AMERICAN MILITARY JUSTICE FROM THE REVOLUTION TO THE UCMJ: THE HARD JOURNEY FROM COMMAND AUTHORITY TO DUE PROCESS

MICHAEL SCOTT BRYANT·

There were three members of the Action Board: the bloated colonel with the big fat mustache, Lieutenant Scheisskopf, and Major Metcalf, who was trying to develop a steely gaze. As a member of the Action Board, Lieutenant Scheisskopf was one of the judges who would weigh the merits of the case against Clevinger as presented by the prosecutor. Lieutenant Scheisskopf was also the prosecutor. Clevinger had an officer defending him. The officer defending him was Lieutenant Scheisskopf.

- Joseph Heller, *Catch 22*

Second Lieutenant Sidney Shapiro was sure the government witnesses could not identify his client as the would-be rapist. Shapiro, an army officer, had been appointed during World War II to defend a soldier charged in a general court-martial with assault and intent to commit rape. In any criminal accusation—especially one as serious as sexual assault—the victim's ability correctly to identify the accused was central to the prosecution's case. Shapiro doubted the ability of the victim to make this crucial identification of his client as the attacker.

Impeaching a victim of sexual assault, however, is always a dangerous tactic for a defense counsel, insofar as it risks alienating the jurors. Such a concern may have underlain Shapiro's decision to use an inventive strategy of defense: he substituted another person for the defendant at counsel's table. The trial went forward through the findings phase of the court-martial, during which the impostor was identified as the perpetrator. After both sides had presented their cases, the impostor was duly convicted of assault with intent to commit rape. Shapiro no doubt felt a thrill of accomplishment as he revealed the identity of his client's substitute to the court.

Any sense of triumph Shapiro may have had quickly vanished, however, when the commander promptly ordered his client to be court-martialed, a proceeding that ended with his conviction. Not satisfied with prosecuting Shapiro's client, the commander also prosecuted Shapiro himself for violating the 96th Article of War, which made it a criminal offense under military law to "delay the orderly progress" of a court-martial. Shapiro received notice of the charges at 12:40 p.m.; at this time, he was informed he would be tried at 2:00 p.m. that same day. All requests to delay the trial were

· Associate Professor of Legal Studies, Department of History and Social Sciences, Bryant University.

[1] Walter T. Cox, *The Army, the Courts, and the Constitution: The*

denied. By 5:30 p.m., he had been convicted and dismissed from the service. Thereafter, he was drafted back into the Army as a private.[1]

The case of 2nd Lieutenant Shapiro is a microcosm of the abuses within the US military justice system during World War II. Most prominently, these included assignment of court members untrained in law, harsh sentences disproportionate to the offense, and despotic control of the proceedings by the commander. A case like Lieutenant Shapiro's may seem tame compared with the monstrous verdicts rendered by *Wehrmacht* courts during the war, which pronounced between 20- and 30,000 death sentences (at least 20,000 of these were carried out), often for vague or relatively harmless offenses like "subverting military strength" (*Zersetzung der Wehrkraft*).[2] These cases often reflected distinct overtones of National Socialist ideology.† While US military justice may not have sunk to the depths of injustice that characterized its German counterpart, it still offended many Americans both during and after

---

[1] Walter T. Cox, *The Army, the Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 5 (1987); *See also Brown v. United States*, 69 F.Supp. 205 (Ct. Cl. 1947). Shapiro later sued for his back pay in a federal court of claims. Finding in favor of Shapiro, the court held that Shapiro's was a "case of almost complete denial of plaintiff's constitutional rights. It brings great discredit upon the administration of military justice;" LUTHER C. WEST, THEY CALL IT JUSTICE: COMMAND INFLUENCE AND THE COURT-MARTIAL SYSTEM 40 (1977).

[2] On the checkered history of German military justice both before and during World War II, see MANFRED MESSERSCHMIDT, DIE WEHRMACHTJUSTIZ 1933-1945 (Paderborn: Ferdinand Schöningh, 2008); WALTER MANOSCHEK, OPFER DER NS-MILITÄRJUSTIZ: URTEILSPRAXIS – STRAFVOLLZUG – ENTSCHÄDIGUNGSPOLITIK IN ÖSTERREICH (Vienna: Mandelbaum, 2003); Steven R. Welch, *Harsh but Just? German Military Justice in the Second World War: A Comparative Study of the Court-Martialling of German and US Deserters*, 17 GER. HISTORY 369-99 (1999); ULRICH BAUMAN AND MAGNUS KOCH, WAS DAMALS RECHT WAR . . . : SOLDATEN UND ZIVILISTEN VOR GERICHTEN DER WEHRMACHT (2008). "Subverting military strength" was a provision of the Special Wartime Military Decree (*Kriegssonderstrafrechtsverordnung*, or KSSVO), which came into effect in August 1939. It criminalized the actions of anyone—soldiers and civilians alike—who "publicly sought to impair or undermine the will of the German or allied peoples to able-bodied self-assertion." Such offense was punishable by death or (in milder cases) imprisonment; as the war ground on, defendants convicted under the KSSVO were increasingly sentenced to death, particularly after the German defeat at Stalingrad. *See* Welch, Harsh but Just? 378-79 (noting Welch mistakenly translates *Verordnung* as "Code," rather than "decree"); *See also*, ULRICH BAUMAN AND MAGNUS KOCH, WAS DAMALS RECHT WAR . . . : SOLDATEN UND ZIVILISTEN VOR GERICHTEN DER WEHRMACHT 67-68 (2008) (quoting ULRICH BAUMAN AND MAGNUS KOCH, WAS DAMALS RECHT WAR . . . : SOLDATEN UND ZIVILISTEN VOR GERICHTEN DER WEHRMACHT (2008) (quoting MICHAEL S. BRYANT AND ALBRECHT KIRSCHNER, "POLITIK UND MILITÄRJUSTIZ: DIE ROLLE DER KRIEGSGERICHTSBARKEIT IN DEN USA UND DEUTSCHLAND IM VERGLEICH); MICHAEL S. BRYANT, THE NUREMBERG WAR CRIMES TRIAL AND ITS POLICY CONSEQUENCES TODAY 49 (Beth A. Griech-Pollele, ed., 2009) (noting "The Appropriation by German Courts in French-Occupied Baden of Control Council Law No. 10's Definition of Crimes against Humanity in the Prosecution of Nazi-Era Defendants 1946-1951[.]").

† On National Socialist military justice, *see infra*.

World War II. Americans did not compare US military justice with German military justice, a comparison that, from the viewpoint of minimizing harm to defendants' rights, certainly redounds to the advantage of the US system; rather, Americans compared it with the criminal procedure they were most familiar with—a civilian judicial process hedged round with constitutional protections.

In the civilian criminal trial, the official who drafted charges against a defendant was different from the one who considered the merits of the defendant's appeal when convicted, unlike military trials, in which the commander as convening authority both referred the charges against the defendant and reviewed the charges after conviction. In the civilian criminal trial, all members of the court were trained lawyers, in contrast with military proceedings, in which few, if any, of the court members had legal training. In the civilian criminal trial, the defendant could hire a vigorous advocate to present his case to an impartial jury without fear of retaliation. This, too, differed from military courts-martial during the war, in which commanders freely meddled in the proceedings and sometimes punished court members disinclined to convict. In this respect, former Vermont governor Ernest W. Gibson's account of his experiences with U.S. military justice during World War II is revealing:

> I was dismissed as a Law Officer and Member of a General Court-Martial because our General Court acquitted a colored man on a morals charge when the Commanding General wanted him convicted—yet the evidence didn't warrant it. I was called down and told that if I didn't convict in a greater number of cases I would be marked down in my Efficiency Rating; and I squared off and said that wasn't my conception of justice and that they had better remove me, which was done forthwith.[3]

Finally, in the civilian criminal trial, punishments had to fit the severity of the offense; by contrast, military courts-martial frequently meted out 25 or more years to first-time offenders for "crimes" unknown in the civilian world, like desertion and being absent without leave. As one important postwar Congressional Committee found in its assessment of US military justice during the war, 75 year sentences for disciplinary infractions were not uncommon.[4] In hearings before a House of Representatives Subcommittee on amending the Articles of War in April 1947, a report submitted by the Committee on Military Law of the War Veterans Bar Association cited the prosecution of an 18-year-old raw recruit in the 5th week of his basic training for willful disobedience to the lawful command of his superior officer. He was convicted and sentenced to a

---

[3] Captain John T. Willis, *The United States Court of Military Appeals: Its Origin, Operation, and Future*, 55 MIL. L. REV. 39, 41-42 (1972).

[4] *Id.* at 41.

dishonorable discharge, total forfeitures of his income, and confinement at hard labor for 55 years.[5]

The abrasive encounter of American soldiers with US military justice in World War II was a form of "culture shock." More than 1,700,000 courts-martial were convened during the war, or one for every eight service members. Most of these trials ended in convictions. In the Army, 20,392 soldiers were convicted of desertion, yielding a conviction rate of nearly four per 1,000 soldiers per year during the conflict. By the war's end, more than 45,000 military members were in military jails, serving out their sentences. The defendants were largely regular citizens who had either volunteered for or been drafted into the Army.[6] According to a board appointed by the Secretary of War in 1946 to investigate unfair treatment of service members, these ordinary citizens with little prior military experience were dismayed by the inequities of military culture. Regarding inequalities based on rank, the investigators commented:

> Americans look with disfavor upon any system which grants unearned privileges to a particular class of individuals and find distasteful any tendency to make arbitrary social distinctions between two parts of the Army . . . . There is need for a new philosophy in the military order, a policy of treatment of men, especially in the "ranks" in terms of advanced concepts in social thinking. The present system does not permit full recognition of the dignities of man. More definite protection from the arbitrary acts of superiors is essential.[7]

Sociologists working for the Research Branch of the US Army conducted a four-year study of American attitudes in World War II that powerfully corroborated the conclusions of this postwar investigation. Published in 1949, their findings confirmed the clash between an American citizenry accustomed to a society based on legal equality and a military judicial system that often discriminated against enlisted members:

> Americans look with disfavor upon any system which grants unearned privileges to a particular class of individuals and find distasteful any tendency to make arbitrary social distinctions between 2 parts of the Army . . . . The present system does not permit full recognition of the dignities of man. More definite

---

[5] Congress, Senate, Subcommittee of the Committee on Armed Services, *Amending the Articles of War: Hearings before the Subcommittee of the Committee on Armed Services*, 80th Congress 2166-2175 (1947).

[6] Edward F. Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 28-29 (1970).

[7] *Id.* at 30. The board became one of the leading postwar bodies inquiring into allegations of unfairness toward soldiers. Its name, the Doolittle Committee, was derived from the committee chairman, General James Doolittle.

> protection from the arbitrary acts of superiors is essential.[8]

What American soldiers were experiencing was a collision with a 160-year military tradition of sacrificing individual rights to the overriding interests of the commander in maintaining "good order and discipline." The disconcertment aroused by the gap between civilian and military justice reflected a basic tension in American legal history with roots buried deep in the country's formative years. On the one hand, the pre-Revolutionary colonial authorities distrusted military rule detached from civilian control. In their view, rules and regulations established by the legislature had to temper military discretion. In June 1775, for example, the Continental Congress instructed George Washington (newly appointed as commander of the continental army) to follow the "rules and discipline of war" and the Congress's direct orders.[9] In that same month, the Congress adopted 69 "Articles of War" based on British models, which erected courts-martial for the prosecution of mutiny, desertion, and other military offenses, and stipulated punishments for them in the form of whippings, fines, and imprisonment. Such action demonstrated Congress's refusal to entrust matters of military discipline solely to command discretion, but to subordinate it to the rule of law as defined by the civilian legislature. The Declaration of Independence of July 1776 was the acme of colonial attitudes toward unaccountable military power: in that founding document, the revolutionaries declared that one of the chief reasons for breaking with England was King George III's effort "to render the Military independent of and superior to the Civil Power."[10]

Likewise, the Articles of Confederation (ratified in 1781) subjected the military to civilian control by enabling Congress to enact regulations for its governance. As successor to the Articles, the US Constitution reaffirmed this commitment to civilian dominance of the military by vesting the war power in Congress and empowering that body to define offenses against the "law of nations" (Art. I, §8). Moreover, the recognition of the president as "commander in chief" of the military was designed to guarantee civilian preeminence. As Abraham Lincoln's attorney general, Edward Bates, averred in 1861, the Constitution designates the president the "commander" of US forces not on account of his martial prowess, but because he was a "civil magistrate."[11]

This emphasis on civilian control of the military, however, was at odds with a persistent counterpoint in American history—the view that the ordinary legal system must yield to military commanders and executive power in times of war. Interestingly, this countervailing notion that prized command discretion above

---

[8] SAMUEL A. STOUFFER, ET. AL., THE AMERICAN SOLDIER: ADJUSTMENT DURING ARMY LIFE 373 (1949); *See also* Sherman, *supra* note 6, at 30.

[9] 2 J. CONT'L CONG. 90 (1905).

[10] Declaration of Independence, *available at* http://www.ushistory.org/declaration/document/index.htm.

[11] 10 Op. Att'y Gen. 74, 79 (1861).

individual rights may be found at the very origins of the American Republic, intertwined and coexisting with the founders' belief in civilian control of the army. The Articles of War adopted in 1776 and 1806 already recognized the unique needs of military culture by limiting freedom of speech (they criminalized the use of "contemptuous or disrespectful words" directed at the president, vice-president, or Congress). Ardent democrats like John Adams and Thomas Jefferson asserted that military necessity outweighed the due process of military members. For Adams, the overriding need for discipline set the "militia" apart from civil society. Without adequate command control, "the ruin of our cause and country must be the consequence," Adams wrote in a diary extract that anticipated Jefferson's remarkable avowal decades later that "scrupulous adherence to written law" must yield to "the laws of necessity, of self-preservation, of saving our country when in danger." For Jefferson, a heightened concern with legal forms that ignored imminent danger to the Republic would "lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the ends to the means."[12]

These perspectives on the primacy of command authority over ordinary law, especially in times of war or national emergency, are a recurrent theme in 19th century American attitudes toward military justice. For the populist Andrew Jackson, legal protections must sometimes be suspended during a crisis because adhering to them would "lose the substance [of law] forever, in order that we may, for an instant, preserve the shadow"—a statement lifted with surgical precision from Jefferson's earlier warning. We encounter a similar view in Lincoln's defense of his decision to suspend the writ of habeas corpus in 1861, in which he chided would-be critics of his decision with a blunt rhetorical question: "Are all the laws but one to go unexecuted, and the government itself go to pieces, lest that one be violated?"[13] Taken as a whole, the views of Adams, Jefferson, Jackson, and Lincoln express a 19th century American tendency to treat the military as a unique institution in American life. Without a strong army to defend it, the experiment in democracy might fail, thereby rendering democratic government and Constitutional practice moot. Hence, the military stood beyond ordinary due process requirements that protected civilians in their relations with the State.

In view of such attitudes, it is unsurprising that the review of court-martial judgments under the 19th century Articles of War elevated command authority above soldiers' due process rights. The Articles provided for a review process internal to the military structure: a court-martial verdict was automatically reviewed by the "convening authority" (i.e., the commander who convened the court-martial) and the Judge Advocate General. In some cases, such as those involving general officers, the death penalty, or dismissal of an

---

[12] JONATHAN LURIE, ARMING MILITARY JUSTICE: THE ORIGINS OF THE U.S. COURT OF MILITARY APPEALS, 1775-1950 5-11 (vol. I, 1992).

[13] *Id.* at 14.

officer, the president served as the final confirming authority.[14] No appellate procedure existed as such under the 19th century Articles of War: a defendant convicted in a court-martial was entitled only to automatic review by the reviewing and (where appropriate) confirming authorities. Moreover, the Articles of War did not address whether civilian courts could review the verdicts of military courts, a question that remained open until the landmark US Supreme Court case of *Dynes v. Hoover* (1858).[15] In *Dynes*, a seaman convicted by naval court-martial of attempted desertion and sentenced to six months at hard labor appealed his conviction to a civilian court, alleging that the military court had lacked jurisdiction over him (inasmuch as the offense he was convicted of did not appear in the Articles for the Government of the Navy). In affirming Dynes's conviction, the high court held that "no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts" over cases on appeal from courts-martial, so long as the court that issued the verdict was properly convened. Reflecting the widely held view that the needs of military discipline were beyond civilian judicial review, the *Dynes* verdict remained the dominant paradigm of US military justice until Congress's adoption of the Uniform Code of Military Justice in 1950.[16]

For influential post-Civil War military leaders like William T. Sherman, a celebrated Civil War general and later Commanding General of the Army (1869-1883), civilian justice and military justice were entirely separate, non-overlapping spheres of law that had little to do with one another. In an 1879 address to a congressional committee, Sherman expounded a minimalist conception of military justice representative of his era, stating that it would "be a grave error if by negligence we permit the military law to become emasculated by allowing lawyers to inject into it the principles derived from their practice in civil courts, which belong to a totally different system of jurisprudence." He continued:

> The object of the civil law is to secure to every human being in a community all the liberty, security, and happiness possible, consistent with the safety of all. The object of military law is to govern armies composed of strong men, so as to be capable of exercising the largest measure of force at the will of the nation. These objects are as wide apart as the poles, and each requires its own separate system of laws, statute and common. An army is a collection of armed men obliged to obey one man. Every enactment, every change of rules which impairs the

---

[14] *See, e.g.*, Articles of War 105, 106, and 107; Sherman, *supra* note 6, at 14. On action by the reviewing and confirming authorities under the 19th century articles; *See also* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS, 447 (Vol. I, 1920).

[15] 61 U.S. 65, 65 (1857).

[16] CHARLES L. SHANOR AND L. LYNN HOGUE, NATIONAL SECURITY AND MILITARY LAW 211-12 (2003); *See also* Lurie, *supra* note 12, at 30-31; *See also,* Sherman, *supra* note 6, at 9.

> principle weakens the army, impairs its values, and defeats the very object of its existence. All the traditions of civil lawyers are antagonistic to this vital principle, and military men must meet them on the threshold of discussion, else armies will become demoralized by evengrafting on our code their deductions from civil practice.[17]

In Sherman's words, we can see the two major discontinuities between civilian and military law that would scandalize the American public during and after World War II: (1) the curtailment of due process rights for military members and (2) their complete subordination to command authority in furtherance of the "good order and discipline" necessary for combat readiness. Even after the alarming revelations of post-World War II Congressional investigations, the former Commander of US Forces in Europe, Dwight Eisenhower, could affirm in November 1948 the unavoidable necessity of a double standard where the rights of service members in military courts were concerned. For Eisenhower, military justice "was never set up to insure justice," but to "to perform a particular function," which required "a violation of the very concepts upon which our government is established."[18] Eisenhower's perspective evokes those of Adams, Jefferson, Jackson, Lincoln, and Sherman, with whom he shared the belief that the aim of military justice was not, paradoxically, to serve justice, but to ensure the discipline required to defend American democracy from its enemies. As Lincoln had framed the issue in defending his suspension of habeas corpus, "are all the laws, but one, to go unexecuted, and the government go to pieces, lest that one be violated?"

The prevailing model of American military justice, then, presents us with a singular puzzle of democracy: in order to preserve American democracy, the country had to be defended by a robust and efficient military force; but, in order to maintain the vigor of the military, command authority over service members had to be absolute, leaving little regard for the rights of individual soldiers. Antidemocratic means, in other words, had to be used to preserve democracy. The USA has confronted this strange conundrum at various points in its history, most recently in denying basic rights to persons caught in the traps of the former Bush Administration's "war on terror." The clash between civilian and military legal norms was concealed from most Americans until times of war, when average civilians had their first brush with a system of total control that existed only in the shadows during peacetime. It is not coincidental that the two most vocal periods of civilian protest against military justice occurred after World Wars I and II (particularly World War II), which exposed millions of civilians for the first time to the military law and its hierarchy based on rank. In the years after World War I, a reform movement originating in the Judge Advocate General's office called for aligning military justice with civilian legal norms. The

---

17 Sherman, *supra* note 6, at 4-5.

18 *Id.* at 35.

result was a cosmetic change in the Manual for Courts-Martial in 1928, in which the commander was stripped of his power to reverse an acquittal or to return a lenient verdict to the court members for redetermination of the sentence. Despite this minor change in the Manual, the commander still enjoyed the right to reprimand any participants in the court-martial who offended him. Furthermore, he was free to advise court members that, while he could not overturn an acquittal or increase a sentence given a defendant, he was allowed to reduce sentences if he deemed it appropriate. Prior to sentencing a convicted defendant, the jurors received a set of confidential instructions published by the War Department. These instructions contained what may be described as "mandatory minimum" punishments for certain kinds of offense. The result was to steer court members toward meting out harsh sentences, on the supposition that they were under orders to do so and that the commander could always reduce punishment later on.[19]

Heading into World War II, then, commanders retained significant freedom to interfere with the administration of military justice, notwithstanding the modest reforms undertaken after World War I. Unlike World War I, however, military justice in World War II triggered a wave of public protest that led to meaningful enhancement of the rights of court-martialed defendants. We can speculate about the reasons for the differing outcomes in these two episodes of protest. One possible explanation is the sheer number of American civilians subject to military justice in World War II. The numbers are staggering: some 12,300,000 Americans were in the armed services at the peak of mobilization—a number almost equal to the country's population in 1830. At this time, the US armed forces processed roughly one-third of all criminal cases tried in the USA. The sheer volume of cases processed by military courts ensured high visibility in the public eye.[20]

A second explanation for the success of military justice reform after World War II is more abstract, but perhaps no less real, than pure demography. In the 1940s the USA was on the cusp of a revolution in extending greater constitutional liberties to individual citizens. Public rejection of a military legal system prone to procedural laxity and reckless interference by military commanders, all to the detriment of the accused's due process rights, may have foreshadowed the country's new emphasis on individual civil rights in the postwar era. It is striking that the most tumultuous era in the history of military justice reform coincided with this seismic shift in US constitutional law. The pro-business conservatism of the Supreme Court gradually yielded by the 1930s to a more progressive ethic, one that led the Court to uphold federal labor regulations and

---

[19] LUTHER C. WEST, THEY CALL IT JUSTICE: COMMAND INFLUENCE AND THE COURT-MARTIAL SYSTEM 36-37 (1977).

[20] Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: the Original Practice I*, 72 HARV. L. REV. 11 (1958). The total number of men and women who served in the US military during the war was in excess of 16 million. *See also,* U.S. Department of Commerce, Statistical Abstract of the United States, table no. 385, 256 (1970).

state minimum wage laws against constitutional challenges. Well before the Warren court of the 1950s and '60s revolutionized American civil liberties with its distinctive brand of judicial activism, the Court had already begun to tilt strongly toward protecting the rights of minorities against suppression by state and local government. This epochal transformation of American law, conditioned by the nation's suffering during the Great Depression and its encounter with anti-individualist autocracies in World War II, must have contributed to Americans' dissatisfaction with the abuses of American military justice after the war.[21] Regardless of the reasons, by 1945 Americans would no longer tolerate a system that seemed so obviously unfair.

The culmination of this development was the Uniform Code of Military Justice, adopted by Congress in 1950. The new code sought to minimize the risk of command influence by requiring "a thorough and impartial investigation" before referral of charges to a general court-martial. It also established the U.S. Court of Military Appeals, consisting of three civilian judges appointed by the president to terms of 15 years. These reforms were intended to eliminate the potential for abuse in unrestrained command authority and inadequate appellate review of court-martial verdicts. In other words, the Uniform Code of Military Justice was designed to "civilianize" a body of law that, prior to 1950, was regarded as separate and distinct from civilian legal norms.[22]

In the face of this history, what are we to make of American military justice before the sweeping reforms of the late 1940s? First, it should be noted that American military justice, whatever its failures in guaranteeing the rights of the accused, was an integral component of a military system whose very purpose was to defend a democratic society. If military justice sacrificed a defendant's rights to good order and discipline, then such sacrifice was considered necessary in order to preserve the Republic. As Lincoln memorably phrased it during the Civil War, should we maintain a criminal defendant's rights in wartime at the cost of losing the government—a government that was the very source of all rights and freedoms enjoyed by Americans? Insofar as its final cause was the preservation of democracy, American military justice before and

---

[21] On the revolution in civil liberties during the era of military justice reform, *see* PETER IRONS, A PEOPLE'S HISTORY OF THE SUPREME COURT (1999); LIVA BAKER, MIRANDA: THE CRIME, THE LAW, AND THE POLITICS (1983); Bernard Schwartz, *Super Chief: Earl Warren and His Supreme Court* (New York: New York University Press, 1983); DAVID M. O'BRIEN, CONSTITUTIONAL LAW AND POLITICS: CIVIL RIGHTS AND CIVIL LIBERTIES, VOL. II (2008), (placing emphasis on chapters 3-12; *see also* HAROLD J. SULLIVAN, CIVIL RIGHTS AND LIBERTIES: PROVOCATIVE QUESTIONS AND EVOLVING ANSWERS (2005).

[22] On the US Court of Military Appeals (now called the U.S. Court of Appeals for the Armed Forces, or U.S.C.A.A.F.), *see* Shanor, *supra* note 16, at 306; Willis, *supra* note 3; WILLIAM T. GENEROUS, SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE 58 (1973); Lurie, *supra* note 12 (placing emphasis on chapters 8-11); Sherman, *supra* note 6, at 46; Cox, *supra* note 1.

during World War II was qualitatively different from its German counterpart. At no time during the war could it be said that participants in German military justice conceived of its ultimate purpose as the defense of democratic government. Quite to the contrary: German military justice was imbued with the racist-eugenic tenets of the Nazi Party. An illustrative case involves a German sailor court-martialed for desertion in September 1941. Although the two factors supporting infliction of the death penalty were lacking (namely, cowardice in the face of the enemy and preservation of discipline),[23] the military court sentenced him to death. In addition to the defendant's "undignified conduct," the court cited in support of its verdict his "career and history," which proved him to be an "inferior person" (*minderwertiger Mensch*). As Ulrich Baumann and Magnus Koch have written in their analysis of this case, the court's emphasis here was less on the objective features of his act than on his character—a character branded by National Socialist ideology as defective and hence fit for destruction. The chief military judge authored a "statement" (*Äußerung*) for the confirming authority (*Gerichtsherr*) on the same day as the sentence was announced, arguing against pardoning the defendant:

> Ich spreche mich gegen eine Begnadigung des Mar[ine] Art[il]l[eristen] . . . aus. Sein Leben, das bisher keinen Wert hatte, wird dann vielleicht nicht nutzlos gewesen sein, wenn er jetzt durch seinen Tod anderen Kamaeraden ein abschreckendes Beispiel gibt.[24]

The case cited above was not an aberration. In March 1943, a military court gave a death sentence to a marine artillery man for declaring to his comrades his pleasure at the crises in Stalingrad and Woronesch. In assessing the defendant's liability to punishment, the military judge wrote:

> Mit Rücksicht auf den in zahlreichen Vorstrafen hervorgetretenen asozialen Charakter des Verurteilten und sein freches widerspenstiges Verhalten sind die zersetzendenen Äußerungen als besonders schwerwiegend anzusehen . . .. Das Todesurteil wird ohne Gnade volstrecken sein. Das Bronchialasthma, unter dem der Verurteilte leidet, bietet keinen Grund zu Begnadigung . . . . Die psychosomatische Veranlagung bietet keinen Milderungs-, sondern nur einen Strafschärfungsgrund . . . . Im übrigen würde der

---

[23] Adolf Hitler announced these two criteria for capital punishment in military courts in April 1940.

[24] ULRICH BAUMAN AND MAGNUS KOCH, WAS DAMALS RECHT WAR . . . : SOLDATEN UND ZIVILISTEN VOR GERICHTEN DER WEHRMACHT 56 (2008) (noting "'. . . kommt es auf Einzelheiten insoweit auch nicht an.' Drei Fallstudien in zeitgenössischer und erinnerungspolitischer Perspektive," The sentence was confirmed, the petition for clemency rejected, and the convict shot on December 4, 1941.).

> Verurteilte bei einer Begnadigung nur fortlaufend weiter der Volksgemeinschaft als Schädling zur Lasten fallen. Die Ausmerzung dieses Übeltäters ist zur Verhütung einer Gegenauslese dringend geboten.[25]

This text is replete with familiar Nazi eugenic and racial terminology: "asocial character," "predisposition," "people's community," "pest," "eradication," "prevention," and "counterselection."[26] Cumulatively, they constitute a National Socialist offender profile (*Tätertyp*), which justified elimination of certain individuals based less on their injurious acts than their dangerous personalities. For the presiding judge, the death penalty was "urgently" required in order to prevent a "counterselection" that might fill the "people's community" with racial "pests." As one scholar of Nazi military justice has observed, the verdicts in these trials are not explicable in terms of the "escalating barbarism" of the war; rather, they were the natural outgrowths of the German military justice system during the war, a system steeped in Nazi ideology and dedicated to achieving its purposes.[27]

As the previous cases show, German military justice, far from serving the final end of democracy, was harnessed to the Nazis' goal of creating a racial utopia through eradication of dysgenic persons. Where American military justice traversed a dynamic force field between two immensely powerful vectors, command authority and a democratic society founded on the rule of law, German military justice was dominated by a single organizing principle: the establishment of the racially pure *Volksgemeinschaft*. This critical difference between US and German military justice during World War II may account for their substantial differences in conviction rates and death sentences.[28]

Furthermore, it is important to grasp that abridging the rights of defendants in courts-martial was repugnant to many Americans at the time. The outcomes of U.S. military trials may seem less harsh when compared with Nazi military justice, but they were perceived at the time, and rightly so, as extreme in comparison with American civilian proceedings. In the tug-of-war between the

---

[25] Quoted in MANFRED MESSERSCHMIDT, DAS SYSTEM WEHRMACHTJUSTIZ. AUFGABEN UND WIRKEN DER DEUTSCHEN KRIEGSGERICHTE; *see also* Bauman, *supra* note 24, at 36 (quoting *"Was damals recht war*[.]*"*).

[26] German jurists reconceived the threat posed by deserters during the war: where previously desertion was considered a threat to military discipline, the Nazis refashioned the offense to emphasize the "asociality" of the offender. The threat he posed was not in undermining combat efficiency, but infecting the *Volksgemeinschaft* with his racial inferiority. The military court's function was to cleanse the people's community of this toxin by liquidating the deserter as an "asocial" and "degenerate." See the discussion on this subject in Welch, "German Military Justice," 382. See also Heinz Pietzner, *Die Fahnenflucht im Wehrstrafrecht* (Wurzburg, 1940), 75-76.

[27] Steven R. Welch, *Harsh but Just? German Military Justice in the Second World War: A Comparative Study of the Court-Martialling of German and US Deserters*, 17 GER. HISTORY 379 (1999)

[28] *Id.* at 385 (addressings the statistical differences).

command authority and due process models of military justice after 1945, the latter ultimately won out, and military justice was to a significant degree "civilianized" thereafter. Under growing popular pressure to address excessive verdicts, the Secretary of War appointed a clemency board in the summer of 1945 to review all general courts-martial in which the defendant was still imprisoned. This board either remitted or reduced the sentence in 85% of the 27,000 cases under review.[29] Such efforts to mitigate the harshness of military verdicts are inconceivable in the context of Nazi military justice. Arguably, it was the existence of a fundamentally democratic culture that enabled the modification of harsh verdicts in the American example, pushing an anti-libertarian, commander-dominated system slowly but inexorably toward civilian legal protections.

The role of public opinion is essential in charting the libertarian influence of democratic culture on American military justice. In the mid-1940s, US politicians were deluged by their constituents with demands for reforming military justice. According to Rear Admiral Robert J. White, "the emotions suppressed during the long, tense period of global warfare were now released by peace, and erupted into a tornado-like explosion of violent feelings, abusive criticism of the military, and aggressive pressures on Congress for fundamental reforms in the court-martial system."[30] Public protest set in motion a train of investigations and federal laws that ended with the passage of the Uniform Code of Military Justice in 1950. The American military justice system, despite its resistance to ordinary due process norms before 1945, proved its vulnerability in the final analysis to democratic calls for reform. I would suggest that the American political identity fashioned during the Revolutionary era infused into US law (including military justice) a long-term receptivity to public opinion. Like the French Revolution, the American Revolution was based on the belief that the government's chief responsibility was the protection of its citizens' natural rights. On this view, society was a voluntary association of individuals who carried their natural rights with them into their social relations.[31]

---

[29] Sherman, *supra* note 6, at 28-29.

[30] *Id.* at 29.

[31] The provisions of Revolutionary period legal documents underscore the centrality of natural rights thinking to the country's founders, along with the related belief that government was the servant of the people. The Virginia Bill of Rights of June 1776, for example, asserted that "all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them." If found lacking, then "a majority of the community hath an indubitable, unalienable, and indefeasible right, to reform, alter, or abolish [the government], in such manner as shall be judged most conducive to the publick weal." Virginia Bill of Rights, June 12, 1776, *available at* http://www.constitution.org/bor/vir_bor.htm; *see also* Massachusetts Constitution of 1780, where we read: "The end of the institution, maintenance, and administration of government is to secure the existence of the body-politic, to protect it, and to furnish the individuals who compose it with the power of enjoying, in safety and tranquillity, their natural rights and the blessings of life; and whenever these great objects are not obtained

Citizens expressed their collective judgment about the government's actions through public opinion, a distillation of the consensus views of a majority of the population (excluding at that time women and slaves). Where government failed to protect natural rights, the "people" were authorized to either change it or discard it altogether. Although American history is marred with numerous failures in the realization of this civil libertarian ideal, at key moments it has furnished a basic blueprint for far-reaching legal reform: among others, the incorporation of the Bill of Rights into the 14th Amendment in order to restrain local discrimination against minorities, the recognition of federal and state regulation of business activities considered inimical to the public good, the Warren era's judicial activism on behalf of individual rights, and the due process revolution in military justice. None of these major legal reforms would have been possible without the responsiveness of the American political system to public opinion.

In the absence of democratic pressure on judicial process, US military justice most likely would have lapsed into widespread abuse as the basic due process of military members accused of crimes was sacrificed to command authority. Comparison of the American and German examples during World War II does not ennoble the US example so much as highlight the importance of democratic culture in tempering the intrinsic disregard of military justice—of whatever nationality—for the rights of the individual.

---

the people have a right to alter the government, and to take measures necessary for their safety, prosperity, and happiness." For its framers, society consisted of "a voluntary association of individuals; it is a social compact by which the whole people covenants with each citizen and each citizen with the whole people that all shall be governed by certain laws for the common good. It is the duty of the people, therefore, in framing a constitution of government, to provide for an equitable mode of making laws, as well as for an impartial interpretation and a faithful execution of them; that every man may, at all times, find his security in them." Massachusetts Constitution of 1780, *available at* http://www.nhinet.org/ccs/docs/ma-1780.htm.