A Sixth Amendment Right to Counsel Under Article 15 of the Uniform Code of Military Justice

Michigan Law Review

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Constitutional Law Commons, Criminal Procedure Commons, and the Military, War, and Peace Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mlr/vol72/iss7/5

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
A Sixth Amendment Right to Counsel Under Article 15 of the Uniform Code of Military Justice

Article 15 of the Uniform Code of Military Justice (UCMJ)\(^1\) enables a commanding officer to sentence a service member who has committed a minor infraction\(^2\) to thirty days of correctional custody.

---


The UCMJ, 10 U.S.C. §§ 801-940 (1970), was enacted by Congress in 1950 to provide a uniform system of justice for all the military services. The UCMJ lists punishable crimes, establishes the military judicial system under which allegations of criminal conduct are adjudicated, and details the procedural safeguards to be accorded an alleged offender. Article 36 of the UCMJ, 10 U.S.C. § 836 (1970), authorizes the President to prescribe further procedures to be used at trials, but they may not be contrary to or inconsistent with the provisions of the UCMJ. The executive orders promulgated under article 36 have the effect of law and are found in the MANUAL FOR COURTS-MARTIAL, UNITED STATES (rev. ed. 1969) [hereinafter MCM].

2. See note 8 infra.
The article 15 proceeding offers few procedural safeguards; among the protections lacking is the right to counsel. This Note will consider whether the failure of the military to provide counsel at an article 15 proceeding is consistent with the sixth amendment, which provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” The Note first will discuss the extent to which military necessity qualifies the application of the Bill of Rights and the sixth amendment to armed forces personnel. Then, assuming that military necessity does not bar the application of the sixth amendment to article 15 cases, the substantive determinants of the right to counsel—for example, the presence or absence of a “criminal prosecution” or “imprisonment”—will be discussed. Finally, the Note will examine whether the right to counsel demands that the accused receive the aid of a trained attorney.

Article 15 was designed to provide a more efficient mode of discipline than the court-martial system and to avoid the stigma associated. See Miller, A Long Look at Article 15, 28 MIL. L. REV. 37, 50-52 (1965); Note, The Unconstitutional Burden of Article 15, 82 YALE L.J. 1481 (1973). Examples of procedural rights that are absent under article 15 are the right to cross-examine witnesses and the right to be protected from double jeopardy. The opportunity to examine or cross-examine is left to the sole discretion of the commanding officer. The service member is authorized only to indicate to the commander the relevant areas to pursue in questioning a witness. Army Reg. 27–10, ¶ 3–14b (Change 12, Dec. 1975). Article 15 punishment does not prevent the commander from prosecuting the service member in a court-martial for more serious charges arising out of the same conduct. 10 U.S.C. § 815(f) (1970); MCM, supra note 1, ¶ 128b; United States v. Fretwell, 11 U.S.C.M.A. 377, 29 C.M.R. 193 (1960).

4. The right to counsel encompasses both the right to have an attorney present at a judicial proceeding and the right to have an attorney appointed if the accused is financially unable to obtain counsel. The two rights are merged in the military context because the UCMJ establishes a right to appointed counsel, regardless of ability to pay, whenever retained counsel is allowed to be present. 10 U.S.C. §§ 832(b), 838(b) (1970); MCM, supra note 1, ¶ 48a. This policy is also followed in situations not covered by the UCMJ. For example, the Manual for Courts-Martial provides that a person subject to a military interrogation has the right to have military counsel assigned to him regardless of his ability to pay. MCM, infra, ¶ 140a(2).

5. The sixth amendment, like the other provisions of the Bill of Rights, was enacted as a limitation solely upon the federal government. Barron v. Baltimore, 32 U.S. (7 Pet.) 242 (1833). The military is under federal auspices, and thus a service member’s right to counsel, if it exists, must be derived under the sixth amendment directly, without incorporation into the fourteenth amendment. See also note 85 infra.

6. There are three types of courts-martial in the armed forces: summary, special, and general. Summary courts-martial have jurisdiction to try all service members except officers, cadets, aviation cadets, and midshipmen for any noncapital offense punishable under the UCMJ. A defendant may object to a summary court-martial and elect to be tried by a special or general court-martial, in which harsher punishments may be imposed. 10 U.S.C. § 820 (1970); MCM, supra note 1, ¶ 16a. A special court-martial may try any service member for most noncapital offenses. 10 U.S.C. § 819 (1970); MCM, supra, ¶ 15a. A general court-martial may try any person subject to the UCMJ for most offenses, including capital offenses, and may impose harsher punishments than special courts-martial. 10 U.S.C. § 813 (1970); MCM, supra, ¶¶ 14a, b.

The UCMJ provides the accused with extensive procedural rights in general and
ated with a court-martial conviction. Once a minor violation of the UCMJ's punitive provisions has been alleged to the commanding officer's satisfaction, he may proceed against the accused under article 15 or invoke a court-martial. If the article 15 proceeding is cho-

special courts-martial. E.g., the right to appointed counsel, 10 U.S.C. § 827 (1970); MCM, supra, ¶ 48a; the right to appeal guilt or appropriateness of sentence, 10 U.S.C. §§ 859-76 (1970); MCM, supra, ¶¶ 98-108. The summary court-martial is a less formal procedure. MCM, supra, ¶ 79a. However, the accused is still provided important procedural rights. E.g., the right to cross-examination, id. ¶ 79d; the right to counsel in cases in which the service member is sentenced to confinement, United States v. Alderman, 22 U.S.C.M.A. 298, 46 C.M.R. 298 (1973). See notes 106-09 infra and accompanying text.


The court in United States v. Johnson, 19 U.S.C.M.A. 464, 42 C.M.R. 66 (1970), stated that the legislative history of article 15 indicated that two of the primary reasons for its enactment were to avoid damaging service members' records with criminal convictions and to reduce the number of less than honorable discharges, which are often based on a service member's former court-martial convictions, 19 U.S.C.M.A. at 69. Court-martial convictions also increase the number of less than honorable discharges. MCM, supra, ¶ 127, Table of Maximum Punishments ¶ B. An article 15 conviction cannot increase the maximum punishment a service member may face for future offenses; at worst it may persuade a judge to levy a sentence close to the allowed maximum.

8. "Generally the term 'minor' includes misconduct not involving any greater degree of criminality than is involved in the average offense tried by summary court-martial. This term ordinarily does not include misconduct of a kind which, if tried by general court-martial, could be punished by dishonorable discharge or confinement for more than one year." MCM, supra note 1, ¶ 128b. Examples of such offenses are absence without leave for less than thirty days, drunkenness, and assault upon other enlisted men. MCM, supra, ¶ 127c. For a case that devotes extensive discussion to the question of what is a minor offense see United States v. Fretwell, 11 U.S.C.M.A. 377, 380, 29 C.M.R. 193, 195-96 (1960).


10. MCM, supra note 1, ¶ 129a. Procedure under article 15 is as follows:

The commanding officer, upon ascertaining to his satisfaction after any inquiry he considers necessary that an offense punishable under Article 15 has been committed by a member of his command, will, if he determines to exercise his Article 15 authority, notify the member of the nature of the alleged misconduct by a concise statement of the offense in such terms that a specific violation of the code is clearly stated and inform him that he intends to impose punishment under Article 15 for the misconduct unless, if such a right exists (128), trial by court-martial is demanded. Also, unless prohibited by regulations of the Secretary concerned, the commander may notify the member concerned of his intention to recommend to a superior commander that the member he punished under Article 15 for his alleged misconduct unless, if such a right exists (128), trial by court-martial is demanded. The notification will also inform the member that he may submit any matter desired in mitigation, extenuation, or defense. In every case, the member will be notified that he is not required to make any statement regarding the offense or offenses of which he is accused or suspected and that any statement made by him may be used against him in a trial by court-martial. An election to accept nonjudicial punishment constitutes a waiver of the right to demand trial. A demand for trial does not require that charges be preferred, transmitted, or forwarded, but punishment may not be imposed under Article 15 while the demand is in effect.

The member will be given a reasonable time to reply to the notification of intent to impose or recommend the imposition of Article 15 punishment, state whether he desires trial by court-martial, if that right exists (128), and submit any matter in extenuation, mitigation, or defense he desires to be considered. With respect to an offense or offenses as to which a right to trial by court-
The service member must also be notified that he may demand trial by court-martial in lieu of the article 15 proceeding; counsel is provided to assist him in this decision. The accused is not told what specific punishments the commanding officer intends to impose, but on request he will be informed of the potential punishments under article 15 and under court-martial proceedings. Although a court-martial would provide procedural safeguards lacking under article 15, the potential punishment is harsher.

martial exists but has not expressly been demanded, punishment may be imposed immediately by the commander indicated in the notice as the commander who is to impose the punishment. Punishment may be imposed only by the personal action of the commander or officer delegated that authority in accordance with 128a. The member will be notified of the punishment imposed, informed of his right to appeal to the next superior authority, and directed to acknowledge receipt of the notification of punishment and to state his election regarding an appeal.

The proceedings will be conducted in writing in all cases involving commissioned officers and warrant officers and in all cases in which the punishment includes reduction in grade, confinement on bread and water or diminished rations, correctional custody, restriction or extra duties for more than 14 days, or forfeiture or detention of pay. In other cases the proceedings may be in writing or may be conducted orally, following the same sequence. However, in any case the member may be permitted to appear in person before the officer authorized to impose the punishment, and that officer may personally interview witnesses. Any written statements or other documentary evidence pertaining to the case which have been considered by the officer authorized to impose the punishment shall be attached to the file in the manner prescribed by pertinent regulations. When oral proceedings are conducted, the commander will cause a summarized record to be made and filed.

McM, supra, ¶ 135a.

11. Id. The Manual for Courts-Martial does not provide for hearing until after the commanding officer has decided to impose punishment.

12. Except in the case of a person attached to or embarked in a vessel, punishment may not be imposed under Article 15 upon any member of the Armed Forces who has, before the imposition of the punishment under that article, demanded trial by court-martial in lieu of the punishment thereunder. He also has the right, in all cases, to refuse trial by summary court-martial (Art. 20; 16a; 79d(3)). Thus, if a serviceman refuses both punishment under Article 15 and trial by summary court-martial, he may then be tried, if at all, only by a special or general court-martial.

Id., ¶ 132; see id., ¶ 16a.


15. Summary courts-martial may prescribe confinement for no longer than one month, hard labor without confinement for up to 45 days, restriction to certain specified limits for up to two months, or forfeiture of up to two thirds of one month's pay. 10 U.S.C. § 820 (1970); McM, supra note 1, ¶ 16b. Special courts-martial may prescribe bad-conduct discharges, confinement for up to six months, hard labor without confinement for up to three months, indefinite forfeiture of up to two thirds of one's monthly
An accused who elects to proceed under article 15 may submit any matter in mitigation, extenuation, or defense. The UCMJ does not guarantee a right to a personal hearing, although the army and the navy grant a hearing as a matter of policy. Neither the UCMJ nor the Manual for Courts-Martial require counsel at an article 15 hearing, although recent army and navy regulations allow a personal representative to speak on behalf of the accused. Those who have sufficient funds may hire a lawyer as their personal representative.

...
Punishments allowed under article 15 range from a reprimand to thirty days of correctional custody. A service member may also

Subject to subsection (a) of this section, any commanding officer may, in addition to or in lieu of admonition or reprimand, impose one or more of the following disciplinary punishments for minor offenses without the intervention of a court-martial—

(1) upon officers of his command—

(A) restriction to certain specified limits, with or without suspension from duty, for not more than 30 consecutive days;

(B) if imposed by an officer exercising general court-martial jurisdiction or an officer of general or flag rank in command—

(i) arrest in quarters for no more than 30 consecutive days;

(ii) forfeiture of not more than one-half of one month's pay per month for two months;

(iii) restriction to certain specified limits, with or without suspension from duty, for not more than 60 consecutive days;

(iv) detention of not more than one-half of one month's pay per month for three months;

(2) upon other personnel of his command—

(A) if imposed upon a person attached to or embarked in a vessel, confinement on bread and water or diminished rations for not more than three consecutive days;

(B) correctional custody for not more than seven consecutive days;

(C) forfeiture of not more than seven days' pay;

(D) reduction to the next inferior pay grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes the reduction;

(E) extra duties, including fatigue or other duties, for not more than 14 consecutive days;

(F) restriction to certain specified limits, with or without suspension from duty, for not more than 14 consecutive days;

(G) if imposed by an officer of the grade of major or lieutenant commander, or above—

(i) the punishment authorized under subsection (b)(2)(A);

(ii) if imposed upon a person attached to or embarked in a vessel, confinement on bread and water or diminished rations for not more than three consecutive days;

(iii) forfeiture of not more than one-half of one month's pay per month for two months;

(iv) reduction to the lowest or any intermediate pay grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes the reduction, but an enlisted member in a pay grade above E-4 may not be reduced more than two pay grades;

(v) extra duties, including fatigue or other duties, for not more than 45 consecutive days;

(vi) restrictions to certain specified limits, with or without suspension from duty, for not more than 60 consecutive days;

(vii) detention of not more than one-half of one month's pay per month for three months.

Detention of pay shall be for a stated period of not more than one year but if the offender's term of service expires earlier, the detention shall terminate upon that expiration. No two or more of the punishments of arrest in quarters, confinement on bread and water or diminished rations, correctional custody, extra duties, and restriction may be combined to run consecutively in the maximum amount impossible for each. Whenever any of those punishments are combined
suffer a reduction in rank or the levy of a fine. Lesser penalties include extra duties for up to forty-five days and restriction to certain areas for up to sixty days. A notation of the punishment may be included in the service member's record and may be introduced at a subsequent court-martial for the purpose of sentencing. The service member can appeal the punishment to the next highest commanding officer or seek collateral review in the federal courts.

The right of an accused to be provided counsel in an article 15 proceeding depends in the first instance on the applicability of the Bill of Rights to military personnel. This issue was first raised in *Dynes v. Hoover*, in which a seaman found guilty of attempted desertion sought to set aside his conviction and sentence in the federal courts. See also MCM, supra note 1, ¶ 131b.

23. See note 22 supra.

24. See note 22 supra.

25. The Manual for Courts-Martial defines personnel records of the accused to include “all those records made or maintained in accordance with departmental regulations which reflect the past conduct and performance of the accused.” MCM, supra note 1, ¶ 75d. Army regulations provide that records of punishment under article 15 will be maintained in the service member's personnel file. Army Reg. 27-10, ¶¶ 3-15b(1), (2), (3) (Change 12, Dec. 1975). Records of article 15 punishments of enlisted persons serving on active duty in the army for three years or less are withdrawn from the service member's Military Personnel Records Jacket when: (1) The individual is separated from the Army; (2) All punishments are set aside; (3) Two years have expired since imposition of the punishment.” Army Reg. 27-10, ¶ 3-15b(3)(b) (Change 12, Dec. 1975). (This is not true for army officers or enlisted personnel who have completed more than three years of service. Army Reg. 27-10, ¶¶ 3-15b(1)-2 (Change 12, Dec. 1975).) A permanent record of all article 15 punishments remains in every service member's Official Military Personnel File. Army Reg. 27-10, ¶ 3-15b (1)(b), (2)(b), (3)(b).


27. 10 U.S.C. § 815(e) (1970); MCM, supra note 1, ¶ 135. Only the service member's punishment, and not his guilt, may be appealed.

28. Military court decisions cannot be appealed directly to federal courts. They may be collaterally attacked, however, in actions seeking habeas corpus relief, back pay, mandamus, declaratory relief, injunctive relief, or tort damages. The scope of review in the federal courts does not vary with the form of relief sought; the applicable criteria are set forth in *Burns v. Wilson*, 346 U.S. 137 (1953). See also *Benson v. Starmore*, No. 73-3015 (5th Cir. July 8, 1974) (excerpted in 45 U.S.L.W. 2045); *H. Moyer, Justice in the Military* 1158-82 (1972).


courts. The Supreme Court held that "[w]ith the sentences of courts martial which have been convened regularly, and have proceeded legally, and by which punishments are directed, not forbidden by law, or which are according to the laws and customs of the sea, civil courts have nothing to do, nor are they in any way alterable by them." 31

Some authorities have argued that, since the Court in Dynes was unwilling to consider constitutional issues on review of military decisions, the decision implied that the Bill of Rights did not apply to the military. 32 This is not the only possible interpretation, however. The limited scope of review announced by Dynes may simply defer to the military the balancing of individual constitutional rights and military necessity. 33 The Bill of Rights is thus not entirely inapplicable under Dynes; its scope, however, is not to be decided by the courts but by the military, which has a better understanding of its particular needs. 34

The proper interpretation of Dynes should have been settled by the Supreme Court's decision in Burns v. Wilson, 35 involving the

31. 61 U.S. (20 How.) at 82.
32. See 6 C.J.S. Army and Navy § 4 (1937); 5 C.J.S. Army and Navy § 9 (1916); 21 Geo. Wash. L. Rev. 492 (1955). See also In re Bogart, 3 F. Cas. 796 (No. 1596) (C.C. Cal. 1873).
33. For an example of the Supreme Court's recognition of and deferral to military expertise, see Smith v. Whitney, 116 U.S. 167, 178 (1885), where the Court noted: "Of questions, not depending upon the construction of the statutes, but upon unwritten military law or usage within the jurisdiction of courts-martial, military or naval officers, from their training and experience in the service, are more competent judges than the courts of common law."
34. One commentator has urged that Dynes implied that the Congress and the President have the sole power to determine the extent to which the Bill of Rights may be qualified to accommodate the unique needs of the military. See Note, Constitutional Rights of Servicemen Before Courts-Martial, 64 Colum. L. Rev. 127, 130 (1964). The argument is based on the idea that to leave the determination of the applicability of the Bill of Rights to the military is in fact to leave the determination to the legislative and the executive branches, under whose control the military operates by virtue of article I, section 8, and article II, section 2, of the Constitution.
jurisdiction of the federal courts to grant habeas corpus relief to petitioners convicted of rape and murder by air force courts-martial. The Court acknowledged that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment." The judicial nonintervention contemplated by Dynes, however, was rejected; the Court held that federal courts could decide whether the petitioner's allegations of deprivation of constitutional rights were dealt with "fully and fairly" by the military courts. The expansion of the scope of review was an implicit recognition that service members are protected to some extent by the Bill of Rights, and a majority of cases have so held.

It is clear, however, that service members are not protected by the Bill of Rights to the same extent as civilians. Certain individual rights must give way to military necessity. The Constitution, for in-

36. 346 U.S. at 140 (footnote omitted).
37. 346 U.S. at 142. The "fully and fairly" test has been differently interpreted by lower federal courts. At one extreme are cases that grant review of a constitutional issue only if the military court did not consider the issue at all. E.g., Suttles v. Davis, 215 F.2d 760 (10th Cir.), cert. denied, 348 U.S. 903 (1954); Easley v. Hunter, 209 F.2d 483 (10th Cir. 1955). At the other extreme are cases that hold that civilian courts may review any constitutional errors of military courts on the ground that a trial is not "fair" if a service member is denied a constitutional right. E.g., Kauffman v. Secretary of the Air Force, 415 F.2d 991 (D.C. Cir.), cert. denied, 396 U.S. 1013 (1969); Sweet v. Taylor, 178 F. Supp. 456 (D. Kan. 1959).

Burns is consistent with other decisions holding that the judicial branch may review the constitutionality of actions that lie within the sole power of the executive or legislative branches. See United States v. Nixon, 42 U.S.L.W. 5237 (U.S. July 24, 1974); Powell v. McCormack, 395 U.S. 486 (1969); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

38. Although the Supreme Court recently limited the application of the first amendment to the military setting, Avrech v. Secretary of the Navy, 42 U.S.L.W. 5233 (U.S. July 8, 1974); Parker v. Levy, 42 U.S.L.W. 4979 (U.S. June 19, 1974), it explicitly held that the service member was "not excluded from the protection granted by the First Amendment." Parker v. Levy, 42 U.S.L.W. 4979, 4987 (U.S. June 19, 1974).

The constitutional interpretations of the Supreme Court are now considered binding on military courts unless military necessity dictates otherwise. See Kaufman v. Secretary of the Air Force, 415 F.2d 991, 997 (D.C. Cir.), cert. denied, 396 U.S. 1013 (1969) ("We hold that the test of fairness requires that military rulings on constitutional issues conform to Supreme Court standards, unless it is shown that conditions peculiar to military life require a different rule."); United States v. Alderman, 22 U.S.C.M.A. 298, 46 C.M.R. 298 (1975); United States v. Tempia, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1959); United States v. Jacoby, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960). In Tempia the Court of Military Appeals was most explicit, stating: "The impact of Burns . . . is of an unequivocal holding by the Supreme Court that the protections of the Constitution are available to servicemen in military trials." 16 U.S.C.M.A. at 634, 37 C.M.R. at 245. See also Warren, supra note 29, at 188-89.

The protection the service member receives from the Bill of Rights thus depends on a balancing of the individual's constitutional

41. Referring to article I, section 8, clause 14 of the Constitution, which grants to Congress the power to "make Rules for the Government and Regulation of the land and naval Forces," the Court in Reid v. Covert, 354 U.S. 1 (1956), stated: "It has been held that this creates an exception to the normal method of trial in civilian courts as provided by the Constitution and permits Congress to authorize military trial of members of the armed services without all the safeguards given an accused by Article III of the Bill of Rights." 354 U.S. at 19. Later the Court summarized: "It still remains true that military tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts." In part this is attributable to the inherent differences in values and attitudes that separate the military establishment from civilian society. In the military, by necessity, emphasis must be placed on the security and order of the group rather than on the value and integrity of the individual.

In Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866), the Court stated, after discussing the exception for grand jury indictment in the fifth amendment (see text accompanying note 40 supra):
The discipline necessary to the efficiency of the army and navy, required other and swifter modes of trial than are furnished by the common law courts; and, in pursuance of the power conferred by the Constitution, Congress has declared the kinds of trial, and the manner in which they shall be conducted, for offenses committed while the party is in the military or naval service. Every one connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts.

71 U.S. (4 Wall.) at 123.
43. 395 U.S. at 265.
45. 42 U.S.L.W. at 4987.
rights against the demands of military necessity.\textsuperscript{46} The balancing approach as taken by federal courts is illustrated in \textit{Henry v. Warner},\textsuperscript{47} which held that defendants have a right to counsel in summary courts-martial. The court noted that “the special attributes of military justice . . . cannot justify denial of basic constitutional rights when both these rights and the needs of the military can be successfully accommodated.”\textsuperscript{49} Similarly, the court in \textit{Application of Stapley}, which held that a service member has the right to adequate counsel at a special court-martial, stated that “the assignment of defense counsel possessing at least minimal qualifications to rationally advise on substantive and procedural legal problems may not be deemed precluded in this day and age in the absence of a showing of \textit{overriding} military necessity that does not exist here.”\textsuperscript{49}

Military courts, as well as federal courts, have faced the problem of the applicability of the Bill of Rights to the military setting. Although one might have expected the military courts to have limited constitutional rights more than federal courts, they have consistently held, relying on \textit{Burns}, that the military must accord the service member “all the protections in the Bill of Rights, except those which are expressly or by implication inapplicable.”\textsuperscript{50}

The “express” limitation refers to the exemption of the military from the fifth amendment requirement that a defendant accused of a capital or “infamous” crime be held only upon presentment or indictment by a grand jury.\textsuperscript{51} What is meant by a protection “by implication inapplicable” is less clear, however. One judge states that the phrase covers only the right to a jury trial—that is, since the sixth amendment requires a jury trial only where a presentment or indictment is necessary, and since no presentment or indictment is needed for military defendants, the right to a jury trial is inapplicable.\textsuperscript{52}


\textsuperscript{49} 246 F. Supp. 316, 321 (D. Utah 1965) (emphasis added).


\textsuperscript{51} \textit{See} text accompanying note 40 supra.

\textsuperscript{52} The Fifth and Sixth Amendments to the Constitution protect certain fundamental rights and privileges of persons accused of crime. With only a single express exception, there is no withholding of the protection of these rights and privileges from an accused because he is, at the time, serving with the armed forces of his country. Under the express exception, set out in the Fifth Amendment, an accused in the armed forces may be held to answer for a capital, or otherwise infamous crime, without presentment or indictment of a grand jury. . . . To this
Other rights apply to the military as fully as they apply to civilians. This was apparently the view taken in *United States v. Tempia*, in which the Court of Military Appeals reversed the conviction of an airman who was not given the aid of appointed counsel during custodial interrogation. In a nonmilitary case, *Miranda v. Arizona*, the Supreme Court had ruled that appointed counsel was necessary adequately to protect the accused's fifth amendment right against self-incrimination. The Judge Advocate General of the navy argued that *Miranda's* stringent formula was undesirable in the military context and that the military courts need not follow it. The Court of Military Appeals flatly rejected this attempt to make an exemption for the military and held that "the views of the Supreme Court of the United States on constitutional issues" are binding on us. In the later case of *United States v. Alderman*, however, Judges Darden and Duncan apparently agreed that the constitutional pronouncements of the Supreme Court were subject to re-evaluation by the military courts in the light of military necessity. *Alderman* dealt with the right of an indigent service member to appointed counsel at a summary court-martial. Judge Darden remarked in dissent that "decisions have not applied specific provisions of the Bill of Rights to military law without regard for their effect on the mission of the armed forces and the basic reason for their existence. Rather, we have recognized the need for balancing the application of the constitutional protection against military needs." He concluded that unless the Supreme Court directly held express exception may be added the implied limitation of the right of trial by jury, as protected by the Sixth Amendment, to the extent that a jury trial is required only where presentment or indictment is necessary. No other recognized exceptions have been cited and I know of none. The opinions of the appellate courts in the Burns case, supra, support the conclusion that there are no other exceptions. United States v. Sutton, 3 U.S.C.M.A. 220, 228, 11 C.M.R. 220, 228 (1953) (Quinn, J., dissenting).

54. The accused was informed that he would be permitted to "retain civilian counsel at his own expense, who could appear at his interrogation," but that "no attorney would be appointed to represent him in any law enforcement investigation." 16 U.S.C.M.A. at 637, 37 C.M.R. at 256-57. The *Manual for Courts-Martial* has been amended to incorporate the *Tempia* decision into the prescribed interrogation procedures. MCM, supra note 1, ¶ 140b(b).
57. 22 U.S.C.M.A. 298, 46 C.M.R. 298 (1978). The defendant appealed his conviction by a special court-martial on the ground that evidence of his previous conviction by a summary court-martial should not have been admitted. He argued that since the sixth amendment as interpreted by *Argersinger v. Hamlin*, 407 U.S. 25 (1972), required that counsel be provided at a summary court-martial and counsel had not been so provided, the conviction by the summary court-martial was invalid.
that the right to counsel applied to summary courts-martial, the military courts should defer to the congressional decision not to extend the right to the military setting. Judge Duncan apparently agreed with Judge Darden’s assertion that “Congressional enactments deserve deference in determining the balance that must be struck between the protection of an accused’s constitutional rights and the needs of military discipline,” admitting that military necessity may require an exception to a constitutional right. However, he did not find that the record contained any evidence that would warrant a limitation on the right to counsel in the military setting.

The view that military necessity may abrogate constitutional rights appears to have been accepted by the Supreme Court in the recent case of *Parker v. Levy*. At issue were articles 133 and 134 of the UCMJ, establishing the power of a court-martial to impose punishment for “conduct unbecoming an officer and a gentleman,” “all disorders and neglects to the prejudice of good in the armed forces,” and “all conduct of a nature to bring discredit upon the armed forces.”

Levy, an army captain, argued that both articles were void for vagueness under the due process clause of the fifth amendment and that they were overbroad in their curtailment of free speech. Justice Rehnquist, writing for the Court, admitted that “members of the military are not excluded from the protection granted by the First Amendment.” However, the “fundamental necessity for obedience, and the consequent necessity for the imposition of discipline,” outweighed Levy’s right to express his views to enlisted personnel and to be informed as to precisely what conduct would be considered a criminal violation.

Even ignoring the view that the Bill of Rights applies with full force to the military with the exception of the presentment and in-

---

63. 42 U.S.L.W. 4979 (U.S. June 19, 1974).
64. “Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.” 10 U.S.C. § 933 (1970). “Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.” 10 U.S.C. § 934 (1970).
65. 42 U.S.L.W. at 4987.
66. 42 U.S.L.W. at 4987.
67. This holding was followed in the similar case of Avrech v. Secretary of the Navy, 42 U.S.L.W. 5233 (U.S. July 8, 1974).
dictment requirement of the fifth amendment and the right to jury trial of the sixth amendment,\(^6\) and accepting the view that a "fundamental" military necessity may limit a service member's rights, courts should find a right to counsel in article 15 proceedings. As the following discussion makes clear, no substantial military need justifies withholding that right.

One of the two basic aspects of military necessity that might warrant infringement upon the rights of an individual is discipline. Discipline is essential to an effective fighting force because a commander must be able to rely on obedience to orders by military personnel even in the face of grave danger.\(^6\) The provision of counsel at article 15 proceedings, it might be argued, would hinder the maintenance of discipline first because it would weaken the role of the commanding officer as the ultimate arbiter of the service member's guilt. While the commander would still decide guilt or innocence and impose sentence, counsel would provide the service member with a spokesman for his cause, who would dispute the allegations posed by the commander and argue that he would be wrong to impose punishment. The accused would identify with his counsel and not with his superior. He will no longer perceive the commander's judgment as beyond scrutiny.

Second, provision of counsel would arguably slow the presently swift proceedings under article 15. Robinson O. Everett, a noted expert on military law, has written: "Even in civilian life it is said that 'Justice delayed is justice defeated.' This statement is still truer in military life, where, to maintain discipline, the unpleasant consequences of offenses must be quick, certain, and vivid—not something vague in the remote future."\(^7\)

These arguments are strengthened by the opinion of the Supreme Court in *Parker*, which stressed the need for obedience and discipline as a justification for narrowing first amendment rights of service members.\(^7\) The Court noted that ""[t]he armed forces depend on a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security

---

6. See note 52 supra and accompanying text.

69. Frederick Bernans Wiener testified at the 1949 congressional hearings on the UCMJ that "we are up against the stubborn hard fact that the purpose of an armed force is to send men obediently to their death, and that it is very carefully designed just for that purpose." *House Hearings*, supra note 34, at 780. Wiener is a noted military writer, and at the time of the hearings he was a colonel and the commanding officer of a Judge Advocate General service training center in the army reserves. *See also* Wood, *Discipline and Military Justice*, 21 JUDGE ADVOCATE J. 1 (1955), for a thorough explanation of the need for teamwork and discipline in the military.


71. *See text accompanying notes 63-67 supra.*
of the nation itself. Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command." 72

The discipline rationale, whatever its strengths in other settings, cannot justify the failure to appoint counsel in article 15 cases. Providing counsel obviously would not undermine discipline to the same extent as allowing a commissioned officer to urge publicly that enlisted men refuse to obey orders that might send them into combat—the root of the controversy in Parker. Simply put, the obedience to orders by combatants is the essence of military necessity; speech encouraging disobedience is justifiably restricted. 73 The advantage in maintaining discipline by not allowing counsel in article 15 proceedings is tenuous at best—in no sense is it directly related to the swift obedience of combat orders.

Furthermore, considerations based on the psychology of military service indicate that the military can better meet its need for discipline by providing counsel in an article 15 proceeding than by denying it. Experts maintain that punishment can instill obedience and loyalty only if it is perceived as just and is associated with the individual's commanding officer. Richard H. Wels, testifying before the House subcommittee that considered enactment of the UCMJ, stated: "We believe that discipline is dependent in a large degree upon the morale of the men who make up the services, and we do not believe that there can be good morale when men feel that the service courts which are set up to do them justice are not real and


73. A strong argument can be made that Parker v. Levy should be limited to combat personnel, for whom the need for discipline becomes paramount. In this respect it is interesting to note that increasing emphasis on service members' constitutional rights has developed with, and perhaps is attributable to, the growth of the military from a small group of fighting men to a huge organization whose members often have little to do with combat. After Washington's first inauguration there were only 672 men in the army. Several million serve in the armed forces today. Warren, supra note 29, at 187. Former Chief Justice Earl Warren, commenting on the increase in size of the army, stated: "When the authority of the military has such a sweeping capacity for affecting the lives of our citizenry, the wisdom of treating the military establishment as an enclave beyond the reach of the civilian courts almost inevitably is drawn into question." Warren, supra, at 188.

Furthermore, technological developments have reduced the need for combat skills and increased the need for technical specialties. Thus, today only about 14 per cent of military personnel have job classifications that require combat skills, while 54 per cent have special technical skills. Hearings on Nation's Manpower Revolution Before the Subcomm. on Employment and Manpower of the Senate Comm. on Labor and Public Welfare, 88th Cong., 1st Sess., pt. 8, at 2579 (1963). It is difficult to justify the subordination of the constitutional rights of all service members when only a small percentage will be required to enter combat and obey orders that place their lives in danger. However, it may be argued that the unflagging obedience of all service members is necessary for optimum combat performance, and that drawing lines will be administratively inconvenient and detrimental to morale in the services.
fair courts as we think of them here in America." Similarly, as Robert D. L'Heureux testified before the same subcommittee: "If your code of military justice is unjust, you will not have discipline, you will invite bitter resentment with which esprit de corps is impossible, you will incite characters who would never have become criminals in civilian life to become felons in the service." A former Undersecretary of the Navy emphasized the importance of the soldier's attitude toward his commander: "The existence of discipline depends in large measure upon the amount of respect which the personnel of the unit have for the commanding officer—respect for his ability, his fairness, and his authority."

Although article 15 punishment is swift and associated with the commanding officer, the proceeding often lacks the appearance of justice. The absolute discretion of the commander and the secrecy of the article 15 proceeding can create feelings of unequal treatment among service members who are charged with the same offense. Members of racial minorities often feel that they are punished for incidents that would be ignored if committed by a white service member. The presence of counsel could serve as an informal review of the commanding officer's action and thus minimize the potential for arbitrary or prejudicial decisions. Moreover, provision of counsel would give service members a full opportunity to articulate a defense and would reduce the skepticism that is inevitably fostered when individuals believe that they have been deprived of their constitutional rights and treated unfairly. After the accused has had the opportunity to present his views openly, the commander would still determine guilt and levy punishment; consequently, punishment would remain associated with the commander and would continue to reinforce his authority. Although the presence of counsel may slow the swiftness of the proceeding, a limit on the time by which counsel must be prepared could reduce delay. Also, the delay cost may be insignificant. Counsel is already provided to assist the accused in choosing between an article 15 proceeding or a court-martial; the lawyer would thus need little additional time to become familiar with the case.

74. House Hearings, supra note 34, at 641 (testimony of Richard H. Weis, Chairman, Special Committee of Military Justice of the New York County Lawyers' Association).
75. Id. at 816 (testimony of Robert D. L'Heureux, Chief Counsel, Senate Banking and Currency Committee).
76. Id. at 1122 (testimony of W. John Kenney, Undersecretary of the Navy).
77. "The Task Force has noted that nonjudicial punishment, largely because of the wide degree of discretion possessed by the commander in this area, is the subject of much criticism. Many blacks, for example, feel—and the Task Force statistics confirm—that nonjudicial punishment impacts on them more often, proportionately, than on whites and that they receive nonjudicial punishment for incidents for which whites would receive nothing." 2 Report of the Task Force on the Administration of Military Justice in the Armed Forces 37 (1972).
78. See note 18 supra and accompanying text.
It should also be emphasized that the armed services have means to achieve discipline that do not deny a service member the procedural protections of the Constitution. Military offenses are created to punish conduct that would not be a civilian crime, such as failure to salute and other forms of disrespect toward superiors.

A second facet of military necessity that may justify infringement of individuals’ rights concerns the logistical requirements of the military. Technological advances in communications, air and land transport, and general warfare techniques have reduced the need to send small groups of personnel into positions that do not allow a periodic return to headquarters. However, some troops may still be placed in strategic positions that severely limit communication and transportation, especially during wartime. Small groups of special forces personnel may be isolated in enemy territory, for example, and sailors may be forced to occupy small vessels for long periods.

If a commanding officer invokes article 15 in such a situation, military necessity may require an exception to the service member’s right to counsel. The right, however, should be denied only when provision of counsel is in fact impossible. Commissioned officers should

79. [Military] offenses are acts that would be rights in the civilian society. Take the business of telling off the boss, that is an inalienable right of an American citizen. If you tell off the sergeant or a commissioned officer, that is a military offense. In the civilian life, if you do not like your job, you quit it. If you do not like your job in the Army and quit, that is called desertion in wartime and it carries very serious consequences. In civilian life, if people decide they do not like working conditions and walk off jointly, that is a strike. In the Army or in the Navy, that kind of an action is mutiny, which is one of the most serious offenses. House Hearings, supra note 34, at 779 (testimony of Frederick Bernans Wiener).

80. 10 u.s.c. §§ 889, 891 (1970).

The distinction between infringing on the procedural rights of the accused at a criminal proceeding and defining a crime to include a broader range of conduct than is proscribed by civilian codes may further distinguish Parker v. Levy, 42 U.S.L.W. 4979 (U.S. June 19, 1974) (see text accompanying notes 63-67 supra), from the article 15 case. Arguably Parker did not demand an “overriding” military necessity for infringing on the defendant’s first amendment rights. It cited only a general need for discipline and the great difference between and separation of the military and civilian systems of justice. The military’s need for obedience may justify limiting the service member’s conduct by creating offenses that would be vague or overbroad in the civilian context; however, once a violation is alleged to have occurred, courts should demand that the military show an overriding need before the service member’s right to a fair hearing concerning his guilt is abridged. This reading of Parker is supported in the following passage from the opinion:

[The] Code cannot be equated to a civilian criminal code. It, and the various versions of the Articles of War which have preceded it, regulate aspects of the conduct of members of the military which in the civilian sphere are left unregulated. While a civilian criminal code carves out a relatively small segment of potential conduct and declares it criminal, the Uniform Code of Military Justice essays more varied regulation of a much larger segment of the activities of the more tightly knit military community. In civilian life there is no legal sanction—civil or criminal—for failure to behave as an officer and a gentleman; in the military world, Art. 133 imposes such a sanction on a commissioned officer. The Code likewise imposes other sanctions for conduct that in civilian life is not subject to criminal penalties.

42 U.S.L.W. at 4984.

81. Cf. 10 U.S.C. § 827(c)(1) (1970); MCM, supra note 1, § 6c, which create a similar
be assigned to act as defense counsel for the accused if no lawyer is available, as is the practice in a special court-martial. Perhaps the proceeding can be delayed until counsel is available. In order to ensure that the military necessity justification is not abused the commanding officer should be required to make a detailed written explanation of why counsel could not be obtained.

Except in the extreme situations discussed above, there is no “fundamental” military necessity that vitiates the application of the sixth amendment to the military. Whether the accused in an article 15 proceeding has the right to appointed counsel thus depends on the substantive requirements for the application of the sixth amendment as enunciated by the Supreme Court in the civilian context.

The first requirement is that the defendant seeking counsel be under threat of criminal prosecution. The Supreme Court has

---

82. MCM, supra note 1, ¶ 6c.
83. See note 81 supra.
84. See text accompanying note 66 supra.
85. “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” U.S. Const. amend. VI (emphasis added).

There is a possibility that an accused has a right to counsel that does not require that he be subject to a criminal prosecution, derived under the due process clause of the fifth amendment rather than under the sixth amendment. In In re Gault, 387 U.S. 1 (1967), the right to counsel was spoken of as a necessary requirement of a fair hearing, 387 U.S. at 38-41, suggesting that the right has an independent basis in the due process clause, apart from the characterization of a juvenile proceeding as “criminal.” But see 387 U.S. at 59-60 (Black, J., concurring). This reading of Gault is supported in the later case of McKeiver v. Pennsylvania, 403 U.S. 528 (1971), in which the Court asserted that the juvenile court proceeding has not yet been held to be a criminal prosecution within the meaning of the sixth amendment and thus implicitly characterized Gault as relying on the due process standard of “fundamental fairness” for the right to counsel. 403 U.S. at 545. A due process right to counsel was also found in Goldberg v. Kelly, 397 U.S. 254 (1970), in which the Supreme Court held that before a state can lawfully cut off welfare benefits it must afford the recipient a hearing at which he may be represented by counsel. 397 U.S. at 261, 270. See also Heryford v. Parker, 396 F.2d 329 (10th Cir. 1968); In re Harris, 69 Cal. 2d 486, 446 P.2d 146, 72 Cal. Rptr. 340 (1968); In re Fisher, excerpted in 43 U.S.L.W. 2050 (Ohio Sup. Ct. July 10, 1974); Grano, Kirby, Biggers, and Ash: Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?, 72 Mich. L. Rev. 717, 742-52 (1974).

The existence of a right to counsel under the due process clause in the article 15 context would depend upon a balancing of the individual’s interest in being represented by counsel and the military’s interest in proceeding without the intervention of counsel. Cf. Goldberg v. Kelly, 397 U.S. 254, 262-65 (1970); Grano, supra, at 744. It should be pointed out that the balancing required under the due process clause would be much more flexible and unpredictable than the balancing required to determine if the sixth amendment applies to the military (see text accompanying notes 29-33...
employed two tests to determine whether a particular proceeding is a criminal prosecution. The first test, which assesses whether the proceeding at issue results in a punitive sanction, was applied in *Kennedy v. Mendoza-Martinez*. The Court there found an expatriation proceeding conducted by the Immigration Service against individuals who left the United States to evade military service to be a criminal prosecution. Although the Court listed a number of criteria to use in determining the purpose of the sanction, it ultimately relied on legislative history to show that the imposition of expatriation was intended to be a punishment.

The second test balances the governmental interests in conducting the proceeding without certain procedural safeguards against the detriment to the individual who is the subject of the proceeding. The Court will consider the proceeding criminal if the individual’s interests outweigh the governmental interests. The particular right under consideration will influence the outcome; a court may hold that a proceeding is criminal when considering some procedural safeguards but not when considering others.

---

87. The criteria the Court listed were:
Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . . .
372 U.S. at 168-69.
88. 372 U.S. at 169-70.
90. In *In re Gault*, 387 U.S. 1 (1967), the Court held that a juvenile delinquency proceeding was criminal for the purpose of allowing the exercise of the fifth amendment privilege against self-incrimination. Although the governmental interest in discarding the rigidities and technicalities of the criminal law so as better to treat and rehabilitate the juvenile was recognized, 387 U.S. at 15-16, the Court felt that it was outweighed by the interest of the juvenile in invoking the fifth amendment. Several years later, in *In re Winship*, 397 U.S. 358 (1970), the Supreme Court again used the balancing approach and again decided to treat a juvenile delinquency proceeding as a criminal trial. 397 U.S. at 361-64. The procedural safeguard at issue in *Winship* was the rule placing the burden of proof of guilt beyond reasonable doubt on the government. After emphasizing the importance of the rule historically and in modern practice, the Court compared the protections it afforded the individual with the governmental interest in maintaining flexibility in juvenile proceedings. 397 U.S. at 365-68. It did not
Evaluating article 15 proceedings under both of these tests is not necessary. The balancing test, it is submitted, is not needed if the purpose of the sanction is clearly punitive; a court should use it only when the purpose of the sanction is not clear. Thus, the Court in *Kennedy* relied on legislative history that definitively indicated that expatriation was meant to be a punishment.91 By comparison, the proceedings at issue in cases using the balancing test were arguably nonadversary inquiries with nonpunitive purposes.92

There is strong evidence that the purpose of an article 15 proceeding is to impose punishment. One indication is the title of article 15—"commanding officer's nonjudicial punishment."93 Another is the legislative history of the article, which indicates that one of its purposes was to enable commanding officers to impose "increased punishments substantially the same as those now within the punitive authority of a summary court-martial."94 In addition, military courts view an article 15 proceeding as an alternative to court-martial, and thus punitive in nature.95 In light of this evidence, a court should consider an article 15 proceeding to be a criminal prosecution under the *Kennedy* test.

The holding of the Supreme Court in *Argersinger v. Hamlin*96 may present a second requirement for the application of the sixth amendment in article 15 proceedings. The Court there held that the labeling of a crime as a misdemeanor or a felony has no significance for the defendant's right to counsel; instead, counsel must be provided in any case where the sentence "actually leads to imprisonment even for a brief period."97

The effect of the *Argersinger* holding on the article 15 right to perceive "any merit in the argument that to afford juveniles the protection of proof beyond a reasonable doubt would risk destruction of beneficial aspects of the juvenile process." 997 U.S. at 366. In *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), the Court, employing the balancing test, found that juvenile proceedings were not criminal for the purpose of requiring trial by jury.

91. 372 U.S. at 167.
92. See note 85 supra.
95. The Court of Military Review stated in United States v. Delancy, 44 C.M.R. 367, 368 (1971), that "it is patent that [article 15] is punitive in nature" and that it serves as an alternative to court-martial. Delaney was charged with obstructing justice by interfering with an article 15 proceeding. In defense he claimed that only interference with a formal judicial proceeding could constitute obstruction of justice, and that article 15 did not give rise to such proceedings. The Court of Military Review disagreed on both points.
97. 407 U.S. at 53.
counsel is unclear. First, *Argersinger* arose under the due process clause of the fourteenth amendment, and presents a binding interpretation of the sixth amendment only to the extent that the Supreme Court has incorporated the sixth amendment into the fourteenth. There are some grounds for arguing that imprisonment is irrelevant under the sixth amendment per se. The opinion, like the opinion in *Gideon v. Wainright,* is cast in terms of "fundamental rights" and the prerequisites of a "fair trial"—terms directly related to due process of law but unrelated to the presence or absence of a "criminal prosecution," the sole requirement for a right to counsel expressly stated in the sixth amendment. Thus, it is possible that the imprisonment test simply identifies those situations in which the fundamental rights "implicit in the concept of ordered liberty" demand the provision of counsel under the due process clause.

To the extent that the right to counsel in article 15 proceedings depends only on the requirements of the sixth amendment, and not upon whether lack of counsel would be a deprivation of due process, imposition of a sentence of imprisonment may be irrelevant. Even if *Argersinger* was an interpretation of the sixth amendment, it did not require a sentence of imprisonment as a precondition of the right to counsel. The Court expressly reserved decision on instances in which the accused is not sentenced to jail: "We need not consider the requirements of the Sixth Amendment as regards the right to counsel where loss of liberty is not involved, however, for here, petitioner was in fact sentenced to jail." It is thus possible that an article 15 defendant may have a right to counsel even if not sentenced to correctional custody, and even if correctional custody is not considered imprisonment.

Justice Powell, in his concurring opinion, found no convincing reason to draw the line at imprisonment: "The Fifth and Fourteenth Amendments guarantee that property, as well as life and liberty, may not be taken from a person without affording him due process of law. The majority opinion suggests no constitutional basis for distinguishing between deprivations of liberty and property." Thus, although

---

99. 407 U.S. at 32.
100. 407 U.S. at 31.
102. See, e.g., Heryford v. Parker, 396 F.2d 393, 396 (10th Cir. 1968): "It is the likelihood of involuntary incarceration—whether for punishment as an adult for a crime, rehabilitation as a juvenile for delinquency, or treatment and training as a feeble-minded or mental incompetent—which commands observance of the constitutional safeguards of due process."
103. There may indeed be an independent right to counsel under the due process clause of the fifth amendment, however. See note 85 supra.
104. 407 U.S. at 37.
105. 407 U.S. at 31. Justice Powell would not extend the right to all cases involving
the Supreme Court has not yet required counsel in nonimprisonment cases, there is a sound basis for arguing that the right may eventually be further extended.

The Court of Military Appeals, in a decision on a service member’s right to counsel handed down after *Argersinger*, failed to recognize that the Supreme Court did not rule that a sentence of imprisonment is *required* to invoke the protection of the sixth amendment. *United States v. Alderman* held that *Argersinger* applies to summary courts-martial; the imposition of a sentence of confinement, which the court held equivalent to imprisonment, thus triggered a right to counsel. Mere restriction, however, which results only in a "deprivation of privileges," was not held to be imprisonment and so did not require provision of counsel. The court apparently ignored or misread the Supreme Court’s caveat in *Argersinger*, holding that "[t]he Court’s repeated reference to actual confinement implies that a trial resulting in other types of punishment does not require appointment of counsel for the accused."

Even if a sentence of imprisonment is or becomes a prerequisite of the sixth amendment right to counsel, however, strong arguments can be made that the imposition of correctional custody under article 15 is tantamount to imprisonment.

The characterization of correctional custody as imprisonment was discussed in *United States v. Shamel*, the only case to deal directly with a right to counsel under article 15. The petitioner, a defendant in a summary court-martial, argued that admission of evidence that he had served thirty days of "correctional custody" under article 15 was reversible error because he had been denied his

---

108. We find the differences between courts-martial and civilian criminal trials to be much less significant than the similarities between the two types of proceedings, at least with respect to the Sixth Amendment. Both types of proceedings may lead to deprivation of liberty as well as property. Both generate potentially severe social stigma. Both have significant repercussions beyond their immediate impact, in particular in the area of future employment. We have been pointed to no convincing reason why *Argersinger v. Hamlin*, . . . with its rejection of the distinction between petty and serious crimes should not establish the framework for Sixth Amendment analysis of military proceedings. Betonie v. Sizemore, No. 73-3015, slip op. at 5411 (5th Cir. July 5, 1974) (excerpted in 43 U.S.L.W. 2045).
110. 22 U.S.C.M.A. at 301, 46 C.M.R. at 301.
constitutional right to counsel during the article 15 proceeding. Although the court refused to hold that Argersinger required the recognition of a right to counsel in an article 15 proceeding, the three justices were unable to agree on a single rationale for their decision. Writing for the court, Judge Quinn reasoned that Argersinger was not controlling because correctional custody was not imprisonment. He analogized correctional custody to military restriction or to detention of a student after school hours, rather than to the imprisonment of a civilian or to military confinement.

Judge Duncan, in dissent, argued that the substantial similarity of correctional custody and confinement mandated the extension of the right to counsel to any article 15 proceeding resulting in correctional custody. Chief Judge Darden merely cited his dissent in Alderman, in which he argued that the military court should not follow Argersinger because the Supreme Court did not affirmatively indicate that the decision was clearly applicable to the military. He acknowledged, however, that if Argersinger did apply to summary courts-martial it would be difficult to argue against a requirement of counsel in article 15 proceedings that may result in correctional custody. Thus, two of three judges (Duncan and Darden) believed that correctional custody was a form of imprisonment that would trigger a right to counsel under Argersinger, and two judges (Duncan and Quinn) acknowledged that Argersinger was in fact the applicable standard.

Although the contortions of the court in Shamel indicate that the analogy is not without difficulty, correctional custody under article 15 strongly resembles military confinement, which was held to be imprisonment in United States v. Alderman.

111. See text accompanying note 108 supra and text accompanying notes 126-27 infra.
115. While it may be argued that counsel should be required for summary courts-martial since they constitute criminal convictions and not for Article 15 proceedings as they are non-judicial and corrective in nature, the effect of confinement under the former and correctional custody under the latter is difficult to distinguish. Consequently, I would have difficulty in sustaining the position that while counsel must be provided before summary courts-martial, they may be dispensed with in Article 15 proceedings that may result in correctional custody.
Confinement differs little from a civilian jail sentence. Army regulations provide for confinement sentences to be served in any federal penal or correctional institution, as well as in military facilities. Confined army personnel, like civilian prisoners, serve their sentences in minimum, medium, or maximum custody. Those in minimum custody normally can be employed or trained outside the confinement facility under minimum supervision. Those in maximum custody can be employed only inside the confinement facility; an armed guard must accompany them when they are outside of the facility. Locked cells house all army prisoners, and each prisoner engages in individually tailored correctional treatment activities, primarily job training and employment.

The physical restrictions that an article 15 proceeding may impose are arrest in quarters, restriction to an area, and correctional custody. Arrest in quarters and restriction to an area are not analogous to confinement because they are "enforced by a moral obligation rather than by physical means." Although the severity of the restraint varies depending upon its duration and the geographical limits it sets, restriction to an area is the least harsh physical restraint possible under an article 15 proceeding. Neither arrest in quarters nor restriction to an area seems severe enough to constitute "imprisonment" as the term was used in Argersinger.

By contrast, correctional custody is an enforced physical restraint that is similar to confinement. There are some differences; for example, time spent in correctional custody does not extend the tour of duty of army personnel, as does time spent in confinement; army personnel in correctional custody may perform their normal work during normal duty hours; they may also receive

121. Army Reg. 190–4, ¶ 6–3 (June 1969).
123. 10 U.S.C. § 815(b)(1)(B) (1970); MCM, supra note 1, ¶ 131b(l)(b)1 (for officers only).
124. 10 U.S.C. § 815(b)(1)(A) (1970); MCM, supra note 1, ¶ 131b(l)(a) (officers); 10 U.S.C. §§ 815(b)(2)(F), (H)(v) (1970); MCM, supra, ¶¶ 131b(2)(a)6, (b)6 ("other personnel").
125. 10 U.S.C. §§ 815(b)(3)(B), (H)(l) (1970); MCM, supra note 1, ¶¶ 131b(2)(a)2, (b)2 (nonofficers only).
126. MCM, supra note 1, ¶ 131c(3).
127. Id. ¶ 131c(2).
128. Id. ¶ 131c(4).
certain privileges not available in confinement. Nevertheless, correctional custody is a substantial deprivation of liberty. While the army declares that it is not confinement and that persons so punished should not be considered prisoners, the navy holds "[t]he status of correctional custody prisoners [to be similar] to that of sentenced prisoners." The UCMJ states that "'correctional custody' is the physical restraint of a person during duty or nonduty hours and may include extra duties, fatigue duties, or hard labor." 

Various service regulations offer further evidence that the physical constraints of correctional custody are as severe as those of imprisonment. The army requires that correctional custody be served in a separate facility that prevents contact with other personnel. Individuals under such custody must spend all nonduty hours, including nights, weekends, and holidays, in the correctional facility. The facility should be "austere and conducive to the rigorous and purposeful correction of these persons." Heavy wire screening or other sturdy material often covers windows, and unarmed guards may control the movement of individuals under custody. Although the army and the navy attempt not to place persons in correctional custody in the same stockades as those under confinement, separate placement is not required by the UCMJ. Moreover, the maximum punishment for escape from correctional custody is the same penalty that a service member faces if he escapes from confinement or breaks arrest.

Finally, there is evidence that Congress enacted article 15 to allow commanders to impose "increased punishments substantially...
the same as those now within the punitive authority of a summary court-martial.'"144

The similarity of correctional custody to confinement indicates that Judge Quinn's analysis in Shamel was erroneous and that Judges Duncan and Darden were correct in concluding that correctional custody is imprisonment. Argersinger thus requires that a service member be given a right to counsel in an article 15 proceeding that results in correctional custody.

Argersinger, however, left unsettled the question whether "right to counsel" requires the appointment of a fully trained attorney-at-law. Although the term apparently refers to representation by a lawyer, a substantial number of federal and military court decisions have held that the military can comply with the sixth amendment by providing the accused with nonlawyer counsel.146

The cases that reached this result involved challenges to article 27 of the UCMJ, which allowed appointment of nonlawyer counsel at special courts-martial.146 Kennedy v. Commandant147 ruled on the propriety of appointment of a nonlegally trained officer to defend an indigent service member. Kennedy did not contend that his appointed counsel was inadequate or ineffective. He argued instead that appointment of a nonlegally trained officer was a per se violation of his sixth amendment right. The court held "that the qualifications for counsel prescribed by Congress in article 27 of the Uniform Code of Military Justice fully comply with the right to counsel requirements of the Sixth Amendment."148 The Court of Military Appeals reached a similar conclusion in United States v. Culp.149

144. Kuhfeld Testimony, supra note 94, at 5.
147. 377 F.2d 339 (10th Cir. 1967).
148. 377 F.2d at 343.

The precedential value of Kennedy has been weakened in two respects. First, the case was effectively overruled in 1968 by an amendment to the UCMJ that requires legally trained counsel at a special court-martial except where precluded by "physical conditions or military exigencies." 10 U.S.C. § 827(c)(1) (1970); MCM, supra note 1, ¶ 6c; see H. MOYER, supra note 28, at 338-39. Second, the result in Kennedy was reached in part because the maximum punishment involved was confinement for six months, see 10 U.S.C. § 819 (1970); MCM, supra note 1, ¶ 15b, a penalty that the court termed "nevertheless as and for a misdemeanor under the civil law." 377 F.2d at 343. At that time—before Argersinger v. Hamlin, 407 U.S. 25 (1972), had been decided—"it was an open question whether the Sixth Amendment right to counsel is applicable in misdemeanor cases." 377 F.2d at 343. To the extent that the court relied on the felony-misdemeanor distinction discarded in Argersinger its opinion lacks precedential value.

It is difficult to accept the view that a nonlawyer officer can adequately protect the rights of a service member. As Judge Ferguson stated in his concurring opinion in *Culp*:

An officer of the armed services of necessity cannot receive the training required to perform adequately as counsel for an accused. At the most, he receives a general orientation course in military law during his attendance at various service schools or takes a few sub-courses in various aspects of its administration. At no time is he 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. To me, it is just unthinkable to conclude that the best intentioned layman can be taught by attendance at a few generalized lectures to become a capable representative of another in a criminal prosecution. The argument is the same as if one taking a course in business law attempted to represent a large corporation in a merger or anti-trust proceedings. And, as military appellate authorities well know, the result usually looks like something intended for entertainment at a church social.150

Persons with practical experience in the system of military justice echo Judge Ferguson's opinion. One commentator has recently remarked that "[most] officers have only the haziest notion about what the code is all about, and if you can find one officer in ten who has actually read fifty pages of the code, the Manual or the Handbook you are extremely lucky."151

The argument that the right to counsel requires provision of trained lawyers is supported in the opinions of the Supreme Court. In *Powell v. Alabama*,152 for instance, the Court stated:

had a different reason for upholding the use of nonlawyer counsel. Judge Kilday felt that the sixth amendment right to counsel did not apply to the military at all. 14 U.S.C.M.A. at 215-16, 33 C.M.R. at 427-28. Judge Quinn believed that nonlawyers provided the service members with adequate representation. 14 U.S.C.M.A. at 217, 33 C.M.R. at 429. Judge Ferguson believed that the rights of the accused had not been violated because he had chosen to be represented by nonlawyers. 14 U.S.C.M.A. at 219, 33 C.M.R. at 431.

Aside from the inability of an officer counsel to perform his duties because of lack of proper grounding in law, there is also the important question of the ethical responsibilities imposed by our profession upon its members. Laymen will never understand an attorney's devotion to the interests of an "obviously guilty" client or the single-minded loyalty to the latter's cause which almost unexceptionally characterizes the practice of law. Too often, it must seem to the officer untrained in the law that his duty lies in the direction of the armed force to which he belongs rather than to the accused whom he represents, and there has not been inculcated in him any of the principles which so naturally form a part of the legal profession and which have impenetrably shielded the client's cause through the ages. It is difficult enough for a military lawyer to withstand the pressures exerted against his principal in the name of discipline and authority.

150. 14 U.S.C.M.A. at 219-20, 33 C.M.R. at 431-32. Judge Ferguson stated additional reasons for his reservations on the adequacy of nonlawyer representation:


152. 287 U.S. 45 (1932).
The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.153

In Gideon v. Wainwright154 the Court was more explicit:

The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.155

If "the intelligent and educated layman" is viewed as incompetent to represent himself, such a layman necessarily cannot be considered adequate counsel for another.156

It should also be noted that the military is compelled to provide lawyer-counsel at interrogations prior to adjudicatory proceedings,157 in accordance with the Supreme Court's decision in Miranda v. Arizona.158 It would be anomalous to hold that the military is not constitutionally compelled to provide lawyer-counsel at the criminal trial itself.

Even if it is held that appointment of lawyer-counsel at a military criminal proceeding is not necessary, an indigent has the indisputable right to the "effective assistance of counsel."159 At a mini-

---

155. 372 U.S. at 344 (emphasis added).
156. Law students under faculty supervision should be allowed to serve as counsel, however; the supervision would ensure that the accused would have representation by an individual with sufficient skills. See Argersinger v. Hamlin, 407 U.S. 25, 40-41 (1972) (Brennan, J., concurring).
This right entitles the accused to the appointment of a person competent in military law. Both military and federal courts have found a denial of an accused’s sixth amendment right when the counsel appointed to represent the accused lacked sufficient competence. In Application of Stapley, for instance, two nonlawyer officers were appointed as counsel in a special court-martial for a nineteen-year-old soldier accused of fraud in the issuance of checks. One officer was a veterinarian with only two days of training in military law, and the other officer was a second lieutenant who had studied the UCMJ in a Reserve Officer Training Corps program but who had neither special knowledge or ability in military law nor practical experience in legal matters or procedures generally. The officers advised the accused to plead guilty to the charges against him. Although the court admitted the good faith of both officers, it held that their representation did not satisfy the requirements of the sixth amendment:

[Minimal] requirements of due process and the Sixth Amendment are not satisfied by the assignment as counsel to an accused of officers with substantially no experience, training or knowledge in the field of law, either military or civilian... With the increasing personnel in the military service, the rapidity and ease of transportation and the training facilities and techniques readily available for specialized training or experience, it is no longer either reasonable or necessary, if it ever were, to deem any officer qualified to act as defense counsel for an accused merely because he is an officer.

The argument must be met that requiring appointment of trained counsel in all article 15 proceedings imposing correctional custody would place too heavy a burden on the resources of the military justice system. Predictions that it will be impossible to provide the lawyers necessary to afford basic procedural protections have been made in the past, however, even with respect to protections contained in the UCMJ, and they have proved to be inaccurate.


162. 246 F. Supp. at 321.


Furthermore, counsel would be required only if the service member is sentenced to correctional custody, which occurs infrequently.\textsuperscript{166} In accordance with \textit{Argersinger} the commanding officer would have to determine the need for counsel before the commencement of proceedings by reviewing the evidence to ascertain if correctional custody is a likely punishment. Overcaution might boost the number of counsel needed to a number greater than one might expect from the frequency of the imposition of correctional custody. However, as noted above,\textsuperscript{166} counsel is already provided to every service member charged with a minor violation to give him assistance in making the election between proceeding under article 15 or under a court-martial. Since this lawyer must become acquainted with the case in order to give adequate legal advice, provision of counsel for the article 15 proceeding should not increase significantly the strain on the legal departments of the services.

A final argument of those opposed to provision of counsel under article 15 may be that a service member waives his right to counsel by electing to submit to an article 15 proceeding rather than a court-martial, in which counsel is appointed.\textsuperscript{167} The difficulty with this argument is that a service member who elects a trial by court-martial exposes himself to greater maximum punishments than are allowed under article 15;\textsuperscript{168} he is thus coerced, or at least encouraged, not to assert his constitutional right.\textsuperscript{169}

An analogous situation came before the Supreme Court in \textit{United States v. Jackson}.\textsuperscript{170} The case involved a section of the Federal Kidnapping Act that encouraged guilty pleas by providing that only a jury could impose the death penalty. The Court held that the section was an unconstitutional burden on the defendant's fifth amendment right to plead not guilty and on his sixth amendment


\textsuperscript{\textsuperscript{\textsuperscript{}}166.} The frequency with which correctional custody was imposed under article 15 in 1973 is shown in the following table:

<table>
<thead>
<tr>
<th></th>
<th>Total Nonjudicial Punishments</th>
<th>Correctional Custodies</th>
</tr>
</thead>
<tbody>
<tr>
<td>January-March</td>
<td>49,199</td>
<td>142</td>
</tr>
<tr>
<td>April-June</td>
<td>48,697</td>
<td>138</td>
</tr>
<tr>
<td>July-September</td>
<td>45,781</td>
<td>180</td>
</tr>
<tr>
<td>October-December</td>
<td>41,659</td>
<td>38</td>
</tr>
</tbody>
</table>

Telephone interview with the Office of the Clerk of the Court, Judge Advocate General, Department of the Army, Washington, D.C., July 16, 1974.

\textsuperscript{\textsuperscript{\textsuperscript{}}166.} See text accompanying note 15 \textit{supra}.

\textsuperscript{\textsuperscript{\textsuperscript{}}167.} See notes 13-15 \textit{supra} and accompanying text.

\textsuperscript{\textsuperscript{\textsuperscript{}}168.} See note 15 \textit{supra} and accompanying text.

\textsuperscript{\textsuperscript{\textsuperscript{}}169.} See \textit{Wood}, \textit{supra} note 69, at 7-8; Note, \textit{supra} note 3.

\textsuperscript{\textsuperscript{\textsuperscript{}}170.} 390 U.S. 570 (1968).
right to a jury trial, stating: “Whatever might be said of Congress’ objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights.” 171

Several courts have adopted the Jackson rationale and have held that a service member does not waive counsel by electing to submit to a summary court-martial even though he could have had counsel by exposing himself to the greater possible penalties of a special or general court-martial. 172 While the Court of Military Appeals has never addressed the issue in the article 15 context, it probably would not sustain the waiver argument.

The right to counsel is but one of the procedural safeguards that protect civilian misdemeanants but are denied to service members accused and punished under article 15. Those opposed to the extension of the right to counsel may thus argue that to recognize the right is to allow “the camel’s nose to peek into the tent”—the right to counsel will be followed by the application of the right to cross-examination, the prohibition against double jeopardy, and all the other procedural safeguards not present under article 15. 173 The recognition of the full panoply of civilian safeguards, the argument goes, will rob article 15 of the procedural flexibility its purpose requires. Two responses may be made to this argument. First, to the extent that procedural reforms are compatible with the function of article 15 and the unique needs of the military, their institution is desirable and probably constitutionally compelled. Second, each right must be judged on the basis of its particular constitutional status and the effect it would have on military operations. To transplant automatically the arguments for extension of the right to counsel to the question of the applicability of the double jeopardy prohibition, for instance, would be to paint with too broad a brush. The right to counsel, as the Supreme Court has observed, 174 is unique: It is fundamental to the right to be heard, and it must not be denied for less than the most urgent of reasons.

171. 390 U.S. at 582.
Although Jackson involved a capital crime, and its holding may arguably be limited to capital cases, the courts that extended the right to counsel to summary court-martial implicitly rejected such a limitation. See text accompanying note 172 infra. Cf. Pickering v. Board of Educ., 391 U.S. 563 (1968); Sherbert v. Verner, 374 U.S. 398 (1963); Speiser v. Randall, 357 U.S. 513 (1958).


173. See note 3 supra and accompanying text.

174. See text accompanying note 153 supra.