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Defendant, a Marine Corps private, was charged with larceny, and naval officers who were not lawyers were appointed as trial[1] and defense counsel. The accused pleaded guilty to six specifications of larceny, and, upon trial by a special court-martial, was given a bad conduct discharge from the service. The board of re-

1. The trial counsel is comparable to the prosecuting attorney in a civilian court.

view,[2] on its own motion, held the guilty plea improvident and stated that, under the sixth amendment, the accused was entitled to counsel qualified in the law unless he had intelligently waived this right. Upon certification[3] by the Judge Advocate General of the Navy to the Court of Military Appeals, *held*, reversed. Appointment of non-lawyer counsel who meet the requirements of the Uniform Code of Military Justice[4] does not violate the accused's rights under the sixth amendment. Two judges held the sixth amendment applicable to courts-martial and satisfied by non-lawyer counsel; the third judge, agreeing that non-lawyer counsel under the Uniform Code was adequate, held that the accused derived no rights from the sixth amendment. *United States v. Culp*, 14 U.S.C.M.A. 199 (1963).

As a Bill of Rights guarantee and an element of due process of law, the right to counsel has been defined in the federal courts to mean the right to be represented by a professionally trained lawyer.[5] This right to counsel in civilian federal courts is expressly secured by the sixth amendment,[6] but, prior to the principal case, the right to counsel in military courts was recognized only as an element of "military due process."[7]

2. Under article 66 of the Uniform Code of Military Justice, 10 U.S.C. § 866 (1958) (hereinafter cited as UCMJ by article), cases involving bad-conduct discharges *must* be examined by the board of review as the last step of review. Prior to this step, the officer who ordered the trial must approve the findings of a special court-martial, and the record must be reviewed by a superior officer who exercises general court-martial jurisdiction over the command. UCMJ art. 64.

3. UCMJ art. 67.

4. UCMJ art. 27. For general courts-martial this article requires the appointment of trained lawyers who are certified as competent to perform as trial and defense counsel. For a special court-martial the article provides as follows: "(1) if the trial counsel is qualified to act as counsel before a general court-martial, the defense counsel detailed . . . must be a person similarly qualified; and (2) if the trial counsel is a judge advocate, or a law specialist, or a member of the bar of a Federal court or the highest court of a State, the defense counsel . . . must be one of the foregoing."

5. See, *e.g.*, Gideon v. Wainwright, 372 U.S. 335, 344 (1963); Johnson v. Zerbst, 304 U.S. 458, 462 (1938); Powell v. Alabama, 287 U.S. 45, 68-69 (1932); *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 379 (1866); Willis v. Hunter, 166 F.2d 721, 723 (10th Cir.), *cert. denied*, 334 U.S. 850 (1948). *But see* Altmayer v. Sanford, 148 F.2d 161, 162 (5th Cir. 1945), where the court held that "the appointed counsel, being a commissioned officer admitted to practice before a court-martial, was a competent attorney within the purview of the sixth amendment," even though not a professionally trained lawyer. See Neff, *Right to Counsel in Special Courts-Martial*, 34 JAG J. 58 (1962).

6. The sixth amendment states in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

7. See, *e.g.*, Romeo v. Squier, 133 F.2d 528 (9th Cir.), *cert. denied*, 318 U.S. 785 (1943); United States v. Clay, 1 U.S.M.C.A. 74, 1 C.M.R. 74 (1951). Chief Judge Quinn of the United States Court of Military Appeals, adamantly holding the position that service personnel are entitled to rights and privileges secured by the Constitution, has defined military due process in the following manner: "It can be said, therefore that military due process begins with the basic rights and privileges defined in the federal constitution. It does not stop there. . . . Military due process is, thus, not synonymous with federal civilian due process. It is basically that, but something more, and something different." Quinn, *The United States Court of Military Appeals and Military Due Process*, 35 ST. JOHN'S L. REV. 225, 232 (1961).

Both civilian and military courts have recognized some distinctions between military and civilian due process. Early decisions, although recognizing that the right to due process is an inherent right and not lost when an individual enters the military,[8] defined military due process without reference to the Constitution.[9] Due process for military personnel was held to be simply the fair application of the principles of military law.[10] And military law, as defined by the Uniform Code of Military Justice, provides for lawyer counsel only at the general court-martial level, while imposing a balanced abilities test for lesser courts-martial.[11]

Notwithstanding the definition of counsel requirements by the Uniform Code, civilian courts have recently demonstrated a tendency to define due process in military courts in constitutional terms, although applying a modified standard of due process adapted to meet the peculiarities of the military system.[12] Similarly, the Court of Military Appeals has recently defined military due process[13] and other fundamental freedoms[14] in constitutional terms. Protection from double jeopardy[15] and the right to a speedy[16] and fair[17] trial, free from command influence, have been held basic rights of military personnel. While these fundamental elements of due process were said to originate in the Constitution, each was in some way

8. Burns v. Lovett, 202 F.2d 335, 340-41 (D.C. Cir. 1952), *aff'd sub nom.* Burns v. Wilson, 346 U.S. 137 (1952).

9. *E.g.*, French v. Weeks, 259 U.S. 326, 335 (1922); Reaves v. Ainsworth, 219 U.S. 296, 304 (1910). *Accord*, Burns v. Wilson, 346 U.S. 137, 146 (1952) (Minton, J., concurring). The leading case decided by the Court of Military Appeals is United States v. Clay, 1 U.S.C.M.A. 74, 1 C.M.R. 74 (1951).

10. See, *e.g.*, Creary v. Weeks, 259 U.S. 336, 344 (1922); Reaves v. Ainsworth, 219 U.S. 296, 304 (1910); White v. Humprey, 212 F.2d 503, 507 (3d Cir.), *cert. denied*, 348 U.S. 900 (1954).

11. See note 4 *supra*.

12. See, *e.g.*, Burns v. Wilson, 346 U.S. 137, 142 (1952) (due process); Wade v. Hunter, 336 U.S. 684, 690 (1948) (double jeopardy). In Shapiro v. United States, 107 Ct. Cl. 650, 653, 69 F. Supp. 205, 207 (1947) (right to counsel), the court stated, "It would seem to go without saying that these [fifth and sixth] Amendments apply as well to military tribunals as to civil ones." Review of courts-martial in civilian courts continues to be limited to writs of habeas corpus based on jurisdiction, *e.g.*, *In re* Yamashita, 327 U.S. 1, 8 (1945); Krivoski v. United States, 136 Ct. Cl. 813, 145 F. Supp. 239, *cert. denied*, 352 U.S. 954 (1956), but jurisdiction has been found lacking when basic constitutional guarantees of procedural fairness were denied. See, *e.g.*, Smith v. United States, 187 F.2d 192, 197 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 927 (1951); Innes v. Hiatt, 141 F.2d 664, 666 (3d Cir. 1944); Shapiro v. United States, *supra*. See also White v. Humprey, 212 F.2d 503, 507 (3d Cir.), *cert denied*, 348 U.S. 900 (1954).

13. See Note, 64 COLUM. L. REV. 127 (1964), for a critical analysis of the court's activities in the area of constitutional law.

14. United States v. Wysong, 9 U.S.C.M.A. 249, 26 C.M.R. 29 (1958) (right of privacy); United States v. Voorhees, 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954) (freedom of speech).

15. United States v. Ivory, 9 U.S.C.M.A. 516, 26 C.M.R. 296 (1957).

16. United States v. Batson, NCM 60-00457, 30 C.M.R. 610 (1961); United States v. Cox, NCM 58-00496, 26 C.M.R. 764 (1957).

17. United States v. Littrice, 3 U.S.C.M.A. 487, 13 C.M.R. 43 (1953).

modified and adapted to the court-martial system, thus perpetuating the dichotomy between civilian and military due process. The principal case is illustrative of this trend to recognize some rights for military personnel that emanate from the Constitution.[18]

If it is assumed, as it was in the opinion of one of the judges in the principal case,[19] that the sixth amendment is not applicable to the military establishment and that a military due process criterion was the real, though unstated, rationale of the court, then the present decision seems well founded. To satisfy due process, general counsel criteria may depend upon (1) the nature of the forum,[20] (2) the objective of the proceeding,[21] and a complex of other factors, including (3) the possible obstruction of the judicial proceeding if the alleged right to certain counsel were granted.[22] Consideration of these criteria as they relate to the military system of justice provides a persuasive argument for the position that a defendant before a court-martial, although not provided with a lawyer for counsel, is nevertheless assured a basically fair trial—therefore due process.

First, the nature of courts-martial encourages just treatment of a defendant. It is generally conceded that courts-martial are judicial in nature, although they are probably not criminal courts in the full sense of the term.[23] Convened by a senior officer with limitations on the type and composition of the court according to the gravity of the offense charged,[24] courts-martial are *ad hoc* bodies empowered to try only offenses under the Uniform Code. Courts-martial, unlike their civilian counterparts, are paternalistic and designed to deal with the internal affairs of the military[25] when summary command discipline is inappropriate.[26] The maximum limits on punishment,[27] the stringent rules against self-incrimination,[28] and the elaborate system of automatic and discretionary review[29] found in military courts

18. See principal case at 217, 219.

19. See *id.* at 215-16.

20. *In re* Groban, 352 U.S. 330, 335 (1956).

21. Romeo v. Squier, 133 F.2d 528, 531 (D.C. Cir.), *cert. denied*, 318 U.S. 785 (1943).

22. Hannah v. Larche, 363 U.S. 420, 442 (1960). In addition, as stated in Hannah v. Larche, *supra*, the nature of the alleged right involved in the trial may affect counsel requirements.

23. See the decision of the Board of Review in the principal case, Edwin L. Culp, NCM 63-00442, at 10-12 (1963). See generally Powers, *Administrative Due Process in Military Proceedings*, 20 WASH. & LEE L. REV. 1 (1963).

24. UCMJ arts. 22-25. The seriousness of the offense charged determines which military court will be convened. In order of ascending importance, courts-martial are ranked as follows: summary, special, and general. Designation of the appropriate court will in turn limit the officer who can convene it and the rank of those officers who may serve upon it.

25. See Solf, *Comparison of Safeguards in Civilian and Military Tribunals*, 24 JAG J. 5 (1957).

26. UCMJ art. 15.

27. UCMJ art. 56.

28. United States v. Smith, 13 U.S.C.M.A. 105, 32 C.M.R. 105 (1962); UCMJ art. 31.

29. UCMJ arts. 60-67. See note 2 *supra*.

offer greater protection to a defendant before a court-martial than he would receive in civilian courts.

Second, the objective of the special court-martial is often to further individual discipline in a positive sense rather than to impose punishment, and, consequently, there may be less temptation to infringe upon the defendant's rights.[30] Many of the offenses tried at the special court-martial level, such as sleeping on watch[31] or absence from assigned duty,[32] are unique to the military, and the objective of the proceeding is necessarily corrective. An officer, familiar with the diverse aspects of military life, would appear to have adequate skill to determine whether a special court-martial offense has been committed and properly charged.[33] Indeed, his familiarity with military processes, as well as his military perspective and personal interest in the maintenance of military justice, may compensate for a lack of formal legal training.[34]

Third, although the system of military justice would probably be improved by requiring that all counsel appearing before a military court have legal training, such counsel are not practically available in the military for assignment to every court-martial. In 1962, the Army alone tried 26,859 cases by special court-martial.[35] Furthermore, the prospect of providing lawyers for special courts-martial during active warfare or even during peacetime for the mobile Navy is staggering. A partial solution to the personnel problem may be the field judiciary, in which qualified Army lawyers "ride the circuit" of military courts.[36] The Navy has considered the establishment of "dockside courts," which would permit ready access to legally trained counsel.[37] These proposals would help to alleviate the burden of providing officer-lawyer counsel for every military trial. Nevertheless, the impracticality of providing legally trained

30. The objective in the court-martial seems to be reformation of the offender. Thus, traditional theories of punishment, such as retribution, restraint, and deterrence receive minimal attention. By not publicizing court-martial proceedings and by emphasizing the purpose of correction, high morale in the fighting force is maintained. See Snedeker, *The Uniform Code of Military Justice*, 38 GEO. L.J. 521 (1950).

31. UCMJ art. 113.

32. UCMJ art. 86. Other military offenses without counterparts in the civilian judicial system include: desertion (UCMJ art. 85), disrespect for superior officers (UCMJ art. 89), failure to obey a lawful order (UCMJ art. 92), and misbehavior before the enemy (UCMJ art. 99).

33. By implication, Powell v. Alabama, 287 U.S. 45 (1932), suggested these functions as general duties of competent defense counsel. However, the ability to perform such functions does not necessarily assure adequate investigation by one untrained in uncovering facts of legal significance.

34. For specific definition of the duties of trial and defense counsel, see SNEDEKER, MILITARY JUSTICE UNDER THE UNIFORM CODE §§ 606-07 (1953).

35. See Brief for the Judge Advocate General of the Army as Amicus Curiae, pp. 4-5, principal case.

36. STAFF OF SENATE COMM. ON THE JUDICIARY, 88TH CONG., 2D SESS., REPORT ON CONSTITUTIONAL RIGHTS OF MILITARY PERSONNEL 26-29 (Comm. Print 1963).

37. *Id.* at 42-45.

counsel for every court-martial argues for the exclusion of this requirement from military due process. Viewed within the totality of the court-martial structure, non-lawyer counsel is probably able to assure fundamental fairness to the military accused. The administration of justice under the Uniform Code incorporates the essential elements of due process, while emphasizing the security and order of the group to meet tactical objectives.

If the court, however, was intending to apply the sixth amendment per se to courts-martial or impliedly to equate military with civilian due process, it probably should have provided the defendant with legally trained counsel. The sixth amendment would appear to require legally trained counsel in a special court-martial since the possible penalties may be as serious as those imposed for some felonies in civilian courts.[38] As recognized by the court,[39] a bad conduct discharge has serious consequences; in addition to barring veterans' benefits, it has a stigmatic effect on the social and future employment opportunities of the discharged.[40] Yet it can currently be imposed by a special court-martial composed entirely of non-lawyers. Similarly, the standard of due process that is used in the civilian courts would seem to require that a defendant in a court-martial proceeding be provided legally trained counsel. The mere balancing of unqualified counsel in a military court does not necessarily preserve the rights of an accused during trial, nor does it necessarily provide him with an adequate record for appeal.[41]

There is convincing evidence, particularly as to the sixth amendment, that the Bill of Rights was not originally intended to apply to the military establishment.[42] Nevertheless, if the present administration of military justice fails to meet the requisite standard of fundamental fairness or if the courts persist in applying the sixth amendment to courts-martial, lawyers may be required as counsel in all military trials. Recognition of the need for trained counsel should be followed by corrective decisions in the Court of Military Appeals, notwithstanding the present shortage of military lawyers.[43] It has been

38. It seems to be well established that a severe penalty, whether it is a denial of life or liberty, dictates the necessity for professionally trained counsel. See note 5 *supra*.

39. Judge Ferguson, concurring in the principal case, questioned the competence of laymen to practice criminal law. In view of the serious consequences of a bad-conduct discharge, he cited lack of training and absence of a professional obligation as serious defects in the military system. Principal case at 219-20.

40. STAFF OF SENATE COMM. ON THE JUDICIARY, 88TH CONG., 2D SESS., REPORT ON CONSTITUTIONAL RIGHTS OF MILITARY PERSONNEL 1-2 (Comm. Print 1963).

41. See note 39 *supra*.

42. See Wiener, *Courts-Martial and the Bill of Rights*, 72 HARV. L. REV. 1, 49 (1958). *But cf.* Henderson, *Courts-Martial and the Constitution*, 71 HARV. L. REV. 293, 324 (1957). Likewise, there was no intention to incorporate into the UCMJ the full procedural guarantees afforded to nonmilitary federal criminal defendants. See 95 CONG. REC. 5718 (1949).

43. Legislative action may be forthcoming. A committee composed of the judges of

forcefully stated that the availability of fundamental safeguards should depend neither upon the military status of the accused nor upon the designation of a military forum for trial.[44] If the Court of Military Appeals deems civilian constitutional guarantees essential to the preservation of military justice, it seems that forthright application of the sixth amendment, not in terminology alone but in substance, may be required.

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the Court of Military Appeals and the respective Judge Advocate Generals of the Army, Navy, and Air Force has proposed a bill that would provide for a single-officer special court-martial staffed by lawyers who would hear cases at the request of an accused without the presence of counsel. Subject to appropriate safeguards, the accused could waive his hearing before members of a special court-martial, and be tried by a law officer alone. FED. R. CRIM. P. 23 provides an analogous method of disposing of criminal cases in the federal courts. See 1962 ANNUAL REPORT OF THE UNITED STATES COURT OF MILITARY APPEALS 7-17.

44. *E.g.*, Innes v. Hiatt, 141 F.2d 644, 666 (3d Cir. 1944). See generally Quinn, *United States Court of Military Appeals and Individual Rights in the Military Service*, 35 MINN. L. REV. 491, 506 (1960); Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. REV. 181, 187-88 (1962).