

Outline for “Comparison of Four Allied Military Justice Systems” Panel

Introduction

The U.S. military justice system is undergoing a period of reform marked by many of its basic assumptions being questioned. For example, in recent years, prosecutorial discretion has been removed from commanders and given to offices of special trial counsel led and staffed by uniformed judge advocates for certain statutorily enumerated “covered offenses” to include sexual assault, murder, and kidnapping. Judge alone sentencing has become mandatory in all non-capital cases. Regardless of the sentence entered into judgment, service members who have been found guilty at a general or special court-martial are entitled as of right to judicial review of their cases. Most recently, in the National Defense Authorization Act for Fiscal Year 2024, Congress directed the Secretary of Defense to conduct a study to determine the feasibility and advisability of requiring unanimous votes for findings in general and special courts-martial.

Because of the state of flux in which the U.S. military justice system finds itself, the organizers of the U.S. Court of Appeals for the Armed Forces’ annual Continuing Legal Education and Training Program decided that it would be interesting and informative to feature an international comparative military justice panel at this conference. The purpose of the panel is to illustrate differences among the military justice systems of Australia, Canada, the United Kingdom, and the United States, despite our common heritage.

We believe that the most effective means to demonstrate interesting commonalities and differences among our systems is through a hypothetical case fact pattern involving an offense that could be prosecuted in any of the panel

members' military justice systems. Accordingly, we have selected the following hypothetical scenario for discussion:

A junior enlisted service member in the Army, Private Smith, is accused of bringing cocaine (a controlled substance) onto a military installation, wrongfully using the drug in his barracks room, and selling a small quantity of the drug to his barracks roommate who is also a service member in the Army. Because of the seriousness of the alleged offense, responsible authorities take the necessary steps to refer charges against him to a court-martial.

The **first issue** our panelists will explore is **assignment of defense counsel to the accused**:

Australia:

- Defense counsel is provided to accused service members free at the trial level.
- However, an accused must retain his or her own counsel on appeal, but the Defence Force Appeal Tribunal can grant legal aid to an appellant if he has insufficient means to prosecute the appeal.

Canada:

- Defence counsel are provided to service members liable of being charged, regardless of the person's financial means.
- The provision of free legal services on appeal is conditional upon a successful application to the Appeal Committee.

- The Director of Defence Counsel Services can approve requests from a service member to be represented by a civilian defence counsel at Crown expense.

United Kingdom:

- There is no defence counsel scheme in the UK's armed forces.
- A defendant whose case is being dealt with in the Court Martial may apply to the Armed Forces Criminal Legal Aid Authority (AFCLAA) for assistance with the cost of hiring civilian legal representation.
 - This is a non-statutory replica of the statutory scheme operating in civilian courts and it applies a means based test.
 - However, all defendants at court martial have an income and may be subject to a contribution.
 - Junior service members may be required to pay more than a more senior service member who has dependents.
 - The defendant may select a solicitor and a barrister of his or her own choice through the AFCLAA scheme or simply request representation from the AFCLAA, which will then "instruct" a suitable advocate.

United States:

- Private Smith is entitled at no cost to himself a detailed defense counsel or an individual military counsel of his own selection.
- He could also hire a civilian counsel at no cost to the United States.
- If there is a conviction, military representation at no cost to Private Smith will continue for representation before the Service Court of Criminal

Appeals, the U.S. Court of Appeals for the Armed Forces, and the Supreme Court of the United States.

The **second issue** our panelists will explore is **whether concurrent jurisdiction exists between federal, state, provincial, and/or territorial authorities:**

Australia:

- There are three jurisdictions that could try Private Smith: 1) state or territory where the offense occurred; 2) civilian federal jurisdiction; or 3) the Australian Defence Force (ADF).
- In Australia, general criminal law is the purview of the states and territories.
- The federal government's legislative power is limited by the Australian Constitution.
 - In the realm of drugs, the federal jurisdiction is generally focused on drug importation and trafficking.
- The scope of ADF's jurisdiction depends on whether the offence occurs inside or outside of Australia and the quantity of the drug.
 - If the conduct occurs outside Australia, the Defence Force Discipline Act (DFDA) has a "full suite" of drug offences.
 - If the conduct occurs inside Australia, the DFDA only has offences of use and possession of a prohibited drug.
 - Additionally, the quantity of the drug dictates whether the conduct is a service offence.
 - For example, for cocaine, any amount above 2 grams exceeds the jurisdiction of the DFDA, and any amount greater would be within the jurisdiction of the civilian authorities.

Canada:

- Except for murder, manslaughter, and child abduction, the Canadian military justice system shares concurrent jurisdiction with the civilian courts.
- Courts martial have material jurisdiction over service offences.
- The Military Police investigator determines where to bring the charges, and in making that decision, may consult with the Director of Military Prosecutions (DMP) or visit the local Crown prosecutor's office, which will generally accept the file.
 - However, before laying a charge, the military police investigator must first seek advice from the local deputy judge advocate.
- The Statement of Principles and Presumptions for the Exercise of Concurrent Jurisdiction by Canadian Prosecuting Authorities does not govern the decision of law enforcement of where to lay the charge.
 - However, these principles set out circumstances where the DMP should refer the matter to the civilian authority.
 - Offences subject to civilian jurisdiction should only be dealt with under the military justice system when its commission harmed or posed a risk of harm to the discipline, efficiency, and morale of the Canadian Armed Forces (CAF).
 - In the event of a disagreement over who should prosecute the case, the civilian prosecution service's decision will govern.
- Private Smith could be dealt with under the Code of Service Discipline or by the local Crown prosecutor, but it is highly likely he would be facing prosecution before a court martial because his offences took place on a base and involved another soldier.

United Kingdom:

- The United Kingdom has three separate civilian jurisdictions (England and Wales, Scotland, and Northern Ireland) as well as the court martial system.
- Service offences include any offence punishable under the laws of England and Wales, and these can be tried in the court martial.
- The 2023 protocol between the Director of Service Prosecutions and the Director of Public Prosecutions sets out the process to be adopted by the civilian and service agencies at the outset of an investigation of an offence involving a service person, and it identifies issues to be considered in determining the appropriate jurisdiction.
 - Para. 3.7.3. of the Protocol would carry significant weight: “Whether the conduct, if established, would be viewed more seriously within the service jurisdiction because of the service context . . .”
- Private Smith can only be tried in one court in the UK, regardless of whether he is convicted or acquitted.

United States:

- Assuming that Private Smith’s offenses occurred on an installation with concurrent federal and state jurisdiction, in all likelihood, because the offenses involved a small amount of cocaine and were committed on a U.S. Army post, the U.S. Army Criminal Investigation Division will likely investigate, and the U.S. Army will likely prosecute the case on behalf of the U.S. Government.
 - However, if Private Smith is part of a larger drug distribution conspiracy, especially one with civilian co-conspirators (who are not subject to the UCMJ) it is possible that he would instead be

investigated by a civilian federal law enforcement agency and prosecuted by the Department of Justice.

- It is less likely under these facts that Private Smith would be prosecuted by state authorities, but it is possible, particularly if local prosecutors are attempting to crackdown on drug offenses in the vicinity of the military installation where his crimes occurred.

The **third issue** our panelists will discuss is **who makes the charging decision**:

Australia:

- For serious offences, the DMP makes the charging decision
 - DMP is appointed by the Minister of Defence and must be at least a 1-star legal officer.
- Military police would investigate serious allegations like those against Private Smith.
 - The military police will send a completed brief of evidence to the DMP.
- DMP will go through a two-step process to assess whether to prefer charges:
 - First, is there evidence that offers a reasonable prospect of conviction.
 - If so, is it in the service's interest to prosecute?
- Assuming the offence of selling a prohibited drug was committed outside Australia, it could only be tried by a court martial.
- Other options are trying Private Smith by a summary authority (a commanding officer or a superior summary authority) or referring the allegations to an appropriate civilian authority.

Canada:

- The following persons have authority to lay charges under the Code of Service Discipline:
 - CO
 - Officer or NCO authorized by a CO
 - A member of the military police assigned to the Canadian Forces National Investigation Service (CFINS)
 - Any other member of the military police assigned to investigative duties.
- Before laying charges, the person must first obtain advice from the unit legal officer concerning the sufficiency of the evidence if:
 - The charge concerns a person against whom a service offence or a service infraction is alleged to have been committed or who is alleged to have suffered physical or emotional harm, property damage or economic loss as a result of the alleged commission of the offence or infraction; or
 - The charge alleges the commission of a service offence.
- Charges must be referred to the DMP as soon as circumstances permit.
- Because of the seriousness of the charges against Private Smith, CFINS would investigate, and if after receiving the mandatory legal advice they had a reasonable belief that Private Smith committed a service offence, CFINS would lay a charge and refer the matter to the DMP.

United Kingdom:

- Service police must refer the case to either the offender's CO or to the Service Prosecuting Authority (SPA).

- SPA is led by the director of Service Prosecutions, a civilian lawyer with considerable experience in criminal law and practice, and who is appointed by the King.
 - Prosecutors within the SPA are usually uniformed lawyers.
- The offence of supplying cocaine can only be tried in court martial, so after completing the investigation, the service police would refer the case to the SPA.
- The SPA applies a two-fold test to decide whether to direct the case for trial at court martial:
 - Is there a realistic prospect of conviction?
 - Is the prosecution in the public and service interest?
- In less serious cases, the service police will refer the case to the CO, who after seeking legal advice, can draft charges which will proceed to the summary justice system, or if the defendant exercises his right, to trial in the court martial.

United States:

- In Private Smith's case, these drug offenses do not fall within the list of "covered offenses" of which the Office of Special Trial Counsel has jurisdiction.
- Therefore, after U.S. Army CID investigates, charges will be drafted by a trial counsel and forwarded to a commander in Private Smith's chain of command.
- Because of the seriousness of the offense, the commander exercising special court-martial convening authority (SPCMCA) will likely convene a preliminary hearing under Article 32, UCMJ.

- The Preliminary Hearing Officer (PHO) will conduct a hearing and prepare a report.
- If the SPCMCA believes that a general court-martial is warranted, he or she will forward a copy of the charge sheet and the PHO report to the first general court-martial convening authority (GCMCA) in Private Smith's chain of command.
 - After receiving the written advice from his or her staff judge advocate, if that advice finds: a) the specification alleges an offense under the UCMJ; b) that there is probable cause to believe that the accused committed the offense charged; and c) that a court-martial would have jurisdiction over the accused, then the GCMCA can refer the charges to a general court-martial.

The **fourth issue** our panelists will discuss is **the composition of the tribunal that would adjudicate the alleged misconduct:**

Australia:

- There are four different service tribunals that could try Private Smith for his alleged misconduct, and these are divided between the summary authority system and the superior service tribunal system.
 - All service tribunals are ad hoc under the DFDA and are dissolved at the end of the proceedings.
- The summary authority system is administered by commanders and there are two types of summary authority:
 - Commanding officers; and
 - Superior Summary Authorities.

- The summary authority system is designed to not have lawyers directly involved.
 - It is an adversarial system requiring a trial and proof beyond a reasonable doubt, but it also has simplified rules of evidence.
- The summary authority system's jurisdiction is restricted based on the maximum penalty of the service offence:
 - It cannot try an offence that has a maximum penalty of more than two years imprisonment.
 - The maximum punishment that Private Smith, who is below NCO rank, can receive at summary authority is 28 days' detention.
 - Members appearing before the summary authority have a right to elect trial by court martial or Defence Force Magistrate (DFM), except for certain lower-level offences.
- Given the objective seriousness of Private Smith's offending, it is unlikely that his alleged misconduct would be tried by a summary authority, and more likely that the matter would be referred to the DMP.
- The superior service tribunal is composed of courts martial and the DFM.
- There are two types of court martial:
 - General court-martial (GCM), which is composed of a president (not below the rank of Colonel or equivalent), a panel of four other officers, and a judge advocate.
 - Restricted court-martial (RCM), which is composed of a president (not below the rank of a lieutenant colonel or equivalent), a panel of two other officers, and a judge advocate.
- A DFM is a judge advocate sitting alone without a panel.

- The DMP alone determines the mode of trial, and the accused has no say in the decision.
- If the case is referred to a court martial or DFM, the charges are referred to the Registrar of Military Justice (RMJ) to convene the relevant service tribunal.
 - The RMJ is a legal officer, with a rank of at least Colonel or equivalent, who is appointed by the Minister for the Defence.
 - The RMJ provides the administrative and management service including issuing convening orders, selecting the president and members, and the judge advocate.
 - The panel is selected from all three services on a random basis.
 - Officers on a court martial panel must be a higher rank than the accused (unless exigencies of service).
- Apart from rulings on the law from the judge advocate, the president presides over the proceedings and every non-legal question is determined by the members.
 - The judge advocate performs a role analogous to a judge in civilian court, and the members are bound by directions and rulings on the law issued by the judge advocate.
 - Judge advocates are appointed by the Chief of the Defence Force on nomination by the Judge Advocate General.

Canada:

- Once the charge is preferred by the DMP and a date has been set for trial by the Chief Military Judge, the Court Martial Administrator (CMA) convenes the court martial.

- The CMA shall convene a General Court Martial (GCM) if any charge on the charge sheet is punishable by life imprisonment or if any charge is a serious offence among those listed in statute.
- A GCM is presided over by a military judge as the judge of the law with a panel of five members, and these members are selected by the CMA using a random methodology.
- If both the accused and the DMP consent, the case can be tried by Standing Court Martial (SCM).
- The CMA shall convene a SCM if every charge preferred carries a maximum term of two years' imprisonment (with limited exceptions).
- A SCM is a court martial consisting of a military judge alone.
- If the DMP preferred a charge of trafficking cocaine or possession for the purpose of trafficking, Private Smith could be liable for imprisonment for life.
 - If so, regardless of other charged offences, he would be tried by a GCM.
 - Because Private Smith is a non-commissioned member, the panel would be composed of one senior member, one other officer, and three non-commissioned members, who are both above the rank of the accused and the rank of sergeant.
 - If Private Smith was only charged with possession of a substance listed on Schedule I of the National Defence Act (NDA), he would have the right to elect being tried by either a GCM or a SCM.

United Kingdom:

- Possession of a controlled drug can be, but rarely is, tried by a CO.
 - Instead, possession of cocaine is likely to be tried in a court martial.

- The more serious offence of supply of cocaine is only triable in a court martial.
- With very limited exceptions, court martial does not conduct trials with a judge advocate alone.
- The judge advocate is a civilian judge within the Ministry of Justice, rather than the Ministry of Defence, and is appointed by the Judicial Appointments Commission.
 - The judge advocate presides over the proceedings with a Board of lay members fulfilling the same role as a jury in a process that is the same as a Civilian Crown court.
- Depending on the maximum sentence for the offences, there will be three or six lay members.
 - For offences like supply of cocaine, six members are required.
- Law members may be officers, warrant officers, or staff sergeants and equivalents.
 - The president is likely to be a lieutenant colonel but may be a major.
 - More senior members are required if the defendant is a senior officer.
 - A panel of lay members is nominated by each Service, and Board members are randomly selected by an independent/civilian Court Administration Officer of the Military Court Service.
 - Boards are tri-service (with limited exceptions) and there must be at least one member from each gender on a Board.
 - The defendant can raise an objection to any lay member prior to them being sworn in.
- Boards are directed by the judge advocate on legal issues and provided written legal directions during the summing up.

- A six person Board may return a verdict on which at least five are agreed, but a three person Board must be unanimous.

United States:

- Because of the seriousness of Private Smith's offenses, the charges in his case will likely be referred to a GCM.
- Although his counsel will provide him with advice, Private Smith must personally elect the forum of trial: a) members with enlisted representation; b) officers members; or c) military judge alone.
 - If he selects trial by members, the Convening Authority (CA) will select the members based on the criteria provided in Article 25, UCMJ.
 - Assuming that Private Smith's charges were referred to court-martial on or after December 23, 2024, the members detailed by the CA will be randomly assigned a number by the military judge (MJ), and the required number of members (as determined by the MJ) will constitute the venire at Private Smith's trial according to that random order.
- Assuming that all of Private Smith's alleged misconduct occurred after December 27, 2023, if he is convicted of any offense, the MJ will serve as the sentencing authority.
 - If for example, Private Smith is convicted of wrongful distribution of cocaine, this is a parameter offense with an Offense Category of 2.
 - This means the MJ would be required to sentence him to a period of confinement of 1-36 months, unless he or she found specific facts that warrant a sentence outside that range.

- If Private Smith is found guilty of multiple offenses, the MJ would utilize segmented sentencing, and in doing so, will announce whether each sentence to confinement is to be served concurrently or consecutively with adjudged sentences to confinement for other offenses.

The **fifth issue** our panelists will discuss is **sentencing principles, punitive exposure, and incarceration options:**

Australia:

- Service tribunals in Australia are required to apply the principles of sentencing applied in civilian courts as well as the need to maintain service discipline.
 - This means service tribunals are required to achieve sentencing aims of retribution, deterrence (both general and specific), denunciation and rehabilitation.
 - The DFDA also requires a service tribunal to take a number of factors into account such as the nature and circumstances of the offence; the offender's behavior before, during, and after the offending; the consequential effects of the conviction or the proposed punishment; and the prospect of the offender's rehabilitation.
- A wide range of penalties are available including, in ascending order, reprimand, severe reprimand, a fine (not exceeding the offender's pay for 28 days, forfeiture of seniority, reduction in rank, detention for a period not to exceed two years, dismissal from the ADF, and imprisonment.

- In addition to the maximum penalty for the offence, there are also limits on the sentence of detention and imprisonment depending on the type of service tribunal:
 - A GCM can sentence up to life imprisonment.
 - An RCM or DFM is limited to sentence an offender up to six months' imprisonment.
 - If a court martial imposes a punishment of imprisonment, it must also impose a sentence of dismissal from the service.
 - A separate penalty must be imposed for each conviction.
 - The panel, as opposed to the judge advocate, determines the sentence.
- It is worth noting that drug offending rarely appears before Australian service tribunals.
 - If a positive result occurs when the member undergoes random drug testing, this result is not admissible for prosecuting a service offence, but it can be used to terminate the member's service.

Canada:

- The NDA provides, "The fundamental purpose of sentencing is to maintain the discipline and morale of the Canadian Forces."
- This fundamental purpose is to be achieved through the imposing of just punishments that have one or more of the following objectives, as listed in the Code:
 - To promote a habit of obedience to lawful commands and orders;
 - To denounce unlawful conduct and the harm done to victims or the community; and
 - To assist reintegrating offenders into the military service.

- The peculiarities of the case, including the situation of the offender, will dictate the objectives to be achieved when determining a proper punishment to impose.
 - The more serious the offence, the more likely a severe sentence such as imprisonment or dismissal will be imposed.
 - Punishments that a court martial can impose are listed in the NDA and range from minor punishments such as confinement to barracks to confinement for life.
 - A member serving a sentence that includes imprisonment will, in most cases, be considered unfit for further military service.
 - Service prisoners and convicts who are sentenced to imprisonment will typically be transferred to a civilian prison within the first 30 days following sentencing and most will be released from the CAF before such a transfer.
 - On the other hand, detention is a punishment, not to be imposed on officers, and limited to 90 days, that seeks to rehabilitate the offender.
 - Once the sentence to detention has been served, the member will normally be returned to his or her unit without any lasting effect on his or her career.
 - When the punishment is not composed of dismissal or of imprisonment, the sentencing decision of the court martial is less indicative of the possible outcome of the offender's future career in the service.
- In Private Smith's case, a finding of guilt for trafficking will most likely result in punishment that includes imprisonment and dismissal.

United Kingdom:

- In almost all cases, the judge advocate does not sentence alone.
 - If a defendant pleads guilty, they will be sentenced by the judge advocate and a Board of three lay members, regardless of the gravity of the case.
 - If a defendant is convicted after trial, he or she will be sentenced by the judge advocate and Board of three or six lay members which dealt with the trial.
 - The judge advocate has an equal voice and vote but retains a casting vote if required.
- Under the Armed Forces Act of 2006, the court martial has to have regard of the following purposes of sentencing:
 - The punishment of the offender;
 - The maintenance of discipline;
 - The reduction of Service offences and other crime;
 - The reform and rehabilitation of the offender;
 - The protection of the public; and
 - The making of reparation by the offender to persons affected by his or her offenses.
- The significance of each principle will vary depending on the facts of the case.
- The court martial may impose all sentences available in the civilian courts as well as Service specific sentences such as dismissal from the Service, military detention, and reduction in rank.
 - Military detention provides military corrective training for those returning to service and offers comprehensive facilities for those who have been dismissed.

- The maximum sentence to military detention is two years.
- Unless there was significant mitigation, Private Smith would likely receive imprisonment together with dismissal from the Service.
 - He would be released on license after serving half of his sentence but could be recalled to prison during the license period if he does not comply with the conditions of his license or reoffends.

United States:

- It is a relatively rare occurrence upon a finding guilt at a SPCM or a GCM that the prosecution will not seek a sentence that includes a punitive discharge.
 - Moreover, in those cases where a punitive discharge is not adjudged, it is routine that the government will process the convicted service member for administrative separation.
 - However, this was not always the case in U.S. history. For example, many service members during the Vietnam War were returned to their units after serving their sentences to confinement.
- If Private Smith is convicted of drug offenses, it is almost certain that the prosecution will seek either a Dishonorable or Bad Conduct discharge as part of the sentence.
 - Even if the sentencing authority does not sentence him to such a punitive discharge, U.S. Army Regulations require him to be processed for administrative discharge due to his use and distribution of illegal drugs.

The **sixth and final issue** our panelists will discuss is **whether the accused, if acquitted, would be protected from a government appeal or from a subsequent prosecution for the same offense:**

Australia:

- If acquitted, Private Smith cannot be tried by a service tribunal for the same service offence.
 - The same prohibition applies if he is acquitted or convicted by a civilian court: he cannot be tried for a service offence that is substantially the same.
- Some uncertainty exists whether Private Smith could be prosecuted by a state or territory for substantially the same offence that he was acquitted by a service tribunal.
 - In the first challenge to the DFDA, the High Court of Australia (HCA) in *Re Tracey* upheld the constitutional validity of the DFDA, but nonetheless determined that the provisions that prevented a civilian criminal court from trying a person acquitted or convicted by a service tribunal were unconstitutional, and they were struck from the legislation.
 - It is unclear what effect, if any, the HCA's decision in that case would have on the doctrine of *autrefois acquit* and *autrefois convict* (double jeopardy).

Canada:

- The Minister of National Defence, or counsel instructed by the Minister (DMP or their representative) has the right to appeal to the Court Martial

Appeal Court of Canada (CMAC) in respect of judicial decisions, including the legality of any finding of not guilty.

- It would be contrary to the Canadian Charter of Rights and Freedoms to try Private Smith for the same conduct in both systems, either concurrently or after a finding.
 - This constitutional protection has also been added to the NDA.
 - However, the principle against double jeopardy clearly does not apply to a decision from the CMAC or from the Supreme Court, ordering that the matter be retried by court-martial because of judicial error.

United Kingdom:

- In the event of an acquittal, Private Smith runs no risk of being tried again in a criminal court.

United States:

- If a court-martial found Private Smith not guilty of the charges, the Government could not appeal and he could not be tried again by the United States Government for the same conduct at either a court-martial or a civilian federal court.
- However, under the dual sovereignty doctrine, a state court with jurisdiction over his offenses could subsequently try Private Smith for the same misconduct, whether he was acquitted or convicted at court-martial.
- Likewise, if Private Smith is first tried by a state court for his offenses, whether acquitted or convicted, a court-martial could subsequently try Private Smith for the same misconduct.
 - This is a result which many consider to be unfair.

Conclusion:

As you can see, the military justice systems of our four countries each embodies concepts of due process, and each demonstrates the similarities one would expect from nations united by a common heritage. However, it is fairly striking that in key areas these systems differ significantly. For example, a Sailor in the United States Navy accused of a crime will enjoy free representation at every step of her court-martial and appellate process all the way up to the U.S. Supreme Court, but a Sailor in the Royal Navy will be required to make a financial contribution to the cost of her representation. A member of the Royal Canadian Air Force who is convicted of a significant, but not serious, offense at court-martial could receive a sentence of detention and subsequently would normally be returned to his unit without any lasting effect on his career, but a similarly situated Airman in the U.S. Air Force would likely receive a punitive discharge or be processed for administrative separation. A Soldier of the Australian military who commits a serious offense in Australia can only be tried by a civilian court, but a Soldier serving in the U.S. Army can be tried by both a court-martial *and* a state court for the same alleged misconduct.

We hope that this session was successful in providing a comparative overview, demonstrating that fair military justice systems are not all the same and that the United States at least might consider the approaches of its key allies as it contemplates further revisions to its military justice system.