



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 55
Number 1 *Bicentennial Issue*

Article 19

9-1-1976

Military Law -- Right to Counsel at a Summary Court Martial: *Middendorf v. Henry*

Mark A. Sternlicht

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

Recommended Citation

Mark A. Sternlicht, *Military Law -- Right to Counsel at a Summary Court Martial: Middendorf v. Henry*, 55 N.C. L. REV. 300 (1976).
Available at: <http://scholarship.law.unc.edu/nclr/vol55/iss1/19>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

Military Law—Right to Counsel at a Summary Court Martial: *Middendorf v. Henry*.

In a 1972 case, *Argersinger v. Hamlin*,¹ the United States Supreme Court held "that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."² The Army and Air Force considered this decision to be applicable to the military and began to provide counsel to all defendants in summary courts-martial.³ The Judge Advocate General of the Navy, however, disagreed with this position,⁴ and the Navy continued the practice of denying appointed counsel to accused before summary courts.⁵ In *Middendorf v. Henry*⁶ a divided Supreme Court⁷ upheld

1. 407 U.S. 25 (1972). For analysis of *Argersinger* and its background, see Comment, *Misdemeanants' Right to Counsel: A Retrospective View of Argersinger v. Hamlin*, 9 GONZ. L. REV. 169 (1973); Note, *The Indigent's Expanding Right to Appointed Counsel—Argersinger v. Hamlin*, 37 ALB. L. REV. 383 (1973); Note, *Constitutional Law—Right to Counsel—Rationale of Gideon v. Wainwright Extended to All Criminal Prosecutions at Which Accused Is Deprived of His Liberty*, 41 FORDHAM L. REV. 722 (1973); Note, *Criminal Law—Sixth Amendment—Right to Court-Appointed Counsel for Indigents*, 47 TUL. L. REV. 446 (1973).

2. 407 U.S. at 37.

3. *Daigle v. Warner*, 490 F.2d 358, 366 (9th Cir. 1974). Courts-martial fall into three categories: general, special, and summary. Uniform Code of Military Justice art. 16, 10 U.S.C. § 816 (1970). Article 20 of the Military Code states:

Subject to section 817 of this title [article 17], summary courts-martial have jurisdiction to try persons subject to this chapter, except officers, cadets, aviation cadets, and midshipmen, for any noncapital offense made punishable by this chapter. No person with respect to whom summary courts-martial have jurisdiction may be brought to trial before a summary court-martial if he objects thereto. If objection to trial by summary court-martial is made by an accused, trial may be ordered by special or general court-martial as may be appropriate. Summary courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter except death, dismissal, dishonorable or bad-conduct discharge, confinement for more than one month, hard labor without confinement for more than 45 days, restriction to specified limits for more than two months, or forfeiture of more than two-thirds of one month's pay.

Id. § 820. Article 27 makes no provision for appointed counsel for the accused before a summary court. *Id.* § 827. Instead, it is the duty of the presiding officer to protect the interests of the accused as well as those of the Government. U.S. DEP'T OF DEFENSE, MANUAL FOR COURTS-MARTIAL ¶ 79a (rev. ed. 1969) [hereinafter cited as MCM]. "The functions of a summary court-martial is to exercise justice promptly for relatively minor offenses under a simple form of procedure." *Id.* Records of the proceeding and opportunity for appellate review are limited. See Uniform Code of Military Justice arts. 54(b), 60, 65, 69, 10 U.S.C. §§ 854(b), 860, 865, 869 (1970); MCM ¶ 79e.

4. *Henry v. Warner*, 357 F. Supp. 495, 499 (C.D. Cal. 1973).

5. See, e.g., *Middendorf v. Henry*, 96 S. Ct. 1281 (1976); *Betonie v. Sizemore*, 496 F.2d 1001 (5th Cir. 1974); *Daigle v. Warner*, 490 F.2d 358 (9th Cir. 1974); *United States v. Alderman*, 22 C.M.A. 298, 46 C.M.R. 298 (1973).

6. 96 S. Ct. 1281 (1976), *rev'g Henry v. Warner*, 493 F.2d 1231 (9th Cir. 1974).

the Navy's procedure, stating that "neither the Sixth nor the Fifth Amendments to the United States Constitution empower us to overturn the congressional determination that counsel is not required in summary courts-martial."⁸

Plaintiffs⁹ in *Middendorf* brought a class action suit¹⁰ "seeking habeas corpus (release from confinement), an injunction against future confinement resulting from uncounseled summary courts-martial convictions, and an order vacating the convictions of those previously convicted."¹¹ The district court found for plaintiffs,¹² but the Ninth Circuit Court of Appeals vacated this decision and remanded the case.¹³ Upon the petition of both parties, the Supreme Court granted certiorari¹⁴ and reversed the Ninth Circuit's decision.¹⁵

The Supreme Court analyzed the issues in *Middendorf* in terms of both the sixth and fifth amendments. As the standard for the application of the sixth amendment's right to counsel,¹⁶ the Court looked

The title of the case changed when J. William Middendorf replaced John E. Warner as Secretary of the Navy.

7. *Id.* Mr. Justice Rehnquist wrote the opinion for the Court, and Mr. Justice Blackmun joined Mr. Justice Powell in a concurring opinion. A separate dissent was filed by Mr. Justice Stewart, and Mr. Justice Brennan joined Mr. Justice Marshall in a lengthy dissent. Not taking part in the consideration or decision of the case was Mr. Justice Stevens.

8. *Id.* at 1294.

9. Plaintiffs were members of either the Navy or the Marine Corps. Most had been charged with unauthorized absence. Five men had been convicted at summary courts-martial, including two who had intervened in the suit pursuant to FED. R. CIV. P. 24(a)(2); three others had been ordered to stand trial. *Henry v. Warner*, 357 F. Supp. 495, 497-98 (C.D. Cal. 1973).

10. Because of the Court's decision, the issues of whether FED. R. CIV. P. 23 (concerning class actions) is applicable to petitions for habeas corpus and whether a district court's injunction is enforceable outside of the court's district remain unanswered. 96 S. Ct. at 1285.

11. *Id.*

12. The district court ordered released all Navy and Marine Corps personnel who had been or were to be tried by summary courts without counsel, enjoined the future convention of such courts, and vacated plaintiffs' convictions: 357 F. Supp. at 499.

13. 493 F.2d 1231 (9th Cir. 1974). *Daigle v. Warner*, 490 F.2d 358 (9th Cir. 1973), held that absent military exigencies:

[C]ounsel must be appointed for the accused before a summary court-martial only where the accused makes a request based on a timely and colorable claim (1) that he has a defense, or (2) that there are mitigating circumstances, and the assistance of counsel is necessary in order adequately to present the defense or mitigating circumstances.

Id. at 365. See text accompanying notes 57-71 *infra*.

14. 419 U.S. 895 (1974).

15. 96 S. Ct. at 1281.

16. The relevant portion of the sixth amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

to *Argersinger v. Hamlin*¹⁷ and drew analogies between summary courts-martial and certain civilian proceedings held not to require counsel under the sixth amendment.¹⁸ Noting from these instances that a proceeding that results in confinement is not automatically classified as a criminal prosecution,¹⁹ the Court then emphasized "the fact that a summary court-martial occurs in the military community, rather than the civilian community."²⁰ The majority looked at three factors:²¹ the type of offense generally adjudicated at summary court-martial,²² the limited consequences of the penalties assessed for these offenses,²³ and the non-adversary nature of the summary court-martial.²⁴ A combination of these factors and "the distinctive nature of military life and discipline"²⁵ led to the Court's decision that the sixth amendment's requirement of counsel is inapplicable to summary courts-martial because such courts are distinguished "from the civilian misdemeanor prosecution upon which *Argersinger* focused."²⁶

17. 407 U.S. 25 (1972). See text accompanying note 2 *supra* for the holding in that case.

18. See 96 S. Ct. at 1287-89; *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (probation revocation proceeding not criminal proceeding); *In re Gault*, 387 U.S. 1 (1967) (juvenile hearing that could result in confinement not criminal proceeding). Although the sixth amendment did not apply in *Gagnon*, the Court did recognize that, in certain cases, due process "will require that the State provide at its expense counsel for indigent probationers or parolees." 411 U.S. at 790. Similarly, in *Gault*, the Court held that due process requires counsel at a juvenile hearing that can assess confinement. 387 U.S. at 34-42.

19. 96 S. Ct. at 1288-89.

20. *Id.* at 1289.

21. Justices Marshall and Brennan dissented strongly concerning this analysis. See 96 S. Ct. at 1297-1304.

22. The Court pointed out: "Much of the conduct proscribed by the military is not 'criminal' conduct in the civilian sense of the word." 96 S. Ct. at 1289 (citing *Parker v. Levy*, 417 U.S. 733, 749-51 (1974)). Most of the plaintiffs in *Middendorf* were charged with "unauthorized absence," in violation of the Uniform Code of Military Justice art. 86, 10 U.S.C. § 886 (1970), "which has no common-law counterpart and which carries little popular opprobrium." 96 S. Ct. at 1289. Furthermore, the Court felt that conviction of such an offense "would likely have no consequences for the accused beyond the immediate punishment meted out by the military," whereas conviction for certain misdemeanors in civilian courts could connote "bad character." *Id.*

23. The Court's regard of this factor was influenced by the limited scope of penalties imposable by summary courts. 96 S. Ct. at 1290. See note 3 *supra* for the text of the relevant section of the Uniform Code of Military Justice.

24. The Court believed that the presiding officer's role—"thoroughly and impartially [to] inquire into both sides of the matter and [to] insure that the interests of both the Government and the accused are safeguarded"—was further evidence of the distinction between a summary court-martial and a criminal prosecution. 96 S. Ct. at 1290-91 (quoting MCM, *supra* note 3, at 79a). See MCM, *supra* note 3, at 79d for a complete description of procedure at a summary court-martial.

25. 96 S. Ct. at 1291 n.19.

26. *Id.* at 1291.

Moving to the requirements of the fifth amendment, the Court observed that plaintiffs, who could suffer losses of liberty or property as a result of summary court conviction, were entitled to that amendment's guarantee of due process of law.²⁷ The extent of this guarantee, however, is limited by the interests of the military regime to which plaintiffs were subject.²⁸ In determining the scope of military necessity that would preclude the appointment of defense counsel at summary courts-martial, the Court minimized the precedential value of the Court of Military Appeals' contrary decision in *United States v. Alderman*²⁹ and decided that the need for such counsel was not "so extraordinarily weighty as to overcome"³⁰ the Court's necessary deference³¹ to "the congressional determination . . . that counsel should not be provided in summary courts-martial."³² The availability, at the accused's option, of an alternative forum³³ with counsel³⁴ was the final major element in the Court's decision, and the Court dismissed objections that the choice is unconstitutional because the alternative (a general or special court-martial) subjects the accused to the possibility of more severe penalties.³⁵

27. *Id.* The fifth amendment's due process provision is as follows: "No person shall . . . be deprived of life, liberty, or property without due process of law . . ." U.S. CONST. amend. V.

28. 96 S. Ct. at 1291. *Cf. Wolff v. McDonnell*, 418 U.S. 539, 556 (1974) (prisoners' due process rights are subject to restrictions necessitated by the nature of the regime to which they have been committed).

29. *See* 96 S. Ct. at 1291-92. *United States v. Alderman*, 22 C.M.A. 298, 46 C.M.R. 298 (1973), held that *Argersinger* is applicable to the military and requires counsel at summary courts-martial. Judge Quinn wrote that *Argersinger* applied to military courts just as it did to civilian courts. *Id.* at 300, C.M.R. at 300. Judge Duncan, concurring in part, applied *Argersinger* to the military only after he found no convincing evidence of military necessity that would preclude such application. *Id.* at 303, C.M.R. at 303. In disagreement with both of these views, Chief Judge Darden dissented. *Id.* at 307-08, C.M.R. at 307-08. Because only Judge Duncan dealt with the issue of military necessity and Chief Judge Darden opposed his analysis, the majority in *Middendorf* felt that the issue was not concluded. 96 S. Ct. at 1292.

30. 96 S. Ct. at 1292.

31. The Court felt obliged to defer to Congress' determination because under the Constitution, "The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces." U.S. CONST. art. I, § 8, cl. 14.

32. 96 S. Ct. at 1291. The Court found that provision of counsel at summary courts would "turn a brief, informal hearing . . . into an attenuated proceeding which consumes the resources of the military to a degree which Congress could properly have felt to be beyond what is warranted . . ." *Id.* at 1292.

33. Uniform Code of Military Justice art. 20, 10 U.S.C. § 820 (1970). *See* note 3 *supra* for the text of this section.

34. Uniform Code of Military Justice art. 27, 10 U.S.C. § 827 (1970).

35. 96 S. Ct. at 1293-94. The Court analogized this choice to decisions faced by defendants in civilian criminal courts. *Id.* *See* Uniform Code of Military Justice arts.

In order to gain a complete understanding of *Middendorf*, it is necessary to consider previous congressional and judicial treatment of the summary court-martial. Congress has twice refused to abolish the summary court.³⁶ Instead, in 1956, Congress provided that a defendant could refuse trial before a summary court unless he had previously rejected nonjudicial punishment.³⁷ In 1968, on the second occasion, a compromise between opponents and proponents of summary courts broadened this right of refusal by eliminating the exception clause.³⁸ At this time, before the Supreme Court's decision in *Argersinger*, civilian defendants subject to less than six months confinement did not enjoy the right to appointed counsel.³⁹ Thus, it is highly improbable that Congress' decisions to preserve the summary court were based upon a determination that the demands of military necessity bar the appointment of defense counsel in summary courts-martial.⁴⁰ Indeed, none of the courts that considered the issue prior to *Middendorf* found any evidence of such a determination.⁴¹

Before the Supreme Court's decision in *Middendorf*, three other cases had reached either a circuit court of appeals or the Court of Military Appeals⁴² with the question of *Argersinger*'s applicability to the military justice system.⁴³ In *Betonie v. Sizemore*,⁴⁴ the Fifth Circuit accepted *Argersinger* as establishing "the framework for Sixth Amendment analysis of military proceedings."⁴⁵ The *Betonie* court found the Army and Air Force acceptance of *Argersinger*⁴⁶ "[p]articularly significant."⁴⁷ Furthermore, the opinion rejected the Navy's attempts to distinguish military from civilian criminal justice, concluding that "both the

18-19, 10 U.S.C. §§ 818-819 (1970) for penalties imposable by general and special courts-martial.

36. 96 S. Ct. at 1292 n.21.

37. *Id.*

38. *Id.*

39. *Id.* at 1303 (Marshall & Brennan, JJ., dissenting).

40. *Id.*

41. See text accompanying notes 42-69 *infra*.

42. The decisions of the Court of Military Appeals are final. Uniform Code of Military Justice art. 76, 10 U.S.C. § 876 (1970).

43. *Betonie v. Sizemore*, 496 F.2d 1001 (5th Cir. 1974); *Daigle v. Warner*, 490 F.2d 358 (9th Cir. 1974); *United States v. Alderman*, 22 C.M.A. 298, 46 C.M.R. 298 (1973). All of these cases arose out of the same basic fact pattern: enlisted members of the Navy and Marine Corps appealed convictions imposed in summary courts-martial at which the men were denied the assistance of appointed counsel.

44. 496 F.2d 1001 (5th Cir. 1974). *

45. *Id.* at 1007.

46. See text accompanying note 3 *supra*.

47. 496 F.2d at 1007.

Fifth and Sixth Amendments require counsel in any court-martial proceeding in which incarceration is to be imposed as a punishment."⁴⁸ The Navy's contention that the multiple functions of the summary court officer fulfill the requirements of the right to counsel was also rejected as "unconvincing,"⁴⁹ for as the court noted, "The potential conflicts of interest . . . are legion."⁵⁰

In *United States v. Alderman*,⁵¹ the Court of Military Appeals reached a decision quite similar to the one in *Betonie*. *Argersinger* was held applicable to the military by Judge Quinn⁵² on the basis of the court's decision in *United States v. Tempia*⁵³ and by Judge Duncan because he found no evidence of military necessity to preclude such application.⁵⁴ The voluntary acceptance of *Argersinger* by the Army and Air Force also impressed Judge Duncan.⁵⁵ Additionally, Judge Quinn noted other extensions of the right to counsel by the military to situations not mentioned in the Uniform Code of Military Justice.⁵⁶

In *Daigle v. Warner*⁵⁷ the Ninth Circuit used an historical approach to determine that the sixth amendment, as applied in *Argersinger*, was inapplicable to summary courts-martial.⁵⁸ This approach relied on the asserted intentions of the framers of the Bill of Rights.⁵⁹ The court noted that courts-martial are required to afford an accused due process of law under the fifth amendment.⁶⁰ Then the court

48. *Id.* at 1008. The court relied on *Argersinger's* rule that prohibits the imposition of potentially severe punishments unless the accused has the assistance of counsel. *Id.*

49. *Id.*

50. *Id.*

51. 22 C.M.A. 298, 46 C.M.R. 298 (1973).

52. *Id.* at 299, C.M.R. at 299.

53. 16 C.M.A. 629, 37 C.M.R. 249 (1967).

54. 22 C.M.A. at 303, 46 C.M.R. at 303 (Duncan, J., concurring in part and dissenting in part).

55. *Id.*

56. *Id.* at 300, C.M.R. at 300.

57. 490 F.2d 358 (9th Cir. 1974), *rev'g* 348 F. Supp. 1074 (D. Hawaii 1972). The district court acknowledged the special attributes of military justice, but held that these attributes "cannot justify denial of basic constitutional rights, when both these rights and the needs of the military can be successfully accommodated. By applying *Argersinger* to summary courts-martial, this court is not burdening the military with an inflexible and impossible requirement." 348 F. Supp. at 1080.

58. 490 F.2d at 363-64.

59. The court accepted Colonel Wiener's analysis. *Id.* at 364 (citing Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1 (1958)). For another historical approach, see Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293 (1957), which states that the framers did intend the sixth amendment's right to counsel to apply to the military.

60. 490 F.2d at 364.

looked to *Gagnon v. Scarpelli*⁶¹ and *In re Gault*⁶² as guides to determine the extent to which due process requires "counsel in situations where confinement may be imposed but the Sixth Amendment does not apply."⁶³ Finding the proceeding in *Gagnon* more analogous to the summary court than was the proceeding in *Gault*, the court held that a modified due process right to counsel would be sufficient for summary courts-martial.⁶⁴ This limited due process right seems to be a retreat from the courts' generally expanding notions of the right to counsel.⁶⁵ As in *Alderman*,⁶⁶ however, the Ninth Circuit found "scant support" for the Navy's argument that military necessity warrants the denial of counsel to accused before summary courts.⁶⁷ Again, the practice of the Army and Air Force was a factor in this decision.⁶⁸ Furthermore, the court felt that the Navy, by allowing private retained counsel to appear in summary courts-martial, undermined any contention of possible harm to discipline that might result from the requirement of counsel.⁶⁹

Although the results of *Betonie*, *Alderman*, and *Daigle* reveal a conflict,⁷⁰ the common findings of the various courts are of great significance, especially in view of the Supreme Court's decision in *Middendorf*, a case that reached that Court when the Ninth Circuit reaffirmed *Daigle* in a half-page opinion.⁷¹ None of the lower courts found evidence of military necessity that would warrant the denial of the right to appointed counsel in summary courts-martial.⁷² In *Middendorf*, however, the Supreme Court relied upon military necessity, as determined by Congress, as an important element in its due process analy-

61. 411 U.S. 778 (1973). See note 18 *supra*.

62. 387 U.S. 1 (1967).

63. 490 F.2d at 364.

64. *Id.* at 365-66. See note 13 *supra*.

65. See, e.g., *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Powell v. Alabama*, 287 U.S. 45 (1932); *Betonie v. Sizemore*, 496 F.2d 1001 (5th Cir. 1974); *United States v. Alderman*, 22 C.M.A. 298, 46 C.M.R. 298 (1973).

66. 22 C.M.A. 298, 46 C.M.R. 298 (1973).

67. 490 F.2d at 366. See text accompanying note 54 *supra*.

68. 490 F.2d at 366. See text accompanying notes 46-47 & 55 *supra*.

69. 490 F.2d at 366.

70. The Fifth Circuit and the Court of Military Appeals applied *Argersinger* to all summary courts-martial. The Ninth Circuit's historical analysis found both *Argersinger* and the sixth amendment inapplicable to summary courts, but the court applied the fifth amendment guarantee of due process to create a limited right to counsel in summary courts-martial. See text accompanying notes 42-69 *supra*.

71. *Henry v. Warner*, 493 F.2d 1231 (9th Cir.), cert. granted *sub nom.* *Middendorf v. Henry*, 419 U.S. 895 (1974).

sis.⁷³ In addition to being totally inconsistent with the earlier cases, this reliance was based on congressional actions⁷⁴ that gave "no indication that Congress ever made a clear determination that 'military necessity' precludes applying the Sixth Amendment's right to counsel to summary court-martial proceedings."⁷⁵ Furthermore, the Court's acceptance of the military necessity argument shows complete disregard for the obvious meaning of the use of appointed defense counsel at summary courts by the Army and Air Force. The acceptance likewise indicates an indifference to the implications that arise from the Navy's policy of allowing the use of private retained counsel at summary courts.⁷⁶ This approach to military necessity may well indicate the Court's willingness to accord "a grant of almost total deference to any Act of Congress dealing with the military."⁷⁷

Part of the Court's sixth amendment analysis⁷⁸ also suffers from an evidentiary deficiency. In particular, the Court's belief—that a summary court conviction of a minor offense "would likely have no consequences for the accused beyond the immediate punishment meted out by the military"⁷⁹—completely ignores the possible effects of the escalator clauses contained in the Table of Maximum Punishments of the Manual for Courts-Martial.⁸⁰ These provisions can detonate the "[e]xplosive [q]uality"⁸¹ of a summary court conviction by empowering a later court-martial to impose considerably greater penalties than those ordinarily authorized.⁸² The Marshall dissent raised this point,⁸³ but the majority ignored it.

After an attack on the "flimsy factual basis" of some of the majority's observations, the Marshall dissent challenged the applicability of two of the factors considered by the majority in its discussion of the sixth amendment issue.⁸⁴ *Argersinger's* holding based the right to

72. See text accompanying notes 46-48, 54, 67-69 *supra*.

73. See notes 31-32 and text accompanying notes 29-32 *supra*.

74. See text accompanying notes 36-38 *supra*.

75. 96 S. Ct. at 1303 (Marshall & Brennan, JJ., dissenting). See text accompanying notes 36-40 *supra*.

76. See text accompanying note 69 *supra*.

77. 96 S. Ct. at 1304 (Marshall & Brennan, JJ., dissenting).

78. See text accompanying notes 16-26 *supra*.

79. 96 S. Ct. at 1289.

80. MCM, *supra* note 3, at ¶ 127c, § B.

81. Feld, *The Court-Martial Sentence: Fair or Foul?*, 39 VA. L. REV. 319, 322 (1953).

82. See MCM, *supra* note 3, at ¶ 127c, § B.

83. 96 S. Ct. at 1299 (Marshall & Brennan, JJ., dissenting).

84. *Id.*

counsel on the possibility of confinement, without regard for the trivial nature of the offense or the absence of consequences collateral to the conviction.⁸⁵ The majority's consideration of the latter two factors,⁸⁶ as the dissent points out, therefore conflicts with *Argersinger*.⁸⁷

Also troublesome is the Court's implied contention that the non-adversary nature of the summary court, as exemplified by the multiple roles of the presiding officer, makes defense counsel unnecessary.⁸⁸ *Powell v. Alabama*⁸⁹ rejected the notion that a judge can serve effectively as defense counsel, citing his inability to "investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional."⁹⁰ It seems extremely unlikely that the presiding officer at a summary court-martial, who is a layman,⁹¹ could perform these tasks in such a way that the rights of the accused would be adequately protected.

The practical effect of *Middendorf* is likely to be the preservation of the summary court-martial. Prior to *Middendorf*, many military lawyers expected the *Alderman*⁹² decision to supply such strong evidence of the general dissatisfaction with summary courts-martial that Congress would abolish the institution.⁹³ Now, with *Middendorf* upholding the constitutionality of the summary court proceeding, abolition seems unlikely. It is presumable, furthermore, that the Army and Air Force will abandon their practice of providing defense counsel at summary courts-martial. If this occurs, *Middendorf* will have denied a prospective right to some and eradicated a realized right of others.

The preservation of summary courts-martial is undesirable because the weaknesses of the proceeding are frequently accentuated by the absence of defense counsel. For example, the limited record of a summary court proceeding can effectively immunize an error of the

85. *Id.* (citing *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972)).

86. See notes 22-23 and text accompanying notes 21-26 *supra*.

87. See 96 S. Ct. at 1299 (Marshall & Brennan, JJ., dissenting).

88. See *id.* at 1290-91; note 24 *supra*.

89. 287 U.S. 45 (1932).

90. *Id.* at 61, quoted in part in 96 S. Ct. at 1299-1301 (Marshall & Brennan, JJ., dissenting).

91. Lermack, *Summary and Special Courts-Martial: An Empirical Investigation*, 18 Sr. Louis U.L.J. 329, 354 (1974).

92. 22 C.M.A. 298, 46 C.M.R. 298 (1973). See text accompanying notes 51-56 *supra*.

93. See Lermack, *supra* note 91, at 374 n.183, 378.

summary court from review.⁹⁴ "Counsel can seek to avoid the disadvantage of the sparse record by requesting a verbatim transcript or by taking detailed notes of the proceeding. Where the record is complete, obviously the reviewer can more effectively assess the potential errors of the summary court."⁹⁵ In like manner, defense counsel can more effectively protect the accused's ability to prepare his defense in the face of the pressing demands of time that often characterize summary court proceedings.⁹⁶

The negative image engendered by the summary court-martial is another disadvantage of the institution's continued existence.⁹⁷ Summary proceedings "are likely to contribute to the atmosphere of cynicism surrounding the entire legal process."⁹⁸ If *Middendorf* has the expected effect of causing the Army and Air Force to discontinue the appointment of defense counsel in summary courts-martial, the Supreme Court itself will have contributed to whatever additional loss of faith in the law results.

The Court's heavy reliance on the distinct qualities of the summary court-martial's military environment⁹⁹ minimizes the likelihood that the civilian community will feel *Middendorf's* significance as a retreat from the principles established in *Argersinger* and its antecedents.¹⁰⁰ Nevertheless, this retreat may signal a trend for the military. By failing to rule on the Navy's practice of allowing private retained counsel at summary courts-martial, the Court left open the possibility of a suit based on concepts of equal protection.¹⁰¹ It is improbable that the Court would accept such an argument without a change in the direction taken in *Middendorf*.

It is unfortunate that the Court departed from the holding of *Argersinger* to preserve the summary court-martial, in which "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

94. Fidell, *The Summary Court-Martial: A Proposal*, 8 HARV. J. LEGIS. 571, 586 (1971).

95. Case Comment, *Right to Counsel at a Summary Court-Martial—Daigle v. Warner*, 7 SUFFOLK U.L. REV. 719, 727 (1973) (citing Fidell, *supra* note 94, at 592).

96. See Lermack, *supra* note 91, at 354-55.

97. See *id.* at 373, 378.

98. *Id.* at 373.

99. See text accompanying notes 20-26 & 28 *supra*.

100. See cases cited in note 65 *supra*.

101. Cf. 96 S. Ct. at 1302 (Marshall & Brennan, JJ., dissenting) (because private retained counsel is permitted, only defendants who cannot afford to pay will be denied counsel).

...¹⁰² The rule that, absent a waiver, "no person may be imprisoned . . . unless he was represented by counsel at his trial"¹⁰³ could apply to the military without undue disruption of its functions. In reaching a contrary conclusion, the *Middendorf* Court over-estimated the needs of the military and under-estimated the needs of the individual.

MARK A. STERNLICHT

Mortgages—Use of Due on Sale Clause by a Lender Is Not a Restraint on Alienation in North Carolina

During the last seven centuries of judicial history, courts have construed restraints on alienation to be contrary to public policy and therefore void.¹ The North Carolina Supreme Court has followed this tradition by consistently holding that conditions that restrain the alienation of legal² and equitable³ estates are void. In *Crockett v. First Federal Savings & Loan Association*,⁴ however, the court altered its position. In departing from the traditional restraints on alienation doctrine, the court developed a new test and sustained the use of a due on sale clause⁵ as a valid restraint on alienation.⁶ This result was reached de-

102. Note, *Military Law—Courts-Martial—Recent Cases Defining the Right to Counsel Before Summary Courts-Martial*, 1975 B.Y.U.L. REV. 285, 292-93.

103. 407 U.S. at 37.

1. The Statute of Quia Emptores, 18 Edw. 1, cc. 1-3, was enacted in 1290. Under this statute the doctrine of subinfeudation was limited by prohibition of feudal tenures in a fee simple estate. L. SIMES & A. SMITH, *THE LAW OF FUTURE INTERESTS* § 15 (2d ed. 1956). This statute laid the basis for many of the common law doctrines dealing with restraints on alienation.

2. *Brooks v. Griffin*, 177 N.C. 7, 97 S.E. 730 (1919); *Latimer v. Waddell*, 119 N.C. 370, 26 S.E. 122 (1896).

3. E.g., *Lee v. Oates*, 171 N.C. 717, 88 S.E. 889 (1916).

4. 289 N.C. 620, 224 S.E.2d 580 (1976).

5. Mortgages that contain a due on sale clause permit the lender to withhold consent to possible transfers by the mortgagor. A mortgagor who seeks to alienate his property without the lender's consent faces the possible exercise of the clause by the lender. An exercise will force acceleration of the existing note and all principal will be due on the note at the time of sale. The clause used in *Crockett* reads:

[O]r if property herein conveyed is transferred without the written assent of the Association, then in all or any of said events the full principal sum with all unpaid interest thereon shall at the option of Association, its successors or assigns, become at once due and payable without further notice and irrespective of the date of maturity expressed in said note.

Id. at 622, 224 S.E.2d at 582.

6. *Id.* at 630-31, 224 S.E.2d at 587.