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Lawyer Counsel in Special Courts-Martial

Hanna v. Plumer offers more predictability about the conduct of a case in a federal court on diversity grounds, and possibly more hope for the proponents of the Federal Rules. The big question now is what would happen if the application of a Federal Rule clearly defeats the purpose of a state rule in a situation in which there is a compelling reason for having federal uniform procedure. The principal case did not pose this problem, thus the Federal Rules policy of uniform procedure among federal courts won the first round by default.

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LAWYER COUNSEL IN SPECIAL COURTS-MARTIAL

Private First Class James E. Stapley, United States Army, was tried before a special court-martial for violation of the Uniform Code of Military Justice, Articles 86, 90, 117, 123 and 134.[1] He was found guilty of all charges and specifications and sentenced to confinement at hard labor for three months, forfeiture of pay of $55.00 per month for six months, and reduction in rank.

Stapley's conviction was brought to the United States District Court for the District of Utah on a petition for a writ of habeas corpus, *Application of Stapley*.[2] The accused[3] when initially served with the charges requested that a lawyer be appointed to defend him. His request was denied; an Army captain with about two years of military service was appointed his defense counsel and a second lieutenant with about one year of military service was appointed his assistant defense counsel. Neither defense counsel nor assistant defense counsel had ever participated in a court-martial, and neither had received any

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tection and uniformity of procedure is due in part to the discrepancy between state and federal procedure. As each state draws closer to the federal norm the possibilities of conflict are reduced proportionally. If the present trends in state procedure continue, the eventual adoption of the Federal Rules by all or almost all of the states could make the possibilities of conflict minute enough to make the problem moot.

[1]The Uniform Code of Military Justice is contained in 10 U.S.C. §§ 801-940, and will be cited as UCMJ, UCMJ. art. 86, absence without leave; UCMJ, art. 90 assaulting or willfully disobeying superior commissioned officer; UCMJ, art. 117 provoking speech or gestures; UCMJ, art. 123, forgery; UCMJ, art. 134, general article (prejudice to the good order and discipline of the service or discrediting the service).

[2]246 F. Supp. 316 (D. Utah 1965).

[3]The defendant in court-martial cases is termed the accused.

formal legal training.[4] The accused contended that failure to provide lawyer counsel was a denial of his constitutional right to counsel, hence deprived the special court-martial of jurisdiction.

In granting the writ of habeas corpus, the court held: (1) Stapley's court-martial was a mere ceremony performed according to script and that the accused's representation by appointed counsel did not, in fact or in law, constitute representation by counsel, civilian or military;[5] (2) the minimal requirements of due process and the dictates of the Sixth Amendment are not satisfied by the appointment of defense counsel with no legal training or knowledge;[6] and (3) the Sixth Amendment's guarantee of the right to the assistance of counsel *"applies to proceedings before special courts-martial* . . . particularly where the charges are substantial or involved moral turpitude or may result in a substantial deprivation of liberty."[7]

The accused is assured by the Uniform Code of Military Justice of the right to counsel in a general or special court-martial.[8] A combination of the Uniform Code and decisions of the United States Court of Military Appeals require that all counsel in a general court-martial be lawyer counsel.[9] But a right to lawyer counsel is not extended to the special court-martial.[10] In special courts-martial *any officer,* not disqualified by reason of prior participation in the case, may be appointed as trial or defense counsel.[11]

Special courts-martial have jurisdiction to try any non-capital offense made punishable by the Uniform Code and may impose the following maximum punishments: (1) bad-conduct discharge, if a verbatim record is kept by a court-appointed reporter; (2) six months confinement at hard labor; (3) forfeiture of two-thirds pay per month

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[4]"Defense counsel was assigned approximately one week before the trial and spent several days studying the Code of Military Justice and the Manual for Courts-Martial . . . and there is no doubt that both he and the assistant defense counsel were in good faith in attempting to properly handle the case." Application of Stapley, supra note 2, at 319.

[5]Id. at 319-20.

[6]Id. at 321.

[7]Id. at 320. (Emphasis added.)

[8]UCMJ, art. 38(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)."

[9]UCMJ, art. 27(b); United States v. Kraskouskas, 9 U.S.C.M.A. 607, 26 C.M.R. 387 (1958).

[10]UCMJ, art. 27(c); Manual for Courts-Martial, United States, 1951. ¶ 6c (hereinafter cited MCM, 1951); United States v. Culp, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963).

[11]UCMJ, art. 27(a); MCM, 1951), ¶ 6c; See Romero v. Squier, 133 F.2d 528, 531 (9th Cir. 1943); cert denied, 318 U.S. 785 (1943).

for six months; (4) reduction to the lowest enlisted pay grade.[12] In practice special courts function primarily in the areas of larceny and related offenses, robbery, and other aggravated assaults. The annual statistics show that special courts are numerous. In 1959, the Army tried 20,287[13] cases by "special court," and the Navy tried 14,770[41] such cases. The large number of special courts combined with the need for more lawyers in the military[15] indicates the possible problem the military would encounter if lawyer counsel were mandatory in special courts.

There has already been important reaction to *Stapley*: (1) on November 1, 1965 a petitioner, relying on *Stapley*, was denied a writ of habeas corpus when the court held that *Stapley* was limited to its facts;[16] (2) the Department of Justice has announced that *Stapley* will not be appealed;[17] and (3) "the several armed forces read the decision in the Stapley case to hold simply that there must be effective representation of an accused before a court-martial, not that the counsel of the accused must be a member of the bar of some civilian jurisdiction."[18]

Before considering the substantive aspect of *Stapley*, it is necessary to discuss the district court's action in deciding Constitutional issues in a military prisoner's application for a writ of habeas corpus.

In *Burns v. Wilson*,[19] the United States Supreme Court limited the review power of federal courts in court-martial cases to (1) an inquiry concerning the jurisdiction of the court-martial over the offense charged, the person tried, and the punishment given; and (2) a determination of whether the accused's basic rights had been fully and fairly considered by the court-martial.[20] Consistent with these limitations, numerous decisions[21] indicate that the inquiry into the juris-

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[12]USMJ, art. 19, MCM, 1951, ¶ 15b. In addition a punitive letter may be, but rarely is, included in the punishment.

[13]1960 C.M.A. & J.A.G. Ann. Rep. 251-52.

[14]1960 J.A.G. of the Navy Ann. Rep. 3. There are also indications that special courts-martial are being used increasingly to try "serious-type" offenses in the Navy. Id.

[15]Id. at 3-4; 1960 J.A.G. of the Air Force Ann. Rep. 4.

[16]LeBallister v. Warden, 247 F. Supp. 349 (D. Kan. 1965).

[17]Richmond Times-Dispatch, Dec. 1, 1965, p. 13, col 4. "But department sources said the decision by Solicitor General Thurgood Marshall—partially based on a Pentagon recommendation—should not be interpreted as requiring a revamping of the uniform code of military justice [sic]...." Id.

[18]Letter from M. A. Larkin, Captain, U.S. Navy, Director, Military Justice Division, to Robert E. Payne, Dec. 13, 1965.

[19]346 U.S. 137 (1953).

[20]Id. at 144, 146.

[21]E.g., Burns v. Harris, 340 F.2d 383 (8th Cir. 1965); Reed v. Franke, 297 F.2d 17 (4th Cir. 1961); Bennett v. Davis, 267 F.2d 15 (10th Cir. 1959).

diction of the court-martial includes "an examination of the accused's Constitutional rights but only to see that the military courts have given due consideration to guarantees afforded by the Constitution."[22]

The *Stapley* court was precisely within these limitations in its discussion of the accused's right to counsel, and it explicitly confined its judgment accordingly.[23] The court held that the practice of denying *as a rule* rather than as an exception the benefit of lawyer counsel constituted sufficient failure to consider the Sixth Amendment right to counsel to oust the court-martial of jurisdiction.[24]

The theory that denial of a Constitutional right deprives a court of jurisdiction consequently authorizing a federal court to hear a petition of habeas corpus is frequently used in the civilian sphere,[25] and it is the well-established ground upon which federal courts hear petitions from military prisoners.[26]

To determine the validity of *Stapley* and the reaction to it, one must examine the relation between military due process and constitutional due process.

It has been authoritatively asserted that the original intent of the Bill of Rights encompassed the rights of the accused in courts-martial.[27] Henderson contends that the history of both the Fifth and Sixth Amendments indicates that these two amendments are applicable to courts-martial except, of course, the provisions for presentment and indictment by grand jury and for jury trial.[28] He also asserts that the remainder of the Bill of Rights is similarly applicable to courts-martial.[29]

This position has been assailed as reading history and the law with "hindsight" and applying contemporary concepts to the facts of the past.[30] Weiner traces the development of the Bill of Rights in relation to early court-martial practice in England and the United States and concludes that the Bill of Rights was not intended by the framers to be applicable to courts-martial.[31]

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[22]Palomera v. Taylor, 344 F.2d 937, 939 (10th Cir. 1965).

[23]Application of Stapley, supra note 2, at 320.

[24]Id. at 322.

[25]E.g., Fay v. Noia, 372 U.S. 391 (1963); Johnson v. Zerbst, 304 U.S. 458 (1938).

[26]E.g., Day v. Wilson, 247 F.2d 60, 62 (D.C. Cir. 1957); Dixon v. United States, 237 F.2d 509 (10th Cir. 1956); Suttles v. Davis, 215 F.2d 760 (10th Cir. 1954).

[27]Henderson, Courts-Martial and The Constitution: The Original Understanding, 71 Harv. L. Rev. 293 (1957).

[28]Id. at 303-15.

[29]Id. at 321-23.

[30]Weiner, Courts-Martial and The Bill of Rights: The Original Practice I, 72 Harv. L. Rev. 1, 3 (1958).

[31]Id. at 42-49. Weiner gives particular emphasis to the right to counsel.

It is currently understood that the rights of the accused in courts-martial are Congressional in origin, not Constitutional.[32] Nevertheless, the United States Court of Military Appeals, the highest military appellate tribunal, has equated what it terms "military due process" with "constitutional due process" to such an extent that it is difficult to delineate the two as separate concepts. In *United States v. Clay*,[33] the Court initially framed the concept of military due process, saying:

> A cursory inspection of the Uniform Code of Military Justice . . . discloses that Congress granted to an accused the following rights which parallel those accorded to defendants in civilian courts: to be informed of the charges against him;[34] to be confronted by witnesses testifying against him;[35] to cross-examine witnesses for the government; to challenge members of the court for cause or peremptorily;[36] to have a specified number of members compose general and special courts-martial;[37] to be represented by counsel;[38] not to be compelled to incriminate himself;[39] to have involuntary confessions excluded from consideration;[40] to have the court instructed on the elements of the offense, the presumption of innocence, and the burden of proof;[41] to be found guilty of an offense only when a designated number of members concur in a finding to that effect;[42] to be sentenced only when a certain number of members vote in the affirmative;[43] and to have an appellate[44] review.[45]

The court added that, although rights and privileges of the accused are based on "laws as enacted by Congress,"[46] they would be

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[32]U.S. Const. art. 1, § 8; United States v. Culp, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963); United States v. Kraskouskas, 9 U.S.C.M.A. 607, 26 C.M.R. 387 (1958); United States v. Clay, 1 U.S.C.M.A. 74, 1 C.M.R. 74 (1951). The United States Supreme Court has held that its power to review courts-martial decision is limited to habeas corpus proceedings in situations in which violations of the accused's rights are so patently a denial of due process as to deprive the court-martial of jurisdiction. Burns v. Wilson, 246 U.S. 137 (1953). See Avins, Accused's Right to Defense Counsel Before a Military Court, 42 U. Det. L.J. 21 (1964).

[33]1 U.S.C.M.A. 74, 1 C.M.R. 74 (1951).

[34]UCMJ, art. 30.

[35]UCMJ, art. 46.

[36]UCMJ, art. 41.

[37]UCMJ, art. 16.

[38]UCMJ, arts. 27, 38.

[39]UCMJ, art. 31(a).

[40]UCMJ, art. 31(d).

[41]UCMJ, art. 51(c).

[42]UCMJ, art. 52(a).

[43]UCMJ, art. 52(b).

[44]UCMJ, arts. 66, 67.

[45]United States v. Clay, supra note 33, at 77-78. (Footnotes 34-44 added.)

[46]Id. at 77.

given the same effect that courts accord the rights of civilian defendants under the Constitution.[47]

In *United States v. Rawdon*,[48] the Court of Military Appeals stated that "a denial of due process exists when an accused is tried under such circumstances as to violate the standards of fundamental fairness which are part of American criminal law."[49] Consistent with this approach, the court has also protected the accused from unreasonable search and seizure,[50] and from being compelled to give evidence against himself.[51] And the court in 1957 insured the accused of the right to the assistance of counsel, not only at his trial, but also in the pre-trial interrogation.[52]

Significantly, in the areas of self-incrimination and assistance of counsel at pre-trial interrogation, the Court of Military Appeals acted prior to action by the United States Supreme Court.[53] "Proceeding from the basic premise of applicability of the United States Constitution to members of the Armed Forces, the Court has on numerous occasions enforced the rights which have their source in the Constitution."[54] It thus appears that there is a strong tendency to congruity

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[47]Ibid.

[48]9 U.S.C.M.A. 396, 26 C.M.R. 176 (1958).

[49]Id. at 397.

[50]United States v. Vierra, 14 U.S.C.M.A. 48, 33 C.M.R. 260 (1963); United States v. Brown, 10 U.S.C.M.A. 482, 28 C.M.R. 48 (1959); MCM, 1951, ¶ 152.

[51]United States v. Kemp, 13 U.S.C.M.A. 89, 32 C.M.R. 89 (1962); United States v. Walker, 9 U.S.C.M.A. 187, 25 C.M.R. 449 (1958). See UCMJ, art. 31. The privilege against compulsory self-incrimination has been extended to prohibit the introduction into evidence of nonconsenually obtained body fluids and handwriting samples. United States v. Hill, 12 U.S.C.M.A. 9, 30 C.M.R. 9, (1960) (blood-alcohol test); United States v. McClung, 11 U.S.C.M.A. 754, 29 C.M.R. 570 (1960) (urine specimen); United States v. Minnifield, 9 U.S.C.M.A. 373, 26 C.M.R. 153 (1958) (handwriting sample).

[52]United States v. Gunnels, 8 U.S.C.M.A. 130, 23 C.M.R. 354 (1957). See UCMJ, art. 32. (pre-trial investigation).

[53]The United States Supreme Court did not interpret the Fourteenth Amendment to extend the privilege against self-incrimination to the states until 1964. Malloy v. Hogan, 378 U.S. 1 (1964). The right to counsel at "pre-trial" proceedings was similarly effected in 1964. Escobedo v. Illinois, 378 U.S. 478 (1964). "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." United States v. Culp, supra note 32 at 203. See Douglas v. California, 372 U.S. 353 (1963); Draper v. Washington, 372 U.S. 487 (1963); Lane v. Brown, 372 U.S. 487 (1963).

[54]1960 C.M.A. Ann. Rep. 9. The Court has recognized the "constitutional guarantee of freedom of speech, limited by reason...." Id. See United States v. Voorhees, 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954). The Court of Military Appeals has often interpreted the rights of the accused according to guidelines established by United States Supreme Court decisions. E.g., United States v. Culp, supra note 32; United States v. Kraskouskas, 9 U.S.C.M.A. 607, 26 C.M.R. 387 (1958).

of a civilian defendant's rights under the Constitution as defined by the Supreme Court and a military accused's rights under the Uniform Code as defined by the Court of Military Appeals.[55]

In *United States v. Kraskouskas*,[56] the Court of Military Appeals held that counsel for the accused in a general court-martial *must* be a lawyer. The court stated:

> We are not unmindful that in the past those representing the adversary interest before a military court-martial were often nonlawyers who performed very creditable service on behalf of their clients. Nevertheless, the obvious truth—with which none can quarrel—is that one untrained in the law is seriously handicapped by the lack of professional skill and legal ability which is so necessary in adversary proceedings, especially involving criminal matters. To the nonlawyer rules of evidence mean little and instructions are but unimportant technicalities. To the lawyer, however, they are tools which oftentimes spell the difference between success and failure.[57]

In *Kraskouskas*, the court interpreted the term "counsel" in Article 27(b), which deals with general courts-martial,[58] to mean only a lawyer admitted to the bar. To interpret the accused's right to counsel in special courts-martial to include the right to lawyer counsel would involve more than interpreting the meaning of the word "counsel." Article 27(c), which deals with special courts-martial, provides only that if the trial counsel (prosecutor) is a lawyer or certified as general court-martial (lawyer) counsel, the defense counsel must be formally equivalently qualified.[59] Article 27(c) does not affirmatively provide for a lawyer as either trial or defense counsel. To provide that the accused in a special court-martial is entitled to lawyer counsel would involve changing the clear meaning of the Uniform Code, rather than merely interpreting its meaning. The court has been unwilling to do this because the power to make the procedural safeguards of the Uniform Code more stringent rests with the President of the United States. Article 36 of the Uniform Code states that the President may prescribe rules for the conduct of courts-martial; such rules are found in the Manual for Courts-Martial, 1951,[60] which provides that *any officer* can be appointed as trial or defense counsel in special courts-martial.

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[55]See Warren, The Bill of Rights And The Military, 37 N.Y.U.L. Rev. 181, 197 (1962).

[56]9 U.S.C.M.A. 607, 26 C.M.R. 387 (1958).

[57]Id. at 610.

[58]UCMJ, art. 27(b).

[59]UCMJ, art. 27(c) provides, in essence, that if trial counsel is a lawyer, defense counsel must also be a lawyer.

[60]The MCM (1951) was issued as E.O. No. 10214, 16 F.R. 1303, Feb. 8, 1951. The Manual is also a separately bound volume.

The Manual does not require that defense counsel be a lawyer except as provided in Article 27(c).[61]

Therefore, the Court of Military Appeals would have to declare that the practice of refusing lawyer counsel to the accused in special courts is unconstitutional. While the Court has been willing to interpret the Uniform Code through the use of Constitutional precepts it has been reluctant to declare a portion of the Code which created the Court itself[62] unconstitutional.[63]

Even though unwilling either to legislate judicially or to declare a portion of the Uniform Code unconstitutional, the Court of Military Appeals has acted in this area by establishing exacting standards for defense counsel, lawyer or nonlawyer.[64] In *United States v. McMa-*

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[61]MCM, 1951, ¶ 6c.

[62]UCMJ. art. 67.

[63]In United States v. Smith, 5 U.S.C.M.A. 314, 17 C.M.R. 314 (1954), the Court of Military Appeals summarily dismissed the accused's contention that court-martial jurisdiction did not extend to civilian dependents of members of the Armed Forces who accompanied them abroad. See UCMJ, art. 2(11). The court relied on United States v. Garcia, 5 U.S.C.M.A. 88, 17 C.M.R. 88 (1954). In Garcia, the court affirmed court-martial jurisdiction without considering constitutional principles, basing its decision on the relationship between the civilian employee and the military. The court held that the basic purpose of UCMJ, art. 2(11) was to provide for a "system of law administration for civilians who accompany our Armed Forces overseas." Id. at 100. The Court of Military Appeals held that absent court-martial jurisdiction (1) these civilians could not be dealt with by military authorities; (2) that foreign policy reasons dictated military control of civilians accompanying the military; and (3) that the jurisdiction of the host foreign nation would as a practical matter necessitate foreign jurisdiction over civilian offenders. Id. at 100.

The United States Supreme Court invalidated UCMJ, art. 2(11) in Reid v. Covert, 354 U.S. 1 (1957). The Supreme Court that "under our Constitution courts of law alone are given power to try civilians for their offenses against the United States." Id. at 40-41.

Three years later the Supreme Court extended the application of Reid to preclude the applicability of UCMJ, art. 2(11) to civilians charged with non-capital offenses. Kinsella v. United States ex rel. Singleton, 361 U.S. 234 (1960). This case was previously considered by the Court of Military Appeals in United States v. Dial, 9 U.S.C.M.A. 541, 26 C.M.R. 321 (1958). The court held that UCMJ, art. 2(11) was applicable to civilians charged with non-capital offenses. Id. at 542. Therefore, the Court of Military Appeals, given the opportunity to extend its scope of Reid (capital offenses), declined to invalidate a provision of the UCMJ as unconstitutional.

[64]E.G., United States v. Broy, 14 U.S.C.M.A. 419,34 C.M.R. 199 (1964); United States v. Rosenblatt, 13 U.S.C.M.A. 28, 32 C.M.R. 28 (1962); United States v. Huff. 11 U.S.C.M.A. 397, 29 C.M.R. 213 (1960). "In this regard, it should be pointed out that the high standard of advocacy set by this court for all courts-martial applies alike to all non-lawyer defense counsel and counsel trained and experienced in the law. In no other way can effective assistance of counsel be meaningful within the general purpose of guaranteeing a fair trial to all those tried by courts-martial." Letter from Alfred C. Proulx, Clerk of the Court of Military Appeals, to Robert E. Payne, Dec. 16, 1965.

han,[65] the court, recognizing that competency of counsel was inherent in the right to counsel, stated that "the uniformed accused, as well as his civilian counterpart, is... justly entitled to receive from his attorney a *full measure of assistance*."[66]

The court held in *Kraskouskas*:

> The constitutional right to effective assistance of counsel is not concerned with merely a procedural requirement but also demands a professional and requisite standard of skill. A fair standard of professional competence must be a necessary condition precedent with the professional undertaking of the defense of a person on trial for a crime.[67]

It is obvious that the court is aware of the problems which non-lawyer defense counsel presents.[68] It approached this problem of insuring that defense counsel conforms to high standards in conducting the defense, by holding that failure to conform to these standards will result in reversal.[69]

Failure of defense counsel to move for a continuance when appropriate, failure to make an opening or closing statement, failure to examine any member of the court-martial on *voir dire* may constitute reversible error.[70] The court has held that defense counsel's obligation to the accused includes an attempt to obtain a just sentence.[71] Defense counsel is obligated to present all evidence which might materially affect the outcome of the case[72] and defense counsel's failure to present circumstances in mitigation and extenuation has been held fatal error.[73] The court has also held that any conflict of interest on the part of defense counsel may constitute reversible error, even though he acted in good faith.[74]

The Court of Military Appeals seems willing to apply Constitu-

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[65]6 U.S.C.M.A. 709, 21 C.M.R. 31 (1956).

[66]Id. at 717. (Emphasis added.)

[67]United States v. Kraskouskas, supra note 56, at 610.

[68]"What makes the problem particularly difficult is that we are dealing with both sophisticated aspects of the law and persons who are untrained in the law." United States v. Gardner, 9 U.S.C.M.A. 48, 50, 25 C.M.R. 310 (1958).

[69]E.g., United States v. Cutting, 14 U.S.C.M.A. 347, 34 C.M.R. 127 (1964); United States v. McMahan, supra note 65, at 720. However, the burden to prove inadequate representation falls on the accused. United States v. Hunter, 2 U.S.C.M.A. 37, 41, 6 C.M.R. 37 (1952).

[70]United States v. McMahan, supra note 65.

[71]United States v. Broy, supra note 64.

[72]United States v. Rosenblatt, supra note 64.

[73]United States v. Huff, supra note 64.

[74]United States v. Lovett, 7 U.S.C.M.A. 704, 23 C.M.R. 168 (1957). Defense counsel in Lovett had previously acted in another trial as defense counsel for a co-accused and that co-accused was a witness for the prosecution against Lovett. The court found a possible conflict of interest.

tional principles as interpreted by the Supreme Court to give greater meaning to the rights of the accused.[75] A cursory examination of recent United States Supreme Court decisions on the right to counsel indicates that the right to *lawyer* counsel inheres in the contemporary concept of the right to counsel.[76]

The *Gideon-Escobedo* line of cases establishes that "counsel" means a lawyer, not merely a person to champion the defendant's cause or to lend him moral support.[77] Although *Gideon* is not without limitation,[78] it is patent that the right to counsel is a fundamental right inherent in the contemporary concept of a "fair trial."[79]

This concept seems to be what Judge Christensen was pointing to in *Stapley* when he stated:

> In sum it appears appropriate, timely and necessary to recognize that it may be repugnant to minimal requirements of due process, even in the military service, for the juridicially blind to lead the blind under a system or in a particular command accepting this [nonlawyer counsel] as a rule rather than a militarily necessitated exception; that the fiat of an appointment of 'defense counsel,' a military commission, a presidential appointment or even an act of the Congress cannot itself satisfy the demands of the Sixth Amendment that in all criminal prosecutions the accused is "to have the assistance of counsel for his defense"; that this assistance of counsel, however, adaptably we many interpret the term in view of military expediency, cannot be constitutionally debased to mean the substantial absence of any legal assistance, the mere shell or shadow of counsel or no more than a semantic illusion; and that the military service in these respects may not be considered a constitutionally uninhabitable wasteland beyond even the scan of the Great Writ where the court is powerless to reach out a protective hand.[80]

The Court of Military Appeals recognizes that the ideal situation would be to provide lawyer counsel for every accused, but it has tempered this recognition with the realization that to do so would be a practical impossibility.[81] The argument of practicability involves such

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[75]1960 C.M.A. Ann. Rep. 9.

[76]Stapley does not require lawyer counsel in all special courts; however, it seems to point to such a requirement in all "serious" cases. The issue involved is not the fact that the accused may not be indigent as indicated in United States v. Culp, supra note 32, at 202, but that the right to counsel is a fundamental right which is meaningless unless counsel is trained in law.

[77]Escobedo v. Illinois, supra note 53; Gideon v. Wainwright, 372 U.S. 355 (1963); Powell v. Alabama, 287 U.S. 45 (1932).

[78]See Hall & Kamisar, Modern Criminal Procedure 81-88 (1965).

[79]See Kamisar, Inbau & Arnold, Criminal Justice in Our Time 4-95 (1965).

[80]Application of Stapley, supra note 2, at 322.

[81]United States v. Hunter, supra note 69, at 41.

valid considerations as the necessity for an effective system of discipline and the availability of personnel.[82] The Supreme Court held in *Burns v. Wilson*[83] that the responsibility for striking the "precise balance" between military exigencies and the rights of military personnel lies with Congress.[84] Commenting on *Burns,* Chief Justice Warren said that "our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes."[85]

Concerning practicability the court in *Stapley* stated:

> [W]ith 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; nor is it either reasonable or necessary to limit the availability of qualified defense counsel to cases in which the prosecution is represented by qualified counsel.... [A]n accused has the right to be reasonably advised concerning charges even though they are filed inadvisedly and prosecuted unintelligently, and in the latter event sometimes he needs qualified counsel all the more.[86]

Stapley perhaps oversimplifies the solution to the problem of practicability, but it does point to the fact that defense counsel, whether lawyer or non-lawyer, should be thoroughly acquainted with the law and legal procedures in order to assure a fair trial.

It is possible that the present system represents the proper balance between military necessity and due process, and that, as *Stapley* suggests, lawyer counsel should be required in special courts-martial only in cases involving serious moral turpitude offenses and substantial deprivation of liberty. That the present system is adequate to conform to Constitutional standards of due process is doubtful.[87]

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[82]A discussion of the many immediate and tangential problems in this area is beyond the scope of this comment. It is sufficient to say that these considerations are important enough to be considered in formulating any solution to the problem.

[83]Burns v. Wilson, 346 U.S. 137 (1953).

[84]Id. at 140. Burns involved two petitioners who were tried and convicted of murder and rape and sentenced to death. The petitioners alleged that military authorities had detained them illegally, coerced confessions from them, and denied them counsel of their choice. The Supreme Court affirmed the convictions.

[85]Warren, supra note 55, at 188 (discussing Burns v. Wilson).

[86]Application of Stapley, supra note 2, at 321.

[87]When there is "an assertion of substantial violation of a precept of the Bill of Rights, a most extraordinary showing of military necessity in defense of the Nation has been required for the Court to conclude that the challenged action in fact squared with the injunctions of the Constitution. While situations may arise in which deference by the Court is compelling, the cases in which this has occurred

Stapley's "serious charges" criterion suggests that it may be wise to revise the punitive articles of the Uniform Code[88] by segregating serious offenses into "criminal violations" and either limiting the trial of these "criminal violations" to general courts-martial, in which lawyer counsel are required; or by providing lawyer counsel in special courts-martial. All other violations could be termed "disciplinary" especially since adequate punishment now appears to be provided for under the non-judicial punishment provision of the Uniform Code.[89]

Any fair appraisal of the rights of the accused shows clearly that the military through the Uniform Code and the Court of Military Appeals has made significant progress in assuring the accused a fair trial.[90] The armed services have themselves established courses to train non-lawyer counsel[91] and have already taken action which hopefully will "prevent, insofar as practicable, a recurrence of cases like the *Stapley* case."[92] The Court of Military Appeals has been extremely effective, insofar as is possible by judicial action, in insuring that military law conforms to contemporary standards of fairness.[93]

The right to effective counsel is fundamental to a fair criminal trial, civilian or military. The factors of practicability and availability may preclude providing lawyer counsel to the accused in special courts-martial. If this is true, then defense counsel should be a person well trained[94] in the substance and procedure of courts-martial.

Because the area of military justice is peculiarly within the purview of Congressional action, Congress should reconsider the accused's

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demonstrate that such a restriction upon the scope of review is pregnant with danger to individual freedom." Warren, supra note 55, at 197.

[88]UCMJ, articles 83-134.

[89]UCMJ, art. 15. Such a provision would require extensive consideration and careful segregation of offenses because one of the primary objections to pre-Uniform Code military justices was the presence of command influence in the conduct of courts-martial. 2 U.S. Code Cong. Ser. 2222, 2227 (1950); 1960 C.M.A. Ann. Rep. 5. It is mandatory that command influence in courts-martial continue to be excluded.

[90]Landman, One Year of the Uniform Code of Military Justice: A Report of Progress, 4 Stan. L. Rev. 491 (1952); Powers, Administrative Due Process in Military Proceedings, 20 Wash. & Lee L. Rev. 1 (1963); Walker, An Evaluation of the United States Court of Military Appeals, 48 Nw. U.L. Rev. (1954); White, The Uniform Code of Military Justice—Its Promise and Performance, 35 St. John's L. Rev. 197 (1961). White, Has the Uniform Code of Military Justice Improved the Court-Martial System?, 28 St. John's L. Rev. 19 (1953).

[91]E.g., The Naval Justice School, Newport, Rhode Island.

[92]Department of the Army, Pam. 27-65-30 at 6.

[93]Authorities cited supra note 89. Warren, supra note 55, at 189.

[94]Ideally, such training would include observation of and participation in courts-martial as assistant counsel as well as law- or Code-oriented education.