INSIDE THE MINDS

Strategies for Military Criminal Defense

Leading Lawyers on Understanding the Military Justice System, Constructing Effective Defense Strategies, and Navigating Complex Cases

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Accounting for Differences in the Military Justice System

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Introduction

While military criminal cases have much in common with criminal cases brought in a civilian proceeding, there are a number of important differences between the systems. These differences are a function of both cultural factors and the Uniform Code of Military Justice (UCMJ) and the Rules for Courts-Martial. Attorneys representing soldiers in military cases must tailor the defense in the case to account for these various differences.

The Cultural Context of Military Cases

Perhaps no difference is more important than the cultural backdrop of the US military. The military has been described as a culture unto itself. That culture is made up of an all-volunteer force. Only a small percentage of the public at large choose to participate in military service. And, while there are always individual exceptions, few would dispute that the military culture leans towards the traditional. Consequently, the military society tends to be more homogenous, and likely more conservative, than the larger civilian public.

As an organization, the military emphasizes certain core values. Most people who succeed in the military assimilate into it and largely adopt the organization's core values. Those values include loyalty, duty, and selfless service. Such qualities emphasize the welfare of the group over the comfort of the individual. The military justice system exists in part to enable the armed services to maintain good order and discipline. That is very different from the civilian justice system, which strives (while balancing individual rights) to achieve justice. The purpose of the military justice system, therefore, reflects the organizational emphasis on prioritizing the group over the individual.

The military's core values also reflect the organization's emphasis on two important priorities that sometimes are in tension: completing the mission and taking care of soldiers. Every leader in the military, starting early in their career and throughout their time in the service, is taught to pursue and balance these priorities. Key decision makers in the military justice process—commanders, convening authorities, judges, jurors, senior judge advocates—are likely to have adopted this mindset.

This cultural context—a tendency toward homogenous decision makers, prioritization of group goals over individual rights, and an emphasis on good order and discipline and mission success—permeates the military. As a defense attorney, you have to understand and account for the military's unique cultural context when approaching the defense of the case.

The Influence of the Command

In the civilian criminal justice system, the charging decision is largely a lawyer-driven exercise. The military system is very different; it is ostensibly a system run by the military command, and the trial counsel's (prosecutor's) role is to advise the command on charging decisions and then try the case. In reality, the practice in the military system is usually more complex than this simple explanation. Often, charging preferences are initiated by military lawyers, and the command merely follows the advice of its assigned judge advocate. Less often, there can be a tension between what the command wants to do in a case, and what the lawyers want to do. This tension rarely plays out in public. Sometimes the lower level of command views the case differently than the higher level of command, and the prosecutor's or staff judge advocate (SJA) office's preferences may lean more toward one level or the other. While these circumstances can be sometimes hard to predict, they perhaps are most likely to play out in two situations: (1) where the accused is a "good soldier" who the lower level command views as an asset and for whom there is skepticism about the truth of the charges; and (2) military offenses for which the command wants to take a harsher position than the lawyers. These situations can create an interesting dynamic: the lower command may want to do something; the higher command may want to do something else; and the SJA office, at least privately if not publicly, may have a third opinion. At times this can be a problem for the defense, and at other times it can be an opportunity. A defense counsel in a military criminal case has to be sensitive to this potential tension and be ready to interact with the appropriate level of the command to take advantage of it when in the client's interest.

Plea Bargaining

Like any system that involves individualized negotiation, widely different outcomes or "deals" can be achieved for different people facing basically

the same types of charges. There are probably many reasons why this is the case. As a general matter, it pays to be both creative and persistent in plea bargaining. Defense counsel should be ready and willing to engage in one-on-one discussions with all the key players about his or her client's situation. Because the command can have such a profound influence in how a case gets resolved, this includes when appropriate talking directly to all levels of command involved, as well as all of the key advisors and decision makers in the SJA office. Some SJA offices may not like this approach, preferring instead to limit defense discussions to the trial counsel and chief of justice (head prosecutor) and, only when necessary, the SJA (the senior lawyer assigned to the command). And, the command may be prepped by the SJA office to not interact with the defense. The defense should not allow itself to be pigeonholed in this way. That is not to say that the defense should not approach the trial counsel or chief of justice to engage in plea bargaining. By all means, those should be the defense counsel's primary points of contact. But, a military defense counsel must be ready to interact one-on-one with the command and others in the SJA office in the right circumstance.

Military clients have many rights under the Uniform Code of Military Justice. Some of the more common ones include the Article 32 investigation; pre-trial motions and requests for expert assistance; open discovery of prosecutors' files; and the right to jury trials, including jury trials on sentencing. These rights should not be bargained away cheaply. Some of these tools, particularly the Article 32 investigation, can be used to develop evidence that will strengthen the defense case and your bargaining position. Military prosecutors often expect these rights to be bargained away early in the process without appropriately valuing them. It sometimes can be better to forgo the early negotiation in order to take advantage of the rights provided by the system. This may allow the defense counsel to develop favorable evidence (that would otherwise go undiscovered or be hard to prove) before negotiating. This may result in a better deal than could have been obtained by waiving everything up front. Additionally, if you routinely represent individuals in military cases, taking this approach may impress upon the prosecution the value of these rights, which can be used for the benefit of clients in future cases should early negotiation be pursued.

Article 32 Investigations

Perhaps no tool is more important to the defense counsel than the Article 32 investigation. An Article 32 investigation is the pre-trial investigation that is required to be held (unless waived) in order to refer charges to a general court-martial (the most serious level of court in the military). The Article 32 investigation is often equated to a civilian grand jury hearing. This is only a rough analogy. An Article 32 investigation is in many ways a stronger protection that is more useful to the defense than a grand jury hearing. In particular, an accused and his counsel get to be present at an Article 32 investigation, ask questions, request witnesses and evidence be produced by the government, and present defense evidence. The proceedings are under oath and are recorded (though rarely transcribed verbatim unless the defense makes a request and can show a need). Because it is a significant right, the government often asks the defense to waive the right as a condition to an early deal. Some prosecutors will also try to get by with doing the bare minimum needed to comply with Article 32 requirements. Unless an early deal with waiver of rights is so good as to clearly be in the client's interest, the defense should be hesitant to waive this procedural protection. In many cases, a good advocate can invariably poke holes in the government's case and develop favorable defense evidence at the Article 32 investigation. Often though, this will require working hard to ensure your client is actually provided with all of the rights the UCMJ says he or she is entitled to at the Article 32 proceeding.

Open Discovery

The open discovery process available in the military differs from the process used in many civilian justice systems. Unfortunately, there can be a tendency on the part of military prosecutors to give lip service to the concept of open discovery. This is partly a natural consequence of the adversarial system. It is also a fact of life that prosecutors in the military have many things on their plate besides prosecution matters. Other military duties or other legal advice given to the command can be a significant drain on a trial counsel's time and may even be a priority over military justice functions. The defense should hold the government's feet to the fire on what it is owed in discovery.

Notwithstanding that open discovery is technically available in military criminal cases, there is no substitute for doing your own investigation using both the tools the system gives you and your own investigative resources. As part of open discovery, you will likely gain access to reports written by the Criminal Investigation Division (CID) or the military police. These reports are often used for charging decisions, but can contain significant factual inaccuracies or unfounded conclusions. While they are a useful source of initial discovery, you should not rely upon the accuracy of a written report from the command, the CID, the military police, or any investigative body without confirming its accuracy and completeness through your own investigation or discovery pursued at the Article 32 hearing.

Dealing with Military Jurors

Unlike the civilian system, jurors are not randomly selected from voter rolls or some other large jury pool; instead, they are handpicked based on criteria set forth in the UCMJ by the convening authority—a senior commander. Many convening authorities choose jurors who are known to him or her and who have been key players in the command. While this group is likely smart and educated, they also can be expected to be somewhat homogenous in their outlooks and experiences. And, because military panels (juries) tend to sit over time, they often will be repeat players who could become familiar with defense theories and themes if not tailored to each specific case. Additionally, military jurors will be familiar with the other commanders—who have technically brought the charges against the accused—and very well may be familiar with the senior judge advocates, including the prosecutors, in the command. All of these factors can combine to make some military jurors skeptical of the defense, at least in the abstract.

Military members are, however, used to evaluating information objectively. They also normally can be counted on to follow rules and instructions (including such things as rules on the burden of proof). These can be very positive qualities for the defense. And, while you are unlikely to find many military jurors who are outright critics of the military justice system or who would be willing to "hold out" from convicting because of some perceived unfairness by the command toward the accused, military juries should not

be confused as mere "rubber stamps" for the prosecution. Most military jurors have a real desire to arrive at what they believe is the right answer, and they want to do the right thing. This creates avenues for the defense to get great results in the right cases when the equities lean in the client's favor.

The Good Soldier Defense

One of the unique aspects of the military system is the "good soldier" defense. This defense enables some defendants (i.e., those with strong performance records) to benefit from their adherence to the military's core values. The legal premise is that a good soldier is less likely to commit a crime than a bad soldier is. This defense can be presented as a substantive defense. As a comparison, imagine a civilian accused of a significant crime seeking to defend against the charges by presenting evidence that they do a good job at work. That is essentially what the good soldier defense allows in the military system. Depending upon the circumstances, this can be a very powerful defense in the military context. Moreover, even if not successful on the merits, the evidence supporting this defense can result in significant benefits in the mitigation calculation at sentencing. If your client has not gotten into trouble before, and particularly if his or her commander and senior leaders are willing to testify that he or she does a good job in the field or when deployed or can be counted on to be a team player and get a job done correctly, you can utilize these facts to obtain a better outcome in the case. This can be used for your client's benefit at the charging and plea bargaining stage as well as at the merits and sentencing phases of trial.

The Sentencing Phase of Military Trials

The sentencing phase of military trials can make a huge difference in the outcome of a military criminal case. In most civilian criminal justice systems, sentencing is the purview of the judge, and the jury's job is to decide only the merits of the case (guilt or innocence). Additionally, sentencing guidelines in some civilian systems often give judges little discretion about the range of penalties that can be imposed. Moreover, the sentencing process in the civilian justice system is less adversarial than the trial on the merits. The rules of evidence do not necessarily apply, and

information relevant to sentencing can be presented to the judge by way of summary evidence such as reports by probation officers.

The sentencing process in military courts is very different. It has the flavor at times of an entirely new, contested case. First, the range of punishments available in any particular case runs the gamut from no punishment to the maximum punishment (which varies by the offense). Second, an accused can opt for a jury on sentencing even if he or she pleads guilty. Third, while the rules of evidence at sentencing can be relaxed, much of the evidence available at sentencing is still subject to objection and must be submitted by live witnesses unless stipulated to by the defense. These factors can make military sentencing a very interesting and fruitful process for the defense. In the military, a case can be lost on the merits, and won in a landslide on sentencing.

It is also important to note that military defendants—even those accused and convicted of serious crimes—usually have some redeeming qualities. Most military defendants are first-time offenders; they may have had some prior minor military-specific misconduct that has been handled at levels below a court-martial, but they are unlikely to have been convicted previously of any serious crimes. Most importantly, they will have done something that many people do not choose to do—they will have volunteered to defend their country, and they may have been deployed in a military operation. Obviously, this record should benefit a military defendant at sentencing. On the other hand, most people in the military have these same redeeming qualities; because of this, military judges and jurors may not appreciate these qualities as fully as they should when balancing mitigation with retribution and assessing a defendant's potential for rehabilitation. A military advocate must find a way at sentencing to highlight these qualities for the individual defendant and weave them into the analysis of the case to ensure maximum benefit for the client.

Final Thoughts

The military justice system is a good system. Like any system, it has pros and cons associated with it. Some aspects of the system are very positive for the defense, and some aspects present special challenges. While defense challenges may be different in kind than those faced by the defense in

comparable civilian systems, they are no worse in degree. The advantages of the system, such as open discovery, Article 32 investigation rights, and discretion at sentencing, as well as effective advocacy, can more than offset any challenges faced by the defense.

Key Takeaways

- As an organization, the military emphasizes certain core values. Key decision makers in the military justice system will have adopted those core values. The purpose of the military justice system reflects the military's emphasis on prioritizing the group over the individual. As a defense attorney, you have to understand and account for this unique cultural context when approaching the defense of the case.
- Military defense counsel must be aware of command preferences for the resolution of individual cases and be ready to interact with key decision makers in the system. Rights secured by the UCMJ should not be bargained away cheaply.
- The Article 32 investigation and open discovery are significant procedural protections available to soldiers in the military system. These rights should be pursued vigorously by the defense.
- Military juries can be skeptical of the defense, but are not rubber stamps for the prosecution. Defense counsel must marshal favorable evidence and develop defense themes that take advantage of equities in their client's favor and resonate with the typical military juror.
- A case can be lost on the merits and won in a landslide on sentencing.

Since joining Williams & Connolly LLP, Edward C. Reddington has worked primarily in the fields of criminal law, products liability and tort defense, and litigation and investigations with a national security component including government contracts and bid protests. However, his experience and interests have not been limited to those fields. He has also represented corporations and individuals in other types of general civil litigation including breach of contract disputes, breach of fiduciary duty cases, fraud claims, and securities litigation. In addition, he has worked on various internal

investigations, represented individuals in Congressional investigations, and participated in alternative dispute resolution including mediations and arbitrations.

A representative sampling of his experience at the Firm includes: the representation of a privately-held corporation in fraud and breach of fiduciary duty litigation against a former officer and director in which Mr. Reddington obtained summary judgment for that corporation and successfully defended that outcome on appeal; the representation of a foreign national in multi-district Antiterrorism Act and Alien Tort Claims Act litigation; and the representation of a former senior DOD official in Congressional investigations and civil Bivens litigation relating to US policy during the global war on terrorism. Mr. Reddington also has represented a major pharmaceutical company in multi-district products liability litigation, a major engineering and construction company in federal and state criminal investigations and collateral civil proceedings that resulted in a complex global settlement agreement, and a number of large government contractors in potential bid protests at both the state and federal levels.

Mr. Reddington's practice also has a significant international component. His international experience includes the conduct of FCPA and other internal investigations in multiple jurisdictions including Europe, Asia, the Middle East, and South America; the successful representation of a US defense contractor in a breach of contract dispute involving an overseas joint venture with another contractor; and the representation of multiple foreign nationals and foreign closely-held corporations in US litigation and collateral activities overseas.

Before joining Williams & Connolly, Mr. Reddington served on active duty in the US Army for over fifteen years, first as a pilot, and subsequently as a judge advocate. As a JAG officer, he gained considerable criminal trial experience as both a prosecutor and a defense counsel, where he handled serious felony-level cases including homicide investigations, attempted murder, aggravated assault, sexual assaults, child pornography and molestation, armed robbery, and drug distributions. He also served as a civil litigation attorney with the Army's Litigation Division, where he was appointed as a Special Assistant US Attorney defending the United States and its employees in wrongful death, medical malpractice, and Constitutional tort suits in federal court. In these roles, he gained significant litigation experience, first-chairing dozens of bench and jury trials, as well as representing the government and individual clients in numerous administrative hearings.

Prior to leaving active duty, he earned an LLM in Military Law from the Army's Judge Advocate General's School with a specialization in Government Contracts. Mr. Reddington continues to serve as a reserve judge advocate and has taught federal litigation and advocacy as an adjunct professor at the JAG School in Charlottesville, Virginia.

Mr. Reddington graduated from West Point in 1991 and the University of Virginia School of Law in 1998. He resides in Virginia with his wife, Courtney, and their two children.

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