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common law, they would appear equally to apply under the Code via its requirement that issuers and transfer agents must always act in good faith.²⁷

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Military Law—Sixth Amendment Right to Counsel Applied to Special Court-Martial

Petitioner in *Application of Stapley*,¹ a private first class in the regular Army, was tried for and convicted of four violations² of the Uniform Code of Military Justice by special court-martial convened at Fort Douglas, Utah. He was sentenced to be confined at hard labor for three months, to forfeit fifty-five dollars of his pay per month for six months and to be reduced in rank to private. At the outset petitioner requested that he be represented by a qualified military lawyer. His request was denied, and he was told that to retain individual civilian counsel would cost about 150 dollars. Unable to pay that amount, he proceeded to trial represented by a captain in the Veterinary Corps and a second lieutenant, "neither . . . [of whom] had any experience before or with any court-martial or in advising persons charged with offenses."³ Acting on their advice, petitioner entered into a pretrial agreement⁴ with the convening authority, pleaded guilty to all charges, made no request for enlisted members on the court, did not object at the trial to the denial of

²⁷ Under the Code, the transfer agent has a duty of good faith running to the holder or owner of securities. N.C. GEN. STAT. § 25-8-406(1)(b). "Good faith" means honesty in fact in the conduct or transaction concerned." N.C. GEN. STAT. § 25-1-201(19). On good faith, see Folk, *supra* note 21, at 708.

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¹ 246 F. Supp. 316 (D. Utah 1965).

² UNIFORM CODE OF MILITARY JUSTICE arts. 86 (unauthorized absence), 90 (willful disobedience of a superior commissioned officer), 117 (provoking speech or gestures), 123a (making, drawing or uttering check, draft or order without sufficient funds), 10 U.S.C. §§ 886, 890, 917, 923a (1964) [hereinafter cited as UCMJ].

³ 246 F. Supp. at 319.

⁴ A pretrial agreement is an administrative procedure, or "negotiated plea," whereby the accused agrees to enter a plea of guilty to all charges in return for a guarantee that any sentence in excess of a stipulated maximum (here two months confinement and two months forfeiture of pay) will be disapproved.

his request for counsel and said only "yes sir" or "no sir" to questions asked by the court.

Without seeking review of his conviction through military channels, petitioner applied to the Federal District Court for the District of Utah for a writ of habeas corpus. The court issued the writ, holding that the sixth amendment right to counsel applied to this special court-martial. The court concluded that because the facts involved substantial charges of moral turpitude and considerable risk of incarceration, counsel with training beyond that common to all military officers was required.⁵

The court felt that it was

appropriate, timely and necessary to recognize that it may be repugnant to minimal requirements of due process, even in the military service, for the juridically blind to lead the blind under a system or in a particular command accepting this as the rule rather than a militarily necessitated exception . . . [and that the sixth amendment's right to] assistance of counsel, however adaptably we may interpret the term in view of military expediency, cannot be constitutionally debased to mean the substantial absence of any legal assistance⁶

Within the framework of the military judicial system, the United States Court of Military Appeals⁷ held in *United States v. Culp*⁸ that the accused in a special court-martial, as distinguished from a general court-martial,⁹ is not entitled to lawyer counsel.¹⁰

⁵ The Justice Department did not appeal the decision. *Charlotte Observer*, Dec. 1, 1965, p. 7A, col. 5. Apparently the thought was that *Stapley* would not receive immediate acceptance in other judicial districts. See notes 34-35 *infra*, and accompanying text.

⁶ 246 F. Supp. at 322.

⁷ A statutory court vested with the power of final review of courts-martial proceedings. UCMJ art. 67, 10 U.S.C. § 867 (1964).

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

⁹ There are three types of courts-martial: general, special and summary. The primary difference is sentencing power. A general court-martial is empowered to impose the maximum statutory sentence for any offense. The special court-martial is limited in power to a sentence of six months confinement for any offense while the summary court-martial is limited to a sentence of thirty days confinement for any offense. See UCMJ arts. 18-20, 10 U.S.C. §§ 818-20 (1964).

¹⁰ The UCMJ requires in general courts-martial cases that every accused be represented by free appointed military counsel, free military counsel of accused's own choice, or by civilian counsel paid for by the accused. However in a special court-martial case, if the government is represented by a nonlawyer (the situation in the principal case), the accused need only be represented by "counsel" with substantially similar training—or lack thereof. UCMJ art. 27, 10 U.S.C. § 827 (1964).

Each of the three judges wrote separate opinions, yet all concluded for differing reasons¹¹ that a qualified lawyer was not required. Thus petitioner Stapley could assert no denial of "military due process"¹² by having been refused the services of a military lawyer in such circumstances.

From the standpoint of civilian constitutional law, it is clear that federal courts have habeas corpus jurisdiction over military prisoners.¹³ But to what extent that jurisdiction encompasses consideration of alleged denials of constitutional due process is debatable. In a two-step argument, petitioner Stapley first contended that the United States Supreme Court in *Burns v. Wilson*,¹⁴ while denying the writ, said that civil courts have jurisdiction to consider due process denials if those denials are so extreme as to deprive the *military* tribunal of its jurisdiction.¹⁵ Secondly, he contended that since due process now includes the right to counsel in a state criminal trial, the military court had by denying his request for a lawyer deprived him of such a fundamental right that it was without jurisdiction.¹⁶

Burns was decided in 1953 and contains four separate opinions,

¹¹ Sixth amendment right to counsel does not apply to courts-martial, 14 U.S.C.M.A. 199, 215-16, 33 C.M.R. 411, 427-28 (1963) (opinion of Kilday, J.); sixth amendment right to counsel does apply, but appointment of nonlawyer counsel satisfies, *id.* at 217, 33 C.M.R. at 429 (opinion of Quinn, C.J.); sixth amendment right to counsel applies, but the accused is not deprived of his rights because he chose to be defended by nonlawyer counsel, *id.* at 219, 33 C.M.R. at 431 (opinion of Ferguson, J.).

¹² The traditional Supreme Court view is that "to those in the military or naval service of the United States the military law is due process. The decision, therefore, of a military tribunal acting within the scope of its lawful powers cannot be reviewed or set aside by the courts." *Reaves v. Ainsworth*, 219 U.S. 296, 304 (1911). See also *United States ex rel. French v. Weeks*, 259 U.S. 326, 335 (1944); *United States ex rel. Innes v. Hiatt*, 141 F.2d 664 (3d Cir. 1944). This authority was acknowledged by the civilian court of appeals in the *Burns* case hereafter discussed. *Burns v. Lovett*, 202 F.2d 335, 341 (D.C. Cir. 1952). The decision in *Culp*, *supra* note 11, then, has the effect of a declaration by the Court of Military Appeals that denial of a lawyer in a special court-martial is *not* a denial of military due process.

¹³ *Ex parte Reed*, 100 U.S. 13 (1879).

¹⁴ 346 U.S. 137 (1953), *rehearing denied*, 346 U.S. 844 (1953).

¹⁵ This argument was prompted by the basic rule that the only ground for habeas corpus relief is lack of jurisdiction on the part of the sentencing court. Traditionally, inquiry may extend to whether the court was legally constituted, whether it had jurisdiction of the offense charged and of the person tried, and whether it imposed a sentence within the maximum limits. See AYCOCK & WURFEL, *MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE* 365 & n.201 (1955).

¹⁶ Brief for Petitioner, p. 2, Application of Stapley, 246 F. Supp. 316 (D. Utah 1965).

the rationale in none of which captured the assent of more than four justices.¹⁷ While Mr. Chief Justice Vinson's opinion *does* seem to say that military habeas corpus jurisdiction extends to due process denials, it is important in assessing its force in the principal case to keep in mind the facts and the Court's holding there. Petitioners were convicted of murder and rape and sentenced to death by a general court-martial.¹⁸ The sentence was approved by the Board of Review, the Court of Military Appeals and the President. In an application for habeas corpus petitioners alleged, *inter alia*, illegal detention, coerced confessions and denial of counsel and effective representation.¹⁹ The allegations concerned matters outside the original record of trial, but all were considered upon military appellate review. In the eyes of one judge of the civilian court of appeals these allegations would, if proved, have constituted a denial of civilian due process.²⁰ Yet the possibility of denial of due process and the imposition of the death sentences notwithstanding, the Supreme Court denied the writ holding that military habeas corpus jurisdiction included due process review only to determine whether the military judicial system gave fair consideration to each contention raised by the petitioners.²¹

Burns does not seem to be good authority upon which to base the decision in *Stapley*. That case did contain allegations of serious due process denial and involved death sentences, but the issue of absence of representation was not presented and the writ was

¹⁷ The judgment of the Court, announced by Mr. Chief Justice Vinson and in which Justices Reed, Burton and Clark joined, affirmed the lower court's dismissal of the application for habeas corpus on the ground that, having found that the military had given fair consideration to petitioners' claims, the civil court had performed its function. 346 U.S. at 144. Mr. Justice Jackson concurred in the judgment of the Court without opinion. Mr. Justice Minton concurred in the judgment, but on the ground that the sole function of the civil courts is to determine whether "the military court has jurisdiction, not whether it has committed error in the exercise of that jurisdiction." *Id.* at 147. Mr. Justice Douglas, joined by Mr. Justice Black, dissented on the ground that the civil courts had jurisdiction to review military decisions where the military had not fairly and conscientiously applied the Supreme Court's due process standards and that here the undisputed facts showed there had been a failure to properly apply those standards. *Id.* at 150-55. Mr. Justice Frankfurter in a separate opinion, neither concurring nor dissenting, felt that the case should be set down for reargument since issues of far-reaching importance were involved. *Id.* at 148-50.

¹⁸ *Id.* at 138.

¹⁹ *Burns v. Lovett*, 202 F.2d 335, 343, 346 (D.C. Cir. 1952).

²⁰ *Id.* at 348-53 (opinion of Bazelon, J., dissenting).

²¹ 346 U.S. at 144.

denied.²² Whatever view one takes of the subsequent expansion of due process and the right to counsel,²³ the facts in *Burns*, if not the holding, drastically restrict its applicability in *Stapley*.

The court in *Stapley* recognized that the decisional basis for petitioner's position was weak.²⁴ Despite this, the Supreme Court's concept of due process has expanded considerably since *Burns*. The rationale in *Stapley* seems to be that this factor, coupled with the increased speed and ease of transportation, the availability of military lawyers and, although not mentioned by the court, the increased effect of the draft in what is now a wartime situation, requires that an accused in these circumstances²⁵ be given the right to representation by a trained lawyer.²⁶ In essence the court's conclusion is that if the right to trained counsel is not the law, it should be. Mr. Chief Justice Warren has given apparent off-the-bench support to such a conclusion. In a speech at the New York University Law Center in 1962²⁷ he commented that on the basis of *Burns v. Wilson*²⁸ courts-martial proceedings could be challenged by habeas corpus and that "our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes."²⁹

It is appropriate here to note that Congress has before it eighteen proposed amendments to the Uniform Code of Military Justice designed further to protect the constitutional rights of servicemen.³⁰ These are the result of hearings and protracted research by the Senate Judiciary Committee's Subcommittee on Constitutional Rights.³¹ While the amendments would substantially increase the

²² There was no denial of counsel found in *Burns*, since the accused were represented by lawyers. In fact, the majority opinion of the court of appeals decision below states that the "accused were vigorously defended at all points." 202 F.2d 335, 347 (D.C. Cir. 1952).

²³ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

²⁴ "The precedential structure *within, or upon the periphery of which*, these conclusions have been reached . . . are indicated in the margin." 246 F. Supp. at 321-22 (footnotes omitted). (Emphasis added.)

²⁵ The circumstances were petitioner's youth, the frustration of his efforts to obtain qualified legal counsel and the fact that the charges involved claimed moral turpitude and risk of substantial incarceration. *Id.* at 318, 321.

²⁶ *Id.* at 321.

²⁷ Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. REV. 181 (1962). The address was delivered as the third James Madison Lecture on February 1, 1962.

²⁸ 346 U.S. 137 (1953).

²⁹ Warren, *op. cit. supra* note 27, at 188.

³⁰ S. 745-62, 89th Cong., 1st Sess. (1965).

³¹ Creech, *Congress Looks to the Serviceman's Rights*, 49 A.B.A.J. 1070 (1963).

rights of military personnel, including a requirement that the accused be represented by a lawyer before special courts-martial where a bad conduct discharge can be awarded,³² they would not provide a lawyer to the accused where no bad-conduct discharge can result.

Historically the premise upon which denial of certain constitutional rights to those in the military rests is that proper order and discipline cannot otherwise be achieved.³³ Nevertheless, a substantial argument can be made that the guarantee of a lawyer in special courts-martial would have little adverse affect on the maintenance of discipline.³⁴ One author in the field of military justice has proposed to the Constitutional Rights Subcommittee that its bill to abolish summary courts-martial be extended to include special courts. This would insure that each military criminal prosecution would be before a general court-martial with the due process protection there afforded, including the right to legally qualified counsel. The present provisions for non-judicial punishment for minor offenses would of course remain in force.³⁵

The problem raised in *Stapley* of providing legally trained counsel in courts-martial is far from settled and probably will not be resolved until the issue is presented to the Supreme Court. Subsequent to the principal case, the Federal District Court for the District of Kansas has denied an application for habeas corpus by a serviceman who did not request a lawyer until after trial by special court-martial. That court distinguished *Stapley* on the ground that it was limited to its facts.³⁶ The California District Court of Appeals for the Second District, however, has held that a national

³² S. 750, 89th Cong., 1st Sess. (1965).

³³ Comment, *Constitutional Rights of Servicemen Before Courts-Martial*, 64 COLUM. L. REV. 127, 131 (1964). This is the substance of "military exigency" to which the court alludes. 246 F. Supp. at 320. For opposing views as to a historical basis for applicability of the Bill of Rights to the military, see Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293 (1957); Wiener, *Courts-Martial and the Bill of Rights*, 72 HARV. L. REV. 1 (1958).

³⁴ The UCMJ already expressly prohibits self-incrimination, cruel and unusual punishments and command influence on courts-martial personnel. UCMJ arts. 31, 55, 37, 10 U.S.C. §§ 831, 855, 837 (1964). These guarantees have brought no discernible protest of damage to the military's capability to maintain discipline. In this setting, the addition of the right to a lawyer would hardly seem likely to raise difficulties.

³⁵ Statement of Professor Seymour W. Wurfel to the Subcommittee on Constitutional Rights, p. 3, January 25, 1966.

³⁶ *Le Ballister v. Warden, United States Disciplinary Barracks*, 247 F. Supp. 349 (D. Kan. 1965).

guardsman tried by a summary court-martial, where no counsel is provided, was entitled to object to such trial and to be tried by a special or general court-martial where counsel is provided.³⁷

Many servicemen tried by special courts-martial are young and are draftees. In civilian life, from which they have recently come, one's right to a lawyer has been upheld in a misdemeanor case in which a sentence of ninety days was imposed.³⁸ Considering these factors and the fact that a court-martial conviction can frequently have effects that continue in civilian life, perhaps the military should no longer be, in the words of the case here noted, "a constitutionally uninhabitable wasteland beyond even the scan of the Great Writ where the court is powerless to reach out a protective hand,"³⁹ at least as far as providing legal counsel is concerned.

PHILIP L. KELLOGG

Torts—Police Immunity—Civil Rights Arrests

The Fifth Circuit decision in *Pierson v. Ray*¹ illustrates the predicament of police officers, both at common law and under federal statute, with respect to liability for torts arising out of the official scope of their authority. In *Pierson* police officers arrested plaintiffs, participants in a civil rights pilgrimage, for disorderly conduct under a Mississippi statute² when they attempted to enter a coffee shop in a bus terminal. They were convicted at a trial before a police justice but on appeal to the county court, where there was a trial de novo, were found not guilty. They then brought suit against the arresting officers in federal district court alleging a common-law tort claim for false imprisonment and a statutory claim for depriva-

³⁷ Application of Palacio, 48 Cal. Rptr. 50 (Dist. Ct. App. 1965). In a special court-martial however, under the UCMJ, "counsel" need not be a lawyer. Hence this state case does not really shed light on the principal question of the right to legal counsel.

³⁸ Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965).

³⁹ 246 F. Supp. at 322.

¹ 352 F.2d 213 (5th Cir. 1965), *petition for cert. filed*, 34 U.S.L. WEEK 3306 (U.S. Mar. 8, 1966) (No. 1074).

² The statute in effect provides that whoever congregates in any public accommodation where a breach of the peace is threatened and fails to disperse when ordered to do so by any law enforcement officer is guilty of disorderly conduct. MISS. CODE ANN. § 2087.5 (Supp. 1964).