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Article 8

Applicability of Sixth Amendment Guarantees to Military Proceedings

supported on the theory of the privileges and immunities clause of article IV, section 2, which outlaws discrimination by one state against citizens of another. The questions raised by the case fall more within the scope of the decisions in *Ward, McCready, Toomer,* and *Blake,* rather than *Thompson* and *Green.* Under the former cases it would appear that a proper ratio must be established between the percentage of taxes paid and the benefits received. However, unlike the earlier cases, we are here involved not with privileges and immunities that arise from United States citizenship but those that are specifically provided by a particular state for its own citizens.

The fundamental significance of the instant case is in the fact that it established a workable test to be used when applying the equal protection clause of the fourteenth amendment to constitutional challenges against residency requirements for welfare benefits. The classification and purpose of the statute are now to be investigated. Such a test appears to validly protect the rights of the individual because, if properly applied, the actual intent of an applicant will be investigated before any decision as to the availability of benefits is determined. However, the problem which remains is whether or not the state may validly restrict aid to its own domiciliaries. In light of the greater burdens that are now being placed upon state treasuries to provide adequate services to residents of a particular state, it would seem that a legitimate requirement may be legislated, *i.e.*, one which reasonably protects the state against the fraud of an applicant but legitimately balances against this the true intent of the individual.

Applicability of Sixth Amendment Guarantees to Military Proceedings

Defendant appealed from an order of the United States District Court of Kansas dismissing his petition for a writ of habeas corpus which had been brought on the grounds that, at his special court-martial, he had been denied his sixth and fifth amendment guarantees as well as those of military due process in that he was assigned a non-legally trained officer in response to his request for qualified counsel.[1] The United States Court of Appeals, Tenth Circuit, in affirming the dismissal of the petition, *held* that the defendant's sixth amendment rights had not been denied since the crime for which the accused had been charged was equivalent to a misdemeanor at civil law and the sixth amendment's assistance of counsel provision had not, as yet, been

[1] 10 U.S.C. § 827(c) (1964) (Article 27(c) of the Uniform Code of Military Justice [hereinafter cited as UCMJ]).

interpreted by the United States Supreme Court as applying to misdemeanors. Furthermore, the Court found the accused not to have been deprived of a fair trial in violation of the fifth amendment since, as required by statute, trial and defense counsel were equally qualified in terms of legal training. *Kennedy v. Commandant,* 377 F.2d 339 (10th Cir. 1967).

Twelve days later, in another case, the United States Court of Military Appeals reached an apparently conflicting conclusion. There, the accused was tried and convicted by a general court-martial. At the custodial interrogation, the defendant requested that counsel be appointed to represent him but the Staff Judge Advocate refused to appoint an attorney at the investigatory stage, noting that the defendant had the right to retain civilian counsel at his own expense. The defendant was otherwise informed of all his rights under the Uniform Code of Military Justice. The Court of Military Appeals, in reversing petitioner's conviction, recognized that members of the armed services are not automatically deprived of their Bill of Rights guarantees and *held* that the principles enunciated by the United States Supreme Court with respect to the right to counsel are of constitutional dimension and hence applicable to military interrogations of criminal suspects. Pursuant to these principles, the Court found that the defendant had the right to be represented by appointed counsel at the pretrial interrogation. *United States v. Tempia,* 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).

Congress was given the power to "make Rules for the Government and Regulation of the land and naval Forces"[2] to insure supremacy of the civil government over the military. This grant, in conjunction with the wording of the Fifth Amendment of the Constitution, which provides that no person shall answer for an infamous crime without indictment by a grand jury "except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger" [3] is generally viewed as the source of authority for court-martial proceedings.[4] Given this power to regulate the armed forces, Congress took the position that it was not limited by any of the Bill of Rights guarantees,[5] a position not without strong historical support.

All the early American Articles of War,[6] which were derived from the British Articles of War,[7] contain no provision for even allowing the presence of counsel at court-martial proceedings. Not until the American Articles of War of 1806[8] can anything resembling a right of counsel be found. Article 69 of this Act provided that the judge advocate as prosecutor for the United States "shall so far

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[2] U.S. CONST. art. I, § 8. *See generally* Warren, *The Bill of Rights and the Military,* 37 N.Y.U. L. REV. 181, 185-86 (1962).

[3] U.S. CONST. amend. V.

[4] *See, e.g.,* W. WINTHROP, MILITARY LAW AND PRECEDENTS 48 (2d ed. 1920).

[5] Note, *Constitutional Rights of Servicemen Before Courts-Martial,* 64 COLUM. L. REV. 127, 128 (1964).

[6] Reprinted in WINTHROP, *supra* note 4, at 953.

[7] *Id.* at 931.

[8] Act of April 10, 1806, ch. 20, arts. 1-101, 2 Stat. 359.

consider himself as counsel for the prisoner . . . as to object to any leading question to any of the witnesses or any question to the prisoner, the answer to which might tend to criminate himself. . . ." [9]

Army Regulations in 1835 provided that while an attorney was allowed to be present, he could not directly participate in the proceedings.[10] As an early treatise writer noted, "counsel are not to . . . offer the slightest remark, much less to lead or argue. . . . [A] lawyer . . . is tolerated, as a friend of the person to assist him by advice in preparing questions for witnesses, in taking notes and shaping his defence."[11]

Since Congress' power to create such tribunals arose independently of the judicial articles of the Constitution, a court-martial was not considered a court as that term is understood in civil phraseology and thus was not to be limited by the provisions of the sixth amendment.[12] While Blackstone's statement that "he puts not off the citizen when he enters the camp; but it is because he is a citizen, and would wish to continue so, that he makes himself for a while a soldier"[13] remains true, the rights of the individual citizen always give way to the necessity of enforcing military discipline. Indeed, Chief Justice Warren recently stated that the military establishment has been given broad power to deal with its own personnel because

> courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have. Many of the problems of the military society are, in a sense, alien to the problems with which the judiciary is trained to deal.[14]

This "hands-off" doctrine, which has continued basically intact, was first enunciated by the United States Supreme Court in *Ex parte Vallandigham*.[15] There, petitioner, a civilian, had made a speech critical of the government's handling of the Civil War. The speech was found to be in violation of a regulation promulgated by the head of the area military department. In refusing to review the petitioner's conviction, the Court held that it had no power to review by certiorari the proceedings of a military commission appointed by an officer commanding a military department since such an application was not from a suit "in law or equity within the meaning of . . . the 3d article of the Constitution. Nor is a military commission a court within the meaning of the 14th section of the Judiciary Act of 1789."[16]

Hence, the Supreme Court seemingly divested itself of any power it might have had, either constitutional or statutory, to

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[9] Act of April 10, 1806, ch. 20, art. 69, 2 Stat. 367.

[10] ARMY REG. art. XXX § 34, at 96 (1835).

[11] A. MACOMB, THE PRACTICE OF COURTS MARTIAL §§ 43, 93 (1840) reprinted in Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1, 38 (1958).

[12] W. WINTHROP, MILITARY LAW AND PRECEDENTS 49 (2d ed. 1920).

[13] 1 W. BLACKSTONE, COMMENTARIES 408 (Wendell ed.).

[14] Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 187 (1962).

[15] 68 U.S. (1 Wall.) 243 (1863).

[16] *Id.* at 251.

inquire into the judgments of military tribunals. However, three years later, a nearly identical fact pattern arose except that a peacetime background now prevailed. The Supreme Court, in *Ex parte Milligan*,[17] granted an application for a writ of habeas corpus requested by a civilian tried by a military tribunal for promoting rebellion in an area that had not been and was not being threatened with enemy occupation. Although discipline is a necessity for achieving military efficiency and, therefore, Congress can prescribe modes of trial as it sees fit, nevertheless all civilians are guaranteed the right of trial in their respective state courts where such are open and operating. At first glance, these cases seemed contradictory but are reconcilable since in *Vallandigham* the Supreme Court said it did not have jurisdiction to inquire into the merits whereas in *Milligan* it felt that the *military* had no jurisdiction over the person sentenced.

Refinement of the jurisdictional basis for inquiring into military proceedings came in *Ex parte Reed*.[18] There, the defendant was tried by a general court-martial, found guilty of malfeasance, and had sentence imposed. The reviewing authority demanded that a higher sentence be provided and this was done. In affirming the lower court's denial of a writ of certiorari, the Supreme Court held that because the military court had jurisdiction over the person, the cause, and the sentence imposed, it could look no further into the record.[19]

The principle that judgments of a military tribunal cannot be collaterally attacked once the requisite jurisdictional requirements have been satisfied continued unchallenged until the World War II era.[20] At that time a series of Supreme Court decisions enlarging upon the applicability of the sixth amendment as applied to civilians as well as certain extra-judicial factors led to attempts to either expand the classical test of jurisdictional inquiry by the civil judiciary or to internally reform military due process. In 1932, the Supreme Court decided *Powell v. Alabama*,[21] in which it held that in a capital case arising in a state court where the defendant is indigent and incapable of effectively defending himself, the court must assign counsel whether requested or not. The reasoning of *Powell* was followed by *Johnson v. Zerbst*,[22] where the defendant was

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[17] 71 U.S. (4 Wall.) 2 (1866).

[18] 100 U.S. 13 (1879).

[19] "Whatever was done . . . we must presume was properly done. If error was committed in the rightful exercise of authority, we cannot correct it." *Id.* at 23. *Accord,* Keyes v. United States, 109 U.S. 336 (1883) (habeas corpus denied where the general court-martial had satisfied the jurisdictional requirements even though one of its members was a witness for the prosecution); *In re* Grimley, 137 U.S. 147 (1890) (grant of habeas corpus reversed where the military court had met jurisdiction even though it incorrectly interpreted a statute).

[20] *See, e.g.,* Reaves v. Ainsworth, 219 U.S. 296, 304 (1911), cited with approval in United States *ex rel.* Creary v. Weeks, 259 U.S. 336, 344 (1922): "To those in the military . . . the military law is due process. The decision, therefore, of a military tribunal acting within the scope of its lawful powers cannot be reviewed or set aside by the courts."

[21] 287 U.S. 45 (1932).

[22] 304 U.S. 458 (1938).

charged with feloniously possessing and uttering counterfeit money. The Supreme Court held that the sixth amendment meant that, in federal courts, counsel must be provided for those unable to employ such counsel unless the right is competently and intelligently waived. The Court concluded that failure to provide such counsel would create a *jurisdictional* bar to conviction and sentencing which may be collaterally attacked in a habeas corpus proceeding.

Not long after these decisions, the lower federal courts began to apply the new standard in reversing a number of court-martial convictions [23] despite the fact that the Supreme Court had held in *Betts v. Brady* [24] that the sixth amendment did not require the states to furnish indigent defendants with counsel. In effect, it seemed that a deprivation of the "Assistance of Counsel" guarantee added a new element to the jurisdictional inquiry into court-martial proceedings. The absence of such assistance would apparently have created a bar to prosecution.[25]

In 1950, however, in *Hiatt v. Brown*,[26] the Supreme Court reaffirmed the traditional limitations on judicial inquiry into military matters. There, the lower court was presented with a record replete with the errors of reliance on inapplicable law, token defense, and conviction for murder without proof of malice, premeditation or deliberation.[27] In granting habeas corpus relief, the lower court applied due process under civilian standards holding that were it not to do so the fifth amendment guarantees would no longer apply in federal courts. In reversing, the Supreme Court restated the classical view that the civilian courts can exercise no supervisory power over court-martial proceedings, that any errors committed are for the military to arrest and that the single inquiry must remain jurisdiction.[28]

The door to the courts being effectively closed to any relief on a constitutional basis, extra-judicial events required a modification in the traditional theory of military autonomy. Soldiers returning from the war told of unnecessary displays of arbitrariness by their superiors. More importantly, the scope of our military strength had increased tremendously since colonial days. Every male was now a potential member of the armed forces with time spent on active enlistment and on reserve duty consuming significant portions of their lives.[29] Thus, the Articles

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[23] *See, e.g.*, Anthony v. Hunter, 71 F. Supp. 823 (D. Kan. 1947) (inexperienced officers appointed counsel); Shapiro v. United States, 69 F. Supp. 205 (Ct. Cl. 1947) (failure to provide counsel).

[24] 316 U.S. 455 (1942).

[25] Note, *Constitutional Rights of Servicemen Before Courts-Martial*, 64 COLUM. L. REV. 127, 131 (1964).

[26] 339 U.S. 103 (1950).

[27] 175 F.2d 273 (5th Cir. 1949).

[28] Hiatt v. Brown, 339 U.S. 103, 110-11 (1950), *citing In re* Grimley, 137 U.S. 147 (1890) and *In re* Yamashita, 327 U.S. 1 (1946) (pursuant to U.S. CONST. art. I, § 8, giving the right to punish "Offenses against the Law of Nations," Congress could by military tribunals punish foreign officers for war crimes).

[29] For an analysis of the events leading up to the expansion of servicemen's rights, see White, *The Background and the Problem*, 35 ST. JOHN'S L. REV. 197 (1961); Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 187-88 (1961).

of War of 1806,[30] which had governed the discipline of American soldiers, with only minor revisions in 1916 [31] and 1920,[32] was replaced in 1950 by the Uniform Code of Military Justice.[33]

Under the UCMJ three kinds of courts-martial exist. The first is a general court-martial which is composed of not less than five members and a law officer.[34] This court has the power to adjudge any punishment including death when specifically authorized and, under the law of war, may try any person subject to trial by military tribunal and adjudge any punishment permitted by the law of war.[35]

The second type of court-martial, designated as special, consists of not less than three members and may impose a bad conduct discharge as well as any other penalty not forbidden, except death, dishonorable discharge, imprisonment for more than six months, hard labor without confinement for over three months, and certain salary forfeitures beyond a stated maximum.[36] The penalties which a special court-martial may impose are thus limited to the length of sentence which may be imposed for conviction of a misdemeanor at civil law.[37]

For each general and special court-martial, the authority convening the court shall detail trial and defense counsel which, at a general court-martial, must be a judge advocate or a law specialist who is a graduate of an accredited law school or member of the federal bar or bar of the highest court of a state and must be certified as competent by his respective Judge Advocate General.[38] The UCMJ also provides that in the case of a special court-martial, neither trial nor defense counsel need be of that class that can be qualified in a general court-martial, but if the trial counsel is qualified to act before a general court-martial or is qualified to act in all respects before a general court-martial except for a lack of certification, then defense counsel must be similarly qualified.[39]

The last type of court-martial is the summary court-martial and consists of one commissioned officer with authority over all persons subject to this chapter for any non-capital offense, except of-

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[30] Act of April 10, 1806, ch. 20, arts. 1-101, 2 Stat. 359.

[31] Act of Aug. 29, 1916, ch. 418, arts. 1-121, 39 Stat. 650.

[32] Act of June 4, 1920, ch. 227, arts. 1-121, 41 Stat. 787.

[33] Act of May 5, 1950, ch. 169, arts. 1-139, 64 Stat. 144, *as amended*, Act of Aug. 10, 1956, ch. 1041, arts. 1-121, 70A Stat. 78, now, 10 U.S.C. §§ 801-972 (1964).

[34] 10 U.S.C. § 816(1) (1964). For the duties of the law officer, see 10 U.S.C. § 826(a)-(b) (1964).

[35] 10 U.S.C. § 818 (1964).

[36] 10 U.S.C. § 819 (1964).

[37] *Compare* 10 U.S.C. § 819 (1964) *with* N.Y. PEN. LAW § 55.102(e).

[38] 10 U.S.C. § 827(b) (1964).

[39] 10 U.S.C. § 827(c)(1)-(2) (1964). When the prosecutor is not qualified to practice before a general court-martial, or qualified but not certified, *compare* Application of Stapley, 246 F. Supp. 316 (D. Utah 1965) (appointment of non-legally trained counsel at special court-martial held inconsistent with the sixth amendment) *with* Le Ballister v. Warden, 247 F. Supp. 349 (D. Kan. 1965) (sixth amendment inapplicable since any existing right to counsel arises from the power of Congress and therefore legally trained counsel not necessary at special court-martial proceedings).

ficers, cadets, and midshipmen. However, no person may be tried before it over his objection unless he has chosen this forum in lieu of a commanding officer's nonjudicial punishment.[40] The penalties that may be imposed are more severely limited, with confinement and pay forfeitures approximately between one-third and one-sixth of those imposable by a special court-martial.[41] As previously mentioned, a commanding officer may impose a nonjudicial punishment which approximately equals, in severity, though in greater specificity, the penalties that may be imposed by summary courts-martial.[42]

The UCMJ also provides that no serviceman may be tried by a court-martial any member of which is his junior, nor may any member of any court-martial be an accuser, witness for the prosecution, or have acted as investigation officer or as counsel in the same case.[43] Compulsory self-incrimination is prohibited in the court-martial and in the pre-trial interrogation and no person is allowed to interrogate without informing the accused of the nature of the accusation against him; that the accused need make no statement; and that any statement made may be used against him in evidence. Any statement elicited in violation of this article is inadmissible evidence.[44] Finally, according to statute, the accused must be represented by counsel in his defense before a general or special court-martial which may consist of either civilian counsel if provided by him, or by military counsel of his own choosing if reasonably available, or by the defense counsel detailed under 10 U.S.C. § 827.[45]

It is to be perceived, therefore, that in 1950, military process had far surpassed civilian due process as applied to the states. Thereafter, decisions of the Supreme Court expanding inquiry into military matters and applying the sixth amendment to the states tended to close the gap between military and civil justice. The landmark case in this area is *Burns v. Wilson*.[46] There, petitioners were tried separately before a general court-martial, found guilty of murder, and sentenced to death. After all military remedies were exhausted, petitioners applied for and were denied habeas corpus relief in the district court on the ground that the military tribunal had jurisdiction in the traditional sense. The court of appeals affirmed, but only after reviewing the evidence. In affirming the lower court's denial of the writ of habeas corpus, the Supreme Court held that the "military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a viola-

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[40] 10 U.S.C. § 820 (1964).
[41] 10 U.S.C. §§ 819, 820 (1964).
[42] 10 U.S.C. § 815 (1964).
[43] 10 U.S.C. § 825(d) (1964).
[44] 10 U.S.C. § 831 (1964).

[45] 10 U.S.C. § 838(b) (1964). *Compare* the language of that statute requiring that the defendant be represented by assigned defense counsel *with* Rule 44 of the Federal Rules of Criminal Procedure requiring that counsel be appointed *only* if defendant is indigent. For a concise discussion of the absolute burden on the military to appoint counsel see Quinn, *The United States Court of Military Appeals and Military Due Process*, 35 ST. JOHN'S L. REV. 225, 237 (1961).
[46] 346 U.S. 137 (1953).

tion of his constitutional rights." [47] Where the military had given a fair consideration to all the claims raised by the petitioner, it was not up to a federal civil court to re-evaluate. The dissent argued that it was not enough to determine that the military had considered the claims where it was clear that an incorrect result had been reached.

The significance of this case is the addition of a new element to the traditional jurisdictional inquiry. Now the federal courts can inquire into whether the military has given a fair hearing to claims raised by the accused. Consequently, the Court of Military Appeals has generally taken it upon itself to quickly follow suit with respect to the new pronouncements concerning individual rights by the Supreme Court. For example, in *Chandler v. Fretag*,[48] a state criminal action wherein petitioner had been denied a continuance in response to his request to obtain counsel, the Supreme Court, distinguishing *Betts* and citing *Powell*, held that regardless of whether the sixth amendment required that counsel be appointed, at the very least his right to be heard through his own counsel was unqualified. This was soon followed by the Court of Military Appeals' decision of *United States v. Gunnels*.[49] At a preliminary investigation, the defendant had been informed of the charges against him and of his privilege against self-incrimination, but, upon application to the staff judge advocate, he was refused any advice regarding the right to counsel. In reversing the conviction by the general court-martial, the Court of Military Appeals held that while the right of assigned counsel exists only in criminal proceedings, as distinguished from an investigation, a suspect has the right to be given legal advice by the staff judge advocate, or in the alternate, by civilian counsel. Since the accused was given no advice whatsoever regarding the right to counsel, this latter alternative of advice by civilian counsel was, in effect, unknown to the defendant.

United States v. Jacoby [50] stands on a par with *Burns* for the sheer breadth of its statements as to the applicability of the Bill of Rights to the military. There, the defendant had been convicted at a special court-martial of uttering worthless checks on the basis of written interrogatories without the opportunity of confrontation of witnesses and sentenced, in part, to a bad conduct discharge. In reversing the intermediate review board, the Court of Military Appeals held that the taking of depositions without the presence of the accused's counsel was a violation of the sixth amendment. It noted that "it is apparent that the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces." [51] Even more interesting, however, is the statement by the court that "the historical development of military practice and subsequent enact-

[47] *Id.* at 142.
[48] 348 U.S. 3 (1954).
[49] 8 U.S.C.M.A. 130, 23 C.M.R. 354 (1957). *Accord*, United States v. Rose, 8 U.S.C.M.A. 441, 24 C.M.R. 251 (1957).
[50] 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960).
[51] *Id.* at 430-31, 29 C.M.R. at 246-47.

ments of Congress have little bearing on the contemporaneous meaning of the Sixth Amendment." [52]

Three years later the Supreme Court took further steps in advancing the civil right to counsel. In *Gideon v. Wainwright*,[53] an indigent defendant was convicted of a felony by a state court over his objection that counsel was not appointed to represent him. In overruling *Betts*, the Supreme Court held that the sixth amendment's assistance of counsel provision was an essential requisite of a fair trial and as such made obligatory on the states by the fourteenth amendment.[54]

Subsequently, the Court of Military Appeals decided *United States v. Culp*.[55] This case involved a defendant who was tried by a special court-martial and who, upon his plea of guilty, was sentenced, in part, to a bad conduct discharge. The board of review set aside the sentence on the determination that the defendant's plea of guilty was improvident and that the defendant had been deprived of his sixth amendment rights where they had not been intelligently waived, and that defense counsel had consisted of non-certified officers. Although the Court of Military Appeals reversed the decision of the board, the three opinions filed in support of the reversal differed as to reasoning. One judge argued that, in light of the common law at the time of its adoption and its subsequent history, the sixth amendment's assistance of counsel provision has always been inapplicable to trials by court-martial. Since the sixth amendment did not apply, the judge then directed his reasoning to the qualifications of counsel as set forth in the UCMJ and found that the defense counsel met the requirements of articles 27 and 38(b) of the UCMJ.

The Chief Judge argued that the sixth amendment is applicable to trials by either general or special courts-martial but that such requirements were satisfied by appointment of counsel pursuant to the UCMJ since presumptive skill matched actual performance so that competent counsel was a reality. In addition, he noted that in all cases where a special court-martial had imposed a bad conduct discharge, an automatic review was provided with the possibility existing of a further review by the Court of Military Appeals.

The third judge, concurring in the opinion of the Chief Judge that the sixth amendment was applicable to military proceedings, felt that the defendant here had not been deprived of his rights since

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[52] *Id.* at 433, 29 C.M.R. at 249. A strong dissent stated that if "the framers of the Constitution entrusted to Congress the task of striking a precise balance between the rights of men in the service and the overriding demands of discipline and duty . . . we must not reject the expression of Congress merely because we believe the civilian system offers a better scale." *Id.* at 441, 29 C.M.R. at 257.

[53] 372 U.S. 335 (1963).

[54] *See also* Douglas v. California, 372 U.S. 353 (1963), requiring counsel on an appeal as of right. Clearly a person may appeal from a military court-martial as a matter of right. Once the court-martial's convening authority has taken final action, the entire record of every general court-martial case and that of every special court-martial approving a bad conduct discharge is sent to the appropriate Judge Advocate General to be reviewed by a board of review. 10 U.S.C. § 865(a)-(b) (1964). All other special and summary court proceedings are reviewed by a judge advocate as prescribed by regulation. 10 U.S.C. § 865(c) (1964).

[55] 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963).

he had chosen his own counsel. He also questioned the desirability of continuing to permit non-lawyers to practice before tribunals where bad conduct discharges could be imposed. Thus, although the court recognized the applicability of the sixth amendment to military proceedings, the court failed to designate the standard to be applied.[56]

Further questions relating to assistance of counsel were raised by the Supreme Court's decision in *Escobedo v. Illinois*.[57] The Court held that where the petitioner had been taken into custody and had begun to become the focal point of inquiry as to the commission of a crime, had asked for and been denied the right to consult with his own attorney and had not been warned by the police of his right to remain silent, the accused had been denied the assistance of counsel.

The Court of Military Appeals, in *United States v. Wimberly*,[58] refused to follow *Escobedo* and instead adhered to the traditional voluntary-involuntary approach regarding confessions, as advocated by the dissent in *Escobedo*. Here the court found a confession to be voluntary although made only four days after another confession which was found to be involuntary. Between the first and second confessions, the defendant had been advised of all his rights, but, due to his ignorance as to the inadmissibility of his first confession, reconfessed when requested. Over the defendant's objections, his conviction by a general court-martial was affirmed. The Court of Military Appeals cited *Escobedo* as establishing nothing new for the military, at least in regard to the admissibility of statements made after the police had denied a request to consult with counsel. As to custodial interrogations where the accused has not requested counsel, the court recognized that there were currently varied interpretations of *Escobedo* in this respect[59] and concluded that nothing indicated "that the only feasible way to give maximum effect to the Constitutional right to the assistance of counsel is that the accused have counsel beside him during police questioning."[60]

Some questions left in doubt by *Escobedo* were settled by *Miranda v. Arizona*.[61] Here the Supreme Court held that prior to any custodial interrogation, the accused must be warned that he has a right to remain silent, that any statement made can be used against him, and that he has the right to the presence of an attorney, either retained or appointed, unless such right be waived voluntarily, knowingly, and intelligently. It should be noted that the Supreme Court there cited with approval the self-incrimination provisions of the UCMJ,[62] the *United States v. Gunnels*[63] and *United States v. Rose*[64] decisions for the proposition that "[d]enial of the right to consult counsel

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[56] *See* note 39, *supra*.
[57] 378 U.S. 478 (1964).
[58] 16 U.S.C.M.A. 3, 36 C.M.R. 159 (1966).
[59] Lane, *Miranda in Uniform*, N.Y.L.J., Nov. 10, 1967, at 1, col. 3-4.
[60] United States v. Wimberly, 16 U.S.C.M.A. 3, 10, 36 C.M.R. 159, 166 (1966).
[61] 384 U.S. 436 (1966).
[62] 10 U.S.C. § 831(b) (1964).
[63] 8 U.S.C.M.A. 130, 23 C.M.R. 354 (1957). *See* text accompanying note 49, *supra*.
[64] 8 U.S.C.M.A. 441, 24 C.M.R. 251 (1957).

during interrogation has also been proscribed by military tribunals." [65]

In *Kennedy v. Commandant*,[66] the instant case, the defendant appealed from the denial of a writ of habeas corpus brought on the ground that the military courts lost jurisdiction in imposing a sentence in a special court-martial where the accused was represented by non-legally trained counsel. Aside from this sixth amendment claim, the defendant argued that a fair trial had been denied in that, since he was unable to afford civilian counsel, the UCMJ provision which permits the accused to hire civilian counsel at his own expense [67] invidiously discriminated against the poor in violation of the fifth amendment.

Since the defendant had conceded that the elements of jurisdiction in the classical sense existed, the Court had to consider only the question of whether the accused was per se deprived of any constitutionally guaranteed right. Historically it found no support for applying the sixth amendment to military prosecutions and saw no need to determine its current applicability. Moreover, while the crime was one of moral turpitude, the penalty was equivalent to a misdemeanor at civil law. Since the applicability of the sixth amendment in such cases was still an open question,[68] the Court felt it need not now decide whether such amendment was applicable to the military, since in any event the UCMJ complied fully with that amendment's provisions. Furthermore, the Court noted that the trial counsel was equally trained, that the sentencing power of special courts-martial was limited, and that every officer must be familiar with the UCMJ and the Manual for Courts-Martial such that the fifth amendment was satisfied.[69]

Finally, the Court found that petitioner had not been denied military due process since the counsel appointed and the trial received had already been deemed to satisfy the sixth and fifth amendments respectively. Satisfaction of these constitutional provisions *ipso facto* precluded any possibility that he could have been prejudiced by his inability to obtain private counsel.[70]

In *United States v. Tempia*,[71] the accused was tried by a general court-martial and sentenced, in part, to a bad-conduct discharge. Prior to custodial interroga-

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[65] Miranda v. Arizona, 384 U.S. at 489 & n. 63.

[66] 377 F.2d 339 (10th Cir. 1967).

[67] 10 U.S.C. § 838(b) (1964).

[68] *See* the opinion of Justice Fortas, dissenting from the denial of a writ of certiorari in Heller v. Connecticut, # 115 B73 CCH (1967) stating the issue to be: "whether we should now hold that the constitutional guarantees of counsel applies to the present case and to other relatively 'minor' offenses or misdemeanors carrying significant penalties for their violation." *Id.* at 74. Thus, a number of opposite conclusions have been reached in this area. Those arguing for the applicability state that it is implicit in *Gideon* (*see, e.g.*, Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965)) and those holding the contrary argue that it would place an intolerable burden on the legal structure (*see, e.g.*, Winters v. Beck, 239 Ark. 1154, 397 S.W.2d 365 (1965)).
The relationship of this conflict to military proceedings lies, of course, in the area of special courts-martial whose scope is limited to penalties that would be meted out for misdemeanors at civil law. *See* note 37, *supra*.

[69] Kennedy v. Commandant, 377 F.2d 339, 343-44 (10th Cir. 1967).

[70] *Id.* at 344.

[71] 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).

tion, defendant had sought legal advice from the Staff Judge Advocate. The advice was given, but the Staff Judge Advocate refused to enter into an attorney-client relationship since such would deprive him from acting in his official capacity. Defendant was told that he had the right to retain civilian counsel at his own expense, that no military lawyer would represent him during the investigatory stages, but that he would be furnished military counsel if charges were preferred. At the interrogation held immediately thereafter, the defendant confessed.

The Court premised its reversal on the ground that, even though military law has a separate existence, members of the armed services, by their mere status, are not deprived of all the protections of the Bill of Rights. The Court reasoned that constitutional safeguards, unless expressly or impliedly inapplicable, encompassed the military and that since *Miranda* laid down principles constitutional in scope, it was binding on the military.[72]

Pursuant thereto, it found these standards not to have been satisfied where the accused had been told that no lawyer would be appointed to represent him at the custodial interrogation and that the availability of consultation with private attorneys was limited to attorneys whom he could employ at his own expense. The burden was now on the government to provide counsel for the accused, not only at the court-martial but also at the custodial interrogation. While it noted that *Miranda* allowed for other procedures that are at least as effective in warning the accused of his right to silence, it found that procedures heretofore employed were not such equivalent methods.[73]

A concurring opinion reiterated the fact that decisions by the Supreme Court of constitutional import, of which *Miranda* was one, are binding on even military tribunals, but further added that *any* denial of the accused's rights are subject to review by habeas corpus proceedings in civil court.[74]

The Chief Judge, in his dissent, noted that *Miranda* had been, in part, based upon the military procedure relating to warning of rights and right to counsel at trials. Even if this were not the case, the military procedures were equivalently effective means, and that even though the attorney-client relationship was not formed, the defendant was told of all his legal rights and right to counsel which is all that any attorney can do.

Tempia unequivocally adds two constitutional rights to those already possessed by servicemen. As enunciated in *Miranda*, as of June 13, 1966, the accused who has been made the subject of custodial interrogation has the right to the presence of an attorney and, secondly, the right to have counsel provided if he is indigent.

At this point, the clarity of the holding in *Tempia* ends. Questions now arise as to what the Court meant by counsel—whether it is either a lawyer or a non-legally trained officer and whether the decision was intended to apply only in

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[72] *Id.* at 634-35.

[73] *Id.* at 639-40.

[74] *Id.* at 640. *See* 28 U.S.C. § 2241 (1964).

the case of a general court-martial. With respect to both questions, the Court merely stated that past procedures were defective, citing *Miranda*, but did not elaborate as to whether an attorney, if not certified as competent or legally trained, would be sufficient to satisfy the sixth amendment in the event the defendant was subject to trial by general court-martial. In all likelihood, advice by such counsel would be insufficient. The question now arises whether such advice would be sufficient where the accused is subject to trial by a special court-martial, which has the authority to levy punishment equivalent to that of a misdemeanor at civil law.

Thus, while the Court has determined that the sixth amendment applies to custodial interrogation, it has failed to set forth what constitutes compliance as to the type of representation required, especially in regard to a special court-martial proceeding. *Kennedy*, on the other hand, while professing uncertainty as to the applicability of the sixth amendment, still managed to set forth a standard that would satisfy the amendment. Although it was a special court-martial with the right to counsel at a military trial that was this Court's focal point of inquiry, it is significant that it held that the UCMJ provisions for qualification of counsel do comply with the sixth amendment whereas previous decisions either held that the sixth amendment was inapplicable to the military or that the sixth amendment is applicable and its requirements were not met by the UCMJ.

An apparent conflict between the two cases seemingly exists. In *Kennedy* it was held that no constitutional rights are infringed by the refusal to permit the accused to obtain his own legally trained counsel when he is able to pay for it. In *Tempia*, which concerned appointment at the pre-trial level, it was specifically held that failure to appoint counsel for an indigent was violative of the Constitution. However, the two cases are distinguishable in so far as *Tempia* is concerned with the otherwise outright denial of such a right whereas *Kennedy* relates to the obtaining of possibly superior counsel where the right to appointed counsel already existed.

A more important issue raised by these decisions is whether felons and misdemeanants are to be afforded the same measure of legal assistance both at the trial and the investigatorial phase. *Kennedy* answered the question in the negative, stating that appointment of equally competent but non-legally trained counsel under the UCMJ fully satisfied all of the accused's rights. This broad language would seem to be diametrically opposed to the *Tempia* holding that an accused's rights to the assistance of counsel do not end with the UCMJ; constitutional mandates require their extension into the investigatorial stage. A reconciliation might lie in the fact that despite *Kennedy*'s broad language as to the completeness of the accused's rights under the UCMJ, it was dealing solely with the trial itself. Its value as precedent for the theory that misdemeanants are not entitled to the same counsel rights as felons on trial is therefore enhanced.

Thus, it would appear that *Kennedy* provides a necessary supplement to the principles expounded in *Tempia* so that

in concert they make significant strides in the application and clarification of the sixth amendment to the armed forces. As a result of these cases, at the very least, the accused in the military has the right to counsel, either retained or appointed, at both the investigatory and trial stage. The remaining questions posed are whether this right is also applicable to special courts-martial, and, if so, is counsel in the sense of a lawyer, as distinguished from an officer familiar with the UCMJ and the Manual for Courts - Martial, required.

CHURCH - STATE

(Continued)

Ariz. II 7; Ind. I 8; Ore. I 7; Wash. I 6; Ky. 232.

14. Unlike Maryland, eleven states provide in their constitutions that religious tests for jurors are forbidden. *Cf.* Md. DR. 36.

Ariz. II 12; Cal. I 4; Mo. I 5; N.D. I 4; Ore. I 6; Tenn. I 6; Utah I 4; Wash. I 11; W. Va. III 11; Wyo. I 18; N.M. VII 3.

15. The constitutions of forty-six (46) of the remaining states in the Union have reference to a Supreme Being in the preamble:

Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, [Maryland], Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin and Wyoming.

Tennessee has no express reference in the preamble to its constitution, but submits various dates in the language, "the year of our Lord."

No references whatsoever may be found in the New Hampshire or Oregon constitutions.

Vermont's constitution has no preamble.

[It is important to note that many of the prohibitions and guarantees mentioned above, which may not appear in the constitutions of the several states, are included among subsequent legislative enactments. *See, e.g.,* bracketed notation to note 1].

THE GHETTO LAWYER

(Continued)

in revamping outmoded legal procedures generally and in encouraging more widespread use of group practice for those well above the poverty line but too poor to afford effective and continuing legal representation.[36]

Today, it is generally conceded that though indigents cannot even begin to think about hiring a lawyer, middle-income people in the big cities, especially, will also think twice before doing so. The cost of an urban lawyer's services, except for real estate closings where cash in hand or a new home tend to give a glow to the transaction, or personal injury litigation, where almost everyone recovers, for most citizens is usually disproportionate to the results achieved, and, therefore, a luxury item.

The fault in most cases is not attributable to the lawyer himself. He has no choice but to charge for the many hours he spends in a lower court, not to speak of the discourtesies he endures, waiting for a calendar call on a single claim worth one or two thousand dollars. The fault, instead, lies with an archaic and rigid system which, in practice, imposes a sacrosanct attorney-client relationship on all except the truly affluent.

[36] Paulsen, *The Expanding Horizons of Legal Services—II,* 67 W. VA. L. REV. 267, 277 (1965).

LAY ATTORNEYS

(Continued)

an affirmative decision that it also be affirmed on appeal except in those cases where the facts in *no way support* the decision of the court of first instance or where there has been a gross violation of procedural law. They argue that the court of first instance is better prepared to grant a just decision because it has had all the parties before it. And ultimately, who is to say that three prudent men in Pittsburgh are more or less wise than three prudent men in Chicago, New York or San Francisco in reaching a decision on the validity of a marriage. If we are not prepared to change Canon 1014 in favor of the person, and if we cannot change our system of appeals, perhaps this suggestion can be the first step in giving a new and greater hope to those who seek the justice of the ecclesiastical tribunal.

(6) Finally, unlike the common law with which the lay advocate is familiar, they find our law too strict and rigid. There is little room for creativity. Like the common law, they feel that canon law ought to live and breathe and realistically reflect the needs of our people within the context of their existential experience.

In conclusion we might inquire as to the future of the lay advocate in our judicial system. We in Pittsburgh are unqualifiedly convinced of their importance and the great contribution which they have made and will continue to make to our sense of justice. In our first meeting with the lay advocates, Bishop Wright held out the hope that some day some of these men and women would sit as judges in our courts and even in the position of officilia. At a recent symposium in New York where the possibility of a constitution for the Church was considered, it was recommended that the only qualification for participation in the judicial structure of the Church be professional competency without any discrimination on the grounds of sex or clerical status. In introducing lay advocates into our court, we feel that we in Pittsburgh will be eminently prepared to meet the challenge and hope of using competent laymen in the total judicial system of the Church.

DEFAMATION

(Continued)

arisen. To be effective and meaningful, this advisor must be an active participant in the day-to-day functioning of the publication without, however, becoming an overbearing censor. The implementation of such a recommendation is essentially a non-legal problem insofar as it involves a delicate balance between the independence of the student writer and the unquestioned right of the institution to protect itself. The difficulties involved, however, do not lessen the need for such a program.