

COURTS-MARTIAL AND CIVILIAN COURTS:

HOW THE COURT MARTIAL AFFORDS GREATER CONSTITUTIONAL PROTECTIONS DURING COURT
PROCEDURES AND SENTENCING

By

Jarrett Alan Benkendorfer

A Thesis Submitted to The Honors College

In Partial Fulfillment of the Bachelors Degree with Honors in

Political Science

THE UNIVERSITY OF ARIZONA

MAY 2012

Approved by:



Dr. Chad Westerland

School of Government and Public Policy

STATEMENT BY AUTHOR

This thesis has been submitted in partial fulfillment of requirements for a degree at The University of Arizona and is deposited in the University Library to be made available to borrowers under rules of the Library.

Signed: A handwritten signature in black ink, appearing to read "James R. ...", is written over a horizontal line.

“The fact is, if I were innocent, I would far prefer to stand trial before a military tribunal governed by the Uniform Code of Military Justice than by any court, state or federal.”- F. Lee Bailey

Abstract

There is often a misconception regarding the military and the procedures that it uses in order to bring military personnel and prisoners of war to justice. While it is true that Constitutional liberties are limited within the military system, the Constitution still very much applies to uniformed members who swear an oath to the document. In this regard, the Uniform Code of Military Justice was adopted to mirror the Federal Rules of Evidence, which govern the procedures for Article III courts. Through scrutinizing the sentencing procedures that take place in a civilian court and comparing those same procedures with its court martial counterpart, there is evidence to suggest that the UCMJ has better methods to ensure that a defendant’s rights are protected from the time an investigation begins to the time of acquittal or guilt. The methods in jury selection and the weight of the orders issued by a Judge Advocate General are two examples of such enhanced procedures. Since 2001, there has also been discussion involving detained individuals at Guantanamo Bay, Cuba, which has led to a sparked interest in the discussion of military commissions. Ultimately, individuals are far more likely to face a fair trial if they enter into a court martial rather than a civilian court.

Military rule of law under the Uniform Code of Military Justice assures that all uniformed members of the armed services, veterans and prisoners of war are allotted specific rights while in the service and care of the United States Federal Government. These subjects are afforded the right to stand trial during a court-martial just as civilians are given the same right to stand before their peers in state courts or Article III courts. Unlike the civilian legal system, however, the process and eventual sentencing of enlisted personnel or officers is a much more defined procedure that ultimately guarantees a fair trial. Contrary to the popular misconception that service members renounce their constitutional rights, military personnel are subject to a court system that mirrors the Federal Rules of Evidence and offers the accused more constitutional protections during court proceedings that include protection under the Double Jeopardy Clause, Jury Clause, Self-Incrimination Clause, the right to Freedom of Speech, the Due Process Clause and the enhanced protection of habeas corpus following the Supreme Court's rulings in Hamdan and Boumediene.

Protection Under the Double Jeopardy Clause

A central constitutional right that has been thwarted by the civilian courts during sentencing is the Double Jeopardy Clause of the Fifth Amendment that prohibits an acquitted person from being tried multiple times for the same offense.¹ In *Green v. United States* the Supreme Court held that the prohibition of double jeopardy is absolutely necessary in order to protect an individual from living in a state of anxiety

¹ United States Constitution Amendment V

and insecurity.² However, this right is often neglected during sentencing hearing and acquitted individuals are often subjected to prolonged sentences based on the very conduct for which they have already have been acquitted.³ If the basic principle of the Double Jeopardy Clause is to prevent multiple attempts by the government to punish any individual for a single offense, then the “distinction between enhancements and substantive criminal prohibitions is irrelevant, because sentencing enhancements are a form of punishment.”⁴

Civilian courts generally reject challenges to sentencing enhancements based on the Double Jeopardy Clause by arguing that sentencing enhancements do not “constitute ‘punishment’ for that acquitted conduct.”⁵ Courts have explained that sentencing enhancements for convicted individuals does not punish the defendant for crimes in which he or she was acquitted, but instead prolong a sentence because of the manner that the defendant committed the convicted crime.⁶ Since the defendant demonstrated a clear contempt for the legal system and has character flaws that may result in future disregard for the law, courts have argued that it is therefore necessary and appropriate to enhance punishments during sentencing.⁷ These arguments are unacceptable and only admit to increased punishment for individuals acquitted of criminal conduct.

² Green v. United States, 355 U.S. 184 (1957)

³ Hessick, Carissa B., and F A. Hessick. "Recognizing Constitutional Rights at Sentencing." *California Law Review* 99, no. 47 (2011), pg. 59

⁴ Witte v. United States, 515 US 389, as found in "Recognizing Constitutional Rights at Sentencing.", pg. 59

⁵ Ibid., pg. 59

⁶ Ibid., pg. 59

⁷ Ibid., Pg. 59

Therefore, there is the very real possibility of a defendant being punished twice for each offense: “once at the trial, and once during sentencing for other offenses.”⁸ There is no explanation by the courts to counter claims that defendants are being punished for crimes in which they were acquitted. On the contrary, the courts openly submit that no matter what the accused was charged with, the past actions of the defendant will always be factored into punishment. Since this is the case, there are obvious violations of the Double Jeopardy Clause in the civilian court system because of the blatant disregard for the constitutional protections allotted to the accused. If civilian courts continue to enhance punishments for conduct in which individuals were acquitted it will only lead to common practice to thwart the Double Jeopardy Clause during sentencing.

Courts-martial generally mirror the same practices and procedures of the civilian courts, but afford greater procedural protections for the accused with regard to protections under the Double Jeopardy Clause, mostly stemming from the differences with how courts-martial arrange the jury. Some of the main differences between juries in the civilian system and juries in courts-martial are that courts-martial do not require unanimous voting and that all panel members must vote by secret ballot.⁹ With the exception of capital offenses, only a two-thirds majority is necessary in order to result in a conviction or acquittal.¹⁰ Since state and federal courts require that jurors reach a unanimous verdict, trials are often prolonged if only one or two jurors differ in their

⁸ Ibid., Pg. 60

⁹ With the exception of Louisiana and Oregon

¹⁰ UCMJ art. 52(a)(2), 10 U.S.C. § 852(a)(2)

conclusions. When this happens the result is either a prod by the judge for the jurors to reach unanimity, or in some cases results in a “hung jury.” Both these situations drastically affect the defendant’s right under the Double Jeopardy Clause, mostly due to procedural norms.

If the jurors of a civilian trial are unable to reach unanimous agreement towards conviction or acquittal, the ultimate result can be a mistrial, resulting in a new trial in front of a new jury.¹¹ Judges often attempt to avoid this situation by prodding the jury using what is known as the “Allen Charge,” which is “an instruction given by a court to a deadlocked jury to encourage it to continue deliberating until it reaches a verdict.”¹² If the jurors continue to be deadlocked, they are deemed a “hung jury” and the judge has no choice but to declare a mistrial, forcing the defendant to make a case once again in front of a new jury. Thus, while the Supreme Court has ruled that retrials do not violate the Double-Jeopardy Clause,¹³ the procedural differences are vastly in favor of defendants who face panels in courts-martial, since unanimous verdicts are not necessary for acquittal.¹⁴

Since the verdict reached by panel members during a court-martial requires a more convenient method, which is voting by secret ballot and the provision for a default acquittal, the panel decision for conviction or acquittal is much more

¹¹ Cornell University Law School. "Rule 31. Jury Verdict."
http://www.law.cornell.edu/rules/frcrmp/rule_31.

¹² Cornell University Law School. "Allen Charge."
http://www.law.cornell.edu/wex/allen_charge.

¹³ United States v. Sanford, 429 U.S. 14, 15-16 (1976)

¹⁴ Holland, Robert F. "Improving Criminal Jury Verdicts: Learning from the Court-Martial." *The Journal of Criminal Law and Criminology* 97, no. 1 (2006): 101-145., Pg. 122

efficient. This efficiency speeds up the trial process and is ultimately more rational since it affords greater protections to the accused. Defendants are not forced to restate their cases in front of new juries like in the civilian system. Instead, they are much more protected from the legal hurdles of double jeopardy solely because of the efficient methods used by courts-martial.

Another constitutional guarantee under the UCMJ involving the Double Jeopardy Clause is the protection from enhanced sentences due to a retrial. This protection is not guaranteed in the civilian court system as was stated in the 1969 case *North Carolina v.*

Pearce:

The guarantee against double jeopardy does not restrict the length of sentence upon reconviction, the power to impose whatever sentence is legally authorized being a corollary of the well-established power to retry a defendant whose conviction has been set aside for an error in the previous proceeding.¹⁵

Article 63 of the UCMJ protects individuals from enhanced sentences by stating that “no sentence in excess of or more than the original sentence may be imposed...”¹⁶ It is clear that courts-martial protect an individual’s right under the Double Jeopardy Clause in multiple ways, whether it be because of efficient procedures or through the protection of enhanced sentences at a retrial.

Protection Under the Jury Clause

The Jury Clause of the Sixth Amendment is another constitutional right that is commonly impeded with regard to enhanced punishment at sentencing. The purpose of the Jury Clause serves to limit the government and courts by making it necessary for a

¹⁵ *North Carolina v. Pearce*, 395 U.S. 711 (1969)

¹⁶ Uniform Code of Military Justice, arts. 44, 63, 10 U.S.C. §§ 844, 863

jury of peers to find guilt beyond a reasonable doubt a prerequisite before punishment may be imposed.¹⁷ If a jury acquits a defendant of a charge, it essentially finds that the government was inadequate in satisfying guilt beyond a reasonable doubt. When a court increases the punishment because of the acquitted conduct it, “ignores, or at least circumvents, that determination.”¹⁸ Since the jury never found the accused guilty beyond a reasonable doubt for an acquitted charge, sentence enhancements punish a defendant without the jury’s approval.¹⁹ If a prosecutor is doubtful that he or she can convince a jury to charge the defendant with a conviction of a certain offense, that prosecutor usually charges the defendant with a more easily proven crime and may “use the uncharged conduct as a basis for increasing the penalty.”²⁰

In response, courts have argued that just because there was a failure to obtain a conviction, it does not establish that the defendant was innocent of the charges.²¹ Since the standard of proof at sentencing is only a preponderance of the evidence, there is an inconsistency given that the prosecution must convince the jury beyond a reasonable doubt during the trial proceedings. However, this does not negate the fact that it is still up to jury’s discretion to decide an appropriate punishment. Even if a judge believes the defendant committed the crime, it is up to the jury to decide a conviction.²² The enhancements of punishments during sentencing clearly violates the Jury Trial Clause of

¹⁷Hessick, Carissa B., and F A. Hessick. "Recognizing Constitutional Rights at Sentencing." *California Law Review* 99, no. 47 (2011), Pg. 60

¹⁸ Ibid., Pg. 60

¹⁹ Ibid., Pg. 61

²⁰ Ibid., Pg. 61

²¹ *United States v. Watts* (95-1906), 519 U.S. 148 (1997)

²² "Recognizing Constitutional Rights at Sentencing." Pg. 62

the Sixth Amendment, but is often infringed upon in other ways.

Those defendants who plead guilty or agree to plea bargains regularly receive longer sentences, but this seems to punish a defendant for exercising the right to a jury trial instead of admitting guilt. Punishing the accused because they choose to exercise a constitutional right is itself unconstitutional.²³ The result of instituting harsher punishments, simply because the defendant requests that the government satisfy the prerequisites to punishment, shows the willful determination by the courts to circumvent constitutional guarantees in response to what they perceive to be a challenge to the legal system.

The Supreme Court has upheld that imposing longer sentences on defendants who proceed to trial is not an enhancement of punishment, but is merely an absence of leniency that is generally given to those who plead guilty.²⁴ However, denying leniency to a defendant for exercising the constitutional right to a trial by jury essentially seems indistinct from increasing that defendant's punishment because he or she performed that same act.²⁵ When the government withholds benefits from individuals because they choose to exercise their rights, it effectively punishes the exercise of that right.²⁶

Sentencing during a court-martial is similar to its counter in the civilian courts, but differs in that once a verdict of conviction has been reached the trial moves straight into

²³ North Carolina v. Pearce - 395 U.S. 711 (1969)

²⁴ "Recognizing Constitutional Rights at Sentencing." Pg. 63, Alabama v. Smith - 490 U.S. 794 (1989)

²⁵ Ibid., Pg. 63, *United States v. Jones*

²⁶ Ibid., Pg. 64, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595, 1599- 1600 (1960) ("Denying a benefit because of the exercise of a right in effect penalizes that exercise, making it tantamount to a crime.")

a sentencing phase.²⁷ In contrast with civilian juries, military court members have much greater discretion in determining the sentence of a convicted defendant. Since the Manual for Courts-Martial only specifies the maximum punishment for an individual crime, panel members on a court-martial have greater power in determining the length or type of punishment for that convicted individual. This allows the panel to consider all aspects of the case and determine a much better sentence for each individual, rather than adhering to mandatory minimum sentences. It also protects the individual at sentencing from judges who determine that an individual deserves an enhanced sentence simply for invoking the right to a trial by jury.

Perhaps the greatest security that a defendant may have from requesting a trial by jury panel in a court-martial is that since all members of the panel are either commissioned officers, warrant officers or enlisted service members, there is a greater possibility for an impartial jury. Since panel members of courts-martial are members of the armed forces, they have already demonstrated a capacity for being able to follow orders and carry out assigned duties. In the cases of officers being brought to trial, this further helps the defendant since a bachelor's degree is required for all officers and thus proves that the panel has a greater level of competence. Similar to civilian juries, courts-martial panels are subject to voir dire as well as challenges by both counsels.²⁸ However, jurors are not often given guidance or recommendations on how to deliberate in civilian trials. Courts-martial do not experience this dilemma, since judges are required to instruct the panel in much greater detail. The result is a panel that is fully

²⁷ "Improving Criminal Jury Verdicts: Learning from the Court-Martial." Pg. 118

²⁸ Ibid., Pg. 116

conscious and educated on a subject and who readily follows orders from commanding authorities.

Protection Against Self-Incrimination

Defendants who fail to express remorse during court proceedings and at sentencing hearings often have their sentences enhanced, thus violating the Fifth Amendment protection against self-incrimination.²⁹ The Supreme Court ruled in *Bram v. United States* that the protection against self-incrimination “prohibits the government from obtaining a confession based on any direct or implied promises, however slight.”³⁰ Similarly, the Court protects the defendant’s ability to refuse to give testimony in trial and has held that invoking this privilege does not give adequate evidence about the guilt of the defendant. Just as a defendant is free to remain silent before the government may extract incriminating speech during an investigation,³¹ the same holds true for the defendant when he or she is on trial. However, the Fifth Amendment protection against self-incrimination is virtually impossible to invoke at sentencing.

In most states, defendants who do not appear to express remorse or guilt for the crimes they have committed are subject under state law to increased sentences.³² Federal courts have likewise enhanced sentences for defendants who refused to express remorse. However, the very foundation for expressing remorse lies solely on the fact that the defendant had committed the crime. If the defendant pleaded not guilty on the

²⁹ United States Constitution Amendment V (“No person . . . shall be compelled in any criminal case to be a witness against himself...”).

³⁰ “Recognizing Constitutional Rights at Sentencing.” Pg. 64

³¹ *Miranda v. Arizona*, 384 U.S. 436 (1966)

³² “Recognizing Constitutional Rights at Sentencing.” Pg. 65

grounds that he or she was innocent of the charges brought forward, it would be unrealistic to believe that the same person should show signs of remorse if the defendant truly believed in his or her innocence. Therefore, by enhancing the sentence of a defendant because of their lack of expression, the courts have essentially violated the Fifth Amendment because the defendants chose instead to invoke their constitutional right against self-incrimination.³³

Mitchell v. United States helped the courts understand or at least recognize a limited privilege of the Fifth Amendment during sentencing. Justice Kennedy delivered the majority opinion of the Court, which supported the right against self-incrimination during any part of the trial phase:

A sentencing hearing is part of the criminal case—the explicit concern of the self-incrimination privilege. In accordance with the text of the Fifth Amendment, we must accord the privilege the same protection in the sentencing phase of 'any criminal case' as that which is due in the trial phase of the same case.³⁴

However, civilian courts have consistently justified the enhancement of sentences solely because of rehabilitation or recidivism reasons. Taking into account the very real possibility that a defendant may end up back in court for future crimes, judges have a necessity to determine the probability of recidivism. Still, *Mitchell* advises that the point of a trial is not necessarily to determine whether the defendant committed the crime, but “whether the Government has carried its burden to prove its allegations while respecting the defendant’s individual rights.”³⁵ Therefore, the courts have been unable to fully defend their position through the analysis of the Fifth Amendment question.

³³ *Ibid.*, Pg. 65

³⁴ *Mitchell v. United States*, 526 U.S. 314 (1999)

³⁵ *Mitchell v. United States*

Article 31 of the UCMJ further protects an individual's right under the Self-Incrimination Clause in that service-members must be notified about why they are under interrogation. The article states that:

No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.³⁶

Since the adoption of the Miranda Rights, courts-martial slightly expanded self-incrimination protections by mandating that interrogating officials must inform the accused about the right to counsel.³⁷ Since the Fifth Amendment also applies to a defendant's right to not incriminate oneself before or during trial, the procedural guidelines of courts-martial also protect the individual.

If the jury panel convicts a defendant during a court martial the sentencing hearing immediately follows after the panel has convened and reached a decision considering the punishment for the crime. Once again, the procedure to allow the jury to decide the punishment of the individual added with the deliberative orders of the judge to not let silence of the accused determine guilt, fully allows the defendant to remain silent during the hearing. Although past convictions may result in an enhancement in the sentence of the defendant, there is no reason that the panel would break its obligation to follow the commands of the judge and break orders by enhancing the punishment of the defendant for exercising the right to not self-incriminate.

³⁶ U.C.M.J, article 31, 10 U.S.C. § 831

³⁷ Everett, Robinson O. "The New Look in Military Justice." *Duke Law Journal* 1973, no. 3 (1973): 649-701. Pg. 670

The Right to Free Speech

The matter of enhancing sentences for expressing a lack of remorse also raises issues on the First Amendment right to free speech. If the government is unable to regulate the right to speech and expression, it is also unable to compel individuals to speak.³⁸ Since the government cannot force an individual to speak, it is therefore unable to punish an individual for refusing to speak. This privilege was made apparent in *West Virginia State Board of Education v. Barnette*, in which the Court struck down a statute requiring expulsion for students who refused to salute and recite the pledge of allegiance.³⁹

The courts have failed to realize that punishing the defendant for not feeling remorse is very similar to punishing a defendant for not expressing remorse.⁴⁰ In order to have the freedom of speech and expression, the First Amendment must then include the right of an individual to think and hold beliefs, even when the government disagrees with those beliefs.⁴¹ Whether a defendant feels remorse depends on the individual's thoughts and viewpoints about charges of the crime. Therefore, when the courts enhance sentences because of what they foresee as a lack of expressing or feeling remorse, they are essentially punishing an individual for his or her independent beliefs.⁴²

Again, the civilian courts defend their position on sentence enhancements

³⁸ *United States v. United Foods Inc.*

³⁹ *West Virginia Board of Education v. Barnette*

⁴⁰ "Recognizing Constitutional Rights at Sentencing." Pg. 68

⁴¹ *Ibid.*, Pg. 68

⁴² *Ibid.*, Pg. 68

because of lack of remorse on the grounds that the accused will likely commit future crimes if they are not subject to longer rehabilitation periods in prison.⁴³ However, this argument does not satisfactorily the constitutional grounds for punishing individuals who hold or express their own beliefs during sentencing hearings. Even though the courts have a legitimate interest in rehabilitation and preventing future misconduct, “the First Amendment imposes limits on the government's ability to achieve those goals through the regulation of speech.”⁴⁴ In some circumstances, it may be proper to limit speech in a courtroom setting, but typically only to maintain order.

The courts have the power of contempt in order to regulate decorum and speech within a courtroom, no matter what proceedings are taking place.⁴⁵ Through contempt, judges may regulate the manner in which and when an individual speaks by imposing jail time or fines if that individual refuses to follow a judge’s orders. The Supreme Court has upheld this opinion in multiple cases, citing grounds that judges must be able to protect disorder or disruptions to court proceedings.⁴⁶ However, there is a lack of justification from the courts for imposing contempt on individuals for exercising their right to Free Speech at sentencing. Rather than regulating speech in order to maintain decorum within the courtroom, courts have regulated speech that violates the First Amendment protections.

The government may also restrict speech if it is done in order to achieve a

⁴³ Ibid., Pg. 68

⁴⁴ Ibid., Pg. 69

⁴⁵ Hill, Gerald, and Kathleen Hill. ALM Media Properties, LLC. <http://dictionary.law.com/Default.aspx?selected=325>.

⁴⁶ "Recognizing Constitutional Rights at Sentencing." Pg. 69, e.g. United States v. Wilson, Bridges v. California

compelling government interest, in which the courts must subject the intentions of the government through strict scrutiny.⁴⁷ The courts have also argued that sentence enhancements may be constitutional because it may be in the government's compelling interest to prevent future crimes since "a defendant who fails to express remorse may feel less compunction about committing crimes."⁴⁸ However, courts have not determined sufficient evidence to make such a conclusion. For example, no research has been done with regard to whether the expression of remorse has been an accurate predictor of recidivism⁴⁹ and the judgment of such findings falls out of the range of traditional legal research. It is rather a psychological condition, in which feelings of embarrassment or shame are often confused with expression of guilt.⁵⁰ Therefore, since no evidence suggests a compelling government interest, the courts fail to substantially hold the ability to limit speech.

The limit on free speech in the military, on the other hand, is perhaps one of the most constraining privileges with regard to constitutional protections and guarantees. Though service members do enjoy First Amendment protections, there are legitimate reasons during a court martial to limit what may be said during trial. Similar to civilian courts, judges in courts-martial may limit the amount of speech in the courtroom for decorum and authoritative purposes, but may also inhibit speech that is deemed confidential and classified.

⁴⁷ Cornell University Law School. "Strict Scrutiny."
http://www.law.cornell.edu/wex/strict_scrutiny.

⁴⁸ "Recognizing Constitutional Rights at Sentencing." Pg. 70

⁴⁹ Ibid., Pg. 70

⁵⁰ Michael H. O'Hear, *Appellate Review of Sentences: Reconsidering Deference*, 51 WM. & MARY L. REV. 2123, 2144-45 (2010) as found on pg. 70

Military judges also have the power of contempt and may invoke the power according to Article 48:

A court-martial, provost court, or military commission may punish for contempt any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceedings by any riot or disorder. The punishment may not exceed confinement for 30 days or a fine of \$100 or both.⁵¹

Although both civilian and courts-martial are similar in their approach to the issue of free speech within the courtroom, the issue that civilian judges often enhance sentences for defendants who show a lack of remorse at sentencing differs once again between the different procedures used by civilian and military courts. Article 56 of the UCMJ limits the panels in courts-martial to a maximum sentence and therefore helps protect convicted service members from enhanced sentences by judges using judicial discretion.⁵²

The Right to Due Process

Finally, sentencing in civilian courts has thwarted a fifth right, once again under the Fifth Amendment in the Due Process Clause, which protects individuals from being deprived of life, liberty or property based on inappropriate considerations.⁵³ This means that individuals cannot be held and punished for crimes without the full consideration and due process of law. With regard to punishing a defendant at sentencing by enhancing the sentence, the courts are essentially penalizing an individual for crimes that he or she has not committed.⁵⁴ If a person has not yet committed any illegal act,

⁵¹ U.C.M.J, article 48, 10 U.S.C. § 848

⁵² U.C.M.J. article 56, 10 U.S.C. § 856

⁵³ "Recognizing Constitutional Rights at Sentencing." Pg. 71

⁵⁴ Ibid., Pg. 71, *People v. Juillet*

the government has no right to punish that individual. Therefore, enhancing sentences because of an individual's odds of committing more crimes is a punishment that very well violates the Due Process Clause.

If judges presume that an individual may break the law in the future by using judicial discretion, then those courts that allow sentencing enhancements to take place give sole discretion to the government to determine whether or not an individual is able to conform to the law.⁵⁵ What this means is that proper notice must be given before the government may take the life, liberty or property from an individual and that when that notice is not given, individuals are unable to conform to the legal statutes.⁵⁶ Though it is reasonable to conclude that some factors may contribute to the recidivism of an individual, these factors are not always taken into account and judges have full discretion when considering what aspects or characteristics of a defendant make that person likely to commit future crimes, thus inhibiting the notice that must be given under the Due Process Clause.⁵⁷

Effective notice must be given according to Due Process in the military in what is known as an Article 32 investigation. Since courts-martial do not have grand jury hearings in which the accused is indicted before proceeding to trial, the military uses its own form of investigation in order to fully afford the due process rights of an accused individual. During an Article 32 investigation, the charging officer and government are required to inform the accused of their rights to counsel and the right to inform them of

⁵⁵ Ibid., Pg. 72

⁵⁶ Ibid., Pg. 72

⁵⁷ Ibid., Pg. 73

pending charges:

The accused shall be advised of the charges against him and of his right to be represented at that investigation as provided in section 838 of this title (article 38) and in regulations prescribed under that section.⁵⁸

The right to Due Process continues until the jury convenes and enters a conviction or acquittal and all notice must be given to the defendant if any more charges are brought against him or her.

Furthermore, the due process rights granted under the Fifth Amendment are recognized after sentencing with respect to the right to appeal to the Military Court of Appeals. If a service member believes that there was undue influence by the command structure during his or her hearing and therefore did not receive the full privilege of the law, the Military Court of Appeals may overturn any decision and even grant a writ of certiorari to the Supreme Court.⁵⁹ Still, ever since 1969, the Supreme Court has never overturned any court martial conviction or even questioned the fairness of a military trial.⁶⁰

Since the adoption of the Uniform Code of Military Justice, service members have substantially benefited with regard to receiving fairer trials than their civilian counterparts. Although courts-martial were created in the image of federal and state courts, and therefore have very similar procedures such as the Federal Rules of Evidence, certain differences during sentence hearing actually afford greater opportunities to individuals tried in a court martial. Civilian courts have circumvented

⁵⁸ U.C.M.J. article 32, 10 U.S.C. § 832

⁵⁹ U.C.M.J. article 67, 10 U.S.C. § 867

⁶⁰ "Improving Criminal Jury Verdicts: Learning from the Court-Martial." Pg. 107

the rights to due process, freedom of speech, protection against self-incrimination, a jury trial and protection against double jeopardy in order to punish individuals who exercise their constitutional rights.

Courts-martial on the other hand, despite the misconception, have historically afforded greater constitutional protections to individuals. The procedural efficiencies of the jury have allowed individuals to receive fairer and speedier trials that protect them against double jeopardy due to hung juries. From the time an Article 32 investigation begins to the sentence hearing immediately following a verdict of conviction, service members can satisfactorily rely on the justice system and procedures required under the Uniform Code of Military Justice. Because of more defined rules and articles as well as a more competent jury, the Supreme Court has never had to reverse the decision of a court martial. In the future, it is quite plausible that state and federal courts will look to courts-martial in order to secure the constitutional protections of the accused.

Since the terrorist attacks that took place on September 11, the military and the federal courts have had to find a balance with regard to trying detainees accused of plotting assaults against the United States. Prisoners of war are supposed to be cared for by the federal government and tried according to the UCMJ, but shortly after the United States entered Afghanistan, President Bush ordered military commissions to take place in Guantanamo Bay, Cuba. Two landmark cases resulted from appeals made by prisoners and the Supreme Court further protected the rights of individuals, particularly prisoners of war, who were detained by the U.S. military. The following cases of *Hamdan v. Rumsfeld* and *Boumediene v. Bush*, along with the application of the Military

Commissions Act of 2006, most aptly display the recent protections guaranteed to prisoners of war in custody.

Hamdan v. Rumsfeld

The case of *Hamdan v. Rumsfeld* tested both the military and civilian courts with regard to granting rights to individuals deemed unlawful enemy combatants, particularly to suspected terrorist operatives involved with the September 11 attacks. Since the UCMJ grants rights to anyone in the care or detention of the United States military, the question of whether or not suspected terrorists had the right to habeas corpus rose following the capture of Salim Ahmed Hamdan. Hamdan, who was a citizen of Yemen and worked as a bodyguard for Osama bin Laden, was captured in November 2001 and sent to Guantanamo Bay Naval Base in Cuba under the charge of conspiracy to commit terrorist acts. That same month, President George W. Bush signed an executive order for the *Detention, Treatment and Trial of Certain Non-Citizens in the War on Terrorism* which stated that trials were to be held in Guantanamo before panels composed of three to seven military officers.⁶¹

The executive branch attempted to take complete control of the judicial process and set up its own tribunals where accused detainees would not be afforded protections under the UCMJ. Hamdan was held for 3 more years and after multiple appeals and legal battling with the administration his case was finally granted certiorari in November 2005. However, the administration attempted to block certiorari by citing

⁶¹ Phillips, Dennis. "'HAMDAN V. RUMSFELD': THE BUSH ADMINISTRATION AND 'THE RULE OF LAW'." *Australasian Journal of American Studies* 25, no. 2 (2006): 40-52. <http://www.jstor.org/stable/pdfplus/41054023.pdf?acceptTC=true&>.

the *Detainee Treatment Act*, which read that “no court, justice, or judge shall have jurisdiction to hear any... action against the United States... relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay.”⁶² The Court quickly dismissed the attempt and made its decision on June 29, 2006.

The Court found in its 5-3 ruling that the military tribunals set up under President Bush violated the uniformity requirement of the UCMJ, under which military commissions must be governed by the same standards as courts-martial except where impracticable.⁶³ It also found that the tribunals violated Common Article 3 of the Geneva Conventions, which is incorporated into courts-martial by Article 21 of the UCMJ and requires that criminal punishments be pronounced only by a “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” In Justice Steven’s plurality opinion, the Court determined that the administration failed to provide any evidence of why courts-martial rules should not be applied.⁶⁴ Since the deviance from standard courts-martial was not justified, the Court questioned the administration’s procedure to barring defendants from appearing at the tribunals and granting the rights under the UCMJ.

Hamdan could not be legally tried in court because neither Congress nor the president has the constitutional authority to declare that ‘conspiracy’ is itself an unlawful war crime.⁶⁵ Though the government relied heavily on *Quirin* in an attempt to

⁶² Ibid.

⁶³ UCMJ 10 U.S.C. §836(b).

⁶⁴ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006)

⁶⁵ Ibid.

legally charge Hamdan with conspiracy, the Court rejected the arguments since both international law and the UCMJ do not allude to conspiracy as a violation of the laws of war. On August 31, 2005, Commission Order No. 1 established that every commission must have a presiding officer and at least three other members, all of who must be commissioned officers. Hamdan would have been entitled to an appointed Judge Advocate General or even a civilian lawyer but his counsel would have had to have at least a 'secret' security clearance. Under the order, he would have also been entitled to a copy of the charges brought against him, the presumption of innocence, and to the basic rights that defendants often receive in a civilian court or court-martial.⁶⁶

Though these rights sound nearly like the requirements for the accused in a court-martial there were some major differences. Under the order, the defense and his counsel could be excluded from ever learning the evidence that was brought up during any part of the court proceedings.⁶⁷ This was especially true if Hamdan had a civilian lawyer, but even if a JAG were to be aware about the proceedings, the presiding officer could forbid the counselor from informing the defendant about what took place. There was also nearly no standard for offering evidence and anything could be admitted as long as the presiding officer thought it had some probative value.⁶⁸ What this means is that any hearsay may be admissible, even if that hearsay was obtained through coercion, and that witness testimony did not need to be sworn. The purpose of the Federal Rules of Evidence, which regulate both civilian as well as courts-martial

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Ibid.

proceedings, is to set a standard for reasonable and reliable information that may be presented at trial. Without this standard, unreliable evidence and testimony would be admissible, as was the case for the commissions.

The Court takes note that military commissions and courts-martial generally only differed in jurisdiction. During times of war, there may be exigent circumstances that exist in order for a commission to take place. However, the procedures that govern trials by military commission have historically been the same as those governing courts-martial. This does not mean that the procedures governing courts-martial and military commissions cannot depart in some way during times of war, but there must always be necessity when such changes occur.⁶⁹ Article 36(a) of the UCMJ makes this clear:

The procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.⁷⁰

Hamdan argued that Commission Order No. 1 violated these terms and was denied access to the court proceedings as well as the evidence that was presented against him. Since the government failed to argue any necessity to deviate from the UCMJ, including the argument that international terrorism posed a serious threat, the commission was illegal and violated the rules set forth by the UCMJ.

⁶⁹ Ibid.

⁷⁰ UCMJ 10 U.S.C. §836(a)

The Court also found that Commission Order No. 1 violated Article 36(b) of the UCMJ since there was no impracticable reason to deviate from the standards set forth in courts-martial.⁷¹ Justice Stevens wrote that the administration failed to understand the history behind courts-martial and commissions because the military commission developed “as a tribunal of necessity to be employed when courts-martial lacked jurisdiction over either the accused or the subject matter.”⁷² Article 36 therefore creates a careful balance between uniform procedure and the need to accommodate exigencies that may arise during times of war.

The Military Commissions Act of 2006

Following the decision of the Supreme Court, the Bush administration once again attempted to counter the courts by signing into law the Military Commissions Act of 2006 which suspended habeas corpus as well as most other rights found to be applicable from *Hamdan*. Since the commissions in *Hamdan v. Rumsfeld* were found to be illegal, all commission activities ceased at Guantanamo Bay and the administration had to quickly redefine commission methods. The Constitution as well as international standards of due process generally upholds the right of habeas corpus for any detained individual. Under Section 7(a) of the MCA, any detained alien who is or is awaiting determination as an enemy combatant would not have the right to apply for a writ of habeas corpus. This was a direct attempt to block the Court from hearing another

⁷¹ “All rules and regulations made under this article shall be uniform insofar as practicable and shall be reported to Congress.”

⁷² *Hamdan v. Rumsfeld*

appeal from a detainee, but was not the only response at an endeavor to counter *Hamdan*.

The MCA further attempted to thwart the rights guaranteed under the UCMJ by directly expressing that certain provisions of the UCMJ did not apply to commissions. Section 948(b)(1) was simply one section created under the MCA that explicitly states that certain provisions under the UCMJ do not apply to commission hearings. The section reads that the following provisions do not apply:

- (A) Section 810 (article 10 of the Uniform Code of Military Justice), relating to speedy trial, including any rule of courts-martial relating to speedy trial.
- (B) Sections 831(a), (b), and (d) (articles 31(a), (b), and (d) of the Uniform Code of Military Justice), relating to compulsory self-incrimination.
- (C) Section 832 (article 32 of the Uniform Code of Military Justice), relating to pretrial investigation.⁷³

Furthermore, the MCA prescribes that evidence that is deemed probative in value may be admissible in trial even if it would not generally be accepted in a regular court-martial, just as the Commission Order No. 1 did.⁷⁴ The MCA also explicitly states that statements made under torture cannot be used as evidence, yet also declares that statements made under coercion according to the Detainee Treatment Act of 2005 may be admissible so long as the presiding judge deems it probative in some value.⁷⁵ These provisions of the MCA were immediately contested in *Boumediene v. Bush*.

⁷³ § 948b. Military Commissions Generally

⁷⁴ § 949a (E)(i) Rules

⁷⁵ 948r(d)

Boumediene v. Bush

The Military Commissions Act of 2006 presented new challenges to the efforts of the Bush administration in its attempt to circumvent the findings in *Hamdan*. In *Boumediene v. Bush*, the Court held that accused detainees held by the U.S. military at Guantanamo Bay may invoke the Constitution's Suspension Clause and that the Military Commissions Act of 2006 violates the Constitution by not granting an adequate option to detainees to present meaningful evidence to his innocence. However, the government attempted to rebut this by implicating that since Guantanamo Bay was in Cuba, and therefore was only a territory under the jurisdiction of the United States rather than under its complete sovereignty, the Suspension Clause did not apply to detainees. The government relied heavily upon *Johnson v. Eisentrager* and the Insular Cases for this argument.

In its 1950 ruling on *Johnson v. Eisentrager*, the Court determined whether habeas corpus jurisdiction extended to enemy aliens who had been convicted of violating the laws of war.⁷⁶ The Court denied writ to the German petitioners because of balancing reasons regarding the Constitution and the fragile time during the postwar period. But, the United States lacked jurisdiction and sovereignty with regard to the postwar occupation of Germany, particularly the prison where the soldiers in question were kept, and had no political control in the territory. Furthermore, *Eisentrager* did not say that sovereignty has always been the only relevant consideration in determining the geographic reach of the Constitution or of habeas corpus. This is important because

⁷⁶ *Johnson v. Eisentrager*, 339 U. S. 763 (1950)

if sovereignty were the only determining factor on whether or not the Suspension Clause applies to geographic regions outside of the U.S., it would be in conflict with the Insular Cases.

When the U.S. acts outside of its borders, there are still constitutional restrictions that regulate its powers. Justice Kennedy recognized the importance that the executive and legislative branches have over territories but concluded, “The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply.”⁷⁷ Under the lease terms that the U.S. has with Cuba, Guantanamo Bay is not under sovereignty of the U.S. but is still under the control of the U.S. government. Therefore, there is no legal or even practical reason that detainees should not be granted habeas corpus, considering the full control and power that the government has at Guantanamo.

The Court also brought up that when the executive branch detains people by an executive order rather than being tried in a courtroom, there is a more urgent need to review the details of the case in order to protect the individuals from unjustified detention. The courts (both the court-martial as well as civilian courts) offer protection to the accused because the judicial branch is always an independent body. However, the Court pointed out that the commissions set forth by the MCA gave review power solely to the executive branch. Though the procedures need not be the same with regard to habeas corpus hearings, the writ must be granted somehow in order to

⁷⁷ *Boumediene v. Bush*, 553 U.S. 723 (2008)

protect the accused, which is unlikely to happen when there is a strict bias against the detained individual.

Boumediene challenged the executive's attempt to circumvent the Constitution and deny habeas corpus to detained individuals. If habeas corpus is ever suspended for practical reasons Congress may only do so through proper legislation that meets the requirements of the Suspension Clause. True, there is no doubt that following the attacks of September 11 the U.S. had a practical reason to detain certain individuals thought to be involved in future attacks on U.S. soldiers and civilians. But, as Justice Kennedy points out, "The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled..."⁷⁸ The power to grant a habeas corpus hearing means that the court can also grant the power to release an individual found to be illegally detained.

On July 7, 2004, Deputy Secretary of Defense Paul Wolfowitz established the Combatant Status Review Tribunals (CSRTs) to determine whether individuals detained at Guantanamo were enemy combatants. The CSRTs were created in direct response to the Court's prior rulings that the commissions at Guantanamo Bay unconstitutionally denied writ to detainees for being unlawful enemy combatants. As previously mentioned, the Court found in *Boumediene* that there was no reasonable way for defendants to refute the claims that they were enemy combatants. Even though the MCA of 2006 made an attempt to circumvent the Suspension Clause by implementing

⁷⁸ *Boumediene v. Bush*

CSRTs, the Court still found that the defendant “does not have the assistance of counsel and may not be aware of the most critical allegations that the Government relied upon to order his detention.”⁷⁹ Because of procedural constraints, unreasonable hearsay evidence may also be used at the CSRTs, thus completely blocking any protection to due process.

Even if the CSRTs satisfactorily protected defendants with regard to due process, particularly a habeas corpus hearing, there is still great risk in the proceedings because of the lack of a proper standard to admit evidence. Furthermore, since the detention of such individuals is the result of a conflict that may last for decades, it is too significant to ignore the implications of not granting a proper hearing for those individuals. There are undoubtedly great risks to the process. Detainees are imprisoned solely because of the suspicion that they may target innocent civilians or U.S. troops. But, as the Court states, there can and must be a balance between practical or exigent considerations as well as the traditional principles that govern U.S. law.⁸⁰ Boumediene and four other detainees were finally released from Guantanamo in November 2008, but the Court still continued the detention of a suspected individual, thus showing how such a balance can be maintained.⁸¹

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Glaberson, William. "Judge Declares Five Detainees Held Illegally." *The New York Times*, November 20, 2008, sec. U.S.

Further Procedural Protections Following Hamdan and Boumediene

The Court's ruling that enemy combatants of the United States must be afforded habeas corpus protections and the right to due process under the Constitution was a major blow to the Bush administration's attempts to circumvent the rules prescribed under the UCMJ. Courts-martial have historically been the standard for trying captured enemies and in the past the Court has held that just because the defendant is tried outside of the sovereignty and territory of the United States it does not mean that the Constitution does not apply. Since the term 'enemy combatant' was so loosely defined, there was an apprehension amongst Constitutional scholars on whether or not US citizens could be detained, but the Court took the necessary steps to ensure that all detainees had basic rights.

The Court relied heavily on the UCMJ in order to make its decision on whether or not detainees held at Guantanamo Bay fell under its jurisdiction. Since the UCMJ typically applied to prisoners of war in the care of the US government, the Court found no reason that accused individuals should be held without the application of due process. Although exigent circumstances arise over the course of a war, the detainees held at Guantanamo were held indefinitely for a war that may last decades. Therefore, protections had to be applied to anyone accused of violating the laws of war lest a detainee face the theoretical possibility of life imprisonment without the chance to a fair trial.

Although the Detainee Treatment Act as well as the Military Commissions Act was initially targeted at terrorist members responsible in aiding or planning attacks on US troops and civilians, it still had a profound effect since it only allowed the President and the Combatant Status Review Tribunals to hear appeals. Since the Court ruled that the President did not have the authority to refuse habeas corpus under the Suspension Clause it applied (to some extent) the UCMJ to military commissions. Though the commissions themselves are not technically courts-martial, it further protected anyone who would be tried in a military setting.

With regard to the procedural protections guaranteed by the UCMJ, *Hamdan* and *Boumediene* protected individuals and their right to due process. Habeas corpus was only one of the Constitutional rights that the Court guaranteed to detainees. It is clear from the majority opinions in both cases that the power to determine the legality of the detention of an accused individual by a judge must also therefore have the power to release that individual. Much like a court martial, the accused is therefore protected under the Double Jeopardy Clause since the government cannot procedurally retry an individual over and over again. Under the laws of war and the established rules in the UCMJ, detainees cannot receive enhanced sentencing either. Furthermore, the Court also asserted that evidence obtained through the use of enhanced interrogation methods (i.e. physical abuse of an individual) could not be admissible.

While courts-martial and civilian courts both respectively protect individuals from self-incrimination under the UCMJ and the Constitution, the MCA of 2006

attempted to retain the same procedures that were used in the Detainee Treatment Act of 2005 with regard to military commissions. The Court ruled that statements made under coercion could not be entered in as evidence, thus enhancing the protection of self-incrimination. Like most questions concerning the Constitutionality of a subject, the protection against self-incrimination inherently lies in whether or not the government granted the accused their full due process rights.

The MCA and the procedures in the Detainee Treatment Act did not adequately give defendants the right to due process by being informed on the precise charges that merit detention. This was a violation of the Due Process Clause as well as Article 32 of the UCMJ. After *Hamdan* and *Boumediene*, the Court ruled that proper notice must be given to individuals about the specific charges for which they were detained. It also meant that competent, legal counsel must be present and that the commissions could not convene without the presence of the accused individual.

Conclusion

After the attacks on September 11, 2001, the military had to find a balance between counteracting the terrors of a new war along with the application of Constitutional liberties. The Court found that the commissions that tried detainees held at Guantanamo Bay were procedurally unconstitutional and granted habeas corpus to all the accused. Though commissions and courts-martial have always been historically different, the rulings in *Hamdan* and *Boumediene* further protected anyone tried in a military setting and found that there is no logical reason for commissions to deter from the UCMJ.

Ultimately, the UCMJ grants enhanced protection for defendants in a court martial setting. Since it was mirrored directly off of the Federal Rules of Evidence, it had the distinct opportunity to improve procedural and Constitutional protections in a trial setting. Former JAGs as well as civilian lawyers have attested to the fairness and diligence that is recognized at a court martial and generally support its applications to Article III courts. In the end if an accused individual had the chance to choose between a court martial and a state or federal court solely due to procedural protections, he or she would promptly choose a court martial in order to guarantee Constitutional protections.