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Military Law and the Miranda Requirements

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IN *United States v. Tempia*[1] the United States Court of Military Appeals[2] held that the legal principles of *Miranda v. Arizona*[3] apply to persons in military service.

On May 1, 1966, Airman Tempia allegedly took indecent liberties with three young girls in a restroom at the base library. Tempia was brought to air police headquarters following a report of the incident, and a special agent interrogated him on the same day. The agent gave Tempia warning under Article 31,[4] Uniform Code of Military Justice[5] and also told him that he could consult with legal counsel. Tempia wanted counsel and was released, but he had not yet received legal counsel when he was called to the Office of Special Investigation (OSI) on May 3, 1966. The agent set up an appointment for him with The Dover Air Force Base Staff Judge Advocate.

Tempia was told by the Staff Judge Advocate that he would be disqualified in his capacity as Staff Judge Advocate if an attorney-client relationship were established.[6] The Staff Judge Advocate told Tempia that he would advise him of his legal rights but this was not the same as acting as his defense counsel. Tempia was then told that under Air Force Regulation 110-4 (Legal Assistance Program), he could not receive legal assistance on a possible disciplinary matter, and also declined to hear Tempia's story. At this stage of the investigation, the Staff Judge Advocate could not provide the accused with a military lawyer, but Tempia

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1 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).

2 10 U.S.C. § 867 (1964).

3 384 U.S. 436 (1966).

4 10 U.S.C. § 831 (1964):

(a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.

(b) No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

(c) No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.

(d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

5 10 U.S.C. §§ 801-940 (1964). The Uniform Code of Military Justice will be cited hereafter as the UCMJ, and referred to in the text as the Code.

6 10 U.S.C. § 806(b) and (c) (1964).

was informed that he would be given a reasonable time to obtain a civilian lawyer at his own expense. Tempia was then told that if charges were preferred, he would be furnished a military lawyer, and the Staff Judge Advocate read and explained each section of Article 31 to the accused.

Tempia was returned to the OSI and advised of the charges against him,[7] and during the second interrogation of that day, he executed a confession to the OSI agent.

The following testimony by an OSI agent points out Tempia's understanding in his search for counsel:

> Q. . . . did Airman Tempia upon returning to the OSI office after speaking with the Judge Advocate decline legal counsel, or did he say he was unable to obtain legal counsel to represent him at the interrogation (or that the military could not help him)?
>
> A. Well, he did not say "military." He said, "They didn't do me no good." [8]

The confession was admitted into evidence at Tempia's general court-martial[9]—held one day after the *Miranda* decision—over objection by defense counsel that the confession was taken contrary to the *Miranda* holding. Airman Tempia was convicted, but his conviction was reversed on appeal to the Court of Military Appeals.

The following case notes show the Court of Military Appeals position in interpreting the *Miranda* rules and why it overruled the government's contention that Airman Tempia was not in custody and that he had waived his right to counsel during interrogation.

> In determining whether an interrogation is a custodial interrogation requiring compliance with the *Miranda* rules if resulting statements are to be used in evidence, the test to be applied is not whether the accused, technically, has been taken into custody, but, absent that, whether he has been otherwise deprived of his freedom of action in any significant way. Considering the realities of military life in which, unlike civil life, a suspect may be required to report and submit to questioning without regard to warrants or other legal process, an interrogation for which a military suspect is ordered to report must be regarded as a custodial interrogation for purposes of the application of the *Miranda* rules.
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> Testimony that the accused told OSI agents that he did not desire further counsel, that they could not help him . . . "They didn't do me no good" was insufficient to establish a knowing and intelligent waiver of the accused's right to counsel during interrogation where he had previously asked to consult counsel and had been referred to the staff judge advocate and that officer not only erroneously advised the accused that he was not entitled to appointed

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[7] Taking indecent liberties with a female under age sixteen is a criminal offense under UCMJ, art. 134.

[8] F. Lane, *Miranda in Uniform,* 3 Trial magazine, 44 (Aug. 1967).

[9] UCMJ, art. 16 (1964).

counsel, but specifically declined to act as counsel. Under these circumstances, the accused's comments indicate no more than that his efforts to obtain counsel had been frustrated. Well might the accused believe the jig was up after he could get no advice from the Staff Judge Advocate; could tell him none of the facts; and could merely sit and listen to a repetitious statement of his rights under Article 31. He wanted a counsel, not an impartial arbiter. He received only the latter. *Miranda* requires the former. What does concern us is our duty to follow the interpretation by the Supreme Court of the Constitution of the United States insofar as it is not made expressly or by necessary implication inapplicable to members of the armed forces. It is well to remember that we, "like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights. . . ." We necessarily must effectuate the mandate by holding *Miranda v. Arizona* applicable in military prosecutions.[10]

The purpose of this article is to examine the Code and its effectiveness in dealing with the military accused in the area of criminal procedure. Emphasis will be placed on the serviceman's right to counsel, the serviceman's Fifth Amendment privilege against self incrimination and the scope of the Bill of Rights when applied to the serviceman. The discussion will be limited to the relationship of the military to its own personnel.

Civil and Military Jurisdictions Distinguished

Military courts are an "entity entirely apart from the civilian federal courts" and "the federal courts, including the United States Supreme Court, generally may not control or interfere with the established system of military jurisprudence." [11] The Constitution vests in Congress the power to control and regulate the military.[12] Courts-martial are convened under Article I, which is the legislative article of the Constitution. The judicial power, under Article III of the Constitution, is entirely independent of Article I.[13]

It is clear that the "tradition of our country, from the time of the Revolution until now, has supported the military establishment's broad power to deal with its own personnel." [14] The "sharp distinction between courts-martial and the state and federal courts" has been maintained for a long time.[15] The noted exception to the rule precluding the federal courts from reviewing courts-martial decisions is a "collateral attack re-

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[10] Lane, *supra* note 8, at 45.

[11] Barker, Military Law—A Separate System of Jurisprudence, 36 U. Cin. L. Rev. 223 (1967).

[12] U. S. Const. art. I, § 8 clauses 11-14 contain the War Powers of Congress.

[13] U.S.C.A. § 801, at 110 (1967).

[14] E. Warren, The Bill of Rights and the Military, 37 N.Y.U. L. Rev. 181, 187 (1962).

[15] Barker, *op. cit. supra* note 11, at 227.

questing a writ of habeas corpus." [16] The purpose of a writ of habeas corpus is to terminate unlawful confinement and it has no relationship to the innocence or guilt of the prisoner.[17] Article 76 of the Code closes all other methods of review by civilian federal courts.[18]

The Code and Its Procedures

For purposes of criminal jurisdiction, a serviceman is subject to the Code and can be tried by courts-martial for offenses against that Code. Three kinds of courts-martial are provided,[19] and each varies in jurisdiction, procedure and sentencing power.[20]

A general court-martial is composed of at least five members (there is no maximum number of members),[21] and usually deals with the most serious offenses. All members must be officers if the accused is an officer,[22] but enlisted men may sit on the panel if the accused is an enlisted man and so requests.[23] The law officer[24] is a lawyer; he conducts the trial and rules on all questions of law and procedure (he has some powers usually exercised by a civilian judge), but is not a member of the court.[25] Trial counsel (the prosecutor)[26] and defense counsel must be members of the bar.[27] This court has jurisdiction to try all offenses and persons subject to the Code and may adjudge any sentence, including the death penalty, that is authorized by the Code.[28]

A special court-martial is composed of at least three members but no member need be a lawyer; they are rarely legally trained.[29] The president has duties similar to the law officer of a general court-martial.[30]

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16 *Id.* at 231.

17 *Id.* at 232.

18 *Id.* at 231; *see also* U.S.C.A. § 876, at 298-309 (1967).

19 UCMJ, art. 16 (1964).

20 UCMJ, arts. 16-54 (1964).

21 UCMJ, art. 16 (1964).

22 UCMJ, arts. 25(a), c(1), d(1) (1964).

23 Under UCMJ, art. 25(c)(1) (1964), if an enlisted man requests that enlisted men sit on the panel, at least one-third of the members must be enlisted; see The Uniform Code of Military Justice and the Right to Counsel, 36 U. Cin. L. Rev. 472, 473 (1967).

24 UCMJ, art. 26 (1964).

25 Manual for Courts-Martial ¶ 57(a) (hereinafter cited as MCM). This serves as the official text on military law and came about by Exec. Order No. 10214, 16 Fed. Reg. 1303 (1951), pursuant to 10 U.S.C. § 836 (1964).

26 UCMJ, art. 38 (1964).

27 UCMJ, art. 27 (1964).

28 UCMJ, art. 18 (1964).

29 UCMJ, art. 16 (1964); Note, Right to Counsel in Courts-Martial: Application of Stapley, 13 U.C.L.A. L. Rev. 1419 (1966).

30 UCMJ, art. 51 (1964).

The accused is not entitled to a qualified lawyer as defense counsel unless the trial counsel is so qualified.[31] The court is usually used for less serious offenses, but has jurisdiction to try all persons and noncapital offenses.[32] It is limited to adjudging sentences of a maximum of six months' confinement, a bad conduct discharge, or lesser penalties.[33]

A summary court-martial is generally used for the least serious offenses and may only try enlisted personnel.[34] This is similar to a civilian police court and consists of one member. The Code provides for neither trial nor defense counsel,[35] and this court can adjudge a sentence of no more than one month confinement or its equivalent.[36] One cannot be tried by this means if he objects and has not already refused nonjudicial punishment.[37]

Commanding officers may impose nonjudicial punishment under Article 15 of the Code for minor offenses,[38] provided the accused is granted a fair hearing.[39] Article 15 penalties are almost identical to those that can be imposed by a summary court-martial.[40]

The Code also provides for extensive appellate procedure.[41] The convening authority and a member of the office of the Judge Advocate General automatically review all court-martial proceedings.[42] Any conviction involving death, confinement for one year or more, or dishonorable or bad conduct discharge must be reviewed by a service Board of Review.[43] The Court of Military Appeals, consisting of three civilian judges, is the highest court in the field of military law and represents the last step in the appeal process.[44] This "Supreme Court" for the military[45] interprets the Code in the light of constitutional protections and its decisions are the final authority on military criminal law, even in the

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31 UCMJ, art. 27(c) (1964).

32 UCMJ, art. 19 (1964).

33 *Ibid.*

34 UCMJ, art. 20 (1964).

35 UCMJ, arts. 27, 38 (1964).

36 UCMJ, art. 20 (1964).

37 *Ibid.*

38 UCMJ, art. 15 (1964).

39 MCM, ¶ 133.

40 *Compare* UCMJ, art. 15 *with* art. 20 (1964).

41 UCMJ, arts. 59-76 (1964).

42 UCMJ, arts. 60-65 (1964); *see* note, Constitutional Rights of Servicemen Before Courts-Martial, 64 Colum. L. Rev. 127, 136 (1964).

43 UCMJ, art. 66(b); *see* note, *op. cit. supra* note 42.

44 *See* Walker, An Evaluation of the United States Court of Military Appeals, 48 NW. U. L. Rev. 714 (1954); Quinn, The United States Court of Military Appeals and Military Due Process, 35 St. John's L. Rev. 225 (1961); Comment, Right to Counsel and the Serviceman, 15 Catholic L. Rev. 203 (1966).

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

face of contrary provisions in the Manual for Courts-Martial.[46] A judgment by the Court of Military Appeals may not be appealed to any civilian court (including the Supreme Court).

The Military Community

While the constitutionality of the draft[47] is debated,[48] it appears here to stay. Every resident male is a potential member of the armed forces. Each year thousands become part of the military community and each year thousands return to the civilian community.[49]

A soldier is created during basic training, and the principles used are depersonalization, isolation and reorganization. Each recruit is subjected to a depersonalization process separated from his normal social environment. A military post is separated from the civilian populace socially by its values, purpose for being, and laws, and physically by fences and guards. Being educated cannot overcome feelings of uncertainty and confusion, as the trainee is moved from one strange environment to another to perform unfamiliar tasks. The Code and Manual for Courts-Martial explain a new set of house rules with strange requirements of conduct. Our society co-operates so well with the military that the future is bleak for persons with Dishonorable or Undesirable Discharges, and with rare exceptions the trainees wind up emulating the cadre and obeying all the rules. The military is a society where everyone does what is required and under conditions where a single infraction stands out against the constantly examined compliance of others. The military is no place for the sloppy, the arrogant, or the independent.[50] The serviceman can not quit his job and go home,[51] nor can he try to convince others to strike against conditions.[52] The right to a jury trial has never been enjoyed by the serviceman.[53] Since the serviceman is always under the control of his superiors, the right to bail guarantee under the Eighth Amendment is inconsistent with a military environment because he does not have the freedom of movement that bail pre-

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[46] *E.g.*, United States v. Simpson, 10 U.S.C.M.A. 229, 27 C.M.R. 303 (1959).

[47] The Universal Military Training and Service Act of 1951, eff. 6/19/51, C. 144, 65 Stat. 86, 50 U.S.C. App. Supp. V 459.

[48] *Compare* J. L. Bernstein, Conscription and the Constitution: The Amazing Case of Kneedler v. Lane, 53 A.B.A.J. 708 (1967), *with* J. W. Delehant, a Judicial Revisitation Finds Kneedler v. Lane Not So "Amazing," 53 A.B.A.J. 1132 (1967).

[49] There were over 22,500,000 veterans of all armed forces living in June 1960. E. Warren, *op. cit. supra* note 14, at 188.

[50] D. Duncan, The New Legions, 96-102 (1967).

[51] Punishable as desertion under UCMJ, art. 85 (1964).

[52] Punishable as conspiracy under UCMJ, art. 81 and as mutiny under UCMJ, art. 94 (1964).

[53] The Uniform Code of Military Justice and the Right to Counsel, *op. cit. supra* note 23, at 480.

supposes.[54] When considering barracks life and military custom, the Fourth Amendment guarantee against unreasonable search and seizure also takes on a different substance.[55]

The military is a perfect example of a welfare state,[56] and it is one of the most undemocratic of all institutions. The separation and difference of the civilian and military communities is a good idea, but it is becoming less and less of a reality.[57] The military has become one of the world's richest and most influential organizations.[58] It also may have the largest political block in the country with three million men in uniform, a million civilians in its employ and four million in defense industries. The military-industrial complex also has a staggering economic influence on this country.[59] Civil service preference is given to ex-servicemen. Corporations hire retired generals to serve as lobbyists for lucrative defense contracts. The military wages public relations campaigns and lends men and equipment to the movie industry in order to glorify the military and warfare. Many colleges have compulsory R.O.T.C. programs and many businesses refuse to hire young men who have not fulfilled their service obligation. The G.I. Bill provides tuition assistance after military service so one who has not accepted military life is deprived of this assistance.[60]

We need an army, but its role should be reduced to protecting the people from attack by an outsider.[61] When the authority and influence of the military have such a capacity for affecting the lives of us all, "the wisdom of treating the military establishment as an enclave beyond the reach of the civilian courts almost inevitably is drawn into question." [62]

While civilian laws are designed for protecting and maintaining order in the community, military laws are designed for achieving and maintaining discipline so the organized force can accomplish its basic objective of military victory.[63] Since the influence and power of the military are not separated from civilian society, the serviceman should

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[54] Right to Counsel in Courts-Martial: Application of Stapley, *op. cit. supra* note 29, at 1429.

[55] *Ibid.*

[56] *See* T. Coffin, The Passion of the Hawks: Militarism in Modern America, 66-74 (1964).

[57] *See* Duncan, *op. cit. supra* note 50, at 105-109.

[58] *See* F. Cook, The Warfare State, 175-201 (1962).

[59] *See* Duncan, *op. cit. supra* note 50, at 255.

[60] *Id.* at 257-262 (portions of the entire paragraph from this source); *see* Coffin, *supra* note 56; Cook, *op. cit. supra* note 58.

[61] Duncan, *op. cit. supra* note 50 at 256.

[62] Warren, *op. cit. supra* note 14, at 188.

[63] The Uniform Code of Military Justice and the Right to Counsel, *supra* note 23, at 479.

be considered a citizen first; he should not be denied any constitutional right so long as his fighting effectiveness is not diminished.[64]

Recent Criminal Procedure Decisions

In addition to a huge military establishment, we are also faced with other massive institutions, such as government, industry and labor.[65] The highly organized, computerized and dehumanized institutions of our industrialized society challenge the ability of government and other large organizations to continue to treat individuals as individuals.[66]

The Supreme Court has in recent years shown concern and feeling for the individual, with decisions of the 1960's giving widened protection to the criminal defendant. *Mapp v. Ohio*[67] said that even if reliable, evidence obtained by illegal search or seizure cannot be used in state prosecutions. In *Gideon v. Wainwright,*[68] the Court applied the Sixth Amendment to the states and said that indigents in state criminal proceedings are entitled to have counsel appointed whether the offense is capital or non-capital, felony or misdemeanor. *Malloy v. Hogan*[69] held that the Fifth Amendment's privilege against self-incrimination applies in state as well as federal courts. *Escobedo v. Illinois*[70] moved the Constitution and lawyers into the police station. *Miranda v. Arizona*[71] attempted to clarify *Escobedo* and said that once an accused was taken into custody or otherwise deprived of his freedom of action by the police, the police must clearly inform him of his right to remain silent, that anything he says may be used against him, that he has the right to consult with counsel and that if he is indigent he has the right to appointed counsel. No confession can be used unless police prove they complied with these *Miranda* rules. In *Application of Gault*[72] the Court states that juveniles must be given the same protections as are given adults.

Miranda has brought about much controversy and discussion.[73] The current trend of the Supreme Court affects almost every American and

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[64] *Id.* at 472.

[65] M. D. Tobriner, Individual Rights in an Industrial Society, 54 A.B.A.J. 21 (1968).

[66] *Ibid.*

[67] 367 U.S. 643 (1961).

[68] 372 U.S. 335 (1963).

[69] 378 U.S. 1 (1964).

[70] 378 U.S. 478 (1964).

[71] 384 U.S. 436 (1966).

[72] 87 S. Ct. 1428 (1967).

[73] *See* Interrogation of Criminal Defendants—some views on Miranda v. Arizona, 35 Fordham L. Rev. 169 (1966); A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and Old "Voluntariness" Test, 65 Mich. L. Rev. 59 (1966); Elsen and Rosett, Protection for the Suspect Under Miranda v. Arizona, 67 Colum. L. Rev. 645 (1967).

is a matter of much debate.[74] The trend is to extend the Bill of Rights in almost every direction in behalf of the individual, and for the court to act in areas where the legislative and executive branches can not or will not move.

Recent Military Criminal Procedure Decisions

The Federal Courts

The question of whether the Bill of Rights should apply to the military came to issue with the appeal of three recent special courts-martial proceedings. Since none of the appointed military counsel had been legally trained, the accused in each case claimed that he had been denied adequate counsel.

The District Court of Utah decided *Application of Stapley*[75] in 1965. Stapley sought a writ of habeas corpus following his conviction by a special court-martial for fraud in issuing bad checks and other Code violations. He requested the appointment of a military lawyer for his defense, but the request was denied because there was no military lawyer available. The appointed defense counsel and assistant defense counsel were untrained and inexperienced in either military or civilian law. The defense counsel was a veterinarian with two days legal training and the assistant defense counsel had studied the Code as part of an R.O.T.C. program in college.[76] They relied on the officer who drew up the charges for guidance in defending Stapley, and discouraged his attempts to secure civilian counsel.[77] In accordance with a deal his counsel had arranged with the prosecution, Stapley pleaded guilty.[78] As agreed, his confinement was reduced to two months following conviction and he also forfeited two-thirds of his pay for six months and was demoted to the lowest enlisted grade.[79] On petition for release, the district court granted the writ of habeas corpus and held that it had jurisdiction to review the alleged denial of Stapley's constitutional rights.[80] The court also held that Stapley was indigent and said he had been denied the assistance of counsel required by due process of law and the Sixth Amendment.[81]

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[74] *Compare* Hayes, Common Fallacies in Criticism of Recent Court Decisions on Rights of Accused, 53 A.B.A.J. 425 (1967), *with* Miller, Balancing the Rights of the Accused and the Public, 53 A.B.A.J. 1046 (1967); also *compare* Touchy, The New Legality, 53 A.B.A.J. 544 (1967), *with* Johnston, The New Nonlegality and the Rule of Law, 53 A.B.A.J. 1012 (1967) (and) Turnbull, Another View of the "New Legality," 53 A.B.A.J. 1015 (1967).

[75] 246 F. Supp. 316 (D. Utah 1965).

[76] *Id.* at 318-20.

[77] *Id.* at 319.

[78] *Ibid.*

[79] *Id.* at 320.

[80] *Ibid.*

[81] *Id.* at 321.

While the Sixth Amendment was applied to special courts-martial here, it did not necessarily require the appointment of legally qualified counsel. The sentence imposed on Stapley by the special court-martial limited review within the military system to an examination of the record by the convening authority and the staff judge advocate.[82] This points out that few cases actually reach the Court of Military Appeals due to the narrow scope of appellate review provided under the Code.[83] Stapley's only remedy was collateral attack on the judgment of the special court-martial by writ of habeas corpus. Since review of courts-martial decisions by habeas corpus action has traditionally been narrow in scope, there is a need to rely on the expertise of the military court and Congress to assess the due process claim.[84]

LeBallister v. Warden,[85] was decided by the District Court of Kansas in 1965. LeBallister was a member of the Army National Guard for Nevada, and had been convicted by two separate special courts-martial for absence without leave and disobedience of orders. His actions stemmed mainly from pursuing his personal beliefs as a conscientious objector.[86] He did not request civilian or military counsel of his own choosing, and he was represented by two appointed infantry officers.[87] Neither had any specialized legal training, but here the court held that they represented LeBallister as effectively as possible under the circumstances.[88] The petitioner cited the *Stapley* decision, but the court said that *Stapley* was expressly limited "to the peculiar circumstances of that case." [89] Thus, LeBallister's writ of habeas corpus was denied with the district court holding that "an accused before a military court is not entitled as a matter of right under the Sixth Amendment to representation by legally trained counsel." [90]

Kennedy v. Commandant,[91] was decided by the District Court of Kansas in 1966. Kennedy was serving two six-month sentences imposed by two separate courts-martial when he petitioned the federal district court for a writ of habeas corpus. He filed an affidavit of indigency that met the federal court requirements. He also requested that either a specified captain or some other qualified military lawyer be appointed to defend him, or that a qualified civilian attorney be hired at govern-

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82 UCMJ, art. 67(c) (1964); MCM § 91(b); *see* Right to Counsel in Courts-Martial: Application of Stapley, *op. cit. supra* note 29, at 1423.

83 Right to Counsel in Courts-Martial: Application of Stapley, *op. cit. supra* note 29, at 1423.

84 *Id.* at 1426; *see* Barker, *op. cit. supra* note 11, at 233-37.

85 247 F. Supp. 349 (D. Kan. 1965).

86 *Id.* at 351.

87 *Id.* at 350-51.

88 *Id.* at 351.

89 *Id.* at 352.

90 *Ibid.*

91 258 F. Supp. 967 (D. Kan. 1966).

ment expense. His request was denied, and the defense counsel who was appointed had no specialized legal training. Kennedy's writ of habeas corpus was denied and the position taken in *Stapley*—that the Sixth Amendment applies to courts-martial—was rejected. The court said "an accused before a military court is not entitled as a matter of right under the Sixth Amendment to representation by legally trained counsel." [92]

The *LeBallister* and *Kennedy* decisions point out the principle that generally the civilian federal courts, including the United States Supreme Court, may not control or interfere with the established system of military jurisprudence.[93] *Stapley* says that the Sixth Amendment right to counsel applied to the military accused while *LeBallister* and *Kennedy* appear to say that the right to counsel should not be based on the Constitution, but rather on Congress' exercise of its constitutional powers in enacting the Code. As a result, there is a clear cut conflict on this point of law in the civilian courts.[94] The petitioner must be confined in order to bring a writ of habeas corpus and this reduces the effectiveness of the federal courts in dealing with denials of due process in special courts-martial.[95] The maximum sixth month confinement that may be imposed by the special courts-martial is the reason for this.[96] This situation calls for legislative action.[97]

The United States Court of Military Appeals

This court is the primary guardian of servicemen's rights before military tribunals.[98]

In 1960, the Court of Military Appeals held a portion of the Code itself unconstitutional in *United States v. Jacoby*.[99] The court said that Article 49 of the Code, which allowed admission of depositions taken on interrogatories in the absence of the accused, violated the Sixth Amendment right of confrontation.[100] It also said that congressional power to make rules for governing the armed forces was limited by the Bill of

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[92] *Id.* at 970.

[93] Barker, *op. cit. supra* note 11, at 223.

[94] *Compare* Application of Stapley, 246 F. Supp. 316 (D. Utah 1965), *with* LeBallister v. Warden, 247 F. Supp. 349 (D. Kan. 1965) and Kennedy v. Commandant, 258 F. Supp. 967 (D. Kan. 1966); *see* the Uniform Code of Military Justice and the Right to Counsel, *op. cit. supra* note 23, at 482.

[95] Right to Counsel in Courts-Martial: Application of Stapley, *op. cit. supra* note 29, at 1430.

[96] UCMJ, art. 19 (1964).

[97] Right to Counsel in Courts-Martial: Application of Stapley, *op. cit. supra* note 29, at 1430.

[98] Right to Counsel and the Serviceman, *op. cit. supra* note 44, at 210.

[99] 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960).

[100] *Id.* at 430-33, 29 C.M.R. at 246-49.

Rights.[101] The court likewise declared that it is its duty to interpret the Code in the light of constitutional protections, and that all Bill of Rights guarantees apply to servicemen except those that are expressly or by necessary implication excluded.[102]

In *United States v. Culp*,[103] decided in 1963, the court upheld the use of nonlawyer counsel in special courts-martial against Sixth Amendment attack. The court implied that while the Sixth Amendment does apply to servicemen regarding their right to counsel before military tribunals, the requirement is met by the appointment of military counsel.[104]

The 1967 *Tempia* decision affirms the court's holding in *Culp* that the Constitution and the Bill of Rights do apply to the military. Thus, we now have instances of the court applying both the Fifth and Sixth Amendments to servicemen. The conflict of decisions that exists in the federal courts does not exist in the decisions of the highest military court. However, it should be noted that the question of whether there is a constitutional right to representation by legally qualified counsel in a court-martial proceeding remains.[105] The accused always is entitled to legally qualified counsel in a general court-martial, in a special court-martial where the prosecutor is legally qualified and in all appeals.[106] This right is not limited to indigents because it also applies to those who can afford to retain counsel.[107] The question is thus ideally raised in a special court-martial where the prosecutor is not legally trained and the accused is indigent.[108]

Conclusion

In view of the current trends of the Supreme Court and the Court of Military Appeals, the *Tempia* decision was not a hasty one.[109] The highest civilian court and the highest military court both indicate that they are going to continue to strengthen the constitutional rights of the individual in a changing society. The concern of the Court of Military Appeals for the individual who is part of our massive military establishment is encouraging, since the Code does not seem fully adequate to protect the individual.

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101 *Id.* at 431-33, 29 C.M.R. at 247-49.

102 *Id.* at 430-31, 29 C.M.R. at 246-47; *see also* E. Warren, *op. cit. supra* note 14, at 189.

103 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963).

104 The appointment of an officer pursuant to UCMJ, art. 27(c).

105 The Uniform Code of Military Justice and the Right to Counsel, *op. cit. supra* note 23, at 483.

106 *Id.*; UCMJ, arts. 27(a), (b), (c) (1964).

107 The Uniform Code of Military Justice and the Right to Counsel, *op. cit. supra* note 23, at 483.

108 *Ibid.*

109 *But see* Comment, United States v. Tempia: The Questionable Application of Miranda to the Military, 13 Vill. L. Rev. 170 (1967).

The Code places no limitations on the types of crimes that can be tried by a court-martial, and the sentences meted out by a court-martial are no less real than those imposed by a civilian court.[110] For example, a special court-martial may impose on a serviceman a bad conduct discharge, which could have a severe impact on any future employment possibilities. A special court-martial conviction also leaves the serviceman with a permanent record. Officers appointed as defense counsel in a special court-martial usually only have superficial training in military law and commit a high frequency of error.[111] The serviceman should be entitled to legally trained counsel whenever a civilian would be so entitled under similar circumstances. A civilian is entitled to legal counsel when a non-capital offense is involved,[112] and a serviceman should be entitled to the same right. Many lawyers serve in the Armed Forces in nonlegal capacities and a large reserve of potential military attorneys remains untapped because of the Defense Department's own personnel policies.[113]

If military necessity makes it impractical for lawyers to be assigned to every court-martial, at least the quality of defense counsel at a special court-martial could be improved. A department of nonlawyer officers specifically trained for the role of defense counsel at special courts-martial is a possibility.[114] The military is concerned that an accused has effective counsel,[115] but it should concentrate more on the specialized legal training of nonlawyer personnel if legislation cannot be passed to guarantee legally qualified counsel in all courts-martial.

The summary court-martial should be eliminated as a judicial proceeding. It deals with disciplinary problems and these could be dealt with just as effectively by a commander using non-judicial punishment under Article 15 of the Code.[116] A commander sometimes needs imme-

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110 Right to Counsel and the Serviceman, *op. cit. supra* note 44, at 226.

111 Right to Counsel in Courts-Martial: Application of Stapley, *op. cit. supra* note 29, at 1429.

112 Gideon v. Wainwright, 372 U.S. 335 (1963).

113 A statement by the American Civil Liberties Union at 1966 senate subcommittee hearings pointed out that many Judge Advocates perform unskilled and nonlegal jobs and that many young attorneys are denied appointments as Judge Advocates. The statement concluded by saying there was a sufficient source of legally qualified persons to implement any legislation designed to safeguard the constitutional rights of military personnel. Right to Counsel and the Serviceman, *op. cit. supra* note 44, at 231.

114 Right to Counsel in Courts-Martial: Application to Stapley, *op. cit. supra* note 29, at 1431.

115 *See* P. E. Wilson, The Right of the Military Accused to Effective Counsel: The Military View, 14 Kan. L. Rev. 593 (1966).

116 A statement by Seymor W. Wurfel, Professor of Law at the University of North Carolina, recommended more effective use of non-judicial punishment as a way of eliminating both the special and summary court-martial. The general court-martial could impose the lesser punishment associated with a special court and that way the proceeding could be fully judicial in all respects in justice to both sides. Right to Counsel and the Serviceman, *op. cit. supra* note 44, at 230-31; note also the broad powers given a commanding officer under UCMJ, art. 15 (1964).

diate discipline to ensure fighting effectiveness, but this should not be in the form of a judicial proceeding where one man is allowed to act as judge, jury, prosecutor and defense counsel.[117]

We are in a time of uncertain peace, and demands are placed on the administration of justice when related to those serving in a war zone. Competing arguments of national security versus personal rights necessarily arise. However, it is during time of war when the exercise of military power is most arbitrary and it is during this time that the individual needs his rights protected most faithfully.[118]

The influence and power of the military touches all of us. We should not let excessive fears for our security diminish the rights given to us under the Constitution. The courts can play only a limited role in protecting the heritage of our people against the possibility of unchecked military power.[119] Both the military and civilian courts "engage in the lonely task of balancing the need for order and stability with the goal of liberty and due process, seeking to preserve a heritage of individualism in a hierarchy of pervasive institutionalism." [120] The Court of Military Appeals is following the lead of the Supreme Court in preserving the constitutional rights of the individual, and recent cases indicate that this trend will continue.

No scheme of law can escape the impact of the imperfect human being, and life itself intrudes on any precise plan.[121] Courts emphasizing constitutional protections see the peril of power-wielding institutions ruthlessly restricting the role of the individual, and they are helping to preserve his rights, his dignity, his opportunity for self-fulfillment and his chances for creativity.[122]

When former President Eisenhower left the White House, he urged that the American people be alert to changes coming about due to the coalescence of military and industrial power.[123] His words were these:

> (T)his conjunction of an immense military establishment and a large arms industry is new in the American experience. The total influence—economic, political, even spiritual—is felt in every city, every state house, every office of the Federal Government. . . .
> (W)e must not fail to comprehend . . . (the) grave implications. Our toil, resources and livelihood are all involved; so is the very structure of our society.

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117 UCMJ, arts. 20, 27, 38 (1964).

118 The Uniform Code of Military Justice and the Right to Counsel, *supra* note 23 at 485; *see* Right to Counsel and the Serviceman, *op. cit. supra* note 44, at 229.

119 E. Warren, *op. cit. supra* note 14, at 202.

120 M. O. Tobriner, *op. cit. supra* note 65, at 23.

121 *Ibid.*

122 *Ibid.*

123 E. Warren, *op. cit. supra* note 14, at 202.

> (W)e must guard against the acquisition of unwarranted influence . . . by the military-industrial complex. . . .
> We must never let the weight of this combination endanger our liberties or democratic processes.
> We should take nothing for granted. Only an alert and knowledgeable citizenry can compel the proper meshing of the . . . machinery of defense with our peaceful methods and goals, so that security and liberty may prosper together.[124]

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[124] *Id.* at 202-03.