

FOREWORD*

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In the early 1960's, military justice was generally a topic of discussion only within the military services themselves. In the last four or five years, that relative seclusion has disappeared. The trials of Lieutenant Calley, Captain Medina, and Colonel Henderson, growing out of the My Lai incident; the PUEBLO investigation; racial clashes; and dissident activities in the military services—all of these events have thrust military justice into the same focus of public discussion and scrutiny to which civilian criminal law has been subjected since the Supreme Court, under Chief Justice Warren, induced the so-called "Criminal Law Revolution."

In these last few years, we have seen public interest in military justice develop far beyond an immediate interest in individual trials or events. Today, we are witnessing the birth and the death of many concepts of justice for the criminal offender in the civilian community and in the armed services as well. The developments in military justice are of particular interest because they represent, in many instances, the concern of society in general for all aspects of criminal law. Basic and pervasive issues confronting our society have been raised in the military-justice context: What is the role of the individual conscience? What heed should be paid

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to the laws of war? What is the "Rule of Law" that governs us as individuals, and as a nation? Perhaps partly as a result of the probing of these basic issues, military justice has undergone major internal changes. In 1968, Congress passed the Military Justice Act,¹ a statute that made the most extensive changes to the system since 1950. A year later, the United States Supreme Court decided the case of *O'Callahan v. Parker*,² the most important court decision involving military justice in the past 20 years. This case limited military jurisdiction to crimes which are "service-connected." Now, as the war in Vietnam winds down, new issues are being raised. We must analyze our experiences with military justice under combat conditions, and we must implement the meaningful lessons we have learned.

In the context of the tasks which still confront us, of the whirlwind of changes to military justice, and of continuing public debate and concern, it seems appropriate to analyze briefly the current state of military justice. The 1968 amendments to the Uniform Code of Military Justice modernized our military courts to a significant degree. If you were to enter a military courtroom today, I doubt if you would really notice any great difference between the conduct of a trial in the military courtroom and a trial in non-military federal or state courts.

Setting aside summary courts-martial, which try petty offenses, there are two basic military courts—general courts-martial, and special courts-martial. General courts-martial may impose any punishment authorized for the offense in question. They are thus roughly equivalent to state courts which have jurisdiction over felonies and other more serious offenses. Special courts-martial may impose penalties only up to a bad conduct discharge and six months' confinement. They thus correspond to local criminal courts which try less serious offenses.

In all general courts-martial, and in any special court-martial in which a man is in danger of receiving a punitive discharge, the trial is presided over by a military judge. This judge is an attorney who is admitted to practice before a federal court or the highest court of a state, and who is also certified by the Judge Advocate General as qualified to sit as a judge. The court members, who perform the function of a civilian jury and also fix the sentence, may include one-third enlisted members if an enlisted accused so requests. In most cases, an accused can elect to be tried by the judge alone. The accused serviceman is defended, free of charge, by another attorney

1. 10 U.S.C. §§ 801 *et seq.* (1970).

2. 395 U.S. 258 (1969).

who also must be admitted to practice before a federal court or the highest court of a state, and who must likewise be certified by the Judge Advocate General as being competent to perform duties as a defense counsel. Usually, these attorneys have received additional training in military law and trial work before they are certified. Of course, an accused man may also retain civilian counsel at his own expense.

As in nonmilitary courts, a man can be convicted only if the Government proves his guilt beyond a reasonable doubt. The accused has the right to cross-examine witnesses and to subpoena witnesses, at Government expense, in his own behalf.

If he is convicted at trial, the case is still not final until it has gone through an elaborate system of appeals. If the officer who convened the court approves the findings, and if the sentence includes a punitive discharge or a year's confinement (the convening authority can reduce, but never increase, the sentence) it is automatically reviewed by the individual service's Court of Military Review in Washington. This court, unlike most civilian appellate courts, has the power to make factual determinations and to reduce the sentence as well as to note legal errors committed at the trial. An even further appeal may be requested to the United States Court of Military Appeals, a court composed of three civilian judges appointed by the President with the advice and consent of the Senate.

This analogy between military and civilian courts can be overextended. Because changes in the military-justice system have been closely related to the over-all changes in both our civilian and our military society, there has been a tendency to equate the goals of both of those systems of justice. While the ultimate goal of both systems is the same—maintaining a balance between the rights of the individual and the rights of society—the paths by which that goal is reached are necessarily different. This difference was explicitly recognized by the Founding Fathers when they gave Congress the power to make rules for the governing of our land and naval forces. The Armed Forces function is to defend the country. The action of the man in uniform must be directed toward the fulfillment of the specific military mission. Military justice therefore has an affirmative aspect which is not present in civilian justice: a serviceman must be at a certain place at a specified time; his uni-

form must be appropriate; he must obey every lawful order given to him by a superior; he must use his initiative to aid in the success of the military mission, rather than to achieve some personal goal. You cannot "drop out" of the military society.

The need for personal freedom, however, persists in the military services. This is so because of the inherent value of each American. The balance of justice in the military services therefore exists in the relationship between the subordination of the individual to the chain of command, on the one hand, and personal dignity and initiative on the other. The enactment of the Uniform Code of Military Justice³ in 1950, and its major revisions in 1963 and in 1968, narrowed the gap between the civilian and military balances of justice. In the final analysis, however, it is still necessary to realize that the military services are distinctive, because they alone have the responsibility for preparing for and waging war and combat.

The balance of justice in the military services is appropriate to its goals. The system, if it is to meet the needs of the Armed Forces and their mission, must ensure a universally firm and fair discipline. It must attain that result reasonably quickly, for justice delayed is justice denied, not only for the accused, but for the Government as well. At the same time, the military justice system is premised on the belief that an individual should not be deprived of any right which he might enjoy as a civilian unless the deprivation of that right contributes to the success of the military mission. In fact, the accused serviceman, in many cases, enjoys a broader range of protections than does his civilian counterpart. It is significant that many rules of constitutional dimension existed in the military services long before they were imposed by the United State Supreme Court upon a resistant civilian society. A few examples will illustrate this point.

The point of initial confrontation between an alleged wrongdoer and a law-enforcement agency is a good place to look for the balance of justice existing in any society. The advice to be afforded suspects before interrogation was set forth by the Supreme Court in *Escobedo v. Illinois*,⁴ in 1964 and in *Miranda v. Arizona*⁵ in 1966. In the military services, however, the rules announced in *Escobedo* provoked little comment. They had already been standard military practice for seven years. In fact, the appellate defense attorney who argued *Escobedo* before the Supreme Court was

3. 10 U.S.C. §§ 801 *et seq.* (1970).

4. 378 U.S. 478 (1964).

5. 384 U.S. 436 (1966).

a former military lawyer who sought for his client the rights that he would already have had in the military services.

The decision of the Supreme Court in *Miranda* had similarly been foreshadowed in the military services. Article 31 of the Uniform Code of Military Justice⁶ requires that any suspect must be advised, prior to questioning, of the offenses of which he is suspected, that he has a right to remain silent, and that anything he says may be used against him at trial. In fact, the experience of the military services was cited by the Supreme Court in *Miranda* as an indication of the feasibility of requiring such specific warnings. Subsequent to *Miranda*, the military services have again gone beyond the civilian requirements in this area. Not only was the *Miranda* requirement—that the suspect be advised before interrogation of his rights to counsel—adopted in the military system, but a “statement” of the accused in the military services has been interpreted to include handwriting exemplars and blood samples.

The fourth amendment to the Constitution guarantees to the individual the right to be secure in his home and private possessions. Prior to 1961, however, when the Supreme Court decided *Mapp v. Ohio*,⁷ evidence gained as the result of an illegal search and seizure was admissible in the courts of more than half of our States. The military services, on the other hand, had barred such evidence since 1929. This military rule was subsequently embodied in the Executive Order known as *The Manual for Courts-Martial*, effective as of May 31, 1951—10 years before *Mapp*. As applied in the military services, a commanding officer stands in lieu of a magistrate. He can authorize the search of a military person or property on a military installation after determining the existence of probable cause. The standards of probable cause for the commanding officer are equivalent to the standards required of his civilian counterpart.

The grand jury or comparable investigation is another important aspect of the fifth amendment to our Constitution. In civilian jurisdictions, a grand-jury proceeding is characterized by an air of secrecy. In most instances, disclosure of testimony to the accused is forbidden unless a particularized need is demonstrated. The military counterpart to a grand-jury proceeding is the pretrial investi-

6. 10 U.S.C. § 831 (1970).

7. 367 U.S. 643 (1961).

gation required under Article 32 of our Code.⁸ It is designed to give free access by the defendant to all available information: the military defendant *must* be present at the investigation; he has the right to be represented by counsel; he may cross-examine prosecution witnesses and may call defense witnesses; he may examine all prosecution evidence; and he is entitled to a written report of the substance of all testimony taken. Military pretrial discovery procedures and the Article 32 investigation go a long way toward ensuring that truth—rather than courtroom surprise—will determine guilt or innocence.

The sixth amendment to the Constitution guarantees a “speedy trial” to the accused. In the civilian arena, Federal Rule 48(b),⁹ enforcing the sixth amendment, has been held to permit delays of over four and a half years in bringing an accused to trial. In the military services, the right to speedy trial is enforced by Articles 10 and 33 of the Uniform Code of Military Justice.¹⁰ Article 10 requires “immediate steps” to commence court-martial proceedings. Article 33 requires that any charges against an accused must be forwarded to the officer exercising general court-martial jurisdiction within eight days of arrest. As a result of these requirements, the right to speedy trial in the military services offers greater protection than does the civilian Federal rule. In cases argued before the U.S. Court of Military Appeals, the delays involved between arrest and trial, including the time required to get witnesses and to conduct investigations, have most commonly been between three and five months. The Court of Military Appeals recently held that a delay of longer than three months will be a presumptive violation of speedy-trial rights, placing “a heavy burden on the Government to show diligence, and in the absence of such a showing the charges should be dismissed.”¹¹

In general, then, the fourth, fifth, and sixth amendments, as applied in and by the military services, offer greater protections to the defendant than he would receive in civilian criminal proceedings. This expansive interpretation of individual rights more than corrects any putative imbalance arising from the size, the internal cohesion, and the necessity for efficiency of the military organization, or from the reduced privacy enjoyed by the individual serviceman.

The military-justice system, of course, is not a perfect system. Abuses, quite frankly, do occur from time to time, although the

8. 10 U.S.C. § 832 (1970).

9. FED. R. CRIM. P. 48(b).

10. 10 U.S.C. §§ 810, 833 (1970).

11. *United States v. Burton*, 21 U.S.C.M.A. 112, 44 C.M.R. 166 (1971).

elaborate military system of appellate courts usually rectifies such instances. As society in general and the military society change, however, new balances of justice must be reached. We are thus continually examining the present Uniform Code of Military Justice in light of our experience in order to provide meaningful changes. The chief vehicle for the examination of the Code is a committee composed of the three civilian judges of the United States Court of Military Appeals, the Judge Advocates General of the Armed Forces, and the General Counsel of the Department of Transportation (who represents the Coast Guard). Each year, this committee submits a report to Congress on the current state of military justice, and it recommends changes to the system. This committee recently charged a working-level group, composed of representatives of the Judge Advocates General and the General Counsel of the Department of Transportation, with the task of studying proposed changes on a continuing basis and recommending meritorious suggestions to the committee. This same working group will review the rules of procedure and evidence of military courts and recommend appropriate changes to the President, who has the power to alter those rules by Executive Order.

The role of any criminal-justice system does not end with a verdict of guilt or innocence. The rehabilitation of those who have violated society's laws is a vital aspect of such a system. A visit inside the United States Naval Disciplinary Command at Portsmouth would pleasantly surprise most civilian prisoners. As just one example of the advanced position of that facility, the prisoners there have a choice of 25 separate vocational training programs.

Parole and clemency, of course, are also important tools in fashioning a final sentence to meet the needs of the offender and the best interests of society. In the naval service, the final authority for these functions is vested in the Secretary of the Navy, just as the final authority for these matters in the civilian world usually rests with the governor of a State. Every military prisoner sentenced to a punitive discharge or eight months or more confinement has his case periodically reviewed by a Clemency and Parole Board which makes final recommendations to the Secretary.

Criminal prosecution and penal measures are not the only methods of preserving discipline in the armed services. In the field of drug abuse, for example, rehabilitation often depends upon quick

detection and concentrated medical, psychiatric, and social reorientation. It was for precisely this reason that the Department of Defense recently inaugurated an "exemption program." Under this program, Navymen who have used drugs, or who have simply possessed them for their own use, can be exempted from penal liability, or from discharge under conditions other than honorable, by disclosing this activity to an exemption representative in their command and by agreeing to cooperate in their own rehabilitation. At the same time, the Navy has opened drug rehabilitation centers at the Miramar Naval Air Station in San Diego, California, and at the Naval Air Station at Jacksonville, Florida. These centers are intended to give the men who do come forward a real opportunity for rehabilitation.

As with the drug problem, the laws and methods with which criminal problems are approached must be constantly reevaluated. The just laws of a changing society must be responsive to changing social needs, or they will become unjust laws in a changed society. Preserving and guarding the rights of the individual, and implementing meaningful change and adopting relevant programs, form a part of this process. Understanding and appreciating the primary mission of the military services, and recognizing that military men who never see the inside of a court-martial room also have rights, is just as important. By keeping both of these factors in perspective, the balance of justice in the military services has been and will be preserved.

The greatness of our country is nourished largely by the willingness of its people to remedy social ills, not by violence, but by orderly change in the law. The most perfect machinery of government cannot survive without the consent and the cooperation of the governed. Each of us as an individual must therefore be aware of his responsibilities to his fellow citizens, to his Government, and to the law.

In much the same way, the Armed Forces fulfill their mission only by securing the dedication of the individual men in uniform. It is not the iron and steel of modern weaponry that preserve our freedom—it is the strength of men working together for a common cause, under an equitable system of military justice.

Throughout our history, both military and civilian law have been responsive to changing social conditions. To keep our democracy vital in the future, soldier and citizen alike must dedicate themselves to maintaining our tradition of peaceful change under the rule of law.