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The Right to Counsel in Special Courts-Martial

The United States Court of Military Appeals recently held that the constitutional right to counsel applies to accused servicemen prosecuted before special courts-martial. At the same time, however, the court indicated that nonlawyer officers may properly be appointed counsel in such cases. The author of this Note considers the arguments for and against retention of nonlawyer counsel and concludes that the importance of providing competent counsel overrides all of the objections commonly raised to any proposed elimination of the present system.

No man should take up arms, but with a view to defend his country and its laws: 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.¹

INTRODUCTION

The sixth amendment to the federal constitution provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." This guarantee was interpreted in Powell v. Alabama² to require the appointment of counsel for indigent defendants in all capital cases, and was expanded in Johnson v. Zerbst³ to afford the assistance of counsel in all federal felony prosecutions. Recently, in Gideon v. Wainwright,⁴ the Supreme Court further held that refusal to appoint counsel for an indigent in certain state criminal prosecutions constitutes a denial of fourteenth amendment due process. After Gideon, therefore, representation by counsel is deemed essential to a fair trial in both federal and state criminal proceedings, at least where the offense charged is of a serious nature.

In Powell the Court implicitly recognized that the right to effective counsel is a necessary corollary to the requirements of the sixth amendment.⁵ Effective counsel has been defined as one who is skilled in the science of the law, is familiar with the rules of evidence, and is otherwise capable of properly conducting the

¹. BLACKSTONE, COMMENTARIES *408.
². 287 U.S. 45 (1932).
³. 304 U.S. 458 (1938).
⁵. 287 U.S. at 56, 58.
defense of an accused. Gideon implies that right to counsel denotes representation by a trained lawyer; moreover numerous federal and state decisions have expressly recognized that the term "counsel" as used in the sixth amendment refers to a member of the bar.

Military tribunals, unlike their civilian counterparts, are completely regulated by a statutory code adopted in 1950 — the Uniform Code of Military Justice (UCMJ). Under the UCMJ a serviceman accused of a violation of military law may be tried before a general, a special, or a summary court-martial.

The "summary court-martial" tries only petty offenses and is therefore substantially comparable to the civilian police or magistrate's court. The question of right to counsel in a summary court-martial, however, is beyond the scope of this Note since it has not yet been determined whether Gideon applies to those civilian inferior courts which deal only with minor offenses. Furthermore the use of the summary court is rapidly declining as a result of recent expansion in the power of commanding

6. Id. at 69.
7. 372 U.S. at 344.
8. See, e.g., United States v. Cariola, 323 F.2d 180 (3d Cir. 1963); United States ex rel. Weber v. Ragen, 176 F.2d 579 (7th Cir. 1949); People v. Agnew, 114 Cal. App. 2d 841, 250 P.2d 369 (1952); People v. Cox, 12 Ill. 2d 265, 146 N.W.2d 19 (1957); Higgins v. Parker, 364 Mo. 888, 191 S.W.2d 663 (1945), cert. denied, 327 U.S. 801 (1946).
9. 10 U.S.C. §§ 801-940 (1964). The UCMJ was enacted after World War II as a result of citizen protests against the abuses inherent in the prior court-martial system. Such abuses included harsh sentences, wide discrepancies in sentence for the same offense, and increases in sentences on appeal. White, The Background and the Problem, 35 St. John's L. Rev. 197, 200 (1961).
For a statement of the major rights and remedies provided in the UCMJ, see Snedeker, The Uniform Code of Military Justice, 33 Geo. L.J. 521 (1950).
11. In the summary court-martial proceedings a single officer, frequently a nonlawyer, serves as judge, jury, prosecuting attorney, and defense counsel. The maximum sentences this court may impose are confinement at hard labor for one month, reduction in rate, restriction for two months, forfeiture of two-thirds pay for one month, and certain limited combinations of these punishments. 10 U.S.C. § 820 (1964) (UCMJ art. 20). For a good description of summary court-martial proceedings see Douglass, One-Man Court, JAG J., Jan. 1954, p. 7.
officers to impose nonjudicial punishment under Article 15 of the UCMJ.\footnote{See 1963 U.S. COURT OF MILITARY APPEALS ANN. REP. 1, 61; Schrader, The Military Trial Judge, 53 KY. L.J. 135 (1964). Article 15 punishment is not considered a conviction and has no connection with the military court-martial system. Moreover, the effect of such punishment is transitory in that all record of it is destroyed when the offending serviceman is permanently transferred to another duty station or is discharged from the armed forces. Penalties imposed under article 15 include “restriction to limits” for up to 60 days, forfeiture of pay for up to three months, and/or reduction of rate. See generally Kiechel, Nonjudicial Punishment, JAG Bulletin, Jan.-Feb. 1963, p. 16; Kuhfeld, Amendments to Article 15, Uniform Code of Military Justice, Judge Advocate J., Bulletin No. 94, Oct. 1962, p. 69; Leonhardt, Nonjudicial Punishment Under the New Article 15—An Explanation, 17 JAG J. 25 (1963).}

The general court-martial is the military court of general jurisdiction and deals with the most serious military offenses; it is the only court with power to impose such sentences as a dishonorable discharge or confinement for a period over six months.\footnote{Prior to adoption of the UCMJ, officers with no formal legal training were frequently employed as counsel in general courts-martial. The draftsmen of the Code, however, recognized that inadequate representation of an accused before courts-martial constituted one of the most serious abuses in the system of military justice, and therefore required in article 27 that an} Prior to adoption of the UCMJ, officers with no formal legal training were frequently employed as counsel in general courts-martial.\footnote{See 1963 U.S. COURT OF MILITARY APPEALS ANN. REP. 1, 61; Schrader, The Military Trial Judge, 53 KY. L.J. 135 (1964). Article 15 punishment is not considered a conviction and has no connection with the military court-martial system. Moreover, the effect of such punishment is transitory in that all record of it is destroyed when the offending serviceman is permanently transferred to another duty station or is discharged from the armed forces. Penalties imposed under article 15 include “restriction to limits” for up to 60 days, forfeiture of pay for up to three months, and/or reduction of rate. See generally Kiechel, Nonjudicial Punishment, JAG Bulletin, Jan.-Feb. 1963, p. 16; Kuhfeld, Amendments to Article 15, Uniform Code of Military Justice, Judge Advocate J., Bulletin No. 94, Oct. 1962, p. 69; Leonhardt, Nonjudicial Punishment Under the New Article 15—An Explanation, 17 JAG J. 25 (1963).}

Despite its increasing obsolescence the summary court-martial should be abolished because, albeit the sentences imposed by it are minor, the convictions stigmatize a serviceman with the permanent taint of “court-martial” without affording him a fair trial. Furthermore, case studies have indicated that many servicemen develop a low opinion of the quality of military justice because of abuses in summary courts-martial. See Creech, Congress Looks to the Serviceman’s Rights, 49 A.B.A.J. 1070, 1072 (1963); 109 CONG. REC. 14148 (1963); cf. Douglass, supra note 11. Legislation is currently pending to abolish summary proceedings. See S. 769, 89th Cong., 1st Sess. (1965). This legislation has considerable support. See 1963 U.S. COURT OF MILITARY APPEALS ANN. REP.; Creech, supra; Ervin, The Congressional Study on the Constitutional Rights of Military Personnel, Judge Advocate J., Bulletin No. 35, June 1963, p. 4, at 9; Neff, Right to Counsel in Special Courts-Martial, Judge Advocate J., Bulletin No. 94, Oct. 1962, p. 55, at 67; Schrader, supra at 187. But see Legislature Comm. of the Judge Advocates Association, Report, Judge Advocate J., Bulletin No. 37, June 1964, p. 18, at 19.

\footnote{See 10 U.S.C. §§ 818–20 (1964) (UCMJ arts. 18–20).}

\footnote{15. United States v. Kraskouskas, 9 U.S.C.M.A. 607, 609, 26 C.M.R. 387, 389 (1958); Snedeker, supra note 9, at 526.}

\footnote{16. See Hearings Before the House Subcommittee on the Armed Services, 81st Cong., 1st Sess. 623 (1949); 2 U.S. CODE CONG. & AD. NEWS 2264–65 (1950).}
accused be represented by professional counsel in general courts-martial. As a result the proceedings of a general court-martial now closely parallel those of a civilian criminal court. The Law Officer, a military lawyer, fulfills the function of an impartial judge in ruling on points of procedural and substantive law; the members of the court determine the guilt or innocence of the accused in much the same manner as a civilian jury; and the trial and defense counsel, both trained lawyers, correspond to the prosecutor and defense attorney. Such trials clearly meet the standard of procedural due process prescribed in *Gideon*.

Special court-martial proceedings, however, are not subject to the procedural safeguards of the general court-martial. Such trials are not conducted in the presence of a Law Officer. Rather, the President of the court, who is its senior officer, fulfills the trial-judge function. In addition, the UCMJ does not require the appointment of lawyers as trial and defense counsel in special courts-martial, and nonprofessionals frequently serve in these capacities. Nevertheless, this tribunal may impose penalties such as a bad-conduct discharge, confinement at hard labor for a maximum period of six months, reduction in rate, forfeiture of pay for a maximum period of six months, or any combination thereof.

The purpose of this Note is to consider whether the use of appointed nonprofessional counsel in the special court-martial trial is per se a violation of the right to counsel established by *Gideon* and its forerunners. Consideration will be given to whether the sixth amendment is applicable to military courts and, if it is, whether it is satisfied by the appointment of non-professional counsel to perform functions in the military which are restricted to professionals in the civilian legal system. Finally, there will be a discussion of the remedies available to a serviceman who believes that he has been wrongfully denied counsel and of the means best calculated to effectuate the right to counsel for all servicemen.

I. THE SIXTH AMENDMENT "RIGHT TO COUNSEL" AND MILITARY DUE PROCESS

A dichotomy has traditionally existed between the requirements of due process applicable to the civilian and military legal

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18. See 10 U.S.C. § 819 (1964) (UCMJ art. 19). It should be noted, however, that both the Army and the Air Force require professional counsel in any case which may warrant a punitive discharge. See text accompanying note 61, *infra*. 
systems. This arose from a tendency to regard military law as a separate area of jurisprudence subject to no external control; thus it was said by the Supreme Court that "[t]o those in the military . . . the military law is due process." Since the adoption of the UCMJ the Court of Military Appeals has dominated the development of military due process. This court consists of three civilian members and functions as the military counterpart of the United States Supreme Court. Like the Supreme Court, the Court of Military Appeals initially adhered to the traditional due process dichotomy and held that the "source and strength" of military due process was the UCMJ — therefore, the Code could limit constitutional due process.

Those who support the dichotomy have argued that the provisions of the UCMJ constitute the standard of military due process established by Congress under its exclusive power "To make Rules for the Government and Regulation of the land and naval Forces." They conclude that since the UCMJ does not explicitly require the appointment of legally-trained defense counsel in special courts-martial such counsel are not necessary to satisfy military due process. This traditionally rigid view of military due process has undergone considerable erosion, however, and currently exerts little, if any, influence. At present there are corresponding due process safeguards afforded an accused in many areas of military and civilian law.


Despite the fact that military tribunals are not immune from all constitutional requirements, civilian and military courts remain in confusion as to which provisions of the Bill of Rights are applicable to military courts-martial.25 The Supreme Court has been somewhat inconsistent on this question, as evidenced by language contained in Burns v. Wilson26 and Reid v. Covert.27 In Burns, the plurality opinion stated that military tribunals have the same responsibilities as do federal and state courts to protect to a public trial). See generally the section on military due process in Tedrow, USCMA Digest 341-51 (1959). Some procedural due process rights are expressly guaranteed in the Code. See, e.g., 10 U.S.C. § 831 (1964) (UCMJ art. 31) (privilege against self-incrimination). See also Solf, supra note 19 (UCMJ affords the serviceman a standard of due process at least the equivalent of that which exists in civilian courts); Quinn, The United States Court of Military Appeals and Military Due Process, 35 St. John's L. Rev. 226 (1961); cf. Warren, The Bill of Rights and the Military, 37 N.Y.U.L. Rev. 181 (1962).

25. The second and third amendment guarantees of the right to bear and keep arms and the right to refuse the quartering of troops in peacetime constitute clear evidence that the role of the military was a significant consideration in the drafting of the Bill of Rights. Arguably, since the fifth amendment right to grand jury indictment or presentment specifically excluded "cases arising in the land or naval forces," the Founding Fathers might have intended the general content of the Bill of Rights to apply to the military. Indeed, in view of the express exclusion contained in the fifth amendment, it is arguable that the failure to refer to military applications in the other amendments reflects an intent that they apply to the military. There is, however, a division of opinion among legal commentators on the question of whether historically the Founders intended the Bill of Rights to extend to the military. Compare Henderson, Courts-Martial and the Constitution: The Original Understanding, 71 Harv. L. Rev. 293 (1957), with Wiener, Courts-Martial and the Bill of Rights: The Original Practice (pts. I & II), 72 Harv. L. Rev. 1, 266 (1959). In view of this divergence little if any value may lie in an historical approach to the question. Moreover the prevailing concept of a "living constitution" indicates very little should turn on the intent of the Founders even if that intent could be determined. The important fact is that the Constitution does not expressly exclude the military from the protection of the right to counsel guarantee. As Justice Jackson has stated:

Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654-56 (1952) (concurring opinion).


an accused from violation of his constitutional rights. The Reid Court adopted a more cautious position, saying that “as yet it has not been clearly settled to what extent the Bill of Rights and other protective parts of the Constitution apply to military trials.” In contrast, the Court of Military Appeals recently declared 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.” However, it was impossible to ascertain whether right to counsel was impliedly excluded from the safeguards afforded an accused serviceman until the recent decision of the Court of Military Appeals in United States v. Culp.

Culp, a Marine private, had been charged with larceny and brought to trial before a special court-martial. At trial the accused pleaded guilty on the advice of his appointed nonlawyer defense counsel, and was sentenced to a bad-conduct discharge, confinement at hard labor for four months, forfeiture of a considerable portion of pay for four months, and reduction to the lowest enlisted rank. The conviction was then examined by a board of review. The Board set the conviction aside on the alternative grounds that prejudicial error had occurred at trial and that, in view of Gideon, an accused serviceman was entitled under the sixth amendment to counsel qualified in the law. On appeal to the Court of Military Appeals the board of review was reversed. One of the three members of the court, analogizing from the inapplicability to servicemen of the right to jury trial, argued that the Bill of Rights was not intended to afford military personnel rights which they did not enjoy at common law. He concluded that since servicemen did not have a right to counsel at common law the sixth amendment did not give them that right. The

28. 346 U.S. at 142.
29. 354 U.S. at 37.
32. Id. at 200, 33 C.M.R. at 412.
33. The appellate functions of a board or review are comparable to those of a federal court of appeals. See generally Currier & Kent, The Boards of Review of the Armed Services, 6 Vand. L. Rev. 241 (1953).
concurring judges regarded the sixth amendment as applicable to servicemen; however, they felt that the amendment had not been violated in *Culp* because nonlawyer officers satisfied the right to counsel for purposes of special courts-martial. Significantly, however, these concurring judges emphatically expressed their dissatisfaction with the prospect of continuing this system of nonprofessional legal representation.

After *Culp*, therefore, the sixth amendment is clearly applicable to all military special courts-martial, but nonlawyer officers may continue to serve as defense counsel. In view of the assumptions to the contrary in civil courts such a situation seems anomalous at best. Consequently, an examination of the arguments favoring and opposing the retention of a system of nonlawyer counsel becomes important.

II. ARGUMENTS FOR RETAINING NONLAWYER COUNSEL

A. MINOR OFFENSE-MINOR PUNISHMENT

As might be expected, proponents of the present system represent various branches of the armed forces. The Army maintains that the legal qualifications of appointive counsel in special and general courts-martial may appropriately differ because special courts-martial trials concern "minor offenses involving relatively minor sentences." However, there is slight difference in the effect upon a convicted serviceman between many of the sentences imposed in general and special courts-martial. Moreover, a reduction in rate or a forfeiture of pay imposed by a special court-martial can be as damaging to a career serviceman's future promotional opportunities and economic status as many sentences imposed for civilian felony convictions. Finally, the stigma of a punitive discharge imposed by a special court-martial will adversely affect a discharged serviceman's future.

37. Ibid.
38. Id. at 218–21, 33 C.M.R. at 429–33.
39. See text accompanying notes 7 & 8 supra.
41. A serious sentence can easily be imposed by a special court-martial without adjudging a punitive discharge. For an example of the possible severity of a reduction in rate, suppose an Army Master Sergeant or a Navy Chief Petty Officer was sentenced to a reduction in rate to pay grade E-1.
employability and reputation. The general public does not distinguish between the dishonorable discharge of the general court-martial and the bad-conduct discharge of the special court-martial. The validity of a rationale which classifies a considerable reduction in rate or a punitive discharge with its concomitant stigma and forfeiture of certain veterans' benefits as a minor sentence is certainly open to considerable doubt. Indeed, the Court of Military Appeals has recognized that special court-martial punitive discharges are harsher than many sentences adjudged in a general court-martial. Thus it is particularly important that the damning effects of a punitive discharge should not be imposed by a special court-martial without affording an accused the right to be defended by legally trained and oriented counsel.

It is true that the special court-martial has jurisdiction over minor offenses which are normally disposed of by summary courts-martial or Article 15 nonjudicial punishment. It may be argued that the availability and quality of counsel at trials involving such offenses does not raise a due process question under the Gideon standard. However, the indelible stigma of any "court-martial" conviction may warrant the services of a lawyer. Moreover, affording the accused serviceman a right to professional counsel at all special court-martial trials may give

salary would drop from approximately $350 a month to $150 a month. Thus, aside from any forfeiture of pay or confinement, he would suffer a financial penalty of over $2000 in the first year after his reduction in rate. It would very likely be many years, if ever, before he could regain his former rate.

42. "According to all available evidence the recipient of a discharge under other than honorable conditions... encounters considerable difficulty in obtaining employment, is restricted from engaging in many types of activities, and is stigmatized." 109 Cong. Rec. 14146 (1963) (memorandum accompanying S. 2003).

43. For an analysis of the effects of a punitive discharge on the statutory rights and benefits of ex-service personnel, see Brown, The Results of the Punitive Discharge, 15 JAG J. 13 (1961).


45. See Kamisar & Choper, supra note 13.

46. Arguably the possibility of a court-martial conviction itself is enough to require professional counsel because certain lasting incidentals, e.g., the humiliation and identification as a criminal resulting from such a conviction, far exceed the actual penalty imposed. Cf. Teeters, The Loss of Civil Rights of the Convicted Felon and Their Reinstatement, 52 Prison J. 77, 80 (1945).
the military an impetus to dispose of minor offenses through Article 15 nonjudicial procedures, where they ought to be handled.

B. MILITARY NECESSITY

Many offenses such as desertion, sleeping on watch, disobedience of a superior, and other disciplinary matters which are tried before courts-martial are of a purely military nature. Consequently it is sometimes argued that "military discipline" requires the application of unique procedural rules to courts-martial.\(^{47}\) There is no doubt that in order to preserve the military as an effective instrument of national defense, servicemen must be deprived of certain substantive freedoms enjoyed in civilian life.\(^{48}\) Moreover, certain crimes such as larceny or assault, by weakening military discipline, entail more serious consequences in the military than civilian life and therefore may call for the imposition of harsher penalties. Since military regulations are promulgated to preserve military law and order in the same manner as civilian laws are enacted to regulate the civilian public, the existence of different offenses and the imposition of harsher sentences in the military is justifiable. On the other hand, matters such as the right to counsel, the right to a speedy trial, the exclusion of coerced confessions, and the confrontation of witnesses are elements of any fair trial, essential to insure that an accused is found guilty only of offenses which he has in fact committed. To require application of these "fair trial" elements of due process does not interfere with military discipline or the punishment of uniquely military offenses.\(^{49}\) The effectiveness of military discipline will depend primarily on morale and leadership rather than on the structure of the court-martial system. In fact, because morale is so important in producing effective discipline, guaranteeing to every accused the protections of procedural due process should affect military discipline beneficially\(^{50}\) by increasing the respect of servicemen for the system of military justice.\(^{51}\)

\(^{47}\) Solf, \textit{supra} note 19, at 6; see Note, \textit{64 Colum. L. Rev.} 127, 142–46 (1964).

\(^{48}\) "[T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty . . . ." Burns v. Wilson, 346 U.S. 137, 140 (1953). For example, refusal to perform an employer's order, disrespect of a superior, or leaving the job would not subject a person to legal sanctions in civilian life. The opposite, however, is true in the military.


\(^{50}\) Snedeker, \textit{supra} note 9, at 526.

\(^{51}\) See \textit{Hearings Before the House Subcommittee on the Armed Services}, 81st Cong., 1st Sess. 630 (1949). General Lyman Lemnitzer, former Chairman
C. AUTOMATIC APPEAL

Advocates of the present system have urged that no compelling need for legally-trained counsel exists because military jurisprudence affords automatic appellate review of all court-martial trials. However, Gideon expressly recognized that legal counsel is essential to a fair criminal trial.\(^2\) Notwithstanding the skill and perception of nonlawyer counsel, he will probably be unable to comprehend and deal with many of the subtle, but significant, details that arise during a criminal trial. As a result, many of those details will fail to appear in the trial record and therefore be unavailable for review by the appellate court.\(^4\) This automatic appeal argument was expressly considered in Culp, where the Court of Military Appeals said that comprehensive appellate review cannot substitute for the right to assistance of counsel at trial.\(^5\) The Supreme Court has recently taken a similar position in Douglas v. California.\(^6\)

D. EQUALLY QUALIFIED ANTAGONISTS

The Navy has argued that Gideon should be limited to the particularly compelling inequities occasioned in that case by the unfair advantage of the legally-trained prosecuting attorney over the indigent nonlawyer.\(^7\) It is reasoned that such unfairness cannot exist in special courts-martial because Article 27 of the UCMJ provides a "balanced abilities" test whereby the defense counsel must possess the same degree of legal training as the trial counsel. Although this balancing standard tends to eliminate the wide disparity of legal ability present in Gideon, it would seem that the accused is nevertheless denied a fair trial of the Joint Chiefs of Staff, has declared: "I believe that the Army and the American people can take pride in the positive strides that have been made in the administration and application of military law under the Uniform Code of Military Justice. The Army today has achieved the highest state of discipline and good order in its history." (Dept. of the Army Pamphlet 27-101-18, Oct. 7, 1959). 1960 U. S. COURT OF MILITARY APPEALS ANN. REP. 4.

53. 372 U.S. at 344.
under such a system if his nonlawyer counsel is incompetent to prepare and argue his defense adequately.

E. IMPRACTICALITY

The most valid objection raised against application of the Gideon standard to the military system of courts-martial rests upon its alleged impracticability in that context. While all of the armed services maintain this position, the Army in particular has asserted that "there are simply not enough lawyers to go around." Although not mentioned in the opinion, this argument may have been one reason for the Court's refusal to require legally-trained counsel in Culp. Lack of sufficient lawyers to handle the extra burden of furnishing legally-trained counsel in all special court-martial trials undoubtedly presents a difficult problem. However, the obstacle is not insurmountable. Significant steps have already been taken to provide legally-trained counsel in special courts-martial. Both the Army and the Air Force have eliminated the use of nonlawyer counsel in any case where a punitive discharge may be imposed. In fact the Air Force has afforded such counsel in approximately 99 per cent

60. See Schrader, supra note 13, at 140. The overall manpower problem which might otherwise arise from requiring the appointment of legal counsel in all special courts-martial could be somewhat mitigated by taking steps to reduce the number of nonlegal personnel needed to conduct military trials. For example, Congress is now considering legislation which would amend the UCMJ to provide "single-officer courts" in both general and special courts-martial, S. 2009 (H.R. 10048), 88th Cong., 1st Sess. (1963). Such tribunals would be conducted by a single legally-trained officer and, because the presence of lay court members would not be required, would enable numerous nonlawyer officers to devote more time to their primary line or staff duties. A permanent committee including the judges of the Court of Military Appeals and the Judge Advocate Generals of the various branches of the armed services has repeatedly recommended approval of the single-officer court. See 1954, 1957, 1961, & 1963 U.S. COURT OF MILITARY APPEALS ANN. REP.

Another way to diminish the overall manpower problem would be to effect a lower percentage of reversals due to error through internal improvements in military justice at the trial level. Such an improvement has been undertaken by the Navy in its partial use of legally-trained officers as presidents of special court-martial trials. This has resulted not only in a reduction of reversals, but also in an overall improvement in naval justice. 1963 U.S. COURT OF MILITARY APPEALS ANN. REP.
61. Neff, supra note 13, at 63.
of all its special court-martial proceedings.\textsuperscript{62} The Army, however, with approximately the same number of personnel as the Air Force, has in one year conducted six to seven times as many special courts-martial as the latter.\textsuperscript{63} Possibly an expanded use of nonjudicial punishment in cases involving relatively minor offenses, as authorized by Article 15 of the UCMJ,\textsuperscript{64} would significantly reduce the Army's total number of special courts-martial.

The Navy has rested its impracticality argument on the difficulties posed by its far-flung operations at sea. The problem of affording legally-trained defense counsel to the sailor, however, may readily be solved by postponing trial for an offense occurring at sea until the ship arrives at a naval base with an adequate legal staff.\textsuperscript{65} “Dockside courts” could be established at these bases to bring shipboard offenders to trial soon after their ship entered port.\textsuperscript{66} The inconvenience of delay from the point of view of the prosecution is negligible since the accused and any necessary shipmate witnesses cannot disembark while the ship is underway. Furthermore, ships are not at sea long enough to violate the right of the accused to a speedy trial; in

\begin{itemize}
\item \textsuperscript{63} See Brief for the Air Force as Amicus Curiae, p. 2, Brief for the Army as Amicus Curiae, Appendix A, United States v. Culp, supra note 62.
\item \textsuperscript{64} See note 13 supra.
\item \textsuperscript{65} The naval vessel on which the author of this Note served for three years had a crew of approximately 300 men. During that period no special courts-martial were conducted while the ship was at sea. The usual practice was to await arrival in port; most ports which were entered contained a naval base with a legal staff. This is the normal practice of ships up to the size of a destroyer. See Greenberg, The Dockside Court, JAG J., Dec. 1957–Jan., 1958, p. 19, at 20. Therefore it is difficult to see the “acutely practical need for the present form of special court” which the Army imputes to the Navy. Brief for the Army as Amicus Curiae, p. 5, United States v. Culp, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963).
\item \textsuperscript{66} Such a system has already been employed by the Atlantic Fleet Mine Force. Ochstein, The Dockside Court, JAG J. June–July, 1959, p. 13. See generally Greenberg, supra note 65.
\end{itemize}

The dockside court . . . is a court set up in various shore installations who are in the business of trying cases and who would have counsel, qualified counsel, available so that when the ships come in they would be able to turn . . . [an accused serviceman] . . . over to this court, and would . . . afford [him] the right of counsel.
any event a speedy trial would be of little value to an accused represented by incompetent counsel. In the case of large task forces and heavily-manned naval vessels such as aircraft carriers the problem could be solved by permanently assigning lawyers to them, thereby allowing special courts-martial to be conducted while at sea or in any port lacking a legal staff.67

The impracticality argument becomes most persuasive when applied to the “exigencies of war.” It has been asserted that to require the appointment of legally-trained defense counsel at every special court-martial would create an overwhelming burden in wartime due to the larger number of offenses which would result from increased manpower.68 Indeed it has been argued that combat conditions would cause a breakdown of the entire UCMJ and a consequent diminution in discipline.69 However, Congress could augment the size of the armed forces’ legal corps during wartime. Effecting an increase in the number of military lawyers should present no greater problem than making similar additions to the medical corps, the engineering corps, and other professional staff bodies which must be significantly enlarged during wartime mobilization.70 In any event, even if it is unfeasible to provide legally-trained counsel during wartime, this does not justify refusal to afford them during peacetime.71 The armed forces cannot be allowed to withhold fundamental rights from the large number of servicemen in current “cold war” military forces merely because affording these rights may one day become impossible.

III. ARGUMENTS FOR REQUIRING LEGALLY TRAINED COUNSEL

Despite the foregoing reasons favoring retention of nonlawyer

67. Ibid.
69. See Richardson, A State of War and the Uniform Code of Military Justice, 47 A.B.A.J. 792 (1961); Subcommittee on Constitutional Rights, supra note 66, at 47. Contra, Cobbs, The Uniform Code of Military Justice in Wartime—Another View, 48 A.B.A.J. 1123 (1962). However, a study conducted by a navy admiral concluded that the UCMJ worked very well during the Korean War. Subcommittee on Constitutional Rights, supra.
70. Only ten percent of the 28,000 lawyers serving in the Army during World War II were assigned legal duties. Cobbs, supra note 69, at 1124 n.10. Therefore the availability of manpower with which to increase legal staffs in wartime does not appear to present a serious problem.
counsel, equally if not more persuasive arguments exist for eliminating them. The foremost of these is that the present system inherently affords incompetent counsel and thus constitutes a per se violation of procedural due process.

The Court of Military Appeals has clearly recognized the necessity of competent counsel. For example, in *United States v. Kraskouskas,* the court referred to "the constitutional right to effective assistance of counsel . . . " in holding that a nonlawyer whom the accused requested to be his counsel could not practice before a general court-martial. And in *United States v. McMahan,* the court determined that an accused must be represented by legally-trained counsel during pretrial hearings incident to a general court-martial. In recognizing the prejudicial effect to the accused arising from the absence of legally-trained counsel at such hearings the court stated: "Had a lawyer been selected to probe into . . . [testimony from witnesses] . . . the defense attorney at the ensuing court-martial trial might well have been the beneficiary of some material which would have been of benefit to his client."

Although *Kraskouskas* and *McMahan* concerned general courts-martial, the court has been equally zealous in protecting the accused from inadequate representation in special courts-martial. In *United States v. Gardner,* a conviction of larceny was set aside because nonlawyer counsel permitted an accused to take the stand and give testimony supplying the only independent evidence that he committed the crime. And in *United States v. Williams,* numerous errors such as the admission of hearsay statements and departures from elementary rules of procedure, were held to reflect ineffective assistance by counsel. The Navy has also recognized that an accused has suffered a deprivation of procedural due process if represented by incompetent counsel. It seems, therefore, that due process has been denied

72. Since its inception the court has consistently demanded a high standard of legal competence from defense counsel. 1960 U.S. COURT OF MILITARY APPEALS ANN. REP. 6.
76. Id. at 718, 21 C.M.R. at 40.
if defense counsel is incompetent to defend the accused properly.

Although the Court of Military Appeals has not hesitated to
denounce inadequate representation by counsel in special courts-
martial, it has done so only on the facts of each case. However,
it is arguable that the high degree of legal competence required
by that court cannot be attained by any nonlawyer defense
counsel in any special court-martial proceeding and that conse-
sequently such counsel is per se incompetent.

In Culp the Chief Judge of the Court of Military Appeals
said that nonlawyer counsel were competent to practice before
a special court-martial because “knowledge of the Uniform Code
is required of every officer” and because the appointed defense
counsel “must be familiar with all pertinent parts of the Manual
for Courts-Martial wherein the procedural regulations for prac-
tice before all military tribunals are promulgated.” But to
attribute such knowledge to the nonlawyer officer is to blind
oneself to the realities of the situation. Reserve officers, who
make up a large part of the junior officer corps and therefore re-
ceive most of the appointments as special courts-martial counsel,
undergo a “cram course” in military justice. In this course, which
is frequently taught by nonlawyers, the officer candidates learn
and retain little useful information. After such limited training
an officer is in no way oriented to the adversarial system of law.
Indeed, numerous Army commanders at battalion, battle group,
and regimental levels have stated that special court-martial pro-
cedures are too elaborate and technical for nonlawyers. Thus,
it is farcical to maintain that a young nonlawyer officer is compe-
tent to conduct the defense of an accused who needs “the guiding
hand of counsel at every step in the proceeding against him.”

82. Ibid.
83. “At no time is ... [a nonlawyer officer] ... subjected to the rigorous
and intensive process which fits one to become the advocate of an individual
enmeshed in the toils of the criminal law.” United States v. Culp, 14
84. 1960 U.S. COURT OF MILITARY APPEALS ANN. REP. at p. 5 of the
Report of the Judge Advocate General of the Army.

The obvious truth— with which none can quarrel—is that one
untrained in the law is seriously handicapped by the lack of profes-
sional skill and legal ability which is so necessary in adversary pro-
ceedings, especially involving criminal matters. To the nonlawyer
rules of evidence mean little and instructions are but unimportant
technicalities. To the lawyer, however, they are tools which often-
times spell the difference between success and failure.
Permitting such a trial has been aptly described as "somewhat analogous to letting an engineer remove your appendix." 88

In addition to his lack of competence, a nonlawyer defense counsel is usually not given or does not take the necessary time to prepare an adequate defense. To the nonlawyer officer, a court-martial assignment represents a collateral duty to his regular line or staff functions. The very real possibility exists, therefore, that the attention devoted his legal duties will be quite limited. Furthermore, the nonlawyer officer is not oriented toward the adversarial nature of the Anglo-Saxon legal system; consequently it is difficult for him to understand the ethical obligations of the legal profession. In some instances he simply lacks the essential quality of personal objectivity necessary to conduct a proper trial. For example, if the accused is a disliked incorrigible, the close-knit operational structure of many military commands may create an atmosphere in which the offender will be improperly represented, however well-intentioned his counsel's motives.

Further, the military concept of "command control" may create pressures on the nonlawyer counsel which prevent him from doing a satisfactory job. Command control means psychological pressure and direct influence exerted on defense counsel or other members of the court-martial by a superior in the military chain of command. 87 A nonlawyer officer is more susceptible


The inadequacy of nonlawyer counsel is convincingly pointed out in an article by a member of one of the military boards of review, who has observed the numerous errors made by nonlawyers. Neff, Right to Counsel in Special Courts-Martial, Judge Advocate J., Bulletin No. 34, Oct., 1962, p. 58 at 62. Due to the existence of such frequent errors, the Navy has experienced a "high incidence of reversal" of special court-martial proceedings. 1963 U.S. COURT OF MILITARY APPEALS ANN. REP. 90.

86. Neff, supra note 85, at 63. In Culp the use of nonlawyer counsel has been similarly described as analogous to allowing "one taking a course in business law ... to represent a large corporation in a merger or antitrust proceedings." 14 U.S.C.M.A. 199, 219, 33 C.M.R. 411, 431 (1963) (concurring opinion).

to "command control" influence than is a legal officer because the convening authority of the court-martial is frequently his immediate commanding officer and therefore controls his promotional fitness reports, transfers, and leaves.

Collateral arguments against the present system may also be advanced. First, the present system discriminates against enlisted men in favor of officers. As a matter of practice and policy, military officers are tried only by general courts-martial and thus are always represented by lawyers. Arguably, such an unequal treatment between officers and enlisted men constitutes a violation of due process of law. Equal justice should apply to those in the armed forces in the same manner as citizens in civilian life. The fact that the proportion of military offenses committed by officers is relatively small is no justification for affording them preferential judicial treatment. Second, the relative complexity of pretrial requirements in general courts-martial has produced a noticeable trend toward the use of special court-martial proceedings in cases normally tried by general courts-martial. As a result, many of these offenses have been tried with nonlawyer counsel. It seems plain that such a circumvention of due process safeguards should not be permitted to continue.

Finally, depriving a citizen of the fundamental constitutional rights for which he is fighting should not be countenanced except under the most extreme circumstances. The military community no longer represents a separate entity in American society, but an essential element in the fabric of the nation. The armed forces no longer consist of a hard core of mercenaries living in a barracks community; instead they are composed of intelligent, well-trained military personnel who, accompanied by their dependents, live and interact in various communities with civilian

89. 10 U.S.C. § 832 (1964) (UCMJ art. 32).
90. 1963 U.S. COURT OF MILITARY APPEALS ANN. REP. 89–90.
91. In Kraskouskas the Court of Military Appeals stressed that a serviceman accused of an offense serious enough to warrant a general court-martial deserves a trained lawyer. 9 U.S.C.M.A. at 610, 26 C.M.R. at 390.
92. Senator Ervin, a ranking member of the Senate Armed Services Committee, has asserted that "no objective could be more important than to protect the constitutional rights of the men and women in uniform to whom we have entrusted the defense of country and our Constitution." Creech, Congress Looks to the Serviceman's Rights, 49 A.B.A.J. 1070, 1071 (1963).
neighbors. Since a large percentage of our male population is currently subjected to military discipline for a considerable portion of their lives, the protection of their constitutional rights becomes a significant element in the achievement of "equal justice under law" for all citizens.

IV. COLLATERAL REVIEW OF COURT-MARTIAL CONVICTIONS

If refusal to appoint legally-trained counsel in special courts-martial is per se a violation of procedural due process, it may fall within the collateral review powers of the civilian federal courts. The scope of habeas corpus review of military convictions was traditionally limited to questions of jurisdiction. Jurisdiction was strictly interpreted to encompass only considerations of whether the military tribunal was properly constituted, whether it had personal and subject-matter jurisdiction, and whether it had the power to impose a particular sentence. The scope of jurisdiction was gradually expanded by the lower federal courts during and shortly after World War II to embrace alleged denials of due process of law or other fundamental constitutional rights.


94. The Chief Judge of the Court of Military Appeals has noted that it is anomalous to afford aliens residing in the country full constitutional guarantees and at the same time to deprive servicemen of any of those rights simply because they wear the uniform. Quinn, The United States Court of Military Appeals and Individual Rights in the Military Service, 35 Notre Dame Law. 491, 493 (1960).

95. See In re Yamashita, 327 U.S. 1 (1946); Ex parte Reed, 100 U.S. 13 (1879); Wurfel, Military Habeas Corpus: I, 49 Mich. L. Rev. 493, 518–19 (1951).


In particular, incompetence of counsel in military trials became a proper subject for habeas corpus review if it were found to produce a denial of due process. However, this trend was seemingly reversed by the Supreme Court in *Hiatt v. Brown*, where the court-martial record suggested violation of the due process clause because, *inter alia*, defense counsel was incompetent and had afforded the accused only a token defense. The Court held that the lower federal courts lacked power to review a court-martial record to determine whether there was compliance with the due process clause.

Notwithstanding the apparent severity of this limitation, the Court intimated shortly thereafter in *Whelchel v. McDonald* that a denial of due process may present a question for collateral review. The traditional view that military trials were governed only by such “due process” as Congress established was still influential when *Hiatt* was decided. Consequently, and in light of *Whelchel*, the decision of the Supreme Court in *Hiatt* that an alleged denial of constitutional due process was not proper subject matter for habeas corpus proceedings does not necessarily mean that the same result would be reached if military proceedings were subjected to constitutional supervision. Thus, as the Court of Military Appeals began to eliminate the dichotomy between constitutional and military due process, the Supreme Court began to broaden the scope of habeas corpus review. In *Burns v. Wilson* it was held that, in addition to inquiry into the traditional elements of jurisdiction, civilian courts might also consider allegations that an accused in court-martial proceedings had been deprived of constitutional due process where it was shown that such allegations had not been given “fair consideration” by the military courts.

As a result of *Burns*, the scope of collateral review of court-
martial convictions is still somewhat uncertain. However, it is arguable that if nonlawyer counsel are per se incompetent, any special court-martial which employs them before "fair consideration" has been given to their constitutionality lacks jurisdiction to try the accused and subjects itself to collateral review by the civilian federal courts. The decision in Culp does not appear to have given the question "fair consideration" since the opinions in that case were concerned primarily with the applicability to military courts of the constitutional right to counsel and with military regulations rather than with the competence in fact of nonlawyer counsel. Until a thorough hearing is had on the factual issues surrounding competence of nonlawyer counsel, they cannot be said to have been "fairly considered" by the military court system and the collateral review functions of the federal courts should not be foreclosed.

One court has recently suggested that any time a court-martial record compels the conclusion that the accused has been denied constitutional rights it necessarily follows that the military courts did not give "fair consideration." This may portend complete abandonment of the "fair consideration" rule.

CONCLUSION

Rubbing the metal of the UCMJ against the constitutional touchstone of right to counsel as interpreted in the decisions through Gideon produces the inescapable conclusion that an impurity exists. Specifically, the utilization of nonlawyer counsel in military special courts-martial does not satisfy constitutional standards of procedural due process; therefore elimination of this relic of "drumhead justice" should be accomplished as soon as possible. In effecting this reform three avenues of approach are available.

First, Congress could modify Article 27 of the UCMJ to require appointment of legally-trained defense counsel at every special court-martial proceeding — legislation is now pending

106. The area of habeas corpus inquiry has been described as one that the Supreme Court "has conspicuously failed to resolve." Bishop, supra note 96, at 48.


108. The New York County Lawyers Association has gone beyond this proposal to recommend the complete abolition of special courts-martial, leaving only (1) nonjudicial punishment under article 15, and (2) one military tribunal in the form of the present general court-martial proceeding. Subcommittee on Constitutional Rights, supra note 66, at 31.
which would impose this requirement on peacetime trials where
the accused may be sentenced to a bad-conduct discharge.
This proposed legislation, however, does not completely answer the
problem of inadequate representation; the nonlawyer special
court-martial would still retain the power to impose a relatively
severe sentence through combinations of other available penalties.
Moreover, the realization of a complete legislative solu-
tion is doubtful in view of public apathy toward the military
community following a long period of peacetime and the absence
of any coordinated effort by lobbying groups to abolish the
present system of nonlawyer counsel. Indeed, the current legis-
lation has been unsuccessfully advocated for many years.

Second, the route of collateral review is open if the uncertain
definition of jurisdiction for habeas corpus inquiry has not pre-
cluded its use to present the question of incompetent counsel to
a civilian federal court. Moreover, if this question were brought
to the Supreme Court as presently constituted, the scope of
civilian judicial inquiry might well be enlarged to include alleged
due process violations or any other constitutional question, to
determine whether the military courts had given "fair considera-
tion" to the issue. Practically speaking however, the remedy
of habeas corpus would be of little value to a convicted service-
man in Private Culp's situation since in most cases he would
have been released from imprisonment before the conviction
could be considered by a federal court, and a writ of habeas
corpus would not restore a reduction in rate or forfeiture in pay
or erase the indelible stigma of a court-martial record.

109. S. 750, 89th Cong., 1st Sess. (1965) provides that a bad-conduct
discharge cannot be adjudged by a special court-martial, except in time
of war, unless the accused was represented at trial by a lawyer. The
memorandum accompanying this bill may be found at 111 CONG.
REC. 1235-36 (1965). For a short discussion of the bill based on the Congressional
hearings, see COMMITTEE ON CONSTITUTIONAL RIGHTS, supra note 66, at
42-45.

110. See text accompanying note 18 supra. For example, disregarding
Private Culp's bad conduct discharge, he still received a relatively harsh
sentence. See text accompanying note 32, supra.

111. In their first and in succeeding annual reports to Congress, the
Court of Military Appeals has recommended such legislation. See 1959
U.S. COURT OF MILITARY APPEALS ANN. REP. 34.

112. See Burns v. Wilson, 346 U.S. 137, 150 (1953) (dissenting opinion); see
also text accompanying note 107, supra.

113. This result would obtain since the maximum confinement imposed
by a special court-martial is six months.
The most effective and complete solution would be afforded through reconsideration of the *Culp* decision by the Court of Military Appeals in light of earlier cases such as *Kraskouskas, McMahan, Gardner, and Williams*. The *Culp* court, in emphasizing the requirements of the UCMJ that defense counsel possess training and orientation in military law, failed to go beyond these requirements to inquire into the actual facts surrounding representation of counsel in special courts-martial. A full hearing on the issue of whether a nonlawyer officer is in fact competent to protect the due process rights of an accused serviceman must therefore be conducted before the court’s conclusion is justifiable. This Note has attempted to demonstrate that such a hearing will prove that nonlawyer counsel are per se incompetent. If this hearing is undertaken and considerations of military necessity or impracticality compel continuance of nonlawyer representation in special courts-martial, the Court of Military Appeals should explicitly recognize that these are the reasons for depriving members of the armed forces of this fundamental safeguard of a fair trial.