

THE PAST AS PROLOGUE:¹ MAJOR GENERAL GEORGE S. PRUGH, JR. (RET.) (1942-1975)—WITNESS TO INSURGENT WAR, THE LAW OF WAR, AND THE EXPANDED ROLE OF JUDGE ADVOCATES IN MILITARY OPERATIONS

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A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect.

— Sir Walter Scott³

I. Introduction

Forty years ago, the American Army faced an enemy unlike any they had previously fought. The Vietnam War was a conflict in which culture and politics blurred battle lines and where evil blended with innocence as the enemy moved almost seamlessly among and between civilian populations. The World Wars and Korea offered few lessons for fighting this new kind of war, where technology and overwhelming mass were no longer the keys to victory. Vietnam was also a war in which the traditional paradigms of international law seemed to reach the limits of its ability to order and define the disparate treatment of detainees,

¹ “Whereof what’s past is prologue, what to come in yours and my discharge.” WILLIAM SHAKESPEARE, *THE TEMPEST*, act II, sc. i, available at http://www.shakespeare-literature.com/The_Tempest/3.html.

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³ SIR WALTER SCOTT, *GUY MANNERING* 259 (New York: E. P. Dutton & Co., 1906) (1815).

insurgents, terrorists, saboteurs, freedom fighters, and domestic criminals. It was a war unlike any other, and the lessons of those who witnessed the conflict in Southeast Asia have resurgent value as a new generation of military leaders adapt to the new paradigm of the Global War on Terror (GWOT).

One such witness was Major General (MG) George S. Prugh, Jr., former The Judge Advocate General of the Army (TJAG) and a giant in the history of the Judge Advocate General's Corps (JAGC), whose tremendous legacy of integrating the law into military operations is still studied three decades after his retirement. Major General Prugh's remarkable career included a tour as General (GEN) William C. Westmoreland's legal advisor, U.S. Military Assistance Command, Vietnam (MACV),⁴ service as a formal delegate to the Diplomatic Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law in Armed Conflict,⁵ tenure as The Judge Advocate General of the Army, and seven years as a faculty member at University of California (U.C.), Hastings College of Law. His military experience spanned World War II, the Korean War, Vietnam, and the Cold War. This period included an evolution in military justice from the Articles of War to the Uniform Code of Military Justice (UCMJ), and a transformation military jurisprudence exemplified by the establishment of an independent military judiciary and creation of a separate criminal defense service.

⁴ The Military Assistance Command, Vietnam (MACV) was the United States command structure during the Vietnam War from 1962-1975. It was the successor to the Military Assistance and Advisory Group (MAAG), established in 1950, to assist the French and the Republic of Vietnam. The Vietnam War was the longest conflict in U.S. history, claiming over 58,000 casualties and an estimated 304,000 wounded. *See generally* SHELBY L. STANTON, VIETNAM ORDER OF BATTLE (2003); BRUCE PALMER, THE 25-YEAR WAR: AMERICA'S MILITARY ROLE IN VIETNAM (2002); GUENTER LEWY, AMERICA IN VIETNAM (1992); ANDREW A. WEIST, THE VIETNAM WAR 1956-1975 (2002).

⁵ The conference contributed to the overall work of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law in Armed Conflict. The conference resulted in the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts 8 June 1977, 1125 U.N.T.S. 3, *available at* <http://www.icrc.org/ihl.nsf/INTRO/465?OpenDocument> [hereinafter Additional Protocol I]; *see* George S. Prugh, *American Issues and Friendly Reservations Regarding Protocol I, Additional to the Geneva Conventions*, MILITARY L. & L. OF WAR REV. 31, 232 (1992); *see* George H. Aldrich, *New Life for the Laws of War*, 75 AM. J. INT'L L. 764 (1981) (providing an overview of the Protocol and discussion of some of its major changes in the law).

During and following his thirty-three years of military service, MG Prugh remained one of those rare leaders who continually sought new ways to integrate judge advocates and the law into military operations, and who provided a legacy of his experience for use by future generations. In his book, *Law at War: Vietnam 1964-1973*,⁶ over two dozen publications, and countless lectures and speeches, he articulated a vision for military law that is more relevant than ever. The contextual framework between Operations Enduring Freedom and Iraqi Freedom, and Prugh's own description of Vietnam, are striking.⁷ In 1974, Prugh wrote of Vietnam:

The battlefield was nowhere and everywhere, with no identifiable front lines, and no safe rear areas . . . It involved combatants and civilians from a dozen different nations. Politically, militarily, and in terms of international law, the Vietnam conflict posed problems of deep complexity. The inherent difficulty of attempting to apply traditional principles of international law to such a legally confusing conflict is well illustrated by the issue of prisoners of war.⁸

Given the increasing attention paid to the role of international law in military operations, it is appropriate to remember Prugh at a time when

⁶ MAJOR GENERAL (MG) GEORGE S. PRUGH, VIETNAM STUDIES, LAW AT WAR: VIETNAM 1964-1973 (U.S. Army Center of Military History 1974), *available at* <http://www.army.mil/cmh-pg/books/vietnam/law-war/law-fm.htm> [hereinafter PRUGH, LAW AT WAR].

⁷ See CONRAD C. CRANE & W. ANDREW TERRILL, RECONSTRUCTING IRAQ: INSIGHTS, CHALLENGES, AND MISSIONS FOR MILITARY FORCES IN A POST-CONFLICT SCENARIO (2003); Edward P. Djerejian, Frank G. Wisner, Rachel Bronson, & Andrew S. Weiss, Guiding Principles for U.S. Post-Conflict Policy in Iraq (2003); James R. Howard, Preparing for War, Stumbling to Peace, Planning for Post-Conflict Operations in Iraq (May 26, 2004) (unpublished monograph) (on file with the School of Advanced Military Studies, Army Command and General Staff College, Fort Leavenworth, Kansas) (examining whether a disparate focus on combat operations during the planning and execution phase of Operation Iraqi Freedom contributed to slow and often ineffective reconstruction efforts); Seth G. Jones, et al., Establishing Law and Order after Conflict (2005), *available at* http://www.rand.org/pubs/monographs/2005/RAND_MG374.pdf ("Establishing security is critical in the short run to avert chaos and prevent criminal and insurgent organizations from securing a foothold in society, as well as to facilitate reconstruction in other areas such as health, basic infrastructure, and the economy."); *id.* at xii.

⁸ PRUGH, LAW AT WAR, *supra* note 6, at 62. "[I]t certainly is arguable that many Viet Cong did not meet the criteria of guerrillas entitled to prisoner of war status under Article 4, Geneva Prisoner of War Conventions." *Id.* at 66.

his experience in Vietnam and elsewhere is increasingly cited for its insights on difficult legal issues surrounding the status of insurgents, detention operations, application of the Geneva Conventions, and related issues. His career and work foreshadowed many of the issues the U.S. armed forces see today, which occupy headlines in an age when tactical decisions have enormous strategic implications.

This article introduces three separate but related stories: MG George Prugh's life and career; the role of judge advocates in Vietnam and its aftermath; and the importance of the law in military operations. Emphasis is given to Prugh's leadership philosophy and the institutional changes in the practice of military law observed throughout his service.⁹ In particular, this article introduces Prugh's direct involvement and work as the MACV Staff Judge Advocate (SJA). It is an introduction to one man's remarkable life and journey from the sandlots of San Francisco to the Pentagon, and of the Army and JAGC during the post World War II period.

II. 1920-1948¹⁰

A. Background

George Shipley Prugh, Jr. was born on 1 June 1920 in Norfolk, Virginia. His father's medical school education was interrupted a year short of graduation when his National Guard unit was federalized under General Pershing to pursue Poncho Villa along the Mexican border.¹¹ After several years as a provisional regular officer in the Infantry, including service in Panama and Europe, George Prugh, Sr. resigned his commission and ultimately took a job in 1928 with the Bausch and Lomb Optical Company in San Francisco, California. Prugh's mother, a

⁹ See THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975, at 159-262 (1975) [hereinafter THE ARMY LAWYER].

¹⁰ See U.S. Army Military History Institute, Senior Officers Debriefing Program: Conversations Between Major General George S. Prugh and Major (MAJ) James A. Badami, Lieutenant Colonel (LTC) Patrick Tocher, and Lieutenant Colonel Thomas T. Andrews (various dates, 1975 & 1977) (unpublished manuscript, on file with The U.S. Army Judge Advocate General's Legal Center and School (TJAGLCS) Library, Charlottesville, Virginia) [hereinafter Prugh History, date of interview]. The Senior Officers Debriefing of MG Prugh is one of over two dozen personal histories on file with TJAGLCS Library. They are available for viewing through coordination with the TJAGLCS Librarian. See also THE ARMY LAWYER, *supra* note 9, at 256-257.

¹¹ *Id.* Prugh History, 18 June 1975, *supra* note 10, at 2.

teacher by education, remained at home after her marriage and applied high personal and academic standards to her two sons.¹²

Major General Prugh enjoyed an active childhood, characterized by athletics and membership in the Boy Scouts, where he earned the status of an Eagle Scout at the early age of 16,¹³ awarded by the founder of the scout movement himself, Lord Baden Powell.¹⁴ The young Prugh played baseball with Joe DiMaggio and the DiMaggio brothers in the sandlots of San Francisco's Marina District.¹⁵ He held part-time jobs as a paper boy for the Saturday Evening Post, and later as a bagman for Prohibition-era bootleggers, fondly remembering "accepting small amounts of money to carry packages that gurgled for some of the fellows that were delivering things around the neighborhood."¹⁶

This early period growing up in San Francisco included the increasing awareness of the rise of Hitler's National Socialist Movement, and the threats it posed.

I remember a German submarine coming to San Francisco, a Nazi submarine, and how . . . German people welcomed the Nazi seamen in town; they came all around, and we saw the swastika for the first time. This was about 1935 or '36. [It was] [v]ery ominous and the sort of thing that youngsters paid a lot of attention to. What was going on in Europe was really quite apparent, and everybody was thinking that there was going to be a war someday.¹⁷

¹² *Id.* at 6-8.

¹³ E-mails from Lieutenant Colonel Virginia P. Prugh, U.S. Army, Judge Advocate General's Corps to LTC George R. Smawley (Jan. 2-31, 2006) [hereinafter Correspondence with LTC Prugh] (on file with author). Lieutenant Colonel Prugh is the younger daughter of MG Prugh and currently serves as a military legal advisor to the U.S. State Department.

¹⁴ Prugh History, 18 June 1975, *supra* note 10, at 10.

¹⁵ *Id.* at 30. Major General Prugh remembers:

Joe DiMaggio was just about the same year in high school that I was. Dominick was a couple years behind and there were two other brothers that also played. . . . Anytime you [went] over to play ball, of course, there was at least one of the DiMaggios there playing.

Id.

¹⁶ *Id.* at 20.

¹⁷ *Id.* at 16-17.

His father's military experience helped inspire Prugh to seek and obtain an appointment to the U.S. Military Academy, but poor eyesight disqualified him from attending.¹⁸ In 1938, he enrolled at the San Francisco Junior College as an engineering major, where tuition was free; he later switched to pre-law when he received official word that he was medically ineligible for West Point.¹⁹ The next year he transferred to U.C. Berkeley, because of its fine reputation, proximity to San Francisco, and relative affordability at \$27.50 a semester. He majored in political science and minored in economics and history.²⁰

During his year at junior college, MG Prugh enrolled in a National Guard commissioning program and entered the Coast Guard Artillery Reserve Officer Training Corps (ROTC) program when he transferred to U.C. Berkeley.²¹ He received his bachelor's degree in May 1941, but still had a year to go before completing the ROTC commissioning requirements. The following fall he enrolled in law school at U.C. Berkeley, Boalt Hall, where he began his final year of pre-commissioning training.²² But in 1941, Pearl Harbor²³ changed everything, and realizing his law school education was about to be interrupted, Prugh took a leave of absence to focus on completing his pre-commissioning program. Also during this time, Prugh met his wife, Katherine "Kate" Buchanan, during a fraternity-sorority exchange. Katherine was the daughter of Rear Admiral Patton Buchanan.²⁴ The

¹⁸ Correspondence with LTC Prugh, *supra* note 13.

¹⁹ *Id.* at 20.

²⁰ *Id.* at 20-21.

²¹ *Id.* at 23.

²² *Id.*

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On Dec. 7, 1941, while negotiations were going on with Japanese representatives in Washington, D.C., Japanese carrier-based planes swept in without warning over Oahu and attacked the bulk of the U.S. Pacific fleet, moored in Pearl Harbor. Nineteen naval vessels, including eight battleships, were sunk or severely damaged; 188 U.S. aircraft were destroyed. Military casualties were 2,280 killed and 1,109 wounded; 68 civilians also died. On Dec. 8, the United States declared war on Japan.

Encyclopedia.com, Pearl Harbor, <http://www.encyclopedia.com/html/P/PearlHar.asp> (last visited Feb. 24, 2006).

²⁴ Prugh History, 18 June 1975, *supra* note 10, at 24-25. Rear Admiral Patton Buchanan (U.S. Naval Academy, Class of 1911) had a distinguished career with service throughout the Pacific, including Guadalcanal, for which he received the Silver Star for heroism, China, and the Philippines. See George S. Prugh, *Reminiscences* 36 (1995) (unpublished

couple was engaged in the spring of 1941 and married in September 1942.²⁵

B. The Coast Guard Artillery & WWII

In March 1942, Prugh received his commission as a second lieutenant (2LT) and entered active duty four months later with the 19th Coast Guard Artillery Regiment (CGAR), stationed at Fort Rosencrans, San Diego.²⁶ The unit's mission focused on the harbor defense for the city of San Diego, armed with two batteries of twenty-year-old sixteen-inch guns.²⁷ Major General Prugh recalls his two-year service with the 19th as "a great experience . . . dug in on the side of a hill, firing [often] and training Marine artillery on [the] guns."²⁸

Shortly after arriving at the 19th CGAR, and despite only completing one semester of law school, Prugh was identified and detailed by his chain of command to serve as a criminal defense counsel. "[I] was one of the stable of about five defense counsel; the chief defense counsel was the only one in the group who was a lawyer."²⁹ During the first six

manuscript, on file with TJAGLCS Library). ". . . Admiral Pat Buchanan...was easily identified as an old sea dog. There was little tom-foolery when he was around." *Id.*

²⁵ Prugh History, 18 June 1975, *supra* note 10, at 24. Major General Prugh recognized the unique challenges for military wives:

A family has got to be able to adjust to [hardships of military life] and that is difficult for many wives, certainly for Judge Advocate wives. It seems to me that my observations of it is that the girl usually marries this young law school graduate having in mind being married to a lawyer and living in a community with all of the stability that the legal profession would normally have. They don't visualize being married to an Army officer and traveling around the world and moving their homes so frequently. I think this creates a real problem for us, especially in military lawyers. *Id.* at 27.

²⁶ *Id.* at 31-32; *see also* Prugh, *Reminiscences*, *supra* note 24, at 9-35.

²⁷ Prugh History, 18 June 1975, *supra* note 10, at 32. "[A]s artillery pieces, they were magnificent things. When we ultimately fired them, we got the longest range at that particular time that any American artillery had ever fired: 55,000 yards, which was then considered to be a tremendous range." *Id.*; *see also* Prugh *Reminiscences*, *supra* note 24, at 21-32.

²⁸ *Id.* at 33.

²⁹ *Id.* at 34. "My earliest court-martial cases were tried before I became a lawyer, while I was an artillery officer during World War II. Few counsel in those World War II days

months he tried roughly a case a month, including a rape contest resulting in an acquittal.³⁰ Thereafter, he was detailed as a trial judge advocate for his regiment, where he participated in numerous special courts-martial.³¹ Line officers without legal training were commonly detailed to this level of criminal trial work. Soldiers charged with offenses were not entitled to representation by an attorney for special courts-martial prior to the 1968 changes to the Uniform Code of Military Justice.³² Applicable military law at the time was derived from the 1928 Manual for Courts Martial (MCM) and the Articles of War, which, as Prugh notes, was “largely a repetition of the same basic law with which the United States Army had fought in World War I.”³³

In 1944, after completing the battery commander’s course at Fort Monroe, Virginia, Prugh returned to California for overseas movement to New Guinea aboard his father-in-law’s ship, the *Zielin*.³⁴ On the island of Leyte, New Guinea, he worked through a number of assignments, including infantry company commander and commander of a harbor defense battalion. Later, he moved to Oro Bay with the 276th Coast Artillery Battalion, where he held duty as the S-3 (operations officer) and commander of a Coast Artillery battalion.³⁵ In 1945, the 276th started up

had legal training and courts-marital were additional duties for already overburdened junior officers.” Prugh, *Reminiscences*, *supra* note 24, at 118.

³⁰ *Id.* at 34.

³¹ *Id.*

³² See JONATHAN LURIE, *MILITARY JUSTICE IN AMERICA: THE U.S. COURT OF APPEALS FOR THE ARMED FORCES, 1775-1980* (2001). See generally DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* § 8-3 (1999); MAJOR GEORGE S. PRUGH, JR., *OBSERVATIONS ON THE UNIFORM CODE OF MILITARY JUSTICE: 1954 and 2000*, 165 MIL L. REV. 21, 37 (2000) [hereinafter PRUGH, *OBSERVATIONS*]; The Judge Advocate General’s Legal Center and School, *available at* <http://www.jagcnet.army.mil/JAGC-NETONINTERNET/HOMEPAGE/AC/TJAGSAWEB.SF/Main?OpenFrameset> (last visited Feb. 24, 2006).

³³ Prugh History, 18 June 1975, *supra* note 10, at 37.

³⁴ *Id.* at 40. See Prugh, *Reminiscences*, *supra* note 24, at 38-44.

³⁵ Prugh History, 18 June 1975, *supra* note 10, at 40-41. Although he held several commands during his service in the South Pacific, MG Prugh observed little if any serious misconduct.

[D]uring World War II when I was in New Guinea, we didn’t have any social problems. There was just too much other activity going on. It was not an agreeable environment so that people were thinking more about how to just survive and make out with their own basic comforts rather than being concerned with social problems. We didn’t have courts-martial. During all the time that my battalion was

the Luzon River, Philippines, landed at Subic Bay near Bataan, and encamped in San Marcellino in preparation for a final movement and invasion of Japan.³⁶ The long journey ended quietly when the war concluded two weeks later.

Following the Japanese surrender, the battalion moved to Manila, where Prugh had his first experience with prisoners of war and the issue of war crimes. He recalls that

the Filipino people were quite eager to tell of all the difficulties that they had had under the Japanese during this period. So there were plenty of things to remind you of atrocities to prisoners, war crimes, violations of conventions and all that sort of business, and I was very much interested in all [of it].³⁷

With the war over, Prugh returned home to California in February, 1946, and continued where he had left off at U.C. Berkeley Law School. When the school discouraged him from working in support of his wife and young daughter, he transferred to Hastings College of the Law, University of California, located in San Francisco.³⁸ Prugh estimates that “almost 100 percent of [his Hastings] class had served during the war,” the vast majority of whom were in school under the G.I. bill.³⁹

In November 1947, Prugh accepted a Regular Army (RA) commission in the Coast Artillery, and pursuant to his request, was assigned to the 6th Army Student Detachment in order to finish law school. In May 1948 he graduated from Hastings; President Harry Truman handed him the diploma.⁴⁰ That fall he received “a little post card telling [him] to report for duty to the 6th Army, Judge Advocate Office,”⁴¹ where he served, pending the results of California bar exam.

in New Guinea and the Philippines, I think we had, in close to two years, we only had one court-martial.

Id. at 31.

³⁶ *Id.* at 41.

³⁷ *Id.* at 43.

³⁸ *Id.* at 51-52.

³⁹ *Id.* at 52.

⁴⁰ *Id.* at 62.

⁴¹ *Id.* at 64.

III. 1948-1964

A. Entry Into the JAGC and Early Introduction to International Law

Major General Prugh was assigned to the Military Affairs Division, 6th Army, Presidio, where he benefited from traditional developmental jobs, including legal assistance and criminal defense work. He was the junior member in an office otherwise staffed by talented and experienced military attorneys with service in World War II.⁴² Issues facing the Presidio in the late 1940s often dealt with the aftermath of the Second World War. Prugh described the Presidio's mission as "sweeping up the debris of WWII . . . We were still concerned with the return of WWII dead, burials . . . and weren't doing very much in the way of military matters."⁴³ Nevertheless, the fundamental work of the legal office retained a traditional focus on military justice, claims, legal assistance, and related legal services.⁴⁴

One of the early and enduring impressions for Prugh was the need for some sort of institutional training program for young judge advocates.⁴⁵ It is important to remember that The U.S. Army Judge Advocate General's Legal Center and School (TJAGLCS)⁴⁶ as it currently resides did not exist in 1948; continuing education in military law was informal at best. Years later, as The Judge Advocate General, Prugh became an active advocate of judge advocate continuing legal education and helped facilitate programs like the Criminal Law New Developments course and the publication of *The Army Lawyer*.⁴⁷

During this early period at the Presidio, Prugh was also introduced to international law and war crimes through his immediate supervisor, Colonel (COL) Burton F. Ellis, who had the distinction of serving as the Chief Prosecutor for the Malmedy Massacre war crimes tribunals. These military tribunals concerned seventy-three Nazi Waffen SS Troops who were tried and convicted for the deaths of approximately eighty American prisoners of war during the Ardennes offensive of the Battle of

⁴² Prugh History, 5 July 1975, *supra* note 10, at 13.

⁴³ *Id.* 27-28.

⁴⁴ *Id.* at 28.

⁴⁵ *Id.* at 19.

⁴⁶ See The U.S. Army Judge Advocate General's Legal Center and School, available at <http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset> (last visited Feb. 24, 2006).

⁴⁷ Prugh History, 5 July 1975, *supra* note 10, at 19-20.

the Bulge, December 1944.⁴⁸ The trial, *United States v. Valentin Bersin*,⁴⁹ began on 12 May 1946 before the Dachau International Military Tribunal.⁵⁰ The tribunal was established by the Judge Advocate Department of the U.S. Third Army to prosecute minor crimes and those alleged to have committed war crimes against U.S. personnel.⁵¹

By 1949, COL Ellis “was defending *himself* in the attacks that had been brought against the government’s prosecution of the Malmedy massacres.”⁵² The controversy, which included a U.S. Senate inquiry,⁵³

⁴⁸ See JAMES J. WEINGARTEN, *A PECULIAR CRUSADE: WILLIS M. EVERETT AND THE MALMEDY TRIAL* 40-43 (2000); see also UNITED NATIONS WAR CRIMES COMMISSION, *LAW REPORTS OF TRIALS OF WAR CRIMINALS* (1997). An abbreviated history of the Malmedy Massacre Trial is available online. Dachau Scrapbook, Malmedy Massacre, <http://www.scrapbookpages.com/DachauScrapbook/DachauTrials/Malmedy.Massacre02.html> (last visited Feb. 24, 2006).

Less well known than the International Military Tribunal at Nuremberg which tried major German war criminals, the American Military Tribunal at Dachau tried 1,672 German alleged war criminals in 489 separate proceedings. Unlike the International Military Tribunal at Nuremberg which consisted of judges from 4 different nations, the Dachau trials were overseen exclusively by the United States. In this sense, the Dachau trials were not “international” in nature and are therefore more closely analogous to the 12 Subsequent Nuremberg Trials which also were overseen by the United States.

Id.; see also *The Malmedy Massacre Trial*, Jewish Virtual Library, at <http://www.jewishvirtuallibrary.org/jsource/ww2/malmedy2.html>.

⁴⁹ Records of U.S. Army War Crimes Trials in Europe: *United States of America v. Valentin Bersin, et al.*, War Crimes Case 6-24, May 16-18, 1946.

⁵⁰ WEINGARTEN, *supra* note 48, at 45.

⁵¹ *Id.* at 42-47.

⁵² Prugh History, 5 July 1975, *supra* note 10, at 1. (emphasis added)

I watched him – pretty much alone, defending the actions that he had taken and the decisions that had been clearly approved by his superiors at the time of the Malmedy action but which, when open to inquiry later, and most especially to political inquiries, no one else was coming forward to say, ‘Well, I approved that and I cleared it, therefore I should take some of the responsibility for it.’ It was a good lesson, I think, to learn that you have to stand on your own hind legs yourself.

Id. at 2.

⁵³ *Id.* at 2, 3. Major General Prugh recalled that,

concerned certain constitutional and procedural aspects of the prosecution of the cases that questioned the legitimacy of the trial.⁵⁴

[The accused] were identified through the use of confessions, and of course there were no American witnesses who could identify the units. Almost all this information had to be developed from confessions that were obtained from the men who actually participated, or from records which indicated that they were present at that time. At trial, the admission of these confessions became crucial. Were they obtained under constitutional safeguards as we would know in our own criminal courts? Or even in our own court martial courts?... there were concerns over our own military law system... and was a period when there were several so-called soul searching reviews of the whole military law system resulting in the Elston Act and then, a year or two later, the UCMJ.⁵⁵

Prugh's early introduction to the process and issues associated with war crimes, legal as well as political, was a defining moment that benefited him later in Korea with the Returned Exchanged Captured Allied Prisoners Korea (RECAP-K) (1953-1955), and in Vietnam. As he recalls, "the basic problems that I got a chance to learn a little about, back in 1948 and 1949, allowed me to apply those lessons on other occasions."⁵⁶

Senator Baldwin, Senator Kefauver, one or two others whose names escape me at the moment, were primarily the Senate sub-committee investigating the Malmedy massacre, and there was Senator Joe McCarthy, who was an invited member, to participant on the committee. Of course, he was one of the antagonists, and listening to him cross-examine not only Colonel Ellis, but Colonel Straight, who later became a Judge Advocate general officer, and General Mickelwaite, and a few of the other leaders of the Military Law community at that time, was a very interesting experience form my point of view.

Id.

⁵⁴ *Id.* at 2-5.

⁵⁵ *Id.* at 4, 5.

⁵⁶ *Id.* at 5.

In late 1948, Prugh finally received word of his passage of the California bar exam, and received orders to move to Washington, D.C. for an “observation tour” at the Pentagon. He hoped for a Regular Army (RA) commission in the Judge Advocate General’s Department after this assignment.⁵⁷ His SJA at the Presidio managed to defer his orders until March 1949, so Prugh could be present for the birth of his second child, a favor he never forgot. “It is the sort of thing that you remember, with an SJA that considerate, to work it out with the thoughts of the family involved. . . . [it helps] keep a person in the service.”⁵⁸ He received his RA commission later that summer.

B. Pentagon, Litigation-Claims Division

By the spring of 1949, the Prugh family arrived in Washington, and the general began work in the Military Litigation-Claims Division supporting Army litigation worldwide. The division was headed by COL Claude Mickelwaite, who later served as The Assistant Judge Advocate General of the Army (TAJAG).⁵⁹ The work focused on the preparation of materials for the Department of Justice in litigation involving military personnel or property. Significant cases included the Texas City Disaster,⁶⁰ which involved the explosion of ships off the Texas coast; and

⁵⁷ *Id.* at 28. Prugh recalls:

In those days, all new judge advocates had observation tours here at the Pentagon, usually a one-year observation tour and at the end of that time, the regular of JAG might be offered to you. Of course, I hadn’t yet gotten the results of the bar, in those days you didn’t have to be a lawyer to be a judge advocate.

Id. It is worth noting that Prugh completed his World War II (WWII) service in the rank of major, but had to accept the lesser rank of captain when he returned to active duty in 1949. Not too long afterward, during the Korean War, judge advocates who served during WWII were brought back on active duty in highest rank they had previously served. Correspondence with LTC Prugh, *supra* note 13.

⁵⁸ *Id.* at 28-29.

⁵⁹ *Id.* at 29. It is worth noting that Mickelwaite was stationed at the Presidio when MG Prugh was a boy; his son, Malcolm, served in the Boy Scouts with MG Prugh, and they later attended the Army Command and General Staff College (CGSC) together. *Id.* at 30.

⁶⁰ *Id.* at 32. Major General Prugh recalls:

[It was] probably the biggest tort claim disaster the United States had ever had up to that point...The ships were carrying nitrate that had been brought down the Mississippi from various war production plants. [The] vessels were French with the intention that they be

the Empire State plane crash, in which “a bomber tried to fly through the middle of the Empire State Building and scattered its parts throughout downtown Manhattan, killing several people.”⁶¹

The Empire State case, in particular, offered some special lessons for Army litigation. Prugh notes that “when problems get to be so large that they influence the minds or pocketbook of the interest of a large number of people, then you can expect the decisions may well be political, rather than legal, and [that] political aspects have to be taken into account.”⁶² He also observed that the Department of Justice (DOJ) was ill-equipped to independently handle all the litigation involving the United States and that it relied heavily upon outside agencies for litigation support.⁶³ “So it became important to actually prepare the case from the standpoint that if you were going to be trying it yourself, what would you need? . . . [I]f you ask yourself that question as a JAG officer in litigation you are going to come up with a much better product.”⁶⁴

During his final two months at the Pentagon, Prugh shared a special assignment with Major (MAJ) Bruce Babbitt⁶⁵ to review clemency matters arising from World War II courts-martial. The team, known as KD-2 after a form used for criminal clemency reviews,⁶⁶ was charged with clemency review of serious criminal cases and had the special authority to make dramatic reductions in adjudged sentences.⁶⁷ Major General Prugh observed that “uniformity is an arguable thing and each

shipped to France in return for nitrate the U.S. used in WWII. So it was a payment in kind. No one knows, of course, what caused the explosion, but there was a feeling that there was a sort of *res ipsa loquitur* application here and that the explosion must have indicated negligence on the part of the (U.S.) government.

Id.

⁶¹ *Id.* at 35.

⁶² *Id.* at 34.

⁶³ *Id.* at 35.

⁶⁴ *Id.*

⁶⁵ *Id.* at 42-43. Babbitt was later promoted to Brigadier General (BG), and served as The Assistant Judge Advocate General for Civil Law. He is credited with authoring the 1968 Manual for Courts-Martial (MCM). Brigadier General Babbitt was a decorated Infantry officer during World War II, the top graduate from the first Judge Advocate Career Course in Charlottesville, Virginia, and had the distinction of assuming command of an Infantry battalion and fighting a rear-guard action while serving as a judge advocate in Korea. *Id.*

⁶⁶ *Id.* at 41.

⁶⁷ *Id.* at 42.

case is different and it is awfully hard to find [a method for giving] a precise punishment.”⁶⁸ The experience had a profound influence on Prugh, and convinced him of the importance of a robust appellate system.

C. United States Army Europe

In March 1950, Prugh was assigned to the Wetzlar Military Post near Frankfurt, Germany. The post-war period was difficult for the local population. Prugh distinctly recalls that “this was the time when Germany was pretty much flat on its back. It was having terrible black market problems, terrible financial problems, unemployment, and a tough winter due to a shortage of coal.”⁶⁹ He was assigned as the trial counsel and legal assistance officer for a large region that included much of Germany north of Frankfurt.⁷⁰ It was a busy time for the young judge advocate:

I was given a driver, an interpreter, and a jeep, and I roamed all over Germany. I was left very much on my own devices to prepare my cases. The case load was about one or two general court cases per week, and I could spend about three or four days in preparation and one day in trial. That [was normal]. The types of cases were largely black market, assault, murder, rape and armed robbery, and relatively few drug cases.⁷¹

A year later, in July 1951, Prugh was reassigned to the Rhine Military Post, Western Area Command, located in Kaiserslautern, Germany.⁷² This was a period of dramatic change in the practice of military justice. The 1948 Elston Act,⁷³ and the *1949 Manual for Courts Martial* implementing it, had come into effect and served as the first effort in a generation to update the Articles of War in effect since the

⁶⁸ *Id.* at 42-43.

⁶⁹ Prugh History, 7 July 1975, *supra* note 10, at 2.

⁷⁰ *Id.* at 2-3.

⁷¹ *Id.* at 3.

⁷² *Id.* at 12.

⁷³ Elston Act, Pub. L. No. 80-759, 62 Stat. 604, 627-28 (1948).

First World War. The Act was transitional legislation bridging the Articles of War to the 31 May 1951 introduction of the UCMJ.⁷⁴

The 1951 changes were significant and included the establishment of an “embryonic” judicial system, civilian oversight of military cases,⁷⁵ expansion of nonjudicial punishment (UCMJ Article 15) authority, and created the right of accused to have enlisted representation on courts-martial panels.⁷⁶ At the command level, revisions to Article 15, which replaced the Article of War 104, were particularly important because they afforded commanders new power to impose forfeitures of pay. This transformation in jurisprudence, however, was not without some resistance. Prugh recalls the atmosphere of a 1951 judge advocate conference, designed to explain the changes detailed in the new UCMJ,

was skeptical if not hostile. . . . 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 [the World Wars]? 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 the 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?⁷⁷

Also during this period, Prugh observed the dramatic transformation of the American presence in Germany from a post-conflict occupation

⁷⁴ The Uniform Code of Military Justice (UCMJ) was enacted on 5 May 1950. Act of 5 May 5, 1950, 64 Stat. 108 (1950) (codified at 10 U.S.C. § 801-940 (1959)); see PRUGH, OBSERVATIONS, *supra* note 32; see also DANIEL WALKER, MILITARY LAW (1954); JAMES SNEDEKER, MILITARY JUSTICE UNDER THE UNIFORM CODE (1953); JAMES SNEDEKER, THE UNIFORM CODE OF MILITARY JUSTICE, 62 HARV. L. REV. 1377 (1949).

⁷⁵ Article 67 of the UCMJ established the Court of Military Appeals as a three-judge civilian court. 10 U.S.C. § 867 (1951).

⁷⁶ Prugh History, 7 July 1975, *supra* note 10, at 12.

⁷⁷ PRUGH OBSERVATIONS, *supra* note 32, at 39.

Army to the long-term, institutionalized presence developing on the eve of the Cold War. The Kaiserslautern area, in particular, saw a dramatic influx of military personnel, family members, and construction as “the American strength went from something like a division and a half to close to five divisions in a period of about a year.”⁷⁸ The rapid growth in the American presence created opportunities for unscrupulous businesses and contractors, mostly American, who took advantage of an environment with little oversight and massive amounts of money. Major General Prugh remembers:

[W]e sacrificed the integrity of the system for the expedient, and I think that whenever you do this you have to anticipate that you are vulnerable to the crook who wants to take advantage of it. These people were known as ‘five percenters’; they got the five percent out of it and became very wealthy people with Swiss bank accounts.⁷⁹

By 1952, Prugh assumed the position of Staff Judge Advocate for the four-attorney Rhine Military Post legal office following the unfortunate and untimely death of the previous SJA, Lieutenant Colonel (LTC) Carl Patterson. Prugh, a relatively young major with less than two years time in grade, was perhaps the youngest staff judge advocate in Europe at the time.⁸⁰ The responsibilities were enormous and included legal work covering “the largest land mass and the largest concentration of people [administered by] the Americans in Germany.”⁸¹ During his period in Europe, Prugh witnessed the remarkable evolution of U.S. involvement

⁷⁸ Prugh History, 7 July 1975, *supra* note 10, at 16.

⁷⁹ *Id.* at 18.

⁸⁰ *Id.* at 19.

⁸¹ *Id.* at 23. Prugh recalls that the staffing of the Rhine Military Post was clearly insufficient for the mission.

I found that a four man JAG office—a four lawyer JAG Office—simply cannot work in a busy jurisdiction. Clearly we were unrealistic in our earlier figures. A division general court-martial jurisdiction today has fifteen lawyers in it. You can see what we were up against with four. . . . We got the job done, I think, but we paid a heavy price in not doing or not trying some of the cases that we should have tried and maybe not trying them as well as we should have.

Id. at 24.

in post-war Germany and the conclusion of the radical downsizing and restructuring of the U.S. Army from 8,000,000 men and eighty-nine divisions in 1945 to 591,000 men and ten divisions in 1950.⁸² When he arrived in Europe in 1950, most military work was conducted by the U.S. Constabulary Army (1946-1952).⁸³ When he left over two years later, the Constabulary created for the allied occupation of Germany had given way to the unified U.S. European Command (USEUCOM) and North Atlantic Treaty Organization (NATO), and the new challenge of the Cold War.⁸⁴

D. Office of The Judge Advocate General (OTJAG): The Army Board of Review and Military Justice Division

Major General Prugh returned to Washington in 1953, where he served as a member of the Army Board of Review, Office of The Judge Advocate General, headed by his former mentor, COL Burt Ellis.⁸⁵ The Board of Review was the appellate body established by The Judge Advocate General for the review and processing of criminal cases.⁸⁶ In 1968, the board was renamed the United States Army Court of Military Review (ACMR);⁸⁷ in 1994, the name was again changed to the United

⁸² See AMERICAN MILITARY HISTORY 529, 540 (1989). The mission of the Constabulary was to:

maintain general military and civil security; assist in the accomplishment of the objectives of the United States Government in the occupied U.S. Zone of Germany (exclusive of the Berlin District and Bremen Enclave), by means of an active patrol system prepared to take prompt and effective action to forestall and suppress riots, rebellions, and acts prejudicial to the security of the U.S. occupational policies, and forces; and maintain effective military control of the borders encompassing the U.S. Zone.

Lieutenant Colonel A.F. Irzyk, *Mobility, Vigilance, Justice*, MIL. REV., Mar. 1947, available at <http://www.usarmygermany.com/Sont.htm> (follow U.S. Constabulary link, then HQ Constabulary, then "Mobility, Vigilance, Justice" link).

⁸³ See generally U.S. Army in Germany, <http://www.usarmygermany.com/Sont.htm> (follow U.S. Constabulary link, then HQ Constabulary) (last visited Feb. 27, 2006).

⁸⁴ Prugh History, 7 July 1975, *supra* note 10, at 23.

⁸⁵ *Id.* at 25.

⁸⁶ THE ARMY LAWYER, *supra* note 9, at 237.

⁸⁷ See Military Justice Act of 1968, Pub. L. No. 90-632 § 2(27), 82 Stat. 1335 (1968). See generally Establishment, Court of Appeals for the Armed Forces, <http://www.armfor.uscourts.gov/Establis.htm> (last visited Feb. 27, 2006) (detailing a history of the CAAF).

States Army Court of Criminal Appeals (ACCA).⁸⁸ Prugh served on the board for one year, which he considered a “fascinating experience.”⁸⁹ The review board was “deluged with cases from Korea . . . desertion cases,” including a case of an American battalion that “left behind most of its officers and senior non-coms [non-commissioned officers] who were overwhelmed by the Chinese in Korea and were killed or captured.”⁹⁰ The resulting trial resulted in convictions for “over a hundred members of the unit,” and Prugh recalls that it was a “[f]ascinating bit of work.”⁹¹

Prugh was the junior member of the board, and consequently it became his responsibility to do much of the research and writing. This was a watershed moment because it facilitated and furthered an interest in thinking about issues and taking the time to memorialize them through publication.⁹² This was also the first time Prugh had the opportunity to work directly with prisoner of war cases: “We were having the first cases involving the returning prisoners of war from Korea who had gotten into some form of trouble over there—collaborating with the North Koreans or the Chinese.”⁹³ These cases were considered with COL Ellis, the man who first exposed him to some of the problems and issues of prisoners of war and international law.

In 1954, after a year on the Board of Review, Prugh moved to the Opinions Branch of the Military Justice Division. During this time the Army was engaged in the return of American prisoners of war from Korea, known as Operation Big Switch and Operation Little Switch.⁹⁴ One of the first issues concerned the identification and prosecution of American prisoners of war who had collaborated with communist

⁸⁸ See National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 924, 108 Stat. 2663, 2831 (1994).

⁸⁹ Prugh History, 7 July 1975, *supra* note 10, at 25.

⁹⁰ *Id.*

⁹¹ *Id.* at 25-26.

⁹² *Id.* at 26. Prugh notes:

I really think that this had a profound influence on the rest of my career, because during this period of time I [wrote] a lot of articles and got quite a few published. I think that helped a great deal to get to be known and to know more about military law.

Id.

⁹³ *Id.*

⁹⁴ *Id.* at 31.

authorities while in captivity. A key challenge became the process of gathering information from interrogations conducted by intelligence personnel following repatriation.⁹⁵ “[T]he files were collected by [intelligence] with a great mass of hearsay, and then all of the files—just a big mess of them—were put together in rooms with judge advocates who would try and index them.”⁹⁶ It became apparent to Prugh and others that a critical flaw in the process was the absence of military attorneys working hand-in-hand with interrogators.

The difficulty was in trying to transpose what we had obtained in the intelligence [process] for use in the criminal prosecution . . . The two just don’t fit or they don’t work the same way. There were no lawyers, for example, involved in the basic interrogation. . . .The result of it was that most of the basic information that we had was just simply not useable for our purpose, and when we started to gather together the material for the prosecution it was necessary to go out and almost to start from scratch.⁹⁷

Following the litigation originating from the Big Switch and Little Switch Operations, Prugh dealt with the related issue of American prisoners of war held by North Korea who, remarkably, opted not to repatriate to the United States immediately following the cessation of hostilities and were suspected of collaborating with enemy.⁹⁸ The RECAP-K program repatriated Americans held prisoner by North Korean forces. The question, in a few key cases, was status. As an action officer in the Military Justice Division, Prugh participated in writing the OTJAG opinion recommending that those Soldiers who voluntarily remained in Communist Korea be declared deserters.⁹⁹

[T]hey were entitled to be dropped from the roles, were not to be given a discharge certificate at all, that the only form of discharge that would be appropriate for them

⁹⁵ *Id.*

⁹⁶ *Id.* at 25-26.

⁹⁷ *Id.* at 33. Prugh recalls that there were as many as 400 possible collaboration suspects, but that in the end only forty to fifty were likely candidates for prosecution. *Id.*

⁹⁸ Prugh History, 5 July 1975, *supra* note 10, at 10-12.

⁹⁹ *Id.*

would be a dishonorable discharge, and that can only be imposed by reason of punishment of a court-martial.¹⁰⁰

The position was adopted by the Department of the Army.¹⁰¹ The Department of Defense (DOD) General Counsel, however, overruled the opinion and directed the Army to issue dishonorable discharges in the absence of courts-martial, which it did.¹⁰² The decision was politically-driven in an environment where civilian leaders wanted to avoid the appearance of prosecuting American Soldiers, despite the circumstances.

Later, however, the Chief of Staff and the Secretary of the Army decided to pursue the prosecution option despite an OTJAG opinion that the discharges the Soldiers received upon their release in Korea denied proper jurisdiction. Prugh, who participated in the meetings with the Chief of Staff and Army Secretary, articulated the OTJAG view that “if the Army was going to exercise the jurisdiction over these men at all, it should be done right at the beginning . . . when they crossed the bridge at Hong Kong and came into the hands of American authorities.”¹⁰³ The advice was disregarded; the men were permitted to fly home via Hawaii, received financial assistance, and were finally arrested by a senior Military Police official in San Francisco Harbor in full view of the media. It was “the worst possible way the thing could have been done.”¹⁰⁴

The Soldiers were confined at Fort Baker, California, and shortly thereafter were released by the Federal District Court under a writ of habeas corpus.¹⁰⁵ As Prugh observed,

[It was] a very predictable result, but one I think that showed a certain lack of sophistication from the standpoint of understanding on the part of our authorities . . . this was fundamentally a political and civilian

¹⁰⁰ *Id.* at 11.

¹⁰¹ *Id.*

¹⁰² *Id.* at 12; *see also* Prugh History, 7 July 1975, *supra* note 10, at 40-43.

¹⁰³ Prugh History, 7 July 1975, *supra* note 10, at 41.

¹⁰⁴ *Id.* at 42.

¹⁰⁵ *Id.* These matters were decided at approximately the same time as a U.S. Supreme Court ruling in which the court held that a lawful discharge normally severs the constitutional and statutory power of a court martial convening authority to try and individual. *See* United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955); Wickham v. Hall, 12 M.J. 145 (C.M.A. 1981) (three opinions).

decision . . . [and] the uniform force was put into the position where it really looked like they were being very stupid . . . ”¹⁰⁶

The men were ultimately released, and the discharges set aside by the U.S. Court of Claims. Much to his frustration, the “turncoats,” as Prugh described them,¹⁰⁷ were granted the full benefits of Soldiers who had served honorably.¹⁰⁸

Major General Prugh saw the RECAP-K issue and the actions by the DOD as indicative of a fundamental lack of understanding by civilian leaders of the important nuances of military law and procedure. Had the Soldiers who refused repatriation at the end of the Korean War been tried as deserters, as recommended by OTJAG and the Department of the Army (DA), there would have been no issue regarding benefits. But when the DOD indiscriminately ordered the process, the agency violated its own procedures regarding the nature and authority for military discharges, allowing redress by the Court of Claims. The lesson, from MG Prugh’s perspective, was that the military services should be attentive to the fact that civilian leaders within the Pentagon may not always understand, or respect, military law and its implications.¹⁰⁹

[T]hey don’t understand the intricacies of military law, and they don’t regard it with the same degree of care and attention that they would civilian law. . . . This is a difficult thing to overcome, because the civilians who head up the Department of Defense/Department of the Army frequently have no exposure to [military] law, and since it is strange to them and seems to be primarily regulatory, from their point of view, they think it is easy to override and get possible political results.¹¹⁰

¹⁰⁶ Prugh History, 7 July 1975, *supra* note 10, at 42.

¹⁰⁷ Prugh History, 5 July 1975, *supra* note 10, at 10.

¹⁰⁸ *Id.* at 12.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* Prugh was similarly concerned about cases tried before the federal courts impacting military operations. “They are tried usually by civilian representatives of the Department of Justice or the U.S. Attorney without the basic knowledge—of the particular military aspects, at any rate—that become so important.” Prugh History, 7 July 1975, *supra* note 10, at 47.

By 1956, Prugh completed his tour at Pentagon, which included interesting additional duties, such as speech-writer for The Judge Advocate General and active participation in the Washington Foreign Law Society and American Society of International Law.¹¹¹ The tour ended when he was selected, along with three other judge advocates, to attend the year-long course of instruction at the U.S. Army Command and General Staff College (CGSC), at Fort Leavenworth, Kansas.¹¹²

Prugh enjoyed the academic environment afforded by the college and recalls the association and friendship with other military professionals: “Right up until the time of my retirement there were officers that I had served with in Leavenworth . . . one of the great advantages of that school that everyone acknowledges.”¹¹³ Prugh graduated with honors from CGSC in the Spring of 1957, finished the year by being promoted to the rank of lieutenant colonel, and was assigned overseas as the Deputy Staff Judge Advocate, 8th Army, Seoul, Korea.¹¹⁴

E. Eighth Army, Korea

The Staff Judge Advocate at 8th Army¹¹⁵ was COL Fernandez, who gave Prugh broad authority to manage and administer the Seoul legal office. “He gave me enough latitude that I could make my own mistakes and learn from them and not cause too much disaster as a result.”¹¹⁶ Significant accomplishments included the establishment of a claims service authorized to administer military claims in Korea,¹¹⁷ and planning for negotiations leading to the creation of a U.S.-Korean Status of Forces Agreement (SOFA). It is worth noting that many military leaders, including Prugh, were initially opposed to the implementation of SOFA agreements, because they limited U.S. authority and autonomy in places like Germany and Korea. Prugh recalls,

¹¹¹ Prugh History, 7 July 1975, *supra* note 10, at 50.

¹¹² *Id.* at 51. The other three officers were MAJ Tom Reese, MAJ Bruce Babbitt, and MAJ Kenneth Crawford. *Id.*

¹¹³ *Id.* at 52.

¹¹⁴ Correspondence with LTC Prugh, *supra* note 13.

¹¹⁵ The 8th United States Army has been in existence from 1944 to the present. A short history of the unit is available at Wikipedia, U.S. Eighth Army, http://en.wikipedia.org/wiki/US_Eighth_Army (last visited Feb. 27, 2006).

¹¹⁶ Prugh History, 7 July 1975, *supra* note 10, at 55.

¹¹⁷ *Id.* Until this time, all military claims were forwarded to claims authorities in Japan for adjudication and settlement.

Most all of us at that point felt that the Status of Forces Agreement was not a very good device. It was restrictive to the services, restrictive to American activities and subjected us to taxation and certain limitations among other things. It certainly took away the authority that we had in legal matters over so many people, and would actually subject us to the local law to a certain extent. . . . So there was considerable distrust and dislike on the part of uniformed people for most Status of Forces Agreements. Looking back on it over twenty years of operation. . . . they have been a magnificent effort and we who objected were clearly wrong.¹¹⁸

His role in helping plan for the SOFA conferences involved developing proposals for what U.S. forces should seek in any future agreement, with alternatives in the event initial recommendations were rejected. The considerations ran the full spectrum of legal concerns, including “criminal jurisdiction, over flight provisions, transportation rights, taxation, communications and radios and just about every aspect of where one nation’s touches upon another when forces from that nation are located in the territory of another.”¹¹⁹ The final staff paper, which included three different courses of action for future consideration, was filed and later referenced when the U.S.-Korean SOFA was finally negotiated in the early-to-mid-1960s.¹²⁰

This early experience with SOFA agreements was complemented by Prugh’s work on behalf of negotiations with the Korean government regarding the return of certain real estate under U.S. control.¹²¹ The language Prugh provided during the negotiations was ultimately adopted and incorporated into the international agreement, and demonstrated the

¹¹⁸ *Id.* at 56.

¹¹⁹ *Id.* at 57.

¹²⁰ Facilities and Areas and the Status of United States Armed Forces in Korea, July 9, 1966, United States- South Korea, 17 U.S.T. 1677, 674 U.N.T.S. 16; Agreement Between the United States of America and the Republic of Korea Amending the Agreement under Article IV of the Mutual Defense Treaty between the United States of America and the Republic of Korea, regarding Facilities and Areas and the Status of the United States Armed Forces in the Republic of Korea of July 9, 1966, as Amended, *available at* http://www.korea.armymil/sofa/2001sofa_english%20text.pdf (last visited Feb. 27, 2006) (showing the full text of the Agreement)

¹²¹ Prugh History, 7 July 1975, *supra* note 10, at 59.

remarkable contribution military attorneys can make in an international legal setting.¹²²

F. Sixth Army, California

Major General Prugh completed his tour in Korea in late 1958 and was reassigned to the 6th U.S. Army, Presidio of San Francisco.¹²³ Prugh and his family were finally home again in Northern California. His assignments there included tours as Chief of Military Affairs, Administrative Law; Chief of Military Justice; Deputy Staff Judge Advocate; and for a short period, the Acting Staff Judge Advocate.¹²⁴

This was the first assignment where Prugh dealt in any meaningful way with the more complex aspects of procurement, contracting, and related elements of administrative and civil law.¹²⁵ He took special interest in legal issues affecting the relationship between the military and civilian authorities, specifically military support and aid to state and local disaster relief contingency planning.¹²⁶ Prugh also took an increasingly active interest in developing meaningful continuing legal education opportunities for judge advocates.

As a California-licensed attorney living in the state, the disparity between the legal education programs available through the state and city bar associations and the near absence of any comparable program through the 6th Army legal office became readily apparent.¹²⁷ In response, Prugh organized a series of conferences and weekly education and speaker programs that grew to become widely attended by military attorneys from 6th Army, Fort Mason, the local Air Defense Command, and elsewhere.¹²⁸ It was a model for developing junior officers that he would expand further later in his career.

¹²² *Id.* As Prugh remembers, “. . . this was pretty heady stuff, and I found that I thoroughly enjoyed that kind of work. It influenced me greatly in later years in wanting to be involved in international negotiation. . . . Having been once bitten by that bug I never recovered.” *Id.* at 59-60.

¹²³ *Id.* at 61. Sixth United States Army, <http://www.nps.gov/prsf/history/hrs/thompson/tt21.pdf> (last visited Feb. 27, 2006) (containing a short history of the Sixth United States Army, 1946-1980).

¹²⁴ *Id.* at 61-62.

¹²⁵ *Id.* at 62, 65-66.

¹²⁶ *Id.* at 65.

¹²⁷ *Id.*

¹²⁸ *Id.* at 66.

The Presidio was also one of the first opportunities for Prugh to work closely with his commanding officer, Lieutenant General (LTG) C. D. Palmer. General Palmer was a memorable figure for Prugh, not because of his brilliance or professionalism, which were beyond reproach,¹²⁹ but because of the way he cared about Soldiers. Prugh recalled that Palmer would conduct inspections “and look at the very fundamental things that you wouldn’t expect a three-star commander to be doing.”¹³⁰ It was another lesson in caring for Soldiers that he carried with him throughout his career: “[I]t is so easy for a military lawyer to get detached from the real flesh and blood Soldier that working with troops and being with a commander who gets out to look at troops and being with him and watching [him] is a great lesson for every judge advocate.”¹³¹

In early 1961, Prugh was selected as one of two judge advocates to attend the one-year course of instruction at the U.S. Army War College, in Carlisle, Pennsylvania. During this period, he took advantage of the opportunity to pursue personal and professional interests developed throughout his career. His thesis related to the Soviet Status of Forces Agreement and how the Soviets dealt with the same issues facing the U.S. in Europe, Korea, and elsewhere.¹³² Overall, the academic focus in 1961-1962 was clearly on the Cold War and events in Europe, the recent rise of the Berlin wall, and Cuba following the Bay of Pigs crises.¹³³ In less than two years, however, all eyes would be focused on Southeast Asia and the gathering storm in Vietnam.¹³⁴

G. Office of The Judge Advocate General, Chief of Career Management

After graduating from the War College in June 1962 and having recently been selected below-the-zone for promotion to colonel,¹³⁵ Prugh returned to the Pentagon as the Chief of the Career Management Division for the Judge Advocate General’s Corps.¹³⁶ It was not a

¹²⁹ *Id.* at 67.

¹³⁰ *Id.* at 67-68.

¹³¹ *Id.* at 68.

¹³² *Id.* at 69-70.

¹³³ *Id.* at 70-71.

¹³⁴ *Id.* at 71.

¹³⁵ Prugh History, 10 July 1975, *supra* note 10, at 2.

¹³⁶ *Id.* at 1. The Career Management Division for the Judge Advocate General’s Corps is currently the Personnel, Plans and Training Office (PP&TO), Office of The Judge Advocate General. U.S. Army Judge Advocate General’s Corps, Personnel, Plans &

position he had sought, recalling “[he] had really hoped to get back to the criminal law division,”¹³⁷ but it allowed Prugh to address some long overdue institutional changes regarding personnel assignments, career development education, and policy initiatives. He would, quite literally, transform the way military attorneys were developed and managed.

One of the first changes involved the manner in which judge advocates were assigned. As Prugh recalls,

I found that assignments were being made by the chief clerk, a civilian named Eileen Burns, who was well known throughout the corps. I decided in my own mind that it was wrong for a civilian to be assigning the lawyers . . . I was horrified on two or three occasions early in that game, going to visit with Miss Burns to see The Judge Advocate General,¹³⁸ when she would make an assignment on a senior officer, a colonel, for example, and in discussing [the officer] would say, “Oh! He has a mediocre record,” or some other slighting remark that would clearly be devastating to that man’s position with respect to the The Judge Advocate General who apparently didn’t know very many of the officers below the rank of colonel.¹³⁹

Thereafter, selected judge advocates made or at least controlled the recruiting and assignment of officers. Assignment policies, which Prugh admits contributed to a lack of credibility for the career management process among many officers, were also consolidated, published, and distributed to the field so individuals would be able to understand the career management process.¹⁴⁰

More fundamentally, perhaps, was the discovery that the Career Management Office had little in the way of informed rosters of active duty judge advocates; he recalls, “we had to find out who we had in the

Training Office, [https://www.jagcnet.army.mil/85256D660060221E/\(JAGCNETDocID\)/HOME?OPENDOCUMENT](https://www.jagcnet.army.mil/85256D660060221E/(JAGCNETDocID)/HOME?OPENDOCUMENT) (last visited Feb. 27, 2006).

¹³⁷ Prugh History, 10 July 1975, *supra* note 10, at 2.

¹³⁸ Major General Charles L. Decker. *See* THE ARMY LAWYER, *supra* note 9, at 233-34.

¹³⁹ Prugh History, 10 July 1975, *supra* note 10, at 3.

¹⁴⁰ *Id.* at 4.

Corps.”¹⁴¹ In 1963, Prugh began the process that continues to the current day, albeit in an updated form, of developing consolidated rosters or directories of all active duty judge advocates cataloging name, grade, current duty station, date of rank, and projected moves.¹⁴² Other initiatives including publication of a pamphlet entitled *Your JAGC Career* and distribution of personnel information in a newsletter that became the precursor to *The Army Lawyer*.¹⁴³

In all, these and related initiatives were an effort to provide greater transparency and understanding of the career management process. Prugh strived to bring predictability to officer policies and assignments, and to enfranchise individuals in the process, and to encourage their commitment to military service despite occasional disappointments or hardship tours. He summarized the career management process in four key principles: equity toward the government; equity toward the individual; requirements for latitude and acceptance of unpredictability; and fair policies.¹⁴⁴

Another aspect of the career management position was recruiting and retaining qualified judge advocates, and seeking lawyers with the qualities required for success in a military practice. Prugh’s focus was on identifying candidates with varied backgrounds who had demonstrated character and integrity through their discharge of responsibilities in academics and in life.¹⁴⁵ Prugh asked of candidates, “What did he do? Is his record . . . only as a student? Is he a leader? Is he a campus politician? Is he a writer? Is he supporting a family while he is going to school and doing a decent job of it? Does he pay his own way?”¹⁴⁶ Prugh looked beyond pure academics and sought a mix of talent, with a focus on character and work ethic, recognizing that “the old style ‘C’ student who has these characteristics could be the winner for us.”¹⁴⁷

¹⁴¹ *Id.* “If we wanted, say, a captain with five years of experience, that could speak Spanish and was an international law expert, we would have one heck of a time trying to find out who this was. . . . It was clearly an impossible situation.” *Id.* at 4-5.

¹⁴² *Id.* at 5, 8; see U.S. PERSONNEL & ACTIVITY DIRECTORY & PERSONNEL POLICIES, JA PUB 1-1 (2005-2006).

¹⁴³ Prugh History, 10 July 1975, *supra* note 10, at 6.

¹⁴⁴ *Id.* at 8.

¹⁴⁵ Prugh History, 4 April 1977, *supra* note 10, at 30-31.

¹⁴⁶ *Id.* at 30.

¹⁴⁷ *Id.* at 30-31.

Prugh's time as the Chief of JAGC Personnel was cut short in his second year by the early retirement of The Judge Advocate General, MG Charles Decker.¹⁴⁸ In late 1963, Prugh was reassigned as the Executive Officer (XO) for the Office of The Judge Advocate General, where he coordinated Decker's retirement and assisted the incoming Judge Advocate General, MG Robert H. McCaw.¹⁴⁹ Some of the issues Prugh observed during his short tenure as the Executive Officer included the reorganization of the Army Staff and the subsequent elimination of The Judge Advocate General as a primary member of the Army Staff Counsel,¹⁵⁰ the creation of the civilian General Counsel's Office, Army Materiel Command, and related erosion of the Judge Advocate General's Corps of the Army's principle procurement and contracting mission.¹⁵¹

¹⁴⁸ Major General Decker was the Judge Advocate General of the Army from 1 January 1961 to 31 December 1963. See THE ARMY LAWYER, *supra* note 9, at 233-34.

¹⁴⁹ Major General McCaw was the Judge Advocate General of the Army from 27 February 1964 to 30 June 1967. Prugh History, 10 July 1975, *supra* note 10, at 10-14. Prugh remembers MG McCaw as an "extraordinarily cautious" leader who, although possessing great scholarship and integrity, was far less active and involved in professional associations and The Judge Advocate General's School than his predecessor, MG Decker.

General McCaw had a totally different attitude about things. He would pretty much stay in his office. He didn't like to travel. He rarely visited other offices . . . and rarely went to the school. . . . I hope I am not being unfair to him, because I can see that there are a lot of advantages in a lawyer taking a very low profile like that and trying to give only the most precise answer that is absolutely necessary. But it just seems to me that the Army needs more help with that from its lawyers.

Id. at 11, 14; see also THE ARMY LAWYER, *supra* note 9, at 238-39.

¹⁵⁰ Prugh History, 10 July 1975, *supra* note 10, at 14-15. Major General Prugh recalls that at the time this "seemed to indicate a down playing of the prestige of the office" to many in judge advocate community. *Id.* at 15.

¹⁵¹ *Id.* at 15-17.

This was regarded at the time of the negotiations as a real disaster. A bad situation from the standpoint of the Judge Advocate General's Corps and, of course, I think events have proven that that was a correct assessment—a very poor move from our standpoint. It had some very bad effects in drying up the procurement attorney's positions for senior uniformed lawyers. The result of it is, while we still have the need to supply senior uniformed people overseas that have a procurement capability, there are so few positions in the middle management area . . . that we can't develop a proper base to train enough colonels. . . ."

In the end, Prugh looked back on his year and a half in career management and later as the Executive Officer as a unique opportunity affording him an invaluable look at some of the fundamental problems and issues facing senior leaders and the JAGC institution itself.¹⁵² They were lessons that would serve him well later in his career, which took a spectacular turn in the fall of 1965 when he was reassigned to Headquarters, Military Assistance Command—Vietnam (MACV).

IV. 1964-1967: MACV SJA, Vietnam—Adapting to the Changing Nature of War¹⁵³

[T]he American public likes nice, neat boundaries of time and place. This is possibly a consequence of our devotion to sports and the sanctity of prime time. This is also consistent with our proclaimed dedication to the “rule of law,” but our staying power seems to be well circumscribed by program time. . . . We are impatient people who like frequent headline changes, choice in our program selection, and arm-chair second-guessing.¹⁵⁴

Id. at 17.

¹⁵² *Id.* at 6-7. Prugh recalls:

What I was getting at [in] the personnel job was a fascinating think to get a chance to see where our [personnel problems] were, where our people served, the kinds of conditions that they had to work under, the getting at the sort of the beginning of the Corps. The recruiting of it, the handling of the dirty linen, the officer cases where there had to be removal or [reduction in force] actions, helping in promotion cases and things of that sort. So you got exposed to a lot of information that the normal career would never have provided. I look back on it now as a very favorable thing.

Id.

¹⁵³ See FREDERIC L. BORCH, JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI (2001) (providing a detailed account of the role of judge advocates during military operations in Vietnam and elsewhere).

¹⁵⁴ Major General George S. Prugh, Address at the Fifth Judge Advocate General Military Law Center, Presidio of San Francisco: Post Gulf War (Mar. 15, 1991) [hereinafter Presidio Address]; Prugh Reminiscences, *supra* note 24, at 114.

A. Introduction

Major General Prugh arrived in Saigon with his wife and younger daughter on Thanksgiving Day, 1964.¹⁵⁵ They occupied a small flat in a local Vietnamese community near other American families, including senior officers from the MACV command.¹⁵⁶ What began as a somewhat “sleepy operation” with approximately seven attorneys and 18,500 personnel changed radically on Christmas Eve when terrorists bombed the Brink Hotel during a party attended mostly by Americans.¹⁵⁷ In an essay included in his collective work, *Reminiscences*, Prugh recalled:

The blast kills and injures many. It marks the commencement of major attacks on US personnel. Life in Saigon for the relatively small group of advisors, support personnel, Embassy people, and dependents suddenly takes on a new and hostile aspect. The next morning, at the Christmas services in the small make-shift chapel, armed and helmeted sentries stand outside as the families, dressed in “Sunday best,” assemble. With unaccustomed gusto and fervor, the congregation sings old hymns and several patriotic songs. Everyone present senses the changed circumstances—the commencement of war, the distance from home, and the tenuous position for this handful of Americans at the small end of a very long line. Surely soon the dependents will be sent home, to be replaced by US combat troops. The long agony of the Vietnam War has begun.¹⁵⁸

Within months, MACV planners were preparing for the massive influx of men and material that followed in 1965, rapidly raising the American presence in South Vietnam from less than 20,000 to nearly 500,000.¹⁵⁹ This necessarily included an exponential growth in the

¹⁵⁵ Prugh History, 11 July 1975, *supra* note 10, at 21; Correspondence with LTC Prugh, *supra* note 13.

¹⁵⁶ Prugh History, 11 July 1975, *supra* note 10, at 21.

¹⁵⁷ *Id.* at 21-22, 27-29. The Brink Hotel was the main transient billet for officers in Vietnam.

¹⁵⁸ George S. Prugh, *Reflections* (10 Aug. 1993) in Prugh *Reminiscences*, *supra* note 24, at 47. Mrs. Prugh and the Prugh’s daughter, Virginia, were evacuated to California on 12 Feb. 1965. Correspondence with LTC Prugh, *supra* note 13.

¹⁵⁹ Prugh History, 11 July 1975, *supra* note 10, at 9-10, 20-21.

number of judge advocates from all military services that were required to meet the anticipated need for full-spectrum legal services. By his own account, Prugh recalls planning for 100 additional judge advocates by the summer of 1965 and 200 by Christmas.¹⁶⁰

The requirements he was generating were stressing the Judge Advocate General's Corps' ability to manage its available manpower.¹⁶¹ Prugh estimates that by the end of 1965 as much as twenty percent of all uniformed Army lawyers were in Vietnam.¹⁶² The scope of judge advocate responsibilities was extremely broad and ranged from traditional disciplines in legal assistance, claims, and military justice to new cross-agency relationships, including Prugh's regular role as legal advisor to American Ambassadors Maxwell Taylor and Henry Cabot Lodge.¹⁶³

As Prugh considered the rapidly changing operational environment, he distilled his priorities down to two essential factors: "One was to assure that whatever MACV did was done within the law, and secondly, to look for ways in which the law can assist MACV in accomplishing its mission. In other words, fighting the war . . . how can MACV benefit by the lawyers?"¹⁶⁴ The first question was relatively straightforward; uniformed lawyers had always worked to keep commanders and staffs within the bounds of policy, regulation, and statute. The second, however, was more problematic and begged answers that had never fully been considered during previous American conflicts. The questions he was asking concerned the very nature and substance of jurisprudence as it existed in South Vietnam. He was looking to find out how local law was playing a role in the conflict, good or bad, and how it could be leveraged to assist in the war effort.¹⁶⁵

¹⁶⁰ *Id.* at 9.

¹⁶¹ *Id.* at 10. It took approximately one year to bring a judge advocate onto active duty, between recruiting, passage of the bar examine and admission to practice law, and initial entry and training. *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 59. Prugh recalls that "[the Ambassadors] had no regularly assigned lawyer." *Id.*

¹⁶⁴ *Id.* at 11.

¹⁶⁵ *Id.* at 11-12.

First of all, we had to find out what the role was that the law was to play in Vietnam, and we're thinking not just the law with respect to the Americans over there but what was the law with respect to the Vietnamese? Was it helping the Vietnamese in fighting the war?

Lost in most histories is fact that the Vietnam War began as a communist insurgency.¹⁶⁶ Prugh took a unique interest in the special character and dynamics of a conflict that differed fundamentally from the force-on-force experience of the World Wars and Korea. The different nature of what was happening in Vietnam seemed, in Prugh's mind, to implicate the law in ways few had considered. In particular, he was interested in identifying the role that local law played—or could play—in defeating an insurgency that seemed to grow like a cancer from rural communities inward. How, he asked, would the communists from North Vietnam and Laos use the law to their advantage? What could be done within the government of South Vietnam to bolster the law's role in defeating them, involving everything from the legitimacy of the judicial system itself to the laws and procedures for dealing with an unconventional enemy?

The law can be used by the insurgent [as a] device for him when he wants protection against search and seizure, for example, or [when] he wants to assure that processes will be delayed and will be deliberate. He can take advantage of that for his gain as an insurgent or as a terrorist to be close to the line of the criminal and get the protection . . . that the law affords a criminal as distinguished from a combatant. . . .¹⁶⁷

Among Prugh's key concerns were the institutional mechanisms available to deal with this new kind of enemy, and how to classify them as either combatants, civilians, or neither. He recalls, "one of the basic problems that we face throughout all of our [counterinsurgency] operations in Vietnam is that we . . . did not grasp clearly the line of demarcation between that which was military and that which was civilian. . . . and frequently there was a gap between the two."¹⁶⁸ These mechanisms included a legal code able to account for the peculiarities of insurgent warfare, law enforcement capable of pursuing it, and a judicial infrastructure sufficient to process, try, and incarcerate those who violate

Id.

¹⁶⁶ See generally THE PENTAGON PAPERS: THE DEFENSE DEPARTMENT HISTORY OF UNITED STATES DECISION-MAKING ON VIETNAM CH. 5 ORIGINS OF THE INSURGENCY IN SOUTH VIETNAM 1954-1960, sec. 1, at 242-69 (1971), available at <http://www.mtholyoke.edu/acad/intrel/pentagon/pent11.htm>.

¹⁶⁷ Prugh History, 11 July 1975, *supra* note 10, at 12.

¹⁶⁸ *Id.* at 13.

the law.¹⁶⁹ Prugh was asking a remarkable new question: what can the law and military attorneys do, not only in terms of military law, but in regard to the operation of civilian law, as a combat multiplier in the overall conduct of operations?

B. The Judge Advocate Advisory Detachment

One of the first projects Prugh undertook was the creation of a Judge Advocate Advisory Detachment within the MACV Staff Judge Advocate Office.¹⁷⁰ The idea was relatively simple, “to find out how the law was functioning in Vietnam.”¹⁷¹ His intent was to use five judge advocates—one per corps combat zone, plus a chief—to monitor the effectiveness of the South Vietnamese civil law system, gather relevant facts, report observations and offer assistance when appropriate.¹⁷² The response to the proposal from Washington astounded him:¹⁷³

It was from General McCaw¹⁷⁴ indicating—it was signed by him personally—that he did not see the need for the advisory detachment but he was even more impressed by the fact that I was risking these officers . . . that they might be in a position where their safety was imperiled and that he really thought that that was not a good utilization for lawyers.¹⁷⁵

Undeterred, Prugh approached the MACV Commander, General Westmoreland, and explained the plan for the advisory detachment, how it would operate and what its advantages could be. General Westmoreland fully supported the idea and gave Prugh “carte blanche” to increase space allocations in the SJA office and requisition the five judge advocates using MACV officer authorizations.¹⁷⁶ In the end,

¹⁶⁹ *Id.* at 12.

¹⁷⁰ *Id.* at 13-14. For an in-depth review of the operation of the judge advocate advisory role, see PRUGH, LAW AT WAR, *supra* note 6, at 40-60.

¹⁷¹ Prugh History, 11 July 1975, *supra* note 10, at 13.

¹⁷² *Id.* at 13-16.

¹⁷³ *Id.* at 14.

¹⁷⁴ Major General Robert H. McCaw, The Judge Advocate General of the Army, 27 February 1964–30 June 1971.

¹⁷⁵ Prugh History, 11 July 1975, *supra* note 10, at 14. Major General McCaw also expressed doubts about the role an advisory detachment might play in inducing the South Vietnamese to conform to American standards of law. *Id.*

¹⁷⁶ *Id.* at 14.

despite the objections of The Judge Advocate General, Prugh successfully “established an advisory division which functioned from early 1965 until the end of the war.”¹⁷⁷

A good example of how effectively the Advisory Detachment operated involved the South Vietnamese court and prison systems as they applied to Vietcong (VC) and other insurgents captured by American forces and later remanded to the South for adjudication. Prugh recalls that in early 1965, General Westmoreland asked a simple but obvious question: “What happens to the Vietnamese that we capture [and] the Viet Cong that are captured by the Army of the Republic of Vietnam [ARVN]?” No one knew the answer.¹⁷⁸

What was known was that U.S. intelligence personnel held prisoners for purposes of interrogation and then remanded them to ARVN officials.¹⁷⁹ Particularly valuable detainees would go to the National Interrogation Center and some to the ARVN Military Interrogation Center,¹⁸⁰ “but the vast bulk of the people that would be picked up . . . would not go to either of those. They would go off to some other place and nobody knew where they were.”¹⁸¹ The Advisory Detachment was charged with answering these questions and more.

C. Translation and Compilation of Vietnamese Civil and Criminal Code

Another example of the role played by judge advocates in Vietnam concerned the translation of certain provisions of Vietnamese code into English. This was as much due to military operations as it was a service to the U.S. State Department and others in need of information on the operation of Vietnamese law.¹⁸² Prugh recalls that, “Resource control law, search and seizure law, and all that sort of business became very important.”¹⁸³ Military Assistance Command—Vietnam judge advocates became in-house authorities on Vietnamese law, providing to both U.S.

¹⁷⁷ *Id.* Major General Prugh recalled that “[MG McCaw] had a feeling that maybe we had too many Judge Advocates in Vietnam at that particular time. But he did not raise the issue of the advisory detachment, and I didn’t try to back of [it].” *Id.* at 17.

¹⁷⁸ *Id.* at 30.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 59-60.

¹⁸³ *Id.* at 60.

personnel and, through the Advisory Detachments, to ARVN commanders who would use it to enforce domestic law.¹⁸⁴

The operational benefits of a catalogue of English translations of local Vietnamese criminal and civil code were many, perhaps best exemplified by the Market Time operations conducted by the U.S. Navy and Coast Guard.¹⁸⁵ In March 1965, U.S. naval forces were deployed to conduct interdiction operations against North Vietnamese and Vietcong efforts to use indigenous vessels to carry the contraband material to insurgent forces in the south.¹⁸⁶ American vessels patrolled within the limits of the national waters claimed by the Republic of Vietnam,¹⁸⁷ but because they were enforcing local law, the skippers required accurate translations of what exactly the Vietnamese law was. Prugh recalls, “The MAVC JA office identified those laws and got them translated . . . some 100 copies . . . a very vital role played by . . . the military lawyers from the very beginning. . . . General Westmoreland was enthusiastic with that kind of support. . . .”¹⁸⁸

V. 1964-1967: A War of Laws—Treatment of Insurgents, Detained Personnel, and War Crimes

It was evident that international law was inadequate to protect victims in wars of insurgency and counterinsurgency, civil war, and undeclared war. The efforts of the international community to codify the humanitarian law of war of 1949 drew upon examples from World War II which simply did not fit in Vietnam. The law left much room for expediency, political manipulation, and propaganda. The hazy line between civilian and combatant became even vaguer in Vietnam.¹⁸⁹

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 41-42; see JONATHAN S. WIARDA, THE U.S. COAST GUARD IN VIETNAM: ACHIEVING SUCCESS IN A DIFFICULT WAR (1997), available at <http://www.nwc.navy.mil/press/Review/1998/spring/art3-sp8.htm>.

¹⁸⁶ WIARDA, *supra* note 184.

¹⁸⁷ Prugh History, 11 July 1975, *supra* note 10, at 41-42.

¹⁸⁸ *Id.*

¹⁸⁹ PRUGH, LAW AT WAR, *supra* note 6, at 78.

A. The Civil Response to Insurgency

Events in Iraq, Afghanistan, and elsewhere in the War on Terror have demonstrated the legally complex relationship between insurgents and the law. The questions implicate a broad spectrum of law as it applies to military law, civil law in counterinsurgencies,¹⁹⁰ and international law under the Geneva Conventions. But the lessons of the last three years are not new and were as much a part of the Vietnam experience forty years ago as it is today. As Prugh recalled in 1975,

When you have an insurgency, a counterinsurgency program, clearly the law has an important role. The law can be used by the insurgent to be a protective device for him when he is . . . when he wants protection against search and seizure for example, or he wants to assure that processes will be delayed and will be deliberate. He can take advantage of that for his gain as an insurgent or as a terrorist to be close to the line of the criminal and get the protection, whatever protection that may be, that the law affords a criminal as distinguished from the combatant who might otherwise be shot out of hand or a terrorist who might be dealt with quite differently. Clearly, the insurgent who knows how to use the legal protections that are normally available in a peacetime operation has a special factor that he can take into account.¹⁹¹

An example of the treatment and protections granted insurgents in Vietnam involved the local prison system. Members of the Advisory Detachment went into the prisons as part of their program to see how the government of the Republic of Vietnam was dealing with confinement and evaluate any possible impact on the anti-insurgency campaign. What they discovered surprised them. The U.S. Overseas Mission (USOM), an extension of the U.S. State Department headquartered in the American Embassy,¹⁹² had provided civilian advisors to the local government to assist with prison administration and had primary focus upon rehabilitation. They were not, however, effectively integrated into

¹⁹⁰ *Id.* at 123-27.

¹⁹¹ Prugh History, 11 July 1975, *supra* note 10, at 12.

¹⁹² *Id.* at 31.

the war effort or the counterinsurgency mission.¹⁹³ Prugh recalls that in many cases USOM personnel were,

two or three pot-bellied old retired deputy sheriffs from down south, working as rehabilitation experts, and they were teaching . . . Viet Cong prisoners automotive maintenance, automotive repair, electrical repair, trades which back in prison in the United States would have been useful. . . But in Vietnam were ideal training for enemy soldiers. The USOM people had addressed the prisoner problem as you would address the prison problem here in the United States and yet we were dealing with a different breed of cat.¹⁹⁴

The Advisory Detachment actively traveled, interviewed, and gathered facts on the function of the local military and civilian penal systems, “[pulling] each item of information out like extracting teeth from the various ARVN officials, who were reluctant to talk about prisoner problems.”¹⁹⁵ One issue with particular sensitivity for both American and ARVN leaders was the discovery that the Vietnamese penal system was utterly incapable of providing reliable, sustained confinement for Vietcong insurgents. Prugh recalls that the system lacked the facilities needed to accommodate and process the increasingly large numbers of Vietcong detainees and that by late 1964, detainees were averaging only around six months in prison due to overcrowding:¹⁹⁶

That meant that a Viet Cong picked up by ARVN . . . by the Vietnamese Army . . . or by the 173rd Infantry or the Marines or any of the American units in those early days, turned over to the National Police System, would go into one of the prisons and six months later, rested, rehabilitated and given the best medical care available in Vietnam, they would then pop out at the other end, trained in something like automotive maintenance or electrical repair, radio repair . . . Free to leave and fight us and be captured again.¹⁹⁷

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 31-32.

¹⁹⁵ *Id.* at 32.

¹⁹⁶ *Id.* at 33-34, 36-38; *see also* PRUGH, *LAW AT WAR*, *supra* note 6, at 62-67.

¹⁹⁷ Prugh History, 11 July 1975, *supra* note 10, at 33-34.

When Prugh shared his findings with General Westmoreland, the MACV Commander was “horrified” to learn he was “fighting the same man twice.”¹⁹⁸ Money was not the issue; Prugh recalls that there were a variety of American and international aid programs for a host of domestic priorities ranging from agriculture to education.¹⁹⁹ Prisons, however, were considered an internal domestic matter and the sole responsibility of the South Vietnamese government.²⁰⁰ What Prugh and his team understood, as few others did, was the inherent disconnect between providing military and economic assistance while ignoring the domestic judicial system responsible for processing the enemy during an insurgent war.²⁰¹

Gradually, and with Prugh’s considerable assistance, MACV authorities began to integrate themselves in a system they had earlier ignored,²⁰² with the Provost Marshal and judge advocates taking a lead role in influencing the outcome of insurgents detained during combat operations.²⁰³ The particular circumstance concerned the status of insurgent detainees, and what, if any, law should define their status as domestic criminals, international combatant, or something in between. He looked to the four Geneva Conventions of 1949 for guidance.²⁰⁴

¹⁹⁸ *Id.* at 34. Prugh recalls: [W]e figured out that it was over 50,000 [prisoners] that went through the [Vietnamese] system in one year. So clearly what we were doing [resulted] in a lot of the resting, recuperating, training, and rehabilitating of our enemy.” *Id.* at 36.

¹⁹⁹ *Id.* at 34.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.* at 36. Prugh recalls, “this was a whole operation in which there was no military agency that was responsible . . . no MACV staff office which was charged with working [prison operations]. Provost Marshal did not; Judge Advocate did not.” *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* at 38. See Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick In Armed Forces in the Field of August 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GWS]; Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of August 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GWS Sea]; Geneva Convention (III) for Treatment of Prisoners of War, Geneva, 12 August 1949, 6 U.S.T. 3316, 75 U.N.T.S. 134 [hereinafter GPW]; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC]. The full texts of the Geneva Conventions are available at <http://www.icrc.org/ihl.nsf/CONVPRES?OpenView>.

B. An Insurgency by Any Other Name

Prugh carefully considered the conventions addressing refugees, the sick and wounded, and ship-wrecked, and concluded they generally did not apply to the situation in Vietnam in 1965 involving an insurgent enemy within a sovereign state.²⁰⁵ What did apply, Prugh argued, were provisions of Common Article 3 of the Third Geneva Convention for Prisoners of War (GPW).²⁰⁶ But it was not a perfect fit.²⁰⁷ As tens of thousands of Americans flowed into South Vietnam in 1965, the character of the conflict was changing, and begged the question of what sort of conflict was it—internal or international?

T]he Geneva Conventions don't say anything about . . . the point at which they became applicable in a international armed conflict . . . North Vietnam and South Vietnam had been divided by a military armistice line in which at the time of the Geneva Accords of 1954 it had been clearly said [that] this is only an armistice line; it is not intended to divide the country into two pieces. . . . [O]ur argument was that the South Vietnamese government was the legitimate heir of the preceding government, and of course there was a legal dispute on that with the North Vietnamese. . . . [W]e ended up with an inability to say just when the Geneva Conventions would become applicable.²⁰⁸

But as time went by, the increasing number of multinational forces and regional players in the conflict convinced Prugh and others that the war in Vietnam was an international conflict.²⁰⁹ By July 1965, he recommended to General Westmoreland that the Vietcong be treated as prisoners of war in accordance with the Geneva Conventions. The MACV Commander agreed, and as Prugh recalls, Westmoreland seemed

²⁰⁵ Prugh History, 11 July 1975, *supra* note 10, at 38.

²⁰⁶ GPW, *supra* note 204. Prugh notes: “As indigenous offenders, the Viet Cong did not technically merit prisoner of war status, although they were entitled to humane treatment under Article 3, Geneva Prisoner of War Conventions.” PRUGH, LAW AT WAR, *supra* note 6, at 62; *see* George S. Prugh, *Prisoners at War: The POW Battleground*, 123 DICK. L. REV. 60, 123-38 (1956).

²⁰⁷ Prugh History, 11 July 1975, *supra* note 10, at 39.

²⁰⁸ *Id.* at 39-40.

²⁰⁹ PRUGH, LAW AT WAR, *supra* note 6, at 63; *see* Prugh History, 11 July 1975, *supra* note 10, at 40.

genuinely appreciative of the fact that his attorney was so fully engaged in support of the counterinsurgency effort: “[Westmoreland] was looking for all the help that he could get and he really hadn’t expected the law or lawyers, the military lawyers, to give him much help. . . . [H]e was just grateful for anything that we could give to assist him in the operation.”²¹⁰ In August, the position was adopted as official U.S. policy, over the determined objections of the North Vietnamese who maintained that the conflict was an internal dispute.²¹¹

C. Opposition by the South Vietnamese

The Republic of Vietnam considered the insurgents domestic criminals, and therefore outside the scope and protections of the Geneva Conventions. One of Prugh’s most significant accomplishments as the MACV SJA was his successful campaign to persuade the South Vietnamese government to recognize the Vietcong in the context of international law.²¹² He recalled that,²¹³ “Their position [in 1965] was that this is not a war, this is not an Article 2, Geneva Convention type of operation so the Conventions don’t yet come into play . . . we had to induce them to do it.”²¹⁴

Prugh set out to convince the South Vietnamese that accession and adoption of the Geneva Conventions for prisoners of war would benefit the war effort. In meetings with high level officials, he emphasized two key points tied to the success of military operations.²¹⁵ First, affording

²¹⁰ Prugh History, 11 July 1975, *supra* note 10, at 41.

²¹¹ PRUGH, LAW AT WAR, *supra* note 6, at 63; *see* Prugh History, 11 July 1975, *supra* note 10, at 40.

²¹² Prugh History, 11 July 1975, *supra* note 10, at 47-49. “. . . we had to convince the South Vietnamese of this. We needed to have their cooperation.” *Id.* at 47.

²¹³ The South Vietnamese argued, not unlike their Northern counterparts, that this was not an international armed conflict within the scope of the Geneva Conventions. Article 2, GPW, states in relevant part:

In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all *cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties*, even if the state of war is not recognized by one of them.

GPW, *supra* note 204 (emphasis added).

²¹⁴ Prugh History, 11 July 1975, *supra* note 10, at 48-49.

²¹⁵ *Id.* at 48.

Vietcong prisoners basic Geneva Convention (III) for Treatment of Prisoners of War protections would enhance the South's ability to gather intelligence by making prisoners available and perhaps compromising their resistance: "Killing prisoners out of hand without an interrogation certainly deprives you of any intelligence."²¹⁶ Secondly, a clear policy for the humane treatment of prisoners of war would "help show the world the maturity of South Vietnam—that they were in fact complying with international law on this and that they were taking a very responsible position. [P]olitically, it certainly was attractive."²¹⁷

One of the best resources for this issue can be found in a book by COL Frederic L. Borch, III (Retired), *Judge Advocates in Vietnam: Army Lawyers in Southeast Asia 1959-1975*.²¹⁸ In it, he summarizes Prugh's role in the prisoner of war status for the Vietcong:

Persuading the South Vietnamese armed forces to change their position concerning the . . . status and treatment of Viet Cong and North Vietnamese prisoners of war was not a judge advocate responsibility, and Colonel Prugh had not been tasked with resolving the matter. Recognizing, however, that the increasing number of Americans captured by the Viet Cong and North Vietnamese would have significantly enhanced chances to survive if South Vietnam applied the Geneva Prisoners of War Convention to enemy soldiers in its custody, Prugh and his staff spearheaded the efforts to bring about this change.²¹⁹

Prugh observed a situation in Southeast Asia where the South Vietnamese government was reluctant to acknowledge the international nature of the forces fighting to remove it. The Vietcong were, in the minds of many, little more than communist rebels deserving less than the limited protections afforded common criminals. "In short, the Saigon government refused to treat Viet Cong captives as prisoners of war, maintaining that the Geneva Conventions addressed only armed conflicts

²¹⁶ *Id.* at 49.

²¹⁷ *Id.*

²¹⁸ FREDERIC L. BORCH, III, *JUDGE ADVOCATES IN VIETNAM: ARMY LAWYERS IN SOUTHEAST ASIA 1959-1975* (2003).

²¹⁹ *Id.* at ix.

between states and not civil insurrections such as the one taking place in South Vietnam.”²²⁰

The issue of the international character of the conflict aside, the concerns and objections voiced by the South Vietnamese were many. Most immediately, they were uncertain as to what they would call these prisoners in 1965 prior to any declaration of war. “Prisoners of war” would suggest a state of formal hostilities that did not yet exist.²²¹ Secondly, they adamantly resisted the GPW provisions requiring payment for prison labor,²²² and were concerned about committing sparse medical resources to Vietcong prisoners at a time when ARVN soldiers received primitive care, at best.²²³ A final concern related to the potential for international criticism of South Vietnamese prisons without a relative comparison to the treatment of prisoners held by the Vietcong and North Vietnamese.²²⁴

D. Application of the Geneva Conventions to the Vietcong

By August, 1965, the Republic of Vietnam finally acceded to the application of the Geneva Conventions toward the communist insurgency.²²⁵ This was a historic development in international law because in this issue of first impression—the relationship of law to an insurgency—the United States and its allies had taken the broad view to extend GPW protections to unconventional combatants. The implementation of the policy required rapid development of training programs and related assistance for ARVN forces, establishment of prisoner of war camps, and coordination with the International Committee of the Red Cross (ICRC).²²⁶

These efforts were led, in large measure, by Prugh and the team of uniformed attorneys at MACV. It is significant that the much of the language and manner of thinking about insurgent detention operations, processing, and treatment was developed forty years ago by Army judge

²²⁰ *Id.* at 11.

²²¹ Prugh History, 11 July 1975, *supra* note 10, at 51.

²²² *Id.* at 49.

²²³ *Id.* at 51.

²²⁴ *Id.* at 51-52.

²²⁵ PRUGH, LAW AT WAR, *supra* note 6, at 65.

²²⁶ Prugh History, 11 July 1975, *supra* note 10, at 52-53; *see* PRUGH, LAW AT WAR, *supra* note 6, at 65-70.

advocates in policies such as *MACV Directive 381-11*.²²⁷ That Directive states in relevant part: “All interrogations will be conducted according to the GPW with particular regard to the prohibitions against maltreatment contained in Article 17 and the fact that these prohibitions apply equally to detainees/PW [prisoners of war] (Article 5, GPW).”²²⁸ Associated policies required all detainees be treated in accordance with the GPW at point of capture, through their interrogation for “legitimate tactical intelligence,” until released to Vietnamese authorities.²²⁹

A related problem for MACV concerned the identification and segregation of detainees and the issue of status. The general policy required application of GPW protections to all detainees regardless of circumstances, even though many failed to qualify as prisoners of war under governing tenets of international law. The three principle categories for detainees were: prisoners of war, civilian defendants under the domestic criminal code of South Vietnam, and “terrorists, spies, and saboteurs.”²³⁰

The problem of identification and status for the MACV should be familiar to anyone even remotely associated with some of the essential dilemmas of detention operations in Guantanamo Bay, Iraq, and Afghanistan. This includes the problems of processing, transporting, interrogating, and housing detainees who might otherwise be held in civilian confinement facilities but who potentially posed some kind of continued risk to military operations. Prugh recalls,

You see a youngster down the trail in black pants and you think he had a weapon a moment ago. Somebody down there fired. He doesn't have one now. Is he a prisoner of war? Twelve years old, [fourteen] years old? How do you treat him? What provisions exist? He is not wearing a uniform, he is not carrying arms openly, and he had no insignia. As far as you know . . . he's not a combatant. [T]he pressures of the Geneva Convention are that when you are in doubt, you treat him as a

²²⁷ MACV DIR. NO. 381-11, EXPLOITATION OF HUMAN SOURCES AND CAPTURED DOCUMENTS (5 Mar. 1968), in PRUGH, *LAW AT WAR*, *supra* note 6, at 127.

²²⁸ *Id.* at 129.

²²⁹ PRUGH, *LAW AT WAR*, *supra* note 6, at 65.

²³⁰ *Id.* at 66. Terrorists were treated in accordance with the provisions of GPW, but were not granted prisoner of war status, as were the Vietcong captured in the course of combat operations.

prisoner of war, and you only deprive a person of prisoner war status by reason of the action if a military tribunal . . . [But in Vietnam] if we applied those rules we would [be required] to treat the prisoner as a . . . civilian defendant, not as a prisoner of war. If he went to a [South Vietnamese] civilian jail the chances were that he would only be there six months because of the pressures and volume in the prison. If he was held as a prisoner of war, he would go to the prisoner of war camp and would stay there for the duration . . . [T]he Viet Cong well understood that.²³¹

This led to the creation of an expansive, largely American-sponsored prisoner of war program designed to accept, process, and administer select prisoners to keep them out of the crowded and unreliable South Vietnamese civilian penal system.²³² The prisoner of war camps adhered to the protections granted under the Geneva Conventions,²³³ and by the close of 1967, housed upward of 13,000 prisoners, mostly Vietcong.²³⁴ Prugh used judge advocates in the field, including the Advisory Detachment, to monitor the progress and success of the prisoner of war program with particular focus on accountability, treatment, and confinement conditions.²³⁵

It is also important to note that during this period, MACV judge advocates, led by Navy Commander (CDR) George Powell, drafted the first set of procedures for conducting a prisoner of war status tribunal.²³⁶ Prugh notes:

[T]his was a novel area because there is no procedure set out in the Geneva Convention for [tribunals]. It doesn't say anything about counsel; it doesn't say anything about who does the deciding or what the due process and procedures are. So, we "ginned" this up out of whole cloth and made it . . . what amounted to a small trial.²³⁷

²³¹ Prugh History, 11 July 1975, *supra* note 10, at 54-55.

²³² PRUGH, LAW AT WAR, *supra* note 6, at 67-68.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ Prugh History, 11 July 1975, *supra* note 10, at 58.

²³⁶ *Id.* at 56-57.

²³⁷ *Id.*

The MACV procedures included provisions for the role of the general court-martial convening authority (GCMCA), establishment of military counsel, and evidentiary standards in an effort to bring integrity and fairness to a forum empowered to deny an individual the special protections afforded by the Geneva Conventions.²³⁸

A final and particularly significant contribution Prugh and his team made during 1965-66 concerned the development of a MACV policy for handling war crimes investigations.²³⁹ Prugh recalls that the first cases of violations of the law of war involved violent and “barbarous” crimes against U.S. personnel.²⁴⁰ In 1965, after researching war crime reporting procedures from the Korean War,²⁴¹ Prugh authored *MACV Directive 20-4, Inspections and Investigations of War Crimes*.²⁴² “What we were looking for was aiming [the directive] at what would our people do when they came across a war crime scene? . . . [P]reserve the evidence and [begin] an investigation.”²⁴³ The directive was the first effort to institutionalize key definitions, appointing and reporting procedures, and related responsibilities for investigations of war crimes committed against American service members.²⁴⁴ The directive was subsequently updated and expanded in 1966 and 1968 to include procedures for investigations involving crimes by U.S. personnel²⁴⁵ and remains a key contribution in the history of jurisprudence in this area.

E. Preserving the Lessons of Vietnam

From 2001 to the present, the period encompassing the war on terror and the downfall of the Taliban and the Hussein dictatorship, the United States has revisited the idea and application of military tribunals and

²³⁸ *Id.* at 57.

²³⁹ See PRUGH, *LAW AT WAR*, *supra* note 6, at 72-73; see also BORCH, *LAWYERS IN VIETNAM*, *supra* note 218, at 20-21.

²⁴⁰ Prugh History, 11 July 1975, *supra* note 10, at 68.

²⁴¹ BORCH, *supra* note 218, at 20.

²⁴² MACV DIR. 20-4, *INSPECTIONS AND INVESTIGATIONS OF WAR CRIMES* (20 Apr. 1965), *cited in* PRUGH, *LAW AT WAR*, *supra* note 6, at 72; see also BORCH, *supra* note 218, at 21.

²⁴³ Prugh History, 11 July 1975, *supra* note 10, at 68.

²⁴⁴ *Id.* at 68; see PRUGH, *LAW AT WAR*, *supra* note 6, at 72.

²⁴⁵ PRUGH, *LAW AT WAR*, *supra* note 6, at 72-73, 136-39. Prugh observes that, “had the war crimes directive been enforced, the My Lai thing would have been uncovered much earlier, Firebase Maryanne much earlier, [and] the whole war crimes problem that we had would have been far smaller that it later turned out to be.” Prugh History, 11 July 1975, *supra* note 10, at 69.

related forums for the adjudication of terrorists and violations of the law of war.²⁴⁶ Major General Prugh witnessed the establishment and operation of this kind of expansive prosecutorial effort. Nearly thirty years before the creation of the Guantanamo Bay Tribunal, MG Prugh anticipated the need to institutionalize the memory, means, and methods by which tribunals might operate.

Prugh's legacy on prisoners of war and war crimes, including *Law at War: Vietnam 1964-1973*,²⁴⁷ remains an invaluable resource for anyone interested in the subject. His observations for retaining records of how the Army deals with such issues are instructive.

I'd say the first big lesson is that we should be getting to work now, "we" being the government, and primarily the Judge Advocate General's Corps, to go to work to study [tribunals and large scale criminal litigation,] and put it in as orderly a fashion as we can to incorporate the lessons that have been learned. . . . [n]ot to permit our people to forget how to handle it. Then I think from this we should be devising some measure. I don't like to use the term expediting measures, but clearly and sometimes in cases there should be some special deviations from the rules permitted. Maintaining fairness, maintaining the basic protection, but permitting some deviation from the rules, that are so rigidly applied, and properly so, in the small criminal cases.²⁴⁸

As previously noted, Prugh was deeply concerned about developing a record of lessons learned for future generations. In large measure, this concern resulted from MG Prugh's personal experience in dealing with issues of relative first impression and, in absence of any records of institutional knowledge, having to seek guideposts wherever he could find them. The issue of the availability of records and resources for the development of war crimes policies is a good example. Prugh recalls:

²⁴⁶ See generally Jeffrey L. Spears, *Sitting in the Dock of the Day: Applying Lessons Learned from the Prosecution of War Criminals and Other Bad Actors in Post-Conflict Iraq and Beyond*, 176 MIL. L. REV. 96 (2003).

²⁴⁷ PRUGH, *LAW AT WAR*, *supra* note 6, at 61-78.

²⁴⁸ Prugh History, 5 July 1975, *supra* note 10, at 7.

When I was serving as General Westmoreland's lawyer, at COMUS [Commander U.S.] MACV, I was quite concerned and conscious of the necessity to have something worthwhile on the books on war crimes and on the handling of prisoners of war [I]n 1965, when we were looking to try to find materials to apply for the development of a War Crimes Directive applicable in Vietnam for the incoming American troops, we could not find any basic references . . . including searches at the Pentagon. Unable to find anything, we ultimately got one copy of a War Crimes Directive developed by then Colonel George Hickman, who later became The Judge Advocate General, when he was the Far East Judge Advocate during the early years of the Korean War. We used that document as a springboard in Vietnam in 1965 to develop a war crimes directive. . . . Clearly, there should have been a better record available to us considering the range of time and experience we had.²⁴⁹

Years later, Prugh looked back upon his twenty months²⁵⁰ of service in Vietnam with justifiable pride and sense of accomplishment for all he had accomplished and witnessed as the MACV Staff Judge Advocate. It was, for him, an exciting time in the history of the Army, the nation, and the law.²⁵¹ He recalls the experience of dealing with the many issues and challenges of first impression that arose in Vietnam as "an adventure, . . . where you [could] go as far as your imagination and your energy will take you."²⁵² That adventure included several milestones in the history and evolution of the role of judge advocates in military operations and the American experience with the Geneva Conventions, prisoners of war, the relationship of the law to counterinsurgency operations.

²⁴⁹ *Id.* at 8-9. The General goes on to recognize the role of TJAGLCS as a resource for future international law practitioners. "I think the JAG School alone, today, can provide to anyone who has this sort of problem again a good deal more of the variations and the provisions and the concepts that ought to be taken into account when dealing with war crimes and prisoners of war." *Id.*

²⁵⁰ The MACV assignment was originally a two-year tour, but was curtailed to a one-year tour in early 1965 when family members were returned to the United States. Prugh agreed to an eight-month extension of the adjusted twelve-month assignment. Prugh History, 11 July 1975 (2), *supra* note 10, at 1.

²⁵¹ *Id.* at 70.

²⁵² *Id.* at 70-71.

VI. 1967-1971

A. European Command and United States Army Europe

In August 1966, Prugh reported to the United States European Command (EUCOM),²⁵³ located at Camp-de-Loges, France, outside Paris.²⁵⁴ The Commanding Officer was General David A. Burchinal. From the moment Prugh arrived, he was hard at work supporting the recently announced American withdrawal from France and the French withdrawal from the NATO military structure.²⁵⁵ The action was ordered by President Charles de Gaulle in February 1966 and was known internally as the fast relocation out of France (FRELOC). For Prugh, it was a mass movement of American manpower and equipment, transfer of property, and related issues for Army lawyers. He observed:

[F]or a lawyer it was a great opportunity because here again the command had not foreseen . . . the sort of problems you get when you suddenly dissolve a tremendous military presence, with all the financial arrangements, all the contracting arrangements, the employment and tax issues . . . the whole raft of things that made our ties with France over a [twenty]-some year period very strong, and that suddenly have to be terminated.²⁵⁶

Army judge advocates were actively involved in significant actions concerning the suspension of U.S. payments to the French for government-to-government contracts undertaken during the period of French participation in NATO.²⁵⁷ These included contracts for facilities, construction, and related claims for the “negative residual value” of French property converted to military use, “e.g., . . . farmland converted to an airfield.”²⁵⁸ Following the move from north of Paris, the EUCOM headquarters shifted to Stuttgart, Germany; Allied Forces Central Europe (AFCENT) moved from Fontainebleau, France, to Brunssum, Holland; and the Supreme Headquarters Allied Powers Europe (SHAPE) moved

²⁵³ See The Establishment, Evolution, and Accomplishments of the United States European Command History, <http://www.eucom.mil/english/Command/history.asp>.

²⁵⁴ Prugh History, 11 July 1975 (2), *supra* note 10, at 3.

²⁵⁵ *Id.* at 4.

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 5.

²⁵⁸ *Id.* at 7.

from near Paris to outside Mons Casteau, Belgium.²⁵⁹ At the same time EUCOM was working the legal issues associated with leaving French territory, a host of new matters arose in anticipation of the pending U.S. presence in Germany, the Netherlands, and Belgium.²⁶⁰

The agreements were negotiated to address issues such as broadcasting rights, police authority, criminal justice jurisdictions, taxes and import duties, and establishment of post exchanges and commissaries.²⁶¹ In some cases, as with Germany, many issues were resolved within the context of the NATO treaty and related SOFAs.²⁶² In others, individual agreements were required to clarify the status, obligations, and privileges of American forces. Prugh recalled that the intensity and detail of judge advocate involvement surprised him. “I never would have anticipated that the lawyers would have been involved in the negotiation and undertaking with a foreign government. But here again, the American Embassies in both [Holland and Belgium] were without lawyers and they hadn’t really been faced with problems like these before.”²⁶³ Similar agreements for the stationing of U.S. personnel were later also reached with Spain and Turkey, each uniquely tailored to the specific concerns host nation governments.

As in Vietnam, Prugh and his military attorneys also became the principle authorities for the multitude of host nation laws impacting the U.S. presence, including over 250 individual international agreements affecting American operations.²⁶⁴ Across the board, military lawyers in EUCOM were actively involved in new disciplines, leading Prugh to note that, “here again, somewhat like Vietnam, you could go as far as your imagination would take you.”²⁶⁵ As the scope of judge advocate work expanded, so did Prugh’s attention to the manner and substance with which legal products were presented in operational planning documents. Contingency planning, in particular, merited special attention.

²⁵⁹ *Id.* at 7. See generally NATO Allied Command Operations, <http://www.nato.int/shape/news/2003/history/index.htm> (detailing a history of Supreme Headquarters Allied Powers Europe (SHAPE)).

²⁶⁰ Prugh History, *supra* note 10, at 7-9.

²⁶¹ *Id.*

²⁶² *Id.* at 8.

²⁶³ *Id.* at 12.

²⁶⁴ *Id.* at 14.

²⁶⁵ *Id.* at 16; see Colonel George S. Prugh, Jr., *United States European Command—A Giant Client*, 44 MIL L. REV. 97 (1969).

[T]he legal annexes to [contingency planning documents] were generally hog wash. . . . [T]he same language would appear in all of them. There had been no realistic appraisal of what the legal requirements would be. . . . I thought it would be useful to take a look at all those plans from a real point of view and see what we could collect with respect to basic identifying information—how far out was the territorial sea, what kind of law did they have, what is the role of the Minister of Interior with respect to handling police matters . . . What is the role of Moslem law which in many cases along the Mediterranean is very important. Who knows what that law is? . . . I saw the contingency planning problem as a very real problem for a headquarters like EUCOM, for the military lawyer.²⁶⁶

By this time Prugh had developed a well-deserved reputation for hard work and innovation at all levels, and for his demonstrated ability to move and expand the role of judge advocates in support of commanders in new and important ways. On 1 May 1969, following the unexpected departure of Brigadier General (BG) Louis Shull, Prugh was reassigned as The Judge Advocate, U.S. Army Europe (USAREUR) and 7th Army,²⁶⁷ Heidelberg, Germany—the senior uniformed Army lawyer in Europe. Shortly thereafter, in September 1969, Prugh learned that a recent Army selection board had identified him for promotion to brigadier general.²⁶⁸ He was promoted approximately two months later.

During his tenure as the USAREUR Judge Advocate, Prugh addressed a host of issues related to the evolving nature of military jurisprudence and the special conditions present during this period in Cold War Europe. Several noteworthy issues included the creation of regional law centers, the development of the military magistrate program, racial animosities among minority service members, and implementation of the Military Justice Act of 1968.

²⁶⁶ *Id.* at 21-22.

²⁶⁷ *Id.* at 24-29. At both United States European Command (EUCOM) and United States Army Europe (USAREUR), the senior legal officer was The Judge Advocate as opposed to a staff judge advocate because his role was that of a supervisory judge advocate and principle legal advisor to the command, and not just a member of the staff. Correspondence with LTC Prugh, *supra* note 13.

²⁶⁸ Prugh History, 5 July 1975, *supra* note 10, at 36-37.

From an institutional perspective, an important development during this period was the evolving role of the Army judge advocate in areas not traditionally embraced by military attorneys. The European law centers were a key fault line in the changing nature of military practice. Recalling the role and responsibilities of the law centers, Prugh notes:

[I]t was apparent that we were being asked to do an awful lot of work, not just the traditional kinds of [military justice], but. . . for example, housing legal advice to the young soldiers with his wife who were in Europe for the first time; the drug problem;²⁶⁹ a great many administrative law problems, the insurance problem. . .²⁷⁰

Acting on his long-held view that judge advocates are “problem-solvers for the Army,”²⁷¹ Prugh went forward with a program to establish regional law centers to consolidate and maximize the availability of legal services to Soldiers and others regardless of command affiliation. Prugh recalls, “What we tried to do there was to bring together the legal talent that had been assigned into areas and try to have them address the problems for everybody in the particular area . . .”²⁷² This regional approach to legal services was designed to make better use of legal assets, but it was not without opposition.

We had difficulties with commanders, not the senior commanders, but the commanders of small intermediate staffs who felt they were being deprived of “their” legal officer . . . and to some extent they were correct. . . . I think that to some extent our own people . . . sometimes dragged their feet. They didn’t understand what a law center was and it was different from what they had expected and so it ran counter to a ‘belonging unit’ which they wanted. So we got opposition from Judge Advocates themselves . . .²⁷³

²⁶⁹ Prugh History, 4 April 1977, *supra* note 10, at 2. Prugh recalls that, “during the period 1969-1970, the role that the Judge Advocate played in USAREUR was primarily to be a catalytic agent and as a staff support to the command’s programs in trying too feel for a solution for the drug problem.” *Id.*

²⁷⁰ *Id.* at 2-3.

²⁷¹ *Id.* at 4.

²⁷² *Id.*

²⁷³ *Id.* at 4-5.

Despite these objections, the regional law center concept later took hold, particularly in Germany, and grew into a successful tool for the efficient delivery of full spectrum legal services for U.S. personnel stationed in Europe.²⁷⁴

A second key development in Europe was the first military magistrate's program. The idea arose in the mid-1970s, during a meeting in Berlin of USAREUR staff judge advocates, where Prugh recalls one participant asked, "Why don't we try a program of having a JAG judge at the stockade to handle habeas corpus—a magistrate?"²⁷⁵ The issue arose from the fact that at the time there were over 500 Soldiers in pretrial confinement facilities in Nuremberg and Mannheim, all at the direction of commanders but without any kind of formal legal review.²⁷⁶

You can have a young man in there for a ten day [absence without leave] AWOL and in the same cell with a man on a murder charge, and also in the same day a fellow facing a German rape charge for which he might not come to trial for a year. . . . Clearly there had to be a better remedy than what we had approached up to that time. We had to have somebody who could take a good hard look at this pretrial confinement and, in a diplomatic way, deal with the commander who was responsible.²⁷⁷

Despite UCMJ and MCM provisions that largely vested pretrial confinement responsibility with commanders,²⁷⁸ Prugh persuaded the USAREUR Commanding General (CG), General James Polk, of the relative merits of such a program.²⁷⁹ In 1971, after a brief trial run, General Polk signed a directive essentially delegating his oversight command authority to full-time military magistrates, who conducted pre-confinement reviews of Soldiers at the major European confinement facilities.²⁸⁰ The initial program, and its progeny, was extremely

²⁷⁴ Interview with Major General George S. Prugh, Jr., in Orinda, Cal. (Apr. 29, 2005) [hereinafter Prugh Interview].

²⁷⁵ Prugh History, 4 April 1977, *supra* note 10, at 9.

²⁷⁶ *Id.* at 10.

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 9-10. See generally MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 304(b), 305(c) (2005).

²⁷⁹ Prugh History, 4 April 1977, at 10-11.

²⁸⁰ *Id.* at 11-15.

successful. Within three months of implementation, the pre-trial confinement population in Europe dropped from over 500 to around 250.²⁸¹ “Commanders weren’t going to send questionable cases in because they didn’t want a magistrate JAG captain releasing them. . . .”²⁸² The USAREUR program was a great lesson for the Army, and a harbinger for subsequent expansions of the program, including the part-time magistrate program and active integration of judge advocates in areas such as search and seizure.²⁸³

Another issue addressed racial animosities among African-American service members. A key concern involved the perception of an inequality within the military justice system as evidenced by the disproportionate number of minority Soldiers in confinement, particularly because of non-judicial punishment.²⁸⁴ In response, a deliberate effort was made to get the facts and to “come up with some valid explanations for whatever the facts were and to try to take actions to reassure [African-American] soldiers that there was square dealing in this.”²⁸⁵

Prugh, along with other subject matter experts, including the USAREUR Inspector General (IG), established a “flying squad” to travel and inspect the administration of military justice down to the company level, to see whether minorities were, in fact, unfairly subject to non-judicial punishment.²⁸⁶ The squads “would descend, unannounced, in a command and look at the non-judicial punishment records and get the specifics . . . and try to see if they couldn’t verify whether there were discriminatory actions as a result.”²⁸⁷ Prugh recalls that the “flying squads” . . . “helped keep the system honest, and . . . their existence was a healthy thing that helped placate the fears of [African-American] soldiers in non-judicial proceedings.”²⁸⁸

In acknowledging the related situation of minority mistrust of the military system in 1969-1971, Prugh observed, “what was not working in

²⁸¹ *Id.* at 14.

²⁸² *Id.*

²⁸³ *Id.* at 14-15.

²⁸⁴ Prugh History, 11 July 1975 (2), *supra* note 10, at 42.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 42-43.

²⁸⁸ *Id.* at 43.

USAREUR at that time was the chain of command.”²⁸⁹ African-American Soldiers and other minorities experienced frustration at their apparent inability to seek recourse from their military leaders, the IG, or others.²⁹⁰ A key lesson learned during this period was the importance of a multi-agency approach to Soldier concerns, with integrated solutions across the full spectrum of available resources. Prugh notes:

I am convinced that it is necessary to tell the command all of the various channels [available to Soldiers]. It is wrong to use just the chain of command. It is wrong to erode the chain of command. I think you certainly have to support the chain of command but all the staff sections can work in support [of it]; the Judge Advocate, the housing officer, the personnel officer, the IG, the Chaplain, even the Provost Marshal. [I]f these are all working in tune, they can do a great deal toward reducing the tensions and suspicion; the tension comes from the suspicion that the soldier . . . is not getting a square deal.²⁹¹

A final matter of special relevance was the implementation of the Military Justice Act of 1968.²⁹² The law, implemented in 1969, placed enormous new burdens on the administration of military jurisprudence. In particular, the Act and subsequent amendments created a military judiciary through designation of law officers as military judges under the authority of TJAG; integrated judge advocates and military judges in special courts-martial; created certain rights of appeal for service members sentenced to dismissal, punitive discharge, or confinement greater than a year; changed the appellate Army Boards of Review to the

²⁸⁹ *Id.* at 44.

²⁹⁰ *Id.* at 44-45.

²⁹¹ *Id.* at 45. In many cases, the frustration of African American Soldiers, and others, arose from the lack of housing available on the German economy. Prugh notes that in many cases, lower enlisted, most of them draftees, would bring spouses to Germany even though they were not authorized command-sponsorship for family members. The already tight housing market, high rents, and occasional discriminatory practices of German landlords contributed to considerable difficulty and anger on the part of many. *Id.* at 45-49.

²⁹² See THE ARMY LAWYER, *supra* note 9, at 243-49. The changes to the UCMJ were long championed by several key members of the U.S. Senate, particularly Senator Sam J. Ervin of North Carolina. “The theme of [his] proposals was the elimination of legal thinking by layman: Qualified attorneys would henceforth administer the military legal system.” *Id.* at 249.

Army Court of Military Review; and demanded a substantial increase in the number of judge advocate defense counsel.²⁹³

Across the Army, there were an estimated 400 special appointments to the Judge Advocate General's Corps to fill the new requirements,²⁹⁴ bringing the size of the JAGC to a Vietnam era high of 1,782 officers.²⁹⁵ In a single twelve-month period, from 1969-1970, the JAGC accessed as many as 600 attorneys onto active duty, far more than the typical 200-250.²⁹⁶ The largely unregulated influx included many who simply did not belong in the Army, and offered lessons for the type of lawyer the uniformed services should seek, and those they should not.

They had great academic records but they didn't have the feel for the Army. They didn't have a feel for the soldier's problems; they didn't have a feel for the commander's problems; they didn't have an appreciation of the dynamism that goes into all that; and they might have been splendid defense appellate counsel but miserable as an advisor to a battle group commander. . . .²⁹⁷

VII. 1971-1975

A. The 28th Judge Advocate General of the Army

On an early morning in the Spring of 1971, MG Prugh received a personal message from General Westmoreland congratulating him on his selection as The Judge Advocate General of the Army. Prugh was still in Europe at the time, serving out the final year at USAREUR, and was "thunder-struck" with the news.²⁹⁸

Perhaps more striking than the announcement of his selection for TJAG was the notice, contained in the second paragraph of the same message, that unless Prugh had some objection, the incumbent Judge

²⁹³ Prugh History, 4 April 1977, *supra* note 10, at 56; THE ARMY LAWYER, *supra* note 9, at 245-246.

²⁹⁴ Prugh History, 4 April 1977, *supra* note 10, at 55.

²⁹⁵ THE ARMY LAWYER, *supra* note 9, at 249.

²⁹⁶ Prugh History, 4 April 1977, *supra* note 10, at 55.

²⁹⁷ *Id.* at 58.

²⁹⁸ Prugh History, 6 April 1977, *supra* note 10, at 1.

Advocate General, General Kenneth J. Hodson,²⁹⁹ would become the Chief Judge of the Army Court of Military Review and Chief Judge of the newly created U.S. Army Legal Services Agency (USALSA).³⁰⁰ This was another seminal moment in the jurisprudence of the Army, because the service was solidly on the path to institutionalizing a senior judge advocate as the head of the appellate court.

[T]hink of what this does to the judiciary and the establishment of an independent, very strong, dynamic, well directed, military judge system—it clearly adds to the prestige. No other service has yet gotten to the point where they can have a general officer or flag officer spot for their Chief Judge. Here was a golden opportunity for the Army.³⁰¹

But the announcement also raised interesting questions: Would all future Judge Advocates General retire to the Chief Judge position?³⁰² How would a former TJAG react to taking direction on policy or related matters from his successor - both senior MGs.³⁰³ In the end, the relationship between Prugh and Hodson was extraordinarily successful; however, the Army would not carry the Chief Judge position as a two-star billet beyond Hodson's tenure. Institutionally, the result was an additional brigadier general authorization for the Judge Advocate General's Corps.

[T]his is the way [MG Hodson] had actually planned it. He had thought that . . . maybe [the Army] could not guarantee a position of a major general, after all that is a pretty heavy investment in a position that had up to that point always had a colonel. It didn't have any statutory requirements, and its position in the Army's table of organization . . . was unclear. To have a Chief Judge and to figure out what his role was and what his power

²⁹⁹ The Judge Advocate General of the Army, 1 January 1967– 30 June 1971; see THE ARMY LAWYER, *supra* note 9, at 255.

³⁰⁰ Prugh History, 6 April 1977, *supra* note 10, at 2-3; see THE ARMY LAWYER, *supra* note 9, at 255. "The Agency brought together the Army's trial and appellate judiciary under one administration and included both the appellate counsel and case examiners necessary to conduct the statutory review of courts-martial." *Id.*

³⁰¹ Prugh History, 6 April 1977, *supra* note 10, at 4.

³⁰² *Id.*

³⁰³ *Id.* at 5.

was, when we were doing it we were really modeling it after a civilian system rather than anything in the military's manning table...the long and short of it is that it worked out beautifully.³⁰⁴

As Prugh prepared to return to Washington, he thought long and hard on what his priorities might be as The Judge Advocate General. “[Y]ou begin to think suddenly you are in a position where you can have a voice in the way things are going to go, the directions that things will take involving the Army’s law and the delivery of the Army’s law services, the whole pattern of Judge Advocate activities.”³⁰⁵ His emphasis would be a restatement of the lessons he learned in Vietnam. He asked, “[W]hat can I as a staff officer do to further the mission of my command; what can I as a lawyer do? What can the law do in support of the command?”³⁰⁶

One of the first things Prugh did was reach out within the professional spectrum of the JAG Corps for ideas and input from young officers and those with many years of military experience.³⁰⁷ “[W]e need to constantly find ways to bring in the new ideas, the young thinking, and the current material coming out of the schools and add that to the judgment and experience level of the older officers.”³⁰⁸ He worked to achieve this by emphasizing continuing legal education, regional “captains’ conferences” for junior officers, and quarterly meetings with senior leaders.³⁰⁹

³⁰⁴ *Id.* at 6.

³⁰⁵ *Id.*

³⁰⁶ *Id.* at 7. Prugh recalls,

I had to try and figure out what the Army was going to look like during the period that I was going to be The Judge Advocate General. Obviously, in a matter of turmoil, with the Vietnam War drawing down. Our overseas commitments were under some constraints, with a good possibility that they would be reduced. This has personnel ramifications; it has ramifications of the educational system that the Army has, and specifically JAG.

Id. at 10-11.

³⁰⁷ *Id.* at 14-16.

³⁰⁸ *Id.* at 16.

³⁰⁹ *Id.* at 1.

Like any Judge Advocate General, Prugh's four years were characterized by events driving the Judge Advocate General's Corps, the Army, and the nation. His tenure included the institutional effects of the downsizing following America's withdrawal from Vietnam,³¹⁰ the delicate litigation and clemency arising from the *Calley* war crimes case,³¹¹ tenuous relations with the Army General Counsel,³¹² personal participation in the 1974 Geneva Conventions,³¹³ the DOD Task Force on Racial Discrimination in the Army,³¹⁴ and the bicentennial of the Judge Advocate General's Corps.³¹⁵ It is beyond the scope of this article to discuss each significant event that occurred during Prugh's service as The Judge Advocate General. Several, however, merit special attention.

B. Downsizing the JAG Corps Following Vietnam

As the Vietnam War began to wane in the early 1970s, the Army was planning for the largest demobilization of forces since the 1950s and the aftermath of Korean War. The effect on the Judge Advocate General's Corps was no different, and Prugh recalls it as a key issue early in his tenure as The Judge Advocate General.³¹⁶ The challenge Prugh faced was planning for an equitable reduction in force commensurate with the diminished U.S. presence in Southeast Asia.³¹⁷

If you had to reduce say, 300-400 officers from a Corps at that point of about 1,800, dropping down to around 1,500 and do it in an equitable way, sending these young fellows out of the service and into either the reserves or

³¹⁰ *Id.* at 17-19.

³¹¹ *Id.* at 30-40.

³¹² *Id.* at 23-29.

³¹³ *Id.* at 42-52.

³¹⁴ *Id.* at 55-59.

³¹⁵ *Id.* at 65-69.

³¹⁶ Prugh History, 4 April 1977, *supra* note 10, at 57.

[I] have often thought that one of the toughest problems I wrestled with at the beginning of my time as The Judge Advocate General...is the transition from the five-year term of service down to the three-year term of service, and the orderly elimination of these extra 400, getting the normal JAG strength of roughly 1500-1550, without causing great trauma throughout the Corps.

Id.

³¹⁷ Prugh History, 6 April 1977, *supra* note 10, at 17.

into the civilian community with at least a palatable recollection of their military service and a friendly orientation toward the Army.³¹⁸

From this downsizing process, Prugh learned some of the things junior officers wanted: better continuing legal education opportunities, better materials from The Judge Advocate General's School, and a greater understanding of the personnel system.³¹⁹ "They wanted some order brought out of the chaotic Army lawyer business as they saw it."³²⁰ A key response to these concerns involved an expansion of the educational opportunities and institutional focus of The Judge Advocate General's School, in which Prugh invested heavily.³²¹

C. Role of Military Attorneys and the Relationship with the Army General Counsel

Prugh recognized the fundamental issues associated with the appropriate roles for military and civilian attorneys within the Department of the Army three decades before the Army's current, and dramatic, effort in institutional transformation and associated policy detailing military to civilian conversions.³²² He acknowledged opportunities for civilianization of certain uniformed positions, but stressed the importance of retaining vital capabilities within the uniformed service for the benefit of commanders and future military operations. A generation before Army transformation to the modular force, Prugh argued:

[T]he Army has got to be able to send some of its lawyers overseas or into dirty, undesirable, disagreeable positions at a time when they may not want to go, and the only assurance the Army can have so an attorney will

³¹⁸ *Id.* at 17.

³¹⁹ *Id.* at 18.

³²⁰ *Id.*

³²¹ It was therefore fitting that in 1975 one of his last official acts before retirement was the dedication of the current school facilities next to the law school of the University of Virginia, Charlottesville, Virginia. Prugh History, 7 May 1977, *supra* note 10, at 6.

³²² See Memorandum, General Peter J. Schoomaker, U.S. Army Chief of Staff and R. L. Brownlee, Acting Secretary of the Army, to MACOM Commanders, subject: Military-Civilian Conversion Target to Support Transformation (Mar. 11, 2004) (on file with author).

do this is when he is a uniformed attorney. . . . [But to do this] you have got to have some good job jobs for them to go to. Some jobs where they learn. Some jobs where they can aspire to positions of responsibility. If all the good jobs are given to, let's say, civilian attorneys, and all the dirty, dangerous and disagreeable jobs are given to the uniformed lawyers, before long you won't have a uniformed lawyer in the service.³²³

Among the long-standing challenges for The Judge Advocates General has been the nature and scope of their relationship with the civilian leadership of the Army from the General Counsel to the Secretary of the Army. Prugh recalls this relationship as “the most difficult problem he faced” during his four-year tenure as The Judge Advocate General.³²⁴ The essential question concerned the precise role played by the senior military and civilian attorneys within the structure and leadership of the Army. Prugh recalls, “During the period that I was there, I never thought that Uncle Sam really got the best service out of his lawyers because we ended up with sort of a two-headed monster in the Army . . . [one civilian, one uniformed]”.³²⁵

Upon assuming the position as the Army's senior uniformed attorney, Prugh learned that the Army General Counsel had sponsored a policy within the Army Secretariat that all members of the Secretariat would receive legal counsel exclusively from the General Counsel's Office.³²⁶ Prugh recalls that, “The Judge Advocate General had the back door closed to him and had to deal through the General Counsel to get to the Secretary . . .”.³²⁷ As a result, Prugh worked through the Army Chief of Staff, and through him to the Secretariat on matters of relevance to the

³²³ Prugh History, 10 July 1975, *supra* note 10, at 23.

³²⁴ Prugh History, 6 April 1977, *supra* note 10, at 23.

³²⁵ *Id.* at 23-27.

³²⁶ Prugh History, 10 July 1975, *supra* note 10, at 21-22.

It wasn't until I became The Judge Advocate General that I saw how much the position had been eroded from what I thought it had been, from what [Title 10, USC § 3037] gave it and that in fact The Judge Advocate General was no longer the legal advisor to the Secretary directly, except on a very limited basis.

Id. at 24.

³²⁷ *Id.* at 28.

uniformed service. The system worked, but it was clearly not what Prugh had originally envisioned.³²⁸

One instance of friction in the relationship arose from the proper place of the procurement law function. This had traditionally been a function for judge advocates; examples included a lieutenant colonel assisting as legal advisor to the Senate Armed Services Procurement Regulations Committee.³²⁹ This position exposed mid-grade judge advocates to the inner workings of Army contracting, including the Assistant Secretary for Installations and Logistics.

Given the position's developmental value for judge advocates, Prugh was understandably disturbed when the Army General Counsel, Robert W. Berry, decided the position should be transferred to his office and threatened to civilianize it if Prugh did not comply.³³⁰ After great consideration, Prugh finally agreed to transfer an officer to the Office of General Counsel, but only as a means of keeping the expertise resident within the Corps. He still considered the matter highly regrettable and "another aspect of an erosion of the JAG's procurement role."³³¹

He was fortunate, however, in the special relationships he had with GEN Westmoreland during Westmoreland's tenure as the Army Chief of Staff,³³² and to a lesser degree afterwards with GEN Creighton Abrams³³³ and GEN Frederick Weyand.³³⁴ Those relationships enabled Prugh to participate in many of the critical discussions regarding legal issues within the Department of the Army including creation of the volunteer force and related draw-down following the Vietnam war.³³⁵

Nevertheless, Prugh could not escape the underlying fact that he was forced to do business through the General Counsel.³³⁶ While

³²⁸ *Id.* at 28-29. "The other system . . . the system that I imagined worked from [Title 10, U.S.C. § 3037] had The Judge Advocate General being responsible to both the Secretary and the Chief of Staff." *Id.*

³²⁹ Prugh History, 6 April 1977, *supra* note 10, at 29.

³³⁰ *Id.*

³³¹ *Id.* at 30.

³³² Chief of Staff, 3 July 1968– 30 June 1972. Historical Resources Branch, U.S. Army Center of Military History, *available at* <http://www.army.mil/cmh-pg/faq/FAQ-CSA.htm> (last visited Mar. 7, 2006).

³³³ Chief of Staff, 12 October 1972–4 September 1974.

³³⁴ Chief of Staff, 3 October 1974–31 September 1976.

³³⁵ Prugh History, 10 July 1975, *supra* note 10, at 36.

³³⁶ *Id.* at 39.

acknowledging the need for the Secretary to have “his own private counsel . . . to advise him on problems that have answers that are ambivalent, and . . . mixed in very deeply with politics,”³³⁷ Prugh felt strongly that legal services in the Army should be headed by a single authority.

The big picture of it . . . should be dealt with by a career lawyer and I think under our present system this is best handled by a Judge Advocate General. I think that is what the system once was, and I believe that is the way it operated at its best.³³⁸

D. Participation at the 1974 Geneva Conference

In the late 1960s, there was a growing sense that the tenets of international law governing armed conflict since the aftermath of World War II required revisiting.³³⁹ In response to a 1968 United Nations Assembly initiative, the ICRC undertook a series of high-level meetings to draft protocols on international humanitarian law applicable in armed conflict.³⁴⁰ This effort, known as the “conferences of government

³³⁷ *Id.* at 42.

³³⁸ *Id.* at 43.

It is just from the stand point of getting into cross purposes at the top level for advice, many times on crucial issues where the Secretary and the Chief of Staff ought to be reading from the same sheet of music and should be getting legal advice from a source which is together. . . . so that they are not giving their best professional answers to their client. That we need, and I think that we do not have.

Id. at 44, 45-46. Prugh was particularly concerned about General Counsel and Secretary of the Army involvement in matters of military justice.

They could argue about how this might sit politically or might sit with Congress or how it might sit with the White House, but to analyze the responsibility of the major on the ground at the time . . . these took a professional “know-how” that only the uniformed man could inject.

Id. at 52.

³³⁹ Prugh History, 6 April 1977, *supra* note 10, at 44.

³⁴⁰ Major General George S. Prugh, Address to the Commonwealth Club of San Francisco, California: Diplomatic Conference on Updating the Law of War (Mar. 23,

experts,” was a preparatory measure designed to draft protocols to the Geneva Convention for debate and consideration later by a diplomatic conference.³⁴¹ While the Conventions themselves are multilateral treaties among and between sovereign states, the ICRC was an influential force because of its compliance and monitoring relationship.³⁴²

In 1971, the first of two conferences of experts representing seventy-seven countries met in Geneva, Switzerland to begin drafting the protocols.³⁴³ The following year, Prugh, recently sworn in as The Judge Advocate General, received permission from the Secretary of the Army and the Army Chief of Staff to take a six-week leave of absence to attend the second conference. He was excited for the opportunity and could not escape the historical importance of his participation.³⁴⁴ He recalled, “General George Davis, The Judge Advocate General right after the turn of the century, had participated in the Hague Peace Conference that resulted in The Hague Regulations, and I felt that we ought to continue [the tradition of Army JAG involvement].”³⁴⁵

Mr. George Aldrich, Deputy Legal Advisor to the State Department, headed the American delegation to the 1972 conference of experts.³⁴⁶ Prugh served as his principal assistant and was the American delegate to the committee considering matters involving prisoners of war, which he recalls was “[a] very difficult area and a very tricky one in which there

1974) [hereinafter Prugh Diplomatic Conference Address] (transcript on file with author). See also Prugh History, 6 April 1977, *supra* note 10, at 44-45.

³⁴¹ Prugh Diplomatic Conference Address, *supra* note 339.

³⁴² Prugh History, 6 April 1977, *supra* note 10, at 44-45.

³⁴³ Prugh Diplomatic Conference Address, *supra* note 339.

³⁴⁴ Prugh History, 6 April 1977, *supra* note 10, at 45. Prugh was eager to participate in the conference.

The main reason I wanted to participate in Geneva, during this development in the Geneva Convention—apart from the fact that I had a personal interest in the subject matter—was the fact that I couldn’t help but think that back in 1907 The Judge Advocate General of the Army had been participating in the conferences of the Hague Peace Conference and that was General George Davis; and here I am almost 70 years later . . . having the same chance to work on the now current version of the Geneva Conventions that have taken over and developed.

Prugh History, 4 April 1977, *supra* note 10, at 77.

³⁴⁵ Prugh History, 6 April 1977, *supra* note 10, at 46.

³⁴⁶ *Id.*

was very little agreement.”³⁴⁷ The disagreements, however, were not without their memorable anecdotes. Prugh recalls one exchange in which the Soviet Ambassador publicly referred to him as “a genocidist and exterminator,” and then later insisted they share a drink of vodka together.³⁴⁸

In July 1973, the ICRC petitioned the Swiss Government to call a diplomatic convention, the Diplomatic Conference on the Law of War, to consider two draft protocols (Protocols I & II to the Geneva Convention) resulting from the earlier conferences of experts.³⁴⁹ Protocol I dealt with international conflicts; Protocol II concerned civil wars and other non-international armed conflicts.³⁵⁰ The conventions included representatives from 126 countries; Prugh was a member of the American delegation and focused on legal issues concerning the Geneva Conventions.³⁵¹ These protocols, which Prugh described as “complicated, ambitious, controversial, frequently vague, indefinite, and ambiguous,”³⁵² were designed to “strengthen the spirit” of The Hague and Geneva Conventions drawn in the first half of the century.³⁵³

As Prugh observed, “After every war an effort is usually made to try to clean up the legal debris that occurred or was visible during that particular fight . . . Vietnam was no exception.”³⁵⁴ The character of the war in Vietnam was clearly different from the European wars of the first half century and demanded a fresh look at issues including the status and treatment of combatants.

[T]he problems that we had involved not only dealing with enemy prisoners, but the Viet Cong, a little kid in black pants who had a weapon in his had a little while ago, and you now take him and you don’t know if he is to be a prisoner of war, or to be treated as a civilian terrorist, or whatever. Clearly this was a new problem

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ Prugh Diplomatic Conference Address, *supra* note 340; *see also* Prugh History, 6 April 1977, *supra* note 10, at 47, 49.

³⁵⁰ *Id.*

³⁵¹ Prugh History, 6 April 1977, *supra* note 10, at 47.

³⁵² Prugh Diplomatic Conference Address, *supra* note 340.

³⁵³ *Id.*

³⁵⁴ Prugh History, 6 April 1977, *supra* note 10, at 44.

that had to be addressed . . . at The Geneva Convention.³⁵⁵

The attendees at the 1974 Diplomatic Conference considered the texts of the two draft protocols dealing with international armed conflict, internal conflicts, and wars of “national liberation” similar to that observed in Vietnam. They were, in part, an effort to provide a legal framework for a new kind of war, where “the enemy moved covertly in and out of the civilian infrastructure seeking shelter among the innocent population prior to striking out in legal combat. The Geneva and Hague Conventions . . . were not readily applicable or adaptable to this guerrilla warfare.”³⁵⁶

A key provision of Protocol II contained language reflecting Prugh’s experience in Vietnam, whereby minimum humanitarian standards and protections would attach to detainees involved in internal armed conflicts.³⁵⁷ This expanded Article 4 of the GPW beyond the traditional definitions for lawful combatant—e.g., insignias and uniforms, chains of command, and certain weapons prerequisites—but did not apply to terrorists, saboteurs, or spies.³⁵⁸ Even these modest gains were highly controversial, because, as Prugh recalled, “nations don’t want international law to repeal their treason laws.”³⁵⁹

While there was modest agreement at the Diplomatic Conference on certain matters expanding international prisoner of war status, including wars of national liberation, freedom from colonialism, and wars against racial conflict, the politics of the conference made meaningful progress difficult. Prugh recalls, “We thought we were going to get into the substance of the matter but . . . were thrown into politics right off the bat: international politics, third world politics, anti-Vietnam politics, and anti-U.S. politics.”³⁶⁰

³⁵⁵ *Id.*

³⁵⁶ Major General George S. Prugh, Keynote Address at the 1973 United States Army Reserve Judge Advocate General’s Conference (Nov. 15, 1973) (transcript on file with author).

³⁵⁷ Major General George S. Prugh, Remarks to Cadets Enrolled in the Law Course at the United States Military Academy (Sept. 27, 1973) [hereinafter Prugh Remarks to Cadets] (transcript on file with author).

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ Prugh History, 6 April 1977, *supra* note 10, at 47. Prugh noted in a 1974 speech:

An example of the discord present during the convention was a proposal for the creation of a “protecting power” with broad authority to inspect and monitor compliance of the draft international protections.³⁶¹ The issue concerned the effective implementation of the Geneva Conventions through an international authority, whatever it might be. This was an attempt to redress a fundamental weakness of the Geneva Conventions—the lack of institutional enforcement. Prugh summarized the problem:

[The Geneva Conventions] assume that each belligerent will accept protecting powers; they do not provide a mechanism which insures their appointment. Moreover, the ICRC, whose humanitarian functions are recognized by the conventions, is given no treaty right to operate on the territory of a party unless that party decides to authorize it.³⁶²

Although a priority for many western nations, the idea of a multi-national authority with extraterritorial enforcement abilities was an anathema to many countries, including the Soviets and some Third World nations, who were sensitive to the notion of third parties entering their territory.³⁶³

While Prugh missed the final meetings of the Diplomatic Conferences held in 1976 and 1977, he nonetheless looked back on the historic nature of Army judge advocates’ participation in the Geneva Conventions, the progress made, and his contributions to it.³⁶⁴ The discussions on expanded definitions for “enemy combatants” and the legal rights that derive from it remain a lasting discourse, still relevant three decades later as we debate the tangled laws applicable to insurgencies and international terrorism.

The United States view, very simply, is that, within the system regulating armed conflict, the people affected by struggles for self determination, whose movement does not qualify for statehood, are entitled to protection under the Law Governing Civil Wars and under the minimum standards of Customary International Law and we stand prepared to provide meaningful consideration for that type of conflict in Draft Protocol II.

Prugh Diplomatic Conference Address, *supra* note 340.

³⁶¹ Prugh Remarks to Cadets, *supra* note 357.

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ Prugh History, 6 April 1977, *supra* note 10, at 49.

Prugh, like GEN Davis two generations earlier, was a witness and participant to the gradual evolution of international law, and the war of laws that collide in diplomatic forums where politics mean as much or more than jurisprudence, precedent, or the rights of men. His message, memorably given in his statement before a conference of experts, was for the need to learn from the past, as he and others worked toward the future.

In a very real sense, we are all prisoners of our time and our common history. We can neither ignore our past nor repeal it. We can learn from it, and we have all seen from the aphorism that if we do *not* learn from it, we shall be condemned to repeat it.³⁶⁵

E. Changes in Military Justice

No introduction to the tenure of a Judge Advocate General would be complete without at least a short review of the developments in military justice. During his time in the Pentagon, Prugh took the opportunity to study and institutionalize many of the components he started at USAREUR. The legal center concept, for example, which centralized processing of legal actions through an area jurisdiction and consolidated special courts-martial at the brigade or equivalent level, was broadly implemented.³⁶⁶

Also implemented was the Military Magistrate Program, which a test program found “was highly successful in reducing pretrial confinement without a significant adverse impact on unit discipline, while engendering a degree of confidence in the system for undergoing pretrial confinement.”³⁶⁷ The magistrate program was so successful that the DOD Task Force on the Administration of Military Justice in the Armed

³⁶⁵ Major General George S. Prugh, U.S. Army, Statement as The United States Representative in Commission III, International Committee of the Red Cross, Concerning the Protection of Civilians (May 16, 1972) (transcript on file with the author).

³⁶⁶ Prugh Interview, *supra* note 274; *see also* Major General George S. Prugh, *TJAG's Annual Report*, ARMY LAW., Aug. 1974, at 1.

³⁶⁷ Prugh, *TJAG's Annual Report*, *supra* note 366 at 1; *see also* Prugh History, 4 April 1977, *supra* note 10, at 8-16.

Forces recommended adoption of the program by the other military Services.³⁶⁸

Other changes included expanding rights of accused to present evidence and call witnesses during nonjudicial punishment proceedings,³⁶⁹ a test program for the random selection of court-martial panel members,³⁷⁰ and the continued growth of a trained, independent military judiciary and publication of Rules of Court for courts-martial.³⁷¹ These efforts were part of an informal program to enhance the faith Soldiers and others had in the fairness and professionalism of the military justice system. But perhaps the greatest institutional change began in 1972, when the DOD Task Force on the Administration of Military Justice in the Armed Forces recommended the establishment of an independent criminal defense bar—the Trial Defense Service (TDS).

The Army had previously studied the idea of a separate criminal defense service, but obstacles, including the insufficient number of officers and support personnel, frustrated the effort. The idea garnered new life through the DOD Task Force, which was appointed following allegations of racial bias in military justice, and was among the recommendations forwarded to the Service Secretaries on 30 November 1972.³⁷² This was a part of an effort to install greater confidence in the military legal process.

It required a “visible, physical separation between defense counsel and staff judge advocate offices,”³⁷³ monitoring by staff judge advocates to ensure qualified defense counsel, and the creation of an independent technical chain.³⁷⁴ Senior leaders with area responsibility were assigned to TDS, as were experienced, senior defense counsel, to manage and supervise junior attorneys.³⁷⁵ The goal of the bifurcation of prosecution and defense responsibilities was an effort to ensure that each Soldier had complete confidence in his lawyer, so no defense attorney “would be

³⁶⁸ Prugh Interview, *supra* note 274; *see also* Prugh, *TJAG’s Annual Report*, *supra* note 366, at 1.

³⁶⁹ Prugh, *TJAG’s Annual Report*, *supra* note 366, at 2.

³⁷⁰ *Id.* at 4.

³⁷¹ Prugh Interview, *supra* note 274; *see also* Major General George S. Prugh, Address to the U.S. Army Armor School Advanced Class (Dec. 12, 1972) [hereinafter Prugh Address to U.S. Armor School] (transcript on file with author).

³⁷² *Id.*

³⁷³ Prugh, *TJAG’s Annual Report*, *supra* note 366, at 3.

³⁷⁴ *Id.*

³⁷⁵ *Id.*

influenced, directly or indirectly, consciously or unconsciously, to do less than his best for his client.”³⁷⁶

F. Relationship with General Westmoreland

Events and timing often drive the direction of an officer’s military career and have lasting effects. Things may be been very different, for example, had Prugh not been the MACV Staff Judge Advocate on the eve of the Brink Hotel bombing and the acceleration of American involvement in Southeast Asia in 1965. Events are also tempered by personalities, and no recollection of Prugh’s career would be complete without at least a brief mention of his special lawyer-commander relationship with General Westmoreland, a truly historic figure in the history of the Army and the Vietnam War.

As the Commander of U.S. forces in Vietnam, and later as the Chief of Staff of the Army, General Westmoreland benefited from having Prugh as his legal advisor. Whether in combat or on the Army staff, in matters of applying prisoner of war status to the Vietcong or dealing with Army-level policy, Prugh found Westmoreland to be the ideal client for his reasonable approach to the law and willingness to listen to lawyers, not only for their technical competence but for the analytical assets they brought to the table. Prugh recalls that Westmoreland was “wonderful with lawyers . . . receptive to advice . . . and was always very attentive.”³⁷⁷

Westmoreland also enfranchised Prugh in a personal way that testified to their many years together. Prugh recalls Westmoreland treated his staff well, and was “very warm, very pleasant, very direct, and very official.”³⁷⁸ But he was also social and would invite Prugh to his home at Quarters #1, Fort Myer, Virginia, for dinners. On one occasion, a dinner included “Potter Stuart, Associate Justice of the Supreme Court, the French Ambassador, and the parents of Mrs. John Kennedy.”³⁷⁹ It was a formal, yet special, relationship of two leaders with the shared experience of war and its aftermath.

³⁷⁶ Prugh Address to U.S. Armor School, *supra* note 371.

³⁷⁷ Prugh History, 6 April 1977, *supra* note 10, at 76.

³⁷⁸ *Id.* at 78.

³⁷⁹ *Id.*

VIII. "Standing on His Own Hind Legs": A Leadership Philosophy

I just think you have to understand that you are going to be responsible, have to be held responsible because you made the decision. You might as well reconcile yourself to this. You have to stand on your own hind legs.³⁸⁰

Throughout over three decades of military leadership, Prugh developed, exercised, and lived a number of key leadership tenets. First and foremost, it is worth remembering that Prugh was an officer who continually sought to move judge advocates and the law into new venues to maximize their effectiveness both for commanders and the mission. Part of this effort required seeking information and feedback. Prugh proudly sought the insights of others and looked beyond the sometimes-narrow confines of headquarters buildings for innovation and truth.

A good example of this was the officers mess luncheons MG Prugh sponsored as The Judge Advocate General. Each month, he would gather seven judge advocates—a judge advocate general officer, two OTJAG division chiefs, and four captains—for lunch at the Pentagon Secretary's Mess. Prugh recalled, "It takes forever to get through the Corps but in about two years we covered a pretty substantial chunk of junior officers; and we'd bring them in there and ask them questions about what was going on, what did they see from their point of view. . . ."³⁸¹ Prugh used the opportunity to informally coach and mentor young officers in the lessons and principles he valued most. The following twelve leadership tenets offer valuable insight into the general's own driving sense of self, his expectations of others, and his goals for individuals and organizations.

³⁸⁰ Prugh History, 5 July 1975, *supra* note 10, at 10-11. Major General Prugh formulated this lesson early in his career, dating back to his observations of the treatment of LTC Ellis and the Malmedy Massacres.

I would say one lesson I learned from this is that when the chips are down, and issues are very high and very important, that you cannot count on support from anyone else in the Army or governmental structures. You have got to pretty well be able to stand on your own hind legs.

Id. at 2.

³⁸¹ Prugh History, 4 April 1977, *supra* note 10, at 71.

1. *Take responsibility for your actions.*³⁸²
2. *Get as much information as you can; be deliberate in your analysis.*³⁸³
3. *Be prudent, but not so cautious or deliberate that you lose opportunities.*³⁸⁴
4. *Take the time to meet and know junior officers; take care of your people.*³⁸⁵

³⁸² Prugh History, 5 July 1975, *supra* note 10, at 10-1; *see also* Prugh History, 10 July 1975, *supra* note 10, at 27.

[I] think the Army normally trains the staff officers sufficiently that an officer stands on his hind legs and calls it as he sees it. He is not going to be influenced by grade, rank, people outside of that chain, and a lawyer shouldn't be (either). I think a lawyer has got to call it—if he is the counsel for this particular client he has got to call the shot for that client, give him the best advice. Now if the client wants to go somewhere else for legal advice, let him do it, but don't let the attorney subject himself to the pressures of another attorney who is the legal advisor to another layer and echelon so that our attorney is giving a diluted advice, trying to please a legal superior as well as the client. I think it is bad for the client and I think it is bad for our business, [and] for the Army.

Id.
³⁸³ *Id.* at 10.

I think in any decision making, whether it is legal or otherwise, you want to get as much information as you can, you want to be as deliberate as you can; you've got to be as critical of all sides as you make you analysis. Sometimes you have to go very fast, and in some cases, you are going to make what amounts to an educated guess. . . . lawyers are probably able to make more of an analytical decision when they can take more time, when they get more information.

Id.
³⁸⁴ *Id.*

³⁸⁵ Prugh History, 7 July 1975, *supra* note 10, at 1. In 1950, upon his arrival at Bremerhaven Port, Germany, the Prughs were greeted by the local Staff Judge Advocate, Colonel Noah Lord. It left a great impression on Prugh.

[T]hat the senior military lawyer in that post would have taken the trouble to come out and meet an incoming judge advocate captain. I learned that he met almost every judge advocate as he arrived in Europe. I think that this sort of thing impressed me early in my time

5. *Learn the lessons now, and preserve them for the future.*³⁸⁶

6. *Keep your own notes and records, your memos for record, on matters likely or even just barely possible to become important.*³⁸⁷

7. *Don't look over your shoulder – there is, as Satchel Page remarked, something back there and it might catch up. Be confident! Most worries never come about.*³⁸⁸

8. *Write – if only for your own amusement and records.*³⁸⁹

9. *There is no sense in trying to cover up mistakes.*³⁹⁰

in the JAG Corps—of the interest that the senior officers have and how much this can influence the junior officers to have [a] family aspect to the JAG Corps.

Id.

³⁸⁶ No where was this more the case than with the administration of military tribunals.

[I] think an important thing right now, is that we should be studying how to handle these matters. They are not handled in the same fashion as you try a 1, or 2, or even 4 or 5 accused case. . . . The number of times witnesses must be interrogated, the numbers of counsel which you must provide, the distribution throughout the world, the geographical distribution of the witnesses when there is a long delay before you can bring the case to trial. All of these make it very difficult to try, using the normal system that you would use for [smaller cases]. Our system just breaks down.

Id. Prugh History, 5 July 1975, *supra* note 10, at 6.

³⁸⁷ Major General George S. Prugh, Address at Fort Lewis, Washington, JACG: Past, Present and Future (March 1995) [hereinafter Fort Lewis Address], *in* Prugh Reminiscences, *supra* note 24, at 120.

³⁸⁸ *Id.* at 125.

³⁸⁹ *Id.* “This will have many benefits, including entertaining yourself as you re-read your own papers in retirement.” *Id.*

³⁹⁰ Prugh History, 7 July 1975, *supra* note 10, at 54.

You just as well come right out and admit it when you make mistakes, and take your lumps if you have to. From the standpoint of the commander or leader or manager, it isn't always necessary to give one. Sometimes you can achieve all the corrective action just by

10. *The troops come first, and if its cold enough for them to be without an overcoat, its cold enough for [you] to be without an overcoat.*³⁹¹

11. *Understand that judge advocates are more than just lawyers; they are problem solvers.*³⁹²

12. *Understand the unique nature of the military client.*³⁹³

In a speech following the 1991 Gulf War, MG Prugh recalled a conversation he had with the Army Chief of Staff, GEN Frederick Weyand, about what had gone wrong in the war they had fought together in Vietnam. In it, he recalled the vital contributions uniformed attorneys made, and detailed his vision for the integrated role of judge advocates:

having the right atmosphere and then by not applying the pressure and the power at that time, you can achieve greater results.

Id.

³⁹¹ Prugh History, 5 July 1975, *supra* note 10, at 25. Taking care of Soldiers and their families was extraordinarily important for MG Prugh, and he felt that by doing so, leaders paid both a small debt to those who served past as well enfranchising current military member in the future.

And if they all get this feeling, that we do take care of our own, really, not just lip service to it, then I think this will have a tendency to have more of a family attitude about the [Judge Advocate General's Corps] itself and that makes it a stronger tie with the service. . . . By and large the return on the investment is pretty great.

Id. at 26.

³⁹² Prugh History, 4 April 1977, *supra* note 10, at 47.

This is something that [a judge advocate] must sell to his commander, and it isn't easy for every person. The personality and psychology for each is very different. You have go to persuade [your commander] somehow, whether by action or by word, that you really want to help him; that you are there to try to further the accomplishment of his mission.

Id.

³⁹³ Prugh, Presidio Address *in* Prugh Reminiscences, *supra* note 24, at 110-11.

What my client wanted was military-legal-political judgment, the kind that takes into account all the years of rubbing elbows with line soldiers, with service in the field at varying levels of responsibility, with knowledge of what makes soldiers tick and respond in dirty and dangerous situations, with sharing the same worries, failures, errors, jargon, values, and traditions.

This, it seems to me, is what sets the military lawyer apart from his civilian counterpart. It isn't enough to be able to draft a will, review a contract, serve as counsel or judge, or accomplish all the many chores lawyers traditionally perform. Those tasks have to be undertaken within the special environment of the military service, with full knowledge of the military risks and principles, supported by the confidence of that military client that the advice he or she is getting is well-suited to the real military world. . . . [I]t has to be delivered in terms understandable to a very specialized class that has its own time-tested structure, language, and atmosphere.³⁹⁴

IX. Conclusion: The Past as Prologue

As soon as I identify a particular fact and put it in a time box the damn fact shifts to an older status. The future becomes the present and almost instantly becomes the past. Rather like learning that the fine old Army Court of Military Review, also once known as the Army Board of Review, has again changed its name to the Army Court of Criminal Appeals.³⁹⁵

Major General Prugh was at the center of dramatic institutional changes in military law and practice and had a significant hand in moving judge advocates out of the narrow space of administrative legal practice and into their proper role as command counselor integrated into military operations. He saw uniformed attorneys as problem solvers, who should look to the law with a broad view on making it work for commanders as another combat multiplier. Examples include his use of

³⁹⁴ *Id.* at 112; see also Prugh History, 6 April 1977, *supra* note 10, at 71.

³⁹⁵ Presidio Address in Prugh Reminiscences, *supra* note 24, at 123.

Advisory Detachments in Vietnam, application of the Geneva Conventions to detainees and insurgents, and his role in creating a separate criminal defense service to make it a fairer, more professional and trusted institution.

Some of the great legacies of Prugh's career were the lessons he created through decades of thoughtful writing, speeches, mentorship, and action. His contributions to the Army legal community are the recorded history of a life spent witnessing events with timeless relevance, and the expanded scope of responsibilities of uniformed attorneys, which he championed. His service during the war in Vietnam, and the American desire for definitive timelines and clarity amid the uncertainty of military operations, are as valid today as they were three decades ago. In particular, leaders seeking to build a future based on an understanding of the past should study his efforts on behalf of international law and the integration of military lawyers in the operational setting. On 16 March 1991, Prugh gave a presentation on the 1991 Gulf War at the Presidio of San Francisco,³⁹⁶ in which he summarized his observations on the perpetual lessons of war and the role of the judge advocate:

(1) [T]he calling of the military lawyer is not measured simply by the metes and bounds of the law – on the contrary it has a full military scope; (2) the lessons of war are never-ending and ever-changing. Each generation of commanders and their legal advisors is continually engaged in this learning process, whether assaulting the beaches of Normandy, slogging through Korean mud, or scouting a jungle tree line. The sands of the Gulf War were only the most recent classroom.³⁹⁷

While Prugh participated and contributed much to the development and application of international law, his career also spanned a period of breathtaking transformation in military justice. From the mid-1940s through the early 1970s, a vastly improved professional judiciary, an increasingly autonomous criminal defense organization, the refinement of the Military Rules of Evidence to become consistent with federal standards, and the greater sophistication of military legal training and education dramatically characterized the civilianization of military

³⁹⁶ *Id.* at 110-119.

³⁹⁷ *Id.* at 116.

criminal practice.³⁹⁸ As Prugh noted in 2000, “Fifty years of activity under the UCMJ have quieted the strident voices of so-called reform that Congress heard in those early days following World War II.”³⁹⁹

Prugh retired from the Army on 30 June 1975 before a memorable review of the Old Guard in Fort Myer, Virginia.⁴⁰⁰ On that day, as he and his family were leaving the parade grounds, he recalls a young judge advocate captain saying, “Well, it sure beats retiring from General Motors.”⁴⁰¹ For Prugh, he “couldn’t help think that [the young captain] had expressed a good deal in that one simple sentence of the great life that Army service has and can make possible, and how it stands apart from almost any other kind of activity that [he knew] of and certainly so for the military lawyer.”⁴⁰² That great life took him from the sandlots of San Francisco, to New Guinea, Germany, Vietnam, and the Pentagon, where he witnessed historic changes in the law of war and the practice of military law.

Following his retirement, Prugh returned to his beloved Northern California where he accepted a faculty position with his alma mater at Hastings College of Law. He taught criminal law and procedure and continued to actively write and speak on matters of importance, with particular emphasis on the Geneva Conventions and the law of war. He retired from Hastings in 1982 but continued to contribute to his considerable legacy of writings and speeches. General Prugh and his wife, Kate, presently lead a quiet life in their home overlooking the mountains outside the San Francisco bay area.

Over the span of three decades, George Prugh answered many of the questions some still ask about the role of legal professionals in military operations. The significance of his military career, his life, and the immeasurable contribution he made to the Army cannot be overstated. His experience with the treatment of insurgents and questions of status and law are more relevant than ever. His concerns with judge advocate professional development are timeless, and his profound dedication to expanded roles for uniformed attorneys finds voice in the new modular force where judge advocates are imbedded at the brigade level. He was a

³⁹⁸ PRUGH OBSERVATIONS, *supra* note 32, at 40.

³⁹⁹ *Id.* at 41.

⁴⁰⁰ Prugh History, 7 May 1977, *supra* note 10, at 9.

⁴⁰¹ *Id.* at 10.

⁴⁰² *Id.*

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remarkable lawyer with a true sense of history, and should be credited as one of the great architects of the modern JAGC.