Twentieth Day

HEADQUARTERS,
ISLAND COMMAND, GUAM.

Wednesday, 22 August 1945.

The commission met at 9:00 a.m.

Present:

Colonel Walter T.H. Galliford, U.S. Marine Corps,
Major Foster H. Krug, U.S. Marine Corps Reserve,
Major Harry S. Popper, junior, U.S. Marine Corps Reserve,
Major Robert H. Gray, U.S. Marine Corps,
Captain Quentin L. Johnson, U.S. Marine Corps Reserve,
Captain Alfred J. Dickinson, junior, U.S. Marine Corps Reserve,
Lieutenant George W. Dean, U.S. Naval Reserve, members, and
Lieutenant Colonel Teller Ammons, Army of the United States, judge advocate.
Joaquin C. Perez, civilian, reporter.
The accused and his counsel.

The record of proceedings of the nineteenth day of the trial was read and approved.

The judge advocate introduced Jorge E. Cristobal, steward first class, U.S. Navy, as interpreter from Japanese to English.

The interpreter was duly sworn.

No witnesses not otherwise connected with the trial were present.

Jesus S. Sayama, the witness under examination when the adjournment was taken, entered; he was warned that the oath previously taken was still binding, and continued his testimony.

Cross-examined by the judge advocate:

183. Q. Explain what the Kohatshu is.
A. Kohatshu is a certain unit which was built and started in Saipan and right after the administration of the Japanese in Guam the same organization came to Guam. It was an organization in Guam for either the benefit of the public and that of the military personnel. That is all I know about the concern of the Kohatshu.

184. Q. Was there any Japanese organization in Guam by the Kohatshu?
A. A certain organization called the Menseibu is directly attached under the Kohatshu organized by Japanese personnel.

185. Q. The Japanese Society in Guam was part of the Kohatshu?
A. We had a Japanese Society Club here once for all Japanese personnel, but that does not come under the Kohatshu.

186. Q. What was the name of that Japanese Society?
A. Nihon Jin Kai, translated meaning Japanese Society.

187. Q. Did that Japanese Society have officers?

The accused objected to the question on the ground that it was incompetent, irrelevant and immaterial.

The judge advocate replied.

The commission was cleared.

The commission was opened. All parties to the trial entered and the commission announced that the objection was overruled.

The question was repeated.

A. The Japanese Society did not carry any military personnel as members.

188. Q. Were you a member of the Japanese Society of Guam?
A. All Japanese civilians that were in Guam were members including myself.

189. Q. Did you have someone that was the head of that Society?
A. A certain person by the name of Homura was the head of the Society.

190. Q. That was during the Japanese occupation, is that right?
A. Yes, after the Japanese had entered Guam.

191. Q. Did you have any Japanese Society prior to the Japanese occupation?

The accused objected to this question on the ground that it was incompetent, irrelevant and immaterial and that it was not within the scope of the direct examination.

The judge advocate replied.

The commission was cleared.

The commission was opened. All parties to the trial entered and the commission announced that the objection was overruled.

The question was repeated.

A. Yes, the Japanese Society was organized before the administration of the Japanese in Guam.

192. Q. Did that organization have a head man in that society?
A. Yes, there was a head man.

193. Q. Who was that head man?
A. The heads of the organization was Mr. Shimizu for one time and Mr. Shinohara.

194. Q. By Shinohara, do you mean the accused?
A. Yes, the accused.

195. Q. How many years was the accused head of that organization?
A. I do not completely recall how long, but I figure ten years of time.

196. Q. Who was the head of that organization at the time the Japanese came here?
A. At that time Shinohara was the president.

197. Q. Did that organization meet often?
A. Officially the meeting takes place once a month unless there are important things to be discussed.

198. Q. Did they have social functions?
A. The club had social functions and also for the proper protection of the Japanese personnel and families, that is in case of sickness or in case of charity.

199. Q. Did they have any particular meeting place for that organization?
A. Yes, we had.

200. Q. Where did you meet?
A. As far as the club was concerned financially, we do not have any regular spot for our meetings since we cannot buy or rent any place, and we have to accomodate ourselves in different spots to hold our meetings.

201. Q. Do you know where Aporguan Beach is in Guam?
A. Yes.

202. Q. Did the Japanese Society meet at Aporguan Beach?
A. At times when to hold parties was the only time we used Aporguan Beach.

203. Q. Who owned that beach at the time you had social parties of the Japanese Society, do you know?
A. That property belongs to Mr. Shinohara.

204. Q. Is this Japanese Society we are speaking of, the same society as the Dai Nisei organization you have testified to before?
A. The Nihon Jin Kai and the Dai Nisei are two separate organizations in which the first was that concerned with the parents or Japanese nationals and the second concerned with that of the children of the nationals.

The accused moved to strike all testimony of this witness in cross-examination which relates to the Nihon Jin Kai (Japanese Society) on the ground that it was incompetent, irrelevant and immaterial.

The judge advocate replied.

The commission was cleared.

The commission was opened. All parties to the trial entered and the commission announced that the motion was overruled.

205. Q. Was there any Dai Nisei organization before the Japanese came in?
A. Yes, there was a Dai Nisei organization before the war.

206. Q. When was it organized, do you know?
A. I have completely forgotten.

207. Q. Were you a member of that Dai Nisei organization before the Japanese came here?
A. No, I was not a member of the Dai Nisei.

208. Q. Do you know any member of the organization of the Dai Nisei before the Japanese came in?
A. Yes, I know.

209. Q. Name them.
A. Luis Takano and Ichang Shimizu are the only two I know .

210. Q. Who was the head of the organization of the Dai Nisei at that time?
A. There wasn't any head or leader of the organization at that time.

211. Q. Was there a leader of the organization of the Dai Nisei after the Japanese came in?
A. I do not know.

212. Q. How do you know there was an organization of the Dai Nisei before the Japanese came in?
A. As to any place in which a Japanese born individual was born, he is considered to be under the Dai Nisei.

213. Q. Then did all members of the Japanese born prior to the Japanese occupation become members of the organization of the Dai Nisei?

The accused objected to this question on the ground that it was compound, complex and not understandable.

The judge advocate replied.

The commission announced that the objection was overruled.

The question was repeated.

A. Before the invasion of the Japanese in Guam there was no members and there was no organization of the Dai Nisei either.

214. Q. What date was the first meeting that you attended of the organization of the Dai Nisei?
A. That I have forgotten completely.

215. Q. Where was that meeting held that you attended?
A. The only time when I remembered to attend was in the Omiya Kaikan, but that was not the first meeting.

216. Q. How many meetings did you attend of the organization of the Dai Nisei?
A. I have attended the meeting twice.

217. Q. Then when was the date that you attended the meeting of the organization of the Dai Nisei the second time?
A. I do not remember the date and the day of my attending the meeting for the second time.

218. Q. Where was the second meeting which you attended of the organization of the Dai Nisei held?
A. The Omiya Kaikan.

219. Q. How much difference in time was there between the first meeting and second meeting which you attended?
A. I do not remember how much time difference between that of the first and that of the second since there was so many complications in between times.

220. Q. What were those complications?
A. Those complications were my personal complications such as looking after my own store and not having time to attend meetings.

221. Q. Do you know Jesus C. Okiyama?
A. Yes, I know him.

222. Q. Did you see him at the first meeting?
A. He was not present in the first meeting.

223. Q. Did you see Jesus C. Okiyama in the second meeting?
A. I didn't see him.

224. Q. Did you see Jesus B. Sayama in the first meeting?
A. Yes, I saw him.

225. Q. Did you see Jesus B. Sayama in the second meeting?
A. Yes, I saw him.

226. Q. Did you see Felix F. Sakai at the first meeting?
A. I do not remember whether I saw him or not.

227. Q. Did you see Felix F. Sakai at the second meeting?
A. I do not know.

228. Q. Did you see Juan S. Okada at the first meeting?
A. I do not remember.

229. Q. Did you see Juan S. Okada at the second meeting?
A. I forgot.

230. Q. Did you see Jesus C. Hara at the first meeting?
A. I forgot and I do not know.

231. Q. Did you see Jesus C. Hara at the second meeting?
A. I do not remember.

232. Q. Did you see Jose C. Blas at the first meeting?
A. I did not see him.

233. Q. Did you see Jose C. Blas at the second meeting?
A. I did not.

234. Q. Would you know Jesus C. Okiyama, Jesus B. Sayama, and Felix F. Sakai if you saw them?
A. Yes, I know them.

235. Q. Would you know Juan S. Okada, Jesus C. Hara and Jose C. Blas if you saw them?
A. I know the first two names, Juan Okada and Jesus Sayama, but I do not know Jose C. Blas.

236. Q. Do you know if Jesus Okiyama, Jesus B. Sayama, Juan S. Okada, Felix F. Sakai, and Jesus C. Hara are members of the organization of the Dai Nisei?
A. I know they are Dai Nisei, but I do not know whether they were members of the Dai Nisei organization.

237. Q. Jesus B. Sayama is your son, isn't he?
A. Yes.

238. Q. And you do not know whether he belonged to the organization of the Dai Nisei or not?

A. I do not know whether he was a member of the Dai Nisei.

239. Q. He worked as a member of the group of the organization of the Dai Nisei, didn't he?
A. Yes.

240. Q. And he kept time for the members of the organization of the Dai Nisei who worked in groups, didn't he?
A. Yes, he worked in the year, 1943, month of May.

241. Q. And you still say that you don't know that your son Jesus B. Sayama was a member of the organization of the Dai Nisei?
A. I do not know whether he was a member.

242. Q. Did your son Jesus B. Sayama live with you in your house during the Japanese occupation?
A. Yes, he stayed in my house.

243. Q. How many members of the organization of the Dai Nisei were present at the first meeting you attended?
A. I do not know how many of them attended, but I know they were quite a lot.

244. Q. About how many if you know?
A. I think 40 were present.

245. Q. Was the accused present at the first meeting you attended?
A. Yes, the accused was present.

246. Q. About how many members of the organization of the Dai Nisei were present at the second meeting?
A. I believe there were 30.

247. Q. Was the accused present at that meeting?
A. Yes.

248. Q. Do you know Pedro B. Sayama?
A. Yes, I know him.

249. Q. Is he your son?
A. Yes.

250. Q. Did he live with you in your home during the Japanese occupation?
A. Yes.

251. Q. Was he a member of the organization of the Dai Nisei?
A. I do not know whether he was a member or not, but he attended meetings.

252. Q. Attended what meetings?
A. Dai Nisei meetings.

253. Q. Did the Kohatshu operate stores on the Island of Guam during the Japanese occupation?
A. Yes.

254. Q. How do you know that?
A. The reason why I know that was this: Since we, retail sellers, bought our stuff from the Kohatshu.

255. Q. Did you operate a store during the Japanese occupation?
A. Yes, I have a store.

256. Q. What connection has your store with the Kohatshu?

The accused objected to this question on the ground that it was incompetent, irrelevant and immaterial.

The judge advocate replied.

The commission was cleared.

The commission was opened. All parties to the trial entered and the commission announced that the objection was overruled.

The question was repeated.

A. There wasn't any connection, but we received the orders from the Menseibu to buy or receive stuff and sell the stuff from the Kohatshu to be sold at the store.

257. Q. During the 36 years of your stay on Guam, have you ever left the Island?
A. Yes.

258. Q. How many times?

The accused objected to this question on the ground that it was incompetent, irrelevant and immaterial, and further that it was not within the scope of the direct examination.

The judge advocate replied.

The commission was cleared.

The commission was opened. All parties to the trial entered and the commission announced that the objection was overruled.

The question was repeated.

A. I think, I have left about seven times.

259. Q. Where did you leave for?
A. I left for Japan.

260. Q. Do you know if the accused remained on Guam during the entire time you knew him here on Guam?

The accused objected to this question on the ground that it was incompetent, irrelevant and immaterial, and not within the scope of the direct examination.

The judge advocate replied.

The commission announced that the objection was overruled.

The question was repeated.

A. Yes, I know of a certain time when he left.

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261. Q. Do you know where he left for?
A. I met him at Japan during my absence and that was the reason why I know where he left for.

262. Q. How many times did he leave the Island of Guam?
A. I do not know how many times, but I know he left once.

263. Q. What date was that?
A. I do not know, but it was a long time ago. That was during the time of the Mariana Maru.

264. Q. What was the Mariana Maru?
A. It was a schooner that belongs to Mr. Shimizu.

265. Q. What was the first name of the Japanese Homura of which you spoke of yesterday?
A. I do not know.

The witness was duly warned.

The commission then, at 11:35 a.m., adjourned until 9:00 a.m., tomorrow, Thursday, 23 August 1945.

Twenty-first Day

HEADQUARTERS,
ISLAND COMMAND, GUAM.

Thursday, 23 August 1945.

The commission met at 9:00 a.m.

Present:

Colonel Walter T.H. Galliford, U.S. Marine Corps,
Major Foster H. Krug, U.S. Marine Corps Reserve,
Major Harry S. Popper, junior, U.S. Marine Corps Reserve,
Major Robert H. Gray, U.S. Marine Corps,
Captain Quentin L. Johnson, U.S. Marine Corps Reserve,
Captain Alfred J. Dickinson, junior, U.S. Marine Corps Reserve,
Lieutenant George W. Dean, U.S. Naval Reserve,members, and
Lieutenant Colonel Teller Ammons, Army of the United States, judge advocate.
Joaquin C. Perez, civilian, reporter.
Jorge E. Cristobal, steward first class, U.S. Navy, interpreter.
The accused and his counsel.

The record of proceedings of the twentieth day of the trial was read and approved.

No witnesses not otherwise connected with the trial were present.

Jesus S. Sayama, the witness under examination when the adjournment was taken, entered. He was warned that the oath previously taken was still binding and continued his testimony.

Reexamined by the accused:

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266. Q. You told us of being in jail from December 8 to December 10, 1941, do you remember that?
A. I do.

267. Q. How many people were taken to jail on or about December 8, 1941, as you recall?
A. I do not know whether it is right, but I think there were 22.

268. Q. Were those people of the same nationality or different nationalities, if you know?
A. They are all the same nationality including the Neseis.

269. Q. What nationality were they?
A. They were all the same, Japanese.

270. Q. Was any charge brought against you while you were in jail at that time?
A. None.

271. Q. How many of those 22 people were released at the same time you were released on December 10?
A. All of us. The 22 of us were released at the same time.

272. Q. Are you familiar with an organization known as Nanu Kohatshu Kaisha?
A. I do not exactly know the organization, but I know a little about it.

273. Q. Is that the same or different organization than the one you have testified to as the Kohatshu?
A. They were the same.

274. Q. Tell us, if you know, what the name Nanu Kohatshu Kaisha means to you in your own translation.
A. Nanu Kohatshu Kaisha is the South Sea Expansion Company.

At this point the accused requested that the witness verify his testimony in regard to question number 184 and the answer thereto.

At the direction of the senior member, question number 184 and the answer thereto were read to the witness, who requested that the answer be changed to read: "A certain organization called Kohatshu is directly under the Menseibu organized by Japanese personnel." With the correction he pronounced his testimony correct.

275. Q. Yesterday, you spoke quite a bit about a Japanese Society in Guam and said, I believe, that it had a constitution, is that correct?
A. I remember mentioning about the laws, rules and constitution of the Japanese Society.

276. Q. Before the war, did the Japanese Society have a written constitution?
A. It was a written constitution.

277. Q. Did any person connected with the Naval Government of Guam give a written approval to that constitution?
A. I think they had, since the society was brought out through the approval of the Island Government of Guam.

278. Q. I believe you said yesterday that the pre-war Japanese Society had social parties, is that correct?
A. Yes.

279. Q. Tell us, if you know, whether or not Governor McMillin ever attended any of those parties.

A. Yes, he attended the party in celebration of his arrival and so many officers including civilian office workers that counts up to 200.

280. Q. Turning now to the Dai Nisei, tell us again what that term means.

A. As far as I understand, the Dai Niseis are the second generation Japanese.

281. Q. Do you know of any organization of Dai Nisei in Guam during the time the Japanese were here that did not include all members of the Dai Nisei living in Guam at that time?

A. I do not know.

282. Q. Did you ever hear of any organization known as an organization of the Dai Nisei which did not include all Dai Nisei in Guam?

A. There wasn't.

283. Q. Is your son, Jesus B. Sayama, a Dai Nisei?

A. Yes.

284. Q. Did he ever mention to you being a member of any organization known as Dai Nisei which did not include all Dai Niseis in Guam?

A. Never.

285. Q. Is your son, Pedro, a Dai Nisei?

A. Yes.

286. Q. Did your son, Pedro, ever mention to you about being a member of any organization known as Dai Nisei which did not include all Dai Niseis in Guam?

The judge advocate objected to this question on the ground that it was leading.

The accused made no reply.

The commission announced that the objection was sustained.

Recross-examined by the judge advocate:

287. Q. Who put you in jail on December 8, 1941?

A. A fellow by the name of Juan Cristina.

288. Q. Do you know who put the accused in jail on December 8, 1941?

A. I do not know who brought him to the jail but he came to the jail.

289. Q. In all your testimony, in speaking of Dai Nisei, do you mean persons of Guam of the second generation of Japanese?

A. Yes.

290. Q. Did all of those persons, members of the Dai Nisei, belong to the organization of the Dai Nisei which was organized in Guam after the Japanese came here?

A. I do not know whether they were members of the Dai Nisei except the smaller kids, but as far as I know and believe they were all members and considered Dai Nisei.

Neither the accused, the judge advocate, nor the commission desired further to examine this witness.

The witness said that he had nothing further to state.

The witness was duly warned and withdrew.

Isabel P. Zafra, the regular interpreter, was recalled and resumed her duties as such.

Jorge E. Cristobal, steward first class, U.S. Navy, was relieved of his duties as Japanese-English interpreter and withdrew.

A witness for the defense entered and was duly sworn.

Examined by the judge advocate:

1. Q. State your name, residence and occupation.
A. Lourdes Anderson, resident of Mungmong, and a nurse maid by occupation.

2. Q. If you recognize the accused, state as whom.
A. I do, as Shinohara.

Examined by the accused:

3. Q. How long have you lived on Guam?
A. 20 years.

4. Q. Were you here at all times during the Japanese occupation?
A. Yes.

5. Q. Do you know where the building known before the war as the Elks Club was located?
A. Yes.

6. Q. Were you ever in that building during the Japanese time here?
A. Yes.

7. Q. When were you in that building during that time?
A. I have forgotten the month, but it was in the year 1942.

8. Q. Fix it a little more accurately, if you can, the time in the year, 1942, you were there.
A. To the best of my recollection, it was sometime in May.

9. Q. Were you employed by anyone in Guam during any of the time the Japanese were here?
A. Yes.

10. Q. Who was your employer?
A. Shinohara.

11. Q. During what period of time did you work for the accused?
A. About 9 months.

12. Q. What year?
A. 1942.

13. Q. Where did you work at that time?
A. At the Omiya Kaikan Club.

14. Q. Where was the Omiya Kaikan?
A. The building west of the Young Men's League of Guam.

15. Q. Was it in the same building as pre-war Elks Club?
A. Yes.

16. Q. What type of work did you do there?
A. Waitress.

17. Q. During the time you worked there, employed by the accused, did you ever see an American flag in that building?
A. Yes, I saw an American flag.

18. Q. How many times?
A. Once.

19. Q. Did anything unusual happen concerning that American flag that time when you saw it?
A. I saw a Japanese wipe his shoes with the flag.

20. Q. Describe in your own words in more detail just what happened.
A. I do not know how the flag came out, but I happened to be upstairs when I saw that man wipe his shoes with the flag. After that I do not know what happened because I went downstairs when I was working.

21. Q. Do you know the name of the Japanese you spoke of?
A. Okada, a member of the Kohatshu.

22. Q. You say this took place upstairs of that building?
A. Yes.

23. Q. What type of room?
A. In the hall.

24. Q. What time of the day was it?
A. I do not remember the time. It has been a long time.

25. Q. Was it morning, afternoon or night?
A. I do not know.

26. Q. Were you working at the club at the time this happened?
A. Yes.

27. Q. What were your hours of work?
A. From 7 o'clock in the morning until 9 o'clock in the evening.

28. Q. I believe you said you were a waitress at the club?
A. Yes, but that was downstairs.

29. Q. Try to remember the approximate time this happened, thinking of your hours of work and of the time you might have gone upstairs.

The judge advocate objected to this question on the ground that it had been asked and answered.

The accused made no reply.

The commission announced that the objection was overruled.

The question was repeated.

A. It happened sometime around noon.

30. Q. About what date was this that you recall?
A. I have forgotten it.

31. Q. Describe by going through his motions, the manner in which this Japanese used the flag wiping his shoes that day.
A. (The witness did so by standing up and swinging her right foot back and forth).

32. Q. Where was the flag when he went through that motion?
A. He had it in his hand and dropped it on the floor.

33. Q. Did he wipe the floor or his shoes with it? Describe it again, the motion he went through.
A. He was wiping the floor with the flag. There was liquid on the floor. (The witness demonstrated the same motion)

34. Q. Did he wipe his shoes with it?
A. No.

35. Q. What did you mean a while ago when you said he wiped his shoes?
A. I meant that he put it down and then used his foot to move it back and forth with.

36. Q. What was the name of the Japanese that used the flag in the manner you just described?
A. Okada.

37. Q. Did you see the accused there at that time?
A. I did not notice.

38. Q. Were there other people present?
A. Yes, Beatrice Rios was there.

39. Q. Were there any guests at the club present?
A. Yes, there was some but they were Japanese, and I do not remember them.

Cross-examined by the judge advocate:

40. Q. Who gave you all of your orders while working at the Omiya Kaikan?
A. We received orders from Shinohara.

41. Q. Did you see the accused at that club often?
A. He didn't go there very often. Sometimes a day went by without him showing up.

42. Q. You worked downstairs, didn't you?
A. Yes.

43. Q. And the entrance to the Omiya Kaikan was from the outside and not through that room?
A. Yes.

44. Q. Were you upstairs often?
A. Very seldom because I worked downstairs.

45. Q. Then you do not know whether the accused was upstairs or not?
A. I do not know.

46. Q. Was this Okada a Japanese soldier or civilian?
A. I think he was a civilian.

47. Q. Had you seen him there before at the Omiya Kaikan?
A. He came whenever there was a party.

48. Q. How large was the flag you saw him mop the floor with?
A. I did not quite notice the size, but maybe it was the size of two of these tables.

49. Q. You think it would be larger than the size of one of these tables?
A. Yes, about the size of one of these tables.

Reexamined by the accused:

50. Q. When you said size of two of these tables, what table do you mean?
A. This table (reporter's table - 28 inches square).

51. Q. When in response to the next question, you said about the size of one of these tables, which one did you mean?
A. About the size of that table. (table used by accused and counsel - size about twice the reporter's table)

Neither the accused, the judge advocate, nor the commission desired further to examine this witness.

The witness said that she had nothing further to state.

The witness was duly warned and withdrew.

A witness for the defense entered and was duly sworn.

Examined by the judge advocate:

1. Q. State your name, residence and occupation.
A. Margaret Anderson, resident of Mungmong, house-keeper.

2. Q. If you recognize the accused, state as whom.
A. Shinohara.

Examined by the accused:

3. Q. How old are you?
A. 19 years.

4. Q. Were you in Guam during the Japanese occupation of Guam?
A. Yes.

5. Q. Were you employed during any of that time?
A. Yes.

6. Q. By whom were you employed?
A. Shinohara.

7. Q. Where did you work?
A. At his club.

8. Q. What was the name of that club, if you know?
A. Omiya Kaikan.

9. Q. What kind of work did you do there?
A. Waitress.

10. Q. How long were you employed there?
A. Eight months.

11. Q. Give us the time of your employment.
A. From May 7, 1942, until January 10, 1943.

12. Q. What were your daily hours of work at the club during that period of employment?
A. At the beginning, I worked from 7:00 o'clock until 9:00 o'clock in the evening, then it was shifted to from 2:00 o'clock in the afternoon until 9:00 o'clock in the evening.

13. Q. During the time of your working there, did you ever see an American flag in that club?
A. Yes, once when there was a party.

14. Q. About what date was that, as you recall?
A. I do not remember.

15. Q. Did anything unusual happen with relation to that flag and the time you said you saw it?
A. Yes.

16. Q. Describe what happened.
A. A Japanese from the Kohatshu, by the name of Okada took the flag and wiped the floor with it.

17. Q. Describe by going through his motion just what you saw done by that man with the flag.
A. (The witness stood erect and with her foot indicated back and forth motion, using the right foot).

18. Q. Where in the club did this happen?
A. Upstairs.

19. Q. What type of room?
A. In the hall.

20. Q. Did you see the accused there at the time this happened?
A. Yes.

21. Q. Where was he in relation to Okada when Okada wiped the floor with the flag?
A. The accused was standing by the door.

22. Q. How far away from him was Okada, as you recall?
A. From my stand to the black board (eight feet).

23. Q. What time of the day or night did this happen, as you recall?
A. It happened just before dark.

24. Q. Who else was present at the time this happened, as you recall names now?
A. There was quite a number there, but I do not remember their names.

25. Q. You say there was a party at the club that day, is that correct?
A. Yes.

26. Q. About how many people were in the hall where this happened at the time it happened?
A. About two or three.

27. Q. How far were you from Okada when you saw him do what you described?
A. From my stand to the door (about 18 feet).

Cross-examined by the judge advocate:

28. Q. Who gave you your orders while employed at the Omiya Kaikan?
A. Shinohara gave orders and sometimes a man by the name of Jesus told us what to do.

29. Q. Do you know Lourdes Anderson?
A. Yes.

30. Q. Was she employed at the club the same time you were employed?
A. Yes.

31. Q. Was she present at the time you saw the Japanese wipe the floor with the flag?
A. I do not know.

32. Q. You said two or three were present?
A. Yes.

33. Q. Do you remember those two or three persons present?
A. I do not remember, because ten of us were working there.

34. Q. But you would have known if she was there at that time?
A. I didn't notice.

35. Q. How long is that hall?
A. About as large as this building (20' by 36').

36. Q. Do you remember who the other two or three that were present?
A. Beatrice Rios and Joaquin Guerrero were there and the other girls that worked with me.

37. Q. But you didn't remember your cousin Lourdes whether she was there or not?
A. No.

38. Q. Did the accused say anything at that time?
A. No.

39. Q. Where did this Okada get the American flag?
A. In one of the cupboards where we kept our mops.

40. Q. Did you hear the accused say anything at that time?
A. No.

41. Q. Is it not true that you left before the American flag came in from the room upstairs?

A. I was there when the flag was taken out, but I left before it was taken up from the floor.

42. Q. And then you went downstairs again, didn't you?
A. Yes.

43. Q. Did you ever see Okada around the Omiya Kaikan before?
A. He was often there.

44. Q. What was the Omiya Kaikan Club?
A. I do not know.

45. Q. Who operated the Omiya Kaikan Club?

The accused objected to the question on the ground that it called for a conclusion of the witness.

The judge advocate replied.

The commission announced that the objection was sustained.

46. Q. Was there a dining room in the Omiya Kaikan?
A. Meals were served in the dance hall.

47. Q. You were employed downstairs?
A. Yes.

Reexamined by the accused:

48. Q. You spoke of meals being served in the hall, is that the same hall where you said you saw Okada wipe the floor with the American flag?
A. Yes.

49. Q. Is there a bar in the hall?
A. No, it was in another room.

50. Q. On the same floor or different floor?
A. On the same floor but in another room.

51. Q. Did you see the accused ever hold that flag that day?
A. I did not see.

52. Q. Did you see him touch it in any way?
A. No.

Recross-examined by the judge advocate:

53. Q. Did you see him objecting to anybody wiping the floor?

The accused objected to the question on the ground that it was incompetent, irrelevant and immaterial.

The judge advocate replied.

The commission announced that the objection was sustained.

Examined by the commission:

54. Q. What were you doing when this incident took place?
A. We were called upstairs to serve. I was standing by the window.

55. Q. Looking out the window or what?
A. No, looking in towards the hall.

56. Q. You were standing, looking and doing nothing else, is that correct?
A. Yes.

57. Q. You were not then acting as waitress?
A. I was not acting as waitress at the time.

58. Q. You spoke of this incident. Have you ever observed any other unusual incident that took place in that club with a flag of the United States?
A. No.

Reexamined by the accused:

59. Q. Did this happen during your working hours or not?
A. Yes.

60. Q. Do you often stand still during working hours or did you move all the time?
A. Whenever we were required to do something, we moved about.

61. Q. Was there anything unusual in your standing still at the time this incident occurred?
A. Our work was done and we were just waiting to have the floor cleaned.

Neither the accused, the judge advocate, nor the commission desired further to examine this witness.

The witness said that she had nothing further to state.

The witness was duly warned and withdrew.

A witness for the defense entered and was duly sworn.

Examined by the judge advocate:

1. Q. State your name, residence and occupation.
A. Vicente Calvo Aflague, resident of Sinajana Village, and a silversmith by occupation.

2. Q. If you recognize the accused, state as whom.
A. I do, as Mr. T. Shinohara.

Examined by the accused:

3. Q. Were you in Guam at the time the Japanese invaded Guam?
A. Yes, I was.

4. Q. Do you recall the date of that invasion?
A. December 10, 1941.

5. Q. Did you see the accused that day?
A. Yes, sir, in the afternoon about 3:30 to 4:00 when I went down to the plaza to get a pass, that is the pass issued by the Japanese.

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6. Q. Did you have any conversation with the accused that day?
A. When I was lining up to take the pass, he walked over to me and asked me whether I could drive a car for him, then I told him that I will. So he went right straight to the one issuing the pass and took a pass and gave it to me and we went to the parochial area where we were supposed to take the car. Before we took the car I noticed that he spoke to one of the priests there and then we took the car and then went to get his family at Aporguan.

7. Q. Tell us, if you know, whose car was taken and driven by you that day?
A. That car belonged to the padres which I drove beginning that day.

8. Q. Did you hear any conversation between the accused and the priest?
A. I didn't hear it.

9. Q. You say you went to Aporguan and picked up his family?
A. Yes, and then went back to his residence.

10. Q. Then what did you do with the car?
A. Then that evening his wife insisted for him to look after his sister-in-law. So we went up to the end of Barrigada road in which his sister-in-law was and he made arrangement with them that early in the morning we will come and call for them to proceed to Agana and get passes.

11. Q. What was done with the car that evening?
A. That evening when we came down, I asked him whether I could take the car. understanding that my family were out at the ranch, he permitted me to take the car in my custody to go to the ranch and return early the next morning. On my way up to the ranch, I knew my mother was in Agana at Torres' residence, so I parked the car on one side and slept there that night until the next morning when I went to his place and reported myself.

12. Q. Did you drive that car any on the day you speak of, December 11?
A. Yes, sir. I drove that up to the afternoon. That is in the morning when I came to his place we went up to get his sister-in-law with some other relatives of his sister-in-law. We proceeded down to the plaza and then he helped them get passes and then we took his sister-in-law to his house and then after that is through, we went to the plaza to see some Japanese officers there.

13. Q. Who was driving the car during all these trips?
A. I was the only one who drove the car from that afternoon, 10 December, until the afternoon of the 11th.

14. Q. Then what was done with that car?
A. When he got through seeing some officers around the plaza area, he told me to park the car on one side and he asked me to ride in another car with him which was driven by Juan Blas. The car belongs to Bordallo. We went up Agana Heights and he spoke to another officer there.

15. Q. This second car you say belonged to Bordallo?
A. The car I drove was parked at the plaza, then he called me to ride with him in another car.

16. Q. Tell us, if you know, what then was done with the church car you left at the plaza?
A. When we came down to the plaza, I looked after that car myself and found that the car was gone. I told him about it and he told me to keep on looking after it and when I saw it, I will report to him and he will try to get it back.

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17. Q. What date was that?
A. 11th. I did not see that car on the 11th. The next day about 11:00 o'clock in the morning, when I saw that car, I told him there was the car and when he knew that the car was being used by an officer, he just didn't bother trying to get the car back.

18. Q. During the time you were with the accused making these various drives for two or three days you speak of, did he say anything to you as to whether he knew how to drive?
A. No, he didn't say anything regarding driving of cars.

19. Q. What color is this church car you have testified about?
A. I cannot verify that because I am color blind, but something like light gray.

20. Q. What make was it?
A. It is either 1940 or 1941 model, but I do not know the make of the car, whether Plymouth, Buick or any other type.

21. Q. After the date of which you have been speaking, did you ever see the accused riding in any other automobile in Guam?
A. Not until about the latter part of January because when I quit working for him I went up to the ranch and stayed up there for about a month and a half when I moved in Agana and tried to establish myself in my business again. I noticed he was using the Davis car, that is Chaplain of the Department of Education.

22. Q. During the period of December 10 and the few days after that, did you or did you not ever see Japanese take possession of automobiles in Agana?

The judge advocate objected to this question on the ground that it was incompetent, irrelevant and immaterial.

The accused replied.

The commission was cleared.

The commission was opened. All parties to the trial entered and the commission announced that the objection was sustained.

23. Q. Tell us whether or not the Japanese changed the name of the Island of Guam when they were here.
A. Yes, they did.

24. Q. What was the name of which the Island of Guam was known when the Japanese were here?
A. Guam Island was known as Omiya To, that is what they called it.

Cross-examined by the judge advocate:

25. Q. Do you understand Japanese?
A. I do not understand it, but I picked up a little mingling with them but I had no interest to learn it.

26. Q. Do you know what Omiya To means?
A. That is just what I heard from what they call the Island of Guam. I do not know what its translation is of the word.

27. Q. How many days did you drive the accused starting December 10, 1941?
A. I drove the car December 10 until December 11.

28. Q. Did you see the accused talking with Japanese officers during December 10 and 11 while you were driving him?
A. No, it was on December 11.

29. Q. Who were those Japanese officers?

The accused objected to this question on the ground that it was incompetent, irrelevant and immaterial, and not within the scope of the direct examination.

The judge advocate replied.

The commission was cleared.

The commission was opened. All parties to the trial entered and the commission announced that the objection was overruled.

The question was repeated.

A. I do not know.

30. Q. Had you ever seen them before that day?
A. That was the first and last time when I saw them. I cannot recognize them. They seemed to have the same looks to me on that day.

31. Q. Were they Japanese military officers?
A. I know it is an officer because they carried swords with them.

32. Q. How many did he talk with?

The accused objected to this question on the ground that it was incompetent, irrelevant and immaterial.

The judge advocate replied.

The commission announced that the objection was overruled.

The question was repeated.

A. On December 11 when we came to the plaza after we secured his sister-in-law, I noticed he walked over to the palace area there and conversed with about two or three of them, but I do not know whether he was talking to one of them only and when we went up to the former Officers' Club of the Americans, he spoke to one.

33. Q. Where was that officer up there at the former Officers's Club?
A. He was up there in the club.

34. Q. In what club?
A. Former Officers' Club of the Americans.

35. Q. Did you see other Japanese around there at that time?

The accused objected to this question on the ground that it was incompetent, irrelevant and immaterial.

The judge advocate made no reply.

The commission announced that the objection was sustained.

36. Q. Who accompanied you in the automobile on the 11th with the accused in the morning?

A. I drove him up to the ranch to get his sister-in-law with some relatives and a few cars followed us down on the way to the plaza.

37. Q. Who was in the car besides you and the accused when you went up to see this Japanese officer at the former Officers' Club?

A. The driver is the only one, himself and myself.

38. Q. About how long did he talk with this Japanese officer at the former Officers' Club?

A. I had no watch with me at that time, and I didn't recall exactly how long, but it might be about, say 15 minutes.

Neither the accused, the judge advocate, nor the commission desired further to examine this witness.

The witness said that he had nothing further to state.

The witness was duly warned and withdrew.

The commission, then at 11:45 a.m., adjourned until 9:00 a.m., tomorrow, Friday, 24 August 1945.

Twenty-second Day

HEADQUARTERS,
ISLAND COMMAND, GUAM.

Friday, 24 August 1945.

The commission met at 9:00 a.m.

Present:

Colonel Walter T.H. Galliford, U.S. Marine Corps,
Major Foster H. Krug, U.S. Marine Corps Reserve,
Major Harry S. Popper, junior, U.S. Marine Corps Reserve,
Major Robert H. Gray, U.S. Marine Corps,
Captain Quentin L. Johnson, U.S. Marine Corps Reserve,
Captain Alfred J. Dickinson, junior, U.S. Marine Corps Reserve,
Lieutenant George W. Dean, U.S. Naval Reserve, members, and
Lieutenant Colonel Teller Ammons, Army of the United States, judge advocate.
Joaquin C. Perez, civilian, reporter.
Isabel P. Zafra, civilian, interpreter.
The accused and his counsel.

The record of proceedings of the twenty-first day of the trial was read and approved.

No witnesses not otherwise connected with the trial were present.

A witness for the defense entered and was duly sworn.

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SAMUEL T. SHINOHARA (28 JUL 1945)

(144704)
PART 2 OF 2

Examined by the judge advocate:

1. Q. State your name, residence and occupation.
A. Carmen Torres Shinohara, resident of Sinajana, and doing work of household.

2. Q. If you recognize the accused state as whom.
A. I do, as Shinohara.

Examined by the accused:

3. Q. What relation, if any, are you to the accused?
A. He is my husband.

4. Q. How long have you been married to him?
A. 25 years.

5. Q. Where were you living at the time the Japanese invaded Guam?
A. Agana.

6. Q. Were you on Guam through the period of the Japanese occupation?
A. Yes.

7. Q. Did you know Captain McMillin, U.S. Navy, by sight?
A. Yes.

8. Q. Tell us if you know what position he had in Guam at the time the Japanese invaded Guam?
A. He was the Governor of Guam.

9. Q. Do you know where the area called Agana Heights is?
A. Yes.

10. Q. Were you there at any time during the period of the Japanese occupation?
A. Yes, I was there once.

11. Q. What was the occasion of your being there that one time?
A. We were told to go up there because there was going to be some kind of manuever held.

12. Q. About what date was that, as you recall?
A. Little over a week after the Japanese invaded Guam.

13. Q. About what time of the day or night did this manuever take place at Agana Heights?
A. I do not recall the time, but it was in the morning.

14. Q. Who, if anyone, accompanied you to that place that day?
A. Shinohara, my daughter, Cecilia, my son Gil and myself. We went there early in the morning.

15. Q. How long did you remain there on the hill?
A. Until it was over after 12:00 o'clock.

16. Q. Tell us whether or not the accused was with you throughout the time you were on the hill that morning?
A. Yes, we were together all the time because before we left, I told Shinohara not to leave us at any time because I was afraid of the Japanese and I didn't understand their language.

17. Q. Did you see any American on the Agana Heights that morning?
A. Yes, I saw many of them.

18. Q. Were you near any American that morning on the hill?
A. I was quite a distance away from them, and about from my stand to way beyond that tree up the hill (over 200 yards).

19. Q. Did you see Captain McMillin on the hill that morning?
A. I did not.

20. Q. Were you close enough to the Americans so that you could recognize the people among that group that you might know by sight?
A. It was quite a distance away so that I would not have been able to recognize any one but I knew they were Americans.

21. Q. Did you see your husband, the accused, slap anyone that day?
A. I did not. He did not slap anyone because we were together all the time and I did not see anything like that.

22. Q. Did the accused have possession of an automobile at any time during the period of the Japanese occupation of Guam?
A. Yes, he was given one to use.

23. Q. How do you know it was given to him to use?
A. I asked him and he told me he was given the car by the navy for his use because he was used as interpreter at that time.

24. Q. Describe to us that car. What color was it?
A. It was green.

25. Q. What make was it, if you know?
A. I do not know the make, but it had a windshield and it had two doors.

26. Q. Tell us the approximate time you first remember seeing that car in the possession of the accused.
A. Approximately two months after the Japanese invasion.

27. Q. What was the date of the Japanese invasion of Guam?
A. 10 December 1941.

28. Q. How long did that automobile remain in the possession of the accused?
A. Just shortly before the Americans started bombarding the Island, the car was still at the warehouse, then we went to the ranch and I asked Shinohara where the car was and he told me that the Japanese had taken it.

29. Q. Have you ever heard of the Elks Club?
A. Yes.

30. Q. Do you know where its building was located?
A. Yes.

31. Q. Do you know whether or not that building was occupied and used during the Japanese occupation?
A. Yes.

32. Q. By whom was it occupied and used?
A. The Japanese.

33. Q. What type of business was carried on at that building during the time the Japanese were here?
A. I think it was some sort of a saloon.

34. Q. Did your husband have anything to do with the operating of that business?
A. I understand that my husband looked after the place. He had something to do with it.

35. Q. Tell us, if you know, whether any parties were ever held at that place during the time the Japanese were here.
A. Yes.

36. Q. Tell us, if you know, whether food was served at those parties.
A. Yes.

37. Q. Did you have anything to do with the preparation of the food for such parties?
A. Yes.

38. Q. Explain your answer.
A. The Japanese took the food over to my place and I prepared it for them.

39. Q. Then what was done with the food?
A. Then they came again and took them and said they were going to take them to the Omiya Kaikan, but I did not see whether they did or not.

40. Q. Do you remember the name of anyone that ever brought food to be prepared by you for the purpose of as you just stated?
A. I do not remember the names, but if I saw those faces, I will be able to recognize them. They were an officer and a chief.

41. Q. Was anything ever paid to you for your work in your helping prepare such food?
A. Yes.

42. Q. Explain your answer.
A. About two months after I had been preparing food for the Japanese, a man by the name of Sakai came and gave me one hundred yen.

43. Q. For what purpose was that one hundred yen?
A. He gave me that much money for my rendering help and he made me understand that if it was not enough, I could ask for more.

44. Q. Who was this Sakai?
A. He was the Aide to the Governor.

45. Q. Do you know Tomas Guzman?
A. Yes.

46. Q. Did you ever see him during the Japanese occupation?
A. Yes.

47. Q. On what occasion did you see him?
A. He came to my house and brought over boxes of food to be prepared for the party.

48. Q. About how many times did he do that, as you recall?
A. About three times.

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Cross-examined by the judge advocate:

49. Q. Who told you to go to Agana Heights at the time you testified going up there?
A. A Japanese officer came the night before that morning and told us that we were to go up there.

50. Q. Where did he come to when he told you that?
A. To my house.

51. Q. What kind of order did he give you to go up there?
A. He told us that we should go up there and I said maybe it was better for me if I stayed home and he said, "No, you can't, you have to go".

52. Q. How did you go up there?
A. We walked.

53. Q. What did you see up there?
A. They were moving around on horse back and then later on there was some kind of target practice.

54. Q. What were the Japanese shooting with?

The accused objected to this question on the ground that it was incompetent, irrelevant and immaterial.

The judge advocate replied.

The commission was cleared.

The commission was opened. All parties to the trial entered and the commission announced that the objection was overruled.

The question was repeated.

A. I do not know. I only heard the noise of the shooting down the bay.

55. Q. Did you stay during the entire time of the exhibition at the Agana Heights?
A. Yes, we stayed there until it was all over.

56. Q. Who was with you in the presence of the accused at this time?
A. There was a great number of people, I could not remember their names.

57. Q. Did you see any Japanese soldier there?
A. Yes, because they were on horseback.

58. Q. As to the Americans you testified to, were they lined up in any kind of formation?
A. They were all grouped together on one side.

59. Q. Were they in line or just grouped together?
A. I do not know that because they were very far from us, but I saw them close together.

60. Q. From where you were standing, could you identify Captain McMillin?
A. No, it was too far from me.

61. Q. Are you sure that Captain McMillin was not there then?

A. I do not know whether he was there or not.

62. Q. Did your husband, the accused, leave before you left that day?
A. We left the place together.

63. Q. Was he standing near to you at all times?
A. Yes.

64. Q. Has the accused remained on Guam during the time of your marriage?

The accused objected to this question on the ground that it was incompetent, irrelevant and immaterial, and further that it was not within the scope of the direct examination.

The judge advocate replied.

The commission was cleared.

The commission was opened. All parties to the trial entered and the commission announced that the objection was sustained.

65. Q. What was your husband's, the accused, occupation during the Japanese occupation?
A. Interpreter.

66. Q. Besides being interpreter, what was his business?
A. He ran a store.

67. Q. What else did he do?
A. That is all I remember.

68. Q. Did he run a taxi cab business?
A. Yes.

69. Q. What kind of store did he run?
A. Groceries and dry goods store.

70. Q. Where was your husband at the time the Japanese invaded Guam?
A. He was in jail.

71. Q. When was he released from jail?
A. He was released on December 10.

72. Q. Who did your husband, the accused, interpret for?
A. I do not know, but every now and then he was called up by the Japanese and he told he was interpreting.

73. Q. You don't know who he was interpreting for then, do you?
A. No.

74. Q. Were you ever in the Omiya Kaikan?
A. Yes.

75. Q. Who was the manager of the Omiya Kaikan?
A. Shinohara.

76. Q. Who had the key to the Omiya Kaikan, do you know?
A. Shinohara.

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77. Q. Who took the money which was collected at the Omiya Kaikan?
A. Shinohara.

78. Q. Was food served at the Omiya Kaikan?
A. Yes.

79. Q. Where was that food prepared?
A. I prepared that.

80. Q. Did you prepare all food that was served at the Omiya Kaikan?
A. Sometimes it was prepared right in the Omiya Kaikan but very little of it wasdone there. Most of the time I did it myself. The kind of work they did at the Omiya Kaikan was simply to warm up the food just before serving.

81. Q. Did they have a cook at the Omiya Kaikan?
A. Yes, there was a cook, but he wasn't very good, and that is why I did the work most of the time.

82. Q. You wanted the Omiya Kaikan to have the best of food, didn't you?

The accused objected to this question on the ground that it called for a conclusion of the witness.

The judge advocate made no reply.

The commission was cleared.

The commission was opened. All parties to the trial entered and the commission announced that the objection was overruled.

The question was repeated.

A. That was what the Japanese wanted. They wanted good food.

83. Q. Was the Omiya Kaikan a private organization or open to the public?
A. That I do not quite understand. What I understood was that it was only for Japanese.

84. Q. Did the accused, your husband, have a cashier in that Omiya Kaikan?
A. I do not recall that.

85. Q. Were there employees in that club?
A. Yes.

86. Q. Who employed them?
A. Shinohara.

87. Q. Who furnished food to the cook who prepared food at the club?
A. Shinohara, but they came directly from the Japanese.

88. Q. Did all food served in the club come from the Japanese?
A. Yes, because the Japanese furnished many boxes of food and from those were taken some to the club.

89. Q. What was done with the food that was not taken to the club?
A. It remained in the warehouse.

90. Q. What warehouse?
A. There was a big building behind our residence that was the warehouse.

91. Q. Was that American food or Japanese food in that warehouse?
A. American food.

92. Q. Was that food paid for by the accused?
A. I do not know, but that food was taken over to the place when there was going to be a party and on occasion there was some left over it remained in the warehouse and from that Shinohara drew some for the Omiya Kaikan in case it was needed.

93. Q. Was the accused paid for running the Omiya Kaikan?
A. I do not know. He did not tell me that.

94. Q. Do you know of any of the employees of the Omiya Kaikan?
A. I know some of the girls.

95. Q. What were their names?
A. Alvin Blas.

96. Q. Do you know Beatrice Rios?
A. Yes.

97. Q. Was she an employee of the club?
A. Yes.

98. Q. Do you know her sister, Agnes Rios?
A. Yes, she worked there too.

99. Q. Do you know Gloria Wusstig?
A. Yes.

100. Q. Was she an employee of the club?
A. Yes.

101. Q. Do you know a man by the name of Taimanglo?
A. No.

102. Q. Do you know a man by the name of Jesus Fernandez?
A. I do not remember that.

103. Q. Do you know Celia Diaz Perez?
A. No, I do not remember that.

104. Q. Didn't she work for you at your home?
A. Yes, Celia Perez worked for me for a short time.

105. Q. Do you know Elena Diaz Perez?
A. Yes.

106. Q. Did she work for you?
A. Yes.

107. Q. Where?
A. At my house.

108. Q. Did Guzman bring food to your house more than three times?
A. I remember only three times.

109. Q. What did you do with that food?
A. It was prepared for the Omiya Kaikan.

110. Q. Did you prepare food in your house for any place other than the Omiya Kaikan?
A. No.

111. Q. Didn't you serve some of that food after it was prepared in your home when you ate at home?
A. Yes.

112. Q. Did you serve some of that food to guests in your own home?
A. Sometimes.

113. Q. Who were those guests?
A. I do not remember. Quite a number of people came to my place.

114. Q. What nationality of people came to your house during the Japanese occupation?
A. Japanese as well as Chamorros.

115. Q. Do you know the name of the first Japanese Governor of Guam?
A. Yes.

116. Q. What is his name?
A. Hayashi.

117. Q. Did you ever serve him any type of food in your house?
A. Yes, sometimes.

118. Q. Was he a frequent visitor to your home?
A. Not very often.

119. Q. About how many times, as you recall?
A. No, I do not remember that, but he didn't come very often.

120. Q. More than once?
A. Yes.

121. Q. What was the name of the second Japanese Governor of Guam?
A. I forgot his name. I still remember his face.

122. Q. Did you see him at your home during his stay in Guam?
A. Yes.

123. Q. Was there liquor served at the Omiya Kaikan?
A. Yes.

124. Q. What kind of liquor was served at the Omiya Kaikan?
A. I remember liquor was served but as to what kind, I do not remember.

125. Q. Where did that liquor come from?
A. I do not know.

126. Q. Was liquor served at your home every time you served food to Japanese guests?
A. I do not remember, but I remember we served cake and ice cream.

127. Q. Did you serve food to the guests other than that brought by Guzman?
A. I only served food from Guzman, that was flour and sugar.

128. Q. Did Guzman bring ice cream?
A. No, he never brought ice cream. I prepared the ice cream.

129. Q. Guzman bring any liquor?
A. I didn't see any liquor.

130. Q. How often did you have Japanese guests at your home during the Japanese occupation?
A. When the sailors were out on liberty, they came to the house.

131. Q. Was the accused always present when you had Japanese guests at your home?
A. Most of the time he was not there.

132. Q. Were the Japanese welcome to come to your house at any time?

The accused objected to this question on the ground that it called for a conclusion of the witness and also called for an answer that would not be evidenciary.

The judge advocate made no reply.

The commission was cleared.

The commission was opened. All parties to the trial entered and the commission announced that the objection was sustained.

133. Q. Who besides the Japanese were present at your home when you entertained Japanese?
A. Some of our neighbors, like the Bordallos who lived next door at that time.

134. Q. Was any member of your family present?
A. My sister was present sometimes, but not very often.

135. Q. Was your daughter present?
A. Many times she was not present because she attended school at that time.

136. Q. Was she present sometimes?
A. Yes.

137. Q. How old is your daughter?
A. 20 years.

138. Q. In fact your daughter played the piano for the guests, did she not?

The accused objected to this question on the ground that it was incompetent, irrelevant and immaterial.

The judge advocate made no reply.

The commission announced that the objection was sustained.

139. Q. Did the accused stay at home during the day time?
A. Sometimes he stayed home, but most of the time he was out.

140. Q. What was he doing, do you know?

The accused objected to this question on the ground that it was incompetent, irrelevant and immaterial, and not within the scope of the direct examination.

The judge advocate made no reply.

The commission was cleared.

The commission was opened. All parties to the trial entered and the commission announced that the objection was overruled.

The question was repeated.

A. Sometimes he went to the Omiya Kaikan and sometimes he went to the store.

141. Q. Any other place?
A. Sometimes he went to the ranch to look after the cattle.

142. Q. Is that all?
A. I do not know about the other places he went to.

143. Q. Did the accused go to the ranch to look after cattle as interpreter?

The accused objected to this question on the ground that it was argumentative.

The judge advocate made no reply.

The commission announced that the objection was sustained.

144. Q. Did he go to the Omiya Kaikan for the purpose of interpreting?
A. I do not know. Whenever he went there, he just told me he was going to the Omiya Kaikan.

145. Q. At the time you were on the hill, Agana Heights, did you see any member of the Insular Guard of Guam?
A. I did not see any.

146. Q. At the time you were on the Agana Heights, did you see any member of the Insular Force of Guam?
A. I did not see any.

147. Q. Did you know Lieutenant Junior Grade James E. Davis, U.S. Navy?
A. No.

148. Q. Where was the automobile kept that the accused used during the Japanese occupation?
A. At the warehouse.

149. Q. Who kept the key to the automobile, the accused used, during the Japanese occupation?
A. I do not know.

150. Q. How far was the warehouse you speak of from your home?
A. Maybe a distance of from that office to that building or little farther back (about 75 yards).

151. Q. Whose warehouse was that?
A. Ours.

152. Q. Who rode in that automobile during the Japanese occupation?
A. I do not remember.

153. Q. Do you know Jose Crisostomo?
A. I do not know him.

154. Q. Do you know Juan L.G. Mesa?
A. If you mean the man by the name of Juan Lonat, yes, I know him.

155. Q. Who drove the automobile during the Japanese occupation?
A. I remember the man by the name of Hines.

156. Q. Do you remember anybody else?
A. This man known as Juan Lonat.

157. Q. Was that automobile kept in your warehouse every night?
A. I do not know. Sometimes I didn't take notice of the car.

158. Q. Did you ever see the accused in that automobile?
A. Yes.

159. Q. Did anybody else use that automobile but the accused?
A. I do not remember.

160. Q. Were you ever in that automobile?
A. Yes.

161. Q. Was there anyone with you in that automobile at the time you were in it?
A. Sometimes I went with my daughter when we went to church.

162. Q. Was any food served at the Omiya Kaikan other than that that came out of the warehouse which was American food?
A. The only food used at the Omiya Kaikan was the food brought by the Japanese. There was plenty of it.

163. Q. Was there any food produced on this Island served at the Omiya Kaikan?
A. No.

164. Q. Were you at the Omiya Kaikan at the opening night?
A. No.

Examined by the commission:

165. Q. Where were you living when the Japanese invaded Guam?
A. At Aporguan.

166. Q. How long did you live there?
A. From December 8, to December 10th.

167. Q. Then where did you live?
A. Then we went back to our home in Agana.

168. Q. That was your own home, your family residence?
A. Yes.

169. Q. Did you or your husband own an automobile at this time?
A. No.

Neither the accused, the judge advocate, nor the commission desired further to examine this witness.

The witness said that she had nothing further to state.

The witness was duly warned and withdrew.

The commission then, at 11:30 a.m., took a recess until 1:00 p.m., at which time it reconvened.

Present: All the members, the judge advocate, the reporter, the interpreter, the accused and his counsel.

No witnesses not otherwise connected with the trial were present.

A witness for the defense entered and was duly sworn.

Examined by the judge advocate:

1. Q. State your name, residence and occupation.
   A. Cecilia T. Shinohara, resident of Sinajana, and a student.

2. Q. If you recognize the accused, state as whom.
   A. I do, as Shinohara.

Examined by the accused:

3. Q. How old are you?
   A. 20 years.

4. Q. Is the accused any relation of yours?
   A. He is my father.

5. Q. Were you in Guam at the time the Japanese occupied Guam?
   A. Yes.

6. Q. What date was that, as you recall?
   A. December 10.

7. Q. What year?
   A. 1941.

8. Q. Where was your home at that time?
   A. We were residing at Aporguan.

9. Q. How long had you resided there at that time?
   A. About three days.

10. Q. And where had your home been before you went to Aporguan?
    A. Agana.

11. Q. Where did you live during the time the Japanese were in Guam?
    A. Agana.

12. Q. All of the time?
    A. Yes, but later on we went to the ranch.

13. Q. With whom did you live in Agana during that time?
A. My father, my mother and my brother.

14. Q. Tell us, if you know, whether or not the Japanese changed the name of the Island of Guam to any other name when they were here.
A. Yes.

15. Q. What was the name used by the Japanese for the Island of Guam?
A. Omiya To.

16. Q. Do you speak the Japanese language?
A. I know a little.

17. Q. Do you read the Japanese language?
A. Yes, but not all.

18. Q. Do you know where Agana Heights is?
A. Yes.

19. Q. Were you there at any time during the Japanese occupation of Guam?
A. Yes.

20. Q. What was the occasion of your being there?
A. When the Japanese had maneuvers, I was up there.

21. Q. About what date was that?
A. December 19.

22. Q. What year?
A. 1941.

23. Q. About what time of the day was it that the maneuver was held?
A. I do not know the time, but it happened in the morning.

24. Q. Did you go there alone or did you go with someone?
A. I didn't go alone.

25. Q. With whom did you go then?
A. My mother, my father and my brother Gil.

26. Q. Is your father, the man sitting by me and to whom we refer as the accused?
A. Yes.

27. Q. By what means of transportation did you go to the Agana Heights that day?
A. We walked.

28. Q. Did your father have an automobile that time?
A. No.

29. Q. How long were you at the Agana Heights that day?
A. I was there since morning maybe 7:00 until 12:00 o'clock.

30. Q. Were you there until the maneuver was completed or did you leave before they were completed?
A. I was there until the maneuver was completed.

31. Q. Did you leave there alone or did you leave with someone?
A. I was with someone.

32. Q. Who?
A. My father, my mother and Gil.

33. Q. During the time you were there, was your father with you all the time or was he away from you part of the time?
A. My father was with us all the time.

34. Q. While you were there, did you see any American at the Agana Heights that morning?
A. I saw people but I do not know whether they were Americans or natives.

35. Q. Do you know an American from a native?
A. Yes.

36. Q. Did you know by sight Captain George McMillin of the United States Navy?
A. Yes.

37. Q. Do you know whether or not he had any position with the Government of Guam at the time of the Japanese invasion of Guam?
A. I do not know.

38. Q. Did you see Captain McMillin at the Agana Heights that day?
A. I did not see him.

39. Q. Did you see your father slap anyone on that day?
A. I did not.

40. Q. Did you see your father talk to any American at Agana Heights that day?
A. I didn't. He was with us all the time.

41. Q. Did you see any American near you that day at the Agana Heights?
A. No.

42. Q. Did your father have an automobile at the time the Japanese invaded Guam?
A. Yes.

43. Q. How long did your father have that automobile before the Japanese invaded Guam?
A. He had a car before the Japanese came in, but that was long ago.

44. Q. Did he have an automobile the day the Japanese came to Guam?
A. No, he didn't own a car until later.

45. Q. Explain what you mean, until later.
A. He didn't have a car at the time the Japanese came in, but then later on when the Navy took over then he was given a car.

46. Q. About how long was that after the Japanese arrived in Guam until he had this car?
A. I remember the navy took over the Island on January 10 and a weeklater I saw the car.

47. Q. Did your father have that car throughout the remaining time of the Japanese in Guam?
A. I saw the car all the time, but when there was an air raid, I do not know what happened to it. I lived at the ranch.

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48. Q. Did you see it after that air raid?
A. I didn't see it.

49. Q. Do you recall at what date that air raid was?
A. I do not remember.

50. Q. Was it soon after the Japanese came here or soon before the Americans returned or what?
A. I didn't see the car at the time of the bombardment.

51. Q. Try to fix that time of the bombardment; try to give us some idea of when that was.
A. I am not sure whether it took place in the month of July or another month.

52. Q. Of what year?
A. 1944.

53. Q. What color was the automobile you have been speaking about; the automobile you say your father had during part of the time the Japanese were here?
A. Green.

Cross-examined by the judge advocate:

54. Q. Where was the automobile the last time you saw it?
A. In the garage at our residence.

55. Q. Was the automobile always kept there when not in use?
A. Yes.

56. Q. Who kept the key to the automobile?
A. I do not know.

57. Q. How far was that garage from your home?
A. About two yards behind our house.

58. Q. Are you sure that was on December 19, when you went to Agana Heights?
A. Yes.

59. Q. How did you set that date?
A. Because it took place about approximately a week after the invasion of the Japanese.

60. Q. It took place a week after the invasion?
A. They invaded the Island on the 10th and so it took place a little over a week.

61. Q. What day of the week was that?
A. I do not remember the day.

62. Q. Are you sure it was the 19th of December?
A. Yes.

63. Q. What kind of maneuver did you see at the Agana Heights?
A. They were shooting out towards that big rock called Alupan.

64. Q. What were they shooting with?
A. I am not sure whether they used rifle or not. Any way they were shooting.

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65. Q. How did you know they were shooting out towards that rock?
A. At the time of the shooting, I saw it go towards that direction.

66. Q. From where you were standing, could you see them shooting?
A. Yes.

67. Q. About how far away were you from the point they were shooting?
A. I do not know where it came from because there were lots of people.

68. Q. You do not know where the shooting came from then?
A. I know it came from up there but as to the exact spot, I do not know.

69. Q. Are you sure they were shooting out towards that rock?
A. I do not know but they were aiming towards that way.

70. Q. Did you see them aiming towards that way?
A. It exploded at that direction.

71. Q. How far from where it was fired to where it exploded?
A. I do not know.

72. Q. Did the Japanese have horses up there that day?
A. Yes.

73. Q. Did you see any American up there that day?
A. I do not know who those people were.

74. Q. Did you see any member of the Guam Insular Guard up there that day?
A. I did not see any.

75. Q. Did you see any member of the Insular Force up there that day?
A. I did not see any.

76. Q. Where did you leave from that day to go up to the Agana Heights?
A. We left our house and went up there.

77. Q. What route did you take?
A. San Ramon Road.

78. Q. Who went with you?
A. Father, mother and Gil.

79. Q. Was your father present with you at all times you say, while on the Agana Heights?
A. Yes.

80. Q. Was there anyone else close to you that you knew?
A. I do not remember that. There were many people.

81. Q. Who were firing these shots?
A. I did not see, but I imagined they were Japanese.

82. Q. Was there a crowd between you and the gun?
A. There were many people there and I did not notice that.

83. Q. Who asked you to go up there?
A. I do not know, but people were all requested to leave. No one could stay in town.

84. Q. How many times did they fire this gun?
A. I do not remember.

85. Q. What rock were they shooting at?
A. I do not know, but I think it was Alupan.

86. Q. Did you live at home at all times during the Japanese occupation?
A. Yes, but later on we moved to the ranch.

87. Q. Did you live with your father and mother at all times during the Japanese occupation?
A. Yes.

88. Q. How old were you on December 10, 1941?

The accused objected to this question on the ground that it was incompetent, irrelevant and immaterial, and not within the scope of direct examination.

The judge advocate made no reply.

The commission announced that the objection was overruled.

The question was repeated.

A. 16 years.

Examined by the commission:

89. Q. During your testimony, you referred to residence and at the ranch. What do you mean by residence?
A. When I spoke of residence, I meant my home in Agana.

90. Q. Did you habitually live at Agana or at the ranch or at both places during the Japanese occupation?
A. Agana, but later on we moved to the ranch and stayed there.

91. Q. What do you mean by "later on"?
A. Three months before the air raid.

92. Q. What air raid?
A. American air raid.

93. Q. When did that happen?
A. I am not very sure, I think it was July.

94. Q. In direct examination, I believe you testified that the accused did own an automobile at the time the Japanese came in, then shortly thereafter in response to a similar question, you testified the accused did not own an automobile at the time the Japanese came in. Now which one do you mean, that your father owned a car at the time the Japanese came in or that he did not own any at the time the Japanese came in?
A. He didn't own any automobile at the time the Japanese came in but at one time back, he did own one.

95. Q. How long ago, if you know?
A. I do not remember. I was then only a youngster.

Neither the accused, the judge advocate, nor the commission desired further to examine this witness.

The witness said that she had nothing further to state.

The witness was duly warned and withdrew.

The defense rested.

The accused did not desire to make a statement.

The commission then, at 2:00 p.m., adjourned until 9:00 a.m., Monday, 27 August 1945.

Twenty-third Day

HEADQUARTERS,
ISLAND COMMAND, GUAM.

Monday, 27 August 1945.

The commission met at 9:00 a.m.

Present:

Colonel Walter T.H. Galliford, U.S. Marine Corps,
Major Foster H. Krug, U.S. Marine Corps Reserve,
Major Harry S. Popper, junior, U.S. Marine Corps Reserve,
Major Robert H. Gray, U.S. Marine Corps,
Captain Quentin L. Johnson, U.S. Marine Corps Reserve,
Captain Alfred J. Dickinson, junior, U.S. Marine Corps Reserve,
Lieutenant George W. Dean, U.S. Naval Reserve, members, and
Lieutenant Colonel Teller Ammons, Army of the United States, judge advocate.
Joaquin C. Perez, civilian, reporter.
Isabel P. Zafra, civilian, interpreter.
The accused and his counsel.

The record of proceedings of the twenty-second day of the trial was read and approved.

No witnesses not otherwise connected with the trial were present.

The judge advocate read his written opening argument, appended, marked, "T(1)", "T(2)", "T(3)", "T(4)", "T(5)", "T(6)", "T(7)", "T(8)", "T(9)", "T(10)" "T(11)", "T(12)", "T(13)", "T(14)", "T(15)", "T(16)", "T(17)", and "T(18)".

The accused made the following argument:

In arguing this case as counsel for the accused, I will follow the same outline of the various charges that was used by the judge advocate.

There are five types of charges - (1) theft of an automobile; (2) assault and battery (three of them alleged); (3) desecration of the flag; (4) taking a female for the purpose of prostitution (two specifications); and (5) treason (four specifications).

Turning then to the first charge mentioned - Theft - Charge II. I call the attention of this commission to the fact that the charge is the taking of

a Chevrolet automobile from the possession of Lieutenant (Junior Grade) James E. Davis, U.S. Navy, in February, 1942. The evidence produced by the prosecution is at considerable variance with the charge. You will recall that the evidence concerns only a Chrysler made automobile and, as nearly as I can gather, it relates to a supposed theft on December 12, 1941, or sometime in January or February, 1942. I think I am correct in stating that the evidence is clear in showing that Lieutenant Davis left the Island of Guam on 10 January, 1942, as a prisoner of war. The evidence is clear and complete to the effect that the Japanese authorities, as the occupant power, had the right to seize all automobiles in Guam; and did seize them on 10 December 1941, and within the next few days following that date. I simply call the attention of the members of this commission to Article 53 of the Hague Regulations, which reads in part as follows:

> "All appliances, whether on land, at sea, or in the air, adapted for the transport of persons or things, exclusive of cases governed by naval law may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made."

Feilchinfeld on The Economic Law of Belligerent Occupation states concerning such seizures:

> "Payment, authority of a commander, or receipts are not required. It need not be established that the article is needed for the occupying army or that seizures are in proportion to national resources." (sec. 163, p. 40)

In other words, the Japanese authorities had the right to seize all automobiles in Guam regardless of whether they belonged to the Government, the church, or to private owners. That they did just that is shown by evidence of the following witnesses: Jose P. Crisostomo, a witness for the prosecution; Angel A. Sablan, a witness for the prosecution; and by defense witnesses Tomas Guzman, Bishop Miguel Angel Olano and Jesus S. Sayama. You will recall that Guzman stated the Japanese took the Davis car; that the Bishop said the Japanese took all cars of the church in Guam. It is perfectly clear that the Japanese took all automobiles in Guam, and it also is evident that the Japanese allowed the accused to use an automobile for most of the time they were here. It appeared this automobile first came into the possession of the accused (the "green car", as it has been referred to) sometime in January or February, 1942. The only evidence at variance with this is the testimony of witness Herrero who testified, upon direct examination of the judge advocate, that he saw the accused driving the Davis car on December 12, 1942; two days after the Japanese occupied Guam. I leave it to your good sense as to whether or not the accused did drive this automobile. The uncontradicted evidence is that the accused had not driven a car for a long time; also no one saw him driving an automobile; he had a driver, except that Herrero said he saw the accused driving on December 12th. You will recall that the "green car" apparently was in the possession of the accused until May or June, 1944, about the time of the first bombing of the Island by the American forces. You also will recall that the wife and daughter of the accused testified that he told them the car was given him to use by the Japanese authorities. There was in this case no theft - the car was kept openly, used openly with no attempt at concealment. There was no attempt to change the car in any way, nor any attempt to conceal it, by changing the color or anything else. It also was demonstrated the car did not belong to the accused but simply was used by him in carrying out various business duties. You also will recall that the car was serviced with gasoline from Government stores of gas. A witness for the prosecution testified that he had serviced this car at the request of an

employer of the Kohatshu; that the accused did not pay for such servicing. Gentlemen, there is no theft in this case. A car was used by the accused, yes, but there is no theft. The judge advocate made some remarks in his opening argument about bailment and bailees. There was no bailment where the Japanese seized the automobile and allowed the accused to use it. Nor is that theft.

Turning to the second type of charge, Assault and Battery - Charge III, and Charge II of the additional charges and specifications. These charges and specifications are barred as to trial before this commission by the statutes of limitations; by section 801 of the Penal Code of Guam which reads as follows:

> "An information or complaint for any misdemeanor must be filed within one year after its commission." (emphasis added)

I am sure the commission will take judicial notice of the fact that the Americans occupied Guam on July 21, 1944. Granting, for the purpose of this argument, that the statutes of limitations was suspended during the period of the occupation of the Island by the Japanese, this charge must have been filed at the very latest before July 21, 1945, one year after the American reoccupation of Guam. It is clear from the record that the charges were filed with this commission on July 31, 1945, or on the 28th of July, 1945, as the earliest date that can be asserted. This charge was therefore filed with this commission more than one year after the American reoccupation of Guam. Under any construction of the statute, these charges of Assault and Battery are barred as to trial at this time.

Turning now to the evidence as to the alleged assaults and batteries: Take the one near the cathedral at the time that the American prisoners of war left the Island. One witness testified as to this slapping of Governor McMillin; that is Francisco I. DeLeon. He testified that he saw the accused slap the Governor twice that morning, at 0600. He definitely and catagorically fixed the date as January 20, 1942. I simply call the commission's attention to the fact that Bishop Olano gave uncontradicted testimony that he and the other prisoners left January 10, 1942, ten days before the slapping was asserted to have occurred as testified to by the only one witness for the prosecution. I also call attention to the fact that the prosecution's only witness stated the slapping occurred when the Americans "fell in" line; and further said there was no other Guamanian present. Let us consider the testimony of Bishop Olano on that asserted slapping. He said he did not see Francisco DeLeon on the plaza near the cathedral that morning. He said there were a number of Guamanians across the plaza, near Dorn Hall. This incident assertedly occurred on the cathedral side of the plaza. Guamanians who may have been present were near Dorn Hall, across the plaza, and the Bishop definitely stated that no Guamanians were allowed on the cathedral side of the plaza. He further stated that he came out of the cathedral at 0630 that morning and it was "reasonably light". The one prosecution witness said the incident occurred at 0600 the bishop said it was "reasonably light" at 0630.

The next incident of assault and battery to be considered is the one the day the Japanese reached Agana - December 10, 1941. I wish to call particular attention to the inadvertent misstatement of the judge advocate in his opening argument that the bishop said he saw Governor McMillin that morning. That is not correct. The bishop said he spent the night at the home of Judge Camacho, the night of December 9 and 10; and came to Agana the afternoon of December 10th. He was not present at the plaza that morning. Therefore, I call attention to that inadvertent misstatement of the judge advocate when he said the bishop saw Governor McMillin at the plaza that morning. Nauta and Salas testified that they saw the accused slap

the then Governor of Guam. Nauta saying that it happened in front of the door of the palace; and Salas said he saw the accused and army men bring the Governor out of the palace, then the slapping occurred and then the Governor was sent back. I leave it to you gentlemen to consider the story of those two witnesses as compared with that of Tomas Guzman who said he was in the plaza from 0600 to 1000; that he was grouped with members of the Insular Force and Insular Guard; that he did not see Governor McMillin that morning; that he was sitting "facing the palace"; that he saw the accused after he, the accused, was released from jail that morning. There is the complete story by that witness. Jesus S. Sayama, who also testified for the defense, stated that he and 21 or 22 other Japanese then in jail were released at 0700; that he came to the plaza; that he saw the accused after their release from jail; that he did not see the accused after that, but he did not see the governor that morning. Taking our time element, here is a man released from jail that morning at 0700. He said the accused left the jail with him that morning, whereas the prosecution witnesses, Nauta, said the slapping was at 0630, and Salas said he saw the accused and army men bring the Governor from the palace. I say that when one tests the credibility of the witnesses for the prosecution, the accused is not guilty of that specification.

Let us take the third assault and battery - at Agana Heights. Two prosecution witnesses again testified in support of the charge; Francisco Aguon and Eugenio Borja. Aguon said this happened 15 or 20 yards away and in the latter part of December. Borja's testimony, question 11 and his corrected answer, page 40 of the transcript is interesting. I quote:

> "The governor and Shinohara passed in front of us and the governor told Shinohara, he said: 'Will you please tell the Japanese navy and army to be kind to the natives of the Island because they will obey all orders, whatever they were told', and after Shinohara heard this, he slapped the governor and said: 'You are no governor'".

Gentlemen, that is a long conversation to hear while two men were talking and walking in front of you; to hear it all. I say the credibility of that witness is very poor when he quotes the complete conversation between the governor and the accused as they were passing by, and I leave it to your own good sense as to whether the Japanese would allow the Governor and the accused to walk in front of this other line. I say the witness' credibility is very poor.

We have the testimony of the wife and daughter of the accused that the accused did not slap the Governor that morning at Agana Heights. Each of these witnesses was subjected to a rigorous cross examination, and I am sure you will all agree they were quite firm and certain in their recollection that the accused not only went with them to Agana Heights, but also remained with them, stayed with them until everything was over, and, they all left together. You will also recall the testimony of the wife that the Americans were a long ways off, something over 200 yards away. There gentlemen, is a complete defense to the charge. First, I must again strongly urge that a trial of these charges is barred by the statutes of limitation under any construction that may be argued; second, that the incidents did not occur.

Turning then to the third type of charge - Desecration of the flag. I call particular attention to the charge where it is stated that this incident occurred "on or about the month of February or March, 1942"; as the date of the alleged desecration of the flag by wiping off a bar with it. The evidence produced by the prosecution was that the incident in question occurred in or about December, 1943 - 20 to 21 months later; that it was not wiping a bar, but it was wiping the floor. Gentlemen, the variances are too great for conviction of this man of that charge. I wish to call attention to certain discrepancies in the testimony

of the prosecution witnesses. The first witness produced was Herbert Johnston - I will read question 14 and 15, page 45, of the transcript:

"14. Q. Please state in detail how you saw the accused wipe the floor with the American flag.

A. Well, I was standing at the door when he passed in front of me with an American flag in his hand and he bent down and wiped the floor with his hand with the American flag and I turned away and coughed and I did not see what happened after that."

"15. Q. What date was this?

A. The date I do not remember; it was I believe about the latter part of 1943."

This witness said the accused bent down and wiped the floor, with the flag in his hand, and also that he was 25 feet away from the accused when he saw this incident. I call your attention to the wiping with the hand and the distance of 25 feet away, as I summarize the testimony of other witnesses. Beatrice Rios said she was at the doorway and saw the accused looking for a mop; then said the accused wiped the floor with the flag with the aid of his foot. Two different stories. She also said this happened in the latter part of 1943, and that she was 15 or 16 feet away. The third witness agreed as to the wiping ith the aid of the foot, agreed it was around December, 1943. Here is her answer to questions as to where she was in relation to the accused and Herbert Johnston (who was 25 feet away from the accused, according to his testimony). I read question 18, 19, and 20, page 50 of the transcript:

"18. Q. How far were you from the accused when this happened?

A. About two yards apart.

19. Q. You say you saw Herbert Johnston there. How far away were you from him when this happened?

A. I was not very far from Herbert. I served him with his beer.

20. Q. Explain a little bit more what you mean by "not very far from Herbert".

A. About two feet apart."

That places Herbert Johnston 8 feet from the accused. The young man remembered he was 25 feet away. I can't explain that discrepancy. It is up to you gentlemen to determine the credibility of witnesses, of course. We have the testimony of Fernandez, who said he was there and fixes the date as being about 21 months after the date stated in the charge. Another thing I wishedto emphasize: All witnesses for the prosecution could only remember names of other prosecution witnesses as persons also present, although they stated that other Chamorros were there. That is too vivid a recollection as to certain names, and too vague a recollection as to other names, not to effect their credibility. The defense produced two witnesses. Each of those witnesses recalled as the date of this incident a time which is much more in line with that set forth in the charge; they said sometime in 1942, when they were working at the club. One thought it was about May and other was not certain as to the exact month. You will recall that each of them stated the incident was simply this: That a Japanese member of the Menseibu, a man named Okada, got the flag out of the cupboard and used his foot to wipe the floor with it. There is your incident which is the subject of this charge and it is not the accused who should be before this bar to answer to that charge. There are too many discrepancies in the stories of the prosecution witnesses to give much credence to what they said.

The same statements concerning the statute of limitations made as to the assaults and batteries also apply to this charge of desecration of the flag.

Turning to the next type of charge - Taking a female for the purpose of prostitution; the first specification - Alfonsina Flores. I want to emphasize the charge, and quote from this specification: "procuring her consent thereto by misrepresentation". The only pertinent testimony would be testimony as to misrepresentation. The girl herself, Alfonsina, said she went to the Kerner home because her mother told her to go; because her family would be killed if she did not go. That is not misrepresentation, that is duress. She further said that the first night she spent there, the accused told her to go into a certain room and told her to submit to a Japanese officer who accompanied him there, or she would be beheaded. How that could be construed as misrepresentation. She further stated that the accused would come to the Kerner home everyday, that she asked him for permission to leave and he would tell her she could not leave or she will be punished. That is duress. The only misrepresentation mentioned in the evidence was in the girl's story that the accused said he would help her parents, and that she would be paid $20.00 per month as first stated and then later corrected to 20 yen. That does not particularly effect her credibility, because dollars and yen are the same in meaning to these people. The girl said she heard the offer made to her mother and father by the accused, that she was to go to the Kerner home; that the accused had a sword and that she was threatened with this sword. The testimony of the father and mother was that this girl did not hear anything the accused said that day when he came to the Flores home. Their testimony was that the accused did not have any sword, as they can recall. There is your story of the girl, shameful as it is, and no criticism of the girl, but it is not misrepresentation, and I do not believe duress can carry much weight when you consider the fantastic story of the girl about hearing what the accused said, and when you consider what she said about the accused having a sword. The real story, gentlemen, as shown by the testimony is this: This girl's older sister, Alice, had been at the Kerner home one or two weeks. She apparently liked it there and arranged for her younger sister to come and join her. Gentlemen, the proper people to be charged of this crime are the father, the mother and the other people involved, and not this man. Whether or not the mother induced the girl to go, this was not through misrepresentation, but according to her story, through fear. According to the mother, she was afraid, and as to the girl, she had no misapprehension of what she was to do. Remember Alice Flores, the mother, and the father.

The prosecution produced another witness, Mrs. Kerner, for what purpose I do not know. This lady testified that Alice Flores paid her rent for that house twice and that the accused paid her the rent once, in July, 1942. As to her credibility: First she said that when the accused paid her the rent in July, 1942, there was no conversation - question 30 - later on under more rigid direct examination by the judge advocate, she said: "Yes, there was conversation at that time". So I say there is not the misrepresentation necessary to be proved beyond a reasonable doubt in support of the specification. There is lots of testimony as to duress, but there is insufficient evidence of any misrepresentation to support a conviction on this charge.

Turning to the next specification; the specification says in part, "against her will and without her consent..." In other words, not a misrepresentation but force was allegedly used to force the girl to enter into prostitution. I will read the answer of witness Adolfo Sgambelluri - question 9, page 73:

9.Q.Please state the circumstances under which you saw them together.
A.I am not very sure of the date, but sometime in 1942. Shinohara, the defendant, came over the Police Department and requested my assistance in locating a woman by the name of Nicolasa Mendiola.

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He came down in a car driven by a native, whom I do not remember. We proceeded to the district of Anigua, Agana, Guam, where Nicolasa was then residing. Upon arrival there, he sent me in to call Nicolasa to the car as he would like to talk to her. Nicolasa was rather reluctant to come out. She made excuses. Finally she came out and while at the car, Shinohara asked her to come down with him to Piti and work at a whore house where Japanese enlisted personnel were being entertained. She refused to work. She made excuses that she had children to take care, further that she did not like the job. Shinohara asked her to cooperate and come along to see the place and see if she liked it. She answered that she would later on if she can get clothes to wear as she had on only rags. The defendant remarked that she may come down. She did not have to stay there, to just come down for the day and to come back, and that Shinohara would furnish her clothes and anything she needs if she worked in this house. She did come along with us in this trip. I remember there were two or three other Japanese in the car. I do not remember whether they came with us and whether we picked them on the way, but I remember two or three navy Japanese in the car and which we disembarked at the whore house at Piti. To the best of my knowledge, Nicolasa went into this house and later on came out in a matter of about 10 or 15 minutes and told Shinohara she will work just as soon as she found someone to take care of the children and some clothes to wear. We then took to Agana and that is all I know.

On cross examination, I asked Sgambelluri if there was anything else said in his presence and he said: "No, sir, that is the complete story." Gentlemen, there is no duress here; this was not against her will and without her consent. You will recall the history of this woman. She had been convicted of vagrancy; had been subjected to one venereal disease examination; (all before the war). Sgambelluri testified that the only persons present were the Mendiola girl, the driver of the car, the accused, himself and possible some Japanese navy people, he could not remember. When the girl was on the stand, she said another woman was with them, who went to Piti and was dropped at Martinez's house in Piti. Which one is correct, I do not know - I quote her testimony, question 8, pages 76 and 77 and the answer:

8.Q.Please state to the commission the circumstances.
A. When I came out to the car, Shinohara was in the car with another woman and a sentry with Sgambelluri. Then the accused asked me if I wanted to work at the whore house. I told the accused that I could not do it on account of my children. He insisted and said, "Come and try it at least for three days and see how you like it", and I said, "No". The accused insisted that I go, and told me that if I didn't go I will be punished, so I got in the car and he took me down. When we got down to the place, the manager was not there, so we turned back. On our way back, we dropped the other woman and we proceeded to my place where I got off.

There are your discrepancies as to what transpired that day. Sgambelluri, who said not one word as to duress and the girl who said there was duress. Two days later, according to the girl, the accused came to her and offered her work at a saloon. She said the accused took her to the hospital to have a physical examination - (question 11, page 77). She also said that on the second night, after she was in the building at Piti, the accused came with two Japanese officers

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and told her to take care of them saying: "If you don't want to, you will be punished". The girl stayed there for 4 or 5 months. Gentlemen, a woman who has been convicted of vagrancy before the war, is unmarried at the time but the mother of a 12 year old child, had a venereal examination before the war, and who went to Piti to look over a whorehouse, and two weeks later went to stay there and stayed two days and nights without working, is not a person who entered a life of prostitution under duress. Bear in mind, she went to the hospital for a physical examination and then went down there. This unfortunate woman knew what work she was to do and entered it voluntarily. As to her credibility, I call you attention to the fact that upon cross examination, in answer to the question: "Have you ever been convicted of crime?" she said, "No". Recall the testimony of Sgambelluri, who said she had been convicted of vagrancy before the war. She further said that she didn't act as a barmaid, although supposedly hired to do so, there was a boy for that. Recall the testimony of this witness - question 56, page 80:

56.Q.When did you first find out that you were to be used for other purposes than dispensing liquor at the bar?
A.The second night when Shinohara came out with some officer.

That unfortunate woman entered into this life of prostitution voluntarily.

Turning then to the last of the five types of charges - treason. The judge advocate read to you from the Penal Code of Guam, as the statute on treason. I also will read to you section 1103 of the Penal Code of Guam:

> "Evidence on trial for treason. — Upon a trial for treason, the defendant cannot be convicted unless upon the testimony of two witnesses to the same overt act, or upon confession in open court; nor can evidence be admitted of an overt act not expressly charged in the information; nor can the defendant be convicted unless one or more overt acts be expressly alleged therein."

And I call particular attention to the following statement in this statute:

> "Nor can evidence be admitted of an overt act nor expressly charged in the information."

We are confined then to the overt act expressly charged in each specification. You will recall the four specifications. The first one:

> "---did on or about December 16, 1941, aid, assist and participate in the taking by the Japanese military forces of the sum of about eight thousand three hundred dollars xxx and checks of the value of about one thousand dollars, being the property of the Naval Government of Guam xxx"

Bear in mind that must be proved by the testimony of two witnesses.

The second:

> "---did on or about December 11, 1941, aid, assist and participate in the taking by and for the use of the Japanese military forces of an electric generator of the value of about $500, said generator, of the value aforesaid, being the property of Ignacia Bordallo Butler, an inhabitant of Guam."

Two witnesses are required to prove that.

The third:

"xxx did, in or about the month of December, 1941, organize, solicit and promote the organization of residents of Guam into an organization known as the Dai Nisei, for the purpose of assisting the Japanese military forces xxx."

and last:

"xxx did, in or about the month of April, 1942, supply to Japanese military and naval forces provisions and refreshments."

I must ask your indulgence while I read more on the law on treason. The judge advocate mentioned the recent and important case of Cramer v. the United States, 65 S.Ct. 918. I have here the advance Supreme Court Reporter, and read to you from the opinion of the court, written by Mr. Justice Jackson. The case was argued in November, 1944, and decided in April of this year. I am reading from pages 934 and 935:

"The very minimum function that an overt act must perform in a treason prosecution is that it show sufficient action by the accused, in its setting, to sustain a finding that the accused actually gave aid and comfort to the enemy. Every act, movement, deed, and word of the defendant charged to constitute treason must be supported by the testimony of two witnesses. The two-witness principle is to interdict imputation of incrimination acts to the accused by circumstantial evidence or by the testimony of a single witness. The prosecution cannot rely on evidence which does not meet the constitutional test for overt acts to create any inference that the accused did other acts or did something more than was shown in the overt act, in order to make a giving of aid and comfort to the enemy. The words of the Constitution were chosen, not to make it hard to prove merely routine and every day acts, but to make the proof of acts that convict of treason as sure as trial processes may. When the prosecution's case is thus established, the Constitution does not prevent presentation of corroborative or cumulative evidence of any admissible character either to strengthen a direct case or to rebut the testimony or inferences on behalf of defendant. The Government is not prevented from making a strong case; it is denied a conviction on a weak one."

There, gentlemen, is the rule which you will apply properly in deciding whether or not the accused shall be convicted of the most serious crime that can be charged against him.

Let us turn to the facts of the four specifications of treason. The first one is the opening of the Records and Accounts safe, where money and checks belonging to the Naval Government of Guam allegedly were taken.

Article 53 of the Hague Regulations states:

"An army of occupation can only take possession of cash, funds and realizable securities which are strictly the property of the state xxxx."

As Feilchenfeld says, (section 212, p. 52):

"The occupant may seize cash, funds and realizable securities, but only if they are strictly the property of the State".

The Japanese authorities had the right to take this state property. The money and checks are alleged to have belonged to the Naval Government of Guam, therefore they were state property. Let us take the testimony of the first of two witnesses of the prosecution in support of this charge - Galo L. Salas. You will recall that he said they went to the Records and Accounts Office in the Robert E. Coontz Building; that there were eight people; the accused, himself, a Japanese officer and some Japanese soldiers. He said that the cashier's cage where the safe was located, was a room 10 by 12 feet; that there were eight people in that small room at about 2:30 in the afternoon; said that the front windows of the cashier's cage were closed; that a small cashier's window, about 8" by 20", was open in the sense that there was no cover, but only perpendicular bars on it; that there was sufficient light through this small window that opened into the lobby; that there was a solid wall between the cashier's cage and the rear room, the clerk's office of the Records and Accounts office. When asked if he saw anyone in the lobby, he replied, "No"; when asked whether he saw anyone in the rear room he replied that there were Japanese in the rear room, Japanese soldiers. When asked whether he saw any Chamorros as he entered the room, he said, "No". When asked the same question as to when he left, he said, "Yes", he saw Zafra and Sgambelluri after he came outside, Zafra near the Dorn Hall and Sgambelluri at a window in the Dorn Hall. Upon being questioned as to leaving the building and coming across to the Marine Barracks, this witness said that the Japanese officers carried the currency, unwrapped; that the accused carried a white canvas bag in which the small change had been placed.

The only other witness was Zafra. What did he say? He states that he saw the accused standing by the door of the cashier's cage in the room; that is all. What is the test? It is set forth by the Kramer case as follows: "Every act, movement, deed and word of the defendant charged to constitute treason must be supported by the testimony of two witnesses."

That is all witness Zafra says that he saw in that building; and further, that man was looking through this small window and also was in the back room. He was in this building not over 10 minutes; and after he left, he walked down to the Dorn Hall and saw this group passing by, the accused carrying a canvas bag. When asked what the Japanese officers were carrying, he said that they had paper bundles, some white paper. Bills are not white, but green. So the only two things one can say is supported by the testimony of <u>two</u> witnesses is that the accused was going along the street carrying a white canvas bag. Gentlemen, that is not treason. One witness said that the Japanese forced him, with the help of the accused, to open the safe. The only other witness said he saw the accused near the door of the cashier's cage. That is not sufficient proof of an overt act by the testimony of two witnesses as required by the supreme court, which has said in the Kramer case:

> "Every act, movement, deed and word of the defendant charged to constitute treason must be supported by the testimony of two witnesses."

Taking of the Butler generator; the next specification: Let us consider the testimony of Ignacia Butler, question 33 to 35, inclusive, page 112:

33.Q.Were you not given a paper that time setting forth the agreement as to the generator being taken?
A.I was given a slip of paper written in Japanese. I do not know what it said.
34.Q.Was it not stated to you that the Japanese were requisitioning your generator and would pay you for the use of it?
A.I did not understand it that way.
35.Q.Where is that paper you spoke of, if you know?
A.I have lost it.

Gentlemen, under Article 53, Hague Regulations, the occupant power has the right of requisition; and here you have a proper and orderly requisition procedure, in the requisitioning of a generator. The only other witness called by the prosecution was the brother of this lady, Carlos Bordallo. Here is his testimony:

11.Q.Did you hear any conversation at that time between the accused and Mrs. Butler?
A.Yes.
12.Q.State the circumstances.
A.I understood that Shinohara came with some others to inquire about a certain generator.

Upon motion of the accused, the last answer was stricken. Therefore, we have no corroborating testimony at all. We do not have two witnesses to the alleging taking of the generator. I wish to emphasize this for there is no corroborating testimony and the charge cannot be sustained under the Supreme Court's statement of the two witness rule. And as further stated in the Kramer case:

> "The government is not prevented from making a strong case; it is denied a conviction on a weak one."

Turning now to the Dai Nisei, the alleged overt act of the accused is as follows:

> "xxx did, in or about the month of December, 1941, organize, solicit and promote the organization of residents of Guam into an organization known as the Dai Nisei, for the purpose of assisting the Japanese military forces xxx."

The earliest date fixed by any prosecution witness of any assertedly treasonable act of the accused is about a month and a half after the Japanese occupation of Guam. In other words, in the latter part of January, 1942. That is not within the charge.

Let us consider the testimony of the seven prosecution witnesses. They said that two meetings were held; one within a month and a half to two months after the Japanese occupation, and a later one, just how much later we cannot be sure. The commission has heard the testimony as to both meetings and the various acts that these boys said they did. That does not go to the question of the overt act which is the basis for this treason charge. They said they worked and went to drills. Let us make a little study of just what the Dai Nisei is. Dai Nisei is a generic term; meaning the same as the word Mestizo, a Mexican or Chamorro term, meaning half blood. Take the testimony of Jesus Sayama. He said that all half breeds in Guam, and the Chamorros, were organized into the Seinendan. There were two groups within the Seinendan; the Chamorro and the Dai Nisei, half blood Japanese. He said drills were carried on by each blood group separately; but were exactly the same drills, without guns, and were not military drills. He further stated that the Dai Nisei were interested in disaster relief, air raid precautions, typhoon disaster relief, and so on. There is nothing treasonable about such an organization. As you know, there is no such thing as an organization in Guam known as the Dai Nisei. Dai Nisei is a generic term meaning half blood, mestizos. And the fact that the Japanese regarded themselves as being of a higher caste than the Chamorros, is the same situation as we had here before the war; the American school where American children were sent to learn good English. That is no reflection on the Chamorros, but that was how it was. Sayama testified a day and a half on this question, and was subjected to a searching cross examination on all phases of it.

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The last charge - furnishing provisions and refreshments to Japanese military and naval forces. We had this building, the old Elks Club building, continued as a club known as the Omiya Kaikan. We got into considerable discussion of its meaning. I do not care what the two words mean, but what they meant to the man on the street was, "Guam Restaurant". The uncontradicted testimony was that food was served to parties of the Japanese occupation personnel; that all food was furnished by the Japanese. This man did not furnish that food; he was simply catering; having the food prepared at home and serving the food at the club operated as any business enterprise might be operated. The testimony of the wife is that she was one time paid 100 yen for what they had done. The fact that this man furnished a catering service is no support for treason. The fact is that food was prepared at the home of the accused and served to Japanese as well as Chamorros. That does not support a charge of treason. You have no witness to any overt act of the accused as set forth in the specification. I racked my brain as to why the charge was brought, and what was the purpose behind it. Simply acting as a caterer for hire to help prepare and serve food furnished by the people holding the party is not treason.

The judge advocate made the following closing argument:

The charges and specifications were served on the accused on the 20th of July, 1945.

It appears as though the counsel for the accused has based his argument in regard to the treason charges entirely on the Cramer case and that he has relied on that case to support the defense. Comparing the facts in the Cramer case to the facts presented in this case, there is not much similarity except the word, "Treason". I now read from the Cramer case a resume of the facts on the proof as made.

> "At the present stage of the case we need not weigh their sufficiency as a matter of pleading. What ever the avertments might have permitted the Government to prove, we now consider their adequacy on the proof as made.
>
> "It appeared upon the trial that at all times involved in these acts Kerling and Thiel were under surveillance of the Federal Bureau of Investigation. By direct testimony of two or more agents it was established that Cramer met Thiel and Kerling on the occasions and at the places charged and that they drank together and engaged long and earnestly in conversation. This is the sum of the overt acts as established by the testimony of two witnesses. There is no two-witness proof of what they said nor in what language they conversed. There is no showing that Cramer gave them any information whatever of value to their mission or indeed that he had any to give. No effort at secrecy is shown, for they met in public places. Cramer furnished them no shelter, nothing that can be called sustenance or supplies, and there is no evidence that he gave them encouragement or counsel, or even paid for their drinks.
>
> "(11). The indictment charged Cramer with adhering to the enemies of the United States, giving them aid and confort, and set forth ten overt acts. The prosecution withdrew seven, and three were submitted to the jury. The overt acts which present the principal issue (foot note 45) are alleged in the following language:

"1. Anthony Cramer, the defendant herein, on or about June 23, 1942, at the Southern District of New York and within the jurisdiction of this Court, did meet with Werner Thiel and Edward John Kerling, enemies of the United States, at the Twin Oaks Inn at Lexington Avenue and 44th Street, in the City and State of New York, and did confer, treat, and counsel with said Werner Thiel and Edward John Kerling for a period of time for the purpose of giving and with intent to give aid and comfort to said enemies, Werner Thiel and Edward John Kerling.

"2. Anthony Cramer, the defendant herein, on or about June 23, 1942, at the Southern District of New York and within the jurisdiction of this Court, did accompany, confer, treat, and counsel with Werner Thiel, an enemy of the United States, for a period of time at the Twin Oaks Inn at Lexington Avenue and 44th Street, and at Thompson's Cafeteria on 42nd Street between Lexington and Vanderbilt Avenues, both in the City and State of New York, for the purpose of giving and with intent to give aid and comfort to said enemy, Werner Thiel.

Foot note (45). "The verdict in this case was a general one of guilty, without special findings as to the acts on which it rests. Since it is not possible to identify the grounds on which Cramer was convicted, the verdict must be set aside if any of the separable acts submitted was insufficient. Stromberg v. California, 283 U.S. 359, 368, 51 S.Ct. 532, 535, 75 L.Ed. 1117, 73 A.L.R. 1484; Williams v. North Carolina, 317 U.S. 287, 292, 63 S.Ct. 207, 210, 87 L.Ed, 279, 143, A.L.R. 1273." ----------

On the above set of facts, defendant Cramer was found guilty of treason by the lower court and upon appeal by a 5-4 decision of the Supreme Court the case was reversed. The tenth act charged (the third submitted was based on five falsehoods and was not considered in the opinion) then there remains two counts which were considered by the court and submitted by the prosecution as the overt acts. You will note in count 1 the alleged "overt act" was "and did confer, treat, and counsel with said Werner Thiel and Edward John Kerling for a period of time for the purpose of giving and with intent to give aid and comfort to said enemies, Werner Thiel and Edward John Kerling". And in the second count the alleged "overt act" was "did accompany, confer, treat, and counsel with Werner Thiel, an enemy of the United States, for a period of time at the Twin Oaks Inn at Lexington Avenue and 44th Street, and at Thompson's Cafeteria on 42nd Street between Lexington and Vanderbilt Avenues, both in the City and State of New York, for the purpose of giving and with intent to give aid and comfort to said enemy, Werner Thiel". I again submit that there is no similarity to the Cramer case with the present case in that in each one of the four specifications of the case at bar there is alleged an overt act which if proven would show that the accused had adhered to and had given aid and comfort to the enemy. Then I submit to you for your consideration that there were in each specification two eye witnesses to an actual overt act of the accused. There was no such overt act in the Cramer case. I further quote from the Cramer case in which the court says:

"Overt acts are such acts as manifest a criminal intention and tend towards the accomplishment of the criminal object. They are acts by which the purpose is manifested and the means by which it is intended to be fulfilled. xxxxx

"It is only overt acts by the accused which the Constitution explicitly requires to be proved by the testimony of two witnesses. It does not make other common-law evidence inadmissible nor deny its inherent powers of persuasion. It does not forbid judging by the usual process by which the significance of conduct often will be determined by facts which are not acts. Actions of the accused are set in time and place in many relationships. Environment illuminates the meaning of acts, as context does that of words. What a man is up to may be clear from considering his bare acts by themselves; often it is made clear when we know the reciprocity and sequence of his acts with those of others, the interchange between him and another, the give and take of the situation."

In the Cramer case as I see it there was not an overt act which was alledged or proven that manifested a criminal intention nor was there any act proven by which the purpose was manifested or the means by which it was intended to be fulfilled. Whereas in the present case, in each one of the four specifications of treason there was a minimum of two eye witnesses to the overt act and when it is said in the Cramer case opinion "every act, movement, deed, and word of the defendant charged to constitute treason must be supported by the testimony of two witnesses, it is obvious that they meant that there first must be an overt act. In the Cramer case there was no overt act which could be considered as such. The act was only by inference, speculation and imagination. But in the alleged acts of each one of the four specifications in the case at bar, the overt acts were such as "manifest a criminal intention and tend towards the accomplishment of the criminal object". And furthermore, the overt acts in each one of the four specifications were acts by which "the purpose was manifested and a means by which it was intended to be fulfilled" were present.

Therefore, weighing the decision in the Cramer case based upon the facts against the testimony in this case, I submit that the Cramer case presents a weak case as distinguished from the case at bar which presents a strong case. It is inconceivable how any person on Guam during Japanese occupation could have adhered to and given aid and comfort more than the accused did under the circumstances on the Island of Guam. His opportunities were limited to the very things the accused did and he took advantage of these opportunities to perform the traitorous acts.

The accused requested permission to make an additional argument.

The commission announced that the request was granted.

The accused made the following additional argument.

On this question of the statutes of limitations; I say it is entirely immaterial on what date a copy of the specification was served on accused. The law says it must be filed within one year. Service on the accused is not filing - filing is with the commission.

The accused accepts the challenge as to two witnesses to the alleged overt acts of treason.

Take the Records and Accounts incident - the accused was walking down the street with a canvas bag; the witness did not see what was in the bag. The accused stood by the doorway; that is not giving aid and comfort to the enemy. Speaking of weak cases, that is extremely weak.

On the Butler's generator: I heard no comment as to the striking, upon motion of the accused, of the corroborating statement of Bordallo as to the conversation he heard. The evidence is clear. The generator was taken by the Japanese in the afternoon; the overt act allegedly occurred that morning at the Butler home.

The Dai Nisei: The overt act was alleged to have been committed by the accused in December, 1941. What was done in 1942 or later has no bearing on the overt act. As to the overt act, there was no witness; not even one.

The food and refreshments: The evidence of the accused is complete on that. He rendered a catering service of food furnished from government supplies; by Guzman on three occasions. The wife of the accused prepared the food at her home, a service for which payment was made. That is not giving aid and comfort, but a commercial service transaction.

In closing, I wish to read just one more statement from the Cramer case:

"Although nothing in the conduct of Cramer's trial evokes it, a repetition of Chief Justice Marshall's warning can never be untimely:

"As there is no crime which can more excite and agitate the passions of men than treason, no charge demands more from the tribunal before which it is made, a deliberate and temperate inquiry. Whether this inquiry be directed to the fact or to the law; none can be more solemn, none more important to the citizen or to the government; none can more affect the safety of both.

"xxx It is therefore more safe as well as more consonant to the principles of our constitution, that the crime of treason should not be extended by construction to doubtful cases.

The judge advocate desired to make no further argument.

The trial was finished.

The commission was cleared.

The judge advocate was recalled and directed to record the following findings:

The specification of the first charge proved.

And that the accused, Samuel T. Shinohara, a civilian, is of the first charge guilty.

The specification of the second charge not proved.

And that the accused, Samuel T. Shinohara, a civilian, is of the second charge, not guilty; and the commission does therefore acquit the said Samuel T. Shinohara, a civilian, of the second charge.

The specification of the third charge proved.

And that the accused, Samuel T. Shinohara, a civilian, is of the third charge guilty.

The first specification of the fourth charge proved in part, proved except the word, "misrepresentation", which word is not proved, and for which the commission substitutes the word, "duress", which word is proved.

The second specification of the fourth charge proved.

And that the accused, Samuel T. Shinohara, a civilian, is of the fourth charge guilty.

The first specification of the first additional charge proved.

The second specification of the first additional charge proved in part, proved except the word and figures "December, 1941", which word and figures are not proved, and for which the commission substitutes the word and figures, "February, 1942", which word and figures are proved.

The third specification of the first additional charge proved in part, proved except the word, "April", which word is not proved, and for which the commission substitutes the word, "February", which word is proved.

And that the accused, Samuel T. Shinohara, a civilian, is of the first additional charge guilty.

The first specification of the second additional charge proved.

The second specification of the second additional charge proved.

And that the accused, Samuel T. Shinohara, a civilian, is of the second additional charge, guilty.

The specification of the third additional charge not proved.

And that the accused, Samuel T. Shinohara, a civilian, is of the third additional charge, not guilty; and the commission does therefore acquit the said Samuel T. Shinohara, a civilian, of the third additional charge.

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The commission was opened and all parties to the trial entered. The commission informed the accused that it found the specification of the second charge and the specification of the third additional charge not proved.

The judge advocate stated that he had no record of previous conviction.

The commission was cleared.

The judge advocate was recalled and directed to record the sentence of the commission as follows:

The Commission, therefore, sentences him, Samuel T. Shinohara, a civilian, to death, to be executed by hanging the said Samuel T. Shinohara by the neck until he is dead, two-thirds (2/3) of the members of the Commission concurring.

W.T.H. Galliford
WALTER T.H. GALLIFORD,
Colonel, U.S. Marine Corps, Senior Member,

Foster H. Krug
FOSTER H. KRUG,
Major, U.S. Marine Corps Reserve, Member,

Harry S. Popper Junior
HARRY S. POPPER, JUNIOR,
Major, U.S. Marine Corps Reserve, Member,

Robert H. Gray
ROBERT H. GRAY,
Major, U.S. Marine Corps, Member,

Quentin L. Johnson
QUENTIN L. JOHNSON,
Captain, U.S. Marine Corps Reserve, Member,

Alfred J. Dickinson, Junior
ALFRED J. DICKINSON, JUNIOR,
Captain, U.S. Marine Corps Reserve, Member,

George W. Dean
GEORGE W. DEAN,
Lieutenant, U.S. Naval Reserve, Member,

Teller Ammons
TELLER AMMONS,
Lieutenant Colonel, Army of the U.S., Judge Advocate.

The commission then, at 11:30 a.m., adjourned to await call by the senior member.

W.T.H. Galliford
WALTER T.H. GALLIFORD,
Colonel, U.S. Marine Corps, Senior Member,

Teller Ammons
TELLER AMMONS,
Lieutenant Colonel, Army of the U.S., Judge Advocate.

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Accused Argument on Special Plea to Jurisdiction of Commission.

To refresh your recollection on the plea: It goes to the charge of treason and the specifications thereunder.

The plea to the jurisdiction of the commission is based upon the following analysis: The accused, while a resident of Guam during the period of the Japanese occupation, did not owe any allegiance to the Naval Government of Guam or to the United States of America. The law is clear that an alien resident of a country owes temporary allegiance to that country and he can be charged with treason, the same as a resident of that country. However, an alien's temporary allegiance ends when he leaves that country. It seems clear that temporary allegiance is allegiance in return for protection furnished by the resident country. The accused was a resident of Guam prior to the Japanese occupation. The record shows that he was resident of Guam during the period of the Japanese occupation. During the time of the Japanese occupation, there was no temporary allegiance owed by the accused to the Naval Government of Guam or the United States of America. Of course, there is no doubt that the accused owed temporary allegiance to the Naval Government of Guam prior to the Japanese occupation.

It is our contention that when the Japanese, the country of the accused, occupied Guam, the accused as a national of that country owed permanent allegiance to that country, and only to that country, and did not during that occupation owe allegiance to the Naval Government of Guam or to the United States of America. Of course this is premised upon the fact that the protection of the Naval Government of Guam was gone, therefore temporary allegiance ended. There is not a great deal of law on this question. What there is tends to hold against our contention. There are however two decided cases that are close enough in point to be of particular interest.

First is a United States Supreme Court case - Carlisle V. United States, 16 Wallace, 147, decided in 1872. In this case we don't have the government of the alien national coming in; as we have the Japanese, the country of the accused, coming to Guam in the case at bar.

Take the case of De Jager v. Attorney General of Natal, (1907), A.C. 326 (Privy Council), summarized in VI Hackworth's "Digest of International Law", page 326. I cannot tell from the information available here whether De Jager owed permanent allegiance to the government whose army invaded Natal, where he was living under British rule. If he did owe such allegiance, then the case is squarely in point and holds against our contention here. However, if De Jager did not owe permanent allegiance to the occupant power, this case is no more in point than the Carlisle case.

The De Jager Case is cited in 52 Am. Jur., section 5 (Aliens) under the subject title "Treason" for the following rule:

> "If an alien lends assistance to invaders during the absence of the government forces from the place where he lives, for strategical or other reasons, he is guilty of high treason. In answer to the argument against this rule, that inasmuch as the duty and liability of an alien arise from the fact of the protection furnished him, such duty must necessarily cease as soon as the government is overcome by an invading force, it has been held that the protection of a state does not cease merely because the state forces, for strategical or other reasons, are temporarily withdrawn, so that the enemy for the time exercises the rights of an army in occupation. On the contrary, when such territory reverts to the

control of its rightful sovereign, wrongs done during the foreign occupation are cognizable by the ordinary courts. The protection of the sovereign has not ceased. It is continuous, although the actual redress of what has been done amiss may be necessarily postponed until the enemy's forces have been expelled." (p. 797)

If this is a correct statement of the law, then the contention of the accused is not sound. However, I wish to point out to the commission that whether the De Jager Case involved a national of the occupant power is not clear from information available here. It is our contention that there is no allegiance owed by the accused, Shinohara, to the United States or to the Naval Government of Guam after the protection of those governments had ended and the accused' own country, Japan (to which he owed permanent and primary allegiance), had occupied Guam.

Emory L. Morris

EMORY L. MORRIS
Counsel for the accused.

Judge Advocate's Brief in Reply to Plea to the Jurisdiction.

The accused Shinohara was an alien resident and an inhabitant of Guam prior to the Japanese invasion. He owed fidelity and allegiance to the Naval Government of Guam and the United States which did not end when the Japanese invaded Guam on December 10, 1941. As an inhabitant, his duty to Japan during their period on Guam was one of obedience only. Had he rendered obedience only to the military occupant, he would not be guilty of treason against either, but if he gave aid and adhered to the enemy of the sovereigh of this domicile, which was Guam, during the absence of the sovereign forces which was the United States and the Naval Government of Guam he is guilty of treason against the United States and the Naval Government of Guam and maybe tried therefor.

He could have terminated his temporary allegiance by leaving Guam, but this he did not do.

Authorities:

a. Carlisle v. United States, 16 Wallace (83 U.S.) p. 147.

b. Vol. 52. American Jurisprudence, p. 796, Title Treason, Sec. 5 - Aliens.

c. Janis v. U.S., 32 Ct. Claims, p. 410 - holding that an alien resident owes temporary allegiance to the nation (In this case an Indian Tribe) of his residence.

(See also Young v. United States, 97 U.S. 39, and U.S. v. Wiltberger, 5 Wheaton 76, and Radich v. Hutchins, 95 U.S. (Otto) p. 211.

d. De Jager v. Atty. General (1907) AC (Eng.) 326, 8 Annotated Cases 76, Hudson, Cases International Law, p. 1061.

e. In the proclamation issued April 16, 1917 under Article III, sec. 3 of the Constitution (see Historical note to Title 18, sec. 1, U.S.C.A) the following is included:

"Such acts are held to be treasonable whether committed within the United States or elsewhere; whether committed by a citizen of the United States or by an alien domiciled, or residing in the United States, inasmuch as resident aliens as well as citizens, owe allegiance to the United States and its laws."

f. "Treason against the United States may be committed by any one resident or sojourner within its territory, and under the protection of its laws, whether he be a citizen or alien. 1 Hale Prec. (Eng.) 59, 60, 62; 1 Hawk. P.C. (Eng.) c. 2, s 5; W. Kel. (Eng.) 38." Charge to Grand Jury, (C. C. Pa. 1851) 2 Wall. Jr. C. C. 134, 30 Fed. Cas. No. 18, 276.

An alien resident may be guilty of treason by co-operating either with rebels or foreign enemies. Charge to Grand Jury Treason (D. C. Mass. 1863) Fed. Cas. Nos. 18, 274 (C. C. Pa. 1851) 18, 276.

g. See also the same effect:

Ex parte Kusweski, 251 Fed. 979
Loi Hoa v. Nagle, 13 Fed. (2nd.) 81
U.S. v. Kainuth, 29 Fed. (2nd.) 317
U.S. v. Kainuth, 30 Fed. (2nd.) 243

"Q(1)"

h. Vol. 3, Corpus Juris Secundum, p. 527, Title Aliens, sec. 5.

"In return for the protection given aliens they owe a temporary and local allegiance to the country in which they reside which continues during the period of their residence."

Teller Ammons

TELLER AMMONS,
Lieutenant Colonel, Army of the U.S.,
Judge Advocate.

"Q(2)"

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Argument in Support of Applicable Statute of Limitations as a Bar to Each Charge and Specification.

Whether or not the three year statute of limitations (Section 800 of the Penal Code of Guam) is effective as to the charges of treason, theft and taking females for the purpose of prostitution, depends upon whether the statute was tolled during the period of the Japanese occupation of Guam. This point has been argued at length in other cases before this commission so I will not go into detail on this point now.

Whether or not the one year statute of limitations (Section 801 of the Penal Code of Guam) is a bar to the trial of the assault and battery, as well as the desecration of the flag charges, involves the additional element of whether or not these charges were filed within one year after the reoccupation of Guam.

I believe the members of the commission have the principles and facts clearly in mind so I will make no extended argument at this time.

Emory L. Morris

EMORY L. MORRIS
Counsel for the Accused.

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Judge Advocate's Brief in Reply to Plea in Bar.

I submit a letter dated 4 June 1945, from the Legal Officer of the Island Command, to the Judge Advocate which reads as follows:

"1400-50
(610)-wka

LEGAL OFFICE,
ISLAND COMMAND, GUAM.

4 June 1945.

Memorandum to: Lieutenant Colonel Teller Ammons, AUS, Judge Advocate,
Military Commission of Guam.

Subject: Case of Nicolas T. Sablan, an inhabitant of Guam.

1. It is noted, in reviewing the case of Nicolas T. Sablan, that counsel for the accused is still raising the plea in bar that those tried for offenses committed during the Japanese occupation are prisoners of war, and thus entitled to the benefits of the Geneva Convention, and also that the statute of limitations has run against the offenses.

2. The Judge Advocate General of the Navy has ruled as follows:

"For crimes committed prior to the re-conquest of Guam, the subject groups should be tried as criminals by the exceptional military courts created by Proclamation IV of the Military Governor of Guam and the Geneva Convention does not apply."

3. As to the statute of limitations, the Judge Advocate General has ruled as follows:

"The statute of limitations is suspended during the period when the ligitimate government was excluded from the Island of Guam and, as to offenses against the laws of Guam or those of the United States that are applicable to Guam, committed during the period of military occupation, there must be excluded from the computation of the period of limitation, the period of occupation."

4. I believe that when pleas in bar with reference to the foregoing subjects are offered to the court, it would save the time of the court and of counsel if you would call these decisions to the attention of the court.

5. I am sending a copy of this memorandum to the President of the court, and to Lieutenant Akerman.

B. S. BARRON.

Copies to: Colonel W.T.H. Galliford, U.S.M.C.
Lieutenant A. Akerman, Jr., U.S.N.R."

Although this letter refers to the case of Nicolas T. Sablan, who has been tried before this commission, it covers the same legal points as to statutes of limitations that is raised by this plea.

Teller Ammons

TELLER AMMONS,
Lieutenant Colonel, Army of the U.S.,
Judge Advocate.

"S"

The Judge Advocate's Written Opening Argument.

Testimony has been based on 7 charges and 11 specifications supporting the charges. I will follow the order of proof as given on the specifications in the trial.

The specification of charge II, is theft. Section 487, page 160, Penal Code of Guam defines grand theft as theft committed in any of the following cases:

"(1) When the money, labor or real or personal property taken is of a value exceeding fifty dollars."

Section 489 of the Penal Code of Guam gives punishment of grand theft, as follows:

"Grand theft is punishable by a fine of not less than one hundred dollars and not more than one thousand dollars, or imprisonment for not less than six months nor more than ten years, or both."

Section 490 of the Penal Code of Guam reads as follows:

"490a. "Theft" to be substituted. -- Wherever any law of this Island refers to or mentions larceny, embezzlement or stealing, said law shall hereafter be read and interpreted as if the word "theft", were substituted therefor."

Section 507, page 169, Penal Code of Guam is as follows:

"507. When bailee, tenant, or lodger guilty of embezzlement. -- Every person intrusted with any property as bailee, tenant, or lodger, or with any power of attorney for the sale and transfer thereof, who fraudulently converts the same or the proceeds thereof to his own use, or secretes it or them with a fraudulent intent to convert to his own use, is guilty of embezzlement."

Section 512, page 170, Penal Code of Guam reads as follows:

"512. Intent to restore property. — The fact that the accused intended to restore the property embezzled, is no ground of defense or mitigation of punishment, if it has not been restored before an information has been laid before a judge, charging the commission of the offense."

Section 484, page 159, Penal Code of Guam, defines theft as follows:

"Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor, or real or personal property, or who causes or procures others to report falsely of his wealth or mercantile characters and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money or property or obtains the labor or service of another, is guilty of theft. In determining the value of the property obtained, for the purpose of

this section, the reasonable and fair market value shall be the test, and in determining the value of services received the contract price shall be the test. If there be no contract price, the reasonable and going wage for the service rendered shall govern. For the purpose of this section, any false and fraudulent representation or pretense made shall be treated as continuing, so as to cover any money, property or service received as a result thereof, and the complaint or information may charge that the crime was committed on any date during the particular period in question."

The automobile involved in this case is registered in the Department of Records and Accounts in the name of James Edward Davis, lieutenant (jg), U.S. Navy, who was taken prisoner by the Japanese at the time they invaded Guam. Six witnesses testified. Each one testified that they knew the automobile that the accused, Shinohara, was using as his own, during the Japanese occupation, as the same car driven by Lieutenant Davis before the Japanese occupation. Every witness described the car so there is no question as to the identity of the automobile as the same one owned by Lieutenant Davis. Mr. Herrero was the landlord of Lieutenant Davis and last saw Davis driving the automobile on December 8, 1941. The next time he saw the car, it was being driven by the accused, Shinohara, about the 12th of December. The accused was driving the car towards his home. The accused kept the key to the car when the car was not in use and parked the car at his residence. He gave orders to the drivers of the car and he employed the drivers. He used the automobile as his own. The license plate on the car during the Japanese time was the type used for civilian use. The accused and his family were seen in the automobile many times during the Japanese occupation.

Specification 1, charge II, of the additional charges and specifications, is for Assault and Battery. Two eye witnesses gave the time, place and circumstances under which the accused assaulted Captain George J. McMillin, U.S. Navy, then Naval Governor of Guam, by slapping with his hand, Captain McMillin.

Specification 2, charge II, Assault and Battery. Two eye witnesses testified as to the place, time and circumstances that they saw the accused slap Captain George J. McMillin, U.S. Navy, then Naval Governor of Guam.

Specification of Charge III, Assault and Battery. The witness testified giving the time, place and circumstances that he saw the accused slap Captain George J. McMillin, U.S. Navy, then Governor of Guam.

Section 240 and 242, page 72, Penal Code of Guam, read as follows:

"240. Assault defined. -- An 'Assault', is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.

"242. Battery defined. -- A 'battery', is any willful and unlawful use of force or violence upon the person of another."

The specification of charge III of the additional charges and specifications, Desecration of flag. Sections 310 and 310a, Penal Code of Guam, read as follows:

"310. Flag defined. Construction. Use of flags and representation thereof....."

"310a. Desecration of flags. -- Whoever, in any manner for exhibition or display, places or causes to appear any word, figure, mark, picture, places design, drawing or any advertisement of any nature, upon any flag, as defined

in section three hundred and ten of this code, of the United States or of this Island; or shall expose to public view any such flag upon which is printed, painted or otherwise placed or to which is attached, appended, affixed, or annexed any word, figure, mark, picture, design, drawing or any advertisement of any nature, or whoever exposes to public view, manufactures, sells, exposes for sale, gives away or has in possession for sale or to give away or for use for any purpose, any article or substance, being an article of merchandise, or a receptacle of merchandise or article or thing for carrying or transporting merchandise upon which is printed, painted, attached or otherwise placed a representation of any such flag, standard, color or ensign to advertise, call attention to, decorate, mark, or distinguish the article of substance on which so placed; or publicly mutilates, defaces, defiles, defines, tramples upon or casts contempt by word or act upon any such flag, is guilty of a misdemeanor, and shall be punished by a fine not exceeding fifty dollars or by imprisonment not exceeding thirty days." (underlining supplied)

Four eye witnesses testified that the accused had used the American flag to mop the floor of an establishment known as Omiya Kaikan, a place operated by the accused.

Specification 1 and 2, charge IV, Taking a Female for the Purpose of Prostitution. The Penal Code of Guam is exact in the protection of honor of female persons. Sections 266a, 266b, 266d and 266e on pages 78 and 79 of the Penal Code read as follows:

"266a. Taking Female for Purpose of Prostitution. -- Every person who, within this Island, takes any female person against her will and without her consent, or with her consent procured by fraudulent inducement or misrepresentation, for the purpose of prostitution, is punishable by imprisonment not less than one nor more than five years, and a fine not exceeding one thousand dollars.

"266b. Taking Female by Force, Duress, etc. to Live in an Illicit Relation. — Every person who takes any female person unlawfully, and against her will, and by force, menace, or duress, compels her to live with him in an illicit relation, against her consent, or to so live with any other person, is punishable by imprisonment not less then two nor more than four years.

"266d. Placing Female in Custody for the Purpose of Cohabitation. -- Any person who receives any money or other valuable thing for or on account of his placing in custody any female for the purpose of causing her to cohabit with any male to whom she is not married, is guilty of a felony.

"266e. Paying for Female for Purpose of Prostitution. — Every person who purchases, or pays any money or other valuable thing for, any female person for the purpose of prostitution, or for the purpose of placing her, for immoral purposes, in any house or place against her will, is guilty of a felony."

Specification 1, charge IV. Complaining witness, Alfonsina Flores, was 17 years old and was living with her parents on a ranch about 16 miles from Agana at the time of the Japanese invasion. The accused, accompanied by a Japanese officer, directed the driver of the automobile he was using to the home of this girl soon after the Japanese had occupied the Island. Accused did the

talking to the parents and told them that he was after their 17 year old daughter and made threats upon not only the girl but the family and actually threatened their lives if the girl did not accompany him. He stated he wanted the girl for the Japanese officer. The girl accompanied the accused, under these threats, to a house in Agana referred to as the Kerner house. Alfonsina was accompanied by her mother at the mother's request. Alfonsina Flores said she was of previous chaste character up to this time and was engaged to marry a Guam boy at that time. When they arrived at the Kerner house, the mother was asked to leave which she did, and then the accused showed Alfonsina a room and instructed her it was the room she was to use to entertain Japanese. The accused further told Alfonsina that she was not to leave the house without his consent. Alfonsina by force and fear of her life and of her family's life, was forced to cohabit with a Japanese at this place. Still under fear of the accused she remained in this house for about six months. At the end of that time she said she quit and said: "I quit when Sakai (the name of the Japanese officer that accused ordered Alfonsina to stay with the night she first arrived at the Kerner house) left the Island. I was waiting for a word from Shinohara but he never showed up and I just left." Alfonsina said that Shinohara was boss of the place (referring to the Kerner house) whether the Japanese were around or not, and the accused came to the house often.

Mrs. Mercedes Kerner, the owner of the house in Agana stated that she left her house on December 8, 1941; that she was at her ranch on December 10, 1941. The next time she saw the house was on December 12; that her husband was a prisoner of the Japanese at that time; that she did not see the accused until the middle of February, 1942; that he wanted to rent the house for the Japanese Governor, Hyashi. She told the accused that she did not want to rent the house and the accused told her that: "I am a military wife and all my husband's buildings belongs to an American and all American properties belong to them, the Japanese." Mrs. Kerner saw Alice Flores and Alfonsina Flores in her house on the same day that she first talked with the accused. Mrs. Kerner said she saw Alice Flores in the middle of April, 1942 and Alice "came with 50 yen for the rent". In the last of July, 1942, Mrs. Kerner received 45 yen from the accused for the rent of the house and the accused at that time told her, "not to receive any money from Alice Flores because Mr. Shinohara is the one that was going to rent the house not the Japanese Governor."

Specification 2, charge IV; reference is again made to sections 266a,b,d,e, of the Penal Code of Guam. The first witness, Adolfo Sgambelluri , stated that accused came to the Police department and requested his assistance in locating a woman by the name of Nicolasa Mendiola. Sgambelluri accompanied the accused and the accused asked Sgambelluri to call Nicolasa to the car as he would like to talk to her. Sgambelluri further stated that Nicolasa was "rather reluctant" to come out. She made excuses. When she came to the car the accused asked her to come and work in a whorehouse. Sgambelluri further said that she refused to work and she told the accused that she had children to take care of. She still made excuses. The accused promised he would furnish her clothes and everything she needed if she would work in this house.

Next is the testimony of Nicolasa Mendiola in which she stated that the accused came to her house and asked her to work in a whorehouse; that she did not want to go but that the accused insisted that she accompany him to see the place and she accompanied him. He told her that if she did not go that she would be punished, that was the first time that the accused came to her home. Accused brought her back to her home that time and about two weeks later the accused came again and asked her if she wanted to work in a saloon just to serve drinks.

She said, "I was willing to do that", and the accused then took her to have a physical examination. Accused took her to a place at Piti and after she was there either the first or the second night the accused came and brought with him a Japanese officer, in fact, he brought two Japanese officers. The accused stated to Nicolasa at that time, "Take care of these men". And Nicolasa said: "What for?" And he said, "Well, your line of work". She further stated that she did not want to. So he, accused, said, "If you did not want to, you will be punished", and she asked him to quit; that she wanted to quit on account of her children and he said that she couldn't. Nicolasa further stated: "I stayed there. I was afraid to leave fearing that I might be punished". She further stated that the accused came there at other times bringing in Japanese officers and that she was subjected to this treatment for four or five months.

In these two specifications, gentlemen, there is evidence which shows the character of the accused. First, we had an innocent girl of 17 years. Next we had a mother of two children. They were forced by the accused to prostitute themselves in fear of disobeying the accused. Provisions of the Penal Code of Guam as cited above amply cover situations of this kind and provide penalties for the violation. Since the beginning of time, written and unwritten laws have been necessary to protect the sanctity of the persons of women against the unscrupulous. The accused not only forced these women to cohabit with the enemy Japanese, but he went further; by fear of death and punishment, he forced these two women to subject themselves to the bestial desires of men of the accused's own selection, who were members of the enemy invasion forces. They were Japanese. No lower trait of character can be found in any man.

Specification 2, charge I, of the additional charges and specifications. Treason -- Seven witnesses, youthful residents of Guam, being of Japanese extraction were ordered by the accused to attend a meeting about a month and a half after the Japanese occupation. Thirty or more of these young people were assembled for the meeting. This was a private meeting and held in a building formerly occupied by the accused for a restaurant. Four of the witnesses were asked personally by the accused to come to the meeting, two of the witnesses received notification to attend the meeting by a police officer, the police officer received his orders through the head of the police force then under the Japanese, at the instance of and in the presence of the accused. At the meeting the accused took charge and was the only speaker and told those present why they were assembled. There was no mistake in the minds of these witnesses why they were assembled after the accused had told them. All the witnesses stated that the accused told them that the organization was formed to help Japan win the war and thereafter the organization was known as the Dai Nisei. The accused did not stop here. After he had organized the group, the accused took a great interest in planning how the members could help the Japanese win the war and the accused gave all the orders to the members on how they were to help Japan win the war. To carry out the purpose of the organization, the accused ordered these young men to work on military installations for the armed forces of Japan, he ordered them assembled and trained in military drill for the purpose of helping the Japanese army defend the Island against the Americans. The members of the organization had a second meeting presided over by the accused in the Omiya Kaikan, a place operated by the accused. This was a farewell party for a Japanese that was leaving the Island. At that meeting when asked by one of the members when the war would be over the accused said, "When all the Americans hold up their hands and surrender." These meetings were private. They were not open to the public; they were private to members of the organization of the Dai Nisei, which the accused had organized and Japanese. The members of the organization of the Dai Nisei worked together in groups. In this specification there has been proven by more than two witnesses

the overt act of the organization meetings, and the intent and motive and the purpose of the organization meetings. In the second meeting two witnesses testified as to the intent and motive of the organization. Members of the organization, Dai Nisei, worked on the airfields, tunnels, foxholes, communication lines, and plane berths to keep the Japanese on orders of the accused. These were acts carrying out the purpose of the organization of Dai Nisei. Witnesses testified that they took part in military drill in which the accused was present. Accused was not only present once at the drill but every time. In fact he would correct their mistakes in their drill. He acted as a reviewing official at the drill. The witnesses said the purpose of the drill was to prepare them against the enemy, the enemy being the Americans. He had a plan on where to put the members of the Dai Nisei that were drilling in the event that the Americans attempted to retake Guam. He said that they were to be behind the Japanese soldiers. Not one of those who testified ever received any orders about the Dai Nisei from anyone except the accused. This organization was never heard of by any of the witnesses prior to the first meeting as stated above which was bout a month and a half after the Japanese invaded Guam.

Specification 1, charge I, of the additional charges and specification, Treason. -- Three witnesses testified in this case, Mrs. Butler, Carlos Bordallo and Jose S. Okada. Testimony shows that the accused accompanied some members of the Japanese armed forces to Mrs. Butler's house in Agana, Guam, on the morning of either December 11th or 12th, 1941. Accused told Mrs. Butler at that time in her home in the presence of Carlos Bordallo that she had an electric generator which the Japanese wanted to use. Mrs. Butler said the generator was not for sale; that it was the only one she had; and that it was in use. The accused told Mrs. Butler at that time that the officer wanted to take the generator. Mrs. Butler told him that her husband being away she could not give the generator away; her husband, Mr. Carl C. Butler, was a prisoner of the Japanese at that moment. The accused told Mrs. Butler to the effect that she better give the Japanese officer the generator and also serve lunch for him and the Japanese officer and their party. Mrs. Butler did serve lunch on this order and after lunch the Japanese took the generator, and that was the last time that Mrs. Butler saw the generator. She did not receive any pay for the generator from anyone at any time. Mrs. Butler had never seen any of the Japanese who were with the accused, before that day. She said she let them have the generator because, "I was afraid of the Japanese; they were holding my husband as prisoner." Mrs. Butler and Mr. Bordallo were eye witnesses to what was said and both saw the generator taken by the Japanese.

The next witness was Jose S. Okada, who stated that he had seen this generator at the home of Mrs. Butler before the Japanese occupation, and the last time he saw it was in 1943 in the possession of the Japanese; that he was an electrician and that he repaired the generator at the Japanese navy yard in Agana during the Japanese occupation; that a Japanese chief in the navy brought the generator to be repaired and Okada, the witness was sure that it was the same generator that he had seen in Mrs. Butler's home before the Japanese invaded Guam. The witness further stated that during the Japanese occupation, he had taken the generator aboard a Japanese ship and that it was used under the auspices of the Japanese navy for moving pictures and later the Japanese took it to Ritidian Point.

This testimony clearly shows that within one or two days after the Japanese came to Agana, Guam, the accused brought members of the Japanese armed forces to the home of Mrs. Butler for the purpose of getting her electric generator for the use of the Japanese, and the Japanese armed forces took it. This generator was identified by Okada as being used for the purposes of giving aid and comfort to the Japanese armed forces while in Guam. The accused was the man who brought

the Japanese to get the generator and accused was the one who told Mrs. Butler to give the generator to the Japanese. A prima facie case has been established.

Specification of charge I, Treason. Galo L. Salas testified that he was the cashier of the Naval Government of Guam before the Japanese occupation; that the last time he was in the office prior to the Japanese invasion was on December 8, 1941. The next time he was in the office was on the 19th of December, 1941. The testimony shows that the accused and two Japanese officers brought him to the Department of Records and Accounts office and accused ordered Salas to open the safe. Salas at first refused to open the safe and stated to the accused, "It would be better for me (Salas) to inform my superior officer before opening the safe combination". Accused then stated, "It is better for you to open the safe than to refuse or else you will be killed", and the accused told me that he was one of the officials of the Japanese Imperial Government. Salas further testified, "Then I put my right hand up to my head still thinking what I was to do, whether to open the combination or refuse. Shinohara talked to the Japanese officers infront of me but I do not know what they were saying. Then Shinohara talked to me and one of the Japanese soldiers tore my shirt under my right hand by his bayonet. I stated to Shinohara: 'I did not expect those things to be done on me', but Shinohara insisted that I open the safe so then I opened the combination for they were forcing me to do it or else I will be killed. After I opened the safe one of the Japanese officers came along and took all the money and papers in the safe that belonged to the Naval Government". Salas gave the amounts of money, checks, and things of value that were in the safe that was taken, and stated that the money was lawful money of the United States. After they took the money and papers, Shinohara ordered Salas to open the vault combination where "We kept all records". Salas testified, "Shinohara with the two Japanese officers got the combination terms from me both for the safe and the vault". The money was taken from the safe by Shinohara and the Japanese. It was placed in a money bag and carried with the other papers. Change from quarters to pennies were placed in a white canvas money bag. Salas further said: "Then we left the department of Records and Accounts, Shinohara with the money bag, the two Japanese officers with the papers and myself with the cashbook proceeded to where the former Marine Barracks was upstairs." They took the money to the Marine Barracks where it was turned over to the Japanese. On their way from Records and Accounts office to the Marine Barracks with the money, Salas recognized two people whom he knew and one of them was Vicente U. Zafra, the other Adolfo Sgambelluri. Zafra testified that he was in the lobby of the Records and Accounts building at the time Salas, accused and the Japanese were there; that he saw Salas open the safe in the presence of the accused and another Japanese. Zafra said that he saw the accused, Salas, two Japanese officers on their way from Records and Accounts towards the Marine Barracks; that Shinohara was carrying the white bag. This was about 10 minutes after Zafra had seen Salas working the combination on the safe in the cashier's cage. A prima facie case has been established.

Specification 3, of the additional charge I, Treason. Testimony of Vicente Taimanglo stated that he was employed by the accused to take care of the bar and mess for the accused at the Omiya Kaikan, which was a place for the use of the Japanese military officers; natives of Guam came there only by invitation. Unless the accused invited Chamorros, it was the only time that they could get in the place. Taimanglo stated that the opening of the club in February, 1942, was a big affair and that nobody was charged for food and drinks on that occasion. The accused instructed Taimanglo who to charge and who not to charge for services rendered at the Omiya Kaikan. Witness further said: "The accused made me understand that everything given out was to be paid for but in case the Japanese Governor came, everything was to be given to him free." The Governor was Hyashi.

"T(7)"

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Also at Hyashi's farewell party there was no charge to those present. Witness took his orders from the accused and no one else, and always turned the money over to the accused in the evening. He never turned it over to anyone else, except if he could not find the accused, then he would turn it over to his wife, Mrs. Carmen Shinohara, or his son, Gil Shinohara. Furthermore the Omiya Kaikan was locked when not in use and the key together with the money was taken over to Shinohara, and in opening the club, the witness had to get the key from Shinohara.

Witness, Agnes Rios, stated that she was at the opening party on 16 February, 1942; that she was a waitress; that she had served the Japanese Governor, Hyashi, at the Omiya Kaikan; that she does not remember at any time that she had ever charged him. She also stated that she was at the farewell party for Governor Hyashi at the Omiya Kaikan; that she did not collect any money at the farewell party. Also Beatrice Rios testified similar to her sister, Agnes Rios.

Next let us examine the testimony of the witnesses for the defense. Tomas Guzman, Cklc, U.S. Navy, during the Japanese occupation, was first taken into custody by the Japanese when they landed on Guam; later on he was employed by the Japanese Navy. In addition to his employment by the Japanese, he ran a soup and coffee house and he made the soup from materials he obtained from the Japanese Navy and native products.

Bishop Miguel Angel De Olano stated that on the 10th of December, 1941, he saw Captain George J. McMillin, U.S. Navy at 4:30 in the morning the day of the Japanese invasion and saw him no more that day. He said that there were many people on the plaza on the 10th of December; that he left the plaza at 7:00 o'clock that morning; that the accused took the key of his automobile and the next time he saw the car it was in possession of Japanese officers; that on the 10th of January, 1942, he left the plaza before the American prisoners and rode on a truck to Piti.

The next on direct testimony, Jesus S. Sayama, said that he had lived on Guam for 36 years; that he was on Guam throughout the Japanese occupation; that he knew the accused during that time; that he knew that the accused left the Island because he had seen him in Japan at one time; that accused was the headman of the Japanese society in Guam for a period of about ten years prior to the Japanese occupation and that the accused was president of that society at the time the Japanese invaded Guam; witness said that the name used by the Japanese for the Island of Guam during the occupation was Omiya To; witness said he spoke Japanese. When asked whether he read Japanese writing, he answered: "I did not go too far in school and I have been here for a long time so when it comes to those difficult characters, I cannot read them." Then he said upon questioning that the Japanese used the name Omiya To for the Island of Guam during the time that they were here. "To" meaning Island. I will now call your attention of the Japanese interpreter, George A.E. Cristobal, who reads, speaks and understands the Japanese language and who studied Japanese in a Japanese school and has been used as interpreter of the Japanese language in other cases before this commission. He was asked to state what the word, Omiya Kaikan means, and the answer was: "That is translated as written out. Omiya, the word literally translated means shrine or a temple or place of worship. Kaikan is a hall not necessarily a small building but it is considered as assembly hall. Those two words together I would say Omiya Kaikan is an assembly hall for either a church, court officials or nobles;" that the word in Japanese for restaurant or cafe is nothing like Omiya Kaikan. The accused asked the witness to consult the dictionary, locate

the word, Omiya, from there and read its definition. Whereupon the witness did refer to the dictionary and the answer was: "It says the word, "O", in Omiya is just a prefix." We find the proper word, Myia, as equivalent to the word in English, shrine. And when asked the further question by the commission, "What does the word, Omiya, mean to you in Japanese language", the answer was: "The word, Myia, means shrine, with the prefix "O", honorable shrine." Question: "Shrine of what nationality?" Answer was: "Just a plain shrine, Japanese." And another question was asked: "If you are engaged with persons conversing in Japanese language and have occasion to mention the Island of Guam, how would you designate it?" The answer was: "As far as all Japanese persons I have come across they never mentioned any other name or term except Guam To". Therefore if the witness used Omiya To, to mean the Island of Guam, he must have meant the shrine island and insofar as the Japanese held the Island and Omiya was a Japanese word he must have meant a Japanese shrine island. He stated that there were Dai Niseis in Guam; that is conceded as the term Dai Nisei applies to children of Japanese extraction. However, this must be distinguished from the organization of Dai Nisei as all children of Japanese extraction would be called Dai Nisei but until organized, it would not mean that there was an organization of Dai Nisei. The witness said that he had attended two meetings of the Dai Nisei held in Guam during the Japanese occupation and that the accused was present both times as an interpreter; that one meeting was presided over by Homura, the highest man in the Menseibu, which means something like the governor of the Island; that the presiding officer said at the meeting; "Now that the Japanese are here you children of Japanese extraction should learn the Japanese language as well as the Japanese ways and in case of fire or something of the sort, you should help". On cross-examination, witness testified that Pedro B. Sayama and Jesus B. Sayama are his sons and lived with him all the time; that both of his sons were Dai Nisei; that he had one son in the Japanese Army, so he has heard; he stated that the meetings of the Dai Nisei he had attended were not public meetings; that he saw the accused present at the time he saw the Dai Nisei drill; that he was not a member of the Dai Nisei; that "it was not mentioned what kind of meeting so he just went there to find out". And when asked who told him about the meeting, the answer was: "The order came from the Menseibu and Shinohara passed the word around." He had forgotten what dates the meetings were he attended. The first meeting he attended after December 10 was: "Maybe about six months later." He did not see any Guamanian Chamorros at the meetings he attended at the Dai Nisei and stated the purpose or principle of the Dai Nisei club were for members to learn the Japanese language, the Japanese custom and to help in case of typhoon or fire. Then he said he did not know if members of the Dai Nisei club worked as a Dai Nisei but they worked. He did say that he knew the members of the Dai Nisei club worked on tunnels, foxholes, airfields and communication lines in a group. He said their services were free at first. He said that someone did come to his house to order his son, Jesus B. Sayama to go to work on the airfield but he forgot who the person was that came (but it was not the accused). (Whereas his son said that Shinohara had asked him to work at the airbase). Witness denied that his son Jesus B. Sayama gave him a list of names of those working on the airbase to be paid and later on his testimony admitted that the son did give it to him. The witness was asked: "Was there any Dai Nisei organization before the Japanese came in?" The answer was: "Yes, there was a Dai Nisei organization before the war." He said that he had forgotten completely when it was organized and when asked if he knew any members of the organization of the Dai Nisei before the Japanese came in, the answer was: "Yes, I know." The next question: "Name them". The answer was: "Luis Takano and Ichang Shimizu are the only two I know." Then a question was again asked: "Did all members of the Japanese born prior to the Japanese occupation, become members of the organization of the Dai Nisei?"

"T(9)"

The answer was: "Before the invasion of the Japanese in Guam there was no members and there was no organization of the Dai Nisei either."

Two witnesses, Lourdes Anderson and Margaret Anderson testified that they worked at the Omiya Kaikan as employees of the accused; they testified that they had seen a Japanese mop the floor of the Omiya Kaikan with an American flag; that one of them had seen the same Japanese around the Omiya Kaikan before. One of them testified that the accused was present when this occurred; that one of them said it happened just before dark and the other said it happened sometime around noon. I do not know the purpose of this testimony only to indict a Japanese by the name of Okada for the desecration of the flag of the United States. The accused stood by during the desecration of the flag of the United States, by the Japanese.

The wife of the accused, Carmen Torres Shinohara, testified in the accused's behalf and stated that she had been married to the accused 25 years; that they were living in Agana at the time the Japanese invaded Guam and continued to live there throughout the Japanese occupation. She further stated that her husband, the accused, was an interpreter during the Japanese occupation, but did not know who he interpreted for; that he also run a grocery and dry goods store, and a taxi cab business at the time the Japanese invaded Guam; her husband was in jail and was released on December 10, 1941, she had been in the Omiya Kaikan; that Shinohara was the manager; that Shinohara had the key to the Omiya Kaikan; that Shinohara took the money which was collected at the Omiya Kaikan; that she prepared the food that was served at the Omiya Kaikan; that the Japanese ordered good food and she prepared it; that she understands the Omiya Kaikan was only for Japanese; that Shinohara, the accused, employed the employees of the Omiya Kaikan; that Shinohara furnished the food for the Omiya Kaikan, but the food came directly from the Japanese; that the Japanese furnished many boxes of food and some of those were taken to the Omiya Kaikan and other food that was not taken to the Omiya Kaikan remained in the warehouse; the warehouse was "a big building behind our residence"; that the food was American food; that the witness did not know if the food was paid for by the accused; that she did not know if her husband, the accused, was paid for running the Omiya Kaikan; that she remembered Guzman (a witness) brought food to her house three times; that she did serve some of the food that was prepared in her home to guests in her home; the guests included Japanese and Chamorros; that she knew the name of the first Japanese Governor of Guam and she served him food in her house; that the second governor of Guam had been to their house; that she did not know where the liquor came from that was served at the Omiya Kaikan but she knew that liquor was served; that when "the sailors were out on liberty, they came to the house"; that her daughter was 20 years old and she was present sometimes when Japanese were entertained; that the automobile that the accused used was kept "at our warehouse", a distance of about 75 yards from her home; that she did not know who kept the key to the automobile during the Japanese occupation; that she did not know Jose Crisostomo who drove the automobile for the accused for about one month; that she remembered the name of only one man who drove the automobile during the Japanese occupation, and the nickname of another one; that she did not know whether the automobile was kept in the automobile place in the warehouse every night; that she had seen the accused in the automobile; that she did not remember of anyone else using the automobile and then she said she had been in the automobile and sometimes she went with her daughter to church in the automobile; that the accused did not have an automobile at the time of the Japanese invasion. She said the only food used at the Omiya Kaikan was food brought by the Japanese; "there was plenty of it"; that she was not in the Omiya Kaikan on the opening night.

"T(10)"

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It appears that this witness, Mrs. Shinohara, wife of the accused, who has been married to the accused for 25 years, and has reared a family as issue of said marriage, and who lived in the same home with the accused and their family prior to and during the time the Japanese occupied Guam, is not very well informed as to all the activities of her husband, the accused, during the time of the Japanese occupation.

As said in the opinion of one of the most recent treason cases, Cramer v. United States, 65 S ct. 918, decided April 23, 1945.

> "Treason - insidious and dangerous treason - is the work of the shrewd and crafty more often than of the simple and impulsive."

The accused is charged with treason on two charges and four specifications and I will denote the remainder of my argument to those charges and specifications.

Treason as defined in section 37, Penal Code of Guam reads as follows:

> "37. Treason, who only can commit. — Every person, resident in the Island of Guam, owing allegiance to the United States or the Naval Government of Guam, who levies war against them or adheres to their enemies, giving them aid or comfort within the Island of Guam or elsewhere, is guilty of treason, and upon conviction shall suffer death or, at the discretion of the court, shall be imprisoned at hard labor for not less than five years."

> "Section 1103. Evidence on trial for treason. — Upon a trial for treason, the defendant cannot be convicted unless upon the testimony of two witnesses to the same overt act, or upon confession in open court; nor can evidence be admitted of an overt act not expressly charged in the information; nor can the defendant be convicted unless one or more overt acts be expressly alleged therein."

It will be noted that section 37 defines treason and provides penalty for violation if committed against either the United States or the Naval Government of Guam.

The accused is charged in each specification of the two charges of "wilfully, knowingly, and treasonably adhere to Japan, an enemy of the United States and give aid and comfort to Japan".

Historical materials aid interpretation of the law on treason. The following are excerpts from historical notes under Section 1.

(Criminal Code, section1.) Treason. United States Code Annotated, Title 18:

> "Proclamation issued under sections 1-3, 6, of this Title, and Const. art. III, section 3, dated April 16, 1917, after reciting the provisions of said sections and said constitutional provision, as follows:
>
> 'The courts of the United States have stated the following acts to be treasonable:
>
> 'The use or attempted use of any force or violence against the Government of the United States, or its military or naval forces:

'The acquisition, use, or disposal of any property with knowledge that it is to be, or with intent that it shall be, of assistance to the enemy in their hostilities against the United States;

'The performance of any act or the publication of statements or information which will give or supply, in any way, aid and comfort to the enemies of the United States;

'The direction, aiding, counseling, or countenancing of any of the foregoing acts.

'Such acts are held to be treasonable whether committed within the United States or elsewhere; whether committed by a citizen of the United States or by an alien, domiciled, or residing, in the United States, inasmuch as resident aliens, as well as citizens, owe allegiance to the United States and its laws.

'Any such citizen or alien who has knowledge of the commission of such acts and conceals and does not make known the facts to the officials named in Section 3 of the Penal Code (section 3 of this title) is guilty of misprision of treason.

'And I hereby proclaim and warn all citizens of the United States, and all aliens, owing allegiance to the Government of the United States, to abstain from committing any and all acts which would constitute a violation of any of the laws herein set forth; and I further proclaim and warn all persons who may commit such acts that they will be vigorously prosecuted therefore.

"Under the laws of the United States, the highest of all crimes is treason. It must be so in every civilized state; not only because the first duty of a state is self-preservation, but because this crime naturally leads to andinvolves many others, destructive of the safety of individuals and of the peace and welfare of society. This crime is defined by the constitution itself, and its magnitude, as well as the importance of a fit and rigid definition of it, may be inferred from the fact that it is the only offense defined by that instrument." Charge to Grand Jury (C.C. Mass. 1851) 2 Curt. 630, 30 Fed. Case. No. 18,269.

"4. What constitutes treason in general. -- Treason, as we are now concerned with it, assumes, as the proper attitude of all who are subject to this law, that of being well disposed toward the United States and of being its well wisher, and brands as traitor one who adheres to its enemies and who also levies war upon the United States, or who, in adhering to its enemies, gives those enemies aid and comfort. It is conceivable that a defendant may have this condemned attitude of mind or be what is termed "traitor at heart", and yet not expose himself to the charge of legal treason because he has committed no traitorous act. It is also conceivable that one under the domination of folly or of factional feeling or directed by a perverted view of what he is doing, or even a wrong-headed conscience, may do what would otherwise be traitorous acts, and yet not expose himself to that charge because the acts, although carrying all the consequences of traitorous acts, were done without traitorous purpose of intent. Such a man plays the part of a traitor, but is not a traitor at heart. U.S. v. Werner (D.C. Pa. 1918) 247 F. 708.

"5. Intent. -- A felonious intent is necessary to commit treason. The Ambrose Light (D.C. N.Y. 1885) 25 F. 408,427.

"But 'an intention to commit treason is an offense entirely distinct from the actual commission of that crime'. U.S. v. Burr (C.C. Va. 1807) 4 Cranch (Appendix) 455, 25 Fed.Cas. No. 14, 692a.

"'The true criterion to determine whether acts committed are treason, or a less offense (as a riot) is the quo animo, or the intention, with which the people did assemble. Where the intention is universal or general, as to effect some object of a general public nature, it will be treason, and cannot be considered, construed, or reduced to a riot. The commission of any number of felonies, riots, or other misdemeanors, cannot alter their nature, so as to make them amount to treason, they cannot be sunk down to a felony or riot. The intention with which any acts (as felonies, the destruction of property, or the like) are done, will show to what class of crimes the case belongs.' Fries' Case (C.C. Pa. 1800) 9 Fed. Cas. No. 5, 127. To the same effect, see U.S. v. Hoxie (C.C. Va. 1808) 1 Paine 265, 26 Fed. Cas. No. 15, 407.

"7. Overt acts. — The crime of treason denounced by Const. art. 3 section 3, and this section, cannot be committed unless there be an overt act, which is an act in furtherance of the crime, which consists either in levying war or adhering to the enemies of the United States, etc. U.S. v. Fricke (D.C. N.Y. 1919) 259 F. 673.

"10. Allegiance - 'Treason is a breach of allegiance and can be committed by him only who owes allegiance, either perpetual or temporary. The words, therefore, 'owing allegiance to the United States' in (this) section, are entirely surplus words, which do not in the slightest degree affect its sense. The construction would be precisely the same were they omitted'. U.S. v. Wiltberger (C.C. Pa. 1820) 5 Wheat. 76, 5 L. Ed. 37.

"11. Aliens. — 'Allegiance is of two kinds: That due from citizens, and that due from aliens residents within the United States. Every sojourner who enjoys our protection is bound to good faith toward our government, and although an alien, he may be guilty of treason by co-operating either with rebels or foreign enemies. The allegiance of aliens is local, and terminates when they leave our country. That of citizens is not so limited — although the European doctrine of indissoluble and perpetual allegiance has not been accepted in this country.' Charge to Grand Jury (D.C. Mass. 1861) 1 Sprague 692m 39 Fed. Cas. No. 18, 273.

"'Treason against the United States may be committed by any one resident or so journer within its territory, and under the protection of its laws, whether he be a citizen or alien. 1 Hale Prec. (Eng.) 59, 60, 62; 1 Hawk. P.C. (Eng.) c. 2, sections 5; W. Kel. (Eng.) 38' Charge to Grand Jury, (C.C. Pa. 1851) 2 Wall, Jr. C.C. 134, 30 Fed. Cas. No. 18, 276.

"An alien resident may be guilty of treason by co-operating either with rebels or foreign enemies. Charge to Grand Jury, Treason (D.C. Mass. 1863) Fed. Cas Nos. 18,274 (C.C. Pa 1851) 18,276.

"The well-established rule that an alien while domiciled in a country owes to it a local and temporary allegiance, which continues during the

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period of his residence, in return for the protection he receives, and that for a breach of this temporary allegiance he may be punished for treason, was extended to aliens who were domiciled during the Rebellion within the insurrectionary district and within the Confederate lines. Carlisle's Case, 8 Ct. Cl. 153.

"16. -- Aid and comfort to rebels. -- Every species of aid and comfort which, if given to a foreign enemy, would constitute treason within the second clause of the constitutional provision -- adhering to the enemies of the United States - would if given to the rebels in insurrection against the government constitute a levying of war under the first clause. U.S. v. Greathouse (C.C. Cal. 1863) 4 Sawy. 457, 26 Fed. Cas. No. 15,254.

"18. After war actually exists, it is treasonable to sell to, or provide arms or munitions of war, or military stores and supplies, including food, clothing, etc., for the use of the enemy; to hire, sell, or furnish boats, railroad cars, or other means of transportation, or to advance money or obtain credits for the use and support of the hostile army; and to communicate intelligence to the enemy by letter, telegraph, or otherwise, relating to the strength, movements, or position of the army. Charge to Grand Jury, Treason (C.C. Ohio, 1861) Fed. Cas. No. 18,272; Charge to Grand Jury (C.C. N.Y. 1861) 5 Blatchf. 549, 30 Fed. Cas. No. 18,271.

"'What amounts to adhering to and giving aid and comfort to our enemies it is somewhat difficult in all cases to define; but certain it is that furnishing them with arms or munitions of war, vessels or other means of transportation, or any materials which will aid the traitors in carrying out their traitorous purposes, with a knowledge that they are intended for such purposes, or inciting and encouraging others to engage in or aid the traitors in any way, does come within the provisions of the act'. Charge to Grand Jury (C.C. N.Y. 1861) 4 Blatchf. 518,30 Fed. Cas. No. 18,270.

"22. Persons liable.

In U.S. v. Burr (C.C. Va. 1807) 25 Fed. Cas. No. 14,693, Chief Justice Marshall said: 'All those who perform the various and essential military parts of prosecuting the war, which must be assigned to different persons, may with correctness and accuracy be said to levy war. Taking this view of the subject, it appears to the court that those who perform a part in the prosecution of the war may correctly be said to levy war and to commit treason under the constitution.'

"A person present, directing, aiding, abetting, counseling, or countenancing the violence, or if, though absent at the time of its actual perpretration, he yet directed the act, or devised or knowingly furnished the means for carrying it into effect, and instigated others thereto, is guilty of treason. Charge to Grand Jury, Treason (C.C. Pa. 1851) Fed. Cas. No. 18,276.

"'Treason may be committed by those not personally present at the immediate scene of violenced. Influential persons cannot form associations to resist the law by violence, excite the passions of ignorant and unreflecting, or desperate men, incite them to action, supply them with weapons, and then retire and await in safety the result of the violence which they themselves have caused.' Charge to Grand Jury (C.C. Mass. 1851) 2 Curt. 630, 30 Fed. Cas. No. 18,269.

"T(14)"

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"The fact of levying war may consist of a multiplicity of acts performed in different places by different persons, and any one of such persons, when leagued in the general conspiracy, is liable as a principal traitor. U.S. v. Burr (C.C. Va. 1807) Fed. Cas. No. 14,694a

"'If war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable object, all those who perform any part, however minute or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors.' U.S. v. Burr (C.C. Va. 1807) 25 Fed. Cas. No. 14,693. To the same point, see Ex parte Bollman (Dist. Col. 1807) 4 Cranch, 75, 125, 2 L. Ed. 554; Charge to Grand Jury, Neutrality Laws and Treason (C.C. Mass. 1851) Fed. Cas. No. 18269; Charge to Grand Jury, Treason and Piracy (C.C. Mass. 1861) Fed. Cas. No. 18, 277; U.S. v. Greathouse (C.C. Cal. 1863) Fed. Cas. No. 15, 254.

"Thus, 'if a person in league with those who are levying war send them arms, provisions, money, or intelligence for the purpose of aiding them, he may be a traitor, however distant from the place of their assemblage'. Charge to Grand Jury (D.C. Mass. 1861) 1 Sprague 602, 30 Fed. Cas. No. 18,273; Charge to Grand Jury, Treason (D.C. Mass. 1863) Fed. Cas. No. 18,274.

"'Successfully to instigate treason is to commit it.' Charge to Grand Jury (C.C. Pa. 1851) 2 Wall. Jr. C.C. 134, 30 Fed. Cas. No. 18,276.

"23 — Principals and accessories. — In treason there are no accessories; all participants are principals. U.S. v. Fries (C.C. Pa. 1799) 3 Dall. 515, 1 L. Ed. 701, 9 Fed. Cas. No. 5,126; Case of Fries (C.C. Pa. 1800) Fed. Cas. No. 5,127; U.S. v. Hanway (C.C. Pa. 1851) 2 Wall. Jr. C.C. 139, 26 Fed. Cas No. 18,276; U.S. v. Greathouse (C.C. Cal. 1863) Fed. Cas. No. 15,254.

"All who engage in rebellion, or who designedly give to it any species of aid and comfort, in whatever part of the country they may be, are principals. U.S. v. Greathouse (C.C. Cal. 1863) Fed. Cas. No. 15,254; Case of Fries (C.C. Pa. 1800) Fed. Cas. No. 5,127; U.S. v. Hanway (C.C. Pa. 1851) 2 Wall. Jr. C.C. 139, 26 Fed. Cas. No. 15,299.

"Every act, which, in the case of felony, would render a man an assessory, will, in the case of treason, make him a principal. All persons present, aiding, assisting, or abetting any treasonable act, are principals. All persons, who are present and countenancing, and are ready to afford assistance, if necessary, to those who actually commit any treasonable act, are also principals. U.S. v. Fries (C.C. Pa. 1799) 3 Dall. 515, 1 L. Ed. 701, 9 Fed. Cas. No. 5,126.

"26 — On trial.

In U.S. v. Burr (C.C. Va. 1807) 25 Fed. Cas. No. 14,693, Chief Justice Marshall ruled: "That any proof of intention formed before the act itself, if relevant to the act, may be admitted. One witness may prove the intention at one time, and another may prove it at another so as to prove the continuance of the intention throughout the whole transaction, and therefore the proof of very remote intention may be relevant to this particular act. --- The intention to commit this crime to erect an empire in the West, and seize New Orleans, may be shown by subsequent events to have been continued; and facts out of the district may be proved, after the overt act as corroborative testimony.

"T(15)"

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"Conversions or actions at a different time and place may be given in evidence as corroborative of the overt act of levying war, after that has been proved in such a manner as to be left to a jury. U.S. v. Burr (C.C. Va. 1807) 25 Fed. Cas. No. 14,694a.

"Facts occurring and rumors prevalent in the neighborhood which would explain certain particulars relied upon to show treasonable intent, and make them show a different intent, though a long time in advance of the alleged treasonable occurrence, are admissible. U.S. v. Hanway (C.C. Pa. 1851) Fed. Cas. No. 15,299.

"There is no rule of law which excludes the testimony of an accomplice, or prevents the jury from giving credence to it, when it has been corroborated in material particulars. U.S. v. Greathouse (C.C. Cal. 1863) 4 Sawy. 457, 26. Fed. Cas. No. 15,254.

Number of Witnesses:

"The crime of treason cannot be committed unless there be an overt act, and that overt act must be proved by at least two witnesses. U.S. v. Mitchell (C.C. Pa. 1795) 2 Dall. 348, 1 L. Ed. 410, 26 Fed. Cas. No. 15,788; U.S. v. Fricke (D.C. N.Y. 1919) 259 F. 673.

"And it is necessary to produce two direct witnesses to whole overt act, and it may not be proved by one witness and circumstantial evidence. U.S. v. Robinson (D.C. N.Y. 1919) 259 F. 685.

"But 'where the overt act is single, continuous, and composite, made up of, or proved by, several circumstances, and passing through several stages, it is not necessary, in order to satisfy the provisions of the Constitution requiring two witnesses to an overt act, that there should be two witnesses to each circumstance at each stage, as distinguished from the necessary proof of two witnesses to an act other than continuous and composite. That means this: If one of the overt acts, we will say, was as in this case the sending of a telephone message, and you have the testimony of the telephone operator who received the message for transmission, and the testimony of the person to whom the message was transmitted, there are the stages of one transaction proved by two witnesses, as the one witness was at one end of the telephone and the other witness at another'. U.S. v. Fricke (D.C. N.Y. 1919) 259 F. 673.

Other offenses:

"Intent is an indispensable element in the establishment of treason, and prior acts have always been admitted for the purposes of showing intent. U.S. v. Schulze (D.C. Cal. 1918) 253 F. 377, affirmed Schulze v. U.S. (C.C.A. 1919) 259 F. 189.

"29. Order of proof.

'When two witnesses are produced which proves the overt act laid in the indictment, there might be then evidence drawn from other counties respecting the intention."

All acts of the accused in this case demonstrates that the accused had a liking for the Japanese design to the extent of aiding them in it. The acts show beyond doubt that Shinohara had more than a treasonable intent, that that intent had moved from the realm of thought into the realm of action.

"T(16)"

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Again citing from the Cramer case 65 S. ct. 918.

"Overt acts are such acts as manifest a criminal intention and tend towards the accomplishment of the criminal object. They are acts by which the purpose is manifested and the means by which it is intended to be fulfilled."

The prosecution has introduced much testimony, perhaps beyond the minimum necessary to support the charge of treason. This has been done to present the aggravation of the crime. However, either one of the four specifications under treason if proven, the accused is guilty of treason.

In each of the four specifications under the charges of treason, there are two witnesses or more to the overt acts, and the evidence supporting each specification demonstrates that accused did adhere to and give aid and comfort to the enemy.

In the Mrs. Butler specification, an electric generator was taken by the accused and the members of the Japanese armed forces and used to supply electric power to the enemy.

In the Omiya Kaikan specification, accused furnished food and drink and provided an assembly hall for the enemy. Thereby the accused adhered to and gave aid and comfort to the enemy.

The accused and members of the Japanese armed forces took lawful money of the United States, and valuable papers from the safe of the office of Records and Accounts, and in so doing, the accused adhered to, and gave aid and comfort to the enemy.

In the specification where accused organized the Dai Nisei, the accused adhered to and gave aid and comfort to the enemy.

Then the prosecution has shown that the accused by his acts and intentions gave electric power, food and drink, money and labor for the installation of military communication lines, air bases, tunnels, fox holes, for the support of the enemy armed forces.

Traitors operate in various ways, in accordance with opportunities presented. In what way would it have been possible on the Island of Guam for the accused or any other enemy to have given greater adhereance and aid and comfort to Japan than by doing the things proven, and by organizing and assembling a group of young men and enforcing their operations in support of the enemy forces against the interests of the Naval Government of Guam and the United States of America.

There is not one scintilla of evidence presented by the defense explaining why these acts were done by the accused to further the interests of the enemy. Again citing from the Cramer case, 65 SCt.918:

"Since intent must be inferred from conduct of some sort, we think it is permissible to draw usual reasonable inferences as to intent from the overt acts. The law of treason, like the law of lesser crimes, assumes every man to intend the natural consequences which one standing in his circumstances and possessing his knowledge would reasonably expect to result from his acts. Proof that a citizen did give aid and comfort to an enemy may well be in the circumstances sufficient evidence that he

adhered to that enemy and intended and purposed to strike at his own country. It may be doubted whether it would be what the founders intended, or whether it would well serve any of the ends they cherished, to hold the treason offense available to punish only those who make their treacherous intentions more evident then may be done by rendering aid and comfort to an enemy."

Section 311 of Naval Courts and Boards reads as follows:

"311. Same: Rebuttable. - A rebuttable presumption is an assumption made by law that an inference of fact is prima facie correct. This presumption places the burden of rebuttal upon the party against whom it operates. In the absence of evidence to the contrary the law presumes that:

(1) An unlawful act was done with unlawful intent."

The crime of treason, although odious as it is, is not a complicated one to prove or determine, facts presented, if proven, determine the innocence or guilt of the accused. Members of the commission, there is one question to determine. Did Shinohara, the accused, adhere to the enemy giving them aid and comfort? If you find beyond a reasonable doubt that Shinohara did adhere to, and give aid and comfort to the enemy, - then he is guilty of treason.

Teller Ammons

TELLER AMMONS,
Lieutenant Colonel, Army of the U.S.,
Judge Advocate.

HEADQUARTERS,
ISLAND COMMAND, GUAM.

OCT 11 1945

I hereby acknowledge the receipt of a copy of the record of proceedings of my trial by Military Commission, held July 28 to August 27, 1945.

SAMUEL T. SHINOHARA

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ADDRESS REPLY TO

AND REFER TO

NAVY DEPARTMENT

WASHINGTON 25, D. C.

JAG:I:TH:tlh
Hil.Com.-SHINOHARA, Samuel T./
A17-10/QQ (6-4-48) 144704

24 AUG 1948

To: Commander Marianas Area.
Via: Commander in Chief, United States Pacific Fleet.

Subj: Military Commission case of Samuel T. Shinohara, inhabitant of Guam, tried by order of the Island Commander, Guam, on 28 July 1945.

1. The Military Commission before which Samuel T. Shinohara, inhabitant of Guam, was tried found him guilty of Charge I, Treason (1 specification); Charge III, Assault and Battery (1 specification); Charge IV, Taking a Female for the Purpose of Prostitution (2 specifications); Additional Charge I, Treason (3 specifications); and Additional Charge II, Assault and Battery (2 specifications); acquitted him of Charge II, Theft (1 specification); and Additional Charge III, Desecration of the Flag (1 specification); and adjudged the following sentence:

> "The Commission, therefore, sentences him, Samuel T. Shinohara, a civilian, to death, to be executed by hanging the said Samuel T. Shinohara by the neck until he is dead, two-thirds (2/3) of the members of the Commission concurring."

2. The Island Commander, Guam, the convening authority, on 13 October 1945, approved the proceedings, findings and sentence in this case.

3. The Commander in Chief, United States Pacific Fleet and Pacific Ocean Areas and Military Governor, Guam, the reviewing authority, on 30 January 1946, subject to remarks, approved the proceedings, the findings as to all charges and specifications except that on the first specification of Charge IV, which he disapproved, the sentence and the action of the convening authority except as it referred to the first specification of Charge IV.

4. The Acting Secretary of the Navy, on 24 AUG 1948 approved the remarks and recommendations of the Judge Advocate General dated 26 April 1948, set aside the findings on Charge I and the specification thereunder, Charge III and Additional Charge

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JAG:I [illegible]
[illegible] General [illegible]
A17-10/04 (6-13-46) 244704

II and the specifications thereunder, and specification 3 of Additional Charge I, and the action of the convening and reviewing authorities thereon; in accordance with the provisions of Section [illegible]-14, Naval Courts and Boards, 1937, commuted the sentence of death in this case to imprisonment at hard labor for a period of fifteen years, time served by Shinohara since the thirteenth day of October 1945 to be regarded as time served with respect to the sentence as commuted; and directed that Shinohara be transferred to Japan for imprisonment at such place as may be designated by the Supreme Commander for the Allied Powers.

John Nicholas Brown
ACTING Secretary of the Navy.

CC:
Chief of Naval Operations.

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ADDRESS REPLY TO

NAVY DEPARTMENT
WASHINGTON 25, D. C.

AND REFER TO

JAG:I:THH:bem
Mil. Com. -SHINOHARA, Samuel T./
A17-10/0Q (6-11-48) 144704

24 AUG 1948

The remarks and recommendations of the Judge Advocate General, in the foregoing Military Commission case of Samuel T. Shinohara, inhabitant of Guam, are approved. Accordingly, the findings on Charge I and the specification thereunder, Charge III and Additional Charge II and the specifications thereunder, and specification 3 of Additional Charge I, and the action of the convening and reviewing authorities thereon, are set aside.

The sentence of death, to be executed by hanging by the neck until dead, is hereby commuted to imprisonment at hard labor for a period of fifteen (15) years. Time served in confinement by Shinohara since the thirteenth day of October 1945, shall be regarded as time served with respect to the sentence as commuted.

It is directed that Shinohara be transferred to Japan for imprisonment at such place as may be designated by the Supreme Commander for the Allied Powers.

[signature]

Acting Secretary of the Navy.

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ADDRESS REPLY TO
OFFICE OF THE JUDGE ADVOCATE GENERAL

AND REFER TO:

NAVY DEPARTMENT
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON 25, D. C.

JAG:I:THH:lmh
Mil. Com. - Shinohara, Samuel T./
A17-10/0Q (7-21-48) 144704

26 July 1948

MEMORANDUM FOR THE SECRETARY OF THE NAVY.

Subject: Military Commission case of Samuel T. Shinohara, inhabitant of Guam, tried by order of the Island Commander, Guam, on 28 July 1945.

Reference: (a) Acting SecNav Memo. to JAG, dtd 8 July 1948.

1. In accordance with the request contained in reference (a) the following explanation is submitted with respect to the attached recommendation regarding the sentence in subject case:

2. Should the Secretary of the Navy approve the attached recommendation of the Judge Advocate General with respect to the findings, Shinohara would stand convicted of specifications 1 and 2 under Additional Charge I, Treason, and of specification 2 under Charge IV, Taking a Female for the Purpose of Prostitution. The Commander in Chief, United States Pacific Fleet and Pacific Ocean Areas and Military Governor, Guam, the reviewing authority, on 30 January 1946, disapproved the finding on the first specification of Charge IV, leaving only one (1) specification found proved under that charge. The one specification under Charge IV would support a sentence of imprisonment not to exceed five (5) years. Penal Code of Guam, Section 266a.

3. The Judge Advocate General concurs in the view expressed by the Acting Secretary of the Navy that the average layman may experience considerable difficulty in rationalizing the conviction of a Japanese national for treason against the United States arising from acts committed during the existence of a state of war between the two nations. Nevertheless, when Shinohara took up his residence on the island of Guam, an obligation of allegiance to the island government and the United States was imposed upon him by operation of law. The rule is reasonable and widely recognized that an alien owes allegiance to the country of his temporary sojourn in return for the protection he receives and that he is not relieved of this allegiance by the acts of the state of his nativity even though that state may be at war with the country of his temporary residence. Under these circumstances, it is no defense to an action for treason that the accused did not intend to undertake an allegiance to the country of his temporary residence.

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Mil. Com. - Shinohara, Samuel T./
A17-10/OQ (7-21-48) 144704

4. The accused in this case was not a casual visitor on the island. He went to Guam in 1905, married a Chammoro woman who was a native of Guam and a national of the United States, had children by her, and conducted a business on the island, thereby earning a living for himself and family. From 1905 until the occupation of the island by the Japanese military forces, Shinohara accepted the actual protection of the sovereignty of the United States as exercised through her peaceful military government of the island. See Naval Courts and Boards, sections D-4 and D-5. Under the law, this protection continued during the Japanese occupation, the sovereignty of the United States over the island remaining in status quo until the right to its possession should finally be determined by a treaty of peace.

5. Section 37 of the Penal Code of Guam defines the crime of treason in substantially the same language that is used in the Constitution of the United States to define that crime. It specifically provides, however, that "Every person, resident in the Island of Guam, owing allegiance to the United States or the Naval Government of Guam, * * * who adheres to their enemies, giving them aid or comfort * * * is guilty of treason, and upon conviction shall suffer death or, * * * shall be imprisoned at hard labor for not less than five years." Underscoring supplied.

6. In the opinion of the Judge Advocate General, approval of the findings of the military commission on specifications 1 and 2 of Additional Charge I, Treason, is inescapable in view of the authorities cited in the opinion of the Judge Advocate General dated 28 April 1948. This being true, it would seem inconsistent, in view of the grave nature of the offense, as well as contrary to the spirit of the Penal Code of Guam, to disregard entirely the conviction on those specifications in arriving at the duration of the imprisonment to be imposed.

7. Treason as defined by the Penal Code of Guam and the Constitution of the United States is a crime that can be committed only in time of war. The military government of Guam and the laws promulgated by that government were founded upon the laws of war. Naval Courts and Boards, section D-5. Winthrop classifies offenses cognizable by military commissions as follows:

(1) Crimes and statutory offenses cognizable by State or U.S. courts, and which would properly be tried by such courts if open and acting;

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A17-10/0Q (7-21-48) 144704

(2) Violations of the laws and usages of war cognizable by military tribunals only;
(3) Breaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of war.

Winthrop further states that "Treason" was frequently charged as a name for offenses included in class (2), such as, among others, aiding the enemy or furnishing them with money, arms, provisions, medicines and the like. Winthrop's Military Law and Precedents, Second Edition, sections 1309 and 1310.

8. In view of the foregoing, it is the opinion of the Judge Advocate General that a sentence of fifteen years at hard labor to be executed in Japan is commensurate with fairness and consistent with the law and existing regulations.

G.L. RUSSELL
Judge Advocate General of the Navy.

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THE SECRETARY OF THE NAVY
WASHINGTON

-8 JUL 1948

MEMORANDUM

To: The Judge Advocate General.

Subject: Military Commission Case of Samuel T. SHINOHARA.

1. The subject-named case presents some aspects which I would desire clarified before approving your present recommendation regarding the sentence.

2. I note that by the present action Shinohara is convicted of white slavery and an additional charge of treason. The treason, I understand, consists of assisting the Japanese occupying forces in Guam by promoting an organization of natives for construction of defenses and for aiding in the confiscation of an electric generator. Since the prisoner is of Japanese origin and it is not clear to me that he had undertaken allegiance to the United States, it is not clear in my mind that the offenses actually constituted treason. This point of view is not taken on legal grounds, but is based purely on a lay reaction to the circumstances as I presently see them. I would appreciate an explanation which would clarify this point and establish the offenses as war crimes.

3. Aside from the conviction for treason, Shinohara's conviction on two (2) specifications of procuring would not appear to support the recommended sentence.

4. My request for these explanations is based entirely on the desire to guard against any action which might have the appearance of arbitrary punitive action under the cloak of prosecution for war crimes. While we certainly are not bound to exercise tenderness in these cases, I feel that they should stand on their merits as to fairness.

JOHN NICHOLAS BROWN
ACTING

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In reply refer to Initials and No.

Op22D/flf
Serial 552P22

NAVY DEPARTMENT
OFFICE OF THE CHIEF OF NAVAL OPERATIONS
WASHINGTON 25, D. C.

30 APR 1948

FIRST ENDORSEMENT on
JAG Record of Proceedings
Mil.Com.-SHINOHARA, Samuel T./
A17-20 I (7-2-47) PVD:mas 144704
dtd 28 April 1948.

From: Chief of Naval Operations.
To: Judge Advocate General.

Subject: Record of Proceedings of Military Commission at Guam in the case of Samuel T. Shinohara.

1. Returned, contents noted.

W. F. Jennings,
By direction.

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Case no. 144704
HM 2/24/47

MILITARY COMMISSION CASE
of
Samuel T. Shinohara,
Inhabitant of Guam.

Date of trial:
July 28, 1945.

	Plea	Finding	CA action	RA action
CHARGE I: TREASON	NG	G	Approved	Approved
Spec. Alleges S treasonably adhered to Japan and gave aid and comfort to Japan on or about Dec. 16, 1941, by aiding, assisting, and participating in the taking by the Japanese forces of $8,000. in cash and $1,000. in checks, property of the Naval Gov't. of Guam.	NG	Proved SA	"	"
CHARGE II: THEFT	NG	NG	"	"
Spec. Alleges S in or about the month of Feb. 1942 stole an automobile, property of one J. E. Davis, Lt (jg), USN	NG	Not proved	"	"
CHARGE III: ASSAULT AND BATTERY	NG	G SA	"	"
Spec. Alleges S on or about Jan. 20, 1942, struck Naval Governor of Guam.	NG	Proved	"	"
CHARGE IV: TAKING A FEMALE FOR THE PURPOSE OF PROSTITUTION.	NG	G	"	"
Spec. 1. Alleges S in or about the month of Feb. 1942 unlawfully took a female against her will and without her consent for the purpose of prostitution.	NG	Proved in part	"	Disapproved
Spec. 2. Alleges S in or about the month of Feb. 1942 unlawfully took a female against her will and without her consent for the purpose of prostitution.	NG	Proved	"	Approved
ADDITIONAL CHARGE I: TREASON	NG	G	"	"
Spec. 1. Alleges S treasonably adhered to Japan on or about Dec. 11, 1941, and gave aid and comfort to Japan by aiding, assisting and participating in the taking by and for the use of the Japanese forces of an electric generator of the value of $500., property of one Butler, inhabitant of Guam.	NG	Proved	"	

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	Plea	Finding	CA action	RA action
Spec. 2. Alleges S treasonably adhered to Japan in or about the month of Dec. 1941 and gave aid and comfort to Japan by organizing, soliciting and promoting a Dai Nisei organization for the purpose of assisting the Japanese forces, and that the members of such organization did in fact assist the Japanese forces by building fortifications, airfields, foxholes and tunnels for the use of the Japanese forces.	NG	Proved in part		
Spec. 3. Alleges S treasonably adhered to Japan in or about the month of April 1942 and gave aid and comfort to Japan by supplying the Japanese forces with provisions and refreshments.	NG	Proved in part SA	"	"
ADDITIONAL CHARGE II: ASSAULT AND BATTERY	NG	G	"	"
Spec. 1. Alleges S on or about Dec. 10, 1941, struck the Naval Governor of Guam.	NG	Proved SA	"	"
Spec. 2. Alleges S on or about Jan. 1, 1942, struck the Naval Governor of Guam.	NG	"	"	"
ADDITIONAL CHARGE III: DESECRATION OF THE FLAG.	NG	NG	"	"
Spec. Alleges S in or about the month of Feb. or March, 1942, publicly defiled and cast contempt upon the flag of the U.S. by using such flag for the purpose of wiping off a bar.	NG	Not proved	"	"

SENTENCE: To death by hanging.

ACTION OF THE CONVENING AUTHORITY: Approved the proceedings, findings and sentence.

ACTION OF THE REVIEWING AUTHORITY: Approved the proceedings, findings as to all charges and specifications except specification 1 of Charge IV which he disapproved, the sentence, and the action of the CA except as it referred to the finding on specification 1 of Charge IV; and referred the record to the Secretary of the Navy.

The accused was acquitted of Theft (1 spec.) and of Desecration of the Flag (1 spec.). The RA disapproved the finding on the first spec. of Charge IV, Taking a Female for the Purpose of Prostitution. The accused thus stands convicted of Treason (4 specs.), Taking a Female for the Purpose of Prostitution (1 spec.), and Assault and Battery (3 specs)

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The first prepared action states in part: "Subsequent to the trial of the accused and the actions of the reviewing authorities on the record of proceedings, there was received in the Navy Department a statement signed by Captain George J. McMillin, the officer alleged to have been assaulted by the accused and who did not testify at the trial. Captain McMillin unequivocally denied that the accused struck him in the face or otherwise on the date specified or on any other date; and that he was in Guam on 10 December 1941 and on 1 January 1942 but that he was removed from Guam by the Japanese Military Authorities on 10 January 1942 and was, therefore, not even in Guam on 20 January 1942, one of the dates on which it was alleged that he was assaulted. * * * Accordingly, it is recommended that the findings on Charge III [Assault and Battery] and Additional Charge II [Assault and Battery], and the specifications thereunder, and the action of the convening and reviewing authorities thereon, be set aside."

Excluding the convictions on the Assault and Battery charges, the accused stands convicted of Treason (4 specs.) and of Taking a Female for the Purpose of Prostitution (1 spec.).

The second prepared action set aside not only the findings on Charge III (Assault and Battery) and Additional Charge II (Assault and Battery) but also Charge I (Treason) and Additional Charge I (Treason) and the specifications thereunder.

Under the second prepared action, the accused stood guilty of only one charge, Taking a Female for the Purpose of Prostitution (1 specification).

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FACTS (Charge I - specification)

For the prosecution:

Salas testified that before the Japanese invasion he was the cashier of the Naval Government of Guam in the Department of Records and Accounts in the Coontz Building, Agana; that at about 2:30 p.m. on December 19, 1941, the accused and two Japanese officers and four Japanese body guards brought him to the Records and Accounts office and that the accused ordered him to open the combination safe; that he refused and stated to the accused that it will be better for the witness to inform his superior officer before opening the safe; that the accused stated that it is better for the witness to open the safe than to refuse or else the witness will be killed, and then the accused told the witness he is one of the officials of the Japanese Imperial Government; that the witness then put his right hand up to his head still thinking what he was to do, whether to open the combination or refuse; that the accused talked to the two Japanese officers in front of the witness, but the witness did not know what they were saying; that then the accused talked to the witness and one of the Japanese soldiers tore his shirt under his right hand by his bayonet; that the witness stated to the accused he did not expect those things to be done on him, but that the accused insisted that he open the safe; that the witness then opened the combination, for they were forcing him to do so or else he will be killed; that after he opened the safe the accused personally came through the safe and opened the door of the safe; that after the accused opened the door of the safe, one of the Japanese officers came along and took all the money and papers in the safe that belonged to the Naval Government; that there was $6700. in cash and $1239.41 in checks in the safe and taken out at that time; that they carried the money in their hands; that the accused had the U.S. currency in a white canvas money bag and the Japanese officers the bills; that the witness, the accused, and the Japanese left the Department of Records and Accounts, the accused carrying the money bag, the Japanese officers the paper, and the witness the cash book, and proceeded to the Marine Barracks; that on the way to the Marine Barracks they passed Dorn Hall; and that in passing Dorn Hall the witness recognized Adolfo Sgambelluri, patrolman, who was inside Dorn Hall at the window, and that he also recognized Zafra who was standing on the side of Dorn Hall with some friends of his.

Zafra testified that about a week after the invasion he went to the Records and Accounts office and remained in the building no more than ten minutes; that he saw Salas there inside the booth turning the combination of the safe; that the accused was standing by the door, and two or three Japanese were with them inside the booth; that after he left the building he went over to the side of Dorn Hall and hung around there with a few policemen; that about five or ten minutes later he saw the accused and Salas and two or three Japanese passing by on the street; that they were all carrying something - white bag, paper and books; that the books looked like a ledger, and some like white paper, and that the accused was carrying a white bag; that they passed by fifteen or twenty yards away heading toward the Marine Barracks; and that Adolfo Sgambelluri and several others were with the witness when these people passed by.

(Additional Charge I - 1st specification)

For the prosecution:

Ignacia Butler testified that the accused came to her house with three or four armed Japanese about the 11th or 12th of December, 1941, between eleven and twelve noon; that the accused said that he knew that she had an electric generator and wanted to know where it was; that she told him it was under her house; that the accused said that this officer wated to take the generator and that the accused wanted to see it; that her brothers, Carlos Bordallo and B. J. Bordallo, were present during this conversation; that the accused said something

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to the effect that she better give the officer the generator and also she should serve lunch for this officer and his party; that she told one of her brothers to take the accused and party down to where the generator was; that she served lunch and after lunch this officer and his party and the accused went downstairs and took the generator and loaded it on a truck; that she never saw the generator again; that she never received pay for it nor for its use; that she let them take it because she was afraid of the Japanese, that they were holding her husband as a prisoner; that she was given a slip of paper written in Japanese, but that she did not know what it said and had lost it; and that the value of this generator was that it was not for sale.

Carlos Bordallo testified that he saw the accused in the home of Mrs. Butler a day or two after the Japanese invasion; that at that time he heard a conversation between the accused and Mrs. Butler about an electric generator which was in the basement; that Mrs. Butler gave him the key and told him to open the basement and show the accused and his companions the generator; that after that they went upstairs to Mrs. Butler again, but that they did not take the generator until later; that after he had showed them the generator, they went upstairs and he heard the accused talking with Mrs. Butler telling her that luhch was to be served to them; that some Japanese, a Saipanese who drove the truck, the accused, Mrs. Butler and himself were present at this time; that after lunch the accused and the rest of their party left the place except the Saipanese and another Japanese who stayed behind to pick up the generator; that Mrs. Butler ordered him to open the basement and turn over the generator to them; that after they had taken the generator out of the basement they loaded it in a truck and that he never saw the generator again; that he heard the accused tell Mrs. Butler that the generator was for those Japanese with him; that he did not see the accused help take the generator away from Butler's home; and that the man there that was supposed to be a mechanic disconnected it and then loaded it on the truck.

(Additional Charge I - 2nd specification)

For the prosecution:

Okiyama testified that one day the accused came to his house and asked him to work for him as typist; that the accused told him to report to work at a building across from the house of the accused every morning at eight; that the witness came there the first morning and the first thing the accused had him do was to make a list of all Guam born Japanese or Nisei; that after he did this the first thing he knew some of these boys came up to that officer where he was working; that then at a later day another bunch came up; that one day when about between twenty to thirty Nisei were present the accused took his seat at the middle center of a long table and there the first meeting started; that the accused got up and started talking to them; that the first thing he told them was that the United States of America and the Imperial Government of Japan were in a state of war, and that the Americans had been pushing the Japs around for a considerable length of time and the Japanese could not stand it any longer and finally came to a show-down; that the accused told them that they, the Nisei, the half-caste of Guam, had been pushed around by the Americans and the time has come when they shall do everything possible to help the Japs [illegible] this war; that the accused told them that they shall always be ready to offer their services to any of the established Japanese Military Units there; that the meeting was strictly for Japanese Nisei; that he never received any [illegible]s a Dai Nisei from any other person other than the accused; that as to how many meetings of the Dai Nisei members were held during the time of the Japanese occupation, there were two actual meetings held where the accused was presiding; and that practically all boys of Japanese extraction were members of the Dai Nisei during the period of Japanese occupation and there were girl members also.

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Rivera testified that during the Japanese occupation he worked as a policeman for the Japanese Civil Administration; that around the month of February, 1942, he was in the Japanese Civil Administration office when the accused came in talking to Castro, who was in charge of the native policemen; that Castro directed the witness in the presence of the accused to inform the bunch of persons listed in a paper to appear at the restaurant of the accused the following morning at 8 a.m./ that the witness went to the house of Hara and informed his mother to inform her son to report to the accused's restaurant at 8 a.m. the following morning; that the witness went to the house of Blas and informed his mother to be sure to inform her three sons; that he saw Hara and Blas and some other people the following morning in front of the accused's restaurant; that he went to the accused and informed him that there were some boys waiting for him in front of his restaurant, handed him the paper, and then went to his work

Hara testified that native patrolman Rivera came to him and told him to report over to the accused's restaurant; that this was about a month and a half after the Japanese invasion; that when he reported at the restaurant of the accused he found between thirty to forty half-breed Japanese; that the accused was not there yet; that he appeared later; that the accused said something at this time when from thirty to forty were present; that he said this assembly is for the purpose of helping the Japanese and to help the Japanese Government in order to win the war.

Blas testified that Rivera brought a message to his house that he was required to appear at a certain house because the accused wanted him there; that he appeared at that meeting about two months after the Japanese occupied the Island; that the meeting was held at the former restaurant of the accused; that there were about thirty other people at the meeting; that the accused was at the meeting; that the accused was the principal speaker; that he called the meeting to order and told them why they were there; that he told them that they were all Japanese inasmuch as their fathers were Japanese and that they were there to help the Japanese win the war.

Sakai testified that the accused came to his house and told them to meet at the building which was formerly the restaurant of the accused; that the meeting was about a month and a half after the Japanese invasion; that the accused and Okiyama and the two Sayama boys were at the meeting; that the nationality of members at that meeting was half-breed Japanese; that the accused told them that they ~~we~~ were gathered there so that they could help the Japanese Government win the war; and that the meeting was only for those of Japanese extraction.

Jesus B. Sayama testified that the accused asked him to go to the first meeting of the Dai Nisei Club; that the first meeting he attended was about a month and a half after the invasion of the Japanese; that the meeting was held in a building opposite the residence of the accused; that about twenty-five to thirty were present; that the meeting was strictly for the half-breeds; that the accused told them that they were assembled there to get together and win the war as soon as possible; that the accused said the Japanese were to win the war; and that

Okiyama further testified that at a later date the accused sent them word for them to assemble at the Japanese officers' club, formerly the Elks Club; that he had them there and a meeting was held in which he presided; that about twenty-five to thirty members were present; that the meeting was restricted; and that the accused was in charge of the club.

Hara further testified that there was a meeting of the Dai Nisei Club at the Elks Club; that about fifty members were there; that the occasion was a party held in honor of the school teacher, a military man, that was to leave the Island for Japan; that besides members of the Dai Nisei Club the accused and the teacher were there; that

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another meeting or gathering of the Dai Nisei was for the purpose of attending a Japanese school.

Jesus B. Sayama further testified that the accused asked him to go to the second meeting of the Dai Nisei Club; that he attended another meeting of the Dai Nisei at the former Elks Club; that about forty members of the Dai Nisei were in that meeting; that the occasion was that there was a high official, a naval officer, leaving the Island for Japan and they were gathered there for this official to see them; and that the accused was present.

Sakai further testified that he attended another meeting of the Dai Nisei which was at the former Elks Club; that the accused ran the club at the time of the meeting; that quite a number attended; that Okada was right beside him; that the meeting was only for the Dai Nisei members; that the accused and the Aide to the Governor, Sakai, a member of the Japanese Armed Forces, were present in addition to the members; that the witness asked the accused when the war will be over; and that the accused said not until all the Americans put up their hands and surrender.

Okada testified that the accused asked him to join the Dai Nisei organization; that he attended one meeting which was at the former Elks Club Building; that approximately forty of them were there; that the meeting was just for the Dai Nisei; that the accused was there; that Sakai sat right next to the witness; that Sakai asked the accused when this war will be over; and that the accused said not until all the Americans surrender.

Jesus B. Sayama also testified that the Dai Nisei were made to do close order drills every first and third Sunday; that the accused and the drill instructor were present at these drills; that the accused followed behind them and whenever they made a mistake reprimanded them; that when they had to pass in review, the accused stood on one side as an official; that they were informed by the accused that they were to learn the various drills so that in case the Americans came they were to help the Japanese soldiers; and that the witness understood that the Dai Nisei, the local Japanese, the members of the Japanese Civil Administration which employed Chamorros, and the members of the Kohatshu were assembled and known as members of the Kebodan to help in disasters and things like that.

Sakai also testified that another time when the members of the Dai Nisei were gathered was for drills at the San Antonio Plaza when they held mass down there; that they gathered for drills twice a month, on the first and third Sundays; that the accused and the drill instructor, a civilian teacher, were present besides the members of the Dai Nisei; that the accused stood there to look over the pass in review; that the accused said that they were drilling in case the enemy should come they were to help the armed forces; and that the Dai Nisei was organized for the purpose of assisting the government in case of disaster such as typhoon, air raids, and that type of things.

Hara also testified that the Dai Nisei participated in another activity as an organization when the members gathered for drills about four times; that the accused was there, just watching how they were doing; that the accused was in charge of the drills; and that the drill master was a civilian member of the Japanese Civil Administration.

Blas also testified that another activity which the Dai Nisei participated in was drilling without arms about two times a week; that the accused said that they have to keep their body in good condition and learn how to drill because they never can tell whether they will be called upon to take up arms against the enemy; and that the witness heard the accused mention that when they have to take up arms probably their place would be behind the Japanese Army lines.

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There was additional evidence adduced that the members of the Dai Nisei performed work on fortifications, airfields, foxholes and tunnels, and that this work was done by such members in consequence of being told and ordered to do it by the accused.

For the defense:

Jesus S. Sayama testified that the Dai Nisei held meetings in Guam during the Japanese occupation; that Homura, the Japanese Island Governor, was in charge of the Dai Nisei Blub on Guam; that the order about the meeting came from the Japanese Civil Administration and that the accused passed the word around; that the witness attended two meetings of the Dai Nisei and that the accused was the interpreter of both meetings;Ithat the first meeting that he attended was maybe about six months after the Japanese came in on December 10, 1941; that the date of the second he did not remember; that the second was held at the Omiya Kaikan, or Guam Club or restaurant; that at one of the meetings Homura, the Island Governor, presided; that he said that now that the Japansse are here the children of Japanese extraction should learn the Japanese language as well as the Japanese ways and in case of fire or something of the sort they should help.

(Additional Charge I - 3rd specification)

For the prosecution:

Taimanglo testified that he was employed by the accused during the Japanese occupation to take care of the Elks Club bar and mess in Agana; that he began working at the Elks Club on February 11, 1942, and on February 16, 1942, the club was opened; that the Elks Club was thegbuilding that was used; that the accused told him that the club was strictly for officers of the Japanese Navy; that the place was known as the Omiya Kaikan; that the bar was the major activity and the accused gave the witness authority to look over the kitchen; that no one ate there regularly; that the accused brought the supplies sold over the bar and also the food from his home; that Agnes Santos Rios and Beatrice Santos Rios and Gloria Wusstic were the only other employees of the club; that they were employed by the accused to serve; that the opening of the club in February, 1942, was a big affair; that the accused made him understand that everything given out was to be paid for, but in case of Governor Hayashi's parties everything was to be given him free; that if given by another officer, everything was accounted for; that there was no charge at the opening party; that the accused made the witness understand that he was to take care of everything; that another party given by the accused in that club was Hayashi's farewell party towards the close of the year;; that the accused told the witness that all drinks were to be served free; that the accused promised to pay the witness 45 yen per month, but very often two months elapsed and he did not get any payment; and that he stopped working at the club shortly after the Governor's farewell, that he could not get along with the accused any more.

Agnes Santos Rios testified that she was employed by the accused as a waitress at the Elks Club building and the name of the place was Omiya Kaikan; that she started working from February 11, 1942, and worked for the accused for five months; that the first party given was about February 16th in honor of the Japanese officers; that she remembered the time when there was a farewell party for Governor Hayashi; that she was not working there at the time of the farewell party for Governor Hayashi, but at times she was asked to come and help; that she was in the Omiya Kaikan when she was not working because her sister was still there; that sometimes she served the Japanese Governor, Hayashi, and his Aide; that she did not remember the date she served the Japanese Governor Hayashi; that when he came the accused told her to feed him and that she personally picked up the spoon and put it in his mouth; that at the time she waited on the Japanese Governor Hayashi she did not collect any money from him for that food she was serving him; that as far as she

knows the Governor was never charged for anything; that as a waitress she did not collect any money from any of those at the first party, and none at the time of the farewell party.

Beatrice Santos Rios testified that she was employed as a waitress by the accused during the Japanese occupation at the Omiya Kaikan at the old Elks Club Building in Agana; that she started working for the accused on February 11, 1942, and worked at the Omiya Kaikan for two years and four months; that at the beginning she was paid, but later was not; that a party was given at the opening of the club on February 16th; that they charged others at that time, but that the party was given free of charge; that another party was given by the club, a farewell party in honor of Hayashi, the Japanese Governor, towards the close of the year, 1942.

For the defense:

Guzman testified that he twice delivered food from the Japanese Navy to the residence of the accused.

(Charge IV - 2nd specification)

For the prosecution:

Nicolasa Mendiola testified that the accused brought two Japanese officers to her and said "Take care of these men, your line of work;" that she stated she didn't want to; that the accused said "If you didn't want to, you will be punished;" that she asked him to quit, that she wanted to quit on account of her children and he said she cannot; that she and the Japanese officer slept together because that is what they were supposed to do and that they had sexual intercourse.

EFFECT OF PREPARED ACTION:

Recommends setting aside the findings on Charge III, Additional Charge II, and the specifications thereunder, and the action of the convening and reviewing authorities thereon.

REMARKS:

The following authorities not cited in prepared action are of interest in regard to the question of an enemy alien's liability for treasonable acts committed against the sovereign of his temporary residence.

Outlines of Criminal Law - Kenny (5th ed.) p. 313.
Wharton's Criminal Law (11th ed.) Vol. III, sec. 2152, p. 2338-9.
Harvard Law Review, Vol. 59, No. 4, p. 612.
University of Chicago Law Review, Vol. 6, pp. 87-8 and note.
University of Illinois Law Review, Vol. 12, pp. 612-14 and note.

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For the defense:

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For the prosecution:

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EFFECT OF PREPARED ACTION:

Recommends setting aside the findings on Charge I, Charge III and Additional Charge II and the specifications thereunder, and specification 3 of Additional Charge I, and the action of the convening and reviewing authorities thereon.

REMARKS:

The following authorities not cited in prepared action are of interest in regard to the question of an enemy alien's liability for treasonable acts committed against the sovereign of his temporary residence.

Outlines of Criminal Law - Kenny (5th ed.) p. 313.
Wharton's Criminal Law (11th ed.) Vol. III, sec. 2152, p. 2338-9.
Harvard Law Review, Vol. 59, No. 4, p. 612.
University of Chicago Law Review, Vol. 6, pp. 87-8 and note.
University of Illinois Law Review, Vol. 12, pp. 612-14 and note.

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15. Subject to the foregoing remarks and recommendations, the proceedings, findings and sentence, and the action of the convening and reviewing authorities thereon, in the opinion of the Judge Advocate General, are legal.

16. Referred to the Chief of Naval Operations for information.

O. S. COLCLOUGH
Judge Advocate General of the Navy

Copies furnished: 8 cm;
Ca. President, 1
Lt. Hanson (2)
Smt

10. Article III, Section 3, Clause 1, of the Constitution provides that "No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." While the testimony of Salas covered fully the offense charged, the testimony of Zafra, in the opinion of this Office, did not fully cover the overt act alleged. This evidence was legally insufficient to meet the requirements for proof of Treason. (Cramer v. United States, 325 U.S. 1).

11. Specification 3 under Additional Charge I, Treason, as found proved, alleges that in or about the month of February 1942, Shinohara wilfully adhered to and gave aid and comfort to Japan by supplying to Japanese military and naval forces provisions and refreshments. The evidence adduced by the prosecution was to the effect that Shinohara operated the Omiya Kaikan which appears to have been a Japanese officers' club. In connection with the operation of the club the evidence shows that food and drinks were served to Japanese officers and their guests for which in some cases payment was made which was ultimately turned over to the accused and in other cases the food and drinks were apparently furnished without cost. The language of the specification indicates that the supplies furnished by Shinohara were from stocks owned or procured by him from sources other than Japanese. The evidence as to ownership of the "provisions and refreshments" served at the Omiya Kaikan is indefinite and, in the opinion of this Office, is not sufficient to establish the allegations in the specification. In connection with this specification, Mrs. Shinohara, a defense witness, testified that she served food to Japanese military personnel who visited at Shinohara's home when the accused was present. However, no other witness testified to this effect and it is apparent from an examination of the testimony of the prosecution witnesses that it was not those incidents on which the specification was based.

12. Each of the specifications under Charge III, Assault and Battery, and Additional Charge II, Assault and Battery, alleges that the accused "did, at or near Agana, Guam, wilfully and maliciously, and without justifiable cause, assault one George J. McMillin, captain, U.S. Navy, by striking the said McMillin in the face; he the said McMillin being the then Governor of Guam and the official representative of the United States of America; * * * ". These offenses were alleged to have been committed on December 10, 1941, January 1, 1942 and January 20, 1942.

13. Subsequent to the trial of the accused and the actions of the convening and reviewing authorities on the record of proceedings, there was received in the Navy Department a statement signed by Captain George J. McMillin, the officer alleged to have been assaulted and struck by the accused and who did not testify at the trial. Captain McMillin unequivocally denied that the accused struck him in the face or otherwise on the dates specified or on any other date; and that he was in Guam on December 10, 1941, and on January 1, 1942, but that he was removed from Guam by the Japanese Military Authorities on January 10, 1942, and was, therefore, not even in Guam on January 20, 1942, one of the dates on which it was alleged that he was assaulted by the accused.

14. In view of the foregoing, it is recommended that the findings on Charge I and the specification thereunder, Charge III and Additional Charge II and the specifications thereunder, and specification 3 of Additional Charge I, and the action of the convening and reviewing authorities thereon, be set aside.

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6. The crime of treason is defined by the Constitution of the United States, as follows:

> "Treason against the United States, shall consist only in levying War against them, or in adhering to their enemies, giving them Aid and Comfort." Article III, Section 3, Constitution of United States.

It has been judicially determined that "the two species of treason mentioned in the Constitution are described in it in language borrowed from that of the English statutes of treasons". U.S. v. Burr, 25 Fed. Cas. No. 14693 (1807). Judicial interpretation of treason in this country seems to follow that of the English courts. U.S. v. Greiner, 26 Fed. Cas. No. 15262 (1861); Carlisle v. U.S., 16 Wall. 147, 154 (US. 1873); 8 Annotated Cases, p. 77.

7. There is no question that an alien owes a local allegiance to the country of his temporary sojourn, so that he may be indicted for treason either in levying war against the local sovereign, or in aiding such sovereign's enemies. 3 Wharton, Criminal Law (12th ed. 1932) sec. 2169. Such allegiance is the fidelity and obedience which the individual owes to the government under which he lives in return for the protection he receives. Carlisle v. United States, supra.

8. Authority for the prosecution for treason of an alien enemy under the circumstances involved in the present case is found in the widely cited case of De Jager v. Attorney General of Natal, A. C. (Eng.) 326, Hudson Cases Int. Law, p. 1061. Upon the authority of that case, Hallsbury's Laws of England (2nd ed.) Vol. 9, p. 291, states that -

> "The essence of the offence of treason lies in the violation of the allegiance which is owed to the King and which is due from all British subjects wherever they may be. This allegiance is owed not only by subjects of the King, but also by an alien living in this country and receiving the protection of its laws, so long as he is resident here, even if the State to which he belongs is at war with the King. If an alien has lived in this country under the protection of the law, and the State of which he is a subject invades the King's territory and the alien assists the invader, the alien is guilty of treason."

In view of the foregoing the military commission in this case had jurisdiction over the offenses of treason charged against Shinohara.

9. The specification under Charge I, "Treason", alleges that on or about December 16, 1941, Shinohara wilfully aided, assisted, and participated in the taking by the Japanese military forces of the sum of about $8300, lawful money of the United States, and checks of the value of about $1000, which was property of the Naval Government of Guam. Two witnesses testified in support of this specification. The testimony of the first witness, Galo L. Salas, cashier, Naval Government of Guam, while confused as to amounts, established that Shinohara participated in the specific acts alleged in the specification. The remaining witness, V. U. Zafra, testified to the effect that at the time in question he saw Shinohara with certain Japanese military personnel and Salas near the safe containing the funds in question and Salas was turning the combination of the safe. This corroborated a part of Salas' testimony but Zafra's testimony did not independently cover all of the essential acts constituting the offense charged. He did not observe the removal of the funds alleged to have been taken by the Japanese.

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ADDRESS REPLY TO
OFFICE OF THE JUDGE ADVOCATE GE

AND REFER TO

NAVY DEPARTMENT

OFFICE OF THE JUDGE ADVOCATE GENERAL

Mil:Com.-SHINOHARA, Samuel T./ WASHINGTON 25, D. C.
A17-20
I (7-2-47) PVD:mas 144704

28 APR 1948

for PEACE
SAVINGS BONDS

1. The record of proceedings in the foregoing military commission case of Samuel T. Shinohara, inhabitant of Guam, shows that he was convicted of Charge I, Treason (1 specification), Charge III, Assault and Battery (1 specification), Charge IV, Taking a Female for the Purpose of Prostitution (2 specifications), Additional Charge I, Treason (3 specifications), and Additional Charge II, Assault and Battery (2 specifications); and that he was acquitted of Charge II, Theft (1 specification), and Additional Charge III, Desecration of the Flag (1 specification). He was sentenced to death by hanging, two-thirds of the members of the Commission concurring. The convening authority, the Island Commander, Guam, approved the proceedings, findings and sentence. The reviewing authority, the Commander in Chief, United States Pacific Fleet and Pacific Ocean Areas and Military Governor, Guam, subject to remarks, approved the proceedings, the findings as to all charges and specifications except that on the first specification of Charge IV which he disapproved, the sentence, and the action of the convening authority except as it referred to the first specification of Charge IV; and, in conformity with Section D-14, Naval Courts and Boards, referred the record to the Secretary of the Navy.

2. The record further shows that the accused is a civilian who was born in Japan and who in 1905 as a young man went to the Island of Guam. Except for infrequent visits to Japan, he has resided in Guam continuously till the present time. He married a Chamorro woman, a native of Guam and national of the United States, and children were born of their union. During his residence in the Island he engaged in business and in this manner earned a living for himself and his family. Thus, he was both an alien resident of Guam and ~~also~~ a national of Japan.

3. When on December 7, 1941, the armed forces of the Empire of Japan attacked Pearl Harbor, T.H., a territory of the United States, the accused was living with his family in Guam as indicated. As a result of this attack the United States on December 8, 1941, declared war upon the Empire of Japan. Upon the outbreak of war, the American authorities in Guam placed the accused in confinement, together with a number of other Japanese nationals who were resident in the Island. On December 10, 1941, the military forces of Japan occupied the Island after overcoming the military forces of the United States that sought to defend it. The Japanese forces thereupon released the accused and other Japanese nationals who had been confined by the American authorities from confinement. Soon afterward the Japanese forces employed the accused as an interpreter because of his proficiency in the Japanese and Chamorro languages.

4. During the period July 21 to August 10, 1944, the military forces of the United States re-occupied the Island of Guam. The accused was later placed under arrest and confined pending trial for offenses alleged to have been committed by him during the period of Japanese occupation. On July 28, 1945, the accused was brought to trial before the military commission which tried him in this case. Each of the specifications of the charges on which he was tried, set forth in paragraph 1 hereof, alleges an offense in violation of the Penal Code of Guam (1933).

5. The question here presented is whether an enemy alien resident of a territory of the United States may be legally tried for treason for acts of giving aid and comfort to the sovereign of his nativity during the time that such sovereign was in military occupation of such territory.

AFFIDAVIT

Comes now, Samuel T. Shinohara and deposes and states as follows:

That he was born in Japan of Japanese parents about the year 1886 and came to the island of Guam in the year of 1905 where he has lived continuously up to the present time;

That in 1920 he married a Chamorro woman and as the issue of this marriage there are two children, aged 17 and 21;

That from the time of his arrival on Guam he entered several different business ventures including the operation of a restaurant, and grocery store for approximately fifteen years prior to 1944;

That on the 8th day of December 1941, he was taken into custody by the Naval Government of Guam and confined in the civil jail of Agana, where he remained until December 10, 1941, at which time he was released from the jail by the armed forces of Japan who invaded the island on that date;

That at no time before this confinement, during this confinement, or after this confinement was he informed of the reason for his incarceration;

That on that date all prisoners in the civil jail were released by the Naval Government before those of Japanese nationality, who were apprehended on that day, were so confined;

That upon his release from the jail by the Japanese invasion force on December 10, 1944, he with the other Japanese was led to the plaza from where he was summoned by Governor McMillan to the Governor's palace, and in the presence of the Japanese officers of the invasion force, the Governor asked the affiant to act as a witness to assure the Japanese officers that the Japanese families on Guam received good treatment from the Governor, and that the affiant did so assure the officers of the invasion force at the behest of the Governor who cited certain examples of benevolent treatment

given by him to those people and the affiant repeated these examples in Japanese adding that he knew these things to be true; and that thereby it was for the first time called to the attention of the Japanese invaders that the affiant could be used as an interpreter of English, Japanese and Chamorro;

That upon his release from custody he resumed his restaurant and grocery business and continued it throughout the Japanese occupation of Guam;

That on the 23d of August 1944, he was again confined by the armed forces of the United States in a stockade on Guam and has been continuously confined since that date, the last seven months of which confinement has been in a solitary cell in the War Criminals Stockade;

That at no time before or during his confinement was he informed of the reason why he was confined and did not learn of any reasons for the confinement until he was served with charges and specifications, and additional charges and specifications on 20 July 1945 at 9:30 in the evening;

That on 28 July 1945 his trial began before a United States Military Commission on Guam, and that sufficient time was not given to prepare a defense;

That he did not have access to an attorney of his choice and was assigned as his counsel, Lt. Emory Morris and Vincente Reyes, a native Chamorro;

That this affiant believed, and now so believes, that the counsel Vicente Reyes was hostile toward him to such an extent, that he could not and did not protect his interests during the trial; and

That this affiant would have objected to the said Vincente Reyes, acting as counsel at that time bub refrained from doing so because he was not aware that he had the right to object to counsel appointed him by the court; and

That this affiant definitely states that he had only two consultation periods of approximately thirty minutes each with his counsel before the trial and the first of these consultations not having baken place until at least two days after the service of the charges and specifications, and the additional charges and specifications;

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That he asked his counsel to call as witnesses in his behalf, Kyomon Miwa, Vincente Isezaki, Jose Cabrera, Zenzo Nitsuma, Masayoshi Fujikawa, some of whom personally offered to testify in his behalf, and all of whom this affiant believes would have offered testimony tending to show his innocence of the charge of treason, especially relating to the allegations concerning the affiant's connection with the Dai Nisei and with the appropriation of the generator; and that none of these witnesses were ever called to the stand for reasond unknown to the affiant;

That he also asked his counsel to call as witnesses in his behalf, Mechio Nino and Antonio Comacho, who this affiant believes could have given substantial evidence to establish his innocence of slapping the Naval Governor at Agana Heights; and that neither of these witnesses were ever called to testify for reasons unknown to this affiant;

That he requested that Governor McMillan be contacted and asked to make a statement regarding the affiant and the charges brought against him, but that he has never heard of any action taken on this request;

That during the course of the trial, certain witnesses for the prosecution were permitted to read their testimony from memoranda into the record, and that one of these witnesses was questioned by defense counsel concerning the memorandum from which he was reading and none of these questions and answers appear in the record;

That the court interpreter for Japanese, namely Jorge Cristobal, did not have a working knowledge of the Japanese language and could not and did not correctly interpret the testimony which was given in Japanese; and that on one occasion during the trial, when the affiant told his counsel that an incorrect translation, detrimental to the accused, was made and counsel brought this to the attention of the court, counsel was admonished by the court that he could not object to translations;

That during the course of the trial incomplete translations, detri-

mental to the affiant were made by the court interpreter of Chamorro and that the witness Jose Flores in the course of his testimony for the prosecution in the Chamorro language, said, as part of an answer to a question, that the accused was only acting as an interpreter and that this part of the answer was not translated; and that the affiant called this to the attention of his counsel but was ignored;

That he desired to take the stand in his own defense and requested this of his counsel who told him that his word had no weight before the court and though he urgently desired to deny the charges brought against him and to testify in great detail, he was thwarted in this regard; and

That if he were not thwarted in his plan to testify, he would have taken the stand and denied each and every charge and specification and each and every additional charge and specification preferred against him;

That after the findings, the affiant was asked by his counsel, Morris, if he wanted to testify in mitigation, whereupon the counsel Reyes stated in words to the effect that Japan had lost the war and there was nothing to say, whereupon this affiant was again thwarted in his efforts to testify; and

That if this affiant could have testified in mitigation he would have done so, and would have offered testimony relating to himself and to his family, to the circumstances at the time of the Japanese occupation, after the American reoccupation and to the length of time he had already been confined, to his age and to his previous excellent record on Guam and with the Naval Government, which he believes would have materially affected whatever sentence the commission may have imposed; and

That after the trial was completed his counsel had him brought to their office, where he was told by counsel Morris that he, Morris, was mistaken in not having him testify before a military court, and that this mistake was due to the fact that counsel was confused by the difference between military and civilian procedure and that he, Morris, was sorry.

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That this affiant believes that he was not given a fair trial in keeping with the fine traditions of Naval Government as he knew it on Guam in the years before the war when said government sought and received his full cooperation on many occasions, and that if he had been able to properly prepare his case and defend himself he would have been found not guilty on all charges.

3 November 1946

Samuel T. Shinohara

GUAM, MARIANAS ISLANDS)
A UNITED STATES POSSESSION) SS

Samuel T. Shinohara, being first duly sworn, deposes and says that he has read the above and foregoing affidavit consisting of five pages, knows the contents thereof and that the same is true and correct to the best of his own knowledge, information and belief and that he has subscribed his name thereto.

SAMUEL T. SHINOHARA

Subscribed and sworn to before me this third day of November 1946

1st Lt USMC

PALMER M. RIXEY
1st Lt. USMC
Commanding Officer
War Criminals Stockade

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Guam Marianas
18 October 1946

I, Felix Flores Sakai, do hereby depose and say that when I was called as a witness for the prosecution in the case of Samuel T Shinohara that I took with me and read from the witness stand from a memorandum with the approval of the Judge Advocate. At the time the defense lawyer raised the question of the use of the memorandum and the court permitted me to read from it.

I swear the above to be the truth to the best of my belief and memory.

/s/ Felix F. Sakai

Subscribed and sworn to before me on the 18th day of October 1946

/s/ Fredric T. Suss
Lt USNR

Certified to be a true copy

Fredric T Suss
Lt USNR

"C" 306

Guam, Marianas
18 October 1946

I, Jesus B. Sayama, do hereby depose and say that when I was called as a witness for the prosecution in the case of Samuel T Shinohara, I was previously instructed by Colonel Ammons, the Judge Advocate, to write a memorandum and take it with me to the witness stand. I did so and read part of my testimony from the memorandum.

I attended about four meetings of the Dai Nisei and each meeting was presidd over by a Japanese officer, (either the Civil Administrator or the governor's aide). Shinohara was at these meetings only as an interpreter. I know he was an interpreter because the Japanese officer would speak to him in Japanese and he Shinohara would speak to us in Chamorro language.

I swear the above to be the truth to the best of my belief and memory.

/s/ Jesus B. Sayama

Subscribed and sworn to before me on the 18th day of October 1946

Fredric T Suss
Fredric T. Suss
Lt. USNR

Certified to be a true copy

Fredric T Suss
Lt USNR

"B" 505

Translation of Affidavitt of MIWA, Kyomon.

1. I arrived on Guam in September, 1942, as a school teacher.

2. We were told that, as the island of Guam was one of the first places to be conquered by Japan, Japanese policies and installations were to be tried out here, and the experience gained was to be applied in the occupation of other areas.

3. When I first arrived on Guam, the Young Men's Association was not formed. Superintendent of Education, Takenaka Kisaku, ordered me to organize the Young Men's Association of the Dai Nisei (Second generation, Japanese). Superintendent of Education Takenaka Kisaku, had received the order from the Civila Administration and passed it on to me. I think this was sometime in August or September, 1943.

4. The organizing of the Dai Nisei (Second generation, Japanese young men's association) was the wish of the Civil Administration especially the Administrator, Homura Teichi.

5. When I first came to Agana I found that Mr. Shinohara was a prominent and influential person and it seemed that he was looking after the welfare of many Japanese families.

6. I learned that Mr. Shinohara was one of the oldest Japanese settlers on the island of Guam, and that he had a good knowledge of the Chamorro language.

7. For the above reasons he was called upon time and again by the Civil Administrator to act as an interpreter.

8. When the Dai Nisei Organization of Guam was to be formed I requested Mr. Shinohara to contact all persons, although a list of Japanese nationals was already in the Civil Administration office, and tell them to be present at the meeting.

9. If Mr. Shinohara had refused my request, I had decided to inform the Civil Administrator of this fact.

10. I was responsible for the formation of the Dai Nisei Young Men's association.

11. When the first meeting of the Dai Nisei Young Men's Association was called, the Civil Administrator, Homura Teichi, and Superintendent Takenaka were present. At this time the administrator, Homura Teichi, attended the meeting in the capacity of president and gave a speech in Japanese which was translated by Mr. Shinohara.

Certified to be a true copy

Fredric T Suss
Lt USNR

"D" 307

Translation of Affidavitt of MIWA, Kyomon (continued)

12. After this, whenever Dai Nisei meetings were held, the civil Administrator or his aid would attend.

13. Usually Mr. Shinohara was requested to act as an interpreter at these meetings.

14. I testify that it was impossible for Mr. Shinohara to form or control an organization of this nature.

15. I only requested of Shinohara to be an interpreter and guide.

16. I made the Dai Nisei organization undergo basic drills. I gave commands in Japanese.

17. Shinohara was not present during basic drill exercises by the Dai Nisei. However if he was a spectator, I do not know the reason why he came.

18. When I was in the Agana stockade with Shinohara he asked me if I would testify for him about the Dai Nisei incident at his trial and I said I would and I expected to be called upon at his trial but I never was used as a witness in the court.

19. I found that the Guamanians were very friendly to the Japanese occupation forces. Many of the prominent people gave parties in their homes for Japanese personnel.

/s/ MIWA Kyomon

Date: October 17, 1946

Home address: Ishikawa-Ken, Hoshi-gun,
Anamizu-machi, Aza-Kawashima

I, MIWA, Kyomon, being duly sworn on oath, state that I have had read to me, and understood the translation of my statement consisting of two (2) pages, and it is the truth to the best of my knowledge and belief.

/s/ (in Japanese)
MIWA, KYOMON

Subscribed and sworn to before me this 18th day of October, 1946.

/s/ Eugene Kerrick Jr.
Lt. USNR

Certified to be a true copy

Fredric T Suss
2d USNR

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I, Frederick Arthur Savory, civilian, interpreter, being duly sworn on oath, state that I have truly translated the foregoing statement given from Japanese to English and from English to Japanese respectively, and that after being transcribed I truly translated the foregoing statement containing two (2) pages to the witness, that the witness thereupon in my presence affixed his signature thereto.

/s/ Frederick Arthur Savory

Subscribed and sworn to before me this 18th day of October 1946.

/s/ Eugene Kerrick Jr.
Lt. USNR

GUAM, MARIANAS ISLANDS)

I, Eugene Kerrick, Jr., Lieutenant, USNR, certify that on 18th day of October 1946, personally appeared before me Miwa, Kyomon, and according to Frederick Arthur Savory, interpreter gave the foregoing statement and that after his statement have been transcribed the said Miwa, Kyomon had read to him by the said interpreter, the same and affixed his signature thereto in my presence.

/s/ Eugene Kerrick Jr.
Lt. USNR

Certified to be a true copy

Fredric T Suss
Lt USNR

Guam, Marianas Is.
19 October 1946

I, Juam Santos Okada being duly sworn do hereby depose and say that during the Japanese occupation of Guam, I was forced to work for the Japanese Navy as an electrician. For that reason I was not permitted to work with the Dai Nisei and I never attended any of their meetings or drill exercises. I did attend Japanese school wi ch was conducted by a Naval officer.

I remember attending a farewell party given for Aide to the Governor Sakai, which was held at the Omiya Kaikan. It was then that Jesus Hara asked Sakai when the war would be over. Sakai answered in Japanese and Shinohara interpreted the answer into the Chamorro language.

I swear the foregoing to be the truth to the best of my knowledge and belief.

/s/ Juan S. Okada

Subscribed and sworn to before me on the 19th day of October 1946

/s/ Frederic T Suss Lt USNR

certified to be a true copy

Fredric T Suss
Lt USNR

"E" 310

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Q. Can Shinohara be tried for treason?

Answer

Shinohara is a Japanese citizen and national who has been an inhabitant of Guam since 1906. He married a native Chamorro and conducted a business in Guam. He was an alien resident in Guam. As such he owed temporary allegiance to the United States so long as he lived in Guam. This temporary allegiance he could end at any time by leaving Guam. When an alien accepts the protection of a country he owes a temporary allegiance thereto so long as he remains therein. The Latin maxim expressing this principle is Protectio trahit subjectionem, et subjectio protectionem, i. e. Protection carries with it allegiance and allegiance, protection. Allegiance means the obligation of fidelity and obedience which the individual owes to the Government under which he lives in return for the protection he receives. Occupation by a belligerent does not change the allegiance of the occupied territory. The inhabitants must give obedience to the occupying power but owe him no allegiance. Their duty of allegiance to the legitimate sovereign continues. The protection of a State does not cease because its forces are for strategic or other reasons withdrawn, and therefore the allegiance which the inhabitants owe continues. Shinohara as an inhabitant of Guam prior to the Japanese invasion owed allegiance, fidelity and obedience to the Naval Government and the United States which did not end when Japan conquered the Island. As an inhabitant his duty to the Conqueror was one of obedience only. The fact that he also owed permanent allegiance to the conquering sovereign does not change his duty of temporary allegiance to the sovereign of his domicile. He owed allegiance to both, and perhaps had the unenviable position of deciding which master he should serve. Had he rendered obedience only to the military occupant he would be guilty of no offense against either, but if he gave aid and adhered to the enemies of the sovereign of his domicile during the absence of the sovereign forces, he is guilty of treason against that sovereign and may be tried therefor.

He could have terminated his temporary allegiance by leaving Guam, but this he did not do. Shinohara can be tried for treason against the Naval Government of Guam and the United States if the facts are sufficient to allege that he aided and adhered to the enemies thereof. (Sec. 37 Guam Penal Code, 18 U.S.C.A. 1, Const. Art. III, Sec. 3).

Authorities

a. Carlisle v. United States, 16 Wallace (83 U.S.) p. 147.

In this case Mr. Justice Field said:

"The alien, whilst domiciled in the country, owes a local and temporary allegiance, which continues during the period of his residence.

"In the case of Thrasher, a citizen of the United States resident in Cuba, who complained of injuries suffered from the government of that island, Mr. Webster, then Secretary of State, made, in 1851, a report to the President in answer to a resolution of the House of Representatives, in which he said: 'Every foreigner born residing in a country owes to that country allegiance and obedience to its laws so long as he remains in it, as a duty upon him by the mere fact of his residence, and that temporary protection which he enjoys, and is as much bound to obey its laws as native subjects or citizens. This is the universal understanding in all civilized states, and nowhere a more established doctrine than in this country.' And again: 'Independently of a residence with intention to continue such residence; independently of any domiciliation; independently of the taking of any oath of allegiance or of renouncing any former allegiance, it is well known that, by the public law, an alien or a stranger born, for so long a time as he continues within the dominions of a foreign government, owes obedience to the laws of that government, and may be punished for treason or other crimes as a native-born subject might be, unless his case is varied by some treaty stipulation.'"

Carlisle was a British subject domiciled in the United States at the time of the outbreak of the Civil War. He was resident in Alabama. His alien status did not change his allegiance and he could have been tried for treason but for the amnesty proclamation.

b. Vol. 53. American Jurisprudence, p. 796, Title Treason, Sec. 5 -- Aliens.

"The principle that treason can be committed only by one owing allegiance to the government does not confine the offense to citizens of the nation against whose government the offense is alleged to have been committed. By the term "allegiance

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is meant the obligation of fidelity and obedience which the individual owes to the government under which he lives, or to his sovereign, in return for the protection he receives. It may be an absolute and permanent obligation, or it may be a qualified and temporary one. The citizen or subject owes an absolute and permanent allegiance to his government or sovereign, or at least until, by some open and distinct act, he renounces it and becomes a citizen or subject of another government or another sovereign. The alien, while domiciled in a country, owes a local and temporary allegiance which continues during the period of his residence; and if an alien, while residing in a foreign country, does any act which would amount to treason if committed by a citizen of that country, it has been held that he will be guilty of treason, for while he is thus a resident, even though only temporarily, he owes allegiance to the government.

"Aliens domiciled in the United States owe a local and temporary allegiance to the Government of the United States; they are bound to obey all the laws of the country not immediately relating to citizenship, during their residence in such country, and are equally responsible with citizens for any infraction of those laws. Those aliens who, being domiciled in the country prior to the Civil War, gave aid and comfort to the Confederate cause were, therefore, subject to be prosecuted for violation of the laws of the United States against treason and for giving aid and comfort to the enemy. If an alien lends assistance to invaders during the absence of the government forces from the place where he lives, for strategical or other reasons, he is guilty of high treason. In answer to the argument against this rule, that inasmuch as the duty and liability of an alien arise from the fact of the protection furnished him, such duty must necessarily cease as soon as the government is overcome by an invading force, it has been held that the protection of a state does not cease merely because the state forces, for strategical or other reasons, are temporarily withdrawn, so that the enemy for the time exercises the rights of an army in occupation. On the contrary, when such territory reverts to the control of its rightful sovereign, wrongs done during the foreign occupation are cognizable by the ordinary courts. The protection of the sovereign has not ceased. It is continuous, although the actual redress of what has been done amiss may be necessarily postponed until the enemy's forces have been expelled."

c. Jamis v. U. S., 32 Ct. Claims, p. 410 - holding that an alien resident owes temporary allegiance to the nation (in this case an Indian Tribe) of his residence.

(See also Young v. United States, 97 U. S. 39, and U. S. v. Wiltberger, 5 Wheaton 76, and Radich v. Hutchins 95 U. S. (Otto) p. 211.)

d. De Jager v. Attv. General (1907) AC (Eng.) 326, 8 Annotated Cases 76, Hudson, Cases International Law, p. 1061.

De Jager was a burgher of the South African Republic who for ten years and at the outbreak of war was peaceably residing in Natal (which was British). He continued to live in that

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portion of Natal which was occupied by the Boer forces, and during the occupation served with the Boer forces and aided and assisted them. Upon recapture of Natal by the British he was tried for treason. The court held that as an alien resident he owed allegiance to the Crown, that the protection of the Crown did not cease because its forces had to temporarily withdraw; that De Jager was under a duty to so act that the Crown would not be harmed by having admitted him as a resident and that he was guilty of treason. The Judge, Lord Loveburn said:

"It would be intolerable, and must inevitably end in a restriction of the international facilities now universally granted, if, as soon as an enemy made good his military occupation of a particular district, those who had till then lived there peacefully as aliens could with impunity take up arms for the invaders."

The headnote of the annotation to this case in 8 Annotated Cases, p. 77, states:

"Treason by Domiciled Alien.--The rule laid down in the reported case that an alien who resides within British territory owes allegiance to the Crown, and that if he lends assistance to invaders, during the absence of the state forces for strategical or other reasons, he is rightfully convicted of high treason, seems to have been generally followed in all cases which have arisen, involving a determination of the question, both in England and the United States."

Cases cited are:

Cases do not extend rule as to De Jager case to foreign invaders

U. S. v. Carlisle, supra
The Homestead Case, 1 Pa. Dist. 785
Ex p. Thompson 3 Hanks (10 N.C.) 355.

e. In the proclamation issued April 16, 1917 under Article III, sec. 3 of the Constitution (see Historical note to Title 18, sec. 1, U.S.C.A.) the following is included:

"Such acts are held to be treasonable whether committed within the United States or elsewhere; whether committed by a citizen of the United States or by an alien domiciled, or residing, in the United States, inasmuch as resident aliens, as well as citizens, owe allegiance to the United States and its laws."

f. "Allegiance is of two kinds: that due from citizens, and that due from aliens resident within the United States. Every sojourner who enjoys our protection is bound to good faith toward our government, and although an alien, he may be guilty of treason by cooperating either with rebels or foreign enemies. The allegiance of aliens is local, and terminates when they leave our country. That of citizens is not so limited--although the European doctrine of indissoluble and perpetual allegiance has not been accepted in this country." Charge to Grand Jury (D. C. Mass. 1861) 1 Sprague 602, 30 Fed. Cas. No. 18,273.

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"Treason against the United States may be committed by any one resident or sojourner within its territory, and under the protection of its laws, whether he be a citizen or alien. 1 Hale Prec. (Eng.) 59, 60, 62; 1 Hawk. P. C. (Eng.) c. 2, § 5; W. Kel. (Eng.) 38." Charge to Grand Jury, (C. C. Pa. 1851) 2 Wall. Jr. C. C. 134, 30 Fed. Cas. No. 18,276.

An alien resident may be guilty of treason by co-operating either with rebels or foreign enemies. Charge to Grand Jury Treason (D. C. Mass. 1863) Fed. Cas. Nos. 18,274 (C. C. Pa. 1851) 18,276.

g. See also to same effect

Ex parte Kuszeski, 251 Fed. 979
Lei Hoa v. Nagle, 13 Fed. (2nd) 61
U. S. v. Kamath, 29 Fed. (2nd) 317
U. S. v. Kamath, 30 Fed. (2nd) 243

h. Vol. 3, Corpus Juris Secundum, p. 527, Title Aliens, sec. 5.

"In return for the protection given aliens they owe a temporary and local allegiance to the country in which they reside which continues during the period of their residence."

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SAMPLE CHARGE AND SPECIFICATION

TREASON

SPECIFICATION

In that Samuel T. Shinohara, an inhabitant and resident of Guam, and subject to the Military Government thereof, having been prior to the Japanese Invasion and conquest of Guam an inhabitant and resident of Guam owing allegiance to the Naval Government of Guam and the United States of America, did, on the Island of Guam, on or about 10 December 1941 wilfully, knowingly and treasonably adhere to Japan, an enemy of the United States and give aid and comfort to Japan, in that he, the said Shinohara, did, during said period

(Here will have to be inserted traiterous acts which can be proved)

the United States during said period being at war with Japan.

(Note. Separate acts of treason should be alleged in separate specifications.

If treason is alleged as a continuing offense the words "during the period from about ____December 1941 to about 10 July 1944" or whatever period is applicable should be used.)

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Nationality Act of October 14, 1940

This act states who shall be citizens and who shall be nationals of the United States. Section 601, 2 and 3, Title 8, U. S. Code deals with citizenship.

Section 604 deals with nationality and is quoted:

Persons born nationals but not citizens

"Unless otherwise provided in section 601, the following shall be nationals, but not citizens, of the United States at birth:

(a) A person born in an outlying possession of the United States of parents one of whom is a national, but not a citizen, of the United States;

(b) A person born outside the United States and its outlying possessions of parents both of whom are nationals, but not citizens, of the United States, and have resided in the United States or one of its outlying possessions prior to the birth of such person;

(c) A child of unknown parentage found in an outlying possession of the United States, until shown not to have been born in such outlying possession. October 14, 1940, c. 876, Title I, Subchap. II, § 204, 54 Stat. 1139.

Other than through nationalization, no other means of becoming a national or citizen of the United States is provided.

146 Patton Street
Springfield, Mass.
4 January 1947

To: The Honorable
The Secretary of the Navy.

Via: The Judge Advocate General, U. S. Navy.

Honorable Sir:

I am submitting herewith a petition on behalf of Samuel T. Shinohara. I have worked diligently and unsparingly in the preparation of this petition because as a member of the bar of Massachusetts and as a Naval Reserve officer I am vitally interested in justice and its proper administration. If the action of the court in this case, is permitted to become a matter of record, I fear it would be an unfortunate reflection on Naval Justice and on other trials conducted by the Navy, called War Crime Trials and with which I was associated.

I do not for a moment doubt that the office of the Judge Advocate General has already recognized, from a study of the record of the trial, its injustice and that the Navy Department would have taken appropriate action, in keeping with its published instructions and decisions, notwithstanding any efforts of mine.

It is my sincere hope that my efforts which are represented in this petition, will be of some assistance to the Navy Department in reaching a decision in this case.

Respectfully yours
Fredric T Suss
Fredric T. SUSS

Enc: 1. Original Petition.
2. One copy.

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PETITION OF SAMUEL T. SHINOHARA

To

The HONORABLE SECRETARY OF THE NAVY

Counsellor for Petitioner
Fredric T. Suss
Springfield, Massachusetts

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PETITION OF SAMUEL T. SHINOHARA

2 January 1947

Your petitioner, Samuel T. Shinohara, respectfully appeals to the Honorable Secretary of the Navy to disapprove and set aside the proceedings, and whatever findings and sentence may have been given in his trial by a military commission at Guam on 28 July 1945 on the ground that the court erred in overruling the plea of the petitioner in bar of trial in that the court had no jurisdiction as to the charges of treason.

The evidence clearly showed that the petitioner was at all times a citizen and national of Japan and therefore owed a permanent allegiance to that government. The petitioner does not deny that he owed a temporary allegiance to the Naval Government of Guam and to the United States. This temporary allegiance is founded upon the protection which the government affords to a resident alien. An alien could terminate this allegiance by leaving Guam. The Naval Government may at any time terminate this allegiance by withdrawing the protection upon which it is founded. That the Naval Government of Guam did in fact withdraw this protection was clearly established by the evidence which showed that soon after war was declared, the petitioner was seized by the government and thrown into prison with other Japanese nationals. Thus the government unmistakably indicated by its action that it chose not to accept the temporary allegiance which the petitioner owed to it, but instead regarded the petitioner as an enemy from whom no allegiance was expected. No explanation or reasons were given to the petitioner for such seizure and confinement.

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The petitioner does not deny the right of the Naval Government of Guam to treat him as an enemy alienand to withdraw such protection as it was affording him as a resident alien before a state of war existed between the United States and Japan. It was held in U. S. v Fricke, 259 F. 673, that on declaration of a state of war between the United States, and Germany, subjects of Germany became enemies of the United States, and remained enemies during the continuance of the war within Constitution Article 3 P 3, Criminal Code P 1 (Comp St P 10,165), denouncing as treason the adhering to the enemies of the United States and giving them aid and comfort. Perhaps the Naval Government acted upon the theory that the same law applies under a state of war with Japan and that Japanese subjects then became enemies of the United States.

The court by claiming jurisdiction over the petitioner as to the charges of treason is in effect declaring that it will try an enemy for treason in adhering to itself and giving itself aid and comfort. No other conclusion can be reached from the unequivocal acts of the Naval Government in treating the petitioner as an enemy, before the occupation of Guam. The only justification for such an arbitrary arrest and confinement is that it was acting under the Enemy Alien Act. If the government contends that it was not acting under this authority and it was not confining the petitioner as an enemy, then the only conclusion left to be drawn is that the government had withdrawn all protection from this resident alien and was denying him the protection of its laws. In either case the government has terminated whatever allegiance was owed to it by the petitioner by removing the protection upon which it was founded. "Protectio

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trahit subjectionem, et subjectio protectionem."

If it can be contended that the duty of allegiance remained even after the Naval Government had voluntarily withdrawn its protection then there arises a question of intent. It has been held that intent is a vital element of the crime of treason and it is not sufficient to show that the treasonable acts were not accidental, but there must be a will to betray. How is it possible for the petitioner to betray a government which has forcefully impressed upon him that it expects no loyalty from him? Cramer v U.S., 325 U.S. 1.

Authorities:

No cases have arisen where the government has prosecuted for treason any resident enemy alien after the same government had voluntarily withdrawn its protection from that alien. However it is universally held that any allegiance due a government from an alien resident, is founded upon the protection which that government affords the person owing the allegiance. These cases also hold that the alien may terminate such allegiance by leaving the country where he is residing. No one can seriously contend that the government is powerless to terminate such allegiance and the conclusion irresistably follows that when the government voluntarily removes the protection upon which such allegiance is based, it has terminated the duty of allegiance.

a. Carlisle v. United States, 16 Wallace (83 U.S.) p. 147

b. Vol. 52. American Jurisprudence, p. 796, Title Treason, Sec. 5 -- Aliens.

c. De Jager v. Atty General AC (Eng.) 326, 8 Annotated Cases 76, Hudson, Cases International Law, p. 1061.
In this case the court held that as an alien resident, De Jager owed allegiance to the Crown, that <u>the protection</u> of the Crown <u>did not cease</u> because its forces had to tem-

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porarily withdraw. Thus the court implied that if the protection had ceased, De Jager would have owed no allegiance to the Crown.

d. Vol. 3, Corpus Juris Secundum, p. 527, Title Aliens, Sec. 5.

> In return for the protection given aliens they owe a temporary and local allegiance to the country in which they are residing which continues during the period of their residence.

Your petitioner respectfully declares that even though the Naval Government of Guam had withdrawn from him its protection and chose to treat him as an enemy, at no time did he cease to give to that government the complete and sincere allegiance which was due from him before the government had taken such action; that after the occupation of Guam by the Japanese forces and all during such occupation, your petitioner has never intentionally done any acts which would weaken or tend to weaken the power of the Naval Government to resist or to attack the enemy, or which would strengthen or tend to strengthen the enemies of the United States or of Guam.

If the Honorable Secretary does not agree that the court had no jurisdiction as stated above then your petitioner respectfully appeals to the Honorable Secretary of the Navy to set aside the proceedings, and whatever findings and sentence may have been given in his trial and to grant him a new trial on the same charges for the reasons here-in-after set out.

1. Petitioner was tried during the war by a military commission at an advanced base when a fair trial was extremely difficult if not impossible.

2. Petitioner was not given an adequate defense.

3. After counsel were assigned to petitioner, sufficient time was not given to prepare an adequate defense.

4. Petitioner was assigned counsel who was hostile to him.

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5. Under the treason charges no overt acts were specially laid in the charges and specifications as required by Article 3 of the Constitution of the United States and by the laws of Guam.

6. Under the treason charges no overt acts were proven by the direct testimony of two witnesses to the same act as required by the Constitution and laws of the United States and of Guam.

7. No evidence was presented that the petitioner gave more than obedience to the Japanese forces of occupation.

8. The commission refused on motion to strike out incompetent evidence to the prejudice of the rights of the petitioner.

9. The commission questioned witnesses in such a manner and to such an extent that it showed bias and established evidence against the petitioner by leading questions.

10. The court interpreter of Japanese was incompetent and unable to interpret correctly.

11. Perjured testimony was given which prejudiced the court against the petitioner.

12. Witnesses for the prosecution were illegally permitted to read testimony into the record from memoranda.

13. The record of the trial was either falsified or is incomplete in that it does not show that such memoranda were used and that the question was raised by the defense.

14. The petitioner has newly discovered evidence which will tend to prove his innocence.

15. The Statute of Limitations had run against some of the offenses charged.

Before considering the above assignments of error individually and at length, the petitioner respectfully calls the attention of the Honorable Secretary to the case of Stephan v. U.S., 133 Fed 87, where the court said:

> "Appellant was convicted of treason and sentenced to death by hanging. There are twenty-five assignments of error, some of which raise questions not presented to the court below and others of which are not discussed in the brief, nor called to our attention in the oral argument. However, the case involves a penalty of death for appellant, and we shall proceed upon the exception to the general rule and shall notice possible error, although the questions may not properly be raised. See Wiborg v U.S., 163 US 632,658, Crawford v U.S., 212 US 183."

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1. The trial of your petitioner began on 28 July 1945, at Guam, when the United States was still at war with Japan and patriotic fervor ran high, especially among those military officers and men who were still engaged in fighting the war. Many of the witnesses against the petitioner were of Japanese blood and had parents confined by the American forces in the local stockade. They were fearful of being momentarily seized by the Americans and thrown into prison because of their ancestry. Many of the Guamanian witnesses who testified against the petitioner were fearful of the troubled times and were most anxious to impress the Americans with their own loyalty by condemning him whom the Americans accused of being a traitor. A fair trial under such circumstances is well nigh impossible. The language of the court in Stokes v U.S., 264 F. 18, may well be applied to this case. There the court said:

> "The real object of the review by appellate courts of trials in lower courts is to determine whether according to recognized rules of procedure, they were fair and impartial. This is the purpose which guides appellate courts in their examination of assigned errors of law claimed to have unfairly influenced the result in the trial court. If the administration of justice is to be practical and substantial and not merely theoretical both trial and appellate courts must strive to ascertain the real substantial effect upon the jury of the action of the trial court.
>
> "In the consideration of the question in any case, and especially in the case in hand, the time of, and the circumstances and atmosphere surrounding the trial as they are revealed by the record, or as they are influenced by facts known of all men, and the real substantial effect upon the jury of the action of the trial court, are the decisive conditions by which the fairness of the trial must be tested. . . .
>
> "The acts and intents charged to the defendant in the indictment were unpatriotic and repulsive to all loyal citizens. They were that she had intentionally endeavored in the manner stated in the indictment to obstruct the prosecution of the war which they were striving and sacrificing to carry on. The trial was in the midst of that war, when patriotic men were particularly impatient of every interference and of every attempt to interfere with or cripple the universal efforts to win that war, efforts in which not only the

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armed forces, but all the people of the nation shared in various ways. The charges were not proof, however. The defendant was presumed to be innocent, and must betreated as innocent of them, until the fact was proved beyond a reasonable doubt. It is apparent that at such a time and under such circumstances the task of conducting a fair trial of one thus accused of intentionally attempting to obstruct the universal efforts of the people was unusually difficult, that extraordinary coolness, care, and impartiality were indispensable to prevent the patriotic fervor of the jury from usurping the place of that considerate judgement which it was their duty to exercise.

". . .The charge contains in several places rich and inspiring expressions of patriotism and of the nobility of our aims in the war, which could hardly have failed to increase the commendable patriotic feeling that was already aflame in the heart of every juryman. . . and when the entire charge is considered in the light of the time and the circumstances surrounding the trial, of the extended discussion in the charge of the many side issues which crept into the case, and of the other characteristics of the charge to which attention has been called this court is unable to resist the conclusion that the patriotic zeal of the court below led it to place too heavy a burden upon the defendant in her endeavor to meet the evidence which the government produced against her, and that the cause of the administration of justice will be served by another trial of this case." (Underscoring supplied.)

When such a trial is conducted by a military commission composed of officers who were actually fighting the war, and who must act as both judge and jury, the task of conducting a fair trial is indeed made even more difficult and requires even more extraordinary coolness, care and impartiality. The difficulty of the task is greatly multiplied when the testimony relied upon by the prosecution is given by the Chamorro people, who, as witnesses, have proven to be as unreliable as children, telling the court what they think it wishes to hear and with no regard for the truth or for their oaths. This was proven by the three charges of assault and battery brought against the petitioner, based on false information and the proven perjury of the five witnesses who testified to these charges.

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2, 3, and 4. Although the closing arguments of defense counsel clearly show that the prosecution had not succeeded in satisfying the evidentiary requirements of the Constitution, so far as the charges of treason are concerned, a reading of the record and of the affidavitt of the petitioner (attached and marked "A") show that the petitioner was not afforded the opportunity to have counsel of his own choice, and was not defended in every "possible legitimate way." There were assigned as defense counsel, a Naval officer of the Military Government and a Chamorro "lawyer", the latter being openly hostile to the petitioner. The trial began on July 28th after the charges and specifications had been served on July 20th. Thus the petitioner was given eight days to prepare his defense to 7 charges and 11 specifications, which included 2 charges and four specifications of treason, the most serious crime of which a man may be accused. To prepare a defense for such a serious and complicated case counsel for the petitioner consultedwith him only on two occasions before the trial and for not more than half an hour on each occasion. Witnesses requested by the petitioner, who were ready and willing to testify, were not called before the court. The petitioner was prevented by counsel from taking the stand as a witness in his own behalf. No evidence in mitigation was presented by counsel although much was available. Although the prosecution had the benefit of an extended research and a resulting brief prepared by the office of the Judge Advocate General of the Navy, no such opportunity or no adequate library was available to counsel for the petitioner. Counsel for the petitioner did nothing about certain deletions in the record of the trial which would have shown the improper use of memoranda to read testimony into the record.

The following Court Martial Orders are cited in support of

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the petitioner's request for a new trial on this ground of inadequate defense:

a. CMO 275-1919 page 1 - 2

"On March 12, 1919, the accused, by counsel filed a petition with the Secretary of the Navy praying that a new trial be granted on the charges upon which he was tried, and in support of such petition alleged hostility on the part of a member of the court; bias on the part of a witness; that hearsay evidence was improperly admitted; that he was prevented by counsel from taking the stand as a witness in his own behalf; that he was improperly defended by counsel who did not understand the rules of evidence and the rules governing the admission of evidence in a trial; and, further, that he has newly discovered evidence which he desires presented; and that he has several witnesses who did not appear in his trial who will materially assist him in proving his innocence.
On March 27, 1919, the Acting Secretary of the Navy granted the petition of accused for a new trial, and accordingly disapproved the proceedings, findings, and sentence of the general court martial in the foregoing case. . ."

b. CMO 8-1921 page 10 - 11

"It is the opinion of this office that the accused was not in fact represented by counsel but on the contrary was opposed by two prosecutors, although it was the duty of one of these prosecutors to defend him. This office cannot understand the action of the counsel for the accused in his conduct of the affairs of the accused during the trial and lays it to ignorance of the duties of his position as counsel. However, the veriest layman could hardly have damaged the interests of the accused to the extent that counsel did in this case and if his action was caused by ignorance of what his true duty was he should have declined to act as counsel for that reason. At any rate, after agreeing to act as counsel <u>it was his duty to defend the accused in every possible legitimate way</u>."

c. CMO 12-1922 page 7 - 8

"However, the manner of establishing this prima facie case was very irregular and points toward a careless performance of duty on the part of both judge advocate and counsel for the accused."

d. CMO 1-1931 page 31

"The procedure followed by the recorder and permitted by the court in this case was highly irregular, and indicated a lack of appreciation, not only by the recorder and the

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members of the court, but also by the counsel for the accused, of their respective duties in connection with the trial. Counsel by attempting to prove as facts allegations of the specification which it was the recorder's duty to prove, failed in his duty to protect the accused's interests. . . .the Secretary of the Navy directed that the finding and sentence in the case be set aside. Also that the department's action be brought to the attention of the members and recorder of the court, and the officer who acted as counsel for the accused."

e. CMO 2-1927 page 7

"In view of the fact that the accused was deprived of a fair and impartial trial by reason of the impracticability to receive the testimony of certain important and material witnesses, whom the accused had requested to be produced but could not be located, and further in view of the doubt cast upon the veracity of one of the witnesses of the prosecution. . . .the findings and sentence in the case of S are disapproved and he will be restored to duty."

5. Under the Constitution and the laws of Guam, the crime of treason cannot be proven except by the testimony of two witnesses to some overt act in furtherance of the crime. This overt act must be specially laid in the indictment and it must be proven precisely as laid in the indictment. If the overt act be not so specially laid in the indictment, it cannot be proven by the prosecution. By "overt act" is not meant some indefinite, general conduct but some specific, physical act. The government cannot allege general treasonable conduct and then proceed to prove certain specific overt acts which are included in such conduct. The Supreme Court of the United States has interpreted this requirement of the Constitution as extremely exacting and has declared that the very act, and mode of the act must be laid as it is intended to be proved. It must be an act of a character susceptible of clear proof, and not resting in mere inference or conjecture. The crime of treason may be charged without reference to the overt act, but since the constitution requires proof by showing an overt act supported by the testimony

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of two witnesses, this specific, physical, overt act must be alleged in the indictment or it cannot be proved. In all treason cases which have come before the Supreme Court, the Circuit Courts and the District Courts, the indictments after alleging treason by using words denoting general treasonable conduct in specific instances, have invariably followed such general terms with a listing of separate and distinct overt acts. The conduct of the accused is divided into each of the physical acts which he is alleged to have committed in the course of such treasonable conduct. Nowhere are these acts left to be included by inference in such broad terms as, "aided", "assisted", "participated", "organized","solicited", "promoted", "supplied". These are all broad and general terms which may serve to charge treasonable conduct but they are not in themselves physical acts, clearly susceptible of proof as required by the Constitution. Any overt acts that may be included under these broad terms must of necessity rest in mere inference since they have not been specifically alleged. The Supreme Court has ruled that this is precisely what the constitutional provision seeks to avoid.

Any treason case which has gone before a Federal court may be taken at random and it will be seen that the overt acts charged are not such broad and inclusive general terms which will admit of proof many and varied overt acts thereunder. On the contrary after using such broad and general terms to charge a treasonable conduct, the specific, physical, overt acts are listed, each separately and in great detail.

For example in U.S. v Robinson 259 F 685, the defendant was indicted for treason under three counts. The first alleged that after April 6, 1917 the defendant gave aid and comfort to the German government while war existed between it and the United States by conveying messages, oral or in invisible ink, from the city of Halifax,

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Canada to the city of Rotterdam, Holland, and communicating and delivering the same to agents and representatives of the German government and in receiving in return oral and similarly written replies. . .Then followed the overt acts laid under this coun t and they are such specific physical acts as, sailed, landed, embarked, arrived. The other counts were similarly laid out in a general way and the overt acts followed such as, registered under false name, met and conferred, made a public speech, conspired.

In the case of U.S. v Fricke 259 F 673 the indictment also first described the general treasonable conduct and then enumerated the specific overt acts alleged which were, held on deposit $6000, delivered $6000, borrowed, sent a cablegram, falsely stated.

In Cramer v. U.S., 325 F 1, the indictment charges general treasonable conduct and follows that with a list of overt acts such as, did meet, confer, treat, and counsel with; and did accompany.

In U.S. v Haupt, 152 F2d 771, treasonable conduct is charged in the indictment with a long and detailed description and even that is followed by a list of separate and specific overt acts, such as, accompanied, harbored and sheltered, accompanied to arrange for purchase, signal a financial statement and an order for purchase and made an initial payment, accompanied to complete arrangements, made a further payment and completed arrangements for purchase and did purchase, harbored and sheltered.

In U.S. v Stephan, 133 F2d 87 the indictment charged treason in general terms with some detail and then alleged twelve overt acts which were set out in the indictment with exact and careful detail. Some of the acts listed were, traveled by auto, obtained money, escorted, escorted and bought a drink for, and concealed identity of, escorted and purchased candy for and obtained money for.

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Authorities: (Underscoring supplied)

a. U.S. v Gooding, 25 U.S. 460, 475 12 Wheat 460;

"The case of treason stands upon a peculiar ground; there, the overt acts must, by statute, be specially laid in the indictment and must be proved as laid. The very act, and mode of the act must, therefore be laid as it is intended to be proved."

b. Trial of Aaron Burr, 4 Cranch 469, 489;

"The law does not expect a man to be prepared to defend every act of his life which may be suddenly and without notice alleged against him. In common justice the particular fact with which he is charged ought to be stated, and stated in such a manner as to afford a reasonable certainty of the nature of the accusation and the circumstances which will be adduced against him. . .If it be necessary to specify the charge in the indictment, it would seem to follow, irresistably, that the charge must be proved as laid."

c. U.S. v. Stephan, 50 F Supp 738, 742;

"The overt act is the doing of some actual act, looking towards the accomplishment of the crime."

"The jury cannot convict unless there are at least two witnesses to an overt act, and there must be at least one overt act charged and proved."

d. Stephan v U.S., 133 F2d 87;

"We must keep in mind that one may not be convicted of treason upon evidence of an overt act, unless such act has been laid in the indictment."

e. U.S. v Haupt, 47 F Supp 836;

"An overt act, in criminal law, is an outward act done in pursuance and in manifestation of an intent or design; an overt act in this case means some physical action done for the purpose of carrying out or affecting the treason. Such overt act, as I have said heretofore must be proved beyond a reasonable doubt by the testimony of two witnesses to said act."

f. In re Charge to Grand Jury (CC Ohio 1861) 1 Bond 609, 30 Fed Cas No. 18,272;

"The plain meaning of the words "overt act" as used in the Constitution and the statute is an act of a character susceptible of clear proof, and not resting in mere inference or conjecture. . .until his disloyalty is developed by some open and provable act he is not legally guilty of the crime of treason."

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Additional Charge I, Specification 1 does not allege an overt act as required by the decisions of the Supreme Court. The words charged are, "did on or about December 11, 1941, aid, assist and participate in the taking by and for the use of the Japanese military forces of an electric generator. . .

With what overt act does such wording charge the defendant? Can it be said that the accused is charged with any physical, clear and open act of treason? The words aid, assist and participate in the taking are so ambiguous that they may include one thousand or more overt acts. They do not allege an overt act, in and of themselves, but they charge general conduct from which may be inferred or implied that overt acts were committed. They do not even allege that the accused did the taking but the taking was by the Japanese. They allege that the accused aided, assisted and participated in the taking but they do not allege what overt act was supposed to have been committed in so aiding, assisting or participating.

Can the prosecution thus come into court with an ambiguous indictment and proceed to prove any number of overt acts which it pleases, so long as they come within the general language of the charge? We think not. In Stephan v U.S. the court said,

> "We must keep in mind that one may not be convicted of treason upon evidence of an overt act, unless such act has been laid in the indictment. Burr's Trial, US v Burr, 25 Fed Cas page 55 No. 14,693; Wharton's Crimi. Law, 11th Ed. vol. 3 Sec. 2153 p 2310."

In the Trial of Aaron Burr, 4 Cranch 469,489 the court said;

> "In considering this point the court is led first to inquire whether an indictment for levying war must specify an overt act, or would be sufficient if it merely charged the prisoner in general terms with having levied war, omitting the expression of place or circumstance.
> ". . .A description of the particular manner in which the war was levied seems also essential to enable the accused to make his defence. The law does not expect a man to be prepared to defend every act of his life which may be suddenly and without

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notice alleged against him. In common justice the particular fact with which he is charged ought to be stated, and stated in such a manner as to afford a reasonable certainty of the nature of the accusation, and the circumstances which will be adduced against him. The general doctrine on the subject of indictments is full to this point. Foster, p 149, speaking of the treason of compassing the king's death, says, 'From what has been said it followeth that in every indictment for this species of treason, and indeed for levying war and adhering to the king's enemies, an overt act must be alleged and proved. For the overt act is the charge to which the prisoner must apply his defence.'"

"In page 220 Foster repeats this declaration. It is also laid down in Hawk b.8.c.17. sect.29, 1 Hale,121 1 East, 116, and by the other authorities cited, especially Vaughan's case. In corroborationof this opinion it may be observed, that treason can only be established by the proof of overt acts, and that by the common law as well as by the statute of 7 William III, those overt acts only which are charged in the indictment can be given in evidence, unless, perhaps as corroborative testimony after the overt acts are proved.

". . If it be necessary to specify the charge in the indictment it would seem to follow, irresistably, that the charge must be proved as laid."

"...Might it be otherwise, the charge of an overt act would be a mischief instead of an advantage to the accused. It would lead him from the true cause and nature of the accusation instead of informing him respecting it."

In U.S. v Haupt the court said that in treason prosecution an "overt act" is some physical action done for the purpose of carrying out or effecting the treason. This Haupt case clearly illustrates the insufficiency of the words "aid and assist" to amount to overt acts:

> "The indictment states (paragraph 4, page 3) that the defendants adhere and give aid and comfort to the German government by aiding and assisting Herbert Haupt. . . .and that this assistance took several forms such as harboring, relieving, aiding and abetting, assisting, counselling and advising Haupt. . .
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> "The indictment states (paragraph 2, page 4) that in execution of their treasonable conduct, the defendants were to perform and committ certain overt acts. The indictment (pages 5-14 inclusive) then proceeds to enumerate these overt acts. . . .
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> "Does the indictment in the instant case meet these requirements? I believe that it does. The crime charged is that of treason. A reading of the indictment by any one of the defendants must sufficiently inform him or her of the charge because it clearly states that part in the crime they are charged with

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committing. They are told that it was to aid and assist Herbert Haupt in doing acts which, without question, if true aided and assisted the enemy. . .It clearly informs them how and when they committed the alleged treasonable acts. The description of the overt acts set forth in the indictment is such as to specifically inform the defendants of what they will be required to meet at the trial, and any judgement of conviction or acquittal that would follow the trial of this case could be pleaded as a complete defense to a second prosecution." (Underscoring supplied)

It will be noted in this case that the court refers to the the words "aid and assist" as charging treasonable "conduct" and that the indictment did not stop with charging this general conduct but went on to enumerate and specify the separate overt acts which made up this conduct. It is thus made vividly clear what the Constitution requires to convict of treason. This requirement is mentioned in the early case of U.S. v Gooding, 25 US 460, which case is often quoted by the courts:

"The case of treason stands upon peculiar grounds; there, the overt acts must, by statute be specially laid in the indictment and must be proved as laid. The very act, and mode of the act must, therefore be laid as it is intended to be proved."

It cannot be said that the words "did aid, assist and participate in the taking . . .of a generator" lay the very act, and the mode of the act. Whatever overt act was hoped to be proved to be in furtherance of the conduct charged, it was not specially laid in the specification; in fact it does not appear at all. "We must keep in mind that one may not be convicted of treason upon evidence of an overt act, unless such act has been laid in the indictment."

The exactly same wording was used in the specification under Charge I and no overt act was there alleged.

The same law as stated above will be seen to apply to specifications 2 and 3 under Additional Charge I. Specification 2 purports to charge an overt act with the words, "did, in or about the

month of December, 1941, organize, solicit and promote the organization of residents of Guam into an organization. . ." Again this specification falls short and stops with alleging general conduct without specially laying any overt act. The specification does not say what open, physical and specific act was done in organizing, soliciting or promoting such an organization. Such general language could embrace a thousand or more overt acts which have not been specially laid in the indictment; particularly when such a great and indefinite period is indluded as, "in or about the month of December, 1941". The prosecution cannot under the law allege some general conduct and then proceed to prove any or all overt acts which might be included in that general conduct.

Specification 3 purports to charge an overt act with the words "did, in or about the month of April 1942, supply to the Japanese military and naval forces provisions and refreshments. ." What specific, physical act was supposed to have been committed in supplying such provisions? The specification does not say. Whatever overt acts were relied on to prove such supplying have not been specially laid in the indictment. "We must keep in mind that one may not be convicted of treason upon evidence of an overt act, unless such act has been laid in the indictment."

Aside from the peculiar ground upon which the case of treason stands by reason of constitutional provision requiring precise pleading and proof, let us consider the policy of the Navy Department when it comes to such vague and ambiguous pleading as "in or about the month of December 1941" or "in or about the month of April 1942" and refer to Court Martial Order 8 of 1945, page 376, 377:

> "Section 35 of Naval Courts and Boards, provides that the time and place of the commission of an offense must be averred in the specification, with sufficient precision clearly to identify the offense and enable the accused to understand what particular act or ommission he is called upon to defend. The

necessity for requiring a specification to set forth with minuteness and precision the material elements of the offense charged is the complement of the right of the accused to be fully informed concerning the particular offense with which he is being charged so that he may have an opportunity to prepare his defense or enter the plea of "former jeopardy" if subsequently charged with the same offense (CMO's 148, 1918, 1,3; 2, 1941, 271). Although at common law it was necessary for an indictment to allege a specific date, this is not required by Naval Courts and Boards, which permits the use of the words "on or about" or in the Federal Courts (Ledbetter v U.S., 170 U.S. 606). However the requirement of precision remains. . .The use of an allegation averring "during the period from" one date to another. . .is proper where the act or acts specified extend over a considerable period of time. .,but the offenses alleged here were not of that type and each consisted of an act which could not have been prolonged but which must have occurred on a definite date. In CMO No 148, 1918, 2, the following language was used; "The allegations as to 'time' and 'place' in the first and second specifications were vague and indefinite and lacked the degree of precision required by the Department. Among other instances of such indefiniteness, certain acts of the accused were alleged to have been committed 'during the months of October and November'. The instructions and decisions of the Department require that a specification should allege that the acts constituting an offense were committed on a day certain, or 'on or about' a day certain." Of similar import are CMO's No.12,1937,5 and No.5,1932,5. Although the first specification of Charge I alleged a period of only 12 days, the offense alleged was of the type wherein the reviewing authority should "insist upon the observance of those salutary rules regarding the admission of evidence and the trial of actions in general, which for centuries have been in practice, to the end that an accused may be assured a fair trial." (CMO 1, 1943, 142) and that the vague and indefinite date alleged antedated the accusation against the accused by almost a year. Having regard to these circumstances, it could not be said that the time when the alleged offenses occurred was set forth "minutely and precisely" (Naval Digest, 1916,p.69) or with the precision required by Naval Courts and Boards. Therefore the court erred in failing to sustain the objections of the accused to the specifications."

The above decision of the Navy Department clearly shows that there is no precedent or justification anywhere for such vague and indefinite pleading as "in or about the month of December,1941". When it comes to the case of treason this is no mere defect in pleading which may be cured by the waiver of the accused. It is a matter of proof, most particularly provided for in the Constitution of the United States which prohibits a conviction of treason except

by testimony of two witnesses to the same overt act, and the Federal courts have held that a conviction of treason may not be had upon evidence of an overt act, unless such act has been laid in the indictment. It is a constitutional gaurantee which cannot be waived except as provided in the Constitution by confession in open court.

From the foregoing it is seen that not one of the four specifications under the charge of treason, alleges an overt act as required by the constitutional provision. There is therefore, no basis upon which to convict the petitioner of treason.

6. As to charge I and the specification thereunder, the only words in this specification which even resemble an overt act are the words, "did, aid, assist and participate in the taking by. . . the Japanese. ."

It will be noted that the accused is not charged with taking, therefore it cannot be said that the overt act charged is "taking". Whatever overt act was intended to be charged by the pleader is not clear. The words "aid, assist and participate", have no definite and specific meaning, when they are relied upon to state some physical and open act. Now let us consider what acts of the accused have been "proved" by the testimony of two witnesses.

The witness, Zafra, was the only corroborating witness. His testimony showed that the accused was standing by the safe and that he was later walking along the street with 2 Japanese officers and was carrying a white bag. Standing by the safe is not an open and plain act of "aiding, assisting and participatingin taking" nor could it be considered that standing by the safe is the act of "taking". The only way in which this standing by a safe can be said to be evidence of any act, whether it be "aiding, assisting or par-

ticipating" in anything, is by inference. According to the decisions handed down by the Federal Courts, this is precisely what the writers of our constitution sought to prevent, namely, conviction of treason by circumstantial evidence. The only acts which can be hoped to be proven by the testimony that the accused was standing by the safe must necessarily be inferred.

The accused is not charged with the overt act of carrying away a white bag of money or of anything else, and all that the testimony of Zafra serves to corroborate, is that the accused was walking along with the Japanese officers carrying a white bag. Even if it could be claimed that the pleader succeeded in charging such an overt act as is required by law, can it be contended that Zafra's testimony proves that the accused "aided, assisted, or participated" in any taking by the Japanese of anything? If so it can only be, by construction and inference and therefore by circumstantial evidence, as this witness saw no taking of anything by anyone. This testimony cannot be said to be direct testimony which proves any overt act charged in the specification. However strong it may be as circumstantial evidence, it does not meet the test laid down by the Supreme court in the Cramer case and by the Federal Courts in all other treason cases.

In the instant case, the judge advocate incorrectly advised the commission of the law, on this point. He cited the Fricke case, 259 F 673 where it said:

> " But where the overt act is single, continuous, and composite, made up of, or proved by, several circumstances, and passing through several stages, it is not necessary, in order to satisfy the provisions of the Constitution requiring two witnesses to an overt act, that there should be two witnesses to each circumstance at each stage, as distinguished from the necessary proof of two witnesses to an act other than continuous and composite. . ."

This was expressly referred to by the court in U.S. v Haupt 136 F2d 661, as an incorrect proposition of law:

> "Another portion of the charge is to say the least, confusing, and we think states an incorrect proposition of law. After advising the jury that an overt act must be proven by two witnesses, the charge states: 'However where the overt act is single, continuous and composite, made up of or proved by several circumstances and passing through several stages, it is not necessary that there should be two witnesses to each circumstance.'
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> "We understand by this language that if an overt act is made up of several circumstances, it is not necessary to prove each circumstance by two witnesses. The government contends that the constitutional provision would be reduced to an absurdity by requiring two witnesses to the entire transaction. <u>This contention, however overlooks the fact that an overt act must be proved as alleged. If the act consists of a chain of events it would be more absurd to think that proof of one link would be sufficient proof of the chain</u>.
>
> "Also the holding in U.S. v Robinson DC 259 F 685, is in point. There the court considered at length the history and requirements of the constitutional provision. The only question for decision was whether the overt acts had been proven by two witnesses. The court on page 694 of 259 F, stated: 'I conclude therefore, that it is necessary to produce two direct witnesses to the whole overt act. It may be possible to piece bits together of the overt act, but if so, each bit must have the support of two oaths; on that I say nothing.'
>
> "It may be, as suggested in the Robinson case, that where the overt act as laid consists of more than one circumstance or stage, that such act may be proven by two witnesses to each circumstance or stage. In our opinion, however, <u>this is the minimal requirement</u>." (Under-scoring supplied).

That the Robinson case was available to the judge advocate, whose duty it was to advise the court of the law, is shown by his quoting from it in his closing argument, only very minutely. This scholarly opinion went into the history of the constitutional requirement of two witnesses, and this judge advocate chose one little sentence from that opinion, viz., "And it is necessary to produce two direct witnesses to the whole overt act, and it may not be proved by one witness and circumstantial evidence." This is precisely what this judge advocate did; he tried to prove overt acts which were not even charged, by circumstantial evidence.

If by any stretch of the imagination it can be held that a sufficient overt act has been alleged in this specification, is it such an act which is sufficient to constitute treason? It has been held that an act is treasonable in its character if it tends to strengthen the enemies of the United States in the conduct of the war, or if it weakens or tends to weaken the power of the United States to resist or to attack the enemies of the United States. Since this money which the Japanese are alleged to have taken was lawful money of the United States, the Japanese Forces as an army of occupation, had the right to take possession of it, under article 53 of the Hague Regulations which states, "An army of occupation can only take possession of cash funds, and realizable securities which are strictly the property of the state." Feilchenfeld says (sec. 212 p 62) "The occupation force may seize cash funds and realizable securities but only if they are strictly the property of the state."

Since the Japanese force by virtue of its status as an Army of Occupation could take these funds of the state and since they were found in the place where they naturally should be expected to be found, how can it be successfully contended that an act which aided them in taking this money was an act which strengthened the enemy or weakened the power of the United States to attack or resist the enemy. The Japanese were in full and complete control of Guam and needed no assistance whatsoever to take possession of that which they already had. Therefore even if the ambiguous language of the specification is so strangely construed as to be taken to allege an overt act, this act is seen to be insufficient to uphold the charge of treason. Just as in the Cramer case it is a colorless act, if indeed there was an act at all.

Standing by a safe as it was being opened, and walking along the street carrying a white bag, acts which were not even alleged as overt acts in the specification cannot be said to be treasonable and any treasonable act which they imply can only be said to exist by inference, speculation and imagination.

Willard Hurst's scholarly treatise in 58 Harvard Law Review, criticized in some respects, the majority opinion of the Cramer case, but he none-the-less clearly points out what the court's interpretation of the Constitutional provision is, and that has become the law. At page 832 Hurst says;

"However in implementing the function of the overt act, Cramer v U.S. goes far beyond the current of previous American authority by apparently insisting that the act of adherence to the enemy must be one which successfully confers tangible benefit upon the enemy; an act which is merely a step in furtherance of a design to confer such benefit is not enough, however substantially it may advance that purpose. "The very minimum function that an overt act must perform in a treason prosecution is that it show sufficient action by the accused, in its setting, to sustain a finding that the accused actually gave aid and comfort to the enemy." "

Under additional Charge I specification 2, the accused is charged with treason in the following words, "did, in or about the month of December, 1941, organize, solicit, and promote the organization of residents of Guam into an organization known as the Dai Nisei, for the purpose. . ."

No overt acts are alleged in the specification to show in just what way the accused is supposed to have acted in organizing soliciting and promoting such an organization. The specification does not say: it does not allege that he made a speechat any specific and definite time, nor that he approached any person or persons and asked him or them to join any organization. In other words the specification does not allege an overt act as required but stops short after alleging general treasonable conduct. Under such an

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indictment the prosecution is free to select any number of acts of the accused which may have been done by him over the great and indefinite period included in the words "in or about the month of December, 1941", which may go to make up the general treasonable conduct charged. Both the prosecution and the court were laboring under a misapprehension, for the law states that: "We must keep in mind that one may not be convicted of treason upon evidence of an overt act, unless such act has been laid in the indictment."

In its attempt to secure a conviction under this specification the prosecution called seven witnesses. Six of these were half Japanese, some of whom had parents confined in the stockade, and all were fearful of momentarily being seized by the Americans and thrown into prison for their nationality. In order to have some corroboration in their testimony the judge advocate encouraged them to take memoranda to the witness stand from which they read their testimony into the record. This does not appear in the record but is proven by the affidavitts of some of those who thus read from memoranda and the affidavitt of the accused.

In spite of this illegal advantage, only three of the witnesses corroborated each other on any single overt act of the accused, and this overt act was not charged in the specification. This was testimony to the effect that the accused was present at a meeting around a "month and a half" or "two months" after the Japanese invasion and that he made the remark that they were gathered there to help Japan win the war. The specification does not charge the overt act of attending the meeting, or of making a speech or any other specific, physical act. It charges general conduct which is alleged to have occurred in or about the month of December, 1941. A month and a half after the Japanese invasion is at least January

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25, 1942, and two months after the invasion is at least February 10, 1942. Even though the specification does not allege any specific act, how can the general conduct it charges include anything happening on January 25, 1942 or on February 10, 1942. (CMO 8 1945 p 376 cited above). No such act was laid in the indictment. The accused was not therefore, apprised that he would be called upon to defend this act. He was thereby precluded from seeking and presenting evidence to show that he was forced by the Japanese invaders to act as an interpreter for them and that the words which he translated did not represent his own thoughts or sentiments. It is not the policy of the Navy Department nor of the Federal Courts to mislead the accused from the true cause and nature of the accusation but rather to inform him respecting it.

Under additional Charge I, Specification I, no overt act is alleged. The langugge charges general conduct, alleged to be treasonable, as follows, "did, on or about December 11, 1941, aid, assist and participate in the taking by and for the use of the Japanese military forces . . ." a generator. The specification does not go on to allege any specific, physical and open act which is laid to the accused. Even though no overt act is charged under this specification, let us see what act the prosecution has proved by the testimony of two witnesses.

Mrs. Butler states that the accused came to her home with three Japanese officers and told her that the Jap officer wanted her generator. She had her brother show them the generator. She testifies that "they. .took the generator", "they " is a very indefinite word. "Q. Who did you mean by they? A. This officer and his party and Shinohara were all together. Q. Did you see

them take the generator from the house? A. Yes, sir. Q. How did they take the generator away from the house? They loaded it on the truck."

There is no testimony as to any act the accused did, except that he interpreted. The witness vaguely says "they took the generator", "they loaded it on a truck" and does not testify as to any specific act of the accused.

The only corroborating witness was Bordallo, who testifies that the accused was there with the Japanese officers and that there was a conversation about an electric generator, that he showed the generator to thevisitors, that the accused and the officers left and later two men disconnected the generator and loaded it on the truck.

Taking the testimony of both of these witnesses it will be seen that no act of the accused is supported by the two of them. The only thing they agree on is that there was a conversation about a generator and that Bordallo showed the generator to the officers and the accused. Both agree that the generator wastaken away, but Mrs. Butler says it was taken away by the whole party, and Bordallo says that after the accused and the officers had left, two men who were left behind disconnected and took away the generator. There is no act of the accused supported by the testimony of two witnesses, not even that the accused acted as an interpreter, for Bordallo says that he did not know whether the accused was acting as an interpreter or not.

Since the prosecution has charged no overt act and has proved none, let us see if the conduct charged was truly giving aid and adhering to the enemy. The Japanese were in complete control of the island and of every inhabitant and all property thereon. The testimony does reveal an orderly requisition by the occupation

forces , of a generator, under Article 53 of the Hague Regulations. Mrs. Butler was given a receipt therefor. If the accused aided or assisted such a requisition, would this be an act which strengthened the enemies of the United States, or which weakened the power of the United States to resist or attack its enemies? The evidence showed that the Japanese used the generator to run a moving picture projector. Since the occupation forces had complete power over the inhabitants and their property, and could require obedience from the people under international law, and under such law had the power of requisition, nothing the accused could do, could possibly increase the rights or powers which the invaders already had. As the judge advocate concedes, if the accused was ordered by the invaders to assist them in requisitioning the generator, he was bound to obey under international law and such obedience is not treason against the United States.

Under additional Charge I, specification 3, the conduct charged is "did, in or about the month of April, 1942, supply to Japanese military and naval forces provisions and refreshments;.." This amazingly broad charge is not followed by one single overt act in the indictment. But the prosecution proceeds and is permitted over the objection of defense counsel, to bring in a whole maze of unrelated, immaterial evidence, none of which even touches upon this specification. And more amazing is the fact that even among all this improper evidence is not one overt act of the accused. This specification is probably based on two "free" parties which the witnesses said were given for the Japanese governor at the club which the accused managed. One of these parties took place on February 16, 1942 and the other at the end of the year of 1942.

Can either of these parties be said to have taken place "in or about the month of April 1942"? Even if this unusually favored, prosecution is permitted to stretch its charge to ind ude the whole year of 1942, what overt act of the accused has been shown even by one witness? A careful study of the record will reveal none. None whatever!

What evidence was presented is the worst kind of evidence in a treason prosecution. Every bit of it depends upon inference and circumstantial evidence. Whatever purpose such questionable evidence was intended to accomplish (unless to prejudice the court) was defeated by the evidence of the defense that all food and supplies served at the club were furnished by the Japanese forces.

There is not one iota of evidence which relates to the period "in or about the month of April, 1942". No overt act is charged in the specification; none is proved in the evidence; nothing is proved in the evidence to have happened in or about the month of April, 1942.

The court was in error in not striking out all the testimony brought in under this specification since none of it related to the time charged, and no overt acts were ever proved.

Since it has been made apparent that not one of the four specifications under treason have alleged even one overt act (and this alone is fatal) and that in spite of this the prosecution has not properly proven a single overt act, let us considerwhat the result would have been, had the prosecution succeeded in proving an overt act which was not submitted as such.

Willard Hurst, commenting on the decision in the Cramer case in 58 Harvard Law Review at page 843 notes that:

". . .Though the Court made passing comment on the insufficiency of the extrinsic evidence offered, the stress is on the weakness of the overt act. The Court kept this same emphasis when, though conceding that Cramer's receipt of the saboteur's money for safekeeping would be a sufficient overt act if submitted as such it refused to consider this transaction, though admitted by Cramer, as evidence that the meeting afforded aid to the saboteur, because, "We cannot sustain a conviction for the acts submitted on the theory that, even if insufficient, some unsubmitted ones may be resorted to as proof of treason." " (Underscoring supplied).

The language of Justice Learned Hand in the Robinson case (259 F 685) bears quoting:

"The evidence in this case is amply sufficient to sustain a verdict for the government, were the crime charged other than treason, and I shall confine myself, therefore, simply to the consideration of whether the rule has been satisfied which is peculiar to that crime; that is, whether any overt act of treason is supported by the testimony of two witnesses." (Here Judge Hand considered the historical development of the rule). "It is clear that men feared prosecutions pieced together inferentially from chance words or deeds which need not be charged and against which no preparation could be made."

"It would be a complete misunderstanding to suppose that when applied to treason it only meant that the prosecution's witnesses to any overt act should number at least two. In the sense of the rule he is not a witness who testifies only to an isolated and neutral fact, which is relevant because it rationally corroborates the story of a direct witness. When evidence is estimated quantitatively it is the support of the oath that counts and the witness is no neutral narrator of past truth."

"I conclude therefore, that it is necessary to produce two direct witnesses to the whole overt act. It may be possible to piece bits together of the overt act, but, if so, each bit must have the support of two oaths; on that I say nothing. In the case of none of the overt acts at bar was the necessary evidence produced. The gravamen of the charge depended for direct support on Victorica alone. For the rest, the case rested upon circumstantial evidence which, while well nigh conclusive in fact, was not direct as required. There seems to me no question whatever that without disregarding the whole theory of the Constitution I could not allow a verdict to stand if I received it. I must therefore direct it for the defendant."

This dictum of Judge Hand's which says that each bit of an overt act must have the support of two oaths, was upheld in U.S. v

Haupt, 136 F2d 661, where the court said it was the "minimal requirement", and was expressly adopted by the Supreme Court in the Cramer case;

> "The very minimum function that an overt act must perform in a treason prosecution is that it show sufficient action by the accused, in its setting, to sustain a finding that the accused actually gave aid and comfort to the enemy. Every act, movement, deed, and word of the defendant charged to constitute treason must be supported by the testimony of two witnesses."

The judge advocate has taken the anomalous position of contending that the Cramer case can have no application to the instant case since the facts are not exactly the same, and at the same time of quoting law from the Cramer case to uphold his own contentions. The judge advocate, in his capacity as advisor to the commission on the law, chose to ignore the chief rulings of the Supreme Court in the Cramer case. In Cramer v U.S., 325 US1, the Supreme Court expressly stated that it was determining the conflict of opinion between U.S. v Robinson, 250 F 685 and U.S. v Fricke 259 F 673, considering as well U.S. v Haupt, 47 F Supp 836 and U.S. v Stephan 50 F Supp 738:

> "Cramer's case raises questions as to application of the constitutional provision that "Treason against the United States shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No person shall be convicted of Treason unless on the Testimony of two Witnesses to the Same overt Act, or on Confession in open Court." "
>
> ". . .As lower courts thus have taken conflicting positions, or where the issue was less clearly drawn, have dealt with the problem ambiguously, we granted certiorari and after argument at the October 1943 Term we invited reargument to specific questions. Since our primary question here is the meaning of the constitutional provision, we turn to its solution before considering its application to the facts of this case."
>
> ". . .Distrust of treason prosecutions was not just a transient mood of the Revolutionists. In the century and a half of our national existence not one execution on a federal treason conviction has taken place."
>
> "Historical materials aid interpretation chiefly in that they show two kinds of dangers against which the framers were con-

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cerned to guard the treason offense: (1) perversion by established authority to repress peaceful political opposition; and (2) conviction of the innocent as a result of perjury, passion or inadequate evidence."

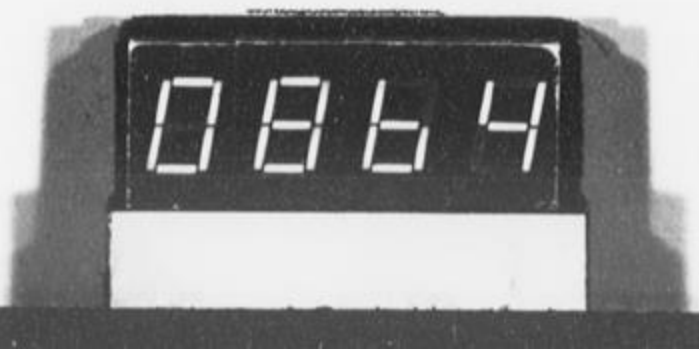
"The second danger lay in the manner of trial and was one which would be diminished mainly by procedural requirements--mainly but not wholly, for the hazards of trial also would be diminished by confining the treason offense to kinds of conduct susceptible of reasonably sure proof."

". . .While to prove giving of aid and comfort would require the prosecution to show actions and deeds, if the Constitution stopped there, such acts could be inferred from circumstantial evidence. This the framers thought would not do. So they added what in effect is a command that the overt acts must be established by direct evidence, and the direct testimony must be that of two witnesses instead of one. In this sense the overt act procedural provision adds something, and something important to the definition."

"The very minimum function that an overt act must perform in a treason prosecution is that it show sufficient action by the accused, in its setting, to sustain a finding that the accused actually gave aid and comfort to the enemy. Every act, movement deed, and word of the defendant charged to constitute treason must be supported by the testimony of two witnesses. The two-witness principle is to interdict imputation of incriminating acts to the accused by circumstantial evidence or by the testimony of a single witness. The prosecution cannot rely on evidence which does not meet the constitutional test for overt acts to create any inference that the accused did other acts, or did something more than was shown in the overt act, in order to make a giving of aid and comfort to the enemy. The words of the Constitution were chosen, not to make it hard to prove merely routine and every day acts, but to make the proof of acts that convict of treason as sure as trial processes may. When the prosecution's case is thus established, the Constitution does not prevent presentation of corroborative or cumulative evidence of any admissible character either to strengthen a direct case or to rebut the testimony or inferences on behalf of defendant. The government is not prevented from making a strong case; it is denied a conviction on a weak one."

"Certainly the treason rule, whether wisely or not, is severely restrictive. It must be remembered, however, that the Constitutional Convention was warned by James Wilson that, "Treason may sometimes be practiced in such a manner, as to render proof extremely difficult--as in a traitorous correspondence with an Enemy." The provision was adopted, not merely in spite of the difficulties it put in the way of the prosecution but because of them."

"Time has not made the accusation of treachery less poisonous, nor the task of judging one charged with betraying the country, including his triers, less susceptible to the influence of



suspicion and rancor. The innovations made by the forefathers in the law of treason were conceived in a faith such as Paine put in the maxim that, '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.' "

A good example of the effect that the Cramer case has had on courts in treason cases is seen in the opinion of the court in U.S. v Haupt, 152 F2d 771:

"Concededly there must be direct proof, by two witnesses, to each overt act, submitted to a jury, upon whose general verdict the sentence in a treason case is pronounced. There may be overt acts of legal sufficiency and established by the direct testimony of two witnesses, but the conviction will fall if the court submitted to the jury, certain alleged overt acts which were legally insufficient or not sufficiently established to present a jury question, by the direct testimony of two witnesses. The holding of the court in the Cramer Case may make conviction in treason cases difficult. It may in actuality make treason a theoretical crime, a paper crime, but we have no alternative but to follow the law as there announced by the Supreme Court." (Underscoring supplied.)

In U.S. v Burr (CC Va 1807) it is clearly stated that every part of an overt act must be proved by the direct testimony of two witnesses. If we substitute for the word "presence" any part of an overt act upon which the prosecution relied for a conviction, it will be most vividly seen that the prosecution in the instant case has not proved, according to constitutional requirements, any single overt act.

"The presence of the party, where presence is necessary, being a part of the overt act must be positively proved by two witnesses. No presumptive evidence, no facts from which presence may be conjectured or inferred, will satisfy the constitution and the law. If procurement take the place of presence and become part of the overt act, then no presumptive evidence, no facts from which procurement may be conjectured or inferred can satisfy the constitution and the law."

That the Constitution applies even in courts of military jurisdiction has been clearly upheld by the Navy Department in CMO 48, 1920 where this question was dealt with atlength; there it was said:

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"Far better authority is the opinion of Mr. Justice Black (9 Op. Atty. Gen. 223, 230), in which he said in no uncertain terms:

> 'The Constitution does apply, and is universally admitted to apply, with the same force and effect to military courts as to other tribunals. The protection against double punishment under one conviction is more important in military courts, because they are much more likely to do injustice. They are the most fallible tribunals in all this fallible world.' "

7. The judge advocate conceded in his arguments that the petitioner owed to the Japanese occupants of Guam a duty of obedience.

> "Had he rendered obedience only to the military occupant, he would not be guilty of treason against either" (the United States or Japan).

The evidence in this case does not show that the petitioner gave more than obedience to the military occupant. The evidence adduced by the prosecution under the specification of Charge I, (Records and Accounts incident) shows that the Japanese who were present carried arms, rifle and bayonet, and forced compliance with their orders by threatening with these arms. The evidence does not show that the accused gave anything more than obedience to the orders of the military occupant.

The evidence under additional Charge I, specification 1 which the prosecution produced showed that the Japanese officers present were carrying arms when the generator incident occurred. There was no evidence that the petitioner gave more than obedience to the commands of the Japanese military power.

Under the "Dai Nisei" specification the evidence showed that a Japanese officer was always present whenever anything took place in which the petitioner was supposed to have acted treacherously. There was no evidence to show that he was not interpreting for the Japanese officers under their orders and threats.

Under additional Charge I, specification 3 there was absolutely no evidence of any act, so there was no question of obedience.

It must be remembered that the burden of proof is always on the prosecution and they must show that more than obedience was given by the accused.

8. During the trial the Commission displayed its bias by admitting incompetent evidence over the objections of the petitioner and by itself asking witnesses leading questions which materially prejudiced the rights of the petitioner.

The record shows on page 39 that while a witness was testifying under the assault and battery charges the following evidence was admitted:

> 33 Q. Explain a little more about this target practice.
> A. There was a national flag, stars and stripes, planted on a buoy which made a target for a kind of heavy artillery, most likely 3-inch guns. I do not know definitely but it was a heavy gun.
>
> The accused moved to strike the entire answer of the witness to the last question on the ground that it was incompetent, irrelevant and immaterial.
>
> The judge advocate replied.
>
> The commission was cleared.
>
> The commission was opened. . .and announced that the motion of the accused was overruled.

It is quite obvious that this testimony had nothing whatever to do with the charge of assault and battery. The petitioner was not being tried for firing upon the American flag, nor was he in any sense responsible for such conduct by the Japanese forces. This would be apparent to the veriest layman. Who will deny that the judge advocate knew what answer to expect when he asked this question? This testimony was calculated to prejudice the court against

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the petitioner and succeeded in doing so. It could only serve to replace considerate judgement with unreasonable passion for it kindled the flame of outraged patriotism which was already aglow in the heart of each American officer on the Commission. That the court had in fact abandoned cool, considerate judgement in favor of passion and prejudice is shown by the fact that it failed to strike out such improper evidence on motion of the accused. The damage done to the case of the petitioner cannot be limited to the charge of assault and battery alone for this testimony is not even related to this charge any more than to any other. The passion, prejudice and bias which it provoked must necessarily have extended to all other charges and specifications upon which the petitioner was being tried. That the Navy Department does not countenance such unethical procedure is shown in CMO 5, 1945 at page 215:

> "The record of the proceedings showed that it was appropriate to caution the judge advocate to exercise extreme care in his duties as legal advisor to the court, to be cognizant of the rules of evidence outlined in Naval Courts and Boards and to be ever mindful of his responsibility not to encroach upon the accused's right to a fair trial. N.C.&B., secs. 360(5), 400; Winthrop Military Law (2d ed. 1920) pages 193-4; see also Berger v U.S. 295 US 78,88 (1935); Viereck v U.S. 318 US 236, 248 (1943)(). While there were other errors shown by the record, those discussed herein show that the rights of the accused were substantially prejudiced, necessitating disapproval of the proceedings."

The record also shows that <u>all</u> of the evidence offered under additional charge III (Desecration of Flag) related to a time more than a year and a half later than the time charged in the specification. Each time the accused objected to the admission of such evidence and requested that it be stricken, he was overruled. Although the petitioner was acquitted of this charge, this arbitrary action of the commission again clearly displays its bias and prejudice against the petitioner, during the trial. (Record p. 45, 48)

9. During the trial the commission asked witnesses one hundred and eighty five questions. At times it is difficult to decide from a reading of the record, just who was prosecuting the case, the judge advocate or the commission. The commission asked one single witness forty four questions between pages 61 and 64. Many of the questions were leading and some of them assumed facts which were not in evidence.

Such procedure is not representative of Naval Justice or American Justice. It is reminiscent of Japanese pre-war courts where the judge asks all the questions and counsel are permitted to speak only at the court's discretion.

For example at page 51 the commission asked:

25. Q. What was the accused doing around there, was he a Japanese officer?
A. He was in charge of us there, the girls that were working as waitresses.

26. Q. The accused was in charge of the club, is that it?
A. Yes, sir.

And at page 62 the commission asked:

76 Q. You were engaged under threats and promises by the accused to serve in a house in Agana inhabited by a couple of Japs is that correct?
A. I was offered to serve and my mother was offered the same thing and that nothing will happen to me.

77. Q. When did the first indication cross your mind that you might be required to serve the sexual appetite of the Japs?
A. The first time that they came to our ranch I knew that something bad was meant by that trip.

On the same page the commission asked:

81. Q. From the beginning of this whole transaction you understood you were to be used for purposes of prostitution by the accused, is that correct?
A. That is just what I understood. They were not going to make a good girl out of me.

At page 95 and 96 a witness was permitted to testify that he and others worked for the Japanese at the Agana Air Base. The prosecu-

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tion was thus trying to establish that an organization known as "Dai Nisei" did work for the Japanese. At page 97 on cross examination of the same witness by the accused:

> 66. Q. At the Agana Air Base, how many worked there when you were working there?
> A.
>
> The judge advocate objected to this question on the ground that it was improper cross-examination.

The objection was sustained!

At page 103:

> 50. Q. Who gave orders at the drill?
> A. The Japanese civilian, but he got his orders from Shinohara because Shinohara did not know how to conduct the drills.
>
> 51. Q. Were you present when he got the orders from Shinohara?
> A. No, sir.
>
> The accused moved to strike the portion of the previous answer of this witness beginning with the words, "but he got his orders from Shinohara because Shinohara did not know how to conduct the drills", on the ground that it was hearsay.
>
> The judge advocate replied.
>
> The commission was cleared.
>
> The commission was opened. . .and announced that the motion was overruled.

There was no justification for admitting hearsay evidence. This came under no exception to the hearsay rule and the trial is not for a "War Crime" since it is not for a violation of a law of war and none of the SCAP rules have been applied or are applicable. On page 100 where the judge advocate is cross examining a witness for the defense, every question is irrelevant and immaterial as well as beyond the scope of the direct examination and yet each time the accused objected he was overruled.

When all these arbitrary rulings and actions of the commission are taken together and considered as a whole, they indicate not

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that the commission was ignorant of its duty but that such a trial could not be conducted during those difficult times and under those circumstances fairly and impartially.

Regarding the court's lengthy examination of witnesses, the Honorable Secretary of the Navy expressed his disapproval in CMO 7-1945:

> "The Secretary of the Navy noted that the court and the president of the court engaged in a lengthy cross examination of defense witnesses that in certain instances amounted to a badgering and heckling of these witnesses. . ."
>
> "However the accused was prejudiced by the improper cross examination by the court and by the failure of the court to strike the improper cross examination from the record. . While the competent evidence adduced upon the trial of this accused might be sufficient to support the conviction found against him, nevertheless, the conduct of his trial could not be said to have been fair and impartial." (A new trial would be granted on request.)

10. On page 184 of the record, it is stated that the judge advocate introduced Jorge E. Cristobal, steward first class, U.S. Navy, as interpreter from Japanese to English. The petitioner respectfully points out that this "interpreter's" knowledge of the Japanese language was elementary and hardly adequate for courtroom interpreting, particularly in a capital case. He repeatedly misinterpreted and garbled the translations which he gave. He was so incompetent that in subsequent trials, where it was attempted to use him as an interpreter, he was ordered from the courtroom. The importance of the testimony which he was called upon to translate is emphasized by the fact that the witness who testified in Japanese was asked and answered 265 questions. In addition the witness was called by the defense and much of the value of his testimony was lost. This same "interpreter" was called by the prosecution to testify as an expert on Japanese language. His testimony begins

on page 156 of the record. This same Jorge E. Cristobal now denies that he took any part in the trial of petitioner as an interpreter!

11. Petitioner denies that he ever slapped or assaulted Captain George J. McMillin, one-time governor of Guam, just as vigorously as he denies all other charges and specifications, and states that those witnesses who testified to the contrary have offered perjured testimony. At his trial this petitioner had presented evidence that the governor was not even on the island on the date when he was alleged to have so attacked the governor. This testimony, in contrast to that of the prosecution, was of a highly credible nature, coming from the former Bishop of Guam. Apparently in its anxiety to convict the petitioner, the court chose to ignore this testimony.

Such perjured testimony serves to color the whole trial and taints all of the evidence produced by the prosecution on all charges. If five witnesses will take the witness stand and after taking oath proceed to tell such methodical and bare-faced lies, it is natural to suspect and question the value of all other testimony given at the trial by the prosecution, and especially since, as will be shown later, some of the other witnesses read their testimony into the record from memoranda.

The damage done to the case of the petitioner by this perjured testimony or even by the unfounded charges alone, is immeasurable. The judges and jurors of the petitioner were all military officers who were listening to charges and evidence that one of their fellow officers was greatly humiliated and suffered public indignity at the hands of the petitioner. What can more serve to

fan the flames of passion and obstruct that cool and considerate judgement that is as indispensable as it is difficult in a trial where treason alone is the charge?

12 and 13. Witnesses for the prosecution in its attempt to prove the charge of treason, were permitted to read their testimony into the record from memoranda. This fact does not appear anywhere in the record but is proven by the accompanying affidavitt of the petitioner, and the affidavitts of two of the witnesses who so testified from memoranda, certified true copies of which affidavitts are attached and marked "B" and "C". That such inexcusable procedure afford ground for a new trial is shown by the following Court Martial Orders:

a. CMO 2-1940 page 252

"The record of proceedings of a summary court martial showed that the court had denied the accused the right to examine a memorandum from which a witness for the prosecution, the reporting officer in the case, was then testifying. However, the accused's request that the memorandum be appended to the record was granted. A comparison of the recorded testimony of this witness with the written memorandum clearly indicated that the witness had been permitted to read the entire contents of this memorandum into evidence. The court erred in not granting the accused the right to examine the memorandum and gravely erred in allowing the witness to testify therefrom. For this, and other errors, the proceedings, findings and sentences were set aside.

b. CMO 144-1920 page 6

"The first witness for the prosecution and the accused as a witness in his own behalf, in giving their testimony, requested permission to refresh their memories from memoranda made by themselves. This permission was in each case granted though it was not stated that such memoranda were made at the time of the occurence or soon thereafter. It is essential that this be shown, before such use of a memorandum be allowed.

c. CMO 4-1922 page 9-10

"At the trial of a man convicted of "Theft" a written memorandum, made by the executive officer of that vessel on which

the accused was stationed shortly after the theft occurred, was introduced in evidence by the prosecution, the executive officer testifying that he could nɑ remember the facts covered in this memorandum, but that it was in his own handwriting and was correct when made. This memorandum contained statements made to the executive officer by the accused and his alleged accomplice shortly after the accomplice had been discovered attempting to leave the vessel with the camera the accused is alleged to have stolen. It appeared that the statements of the accomplice were made when the accused was not present. Counsel moved to strike from the record the whole memorandum on the ground that it was hearsay, but the court overruled this objection."

"In acting in this case the Department stated that it is true that a memorandum is admissible in evidence where it was made by the witness, or under his direction, at a time when the facts stated therein were fresh in his mind, and the witness cannot, at the time of trial, testify to such facts as of his own recollection (Naval Courts and Boards, section 145.) However, this does not mean that any statements whatsoever contained in such memorandum are otherwise admissible, it simply means that evidence which would otherwise be admissible but which the witness has forgotten, can be admitted in the shape of a memorandum prepared under the conditions set forth in the preceding sentences."

14. The petitioner respectfully submits that he has much newly discovered evidence which will assist him materially, in proving his innocence if a new trial is granted.

The man who was responsible for and who actually did organize the so called "Dai Nisei", is available, ready and willing to testify in behalf of the petitioner, as to the treason charges. A certified true copy of an affidavitt made by him (English translation) is attached herewith and marked "D".

Captain G.J. McMillin, U.S.Navy, is now available to testify.

A former Japanese policeman during the occupation of Guam, is ready and willing to testify on behalf of the petitioner concerning the treason charges.

Many of the local Chamorro people are now convinced that the real desire of the American authorities is not to condemn the petitioner because of his nationality, but to seek and know the truth and they are willing to testify in his behalf.

15. The Statute of Limitations had run against the assault and battery charges and the court erred in overruling the plea of the petitioner in bar of trial on these charges. These were misdemeanors and the law requires that the charges based on them be filed within one year after their commission. The prosecution contends that the statute of limitations was held in abeyance during the Japanese occupation. Even if this is so, the one year period had run since the reoccupation of Guam by the United States forces. The following sections of the Guam penal code are applicable:

> 801. Limitation for one year in misdemeanors.--An information or complaint for any misdemeanor must be filed within one year after its commission.
>
> 803. Information, when presented and filed.--An information is filed, within the meaning of this chapter, when it is presented in open court, and there received and filed.

The record shows that "The accused stated that he had received a copy of the charges and specifications. . .on 20 July 1945." It cannot be saidthat they were then presented in open court.

The trial did not begin until 28 July 1945 and it was not until that date that the information was filed within the meaning of the Guam Penal Code. This is the first time that anything concerning these charges was done in "open court". This was more than a year after the reoccupation of Guam by the forces of the United States. There is nothing in the record to show that the charges were presented in open court at any earlier date.

In addition to the above fifteen assignments of error your petitioner respectfully calls the attention of the Honorable Secretary to Charge IV specification 2 and to the record of the trial on page 230 where the defense pointed out to the court the following:

"Gentlemen, a woman who has been convicted of vagrancy before the war, is unmarried at the time but the mother of a 12 year old child, had a venereal examination before the war, and who went to Piti to look over a whorehouse, and two weeks later went to stay there and stayed two days and nights without working, is not a person who entered a life of prostitution under duress. Bear in mind, she went to the hospital for a physical examination and then went down there. This unfortunate woman knew what work she was to do and entered it voluntarily. As to her credibility, I call your attention to the fact that upon cross examination, in answer to the question: 'Have you ever been convicted of crime? " she said, "No". Recall the testimony of Sgambelluri, who said she had been convicted of vagrancy before the war."

It is fitting to conclude this petition with the well considered language found in CMO 6-1946 page 220-221:

> "It is a fundamental concept of naval law that each accused is entitled to be fairly tried in a tribunal free of prejudice, passions, excitement or arbitrary power, on the issues set forth in charges and specifications. Zest in tracking down crime or in prosecuting an accused is not itself an assurance of sober judgement. Experience has therefore counseled that certain safeguards must be provided to assure a fair trial and that the convening authority, the members of the court and the judge advocate have no greater duty than to see these safeguards are preserved. The investigation and prosecution of the instant case was marked by an obvious impropriety in the handling of witnesses by denials of the right of the right of full cross examination and by a course of conduct on the part of those administering the law apparently discouraging the pursuance of an active and vigorous defense. Such practices, clearly prejudicial to the accused, have no place in the administration of naval justice and warrant the unequivocal disapprobation of the Navy Department (CMO's 1, 1945 14; 5, 1945,211). Accordingly, it was held that neither the convictions nor the proceedings upon which these convictions were based should stand as a matter of record and irrespective of the guilt or innocence of each of the accused, the proceedings, findings and sentences, and the action of the convening authority thereon were set aside."

It is the earnest hope of your petitioner that from all of the foregoing facts and law, it has been made apparent to the Honorable Secretary, that in spite of the fact, that the trial given the petitioner can not be said to have been fair and impartial it has been shown at that trial that the petitioner is not guilty of any of the charges brought against him. The petitioner is not

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able to contend that the findings are against the weight of the evidence because he has never been informed that he was found guilty of anything. The trial ended in August, 1945 and to this date your petitioner has not been advised whether he was found guilty of any of the charges.

Your petitioner earnestly desires a new trial since at the present time it seems his only course of action. He is certain that his innocence of the charges can again be proved at a new trial and that such trial will publicly absolve him from all guilt of the charges will be of great benefit to the petitioner and his family.

However if the Honorable Secretary sees sufficient merit in the appeal of the petitioner, in view of the advanced age of the petitioner, his lengthy imprisonment for two and a half years (seven months of which have been in a solitary cell), the suffering, arbitrary and long imprisonment inflicted on his blameless wife and minor children and on his wife's sister and her minor child, the petitioner would gladly accept the Honorable Secretary's kindness in disapproving and setting aside the proceedings, findings and sentence of the court and the action of the convening authority; without granting a new trial. If the Honorable Secretary does not believe that justice would be so served, then your petitioner asks your favor in granting a new trial. The petitioner does not intend such request for a new trial as a waiver of any right he may have to appeal to the Supreme Court on jurisdiction.

Counsellor for the Petitioner
Fredric T Suss
FREDRIC T. SUSS

36K

21 NOV A.M.

89-6

FREDRIC T. SUSS
ATTORNEY AT LAW
146 PATTON STREET
SPRINGFIELD, MASS.

Date: November 19, 1946

From: F. T. Suss

To: Secretary of the Navy

Via: Judge Advocate General, U. S. Navy

Subject: Samuel T. Shinohara, Brief concerning

Reference: (a) Verbal conversations with Rear Admiral Russel and Captain Martin

In accordance with permisson granted in reference (a), my brief in the case of Shinohara will be submitted by 5 January, 1947

This time is needed since the record of the trial has just arrived from Guam.

Fredric T. Suss

365

UNITED STATES PACIFIC FLEET
COMMANDER MARIANAS

FF16-3/FF12/
13-JRM-cn

Serial: 18692

5 November 1946.

RECEIVED
49
NOV 18 1946
OFFICE OF JUDGE ADVOCATE GENERAL

From: The Commander Marianas Area.
To: The Provost Marshall, Guam.

Via: The Director of Public Security.

Subject: SHINOHARA, Samuel T. - Transfer of to Civil Jail, Agana, Guam.

1. On 28 July 1945, Samuel T. SHINOHARA, a civilian inhabitant of Guam was brought to trial before a United States Military Commission on Guam, convened by the Island Commander, Guam. He was tried on the charges of Treason (one specification), Theft (one specification), Assault and Battery (one specification), Taking a Female For the Purpose of Prostitution (two specifications) and upon the additional charges of Treason (one specification), Assault and Battery (Two specifications) and Desecration of the Flag (one specification), all in violation of the Penal Code of Guam. He was acquitted of the charge of Theft and of the additional charge of Desecration of the Flag and was found guilty on all other charges and the specifications thereunder.

2. On 13 October 1945, the Convening Authority, approved the proceedings, findings, and sentence in the case of Samuel T. SHINOHARA. On 30 January 1946, the Reviewing Authority, the Commander in Chief, United States Pacific Fleet and Pacific Ocean Areas and Military Governor, Pacific Ocean Areas, approved the proceedings, findings, and sentence in the case with the exception of specification 1 under charge IV which was disapproved. The record was then referred to the Secretary of the Navy for final action.

3. The findings, and sentence in the case of Samuel T. SHINOHARA have not been published, and no place of confinement was designated by the Convening Authority in his action of 13 October 1945. SHINOHARA has been and is now confined in the War Criminal Stockade, Guam.

4. Pending the final action of the Secretary of the Navy in SHINOHARA's case the Civil Jail, Agana, Guam, is designated as the place of confinement.

5. You are accordingly directed to transfer Samuel T. SHINOHARA from the War Criminal Stockade, Guam to the Civil Jail, Agana, Guam.

NOV 15 46PM

C. A. POWNALL
Rear Admiral, U. S. Navy.

JAG

Copy to:
Secretary of the Navy
(Office of the Judge Advocate General).
Bureau of Naval Personnel

RECEIVED
NAVY DEPARTMENT
EXOS - ROUTING SECTION

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BEST COPY AVAILABLE

ADDRESS REPLY TO
OFFICE OF THE JUDGE ADVOCATE GENER.

AND REFER TO

JAG:I:CEC:ngm:mak

NAVY DEPARTMENT
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON 25, D. C.

28 OCT 1946

Mr. Frank Placzek
Attorney at Law
33 Elm Street
Westfield, Mass.

Dear Mr. Placzek:

Receipt is acknowledged of your letter of 19 October 1946, addressed to the Secretary of the Navy, in the interest of Samuel T. Shinohara.

The review of the record of proceedings in Shinohara's case will be delayed a reasonable length of time in order to enable you to prepare and submit a brief in his behalf.

Inasmuch as the convening authority approved this case on 13 October 1945 it is requested that every effort be made by you to forward your brief to this office not later than 20 November 1946 to avoid any excessive additional delay in this review.

Sincerely yours,

H. J. MARTIN
Captain, U.S.N.
Chief, Military Law Division

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ADDRESS REPLY TO
OFFICE OF THE JUDGE ADVOCATE GE

AND REFER TO

NAVY DEPARTMENT
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON 25, D. C.

4 JUL 1946

MEMORANDUM FOR JUDGE ADVOCATE GENERAL

From: Chief, Division I.

Subject: Trial by military commission of Samuel T. Shinohara on charge of Treason.

The International Law Section's prepared opinion is the basis upon which Shinohara was tried, convicted of treason, and sentenced to be hanged. It is believed that the opinion reaches an unwarranted and undesirable result. Nothing in the laws of the United States warrants the conclusion reached, and international law, as such, is equally devoid of justification for this holding. What law is to be found in the U. S. cases points to the contrary. Since this appears to be the first instance in which a case of this type has arisen in the U. S., and since the crime involved is Treason, with a sentence of hanging, it may be in order to re-examine the pre-trial opinion and to reconsider whether or not Shinohara is properly chargable with Treason.

Shinohara, a Japanese citizen and national was a resident of Guam for many years prior to the war. As a resident, he held the status of a resident alien. The alleged treasonable acts charged were committed after the Japanese had made good their military conquest. There is no evidence of his having joined the invading force prior to its having become established in possession and control of Guam.

That, as a general rule, a resident alien under U. S., English, and acceptable principles of International Law can lawfully be tried for

treason against the state upon whose territory he resides is well established and is not disputed here.* (Carlisle v. U.S., 16 Wall 147 (U.S. 1873); 35 Stat. 1088 (1909), 18 U.S.C. 1 (1940) (Whoever owes allegiance may be guilty of treason); 1 Blackstone's Com. 370.)

The basis of this principle is that the resident alien owes allegiance to the state in which he resides in return for the protection which he may lawfully demand. Throughout English law, from which the rule was adopted, this reasoning is apparent. (See e.g., 1 Blackstone Comm. 369, 3670, stating "...Local allegiance is such as is due from an alien or stranger born, for so long time as he continues under the King's domain and protection"; East's Pleas of the Crown, Vol. 1,c.2, par. 4, "...Local allegiance is that which is due from a foreigner during his residence here, and is founded in the protection he enjoys for his own person...")

Since allegiance of a resident alien is the obligation of fidelity and obedience which he owes to the government under which he lives (U.S. v. Carlyle, 16 Wall, 147 (1873)), it follows that if such protection ceases, as in the instant case where a superior military force occupied the territory, such allegiance, based solely upon a resident alien's residence and protection received, is suspended. If this be true as regards one whose only tie to such allegiance is residence, an even stronger case is made out where, as here, the resident alien is a

* It is noteworthy, however, that even this rule, well accepted by U.S. & England, is not an inevitable result; see e.g., the opposing view held by the U.S.S.R., adopting the principle that only "citizens" owe allegiance and, therefore, a resident alien may not be guilty of treason. 6 Univ. of Chi. L. Rev. 77, at 87 (1938).

citizen of the country whose military forces have successfully occupied the "protecting" state. As has recently been reaffirmed in an English case, "...a resident alien's allegiance is correlative with protection". (Joyce v. Director of Public Prosecutions, (1946) 1 All Eng. 186, 188 (H.L.)

In the English case of De Jaeger v. Atty General, (1907) A.C. (Eng) 326, upon which the pre-trial opinion relies, the court held that the allegiance which a resident alien owed to the Crown continued even during the period in which the territory in which the alien resided had been completely and successfully occupied by a superior military force. The court said "...the protection of the Crown did not cease because its forces had to temporarily withdraw; that De Jaeger was under a duty to so act that the Crown would not be harmed by having admitted him as a resident and that he was guilty of treason..." The fallacy in this reasoning is apparent, provided the reason for the resident alien's allegiance is not lost sight of.

The De Jaeger case fails to give sufficient weight to two very basic factors: (1) that allegiance is based upon residence and protection received, and (2) that where a country or area is completely overrun by an invading force of the country to which the resident owes permanent allegiance, such permanent allegiance is paramount, and whatever obligation he owed as a resident alien is suspended.

As to (1) there appears to be no disagreement between the International Law Section's pre-trial opinion and my opinion as to the basis of allegiance owed by a resident alien. (2) Support of the belief that there is no sound basis for a resident alien's local allegiance continu-

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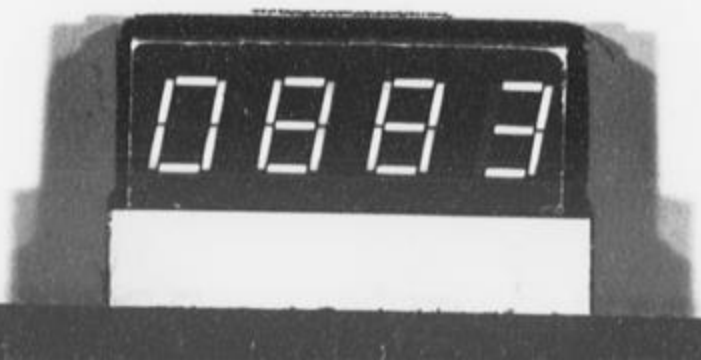

ing during the period in which the territory in which he resides has been successfully occupied by the forces of the country to which he owes permanent allegiance, is to be found in several United States cases which have followed the doctrine that temporary allegiance is suspended during the period of a successful conquest. The United States courts have affirmed the doctrine that allegiance during conquest and occupation is temporarily suspended, basing their holding on the fact that where there is no protection there can lie no claim to obedience.

The United States rule is most ably presented by Justice Story in United States v. Hayward (1815) 2 Gallison 500, 26 Fed. case 246. In this case the facts disclosed that the British during the war of 1812 conquered and occupied Castine, a United States port. The non-importation acts declared illegal the bringing in of British goods to any United States port. The question arose as to whether Castine was a port of the United States with reference to the non-importation acts in view of the conquest and occupancy of this port by the British. Justice Story held that Castine was not a United States port, and, therefore the bringing in of British goods from Halifax to Castine was not illegal. The basis of the decision was that the laws of the United States were necessarily suspended in Castine by the conquest and occupation. With compelling logic Justice Story points out that by their surrender the inhabitants became subject to such laws, and such laws only, as the conquerors chose to impose. "No other laws could in the nature of things be obligatory upon them for where there is no protection or sovereignty there can be no claim to obedience. By conquest and oc-

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cupation of Castine that territory passed allegiance and sovereignty to the enemy. Sovereignty of the United States territory was, of course, suspended, and the laws of the United States could no longer rightfully be enforced, or be obligatory upon inhabitants who remained and submitted to the conqueror. Castine, therefore, could not have been deemed a port of the United States, for its sovereignty no longer extended over the place, nor on the other hand, could it, strictly speaking, be deemed a port within the Sovereignty of Great Britian, because it had not permanently passed under her sovereignty. The right which existed was the mere right to superior force. The allegiance was temporary, and the possession not that firm possession which gives the conqueror plenum dominium et utile, the complete and perfect ownership to the property. It could only be by renumciation of a treaty of peace or boundary, or possession so long and permanent as to furnish conclusive proof that the territory was altogether abandoned by the sovereignty, or had been irretrievably subdued, that it could be considered as incorporated in the dominion of Great Britian."

Four years later, in 1819, in his judgment of the case, United States v. Rice, Wheaton 246, Justice Story makes a similar assertion with regard to the inhabitants of Castine. Again, eleven years later, in 1830, in his judgment in the case of Shanks v. Dupont, 3 Peters 246, Justice Story points out; "the capture and possession of the British was not an absolute change in the allegiance of the captured inhabitants. They owed allegiance to the conqueror during occupation; but it was a temporary allegiance which did not destroy but only suspended their former allegiance".

The recent affirmation by the House of Lords of the Court of

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Criminal Appeal in a treason case of far reaching importance might appropriately be considered in the instant case, since it throws light upon the view that the question of protection is a very real one in any treason case involving resident aliens. The House of Lords held that upon the issuance of a passport the government assumes the burden of protection and the holder a duty of fidelity, so that as long as a passport is held by an alien, he may be liable for treason.

The accused, Joyce, was a U. S. citizen who had resided in England many years. He obtained a British passport, fraudulently claiming British citizenship. The passport was issued; he traveled on it, and while it was still valid he went to Germany where he was employed by the German Radio Company. He broadcasted propaganda, and became known as "Lord Haw Haw". The House of Lords, in a very considered opinion, affirmed the lower court's holding of treason. The opinion goes squarely on the ground of protection, afforded the accused by the British passport which he held. The court reviewed the basis of an alien's allegiance, concluded that it was "protection", and held that the protection afforded by the passport during the period of its purported validity was sufficient to sustain conviction.

The question posed in the Joyce case is not unlike the basic question presented here: "--Whether there was not such protection still afforded by the government as to require (of him) the continuance of allegiance. The principle (which) runs through the feudal law and what I may perhaps call constitutional law, requires on the one hand protection, on the other, fidelity..."

Though one might question the wisdom of extending a state's penal competence over aliens for acts committed abroad, as in the Joyce case,

it is clear that the House of Lords did not deviate from or overlook the basic principle which was disregarded in De Jaeger's case and in the decision to try Shinohara for treason --- namely, that unless there is available to a resident alien the protection of the state which claims penal competance, there is no jurisdiction to try aliens for alleged treasonable acts.

In addition to the fact that lack of protection leaves an insufficient basis in law to hold Shinohara for treason, an additional factor adds to that insufficiency. Shinohara was a Japanese citizen. As such, he was compellable to perform acts for his sovereign state when that state completely occupied and controlled Guam. Even assuming that as a resident alien on Guam after the Japanese occupation he still was obligated to the U. S. not to so act as to unnecessarily impair the position of the U. S., he was also duty bound, as a Japanese citizen, to obey the dictates of his sovereign state to whom he owed permanent allegiance, so long as that state to which he owed permanent allegiance was in control of the Island. As between whatever temporary allegiance Shinohara may have continued to owe to the U. S., and the permanent allegiance which he owed to Japan, his permanent allegiance was paramount in this situation where the territory to which he had owed temporary or local allegiance was overcome by his sovereign state. Under the view taken here, that Shinohara is not properly subject to being charged with treason, it is not necessary to determine whether proof of the alleged treasonable acts meets the exacting requirements of the "two witnesses" and "overt act" rules as interpreted by the Supreme Court in the Cramer Case. (Cramer v. U.S., 325 U.S. 1 (1944).

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I therefore recommend that Charge I, Treason, the specification thereunder, Additional Charge I, Treason, and the three specifications thereunder, be set aside. If this recommendation be approved, Division I will prepare an opinion accordingly.

As a case of first impression which affects not only the law of the U. S. but International Law, as such, this case takes on an importance out of proportion to the usual ones with which the Navy Department is concerned. If the original view that Shinohara is properly subject to the law of treason, which is supported by little more than the obscurantist and questionable precedent of the De Jaeger case, is adhered to, the accused should be afforded the opportunity of having the Supreme Court pass upon the principle involved.

James Snedeker
JAMES SNEDEKER
Colonel, U.S.M.C.

NAVAL COMMUNICATION SYSTEM

DRAFTED BY	FILE NR.	ROOM NR.	EXT. NR.
CAPT J C DELPINO (USN (RET)	MM-SHINOHARA SAMUEL T/A17-20 2348		2819
RELEASED BY	**CODE/SECT. NR.**	**DATE**	
COLONEL J SNEDEKER USMC	JAG:I:JCD:NRA	16 MAY 1946	

Please leave this space clear

FROM: SECNAV(JAG) WASH DC 161340 (date/time group) (GCT)

TO: COMMANDER IN CHIEF
UNITED STATES PACIFIC FLEET

INFO:

To Jag 6/14
#144704

PRECEDENCE

- ☐ PRIORITY
- ☐ ROUTINE
- ☐ DEFERRED
- ☐ NIGHT LETTER

UNLESS CLASSIFIED
RESTRICTED
WILL BE CLASSIFIED
PLAIN

Unless otherwise indicated, this dispatch will be transmitted with Deferred Precedence

TEXT:

SHOULD REVISORY PROCEEDINGS BECOME NECESSARY IN MILITARY COMMISSION CASE SAMUEL T. SHINOHARA WILL THAT COURT BE AVAILABLE

JAG

Reply - Com Marianas 1423132, July 46 - negative. JS

RECEIVED
16 JUL 1946
OFFICE OF JUDGE ADVOCATE GENERAL
U.S.N. SECTION

376

Master Record Card flagged. Docket Desk (7-17-46)

OPNAV 19-7 (4-45)

ADDRESS REPLY TO
COMMANDANT
11TH NAVAL DISTRICT
AND REFER TO:

COMMANDANT'S OFFICE
ELEVENTH NAVAL DISTRICT
SAN DIEGO 30, CALIFORNIA

on 1st shelf

ND11/P13/00(1e) #144704

Serial (Q-4)-237 D.R.M. - Rev. Officer

RECEIVED JUN 1946 OFFICE OF JUDGE ADVOCATE GENERAL

27 MAY 1946

To: Captain George J. McMillin, USN.
Via: Commandant, U. S. Naval Base, Terminal Island, San Pedro, California.

Subj: Request for statement in re military commission case of Samuel T. Shinohara.

Ref: (a) Com11 ser (Q-40)-2122 dtd 2 May 46.

1. Reference (a) forwarded subject correspondence with request for statement to be forwarded to the Judge Advocate General via Commandant, ELEVENTH Naval District.

2. To date no reply has been received.

3. Information is requested as to approximate date that reply may be expected.

A. H. GRAY,
Acting Commandant,
Eleventh Naval District

4 June 1946
attach to
Shinohara
record.

cc: JAG USN Washington DC

RECEIVED 8 JUN 1946 OFFICE OF JUDGE ADVOCATE GENERAL G. C. M. SECTION

RECEIVED 8 JUN 1946 OFFICE OF JUDGE ADVOCATE GENERAL G. C. M. SECTION

RECEIVED 3 JUN 1946 OFFICE OF JUDGE ADVOCATE GENERAL G. C. M. SECTION

377

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ADDRESS REPLY TO
COMMANDANT
11TH NAVAL DISTRICT
AND REFER TO:

COMMANDANT'S OFFICE
ELEVENTH NAVAL DISTRICT
SAN DIEGO 30, CALIFORNIA

ND11/P13/00(1e)

Serial (Q-4)-257

27 MAY 1946

To: Captain George J. McMillin, USN.
Via: Commandant, U. S. Naval Base, Terminal Island, San Pedro, California.

Subj: Request for statement in re military commission case of Samuel T. Shinohara.

Ref: (a) Comll ser (Q-40)-2122 dtd 2 May 46.

1. Reference (a) forwarded subject correspondence with request for statement to be forwarded to the Judge Advocate General via Commandant, ELEVENTH Naval District.

2. To date no reply has been received.

3. Information is requested as to approximate date that reply may be expected.

A. H. GRAY,
Acting Commandant,
Eleventh Naval District

cc: JAG USN Washington DC

378

337-87

End-5 on ltr of JAG, Wash, DC,
dtd 25 Apr 1946.

RECEIVED
14 1946
OFFICE OF JUDGE
ADVOCATE GENERAL

ND11/P13-4
Ser.J-4563
GDM/bwp

10 May 1946.

To: Judge Advocate General of the Navy.

Subj: Request for statement in regard to military commission case of Samuel T.Shinohara.

1. Forwarded.

By direction of the Commandant.

G. D. MORRISON,
District Legal Officer.

RECEIVED
15 MAY 1946
OFFICE OF JUDGE
ADVOCATE GENERAL
G. C. M. SECTION

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Legal

NB66/G.J.McMillin
Serial 1666

End-4 on JAG Navy Department
letter dated 25 April 1946

9 MAY 1946

To: The Judge Advocate General of the Navy.
Via: Commandant, Eleventh Naval District.

Subj: Request for Statement in regard to military commission case of Samuel T. Shinohara.

1. Forwarded.

L. J. WILTSE
Commandant, U. S. Naval Base
Terminal Island (San Pedro), Calif.

380

NB66/ G.J.McMillin
6:Kk
Serial 1828

End-2 on JAG Navy Dept. ltr.
dated 25 April 1946.

7 MAY 1946

To: Captain George J. McMILLIN, USN.

Subj: Request for Statement in regard to military commission case of Samuel T. Shinohara.

1. Delivered for compliance.

L. J. WILTSE
Commandant, U. S. Naval Base
Terminal Island (San Pedro), Calif.

381

G. J. McMillin
2 2 2

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MAY 3 12 04 PM '46

U.S. NAVAL BASE
TERMINAL ISLAND, CAL.

ND11/P13/00(n)

Serial (Q40) 2122

MAY 2 1946

End-1 on JAG Navy Dept. ltr
dated 25 April 1946.

To: Captain George J. McMILLIN, USN
Via: Commandant, U. S. Naval Base, Terminal Island, (San Pedro), California.

Subj: Request for Statement in regard to military commission case of Samuel T. Shinohara.

1. Forwarded for compliance with basic letter. Submit your statement to the Judge Advocate General of the Navy via Com ELEVEN.

By direction of the Commandant:

W. F. Dearth
H. F. DEARTH,
Director of Discipline.,
ELEVENTH Naval District.

cc: JAG USN Wash:D C

382

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#4704

ND11/P13/00(n)
Serial (940) 2122

End-1 on JAG Navy Dept. ltr
dtd 25 April 1946.

2349

MAY 2 1946

To: Captain George J. McMILLIN, USN
Via: Commandant, U. S. Naval Base, Terminal Island, (San Pedro), California.

Subj: Request for Statement in regard to military commission case of Samuel T. Shinohara.

1. Forwarded for compliance with basic letter. Submit your statement to the Judge Advocate General of the Navy via Com ELEVEN.

By direction of the Commandant:

H. F. DEARTH,
Director of Discipline.,
ELEVENTH Naval District.

cc: JAG USN Wash:D C

383

ADDRESS REPLY TO
OFFICE OF THE JUDGE ADVOCATE GENERAL
AND REFER TO

NAVY DEPARTMENT
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON 25, D. C.

25 APR 1946

From: The Judge Advocate General of the Navy.

To: Captain George J. Mc Millin, U. S. Navy.

Via: Commandant, Eleventh Naval District.

Subject: Request for statement in re military commission case of Samuel T. Shinohara.

References (a) Record in the military commission case of Samuel T. Shinohara - Charge III and Additional Charge II, Specifications 1 and 2.

(b) Letter of Lieutenant Commander Emory L. Morris, U. S. Naval Reserve, dated 17 April 1946.

1. Samuel T. Shinohara, a Japanese alien resident of Guam prior to and during the occupation of Guam by the Japanese forces, was tried by a military commission on 28 July 1945. The accused was convicted of various charges, including two charges of assault and battery, reference (a).

2. Each of the three specifications under the two charges alleged that the accused, on or about a specified date, "did, at or near Agana, Guam, wilfully and maliciously and without justifiable cause, assault one George J. Mc Millin, Captain, U. S. Navy, the then Military Governor of Guam, by striking the said Mc Millin in the face * * *." The offenses were alleged to have occurred on 10 December 1941, 1 January 1942, and 20 January 1942.

3. According to reference (b) the counsel for the accused, Lieutenant Commander Emory L. Morris, after a discussion with you of the facts in the present case with reference to the circumstances surrounding the alleged offenses of assault and battery, is of the opinion that the accused was convicted on perjured testimony. Attached is a copy of reference (b).

4. It is requested that you submit a statement of the facts concerning the offenses of assault and battery averred in the charges and specifications.

O. S. COLCLOUGH
Judge Advocate General of the Navy

Encl: (1)

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22 apr.

A/

Please prepare letter to Capt. McMillin, referencing Morris' letter, and ask for full statement.

Hold record of trial until statement can be reviewed.

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601 First National Bank Building
Santa Ana, California

April 17, 1946

From: Lieutenant Commander Emory L. Morris, USNR

To: Judge Advocate General of the Navy

Reference: (a) Military Commission of Guam - Record in case of Samuel T. Shinohara, upon trial for treason, assault and battery, theft, etc.

(b) Charges and specifications of reference (a) - Charge III; Additional Charge II, Specifications and 2.

1. Samuel T. Shinohara, a Japanese national who lived on Guam prior to and during the Japanese occupation thereo was tried before a military commission there in July and August, 1945, upon the charges and specifications which a part of reference (a). I was counsel for the defendant, appointment from the Island Commander, Guam.

2. Defendant Shinohara was convicted of various charg including the assault and battery charges described in reference (b). The specifications of reference (b) alleged that the defendant slapped Captain George J. McMillin, U. S. the Governor of Guam, in the face on three occasions, namely, on or about 10 December 1941, 1 January 1942, and 20 January 1942.

3. Since returning to the United States, and after release from active duty, I have talked with Captain McMillin. He states that none of these assaults and batteries occurred. This confirms the story of the defendant to me, as his counsel. Captain McMillin has stated to me that he will furnish a statement of the facts concerning the charges and specifications, reference (b), upon request of the Department therefor.

4. I believe that you and the final reviewing authority of the record, reference (a), will desire this advice of Captain McMillin's verbal statements in order that proper steps may be taken to obtain a verified statement of these facts from him.

5. As it appears that defendant Shinohara was convicted of the charges, reference (b), upon perjured testimony, established principles of American justice are involved and requir my bringing this matter to your attention.

Emory L. Morris

EMORY L. MORRIS

Copy to: Captain George J. McMillin, U.S.N.

Cincpac File
A17-25

UNITED STATES PACIFIC FLEET
AND PACIFIC OCEAN AREAS
Headquarters of the Commander in Chief

Serial 1446

c/o Fleet Post Office,
San Francisco, California.

30 JAN 1946

In endeavoring to reconcile the variance between the proof and the offense specified in specification 1 of charge IV, the commission, in its finding, substituted the word "duress" for "misrepresentation", and found the accused guilty of the offense as thus described. It would appear that the commission attempted to combine essential elements of the offenses provided for in both section 266(a) and 266(b) to make one offense. If this was true, it was obvious error (section 27, Naval Courts and Boards, 1937). Regardless of this, by changing the wording of the specification, the commission removed the gravamen of the offense charged, and it's finding is considered contradictory and irregular. The commission's substitution in the specification of the word "duress" for "misrepresentation" was tantamount to changing the specification to allege the first offense provided for in section 266(a) of the Penal Code of Guam, namely, taking a female person against her will and without her consent for the purpose of prostitution, whereas the accused was actually tried for violation of the second offense described in the statute, namely, taking a female with her consent procured by misrepresentation.

As a result of the alteration which the commission, in its finding, made in the wording of specification 1 of charge IV, the accused was found guilty of an offense entirely separate and distinct in its nature from that charged or specified, (section 429, Naval Courts and Boards, 1937) and was found guilty of violating a part of a statute without being so charged (C.M.O. 1, 1942, 87). In such circumstances, the accused was deprived of an opportunity to prepare a proper defense against the offense on which he was tried and of which he was convicted, because he did not know and had no way of knowing what it was until after his conviction. It is doubtful if, even then, he could tell what it was. Such a finding was materially prejudicial to his right (C.M.O. 10, 1930, 14).

In view of the above, the finding of the commission as to specification 1 of charge IV is disapproved. The proceedings, findings, as to all charges and specifications except specification 1 of charge IV, the sentence, and the action of the convening authority, except as it refers to specification 1 of charge IV, are approved, and prior to the execution of the sentence, in conformity with section D-14, Naval Courts and Boards 1937, the record is respectfully referred to the Secretary of the Navy.

R. A. SPRUANCE,
Admiral, U.S. Navy,
Commander in Chief,
United States Pacific Fleet
and Pacific Ocean Areas
and Military Governor, Guam.

To: Judge Advocate General.
Re: Record of proceedings of Military Commission - case of Samuel T. Shinohara.

Copy to:
IsCom GUAM
Com MARIANAS

387

Cincpac File
A17-25

UNITED STATES PACIFIC FLEET
AND PACIFIC OCEAN AREAS
Headquarters of the Commander in Chief

Serial 1446

c/o Fleet Post Office,
San Francisco, California.

30 JAN 1946

The record of proceedings in the foregoing case of Samuel T. Shinohara, civilian, shows that the accused was tried before a Military Commission, an Exceptional Military Court, convened by a precept dated July 21, 1945. The orders for trial which contained the charges and specifications were dated May 12, 1945 and July 20, 1945, respectively. In this connection attention is invited to paragraph 3 of the precepts dated April 13, 1945, June 16, 1945 and July 21, 1945. Copies of the precepts dated April 13, 1945 and June 16, 1945 are attached to this action and together with the precept in this case show that the commission was authorized and directed to take up this case as one which was pending before a previous commission. Further, the accused affirmatively stated that he had no objection to any member of the commission which tried him.

The commission's finding on specification 1 of charge IV is as follows:

> "The first specification of the fourth charge proved in part, proved except the word, 'misrepresentation', which word is not proved, and for which the commission substitutes the word, 'duress', which word is proved."

Specification 1 of charge IV, as originally worded, charged the accused with taking a female, "for the purpose of prostitution, procuring her consent thereto by misrepresentation." As worded, this specification alleged a violation of section 266(a) of the Penal Code of Guam, quoted in the record. This section of the code is worded in the alternative. Two distinct offenses are provided for, namely, (1) the taking of a female person against her will and without her consent for the purposes of prostitution, and (2) the taking of such person with her consent procured by fraudulent inducement or misrepresentation for the purpose of prostitution. The specification as worded alleged the second of these offenses, in which misrepresentation is an essential element.

The evidence does not support the offense provided for in section 266(a) of the Penal Code of Guam and alleged by specification 1 of charge IV, as there is not sufficient evidence, to establish that the accused took the female in question for purposes of prostitution or that her taking was by misrepresentation. The evidence does prove that the accused committed an offense which was not alleged, namely, taking a female by duress to live in an illicit relation. (Section 266(b), Penal Code of Guam).

388

1400-30-65
(610)-jam

Serial No. 6995

In reply address:
The Island Commander,
Navy #926, C/O F.P.O.,
San Francisco, Calif.

HEADQUARTERS,
ISLAND COMMAND, GUAM.

April 13, 1945.

From: The Island Commander.
To : Colonel Walter T.H. Galliford, U.S. Marine Corps.

Subject: Precept convening Military Commission of Guam.

Reference: (a) Proclamation No. 4, Military Government of Guam.

1. Pursuant to the authority vested in me by Admiral of the Fleet Chester W. Nimitz, United States Navy, Commander in Chief, United States Pacific Fleet and Pacific Ocean Areas, Military Governor of Guam, a Military Commission is hereby ordered to convene at Agana, Guam, on the 16th day of April, 1945, or as soon thereafter as practicable, for the trial of such persons as may legally be brought before it.

2. The commission will be constituted as follows:

Colonel Walter T.H. Galliford, U.S. Marine Corps, senior member,
Lieutenant Colonel George E. Congdon, U.S. Marine Corps Reserve,
Major Foster H. Krug, U.S. Marine Corps Reserve,
Major Richard P. Rice, U.S. Marine Corps Reserve,
Major Samuel A. Gardner, U.S. Marine Corps Reserve,
Lieutenant Commander Avery W. Thompson, U.S. Naval Reserve,
Lieutenant Commander Ralph L. Coffelt, U.S. Naval Reserve, members, any five of whom are empowered to act, and of
Lieutenant Colonel Teller Ammons, Army of the United States, judge advocate.

3. This commission is hereby authorized and directed to take up such cases, if any, as may be now pending before the military commission of which Colonel Walter T.H. Galliford, U.S. Marine Corps, is senior member, convened by my precept of January 19, 1945, except such cases the trial of which may have been commenced.

4. This commission shall be competent to try all offenses within the jurisdiction of the Exceptional Military Courts, including offenses in violation of the Penal Code of Guam, and to impose any lawful punishment.

5. Power of adjournment is inherent in the commission, and adjourned sessions may be held at such times and such places as the commission may determine.

6. You will inform the members and judge advocate that they will continue on Military Commission duty under their previous orders.

ROBERT BLAKE
Brigadier General, U. S. Marine Corps,
The Island Commander.

COPY

389

1400-50
(610)-ekm

Serial No. 10490

In reply address:
The Island Commander,
Navy #926, c/o F.P.O.
San Francisco, Calif.

HEADQUARTERS
ISLAND COMMAND, GUAM.

16 June 1945.

From: The Island Commander.
To : Colonel Walter T. H. GALLIFORD, U. S. Marine Corps.

Subject: Precept convening Military Commission of Guam.

References: (a) Proclamation No. 4, Military Government of Guam.

1. Pursuant to the authority vested in me by Fleet Admiral Chester W. Nimitz, United States Navy, Commander in Chief, United States Pacific Fleet and Pacific Ocean Areas, Military Government of Guam, a Military Commission is hereby ordered to convene at Agana, Guam, on the 18th day of June 1945, or as soon thereafter as practicable, for the trial of such persons as may legally be brought before it.

2. The commission will be constituted as follows:

Colonel Walter T. H. GALLIFORD, U. S. Marine Corps,
Senior member,
Major Foster H. KNUS, U. S. Marine Corps Reserve,
Major Samuel A. GARDNER, U. S. Marine Corps Reserve,
Lieutenant Roland GRIMM, U. S. Naval Reserve,
Captain Quentin L. JOHNSON, U. S. Marine Corps Reserve,
Captain Alfred J. DICKINSON, Junior, U. S. Marine Corps Reserve,
Lieutenant George W. DUAN, U. S. Naval Reserve, members,
any five of whom are empowered to act, and of
Lieutenant Colonel Tailer ANDONS, Army of the United States, judge advocate.

3. This commission is hereby authorized and directed to take up such cases, if any, as may be now pending before the military commission of which Colonel Walter T. H. GALLIFORD, U.S. Marine Corps, is senior member, convened by my precept of April 13, 1945, except such cases the trial of which may have been commenced.

4. This commission shall be competent to try all offenses within the jurisdiction of the Exceptional Military Courts, including offenses in violation of the Penal Code of Guam, and to impose any lawful punishment.

5. Power of adjournment is inherent in the commission and adjourned sessions may be held at such times and such places as the commission may determine.

6. You will inform the members and judge advocate that they will continue on Military Commission duty under their previous orders.

COPY

HENRY L. LARSEN,
Major General, U. S. Marine Corps,
The Island Commander.

390

1400-65-25
(610)-wka

Serial No.

In reply address:
The Island Commander,
Navy #926, C/O F.P.O.,
San Francisco, Calif.

HEADQUARTERS,
ISLAND COMMAND, GUAM.

OCT 13 1945

The proceedings, findings, and sentence in the foregoing case of Samuel T. Shinohara, an inhabitant and resident of Guam, are approved.

L. D. HERMLE,
Brigadier General, U. S. Marine Corps,
The Island Commander.

Copies to: ComMarianas
CincPac
Legal Advisory Unit.

391

0904

1300-63
(602)

Serial No.

In reply address:
The Island Commander,
Navy #926, c/o F.P.O.,
San Francisco, Calif.

HEADQUARTERS,
ISLAND COMMAND, GUAM.

NOV 14 1945

From: The Island Commander.
To : The Secretary of the Navy (Office of the Judge Advocate General).
Via : The Commander in Chief, U. S. Pacific Fleet and Pacific Ocean Areas.

Subject: Records of proceedings of Military Commission.

Enclosures (A) Samuel T. Shinohara, case of.
(B) Akiyoshi Hosokawa, case of.
(C) Kunso Kawauchi, case of.
(D) Jose C. Cabrera, case of.
(E) Hirose Ogawa, case of.
(F) Koju Shoji and Kiyoshi Takahashi, case of.
(G) Domingo S. Quintanilla, case of.
(H) Ltr. IsCom to SecNav, serial 19311, dtd. 5Nov45.

1. The enclosures are forwarded for information and such action as may be deemed appropriate.

2. These enclosures were previously forwarded via official channels on the dates set forth below but were returned to this command on November 6, 1945 by messenger with oral instructions to omit Commander Marianas from the routing and only to send a copy to that command for information.

	Date forwarded to ComMarianas.
Enclosure (A)	October 13, 1945.
Enclosure (B)	October 18, 1945.
Enclosure (C)	October 25, 1945.
Enclosure (D)	October 25, 1945.
Enclosure (E)	October 29, 1945.
Enclosure (F)	October 30, 1945.
Enclosure (G)	November 2, 1945.
Enclosure (H)	November 5, 1945.

L. D. KEMBLE.

382

0905

1400-65-25
(610)-wka

Serial No. 17975

In reply address:
The Island Commander,
Navy #926, C/O F.P.O.,
San Francisco, Calif.

HEADQUARTERS,
ISLAND COMMAND, GUAM.

October 13, 1945.

From: The Island Commander.
To : The Secretary of the Navy (Office of the Judge Advocate General).
Via : (1) Commander Marianas.
(2) CincPac.

Subject: Record of proceedings of Military Commission, case of Samuel T. Shinohara.

Reference: (a) Section 47 (page 58) FM 27-5 CPNAV 50 E-3.

Enclosure: (A) Record of proceedings.

1. Enclosure (A) is submitted herewith for the action required by reference (a).

L. D. HERMLE.

October 5, 1948

Ric

Will you be good enough to insert this Military Commission Order No. 11 in re SHINOHARA, Samuel T. in the Record of Proceedings -- #144704. Put this immediately under the Cover Page, please.

Thank you.

H. Lamberson -- Rm. 2350

FF12/A17-10(2)
02-JDM-fsk

THE PACIFIC COMMAND
AND UNITED STATES PACIFIC FLEET

Headquarters of the Commander Naval Forces Marianas
Naval Forces Marshalls-Carolines and Marshalls-Carolines Area

Serial:

#144704

MILITARY COMMISSION ORDER NO. 11

(In re SHINOHARA, Samuel T., (of Japanese origin) inhabitant and resident of Guam).

1. During period 28 July 1945 to 27 August 1945, SHINOHARA, Samuel T., (of Japanese origin) inhabitant and resident of Guam was tried by a United States Military Commission convened by order of The Island Commander, Guam, dated 21 July 1945 at Headquarters, Island Command, Guam, Marianas Islands on the below listed charges and specifications:

CHARGES: (Preferred 12 May 1945).

CHARGE I - TREASON (one specification)

Spec.	Nature of Offense	Place of Offense	Date of Offense	Name of Accused
1	Did treasonably adhere to Japan and give aid and comfort to Japan by assisting the taking by the Japanese military forces of money and checks in the amount of $9,300, lawful money of the United States, belonging to the Naval Government of Guam.	Island of Guam	16 Dec. 1941	SHINOHARA

CHARGE II - THEFT (one specification)

Spec.	Nature of Offense	Place of Offense	Date of Offense	Name of Accused
1	Did steal from James E. Davis, lieutenant (junior grade), U.S. Navy, one Chevrolet automobile of the value of about $1,200.	City of Agana, Guam.	Feb. 1942	SHINOHARA

CHARGE III - ASSAULT AND BATTERY (one specification)

Spec.	Nature of Offense	Place of Offense	Date of Offense	Name of Accused
1	Did assault and strike George J. McMillin, captain, U.S. Navy.	Agana, Guam.	20 Jan. 1942	SHINOHARA

CHARGE IV - TAKING A FEMALE FOR THE PURPOSE OF PROSTITUTION
(two specifications)

Spec.	Nature of Offense	Place of Offense	Date of Offense	Name of Accused
1	Did unlawfully take Alfonsina Flores, a female person, for the purpose of prostitution, procuring her consent thereto by misrepresentation.	Island of Guam.	Feb. 1942	SHINOHARA
2	Did unlawfully take Nicholasa P. Mendiola, a female person, against her will and without her consent, for the purpose of prostitution.	Island of Guam	Feb. 1942	SHINOHARA ok.

ADDITIONAL CHARGES: (Preferred 20 July 1945).

CHARGE I - TREASON (three specifications)

Spec.	Nature of Offense	Place of Offense	Date of Offense	Name of Accused
1	Did treasonably adhere to Japan and give aid and comfort to Japan by aiding the Japanese military forces to take for their use an electric generator of the value of $500, said generator being the property of Ignacia Bordallo Butler.	Island of Guam.	11 Dec. 1941	SHINOHARA ok
2	Did treasonably adhere to Japan and give aid and comfort to Japan by organizing the residents of Guam into an organization known as the Dai Nisei for the purpose of assisting the Japanese military forces.	Island of Guam.	Dec. 1941	SHINOHARA ok
3	Did treasonably adhere to Japan and give aid and comfort to Japan by supplying the Japanese military and naval forces with provisions and refreshments.	Island of Guam.	Apr. 1942	SHINOHARA Set Aside

CHARGE II - ASSAULT AND BATTERY (two specifications) Set Aside

Spec.	Nature of Offense	Place of Offense	Date of Offense	Name of Accused
1	Did assault and strike George J. McMillin, captain, U.S. Navy.	Agana, Guam.	10 Dec. 1941	SHINOHARA
2	Did assault and strike George J. McMillin, captain, U.S. Navy.	Agana, Guam.	1 Jan. 1942	SHINOHARA

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CHARGE III - DESECRATION OF FLAG (one specification)

Spec.	Nature of Offense	Place of Offense	Date of Offense	Name of Accused
1	Did publicly defile a flag of the United States by using it for the purpose of wiping off a bar.	Agana, Guam.	Feb. or Mar. 1942	SHINOHARA NG

FINDINGS: The commission on 27 August 1945 made the following findings:

"The specification of the first charge proved.
And that the accused, Samuel T. Shinohara, a civilian, is of the first charge guilty.

"The specification of the second charge not proved.
And that the accused, Samuel T. Shinohara, a civilian, is of the second charge, not guilty; and the commission does therefore acquit the said Samuel T. Shinohara, a civilian, of the second charge.

"The specification of the third charge proved.
And that the accused, Samuel T. Shinohara, a civilian, is of the third charge guilty.

"The first specification of the fourth charge proved in part, proved except the word 'misrepresentation', which word is not proved, and for which the commission substitutes the word 'duress', which word is proved.
The second specification of the fourth charge proved.
And that the accused, Samuel T. Shinohara, a civilian, is of the fourth charge guilty.

"The first specification of the first additional charge proved.
The second specification of the first additional charge proved in part, proved except the word and figures 'December, 1941', which word and figures are not proved, and for which the commission substitutes the word and figures, 'February, 1942', which word and figures are proved.
The third specification of the first additional charge proved in part, proved except the word, 'April', which word is not proved, and for which the commission substitutes the word, 'February', which word is proved.
And that the accused, Samuel T. Shinohara, a civilian, is of the first additional charge guilty.

"The first specification of the second additional charge proved.
The second specification of the second additional charge proved.
And that the accused, Samuel T. Shinohara, a civilian, is of the second additional charge guilty.

"The specification of the third additional charge not proved.
And that the accused, Samuel T. Shinohara, a civilian, is of the third additional charge, not guilty; and the commission does therefore acquit the said Samuel T. Shinohara, a civilian, of the third additional charge."

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SENTENCE: The Commission on 27 August 1945 sentenced the accused as follows:

> "The Commission, therefore, sentences him, Samuel T. Shinohara, a civilian, to death, to be executed by hanging the said Samuel T. Shinohara by the neck until he is dead, two-thirds (2/3) of the members of the Commission concurring."

2. The Island Commander, Guam, the convening authority, on 13 October 1945, approved the proceedings, findings and sentences in this case.

3. The Commander in Chief, United States Pacific Fleet and Pacific Ocean Areas and Military Governor, Guam, the reviewing authority, on 30 January 1946, subject to remarks, approved the proceedings, the findings as to all charges and specifications except that on the first specification of Charge IV, which he disapproved, the sentence and the action of the convening authority except as it referred to the first specification of Charge IV.

4. The Acting Secretary of the Navy, on 24 Aug 1948 approved the remarks and recommendations of the Judge Advocate General dated 28 April 1948, set aside the findings on Charge I and the specifications thereunder, Charge III and Additional Charge II and the specifications thereunder, and specification 3 of Additional Charge I, and the action of the convening and reviewing authorities thereon; in accordance with the provisions of Section D-1X, Naval Courts and Boards, 1937, commuted the sentence of death in this case to imprisonment at hard labor for a period of fifteen years, time served by Shinohara since the thirteenth day of October 1945 to be regarded as time served with respect to the sentence as commuted; and directed that Shinohara be transferred to Japan for imprisonment at such place as may be designated by the Supreme Commander for the Allied Powers.

C. A. POWNALL,
Rear Admiral, U. S. Navy,
The Commander Naval Forces, Marianas.

cc: CinCPacFlt (3)
JAG, USN (3)
SCAP (3)
ComdGen U.S. 8th Army, Japan (3)
National War Crimes Officer, Wash., D.C. (3)
CO, Marine Barracks, Guam (3)
ComMarianas Liaison Officer, Tokyo, Japan (3)

AUTHENTICATED:

H. D. VANSTON,
Flag Secretary.

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