

**OBSERVATIONS ON THE UNIFORM CODE OF MILITARY
JUSTICE:
1954 AND 2000**

Editor's Note: In 1954, then-Major George S. Prugh wrote his observations on the Uniform Code of Military Justice (UCMJ). At that time, the UCMJ was relatively new law; its success was still being tested and the public was still critical of military justice. In 2000, Major General (Ret.) Prugh reflected upon the fifty years of military justice since the UCMJ was passed. His observations from 1954 and 2000 are combined here as one article.

OBSERVATIONS: 1954¹

MAJOR GEORGE S. PRUGH, JR.²

In the periods immediately following World Wars I and II there arose in some parts of the press and the legal circles a considerable agitation concerning the system of military justice in operation in the war time armies numbering millions of American citizens.³ During World War II about 13,000,000 men had seen service in either the Army or the Navy, and of this number about 147,000 were tried by general courts-martial. At its peak, in October 1945, the Army's prison population counted five men for every one thousand servicemen.⁴ Any system of justice—military or otherwise—was bound to be carefully scrutinized when such significant numbers were being affected. Although there was little comment during the actual war years, as peace descended the passions cooled, memories of the fighting dimmed, and the public appeared to become compassionate

1. Reprinted from the Fall 1954 issue of *The Brief*, with permission of the International Legal Fraternity of Phi Delta Phi.

2. At the time this article was written, now-Major General (Ret.) Prugh was a major in the Judge Advocate General's Corps. A.B., 1941, University of California; LL.B. 1948, University of California. Member of the Bars of California, the U.S. Supreme Court, and the Court of Military Appeals.

3. See Harold F. McNiece & John V. Thornton, *Military Law from Pearl Harbor to Korea*, 22 *FORDHAM L. REV.* 155 (1953); Alexander Holtzoff, *Administration of Justice in the United States Army*, 22 *N.Y.U. L.Q. REV.* 1 (1947).

4. THE ADJUTANT GENERAL, U.S. DEP'T OF ARMY, *THE ARMY CORRECTIONAL SYSTEM* 92 (Jan. 1952).

toward those servicemen who languished in the various confinement facilities serving sentences imposed by courts-martial. Attention was directed not so much to those convicted of civilian-type crimes as it was to those convicted of the so-called military offenses, constituting about two-thirds of the servicemen who were serving confinement.

The American civilian saw little criminality in the military offenses, which have no true counterpart in the civilian justice system although these offenses were made crimes, many carrying extreme penalties, by the laws of the United States. He forgot that the standards of civilian criminal procedure cannot be applied absolutely to military courts,⁵ and he failed to recognize that “the degree of punishment imposed by a court-martial is closely connected with the maintenance of discipline in the command.”⁶ The maintenance of discipline was, with the advent of peace, of little importance to the civilian. The words of Secretary of War Robert Patterson remained largely unnoticed, when he wrote in the *Tennessee Law Review* in 1945 that “an army without discipline is a mob, worthless in battle,”⁷ for of course it was not long afterwards that the battles were over and the troops were returning to be civilianized.

Some observers noted that the military justice system operating during World War II resulted in few, if any, convictions of the innocent, and few, if any, acquittals of the guilty, clearly the goal of any system of criminal law.⁸ But such plaudits were overwhelmed by the denunciations of *command control*—courts obedient to the whim of a military commander—and *excessive sentences*.

In 1944, a general could order into battle millions of men, a high percentage of whom faced certain death. In 1946 the public began to doubt the wisdom of permitting that same general to act in matters of military justice, regardless of the relationship of justice to discipline, and discipline, in

5. *Kirkman v. McClaughry*, 160 F. 436 (CCA 8th 1908) (citing Porret’s case, Perry’s Oriental cases); Albert R. Mugel, *Military Justice, Command, and The Field Soldier*, 2 *BUFF. L. REV.* 183 (1952-53).

6. Benjamin Feld, *The Court-Martial Sentence: Fair or Foul?*, 39 *VA. L. REV.* 319, 321 (1953).

7. Robert P. Patterson, *Military Justice*, 19 *TENN. L. REV.* 12 (1945-47).

8. Kenneth C. Royall, *Revision of the Military Justice Process as Proposed by The War Department*, 33 *VA. L. REV.* 269, 270 (1947). The War Department Committee on Military Justice [The Vanderbilt Committee] reported that it had been unable to find in an authenticated case that an innocent man had been convicted. JAGF 1946/8221 (on file with the Office of The Judge Advocate General).

turn, to victory in battle. The soldier at the Rapido or the Bulge or Okinawa thought no punishment was too severe for the shirker or deserter, but some civilians who had fought the war vicariously appeared to express horror at the long sentences courts-martial were imposing. A few excesses and abuses were seized upon to demonstrate the failure of the military to dispense justice. Without noting that almost invariably the same cases were being cited repeatedly as such examples, the “public” demanded “reform”—and “reform” it got. The story has been told too often and too well to be repeated in the limits of this article⁹—how committees were appointed to examine and report, how the Elston Act¹⁰ became the law for the Army, how “unification” was achieved, and how the Uniform Code of Military Justice was enacted into law.¹¹

Now, it seems apparent that any American code of military justice must serve a dual purpose: (1) it must establish a framework whereby offenders are appropriately and promptly punished by means of an enlightened procedure fully in accord with the basic principles of American justice; (2) while at the same time, not only not impeding, but on the contrary, aiding the military commander in accomplishing his assigned mission.¹² Traditionally, but mistakenly, the scheme of military justice was said to rest primarily upon the second of these purposes, being defined as a system for the maintenance and enforcement of good order and discipline in the armed forces, or as simply “an instrumentality of the executive power, provided by Congress for the President as Commander-in-Chief, to aid him in properly commanding the Army and Navy and enforcing discipline therein.”¹³

The new Code clearly re-affirmed the congressional and military intent of long standing that American military justice must rest equally upon both bases.¹⁴ The Court of Military Appeals in an early case announced that “we believe Congress intended, insofar as reasonably pos-

9. Robert S. Pasley & Felix E. Larkin, *The Navy Court-Martial: Proposals for its Reform*, 33 CORNELL L.Q. 195 (1947); Mandeville Mullally, Jr., *Military Justice: The Uniform Code in Action*, 53 COLUM. L. REV. 1 (1953); Arthur E. Farmer & Richard H. Wels, *Command Control or Military Justice*, 24 NYU L.Q. REV. 263 (1949); George L. Russell, *The Uniform Code of Military Justice*, 19 GEO. WASH. L. REV. 233 (1950).

10. Act of 24 June 1949, 62 Stat. 627.

11. Act of 5 May 1950, ch. 169, 64 Stat. 108.

12. See Chester Ward, *UCMJ—Does It Work*, 6 VAND. L. REV. 186 (1953).

13. 1 WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 40 (2d ed. 1920 Reprint).

14. *Report of Hearings Before a Subcomm. on Armed Services, House of Representatives, 1st Session, 81st Congress on H.R. 2498*, at 606 (1940) (statement of Professor Edmund M. Morgan, Jr., Harvard University Law School).

sible, to place military justice on the same plane as civilian justice, and to free those accused by the military from certain vices which infested the old system."¹⁵ Although it may sound as if the Code thereby established a very fundamental change in the philosophy behind military justice, the foregoing language of the Court of Military Appeals is hardly different from that expressed over half a century ago by Colonel Winthrop, one of the leading authorities on military law, when he wrote that a court-martial is "so far as it is a court at all, and within its field of action, as fully a court of law and justice as is any civil tribunal . . . it is bound, like any court, by the fundamental principles of law."¹⁶

Nevertheless, regardless of the rationale, the Code made certain drastic changes in the procedures of military justice. It established a more or less uniform system for all of the armed forces, designed to function in both peace and war; created a sort of civilian "supreme military court" to place the seal of judicial sanction on interpretation of the law; engrafted many civilian legal practices to the military; and made the part of lawyers more prominent in every phase of the system. Space is not here available for a detailed study of the provisions of the Code.¹⁷ Suffice it to say that almost without exception the changes tended to complicate a simple system beyond reason and, while purporting to increase the safeguards afforded an accused, permitted the escape of the guilty through a multiplication of legal loopholes that reflected the ascendancy of form over substance. The Code met with almost universal approval, although a few observers felt that it did not go far enough to eliminate command influence.¹⁸ Only a few voices were heard to express doubts that the system would work.¹⁹

Now, from the vantage point of three years of the Code's operation, tested in some measure by the Korean police action, we are in a fair posi-

15. *United States v. Clay*, 1 C.M.R. 74, 77 (C.M.A. 1951).

16. WINTHROP, *supra* note 13, at 54, 55.

17. See F.B. WIENER, *THE UNIFORM CODE OF MILITARY JUSTICE* (1950); DANIEL WALKER, *MILITARY LAW* (1954); JAMES SNEDEKER, *MILITARY JUSTICE UNDER THE UNIFORM CODE* (1953); Bernard Landman, Jr., *One Year of the Uniform Code of Military Justice: A Report of Progress*, 4 STAN. L. REV. 491 (1951-52).

18. Note, *Can Military Trials be Fair?*, 2 STAN. L. REV. 547, 558 (1950); JAMES SNEDEKER, *THE UNIFORM CODE OF MILITARY JUSTICE*, 38 GEO. L.J. 521, 597 (1950); Note, *The Proposed Uniform Code of Military Justice*, 62 HARV. L. REV. 1377, 1379 (1949).

19. WIENER, *supra* note 17.

tion to make some observations about the Code and just how it works in practice.

Anyone evaluating the Code must consider that a primary purpose of the framers of the Code was to create a system that would be regarded with favor by the public, which would earn and hold the public's confidence. In this respect all indications are that the Code is performing well. For example, examination of law review articles over the past few years clearly reveals a trend away from the blanket and ill-considered condemnations of "drumhead justice" and toward scholarly examinations of the legal problems dealt with by Boards of Review and the Court of Military Appeals. Many law schools teach courses in military law today, and various reporting systems carry leading opinions of the Court of Military Appeals. The judges of the Court of Military Appeals reported in 1954:

Experience has shown that as the members of the State and Federal bars and the public generally have become familiar with the scope and effect of the Code, and its beneficent provisions, they have lost many erroneous concepts concerning the abuses supposedly present in military justice. Many lawyers now realize that procedures under the Code afford protection to an accused that compares favorably with that found in civilian courts.²⁰

Another effect of the Code has been the increased participation of military lawyers in the military justice system. There is no doubt that trials by general courts-martial are now conducted in a more professional manner than prior to the Code—with three lawyers serving in the various capacities of law officer and counsel for the accused and for the government, this result was inevitable.

The techniques of practice of this highly specialized form of law, military justice, closely parallel those of the civilian criminal law practitioner. The individual judge advocate officer, assigned to military justice duties, may be expected to present cases, prepare briefs, argue appeals, submit motions, and draft instructions for the court in a manner familiar to civilian lawyers. If assigned as a law officer or member of a Board of Review he

20. ANNUAL REPORT OF UNITED STATES COURT OF MILITARY APPEALS AND THE JUDGE ADVOCATE GENERALS OF THE ARMED FORCES, 1 JUNE 1952 TO 31 DECEMBER 1953, 15-16 (1953).

functions as a judge, with all of the responsibilities of that important position.

The scholarly debates of questions of law by members of the corps engage the attention of a large segment of the civilian population, as well as the military, through professional and institutional publications. As the civilian gradually realizes that the military practitioner truly represents the highest traditions of the bar, or, perhaps more realistically, as the civilian sees the military practitioner use techniques which have been associated with the civilian lawyer, the prestige of the military lawyer is enhanced. Concomitant is an elevated regard by the civilian for the procedures and practices of military justice.

With respect to the rights of the accused serviceman, there is simply no longer any question but that he stands in a position more favorable than his civilian counterpart.²¹ As has been true since World War I all punitive proceedings against him are subject to automatic review by one or more agencies, and in certain serious cases there may be now as many as six levels which will entertain the accused's case for legal review or clemency consideration (the convening authority, the Board of Review, the Court of Military Appeals, the Secretary of the Department, The President, and the new trial proceeding).

Judge Latimer, in a commencement address at Charlottesville, Virginia, in January 1952, remarked that "if anyone now believes that a court-martial is merely an agency of the commander, and governed solely by his whims, then he is too blind to see what has clearly been spelled out by members of Congress." The Court of Military Appeals has used its strongest language in the few cases that it has had to decide dealing with "command control."²²

The Court of Military Appeals, the unique product of the Code, has diligently acted to protect the safeguards afforded an accused.²³ This has been particularly noticeable in cases involving the right against self-incrimination.²⁴ Critics of the military justice system will find most prof-

21. John B. Barnard, *Uniform Code of Military Justice—A Recommendation*, 26 ROCKY MTN. L. REV. 48-55 (1953-54).

22. *United States v. Littrice*, 13 C.M.R. 43 (C.M.A. 1953); *United States v. Duffy*, 11 C.M.R. 20 (C.M.A. 1953); *United States v. Ferguson*, 11 C.M.R. 251 (C.M.A. 1953).

23. "By adopting these principles we impose upon military courts the duty of jealously safeguarding those rights which Congress has decreed are an integral part of military due process." *United States v. Clay*, 1 C.M.R. 74, 82 (1951-1952).

itable and illuminating a study of the decisions of the court and the boards of review.²⁵

The foregoing statement of the operation of the Code is not exhaustive, but it does touch upon the principal effects. That is not the complete story however. The Secretary of Defense, in his semi-annual report covering the first half of 1953, remarked that the Code's "benefits are not entirely unalloyed." With this caveat, let us see the debit side of the ledger.

Protracted appellate review is the most obvious harmful effect of the Code. Our civilian brethren, accustomed to and troubled by the long delays in the civilian courts, may not be dismayed by the statistics indicative of prolonged proceedings, but to the military the imposition of such delay is equivalent to nullifying the deterrent effect of the sentence involved. Certified cases, that is, cases forwarded by The Judge Advocate General to the Court of Military Appeals for review, require on an average over half a year before the opinion is handed down by the Court of Military Appeals. As for cases going to that court on petition by the accused, if the petition is denied the delay averages about seven months from trial to denial, and if the petition is granted the delay from trial to opinion by the court extends to an average of twelve months. When one considers that the median sentence to confinement is about two years, and that time off for good behavior, clemency, and parole may reduce that confinement by half, it becomes apparent that the delay incident to the cumbersome appellate procedure has created a wholly new set of problems. The Secretary of Defense reported in 1953:

The most pronounced adverse impact upon the military justice system appears in the intricacies and delays attending appellate review. Since convicted persons have a right to appeal they may delay the final disposition of cases although the petition for review may be entirely without merit and even when it follows an original plea of guilty. Moreover, because of delays in the appeal process, convicted persons receiving short sentences of confinement may have served their sentences before the proce-

24. See, e.g., *United States v. Greer*, 13 C.M.R. 132 (C.M.A. 1953); *United States v. Eggers*, 11 C.M.R. 191 (C.M.A. 1953); *United States v. Rosato*, 11 C.M.R. 143 (C.M.A. 1953); *United States v. Wilson and Harvey*, 8 C.M.R. 48 (C.M.A. 1953).

25. See FRANK FEDELE, *THE UNITED STATES COURT OF MILITARY APPEALS AND APPELLATE REVIEW IN MILITARY LAW* (1954); John V. Thornton, *Military Law*, 28 N.Y.U. L.Q. REV. 128 (1953); Seymour W. Wurfel, *Court-Martial Jurisdiction Under the Uniform Code*, 32 N.C. L. REV. 1 (1953-54).

dures prescribed by the Code is completed. These individuals are rendering no benefit to the service during this period, but must be retained on full pay status until appellate review is concluded. This involves great expense to the taxpayer and, because of the frivolous nature of the appeal, is generally of no value to the accused.²⁶

The Code is costly, particularly in terms of personnel. Despite the fact that a large Judge Advocate General's Corps is required to operate the Code, it is still necessary to call upon the officers of the other branches of the service in large numbers. For instance, the duties of the investigating officer, the summary court-martial, members of special and general courts-martial, counsel in special courts-martial, and assistant counsel in general courts-martial are almost always performed by what might here be called the military laity. The Code only negligibly reduces the demands upon the non-lawyers, while at the same time it greatly increases the demands upon the lawyers in the service. Other than a judge advocate, every officer spending time upon military justice duties is taking it from the time he could be spending in his primary assignment.

Insofar as legally trained personnel are concerned, it appears that the Code requires roughly one lawyer for every one thousand servicemen. During a war of the magnitude of World War II, when there were as many as 12,000,000 people in the service at one moment, there would thus be required somewhere in the neighborhood of 12,000 military lawyers. It is no secret that the services do not now have anywhere near that number of military lawyers, regular or reserve, active or inactive. Probably less than one half of that figure would be presently available. The balance would have to come from the civilian bar. Lest anyone labor under the misapprehension that any civilian lawyer can easily and quickly be transformed into a military lawyer, that "difficult law points in courts-martial cases are practically non-existent,"²⁷ let him consider the remarks of a staff judge advocate, fresh from service in Korea, when he said: "Perhaps there is no other assignment . . . that taxes the ingenuity, resourcefulness, competency, and physical and mental stamina more than that of a Staff Judge Advocate of a division engaged in combat."²⁸ Let him also consider that the decisions of

26. DEPARTMENT OF DEFENSE, SEMI-ANNUAL REPORT OF THE SECRETARY OF DEFENSE, 1 JANUARY TO JUNE 30, 1953, 122 (1953).

27. Arthur J. Keefe & Morton Moskin, *Codified Military Injustice*, 35 CORNELL L.Q. 150, 162 (1949-50).

28. REPORT OF PROCEEDINGS, ARMY JUDGE ADVOCATE CONFERENCE, 21-25 APRIL 1952, at 50.

the Court of Military Appeals and the Boards of Review are published at the rate of about five volumes annually; the most diligent military lawyer is hard pressed to read and digest such a mass of material. Any lawyer undertaking the duties of a judge advocate now or in the future will have to come to grips with and master a fast-growing body of military case law. Even the judges of the Court of Military Appeals have had difficulty in dealing with what have been mistakenly referred to as the military's uncomplicated legal problems.²⁹ In a sample period of eight weeks the court handed down forty-five opinions, only nineteen of which were unanimous. Approximately one-third of these forty-five opinions contained dissents. If the civilian judges of this Court, after three years of experience on this bench and many years of civilian law experience prior thereto, cannot agree on the state of the military law, think what faces the civilian lawyer called to duty with the services as a military lawyer.

One further shortage has been noted—that of qualified court reporters, particularly in overseas and combat situations. All of the services have struggled with this problem, particularly by undertaking large scale experiments with sound recorder-producers and the Stenomask, but as yet there remains unanswered the question of where reporters in necessary numbers will be found.

All of these shortages existed during World War II, when the requirements for legally-trained personnel and qualified reporters were not nearly so great.³⁰ There is little optimism in the services that the problem of personnel shortages can be any more easily handled in our next great conflagration, should it occur, than in the past.

The next defect of the Code is probably the most serious. Whereas there may be increased confidence on the part of the public in military justice now that it operates under the Uniform Code of Military Justice, the reverse seems to be true for the military commanders. The Ad Hoc Committee on the Future of Military Service as a Career (the so-called Womble Committee) reported in October 1953:

The committee unanimously concludes that professional standards have been permitted to deteriorate through lack of effec-

29. For an example of an extremely difficult phase of military law, and the court's struggle to find a solution, see *United States v. Gibson*, 13 C.M.R. 68 (C.M.A. 1953).

30. REPORT OF THEATER JUDGE ADVOCATE, ETOUSA & USFET, 4 APRIL 1942 TO APRIL 1946 (3 Apr. 1946).

tive disciplinary control. The adoption of the Uniform Code of Military Justice, with its unwieldy legal procedure, has made the effective administration of military discipline within the Armed Forces more difficult.

This is a terrible indictment of the Code, for it indicates a failure of the system to equip the commander with one of the tools necessary to the accomplishment of his, and the service's, primary mission—success in combat. The pendulum has swung, it would seem, from too much emphasis on the “military” aspect of military justice to too much emphasis on the civilian procedural aspects of law.

Several students of military law have made observations with respect to the functions of military law directly bearing on the commander's side of the picture. In 1880, General William T. Sherman wrote in the *Journal of the Military Service Institution of the United States*:

Civilian lawyers are too apt to charge that Army discipline is tyranny. We know better. The discipline of the best armies has been paternal, just and impartial. Every general, and every commanding officer, knows that to obtain from his command the largest measure of force, and the best results he must possess the absolute confidence of his command by his firmness, his impartiality, his sense of justice and devotion to his country, not from fear. Yet in order to execute the orders of his superiors he must insist on the implicit obedience of all in his command. Without this quality no army can fulfill its office, and every good citizen is as much interested in maintaining this quality in the army as any member of it.³¹

General Pershing, in his work, *My Experience in the World War*, stated:

In a new army, like ours, if discipline were lacking, the factor most essential to its efficiency would be missing. The army was composed of men representing every walk of life . . . and practically all were without military experience. In the beginning, our army was without the discipline that comes with training. The vast majority of both officers and men were unaccustomed to the

31. 1 GENERAL WILLIAM T. SHERMAN, J. OF THE MIL. SERVICE INST. OF THE U.S. 132 (1880).

restraints necessarily imposed, and unfamiliar with the rules and regulations required to insure good conduct and attention to duty.³²

Mr. George A. Spiegelberg, in his article, *Reform of Courts-Martial*,³³ remarked that “[t]he authority of command must not be undermined by limiting in any way its power to enforce obedience and respect”³⁴ Former Secretary of War Newton D. Baker stated that the administration of justice is a compromise between speed and certainty, and that it was inevitably difficult in a hastily formed Army

to establish such processes as will throw around every man in the Army, whether private or officer, the surest safeguards and protections which can be devised against either error of law or passion or mistake of justice at the hands of those who try him, involving either his property, his honor, or his life.³⁵

Even the United States Supreme Court has announced the basic principle that “the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty”³⁶

Clearly today no one will argue against the proposition that any system of military justice must be fair and in accord with the basic principles of American justice. But the techniques whereby that fairness is achieved and those basic principles of justice are applied change with the situation—and with the times. Modern warfare requires a greater degree of teamwork, holds the individual to a higher standard of military proficiency, and subjects that same individual to greater mental and physical stresses than ever before in history. The failure of the individual soldier today could cause the loss of great shares of the nation’s wealth or could result in devastating loss of life. The normal human being seeks survival—but survival in modern warfare is at best a tricky matter. Increasingly there is evidence that the normal man requires support to enable him to enter the fight. Some men find this support only in compulsion generated by fear of the consequences of defection equal to that they face in battle. Long ago Lord Birkenhead stated that “where the risks of doing one’s duty is so great, it

32. 2 GENERAL JOHN PERSHING, *MY EXPERIENCE IN THE WORLD WAR* 97 (1931).

33. George A. Spiegelberg, *Reform of Courts-Martial*, 35 A.B.A. J. 29, 31 (1949).

34. *Id.*

35. 1 FREDERICK PALMER, *NEWTON D. BAKER: AMERICA AT WAR* 279 (1931).

36. *Burns v. Wilson*, 346 U.S. 137 (1953).

is inevitable that discipline should seek to attach equal risks to the failure to do it."³⁷ And former Secretary of War, Robert Patterson noted:

The soldier who commits [a military] offense must pay the penalty, and the penalty must be severe enough to act as a deterrent to others. His fellow soldiers are entitled to the assurance that no soldier can dodge the perils of battle without paying a heavy price. A military prison is safer than the battlefield, but it should not be made into a soft berth, and certainly no soldier who commits a serious offense should be sent back to civilian life ahead of the steady soldier who did his duty.³⁸

There must be, then, in the framework of military justice that form of compulsion that forces a man to something against which his spirit, his training, and his entire being rebels. The military services and the nation cannot tolerate the faltering soldier, the coward, or the traitor whose act may cause the bitter and wasteful death of even one comrade. The Code must provide a means for imposing upon a military offender punishment that will serve as a deterrent to others.³⁹ And that punishment must be swift and sure.⁴⁰ When peace is finally won it will be time enough to reexamine sentences of long confinement and to consider restoring that offender to society.

The civilian lawyer has struggled with this concept of the necessity of the exemplary effect of punishment in cases involving military offenses. And yet there is certainly a case to be stated for that concept. The man undergoing daily hazard of death is not inclined to be very content with the prospect of facing another day of fighting when he knows that a cowardly comrade is resting comfortably in jail in the safety of the rear areas. Nor is this soldier made happier by the thought that as soon as the war ends, this same coward can begin to look forward to an early release from confinement and the enjoyment of many of those things of life for which the sol-

37. Lord Birkenhead, a British politician, served as the British attorney-general from 1915 to 1918, and served in the Cabinet of David Lloyd George as Lord Chancellor from 1919 to 1922.

38. Robert P. Patterson, *Military Justice*, 19 TENN. L. REV. 12, 13 (1945-1947).

39. For an interesting and timely article concerning a wartime execution of a military offender, see Frederick B. Wiener, *Lament for a Skulker*, U.S. ARMY COMBAT FORCES J. (July 1954).

40. The First British Mutiny Act (1689) provided in part that deserters would "be brought to a more exemplary and speedy punishment than the usual forms of law will allow." Universally, military codes have sought this goal of expeditious certainty.

dier carries on his fight. It is not vindictiveness that argues for the severe punishment for military offenders. It is its deterrent power: the penalty must be such that a soldier will at least subconsciously weigh his prospective act of misconduct against the certainty of heavy punishment. It might also be noted that there is in this an inherent spirit of justice to those who stand and fight, who get up and go forward at command even in the face of certain death.

The Womble Report did not contain specific references to areas where the administration of discipline had been made more difficult, but those areas are not very obscure. One of these, the delay in appellate procedure, has already been mentioned. Another directly concerns the small-unit commander, the man most in need of assistance in maintaining discipline. He is the closest to the troops; he is the man who customarily gives them the orders that compel them to risk their lives. Yet the Code gives him the least support. Take for example the workings of non-judicial punishment.⁴¹ In order that he may adequately deal with minor military offenses in a manner that will not leave the blot of a judicial conviction upon a soldier's record, unit commanders are permitted to impose very limited punishments without the necessity of referring the matter to a court-martial.

For example, a captain, commanding an infantry company of about 200 men, may reduce a private first class to the grade of private, or he may restrict any of his men to specified limits for up to two weeks, or he may impose two hours of extra duty per day for up to two weeks. Obviously, these punishments are of little practical effect where the offender is a private in a unit in combat or in the field. Since the Code prevents the use of the lowest court-martial, the summary court,⁴² without the accused's consent, unless he has first been offered and has refused non-judicial punishment, the unit commander is often faced with the dilemma of deciding whether to impose an insignificant punishment or undertake the procedurally burdensome task of bringing the offender before a special court-martial.

A few combat commanders resolved this problem by assigning the dirty-and the dangerous-jobs as punishment for those who should more properly have been dealt with by non-judicial punishment or even by court-martial. The objections to such a practice are obvious. But when the commander is so circumscribed by procedural red-tape, his powers of legal

41. UCMJ art. 15 (1950).

42. *Id.* art. 20.

punishment so emasculated, and the performance of his primary duties so hindered by time-consuming attention to secondary matters, it is only reasonable to expect that he will turn to some short-cut that will serve his purpose of quickly and easily punishing an offender. Clearly, then, the Code has somehow failed the small-unit commander, because it has not equipped him with tools adequate to deal with minor military offenses—those annoying acts of misconduct which so eat into the efficiency and discipline of a military unit.

Finally, let us turn for a moment to the burden of the Court of Military Appeals. In 1949, A. J. Keefe and Morton Moskin wrote that “there should be no difficulty at the present time in [the Court of Military Appeals] reviewing all court-martial convictions.”⁴³ The writers could not seriously have contended that the Court of Military Appeals could review summary and special courts-martial, and their failure to see any difficulty for the court in reviewing general courts-martial is palpable. In about twelve percent of cases acted upon by a Board of Review the accused petitions the Court of Military Appeals for review. The Court of Military Appeals grants on an average only one out of eight of those petitions. About one half of all grants result in affirmance. As of 31 December 1953,⁴⁴ the Court of Military Appeals had received over 4000 petitions from accused since the inception of the Code. The backlog of the court’s work, however, has been such that opinions are as likely as not published a year after the trial of the case. And yet the nation is mobilized on a peacetime basis, with the armed forces strength at about one-fourth of the World War II peak. What will be the result of an all out mobilization?

Certainly it is true that now is the time for the Court of Military Appeals and the Boards of Review to wrestle with the fundamental questions, when time is available for thorough study. Opinions and precedents must be stockpiled like any war commodity, ready to be drawn upon when the situation demands and time is no longer available. In time of war it will probably not be necessary for the court to write opinions in as high a percentage of cases as it presently does. Nevertheless, the cases coming to the

43. Arthur J. Keefe & Morton Moskin, *Codified Military Injustice*, 35 CORNELL L.Q. 150, 162 (1949-1950).

44. UNITED STATES COURT OF MILITARY APPEALS & THE JUDGE ADVOCATE GENERALS OF THE ARMED FORCES, ANNUAL REPORT OF THE UNITED STATES COURT OF MILITARY APPEALS & THE JUDGE ADVOCATE GENERALS OF THE ARMED FORCES, 1 JUNE 1952 TO 31 DECEMBER 1952, at 21 (1953).

court must be read, and this requires time and personnel. Adding appellate counsel and commissioners will solve only part of the problem.

The above mentioned criticisms of the Code are not by any means all, but they are the most significant. Clearly, these criticisms are important enough to shake the confidence of those charged with administering military justice under the Code.

The overall picture is not hopeless, however. One fact is certain: in the event of a large scale war, nothing, not even judicial processes, will be allowed to hinder the fight for survival. If the Code does not work, something else will take its place. Accordingly, even the severest and most skeptical critic of military justice must re-examine the Code with an eye to both of its primary functions. Some changes have already been proposed by The Judge Advocate Generals of the various services, and have been studied by the Court of Military Appeals and a special committee appointed by that Court.⁴⁵

These changes neither cut into the basic rights of an accused, nor do they eliminate in any way the safeguard accorded him. They do strive to eliminate waste of personnel in making useless records of trial and undertaking reviews of meritless petitions, to increase the authority of the commander to deal with minor offenses, to permit earlier execution of sentences. Space does not permit a detailed examination of the proposed changes. Some, however, bear scrutiny at this time. For instance, it is proposed that in general courts-martial where the accused pleads guilty, he may be tried before a one-man law officer court, if the accused, his counsel, and the convening authority agree. Another proposal would permit a one-man law officer special court-martial. One recommendation would change Article 15, the non-judicial punishment article, to permit short confinement and small forfeitures of pay for minor offenses by enlisted men, and to permit larger forfeitures of pay of officers and warrant officers. It has been proposed that where there is an acquittal or the trial results in no punitive discharge and confinement less than one year, the record of trial need not be verbatim. Where an accused requests the execution of his punitive discharge and there remains no unexecuted sentence to confine-

45. UNITED STATES COURT OF MILITARY APPEALS & THE JUDGE ADVOCATE GENERALS OF THE ARMED FORCES, ANNUAL REPORT OF THE UNITED STATES COURT OF MILITARY APPEALS & THE JUDGE ADVOCATE GENERALS OF THE ARMED FORCES, 1 JUNE 1952 TO 31 DECEMBER 1953, at 23 (1954).

ment it has been proposed that he may be so discharged, although this would not effect the review procedure.

Have the proposed changes gone far enough? If enacted into law they will be of material help in correcting some of the defects of the Code. But it is not likely that all has been done to attain the supreme objectives of military justice. There are many techniques and procedures that have been considered with a view to lightening the load of military justice upon the services. It has been suggested that *all* justice matters should be in the hands of the lawyers; courts-martial should be appointed only by major commanders; courts should serve on an area basis rather than a unit basis, as at present, and should be permanent; officers of other branches should not serve as court members but rather the court should be composed of three judges who would determine questions of fact and law; sentencing should be taken from the court altogether and should be placed in the hands of the law officer who would be appointed by a higher command than the one convening the court; sentencing should be indeterminate at the trial level, that is, that the conviction of an offense carry with it a fixed maximum and minimum punishment, and that the actual time spent in confinement would be determined by the various clemency and parole agencies.

It is enough for the present that lawyers, both military and civilian, join in studying the problem and bending every effort to discover the remedy. In the event the recently proposed changes of the Court of Military Appeals and The Judge Advocate Generals are enacted into law some substantial improvement will be forthcoming.

In conclusion, however, it must be made crystal-clear that the operation of any system of military justice depends not upon a Code but upon the quality and quantity of the men who are charged with its enforcement. No amount of legislation will replace the intelligent application of fundamental principles of fairness, promptness, and certainty—that must come from the brand of man vested with the power and the responsibility. Both the legal profession and the military services must combine their wits to see that the nation has a sufficient number of such men when the next test of survival arises.

OBSERVATIONS: 2000

MAJOR GENERAL (RETIRED) GEORGE S. PRUGH, JR.⁴⁶

In early 1951, a judge advocate conference was convened at the famous Hotel Berchtesgadenerhof in Bavaria, the purpose being to prepare the judge advocates (JA) stationed with elements of the U.S. Army in war-torn Occupied Germany for the application of the new Uniform Code of Military Justice (UCMJ or Code), enacted into law as of 5 May 1950 to become fully effective 31 May 1951. To accompany the new Code was a new *Manual for Courts-Martial*, issued by President Truman as an Executive Order, dated 8 February 1951 and effective the same date as the new Code.

Fifty or more JAs assembled to hear the briefer sent from the Office of The Judge Advocate General (OTJAG) in Washington. The audience was composed of roughly two groups. The first consisted of senior officers with considerable experience as civilian lawyers who were or shortly would become staff judge advocates or law officers. The second group was made up of officers recently admitted to the bar, captains and majors, most of whom were newly integrated into the Regular Army and whose duties were primarily as defense counsel or trial judge advocates (prosecutors).

The conference attendees came from the half a dozen or so military posts that divided the American Zone of Occupation and exercised general court-martial jurisdiction. In addition to these major jurisdictions there were a few combat arms units composing the division-sized constabulary that provided the security of the command. The implementation of the new UCMJ would be the responsibility of these general court-martial jurisdictions.

The Wetzlar Military Post, of which I was one of the representative attendees at the conference, was situated on the northern side of the American Zone, abutting the British Zone to the west, the Soviet Zone to the east, and the French Zone to the south. It was the largest Military Post in area but the smallest in troop strength in the American Zone. Troops assigned to the Wetzlar Military Post included major supply installations,

46. The Judge Advocate General, U.S. Army (1971-1975); Staff Judge Advocate, U.S. Military Assistance Command, Vietnam (1964-1966); Legal Advisor, U.S. European Command (1966-1969), and the Judge Advocate, U.S. Army Europe (1969-1971).

many transportation, engineer, and ordnance elements, an armored cavalry regiment patrolling the eastern border particularly the Fulda Gap, a field artillery battalion stationed in the city of Wetzlar, the U.S. Army Europe replacement depot at the university town of Marburg, and at Giessen a separate infantry battalion (that had as one company commander then Captain Joe Bailey, years later to become a stalwart military judge on the Army Board of Review).

The JA office for the Wetzlar Military Post at that time was typical of the organization, experience level, and professional quality of the general court-martial jurisdictions then in Germany. It consisted of four judge advocate officers, two civilian attorneys to handle procurement law, claims, and military affairs issues, a German interpreter, one or two court reporters, and a couple of clerks. Training and applying the UCMJ would be the responsibility of the JA office.

Lieutenant Colonel Jim Burnett, formerly a prosecuting attorney in Kentucky and a longtime JA in Europe, was the staff judge advocate. Our law member (soon to be called law officer) was Major Don Manes, later to be assigned as Assistant Exec at OTJAG in Washington and to be designated by TJAG General Decker as the action officer for the famous *Girard* case.⁴⁷ If law officer help was required it could be obtained through the headquarters at Heidelberg from Colonel Charlie Berkowitz (a former prosecutor in New Jersey) or Lieutenant Colonel Wally Solf (later to become the chief military judge). Major Bill Kramer (later to be another distinguished member of the U.S. Army judiciary) was the defense counsel, and I, the least experienced in the office with a mere twenty or so general court-martial trials, was the trial judge advocate, soon to become the trial counsel.

Everybody in the Wetzlar Military Post JA office took a crack at legal assistance but our main tasks were in the military justice cases. The consistency of our primary duties facilitated liaison with the civilian and mil-

47. *Wilson v. Girard*, 354 U.S. 524 (1957) (holding that neither the Constitution nor any statute enacted subsequent to the effective date of the Treaty between the United States and a foreign state bars the carrying out of an agreement, authorized by the Treaty, relating to jurisdiction over offenses committed in that foreign state by members of the United States Armed Forces). In *Girard*, an American soldier who, while guarding a machine gun and articles of clothing in an Army exercise area in Japan, fatally wounded a Japanese woman who was gathering expended cartridge cases in the area. The Supreme Court denied a writ of habeas corpus and determined that the soldier should, as requested by Japanese authorities, be delivered for trial on criminal charges in the Japanese courts.

itary law enforcement and investigative offices, including the High Commissioner's court and the Kreis resident officer (the local representatives of the U.S. occupational authority). Although we had a very busy work week of five and a half days, it was customary to be in the office or out investigating or preparing a trial every day. All of us lost leave regularly. Familiarization and training in the UCMJ were new added burdens for the already struggling JA office.

The conference atmosphere at Berchtesgaden in 1951 was skeptical if not hostile to the briefer. After all, it was only recent that the Army had had to undergo the study and application of a revised military justice system with the adoption of the Elston Act and the *1949 Manual*. That new law was an embellishment of the Article of War law that served since World War I. The conferees sought answers to many questions regarding the new Code. Why is it necessary to make sweeping changes in that older law after it successfully served the United States through those great conflicts? What is to be gained by an overwatching civilian Court of Military Appeals? Isn't it risky to undertake such a change in the midst of the then current disasters in Korea? Why should the very useful law member be removed from the trial court's deliberations? Is it not foolish to charge the law officer with the requirement to instruct the court-martial on the elements of an offense, thus adopting a civilian procedure that so frequently generates error on appeal? This new Code obviously demanded many more military lawyers—where would the services find sufficient legal talent to meet the needs?

The briefer sought to reply to some of these changes: the peacetime scrutiny of wartime courts-martial had indeed revealed excesses in some cases; some military offense sentences were excessive when viewed in peacetime; notwithstanding the approach towards civilianization, Congress had retained maintenance of discipline as one of the missions of the military justice system; the law officer's duty to instruct on the elements of the offense could be safely satisfied by reading to the court the *Manual's* applicable subparagraphs entitled *Discussion* and *Proof*. (This advice would soon turn out to be inadequate, too simplistic, and inaccurate.) The impact of the new Code and *Manual* was not as burdensome as we had imagined it to be. That burden was a lot heavier on the Navy than it was for the Army.

Other matters were arising to demand our attention: Germany was finally beginning to get on its feet; the Cold War brought substantial increases in U.S. troops to protect along the border with East Germany;

U.S. military responsibility for the Wetzlar Post area was to be exchanged with the French for Kaiserslautern and much of the remainder of the Rhineland-Pfalz; massive construction programs and procurement contracts were initiated to house and support that troop strength; the greatly increased U.S. presence brought families and with them increased legal issues. The North Atlantic Treaty Organization Status of Forces Agreement was in the negotiation process, and speculation was already beginning to be heard about an agreement that would give Germany some share in the exercise of criminal jurisdiction over U.S. personnel with offenses involving Germans. In light of the changes and difficulties now facing the Army, the new UCMJ presented lesser problems of adjustment.

The Berchtesgaden conference broke up on a positive note. We could and would make the new Code work; like any system of law it can be made to function with justice and fairness if the right qualified people were in its key positions; as in the civilian criminal law system much depended on the professional character of the people making the decisions in the lowest levels, at the troop, unit command, field JAs and counsels, and convening authorities.

In practical matters the Court of Military Appeals judges were in a distant and relatively rarefied position. While the UCMJ deliberately tended to "civilianize" the court-martial system, that presented no difficulty for the senior judge advocates and for the junior officers it presented a welcome professional challenge.

The Code has indeed performed well in its peacetime application upon an all-volunteer force. The Court of Appeals for the Armed Forces (CAAF) and the services Courts of Criminal Appeals and their predecessors have largely earned the confidence of the public and the civilian legal establishment. The Code does in fact provide procedural due process for accused service personnel comparable to or even exceeding that found in our American civilian criminal courts.

Following the adoption of the UCMJ were many law related activities that would prove to be beneficial. Illustrative are the maturing and strength of the military judiciary, the creation of the trial defense service, the sophistication of The Judge Advocate General's School at Charlottesville, the development of the Military Justice Reporter service, the publication of *The Army Lawyer* and the *Military Law Review*, the initiation of the Senior Officers' Legal Orientation course, the acceptance of the concept of the expediting negotiated plea, the recognition of the value of the

military magistrate, the refinement of the Military Rules of Evidence, and the assistance of the many instructional materials to include the *Military Judge's Deskbook*.

Fifty years of activity under the UCMJ have quieted the strident voices of so-called reform that Congress heard in those days following World War II. I have been subject to that Code for every day of those fifty years. For the first half of those fifty years, I was an attentive participant in the Code's operations, and for the second half I was an interested enthusiast. For seven years as a retiree teaching criminal procedure at a major law school, I was able to compare the UCMJ to the criminal codes or practices of our civilian community. As a result, I was proud to find the UCMJ to be at the least upon a par with the most enlightened civilian counterparts.

There remain some blemishes, however. The Code, as interpreted by the CAAF, incorporates extraordinary writs that have the potential of delaying and interfering with the legitimate functions of commanders and others in authority. The Code has likewise been interpreted in such a way as to develop a collision between the CAAF and The Judge Advocate Generals of the services. Most serious, however, is the omission in the Code of the recognition that it must function under wartime and draft conditions. In spite of obvious troubles in the application of the Code in the Korean conflict and most especially in the Vietnam war—which saw incidents of fragging, near mutiny, and a burgeoning drug problem—no serious study has been undertaken to evaluate the Code's functioning in times of military exigency and its ability or inability to support the discipline of a command in wartime or other emergencies.⁴⁸

Thus it is that while the UCMJ has given the services—and the country—a fine, workable, fair, just, and generally effective system of military justice there remains a serious problem area that cries out for consideration. How to incorporate the application of the Code in such a way as simultaneously to be fair and just while supporting the maintenance of military discipline under exigent circumstances presents the riddle for today's military lawyers. This is a challenge worthy of their best efforts.

48. See William C. Westmoreland & George S. Prugh, *Judges in Command: The Judicialized Uniform Code of Military Justice in Combat*, 3 HARV. J.L. & PUB. POL'Y 1 (1980).