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### Military Justice and the Right to Counsel (S. Sidney Ulmer)

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## REVIEWS

MILITARY JUSTICE AND THE RIGHT TO COUNSEL. By S. Sidney Ulmer. Lexington, Kentucky: The University Press of Kentucky, 1970. Pp. 115. \$6.50

In 1968 North Korean patrol boats summarily seized the U.S. Navy intelligence ship *Pueblo* off the North Korean coast. The highly publicized Court of Inquiry, convened after the release of *Pueblo* Commander Lloyd M. Bucher and his crew, becomes the launching pad for Professor Ulmer's thoughtful study of

[T]he development of American Military justice in the context of military prosecutions and the interplay of politics and the public with that development.<sup>1</sup>

It is Professor Ulmer's premise that the American public has long been interested in the rights of servicemen prosecuted for alleged irregularities, and that this interest has never been higher than it is now. Even school children know that My Lai is a tiny Vietnamese hamlet and that one Lt. William L. Calley was convicted of killing 22 civilians there. The trials of Calley's superiors, Capt. Ernest L. Medina and Col. Oran K. Henderson, further fire public interest in, and comment on, military justice. Because civilian courts usually cannot grant military prisoners relief until all available remedies within the military system are exhausted,<sup>2</sup> military justice should be of no small interest to us. Professor Ulmer's analysis of the rights of the accused is thus most timely and appropriate for our leisurely reading.

After tracing some parallels between civilian and military justice, and noting that civilian interest in military justice substantially increases during wartime, the book moves from the abstract to the concrete and considers, specifically, the right to counsel in criminal military prosecutions. The primary burden undertaken by Professor Ulmer is a thorough chronological dissertation on the serviceman's right to counsel, beginning with a 1731 South Carolina statute, and ending with a 1969 federal statute extending the right to counsel for bad conduct discharges. Opinions of the Court of Military Appeals, as well as Supreme Court cases, are discussed. Behavior of defense counsel and adequacy are both treated to some extent. The book is historically expository rather than argumentative, but the disparities shown between the military and civilian systems indicate that it is Professor

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1 S. ULMER, MILITARY JUSTICE AND THE RIGHT TO COUNSEL 12 (1970).

2 *Noyd v. Bond*, 395 U.S. 683 (1969).

Ulmer's position that the rights of the civilian accused are more substantial than those of the military accused.

Occasionally the military accused has some procedural advantages over his civilian counterpart. *Gideon v. Wainwright*<sup>3</sup> and its progeny settle the civilian issue of the indigent's right to counsel under the sixth amendment. In general and special courts-martial, lawyer-counsel is provided free even if the accused could afford to pay,<sup>4</sup> whereas the civilian accused must first qualify as an indigent to be eligible for free legal assistance.<sup>5</sup> At a summary courts-martial the accused is exposed to possible confinement for a month or less, but it is not required that he be represented by counsel. He can, however, refuse summary courts-martial and thereby effectively demand special courts-martial, thus obtaining counsel.<sup>6</sup>

Professor Ulmer's observation that liberalization of military law correlates with the use of large numbers of citizen draftees is conclusively proven in his book. It would seem that a President and Congress burdened with an almost universally unpopular Viet Nam war will further relax the rules under which the military is tried. With the recent discharge of two Marine Corps officers as conscientious objectors, one wonders about the extent to which the armed forces will go in assuring the constitutional rights of its constituents.<sup>7</sup> If an all-voluntary armed force is desirable, then it would appear that fact-finding procedures in military trials will have to be much more comparable to those found in civilian life. A tactical retreat must be made from the long-held position of the military establishment, that military justice must be swift and certain, and must be military-administered. In the words of Professor Ulmer:

[T]he draftee is more likely to aspire to the principles and procedures of the larger society and its legal system than the professional military man who may subjugate such values to military expediency.<sup>8</sup>

<sup>3</sup> 372 U.S. 335 (1963).

<sup>4</sup> Uniform Code of Military Justice, 10 U.S.C. § 827(c) (1964). Sentences of more than 6 months confinement can be meted out only at General Courts-Martial, 10 U.S.C. § 818, 819 (1964).

<sup>5</sup> Before the Military Justice Act of 1968, the serviceman's right to counsel before military tribunals was anything but exemplary. See Sherman, *The Right to Counsel in Special Courts-Martial*, 54 A.B.A.J. 866 (1968); see also *Gibbs v. Blackwell*, 354 F.2d 469 (5th Cir. 1965); Application of Stapley, 246 F. Supp. 316 (C.D. Utah 1965), noted in 2 CAL. W. L. REV. 121 (1966); Christensen, *Pretrial Right to Counsel*, 23 MILITARY L. REV. 1 (1964).

<sup>6</sup> Uniform Code of Military Justice, 10 U.S.C. § 820 (1964). For an interesting defense of the adequacy of military rights, see Moyer, *Procedural Rights of the Military Accused: Advantages over a Civilian Defendant*, 51 MILITARY L. REV. 1 (1971).

<sup>7</sup> See Curtis, *Due Process and Military Discharges*, 57 A.B.A.J. 875 (1971).

<sup>8</sup> S. ULMER, *supra* note 1, at 107.

The book carefully distinguishes between the two dimensions of the right to counsel problem. The question of who has the right to counsel can be separated from the issue of qualifications of counsel. It is here that the book must be brought up to date, as it was apparently written prior to the Military Justice Act of 1968<sup>9</sup> Professor Ulmer's discussion is predicated on the old law, under which the accused could be tried before a special court-martial without a lawyer-counsel. Since October, 1968, the trial or defense counsel in both general and special courts-martial must be a judge advocate, a law school graduate, or a bar member, and must be certified as competent to perform trial duties by the Judge Advocate General.<sup>10</sup> Professor Ulmer correctly predicted that the former discrepancy between civilian and military courts would be eliminated.<sup>11</sup> Incidentally, the requirement of certification of competence of trial and defense counsel could well be emulated by civilian courts. All too frequently, opposing advocates in civilian trials are grossly mismatched.

Professor Ulmer suggests that in the period 1951-1967, the United States Court of Military Appeals placed greater emphasis on the behavior of counsel during trial than had the Supreme Court. The American public has since witnessed spectacularly outrageous behavior by defense attorneys in certain highly publicized trials, the likes of which would hardly be tolerated by any military tribunal. Of course, the cases to which Professor Ulmer refers deal with errors in legal judgment rather than deliberate attempts to thwart the judicial process, but it must be expected that obstructive tactics may also find their way into military trials. Counsel who are members of the armed forces may be hesitant to obstruct for the sake of mere obstruction, but the military court's disciplinary powers over civilian attorneys might not be wholly adequate. We have fortunately seen only the highest degree of professional integrity and responsibility in the recent My Lai trials.

#### CONCLUSION

It must be conceded that the few hours needed to read Professor Ulmer's interesting work will be well worth the time. He may not write for the critical lawyer-technician or for the military lawyer, but he does write for the layman and for the general practitioner interested in comparing military justice with that found outside the armed services. For the student who requires a concise summary of the historical

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<sup>9</sup> Pub. L. No. 90-632, 82 Stat. 1335.

<sup>10</sup> Uniform Code of Military Justice, 10 U.S.C. § 827(b), (c) (1964).

<sup>11</sup> S. ULMER, 110.

background of our present system of military justice, the book is a must. The style is fluid and the train of thought is readily comprehensible. Professor Ulmer is never impenetrable or inane, nor does he attempt a task which is inexecutable within the chosen length of his work. On the contrary, the book should be a part of the military justice collection of every law school and county law library.

The military establishments of the world have achieved political power inconceivable before World War II. It is fitting that scholarly work be addressed to the scope of that power and its consequences. In the words of a former Chief Justice of the United States:

Determining the proper role to be assigned to the military in a democratic society has been a troublesome problem for every nation that has aspired to a free political life. The military establishment is, of course, a necessary organ of government; but the reach of its power must be carefully limited lest the delicate balance between freedom and order be upset. The maintenance of the balance is made more difficult by the fact that while the military serves the vital function of preserving the existence of the nation, it is, at the same time, the one element of government that exercises a type of authority not easily assimilated in a free society.<sup>12</sup>

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<sup>12</sup> Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. REV. 181 (1962).

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