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## THE DEFENSE OF YAMASHITA

GEORGE F. GUY\*

After four years, I still remember the blazing headlines of February 23, 1946; those big black headlines announcing: "YAMASHITA DIES ON GALLOWS" . . . "YAMASHITA HANGS LIKE COMMON CROOK" . . . "THE TIGER HANGS" etc., etc. All across the nation they screamed, yes even across the world press they shouted the exultant and triumphant message . . . "YAMASHITA DIES" . . . But for those of us who had been assigned the task of defending Tomoyuki Yamashita, General, Imperial Japanese Army, for "violation of the laws of war" for "failing to control his troops" and for "permitting them to commit atrocities" . . . February 23, 1946 was no day of triumph or exultation. It was the final climax to the international drama that had its opening scene in the mountains north of Baguio, Luzon, Philippines, on September 3, 1945, when General Yamashita, pursuant to the orders of his government, surrendered himself and his remaining troops to the American Army.

The front cover of *YANK FAR EAST*, the American Army newspaper, carried a full length picture of Yamashita striding down the mountain trail, followed by his staff and flanked by the American doughboys against whom he had fought so long and so bitterly. I remember his cheerfully autographing copies of that *YANK* for me later in New Bilibid Prison and I remember the description bestowed upon him by my old friend, Lt. Col. (then Major) A. S. Kenworthy of the Military Police. "Jack" Kenworthy had made the official arrest of Yamashita and had furnished the security and escort for him down from Baguio and to New Bilibid and was later Baliff at the trial. Jack has had a long and colorful career, from service on the Mexican Border in '16 and service in France in 1917-18, including a wound received in action, to service in Africa, Australia, New Guinea and the Philippines in World War II. Jack is at present commanding a Military Police Battalion in Tokyo after having served with distinction as Provost Marshal of the International Military Tribunal in Tokyo which tried General Tojo and other high ranking Japanese war criminals. I had known Jack in Cheyenne during his some ten years residence here when he was a special agent for the Union Pacific Railroad. When I asked Jack, "What kind of a guy is this Yamashita? . . . Jack looked at me and smiled a bit and said slowly, "Well, George, you'd be surprised. He is quite a character". This was some weeks before I had any inkling that I would ever see Yamashita, let alone assist in defending him. But the picture on the cover of *YANK* reminded me

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—there was the picture of Yamashita surrendering and then in March 1946, I saw a brief newsreel flash on his execution.

It was about October 1, 1945 when first indications were received that I might be associated with the case. I had just returned from Japan, where I had landed with Headquarters 8th Army, when Colonel Chas. C. Young, Staff Judge Advocate to Lt. General Wilhelm D. Styer, Commanding General of American Forces Western Pacific (AFWESPAC), informed me that my name was being submitted with others as defense counsel. Col. Young, a Denver lawyer, is now commissioned in the J.A.G.C. of the regular army. The order appointing the Military Commission and appointing both prosecution and defense counsel was first published by HQ AFWESPAC on October 1, 1945. The complete personnel of the defense as finally constituted was as follows:

Colonel Harry E. Clarke, JAGD, Altoona, Pa.  
Lt. Col. Gordon Feldaus, JAGD, Pierre, S. D.  
Lt. Col. Walter C. Hendrix, JAGD, Atlanta, Ga.  
Major George F. Guy, Cavalry, Cheyenne, Wyo.  
Captain A. Frank Reel, JAGD, Boston, Mass.  
Captain Milton Sandberg, JAGD, Keyport, N. J.

I am sure that the officers assigned to the defense approached their task with uncertainty, concern and curiosity. We had all seen the ravages and destruction in Manila itself and many of us had seen similar sights out in the provinces and in other cities in the Philippines. We all knew that Yamashita was entitled to a defense, but we all wondered, "Why does it have to be us?"

The war was so recently over that it was difficult to regard any Japanese other than as an enemy and it was particularly difficult to regard the Commanding General of the Japanese Forces in the Philippines as anything but the representative of all that was repugnant and brutal and cruel and treacherous in the Japanese system—as the prime standard bearer of that inhuman power that had looted, burned, murdered and raped Manila, the "Pearl of the Orient" and her sister cities of the Philippines. Therefore, it was indeed with mixed emotions, including no small amount of curiosity, that we six, who had been appointed as defense counsel, approached our task and our first interview with our client at New Bilibid Prison, Muntinglupa Province, Luzon, on October 4, 1945. New Bilibid Prison is about 25 miles south of Manila and the trip was made in staff cars. The six defense counsel, accompanied by WAC Sergeants Elizabeth Scholder of Los Angeles and Arline Walker of Cleveland, Ohio, made up the group that were ushered by the MPs into one end of the Prison Chapel, the room that was to serve as our "conference room" for that initial interview and for a number of others. In a few minutes, General

Yamashita, accompanied by General Akiro Muto, his Chief of Staff and General U. Utunomiya, his Assistant Chief of Staff and Mr. Masakatsu Hamamoto, his Harvard educated (Class of 1927) interpreter, crossed the courtyard from their cell blocks and entered the chapel. All of them stopped when inside the doorway and turned toward the altar and bowed, and then all turned toward us and bowed before coming all the way into the room and to the benches which had been set out for them. Colonel Clarke proceeded with the introductions, which took some time because General Yamashita neither spoke nor understood English. Generals Muto and Utunomiya both spoke and understood English, the latter quite well. During all of this time, I studied Yamashita quite closely. He stood about 5'7" tall and was clad in the gray green Japanese field uniform. He was a large man for a Japanese but his clothes hung in folds on his body, he having lost a very considerable amount of weight as a result of the reduced diet upon which Japanese troops had been subsisting during the last months of the Philippine Campaign. His uniform tunic was adorned by the red cord fourragere of the Japanese General Staff and with the two lapel insignia of three gold stars each, the insignia of a full General of the Emperor's Army. On his left breast were rows of ribbons, the "lettuce" that soldiers of all armies have worn since that clever device of campaign ribbons was first invented by that craftiest of soldiers, Napoleon himself. A pair of highly polished boots, complete with gold spurs completed the ensemble. Little did I realize then that the gold spurs were later to become my own possession as a gift from the General on that fateful December 7, 1945, when he was sentenced to die. Our client stood facing us, his peaked forage cap held in his large hands. His figure was erect but not stiff and he acknowledged each introduction with a little bow and in a rather solemn manner, although there were traces of a smile about the corners of his large mouth and his large brown eyes brightened perceptibly as they rested in turn on each of us. His head seemed to be unusually large, particularly so for a Japanese and the face was marked with heavy lines. His neck was thick and bull like and the back of his neck and head ran in almost a vertical line from the white shirt collar which was turned down over his tunic collar. The shirt collar was open, exposing the full and deep throat. The nose was quite large and was not flat as is true with so many Japanese and perhaps the most distinctive characteristic of the face was the inordinately long upper lip. The eyes were deep and expressive and without the usual oriental slant. The man's face so interested me that I determined then and there to ask him to allow me to try to sketch him. Opportunity for this did not come until November 18 when, during an interlude of a few hours on a Sunday afternoon, General Yamashita did sit for me. It was a hot afternoon and when I had taken about an hour to do his

face and head and, noticing that he was tired, offered to call the whole thing off because I couldn't sketch anyhow, he courteously insisted that I proceed. This I did, and the completed sketch was finally autographed by the subject himself. He politely suggested that he would like to do another sometime, one that he might keep or send to his wife, whom I had met while I was in Japan. However, it seemed that chance never permitted us the time to do a second one. Or perhaps, the Almighty, seeing the first sketch, decided that no matter what Yamashita might have done, he didn't deserve *that* fate again!

We shortly and quickly got down to the serious business at hand and, working through Mr. Hamamoto, were soon in the midst of the allegations of the charge against Yamashita. That charge is as follows:

"Tomoyuki Yamashita, General Imperial Japanese Army, between 9 October, 1944 and 2 September, 1945, at Manila and at other places in the Philippine Islands, while commander of armed forces of Japan at war with the United States of America and its allies, unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines; and he, General TOMOYUKI YAMASHITA, thereby violated the laws of war.

Dated 25 September, 1945.

/s/ Alva C. Carpenter,

ALVA C. CARPENTER  
Colonel, JAGD  
United States Army."

That charge had been served on Yamashita a few days before by Captain D. C. Hill, Wamego, Kansas, one of the Prosecution staff, but it was not until this afternoon that Yamashita, after conference with his counsel, had any real concept or understanding of the nature of the charge against him. At that very first moment of comprehension of the full import of the charge, Tomoyuki Yamashita firmly and solemnly maintained his innocence of such charge. His position on the matter was an unequivocal—"NOT GUILTY"—on that day, on the day of his arraignment, October 8, 1945, and throughout his trial and even on the fateful night of February 23, 1946 when he mounted the scaffold at Los Banos to pay with his life for the crimes of his troops. His forthright manner, his candor and his strength of character made a distinct impression on me that first interview and those qualities continued to impress me as time went on and as my contacts with him became more frequent. I am confident that my associates on the defense staff had the same impressions. This confidence arises because men of the caliber of Colonel Clarke, Lt. Colonels Feldhaus and

Hendrix, and Captains Reel and Sandberg, while they would have devoted sincere effort to any case to which they would have been assigned, would not, in my opinion, have exhibited the genuine zeal and intense industry displayed in this case, had they not felt these characteristics in General Yamashita which are here described.

We all worked steadily from the day of the initial interview until October 8, 1945, the day of the arraignment. This proceeding was held in the ballroom of the High Commissioner's Palace on Dewey Boulevard in downtown Manila, fronting out on historic Manila Bay. The Palace was a lovely new building just opened in 1940 and scarcely used by us before the Japanese attack on Manila in December, 1941. The building was undamaged in the 1941-42 hostilities and was used as a Headquarters by Lt. General Homma, the then Japanese Commander in Chief. Homma's trial for his war crimes opened in the same room, following the conclusion of the Yamashita case. At the arraignment, the charges were formally read to Yamashita, who was present in the Courtroom with all his counsel. He stood before Major General Russell B. Reynolds, the President of the Commission, and announced loudly in Japanese, "Not Guilty", when the charges had been translated to him in his own tongue. The arraignment was over in a few minutes and just 21 days later, on October 29, 1945, the trial opened . . . a trial which marked the first time in history that the United States as a sovereign power has tried a General of a defeated enemy nation for alleged war crimes. While no one on either side said much about it, there was a general unspoken feeling that here indeed was something new in the ancient field of law . . . that we were about to make law . . . that here was *stare decisis* in its real meaning, because it would be the first decision upon which others would follow that would build up another branch of the law, the inexact science to which we were all devoted.

Colonel Clarke, foreseeing the length of the battle ahead and also its complexity and intensity, "departmentalized" the defense. Unfortunately, Col. Feldhaus was then hospitalized with a recurrent New Guinea malady and that deprived us of his services at a crucial time. Colonel Clarke and Captains Reel and Sandberg undertook the formidable task of interviewing scores of Japanese prisoners of war who were believed to have some knowledge of the persons and places involved in the 66 original Specifications served on the accused on September 23, 1945 and the additional 58 Supplemental Specifications served on the day the trial opened. The devotion of these three officers to this arduous and difficult task was of the highest degree. Lt. Colonel Hendrix was assigned the perplexing mission of figuring out how to get into the civil courts by way of habeas corpus. I was cast the role of "liaison man" between the Commission, the Defense and any and all other Army agencies with whom we might have to deal. My

first job was to wangle a "headquarters" for the defense. The Real Estate Section finally allocated us a large two-story house at 1621 Taft Avenue, Manila. This edifice was surrounded by a high stone wall and permitted the secrecy essential in bringing so highly sought after a person as Yamashita into the heart of the city he was charged with having ravished. Doubtless, there were thousands of Manilans who would have welcomed the chance to take the law into their own hands had the opportunity presented itself. However, my good friend Major Kenworthy was at hand and provided ample Military Police security, both at 1621 Taft and in transporting Yamashita and many witnesses safely from New Bilibid and the Prisoner of War Stockades to and from our endless conferences. I myself moved into the house at 1621 Taft in order to be in constant touch with the situation and a few days later, I succeeded in having assigned to us two Neisi interpreters, Sergeants Bill Makino of Portland, Oregon and Tadao Ichikabuchi of Chicago. As they have done every job assigned them anywhere in the American Services, these Neisi did this one in bang-up fashion. They were not only invaluable in our numerous and lengthy discussions and interviews with the non-English speaking Japanese witnesses, but they were of great assistance in acting as messengers and in assisting in caring for and operating the premises at 1621 Taft. At the conclusion of the trial, both were ordered to Japan, where they rejoined ATIS, their regular organization (Allied Translator and Interpreter Section).

Along about the middle of October, it became apparent that something akin to "character evidence" on behalf of Yamashita would be not only advisable, but almost imperative. By that time, the great mass of publicity that had grown up around the impending trial and the proceedings already, had convinced Colonel Clarke that the defense, if possible, must disassociate Yamashita from the extreme Japanese "Military Class". By mid-October, it seemed that all of America, yes, all of the occidental world, not to mention all the Philippines, believed firmly that all Japanese army officers were "Samurai fanatics", "Greater East Asia exponents", "Empire Imperialists", etc., whose hands dripped with the blood of helpless and innocent women and children. All Japanese officers were regarded alike, regardless of what individual records might be. In the case of Yamashita, the popular concept was even darker and bloodier, because he was commonly referred to in the press of the world as the "Tiger of Malaya". This appellation gave rise to the popular picture of Yamashita as the Japanese conqueror who raged down the Malayan Peninsula like a roaring Tiger, devouring and destroying as he went. (Incidentally, Yamashita described the Malayan campaign to me in great detail one day in most interesting fashion.) By virtue of this press buildup, Yamashita was already convicted in the eyes of the world, and cer-

tainly in the eyes of the Filipinos, even before a shred of evidence had been introduced against him. I fear that a great majority of American military personnel in the Philippines was satisfied, from this mass of publicity, that Yamashita was guilty of anything that might be said of him.

Under such conditions, and with the trial held in Manila, the very center and vortex of these swirling animosities and predetermined public concepts of guilt, the task confronting the defense seemed enormous indeed. On October 20, Colonel Clarke assigned me to the mission of obtaining and developing character evidence on behalf of the accused. I was particularly charged with the task of obtaining evidence as to Yamashita's life, his history, his background, his family, and—most important of all—his military career. I thereupon entered into numerous conferences with him and with Generals Muto and Utunomiya concerning these important elements. With the basic information thus obtained, and with a list of names of persons to see in Japan, I flew to Tokyo on October 25th. Upon arrival there, I checked in with the G-2 (Intelligence) Section of General MacArthur's Headquarters, where I met an old friend, Colonel Frederick Munson, GSC, who was in charge of liaison with the Japanese Joint Army and Navy Liaison Committee. I also had the pleasure of meeting Major General Charles Willoughby, General MacArthur's G-2, whom I had known years before when he was a Major in the 20th Infantry at Fort Warren, Wyoming. General Willoughby received me most courteously and arranged that all possible facilities be placed at my disposal to enable me to see the Japanese witnesses desired on Yamashita's behalf. Colonel Munson contacted General Seizo Arisue, the G-2 of the Japanese Army, and from then on every request that I made for location of documents, contacting of individuals as witnesses, interviewing of witnesses, taking of statements and furnishing of transportation was promptly complied with.

My stay in Japan occupied about two weeks and during that period, I was furnished an office in the Nippon Club and the Japanese authorities brought all of the persons whom I desired to interview to the Club. I spent all of the day and many evening hours at the task and managed to keep two Japanese army interpreters busy all the time. We also made one trip outside Tokyo to Naguoka to interview General Kazunari Ugaki, who had twice been War Minister and who had once been Foreign Minister of Japan. General Yamashita had served in the War Ministry under General Ugaki on both of the latter's administrations in 1924-25 and 1931-32, and had assisted in the drafting of plans for the reduction of the Japanese Army by four divisions. For this reduction, forced through the Diet in spite of opposition of the militarists in 1931, Ugaki earned the undying hatred of the extremists. They had their revenge in 1937, when Ugaki was called upon by the



Emperor to form a cabinet and be Premier of Japan. This, he could not accomplish because the Imperial Army would not give him a War Minister. Had this great Liberal become Premier in that critical time, perhaps the China Incident and even Pearl Harbor itself could have been avoided. General Ugaki's health was such that he could not come to testify at the trial, but he did give me a statement which was read into evidence as a deposition at the trial. I found Ugaki to be a most interesting old man. He was a major at the time of the Russo-Japanese War in 1904, and recalled with great interest having met the then Captain John J. Pershing, U. S. A., who was in attendance with Ugaki's unit as an American military observer. Ugaki was greatly interested when I told him General Pershing's wife and three of his four children were buried in my home town cemetery at Cheyenne, Wyoming, following the disastrous fire at the Presidio of San Francisco in 1915, in which all four had lost their lives together.

General Ugaki had been in political eclipse for some ten years because of his liberal ideas and his belief that Japan's destiny lay in understanding and cooperating with the Western Powers and in avoiding aggression and in terminating the "China Incident". He was saddened by the destruction of war which had been necessarily visited upon his country, but was full of hope for the future and had great faith in the policies of the United States and particularly in General MacArthur. He is an old man in his 70's but was energetically entering into plans for his country's future, to be carried out on the liberal and democratic lines which have been his political gospel all his life. He firmly believed, too, that General Yamashita could not have been guilty of complicity in the Philippine atrocities.

I returned to Manila the first week in November and rejoined my colleagues, who were then heavily engaged in the trial before the Military Commission. When the time came for the presentation of the character evidence, we arranged for the witnesses to be flown from Japan and the following Japanese all appeared before the Commission and testified on behalf of General Yamashita:

Lt. General Shigetataro Amakasu, retired, who had been a lifelong friend of Yamashita's;

Colonels Hiruimu Hosoda and Nobutake Takayama, who had served under Yamashita when the latter had headed the Japanese Army Military Mission to Germany from January to June, 1941;

Mr. Keichoku Yoshida, a prominent Tokyo lawyer who had been a close friend for many years;

Mr. Shigesmasa Sunada, a lawyer and for 24 years a member of the Japanese Diet, and who had served under Yamashita in Malaya as legal advisor on civil affairs;

Mr. Kensuke Sakasaki, a prominent Yokohama businessman, who had first met the accused 34 years before when he was a Private and Yamashita a 1st Lt. in the Japanese Army, and from which association had grown a lifelong friendship;

Mr. Tsutomu Nishiyama, a Japanese bank official, who had lived for several years in New York City, and who had long known General Yamashita, particularly in Manchuria.

In addition to the above, the defense also introduced statements sworn to by General Masataka Yamawaki of the Imperial Japanese Army, and by General Yoshijior Umezu, Chief of the Imperial General Staff of the Japanese Army. General Umezu was one of the signers of the Japanese Surrender on the deck of the Battleship Missouri, and was a defendant before the International Military Tribunal Far East in Tokyo but died prior to the conclusion of that trial. The testimony of all was to the same general effect—that Yamashita had never been a “political” General, that he had earned his high rank by sheer efficiency, that he was not a Samurai, that he was not of the extremist military group, that he opposed war with the western powers, and that he had always had a reputation for fairness and for being a firm and strong disciplinarian. I will not attempt to detail the testimony, but that was the general tenor of it. I might add that one of the most significant facts which emerged from the character testimony as a whole, was the uniform statement of all witnesses that Yamashita was definitely out of favor with General Tojo and the “military extremists”.

Upon my return to Manila, I found that the prosecution was going full blast and was producing witnesses from all over the Philippines as to crimes and atrocities committed by Japanese Army-Navy Personnel and Air Force. The lay public must understand that the trial before the Military Commission was no trial in the ordinary sense of the term, and the lay public must disassociate from its mind the usual conception of a criminal trial with a judge, learned in law, sitting as the trier of questions of law and with a jury sitting as the trier of questions of fact of the evidence presented to it within the usual rules of admissibility as determined by the judge. The Military Commission which tried General Yamashita had no “judge learned in the law” sitting with it. True, one of the officers was designated as “law member”, but he is not a lawyer and is not “learned in the law” and not a member of the legal profession. The Commission as a whole—that is, the five members, all Generals—sat also as a jury in determining the facts as presented. The Rules of Evidences were especially prepared for this trial. They provided numerous exceptions to the usual safeguards thrown about accused persons in criminal or military proceedings. A clear exception, for example, was made in the case of

hearsay evidence. One of the basic rules of our law of evidence for hundreds of years has been the hearsay rule: i.e., a witness cannot testify as to what someone else told him. This was entirely eliminated in the Yamashita rules. Under this elimination, hearsay was freely accepted as were statements of absent and even unidentified persons. These rules also permitted the introduction of diaries of Japanese troops and enemy orders found on the battlefield without identification of the authors or the units to which they belonged. All of these were unquestionably inadmissible under the usual rules of evidence. The defense vigorously contested these rules and carried that part of the fight into the Supreme Court of the Philippines and finally into the Supreme Court of the United States itself.

It would be impossible to detail or even summarize here the testimony introduced in this case. The trial opened on October 29th and the final arguments were not concluded until December 5, 1945., the Commission was in session every day during this period, with the exception of Sundays and one or two Saturdays, from 8:30 to 11:30 and from 1:30 to 5:30. The proof of murder, torture, rape, and maltreatment of thousands of Filipinos and of hundreds of Americans and of some scores of other nationalities, was clear and overwhelming. These outrages occurred at points in the Philippines from Bataan Island north of Luzon itself to Davao in southern Mindanao. There is no denying that Japanese personnel indulged in the most revolting outrages and in some instances, seemed to conduct their activities on almost an organized basis with officers and non-coms directing the activities. The Japanese personnel involved were variously identified as Navy, Army and Merchant Marine, but there is no doubt that the atrocities complained of did occur. Witness after witness testified to these crimes until tales of horror, death, mutilation, starvation, maltreatment, and abuse became almost commonplace. The defense consistently fought back with every possible weapon at its disposal. Cross-examination of the prosecution witnesses was conducted, for the most part, by either Captain Reel or Captain Sandberg. In many, many instances, their effective questioning brought forth the fact that the witness had been engaged in guerrilla activities in one way or another, giving the inference, at least, that the treatment the witness had suffered at the hands of the Japanese was just punishment by the Japanese because the law of war has universally recognized that a guerrilla is an illegal fighter and, when captured, is not entitled to the rights and protection usually afforded a prisoner of war.

The most significant point made by the defense was that throughout the great mass of prosecution testimony and evidence, there was not one word or one shred of credible evidence to show that General Yamashita ever ordered the commission of even one of the acts with

which he was charged or that he ever had any knowledge of the commission of any of these acts, either before they took place, or after their commission. It is true that two witnesses did take the stand and testify to purported orders on the part of Yamashita for the massacre of Filipinos and for the destruction of the City of Manila. Both of these parties appeared in court under guard themselves and in the custody of our Military Police. Both were in confinement as Japanese collaborators at the time. The testimony of each witness seemed doubtful on its face and very dubious after cross-examination by Colonel Clarke and Captain Reel. The testimony of both these witnesses, the notorious Lopus and the infamous Galang, was completely destroyed when the defense produced CIC (Counter Intelligence Corps) files on each, showing unquestionably that they were guilty of collaboration and that they had offered to "sell" their testimony against Yamashita. So worthless did their testimony become under these relentless exposures by Colonel Clarke and Captain Reel, that Major Robert Kerr, the Chief Prosecutor, in his final argument to the Commission, did not even mention either Lopus or Galang.

At the conclusion of the prosecution's case, the defense made a motion for a finding of "Not Guilty" on the ground generally that there was no proof of any kind to connect Yamashita with what did happen. This motion was over-ruled and the defense was directed to proceed with its evidence. A defense motion for a continuance, based upon an indication given at the time the trial opened that such continuance would be granted at the close of the prosecution's case, was denied. Thereupon the defense evidence was presented. It is not my purpose here to try to detail that evidence, witness by witness or piece by piece. Time, space and circumstances do not permit such exhaustive presentation and discussion. While sections of the Press were not prejudiced in their reporting of the Yamashita trial, yet it seemed to me that the general public really got only the prosecution's side of the case. Pat Robinson, I.N.S. correspondent, seemed to be particularly fair to the defense in his dispatches, but nevertheless, the general impression at home seemed to be one of pre-conviction of the accused.

Numerous witnesses testified for the defense. I have already detailed the "character evidence" because that was the portion of the defense with which I was particularly charged. General Muto, Yamashita's Chief of Staff, was perhaps the most important defense witness, aside from the accused himself. Muto had been Chief of Staff in Sumatra and did not arrive in the Philippines until about October 20, 1944 or at the time of the initial American assault on Leyte. He, like his commander, had never served in the Philippines and he didn't even know where Leyte was! General Muto had had a long record in the Japanese Army and was a most capable officer. He was sub-

sequently tried along with several others including General Tojo before the International Military Tribunal Far East in Tokyo and was finally executed. He immediately threw himself into his arduous task and instantly became, as any good Chief of Staff should, his Commander's "right arm". General Muto testified in considerable detail as to the difficulties confronting Yamashita upon his assuming command. Muto also testified at some length as to the "chain of command" and to show when various units, such as the Maritime Transport Command, the 4th Air Army, Manila Naval Defense Units, etc., came under Yamashita's command. He positively testified that never at any time had Yamashita ordered the commission of any atrocities against the Filipinos or anyone else. There never had been any prosecution evidence that such orders *had* been given, but any inference of their having been given or having been condoned, was certainly effectively refuted by General Muto's testimony. As Chief of Staff, he was certainly in position to have known of any such orders being given or of any information of such atrocities that might have reached his Commander. Numerous other Japanese officers testified as to various elements involved in the Specifications of the charge, and in answer to the prosecution evidence. None, however, made the impression that the accused, Yamashita, made.

He took the stand in his own behalf, after explanation by General Reynolds that he did not need to, and that he could make an unsworn statement or remain silent as he liked, but that if he did take the stand as a witness, he would be subject to cross-examination. He elected to take the stand and did so, and was on the stand all told for about 18 hours. His testimony was frank, forthright, full and complete. He related in detail the situation confronting the Command on October 9, 1944, just a bare week before our initial blow fell at the beaches off Tacloban; then he went on to relate in similar detail the problems and tasks that continued to confront him in ever increasing size and number as the devastating American attacks by land, sea and air mounted in constantly rising fury. The superiority of American Arms in every category was so great that the Japanese cause was indeed a lost one and the only thing that Yamashita could do was to hope to prevent the full use of the Philippines as a base from which the Americans could launch the final drive against Japan itself. Our ceaseless and tremendous assaults literally cut Yamashita's Army to pieces. His communications between his own Headquarters on Luzon and his troops in the Visayas and in Mindanao were practically non-existent after the middle of November, 1944 and virtually such even with Leyte after the end of December. His own Headquarters were moved from Fort McKinley on the outskirts of Manila to Ipo, in the mountains east of Manila late in December, 1944. He remained at Ipo until the pressure of the American attacks forced him

to remove to Baguio, high in the mountains, to which place President Jose Laurel of the Philippine "puppet republic" and the Japanese Ambassador to the Philippines, Murata had already fled. On March 21, 1945, these two worthies took plane for Japan and on April 16th, Yamashita was forced to remove his Headquarters from Baguio further back into the mountains to Banban. It is not inappropriate to observe at this point that this same Jose Laurel who fled the American advance in March of 1945 and who was subsequently apprehended by our troops in Japan, managed to escape trial of any kind even though he had brought his country into war against the United States. He not only managed to escape trial but also succeeded in redeeming his former political position to the extent that he was a nearly successful presidential candidate in the 1949 Filipino election! I myself had the experience of going into Baguio on April 28th about 48 hours after the capture of that Summer Capitol by our 37th and 33rd Divisions, I Corps, 6th Army. Devastation was everywhere. The city had been under effective American air and artillery attack for weeks and its untenability by the enemy was readily apparent. Dead Japanese lay in the streets and all about were smashed and strafed Japanese staff cars, trucks, cussions, wagons and other vehicles, all giving mute testimony to the power and fury of the American air attacks which had been such an important factor in driving Yamashita from lair to lair. Later that afternoon, I stood on the high Cathedrala Hill in Baguio and saw our P-38s bomb and strafe Jap positions on the ridge to the north of the city and then watched as the American artillery opened up a terrific fire on the Japanese emplacements. The artillery fire was so intense that within a short time, the top of the ridge was ablaze from the underbrush ignited by the 105s and 155s. In all that smoke and flame, I could see the flashes of additional shells as they exploded on the target, adding further to the holocaust already raging. I was witnessing then, although not realizing it, another step on the long road that was driving Yamashita, step by backward step, to surrender—and—to trial for "failure to control his troops" and to the final end on the gallows at Los Banos.

On May 20th, the pressure of the military situation was such that Yamashita had to move his Headquarters again—this time to Riangan where he remained until again forced to move on June 18th. His final headquarters establishment was at a place called Rest House No. 9 in the vicinity of Takben, set up on July 22nd and where he remained until ordered by Tokyo to surrender on September 2nd. Yamashita himself carefully recited all those moves to me the day I sketched him.

Thus, almost from the outset of the campaign, Yamashita was confronted with the overwhelming power of the American attack—so great in volume, intensity and diversity that his own headquarters

were constantly on the move, harried and pressed, and ever fleeing further and further into the mountains of northern Luzon in desperate moves to escape capture and destruction by his inexorable nemesis, General Douglas MacArthur. Is it any wonder that his control over his troops might not have been all that it should have been to insure that excesses would not be committed? In effect, this situation at the trial might be summarized by the following: "We Americans did everything we could to destroy your army and cut your communications and to prevent your being able to control your troops, but we are now trying you for failure to control them."

The whole essence of the Charge against Yamashita was that he "failed to control" his troops, thereby "*permitting*" them to commit crimes, etc. He was subjected to a long and searching cross-examination by Major Kerr, the Chief Prosecutor, the dramatic climax of which was reached in the following cross-examination, appearing at page 3660 of the record of trial:

"Q. You admit, do you, that you failed to control your troops in the Philippines?

A. I have put forth my maximum effort in order to control the troops, and if this was not sufficient, then somehow I should have done more, but I feel that I have done my very best.

Q. Did you fail to control your troops? Please answer 'yes' or 'no'.

A. I believe I did control my troops."  
But, as Captain Frank Reel ably pointed out in his phase of the final argument to the Commission:

"His answer, 'I believe that I did control my troops' is of course a legal and a factual conclusion which only this Commission can decide, but also it must be taken in the context of his previous answers, particularly the long answer which preceded it. Now, actually there is no question about this. General Yamashita did not have full control over all of his troops at all times. While these atrocities were being committed, he did not actually control the actual perpetrators in a strictly factual sense. Yet on paper, as a Commander, he can give no other answer. I suppose there have been rapes and that there has been mistreatment of prisoners of war by all armies—isolated cases at least. And I don't suppose that any Commander would say that he controlled a man while he was in the act of committing rape or mishandling a prisoner of war, but if you asked any of those Commanders whether they controlled their troops they would certainly say they did."

To me, it seems that the real answer is that Yamashita did all in his power to control his troops, but that the effectiveness of American military operations against him was so great that he was prevented by those operations, and those operations alone, from effectively controlling his troops.

The reader must understand that the evidence presented to the Commission and the actual appearances in the Court room were only portions of the labors required to present the defense. Portions of the defense staff were constantly engaged in important tasks outside the Court room—maintaining our headquarters, checking records and files, maintaining liaison with the prosecution and the Commission, interviewing witnesses and laying plans for future action. As I mentioned earlier, one of the “outside” tasks assigned was that allocated to Lt. Colonel Walter Hendrix, who had been working long and arduously on this phase of our operations, and he had devised a theory whereby we could get into the Supreme Court of the Philippines on a Writ of Habeas Corpus and Writ of Prohibition.

Colonel Clarke and Captains Reel and Sandberg were deeply involved with the trial itself and Colonel Clarke then assigned me to assist Colonel Hendrix in the proposed civil court procedures. Colonel Hendrix and I immediately embarked on this assignment and, in the process, rounded up all the Philippine law books that we could find. The building housing the Supreme Court of the Philippines had been burned during the Intramuros fighting and, consequently, we were handicapped by a lack of library, not to mention the fact that we were sallying forth on litigation in a strange jurisdiction. Colonel Hendrix was Judge Advocate to the Military Police Command and had made one previous appearance in the Philippine Supreme Court in contesting a habeas corpus action by three Philippine women collaborators who sought release from an alleged illegal detention by the American Army. We were assisted by finding many of the books of the library of that brilliant lawyer, Mr. Jose Laurel, which books were assembled in Colonel Hendrix's office by Mr. Julian Wolfson, a veteran American Manila lawyer, who had survived over three years internment in Santo Tomas Internment Camp.

Our research into the Philippine Law concerning the questions at hand brought forth a number of interesting examples of the workings of Anglo Saxon Justice on the matter of the Writs of Habeas Corpus and of Prohibition. Some of these cases went back to the days when the Philippines had scarcely been liberated from the long heavy rule of Spain. I will not attempt to enumerate the cases in this article as it will suffice to say there that our research showed that the power and majesty of our civil law had closely followed our flag and that individual rights had been jealously guarded by the courts even



from the earliest days of American influence in those islands. Some of these cases arose while General Douglas MacArthur's father, the illustrious General Arthur MacArthur, was Governor General of the Philippines.

Service of the papers in the Habeas Corpus and Writ of Prohibition action was made upon Lt. General Wilhelm D. Styer on November 13th by a bailiff of the Supreme Court of the Philippines. The proceedings required that General Styer, as the respondent in the action, appear or file his answer within five days from the date of service. On the required date, no appearance was made by or on behalf of General Styer, but on November 14th the Manila law firm of Delgado, Dizon, Flores and Radrigo appeared *amicus curiae* on behalf of the general public of the Philippine Islands. The theory of the appearance of this firm as *amicus curiae* was embodied in the following excerpts from their petitions:

"That the trial of General Tomoyuki Yamashita is of vital significance to the cause of democracy, for in the conduct of this trial is put to a test the ability of a democratic institution to administer justice with dispatch and efficiency, without sacrificing those fundamental rights accorded to the accused by democratic tenants;

"That said trial is of paramount interest to the People of the Philippines, who, in their uncompromising adherence to the cause of democracy, bore the direct and full impact of the enemy's wanton barbarity;

"That said trial is likewise of supreme concern to all the members of the United Nations which unanimously stand behind the principle that the laws of civilized warfare should be upheld and enforced, and that, within democratic bounds, unwarranted acts of savagery and inhumanity should never go unpunished;

"That the petition for *habaes corpus* and prohibition is of first impression in this jurisdiction, and, upon the ruling which will be laid down regarding said petition will depend the course and conduct which this nation will, in the future, take in cases of this nature which vitally affect the national well-being."

The petition was actually filed by Mr. F. A. Delgado, the head of this firm. Mr. Delgado was the Philippine representative to the United Nations and is a leading Manila lawyer. Prior to the filing of the *amicus curiae* by Delgado, et al, a similar appearance had been filed by Colonel Luis P. Torres and Major Cliceria Opinion of the Judge Advocate General Staff of the Philippine Army. This appearance, however, was withdrawn and no appearance was ever made in the

Philippine Supreme Court by or on behalf of General Styer. The matter then went to oral argument before the court on the 23rd of November. All counsel, save Lt. Colonel Hendrix and myself, were involved in the trial, then proceeding before the military Commission, and this meant that the appearance before the Philippine Supreme Court had to be made by Colonel Hendrix and myself. The case had, of course, attracted a great deal of attention and the prospect of the Commander in Chief of the hated Japanese forces seeking judicial redress in the courts of the country which Japanese armies had occupied for so long and in the courts of the very country whose people had suffered so much at the hands of the invaders, was one that generated public interest to a high pitch. Consequently, when Colonel Hendrix and I drove up to Malacanan Palace in a jeep, there was such a crowd in front of the annex, which was then being used as a temporary court house, that it was all we could do to get into the place. The temporary court room itself was small and the space required for seating the nine supreme justices who heard the argument, plus the clerks and other officials of the court, occupied a goodly portion of the room. The room was so filled with newspaper correspondents and with the general public that Colonel Hendrix and I found ourselves virtually a part of the crowd.

While there was no hostility in the atmosphere, nevertheless there was an over-all feeling of tenseness as the case was called. Mr. Delgado appeared *amicus curiae* and the argument on behalf of General Yamashita was opened by Colonel Hendrix. We had divided the argument so that Colonel Hendrix presented to the court our plea for the writ of habeas corpus, leaving to me the plea of writ of prohibition. The principal points which were presented to the Highest Tribunal in the Philippines were the same points which were later presented to the Supreme Court of the United States, namely:

1. That the Military Commission, then trying General Yamashita, was without jurisdiction over, or to try him.
2. That the charge upon which he was being then tried failed to state any offense against the laws of war.
3. That "due process of law" guaranteed to the accused by both the Philippine and the American Constitutions was being denied to the accused because of the manner in which the trial was being conducted.

Colonel Hendrix, who is an able and successful lawyer from Atlanta, Georgia, opened the argument in the somber atmosphere of tension that I have already described. He launched into his prepared argument and was proceeding smoothly when various justices of the Court commenced interrupting and asking numerous questions. This

is a habit which judges of all appellate tribunals seem to have. It is a practice which no doubt has its merits, in that it enables the justices to satisfy themselves on various points as they occur in the mind of the judge. However, to the attorney appearing before the court, this practice can be, and often times is, most disconcerting. In the Yamashita case, a number of the questions asked, in my mind, indicated a bias against the petitioner which amounted to almost open hostility. The judges being Filipinos, were naturally resentful to all Japanese and most of all to the Japanese Commander in Chief. Hence, it was not too long before the verbal exchange between Colonel Hendrix and some of the justices took on some warmth. The impatience of some of the justices with the plea on behalf of Yamashita was hardly in keeping with the fact that some of their number had served in their present capacities under the Japanese. Some of the things which were said before the Philippine Supreme Court that morning made excellent copy for the newsmen and accounts of the proceedings went out around the world.

Upon the conclusion of Colonel Hendrix's argument, concerning the habeas corpus, I then took up the task on behalf of the writ of prohibition. The same legal theory obtained for it as obtained for the writ of habeas corpus, save and except that on behalf of the writ of prohibition, it was necessary to emphasize the manner in which the trial, before the Military Commission, was being conducted. Particular emphasis was laid upon the disregard, by the Military Commission, of the rules of evidence and the protective features of the Articles of War. The argument on behalf of the petitioner was completed on Friday and the court adjourned until Saturday, November 24th, at 10:00 A. M., at which time Mr. Delgado made a long and stirring speech against the petition. It was apparently entirely proper for him to appear *amicus curiae* on behalf of the Philippine public, and even the world at large. We could not feel that his argument was really an answer to the legal points which we had raised, but that it was nothing more than a rehash of the anti-Yamashita propaganda which had already flooded the press and the radio. Upon the conclusion of the argument, the Philippine Supreme Court took the case under advisement and on November 28th, issued a memorandum opinion denying the relief sought. However, Mr. Justice Ozoatoa dissented as to the theory of the majority opinion but concurred in the result. Mr. Justice Perfecto voted to deny the habeas corpus but to grant the writ of prohibition. Mr. Justice Perfecto wrote a very long dissenting opinion in which he gave an interesting and learned dissertation upon the history of International Law. The opinion itself would be interesting reading from the standpoint of the historical coverage alone, if not for the fine composition and excellent expression which characterizes it. Mr. Justice Perfecto said, in part:

“The peoples of all nations who are keenly watching the prosecution of Yamashita should be convinced by conclusive evidence that said prosecution is not a mere parody of the administration of justice devised to disguise the primitive impulses and vengeance and retaliation and of the instinctive urge to crush at all costs no matter by what means, a hated fallen enemy. The prosecution, trial and conviction of Yamashita must impress all the people of the world that the principle of law is paramount and supercedes and wipes out all other considerations dealing with war and commanders as war criminals. Otherwise, their faith in the supremacy of law as the invulnerable bulwark of all fundamental human rights will be shaken as will be the moral position of the victorious United Nations. The ethical value of the grandiose pronouncements of their great leaders and the profound significance of the lofty ideals for which millions have died, will be weakened and diminished.”

The reader must realize that our system of law does not permit any direct appeal from the decision of a court-martial or Military Commission; in other words, there is no procedure provided whereby an appeal can be taken from conviction by this military tribunal to civilian courts for the purpose of reviewing those decisions. The only means of judicial escape for Yamashita, or for that matter, for an American so convicted by military court, is by habeas corpus and prohibition. In order to make these remedies available, it is essential that the petitioner show that the military court which tried him was without jurisdiction. That was the under-lying theory of the action of the Supreme Court of the Philippines and for that matter, was the position which the defense took and maintained throughout the trial before the military Commission itself. The Philippine Supreme Court announced its decision denying the petition on December 4th, the day before the conclusion of the final argument before the Military Commission.

On the afternoon of December 5th, Major General Russell B. Reynolds, the president of the Commission, announced that the Commission would meet again at 2:00 P. M., December 7, 1945, to announce its decision. That session was as brief as it was dramatic. Just prior to the opening of the court room, Pat Robinson, of International News Service, took a straw vote of the twelve newsmen who had most conscientiously covered the trial. The question submitted was: “On the evidence produced before the Commission, would you hang Yamashita?” The vote of the twelve newsmen was twelve to nothing in the negative. This was taken by some of the defense counsel as a favorable sign, for the reason that the press, with a few exceptions, had not been too kindly disposed toward Yamashita. Others of the defense

staff, however, including myself, felt that the die had been cast and that the finding of the Commission would unquestionably be "guilty" and that the sentence, surely as unquestionably, would be death. General Yamashita was brought into the jam-packed court room amidst the exploding of flash bulbs and the grinding of the newsreel cameras. He was directed to take a stand in front of General Reynolds accompanied by Colonel Clarke, senior defense counsel. Almost immediately General Reynolds commenced reading the prepared statement which constituted the Commission's findings, judgment and sentence. It was indeed a dramatic moment and history was being made in the field of International Law, for this was the first time in American history that a Commander of a defeated enemy army was convicted as a war criminal upon the theory of command responsibility alone.

The German General Dostler had been already convicted and shot in Italy, but the proof, in his case, was clearly that he had personally ordered the execution of American prisoners. There had not been one word or one shred of evidence in the entire seven weeks of trial to show that Yamashita had ordered or condoned any of the things that had taken place, or that he had even had knowledge thereof. We were witnessing the conviction of a defeated and surrendered enemy General upon the charge that: "While Commander of armed forces of Japan . . . he unlawfully disregarded and failed to discharge his duties as Commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes". Here also was an official pronouncement that a Commanding General was automatically criminally liable for such occurrences without the showing of any direct connection whatsoever with the offenses themselves. When the vital words, "and sentences you to death by hanging", had been spoken, there was a moment of dead silence which hung over the entire room, and then Yamashita and the other Japanese were taken away.

I closely watched his face throughout the proceedings and looked attentively for change in expressions as the translations were made. For myself, I feel that he must have known what was coming. When the final words were translated, there was scarcely a change of expression on his quiet and solemn face. At no time had he ever exhibited any resentment or bitterness toward the United States, or toward those who were charged with the task of conducting the trial. I had talked with other Japanese officers of high rank who were arrogant, mean, bitter and resentful, but Yamashita, the man who must hang as the first proven example of this new theory of International criminal law, was quiet, dignified and philosophical.

Prior to the actual passing of sentence, he had made a brief statement, through Mr. Hamamoto, in which he thanked the military Com-

mission for the courteous manner in which he had been treated and thanked the American Army for providing him with defense counsel and publicly expressed his appreciation to defense counsel himself. That morning he had asked each of the defense counsel in and had grasped us by the hand and had personally expressed his heartfelt appreciation for the efforts that we had exhibited on his behalf. To each of us he presented some item of uniform or equipment that was particularly dear to him. Colonel Clarke received a Chinese tea service that Yamashita had carried for many years through Manchuria, China, Malaya, Japan and the Philippines. Colonel Clarke also received the General's array of ribbons. Lt. Colonel Feldhaus received this general staff fourragere cord and one of his three star gold General's insignia. Lt. Colonel Hendrix received another General's insignia and Yamashita's cordovan saber belt. Captain Reel and Sandberg received his sets of Chinese poetry brushes and the General presented to me, as the one Cavalry officer on the defense staff, his gold plated presentation spurs and also with a 24K Gold Chinese good luck piece. These presentations were all made on the morning of December 7th and I feel that Yamashita knew at the time what the verdict would be.

Very shortly after that, he was removed from his cell in the High Commissioners Palace to confinement at the prisoner of war area south of Manila, and there held incommunicado. I never saw him again, but our efforts on behalf of the defense were by no means over. On that very day, December 7th, we forwarded by air mail to the Supreme Court of the United States an original petition for writ of habeas corpus and prohibition. In the meantime, we were frantically getting together the necessary record to take an appeal from the adverse decision of the Supreme Court of the Philippines. That record was finally made up and dispatched by air mail in the evening of December 7th. It was indeed an odd turn of fate that the Japanese Commander should be sentenced to die and should direct his appeal to our highest court on the 4th anniversary of the attack on Pearl Harbor. Shortly thereafter, we addressed a telegraphic request to the Supreme Court for stay of execution and this was granted. There then followed a period of great uncertainty as to whether or not the United States Supreme Court would even hear the case, and if it would, whether or not the matter would be heard orally, and if so, when and by whom such argument would be made. At about that same time, Lt. Colonel Feldhaus and I were relieved from duty in the Pacific, as we then had each served over 30 months in that theater. We both departed for home before the end of December. In the meantime, authority came through for three of defense counsel to go to Washington to present the case to the United States Supreme Court, and that task was undertaken by Colonel Clarke and Captains Reel

and Sandberg. Lt. Colonel Hendrix had been assigned to the Staff of Mr. Paul McNutt, United States High Commissioner of the Philippines, where he served until after Philippine Independence July 4, 1946.

The case was set down for oral argument before the United States Supreme Court on January 7, 1946 and it was there presented by my three colleagues, who had flown to Washington from Manila. The Government's case was presented by the newly appointed Solicitor General Mr. Howard McGrath, his assistant, Mr. Judson, and the Attorney General, Mr. Tom Clark. Both the original application and the appeal from the Philippine Supreme Court were heard together. The principal contentions that had been made throughout, were renewed in the United States Supreme Court, and they were:

1. That the Military Commission was unlawfully created and that no Military Commission to try the petitioner for the violation of the laws of war could lawfully be convened after the cessation of hostilities by the United States and Japan. (Captain Reel).
2. That the Charge preferred against the petitioner fails to charge him with the violation of the law of war. (Colonel Clarke).
3. That the Commission was without authority and jurisdiction because the order covering the procedure of the Commission permitted the admission in evidence of depositions, affidavits, hearsay and other documents in violation of the 25th and 38th Articles of War and the Geneva Convention and deprived the petitioner of a fair trial in violation of the due process clause of the 5th Amendment. That the Commission was without authority and jurisdiction because of failure to give advance notice of the trial to the neutral power representing Japan as a belligerent, as required by Article 60 of the Geneva Convention. (Captain Sandberg).

The matter was taken under advisement, and on February 4th, the Supreme Court announced its momentous denial of the writs sought and this meant death for Yamashita. The majority opinion was read by the late Mr. Justice Stone. It considered each of the points made by the defense and concluded that the Articles of War did not apply to Yamashita and that he, therefore, could not complain if the procedure did not conform to the standards set by our military code. The majority opinion concluded in the following words:

"It thus appears that the order convening the Commission was a lawful order. That the Commission was lawfully constituted. That petitioner was charged with violation of the law of war and that the Commission had authority to proceed with

the trial and in doing so, did not violate any statutory or Constitutional command. We have considered and find it unnecessary to discuss other contentions which we find to be without merit. We therefore conclude that the detention of petitioner for trial and his detention after his conviction subject to the prescribed review by the military authorities, were lawful and the petitions for the . . . writs . . . should be and they are DENIED."

Mr. Justices Murphy and Rutledge both now deceased, wrote vigorous and thoroughly dissenting opinions. Mr. Justice Murphy was particularly impressed with the inadequacy of the charge upon which Yamashita had been convicted, and also with the contention that he was denied Constitutional rights under the 5th Amendment. He says, in part:

"He was not charged with personally participating in the acts of atrocity or with ordering or condoning their commission. Not even knowledge of these crimes was attributed to him. It was simply alleged that he unlawfully disregarded and failed to discharge his duty as commander, to control the operations of the members of his command, permitting them to commit the acts of atrocity. The recorded annals of warfare and the established principles of International Law afford not the slightest precedent for such a charge. This indictment in effect permitted the military commission to make the crime whatever it willed, dependent upon its biased view as to the petitioner's duties and his disregard thereof, a practice reminiscent of that pursued in certain less respected nations in recent years. Also in my opinion such a procedure is unworthy of the traditions of our people or of the immense sacrifices that they have made to advance the common ideals of mankind, the high feelings of the moment doubtless will be satisfied. But in the sober after-glow will come the realization of the boundless and dangerous implications of the procedure sanctioned today. No one in a position of command in an army, from sergeant to General, can escape those implications. Indeed, the fate of some future president of the United States and his chiefs of staff and military advisers may well have been sealed by this decision . . .

"That just punishment should be meted out to all those responsible for criminal acts of this nature is also beyond dispute. But these factors do not answer the problem in this case. They do not justify the abandonment of our devotion to justice in dealing with a fallen enemy commander. To conclude otherwise is to admit that the enemy has lost the battle but has destroyed our ideals."



I think that Mr. Justice Murphy had the reputation of being a humanitarian and he was certainly a man of deep religious convictions and of high ideals. His service as Governor General of the Philippine Islands brought him into close contact with those Islands and with the Filipinos. I am sure that he had the highest regard and the warmest affection for the Filipinos, and that the wrongs which they suffered grievously affected him. There could be nothing in the case which would create any sympathy for Yamashita, insofar as Mr. Justice Murphy was concerned; yet he dissented from the majority opinion and would have saved Yamashita's life because his convictions concerning the moral and legal principles involved were so strong.

The other dissenting opinion was written by Mr. Justice Rutledge, a newcomer to the court. If anything, his dissent was more vigorous than that of Mr. Justice Murphy's and the dissenting opinion written by him is lengthy and in very considerable detail. He was particularly impressed with the belief that Yamashita was entitled to Constitutional rights and that there had been denial of those rights. No effort will be made here to give a synopsis or even a resume of Mr. Justice Rutledge's opinion, but some of the language therefrom seems particularly pertinent. I, therefore, quote, in part, as follows:

"Not with ease does one find his views at odds with the Court's in a matter of this character and gravity. Only the most deeply felt convictions could force one to differ. That reason alone leads me to do so now, against strong considerations for withholding dissent.

"More is at stake than General Yamashita's fate. There could be no possible sympathy for him if he is guilty of the atrocities for which his death is sought. But there can be and should be justice administered according to law. In this stage of war's aftermath it is too early for Lincoln's great spirit, best lighted in the Second Inaugural, to have wide hold for the treatment of foes. It is not too early, it is never too early, for the nation steadfastly to follow its great constitutional traditions. none older or more universally protective against unbridled power than due process of law in the trial and punishment of men, that is, of all men, whether citizens, aliens, alien enemies or enemy beligerents. It can become too late . . .

"This trial is unprecedented in our history. Never before have we tried and convicted an enemy general for action taken during hostilities or otherwise in the course of military operations or duty. Much less have we condemned one for failing to take action. The novelty is not lessened by the trial's having taken place after hostilities ended and the enemy, including the accused, had surrendered. Moreover, so far as the time permitted

for our consideration has given opportunity, I have not been able to find precedent for the proceeding in the system of any nation founded in the basic principles of our constitutional democracy, in the laws of war or in the other internationally binding authority or usage.

“The novelty is legal as well as historical. We are on strange ground. Precedent is not all-controlling in law. There must be room for growth, since every precedent has an origin. But it is the essence of our tradition for judges, when they stand at the end of the marked way, to go forward with caution keeping sight, so far as they are able, upon the great landmarks left behind and the direction they point ahead. If, as may be hoped, we are now to enter upon a new era of law in the world, it becomes more important than ever before for the nations creating that system to observe their greatest traditions of administering justice, including this one, both in their own judging and in their new creation. The proceedings in this case veer so far from some of our time-tested road signs that I cannot take the large strides validating them would demand.”

If the mantle of modesty has heretofore gracefully draped from the shoulders of defense counsel, we feel that it has done so with some justification in the light of the following language from the Rutledge dissent:

“One basic protection of our system and one only, petitioner has had. He had been represented by able counsel, officers of the army he fought. Their difficult assignment has been done with extraordinary fidelity, not only to the accused, but to their high conception, of military justice, always to be administered in subordination to the Constitution and consistent Acts of Congress and treaties.”

Mr. Justice Rutledge then proceeds in page after page of scholarly language to follow a sound theory of reasoning which excludes every possible aspect except that the relief sought by the petitioner should be granted. For a beautifully written and logically sound opinion, I would refer the reader to the text of the Supreme Court decision itself. The summary of the Rutledge dissent is, however, most noteworthy and is contained in the concluding paragraphs of that opinion, which read as follows:

“It is not necessary to recapitulate. The difference between the Court’s view of this proceeding and my own comes down in the end to the view, on the one hand, that there is no law restrictive upon these proceedings other than whatever rules and regulations may be prescribed for their government by the execu-

tive authority or the military and, on the other hand, that the provisions of the Articles of War, of the Geneva Convention and the Fifth Amendment apply.

“I cannot accept the view that anywhere in our system resides or lurks a power so unrestrained to deal with any human being through any process of trial. What military agencies or authorities may do with our enemies in battle or invasion, apart from proceedings in the nature of trial and some semblance of judicial action, is beside the point. Nor has any human being heretofore been held to be wholly beyond elementary procedural protection by the Fifth Amendment. I cannot consent to even implied departure from that great absolute. It was a great patriot who said:

‘He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach himself’. (42 Tom Paine, quoted in Brooks, *The World of Washington Irving*, 73, n. I am indebted to counsel for petitioner for this quotation.)”

Following the action of the United States Supreme Court, Colonel Clarke made supreme final effort on behalf of Yamashita by taking an appeal for clemency to President Truman. The President, however, declined to act and thereby left the matter entirely in the hands of the military.

More than four years have now passed since these momentous events took place. General MacArthur and our armies of occupation are still in Japan. The fruits of war, if there ever are any, should be law, order and peace. We have brought law, order and peace to Japan but seemingly the diplomatic negotiations which proceed with Russia while hostilities were proceeding against the Japanese, may have robbed us of the real fruits of our victory in the Pacific war. We are now concerned again with a tense and frightening international situation. All of this, plus the passage of time has a natural tendency to make us forget the possible implications of the Yamashita case. There is no doubt but that that situation presented to General MacArthur a difficult and momentous question. The brutalities and criminal excesses of Japanese personnel in the Philippines had without a shadow of doubt been widespread and shocking. As I have stated previously in this article, there were instances when the massacres, brutalities and excesses appeared to have been carried on on an organized scale and under the direction of Japanese non-coms and commissioned officers. The contention made by the prosecution was that these excesses and criminal acts were so widespread and so numerous that General Yamashita as the Commanding General must have known of them, or if he did not know of them, he should have known of them.

The Military Commission took that view and the Supreme Court of the Philippines declined to intervene. The Supreme Court of the United States with the two dissenting Justices whose opinions I have referred to herein, likewise declined to interfere. Military Control of the case was thereupon entirely undisturbed.

Colonel Chas. C. Young, as General Styer's Judge Advocate, had been relieved from duty in the Western Pacific in December and on his way back to the States had carried the record of trial by safe hand from Manila to Tokyo. There he delivered the record to General MacArthur and there had a personal conference with the Supreme Commander in connection with the case. In due time, General MacArthur announced that he had confirmed the sentence of the Commission and on February 23, 1946, at Los Banos Prison Camp, 30 miles south of Manila, Tomoyuki Yamashita paid with his life for the crimes of his troops. Before mounting the scaffold, he issued a statement which I quote herewith. Unfortunately, the quality of the interpretation was not what it would have been had our old friend, Hamamoto, been doing it. The statement is as follows:

"I were carrying out my duty, as Japanese high commander of Japanese Army in the Philippine Islands, to control my army with my best during wartime. Until now I am believing that I have tried to my best throughout my army.

"As I said in the Manila Supreme Court that I have done with my all capacity, so I don't ashame in front of God for what I have done when I have die. But if you say to me 'you do not have any ability to command the Japanese Army' I should say nothing for it, because it is my own nature. Now, our war criminal trial going on in Manila Supreme Court, so I wish to be justify under your kindness and right.

"I know that all your American and American military affairs always has tolerant and rightful judgment. When I have been investigated in Manila court I have had a good treatment, kindful attitude from your good natured officers who all the time protect me. I never forget for what they have done for me even if I had died. I don't blame my executioner. I'll pray God bless them.

"Please send my thankful word to Col. Clark and Lt. Col. Ferdhause (Feldhaus), Lt. Col. Hendric (Hendrix), Maj. Goi (Guy), Capt. Surburn (Sandburg), Capt. Real (Reel), at Manila court, and Col. Arnard, Capt. Cara, Capt. Herdman and Brunner.

"I thank you."

Thus the final act was played and Yamashita plunged to his death at the end of a rope on American gallows. A New Era was conceived

in the field of International criminal law. We are still too close to the event to determine its effect for good or bad, but what is done has been done and we can only hope that history will vindicate the judgment of the moment.



TOMOYUKI YAMASHITA - sketched at  
High Commissioners Residence Court House  
MANILA, P.I. 18 November, 1945

GEORGE F. GUY  
Major, Cavalry.