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The Case of General Yamashita, by A. Frank Reel

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THE CASE OF GENERAL YAMASHITA. By A. Frank Reel. Chicago: The University of Chicago Press, 1949. Pp. 324.

Hurriedly picked from various army commands in the Philippines at the end of the war, six American lawyers were assigned the task of defending the Japanese general, Yamashita, who, as commander of Japanese forces in the Philippines from October 9, 1944, to the surrender on September 3, 1945, was charged by the American Government with responsibility for the war crimes committed by his troops. At no time in a position to offer coordinated resistance to the American Army, which began its relentless return to the Islands with the landings on Leyte on October 18, 1944, the Japanese forces had succumbed to an orgy of murder, destruction, pillage, and rape. Unlike the atrocities at the time of the surrender on Bataan, which were committed against American prisoners of war, these later acts were committed for the most part against Philippine civilians. The only extenuating circumstance was the problem which guerrilla warfare posed for the Japanese—a factor, however, which was not involved in Manila where the wanton behavior of the Japanese forces was particularly shocking.

Yamashita was served with the charge on September 25, 1945, and was arraigned on October 8. On October 29, the trial began and on December 7, the anniversary of Pearl Harbor, the sentence of death was pronounced. The author of this present volume, viewing the trial from the standpoint of the defense counsel of which he was a member, makes the reader cognizant of the impatient haste with which the Military Commission conducted the trial and also of the pressure which the Commission itself was under from General MacArthur's headquarters. From the point of view of the military authorities speed seemed to accentuate the justice of a result which they anticipated with certainty; but from the point of view of the defense counsel, all but one of whom were civilian lawyers in uniform, it seemed to be a gross violation of even the minimum requirements of due process—a fault which for them was compounded by their belief that the charge itself failed to define a war crime and that Yamashita was in fact innocent.

The prodigious labors of defense counsel, which the author relates with a nice appreciation of the human drama involved, did not arise out of mere professional zeal. Nor did they arise out of fondness for Yamashita, although the author was obviously attracted by his personality and persuaded

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as to his good character. The extraordinary energy and devotion displayed by the defense arose primarily out of their inability to give any credence to the idea that Yamashita was actually responsible. He was not charged with having ordered the atrocities. The logic of the charge was that his position of command was sufficient in itself to incur responsibility for acts of subordinates; no evidence was adduced that the acts were either ordered or condoned—although the inference was that atrocities on such a wide scale could not have occurred without the knowledge of Yamashita's headquarters. Mr. Reel is personally convinced that Yamashita, who was new to his command, never had a chance amidst the confusion created by the overwhelming power of the American assault to establish any effective control over his forces, which included air and naval contingents freshly assimilated to army command. The crimes in Manila were perpetrated by Japanese marines who, either through confusion or insubordination, had failed to evacuate the city according to Yamashita's orders.

The case *In re Yamashita*,¹ decided by the United States Supreme Court on February 4, 1946, was unprecedented in a number of its aspects, but most notably in that this was the first instance in which an enemy general had been held responsible by the United States for action (or inaction) connected with hostilities. The novelty was not lessened by the fact that the accused (by virtue of the diligence of defense counsel) appealed to the civilian courts against jurisdiction claimed and exercised by the American Army. Had warfare still been in active progress the Supreme Court might not have seen its way to admitting the case to a hearing. However, the fact of the Armistice deprived the case of the element of military urgency which is the essential basis for the large autonomy enjoyed by military courts. Nevertheless, having received the appeal, the Court, in an opinion subscribed to by six judges, upheld the jurisdiction of the Military Commission. Both majority and minority opinions made clear that the substance of the case was subject to review only by higher military authority and ultimately by the President, the question of guilt or innocence being outside the purview of the civilian courts. Yamashita was hanged on February 23, 1946.

In strongly felt and vigorously uttered dissents, Justices Murphy and Rutledge denied the jurisdiction of the Commission. Both agreed, although it was left to Justice Murphy to emphasize, that the charge was defective in failing to accuse Yamashita of any recognized war crime. They rejected the theory of command responsibility as repugnant to American legal concepts

1. 327 U. S. 1 (1946).

and as being without foundation in international law.² Justice Rutledge explored the still more interesting question of the bearing of the 5th Amendment. Whereas the majority had found the Articles of War and the Geneva Convention of 1929 to be inapplicable to an enemy combatant, it was Rutledge's view not only that these instruments did not exclude Yamashita, but that the 5th Amendment was in any event applicable. Since the order establishing the Commission sanctioned the admittance of evidence which fell far short of the safeguards erected by the common law, Rutledge was prepared to find, on that basis alone, that the Commission did not have lawful control of the defendant and that the writ of habeas corpus should issue.

The eloquence of the dissents, whose authors have now been lost to the Court through untimely death, deserves special comment. Included within their scope is judgment on the effect of the summary character of Yamashita's trial on the pacification of the defeated enemy³ and on the integrity of American standards of justice. It is this latter consideration which moves Justice Rutledge to a painstaking formulation of his position. Although the case is on the periphery of civilian jurisdiction in hitherto untrod territory, Rutledge finds no convincing basis on which to give the Military Commission free reign. In the circumstances, not of battle but of the enemy's acknowledged defeat, the Constitution, Rutledge contends, follows the flag, guarantees to an enemy

2. Mr. Justice Murphy stated:

Duties, as well as ability to control troops, vary according to the nature and intensity of the particular battle. To find an unlawful deviation from duty under battle conditions requires difficult and speculative calculations. Such calculations become highly untrustworthy when they are made by the victor in relation to the actions of a vanquished commander. Objective and realistic norms of conduct are then extremely unlikely to be used in forming a judgment as to deviations from duty. The probability that vengeance will form the major part of the victor's judgment is an unfortunate but inescapable fact. So great is that probability that international law refuses to recognize such a judgment as a basis for a war crime, however fair the judgment may be in a particular instance. It is this consideration that undermines the charge against the petitioner in this case. 327 U. S. 1, 35 (1946).

3. Mr. Justice Murphy stated:

But in the sober afterglow 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. . . . But even more significant will be the hatred and ill-will growing out of the application of this unprecedented procedure. That has been the inevitable effect of every method of punishment disregarding the element of personal culpability. The effect in this instance, unfortunately, will be magnified infinitely, for here we are dealing with the rights of man on an international level. To subject an enemy belligerent to an unfair trial, to charge him with an unrecognized crime, or to vent on him our retributive emotions only antagonizes the enemy nation and hinders the reconciliation necessary to a peaceful world. 327 U. S. 1, 28 (1946).

belligerent the benefits of due process, and requires that the civilian courts strictly confine the jurisdiction of the military to what will withstand critical scrutiny.

Mr. Reel is notably successful in combining the dramatic aspects of his story with the technicalities of the law, which enhances the value of the book for educating the public to that little known area of law in which civilian and military jurisdictions impinge on each other. Moreover, this account of Yamashita's case is a new reminder of the very human and violently emotional situations which have given rise to the safeguards which normally hedge in our criminal procedure. The reader is persuaded that Yamashita paid for crimes for which he was not personally responsible and which, if circumstances had permitted, he might have tried to suppress. The book does not help to explain what seems to be a consistent pattern of gratuitous cruelty indulged in by Japanese forces against civilians and prisoners of war. Neither the prosecution nor the defense in Yamashita's case throws light on this interesting question, which, perhaps, can be answered only through a close acquaintance with Japanese culture and history. The answer to this problem is not likely to be one of a nature which permits the fixing of responsibility for Japanese war crimes in accordance with the recognized categories of the law.

The reviewer is greatly impressed with the conscientious, skillful, and energetic defense which Yamashita's counsel afforded to a fallen foe. These lawyers, who were chosen quite at random, overcame tremendous obstacles at almost every step, eventually carrying their case to the Supreme Court and then on to the White House. As a layman, the reviewer can say in good grace that this remarkable record is not without significance as an index to the health of the American legal profession.

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PUBLIC ORGANIZATION OF ELECTRIC POWER, by John Bauer and Peter Costello. New York: Harper & Brothers. Pp. 263.

Public Organization of Electric Power, by John Bauer and his associate, Peter Costello, presents the most effective analysis of the case for public ownership and operation of the electric power industry that has appeared. Dr. Bauer has devoted most of his life to the cause of effective regulation and he concludes with reluctance that regulation can never accomplish the national organization of the industry, the reduction in costs, and the universal availability of this basic and essential service which the public requires. "I should prefer continuance of private ownership under public control if this

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