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Military Law — COURTS-MARTIAL — RECENT CASES DEFINING THE RIGHT TO COUNSEL BEFORE SUMMARY COURTS-MARTIAL

I. PROBLEM

In June, 1972, the United States Supreme Court expanded the sixth amendment right to counsel by holding in *Argersinger v. Hamlin*¹ that absent a valid waiver no one could be imprisoned for even a "minor" offense unless he had been assisted by counsel at trial.² The Navy and Marine Corps considered this expansion inapplicable to summary courts-martial,³ thereby leaving marines and sailors to be tried, convicted, and sentenced to confinement for minor offenses without a right to appointed counsel. Several such convictions were challenged in the federal courts and the Court of Military Appeals,⁴ but conflicting rulings resulted. The Court of Military Appeals and the Court of Appeals for the Fifth Circuit held *Argersinger* applicable to all summary courts-martial,⁵ thus guaranteeing servicemen a right to counsel before confinement may be imposed. The Court of Appeals for the Ninth Circuit disagreed, holding both the sixth amendment and the *Argersinger* ruling inapplicable to summary courts-martial and prescribing its own version of a right to counsel in summary courts-martial based on fifth amendment due pro-

¹407 U.S. 25 (1972).

²*Id.* at 37.

³The summary, special, and general courts-martial comprise the military trial court system. The summary court differs from the other two in that it may try only those servicemen who are not officers, cadets, or midshipmen, and may adjudge only those sentences equivalent to, or less than, one month's confinement. While the special and general courts-martial are composed of either a military judge or a panel of officers, the summary court-martial consists of a single commissioned officer. In either the general or special court-martial the accused is provided with defense counsel by military law; in the summary court-martial one has had no such established right. UNIFORM CODE OF MILITARY JUSTICE arts. 16-27, 10 U.S.C. §§ 816-27 (1970) [hereinafter cited as U.C.M.J.].

⁴This case note considers four cases that challenged the Navy's position. *Daigle v. Warner*, 348 F. Supp. 1074 (D. Hawaii 1972), *rev'd*, 490 F.2d 358 (9th Cir. 1973); *Henry v. Warner*, 357 F. Supp. 495 (C.D. Cal. 1973), *vacated*, 493 F.2d 1231 (9th Cir. 1974), *cert. granted sub nom. Middendorf v. Henry*, 95 S. Ct. 173 (1974) (No. 74-175); *Betonie v. Sizemore*, 369 F. Supp. 340 (M.D. Fla. 1973), *aff'd in part and rev'd in part*, 496 F.2d 1001 (5th Cir. 1974); *United States v. Alderman*, 22 U.S.C.M.A. 298, 46 C.M.R. 298 (1973).

The factual settings in the three federal court cases were similar: enlisted members of the Navy and Marine Corps were tried and sentenced to confinement by summary courts-martial without the right to counsel. Their sentences were then challenged in the federal courts by petitions for writs of habeas corpus, thereby directly presenting the question of the applicability of *Argersinger* to summary courts-martial.

In the military case, the Court of Military Appeals considered the admissibility of evidence of a previous summary court-martial conviction, which had been obtained without the assistance of counsel, in determining the sentence to be imposed following a special court-martial conviction. This setting indirectly required the court to determine the applicability of *Argersinger* to the military.

⁵*United States v. Alderman*, 22 U.S.C.M.A. 298, 46 C.M.R. 298 (1973); *Betonie v. Sizemore*, 496 F.2d 1001 (5th Cir. 1974).

cess grounds.⁶ As a result of the Ninth Circuit's position on the right-to-counsel issue, the case of *Middendorf v. Henry*⁷ is on appeal to the Supreme Court, presenting that Court with its first opportunity to decide whether the Constitution guarantees a right to counsel to servicemen before summary courts-martial.⁸

II. BACKGROUND

A. *The Right to Counsel in Civilian Courts*

The sixth amendment to the United States Constitution declares that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." The meaning of this provision has developed throughout our history, with much of the significant interpretation dating from 1932 when, in *Powell v. Alabama*,⁹ the Supreme Court held that due process of law¹⁰ requires the states to provide an accused with the assistance of counsel in capital cases.¹¹ Then, in *Johnson v. Zerbst*,¹² the Court construed the sixth amendment to mean that no federal criminal conviction can stand unless the accused had, or waived, the assistance of counsel. In 1963, the Court held in *Gideon v. Wainwright*¹³ that the right to the assistance of counsel is a fundamental right which is essential to a fair trial,¹⁴ and that due process is violated if

⁶*Daigle v. Warner*, 490 F.2d 358 (9th Cir. 1973); *Henry v. Warner*, 493 F.2d 1231 (9th Cir. 1974), cert. granted sub nom. *Middendorf v. Henry*, 95 S. Ct. 173 (1974) (No. 74-175).

⁷95 S. Ct. 173 (1974) (No. 74-175) (J. William Middendorf II has replaced John E. Warner as Secretary of the Navy, and the title of the case has therefore been changed from *Warner v. Henry*).

⁸The case was argued before the Court on January 22, 1975. 43 U.S.L.W. 3414 (U.S. 1975). 9287 U.S. 45 (1932).

¹⁰The right to counsel was applied to the states through the due process clause of the fourteenth amendment. *Id.* at 71.

¹¹The Court also emphasized the importance of the assistance of counsel:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Id. at 68-69.

¹²304 U.S. 458 (1938).

¹³372 U.S. 335 (1963).

¹⁴The Court stated:

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

Id. at 344.

a state felony conviction is obtained without the accused's having had the right to appointed counsel at trial.¹⁵

The Supreme Court's holding in *Argersinger* added a new but consistent dimension to this historical development. In *Argersinger*, the Court held that due process requires that no person may be imprisoned for *any* offense unless he is represented by counsel at trial.¹⁶

B. *The Right to Counsel in Military Courts*

The right to counsel in the military courts has closely paralleled the civilian right, not because the civilian standards control in the military, but because Congress has evidenced an intent to conform military law as closely as possible to the standards of civilian courts.¹⁷ The Uniform Code of Military Justice (UCMJ) directs that defense counsel must be appointed for all accused before general and special courts-martial,¹⁸ the military trial courts which have exclusive jurisdiction of all felony and the more serious misdemeanor cases.¹⁹ The UCMJ makes no provisions, however, for the appointment of counsel in summary courts-martial, where less serious offenses are tried, even though these courts may impose sentences of up to 30 days confinement.²⁰ It is this potential of confinement without the right to appointed counsel that has raised the issue of the applicability of *Argersinger* to trials by summary courts-martial.

C. *The Relationship of Civilian to Military Courts*

Direct application of *Argersinger* to the military courts is inhibited because of the unique status of military jurisprudence. The military judicial system has its constitutional base in article I, where Congress is granted express powers over the land and naval forces.²¹ Pursuant to its power to make rules for the regulation of the armed forces, Congress

¹⁵The Court confirmed its decision in *Powell* that the due process clause of the fourteenth amendment incorporates the sixth amendment's guarantee of a right to counsel. *Id.* at 341-42.

¹⁶407 U.S. at 37.

All four of these cases — *Powell*, *Johnson*, *Gideon*, and *Argersinger* — involved settings in which defense counsel was permitted, but not provided. Only those who could not afford counsel were denied it.

The *Argersinger* holding allowed for "knowing and intelligent" waivers of the right to counsel therein defined. This case note assumes that the same qualification would accompany an application of *Argersinger* to military procedure.

¹⁷Several of the 1968 Amendments to the UCMJ were for the express purpose of conforming military criminal procedure more closely to that of federal district courts. S. REP. NO. 1601, 90th Cong., 2d Sess. 3, 10, 11 (1968).

¹⁸U.C.M.J. art. 27, 10 U.S.C. § 827 (1970).

¹⁹U.C.M.J. arts. 18-19, 10 U.S.C. §§ 818-19 (1970).

²⁰U.C.M.J. art. 20, 10 U.S.C. § 820 (1970).

²¹U.S. CONST. art. I, § 8 provides: "The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces . . ."

has provided the military with its own code of law²² and judicial system,²³ including its own "supreme court," the Court of Military Appeals (COMA).²⁴ Hence, the military judicial system is separate and distinct from the federal judiciary.²⁵

In this structural aspect of the military-federal relationship, the military judicial system stands vis-à-vis the federal judiciary in a position similar to that of any state judicial system. But in the interactional aspect, there are important differences between the military-federal and the state-federal relationships. For example, the federal and state systems are often alternative adjudicatory forums,²⁶ with each commonly interpreting the other's laws. Furthermore, state convictions are subject to federal habeas corpus review,²⁷ and direct appeal is available from final state supreme court decisions to the United States Supreme Court.²⁸ By contrast, the only direct link between the military and the federal judicial systems is limited habeas corpus review of military decisions by the federal courts.²⁹

²²The Uniform Code of Military Justice was enacted to cover "both the substantive and the procedural law governing military justice and its administration in all of the armed forces of the United States." S. REP. NO. 486, 81st Cong., 1st Sess. 1(1949). All persons in the military, and some who are not, are subject to the Uniform Code. U.C.M.J. art. 2, 10 U.S.C. § 802 (1970). The UCMJ applies in all places. U.C.M.J. art. 5, 10 U.S.C. § 805 (1970).

²³The military judicial system includes a unique set of trial courts. U.C.M.J. art. 16, 10 U.S.C. § 816 (1970). See also note 3 *supra*. In addition, the military has a separate bar. See, e.g., U.C.M.J. art. 27, 10 U.S.C. § 827 (1970), which requires that counsel appointed for a general court-martial be certified by the Judge Advocate General.

For the purposes of this case note, the most distinctive aspect of the military judicial system is its scheme of appellate review. U.C.M.J. arts. 59-76, 10 U.S.C. §§ 859-76 (1970). Essentially the appellate review system can be divided into two parts: one administrative and one judicial. The administrative part is performed first. It involves review of the court-martial record first by the convening authority, and then by the office of the Judge Advocate General of the service involved. There is also the possibility of petitioning the Secretary of one's service or the President for redress. The second part is the judicial, consisting of review by a Court of Military Review and finally appeal to the Court of Military Appeals. The judicial review is only provided for those cases involving an officer or some serious sentence, e.g., a sentence to confinement for 1 year or more. Hence, one convicted by a summary court-martial has no statutory right to judicial review. For a discussion of this lack of judicial review of summary court-martial convictions, its consequences, and possible remedies, see 1974 UTAH L. REV. 612.

²⁴Appellate review by the Court of Military Appeals is final — "binding upon all departments, courts, agencies, and officers of the United States. . . ." U.C.M.J. art. 76, 10 U.S.C. § 876 (1970); see S. REP. NO. 486, 81st Cong., 1st Sess. 2, 6 (1949).

The Supreme Court and Congress agree that this provision does permit, however, a limited habeas corpus review by civilian courts. *Burns v. Wilson*, 346 U.S. 137, 142 (1953); S. REP. NO. 486, 81st Cong., 1st Sess. 32 (1949). See also note 29 *infra*.

²⁵See *Burns v. Wilson*, 346 U.S. 137, 140 (1953).

²⁶This "alternative" relationship is illustrated by the fact that cases properly in state court can be removed to federal court. 28 U.S.C. §§ 1441-51 (1970).

²⁷28 U.S.C. § 2241 (1970).

²⁸28 U.S.C. § 1257 (1970).

²⁹Traditionally, federal habeas corpus review has been more narrow in military than in civil cases, limited to insuring that the military court-martial has exercised proper jurisdiction or, at best, has dealt fully and fairly with the allegation raised. *Burns v. Wilson*, 346 U.S. 137

III. ANALYSIS

A. Should Argersinger and the Sixth Amendment Apply to Summary Courts-Martial?

1. *Ninth Circuit's analysis.* The *Henry* case was summarily vacated and remanded by the Ninth Circuit³⁰ "under the compulsion" of its opinion in the earlier case of *Daigle v. Warner*.³¹ In *Daigle* the Ninth Circuit held the sixth amendment inapplicable to trials by summary court-martial after examining what "the framers of the Bill of Rights intended." The court reasoned that since the framers meant to recognize the practice that had developed in colonial America, and since at that time no right to counsel as required by *Argersinger* existed in the military, the framers intended no such right.³² The court did hold, however, that courts-martial must afford an accused due process of law as guaranteed by the fifth amendment, reasoning that since the fifth amendment due process clause is an evolving concept, its applicability is not limited by historical practices.³³ To satisfy due process the court analogized to the limited right-to-counsel standard now applied in parole or probation revocation proceedings³⁴ and prescribed that in summary courts-martial the military need appoint counsel only upon request, and

(1953). For a discussion of the reasons against such a limited habeas corpus review see Mr. Justice Frankfurter's separate opinion on denial of rehearing. *Id.* at 844.

³⁰*Henry v. Warner*, 493 F.2d 1231 (9th Cir. 1974), cert. granted sub nom. Middendorf v. Henry, 95 S. Ct. 173 (1974) (No. 74-175).

³¹490 F.2d 358 (9th Cir. 1973).

³²*Id.* at 363-64.

³³*Id.* at 364.

³⁴The Ninth Circuit disregarded the due process aspect of *Argersinger* where the Supreme Court was considering what right to counsel the *due process clause* guarantees one accused by a state of a "petty" offense, and where the Court's holding defines the due process standard. 407 U.S. at 27-29.

The Ninth Circuit looked to the standards in juvenile delinquency proceedings and probation-revocation hearings on an applicable due process guidepost. It considered those two because they involved the extent to which due process requires counsel in situations where imprisonment "may be imposed but the Sixth Amendment does not apply." 490 F.2d at 364. (The standard in juvenile delinquency proceedings was set forth by the Supreme Court in *In re Gault*, 387 U.S. 1 (1967); the rule for probation-revocation hearings was established in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).)

The circuit court found *Gagnon* more applicable than *Gault* to summary courts-martial because (1) servicemen are adults and presumably do not have difficulty presenting a defense or mitigating circumstances without the aid of counsel, and (2) summary courts-martial are less adversary and accusatory than are juvenile court proceedings, and so need to be informal and flexible, as are probation-revocation hearings. 490 F.2d at 365.

The Supreme Court considered an adult's need for the assistance of counsel in *Powell*, concluding that even an "intelligent and educated layman . . . needs the guiding hand of counsel at every step in the proceedings against him." See note 11 *supra*. Furthermore, the Court carefully explained the bases of its decision in *Gagnon*, *i.e.*, there are critical differences between criminal trials and probation-revocation hearings; and since a probationer has already been convicted of a crime, he has a more limited due process right than the right to counsel of an accused in a criminal prosecution. 411 U.S. at 788-89 & n.12.

then only if it is evident that the accused has a defense or claim of mitigating circumstances that cannot be adequately presented without assistance of counsel.³⁵

The Ninth Circuit's strictly historical test for applicability of the sixth amendment is improper for two reasons. First, the sixth amendment right to counsel, as Chief Justice Burger has noted,³⁶ has been an evolving concept in terms of both substance and availability from what it was in 1791.³⁷ Although the intent of the amendment's framers may be a relevant factor in determining the applicability of today's right to counsel, that intent cannot reasonably be the sole criterion.³⁸ Second, even if the founders did not intend the Bill of Rights to apply to the miniscule Army and nonexistent Navy of 1789-1791, as one commentator suggests,³⁹ it does not follow that the founders would have had the same opinion had they been dealing with the greatly enlarged armed forces and the greatly widened military jurisdiction of today.⁴⁰ The Supreme Court has indicated that a proper application of a constitutional provision should involve a consideration of *current* realities and needs.⁴¹

³⁵490 F.2d at 364-65.

³⁶*Argersinger v. Hamlin*, 407 U.S. at 44.

³⁷*E. g.*, in terms of substance, juvenile court procedures including the representation of an accused's interests by multipurpose probation officers or judges were struck down in 1967, after having prevailed for over half a century and after having withstood constitutional attack in over 40 jurisdictions. The new standard is personal, appointed counsel. *In re Gault*, 387 U.S. 1 (1967).

The cases of *Powell*, *Johnson*, *Gideon*, and *Argersinger* exemplify the evolution in the availability of the right to counsel. An indigent accused of a capital offense in state court has had a right to counsel only since 1932, while the same man accused of any other felony in state court has had a right to counsel only since 1963.

³⁸The U.S. District Court for Hawaii in *Daigle* and the U.S. District Court for the Central District of California in *Henry* recognized that the correct starting point for a determination of *Argersinger's* applicability to military court-martial procedures was an examination of the then-current right to counsel in the military, rather than the framers' intent. The courts found that by the time *Argersinger* came down the military had recognized the importance of counsel, and in fact had provided a right to counsel that in some respects was broader than the civilian right. The question for the courts then became one of considering whether the summary court-martial procedure generates the same need for counsel the Supreme Court found that state misdemeanor trials generate, and weighing against that need the mitigating effect of any peculiar needs of the military. *Daigle v. Warner*, 348 F. Supp. 1074, 1078-80 (D. Hawaii 1972); *Henry v. Warner*, 357 F. Supp. 495, 503-04 (C.D. Cal. 1973).

³⁹Wiener, *Courts-Martial and the Bill of Rights: The Original Practice* (pts. I, II), 72 HARV. L. REV. 1, 266 (1958) [hereinafter cited as Wiener]. *Contra*, Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293 (1957).

⁴⁰Wiener, *supra* note 39, at 302.

It is interesting to note that while the Ninth Circuit relied for its holding on Wiener's historical analysis and accepted his conclusion that the framers intended that the Bill of Rights not apply to the military, the court seemed to disregard entirely Wiener's argument that changed circumstances have made the original intent immaterial today. 490 F.2d at 364.

⁴¹In extending the right to counsel to a postindictment police lineup in *United States v. Wade*, the Supreme Court noted that at the time the Bill of Rights was adopted there were no police forces as we know them. However, in recognition of the "realities of modern criminal prosecution," the Court has interpreted the sixth amendment guarantee to apply

The aberrational aspect of the Ninth Circuit's holding is further illustrated by the fact that the five other courts, including COMA, that have considered the question have held that the sixth amendment and *Argersinger* apply to military courts-martial.⁴²

2. *The standard developed by the Court of Military Appeals.* COMA is the court Congress established to define military law, and it has developed the most appropriate and compelling test for determining the applicability of constitutional standards to the military.⁴³ Under this COMA test the fully defined constitutional right to counsel, like all other constitutional standards announced by the Supreme Court, applies in the military system unless the adaptation or restriction of that right is required by military peculiarity. This test, unlike the Ninth Circuit's standard, properly considers the present status of the right to counsel in federal and state courts and the current composition and needs of the military.

It is significant that all six of the courts that have considered the question of a right to counsel in military trials weighed the effect of providing defense counsel in summary courts-martial on the military's ability to perform its unique function. While the courts agreed that military peculiarity may require some adaptation in the type of assistance provided, none of the six held that the unique aspects of the military and its

to the "critical" stages of the proceedings. 388 U.S. 218, 224 (1967). See *Oregon v. Mitchell*, 400 U.S. 112 (1970).

A good example of this kind of analysis in considering *Argersinger's* applicability to summary courts-martial is the opinion of the U.S. District Court for Florida in *Betonie v. Sizemore*, 369 F. Supp. 340, 349-52 (M.D. Fla. 1973).

⁴²The five courts are the U.S. District Courts for Hawaii, for the Central District of California, and for Florida; the Fifth Circuit Court of Appeals; and the Court of Military Appeals. See note 4 *supra*.

⁴³COMA has fashioned the rule 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." *United States v. Jacoby*, 11 U.S.C.M.A. 428, 430-31, 29 C.M.R. 244, 246-47 (1960); accord, *United States v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967). This rule has been used to overrule previous military law and require that the accused be afforded the opportunity to be present with counsel at the taking of written depositions. *United States v. Jacoby*, *supra*. COMA used the test again to apply the Supreme Court's ruling in *Miranda* to the military and overturn a conviction obtained in violation of the federal court standard. *United States v. Tempia*, *supra*.

In updating the UCMJ, Congress has employed essentially the same rule. In amending article 16 of the UCMJ in 1968, Congress adopted a provision modeled after rule 23a of the Federal Rules of Criminal Procedure with a modification to account for command influence, a problem unique to the military community. S. REP. NO. 1601, 90th Cong., 2d Sess. 4 (1968).

The Supreme Court has implicitly sanctioned both the standard and its genesis: The standard provides in essence that servicemen have constitutional rights that are to be conditioned only when overridden by the unique demands of the military. The Supreme Court agreed in *Burns v. Wilson*, 346 U.S. at 140, 142.

The same standard is applied by COMA which was established by Congress as the final arbiter in this area. See note 24 *supra*. The Supreme Court has recognized such a balancing role for Congress and, by implication, for COMA. *Burns v. Wilson*, *supra* at 140-41.

judicial system justified the denial of the right to counsel in summary courts-martial.⁴⁴

COMA ruled on the applicability of *Argersinger* in the case of *United States v. Alderman*.⁴⁵ The court's implementation of its standard for determining the applicability of constitutional rights in the military was best delineated in Judge Duncan's concurring opinion, where he noted that the record contained no evidence of military necessity sufficient to warrant nonapplication of the *Argersinger* standard.⁴⁶ The court found a persuasive argument against the Navy's military-necessity position in the fact that the Army and Air Force had voluntarily applied *Argersinger* to their summary court-martial procedures.⁴⁷

3. *Policy considerations.* Considerations of policy also weigh in favor of the applicability of *Argersinger* to the military courts. The only servicemen who can be tried by summary courts-martial are those of lowest rank.⁴⁸ For the most part, they are the youngest in age and the newest to the military system. The summary court-martial officer is typically a lay officer with no special training in the law, who compares quite unfavorably, in terms of ability to insure procedural propriety, with the military judges or panels of officers presiding at general and special courts-martial.⁴⁹ Moreover, a conviction by summary court-martial creates a criminal record that, in addition to the obvious consequences, can have significant repercussions in the sentencing following any subsequent military misconduct.⁵⁰ In the summary court-martial,

⁴⁴The Ninth Circuit joined the other five courts in rejecting the argument that the affording of counsel would adversely affect the military. 490 F.2d at 366. All the courts agreed with Judge Duncan's position in *Alderman* that the Navy had shown no valid necessity for a rule against providing counsel. 22 U.S.C.M.A. at 303, 46 C.M.R. at 303. The Fifth Circuit reasoned that courts-martial and civilian trials are more similar than different, since in either a conviction can result in deprivation of liberty, potential social stigma, and significant repercussions in the future. 496 F.2d at 1007.

Factually the strongest arguments against the Navy's military necessity contention are (1) that the Army and Air Force have voluntarily complied with *Argersinger*, and (2) that the Navy itself allows the assistance of privately retained counsel, with no reported claim that it limits the effectiveness of summary courts-martial. *Daigle v. Warner*, 490 F.2d at 366; see note 47 *infra*.

⁴⁵22 U.S.C.M.A. 298, 46 C.M.R. 298 (1973).

⁴⁶*Id.* at 303, 46 C.M.R. at 303.

⁴⁷H. MOYER, JUSTICE AND THE MILITARY § 2-309 (1972); *Daigle v. Warner*, 348 F. Supp. 1074 n.14 (1972); *Henry v. Warner*, 357 F. Supp. 495 n.1 (1973). The Army ordered the change in procedure in DA Message 101236Z dated August 10, 1972, which has been reprinted in *The Army Lawyer*, August 1972, at 7. The Air Force directive was AFM 111-1 dated August 30, 1972.

⁴⁸U.C.M.J. art. 20, 10 U.S.C. § 820 (1970). See also note 3 *supra*. The *Betonie* court noted this fact among its policy considerations favoring the applicability of right-to-counsel safeguards. 369 F. Supp. at 351.

⁴⁹See Lermack, *Summary and Special Courts-Martial: An Empirical Investigation*, 18 ST. LOUIS U.L. REV. 329 (1974) [hereinafter cited as Lermack]. See also Fidell, *The Summary Court-Martial: A Proposal*, 8 HARV. J. LEGIS. 571, 578-84 (1971).

⁵⁰*Hearings on S. Res. 260 Before the Subcomm. on Constitutional Rights of the Senate*

then, one finds the coincidence of the military accused least able to defend himself being tried by the military court most unsuited to insure legal rights with considerable consequences accompanying a conviction. Providing the assistance of counsel is the best way to insure that the military accused will receive the benefit of the available safeguards necessary to prevent violation of his rights.⁵¹ Just as the right to vote is preservative of all other rights in our political system,⁵² so the right to counsel is determinative of all other legal rights in our judicial system.

B. Under What Circumstances Should Counsel Be Provided in Summary Courts-Martial?

The opinions considering *Argersinger's* applicability to the military raise additional questions concerning the circumstances under which counsel should be provided in summary courts-martial.

1. *The effect of confinement.* Because it started from a fifth amendment due process base and looked to the probation-revocation hearing standard as a guidepost, the Ninth Circuit ruled that counsel need be appointed only when requested, and then only if it is evident that the accused has a defense or a claim of mitigating circumstances that cannot be adequately presented without the assistance of counsel. Furthermore, the court provided that even this limited right can be denied if required by the exigencies of military operations.⁵³

Argersinger, however, clearly required the appointment of counsel in cases in which a sentence of imprisonment would be imposed,⁵⁴ and COMA and the Fifth Circuit found the sentence-of-confinement the appropriate trigger for the right to provided counsel in the military setting.

2. *The effect of "equivalent punishments."* However, in the military, the range of sentencing possibilities includes "equivalent punishments,"⁵⁵ e.g., hard labor, restriction to limits, and forfeiture of pay, into which a possible sentence of confinement can be translated at the

Comm. on the Judiciary, 87th Cong., 2d Sess. 838 (1962); U.S. DEPT OF DEFENSE, MANUAL FOR COURTS-MARTIAL UNITED STATES ¶ 75b (rev. ed. 1969).

⁵¹A recent empirical study of minor courts-martial noted that while servicemen have a right to a speedy trial, the greatest danger in the minor trials is a procedure that is too speedy. While free continuances are supposed to be the rule, in the 83 minor courts-martial during 1 month in which the accused were unrepresented by counsel, there was only one continuance granted. In the 51 courts-martial where accused were represented by counsel, continuances were granted in 87 percent of the cases.

Even if the accused does not offer a defense, it is important to have counsel for the proper presentation of mitigating circumstances. Lermack, *supra* note 49, at 348, 354-55, 377.

⁵²*Reynolds v. Sims*, 377 U.S. 533, 562 (1964), citing *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

⁵³*Daigle v. Warner*, 490 F.2d at 364-65.

⁵⁴407 U.S. at 37-40.

⁵⁵U.S. DEPT OF DEFENSE, MANUAL FOR COURTS-MARTIAL UNITED STATES ¶ 127 (rev. ed. 1969).

court's discretion. Since any of these alternatives is considered adequate punishment and each involves deprivation of liberty or property, the *Argersinger* mandate should require defense counsel at a summary court-martial before confinement or any of the "equivalent punishments" may be imposed. Alternatively, the military could simply provide the right to assistance of counsel, unless waived, to all servicemen tried by summary courts-martial.⁵⁶

3. *The effect of indigency.* Because indigency is a normal prerequisite to the right to appointed counsel in civilian trials, the United States District Court for Florida⁵⁷ and Judge Quinn of COMA⁵⁸ included a requirement of indigency in their prescription for a right to provided counsel in summary courts-martial. But Judge Duncan of COMA argued that indigency is irrelevant in the military context.⁵⁹ The UCMJ does not limit the right to appointed counsel to indigents in any other context; whenever the benefit of counsel is prescribed for servicemen, it is always provided without regard to their financial status.⁶⁰ Indigency, therefore, should not be a precondition on the right to counsel before summary courts-martial.

IV. CONCLUSION

The sixth amendment right to counsel, as extended to minor offense trials by *Argersinger*, should apply in the military's summary courts-martial. Under the COMA test for applicability, constitutional standards defined by the Supreme Court in both state and federal cases are available in the military judicial system unless their adaptation or restriction is required by military peculiarity. The COMA rationale not only mandates application of *Argersinger* to summary courts-martial, but also is well suited for use in the continual process of considering the appropriateness of constitutional standards in a military setting because it properly balances the accused's rights as a citizen against his duties as a soldier. The COMA test and its result in the *Argersinger* context should be upheld by the Supreme Court when it considers the question in *Middendorf v. Henry*.

⁵⁶Justice Powell indicated that in his view the majority opinion in *Argersinger* foreshadows the adoption of a broad rule requiring counsel in all petty offense cases. 407 U.S. at 52.

⁵⁷*Betonie v. Sizemore*, 369 F. Supp. at 353.

⁵⁸*U.S. v. Alderman*, 22 U.S.C.M.A. at 300, 46 C.M.R. at 300.

⁵⁹22 U.S.C.M.A. at 306, 46 C.M.R. at 306.

⁶⁰*Lermack*, *supra* note 49, at 368.