transferred to the state penitentiary except for Jones, who remained confined in the guard house in Pratt. They were not released until Governor Hatfield had worked out a settlement of the strike that restored coal production.<sup>19</sup>

Mother Jones was released on 7 May 1913. The bad publicity from the strike, which reached a national audience as a U.S. Senate subcommittee held hearings on the labor unrest in West Virginia, caused Governor Hatfield to realize that the continued imprisonment of an elderly woman was ill-advised and was not helping West Virginia's image. Mother Jones was now eighty-one years old, and it also would not be good if she were to die while confined in the military guard house in Pratt.<sup>20</sup>

After her release, Jones immediately resumed her UMW activities. Unrepentant and undeterred by her ordeal, she travelled to Colorado a few months later, where she called upon coal miners to strike. Jones was arrested and imprisoned by the Colorado National Guard after a melee between strikers and company guards in Ludlow, Colorado. While she spent some weeks in jail, Colorado authorities did not prosecute her.<sup>21</sup>

Of all the participants in this unusual trial, only Mary Harris Jones is widely remembered. She has been the subject

<sup>14</sup> See, e.g., STEEL, *supra* note 2, at 104–05, 112, 116.

<sup>15</sup> *Id.* at 185. Some witnesses testified that Mother Jones had advised them not to give up their guns, and that if she had had money she would have bought them more guns. *Id.* at 114–15, 248–50, 252, 256. Others testified that she had denounced the governor, the mine guards, and the mine clerks. *Id.* at 156, 252. One said that she had expressed disdain at low-class militia "coming in to butcher up their people" and that "they ought to fight; they had a just cause." *Id.* at 252. On the other hand, a militia captain reported that he had heard her make only a "very reasonable speech," advising the miners to continue with the strike but not to "waste money on guns," as the National Guard was now present "and would protect them." *Id.* at 201.

<sup>16</sup> *Ex parte Jones*, 77 S. E. 1029, 1045 (W. Va. 1913).

<sup>17</sup> STEEL, *supra* note 2, at 306.

<sup>18</sup> *Id.* at 302.

<sup>19</sup> *Id.* at 74–75. While some diehard socialists felt this settlement was a sell-out, Mother Jones herself described it as the best the miners could get. *Id.* at 82. Interestingly, she described Governor Glasscock, who had imposed martial law and ordered the tribunal, as a "good, weak man," but described Governor Hatfield, who made the settlement and ordered the release of all the prisoners, as "dictatorial with the instincts of a brute." *Id.* at 81.

<sup>20</sup> See *id.* at 59–60. For more on the Senate hearings, see U.S. SENATE, CONDITIONS IN PAINT CREEK DISTRICT, WEST VIRGINIA (1913). This was the first congressional subcommittee to examine a labor dispute. For more on coal mine unrest in West Virginia, see DAVID CORBIN, LIFE, WORK, AND REBELLION IN THE COAL FIELDS: THE SOUTHERN WEST VIRGINIA COAL MINERS 1880–1922 (1981).

<sup>21</sup> For more on the Ludlow massacre of 1914 and Jones's involvement, see Caleb Cain, *There Was Blood*, NEW YORKER, Jan. 19, 2009, at 76.

of a number of folk songs: Gene Autry, famous as “The Singing Cowboy” on radio and television from the 1930s to 1960s, recorded a song called “The Death of Mother Jones,” and “The Spirit of Mother Jones” was recorded by the Irish singer Andy Irvine in 2010.<sup>22</sup> The magazine *Mother Jones* also is named after her. With a paid circulation of over 200,000, it publishes stories on topics that would have resonated with Jones, such as corporate corruption, workers’ rights, community service, and feminism.<sup>23</sup>

The trial of Mother Jones was a highly unusual event in military legal history. It may even be unique as the only National Guard military commission to try an American woman for murder and conspiracy to commit murder.<sup>24</sup>

*More historical information can be found at*

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<sup>22</sup> *Death of Mother Jones*, MOTHER JONES MUSEUM, [http://motherjonesmuseum.org/Death\\_of\\_Mother\\_Jones.htm](http://motherjonesmuseum.org/Death_of_Mother_Jones.htm) (last visited Feb. 25, 2012); *Abocurragh*, ANDY IRVINE, [www.andyirvine.com/albums/abocurragh.html](http://www.andyirvine.com/albums/abocurragh.html) (last visited Apr. 9, 2012).

<sup>23</sup> *About Us*, MOTHER JONES, <http://motherjones.com/about> (last visited Apr. 9, 2012).

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<sup>24</sup> Governor Hatfield ultimately declined to approve the findings of the military commission convened in Pratt, West Virginia, and either released or pardoned all those who had been convicted. Hatfield’s actions meant that West Virginia avoided litigation in the federal courts. It also meant that the constitutionality of the military tribunal that convicted Mother Jones and others has never been examined by the federal courts. However, in other cases, the Supreme Court repudiated the central holding of *Ex parte Jones*—that the governor had plenary power to determine that a given area was in insurrection, and to declare martial law, without having his decision challenged in federal court. *Duncan v. Kahanamoku*, 327 U.S. 304, 321 n.18 (1946) (citing *Sterling v. Constantin*, 287 U.S. 378, 401 (1932), cited in Anthony F. Rezzo, *Making a Burlesque of the Constitution: Military Trials of Civilians in the War against Terrorism*, 31 VT. L. REV. 447, 489 n.202 (2007)).