United States. Army. Judge Advocate
" General's Corps.

THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775—1975

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I

A First Look At The Corps

This history celebrates the Bicentennial of The Judge Advocate General's Corps of the United States Army. The Corps joins its military colleagues to mark the second century of progress in honorable service to the nation. Army lawyers have been with their commanders in that national service since the beginning: the institution of the Army lawyer is but 23 days younger than the Army of 1775 commanded by George Washington.

War has been said to be an impersonal thing, and in many respects it is. However, armies are necessarily composed of human beings—who perform or influence the performance of great actions; who bring new growth and new challenge; and who have the capacity to leave a legacy of honor, hard work and respect for the law. This is a history of such people. It is also a history of the law they practiced, where their deeds and dreams depend for explanation upon the conditions and circumstances of their time.

Many kinds of lawyers appear here in text and vignette. Wells Blodgett, Blanton Winship and Eugene Caffey were combat soldiers of great distinction, wearers of the Medal of Honor, Distinguished Service Cross or Silver Star. Important, too, were the citizen-soldiers, members of the Reserve and National Guard, who left home and work to answer wartime needs. There are "great" names, too: John Marshall and Felix Frankfurter of the Supreme Court; great law teachers such as John Chipman Gray, Edmund Morgan, and John Henry Wigmore; and such prominent public servants as Henry L. Stimson, Enoch Crowder, Patrick J. Hurley, and Leon Jaworski.

The unique American military legal system both produced and is the product of great lawyers. After John Adams, who introduced the first major criminal code in the Continental Congress in 1776, the efforts of men like William Winthrop, Samuel Ansell and Kenneth Hodson produced proud chapters in the history of the law.

Finally, there is a general category of men who participated in key events in our history, who responded to the various challenges and tests. Judge Advocates from the beginning to

modern days had the burden of conducting trials in the glare of publicity: the prosecutions of Benedict Arnold, the assassins of President Lincoln, and the Nazi saboteurs come to mind. Other "events" presented opportunities for bold, forthright public service by the Judge Advocates General of the time: the Army's growth from 200,000 to eight million men in World War II; implementation of a revolutionary Uniform Code of Military Justice during combat in Korea; and the most recent problems of a new kind of war and new forms of public reaction. Judge Advocates General George Davis, Myron Cramer, Ernest Brannon and Charles Decker, among others, were the architects of adjustment to the demands of modern war and politics as "the world's largest law firm" finished the last decades of its second century.

The bicentennial celebration of these Judge Advocates and their contributions is a sufficient reason for this history. However, there are other reasons, consideration of which enriches the Corps history and increases its usefulness. First among these is the way in which the history of these officers signals the development of ideas and legal concepts. Although war may be impersonal, the development and application of law clearly are not. Law, especially the criminal law, applies to people and is adopted by them for the protection of basic values. The values to be protected and the nature of legal effects on people touch fundamental human concerns; for that reason, they also provoke the finest in human thought and action. Those in the society empowered to enact and administer laws are compelled to enviable action by the seriousness of the trust with which they are charged. Much of that trust in the Army society has reposed in its lawyers over the years, and a study of those men will disclose the ideas and ideals by which they lived.

The growth of ideas and ideals has two facets, both suggested by this history of the Army's lawyers. One facet is the content of law, the "rules" for behavior, such as those contained in the Army sponsorship of what became the first modern rules for land warfare among civilized states, the Lieber Code. The other facet of law is the way it is applied to people, how its coercive power is controlled and balanced between society's needs and personal liberty.

The military legal system is a part of the total national legal system in the United States, flowing as it does from the constitutional powers of Congress to "provide for the common Defense," "to raise and support Armies" and "to make Rules for the Government and Regulations of the land and naval Forces." However, its origins antedate the Constitution by more than a decade. The first military code was enacted in June 1775, and

when William Tudor was made the first Judge Advocate of the Army in July, he was the first legal officer appointed under authority of the nascent United States, 14 years before there was an Attorney General or Chief Justice.

However, there is more meaning to this than recitation of a "first." The commanders of the colonial Army did not promulgate their own criminal code; they went to their legislature which enacted for them a set of legal controls on the behavior of the forces. This followed an English practice in effect since 1689 when Parliament wrested from the Crown the power to legislate for the Army and enacted the first Mutiny Act. The colonists, by continuing the practice, established both the principle of civilian control over the military forces and the relationship between civilian and military law.

Civilian control and civilian standards have been part of the Army story for two centuries. We will show how these influences worked on the Army's law and especially on the Army lawyers. The story for each is one of growth according to regular patterns.

To speak of "the Army's law" is to use a phrase which is not sufficiently descriptive. Army lawyers practice under two distinct legal orders: an external order consisting of those parts of international and domestic law which affect the organization, mission and operations of the Army, and an internal order which flows from the Army's authority and need to regulate itself. All kinds of law are included within these orders and the growth in their numbers is among the first in drama and effect; within most of the kinds of law there has also been growth, particularly in the judicialization of the criminal justice system. There have been significant increases in the size of the Corps and changes in its composition as women and minority officers have taken their places and the citizen-soldier has repeatedly answered the "call to colors." All have shared the same sense of professionalism as soldiers and attorneys which is the modern JA's heritage. They have also contributed to the growing role in community service played by the Army's lawyers, both in extended assistance to individuals within the Army and in ever-increasing participation in the establishment of community policies and standards. There is yet another story in this pattern of service; the skills developed by Army lawyers are in great demand, and we shall read of their service on behalf of other government agencies and the ease with which they fit into civilian law teaching or other public service upon separation or retirement from the Army.

The law for early courts-martial, as did colonial law, generally reflected the intense moral tone of the period; but also as did the civilian courts, Army courts suffered from a shortage of men

learned in the law. William Tudor was a lawyer, but John Marshall did not go to law school until some years after his experience as a judge advocate at Valley Forge. The effort, however, was always toward current professional standards in the military courts and this history of the Corps will show how the military practice kept pace with and sometimes exceeded civilian standards. This was particularly true of those areas of the criminal law which protect individual rights. For example, the soldier had a right to free legal counsel and to be advised concerning his right to remain silent many years before his civilian contemporaries in state courts.

The account of the progress of the Corps in the military community and its influence on community standards also mirrors developments "outside." Early criminal prosecutors in the United States acted as today, in the name of "the people," and were usually their elected representatives. The Army held no such elections, but we will see how often its prosecutors and principal legal leaders came from the community at large. This pattern has largely disappeared because the demands of specialization in both military science and law preclude mastery of two complex disciplines by more than a few exceptional persons. Nonetheless, the modern officer receives legal training at several points during his career and the modern Army lawyer wears the same uniform, faces the same promotion criteria, and receives the same advanced military education as his brothers of the "line." This professionalism in two honored occupations is seldom duplicated outside the military services, but raises its own set of new issues. Military lawyers are in the forefront of a new emphasis on professional ethics because of skills developed over the years in reconciling the demands of discipline with the imperatives of justice.

Being in and of the military community provides the military attorney opportunities for leadership comparable to those of his civilian colleagues. Early in the Corps history its members became concerned about the needs of accused persons for counsel at trial. Today, the absence of counsel for a criminal accused would seem incredible, but it was not in early 19th century America. The Army's course of action, first by the trial judge advocate, then by informal admittance of defense counsel to trials, is an interesting and useful account of the growth of law and how the professionals in a community contribute by their striving for excellence. When the custom culminated in a statutory right to counsel provided by the government, the Corps had an important new mission and Army practice was ahead of civilian standards.

The lawyer's role in the military community is also exemplified in the history of the growth of the military attorney's functions.

He started as a prosecutor and administrator of the criminal justice system, but today is a proper party in the making of nearly all major decisions except those which are exclusively tactical. There are international law implications in the development and acquisition of new weapons systems; commercial and labor law problems in equipping and feeding the Army; and environmental law problems in using the vast real estate holdings of the Army, to suggest a few examples. These increases in categories tell only part of the story; within each group or "kind of law" there was growth. In some, like international law, the growth was staggering as the post World War II Army remained abroad in many places and in large numbers. Peacetime relations with friendly foreign countries involve an entirely different set of questions than do relationships in wartime.

However, the military lawyer's business today remains people oriented. Although criminal justice work has decreased from all to less than half of his function, he retains close contacts with Army personnel as people by providing personal legal assistance to servicemen, adjudicating their claims against the government, and participating in human development and equal opportunity programs. These community service activities are satisfying to many officers, both from a professional and human point of view. Opportunities for this kind of work have multiplied as the members of the Corps were given increasing numbers of assignments at lower levels of command, closer to "the troops."

Closeness to the military community is marked not only by formal integration into the rank structure and by the functions just described, but also by the people who make up the Corps. Army lawyers, at least since World War II, have included fair numbers of those emerging social groups which have been making their influence felt in the American society. Women lawyers, serving as Army officers, hold positions as teachers, judges and Staff Judge Advocates, and officers from minority groups abound.

One particular influence on the Corps is the dependence upon the citizen-soldier in times of crisis. Typically, when the Army expands to meet a crisis, Corps strength is doubled or tripled by the influx of those Reservists and National Guardsmen who have kept their military skills fresh while in civilian legal practice.

Thus, the Army lawyer is an officer who, with his military colleagues, has been engaged in performance of the defense mission since the nation began. The law the judge advocate practices is more varied than most civilian lawyers ever see and more professionally satisfying because more law than policy or profit determines his conclusions. Judge advocates are unique

among the servants of the law, but not different in any way that makes them less a lawyer or less a soldier. This is the military lawyer's story.

II

In The Beginning

On June 14, 1775, the Second Continental Congress resolved that 10 rifle companies should be immediately raised to the southward to march north and join the New England forces gathered around Boston. On the same day Congress appointed a committee headed by George Washington, with Philip Schuyler, Silas Deane, Thomas Cushing and Joseph Hewes as members, to prepare the rules and regulations for the government of the newly-created Continental Army. On the 28th of June the committee reported, and two days later Congress adopted a set of 69 articles for the regulating and well-ordering of the Army. These articles were generally a copy of the then-existing code governing England's "ministerial army" and, with slight modification, reflected portions of the Massachusetts Articles of the proceding April.

General George Washington assumed command of the 16,000 New England volunteers and militiamen beseiging Boston on July 3, 1775. He then established the General Headquarters of the Continental Army at Cambridge. Meanwhile, in Philadelphia, members of the Second Continental Congress turned to their British model for further guidance in their task of regulating a fledgling colonial army. British Article VI of Section XV of the 1765 Articles provided that "The Judge Advocate General, or some person deputed by him, shall prosecute in His Majesty's name." On the 29th of July, 1775, the Congress elected John Adams' law pupil, the prominent Boston counsellor, William Tudor, to be Judge Advocate of the Army, a $20 a month position created that same day. An order issuing from General Headquarters on the following day heralded the appointment and directed that the Judge Advocate was "in all things relative to his office to be acknowledged and obeyed as such."

* * *

WILLIAM TUDOR

William Tudor was born in Boston on the 20th of March, 1750. He entered Harvard at age 16 and earned his bachelor's degree in 1769. On leaving the University, he chose the profession of law and was about to enter the office of Mr. John Adams, then known as "the greatest lawyer in

the province," and later President of the United States. Adams once wrote Tudor's father and described the youthful Tudor:

> I know him to have a clear head and an honest, faithful heart. He is virtuous, sober, steady, industrious, and constant to his office. He is as frugal as he can be in his rank and class of life, without being mean.

figure 1

First Judge Advocate of the Army, William Tudor

As a youth Tudor was well known for his athletic abilities. It is related that, when the waters around Boston were occupied by the British fleet and all passage was dangerous, Tudor would nightly swim across the creek between Chelsea and East Boston, his clothes in a bundle on his head, to visit the lady who afterward became his wife.

After the British Army evacuated Boston, Tudor, then attached to Washington's general staff, accompanied the Continental Army to New York. It is related that the business of Judge Advocate was incessant during the early years of the Continental Army. Among all the trials Tudor prosecuted perhaps the most interesting was the court-martial of Colonel Henley at Cambridge in January of 1778. Colonel David Henley was

commandant of the garrison at Cambridge which also served as a prisoner of war camp for the captured British General Burgoyne and his army. Henley's troops were raw, undisciplined militia who were constantly taunted by their British regular prisoners. It required a great deal of energy and patience to suppress the British insolence. But Colonel Henley was passionate and impetuous, and one day after a provocation by a British corporal "and repeatedly ordering the man to be silent in vain, he seized a musket and pricked him slightly with the bayonet." General Burgoyne accused Henley of the "most indecent, violent, vindicative severity against unarmed men, and of intentional murder." A court-martial was ordered and General Burgoyne was allowed to take part in the prosecution. At trial, Burgoyne attempted to establish that "a general massacre of the troops under his command was apparently threatened." Tudor rebutted the charge in his closing statement:

> It has been said that Reeve's [the man wounded by Colonel Henley,] behaviour was only firm, not insolent. British firmness often so nearly approaches insolence, that Europeans as well as Americans have been very apt to confound them. The Court will recollect the pains taken in one or two instances during this trial, to get from the British witnesses their idea of insolence. They all affected to think it impossible a Briton could look insolent. It was, they said, only looking up. But this so sublime, this erect countenance which they boast of, leads them to looking down upon the rest of the world, though not always with impunity. Britain is feared because she is powerful. What pity it is that a nation cannot be just as well as gallant. Less pride had prevented the dismemberment of her empire, had saved the blood of thousands: and real magnanimity had, ere this, arrested the hand of destruction from the heads of men, whose greatest fault (once the glorious fault of Britons!) is the love of freedom.

Tudor then alluded to the murder of Miss McCrea by Burgoyne's Indian mercenaries:

> But, says General Burgoyne, Colonel Henley's conduct has a great effect on his guards: he was known to be no friend of the British soldiers; he had himself wounded one and been violent in his menances against them all; he thus influenced his soldiers to stab and murder whom they pleased, if they belonged to the British army; and ought therefore to be considered as an accomplice in every outrage which took place. If this reasoning is conclusive by the same logic the General himself is an accessory to all the murders prepetrated by the ferocious bipeds, the savages, who accompanied and disgraced his army last summer. Ought it to be said that because these black attendants knew that General Burgoyne did not love Americans, that therefore he would be pleased at the butchery of the nerveless old man, defenceless female, and infant prattler?—because he hated 'rebels,' he therefore influenced the Indians to massacre that young unfortunate, the inoffending and wretched Miss McCrea!

Colonel Henley was acquitted by the court martial.

After having served nearly three years as Judge Advocate of the Army, Tudor resigned his office and retired with the brevet rank of colonel. He was commissioned as a magistrate in 1781 and served in that capacity throughout the latter part of his life. Tudor was elected a representative for Boston in the state legislature from 1791 to 1796; a state senator for Suffolk from 1801 to 1803; Commissioner of Bankruptcy in 1801 and 1802; Secretary of State of Massachusetts in 1809; and Clerk of the Massachusetts Supreme Court from 1811 until his death on July 8, 1819.

* * *

On November 7, 1775, the same Congress which enacted the "Rules and Regulations of the Continental Army" made certain "additions, alterations and amendments" to the Articles." And in January of 1776, "That no mistake in regard to the said articles may happen," the "Judge Advocate of the Army of the United Colonies" was directed in orders from General Headquarters to countersign each copy of the new Articles of War.

The Code of 1775 provided for a general and a regimental court-matial, as well as for punishment "by order of the commanding officer." The commander-in-chief or general had full power of pardon and mitigation over sentences imposed by the general court, while similar power was vested in the regimental commanders with regard to sentences at the regimental court level. Judgments of the latter court required confirmation by the commanding officer, who was not a court member; while there was nothing said concerning general courts-martial in this regard. Membership and procedural rules for courts-martial were delineated. The death penalty was specifically authorized only for giving the "watchword" to unauthorized persons and for compelling a commander to give up a fortification. Punishments were not prescribed with specificity, but rather as a court-martial "might order," "according to the nature of the offense" or "in the court's discretion." Certain "additions, alterations and amendments" were made to the foregoing "Rules and Regulations of the Continental Army" in November of 1775. The action was restricted to punitive articles in the Code, no doubt prompted by the exigencies of the service premised upon months of field service. The list of capital crimes grew to encompass such offenses as corresponding with the enemy; mutiny, inciting to mutiny or failure to suppress or report it; desertion to the enemy; striking a superior officer or lifting up a weapon or offering violence; misbehavior before the enemy or abandoning a post entrusted to one's care or "inducing others to do like." A maximum of 39 lashes, to be laid on publicly with vigor, were prescribed for an additional number of offenses.

A year after initial action on the 1775 Code—June 14, 1776—Congress resolved that "the Committee on Spies be directed to revise the Rules and Articles of War." This committee was composed of John Adams, Thomas Jefferson, John Rutledge, James Wilson and R.R. Livingstone.

The suggested revision of the Articles was prompted in part by General Washington, who submitted his amendments to the

committee through his Judge Advocate, William Tudor. Adams favored reporting the British Articles *totidem verbis* in that the British and Roman systems "had carried two empires to the head of mankind" and, accordingly "it would be vain for us to seek in our own invention . . . for a more complete system of military discipline." These American Articles of War of 1776 were prepared by the committee and agreed upon by Congress on September 20, 1776. In his diary under that date, John Adams refers to the version as "the system which he persuaded Jefferson to agree with him in reporting to Congress." As offered by Adams, the Articles were substantially a recasting of the 1775 Code, with some enlargements and modifications. They were arranged according to the form of the British Code, containing 102 separate articles divided into 18 sections.

The Articles spoke for the first time of ". . . the respective armies of the United States," omitting any reference to "the Crown." Fines for profanity were increased from one-sixth to "two-thirds of a dollar" and the maximum number of lashes increased from 39 to 100. Punishments were still generally within the court's discretion after considering the nature of the offense; the death penalty was authorized for more offenses. New offenses were added, such as: deserting the service of the United States, sleeping on or leaving from one's sentinel post, doing violence to persons bringing provisions or necessities to camp, and leaving one's post in search of plunder. Appeals from wrongs were permitted, but as before, "if upon a second hearing, the appeal shall appear to be vexatious or groundless, the person so appealing shall be punished at the discretion of the . . . general court." Sentences of regimental courts were subject to confirmation by the commanding officer, as heretofore, or by the garrison commander. Added was the requirement that no general court-martial sentence could be executed until "after a report shall be made of the whole proceedings to Congress or to the General or Commander-in-Chief of the forces of the United States, and their or his direction be signified thereon."

The Articles further provided that the Judge Advocate General (the title given to Tudor's office on August 10, 1776) "or some person deputed by him, shall prosecute in the name of the United States of America." Consequently, in those early days, the Judge Advocate General was found personally conducting trials before courts-martial or other appropriate military tribunals. Some of the more important of the Revolutionary War prosecutions included those against Major Generals Benedict Arnold, Charles Lee and Philip Schuyler.

figure 2

Father of His Country and Military Law in America, George Washington

* * *

George Washington—"Father of Military Law" in America

In 1775, only a few days after General Washington took command of the Continental Army in Cambridge, Massachusetts, he wrote to the Congress and asked that one William Tudor be commissioned as an officer and Judge Advocate. Washington noted that courts-martial were sitting everyday and the services of a lawyer were sorely needed. As Commander-in-Chief, General Washington took action on each sentence imposed by courts-martial which he had appointed—a practice which still prevails.

Prior to his assumption of command of the Continental Army, Washington had been deeply concerned with the administration of military justice. As early as 1756, when Washington was engaged in the French and Indian war, he protested the enactment of the "act governing mutiny and desertion" which required a commander to obtain permission from the Governor of Virginia to hold a general court-martial and to obtain a

warrant from Williamsburg, the colonial capital, before execution of sentence. It was his opinion that if good discipline was to be maintained, justice had to be meted out expeditiously. Washington complained to the Governor that the statute imposed delays harmful to the discipline of his command and was inadequate for offenses such as cowardice in the face of the enemy.

When it became obvious that hostilities between the British and the colonies were soon to break out, the Continental Congress appointed Washington chairman of the committee to prepare the original rules and regulations for the Army. The first Articles of War, framed by this committee, were adopted on June 30, 1775.

The matter of discipline of "individuals" in the army weighed heavily on Washington. The original Articles of War apparently did not provide strong enough penalties to maintain discipline. Washington accordingly advocated institution of the death penalty for very serious offenses. Although he was known as a stern disciplinarian, Washington had a reputation for fairness. Officers and men were tried promptly and with the utmost impartiality. The punishments levied followed the pattern of military punishments of the day. "Drumming out of camp," the "pillory" and the "wooden horse" were not uncommon. Flogging was indeed a frequent punishment. A particularly gruesome provision requiring salt to be rubbed into the wounds after flogging was sometimes added to the sentence where the offense was a serious one. Branding on the hand and running the gauntlet were also common punishments. In spite of his disciplinary attitudes, Washington was compassionate in those cases deserving clemency. Upon Benedict Arnold's conviction on charges of permitting a vessel to leave an enemy port, closing the shops in Philadelphia and using public wagons for private purposes, Washington was not unmindful of Arnold's former service. In his reprimand to Arnold, he wrote:

> Our profession is the chastest of all. Even the shadow of a fault tarnishes the lustre of our finest achievements. The merest inadvertence may rob us of public favor, so hard to be acquired. I reprimand you for having forgotten that, in a proportion as you had rendered yourself formidable to our enemies, you should have been guarded and temperate in your deportment towards your fellow citizens; exhibit anew those noble qualities which have placed you on the list of our most favored commanders. I will, myself, furnish you as far as may be in my power, with opportunities of regaining the esteen of our country.

Washington might be fairly referred to not only as the "father of his country" but also as the father of this country's military law. His propensity for clemency in deserving cases and his just application of the law is a trait followed by military commanders to this day.

* * *

The severity of possible punishments under early versions of the Articles of War gave Washington and his commanders ample opportunity to exercise compassion. Many of the possible punishments fall harshly on modern ears–and so do some of the offenses enumerated in those first Articles. Punishable under the 1776 Articles were: indecent or irreverent behavior at any place of divine worship; use of "any prophane oath or execration [sic]" and commission of "any waste or spoil, either in walks of trees,

parks, warrens, fishponds, houses or gardens." The last one may bring nods of agreement from today's environmentalists, but the general thrust of the early Articles, both as to offenses delineated and as to punishments, reflected the general legal conditions of the day.

Although the American Colonies had rejected the notion of an established church, their law was regarded as the formal enforcement mechanism for prevailing standards of conduct and they gave it a deliberately high moral content. Public whipping and other corporal punishments were not unknown to persons brought before the bar of justice. One counsel, John Adams, was able to secure the ancient side-step, "benefit of clergy," from the

figure 3

COLONEL FREDERICK BERNAYS WIENER (JAGC, RET), NOTED LEGAL SCHOLAR, AT A VISIT TO THE JUDGE ADVOCATE GENERAL'S SCHOOL IN THE 1960's

Massachusetts court before which he had defended the British soldiers charged with homicide after the Boston Massacre. However, legal costs were high and court procedures restrictive; few criminal defendants had any counsel at all, and busy lawyers like William Livingston of New York City could practice a whole year without defending one criminal case.

This time was 80 years before the Fourteenth Amendment to the Constitution and more than 150 years before the effects of that amendment were felt in state court criminal proceedings. Frederick Bernays Wiener (Col., JAGC, Ret.) has pointed out that the right to counsel, search and seizure rules, and protection against self-incrimination were matters for the states to decide, under the prevailing morality. Many judges of the post-Colonial period were untrained in the law and there were few legal reports through use of which practices in one court could influence others. Courts-martial conducted by prominent laymen in the military community who applied law reflective of prevailing community standards thus were not much different from their contemporary civilian counterparts.

During the period of legislative action on their new Articles, the United Colonies had declared their independence and become the United States of America. In addition to Mr. Tudor's new designation as Judge Advocate General, he was accorded the rank of lieutenant colonel in the Army of the United States on August 10, 1776. Colonel Tudor resigned as Judge Advocate General on April 9, 1777, but remained in the service for another year before returning to the civilian practice of law. He was succeeded by John Laurance of New York.

* * *

JOHN LAURANCE AND THE REVOLUTION

John Laurance of New York served as a staff officer and "Regimental" in General Alexander Macdougall's First New York Regiment, and as an aide-de-camp to General Washington prior to his appointment as Judge Advocate General of the Army on April 10, 1777.

According to records at the Reference Library of the New York Historical Society, Laurance (whose name has been the vicitm of various spellings within military literature) signed his name on his personal letters and manuscripts as indicated.

As Judge Advocate General he played a significant role in several notable courts-martial. General Charles Lee requested a trial by court-martial after being reprimanded by Washington on the battlefield at Monmouth. Generals Scott and Wayne charged that the disastrous retreat at Monmouth was solely Lee's fault. Apparently Lee had given neither of his generals any instructions until the retreat had already taken place. Washington held Lee personally responsible and stated that Lee would answer to the Army, to Congress and to the world for his conduct—to which General Lee replied ". . . You cannot afford me greater pleasure than in giving me the opportunity of showing to America the insufficiency of her respective

figure 4

COLONEL JOHN LAURANCE, TRIAL ADVOCATE AND NEW YORK CONGRESSMAN

servants . . . it will be for our mutual convenience, that a Court of Enquiry should be immediately ordered, but I could wish it might be a Court-Martial . . ." A court-martial was convened and the judge advocate was John Laurance.

At that time the Judge Advocate acted not only as prosecutor but also as legal adviser to the court and as "friend" of the accused. Colonel Laurance presented as the star witness for the prosecution a Colonel Laurens who described Lee's orders as so indistinct that they showed "a want of presence of mind." To this General Lee retorted, "Were you ever in an action before?" And Laurens replied, "I did not call that an action, as there was no action previous to the retreat." Lee was found guilty, on all counts, of "disobedience of orders, misbehavior before the enemy, making an unnecessary, disorderly and shameful retreat, disrespect to the Commander-in-Chief."

In the following year Colonel Laurance conducted the prosecution of

Major General Benedict Arnold for permitting a vessel to leave an enemy port, closing the shops in Philadelphia, and using public wagons for his own private business. This proceeding, resulting in Arnold being reprimanded by General Washington, embittered General Arnold. In September of 1780, Colonel Laurance was recorder of the board of officers-precursor of the military commission—which investigated the case of Major John Andre, Adjutant General of the British Army, and recommended his execution for coming within the American lines in disguise to conspire with Arnold for the surrender of West Point.

Laurance's example of prosecuting the most important military trials was to be followed by later Judge Advocates General such as General Joseph Holt who acted as co-prosecutor at the Lincoln assassination trials and General Myron Cramer who was a co-prosecutor of eight German saboteurs in World War II. After the Revolutionary War, John Laurance was elected the first Congressman from New York City. In his first attempt at re-election he failed because of opposition to his advocacy of the new federal constitution. He later served as Judge of the United States District Court for New York and as presiding officer of the United States Senate.

* * *

John Laurance became Judge Advocate General of the Army on April 10, 1777. The eminent jurist had active service in the field with the Revolutionary Army, as both regimental and staff officer at various times before his new duties as chief military legal officer. Laurance continued at the head of the administration of military law for some five years, serving as prosecutor in the 1770 court-martial of Major General Benedict Arnold for various transgressions occurring during Arnold's tenure as military commandant of Philadelphia. A year later, Judge Advocate General Laurance served as Judge Advocate of the Board of Officers which investigated the celebrated case of Major John Andre, Adjutant General of the British Army and chief of Sir Henry Clinton's intelligence service, who conspired with the embittered Arnold for the surrender of West Point.

* * *

THE CASE OF MAJOR ANDRE AND GENERAL ARNOLD

In his capacity as Judge Advocate General, Colonel Laurance served as recorder for the board of officers which investigated perhaps the most infamous case of the Revolutionary War.

When the H.M.S. *Vulture* sailed up the Hudson River to Croton Point on September 20, 1780, Major John Andre, Adjutant General of the British Army in New York, was on board, clad in civilian clothing. Andre's mission was to negotiate the surrender of West Point with the American General Benedict Arnold. Andre was put ashore and proceeded to Haverstraw where he met secretly with General Bendict Arnold. Meanwhile, at Croton Point, an alert American Commander, Colonel James Livingston, opened fire on the *Vulture* with his shore battery of small caliber guns. Captain Sutherland of the *Vulture* was forced to abandon his position, which left Andre stranded within American lines. Andre attempted to make his way back to New York on horseback but was arrested at Tarrytown, New York, where the papers disclosing his secret mission were found in his boot.

On the 29th of September, a board of officers convened to decide Andre's fate. The Board consisted of 14 general officers, including Major General Nathaniel Greene, president, Major General St. Clair and the Marquis de la Fayette. A letter from General Washington was presented to the board concerning the duties of the Judge Advocate. He wrote:

> The Judge Advocate will attend to assist in the examination, who has sundry other papers, relative to this matter, which he will lay before the Board.

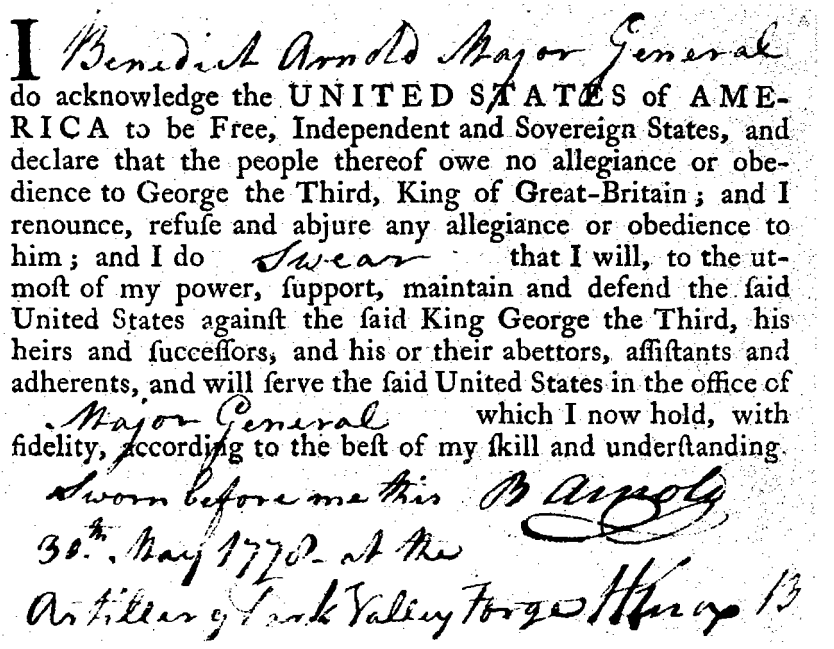

I Benedict Arnold Major General do acknowledge the UNITED STATES of AMERICA to be Free, Independent and Sovereign States, and declare that the people thereof owe no allegiance or obedience to George the Third, King of Great-Britain; and I renounce, refuse and abjure any allegiance or obedience to him; and I do Swear that I will, to the utmost of my power, support, maintain and defend the said United States against the said King George the Third, his heirs and successors, and his or their abettors, assistants and adherents, and will serve the said United States in the office of Major General which I now hold, with fidelity, according to the best of my skill and understanding.
Sworn before me this 30th. May 1780 at the Artillery Park Valley Forge
B Arnold
Hazen 13

figure 5

BENEDICT ARNOLD'S REPUDIATED OATH OF ALLEGIANCE

On the basis of a letter from General Washington concerning Andre's capture, the confession of Major Andre, and certain other papers submitted in evidence, the board made its findings and recommended that "Major Andre, Adjustant-General to the British Army, ought to be considered as a spy from the enemy, and that, agreeable to the law and usage of nations, it is their opinion, he ought to suffer death." Washington approved the recommendation and Andre was sentenced to death as a spy.

* * *

At various times during the War, Congress appointed deputy judge advocates for the different armies and the Army at large; in addition, Congress empowered commanding generals to appoint these officers from time to time. During Laurance's tenure the Army's legal staff came to include the Judge Advocate General,

two judge advocates at General Headquarters (Lieutenant Thomas Edwards and a "Mr." Strong), and one judge advocate for each separate army and territorial department (Northern, Middle and Southern). These legal officers were variously referred to as "deputy judge advocate general," "judge advocate" and "deputy judge advocate"—however, these dissimilarities in title do not seem to have indicated any differences in status or function, in that the same individuals are often referred to by any of the titles. Certain of the judge advocates were given the rank, pay and rations of captains by a resolution of Congress dated June 6, 1777. And after an April 1777 raise to $60 per month, Judge Advocate General Laurance, on March 27, 1778, was "allowed 75 dollars per month, his former rations, and forage for two horses." On the 21st of December, 1779, Congress accorded the Judge Advocate General the subsistence of a colonel and other judge advocates that of lieutenant colonels. The majority of these officers retained commissions in regiments of the line while serving as judge advocates, being commonly referred to by the titles of their grade in the line.

On the 16th of May, 1782, Judge Advocate General Laurance tendered his resignation which Congress accepted on June 3 of that year. Thereafter, an almost futile effort was made to find a successor. On July 9, 1782, Congress proceeded to the election of a Judge Advocate for the Army, and after being duly nominated by Bland of Virginia, James Innes, Esq., was elected to the office. Two days later, Congress passed a resolution fixing the pay of that office at $75 per month, but adding $12⅔ per month for subsistence, and an additional $6⅔ per month for a servant to whom would also be allowed rations and clothing equivalent to that of an Army private. Nevertheless, Innes failed to communicate any acceptance of the offer, and instead verbally intimated to his friends that he would definitely decline if pressed too hard on the matter. Consequently, on the 18th of September, that year, Congress elected Major Richard Howell in place of Innes. By the 1st of October, Congress received Howell's refusal of the offer.

* * *

THE OFFER THAT COULD BE REFUSED: TWO TJAG'S WHO NEVER WERE

James Innes and Richard Howell appear to have both been men of occasional mystery and contradiction. Aside from their dubious distinction of having refused Judge Advocate Generalships, Howell was apprehended in a New Jersey version of the Boston Tea Party, and in a later brush with the authorities was nearly tried for treason; while Innes continued his disinterest in high legal office by subsequently declining President Washington's offer of the post of United States Attorney General. Obviously, however, neither man stayed totally out of the military or legal limelight—and each served his country with honor.

Innes proved himself to be an able attorney and soldier. During the Revolution he served as captain of the Williamsburg Volunteers, leading them in the Battle of Hampton. Later Innes rose to the rank of lieutenant colonel with the 15th Virginia Regiment. He was an aide to General Washington; saw action at the battles of Trenton, Princetown, Brandywine, Germantown and Monmouth; and commanded a regiment at Yorktown. A native Virginian, Innes served from 1780 to 1782 as a respresentative in his home state Assembly. And in 1786, he succeeded Edmund Randolph as Attorney General of Virginia, defeating John Marshall for the office.

In November of 1774, Richard Howell and several other individuals disguised as Indians broke into a storehouse at Newcastle, New Jersey. Once inside, the group confiscated and burned boxes of recently imported English tea from the brig *Greyhound.* In spite of his disguise, Howell was recognized and the tea owners brought suit. However, the case never came to trial owing to the general favor in which the actions of Howell's group were held by the people of the area. Later, he served as captain of the 2d Regiment of Continental troops from New Jersey. Like Innes, he also fought at the battles of Brandywine and Monmouth. In April of 1779 he resigned his commission to engage in intelligence work for General Washington. His clandestine efforts were interrupted when he was arrested for treason and brought before the New Jersey Supreme Court, but Howell's production of secret orders from Washington abrogated the proceedings. In 1793, Howell was elected Governor of New Jersey, and led troops from that state in the famous Whiskey Insurrection of 1794. After an eight-year term as governor Howell was succeeded by another judge advocate, Joseph Bloomfield.

Innes' and Howell's 1782 refusals of the Judge Advocate Generalship have never been fully explained. It should be remembered, however, that Cornwallis had been decisively defeated at Yorktown in October of 1781. The importance of military matters was on the ebb. During the following months, the main attention of the new nation's leaders was in making a satisfactory peace with their mother country. Many of those who had fought in the Revolution were interested in returning to their own states to work they had left behind or take part in local politics in a blossoming new nation. These early years of the 1780's also signalled the reduction of a permanent national military force to less than 1000. Perhaps it is against this backdrop that these two men made their decision, opting instead for political careers at the state level, where both served admirably.

* * *

The search for John Laurance's successor finally ended with the choice, of the man who had served as his principal deputy, Lieutenant Thomas Edwards of the 9th Massachusetts Regiment. Congress, not to be thwarted from the purpose of furnishing the Army with a chief legal officer, elected Edwards on October 2, 1782, and the fact was duly published in orders from General Headquarters, Verplank's Point. Colonel Edwards was the last incumbent of the office of Judge Advocate General prior to the adoption of the Constitution and the commencement of the federal government.

* * *

THOMAS EDWARDS—JUDGE ADVOCATE GENERAL

A graduate of Harvard in 1771, Thomas Edwards studied law in the

office of John Williams of Boston. His first military service of the Revolution was as a private in the Massachusetts Militia in April 1775. He was commissioned a lieutenant in Henry Jackson's 16th Massachusetts regiment in 1777. Jackson's regiment was widely noted for its soldierly qualities. The Massachusetts unit played an important role in the battles at Monmouth, Quaker Hill, Rhode Island, and Springfield, New Jersey.

Edwards succeeded John Laurance as Judge Advocate General by Congressional appointment in October 1782. Perhaps the most controversial point of Edwards' career as Judge Advocate General came when charges of neglect and incompetence were preferred against him by General Hasen. Edwards had acted as the judge advocate at the trial of a Major Reid for disobedience of orders and unmilitary conduct, charged by Hasen and officers of Hasen's command. When Reid was found "not guilty" by the court presided over by General Putnam, Hasen complained to General Washington that Edwards had failed to act impartially. Washington directed that a board of officers make an inquiry into the charges. His order of February 12, 1783 to the Board read:

TO THE BOARD OF GENERAL OFFICERS
Head Quarters, Newburgh, February 12, 1783.

> Gentlemen: I do inclose you a Letter and Memorial to the 13th of January last from Brigadier General Hasen in behalf of himself and twenty four Officers of his regiment remonstrating generally on the want of System and some general established rules in the Proceedings of Courts Martial, by which means the innocent have been at some time injured and the Guilty escaped the punishment due to their Crimes; And then pointing out Cases in which they conceive that for want of some certain uniform rules the Determinations and Proceedings of General Courts Martial have on different occasions been diametrically opposite, to the exclusion of themselves from redress for supposed Misconduct and partiality in Mr. Edwards the Judge Advocate the Proceedings of a late General Courts Martial of which the late Colonel, now General Putnam was President might be set aside and that I would direct an inquiry into the matters complained of an a full and fair Trial of Major Reid on the Charges by them exhibited against him.
>
> This Memorial as far as it respected Major Reid's Trial was referred to a Board of General Officers of which Major General Gates was President which Board on the 23d of January did report to me as follows to wit:
>
> We are of Opinion that the Conduct of the Judge Advocate upon that occasion should be investigated in the first place; As, if it appears by such investigations as through his Neglect or Partiality the Court were not possessed of every knowledge and Light which could be thrown on the Case before them, a revision of the Proceedings by the same Court, or a new Trial of Major Reid by another Court must be the natural consequence that should the uprightness of the Judge Advocate fully appear upon such an investigation being had we think no Appeal can be allowed; and that the only redress the parties who suppose themselves injured can obtain will be an inquiry into their Conduct before a Court convened for that purpose, at which Major Reid might be ordered to attend, to support his Allegations.

General Washington added that:

> In order to prevent similar complaint against so important a part of our Military System as the Channel appointed for the equal distribution of public justice to every Member of the Army, on account of a defect of some certain rules for the Government of General Courts Martial and their Officer the Judge Advocate; I wish you to take up the matter on a General Scale and that you will report to me what in general cases is and ought to be the

figure 6

THOMAS EDWARDS

business of a Judge Advocate, precisely delineating his duties as well with relation to the Court as with respect to the Accuser and accused.

It is my wish also that you will take up the Charges exhibited against Mr. Edwards and on a review of the Memorial of the 13th determine whether any and which of them as specified in the Letter and inclosure of the 29th, *if true* are really military charges And for which Mr. Edwards now at the head of the Department and as Acting Judge Advocate against Major Reid is amenable to a Court Martial; And that you will then enter into a full investigation of the truth of the matters which you shall suppose to be objects of Charge against Mr. Edwards and report thereon without delay that I may be enabled to determine whether a General Court Martial will be necessary for his trial, or the proceedings of the General Court Martial against Major Reid should be approved and General Hasen and his Officers referred to the alternative pointed out in the report of the board of General Officers above mentioned. I have honor etc.

Apparently the board of officers headed by Major General Gates felt that Hasen's charges were unsupported, for in the Washington's General Orders of 20 February 1783 it is noted that:

The Board of General officers appointed in the orders of the

9th instant whereof Major Genl. Gates is president having taken into consideration that part of the reference which relates to the charges exhibited by Brigadier Genl. Hasen &ca. against Mr. Edwards, Judge Advocate to the Armies of the United States, and reported in the words following vizt. The Board having determined.

That the first charge vizt. want of abilities and a regular Judicious system in the office and duties of a Judge advocate is not a Military offence cognizable by a Courtmartial proceeded to the fullest and most minute investigation of the 2d. and 3d. charges, viz want of cander and impartiality in conducting prosecutions as Judge Advocate, and are unanimously of opinion that neither of them are supported.

The Commander in Chief fully approves the foregoing report.

After the war, Edwards resumed the practice of law in Boston. He served diligently as Secretary of the Massachusetts Society of the Cincinnati, a famous organization of the officers of the Continental Army, until his death in 1806.

* * *

On November 12, 1782, Congress appointed Lieutenant Samuel Cogswell, comrade in arms to Judge Advocate General Edwards in the 9th Massachusetts Regiment, to be deputy judge advocate.

With the Revolution waning, the Army of the United States was temporarily reduced in 1784 to some 80 officers and men. While Congress thereafter provided for the recruiting of a force of nearly 700, it was not until after adoption of the Constitution in 1789 that any great interest was again taken in military legal matters. However, several of the 15 judge advocates who served during the war merit note. One of the more recognizable figures was Captain John Marshall of the 15th Virginia Regiment. Marshall served two short terms, one as Congressman (1799—1800) and one as Secretary of State (1800—1801) upon completion of which he commenced his 34 years of tenure as Chief Justice of the United States. Another Virginia officer, Major John Taylor, served with his native state's 1st Regiment. Taylor went on to become a prominent Jeffersonian Democrat, a political writer of note, and critic of Chief Justice Marshall. He also served as United States Senator from Virginia for a number of years. Major Joseph Bloomfield of the 3d New Jersey Regiment continued to ably serve that state in the postwar years, as its Attorney General (1782—1792), Governor (1801—1812), Brigadier General, U.S.A. (1812—1815) and United States Congressman (1817—1821). The "Mr." Strong at General Headquarters during Colonel Laurance's incumbency may have been Caleb Strong, the Federalist statesman and United States Senator from Massachusetts (1789—1796) who later served as Governor of that commonwealth for two terms (1800—1807 and 1812—1816).

* * *

CONTINENTAL ARMY JUDGE ADVOCATES IN THE FIELD

Most of the early judge advocates held positions of leadership in the Continental Army in addition to their legal duties. One such junior officer later to hold this country's highest judiciary post fought at the battles of Brandywine, Germantown and Monmouth.

John Marshall, fourth Chief Justice of the United States Supreme Court, served as a first lieutenant and captain in the 11th Virginia Regiment. At Valley Forge he was appointed "Deputy Judge Advocate in the Army of the United States." A contemporary described the future Chief Justice accordingly: "Indeed all those who intimately knew him affirmed that his capacity was held in such estimation by many of his brother officers, that in many disputes of a certain description he was constantly chosen arbiter; and that officers, irritated by differences or animated by debate, often submitted the contested points to his judgment, which being given in writing, and accompanied, as it commonly was, by sound reasons in support of his decision, obtained general acquiescence."

A noted critic of John Marshall and fellow judge advocate during the Revolutionary war was John Taylor of Virginia. A lieutenant colonel who fought with Lafayette against the Hessians, Taylor achieved eminence through many of his political writings such as: *A Definition of Parties, An Enquiry into the Principles and Tendencies of Certain Public Measures, Construction Construed and Constitutions Vindicated.* Taylor, who served several terms as a United States Senator from Virginia, was a champion of local democracy and spokesman for states' rights.

Another Revolutionary War judge advocate whose service in the Army led him frequently into battle was Joseph Bloomfield. Admitted to the bar in 1774, only a year later he was commissioned a captain in Colonel Elias Dayton's Regiment, and took part in the Quebec Expedition. As General Philip Schuyler's guard officer, Bloomfield brought the Declaration of Independence to Fort Stanwix. He soon after received his promotion to major and appointment as judge advocate of the Northern Army. Bloomfield distinguished himself at the battles of Brandywine (where he was wounded in the "bridle arm") and Monmouth. After the war Bloomfield settled in Burlington, New Jersey, where he began a distinguished career as an attorney and legislator. He was elected Governor of New Jersey and served as that state's Attorney General. Bloomfield was elected to two terms as a United States Congressman from 1817 to 1821. As commander of an infantry brigade of New Jersey militia, he took an active part in suppressing the Whiskey Rebellion without bloodshed during Washington's term as President. President Madison, noting Bloomfield's experience as a leader, appointed him general and commander of the 3d Military District during the War of 1812.

* * *

The 1776 Articles of War, except for occasional amendments, continued in force until the adoption of the Constitution. The First Congress, as well as later convocations, expressly recognized that Code, continuing it in operation until 1806. Amendments in 1786 had effected changes in the administration of military justice via some 27 articles. One of the purposes of the amendments was to make provision for the trial of offenders serving with small detachments, and to prescribe membership levels for the various courts-martial. It was also provided that any sentence by a general

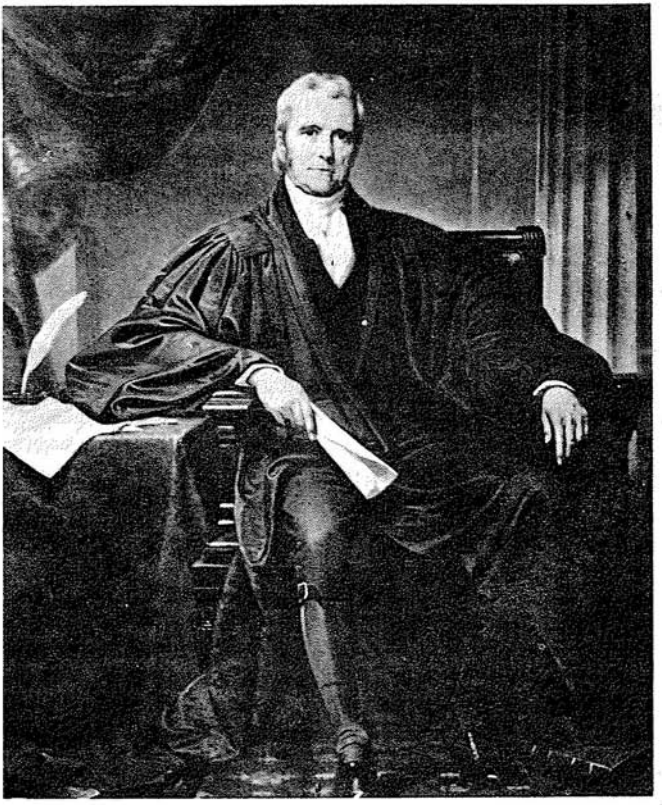


figure 7

EARLY JUDGE ADVOCATE AND CHIEF JUSTICE OF THE UNITED STATES SUPREME COURT, JOHN MARSHALL

court-martial that included death or dismissal of an officer (in time of peace) or which affected a general officer (during war or peacetime) would be "transmitted to the Secretary of War, to be laid before Congress for their confirmation, or disapproval, and by their orders in the case." The amendment also provided that "all other sentences may be confirmed and executed by the officer ordering the court to assemble, or the commanding officer for the time being, as the case may be."

In 1789, the United States Constitution gave Congress specific powers of military regulation. Article 1, Section 8, contained several clauses empowering that body: to declare war, grant letters of marque and reprisal, and make rules concerning captures on land or water; to raise and support armies; and, to make rules for the government and regulation of the land and naval forces. The

Act of September 29, 1789, recognized the existing military establishment, and contained a provision to the effect that the troops should "be governed by the Rules and Articles of War which have been established by the United States in Congress assembled, or by such Rules and Articles of War as may hereafter by law be established."

The remnants of the Continental Army were expanded to some 672 enlisted men and 718 officers in August of 1789. By December 1792, after disastrous defeats at the hands of frontier Indians, the total force consisted of 3692 men. That same month the Army was reorganized as the "Legion of the United States" and Lieutenant Campbell Smith was appointed "Judge Marshal and Advocate General" on July 16, 1794, by Major General Anthony Wayne. And it appears that a Lieutenant Staats Morris may have been appointed as a deputy judge advocate sometime in September of 1792. The duties of the Judge Marshal and Advocate General were terminated by another military reorganization, but Smith—then a captain—was appointed Judge Advocate of the Army on June 2, 1797.

* * *

CAMPBELL SMITH—"JUDGE MARSHAL AND ADVOCATE GENERAL"

In 1784 the remnant of the Continental Army had been disbanded and the permanent standing force was reduced to an authorized strength of one 700-man regiment from the state militias. It was not until the adoption of the Constitution in 1789 that any great interest was again taken in military matters. In the interim, judge advocates were merely detailed from the line. In 1792 the Army was reorganized as the "Legion of the United States." Lieutenant Campbell Smith, IV Sublegion, who had entered the service as an ensign of infantry from Maryland, was appointed "Judge Marshal and Advocate General" on July 16, 1794 by Major General Anthony Wayne. Smith served more than two years as judge advocate and also performed duties as aide-de-camp to Brigadier-General James Wilkinson. The appointment as judge advocate was terminated by another reorganization of the armed forces on the 13th of July 1796. Following further reorganization in November of 1796, Smith—then a captain of the 4th Infantry—was appointed Judge Advocate of the Army. Because of the fact that special emoluments were not provided by law, he applied for Congressional redress in 1798 for services rendered as a judge advocate from 1794 to 1796. Acting on Smith's claim, Alexander Hamilton, as Deputy to General Washington to head military preparations for a possible war with France, wrote:

> I consider it to be a principle sanctioned by usage that when an officer is called to exercise in a permanent way an office of skill in the Army (such as that of Judge Advocate) for which provision is not made by law, he is to receive a *quantum meruit* by special discretion for *the time he officiates,* which in our present system would be paid out of the funds for the contingencies of the War Department.

Captain Smith's petition was reviewed favorably, and he received the equivalent pay of the Judge Advocate of the Army under the Act of March 3, 1797. Five years later, the Act of March 16, 1802, abolished the office of

Judge Advocate of the Army and Campbell Smith was discharged from the service on the 1st of June, 1802.

* * *

Smith's second appointment had been made pursuant to the Act of March 3, 1797, enacted principally to prepare a struggling young nation for a threatened war with France. The enactment, in making provision for a single brigadier general as the highest Army officer, provided also:

> That there shall be one Judge Advocate, who shall be taken from the commissioned officers of the line, and shall be entitled to receive two rations extra per day, and twenty-five dollars per month, in addition to his pay in the line; and whenever forage shall not be furnished by the public, to ten dollars per month in lieu thereof.

Smith served intermittently as Judge Advocate of the Army until June 1, 1802, when he was honorably discharged. His office, along with others on the General Staff, was abolished by the Act of March 16, that year, which also established the United States Military Academy and reduced the line of the Army to one regiment of artillery and two of infantry. The Act also provided that:

> [W]henever a general court-martial shall be ordered, the President of the United States may appoint some fit person to act as judge advocate, . . . and in cases where the President shall not have made such appointment, the brigadier-general or president of the court may make the same.

The early 1800's saw the first major revision in the Articles of War—but this change did not occur on the first attempt. A Congressional committee was finally appointed in 1804 to revise the Code along the lines of the Constitution, then 15 years old. On January 30, 1805, there was received in the Senate a remonstrance of some 75 Tennessee citizens and militiamen, headed by Major General Andrew Jackson. Their protest was aimed at having the militia exempted from the rules of uniform, and involved the first Army haircut case of notoriety.

* * *

THE COLONEL WHO REFUSED TO CUT HIS QUEUE

On 30 April 1801, General James Wilkinson issued a general order "regulating the cut of the hair." It required all military men, officers and enlisted alike, to crop their hair. All obeyed save one: Colonel Thomas Butler, Revolutionary veteran, aristocrat and ardent Federalist refused to cut off his queue. He pronounced the order "an arbitrary infraction of my natural rights and a noncompliance on my part not cognizable by the

Articles of War." When Butler displayed his defiance by appearing before his detachment with his queue, Wilkinson had the order repromulgated. Butler was then tried for his disobedience and sentenced to be reprimanded. Angered by the treatment of Butler, some 75 persons, civil and military, led by Major General Andrew Jackson, protested in Congress Butler's "persecution." Wilkinson ordered Butler to a second court-martial. Apparently the catalyst for this second trial was not so much Butler's refusal to conform to the hair-cropping order as Butler's vigorous expression of his belief that Wilkinson was a paid Spanish spy. This time Butler was sentenced to forfeit command, pay and emoluments for 12 months, but he died of yellow fever before the sentence was approved. It was even said that the cantankerous colonel was equally ornery in death—for history reports that Butler was buried face down with his queue waving defiance at the world while protruding from a hole in the top of his coffin.

Butler's case is noteworthy for another reason. Jackson's remonstrance called for Congressional revision of the governing regulations. Wilkinson immediately submitted his own revision of the Articles of War for the consideration of the Adams committee. Soon after Senator Adams reported the revised code with amendments and it later became the last comprehensive revision of the Articles of War before the Civil War. Thus, Butler's tribulations were also the touchstone for a reformation of the Army's rules and regulations.

* * *

The sentiments of the Tennessee militiamen were forceful enough to precipitate some effort toward exempting the militia from the rules of uniform. The commanding general offered an article to accomplish that end; a bill was reported by and passed the House; but Senate action on the matter was bogged down in other issues of the day. It was not until 1806 that the Articles were updated—but the rules of uniform were noticeably silent on the subject of haircuts and militiamen.

On April 10, 1806, the Ninth Congress passed the American Articles of War, a thorough revision of the Code to correspond to the letter and spirit of the Constitution. The former sectional arrangement was replaced by numbered articles, totalling 101. A few substantive changes were wrought by the 1806 revision; new offenses appeared, such as AWOL as it is known today and contemptuous or disrespectful language directed at the President and other governmental officials; death remained a possible punishment for various offenses although it could be adjudged only by a general court-martial and required the concurrence of two-thirds of its membership. Regimental and garrison courts were continued. These inferior courts were limited in the punishment they could impose to no more than a fine of one month's pay and confinement or hard labor for a similar period. Confirmation of sentences was much as before, although approval of the President of the United States was required where that of Congress had been previously.

Previous provisions for the preservation of general court-martial records were continued in the 1806 legislation. Article 90 provided that:

> Every judge advocate . . . shall transmit, with as much expedition as the opportunity of time and distance of place can admit, the original proceedings and sentence of such court-martial to the Secretary of War; which said original proceedings and sentence shall be carefully kept and preserved in the office of said Secretary, to the end that the persons entitled thereto may be enabled, upon application to the said office, to obtain copies thereof.

* * *

DEFENSE ACTIVITIES IN EARLY COURTS-MARTIAL

There are no complete proceedings of trials by American Army courts-martial prior to 1801 because all of the War Department files were destroyed in a fire on the night of November 8, 1800. The earliest known copy of a general court-martial is dated May 25, 1808, which gives the members of the court, the judge advocate, the charges and specifications, the questions and the answers of witnesses, the opinion of the court, the action of the reviewing authority and final sentence.

Another early recorded case, the 1809 trial of Captain W. Wilson, Artillery, before a general court-martial including Major Zebulon M. Pike, President, and Lieutenant William S. Hamilton, Judge Advocate, illustrates the limits that were in fact placed upon an accused's counsel in court-martial proceedings. The accused had the services of one William Thompson as individual counsel. During the trial, Thompson examined witnesses, made objections, and read the accused's defense. The proceedings were disapproved in large part by General James Wilkinson because of the defense counsel's participation in the court-martial proceedings. Wilkinson's action read:

> . . . the grounds of exception are so strong; the innovation so glaring and the precedent if permitted so pernicious in its Tendency, that the General owes it to the Army and to the State, not only to disapprove the proceedings and sentence of this General [*sic*] Martial, but to exhibit the Causes of his disapproval.
>
> The main points of exception & those on which the general rests his opinion, are the admission of Counsel for the defence of the prisoner, to mingle in the deliberations of the Court, the rejection of a competent witness & the utter incompatibility of the facts found and the sentence uttered.
>
> Shall Counsel be admitted on behalf of a Prisoner to appear before a general Court Martial, to interrogate, to except, to plead, to teaze, perplex & embarrass by legal subtilties & abstract sophistical Distinctions?
>
> However various the opinions of professional men on this Question, the honor of the Army & the Interests of the service forbid it, & the interdiction is supported by the ablest witness on the Law Marshal; & by the uniform usage & practice of the American Army. Were Courts Martial thrown open to the Bar, the officers of the Army would be compelled to direct their attention from the military service & Art of War, to the study of the Law.
>
> No one will deny to a prisoner, the aid of Counsel who may suggest Questions or objections to him, to prepare his defence in writing—but he is not to open his mouth in Court.

* * *

Article 69 of the revised Articles continued the notion previously enunciated in the Articles of 1786 and 1775, that every judge advocate was supposedly prosecutor, court legal adviser and "friend" of the accused. The only provision relating to counsel for an accused, this Article stated:

> The judge advocate . . . shall prosecute in the name of the United States, but shall so far consider himself as counsel for the prisoner, after the said prisoner shall have made his plea, as to object to any leading question to any of the witnesses or any question to the prisoner, the answer to which might tend to criminate himself . . .

In the famous 1814 trial of Brigadier General William Hull, the right of an accused's counsel to participate in the proceedings was squarely raised.

* * *

THE COURT-MARTIAL OF GENERAL WILLIAM HULL

During the Revolutionary War, William Hull established a reputation for bravery and leadership under fire. His intrepid service at Dorchester Heights, White Plains, Trenton, Princeton, Ticonderoga, Monmouth and Stony Point evoked the respect of his superiors and subordinates. Nevertheless, the annals of the War of 1812 have rendered Hull's name synonymous with cowardice.

In 1805 Thomas Jefferson appointed Hull governor of the Michigan Territory. When it became apparent that hostilities were soon to break out between the Americans and the British and their Indian allies, Hull reluctantly accepted a commission as a brigadier general to lead troops to the defense of Detroit. His initial failure to attack the key British post at Malden altered the general's aides to his indecisiveness. Shortly thereafter, the British commander Brock took advantage of the situation by approaching Hull's numerically superior force at Detroit. Hull's surrender of the garrison without a single shot being fired came as a shock to many of his subordinates. The public was outraged by the surrender and clamored for retribution. Upon his release as a prisoner of war in Canada and return to the United States, Hull was ordered before a general court-martial at Albany in 1814.

General Hull was charged with treason, cowardice, neglect of duty and unofficer-like conduct. The charges were drawn by A. J. Dallas, United States Attorney for the District of Pennsylvania, as the judge advocate. At Dallas' request, he was dismissed from the case as judge advocate, and the task evolved on Philip S. Parker, the Army judge advocate, and a special judge advocate Martin Van Buren, who was to become the eighth President of the United States. By an unfortunate turn of events for Hull, General Dearborn was appointed president of the court-martial. It was Dearborn who was to have cooperated with Hull by invading Canada from the East, but who signed an armistice allowing the British troops to concentrate against Hull's force. Thus, any failure of the court to attach culpability to Hull might have pointed to Dearborn as the general at fault.

General Hull was accompanied by legal advisors, but they were not permitted to address the court. Hull put in issue the question of applicability of the right-to-counsel provision of the Sixth Amendment to trials by court-martial on the third day of the proceeding when he stated:

> But, Mr. President, I make a higher appeal upon this occasion than to English writers or English practice: I appeal to the constitution of our country; and if you do not find my claim sanctioned by the letter of that instrument, I am sure you will by its spirit, which I know must govern the deliberations and decisions of this honourable court. —By the amendments to the Constitution it is provided that in all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defence. I know well, Sir, that if this provision be taken in connection with the context, and the instrument be construed according to the technical rules of law, it will be considered as applying only to civil prosecutions—But, upon this occasion, and in this honourable court, I look for a disposition that shall trample upon professional quiblings. For, by minds that are able to separate and feel the influence of the rays of truth and justice, however they may be obscured by words and forms, when it was provided that the accused should have the benefit of counsel, how can it be supposed that it was intended to confine this provision to accusations before a civil court. Is there any reason that can apply to the admission of counsel before a civil tribunal, that does not apply to a military court? It is not to be supposed that the judges of a civil court are less learned, less honourable, or less humane, than those of any other tribunal. It is as much their duty to be counsel for the prisoner, as it is the duty of the Judge Advocate or of the members of this court to discharge that charitable office. Can it then have been the intention of the constitution that counsel should be admitted in the one case and not in the other? In the passage before quoted, Judge Blackstone says, 'upon what face of reason can that assistance be denied to save the life of man, which yet is allowed him for every petty trespass?' May I not ask upon what face of reason can that assistance be denied to save the life of man before a military court, which yet is allowed him before every other tribunal?

Hull's request was denied and the trial proceeded. Upon the conclusion of the argument by the special judge advocate, Hull presented his defense which consisted of a long speech most probably written in large part by his counsel. The court-martial found General Hull guilty and sentenced him to be shot to death. However, President Madison took note of the court's recommendation for clemency in consideration of Hull's revolutionary war services and advanced age, and he remitted the execution of the sentence.

* * *

III

Two Wars and an Intervening 30 Years' Peace

As war with England became inevitable, Congress, by the Act of January 11, 1812, authorized the raising of 10 regiments of infantry, two of cavalry, and provided that a judge advocate should be appointed to each division "who shall be entitled to the same pay and emoluments as a major in the infantry, or if taken from the line of the Army, shall be entitled to thirty dollars per month in addition to his pay, and the same allowance for forage as is allowed by law for a major of infantry." On September 26, 1812, Thomas Gales became the first of 16 wartime appointees.

More than a year after passage of the Act, a half-dozen more judge advocates received appointments, including: Evert A. Bancker of New York, Philip S. Parker (who subsequently became Recorder of Albany, New York), Robert Tillotson, John S. Willis, James T. Dent of Georgia and Stephen Lush. In 1814, five additional judge advocates entered upon their duties. One of these, Henry Wheaton, became the great publicist whose distinguished career embraced the posts of Professor of Law at Harvard, American Minister to Denmark and Prussia, and Reporter to the United States Supreme Court (almost every lawyer recalls citations to "Wheat."). Another judge advocate, Major Auguste Davezac, served in that capacity with Andrew Jackson's army at the defense of New Orleans, and later became *charge' d'affaires* to the Netherlands. The list of 1814 appointees was completed by the names of Rider H. Winder of New York, Leonard M. Parker and Samuel Wilcox.

* * *

HENRY WHEATON, JUDGE ADVOCATE

Perhaps best known of the judge advocates who served during the War of 1812 was Henry Wheaton. The distinguished authority on international law was appointed Division Judge Advocate of the Army on October 26, 1814. He remained in the service for nearly a year after the war, as judge advocate of the Third Military District (southern New York and part of New Jersey). Of Wheaton's service as the reporter for the United States Supreme Court, Daniel Webster commented, "No reporter in modern times has inserted so much and so valuable matter of his own." Wheaton's Reports were later to become the subject of a civil suit which Wheaton himself

argued. In the Case of *Wheaton v. Peters* it was decided that "no reporter has or can have any copyright in the written opinions delivered by this court." As a recognized jurist, Wheaton also presided as Chief Justice of the Marine Court.

Upon his appointment as *charge' d'affaires* to Denmark, Wheaton embarked on a career in diplomacy. His first task, and a delicate one at that, was to negotiate with the Danish Government an agreement of indemnity covering the seizure of American vessels. The resultant treaty was utilized as prototype for similar treaties made with France and Naples. As a minister to Prussia, Henry Wheaton negotiated an agreement establishing commercial relations with the states of the Prussian Customs Union. He is perhaps best noted for his monumental treatise, *Elements of International Law,* concerning the sources of international law and the absolute international rights of states in their pacific and hostile relations.

* * *

In addition to reenacting the Rules and Articles of War, Congress, in the Act of March 3, 1813, authorized the "Secretary of the war department" to prepare "General Regulations" for the governance of the Army. It was provided that these regulations, when approved by the President, were to be respected and obeyed until altered or revoked by the same authority. At the close of the second war with Britain, an Act of April 24, 1816, provided "that the regulations in force before the reduction of the army [which had been effected by an act approved March 3, 1815] be recognized . . . subject, however, to such alterations as the Secretary of War may adopt with the approbation of the President." Thus, the General Regulations of the Army were given all the binding force of military law, provided, always, that they were consistent with the Constitution and laws of the United States.

The Act of April 24, 1816, "for organizing the general staff," increased the number of judge advocates to three per division, with the same rank, pay and perquisites as before. Additional officers procured under this legislation, listed in order of appointment, were: William O. Winston, Thomas Hanson, Samuel A. Storrow and John L. Lieb.

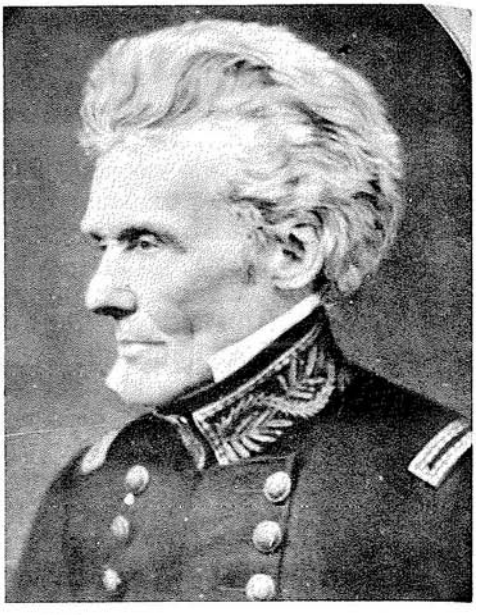
Although judge advocates apparently served with tactical divisions during the War of 1812, after the Army reverted to its peacetime posture in June of 1815, they were assigned as judge advocates of the two territorial divisions (Northern and Southern) into which the country was then divided for military purposes. Later, during the period from 1816 to 1818, when three JA's were authorized per territorial division, these officers acted as staff judge advocates of some of the 10 districts (later called "departments") into which the Northern and Southern Division wers subdivided.

The Army was decreased from 62,674 to 12,383 troops by the Act of March 3, 1815. Some three years later, April 14, 1818, the

number of judge advocates per division was again reduced to one. Stockley D. Hays of Tennessee accepted a judge advocate appointment some five months later, receiving the pay and emoluments of a topographical engineer (*i.e.*, major of cavalry) provided for by that legislation. A further reduction in military strength—the Act of March 2, 1821—brought the force level to 6,126, but made no provision for judge advocates. As a result, Major Storrow of Massachusetts, last judge advocate of the Northern Division (who was either reappointed or retained after the 1818 legislation) and Major Hays, last judge advocate of the Southern Division, were honorably discharged on the 1st of June, 1821. The Army did not have a full-time statutory judge advocate again until 1849.

Between 1821 and 1849 there were no statutory enactments relating to Judge Advocates. The military legal structure and administration of the Army was given no recognition on the War Department General Staff although that body included some ten staff departments and staff-corps. Nevertheless, the Army continued to concern itself with matters of military law. The regulations of 1835 stated: "The discipline and reputation, of the Army, are deeply involved in the manner in which military courts are conducted, and justice administered." Additionally, the regulations emphasized that officers who sat on courts-martial were to "apply themselves diligently to the acquirement of a competent knowledge of military laws; to make themselves perfectly acquainted with all orders and regulations, and with the practice of military courts." Under this interim arrangement, a line officer was usually appointed to act as a temporary judge advocate, prosecuting general courts-martial on an ad hoc basis. Other officers were detailed as acting judge advocates of the major territorial commands (from 1821 to 1837, the Eastern and Western Departments; thereafter the Eastern and Western Divisions).

Available records indicate that the administration of military justice and the responsibility for advising the general staff on legal matters were not uniformly exercised. At times the Secretary of War or the General-in-Chief of the Army might request opinions on various matters from the Attorney General of the United States. Additionally it appears that many of the generals-in-chief during this time were either lawyers or officers familiar with the law, no doubt serving as their own legal advisors to some extent. Jacob Brown, General-in-Chief from 1815 to 1828 studied some law; Alexander Macomb, General-in-Chief from 1828 until 1841, while an engineer by profession, published treatises on martial law and court-martial procedure; Winfield Scott, who served as General-in-Chief for the next two decades was a member of the



figures 8 and 9

GENERALS SCOTT AND GAINES WERE BROUGHT BEFORE A COURT OF INQUIRY TO EXPLAIN THEIR FAILURE TO QUELL THE SEMINOLES RESPONSIBLE FOR THE DADE MASSACRE

Virginia bar; and Henry W. Halleck, General-in-Chief from 1862 to 1864, was a California attorney and author of various legal treatises on international law and the laws of war. One of the more celebrated cases of that era involved two of these generals-in-chief and illustrated the practice of temporary JA appointments from the line.

* * *

THE SEMINOLE FIASCO

When over one hundred soldiers under the command of Major Francis L. Dade were massacred by Indians in Florida, a war which would cost 1,500 lives, $30 million, and last some seven years was set in motion. Senator Thomas Hart Benton of Missouri later described the campaign known as the Second Seminole War:

> [Its] origin was charged to the oppressive conduct of the administration—its protracted length to their imbecility—its cost to their extravagance—its defeats to the want of foresight and care.

During the early part of January 1836, General Edmund P. Gaines, commander of the department in which the Dade massacre occurred, learned of the terrors spreading throughout the Florida settlements and prepared to proceed to the scene of the conflict. At the same time General

Winfield Scott, long-time adversary and rival of Gaines, had received orders from Washington to proceed to Florida to quell the disturbance. From the moment of Scott's arrival in Florida, dissension between the two commanders plagued the conduct of the campaign. Efforts to trap Seminole leader Osceola were unavailing as were their attempts to remove the Indians from the territory. Newspaper editors unaware of the problems of waging war in Florida hurled scathing criticisms of the war at Scott. One such article dubbed Scott the "Scientific General" who like "The King of France, with twenty thousand men March'd up the hill and then—marched back again."

Both Generals Scott and Gaines were called to Frederick, Maryland, before a court of inquiry to explain their failure in Florida. The court of inquiry—presided over by Major General Alexander Macomb—exonerated Scott in a first proceeding, finding that the failure of the campaign was due to "want of time to operate; the insalubrity of the climate after the middle of April; the impervious swamps" and the absence of all knowledge by the General of the country's topography. The court which met to investigate Gaines' conduct also appointed Captain Samuel Cooper of the 4th Regiment of Artillery as judge advocate. This court of inquiry was also charged with determining whether any reports or publications made by Gaines were particularly reprehensible. This latter investigation related to Gaines' purported answers in the public press to newspaper attacks by Scott.

Gaines' defense before the court was Scott's implacable attitude toward the Seminoles. The Indians had doubtless heard of Scott's threat to "obtain an overwhelming force and then annihilate them." The presence of Gaines' army in Florida could hardly have interfered with Scott's direction of the war. Certainly Gaines had not urged the rainfall which impeded the progress of Scott's troops into the area. Nevertheless, the feud between the two generals came to haunt Gaines when the court headed by Macomb reproached him for his use of invective:

> The Court cannot close its proceedings without adverting to the strain of invective and vituperation used by the Major General Gaines . . . particularly that couched in the following terms: 'The atrocious machinations of the second United States' general officer, who has ever dared to aid and assist the open enemy of the republic in their operations against the United States forces employed in the protection of the frontier people. The first great offender was Major General Benedict Arnold; the second, as your finding must show, is Major General Winfield Scott.

But Gaines' unsolicited involvement in the affairs of state did not end with the Seminole fiasco. In command of the Western Department at the outbreak of the Mexican War, Gaines, without authority to do so, called upon the Governor of Louisiana for volunteers. He was relieved of command and ordered to Fortress Monroe for trial. A court of inquiry found that Gaines had transcended his powers but recommended, in view of his long services, that no further disciplinary action be taken. Gaines' rival in the service, General Winfield Scott, later went on to become the Army's Commanding General.

* * *

The Adjutant General of the Army performed some of the Judge Advocate General's usual responsibilities during the period from 1821 to 1849. Records of trial by general courts-martial, which were required to be preserved by the Secretary of War, were often reviewed by the Adjutant General. This review included revision of records for clerical and procedural errors,

and, in some cases, consideration of the legality of the punishment imposed.

Colonel James Gadsden of South Carolina, a former Inspector General, served as Adjutant General from August 13, 1821 until March 22, 1822, under a recess appointment which never received Senate confirmation. He was followed in office by Captain Charles J. Nourse, 2d Artillery, who was Acting Adjutant General for some three years before Colonel Roger Jones of Virginia was appointed to that position in March of 1825. During Jones' 27-year tenure—in 1842—the War Department reorganized its national military divisions. Those departments which had previously been fragmented were to report directly to Washington, and the major general commanding the Army was instructed to redistrict the United States into military departments not to exceed 10 in number. In conjunction with this 1842 reorganization, the Office of the Adjutant General became even more concerned with the administration of military justice.

Colonel Jones, a Virginian, appears to have been rather well-known in military legal circles of the day. In his earlier years as Adjutant General, he was found guilty of charges preferred and prosecuted by Captain Robert L. Armstrong, 2d Artillery, Acting Judge Advocate of the Eastern Department, and was sentenced by a general court-martial to be reprimanded for having issued orders without authority and saying "I defy you, sir; I defy you!" to Major General Alexander Macomb, the Commanding General of the Army at that time. Notwithstanding this transgression, Jones was allowed to continue to serve as Adjutant General.

* * *

THE DISRESPECTFUL ADJUTANT GENERAL

On March 7, 1825, Colonel Roger Jones, a former Marine Corps officer was appointed the Adjutant General. During the period of his office the Adjutant General performed most of the normal functions of a Judge Advocate General, including supervision of the Department Acting Judge Advocates. And in 1830, Colonel Jones found himself being prosecuted in a general court-martial by a judge advocate—Captain Robert L. Armstrong.

Colonel Jones apparently had "clandestinely procured" the authority of the Secretary of War for the form given to the *Army Register* of 1830. General-in-Chief of the Army Alexander Macomb had held many animated discussions with Jones over the form of the *Register* and was surprised that Jones had, without his knowledge, approached and secured the approval of the Secretary of War. Macomb confronted Jones on the matter, leading to a heated argument. In the midst of the exchange, Colonel Jones protested "I defy you, sir" to the general-in-chief. Macomb ordered a court-martial charging Jones with disrespect and disobedience of orders.

In his defense to the charge of disrespect, Jones claimed that the specification "imputes to me expressions which, as a gentleman, I had no occasion to use—as an officer, I should not have used. I trust that I am too little accustomed to aberrations from the path of either, to render it likely that I did use them." Nevertheless, Jones was found guilty of the charge and

sentenced to be reprimanded. The court concluded that Jones labored under a misconception of his official obligation and he was returned to duty as the Adjutant General. Colonel Jones continued to perform as Adjutant General until his death in 1852.

* * *

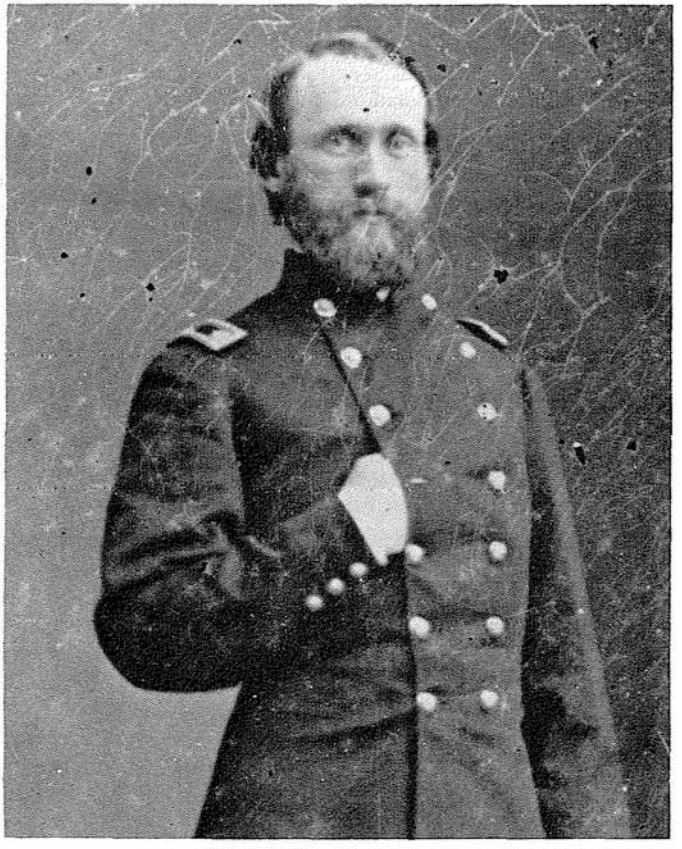


figure 10

COLONEL ROGER JONES' DISRESPECT AS ADJUTANT GENERAL EARNED HIM THE GENERAL-IN-CHIEG'S ENMITY AND A COURT-MARTIAL

Undaunted, and perhaps educated by the experience, Jones published the aforementioned Army Regulations of 1835, describing the duties of the judge advocate and outlining various court-martial procedures—it was acknowledged as one of the finer treatments of the subject. He also wrote several opinions between December 21, 1842 and August 28, 1842, regarding certain irregularities in courts-martial procedure. But starting in 1843,

Colonel Jones detailed an officer of the line to his office designated as "Acting Judge Advocate of the Army" to assist him in the legal functions that he had assumed. The first of these officers, serving from February 8, 1843 until March 11, 1847, was First Lieutenant Samuel Chase Ridgley, an 1831 West Point graduate from the Maryland 4th Artillery.

* * *

THE "LEONIDAS" LETTERS

Gideon J. Pillow was by his very nature a politician. He delighted in undercover political manipulations, but held no civil office himself—

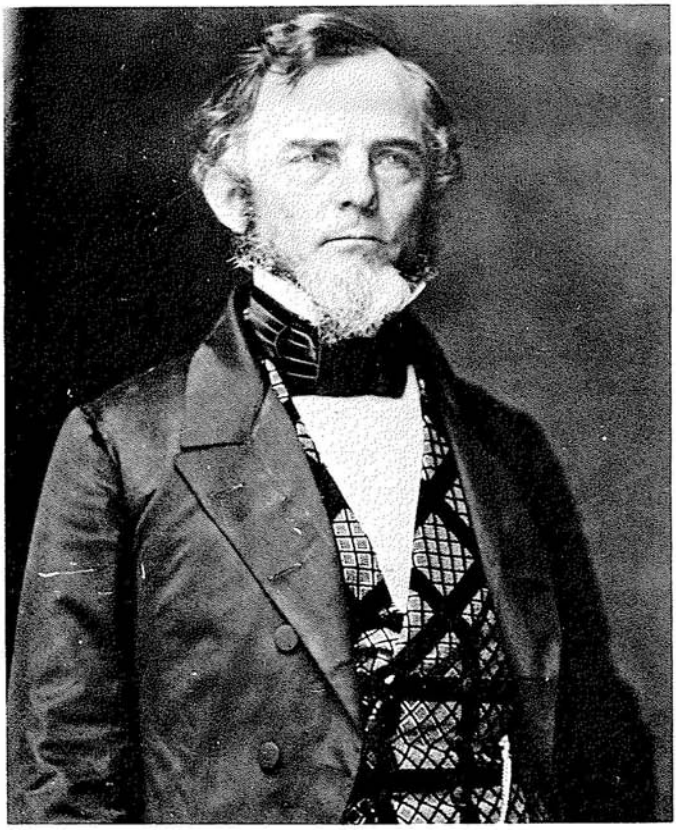


figure 11

GIDEON PILLOW'S REPUTATION FOR POLITICAL CHICANERY AND HIS SUSPECTED AUTHORSHIP OF THE "LEONIDAS" LETTERS CULMINATED IN A COURT OF INQUIRY

although he did claim the responsibility for Polk's nomination to the Presidency in 1844.

Pillow's claim to notoriety, however, stems from his career as an ambitious

and overbearing Army officer. In 1846 President Polk appointed him a brigadier general of Volunteers to serve in the Mexican War. He was soon advanced to the grade of major general and served under General Winfield Scott in several notable battles, including the capture of Mexico City. Pillow maintained a personal correspondence with his benefactor President Polk throughout the campaign, but had serious problems in his relations with other officers. He quarreled violently with Scott, who charged him with the authorship of a letter printed in the September 10, 1847, edition of the New Orleans *Daily Delta* and other letters which severely criticized Scott's conduct, but lauded Pillow's actions at the battle of Coutreras. At one point one of the letters described Pillow's plan of battle:

> He envinced on this, as he has done on other occasions, that masterly military genius and profound knowledge of the science of war, which has astonished so much the mere martinets of the profession. His plan was very similar to that by which Napoleon effected the reduction of the fortress of Ulm, and General Scott was so perfectly well pleased with it, that he could not interfere with any part of it, but left it to the gallant projector to carry it into glorious and successfull execution.

The correspondence was mysteriously signed "Leonidas." Scott preferred charges and ordered Pillow to a court of inquiry where Scott himself acted as prosecutor with judge advocate Captain Samuel Chase Ridgely. General Scott—who was a lawyer and member of the Virginia bar—had the burden of proving that the handwriting of the original Leonidas letter was Pillow's, or in the alternative, that Pillow had ordered the correspondence. Pillow defended by attempting to show that his paymaster, a Major Burns, had independently composed and delivered the letter. The court apparently agreed when it absolved Pillow, holding that there was "no direct evidence showing General Pillow's connexion with this article."

* * *

Ridgely was followed by two more Academy alumni: Captain Leslie Chase, 2d Artillery of New York (U.S.M.A. Class of 1838) who served as Acting Judge Advocate during 1847; and Captain John Fitzgerald Lee, a Virginian with the Ordnance Department (U.S.M.A. Class of 1834). It was also during this time that the noted military legal scholar, Captain William C. De Hart of the 2nd Regiment, Artillery, apparently labored as Acting Judge Advocate of the Army.

In broad terms, the inner-office procedure called for the Acting Judge Advocate to prepare a report for the Adjutant General who, in turn, forwarded it by endorsement to the General-in-Chief, General Winfield Scott. After approval, the chief general's opinion on the matter was then written by the Acting Judge Advocate to the officer concerned. On one occasion—August 1, 1846—Lieutenant Ridgley wrote the Secretary of War directly from the Adjutant General's office. Several opinions were written by the Adjutant General as late as 1849, and his last legal correspondence is dated March 7, overlapping the statutory reestablishment of the Judge Advocate of the Army by some five days.

By the Act of March 2, 1849, Congress authorized the appointment of a Judge Advocate of the Army. That legislation provided that "the President be, and is hereby authorized by and with the advice and consent of the Senate, to appoint a suitable person as Judge Advocate of the Army, who shall have the brevet rank, pay and emoluments of a major of cavalry." The Acting Judge Advocate, Captain John Fitzgerald Lee, was appointed to the position.

* * *

figure 12

JOHN FITZGERALD LEE

JOHN FITZGERALD LEE—JUDGE ADVOCATE OF THE ARMY

Born on May 5, 1813, John Fitzgerald Lee was the second son of Francis Lightfoot Lee and a grandson of Richard Henry Lee, a strenuous advocate of American Independence while president of Congress of 1776. Lee

graduated ninth in his class at West Point in 1834. Before Lee completed his study of law, the Seminole Indian War broke out, so he served in Florida earning a brevet as captain of artillery for gallant conduct. From 1837 to 1848 he served as an ordnance officer commanding the Fort Monroe arsenal and the Washington, D.C. arsenal. By this time he had become conspicuous for his knowledge of military law and his aptitude for the duties of judge advocate. He was frequently detailed to act as judge advocate to courts-martial and courts of inquiry, and he was frequently called to Washington to review the records of such cases. It appears that the Act of March 2, 1849, which directed the President to appoint one of the captains of the Army as "Judge Advocate for the Army" was framed for the purpose of securing his services. With the advent of the Civil War, Major Lee found himself in a difficult position. Torn between his devotion to family and relatives in Virginia, and fidelity to the office of Judge Advocate, Lee ultimately resigned his commission in 1862 and retired to his farm in Maryland. Lee later served as a valuable and influential member of the Convention to Amend the Constitution of the State of Maryland, and in the following year was elected to the State Senate.

* * *

Although the Judge Advocate's duties were not prescribed by statute, records from the office indicate that Lee's duties included the review of courts-martial and the rendition of various opinions on military subjects as they arose. However, there may be some question as to the new Judge Advocate's workload, in that the first opinion bearing Lee's signature in his official capacity was dated June 17, 1850, and the first recorded incoming correspondence was dated August 19, 1854 (the second date, however, may well be explained by the fact that correspondence regarding court-martial cases was kept with the action itself, and the fact that the Judge Advocate was concerned with little other than matters of military justice in the lull before the War Between the States). But like his predecessors, Lee personally prosecuted courts-martial—to include the trial of John C. Fremont.

* * *

THE MILITARY TRIAL OF FRONTIER HERO JOHN C. FREMONT

In September of 1846, the conquest of California by the combined forces of Commodore Stockton in overall command, with the sailors and marines, and Lieutenant Colonel John Charles Fremont's battalion, appeared to be complete. In June of 1846, General Kearney's army of the west had left Fort Leavenworth for California. When Kearney met Stockton at San Diego, the troubles began. Both Kearney and Stockton were apparently under order to establish a civil government in California: the question was who would be the head of the government. Fremont made the unfortunate decision to take the side of Stockton in the quarrel. When Stockton appointed Fremont Governor and Commander-in-Chief for the territory of California, Fremont found himself inextricably immersed in the power struggle. Kearney demanded that Fremont accede to the general's authority; but it was not until Fremont discovered that the newly arrived naval replacement for Stockton, a Commodore Shubrick, had conceded Kearney's authority that Fremont finally yielded. Kearney abruptly had Fremont arrested upon their

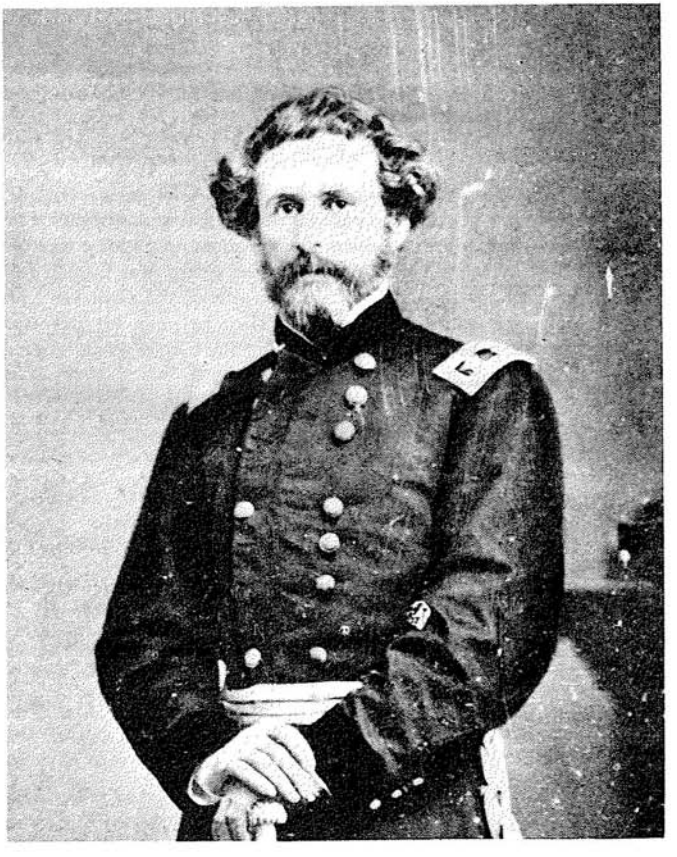


figure 13

FRONTIER HERO JOHN C. FREMONT WAS CHARGED WITH MUTINY FOR HIS ROLE IN THE ESTABLISHMENT OF A GOVERNMENT FOR CALIFORNIA

return to Fort Leavenworth, and a court-martial was ordered for November 2, 1846, at Washington Arsenal, now Fort McNair.

Fremont was charged with mutiny, disobedience of orders, and conduct to the prejudice of good order and military discipline. Most of the specifications related to Fremont's refusal to recognize Kearney's authority, but one peculiar specification referred to Fremont's purchase of White or Bird's Island (now Alcatraz) obligating the government for $5,000. For counsel, Fremont enlisted the services of his father-in-law, the well-known United States Senator Thomas Hart Benton. Benton's courtroom antics were later to be the cause of much concern for court-martial president General George M. Brooks. Captain John Fitzgerald Lee served as the trial's judge advocate.

The much publicized trial took an inordinate amount of time. The court adopted the time-consuming practice of clearing the courtroom for each minor decision. Further, the daily sessions were limited to five hours.

One such incident which delayed the trial for some period of time occurred on January 8, 1847. Kearney became very disturbed at the conduct of Benton, although Benton by custom was not allowed to address the court in his capacity as defense counsel. Kearney rose and stated:

> Mr. President, Before the court is cleared I want to make a statement.
> I consider it due to the dignity of the court, and the high respect I entertain for it, that I should here state that, on my last appearance before this court, when I was answering the questions propounded to me by the court, the senior counsel of the accused, Thomas H. Benton, of Missouri, sat in his place making mouths and grimaces at me, which I considered were intended to offend, to insult, and to overawe me.

The president of the court stated that he regretted very much to hear it and read the 76th Article of the Rules and Articles of War regulating conduct in the courtroom.

Benton responded:

> When General Kearney fixed his eyes on Colonel Fremont, I determined if he should attempt again to look down a prisoner, I would look at him. I did this day, and the look of to-day was the consequences of the looks in this court before. I did to-day look at General Kearney when he looked at Colonel Fremont and I looked at him till his eyes fell—till they fell upon the floor.

The key issue of the case centered on who actually had the authority to install a civil government in California—Stockton or Kearney. Fremont's defense was premised on the theory that Kearney's orders were obsolete when he arrived in California since a legitimate civil government had already been established. Judge Advocate Lee effectively refuted the Fremont argument when he questioned Stockton on the stand:

> Lee: What orders and instructions from the President of the United States or Secretary of the Navy had you in California, on the 16th January, 1847, in regard to the establishment of a civil government in that country?
> Stockton: Well, I do not think I had any.

Fremont was found guilty of all charges and dismissed from the service. The decision went to President Polk for review, with seven of the members of the court recommending clemency.

Polk released his findings on February 16, 1848:

> Upon an inspection of the record, I am not satisfied that the facts provided in this case constitute the military crime of mutiny . . . in consideration of the peculiar circumstances of the case, of the previous meritorious and valuable services of Lieutenant Colonel Fremont, and of the foregoing recommendations of a majority of the members of the court, the penalty of dismissal from the service is remitted.

Fremont, feeling unjustly convicted, resigned his commission. Colonel Fremont was later to become one of the first two senators from California.

* * *

From 1849 until 1862, no other statutory judge advocates were authorized either at headquarters or in the field. Prosecutions of general courts-martial cases continued to be conducted by officers

detailed as "judge advocates" by commanders empowered to appoint such courts. Thus, for the first time, there was a distinction between personnel of the "office" of Judge Advocate of the Army, who were responsible to that office for the performance of their duties, and judge advocates of general courts-martial who were responsible to the commanders appointing them. Also, for the first time, the office of the Judge Advocate of the Army began to exercise some influence on the overall operation of the system of military justice through the review of general courts-martial records.

As Judge Advocate, Major Lee rendered two interesting opinions during his tenure. One letter to Brevet Major General John E. Wool concerned the court-martial sentences of four privates approved and ordered into effect by Wool as follows: "for the period of one year, a band of iron about the neck with 7 prongs each 7 inches long."

The Judge Advocate's opinion noted that:

> The General-in-Chief is of opinion, that such a collar from the suffering it seems designed and is certainly capable of causing, would inflict a punishment cruel and unusual, and consequently illegal.
>
> With this opinion I am directed to convey to you the desire of the General-in-Chief that you will direct the remission of that part of the sentence.

The other opinion rendered by Major Lee may well have been responsible for his ultimate resignation from the Army. In August of 1861, Major General Henry W. Halleck of California was assigned to command the Department of the Missouri. While a lieutenant in the Mexican War, Halleck had been Secretary of State in the military government established for the occupation of the Mexican territories that eventually became California. During that time he had become familiar with the practice of his General-in-Chief, Major General Winfield Scott, under which numerous civilian offenders throughout the territories were tried by military commission. Upon his arrival in the Missouri jurisdiction, Halleck found the civilian populace equally obstreperous and their courts just as ineffective. He subsequently ordered trial by military commission for any person suspected of aiding the Confederacy. When confronted with Halleck's action—in the case of Colonel Ebenezer Magoffin, C.S.A.—Judge Advocate Lee opined that military commissions were without authority and illegal.

As the nation became engulfed in the throes of civil war, President Lincoln became hard-pressed for a commander who

could fight and win. In July of 1862, he brought Major General Halleck to Washington to replace the cautious General McClellan as General-in-Chief of the Army. By coincidence, shortly after Halleck assumed command, Congress legislated Major Lee out of his job by superseding the office of the Judge Advocate of the Army, and by recreating the post of Judge Advocate General. Whether Halleck was still disgruntled at Lee's intercession in the Magoffin case, or whether he wanted an attorney for the post (as the ultimate appointee was), Halleck did not recommend Lee for appointment to the new office of Judge Advocate General. Rather than being reassigned to the Ordnance Department or continued as a subordinate judge advocate, Lee resigned from military service. Most records of the Judge Advocate General indicate that Lee's resignation occurred in September of 1862, although his fall from favor under Halleck's administration may have happened sooner—the legislative history of the General Staff indicates that Major Levi C. Turner of New York served in the interim between July 31 and September 3, 1862.

IV

The Civil War and Beginnings of the Classical Period of American Military Law

When the Civil War began, the Regular Army consisted of 15,304 enlisted men and 1,098 officers, most on duty in the West. Although the troops remained with the Union, about one-third of the officers resigned and went south. President Lincoln responded to the need for a larger Army after the April 1861 firing on Fort Sumter by calling out the Militia and calling for volunteers for new units he created. A further call for 500,000 volunteers was made during the summer of 1862. The size and scope of the new war made old organizations obsolete and after August 1861, Congress began to catch up with the President's almost single-handed reorganization of the defense establishment.

In 1861 the Army was authorized by statute a Chief of Ordnance and additional staff specialists including one Christian chaplain per regiment, to serve the new forces. In 1862, Jewish chaplains were authorized and the Medal of Honor was created. The same year new life to the Army's legal corps was brought about by the Act of July 17, 1862. *The Army Almanac* points out that some expansion of legal work, specifically review of general courts-martial records and the rendering of legal opinions on non-criminal subjects, began in 1849 when the office of Judge Advocate of the Army was created. That Act had also signalled the developing distinction between the *office* of the Judge Advocate in Washington and the judge advocates in the field who were each responsible to one commander. The Act of July 17, 1862, marked the renascence of the legal corps and laid an important foundation for the future. First, the Act provided for a Judge Advocate General in Section V and announced his duties:

> That the President shall appoint, by and with the advice and consent of the Senate, a Judge Advocate General, with the rank, pay, and emoluments of a colonel of cavalry, to whose office shall be returned for revision, the records and proceedings of all courts-martial and military commissions, and where a record shall be kept

> of all proceedings had thereon. [The Judge Advocate General's authorized rank was increased to Brigadier General by the Act of 20 June 1864.]

The foundation for a corps of judge advocate officers was laid by the succeeding section of the Act, by which it was provided:

> That there may be appointed by the President, by and with the advice and consent of the Senate, for each army in the field, a Judge Advocate, with the rank, pay, and emoluments, each, of a major of cavalry, who shall perform the duties of Judge Advocate for the army to which they respectively belong, under the direction of the Judge Advocate General.

Secretary of War Stanton, under date of November 13, 1862, defined the duties of such judge advocate officers as follows:

> Your duties will be—
>
> 1. Those pertaining to the office of judge-advocate under the general military law as defined in the standard works of military jurisprudence.
>
> 2. To advise and direct all provost-marshals or other ministerial officers, civil or military, in the police or other duties that may be directed by the orders of the War Department, or commanding general, or by the Judge-Advocate General from time to time.
>
> 3. Such other special duties in regard to state prisoners and measures relating to the national safety as may be assigned you by the Department, by the commanding officer, or by the Judge-Advocate-General.
>
> 4. To advise the War Department, through the Judge-Advocate General, upon all matters within your military district whenever you may deem the action of the Department important to the national safety and the enforcement of the laws and Constitution.
>
> 5. To apply for special instructions to the commanding general upon such matters as may need special instruction to guide your action.
>
> 6. To report to the commanding general all disloyal practices in your district, and when prompt action is required, take such measures [as may be necessary] through the provost-marshal, military commandant, or other authority to suppress them.

The language requiring field JA's to perform their duties "under the direction of" the Judge Advocate General became a basis for what is now known as his "technical channel," a route in addition to regular command channels for transmitting professional guidance and assistance. Corps identity was further en-

hanced by the 1864 Act. In addition to making the senior member a brigadier general, that Act created in the War Department a Bureau of Military Justice, the forerunner of "OTJAG."

Some parts of Section 5 of the Act of 1862 were to remain important through the end of World War I (great emphasis would be placed on the phrase "to whose office shall be returned for revision . . ."). Other parts were of immediate impact because they increased the number of cases which had to be sent to Washington for Presidential review prior to execution of a sentence. Predictably, these went first to the Judge Advocate General for administrative review and the preparation of staff advice to the President. Initially this enlargement included all cases in which the sentence was to death or a penitentiary term, expanding the previous few instances of automatic review of certain officer cases (all those involving general officers, or death or dismissal of other officers in time of peace). Thus, a field

figure 14

BINGHAM, HOLT AND BURNETT, THE PROSECUTION TRIO IN THE LINCOLN ASSASSINATION TRIALS

commander in time of war before the date of this Act could order into execution any sentence in any case, except those in which a general officer was accused. The 1862 Act had a real and persistent effect—the Judge Advocate General began to exercise an appellate function.

The internal Corps developments of this period were overshadowed by what was probably the closest brush with politicization of the Judge Advocate General's position in our history. The Army needed a new Judge Advocate General and the importance that President Lincoln placed on the office was shown by his selection of Joseph Holt, an eminent statesman and lawyer, to fill that post. The issue concerning jurisdiction of the military commission over civilians accused of nonmilitary crimes had become a wartime political matter—and the President looked to Holt, a former Secretary of War and Postmaster General, to successfully push his policies favoring extended control over the civilian population in the North.

* * *

JOSEPH HOLT: PRESIDENT LINCOLN'S ARMY LAWYER

Born in Breckenridge County, Kentucky, on January 6, 1807, Joseph Holt obtained his education at St. Joseph's College and Centre College. He read law in a law office, began practice in 1831, and rose to prominence as an attorney. Under President Buchanan, Holt served as Commissioner of Patents, the Postmaster General and finally as the Secretary of War. Although he supported Douglas for the presidency, he began a very close association with Abraham Lincoln upon the latter's election. With the outbreak of the Civil War, Lincoln became involved with Congressional leaders in a struggle over war powers. His policies with respect to treatment of political prisoners were challenged by legislation introduced by Senator Lyman Trumbull. Lincoln wished to arrest citizens suspected of disloyal activities and hold them in prison by suspending the writ of habeas corpus. As a result, the President turned to Holt to promote his policy of military control over civilian political prisoners or civilians accused of non-military crimes; Lincoln then appointed Halt Judge Advocate General of the Army and elevated him to the rank of brigadier general.

Holt set to work to establish the jurisdiction of the "military commission" so that persons ordinarily not subject to court-martial jurisdiction could be tried by a military body. Military authorities were thus enabled to arrest and imprison civilians previously tried exclusively in civil courts. In the *Vallandigham* case in 1864, the United States Supreme Court "taking its opinion bodily from the argument of Judge Advocate General Holt" refused to review the decisions of military commissions. But in 1866, upon the termination of the war and any need for trying citizens by military bodies, the Supreme Court in the famous case of *Ex parte Milligan* held that where civil courts were available, civilians would not be tried by military authorities.

General Holt continued the practice begun by Judge Advocate General John Laurance of personally conducting the most sensitive trials. In addition to the famous trial of General Fitz-John Porter for disobedience of orders, Holt also prosecuted at the trial of Confederate prisoner of war camp commandant Henry Wirz.

Soon after the trial and execution of the Lincoln assassins—where Holt

again played a major role in the prosecution—the general was implicated in a plot to subvert justice at their trial. A wave of revulsion swept the country when it became known that there were instances of gross perjury by government witnesses; that evidence had been suppressed (Holt had withheld Booth's diary); and that the Judge Advocate General had purportedly withheld from President Andrew Johnson a recommendation for clemency in the case of Mrs. Surratt, another convicted assassination conspirator. Holt spent a great deal of personal effort in attempting to vindicate himself from what appeared to be a spurious accusation.

Prior to his death, President Lincoln had tendered Holt the office of Attorney General, which he declined. Holt also declined the cabinet position of Secretary of War offered him by President Grant. Holt was brevetted a major general for his faithful, meritorious and distinguished services during the Civil War, and in 1875, at his own request, he was placed on the retired list of the Army.

* * *

It was one day after Holt's appointment on September 3, 1862, that JAG records reflect the resignation of John Fitzgerald Lee—a man who apparently adhered firmly throughout to his former

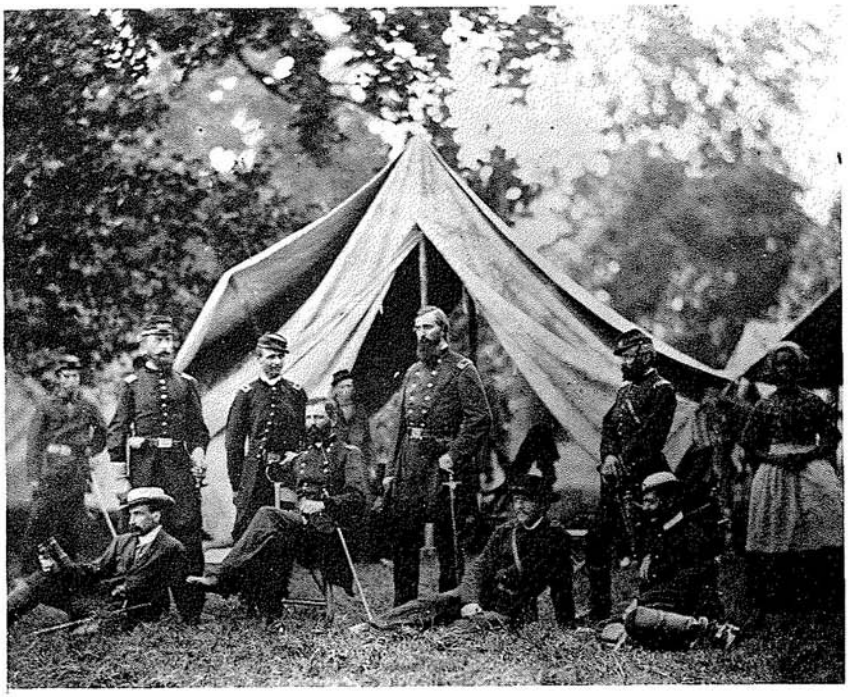


figure 15

GENERAL FITZ-JOHN PORTER, CENTER, AND HIS STAFF, HEADQUARTERS, 5TH ARMY CORPS, ARMY OF THE POTOMAC, BEFORE THE DEBACLE AT THE SECOND MANASSAS

ruling regarding the use of the military commission in domestic cases.

Under the enabling legislation of 1862, and until the close of the War Between the States, some 33 officers were appointed in the newly-created corps of judge advocates. Seven or eight of these officers were kept on duty in the office of the Judge Advocate General, while others had field assignments.

Noteworthy among the Union judge advocates were a number of individuals who became outstanding in their respective fields after the war: Major John A. Bolles of Connecticut became the Judge Advocate General of the Navy; Major Henry L. Burnett of Ohio was prominent in the case of *Ex parte Milligan* and afterward an outstanding member of the New York bar and United States Attorney for the Southern District of New York. Major John A. Bingham of Ohio was part of the prosecution at the Lincoln assassination trial. He was also a member of Congress for 18 years and Minister to Japan for 12 years. While in Congress he was one of the House managers for the impeachment of President Andrew Johnson.

* * *

LAWYERS IN BLUE

Civil War Prosecutor—Henry L. Burnett

Perhaps the most traveled and widely respected Army prosecutor of the Civil War was Henry L. Burnett. Like other attorneys who volunteered for service, Burnett initially served with line units and saw a great deal of action. In 1863 he was appointed judge advocate of the Department of the Ohio and Northern Departments and assigned to the Army of the Cumberland. At the request of Governor Oliver Morton, Burnett was sent to Indiana to investigate and prosecute the Indiana treason cases. Burnett's reputation soared when Clement L. Vallandigham was convicted by military commission. He played a significant role in the cases growing out of the Sons of Liberty Chicago conspiracy to free Confederate prisoners of war. Burnett was responsible for the conviction of these conspirators when his argument supporting the jurisdiction of the military body over civilians was adopted by the court. The case was later to become the landmark Supreme Court decision of *Ex parte Milligan* in 1866. In 1865 Burnett was brevetted a brigadier general and served a further important role as prosecutor with General Holt in the trial of the Lincoln assassins. Burnett's penchant for the prosecution served him well during his many years after the war as a United Attorney for the Southern District of New York.

John A. Bingham—Orator and Legislator

John A. Bingham rose to prominence as a stump speaker in William Henry Harrison's "log cabin, hard cider" campaign. Elected to Congress in 1854, he served continuously as a legislator until 1873, with the exception of the period of his service as a judge advocate. Bingham's special role in the trial of the Lincoln assassins was that of hard-nosed cross-examiner of defense witnesses. His often quoted summary of the evidence at the trial likened the rebellion to "simply a criminal conspiracy, and "a gigantic assassination" in which "Jefferson Davis is as clearly proven guilty . . . as is

John Wilkes Booth, by whose hand Jefferson Davis inflicted the mortal wound upon Abraham Lincoln."

Perhaps Bingham's most notable contribution to the law was his role in framing the Fourteenth Amendment to the Constitution, but he also was selected by the House as one of the seven managers to conduct the impeachment proceeding against President Andrew Johnson. His closing speech at the President's trial is noted as one of Bingham's greatest orations.

figure 16

Henry L. Burnett: Prosecutor in the Indiana Treason Cases and the Sons of Liberty Conspiracy Culminating in the Landmark Supreme Court Case of *Ex parte Milligan*

Wells H. Blodgett—Judge Advocate Medal of Honor Winner

In 1858 the Judge Advocate General's Corps' only known recipient of the Medal of Honor entered the practice of law as a partner in the firm of Judd & Blodgett in Chicago. When the Civil War broke out, Wells H. Blodgett enlisted as a private in the 37th Regiment, Illinois Volunteer Infantry. Soon after, his legal abilities were discovered and he was appointed a judge

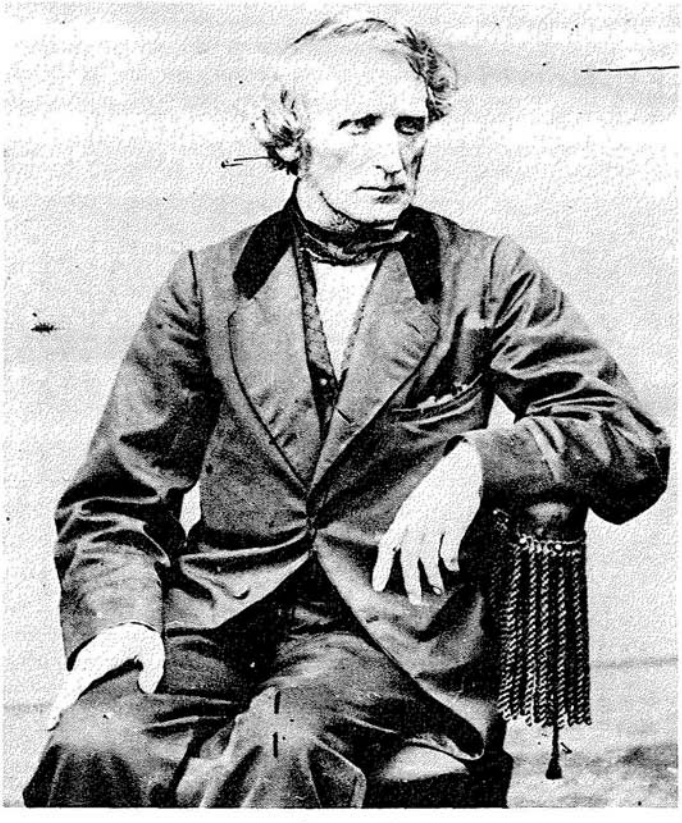


figure 17

JOHN A. BINGHAM: HOUSE MANAGER OF THE JOHNSON IMPEACHMENT PROCEEDINGS AND NOTED PROSECUTOR OF THE LINCOLN ASSASSINS

advocate of the Army of the Frontier with the rank of major. A judge advocate's commission, however, did not keep an officer out of battle. Blodgett participated in all campaigns of the frontier army in Missouri and northern Arkansas. For a short time he even served as an infantry brigade commander in the 4th Division of the 20th Army Corps in Tennessee and Alabama. His propensity for being in the midst of the action eventually earned him the nation's highest award for valor. Blodgett, apparently on his own initiative, approached the enemy's lines and "with a single orderly, captured an armed picket of 8 men and marched them in prisoners." After the war was over, Blodgett was elected to the state legislature of Missouri and later served as a state senator.

John Chipman Gray—Harvard Professor

In one of his official reports, General William Tecumseh Sherman of the Union Army mentions the dispatch of a boat up the Savannah River on an

errand of importance in the charge of "a very intelligent officer whose name I cannot recall." The officer was Major John Chipman Gray and Sherman's description matches Gray's modest demeanor and penchant for anonymity.

A graduate of Harvard College and the Harvard Law School, Gray's Unionist fervor led him to join the 41st Massachusetts Volunteer Infantry as a second lieutenant in 1861. He was placed on the staff of Brigadier General Gordon at Harpers Ferry and served with the Army of the Potomac during the Peninsular Campaign. In July of 1864, Gray was appointed a judge advocate and major on the staff of General Foster and later with General Gillmore, both of whom commanded the Department of the South during the last months of war. Of his new position as judge advocate, Gray wrote John C. Ropes, his future law partner:

> It is singular that I should have been two years an aide-de-camp on the staff of a fighting brigadier without hearing a bullet whistle, and within two months after becoming the legal advisor of a supposed sleeping department, I should be in the midst of a hot fire.

Apparently Major Gray's service as an Army lawyer led him frequently into the fray. Upon termination of the fighting, Gray returned to Boston and commenced the practice of law with Ropes. Together the two attorneys founded the *American Law Review.*

Appointed a lecturer at the Harvard Law School, Gray has been identified with the case method of teaching law although he at first adhered to the time-honored practice of lecturing. Gray continued to practice law as a means of becoming a more efficient teacher. Most of his cases dealt with real property, charitable trusts and quasi-public educational corporations, never of a sensational order and the public knew little of his legal attainments. Nevertheless, the Harvard faculty recognized his superior teaching abilities and he was appointed Story Professor of Law and later still the Royall Professor Emeritus. John Chipman Gray is perhaps best known for his contributions to legal literature: *Restraints on the Alienation of Property* (1883) and *The Rule Against Perpetuities* (1886) which became the standard text on that area of property law.

* * *

Judge Advocate General Holt's Confederate counterpart was Albert Bledsoe, Assistant Secretary of War of the Confederacy. He is probably best known for founding the *Southern Review.* Among the large number of attorneys who served the Southern cause were: John A. Campbell, appointed an associate justice of the United States Supreme Court by President Pierce, who administered Confederate conscription law and reviewed various courts-martial; John Singleton Mosby ("The Gray Ghost"), who with his rangers, was noted for his many daring Civil War raids; Jubal A. Early, best remembered for his attempt to capture the Union capital in Washington; and a number of other legislators and judges.

* * *

LAWYERS IN GRAY

Albert Taylor Bledsoe—Chief Confederate Lawyer

The Confederate counterpart of the Union Army's Judge Advocate General was the Chief of the War Office and later the Assistant Secretary of

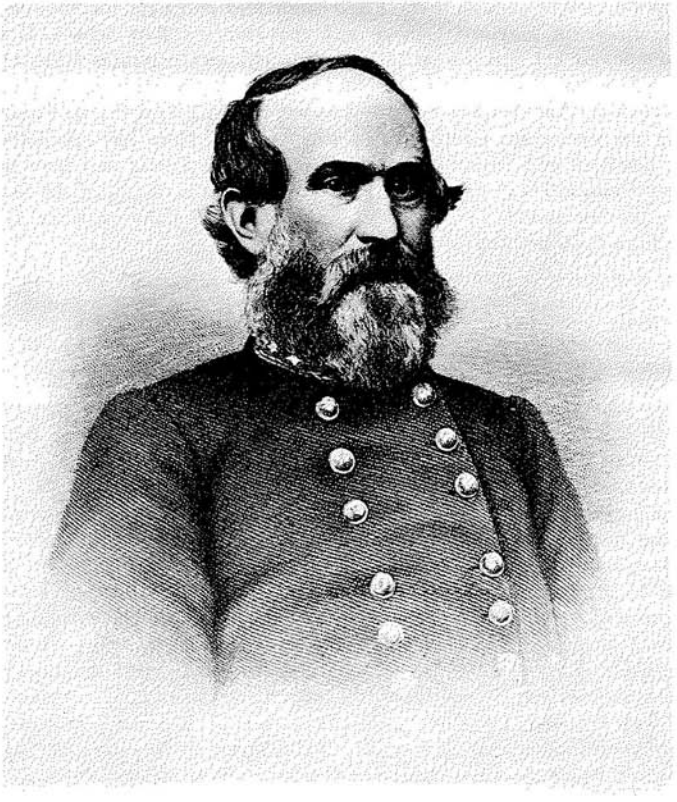


figure 18

Jubal Early: Virginia Attorney and Confederate Troop Leader

War. Professor Albert Taylor Bledsoe, as the first chief of the war office, was responsible for Departmental review of court-martial proceedings. An 1830 graduate of the United States Military Academy, Bledsoe was a cadet with Jefferson Davis and Robert E. Lee. For a time, he practiced law in Springfield, Illinois, in the same courts as Lincoln and Douglas, but succumbed to a desire for the profession of teaching and thereupon accepted a position at the University of Virginia. As a colonel in the Confederate Army, Bledsoe was sent to England at the outbreak of the Civil War to influence British opinion for the southern cause. His deep emotion and Confederate fervor were voiced long after the end of the war when he edited the *Southern Review*. As the fiery protagonist of a lost cause, his writings represented the attitudes of the unreconstructed southerner in the magazine dedicated to "the despised, disfranchised, and downtrodden people of the South."

John A. Campbell—Supreme Court Justice . . . and Other Confederate JA's

John A. Campbell of Alabama succeeded Albert Taylor Bledsoe as the head of military justice in the Confederate cabinet. A graduate of West Point and member of the Alabama bar, Campbell had achieved a nationwide reputation for his legal attainments by 1853. At the age of 42, he was appointed an associate justice of the United States Supreme Court by President Pierce. At the beginning of the war, Judge Campbell stepped down from his seat on the Court and took up the practice of law in New Orleans. Upon Bledsoe's resignation, Confederate Secretary of War Randolph prevailed upon Campbell to accept the War Office post. During his two and half years as the Assistant Secretary of War he paid special attention to the administration of conscription laws in addition to reviewing court-martial proceedings. Campbell was a member of the unsuccessful peace commission which met with Lincoln and Seward at Hampton Roads. After the war he founded a lucrative law practice and argued several notable cases before the Supreme Court.

Some other notable attorneys who wore the Confederate gray served the South as leaders of infantry and cavalry. A lawyer who practiced at Rocky Mount, Virginia, until the outbreak of the Civil War, Jubal A. Early reached the rank of lieutenant general and is most noted for his attempt to capture the Union capital at Washington. The "Gray Ghost," John Singleton Mosby, leader of partisan rangers and noted for his daring capture of General Stoughton and 100 others at the Fairfax Court house, acted as a judge and administrator of the Confederacy in Northern Virginia. After the war, he practiced law at Warrenton, Virginia, and served in the Department of Justice.

* * *

With a few modifications—none affecting the types of courts-martial—the Confederate Provisional Congress adopted the Articles of War and the Army Regulations of the United States to constitute the military law of the Confederate Army.

The jurisdiction of the courts-martial under the Articles of War extended to all officers and enlisted men in the service of the Confederate States, whether of the Regular Army, the Provisional Army, the Volunteers, or the Militia. The judge advocate, or some person deputed by him or the appointing authority, prosecuted in the name of the Confederate States, but in a limited sense he also represented the accused. He summoned the necessary witnesses, organized the courts-martial by swearing in the members of the court, and was then sworn in himself by the president of the court. When a prisoner refused to plead, the trial proceeded as if he pleaded not guilty. The accused had the right to challenge any member for cause. Witnesses were examined on oath or affirmation. Except in capital cases, the deposition of nonmilitary witnesses could be taken before a justice of the peace and read in evidence, provided both the prosecutor and the accused had due notice of the taking. The president of the court-martial conducted the court, speaking for it where the rule was prescribed by law, regulation, or its own resolution. He kept order and conducted

business, securing to all members equality in deliberation. In balloting, the voting began with the junior member and proceeded in inverse order of seniority. The findings and sentence in noncapital cases were fixed by a simple majority of the court; but concurrence of two thirds of the members was necessary to the imposition of the death penalty. Sentence was carried into effect upon approval of the proceedings by the appointing authority, save in cases affecting a general officer and, in time of peace only, affecting loss of life or commission. In the excepted cases, Presidential approval was required. The power to order sentences into execution carried with it power to pardon the offender or to mitigate the punishment.

Every court-martial was required to keep a complete and accurate record of each case. The proceedings had to show that the court was organized according to law; that the court and judge advocate were sworn in the presence of the accused; and that previously the accused had been interrogated and responded on the matter concerning any objection to members of the court. A copy of the appointing order was incorporated into the proceedings. No recommendation could be included in the body of the sentence. Only members concurring in the recommendations signed them. The evidence and documentary exhibits, properly identified, were stitched to the proceedings. The original copy, duly authenticated by the signatures of the president of the court and the judge advocate, were forwarded to the adjutant and inspector general of the Army, War Department, Richmond, Virginia, with the cover marked "Judge Advocate."

In the fall of 1862, General Lee recommended the establishment of a new type of military tribunal, a permanent court in each Army corps. An act passed by the Confederate Congress provided for the organization of one military court in each Army corps, to be composed of three judges with the rank of colonel and one judge advocate with the rank of captain. Jurisdiction of the courts extended to all offenses cognizable under the Rules and Articles of War, offenses proscribed by a law of the State or the Confederate States and to all offenses cognizable under the customs of war. Although the establishment of the permanent court system did not preclude appointment of courts-martial by proper authority, the tendency of the Confederate legislature was to vest exclusive jurisdiction over most crimes in the permanent courts.

President Jefferson Davis' selection of personnel for the military court system is worthy of note. While the judges were generally chosen for their judicial attainments, preference was given, as far as the range of choice permitted, to those who had been wounded

or disabled in the military service. Among the latter may be mentioned James Conner, member of the military court for the Second Army Corps of the Army of Northern Virginia. Conner had been wounded while commanding a brigade as a senior colonel in Ambrose P. Hill's division. In civilian life he was Confederate States attorney for the District of South Carolina.

Because of the import of the Civil War upon the American conscience, a development took place which would have as profound and lasting effect upon the other civilized nations of the world as the United States Constitution itself has had during the past two centuries. The unique experience of Americans fighting Americans, alienated not by economic status or class but rather by ideals and geography, brought about a keen awareness of the nature of a war now being visited upon relatives and fellow countrymen, rather than just upon a faceless "enemy." Thus, for the first time a need was felt for uniform guidance relating to the laws of war for the Army in the field.

Until that time there had been no uniform treatise to guide either commanders or men in the field. The Union Commander, General Halleck, called upon Dr. Francis Lieber, professor of international law at New York's Columbia Law School, to prepare guidance on the law of war. In 1862 Dr. Lieber responded with a treatise on guerrilla warfare. One year later, as principal draftsman on a five-member revision committee, Lieber devised new regulations on the usages of war—subsequently adopted by the United States as the *Instructions for the Government of Armies of the United States in the Field,* General Orders No. 100 (April 24, 1863).

* * *

DR. FRANCIS LIEBER: FATHER OF A JUDGE ADVOCATE GENERAL AND THE LAWS OF WAR

Ironically, the first attempt to codify the laws and usages of war for the guidance of the United States Army was made by an outcast of the Prussian autocracy. *The Instructions for the Government of Armies of the United States in the Field,* General Orders No. 100 (April 24, 1863) has become known as the Lieber Code in honor of its principal draftsman, Dr. Francis Lieber.

Francis Lieber was born in Berlin, Germany, on March 18, 1800. After receiving his Ph.D. from Jena in 1820 and a short participation in the Greek War of Independence, he was arrested in Berlin on charges of political disaffection. Upon the intercession of the Prussian Ambassador to Rome, he was released after a confinement of six months. In 1826 Lieber made his way secretly to England and then to the United States.

Shortly after his arrival in America, Lieber became a naturalized citizen and embarked on a career of distinguished accomplishment. He devised a plan for the publication of an encyclopedia and soon thereafter founded and edited the *Encyclopedia Americana* (1829–1833). His work brought him into contact with leading educators and lawyers and secured for him a position as Professor of History and Political Economy at South Carolina College (now the University of South Carolina). Later, from 1865 until his

death in 1872, Dr. Lieber taught international law, civil law and common law at the Columbia Law School in New York.

The American Civil War struck Lieber, as it did many Americans, as a personal tragedy. His three sons fought in the conflict: Oscar Montgomery Lieber eventually died of wounds received while fighting for the Confederacy; Hamilton Lieber, a Union Volunteer lost an arm at Fort Donelson. However, Guido Norman Lieber, who fought in the Union infantry, later served as the Army's Judge Advocate General.

Dr. Lieber's selection by General Halleck (himself a student of international law) proved to be a worthy one. As a preamble to his monumental work, Dr. Lieber wrote *Guerilla Parties Considered with Reference to the Laws and Usages of War.* The product of Secretary Stanton's revision group—composed of Lieber and Generals Cadwalader, Hartsuff, Hitchcock and Martindale—was transmitted to General Halleck on February 20, 1863, barely two months after the beginning of the project. The work of Lieber, with some additions and omissions by the "generals of the board" under the command of Major General Hitchcock, was adopted by the United States as the *Instructions for the Government of Armies of the United States in the Field,* General Orders No. 100 (April 24, 1863).

General Order No. 100—since known as the Lieber Code—consisted of 10 sections dealing with such topics as military necessity, retaliation, prisoners of war, hostages, spies, exchanges of prisoners, and flags of truce. Of special significance was the fact that the Lieber Code was not confined to the conflict which occasioned it—being generally adopted by the German government for the conduct of hostilities in the Franco-Prussian War. But most importantly, Dr. Lieber's classic legislation had a profound influence on the drafters of the Hague Convention of 1899 Respecting the Laws of War and, later, on the Hague Regulations of 1907.

The "Lieber Code" represented the first codification of the laws of war issued to a national army for its guidance and compliance.

* * *

Aside from advances in the formulation of laws of war, the Civil War brought a number of other changes in American military law. Until 1863, the Articles of War did not include common law crimes of violence unless they were prejudicial to "good order and military discipline." The Civil War Draft law of March 3, 1863, included what was to become Article of War 58 in the 1874 revision. It read:

> In time of war, insurrection, or rebellion, larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault and battery with an intent to kill, wounding, by shooting or stabbing, with an intent to commit murder, rape, or assault and battery with an intent to commit rape, shall be punishable by the sentence of a general court-martial, when committed by persons in the military service of the United States, and the punishment in any such case shall not be less than the punishment provided, for the like offence, by the laws

of the State, Territory, or District in which such offence may have been committed.

As the War of Rebellion wound down, two other historic trials received national attention. Judge Advocate General Holt and several of his Army lawyers, figured prominently in the Lincoln assassination trials, and the case against the commandant of the Confederate prison camp at Andersonville, Georgia.

* * *

THE LINCOLN ASSASSINATION TRIALS

In the spring of 1865, the shattered armies of the Confederacy were dissolving. Lee had surrendered to Grant at Appomattox on April 9, and though Joe Johnston and Kirby Smith were still holding out in the deep South, everyone knew that the Civil War was over. When General Grant arrived in Washington, Mrs. Abraham Lincoln arranged a theater party for the General and reserved boxes for the evening of April 14th at Ford Theater where *Our American Cousin* was playing. Although the Grants unexpectedly decided to go on to New Jersey, the Lincolns attended the play. During the third act, a man wearing a black slouch hat, dark clothing and spurred riding boots entered the theater and gained entrance to the President's box. Shortly thereafter, a pistol shot rang out. The intruder in black leapt from the balustrade to the stage landing heavily on and injuring his left foot, but was able to make his way into the wings. The audience was stunned and perhaps did not realize they had witnessed the assassination of Abraham Lincoln.

Less than a month later, eight of the suspected conspiratiors in the assassination of the President were brought to trial before a military commission. Ironically, the man who fired the fatal shot, John Wilkes Booth, never appeared in court—he had been pursued by federal troops to the farmlands of the lower Potomac and trapped in a burning barn of the Garrett farm where he died of gunshot wounds on April 26th. On May 9, 1865, the trial of the assassination conspirators began. Judge Advocate General Holt acted as prosecutor with his two able assistants Henry L. Burnett and John Bingham. As expected, the evidence presented against the conspirators Payne, Herold and Atzerodt left no doubt that they were doomed. Arnold, O'Laughlin and Spangler were less deeply implicated in the plot to kill the President. It appeared that Mrs. Surratt and Dr. Mudd stood a fair chance of receiving light sentences.

As in the other Civil War trials of civilians by military commission, the defense attorneys presented cogent arguments against the jurisdiction of the courts. However, the authority of the military body to convict civilians was not seriously considered by the federal courts or government legal officials until *Ex parte Milligan* was decided by the Supreme Court in 1866.

After the defense attorneys presented their case, Special Judge Advocate Bingham summed up for the prosecution. When he finished, the commission deliberated for two days and presented its findings and sentences. Herold, Payne and Atzerodt, accomplices in the murder, were sentenced to death. O'Laughlin, Arnold, and Dr. Mudd were sentenced to imprisonment at hard labor for life. Spangler got off with a six-year sentence. But what caused the greatest sensation was a death sentence for Mrs. Surratt. Five members of the commission signed a petition requesting the President to commute her sentence. What happened to this petition is the source of

figure 19

LINCOLN ASSASSINATION COMMISSION

much controversy. General Holt maintained that he delivered the petition for clemency to President Johnson who rejected it. Johnson later denied having seen it. In any case, the four prisoners condemned to death were hanged in the courtyard of the Old Penitentiary Building on July 7, 1865. Holt attempted throughout the remainder of his life to vindicate himself from Johnson's charge.

THE TRIAL OF HENRY WIRZ—ANDERSONVILLE COMMANDANT

Months before the last Union prisoner left Andersonville the Confederate prison camp had become the subject of bitter controversy. In the late summer and early fall of 1864 reports of cruelty to prisoners of war were widely circulated in the North. The northern press drew attention to accounts of horrible conditions and fictionalized stories of fiendish rebel guards who subjected prisoners to inhuman tortures. Soon the northern public and the Union Army clamored for revenge.

When the Civil War ended in 1865, the Commandant of the Andersonville camp elected to remain near the Georgia stockade with his family. Cognizant of the threat to his safety from those prisoners he had released,

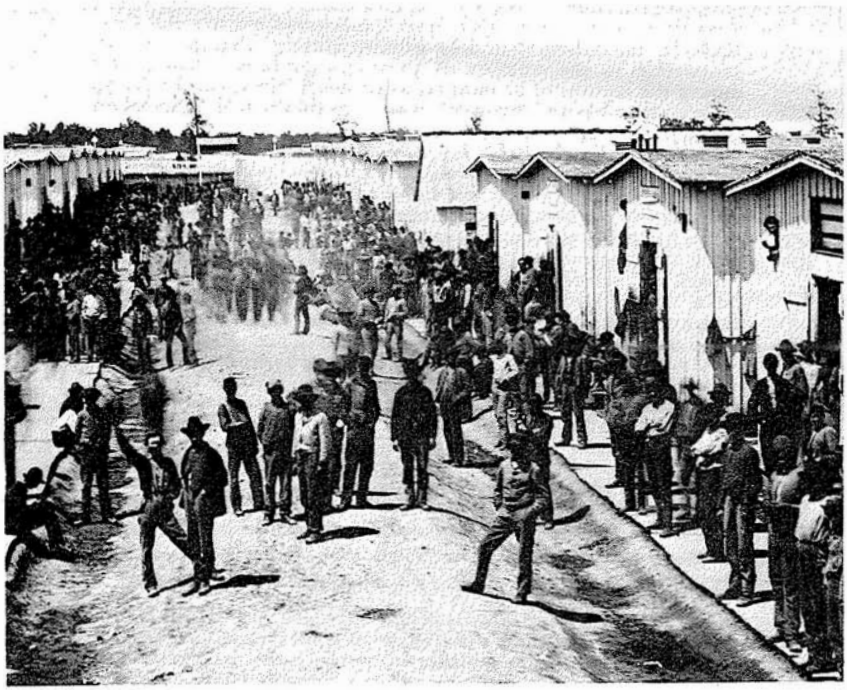


figure 20

The Andersonville Hell-Hole

Henry Wirz wrote to General James H. Wilson, the Union commander at nearby Macon, requesting protection. Wirz contended that he had acted under orders and should not be held accountable for the Andersonville tragedy. General Wilson responded by ordering Wirz's arrest. Captain Henry E. Noyes took Wirz to Washington where he was confined in the Old Capital Prison to await trial.

On August 23, 1865, a military commission convened for the trial of Captain Wirz. He was charged with conspiracy to "impair and injure the health and to destroy the lives . . . of large numbers of federal prisoners at Andersonville" and "murder, in violation of the laws and customs of war." General Lew Wallace (author of *Ben-Hur*) was appointed president of the commission and Colonel N. P. Chipman served as its judge advocate. At one point in the trial Colonel Chipman summed up the horror of prison life in Wirz's camp:

> The closest scrutiny of the immense record of this trial will show that, up to the very close of that prison, there were no steps taken by the rebel government, by General Winder, or by any of the officers of his staff clothed with proper authority, to alleviate in any material particular the great sufferings of that place. You will remember the uniform testimony of the medical officers, as

> well of the prisoners who remained there during the winter of 1864–65, that there was no perceptible change in the condition of the prison, and an examination of the hospital register will show that the mortality even was greater during that period, in proportion to the number of prisoners confined, than it was during the months of its most crowded condition. From the prison journal, kept by the prisoner himself, we find that in September, the mean number of prisoners being seventeen thousand, the deaths were two thousand seven hundred; in October, the mean strength being about six thousand seven hundred, the number of deaths was one thousand five hundred and sixty—nearly one out of every five; in November the mean strength being two thousand three hundred, the deaths were four hundred and eighty-five; while those who remained to the very close—till the prison was broken up, are described by General Wilson and others as having been "mere skeletons"—"shadows of men." Nor must it be forgotten that the marks of this cruelty were so indelibly stamped upon its victims, that thousands who survived are yet cripples, and will carry to their graves the evidence of the horrible treatment to which they were subjected. The surgeons of our Army who treated these shadows of men when they arrived within our lines at Jacksonville and Hilton Head tell you of hundreds who died before they could be resuscitated; of others permanently disabled; of others, on their partial recovery, being started upon their way homeward and being treated at Annapolis.

Henry Wirz was found guilty and sentenced to death by the commission. He was hanged on the 10th of November 1865. General Holt, in his report to the President on the trial, was later to comment:

> The annals of our race present nowhere and at no time a darker field of crime than that of Andersonville, and it is fortunate for the interests alike of public justice and of historic truth, that from this field the veil has been so faithfully and so completely lifted. All the horrors of this pandemonium of the rebellion are laid bare to us in the broad steady light of the testimony of some 150 witnesses who spoke what they had seen and heard and suffered, and whose evidence, given under oath and subjected to cross-examination and to every other test which human experience has devised for the ascertainment of truth, must be accepted as affording an immovable foundation for the sentence pronounced.

* * *

In 1866, the United States Supreme Court finally closed the door on a divisive wartime issue that extended back to John Fitzgerald Lee's days as Judge Advocate of the Army. In December of that year, the jurisdiction of the military commission was narrowly defined in the case of *Ex parte Milligan.* Prior to that ruling, military commissions had indiscriminately exercised jurisdiction over anyone when the various military departments were brought under martial law, and when the ordinary criminal jurisdiction of the state and federal courts was suspended, or the offense was not cognizable by the courts in session. The Supreme Court held that a citizen, not connected with the military and residing in a state where the courts were open and in the proper exercise of their jurisdiction, could not, even when the writ of

habeas corpus was suspended, be tried, convicted or sentenced other than by the ordinary courts of law.

* * *

THE INDIANA TREASON TRIALS

During the Civil War the rumors were constant and pervasive that there existed in the Northwest and in the border states secret societies. Such names as "Knights of Malta," "Circle of Honor," "*Corps de Belgique*" and "Knights of the Golden Circle" were heard. Their organization was loose but included much of the pro-Confederacy population. It included those who did not wish to fight for the South but opposed the abolition of slavery, the states' rights advocates, the opponents of the draft and a large number of the generally disaffected. As the movement mushroomed, the Administration grew panicky. It was widely believed that the Knights of the Golden Circle maintained a spy service for the South and had cooperated with Morgan in his raid into the Northwest.

In the *Chattanooga Daily Rebel* of March 13, 1863, there appeared a letter which set forth a plan for an alliance between the Confederacy and the states of the northern Mississippi Valley—it was indeed a plan for a Northwest Confederacy. Needless to say, the federal government was jittery. In January of 1862 Senator Hendricks of Indiana added fuel to the fire when he also threatened a Northwestern Confederacy. The plan was not beyond comprehension. Why should not the Northwest, dissociated from New England and the Atlantic Coast states by tradition and economics break away as a separate confederacy?

By mid-1864, a plot to prolong the war had been formulated by the Sons of Liberty. A simultaneous armed rebellion in the states of Illinois, Ohio, Indiana, Missouri and Kentucky was to take place on the Fourth of July, 1864. The plan was to seize the federal arsenals at Columbus, Ohio, at Indianapolis, Indiana, and at Chicago, Alton, and Rock Island, Illinois. Its next step called for the freeing of the Confederate prisoners in the camps at these places and—with the aide of the population—to march through the states, overthrow the state governments, and set up new provisional governments and so draw Sherman northward from the south. When the first plan was postponed due to the arrest of key conspiracy figures, the leaders decided that Chicago was to be the center of the uprising. With the Democratic National Convention in session on August 29, 1864, Clement Vallandigham was to be arrested after the delivery of an arousing speech thereby inciting the Confederate sympathizers to rebellion. But federal agents were alerted to the plot by their discovery that arms to be used in the uprising were being shipped from New York to Indianapolis as Sunday school books. Soon after, Harrison H. Dodd, Grand Commander of the Sons of Liberty in Indiana, was arrested by soldiers under the command of General Carrington. Among the other prisoners incarcerated at Indianapolis were William A. Bowles, Lambdin P. Milligan, Stephen Horsey, Andrew Humphreys, Horace Heffren, and T. A. Bingham. Secretary of War Stanton was resolved to strike terror into the hearts of the Northwest traitors and he ordered them to trial by military commission.

Accordingly, on September 17, 1864, Harrison H. Dodd was brought before a military commission at Indianapolis. But before judge advocate Major H. L. Burnett had finished with the prosecution, Dodd had let himself down from a window in the federal post office building and escaped to Canada. Major Burnett rested without introducing any further proof and the commission, headed by Brigadier General Silas Colgrove, after hearing

arguments by Dodd's counsel found Dodd guilty of treason and sentenced him to death.

The trial of the remaining five soon followed. The most dramatic part of this celebrated case came when Horace Heffren, who had stood as a defendant, took the stand as a witness for the prosecution. Unbeknownst to his attorney, Cyrus Dunham, Heffren turned against his four codefendants for a promise of immunity from Major Burnett. Heffren's subsequent testimony—relating to meetings of the Sons of Liberty, the plot to overthrow the Indiana state government and plans to hold Governor Morton hostage—deeply incriminated the remaining conspirators. In this proceeding, as in the Vallandigham case, Burnett was faced with the question of jurisdiction of the military commission. The ultimate question, resolved favorably to the government, was whether the power to suspend the writ of habeas corpus belonged to the President or to Congress. The commission then found Horsey, Milligan, Bowles and Humphreys guilty. Humphreys was paroled, but the other three were sentenced to death. It appeared that the three would receive executive clemency when, upon review of the sentencing, Lincoln remarked that "none of us want any more killing done." Unfortunately, the assassination of President Lincoln threw Andrew Johnson into the Presidency before final review was completed. Johnson had already made his position clear:

> I hold that robbery is a crime, that rape is a crime; treason is a crime and crime must be punished. Treason must be made infamous and traitors must be impoverished.

It was no surprise when General Order No. 27 was issued at Indianapolis on May 9, 1865, stating that each of the prisoners "will be hanged by the neck until he be dead on Friday, the 19th of May, 1865." Gallows were constructed and final preparations for the execution were completed when, three days before the appointed hour, Johnson commuted the sentences to life imprisonment. Although relieved by the reprieve, the prisoners petitioned the federal courts for a rehearing and shortly thereafter the United States Supreme Court heard the case of *Ex parte: In the Matter of Lambdin P. Milligan* now popularly known as *Ex parte Milligan.* This landmark decision, although frequently criticized for failing to deal directly with the problems of martial law, laid down the broad rule that the operation of the civil courts and the ordinary procedure of grand jury presentment and jury trial can at no time be rightly suspended unless the civilian government is paralyzed.

* * *

Congress, by the Act of March 2, 1867, answered the court in *Ex parte Milligan* by empowering district commanders to substitute in the rebel states, for the trial of *all* criminals, military commissions in the place of civil courts. A citizen of Texas, James Weaver, was tried under this authority by a military commission for murder, and sentenced to be hanged. At the time the local courts were in session and an indictment was pending against him before the state courts for the same offenses. The question as to the jurisdiction of the military commission was submitted to the Attorney General, who decided in the affirmative. He said,

> The rights of war do not necessarily terminate with the cessation of actual hostilities. I have no doubt that it is competent to the nation to retain the territory and the people which have once assumed a hostile and belligerent character, 'within the grasp of war' until the work of restoring the relations of peace can be accomplished, and that it is for Congress, the department of the national government to which the power to declare war is entrusted by the Constitution, to determine when the war has so far ended that the work can be safely and successfully completed.

The establishment of the Bureau of Military Justice, like much other legislation relating to the wartime staff and line of the Army, was continued in operation by a section of the Act of July 28, 1866, fixing the "Military Peace Establishment." Section 12 of the Act authorized the Bureau composition at ". . . one Judge Advocate General, with the rank, pay, and emoluments of a brigadier general, and one Assistant Judge Advocate General, with the rank, pay, and emoluments of a colonel of cavalry . . ." In regard to judge advocate officers, that same section (as amended by the Act of February 25, 1867) provided as follows:

> Of the Judge Advocates now in office there may be retained a number not exceeding ten, to be selected by the Secretary of War, who shall perform their duties under the direction of the Judge Advocate General.

This legislation gave these judge advocates the status of permanent officers of the Regular Army. The number of judge advocates was fixed at eight and the filling of vacancies was authorized by the Act of April 10, 1869.

In May of 1872, General Holt described the duties of his office thusly:

> These duties may be enumerated under five heads: 1. The review and revisal of, and reporting upon, cases tried by military courts, as well as the receipt and custody of the records of the same. 2. The reporting upon applications for pardon or clemency preferred by officers and soldiers sentenced by court-martial. 3. The furnishing of written opinions upon questions of law, claims, etc., referred to it by the Secretary of War, or by heads of bureaus, department commanders, etc., as well as in answer to letters from officers of courts-martial and others. 4. The framing of charges, and the acting by one of its officers, in cases of unusual importance, as

> judge advocate of military courts. 5. The direction of the officers of the corps of judge advocates . . .
>
> While the review, etc., of military records is specified in the statute law as the most conspicuous duty of the judge advocate general, this is not, in fact, his only important duty. . . . a leading part of these duties, certainly since the establishment of the office in 1862, has been the preparing and furnishing of *legal opinions* upon various subjects of military law and administration constantly arising in the War Department and in the Army. . . .
>
> Of the questions upon which opinions are given by the judge advocate general, some—often at his suggestion—are subsequently submitted to the Attorney General, but the great mass are at once acted upon by the Secretary of War.

These statements summarize the developments since 1849 and mark completion of the passage from predominantly prosecutorial duties to the threshhold of Total Legal Service.

V

The Classical Period of Military Law

This period has been delineated as much for developments in the military society generally as for its significance in the maturation of the Corps and the law it practiced. Congress reduced the Army's strength in 1874 to 25,000 men, despite its missions in Mexico (Maximillian's threat) the South (Reconstruction) and the West (the Indian Wars). The Army was appropriately described as a vast police force during the period because it was strung out in company and detachment-sized units along all the frontiers (10 regiments of cavalary were divided among 55 posts). This fragmentation caused training deficiencies, promotion stagnation and disorganization for which high prices would be paid in Cuba, China and the Phillipines over the turn of the century.

There were, however, bright spots. General, then President, Grant began efforts to reorganize the War Department and the Army. He was not completely successful, but was able to bring attention in Congress to the unworkable arrangement from Civil War days under which the Commanding General of the Army commanded the tactical troops, but the Secretary of War controlled all the services of supply and support. Also during this period the great Army schools system was begun, one cornerstone being the School of Application for Infantry and Cavalry at Fort Leavenworth, Kansas. Established in 1881, it became the U.S. Army Command and General Staff College, the fountain of Army doctrine and training ground for its senior commanders.

1874 was the year for a major revision and compilation of United States statutory law as the "Revised Statutes of the United States." That general work encompassed both a reorganization of the Army Staff and renewal of the Articles of War.

The Articles of 1806 had remained in force (except for minor amendments) for nearly 70 years—encompassing the War of 1812, the Mexican War, the Civil War and part of the Indian Wars. Although technically a formal revision of the Code, consisting of 128 articles, the Act of June 22d, 1874 was mainly a rearrangement and clarification of the 1806 enactment. Winthrop

tells us that the provision of 1806 authorizing the detailing of judge advocates as prosecutors was clarified by this simpler provision stating that "officers who appoint a court-martial shall be competent to appoint a judge advocate for the same." This provision established as law what had been not only construed as authority, but also as a requirement, for appointment of a judge advocate whenever a general court-martial was convened. (It took some five more years before the Article was applied with equal force to all levels of courts-martial.) This 1874 revision also gave legislative authority for another wartime tribunal—the field officer's court—which had been born between the time of the 1806 Code and this revision, and enacted into permanent law the 1863 Draft Act's extension of court-martial jurisdiction over "common law" offenses in time of war.

A day after the revision of the Articles, the Act of June 23, 1874, "reorganizing the several staff corps of the Army," declared:

> That the Bureau of Military Justice shall hereafter consist of one Judge Advocate General, with the rank, pay, and emoluments of a brigadier general, and the said Judge Advocate General shall receive, revise, and have recorded the proceedings of all courts-martial, courts of inquiry, and military commissions, and shall perform such other duties as have been heretofore performed by the Judge Advocate General of the Army. In the corps of Judge Advocates no appointment shall be made as vacancies occur until the number shall be reduced to four, which shall thereafter be the permanent number of the officers of that corps.

The practical effect of these restrictive provisions was to discontinue—after the term of the then incumbent—the office of Assistant Judge Advocate General which had been created in 1864 and was continuously occupied by William McKee Dunn. Colonel Dunn's incumbency as assistant ended when he succeeded Joseph Holt, who retired on December 1, 1875, after 13 years as Judge Advocate General.

* * *

BRIGADIER GENERAL WILLIAM MCKEE DUNN, JUDGE ADVOCATE GENERAL (1875–1881)

The seventh Judge Advocate General of the United States Army was Brigadier General William McKee Dunn, who succeeded Brigadier General Joseph Holt in 1875. General Dunn, a native of Hanover, Jefferson County, Indiana, received his college education at Indiana University. In 1835 he earned his A.M. from Yale University. Upon completing his education, Dunn entered the practice of law in Madison, Indiana, and later became an active participant in state politics. He represented his county in the state legislature and was a delegate to Indiana's State Constitutional Convention.

In 1859 he entered the national political scene, serving as a representative from Indiana to the United States Congress. During the 37th Congress General Dunn acted as Chairman of the Congressional Committee on Patents.

With the commencement of the Civil War, in addition to his political responsibilities, he served from June to August 1861, as aide-de-camp to General McClellan. The Congressional elections for the 38th Congress saw

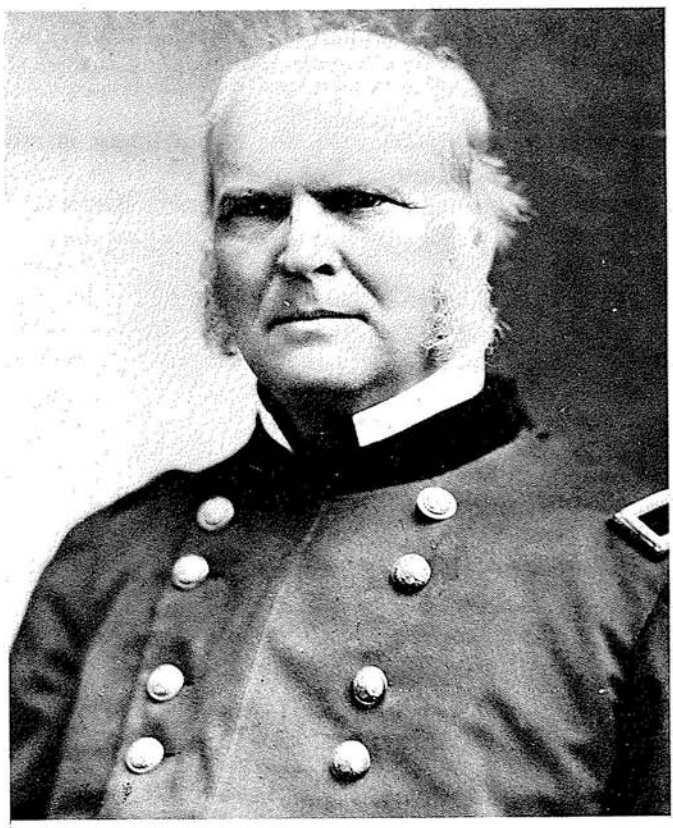


figure 21

William McKee Dunn: TJAG, Congressman and Chronicler of JAGD History

General Dunn lose his seat in the House, but President Lincoln, realizing him to be a capable leader, did not permit him to leave public life. The President ultimately appointed him a judge advocate in the expanding Judge Advocate General's Department. In June 1864, General Dunn was appointed Assistant Judge Advocate General with rank of lieutenant colonel, and at the close of the War he was breveted a brigadier general for his faithful, meritorious, and distinguished service.

After the War, Congress retained 10 of the 30 wartime judge advocates and the offices of Judge Advocate General and Assistant Judge Advocate General. General Dunn continued to serve as Assistant Judge Advocate General until he became Judge Advocate General in 1875. While in office, General Dunn wrote *A Sketch of the History and Duties of the Judge Advocate General's Department, United States Army (1876 & 1878)* which vividly portrayed the growth of the Department from the Revolutionary period to 1875 and included a statistical appendix listing the various statutes affecting the Department's strength.

By January 1881, General Dunn had completed 18 years of service in the United States Army. He retired to Fairfax County, Virginia, where he lived until his death in 1887.

* * *

During General Dunn's tenure, the Department strength was returned to the former figure of eight men, in 1878. It was Dunn who oversaw the inquiry into the massacre of General Custer's forces in the Dakotas and it was one of his subordinates—Colonel W. A. "Will" Graham—to whom we are indebted for much that is factual about both Custer and Reno. In addition to performing duties in the Bureau in connection with these events, Colonel Graham wrote two standard works, *The Custer Myth* and *The Battle of the Little Big Horn.*

* * *

THE RENO COURT OF INQUIRY

The Battle of the Little Big Horn, in which the popular and spectacular General George A. Custer, together with every officer and man of five companies of the 7th Cavalry were exterminated by hostile Indians, occurred on the 25th and 26th of June 1876. Few events in American history have more profoundly shocked the American people, or have caused more controversial discussion and debate. Almost immediately after news of the disaster reached the press and public, efforts to find the responsible parties were initiated in many quarters.

Failing in attempts to pin the blame on General Terry, who was in general charge of the operation, and on the morning of the 27th relieved the survivors of the regiment, Custer's partisans turned upon Major Marcus A. Reno, the regiment's second in command, and upon Captain Frederick W. Benteen, the senior captain, to both of whom were assigned three-company battalions on the 25th of June. Despite their desperate struggle some four miles distant from Custer's battlefield, Reno and Benteen were accused of cowardly failure to go to his relief. Reno's chief critic, Frederick Whittaker demanded that a court of inquiry be convened to settle the issue once and for all. When Major Reno concurred in the demand, a court was convened at Palmer House, Chicago, on the 13th of January 1879, to determine whether Reno's conduct at the Little Big Horn was cowardly or incompetent.

In an exchange with the recorder (acting judge advocate) First Lieutenent Jessee M. Lee, Reno testified as to his relations with General Custer:

> Q. The question is, did you go into that fight with feelings of confidence or distrust.
> A. My feelings toward Gen. Custer were friendly.

Q. I insist that the question shall be answered.
A. Well, sir, I had known Gen. Custer a long time; and I had no confidence in his ability as a soldier, I had known him all through the war.

Despite Reno's lack of confidence in his commander, the evidence tended to show that Major Reno was not guilty of cowardice. Judge Advocate General William McKee Dunn's report to the Secretary of War described the situation:

> The object of Gen. Custer in detaching Major Reno is shown to have been to attack the Indians simultaneously on opposite sides of their encampment or village. Their number appears to have been far greater than Gen. Custer imagined, and very far in excess

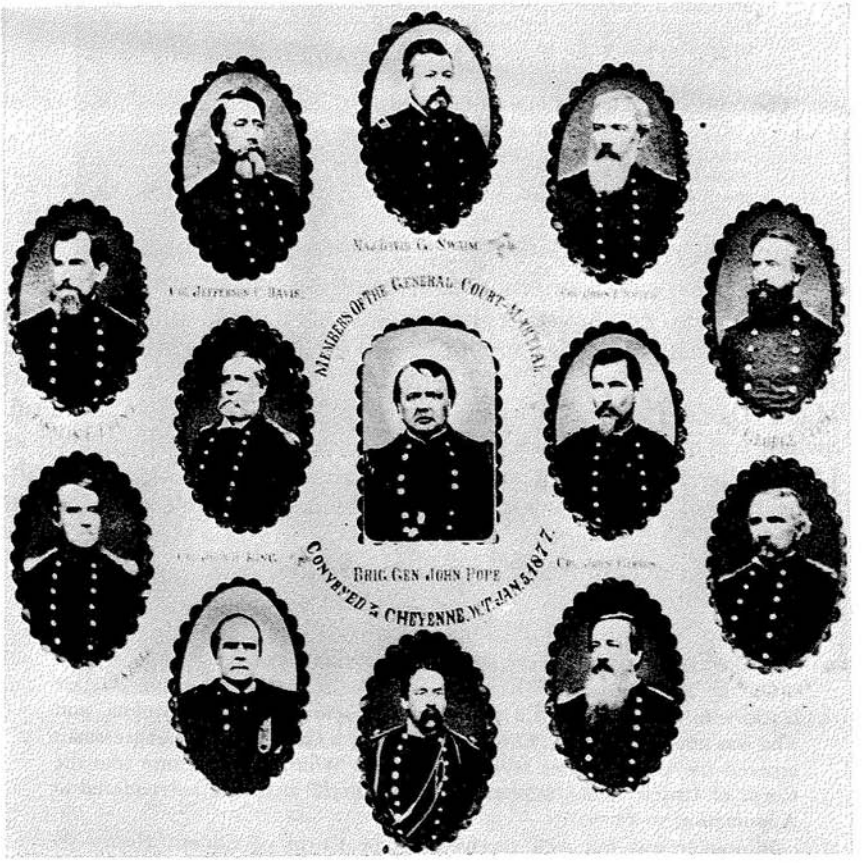


figure 22

THE RENO COURT OF INQUIRY MAY HAVE RESEMBLED THIS COMPOSITE OF A GENERAL COURT-MARTIAL FOR THE WYOMING TERRITORY IN 1877 WHICH INCLUDED FUTURE TJAG SWAIM AND CIVIL WAR GENERAL JOHN POPE

of the force under his command. On Major Reno arriving within striking distance, he appears to have attacked at once, but being met by overwhelming numbers, was compelled to fall rapidly back and intrench himself on the summit of a hill a short distance from the battle field. This hill was four and a half miles by measurement from the point at which Gen. Custer lost his life. Faint firing from the direction of Custer's command was heard by some, but not by all, of Major Reno's detachment. But the testimony makes it quite clear that no one belonging to that detachment imagined the possibility of the destruction of Gen. Custer's troops, nor, had this idea suggested itself, does it seem to have been at any time within their power, fighting as they were for life under the attack of a body of Indians vastly outnumbering them, to go to his assistance. The common feeling was at the time one of anger with Gen. Custer for sending them into so dangerous a position and apparently abandoning them to their fate. The suspicion or accusation that Gen. Custer owed his death and the destruction of his command to the failure of Major Reno, through incompetency or cowardice, to go to his relief, is considered as set at rest by the testimony taken before the present court.

The court of inquiry did indeed find that:

> The conduct of the officers throughout was excellent and while subordinates in some instances did more for the safety of the command by brilliant displays of courage than did Major Reno, there was nothing in his conduct which requires animadversion from this Court.

* * *

Judge Advocate General Dunn retired on January 22d, 1881. As there was no Assistant Judge Advocate General during this period, the senior office member served briefly as Acting Judge Advocate General until President Hayes selected fellow Ohioan Major David G. Swaim to be the new Judge Advocate General. Swaim was not a wartime judge advocate, but previously served as JA of the Department of the Missouri at Fort Leavenworth, Kansas. And it was not long before Swaim's legal talents were put to the test in the review of one of the more celebrated race-related court decisions since the days of Dred Scott.

* * *

THE COURT-MARTIAL OF WEST POINT CADET WHITTAKER

On the 23d of August 1876, Johnson Chestnut Whittaker, one-quarter black, who had been born a slave 18 years before in South Carolina, and who was nominated to the Corps of Cadets by a Carpetbagger Congressman entered the United States Military Academy. Whittaker's entrance into the Corps of Cadets came 11 years and five months after Lee surrendered at Appomattox.

Whittaker was not well received by the Corps of Cadets. Henry O. Flipper, at the time a second classman, but destined to become West Point's first black graduate, had been under silence since his entrance. Whittaker, the plebe, found himself Flipper's roommate and, like him, ostracized. He was soon in more immediate difficulty himself, after being struck during a quarrel with a white cadet. Rather than fighting back, Whittaker reported his assailant to the Superintendent, and the white cadet was suspended. Thereafter, Whittaker was held in disdain by the Corps. One morning in the spring of 1880, Whittaker was discovered lying on the floor of his room

in his underwear, apparently unconscious. His hands were bound in front of him; his feet tied to the bedrail; blood was on his face, neck, ears, and feet; his earlobes were slashed; and swatches of his hair had been hacked out. His alcove was littered with shards of mirror, tufts of hair, half-burned pieces of paper, and small pools of water.

figure 23

JOHNSON CHESTUNT WHITTAKER

Whittaker explained that during the previous night he had been attacked by three masked men who half strangled him, sliced his earlobes, and hacked his hair. His attackers, he went on, had bound his hands and feet and had left with the warning, "Cry out, or speak of this affair, and you are a dead man." Fearful of calling for help, Whittaker continued, he struggled for some minutes then fell unconscious.

It was the Commandant's opinion that Whittaker had mutilated himself, bound his own hands and feet, faked the state of unconsciousness and even

written himself a threatening letter. The Superintendent called Whittaker before him and asked him to refute the Commandant's findings. Whittaker demanded a court of inquiry.

Thus began a two-year legal process; a military court of inquiry appointed by the Superintendent was followed by a general court-martial convened at the order of President Rutherford B. Hayes—the whole lasting from April of 1880 until July of the following year. The court of inquiry was composed of Academy faculty members. The press corps was also there in force, for Whittaker had become front page news even before the hearing began.

During the inquiry, two diametrically opposed scenarios of the mysterious affair were put forward, that of the "prosecution" and that of Whittaker himself. The prosecutor contended that the black cadet, fearful of being found delinquent in his final examinations, and counting on a ground swell of public opinion in his favor which would assure his commissioning despite any academic shortcomings, had cleverly staged the whole business. He urged that the cadet be brought before a general court-martial on dual charges of conduct unbecoming a cadet and of perjury. Meanwhile, Whittaker's contentions held firmly to the elements of the three masked assailants (the inference being clear enough that they were cadets) and to the idea that the grotesque punishment they had visited upon him demonstrated the virulence of the feeling against him, a repugnance and enmity of which his silencing and social ostracism were but lesser manifestations. The arguments on both sides emphasized two aspects of the case: whether or not Whittaker had written the warning note himself and whether or not his state of unconsciousness when found was genuine, or had been cleverly feigned. At the close of the inquiry, the very tribunal which Whittaker had asked to clear him ended by finding against him. Whittaker was placed in quarters arrest and dropped almost immediately from the public's attention.

On the 20th of January 1881, the court-martial of Cadet Whittaker opened. On hand to represent Whittaker was Daniel H. Chamberlain, a successful New York lawyer. He was Massachusetts born, a graduate of Yale and of the Harvard Law School, and an officer of the 5th Massachusetts Colored Cavalry who had been nourished his whole life on abolitionist principles. A postwar resident of South Carolina, he was once its governor (1874–1876). On the government side stood Major Asa Bird Gardiner. As a captain of the New York Militia in the Civil War he had won the Medal of Honor, and, in 1873, by then an officer of the Judge Advocate General's Department, had organized West Point's Department of Law. General Nelson Miles took the chair as president of the court.

An extended trial began on February 3d and lasted until June. The proceedings generated some 9,000 pages of testimony, but were little more than a rehash of the court of inquiry—with even more longwinded, elaborate, and conflicting testimony from handwriting "experts." Throughout the proceedings Gardiner, seeking to highlight inconsistencies in the black cadet's story, showed himself an insistent and dogged questioner of Whittaker. The young black, on his part, responded with what seemed to observers to be "careful evasiveness." Chamberlain was at his best in arguing that Whittaker had no convincing motive for mutilating himself; that he had been in no real danger of academic dismissal. The New York lawyer was persuasive in arguing that Gardiner had failed to prove his case and that the burden of proof lay upon him, not upon the defense. It was by no means sufficient, Chamberlain maintained, merely to show that Whittaker could

have staged the whole affair. What was necessary was proof that he indeed had done so.

On 10 June the court announced its decision. With some changes in the charges and specifications as originally written, Whittaker was found guilty of self-mutilation, of himself writing the threatening note, but not guilty of the charge that he had done these things to bring discredit upon West Point and escape the June examination. The court sentenced him to be dishonorably discharged, to be fined $1.00 and to be confined at hard labor for a year. General Miles and five others of the court urged clemency in light of Whittaker's youth and inexperience. Six months later, the Judge Advocate General, David Swaim, in a review of the case for Secretary of War Robert Todd Lincoln, demolished the Army's case—holding that the court-martial was illegal.

In March of 1882, President Chester A. Arthur reviewed Whittaker's case. In briefs submitted to the President, the Attorney General and Judge Advocate General Swaim cited probable errors in the court-martial proceedings due to the admission at trial of certain letters written by Whittaker and used as handwriting evidence. President Arthur concurred and the case was thrown out on legal grounds. Secretary of War Lincoln, however, ordered Whittaker's dismissal from the Military Academy on grounds of academic deficiency.

* * *

While Swaim's action in the Whittaker case demonstrated the growing appellate function of the office of Judge Advocate General, the true test of Swaim's personal legal acumen came in 1884. It was then, because of alleged improprieties in his conduct of a business transaction, that he himself faced court-martial charges. Swaim was prosecuted by one of his own subordinates—Major Asa Bird Gardiner—and ultimately was found guilty.

* * *

THE COURT-MARTIAL OF A JUDGE ADVOCATE GENERAL: BRIGADIER GENERAL DAVID G. SWAIM

On February 18, 1881, President Rutherford B. Hayes appointed Major David G. Swaim Judge Advocate General of the Army. Less than a year later, General Swaim concluded the financial agreement with Bateman and Company, bankers and stockbrokers, which led to the trial of the Army's highest ranking lawyer. On the 16th of April 1884, A. E. Batemen referred a dispute with Swaim over a "due-bill" to the Secretary of War, charging Swaim with fraud and conduct unbecoming an officer in that he had negotiated Bateman's bill knowing that the amount of the bill was not due him. When confronted with Bateman's accusations, Swaim replied to the Secretary that the due-bill was a negotiable promissory note according to all the authorities on the subject, and was transferred in due course of business and payment demanded, but refused. With regard to a second charge of complicity in the assignment of Army pay accounts as security for a personal debt of one Lieutenant Colonel Narrow, Swaim claimed that:

> It will be seen that I had no concern or interest in these pay accounts whatever, and all I did was the friendly act of introducing a brother officer to those who were in the habit of doing what I could not do for him. I have no knowledge of any other pay account transaction with Bateman & Co.

The Secretary was not persuaded by Swaim's argument, and after a court

of inquiry confirmed that there was sufficient evidence to proceed with a trial, he ordered General Swaim before a court-martial. The final list of court members reads much as an Army's *Who's Who:* Major General John M. Schofield, Superintendent of the Military Academy during the Whittaker incident in 1881 and now president of the court; Brigadier General Alfred H. Terry, Custer's commander at the time of the Battle of Little Big Horn; Brigadier General Nelson A. Miles, who became Commanding General of the Army in 1888; Brigadier General William B. Rochester, the Paymaster General; Brigadier General Samuel B. Holabird, the Quartermaster General for whom Fort Holabird was named; Brigadier General Robert Murray, the Surgeon General; Brigadier General John Newton, the Chief of Engineers; and six colonels. In addition, on September 15, 1884, Major Asa Bird Gardiner, still the most famous Army lawyer of the time in spite of his rebuke by Swaim for the court-martial of black West Point Cadet Whittaker, was appointed as judge advocate to prosecute the case. The firm of Shellabarger and Wilson and General Charles H. Grosvenor of Ohio represented General Swaim, with Judge Shellabarger as chief counsel.

Two charges were made against General Swaim according to Captain William Robie's account in the *Military Law Review.* The first charged him with "conduct unbecoming an officer and a gentleman in violation of the 61st Article of War." Article 61 stated that "any officer who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service." Four specifications were noted claiming: (1) fraud against Bateman and Company by assignment of the due bill to Bright, Hunphrey and Company for collection; (2) an attempt by Swaim to prevent any official inquiry into Bateman's original charges by getting Bateman to write another letter to Secretary of War Lincoln withdrawing the charges; (3) an evasive, uncandid and false reply by Swaim to the Secretary's request for an explanation of Bateman's charge, which reply was intended to deceive the Secretary; and (4) threats by Swaim to use his official position to cause the dismissal of Colonel A. P. Morrow from the Army, thus jeopardizing repayment of loans to Morrow from a group of bankers and brokers, if that group did not pay a claim Swaim had against Morrow in the amount of $115.

The second charge against General Swaim was "neglect of duty, in violation of the 62d Article of War." The substance of the accusation was that Swaim failed to report the facts concerning Colonel Morrow's dealings with Army pay accounts to the proper authorities once they were known to him.

The trial, which convened on the 15th of November 1884, opened with an attack by the defense on the jurisdiction of the court. Counsel for the accused argued that only Swaim's commanding officer, Lieutenant General Sheridan, the Commanding General of Army, then had the authority to convene the court. Major Gardiner, as the judge advocate, contended that the Secretary of War's power to appoint courts-martial derived from the Chief Executive's inherent powers as Commander-in-Chief of the armed forces. Upon Gardiner's presentation of 12 prominent cases convened by the President through the Secretary of War, the court rejected Swaim's attack on the court's jurisdiction.

After 52 days of trial time, the court reached its verdict. Swaim was found guilty only of conduct to the prejudice of good order and military discipline stemming from the assignment of the due-bill and his misleading response to the Secretary. He was sentenced to suspension from rank, duty and pay for three years. However, President Chester A. Arthur was less than

figure 24

DAVID G. SWAIM WAS COURT-MARTIALED WHILE JUDGE ADVOCATE GENERAL

satisfied with the results of the case. Noting inconsistencies between the sentence and the findings of the court, the President twice returned the case to the court for revision. Accordingly, on February 16, 1885, the court met and adjusted the sentence to suspension from "rank and duty for twelve years and to forfeit one half his monthly pay every month for the same period." President Arthur's reluctant approval of this final sentence is worthy of note:

EXECUTIVE MANSION: February 24, 1885.

The opinion of the President as to the proper consequence of the findings of fact made by the court in the within record has already been given, and no further comment will be made upon the final sentence than to say that it is difficult to understand how the court could be willing to have the officer tried retained as a pensioner upon the Army register while it expressed its sense of his unfitness to perform the duties of his important office by the

imposition of two different sentences, under either of which he would be deprived permanently of his functions. The idea that an office like that of Judge-Advocate General should remain vacant to effect for twelve years, merely to save a part of its emoluments to its incumbent under such circumstances, would seem to come from an inversion of the proper relation of public offices and those holding them, and is an idea not suited to our institutions.

While holding the views now and heretofore expressed, it is deemed to be for the public interest that the proceedings in this case be not without result, and therefore the proceedings, findings, and sentence in the foregoing case of Brigadier-General David G. Swaim, Judge Advocate-General, United States Army, are approved, and the sentence will be duly executed.

CHESTER A. ARTHUR

During the next 10 years Swaim sought vindication through administrative channels and the courts. However, it was not until December 3, 1894, that the unexecuted portion of Swaim's sentence was remitted and he was consequently retired on the 22nd of December of that year.

figure 25

ASA BIRD GARDINER

ASA BIRD GARDINER--ADVOCATE AND WAR HERO

The descendant of a colonial family which settled in America in 1638, Asa Bird Gardiner studied law at New York University, and was admitted to the bar in 1860. At the outbreak of the Civil War he relinquished his legal practice and assisted in recruiting a regiment of Volunteers. As a first lieutenant he first served in the field in Virginia in a skirmish at Fairfax Court House. As a captain he led the advance of the Army of the Susquehanna with a company of Volunteers from Sporting Hill, Pennsylvania to Carlisle. He was wounded in the bombardment of Carlisle by J. E. B. Stuart's command. In 1863—before becoming a judge advocate officer—he was awarded the nation's highest honor for valor in combat when he received the Medal of Honor for his actions at the Battle of Gettysburg.

In 1873 Gardiner was appointed a judge advocate, United States Army, with the rank of major, by President Ulysses S. Grant. In 1878 he represented the government in the retrial of Major General Fitz-John Porter. He served as president of the military commission which investigated the summary execution of 22 Union soldiers by the Confederate commanding general in Ohio. Gardiner conducted the successful defense of Sergeant James Clark, 23d U.S. Infantry, charged with the murder of a military convict. In the court of inquiry investigating the conduct of General G. K. Warren at Gravelly Run and Five Forks, he represented General Grant and General Sheridan as counsel. As counsel for the War Department, he was involved in six cases of great importance before the Court of Claims concerned with the validity of adverse decisions by the Treasury Department. In 1870, as a member of an Army board, Colonel Gardiner went to Canada to investigate the military prison discipline of the British Army. Gardiner also prosecuted the court-martial of Cadet Whittaker, the black West Pointer, and had the distinction of conducting the case against his immediate superior, Judge Advocate General Brigadier General David G. Swaim for dubious financial transactions.

Aside from obvious achievements as an advocate, Asa Bird Gardiner published several works in the field of military law: *Jurisdiction and Powers of the United States and State Courts in Reference to Writs of Habeas Corpus as Affecting the Army and Navy (1867); Evidence and Practice in Military Courts (1875); Practical Forms for Use in Court-Martial and Remarks as to Procedure* (1876). Gardiner was elected District Attorney of New York City in 1897, and held that office until 1900 when he resumed the private practice of law.

* * *

As a result of Swaim's court-martial he was suspended from rank and duty for a period of 12 years. The unexecuted portion of his sentence was ultimately remitted on December 3, 1894, and he was retired 19 days later. In at least one way the sting of Swaim's sentence was felt as keenly by his assistant, Colonel Guido Normal Lieber of New York, who served as Acting Judge Advocate General with neither commensurate rank nor pay from July 22, 1884, until January 11, 1895.

In the midst of the Swaim troubles the Bureau of Military Justice and the Corps of Judge Advocates were, by the Act of July 5, 1884, consolidated under the title of the Judge Advocate General's Department—to consist of: one Judge Advocate General with the rank, pay and allowances of a brigadier general; one

Assistant Judge Advocate General with the rank, pay and allowances of a colonel; three Deputy Judge Advocate Generals, with the rank, pay and allowances of majors. Under the same Act the Secretary of War was authorized to detail such number of line officers as might be necessary to serve as acting judge advocate of military departments, with rank, pay and allowances of captains of cavalry.

While Acting Judge Advocate General, Lieber not only worked for a lower salary, he also had to fend off continued Congressional criticism of the Department's very existence. Although General Dunn's 1876 and 1878 "sketches" of the history and duties of the Judge Advocate General's Department had served as extremely helpful lobbying vehicles, eight years later the calls for reform were sounded again. One particular Ohio representative was quite vocal, stating in 1886 for the *Congressional Record:*

> . . . there is not in all the laws of the United States a more fruitful source of the violation of all principles of law, constitutional and statutory, than the machinery of this Judge Advocate General's office . . . I can point to a half dozen records in the Judge Advocate General's Department, where by the advice of the Judge Advocate General and by the solemn judgment of the courts-martial acting under that advice, every principle of legal protection guaranteed to us by the Constitution and every principle which is taught in the books . . . has been overruled and trodden under foot; I condemn . . . the whole system by which military law is administered; I condemn the system which permits the organization of the courts, by which the Secretary . . . can pack a court to execute his personal vengeance . . . I care not who invented it, the system is pernicious and outrageous . . . I say this Judge Advocate General's Department is an excrescence upon the Army. . . .

Those remarks were followed by a motion which, if adopted, would have abolished the Department. The vote was 93 to 89 in favor of retention. And so, by the narrow margin of four votes, the Judge Advocate General's Department continued to march into the 20th Century.

Colonel Lieber accepted the appointment as *de jure* Judge Advocate General on the 11th of January 1895.

* * *

G. Norman Lieber: Acting Judge Advocate General (1884–1895), Judge Advocate General (1895–1901)

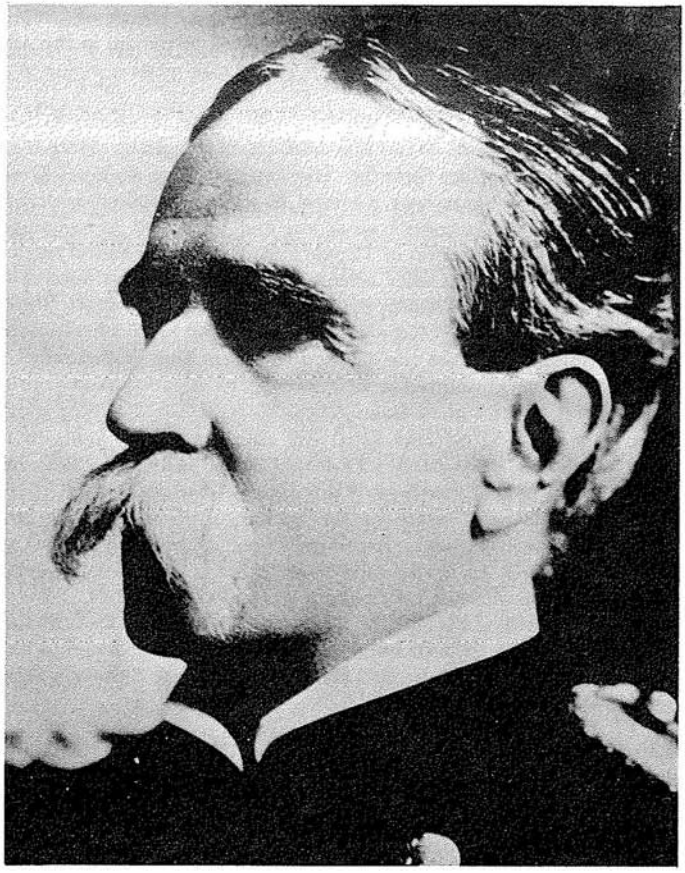


figure 26

Guido Norman Lieber: Civil War Hero and Author of Notable Works on Military Law

Guido Norman Lieber was born in Columbia, South Carolina, on May 21, 1837, the son of Dr. Francis Lieber, celebrated author of the "Lieber Code." He was graduated from South Carolina College in 1856 and received his LL.B. from Harvard Law School in 1858.

After admission to the New York bar, he practiced until the outbreak of the Civil War. In 1861 he was commissioned a first lieutenant in the 11th U.S. Infantry, Regular Army. He remained an infantry officer for a year and a half, serving with McClellan during the Peninsular Campaign. On June 27, 1862, he was breveted a captain for his "gallant and meritorious service" in the Battle of Gaines Mill. Captain Lieber also served at the Second Battle of Bull Run.

In November of 1862 he was offered an appointment as a judge advocate of Volunteers. Lieber accepted the position and was appointed as a major. On May 28, 1864, Major Lieber was decorated again for "gallant and

meritorious service" for the Red River Campaign in Louisiana. He received the brevet rank of lieutenant colonel of Volunteers in March of 1865 for faithful service during the War of Rebellion. Electing to remain in the Army after the war, the future Judge Advocate General was made a major in the Regular Army in 1867.

In 1881, the Judge Advocate General of the Army, Brigadier General McKee Dunn, retired, and Major David G. Swaim was promoted and appointed Judge Advocate General. His assistant was Colonel Guido Norman Lieber. Three years later, General Swaim was court-martialed for improper conduct in a business transaction and sentenced to suspension from rank and duty for a period of 12 years. While General Swaim retained the title, thereafter Colonel Lieber actually performed all the duties of the Judge Advocate General and was appointed Acting Judge Advocate General in 1884. In December of 1894 the remaining portion of General Swaim's sentence was remitted, and he was allowed to retire. Shortly thereafter, G. Norman Lieber was appointed a brigadier general and named Judge Advocate General of the United States Army.

General Lieber retired on May 21, 1901, after serving 40 years in the Army, 16 of which were as head of the Judge Advocate General's Department, the longest tenure held by any Judge Advocate General

General Lieber is well known as the author of *Remarks on the Army Regulations* (1898, perhaps better known as *Lieber on Army Regulations*) and *The Use of the Army in Aid of the Civil Power* (1898). In addition, General Lieber published several articles on military law and related fields.

G. Norman Lieber died on April 25, 1923, in Washington, D. C.: he was 85. His excellent library of both history and military law continues to serve the Corps as a part of the library of The Judge Advocate General's School in Charlottesville, Virginia.

* * *

Several amendments were made to the Code of 1874. Of importance, on September 27, 1890, punishment "left to the discretion of the court-martial" was eliminated, it being provided instead that such punishment "shall not, in time of peace, be in excess of a limit which the President may prescribe." An Executive Order embodying a table of maximum punishments followed on the 16th of February, 1891. Winthrop emphasized that this Act applied only to enlisted persons and grew from a general dissatisfaction with the variations in sentences for desertion. The summary court-martial was established on the 1st of October 1890, to try cases in time of peace then cognizable by garrison or regimental courts. An accused was permitted to object to trial by summary court, in which event he could be tried by a regimental or garrison court. Amendments in 1892 stated that no court-martial sentence was to be carried into execution until approved by the officer who ordered the court, or the officer commanding at that time. No sentence by a field officer detailed to try soldiers of his regiment was to be carried into execution until approved by the brigade commander, or—in case there was no brigade commander—by the commanding officer of the post or camp. It was further set out that when the court-martial sat in closed

session, the judge advocate was to withdraw; and when his legal advice or assistance in referring to recorded evidence was required, it would be obtained in open court.

Readers of the foregoing text and vignettes of celebrated 18th and 19th century Army courts-martial undoubtedly have noted that as the Judge Advocate General's Department prepared to enter the 20th century many of the safeguards found in today's court-martial system were still not present.

One of the primary reasons for this phenomenon was that, in the thinking of the period, the court-martial was not actually a judicial body, but, instead, an executive agency. In *Dynes v. Hoover*, 61 U.S. (10 How.) 65 (1857), the Supreme Court had held that military courts were not part of the federal judiciary under Article III, but merely agencies of the Executive under Articles I and II. It was therefore felt that constitutional limitations placed upon the federal courts were not applicable to the military tribunal. The significance of *Dynes* and other cases of the period was central to one of the great controversies in the literature about military jurisprudence. The *Harvard Law Review* in 1957 and 1958 contained articles by Gordon Henderson and Frederick Bernays Wiener which stated exhaustive views on the constitutional history and issues involved.

During the period from 1869 to 1883, William Tecumseh Sherman had served as Commanding General of the Army. Remembered for his enunciation of the infernal nature of warfare, he had definite ideas about military justice as well. Sherman was trained in the law, and in 1879 told a Congressional committee that:

> I agree that it will be a grave error if by negligence we permit the military law to become emasculated by allowing lawyers to inject into it the principles derived from their practice in the civil courts, which belong to a totally different system of jurisprudence.
>
> The object of the civil law is to secure to every human being in a community all the liberty, security, and happiness possible, consistent with the safety of all. The object of military law is to govern armies composed of strong men, so as to be capable of exercising the largest measure of force at the will of the nation.
>
> These objects are as wide apart as the poles, and each requires its own separate system of laws, statute and common. An army is a collection of armed men obliged to obey one man. Every enactment, every change of rules which impairs the principle weakens the

> army, impairs its values, and defeats the very object of its existence. All the traditions of civil lawyers are antagonistic to this vital principle, and military men must meet them on the threshold of discussion, else armies will become demoralized by engrafting on our code their deductions from civil practice.

By today's standards the procedural shortcomings of the court-martial system were several—but as will be seen, most of these gaps were closed by later Congressional enactments. The function of the Judge Advocate General as supervisor of the system and the trend toward engrafting the safeguards of civilian practice onto military procedures were, however, fixed by this time. The rest was but a question of "how much".

Most of the crimes in successive enactments of the Articles of War had been listed without any attempt to define the elements of the offense. The essential elements, such as intent and act required, were matters derived from custom. It is interesting to scan the 25th chapter of Winthrop's *Military Law* for its reference to the Code of Gustavus Adolphus, etc. As noted, there was no statutory maximum penalty for any crime, except for a limitation as to the death penalty—and punishments before 1890 were imposed under the statutory language: "shall be punished as a court-martial may direct".

The court-martial process was begun by the preferral of charges by an officer, not necessarily the commander of the accused. There was no early right to an independent pretrial investigation recognized in the Army because the Fifth Amendment specifically excepted cases arising in the land or naval forces from the right to grand jury indictment. However, by the late 19th century Army regulations required the post commander or the commander of a unit in the field to, upon receipt of charges, "make such personal investigation as is sufficient to satisfy him (a) whether the case is one in which a trial is necessary to the interests of discipline; [and] (b) if such trial is believed by him to be necessary, whether the evidence in support of the charges is such as to warrant a conviction".

The court-martial was considered a command function and the commander was expected to use it to maintain order and discipline. There was a three-tiered hierarchy of courts which could be convened at different command levels. Each court-martial type had restrictions on the punishment it could impose, and on the rank of the officer empowered to assemble it as "convening authority". The hierarchy of courts permitted subordinate commanders to discipline their own men, allowing higher

courts-martial to be used only when a subordinate commander had sent the case up his chain of command, or a superior commander wanted a court-martial of higher degree.

The commander's role in military jurisprudence was pervasive: all court-martial functions were carried out by him through his subordinates. The commander made the determination whether to court-martial, appointed all court-martial personnel (including the court and counsel), oversaw the administration of the trial and reviewed the decision and sentence. As "appointing authority" the commanding officer selected the court members from among the officers under his command with no real restriction on the method of selection used (originally only line officers could be appointed, with such officers as surgeons and chaplains excluded; later in this century, the selection process was expanded to allow all commissioned officers to serve, but not enlisted men). There was no set number of court members—only a minimum number was required. The commander had the power to remove or replace court members, even during trial, so long as the number never fell below the minimum.

There was no judge in a court-martial. The traditional judicial functions were divided among the prosecutor-judge advocate, the senior court member-president, and the court members themselves. The president oversaw the trial, while the judge advocate carried out many administrative and the remainder of the judicial duties such as the swearing in of witnesses and advising the court as to legal matters. The court itself determined all issues arising during the trial, such as motions for continuance, objections to the competency of a witness or the admissibility of evidence—usually voting secretly on such matters.

The nature of a court-martial trial was somewhat different from its civilian counterpart. There were few rules of evidence as we know them today. The court members took an active role in the trial, at times questioning the accused and witnesses, recalling witnesses, and calling upon the judge advocate to have any uncalled individual ordered to testify as a witness. The decision of the court was not announced since it was only considered final after examination by the appointing authority in his capacity as "reviewing authority"—and he had the power, even in instances of acquittal, to return the case and require the court to deliberate for a different verdict or a different sentence. The commander as reviewing authority provided the only available post-trial examination of a record in peacetime except in those cases involving a sentence of dismissal of an officer, death, or those involving generals, where it was provided that the sentence should not be executed without the confirmation of the President.

The growth of military law toward conformity with civilian practice by custom and regulation, as well as by statute, is nowhere better exemplified than in the development of the accused's right to counsel before courts-martial. Early 19th century writers such as McArthur in England and Benet in the United States were quite clear about the accused's very limited "privilege" to have counsel present with him in court. He had a privilege to have counsel present, but it did not include permission to speak! However, by the middle of the classical period Winthrop could say that an accused's request to have counsel present would be acceded to "as a matter of course" whether counsel was military or not and whether a professional person or not. In fact, Government Order 29 of 1890 required commanders to appoint "a suitable officer" as counsel upon request in general court cases.

The old rule—Winthrop called it *humiliating*—which permitted counsel to be present but not to speak, had by this time been largely abandoned and custom permitted counsel to engage freely in the examination of witnesses or argument. The reality of this custom may be observed in territorial orders cited by Winthrop which contained criticisms of counsel detailed under Government Order 29 for "perfunctory or indifferent" performance of their duties. In such cases, says Winthrop, it was proper for the court-martial to recess and petition the appointing authority for replacement.

These, generally, were the conditions of the Army and its justice system as the armed forces were about to be thrust into their role in the overseas expansion of the United States.

Appointment of Volunteer officers for the war with Spain was authorized by the Act of April 22, 1898. That legislation provided that each Army corps should have a judge advocate with the rank of lieutenant colonel. A total of 21 judge advocates comprised the Department during the Spanish-American War.

Less than a year later, the Act of March 2, 1899 resulted in a slight temporary expansion of the Department by authorizing the retention in service of five judge advocates of Volunteers with the rank of major. Another section of that Act stated that "no person in civil life shall hereafter be appointed a judge advocate . . . until he shall have passed satisfactorily such examination as to his moral, mental, and physical qualifications as may be prescribed by the President, and no such person shall be appointed who is more than forty-four years of age . . ."

Congress continued its practice of prescribing manning levels in detail, for the Department. The Act of February 2, 1901, set the strength at one brigadier general as Judge Advocate General, two colonels, three lieutenant colonels, six majors, and one acting

judge advocate with the rank and pay of captain, mounted, "for each geographical department or tactical division not provided with a judge advocate" commissioned in the Department. The acting judge advocate's tour of duty was four years, and he could not be reappointed without serving two years with the arm in which he was permanently commissioned.

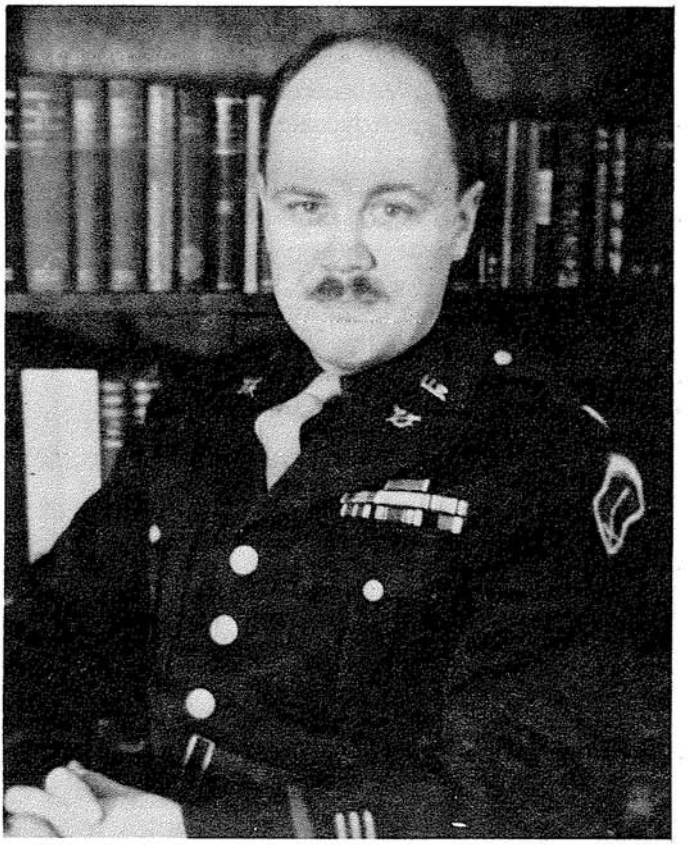


figure 27

COLONEL WILLIAM F. FRATCHER (JAGC, RET.), NOTED LAW PROFESSOR, WAS CORPS HISTORIAN DURING WORLD WAR II

Colonel William F. Fratcher, a World War II member of the Department, was also its Historian. He and a predecessor, Colonel Allen M. Burdett, have left us careful accounts of the early periods and some intriguing sidelights on the Army and the Corps before World War II. One such concerned "the year of the generals." The retirement of General Lieber as Judge Advocate

General on May 21, 1901, was followed by the appointment, in rapid succession, of the two senior colonels in the Department: Thomas F. Barr and John W. Clous. Colonel Barr, a judge advocate since 1865 and Assistant Judge Advocate General for the previous six years, was appointed Judge Advocate General on May 21, 1901, only to retire as a brigadier general the next day. He was succeeded that same day—the 22d of May, 1901—by Colonel Clous, a German native who had enlisted as a private in 1857 and been a judge advocate since 1886. Clous had also served as a brigadier general of Volunteers in 1898 and 1899. He retained the office of Judge Advocate General for two days and retired on May 24, 1901. The reasoning behind this rapid succession of short-term Judge Advocate Generals is found in a publication by Secretary of War Elihu Root entitled *Papers Colonial and Military* wherein it was suggested that the old Civil War veterans should be given a farewell present of the next higher rank, contingent upon their promising to retire the next day in order to prevent a cluttering up of promotions. This suggestion was followed by the various departments of the General Staff and consequently the list of retired generals became so overburdened that Congress finally took action in 1906 by passing a bill to prevent the practice.

* * *

BRIGADIER GENERAL THOMAS F. BARR

Thomas F. Barr was appointed Judge Advocate General on May 21, 1901. Born in West Cambridge, Massachusetts, November 18, 1837, he received his education at Lowell, Massachusetts, where he studied law and was admitted to the bar in 1859. He entered the Army as a major and judge advocate early in 1865 and, during the next 36 years of service, passed through the intervening grades to that of brigadier general. He served as Deputy Judge Advocate General; as Assistant Judge Advocate General; as Commissioner of the United States Military Prison, Fort Leavenworth, Kansas, for some 21 years; and as Military Secretary under four different Secretaries of War. His duties as "Military Secretary" consisted primarily in acting as a personal adviser to the Secretary of War on military matters.

General Barr played a significant role in several important military trials of the day, including those of General Innis N. Palmer, Major Marcus Reno, Major Charles Throckmorton and Captain Oberlin Carter. General Barr served only a single day as the Judge Advocate General, retiring on May 22, 1901. The short period of service as Judge Advocate General was a farewell gift for the Civil War veteran who had been so long in the service of his country.

BRIGADIER GENERAL JOHN W. CLOUS

Like his predecessor as Judge Advocate General, John W. Clous served an inordinately short period of time in the office—from May 22 to May 24, 1901. He was born in Germany on June 9, 1837, and his early German studies included a course in civil law. He came to America in 1855, and in 1857, when only 19 years of age, he enlisted in the Regular Army of the

United States. Clous remained in the military service for over 44 years. He spent almost six years as an enlisted man and served in the line for nearly 30 years until he was appointed a major, judge advocate, in 1886. While serving in the line, he finished his law studies and was admitted to the bar and to practice before the United States Supreme Court. He was twice brevetted for gallant conduct at the Battle of Gettysburg; earned distinction for gallantry in the Indian campaigns; and served as a brigadier general of Volunteers during the Spanish-American War. He was Secretary and Recorder of the Commission for the Evacuation of Cuba, and was judge advocate of many important courts-martial. He also served as Deputy Judge Advocate General prior to his appointment as Judge Advocate General.

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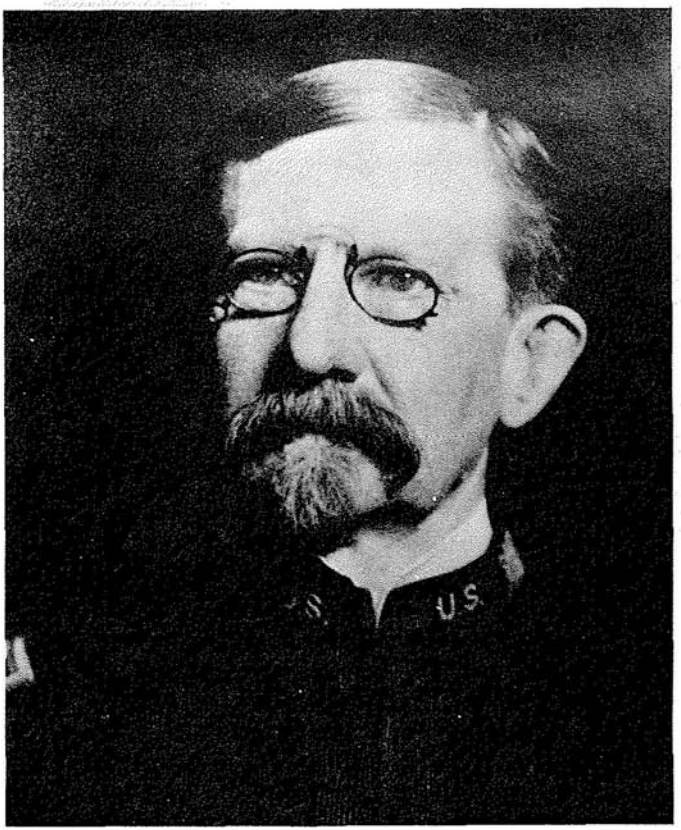

figure 28

Thomas F. Barr Was TJAG for One Day

The Judge Advocate General's Department under G. Norman Lieber included a number of noteworthy military lawyers and scholars. Among them were included: Lucien Francis Burpee, a

staff officer for Generals Miles and Wilson during the Spanish-American War, who later commanded the Connecticut State Guard at the rank of major general; Captain William E.

figure 29

JOHN W. CLOUS: GERMAN IMMIGRANT, GETTYSBURG HERO AND TJAG FOR TWO DAYS

Birkhimer, acting judge advocate of the Department of the Columbia, who wrote the authoritative text, *Military Government and Martial Law* in 1892; and Captain Arthur Murray, acting judge advocate in the Missouri Department, whose 1889 "Instructions" were expanded into a court-martial manual printed commercially under his own name. Murray's work later became the first official *Manual for Courts-Martial* and was published by the War Department in 1895.

* * *

"THE MURRAY MANUAL"

The first *Manual for Courts-Martial* was actually an adaptation of the author's earlier work, the "Instructions for Courts Martial and Judge Advocates," prepared by Captain Arthur Murray, Acting Judge Advocate for the Department of Missouri, and promulgated as Circular No. 8, July 11, 1889, at Department Headquarters, Fort Leavenworth, Kansas. Captain Murray deserves special recognition for his efforts in view of the fact that the adoption of his work effectively deprived him of any royalties as author (until 1960 the government could not be sued in the Court of Claims for infringement of copyright).

Murray was originally commissioned as an artillery lieutenant in June 1874. Frederick Bernays Weiner tells us that because Murray possessed a rather large family he sought and in 1887 obtained an appointment as Acting Judge Advocate which entitled him to the rank, pay and allowances of a captain, mounted (an increase of some $5000 in his annual salary). During the early days after his appointment as a judge advocate he wrote his "Instructions."

At the time the only authoritative sources of military law were Colonel Winthrop's 1886 *Military Law* and his successive *Digests of Opinions of the Judge Advocate General*. Murray made little pretense of writing more than a handy source of legal guidance for the line officer called upon to prepare charges or serve at a court-martial. He quoted liberally from Winthrop, Army regulations, and other source materials of the day. However, his "Instructions" were expanded into the official manual on the subject and published by the War Department in 1895 as a "Manual for Courts-Martial, prepared under the supervision of the Judge-Advocate General by First Lieutenant ARTHUR MURRAY, First Artillery."

The practice of military law as revealed by the first *Manual* was quick, somewhat stern and strictly paternalistic. While tolerating minor infractions, it indicated a degree of intolerance of legal niceties. There was little attention paid to the "rights" of the accused, but the work evidenced a fierce devotion to obtaining *justice*. According to the Murray *Manual* the judge advocate was a busy man by today's standards, performing duties as legal adviser to the court, prosecutor and, as far as necessary, individual defense counsel. The judge advocate's legal opinion was rendered only when asked for. The *Manual* contained no formal discussion of evidence and only a few brief notes on credibility, competency and proof of intent. The author advised that the court should follow as far as possible the evidentiary rules of the criminal courts of the United States—but that since members were not versed in legal science they should not be overly concerned with technicalities. There was a Table of Maximum Punishments, but reference was made to an 1864 General Court Martial Order which stated: "Should the court, for any reason, adjudge a milder sentence than is usually awarded for a like offence, the reason for doing so should be stated, lest the punishment appear inadequate to the offence and *an example set.*"

Yet, the first *Manual* served its purpose, and guided generations of unnamed officers through the struggle of trying to see military justice done. Murray's work served as the prototype of every *Manual* issued during the next 15 years (1901, 1905, 1907, 1908, 1909, 1910). All were pocket-sized books with small type, similar in size and style to the many other manuals on infantry drill, mess operation, construction of railroads, and other military subjects. The *Manual* was published in a somewhat enlarged version in 1917, but was not basically changed until Colonel Wigmore revised it in 1921 to

reflect the substantial changes in the Articles of War that were enacted in the previous year.

The author of this progenitor *Manual* continued his distinguished military career in other areas as well, later becoming a chief of artillery with the grade of brigadier general and a major general commanding the Western Department.

* * *

Great events may fade in the memory and the deeds of great men go unnoticed without a poet to immortalize them. Military law has spawned few poets, but its classical period owes as much to a scribbler as to the events and deeds which marked it. Perhaps the single most important figure of this era—and the entire 19th century—was Colonel William Woolsey Winthrop.

* * *

COLONEL WILLIAM WINTHROP

In an *American Bar Association Journal* article entitled "Colonel William Winthrop: The Tradition of the Military Lawyer," future TJAG—then Major George S. Prugh described Winthrop's life "like a Wagnerian opera" through which ran several constant themes.

> The first of these themes describes him as a man taking part in the great American transition, from the minor key of the struggling nation just before the Civil War to the hopeful crescendo closing the Spanish-American War and opening the new century. Flushed with the sudden realization of its importance, its flexing muscles giving notice to all the world of its great new powers, the United States by 1899, when Winthrop died, had just completed a half century of the most amazing progress known to the history of the world. Insignificantly, unaware that he, too, had a part in the making of that progress, Winthrop had moved along with the score until the twentieth century was just in sight.
>
> The second theme is a steady one—it recounts the story of the loyal public servant; the devoted, nose-to-the-grindstone, day-to-day plugger, who bows to the routine of his profession, but never loses sight of his larger purpose.
>
> The third theme is the tragic one—Winthrop's fate always to be the "also-ran," forever the "Indian" and never the "chief."

William Woolsey Winthrop was born August 3, 1831, in New Haven, Connecticut. Before he reached the age of 20 he received his A.B. degree from hometown Yale University. Two years later, in 1853, he was awarded a law degree from Yale's law school. Winthrop spent the following year at Harvard doing graduate studies. In 1855 he entered the private practice of law in Boston. Later, he practiced in what is now Minneapolis, and then moved on to New York City to set up law offices with a Yale classmate.

When Fort Sumter fell on April 13, 1861, President Lincoln called for 75,000 volunteers. Four days later William Winthrop and his older brother enrolled as privates in Company F of the 7th Regiment, New York State Military. Within two days they were marching to Washington; within three months Winthrop's brother was dead. Although Winthrop's short-term enlistment expired, he was offered his brother's command and a commission as captain, but declined "out of respect for the feelings of his mother." However, by fall he began raising a new volunteer organization, Company H, 1st U.S. Sharpshooters, in which he served as a first lieutenant. On

September 22, 1862, Lieutenant Winthrop was promoted to captain for gallant conduct in the field resulting in him being wounded several times and nearly forcing him to leave the service as a result. He thereafter took a position as Brigadier General J. J. Bartlett's aide-de-camp. At the suggestion of Major General Hitchcock, Winthrop was assigned to duty in the Judge Advocate General's office, serving with a newly-gathered group of some 33 judge advocate officers. From this collection of talented young lawyers came five Judge Advocates General of the Army, a Navy Judge Advocate General, two Congressmen, a reporter for the U.S. Supreme Court, a noted legal scholar and property authority, and several other famous practioners.

figure 30

AUTHOR OF THE UNPARALLELED *MILITARY LAW AND PRECEDENTS*, COLONEL WILLIAM WINTHROP

In 1863 Captain Winthrop reported for duty in the Washington office, at that time as judge advocate for the Department of the Susquehanna. One of the initial assignments of his near-20 years which followed in the D.C. office was as action officer on the legislation designed to create the Bureau of Military Justice. Apparently one of the two planned colonelcies was to go to

Winthrop upon passage of the bill, but the finally-approved legislation provided for only one colonel/assistant—and that position went to another officer. However, all other JA officers were authorized the grade of major, and Winthrop accepted a commission as major of Volunteers on the 24th of September 1864. Some six months thereafter, Winthrop was given two brevet promotions on the same date—March 13, 1865—for his faithful and meritorious service in the field. And when the War Between the States had ended, Winthrop was a brevet colonel of Volunteers, still serving as a JA major in Washington.

Major Winthrop became a Regular Army officer in February of 1867. After assisting in the revision of the 1806 Articles of War—finally enacted in 1874—he completed and published a translation of the Military Penal Code for the German Empire. During the next several years, Winthrop began work on one of his first treatises, *Military Law*, was married at the age of 46, and made two unsuccessful efforts at correcting the status of his brevet rank from Volunteer to Regular Army.

During the years which followed the War, Major Winthrop published a multitude of works contributing to the development of military law. The first of his two most lasting contributions was his *Digest of Opinions of the Judge Advocate General,* a volume of 136 pages, published by the Government Printing Office in 1865. A second edition, increased to 252 pages, appeared in 1866, and a third edition of 393 pages (the first to bear Major Winthrop's name on the title page) was published in 1868. The first annotated edition of the *Digest* was issued in 1880 containing over 600 pages of text and a preface in which Winthrop explained that the notes were taken from memoranda which he had compiled for personal use over a period of 15 years.

Upon the retirement of Judge Advocate General Dunn, it was William Winthrop who President Hayes appointed as Acting Judge Advocate General of the Army. This was Winthrop's closest brush with the Judge Advocate Generalship, for, 16 days later, Major David G. Swaim, five years junior in service to Winthrop, was appointed the new Judge Advocate General.

Within months, Winthrop was given a California assignment with the Department of the Pacific, although his transfer was delayed nearly a half-year due to the ill health of his wife. The west coast transfer proved a distinct handicap for an author in need of archives and records that only Washington could offer. But the 1884 court-martial of Judge Advocate General Swaim created an upheaval in the Bureau of Military Justice which signalled for Winthrop a long-sought promotion and his ultimate reassignment back east. The elevation of Norman Lieber to the post of Acting Judge Advocate General brought Winthrop's appointment as Deputy Judge Advocate General and with it—after 17 years in grade—the rank of lieutenant colonel. Winthrop's permanent return to the east coast was still some two years away, but his new status did allow him to take leave to Washington in between to put the final touches on *Military Law.*

When published in 1886, the two-volume work represented 10 years of laborious research. It was dedicated to Winthrop's former chief, Judge Advocate General Joseph Holt. The author described it in a letter of November 10, 1885, to Secretary of War Endicott:

> My object in the extended work prepared by me is to supply to the body of the public law of the United States a contribution never yet made. My book is a *law book*, written by me in my

> capacity of a lawyer even more than in that of a military officer: and the reception which my previous work [the *Digest*] has met with from the bar and the judges, encourages me to believe that my present complete treatise will be still more favorably appreciated.

In August of 1886 Winthrop and his wife departed California for an assignment at West Point where he was to serve as professor of law for the next four academic years. Once there he began work on an *Abridgment of Military Law*, which came out in its first edition in 1887. Winthrop returned to Washington duties in May of 1890, assuming the functions of deputy to Acting Judge Advocate General Lieber. His *Abridgment* was updated and a second edition was published three years later.

It was finally in 1894 that the unexecuted portion of General David Swaim's sentence was remitted and he was allowed to retire. With the appointment of a new Judge Advocate General now imminent, William Winthrop, with retirement nearing, was a likely prospect for the position. Judge M.F. Morris of the District of Columbia Court of Appeals wrote to President Cleveland suggesting Winthrop as a candidate, but the position instead went to Lieber–Winthrop's senior by two years–who had served long and hard as Acting Judge Advocate General without the commensurate rank. Winthrop was promoted to colonel and Assistant Judge Advocate General on January 23, 1895, after almost 34 years of loyal service. Eight months later, on the 3d of August, he was retired from the Army.

Shortly after his retirement, Winthrop's most lasting contribution to the military law went to press. In the years that had followed the publication of *Military Law* Winthrop had spent endless hours to complete the annotation and modernization of his work. Called *Military Law and Precedents,* this monumental treatise was a masterpiece of painstaking scholarship, brilliant erudition and lucid prose. Winthrop remembered the earlier support that Judge Morris had given him by dedicating the work to the distinguished jurist. It collected for the first time in one work the precedents which constituted the framework of military law gleaned from a mass of statutes, regulations, orders and unpublished opinions. What Lord Chief Justice Sir Edward Coke did through his *Reports* and *Institutes* for the common law, Colonel William Winthrop did through his *Digest* and *Military Law and Precedents* for military law.

William Woolsey Winthrop died on the 8th of April 1899 in Atlantic City, New Jersey. Two days later the Washington papers carried the story. Yet, as noted in TJAG Prugh's account, "[e]ven in his death, Winthrop had been overshadowed by events outside of his control, for on April 9, Justice Stephen J. Field had expired in Washington and the papers were filled with material concerning that colorful judge who had established the record for the longest term on the Supreme Court." Winthrop's death notice was tucked away in a small column on an inside page on the *Washington Evening Star* near an ad for a local department store. No mention was made of Winthrop's *Military Law and Precedents* which, (although originally spurned by the Army in favor of its first authoritative manual for courts-martial) became *the* classic work on American military law, reprinted twice thereafter at government expense.

The preservation and organization of more than a century's worth of military jurisprudence was Winthrop's immediate contribution to the Judge Advocate General's Corps, and that alone would have assured him an

honored place in this history. His work did more, however; it began a tradition of careful legal scholarship for all military attorneys and provided the impetus for a continuing stream of information and instruction from OTJAG to "the field." His several digests were the progenitors of modern equivalents in worldwide use.

* * *

VI

New Responsibilities and New Articles of War

Colonel George B. Davis, a West Point graduate who spent some 17 years as a cavalryman, became Judge Advocate General on May 24, 1901, and served in that office for the following 10 years. Davis authored several legal treatises and was a noted scholar of international law. He represented the United States at the seminal Geneva Conferences of 1903 and 1906 and the Hague Conference of 1907 on the law of war.

* * *

MAJOR GENERAL GEORGE B. DAVIS, JUDGE ADVOCATE GENERAL (1901–1911)

George Breckenridge Davis was born in Ware, Massachusetts, on February 14, 1847. In 1863, at age 16, he finished high school and enlisted in the 1st Massachusetts Volunteer Cavalry. As a cavalryman and later a second lieutenant of Volunteers, he participated in 25 battles and engagements during the War Between the States. Appointed to the United States Military Academy two years after the war, Davis graduated in 1871, was commissioned a second lieutenant of the 5th U.S. Cavalry, and spent the next two years on the Wyoming and Arizona frontiers with the 5th Cavalry. His next tour was at West Point, where he served for five years as Assistant Professor of Spanish, also teaching French, geology, chemistry and mineralogy.

Promotion to first lieutenant in 1878 brought with it another five-year tour on the Western frontier. The return to West Point in 1883 gave Davis a chance to head the History Department as Principal Assistant Professor, and to serve as Assistant Professor of Law, instructing also in geography and ethics. During this tour he completed his *Outline of International Law.* Simultaneously with his promotion, Captain Davis was rotated to the Western Territory in August 1888. Only four months later, however, Davis' professional abilities were recognized and required in Washington. He was appointed a major, Judge Advocate General's Department, and transferred to the Office of the Secretary of War. Davis took advantage of the Washington tour to obtain his LL.B. and LL.M. degrees at Columbian (now George Washington University) Law School. He was promoted to lieutenant colonel and Deputy Judge Advocate General in 1895, but left Washington the next year to serve as Professor of Law at West Point.

It was during the next few years that Davis completed his major publications. *Elements of Law and Elements of International Law* (1897) was followed by his definitive *Treatise on Military Law of the United States* in 1898. In addition, Davis authored several historical and professional works on the tactical use of cavalry.

Davis was promoted to colonel in 1901. A few months later he became a brigadier general and Judge Advocate General—a post he was to occupy for a decade. During his tenure as Judge Advocate General, Davis represented the United States as Delegate Plenipotentiary to the Geneva Conferences of 1903 and 1906, and the Hague Conference of 1907.

On February 14, 1911, General Davis retired with a promotion to major general. He died on December 16, 1914.

* * *

It was during Davis' term of office as Judge Advocate General that certain events in Brownsville, Texas, again spotlighted the American system of military justice for the rest of the nation.

* * *

THE BROWNSVILLE INCIDENT

The "Brownsville Affray," as it is commonly known, occurred on the night of August 13, 1906, in Brownsville, Texas. Some 16 to 20 unidentified black soldiers of Companies B, C, and D, of the 1st Battalion, 25th United States

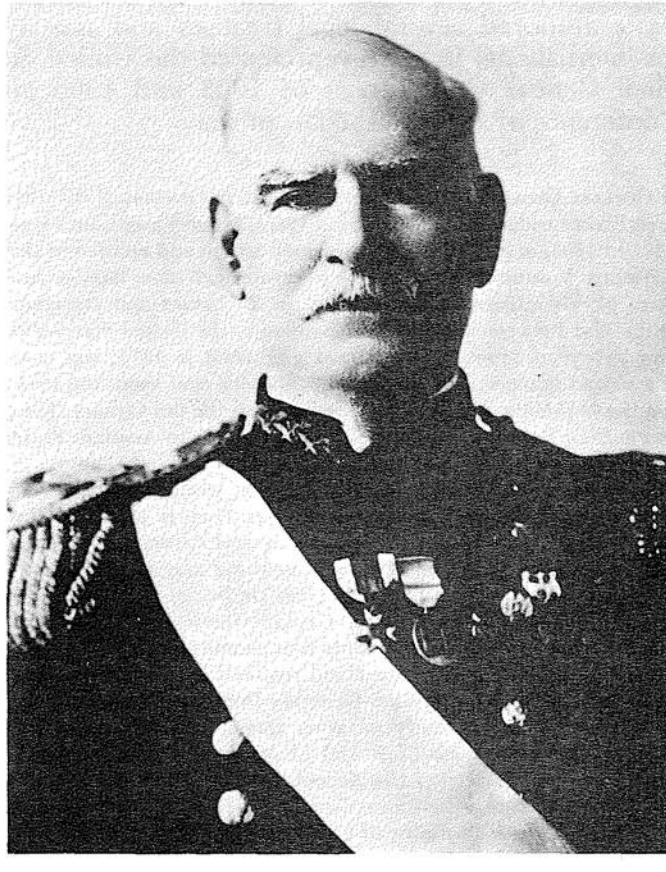

figure 31

GEORGE B. DAVIS

Infantry, left their Army garrison near Brownsville and ran amuck through the town firing into homes and stores. One townsman was killed and two were wounded, one of whom was Brownsville's lieutenant of police. The incident apparently was precipitated by racial tension between the townspeople and the black units which had recently arrived at nearby Fort Brown. In the two weeks prior to the affray there were several incidents involving white townspeople and the black troopers. The incident was immediately investigated by the commanding officer of the 25th Infantry, Major Charles Penrose. He concluded that, although the specific raiders could not be identified and none would come forward to admit guilt, the raid was definitely perpetrated by members of his command. On August 18, 1906, Major Augustus Blockson investigated the matter for the Inspector General's Office of the Department of Texas. Companies B, C, and D were immediately removed to Fort Reno, Oklahoma. In September of 1906, the incident was again investigated by Lieutenant Colonel Leonard A. Loverling of the Inspector General's Office, 4th Infantry, and by the Cameron County Grand Jury sitting in Brownsville, In October, Brigadier General Ernest A. Carlinton, the Inspector General of the Army, visited Companies B, C, and D at Fort Reno and further investigated the matter. The finding of each Army investigation was that certain members of Companies B, C, and D raided and fired upon the town of Brownsville. The grand jury, however, returned no indictments. None of the members of the specific units ever came forward either to identify themselves as participants, or to offer any evidence—or to incriminate any of the other members of the units. Each investigating officer recommended to the Secretary of War that all of the men in Companies B, C, and D be discharged without honor from the Army. On November 9, 1906, by direction of President Theodore Roosevelt, Special Orders Number 266, War Department, discharged 167 members of Companies B, C, and D, 25th Infantry, from the Army without honor and forever barred them from re-enlisting in the armed forces, as well as from employment in any civil capacity under the government.

The controversial Special Orders Number 266 touched off a public outcry and heated debate in the United States Senate. In December of 1906, Major Blockson and Assistant United States Attorney Milton D. Purdy reinvestigated the matter on behalf of the War Department. In a message to the Senate on January 14, 1907, President Roosevelt reaffirmed the discharges made by Special Orders Number 266, but revoked that portion of the order which barred the discharged members from civil employment under the government. He again called on those discharged to come forward and identify the guilty parties.

In February of 1907, Major Penrose, the commanding officer of the 25th Infantry, was tried by general court-martial on two counts of neglect of duty (failure to take proper measures to prevent the affray, and failure to detect the perpetrators), and he was acquitted. At the same time, Captain Edgar A. Macklin, the Officer of the Day on August 13, 1906, was tried by general court-martial on one charge of neglect of his duties and acquitted.

Beginning in February 1907, and continuing until March 1908, the Military Affairs Committee of the United States Senate conducted a full reinvestigation of the incident. The committee took testimony from 169 witnesses. The transcript covered over 3,000 pages, including numerous exhibits. The committee sustained the action of Special Orders Number 266. Although the committee's findings did not fix responsibility on any individual soldier, it found that the soldiers of the garrison were responsible for the shootings.

On the 2d of March 1909, President Roosevelt signed a Senate Bill creating a court of inquiry to determine whether those discharged by Special Orders Number 266 were qualified for re-enlistment in the Army of the United States. The court of inquiry met for over a year and considered over 13,000 pages of testimony and exhibits. In its findings, announced on March 28, 1910, the court unanimously found the evidence sustained the charge that soldiers of the 25th Infantry did, on the night of August 13–14, 1906, shoot into the houses of the town of Brownsville, Texas, occupied by men, women and children, killing one man, and seriously wounding the lieutenant of police and killing the horse under him. The court also found that, had the officers and noncommissioned officers performed their respective duties immediately prior to the affray, the shooting could have been avoided. Also, if immediately after the shooting a careful inspection of every man in the garrison had been made, some of the guilty men would have been discovered. The court further found that 14 of the originally discharged 167 men should be eligible for re-enlistment.

After the adjournment of the court in 1910, there were several attempts to renew the investigation and review the discharges of the remaining Brownsville soldiers. The matter was reopened by the Department of the Army in 1973 and on September 28th of that year the Army cleared the soldiers' records and changed their separations to honorable discharges.

* * *

On the 14th of February 1911, another West Point cavalry officer, Colonel Enoch H. Crowder of Missouri, succeeded Davis as Judge Advocate General.

* * *

MAJOR GENERAL ENOCH H. CROWDER, JUDGE ADVOCATE *EXTRAORDINAIRE*

Enoch H. Crowder was born in a log house near Edinburg, Missouri on the 11th of April 1859. Following education in the local schools, he tried his hand at farming and rural school teaching. In 1877 he entered the United States Military Academy.

Graduating in 1881, Lieutenant Crowder was assigned to the 8th Cavalry, then stationed near Brownsville, Texas. During this tour he studied law, and in 1884 gained admission to the Texas Bar. The same year, Crowder obtained a long-sought transfer to Jefferson Barracks, Missouri, and after a brief period of study there, was admitted to the Missouri Bar. The next year, Lieutenant Crowder was given an assignment he sought—Professor of Military Science at the University of Missouri. Here he instructed two companies of cadets and a company of 100 coeds which he organized, working meanwhile toward a law degree which he received in 1886.

Soon after obtaining his law degree, Crowder was promoted to first lieutenant and ordered to rejoin his regiment as a troop commander in the Geronimo campaign. Following the end of that campaign in September 1886, he returned to the University of Missouri where he instructed in law and military science for the next three years. Upon completion of this detail, Lieutenant Crowder returned to the 8th Cavalry at Fort Yates, Dakota Territory, where he participated in the final campaign against Sitting Bull. During this same period he defended Lieutenant M. F. Steele—an officer who, in a rash moment, maintained his authority over a defiant trooper with his fists, and whose case had been prominently featured in the journalism of that period.

In 1891, Crowder was transferred to the Judge Advocate General's Department, promoted to captain and given the post of Acting Judge Advocate for the Omaha headquarters of the Department of the Platte. In January of 1895, this temporary branch transfer became final and Crowder was promoted to major. The beginning of the Spanish-American War marked his promotion to lieutenant colonel, following which he served on the commission which arranged the Spanish surrender of the Philippines. During his service in the Philippines, he filled many important posts in the military government of the Islands. In 1899, he headed the Board of Claims, served on the Philippine Supreme Court, and drafted the new Philippine criminal code.

Impressed with the ability Crowder had demonstrated in the Philippines, Judge Advocate General Davis called him to Washington to serve as Deputy Judge Advocate General in 1901. In this capacity, Crowder prepared and argued the government's position in the then noteworthy case of *McClaughry v. Deming* which decided that a court-martial composed entirely of Regular Army officers did not have jurisdiction under the 77th Article of War to try an officer or soldier in the Volunteer Army raised under the Act of March 2, 1899. Although the United States lost its argument that such Volunteers were "soldiers of other forces" under the Article, the case enhanced Crowder's reputation as an able lawyer. During this period Crowder attained the rank of colonel and served as the senior American observer with the Japanese Army in the Russo-Japanese War of 1904–1905.

Colonel Crowder served as chief legal adviser to the American-sponsored Provisional Government of Cuba, and Supervisor of its Departments of State and Justice from 1906 to 1909. Simultaneously he headed the Cuban Advisory Law Commission and Central Election Board. In 1910, he represented the United States at the Fourth Pan American Conference in Buenos Aires and in that capacity made official visits to Chile, Peru, Ecuador, Columbia and Panama. After studying the military justice and penal systems of France and England on a European tour, he returned to Washington to assume the duties as Judge Advocate General of the Army on February 11, 1911.

As Judge Advocate General, Crowder initiated a number of innovations including the regular publication of Judge Advocate General opinions; the issuance of a new digest (published in 1912) of all JAG opinions issued since 1862; and a program for the legal education of line officers at government expense. Additionally, he supervised the revision of the Articles of War for the first time since 1874, revised the *Manual for Court-Martial* and took an active part in prison reform in the Army.

With the advent of World War I, General Crowder was appointed Provost Marshal General in addition to his duties as Judge Advocate General. As Provost Marshal General he prepared the Selective Service Act of 1917 and supervised the registration, classification and induction of nearly three million men into the armed services. As Judge Advocate General, he supervised the administration of military justice in the Army during the period when the number of general courts-martial rose from 6,200 in 1917 to over 20,000 in 1918. Although offered a promotion to the rank of lieutenant general in 1918, General Crowder, mindful of public and Congressional opposition to "swivel chair" generals, refused the promotion, seeking instead a field command.

After the war, General Crowder found himself, along with the entire military justice system, the center of a storm of controversy, stemming from

figure 32

MAJOR GENERAL ENOCH CROWDER, SECOND FROM LEFT, FRONT, AND OFFICERS WHO ASSISTED AT THE SECOND DRAWING OF DRAFT NUMBERS, AT THE SENATE BUILDING, JUNE 27, 1918

charges that the military justice system was "un-American." Crowder, a perceptive critic of the system who had already commenced work on needed reform, now accelerated his efforts. The specific recommendations he submitted to Congress, most of which were subsequently adopted, included greater safeguards for the accused, changes in the composition and powers of special courts-martial, and the addition of an authority in the President to reverse or alter any court-martial sentence found to have been adjudged erroneously.

In 1920 a bill authorizing the President to retire General Crowder with the rank and pay of a lieutenant general was introduced in Congress but was never formally brought to the floor of the House for action. On February 14, 1923, after 46 years of service, General Crowder retired from the Army—but his days of service to his country were not finished. On the very same day, he was appointed the first ambassador from the United States to Cuba, a post which he held until 1927.

From 1927 until his death in 1932, General Crowder was engaged in the private practice of law in Chicago. Among his many personal honors and decorations were the Distinguished Service Medal, the Cuban Order of Carlos Manuel de Cespedes, the Japanese Order of the Rising Sun, Knight Commander of the British Order of St. Michael and St. George, Com-

mander of the French Legion of Honor, and Commander of the Italian Order of the Crown. His name was suitably memorialized in his home state of Missouri through the naming of a state park in his honor and through the designation of the World War II training center at Neosho, Missouri, as Camp Crowder.

Perhaps the most apt description of the service to his country by Enoch H. Crowder was contained in the words of the late Henry L. Stimson, Secretary of State in the cabinet of President Hoover and Secretary of War in the cabinets of Presidents Taft and Franklin D. Roosevelt, who said of General Crowder:

> His record as Judge Advocate General and his later record as Provost Marshal General have constituted a page in the history of our Army upon which we can all look with deep satisfaction and admiration.

* * *

The Judge Advocate General's Department, grew from 13 lawyers to an authorized strength of 32 under provisions of the Act of June 3, 1916, which provided for incremental increases in strength, to include: one Judge Advocate General with the rank of brigadier general, four judge advocates with the rank of colonel, seven with the rank of lieutenant colonel, 20 with the rank of major, plus the acting judge advocates for separate brigades and general court-martial jurisdictions authorized by earlier legislation in 1901. The same Act also provided for the organization of an Officers' Reserve Corps. Lawyers in the Army Reserve were to become the muscle of Corps strength in the several great mobilizations of forces during the next 60 years. Regular officers constituted the backbone, but there were never enough when the Army expanded.

In 1916, the most important revision of the Articles of War in years was passed by Congress. The struggle for revision of the Articles, drafted under the direction of General Crowder, ended what many termed a legislative endurance contest. After several years of study by the staffs of the Judge Advocate General's office, the War Department, the General Staff, and the Army War College, a bill embodying the revised Articles of War was introduced in the House of Representatives on April 22, 1912. Shortly thereafter a companion bill was introduced in the Senate; and from the 14th through the 27th of May, hearings were held by the military committees of both houses. But during this period, Republicans, Democrats and Progressives were all apparently more interested in national and state elections than in Army reform—consequently, no Congressional decision on the bills was ever reached, and neither draft was reported out for consideration. Following the inauguration of Woodrow Wilson as President, Congressmen became even more absorbed in the Federal Reserve Banking Law, the Underwood Tariff, and other legislation. And, after the outbreak of war in Europe, the Articles of War were

almost lost in the mad scramble for military preparedness and the jockeying attendant to passage of the National Defense Act.

For three arduous years all revision efforts died in committee or subcommittee–but finally, in 1916, Judge Advocate General Crowder's perseverance was rewarded. On January 16 of that year, the revision bills were reintroduced in Congress, and were referred to the military committees. Inasmuch as the war in Europe was daily drawing closer to America, prompt action was expected. But, instead, Congress became involved in a prolonged debate over the various plans for military expansion and the debate ended in a bitter feud between Representative James Hay, Chairman of the House Committee on Military Affairs, and Senator George E. Chamberlain, Chairman of the Senate Committee on Military Affairs. Hay advocated establishment of a National Guard subject to call by the President during a national emergency, and Chamberlain opposed federalization of state militia. The fight between these key leaders and their followers was the talk of the capital, and it not only delayed, but also influenced the content of all military legislation enacted during months that followed.

Perhaps a Presidential election year was a poor time to harass congressmen, but the new Secretary of War, Newton D. Baker, General Crowder, and the public all demanded action following the raids of Mexican bandits across the border of New Mexico. On March 9, the Senate approved the Articles of War bill, but to no avail: the House Committee failed to make a report. The delay in the House disturbed Senate leaders and on July 3, they included the revised Articles of War in the Military Appropriation Bill then pending in Congress. This omnibus bill passed the Senate on the 25th of July, but the House objected and the matter was thereupon referred to a conference committee. At the insistence of House members, the revision was nullified in part by exempting retired officers from its coverage. On August 7, the appropriation bill containing the emasculated Articles of War was accepted by both houses.

Members of Congress and military leaders alike were dissatisfied with this turn of events. Crowder and Secretary Baker carried their case directly to the White House–and it did not take them long to convince Wilson that the law as passed divested the President of control over officers on the retired list and that it should be vetoed.

General Crowder personally prepared the Presidential veto message objecting to the exemption of retired officers from the Articles of War. He pointed out that under the Act of 1861

establishing the retired list, such officers were only partially retired: they could wear the uniform of their grade; their names were carried on the *Army Register;* and they were subject to the Articles of War. The Act of 1876 specifically declared officers on the retired list to be a part of the Regular Army. Therefore, Crowder argued: ". . . officers on the retired list of the Army are officers of the Army, members of the Military Establishment distinguished by their long service, and, as such, examples of discipline to the officers and men in the active Army." He contended further that Congress had no power to deprive the Commander in Chief of his constitutional authority over part of the military establishment. President Wilson vetoed the Act on August 18 and returned it to Congress with the objection as noted.

As far as the Articles of War were concerned, it was fortunate that their fate was now linked with an appropriation bill which was destined for passage. The vetoed bill was promptly reintroduced into Congress, and on August 22, the House passed it without the Articles. The Senate restored the Articles of War, making changes to meet Wilson's objections, and approved the measure without delay. In the House a motion to concur in the Senate amendments prevailed, and the bill finally passed. The new Articles were signed by the President on August 29, 1916.

The revised Articles of War had been under consideration for 13 years, and before Congress for four years. Many individuals had labored on the project but none more zealously than General Crowder. Secretary Baker—an able and distinguished lawyer—appraised Crowder's service as follows:

> The work of the Judge Advocate General in preparing the revised Articles is a singularly able piece of work, introducing needed reforms, and throughout characterized by moderation and a conservative attitude toward an established and well understood disciplinary system.

General Crowder's 121 Articles of War eliminated certain obsolete matters, and were arranged in a more orderly and logical manner than their predecessors. They made common law felonies military offenses at all times, except that murder and rape committed within the continental United States in time of peace could not be tried by court-martial. In peacetime, soldiers accused of civilian offenses were required to be turned over to civil authorities on request. One article provided that the President could prescribe procedures, including modes of proof, used in court-martial if not inconsistent with the Articles of War. This

authority was initially delegated to the Commanding General of the Army and the Judge Advocate General. Today, similar statutory language is the authority for promulgation of the *Manual for Courts-Martial* as an Executive Order.

The authority to convene general courts-martial was extended to include the commanding officer of any district or of any force or body of troops when empowered by the President, thus providing for the case of expeditionary forces not the equivalent of a brigade or higher unit, and other emergent services, and permitting general court-martial jurisdictions to be multiplied as the exigencies of the service might require.

Death as a punishment became largely limited to times of war, save for assault on or willful disobedience of a superior officer, mutiny and sedition (as well as failure to suppress them) and rape (outside the "geographical limits of the States of the Union and the District of Columbia"). A disciplinary "special" court—intermediate between the general and summary court, with power to impose disciplinary punishments but without the power to adjudge dishonorable discharge—was created in the mold of the regimental/garrison courts. This tribunal was to be used for the trying of offenses where the retention of the offender within his command was contemplated, leaving the general court-martial for cases calling for serious discipline, dishonorable discharge or prolonged detention in confinement; while the summary court was reserved for the trial of minor offenses calling for light punishments of confinement and forfeiture.

An accused could be represented by counsel of his own choice, if reasonably available; if not, the prosecutor-judge advocate was charged "from time to time" to "advise the accused of his rights." Challenges for cause were permitted. Court-martial sentences had to be approved by the "officer appointing the court or by the officer commanding for the time being." The Articles further established the right of the reviewing authority to mitigate a finding of guilty by a court-martial to a finding of guilty of any lesser included offense. Presidential confirmation was required for any sentence respecting general officers and extending to death or dismissal of an officer or cadet. No other real changes were effected in the justice system—and would not be for another four years.

In 1917 a *Manual for Courts-Martial* was published to introduce and interpret the revised Articles for the military establishment. Prepared in the Office of The Judge Advocate General and promulgated "By Order of the Secretary of War," this *Manual* contained an introduction which usefully summarized the significant changes worked by the 1916 Articles of War. It also added

directives to the field, an important one of which required the officer exercising summary court-martial jurisdiction over an accused to make a preliminary investigation of the charges, and to give the accused an opportunity to make a statement or present evidence before action was taken against him.

The 1917 *Manual* reflected changing social values and attitudes toward the whole problem of crime and punishment. Section III, Chapter XIII, announced as War Department policy that "because of the effect of confinement upon the soldier's self-respect confinement is not to be ordered when the interests of the service permit it to be avoided." Section IV of the same chapter recited that punishments such as "carrying a loaded knapsack, wearing irons . . . and tying up by the thumbs" had "become so obsolete as to be effectually prohibited by custom without the necessity of regulations" to prohibit them.

One point of some sensitivity was, surprisingly, not treated in the 1916 Articles or the 1917 *Manual* despite the modernization generally reflected in both. This was the power of the officer reviewing the findings and sentence of a court-martial to return the case to the court for revision of the sentence if he found the first too lenient. There was "a principle of military law" announced in digested cases as early as 1863 that the reviewing officer could not, himself, add to the sentence, as by increasing the weight of rocks to be carried in a knapsack from 20 to 30 pounds.

These cases appeared regularly in the *Digests of Opinions* from 1880 through 1912. At the same time, opinions were reported which held it proper for the reviewing authority to return cases to a court-martial for upward revision. Although the reviewing authority could not compel the court to revise its sentence, the 1912 *Digest* reported a holding that, upon the court's refusal to adopt his views, "he may express his formal disapprobation of their neglect to do so."

The source of surprise about this is one case decided by the Supereme Court and a revisit to the legal saga of former Judge Advocate General Swaim. In 1879 the Supreme Court decided a habeas corpus action brought by a Navy paymaster, Alvin Reed, who alleged that he was being held in a Navy brig pursuant to an unlawful sentence. His first court-martial sentence for "malfeasance" as paymaster had in fact been revised upwards when the reviewing officer, an admiral, found the sentence too lenient and sent the case back to the court-martial for revision.

Although the Supreme Court held that this issue was not properly raised before it in a habeas corpus proceeding, it did acknowledge that the admiral's action might have violated existing

Navy Regulations which prohibited the reviewing authority from enlarging a sentence "directly or indirectly."

The *Reed* case played a part in the 1893 decision of the United States Court of Claims when it decided against General Swaim's claim for allowances due him during the first half of his period of suspension from duty. The President had returned the court-martial action twice, the first time chiding the court for the leniency of its sentence and the second for overreacting to his chiding to the point of imposing an unlawful reduction in grade. The military court's third sentence of suspension from duty and forfeiture of one-half pay for 12 years, he approved. General Swaim claimed that since the forfeiture clause mentioned only "pay," he was entitled to the other allowances appropriate to his grade.

The Court of Claims, therefore, had to consider the legality of the third sentence. It found the *Reed* case controlling and the third sentence illegal because it was more severe than the first one imposed. However, General Swaim did not get his allowances—the court said they did not accrue during a period of suspension from duty! A formal prohibition upon the convening authority's ability indirectly to increase a sentence by revision proceedings had to await the outcome of the great conflict between General Crowder and his Deputy, General Ansell, after World War I. Article of War 40 in the 1920 Articles settled this matter.

General Crowder also saw to continuation of the Winthrop tradition of preservation of legal sources and getting information out to the field. Colonel Fratcher records that early in his administration Crowder caused Captain (later Brigadier General) Charles R. Howland to bring the *Digests of Opinion* up to date—first to 1912 and then to 1917. This permitted further supplements in 1931, 1942 and thereafter, so that the law making and law interpreting functions of The Judge Advocate General have a solid historical record. TJAG Crowder also continued preparation of a compendium, *Military Laws of the United States,* which appeared in 1915. That, and the revisions of 1921, 1939 and 1949, were a standard source of often hard-to-find law until largely supplanted by the codification of military law in Title 10 of the United States Code in August of 1956.

VII

The First World War, Further Revision of the Articles, and 20 Years of Peace

In addition to his duties as Judge Advocate General, Enoch Crowder was given the post of Provost Marshal General—a position then equivalent to that of the Director of Selective Service—in 1917. During the two years that Crowder served as Provost Marshal General, his new work kept him away from the Judge Advocate General's office. Consequently the wartime administration of that office was conducted in General Crowder's absence by Brigadier General Samuel T. Ansell of North Carolina, as Acting Judge Advocate General.

That division of the leadership framed a dispute about the philosophy and administration of military criminal law which presaged the major trends from 1920 to the present. Military law was becoming more and more affected by influences from the civilian community, and those influences were powerful. Oliver Wendell Holmes, Jr., was on the Supreme Court during this period and Brandeis was appointed by President Wilson in 1916. Although the "separate but equal" case, *Plessy v. Ferguson* (1896) was still law, the Court had decided *Muller v. Oregon* in 1908 and it was becoming apparent that jurisprudence in the United States was reflecting some ideas of the new liberalism. It would take the Court until 1937 to overcome the conservative bias of the age of Imperialism and laissez-faire economics which occupied the two decades on each side of the millennium, but seeds were beginning to sprout early in the new century.

This was the time of the flowering of Legal Realism in the United States, a view of the law held by men such as Holmes, which emphasized the humanity of judges and the "reality" that law is what the judges say it is. Realism was a major theme in legal thought and writing during this period, particularly, though not exclusively, at the large northeastern law schools. When the coming war caused the introduction of numbers of law professors into the Department and their association with the dispute about new directions for military criminal law, some of the current civilian thought had immediate impact.

One of the principal issues in what became known as the "Ansell-Crowder Dispute" was the proper role of the military commander in the court-martial process. That conflict did not develop fully until after the war, but it began with the introduction of civilian influence and Ansell's appointment.

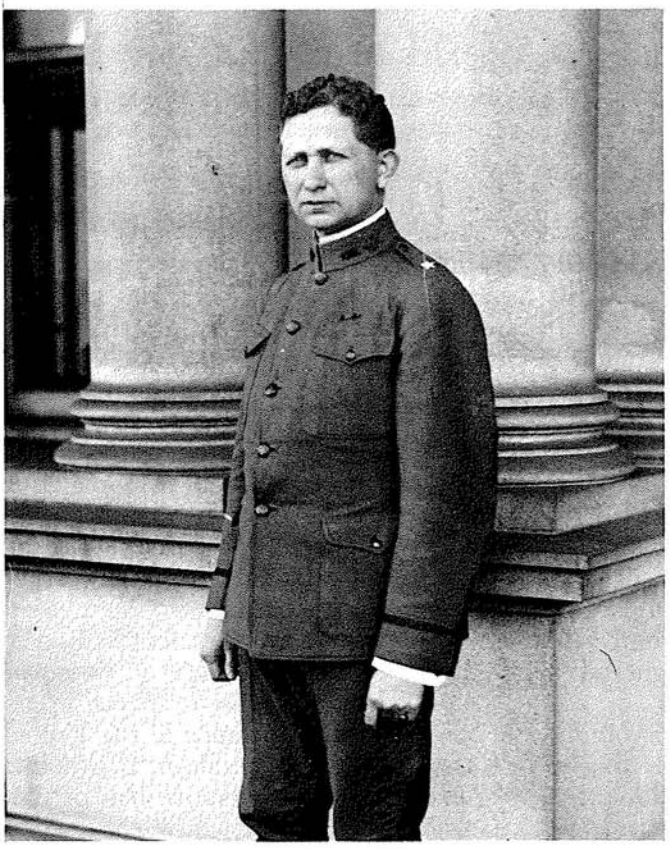

figure 33

SAMUEL TILDEN ANSELL

* * *

SAMUEL TILDEN ANSELL—PROGENITOR OF MODERN REFORM

An 1899 graduate of the United States Military Academy and 1904 graduate of the University of North Carolina School of Law, Samuel T. Ansell served as prosecuting attorney for the Province of Moro, Philippines, from 1909 to 1911. Prior to that time he served as instructor in law and history at West Point. During 1911–13 he was engaged in special work for the War Department in New York City and Washington, D.C., and from 1913 to 1917 he represented the governments of the Philippine Islands and Puerto Rico before federal courts in this country. Ansell had been commissioned a second lieutenant upon graduation from West Point, and

then assigned to the 11th Infantry. He was promoted to major in 1913 and to lieutenant colonel and then brigadier general in 1917.

As the Acting Judge Advocate General from 1917 to the end of World War I, Ansell was the unyielding proponent of reform in the administration of military justice. He took the initiative in preparation of General Order No. 75 which abolished all distinctions among Regular Army, National Army and National Guard forces and placed all such forces in the Army of the United States.

The dishonorable discharge and imprisonment of a group of soldiers for mutiny at Fort Bliss and the execution of 13 black soldiers in the Fort Sam Houston Riot case created a nationwide clamor for revision of the Articles of War. Within the War Department General Ansell became the outspoken advocate for reform of military justice. He was largely responsible for the revision of court-martial procedures and judicial review bringing military justice into closer consonance with civilian practice. Unsurprisingly, Ansell's reform notions encountered stiff opposition from government and military leaders. The controversy set the stage for what is popularly known as the "Ansell-Crowder Dispute." Ansell's conduct in picking a public forum for airing what appeared to be an "in-house" problem, however, was considered inappropriate by many in the Army hierarchy—especially in view of the fact that many less vocal JAG officers were pursuing Ansell's same goals "behind the scene" with some efficacy. In hearings before the United States Senate in 1919, Ansell proposed changes in appellate procedure, protection of accuseds' rights and preclusion of command manipulation. Although his views were "30 years ahead of time" and most were ultimately adopted in the Uniform Code of Military Justice, his overzealous advocacy and direct dealing with the Secretary of War "over his superior's head" incurred some measure of dissatisfaction with his conduct among his fellow officers in the War Department. Consequently, Ansell was reduced in grade from brigadier general to his permanent rank of lieutenant colonel. He resigned from the Army a short time thereafter but his controversial career and reform efforts were not daunted.

Ansell and Senator George E. Chamberlain then joined forces in attacking the existing court-martial procedures. At the request of Newton D. Baker, a principal defender of the court-martial system, the American Bar Association appointed an investigative committee. After an extended inquiry, the Committee's majority upheld the existing practice. Ansell nevertheless continued his activities in behalf of military justice reform, and his efforts must be credited with some measure of responsibility for the Congressional enactment of new Articles of War in 1920.

As a civilian Ansell became embroiled in a dispute of other sorts. While serving as the counsel to a special committee of the US Senate investigating dubious political practices, Ansell attacked the controversial governor of Louisiana, Huey Long. Long suggested in print that Ansell was guilty as well of a variety of crimes including forgery of his own appointment as Acting Judge Advocate General. Ansell swiftly initiated a $500,000 defamation suit against Long; the Ansell-Long controversy and tort suit, however, was brought to an abrupt end with the assassination of the Louisiana politician.

After a long and successful practice in the Washington, D.C., law firm of Ansell and Bailey (later Ansell and Ansell), Samuel T. Ansell died on May 27, 1954.

* * *

When the United States entered World War I on April 6, 1917, the Judge Advocate General's Department consisted of 17 officers, four of whom were on duty in the Office of the Judge Advocate General. The Act of May 18, 1917, provided for wartime expansion of the Army by the appointment of temporary officers, and the temporary promotion of Regular Army officers. Under the Act of October 6, 1917, the Judge Advocate General was given the rank and pay of a major general. Instructions issued in 1918 directed the addition of enlisted men to the Judge Advocate General's Department for service as law clerks in the War Department and in the field, and a proviso to the Act of July 9, 1918 (added pursuant to a suggestion made by General Crowder) authorized the appointment of Reserve and temporary first lieutenants and captains in the Department. By December 2, 1918, the commissioned strength of the Department had reached 426 officers: 35 in the Regular Army (1 major general, 4 brigadier generals, 13 colonels, and 17 lieutenant-colonels) and 391 in the Officers' Reserve Corps and National Army (7 colonels, 39 lieutenant colonels, 245 majors, 60 captains, and 40 first lieutenants).

Expansion for war brought to the Department many civilian attorneys, then or later prominent in the law schools, courts and government. Major Felix Frankfurter became an associate justice of the United States Supreme Court after serving on the Harvard law faculty. With him at Harvard were fellow JA Colonels Edmund M. Morgan and Eugene Wambaugh, respectively experts in the fields of evidence and constitutional law; former Northwestern Law School dean, John H. Wigmore, who contributed his legal acumen in two separate revisions of the *Manual for Courts-Martial*—most notably in areas dealing with his principal field of evidence; and Edwin R. Keedy, later Dean of the University of Pennsylvania Law School. Outside the academic circle: Henry L. Stimson and Patrick J. Hurley both became Secretaries of War—Stimson also serving as Secretary of State, and Governor General of the Philippines—and Charles Beecher Warren was Ambassador to Japan and Mexico. Nathan William MacChesney, an eminent member of the Chicago bar, wore the full dress uniform of a colonel, Judge Advocate General's Department Reserve, when he presented his credentials as Minister to Canada in 1932. Brigadier General Hugh S. Johnson became well known as Administrator of the National Recovery Administration. Colonel Guy D. Goff became United States Senator from West Virginia and Major Charles Loring became a justice of the Supreme Court of Minnesota in 1930.

* * *

WORLD WAR I JUDGE ADVOCATES
Felix Frankfurter

Associate Justice of the United States Supreme Court, Felix Frankfurter was a close friend of Judge Advocate General Enoch Crowder. A *cum laude* graduate of Harvard Law School in 1906, Frankfurter practiced in New York City as an assistant US attorney and then with the firms of Hornblower, Byrne, Miller and Taylor and later with Winthrop and Stimson before he joined the Harvard Law School faculty in 1914. As secretary and counsel to President Wilson's Mediation Commission on labor problems from 1917 to 1918, Frankfurter investigated the Tom Mooney case in San

figure 34

ASSOCIATE JUSTICE OF THE SUPREME COURT AND RESERVE MAJOR JUDGE ADVOCATE, FELIX FRANKFURTER ASSISTED TJAG CROWDER WITH WARTIME MILITARY LEGAL PROBLEMS

Francisco and the infamous Bisbee Deportations when local law enforcement officials shipped striking miners from Arizona to New Mexico. In 1933 Frankfurter declined an appointment to be Solicitor General but in 1939 he could not refuse Roosevelt's invitation to the Supreme Court bench. From there he went on to become one of the more noted constitutional jurists of this century.

Frankfurter's relationship with General Crowder in the earlier days was not only as a friend, but as a working associate as well, Frankfurter was often asked to help resolve problems in the War Department relating to

minority groups, conscientious objectors and industrial relations. As a major in the Reserve Corps of the JAGD, Frankfurter also worked with General Crowder on the revision of the Articles of War. Crowder once asked Frankfurter's opinion on the American seizures of the customs house at Vera Cruz.

> Frankfurter, I want you to help me. I've just been over to the White House and I'm asked to write a memorandum whether that seizure should be treated as an act of war and what its status is in international law. Will you work with me on that?
>
> Frankfurter replied: General, I'm going to ask to be excused. I don't have to work on that. I know the answer to that.
>
> You do?
>
> Yes, I do.
>
> What is the answer?
>
> It would be an act of war against a great nation; it isn't against a small nation.
>
> I can't give him that.
>
> I know you can't, but that's the answer.

While serving in the Judge Advocate General's Office, Frankfurter never put on a uniform. In his memoirs, he elaborated on why he wore only civilian clothes:

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

Edmund Morris Morgan

Edmund Morgan, a lieutenant colonel in the Judge Advocate General's Department during World War I, later assisted in drafting the Uniform Code of Military Justice. Morgan taught law at the University of Minnesota, Yale University, and was twice Acting Dean of the Harvard Law School. During World War II, Colonel Morgan, as Chairman of the War Labor Board's war shipping panel, reviewed wage adjustment cases for merchant seamen. In 1948 Secretary of Defense Forrestal appointed him chairman of a four man committee to draft a modern and uniform code of military justice. The Morgan draft was adopted by Congress two years later. Morgan's *Cases and Materials on Evidence* ranks as one of the outstanding casebooks in the field of evidence. Professor Morgan—once President of the Association of American Law Schools—was also a contributing member of the advisory committee to the United States Supreme Court on the Rules of Civil Procedure.

Dr. Eugene Wambaugh

A distinguished professor of constitutional law at Harvard University, Eugene Wambaugh's talents were well utilized during his tour as Chief of the Constitutional and International Law Division, Office of the Judge Advocate General, from 1917 to 1919. A graduate of Harvard Law School in 1880, Wambaugh worked on war problems while serving as the special counsel to the State Department in 1914, and was the American member of the Permanent International Commission under the treaty with Peru in 1915. Wambaugh later achieved the distinction of Professor Emeritus at Harvard University in 1925.

John Henry Wigmore

John Henry Wigmore was born on March 4, 1863, in San Francisco,

California. He received an A.B. degree from Harvard in 1883 and M.A. and LL.B. degrees from the same institution in 1887. Wigmore began his teaching career with three years as a lecturer in Anglo-American law in Japan. In 1893, he became Professor of Law at Northwestern and was made Dean eight years later.

When he applied for an Army commission in 1916, John Wigmore was at the peak of his career. In addition to having been Dean of the Northwestern University Law School since 1901, his authoritative treatise on evidence had already been published. He had organized and headed the National Conference on Criminal Laws and Criminology, which later became the American Institute of Criminal Law and Criminology under his continuing guidance. He was completing a term as President of the Association of American University Professors. However, in spite of these imposing qualifications, he entered military service with the rank of major.

After being placed on active duty in 1917 he was sent to Washington. General Enoch H. Crowder, the Judge Advocate General of the Army had been given the additional title and office of Provost Marshal General during this time. When called upon to assist Crowder in the administration of the Selective Service draft, Major Wigmore was given the title, "Chief, Statistical Division, Office of The Provost Marshal General." During this assignment he originated and placed into execution the general plan of statistical tables concerning classification deferment, industry and agriculture which were employed in the raising of our military forces. Over 10 million registrants were screened and classified under the system devised by Major Wigmore.

In addition to organizing the Selective Service draft, Major Wigmore performed many other duties. He did liaison work with nearly every government agency in Washington. He was also a member of the War Department Committee on Education and Special Training which organized the Student's Army Training Corps. This committee was responsible for recommending desirable or necessary changes in the system of classifying enlisted personnel and in coordinating with educational institutions in the organization and administration of the Student's Army Training Corps program.

In recognition for his services, Wigmore was promoted to lieutenant colonel in early 1918 and to the rank of colonel later that year. Discharged on May 8, 1919, he was awarded the Distiguished Service Medal "for exceptionally meritorious and distinguished service to the Government in connection with the administration of the Selective Service Law during the war."

Wigmore served as a member of the Board of Editors which revised and enlarged the *Manual for Courts-martial,* authoring and later expanding the chapter on evidence in the 1917 and 1921 *Manuals.* His efforts in these projects merited him the only chapter byline bestowed in the two *Manuals,* and he also received special acknowledgment in the preface of both. After his work on the 1921 *Manual,* Wigmore was again relieved from active duty on October 25, 1920. However, as the nation's foremost expert on military and industrial mobilization, the Army had Wigmore attached to the Army General Staff as part of its post-war mobilization plans.

Wigmore wrote several law review articles growing out of his military experience. In addition, he prepared the bibliography and preface for *Military Law and Wartime Legislation* (1919).

While not eligible for retirement benefits, he retained his status as a Reserve Officer, signing his last oath of office in 1940 at the age of 77.

Three years later, on April 20, 1943, John Henry Wigmore died. He is buried in Arlington National Cemetery, Washington, D.C.

* * *

The civilian talent brought to the JAG Department by mobilization was integrated into the performance of the burgeoning variety of legal tasks falling to the Judge Advocate General. This considerable pool of resources permitted continuation of Department contributions in fields other than criminal justice and engendered increased reliance on the Army attorney by his commanders. The story of the increase of the Army commander's consciousness of legal problems and of his reliance on his uniformed attorney is the measure of the growth of the community role of the Corps.

Concern with international law and relations had begun with the Lieber Code in 1863 and was continued by General Davis when he participated influentially in the several early conferences on the law of war at The Hague and Geneva. Winthrop's *Digest of Opinions* reflects the Department's broadening activities in connection with contract law and administration of the Army. And there was in World War I a predecessor to the Soldiers' and Sailors' Civil Relief Act of 1940 which was to become the foundation for one of the major new missions of the Corps—free legal counsel to the individual soldier about his personal affairs.

Many of these areas of increased activity are reflected in the service rendered by those mobilized for the war effort. Those officers served in combat with distinction, dealt with foreign governments on behalf of U.S. military interests, assisted with the mobilization for war, and advised in the exercise of the full range of their commanders' legal military powers. That breadth of contribution is reflected in the accompanying vignettes of the careers of Patrick J. Hurley, Charles Beecher Warren, Nathan William MacChesney and "Iron Pants" Johnson.

* * *

OTHER WORLD WAR I JUDGE ADVOCATES

Patrick J. Hurley

Born in the Choctaw nation, Indian territory (now Oklahoma) Patrick J. Hurley went to work first as a mule driver and then as a cowboy. Having studied Law at the National University, Washington, D.C., he represented the Choctaw tribe as its national attorney from 1912 to 1917. Commissioned a major in the Army at the outbreak of World War I, he served in France as judge advocate, Army artillery, 1st Army. He took part in the Aisne-Marne, St. Mihiel, and Meuse-Argonne battles, receiving a Silver Star for gallantry. After the Armistice, as judge advocate, 6th Army Corps, he secured permission from the Grand Duchy of Luxembourg for U.S. troops to march across Luxembourg in order to occupy Germany. Hurely succeeded James William Good as Secretary of War in President Hoover's cabinet and also chaired the War Policies Commission, a nonpartisan body to prepare national policies in time of war. As a Reserve colonel at the outbreak of the

figure 35

PATRICK J. HURLEY: SPECIAL EMISSARY, AMBASSADOR TO CHINA, SECRETARY OF WAR AND WORLD WAR I JUDGE ADVOCATE, ENJOYS THE COMPANY OF HUMORIST WILL ROGERS

Second World War, he was called to active duty. Promoted to the rank of brigadier general in 1942, he was ordered to the Southwest Pacific to "direct efforts to run the Japanese blockade of the Philippines with supplies for General Douglas MacArthur's forces on Bataan peninsula." Hurley was wounded in the Japanese bombing attack on Port Darwin, Australia, but he recovered quickly and was appointed United States Minister to New Zealand.

General Hurley acted several times as a special emissary to the parties at war. At the request of the President, he conducted a special mission to Moscow to consult Stalin, and at the same time made an evaluation of the Stalingrad and Caucasus battlefields. He participated in both the Cairo and Tehran conferences where he held the rank of Ambassador. Advanced to major general in December of 1943, Hurley was sent to Chungking to help prevent the collapse of the nationalist government of China and keep the Chinese Army in the war. After service as the U.S. Ambassador to China, he

was awarded the Medal for Merit by Secretary of War Patterson for his efforts in China. He died on the 30th of July 1963.

Charles Beecher Warren

An 1891 Phi Beta Kappa graduate of the University of Michigan, Charles Beecher Warren represented the United States as an associate counsel in hearings before the joint high commission for the Bering Sea controversy with Great Britain. Commissioned a major in the Judge Advocate General's Department at the outset of World War I, he was assigned as General Crowder's Chief of Staff while the latter was Provost Marshal General. In that capacity Warren formulated and directed regulations administering the Selective Service Act. After the war he embarked on a successful career as an emissary and diplomat, first acting as the legal adviser to the American delegation at the Paris Peace Conference. In 1921 he was appointed by President Harding as Ambassador to Japan. After having served as a high commissioner to Mexico to reestablish normal diplomatic ties, Warren was named Ambassador to Mexico by President Coolidge in 1924. He was also twice nominated as United States Attorney General but was never confirmed due to political controversy between the Senate and President Coolidge.

Nathan William MacChesney

Cited by General Pershing "for exceptionally meritorious and conspicuous service" as a member of the American Expeditionary Force commander's staff, Nathan William MacChesney additionally served as chief of the section which reviewed dishonorable discharge cases in France. He represented the War Department in the U.S. Supreme Court case of *Stearns v. Wood* which upheld the power of the Secretary of War to control the military forces of a state by executive order. MacChesney, a life trustee of Northwestern University, is also known as the father of that university campus. He was appointed Minister to Canada in 1932 by President Hoover and also served as Consul General to Thailand. And while an attorney for the government, MacChesney was counsel for the United States Senate in the investigation of several notorious political frauds. In 1951 he ended his extensive military career retiring at the rank of brigadier general. He died in Libertyville, Illinois, September 25, 1954.

Hugh S. "Iron Pants" Johnson

A graduate of the United States Military Academy, Hugh Johnson's bluntness and straight-from-the-shoulder language earned him the nickname "Iron Pants." He served as General Pershing's judge advocate in 1916 during the Mexican punitive expedition. Two weeks after the Selective Draft Bill was passed at the outset of the First World War, Johnson was appointed major, judge advocate, in charge of the draft. Hugh S. Johnson is perhaps best known as the administrator of the National Recovery Act where he gave popularity to such phrases as "crack-down," "bunk," "chisler," and "dead cats." As the NRA head Johnson supervised the publication of more than 450 codes for the regulation of business in the nation's recovery program.

* * *

The First World War soon demonstrated that the 1916 revision of the Articles of War had not eliminated many of what were then considered major faults in the military justice system. The Articles had not been drafted to govern an Army of 200,000 officers and nearly four million men. It was to be expected that the conditions of such an unprecedented World War would show

many areas in which the existing code might be improved. The criticism was directed principally toward three points: (1) that the system was almost wholly in the control of line officers without legal training and who were frequently harsh and arbitrary; (2)

figure 36

"Iron Pants" Johnson After First Flight in His Airplane

that sentences were excessive and unequal as between commands; and (3) that there was no system of appellate review, except in the small class of cases requiring Presidential confirmation.

That recitation of objections would not seem unusual to modern ears, at least to those which have listened to what the Supreme Court was saying about defendants in criminal proceedings during the "law revolution" of the 1960's. However, the time was 1918, commanders felt, in the light of many years of military history, that the disciplining of troops was their business and that if one could be trusted to take 15,000 men into combat, he could also be trusted to treat them fairly. The vice of that argument was, however, becoming apparent and the nature of the court-martial was changing; it was becoming a true court.

Before the English Mutiny Acts of 1689, the King and his commanders pronounced and executed the law, all within the

military community. After the Restoration of 1688, Parliament established its position as the lawmaker for all Englishmen, especially the Army. That precedent was adopted by the American Colonies whose forces from the first were governed by rules emanating from the legislature, not the commander. Although the rules thus were prescribed by representatives of the people, the structure for their implementation in the forces differed materially from that in the civilian community through the 19th century. The court-martial of that early period was a fact-finding and recommending body. Its results were not announced in open court at the end of the trial, but were reported to the commander for his "approbation or disapprobation," to use words the Continental Congress employed in transmitting one set of proceedings to General Schuyler in 1775.

As has been detailed elsewhere in this history, the growth of ideals about due process of law in the American polity was reflected in accretions to the procedure in courts-martial. Those accretions occurred largely by custom and usage prompted by the legal training of the administrators of the Army system. The growth was, however, against the background of a view of the court-martial which tended to inhibit its maturation.

On its first occasion to consider the nature of courts-martial, the Supreme Court, in 1830, said of the judgments of a court-martial that "they are not placed on the same high ground with judgments of a court of record." In this case, *Ex parte Watkins,* the Court did find the court-martial to be enough of a court for its determinations to be reviewable. Winthrop, writing in mid-century, went perhaps a bit far in an oft-quoted characterization of courts-martial as "simply *instrumentalities of the executive power*" (his emphasis), but he was relying on language of the Supreme Court in an 1857 case, *Dynes v. Hoover.* Winthrop was distinguishing courts created by Congress under Article III of the Constitution from those created under Article I, but he did add that, under that distinction, a court-martial is not "a court in the full sense of the term, or as the same is understood in the civil phraseology."

Today, U.S. Circuit Courts of Appeal refer to courts-martial and Federal District Courts as "two coordinate courts of the same sovereign," and to military courts as "expert adjudicating tribunals" whose actions are to be treated as other federal and state courts. This view is a long way from that of Winthrop; the gap is bridged by events which began during the First World War. Two incidents in particular triggered important developments in the process.

The first of these incidents occurred in October 1917, and involved the court-martial of a number of noncommissioned officers at Fort Bliss on charges of mutiny for refusing to attend a drill formation while under arrest for minor infractions of the Articles of War. The defendants had relied upon a regulation which provided that a noncommissioned offer under arrest should not attend drill. Nevertheless, an officer persisted in the order and, upon their continued refusal, had them court-martialed for mutiny. All were found guilty and sentenced to be

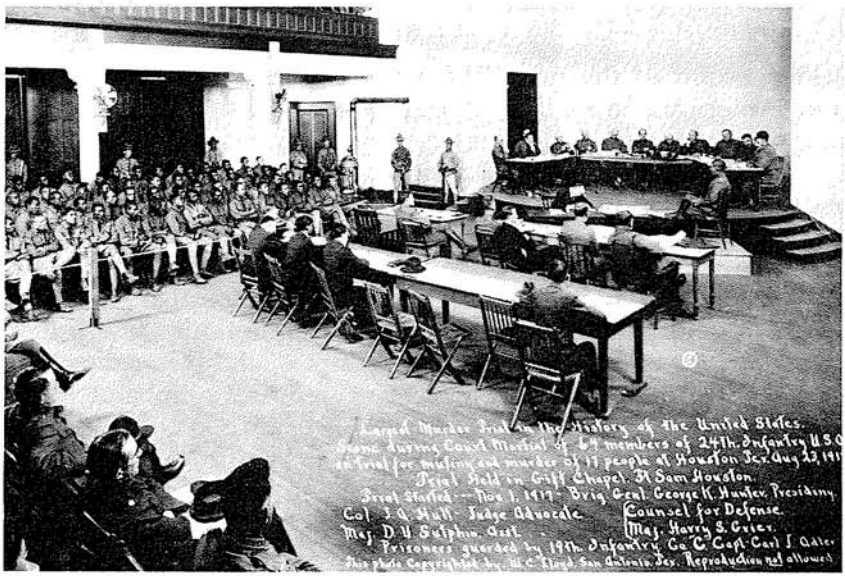

figure 37

LARGEST MURDER TRIAL IN THE HISTORY OF THE UNITED STATES. THIRTEEN OF THE 63 DEFENDANTS WERE HANGED THE MORNING AFTER THE DAY OF SENTENCING

dishonorably discharged from the service and to be confined for various terms of imprisonment ranging from 10 to 20 years.

As Acting Judge Advocate General, Samuel Ansell attempted to overturn the verdicts in the so-called "Texas Mutiny Cases" for both legal and policy reasons. Although unsuccessful, he let his feelings be known about the matter:

> Those men did not commit mutiny. They were driven into the situation which served as the basis of a charge by the unwarranted and capricious conduct of a young officer commanding the battery who had been out of the Military Academy but two years. Notwithstanding the offense was not at all made out by the evidence of record, notwithstanding the oppressive and tyrannical conduct of the battery commander, notwithstanding the unfair and unjust attitude of the judge advocate which all appeared on the record, these noncommissioned officers were expelled from the Army in dishonor and sentenced to terms of imprisonment . . .

The second of the two 1917 Texas incidents occurred shortly after American entry into World War I, when black soldiers, camped near Houston, demonstrated riotously against alleged racial injustices by the Army and the local community, climaxing in the death of 15 white men. As a result, 63 black soldiers were tried by court-martial. Fifty-eight were convicted, of whom 13 were sentenced to death and five acquitted. Although not required by law to do so, the commander at Fort Sam Houston had sought to ensure total fairness in the case by assigning his staff judge advocate to review the unfolding transcript of the proceedings on a daily basis. Because a state of war existed, the commander was authorized under Article 48 to carry out death sentences without submitting the case for further review or confirmation. Having received assurances as to the legality of the convictions, the commander ordered the executions to be conducted the morning after completion of the trial.

* * *

THE HOUSTON RIOTS

No other event during the First World War portended such vast change in the review of court-martial proceedings as the trial of the black troopers of the 24th Infantry in late 1917. Throughout that summer there were frequent racial confrontations between the soldiers acting as guards for the construction of a training camp and the city police and townspeople of Houston, Texas. Most of these incidents consisted merely in applying epithets of opprobrium to each other, sometimes resulting in a soldier's arrest.

Matters came to a head in August 23, when two black soldiers were arrested by the local constabulary in Houston for disorderly conduct. Rumors quickly reached the soldiers' camp that one had been killed by the police. The enraged soldiers raided their unit supply tents for weapons and ammunition and marched out of camp into Houston. During the next several hours, 15 white men, civilians, police officers and National Guards-

men were killed by the mob of black soldiers proceeding through the streets of the city. At one point the troopers halted the rioting to determine whether to carry the carnage further downtown or return to camp. When the majority decided to infiltrate back into camp, the leader of the riot, a Sergeant Henry, perhaps cognizant of the fate awaiting the mutineers, took his own life.

As soon as the Houston rioting became known to the authorities, Brigadier General J.A. Hulen was placed in charge of the city and martial law was declared. Early the next morning three companies of the Coast Artillery Corps and a battalion of the 19th U.S. Infantry arrived to assist in quelling the disturbance. Soon, all members of the 24th Infantry were disarmed and, with those who had been arrested in Houston, placed on trains and sent to Columbus, New Mexico. The suspected mutineers were delivered to the stockade at Fort Bliss, Texas, while the remainder of the unit was held at Columbus until the end of October 1917, when it was restored to duty.

On November 1, 1917, a general court-martial was convened in accordance with Paragraph 47, Special Order No. 290, Headquarters Southern Department for the trial of 63 of the suspected mutineers. Colonel John A. Hull, later Judge Advocate General, was detailed to supervise the prosecution which was conducted by Major Dudley V. Sutphin. When the trial concluded in early December, the court sentenced 13 of the blacks to be hanged; 41 to life imprisonment and four others to short terms. Five of the accused were acquitted. The 13 sentenced to death were hanged the next morning in a mass execution, the first since 1847. While the commander's actions were authorized under military law of the time, news of the execution created a furor in Washington. Soon thereafter the Commanding General of the Southern Department was relieved, reduced in rank and retired. As a result, General Order 169 of 1917—which prohibited the execution of death sentences before review by the Judge Advocate General—was promulgated. When General Samuel T. Ansell, then Assistant Judge Advocate General testified before the Senate Committee on Military Affairs with regard to the case, he stated that:

> 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.

It was not long before further provisions concerning the review of court-martial proceedings were put into effect.

* * *

After General Ansell's abortive attempt to set aside the verdicts in the "Texas Mutiny Cases," he addressed a memorandum to Secretary of War Newton D. Baker on November 10, 1917. Ansell asserted his opinion that a proper interpretation of Section 1199 of the Revised Statutes of 1878 (based on the Act of July 17, 1862) required the conclusion that the words "revise" and "review," as used in that statute, vested in the Judge Advocate

General authority to modify or set aside the findings and sentence in a court-martial case after approval by the appointing authority if there existed a lack of jurisdiction or serious prejudicial error.

General Crowder opposed Ansell's view, and thus began the famous "Ansell-Crowder Dispute" which ultimately caused a nationwide clamor for revision of the 1916 Articles of War. Details of this dispute have been collected by then Major Terry Brown, JAGC, in the *Military Law Review.* Portions of his work are summarized here because the dispute led directly to major changes in the law practiced by the military attorney and the practitioner's relationships with the military community. This was also the beginning of close public and Congressional interest in military criminal law. News of the "Houston Riot Cases" merely fueled the fire. There were bitter newspaper denunciations of military justice as administered during World War I; two independent investigations of the military justice system, one, by a special committee of the American Bar Association, and the second by a Special War Department Board on Courts-Martial and their procedure (dubbed the Kernan Board after its chairman, Major General Kernan); a statement by the President of the American Bar Association attacking the Articles of War—and finally, lengthy Congressional hearings that ultimately resulted in a revision of the Articles of War.

Ansell's contentions were based on grounds that: (1) "Revise," as defined in both legal and standard dictionaries, meant to re-examine for correction, to alter or amend; and that "review" was a synonym for "revise" and imported the same meaning; (2) the federal bankruptcy law was worded similarly to Section 1199 and the word revise had been judicially interpreted to connote the "power to re-examine all matters of law imported by or into the proceedings of the case;" (3) The Office of the Judge Advocate General had, for a short period of time following the Civil War, through the Bureau of Military Justice, exercised the power to take appellate action on court-martial findings and sentences pursuant to a statute brought forward without substantial change as Section 1199; (4) a change had occurred for reasons not expressed or known to Ansell—during the early 1880's, Judge Advocate General G. Norman Lieber adopted the viewpoint supported by General Crowder that the power of revision did not exist in Section 1199; (5) the Army was rapidly expanding and the influx of untrained officers and increase in the number of courts-martial which would logically follow such expansion required that the statute be properly construed to empower the Judge Advocate General to correct the increased number of

improper court-martial proceedings which could reasonably be expected to occur; and (6) The Judge Advocate General of the British Army exercised similar power.

On November 27, 1917, General Crowder countered with a memorandum to Secretary of War Baker opposing the views set forth by General Ansell on the basis that: (1) there was no valid analogy between Section 1199 and the bankruptcy law cited in General Ansell's memorandum; (2) his review of the history of the Office of the Judge Advocate General from 1864 to 1882 did not reveal a single instance of the use of the revisionary power which General Ansell alleged had been exercised; (3) Winthrop in his treatises did not refer to any such power in the Judge Advocate General; (4) an unreported case in the Circuit Court of Appeals for the Northern District of New York had held that the Judge Advocate General did not have the power of revision; and (5) in the instant "Texas Mutiny Cases," the Secretary of War, by statute, had the authority to effect an honorable restoration to duty of the individuals concerned (and General Crowder recommended that course of action).

On the 11th of December, 1917, General Ansell filed a brief with Secretary Baker, through General Crowder, supporting his interpretation of Section 1199. He took issue with Winthrop's thesis that *Dynes v. Hoover,* 61 U.S. (20 How.) 65 (1857) defined courts-martial as agencies of the Executive Department, asserting instead that they were "courts created by Congress, sanctioned by the Constitution and their judgments ... entitled to respect as such." He went on to argue that Section 1199 had established the Bureau of Military Justice in the Office of the Judge Advocate General for the sole purpose of taking revisionary action on court-martial records and recording the action taken; and the use of the word "revise" in the statute was organic, creating and defining the duties of the Bureau of Military Justice. General Ansell reiterated his belief that the proper definition of the word "revise" alone had been found by courts to be a statutory grant of appellate authority. He noted the anomaly where the Judge Advocate General had the authority to declare court-martial proceedings null and void for jurisdictional defect, but not the lesser power of revising the proceedings for errors substantially prejudicing the accused. He again asserted the necessity for this power of revision in light of the rapidly growing Army.

Six days later, General Crowder filed his opposing brief in which he relied predominantly on the points made in his memorandum of November 27, 1917. And on the 28th of December, 1917, Secretary of War Baker informed General Crowder that he felt General Ansell's brief was based primarily on

the necessity for, rather than the actual existence of, the power of revision. But Baker asked General Crowder to recommend how far the power to revise could be expanded by executive order and to what extent legislation would be required. Shortly therafter, a proposed revision of Section 1199 was submitted to the Senate Military Affairs Committee, but that group ultimately decided not to consider it.

Ansell was ultimately vindicated, however. To prevent a recurrence of the injustice of the "Texas Mutiny Cases" and the tragedy of the "Houston Riot Cases," General Order No. 7 was promulgated by the War Department, on January 17, 1918, requiring that execution of the sentence in any case involving death or the dismissal of an officer be suspended pending review and a determination of legality by the Office of the Judge Advocate General. Fratcher tells us that the reviewing authority, however, was still free to disregard the advice of the Judge Advocate General, and there was continued agitation for statutory reform of this and other features in the system of military justice.

General Order No. 7 led to establishment of a Board of Review in the Judge Advocate General's Office, with duties "in the nature of an appellate tribunal." The Board was to review the records in all serious general court-martial cases. Its opinions were merely advisory to the Judge Advocate General, who in turn recommended disposition to the field commander.

After these events, matters of military justice went along quietly until the Armistice of November 11, 1918. The following month, Senator George E. Chamberlain of Oregon made a speech alleging inequality within the military justice system, excessive sentences, command control, and calling for the establishment of an appellate tribunal to "formulate rules and equalize these unjust sentences." Shortly thereafter, the Executive Committee of the American Bar Association announced that "our military law system of administering military justice appeals to us as a subject which requires consideration and probably some reformation," and General Ansell launched his public campaign for revision of the Articles of War, establishing himself as the standard-bearer for the reformation of military justice. Speaking before the Chicago Bar Association and later the Chicago Real Estate Association he stated that the established system of military justice was "in many respects patently defective and in need of immediate revision at the hands of Congress." Eminent authorities within the field of law quickly lined upon both sides of the question, Professors Wigmore and George G. Bogert staunchly supported the then-existing Articles of War while admitting that some minor revision

was necessary. Professor Edmund M. Morgan sided with General Ansell.

Professor Wigmore, a supporter of General Crowder, put it this way:

> The prime object of military organization is Victory, not Justice. In that death struggle which is ever impending, the army, which defends the Nation, is ever strained by the terrific consciousness that the Nation's life and its own [sic] at stake. No other objective than Victory can have first place in its thoughts, nor cause any remission of that strain. If it can do justice to its men, well and good. But Justice is always secondary, and Victory is always primary.
>
> This general principle will explain why it is not always feasible to do exact justice in the Army in the midst of war.

The leading Senate reformer, George E. Chamberlain of Oregon, had introduced amendments to the Articles of War late in 1918. Senator Chamberlain's amendments were not reported to the full committee, but during the hearings on his proposals the Ansell-Crowder dispute was raised. At the Senator's urging the committee asked Ansell to draft completely revised Articles of War. Ansell's efforts were introduced by Chamberlain as Senate Bill 64 on which subcommittee hearings were conducted. It was thereafter introduced in the House of Representatives by Representative Royal Johnson of North Dakota as House Resolution 367.

General Ansell proposed a sweeping reform of military justice. Testifying before the Senate Committee on Military Affairs in February of 1919, he spoke as bluntly and critically as any American military man had ever dared to speak about the condition of military justice:

> Army officers, acting on a mistaken sense of loyalty and zeal, are accustomed to say, somewhat invidiously, that "courts-martial are the fairest courts in the world." The public has never shared that view. . . .
>
> This is not a pleasant duty for me to perform. I realize, if I may be permitted to say it, that I am arraigning the institution to which I belong—not the institution, but the system and practices under it—an institution which I love and want to serve honestly and faithfully always. Yet an institution has got to be based

> on justice, and it has got to do justice if it is going to survive, and if it is going to merit the confidence and approval of the American people. Indeed, if our Army is going to be efficient, justice has to be done within it, whether in war or in peace.

Ansell's hoped-for legislation was revolutionary for his time. The basic proposals in his draft were that:

(1) A number of the punitive provisions of the Articles of War should be rewritten to delineate the elements of the crimes, to establish a maximum punishment for each offense and to remove vague and ambiguous language;

(2) The 1917 *Manual* requirement that the officer exercising summary court-martial jurisdiction over the accused make a preliminary investigation of the charges, and give the accused an opportunity to make a statement or present evidence, would become statutory law. (Furthermore, the charges could not be referred for trial unless an officer of the Judge Advocate General's Department certified in writing that the charges were legally sufficient and it was apparent that prima facie proof of guilt existed.) This was consistent with Ansell's desire to remove the commander as sole judge as to when there should be a court-martial and to inject, whenever possible, a lawyer into the process.

(3) The military court scheme of general, special and summary courts-martial would be retained. However, Ansell did attempt to limit the functions of the commander in the court-martial process. First, his draft sought to limit the authority to convene a general court-martial. Under existing law, any commanding officer "when empowered by the President" could convene a general court-martial, and in practice, this power was delegated by the President to the War Department and far down the chain of command. The unlimited power of the President to authorize any commander to appoint general courts unnecessarily increased the number of courts without a corresponding benefit to the service. The Chamberlain (Ansell) bill would have limited convening authority to the President, Superintendent of the Military Academy, commanding officer of a territorial division, department, corps, tactical division, "or of any isolated body of troops consisting of a regiment or more which by reason of delay and difficulty of communication with it the President shall find it necessary to constitute a separate general court jurisdiction." This was an attempt to set some limiting standards on the delegation of the convening authority and reflected Ansell's belief that there would be a better chance for justice at a higher command where military lawyers would be available. The bill also would have

limited considerably the commander's control over courts-martial by removing his power to appoint court members, requiring counsel in general courts to be lawyers, and providing for a military judge in general courts.

(4) General Ansell realized that among the crucial aspects of any court-martial were the personnel sitting on the court and the method of their selection. The Chamberlain bill would have required exactly eight members for a general court-martial and three for a special court-martial. It also would have altered the commander's power to select the court and to control it during the trial. First, it provided that enlisted men would be tried by courts containing members from their own rank. Three of the eight members of a general court-martial, and one of three members of a special court-martial, would be required to be of the same rank as the accused. The bill also would have increased the required vote for conviction from two-thirds to three-quarters, with unanimity required for imposition of the death penalty. Thus, court members of the accused's own rank, constituting more than one-third of the court, could have held the determining votes as to conviction or not. Second, the Chamberlain bill attempted to change, for the first time, the commander's power to select the court members, a practice particularly foreign to civilian justice. The appointing authority would be permitted to designate a panel "consisting of those who are by him deemed fair and impartial and competent to try the cases to be brought before them," but a court judge advocate would be required to sit with each court-martial and would choose the court members from the panel. Again this indicated Ansell's faith in the introduction of legal officers into the court-martial process. The bill also proposed that in selection of the court the accused should be given two peremptory challenges, instead of one as before—and that he should be permitted to challenge the array by submitting an affidavit indicating that its composition or constitution manifested an inability to render justice, or that the appointing officer had acted with prejudice.

(5) Ansell disliked the existing court-martial structure with its judgeless court, with judicial functions performed by the prosecutor-judge advocate. The Chamberlain bill would have required the appointing authority to appoint a lawyer from the Judge Advocate General's Department or, if not available, an officer recommended by the Judge Advocate General as specially qualified by reason of legal learning or judicial temperment, to serve as court judge advocate for each general and special court-martial. There would be a division of duties along civilian court judge-jury lines. The court judge advocate would attend all sessions of the court

but would not be a voting member. He would be given most of the functions held by a civilian judge. He would rule upon motions and questions of law, summarize the evidence and applicable law at the conclusion of the case, review findings of guilt for legal sufficiency, and impose sentence with power to suspend it in whole or in part. He also would have had certain other responsibilities as a sort of "ombudsman" to ensure that the proceedings were fair, including the ruling on challenges and questions related to the competency and impartiality of the court, and ensuring that the accused would not suffer any disadvantage due to ignorance or incapacity (with the power to call witnesses if necessary "to elicit the truth").

(6) The Chamberlain bill provided that an accused in a special or general court-martial would be represented by the military counsel of his choice. The counsel selected by the accused would have to be appointed "unless the appointing authority shall furnish the court with a certificate which shall be placed in the record that such assignment cannot be made without serious injury to the service and setting forth the reasons therefor." The bill also provided that if the accused made it appear to the court judge advocate that he needed the assistance of a civilian counsel but could not afford to hire one, the judge advocate would employ civilian counsel and pay for his services. If the accused were found guilty, the judge advocate would be able to order a two-thirds deduction from the accused's monthly pay.

(7) The bill would have required that the rules of evidence applicable in United States district courts apply in courts-martial. The 1917 *Manual for Courts-Martial* did contain rules of evidence for courts-martial, written under the direction of Professor Wigmore. However, Ansell argued that military courts too often ignored the *Manual* and proposed that the exact evidentiary rules applicable in civilian courts should govern in courts-martial.

(8) There had been a number of World War I cases in which, after an acquittal by the court-martial, the commander refused to accept the verdict and returned the case to the court-martial, resulting in a conviction the second time around. The Chamberlain bill would have required that an acquittal be announced immediately in open court, and would have taken away from the reviewing authority the power to return an acquittal for reconsideration or to revise a sentence upward.

(9) Ansell felt strongly that civilians not in the chain of command or affected by military loyalty should be involved in reviewing court-martial convictions. The Chamberlain bill would have created a military appeals court of three judges, appointed by the President with lifetime tenure during good behavior and

the pay and retirement privileges of a federal circuit court judge. The court would have reviewed every general court-martial conviction in which the sentence involved death, dishonorable discharge or dismissal, or confinement for more than six months. The scope of its review would have extended to "correction of errors of law evidenced by the record and injuriously affecting the substantial rights of an accused, without regard to whether such errors were made the subject of objection or exception at the trial." The court would have been empowered to disapprove a finding of guilty or approve only so much as involved a lesser included offense, or disapprove the sentence in whole or part and to order a new trial, or report to the Secretary of War for transmission of recommendations of clemency to the President. The bill did not provide for an appeals court review of special or summary courts-martial. However, it did require that after the appointing authority approved a case, he would forward the records of the trial to general headquarters appointed by the President. There, a judge advocate would review the proceedings with the power—in cases of error prejudicial to the substantial rights of the accused—to revise the proceedings.

The Chamberlain bill was described by Professor Edmund Morgan in a 1919 article in the *Yale Law Journal:*

> Obviously the basic principle of the bill is the very antithesis of that of the existing court-martial system. *The theory upon which this bill is framed is that the tribunal erected by Congress for the determination of guilt or innocence of a person subject to military law is a court, that is proceedings from beginning to end are judicial, and that the questions properly submitted to it are to be judicially determined.* As the civil judiciary is free from the control of the executive, so the military judiciary must be untramelled and uncontrolled in the exercise of its functions by the power of military command. . . (Emphasis supplied)

Nevertheless, the Chamberlain bill ran into immediate difficulties in Congress. Its advocates, who had evoked the concern of Americans over court-martial abuses, found that, with the war over, interest began to ebb. After hearings on the Chamberlain bill were held in November 1919, it became obvious that the proponents of the bill could not muster enough support to overcome the opposition of the military and the War Department. The subcommittee considering the bill failed to report it out of committee, adopting instead a limited revision of the Articles of War which was passed as Title II of the National Defense Act of 1920. "The Ansel draft," remarked Professor Morgan years later,

"was badly mutilated." Many of his proposed reforms would have to wait for another "Great War" and for the Uniform Code of Military Justice of 1950 to become law.

The Revised Articles of War enacted in 1920 did not institute all the changes endorsed by General Ansell, but they did attempt to meet a number of the criticisms that had been levied at the 1916 Articles.

The 1920 Articles of War made no changes in the wording of crimes from the 1916 Articles, but the President was given continued authority to prescribe maximum punishments for various offenses. A pretrial investigation by an officer appointed by the commander was to be provided in general courts where the accused could offer evidence and witnesses, however, the investigating officer's recommendations were not to be binding upon the commander. Charges were to be referred to a staff judge advocate for consideration and advice prior to directing trial by general court-martial. The rules with respect to membership and selection of the court remained basically unchanged. Officers alone continued to sit on courts, and the only limitations on the commander's selection were that he choose those officers he considered best qualified "by reason of age, training, experience, and judicial temperament." No definite number of court members was established; general courts could have from five to 13 members, special courts from three to five. A two-thirds vote was still required to convict, except that a three-quarters vote was required for a sentence of life or one of more than 10 years, and a unanimous vote for death. The number of peremptory challenges remained at one without any right to challenge the array. There was still no provision for a judge, but the appointing authority in a general court-martial would detail one member of the court, who had to be a lawyer from the Judge Advocate General's Department, to serve as the "law member." He would rule upon interlocutory questions and instruct the court on the presumptions of innocence and the burden of the prosecution. However, his rulings would be final only as to admissibility of evidence, and he could be overruled by a majority vote of the court on all other matters. A defense counsel would have to be appointed for all special and general courts-martial, but he would not be required to be a lawyer. The Chamberlain bill's proposal for a civilian military appeals court was rejected. Commanders would continue to review convictions and sentence, but could not revise sentences upwards or return an acquittal to the court for reconsideration. The reviewing authority would have to refer the records of general courts-martial to his staff judge advocate for

review prior to taking final action, but would not be bound to accept the judge advocate's advice.

One of the more significant aspects of the Revised Articles was Article 50½ which required the Judge Advocate General to establish in his office a board of review consisting of three or more officers who would review the records of all sentences requiring Presidential confirmation (sentences involving a general officer, dismissal of an officer or cadet and cases involving the death penalty, the latter with certain wartime exceptions) and those with sentences of unsuspended dismissal, dishonorable discharges, or confinement in the penetentiary. In cases requiring Presidential confirmation, questions of both law and fact were considered. In all other reviews the board examined only questions of law. For cases requiring Presidential approval, the board submitted its written opinion to the Judge Advocate General who attached his own recommendations for forwarding directly to the President. Since final determination rested with the President, opinions of the board and of the Judge Advocate General were advisory. Despite this lack of finality, the Judge Advocate General ruled that when both the board of review and he found a conviction unsupported, the case would not be transmitted to the President. Instead, the entire record would be returned to the field commander for rehearing. The effect was to accord a distinct judicial character to the opinion of the board of review and of the Judge Advocate General.

Cases in the second category (involving dismissal of officers, confinement and dishonorable discharges) were examined by the board for the purpose of recommending disposition to the Judge Advocate General, who also reviewed the same cases. If the board and the Judge Advocate General agreed the record was legally sufficient, the sentence was ordered executed. If both found that a conviction was unsupported, the verdict and sentence were vacated, and the record returned to the field commander for his decision on the feasibility of conducting a new trial. If the Judge Advocate General did not concur with the board's decision, the case was submitted to the President for disposition. Thus, the board of review could never by its own authority cause its opinion to prevail over that of the Judge Advocate General; yet the board opinion was not subject to veto by the senior legal officer.

One other method existed whereby cases were heard by the board of review. The transcript of all remaining general court-martial convictions, with sentences involving fines or confinement for less than one year, were examined by a lawyer in the office of the Judge Advocate General. If this officer found the conviction unsupported, the case was sent to the board. If the panel agreed

that an injustice had occurred, the procedure followed was that for cases requiring Presidential confirmation.

As noted, cases requiring Presidential confirmation enabled the board of review to exercise broad powers in the examination of questions of fact and law. But in all other cases—numerically the great majority—the board interpreted its power very narrowly. Neither the board nor the Judge Advocate General weighed evidence, judged the credibility of witnesses, determined controverted questions of fact, or made inferences from testimony. The boards did adopt procedures patterned after federal appellate court rules. Counsel for the appellant-accused and for the government appeared before the board. Formal written opinions, with dissents, were prepared in all Presidential confirmation cases and in others involving major questions of law. The accumulation of opinions created a body of precedent which was followed according to the doctrine of stare decisis. However, their value as precedent was diminished by the fact that they were not published or made accessible outside the Army headquarters.

A revised and enlarged *Manual for Courts-Martial* was published in 1921 incorporating the changes made by the 1920 revision of the Articles of War. The *Manual* was edited by a board consisting of three JA officers: Colonels Walter A. Bethel and John H. Wigmore, and Lieutenant Colonel William Cattron Rigby. A condensed edition of the *Manual* was issued in 1928 which, with minor changes, remained in force until 1949.

Between the Wars

The Department strength remained high after the close of the First World War. The active duty officer strength was 373 on June 30, 1919, but a year later, the National Defense Act of June 4, 1920, fixed the strength of the Army's legal department at one Judge Advocate General with the rank of major general and 114 officers in grades from colonel to captain. The 114 officers were placed on the promotion list and advanced at an Army-wide rate so that there would not be fixed numbers in any particular grade. Vacancies created by the Act were to be filled by the appointment of Reserve, National Guard and temporary officers who had served during the war; vacancies occuring subsequently were filled by transfers from other branches of the service or by the appointment of Reserve judge advocates. After the reorganization of 1920, vacancies were, as a matter of practice, filled by transfers from other branches until 1940. The Department was forced to demote, retire, or discharge some of its officers where its strength was cut to 80 by the Act of June 30, 1922.

After an extraordinary career as a judge advocate officer, Major General Enoch Crowder retired on February 15, 1923. Colonel Walter A. Bethel of Ohio, who had served during World War I as a brigadier general and judge advocate of the American Expeditionary Forces under Pershing, replaced Crowder as Judge Advocate General. Bethel's promising career was foreshortened by his retirement for medical reasons, but the 22 months of his tour of duty were marked by two events of lasting interest to the Corps, one pertaining to his title; the other, to the insignia of the Department. Up to now we have referred to "the Judge Advocate of the Army" or "the Judge Advocate General," taking the titles from the statutes which created the office, but now the form changes to The Judge Advocate General. This change was the result of the appearance of the title in that form in War Department General Order No. 2 of January 31, 1924, which capitalized the "The" in the title of several principal Army staff members. The practice persists to this day and this volume shall henceforth use the term "The Judge Advocate General" or its usual abbreviation, TJAG.

* * *

MAJOR GENERAL WALTER A. BETHEL

Born in Smyrna, Ohio, on November 25, 1866, Walter A. Bethel was appointed a cadet to the United States Military Academy on June 14, 1885. He graduated from West Point in 1889, standing 14th in a class of 49, and was appointed a second lieutenant of artillery. He served 14 years in the line of the Army, studying law in his off-duty hours. In 1892 he obtained the LL.B. from Atlanta Law School; and received an LL.M. two years later from Columbia (now George Washington) University.

On July 15, 1903, he was appointed a major in the Judge Advocate General's Department, and served at various stations in this country, the Philippines, Puerto Rico and Europe. A great deal of his duty time was spent as an instructor of law at West Point. In 1917, when General Pershing was chosen to command the American Forces in Europe, he selected General Bethel (then a lieutenant colonel) as judge advocate on his staff. Bethel was promoted to the rank of brigadier general (temporary) on October 8, 1917, which rank he held until June 30, 1920, when he reverted to his permanent rank of colonel. General Bethel served as judge advocate of the American Expeditionary Forces until August 15, 1920, for which he was awarded the Distinguished Service Medal. Also, during his time in Europe he participated in the Meuse-Argonne offensive and in the occupation of the St. Die Sector. On February 15, 1923, he was appointed the Judge Advocate General with the rank of major general. He retired from active service on account of disability in line of duty on November 15, 1924.

* * *

The second event of Bethel's tour important to the traditions of the Corps was his unsuccessful effort to change its insignia, the "crossed pen and sword, wreathed." That device had been used by Army lawyers since 1890, but was not their first trademark.

The lore of JAG Corps heraldry was once traced by then

figure 38

THE DISCIPLINARY SECTION, JUDGE ADVOCATE'S OFFICE, A.E.F., WAS HEADED BY BRIGADIER GENERAL WALTER A. BETHEL, THIRD FROM LEFT, FRONT, LATER TJAG

Lieutenant Edward F. Huber in an early issue of *The Judge Advocate Journal.* Huber found that marks of Corps identity were not provided until after the Civil War. Indeed, Army Regulations of 1825 provided that "Chaplains, judge advocates, commissaries of purchases and storekeepers have no uniform." Although the 1857 Regulations required JA's to wear a white pompon of cloth material "wherever the epaulettes are worn," all available pictures of Judge Advocate General Joseph Holt (1862–1875) show him in mufti. However, during the last three years of Holt's tour there was authority for a uniform for members of the then Bureau of Military Justice.

From 1872 to 1890, officers of the Bureau were distinguished by the letters "JA" in Old English characters embroidered on the shoulder knot. It was in 1890 that the design of the original crossed sword and pen was adopted. General Order 53 of that year provided that the insignia for judge advocate officers should be worn on shoulder knots and should be:

> . . . of gold cord, one-fourth of an inch in diameter, Russian pattern, 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).

According to Huber, the Heraldic Section of the Quartermaster Corps, explained the significance of the design this way: the pen is to denote the recording of testimony; the sword, the military character of the Corps' mission; and the wreath, the traditional symbol of accomplishment. Curiously, the development of the insignia of the Inspector General branch parallels that of the JAGC in both time and design. Both insignia were authorized in the same year and both insignia were wreathed, resulting in a similarity of appearance. By another coincidence, the Corps' present colors of dark blue piped with white were once those of the Inspectors General. Prior to that time, the JAGD had colors of dark blue piped with light blue—then sometime during the first half of the 20th Century the colors of the two Departments were switched, for reasons no longer known.

In 1923, a complete revision of the Army Regulation containing provisions relating to JA insignia was undertaken, in the course of which there ensued a proposal to change the JAGD insignia. The proposal provided that effective 1 July 1942 the insignia should be: "A balance upheld by a Roman sword and ribbon blindfold, 1 inch in height. Scales and sword hilt to be gold, blade of sword and ribbon silver." Major G.M. Chandler, then in charge of Army heraldry, designed the insignia. It was taken from one of the bronze zodiac signs which ornament the floor of the main reading room of The Library of Congress. The explanation for the alteration in insignia was not obvious, but the similarity between IG and JA insignia may have played a major role in the proposal of a new trademark.

In addition to the confusion of IG and JA insignia, a more fundamental reason for the change was held in some quarters. Several judge advocates considered the crossed sword and pen not sufficiently symbolic of the JA's functions and desired a more appropriate replacement. This was the view of Judge Advocate General Bethel who apparently was instrumental in the switch of the Roman sword and balance design. In this case the sword

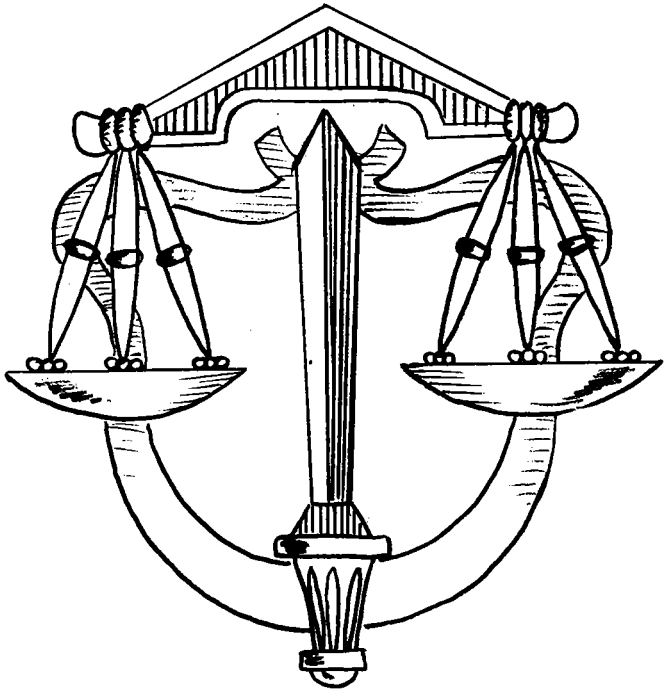

figure 39

TJAG Bethel Advocated JA Insignia With a Roman Sword and Balance—This Was a Short-Lived Change in Corps Heraldry

again represented the military character of the JA mission; the balance on the scales was the symbol of justice.

The change, however, was not popular in the Department. A few officers procured the new insignia in anticipation of the effective date of the new regulations, but most did not. Shortly after General Betel's retirement in November 1924, members of the Corps were canvassed for their views on the insignia. Most wanted to return to the crossed sword and pen.

When Colonel John A. Hull succeeded Bethel, one of his first acts was to procure a rescission of the still-proposed change in insignia. The sword and pen crossed and wreathed were retained as the insignia of the Judge Advocate General's Department (now

Corps). It has remained so ever since and is proudly worn by officers in every part of the globe where American troops are stationed—the respected symbol of the JA.

Colonel Hull, who had been judge advocate of the Services of Supply, American Expeditionary Forces in France, became The Judge Advocate General on November 15, 1924.

* * *

MAJOR GENERAL JOHN A. HULL

John A. Hull was born in Bloomfield, Iowa, on the 7th of August 1874, and graduated from the University of Iowa with a Ph.D. in 1894. He earned a law degree from Iowa one year later. Hull served through the Spanish-American War and the Philippine campaigns as a judge advocate of Volunteers in the grades of major and lieutenant colonel. At age 26 he was appointed a major, judge advocate, in the Regular Army, and became known in the service as the "Boy Major." He served at various higher headquarters in the United States and in the Philippine Islands during the next 17 years. At the beginning of the First World War he was on duty as judge advocate of the Central Department, Chicago, Illinois. Soon afterwards he was placed on special duty, which lasted until January 20, 1918, in connection with prosecution of the "Houston Riot Cases," mentioned earlier. On February 8, 1918, then a colonel, Hull sailed for France where he organized and became the Director of the Rents, Requisitions and Claims Service, American Expeditionary Forces at Tours, France. From November 27, 1918, to August 9, 1919, he was chief of the Finance Bureau, A.E.F., at Tours. Immediately thereafter, he returned to the United States and was on duty in Washington, D.C. in various capacities, until he was appointed The Judge Advocate General with the rank of major general on November 16, 1924. He served as Judge Advocate General for four years, retiring from the Army at his own request at the age of 54. Afterward, he served for several years as an associate justice of the Supreme Court of the Philippine Islands.

* * *

It was during Hull's term as The Judge Advocate General that the famous court-martial of Brigadier General William Mitchell, Assistant Chief of the Army Air Corps, took place.

* * *

THE COURT-MARTIAL OF BRIGADIER GENERAL WILLIAM "BILLY" MITCHELL

During the First World War the name of "Billy Mitchell" became a household word. He was the first American officer to fly over enemy lines and the first to be given the French *Croix de Guerre.* Always a man of action, Mitchell became the outstanding U.S. combat air commander of the war. In September of 1918 he commanded a French-U.S. air armada of almost 1,500 planes, the largest concentration of air power up to that time. This powerful force helped the U.S. 1st Army wipe out the St. Mihiel salient. In the subsequent Meuse-Argonne campaign, Mitchell, promoted to brigadier general in October 1918, used formations of up to 200 planes for mass bombing of enemy targets. His aggressive tactics reflected not only his character but also his ideas on the use of airpower. Mitchell returned to Washington after the war to be appointed assistant chief of the Air Corps in 1919. He became a strong proponent of an independent U.S. air force and of unified control of air power, both of which were opposed by the Navy and the Army general staff.

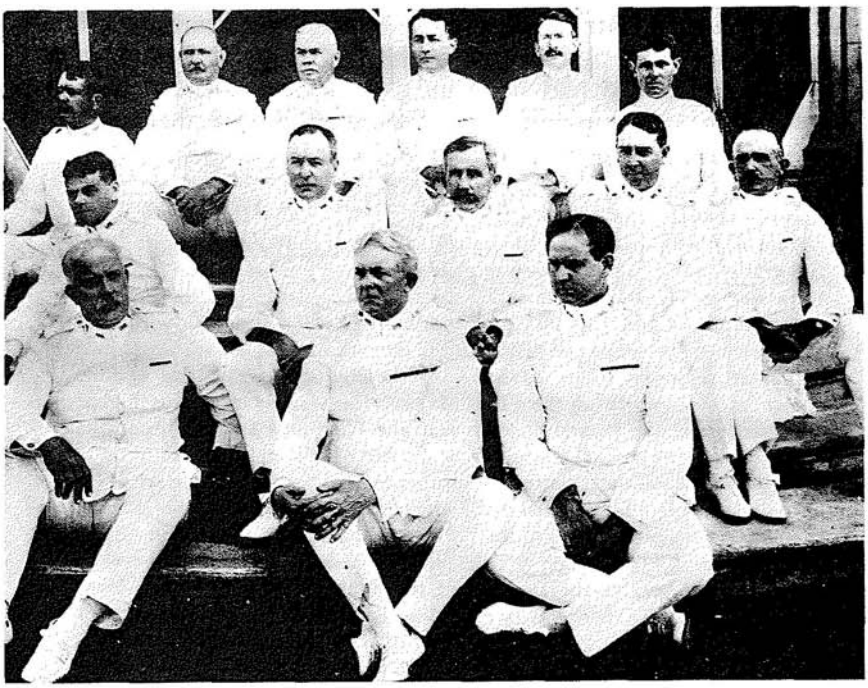

figure 40

JOHN A. HULL, FRONT ROW RIGHT, SERVED AS DEPARTMENT JUDGE ADVOCATE, PHILIPPINE DEPARTMENT, BEFORE BECOMING TJAG

Mitchell arranged and executed a demonstration of the effectivenesss of air power by sinking three captured battleships off Norfolk, Virginia, from the air. However, the demonstration proved unsuccessful in advancing his cause and as his hopes for recognition and appreciation of the future of air power failed to materialize, he became increasingly outspoken in his criticism of the military hierarchy that did not accept his views. At the expiration of his term as assistant chief of the Air Corps in April 1925, he was sent to San Antonio, Texas, in his permanent grade of colonel, as air officer of the VIII Corps area. But this departure from the seat of government did not silence him. He continued to write and speak in behalf of his views. The climax came in September 1925, when two highly publicized air disasters (the crash of the Navy dirigible *Shenandoah* and the loss of three craft on a Los Angeles to Hawaii flight) threatened to shake Mitchell's credibility. He went before the public, and at a press conference he handed out the following release:

> I have been asked from all parts of the country to give my opinion about the reasons for the frightful aeronautical accidents and loss of life, equipment, and treasure that has occurred during the last few days.
>
> My opinion is as follows: These accidents are the direct result of the incompetency, criminal negligence, and almost treasonable

figure 41

BRIGADIER GENERAL "BILLY" MITCHELL STANDS BEFORE THE COURT-MARTIAL WHICH FOUND HIM GUILTY OF INSUBORDINATION, CONDUCT TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE, AND BRINGING DISCREDIT ON THE WAR DEPARTMENT

administration of our national defense by the Navy and War Departments.

Mitchell was ordered to appear before a court-martial in Washington. He was charged with insubordination, conduct to the prejudice of good order and military discipline and bringing discredit on the War Department. Defense counsel Frank Reid first argued that the case should have been dismissed on the ground that Mitchell's purported offense was within his First Amendment rights. Colonel Sherman Moreland's argument as the judge advocate convinced the court that the speech was not protected by the First Amendment due to Mitchell's military status. Reid then took another approach. Attempting to show that Mitchell's statement with respect to incompetence in the War Department was indeed true, the defense paraded witness after witness before the court. General "Hap" Arnold, Fiorello La Guardia and many others testified to the unwarranted denigration of air power by the military hierarchy. But counsel for the government was not perturbed by the barrage of testimony from what Mitchell called the "air fraternity." Major Allen Gullion, later Judge Advocate General, attacked Mitchell's own testimony head on.

In an exchange concerning the prophecies in a paper submitted by the general after a tour of the Pacific, Gullion questioned Mitchell's assertions with regard to the versatility of the Japanese submarine. Mitchell replied:

> That was my opinion.
> That was your opinion?
> That was my opinion.
> Is that your opinion now?
> Yes.
> Then, any statement—there is no statement of fact in your whole paper?
> The paper is an expression of opinion.
> There is no statement of fact in your whole paper?
> No.

Mitchell's credibility was shaken but not destroyed. Gullion's closing statement returned to the attack of Mitchell's veracity:

> 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 counsel would have you believe? Is he not rather of the all-too-familiar charlatan and demagogue type—like Alcibiades, Catiline, and except for a decided difference in poise and mental powers in Burr's favor, like Aaron Burr? He is a good flyer, a fair rider, a good shot, flamboyant, self-advertising, wildly imaginative, destructive, never constructive except in wild nonfeasible schemes, never overly careful to the ethics of his method.
>
> 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.

Mitchell was found guilty of all charges and specifications and sentenced to be suspended from rank, command, and duty with forfeiture of all pay and allowances for five years. A disheartened man, he resigned from the Army effective February 1, 1926, and died some 10 years later. Despite the fall of the air arm's earliest advocate, air power grew and fulfilled most of Mitchell's predictions.

* * *

All the forces at work in a situation such as the one which led to Billy Mitchell's trial may never be identified. However, this midpoint between two great wars and the eve of the Great Depression is an appropriate place to look at some of the conditions in the "peacetime" Army. Those conditions are relevant to such occurrences and to the approach to the next war.

Characteristically, the Army had been reduced drastically after the First World War—down to some 131,000 men in 1923 and never more than 190,000 until 1940. Resources, especially training and equipment money, were similarly reduced in a total War Department budget of $300 million a year. Strength reductions—as after the Civil War—were exacerabated by dispersion. The Marshalls, Stilwells and MacArthurs were serving in China and the Philippines. Others like Patton, Bradley and Eisenhower were

building the new Army School System, particularly the largest at Fort Benning, Georgia, but there were 30 others. Regular officers and NCO's were committed to 325 schools and colleges in ROTC programs created by the National Defense Act of 1920. These and other programs for the Reserve Components, including JAGD, were to pay handsome dividends in the early 40's, but were a severe drain on an Army of 150,000.

This also was the period when national policy opposed engagement in any future foreign wars. The United States promoted and participated in the Washington Conference of 1921 on the limitation of naval armaments and the Pact of Paris in 1928 which denounced war as an instrument of national policy. At home, the Army saw its primary mission to be defense of the national frontiers, and was employed in a number of nonmilitary tasks. In addition to traditional duties in natural disaster relief activities, the Army assisted the Post Office in air mail delivery in 1934. Its largest distraction, however, was the organization and direction of the Civilian Conservation Corps under strict orders not to make it a military program. Three thousand regular officers and corresponding numbers of NCO's were devoted to that task until 9,300 Reservists were called to active duty to replace them.

JAG Department strength during the period between the wars was divided among several War Department offices, subordinate area headquarters in the United States, and the tactical units, particularly the divisions which were the new mobilization base (rather than regiments) established by the National Defense Act of 1920. There was plenty of work, even in a small Army. Officers in the Washington offices advised their chiefs, exercised the new appellate functions assigned to The Judge Advocate General, and served with the Departments of State and Justice in international cliams commissions, delegations and provisional governments in Cuba and the Philippines. In the field, prosecutions were frequent by current standards, although the trend was down. During the 1920's general courts-martial were conducted at a rate averaging 35 per thousand troops per year, but that dropped to about 15 during the 1930's. It is now about two per thousand. Special courts-martial rates exceeded 50 per thousand through the early part of the period between the wars, and dropped below 25 just before 1940. Their rate from 1945 to 1969 was higher than immediately before World War II, but is now around 18 per thousand per year. Only the general courts-martial records reached Washington for review under the 1920 articles. Special and summary courts-martial records of trial of this and earlier

figure 42

TJAG Edward Kreger Administers the Oath of Office to Douglas MacArthur as Chief of Staff. Secretary of War Patrick Hurley Looks On

periods were approved and retained locally and are now difficult or impossible to recover—much to the historian's chagrin.

* * *

Major General Edward A. Kreger

Edward A. Kreger, born May 31, 1868, in Keota, Iowa, received a B.S. degree from the Iowa State College of Agriculture and Mechanic Arts in 1890. He read law and was admitted to the state bar of Iowa where he served as a practicing attorney until the outbreak of the Spanish-American War. On May 24, 1898, he entered the service as a captain, 52d Iowa Volunteer Infantry and served for approximately three years with the Volunteers, spending most of this time in many engagements against the insurgents. Having been mustered out of the Volunteer service on May 6, 1901, he was appointed a first lieutenant of the 28th Infantry, Regular Army, some two months later. He served in that grade for 10 years, was

elevated to the grade of captain of infantry on February 15, 1911, and was made a major, judge advocate, the same day.

General Kreger was awarded the Distinguished Service Cross for heroism in battle in the Philippines. An Honor Graduate of the Infantry and Cavalry School, Fort Leavenworth, Kansas, he served two tours as Instructor in Law at that institution. Kreger also served as Professor of Law at West Point and as legal adviser in the Departments of State and Justice of the Government of Cuba. During the First World War, he had varied duties: as Assistant to the Provost Marshal General, as Assistant and Acting Judge Advocate General of the American Expeditionary Forces in France, and Acting Judge Advocate General in Washington. Kreger's advance in military rank reflected his creditable service: he obtained his lieutenant colonelcy in 1917; and on March 11, 1918, was appointed a brigadier general judge advocate. He was awarded the Distinguished Service Medal as a result of his service with the A.E.F. during World War I, and performed valuable services as legal adviser and arbitrator in the Tacna-Arica dispute between Chile and Peru in 1926. Kreger compiled a casebook on martial law (1910), and supervised writing of the 1920 *Manual for Courts-Martial* along with an annotated compilation of military laws in 1921.

On November 16, 1928, he was appointed The Judge Advocate General with the rank of major general—the position he held until February 28, 1931, when he was retired from active service. He died in San Antonio, Texas, on May 24, 1955.

* * *

Colonel Blanton Winship of Georgia, who had been judge advocate of the 1st Army in France during the war succeeded General Kreger as The Judge Advocate General. General Winship's World War I service was unusual for a judge advocate in that for a time he commanded a force of infantry and, while doing so, earned the Distinguished Service Cross for heroism in action. His career also included such positions as President Coolidge's military aide and legal adviser to the Governor-General of the Philippines.

* * *

MAJOR GENERAL BLANTON WINSHIP

Blanton Winship was born at Macon, Georgia, November 23, 1869, and obtained his A.B. degree from hometown Mercer University in 1889. He received a bachelor of laws degree from the University of Georgia in 1893. He was admitted to the bar and practiced law in Georgia, but upon the outbreak of the Spanish-American War, entered the Volunteer forces as a captain of the 1st Georgia Infantry. After some three years of service in the Volunteer infantry—mostly in the Philippines—he was mustered out. Winship accepted an appointment as first lieutenant of infantry in the Regular Army. Soon, he was made an acting judge advocate, with the rank of captain, and on January 4, 1904, he was appointed a major in the Judge Advocate General's Department.

While a Volunteer in the Spanish-American War, he served as a regimental and staff officer and as a member of a board of officers on claims in Manila. After his appointment in the Regular Army, he served as a judge advocate with the Army of Cuban Pacification, where he was for a time on duty in the Departments of State and Justice of the Provisional Government of Cuba, and as a member of the Advisory Commission for

Revision of the Laws of Cuba. He was judge advocate of the Maneuver Division, San Antonio, Texas, in 1911; judge advocate of the 2d Division, Texas City, Texas, in 1914; and was in charge of civil affairs with the Vera Cruz, Mexico, Expedition, in 1914. Afterwards, he became Instructor in Law at the Army Service School, Fort Leavenworth, Kansas and was on duty with the Office of the Judge Advocate General until December 26, 1917, when he sailed for France.

Winship was first the JA of the 1st Division and later performed duties as Acting Inspector, and with the G–3 of the 1st Army, American Expeditionary Forces. On July 19, 1918, he was given the temporary rank of colonel, judge advocate, National Army, and, although serving as judge advocate of the 1st Army, was placed in command of the 110th and 118th Infantry Regiments of the 28th Division with whom he participated actively in the Champagne-Marne, Aisne-Marne, Oise-Aisne, and Saint-Mihiel operations.

figure 43

TJAG Blanton Winship: Holder of the Distinguished Service Cross and Silver Star for Gallantry in Action During World War I

He was awarded the Distinguished Service Cross, for "extraordinary heroism in action near Lachaussee, France, November 9, 1918." General Winship became judge advocate of the Services of Supply and Director of Rents, Requisitions and Claims Service, at Tours, France, and from September 1919, to November 1923, he was on duty with the Reparations Commission in Paris. For his exceptionally meritorious and distinguished services in France, Winship also received the Distinguished Service Medal. He was awarded the Silver Star for an act of gallantry near Villers sur Fere, France; and his foreign decorations included those of the French Legion of Honor (Officer), and the Montenegrin Silver Medal for valor.

General Winship returned to the United States in 1923 and was placed in charge of Civilian Military Training Corps affairs at Headquarters 1st Corps Area, Boston, Massachusetts. Afterwards, he became Executive Officer in the Office of The Judge Advocate General; Military Aide to President Coolidge; Legal Adviser to the Governor General of the Philippines; and Assistant to The Judge Advocate General. While serving as Assistant to The Judge Advocate General, he was sent as the War Department representative to accompany a delegation to Venezuela to attend the unveiling of a statute to Henry Clay erected in that country; and while The Judge Advocate General, he was sent to Liberia several times as the representative of the President in negotiations with that country.

Winship became The Judge Advocate General on March 1, 1931, which position he held until his retirement from the service on November 30, 1933. General Winship continued his career of public service as Governor of Puerto Rico from 1934 to 1939. When World War II broke out, he was recalled to active duty as coordinator of the Inter-America Defense Board, and served as a member of the military commission that tried the eight German saboteurs prosecuted by his successor as TJAG, Myron C. Cramer. When General Winship retired again from the service in 1944 he was the oldest American officer on active duty. He spent the later years of his life devoted to the conservation of southern forest lands, and he died a bachelor in Washington, D.C., October 9, 1947.

* * *

The twenties and thirties were a slow period for the Army of the United States, except for cooperation with national recovery programs and such training as a very limited budget permitted, which are described elsewhere in this history. Although the Army's strength did not exceed 150,000 from 1922 to 1935, there was work for its lawyers, an increasing portion of which was in fields other than criminal justice.

The Depression made the Army an economic opportunity for many men and those who successfully survived the long lines at the Recruiting Stations were better behaved than some of their predecessors. Whereas general courts-martial rates per thousand troops varied between 30 and 40 in the first decade after World War I, the rates after 1930 dropped to 10 per thousand. Though not as dramatic, the drops in special and summary courts-martial were similar, at least to half their former levels. There is a generally-held belief that the Army's desertion rate is inversely proportional to the national unemployment rate, *i.e.*, when it is

"cold on the outside" the soldier tries his best to stay in the Army. These figures would tend to confirm that view. However, the rates continued their general decline through the Second World War and into the modern era, marking the progress of the introduction of modern legal standards presaged by the dispute over revision of the 1916 Articles of War.

A brief look at the Opinions of The Judge Advocate General and the Board of Review during this time show disapproval of courts-martial results in language quite like that which we expect to see today. Cases from the field were "busted," as the word is used in office parlance, for variation between allegations and the proof at trial, for misconduct at trial by the prosecutor, for permitting the officer who filed the charges to sit on the court, for "entrapment" of the accused, and because of the admission of illegally-obtained evidence. These are but samples of the opinions recorded; there are many more which, taken together, show the growing emphasis on "procedural due process" in the military legal system and the enlarged community role of The Judge Advocate General.

That larger role was not confined to the criminal justice function. Even though the Army had less money to spend there were still questions about the validity of contracts bearing a date which turned out to be a Sunday; the Army's right to full performance of all contract terms; and the extent of its obligations under certain contract terms, to mention a few. There were recurring problems about "lands and buildings," and TJAG was called upon frequently to determine what law applied and to whom in "territories and insular possessions" of the United States. Not surprisingly, money problems abounded, and staff disputes about the allocation of scarce resources were often resolved by a decision of TJAG that money from appropriation by Congress was not available for the use some agency intended. One decision settled an argument between the Civil Service Commission and the Chief of the Quartermaster Corps over who would pay for telegrams sent by the persons selected for employment with the latter.

Two other observations may be offered from this short review of TJAG's office opinions during the Depression era. The volume of business is to some measurable extent related to the size and current mission of the Army—opinions from the period 1912 to 1924 far outnumber those from 1925 to 1940. Secondly, and less obviously, the proportion of opinions turning on Army Regulations grew. Earlier collections were dominated by opinions which interpreted the Articles of War and other statutes, but the Army's lawyers seem from this period forward to be getting more and

more involved in the internal operations of the military community as evidenced by the number of requests for interpretation and construction of regulations dealing with the full gamut of Army activities.

Colonel Arthur W. Brown of Utah, who had been acting judge advocate of the United States Expeditionary Forces at Vera Cruz

figure 44

ARTHUR W. BROWN

in 1914 and judge advocate of the 3d Army in France during World War I, was appointed The Judge Advocate General on December 1, 1933, and served in that position until his retirement on November 30, 1937.

* * *

MAJOR GENERAL ARTHUR W. BROWN

Arthur Winton Brown was born in Davenport, Iowa on November 9, 1873. He enrolled in Cornell University Law School and received his

Bachelor of Law degree in 1897. When the Spanish-American War broke out he enlisted in the Utah Light Artillery and served as a private, corporal and sergeant in the Volunteer forces on the Philippine Islands where he participated in several expeditions and many engagements. On January 22, 1900, he was appointed a Regular Army second lieutenant in the infantry where he served for over 16 years, reaching the grade of captain. He was appointed a major in The Judge Advocate General's Department on October 2, 1916. Seventeen years later he was appointed the Judge Advocate General—on December 1, 1933,—and filled that office for four years, retiring from active service on November 30, 1937.

General Brown had varied and extensive military service. While serving in the line of the Army, he was stationed at various U.S. posts and in the Philippines where he spent almost six years. Brown commanded the 26th Company, Philippine Scouts, conducting jungle warfare against guerilla forces on Luzon, Samoa and Leyte. He was acting judge advocate of the United States Expeditionary Forces at Vera Cruz, Mexico, in 1914, and was acting judge advocate of the 2d Division, at Texas City, Texas when the United States entered the First World War. After a short detail in The Judge Advocate General's Office, Brown became judge advocate of the 78th Division at Camp Dix, New Jersey, and sailed to France with that organization early in 1918. Soon after his arrival, he was named judge advocate of the 3d Army. While serving in France he participated in the Aisne-Marne, the Oise-Aisne, and the Meuse-Argonne engagements, and later became the Chief Claims Officer of the Rents, Requisitions and Claims Service in France and Germany.

Brown returned to the United States in 1920; and after a few weeks of service in the Office of The Judge Advocate General, sailed for Panama where he served three years as Department Judge Advocate of the Panama Canal Department. Returning again to the United States, he served four years in the Office of The Judge Advocate General and then went to Omaha as judge advocate of the VII Corps Area. From there he went on detached service to Tacna-Arica, Chile, to assist in settling the boundary dispute between that country and Peru. Returning to the United States, he was soon off again, this time to Nicaragua as Legal Adviser to the Chairman of the National Board of Elections in that country. Following this duty—and after a tour as Executive Officer in the Office of The Judge Advocate General—he went to Boston as judge advocate of the I Corps Area. From there he was sent to South America in connection with the settlement of the boundary dispute between Paraguay and Bolivia. Before he returned from this mission, he was appointed The Judge Advocate General of the Army, assuming that office on February 28, 1934, after a short tour of duty with the State Department to close out the details of his South American mission. Brown served four years as Judge Advocate General, retiring from office n 1937. He died on January 3, 1958, in St. Petersburg, Florida.

* * *

Colonel Allen W. Gullion of Kentucky, who had served in the Provost Marshal General's office and as judge advocate of the III Army Corps during World War I succeeded General Brown as The Judge Advocate General on December 1, 1937. He was perhaps best known as the trial judge advocate who prosecuted Brigadier General William "Billy" Mitchell, Assistant Chief of the Air Corps, in 1925. But many other military personnel recall him as the great Provost Marshal General during World War II.

figure 45

Allen W. Gullion, TJAG and Provost Marshal General

* * *

Allen W. Gullion

A native of Kentucky, Allen Wyant Gullion graduated from Centre College with an A.B. degree in 1901. He graduated from the United States Military Academy in 1905 and was commissioned a second lieutenant of infantry. Gullion spent some 12 years as an infantry officer, seeing action in the Philippines. After service with the 2d Infantry in Hawaii and an assignment as Professor of Military Science and Tactics at State University in Lexington, Kentucky, he joined the 20th Infantry for Mexican border service.

Gullion received a Bachelor of Laws degree from the University of Kentucky in 1914, and three years later was appointed a major in the Judge Advocate General's Department. In 1917 he was sent to Washington performing various duties in connection with the administration of the Selective Service law, for which he received the Distinguished Service Medal. In 1918 he joined American forces in Europe where he performed legal duties in France and became judge advocate of the III Corps on its march

into Germany. After being recalled to the United States, Gullion performed special duties with the War Department General Staff. Thereafter he served as department and corps area judge advocate at Governors Island, New York; attended various service schools; and taught at the Command and General Staff School.

From the Spring of 1932 until December 1933, General Gullion headed JAG operations in the Hawaiian Department and took over as Administrator of the National Recovery Act in Hawaii until July of 1935. He then returned to Washington and was designated Chief of the Military Affairs Division of The Judge Advocate General's Office; later Assistant Judge Advocate General; and, in 1937, The Judge Advocate General of the Army. During his term as TJAG, General Gullion represented the United States at a conference of juridicial experts at Luxembourg. His administration was marked by many notable achievements including the passage of major legislation transforming the peacetime Army into a wartime body, and the reduction of the general court-martial rate to its lowest point in the peacetime history of the Army. General Gullion established several military schools, including a school on military government at the University of Virginia for training officers for possible military occupation duties. Later, on his recommendation, the Civil Affairs Division of the Army General Staff was created to utilize the personnel he trained at Virginia. On July 3, 1941, he was appointed Provost Marshal General in addition to his duties as The Judge Advocate General (many young JAG officers who recently attended officer basic training at Fort Gordon, Georgia, may recall Gullion Hall, named in his honor). Upon completion of his tour as The Judge Advocate General on December 1, 1941, he continued as Provost Marshal General. Under General Gullion's guidance the "MP" of World War II emerged as a trained specialist equipped to handle the difficult task of military law enforcement.

One of the more important duties of General Gullion as Provost Marshal General was supervision of the handling of Axis prisoners of war. It was his task to see that the rules of the Geneva Convention were followed and that the prisoners received the treatment which they merited under those rules without coddling or undue favor. By an interesting coincidence, in 1929 General Gullion had been the senior War Department representative at the International Conference at Geneva, Switzerland, which met to formulate a code for prisoners of war and revise the Geneva Convention of 1906. Thus General Gullion, who was perhaps more responsible than any other American military officer for the creation of a code governing prisoners of war, was chosen to carry into effect the provisions of that code. And it was the American Prisoner of War Information Bureau, a part of the Provost Marshal General's Office created pursuant to that international code, which first reported to General Gullion the capture by the Germans of his youngest son, First Lieutenant Allen W. Gullion, Jr., an Air Corps officer.

In 1944 General Gullion accepted an appointment as Chief of the Displaced Persons Branch on General Eisenhower's staff. In this role he was charged with consultation and coordination with the governments in exile with respect to the rehabilitation of their nationals found in Germany upon its occupation by the Allies. General Gullion was able to complete the basic planning for this project prior to his retirement in December of 1944. He died some 18 months later, on June 19, 1946.

* * *

Fratcher reports that by 1938 there were 90 judge advocates in active service, 36 of whom were assigned in the Office of The

Judge Advocate General while 27 were assigned to the headquarters of corps areas and posts. Other judge advocate officers served in various War Department offices and with tactical commands. After passage of the Act of April 3, 1939, an increase in the strength of the department to 121 was authorized in annual increments over a period of 10 years. The outbreak of war in Europe and the possibility of the United States becoming involved stimulated additional, but gradual expansion. On July 1, 1940, there were 105 judge advocates in active service—19 serving in the Office of The Judge Advocate General. Retired, Reserve, and National Guard judge advocates were ordered to active duty in 1940 and 1941. By July 1, 1941, there were 190 judge advocates in active service, with some 100 serving in the Washington office.

VIII

The Second World War and Two New Military Codes

The early 1940's saw the beginning of the greatest expansion in the history of the Judge Advocate General's Department. The existence of a limited national emergency had been declared by President Roosevelt on September 8, 1939. Increases in the commissioned and enlisted strength of the Regular Army and National Guard—within the limits of peacetime authorization—were authorized by Executive Order on September 8, 1940. The full impact of the changing situation was felt by the Department when the National Guard was called into active federal service beginning August 31, 1940, and the Selective Training and Service Act was approved on September 16, 1940. The nation went on a war footing during a period of what was, legally at least, peace. New legislation affecting the military service followed in great quantity. Procurement of materiel became a matter of billions of dollars. Every phase of Army life and activity outgrew its peacetime mold, and the legal challenges presented to the Department became more numerous and varied. Many of these problems had been encountered and solved in other periods of national emergency and war; but with the old came innumerable new challenges, which had never before been presented to the Army lawyer.

On December 1, 1941, a few days prior to the Pearl Harbor attack, Colonel Myron C. Cramer of Connecticut succeeded General Gullion as The Judge Advocate General of the Army, and as such, became chief legal adviser of the Secretary of War, the War Department, the Chief of Staff and the rest of the military establishment as a whole. The everyday matters with which General Cramer became concerned—besides supervision of the system of military justice throughout the Army—included the furnishing of advice concerning legal phases of the business, property and financial operations under the jurisdiction of the Secretary of War, and the legal questions growing out of the administration, control, discipline, status, civil relations and activities of the personnel of the military establishment. More specifi-

cally, these newly emphasized duties included the furnishing of legal advice and service to agencies of the War Department on matters relating to claims by and against the government; contracts; bonds of government officials, contractors and subcontractors; patent activities; land purchases, sales, leases, and grants; organization of the Department and the Army; rights and obligations of military and civilian personnel of the Department; legal assistance to personnel of the Army in connection with their personal affairs; and the laws of war, international law, military government, martial law, prisoners of war, and the internment of enemy aliens. Although, in all of these matters The Judge Advocate General was primarily concerned with the legal aspects, as distinguished from the discretionary or policy phases, he was often called upon to make policy recommendations as well as to render opinions based solely upon law and precedent.

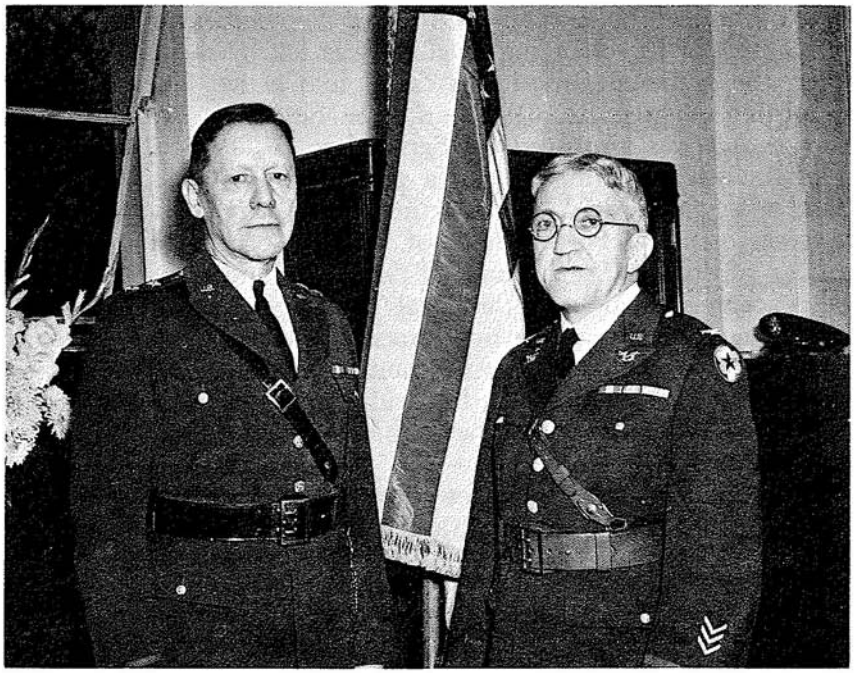

figure 46

MAJOR GENERAL ALLEN GULLION, LEFT, SWORE IN MAJOR GENERAL MYRON CRAMER AS HIS TJAG SUCCESSOR. WITHOUT LOWERING HANDS THE NEW TJAG SWORE IN GULLION AS THE NEW PROVOST MARSHAL GENERAL

* * *

MAJOR GENERAL MYRON C. CRAMER—WARTIME TJAG

General Myron C. Cramer served as Judge Advocate General during World War II when the Judge Advocate General's Department underwent an unprecedented expansion to meet wartime needs and was reorganized along its present lines.

Myron Cramer was born in Portland, Connecticut, on November 6, 1881. He attended Wesleyan University where he obtained an A.B. degree in 1904, then entered Harvard Law School, receiving the LL.B. in 1907. Cramer entered the practice of law in New York City, spending three years on the legal staff of a large insurance company. In 1910 he moved to Tacoma, Washington, where, for a time, he engaged in the general practice of law and then served as Deputy Prosecuting Attorney for Pierce County. During this time he joined the Washington National Guard as a private, and was commissioned a second lieutenant of cavalry in November of 1911.

In 1916, while still serving as the deputy county prosecutor, Cramer was called into active service for Mexican border duty. This service concluded, he returned to the prosecuting attorney's office for a brief period before the Guard was again federalized for World War I. First stationed at Camp Greene, North Carolina, Cramer went overseas in January 1918 as a captain with the 41st Division. While in France he attended the General Staff College at Langres. Upon his graduation in June of 1918 he rejoined the 41st Division as Assistant Chief of Staff. Awarded the *Ordre de l'Etoile Noir* of France for his World War service, Cramer returned to the United States in July 1919 with the rank of lieutenant colonel.

Myron Cramer resumed his civilian practice in Tacoma for about a year, but in July of 1920 accepted a commission as a major in the Judge Advocate General's Department. As a member of the Regular Army he first served as judge advocate of the 3d Division and later the 4th Division at Fort Lewis, Washington. Other assignments took him to West Point as assistant professor of military law at the United States Military Academy, and to Manila as judge advocate of the Philippine Department. Returning from Manila, General Cramer became chief of the Contracts Division, JAGO, which office he held until he became The Judge Advocate General on December 1, 1941.

Called to the Army's top legal post only days before Pearl Harbor, General Cramer presided over the immense expansion of the Judge Advocate General's Department necessitated by World War II. The proportions of this expansion are reflected by corps strengths: there were 190 judge advocates in the Army in 1941. By 1945 there were 2,162. The workload increased tremendously on all fronts, and new areas of endeavor were undertaken. In the field of military justice, alone, more than 82,000 general court-martial records were reviewed.

During the war years, General Cramer briefly returned to the practice of his predecessors by serving as co-prosecutor of the German saboteurs who landed in Florida and Long Island by submarine in 1942. The Army joined with the Department of Justice with General Cramer prosecuting for the Army and Francis Biddle for the Justice Department.

After World War II General Cramer retired to private practice in Washington, D.C., but was recalled to active duty in 1946 to act as the United States member of the 11-nation military tribunal for disposition of Japanese war crimes. Upon conclusion of the war crimes trials he returned to his practice. General Cramer died on March 25, 1966, in Washington, D.C.

* * *

At the outbreak of World War II, judge advocates in the field were assigned to the staffs of commanders exercising general court-martial jurisdiction and to larger commands. These members of the Department were known as Staff Judge Advocates, the official designation corresponding to the designation of the command; for example, Division or Corps Staff Judge Advocate. With respect to the command to which they were assigned, their duties corresponded in nature and scope to those discharged by The Judge Advocate General in relation to the whole military establishment. In time of war or domestic disturbance their functions might include duties in connection with military commissions, provost courts or other military tribunals, and the furnishing of advice concerning legal questions relating to claims and relations of the civil population arising in occupied enemy territory or incident to hostilities or domestic disturbances. These judge advocates were in every sense of the word staff officers, often engaged in additional duties as participation in training tests of units prior to entry into battle; liaison officers between headquarters during combat; acting members of the general staff with troops; and acting inspectors general. The judge advocate was a soldier as well as a lawyer, as evidenced by the wartime activities of many JA officers.

* * *

ARMY JA'S IN WORLD WAR II

The Spitzer Incident

On the morning of July 31, 1944, a young lawyer who was attached to the 4th Armored Division found himself in the midst of the war in France. First Lieutenant Samuel E. Spitzer laid aside his personal weapons and walked openly down the center of a small French town occupied by German forces, calling out loudly in German that the town was surrounded by American forces and demanding that the Germans surrender. As a result of this act, the young attorney captured 508 prisoners of war and saved American lives that might have been lost in a fight for the town. For his heroism Spitzer was awarded the Silver Star.

Colonel Rawitser's Capture

At the outbreak of the Second World War, the Judge Advocate General's Department had eight men performing the Army's legal tasks in the Philippines. As the Japanese attacks portended the ultimate fall of the Philippines, the Army lawyers set aside their books and took up arms and fought alongside the rest of the Bataan defenders. Six lost their lives in the final battle; the survivors were the two oldest men. One was Colonel Emil C. Rawitser from Tennessee who came into the Army with the 1st Infantry Tennessee National Guard. Having won a Silver Star in the First World War, Colonel Rawitser was perhaps not too unfamiliar with the rigors of combat. Upon capture by the Japanese, the two JA's were sent as prisoners to Japan. There, because of their poor physical condition, the two Army lawyers spent their days in captivity as goat tenders. As General Thomas H. Green once observed "they survived by cheating on the goats."

figure 47

CAPTAIN SAMUEL SPITZER IS AWARDED THE SILVER STAR FOR HIS DARING CAPTURE OF 508 GERMAN SOLDIERS AT LEPONT, GILBERT, FRANCE

Carl Bert Albert

Congressman Carl Albert served with the Judge Advocate General's Department in the Pacific Theater. A Rhodes Scholar and graduate of the Oklahoma City University where he had obtained his law degree, Albert was first elected to the United States House of Representatives with the 89th Congress in 1947. He was named Democratic Whip of the 84th through the 91st Congresses and, in the 92d Congress, became Speaker of the House.

Alexander Pirnie

A graduate of the Cornell Law School, Alexander Pirnie began his military career as an infantry second lieutenant, Officer Reserve Corps, in 1924. He volunteered for active duty on December 4, 1942, and served as a JAGD colonel in the European Theater. For his valuable service during the war, he was awarded the Bronze Star and Legion of Merit.

He was elected to the 86th Congress from New York on November 4, 1958, and served in the next six Congresses. Congressman Pirnie participated as a member of the House Armed Services Committee and the Republican Policy Committee. He is a past president of the Judge Advocates Association.

Other notable World War II JAG'S included: Former American Bar Association President and Watergate Special Prosecutor Leon Jaworski;

figure 48

ABE MCGREGOR GOFF, ICC CHAIRMAN AND CONGRESSMAN, DECORATED BY TJAG GREEN

former United States Senator Ralph Yarborough of Texas who served as a lieutenant colonel in the Corps from 1943 to 1946; Judge John Lewis Smith, a colonel in the JAGD presently serving with the United States District Court for the District of Columbia; Abe McGregor Goff, a former chairman of the Interstate Commerce Commission and member of the 80th Congress; Congressman Joseph Landon Evins from Tennessee who served as a major in the European Theater of Operations; Karl Robin Bendetson who as a JAG from 1940 to 1946 directed the evacuation of Japanese from the West Coast. He later served as an Assistant and Undersecretary of the Army. A host of distinguished legal educators and deans who served as JA's includes such names as Charles Potterfield Light (Washington and Lee), Paul M. Hebert (Louisiana State), John Ritchie (Northwestern), Mason Ladd (Iowa and Florida State), Robert Kramer (George Washington), Ernest Raba (St. Mary's), Joseph Warren Bishop (Yale), and William Fratcher (Missouri). Many other wartime JA's remained in the Corps until retirement and then began second careers at the podium or in the office of the Dean.

* * *

In addition to duty in the Judge Advocate General's Office and as staff judge advocates, members of the Department were from

time to time assigned as additional members of the War Department General Staff, in the Office of the Secretary, Undersecretary and Assistant Secretary of War, at the United States Military Academy, and to other offices and agencies.

The personnel of the Judge Advocate General's Department consisted of officers of the Regular Army, Organized Reserve officers, National Guard officers, and officers temporarily commissioned in the Army of the United States without specification of component. These officers were all qualified lawyers, many having had years of experience as line officers, which gave them an intimate acquaintance with the operating, as well as the legal phases of the military establishment. Others were prominent and highly successful members of the civilian bar, teachers of law, members of the judiciary, and officials of other departments of the government. They all enriched the Judge Advocate General's Department with their ability, knowledge, and experience. Warrant officers, classified as clerical specialists by the Judge Advocate General's Department also served in the offices of the staff judge advocates. Some of these warrant officers were lawyers while others were experienced in Army administrative methods, but, regardless of their backgrounds, their services were of great value to the Department. The Department had no enlisted men permanently assigned, although many enlisted men attached to the headquarters company of the unit concerned were on duty in the various staff judge advocate offices. A number of these men, too, were lawyers, while others were stenographers, typists and clerks. They were, with few exceptions, men of high-caliber without whom the offices in the field could not have properly functioned. Finally, there were civilian employees of the Department, some few of whom were lawyers who had served there for many years. These other civilians furnished the clerical assistance so vital to the proper operation of a large office.

As mentioned, the Department's ranks were filled with men from the Reserve and National Guard. These judge advocates were in the grades from colonel to captain, and had completed the basic Departmental correspondence courses. Most of them had spent one or more two-week training periods, either in the Washington office or in a staff judge advocate's office, while a few had spent a year on extended active duty with the Office of The Judge Advocate General. It was this group of men that The Judge Advocate General relied upon during the state of national emergency that existed immediately prior to and during the Second World War.

During the first two months of war, The Judge Advocate General remained under the supervision of the Chief of Staff until the Army of the United States was reorganized by Executive Order No. 9028, February 28, 1942, into a War Department General Staff, a Ground Force, an Air Force, and the Services of Supply, the latter being redesignated the Army Service Forces by War Department General Order No. 14, March 12, 1943. The details of the reorganization were set out in War Department Circular No. 59, March 2, 1942, and The Judge Advocate General was placed under the command of the Commanding General, Services of Supply, except with respect to courts-martial and certain other matters on which he was to report directly to the Secretary of War. Pursuant to Executive Order 9082, the Office of The Air Judge Advocate of the Army was established on March 9, 1942. With the promulgation of War Department Circular 1, the reorganization of the Army created the Office of The Air Judge Advocate as an office of the Air Staff. Within the Services of Supply, The Judge Advocate General was placed under the supervision of the Chief of Administrative Services, later the Director of Administration. In October and November of 1943, changes were made in the overall staff structure of the Army Service Forces and The Judge Advocate General became one of the functional staff directors directly under the Commanding General, Army Service Forces.

Generally speaking, the wartime work of the Department fell into three main categories; *judicial,* or the supervision and operation of the system of military justice throughout the army; *advisory,* or the rendition of opinions and other legal services to the Secretary of War and the military establishment; and *administrative,* or the personnel administration of the Judge Advocate General's Department. World War II was big business for everyone in the United States, including Army lawyers. The scope of their work and the maturation of the Corps are portrayed in the following detailed account of wartime organization and activities.

The organization of The Judge Advocate General's Office on July 1, 1940, is reflected in the chart on the following page. In order to relieve The Judge Advocate General of many of the details which he had handled personally, the office was reorganzied in November 1941. Two senior officers were designated as Assistants to Judge Advocate General, each supervising various divisions of the office. These officers eventually became Assistant Judge Advocates General.

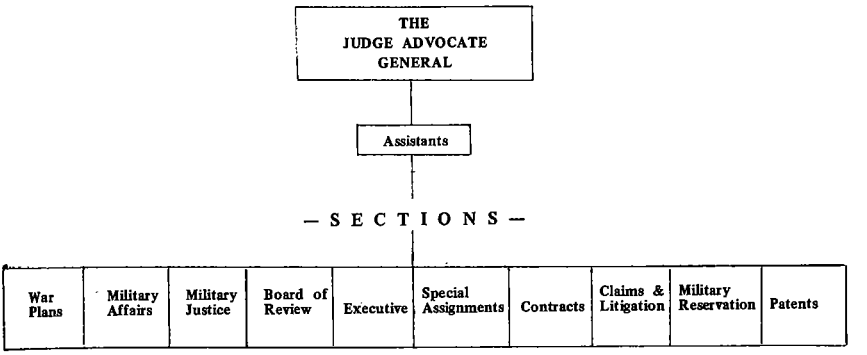

figure 49

ORGANIZATION OF THE JUDGE ADVOCATE GENERAL'S OFFICE, JULY 1, 1940

In October 1944, the office of Deputy Judge Advocate General was created. That position absorbed most of the functions of the executive officer and the incumbent assumed direct supervision over such activities as the Industrial Law Branch, which figured prominently in the seizure and operation of industrial plants. Brigadier General Thomas H. Green, who formerly served as Assistant Judge Advocate General in charge of military justice and, later, in charge of civil matters, was designated as the new Deputy. The three Assistant Judge Advocate General positions were retained: one to supervise military justice matters; one to supervise the War Crimes Division; and one to supervise civil matters (although General Green continued to perform the latter duties in addition to his position as Deputy Judge Advocate General). Administration and coordination functions were centered in the Executive.

The internal reorganization of the Office of The Judge Advocate General was even more extreme. During the early 1940's, JAGO sections were small and the volume and variety of their work did not require any further subdivision of functions. As the volume of work increased and grew in importance, it was found necessary, not only to subdivide some sections, but to create new ones to handle specialized fields. As part of the reorganization the former sections were redesignated as divisions, their subelements being known as branches and sections respectively. The JAGO organization as of March 1945 is indicated in the chart on the following page.

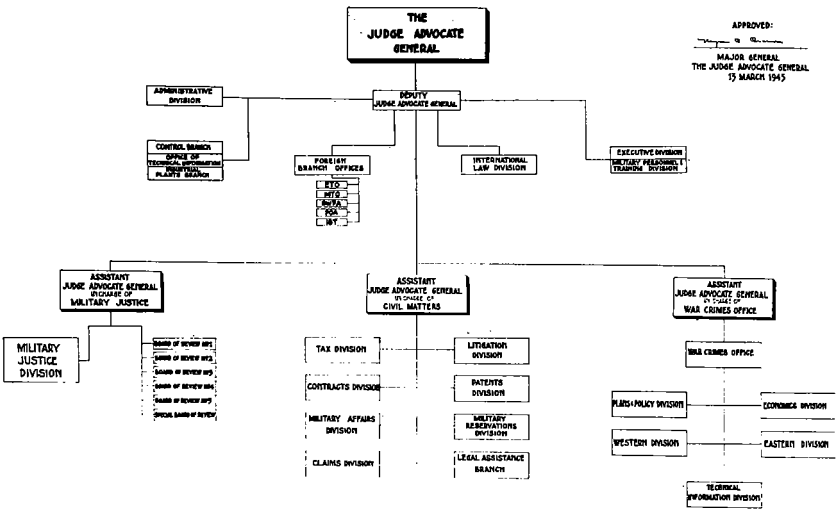

figure 50

ORGANIZATION OF THE JUDGE ADVOCATE GENERAL'S OFFICE, MARCH 1945

Administering Justice

The Military Justice Division examined those records of trial by general court-martial not required to be reviewed by the Board of Review; prepared opinions on points of law and procedure arising in the administration of military justice; prepared clemency memoranda; assisted in the presentation of the government's case in habeas corpus proceedings involving persons subject to military law; and initiated action to secure uniformity of sentences when appropriate.

The only Board of Review prior to February 1941 was in Washington, D.C. By April 30, 1945, there were five boards in the Washington office and nine in five overseas branch offices. Between July 1, 1941, and April 30, 1945, 63,093 records of trial by general court-martial were reviewed in the Washington office and 19,701 were reviewed in overseas branch offices—a total of 82,794 general court-martial records.

The five overseas branch offices had been created pursuant to Article of War 50½ which authorized the establishment of branch offices in distant commands to perform TJAG's appellate review function. The first was established on April 14, 1942, in Great Britain under the supervision of Brigadier General Lawrence H. Hedrick, who was succeeded in 1943 by Brigadier General Edwin C. McNeil.

Branch Offices were thereafter established in the Southwest Pacific Area with Brigadier General Ernest H. Burt in charge; the China, Burma and India Theater under Colonel Robert W. Brown; the North African Theater of Operations with Brigadier General Adam Richmond in charge; and in the Pacific Ocean Area under the leadership of Brigadier General James E. Morrisette.

House Counsel

Activities of the Military Affairs Division of OTJAG involved the internal administration of the Army. Many of the opinions it prepared for The Judge Advocate General pertained to personnel matters, such as enlistment, appointment, promotion, reduction, discharge, retirement, pay and allowances, restrictions on outside activities, line of duty, nonsupport of dependents, transportation, leave, reclassification, and relative rank of military personnel. The Division was frequently required to prepare, revise or to comment upon legislative drafts, executive orders, regulations and circulars pertaining to the military establishment or the personnel matters mentioned above. Important personnel legislation included the Soldiers' and Sailors' Civil Relief Act of 1940; the Selective Training and Service Act of 1940; the Servicemen's Dependents Allowance Act of 1942; the Missing Persons Act; the Soldiers' Voting Act; the Mustering Out Payment Act of 1944; the act establishing the Women's Army Corps; and the Servicemen's Readjustment Act of 1944. Army management matters considered included: the imposition of controls over excessive overseas spending by American troops; the disposition of captured enemy equipment; and providing means of review for administrative discharges and dismissals. The more important opinions of The Judge Advocate General in the foregoing and other fields were digested and published monthly by this Division for inclusion in the official Judge Advocate General's *Bulletin*.

Buying the Materials for Defense

The Contracts Division concerned itself with preparation of opinions regarding the nature and extent of authority to contract; the availability of appropriations; advertising for and awarding bids; the negotiation, form, legal sufficiency and effect of originial and supplemental contracts and change orders; advance payments; rights and obligations arising upon modification, extension of time, renewal, performance, delay, breach, renegotiation, repricing and termination of contracts; debarment of bidders; the assessment of liquidated damages; emergency purchases; acceptance of donations; the requisition, sale, lease, exchange and other

disposition of personal property; and the construction and operation of contract provisions of unemployment, workman's compensation, liability and other forms of insurance. This broad range of concern encompassed the entire field of contract and insurance law as applied to the acquisition, operation and disposition of government property, both real and personal.

The advent of war gave rise to tremendous appropriations and vast requirements on the part of the military establishment for housing, land, equipment, supplies and materials of all kinds, resulting in a procurement program far more extensive in its scope and tremendously more urgent as to time than anything theretofore experienced. The old methods of procurement were not adequate to meet the impending threat to national existence—new methods had to be devised. Emergency legislation was sought and enacted whereby faster procurement procedures were authorized. The requirement of competitive bidding was suspended, for example, and cost-plus-fixed-fee contracts were sanctioned. This and other emergency legislation brought about revolutionary changes in the procedure of government contracting.

In August 1942, pursuant to the War Department policy of the intramural settlement of disputes arising between the government and its contractors, there was established in the Office of the Undersecretary of War a War Department Board of Contract Appeals. This body acted as the representative of the Secretary of War in the hearing and determination of appeals by War Department contractors from decisions of contracting officers. A chief trial attorney and some 12 assistants were designated to represent the government at such hearings. They constituted the Contract Appeals Branch, the trial attorney being designated chief of the Branch. This Branch prepared and presented the government's case in approximately 1200 hearings before the Board involving contractors' claims in excess of $20 million.

Claims By and Against the Government

The Claims Division originally functioned as a branch of the Claims and Litigation Section until the 1941 reorganization, when that section was divided into two separate divisions. The major functions of the Claims Division were the training, staff supervision and inspection of all activities throughout the War Department and the Army involving service-connected claims (other than those arising in the procurement of services or supplies) against or in favor of the government, and the recommendation to the Undersecretary of War of the approval or disapproval of claims under the existing claims acts. In general, claims were investigated in the field by Boards of Officers (normally consisting of three

officers) and were forwarded to the Chief of Finance who decided whether a claim should be approved, disapproved, or returned to the field for further investigation. Upon final determination by the Chief of Finance, the claim was forwarded to the Undersecretary of War with a statement of facts and a recommendation as to the action to be taken. Such cases as appeared to the Undersecretary to raise complicated questions of law or fact, or which appeared of doubtful merit, were referred by him to The Judge Advocate General. The Claims Division then made an independent determination of the legal merits of the claim and prepared an opinion recommending appropriate action. The Undersecretary of War took final action and returned approved claims to the Chief of Finance for settlement.

In 1942, recognizing that the administrative settlement of claims was fundamentally a judicial problem, the Claims Division sought a wholesale reorganization of the military claims procedures. The recommendations of The Judge Advocate General were adopted by the War Department, and his Claims Division prepared the necessary directives and circulars to put them into effect. The initial step was the transfer from the Chief of Finance of all activities pertaining to the processing of claims for damage to private property arising as a result of activities of the Army, of the National Guard incident to special field exercises, of claims for damage incident to operations of the Civilian Conservation Corps under the jurisdiction of the War Department, admiralty cases, and the processing of claims in foreign countries.

As may be imagined, the number of matters handled by the Division multiplied as the war effort increased: in fiscal year 1942 it handled 1584 claims; 26,912 were handled in 1943; and in 1944, some 58,131 matters were processed with an average processing time of 62 days for domestic claims.

On July 3, 1943, the Act referred to as the Military Claims Provision was passed by Congress setting up two broad classes of claims payable under its authority: first, those "caused by military personnel or civilian employees of the War Department of the Army while acting within the scope of their employment," and second, those "otherwise incident to noncombat activities of the War Department or of the Army . . ." The Act authorized payment for personal injury as well as property damage. However, claims for personal injury were limited to reasonable medical and hospital expenses actually incurred and death claims were limited to reasonable burial expenses so incurred. Claims in excess of the monetary jurisdiction of the War Department could be certified to Congress by inclusion in a deficiency appropriation bill.

Claims in favor of the government were also actively pursued, and, from November 1943 to December 1945, $970,415 was collected for the United States. In 1945 it was also ruled that the government was entitled to collect the reasonable costs of hospitalization, and pay and allowances of injured military personnel from those who caused such losses.

What could have been one of the classic wartime claims actions against the United States grew from the famous theft of the Crown Jewels of Hesse-Darmstadt. Major criminal proceedings also followed the theft.

* * *

THE THEFT OF THE CROWN JEWELS OF HESSE-DARMSTADT

In February 1946, amid the rubble that was wartorn Germany, plans moved for the marriage of a widow of the House of Hesse. Princess Sophie of Greece, whose husband Prince Christopher of Hesse had been killed in the war, was now bethrothed to Prince George Wilhelm of Hanover. The Countess Margaretha announced that her daughter-in-law Sophie would wear the family jewels during the ceremony. A servant was dispatched to retrieve the jewels from their hiding place in the depths of the family castle, Schloss Friederischshof. When the servant returned emptyhanded, the countess surmised that strange things were happening in the Army-occupied castle then used as a retreat for the Army staff. Margaretha was aware of her rights: all property in the castle was personal family property and thus exempt from seizure as assets of the defeated German state. She went to the provost marshal in Frankfurt, and soon after the Army's Criminal Investigation Division began an intensive investigation to recover the lost treasures.

The CID discovered that when General George S. Patton's 3d Army swept through the area, a WAC captain, Kathleen Burke Nash, had been detailed to manage the castle. Based on a tip from one of her subordinates learned through family servants, Captain Nash first heard of the hidden cache of jewels in the deserted wine room of the massive structure. When the booty was unearthed, a few trinkets were doled out to the informants, but the lion's share of the treasure went to Captain Nash. She shared her secret with Colonel J. S. "Jack" Durant and Major David Watson. Together, the three devised a plan to smuggle the jewels from Germany to the United States. Major Watson mailed a silver pitcher home to his family in California. Captain Nash sent a 36-piece solid gold table service parcel post to her sister in Wisconsin. Colonel Durant sent pieces in envelopes stamped "Official" and by diplomatic pouch. In May of 1946 the CID had caught up with the culprits. Army investigators arrested Colonel Durant and Captain Nash (who were by then husband and wife) in Chicago on June 2. Watson was arrested in Germany.

A few days later, nearly a million dollars in recovered loot—according to the authorities, "a mere pittance" compared to the value of the total collection—was displayed at the Pentagon. The Durants were flown to Germany where they faced charges preferred in the European Theater of Operations. Captain Durant was the first charged—with larceny, embezzlement, conspiracy and AWOL. Appearing in uniform without insignia, she refused to enter a plea. Captain Glenn Brumbaugh, her defense counsel, argued three defenses: (1) that her reactivation by the Army three days before apprehension had been engineered solely to effect an invalid military arrest under questionable jurisdiction; (2) that the Hesse family had

figure 51

DEFENSE COUNSEL GRANIK, LEFT, AND BRUMBAUGH, RIGHT, WITH THE ACCUSED, COLONEL JACK DURANT, IN THE HESSE JEWELS CASE

abandoned the treasures; and (3) that the appropriation of the jewels was part of the spoils of war. To these arguments the Army prosecutor replied:

> It is our obligation to see that private property in enemy territory which we occupy be respected and that any interference with such private property for personal gain be justly punished.

Captain Durant was found guilty, dishonorably discharged and sentenced to five years' imprisonment.

Major Watson's defense that looting was commonplace in Germany was equally unavailing. He reasoned that the loot either belonged to ardent Nazis who were dead or to S.S. members and, as such, "the properties would never be returned to them." Captain Abraham Hyman, in summarizing for the prosecution, was not persuaded:

> The court cannot 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.

The court of 10 colonels accepted the defense counsel's argument that Watson had no intention to steal and found him not guilty of theft. After 90 minutes of deliberation, however, they convicted him of conspiracy and

receiving stolen property. Watson was sentenced to three years' imprisonment and dismissal from the service.

Colonel Durant fared no better in his trial at Frankfurt. Durant was sentenced to 15 years' imprisonment at hard labor and dismissal from the Army. In any case, much of the Hesse treasure was never found and the question remains unanswered to this day what happened to that remainder of the loot, now valued in excess of a million dollars.

* * *

The Litigation Division represented the Army before governmental regulatory commissions, and normally provided most of the behind-the-scenes legal work needed by the Department of Justice in its in-court representation of War Department interests. In proceedings before the Federal Communications Commission, judge advocates, in cooperation with counsel representing other federal agencies, successfully resisted an effort to discontinue a special government rate on wire messages, and succeeded in having the rate made applicable to messages of the Army Exchange Service and the Army Motion Picture Service. In a proceeding before the United States Maritime Commission, judge advocates represented the War Department in obtaining the elimination of proposed increases in port charges at all Pacific Coast ports.

After 1942, members of the Litigation Division acted as counsel for the War Department in more than 750 formal proceedings before federal and state regulatory agencies having jurisdiction over common carriers, and their efforts saved the government millions of dollars. Briefs were prepared and oral arguments presented in several cases in federal courts dealing with the exclusion of persons of Japanese ancestry from coastal areas and with military jurisdiction over civilians serving in the Army. Considerable attention was also given to cases concerning personnel eligible for employment on hospital ships, the establishment of suitable criminal jurisdiction over American personnel working at oil refineries in the Middle East, and the disposal of recaptured Allied merchant vessels.

The Tax Division was established primarily because of two Supreme Court cases which gravely affected the government's contracts then in effect. Those decisions held that cost-plus-fixed-fee contractors, under the particular contracts involved, were not agents of the United States and had no constitutional immunity from taxation. With the vast wartime expansion of military procurement activities, the tax problems caused by these cases became more important and acute. It became necessary to decide what was to be done about all the state taxes which had accrued—and those which might accrue—against cost-plus contractors. Consequently, in late 1941 The Judge Advocate General was

directed by the Undersecretary of War to prepare instructions for the guidance of contracting officers in connection with state taxes. In order to handle these new assignments, on July 29, 1942, the Tax Division was established with cognizance over all tax matters, federal and state.

Because of the new state tax burden, two courses of action were open to the War Department: one was to seek immunizing legislation; the other was to negotiate with the states for the most favorable treatment possible under their respective statutes and regulations. The War Department sought to do both.

Negotiations were carried on with the various states, looking toward statutory or administrative exemption of cost-plus contractors from sales, use, and gross receipts taxes. When it became evident that Congress was not going to enact immunizing legislation, this activity was intensified. A number of states and a few cities imposed such taxes. As a result of negotiations lasting until December 31, 1945, 12 states agreed to waive sales and use taxes accruing prior to the effective date of the tax decisions: November 18, 1941. Ten states and two cities agreed that their sales and use taxes would not apply to purchases by cost-plus construction contractors, and 16 states and two cities agreed that their sales and use taxes would not apply to purchases by cost-plus manufacturing contractors.

Technology for Defense

The Patents Division had technical supervision over collection and preparation of evidence by patent sections in various branches of the Army for use by the Department of Justice in defense of patent infringement suits filed against the United States. It also advised those sections upon questions involving patent matters with other governmental departments.

On January 26, 1943 the Patents Division was subdivided into an Administrative Branch, a Classified Inventions Branch, a Claims Branch, a Prosecution Branch and an International Branch (later redesignated as the Foreign Liaison Branch). The Administrative, Claims and Prosecution Branches performed the normal peacetime functions of the Division. The Classified Inventions Branch was established principally because of passage of the Secrecy Act, and was assigned functions designed to assist the Commissioner of Patents in carrying out the provisions of that Act. In addition, the Classified Inventions Branch maintained records of the Army Section, Army and Navy Patent Advisory Board, and processed tenders made to the Secretary of War in accordance with the terms of the Secrecy Act. The Prosecution

Branch conducted patentability searches and rendered reports thereon covering inventive disclosures received from officers, enlisted men and other governmental entities. Aside from varied other duties, the Prosecution Branch handled 210 applications for copyright registrations during the period 1 July 1940 to 31 December 1945.

The Industrial Law Branch, activated on August 12, 1944, was the focal point for legal work incident to War Department operation of industrial plant facilities seized by the government as the result of labor disturbances threatening war production. Judge advocates assigned to the Branch were immediately faced with the problems inherent in assuming control of a going private business and the competing interests of the labor movement and business. In November of 1943 plant seizures increased in number and importance. Leather manufacturing plants, electric companies, railroads, textile mills, transportation services, tool producers and chemical works were among those facilities seized during the emergency period. Judge advocates were called upon to furnish all the legal services concomitant with the complete operation of some of the nation's largest businesses. They were also required to render counsel in formulating executive policy formerly supplied by management. Despite the urgent needs of war production, seizures were limited to a surprisingly low number, and it was possible in most cases to conduct the operation with company funds and with the existing management to the extent permitted by the terms of the Executive order. Despite the relatively smooth working manner in which the seizures were conducted, the validity of the President's action did not go unchallenged.

* * *

THE MONTGOMERY WARD CASE

The increasing demands placed on wartime industry for production and the continual drain on the labor working force due to the draft enlistments presented new and difficult problems in labor-management relations. The National War Labor Board was created by Executive Order in January 1942 and was empowered by Act of Congress in 1943 to resolve labor disputes. Throughout the early part of the war a bitter controversy was waged between the Montgomery Ward Company and labor unions representing its employees. Because Montgomery Ward operated a vast merchandising organization with annual gross sales in excess of $60 million, the War Labor Board found that its plant and facilities were equipped for the production of articles that might be required for the war effort. When the Board issued orders against the Company in its labor dispute with the Unions, Montgomery Ward refused to comply. The President then exercised his power under the War Labor Disputes Act to seize Montgomery Ward because the labor dispute threatened to interfere with the successful conduct of the war. The Attorney General filed legal proceedings in the federal district court in Chicago for a declaratory judgment of the parties' rights. The President's

authority to seize key industries during wartime was clearly on the line.

The district court agreed with Montgomery Ward's position that the President as Commander-in-Chief had power strictly military in character and therefore no power to seize a commercial business. Ward further argued that its properties were utilized for "distribution" of general merchandise and were not properties for "production" of war materials within the meaning of the War Labor Disputes Act. On appeal to the Seventh Circuit, the district court's decision was reversed by a two-to-one margin. The Seventh Circuit vindicated the government's position with respect to the President's seizure power but even then the issue was not finally resolved. On November 5, 1945, on writ of certiorari, the Supreme Court dismissed the government's complaint as moot since the War Department had vacated the company's plants. Thus, a lengthy legal proceeding went for naught and the issue of the President's authority went unresolved until another day.

* * *

Real Estate for National Defense

The Military Reservations Division was concerned with legal matters pertaining to the lands and buildings under the control of the Secretary of War, as well as rivers, harbors and flood control regions.

At the outset of the period from July 1, 1940 to December 31, 1945, the Military Reservations Division performed a threefold function. Initially, the Division engaged primarily in giving legal advice in the form of written opinions to the Secretary of War and the various branches of the War Department with respect to matters such as those mentioned above. Secondly, as a corollary to this duty, it was the repository and custodian of the title records to those lands under Secretarial control. And, finally, from those records, the Division compiled and published a revision of the 1916 edition of the War Department publication *United States Military Reservations, National Cemeteries, and Military Parks,* in the form of separate pamphlets entitled *Military Reservations,* each covering the title, jursidiction and descriptive data for all the military reservations in one state or territory.

The national defense program instituted in 1940 and the war program which followed the declarations of war in December 1941 resulted in a tremendous land acquisition program. The number of military reservations increased from about 512 to over 1,800; the acreage involved increased from two and a half million to approximately 33 million. The volume of The Judge Advocate General's work in the field of real property law reflected a concommitant increase.

International Law

A War Plans Section was established in the Judge Advocate

General's Office on September 26, 1939, and subsequently became the International Law Division. Its cases involved war plans, international law, military government, martial law, prisoners of war, internment of enemy aliens, and related subjects.

In 1940 the Division advised concerning the disposition of a smaller number of cases involving the relation of this country to the warring powers abroad. As evidence that there is "nothing new under the sun," many cases concerned the disposition of deserters from the belligerent armies who had made their way to this country.

Also during this period the Division rendered opinions relating to proposed legislation on the disposition of funds that might be acquired by the United States in exercising military government, and relating to the subjection of American war plants to martial law. It also was called upon for advice as to the military control of alien fifth columnists. In 1941 a large part of the work was still primarily of a planning character but it came to relate to plans for martial law in Hawaii, the Panama Canal Zone, and Alaska rather than to military government in foreign territory. The Division assisted in the drafting of documents and outlining of plans for martial law in those possessions.

* * *

THE EXECUTIVE AND JUDICIAL BRANCHES AT LOGGERHEADS: MARTIAL LAW IN HAWAII

The Japanese attack at Pearl Harbor and the declarations of war which followed created a state of emergency in the Territory of Hawaii. The government of Hawaii which was created in the wake of the Pearl Harbor disaster has presented a controversy not settled to this day.

On December 7, 1941, martial law in Hawaii was declared under the direction of Lieutenant General Delos C. Emmons. Thomas H. Green, later Judge Advocate General, assisted in drafting the martial law documents and, in fact, served as the executive to General Emmons in charge of the martial law operation.

During the first 16 months of martial law in Hawaii, the Military Governor issued 181 general orders and numerous special orders. Martial law regulated the use of materiel and supplies, provided for food production, changed the legal tender of the Islands, provided for the apprehension and internment of enemy aliens deemed dangerous to internal security and, in brief, took over many of the functions and responsibilities of the government. At the inception of the martial law complete control over civil courts was exercised but restrictions were gradually modified, especially as to noncriminal proceedings.

At the time Governor Poindexter of Hawaii signed the proclamation of martial law it appeared that the institution of such regulation was essential because the civil authorities were unable to cope with the military emergency. By 1943 Hawaii had shifted gears from defensive to offensive preparations. Thus, the continued use of the military tribunals for trial of civilians and the prohibition against writs of habeas corpus after 1943 were criticized. Matters finally came to a head when two German-American internees applied for writs of habeas corpus.

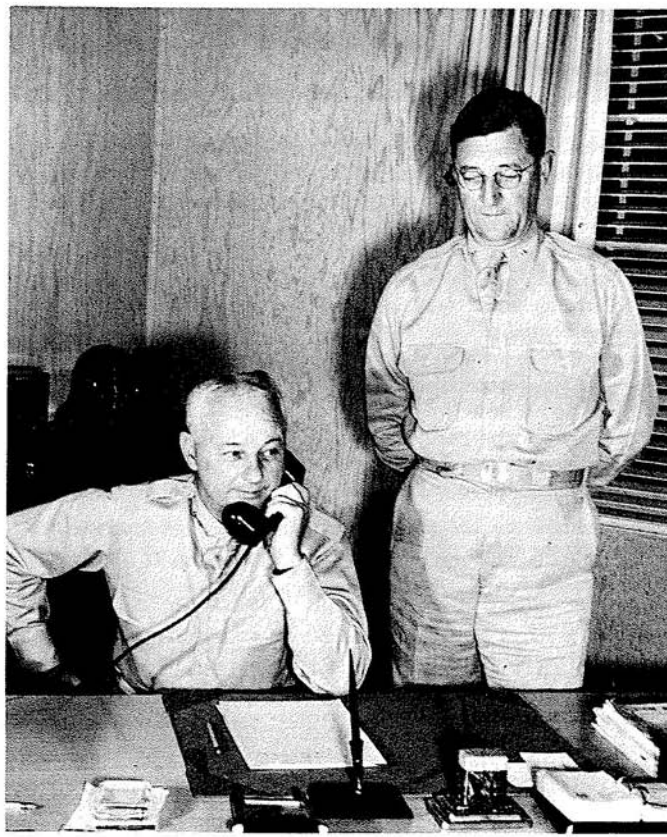

figure 52

GENERALS EMMONS, SEATED, AND GREEN HEADED THE MILITARY GOVERNMENT OF HAWAII AT THE OUTSET OF WORLD WAR II

In February of 1942 the senior federal judge in Hawaii, Judge Metzger, had refused to issue writs of habeas corpus based on Order No. 57 of the Military Governor of Hawaii in the case of *Zimmerman v. Walker.* On August 16, 1943, Judge Metzger reversed himself and ordered that writs of habeas corpus issue to compel Lieutenant General Richardson, then Military Governor, to produce the internees in court in the cases of Seiffert and Glockner. General Richardson found himself in a dilemma. Faced with a judicial order diametrically opposed to the orders of the War Department, he chose to obey his Commander-in-Chief and refused to produce the German-Americans. On August 25, 1943, Judge Metzger fined General Richardson $5,000 for contempt of court and instructed the clerk to take immediate steps to collect.

The situation brought back memories of Andrew Jackson in 1815 when Judge Dominick Hall, in New Orleans at the time of the British threat against the city, held General Jackson's declaration of martial law illegal and

ordered him to produce a prisoner. Old Hickory retaliated by clapping the judge into jail.

On August 25, 1943, to prevent additional "interference" with military rule by habeas corpus proceedings, General Richardson issued General Order No. 31 prohibiting further such proceedings under pain of imprisonment for five years and/or fine not to exceed $5,000. For several months the impasse between executive and judicial branches of government in Hawaii continued. On the one hand, General Richardson followed the orders of the President who had suspended the writ of habeas corpus and continued to maintain its suspension. On the other hand, Judge Metzger claimed that the civil courts had always been able to function and that consequently there was no military necessity for the trial of civilians by military tribunals. General Richardson was eventually relieved of the contempt citation when he received a Presidential pardon.

The issue was presented to the Supreme Court in the 1946 case, *Duncan v. Kahanamoku.* Mr. Justice Black, writing for the majority, asserted that not only was there no necessity for military trials in Hawaii, but that even under martial law duly and properly proclaimed in a perilous situation, military trials of nonmilitary persons would never be lawful. Chief Justice Stone's concurring opinion defined the limitations on martial law. He stated that:

> The exercise of the power may not extend beyond what is required by the exigency which calls it forth.

* * *

Two other sensitive international law matters affected Corps activities after 1940. The first related to plans for the treatment of aliens in this country in the event of war, and the second arose in connection with the negotiations then being conducted with Great Britain which resulted in the exchange of 50 destroyers for certain military and naval bases in the British Colonies under the Base Lease Agreement. The War Plans Division participated in the drafting of that agreement.

Among the miscellaneous international law matters handled in 1942 were questions relating to espionage, to the militarization of plant guards in factories producing war materials, military cooperation agreements with foreign countries, the laws of war with respect to military hospitals, and a few cases relating to prisoners of war. The most prominent feature of the work in 1942 was the Division's part in drafting agreements with friendly foreign countries to which the United States was intending to send or had already sent military forces. Those agreements related to securing for the United States exclusive criminal jurisdiction over its troops while on duty in those countries. In negotiations with Great Britian on this subject The Judge Advocate General's part was largely the giving of advice and assistance to the Department of State in the negotiation and drafting of the ultimate agreement. In the arrangements with Canada a more active role was played.

A considerable number of additional matters were handled in

1943. Some related to the legitimacy of certain types of weapons, the internment of United States military personnel who for one reason or another were found in neutral countries, the settlement of estates of American soldiers dying abroad, the rights of aliens in the Army requesting discharge or noncombat service, and the marriage of soldiers abroad.

In a letter dated September 25, 1944, Subject: "Punishment of War Criminals," the Secretary of War directed The Judge Advocate General to establish an office agency under his direction which would at once collect all evidence of cruelties, atrocities and acts of oppression against members of our armed forces and other Americans; examine and sift through such evidence; arrange for the apprehension and prompt trial of persons against whom a prima facie case was made out; and provide for the execution of sentences which might be imposed. On the same day The Judge Advocate General set up an office in his War Plans Division to effect this policy. On October 6, 1944, the War Crimes Division was established, and on March 22, 1945, the agency was designated the "War Crimes Office." Brigadier General John M. Weir, Assistant Judge Advocate General, was placed in charge of this new office. Three judge advocates went to London to work with the United Nations Commission for the Investigation of War Crimes. One of those officers, Colonel Joseph V. Hodgson, later became the United States representative on that commission. In April of 1945, The Judge Advocate General assumed the responsibility for sending some 60 legal officers to Germany to assist the Theater Commander in investigating and prosecuting war criminals.

After cessation of hostilities, the evidence accumulated of atrocities committed by enemy personnel was correlated and, except for the trial of certain major war criminals who were brought before international military tribunals established by international agreement, the Judge Advocate General's Department supervised the trial of more than 2,500 war criminals by military commission and military government court.

* * *

THE PROSECUTION OF GERMAN WAR CRIMINALS

While the Second World War was in progress a great deal of criticism arose concerning acts of barbarity committed by the Germans, and it became generally agreed among the Allies that these acts must be punished. Prime Minister Churchill stated that, "Retribution for these crimes must henceforward take its place among the major purposes of war." In October of 1942 President Roosevelt and the Lord Chancellor of England, Viscount Simon, announced simultaneously that, after consultation with the other Allied representatives concerned, the two governments had decided to propose the creation of the United Nations Commission for the Investigation of War Crimes. Consequently, in October of 1943, the 16 member nations of this

Commission joined together to investigate the reported acts of Nazi war atrocities. The Honorable Herbert Claiborne Pell, a former Minister to Portugal and Hungary, was first appointed as the American Representative on the Commission, but he was soon suceeded by Colonel Joseph V. Hodgson, a member of the Judge Advocate General's Department. Colonel Hodgson was later replaced by another Army Judge Advocate, Colonel Robert M. Springer.

On recommendation of the United Nations War Crimes Commission, each of the member nations set up its own national war crimes office to collect complaints of war crimes and to forward them to the central commission. The United States office was established in Washington, D.C., initially headed by Brigadier General John M. Weir and later by Colonel David "Mickey" Marcus, both of whom were career officers of the Jude Advocate General's Department (Marcus, who had previously served as Secretary-General of the Office of Military Government for Germany, was later to receive worldwide recognition for his efforts in the organization of the Israeli Army). Together, the local and the central commission published lists of alleged war criminals, supplying them to Allied troop commanders during combat and to the occupation authorities in Germany thereafter, to enable them to apprehend wanted criminals. Research was also conducted into the law governing war crimes and their punishment, and papers were published on various aspects of the subject representing the considered collective view of the member nations.

Meanwhile, the Allies also created what was called the German Country Unit, a staff section charged with planning the occupation and military government of Germany. It contained a Legal Division responsible for planning the apprehension, trial and punishment of suspected war criminals. However, this unit was strictly for planning purposes and possessed no operational responsibilities. Prosecution of war criminals was to be carried out by troop commands in the field. Each of the Allied commands had legal sections which supervised the conduct of courts-martial and military commissions. Consequently, the judge advocate sections seemed the logical and appropriate agencies to handle war crimes. As the military situation became static, staff judge advocates of the two American Army groups in Germany set up war crimes branches in their offices. The 12th Army Group came to include the bulk of the American ground forces in Germany and its judge advocate section, headed by Colonel Claude B. Mickelwait, became the chief war crimes agency of the American forces.

Colonel Mickelwait would later become the Deputy Theater Judge Advocate for War Crimes and Chief of the War Crimes Branch of the Theater Judge Advocate's Office. This War Crimes Branch has its headquarters at Wiesbaden where an extensive war crimes library, documentation center and translation bureau was set up. At the time many alleged war criminals were already in American custody as prisoners of war. Others would be apprehended by war crimes investigating teams which were sent out over Western Germany to locate war criminals not in custody and to find witnesses and other evidence. It should be remembered, however, that the responsibility of the Theater Judge Advocate and his Deputy for the prosecution of war criminals was limited to violations of the laws and customs of war, largely codified in the Hague and Geneva conventions. Atrocities concerning German civilians or having no connection with the war were not within their jurisdiction. Yet, many important cases were tried, and many are familiar to most Americans. The Dachau and Mauthausen concentration camp cases involved the perpetration of horrible cruelties on

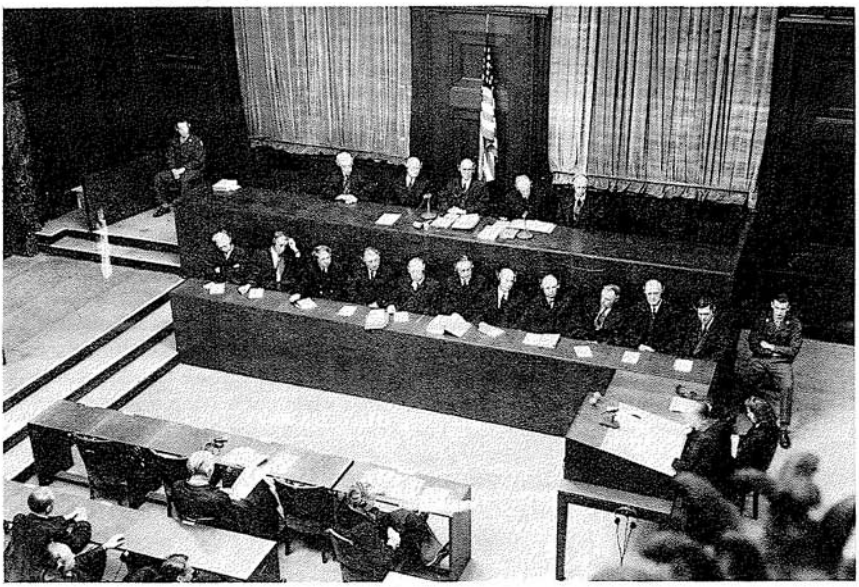

figure 53

JUDGES AT THE NUREMBERG WAR CRIMES TRIALS HEAR ARGUMENTS ON A CONSPIRACY CHARGE

Allied Nationals. The Malmedy massacre case involved the cold-blooded shooting of American troops who had surrendered as prisoners of war and laid down their arms.

The scope of prosecution widened with the famous "Nuremberg Trial." On May 2, 1945, the President appointed Associate Justice Robert H. Jackson of the United States Supreme Court,

> To act as the Representative of the United States and as its Chief of Counsel in preparing and prosecuting charges of atrocities and war crimes against such of the leaders of the European Axis powers and their principal agents and accessories as the United States may agree with any of the United Nations to bring to trial before an international military tribunal.

Justice Jackson conducted the prosecution against major war criminals who had committed "crimes against humanity" and "crimes against peace" in addition to those who violated the law of war. He was assisted by Colonel Robert Story as Executive Counsel, Telford Taylor acting as Chief Counsel, and a staff of Judge Advocate officers and other attorneys. The trial started on November 20, 1945, and ended on 31 August 1946. Twenty-four high ranking Nazis were tried: 10 defendants were sentenced to death by hanging; three received life imprisonment; four were given sentences ranging from 10 to 20 years; and three were acquitted. Five organizations were declared criminal. The trial was held and the sentences administered independently of the military courts mentioned above.

Meanwhile, the military courts conducted by the Army continued. There

were also proceedings held by commissions appointed by the military government to try violations of government law. In September of 1945 with the Nuremberg trials concluded, an attempt was made to extend the jurisdiction of the military courts. The American Joint Chiefs of Staff directed the Theater Commander to prosecute not only offenses against the laws and customs of war but also for crimes against peace and humanity as described in the Charter of the International Military Tribunal. This would have been an impossible task since it involved not only prosecuting for individual offenses but also members of organizations, and for offenses not normally recognized under military law. To solve the problem a plan was worked out by Brigadier General Edward C. Betts, the Theater Judge Advocate, with Justice Jackson and Mr. Charles Fahy, the legal adviser to the military government, under which the German courts would try offenses against German nationals and the Denazification System, by means of administrative hearings and quarantine, would handle members of the National Socialist Party. The plan was approved, thus leaving the Army to continue its regular prosecution of war crimes while not leaving undone the task of the International Tribunal. The Army Trials were held from July of 1945 until July of 1948, involving a total of 489 cases and 1672 defendants. There were 1,416 convictions; 244 death penalties were executed.

* * *

Helping the Individual Soldier

The Legal Assistance Branch was not established until March 22, 1943. Six days before, the War Department had issued Circular No. 74 announcing a comprehensive plan to make legal assistance available to servicemen and their dependents under the joint sponsorship of the Army and the American Bar Association. Prior to that time, legal advice and assistance was traditionally provided as part of the unofficial duties of members of the Judge Advocate General's Department. During the years of peace neither the quantity nor complexity of the personal legal problems of military personnel presented a problem that JA's could not handle as an incidental matter. But with the coming of the war, many persons were brought into service from civilian life with little notice or opportunity to arrange their personal affairs. To provide a measure of protection for such persons, the Soldiers' and Sailors' Civil Relief Act of 1940 was enacted on October 17, 1940. Although the Act provided legal remedies and relief, it did not, in general, work automatically—legal advice and assistance were necessary to obtain its benefits. In addition, newly inducted personnel had many other legal problems, such as the need for a will or a power of attorney, which required professional legal counsel.

It was also in the fall of 1940 that an American Bar Association Special Committee on National Defense was formed to seek cooperation from similar state and local groups dedicated to the concept of legal assistance for the serviceman. The committee

labors proved ultimately successful, and much of the credit for the formal establishment of the Army's legal assistance program goes to Colonel Milton J. Blake. It was his liaison efforts with the ABA which resulted in the first such plan for any military branch, and which served as the prototype for subsequent legal assistance programs in the other services.

A separate branch was needed to supervise the legal aid system throughout the Army. The bulk of the work done by the branch was in the preparation and execution of wills and powers of attorney; the handling of cases involving the protection afforded by the Soldiers' and Sailors' Civil Relief Act; the leasing and transfer of real property and eviction matters; problem regarding automobiles and other personal property; income and other taxes; and domestic relations matters. Personal legal problems of an infinite variety were encountered, some easy of solution and others difficult and complex. An estimated total of eight million cases were handled by legal assistance officers worldwide from March 16, 1943, to December 31, 1945; this "averages out" to one case per soldier. Of these, approximately 26 percent related to taxation; 21 percent to powers of attorney; 19 percent to wills; and 8.5 percent to domestic relations. Reflecting the variety of this work, about one-quarter of the legal problems fell into "miscellaneous."

After the outbreak of World War II, the ABA committee was renamed the Committee on War Work; the provisions of Circular No. 74 were incorporated into Army Regulation 25–250, 14 May 1946; and that same year the committee was redesignated the Special Committee on Legal Service to the Armed Forces. As fitting appreciation for his work in that field, Colonel Blake was named chairman of that ABA committee.

Legal Bibliography

Participation in a lawmaking process entails a responsibility for making the product known to those who need it. Prompted by the wartime acceleration of activity, The Judge Advocate General adopted a new publication policy in May of 1942: annual supplements to the 1912–40 *Digest of Opinions of The Judge Advocate General* and the reproduction of selected opinions were discontinued. Both were replaced by a monthly *Bulletin* which published significant Judge Advocate General opinions along with decisions of the Comptroller General and opinions of the Attorney General. The first issue covered January to June 1942; it appeared each month thereafter until 1951. Tables and Indexes were issued at the end of each year. Later the coverage was extended to include the opinions of the overseas Boards of Review, the War

Department Board of Contract Appeals, the Appeal Board of the Office of Contract Settlement, and changes made to military laws as a result of Congressional action.

The World's Largest Law Firm

The activities described above were performed by a staggering number of lawyers. When some of the Wall Street law firms recently exceeded 100 attorneys, partners and associates, questions were raised about the desirability and feasibility of administering that number in a professional manner. Time and experience assuaged most of these doubts, but what would the doubters have said about General Cramer's "law firm" during World War II?

Army strength from 1941 and 1945 increased tenfold (from 775,000 to eight million). During the same period its legal force multiplied five times (from 400 to more than 2,000). There were branch offices to be sure, and many lawyers were assigned directly with field units. However, all acted "under the direction of" TJAG.

Nearly all members of this legal brigade were citizen-soldiers who made transition to military, life, adapting their civilian education and experience to the new, worldwide problems of a nation at war. Those who had received the benefits of Reserve and National Guard training—and the majority who had not—were welded together under the leadership of one man, the "senior partner" of the firm.

The Army's Own Law School

With a nation at war, General Cramer realized the need for a regular training program in military law which could meet the needs of his expanding team of junior partners in the Corps. The peacetime "apprentice system" of training at OTJAG and in the field would just not work. On February 9, 1942, basic, specialized and refresher training for active duty military legal personnel was initiated at the National University Law School in Washington, D.C. The national captial was not an ideal wartime location—while close at hand to expert lecturers from OTJAG and the War Department, the overcrowded condition of the city was a distinct handicap. Perhaps symbolic of Washington's lack of space was the JAG School's "campus:" according to Major General Brannon's later recollection, it consisted of a small balcony to which the students repaired for a smoke between classes (and perhaps to watch the girls go by). So four courses later, in September of 1942, operations were transferred to the new Judge Advocate General's School located at the Law Quadrangle of the University

of Michigan Law School, Ann Arbor, Michigan. There, a regular program of instruction was set up to train attorneys in all areas of military law and to introduce those who were coming directly from their civilian professions to military life. The war years saw state supreme court justices, Congressmen, deans and professors of law schools, United States attorneys and state legislators all being trained to be Army lawyers. By June of 1944, two-thirds of the active duty strength of The Judge Advocate General's Depart-

figure 54

THE ANN ARBOR JAG SCHOOL CREST

ment were graduates of the School. The end of the war substantially reduced the need for trained military lawyers, and on February 1, 1946, the School, which had been initiated only on a temporary basis, was deactivated.

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THE LEGAL TRAINING OF WORLD WAR II JUDGE ADVOCATES

With lawyers entering the service from all walks of life, a training program had to be devised to change general practitioners and specialists into officers and experts in military law. Much of the praise for this feat goes to the first Commandant of the Judge Advocate General's School, Colonel Edward Hamilton ("Ham") Young. A West Point graduate and infantry officer detailed by the Army to take several law courses so he could return to the Point and teach, Young stayed in the law field and was detailed to the Judge Advocate General's Department. Thereafter he finished his degree work at New York University Law School.

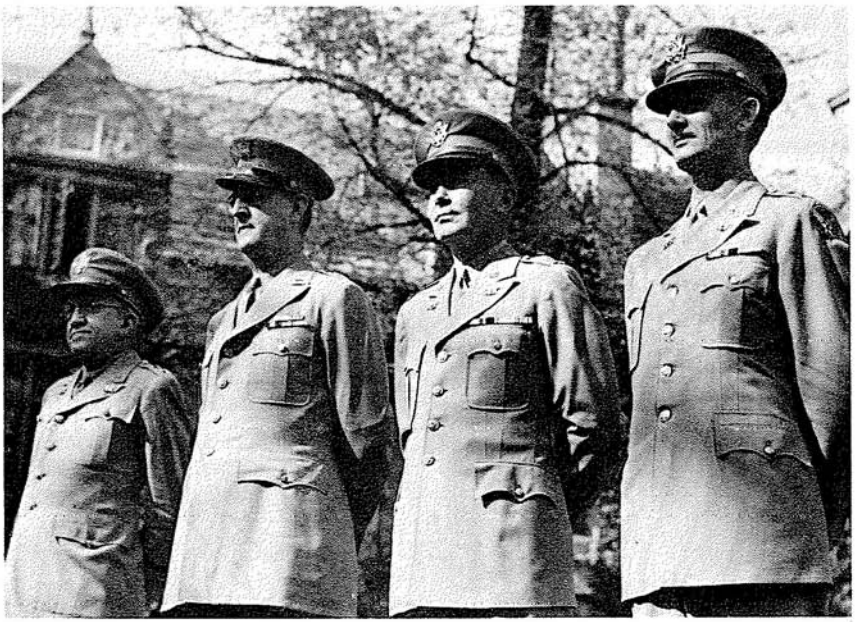

figure 55

REVIEWING JAG SCHOOL PARADE ARE, LEFT TO RIGHT, JUDGE ADVOCATE GENERAL CRAMER, FUTURE TJAG GREEN, COLONEL "HAM" YOUNG, TJAGSA COMMANDANT, AND COLONEL EDGAR HARVEY SNODGRASS WHO BECAME THE FIRST AIR JUDGE ADVOCATE

The Judge Advocate General's School program under Colonel Young's guidance featured not only the "backbone" course in military justice, but also military affairs, claims by and against the United States, government contracts, rules of land warfare, taxation, constitutional law, military reservations and legal aspects of military government. The curriculum taught "soldiering" as well as "lawyering." With great stress upon military discipline—military science and tactics included close order drill, interior guard, map reading, chemical warfare, tactics, staff functions, signal communications, weapons, and similar subjects designed to prepare students

for duty as staff officers. But the life of the JAG officer candidate was not all drudgery. Colonel Young wrote about the life at Ann Arbor:

> All work and no play, so the saying goes, makes "JAG" a dull boy. Although competition is keen and the students approach their duty with serious mien, amusing incidents intrude to lighten the daily round. The various details—bugle, flag, mess, O.D., etc.—have provided booby traps and resulting "skins" which are fondly recalled by school alumni.

Many school stories centered around the school's trusty cannon, an old French 75 mm. piece of World War I, fondly referred to as "Old Hateful." To protect "Old Hateful's" shining muzzle, a canvas cover was strapped on. One cannoneer, being a few seconds behing time, and rushing to make it up at reveille absent-mindedly jerked the lanyard without first undressing the piece. Demerits ensued. For firing the gun too soon one graduate earned the nickname "Early Boom O'Brien." Another who failed even to discharge the piece was dubbed "No Boom Akanow." One student on his initial tour of duty on the bugle detail, apparently lacking an ear for music, played the reveille record on the robot bugler when it was time for taps; another played taps at time for reveille; while a third "skinee" on a dark icy morning committed the unpardonable sin of sounding reveille exactly one hour too early. Needless to say, this early riser found little sympathy from his classmates over his "handful" of demerits.

* * *

General Cramer's term as The Judge Advocate General expired on December 1, 1945, after four years of total-war experience. He was succeded by Brigadier General Thomas H. Green of Massachusetts, who had served during the war as executive to the Military Governor of Hawaii and as Assistant and Deputy Judge Advocate General in Washington.

* * *

THOMAS H. GREEN

General Green was born in Cambridge, Massachusetts, on April 22, 1889, and graduated from Boston University in 1915 with a Bachelor of Laws degree. He was admitted to the bar of Massachusetts and practiced law in Boston until called into federal service with the Massachusetts National Guard in 1916 for border patrol service. In late 1917 he was commissioned a second lieutenant in the Regular Army and assigned to duty with the 2d Cavalry at Fort Ethan Allen, Vermont. He later transferred to the 15th Cavalry at Douglas, Arizona, and went to France with that regiment in March of 1918. He served in various places throughout France and participated in the Meuse-Argonne Offensive. He attained the temporary rank of major while overseas and served as commanding officer of his regiment in bringing it back to this country. Thereafter he held numerous assignments and manifested a renewed interest in the law by pursuing studies at George Washington University, culminating in his receipt of the degree of Master of Laws in 1923. On December 22, 1924, he transferred from the cavalry to the Judge Advocate General's Department.

In his tours of duty thereafter he served in the Civil Affairs Section of the Judge Advocate General's Office in Washington, and as Assistant Judge Advocate of the 2d Corps Area at Governor's Island, New York. These duties were followed by a further tour in the Washington office where he was assigned to the Military Affairs Section, and later as Chief of the Patents Section until June 1939. During this period he was also detailed to take a

special field officer course at the Chemical Warfare School, Edgewood Arsenal, and received further specialized military instruction at the Army Industrial College, from which he graduated in June of 1938.

In August 1940 he was assigned for duty as Judge Advocate of the Hawaiian Department where he was made Executive to the Military Governor in December of 1941. For his work in the latter assignment he received the Distinguished Service Medal, and was largely responsible for the military government of the Islands during the critical year and a half immediately following the Japanese attack on Pearl Harbor. Under his administration the health, morale and financial condition of the territory were greatly improved, and procedures of military government worked out and placed in operation at that time have since become the model for modern legal thinking on this subject. In recognition of the part General Green played during this period, the Hawaiian legislature passed a special resolution commending him for his outstanding work. It is known that he received hundreds of letters from people of all walks of life in Hawaii praising his administration. And it was while occupying the position of

figure 56

THOMAS H. GREEN, JUDGE ADVOCATE GENERAL

Executive to the Military Governor that he was promoted to brigadier general on May 24, 1942.

He returned to the United States in April 1943 and was reassigned to the Office of The Judge Advocate General, as the Assistant JAG in charge of Military Justice and later in charge of Civil Matters.

Thomas Green's love for the service and its tradition was evidenced when Assistant Judge Advocate General Green came to Washington. The Winter 1945 issue of *The Judge Advocate Journal*, in its "Meet General Green" article reported:

> On coming to Washington as Assistant Judge Advocate General in 1943 he immediately decreed that since every Army Officer worth his salt should be a good marksman, all those on duty in JAGO should report to Fort Myer for pistol practice. He was privately pleased at the high percentage of experts and sharpshooters that were revealed. Carrying it a bit further, all officers were next required to fire the carbine at a range set up in Rock Creek Park. The final scores on this firing were also unusually satisfactory and about this time there was speculation in the corridors of the Munitions Building that the "Old Man" was about to send the office force out for an hour of close order drill each morning up and down Constitution Avenue.

In September 1944, General Green was made Deputy Judge Advocate General. He was awarded an Oak Leaf Cluster to the Distinguished Service Medal for his work in the Washington office, principally in recognition for the important part he played in determining the legal policies to be followed in the unprecedented field of Army operation of industrial plants arising from labor disputes.

Thoms H. Green, who started his military career as a private in the cavalry, attained the rank of major general by virtue of his appointment as Judge Advocate General on December 1, 1945. He served four successful years in that position, retiring on the 30th of November, 1949.

The podium beckoned to General Green, as to so many of his colleagues. His retirement years, until his death in 1969, were occupied as Professor of Law and Professor Emeritus at the University of Arizona. Mrs. Green graciously made available to the TJAGSA Library his papers and the Memoir which occupied the General's second retirement.

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Management of the world's largest law firm and of the legal needs of the Army is always a major task for The Judge Advocate General. General Green foresaw the increased need for judge advocates after the cessation of hostilities and his estimates were fully justified by the large requisitions for judge advocates submitted immediately from both overseas commands and the Zone of Interior. It was obvious that the decline in legal business would not be as rapid as had been the decline in troop strength. Additional attorneys were needed for the prosecution of war criminals; the administrative settlement of several kinds of claims; and the review of all records of trial by Army courts-martial to consider prisoners for clemency. The number of courts-martial cases tried during World War II (1,700,000) amounted to one third of all criminal cases tried in the nation during the same period. The bulk of these were minor and the sentences or other

punishments forgotten or expiated by later, honorable service. Some were, however, serious. A clemency board, appointed by the Secretary of War in the summer of 1945 to review all general court-martial cases where the accused was still in confinement, remitted or reduced the sentence in 85 percent of the 27,000 serious cases reviewed.

Although there were over one and a half million courts-martial during World War II, the death penalty was rarely imposed. Those cases typically were murders and rapes; only one—Private Eddie Slovik—had been convicted of a "purely military offense."

* * *

THE EXECUTION OF PRIVATE SLOVIK

During the Second World War there were 318,274 deaths in the United States Army, of which 255,618 were battle deaths. Of the larger number, 142 were deaths by execution, all for murder, rape and rape-murder except one. The one exception was Private Eddie D. Slovik, who was "shot to death by musketry" on January 31, 1945, for the crime of desertion in the face of the enemy.

Slovik was born in Detroit in 1920 to a family of Polish ancestry. Home conditions were poor and Eddie Slovik grew up as a "dead end" kid with a police record. By late 1943 the Army was beginning to scrape the bottom of the manpower barrel and Slovik was reclassified 1–A. Upon completing his infantry training at Camp Wolters, Texas and receiving a denial on his application for a dependency discharge, Slovik sailed for Europe with 7,000 other infantry replacements. On the trip over, while cleaning his rifle, Slovik said to one Tankey, "I never intend to fire it." Slovik and Tankey were assigned to Campany G, 109th Infantry, 28th Division. The truck set out for Elbeuf to join the unit, passing by scenes of wreckage, destruction and death that had been the Falaise pocket. When they reached Elbeuf, shelling began and the men were required to dig in. There was an order to move out which Slovik and Tankey obeyed in one respect—they moved away from the action and turned themselves in to a Canadian outfit, the 13th Provost Corps, with which they remained for about 45 days. Slovik did odd jobs for the Canadians, principally cooking. On October 7, 1944, he and Tankey finally reached the 109th Infantry Headquarters, and on the next day he reported to Company G.

He told the CO that he was "too scared, too nervous" to serve with a rifle company and that unless he could be kept in a rear area he would run away. The CO assigned Slovik to the 4th Platoon, turned him over to the platoon leader and forbade him to leave the company area without permission. The platoon leader introduced Slovik to his squad leader. Later Slovik came to the CO and inquired if he could be tried for AWOL, the CO said he would find out, and had him placed in arrest and returned to his platoon area. About an hour later, Slovik went back to the CO and asked, "If I leave now will it be desertion?" The CO said yes, and Slovik left, without his gun, walking fast.

At about 0830 hours the next morning Slovik turned himself in to the Military Government Detachment, 122th Infantry, told the cook he had made a confession and handed him a green slip containing the following broken language:

> I Pvt. Eddie D. Slovik No. 36896415 confess to the desertion of the United States Army. At the time of my desertion we were in

> Albuff in France. I came to Albuff as a replacement. They were shelling the town and we are told to dig in for the night. The following morning they were shelling us again. I was so scared nerves and trembling that at the time the other replacements moved out I couldn't move. I stayed there in my foxhole till it was quiet and I was able to move. I then walked in town. Not seeing any of our troops so I stayed over night at the French hospital. The next morning I turned myself over the Canadian Provost Corp. After being with them six weeks I was turned over to American M.P. They turned me loose. I told my commanding officer my story. I said that if I had to go out there again I'd run away. He said there was nothing he could do for me, so I ran away again and I'LL RUN AWAY AGAIN IF I HAVE TO GO OUT THERE.

This confession was turned over to a lieutenant colonel of the 109th Infantry, who warned Slovik that the written confession could be damaging to him and suggested he take it back and destroy it. Slovik refused, and then signed the following on the reverse of the green slip:

> I have been told that this statement can be held against me and that I made it of my own free will and that I do not have to make it.

On November 11, 1944, Slovik, charged with desertion, appeared before a nine-man general court-martial composed exclusively of staff officers. The combat people were otherwise engaged in the intense battle for the Hurtgen Forest.

The case against Slovik was open and shut and the trial lasted less than two hours. Actually, there was nothing to try, Slovik having fully admitted his guilt. After findings of guilty, the court took three ballots on the sentence. All were unanimous: death.

The record was then forwarded for review, at which time Slovik's civilian background became material. But whether Slovik's past influenced the convening authority, Major General Norman D. Cota, Commander of the 28th Division, may well be doubted. General Cota's attitude was crystal clear.

> Given the situation as I knew it in November, 1944 I thought it was my duty to this country to approve that sentence. If I hadn't approved it—if I had let Slovik accomplish his purpose—I don't know how I could have gone up to the line and looked a good soldier in the face.

And so, on November 27, 1944, General Cota approved the sentence, after which the record was sent to the Theater Judge Advocate for further review. That officer had before him Slovik's plea to General Eisenhower for clemency, which although saying, "I don't believe I ran away the first time as I stated in my first confession" and "I'd like to continue to be a good soldier" was pointedly silent about offering to return to the infantry duty for which Slovik had been trained.

The Theater Judge Advocate recommended that the death sentence be approved, "not as a punitive measure nor a retribution, but to maintain that discipline upon which alone an army can succeed against the enemy."

And so General Eisenhower confirmed the sentence on December 23, 1944. The Battle of the Bulge was raging. Bastogne was surrounded. Indeed, on the day before, 22d December, General McAuliffe of the 101st Division had responded to the German demand for surrender with "Nuts," a monosyllable that has become part of our legendry.

General Eisenhower's action completed confirmation of the case, but the review required by Article 50½ was still to come. The record of trial was

found legally sufficient by a board of review, and then by the Assistant Judge Advocate General for the European Theater of Operations. The latter officer wrote:

> This soldier has performed no front line duty. He did not intend to. He deserted from his group of 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 had anticipated but the imposition of a less severe sentence would only have accomplished the accused's purpose of 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.

Slovik was sent back to the 28th Division somewhat to the surprise of General Cota, to be executed. Cota, however, "conceded the logic in the theatre commander's action; a deserter should be shot by the outfit he deserts."

On January 31, 1945, Private Eddie Slovik was shot by firing squad—the only execution for a purely military offense from the close of the Civil War to this day.

* * *

Substantial numbers of servicemen who had never been in trouble with the law in civilian life served time in military jails, and came home from the war with military records showing court-martial convictions or less than honorable discharges. Senators and Congressmen were flooded with complaints. Rear Admiral Robert J. White described the ground swell of criticism against military justice thusly: "The emotions suppressed during the long, tense period of global warfare were released by peace, and erupted into a tornado-like explosion of violent feelings, abusive criticism of the military, and aggressive pressures on Congress for fundamental reforms in the court-martial system. Most of the stories of unfairness, arbitrariness, misuse of authority and inadequate protection of rights could be boiled down to the criticism that commanders exercised too much control over courts-martial procedures from prosecution through review. It was clear that the central issue in reforming military justice was the commander's role in the court-martial.

On March 18, 1946, the Secretary of War appointed the Board on Officer-Enlisted Men's Relationships, headed by General James Doolittle, to investigate the alleged abuses in the military system. The board considered thousands of letters and held many hearings. Although not primarily concerned with military justice, the board concluded that "the largest differential which brought the most criticism in every instance, was in the field of military justice and courts-martial procedure which permitted inequities and injustices to enlisted personnel." The board was particularly concerned with the inequities of rank which even appeared in the court-martial system. It recommended a sweeping recasting of the

military structure which would deemphasize rank by such reforms as abandoning the requirements of saluting off base and off duty and removing the prohibitions on social fraternization between ranks.

The armed services, faced with tremendous manpower cuts, strongly resisted tampering with the prerogatives of rank in any restructuring of the military. The report drew little support within the services, and few proposals were even seriously considered for remedial legislation.

Later in 1946 the Secretary of War appointed a committee headed by Arthur Vanderbilt, a former President of the American Bar Association, to advise on changes in the Army court-martial system. This committee, after a prolonged study, found that the overall administration of military justice had been excellent, but recommended further safeguards of the rights of accused persons and an increase in the number of JAGD personnel to effectuate recommended revisions. Similar committees appointed by the Navy proposed changes in its court-martial system, the Articles for the Government of the Navy. Meanwhile, support for a drastic reform of the military justice system—with particular emphasis upon removing the commander's control and providing for civilian review—was building up in various bar associations.

The Administration endorsed separate legislative programs offered by both the Navy and Army for updating their individual criminal statutes. Despite the continuing Administration support for separate statutes, Ohio Congressman Charles H. Elston, Chairman of the House Armed Services Committee (itself a product of the trend toward military unification, as it replaced the formerly separate Committees of Military Affairs and Naval Affairs), expressed hope that "we will be able to write some legislation applicable to both the Army and Navy, so that the entire system within those branches may be revised." However, two months later during consideration of the Army legislation by the full Armed Services Committee, Representative Elston acknowledged the complexity of merging the two quite diverse statutes.

The Army's proposed amendments to the Articles of War were, admittedly, a compromise between the advocates of continued military control of the legal system and the reformers urging infusion of civilian procedures. Hearings were held on the Army proposals, resulting in a somewhat more reformative draft which was reported to the House in June of 1947 as the Elston Act. It was not voted on until the following January. However, after a

short debate, the Elston Act was passed by the House with few alterations.

Meanwhile, the Senate Armed Services Committee took no action on the Army legislation, principally because the chairman, Chan Gurney of South Datoka, opposed any statute applicable to only one armed service. On May 3, 1948, Senator Gurney wrote to Secretary of Defense James Forrestal urging preparation of a uniform code of military justice, with "defense establishment proposals ready for the convening of the Eighty-first Congress." Eleven days later Secretary Forrestal announced appointment of a committee to draft the first American statute of criminal law and procedure applicable to all military personnel.

Alarmed at the prospect of Senate rejection of the House-passed amendments to the Articles of War, interest groups lobbied to bring the bill directly to the Senate floor. House Resolution 2575 was introduced by Senator James P. Kem of Missouri as a rider to the first peacetime Selective Service Bill. Floor debate centered on the supporters' contention that no American should be drafted without protection of military law reforms. Senator Gurney objected to the bill because it pertained to the Army only and urged delay until legislative proposals from Forrestal's committee could be received, but the advocates of immediate reform prevailed by a five-vote majority. The House concurred, and revised Articles of War were enacted to become effective February 1, 1949. At the time, confusion existed over applicability of the new act to the Department of the Air Force created in 1947. Nevertheless, the Air Force complied with the amended Articles.

This new legislation amended 43 of the Articles of War in effect at that date. Among some of its new features were:

(1) Enlisted persons were authorized to sit as members of general and special courts-martial upon a written request of an enlisted accused person.

(2) The authority of commanding officers to impose disciplinary punishment under the 104th Article of War as to officers and warrant officers was extended, but not as to enlisted persons. Under the article, officers exercising general court-martial jurisdiction could impose in peacetime as well as in time of war a fortfeiture of one-half pay per month for three months upon officers below the grade of brigadier general and upon warrant officers.

(3) Officers were made subject to trial by special courts-martial.

(4) Qualified lawyers were required as law members of general courts-martial. The presence of the law member was

required throughout the trial and his power to rule finally on questions of law was increased.

(5) In all cases tried by general courts-martial the regularly appointed defense counsel had to be a lawyer if the trial judge advocate were a lawyer.

(6) An accused, if he so desired, was allowed counsel at the pretrial investigation.

(7) A bad conduct discharge could be adjudged by general and special courts-martial.

(8) Automatic appellate review was redefined in Article of War 50, and the power of confirmation except in cases involving death sentence and cases involving general officers was vested in the Secretary of the Army, The Judge Advocate General, and a Judicial Council composed of three general officers of the Judge Advocate General's Corps.

(9) Provision was made for granting new trials upon petition of accused persons within one year after final appellate action or within one year after the termination of World War II.

(10) A lesser sentence than death and life imprisonment was authorized for unpremeditated murder and for rape.

(11) Specific provisions were made to prohibit any coercion or undue influence upon members of a court in their consideration of a case.

Immediately upon approval of the revision, measures were taken by The Judge Advocate General to implement the revision of the Articles of War. These included: the drafting of a revised *Manual for Courts-Martial*; preparation of the necessary executive orders to become effective on 1 February 1949; and, procurement of additional judge advocates required to implement the new Articles.

Pursuant to the 1948 Articles of War a new appellate tribunal was created in the Office of the Judge Advocate General. The Judicial Council, composed of three general officers of the Corps, was essentially a super board of review. Under the provisions of Article 48, all sentences involving imprisonment for life, dismissal of an officer below the grade of brigadier general, or dismissal or suspension of a West Point cadet were automatically reviewed by the Judicial Council. Cases in which TJAG disagreed with the holding of the Board of Review were also referred to the Council. Under the Articles, The Judge Advocate General could direct that all records before the Judicial Council for confirmation be forwarded to him before judicial review became final. Where TJAG then failed to concur with the Judicial Council's decision, the record was reviewed by the Secretary of the Army. Although this system had the beneficial result of interposing a group of

highly skilled military lawyers at the top of the appellate review ladder, the addition of the Judicial Council also created a complex network of interrelationships among Boards of Review, The Judge Advocate General, the Judicial Council and the Secretary of the Army.

There were several developments important to military lawyers contemporaneous with the great reform of military law from 1946 to 1950. The second and major part of the reform story comes somewhat later, but it is worthwhile to note the other actions at this point.

The first event has been mentioned: separation of the Air Force from the Army in 1947. During and after World War II the U.S. Army Air Corps had been staffed by Army JAG's, just as had other units—with the difference that the Air Corps JAG's were regarded as specialized officers whose career assignments normally were in Air Corps units. Most of these specialists went with the Air Corps into its new sub-cabinet status; how they fared is really the Air Force's story.

The reduced Army JAG Department was then affected by two pieces of legislation. The first, in 1947, removed the statutory designation of position, strength and commissions in the Department which had been customary since the earliest days. All such matters were left to the Secretary of War, but only for a short time. The Act of June 24, 1948 restored the previous pattern and changed the name from the Judge Advocate General's Department to The Judge Advocate General's Corps. The new Corps strength and organization were as follows: one Judge Advocate General with the rank of major general; one assistant with the rank of major general; three officers with the rank of brigadier general, and a number of Regular Army judge advocates, in grades from colonel to first lieutenant, not less than one and one-half percent of the authorized officer strength of the Regular Army.

Even while The Judge Advocate General was preparing to implement his new organization and the revised Articles of the Elston Act, yet another military criminal code was being prepared to govern all military personnel. This one was seen as consistent with the idea of the newly created Department of Defense which controlled all the services. The Forrestal Committee, which put the new law together in a six-month drafting project, was headed by Edmund M. Morgan, Harvard University law professor. The choice of Professor Morgan was a fortunate one for the cause of broader reform of military law because he was not only highly respected as an expert in evidence and legal procedure (he had served on the drafting committee for the Federal Rules of Civil

Procedure 10 years before), but he had also served as a major under General Ansell in the Judge Advocate General's Office in World War I and was sympathetic to many of Ansell's ideas.

Defense Secretary Forrestal undoubtedly knew of and, at least, did not oppose Morgan's frequently expressed criticism of military law. Appointment to direct the drafting committee gave Morgan the opportunity to advance his concept of "judicialization" of the military legal system. Similar reform views were held by another influential member of the committee, Felix E. Larkin, Assistant General Counsel to the Secretary of Defense, who served as the committee's executive secretary. As the principal Department of Defense spokesman during the Congressional hearings which followed their efforts, Larkin influenced the legislative history of the new Code through his explanations of its various provisions. Other members of the drafting team included 15 lawyers—10 military officers and five civilian representatives—from the four services.

The committee painstakingly compared the Army and Navy codes, attempting to reconcile their pecularities and to mold in reforms. The *American Bar Association Journal* urged removal of command control in a number of editorials from 1945 to 1948. On November 22, 1948, the Committees on Military Justice of the American Bar Association, the Association of the Bar of New Jersey, the New York County Lawyers' Association, the Association of the Bar of the City of New York and the War Veterans' Bar Association all called on the drafting committee to make certain reforms in military justice, namely: that the judicial systems of the armed servies be removed from command control; that a simple system of review be adopted; and that in all general courts, and wherever possible in all other cases, both the trial judge advocate and the assigned defense counsel be lawyers.

Hearings were held on the Uniform Code of Military Justice in March and April 1949. Many military leaders, and even some JAG's, questioned the need for the UCMJ, basically because the Elston Act had just been made law and the Articles of War had just been amended. They felt that these recent changes should be given a chance to succeed. However, the House passed the committee's draft without substantial change on May 5, 1949. The Senate, however, did not pass it until February 3, 1950, for a variety of reasons. The Senate bill had been introduced in February of 1949, and referred without objection to the Committee on Armed Services. On June 19, 1949, that committee reported the bill favorably, and it was made the order of business on June 21, 1949.

But Senator Wayne Morse of Oregon objected, and the bill was

deferred. Similar parliamentary delays occurred on September 27 and October 17, 1949. Morse's objections were based on his contention that the bill, as offered, contained insufficient reforms to eliminate biased command control. Meanwhile, the chairman of the Senate Judiciary Committee, Pat McCarran of Nevada, attempted to persuade the chairman of the Armed Services Committee to agree to assign the bill to the Judiciary Committee for additional hearings. Senator Millard Tydings of Maryland, the Armed Services Committee head, refused; seven months later the full Senate sustained his action. This dispute arose principally as a jurisdictional struggle between the two committees. McCarran contended that the Uniform Code was a criminal statute and, therefore, should be heard by the Judiciary Committee, a panel probably less willing to ratify Department of Defense proposals than was the Armed Services Committee.

Following finalization by the House-Senate Conference Committee, the Uniform Code of Military Justice was approved by Congress and signed into law by President Truman on May 5, 1950. It became effective one year later.

1950 also saw the appointment of Major General Ernest M. Brannon as Judge Advocate General. Brannon succeeded General Green as The Judge Advocate General on January 27, 1950.

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MAJOR GENERAL ERNEST M. BRANNON

The Presidential appointment of General Ernest M. Brannon as Judge Advocate General was confirmed by the Senate on January 26, 1950, and the Secretary of the Army administered the oath of office to the new chief of the Army's legal corps the following day.

General "Mike" Brannon was born in Ocoee, Florida, on December 21, 1895. He attended Alabama's Marion Institute and the University of Florida before entering the United States Military Academy on June 14, 1917. Following an accelerated graduation from West Point in 1918, Brannon was commissioned a second lieutenant for wartime duty. Following the Armistice in Europe, he returned to the Academy as a student officer with his class and remained until June 1919. Following completion of his West Point studies, he made a tour of the European battlefields and entered the Infantry School at Fort Benning, Georgia, graduating in June of 1920.

He was detailed to Columbia University, New York in September 1925 and pursued a course of instruction in its law school. In September 1926 he was transferred to the Military Academy where he served as an instructor in the Law Department until June 30. Brannon was detailed to the Judge Advocate General's Department on June 18, 1930, and was again sent to Columbia University where he graduated with his LL.B. degree in June of 1931. He was assigned to the Office of The Judge Advocate General in August 1931 and was on duty with the Contracts Section until September 1933, when he entered the Army Industrial College, graduating in June 1934.

He spent one year as legal adviser in the Planning Branch, Office of The Assistant Secretary of the Army before being assigned to duty as Assistant

figure 57

ERNEST M. BRANNON, JUDGE ADVOCATE GENERAL

Staff Judge Advocate, II Corps Area, Governors Island, New York, in August 1933. He returned to duty in the Office of The Judge Advocate General in August 1938, and early in 1942 was made Chief of the Contracts Division. This was followed in December 1942 by an additional appointment as Chief of the Tax Division. Brannon was thereafter assigned as Judge Advocate of the 1st Army and served with that unit in England (from October 1943 to June 1944), during all European combat operations until V-E Day, 1945. After short stops at Fort Jackson, South Carolina, and Fort Bragg, North Carolina, he returned to Washington in October 1945 as Procurement Judge Advocate, Headquarters, Army Service Forces.

In 1946, the Office of Procurement Judge Advocate was made a part of the Services, Supply and Procurement Division of the War Department General Staff; in 1947 it became part of The Judge Advocate General's Office and Brannon was designated Assistant Judge Advocate General (Procurement) where he served until he succeeded General Green.

General Brannon's tour was marked by the crucial problems of the Cold

War in Europe; implementation of the new UCMJ during combat in Korea and the re-establishment of The Judge Advocate General's School. He served a four-year tour and retired on January 26, 1954.

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IX

Korea and the Uniform Code of Military Justice

The Uniform Code of Military Justice took effect on May 31, 1951. This was the most far-reaching change in military law in the country's history, providing, for the first time, one criminal code applicable to all of the services and a military criminal justice system containing safeguards for the soldier not yet enjoyed by his civilian friends. The enactment in 1950 of the UCMJ required the preparation of a new *Manual for Courts-Martial*, to apply to the Army, Navy, Marine Corps, Air Force, and Coast Guard. The 1951 *Manual* was written by officers working under the direction of Army Colonel Charles L. Decker, then was agreed upon by all the services and promulgated by the President as an Executive Order.

The new Code made few substantial changes in the wording of military-type crimes. It tended to follow the Army's Articles of War, making alterations where appropriate for special Navy situations. Traditional military crimes limiting the personal conduct of servicemen were continued. Among these were using "contemptuous words against the President;" offering "provoking or reproachful words or gesture towards any other person;" "conduct unbecoming an officer and a gentleman;" and "all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this Code may be guilty." Some of these are general statements when considered under the standards usually applied to the interpretation of criminal statutes, but soldiers know what they mean, and most are explained in the *Manual.*

This new Uniform Code removed the limitations of time and place for court-martial jurisdiction as to murder and rape and defined each of the other civilian crimes in a separate article (adding the crimes of extortion and perjury). It did not state maximum punishments for most crimes but provided that the President could, by Executive Order, prescribe a table of maxi-

mum punishments. The President promulgated a table as part of the 1951 *Manual for Courts-Martial* which has continued (with minor changes) since that time. However, the President retains the power to suspend all or part of the table at any time, which he might do in time of war or other crisis.

Essentially the same levels of command as before were permitted to convene summary, special and general courts-martial, with the power to convene a general court-martial granted to commanders of separate brigades and larger units. The commander with authority to convene a court was called the "convening authority" rather than the "appointing authority" as under the Articles of War.

Many changes added important, new protections for military persons. The Code provided that any person subject to its provisions could prefer charges against another person also subject to its provisions, making the preferral of charges much like filing a criminal complaint in civilian courts. Charges could be referred to a special or summary court-martial without a formal investigation, but before charges could be referred to a general court-martial, the convening authority had to appoint an investigating officer to make "a thorough and impartial investigation." At these investigative proceedings the accused would be afforded an opportunity to present evidence and cross-examine witnesses. The convening authority was required to refer the charge to his staff judge advocate "for consideration and advice," before ordering a trial. The commander was not bound by the recommendation of either the investigating officer or the staff judge advocate, but had to make his own determination "that the charge alleges an offense under this Code and is warranted by evidence indicated in the report of investigation." The Court of Military Appeals has called this a "judicial act" which only the proper commander can perform. The commander was held to this same high standard in performing his post-trial review of courts martial.

The new Code extended the soldier's privilege against self-incrimination which had been accorded in American courts-martial under what was known as "law militaire" before the date of the Fifth Amendment and which had made its first appearance in military legislation in Article 6 of the 1786 Articles of War. The basic provisions were ultimately expanded by military case law to include the additional advice to an accused that he had a right to have counsel present during the interrogation. That right to counsel included a right to either free government counsel or civilian counsel chosen by the accused at his own expense.

The military commander plays a unique and necessary role in

the criminal justice system, but it remains a judicial system, nevertheless. Provisions were included in the UCMJ which were intended to prevent the commander from unduly influencing the justice system. A commander would be disqualified from appointing a court-martial if he had a "personal interest" in the case. Another more important provision sought to prevent command influence by prohibiting the convening authority of any court-martial from censuring, reprimanding or admonishing any court member or counsel with respect to the findings or sentence; and from attempting to coerce or, by any unlawful means, influence the action of a court-martial or any member thereof. Violations of this provision were considered criminal.

As did the Elston Act of 1948, the UCMJ provided that enlisted men could serve on courts-martial. Upon his request, an accused enlisted man was entitled to be tried by a court made up of at least one-third enlisted men. However, the convening authority still had the power to appoint those enlisted men whom he believed were "best qualified for the duty by reason of age, education, training, experience, length of service and judicial temperment." This right to be tried by a "jury" made up, at least in part, of an enlisted man's peers had been one of the cherished objectives of reformers for 50 years, General Ansell having proposed after World War I that three-eighths of the court must be of the same rank as the accused.

More "judicialization" was added to the system via the Code provision that every general court-martial have a "law officer" appointed by the convening authority. The law officer was to be a judge in many respects and a member of the bar or highest court of a state and certified as legally qualified for his duty by The Judge Advocate General. He would instruct the court as to the elements of the offense, the presumption of innocence, the burden of proof, and would rule on interlocutory questions of law. The senior officer of the court panel continued to preside at the trial as president of the court and carry out many administrative and judicial functions. His duties were to: set the time and place of trial, and uniform to be worn; conduct the trial and preserve order; administer oaths to counsel; recess or adjourn the court; preside over closed sessions; and speak for the court in announcing findings and sentence, and in conferring with the law officer. Despite the retention of these duties in the office of the president, the introduction of the law officer was the beginning of one of the most important developments in military criminal law in this century: the rise of an independent judiciary in the services.

Another significant reform in the 1950 Code was the grant to

an accused of the right to be represented by a lawyer defense counsel in most serious cases. The convening authority would appoint as defense counsel a military lawyer certified by The Judge Advocate General as legally qualified, for each general court-martial. The accused in a special court-martial could be represented by his own civilian lawyer (as could an accused in a general court), or by a military lawyer of his own selection "if reasonably available" or, if he did not hire a lawyer and a requested military lawyer was not provided, by a nonlawyer officer who would serve as defense counsel.

Among the greatest effects of the Korean Conflict—to be discussed in the next section—was its impact on military justice activities. In many situations, the switch to a Uniform Code of Military Justice was in "mid-trial," yet the members of the Corps served with distinction while meeting the challenge of a new Code and a war simultaneously. The transition into lawyer-conducted general courts was smooth, and, in the long run, there was no noticeable adverse effect upon military discipline or effectiveness. Both the new *Manual* and the extensive procedural provisions of the Code contributed to the success of this adjustment.

The 1951 *Manual* also adopted more of the indicia of civilian court procedure; however, the basic court-martial format retained its distinctive military character. The trial by general court-martial was conducted not by the law officer, but by the president of the court and the court itself voted on a number of questions normally determined by a judge in civilian courts. Special courts-martial in the Army retained their traditional characteristics in that they were limited in punishment powers and were generally conducted without lawyers. Although the *Manual* and service regulations attempted to provide guidelines for the nonlawyer participants, the special court-martial remained in too many ways as before the new Code. The day for its reform was not long in arriving, but there remains for discussion here the most far reaching of the 1951 reforms which established extensive post-trial review and judicial supervision of courts-martial.

General Ansell's desire for civilian review of courts-martial was met by the new Code provision which established a United States Court of Military Appeals, to be composed of three civilian judges appointed by the President to 15-year terms. This court was at the top of a hierarchy of three levels of review of courts-martial. The first type of review was still to be performed by the convening authority, called the reviewing authority for this purpose. He was required to refer the record of trial by general courts-martial to his staff judge advocate or legal officer for a written opinion concerning all aspects of the case. The reviewing authority (who

figure 58

THE COURT OF MILITARY APPEALS WAS ESTABLISHED IN 1951. MEMBERS OF THE ORIGINAL COURT INCLUDED, LEFT TO RIGHT, JUDGE GEORGE W. LATIMER, JUDGE ROBERT EMMETT QUINN AND JUDGE PAUL WILLIAM BROSMAN

differs with his legal adviser) was to state his reasons in writing and make them part of the record. He had power to approve only those findings and the sentence which he found "correct in law and fact and as he in his discretion determines should be approved." He also could remit or reduce, but not increase, any sentence.

Special and summary court-martial results were subject to the same reviewing authority action and were further reviewed by a legal officer before becoming final. There was no automatic appeal of these lower courts, but an accused could request extraordinary relief from The Judge Advocate General, if the error in his case was serious.

Completed general court and those special court cases in which the sentence included a bad conduct discharge were, after local review, forwarded to The Judge Advocate General who was given both substantial personal powers of review and mitigation, and

authority to establish boards of review. The Judge Advocate General of each service was directed to establish boards of review in his office, each composed of three military or civilian lawyers. All cases would be reviewed by a board where the sentence approved by the convening authority affected a general or flag officer, extended to death, dismissal, dishonorable or bad conduct discharge of any person, or included confinement of a year or more. The board considered the whole record, weighed the evidence, judged the credibility of witnesses, and determined controverted questions of fact. It could affirm only those findings and sentences which it found correct in law and fact, and could set aside findings or sentence, order a rehearing or (where it found the evidence insufficient) order the charges dismissed. Its determination was final and binding on The Judge Advocate General who lost the power, as under the previous law, to disagree and send the case to the President.

The final appeal was to the new United States Court of Military Appeals which sat as a sort of supreme court of military law. That title is still justified because no direct appeal from its decision is possible, although as is the case with state courts, a decision may be "collaterally attacked" in the federal courts as by petition for a writ of habeas corpus which requests a Federal District Court to order release from military custody. Although the impact of the Code at trial level was substantial, the most revolutionary provision of the UCMJ was the creation of this Court of Military Appeals. The court quickly indicated that it intended to act as an independent appellate court and that, as the supreme court of the military, it was the highest authority as to interpretation and application of the UCMJ. A review of the ways this new appellate court has affected military criminal law would be too long and technical for this history but it may be noted that the court has been both a legal arbiter, as courts are supposed to be, and a social force of much more immediate impact on the community it serves than most other courts in the United States.

Since 1951, the decisions of the Court of Military Appeals, supplemented by those of the boards of review, have created a body of military "common law" interpreting and applying the statutory commands of the UCMJ and increasingly anticipating and accepting civilian constitutional law standards. The Court of Military Appeals has felt its way carefully and, due to its small membership, the attitudes of individual judges have particularly affected its willingness to expand due process rights and grant relief. It has accomplished more reform in the field of procedural due process than all the prior Congressional military codes put together.

Congress, by Article 76 of the new Code, has required the court to make an annual report in conjunction with the Judge Advocates General. Together they formed a "Code Committee" which soon became a valuable forum for the resolution of problems, the interchange of information and a record-keeping body which has preserved the history of the court. For example, TJAG Brannon's early reports explained the Army's reluctance to implement the authority to convene special courts empowered to impose a bad conduct discharge, reported efforts to train court reporters and joined with the other members in recommending changes to the Code. Except for a brief period of 1959 and 1960 when early negative feelings about some decisions came to a head, the Committee has worked well and usefully.

The Korean Conflict: More Wartime Demands on the Judge Advocate

The UCMJ increased the need for judge advocate officers and together with existing demands of the Korean War, resulted in a large number of Reserve judge advocates being brought to active duty to supplement the 650 (350 Regulars, 300 Reservists) then in uniform. To meet the increased need for junior officers, a system was inaugurated in 1951 whereby 200 recent law school graduates were commissioned as first lieutenants in the Army Reserve and ordered to active duty. At the peak of the Korean War over 1,200 officers, approximately two-thirds of whom were Reserve Component officers, served on active duty with the Corps. TJAG Brannon's Report to the Court of Military Appeals in May of 1952 said that 750 of his 1,200 attorneys were engaged full-time in criminal justice activities.

As the United States entered the Korean War, The Judge Advocate General's duties, prescribed in detail by law or directive, included being the legal adviser of the Secretary of the Army and of all officers and agencies for the development of policy for all legal aspects of the affairs of the Army. His duties included advice concerning the business, property and financial operations under the jurisdiction of the Secretary of the Army, and the legal questions growing out of the administration, control, discipline, status, civil relations, and activities of all Department of the Army personnel.

The drafters of the *Manual for Courts-Martial, 1949*, had recognized that certain offenses such as desertion, absence without leave, disobedience of orders, and misbehavior of sentinels, became extremely serious offenses of war. Accordingly, they had provided that limitations on the punishment of such offenses would be suspended automatically "upon a declaration of war." Shortly after hostilities commenced in Korea, it became obvious that a wartime situation existed even though there had been no

formal declaration of war. Accordingly, the Judge Advocate General's Office, acting upon the recommendation of the Commander in Chief, Far East, coordinated the promulgation of Executive Order 10149, issued by the President on August 8, 1950, which suspended the limitations on punishment for these offenses. As the hostilities were localized, the order of suspension was limited to offenses committed by persons under the command of or within any area controlled by the Commander in Chief, Far East.

While the order of suspension solved one problem—that of permitting courts-martial to adjudge sentences which would punish the offender adequately and serve to deter others—it gave courts-martial in Korea a wide latitude in determining the sentence which they might impose in particular cases. Because of the varying states of morale and discipline in different units, disparity in sentences adjudged by different courts for like offenses was observed. The Judge Advocate General considered that the interests of military justice would be better served by a system whereby like punishments were adjudged for comparable offenses. The matter was finally resolved in action upon the Korean War case involving a company commander who refused to advance with his unit.

* * *

THE GILBERT CASE

On the morning of July 31, 1950, the United States forces in Korea were actively engaged against their North Korean enemy. At Sangju, Korea, Company A, 24th Infantry, occupied the right flank of the regimental outpost line of resistance. By midafternoon, Communist forces had penetrated Company A's defensive position and it appeared that they might be cut off. Tanks and infantry from the main body of the 24th Infantry were dispatched to counter the enemy's advance. Then the regimental executive officer encountered a small group of men heading toward the rear. Among the group was Company A's commander, Lieutenant Leon A. Gilbert. The Exec asked Gilbert where he was going and Lieutenant Gilbert replied that he had been cut off from his unit by sniper fire and could not return. Three of the regiment's officers countered by ordering Gilbert and his troops to return to the fighting. Although the enlisted men moved out, Gilbert steadfastly maintained that he could not go back, adding that he had a "wife and children to consider."

In a court-martial convened only 200 yards from the front, Lieutenant Gilbert faced charges of "misbehavior before the enemy," a violation of the 75th Article of War. (The offense occurred before the effective date of the UCMJ.) Although a great deal of testimony relating to Gilbert's mental abilities under fire was presented, the court rejected the defense of mental irresponsibility and found Gilbert guilty of the charge. He was subsequently sentenced to death. The Board of Review in the Office of The Judge Advocate General held that the record was legally insufficient to support the verdict—this decision based on the board's opinion that the prosecution failed to carry the burden of proof of the accused's sanity. The Judicial Council and The Judge Advocate General did not concur with the Board

and found Gilbert mentally responsible; they recommended that the President commute the sentence to dismissal and 30 years' confinement at hard labor. On November 27, 1950, President Truman commuted Gilbert's sentence to dismissal and imprisonment at hard labor for 20 years.

The case set a significant precedent for sentencing procedures in the Korean War. Because the President's Executive Order of August 8, 1950, removed limitations of sentences for certain offenses, a situation soon developed where dissimilar sentences for like offenses were being imposed, creating a serious problem for the Office of The Judge Advocate General and the Army. The Gilbert case was utilized by General Brannon as a standard against which similar cases could be measured and a policy extending to all such offenses was employed. Excessive sentences imposed by courts-martial in the field were mitigated upon review in the Office of The Judge Advocate General in all cases thereafter, another result of which General Ansell had been the harbinger.

* * *

Other activities in the Office of The Judge Advocate General began to reflect the new Code. All records of trial in serious cases were automatically reviewed by a board of review. All other cases received were reviewed by the Examination Branch of the Military Justice Division. If, upon examination by that division, any part of the findings or sentence was found unsupported in law, or if The Judge Advocate General directed, the case was sent to a board of review for further review.

There had been a steadily increasing number of records of trial received for appellate review during the first two years of the Korean War. The increasing load of cases required that the boards of review be augmented. On the effective date of the Uniform Code of Military Justice five boards of review were constituted. (A sixth board was established on September 1, 1951, and a seventh on January 21, 1952.) Each board consisted of three members with either one or two assistants.

Under the Code, any accused whose case was to be reviewed by a board of review was entitled to representation by appellate defense counsel, which was supplied by the Defense Appellate Division of OTJAG. The number of accused availing themselves of this privilege rose steadily, from 66 percent during several months after inception of the Code, to 76 percent a year later.

During the first 19 months of operation under the Code (June 1951 through December 1952), the boards of review reviewed 11,289 cases. Acting under the provisions of Article 74(a) of the UCMJ, the boards of review of the three Judge Advocates General modified the findings or sentences, or both, in 1,394 cases or 12 percent of the total.

Article 67 of the UCMJ provided the accused with the right to petition the United States Court of Military Appeals for a grant of

review of a board of review decision. In the first 19 months of operation under the Code about 1,650 appeals to the court were received from the Army. This constituted about 18 percent of the 9,100 cases in which board decisions had been forwarded to the court and the accused's election as to the exercise of his right to appeal had been ascertained.

During the first two years of the war, 181 of every 1,000 accused appealed to the Court of Military Appeals; of those, 28 were granted review and 14 secured reversal (in whole or part) of the decision of a board of review. In addition to appeals by the accused, cases reached the USCMA through certification by The Judge Advocate General or because review by the court was mandated by statute (sentences extending to death or affecting a general officer). During that two-year period, 11 cases were forwarded to the court for mandatory review and 29 cases were certified by The Judge Advocate General of the Army.

The major activities of the Defense Appellate Division included the furnishing of appellate defense counsel pursuant to Article 70 of the Code; the preparing of assignments of errors with necessary supporting briefs and argument of such allegations before the boards of review; the drafting of petitions for grants of review with supporting briefs; and arguing of actions before the United States Court of Military Appeals.

After General MacArthur's announcement in the Far East that United Nations forces would adhere to the new 1949 Geneva Conventions for the protection of war victims, it was decided that the detection and prosecution of war crimes in Korea should be a United Nations or international program. This decision created novel questions of status and treatment of persons accused of war crimes. These questions stemmed not only from the fact that the 1949 Geneva Conventions generally afforded war criminals the same legal rights as a member of the detaining power's own armed forces, but also because the Conventions had not been ratified by the United States Senate. After obtaining pertinent information from General MacArthur's headquarters, from United States authorities in Germany and from other interested governmental agencies, the Office of The Judge Advocate General prepared studies relating to the pretrial and trial phases of the Korean war crimes program. These studies were forwarded to the Department of Defense for consideration in connection with a proposal by the Senate Subcommittee of the Committee on Armed Forces that uniform rules for the trials of war criminals be adopted. The view was additionally expressed that, as North Korea was not a party to the Hague and Geneva Conventions, announcement should be made that the allies would afford North

Korea the rights normally accorded to lawful belligerents and would expect reciprocity in this regard. Subsequently, the People's Republic of Korea advised the United Nations that its government was "strictly abiding by the principles of the Geneva Convention in respect to prisoners of war."

There is no record that the Chinese Communists undertook explicitly to abide by the Convention. However, on July 16, 1952, the foreign minister of Red China informed the Swiss that his government had decided to "recognize" the 1949 Geneva Convention subject to certain reservations.

The war wore on for three bloody years. Yet during the last 18 months of this conflict, selected personnel from the forces concerned—to include several top-ranking JA's—were meeting over the council table to negotiate an end to the fighting. The most difficult issue in the armistice talks concerned the release and repatriation of prisoners of war. Since both parties to the conflict apparently agreed to comply with the provisions of the 1949 Geneva Convention, and since the matter of repatriation was covered therein, it would have appeared that the extra months of fighting might have been prevented.

The war had taken its toll in many ways other than casualties. The success of the Allied psychological program, the superiority of American arms, as well as the inherent desires of certain Communist soldiers to desert, all caused United Nations prisoner of war stockades to overflow. Investigation revealed that thousands of prisoners—North Korean and Chinese alike—did not desire to be repatriated to their own country, and, if necessary, a large number would resist repatriation to the death. This was the situation confronting the conferees at the peace table. It soon became apparent that the United Nations could not force these prisoners to return to their own country with the prospects of retaliation for their surrender and subsequent defiance towards Communism while in the PW compounds. On the other hand, the Communist delegates to the peace conference demanded a rigid adherence to the terms of the Geneva Convention, insisting that the principle of nonforcible repatriation was contrary to Article 118. That Article provided in part:

> Prisoners of War shall be released and repatriated without delay after the cessation of active hostilities.

Coupled with Article 7's provision that prisoners of war could "in no circumstances renounce in part or in entirety the rights secured to them by the present Convention," the Russian delegate argued that the Geneva Convention of 1949 demanded unconditional repatriation of all prisoners of war, and that no PW was

entitled to waive his right of repatriation regardless of personal preference.

Various legal arguments were presented to answer the Communist interpretation. Lawyers for the Unified Command took the position that Article 118 merely imposed on the Detaining Power the duty to offer every prisoner an unrestricted opportunity to go home. But it was argued that the 1949 Geneva Convention had not revoked the customary international rule which allowed a government to grant asylum to PW's. Perhaps the most telling of arguments was that the United Nations had bound itself only to the humanitarian principles of the Geneva Conventions, and that the forced return of thousands of prisoners of war to a fate of possible torture or death in their homeland was not in keeping with those concepts. It was argued that Article 118 should not be construed to be in derrogation of humanitarian principles of asylum, and that there was no evidence that Article 7 was intended to preclude prisoners of war from claiming asylum.

Thus the lines of disagreement at the peace table were as distinct and tightly drawn as were the lines of contact along the Korean battlefields. As the war continued it became obvious that the question was far more than an interpretation of the provisions of the Convention or principles of international law. Although the Unified Command spoke of humanitarian concepts and the Communist Bloc pleaded for a strict interpretation of and adherece to the words of the Geneva Convention, the real issue was apparent: the Soviets were fearful of any policy which encouraged an enemy soldier to surrender and be offered asylum if he refused repatriation, knowing full well the undermining effect it would have on the already present desire of many of the impressed soldiers to flee from Communist control.

The position taken by the Unified Command won overwhelming support in the UN General Assembly on December 3, 1952, and was subsequently implemented in the armistice agreement. This document accepted the principle of nonforcible repatriation and concentrated its provisions on ensuring that a bona fide free choice was actually given to each PW. The Communists suffered one defeat after another in their efforts to induce their PW's back home. When confronted with a free choice, only a very small percentage accepted the opportunity to return. Thus, the acknowledgement of the right of PW's not to be repatriated left open a welcome passageway to freedom which proved to be a powerful Allied weapon for the cold war years that followed.

Claims activity increased after the outbreak of the Korean War. Its major wartime problem areas involved claims of military personnel and civilian abandonment of personal property occur-

ring incident to service. Because of the nature of the Korean hostilities and the reverses that were suffered during certain phases of the fighting, these claims were not only more numerous than usual, but also the individual losses were larger than average. The maintenance of morale among the personnel who had suffered such losses demanded the processing and settlement of claims of this type with the highest priority. Accordingly, forms were standardized and simplified, processing procedures were streamlined, and personnel were transferred from other duties to the processing of personnel claims.

The Korean Conflict brought about an immediate and considerable increase in the patent activities of the Office of The Judge Advocate General. There was a 25 percent increase in the number of patent applications transmitted by the Commissioner of Patents to the Armed Services Patent Advisory Board for review and recommendation as to whether the patent contained information which would be detrimental to national defense if disclosed. As secretary of this joint board, the Army representative (an officer from The Judge Advocate General's Office) performed the bulk of the administrative work connected with any board action. The increased armed forces procurement program which followed the outbreak of Korean hostilities caused a 100 percent increase in the review of patent royalty reports. Such reports were forwarded by procurement agencies of the Department of the Army for review to determine whether the government was paying royalties on patents already licensed to it or whether the royalties being paid were large enough to warrant readjustment action.

At the time of Korean hostilities, the authority for the procurement of military supplies and equipment was found in the Armed Services Procurement Act of 1947. The continuance of hostilities and the consequent expansion of the Army resulted in a rapid depletion of available supplies and equipment. In the interest of national defense, it was necessary that such supplies and equipment be replenished quickly, efficiently, and without too severe a dislocation of the civilian economy. To achieve these ends, Congress enacted the Defense Production Act of 1950 which, among other things, gave procurement agencies power to expedite certain procurement activities by making direct and guaranteed loans to contractors. Although the procurement of supplies was satisfactorily accomplished under the Armed Forces Procurement Act of 1947 in most instances, some contractors suffered undue hardships as a result of the rising costs of raw materials, labor and component parts. Accordingly, judge advocates assisted in drafting an amendment to Title II of the First

War Powers Act of 1941, which removed any doubt as to the authority of procurement agencies, in the interest of national defense, to make advance payments to contractors, to modify and correct existing contracts without consideration and to formalize informal commitments of contracting officers.

The acceleration of procurement with the outbreak of the Korean Conflict was reflected in the increased number and complexity of cases involving proceedings under the Bankruptcy Act and the financing action necessary to essential procurement. In those cases, it was necessary for Corps personnel to render extraordinary assistance to the Justice Department. Correspondingly, operations of cost-plus-fixed-fee contractors resulted in a number of suits by their employees and subcontractors. Favorable precedents were obtained in state courts and settlements of other cases on reasonable terms were also effected.

The Contract Appeals Division, using government trial attorneys, represented the interests of the United States in statutory and contractual appeals of Army contractors before the Armed Services Board of Contract Appeals and the Appeal Board, Office of Contract Settlement. Personnel of this office arranged for the attendance of witnesses, prepared for and presented the government's cases at hearings, submitted any necessary briefs therein, and prepared and presented ancillary matters in connection with such litigation. The period from 1950 to 1952 saw a total of 290 cases presented before the two boards.

The Legislative Division prepared official reports for the Congress on special relief bills and on general legislation concerning claims and related matters. In addition, the Division prepared replies to all Congressional correspondence concerning claims handled within The Judge Advocate General's Office. It also drafted reports for the signature of the Secretary of the Army to the Director of the Bureau of the Budget recommending approval of enrolled bills relating to, or for the payment of, claims, and prepared vetoes for the signature of the President whenever it was believed that a certain legislative bill should not become law. During the period from September 1951 to December 1952, the Division prepared reports on 175 bills which involved the proposed expenditure of substantial sums. During the same period, reports to the Director of the Bureau of the Budget recommending the approval of 53 bills, and veto messages involving seven bills, were prepared.

There was a continued increase in the number of tax problems affecting the Army: mostly in consequence of the accelerated defense expenditures following the outbreak of the Korean Conflict, increases in general price levels, and efforts of federal,

state and local governments to tap new sources of revenue. Thus, during 1950–1952 the Tax Division was called upon to furnish formal opinions, or to act otherwise, with respect to 233 legal problems involving the applicability of federal, state, and local taxes to activities of the Army, its instrumentalities, and its contractors. The Division coordinated policies respecting such taxes with the other services and within the Army, and endeavored to minimize the impact of such taxes upon appropriations. Members of the Division served on the Tax Subcommittee of the Munitions Board Armed Services Procurement Regulation Committee, and there assisted in the formulation of uniform regulations and contract activities.

Military Legal Education

As in World War II, the Korean Conflict caused the summoning to the colors of Reserves, National Guardsmen and other citizens in large numbers. The Reserve Components judge advocates were again ready and able to join together, but the Elston Act and the new Code for all the services meant that the legal skills of even those Regulars not in recent contact with the criminal law were rusty. In addition to these immediate problems, The Judge Advocate General was aware that the business of his firm was becoming more diverse every day. Gone were the times when a man could prepare for the practice of law in the Army by mastering a few books. Detailed instruction was needed for the newcomers, and the cadre had to be refreshed as military law grew each day.

The Judge Advocate General's School in Ann Arbor had been deactivated following World War II. However, the Army reopened its law school on October 2, 1950, in temporary facilities at Fort Myer, Virginia, once again under the guidance of Colonel "Ham" Young. Meanwhile, the Special Projects Division of OTJAG under the leadership of Colonel Charles L. Decker set up plans for a permanent school. The offer of a site on the grounds of the University of Virginia in Charlottesville was accepted. Facilities at Charlottesville were leased, and the School began operation at its new Virginia location in late summer of 1951 with Colonel Decker serving as the first commandant.

Colonel Decker said of the move to Charlottesville from Fort Myer:

> The move to Charlottesville was made by truck. It was completely without incident. Starting on 25 August, it 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.

Within a few years (1955) the Advanced Course of The Judge Advocate General's School was accredited by the American Bar Association and the School began to move into a prominent place in the field of graduate legal education.

The lessons of two wars were not lost on its administrators and faculty. As a result, the School (usually referred to by the official abbreviation, TJAGSA) was able to meet the full spectrum of the Army's needs. In addition to TJAGSA's mission of preparing newly commissioned officers for the specialized practice of military law through its introductory Basic Course, the School presented its flagship course for middle level managers. The Advanced Course provided a full academic year of graduate legal education to Army lawyers as they approached eligibility for responsible positions as division staff judge advocates or chiefs of specialized branches in large headquarters. Finally, the demands of the legal field caused the introduction of "short courses" which permitted practicing attorneys in the government service to receive two or three weeks of intensive work in special subjects such as trial advocacy, environmental law and procurement. The number of short courses was small in the early years, just three or four, but professional interest in continuing legal education for the Bar was reflected in the growth of that number to 25 during the early 1970's.

All three types of courses attracted uniformed attorneys from the other armed services in significant numbers, especially after the Korean War. The short courses were also attractive to civilian attorneys in many government agencies other than the Department of Defense. All were welcome at what was to become "The Home of the Military Lawyer." Some of this account of the War, the School and the new Code has put us ahead of our story, but the 1950's were a watershed period for the Corps. We can now return to some of the men who bore the burden of those years.

The Army in Peacetime

The Korean War ended in July 1953, and General Brannon completed his four-year term as Judge Advocate General some six months later. He was succeeded on February 5, 1954, by Eugene Mead Caffey.

* * *

MAJOR GENERAL EUGENE MEAD CAFFEY, JUDGE ADVOCATE GENERAL

Eugene Mead Caffey was born in Decatur, Georgia on December 21, 1895. He entered West Point in 1915 and was graduated in 1918 in the accelerated courses consequent upon the First World War. On the day of his

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EUGENE MEAD CAFFEY

graduation he was commissioned a second lieutenant, first lieutenant and captain (temporary) in the Corps of Engineers. When the Armistice ending the First World War was signed he was in command of a company of the 213th Engineers of the 13th Division in training at Camp Lewis, Washington.

Thereafter he served with the Panama Canal Department, followed by service in Chile in connection with the Tacna-Arica Plebiscite Commission headed by General Pershing. From Chile he proceeded to Nicaragua where he assisted in exploring the alternative canal route. When he returned to the United States, he applied for detail with the Judge Advocate General's Department. He was accepted, and was sent to the University of Virginia School of Law.

Then Lieutenant Caffey was admitted to the Virginia Bar in September 1932 and received his LL.B. in June 1933. After a military promotion and a tour of duty with the 1st Cavalry Division at Fort Bliss, Texas, Captain Caffey was ordered to the Judge Advocate General's Office for duty with the Insular Affairs Section. In this capacity he represented the Government

of the Philippines in the courts, the last of a long line of such representatives, which had included Felix Frankfurter.

In 1938 Captain Caffey was assigned as judge advocate at the Infantry School, where, in the spring of 1940, he was finally promoted to major. His had been the first West Point class since the War with Spain whose members had served more than 20 years in the company grades. Later in the same year, when the 4th Division was activated at Fort Benning, Georgia, he was transferred there as Division Judge Advocate.

By early 1941 it became obvious that war was imminent and Major Caffey traded his JAGD brass for the engineer castle and "Essayons" buttons and, effective February 1941, was assigned to the 20th Engineers. By then a colonel, Caffey sailed with his unit for North Africa and in early 1943 participated in the Tunisian Campaign, winding up in Bizerte. In the process, Colonel Caffey was awarded two decorations, a Silver Star for gallantry, and a Purple Heart for wounds received when his jeep ran over a German mine.

Thereafter, Colonel Caffey was assigned to command of the 1st Special Engineer Brigade, and was with that unit in the Sicilian invasion and at Utah Beach on D-Day in Normandy. On the latter occasion, he was awarded the Distinguished Service Cross for his "extraordinary heroism" in connection with military engineering operations while a member of the first wave of the forces assaulting the enemy-held beaches. After conditions on Normandy's shore stabilized, Utah and Omaha Beaches were combined as Beach District, with Colonel Caffey commanding. Later, he commanded other districts and base sections in Europe.

When the war ended Colonel Caffey was sent to the National War College, serving on a committee that undertook to standardize amphibious doctrine, and, on graduation, was ordered to engineer duties on the West Coast. In 1947 Colonel Caffey rejoined the Judge Advocate General's Department. Beginning in 1949, Colonel Caffey was administrative officer (and de facto executive officer) in JAGO, primarily occupied with matters of personnel. In August 1948, he was transferred to the 3d Army as Army Judge Advocate, where he remained until the summer of 1953, when he was promoted to brigadier general and assigned to JAGO as Assistant Judge Advocate General for Civil Law.

On January 22, 1954, the President nominated him to be The Judge Advocate General with the rank of major general. While the nomination was pending, he was designated Acting The Judge Advocate General. On February 5, 1954, his nomination was confirmed and his promotion and permanent office took effect. General Caffey served as The Judge Advocate General until December 31, 1956.

* * *

Among other highlights of General Caffey's tenure, the JAGC function in development of the law deserves emphasis. Judge advocates struggled through World War II and the Korean War with a mass of military legislation—some of it archaic and contradictory—which had not been codified since 1878. The tremendous task of revising and codifying all the military legislation in force, including that governing the Navy and Air Force, was accomplished under the direction of Colonel Archibald King, a scholarly judge advocate who had known Colonel Winthrop and served under General Crowder. The revised Code

was enacted as Title 10, United States Code, on August 10, 1956. A revision of the manual, *The Law of Land Warfare,* necessitated by changes in international law during and since World War II, was prepared and published in 1956. Written largely by Major Richard Baxter, JAGC, now Professor of Law, Harvard Law School, the manual was prepared under the direction of Major General C. B. Mickelwait, then Assistant Judge Advocate General, and published in 1956.

Other JAG concerns with the law of war became active in the years which followed World War II—one of which involved the MAAG function.

* * *

MILITARY ASSISTANCE ADVISORY GROUPS: ANOTHER SPECIAL MISSION FOR THE MILITARY LAWYER

Along with the expansion of American military overseas activities went the setting up of Military Assistance Advisory Groups (MAAG's) or Military Missions whose purpose was to advise military leaders of friendly nations concerning the equiping, training and employment of modern armies.

The United States had been in the military assistance business since as early as 1869 when William Tecumseh Sherman took 50 men as advisers to Egypt. In 1886, the United States sent an aid team to Korea, and in 1926 military missions went out to a number of South American countries. World War II saw a major military assistance effort begin, with the 1941 Lend Lease Act. This was followed by the Mutual Defense Assistance Act in 1949 and the Foreign Assistance Act in 1951. These became the bases for the dispatch of military assistance groups to many friendly states.

Judge advocates were called to join a number of Military Assistance Advisory Groups. Activities in Iran presented a representative example of overseas MAAG duties. A military mission was first sent there in 1941 and a supplementary MAAG Agreement signed in 1952. The judge advocate sent to the Iranian MAAG had the primary duty of advising the Iranian Judge Advocate General and was given the specific Military Occupational Specialty Code, "Advisor In A Mission."

By informing the Iranian Judge Advocates about American military law and how we solved our military justice problems, he acted to "export" the American ideals and experience abroad. In turn, Iranian legal officers come to both Basic and Advanced Classes at The Judge Advocate General's School in America. But Iran was not an isolated instance: other judge advocates went out to similar assignments in the Republic of China, Greece, Korea, Thailand and Turkey. One also served with the joint Brazilian Mission at Rio de Janeiro.

The assignment to the MAAG, Republic of China, on Taiwan began differently, but became much like the others. That position also deserves mention for the way it illustrates how a lawyer's job can grow in interesting ways. The judge advocate went to the MAAG not under any policy to "export" our law, but because a significant number of U.S. forces were in Taiwan and house counsel was needed to serve them. Yet, the advisory group's mission there was unique and special duties were also required of the servicing judge advocate. His initial job was to provide support to the American forces stationed in the MAAG, to advise local judge advocates, and to also advise the local U.S. Embassy as necessary. Advice to the local Taiwan judge advocates was given and accepted as a natural development

from contacts between the forces. An important part of the job in Taiwan was not to give our law to the Chinese but to explain it to them so the Americans and Chinese could work together. This was a special need which grew with the negotiations for a status of forces agreement.

Perhaps the most challenging MAAG assignment was given to the judge advocates assigned to the MAAG in Vietnam. There, the mission grew far beyond its original size yet typified the basic intent of a MAAG. The first judge advocate in Vietnam went to the U.S. Army Element of the Military Assistance Advisory Group Vietnam (MAAGV). In 1962 the Military Assistance Command, Vietnam (MACV) was established, and MACV gradually assumed the functions of MAAGV. The staff judge advocate at MACV had the responsibility of providing field advisers—military lawyers—who could assist their Vietnamese counterparts in the field and also would at the same time gather as much information as possible about the local legal system. Additionally, a great deal of assistance was needed by the Vietnamese who were simultaneously building their own rule of law, creating a bench and bar, and establishing a civil service where none had existed before. Problems centered around assisting the Vietnamese to create, strengthen and reorganize their military and military-related governmental institutions. The American judge advocates tried to inject into these systems American ideas and attitudes on law and justice: papers were presented, seminars were held, courses were given at Saigon University, Vietnamese officers were sent to The Judge Advocate General's School, and a constant stream of on-the-spot advice was given. Typical projects include American help in reorganizing the Vietnamese military prison system, and advice on prisoners of war and war crimes.

* * *

Thus Army JA's spent some wonderful years abroad—and some uncomfortable ones—assisting their colleagues in friendly armed forces. Like so many of the activities in the military community the job of assistance abroad spanned decades. The brief review in the Vignette carried us almost to the present from the middle of General Caffey's tour. That tour was also marked by the decision of the U.S. Supreme Court in *Toth v. Quarles* (1955) by which the Court invalidated that part of Article 3 of the Code which permitted the trial of service members after separation, in certain serious cases. The *Toth* case also marked the beginning of a period of closer scrutiny of military courts by their civilian counterparts. During the period TJAG also was assigned new missions in the field of administrative law. One which touches the lives of many soldiers is the review of "Reports of Survey," the administrative procedure by which responsibility for the loss of government property may be fixed. The Army lawyers in the field and in Washington were obliged from this time forward to review the reports of the investigation, especially if someone had been found "pecuniarily liable" by the investigator. The legal review normally considered the local law of negligence, scrutinizing the individual responsibility of the person named in the report and the procedures established by Army Regulations, to ensure that the burden of the damages was properly placed.

Status of Forces Agreements: A New Dimension in International Law

To supplement the United Nations Collective Security System after the Second World War, many States turned to bilateral and multilateral self-defense agreements to provide security from external armed attack. The United States entered into many of these agreements, comprising what was commonly termed "the United States Mutual Defense System." Under developing conditions of modern warfare, collective self-defense preparation required close peacetime cooperation, including in many instances, the stationing of military forces in territories of allied States. In the decade of the 1950's, the stationing of American troops in foreign countries around the world required the execution of many status of forces agreements that specified the rights and duties of the receiving (host) State and the sending (guest) State. The best known of these agreements is the NATO Status of Forces Agreement, but others have regulated the status of US forces in such countries as Japan, Korea, the Philippines, Ethiopia and Saudi Arabia. Many supplementary implementing agreements flowed from these status of forces agreements, and many other successful negotiations such as those providing for bases likewise resulted from stationing U.S. forces abroad. This large body of international agreements was essential to the Army's mission in American collective defense arrangements, and created many new demands for Army legal services in the fields of international, comparative and foreign law. Precedents created under these agreements in the course of adjudication and practice rapidly grew into a body of "Status of Forces Law."

The matters covered by the status of forces agreements varied in scope and detail, but commonly regulated such subjects as criminal and civil jurisdiction, claims, taxes and duties, and the procurement of employees and local supplies. Under these agreements, the crucial area of Army judge advocate work concerned the implementation of provisions regarding criminal jurisdiction in tens of thousands of cases involving American military personnel, their dependents and civilian employees of the military. And in their modern-day practice under these agreements, the lawyers of the Corps have seen to the faithful execution of our country's duties. Concurrently, they have vigorously maintained the right of U.S. forces to be subject only to the proper exercise of foreign criminal jurisdiction when in foreign custody; that they receive the procedural protection that was guaranteed to them at all stages of foreign criminal proceedings; and that they be accorded all other benefits provided

under the relevant agreements with the country exercising criminal jurisdiction.

The entrance of the United States into this complex structure of international agreements gave rise to new issues under our Constitution and statutory law. One vital issue was considered by the U.S. Supreme Court in the case of *Wilson v. Girard,* 354 US 524 (1957), wherein the Court was confronted with the question of whether the Army could lawfully choose to waive its right of jurisdiction over a serviceman and allow him to be tried by the Japanese courts, as provided for in the status of forces agreement with Japan. The Court found no constitutional or statutory barriers to the treaty provisions in question, stating: "In the absence of such encroachments, the wisdom of the arrangement is exclusively for the determination of the Executive and Legislative Branches."

Major General Caffey retired as The Judge Advocate General on December 30, 1956, after a distinguished military career that extended over a period of more than 38 years. He was succeeded on January 2, 1957, by Major General George W. Hickman, Jr.

* * *

MAJOR GENERAL GEORGE W. HICKMAN, JR.

The son of a lawyer, George W. Hickman, Jr. was born in Calhoun, Kentucky, February 3, 1904. He graduated from the United States Military Academy and was commissioned a second lieutenant of infantry in June 1926. Hickman served at various posts in the United States and Hawaii prior to the outbreak of World War II: he graduated from the Infantry School in 1932 and the Command and General Staff School in 1940.

Hickman attended Harvard Law School from 1940 to 1942. When World War II began, he left Harvard and was soon made the Staff Judge Advocate of the 98th Infantry Division, and, later, XII Corps. He was detailed in 1943 to the War Department General Staff and served as chief of the Mobilization Branch of G–3. He was transferred to Army Forces, Pacific, and served as a Division Chief in the G–1 section. In 1946 he was assigned to Japan as executive officer, Staff Judge Advocate's Office, Far East Command.

Hickman returned to Harvard Law School and graduated from there in 1948. That same year he was transferred to the Judge Advocate General's Department and assigned to JAGO where he served as Chief of the Claims and Litigation Division from July 1948 until January 1949. In February 1949, he returned to Japan as Staff Judge Advocate of the Far East Command. During the first trying years of the Korean Conflict, he also served as the Staff Judge Advocate, United Nations Command. From July 1951 to May 1952, he served as senior legal adviser with the United Nations Command Delegation during the cease-fire armistice negotiations. He returned to the United States in July of 1952 and was assigned as chairman of a Board of Review in the Office of The Judge Advocate General.

In October 1952 he became the Executive Officer at JAGO. He was appointed Assistant Judge Advocate General for Civil Law in May 1954, and served in that capacity until appointed Assistant Judge Advocate General on August 1, 1956.

figure 60

GEORGE W. HICKMAN, JR.

On January 2, 1957, General Hickman took the oath of office as The Judge Advocate General of the Army and served as the highest ranking Army lawyer until 1961. He is presently active in civic affairs in San Diego, California.

* * *

The years of peace after Korea were marked by legal developments of far-reaching consequence, some still difficult to appraise completely. One which overlapped the tours of General Caffey and General Hickman was quite clear.

The Cold War in Europe required that United States troops be stationed in military bases in foreign countries, and the government allowed military dependents to accompany the servicemen overseas. The "military communities" which subsequently sprung up produced new questions concerning the boundaries of court-

martial jurisdiction, the number and types of people who made up the military community and the military commander's power to govern those units. Many overseas bases contained or closely adjoined communities of families and civilian employees of the Army whom the host government regarded as the commander's responsibility.

There were crimes and other social problems in these areas, just like "back home." In 1957 the Supreme Court considered the problem of court-martial jurisdiction over civilians accompanying servicemen overseas in the companion cases of *Kinsella v. Krueger* and *Reid v. Covert.* Two civilian wives had been convicted by courts-martial (one conducted in England and the other in Japan) of murdering their husbands. Each husband at the time of his death was in the military service of the United States and living with his wife overseas. Each country had agreed with the United States to permit the American military courts to exercise jurisdiction over offenses committed in such countries by its servicemen or their dependents. The United States, in turn, gave assurances that these military courts were available to try and to punish all such offenses. Article 2(11) of the Uniform Code of Military Justice conferred military jurisdiction over "persons serving with, employed by, or accompanying the armed forces outside the United States." Following their incarceration pursuant to sentences to life imprisonment, each of the accused petitioned for a writ of habeas corpus contending that Article 2(11) of the UCMJ was unconstitutional. In a reconsideration of a previous decision, the Supreme Court held that the wives "could not constitutionally be tried by military authorities."

By 1960 the Supreme Court was confronted with further questions delineating the boundaries of court-martial jurisdiction. A civilian accused, employed by the Army in France, was charged with premeditated murder. A court-martial found him guilty of the lesser offense of unpremeditated murder and sentenced him to life imprisonment. In the case of *Grisham v. Hagan*, the Supreme Court held that civilian employees were entitled to trial by jury just as were civilian dependents. Accordingly, the military did not have jurisdiction to try such persons for capital offenses committed overseas in peacetime. In *Kinsella v. United States ex rel. Singleton,* also decided in 1960, the accused and her husband, a soldier stationed in Germany, pleaded guilty in a trial by court-martial to charges of involuntary manslaughter in the death of one of their children. The mother appealed her conviction on the ground that application of Article 2(11) of the UCMJ to a civilian dependent charged with a noncapital offense was unconstitutional. The Supreme Court held that the military could not

properly exercise jurisdiction in such a case and further restricted the scope of jurisdiction only to those persons who could be regarded as falling within the term "land and naval forces."

With the addition of two further cases, *McElroy v. United States* and *Wilson v. Bohlender,* the Court established the general rule that civilians accused of committing offenses while accompanying the armed forces overseas during peacetime, cannot be tried by military courts-martial.

These cases affected both the type and quantity of JAGC work at all levels. Obviously there were policy decisions of major magnitude which had to be made at Departmental level. Status of Forces problems are common to all services and have the potential to affect adversely the foreign relations of the United States. On the practical side, there is the basic proposition that the United States will not be welcome to maintain necessary bases and airfields abroad if the host nations are displeased by the unpunished misconduct of our personnel and dependents.

The clear necessity for a uniform national policy produced a good example of the workings of the military legal community. Principal supervisory responsibility reposed in the General Counsel to the Secretary of Defense because the problem was common to all services. Fundamental policy issues were resolved at that level and announced in a Department of Defense Directive. Each service received that guidance and promulgated it within established command channels.

The impact of the basic problems of stationing troops abroad and its overlay of dependent problems was significant in the field. Army lawyers had to conduct "country law studies" to become familiar with widely different legal systems and to be able to say that United States personnel would or would not receive a fair trial under such systems. They had to become "trial observers" and visit foreign proceedings—often conducted in unfamiliar languages—to be able to report on the fairness of treatment received by Army personnel, civilian employees and their dependents. The organizational problems were immensely challenging, too; just accounting for persons desired by foreign authorities for trial or as witnesses was a big job. Even those sentenced to foreign jails were not forgotten; an elaborate system of visits and inspections was established. The Army lawyer became responsible for such visits, as well as insuring visits by chaplains, medical officers and commanders.

The Army in Court: Litigation Activities

The lull in wartime action after Korea did not decrease the

Corps' litigation activities. The Army can be equated to a big business, moneywise and personnelwise; consequently, its activities generate many lawsuits both by and against the Army. The Attorney General of the United States is the officer responsible for the conduct of most litigation involving interests of the government and its agencies, but he relies heavily on the JAGC when Army interests are involved. Army lawyers typically gather the facts, prepare the "briefs" and arguments, and frequently appear in court with Department of Justice attorneys.

The *Covert, Krueger* and *Singleton* cases generated a rash of actions after 1957 by civilians earlier tried by Army courts-martial. They naturally sought expungement of their convictions from "the record," recovery of fines paid, reinstatement of Civil Service status and similar relief. This phenomenon is found in many types of litigation activities: Army military action tends to affect large groups of people who may have similar claims for relief. One change in the retirement statutes generated nearly 2,000 claims in the Court of Claims during General Hickman's tenure. These were filed by Reserve officers with service prior to 1918 seeking recomputation of their entitlements.

Litigation facing the Army lawyer is as complex as that occupying any Wall Street or Washington attorney. During this same period the Office of The Judge Advocate General faced other actions in the Court of Claims, these by German contractors who worked for the Army during the occupation of Germany after World War II. Again the issue was more money. Members of the largest law firm also appeared before numerous federal and state regulatory tribunals to protect the government's interest in utility rate determinations and to secure needed services.

Preventing Litigation While Maintaining Morale: The Army Claims Service

While some lawyers in the Corps spent their time involved in government litigation, others devoted their efforts toward the continuing need to prevent it. The adjudication of administrative claims filed against the government by civilians and military personnel had been a traditional function of post and command judge advocates, under policy supervision by the Personnel Claims Division in OTJAG. That Division also had an operating function pursuant to which it had processed as many claims items (66,000) in FY 1945 as had field agencies. At the Division's request, Congress liberalized the administrative authority to pay claims by the Military Personnel Claims Act of 1945. And because it was anticipated that these "incident to service" claims would more than

double the workload, General Cramer had re-established the Division at Fort Holabird, Maryland in 1945 as the Branch Office of The Judge Advocate General.

"BOJAG" was the predecessor of the present United States Army Claims Service at Fort Meade, Maryland. It assumed the tremendous personnel claims burden of the European Branch Office of TJAG and embarked on a period of expanded activities. There were foreign claims, as from Korea where the Army had "Single Service Responsibility" for the adjudication of all claims against United States military activities. In 1958 they were assigned supervisory responsibility for tort-type claims activities in all nonappropriated fund agencies, and they acted as the "Receiving State Office" for the United States when claims arose from NATO activities in the United States. The 1958 crash of a British bomber in Michigan illustrated the need for an agency which could respond quickly to the personal and property damage claims caused by such events.

Some military activities such as airplane crashes cause damage of disaster size and generate adverse public reaction. An explosion at a New Jersey NIKE missile site in 1958 was another example. Even routine activities such as the multi-state maneuvers held from time to time can irritate landowners and stock raisers. BOJAG quickly established procedures—patterned on their reaction to the Texas City phosphate ship explosion—to rush men to the scene for on-the-spot investigation and payment of meritorious claims. These responses have done much to assure the Army's continued welcome in areas suitable for maneuvers and to repay innocent victims of military activities both at home and abroad. General Hickman reported payments in the Texas City case in excess of $17 million.

The US Army Field Judiciary

In the administration of military justice one of the most significant developments occurred during General Hickman's period of service as TJAG. The law officer required by the UCMJ for general courts-martial had, since 1951, usually been drawn from the legal personnel of the command of the officer who convened the court. That practice, though lawful, created both undesirable tensions and workloads. After appropriate study and testing in Europe and on the West Coast, General Hickman secured the promulgation of Department of the Army G.O. 37, dated November 13, 1958. By its terms the Field Judiciary Division was created as a separate activity under his "direct supervision and control." Its 39 officers were made available to

"sit" as law officers in eight judicial areas and 19 circuits world wide.

The immediate effects of the creation of the Judiciary were a 50 percent reduction in appellate reversal rates and the institution of studies by the other services to see if the idea would work for them. In the long range the independent Army judiciary became a major weapon against those who condemned the military justice system as commander-dominated. Congress made the idea law for all the services in the Military Justice Act of 1968.

Special Note on the Reserves

The contributions of the lawyer-members of first the Officers' Reserve Corps and then the U.S. Army Reserve to the success of TJAG's mission in the military community are much too important for a Vignette, and treatment in a separate chapter would give an inaccurate impression of difference or isolation. The active Corps has relied heavily on Reservists to fill its ranks in both wartime and peacetime, especially since 1950.

One development during General Hickman's tenure deserves detailed mention: the promulgation by Headquarters, Department of Army of Table of Organization and Equipment (TOE) 27–500D, on 17 October 1958. We are indebted to *The Judge Advocate Journal* for the only extant account of the development and implementation of this concept. Essentially, this TOE (the same sort of document according to which divisions, battalions and companies are organized) established the mission, organization and equipment for teams of lawyers, court reporters and clerks who could be "plugged in" wherever the need arose for specialized assistance in military justice, war crimes investigations, claims, or any of the other major areas of JAGC work.

For the Reserves this TOE meant the ability to organize legal units which could train and work together in their specialty, whereas before they were bound to the schedule and resources of a larger, nonlegal unit. It also meant the eventual establishment of over 1,000 authorized spaces from which duty-ready personnel could be drawn when needed. Reserve divisions and corps kept their usual allocations of legal personnel as in the equivalent active units; now there were more in a better training posture.

The TOE for the Reserve also meant achievement of a greater sense of identity with active counterparts—the "One Army" concept. Spaces in the Reserve units were frequently filled by officers completing tours of active duty and the units provided a organizational base for the communication of current doctrine and information, largely from and through The Judge Advocate

General's School. The School's faculty cooperated with USAR Schools which the Reserve units attended in the summertime by providing resident instructors to supplement the Reserve faculty. In 1972 The Judge Advocate General's School was directed to, and did, begin to send its faculty to Reserve units at their home stations during their periodic "drill" periods. Thus the continuing legal education of the Reservist and his duty readiness were brought to levels never possible before the promulgation of this new concept of organization.

X

The Community Role of the Judge Advocate is Expanded

The first decade under the radically new procedural provisions of the UCMJ was naturally one of adjustment and settling in. The Congress had purposefully revised relationships and duties in the military community with respect to the administration of its military justice system, and these took time to reorder. For much of this first period the strength of the Army exceeded one million men, who with dependents and civilian employees numbering in the hundreds of thousands were spread all around the world. Ten years was not too long for the fundamental adjustments of attitude and practice which had to be made. There was a short period of intense negative reaction in the armed forces to the new Code and court which marked the end of the first 10 years. That was, however, dispelled and the uniformed attorneys moved toward the first group of new challenges to be presented by the United States Supreme Court under Chief Justice Earl Warren and those to be presented by the politics of Southeast Asia. General George W. Hickman, Jr., retired on December 31, 1960, and was succeeded by Major General Charles L. Decker as Judge Advocate General on January 1, 1961.

* * *

MAJOR GENERAL CHARLES L. DECKER

Charles L. Decker was born in Oskaloosa, Kansas, on October 18, 1906. He attended the University of Kansas from 1923 to 1925, and subsequently entered the United States Military Academy where he received his B.S. degree in 1931. Second Lieutenant Decker served with the Panama Canal Department from 1934 to 1936 and as an instructor of English and law at West Point from 1936 to 1939. He then entered law school at Georgetown University where he finished first in his class, receiving the J.D. degree in 1942.

Before his retirement from the Army in 1963, Decker served as a judge advocate at all levels of command from division to Headquarters, Department of the Army. During World War II, he was the Staff Judge Advocate of the XIII Corps throughout its campaigns in Western Europe. He planned for and organized The Judge Advocate General's School, U.S. Army, at Charlottesville, Virginia, in 1951 and served as its Commandant until 1955. Before he left the School, its graduate program had been

figure 61

THE TWO-STAR FLAG IS PRESENTED BY LTG JAMES F. COLLINS, DCSPER, TO NEW TJAG CHARLES L. DECKER AS SECRETARY OF THE ARMY WILBER M. BRUCKER OBSERVES

examined by the American Bar Association and the School was soon to be added to the ABA list of approved law schools.

Active in court-martial work and criminal trials throughout his career, General Decker was the chief drafter of two *Manuals for Courts-Martial* and was the co-author of the book, *The Serviceman and the Law.*

From 1957 to 1961 General Decker served as the Assistant Judge Advocate General for Military Justice, supervising the International Affairs Division, Military Affairs Division, Legal Assistance Division, Military Justice Division, and the Appellate Divisions in the Office of The Judge Advocate General. He assumed duties as The Judge Advocate General on January 1, 1961, and served at that post until December 31, 1963.

During a military career that spanned three decades General Decker earned many awards, including the Distinguished Service Medal, the Bronze Star Medal, the Legion of Merit, and the Georgetown University Law Center's Award as "Outstanding Alumnus of 1961." In 1963, the Alumni Association of the University of Kansas School of Law bestowed on him its annual award for distinguished and outstanding service to the legal profession.

After retirement in 1963, General Decker continued his active involvement in legal affairs; his private practice did not preclude serving as an adviser to the President's Commission on Law Enforcement and the

Administration of Justice 1966—1967 and as Director of the Defender Project of the National Legal Aid and Defender Association from 1964 to 1970.

* * *

General Decker's tour as TJAG saw the end of the first decade of operations under—and was marked by the first revisions of—the UCMJ since it became effective in 1951. The decline in general court-martial rates begun earlier continued through this period, but the instances of appeal to the civilian Court of Military Appeals continued their rise. Some general and specific comments on Code revision are appropriate at this midpoint because General Decker's service as Assistant and later as The Judge Advocate General spanned critical points in both periods.

We noted in the last Chapter that Article 67(a) of the Code, directed the judges of the Court of Military Appeals and the four armed services' senior legal officers to confer periodically on the operation of the legal system and to annually report recommendations for Code amendments to the House and Senate Armed Services Committees and to the Department secretaries. The members of the group established by this mandate referred to themselves collectively as the "Code Committee." However, the need to publish a joint report has not always produced agreement among the civilian and military officials. Throughout most of the first decade, disagreements persisted between the Court of Military Appeals and the military departments in legal matters, especially when the court objected to provisions of the *Manual for Courts-Martial* which contained ancient practices. Even when unity of objectives did exist, concurrence on methods was sometimes difficult to achieve.

In its report in 1953 the Code Committee was able to reach unanimity on 17 relatively noncontroversial recommendations for amendment of the Uniform Code. Many of them sought to simplify and streamline review procedures by giving The Judge Advocates General more power or by eliminating some steps in the cases involving guilty pleas. Others urged an increase in nonjudicial punishment, the inclusion of a bad check law in the UCMJ, and some changes in the time limits on review and retrial applications. More innovative were the suggestions for trial by law officer only—the so-called "single officer courts"—at both the general and the special court-martial levels. Many of these same proposals were heard regularly during the ensuing 15 years of legislative delays.

In the late 1950's, when the passage of time had allowed evaluation of the UCMJ, the Secretary of the Army, on the recommendation of The Judge Advocate General, appointed a committee to study problems of order and discipline in the Army.

The "Committee on the Uniform Code of Military Justice, Good Order and Discipline in the Army" came to be referred to as the "Powell Committee," after its Chairman, Lieutenant General Herbert B. Powell. All the committee members held important high-echelon posts. Only two of the nine general officers were lawyers—The Judge Advocate General and his assistant for military justice, Brigadier General Charles L. Decker—the others represented a broad spectrum of the combat arms, technical commands, and staff and logistics supporting branches of the Army.

The work of the Powell Committee took about three months; the committee report was submitted to the Secretary on January 18, 1960. The report consisted of 287 pages of discussion, findings, and recommendations, in addition to a lengthy legislative proposal. The committee recommended simplification of procedure, reduction in review time, enhancement of commander punishment powers, and legislative reversal of a number of decisions of the U.S. Court of Military Appeals.

The initial outcome was the first and only amendment of the substantive law of military crimes. The Act of October 4, 1961, defined a new offense, making or delivering a "bad" check with intent to deceive and provided for easier proof at trial of the existence of that intent. Under the terms of this new Article 123a—still in force today—a person subject to the Code is presumed to have had an intent to deceive unless he makes the check good within five days of notice that it "bounced." This passage of time could be more readily established than could his subjective state of mind at the time he wrote the check, a point on which many prosecutions had foundered.

Although the Powell committee's philosophy was weighted in favor of the commander's traditional role, its proposals for expanding nonjudicial punishment were not inconsistent with those of other reformers. Civilian critics of the UCMJ generally admitted the need for a commander to maintain discipline through the use of minor punishments which could be dispensed under Article 15, without the necessity of a formal court-martial. Most reformers would have objected to giving the commander power to impose sentences as long as 90 days without a court-martial and, in fact, when one proposal of the Powell committee was passed as an amendment to the UCMJ in 1962, the commander's nonjudicial punishment authority was extended to permit imposition of only 30 days "correctional custody," but no formal confinement. The same amendment gave certain senior commanders other increased punishment powers (restrictions, forfeiture of pay, etc.) under the nonjudicial punishment article.

But these were seen as decreasing, the use of courts-martial, not enhancing command power. These amendments, and the "bad check" statute were the only major change to the UCMJ during the first 17 years of its existence.

One part of the Corps' function which is not always well enough understood is its participation in the purchase of goods and services for the Army, the procurement business. An Army travels on its stomach, as it has been said; it also travels in trucks, tanks and airplanes, the acquisition of which consumes major portions of the budget each year. The contracting officers who do this work and the lawyers who advise them work under laws which are complex and not applicable to other activities. Additionally, those men are usually talking to civilian suppliers in special tribunals, such as the Board of Contract Appeals. Consequently, "procurement" tends to be regarded separately from other legal activities despite its obvious importance.

The Army reorganization of 1962 abolished certain "technical services," such as the Quartermaster and Transportation Corps. They were largely replaced by a new procurement and distribution activity, the Army Materiel Command. General Decker was careful to see that the new command and its subordinate units were staffed with 60 of his lawyers and that the major functions of the legal advisers to the Chief of Transportation, Quartermaster General and Chief Signal Officer, were moved into OTJAG. At the same time, he reorganized the Procurement Law Division and established a separate Contract Appeals Division to present the Army side in contractors disputes before the Armed Services Board of Contract Appeals.

During the last half of his tenure, General Decker also saw to substantial improvements in the Army's appellate tribunals and the organization of his own office. The Army Boards of Review, were designated the Appellate Judiciary and were given commissioners and a Clerk of Court to assist in the administration of their growing case load. Organizationally, the Appellate Judiciary and the Field Judiciary were combined into the U.S. Army Judiciary on October 1, 1962, further establishing their "independence."

Within the Corps this was a period of transition. Cold War tensions gripped the sixties: the Berlin buildup, the Cuban missile crisis, the Dominican Republic operation and finally, war in Vietnam renewed the need for a strong military establishment. As the military community grew, the JAG Corps also grew, not only in numbers but also in its mission. The expansion of the Corps began slowly in the early sixties and gradually increased throughout the decade.

This period was also one of unprecedented growth in American law schools and the legal profession. Although the Corps received "fills" for all authorized vacancies, and even had a surplus of good applicants each year, the applicants were volunteers only in the sense that they preferred three or four year tours as an officer to two years' service under the Selective Service Act. Few of those officers remained in the Army at the end of their obligated tours, which combined with the normal retirement of the older officers created a serious gap in "middle-management levels." To close this gap the Excess Leave Program was started in June 1961. By its terms, career-motivated officers from other branches of the Army were authorized to go into an extended leave status without pay and attend a civilian law school of their choice, but at their personal expense. This program was required because use of Department of Defense funds to send military personnel to law school was prohibited by law in 1953. Upon graduation and admission to practice they were welcome additions to the Corps. By 1965 there were 144 officers in the program. During this period in which the Corps was gathering itself for the effort to come, Major General Robert H. McCaw served as The Judge Advocate General, having assumed the duties of that position in January 1964, pending his confirmation the next month.

* * *

MAJOR GENERAL ROBERT H. MCCAW

Robert H. McCaw was born in Boone, Iowa, on January 3, 1907. He studied at Northwestern University and graduated in 1931 from Creighton University with a Bachelor of Laws Degree. From 1931 until 1942 he engaged in the private practice of law.

His military career began on July 9, 1928, when he was commissioned a second lieutenant of infantry, ORC. On October 4, 1935, he was appointed a captain, Judge Advocate General's Department Reserve. From 1928 until 1942 he participated regularly in Reserve activities. On February 19, 1942, McCaw was ordered to active duty and assigned to the Litigation Division, Office of The Judge Advocate General in Washington, D.C. He attended The Judge Advocate General's School and following graduation was assigned as Division Staff Judge Advocate with the 78th Infantry Division.

In the summer of 1944, McCaw was ordered to the European Theater of Operations. On July 14, 1944, he assumed the duties of Task Force Judge Advocate with the 1st Airborne Task Force. From November of 1944 until July of 1945 he served as Assistant Army Group Judge Advocate with the 6th Army Group and Army Judge Advocate with the 1st Allied Airborne Army. During this period he participated in the Rome-Arno, Southern France, Rhineland, and Central Europe Campaigns.

Following the termination of hostilities, on July 1, 1945, McCaw assumed the dual responsibilities of Army Staff Judge Advocate, 1st Allied Airborne Army, and Staff Judge Advocate of the Berlin District. He was released from active duty on February 7, 1946. On August 24, 1946, he accepted a commission in the Judge Advocate General's Department, Regular Army, and following return to active duty, was assigned to the Military Affairs

figure 62

CHIEF OF STAFF HAROLD K. JOHNSON, RIGHT, AWARDS THE DISTINGUISHED SERVICE MEDAL TO MAJOR GENERAL ROBERT H. MCCAW ON THE TJAG'S RETIREMENT

Division in the Office of The Judge Advocate General. In October 1948, he was transferred to the Panama Canal Zone, where he once again served in a dual capacity, this time as Army Staff Judge Advocate, United States Army, Caribbean, and Theater Judge Advocate, Caribbean Command.

In 1951 he was selected to attend the Army War College. Following graduation, McCaw became Chief, Military Affairs Division, Office of The Judge Advocate General in July of 1952. In 1956 he was ordered to the Far East, where, on November 15, 1956, he became Judge Advocate of Army Forces Far East and 8th United States Army (Rear).

On March 1, 1957, General McCaw became Assistant Judge Advocate General for Civil Law, which position he held until August 1959. During this period he attended the Advanced Management Program at Harvard University. In June of 1957 McCaw became a brigadier general. Two years later he once again departed for an overseas assignment, this time to become Judge Advocate of United States Army, Europe, a position he held until January 1, 1961. On that date he became Assistant Judge Advocate General. On the 22nd of January 1964, the White House announced that General McCaw had been nominated to become The Judge Advocate General of the Army. The Senate confirmed the nomination on February 27, 1964. General McCaw retired from the service as The Judge Advocate General on June 30, 1967.

* * *

The period of the gathering of strength was also one of change. There were two indicators of transition in the field of military justice during General McCaw's tenure: one reflected the changing emphasis in the administration of criminal justice in the Army, the other presaged new problems.

The first illustrated dramatically the effect a statute can have and the ease with which the separate military legal system may be used to study such "legal process" occurrences. Because it is separate and smaller than the total American system, influences such as policy or statutory changes can be readily seen and measured. Summary (one officer) courts had been imposed on soldiers in the Army in large numbers: more than 100,000 in 1952 and still at least 32,000 in 1963. In FY 1964 the number was 16,900,a drop of 47 percent largely attributable to the 1962 amendments to the UCMJ which, by increasing the commander's power to punish nonjudicially, gave him a better alternative than trial by court-martial for minor offenses. Because of this change, Army court-martial rates dropped from 59.7 per thousand troops to 42.2, thus reflecting achievement of the Congressional intent to reduce the number of trials.

The second indicator of transition was the otherwise unexceptional sentence in General McCaw's July 1966 Report to the Committee and Congress.

> In October 1965, a new Judicial Circuit (Area VII, Circuit 22) was created in Vietnam. Its present strength is two Law Officers.

This signalled one of the largest challenges the Corps ever met, but the impact of developments in Southeast Asia was still some years away.

The Army reorganization of August 1, 1962, had provided for the establishment of a new major command to be concerned about the Army of the future. The United States Army Combat Developments Command was to plan for the organization, equipment and training of the Army, test its equipment, and develop its doctrine for combat. A senior JA officer had been placed in the staff of the headquarters by General Decker.

To provide specialized, branch-oriented attention to each problem, "agencies" subordinate to the CDC Headquarters were established. Thus, there was an agency for infantry, quartermaster, transportation, etc., and, on January 15, 1964, the Judge Advocate Agency, Combat Developments Command was organized at Charlottesville. Then Acting Judge Advocate General, Major General Robert H. McCaw attended the organization ceremonies.

During the period of growth and through the period of challenge, the Judge Advocate Agency provided the Corps a window upon the whole spectrum of Army developments. The Corps became closely involved with force structure planning, enjoyed improved opportunities to fix legal resources in new or reorganized units, and contributed to consideration of broad problems of discipline and adjustment to the climate of dissent during the sixties. The Agency merged with The Judge Advocate General's School, pursuant to the Army Reorganization of 1973, but these opportunities did not end with the dissolution of the present Combat Developments Command. The mission and personnel of the JAA were both made a part of the School, and were carried forward in its new Directorate of Developments, Doctrine and Literature.

Major General McCaw retired from active service on June 30, 1967, and was succeeded as Judge Advocate General by Kenneth J. Hodson, who will be well remembered for the pivotal role he played in the passage of the Military Justice Act of 1968.

* * *

MAJOR GENERAL KENNETH J. HODSON

Kenneth J. Hodson was born in Crestline, Kansas, April 27, 1913. He graduated from the University of Kansas in 1935 with a Bachelor of Arts degree in political science and obtained his Bachelor of Laws degree there in 1937. From 1938 until 1941 he practiced law in Jackson, Wyoming.

His military career began on June 6, 1934, when he was commissioned a second lieutenant of artillery in the Officers' Reserve Corps. From 1934 until 1941 his Army career was limited to regular participation in Reserve activities. On May 15, 1941, he was ordered to active duty and, prior to his transfer to the Judge Advocate General's Department, he served as battery motor officer, battery commander, and assistant inspector general with various units, both within the United States and overseas.

On September 17, 1942, he was transferred to the Judge Advocate General's Department and assumed the duties of Assistant Judge Advocate, Trinidad Sector and Base Command. On February 1, 1944, General Hodson became the Assistant Judge Advocate, Western Tactical Training Command (Army Air Corps) where he remained until selected to attend The Judge Advocate General's School, Ann Arbor, Michigan. Following graduation he became Judge Advocate of the 52d Medium Port at Fort Hamilton, New York, in September of 1944.

In December 1944 General Hodson's unit was ordered to Le Havre, France. On March 18, 1945, he became Assistant Judge Advocate, Normandy Base Section. When that command was consolidated with Channel Base Section into Chanor Base Section he became Assistant Staff Judge Advocate and, on January 1, 1946, Staff Judge Advocate of the new command. When Chanor Base was consolidated into Western Base Section, General Hodson became Assistant Staff Judge Advocate, then Executive Officer, and, on January 1, 1947, Staff Judge Advocate, of Western Base Section. On April 1, 1947, he became Assistant Staff Judge Advocate of the United States Constabulary and was placed in charge of the Paris Branch Office of that command. In July of 1947 he became Assistant Staff Judge

Advocate and later Staff Judge Advocate of the American Graves Registration Command in Europe.

In January 1948, General Hodson was transferred to the Office of The Judge Advocate General, Washington, D.C., where he served until July

figure 63

JUDGE ADVOCATE GENERAL KENNETH J. HODSON WAS RECALLED TO DUTY AS CHIEF JUDGE OF THE ARMY COURT OF MILITARY REVIEW

1951. During this period he was Assistant Executive, member and Chief of the Special Projects Division, and Assistant to Board of Review Number 1. While serving as Chief of the Special Projects Division he was responsible for establishing the postwar legal training program for the Judge Advocate General's Corps Reserve officers; subsequently, he authored the procedural chapters of the 1951 *Manual for Courts-Martial.* On July 10, 1951, he became a member of the Staff and Faculty of the reactivated Judge Advocate General's School at Charlottesville, Virginia.

Following his 1954 graduation from the Command and General Staff College, Fort Leavenworth, Kansas, General Hodson served as Assistant

Staff Judge Advocate and, later, Executive Officer, Headquarters, Army Forces, Far East/8th United States Army (Rear) from August 1954 to June 1957. During this same period he was also senior United States member of the joint United States-Japan Committee which supervised the exercise of criminal jurisdiction over United States personnel by Japanese courts.

Upon completion of this overseas assignment in 1957, General Hodson attended the Army War College. Following his graduation, he was once again assigned to the Office of The Judge Advocate General. From July of 1958 until September of 1962 he served as Chief of the Military Personnel Division, Chief of the Military Justice Division, and Executive Officer. On September 1, 1962, he was promoted to the grade of brigadier general. A month later he became Assistant Judge Advocate General for Military Justice. On July 1, 1967, he was appointed The Judge Advocate General of the Army and was promoted to the grade of major general.

Upon completion of his tour as The Judge Advocate General, in mid-1971 General Hodson retired, but was immediately recalled to serve as Chief Judge of the Court of Military Review until March of 1974. He was the first general officer to serve in that appellate judicial capacity.

* * *

At the end of 1967 General Hodson's report to the Code Committee and Congress reflected the fruition of the indication of change General McCaw had reported 18 months earlier. The new judicial circuit in Vietnam had been expanded and there were 104 JA's serving in Vietnam. Also, it was during General Hodson's term of office that a decade of disagreement over military law revision was finally ended, as Senator Sam J. Ervin, Jr., of North Carolina and his Subcommittee on Constitutional Rights assumed a new initiative in developing legislation. Enactment of the Military Justice Act of 1968 can be attributed to more than six years of advocacy by Senator Ervin; to Florida Congressman Charles E. Bennett; and to enlightened military leadership by General Hodson, who served as the Defense Department's Congressional liaison. Senator Ervin's chairmanship of two subcommittee hearings, preparation and sponsorship of legislation, and reconciliation of the parties in disagreement were all essential to passage of the first comprehensive amendments to the Uniform Code. As with the 1920 and 1948 amendments to the Articles of War, the 1968 legislation was passed through unusual processes. By parliamentary actions in the concluding days of the session. Senator Ervin succeeded in adding to House-passed amendments important reforms agreed to in informal conferences with the Department of Defense. Many of the 1968 reforms had been "in the mill" for a long time—their story is revealing.

Prompted by complaints of injustices occurring in the administration of the Uniform Code, the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary conducted in 1962 fact-finding hearings to prepare legislation. As a result of

the hearings, Senator Ervin introduced 18 separate bills amending the UCMJ. The theme of the proposals was elimination of legal decisionmaking by laymen: Qualified attorneys would henceforth administer the military legal system.

As with the revisions initiated by the Code Committee beginning in 1954, Senator Ervin's first attempt at reform failed because Congress was reluctant to reconcile divergent positions. Even The Judge Advocate General at that time displayed opposition to the proposed legislation. And although the bills were subjected to intensive study by both military and civilian experts, no Congressional action occurred during the 88th Congress. At the opening of the next Congress, the same bills were introduced in the House and Senate. As Senator Ervin explained:

> Although there was no disposition to have Committee hearings on the bills, upon my urging the Committee Chairman agreed to appoint a special subcommittee of the Armed Services Committee to join the Subcommittee on Constitutional Rights in joint hearings on the bills, under my chairmanship, with the understanding, of course, that the bills could be reported to the Senate floor only by vote of the Armed Services Committee.

In preparation for the new series of hearings in January 1966, the Committee solicited formal position statements from the Defense and Treasury Departments on each bill and obtained additional data from a questionnaire to each military service.

No significant new proposals or arguments on the Ervin-sponsored amendments resulted from these 1966 hearings by the joint Judiciary and Armed Services subcommittee. In many respects the sessions merely consolidated the range of previously expressed opinions into a few major and contrary viewpoints on the merits of the amendments. Consequently, the bills died in the 89th Congress.

At the beginning of the 90th Congress, Senator Ervin consolidated all the proposals developed over the previous five years into a single bill—a technique used by the Code Committee in the 1950's. However, Defense Department supporters on the Senate Armed Services Committee prevented action on the bill. Recognizing the impossibility of dislodging the bill from the Committee, reformers took a new approach by introducing in the House a bill containing only those amendments acceptable to the military departments. As written, the rather innocuous bill was designed principally to increase the participation of military lawyers in courts-martial. It passed the House on June 3, 1968.

When the legislation arrived in the Senate, Ervin immediately sought to use the House-passed bill as a vehicle for adding, as he later stated, "the minimum reforms necessary to any meaningful justice legislation." Because he wanted to ensure complete Defense Department support for his amendments, Senator Ervin gained concurrence of the Armed Services Committee and the Department for informal negotiations to identify acceptable additions from those controversial portions of the omnibus bill omitted from the House-passed legislation. Because of the lengthy history of opposition to significant reforms by influential Congressmen and by the military leadership, it is surprising that the negotiators agreed on several important provisions. A logical interpretation of the event is that General Hodson, as Department of Defense representative, agreed with Ervin's proposals and was successful in convincing other officials of the Department of Defense to accept the legislation.

The Armed Services Committee accepted the amendments written by Senator Ervin after the informal negotiations and reported the revised bill. Both chambers adopted the new language without dissent on voice vote late in October 1968. Thus, the Military Justice Act of 1968 was the culmination of more than 15 years of debate among the persons and agencies responsible for ensuring justice to the American serviceman. It was the first change to the concept of and structure for the administration of criminal justice in the Armed Forces since 1951, and continued the theme of making that system as much like civilian courts as possible. Its provisions govern the administration of military criminal justice to this day and reflect the influence of civil authority tempered by the more explicit knowledge of the military professional. Uniformed lawyers were as eager for some changes as any Congressman or Senator, but it took a united effort to produce workable change.

The Military Justice Act of 1968 redesignated the law officer as a military judge and gave him a number of new duties and powers comparable to those of a civilian judge. First, he was given the power to try the case by himself if "before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests in writing a court composed only of a military judge and the military judge approves." This opportunity for trial by a military judge alone exists in both general and special courts-martial.

The Act transferred to the military judge a number of functions which, under the original UCMJ, were performed by the court. The military judge may now call the court into session

figure 64

PRESIDENT LYNDON JOHNSON UPON THE SIGNING OF THE MILITARY JUSTICE ACT OF 1968, 24 OCTOBER 1968. TO HIS IMMEDIATE RIGHT, BRIGADIER GENERAL HAROLD E. PARKER (WHO BECAME ASSISTANT TJAG IN 1971 AT THE GRADE OF MAJOR GENERAL) AND TJAG KENNETH J. HODSON

without the attendance of the members for the purpose of disposing of interlocutory motions, motions raising defenses and objections, ruling on pertinent legal matters, and arraigning the accused and receiving his plea. He, rather than the court, determines the validity of challenges for cause against court members, removing the undesirable practice of having the court (minus the challenged member) vote on challenges to its own membership. The military judge's rulings on all question of law and all interlocutory questions, other than the factual issues of the accused's mental responsibility, are final.

Another provision of the Act contributing to the independence of military judges added the requirement that The Judge Advocate General of each service establish a field judiciary from which military judges would be assigned for court-martial cases. The significance of this provision is that military judges are now appointed from a field judiciary under the command of The

Judge Advocate General rather than from the commander's staff judge advocate office, and so they are not subject to rating, assignment or other potential controls by the commander/ convening authority. The Army and Navy already had established field judiciaries without legislative intervention, but this provision ensured that military judges of all services would be drawn from a field judiciary for all courts-martial. Thus, the Act approximated the objective of General Ansell in making the presiding judge independent of the convening authority. The importance of this reform was clearly demonstrated almost immediately after the Act became effective, in the cases arising out of the My Lai incident. The independence of judges was made more apparent by regulations allowing them to wear robes and be addressed as "Your Honor."

The UCMJ did not require that special court-martial counsel be lawyers, however amendments in the Military Justice Act of 1968 provided that the accused "shall be afforded the opportunity to be represented at the trial" of special courts-martial by a lawyer "unless counsel having such qualifications cannot be obtained on account of physical conditions or military exigencies." If a lawyer cannot now be obtained, the convening authority must make a "detailed written statement, to be appended to the record, stating why counsel with such qualifications could not be obtained." The Act continued the provision that a bad conduct discharge could not be adjudged by a special court unless a complete (verbatim) record of the proceedings and testimony had been made and added requirements that lawyer counsel and a military judge be detailed (except in a case in which the military judge could not be detailed to the trial because of physical conditions or military exigencies).

In keeping with the attempt to upgrade the status of the law officer by addressing him as judge and giving him additional judicial powers, the Act also changed the name of the boards of review to Courts of Military Review and redesignated the members judges. The courts of military review are still constituted under The Judge Advocates General of each service, but there is a chief judge who divides the other judges into panels of not less than three and appoints a senior judge to preside. The court may now sit en banc or in panels. The fact that there is only one court with a number of panels, rather than a number of separate boards as under the original UCMJ, should foster more consistency and a higher quality of legal decision.

Provisions relating to the civilian Court of Military Appeals

noted in the preceding Chapter were carried forward with virtually no change under the 1968 Act. The legislation also extended to all accused (not just those sentenced to death, dismissal, punitive discharge, or a year or more confinement as under the original UCMJ) the right to petition for a new trial on the basis of newly discovered evidence or fraud. The time within which the accused may petition was extended from one to two years.

figure 65

TJAG George S. Prugh Congratulates Brigadier General Emory M. Sneeden on His 1974 Appointment as Chief Judge of the Army Court of Military Review

A significant new due process right provided by the Act was a provision for post-conviction release. The Act gave the convening authority power to defer the serving of a sentence to confinement until completion of appeal. Also, The Judge Advocate General of each service became authorized in any court-martial case that had been finally reviewed to vacate or modify the findings and sentence because of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or offense, or error

prejudicial to the substantive rights of the accused. The last ground—error prejudicial to the substantive rights of the accused—is important, for this now means that, for the first time, a person convicted in a special court-martial who did not receive a bad conduct discharge (this type of case accounts for almost two-thirds of the total military courts-martial) can obtain a review of prejudicial errors by someone other than the convening authority and his staff judge advocate's office. Performance as a member of a court-martial or defense counsel cannot be considered in the preparation of an effectiveness, fitness, or efficiency report or in the report used in determining promotion, retention or assignment.

A revised edition of the *Manual for Courts-Martial* came into being in late 1969, incorporating the changes of the new Justice Act into a *Manual* previously issued that year. Except for a few provisions which took effect upon enactment, the new legislation became effective on the 1st of August, 1969. One measure of its impact was the demonstrated requirement for 401 new JA officers, the addition of which produced a Vietnam era high of 1,782 attorneys on active duty in the Corps.

Changes within the Army had their counterparts in changes in the civilian society and, as always, there were effects on the military community. This was the period of the Warren Court and of a new liberalism "outside." During the 20 years or so after World War II there were more military cases in United States courts than in the previous 18 decades. The cases were challenges to the government's power to conscript young men, to retain them in the service, to try them for misconduct, or even to reassign them from one post to another. We are speaking here of "status" determinations and actions which federal courts to 1950 had almost uniformly regarded as matters of internal military administration. This startling increase was the product of the new liberalism and the number of lives touched by compulsory military service. The Army won some of these challenges and lost some. Probably the most dramatic loss was of a segment of its criminal jurisdiction which occurred in the 1969 case, *O'Callahan v. Parker.*

* * *

O'Callahan v. Parker, LANDMARK CASE FOR JURISDICTION OF MILITARY COURTS

In 1962 when Chief Justice of the Supreme Court Earl Warren delivered the third James Madison Lecture at the New York University Law Center entitled "The Bill of Rights and the Military," he discussed the role of the Court in determining conflicts between the Bill of Rights and military necessity. The Chief Justice stood solidly behind the Supreme Court's unwavering position that it lacked jurisdiction to review, by certiorari, the decision of military courts except in extraordinary circumstances. Little did the Chief Justice know that he would became a part of the majority which would place a firm grip by the judiciary on an area formerly considered

beyond the reach of civilian courts—the military establishment's broad power to deal with its own personnel.

On the night of July 20, 1956, Army Sergeant James F. O'Callahan and his roommate and friend, Charles Redden, left their duty station at Fort Shafter, Oahu, Territory of Hawaii, with an evening pass. The two, dressed in civilian clothes, had a few beers in a Honululu hotel bar. Later that night, they made their way to a balcony on the fourth floor of the residential part of the hotel. From the balcony, they could see a girl sleeping in an adjacent bedroom. O'Callahan suggested that they enter the room and one of them could hold the girl while the other had intercourse with her. Redden refused to participate and departed. O'Callahan then forced his way into the room and seized the 14-year-old girl. His sexual attack upon the girl was unsuccessful; she struggled free from his restraints and screamed for assistance. Immediately thereafter O'Callahan was observed jumping from one balcony ledge to another, until he reached ground level. He was apprehended on the hotel grounds by a hotel security guard, who observed him wearing a tee shirt, with his belt loose and his trousers open. O'Callahan's outer shirt was found in the victim's room. Later he was returned to military authority, and after interrogation, confessed.

He was charged by the military with attempted rape, housebreaking, and assault with intent to commit rape. A general court-martial tried O'Callahan and found him guilty as charged. He was sentenced to be dishonorably discharged from the Army, to forfeit all pay and allowances and to be confined at hard labor for 10 years. His conviction was affirmed by an Army board of review. The United States Court of Military Appeals denied his petition for review.

In April 1966, O'Callahan petitioned the United States District Court for the Middle District of Pennsylvania for a writ of habeas corpus alleging generally that the court-martial had no jurisdiction to try him for a nonmilitary offense committed off-post while he was authorized to be absent. The District Court refused to consider that issue because O'Callahan had obtained an unfavorable ruling that same year from the Federal District Court of Massachusetts where he previously had been confined. The United States Court of Appeals for the Third Circuit affirmed the decision of the lower court without discussion of the question. On certiorari, the United States Supreme Court reversed the lower courts, holding that the crimes of which O'Callahan was charged were not "service connected" and, therefore, not triable by court-martial.

Justice Douglas, delivering the opinion of the majority, concluded that O'Callahan could not be tried by court-martial because his crimes were not "service connected." Douglas stated that "not even the remotest" military connection existed in the case. At the time of the offense O'Callahan was off-duty, off-post, in civilian clothing, committing a "civilian" offense of no military significance, against a civilian victim. In establishing the absence of any service connection, the majority further noted that these were peacetime offenses "committed within our territorial limits, not an occupied zone of a foreign country." That being so, the accused was entitled to civilian procedures, especially a jury trial. The majority opinion brushed aside the government's contention that status as a member of the armed forces was all that was needed for the exercise of military jurisdiction, which had been the general rule for 190 years.

Justice Harlan vigorously dissented in the *O'Callahan* case. He contended that the military's interest in deterring crimes by soldiers should mean jurisdiction in military—not civilian courts. Arguing that the limitation of

court-martial jurisdiction was solely a matter for the legislative branch, Harlan maintained that:

> [T]his court has consistently asserted that military 'status' is a necessary and sufficient condition for the exercise of court-martial jurisdiction. The court has never previously questioned that the language of Clause 14 would seem to make plain—that, given that requisite military status, it is for Congress and not the Judiciary to determine the appropriate subject-matter jurisdiction of courts-martial.

On the other hand, Justice Douglas and the majority noted that constitutional civil rights were at stake in *O'Callahan*, and that in order to protect those civil rights, the power of Congress to make rules for the government and regulation of the land and naval forces must be "exercised in harmony with express guarantees of the Bill of Rights."

O'Callahan had a significant impact on the Corps. In civilian life such unexpected decisions require many more cases thereafter to sort out all the consequences of a major change of direction. For the service attorney, *O'Callahan* meant some 40 cases in the next three years, and others in later years to define the term "service connected" and the geographical limits of the rule. At first glance it seemed to some that *O'Callahan* would save a lot of work, but General Hodson's contemporary prediction to the contrary was the more accurate one. The number of cases involving "purely" civilian offenses is small and their disappearance was more than offset by work involved in the follow-on cases and the increased coordination with civil authorities required when the case was tried "downtown."

* * *

The late sixties and early seventies were a period of unprecedented challenge to the Corps. Changes in the criminal justice system were sufficient to have occupied a decade of attention in an earlier time, but became almost workaday problems in this period because there were new developments on almost every front.

During this period the Corps also joined with law schools and other organizations in a nationwide effort to recruit and train high caliber minority lawyers. Aware of the acute shortage of black attorneys in the military and civilian legal forces, Army representatives met to do their part in formulating a strong and positive minority JAGC recruiting program with several black Army JAG's (among them: Captain Togo D. West, Jr., now a Washington, D.C. practitioner; Captain Sanford W. Harvey, Jr., still on duty, presently as a special court military judge; and Captain Curtis R. Smothers, now associate professor at Georgetown University Law Center). Out of these discussions with black JAG attorneys and the senior leaders emerged the Corp's Minority Lawyer Recruiting Program. Captain Kenneth D. Gray, a black judge advocate, was assigned to OTJAG to implement and coordinate the program designed to recruit all minority lawyers and women for the Corps. Increased recruiting efforts were directed toward law schools with substantial minority enrollments;

advertisements were selectively designed and placed, depicting the role of the minority and female judge advocate as counsel or judge; a summer internship program designed to hire some 100 first and second-year law students was agressively pursued for minority participation; the Corps pushed for the voluntary return to active duty of many of its fine black Reservists; and the Excess Leave Program—the major source of the Corps' present-day black strength was actively promoted among minorities. Even at this August 1971 meeting there was a nucleus of 17 black Army judge advocates. Many of these attorneys continue in their service to the Corps: Colonel Joseph Bailey has distinguished himself as an able jurist as senior judge of the Army Court of Military Review, and there are a number of other fellow officers serving as senior JA's and judges at the trial level. Other black JAG "alumni" have gone on to more promising civilian posts: Talmadge Bartelle, a career JA officer for many years, is now associate legal counsel with General Mills; J. Clay Smith, a D.C. practitioner and outstanding legal educator, presently holds the position of deputy chief with the Federal Communication Commission's Cable Television Bureau; Ronald C. Griffin left the TJAGSA podium for a teaching position with the University of Oregon School of Law; Vernon S. Gill is serving as a legal adviser with the District of Columbia police department; and Robert Henry Cooley, who left a noteworthy career with the Armed Services Board of Contract Appeals, is presently pursuing the private practice of law in Washington, D.C. Black participation in Corps activities continues to grow with the ever-increasing ranks of promising young attorneys. And although competition for such qualified legal talent has grown keener in recent years, as of the fall of 1974 there were 38 black JA's on active duty. Recruiting efforts for the future look all the more hopeful under the direction of William P. Greene, Jr., a black senior captain in charge of *all* Corps recruiting.

During the late sixties and early seventies Army JAG's went with their commanders to Arkansas, Mississippi, Michigan and other parts of the United States where the Army was sent to keep the peace. OTJAG was involved in the planning and supervision of such operations and unit SJA's went to the scene with the units. They helped deal with civilian authorities, advised their commanders concerning the limits of emergency powers, and performed their traditional role with the troops.

The increasing complexity of modern life had its effect on the soldier, perhaps a larger effect because his life was already complicated by low pay relative to his contemporaries and frequent moves to new surroundings at home and abroad. These

conditions often make the soldier's legal problems larger than his income level would suggest as appropriate. Such problems, if unresolved, become preoccupations and reduce efficiency. Consequently, the Corps has maintained an active "legal assistance" program which permitted the individual soldier to consult with an attorney and receive advice about personal legal matters. Under this program soldiers could also have wills or powers of attorney written for them and receive help with correspondence to creditors or civil courts. From World War II forward, the program was limited to office advice—the legal assistance officer was limited in his authority to negotiate on behalf of a client and could not appear in court. These limitations frustrated both counsel and the client, the one who wanted to help and the other who needed it and usually could not afford it from civilian sources.

After a period of coordination with local bar associations a "Pilot Legal Assistance Program" was approved in 1971. Under this authority, SJA's could make arrangements with local bar associations and courts under which qualified Corps members could appear in minor, *e.g.,* Small Claims Court proceedings on behalf of soldier clients. The legal assistance officer could also advise on more subjects and take a more positive role in helping his clients. The program was of obvious benefit to the soldier; it also increased the professional satisfaction of the Corps members assigned such duties.

The politicized war caused more and more new problems for the litigation specialists. Although the Korean War experience presaged this slightly, it nevertheless was unprecedented for Reservists to defend an absence charge with a claim that the war was illegal or for a draftee to resist induction because of his "conscientious objection" to this one kind of war rather than to all war.

This same period brought about another kind of challenge:

> The personnel of the court, counsel, and the accused recessed to nearby bunkers because of a VC [Viet Cong] rocket and mortar attack.

General Hodson quoted this as a recurring line in court-martial transcripts received from Vietnam. Courts-martial had been tried in combat situations in earlier wars, but the operation in Southeast Asia was different. Its details have been accumulated in the *Army's Vietnam Studies* series and will not be repeated here. There were, however, differences which affected the Corps and its activities which ought to be mentioned.

Both legal and administrative problems were generated by this

war fought among Ho Chi Minh's "fish in the sea." For example, where everyone is a potential warrior and everywhere a potential battlefield, there is no "front," and the essential claims determination of combat or noncombat damages is hard. Also, ground travel for judges, counsel and legal assistance officers is often too perilous. Such circumstances required organizational adjustments, such as placing legal officers with small units (brigades and groups) to increase their availability to the troops and the establishment of special units in secure areas to which accused could be transferred for trial.

The time between passage of the Military Justice Act of 1968 and its effective date, August 1, 1969, had been put to good use by the Army. Some of its requirements were anticipated, as by early introduction of qualified counsel into special courts, and the

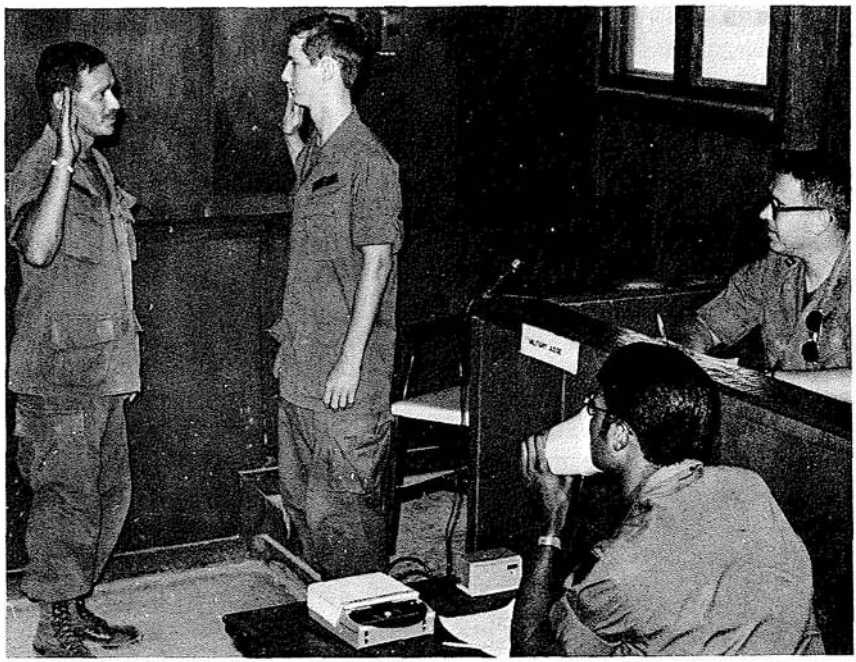

figure 66

MILITARY JUSTICE IN A COMBAT ZONE

implementation of others was eased by the prior experience with the United States Army Judiciary. By the end of the first year of activity under the new law, General Hodson was able to report that 85 percent of the Army's 48,000 special courts had had a

military judge detailed. The Congressional idea that military courts should be more like federal courts really caught on as 86 percent of the general courts and 95 percent of the special courts to which a judge was detailed were tried by judge alone; that is, the accused in those cases "waived" the military jury.

General Hodson ended his busy and fruitful tour as The Judge Advocate General in June of 1971 when he retired. However, he was immediately recalled to active duty to become Chief Judge of the United States Army Court of Military Review and Chief of the newly formed United States Army Legal Services Agency. The Agency brought together the Army's trial and appellate judiciary

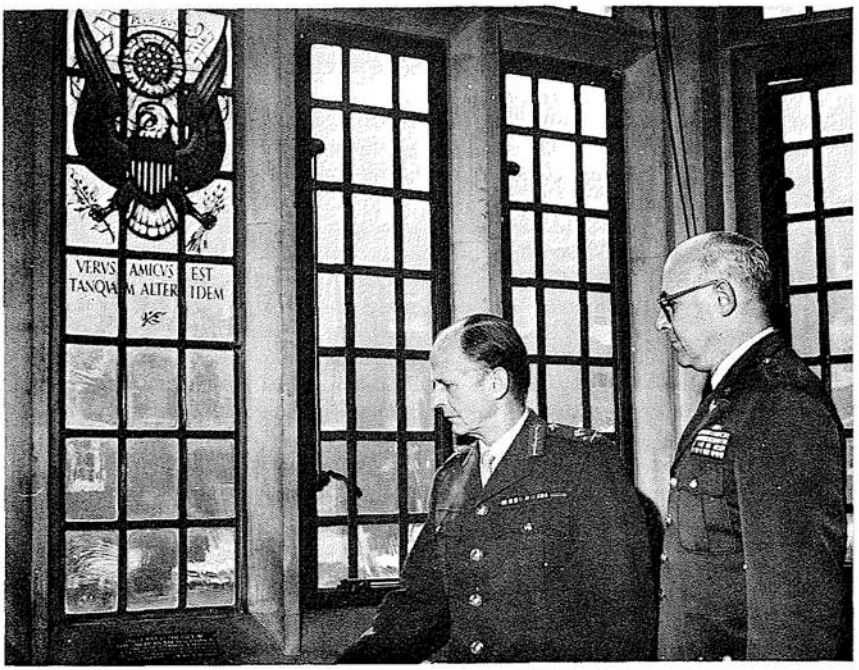

figure 67

WHILE ON AN OVERSEAS VISIT TO LONDON, TJAG GEORGE S. PRUGH, LEFT, JOINS HIS BRITISH COUNTERPART, MAJOR GENERAL JOHN ROBERTSON, D.A.L.S., AT GRAY'S INN TO VIEW THE WINDOW GIVEN BY THE ABA TO COMMEMORATE THE DESTRUCTION OF THE HALL BY ENEMY BOMBS DURING WORLD WAR II

under one administration and included both the appellate counsel and case examiners necessary to conduct the statutory review of courts-martial. Located in the leased Nassif Building at Bailey's Crossroads in Falls Church, Virginia, its physical and administra-

tive separation from the Office of The Judge Advocate General and Headquarters, Department of Army, contributed to the maintenance of the concept of an independent judiciary, yet provided the judges a needed "home" with the general Army community. General Hodson ended his recall period and reverted to retired status in March of 1974.

The new Judge Advocate General in July 1971, was Major General George Shipley Prugh.

* * *

MAJOR GENERAL GEORGE SHIPLEY PRUGH

George Shipley Prugh was born in Norfolk, Virginia, on June 1, 1920. In 1941, he graduated from the University of California, at Berkeley, receiving a Bachelor of Arts degree in political science. From January 11, 1939, until August 6, 1940, he had enlisted service in the 250th Coast Artillery Regiment, California National Guard, being discharged to enter ROTC at the University of California. At Berkeley, he commanded the Coast Artillery ROTC regiment and received his commission as a second lieutenant, CAC, ORC, in March 1942, while enrolled in the study of law at Boalt Hall, University of California. He entered on active duty on July 10, 1942, at San Francisco, California.

His initial assignment was with a 155-mm. gun battery, later serving as S–3, in the 19th Coast Artillery Regiment, Fort Rosecrans, San Diego, California. In 1944 he joined the 276th Coast Artillery Battalion (155-mm. gun) as battery commander in New Guinea and served there and in the Phillippines (Leyte and Luzon). He returned to the United States in February 1945, was separated from active duty in May of that year, and entered Hastings College of the Law, University of California, in San Francisco. While still a student, he accepted a Regular Army commission in November 1947. In May 1948 he received the degree of Juris Doctor and reported for duty at Headquarters, 6th Army, serving there until his admission to the California Bar and subsequent assignment to the Office of The Judge Advocate General, Department of the Army, at the Pentagon. He was transferred to JAGC in July 1949. After a year's duty with the Military Justice and Claims and Litigation Divisions, OTJAG, he was assigned to duties as Trial Counsel, Wetzlar Military Post in Germany. In 1951 he became the Executive Officer and later Staff Judge Advocate, Rhine Military Post (later Western Area Command) in Kaiserslautern, Germany. He returned to OTJAG in June 1953, where he served as a member of the Board of Review, and then in the Opinions Branch, Military Justice Division.

In 1956–57, he attended Command and General Staff College, Fort Leavenworth, Kansas, and upon graduation reported for duty as Deputy Staff Judge Advocate, 8th United States Army, in Korea. In 1958 he began a three-year tour as Deputy Staff Judge Advocate and Assistant Executive for Reserve Affairs, 6th Army, Presidio of San Francisco, and then attended the U.S. Army War College, Carlisle Barracks, Pennsylvania, graduating in 1962. In that year he became Chief of OTJAG's Career Management Division, and then Executive to The Judge Advocate General in 1963. During this latter tour he also received the Master of Arts degree in International Affairs from George Washington University.

In November 1964 he became Staff Judge Advocate, United States Military Assistance Command, Vietnam. In August 1966 he assumed the

duties of Legal Adviser, U.S. European Command, in Saint-Germain-en-Laye, France, and later Stuttgart, Germany. On May 1, 1969, he became the Judge Advocate, United States Army, Europe and 7th Army at Heidelberg, Germany. Later that year, in November, he was promoted to the grade of brigadier general.

He was reassigned to Department of the Army, Washington, D.C., in June 1971, and became The Judge Advocate General on July 1, 1971, in the grade of Major General.

The legacy of General Prugh's TJAG tour has been chronicled in the accompanying text but one highlight ties him to a great tradition of the Corps. He will be remembered for his activist role in the area of international law and the law of war. Just as TJAG Davis had participated in the early 20th century international conferences at The Hague, General Prugh participated in the United States delegation to the Geneva meetings of the International Committee of the Red Cross and the Swiss-hosted diplomatic conference dealing with the modernizing of the Geneva Conventions of 1949. One of the early meetings—in the Spring of 1974—considered application of the rules for protection of the innocent victims of war to those injured or captured in the newly characterized "wars of national liberation."

General Prugh retired from his TJAG duties in the summer of 1975. He is now Assistant Dean at the Hastings College of the Law, University of California.

* * *

The Corps celebrated its bicentennial in 1975. Upon the retirement of Major General George S. Prugh on 30 June 1975, Major General Wilton B. Persons, Jr., was named The Judge Advocate General. And on the 29th of July 1975, JA offices throughout the world observed the Corps' 200th year of total legal service to the Army. As a supplement to local field activities, the bicentennial celebration featured a reception in the Office of The Judge Advocate General hosted by TJAG Persons and a formal dining-in at Fort Leslie J. McNair, Washington, D.C. In addition to the preparation of this commemorative history, the Corps bicentennial observances included a compilation of important military legal writing for a special edition of the *Military Law Review*.

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MAJOR GENERAL WILTON B. PERSONS, JR.

Major General Wilton B. Persons, Jr., became The Judge Advocate General, United States Army, on 1 July 1975. The 51-year-old native of Tacoma, Washington, assumed those duties after serving the previous four years as Judge Advocate, U.S. Army, Europe and 7th Army, Heidelberg, Germany. General Persons studied aeronautical engineering for two years at Alabama Polytechnic Institute (now Auburn University), served six months as an aviation cadet in the Army Air Corps, and was then appointed to the United States Military Academy, West Point, New York. He graduated from West Point with a Bachelor of Science degree in June 1946, and was commissioned a second lieutenant of cavalry in the Regular Army. Following

figure 68

MAJOR GENERAL WILTON B. PERSONS, JR.

a student assignment at the Armor School, Fort Knox, Kentucky, he was assigned for three years to the European Command where he served as Platoon Leader and Assistant Squadron S–3 in the 24th Constabulary Squadron in Austria, and Platoon Leader, Company E, 6th Armored Cavalry and Assistant GSG, Headquarters, European Command, in Germany.

General Persons returned to the United States in July 1950 and entered the School of Law, Harvard University, from which he received the J.D. degree in June 1953. He spent his last two years of law school also as a member of Harvard's Legal Aid Bureau, serving as vice president of that organization. General Persons was then assigned to the Military Affairs Division, Office of The Judge Advocate General, Department of the Army, Washington, D.C. From July 1953 to July 1955 he served in the General Law Branch and as chief of the Research Branch. He served the following two years in the newly established Legislation Branch, participating in the drafting of many legislative proposals. From August 1957 to June 1958, General Persons attended the U.S. Army Command and General Staff College, Fort Leavenworth, Kansas. Upon graduation he reported to Germany for a three-year tour of duty with the 8th Infantry Division, where he served as defense counsel, trial counsel and deputy staff judge advocate.

In September 1961, General Persons began a three-year duty assignment at The Judge Advocate General's School, Army, Charlottesville, Virginia,

serving first as School Secretary, then as an instructor in the Military Justice Division of its Academic Department and, from July 1963 to June 1964, as chief of that Division. In 1964 he was selected to attend the U.S. Army War College, Carlisle Barracks, Pennsylvania. After graduation in 1965, he returned to the Office of The Judge Advocate General, with duties in the Military Affairs Division, as chief of the General Law Branch from July 1965 to July 1966, as assistant chief of that Division from August 1966 to October 1967, and, thereafter, as chief of the Military Affairs Division until June 1969. During much of his OTJAG tour, General Persons was the JAGC representative on the Army Civil Disturbance Planning Group providing legal support for Army civil disturbance operations.

General Persons served as Staff Judge Advocate, U.S. Army, Vietnam, from July 1969 until July 1970. In August 1970 he reported for duty as Staff Judge Advocate, U.S. Army, Pacific, Fort Shafter, Hawaii. General Persons was named Judge Advocate, U.S. Army, Europe and 7th Army, Heidelberg, Germany, in June 1971.

* * *

The history of the Judge Advocate General's Corps cannot have an end; so long as there is an Army and the rule of law in the United States, there will be some element responsible for the delivery of legal services to that Army. The history of the Corps thus far has been one of growth and change, and there is no reason to suspect that that process will diminish. The history does make it clear, however, that the process of growth focuses on different facets of Corps activity from period to period. It is reasonable, then, to bring this history up to date with an emphasis upon those facets of legal activity currently in the process of adjustment to modern needs.

Many of the same forces in our society which increase Corps business generally affect soldiers as individuals. The pilot programs for more active legal assistance to soldiers were tested during the late stages of the Vietnam period and matured into an Expanded Legal Assistance Program. Military counsel in nine jurisdictions from Massachusetts to Hawaii are authorized to represent soldier-clients in local civil and criminal courts. Practice varies with state rules, of course, but this program is a major contributor to soldier confidence in the Corps and to reduction of recourse to criminal or other improper conduct prompted by the pressure of personal legal involvements.

Two other actions by The Judge Advocate General paralleled this adjustment to the external legal requirements of the soldier. Within the Army, soldiers have a statutory right (Article 138, UCMJ) to complain of wrongs committed against them by their commanders and a statutory right (Article 27, UCMJ) to qualified legal counsel when summoned before a court-martial.

The procedures under Article 138 were formal, complex and lengthy, conditions which tended to make the statutory protection

difficult to obtain in practice. Under authority delegated to him by the Secretary of the Army, The Judge Advocate General revised the procedures to permit intermediate commanders to act on complaints received rather than having to send them all the way to Washington. The soldier's access to higher authority is not diminished by this, but a commander, such as the Division CG, may now interrupt routine processing of the complaint and redirect it to the specific agency empowered to resolve it, thus providing quicker and clearer resolution of soldier dissatisfactions.

The soldier's right to qualified legal counsel was one JAG's were consistently diligent to implement. Young attorneys in the Corps have traditionally been aggressive, efficient counsel for accused soldiers. They were, however, members of the same SJA office as the prosecutors and worked for the SJA who advised the commander to refer the case to trial. There was an unavoidable amount of dissatisfaction and loss of confidence among soldiers prompted by the appearances of that arrangement, although the reality was different.

In order to enhance soldier confidence in his counsel, The Judge Advocate General moved to separate him from the command surroundings and presumed influences. A proposal for an entirely separate corps of defense counsel was not implemented because of limitations on the number of available attorneys. However, it was possible to prescribe separate office facilities for counsel, training to meet American Bar Association standards, and to establish an efficiency report channel for defense counsel independent of the normal command-oriented routing. This channel begins with a new function—the Senior Defense Counsel—established in each major command and who is authorized direct access to the Assistant Judge Advocate General for Civil law in OTJAG. This provides military defenders a channel for information and a voice at the highest levels equal to the prosecutors who are supervised by the Assistant Judge Advocate General for Military Law.

The same Department of Defense Task Force on the Administration of Military Justice which had recommended the enhancement of defense counsel's position also espoused other changes which The Judge Advocate General was able to implement. First among these were improvements in the method of administering nonjudicial punishment on soldiers guilty of minor infractions of discipline. Here, again, there was a strong element of soldier dissatisfaction which was overcome by delivering more legal services to the point where a need existed. The Judge Advocate General sponsored changes to Army Regulations which gave the soldier access to counsel before he appeared before his com-

mander to answer the allegation. He is also permitted to have present a friend or adviser (though not counsel) when he meets with his commander and he may participate in the proceedings by calling witnesses or presenting other evidence.

Another recent and major development involved creation of the Military Magistrate. Traditionally, and as authorized by the UCMJ, commanders ordered soldiers accused of crimes into pretrial confinement where they could remain until trial. The Army had no procedure for a judicial review of such confinements, although such review is becoming more common in civilian jurisdictions. Upon recommendation of The Judge Advocate General, the Army Chief of Staff ordered the establishment of a Military Magistrate at every installation with significant pretrial confinement facilities. Every prisoner must be brought before the Magistrate shortly after his incarceration for a review of the basis for confinement and surrounding circumstances such as his family situation. The Magistrate may order his release or approve continued confinement awaiting trial. He also ensures that no prisoner is denied access to counsel.

These tracings of change, adjustment and progress show where and how the challenges will arise for the next generations who will wear the "crossed pen and sword, wreathed."

From these two centuries can be drawn the criteria which future architects of adjustment will apply as they deliver "total legal service" to the Army. As in the past, their benchmarks must be a diligent concern for the rule of law, strong orientation toward the requirements of the military community they serve and the standard of professional pride that is uniquely theirs. The Army lawyer has shown that the profession of law and the profession of arms are complementary, not mutually exclusive. His is the deep personal satisfaction of dual achievement and dedicated public service.

Bibliographic Note

The history of the Judge Advocate General's Corps is a rough time line for the history of military law in the United States. Obviously members of the Corps, as the practitioners of military law, adjusted to or prompted the changes in that law over time and Corps activities should reflect each new condition of the law. These assertions are, however, difficult to demonstrate; there is no complete and authoritative history of military law against which they may be tested.

The history that is available from DeHart, Benet, Winthrop, Davis, and Wiener is that of the criminal justice system. Their efforts can be readily supplemented or evaluated from office records, orders files, and records of trial in the National Archives and Records Service. These provide a base for original research into the more important trials and actions. The statutes, of course, are also readily available. A significant gap exists, however, with respect to the conduct of inferior courts (regimental and garrison courts-martial) prior to World War I. Records of these trials were retained at local headquarters outside Washington and no remaining accumulations are known. Research in that area could establish a great deal about conditions in the Army, and relationships and attitudes in the military community during the long periods between wars from which a few diaries and memoirs remain.

The most difficult problem in putting together a history of military criminal law, however, is not the absence of that material about local courts-martial, but the absence of a history of American criminal law generally. Military law is part of the national system so that its history would be incomplete and speculative if not written against the larger picture. It is, for example, significant that a right to counsel in courts-martial developed during the 19th century. But was that growth slower or faster than state and federal practice? Was one development causally related to the other, mere coincidence, or were both the product of common, independent forces? These and other questions cannot be addressed *in vacuo*. On the other hand, ought one wait for something like a definitive history of American law before embarking on a needed task?

Thus far, this Note has emphasized the problems of writing the

history of military criminal law, and thereby exposed the largest problem with military legal history in general. Criminal law has gotten most of the attention because it is more saleable history and the research materials are so much easier to come by. But criminal law is just one part of a major legal system such as that of the military forces. Distressingly, the sources and effort in all these other areas have not matched those devoted to the criminal law, producing a sort of distortion by default. The various *Digests of Opinions* from the time of Winthrop (Civil War) provide good clues to the areas of legal expansion and to references to office materials available in the Archives. There are also some compilations of statutory law and opinions of the Attorney General which trace the broadening scope of the military lawyer's responsibility. Even from the beginning there are questions, however. Winthrop's earliest *Digests* show that the then Judge Advocate General advised Army commanders about noncriminal matters, but the first such instance has not been identified. Pivotal questions about the standing of The Judge Advocate General to speak on contract or claims matters could and should be explored. The Old Military Records Branch of the National Archives and Records Service contains indexed records of the predecessor offices of The Judge Advocate General, among many other War Department collections. These are about the only source for general research into 19th century events. Somewhere there is the evidence of the first claims decision and how it came about, and of the first discussion between the Adjutant General and TJAG about the interpretation of an Army regulation. Additional material on the last four or five decades is becoming available as retired persons such as Major General Thomas Green make their personal collections available to the US Army War College and The Judge Advocate General's School.

The history of the Corps is in deep debt to Brigadier General William McKee Dunn whose 1876 and 1878 *Sketches* are the earliest known efforts to describe the Corps as an entity, and its duties. Other reliable, although less formal, sources are available. Colonel Allen Burdett prepared a compilation of biographies of TJAG's to 1938 which has been preserved, as was an historical monograph prepared in OTJAG near the end of World War II. More formal, recent sources include the work of George James Stansfield whose father was a career Corps member, Colonel William Fratcher, and Colonel Frederick Bernays Wiener. The informal style chosen for presentation of the Corps history precludes the use of footnotes; had we used them, Fratcher and Wiener would have dominated the nonstatutory entries because their works have become standards in the field.

Recent writers such as Edward Sherman, Joseph Bishop, and William Generous are making contributions to broader understanding of military criminal law, but they have no counterparts in contracts, claims or (save the late Archibald King and Professor Richard Baxter) in international law. Some developments in these areas since 1951 may be broadly traced, along with the criminal justice business, through the several annual reports of The Judge Advocate General which are repeated or summarized in the *Judge Advocate Legal Service, Judge Advocate Journal* or the *Court-Martial Reports.* They are filed with the Center of Military History, Headquarters, Department of Army. None of these sources will have the wealth and specificity of inter-office correspondence and decisions made for the moment which can only be recovered by searching the "back-up files," tracking down the holographic annotations on decision papers, so that actions are attributed to persons, and relating such actions to other events of the period. Other modern and readily available sources include the *Judge Advocate Journal,* the *Military Law Review, The Army Lawyer* and various publications of The Judge Advocate General's School which appear as numbered Department of Army publications with the numerical prefix "27–."

The Bibliography which follows contains all the sources used in preparation of this history and some "backgrounders." It is probably incomplete because the field is new, but it does include those to whom we are indebted.

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★U.S. Government Printing Office: 1975 O—578–159.