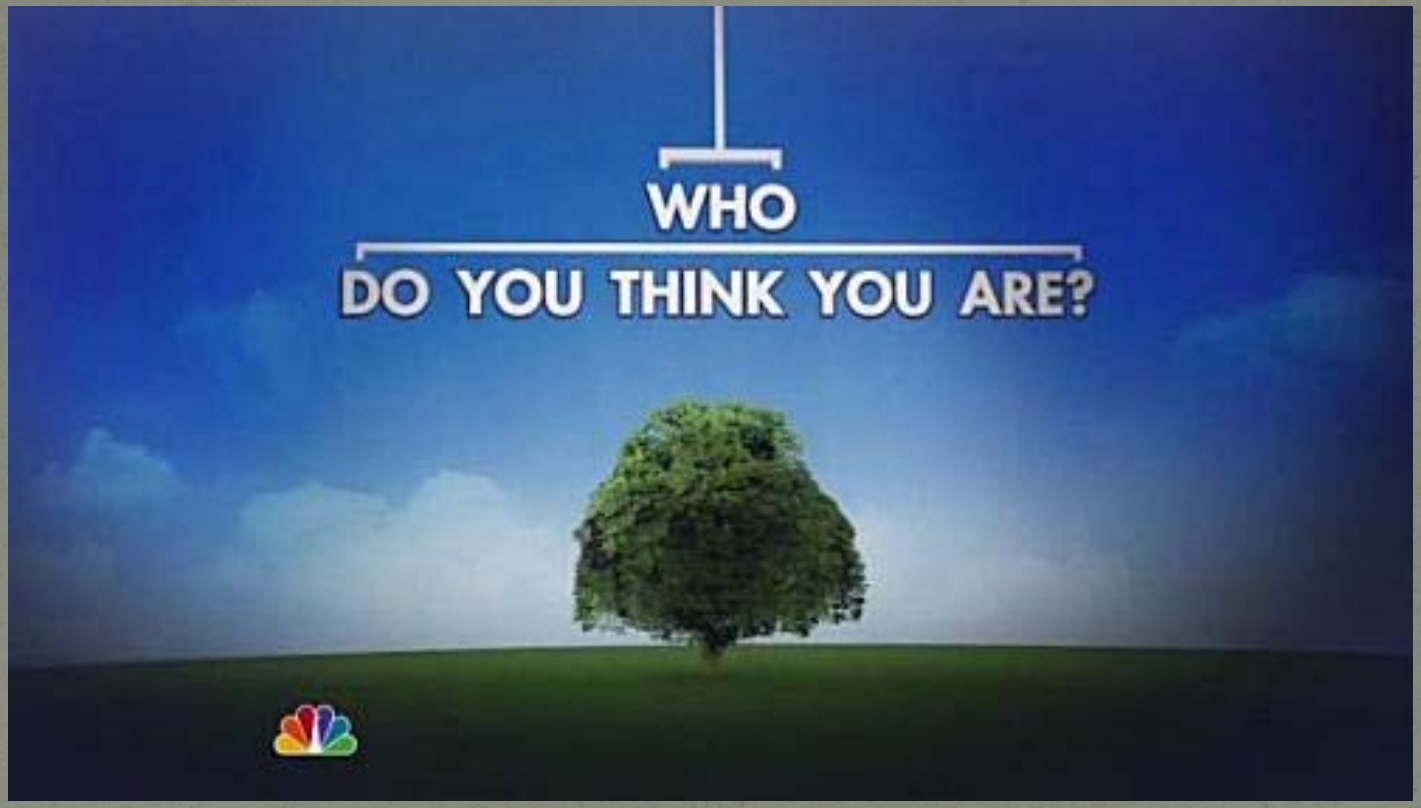
Who Do You Think You Are? Military Lawyers in Historical Perspective

Bernard Hibbitts
University of Pittsburgh School of Law

Rediscovering roots



Lawyers also need to know who they are, and what they stand for

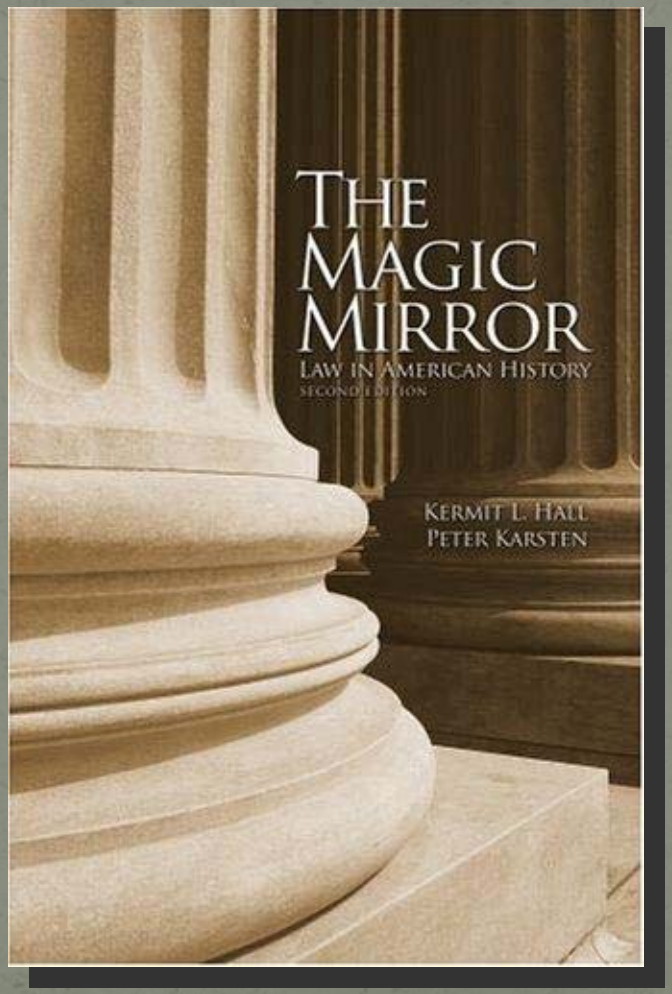
One "solution": ethics training

It’s not working

Another "solution": history

But not necessarily “legal history”…

“Lawyers” covered in 22 of 400 pages



“Lawyers” in 1 of 102 paper titles

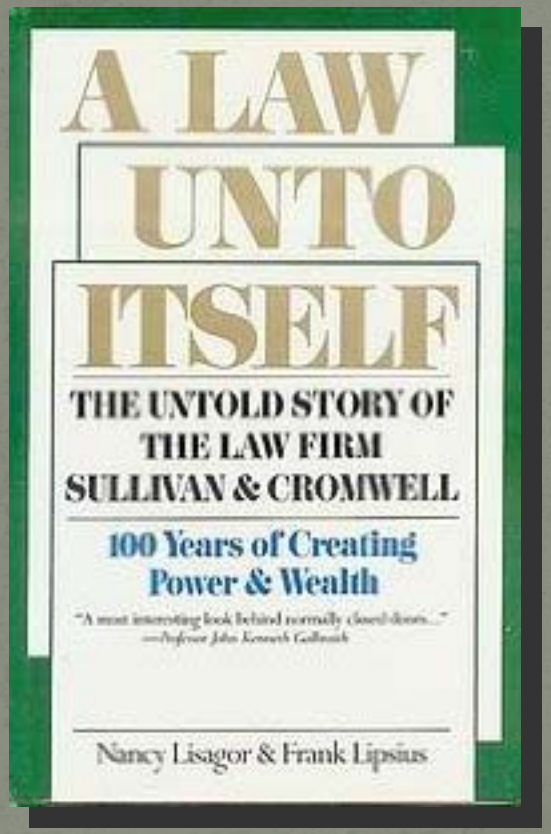
We do not know ourselves

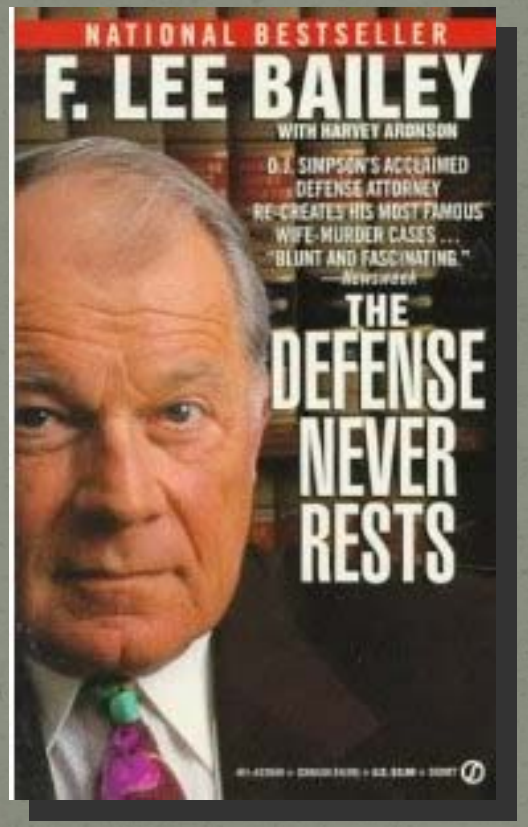
We need a history of lawyering

Few courses, and no text

The history of lawyering must include all types of lawyers

Some lawyers are more visible than others



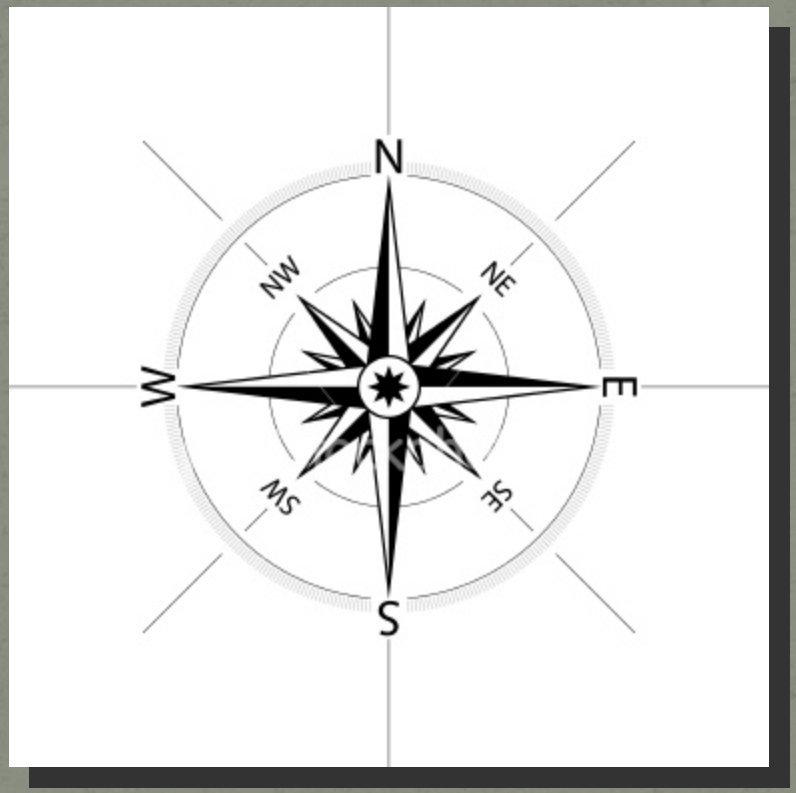


Military lawyers are historically invisible
(at least to non-military lawyers)

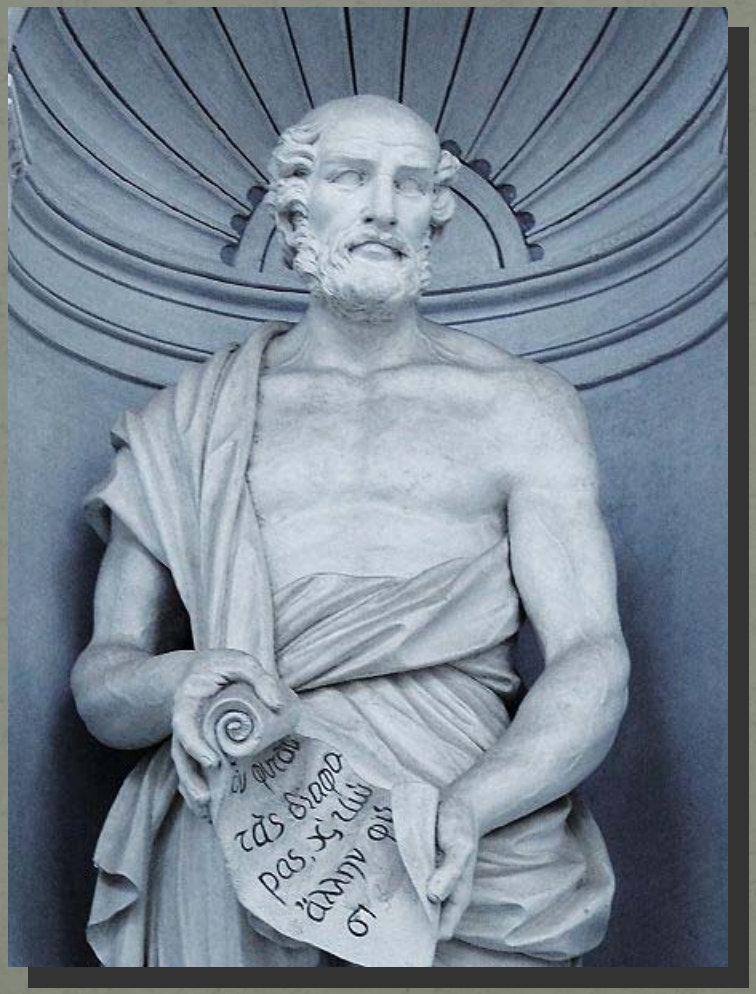
Military lawyers have played important roles

We need to bring these lawyers into the light

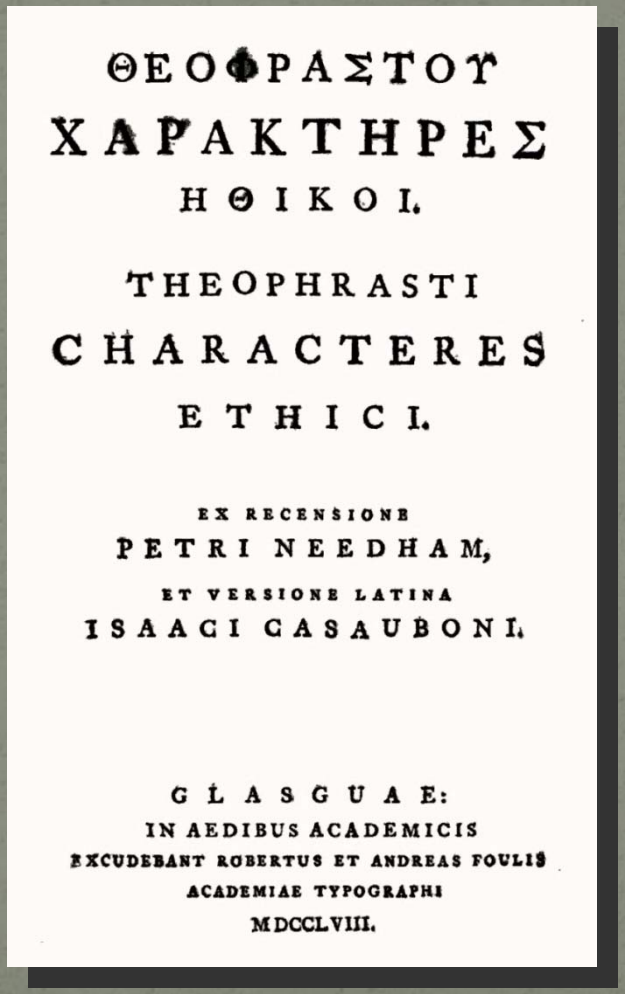
A civilian historian's tour of military lawyering



A page from Theophrastus



The *Characters* (c. 319 BC)



ΘΕΟΦΡΑΣΤΟΥ

ΧΑΡΑΚΤΗΡΕΣ

ΗΘΙΚΟΙ.

THEOPHRASTI

CHARACTERES

ETHICI.

EX RECENSIONE

PETRI NEEDHAM,

ET VERSIONE LATINA

ISAACI CASAUBONI.

GLASGUAE:

IN AEDIBUS ACADEMICIS

EXCUDEBANT ROBERTUS ET ANDREAS FOULIS

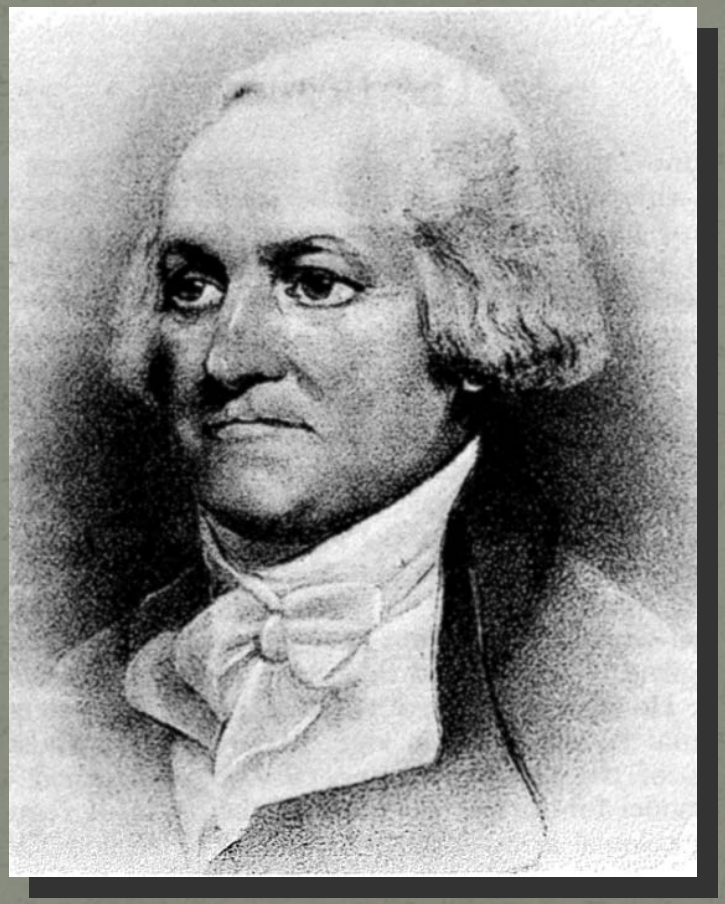
ACADEMIAE TYPOGRAPHI

MDCCLVIII.

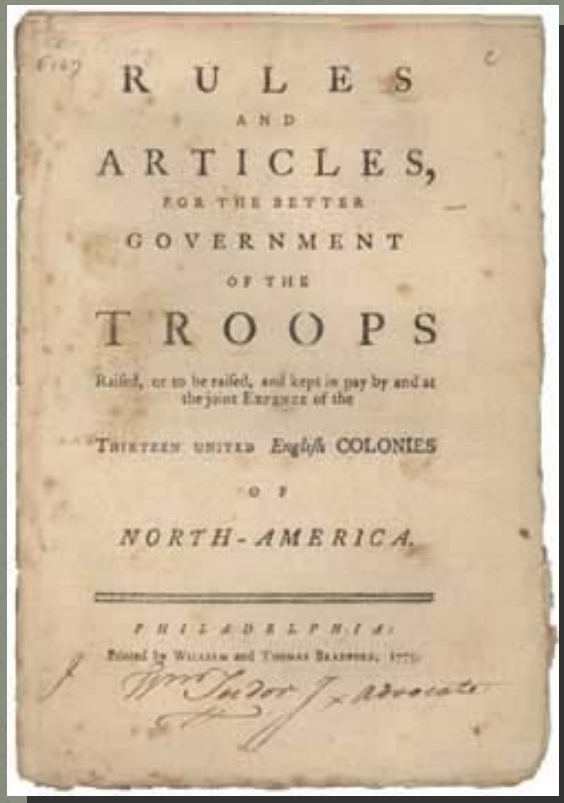
Eight military lawyers…

The Counselor

William Tudor



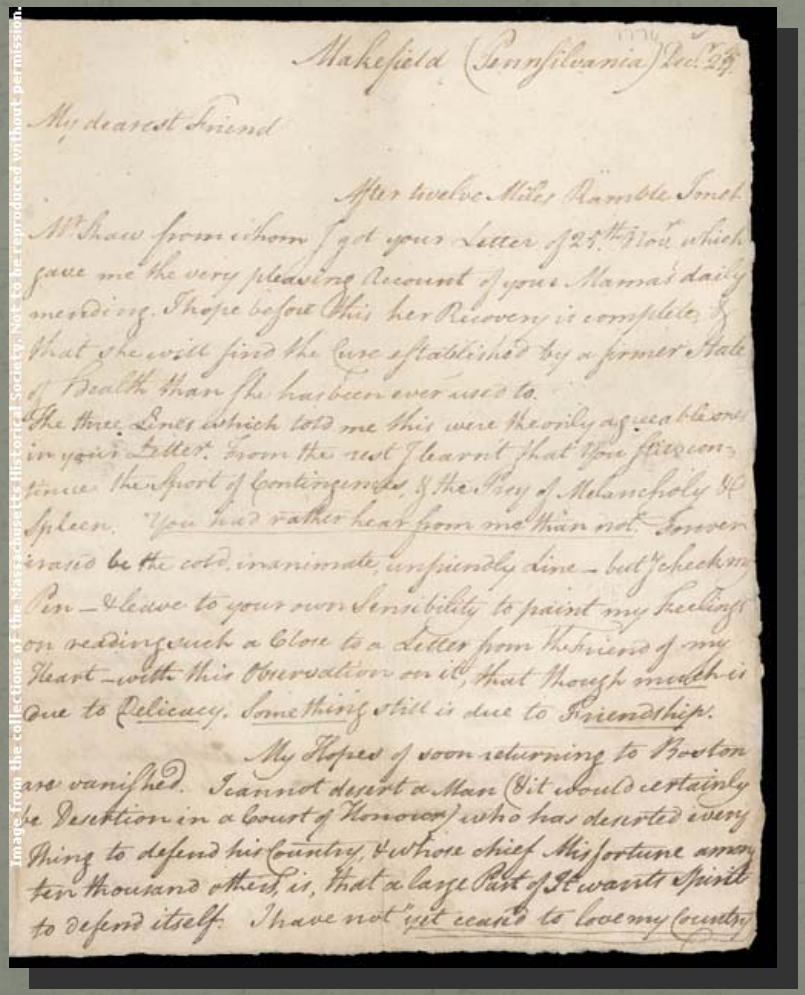
Tudor's law



RULES
AND
ARTICLES,
FOR THE BETTER
GOVERNMENT
OF THE
TROOPS
Raised, or to be raised, and kept in pay by and at the joint Expence of the
THIRTEEN UNITED English COLONIES
OF
NORTH-AMERICA.

PHILADELPHIA:
Printed by William and Thomas Bradford, 1775.

Tudor's duty



Makefield (Pennsilvania) Decr. 25

My dearest Friend

After twelve Miles Ramble I met Mr Shaw from whom I got your Letter of 25th Novr which gave me the very pleasing Account of your Mama's daily mending. I hope before this her Recovery is complete, & that she will find the Cure established by a firmer State of Health than she has been ever used to.

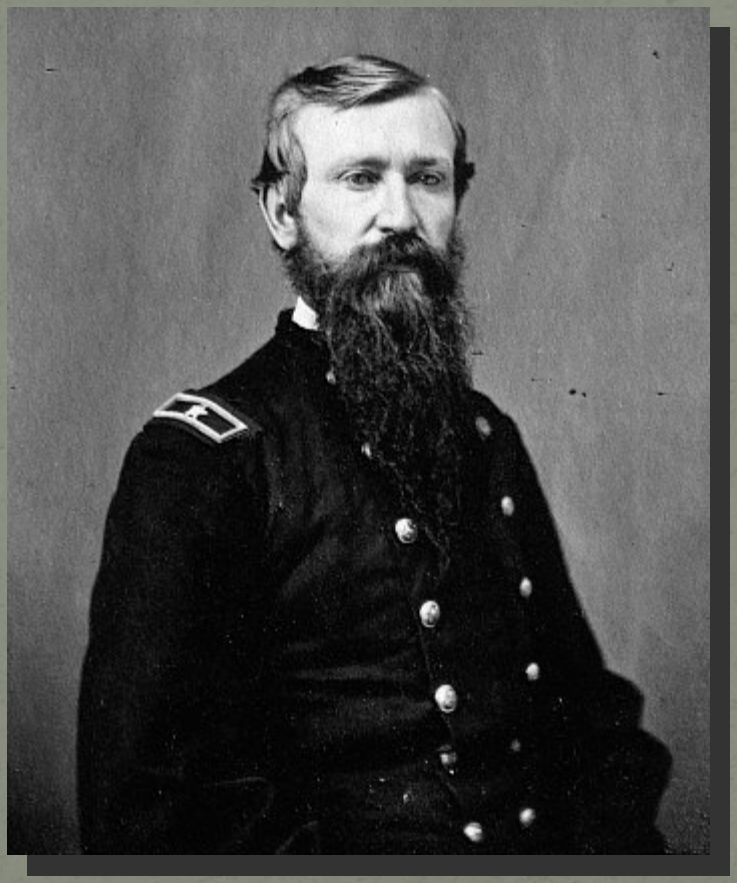
The three Lines which told me this were the only agreeable ones in your Letter. From the rest I learnt that You still continue the Sport of Contingencies, & the Prey of Melancholy & Spleen. You had rather hear from me than not. Forever erased be the cold, inanimate, unfriendly Line – but I check my Pen – & leave to your own Sensibility to paint my Feelings on reading such a Close to a Letter from the Friend of my Heart – with this Observation on it, that though much is due to Delicacy. Something still is due to Friendship.

My Hopes of soon returning to Boston are vanished. I cannot desert a Man (& it would certainly be Desertion in a Court of Honour) who has deserted every Thing to defend his Country, & whose chief Misfortune among ten thousand others, is, that a large Part of It wants Spirit to defend itself. I have not yet ceased to love my Country

Image from the collections of the Massachusetts Historical Society. Note to be reproduced without permission.

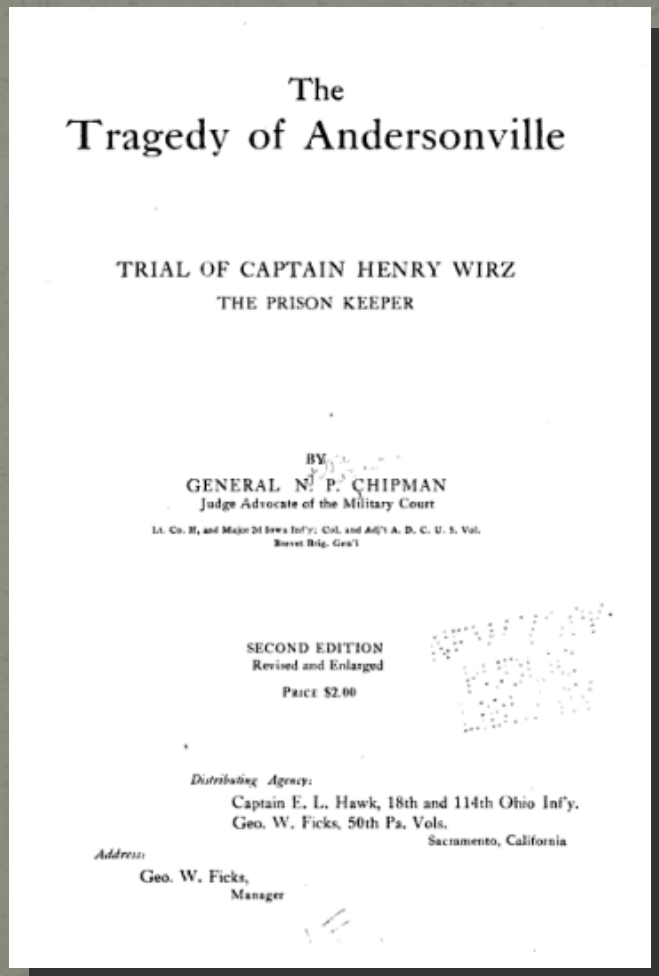
The Prosecutor

Norton Parker Chipman



The Andersonville trial

Chipman's answer



The
Tragedy of Andersonville

TRIAL OF CAPTAIN HENRY WIRZ
THE PRISON KEEPER

BY
GENERAL N. P. CHIPMAN
Judge Advocate of the Military Court

Lt. Co. H, and Major 2d Iowa Inf'y; Col. and Adj't A. D. C. U. S. Vol.
Brevet Brig. Gen'l

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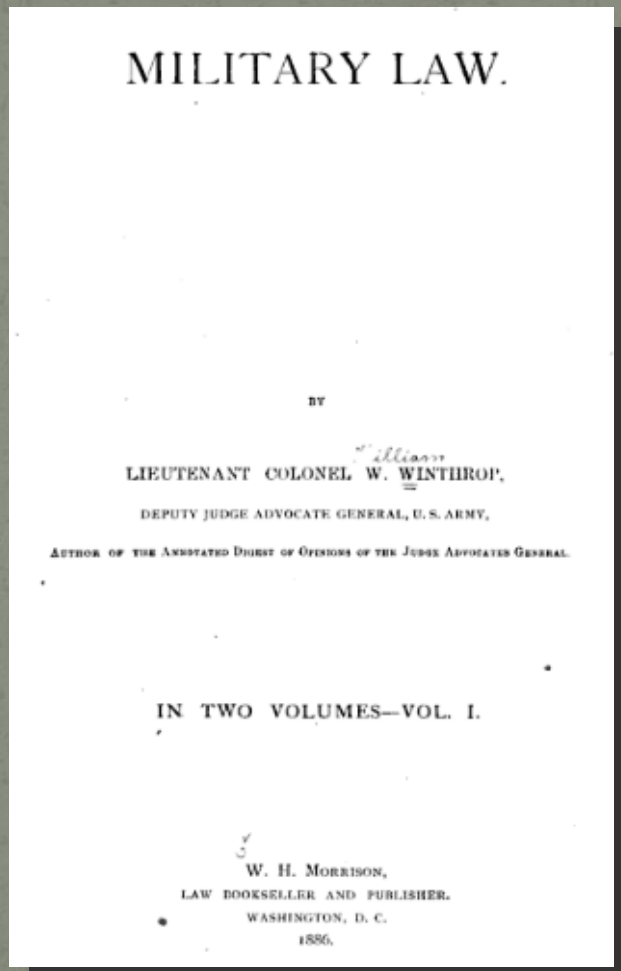
The Scholar

William Winthrop

Winthrop's book



MILITARY LAW.

BY

LIEUTENANT COLONEL W. WINTHROP,

DEPUTY JUDGE ADVOCATE GENERAL, U. S. ARMY,

AUTHOR OF THE ANNOTATED DIGEST OF OPINIONS OF THE JUDGE ADVOCATES GENERAL.

IN TWO VOLUMES—VOL. I.

W. H. MORRISON,
LAW BOOKSELLER AND PUBLISHER.
WASHINGTON, D. C.
1886.

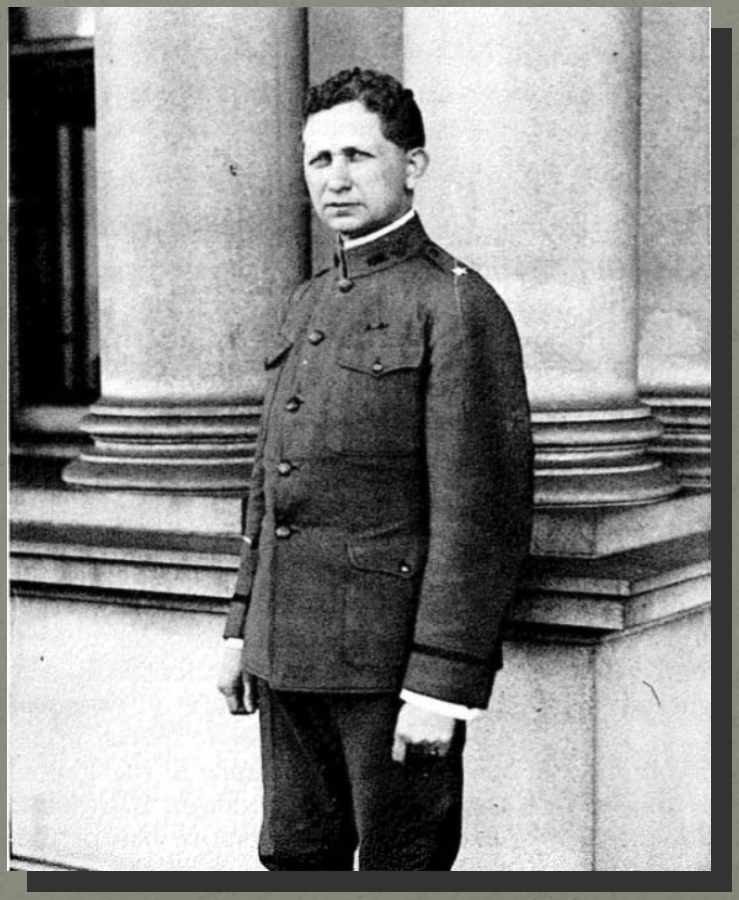
Winthrop's hope

"The author…will be fully recompensed for his labors if the same shall result in inspiring an interest in the study of Military Law as a department of legal science not heretofore duly recognized."

- *Military Law*, 1886 (from the Preface)

The Reformer

Samuel Ansell



Speeches

SPEECH

OF

LIEUT. COL. S. T. ANSELL,

DELIVERED BEFORE THE PENNSYLVANIA BAR ASSOCIATION AT BEDFORD SPRINGS, PA., JUNE 26, 1919.

"MILITARY JUSTICE.

"I.

"One view:

"The army is the army of the King, to be disciplined by him and his commanders under his ordinances and at his pleasure. (Recital of the ordinances of Richard II.)

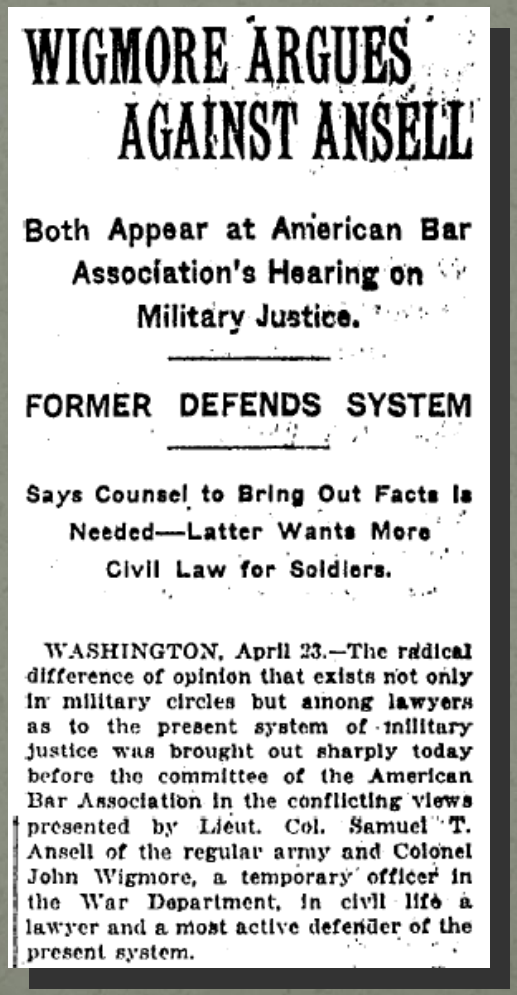
"And another view:

"Congress shall have (the exclusive) power to raise and support armies; Congress shall have (the exclusive) power to make rules for the regulation and government of the land and naval forces. (The Constitution of the United States.)

"Among the nations of the world there are two diametrically opposite theories as to the place that the army shall occupy as an institution of government. Those theories are well illustrated by the two texts quoted at the beginning of this discussion. The one clearly represents the monarchical, reactionary, and personal government view. The other is a necessary part of that larger theory of government which insists that the source of all political power is to be found in the people. Under the one theory the army is an army of a king or emperor or person in authority; under the other it is an institution ordained by the people to do their service. Under the one, the obligation of the soldier is to a military chieftain; under the other, it is to the State. Under the one, the military relationship is governed by considerations of personal loyalty and fealty to those in authority; under the other, the military obligation and all relations *inter sese* are established and governed by law established, not intra-institutionally but by the people themselves. Under the one theory the army has a detached, independent, and self-sufficient existence, finding within itself the source of its own government; under the other it is but an institution of government, drawing, like all other institutions, its power from a common superior source upon which it depends for its government and its very existence. Under the one the common soldier was but a serf, a personal retainer of the King, or a subordinate commander, and under the other he is a citizen serving the State in the highest capacity of citizenship.

"That the army belonged to the King rather than to the people was a doctrine maintained in England from earliest times, and which has only been modified with, and rather less slowly than, the progressive growth of popular government. Even at the time of our separation such was the constitutional theory. The right of control by Parliament was practical rather than

Debates



WIGMORE ARGUES AGAINST ANSELL

Both Appear at American Bar Association's Hearing on Military Justice.

FORMER DEFENDS SYSTEM

Says Counsel to Bring Out Facts Is Needed—Latter Wants More Civil Law for Soldiers.

WASHINGTON, April 23.—The radical difference of opinion that exists not only in military circles but among lawyers as to the present system of military justice was brought out sharply today before the committee of the American Bar Association in the conflicting views presented by Lieut. Col. Samuel T. Ansell of the regular army and Colonel John Wigmore, a temporary officer in the War Department, in civil life a lawyer and a most active defender of the present system.

Testimony

ESTABLISHMENT OF MILITARY JUSTICE—PROPOSED AMENDMENT OF THE ARTICLES OF WAR.

MONDAY, AUGUST 25, 1919.

UNITED STATES SENATE,
SUBCOMMITTEE ON MILITARY AFFAIRS,
Washington, D. C.

The subcommittee met, pursuant to the call of the chairman, in the room of the Committee on Appropriations in the Capitol, at 10 o'clock a. m., Senator Irvine L. Lenroot presiding.

Present: Senators Lenroot (acting chairman) and Chamberlain.

Senator LENROOT. Will you proceed now, Gen. Ansell, and make such statement as you desire?

STATEMENT OF MR. SAMUEL T. ANSELL, FORMERLY BRIGADIER GENERAL AND ACTING JUDGE ADVOCATE GENERAL, UNITED STATES ARMY.

Mr. ANSELL. Mr. Chairman and gentlemen, the subject of military justice is one in which I think every Army officer ought to be specially interested, and the people themselves generally interested.

I, myself, have been specially interested in this subject since my cadet days. The system of military justice that is ours, it has always appeared to me, does not fit the kind of army with which we must fight the battles of this country; that is, an army that is not composed of professional soldiers entirely—a standing army—but an army that is created for the emergency out of our citizenship.

The old idea has been that a court-martial, which is the agency for executing the disciplinary law of the Army, is a rough and ready tribunal, and must necessarily be so; that it is not a court at all; that it is an agency of a military commander to investigate facts and recommend what disciplinary action ought to be taken; that it is a body responding purely to the exigencies of a military situation; not a normal thing, not governed by principles of law at all.

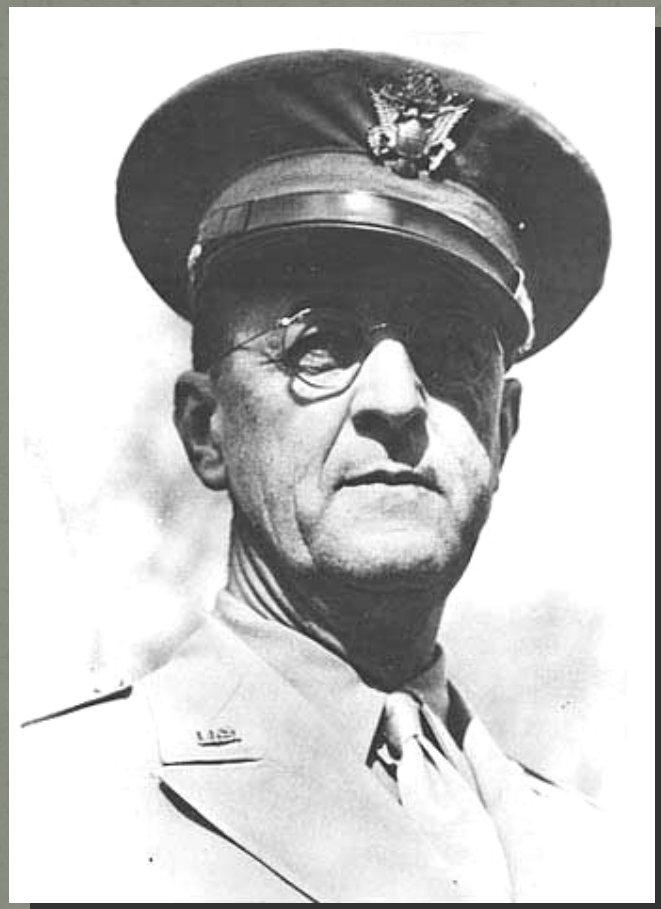
That was, as I shall show later on, the old continental idea, and it was the theory of the system, was indeed the system, which we ourselves adopted, rather witlessly, when we established this Government.

I think it is by reason of this that courts-martial, as we understand them, have really never had the confidence of our people. They, as a rule, have been sneered at by the legal profession, and it has been pointed out by great lawyers, beginning with Blackstone, that they were not to be regarded as courts at all; that the law gov-

Legacy

The Administrator

Thomas Green



Pearl Harbor

Martial law in Hawaii

Martial law assailed

California Law Review

Volume XXX MAY, 1942 Number 4

Martial Law in Hawaii

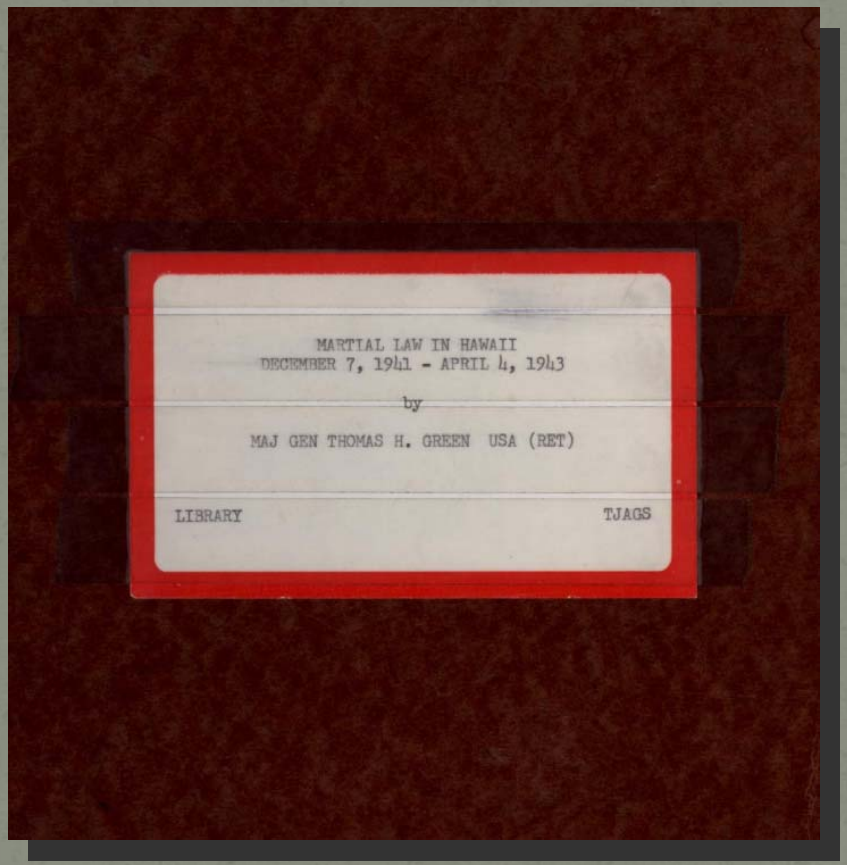
*Garner Anthony**

THE declaration of martial law in the Territory of Hawaii as a result of the Japanese raid on Pearl Harbor presents profound problems not only to the legal profession but to all persons in Hawaii, military and civilian alike. The current tension on the west coast, coupled with suggestions of applying martial law in certain mainland areas, makes an inquiry into that ill-charted field a matter of national concern. It is the writer's purpose to attempt an analysis of the legal problems involved, with the hope that it may evoke a free trade in ideas, to the end that a solution may be reached whereby the armed forces will be helped, not hindered, and that the all-important business of winning the war can be conducted in combat areas with dispatch and intelligence under a reign of law.

Green versus Ickes

Martial law lifted, October 1944

Green's account



The Trailblazer

Phyllis Propp Fowle

In the WACs

First woman judge advocate, 1944

Not welcome at JAG school

Not welcome (even) at Fort Des Moines

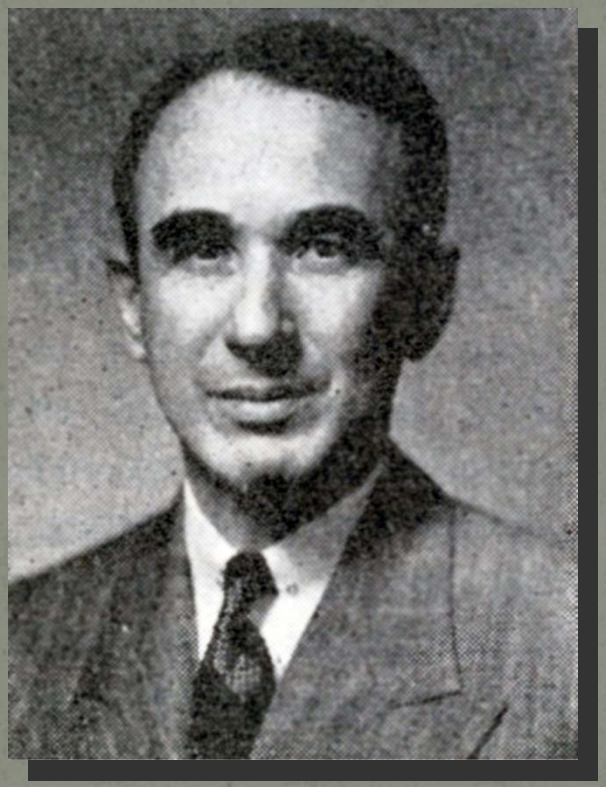
"I don't want you, I don't need you, and I didn't ask for you."

- Male installation commander

First woman judge advocate overseas, 1945

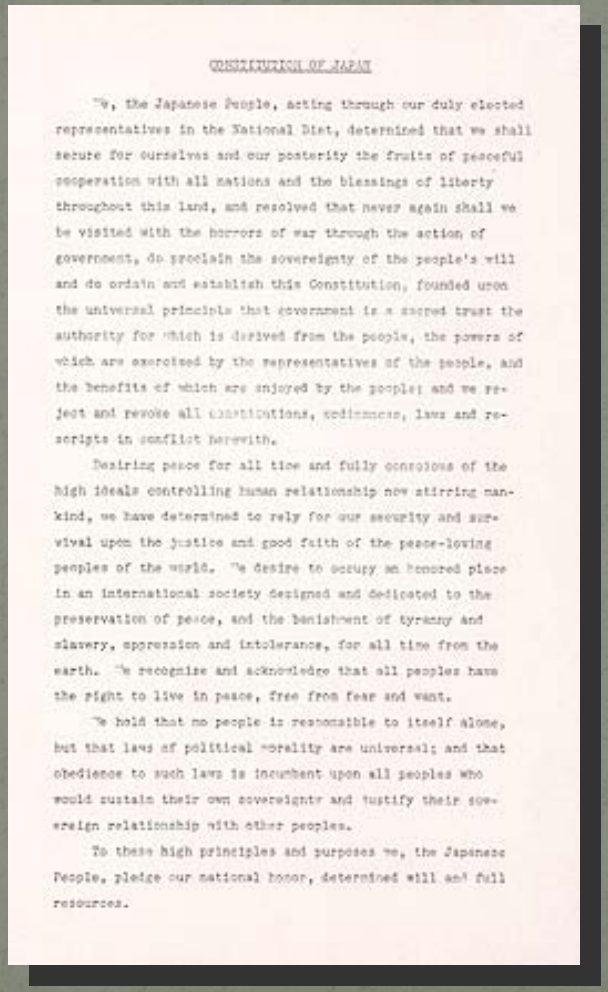
The Framer

Charles Kades



Reshaping Japan

A constitution in six days



CONSTITUTION OF JAPAN

We, the Japanese People, acting through our duly elected representatives in the National Diet, determined that we shall secure for ourselves and our posterity the fruits of peaceful cooperation with all nations and the blessings of liberty throughout this land, and resolved that never again shall we be visited with the horrors of war through the action of government, do proclaim the sovereignty of the people's will and do ordain and establish this Constitution, founded upon the universal principle that government is a sacred trust the authority for which is derived from the people, the powers of which are exercised by the representatives of the people, and the benefits of which are enjoyed by the people; and we reject and revoke all constitutions, ordinances, laws and rescripts in conflict herewith.

Desiring peace for all time and fully conscious of the high ideals controlling human relationship now stirring mankind, we have determined to rely for our security and survival upon the justice and good faith of the peace-loving peoples of the world. We desire to occupy an honored place in an international society designed and dedicated to the preservation of peace, and the banishment of tyranny and slavery, oppression and intolerance, for all time from the earth. We recognize and acknowledge that all peoples have the right to live in peace, free from fear and want.

We hold that no people is responsible to itself alone, but that laws of political morality are universal; and that obedience to such laws is incumbent upon all peoples who would sustain their own sovereignty and justify their sovereign relationship with other peoples.

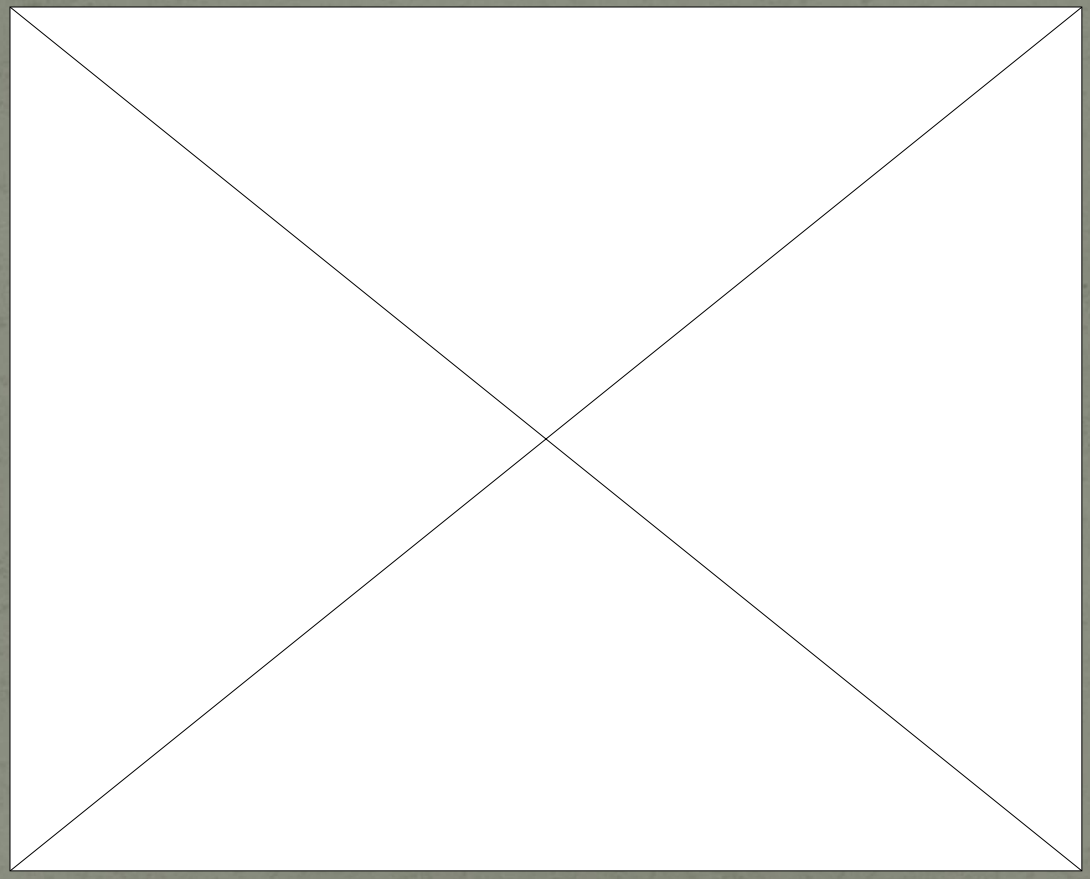
To these high principles and purposes we, the Japanese People, pledge our national honor, determined will and full resources.

The Defender

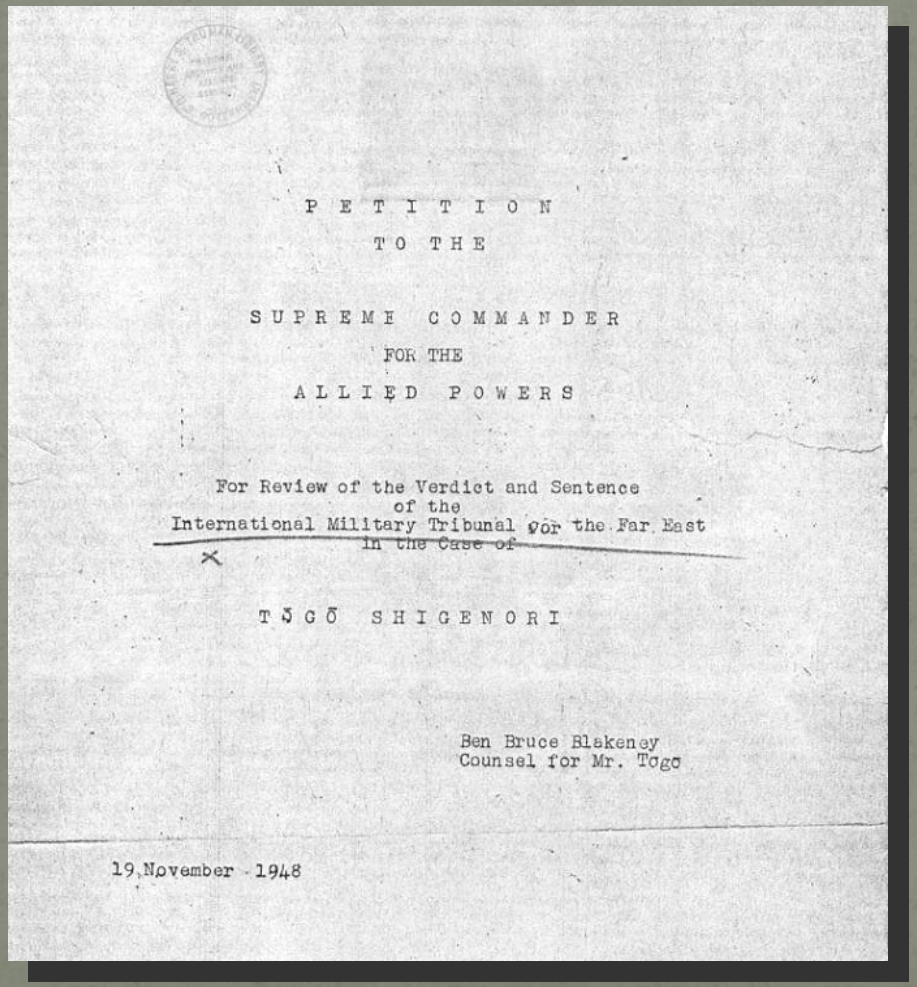
Ben Bruce Blakeney

The Tokyo war crimes tribunal

Blakeney's gambit



Blakeney's appeal to MacArthur



P E T I T I O N

T O T H E

S U P R E M E C O M M A N D E R

F O R T H E

A L L I E D P O W E R S

For Review of the Verdict and Sentence
of the
International Military Tribunal for the Far East
in the Case of

T Ō G Ō S H I G E N O R I

Ben Bruce Blakeney
Counsel for Mr. Tōgō

19 November 1948

Blakeney's last stand

18 To this point we have spoken strictly as defence counsel. Now I wish to say a word as an American.

The result of the trial by the International Military Tribunal for the Far East has about it singularly the look of an act of vengeance. The conviction of all defendants, without exception, though with the writing of six separate opinions which disclose an almost total lack of agreement on the existence, nature and extent of the law being enforced; the remarkable severity of the sentences as a whole, exceeding, as the

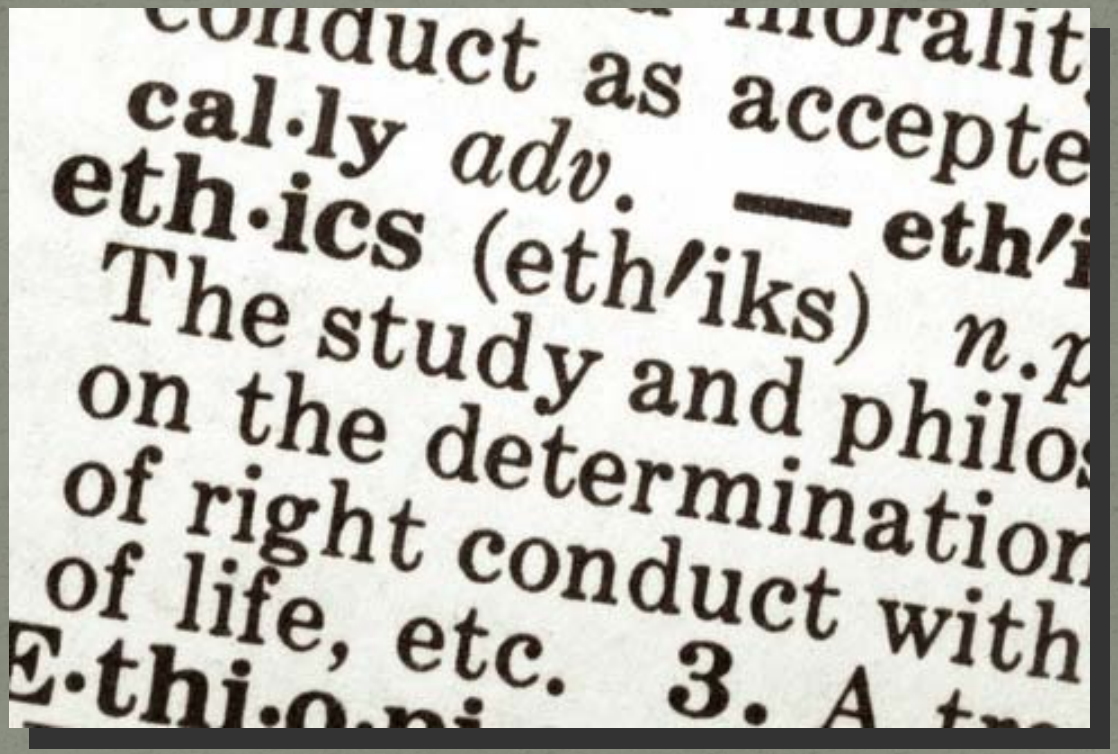
Eight military lawyers

- The Counselor
- The Prosecutor
- The Scholar
- The Reformer
- The Administrator
- The Trailblazer
- The Framer
- The Defender

Eight military lawyers

- William Tudor
- Norton Parker Chipman
- William Winthrop
- Samuel Ansell
- Thomas Green
- Phyllis Propp Fowle
- Charles Kades
- Ben Bruce Blakeney

History is ethics by example


conduct as accepte
cal·ly *adv.* — eth′i
eth·ics (eth′iks) *n.p*
The study and philos
on the determination
of right conduct with
of life, etc. 3. A
E·thi·o·pi

They (and others) can teach us much…

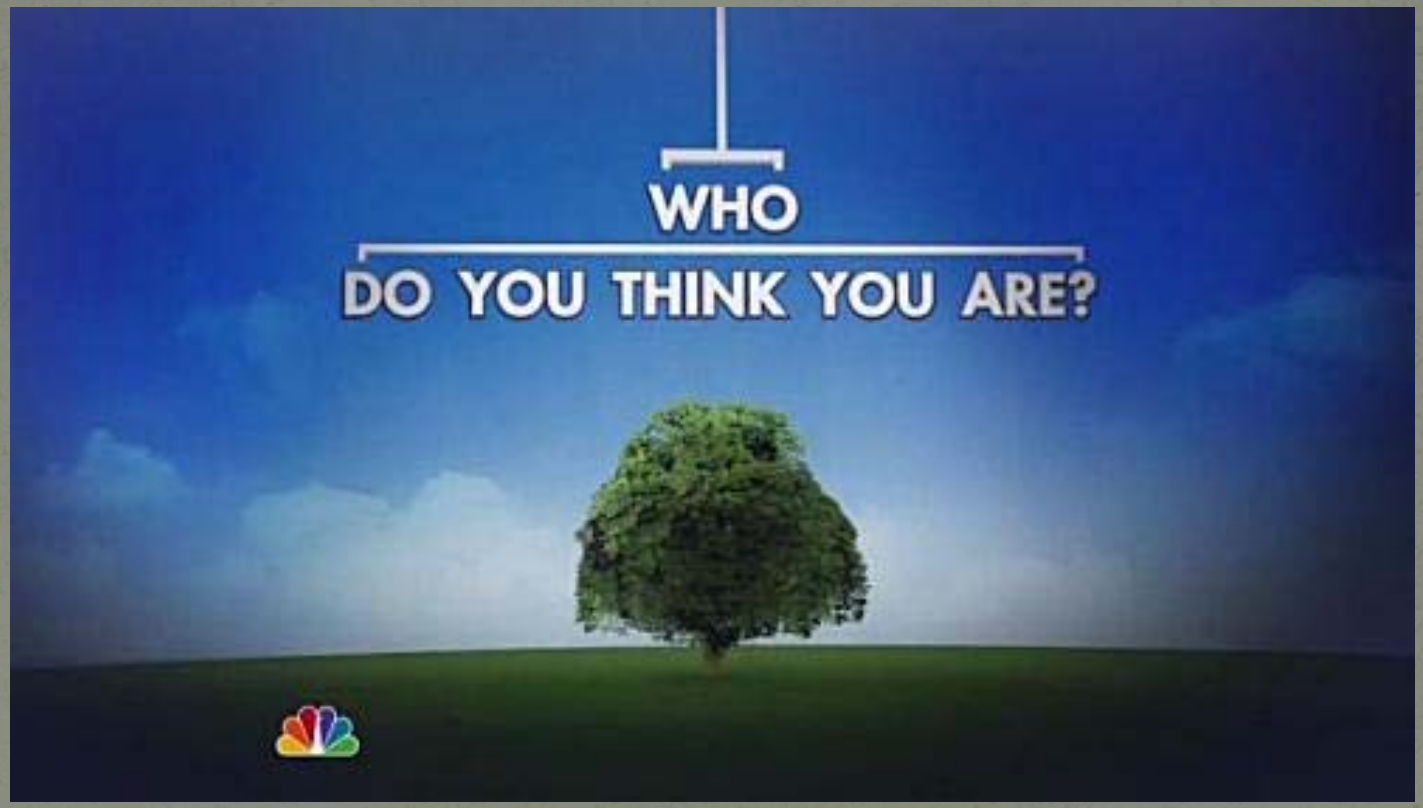
...but only if we learn about them

Remember these lawyers

You can help

They are in your professional DNA

Life is not TV



A better sense of who we are

Pride, humility, and hope

Better lawyers for client and country

Who Do You Think You Are? Military Lawyers in Historical Perspective

Bernard Hibbitts
University of Pittsburgh School of Law