

The Military Justice System and Command Accountability

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The Long Commission, which investigated the terrorist bombing of the Beirut Marine barracks, recommended punitive action against officers in the chain of command. The president, however, ruled out courts-martial. This article examines the concept of command accountability and the role of the military justice system.

Professional dereliction and incompetence have rarely been punished since World War II. . . . Failure to do so has bred an atmosphere of professional unaccountability that encourages, because it does not penalize, repetition of failure on the battlefield.¹

INTRODUCTION

IN LATE December 1983, the "DOD Commission on the Beirut International Airport Terrorist Act, October 23, 1983," chaired by Admiral Robert L. J. Long, US Navy, Retired, issued its report. The Long Commission, as it became known, found that the military officers in the chain of command were responsible for the security failure which resulted in the deaths of 241 Marines when a terrorist truck-bomb exploded in their Beirut, Lebanon, compound.² The commission recommended that appropriate administrative or disciplinary action be taken against these commanders.³ Nevertheless, President Ronald Reagan, saying that the commanders had "already suffered quite enough," ruled out court-martial for the officers and accepted the responsibility for the disaster himself.⁴

The president's decision brought immediate criticism. One unidentified former senior military officer was quoted in *The New York Times* as saying of the president's action:

I'm astonished that he moved so quickly to pre-empt the possibility of formal punishment. . . . If the system isn't given a chance to establish accountability, how can you expect officers to fear the result of failure?⁵

Similarly, a *Wall Street Journal* editorial argued:

In relieving the military of even its

minimum responsibilities, the President is suggesting that it has no responsibilities at all. That is anything but a recipe for avoiding new military embarrassments in the future.⁶

ANALYSIS OF THE POTENTIAL OFFENSES

The Uniform Code of Military Justice—or code—has no provision dealing exclusively with command accountability. Yet, at least three provisions of the code could apply to the commanders in the Beirut case: Article 92, dereliction of duty;⁷ Article 134, homicide based on simple negligences;⁸ and Article 99, misbehavior before the enemy.⁹ These articles state offenses which have no parallel in civilian criminal law. Likewise, these offenses share another unique characteristic—criminal liability based on a showing of only simple negligence.

Simple Negligence Standard

Nothing in the *Long Commission Report* suggests that the Beirut commanders could be blamed for anything more than simple negligence. However, the House Armed Services Committee concluded in its separate investigation that "very serious errors in judgment" had occurred.¹⁰ Although this conclusion indicates a greater degree of liability, the factual findings indicating only simple negligence were similar to the findings of

the Long Commission.¹¹

Still, simple negligence makes criminal a wide range of conduct requiring proof of only a slight deviation from acceptable standards. Colonel William Winthrop, in his classic treatise, *Military Law and Precedents*, defined it to include the "improper" execution of orders, the failure to take "proper precautions" and not "doing the best" in a given military situation.¹²

The current *Manual for Courts-Martial*¹³ is similarly broad in its explanation, describing simple negligence as a "lack of that degree of care which a reasonably prudent person would have exercised under the same or similar circumstances."¹⁴ This definition, found in the discussion of Article 92, is altered slightly in the discussion of Article 99 wherein simple negligence is described as the "absence of conduct which would have been taken by a reasonably careful person."¹⁵ Similarly, the explanation of negligent homicide under Article 134 uses the "reasonably careful"¹⁶ language.

Despite these minor variations, the phrases describe, as law Professor William L. Prosser puts it, a standard of conduct not of "any ordinary individual, who might occasionally do unreasonable things; he is a prudent and careful man, who is always up to standard."¹⁷ It is against this standard that the Beirut commanders must be judged.

Dereliction of Duty

The most common offense suggested by Jeffery Record and the other critics is dereliction of duty. It is important to note that the evaluation of a supposed dereliction must be based on the facts as they appeared at the time of the alleged offense, not afterward. As the Army Board of Review stated in the *United States v. Ferguson*,¹⁸ "In testing for negligence the

law does not substitute hindsight for foresight." This case also held that a commander does not have to be more than "reasonable" to escape criminal liability. Conceding that the commander "could have done more," the board, nevertheless, reversed Lieutenant Ferguson's dereliction conviction for not sufficiently briefing a subordinate on a safety matter.¹⁹ Contrary to the trial court, the board found the commander's actions minimally adequate.

Lack of malicious intent does not excuse the offense, however. For example, Major General Robert W. Grow, a military attache to the Soviet Union, was convicted of dereliction of duty for failing to secure his personal diary.²⁰ Included in it were references to material which was technically classified. Because the same information was widely available in the media, the general treated his memoir as if it were "a copy of the Saturday Evening Post."²¹ Unfortunately for the general, persons unknown photocopied the diary, and embarrassing excerpts appeared in an East German paper. Parenthetically, this case also serves as a precedent for prosecuting a senior officer for what may be regarded, because of its maximum penalty of only three months' confinement, as a relatively minor offense.²²

Negligent Homicide

A more serious charge against the Beirut commanders would be negligent homicide under Article 134. Punishable by up to one year in prison for each death,²³ this offense uses essentially the same simple negligence standard. In the *United States v. Kick*,²⁴ the Court of Military Appeals acknowledged that criminal liability for crimes based on simple negligence was virtually unknown in civilian law. The court, nevertheless, af-

firmed the conviction by citing the "special need in the military to make the killing of another as a result of simple negligence a criminal act."²⁵ Because of the use of weapons, explosives and other dangerous instruments, the court found that "society demands protection."²⁶

Despite this judicial acknowledgment of the special need for accountability in the military, no published case reports the prosecution of a commander for the negligent homicide of his troops. Very likely, this omission is simply the result of a reluctance to extend criminal responsibility to a commander for an act which, as in the Beirut case, was initiated by an enemy. Nonetheless, no legal barrier prevents such a prosecution if the commander's negligence played, in the words of the Court of Military Appeals, a "material role in the victim's decease."²⁷

Misbehavior Before the Enemy

By far, the most serious of the potential charges against the Beirut commanders is the one posed by Article 99. This article, which provides for the imposition of the death penalty,²⁸ prohibits several forms of misbehavior before the enemy. It condemns military personnel who, through "neglect, . . . endanger the safety of any . . . command."²⁹

The *Manual for Courts-Martial* explains that the "before the enemy" element is not defined in terms of distance but is a tactical relation which would include at least the ground commanders in Beirut.³⁰ "Enemy" is loosely defined to include any "hostile body." For example, in the *United States v. Monday*, the 1965 Dominican Republic operation, resembling in many ways the Beirut situation, fulfilled the Article 99 prerequisites.³¹

As the examination of these three articles of the code has shown, a court-

martial, if it came to the same conclusions as the Long Commission, could lawfully adjudge long prison terms for the Beirut commanders. Indeed, the ground commanders could face the ultimate punishment—execution. Nevertheless, no trial will take place despite the seriousness of the potential charges. The support for this decision demands examination.

ANALYTICAL SUPPORT FOR THE DECISION

Purpose of the Military Justice System

The purpose of the military justice system is broader than that of the civilian system. As Captain Edward M. Byrne observes in his book *Military Law*:

*Civilian criminal law seeks to restrict and regulate behavior so that people can live together in peace and tranquility. Military justice has a similar and yet more positive purpose. Military justice must, of necessity, promote good order, high morale, and discipline.*³²

The goal of this "more positive purpose" is to achieve the military mission. The entire rationale of the military justice system is to help provide the nation with a force capable of winning wars. Therefore, the paramount factor in military justice decisions should be the interests of the military mission.

The US Supreme Court has readily acknowledged the primacy of the military mission over individual interests. In the often-quoted case of *Burns v. Wilson*, the court said, "The rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty."³³ Of course, a military member still has a right to a fair trial requiring proof of guilt beyond a reasonable doubt. But the decision to refer a case to

trial where, as in the Beirut case, reasonable evidence of individual guilt exists is entirely at the discretion of the court-martial convening authority. Such a decision should be based on clear military interests and should not be clouded by subjective perceptions that those accused had "already suffered quite enough."

Regardless of the evidence of guilt, nothing in the code or the *Manual for Courts-Martial* requires the convening authority to refer a particular case to trial. In fact, the manual merely states that a commander "may refer" a charge but is "not obliged" to do so.³⁴ In practice, many cases are disposed of administratively, as was the Beirut case when three commanders received "letters of caution."³⁵ Other command accountability cases are resolved through the expediency of the relief of command.³⁶ To determine whether a court-martial is necessary, a judgment must be made that court-martial punishment would enhance the military's ability to accomplish its mission.

Rehabilitation

Court-martial punishment traditionally addresses three theories: rehabilitation, deterrence and retribution.³⁷ Rehabilitation by court-martial punishment is seldom appropriate in command accountability cases based on simple negligence. For example, behavior modification, often a goal of rehabilitation, is not easily adapted to these cases. For most commanders, such as those in the Beirut case, there is simply no pattern of criminal behavior to modify. Besides, a conviction would virtually end the chances of those accused for further command, and this could very well be harmful to the military mission.

Commanders, including those in the

Beirut case, are usually highly trained and motivated professionals—valuable assets to the military mission. General Sir John Hackett, a much decorated former British army commander, suggests that a failed commander given another chance is a "wonderful investment." He explains:

*An opportunity to re-establish himself in his own esteem, when he has forfeited it, is something for which a man will give you a great deal in return. . . . and the return is often a bountiful one.*³⁸

Thus, it appears that the rehabilitation theory may best be served in the Beirut case by returning the commanders to duty.

Deterrence

Deterrence is the theory most attractive to the critics of the Beirut decision. Presumably, the harsh punishment of those commanders would deter others from making similar mistakes. The end result of this process would be, theoretically, more competent, effective leaders. As attractive as this may sound, careful analysis shows that the result may well be just the opposite. Consider the Soviet model.

The Soviets employ a deterrence theory in dealing with their commanders. Military analyst Andrew Cockborn reports that Soviet officers at all levels of command fear stiff punishments for even minor transgressions.³⁹ As a result, officers cover up errors and, even worse from the standpoint of military effectiveness, initiative is blunted.⁴⁰

The Soviets do, however, recognize the practical military difficulty their approach raises. Colonel General Oleg Kulishev pleaded in an article in the *Soviet Military Review* for punishment for the officer who is "afraid" to take responsibility, "not the one who showed initiative but did not

achieve success."⁴¹ Nevertheless, Cockborn says the reformers are making little progress in fostering initiative among Soviet officers.⁴²

Furthermore, the US Supreme Court recognizes that the fear of a legal penalty can undermine a commander's effectiveness. In barring lawsuits by enlisted personnel against commanders for alleged constitutional violations, the court, in the 1983 case of *Chappell v. Wallace*, cited "the special nature of military life" and the "need for unhesitating and decisive action by military officers" as the rationale for its decision.⁴³ Likewise, Martin Blumenson and James L. Stokesbury point out in their book, *Masters of the Art of Command*, that officers who constantly look "over their shoulder to see whether the ax is about to fall are diverting attention and energy from the more important matters on the battlefield."⁴⁴

Criminal action against commanders for simple negligence could also greatly aggravate what is widely viewed⁴⁵ as one of the most serious problems facing the military today—careerism. Excessive anxiety about one's career is an attitude sometimes attributed to military commanders. According to psychologist Norman F. Dixon, in military organizations, "the penalty for error is very much more substantial than the reward for success."⁴⁶

Dixon believes that this negative reinforcement breeds a fear of failure that stifles good leadership.⁴⁷ Certainly, any punishment would tend to feed this fear, but the prosecution of the Beirut commanders based on simple negligence would likely result in a new and even greater level of anxiety among commanders. The probable consequence would be less effectiveness in officers faced with command under similarly trying circumstances.

As we have seen, the deterrence concept might well succeed in causing other commanders to change their actions. But the military benefit of such a change is dubious at best. Since court-martialing the Beirut commanders to deter others would not produce the kind of leader the military needs, the military justice system would not have been served by such a prosecution.

Retribution

Retribution is the theory of punishment most applicable to command accountability cases. Byrne defines it as "the concept that a person has an ultimate responsibility for his acts and, if he has committed a crime, deserves punishment."⁴⁸ In military terms, the failure to exact retribution through appropriate channels can have a devastating effect on morale. Witness the fact that US officers were assassinated in Vietnam by their own troops.⁴⁹ Reasons for this situation were varied and complex, but at least part of the blame lay in the apparent perception that the system was not dealing with officers who were unnecessarily risking the lives of their troops.⁵⁰ In the Beirut case, however, there is no evidence of such a perception. In fact, a prosecution might well have hurt the morale of the Marine Corps, and this possibility, according to *The New York Times*, was a factor in the president's decision.⁵¹

Another factor *The Times* reported was the president's desire to minimize the impact of the *Long Commission Report* on his policy in Lebanon.⁵² Similarly, analyst Patrick J. Sloyan suggests that the president wanted to avoid airing at a court-martial an alleged dispute between the Joint Chiefs of Staff and the White House over the role of the Marines in his Middle East policy.⁵³ Despite implications to the

contrary, the desire to avoid negative public opinion is a legitimate consideration in command accountability cases. Clearly, public support and confidence are in the interests of the military. Colonel Harry G. Summers Jr., in his book *On Strategy: A Critical Analysis of the Vietnam War*, sees public support as a key to the successful use of military force.⁵⁴ Therefore, if retribution by means of a court-martial is necessary to retain public confidence in the military, then, this theory should predominate in command accountability cases.

In cases such as that of Beirut in which a large number of lives were lost, the public may find any disposition short of court-martial unacceptable. Administrative actions, as devastating as they may be for the officers personally, may be perceived by the public as a mere "slap on the wrist."⁵⁵ However, unlike deterrence, there have been no calls for retribution in the Beirut case. Still, a demand for retribution by the public could have justified a different decision. This would not be "scapegoating" because scapegoating implies the prosecution of innocent persons which, if the Long Commission's findings are correct, is not the case with the Beirut commanders.

The "X" Factor

Besides the traditional theories of court-martial punishment, an additional factor must be considered in the decision to refer a command accountability case to trial—the unpredictability of the outcome, or the x factor. Members of a court-martial panel may decide not to convict an individual despite seemingly conclusive evidence of guilt. They may also decide to adjudge little or no punishment even if they do bring a conviction. Both of these phenomena occurred in the courts-

martial which resulted from the collision of the USS *Belknap* and the carrier USS *John F. Kennedy* in 1975.⁵⁶

In the military justice system, the commander's fate is decided by other military officers. Current Chief Judge of the Court of Military Appeals Robinson Everett explains that, since military juries are drawn from the same profession, there is "a much higher probability that the persons who hear the case will understand and be responsive to the problems involved."⁵⁷ In the Beirut case, few military professionals apart from the Long Commission were critical of the commanders' performance. In spite of the evidence and the relatively easy legal standard involved, a prosecution before fellow officers cognizant of the difficult mission the commanders faced might well have been fruitless.

The decisionmaker must consider the damaging effects of a potentially unsuccessful prosecution. The public may consider it a self-serving whitewash by the military, while the military may conclude that the outcome eviscerates the concept of command accountability. The severity of these effects on the military mission may well lead a decisionmaker to conclude that prosecution is ill-advised.

CONCLUSION

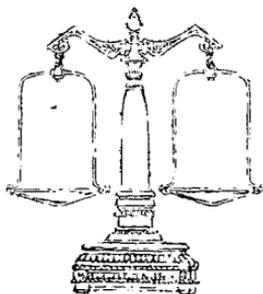
We have now considered why the decision not to court-martial the Beirut commanders, even assuming their guilt, was warranted in the interests of both the military mission and the military justice system. All commanders should be aware of their vulnerability to criminal charges under the Uniform Code of Military Justice because of the simple negligence standard.

Rather than setting a precedent of absolving commanders of their accountability, the Beirut proceedings merely reaffirm the principle that each case must be decided upon its own particular set of facts and circumstances. As we have seen, the code provides stiff punishments to enforce accountability. Yet those punishments need not always be imposed to have the desired effect as this account by the ancient historian, Livy, illustrates:

In the Samnite wars a certain Praenestine praetor had been slow in bringing up the reserves. When back in camp after the battle the Roman commander, Papirius Cursor, came to the praetor's tent and called

*him out. He then commanded a lictor to prepare his axe; and after waiting in silence until the axe was ready—while of course the praetor stood aghast expecting the next command to be for his execution—Papirius continues to the lictor: 'Come, cut this root; someone will stumble on it.'*⁵⁸

Clearly, a court-martial is a potent tool with which to enforce command accountability. It can present a convenient and enticing option to the decisionmaker who is faced with a military tragedy. But, as the analysis of the Beirut case shows, it may very well be the wiser man who forgoes its use.



NOTES

1 Jeffrey Record, 'Is America's Officer Corps Inept?' *US News & World Report*, 27 February 1984 p 38

2 'Report of the DOD Commission on the Beirut International Airport Terrorist Act October 23 1983' *Congressional Record* 98th Congress, Second Session US Government Printing Office Washington D.C. 30 January 1984 p S360

3 *Ibid*

4 'Transcript of President's News Conference on Attack on Marine Barracks. *The New York Times*, 28 December 1983 p A11

5 Philip Tauleman, 'Reagan's Timing and Reasons Protecting Corps,' *The New York Times*, 28 December 1983 p A10

6 'The Easy Way Out,' *The Wall Street Journal* 29 December 1983, p 12

7 *Uniform Code of Military Justice*, Article 92, Public Law 506, Act of May 5, 1950, 64 STAT 108 (64 Statutes at Large 108), 10 USC 892 (Title 10, US Code, Section 892) (1976)

8 *Uniform Code of Military Justice*, Article 134, Public Law 506, Act of May 5, 1950, 64 STAT 108, 10 USC 934 (1976)

9 *Uniform Code of Military Justice*, Article 99 Public Law 506 Act of May 5, 1950, 64 STAT 108 10 USC 899 (1976)

10 Joel Brinkley 'House Study Finds Officers at Fault in Beirut Bombing,' *The New York Times* 20 December 1983 p A1

11 Joel Brinkley, 'Reagan Asserts Blame is His in Marine Security Failure. Opposes Punishing Officers,' *The New York Times*, 28 December 1983 p A10

12 Colonel William Winthrop, *Military Law and Precedents*, Second Edition US Government Printing Office Washington D.C. 1920 p 722

13 *Manual for Courts-Martial United States, 1984* US Government Printing Office, Washington D.C. 1984

14 *Ibid*, Part IV, paragraph 16c(3)(c)

15 *Ibid*, paragraph 23c(3)(a)

16 *Ibid*, paragraph 85c(2)

17 William L. Prosser, *Law of Torts* Fourth Edition West Publishing Co. St Paul Minn 1971 p 151

18 *United States v Ferguson*, 12 CMR 570 (Court Martial Reports, Volume 12 p 570); (A B R (Army Board of Review) 1953) p 576

19 *Ibid*, pp 576-77

20 *United States v Grow*, 11 CMR 77, 3 USCMA 77 (US Court of Military Appeals Volume 3, p 77) (1953) p 80

21 *Ibid* p 86

22 *Manual for Courts-Martial United States, 1984 op cit* Part IV, paragraph 16c(3)(A)

- 23 *Ibid.*, paragraph 85e
 24 *United States v. Kick*, 7 M.J. 82 (Military Justice Reporter, Volume 7, p. 82), (C.M.A. (Court of Military Appeals) 1979)
 25 *Ibid.*, p. 84
 26 *Ibid.*
 27 *United States v. Romero* 1 M.J. 227 (C.M.A. 1979)
 28 *Uniform Code of Military Justice*, Article 99, *op cit*
 29 *Ibid.* subsection 3
 30 *Manual for Courts Martial United States, 1984 op cit.* Part IV, paragraph 23(c)(1)(c)
 31 *United States v. Monday*, 36 CMR 711 (A.B.R. 1965)
 32 Captain Edward M. Byrne *Military Law* Third Edition, Naval Institute Press, Annapolis, Md., 1981, p. 1
 33 *Burns v. Wilson*, 346 U.S. 137 (U.S. Supreme Court Reports, Volume 346, p. 137) 97 L. Ed. 1,508 (Lawyers Edition, Volume 97 p. 1 508) 73 S. Ct. 1 045 (Supreme Court, Volume 73 p. 1,045) (1953) p. 140
 34 *Manual for Courts Martial, United States, 1984*, R.C.M. 601 (d)(1) (Rules of Courts-Martial, Rule 601(d)(1))
 35 Patrick J. Sloyan *The Mistakes of Lebanon. The Virginian Pilot and Ledger Star* 15 April 1984 p. C2
 36 Martin Blumenson and James I. Stokesbury *Masters of the Art of Command* Houghton Mifflin Co., Boston Mass., 1976, pp. 361-74
 37 Byrne, *op cit.*, p. 84-85
 38 General Sir John Hackett *The Profession of Arms* Macmillan Co., N.Y. 1983 pp. 220-21
 39 Andrew Cockburn *The Threat Inside the Soviet Military Machine* Random House Inc. N.Y. 1983, pp. 57-63
 40 *Ibid.*, p. 175
 41 Colonel General Oleg Kulishhev "The Commander's Responsibility" *Soviet Military Review* February 1982, p. 15
 42 Cockburn, *op cit.*, p. 176
 43 *Chappell v. Wallace*, U.S., 76 L. Ed., Second Edition, p. 586, 103 S. Ct. (1983), p. 593
 44 Blumenson and Stokesbury, *op cit.*, p. 368
 45 Lieutenant Colonel G. E. Secrist, "Defective Leadership America's Greatest Peril." *Air University Review*, September-October 1983, p. 13
 46 Norman F. Dixon, *On the Psychology of Military Incompetence*, Basic Books, N.Y., 1976, p. 222
 47 *Ibid.*
 48 Byrne, *op cit.*, p. 85
 49 Richard A. Gabriel, "What the Army Learned From Business," *4S10 Professionalism and Leadership*, Armed Forces Staff College, Norfolk, Va., September 1983, p. 10-5
 50 Richard A. Gabriel and Lieutenant Colonel Paul L. Savage, *Crisis in Command: Mismanagement in the Army*, Hill & Wang Inc., N.Y., 1978, pp. 43-44
 51 Tauleman *op cit*
 52 *Ibid.*
 53 Sloyan, *op cit*
 54 Colonel Harry G. Summers Jr., *On Strategy: A Critical Analysis of the Vietnam War*, Presidio Press, Novato, Calif. 1982, p. 18
 55 Captain John E. Greenbacker "The Cruel Business of Accountability" *US Naval Institute Proceedings*, August 1977 p. 29
 56 *Ibid.*, p. 27
 57 Robinson O. Everett, *Military Justice in the Armed Forces of the United States*, Military Service Publishing Co., Harrisburg, Pa., 1956, p. 5
 58 Colonel C. F. Brand, *Roman Military Law* University of Texas Press, Austin, Texas 1968



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Tuition Assistance. Scheduled changes to the Army's Tuition Assistance Program that would have cut benefits and required soldiers to use their GI Bill while still on active duty have been canceled. A restoration of budget funds now allows the Army to keep tuition assistance rates and policy unchanged. The proposed changes, which would have taken effect in October 1984, would have required soldiers to use GI Bill benefits before becoming eligible for tuition assistance. The current rates now in effect are at the maximum congressional limits—90 percent and above for soldiers E5 and above with less than 14 years' service and 75 percent for all others.

Soldiers who are eligible for assistance under the GI Bill should still consider using it while in the service. Benefits under the GI Bill expire 31 December 1989, and extension beyond that date is uncertain.