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The Right To Competent Counsel in Special Courts Martial

by Edward F. Sherman

The special court martial is the intermediate court of the Armed Forces, with jurisdiction over any noncapital offense under the Uniform Code of Military Justice. Counsel in special court martial cases need not be lawyers, and in fact few of them are in special courts martial of the Army and the Navy. Mr. Sherman argues that the time has come to change this practice and ensure that servicemen are always represented by competent lawyers at such trials.

One of the traditional duties of a commissioned officer in the American military has been to act as counsel in court-martial trials. In the days when the court martial was primarily a disciplinary proceeding without complicated legal procedures, officers without legal training were usually capable of performing the limited functions required of counsel. But as drumhead justice gave way to the modern court martial, it became more difficult for officers untrained in the law to understand the legal issues involved. Realizing the inadequacy of nonlawyer counsel, Congress made the requirement in the 1951 Uniform Code of Military Justice that counsel in general courts martial must be lawyers. The requirement, however, was not extended to special courts martial because of the scarcity of military lawyers, and special courts martial today are still using nonlawyer officers as counsel. The practice has been condemned by judges, attacked by legal scholars, and challenged in both the courts and Congress, but, like many a time-honored tradition, it does not die easily.

A 1967 decision of the Court of Military Appeals has now cast further doubt on the practice of using nonlawyers in special courts martial. In United States v. Tempia, the court held that the Miranda principles apply to military interrogations of criminal suspects, and so a serviceman must be given the same rights during interrogation (to be told that he may remain silent, that anything he says may be used against him, and that he will be provided a lawyer without charge upon request if he cannot afford one) as a civilian possesses. Thus, after Tempia, illogical as it sounds, a serviceman is entitled to an appointed lawyer during interrogation but not in his special court-martial trial. This anomalous situation is a good example of what happens when constitutional standards are applied to certain military law procedures, but the special court-martial practice of using nonlawyer counsel is permitted to continue. It is an indication of the weakness of the special court-martial practice, both on constitutional and policy grounds.

Constitutional Questions

The special court martial is the intermediate military tribunal, standing between the general court martial in which the accused can receive a heavy sentence—and in which he is provided a lawyer—and the summary court martial in which the accused is not entitled to counsel but can receive only minor punishments (one month’s confinement at hard labor, one month’s forfeiture of two-thirds pay, extra duties and restriction). A special court martial may try any noncapital offense punish-

1 Uniform Code of Military Justice, 10 U.S.C. § 864 (hereinafter referred to as UCMJ), art. 27(b).
4 UCMJ, art. 18.
5 UCMJ, art. 29.
able by the Uniform Code of Military Justice, but its maximum sentence is six months’ confinement at hard labor, six months’ forfeiture of two-thirds pay, demotion and a bad conduct discharge.

When the Uniform Code was passed in 1951, it was provided that an accused in a special court martial may be represented by his own civilian lawyer or by a military lawyer of his own selection "if reasonably available" or if he does not hire a lawyer and a military lawyer is not provided, by an appointed nonlawyer defense counsel. This provision for counsel was considered more than adequate at the time and, in fact, exceeded the right to counsel provided in most state and federal courts. Then in 1963, the Supreme Court held in Gideon v. Wainwright that the Sixth Amendment right to counsel as applied to the states by the Fourteenth Amendment due process clause requires that an indigent be provided legal counsel in the trial of a felony case. Courts around the country scurried to comply with the new requirement, but the military took the position that courts martial are not bound by these constitutional limitations and made no move to provide lawyers in special courts.

The claim that military courts are not bound by all the limitations of the Bill of Rights comes from the fact that Article I, Section 8, Clause 14 of the Constitution gives Congress the power to "make Rules for the Government and Regulation of the land and naval Forces". This provision has been interpreted over the years as establishing a relatively autonomous system of military law in which the due process rights of servicemen derive not from the Bill of Rights but from Congress under its Article I powers. In recent years, however, the Court of Military Appeals has held that portions of the Bill of Rights apply to courts martial, and the Supreme Court has extended federal court review of court-martial convictions to claims of denial of constitutional rights. Thus, although there is still a question as to the extent to which the Bill of Rights, particularly the Sixth Amendment, applies to courts martial there is no longer doubt that the court-martial procedures established by Congress are subject to constitutional limitations.

The hub constitutional issue, then, is whether the special court-martial practice of providing nonlawyer counsel meets the requirements of the Sixth Amendment right to counsel and Fifth Amendment due process. The Court of Military Appeals (in United States v. Culp) and the Tenth Circuit (in Kennedy v. Commandant) have held that it does. There was no majority opinion in United States v. Culp, in which all three judges concurred, but Judge Kilday found that due process is complied with (although he believes the Sixth Amendment does not apply to courts martial), Judge Quinn found nonlawyer counsel to be a reasonable compliance with the Sixth Amendment and Judge Ferguson found no violation of the Sixth Amendment because the accused waived his right by accepting nonlawyer counsel. The Tenth Circuit in Kennedy v. Commandant adopted Judge Quinn's analysis that there is reasonable compliance with the Sixth Amendment.

The two courts avoided Gideon by finding that, owing to the "singular nature" of the special court martial—that is, that typically it tries military and misdemeanor offenses, that the procedures are simplified and that the prosecutor must not be a lawyer when the defense counsel is not a lawyer—nonlawyer officers can provide adequate legal representation. Gideon specifically involved an indigent charged with a felony in a civilian trial. Whether the Gideon rationale should be extended to the special court martial raises several questions: First, can a soldier in a special court martial, no matter how impecunious, be considered an indigent so that he is entitled to appointed counsel? Second, is a special court-martial offense, which can be punished only by a maximum of six months’ confinement, comparable to a felony, so that counsel is required? Third, in order to comply with the Sixth Amendment, must the appointed counsel be a lawyer or is an officer who has had classes in military law sufficient?

(1) Whether a soldier qualifies as an indigent would have to be decided on a case-by-case basis. Most enlisted men's pay is so low and savings so small that they would meet the usual standards for indigency applied in civilian courts. However, Judge Kilday maintains in his opinion in United States v. Culp that members of the military can never be indigents because they are always guaranteed representation in a special court martial. The difficulty with this argument is that it begs the question by assuming that a nonlawyer counsel actually does provide adequate legal representation. If nonlawyer counsel is not adequate, and a strong argument can be made that no nonlawyer can provide adequate representation, then the serviceman is in the same position as an indigent in a civilian court before the decision of Gideon. Each is being deprived of adequate representation because he does not have the money to hire a lawyer.

(2) The term "felony" usually refers to an offense punishable by confinement...
in a penitentiary for more than one year. A majority of special courts martial involve such offenses as AWOL, drunkenness, breaking restrictions and destruction of government property. These are either not civilian crimes or would not be felonies if tried in a civilian court. However, a special court has jurisdiction to try all noncapital offenses under the code, and felonious crimes such as manslaughter, grand larceny and aggravated assault are also tried there. The maximum confinement which a special court can adjudge is only six months, but the total potential punishments are so great (six months' forfeiture of two-thirds pay can amount to some $2,000 for a ranking NCO and more for an officer, demotion will affect both future earnings and career, and a bad conduct discharge may be a lifetime liability) that it is comparable in seriousness to a civilian felony trial.

There is also precedent to extend the Gideon rule to nonfelonies. Two Fifth Circuit cases involving misdemeanors have held that counsel is constitutionally required, rejecting the formal distinction between felony and misdemeanor as having little to do with the Gideon rationale and instead relying on such factors as the nature of the offense, the extent of the possible sentence and the legal complexity of the case. Application of Stapley, a 1965 decision of the United States District Court for Utah, offered a similar analysis. There, a 19-year-old private charged with fraud was refused a lawyer in a special court martial and was represented by an appointed captain in the Veterinary Corps who confused the elements of a key defense and incorrectly advised a guilty plea on all charges. The court found the representation inadequate and held that because the charges involved moral turpitude and there was a risk of substantial incarceration, the Sixth Amendment right to counsel applied. This type of approach seems to be a reasonable application of Gideon to the court martial situation, and, under it, most special courts martial would require legally trained counsel.

(3) Although Gideon does not specifically state that the "counsel" required by the Sixth Amendment must be a lawyer, the Court imputes legal proficiency to counsel that could only refer to legally trained counsel. There was really no reason for the Supreme Court to specify that it meant a lawyer because only members of the Bar may be admitted to practice before a civilian court. Both the Culp and Kennedy decisions, however, maintain that the Sixth Amendment requirement of counsel may be met by an officer who has had classes in military law. Thus a key element of the constitutional position taken in Culp and Kennedy is that nonlawyer officers have enough legal training to provide adequate representation in the simplified special court-martial trial.

Are Nonlawyer Counsel Adequate?

Anyone who has had personal experience with the training in military law given to ROTC and OCS candidates and who has observed nonlawyer officers trying special court martial cases is likely to wonder at the judges' faith in the legal abilities of such officers. The fact is that the average officer has little knowledge of military law, and the contention that he is capable of serving in a special court martial because it is a simpler type of trial is an unfortunate piece of logic that should be seriously examined by the legal profession.

The special court martial, despite the claims that it is a simplified proceeding, purports to provide a full jury trial, to follow the same basic judicial procedures to insure due process as in a general court martial, and to be bound by legal statutes and precedents. Complex problems of admissibility of evidence, instructions and charges, and the concepts of constitutional law, the fact remains that the nonlawyer, no matter how experienced or well-intentioned, has only a superficial understanding of the legal method, the role of statutes and precedent, the background of legal defenses and rules of evidence, and the concepts of constitutional law. His lack of depth in the law could mean, at a hundred different points in the trial, that the accused will not receive adequate representation.

Despite assurances by the military that nonlawyers provide adequate representation in special courts, few persons who have been closely involved in special courts martial have illusions about the quality of representation. An Army JAG captain, for example, wrote in the Military Law Review in 1962:

Since legally trained personnel are not required on special courts martial

17. Harvey v. Mississippi, 340 F. 2d 263 (5th Cir. 1965); McDonald v. Moore, 353 F. 2d 106 (5th Cir. 1965).
The strongest denunciations of the use of nonlawyers in special courts martial have been made by Judge Ferguson, who stated, "I believe that evidence or information favorable to the accused may not be placed in the record to support the validity of a nonlawyer confessing his guilt judicially and nothing is placed in the record to support the validity of his plea except a formality prated from the Manual." Judge Ferguson spoke in Culp of the frustration of trying to review a special court martial where the defendant pleaded guilty: "How are we to know the real truth of the matters because of his lack of legal training and the initiative of the officer, but few officers have only the haziest notion of what the code is all about, and if you indulge in sheer fantasy. Most officers have only the haziest notion of what the code is all about, and if you find one officer in ten who has actually read fifty pages of the code, the Manual or the Handbook you are extremely lucky."

The amount of time which a counsel devotes to investigating and preparing the case varies with the type of case and the initiative of the officer, but few will undertake the type of thorough investigation, search for witnesses and evidence, and legal preparation which are standard procedures for a competent criminal lawyer. Counsel often fails to make adequate investigation and preparation not because of laziness but because of lack of appreciation of the facts, evidence, witnesses and legal precedents he will require to present an effective defense.

A Truly Adversary Proceeding?

Special courts martial without lawyers frequently do not constitute a truly adversary proceeding. Take a typical Army special court martial. A junior officer, often a lieutenant, will usually be appointed defense counsel as an additional duty in order to "give him some court-martial experience" or because officers of higher grade are too busy. Upon appointment, he will be provided the 144-page Military Justice Handbook and the 600-page Manual for Courts-Martial, 1951. The commander is required by regulation to "assure himself" that counsel "are currently familiar" with the Handbook, but this is a mere formality because officers, due to the press of other duties, rarely devote much study to it or the Manual. Judge Quinn wrote in Culp that the nonlawyer officer, "with a full knowledge of the Uniform Code and of the procedural regulations" is competent to give legal assistance, and the Tenth Circuit in Kennedy spoke confidently of the requirement that every officer be familiar with the code and understand the substance of military crimes.

The courts, unfortunately, are indulging in sheer fantasy. Most officers have only the haziest notion of 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.

The actual special court-martial trial runs according to the script in the back of the Manual. The script is helpful to the nonlawyer participants in insuring that they do not forget any of the necessary elements of the trial, but it has the disadvantage of formalizing what should be an adversary proceeding into a static ritual. Thus, it is not uncommon for a special court martial to be reduced to a recitation from the script, the president and counsel reading back and forth to each other, garbling the unfamiliar legal terms, mistakenly reading beyond their appropriate sections and missing the cues for raising objections and defenses.

A military officer, although not a lawyer, does have the benefit of understanding the psychology and thought processes of the officers on the court. But his military attitudes may also mitigate against his being a good defense counsel. It may be difficult for him to withstand pressures from his commander, and he may be reluctant to take a strongly adversary position before a court of officers of higher grade. Nonlawyers often equate guilt in fact with guilt under the law and lack the background in professional ethics which may help a lawyer to avoid either overzealousness or underzealousness. In Judge Ferguson's words:

"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.29

It has been shown that nonlawyers are more likely to advise the accused to plead guilty and not to bargain for a lesser sentence29 and are less likely to make pretrial motions, such as for the suppression of evidence and confessions, to make timely objections to questions and evidence and to cross-examine witnesses. Finally, although legal training does not insure an effective trial manner, a lawyer with some training in advocacy is more likely to make an effective presentation both in the trial and prior to sentencing. All told, the nonlawyer lacks so much knowledge and training that the adversary nature of the special court martial is seriously threatened.

Congressional Considerations

An omnibus bill on military justice has been under consideration by the Subcommittee on Constitutional Rights of the Senate Judiciary Committee since 1958. Most prior versions of the Senate bill and similar bills offered in the House by Congressman Bennett, one of which was passed by the House on June 3 of this year,31 include a provision that a bad conduct discharge cannot be adjudged by a special court martial unless the accused was afforded the opportunity to be represented at the trial by a lawyer. However, the Senate bill introduced last session by Senator Ervin, Chairman of the Subcommittee on Constitutional Rights, replaced this provision with the stronger requirement that lawyers be provided in all special courts martial32 and Congressman Gonzalez introduced a bill with a similar provision in the House.33

The military services have reluctantly approved the provision for counsel before a bad conduct discharge can be adjudged but are strongly opposed to requiring lawyers in all special courts.34

The provision that counsel must be provided only when a bad conduct discharge is adjudged is so watered down that it will not substantially remedy the present situation and, if passed, it may blunt the impetus for reform and prevent the passage of a stronger provision for years to come. It will not apply at all to Army special courts martial (which constitute almost two thirds of the total military special courts) because Army regulations do not permit special courts to adjudge bad conduct discharges.35 The Air Force already provides lawyers in all special courts,36 and so only the Navy would be affected. The provision would not apply to those Navy special courts martial in which a bad conduct discharge is not a possible penalty, and the Navy could avoid the provision entirely simply by not permitting its special courts to adjudge bad conduct discharges as does the Army. There are indications, however, that the Navy would not give up the power to adjudge bad conduct discharges in special courts and so would attempt to provide lawyers in courts where that penalty could be given. A reform provision that has this little effect can scarcely be said to provide a solution to the serious problems posed by special courts without lawyers.

The opposition of the military to providing lawyers in special courts martial has traditionally been based on the philosophy that the special court martial is a disciplinary, rather than a judicial, proceeding and should be controlled and administered by the commander and his officers without unnecessary legal formalities. However, this “disciplinary” view has gradually lost ground as special courts martial have been required in recent years to adopt most of the due process procedures followed in general courts (except for use of lawyers). Congress’s amendment of the code in 1962 to permit a commander to assess greater penalties under Article 1535 has further hastened the progress of the special court away from the disciplinary philosophy since now that a commander can sentence an offender to up to one month’s correctional custody (plus fines, restrictions and demotions), there is less need to use a court martial to discipline offenders. As a result, summary courts martial are used less frequently these days,37 and the special court martial, with its six-months’ confinement power, should be made a full-fledged judicial proceeding where an accused can receive a fair trial and be represented by a lawyer.

The military’s primary argument against providing lawyers in special courts martial is that, as stated by the Army in its amicus brief in United States v. Culp, “there is simply not enough lawyers to go around”. The argument is based upon estimates that the JAG Corps would have to be doubled in size to provide lawyers in all special courts martial.38 This would mean some 1,200 new Army JAG officers and 600 Naval law specialists.39

A sudden need for twice as many military lawyers would undoubtedly cause administrative problems, but rapid expansion is nothing new to the military, and there is no reason to believe the military could not handle it. The legal corps had to expand suddenly in World War II when the Army JAG Department went from 190 officers in 1941 to 2,162 in 1945,40 and in the Korean War when 400 Army Reserve JAG officers were called to active duty,41 and this could be done again. Doubling the JAG Corps is actually less of a problem today than in World War II or the Ko-

30. 1964 COUPE OF MILITARY APPEALS ANN. REP. at 55-56.
34. See footnote 23.
36. UCMJ, art. 15(b), as amended September 7, 1962.
37. In the first nine months after Article 15 was amended, there were 12,371 Army summary courts martial as compared to 41,848 for the same period the year before. Miller, A Long Look at Article 15, 28 MIL. L. REV. 37, at 113 (1965). H.R. 226, 90th Cong., 1st Sess., would abolish the summary court martial.
39. As of December 31, 1966, the Army had 1,164 JAG officers, the Air Force 1,286, and the Navy 591 legal specialists. No additional Air Force lawyers would be necessary because the Air Force provides lawyers in all special courts. Whenever the term “JAG Corps” is used in this article it is intended to refer to all three services, although Navy lawyers are called “legal specialists” and are not in a separate JAG Corps. S. 2009 and H.R. 226, 90th Cong., 1st Sess. would create a Naval JAG Corps.
tive thinking about how to train and utilize recent law graduates for special court-martial work. The lawyers' corps have been unduly concerned with maintaining a high percentage of career officers and should accept the fact that young, noncareer JAG officers, like the young lawyers in a D.A.'s office, are quite capable of bearing the burden of the litigation work in special courts martial.

One way to train the military lawyers needed for special court martial work is to enlarge the facilities of the Army JAG School at Charlottesville, Virginia, and the Naval Justice School at Newport, Rhode Island, or to establish JAG training schools at other sites. Another possibility is to give law students military law training in conjunction with the ROTC program so that they can be commissioned in the JAG Corps upon graduating and passing their bar examination. A number of law schools now offer ROTC programs, and applications have been stimulated by the fact that ROTC provides a deferment for the student to finish law school. It is shortsighted of the military to continue to commission these law graduates in combat branches, and consideration should be given to devising a ROTC program which would include training in military law (perhaps with one or two summer's additional training) so that they could be commissioned in the JAG Corps. Finally, the military should consider establishing a category for lawyers on active duty whose commissions are in other branches than JAG which would qualify them (after taking a short military law course or passing a qualifying exam) to serve as special court martial counsel when appointed as an additional or temporary duty.

The Navy has special problems. It has been better than the Army in attempting, when possible, to assign lawyers who are not legal specialists to special court-martial work, which partly accounts for its 42.03 per cent of its special courts martial as compared to only 5 per cent for the Army. It is about time that the military stop hiding behind the legal manpower argument and begin to do some serious thinking about how to train and utilize recent law graduates for special court-martial work. The lawyers' corps have been unduly concerned with maintaining a high percentage of career officers and should accept the fact that young, noncareer JAG officers, like the young lawyers in a D.A.'s office, are quite capable of bearing the burden of the litigation work in special courts martial.

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The Navy has special problems. It has testified that 10 per cent of its special courts in 1965 were conducted at sea on ships "which cannot afford the luxury of carrying a law office", while 24 per cent were conducted by "relatively isolated commands" which do not have enough case load to justify a full-time law officer. Two feasible methods of providing lawyer counsel for ships which cannot carry a lawyer have been used in recent years: the establishment of "dockside courts" whereby larger ships provide the court-martial personnel and counsel for smaller vessels, and the use of "circuit-riding" lawyers in task forces or carriers who would try cases either by going to the small craft by boat or helicopter or by bringing the accused to the large craft. Crimes committed on a small vessel at sea will have to be tried, as are most serious crimes now, when the vessel reaches port or can obtain legal support from another vessel. For those cases where a ship or submarine is isolated for an extended period, provision may have to be made to give the accused his choice of a speedy trial without a lawyer or a delayed trial with a lawyer. The Navy will have to work out its logistical problems, but with some effort and additional lawyers, it can provide lawyers in special courts.

Conclusion

The special court-martial practice of using nonlawyers as counsel does not do credit to the military nor serve the ends of justice. Judicial action to declare the practice unconstitutional is slow and uncertain, and so Congressional action is especially needed if reform is to take place in the near future. The manpower problem can be solved, and, in fact, the unfortunate misuse of the skills of many lawyers serving in the military can be corrected in the process.

42. In fiscal year 1966, there were 1,700 applications for the approximately 150 available Army JAG spaces. Ann. Hist. Sum., Office of Army JAG, fiscal year 1966, page 6.
43. It must be conceded that the current draft situation has increased the number of JAG applications. However, the JAG Corps have consistently had more applicants than spaces, even in the late 1950's when the draft threat was minimal, and it appears that there will always be law graduates who for reasons such as desire for responsibility, experience or travel will apply to JAG. Incentives, such as the addition of assignment to longer tours (from the present four to a more reasonable two years) may have to be adopted in periods of small drafting.
44. Joint Hearings, pages 916, 940.
45. All three services have expressed concern over low JAG officer retenion rates. Career Legal Billets Go Begging, Journal of the Armed Forces, April 8, 1967, page 1. Reprint to Hon. William M. Brien, supra note 38, at 241, noted that first lieutenants made up 40 per cent of the Army JAG Corps (1965) and that "It is desirable that not more than 15-15% of the Corps be first lieutenants".
46. Joint Hearings, page 943.
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