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Constitutional Law—The Serviceman'a Right to Counsel in a Special Court-Martial

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to clarify the federal laws which authorize states to enact residence requirements, a direct attack on these federal statutes will probably be the only way to finally resolve the residency requirement problem.

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CONSTITUTIONAL LAW—THE SERVICEMAN'S RIGHT TO COUNSEL IN A SPECIAL COURT-MARTIAL

Petitioner was convicted in two separate court-martials and sentenced to confinement with forfeiture of two-thirds of his pay for six months. Prior to trial, the petitioner had requested the appointment of legally qualified civilian or military defense counsel. The request was denied. The court then appointed, as defense counsel, an officer who was not legally trained but who had training comparable to that of trial counsel as required by the Uniform Code of Military Justice, sections 827 and 828.[1] After exhausting military appellate review, the petitioner filed a writ of Habeas Corpus in the United States District Court, which was dismissed.[2] Appeal was then taken to the Court of Appeals, which affirmed the district court decision and *held:* The appointment of non-legally trained counsel in a special court-martial was not violative of the sixth amendment right to counsel or of the fifth amendment right to a fair trial under the due process clause. *Kennedy v. Commandant*, 377 F.2d 339 (10th Cir. 1967).

The judicial system of the Army, Navy and Air Force is defined by the Uniform Code of Military Justice.[3] The Code provides for a General Courts-Martial, Special Courts-Martial and Summary Courts-Martial.[4] The officer in a defendant's chain of command decides before which of the three courts a defendant will be tried. The Courts-Martial jurisdictions are differentiated by the extent of the punishment that may be applied to a convicted defendant. A General Court-Martial may prescribe any punishment, including a penalty of

1. *See* 10 U.S.C. § 827 (1964) which provides:
   (a) For each general and special court-martial the authority convening the court shall detail trial counsel and defense counsel, and such assistants as he considers appropriate. . . .
   (c) In the case of a special court-martial—
      (1) if the trial counsel is qualified to act as counsel before a general court-martial, the defense counsel detailed by the convening authority 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 detailed by the convening authority must be one of the foregoing. . . .

   Id. § 838 provides:
   (b) The accused has the right to be represented in his defense before a general or special court-martial by civilian counsel if provided by him, or by military counsel of his own selection if reasonably available, or by the defense counsel detailed under Section 827 of this title (article 27). . . .
2. 258 F. Supp. 967 (D. Kan. 1966).
3. 10 U.S.C. §§ 101-2771 (1964).
4. *Id.* § 816.

death.[5] In a General Court-Martial the defendant is required to have counsel who is a graduate of an accredited law school or a member of the bar of a federal court or of the highest court of a state.[6] A Special Court-Martial may render authorized punishment not exceeding a maximum sentence of confinement for six months or hard labor without confinement for three months, forfeiture of two-thirds pay per month for six months and a bad conduct discharge if a full trial record is prepared.[7] In a Special Court-Martial the defendant must have counsel with training comparable to that of the trial counsel,[8] although neither need be legally qualified as in a General Court-Martial.

From the early days of the republic the courts of the military and civilian spheres of our government have existed and developed separately from one another.[9] Chief Justice Vinson, in *Burns v. Wilson*, stated that:

> Military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment. This Court has played no role in its development; we have exerted no supervisory power over the courts which enforce it; 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 Framers expressly entrusted that task to Congress.[10]

Following this line of reasoning, all the constitutional rights of a defendant in a civilian criminal proceeding do not necessarily apply to a defendant in a military proceeding.[11] Such a defendant can bring his appeal to a civilian court only collaterally,[12] and the scope of review is limited.[13] However, this does not mean that the service man or woman is wholly denied the rights afforded his civilian counterpart. The United States Court of Military Appeals, referred to by Mr. Justice Warren "as a sort of civilian 'Supreme Court' of the mili-

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5. *Id.* § 818.
6. *Id.* § 827(1), Manual for Courts-Martial § 6B.
7. *Id.* § 819.
8. *Id.* §§ 827(c), 838(b).
9. *See, e.g.*, Burns v. Wilson, 346 U.S. 137 (1953); Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857); United States v. Culp, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963); Comment, *Constitutional Rights of Servicemen Before Courts-Martial*, 64 Colum. L. Rev. 127 (1964); Comment, *Lawyer-Counsel in Special Courts-Martial*, 23 Wash. & Lee L. Rev. 142, 140 (1966).
10. Burns v. Wilson, 346 U.S. 137, 140 (1953).
11. *See, e.g.*, Hiatt v. Brown, 339 U.S. 103 (1950); United States v. Culp, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963); United States v. Jacoby, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960); *see also* J. Snedecker, Military Justice Under the Uniform Code 446 (1953); Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I, II*, 72 Harv. L. Rev. 1, 266 (1958); Comment, *Right to Counsel and the Serviceman*, 15 Catholic U.L. Rev. 203 (1966); Comment, *An Accused is Entitled to Representation at a Special Court-Martial by Legally Trained Counsel*, 4 Houston L. Rev. 126 (1966).
12. *See, e.g.*, Burns v. Wilson, 346 U.S. 137 (1953); *Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243 (1863); Shaw v. United States, 288 F.2d 811 (D.C. Cir. 1954); Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 18 (1962); Comment, 76 Yale L. J. 380 (1966).
13. Hiatt v. Brown, 339 U.S. 103 (1950), *cited in* Burns v. Wilson, 346 U.S. 137, 139 (1953).

tary,"[14] recently stated that "the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces."[15] In *United States v. Culp*,[16] the court went even further when it stated, "It is abundantly clear that defendants before military tribunals are, by law, provided with and shielded by a mantle of valuable protection extending to areas but recently the subject of discussion by the Supreme Court." Nevertheless, it is also clear that military personnel do not enjoy some of the constitutional rights that a civilian is entitled to. The only express distinction in the Constitution is that the military defendant has no right to indictment by grand jury.[17] Historically, the full right of freedom of speech,[18] the right of bail,[19] and the right to trial by petit jury[20] have been denied the serviceman.

While it has been argued that the sixth amendment right to effective counsel was meant to apply to military defendants,[21] most cases and authors have denied this contention.[22] Frederick Wiener, in a leading article, states:

> Neither the 1799 nor the 1800 Articles for the Government of the Navy made any mention of counsel for the prisoner. . . .
>
> In the 1806 Articles of War, there is not only no provision for any counsel for the accused, but article 69—taken verbatim from article 6 of 1786—indicates that Congress considered that an accused soldier was on his own while standing trial . . . reflects the Blackstonian common-law notion of the judge as counsel for the prisoner rather than the sixth amendment's guarantee of the assistance of counsel.[23]

Early commentators suggest that the right of counsel, if applied at all, did not require the same type of counsel required in a civilian trial of that day, and certainly not the same right to effective counsel as applied in civilian trials of today. In more recent times, the sixth amendment right to counsel in the civilian sphere has been broadened to include the right to effective counsel[24]

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14. Warren, *supra* note 12, at 188.

15. United States v. Jacoby, 11 U.S.C.M.A. 428, 430-31, 29 C.M.R. 244, 246-47 (1960); United States v. Welch, 3 C.M.R. 136 (1952).

16. United States v. Culp, 14 U.S.C.M.A. 199, 33 C.M.R. 411, 415 (1963), *citing* Lowe v. Brown, 372 U.S. 477 (1963); Draper v. Washington, 372 U.S. 487 (1963); Douglas v. California, 372 U.S. 353 (1963).

17. U.S. Const. amend. V.

18. 1806 Articles of War, arts. 3, 5, 53, 57, 2 Stat. 360, 366 (1806); *See* J. Winthrop, Military Law and Precedent 698-21, 625-26 (2d ed. 1920).

19. 1806 Articles of War, art. 78, 2 Stat. 369 (1806).

20. *See, e.g.*, Whelchel v. McDonald, 340 U.S. 122, 127 (1950); Comment, 64 Colum. L. Rev. 127 (1964).

21. Henderson, *Courts-Martial and the Court: The Original Understanding*, 71 Harv. L. Rev. 293 (1957).

22. *See, e.g.*, United States v. Culp, 14 U.S.C.M.A. 199, 33 C.M.R. 411, 427-28; J. Macomb, Martial Law Court-Martial as Practiced In the United States of America 93-96 (1809); P. Maltby, Courts-Martial and Military Law 73-76 (1813); Wiener, *supra* note 11; Comment 64 Colum. L. Rev. 127 (1964).

23. Wiener, *supra* note 11, at 22 (Footnotes omitted.).

24. *See, e.g.*, Powell v. Alabama, 287 U.S. 45, 56, 58 (1952).

and, where defendant is indigent, the right to state appointed counsel.[25] Further, the defendant's right to counsel has been extended so as to commence at the point of initial custody.[26] In contrast, the mandate for the right to effective counsel for the military defendant is not as clear. A defendant before a General Court-Martial is granted the right to legally trained counsel in both the pretrial and trial proceedings,[27] but this right generally has been denied the defendant in a Special Court-Martial proceeding.[28] There have been exceptional cases, however, where the denial of legally trained counsel in a Special Court-Martial has been considered sufficiently prejudicial to warrant reveral of a defendant's conviction.[29] In *United States v. Culp*, the court stated:

> We have never hesitated to reverse convictions even though the error be not assigned before us, for any prejudicial action appearing therein, including . . . adequacy of representation by counsel; reasonable availability of individual military counsel requested by accused; fair opportunity to be represented by civilian counsel.[30]

In contrast, commentators have stated that "the court usually disagrees with contentions of the accused that he was not represented adequately by counsel."[31] Some courts have attempted to grapple with the clear wording of the statute, as in *United States v. Sutton* where the court said:

> Surely we are seeking to place military justice on the same plane as civilian justice, but we are powerless to do that in those instances where Congress has set out legally, clearly, and specifically a different level.[32]

Other courts have said the sixth amendment does apply to military defendants, but that the articles in the Uniform Code of Military Justice comply with the sixth amendment. Courts have recognized the problem of the right to counsel in a Special Court-Martial, and in previous cases[33] strong arguments have been formulated for allowing all military defendants the right to legally trained counsel.[34]

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25. *See, e.g.*, Douglas v. California, 372 U.S. 353 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963); Johnson v. Zerbst, 304 U.S. 458 (1938).

26. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964).

27. *See, e.g.*, United States v. Tellier, 13 U.S.C.M.A. 323, 32 C.M.R. 323, 327 (1962); United States v. Kraskouskas, 9 U.S.C.M.A. 607, 26 C.M.R. 387 (1958) and cases cited therein.

28. *See, e.g.*, Burns v. Wilson, 346 U.S. 137 (1953); Le Ballister v. Warden, 247 F. Supp. 349 (D. Kan. 1965); United States v. Culp, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963); United States v. Rawdon, 9 U.S.C.M.A. 396, 26 C.M.R. 176 (1958); United States v. Sutton, 3 U.S.C.M.A. 220, 11 C.M.R. 220 (1953).

29. *See, e.g.*, Matter of Stapley, 246 F. Supp. 316 (D. Utah 1965).

30. 14 U.S.C.M.A. 199, 33 C.M.R. 411, 415 (1963) (Footnotes omitted.).

31. W. Aycock & S. Wurfel, Military Law Under the Uniform Code of Military Justice 133 (1955) and cases cited therein.

32. 3 U.S.C.M.A. 220, 11 C.M.R. 220, 223 (1953).

33. *See, e.g.*, Matter of Stapley, 246 F. Supp. 316 (D. Utah 1965); Shapiro v. United States, 69 F. Supp. 205 (1947); United States v. Mathis, 6 C.M.R. 661 (1952).

34. *See, e.g.*, Burns v. Wilson, 346 U.S. 137, 149, 152 (1953) (dissenting opinions: Frankfurter, J., and Douglas, Black, J.J., respectively); United States v. Culp, 14 U.S.C.M.A. 199, 212-21, 33 C.M.R. 411, 428-33 (1963); United States v. Forbes, 3 C.M.R. 399 (1951); United States v. Rawdon, 9 U.S.C.M.A. 396, 26 C.M.R. 176 (1958); United

In the instant case, petitioner made three major arguments on appeal. He first contended that the sixth amendment constitutional right to counsel is applicable to all military prosecutions including Special Courts-Martial, and that this right was infringed upon when he was assigned a non-legally trained defense counsel. Second, he argued that representation by a non-legally trained defense counsel denied him a fair trial in violation of the due process requirement of the fifth amendment. Petitioner further argued that if it is found that appointment of a non-legally trained defense counsel does not violate his fifth and sixth amendment rights to counsel and fair trial, he was nevertheless denied due process since article 38b of the Uniform Code of Military Justice[35] grants a defendant the absolute right to legally trained civilian counsel while failing to provide similar assistance for the indigent.

After citing ample authority for the court's power to review the constitutional questions involved, the court proceeded to dismiss petitioner's contentions. It was first recognized that "at least the spirit of the Sixth Amendment right to counsel pervades the due process requirements of military justice."[36] However, the court determined that it was unnecessary to resolve the question of whether the sixth amendment right to counsel should be made strictly applicable to military prosecutions, since "we are convinced 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."[37] Under article 27 of the Uniform Code of Military Justice,[38] defense counsel must have had legal training equivalent to that of the trial counsel and must also be "familiar with" the Manual for Courts-Martial and the Uniform Code of Military Justice, including the substance of military crimes tried by Special Courts-Martial. The court further based its conclusion on the fact that the penalty for the offense would constitute a misdemeanor under civilian law, "and, it is an open question whether the sixth amendment right to counsel is applicable in misdemeanor cases."[39] It was argued that the practice and procedure in Special Courts-Martial are simplified and that scope and sentencing powers are limited. For these same reasons the court also found that due process requirements had been satisfied.

The court dismissed petitioner's argument as to indigent discrimination by stating:

> If as we have held, the representation by non-legally trained officers provided by Article 27(e) is adequate and effective to secure to an accused the full equivalent of the sixth amendment right to counsel,

States v. Williamson, 4 U.S.C.M.A. 320, 331 (1958) (Quinn, C.J., dissenting); Quinn, *The United States Court of Military Appeals and Individual Rights in the Military Service*, 35 Notre Dame Law 491 (1960); Comment, 76 Yale L.J. 380 (1966).

35. 10 U.S.C. § 838(b) (1964).
36. 377 F.2d 339, 343 (1967).
37. *Id.*
38. 10 U.S.C. § 827.
39. 377 F.2d at 343.

> he cannot be disadvantaged by his inability to hire private counsel. To hold otherwise, would be to say that an indigent is constitutionally entitled to appointed counsel of his choice.[40]

Having dispensed with petitioner's arguments, the court unanimously affirmed the district court's decision.

The *Kennedy* court considered both the limited jurisdiction of Special Courts-Martial and its powers of limited punishment as reasons for holding that representation by non-legally trained counsel did not violate petitioner's rights. The applicable articles of the Uniform Code of Military Justice as to the jurisdiction of Special Courts-Martial provide:

> Special courts-martial have jurisdiction to try persons subject to this chapter for any non-capital offense made punishable by the Chapter.[41]

The jurisdiction therefore seems to be broader than the court's opinion would lead one to believe, and includes offenses which would be felonies were they tried in a civilian criminal court. Furthermore, a conviction before a Special Court-Martial, for an offense which would be a felony if tried before a civilian court, may in some instances be considered as a prior felony conviction if the defendant is subsequently sentenced for a felony conviction in a civilian court. This increases the defendant's punishment in the civilian court.[42]

In addition, "the scope of offenses triable by courts-martial has been gradually but steadily broadened."[43] But, said the court, the punishment is not of such gravity that legally trained counsel is needed. In the instant case the defendant was sentenced to imprisonment for six months with loss of two-thirds of his pay, but a Special Court-Martial also is authorized to grant a bad conduct discharge. "Indeed, the court of Military Appeals has recognized that Special Court-Martial punitive discharges are harsher than many sentences adjudged in a General Court-Martial."[44] Any discharge other than honorable will follow a defendant in civilian life, and automatically reduces his veteran's benefits.[45] While arguments have been advanced that the army has blocked bad conduct discharges in Special Court-Martials, by requiring a verbatim transcript of the trial when such punishment is given,[46] the fact that the power still exists seems to invalidate the court's lack of severity of punishment argument.

The court based its argument as to the right of indigents to legally trained appointed counsel on the same argument which it applied to the sixth amendment right to counsel. However, the issues seem to be separable. The discrimina-

40. *Id.* at 344.
41. 10 U.S.C. § 819 (1964).
42. *See, e.g.*, People v. Kadin, 41 Misc. 2d 424, 245 N.Y.S.2d 698 (1963); People v. Shaw, 38 Misc. 2d 401, 238 N.Y.S.2d 104 (1963); People v. Wilson, 11 Misc. 2d 40, 171 N.Y.S.2d 438 (1958).
43. Wiener, *supra* note 11.
44. United States v. Kelly, 5 U.S.C.M.A. 259, 263, 17 C.M.R. 259, 263 (1954) (concurring opinion); *see, e.g.*, Comment, *The Right to Counsel in Special Courts-Martial*, 50 Minn. L. Rev. 147 (1965).
45. *See, e.g.*, Comment, 64 Colum. L. Rev. 127 (1964).
46. R. Everett, Military Justice in the Armed Forces of the United States 158 (1956).

tion of allowing only those with sufficient resources the right to employ trained civilian counsel seems to apply with equal force in both the civilian and military spheres. In *Gideon v. Wainwright*,[47] the Supreme Court held that an indigent civilian defendant must have adequately trained legal counsel for his defense. A man should have equal rights in court, whether he is a soldier or a civilian. Furthermore, the economic fact of indigency is in many cases fostered by the military system itself, due to the inadequate wages paid soldiers in the lower ranks. These ranks produce most of the defendants in Special Courts-Martial; therefore, even the statutory right to hire civilian counsel seems somewhat illusory. The only equitable solution would be to provide all defendants, indigent or otherwise, with adequately trained counsel. This could be administered effectively by increasing military legal staffs. To safeguard the rights of a potentially innocent defendant, it seems that adequately trained defense counsel should be provided at both General and Special Courts-Martial.

As previously noted, it is an officer in the defendant's chain of command who decides whether a defendant will be tried before a General or Special Court-Martial. This officer has a vested interest in a conviction since he has the responsibility for discipline within his command, and his chances for promotion may depend on this discipline. In a case where it might be difficult to convict a defendant before a General Court-Martial, due to the requirement of adequate and legally trained counsel, the commanding officer may send the case to a Special Court-Martial. Conviction there might be more readily assured, since adequately trained counsel is not required.

Congress is conversant with these problems through its Senate Subcommittee on Constitutional Rights, and legislation has been promoted to afford the defendant in a Special Court-Martial the right to legally trained counsel.[48] The proposed bill "was approved by the judges of the Court of Military Appeals,[49] the Judge Advocate Generals,[50] [and] the Department of Defense. . . ."[51] Since the legal staffs of the military have approved the right to legally trained counsel in a Special Court-Martial, this right should be implemented through court action, especially when legislative response has been sluggish. This was the pattern in the civilian sphere, and reason demands a similar pattern for the military.

Some of the charges against Petitioner would have been felonies in a civilian court and all involved moral turpitude. Furthermore, Petitioner's assigned counsel were particularly unqualified since his defense counsel's total training in military law was accomplished in about two days and his assistant

47. 372 U.S. 335 (1963).
48. S. Rep. No. 750, 89th Cong., 1st Sess. (1965).
49. *See* statements of Chief Justice Quinn, Justice Kilday and Justice Ferguson in *Hearings Before the Subcomm. on Constitutional Rights and a Special Subcomm. of the Sen. Armed Forces Comm. in Joint Hearings on Military Justice and Military Discharges*, 89th Cong., 1st Sess. 578, 608, 620 (1966).
50. *See id.* 27, 38-39.
51. *Id.; see also* Comment, 15 Catholic L. Rev. 203, 220 (1967).

defense counsel had some training but no experience.[52] Therefore, it would seem that one could be critical of the court's decision. On these facts the court might have found that Kennedy was denied effective counsel, and could have equitably decided the case without ever reaching the constitutional questions involved. But even if the court were not so disposed, it did have ample authority to formulate a more equitable decision. It should have resolved the constitutional question in favor of the right to counsel in Special Court-Martial. As Blackstone has written:

> No man should take up arms, but with a view to defend his country and its laws; he puts not off the citizen when he enters the camp; but it is because he is a citizen, and would wish to continue so, that he makes himself for a while a soldier.[53]

RICHARD LIPPES

DOMESTIC RELATIONS LAW—DIVISIBLE DIVORCE—EFFECT OF SISTER STATE EX PARTE DIVORCE ON NEW YORK TENANCY BY THE ENTIRETY

Edith Kolb, the plaintiff, married Henry Kolb in 1933. In 1939 they acquired New York real property as tenants by the entirety.[1] The plaintiff was granted an ex parte divorce[2] in Florida in 1960. Mr. Kolb, a resident of New York, was served by substituted service in accordance with Florida law, but neither answered the complaint nor appeared in the divorce proceeding. Eight months after the Florida decree, Mr. Kolb died. Plaintiff brought this action to declare herself, as survivor, sole owner of the real property. Plaintiff's claim was based on the theory that the ex parte Florida divorce did not affect the tenancy by the entirety in New York realty. Opposing her in this action was her infant son, Roger Kolb, who claimed title to part of the real estate as decedent's heir.[3] His claim was based on an argument that the ex parte Florida divorce changed the tenancy by the entirety into a tenancy in common, thereby destroying his mother's right of survivorship. *Held*, a valid sister state ex parte

52. Note, 5 Duquesne U.L. Rev. 431, 435 (1967).
53. Blackstone, Commentaries *408.

1. A tenancy by the entirety is a type of property ownership available only to husband and wife and under which the husband and wife have a right of survivorship. For a general treatment of the subject of tenancies by the entirety, *see* 4 R. Powell, The Law of Real Property ¶¶ 620-24 (1967).

2. An ex parte divorce is one rendered by a court lacking personal jurisdiction over the defendant spouse.

3. Pursuant to N.Y. Deced. Est. Law § 83 which provides:

> The real property of a deceased person . . . shall descend . . . in the manner following:
>
> . . .
>
> Subd. 5, If there be no surviving spouse, the whole thereof shall descend and be distributed equally to and among the children . . . .

Section 83 was replaced by Section 4-1.1 Estates, Powers and Trusts Laws which became effective September 1, 1967. The new section did not affect the import of subd. 5.