

THE SEVENTH ANNUAL GEORGE S. PRUGH LECTURE IN
MILITARY LEGAL HISTORY*

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It is a high honor to talk to you today. In fact, you're the first group of lawyers with whom I have discussed this subject. And I told my father before I came out east from Illinois that I was going to be talking to a group of over a hundred military lawyers. He had been a Private First Class in the Hürtgen Forest and the Battle of the Bulge in World War II; he's not a lawyer either. And when I told him about how many lawyers I was going to speak with today, he said, "What kind of trouble have you gotten into this time?"

I am here today to tell you about mysterious murders that happened seventy years ago, about late night courts-martial, about a secret order on jury composition. I'm here to tell you about the mysterious hangman who drove around France wheeling an Army flatbed with a gallows on the back. I'm here to tell you about a death train moving bodies to a secret cemetery in the dark of night. That secret cemetery exists to this

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During Operation Desert Storm, then-Major MacLean fought in Iraq as a battalion operations officer in a mechanized infantry battalion; twelve years later, in 2003, Colonel MacLean returned to Iraq as the historian for U.S. Army Fifth Corps during Operation Iraqi Freedom.

Before retiring from active duty, Colonel MacLean served as the Inspector General for the U.S. Army, Europe, and as a course director and professor at the National War College at Fort McNair, Washington, D.C.

A prolific author, French MacLean has authored the acclaimed *Custer's Best: The Story of Company M, 7th Cavalry at the Little Bighorn*, and ten books on World War II. The British historian Sir John Keegan wrote that MacLean's *Quiet Flows the Rhine* is "a most valuable study of the German Army in the Second World War".

The Fifth Field, Colonel MacLean's study of death penalty courts-martial in World War II Europe, was published in 2013. *The Fifth Field* won the Lieutenant General Richard G. Trefry Award, in the 2013 Army Historical Foundation Distinguished Writings Awards.

day and your General would have a hard time visiting it without special permission from Washington, D.C. My story today is about a time, back in World War II, when Judge Advocates were the big dogs on the porch. My story is about when giants walked the earth, but it's a complicated story.

In December of 1944, the Army's Deputy Judge Advocate gave a speech in Milwaukee positing that if he were a defendant and had to choose between a military or civilian criminal venue, his choice would depend on whether or not he was guilty. If he were innocent, he would ask for a trial by court-martial. But, if he knew that he were guilty, than a military courtroom is the last one into which he would want to walk. I reach the same conclusion after twelve years of researching ninety-six executions of military members in Europe during the aftermath of World War II.

I believe that now in the Judge Advocate General's Corps, as well as in Europe during World War II, are, maybe, the two most interesting times for Judge Advocates that we have known throughout history. We can learn a lot from what went on in World War II. And I think that future generations will look back at your work today learn that not only was the country fighting nation-state adversaries, but enemies that were not nation states that we would call terrorists.

From my perspective as a former Inspector General, sometimes you can follow all the rules; you can dot the i's and cross the t's legally, but if something looks bad, it will be addressed somewhere in the process. You'll hear some things today that do not look very good.

So no matter what you work with or what subject you tackle, someday somebody is going to find out about it. Colleagues will tell you: "This is secret. No dissemination. Keep it close hold." But these declarations cannot defend against an Inspector General or a Judge Advocate fifty years from now who is interested and goes through files knowing for what to look and finding answers. I am not implying that there are deliberate cover-ups, but simply that work will see the light of day at some point. Obviously, you cannot undo a death penalty decision once it has been carried out. But I think equally as important, is the effect on courts-martial panelists who knew that their death sentence actually had been executed.

I do not think history has done a good job preserving the effect on the psyche of these folks that are carrying out the judicial system. I would like to tell you about Sergeant Mosley who died in 1953; a big man, 6' 5", 230, from hardscrabble Eastern Kentucky. Sergeant Mosley escorted a number of prisoners from the flatbed truck to the scaffold. In one instance, in France, he and another military police officer, who was also a rather large fellow, allowed the prisoner one last cigarette before they took him to the gallows, which was completely against regulation. I interviewed an old Frenchman who remembered seeing them. It's the humanity he remembered. The Frenchman said those, physically, were the two biggest men that he had ever seen, but in the final moments of that one Soldier's life, they provided a little bit of kindness.

Well, Sergeant Mosley could only take so much. After a number of these executions—remember he is the biggest guy in the barracks—he starts to wet the bed at night. His gut starts to hurt, and they had to take him off of that duty and assign him to other duties. He died in his forties in 1953. I submit that a contributing factor to such an early death might have been the work he had to do with respect to these executions. At some point, historians need to examine that and find out what are the effects.

I believe that in contemporary debates and discussions about the death penalty in the United States, the military needs to weigh in because the death penalty in the military could be considered a little different than in the civilian system. I hope that these ninety-six cases, no matter how one comes down on the death penalty debate, can inform people a little bit about the lasting ramifications of the death penalty, at least in these particular trials.

Now, I was in Desert Storm. I was in Iraq in 2003. If someone had told me then that one day I would be in favor of General Order No. 1—no cold beers—I would have said, "Not me." But in seventy-one of these ninety-six World War II cases, the defendant had consumed some amount of alcohol before he committed the offense. I can't tell you that he was legally intoxicated—we do not know the percentages except in a few cases—but alcohol was a contributing factor. If today you are advising one of your Commanders and he is considering maybe not having the ban on alcohol, feel free to say, "Fine, sir. 96 executions; a lot of murders; 71 were drunk. But just let me know, and I will do whatever you want."

The files on these execution cases rested with the Army for almost seventy years; approximately two years ago the National Archive system gained them, and they are currently in St. Louis. They are in a place called “the Vault.” It has a massive door and massive walls, and is fireproof because, as you know, back in 1973 the Archives out there had a horrible fire and a lot of these records were burned up.

In my initial hunt for the records out at the Archives, they told me that most of them burned up; I could not get to them. But as I found out, at least ninety-three are still in existence. I think more of these records survived out there, and you may have to stay at it to get at these records.

It has been a long and winding road from the beginning of this project to *The Fifth Field*. On September 11, 2001, I was a professor at the National War College. I figured sooner or later the United States was going to catch some of these terrorists and, like many, I wondered what we were going to do with them. I thought I should go over to see the Judge Advocate General, because the government might start military tribunals any week now. I spoke with my students about the pros and cons of military tribunals from a Soldier’s perspective, not from a legal one.

While I was visiting the Army’s Clerk of Court’s Office, a nice lady who had probably worked there thirty-five or forty years came up to me and said, “Colonel, do you want to see the death book?” Well, making the decision in about two seconds, “Do I want to go through my whole life never knowing what that was or do I want to see the death book?” She brings out an accountant’s ledger. It is green and large. When I open it, in very neat ink handwriting, pre-ballpoint pen, is the information of all of these death penalty cases. I read through them for hours, not having known anything about this part of our history. I knew about Eddie Slovik but I did not know about the other 95.

When I finish with the death book and give it back to her, she says, “Do you want to see the case files?” “Sure, where are they?” She responds, “In the closet.” She wheels out the first case file which is thick with papers. It contains trial records and witness statements and pictures and military police reports.

The first case contains a heavy, closed envelope. I reach in and pull out the murder weapon. It is the knife that the Soldier used to stab and

kill a military policeman. And this kid paid for it with his life. Well, now, I have to see all the files!

I copied as many of the files as I could, to get a historical record of each case. I was not looking to overturn cases. I figured if a series of reviews said everything was legal and all the Commanders said everything was legal in a particular case, who am I, as a non-lawyer, to say, "Well, you violated this rule of evidence?" I wouldn't know that. So I'm writing about these Soldiers' histories. And while I do that, I find out that they are buried in one cemetery, that I call the Fifth Field.

This cemetery, the Fifth Field, is also known as Plot E. It is sixty-five miles northeast of Paris, adjacent to a World War I military cemetery, which has four fields: A, B, C, and D. You have visited these cemeteries; you know the crosses marking each grave. The grass is perfect. The crosses are all clean all the time. Past these pristine fields, there is another field. This one is behind a ten to twelve foot wall, and no one can go into without special permission.

The Fifth Field is all based on records and reports and I knew I really needed to get some first-hand testimony or first-hand witnesses. So I put on my website, in a searchable format, the names of about twenty Military Police guards at the various stockades in Europe during World War II, hoping that someone today would be surfing the net, searching for that name.

And sure enough, a lady called me and said, my uncle was the Supply Sergeant at the Loire Disciplinary Training Center and he has stories about the twelve executions there. Back then, the hangman would come into stockade supply room two days prior to the execution, sit down, have a cup of coffee with the Supply Sergeant and then say, "Okay, let's get the rope." They would roll this rope out from a spool until it was the width of the supply room and that's how they would cut it. Not very precise. You know, it wasn't down to the inch, but it was good enough. And then, they would have a roll of black hoods. It was similar to the system at the grocery store where you pull the bag down to put apples in the bag and the bag tears off the spool. It was kind of like that.

I received another call from a fellow down South who said, "My father talked to me about four executions in Italy." The father died in 1992 and the son told me about this and lots of other things. I'm taking

notes on the phone, and I told the fellow that he had a fabulous memory remembering what his father told him twenty-one years ago. He said, “Oh, no. It’s not my memory. I’m looking at pictures.” What pictures? The Army said there wouldn’t be any pictures because it was strictly forbidden to take photos. But the fellow says, “Oh, sure. I have photos of two hangings and two firing squads.”

The last time photos emerged of the United States Army executing United States citizens, to my knowledge, is the Lincoln conspirators back up in Washington in 1865. The reason I’m sharing this is that I believe that posting things on the Internet may become a tool for people who are surfing to contact you with possible evidence that you would not have normally. You can run an advertisement on the television or the radio, but that goes in one ear and out the other. You might need to figure out the chain-of-custody for evidence, and so forth, but it might be something that could help you in the future.

As an old professor from the National War College and a graduate of the School of Advanced Military Science out at Fort Leavenworth, I cannot give a briefing without mentioning Carl von Clausewitz.

Clausewitz said that a War for national survival would approach total War and people would do things “outside the box” just to survive. World War II was one of those types of Wars. Americans have had three such Wars: The Revolutionary War, which if we failed, we didn’t become a country; The Civil War, which if the Union failed, it became two countries; and World War II, which if we fail and the Germans win, our whole way of life is going to change.

During World War II, over ten million folks were inducted; 400,000 died. Now, remember that then, the country was half the size that it is today, so double the numbers to get the true impact. It would be the equivalent of 800,000 fatalities. You can imagine what people would think about that. I do not know how Judge Advocates did it. Their jurisdiction was not just in Europe but in the Pacific, the Canal, China, Burma, India, Alaska and the Continental United States. There were 12,000 general courts-martial.

All of those dots are serious crimes. The ones with X’s are murders, most of the others are rapes. That’s the Normandy Peninsula. Up at the top you see a bunch of them. They go to Cherbourg, that’s the largest city. And then over here kind of by the legend, there are the Normandy

beaches. This is just for September. Supplies are coming into Normandy, because the front line now is way over by the exit door. By September, we're at the Siegfried Line, Patton's pushing. He's running out of gas, and we've got all of these supplies coming through, and all of these crimes are being committed against French citizens.

[Generals Omar] Bradley and [Dwight] Eisenhower must be going crazy. A French doctor who examines a rape victim said, "I've seen something like this before, when the Gestapo interrogated somebody." You never want to be compared to the Gestapo! Bradley must be concerned that the French are going to pull rifles from the barn and start shooting at Americans. That would impact operations. It would impact supplies. Clearly a few Soldiers' criminality affects operations; and that is, of course, where Judge Advocates come in.

When I reviewed all ninety-six courts-martial, I found between six and eleven voting members on each panel. I never found one that had more than eleven, and I never found one that had less than six. In order for a panel to convict and sentence to the death penalty, there had to be seventy-five percent and fractions accrued to the defendant. Once an accused entered the sentencing phase, the panel had to vote one hundred percent for death. If one person didn't, then the accused would get life.

All of the jurors had other jobs; they were commanders, staff officers. It was part of their duty to be on a court-martial, but they had things on their minds as well. In my research, I identified 409 jurors and I found out their grades. There were no General Officers on any of these panels. Some may feel that an accused may not want an infantry officer on a panel because he would vote for guilty all the time. I did not find that to be the case. The three largest contributors to panels were: the Corps of Engineers, Infantry, and Quartermaster. Sixteen Judge Advocates sat as voting members on panels, an occurrence which I do not think would happen today. Twenty-two panel members graduated from the United States Military Academy at West Point. Four officers sat on execution panels that ended up executing five guys. Is it easier for them the second time around? If today, in military tribunals, panels used the same members more than once, someone is going to ask that question.

Back then, in the earlier part of the War, the defense counsel was not a lawyer, and that's just the way it was. Sometimes the prosecutor was not a lawyer either. The president was the senior officer. Also a law

member would determine the rules of evidence. If the defense counsel objected to something, then the law member would look it up in the 1928 *Manual for Courts-Martial*.

Now, remember, some of these trials lasted from opening gavel to closing gavel, eighty minutes. So that law member is not going to say, "I'm going to go to the law library to look this up." He is frantically searching, and probably the other guys are saying, "No, no! You need to go to paragraph 3-1. But that contradicts paragraph 4-5! What do we do?" They are making decisions really fast.

I used the term "guys" because in those days there were no female officers who sat on any of these ninety-six court-martial cases. No female defendants were prosecuted in any of these ninety-six cases. That was the way it was. And then, there were no enlisted personnel as part of the jury.

In my study of the ninety-six executions, all were for murder and rape, except for Eddie Slovik. Twenty-six of the victims were military personnel of which four were officers. Some of the victims were in the performance of their duties, like an officer of the day checking a guard out, asking him for his weapon, and the kid shoots him. Some of them involve a guy and his best buddy playing craps. The guy loses all of his money to his buddy. The buddy makes fun of him. He pulls out his M1 Garand, pumps eight rounds into him. So some of them are duty-related, some of them aren't. A lot of them were stupid crimes.

In these cases, Soldiers murdered thirty-five British, French, and Italian civilians. Soldiers raped thirty-six female civilians. There were three types of review back after World War II, none of them involving civilian review. The convening authority's Judge Advocate would offer his opinion on whether everything was legal. It then would go up to the Theater Judge Advocate, a Brigadier General, and he would offer his opinion. Finally, the branch office within each theater would offer an opinion. At this level a three-person board convened to review the case. This board worked for the Judge Advocate General in Washington; it did not report to Eisenhower. So nobody in Eisenhower's chain could pressure the board. Their first headquarters was in downtown London. Their second headquarters was in downtown Paris, three blocks from Harry's New York Bar. It's good duty. Somebody had to do it, but you were not in the Hürtgen Forest.

The theater commander was the confirming authority. In my opinion, it could have been withheld by the president. In one case, the appeal did go to the president and his military aide said, "Sir, you don't want to touch this. Let Eisenhower do it." And the President said words to the effect of, "You're right," and he sent it back. Eisenhower was the confirming authority for every execution in the European theater. Italy was the Mediterranean theater and Eisenhower did not have anything to do with that; that was a different four-star general.

Two of the most well-known convening approving authorities were General [George S.] Patton and General Bradley. If, in the 1940s, there was something that could be considered a rocket docket, it was the 3rd Army under General Patton. From the commission of an offense, assuming law enforcement arrested the accused at about that time or a few hours later, to the time of the court-martial, General Patton's boys could get a case to court in five days: investigation, preferral of charges, all of that stuff. Now, the down side is, I wonder, when did the defense counsel meet the defendant for the first time and how long did the defense counsel have to prepare?

One of the reasons cases moved so quickly was that the tactical front was moving. Sometimes it moved very rapidly and investigators could not wait a month or two to interview civilians. Remember, also, there were 400,000 dead. Witnesses die every day in Europe and if investigators did not get that testimony, it was lost.

When cases reached General Eisenhower for review, his Judge Advocate said, "Look, Boss. Whenever we send one of these up to you, you say, 'but he's so young.' The whole Army is young. That is all you are going to get." There were no sixty-year-old guys in the Army. They were nineteen. They were eighteen. Some of them were younger. All of them were junior enlisted. Today's equivalent today would be an E5 or below. Once a Soldier was condemned, he was reduced from Private to general prisoner.

Of the ninety-six, sixty-one had previous court-martial convictions. Those convictions could be evidence at trial if they were within a year of the court-martial. If the conviction was older than a year, it would not be allowed. Six of the ninety-six were convicted felons. There was a guy there from Sing Sing, a guy there from Menard that was doing twenty for armed robbery; San Quentin had a guy for auto robbery. The Soldier from Sing Sing previously had about five counts of assault with a deadly

weapon, and then in the Army he stabbed somebody. Who would have thought it? How he must have turned when he came in the Army.

Back then, there was no computer system to check these Soldiers. America was a big country; the Army did not know about the Soldiers backgrounds. A young man would tell the personnel specialist, "I want to join the Army. I am from New York City." There was no way to check up on that. But every time a jury condemned a Soldier to death, the Army would request from the Federal Bureau of Investigation (FBI) any records by fingerprint that this guy may have from his civilian life. The jury would never get this information. Eisenhower would get it in Europe only if it reached him in time. Sometimes the FBI was so late that they did not get the prints back until months after the execution.

Of the executions, eighty-nine were by hanging while seven were by firing squad. Thirteen of the hangings and two firing squads were botched. What's a botched firing squad? A botched firing squad is if the person does not die right away. Why am I telling you this? People think from cradle-to-grave that everything with the judicial system really does belong to the attorneys. So if the execution does not go right, lawyers get a black eye even though by the staff division manual it is the Provost Marshall who is responsible.

When United States forces got to Britain, we did not have our own hangman. The British let us use theirs at ten pounds [sterling] a whack. The British conducted seventeen hangings. One executioner conducted about 180 hangings in his career while his young nephew conducted 345. They knew how to do it and they had it down to a science to where the Soldier died immediately when he was hanged. They would weigh and measure the Soldier and calculate the drop.

If a Soldier killed a Frenchman or raped a French woman, the Army would hang the Soldier very close to where the crime was committed so the people in the town could see that they meant business. Could you imagine the uproar today if a Soldier was taken back to Afghanistan for punishment? We would probably hear a little bit about that.

It was not enough for a case to be legally-sufficient; it had to pass the common sense test, too. In Sicily, four Soldiers raped a woman at gunpoint. The Army wanted a joint court-martial. The defense counsel disagreed; they wanted severed trials. So, the Army severed them. At the first trial, the panel finds the Soldier guilty in 80 minutes and gives him

the death penalty. The courtroom is cleared for the next defense counsel and Defendant No. 2. The very same jury comes strolling on in. They sit down. They use the same jury for all four. Now, as I look at it from a historical perspective, I see the length of each trial shortening over time. Maybe the panel was hungry, maybe it was getting close to lunch. I figure they are assimilating all of this, and I do not think that is what is supposed to happen. That's not what any of you signed up to do.

Down in North Africa and Sicily, the delegation of the onerous execution duty got passed down from the senior officers to the junior officers, usually Majors. Eisenhower did not like that, so he calls in his Provost Marshall, a Brigadier General, and says, "You're hanging him. No delegation. You put the rope; you pull the lever." Eisenhower tells the theater Judge Advocate, "You're watching." He tells the investigating officer, "You're watching." He tells the president of all four panels, "You're watching. If you are going to sentence these Soldiers to death, you have got to be big enough to watch them hang." So all of these senior Generals and Colonels go and watch the four Sicily guys get hanged.

With regard to clemency, sometimes a panel would declare guilt and adjudge the death penalty and then immediately sign a statement to Eisenhower requesting clemency to reduce the sentence to one of life imprisonment. Well, wait a minute, if only one panel member needed to disagree with the death sentence for it to be life, why did they sentence that way? It is bad enough when the defense counsel sends the letter but it is really bad when the jurors sign on.

Eisenhower could see that the Army was going to integrate after the War. He put out an order that said, in death penalty cases and other serious courts-martial that could inflame racial sensibilities, at least one panel member would be of the same race as the defendant. Now, of the lawyers I have talked to, some say this was good; some say that he should not have tinkered with the panel. The problem with this order was that he put it out secretly.

The first wave of commanders heard it; but when they transferred, there was nothing in writing, and so subsequent commanders may not have followed through. If Eisenhower was going to do it, the secret part really hurt. Eisenhower received a Judge Advocate colonel on the European Theater of Operations staff and he used him as a direct telescope into many death penalty cases. He told the Judge Advocate to

look at every death penalty case and tell him if something did not seem right. I believe Eisenhower used that attorney to overturn some death penalty sentences because that Judge Advocate could come in with no fear of retribution and say, "Sir, this didn't smell too good on this one."

What would get a Soldier life imprisonment? Well I asked myself how I would have voted in a separate chapter in the book; this is just my view. When the 'shrinks' came back and said that the Soldier had the mental capacity of a six-year-old—I'm not hanging him. I can't do that. Or when the military police arrest a Soldier for being boisterous in a bar and they use racially-sensitive language and the Soldier, just a kid really, pulls out a pistol and kills one, I am not hanging him either. Now, he killed them, but there was a contributing factor that would stop me from giving the death penalty. So when Eisenhower said, "Don't do the trial," unless you have a racially-mixed jury, then you don't go do that. Historical records support that many panels knew of this order but went ahead to trial anyway. That secret order should have been promulgated openly.

Often, only after the execution did families get notified by telegram saying, for example, that their son died in Paris, France, August 31, 1944, due to his own misconduct of judicial asphyxiation. Families might not have understood what this meant until they brought that letter to the old local justice of the peace. The families did not get insurance because the death was due to the Soldiers' own misconduct. The Soldiers were buried in France. This is, in a way, their second punishment. In my opinion, punishment stops at death. I think these Soldiers ought to have some kind of marker that has their names on it.

As I reviewed the casualty notifications, I found in one file a letter from an old man who was looking for his father's grave.. He did not know what happened to his father in World War II. From the file, it was clear that the Army had given all the information to this man's congressman, and the congressman had chosen not to give it to him. Well, I called him up. The man said, "Sir, I have been trying to find out my whole life what happened to my dad. Nobody will tell me." I sent him the pictures of his father's grave. He called me back crying. He said, "Nobody would ever help me; nobody told me. Why wouldn't they tell me where he was buried? Now I know where he's buried, now I can rest." I hung up the phone. He called me up about an hour later and said, "Do you know how my dad died?" I told him that I would not tell him over the telephone but that I would come down to Memphis and tell

him man-to-man. He called me back the next day and told me that he didn't want to know. There is just something not right about kids not knowing where their parents are buried even if the parent did something really bad. As long as the secret cemetery operates the way it does, and until this story sees the light of day, then a lot of people won't know that.