AN ORAL HISTORY

of

FREDERICK BERNAYS WIENER

Conducted

by

CPT MICHAEL J. KELLEHER

and

CPT DAN TRIMBLE

on

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JUDGE ADVOCATE ORAL HISTORY PROGRAM
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Frederick B. Wiener

Date:
28 JAN 87

FREDERICK B. WIENER
COL. [redacted] Retired
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INTRODUCTION

Frederick Bernays Wiener, U.S. Army, Colonel (Retired) is owed a debt by all serious military legal historians. Throughout his adult life he has created a vast resource of material with his prolific and astute volumes on historical and legal issues. Now retired and living with his wife in Phoenix, Arizona, he is a long way from his East Coast beginnings. Colonel Wiener began his life in 1906. His early childhood and schooling were spent in and around the New York City area. After a year's sojorn to a school in Switzerland in 1921, he returned to the United States and finished his preparatory training at Dwight School in New York. After graduation he attended Brown University in Providence, Rhode Island where he successfully completed the requirements for a Ph.B in 1927. From 1927 to 1930 he attended Harvard Law School where he worked on the Law Review becoming Note Editor in 1930. He graduated with a LL.B the same year.

Following law school, Colonel Wiener entered private practice with the prominent Providence law firm of Edwards and Angell. Among other things, he worked on the Gillette Safety Razor Co. case involving director impropriety and a subsequent stockholder suit. After three years in Rhode Island he decided to move on, and in 1933 he began his long career with the federal government.

During his first appointment with the Public Works Administration, he reviewed the eligibility of project proposals. Transferring to the Department of the Interior in 1934, he became involved in a near armed rebellion in the Virgin Islands between the Territorial Governor and a Federal Judge. In 1937 he transferred to the Department of Justice. Among his more significant cases there are the defense of claims arising out of the World War I seizure of a German owned sugar company in Hawaii and the enjoining of the Governor of Oklahoma from using his National Guard to stop the building of a federally-owned dam.

In 1935 Colonel Wiener satisfied his intense interest in the military by joining the U.S. Army Reserve as a Captain in The Judge Advocate General's Corps. Initially his active duty was minimal since he kept his position in the Justice Department. In 1941, however, he was called to full time active duty and assigned to OTJAG. Soon he volunteered for duty in Trinidad as the judge advocate for the Base Command. He remained on the island for seventeen months and was duty officer on Pearl Harbor day. During World War II, Colonel Wiener also saw duty in New Caledonia, Guadalcanal and was present during the invasion of Okinawa where he worked on establishing the occupational government.

Interspersed with his overseas duty were assignments in Washington. He was assigned to the War Plans Division, OTJAG, from October 1942 until April 1943. He was also detailed to the Liaison Section for the

Operations Division, War Department General Staff. In late 1944, he served briefly with the War Crimes Division, OTJAG.

After being relieved from active duty in December 1945, Colonel Wiener remained in the Active Reserve until 30 June 1961. His active duty tours during the post-war period were in G-1, War Department General Staff, later known as DCSPER. He was also a consultant-adviser at the Army War College in 1954. Additionally, he gave numerous lectures to the Judge Advocate General's School when it was in Ann Arbor, Michigan and Charlottesville, Virginia.

The day after his release from active duty in December 1945, Colonel Wiener went to work for the Solicitor General's Office. His tenure there lasted three years, terminating in 1948. He became immediately involved in the Yamashita and Homma cases and other alleged Filipino war criminal reviews. He also argued the appeal of Wade v. Hunter, which has become famous for his use of demonstrative evidence (maps) during oral argument.

Colonel Wiener left federal service in 1948 to open a private practice specializing in federal appellate cases. During the next 25 years he argued many well-known cases in front of the Supreme Court. The highlight of his career was his oral arguments in Reid v. Covert. This case is the first and only time since 1790 that the Court has reached a different result in the same case following a published opinion without a controlling change in its membership.

During his lengthy legal career, Colonel Wiener found time to write and teach. His list of publications is long and impressive. Among the most noteworthy of these are: Effective Appellate Advocacy (1950), Civilians Under Military Justice (1967), A Practical Manual of Martial Law (1940), and Military Justice for the Field Soldier (1943, rev. ed. 1944). His teaching accomplishments include serving as Professional Lecturer in Law at the George Washington University during the 1950's.

In 1973, Colonel Wiener and his wife Doris moved to Arizona and retired. His retirement, however, has not been idle. As recently as 1986, he submitted written testimony to the 99th Congress addressing the issue of "redress" legislation for Japanese-Americans interned during World War II. A truly remarkable man, Colonel Wiener has left his indelible mark on the legal profession and the Judge Advocate General's Corps.

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Q. Sir I would like to start out with your background and your early history. First of all your parents were Felix Frederick Wiener and Lucy Lea Bernays.

A. Yes.

Q. Sir were they immigrants?

A. They were not born here. My father came over. He was born in Berlin. He served a year as a Gefreiter. If you had a secondary education in the Gymnasium, you only had to serve one year in the Army. He, living in Berlin, served in the Guards and he was in the 3d Footguard Regiment because he was only 5'8". To be in the 1st Guards you had to be taller. His training really was in machinery. He came over about the age of 30. He was a young man of 30.

Q. So would that be about 1903?

A. That would be about 1903. On one of those trips he met my mother's parents. They were married in 1904, November 24, 1904, and I was the oldest son.

Q. Sir, you mentioned that you had some relatives that are famous.

A. Yes. My uncle is Edward L. Bernays.

Q. Is he still alive?

A. Yes. He celebrated his 95th birthday in November.

Q. And he is a pioneer in the area of Public Relations Counsel.

A. Yes.

Q. What exactly is that?

A. Publicity in a dignified sense. Not just press agent for theatrical stars but scientific advancement of the client's interest.

Q. And he's your mother's brother?

A. Yes, and he has written several books on the subject.

Q. And your mother's uncle was Sigmund Freud.

A. Yes. He was Sigmund Freud.

Q. Sir, did you ever meet him?

A. Yes. My mother's aunts, uncles, grandmother and Professor Freud were great fans of Greek, Roman and Egyptian antiquities, and he had a very extensive collection, a very extensive, private collection. I had been told, "You had better see Uncle Sigi's museum. Here were two what-not cabinets with little figures in them. I at seven, having been in a number of large museums, looked at this unique private collection and said "Is that all"?

Q. Did he hear you say that?

A. Oh yes, some of it was not well received. Most of that collection was in his last home in London, which is now operated as a museum. It is in the Hampstead portion of London and in 1972, 1976 and 1981 we visited his surviving daughter there, Anna Freud, who ultimately had honorary degrees from Yale, Columbia and Harvard and most of the artifacts are still there. She died in the fall of 1982 and a foundation or a trust keeps up the house. And I did see him in 1913, 1921 and 1924 when I went to Europe after my freshman year at Brown.

Q. Now when you first met him did you know that he was famous?

A. No, not really. He was just a kindly old gentlemen. But certainly by the time I saw him in 1921, I knew.

Q. You were born in New York in 1906. Do you remember your early childhood?

A. Well, everyone who is in his eighties remembers his early childhood.

Q. You were born in what borough?

A. Manhattan.

Q. You lived there until you moved to Mount Vernon?

A. Yes, there and in the Bronx.

Q. That is a suburb of New York isn't it?

A. Mount Vernon is a suburb just to the north of it. It is between Yonkers on the West and New Rochelle and Pelham on the East.

Q. Sir, did you go to high school there in Mount Vernon?

A. I went to the first year and half of high school.

Q. So what was your father doing at that time?

A. He was in the machinery business.

Q. And then you went abroad.

A. And then we went abroad for my mother's health and we were in Switzerland.

Q. Did your father go to Europe with you?

A. He was traveling around on business between New York and Germany.

Q. So you went to school in Switzerland?

A. I went to school in Switzerland and learned French.

Q. So you went to school without even knowing French and you learned it there?

A. Well I picked up the basics from high school but I became sufficiently fluent in it so I could go all day without a word of English. At this school, once a day we were asked how much French we had spoken and sometimes the answer was "Pas Beaucoup," and sometime the answer was "Excepte dix phrases," and finally I got to the point where

I could say "Sans exception." If you had a high score for the month on speaking French, your reward was a trip to the confectioners for a high tea consisting of cocoa and little French pastries. Then the other encouragement for learning French was that there was some French playboy magazines at the kiosk a block away from the school and it was much easier to be able to read the captions by yourself than having to take them to a friend who knew more French than you did and that was also a motivation for your friends. In 1924, when I was on this post-Freshman year trip, I was very proud of myself in Basle, Switzerland, that I could speak French on one side of the customs boundary and German on the other.

Q. So you learned German there.

A. Well no, I learned German at home. But I am not much of a linguist these days.

Q. So you returned to New York City from Switzerland in 1922.

A. Yes.

Q. Where did you move then?

A. In Manhattan and I went to a cram School, a prep School, Dwight School.

Q. Is that in Manhattan sir?

A. It is in Manhattan and I think it has folded since. What I needed was to get my college credits with this absence from the American school system being in Swiss schools, to get into college.

Q. So you went from Dwight to Brown in 1923?

A. Yes, 1923.

Q. And you graduated in 1927?

A. Yes.

Q. And you majored in history, is that right?

A. Yes.

Q. Tell us a little about your schooling at Brown.

A. Well I was active in debating and I was active on the school paper. I wrote a column for the daily paper in my last two years. I was active in dramatics. I did absolutely nothing in athletics. I would take a walk on Sundays. Walk to the Seekonk River, which was about a mile away, spit in the river and walk back and that was my exercise.

Q. Why history, sir?

A. It always interested me. History and Biography always interested me.

Q. Do you have a particular area in History that you enjoy more than others. American versus European?

A. In college when I worked on colonial history, which led to my first published article, and I knew a great deal about European history, especially the causes of World War I and the post World War I settlements. When I was in England in 1924 I could see that the British were really washed up. The impression I got from being in England in 1924 was that Britain was like an elderly gentleman who had been very sick and had major surgery, had come out of the hospital, was going through the motions just as he did before but he wasn't the man he had been before. This is not something I have invented later on. I wrote a piece about it for the college daily paper on the basis of my observations. If you look at British history, they

ruined themselves and the cause for the decline of the British Empire was inadequate military and naval leadership in the first World War. Their wartime casualties were almost a million, because no one in the British Army had the brains to stop sending masses of men against machine guns.

Q. When did you first decide to go to law school or have an inkling that you wanted to become a lawyer?

A. Well at one time I thought of becoming a chemist. Everything was neatly arranged; there was the atomic table; the table with the elements, everything was neat and then along came the radioactive elements and they messed up everything and I decided I didn't want anything as fuzzy as chemistry. I decided to go in for what is very clear and never changes and is always settled and predictable, namely: the law. The answer is that at that time the law was more predictable than it has become since.

Q. Did you make that decision in college?

A. I think it was before college because in one of the numerous questionnaires to which freshmen are subjected, Why did you come to Brown? What was your reason for coming to college? The answer was to get into law school; so I recognized it right in the beginning of

my freshman year. That was the reason I went to college; it was to get into law school. I went to great pains never to take any kind of course on constitutional law because our debating coaches, who were all young lawyers, said, "Don't have anything about law in your mind. Come to the law school with a completely open mind, a blank page, learn all year long when you get to law school and don't pick up any ideas here." He could have said it about political science people who don't know anything about it. I have frequently said in the intervening years that the committees of bar associations on the unauthorized practice of law ought to join hands and keep the political science professors from writing books or articles about the Constitution.

Q. In 1927 you entered Harvard Law School.

A. Yes.

Q. You graduated in 1930. Why don't you tell us a little bit about your time at Harvard along with whatever would stick out in your mind as being significant.

A. Well there's a line in Shakespeare, "Tis but a three years' fast/The mind shall banquet though the body pine."

Q. What play is that from?

A. Love's Labor Lost, Act 1, Scene 1.

Q. You were on the Harvard Law Review?

A. Yes, second and third years. I was rather hard up financially at the time and I remember that I didn't go to the first Harvard-Yale game which through my college years had been sort of the absolute crowning glory of the football season. The reason I didn't go to the Harvard-Yale game was because the tickets cost five bucks and I couldn't afford an extra five bucks to see a football game, so I worked because I had nothing else to do. In the Spring when classmates blossomed out in new cars, I suppose it was a sour grapes attitude on my part, when I would see the cars and say to my myself "Well, there's another competitor eliminated," because he would go out driving in his car and I would be cramming and studying for the exams. But that's the way it turned out. Because in those days there was no pass-fail. Everything was on grading and the Law Review didn't pick you on the basis of personality or literary aptitude. They took the list of numerical grades that they had from the Dean's office and they picked the people off the top. And it made no difference who you were, what your name was or what you looked like or whom you knew, selection was right on the numbers.

Q. Sir, could you tell us something about how law was taught when you learned it and also about any memorable instructors or professors you may have had.

A. Well I suppose the one who made the greatest impression was Felix Frankfurter. I was impressed by Pound, who had not yet slipped. That was Roscoe Pound. I was in the section that had Francis Sayre teaching criminal law. He was later the last U.S. High Commissioner to the Philippines. He was a son-in-law of President Wilson.

Q. You said he went to the Phillipines after that.

A. Yes. He was last U.S. High Commissioner and I think he was finally rescued in a submarine. He was out sick for a month and Pound took over the class. Reading over my notes afterwards, I could tell when Pound was teaching, because his instruction was so much better than Sayre's. Samuel Williston was there, he had written the four volume text on contracts, later, it was expanded. He was a master of the Socratic method and in my third year I went back once to sit in on one class to try to watch his technique, which of course was beyond me as a first year student. But as a high ranking third year student, I could see the way he did it. He did a marvelous job. Then for civil procedure we had Roger Foster, who wound up as the General Counsel of the Securities and Exchange Commission, and even then had a

talent for obfuscation. In self defense we would go and listen to Eddie Morgan.

Q. Sir what did Felix Frankfurter teach you?

A. Felix Frankfurter taught only third year courses and I took his seminar in federal jurisdiction.

Q. He was appointed later on by FDR, is that correct?

A. Yes, that's correct. There were five courses in the first year, criminal law, civil procedure, contracts, torts by Francis H. Bohlen, who was a Philadelphia gentleman. He was stimulating. The property class was taught by McLaughlin, who was a sort of wild eyed mid-westerner. Then in the second year I worked so hard on the Review, I neglected my courses and took a shellacking in grades. We had Austin W. Scott in trusts who was stimulating, Zechariah Chafee, Jr., in Equity, and a gentleman named McCurdy, who was incorrectly reputed to be Williston's son-in-law, teaching sales, which was a dismal course.

Q. Sir, you mentioned Felix Frankfurter first here, would you rate him as the top professor that you had at the Law School.

A. Yes, I would say that.

Q. Why is that sir?

A. He had been in public life, had exposure to large affairs, he had great insight, and he had vision and wisdom. He was more than just a teacher. Then I had Eddie Morgan in evidence, and bills and notes with Morton C. Campbell. He and McCurdy together squelched any interest I might have had for commercial law. Then we had Gentleman Joseph Warren in wills and conveyances. He killed any enthusiasm I might have had for future interests. But the high point in this class was when he asked in his customary way, "What's my next question going to be?" and I was able to tell him. That was the high point of his course but his second year course was fairly dismal. Then in the third year I had the Frankfurter seminar in federal jurisdiction. I had corporations with E. Merrick Dodd, which was awfully dull. I had conflict of laws with Joey Beale, which was stimulating and aggravating, but he made you think. I had constitutional law with Thomas Reed Powell. That was a terrific course because Powell was a realist. He divided his course into three parts. One was the Due Process Clause. He used most of his time there on Adkins v. Children's Hospital. Then in his second third, the Commerce Clause, he concentrated on Hammer v. Dagenhart, knocking out the first child labor law. The third part of this course

dealt with reciprocal intergovernmental immunities. Of course, Adkins v. Children's Hospital was overruled, Hammer v. Dagenhart was overruled, and there are no more immunities. He made us better constitutional lawyers than most of the people I had to face in court in my adult years. He taught a technique, he taught an approach, and I would say he was one of my most stimulating teachers. Now in order to protect myself for the examinations, I took two half courses the first semester of the third year, and saw that I had less finals to sweat over when I was the Note Editor of the Law Review. I took a half course in bankruptcy, which turned out to be a very wise investment since I graduated in 1930, just after the crash. Then I took Admiralty because it interested me. Then I never had an admiralty case in my life.

Q. So you went into private practice upon graduation?

A. I went into private practice with the biggest law factory in Providence, Rhode Island.

Q. Based on your law school studies do you have any comment on the motion picture entitled "The Paper Chase"?

A. I didn't see a great deal of "The Paper Chase". It was modeled after "Bull" Warren, Edward H. Warren. I never had him as a teacher. All

sorts of stories were circulating about him, he was a tyrant in the class room. He would insult students, of course in those days there were no women. One of the great stories was that he was teaching the forms of action and someone gave him a completely wrong answer and he said, "Well Mr. McClaferty, you can sue the archbishop of Boston for bastardy, but that doesn't mean that you will recover." Then there was one famous story of a halting and wrong answer from somebody and he said, "Sir, take your books and leave. You will never make a lawyer". The chap got up and said, "Mr. Warren, I will go, but before I do I just want to say to you, sir, that you can go straight to hell!" Mr. Warren said, "Sit down sir, sit down sir, I have misjudged you."

I don't know enough about the Paper Chase, but I imagine that "Bull" Warren was the model. He had a rather sad after life. He was dreadfully opposed to any organization acquiring corporate advantages without being an actual corporation. He wrote a whole book on it. Bull Warren had this book out on Corporate Advantages Without Incorporation. Just as the book was ready for binding, a Supreme Court decision came down and practically knocked out the props on which the book rests. He had to at the last moment add a chapter to try to distinguish this case without great success. At about that time he retired. He was going to the Isle of Jersey to live on his income from securities, but then came the crash, and so he came back to Harvard and resumed teaching again. He wrote a book

called Spartan Education. That may have been one of the items that influenced the "Paper Chase". I think I sat in on his last lecture before retiring and there weren't any explosions or anything outstanding, just a question of being there when old "Bull" Warren gave his last lecture.

Q. So we are now at Edwards and Angell in Providence and you started there in 1930 as an associate.

A. Yes, first of July 1930.

Q. What area did they put you in, general practice?

A. Well everything that came along. Then in October 1930 until June 1932, I worked on the Gillette Safety Razor Co. stockholders litigation.

Q. Tell us a little bit about that, sir.

A. Well, Gillette was the Safety Razor Co. and it had phenomenal success for many years. The greatest gift that anybody visiting Europe after World War I could give to a friend would be a package of Gillette blades. There was a considerable markup and other people decided that they could make blades also. Competition got rough and

Gillette wondered about how to meet the competition. With the depression and the drop in sales abroad, they began to be worried. Their principal competitor was Autostrop. They decided to buy out Autostrop. They would do it by an exchange of shares. They went into the open market to buy shares of the Gillette Company to trade to Autostrop. One large block was in the hands of an account of which several Gillette directors were members. It was therefore impossible to get an unbiased board to buy those shares, but they bought them just the same. Then they sat down with Autostrop to tender the shares. Meanwhile Autostrop had gone into the Gillette books which were phony. I will explain in a minute why. The deal fell through, the Gillette stock broke, and the merger was finally accomplished on terms not too favorable to Gillette and a bunch of stockholders brought suit.

What had happened was this. In the 1920s taxes were high in Europe and they were low at home. Therefore the company sold to its subsidiaries in Europe and took a profit on the sales when they sold them because that would mean that the subsidiaries' profits, which were subject to higher tax, would be low and the home company which was subject to low tax would have the high profits. That went along for a while until they couldn't sell abroad. Originally it was the practice that at the end of the calendar year, the company at home would adjust the books so that they could squeeze out the anticipated

profits from the subsidiaries to balance their books to show the correct figures. At the beginning of the next year they replaced them. What happened, however, was when the sales abroad began to slow up, they would not turn the figures back so that their balance sheet would show a profit on anticipated sales to the subsidiaries which hadn't been consummated and they declared dividends out of those anticipated profits. There was finally one item of billed-not-shipped, about $3 million worth of blades that never left the warehouse in South Boston and they took the profit on that which had never even gone overseas and declared dividends on that. When the Autostrop people saw those figures, they said the deal is off. That brought on the stockholders' suit.

Q. Your firm was retained by those stockholders?

A. No. Our firm was retained by one of the Gillette directors who was also a director in the Gorham Company, the Providence silversmiths, of which an Edwards and Angell partner was also a director. When this thing started up the Gorham director of Gillette retained one of the senior Edwards and Angell partners. I worked with this senior partner for a year and a half on this case.

There were several dramatic incidents in the case. One was when a great New York Wall Street financier was built up by his New

York counsel as the educated self-made boy who became a millionaire because he had a vision to start electric water power projects in Canada, to develop parts of that country, and here he was being sued and he broke down in tears. That's pretty heady stuff for somebody just 26, to see in the courtroom, to see a great Wall Street tycoon crying in the courtroom.

Then counsel for one of the other directors started going after our client. "How could he possibly suppose that the books had been turned back for so many years?" He said, "Well he had been a director of Fairbanks Morse in Vermont and they did that and other firms that sold to the subsidiaries at a profit, where subsidiaries could not make much money and the high taxes would be paid on the small profits. At the end of the year they corrected their books and declared dividends on the real earnings."

On New Year's Eve 1931, I was sent out to South Boston to examine the actual books to see whether the Gillette books had been turned back, and sure enough they were. We were, I think, 120 days before a master and he was to make his report to the full court. That got us into the summer of '32. By that time the directors, who were the defendants, were so badly broke themselves, that they couldn't respond in damages, but they did have to pay up and that was the end of the case. It never got to be a precedent. It was settled. It was a

terrific experience. One of the things I learned was "the stockholder Wall Street barrel vision" of the stockbroker. I recognize that today in poor Donald Regan.

Q. What is the barrel vision?

A. It is like a tunnel vision.

Q. Do you still feel that that's the way it is on Wall Street today?

A. Look at Don Regan.

Q. Even with all the changes in the SEC?

A. With all the changes in SEC, the people who are operating there still have tunnel vision. I am a very persistent viewer of Wall Street Week, with Louis Rukeyser. It's a type of mind, it's a type of approach, it's an outlook. They will operate that way. They look on the world that way.

Q. Sir I would like to start off now with your government service. You left your law firm in 1933?

A. Yes.

Q. Why did you leave sir?

A. I had just got married and this was my first wife. The lady you know is my second wife.

Q. That would be Esther H. Green.

A. Yes. We got married on the 8th of April and this offer came at the end of July or the beginning of August. I was offered 80% more than I was making.

Q. That's a switch, moving from private practice and getting more in government practice.

A. This was the New Deal, being married four months and being offered a 80% increase in income. That wasn't a very difficult decision.

Q. So they sought you out sir?

A. Well I had been itchy. I was in touch with people who knew I was interested in joining the New Deal.

Q. Were you a Democrat?

A. Yes, I cast my first vote for Al Smith. I was a Democrat for 40 years until the kooks and crazies pushed me out of the party, and that may be quoted in its entirety with full attribution.

Q. So you went to work for the Public Works Administration?

A. I went to work for the Public Works Administration, which was Ickes' outfit. He was the Secretary of the Interior and the Administrator of Public Works.

Q. What did you do for them?

A. Well, for a while I answered letters, for a while I wrote a few legal memorandums, and then I got up to be Acting Executive Assistant to the Deputy Administrator. I would interview people who came in. They would want to know about whether their projects were eligible. I'd write letters and I early learned that the man who makes policies is the rough drafter, who writes the original letter. If it doesn't come back it's policy.

Q. Sir in your outline you had put in a phrase here in which both Dan and I were a little curious about, "the New Deal" boy executive. What exactly did you mean by that?

A. Well, that is it. Here I was considerably less than 30, I was making decisions and I sat down with Congressmen and businessmen and so forth. I was making decisions, guiding them, and giving them advice.

Q. Would this be in the area where sites would be constructed?

A. No, this was eligibility for projects. In other words, I did not pass on the validity of their municipal bonds or the accuracy or soundness of their financing or any of the engineering of their projects, but simply, "Could they get a public works loan to refinance something?" Of course the answer to that was No. Could we get a loan to build a new fire station? Yes. Can we get a loan to buy a new fire engine? There was a great deal of pressure from the fire engine manufacturers. The answer came down to this, well, if there was enough construction so that the cost of the new fire engine was a small part of it, we could consider the whole thing eligible, but if you were building simply a fire house and you wanted to put five engines in it, no, that was not public works. In other words, the loans had to go into capital improvements and not just for any expenditures.

Q. So you transferred over to the Interior?

A. I then transferred over to Interior as an Assistant Solicitor. Before I had been there a week, I was sent down to the Virgin Islands to look into an impending mutiny of the District Judge against the Governor.

Q. That's interesting. Could you elaborate more on that?

A. The Governor was Dr. Paul Pearson. He came from Swarthmore College in Pennsylvania. He was a Quaker. He had been made Governor of the Virgin Islands in 1931 by President Hoover. He was also the father of Drew Pearson. Hoover, who was a Quaker, had appointed him and that was the end of the Naval Government in the Virgin Islands, which had been taken over from the Danes in 1917. Paul Pearson was a well-intentioned good man, but no realist and probably past his prime. The District Judge was a Mississippi ex-Congressman, who was appointed not by the Secretary of the Interior, but by the Attorney General. His name was T. Webber Wilson. He was a protege of Senator Pat Harrison. As is not infrequent in isolated communities, the beginning of the row had to do with an expense voucher, for $6.00, when the Judge went from St. Thomas to St. Croix, to hold court on the other island. There was a $6.00 voucher for expenses that the government disallowed. And from then on one thing led to another and Governor Pearson was painted as a Republican holdover from the Hoover Administration and the Judge was the New Deal Democrat. It went on from there and it almost led

to a revolt and bloodshed. I was sent down there to look into it and there was finally a Senate investigation. I went down there again and at that point it was about to boil over. The French consul got worried and got in touch with the French Embassy in Washington and they complained to the State Department, the State Department went to the President, and the President sent in a cruiser and about 100 Marines. That quieted everything down.

Q. Were there actual factions of men following each party?

A. Yes. There is a story in Collier's Magazine in the Fall of 1935, which tells about it. The President in his usual fashion, removed both men. He put the Judge on the Parole Board and he gave poor old Dr. Pearson a job with the Housing Administration. He appointed the Lieutenant Governor as the new Governor and sent someone else down to be the Judge. That's how the things finally settled. But it was a very messy business because in the Caribbean, violence in those days certainly was endemic and little things could trigger it.

Then I learned about the Public Land System and I argued a few cases in the Court of Appeals for the District of Columbia. But it was not a very happy place.

Q. You're talking mostly about western states aren't you.

A. Yes.

Q. You want to talk about the Public Land System.

A. The Public Land System was rectangular surveys and one or two or later on three sections of each township were reserved for schools and so forth. They had section-line roads and the northwest quarter of the southeast quarter and so forth.

Q. In 1937 you transferred over to the Department of Justice.

A. Yes.

Q. What was your motive in doing that.

A. Well partly to get away from Ickes and partly to get back into law practice. I mean real law. I got into the Hawaii Alien Property Cases. Basically, under the Trading with the Enemy Act of 1917, all German owed property in the United States and its possessions was subject to seizure by the Alien Property Custodian. One of the Big Five in Hawaii was Hackfeld & Company.

Q. What is the Big Five, sir, sugar companies?

A. The sugar factors and companies were Alexander and Baldwin, Castle and Cooke, C. Brewer and Company, Theo. Davies and Company and Hackfeld and Company. Castle and Cooke, Alexander and Baldwin, and Brewer were American. Theo. Davies was British, Hackfeld was German and Hackfeld was seized. After the war, Hackfeld said that he was an American citizen and that he could get back his property and he got it back. But he didn't have sense enough to leave it alone and he was in the hands of the lawyer who suggested that he ask for more on the grounds that the sum for which Hackfeld and Company had been sold to American Factors in 1918 was less than its true value. Hackfeld felt that the sale was a consequence of an allegedly patriotic scheme but a fraud. He felt it was fraudulent to take over a valuable asset for less than its true value. Hackfeld got his money back and then the other expropriated stockholders brought suit against the reorganizers.

That was brought in the California courts because it could not be tried in Hawaii. Couldn't get a disinterested judge, couldn't get a disinterested jury. You had to find neutral grounds. The final judgment in California was that there was no fraud, that the property was conveyed at fair value.

When that was over, Hackfeld's executor in the United States had introduced a bill in the Senate to give him more. In those days that could be referred to the Court of Claims as a Congressional Reference, and it was. Congressional References could go forward by getting on with the case, but the government couldn't come back by way of counterclaim and the court would make its recommendations but it couldn't give a money judgment.

I got into it after it had been tried once before a Commissioner of the Court of Claims, and it was a very unfavorable report. I was able to find some more evidence against that result. Then we had a counter suit, a cross claim in New York and we got judgment on the cross claim, and eventually won the Congressional Reference. The claim was defeated. The answer was that it was a carefully constructed fraud, a mistake of law and also the corrupting of an American Vice Consul in Bremen, Germany. I was finally able to show, to get this guy to admit, that he had received money from Hackfeld. That was probably the most time consuming of my cases in the Department of Justice and then I had my first Supreme Court cases.

Q. You also got involved with the Governor of Oklahoma.

A. Oh, yes. Red Phillips was negotiating with some Federal agency which was building the Grand River Dam in Northeastern Oklahoma which would involve flooding, over the price to be paid for the state and county roads that would be overflowed by the lake the dam would contain. In order to put pressure on the Government to give a higher price for these dirt roads, Governor Red Phillips declared martial law and called out the National Guard to stop the building of the dam, just at the most critical point when the waters were rising in the spring, and the dam wasn't completed; the rising waters would wreck the dam. I had completed the text of my Practical Manual of Martial Law, so I was picked to go out and handle the case. We got an injunction against Red Phillips from a three-judge court. Then we got to the Supreme Court and the Supreme Court said that it should have been a one-judge court but by that time the dam was completed. U.S. v. Phillips, 33 F. Supp. 261 (1940), reversed on other grounds, 312 U.S. 246 (1941).

Q. OK sir, during this time period we are talking about Department of Justice time period from October 37 to about March 41, you argued your first cases in front of the Supreme Court in U.S. v. Summerlin and the Northern Pacific Railroad Company case. Could you briefly tell us sir, about the Summerlin case and what that involved.

A. Summerlin involved a Florida statute of nonclaim. That is, if you didn't file a claim in a probate proceeding within a given time you lost your claim. The United States had a claim against the Summerlin Estate. Some lazy assistant U.S. attorney sat on his butt and didn't file the claim until after the period had ended. The Supreme Court of the great state of Florida held that the United States was barred by the statute of nonclaim and therefore its claim was void. Cert. was granted at the Government's instance. The question was, could the United States be barred by a statute of limitations. The statute of limitations in Summerlin was really a statute of nonclaim. I argued the case orally in front of the court. I then read a sentence from a comparatively short record where the Florida court had said, "The claim of the United States is therefore void." Chief Justice Hughes' whiskers trembled when he heard the word "void." As it was, I stood up to the questioning. I stood up to McReynolds, who at that time, April 1940, had only one pleasure left in life and that was to badger new Government counsel as they appeared. He said, "Counsel, wasn't there a case a few years back where we said that the Government, when it goes into the market, is bound by the rules of the market?" By dumb good fortune I tried a raised check case in Anniston, Alabama just a few months previously, and I said "Oh, Your Honor, you're thinking of the U.S. National Exchange Bank case in 270 US; that was a very different case;" and I kept him down. Then I dealt with another case that Stone had written and he said "Well, that had

to do with a foreign statute of limitations." I said "Yes, Your Honor, but before reaching that point, the Court in the opinion in which Your Honor wrote explained why the United States was never bound by a domestic statute of limitations."

Then the net result was that I won the case because at that time a lot of federal immunities were being lost because counsels arguing the cases were just too scared when they got questions to stand up for their propositions.

Then came Northern Pacific. This was a very complicated case and it involved the adjustment of the entire grant of the Northern Pacific Railroad, which went back to 1864, and it covered an area of some 40 million square miles, bigger than the entire area of the six New England states. It had been referred to a master. The master had issued a very perverse report and then the district judge in Washington state had perversely approved that perverse report. At that time the Government and Northern Pacific got together and said, "Look, this is just too complicated for ordinary litigation." Then they got a special act through Congress, providing for a direct appeal from the District Court's interlocutory decree directly to the Supreme Court.

Then came the question, who would argue this case. The Assistant Attorney General of the Lands Division said he would take part of it and then they looked around to see if they could get outside counsel to do it. They got Edward F. McLennen from Boston. His claim to fame was that he had been a law partner of Mr. Louis D. Brandeis, and because in the 1890's he had been known as a rising young man of the Boston bar. McClennen asked the court for six hours on each side. The court gave him three. When he got up, and I am speaking from having read the transcript of the argument, he told the court that, after he concluded with his argument if they weren't clear about the case, they should attribute that fact, not to any shortcomings on his part, but to the circumstance that he had only been allowed three hours on the side to make the presentation.

By that time the only land law specialist on the court, Van Devanter, had retired. Nobody on the court really knew much about public land law. All they did know was that they didn't want to hear Mr. McClennen again. When they put the case down for reargument, they told the SG, "You've got to send someone else but McClennen." Through a series of circumstances, and here again read Justice Frankfurter's oral history reminiscences and note the emphasis he places on the importance of contingency, on the basis of my standing up to the court in the Summerlin case, although I wasn't in the Lands Division of the Department, I was picked by the Solicitor General,

Francis Biddle, to take the Northern Pacific reargument. I got a reversal. Although on some points the court was equally divided. This was my argument against John W. Davis. This was considered a nine-day wonder for awhile. It was in October, 1940. By the time I got back from wearing a soldier suit, a little over five years later, nobody remembered that argument anymore. (U.S. v. Summerlin, 310 U.S. 414 (1940), U.S. v. Northern Pacific R. Co., 311 U.S. 317 (1940)).

Q. You mentioned wearing a soldier suit, would you like to delve into your military service. You first applied for a commission in August of 1935 and that was as a Captain in the JAGD (Reserve). Sir, why did you join?

A. Well, I was always interested in military things, so I suppose I went along to play soldier. I knew I would never make a doughboy. I might have been interested in the field artillery because I had been pretty good in freshman math, firing tables and trig. and that sort of thing, but if I asked for commission in the Field Artillery Reserve, I would go in as a Second Lieutenant and if I got a commission in JAG, I would go in as a Captain. I knew two JAG officers, one of them was Colonel Rigby, who had participated very significantly in post World War I court-martial complaints and investigation and who was then commissioned and who wrote the 1921 MCM. Then I knew Captain Caffey, who was still active and I applied for a JAG commission. I

got to be a Captain doing the extension courses and appearing before a board of three officers.

Q. Who comprised the board? Were they JAG officers?

A. No, there was an infantry Colonel regular and there was a JAG reserve major and I do not know who the third member was.

Q. Where did you do that?

A. It was in the Munitions Building.

Q. This is in Washington?

A. In Washington. The regular Army doughboy and I primarily discussed the business of weaning a child from a 2 A.M. bottle. We came to an understanding on that and then I was asked one technical question about the court-martial jurisdiction over a marine attached for service with the Army. Who could try him after he goes back to the Navy? There was a 1915 case saying nobody could and then the 1916 and 1920 AWs had a special proviso, saying that the Army could try him afterwards. Then I was also asked what would I do if I got a call to active duty, and I said I would comply with it of course. That was the sum total of the examination.

Q. You got these extension courses from the Office of The Judge Advocate General?

A. No, I applied from my legal residence, which was in Providence and the Headquarters 76th Division was in Hartford and the stuff would be sent out from Hartford. So I became a JAG captain by mail.

Q. So you had no training in military bearing and they gave you direct commission into the JAG Corps, is that right?

A. That's right.

Q. You noted in your outline that to be considered for commission, there would have to be a vacancy in the procurement objective of the Corps Area where the applicant was a resident.

A. There would have to be a opening in First Corps Area which was New England. If you could find a vacancy there, they would be very happy to consider you. If I were to apply in the District of Columbia or Virginia, "No we are full, not interested."

Q. So it just depended on the geographic area whether or not there were vacancies. So in New England at this time there were openings?

A. There were openings, at least it was thought that there were openings. And I learned later after I was safely commissioned, that this had been a mistake.

Q. Why is that, sir?

A. Somebody totted up the figures wrong.

Q. So technically you weren't supposed to be admitted?

A. The importance of contingency.

Q. What was it like being a new officer back then sir?

A. Well, I was very happy. Gene Caffey helped me get the proper uniform. A lot of my legal friends in the Department of Justice thought I was an idiot.

Q. Why was that sir?

A. In 1936 anybody who was a lawyer that was thinking of getting into the Army, this was a strangeness bordering on insanity and they laughed. Now later on when they were in basic training digging

trenches and I was a field grade officer, I think the laugh was on the other foot, but then they thought it was as funny as hell.

Q. You must have had great vision there?

A. Well, I could see the war coming.

Q. You really could?

A. I really could. And also I knew I was a good lawyer and I would be a piss poor infantryman.

Q. After you had help getting your new uniforms, do you have any other observations about what it was like being newly commissioned back then.

A. I was very proud to be commissioned. There was one JAG training session a month for the JAGs. The JAG then was in the Otis Building, on 18th street between H and I on the west side. I don't know if that building is still there.

Q. This is in Washington?

A. In Washington.

Q. Which office was there, sir?

A. OTJAG.

Q. In what year was this?

A. This was in 1936 through 1940.

Q. Do you remember who was the TJAG then?

A. In 1936, it was General Arthur Brown.

Q. Did you ever meet that man.

A. Yes, but very casually. I did, however, know General Blanton Winship.

Q. For the first few years of your reserve status in the JAG Corps were you mostly going to meetings or did you actually do some two weeks active duty training during the summer?

A. It was very difficult to get active duty. I was commissioned in January, I accepted my commission in February of 1936 and reserve training was very limited and very logically reserve JAG training had

very low priority. The first time I could get any training was in the summer of 1939. I went up to Boston and I spent two weeks at the Boston Army Base.

Q. That would be First Corps?

A. First Corp Area. At that time there were maneuvers at Fort Drum, or Camp Drum as it was known in those days, up in New York State. The troops were so excited about these maneuvers that they forgot to misbehave and during that time when I was there there wasn't a single GCM trial or papers recommending a trial by GCM at the office.

Q. This is for an entire corps.

A. For an entire corps area. They didn't have any active corps headquarters, just corps areas, nine corps areas in the United States. I learned quite a bit. I went through War Department General Court-Martial Orders and came across Billy Mitchell's GCM and it was the first time I had ever seen it. It was perfectly obvious that he had been properly tried and convicted because no outfit could maintain its self-respect and keep as a member thereof, someone who had impugned its motives the way Billy Mitchell did.

Q. The media didn't portray it that way?

A. No, I know, it's what I had known about it earlier, this trial took place when I was in college, was the media's representations, but to see in black and white what Billy Mitchell had said, of course he was guilty and of course he had to be dismissed, or at least considerably cut down. He wasn't sentenced to dismissal.

Q. Wasn't Douglas MacArthur on that board?

A. Yes. MacArthur violated the Articles of War by asserting later that he had voted against conviction, which I frankly don't believe. That was also the case where Major Allen Gullion had been Assistant Trial Judge Advocate and had a beautiful speech ready for the prosecution that he had sent off to the media. Then the court said that "The court does not desire to hear Major Gullion." So don't send off press releases of your gilded prose before it is actually delivered. Then we had some National Guard fitness exams and we saw the endemic militia business: "He's a good guy and we've got to take care of him and close ranks against the regular Army" and that sort of thing. It was a very pleasant tour.

Another chap came from somewhere in Western Connecticut and we had a very pleasant time together. But, the really interesting tour was in 1940.

Q. Yes, you worked at the War Plans Division, OTJAG.

A. Yes, the War Plans. France had fallen. I had to report the 1st of July. We worked on plans to set up military government in the Caribbean colonies in case the British followed the French example and folded.

Q. Sir, was this classified work?

A. Oh yes. This was classified, it is now completely unclassified and you will find it mentioned in a volume of the official history, The Framework of Hemisphere Defense in the official Army history of World War II.

Q. Sir, could you elaborate a little on these plans?

A. Well, we had to go in and take over the government and run the islands.

Q. Would you use military tribunals?

A. I think we would probably have relied on the local tribunals. Let them handle anything except offenses against the occupying forces.

Q. Was it modeled after the Philippine Government at all or any of our territories at that point?

A. No, it was a very simple framework. I also worked on some real war plans. For instance, there was the plan if you had a war with Mexico, what would you do. You would seize the four biggest ports. Well, quaere whether that would be a solution today with air travel, but in those days, the plan was, you sent your Navy and seized the ports.

Q. What was the JAGs input into these plans?

A. We had to draw the outlines on the basis of what had been done before. I had the documents that described American occupation of the Rhineland in Germany after the 1918 Armistice. I had also what happened when General Fred Funston occupied Vera Cruz in 1914; so there were models there. He was the capturer of Aguinaldo.

Q. Sir, how many people were working in this War Plans Division, especially on the European colonies and Western Hemisphere?

A. Well, I did the rough drafting and then it was checked by COL Archie King.

Q. Did they have an International Law Department there?

A. War Plans was the closest to this. Then I had to go around and get concurrences from the various General Staff sections.

Q. Did you have to brief all these general staff sections, sir?

A. Yes. And one of the things, this was an interesting experience, I went over to the War College, having been in the Virgin Islands twice, and I talked to a Colonel King and he was the poor gentleman who had to surrender Bataan finally to the Japanese. He showed me a map, pointed to Trinidad, and said, "We will have a division there." I knew the T/O for the division, that's a lieutenant colonel, division JA was a lieutenant colonel. Later, when the bases opened up, I was offered a choice between Bermuda and Trinidad. There were two advantages to Trinidad from my selfish point of view. One of them was since they were sending a division there, the JA would be a lieutenant colonel, and the second was that Trinidad was much closer to the solid land than Bermuda.

Q. Sir, you were talking about drafting the plans and then getting the concurrences from the other staff elements. Why were the lawyers drafting plans and getting the concurrences?

A. Military Government had always been considered a JAG function.

Q. You were drafting the plans for the military government after the occupation?

A. Yes. They weren't tactical plans on it.

Q. Ok sir.

A. My two weeks were extended to four weeks.

Q. So this was the entire month of July of 1940 and then you went back to the Department of Justice?

A. Yes. As a matter of fact my evenings were spent reading the record of the Northern Pacific case.

Q. Yes I was going to say sir was that you were involved with two court cases during that time.

A. No, the Summerlin case was over, but I was reading the Northern Pacific records at night and working on the Caribbean Islands by day.

Q. You were very busy.

A. One evening another officer at JAG that I had known for a long time, Eddie Walsh, he and his wife came over to where we were and we had a very pleasant evening, and in the morning I had a hangover. Having been in air conditioned offices for a while, which the Otis Building was not, I was a little shaky the next morning. Colonel Archie King, who except for beer with sea food, was a pretty confirmed teetotaler said, "You know, Captain Wiener, as a reserve officer on active duty you're entitled to full medical attention. So if you like you can go to the dispensary at the Munitions Building." I said, "I thank you, sir, but I think I can see it through." I thought to myself, won't that be wonderful, a reserve officer on a two week tour, turning up with a hangover.

Q. In March of '41 you came on extended active duty.

A. That was after the act of Congress that provided for calling the National Guard into Federal service and the reserve components to active duty.

Q. So where did you go first, sir, in '41.

A. JAGO.

Q. What is that, sir.

A. To The Judge Advocate General's Office, which was then in the Munitions Building.

Q. What did you do?

A. Well, I was given a couple of old chestnuts that had been hanging around the office for a while. One of them concerned a officer who took an official car to go from home to his place of duty and got into an accident. The question was, was he personally liable for the repairs to the Government. While kicking that around, I tried to dig through the regulations and came out with what seemed to be a proper solution.

Q. Sir, did they call it reports of survey then? Do you know what that is?

A. I know what a report of survey is. No I don't think it was that, it was just to fix the legal liability. Then I would review some short form cases, and they were all interesting, because they taught me something. There was a chap who had been joy riding in a plane, couldn't get it off the ground but he buzzed around on the ground and he was hitting one obstacle after another. He was joy riding in the

plane and the record gave you absolutely no indication of where he was going. This taught me that, Good Lord, when you have testimony like that, you have got to make it clear on the record where the witness is pointing.

Then one morning, I was in the office a bit early working on a private matter for a private non-governmental client. General Gullion came by and saw me there in the library. He said "The bases have opened up, which one do you want? Trinidad or Bermuda.?" I said, "When do I have to make up my mind?" "Immediately." I said, "I have to talk it over with my wife, and I can't give you an immediate answer." Then he said, "All right, I'll look for someone else." Later after office hours, when I was still in the library, I happened to see him again. I said, "Well, General, whom did you finally get to go to those bases?" He said, "I haven't got anyone else." I said, "Can I give you an answer in the morning?" He said, "Yes." I said, "I will give you the answer." That's when I picked Trinidad for the reasons that I have already indicated.

Q. Sir, you went to Trinidad in April of 1941?

A. Yes.

Q. So you were in only in OTJAG then for about a month before you went to Trinidad?

A. Correct.

Q. Now you were there for over a year it looks like.

A. 17 months.

Q. And you went in there with a division, sir?

A. No, there was no division there. There was a company of dog-robbing infantry; a battalion of National Guard coast artillery, which someone with a complete lack of imagination picked from the South to go to Trinidad, which was 90% black; headquarters with nine officers and ten enlisted men; a quartermaster detachment of about 100 men; and a medical detachment of the same number; perhaps a very small signal detachment and a very small ordnance detachment.

Q. Were you the only JAG officer?

A. I was the only JAG officer. This was one of the first bases to be garrisoned. I think Newfoundland was the first, we were the second, Bermuda was the third. Nobody had thought it out, but we aggregated

about 1500 men and when we said we need a larger headquarters, they would say "The Trinidad Battalion Command needs a larger headquarters?" If we had no men, which we learned later, we would say, "Well, its only 1500 men, but it is really a corps area. It has general court-martial jurisdiction, we can't live on the economy, it's got to have a PX of it's own, it's got to have all the amenities that are normal in a military post. And therefore, the headquarters has got to be disproportionately large compared with the number of troops," but nobody knew that at the time. They didn't know how to send out extract orders at that time either. This was really at the beginning. Toward the end, of course, it got to be a very efficient system of moving people and establishing new outposts.

Q. What was your particular duty sir?

A. Well, first to supervise courts-martial, to advise on questions involving the Army regulations, and to a lesser extent, liaison with the civilian government, especially on legal matters. One of my jobs was to try to keep our troops out of the local courts, which were largely black, which under the literal, probably correct interpretation of the Base-Lease Agreement would be triable in the local courts. You couldn't say in a place which was 90% black, that we don't want our men to be before colored judges, this even in 1941. The higher officials of the colonial government all resented our presence. The

Governor, who had grown up in the glitter of the late Queen's Diamond Jubilee, couldn't adjust his mind to the stationing of "a brutal and licentious foreign soldiery" on British soil. And, of course, that sentiment on his part was perfectly well known to all his subordinates.

Q. This is part of the Lend-Lease program?

A. This was the destroyer base deal. In the Official History, you will find that the narrative says it was up to us to find commanders who had sufficient tact and diplomacy to adjust to this situation and that the G1 personnel file that didn't have any slots to measure those qualities. What they didn't mention was that the British didn't do that either, because Sir Hubert Young, who was the Governor in Trinidad, was very much opposed to us and the Colonial Secretary was also opposed to the Base Lease Agreement. Then our commander was a veteran of the Days of the Empire in the Philippines and an ex-cavalryman. Of course, the two men clashed and the thing really didn't work well until General Marshall and Field Marshal Sir John Dill came to a gentlemen's agreement that we would yank our general and they would sack their governor. But until that happened, there were a lot of sticky incidents.

Q. You were there when the war broke out then, right sir?

A. I was duty officer on Pearl Harbor day.

Q. Why don't you relate that experience to us, what happened?

A. Well, my wife had taken the two children to the beach, I stayed in my quarters playing solitaire. I didn't have to stay at the headquarters in those days. About 3:00 in the afternoon the lessor of our headquarters building, a Mr. Henderson, who was a relative of the family that owned Angustura Bitters, who owned the building, called me up and said "Oh, Major, Major have you heard? They bombed Manila and Pearl Harbor!" I hadn't heard and all the brass in our outfit was out on a recreational cruise in a fine 40-foot Quartermaster motor boat that took them from island to island. And finally we had some dinner guests and I excused myself and I went up to the headquarters. There were two messages: one was from Panama, "Place Caribbean Defense Command Defense Plan No. 2 in effect," and the other was a G2 wire, "Use the private G2 channel for intelligence information directly to War Department G2." I was the first duty officer who stayed in the headquarters over night, and that was all that happened.

Q. Were you able to get the officers that were on that cruise?

A. Not really, I think they finally came up. By the way I have given a reference to an article.

Q. Yes sir, Opening an American Base in a British Colony Before Pearl Harbor.

A. Shortly after Pearl Harbor, it was Christmas week, a high-ranking ordnance colonel came through Trinidad. He had originally been sent to the Far East via Hawaii. He was in Honolulu during the attack. Then his orders were changed, he had to come back and get to the Far East via Trinidad, Brazil, Africa, India, where he was sent. He started telling the story including the item about the Air Force lieutenant, to whom the young Signal Corps private had said, "I see some planes coming in, sir." The lieutenant said, "I know all about that, don't worry about it." The lieutenant was thinking of the shipment of B17's coming for transhipment to the Philippines. The private saw the Jap planes as blips on the screen. The private was sent to OCS and given a DSM, because that's the only thing that they had at the time, and I think about a year and half later I saw him on a Washington street. There was a Signal Corps second lieutenant with a DSM ribbon. The Air Force lieutenant went on to become a lieutenant colonel. He was with the Thirteenth Air Force on Guadalcanal and as I went up there, it was quite some distance from the Air Force headquarters. I went out there to deliver a lecture on military law. They gave me a vacant bunk and it was his.

Q. Sir, when you were on Trinidad and after Pearl Harbor occurred, what changes occurred in the command to gear up for the war?

A. Well, there really weren't any. I think we were issued the old steel hemlets, we were issued a .45 and ammunition, and that was really about all.

Q. Were there any German activities in the area? Submarines?

A. There were submarines, oh yes, there were submarines. Submarines sank two ships in Port-of-Spain harbor.

Q. Was that near Trinidad?

A. That's the port in Trinidad. They sank a ship that was docked at Saint Lucia, which was part of our command. In May I was given 10 days leave in Barbados and every day I was there, there were more survivors from ships that the German submarines had been sinking in the Caribbean. I gave all my civilian clothing to the Red Cross to distribute to the survivors who were rescued from sinking merchant ships.

Then one of the most interesting jobs I had was this. The S.S. Argentina, Moore- McCormack Line, had left Buenos Aires before Pearl Harbor and around Christmas time she was about to come into British territorial waters in the Port-of-Spain. It was arranged between the Colonial Government and our headquarters, that I was to go out to the ship and interview everybody on the British blacklist as suspected Nazi agents and determine whether they should be taken off the ship. I went down about 9 or 10 p.m. and they were still dancing on the upper rear deck, people in evening clothes, and one by one I sent for the people on the list. They were brought up, and I questioned them, mostly American citizens of German descent. I questioned them as best I could to determine where their loyalty lay.

Q. How did you do that, sir?

A. Well, I asked them whether they knew that Germany and the United States were at war, and what is your citizenship, and what would you do now that you know the war is on and so forth. Most of them passed muster but the ship's printer didn't satisfy me, and I said "Take him off." He was taken into custody by the Trinidad police. He was shipped up to New York and I learned later that they released him up there. That was an all night long affair. I got home about 4:00 a.m. The Christmas dinner that we had was lovely, right out of the commissary, with Smithfield ham, a big turkey, fruitcake and all the

trimmings. We had for our guests a British naval doctor who was a very interesting, intelligent person. We had known him for some time, we had also the British paymaster, who was an Englishman, whose job it was to pay off the local Trinidad Volunteers. This was the time when we had just heard that Sir Hubert Young's brother, Sir Mark Young, had been captured in Hong Kong, where he had been governor. So, it wasn't a very Merry Christmas. And then this ordnance colonel came by and told about what had happened. And some idiot in our headquarters said, "Colonel, just what did they do to our Navy?" And the visiting idiot told. The old man called us together the next morning and he pounded the table, that we had lost the initiative, this is a terrible thing, and this musn't even be breathed, and so forth and so on. Quite frankly we were too ashamed to discuss it among ourselves. Incidently, this high ranking ordnance colonel never got a star.

Q. Sir, when you had this job in Trinidad, you mentioned that you did get involved with the local authorities. Did you have any legal help with any of the Trinidad citizens? Did you work with any of the lawyers there?

A. I was really fighting the Trinidad bar. What happened was we had this case. A local Trinidadian, a full-blooded Chinese, with the improbable name of Winfield Scott, was in a fender-bender with one

of our vehicles. The police investigated and decided that Winfield Scott was the party at fault and it cleared our guy. In Trinidad, certainly at that time, they still had the private criminal prosecution. Winfield Scott brought a private criminal prosecution against our sergeant. We were obliged to serve summonses to produce witnesses, that was under the Base-Lease Agreement. We had been doing that regularly. I decided this is a very doubtful business, but it's not the sort of case which is so clear that we can make an issue out of it. So I said to the Chief of Staff, I don't think he had acquired general staff status yet, "Let me go down under the Base-Lease Agreement and represent our sergeant, under the right of audience granted under the Agreement. In this way we won't make a big international fuss about it in Washington and London." So, I went down, ready to appear in the Magistrate's court. When I got up, the counsel for Winfield Scott was as black as anyone's shoe here, said "But I question Major Wiener's right to appear." I said, "If Your Worship please," that's the way you address a magistrate, "If Your Worship please, I rely on article VII of the Base-Lease Agreement, giving me a right of audience. I am a member of the bar in the United States, and I have here certificates evidencing my admission to the bar of my native state, Rhode Island, and to the bar of the Supreme Court of the United States. I have also a letter signed by my commanding general, authorizing me to appear in this case." The Trinidad legal eagle said "Yes, Your Worship, but our point is the

Base-Lease Agreement is not law in this colony, because under British law, treaties are not self-executing." I said, "If Your Worship please, we are producing Sergeant 'so and so' pursuant to the base-lease agreement. Now if Article VII is invalid so that I have no right of audience, then Sergeant 'so and so' should have never been produced here because if Article VII is no good neither is Article VI. If Your Worship agrees with my learned friend, and holds that I have no right of audience, I should have to recommend to my commanding general that he no longer serve witness process or produce anybody here pursuant to Article VII." Well the Magistrate was sufficiently upset by it and said, "I will take this under advisement." This was all done in open court, in a crowded court room, the newspaper guys were scribbling away, and not a word got into the paper the next morning. The result was that they quickly passed the right of audience ordinance in Trinidad, but they never did implement the Agreement.

Q. What happened to the Sergeant?

A. The case was dropped. I think I did appear once in another accident case, and after I got an assistant I sent him out. His right of audience was not only unquestioned in view of the ordinance, but the judge asked him to lunch afterwards. It was a very sticky business. The British Government wouldn't force the Colonial Government to

implement the agreement. They knew it wasn't any good, and yet they assured us all along that it was, all of which is set forth in the reference.

Q. Sir, we have been talking about your tour in Trinidad. Later on you had an opportunity to address a class and give a lecture at the Judge Advocate General's School located in Ann Arbor, Michigan, on the duties of the Staff JA in the field. Could you expand upon that sir?

A. Well, I had been a Staff JA for 17 months and here was the class at the School and very few people on the faculty had had any field experience and the curriculum was based on the notion that the military wheel revolved around a hub which was marked JAG. I had to bring a touch of realism into their picture to show that a JAG was a rather subordinate part of the whole picture, even if he played an important role, but he wasn't the centerpiece. This was based on experiences of nearly a year and a half, with some senior officers who, to speak mildly, could be extremely difficult. The commanding general had my law library rearranged according to size, all the tall books to the left of the shelf, so that everything would be neat and not disorderly. Of course, every senior officer there knew more about the court-martial system than I did, or he thought so. It was not an easy situation. I wanted to advise the students there of the actual situation that confronted them when they went off to their first duty

station, that whether they were highly regarded when they left, would depend on their good sense and their ability to adjust. Through the rest of my active duty career and afterwards, I would run into people who had heard that lecture, and they never forgot it, but the faculty of the school never invited me back and it was seven years before I was ever invited to address the school again.

Q. Was that by a different administration in the School, had they changed?

A. Well, it had changed, of course. I think the school folded with VJ Day and then I think it was 1948 when they started building up the Army again. I don't know.

Q. Sir, what is the relationship of what you told the students then to what a judge advocate should think about today?

A. Well, of course, its very difficult for me to say because I have been completely retired for over 25 years. I would say that the important thing for a judge advocate to learn, and I didn't learn it until rather late, when he's asked for advice, he says, "General, my opinion is so and so, my advice is such and such," and when the General says, "I don't propose to follow that advice," the only thing he can say is, "Well, General, I have given you my opinion and my advice. In doing

so I have performed my duty. Now sir, you will give whatever directions you feel proper and you will be performing your duty. What are your orders, sir?" And very often that will give the commander a pause and he will think, and he won't give the orders. This is something you learn, and you don't come equipped with. One thing that helped me a lot in Trinidad is that Gene Caffey, who by then was a lieutenant colonel, and had gone back to the Corps of Engineers, came down as sector engineer. Whenever some kind of silly nonsense was floating around he would call my attention to a paragraph in the 1912-1940 Digest of Opinions of the Judge Advocate General, which would support my position.

It was very difficult. There was a case in Trinidad that was rather nasty. One soldier got into a drunken mess and started beating up on an officer. This was before Pearl Harbor but obviously that's one of the things that can't be permitted. There was some doubt whether he was sane. He was in the hospital and we asked the surgeon for a psychiatric evaluation. The surgeon came back and said "Alcoholic psychosis." Psychosis, of course, is insanity. I wasn't very sure whether I knew that at the time, but I probably didn't. What I should have done, having the precious copy of the 1921 Manual before me, I should have prepared endorsements, sending it back, please spell out your diagnosis and indicate (A) whether in your opinion, Private so and so at the time of the alleged offense knew right from wrong and

(B) whether in your opinion, Private so and so at the time of the alleged offense was able to adhere to the right. That would have given me a basis on which to say that, "By medical opinion, he is insane and cannot be tried and he should be medically evacuated with a view to medical discharge." Unfortunately, not only was the commanding general not completely convinced by my statement that he shouldn't be tried but his wife got into the act. She was an Army brat. The worse thing that ever happened to the command was when she was permitted to come down. That's the sort of thing that happened in the spring of 1943. They were not prepared to teach that at the Judge Advocate General's School in Ann Arbor, because there was no one with that experience.

Q. After you left Trinidad, you went to OTJAG to the War Plans Division, sir.

A. Yes.

Q. October of 1942?

A. Yes. I went back with different orders and they were cancelled and then I wound up in JAG again.

Q. What were your duties there?

A. Principally preparing opinions. There is one opinion over my own signature in one volume in the Army official history. The book is Civil Affairs, Soldiers Become Governors and it's on page 56 and it's headed "What Sense in Nonoperational Agencies Doing the Job the Army is Qualified For," and this is dated 7th of December 42 over my signature as Acting Judge Advocate General because everybody else took the day off.

Q. So you were Acting Judge Advocate General? (Colonel Wiener read his opinion and indicated that he wouldn't change a word of it, even today.)

Sir, while you were in the Office of the Judge Advocate General from Oct. '42 until April '43, you have mentioned in your outline a particular case involving a lieutenant colonel who had some conflict of interest problems and this case is summarized in the Bull. JAG sometime in 1943. I would like for you now to expand upon this case, it was a Pentagon officer?

A. Yes, there was a Texas contractor who sold oil well equipment. He was a simple fellow and his theory was that it was silly to advertise in the industry media when you could get just as much business and have much more fun by taking your prospective customers on hunting trips in the Big Bend country of Texas. When the Ordnance Department

was busy setting up an industrial base for the manufacture of ammunition, this chap came in with a roughly machined shell. He was the first person who knew the fundamental steps of machining steel so that you could make shells out of it. He was put in touch with a Major Cayouette, who was the machine tools expert in one branch of the Chief of Ordnance's office and was told what kind of tools he needed to set up a production line to produce these shells according to specifications. The contractor was quite attentive to Cayouette and they got chummy and socialized and the contractor said to the Major, "Do you own your own house"? "No," he said, "we rent an apartment." The contractor said, "My dear Major, owning one's own house is the foundation of the American family and the American way of life." The Major said, "Well I don't question that but I just haven't got the money to make the down payment." He said, "Don't worry about that, I can do that for you. I'll let you have the money." This was a Saturday evening and on Sunday Cayouette, his wife and son drove around Bethesda and found what they thought was a very nice house. The next afternoon when he saw the contractor off at the Union Station to go back to Texas, he said, "You know, I took your advice very seriously. Mrs. Cayouette and I found a place that's just right but they want $3,000 as a down payment." The contractor said, "I'll take care of that." He whipped out his checkbook, wrote Cayouette a check for $3,000 and said, "Here you are." Cayouette, the idiot, took it.

By this time the contractor had a deal and a contract with the Navy for making shells. When the Navy auditor went through the books and found this $3,000 payment to Cayouette, he turned it over to the Army auditor and the Army auditor turned it over to the Army Inspector General. The Inspector General got all the dope and sent it over to the Under Secretary of the Army. The next thing I knew—fortunately, Colonel King, my immediate chief was out of town in Canada trying to work out exemptions of U.S. troops there from Canadian jurisdiction. It was another senior colonel in the office, later a BG, who said "You are going to be TJA on this court-martial. Draft up the charges and let me see them." He said, "Remember, if you just get this chap dismissed, you've lost your case. You've got to see that he serves time." I drafted the specs and he improved them very much.

Then came the question of who was to sign the charges. In those days the myth and the legend, which was adhered to very closely in practice, was that only the commander could sign charges. The CG Military District of Washington didn't know anything about it. I thought that the proper person to sign the charges was the IG, who had investigated and had got Cayouette's testimony. I requested him to sign the charges, he said he couldn't because policy was against it. By then I had read the record in the trial of BG Alexander Williams of

the Quartermaster Corps in which Mike Brannon had been the TJA. Those charges were signed by Colonel Walter L. Reed, who was later Major General, the Inspector General. So I went to the Inspector General's Office to see if they would permit the IG to sign the charges. I was told by a senior colonel there that it was against policy. I said, "Colonel, I have looked up the records in the case of General Williams, late of the Quartermaster Corps, and find that the charges in that case were signed by Colonel Walter L. Reed, IGD, who I assume is well known to you." He took it back to the front office in the Inspector's General Office and came back and said, "The policy has been changed since then." I think I finally got the Chief of Staff of the Military District of Washington to sign the charges. Then they were ready to appoint the court, and Colonel Weir—then the Executive in OTJAG—said, "Wiener, I'm going to see that you have a rough time. I will get Colonel Park Holland of the Air Corps appointed Defense Counsel."

Park Holland had been a lawyer before World War I and a very good one. When you mentioned his name to senior JAG officers, they would get so mad they trembled and said, "That man has done more to put the administration, to discredit the administration of military justice, than any other individual in the Army." His most fantastic case was defending an officer charged with AW 95, conduct unbecoming, that he, being a married man, was nude in a hotel room

with another woman, not his wife, also nude. Park Holland had pleaded not guilty to the charge, guilty to the specification, had shown that the woman was the officer's divorced wife who wanted to get him back. They got an acquittal. He rankled in the craw of all the old time JAGs.

Cayouette was in many respects an awfully easy case, because everything was in writing and you had the checks and when this check for $3,000 came along before a court whose members had been captains when $3,000 was a captain's basic annual pay, it didn't really make sympathy for the defendant.

My assistant was Ralph Langdell of New Hampshire, who was really a hot trial lawyer and he said when you get the contractor on the witness stand, you must ask him whether he thought he considered it good business policy to use company funds for that purpose. Also, I had been out in Saint Louis with the Saint Louis Ordnance District and the ordnance officer who was in charge had received a reprimand from the War Department's Secretary for accepting a stuffed deer head from this same contractor, because the contractor didn't know the difference between taking prospective civilian customers out on a fine hunting trip and taking Army officers on the same trip when they were doing business with them. When I reported to this ordnance Colonel in Saint Louis, saying that I was the Trial Judge Advocate of

the General Court-Martial that was going to try Lieutenant Colonel Cayouette, my reception wasn't exactly warm and friendly. Then I told them the facts and his answer was, "I don't see what Cayouette could have done for this man that would be worth that kind of money." Because in addition to the $3,000, he had given Cayouette something for a wedding present and Cayouette, the klutz, accepted that. Then he took Cayouette on a hunting trip at which time he was technically AWOL because he was out there on duty.

Finally, I was chewing the fat with a more junior officer in that ordnance district, and said "What could Cayouette have possibly done for the contractor that was worth money to him?" He said "Look, it was Cayouette who saw to it that this line of machine tools which FDR had accepted from an impulsive Churchillian offer to send over machine tools in the form of reverse lend-lease and put them to work in the contractor's plant." He said "Look, once this machinery was in the contractor's plant, it was a magnet for new business. Once he had his production line set up he would make money hand over fist because it was all set to do it."

I remembered an old chief of mine in the Department of Justice had said, "Always go for the tax returns." I got Cayouette's tax returns and of course they did not disclose any payments by the contractor. Going down these various checks, again, thanks to Ralph

Langdell, the question was, "Let me take you back, Colonel, to March of 1942 when you were making up your 1941 tax return." Parenthetically let me just remind you that this was before pay as you go. You put in a return on the 15th of March for all your taxes that were due from the preceding year and you paid them all in one lump sum. Pay as you go came in 1943. I got him to admit that he had worked for the contractor and that these checks were payments for the work he had done for the contractor. Cayouette was not a bad man. He was simply amoral. He had no idea that it was wrong to work for two masters at the same time and accept funds for it. "This was perfectly honest work?" "Yes." "You've always been of that opinion?" "Yes." "Let me take you back to March 1942 when you were making out your 1941 tax return, were you then of that opinion?" "Oh," he said, "it was a gift." I said, "Now, Colonel, look, you told us it was for work. You've told us the nature of the work. Now it was for work wasn't it?" "Yes." "No further questions," and no redirect. Cayouette got, I think, dismissal and two years' confinement.

On the last recess before we got to the summing up, things looked pretty black for Cayouette. So I called the Staff JA at the Military District of Washington and said, "Now I think this guy is going to be convicted and I'm pretty sure he's going to do time. Where are you going to put him?" So the Staff JA went to the AG

section and the AG was made up of ex-sergeants that were now on duty as majors and lieutenant colonels. Some young drafted private said, "Well, Colonel sir, where does one confine an officer?" The ex-sergeant turned lieutenant colonel, said, "Where do you confine them? You confine them in the guard house like any other prisoner. Tell him to get his blankets." Well, that wasn't quite the way it was done, so the net of it was that Cayouette was assigned an armed orderly who took him to a room at the officers' club at Fort Myer and was always posted outside his door. There Cayouette stayed while they went through the review. He got the "heave-ho" and went off to jail.

Q. In April of 43 you transferred over to the liaison section for Operations War Department General Staff. What did you do in this position, sir?

A. Well, the OPD was General Marshall's Command Post. The Liaison Section had the miscellaneous matters. The reason I was asked for and sent there was because it was having all kinds of difficulties with the Base-Lease Agreement and I had been there for 17 months and knew about it and there were all kinds of problems coming up. One problem was, as the war moved on, some of the commanders in the Caribbean suggested we cancel the rest of the 99-year lease. That passed over my desk and I stuck it in my craw. After all, we had

given them 50 destroyers, why should we turn this back? I worked out an action which was, "Not favorably considered." The United States should keep up the leases or continue to be the beneficiary of the leases until and unless it can be shown that they would be of no conceivable military value to the United States for the remainder of the 99-year term. That was approved and we held onto them and then in this article I've cited on opening the base, finally, one by one, the State Department released the leases. I think they have all been given up subject possibly to a residual right to take them over again if they really need them in an emergency.

Q. You were in the Liaison Section for a period of about four months?

A. 4 months, and the most idiotic thing I ever did was to try to get away.

Q. Why do you say that?

A. Well, here I was in Washington and the war was going on and I had been overseas and I had gotten out of another overseas assignment and I was justing itching to get back into the war. It was perfectly idiotic because here in OPD, it was the center of the American war efforts. I was performing very well and to the satisfaction of my immediate chief because, with legal training, I could analyze things properly. He was very happy over the proposed decision I wrote about

not giving up the leases. He said, "You are a damned fool to leave this." I wanted to go out and fight the war. What happened? I got out to the South Pacific reviewing rape cases of the asterisked troops.

Q. What do you mean by asterisked?

A. Colored outfits were marked by an asterisk. You couldn't say "colored" and, in those days, the term "black" was never used. That came later in the civil rights movement. If the outfit had an asterisk behind it meant it was colored. The military value of any of these segregated outfits was very limited. They were 25% of the troop population and 75% of the GCM cases. They would kill over a dispute of $4.00 in a game of craps. I concluded — and this is not DOD policy — the reason was they were closer to the jungle. Therefore they had a lower emotional boiling point than white people. This was the reason why. Now military value of segregated units was very limited. They were over there as engineer aviation battalions, which were labor troops; or air base security battalions, that were supposed to guard the air fields. Naturally they didn't get the cream of the officer crop.

When I was at the Forward Area, the Inspector General and I rated the four air base security battalions on the merits, he on the basis of actual inspection and I on what was revealed in the court-

martial records involving their members, and we agreed on the rating.

Q. What was that rating?

A. One of them was the best of the four and one was the worst, and the other two in between. We had no doubt as to how to rate them.

Q. So this rating was then the officer efficiency rating system?

A. No, this was just which is the best outfit, which is the worst, and how you rate the other two. We agreed perfectly. He had done so on the basis of actual inspection and I had done so on the basis of what I found in the court-martial records, such as having a slush fund for petty cash money, and having a sergeant as an acting officer of the day to inspect the sentries.

Q. Sir, do you happen to remember who the first black JAG officer was?

A. No, I do not. The JAG office was the target of a great deal of agitation by the NAACP. The JAG office itself was resolutely against black JAG officers. I can remember there was a meeting of the National Lawyers Guild, which was a left wing counterpart of the ABA, which was really a communist front. General Cramer, who was TJAG, was supposed to go out and he had a bad illness turning into

pneumonia and he couldn't go. So my chief, Colonel Archie King, was sent instead. And poor old Archie King developed the flu so I was tagged to go out and address this group.

The other speaker was the Mayor of Chicago and he hadn't been adequately briefed about the National Lawyers Guild, and he thought it was an association of the foreign born. So he made a great speech on how much this country has owed to people who were born elsewhere and then came here.

Then they started ganging up on me. I had a fairly routine set speech for civilian audiences on the need for a different system of justice in the military. Going on strike might be the highest flowering of the Labor movement in civil life, but in the military of course it was mutiny. Then they opened up on me, "Why were there no black JAG officers?" In those days being colored or a negro meant you weren't an officer. "Well I am sorry, gentlemen, I can't answer that question. I have nothing to do with personnel." They were definitely ganging up on me. And they would have ganged up on Colonel King if he had been able to go, or on General Cramer if had been able to go. When I got back, I recommended that nobody else be sent to address the National Lawyers Guild.

Q. In 1943 you were able to leave Washington and you went to the Island

Command.

A. Yes. My original assignment was the Thirteenth Air Force, and according to the table of organization, the Staff Judge Advocate of an Air Force was a full colonel. What I didn't know, was that in the South Pacific, the Air Force units were arranged not according to the printed TOs but according to manning tables. I got out to the headquarters of the theater in New Caledonia. Bill Connally of the class of '29 at West Point was the Staff JA for the U.S. Army Forces in the South Pacific. He said, "You're not going out to the Thirteenth Air Force, they are nothing but a bunch of boy colonels sitting around under the palm trees. You're going to stay here at 1st Island Command. They have military justice problems and if you can clean it up, see me again."

I found a number of cases requiring review. Reviews before then had not been very satisfactory. The JA who had come out as the Division Judge Advocate of the 43rd National Guard Division had got into the First Island Command headquarters and had become G1. He was very good in reviewing tort claims cases rising out of auto accidents but he didn't know much about military justice. There was a lot of cleaning up to be done. Most of that I think was done satisfactorily. Then Colonel Connally called me in and said "Fifth Island Command in Forward Area is opening up and I'm sending you up

there and then we will see about the Air Force later on." I got to Forward Area which was headquarters on Guadacanal and found five murder cases awaiting review. We cleaned those up and then I went over to the Thirteenth Air Force. They were all set to move on through the Admiralties and eventually they got into Mindanao and the Philippines. They followed the troops along New Guinea and they attacked the southern Philippines. Just at that point, one hot Sunday morning there was a message that I was wanted and I was mentioned by name, Lieutenant Colonel Frederick Baker [phonetic alphabet]—Wiener, requested for important overseas assignment involving international law.

The Commanding General of the Thirteenth Air Force, General Hubert Harmon, had a firm personal policy, that is, never question a request from higher headquarters. It stood him in good stead, because he wound up, I think, as the first superintendent of the Air Force Academy with three stars. I wrote Colonel Connally and said, "I don't know what this is and I can assure you that I did not ask for it because we were moving on up." But anyway, I was yanked out, and then the Air Force had a new TO&E.

I got back to JAGO and saw Colonel Springer who was the assistant exec.. Then I found out about my assignment, Judge Advocate and Legal Advisor U.S. Military Mission to the USSR.

Colonel Springer said, "How do you like your new assignment?" I said, "Colonel Springer, do you realize you pulled me off a position vacancy?" "Oh," he said. Then when I found out about some of the people who were trying to get the job and hadn't succeeded I felt a little better.

I left Washington when the D-Day news from France was in the papers. I went down to Miami. My family had been evacuated from Trinidad, two years previously and they were living in Coral Gables. Some of the other people on the mission, who were coming through Miami, we had them out to the house. They had real Russian Vodka, not the artificial stuff you get here, but real Russian Vodka. I learned when you were tight on real Russian Vodka then you no longer minded the taste. Originally Vodka was made from potatoes. So you lose the potato taste.

I went down to the Miami Port of Aerial Embarkation and I was waiting for my visa because in order to get into Russian every American had to have a passport and a Russian visa. Well, I was there in Miami, in Coral Gables, until September. Once a month I would go over to the Miami Beach Port of Aerial Embarkation, sign a pay voucher and draw my pay. I had nothing to do. I went to the C.O. of the Port of Aerial Embarkation, told them my picture and said if you want a law member for your general court or if you want a president

for your special court, I'll be happy to help because I'm not doing anything here except breathing and drawing pay. He wasn't interested.

I would call General Weir at JAGO long distance. "Well, you know," he said, "General McNarney had said no officer on TDY in Washington." General McNarney had been named Deputy Chief of Staff at the time. I said, "Well General, at least I would be doing some work in return for my pay. I'm down here not doing anything." Finally, in September, after having heard on the radio of the cries of the population of Brussels in Belgium, welcoming the liberating allied troops, I left Miami and got to Washington on TDY. Back again in the War Plans Division, two wasted years.

However, by that time my technique had improved and I went to a friend whom I had known way back. General Hilldring was in charge of the Civil Affairs Division in the War Department. He said to me, "Would you like to go to Okinawa?" He said, "That's the next operation." I couldn't very well say I would rather go to Europe where they have white folks who wear shoes during the day time. I said, "Well, that would be wonderful."

The conversation was very amusing. I happened to be on another piece of business. He said, "Colonel, what have you been doing?" I

told him. I said, "There I was out at Guadalcanal ready to move ahead with the Air Force and yanked back to this nothing job that didn't materialize." "Well," he said, "you know the Army is a vast impersonal machine." I said, "Yes, sir, I'm fully aware of that. There are 800,000 officers in the Army of whom half are probably here in The Pentagon. And with all that quantity to choose from, when they wanted someone to go to Moscow, they went way out to Guadalcanal and snatched me out there."

He pressed a button, and in comes Chuck Kades, whom I had known back in the Public Works Administration days. He wound up, I think, as General MacArthur's personal attorney. He said "Here is a lieutenant colonel, set up a colonel's vacancy for him." So I was on my way to Okinawa.

Q. So you went to Hawaii first?

A. Joined Headquarters Tenth Army. They were staging for the Okinawa invasion. Originally the plan had been to activate Tenth Army to invade Formosa and then they learned Formosa had no beaches and had very high mountains right at the beginning, so they switched to Okinawa as the target.

Q. So how long were you in Hawaii.

A. Well I got there a few days before Christmas and we sailed on the 1st of March.

Q. So what did you do in the period that you were in Hawaii?

A. Well, we worked on the plans for military government of Okinawa. I saw a picture going downtown one Saturday night, there was a picture on the cover of both Time and Newsweek of the flag raising on Iwo Jima. I said, "I bet they'll make a monument out of that when the war is over." When this particular party was over, the people said, "This was wonderful, let's do it again next week." I said, "Well, I will accept tentatively for next week, but I may have to go to one of the other islands on that day." So my acceptance was only tentative, the other island, being not Hawaii or Maui but Okinawa.

We sailed to Saipan and we were there for ten days. We went to the military government headquarters on Saipan and picked up what they could tell us and then sailed for Okinawa. We were in the convoy that was going to make the feint on the eastern shore of the island. The main attack was on the western shore. We had the 2nd Marine Division. They quickly ran down the landing craft and started for the beach and then turned around and reembarked. In our convoy at 6 in the morning, one LST ahead of us was hit by a bomb. I was in the

shower when a squawk box yelled, "Stand by to repel air attack !" Now if you're in the shower and are fully covered by a thin layer of lather, how do you stand by to repel air attack? Fortunately nothing more happened. We then reloaded, turned around, sailed to the west shore and watched the troops and the equipment going ashore. There was absolutely no sign of enemy resistance. Some Japanese pilots hadn't got the word and landed on the field, thinking it was still in Japanese hands. But they didn't last very long. I remember seeing USS Nevada, which was a very old battleship, having been salvaged after being sunk at Pearl Harbor. I remember one of the officers in the artillery section of the Tenth Army Headquarters saying, "Once we get the artillery ashore, then we can't be pushed back." We were there to stay. Finally, at 6:00 p.m. the following night there was an attack and we put out smoke from our ships. For 36 hours there was absolutely no Japanese reaction.

Q. Sir, did you see any combat during your period off Okinawa?

A. Well, there was a long range artillery bombardment and one of my tentmates, who was a World War I artilleryman, said he experienced nothing as severe in World War I; and then in May there was an attempt by the Japanese to land planes with troops on the air field, saboteurs and people to damage installations. They were shot down and I remember the next morning walking about five minutes and

there were these ex-Sons of Heaven strewn on the ground, literally spilling their guts. They were really very dead.

Q. How long did you remain on the island?

A. I had gone ashore on the 6th of April to look it over and then we came back to the ship in the course of a Kamikaze attack. Climbing back aboard on landing mats, then my strength gave out completely. I didn't panic, but just had no strength. From reading later accounts, this was not an unusual experience. Some people pulled me up and I got back on board. In doing so they yanked my arm and injured it.

Sometime in June I went to a hospital and one of the doctors said to me, "Now, Colonel, don't fight this, you have to have deep x-rays and we don't have any of those ashore yet." I said, "Doc, I am not fighting your orders and I'm not requesting to stay, I'm not requesting to leave. Whatever you decide." He said, "Well, go back." So I went back first to Guam. I got into a Navy hospital and had my first hot shower since leaving the command ship. Then I went from there to a Army hospital on the same island. By the time I left Okinawa the island was secure. Then I was in the medical chain of evacuation, which started on Guam. They got me to Hawaii for VJ-Day and then a hospital at Camp Haan near Riverside, California, and then on the hospital train across country, then to Woodrow Wilson

General Hospital in Staunton, Virginia, then to Walter Reed. I was at Walter Reed for a while until I could get my job back in the Department of Justice. When I had that lined up, I went to Fort Meade for separation. That was about the 8th or 9th of December 1945. The next day I was an Assistant to the Solictor General. The first item that dropped on my desk was General Yamashita's application for a stay.

Q. Before you were medically evacuated were you there to implement the Military Government?

A. Yes.

Q. So you did set it up?

A. Well more or less. There were a lot of Navy people there and it was set up according to Navy standards. It was actually a disaster relief operation. We did have some interpreters but not nearly enough. Some provost courts were set up but I don't think from what I saw of them in operation, that the Okies had any idea of what was going on. Okinawa prior to the mid-19th Century was a new independent kingdom, Loochoo. If you look in the U.S. Treaties series you will find that the United States had a treaty with the Loochoo Kingdom until the Japanese annexed it. The Japanese looked down on the Okies, I

would say about the way, speaking of the intellectual climate of 1945, Chicanos were looked down on by Texans. They were above the blacks, but they weren't full fledged citizens. I think one reason the Japanese looked down on the Okies was that the Okies were far more easy going than the Japanese. There was no toilet training for the kids; just wore a shirt and let it fly. There was no suicide; Japan was full of suicide. It had been planned as a military government proposition but in reality it was a Disaster Relief Operation. It would have been worse if they had built all the airfields on the island that had been planned. The Okinawans were spared that when the A-Bomb was dropped.

Q. During your extended active duty tour during the war years, you were able to view a great deal of change due to the war itself. In the area of promotions, what were your feelings on the promotion systems at the time that you came on active duty and did it improve during the time when you were on active duty?

A. Well, as you may or may not know, there was a single promotion list for everybody after the National Defense Act of 1920. A single promotion list, except for doctors, veterinarians and chaplains. Promotion was very slow and one reason for unhappiness was that the people who had stayed in continuously after World War I were, in their view, treated less favorably than those who had left after the

armistice and then had come in and accepted commissions leaving a gap of service for which they received full credit and frequently were put in on the list ahead of those who had stayed the whole time. Also there was the big hump due to the fact that so many officers had been commissioned in one fell swoop in 1917. A great many who were commissioned before 1917 were rather too senior. For instance, the Class of 1915, which included Eisenhower, Bradley and Colonel Hobbs in Trinidad were majors in 1920, permanent majors with only five years service. And that didn't sit well. In 1935 they put in promotion by the length of service. You got promoted to captain after 10 years, to major after 17, to lieutenant colonel after 23. The contemporary comment was that this didn't remove the hump, it just grew grass on it.

In 1940 they lowered the mandatory retirement age from 64 to 60. In the late 30's a number of JAGs started screaming about getting horse-doctor promotions. In other words, they wanted to be off the single list and go up by length of service. I remember Gene Caffey saying to me in the late 30's that he was in the Class of June 1918 and that his was the first class since the Spanish War where they were only captains after 20 years' service. Then, of course, there was the special Air Corps promotion which was separate and went higher. With the mobilization and the Act of September 1940 which provided for AUS promotions, that, of course, helped a lot.

Then after Pearl Harbor it went by position vacancy. If you could find a position vacancy and you could be there for three months you were all set. So there weren't many promotion problems. The real grief came when, in the post-war readjustments, some of the JAGs still wanted a separate JAG promotion list. They were thinking back to the old days when they wanted to get off the single list. What they didn't realize was that you had a post-war Army with an officer corps, half of which didn't have college degrees, and you had a JAG Corps where presumably everybody had to have seven years of post high school education. So they had to compete among themselves instead of against the Adjutant General paper shuffler, the ordnance ammunition checker, and they killed themselves off and they had to be rescued by a new act to put them back on the regular list.

Q. These promotions during this time period were any of them competitive selections or was it automatically you were promoted?

A. If you were in a position vacancy you got promoted. If you were there for three months, and if you performed satisfactorily it would be automatic.

Q. So the other method you discussed was the length of service, was ten years for captain and 17 years for major, that too was not

competitive?

A. That wasn't competitive. That was the permanent rank and then there was the temporary rank and you find a lot of that in an article which I think I mentioned, Mex Rank Through the Ages, in the Infantry Journal for 1943.

Q. You did, sir. You also mentioned in your outline that there was a peculiar relationship with the Army staff and that in late 1944 the Office of the Judge Advocate General was rather a small outfit.

A. Yes, they were in bad shape. You had the Judge Advocate General: poor Myron Cramer was not the ablest of the succession and his daughter, I think was interned by the Japanese in the fall of the Philippines. He was a contracts man more than a military justice man. They had a few senior officers. The rest were captains and lieutenants. I remember one project on which I was working with G1, these was the preliminaries to the Nuremberg trial. One of the officers there was a lawyer who told me about a case he was working on which involved liability for the loss of a field safe along the Lido Road which contained a great deal of currency. When I said, "What has G1 to do with the liability and responsibility for loss of funds way out on the Lido Road?" He said, "Because we are not getting a satisfactory answer from your people in JAG." I don't know how far

that went.

Also—and this is documented — when the Nuremberg conspiracy trial notions first floated, I was there in Mr. Stimson's office when it was announced by Lieutenant Colonel Murray C. Bernays—not a blood relative—it was sent to JAG and JAG turned it over to a first lieutenant in War Plans who had international law training. He knocked it down on half a dozen points. If you would look at my article in the New York State Bar Journal, which is a review of The American Road to Nuremberg, you will see that it was completely wrong and that JAG in due course went along with the plan to support it. To think of the intellectual poverty, not to say, bankruptcy, turning over and relying in a matter of that importance on just one lieutenant.

Q. Did you find that the senior officers from other staffs were seeking their advice elsewhere?

A. I don't know whether that's true or not. I would doubt it. After all, if you're on the general staff you can speak with more authority than if you're just the Quartermaster's General Assistant.

Q. What I like to do now is turn to the civilian life after you got out in December 1945. I think it's a good time for you to pick up where you

were about to tell us what happened when you left Fort Meade, sir.

A. Back in civvies, I reported for duty in the Solicitor General's Office and the first matter laid on my desk was the application of General Yamashita for a stay, pending his application for a writ of certiorari to the judgment of the Supreme Court of the Philippines refusing him habeas corpus to review his conviction by military commission appointed by General MacArthur.

We hadn't got very far when there was a telephone call from the Clerk of the Supreme Court saying that the Court had decided to grant a stay and please notify the Army and then the Army notify General MacArthur not to execute the death sentence on General Yamashita.

Then we got to work, writing what was in form of a brief in oppostion to a petition for a writ of certiorari, but what in substance was a brief on the merits sustaining the jurisdiction of the military commission.

There was no difficulty about sustaining the jurisdiction of the commission. It's proper appointment. It's right to punish war crimes. But the question was whether Yamashita had committed a war crime, because the charge against him was not that he had

affirmatively ordered his troops to injure and wound and rape and kill Filipinos in Manila, but that he hadn't controlled his troops to keep them from doing so. Actually, there could be no doubt that Yamashita made no effort to control his troops. He issued the formal orders about protecting civilians but he sent no inspectors general down to see if those orders were being obeyed. The people in Manila sent no messages to General Yamashita up in the mountains saying that his orders weren't obeyed.

The reason was obvious. Number one, if General Yamashita had sent inspectors general down to check on the subordinates they would have lost face because the old man mistrusted them; and if they sent messengers from Manila, General Yamashita would lose face because his orders hadn't been obeyed. So he did nothing, and his troops raised unbelievable hell in Manila.

The Army flew to Washington three of Yamashita's defense counsel, and three people representing the prosecution. This was right after VJ Day, when President Truman had declared two 4-day weekend holidays for both Christmas and New Year's, and I worked on every one of those eight days. The argument was divided between the new Solicitor General, J. Howard McGrath, who had just resigned as Governor of Rhode Island, he had been a protege of Senator Theodore Francis Green—the so-called Assistant Solicitor General, whose name

now escapes me because he was a complete incompetent.

I had to listen to the argument and both arguments were pretty bad, because nobody knew anything about the case or about military law. The Assistant Solicitor General, in a cursory reading of Winthrop, came across a statement to the effect that, "the existence of the military commission has frequently been recognized by the Supreme Court." But he misquoted it, and said that, "The jurisdiction of the military commission has frequently been sustained by the Supreme Court." Whereupon Justice Black, who was an old line Southern populist and still had Civil War memories, said, "Cite one case that sustains the jurisdiction of the military commission"—which of course this chap was unable to do. He said, "Well I can't cite one at the moment, but we'll submit a brief."

After the argument we assembled in his office to consider the drafting of such a brief and who would be working on it. I had worked on the other brief. I said to the Assistant SG, "There isn't any such case." "Oh," he said, "but we promised the court a brief we've got to file something."

I, just out of the Army, said, "All right sir. You fucked it up, now you unfuck it. So if you say in the brief that there are cases sustaining the jurisdiction of the military commission, please take my

name off, because there aren't any such cases." Well, things were calmed down and smoothed over and something was filed in which I could concur. Then the decision sustained the jurisdiction of the commission.

The Court followed the Quirin case [317 U.S. 1] and the point principally raised against MacArthur was that he had abandoned the rules of evidence. The reason why he had abandoned the rules of evidence was because in the Quirin case everything hinged on the hearsay statements of co-conspirators and those couldn't be used against other conspirators. In the Quirin case the Court overlooked the preamble to the 1920 Articles of War, the substance of which was that these articles shall at all times and in all places govern the armies of the United States. That was completely overlooked by the Court in the Quirin case and necessarily by the court in the Yamashita case. Then there were violent dissents by Murphy, who had no brains at all, and by Rutledge, who had a soft heart and a brain equally soft; and if you would look at my article in 113 Military Law Review you will find that D. Clayton James, the definitive biographer of MacArthur, attacks the decision but never once sets forth the holdings of the majority of the Court--which I may add is a consistent and persistent academic fault these days.

Then the next case was Homma. Just following the

memorandum, the court affirmed on the authority of Yamashita, or rather, in the Homma case they denied the petition for certiorari and denied the petition for habeas corpus. Of course, there is no doubt that both Yamashita and Homma were guilty and Colonel Wally Solf told me later that when he read the record of the military commission in the Yamashita case, that Yamashita had actually authorized the military police to go forward and kill anybody in Manila that they thought stood in the way. Neither Yamashita nor Homma were innocent. The difficutly was that afterwards, the divisions in the Court, which were pretty well papered over in both Quirin and Yamashita began to resurface, and then there came a case involving two alleged Filipinos who had been convicted by U.S. Army Courts-Martial on Davao where there had always been a very large Japanese colony.

Q. Sir, while you were in the Solicitor General's office you worked on some more military and treason cases. Were there any particular cases that you would like to discuss, such as the Chandler case?

A. The Chandler case I argued in the First Circuit and then after I left the SG's office, certiorari was denied. He was the Paul Revere who was on Nazi radio in Germany. His treasonable action was clear.

Then there was the Haupt case. Haupt was the father of one of the Quirin saboteurs who had been executed, and the question was

whether by sheltering his son, who was over on the saboteur mission with Quirin et al., he could be excused from committing treason because he was helping his son. The answer of course was since the father knew of the son's mission, he assisted the son and sheltered him, the father was plainly guilty of treason.

Then there was a denaturalization case, Knauer v. U.S.. Knauer was one of the leaders of the German-American Bund in Wisconsin who said that American citizenship was a good thing to hide behind. This was the first denaturalization sustained by the Supreme Court, because in the earlier cases the court had struck down denaturalization decrees. If you would look at the Knauer opinion you will find a concurrence by Justice Black. As you read it, you will ask yourself, "What does this mean?" Well, Justice Frankfurter, after it had been decided, I think it was during summer vacation, I think it was in a lull, told me about it. Originally Black had been with the dissent, voting to strike down the Knauer denaturalization. Justice Frankfurter started a dissent which began, "The court now holds American citizenship to be so precious that it refuses to take it from one who has admittedly obtained it by fraud." When that dissent circulated, Justice Black switched over. Justice Douglas wrote the opinion sustaining the denaturalization. The concurrence by Black is simply a note of sympathy to Justice Rutledge explaining why he couldn't stay with him.

Q. What did the Wade v. Hunter case involve?

A. Wade v. Hunter - Wade was a soldier in the 76th Division that had reached Germany in the Spring of 1945. He was charged with rape. There was some doubt in the minds of the court as to whether the identification was clear. So they adjourned and directed the TJA to find certain identified witnesses, then they would resume. Meanwhile the war moved on and the 76th Division moved on with it. The case was sent by the Commanding General 76th Division, to the Commanding General, Third Army, of which the 76th was a part, and they were moving into Czechoslovakia when they nearly got to Prague. Third Army decided that they couldn't resume the case; they were hundreds of miles away. So they sent it back to Headquarters Fifteenth Army, which was the occupational Army in Germany, mopping up behind the front lines. Whereupon, Wade was retried by a GCM appointed by the Commanding General Fifteenth Army, which convened in the neighborhood of the town where the alleged offense was committed. This time Wade was convicted. The board of review in the European Theater Operations Branch Office held that this was double jeopardy: Wade had been tried twice. The Assistant JAG in charge of the Branch Office disagreed and held that there was no double jeopardy in view of the circumstances. It was like a mistrial due to disagreement or a mistrial because there was an earthquake or

a great civic disaster or what not.

Under Article of War 50 1/2 then in force, this disagreement between the Assistant JAG of the Branch Office and one of his boards of review had to be resolved by the theater commander who, of course, sided with the Assistant JAG.

When Wade was sent back to Leavenworth he sought habeas corpus. Habeas corpus was granted and the case came into the Solicitor General's Office because it is the Solicitor General who has to authorize all appeals. I asked one of the lawyers in the criminal division to come up and take a look at it and she did. She said, "It looks like they're trying to get a second bite of the cherry." Then it occurred to me if this is the reaction of a first rate criminal lawyer, it is bound to be the reaction of the Court of Appeals when it is appealed. I went over to The Pentagon and got two maps. One was to show the situation in Europe, one point showing on the map first where the offense had been committed and where the first trial was held. Second, where the 76th Division was when it sent the case to Third Army and finally the situation where Third Army was when hostilities ceased. That map was superimposed on a map of equal scale of the state of Kansas. I superimposed the two maps so that the scale of the distances in Germany and Czechoslovakia could be seen by comparison with a map of Kansas on the same scale, so that they

could see the distances involved. I attached that to a motion for new trial filed in the district court. The motion for new trial was denied but that got the map into the record. On that basis we authorized the appeal and I was sent up to, I think Okie City, to argue the appeal in the 10th Circuit because the 10th Circuit is a peripatetic court that moves around. I had that map in the court room blown up on a big easel and pretty soon the judges were asking questions based on the map. Later counsel for the prisoner was using the map so the map became part of the case. Although one of the judges said, "The doing of justice is the most important thing in the world", I was able to say "Well now let's suppose this case, Your Honor, a trial begins, a jury is empaneled, prosecution makes its opening statement, calls several witnesses, and there is an adjournment that evening. Its very plain that, in the ordinary situation, jeopardy has attached, but suppose that night there is a fearful cyclone and the entire community, including the court house, is flattened and then when the community recovers and normal life resumes, the case is started from the beginning. It can't start just as it did because a sufficient number of jurors have been killed in the cyclone so they can't reconstitute the same jury. Is that going to be called double jeopardy because the doing of justice is the most important thing in the world." Well, the court didn't buy it. It reversed the granting of the writ, the case went on cert and my successor in the Solicitor General's Office used the same map and the Supreme Court affirmed the Court of Appeals.

That was a case where the record was inadequate as it stood to present to the civil courts the real situation in Europe in the closing days of the campaign.

Q. Sir, what was your involvement in the Henry v. Hodges case.

A. Well Henry v. Hodges was a case tried in the European Theater of Operations where an officer who had been a custodian of some captured silver, embezzled some of it for himself. There was no lawyer, the law member was completely absent following appointment. The accused was sprung on habeas corpus and it was taken on appeal to the Second Circuit. Normally nobody in the Department of Justice got into a court room in the Southern District of New York, because there had grown up a tradition of autonomy for the U.S. Attorney there. The origin was that he wouldn't be interfered with by New York's city politicos in making appointments of bright young lawyers to staff his office. But it had gone beyond that. In the Hackfeld case, which went back to my pre-war days, the Hawaiian cases, the U.S. Attorney in the Southern District of New York wouldn't even file a complaint. It took quite a bit of doing to get that filed and in the end we got a directed verdict for the Government.

In this case, what happened was that on the same law officer

problem there had been an adverse decision either in another circuit or in another district court. The Assistant U.S. Attorney handling the case got his wind up and telephoned and said, "You better come up here and handle this." So I went up to argue the case. It went along without any difficulty, but one thing I was worried about was there was a piece in the record where there was conversation between Henry, who was the prisoner, and either his counsel or someone else. The counsel said, "Well that's just too bad; take your TS slip to the chaplain." I was very much worried, lest Judge Learned Hand, who was presiding, had asked me to explain what TS was, in open court. They sustained the thing and cert was denied and then there was another case at about the same time after I left the Solicitor General's Office in 336 U.S. where they held that the absence of the law officer was not jurisdictional.

Q. And you also were involved in another military case concerning Hirshberg.

A. Hirshberg was a navy chief who had been captured by the Japanese in the surrender. After he was repatriated, prisoners in the same camp complained that he had sided with the Japanese and had maltreated a number of his fellow prisoners. Meanwhile, before the trial, his enlistment expired. He did the usual sailorly thing and got drunk that night and the next morning re-upped. The question was, did his entry

into a new enlistment deprive the service of jurisdiction to try and convict him for offenses committed in his prior enlistment. There was a lot of talk in the case about an honorable discharge, that it was the judgment rendered on the soldier's entire service, and so forth and so on. I think the Army MCM 1928 said jurisdiction continues, but the Navy very stubbornly refused to make a similar change and they continued that if you finish one enlistment, that closes the book on everything that happened in that enlistment.

The case was argued twice in the 2nd Circuit, first with Judge Jerome Frank participating. He wrote a dissenting opinion. It was completely wrong but the court granted a rehearing. I think he was on the court again for the rehearing and wrote a different dissent. In any rate, the argument I made to the court was that if a person commits an offense in Canada and comes to the United States and then returns to Canada, he is still liable for any offenses earlier committed in Canada, subject of course to the statute of limitations. In the Hirshberg case, there was no question to the statute of limitations, he was in military service, he was out of it one day, he reenlisted. He is like the man in Canada who goes to New York and then goes back to Canada.

When you talked about these old cases and the effect of the honorable discharge, that made sense in the days when somebody

enlisted to serve in one regiment or on one ship during his entire military career, so that whoever signed the honorable discharge knew all about this person's record from beginning to end. But here the honorable discharge was signed by someone at the Brooklyn Navy Yard who could not have possibly have known what Hirshberg did or did not do in the Philippines during the war when he was a prisoner. Although the 2nd Circuit bought it, the Supreme Court, however would not. I got a call from one of the editorial writers from the Washington Post and explained the case to him and he wrote an editorial condemning the Supreme Court decision as unsound and nonsense. Then I sent a copy of that editorial to Judge Hand, whom I had met rather casually. Then he replied and if you are interested I have a framed copy of his letter on my wall.

Q. Sir why don't you read us the letter that was in the envelope with the 3 cent stamp.

A. All right. March 4, 1949. The stationery is Judge Learned Hand's Chambers, United States Court House, New York and addressed to me.

"Dear Colonel,

"Thanks for yours of the 2d. My head is bloody, but unbowed. I

will confess that it is something of a "dasher," even after forty years of being beaten about, not to draw a single dissent; but it is all in the day's work, and, thank God, I have long since got over the notion that in our job there is an absolute right or wrong which the opinion of any court—even an unanimous court—proclaims.

"As I said to you on the street the other day—or at least tried to say—it is with regret that I learned that you have resigned. This military law is ticklish business for a civilian—as the sad event I have just mentioned is evidence—and to have it presented with fairness, learning and acumen as you presented it, is an experience not likely to be repeated. I congratulate you upon the past, and extend my best wishes for your success in the future.

"Sincerely yours,

"Learned Hand."

Q. You also had some Supreme Court arguments that involved the military during this time period and I would like to focus on a few of them. First of all, you argued a case called Patterson v. Lamb involving discharge from the draft. What was that about and what was your involvement sir?

A. You may recall from your reading of military history that the Armistice was, when it came, quite unexpected and that it had been preceded by this horrible influenza epidemic that killed people, in the tens or possibly even hundreds of thousands. It was a very virulent form of the disease. People just dropped off like flies, including recruits in the training camps. While it was at its height, draft calls were suspended. Finally, when the epidemic died down and it was safe to send people to the camps, on one particular day there was a huge number who were ordered to report. In those days military status attached from the date that you were required to report. Lamb was an Iowa lawyer, somewhat, over-age, in his low 30s. He reported and the local Chamber of Commerce, some civic organization, gave him a fine dinner and while they were enjoying this standard dinner of fried chicken, peas and sloppy mashed potatoes, news came that the Armistice had been signed and that all draft calls were cancelled. "You can go home now, and you will hear from us." About four days later the War Department put out a regulation on what to do with these people. They were to draw pay for the four days between the date they were required to report and the date when they were told they were longer subject to call. Then they would be issued a discharge from draft. Lamb took his discharge from draft.

Sometime in the intervening years the Iowa legislature granted a tax exemption to all honorably discharged soldiers or sailors in the

war with Germany. Lamb applied for that exemption and it was granted to him year after year. Then things got hard in Iowa. The tax authorities checked up and discovered that Lamb was not an honorably discharged soldier in the war with Germany. All he had was a discharge from draft. So they cancelled the exemption.

Whereupon Lamb brought suit in the Iowa court saying that his service had been honorable. He had done everything that was required and he got 4 days' pay for doing his civic duty and he was entitled to the tax exemption. The Supreme Court of Iowa said, "Very sorry, Mr. Lamb, but the paper you have is not labeled an honorable discharge. It is a discharge from draft." Whereupon Lamb, by this time a more or less senior lawyer, brought mandamus against the Secretary of War in the District of Columbia, insisting that he be given a honorable discharge. He was turned down by the District Court but the Court of Appeals reversed, saying that there was nothing in the regulations providing for discharge from draft when Lamb was given a discharge from draft. This was arbitrary and he is entitled to an honorable discharge. Well, The Adjutant General's Office was besides itself. There were still about 50,000 survivors who had been called on the 11th of November 1918. This would require all kinds of paper work and it would also dig into local treasuries which provided veterans' benefits. It would raise unshirted hell. So we petitioned for cert and it was granted.

You will find the petition for cert in one of the appendices to Effective Appellate Advocacy, the stress, of course, being on the number of instances that would be affected by the ruling. I argued the case and got a reversal within ten days. On the arguments, somebody asked counsel for Lamb what branch of the service he was in. Counsel hedged and said, "Well he wasn't really in any branch of the service. He was like a general officer. They're not in any branch of the service." When it came my turn I said, "Well, I'll answer that question. He wasn't an infantryman because he never reached the camp. He wasn't a calvaryman because he hadn't been sworn in by the Army. He wasn't an artilleryman because he never got any military equipment. But, he had lunch with his draft board, so I guess he was a trencherman." Anyway they reversed in less than 2 weeks. That's Patterson v. Lamb [329 U.S. 539].

Q. Another case you were involved in was the Bayer case.

A. Bayer was a wealthy business man in New York. He got chummy with some Army officers and they tried to keep his son and one of his nephews out of combat. He bribed various officers and transfers were made. Finally, they got transferred to the aviation engineers who were supposed to go out to China-Burma-India theater with these airborne drops, Merrill's Marauders, and so forth. He paid

considerable sums of cash to the Air Force officer who was supposed to transfer them out of this unit alerted for overseas service and put them back at Mitchell Field or some place where they wouldn't be shot at. The Air Force officer was convicted by court-martial and while he was in arrest awaiting review of the case, he and the Bayers were indicted for conspiracy in one of the New York districts: conspiracy to deprive the United States of the faithful services of one of its officers. It could be shown that there was no double jeopardy because the two offenses were different. There was a great deal of fuss about the Air Force officer being put in a nut ward and being fed only with a spoon because he might injure himself with a knife and fork and so forth. I brought a petition, got review granted and got a reversal. You have the citation there in the outline. It deals with the question of double jeopardy. The Court found there wasn't any double jeopardy (U.S. v. Bayer, 331 U.S. 145).

Q. You were also involved with the Standard Oil Company case?

A. Yes, some truck belonging to the Standard Oil Company injured a soldier and the soldier had to be hospitalized, so the United States sued the Standard Oil Company for the loss of the soldier's services plus medical expenses. It was the old common law action of trespass per quod servitium amisit by which he lost the services of his servant. That was too much for the Court to swallow and then some

years later Congress overruled the decision so that now if a soldier is injured by tortfeasor the United States can collect. [See 42 U.S.C. §§ 2651-2653.]

Q. In 1948 you left the Solicitor General's Office in October and you entered private practice. During the time period, sir, that you were in the Solicitor General's Office from December of 45 until October 48, you were still in the active reserves?

A. Oh yes.

Q. You're going to meetings at that point?

A. I think I was going to meetings. Yes, yes, I was the CO of the Legal Eagle Squadron of the reserve Judge Advocates in the Washington area. I got a lot of people from the Pentagon to talk to the group, one of them discussed what a commander expects from his judge advocate, some occupational problems, occupational courts, controls of occupational currency. It was a good program.

Q. On 15 October 1948 you started private practice again and where was this sir?

A. In Washington, D.C.

Q. Was this your own office?

A. No, this was a partnership that didn't work out.

Q. Sir, why did you decide to leave the Solicitor General's Office and make this transition?

A. Well two reasons. The first place I needed more money. At that time the most paid anybody was I think $10,400 or maybe $10,800 and the Solicitor General himself got only $10,000. Then also I had been in Government service, either civilian or military, for 15 years and it was time to move on. I had noticed that the people who stayed too long in the Government, insteading of improving, started to go down hill. I had to get out. I was made an offer that sounded awfully good and I left. Also this was October 1948 and everybody thought that Harry Truman would be defeated and I frankly expected, having been a political appointment, to have got the heave-ho right after Inauguration Day. Two of my classmates with very good connection with the Republican hierarchy in New York City, assured me they would talk to whoever was the new Solicitor General to see that he didn't fire me out on my butt, but that was fairly chancy. It was time to get out. It was time to move on. Then, as I say, the partnership didn't work out and on the 1st of August 1950, I started for myself and continued solo practice until the end of June 1973.

Q. Sir before we continue with what you did in your private practice after you left the Solicitor General's office we want to go back and cover a couple of items concerning the Office of The Judge Advocate General assignment. Particularly during the war and leading up to after the war. I would like to get your views on the organization of the office during that time period.

A. Well I can't lay out the organization chart, you will have to get that in the files. But JAGD was a very small Corps. The Army List and directory for April of 1940, lists about 103 officers commissioned and detailed in that department. The only way they could get more people was with the passage of the Act of August 1940 authorizing the President to order the NGUS to federal service and calling reserve officers and reserves to duty. They proceeded to do that. By the summer of 1941 there was a big thick book in a grey paper binding which listed all of the non-regulars on duty all over the world. I don't know if you have a copy at the JAG library, but that shows how many people there were.

Q. Sir, as far as the GCM Jurisdictions throughout the Army, what was the set up as far as the assignment of a JAG officer to it.

A. Well, I think I counted up at that time there were 23 GCM jurisdictions before they started organizing new divisions. By and large these senior officers would be detailed as Staff JA of GCM jurisdictions. Some were colonels, most of them were lieutenant colonels and they had a few majors. Maybe the Hawaiian Division had a captain as Staff JA. But it was a question of who was available, how they would travel, money, when and whose foreign service obligations expired and who was next on the list for foreign service.

Q. Sir, these Staff Judge Advocates of the division of the GCM level, were they the sole attorney in the division?

A. It would depend I think on the size of the unit.

Q. What was the average size? The JA office would be just one attorney?

A. One or two. I don't think it had more than two. There was the TO&E for the Infantry Division and a JAG section of six officers, lieutenant colonel, a major, and 4 captains. I think this was designed by Colonel Allen Burdett, who was a very senior JAG officer. The idea was that the lieutenant colonel was the Division JA, the major would be used as law member in the general courts, the first captain would be an assistant in the office and the three other captains would be assigned

to the headquarters of the two infantry and one artillery brigade of the division. It was his job to give a look-see of all court-martial charges so as to head off those which were plainly without merit. If they were meritorious but poorly drafted to redraft them. That was the purpose and I know I discussed that once with Colonel Burdett.

Q. Sir, these three captains that were assigned to each of the Brigades, did they work where the other lawyers worked or did they work at the Brigade headquarters.

A. They worked where the Brigade headquarters were. But I don't think these 6 JA's per Infantry Division, I don't think there was a single division or even a single GCM headquarters in the Army that had as many as six officers.

Q. Were there one or two officers normally?

A. One or two.

Q. Sir, you don't think there was any at the brigade level?

A. The brigades were awfully scattered. The only thing that I can suggest is get hold of the April or October 1940 Army List and Directories and see where each of the 100 odd JAG officers were

stationed. That's the only way you can really get that information directly and accurately.

Q. Sir, is there anything else you would like to add concerning the organization or personnel during this time period?

A. No, it was a small closely knit group.

Q. Anything else regarding the relationship of the lawyers that worked in the JAG Department in relation to, that shop, as related to the other staff elements?

A. Well, it was really a matter of personal equations. One of the JA's, my friend Gene Caffey, he was JA at the Infantry School at Ft. Benning. At that time when he was stationed there, the Infantry School did not have GCM jurisdiction. He was there really as an adviser. GCM jurisdiction was at Fourth Corps Area, HQ, Ft. McPherson, Atlanta. He was there really as an adviser to the Commanding General of the Infantry School and also to give legal aid to young officers who came along, such as young lieutenants who passed through Panama and had violated the customs laws, trying to keep them from getting their rear ends in a sling. But it was a paternalistic business, just helping out wherever help was needed.

Q. Sir, could you give us some insight on your feelings as far as the way the JAG Corp geared up for WWII and whether or not the system they put in place, or was in place at the start of the war, was effective, or do you think it could have been modified?

A. It could have been greatly improved in two respects. In the first place, there was no one there who had the vision to see how many lawyers would be needed. But, most of all, they knew about the World War I court-martial controversy in a vague sort of way, and they knew about the 1920 amendments, the revision of the Articles of War in the National Defense Act, and they knew about this terribly verbose 1921 Court-Martial Manual. They thought this system was perfectly foolproof. And, in peacetime, it was, because they were dealing with a very small professional group. The strength of the Army between the end of World War I demobilization and the beginning of the pre-World War II mobilization, fell to 120,000 officers and men. Now, in a outfit that small, there isn't much that can go wrong, and when something goes wrong, the system is adequate to deal with it. I don't think they really grasped the big lesson of World War I, which, in my view, is that when you are expanding your small, professional, highly trained cadre into a multi-million man and woman force, you have got to shift gears and go to a different system.

No. 1, they should never have continued the disregard of the law member. The rule laid down in the 1920 Articles was, every GCM has to have a law member. But soon it was ruled that it was sufficient if the law member was named in the order appointing the court, he didn't have to be present for the trial. Then it was ruled that the law member doesn't have to be a member of the JAG, he has to be specially qualified. Well, anybody who had 1-2 years of law school, who was in the field artillery or the infantry, would be deemed sufficient. Now, mind you, he didn't have to be there. And, trial counsel and defense counsel could be line officers. Now, I can remember in Trinidad, having a GCM case tried and defended by two Air Corps flying second lieutenants, not Kiwis, but pilots. And, they did it adequately.

But once the mobilization started, the JAG should have said "We'll get lawyers." We have the cream of the American Bar to pick from, and we will see that there are 3 sitting lawyers with every GCM, and we will expand the 1928 Manual so that all the punitive offenses are mentioned. They weren't in the 1928 Manual. That everything is spelled out more to assist the untrained masses who are going to constitute the mobilized, large scale Army. Because, the system set up in 1920 was fine, but they didn't follow it.

Then the other thing they should have done is to have made it very plain to all field commands, that if you have approved a sentence suspending the dishonorable discharge, you can't automatically, 10 days later, execute the dishonorable discharge, in other words, withdraw the safeguard.

Then, I think it would have been very helpful if they had insisted that when someone writes an opinion for a board of review, it should not be simply a recital of the testimony in the order in which it was given. Sergeant so-and-so testified that, record citation, that, that, that, that, that. Write a narrative story and lay it out that way, and then you will have a review that makes sense to the layman who is going to act on the record. I don't know to what extent that's required today, but I always thought it was the greatest shortcoming of these boards of review that would simply recite evidence instead of telling a story that makes sense.

I early adopted that practice. Every commanding general I worked for liked it and said these were the clearest reviews he'd every read. Because I told him the story, "At such and such a time, the accused, Private so-and-so was posted on post number so-and-so by Sergeant so-and-so, and at 11:39 pm he was found asleep by Lieutenant so-and-so, the OD." Any half-literate stenographer can recite the evidence as it's produced in the record, but you've got to

give a narrative account just as you'd expect to find in an appellate opinion.

Q. Sir, is there anything else you want to add on the impact of WWII on the JAG?

A. Well, they gave up military government to the Corps of Military Police.

Q. Are you talking about the occupational government?

A. Yes. After World War II, they gave up the codification of the military law to the Army Controller's Office.

Q. You felt these were both mistakes?

A. Oh, yes.

Q. I guess we can go on to your private practice at this point. It began on 15 Oct 1948 after you left the Solicitor General's Office. You mentioned that you originally went into a partnership, and that didn't last very long?

A. That didn't work out. Beginning 1 Aug 1950, I was practicing by myself.

Q. What kind of practice did you have, sir?

A. Well, it was mostly appellate. At first, anything that came along that had a fee connected with it, and if it was respectable. I wouldn't take loyalty cases, I wouldn't take draft-dodging cases, I wouldn't take drug cases, and I wouldn't take commercial vice. But, more and more I found that I was not really qualified to carry on a general practice, so it had to be either a military practice or a litigating practice, with emphasis on appellate work. The best way to build that up would be to write a book. The start of it was a series of lectures at the Washington College of Law, which is now the Law School of American University, then the first version of the book, Effective Appellate Advocacy.

Q. When was that book published?

A. That was published in May, 1950. From time to time, cases came along. I think my first big case was Swift & Co., an ICC case. I got that because I was on the same side with Swift & Co., when I was still in the Solicitor General's Office in an ICC matter. On the basis of that, I was retained by Swift & Co. The biggest case so far as fee was

concerned, was a land dispute in which I was retained by a lawyer whom I had defeated in the Supreme Court while in the Solicitor General's Office, Krug against Southern Pacific RR [329 U.S. 591]. He had a railroad land grant case pending in the Interior Dept. and retained me.

Q. You also took appellate cases involving courts-martial at that point.

A. Yes, I had some early cases in the Court of Military Appeals. I got Grady Phillips off, in 3 U.S.C.M.A.

Q. Why don't you tell us a little bit about that case, sir.

A. Well, Grady Phillips was a doctor, I think he was a gynecologist, at Ft. Belvoir. He was working late, and got hungry. Instead of going into the icebox at home, he went down the Shirley Highway, looking for a place to find something to eat. He found nothing until he got into the District, White Tower Hamburgers, at 17th St. and L. On his way back, on one of the highway bridges over the Potomac, this was a very cold night, he sees a shivering gyrene. His warm heart overtakes him and he says, "Can I give you a ride?" The gyrene says, "I want to go to Quantico." Phillips says, "I'm only going to Belvoir, will that help?" "Oh," he says, "that will be fine." So the guy jumps in and, as they approach Belvoir, the gyrene pulls out a knife and holds it to my

hero's throat, and says, "You're going to take me all the way to Quantico." Phillips tries to escape, and goes up a side road where there's a light on somewhere. When the cops catch up to him, the gyrene says that Phillips assaulted him and committed sodomy per os while driving the car. He is charged with this unnatural offense before a GCM convened at Ft. Belvoir.

He had a defense counsel who let him talk instead of saying, "Now look, I'm going to ask you questions. We're going over them in about this order. I want you to answer the question and then stop, and I will ask you the next question." Instead of which he let Phillips go and ramble on, and ramble on, and ramble on. There was a charge that left something to be desired. Mind you, this was right at the beginning of the Uniform Code when instructions were a novelty. Poor Phillips is convicted and without any notice, he is picked up at home about 7 a.m. and taken to the DB in Pennsylvania. It was a supply depot.

Q. New Cumberland?

A. New Cumberland, yes. He was taken to New Cumberland. Then I got into the case. I don't know whether I got a reversal in the Board of Review, but I certainly got a reversal in the Court of Military Appeals. They insisted on retrying him and I moved for a change of

venue from Ft. Belvoir where everybody knew all about the case and talked about it, and everybody and his brother and wife and mother had an opinion about it, to Second Army. We tried him again in the Second Army, and got him off. Then they went after him with an elimination proceeding and he came to me and said "What do I do now?" I said, "Take your money and get out. You have no more military career."

Q. Sir, in your appeal on the Phillips case, did you cite ineffective assistance of counsel when he'd allowed him to testify?

A. No. I cited the incorrect instructions.

Q. When he testified on direct in the court-martial that you defended him in, you questioned him very narrowly?

A. Oh, definitely. And, I was able to show that the marine had received either a dishonorable discharge or a discharge without honor from the Marines. I tried to show that there were places where Phillips could have gone off the road. Then the best thing was, when I put his wife on the stand as a witness. She was a doctor's daughter. Her brother was a doctor. After appologizing for raising the question, showing how long they'd been married, and were your sexual relations normal? Good for her, she said, "They were normal and very

satisfactory." Then, my summation was that this could happen to you. "That's what is meant when the Good Book says, Judge not lest ye be judged. This could happen to you. I got him off.

Q. You also had the Krivoski case.

A. Yes. Krivoski is a case about which I've never been completely happy. In the Occupation Army in Germany, they had this occupation currency. And, in order to minimize fraud, there would be periodic instances in which the blue currency would be invalid and you'd have to exchange them on a particular day, and you got red currency or something like that. They had, at one point, a great deal of the old currency handed in but it wasn't yet invalid. This other officer - Krivoski was the finance officer - and this other chap went to him and said, "Look, you have access to the vault. You can go in there and take out a batch of occupation currency and turn it in later on and get the profit on it." Krivoski, of course, fell for it. Well, they caught both people. They tried the first officer first, and he was convicted. Krivoski was a witness against him. Then, when it came time to try Krivoski, he was given the same defense counsel who had defended the co-conspirator. He didn't defend Krivoski properly, and I insisted there was a conflict of interest. He couldn't have defended him properly because his real loyalty was to the co-conspirator. Well, it got nowhere with the court-martial, it got nowhere with the Board of

Review, it got nowhere with the Court of Claims, and cert was denied. I've always felt that Krivoski was done an injustice.

Q. Also you were involved with the Grahl case?

A. Yes. General Charlie Grahl, who was a great old boy, was a long time National Guardsman, and he was Adjutant General of Iowa during all of World War II. After a new governor came along and wanted a new Adjutant General, Charlie Grahl was placed on duty with HQ, Selective Service. Then came the time when retirement was in the offing. The question was, in what grade could he retire. Did he need any kind of new commission in which to pull his service together? Army JAG and Army National Guard Bureau and Selective Service advised that he could be appointed a Colonel, AUS. He was then past the age, the highest age for appointment as a Colonel in AUS. As soon as he was retired, he applied to the General Acccounting Office for BG's pay on the basis of the Court of Claims case, which was that anybody who had served satisfactorily for six months or more as a state adjutant general was entitled to retired pay at a higher grade. That request resulted in a turn down by the Controller General, and a statement that the appointment was invalid because it was illegal, and please refund the amount of money you've received on that retirement since then. Well, I took that to the Court of Claims and won. I suggest that it would be worth your while to look it up either the Court of Claims or F.2d.

Q. Colonel Wiener, while you were in private practice again in the DC area, you were also involved in numerous arguments before the Supreme Court. We'd like to touch upon a few of these. First of all, in 364 U.S. 206, the Elkins case, you argued that before the Supreme Court. Why don't you tell us about that case and what your involvement was.

A. There had been a decision to the effect that if state authorities handed evidence to the feds on a silver platter, the feds could use the evidence, no matter how it was obtained. That was questioned in some other courts. Finally, there was the Elkins case, arising in Portland, Oregon, and there was a similar case in which cert had been granted on that issue. How far could the federal authorities use evidence that had been illegally seized by state authorities, but without any collusion or connection or suggestion from the federal authorities. Cert was granted. The silver platter doctrine was rejected and the court held that if the evidence collected is inadmissible if obtained through federal efforts, it is inadmissible in any federal prosecution, no matter how it is obtained and by whom, it simply cannot be used by federal authorities. That was the end of the silver platter doctrine.

It was a very arduous and heated argument because Justice Frankfurter was dead against me because the silver platter doctrine was mentioned in one of his opinions, and he didn't want to bend the silver platter. He was really down my throat. The Oregon lawyer who retained me on the case and who built a magnificent record - he always protected his record at every point - he had originally wanted to share the argument with me. I pointed out the provision in the rules that divided arguments are not favored by the court. And, with some twisting of arms, I finally prevailed on him not to insist on sharing the argument. Then, after the actual argument was over and The Little Judge had been down my throat very much of it, my forwarding counsel said to me, "I'm awful glad you were up there. I just couldn't stand up to that." That was "silver platter."

Q. Justice Frankfurter wrote a dissenting opinion?

A. He wrote a dissent - a very vigorous dissent.

Q. Also, you were involved at 407 U.S. 163, with Moose Lodge v. Irvis.

A. Yes. Irvis was the majority leader in the Pennsylvania House of Representatives. One of his buddies wanted to take him into the Moose Lodge, in which the political buddy was a member, to buy him a drink. At the door, he was very politely advised that under the

Moose Lodge rules, blacks were not eligible either for membership or as guests. A three judge court sustained him. There was a Pennsylvania lawyer, Bernie Segal. Bernie Segal had been president of the American Bar Association. This was the time when the Kennedy administration was going all out for civil rights. Bernie Segal backed out of the case and said he couldn't handle it in view of his promise to President Kennedy to be on the civil rights side. I listened to the people when they came in with the case, saw what was outlined, and said, "I'd be happy to take it for you and try to get a reversal." We did, although there was a dissent.

The ultimate outcome was very strange. The Moose Lodge case didn't get a good press. When the matter went back to the Pennsylvania court, the Pennsylvania court didn't like the result and they said that the Moose Lodge would have to lose its liquor license. They tried to get up there again on appeal from the Pennsylvania Supreme Court. That was denied, and then later, trying to get up a club case from Maine; that was rejected. So, the Moose Lodge victory was short lived. One of the difficulties was that, before the passage of the 1964 Civil Rights Act, the effort was to squeeze state action out of everything anybody did. If you had a license from the state, it was supposed to be state action. I was able to argue that, "Good Lord, in order for me to be heard in this Court, I have to have 3 licenses. I must have a license from this Court to practice here; as a prerequisite, a license from the state court of last resort to practice

there. And, a license from the District of Columbia to be able to pursue the practice of law within the District. Surely that doesn't make my remarks here state action." So, I won the case, but it got a bad press, so the Court backed away from it.

I also had the Greenberg case. That's a case on how much possible incrimination you have to show in order to sustain your claimed privilege against self-incrimination. Well, there was the Hoffman case, in I think 341 U.S. [479], in which the Supreme Court held that all you have to do is show some danger of incrimination. You don't have actually to incriminate yourself in order to make out the danger. When I came along with my cert in the Greenberg case, who had refused to answer questions like, "What is your business? Are you in the numbers business now? Do you know any numbers writers, and who?" The court granted cert, vacated the judgment, and remanded it for reconsideration in the light of the recent Hoffman case. Well, the Third Circuit had the bit in its teeth, and reaffirmed the Greenberg conviction. Sought cert again. It was granted the second time. Then I argued it and the Solicitor General decided that, by way of punishment for this bird who'd gone off to Philadephia to bring all these cases and start his numbers investigation, he would make him defend the result in the Supreme Court. You'll see the brief and arguments in Briefing and Arguing Federal Appeals [ch. XIV]. Really, the determining point was, Justice Jackson, who'd been Attorney General, Solicitor General, and General Counsel of the

Bureau of Internal Revenue said, "He is hooked, once they get him on the tax business," which is the only realistic approach. They reversed per curiam, 3 to 5 days later. Then, as I point out later on, the case is completely messed up as it is stated in McNaughton's edition of Volume 8 of Wigmore.

Q. You were also appointed by the court in the Gibbs v. Burke case. How did you get appointed, and what was your involvement with this case?

A. Gibbs was a man who was forced to trial without counsel. The case was open and shut on the facts, but he had no counsel. He had no legal training except such as he might have acquired by osmosis from having been in court as a defendant on numerous occasions. They granted cert without sending for the record. On the facts, of course, it was open and shut. But, he had no lawyer at the trial. This was shortly after I had left the Solicitor General's Office and gone into private practice, and at some cocktail party following a DC Bar Assoc. dinner, I ran into the Chief Justice, Chief Justice Vinson. He said, "Well, we haven't seen much of you recently." I told him I wasn't boycotting the Court, and within a week I was appointed counsel to defend this guy. That used to happen fairly frequently as people left the Government, they would be appointed to represent forma pauperis cases. I don't know what the practice is nowadays.

Q. Sir, is there another case or anything else in the same area you'd like to discuss?

A. I don't think so.

Q. We are leading up to one of the more significant cases for military lawyers, that you argued before the Supreme Court. This is the Reid v. Covert case at 354 U.S. 1. What I'd like for you to do, sir, is to discuss how you got involved in the case, how you prepared for it, and what your arguments were, and tell us a little bit about the case.

A. Clarice Covert was the wife of an Air Force Master Sergeant stationed in England in the early 1950's. Her husband was pretty much a ne'er-do-well. He went overseas as a Second Lieutenant in the Air Force, early in 1943. When the war was over in mid-1945, he was still a Second Lieutenant, and you could well ask yourself, how did he escape promotion? Well, he was a tough luck guy all the way; their household goods were burned, he had no insurance; they moved from one place to another. He couldn't hold a job. He reenlisted in the Air Corps, and as a former commissioned officer, he could be a Master Sergeant. They were then stationed in England, and Clarice learned that her father, who had abandoned her and her mother when she was a small child, had died, leaving a substantial fortune from a relative's estate to the Coverts. Her husband wanted to take the money, buy a discharge, and go traveling around. She said no. She said they had to keep the money for the children's education. She got

very much upset. She turned to a doctor who gave her aspirin or maybe tranqualizers. She came in again to see the psychiatrist, who later testified that she was pre-psychotic. That night, she, believing that her husband was the father who had maltreated her as a child, took an ax from the fireplace and axed Eddie till he was dead. In the morning, she got up, got dressed, saw the kids off to school, went to see the doctor, and said in a voice completely without affect, or, in English, without any kind of emotion, said, "I've killed Eddie." The doctor didn't believe it and went over to the house, and sure enough, there was Eddie awfully dead. She had slept in the bed with the corpse all night long. Then they called the Air Force Judge Advocate who insisted on reading her rights under Article 31. Then she was held for trial. Under the provision of either the Status of Forces Act, or what had preceded it, a certificate by the commanding general kept her from being tried by the English courts. She was tried by court-martial. Everything hinged on the wording of the Manual prescribed for Army and Air Force about the test for insanity. Insanity in Military Law was the title. This had to do with the McNaughton test for insanity and the commentary on it, would the accused have performed the act had there been a policeman at her side. The Manual went on to say, unless the medical officer can answer this question in the affirmative, he may not testify that the accused was insane. Some of the medical witnesses thought this was a military order directed to their testifying. The medical testimony was 3 to 2 against Clarice Covert. She was found guilty and sentenced to life imprisonment and shipped to the reformatory for

women in Alderson, W.Va. This was in the summer of '53. I was on duty in either G1 or DCSPER for my summer ADT tour. Through a long series of circumstances, I had been recommended by an acquaintenance of mine to the lawyer for the bank in which this recently inherited trust fund was deposited as the court-martial expert to take the case. So, I took Clarice Covert before the AF Board of Review. The vote was 2 to 1 against her. I asked General Harmon, then Air Force JAG, to certify the case to the Court of Military Appeals. He refused to do it. I took it up. Review was granted. I got a reversal with the statement that a rehearing is authorized. At that point, they took Clarice out of Alderson and put her in the DC jail. Then I wrote a letter saying I didn't think it was appropriate that this woman should be in the DC jail. Perhaps there should be another sanity test. Some appropriate place of confinement must be found. They transferred her to St. Elizabeth's. This is when I first met her. The appointed Air Force Appellate Defense Counsel, whose name would be in the report but which I do not now remember [MAJ John J. Ensley], said, "Look, if you ever get a reversal, they'll drop the case." And he told me about a case of his in Alaska with the same thing.

Shortly after the reversal, the case was discussed in the staff meeting of the Air Force JAG, and the head of appellate defense said, "Well, the woman is in America now. All the witnesses are in England. Some of them are no longer in the service. Are you going to bring them all over here, or what are you going to do?" I said, "I think

this woman's been punished enough, particularly since she had a child born in prison. There's certainly grave doubt about her sanity, as shown by the dissenting opinion in the Air Force Board of Review."

At this juncture, the officer who had been staff JA in England and had recommended trial, had been transferred. He was one of the members present at this staff conference. "They should know that woman's a murderer. She's got to be retried. You can use the old testimony. It's now a non-capital case. You can use those depositions." So, there is the decision made by Reg Harmon, the Air Force JAG, who said the woman would be retried at Bolling Air Force Base.

If anybody wants to convey credit to the individual who was really responsible for the result in Reid v. Covert, find Reg Harmon if he's still alive and bring your trophies and tokens of appreciation to him.

Well, I tried to plea bargain with Air Force trial counsel. He wouldn't give her credit for time served and he wouldn't permit any testimony as to her mental condition. In other words, he was playing the hard line.

Meanwhile, appointed defense counsel and appointed trial counsel, traveling through the western U.S., located all the psychiatrists whose testimony had been used at the trial. They were

out of the service and once they were freed from what they considered to be the compulsion of the Air Force-Army Manual on Insanity and Military Law, the score was 5 to 1, in favor of Clarice Covert. The date of trial was set. Of course, I couldn't make a plea bargain under the terms I'd been granted.

I corresponded with the lawyer in Augusta, Georgia, who was the senior counsel for the bank holding the trust fund, and he suggested I walk very carefully before insisting on a trial because of Mrs. Covert's condition. Would she be able to withstand listening to the testimony again?

Then, at that time, the Toth case came down from the Supreme Court. The Toth case exploded the basis underlying peacetime military jurisdiction over civilians, namely that the Fifth Amendment was not a source of military jurisdiction, and that Winthrop had been right in saying that it couldn't be. Not only as a matter of law, but as a matter of history, the purpose of the Bill of Rights was to limit the powers of the new federal government, not to extend it. Therefore, Winthrop laid it down in italics, that no statute can be drawn that will confer military jurisdction over a civilian in time of peace.

Well, with that in hand, I communicated with travelling defense counsel, and she said, "Don't do anything now, because if you file a habeas corpus, we will both be ordered back to Washington and won't be able to interview the remaining medical witnesses." I said, "Fine.

When do you get back to Washington?" So, I drafted up the papers, the petition for habeas corpus. Then when she got back, she and I went to the jail, got Clarice, got her to sign and swear to the complaint, and went over and filed it in the District Court. I got an order to show cause why she shouldn't be released and that didn't require her presence in the courtroom when the matter was being argued.

At that time, Ollie Gasch, who's now a retired U.S. District Judge, was U.S. Attorney. When the case landed in his lap, he got hold of the Air Force JAG people, and said, "Look, this is not a very good case." "Oh," they said, "this is terribly important. This is too important to drop. This is one of the most vital cases we've had in a long time." And Gasch said, "Well, if you're going to make a test out of it, you're not picking a very sympathetic test case. Here's a woman who's already been punished. She's had a baby in prison. This isn't going to appeal to a court. Especially in the face of the Toth case, which knocks out your remaining trial." "Oh no, we have to go ahead."

So, it came out for hearing before Judge John Sirica, who later was the nemesis of the Watergate caper. John Sirica decided that the Toth case laid down the proposition that a civilian is entitled to a civilian trial. He would grant the writ. Then all I had to do was post an appeal bond.

I got that on the telephone from the lawyer in Augusta, GA, and got ready to walk her out of the courtroom, and some of the media people came up to me and asked, "May we take her picture?" I said, "Yes." And what I forgot to add was, "Be sure you get me in the same picture with her so that I can get the credit for springing her." I didn't say that, and only she was in the picture and the headline in the Evening Star was, "Civilian is Entitled to a Civilian Trial," with a picture of Clarice being walked out of the courthouse. And that evening she and LTC Janna Tucker, appointed defense counsel, my wife, and I took her to the basement of the Roger Smith Hotel at 18th and Pennsylvania Ave. This was the first meal she'd had out of jail for at least 2 years. This was also the day on which I learned that the 9th Circuit had granted my motion for a rehearing en banc in the Herzog case. So, it was a big day. And then, we got ready to see what the next step would be. I didn't have to appeal—the Government was going to appeal.

About that time, I heard from BG Adam Richmond, a retired JA who had been Eisenhower's JA in the North African Theater of Operations and General Krueger's JA in Third Army. He had represented General Krueger's daughter, Dorothy Krueger Smith, who had killed her husband in Japan and had been tried by court-martial and convicted of murder there. The upshot of our conversations was that I should similarly apply for habeas corpus in West Virginia, where

Dotty was also at the Alderson Prison for Women, to get the judge there to spring her the way Judge Sirica had sprung Mrs. Covert.

The judge there was an old-fashioned mining type, I can't remember his name [Ben Moore, U.S.D.J.] He looked like Abe Lincoln without a beard. He had a very simplistic view of life. He thought it was wrong for people to steal, so he had refused habeas corpus to the WAC who, with the Air Force colonel, had stolen the Hesse Crown Jewels. He also thought it was wrong for women to kill their husbands. So, he wouldn't spring Dorothy Krueger Smith.

Then came the question of getting both cases to the Supreme Court at the same time. I arranged with the people at Justice that we would bring up the record from the Northern District of West Virginia into the 4th Circuit, and that the government would then apply for cert. to the 4th Circuit before decision, along with the appeal in the Covert case. We tried to get the cases decided before the end of the term.

Now, I can say on the basis, not just of those cases, but on a number of experiences since then, that it is also a mistake to try to expedite litigation, because it results in inadequate preparation by counsel and in a too hasty disposition by the court. It makes no difference what kind of court or what kind of case. It was a

mistake. It would have been better to let them pursue their ordinary course.

The result was that I argued the case on the last day of the term. We joined the two together and argued them on the last argument day of the term. The argument extended beyond the adjournment hour. Everybody was tired and the result was adverse. When I was in the Supreme Court on the last day of the term, and the final opinions were announced, and the opinions were adverse to both Mrs. Covert and Mrs. Smith, the very knowledgeable Supreme Court lawyer next to me said, when Justice Frankfurter was noting his reservation in the case, "That is a command to file a petition for rehearing."

So, I prepared a petition for rehearing. The filing of that petition would not automatically have entitled Clarice to a stay until it was acted on. I argued the stay before Justice Clark, because it's always the practice up there that this kind of stag application has to be argued before the Justice who delivers the majority opinion. I tried to get the government to join with me. The Solicitor General, who for the time being shall be nameless, refused. I said to him, "General, why don't you agree? I know the percentages on rehearings granted; they're very slim. You can't gain a great deal. Mrs. Smith is already in prison. Nobody will be hurt if Mrs. Covert is allowed to

remain out of jail for a few months." "Well," he said, "this is what the Air Force wants and we're their lawyer."

I said, "General, what happens to the proposition that I have heard you repeat so many times before bar groups, quoting Solicitor General Frederick Lehman—the words that are engraved in the building in which you work: The United States wins its case whenever justice is done its citizens in its courts'?" And he flew up and got very mad and wouldn't agree.

It was argued before Justice Clark. He didn't say anything then. The Clerk was with him and I feel pretty sure that what the Clerk said was "Well look, Mr. Justice, your Brother Frankfurter hasn't yet indicated how he would decide the case, but I think just out of courtesy to him you might grant the stay so that the matter could go over for his review." So, the stay was granted.

Then, on the first day of the next term when orders were announced, rehearing granted, I knew that one of the judges would have moved over. Because, to get a rehearing, you've got to have the majority of the Court joined by someone who originally concurred in the opinion sought to be reheard. And that was Justice Harlan.

One of the arguments most strongly against the jurisdiction was that, even assuming that Mrs. Covert's court-martial originally had jurisdiction, the Air Force had lost it when they took her out of the custody of the Air Force, and turned her over first to the Government of the District of Columbia in the D.C. Jail, and second to St. Elizabeth's, in the custody of the Department of Health, Education, and Welfare. So that even admitting jurisdiction the first time, they lost it because they gave up custody. She was no longer in the military jurisdiction. And then, when it was granted, it came time to write the brief on the reargument. This time, they gave us an hour and a half on a side, and it was perfectly obvious during the argument that it would be favorable. And so it was. Now you gentlemen, knowing Reid v. Covert, will probably have specific questions to ask.

Q. Sir, I'd like you to talk about what you've mentioned in your writings and talks about "the advocate's dream" — about getting a court to reverse itself which is, of course, what happened in the case of Reid v. Covert.

A. Well, it's awfully hard to get people to change their minds once they've made them up. I knew that the swing vote - well let's see - I had for me, The Chief Justice, Black, Douglas, and I could hope I'd get Frankfurter, so that would be four. And I had against me Reed, Clark, Minton Burton - they were known to the Bar as the "Battalion

of Death" - and Harlan. I tried to get Harlan, and I asked a friend of mine, who had been associated with John Harlan in the General Motors - Dupont Antitrust case, what his views were about Justice Jackson. When I learned that he admired Jackson greatly, I quoted in the petition for rehearing, Justice Jackson's book that "more consideration frequently would lead to a different result." Then I particularly stressed the way the case had been decided.

Q. Sir, this was in your second oral argument?

A. No. I'm now speaking of the petition for rehearing. It hasn't been granted yet. You may remember that in the first ruling there were no full dissenting opinions. Most serious of all, however, is the circumstance that the Court's opinions were announced before the three dissenting Justices had had time to formulate their views and before another Justice had even been able to reach a decision. It cannot be said that a further period of waiting would have been without effect. Only recently, a Justice who's experience spanned twelve full Terms declared, in this posthumous declaration of constitutional faith, that "not infrequently the detailed study required to write an opinion, or the persuasiveness of an opinion or dissent, will lead to a change of vote, or even to a changed result," citing Jackson's Supreme Court in the American System of Government, page 15. "These petitioners for rehearing, therefore, may justly

complain that their contentions did not receive as full consideration as if their causes had been argued a few months earlier. And they cannot forbear to remark that there appears to be no compelling reason of judicial administration why all of the Term's cases must be disposed of within the Term, or why the Court cannot return to its former practice of holding argued cases over the summer for disposition the following Term." Footnote: "As late as the 1929 Term, the court decided eight cases that had been argued during the 1928 Term [citing them]. "Otherwise there is added to the inherent hazards of litigation the further danger of an inequality of treatment as among litigants that rests only on the happenstance of the position of the case on the calendar for the particular Term.

But if the present practice is to be continued, then, assuredly, reargument is called for in these cases. True, Rehearings are not a healthy step in the judicial process; surely they ought not to be deemed normal procedure. Western Pacific Railroad, 345 U.S. 247, 270. But certainly the issues that are involved in the present causes would seem to have far more public importance than those that were under consideration in the last two instances wherein this Court granted a rehearing after opinions had already been published. Elgin Railroad, 325 U.S., rehearing granted, 326 U.S.; Engraver Manufacturing, 336 U.S., rehearing granted, 337 U.S.

"Least of all in the present cases, which will have such far reaching consequences for so many individuals, and which plainly concern grave national policies as well, can the Court afford to substitute for the patient maturing of the judicial process a method of disposing causes that all too obviously involves decision by deadline."

Q. Sir, in your second oral argument, when you did get the rehearing, what did you change from your first oral argument?

A. Well, I had more time and I concentrated on the basic error in the first opinion, something to the effect that the United States had yielded jurisdiction. I pointed out that you either have or don't have jurisdiction. You cannot transfer it. You may decline to exercise it for any one of half a dozen reasons, but you either have it or you don't have it. In other words, the notion that under the Status of Forces Act, the U.S. yielded jurisdiction to Britain or Japan wasn't true. It either had jurisdiction or it didn't. I illustrated that with examples and rang the changes on that. The old case of the American sailor killed on an American ship in China - no jurisdiction because Congress hadn't extended jurisdiction. The case of the Belgian ship in Jersey City - there was jurisdiction but it wasn't exercised. Another case written by Stone in Canada, then the Toth case where the foreign country was perfectly willing to let the visiting country exercise jurisdiction, but the visiting country hadn't extended jurisdiction to the particular tribunal.

Then I dealt with the proposition that this wasn't military. In other words, just take the principal headings of the brief: "1. The consent of England and Japan to the exercise of American jurisdiction within their territories in respect of offenses committed therein, does not and could not invest American courts-martial with jurisdiction to try particular persons. 2) Nothing in the Constititution of the United States authorizes the trial of civilians by court-martial in times of peace and not in occupied territory. 3) The result reached last June is completely irreconcilable with the Toth case. 4) As long as the object sought to be obtained is punishment of crime rather than military control of civilians, practical alternatives are available. 5) In any event, Mrs. Covert cannot now be tried by court-martial in the District of Columbia." And that was based on the rationale of last June's opinion and Krueger. Sustaining military jurisdiction over accompanying civilians overseas is patently insufficient to sustain the Covert holding that such a trial is proper in the District of Columbia. Because, as I said in the District Court habeas corpus hearing, they are seeking to try her by court-martial in the very shadow of the Capitol Dome. [For references, see Briefing & Arguing Federal Appeals, pp. 84-87.]

Q. Was there any hint by either the British or the Japanese government that they would want to try these people?

A. The British attitude, as I have learned it in Trinidad, was that as long as the victim was not British, they didn't give a damn what we did. We could try all the civilians by court-martial in Trinidad as long as no British subject or British subject's property was affected. So far as the Japanese are concerned, and I discussed this at some length with Ken Hodson long before he became TJAG, they would certainly not have given either of these women a life sentence. Then, of course, there was always the question of diminished mental responsibility.

Q. Sir, you also mention a quartet of cases involved in military trials of civilians.

A. Yes. You will recall with the concurrence of Justice Frankfurter, it was limited to civilians in capital cases. The quartet of cases that came up and were decided in 361 U.S.; if you'll read the captions again I can tell you what each one was.

Q. Kinsella v. Singleton.

A. Kinsella v. Singleton was a dependent for a non capital offense. Second one?

Q. Grisham v. Hagan.

A. That involved the court-martial of an employee for a capital offense.

Q. McElroy v. Guagliardo.

A. That was an employee tried for a non-capital offense.

Q. Finally, Wilson v. Bohlender.

A. That was an employee for a non capital offense with the complication that it arose in occupied Berlin. And it was the Pentagon attitude, as I ascertained it from my good friend Bill Mott who was then Judge Advocate General of the Navy, "Let's see if we can't get Reid v. Covert limited." They did their best to do so but they resorted to a great many misstatements. Unfortunately for them, I had too much information and background to be taken in by their fallacious arguments. For instance, you could show, "Well, we've got to have civilians overseas." I could quote chapter and verse from Army publications, the reason they had civilians is because they were cheaper. If you only had them over there for a short time, you didn't have to pay any retirement. They went pretty far, and got statements and contentions diametrically opposed to what they'd contended in Reid v. Covert.

Q. Sir, based on all these cases concerning military courts-martial of civilians and the constitutional restraints implied in that, where would you draw the line, in your legal opinion? Would it have to be a declared war?

A. No, I would say a shooting war is sufficient. When the bullets start flying, then it's "in the field."

Q. So you believe that those civilians who did accompany the Army in Vietnam should have been subject to courts-martial.

A. Yes, logically yes, and I think I wrote a short piece in the ABAJ. But as a practical matter, having in mind the hostility to the war in the Vietnam situation, they would've lost. Because O'Callahan shows the extent of judicial feeling about it. Any step beyond the strict literal letter would have been doomed to defeat.

Q. Considering the make-up of the court today and the nature of combat that the Army seems to be getting into every once in awhile, without any declaration, do you feel that if there were a circumstance involving a civilian accompanying a force that did have some combat activity, that they would sustain the jurisdiction?

A. Oh, I would be inclined to think so if it were in real war. And certainly more likely to sustain it for a technician than for a mere paper shuffler — certainly more than for dependents that happen to be caught there.

Q. Notwithstanding the current state of the law, considering possible impact on U.S. forces stationed overseas, do you think that the law should be changed regarding jurisdiction of civilians?

A. Well, I don't see how you can change the law regarding jurisdiction without changing the Constitution. I would not suppose the changes made by a Constitutional amendment enlarging military jurisdiction would have a great chance for success. It would raise too many heated emotions, largely irrelevant. Also, I've always had the feeling that the military was not at its best dealing with civilians in a disciplinary way; and also, that in too many court-martial jurisdictions, the offense charged is always a couple of degrees higher than the facts warrant.

Q. Sir, yesterday we were talking about your arguments before the Supreme Court. Let's begin today with your telling us about the case of Roman v. Sincock.

A. That was the Delaware Reapportionment case. After the first reapportionment case, the one from Tennessee, the one that first laid down the proposition of "one man — one vote," all the states started to revise their ancient constitutions to meet those standards. And Delaware did so. They were pretty badly harried by a three-judge court presided over by the Chief Judge of the 3rd Circuit who had been a Delaware lawyer, and whose father and grandfather had both been members of constitutional conventions in Delaware. I don't remember the names of judges who hand down wrong decisions. If you'll read my great uncle Sigmund Freud's works you'll find out that you always forget the unpleasant things, and therefore you cannot remember the names of people you dislike or of judges whose decisions you question. Anyway, Delaware called a constitutional convention and they reapportioned the representation of the lower house according to population, but gave each county equal voice in the senate, just as in the Senate of the United States — Alaska has the same vote as California.

Well, the reapportionment people said this was an invalid parallel because, while the nation was composed of the states, counties were creatures of the state, and therefore the parallel was not exact. Our argument was, well that may be so in most states, but in Delaware, it was the three counties that made the state of Delaware and that is proved by history. If you will go to all the

records prior to 1776, you will find Delaware referred to as the Three Lower Counties or the Three Counties on Delaware. And to go through the writings of the members of the Continental Congress, always it was the Three Lower Counties. So, it was the Three Counties that made the state of Delaware. So, in Delaware, the parallel was exact - the counties made the state, the state didn't make the counties.

Also, in the course of digging up matters, researching, I came across a reference to the effect that reapportionment or alleged malapportionment had been considered in Congress at the time Florida was readmitted to the Union in 1868. As you know, after the Civil War, the southern states could not be represented in Congress until they passed constitutions that complied first with the 14th Amendment, and later, with the 14th and 15th. Well, in the debates in Congress on the readmission of Florida, some Congressman got up on the floor and objected to Florida's readmission, pointing out that Dade County, now the seat of Miami, which had 30 registered voters according to the 1860 census, which of course was the last available in 1868, whereas Jefferson County, the site of Tallahassee, the state capital, had 3,000 voters, and this was inequality and this malapportionment didn't comply with the 14th Amendment.

Whereupon Ben Butler, who was one of the architects of reconstruction and a bitter and violent man, got up and said "This constitution of Florida has been approved by the House Committee on Reconstruction and by the Senate Committee on the Judiciary, and it complies in every respect with all of the 14th Amendment. I think the gentleman's objection should be voted down and voted down at once."

Well now that, of course, undercut the constitutional supposition that the Equal Protection Clause of the 14th Amendment forbade malapportionment. When I brought that out in open court, the look of pain on Chief Justice Warren's face was reminiscent of that of an individual with terminal cancer who's been taken off morphine. But, of course, it didn't change any votes. It was brought out in Justice Harlan's oral dissent, and when Justice Harlan pointed to this colloquy in Congress on the readmission of Florida, the same look of pain crossed the visage of the Chief Justice. So that you can take it as a matter of historical fact that the framers of the 14th Amendment never contemplated for a moment that it required one man, one vote. That matter is discussed in my "Advocacy at Military Law" article under the heading the "Courts with completely closed minds" in 80 Military Law Review 1. There's just no constitutional basis for the malapportionment doctrine, except the will of a majority of the Supreme Court to make that decision.

Q. Sir, where did you do most of your research for that case? Was that in the Library of Congress?

A. That was in the Congressional Record, and I got a reference to it in the U.S. briefs in U.S. v. Florida, which was the tidelands case involving Florida. Most of the Delaware history references were supplied by the Delaware officials who had retained me to handle the case. They had some very capable historians and there were a great many published articles and local historical journals. But Ben Butler, on the admission of Florida, I found myself in this government brief in U.S. v. Florida. Incidently, the government was against me - they appeared amicus, and they were all hell-bent for reapportionment.

Q. Sir, the case we discussed yesterday, Reid v. Covert, could certainly be considered a high water mark in your career.

A. Well, it was for two reasons. There are ample instances, especially since the middle 1950's, of the Supreme Court overruling itself. There used to be a time when there were very few overruled cases you could point to. After the Court Plan, between 1937 and about 1941, there were quite a number of overruled cases. But, the gates were really opened under the Warren court, so-called. Not that Earl Warren was the Court's intellectual head. He didn't have the

equipment for that. But he presided over it. There were a great many overruled cases. But there have been very few instances of the Court coming to a different result in the same case. Now, it happened in the income tax case of the 1890's, Pollock v. Farmer's Loan and Trust. One judge changed his mind. No one ever knew who it was. But, there had been no published opinion on the first go-around — the court was equally divided in the first go-around so there wasn't a published opinion on it. Then there were overrulings in Jehoviah's Witnesses cases in the mid-1940's, but those were due to a change in the composition of the Court. But Reid v. Covert remains the only case since the Supreme Court started sitting in 1790 that the Court has come to a different result in the same case, following a published opinion and without a controlling change in the membership of the Court.

Emotionally, it was a high point, also, because it indicates, as one or two other cases have indicated, what a rather emotional oral argument can do to sway the Court on close issues. Webster used to have the Court eating out of his hands. There's some question whether Joseph H. Choate, who argued the income tax case in the 1890's, contributed by his oral argument to the ultimate result in that case, which of course resulted in the 16th Amendment. But, certainly, Senator George Wharton Pepper, who argued the AAA case in the middle thirties, made a magnificent peroration. Let me read it to you and judge for yourself. You will find it in 297 U.S. at 44.

My time is fleeting and I must not pause to sum up the argument I have made. I have come to the point at which a consideration of delegation is the next logical step, and that is to be dealt with effectively by my colleague, Mr. Hale. But, I do want to say just one final and somewhat personal word.

I have tried very hard to argue this case calmly and dispassionately, and without vehement attack upon things which I cannot approve, and I have done it thus because it seems to me that this is the best way in which an advocate can discharge his duty to this Court.

But I do not want your Honors to think that my feelings are not involved and that my emotions are not deeply stirred. Indeed, may it please your Honors, I believe I am standing here today to plead the cause of the America I have loved; and I pray Almighty God that not in my time will "the land of the regimented" be accepted as a worthy substitute for "the land of the free."

That knocked out the AAA and brought on the Court Plan. There were rumors at the time in Washington that the old gentleman was in tears as he wound up. About 20 years later, when I was working as the Reporter to the Supreme Court's committee on the revision of its rules, and was dealing with Justice Reed, who was the chairman of that committee, I asked him whether in his opinion that had been an effective peroration, when Stanley Reed had been the losing counsel in the AAA case. He said, "It was too effective."

Well now, when I got ready for the reargument in Reid v. Covert, I knew that I had spoiled the original argument by being too sarcastic and making too many wisecracks. And I was determined to avoid that. But, at the same time, I had rehearsed the entire argument with my wife, with a recording machine so that I could play it back and see what needed adjustment and revision. I always wound up with "trying Mrs. Covert in the District of Columbia in the very shadow of the Capitol Dome."

The last time a woman had been tried in a military tribunal in that location was when Mrs. Surratt had been condemned by the military commission that had tried the Lincoln conspirators. When she sought relief from the courts, President Andrew Johnson suspended the writ of habeas corpus. Well, I knew Senator Pepper's peroration, and I knew that his vanquished opponent, Justice Reed,

had called it "too effective." So I set out to compose something along those lines.

If you want to say that I cribbed it from the Senator, you won't be substantially wrong. In those lovely days, the Supreme Court sessions were from noon to two, and from two-thirty to four-thirty. That meant you could use the morning getting yourself together and putting on the final touches, and so forth, and you didn't have to be rushed to be in Court by ten o'clock. So, I was in my office and I "walked-out" this peroration on the basis of a Cardozo quotation I had encountered the previous summer. Here is the peroration in that case, after I finished with Mrs. Covert and suspension of the writ in the Surratt case.

> If your Honors please, I have tried to argue this case with some degree of objectivity. I have tried to put out of mind as nearly as I can the callous and somewhat obtuse cruelty with which these two women were treated because I felt that I could best discharge my duties to this Court, as well as my duty to them, by dealing with this as a question of constitutional law, which calls for research, reflection, and cogitation.

But I cannot conceal my concern over the seriousness of what is involved, because this is about as fundamental an issue as has ever come before this Court, one certainly more vital and fundamental in a constitutional sense than any that has been here for some years.

And it is fundamental and vital because it poses in stark immediacy the question of how far we may properly brace ourselves to withstand assault from without, and yet perhaps sow the seeds of our own disintegration from within. Because we have here, I think for the first time, a question involving the impact on the one hand of the supposed needs of the garrison state upon, on the other, "the immutable principles of a free nation."

That is a quotation, "The immutable principles of a free nation," not from the writings of some cloistered libertarian philsopher, but from the institution of the Order of the Cincinnati, which was founded in 1783 by the Revolutionary officers who had pledged their lives and shed their blood that this country might be born.

I think we will be aided in the resolution of that problem by considering two sentences from the late Mr. Justice Cardozo's immortal classic, The Nature of the Judicial Process.

"The great ideals of liberty and equality are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encrouchments, the scorn and derision of those who have no patience with general principles, by enshrining them in the constitutions and consecrating to the task of their protection, a body of defenders. By conscious or subconscious influence, the presence of this restraining power, aloof in the background, but none the less always in reserve, tends to stabilize and rationalize the legislative judgment, to infuse it with the glow of principle, to hold the standard aloft and viable of those who must run the race and keep the faith."

If your Honors please, I have been enrolled among the body of defenders. I hope this Court will keep the faith.

Well, that really had them. I had a very difficult time bringing it out, and I had to take several sips of water in the process because I was very much wound up. I hoped to finish just at 4:30 when there would be no reply to it. But I finished at about 4:25, and the Solicitor General undertook his reply. We got to 4:30, which was the normal adjournment hour, and the Chief didn't adjourn. He held the SG's nose to the grindstone, and then Justice Black started asking questions after the manner of the chap in the Spanish bullfight who throws arrows into the wounded bull. The poor SG sort of rolled on and on, and down and down until it was all over, about 10 or 15 minutes after the usual adjournment. So that emotionally, it was also a forensic high point.

Q. Sir, yesterday and today we've been discussing your private practice with emphasis on your appellate practice. We'd also like to discuss, your involvement with the JAG Reserve during this period. Specifically, we'd like to start off with your involvement with the Manual for Courts-Martial in 1948-49, and your testimony before Congress concerning the Elston Act Amendments to the Articles of War.

A. Yes. Well, I was recommissioned in the JAG Reserve on the day of separation at Ft. Meade. I continued to be interested in military matters. When the libertarians started attacking the court-martial

system, of which I had been a part, I got reasonably steamed up and replied to most of the criticisms in the Infantry Journal for January, February, and March of 1947. Then came the American Bar Association report from a commission. I think one of the members of that commission had served with the Student Army Training Corp between September and November 1918, but nobody else had any military experience. And of course, the only legal system they knew was the civilian system, and it led to the Elston Act.

I testified before committees on both sides of the Capitol, pointing out what I perceived to be errors in the approach of the Elston Act. I'm sure that testimony has been published. Then when the Elston Act was succeeded by the UCMJ, I testified before the committee on both sides on that, pointing out what I thought were the errors in the draft UCMJ. Of course, the draftsman was Professor Eddie Morgan, who had been on the side against General Crowder in the post-World War I court-martial controversy. So he wasn't exactly an impartial person to head that commission. What ultimately turned out to be very strange, is that that commission didn't do too well in the definition of common law offenses. That had to be corrected later on.

Then, as you know, the Manual for Courts-Martial is issued by Executive Order. Being an Executive Order, it has to go through what

was then the Bureau of the Budget, and now the Office of Management and Budget. I was retained for a fee by the Bureau of the Budget to review the draft Manual so that they could advise the President whether to sign or not, or whether to send it back for revision. One point which I differed from was old Article of War 2(e). Article of War 2(e) was a provision taken from R.S. 4824 to the effect that there was military jurisidiction over residents of the U.S. Soldiers' Home. Winthrop had always considered that unconstitutional. The draft Manual continued it. I advised the Bureau of the Budget to insist that be taken out and, to the extent that it was still there, flagged as to its invalidity. That was my only connection with the '49 Manual.

Q. Sir, you mentioned that you testified as to what you thought were errors in the Elston Act and the Manual. You just mentioned Article of War 2(e), and its interpretation in the new Manual that came out in '49. What other errors did you see?

A. Well, there were things I didn't particularly like about the Elston Act. I think that put enlisted men on courts for the first time. That was the French practice. Colonel Rigby discussed it in his testimony on S. 64 of the 66th Congress, Administration of Military Justice. I had read through every word in that two-inch thick compilation about three times. So, I was very familiar with it. I said, "Why should we

follow the example of an Army that's been defeated two and a half times within the memory of men still living — 1870, 1914, and 1940?" That was something on which I was able to work when I went over to G1 for a 30 day tour of active duty. Do you want me to discuss that now?

Q. Yes, sir.

A. Well, I worked on a paper entitled, "Causes of the Maladministration of Military Justice in World War II." One was that the Army hadn't properly used the legal talent available. If you'd had lawyer law members and took the prosecution and defense out of the hands of pilots and put them into the hands of lawyers, you'd really save time and money in the long run, and get far better results. In this paper, "The Causes of the Maladministration of Military Justice in World War II," were first, the failure to utilize the legal talent available to the Army; and second, the bad inter-war tradition which made it practically impossible to try an officer. There were all kinds of pressures whenever charges were brought against an officer, to quash the proceedings, or to find them improper.

I can remember Colonel Archie King telling me that when he was SJA at Fort Benning, of an officer who had been caught cribbing on an examination. Unfortunately, Archie was not given to brevity

and he wrote a tremendously long review, the sum total of which was overwhelming. It couldn't have been coincidence that the accused got all the answers correct. But unfortunately, the Board of Review only reviewed the lengthly review on the first specification, and turned the guy loose.

Later, I came across that in the published opinions, and found out who the officer was who had beaten the rap. Although clearly guilty, he was an officer with whom I'd served on Okinawa, and didn't know it at the time. It was too difficult to try an officer. Then, of course, when every dismissal case in the ZI (Zone of the Interior) would go to the White House, all kinds of pressure were brought to bear on the President. And FDR was not the man that Woodrow Wilson was in dealing with officer cases. Because, if you find an officer who is plainly guilty and he beats the rap, this is not going to encourage other commanders to start the long process of bringing charges. So that was part of the memorandum also.

Then one of things I had to deal with was how do you deal with enlisted members on courts. That was taken care of very easily by having the Manual read, "Officers and enlisted men named as members should be chosen on the basis of" — repeating the words of the Articles of War — "on the basis of their experience and judgment." You put long service sergeants on a court, and you're not

going to be helping the enlisted accused simply because the sergeants are enlisted. They're going to be tougher than a lot of junior officers. Of course, I learned as Staff JA that if you want to get convictions in disciplinary cases, don't use staff officers, use company commanders, because they deal with the problem. And, for God's sake, don't ever put doctors on the court, because they will try to diagnose the accused and not listen to the evidence.

Q. Sir, you mentioned ZI?

A. ZI. Zone of the Interior. I'm sorry that the military abbreviations of my generation seem to have been forgotten by the up and coming young.

Q. Sir, you also testified in 1951, concerning the Manual?

A. No. I don't think I had anything to do with the 1951 Manual. I did testify before both sides of the Capitol on the UCMJ in draft. I think you'll find that testimony in a pamphlet published by the Air Force JAG on the legislative history of the Uniform Code.

Q. What was the nature of your testimony on the draft UCMJ? Was it similar to what you've already discussed?

A. I think pretty much so. I had doubts about the Court of Military Appeals.

Q. What doubts did you have?

A. You were dealing essentially with military problems. And where are you going to get good results with a court of civilians? In the beginning, actually, the USCMA worked out very well because all three members had had military service. Chief Judge Quinn had been a Navy captain, Judge Latimer had been an Army division's chief of staff, and Judge Brosman had served in the Air Force. I don't think the CMA really went badly wrong until they got this terrible fellow Fletcher. So that in retrospect, up to the Fletcher administration, the CMA was a very useful institution. What I'm less clear about is whether you can afford to have a double tier of appellate review in time of war. Because, the purpose of military justice is to act as a deterent. If you're going to have six years between the date of the offense and the execution of the sentence, as in those Guam death cases, murder cases, or more than that, as in the case of General Grow, whose file got completely lost for a number of years without any action, which is really inexcusable.

Q. So what do you see as a solution to that in time of war? A one-level appellate review?

A. I think if you have one good level of appellate review, it ought to be enough except in certain cases. I think probably death cases should have two tiers of review. I don't think that the ordinary dismissal case needs two tiers. A misbehaving lieutenant doesn't. Dismiss him, draft him, and let him go to OCS and learn it next time.

Q. In addition to your testimony before Congress concerning the Manuals in the late 40's and 50's, you also testified before Congress on some other subjects in dealing with the military. Specifically, in 1969 you dealt with the obstruction of the armed forces. Could you explain what this is and what you did with it?

A. Well, this was the time of the Vietnam disturbances, which I might add, were a plain result of student deferment. Because it meant that if your family had enough money to keep you in college, you didn't have to be shot at. After awhile, you got to thinking: "How is it that I am safe and other people are being sent to war? Why am I opposed to the war? Why, it's an immoral war!" It was the student deferment that was responsible for most of the anti-war agitation and for infecting the entire academic community. We haven't seen the end of that yet.

Q. So what was this committee?

A. I think I have the hearings here. Basically, there'd been a statute for a good many years prohibiting and rendering criminal any obstruction with the armed forces of the U.S. The question I think was on the amendment, or the repeal or modification of this statute, and I testified on that. I cannot recall the details at this point. I'm not sure I have a copy of the hearings. [See Hearings Relating to H.R. 959, Amending the Internal Security Act of 1950 (Obstruction of Armed Forces), Hearings, Comm. on Internal Security, H.R., 91st Cong., 1st sess., Sept. 1969.]

Q. Sir, in 1970 you also were involved with Congressional testimony involving bills to repeal the Emergency Detention Act of 1950. What did that involve?

A. That was intended to regularize the "fifth column menace." They took the Japanese-American evacuation as the way not to do it. In order to detain these people, you had to have a hearing, you had to have evidence, you had to have an inquiry as to whether the person proposed to be detained was really dangerous. But all the libertarians got together and started to reargue the Japanese evacuation. I testified at some length as to the various kinds of civil disorders. You start with a riot. Then you get an insurrection. Then you get a rebellion, which differs from the insurrection in that it seeks to

substitute a new government. If the rebellion is successful, it becomes a revolution. Please remember that the official Civil War records are called Records of the War of the Rebellion. Also, in view of some testimony based on Justice Davis' dictum in the Milligan case, that the Constitution is an instrument for peace and war alike. I pointed out that governmental power is broader in war than in peacetime. I collected a whole list of situations — rent control, price control. In one of my favorite cases, McKinley v. U.S. in 249 U.S., the Secretary of War has power to close down houses of ill-fame within 5 miles of the military camp. The governmental power to raise armies includes the power of protecting their health. Of course, regulation of houses of ill-fame is entirely a state matter, as you will find out if you ever go to Nevada. Then, there were certain criticisms directed at the Act, and I said, "After all, this was an act passed 20 years ago and the salaries fixed in the Act are completely unrealistic. But I think you ought to keep the Act. It ought to be amended to be brought up to date, but it's a perfectly good Act." I am told that my testimony delayed its repeal by one year.

Q. You mentioned that you received a Guggenheim Fellowship Grant in 1962 involved with Civilians Under Military Justice. It was published by the University of Chicago Press in '67. Would you discuss that with us now, sir?

A. Yes. A very good friend and law school classmate, Professor Sam Thorne of Harvard, was on a committee to select candidates for Guggenheim Fellowships. I said, "You know, I would love to be able to review in depth, at length, in unhurried fashion, all the historical research on jurisdiction over civilians, but I didn't have time for it in Reid v. Covert or any of the other cases." He said, "Why don't you apply for a Guggenheim? There's very little competition for legal subjects. If you wanted a fellowship for creative writing, or poetry, or sculpture, there are an awful lot of candidates for those. If you want to count commas in Shakespeare, there are long lines extending into the next county. But there are very few candidates on legal subjects, so why don't you apply?" And, I applied and got the fellowship. What I intended to do was to have one chapter discuss Reid v. Covert and the companion cases, and have an introductory chapter entitled "Appeal to History", first the British practice and then the American.

Well, when I got going, my first stop was in the Clements Library in the University of Michigan at Ann Arbor, which had a great many of the British papers on the Revolution. I started on the headquarters papers of Sir Henry Clinton, who was British commander-in-chief in America from 1778 to 1782. I found that resident civilians in the occupied American cities were regularly tried by general courts-martial of the British army for committing common

law offenses — murder, robbery, rape. That got me going into the order books which were widely scattered — some are in Boston, some are in New York, some are in Ann Arbor, some are in print — then going abroad to the Public Record Office in London, reading the court-martial books and the correspondence of the Judge Advocate General over there. Half of the projected first chapter turned out to be a book. That's the story of Civilians Under Military Justice. It was based entirely on the British practice, actually from the passage of the First Mutiny Act, before which all military trials were deemed illegal, until about the time of publication — the 1960's.

Q. Sir, we'd like to discuss some of your reserve duties, focusing on the last 10 years of your active reserve duty — from about 1949 to about 1961, when you retired from the active reserve.

A. Yes. All my duty was in G1, or as it later became, DCSPER, except for two weeks as a consultant adviser at the Army War College at Carlisle Barracks, Pennsylvania. Because I felt that since I practiced law, during two weeks of active duty I'd like to do something else. One of the projects was, Why did so many elimination cases break down at the "Big Board"? I'm talking about officer elimination proceedings. I found out that the reason that they broke down was because the original decisions to initiate elimination proceedings were never properly reviewed. They broke down because they were very

weak cases. I wrote an enlightening memo based on detailed analysis of about 50 cases. My request to TAGO: "Let me have the last 50 cases where an officer has beaten the rap before the 'Big Board.'" As I say, most of those cases broke down because the cases were weak. They'd never been reviewed. Someone would see the allegation and accusations and start elimination proceedings. They frequently were held in the field and when they got to the "Big Board," that's where they would break down.

I wrote a lengthy memo, completely documented, which is in the hearings, I think it's the "Constitutional Rights of Military Personnel." [See Hearings, Subcomm. on Constitutional Rights, Senate Judiciary Comm., pursuant to S. Res. 260, 87th Cong., 2d sess. (Feb., Mar., 1962) pp. 736-773.] The one case I didn't correctly solve at the time had to do with a black officer who was good in some assignments and very poor in others. I didn't catch it at the time. If he was in a segregated institution, like Wilberforce College in Ohio, he wasn't worth a damn. Put him out and have him compete with white officers and he'd be tops. I didn't catch that. If anybody's interested, look up the memo. And of course, one other thing, unless the man is caught with his fingers actually in the till, you cannot eliminate anybody with one Silver Star or better. Combat heroes are untouchable.

Q. Were you still the leader of the Legal Eagles in Washington at that point?

A. No. At that point, I had become the leader of the Mobilization Designee Detachment of officers who had assignments to G1 or DCSPER. I was CO of that outfit for a number of years. We'd meet once a month at night.

Q. What was the normal agenda at these meetings?

A. Well, we went pretty widely. We spread our net pretty widely. We'd get some officer of the Army Nurse Corps, to talk about her personnel problems. We would talk about Army pay cases in the Court of Claims. I had the Inspector General of the Army, with whom I'd served in Trinidad, talk about the basic work of an Inspector General other than checking the accounts — whether there were smudges on the covers of company fund books. We had a very good, interesting program.

Q. Sir, you've mentioned that two JAGC officers have been very influential during your service as a JAGC officer. You termed it in your outline as an "introductory indoctrination" you owe to two individuals, Colonel W.C. Rigby and Captain Caffey who later became TJAG. I'd like for you to describe how you felt about these men and why they influenced you.

A. Colonel Rigby was one of my two introductions to military law. He had become a judge advocate in World War I. His father was a Civil War veteran who was on the Vicksburg Battlefield Memorial Commission. He got his appointment through the senator from Mississippi who remembered and liked his father. The family came from Iowa. Then he was put to work on this inquiry into the military justice controversy that followed World War I. I met him when he was being retired from the Army, and his last assignments had been to represent the government of Puerto Rico and the government of the Philippines in court.

Q. When did you first meet him?

A. This was, I think, in the winter of 1933-34, when I was first in Washington. The Bureau of Insular Affairs was in the War Dept. and represented Philippine and Puerto Rican matters in Washington. Colonel Rigby was the JAGC officer assigned to handle the legal work. He would handle Puerto Rican cases in the 1st Circuit, because appeals from Puerto Rico went to the 1st Circuit. And, he would handle Philippine cases in the Supreme Court. Of course, there was always the famous agitation about Philippine independence, and the rather arbitrary rulings by Governor General Leonard Wood. One of the stories circulating in the Judge Advocate General's Office was

about the very eager, not terribly senior, officer who got all excited, "Here's another General Wood action. But I think this time I've worked out a way to sustain it."

Then, when he was retired from the Army, he was retained as counsel for Puerto Rico, thanks to the then governor of Puerto Rico, who was General Blanton Winship, a retired TJAG. I got very friendly with Colonel Rigby and he lent me a copy of Administration of Military Justice, and that's how I got interested in military justice. And about the same time, I met Captain Caffey through Colonel Rigby. Captain Caffey had succeeded to Colonel Rigby's work on the Philippine cases.

Captain Caffey argued one case in the Supreme Court long before he was TJAG. His Filipino opponent didn't appear, submitted on briefs, but poor Gene, who made an argument, lost the case.

Then I got very friendly with Captain Caffey, and learned about his Army experiences. His father had been a Colonel in the Army, and was still living at the time. Gene had been an engineer. Then when he reported once to Fort Belvoir, and saw the same pile of trash in the middle of the lawn — it had been there some years previously — and saw the Commandant of Fort Belvoir, a senior engineer officer, wearing a black sleeveless sweater over his OD shirt, he decided it was time to leave the engineers.

He applied for law school detail. He was sent to UVA, had a very fine record there, and was on the law review, a member of "The Raven," and then went to JAGO. So I got from him a great deal about military life, to which I'd never been exposed before, and a great deal about his philosophy on military law and military justice.

His notion, for instance, of what the law department at West Point should teach was: "First teach the Manual; then, never sign a paper until you've had a JA review it; never co-sign a note for anybody; and never post-date a check. That's all the law you need to know." We were very close. He was my introduction, through this. When I had my commission and it was time to buy a uniform, he stood by my side so that I got the prescribed uniform and didn't get anything "non-reg."

General Green, who was later TJAG, told the World War I story about the young officer who goes to buy his first uniform and he has his choice of hat cords on the campaign hat. They had a gold cord that looked very nice. So he ordered that and wore it. And, oh, he was received with the greatest respect as he walked around. A gold cord meant a general officer.

Then he came down to Trinidad as Sector Engineer, and helped me by giving me references to the Digest that enabled me to hold my own against my military superiors who didn't know much about the Manual or anything else except the myths they had picked up. So, these two officers were really my introduction to military law and military life. As I mentioned earlier, I became a Captain, Judge Advocate General's Department Reserve, by mail using Army extension courses.

Q. How did Captain Caffey get back into combat engineers during the war?

A. Well, the war was coming and he was the judge advocate at Fort Benning. He wrote a letter to a close friend or classmate who was in the Office of the Chief of Engineers and said, "Please sound out your bosses as to whether they would look favorably upon my request for a transfer back to the Corps of Engineers." When the word was "yes", he went immediately and became commanding officer of the 20th Engineers. Now, when then Lieutenant Colonel Caffey was set to come to Trinidad as Sector Engineer, the Trinidad headquarters prepared an order announcing him as Sector Engineer, and they looked at the latest copy of the Army Register that they had, and the draft orders said, "LTC Eugene M. Caffey, JAGD, is announced as Sector Engineer." Well, I saw that and I went to the adjutant and said, "This

is all wrong. I know Gene Caffey; he is back in the engineers. You ought to make this 'CE'." Who was a reserve major to know more than the printed Army Register? So they had to put out a corrected order when he arrived.

Q. Sir, you've already discussed how you got interested in the military, and how you joined the JAG Department. If you had not met either one of these officers, Colonel Rigby or Captain Caffey, do you think you still would have joined the JAG Department, or do you think they were the influence that got you involved.

A. Well that, as you well know, is a speculative question. The objection should be sustained. The answer is, I was always interested in JAG, and would have tried somehow to get into JAG, even if I hadn't met these officers. But, having met them and having learned from them, I was infinitely better qualified than I would have been without their advice, narration, and information.

Q. Sir, I have a couple of questions about some things you've already talked about. One, relating all the way back to your appellate practice. If someone wanted to see the appellate briefs that you wrote, where could they go?

A. They are now in the library of the George Mason University Law School in Clarendon, Virginia.

Q. Sir, earlier you mentioned a tour of duty that you had as a consultant to the Army War College. What was that about?

A. I was in the Mobilization Designee Detachment of DCSPER. A good friend of mine in DCSPER asked me whether I'd like to go up in that capacity to the War College while they were conducting the G1 course. I said, "Of course I would." He made the arrangements and I got an active duty tour for 15 days and went up there. Mostly it was sitting around in the lectures and a lot of conversation at coffee breaks, and then socializing in the evening, and explaining to the student classes how particular problems in which they were concerned were being handled in DCSPER — wide ranging conversations.

For instance, why there was all this fuss about discipline and the court-martial system arising in the Army and there wasn't anything comparable from the Navy? I said well, the reason was perfectly simple. The Army instituted a democratic process of officer selection through OCS. The result was a social inversion. Like the butler in James Barrie's Admirable Crichton. The yacht is shipwrecked and the man in charge was not his lordship, but the butler, because the butler was the ablest man there.

What happens is that the preppy from the well-to-do family is kicked out of OCS and he is ordered around by officers who were peacetime NCOs. In the Navy, the Navy didn't really have an OCS system. They appointed officers on the basis of education and qualifications, which means, "Is pappy in the chips?" The result was that in the Navy the people who got kicked around at the bottom stand in mess lines and the foreman type is at the petty officers' mess, and the people from suburban country clubs are in the officers' mess. Everybody is in the same relative position. This is perfectly normal, and they're not unhappy. Everybody is in the same steps on the social ladder as they were in civil life. But in the Army, the guy in the ranks may have been the captain of the country club's golf team, and the lieutenant colonel was a sergeant in the pre-war Army.

Q. Sir, I'd like to highlight some of your teaching. You had a long career in that area, starting off with the series of lectures you gave at the Washington College of Law — now the Law School of American University — in 1949.

A. Yes. That was just after I had left the Solicitor General's office. I knew the dean, Horatio (Ray) Rogers, who had won the DSC in World War I, and was in the Provost Marshal General's Office in World War

II. He was dean of the law school and he asked me if I would talk about appellate practice. These lectures resulted in the book, Effective Appellate Advocacy. Then it was revised to Briefing and Arguing Federal Appeals. Then Dean Colclough, who was Dean of the George Washington University Law School and had been Judge Advocate General of the Navy when I was handling one of his cases, asked me if I would teach a course on military law and jurisdiction. I said, "Yes." And I taught at GW for about five years.

Q. This also gave you the background to publish an article concerning that.

A. Oh yes. "The Teaching of Military Law in a University Law School."

Q. What are the highlights of that article concerning the methodology and teaching of military law in a law school?

A. I think on that I will have to refer you to the article, incorporated by reference. It also has a blistering review of that terrible botch — Snedeker's book on military justice. I'm sure you have a copy in the law school there.

Q. These professorial lectures at GW University — this was as Adjunct Professor?

A. Adjunct, yes. Georgetown calls the part-time people Adjunct Professors, and GW calls them Professorial Lecturers. Professorial Lecturer is one step up above Lecturer.

Q. You related earlier, sir, that the "SJA Experiences in Trinidad" class which you gave at the Army JAG School, created a problem that did not allow you to be invited back. Do you perceive that as what happened? Is that the way you feel about it?

A. Well, I had the feeling that the cold breath of realism that I gave to these student officers, who were civilians barely into uniform, did not sit well with the faculty of the school. So I was never invited back until the school was reestablished after the war.

Q. You came back and started teaching again in 1950 or 1951, sir?

A. It may have been even a few years later. I don't know exactly when, but it was after the school was established in Charlottesville.

Q. Do you remember the nature of the lectures that you gave to the JAG school at that point?

A. I cannot specifically remember. You'd have to look up the records to see what I talked about.

Q. You also mention in your outline that until 1961, there wasn't much of a problem, but then during 61-63, you again got the "cold shoulder."

A. Yes, and let's call a spade a spade. General Decker, who was TJAG in those years, was firmly of the opinion that Reid v. Covert was "bad law," and he obviously didn't like what I had to say to the Senate Committees on the rights of military personnel. Although he was on a "heave-ho" board and supported my position on the lie detector tests.

Q. What is a "heave-ho" board?

A. The "heave-ho" board is the final board on the elimination of officers. He was a member. My hero was questioned by an enlisted CID soldier who addressed him by his surname, not by his military rank, and reported on him. They made one of the reasons he got the heave-ho from the field board was because he wouldn't submit to a lie detector test.

In my summing up, I quoted the passage from J. Edgar Hoover, which was testimony of his before a congressional committee, that he would never rely on the lie detector test to determine guilt or innocence. I got my man off, and there were two consequences.

Consequence number one was that the regulations were ammended. This was Ted Decker's work, to eliminate any adverse inferences being drawn from refusal to take a lie detector test. The second was that, as I was gathering my papers after the board cleared my hero, I received word that the chairman of the board would like to see me. He was a major general and had had considerable combat. He said, "I was awfully glad to hear what you said because I had gone through the papers very thoroughly myself and I had arrived at the same conclusion." It was an estranged wife who had coached her daughters, my man's stepdaughters, to give damaging testimony against him.

But afterwards, I learned that two things happened. First, my wife and I were knocked off the social list of the JAG office. That'd be teas, dinners, dances, and so forth. And I learned through Jack Murray, then Commandant of the School, that I had been labelled "controversial," and therefore, was not to be invited. Oh, I knew it was the doing of General Decker. The last time I saw him, when he extended his hand, I wouldn't take it. Since then, the Good Lord has gathered him into His arms.

Q. But you did go back.

A. Yes. After General Hodson became TJAG, I was invited back.

Q. Again, you started giving lectures.

A. Yes.

Q. In fact, up until 1973 you gave lectures.

A. Yes. Last time was when Colonel Douglas was Commandant.

Q. But you have not seen the new JAG School.

A. I haven't seen the new building.

Q. Sir, do you know why Homer Ferguson was selected to the Court of Military Appeals?

A. Homer Ferguson was an isolationist senator from Michigan. He was a thorn in the side of every witness that appeared before the Pearl Harbor investigation. When he was defeated for reelection, he had to be taken care of. They sent him to the Philippines as ambassador. He didn't do too well and it was essential to the continuation of good relations, and effective relations with the Philippines, to get him the hell out of there. And when Paul Brosman died, it was a nice plum for

a deserving Republican. That's how Ferguson became a judge of the U.S. Court of Military Appeals.

Q. He was appointed by President Eisenhower?

A. I think so.

Q. Ok, sir. We're going to cover a couple more areas where you did testify before the Congress. Specifically, two senate committees in the sixties. First of all, one of the subjects that you covered was the constitutional rights of military personnel in 1962. Could you expand upon that and tell us what that was about?

A. That mostly had to do with the elimination procedures. It pointed out that there was a good strong dictum, or at least a footnote in a Supreme Court opinion, to the effect that people in the service didn't have all the constitutional rights that people not in the service had. They had no right to a jury trial. There was an opinion written by Justice Douglas in 1948 or 1949, which he didn't cite when he wrote the opinion in O'Callahan v. Parker. I have not reviewed that testimony. I incorporate it only by reference. I'm not very clear on what was done there. I think I concentrated on the elimination proceedures, and then on military justice.

Q. This would be in 1966?

A. 1966. On military justice I have the testimony in back of me, but I haven't looked at it in years.

Q. Sir, you were also a consultant to TJAG. How did that come about and what were you consulting on?

A. O'Callahan v. Parker was argued by a gentleman from the Solicitor General's office. In the words of General Buck Lanham, "He wasn't just lousy, he was typhus-bearing. He didn't just stink, he stank on dry ice." The chap had absolutely no knowledge or background to argue that case. It was way beyond him. It was very poor judgment on the part of the then Solicitor General to have assigned that to the man. Unfortunately, the case was decided at the time of the Vietnam War agitation. The majority of the Court, very obviously, was against the Vietnam War, although Justice Fortas, who heard the argument, resigned under pressure before it was decided. Incidentally, my Civilians Under Military Justice was cited in both opinions. Then General Hodson came to me and said would I be willing to try to draft a petition for rehearing in this case and he would submit it to the Solicitor General. That was how I happened to become a consultant to TJAG. I remember Ken telling me he had an awful time finding the money to pay my consultant's fee. We worked up a draft. Then it

was taken to the Solicitor General who advised that he didn't want to file it, but rather let nature take its course.

Q. Sir, do you remember what points in the argument you made in the petition?

A. I can't remember that. The difficulty was that Justice Douglas, with his characteristic intellectual dishonesty, said that by not limiting court-martial military jurisdiction, people would be deprived of their right to a jury trial and to indictment by a grand jury — conveniently, overlooking the fact that military personnel, by the very language of the 5th Amendment, had no right to an indictment by grand jury; and overlooking, as well, his own opinion in about 1946,7, or 8, saying that a soldier had no right to a jury trial. It was a typically dishonest Douglas opinion.

Q. Sir, let's begin this afternoon's session by talking about your retirement from 1 July 1973. What all happened that led up to your retirement?

A. I represented the Elks in the case arising in Maine. Maine had passed a statute aimed at private clubs. Under the terms of that enactment, a club could exclude prospective members on religious grounds but not on racial grounds. In other words, the statute supported the anti-

Semite but denounced the anti-Hamite. I took a direct appeal. The appeal was dismissed for want of a substantial federal question with three justices dissenting. At that point, I decided to retire. If you can't trust the umpire it's time to turn in your suit. I did. I thought that was an absolutely outrageous move. Of course, the answer was that the Moose Lodge case got a poor press and the court did not want to mess with any other club cases.

Q. This was Elks v. Ingraham?

A. Yes. The short of the matter is that most of my practice was the Supreme Court practice and I had lost confidence in the Supreme Court as then constituted and functioning.

Q. Sir, I noticed that you did occasional professional consultations after you retired. Are any of those particularly memorable?

A. Well, I did not appear in court and I did not sign my name to any briefs so I would have to consider the identity of those causes privileged. I did write some briefs. I wrote some petitions for certiorari. I provided advice for out-of-town lawyers. I advised, to some extent, with local lawyers. That pretty well dwindled. The last big outside case I had was 1980. There was one more consultation in early 1981 and that was the last one. After all, when you take down

your shingle, and don't appear in legal magazines with issues of current interest, people forget you are around. People forget you are there and won't come to you. The way to get practice is to be in the public eye and have it bruited about. In the old days you could do that ethically without having to advertise in the papers, or on billboards if you were a law factory: "50 lawyers — no waiting."

Q. I take it by your comment that you have an opinion about lawyer advertising?

A. Well, I still think it is unethical. I would never have supposed that. But for the case that held that the Constitution protected the free speech of lawyer advertising, I wouldn't have thought so. As a famous Holmes dissent but it, "I also think the statute constitutional, and, but for the opinion of my brethren, I would have had no doubt about it." I think lawyer advertising demeans the profession or, more accurately, demeans those who are practicing it.

Q. There were at least two different subjects that you had an opportunity to testify at Congress about. One was unionization of the armed forces. Can you tell us about that, please?

A. Yes. As you will probably recall yourselves, it was a bill to permit unions to be formed in the armed forces. It was using analogies from

civilian labor cases. The General Counsel of the Department of Defense could never get to the point where they would declare such legislation barring unions constitutional. And when I had an invitation from Chairman Thurmond, of the Senate Judiciary Committee, to submit a statement, I did so. I didn't testify. I was asked for a statement. I submitted one, the substance of which was that the military differs from civilian society and you cannot have unions in an Army and expect to have it remain an Army. I am happy to say that the bills were defeated and that result, I think, should have shamed the people in the Office of General Counsel of DOD. But then this was during the Carter administration and I remain of the opinion that Jimmy Carter was the worst President since the Articles of Confederation. He put some terrible people into office.

Q. Sir, the second subject before Congress, concerned the Japanese-American Redress Legislation.

A. Yes. When the Japanese were evacuated in the spring of 1942, I was stationed overseas in Trinidad. I was still in Trinidad after the evacuation was completed so that I had absolutely no personal concern with it whatever, even in marginal peripheral fashion. It was something that I never touched at any time. Then, the revisionist bar and the revisionist professors began to get underway and to start writing.

The Grodzins book, Americans Betrayed, was sent to me by the Harvard Law Review for evaluation. I thought it was a dreadful book and I thought it was completely biased. It started out with the premise that the evacuation was bad and concluded that. But, it was inaccurate and it attributed a great deal of blame to General DeWitt when the real villain of the piece, from the point of view of those against the evacuation, would have been Francis Biddle, the Attorney General.

I had had some contacts with Mr. Biddle — both when he was Solicitor General — before I left the Department to enter military service. Afterwards, when I was in the Army and the War Department, he had some questions about individual relocations. I pretty well made up my book about Francis Biddle — a typical instance of an underprivileged boy who never had to work, and a complete dilettante. The fact of the matter was, according to the Grodzins book, that after he argued very strongly against evacuating even aliens, he folded when General Gullion, the Provost Marshal General, proposed evacuating not only aliens but also people that had a claim to American citizenship. So, I thought that if there was a villain in the piece, it was this gutless civilian rather than anybody in the military. All of which you can see when you read the review.

I was also asked to review Prejudice War and the Constitution by three authors headed by a man named Ten Broek. That also was badly slanted but provided the interesting facts that when the persons of military age in the relocation camps were asked whether they would serve in the armed forces of the US, ninety-four percent of them said no. And it also showed that between twenty and twenty-five percent gave negative answers to the loyalty questions, which were aimed at the persons with dual citizenship, and asked them whether they would declare unalterable allegiance to the United States and renounce any shred of allegiance to the Emperor of Japan. Twenty to twenty-five percent of those questioned either did not answer or answered negatively. So, there again was a very slanted approach which, however, revealed facts that justified the relocation.

The next step was the passage of an act by Congress to establish a commission to investigate the relocation, and report to Congress.

Now, the facts on record showed that of the 112-odd thousand ethnic Japanese who were relocated, no less than thirty-six percent of them had been born in Japan and, therefore, on the 8th of December 1941 became enemy aliens. Back in the Adams administration Congress passed the Alien Act and the Alien Enemy Act. The unconstitutionality of the Alien Act was an article of faith with all the liberitarians and the left-wingers. Indeed they triggered the

Kentucky and Virginia Resolutions which certainly showed Thomas Jefferson to have been the godfather of secession.

However, the Alien Enemy Act which permitted the internment of all enemy aliens in a time of declared war, which was also passed, was never questioned by Jefferson. If you have any doubts about that, I suggest you look in the index entries to Volume III of Dumas Malone's six-volume biography of Thomas Jefferson. Jefferson never questioned the power and the right and the constitutionality of interning enemy aliens in time of war and that is still on the books, 50 U.S. Code § 21.

Now the terms of reference to the Commission to be appointed to inquire into the Japanese relocation were that it was to look into the relocation of American citizens and resident civilians. Now this artful language — and so far as I know, it was never discussed in the committee reports or on the floor of Congress — this artful language effectively removed the stigma of enemy alien status from thirty-six percent of the people who were relocated.

Then we get to the nine members of the Commission. Three of them had previously indicated publicly in print their conclusion that the evacuation and relocation was wrong. I submit that they were disqualified from sitting on the Commission appointed to inquire into

the relocation. Certainly two of those three were lawyers. I have said before I think it was completely unethical on their part to have sat on a Commission to look into a matter in which they had made up their minds. More than that, a fourth member of the Commission was a Japanese-American who had himself been evacuated and a fifth was an Aleut from the St. George Islands, who had also been evacuated. I submit that both of those were acting as judges in their own cases. So that five members out of nine were disqualifed; and the Commission was stacked and disqualified. The majority of the Commission was disqualified.

The staff was similarly stacked, and about forty percent had Japanese surnames and one more was married to a person with a Japanese surname. One of the staff members gave testimony before the Commission — submitted affidavits and statements. So the staff was stacked.

Finally, when the hearings were being held in various cities in the United States, every time there was testimony favorable to the Government, there was a large Japanese-American claque that would hiss and boo and stamp their feet. So the hearings were stacked also. Necessarily, therefore, and unsurprisingly, the report that the Commission produced was unreliable.

It is full of misstatements such as no American of Japanese descent was ever guilty of an act of disloyalty to the United States. That of course is not true. Two Japanese Americans were duly convicted of treason: Kawakita in the Supreme Court, and Tokyo Rose — Mrs. D'Aquino — in the Ninth Circuit, cert. denied. Another Japanese, Harada, committed treason on the small Hawaiian Island of Niihau, though that incident is mentioned in the Commission's report. More than that, at the Tule Lake Relocation Center, in the summer of 1943, it may have been '44, there was a reign of terror organized by ethnic Japanese — some of them dual citizens, some of them alien enemies, some purely American citizens — to force other dual citizens to renounce their American citizenship as they had been permitted to do under an act passed by Congress. All of this appears in litigated cases easily accessible in the Federal Reporter. It was obvious that these people were actively disloyal to the United States.

Finally, I discovered in the course of digging in the law reports a Japanese couple who were born in California of Japanese parents, were registered with the Japanese Consul, married and had children, third-generation Japanese who were registered with the Japanese Consul. They were among the leaders of the Tule Lake reign of terror. After the war was over they were among those who elected to be repatriated to Japan. Before such repatriation, in the fall of 1944

when the outcome of the Pacific War was all too clear, both of them said that their loyalty is still with Japan and they hoped she would win the war. When the war was over and Japan had lost, the husband said that he had been loyal to Japan during the war and he wasn't going to change his loyalty now. Yet these two had the gall to come back to the United States to reclaim the American citizenship that they had renounced. They were in the courts for 12 years before they were finally turned down. I told the Committee they weren't denied due process they had undue process. They were among the people who, under the bills submitted to implement the Commission's report, would have to have been sought out by the Attorney General in Japan and given $20,000 for having been relocated during the war.

Now, the rest of the report is just as bad. It couldn't be anything else except incorrect. The most telling instance is that they call the loyalty program divisive. Well, if all these Japanese-Americans born in the United States had been one hundred and five percent pure Americans at heart, the loyalty questions would not have been divisive. The trouble was, that having been brought up under Japanese family influences, and pretty well self-segregated from the main current and the mainstream of American life, they naturally suffered a severe emotional schizophrenia once Pearl Harbor happened. The program was divisive because it required them to decide whether their loyalty lay with their cultural upbringing, or

with their birth in the United States that made them American citizens; although, of course, under Japanese law they were Japanese subjects.

So that without going into more detail, which is all in my testimony and my written statements submitted to the House Committee in September 1984, I concluded that the Commission's report was, in the words of Roger Williams commenting on the royal charter of the Massachusetts Bay Company, "a solemn public lie." The bill was not reported out of the subcommittee or out of the committee. It was reintroduced in the 99th Congress. They held hearings in April of 1986 scheduled for the exact day when I was to go into the hospital for major surgery. I did submit a written report and highlighted what I have just outlined here and concluded that the pressures behind these so-called redress bills were a frightening example of "the monstrous and debauching power of the organized lie." The bills, of course, have been reintroduced. I plan to offer my testimony again should hearings be held either this year or next year.

Q. If I can ask you a couple of questions about this, sir, one of the things that you mention in your 25 April 1986 letter to Congress is that the Commission was remiss in not setting forth any of the rationale in the Supreme Court decisions.

A. Yes. That, you will find, is a common academic disease. If you don't like a Supreme Court decision, you quote extensively from the dissent but you never once set out the rationale of the majority opinion, which of course is completely dishonest intellectually. Nowhere in the Commission's report can you find spelled out the holding of the Korematsu or Hirabyashi cases. As a matter of fact, as late as 1978, Justice Douglas, who concurred in both those opinions, referred to them with approval. But when he wrote his memoirs, which were published posthumuously and which were dictated after he had his stroke, he was completely confused. He told about writing a concurring opinion in Korematsu which his brothers, Black and Frankfurter, persuaded him to withhold. This was in the fall of 1944. Well the answer is that he and his influence on Justice Frankfurter, and vice versa, by that time was nil. And the answer also is that he confused the Korematsu case with the Hirabyashi case decided one or two years earlier, in which he himself had filed a concurring opinion. He also said he should have joined Murphy and Rutledge dissenting in the Korematsu case. The fact of the matter was that Rutledge did not dissent in Korematsu, he was with the majority. But Justices Roberts and Jackson were among the dissenters. Now, why did Justice Douglas omit those two unnamed dissenting judges in his memoirs? First, I don't think his mind was still functioning at top efficiency after the stroke; and the second was

that he was not on friendly terms with either Justice Roberts or Justice Jackson. So, it is a completely unreliable memoir as posthumous memoirs always are. Because who wrote it? Did the autobiographer write it that way? Or was his text changed by the editors?

The whole business of Japanese redress, when you consider the well-justified doubts on loyalty entertained by people as sensitive to civil rights as President Roosevelt, Secretary of War Stimson, and Assistant Secretary of War John J. McCloy, you can be sure that they felt that they were acting on probable cause in recommending the evacuation.

Q. You maintained this position, sir, for many, many years.

A. Ever since, at least, the Grodzins book review.

Q. Sir, do you think it could have been handled in any different manner, getting the same result?

A. I don't think you could have. You certainly could not have separated the enemy aliens from the dual citizens because they were very often members of the same family. It was the minors and little children who were citizens, or dual citizens. You certainly did not have time

to examine the individual loyalties of 112,000 people. The left-wingers cry "This was racist". This wasn't racist at all. It had to do with nationality. Far from being racist, the United States repealed the Chinese Exclusion Act during the war. It was allied with China during the war, and it abolished extraterritorial courts in China during the war. It had nothing to do with racism. Furthermore, as the Ten Broek book indicates, during the war, Japanese-Americans were physically attacked by a Chinese ethnic, by a Filipino ethnic, and by a black American. It wasn't racist, it was the fact that after the sneak attack at Pearl Harbor, which took place just as the Japanese envoys were negotiating with Secretary of State Hull, everything Japanese was absolutely hateful and abhorrent to every right-minded American. That continued for many months; and, in the minds of some, for many, many years.

Q. Sir, both before and after your retirement you received several honors. There are three in particular I would like to ask you about. One, in 1965: The Brown University Bicentennial Medallion.

A. Well, Brown University was chartered in 1764 by the General Assembly of the British Colony of Rhode Island and Providence Plantation. In 1964 its bicentennial rolled around. In the spring of 1965, the then president of Brown, Dr. Barnaby Keeney, with presumably the consent and approval of the corporation, designed a

bicentennial medallion which was awarded to 20 or 25 alumni who were not in line to receive honorary degrees. I was given one of those and I have the shingle on the wall. If you will take a minute, I will let you read the citation.

Q. Thank you, sir. The citation dated 6 February 1965 reads: "You have shaped a career, notable for its brilliance, in the federal government, in the military service, and in the private practice of the law. Your powers of advocacy have won you admirers in many tribunals, including the Supreme Court of the United States, and you have generously shared your wisdom through the authorship of standard works on appellate procedure. We proclaim you the possessor of outstanding merit, and declare that from this judgment there is no appeal." It is signed by the President of Brown University, Dr. Keeney.

Sir, second: The Honorary Doctor of Laws from Cleveland Marshall Law School in 1969.

A. The dean of that law school was Colonel James K. Gaynor, US Army Retired, a former Judge Advocate. He had been one of my pupils when I taught military law and jurisdiction at George Washington University Law School. The degree was offered to me in December of 1968 and, of course, I accepted it. I had better preface my remarks

by saying that I strongly suspect that a great many other honorary degrees are offered and accepted in the same "old boy" network basis. It was Jim Gaynor's notion that I should get an honorary degree. My address on that occasion was entitled "A Lawyer Views The Gathering Storm" and that appears in the Congressional Record citation given in my outline, through the courtesy of Senator Sam Ervin of North Carolina.

Q. The final award, sir: In 1974, you were given the Army's Outstanding Civilian Service Medal.

A. That had this background. Some of the libertarian lawyers were asserting that the general military articles were unconstitutionally vague. The principle of unconstitutional vagueness, in its essentials, is perfectly defensible. A person has to know what he is prohibited from doing. It appears that in the Supreme Court decisions, first in about 250 US (U.S. v. Cohen Grocery), there was a wartime measure that made it an offense to sell goods at other than reasonable prices. Now, who would know what prices are reasonable? Cohen Grocery, represented by ex-Justice Charles Evans Hughes, had no difficulty in persuading the Court that this statute was unconstitutionally vague, because nobody could know what it meant. Then the principle had been applied and rejected in a whole spectrum of cases. One commentator indicated that it was being used as a tool toward a

result. Shortly before I wrote the article, there was a proceeding in the District of Columbia where I think there was a three-judge court. Chief Judge Bazelon of the Court of Appeals, who was a member, wrote an opinion suggesting that the general military articles were unconstitutionally vague. Of course, Chief Judge Bazelon was a doctrinaire left-winger and I thought it was about time to write a brief sustaining the article. So I wrote the law review article which was published in the ABAJ pointing out first, that these two articles antedated the Constitution; and second, that they had been so circumscribed by the particular regulations and specifications put right in the Manual, that nobody could be in doubt as to what was prohibited. There might be gray areas in the conduct unbecoming, especially when it was on the border of adultery, or shacking up, or in an area where there might be different points of view. But by and large, nobody who was charged under either general article had any doubt whatever that what he did was wrong.

So I wrote this article for the American Bar Association Journal to indicate that the articles were not only pre-constitutional, but were perfectly valid post-constitutionally. When Parker v. Levy was decided by the Supreme Court, the opinion of the Court followed my reasoning and only the dissent cited my article. The Judge Advocate General at the time, General Prugh, was so happy with the result that he awarded me an Outstanding Civilian Service Medal which, as a

major general and head of an office, he was authorized to do. Do you want the citation?

Q. Yes, sir.

A. So, I suppose I am the only individual who has ever been awarded a medal for writing a law review article.

Q. The citation reads: "Mr. Frederick Bernays Wiener has distinguished himself by a lifetime of outstanding public service to the United States Army and the legal profession. His devotion to military law and military history, as evidenced by his enumerable scholarly writings and addresses, has served to enhance the stature of military law in the legal profession and to enrich the traditions of the United States Army. Through his continued close association with the United States Army Judge Advocate General's Corps, military lawyers have become primary beneficiaries of his scholarly achievements. To the man who has helped the military lawyer up the ladder of professional excellence, the United States Army hereby expresses it gratitude." Signed: George S. Prugh, Major General, The Judge Advocate General.

Sir, earlier we have talked about your involvement with military justice. And, I think we last discussed how you were a consultant to

TJAG in the petition for rehearing of Callaghan v. Parker. You also are noted for being an historian in the field of military justice. How did you begin your study of this history?

A. Well, as I think I mentioned in an earlier session, I have always been interested in matters historical. I majored in history in college. I became interested in legal history in law school. Therefore, my approach to a problem has always been to look up its history and see how the matter originated. Where did this thing start? Who first did it? What were the causes that led to its creation? What were the factors that led to modifications? It is for that reason that I have always approached every question of military law with an eye to going to the beginnings. I have cited one article I had published in The Army Lawyer. I was digging around in the Cumberland papers in Windsor Castle. The Duke of Cumberland was a son of George II, and an uncle of George III. He was the victor at the Battle of Culloden in Scotland, so he is known north of the border as "Billy, the Butcher." I found in his papers the earliest set of instructions to judge advocates--how a young officer should proceed when he is trying a case as judge advocate of the court-martial. The date of this was 1749. The earliest similar instructions from the US Army, of which I was aware, were something dating from 1871. And, so, I always start with the beginning and proceed from there.

Q. Where did you do your research and how were you able to find time?

A. Well, on finding time, let me go back to when the original staff of the Trinidad Base Command gathered at the Brooklyn Army Base in New York Harbor. The executive officer of that expedition was then Lieutenant Colonel Leland S. Hobbs, who was a doughboy. He was extremely able and also quite unpleasant. He wound up as commanding general of the 30th Division in the ETO (European Theater of Operations) during World War II. But he taught a great lesson, and he gave us the fire and brimstone peptalk. One of his items was: "Now gentlemen, I don't ever want one of you to say to me, when I have asked about the progress of an assignment that I have given you, I don't ever want one of you to say, "I didn't have time." Gentlemen, you make time." That, I think is the answer to your question. If you are sufficiently interested in something you will find time. You make time.

Q. Where were you able to do your research, sir?

A. Well, in Washington I had magnificant library facilities. I had the Library of Congress. I had the Supreme Court Library which is easier of access. If there was anything military I could go over to the War Department Library in the Pentagon. So, the materials were there. For Civilians Under Military Justice, with the aid of the Guggenheim

fellowship grant, I could travel around. I went to England twice, and I went to Ann Arbor to dig in the Clements Library. I could go to Boston and New York and Philadelphia.

Q. Sir, you are one of the few who has written extensively about the history of military justice. Why do you suppose there has been so little interest?

A. Most people aren't interested in history. They are interested in today and tomorrow. And then a lot of people have no curiosity. I remember when I was first at the law school, and all full of wonderment and eager beaver and wondering where to begin, I said to a second year friend of mine "Well, I went to the library and got out Volume 1 of the Harvard Law Review to see what it was like." And he was amazed. Well, so go to beginnings. You go to beginnings.

Q. If you were talking to today's Army's lawyers collectively, what would you tell them is important in the study of the history of military justice?

A. Well, one vital point is that they will learn about the mistakes of the past so that they will themselves avoid those same mistakes in the future. I would say that.

Then Gene Caffey said something to me, I remember, in the Spring of 1937. There were great floods on the Ohio River. JAGO was getting all kinds of calls from Army commanders and Army posts about what could they do in the way of extending military aid and what could they do to stop traffic, and so forth? And he gave them a very simple answer: "You can do anything that you can justify afterwards."

One of the difficulties of Army martial law in Hawaii in World War II is that much of what was done could not be justified afterwards. How can you know what can be justified afterwards? Well, if you have the history in mind you will know the points that created difficulty. And you will avoid those difficulties.

One example that occurs to me is that Trindad was about ninety percent black. A lot of our troops were southern. One of the senior officers of that Coast Artillery Battalion told me that when he went down to see the mayor of San Fernando, which is a small city south of Port of Spain in the vicinity of the famous asphalt lake which was really a very small body, he met the mayor of the city and shook hands with him. He told me it was the first time in his life he had ever shaken hands with a black man.

Over to the east of Port of Spain, was a town named Arima, of about 12,000 people of whom maybe twelve were white. This was adjacent to Fort Read which was the big Army catonment in Trinidad which had been planned for a long time. In there, they sent the 99th Coast Artillery which was a colored outfit — indicated by an asterisk.

Over the weekend some of the soldiers, including Jimmy Collins of the 99th Coast Artillery, went into town looking for "Topic A". They asked about it and were pointed to a house which was obviously a house of assignation. Jimmy Collins took a girl, a white girl, and grabbed her by the arm and took her into a room and wreaked his will on her. He was charged with rape. And he was convicted. Since a local civilian was involved, I attended the trial with the solicitor general of the colony. Under AW 92 then in force, there were only two possible penalties—death or life imprisonment. Jimmy Collins got the lesser.

On our way back to town, I said to the solicitor general, "Let me ask you this: If this case had been tried in the supreme court of the colony in the Port-of-Spain, what would have happened?" "Oh," he said, "the man was guilty as hell, he would have been convicted." I said, "What kind of a sentence would he have received?" "Oh, five or six years."

That got me to thinking. On the one hand, I did not want my commanding general — this was General Pratt and he was a wonderful person — I didn't want General Pratt to be sending a "Scottsboro" case into the War Department. So, I went down to see the registrar of the supreme court and got from him a list of the sentences adjudged in rape cases over the past five years. And the result was that the range was, from release on his own recognizance and being bound over to keep the peace, to six years confinement. And, I went in to see General Pratt and told him the problem.

I said, "I attended the trial because I wanted to do more than just tell you that the record was legally sufficient. I wanted to convince myself that the man was guilty. There was no question about that. So the only question is sentence. Now, on the one hand, I don't want you in the position of sending a 'Scottsboro' case to the War Department. On the other hand, I don't want to suggest something so light that it will encourage the gallant coast artillerymen of the 99th to go and commit the same offense. So I propose doubling the local maximum and cutting down the life sentence to 12 years."

He said, "Judge, what would be the sentence or what would be the maximum for this offense in the States?" I said, "Well, in the

northern states rape would carry a maximum of 20 years, and in a southern state it might involve a lynching." He said, "Judge, I'll split the difference with you. You want 12 years; I want 20 years. Make it 15." It was approved for 15. It went through.

I had a letter from Colonel Weir saying, "Why did you sit there with the court? What about that paragraph in the Digest?" I said that the paragraph in the 1912-1940 Digest had to do with a Staff Judge Advocate who was giving signals to the court. Here I was a mere spectator accompanying the Solicitor General of the Colony to a case in a trial that was not open to the public at large. So, there was no influence there.

Later, a case arose in New Caledonia. Two black soldiers had raped a white woman. The life sentence had gone through and when it got to Washington the NAACP started raising unshirted hell. It got into Judge Patterson's hands, the Under Secretary of War. And it hit Time magazine sometime in the first half of 1944. In late 1944, when I was on my way out to join Tenth Army, and General Pratt was then in command at the Presidio, I called on him, and the last thing he said to me was, "Well, Judge, you kept me out of a lot of trouble."

Q. Sir, now might be as good a time as any to talk about what you envision should be the future of military justice.

A. I think that with the Code as it now stands, an expanded Manual, and a situation where a military judge who is a trained lawyer runs the trial — the president of the court is now simply foreman of the jury — you have trained lawyers on both sides, and you have a Manual that is large enough to answer virtually any question that can arise. I don't think you are going to have the same military justice difficulties you had in World War I or II. I think that with the elimination of confirmation of death sentences by theatre commanders, and incidentally that went out in the Elston Act, the really serious cases will go the President. I don't think you have quite as much difficulty there.

I question whether in a large scale war, where something turns on the deterrent effect of sentences, it would be wise to continue the automatic system of double appellate review. I would imagine that you would have to cut down or limit the kinds of cases that are entitled to second review. Short of that, I think the problems have been surmounted. But the real problem is to deal with people who insist that soldiers are nothing but mechanics and you don't need a court-martial system. Some of those bills, like those that were introduced by the late Senator Bayh of Indiana, egged on by the chap at the Indiana Law School who has been making a career out of fighting military justice — I forget his name for obvious reasons —

wouldn't have the members of the court seated accorded to rank, anti-authoritarian in every instance. I think I have mentioned him in some of the articles I have cited in the outline. We have got to keep those people down. You've got to emphasize again and again and again as Justice Holmes use to say: "We need education in the obvious more than investigation of the obscure."

A military outfit where people are bound to advance obediently to their death if need be, is very different from a civilian community where everything is done for the greatest good of the greatest number. That must be emphasized. I think that the transition now from the old AW's and the old AGN has progressed sufficiently so that you won't have the virtual sitdown strike against the Code the way you had in the early 50's. So, I would envision reasonably smooth sailing except when you get particular death cases. But you have to have particular death cases in any system which will be troublesome. After all the Supreme Court has gone back and forth on the constitutionality of the death penalty like a yo-yo.

Q. Sir, one other thing you mentioned is the feeling that the armed services should study the causes for endemic civilian dissatisfaction when the services are expanded through the use of the draft. What do you believe those real causes are?

A. Well, it is very simple. People who live a free and easy life are suddenly subject to discipline and are told what to do and what they can't do. And, they don't like it.

Q. Do you think that is peculiar to the American's cultural system or do you feel it is different in an Eastern European or Western European country?

A. It might be different in Germany. It might be different in Russia. It would be, I suppose, somewhat similar in France and probably somewhat similar in England. Don't forget that the way to obtain the obedience of the American solider is by explaining to him why the order is being given. A matter that is too frequently lost sight of. By and large the troops will do with rigid discipline if it is fairly administered. The reason there was more yelling after World War II than after World War I is because there were more people in the Army, in the armed services, and they were in the subject of restraints of military discipline for a longer time. After all, World War I was less than two years. World War II, starting with the mobilization and the draft, was almost five years. The numbers were greater. What is needed is an examination of our very sorry system of civilian criminal justice and to see how we can avoid making the same mistakes in the military system. Otherwise, I don't think you've got the problem that you had before. You certainly don't have the

problems of World War I where you could return acquittals for revision and allegedly inadequate sentences for enhancement. Don't forget also the Houston Mutiny Case in the 24th Infantry. You are familiar with that I take it.

Q. I am, sir. It's involving the black soldiers.

A. Yes. The 24th Infantry — which was one of the four colored regiments under the Revised Statutes, the 9th and 10th Calvary, and 24th and 25th Infantry — the 25th Infantry had rioted in Brownsville. And the 24th Infantry rioted in Fort Sam Houston in the fall of 1917. There was a large trial and a large number of individuals were tried at the same time. The record was reviewed every day by the Staff Judge Advocate of the Southern Department. When the case was over, about a dozen of the accused were sentenced to death by hanging and the others to long terms of imprisonment. The Staff JA had been writing his review all along, and been keeping it current. So, immediately when the trial was over, he was able to advise the commanding general that the record was legally sufficient and the sentence could be executed. Now, under a peculiar quirk in the 1916 Articles of War, a Department Commander in time of war had confirming authority. He could confirm a dismissal case and a death case. When he was himself the appointing authority, a second review was not necessary. So, he approved the death sentences that night

and the next morning at about 6 o'clock this group of 12 or 20 soldiers in the 24th Infantry was hanged. And, as Colonel Rigby told me many years later, that news hit the War Department with a dull thud.

The first thing they did was to say that no death sentence in the United States would be executed without reference to the War Department. The second thing was that they immediately set up a board of review procedure for all death and dismissal cases. The Department Commander was relieved from command and sent out to become the commander of the Coast Artillery brigade in Hawaii. But the difficulty was that everything that had been done, was completely legal. Of course, if the records had been insufficient, they couldn't have done anything about it. Also, there was no provision for assigning defense counsel. The sentences were high and the reconsideration which was still needed sat in the craw of many people. It was subject to many injustices. The difficulty with the post-World War I JAs was that they assumed that their system was now perfect. But they neglected to implement its safeguards by always insisting on lawyer law members and always providing lawyers to run the trials. I indicate somewhere in my court-martial system articles in the 1947 Infantry Journal about the recruiting system of the Judge Advocate General. They had the flower of the American Bar to pick from and then look what they came up with.

When I was in New Caledonia, I had a clerk who was a member of the Bar; he was a corporal. Well, I tried to get him to write draft reviews of GCM cases. No good. I tried to get him to write draft specifications for charges which came in and needed some amendments. No good. I couldn't get him to type because he wasn't a very good typist. Finally, there came a communication from the War Department saying that he had been selected for attendance at the JAGC OCS and did I have any objection? You know what my answer was? "Go take him. I am now rid of him." I had tried previously to pass him off on other staff sections, but I had not succeeded. I think they really could have done much better.

Q. Sir other than the gentlemen you have already talked about, are there any other particularly memorable JAGC general officers that you have been acquainted with?

A. Well, I suppose the most senior whom I knew well, was General Blanton Winship who was Governor of Puerto Rico. I had dealings with him when he was Governor. I met General Arthur Brown only casually. I knew General Gullion reasonably well and thought very highly of him. Of course, he got tired of being JAG and wanted to be Provost Marshal General. General Cramer, I am afraid, was a disappointment. He was largely a contracts man. Certainly by the end of the war, after years of worrying about his daughter and son-in-

law interred in the Philippines by the Japanese, he would always agree with the last person who talked to him. He was incapable of making a firm decision. General McNeil who had one star was looked down on by a great many of the lawyers because he didn't know much about contract law and because he had long postponed his admission to any bar. General Fred Llewellyn who was an assistant JAG, I always thought was one of the ablest lawyers in the shop. General Weir did very well by me while he was there. But he had a heart attack, I think, about the time that he lost out to become the next TJAG.

I was on very friendly terms with General Tom Green, but not even his dearest friends could characterize him as a profound lawyer. I disagreed with him very violently in how he consistently, after the war, recommended commutation of dismissal sentences. You will find the recommendations in the bound BR volumes. One recommendation involved an Air Corp officer — the Air was not yet separate — who was an operations officer at the Tulsa airport. He was a married officer, and he had temporary sleeping quarters on the field so that he would be available at any time he was needed. He was shacked up in those quarters with a babe. Well, the court sentenced him to a dismissal because it was perfectly obvious and flagrant. General Green recommended commutation. I took it up with him in casual conversation one day. "But Fritz, dismissal is a harsh punishment." With that kind of attitude at the top, it was

understandable that when they enacted the Code, dismissal was no longer mandatory for violation of Article 133 the way it used to be.

As a matter of fact, it was my observation during the war that mere dismissal was inadequate in a number of cases. Now there was an officer in New Caledonia, and that was a Navy theatre and enlisted personnel could not — repeat not — have any liquor. This officer made money selling liquor to enlisted men at a very large profit. He needed the money. Why? Well, he was a married man, he had a large allotment to his wife, and he was getting engaged to a French girl and he needed the money to buy an engagement ring. And all they could do for him was dismissal. Yet it really deserved more than dismissal. He should have done time. But with that lenient attitude at the top, you couldn't really yell at the Congress for following the example.

He was followed by Mike Brannon who I think was a good Judge Advocate General. He had the sense to take the JAG officers off the single list, where they were competing against themselves, and to put them back on a general list for competition against officers from other branches. Then, General Caffey was next. I am afraid that my dear and close friend Gene Caffey was not the best Judge Advocate General. He was given to impulses which, on second thought, I think he would have controlled. Then, he was followed by George

Hickman. George Hickman had been a line officer. But he never went to law school until after the war. I think almost immediately after he got out of law school he was a high ranking JAG officer. I don't think he was too successful; he couldn't have been. He had had a lot of military experience but he had virtually no legal experience. He was followed by General Decker who was a strange individual. He was a good lawyer in streaks. He was dreadfully pompous. I recall some people telling about General Decker addressing some of his troops and saying, "It's very important that you take one day off a week, and not work seven days." My friend's comment was, "The Good Lord told us that in the Bible."

Ken Hodson was a very good Judge Advocate General. He was also an old friend. I first encountered him in Trinidad where they were trying a civilian for being a poor poker player. Well, the engineers who were building Fort Read — building the airfield — rented quarters to the civilian employees they brought down from the States. Our hero was the chap who was supposed to collect the rents and turn them in. He was a very poor poker player. In order to find money to cover his card playing debts, he dipped his fingers into the rental till. He was brought up before a general court-martial. Ken Hodson, then a first lieutenant of the coast artillery, defended him.

The facts were that he had come down from the States on a commercial liner to Puerto Rico and then again to Trinidad. Ken moved to dismiss the charges for lack of jurisdiction because having come down individually, he wasn't a person "accompanying the Armies of the United States without the continental limits of the United States." I told my assistant not to show me any papers. I wanted to be Law Member in that case and be insulated from it. In an oral opinion, I overruled that motion to dismiss and also various other motions to dismiss. And, from what Ken told me later, made a tremendous impression on him as someone who could deliver an oral opinion dotted with citations. His guy was convicted and they shipped him back to the States and I don't know whether they turned him loose then or not. So far as the British were concerned, they weren't interested because he had not damaged or stolen British property or injured any British civilians. We could take care of that. My acquaintance with General Hodson goes back to the time when I overruled his motions to dismiss back in the summer of 1942.

Q. And then after General Hodson?

A. Well, I don't really know the succession.

Q. Well, just those you have known, sir. Any general officer.

A. General Larry Williams has been a close friend since about 1958. Then I met General Persons when he was TJAG and I was greatly impressed by his perceptiveness. He was TJAG when they had those West Point cheating problems. I thought he handled those extremely maturely. I always regretted the fact that when he retired he decided to do absolutely nothing except go fishing. I don't think I have had more than a nodding acquaintance with any others since then.

Q. Sir, with your experience in military justice and our research, we found it not unusual to find allusions to the fact that you could have been or should have been a judge on the Court of Military Appeals.

A. Well, Ken Hodson mentioned that to me in the fall of 1968. But a seat on that court, a 15-year term with a circuit judge's salary and retirement, was a real plum. The chairman of the Military Affairs Committeee of the Senate had his own candidate.

Q. So at one time you were considered?

A. I think Ken Hodson would have liked to have had me on the court. It was just an expression of opinion. I have never been upset by it because of what I learned some years before then when I had argued the Chandler treason appeal in Boston. A friend of mine from the Department of Justice had his father in town and on this one evening I

was invited to come over. The father was a practicing attorney in Boston. He asked who the trial judge had been in the Chandler treason case and I gave them the name. The poor old man sighed. I found out later that it was this judge's vacancy that my friend's father had worked for and tried awfully hard to get. I made up my mind then that I would not sour my entire life by hopeless regrets about things I might have liked that never came true. I can say this — I don't think that, had I been appointed to the Court of Military Appeals, I would have lowered the average ability on that tribunal.

Q. Sir, we have talked about your involvement in the history of military justice, but we would certainly be remiss if we did not talk about the things you've done in other legal history activities.

A. Again, I was always interested in legal history and I joined the Selden Society while I was in law school and continued for a few years until my first son was born. Then being a father turned out to be more expensive. And the Selden Society, I figured, was a luxury I didn't need. Later, in more oppulent days, I was able to attain a long-felt desire to own the entire set of Selden Society volumes; which, if you bought all of them, they gave you a concessional price. About that time, I was asked by Mark Howe, who was professor of legal history at Harvard and who had served in Allied Military Government in Italy as a bird colonel and had been awarded the DSM, "Would you be willing

to be state correspondent for the District of Columbia?" I said, "Sure," and began to recruit members. I turned out to be a terrific recruiting sergeant even without getting any prospective members drunk. I found out what the trick was to get them to join. You see your victim and you say, "You know, Mike, you are one of the few people in this town who has got the background and the learning to appreciate what the Selden Society is doing. And I think you would enjoy being a member." What were the requirements? One is an interest in legal history; and the other, in those days, was $10.00 a year. And the first requirement could be waived. So, I was an extremely successful recruiting sergeant.

Then in 1960 when the British Bench and Bar and the Solicitors came over to Washington to join with the ABA for the annual meeting, I suggested having a meeting of the Selden Society in the ceremonial courtroom of the US Courthouse in Washington. This seemed to go well with most of the people concerned. I worked with the Chief Judge of the US Court of Appeals and the Chief Judge of the US District Court and we put up the president of the Society at our house. We then had a house in Chevy Chase; and we could put them up on their trip. Then I got the wife of a Supreme Court Justice and the wife of a Court of Appeals judge to be the hostesses at the tea.

Then I learned how you operate a function like that. You get as many people as you think you need and you fractionalize. You give each one of them just one job. You, Mike, take care of the posters. You, Dan, arrange with the caterer for the tea, and the urns, and the pastries, cups, and nibbles and the coffee cake. Someone else check with the janitor to see that the lights are on, and so forth and so on. By fractionalizing, they only have one thing to do, and all you have to do is coordinate.

In the ceremonial courtroom, we had Sir Cecil Carr delivering the address. And we had on the three chairs behind the bench, The Chief Justice of the United States, the Lord Chancellor of England, and the U.S. vice-president of the Selden Society at that time, Erwin Griswold, who was then dean of the Harvard Law School. I had known Erwin since my second year there. We joined in and laid on a big buffet supper at the Army-Navy Club in town, and made it a very fine party all around.

The consequence was that I was elected an American member of the council the following year. It's not who you are, or whom you know, but what you do for the party that counts. The following year, I happened to be up in Cambridge. My older son, the submariner, was not yet then in submarines. He was taking a course at MIT leading to a Doctorate in Science. I was in Boston there visiting him and his

wife, and seeing Mark Howe and Sam Thorne, members of the council of the Selden Society. Howard Drake, the secretary from England, was over in this country. We had a couple of meals together and the net result was that I was invited to deliver the Selden Society lecture in London the following spring. So, we went over in the spring of 1962. I delivered the lecture and it was well received. We were very widely entertained. Then in 1964 and 1965, when I was in London researching Civilians Under Military Justice, I resumed my personal contacts with the heads of the Selden Society. That has continued down to the present day, except to the extent that, unhappily, they have died off.

Q. Would you comment on Justice Frankfurter's influence in your life and your career?

A. He had a tremendous influence on me. I first met him, to speak to, in the winter of 1928-29 at the law school. I was on the law review. And, we used to have case meetings when you discussed what you thought were novel cases in the advance sheets assigned to each editor to read. Then there would be a decision whether the thing was worth pursuing. In one advance sheet of the Northeastern Reporter, there were recorded about a dozen criminal cases from the Supreme Court of Illinois of which ten had been reversed. This was turned over to me as a possible subject for a note. I went to see Eddie Morgan.

Eddie Morgan talked about how it was difficult to get good judges because did you pay them enough and so forth. Then I went to see Professor Frankfurter and told him the problem. He said, "The thing to do is to concentrate on those ten reversed cases." And, I did. You will find it in Volume 42 of the Harvard Law Review entitled "Reversals in Illinois Criminal Cases." I quoted at the end something that Dean Wigmore had said: "In the long run every community gets the kind of justice it deserves." This so impressed Dean Wigmore that he called the president of the law review — incidently, Wigmore had been one of the founders of the law review in 1887, he and Williston and Beale — "Who wrote that note on Illinois Criminal Reversals?"

Then, I saw Mr. Frankfurter from time to time. In my last year, I was permitted to take his seminar on federal jurisdiction. It was very informal. The text was the current Supreme Court Reporter. We would discuss each case reported. The question was: On what jurisdictional basis did this particular case reach the Supreme Court for decision? Then, when that bread and butter work was done, as a sort of dessert, he would throw open the merits of the cases for free discussion.

Somewhere at the beginning of the course, at the earlier meetings, he asked, "How many men do you suppose have been members of the U.S. Supreme Court since the beginning?" This was

the fall of 1929. No one knew the answer. So he sent one of his students to his office to get a World Almanac. When the World Almanac was produced, I said, "It is on page 248, Mr. Frankfurter." He turned to page 248. "Ha ! 'Wives of the Presidents'." I said, "That's because you must have the 1928 Almanac and not 1929. In the 1928 Almanac the Justices are on page 273." He told that story for the rest of his life.

How did this happen? I was utterly fascinated by the Supreme Court as a first and second and third year law student. I had a very small room in the attic of a house on Massachusetts Avenue where you could hear the square-wheeled subway trolleys going along on their way up to Arlington and Lexington. I had my bookcase next to my bed, and I could reach from my bed to the bookcase. Every time I had a question about a Supreme Court justice, I would reach to the bookcase for the World Almanac. And, obviously, it was easier to remember the page in the almanac in which these justices were listed, than to have to look it up all the time. And I always had a good memory for citations.

One of the interesting cases arose out of the Myra Clark Gaines will litigation. Myra Clark was the daughter, either legitimate or illegitimate, of Daniel Clark who was a great figure in the history of early Louisiana about the time of the purchase. She married General

Edmund Pendleton Gaines who was the great rival of General Winfield Scott. The dispute between the two, as to whose brevet of major general made them senior, bedeviled several Presidents. The question was: Was Daniel Clark's will valid? And if so, was she entitled to recover? And if the will was invalid, was she a legitimate child so she could recover?

This reached the Supreme Court 17 times. There was a book written about it which I reviewed in the Georgetown Law Journal in the late 1940's: "The Creole Claimant." We got it first as a federal jurisdiction case, whether probate proceedings could be heard in Federal courts. And of course, they can't. When you have a decision inter partes, they can be heard. Mr. Frankfurter assigned the Myra Clark Gaines case to me. So for the next week, I read all the cases on Myra Clark Gaines from beginning to end and reported on them. That was a fairly bright spot in the seminar.

Then there was a case involving jurisdiction over declaratory judgment — is that a case or controversy? There was a decision about 1929 where it was denied. There was dissent by Justice Stone, and one of my classmates was quite upset, and he espoused the cause of the dissent. I said, "I think that all this enthusiasm about declaratory judgments and arbitration can fairly be characterized as 'boy scout jurispruduence'." This made a great impression on Professor

Frankfurter. Finally came the time to write the thesis — to pick a subject. Well, one of my classmates decided to look up equity receiverships in the District of Massachusetts. Someone else was going to write a paper on some abstruse question of federal jurisdiction. I had noted that one of Mr. Frankfurter's great traditional heroes was William H. Moody who was only on the Court from 1906 until 1909. Then he got sick and had to retire; and he died. He was the author judge of Twining v. New Jersey holding that in the state court the prosecutor could comment on the accused's failure to testify. It isn't law anymore, but it was then. Mr. Frankfurter thought it was a wonderful case. Moody was a wonderful fellow, and Holmes had thought well of Moody. I looked into the matter, and decided I would suggest as a topic, "A Judicial Biography of Mr. Justice Moody." That suited the little professor just fine. And it suited me just fine for two reasons. In the first place, writing about one of his heroes meant that anything I could say would be well received. In the second place, Moody J. had only served for three terms and that meant a minimum of cases to have to read. When I started digging around, Moody had been Secretary of the Navy and then was made Attorney General and then was put on the Court by Theodore Roosevelt.

When I went to look in the contemporary magazines about the comments on this appointment, I found that there was a considerable

body of opinion to the effect that when President Roosevelt was making his Attorney General an Associate Justice he was packing the Supreme Court. This was 1929. The only President Roosevelt was Theodore Roosevelt. The only Roosevelt active in politics was Franklin D. who was in his first term as Governor of New York. And if anybody had mentioned the 1937 Court Packing Plan he would have been sent to the nut ward for examination. I went to see old Professor Wambaugh, Eugene Wambaugh, who used to teach constitutional law at the law school and who had earlier written a book on the study of cases, and who had been a college classmate of William H. Moody. I went to see him and I had some questions. Then I put to Mr. Wambaugh these comments that Theodore Roosevelt had packed the Supreme Court by putting his Attorney General on it. Here was Old Wamby's reply: "All Presidents have packed the Supreme Court. Only some have packed it with able men — and others with men not so able."

Q. How did he like your paper?

A. I got an ethereal 80 in the course. And at Harvard, at that time, an A was 75.

Q. So your plan worked?

A. The plan worked admirably. Of course, afterwards I saw the "little man" regularly from time to time. I would see him after he was on the Court, and also after he had retired. The last time I saw him — he died in February of 1965 — I saw him in the spring of 1964. It was after I had returned from my first research trip to England for Civilians Under Military Justice. I told him about friends of his I had seen and talked to. Then he was very much upset. He had heard that the next vacancy on Our Court — he always referred to it as "Our Court" — would be given to Abe Fortas. He was just disturbed beyond words by that possibility.

Q. Why?

A. Because he knew that Fortas was a snake. And in any event, he proved to be right because Fortas committed the high misdemeanor of practicing law while on the bench. Now, the word "high misdemeanor" is taken from the statute in Title 28 of the U.S. Code prohibiting Judges or Justices from practicing while on the bench. The word, the expression, "high misdemeanor" is in the Constitution and its implications are obvious. Oh yes, he had Abe Fortas sized-up.

Q. Sir, looking back on all you've done and all you've told us about, are there any regrets?

A. Well, there are a number of goals I had in mind that I didn't reach but I'm not going to dwell on them and let them sour my outlook. I have had a very interesting life. The happy moments have far out numbered the unhappy ones. As always, "Why didn't I think of this" is what the French call "L'esprit de l'escalier" — the wit of the staircase. You think of the things you could have said on your way down the stairs to leave the house. It's twenty-twenty hindsight. I would say I can think of a great many situations where I might have acted more wisely, worked more effectively, but I have had an interesting life.

Q. You don't care to comment on any of those?

A. No, why dwell on things that you had in mind but didn't make? Why sour one's existence with regrets? I think of my classmate's father who would sigh when he heard his successful rival's name. I determined then that I would never dwell on things I wanted to get and didn't get.

Q. Sir, there have been in the history of the United States some notable soldier-lawyers, the most famous of which is probably Oliver Wendell Holmes. I was wondering if you would summarize your role as a soldier-lawyer.

A. Well, I would like to think that I have been objective. On the one hand, I went all out for the Army when I was convinced it was right. Read my articles on the court-martial system in the 1947 Infantry Journal. Read my article on "Are the General Military Articles Unconstitutionally Vague." Read my article on the "Field Judiciary System, a Notable Advance."

On the other hand, when I was dealing with jurisdiction, where I felt that the Army was wrong, I went all out in that direction. But I have not made a career of fighting the Army. I have not made a career out of being an unqualified apologist for the Army — right or wrong. I have tried, on the whole, to take a position that could be justified later. With one or two exceptions, I think I have managed to succeed. Maybe I'm being overly optismistic, but I think that's the only honest answer I can give your distinctly searching question. When it comes to encomia, although I am no admirer of the late William O. Douglas, I like what he said about me in his review of Civilians Under Military Justice. I certainly like what the editors of the Military Law Review said about me in their Bicentennial Issue. That warms the cockles. So, perhaps I was successful in what I set out to do. You know the definition of the perfectionist. He's the man who takes infinite pains himself and gives infinite pain to others. Maybe I have been a perfectionist. I don't like to make mistakes. I don't like to find later, mistakes that I have made. That's one reason I

have always urged very strongly that everybody should proofread carefully and, if possible, have more than one person proofread. And always check your citations. There was the head of an Oxford college, who died about 130, 150 years ago, who lived to be 99. He is remembered in the Oxford Dictionary of Quotations for one saying: "You will find it a very good idea, my dear sir, always to verify your references." I have tried to live up to that; because, in the old days, I sometimes failed to do so. And I have seen what happened.

The one thing I would like to see happen — I have suggested it to Colonel Rice. On the 12th of April in 1989, there ought to be a celebration at the School to mark the 300th anniversary of the First Mutiny Act. Because just as that enactment meant the constitutional beginning of the English Army, so it marks the constitutional beginning of the U.S. Army. Because we took, of course, our military law from the British. I am sure you are aware that when John Adams and Thomas Jefferson were named a committee by the Continental Congress to draft the 1776 Articles of War, they copied them virtually verbatim from the existing British Articles. The First Mutiny Act is the beginning of our military law just as it is the beginning of English military law. The School would be the most appropriate place to have that celebration. I have suggested to Colonel Rice that he get it underway. He can dispose of it before the other celebration on the 30th of April in the same year which marks

the 200th Anniversary of Washington being sworn in as the first President at the City Hall in New York. Incidentally, the City Hall in New York, on the site where the Sub-Treasury now stands on Wall Street, was the site of most of the courts-martial held by the British Army while they occupied the city.

Q. Thank you, Colonel Wiener.

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20 January 1987

JAGC ORAL HISTORY PROGRAM --- EXPANDED INTERVIEW PLAN

Subject: Colonel Frederick Bernays Wiener, AUS (Ret.)

Researchers: Captains M. J. Kelleher & D. Trimble, JAGC.

Interview Date & Location: 28, 29, and 30 Jan. 1987; Phoenix, AZ.

I. BACKGROUND AND EARLY HISTORY

A. Family. Parents, Felix Frederick Wiener (1873-1930) and Lucy Lea Bernays (1886-1980). Best known relatives, Edward L. Bernays(1891-), pioneer Public Relations Counsel; Professor Sigmund Freud (1856-1939), founder of psychoanalysis. Former is maternal uncle, latter was maternal great-uncle.

[Subsequent Family Data: Married (1) Esther H. Green, 1933, div. 1948, d. 1956. (2) Doris Merchant, 1949.
Two sons. Thomas Freud Wiener, Sc.D. (CDR, USN, Ret.), Alexandria, VA; Frederick Robertson Wiener, SGM, USA, c/o SAA, Oklahoma Military Dep't, Oklahoma City, OK. Two grandchildren.]

B. Youth. Born, New York, NY, 1 June 1906. Lived there, 1906-1913. Mount Vernon, NY, 1913-1920. Abroad, 1920-1922. Lived in New York City or suburbs from mid-1922 until mid-1930, except for absence at college and law school.

C. Education. Public schools, New York City, 1912-1913. Public schools, Mount Vernon, NY, 1913-1920. Institution Sillig, Vevey, Switzerland, 1921. Dwight School, New York City, 1922-1923.
Brown University, Ph. B. s.c.l., 1927. Harvard Law School, LL.B. m.c.l., 1930. Harvard Law Review, vols. 42 & 43; Note Editor, vol. 43.

D. Private Practice. Associate, Edwards & Angell, Providence, RI, 1930-1933. Argued first appellate case, Hope St. Garage Co., in 51 R.I. Engaged in Gillette Safety Razor Co. stockholders' suit in Boston, MA, 1930-1932.

E. Publications. "The Rhode Island Merchants and the Sugar Act", 3 N.E.Q. 464 (1930). "Roger Williams' Contributions to Modern Thought", R.I.H.S.Coll. (1935) (talk delivered in 1931 and later cited by Supreme Court in first flag salute case, Gobitis, 310 U. S. 586); "Notes on the Rhode Island Admiralty, 1727-1790", 46 Harv.L.Rev. 20 (1932).

F. Values. [Please develop this heading from original outline by appropriate questioning.]

II. GOVERNMENT SERVICE (14 Aug. 1933 - 27 Mar. 1941)

A. Public Works Administration. First as Attorney Examiner, then as Executive Assistant to Deputy Administrator. ("New Deal Boy Executive")

B. Interior Department, July 1934 to Oct. or Nov. 1937, Assistant Solicitor and Member, Board of Appeals.
Participated in investigation of conditions in the Virgin Islands, 1934-1935.

C. Department of Justice, Oct. or Nov. 1937 to 27 Mar. 1941, in Claims Division [now Civil Division], first as Special Attorney and then as Special Assistant to the Attorney General.
Principal litigation handled involved defense of claims arising out of 1918 war-time seizure by the Alien Property Custodian of Hackfeld & Co. Ltd. of Honolulu, Hawaii, details of which were later set forth in "German Sugar's Sticky Fingers", 16 Haw. J. Hist. 15 (1982).

Handled case enjoining Governor of Oklahoma from calling out his National Guard to halt building of a federally-owned dam, U. S. v. Phillips, 33 F.Supp.261 (1940), reversed on other grounds in 312 U. S.

Argued first Supreme Court cases in this period, U. S. v. Summerlin, 310 U. S. 414 (1940), and the Northern Pacific R. Co. reargument, 311 U. S. 317 (1940).

D. Publications.

"Generally Speaking", Infantry Journal [hereafter always simply "IJ"], Jan-Feb 1937 (first military publication); "Decline of a Leader: The Case of General Meade", IJ, 1938-1939; "The Militia Clause of the Constitution", 54 Harv.L. Rev. 181 (1940), later reprinted, but without either attribution or quotation marks, in H.R.Rep. 1066, 82d Cong., 1st sess. (1949); and A Practical Manual of Martial Law (1940)(quoted with approval in Duncan v. Kahanamoku, 327 U. S. 304).

III. MILITARY SERVICE

A. First Commission. Applied in August 1935, and, after completing Army Extension Courses and appearance before a fitness board, was commissioned Captain, JAGD, ORC, in January 1936 (accepted early Feb. 1936). Should note that prerequisite to being considered for a commission was existence of a vacancy in the procurement objective of the Corps Area where applicant was legally resident.

III. MILITARY SERVICE (continued)

B. Short Tours. Two weeks ADT, HQ First Corps Area, 1939. Four weeks ADT, War Plans Div., OTJAG, July 1940. Worked on military government plans for European colonies in the Western Hemisphere in the event that Britain should follow France in falling to Nazi Germany.

C. Extended Active Duty, Mar. 1941 - Dec. 1945.

1. Then status of JAGD (not JAGC until after passage of Elston Act in 1948).

a, Organization. See contemporary organization charts of OTJAG. Every GCM jurisdiction had at least one JA officer as Staff JA. But it was only on rare occasions, in trials of very senior officers, that any JA participated in a trial by court-martial.

b. Personnel. Army List & Directory, Apr. 20, 1940, lists only 103 officers commissioned or detailed in the JAGC. First increments after NGUS and individual ORC officers were ordered into Federal service and active duty, respectively, under the 1940 legislation. List of NGUS and ORC officers on active duty in the summer of 1941 (paperbound, gray cover) will supply figures.

c. Promotions. Regulars still on single list, with advancement by senility: Individuals were promoted when those above them on the list grew old or cold. Reservists were promoted on basis of years of service required by ARs, plus Certificate of Capacity issued after completing Army Extension Courses for next higher grade.

Prior to 1940 mobilization, some JAs had unsuccessfully sought legislation that would give them horse-doctor promotion, viz., by length of service like veterinarians, doctors, and chaplains. First AUS promotions were authorized by Act of 9 Sept. 1940, to supply suitable rank for those assigned to newly formed divisions. But army-wide promotion on basis of position vacancy did not come until after Pearl Harbor, with promotion for regulars starting in December 1941, and for the other components as of 1 Feb. 1942.

d. Relationship with Army staff. One JA was invariably aaigned to the legislative branch of G-1, WDGS. Later there was an independent Legislative Liaison Section in the WD. One JA officer was always, similarly, assigned to the National Guard Bureau.

But, by late 1944, when OTJAG was down to a very few senior officers plus a scattering of captains and lieutenants, some WDGS sections, dissatisfied with that Office's handling of legal queries, sought answers from their own lawyer members who were not comissioned as JAs.

III. MILITARY SERVICE, C. EAD, 1. Status of JAGD (continued)

e. Impact on World War II. Greatest mistake made by OTJAG in WW II was failure to recruit sufficient lawyers so that the LMs of GCMs would invariably be legally qualified, and so that sufficient JAs would be available to try and defend GCM cases. This stemmed from a failure to absorb the lessons of WW I, set forth in Establishment of Military Justice, Hearings before Senate Comm. on Military Affairs on S.64, 66th Cong., 1st sess., which was this: A system that works well for a small, professional, highly trained force does not work for a large, hastily recruited, and barely trained force in an emergency. See VII E, below. See also my own full post-war analysis, "The Court-Martial System", IJ, Jan,Feb,&Mar 1947.

2. Assignment in three overseas theaters.

(a) JA, Trinidad Base Command, April 1941-Sept. 1942. This was one of the bases leased by Britain in Sept. 1940 in return for 50 over-age destroyers. Experiences there were later set out in "Opening an American Base in a British Colony before Pearl Harbor", History, Numbers & War [hereafter H,N & W], Vol. 1, Nos. 1 & 2 (1977).

Exposure to the actual functioning of the Army's disciplinary system resulted in a book, Military Justice for the Field Soldier (1943; rev. ed. 1944).

(b) JA, I. Island Command (New Caledonia), Forward Area & V. Island Command (Guadalcanal), and Thirteenth Air Force (then with HQ on Guadalcanal), Aug. 1943 -May 1944. Demonstrated unhappy consequences of separating GCM jurisdiction from military command.

(c) While with Thirteenth A.F., received orders assigning me as JA and Legal Adviser to U.S. Military Mission to USSR, Moscow. Proceeded from Guadalcanal to Aerial Port of Embarkation, Miami, FL, but no further, because Soviets never issued visa permitting entry into USSR.

(d) Military Gov't Sec., HQ Tenth Army, then at Schofield Barracks, Hawaii, staging for invasion of Okinawa. Reported Dec. 1944; was present at invasion, 1 April 1945; remained on island until it was secure, then medically evacuated. See review of the operation, "Okinawa Record", IJ, Apr. 1949.

Following a course of hospitalization that finally terminated at Walter Reed General Hospital, Washington, DC, was separated at Fort Meade, MD, early in Dec. 1945.

III. MILITARY SERVICE, C. EAD (continued)

3. Assignment to OTJAG. Served in War Plans Div, OTJAG, Oct 1942 - Apr 1943. Was TJA of GCM that convicted first Pentagon officer actually caught with his fingers in the till, a LTC Cayouette, OrdD. Was convicted of improper conflict of interest, working simultaneously for U. S. and for contractor while drawing pay from both. Case summarized in the Bull JAG some time in 1943; check bound BR books for complete opinion.

From Apr to Aug 1943 was detailed to the Liaison Sec, Operations Div, WDGS. Best job I had during entire war, yet foolishly insisted on leaving because of perverse itch to get out of Washington and into a Theater of Operations.

Back in War Plans Div, OTJAG, Sept to Dec 1944, serving briefly with newly-formed War Crimes Div, before joining HQ Tenth Army.

During this time, published, in IJ, "Mex Rank Through the Ages" (1943) and "Three Stars and Up" (1945).

D. Short tours after WW II and before mandatory retirement from USAR for age on 30 June 1961.

During post-war period, all of my ADT tours were in G-1, WDGS, or, as it was later designated, DCSPER---except for a two-week tour at the Army War College, Carlisle Barracks, PA, in Oct 1954, as a Consultant-Adviser. Was never on duty with OTJAG following departure for HQ Tenth Army in Dec 1944.

Last article written while still on EAD, but not published until afterwards, "This Was the Army: Service Without Pay", IJ, Feb 1946 (how military personnel survived in FY 1877, when Congress for five months appropriated no money for the Army).

IV. ASSISTANT TO SOLICITOR GENERAL (Dec 1945 - Oct 1948)

A. Tenure. Reported for duty early in Dec 1945, day after relief from EAD at Fort Meade, and first matter then placed on my desk was application of Gen Yamashita for a stay. Last duty there on 14 Oct 1948, returning to private practice the next day.

B. Memorable Arguments. Worked on Yamashita and Homma cases plus those of the alleged Filipino war criminals that were ultimately mooted; see article at 113 Mil.L.Rev. 203. All told, argued 16 cases before Supreme Court while in Sol Gen's office,

IV. ASS'T TO SOL GEN, B. Memorable Arguments (continued)

plus some notable military and treason cases in Courts of Appeals: Chandler treason case, 171 F.2d 921 (C A 1), cert. later denied; Wade v. Hunter, 169 F.2d 973 (C A 10) (doUBle jeopardy at military law), later affirmed, 336 U.S. 684; need for lawyer law member, Henry v. Hodges, 171 F.2d 401 (C A 2), cert. later denied; effect of hon. discharge on offenses committed in earlier enlistment, Hirshberg case, 168 F.2d 503 (C A 2), later reversed, 336 U. S. 210.

Memorable Sup Ct arguments:

Knauer, 328 US 654, sustaining denaturalization of German-American Bund leader.

Girouard, 328 US 61 (right of conscientious objector to American citizenship).

Patterson v. Lamb, 329 US 539, effect of discharge from draft. (father of)

Haupt, 330 US 631, sustaining treason conviction of saboteur involved in Ex parte Quirin, 317 US 1.

Trailmobile Co. v. Whirls, 331 US 40, scope of veteran's reemployment rights.

Harris, 331 US 145, sustaining search and seizure incident to arrest.

Fullard-Leo, 331 US 256, title to Palmyra Island in the Pacific.

Bayer, 331 US 532, double jeopardy at military law.

Standard Oil Co., 332 US 301, denying recovery to U S for injury to a member of its armed forces, a decision legislatively overruled in 1962, see 42 USC §§2651-2653.

Line Material, 333 US 287, reargument in complex antitrust case involving cross-licensing agreement under combined patents; text of complete oral arguments, on original argument as well as on reargument, is at Effective Appellate Advocacy, ch. 17.

Other cases argued can hardly be classified either as "memorable" or as of interest to military lawyers.

V. PRIVATE PRACTICE (15 Oct 1948 - 30 June 1973)

A. Memorable Cases. Those of military interest include Darby, 173 F.Supp. 619, the seasick sailor; Loth, [Ct Cl 1956], reopening of retirement that closed the door on retirement; Phillips, 3 USCMA, one of the earliest CMA cases turning on refused instructions; Krivoski, 136 Ct Cl 451, 145 F.Supp. 239, cert. later denied, appointed counsel's conflict of interest; Grahl, Ct Cl & F.2d in mid- or late 1960s, validity of over-age AUS appointment. A number of heave-ho (=elimination)cases. Two trials by GCM, both resulting in acquittals. And many, many minor matters, including the usual distressingly high proportion of petitions for certiorari that were denied.

V. PRIVATE PRACTICE (continued)

B. Arguments before Supreme Court

Eighteen during this period, including one by appointment of the Court, Gibbs v. Burke, 337 US 773, extent of right to counsel.

Here is chronological list of those that in retrospect seem most significant.

Greenberg, 343 US 918, certiorari twice granted to straighten out C A 3. Text of oral argument on merits following second grant is in Briefing and Arguing Federal Appeals, ch. XIV, pp. 443-470.

Swift & Co., 343 US 373, I.C.C. case involving Chicago stock yards.

Cammarano, 358 US 498, whether funds spent to defeat initiative that would have put petitioner out of business were deductible as necessary business expenses.

Elkins, 364 US 206, end of silver platter doctrine in search and seizure cases.

Hutcheson, 369 US 599, last case to hold that witness in federal court could not assert privilege against self-incrimination under state law. For change in law since then, see 1967 Supplement to Briefing and Arguing Federal Appeals, pp. 487-488.

Roman v. Sincock, 377 US 695, Delaware reapportionment case that disclosed lack of constitutional foundation for "one-man-one-vote" rule, but to no avail; see 80 Mil L Rev at 12-13.

Paragon Jewel v. CIR, 380 US [?; check in digest], scope of depletion allowance in coal mining cases.

Moose Lodge v. Irvis, 407 US 163, private club may refuse service to black guest of member.

R. I. Board of Elections, memo in US reports early in 1971 or 1972 Term, effort to overturn election after Senate had seated individual involved, Sen Pastore of RI.

Herzog, see successful petition for rehearing in banc in C A 9, Briefing & Arguing Federal Appeals, pp. 422-431, and later comment at p. 487 of Supplement.

V. PRIVATE PRACTICE (continued)

C. Reid v. Covert, 354 US 1.

First and only time since 1790 that the Court has reached a different result in the same case following a published opinion and without a controlling change in its membership. For text of successful petition for rehearing in the case, see Briefing & Arguing Federal Appeals, 431-442. Suggest that this litigation (and that of companion case, Kinsella v. Krueger) be dealt with at length in oral history interview.

Deal also with quartet of cases in 361 US involving military trials of civilians: Kinsella v. Singleton, Grisham v. Hagan, McElroy v. Guagliardo, and Wilson v. Bohlender.

D. Civilians Under Military Justice.

Made possible by a Guggenheim Fellowship granted in 1962; published by the U. of Chicago Press in 1967; very favorably reviewed by Douglas J. of U S Sup Ct at 35 U of Chi L Rev 568, and by Prof. A L Goodhart of Oxford in LQR for 1968.

E. Testimony before Congress.

1. Obstruction of Armed Forces (1969).

2. Bills to repeal Emergency Detention Act of 1950 (1970).

3. Testimony on Military Justice considered under VIIB, and that on Japanese "redress" legislation under VI D.

F. Reporter to Committee of Supreme Court.

From 1952-1954 was Reporter to Committee of the U. S. Supreme Court on the Revision of its Rules; see 346 US 945-946. Explanation of the problem and of the changes effected was later set forth in "The Supreme Court's New Rules", 68 Harv L Rev 20 (1954).

G. Publications (other than those listed elsewhere in this outline).

(1) Pamphlet of military interest.

"The Carabao's First Seventy Years, 1900-1970" (history of the Military Order of the Carabao).

(2) Articles of Military Interest.

"Civilian Control of Military Power: Dogma versus Reality", Combat Forces Journal [hereafter CFJ], Oct 1952.

"Lament for a Skulker: The Case of Private Slovik", CFJ, July 1954.

V. PRIV PRAC, G. Publications, (2) Arts of Mil Int (cont'd)

[with COL (later LTG) H. M. Exton] "What Makes a General?", ARMY, Jan 1958

"Courts-Martial and the Constitution: The Original Practice", 72 Harv L Rev 1, 266 (1958)

"The Army's Field Judiciary System: A Notable Advance", 46 ABAJ 1178 (1960).

"The Military Occupation of Philadelphia, 1777-1778", 111 Proc Am Phil Soc 310 (1967).

"Helping to Cool the Long Hot Summers", 53 ABAJ 713 (1967).

"Are the General Military Articles Unconstitutionally Vague?", 54 ABAJ 357 (1968).

"Martial Law Today", 55 ABAJ 723 (1969).

"The Perils of Tinkering with Military Justice", ARMY, Nov 1970.

"How Many Stars for Pershing?", ARMY, Dec 1970 & Jan 1971.

"The Case of the Colonel's Queue", ARMY, Feb 1973.

(3) Book Reviews of Military Interest.

Howe, ed., Touched with Fire: Civil War Letters of Oliver Wendell Holmes, 1861-1864, IJ, 1947.

Grodzins, Americans Betrayed, 63 Harv L Rev 54 (1950).

Washington Command Post: The Operations Division, CFJ, Jan 1952.

ten Broek, Prejudice, War, and the Constitution, 43 Geo L J 710 (1955).

Anthony, Hawaii under Army Rule, ARMY, Apr 1955.

The Women's Army Corps, ARMY, June 1955.

Falls, The Great War, ARMY (1959 or 1960).

Kinkead, In Every War But One, ARMY, Apr 1959.

War in the Pacific: Strategy and Command, First Two Years, ARMY, Aug 1964.

Pullen, A Shower of Stars: The Medal of Honor and the 27th Maine, Dec 1966.

["Early Instructions for Conducting Court-Martial Proceedings", 2 The Army Lawyer, No 10, Oct 1972. A text from 1749, when the Duke of Cumberland, son of Geo II and uncle of Geo III, was Captain-General of the British Army.]

V. PRIV PRAC, G. Publications, (3) Bk Revs of Mil Int (cont'd)

DeWeerd, President Wilson Fights His War, and Coffman, The War to End All Wars, ARMY, Mar 1969.

Sherrill, Military Justice is to Justice as Military Music is to Music, ARMY, July 1970.

Trewhitt, McNamara, His Ordeal in The Pentagon, ARMY, Nov 1977.

Korean War: Policy and Direction, The First Year, ARMY, May 1973

(4) Articles and Book Reviews of Legal Interest

"Freedom for the Thought that We Hate: Is It a Principle of the Constitution?", 37 ABAJ (1951).

Holmes-Laski Letters, 2 J. Public L. 136 (1953).

Jackson, The Supreme Court in the American System of Government, 50 Nw U L Rev 824 (1956).

"Wanna Make a Federal Case Out of It?", 48 ABAJ 59 (1962).

"Decision Prediction by Computers: Nonsense Cubed---and Worse", 48 ABAJ 1023 (1962).

"Federal Regional Courts: A Solution for the Certiorari Dilemma", 49 ABAJ 1169 (1963).

"Handling a Case in the Supreme Court", 6 G W [the George Washington University magazine] 7 (1966).

"A Lawyer Views the Gathering Storm", 115 Cong Rec 20274 (1969).

VI. RETIREMENT (from 1 July 1973).

A. Triggered by dismissal, 411 US 924, of appeal from BPOE Elks v. Ingraham, 297 A2d 607 (Me 1972), holding that no substantial federal question was presented by a statute that permitted private clubs to exclude membership applicants on grounds of religion but forbade exclusion on grounds of race. Or, succinctly, that the Constitution sustains the anti-Semite but strikes down the anti-Hamite.

B. Occasional professional consultations.

VI. RETIREMENT (continued)

C. Military Justice and Legal History activities, see VII and VIII, below.

D. Congressional testimony.

1. Submitted, by request, statement to Senate Committee on Armed Forces on "Unionization of the Armed Forces", 1977.

2. Testified against Japanese-American "redress" legislation:

(i) Recommendations of the Commission on War-Time Internment and Relocation of Citizens, S.2116 (S. Hrg. 94-1304) (1984).

(ii) Japanese-American and Aleutian Wartime Relocation, H.R. 422) (Serial No. 90) (1984).

(iii) SuBMITTed statement on similar bill in next Congress, H.R. 422, 99th Cong., 1st sess. (1986), testimony on which has not yet been printed.

E. Publications (nOT elsewhere noted herein)

Review of Leach, Arms for Empire: A Military History of THE British Colonies in North America, 1607-1763, ARMY, Nov 1973.

Review of Harbaugh, Lawyer's Lawyer: The Life of John W. Davis, 60 ABAJ 1330 (1974).

"Siren Call to Treason: The Greed of Benedict Arnold", ARMY, May 1974.

"The First Capture of Manila [1762]", British History Illustrated, 1975.

"Our Fumbling Foes of '76", American Heritage, Apr 1975.

"The Signer Who Recanted [Richard Stockton of NJ]", American Heritage, Jun 1975.

"The Relief of the First General MacArthur", H N & W, VOL 2, No 1 (1978).

"Advocacy at Military Law", 80 Mil L Rev 1 (1978).

"Crime and Justice in the Days of the Empire", H N & W, vol 3, No 1 (1980).

"Chief Justice Hughes' Appointment: The Cotton Story Reconsidered", YEARBOOK 1981, Sup Ct Hist Soc.

[A further instalment has been accepted for publication in YEARBOOK 1986, Sup Ct Hist Soc.]

VI. RETIREMENT, E. Publications (continued)

"How American Lawyers Prevented Winston Churchill from Initiating Britain's Blackest Hour", 54 NYStBarJ468 (1982).

F. Honors. (Before and after retirement)

1. Brown University Bicentennial Medallion (1965).

2. Hon. LL.D., Cleveland-Marshall Law School (1969).

3. U. S. Army Outstanding Civilian Service Medal (1974). After contentions set forth in "Are The General Military Articles Unconstitutionally Vague?", 54 ABAJ 357, were approved and adopted by the Supreme Court in Parker v. Levy, 417 US 733, the Army made this award to express its appreciation.

VII. MILITARY JUSTICE

A. Introductory Indoctrination. Owe this to two individuals:

(i) COL W. C. Rigby, USA (Ret), whose testimony permeates the record of the post-World War I court-martial controversy, Establishment of Military Justice, Hearings before the Senate Committee on Military Affairs on S.64, 66th Cong., 1st sess., and who subsequently wrote the 1921 MCM.

(ii) CPT E. M. Caffey, JAGD, who was COL, CE, in World War II, winning a DSC on Utah Beach in the process, and who concluded his career as MG, TJAG. See my biography of this versatile individual in the Judge Advocate Journal for 1954.

B. MCM, 1949.

1. Testified before Congressional Committees considering Elston Act amendments to the AWs, then researched military justice matters while serving a 30-day tour of active duty in G-1, WDGS, July 1948.

2. Served as Consultant to Bureau of the Budget on draft MCM 1949, which, prior to its presentation to the President as an Executive Order, was required first to be reviewed in that Bureau.

C. MCM, 1951.

1. Testified before both Congressional Committees considering drafts of UCMJ. See blue-bound, thick pamphlet containing legislative history of the UCMJ, published, I think, by TJAG of the Air Force.

3. Published pamphlet, "The New Articles of War", 1948.

VII. MILITARY JUSTICE, C. MCM, 1951 (continued)

2. Published The Uniform Code of Military Justice (1950)

3. Testified before Senate Committees:

a. Constitutional Rights of Military Personnel (1961)

b. Military Justice (1966).

D. Consultant to TJAG.

1. Re proposed petition for rehearing in O'Callahan v. Parker, 395 US 258.

2. Re early drafts of JAGC Bicentennial History, The Army Lawyer.

E. The Future of Military Justice.

1. Must remain a separate system, because of vast gulf between the objectives of a military and a civilian society. This is fundamental, and cannot be too often or too strongly stressed. Fortunately, most of the Viet Nam era anti-military agitation has currently died down. But keep in mind always the effect of student deferment from draft on academic attitudes against the Viet Nam war and towards all matters military.

2. Armed services must study, and restudy, the real causes of endemic civilian dissatisfaction when those services are significantly expanded through the force of legislative compulsion expressed in conscription.

3. Basic mistake in both World Wars lay in applying to large but hastily trained citizen forces standards and procedures that worked well only with small but highly trained professional armed services.

4. Contrariwise, "civilianization" of military justice is a dangerous fallacy, and not only because of the very obvious current shortcomings of civilian criminal justice.

VIII. TEACHING

A. Beginning. A series of lectures at the Washington College of Law (now the Law School of American University), given in 1949, led to the writing of Effective Appellate Advocacy (1950), parts of which had first seen the light as law review articles. A revised and expanded version of the same book was published in 1961 under the title, Briefing and Arguing Federal Appeals, which was reissued in 1967 with a Supplement of late authorities.

[See also, "On the Improvement of Oral Argument", N Y State Bar J, June 1967.]

VIII. TEACHING (continued)

B. Next Step. From 1951 to 1956, served as Lecturer and Professorial Lecturer in Law at The George Washington University, teaching a course on Military Law and Jurisdiction. This was the occasion for writing "The Teaching of Military Law in a University Law School", 5 J. Legal Educ. 475 (1953).

C. Consultant-Adviser, U. S. Army War College, Oct 1954; see III D above.

D. All told, have lectured at law schools and before bar groups in over 30 states, the District of Columbia, and the Virgin Islands, on various topics, some strictly professional, some on the postprandial side. See also IX C, below, re Selden Society Lecture in England.

E. First lectured to TJAGS early in 1943, when it was located at Ann Arbor, MI, on "The Duties of a Staff JA in the Field." The stark reality of this presentation, based on 17 months' duty as SJA in Trinidad, contrasted so significantly with the central thesis of the instruction then current, to the effect that the JA was the hub around which the military wheel revolved, that it was seven years before I was ever again invited to lecture at the School.

Thereafter lectured there occasionally, except during the years 1961-1963, when the then TJAG, disenchanted with the results of my jurisdictional litigations and with my Congressional testimony on military justice, listed me as too "controversial" to remain on the School's list of approved speakers.

But I was invited there again later on, the last time early in 1973.

F. Although a member of TJAGS Alumni Ass'n, I was never a student at the School, and never attended, or graduated from, any of its courses.

G. For other pedagogical lecturing, see IX E below.

H. Slashing Reviews of Trashy Books. Properly listed under "Teaching" would be book reviews that exposed exceptionally poor books. Here is a representative listing, not chronologically, but in the order of the books' obvious lack of merit.

1. McNaughton's revision of vol. VIII of Wigmore on Evidence (3d ed.,1940), in 75 Harv L Rev 441 (1961). See esp. pp. 442-443 for the botch there made of the Greenberg case, noted above at V B.

VIII. TEACHING, H. Slashing Reviews of Trashy Books (continued)

2. Schwartz, Commentary on the Constitution of the U. S.: Part I: The Powers of Government, in 58 Nw U L Rev 713 (1963), a discussion concentrating on the author's obvious misstatements of military law.

3. Schwartz, The American Heritage History of the Law in America, in [1975] Sup Ct Rev 423.

4. Rodell, Nine Men, in 51 Nw U L Rev 155 (1956).

5. Generous, Swords & Scales: The Development of the UCMJ, in 50 Corn L Rev 748 (1974).

6. Levy, Against the Law: The Nixon Court and Criminal Justice, in 1 ISL [International School of Law] L Rev 79 (1974).

7. The [posthumously published] Memoirs of Earl Warren, in Modern Age, Winter 1978, p. 98.

8. Rankin, When Civil Law Fails, in Harv L Rev, 1939 (or possibly 1940).

IX. LEGAL HISTORY ACTIVITIES

A. Background. College major was history, became interested in legal history while in law school, and first legal-historical work published was 1932 article on the 18th Century Rhode Island admiralty; I E above. From 1928 to 1934 was a member of the Selden Society, founded in 1887 by Pollock and Maitland "To encourage the study and advance the knowledge of the history of English law."

b. Later Selden Society activities. Rejoined in 1956; was able to acquire complete set of its publications; then became its State Correspondent for the District of Columbia, and recruited many American members for the Society.

Laid on the Selden Society meeting in the Ceremonial Courtroom of the U. S. Court House in Washington in 1960, when the English bench and bar came over to join the ABA for its annual meeting. In consequence, was elected a member of the Society's Council in 1961.

Became State Correspondent for Arizona on retirement in 1973, and from 1978 to 1984 served two terms as the Society's Vice-President for the USA.

IX. LEGAL HISTORY ACTIVITIES (continued)

C. Selden Society Lecture. In 1962, delivered the Selden Society Lecture in the Old Hall of Lincoln's Inn (built in 1480s), entitled "Uses and Abuses of Legal History: A Practitioner's View."

D. Other Legal History Publications.

1. "The Selden Society and Its Significance for the American Lawyer", 46 ABAJ 611 (1960).

2. "Holdsworth's History Finally Completed", 53 ABAJ 321 (1967).

3. "The Human Comedy in Legal History", 11 W & M L Rev 453 (1969).

4. The Register of Writs: Seed-Bed of the Common Law", 58 ABAJ 498 (1972).

5. "Tracing the Origins of the Court of King's Bench," 59 ABAJ 753 (1973).

6. "BRACTON---A Tangled Web of Legal Mysteries That Defied Solution for More than Seven Centuries", 2 GMU [George Mason Univ.] L Rev 129 (1978).

7. "A Cosey, Dosey, Old-Fashioned, Time-Forgotten, Sleepy-Headed Little Family Party" [review of Squibb, Doctors' Commons], 39 La L Rev 1035 (1979).

8. Obituary Notice of Mr. Justice Frankfurter, my teacher and mentor, who served as an American Vice-President of the Selden Society, in Yearbook of the Am Phil Soc, 1965, pp. 146-156.

E. Adjunct Visiting Scholar at the Arizona Center for Medieval and Renaissance Studies.

This appointment involves delivery of one or two lectures during each academic year.

"Domesday Book through Nine Centuries", delivered in Sept 1986, will be published in the N Y State Bar J in 1987.

Talk on Bracton, scheduled for March 1987, will be a compression of item IX D 6, just above.

2A. Review of Wroth & Zobel, eds., The Legal Papers of John Adams, in 20 Vand L Rev 741 (1967).

X. CONCLUSION---PHILOSOPHY ABOUT ROLE OF SOLDIER-LAWYER

Perhaps best expressed in summary fashion by obituary on Judge Brosman of the USCMA; see 6 USCMA x.

For a more expanded exposition, can only cite all of my voluminous writings on military law, justice, and discipline, followed by "passim".

This particular subject should be fully developed in the course of the oral history interview.