S. Sidney Ulmer, Military Justice and the Right to Counsel Lexington: The University Press of Kentucky, 1970

"Military justice" refers to the complex mixture of administrative and criminal law, under the Uniform Code of Military Justice, which governs the lives of more than three-and-a-half million American citizens in uniform. In recent years, the system has come under criticism from journalists and social scientists who argue that some of the most basic constitutional rights, ostensibly guaranteed to all Americans, are not protected in the military system. Alternatively, some critics argue that even where such rights are formally protected, "command influence" and other perversions of the judicial process operate to deny these rights in practice.

Professor Ulmer has studied one area of military justice—that involving the right to counsel—in an attempt to shed some light on these criticisms. His essay compares the development of the right to counsel in military and in civilian courts, from the vague beginnings in the Sixth Amendment down to recent decisions in *Miranda* and related cases. The material discussed includes several revisions of the basic code law governing the military, many of the landmark civilian cases, and many of the military cases such as *Tempia* which have had prescriptive influence on the system.

Ulmer concludes that the right to counsel is *formally* very well protected, both by statute and by precedent, in the military system. He argues that, while neither system is perfect (and, using strict criteria, "we may find ourselves unhappy with both legal systems"), still the right to counsel is, by and large, as well protected in the military system as in the larger federal system. Ulmer perceives the two systems as growing increasingly more similar in their procedures, and he carefully points out the areas in which possible injustices remain.

This analysis certainly has some relevance to the criticisms. In terms of formal guarantees of rights, it seems that the military is

not languishing in the judicial Dark Ages. Indeed, as Ulmer repeatedly notes, many innovations in safeguarding basic rights were adopted in the military many years before they appeared in civilian systems. There can be no question but that the relevant statutes and case directives show great concern with protecting both the availability and functional benefits of counsel in military trials.

However, it is still possible that, even though the right to counsel is protected formally, in practice, soldiers are not permitted to enjoy this basic freedom. We have no way of knowing what percentage of soldiers are represented by counsel at the trivial level, but we do know that, in 1969, of convicted soldiers whose records were reviewed by the Army Boards of Review, only 72.4% requested counsel at this appellate level (Department of the Army, 1969). That is to say, 27.6%, or roughly one defendant in four, did not choose to be represented by counsel at this level, either because he was unaware of his right, was kept from exercising it, or had some reason to think that it was of no use.

Alternatively, it is possible that, in practice, other factors minimize the importance of the right to counsel. Murphy (1961) argues that some appointed defense counsels, who are Army officers, may find themselves in a role conflict between their duties as officers and members of the "military justice team" and their duties as defense attorneys. The results of this role conflict may be that appointed defense counsels may do less than their best to help the defendants.

The conclusion to be drawn from this is that it is not possible to analyze the military system in terms of justice simply by looking at the formal documents which specify how trials *should* be run; it is necessary to have empirical studies to see how the system works in practice. In the absence of such studies, Professor Ulmer's book should not be read as a vindication of military law. He has studied only the formal directives; the nature of compliance has yet to be determined.

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CASES

MIRANDA v. ARIZONA 384 U.S. 436; 86 S.Ct. 1602 (1966).
UNITED STATES v. TEMPIA 16 U.S.C.M.A. 629 (1966).

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