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WHAT MILITARY CRIMINAL LAW CAN TEACH US: A UNITED STATES PERSPECTIVE

Donald N. Zillman*

A quarter century ago, any comparative criminal law in the United States tended to treat the federal criminal justice system as the model for other systems (state, military, Indian tribal). The fifty state systems handled the vast majority of criminal cases. They were reforming both their adherence to federal constitutional protections for the accused and their administrative organization. Criminal justice had become a large volume business and old "horse and buggy" practices could not keep up with the workload.

Military criminal law, vintage 1967, seemed even more behind the times. Several of the perceived essentials of modern criminal justice were missing from the military system. The protections of the American *Bill of Rights*¹ were applied haphazardly. The growing unpopularity of the Vietnam War was thoroughly colouring all judgments of military criminal law. Comparative studies of military law and federal civilian criminal law focused on how the military system could become more like the civilian. The whole could be summed up as the title of a popular book, "Military Justice is to Justice as Military Music is to Music."

A quarter century later, comparative study is much more fruitful and balanced. The civilian justice system in the United States (federal or state) is no longer the ideal to be blindly emulated. The military justice system has changed, and it has many valuable insights to offer the other criminal systems in Canada and the United States.

Military law in the United States is older than the *Constitution*.² One of the first acts of the Continental Congress was the adoption of the *British Articles of War* to govern the new Continental Army.³ The *Constitution of 1787* recognized that the new Congress had the power to "make rules for the Government and Regulation of the land and naval Forces."⁴ This provision clearly envisioned that one set of those rules would be a criminal code to govern the armed forces. Congress enacted separate codes for the Army and Navy and periodically renewed them over the next 150 years. American military criminal jurisprudence grew out

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¹*United States Constitution, Bill of Rights, U.S.C.S. Constitution, Amendment 9.*

²*United States Constitution, U.S.C.S. Constitution, Art. I-VII [hereinafter Constitution].*

³*Diary of Congress, Journals of the Continental Congress (1905), vol. 2 at 111 (30 June 1775).*

⁴Art. I, § 8, cl. 14.

of these codes and the regulations, judicial decisions and expert commentary which followed.

Following World War II, military criminal law underwent one of its greatest transformations. In line with the consolidation of all armed forces into the Department of Defence, Congress adopted a *Uniform Code of Military Justice*.⁵ The same criminal statutes would govern soldiers, sailors, marines, and Air Force personnel.⁶ The new Code also made the military one more like civilian criminal codes than had previously been the case. The major changes were in criminal procedure rather than in the definition of criminal acts. As to the latter, the Code continued the prior practice of punishing both common criminal acts (homicide, robbery, rape, etc.) and distinctly military crimes (disobedience of orders, mutiny, sleeping on guard duty, hazarding a vessel and so forth).

A major change from old codes to the new *UCMJ* was the lessening of the criminal justice system as an instrument of the military command. American military justice and virtually any military justice system struggles with the appropriate role of the commander. On the one hand, criminal misconduct in general and the performance of the individual soldier or sailor in the specific, are matters of great concern to the military commander. Command is the effective use of personnel to achieve the military mission. The military commander bears far more direct responsibility for the failure of subordinates than almost any other leader in society. The captain whose ship runs aground or the brigade commander whose unit is ambushed, gains little sympathy by claiming that subordinates "screwed up." He or she will be reminded, in no uncertain terms, that it is the commander's job to see that subordinates do not "screw up." Under these circumstances, it is not unusual that a commander's instinct is to be concerned about any criminal misconduct among the troops under his or her command. This concern can extend to such essentials as determining if the accused committed the criminal act and the appropriate punishment. At the extreme, this could make the commander (often acting through subordinates), investigating officer, prosecutor, judge, jury, and corrections officer.

At the other extreme is the system in which military command is totally removed from the accused during the criminal process. In this system, federal civilian prosecutors, judges, and juries would investigate and adjudicate the criminal offence. Alternatively, the military criminal law system could remove the commander from the process replacing him or her with independent military prosecutors, defence counsel, and judges. The criminal investigation and

⁵The *Uniform Code of Military Justice* is codified at 10 U.S.C. § 801-940 (1992) [hereinafter *UCMJ*].

⁶*Laws of the United States*, c. 169, 81st Cong., 2nd Sess., 64 Statutes at Large 107 *et seq.* (1950).

adjudication would proceed with the soldier's commander as no more than an interested by-stander.

The objection to command control has been the lack of fairness to the individual accused. The widespread exposure of once-and-future civilians to military justice during World War II doomed excessive command involvement. The *UCMJ* and its amendments in 1968 created a model that moved in the direction of greater individual rights to the accused at the expense of command control. The system that exists in 1992 continues to give the commander powers over the criminal process, significantly the ability to bring a criminal prosecution and define some of the terms under which it shall be adjudicated. It provides military defence counsel and judges, at the trial and appellate levels, with almost full independence of the accused's military commander. Also, it provides specific prohibitions of things a commander may not do to prejudice the judicial process. While the names and procedures may be different, the current military felony trial would be easily recognizable to anyone familiar with Anglo-American criminal jurisprudence.

The process begins with the filing of charges, typically by the victim, the commander of the accused, or a military police official.⁷ The charges are acted upon by a military commander who performs some of the functions of the civilian prosecutor.⁸ The more serious the offence, the more high ranking the commander who may convene the court-martial.⁹ At the felony level, the commander is typically a general officer and often the commander of the installation. The commander, after investigation, has the civilian prosecutor's range of options including the following: dismissing the charges, referring the matter to a higher level of command, or initiating court-martial proceedings.¹⁰ While the commander is the statutorily responsible officer, much of the actual processing of charges and the recommendations to prosecute come from the commander's legal staff.¹¹

Unless the parties request trial by military judge alone, the commander will convene the court-martial by appointing a military judge, trial [prosecution] and

⁷*UCMJ*, Art. 30, 10 U.S.C. § 830.

⁸*UCMJ*, Arts. 32-35, 10 U.S.C. §§ 832-35 require the investigation of charges before submission to a general court-martial, the legal advice of the staff judge advocate, and the service of charges on the accused.

⁹*UCMJ*, Arts. 22-24, 10 U.S.C. §§ 822-24. See also, *UCMJ*, Arts. 18-20, 10 U.S.C. §§ 818-20 which spell out the jurisdiction of general, special, and summary courts-martial.

¹⁰*Rules for Courts-Martial* 401, *Manual for Courts-Martial*, II-33 (1984). The President's power to prescribe court-martial rules is spelled out in *UCMJ*, Art. 36, 10 U.S.C. § 836.

¹¹Attorney members of the Judge Advocate General's Corps.

defence counsel, and by naming members of the court.¹² In current practice, both the judge and the defence counsel are members of separate command structures from the convening authority. The goal is to avoid even the appearance of prejudice to the defendant.

The court-martial proceeds like the civilian trial. The defendant may plead guilty, typically by means of a plea bargain,¹³ the prosecution and defence put forth their evidence and witnesses are examined and cross-examined. Constitutional rules regarding search and seizure and statements of the accused are applicable. At the conclusion, the fact finder reaches a judgment as to whether the charges are proven.¹⁴ If they are, he or she then sets the appropriate penalty. Following the completion of the court-martial, the convening officer may modify the punishment in favour of the accused or remit it altogether.¹⁵ In this situation, the commander has a clemency power similar to that of a state governor, which can be exercised for a good reason or for no reason at all.¹⁶

After command review of the court-martial is complete, and if the accused's conviction stands, the appellate process begins. The seriousness of the findings determines the appeal process. Where the sentence is discharge from the service or imprisonment for one year or more, the accused is guaranteed reassessment at the Court of Military Review of his/her service.¹⁷ The Courts of Military Review are usually composed of senior military legal officers. Typically, the defendant will be represented by new counsel who specializes in appellate criminal work.

A further discretionary review is available from the "Supreme Court of the Military." This is the United States Court of Military Appeals created in the *UCMJ*.¹⁸ By statutory requirement, the members of the Court of Military Appeals are civilians, not uniformed military members. The sceptic of military justice will probably be disappointed to find much similarity between civilian and military criminal law. Yet points of difference do exist and an examination of these points will provide valuable lessons to the civilian justice system.

¹²*UCMJ*, Arts. 25-27, 10 U.S.C. §§ 825-27.

¹³*Rules for Courts-Martial* 910, *Manual for Courts-Martial*, II-117.

¹⁴*UCMJ*, Arts. 51-52, 10 U.S.C. §§ 851-52.

¹⁵*UCMJ*, Art. 60, 10 U.S.C. § 860.

¹⁶*Ibid.* at 60(c)(1), 10 U.S.C. § 860, "The authority under this section to modify the findings and sentence...is a matter of command prerogative involving the sole direction of the convening authority."

¹⁷*UCMJ*, Art. 66, 10 U.S.C. § 866.

¹⁸Art. 67, 10 U.S.C. § 867.

The military criminal law experience over the last 20 years offers some useful bases of comparison with civilian criminal justice. In general, military justice has grown in popular esteem, while civilian criminal law has been increasingly criticized. Military justice has generally benefitted from the reforms of the Vietnam era. The full recognition of the military judge and the independence of defence counsel from command influence, have removed two of the perceived deficiencies of the old system. The continued improvement of the military appellate system has allowed for the correction of inevitable trial errors. Also, the development of an all-volunteer force, with high entry and retention standards, has ended some of the problems created by including unproductive and unmilitary persons in the ranks.

Assessment of any criminal justice system can be based on a number of questions which measure of performance. Among them are the following:

Does the system accurately assess guilt?

Does the system provide the accused with the rights promised to even the guilty person under the *Constitution* and laws?

Does the system provide appropriate support for victims and others harmed by criminal activity?

Does the system encourage the correction of the convicted criminal?

Does the system achieve its objectives with the most efficient expenditure of public wealth?

I cannot answer these questions with certainty. However, I will present some features of the military criminal justice system which provide potential answers deserving study by the reformers of civilian systems.

The first feature is the involvement of the commander. While reforms have properly removed the commander from involvement with individual guilt determinations, military criminal law remains commander-focused. He or she convenes the proceedings, receives reports from the legal and police experts about the state of wrongdoing in the command, and exercises a considerable post-conviction clemency power.

The civilian system has no equivalent to the commander. The prosecuting attorney is in a largely adversarial role with the accused. The mayor or governor offers little that makes him or her the employer-supervisor figure. Typically, the politician's role is to rail against crime rather than to undertake serious efforts to control it. The civilian structure of government may place much of the responsibility for crime and punishment on attorneys general and district attorneys who are independent from the mayor or governor of their jurisdictions (or even of a separate political party). Civilian responsibility for crime is thus fragmented. With everyone to blame, there is no one to blame.

The second feature is the specialized nature of the criminal legal profession in the military. At the larger installations criminal work is handled by criminal justice professionals. The prosecutor and the defence counsel are equivalent to civilian district attorneys and public defenders. Criminal law is their primary or entire workload. The generalist handling the occasional criminal case is largely absent from the military. As well, the military judge is a criminal specialist, not a judicial generalist. The military has no separate judicial control over non-criminal matters as is common in civilian spheres. The military judge is drawn from the ranks of military criminal lawyers. Judgeship becomes the next and often final stage of a military professional career that may take the officer to his or her fifties or sixties. A new military judge is often younger than his or her civilian counterpart, but rarely comes to the bench without substantial familiarity with criminal law and practice. The new civilian jurist may reach the bench without any exposure to criminal practice. The military judge may also find greater incentives towards a career in judging than the civilian. The military jurist does not face re-elections or wages well below that of some civilian contemporaries.

Professionalization extends to the military appellate process as well. The work of the "Supreme Court of the Military" is solely criminal. Appeals are automatic and experienced appellate counsel are available to challenge any failings of the defence counsel. The military jurists of the Courts of Military Review come to their appellate assignment with considerable criminal justice experience. Civilian judges of the Court of Military Appeals without such experience find it soon develops.

A third feature of the military justice system involves the treatment of the victim. In recent decades, civilian criminal law has begun to recognize that crime victims may be damaged by the legal system after they have been damaged by the criminal. Civilian efforts to improve the situation have been sporadic and often thwarted by budgetary and constitutional considerations. The military may do better. While the *UCMJ* provides no victims' rights section, the structure of the military is likely to give support and comfort to a victim who is a military member or dependent. Free medical and counselling care is available. Military claims statutes may recompense some criminal harms. Lastly, the military community is likely to side firmly with the victim.

A fourth feature of the military justice system is its potential for rehabilitation of the convicted. The civilian "corrections systems" appear to be doing little correction. The system has little to offer the convict who truly desires to better him or herself. The military, at least, offers rehabilitation within the system. The offender who has not been discharged may anticipate a return to the service after completion of sentence. In practice, however, the shrinking size of the force makes it unlikely that a convicted felon will be retained for a further enlistment.

The military criminal justice system has improved over the years, but it remains short of perfection. Nonetheless, it provides profitable areas of study in criminal justice. I would not urge its complete adoption in the civilian sphere. Each system should be tailored to the distinct constituencies it serves. I would recommend that civilian systems examine features of the military system that have worked well. Possibly, the lessons learned in the military can stimulate reform in the civilian system, especially in those areas that demand improvement.