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The Right to Counsel at Summary Courts-Martial: COMA at the Crossroads

In deciding *United States v. Redmond*[1] the United States Court of Military Appeals (COMA) will make a major determination concerning the right to counsel at summary courts-martial. Not only will this decision clarify the position of the summary court-martial in the military justice system,[2] it will also indicate COMA's perception of its own role in that system. This note will examine the options available to COMA and recommend a course of action for it to follow.

UNITED STATES V. ALDERMAN: RIGHT TO COUNSEL AT SUMMARY COURTS-MARTIAL

In 1973 the Court of Military Appeals held, in *United States v. Alderman*,[3] that unless an accused had been represented by counsel at a summary court-martial which resulted in conviction and confinement, evidence of his conviction was inadmissible at a subsequent special court-martial for the purpose of consideration in sentencing.[4] In March 1976 the

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[1]No. NCM 76-0006 (U.S. Navy C.M.R. 1976), *appeal docketed*, No. 32,049 (C.M.A. March 30, 1976).

[2]The constitutional position of the summary court-martial was drastically altered by a recent Supreme Court decision which held that summary courts-martial are not criminal prosecutions within the meaning of the sixth amendment. Middendorf v. Henry, 425 U.S. 25 (1976). Summary courts-martial are provided for by the Uniform Code of Military Justice (UCMJ) art. 20, 10 U.S.C. § 820 (1970). The jurisdiction of summary courts-martial is limited to enlisted personnel. The sentence which may be imposed is limited to one month's confinement, forty-five days' hard labor without confinement, two months' restriction, or forfeiture of two-thirds of one month's pay. An accused may, by statute, refuse trial by summary court. In that event, charges will be either dropped or referred to a special or general court-martial. *Id.*

[3]United States v. Alderman, 22 C.M.A. 298, 46 C.M.R. 298 (1973). Judge Quinn, for the majority, carefully limited the holding to the "admissibility of evidence of a previous conviction obtained at a trial at which the accused was improperly denied the right to counsel." 22 C.M.A. at 302, 46 C.M.R. at 302. He noted that although the decision was based on the precept of Argersinger v. Hamlin, 407 U.S. 25 (1972), that a sentence to imprisonment for even a brief period of time without representation by counsel was invalid, *Alderman* presented a narrower question than did *Argersinger*. Judge Duncan, concurring and dissenting, would have expanded the holding of *Alderman* to preclude the use of all summary court-martial convictions, since excluding only those at which confinement had been imposed would produce a "bizarre result." 22 C.M.A. at 303-06, 46 C.M.R. at 303-06. In response to the *Argersinger* and *Alderman* decisions, the Navy and the Army promulgated regulations requiring counsel at summary courts-martial before confinement could be imposed. SECNAV 082237Z152, June 8, 1973; D.A. Msg P101203Z, July 10, 1972. The Air Force changed its regulations to require counsel at all summary courts-martial. A.F. Military Justice Guide, A.F. Man. 111-1, ¶ 3-6c, July 2, 1973.

[4]The maximum punishment that can normally be imposed at a special court-martial is six months' confinement, three months' hard labor without confinement, or partial forfeiture

United States Supreme Court, in *Middendorf v. Henry*,[5] held that the sixth amendment did not mandate a right to counsel at summary courts-martial, nor did the due process clause of the fifth amendment require the provision of counsel,[6] in light of congressional intent and military necessity.[7]

COMA must now reappraise its decision in *Alderman*[8] in the context of the Supreme Court's decision in *Middendorf*.[9] In facing the same issue in the pending *Redmond*[10] case as it did in *Alderman*,[11] COMA has several choices open to it: it may overrule *Alderman*; it may modify *Alderman* in the context of *Middendorf*, taking into account the collateral effects which summary court-martial convictions have in other areas of military law;[12] or as part of its continuing review of the military justice system,[13] it may

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of pay for six months. UCMJ art. 19, 10 U.S.C. § 819 (1970). An escalator clause, however, provides that a bad-conduct discharge may be adjudged on proof of two or more convictions within the previous three years. Manual for Courts-Martial ¶ 127*c* (Table of Maximum Punishments, Section B), United States, 1969 (rev.) [hereinafter cited as MCM].

Alderman had only two prior convictions—one by summary court-martial and one by special court-martial. While UCMJ art. 27, 10 U.S.C. § 827 (1970), provided the accused the right to counsel at the prior special court-martial, no such right existed with respect to the prior summary court-martial. Since Alderman received the bad-conduct discharge at the special court-martial proceedings from which he appealed, the inference was clear that his prior summary court-martial conviction had activated the escalator clause of MCM ¶ 127*c*, 1969 (rev.).

[5]Middendorf v. Henry, 425 U.S. 25 (1976), *rev'g* Henry v. Warner, 493 F.2d 1231 (9th Cir. 1974). The suit was originally brought in federal court by enlisted members of the Marine Corps as a class action for habeas corpus relief, challenging military authority to try them at summary courts-martial without providing counsel. 357 F. Supp. 495 (C.D. Cal. 1973).

[6]Where there is a right to counsel in the military, it is provided without regard to indigency. UCMJ art. 27, 10 U.S.C. § 827 (1970).

[7]By accepting without examination the Navy's argument that military necessity required that a summary court-martial be a brief disciplinary hearing, and then assuming that military necessity was the reason for congressional failure to provide for counsel at summary courts-martial, the Supreme Court has created the anomaly of Congress being the final arbiter of constitutional questions for the military. Justice Rehnquist's majority opinion also suggests that budgetary concerns are at the heart of the argument, thus equating money with military necessity. Middendorf v. Henry, 425 U.S. 25, 45 (1976). The military necessity rationale is undercut by the accused's right to refuse trial by summary court-martial, *see* note 2 *supra*, since counsel would be provided under UCMJ art. 27, 10 U.S.C. § 827 (1970) at a special or general court-martial. 425 U.S. at 71 n.24 (Marshall, J., dissenting).

[8]22 C.M.A. 298, 46 C.M.R. 298 (1973).

[9]425 U.S. 25 (1976).

[10]No. 32,049 (C.M.A. March 30, 1976). Redmond was convicted by a special court-martial at which the military judge had received evidence of two prior counsel-less convictions at summary court-martial and one imposition of nonjudicial punishment under UCMJ art. 15, 10 U.S.C. § 815 (1970). On appeal Redmond has challenged the validity of his sentence.

[11]There is no direct review of summary courts-martial since they may not impose punitive discharges or confinement for more than one year. UCMJ arts. 66(b), 67(b), 10 U.S.C. §§ 866(b), 867(b) (1970). In addition to the question which was certified to COMA by the Navy Judge Advocate General pursuant to art. 67(b) (2) concerning *Alderman's* continued validity, COMA itself ordered briefs in the *Redmond* case on the additional question whether "the introduction of counsel-less non-criminal adjudications of guilt or culpability in a criminal trial by court-martial is permissible." C.M.A. Daily Journal, No. 76-72 (April 14, 1976).

[12]The Supreme Court's *Middendorf* opinion did not consider this issue at any length, which indicates that the Court may not have had sufficient information on which to base a judgment. *See* 425 U.S. 25, 39-40 (1976).

[13]*See* notes 64-91 *infra* & text accompanying.

expand the holding in *Alderman* to include a right to counsel at all summary courts-martial.[14]

Overruling Alderman

COMA may simply overrule *Alderman* and declare that convictions obtained at summary courts-martial without counsel are valid. It would be unfortunate if COMA chose this course of action. While the Supreme Court's decision in *Middendorf* deserves consideration,[15] there are several reasons why it should not be necessarily controlling. First, the issues presented in *Redmond* differ from those in *Middendorf*.[16] *Middendorf* was concerned with the validity of a counsel-less conviction at a summary court-martial; the Supreme Court did not seriously consider the collateral effects of such a conviction at subsequent special or general courts-martial.[17] In addition to the effects of such convictions within the court-martial system, the consequences of these convictions follow the enlisted serviceman throughout his military career and extend into civilian life. A record of summary court-martial convictions may affect chances of military promotion,[18] contribute to a bad-conduct discharge at a subsequent special court-martial,[19] trigger an administrative discharge from the service,[20] and keep a former serviceman from obtaining a job in civilian life.[21] In view of

[14]Since the Supreme Court, in *Middendorf*, has rejected confinement as triggering the right to counsel, *see* 425 U.S. 25, 56 (1976) (Marshall, J., dissenting), COMA may now make a decision free of the conceptual difficulties which Argersinger v. Hamlin, 407 U.S. 25 (1972), caused the court in *Alderman*. See note 3 *supra*.

[15]The Court of Military Appeals has consistently held that it follows Supreme Court decisions. *E.g.*, United States v. Alderman, 22 C.M.A. 298, 299, 46 C.M.R. 298, 299 (1973); United States v. Tempia, 16 C.M.A. 629, 641, 37 C.M.R. 249, 261 (1967). However, these statements have always followed an expansive construction of constitutional rights by the Supreme Court. In *Middendorf* the Supreme Court took a restrictive view of the applicability of the Bill of Rights to the military. *See* Willis, *The Constitution, the United States Court of Military Appeals and the Future*, 57 MIL. L. REV. 27, 67 (1972).

[16]*See* notes 5, 10-11 *supra*. Plaintiffs in *Middendorf* were challenging their convictions at summary courts-martial without counsel and made no claim of any future consequences. In addition, the Supreme Court did not receive sufficient information on which to base a judgment on collateral effects. The Government, for example, claimed that the collateral effects of summary courts-martial were minimal but cited little authority for its assertion. Brief for Federal Parties at 39-40, Middendorf v. Henry, 425 U.S. 25 (1976).

[17]*See* notes 33-63 *infra* & text accompanying.

[18]*Hearings on S. 260 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 2d Sess. 838 (1962) [hereinafter cited as *1962 Hearings*]: "A NCO may survive one summary court-martial without reduction being effected, but it is unlikely that, with one conviction on his record, he will survive a second trial and retain his status."

[19]MCM ¶ 127*c*, 1969 (rev.). *See* note 4 *supra*.

[20]A summary court-martial can be used to justify an undesirable or general discharge for "frequent involvement of a discreditable nature with civil and military authorities." Dept. of Defense Directive 1332.14, ¶ VII, I, 1. *See* Jones, *The Gravity of Administrative Discharges: A Legal and Empirical Evaluation*, 59 MIL. L. REV. 1 (1973); Comment, *Punishment of Enlisted Personnel Outside the UCMJ: A Statutory and Equal Protection Analysis of Military Discharge Certificates*, 9 HARV. C.R.-C.L. L. REV. 227 (1974).

[21]*See 1962 Hearings, supra* note 18, at 838. The discharges to which summary courts-martial contribute also affect civilian employment. According to former Chief Judge Quinn,

the results that flow from such convictions, it is difficult to accept the statement of the Court in *Middendorf* that summary court-martial convictions "have no consequences for the accused beyond the immediate punishment meted out . . . ."[22]

Second, the Court of Military Appeals has expertise in military law and the military system in general, while the Supreme Court does not.[23] COMA has dealt with the claim of military necessity frequently,[24] understands it thoroughly, and, as a result, employs a balancing test which requires the proponent of the claim to bear the burden of persuasion before rights of the accused are swept aside.[25] COMA, by virtue of its knowledge of the military justice system as a whole, is able to view the effects of a summary court-martial from the newly modified perspective of a noncriminal

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civilian employers "will not give work to a man with an undesirable discharge. It is a very severe penalty." *Id.* at 188. Many civilian courts have recognized that any discharge less than honorable stigmatizes the former serviceman. *E.g.*, Van Bourg v. Nitze, 388 F.2d 557 (D.C. Cir. 1967); Bland v. Connally, 293 F.2d 852 (D.C. Cir. 1961); Stapp v. Resor, 314 F. Supp. 475 (S.D. N.Y. 1970); Glidden v. United States, 185 Ct. Cl. 515 (1966); Sofranoff v. United States, 165 Ct. Cl. 470 (1964). *See* Jones, *The Gravity of Administrative Discharges: A Legal and Empirical Evaluation*, 59 MIL. L. REV. 1, 15 & n.72 (1973); Brown, *The Results of Punitive Discharge*, 1961 JAG J. 13; Comment, *Punishment of Enlisted Personnel Outside the UCMJ: A Statutory and Equal Protection Analysis of Military Discharge Certificates*, 9 HARV. C.R.-C.L. L. REV. 227, 272 (1974).

[22]425 U.S. 25, 39 (1976).

[23]At least one Justice did not even know what a summary court-martial was and confused the military justice system of World War II with the current Uniform Code of Military Justice. Oral argument before the Supreme Court 7-12, Middendorf v. Henry, Nos. 74-175, 74-5176, Jan. 22, 1975. The Court did not understand the difference between confinement on the one hand and restriction and correctional custody on the other. *Id.* at 7-8. COMA has dealt at some length with these distinctions. *E.g.*, United States v. Alderman, 22 C.M.A. 298, 301-02, 46 C.M.R. 298, 301-02 (1973) (restriction); United States v. Shamel, 22 C.M.A. 361, 362, 47 C.M.R. 116, 117 (1973) (correctional custody).

[24]*E.g.*, United States v. Young, 24 C.M.A. 275, 51 C.M.R. 791 (1976) (military necessity justifies regulations governing hair length and style); United States v. Wolzok, 23 C.M.A. 492, 494, 50 C.M.R. 572, 574 (1975) (a crowded docket, evidence of a manpower shortage, insufficient reason for failure to comply with speedy trial rule); United States v. Quinones, 23 C.M.A. 457, 461, 50 C.M.R. 476, 480 (1975) (denial of accused's request for individual military counsel unsupported by claim of work week in excess of forty hours); United States v. Johnson, 22 C.M.A. 524, 48 C.M.R. 9 (1974) (claim of inadequate personnel, administrative convenience no excuse for failure to afford accused speedy trial). The issue of military necessity was found not persuasive in *Alderman*, in part because the Army and Air Force had voluntarily complied with *Argersinger* at summary courts-martial. Alderman, 22 C.M.A. at 303, 46 C.M.R. at 303.

[25]"[T]he burden of showing that military conditions require a different rule than that prevailing in the civilian community is upon the party arguing for a different rule." Courtney v. Williams, 24 C.M.A. 87, 89, 51 C.M.R. 260, 262 (1976); "[W]e have recognized the need for balancing the application of the constitutional protection against military needs." United States v. Alderman, 22 C.M.A. 298, 307, 46 C.M.R. 298, 307 (1972) (Darden, J., dissenting, arguing that military necessity precluded application of *Argersinger*). Other cases in which COMA has balanced military necessity against individual rights include United States v. Smith, 23 C.M.A. 542, 50 C.M.R. 713 (1975); United States v. Priest, 21 C.M.A. 564, 45 C.M.R. 338 (1972); United States v. Tempia, 16 C.M.A. 629, 37 C.M.R. 249 (1967); United States v. Wilson, 12 C.M.A. 165, 30 C.M.R. 165 (1961); United States v. Jacoby, 11 C.M.A. 428, 29 C.M.R. 244 (1960); United States v. Nation, 9 C.M.A. 724, 26 C.M.R. 504 (1958); United States v. Hilldebrandt, 8 C.M.A. 635, 25 C.M.R. 139 (1958).

characterization of summary courts[26] and to deal with such effects in this new context. Because of the conceptual problems which a noncriminal adjudication of guilt presents,[27] COMA would be well-advised to deal with the practical problems that will arise within the military justice system.[28] In contrast, the Supreme Court—because of its already crowded docket and the necessity to rely almost exclusively upon the parties to a case for its information on military justice—is ill-equipped to engage in this type of ongoing analysis.

Finally, the Supreme Court has given great deference in the past to judgments of the Court of Military Appeals.[29] COMA has been called the "Supreme Court" of the military[30] and is in a unique position to supervise the court-martial system as a whole. With its extensive knowledge of military law, and with the ruling in *Middendorf* that confinement is irrelevant,[31] COMA now has the opportunity to clear the theoretical muddle[32] of *Alderman* that prevented the Supreme Court from drawing on COMA for guidance.

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[26]*See* note 2 *supra.*

[27]*Compare* Brief for Appellant at 4-5 *with* Brief for American Civil Liberties Union Foundation and National Military Discharge Review Project as Amicus Curiae at 6-7, United States v. Redmond, No. 32,049 (C.M.A. March 30, 1976). Appellant argues that a summary court-martial is criminal in all respects save that of the right to counsel, while the Amicus Curiae contends that the *Middendorf* characterization of summary courts-martial as non-criminal applies to all aspects of the proceeding.

[28]*See* notes 33-63 *infra* & text accompanying.

[29]*See* Schlesinger v. Councilman, 420 U.S. 738, 758 (1975) (refers to "an integrated system of military courts and review procedures" and COMA's "thorough familiarity with military problems"); Noyd v. Bond, 395 U.S. 683, 695 (1969) (COMA is the "court to which Congress has provided primary responsibility for the supervision of military justice in this country"); Burns v. Wilson, 346 U.S. 137 (1953) (only in the absence of a "full and fair consideration" by COMA would the Supreme Court review claims of denial of constitutional due process).

[30]*E.g.*, Walker & Niebank, *The Court of Military Appeals—Its History, Organization and Operation*, 6 VAND. L. REV. 228, 230 (1953). Judge Quinn, discussing COMA's role, once said, "It was contemplated . . . that the Court would function as the 'Supreme Court' of the whole military justice system, which includes the summary court-martial which has no power to impose a sentence of the kind subject to review by the Court of Military Appeals, and that the decisions of the Court would be applied in all courts-martial." Quinn, *The United States Court of Military Appeals and Military Due Process*, 35 ST. JOHN'S L. REV. 225, 225 (1961) (citation omitted). *See* Willis, *The United States Court of Military Appeals: Its Origin, Operation and Future*, 55 MIL. L. REV. 39, 71 (1972). COMA has in several instances also referred to its position in the military justice system. Courtney v. Williams, 24 C.M.A. 87, 88 n.2, 51 C.M.R. 260, 261 n.2 (1976), *quoting* Gale v. United States, 17 C.M.A. 40, 43, 37 C.M.R. 304, 307 (1967) (COMA is "supreme civilian court" in the armed forces); United States v. Ambruster, 11 C.M.A. 596, 598, 29 C.M.R. 412, 414 (1960). Former Chief Justice Warren believed that the "establishment of a special court to review [due process] cases obviates, at least to some extent, the objection of lack of familiarity by the reviewing tribunal with the special problems of the military." Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. REV. 181, 190 (1962) (citation omitted).

[31]Middendorf v. Henry, 425 U.S. 25, 33-39 (1976).

[32]*See* note 3 *supra*; Middendorf v. Henry, 425 U.S. 25, 43-44 (1976).

Modification of Alderman: Collateral Effects of Summary Court-Martial Convictions

COMA's second option is to restrict the use at a subsequent trial of summary court-martial convictions obtained without counsel. *Alderman* held that the use at a later trial of counsel-less summary court convictions where confinement had been imposed was prohibited because *Argersinger v. Hamlin*[33] mandated the prohibition.[34] After *Middendorf*, that rationale is gone and in its place is the holding that summary courts-martial are not criminal prosecutions.[35] COMA must now examine the Manual for Courts-Martial in three important areas to determine whether its provisions comport with that holding.

Congress, in drafting the Uniform Code of Military Justice,[36] the promulgators of the Manual for Courts-Martial,[37] COMA[38] and commentators in the field of military law[39] had always assumed that summary courts-martial, as part of the court-martial system, were criminal in nature. Convictions obtained at summary courts-martial are used in the military to escalate punishment, aggravate sentences at subsequent courts-martial and impeach witnesses. If summary court-martial convictions are not criminal, then their use in these situations must be questioned.[40]

Article 19, UCMJ, provides that a bad-conduct discharge may not be adjudged unless the accused was represented by counsel. Yet the escalator clause of the Manual for Courts-Martial[41] thwarts this congressional intent by permitting the use of counsel-less summary court-martial convictions to

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[33]407 U.S. 25 (1972) (sentence to imprisonment for even a brief period of time without representation by counsel invalid).

[34]*See* note 3 *supra.*

[35]*See* note 2 *supra.*

[36]UCMJ art. 36(a), 10 U.S.C. § 836(a) (1970), which provides for executive promulgation of the Manual for Courts-Martial, also provides, without distinguishing among courts-martial, that the regulations shall "apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in United States district courts . . . ." *Cf.* UCMJ art. 31 (self-incrimination), art. 44 (former jeopardy) and art. 45 (guilty pleas), 10 U.S.C. §§ 831, 844, 845 (1970).

[37]MCM ¶ 79*a*, 1969 (rev.), provides that "the procedure prescribed for a general court-martial will, when applicable, serve as a guide for a summary court-martial." MCM ¶ 115*a* provides for process to compel testimony of witnesses and production of evidence "similar to that which courts of the United States having criminal jurisdiction may lawfully issue." *See also* MCM ¶ 137 (evidence), ¶ 128*b* (degree of criminality of summary court-martial offenses).

[38]"[C]ourts-martial are criminal prosecutions . . . ." United States v. Crawford, 15 C.M.A. 31, 32, 35 C.M.R. 3, 6 (1964). All three judges in the *Alderman* case mentioned the criminal nature of summary courts-martial. 22 C.M.A. at 300, 304, 309 n.1, 46 C.M.R. at 300, 304, 309 n.1. In addition, government counsel at oral argument for *Middendorf* said, "[W]e don't deny that this is a criminal proceeding." Oral argument before the Supreme Court 29, Middendorf v. Henry, Nos. 74-175, 74-5176, Jan. 22, 1975.

[39]*E.g.*, Sherman, *Congressional Proposals for Reform of Military Law*, 10 AM. CRIM. L. REV. 25, 28 (1971); UNITED STATES TASK FORCE ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE ARMED FORCES, 74-75 (1972).

[40]*See* notes 36-39 *supra.*

[41]MCM ¶ 127*c*, 1969 (rev.). *See* note 4 *supra.*

trigger a bad-conduct discharge for an accused at a subsequent special court-martial.[42] Thus, such a discharge may be based on counsel-less adjudications of guilt at what are now deemed noncriminal proceedings. In effect, the counsel-less summary court-martial is a critical stage[43] in the sequence of proceedings leading to a bad-conduct discharge which a special court-martial could not otherwise have imposed. Since Congress in all probability considered summary courts-martial to be criminal[44] but did not, before *Argersinger*, consider the issue of counsel at such courts,[45] the Court of Military Appeals should exercise its supervisory authority over the Manual for Courts-Martial[46] to void its escalator clause.[47]

Even if summary court-martial convictions are not used to escalate the maximum sentence at special courts-martial, they still may be introduced as matters in aggravation of sentence at a subsequent court-martial.[48] Although the accused's record of nonjudicial punishment[49] may also be

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[42]It has been suggested that summary courts-martial "are often convened with a specific purpose of using the conviction to escalate punishment at subsequent prosecutions of the same accused." Fidell, *The Summary Court-Martial: A Proposal*, 8 HARV. J. LEGIS. 571, 585 (1971) (citation omitted).

[43]COMA has recognized a right to counsel at the critical stage, for example, of questioning a suspect at a preliminary investigation. United States v. Tempia, 16 C.M.A. 629, 37 C.M.R. 249 (1967). That is not the argument here; rather, the point is that since a summary court-martial is a critical stage to a later bad-conduct discharge, and since there is no right to counsel at the summary court, its use for this subsequent purpose is impermissible.

[44]*See* note 36 *supra*.

[45]The Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1135, amended UCMJ art. 19, 10 U.S.C. § 819 (1970). It also extended to accused the right to legally-trained counsel at special courts-martial. UCMJ art. 27(b), 10 U.S.C. § 827(b) (1970). No mention was made of summary courts-martial, but this law was passed four years before the decision in *Argersinger*, and Congress probably did not give any attention to the issue of confinement.

[46]COMA has in the past voided provisions of the Manual for Courts-Martial which it found to be in conflict with provisions of the UCMJ or the Constitution. *See* Willis, *The United States Court of Military Appeals: Its Origin, Operation and Future*, 55 MIL. L. REV. 84-85 & nn. 249-52 (1972). In United States v. Douglas, 24 C.M.A. 178, 51 C.M.R. 397 (1976), COMA held that its interpretation of the UCMJ is controlling when an MCM provision is in question. COMA recently found that MCM ¶ 67*f*, 1969 (rev.), which provided that a military judge would accede to a convening authority's view of a pre-trial dismissal, was in direct conflict with UCMJ art. 62(a), 10 U.S.C. § 862(a) (1970), and congressional intent. United States v. Ware, 24 C.M.A. 102, 51 C.M.R. 275 (1976). *See also* United States v. Ward, 23 C.M.A. 391, 394, 50 C.M.R. 273, 276 (1975) (UCMJ art. 10, 10 U.S.C. § 810 (1970), speedy trial provision is a "command of Congress" and controls MCM ¶ 31*g*, 1969 (rev.), provision for joinder of offenses, which is "only a statement of policy"); United States v. Landry, 14 C.M.A. 553, 34 C.M.R. 333 (1964) (improper limitation of sentencing power of court-martial); United States v. Rhinehart, 9 C.M.A. 402, 24 C.M.R. 212 (1957) (court members not allowed to use MCM during trial); United States v. Jenkins, 7 C.M.A. 261, 22 C.M.R. 51 (1956) (UCMJ art. 83, 10 U.S.C. § 883 (1970), "fraudulent enlistment" did not include inductions as stated in the Manual).

[47]In Burgett v. Texas, 389 U.S. 109 (1967), the Supreme Court invalidated a conviction obtained under a recidivist statute where the contributing prior conviction was obtained in violation of the right to counsel for indigents required by Gideon v. Wainwright, 372 U.S. 335 (1963).

[48]MCM ¶ 75*b*, 1969 (rev.).

[49]UCMJ art. 15, 10 U.S.C. § 815 (1970), allows a commander to impose punishment for minor offenses without court-martial. At most, a commander at an article 15 proceeding,

introduced at sentencing, it must be remembered that the court members sentence,[50] not the military judge.[51] With the introduction of a prior summary court-martial conviction, the court members are receiving not background information on the accused, but an adjudication of guilt. Accustomed as most people are to regarding all court-martial convictions as criminal,[52] members may give undue weight to a noncriminal conviction at a summary court. At the very least, COMA should require a limiting instruction to remind members at sentencing that the adjudication of guilt from a summary court-martial was obtained at a noncriminal proceeding, and without the benefit of counsel. A better solution would be to prohibit altogether the use of prior convictions at summary courts-martial for sentencing purposes.[53]

The use of summary court-martial convictions at a later trial as evidence to impeach the accused must also be examined.[54] Such convictions do indeed "carry a stamp of 'bad character' "[55] with them that could influence a court to convict. Since summary courts-martial are appropriate only for "minor offenses,"[56] it is difficult to justify their use for impeachment purposes as proving moral turpitude or lack of credibility.[57] In a recent case, COMA discussed the general guideline for an offense involving

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which is regarded as a disciplinary tool, can give thirty days' correctional custody. It has been compared to detention after school in terms of community attitude toward it. United States v. Shamel, 22 C.M.A. 361, 362, 47 C.M.R. 116, 117 (1973). COMA has also observed that "an Article 15 punishment is not a conviction." United States v. Johnson, 19 C.M.A. 464, 467, 42 C.M.R. 66, 69 (1970). *See* Miller, *A Long Look at Article 15*, 28 MIL. L. REV. 37 (1965).

[50]MCM ¶ 75*d*, 1969 (rev.).

[51]MCM ¶ 76*b*, 1969 (rev.). Thus, sentencing is done by persons who lack judicial experience, have no background report on the accused on which to base a judgment, and must make their decision on the basis of what they hear in court. This situation is exacerbated by the fact that the responsibility for presenting matters in extenuation and mitigation rests with the accused, not with the judge or an associated agency. MCM ¶ 75*c*, 1969 (rev.).

[52]*See* notes 36-39 *supra*.

[53]*See* United States v. Tucker, 404 U.S. 443 (1972), in which the Court held that a conviction rendered in violation of Gideon v. Wainwright, 372 U.S. 335 (1963), could not be used in a later proceeding to increase punishment. The counsel-less adjudication of guilt at a summary court-martial handicaps the accused at his new trial by stigmatizing him in the eyes of the sentencing members and therefore becomes an integral part of the trial. In contrast, nonjudicial punishments do not carry nearly the prejudicial weight court-martial convictions do. *See* note 49 *supra*.

[54]MCM ¶ ¶ 138*g*, 149*b*, 153*b*(2) (b), 1969 (rev.). *See* note 55 *infra*.

[55]Middendorf v. Henry, 425 U.S. 25, 39 (1976). The Supreme Court, conjecturing that a conviction for a military offense would have "no consequences for the accused beyond the immediate punishment," *id.*, evidently was not aware of its use at trial. The Court may also have assumed that the MCM was similar to the Federal Rules of Evidence; there are significant differences. *Compare* MCM ¶ ¶ 138*g*, 149*b*(1), 153*b*(2), 1969 (rev.), *with* FED. R. EVID. 404, 608(b), 609. Under MCM ¶ 153*b* there is no requirement that the judge weigh prejudice to accused for moral turpitude offenses; there is such a requirement in FED. R. EVID. 609(a) (1).

[56]MCM ¶ 79*a*, 1969 (rev.).

[57]COMA has recognized the conceptual problem of using convictions for "minor" offenses to impeach when they must at the same time involve "moral turpitude" or affect "credibility" under MCM ¶ 153*b*(2) (b), 1969 (rev.). *See* United States v. Moore, 5 C.M.A. 687, 697-98, 18 C.M.R. 311, 321-22 (1955).

moral turpitude which would exclude in most cases both convictions at summary and special courts-martial as evidence of a prior offense.[58] However, the case involved the use of a nonjudicial punishment to impeach a witness who was not the accused. Left open was the question whether a summary court conviction could be used to impeach credibility[59] or as evidence of misconduct under MCM ¶ 138g.[60] In light of the minor nature of the offenses for which summary courts are convened and of the weight a court-martial conviction carries with members of a court,[61] COMA should set a standard for the use of summary court-martial convictions for impeaching credibility to replace the present vague standard.[62] The most easily administered standard, and one which avoids any possibility of prejudice to the accused, is one of total exclusion of the use of summary court-martial convictions to impeach credibility.[63]

Expanding Alderman: Extension of the Right to Counsel at Summary Courts-Martial

Early in its existence, COMA took a position of judicial activism[64] to oversee basic rights in the military justice system. Although this activism has been on the wane in recent years,[65] there are indications that COMA

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[58]United States v. Johnson, 23 C.M.A. 534, 535, 50 C.M.R. 705, 706 (1975). The guideline is whether "the authorized punishment include[s] a dishonorable discharge or confinement at hard labor for a year or more." This means the offense, not the type of court-martial which is chosen, controls. It is a fair inference, however, than an offense which warrants a dishonorable discharge or confinement for one year would not be tried at a summary court, whose jurisdiction extends to not more than thirty days' confinement, or at a special court-martial, whose jurisdictional limits are a bad-conduct discharge and six months' confinement.

[59]In United States v. Johnson, 23 C.M.A. 534, 50 C.M.R. 705 (1975), the court indicated that in order to affect credibility, deceit or fraud must have been involved in the commission of the offense, but it did not set out the offenses which fall into this category. *See* FED. R. EVID. 609(a) (Conference Report notes delineate offenses involving fraud or deceit).

[60]MCM ¶ 138g, 1969 (rev.), allows evidence of prior misconduct of an accused to prove identity, knowledge, intent, consciousness of guilt or motive, or to rebut an inference of accident, mistake or entrapment. *Cf.* FED. R. EVID. 404(b).

[61]*See* notes 48-53 *supra* & text accompanying.

[62]*See* note 59 *supra.*

[63]*Cf.* FED. R. EVID. 609(a)(1).

[64]*See* Sherman, *Legal Inadequacies and Doctrinal Restraints in Controlling the Military,* 49 IND. L.J. 539, 568 (1974); Willis, *The Constitution, the United States Court of Military Appeals and the Future,* 57 MIL. L. REV. 27 (1972); Sherman, *The Civilianization of Military Law,* 22 MAINE L. REV. 3, 51 (1970) (COMA has "accomplished more reform in the field of procedural due process than all the prior congressional codes put together.").

[65]Willis, *supra* note 46, at 96-97. *See also* United States v. Snyder, 18 C.M.A. 480, 40 C.M.R. 192 (1969), where COMA retreated from its prior stand on jurisdiction to hold that it would not take action under the All Writs Act, 28 U.S.C. § 1651(a), unless in aid of jurisdiction or where it would eventually have jurisdiction under UCMJ arts. 66 and 67, 10 U.S.C. §§ 866, 867 (1970).

Snyder was applied to summary courts-martial in Thomas v. United States, 19 C.M.A. 639 (1969). However, in a recent case COMA reasserted the exercise of its supervisory authority and noted that *Snyder* was "too narrowly focused." McPhail v. United States, 24 C.M.A. 304, 310, 52 C.M.R. 15, 21 (1976).

may be willing to provide a strong sense of direction for the military justice system once again.[66]

As part of its role as the general supervisory authority for the military justice system, COMA could choose the third alternative: to expand *Alderman* and extend the right to counsel to accused at all summary courts-martial[67] as a mandate of military due process. Military due process has been described as "representing the various procedural and substantive rights of a military accused,"[68] and COMA frequently has extended protections in its name.[69] Closely connected with the concept of military due process is the idea that COMA may exercise "inherent powers"[70] in addition to its statutory powers under Article 67.[71]

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[66]*See* Courtney v. Williams, 24 C.M.A. 87, 88 n.2, 51 C.M.R. 260, 261 n.2 (1976), where the court said that "Article 67, Uniform Code of Military Justice . . . does not describe the full panoply of [COMA's] powers" and held that decisions whether to impose pretrial confinement must be made by an independent magistrate. *See also* United States v. Cruz-Rijos, 24 C.M.A. 271, 51 C.M.R. 723 (1976); United States v. Iturralde-Aponte, 24 C.M.A. 1, 51 C.M.R. 1 (1975); Note, *Building a System of Military Justice Through the All Writs Act,* 52 IND. L.J. ___ (1976), *supra.* In addition, COMA seems to be making a concerted effort to introduce ABA Standards and the ABA Code of Professional Responsibility into its opinions. *See* note 89 *infra. Cf.* Willis, *The United States Court of Military Appeals: "Born Again,"* 52 IND. L.J. ___ (1976), *supra.*

[67]Free of the "confinement" rationale it followed in *Alderman, see* note 3 *supra,* COMA could recognize a right to counsel at all summary courts-martial, as it previously felt it could not. *See, e.g.,* United States v. O'Brien, 22 C.M.A. 325, 46 C.M.R. 325 (1973) (summary court-martial where confinement not imposed could be used in aggravation of sentence); *accord,* United States v. Peters, 22 C.M.A. 348, 46 C.M.R. 348 (1973).

[68]Willis, *The United States Court of Military Appeals, Its Origin, Operation and Future,* 55 MIL. L. REV. 39, 81 n.226 (1972) [hereinafter cited as *COMA: Origin, Operation and Future*]. *See* Quinn, *The United States Court of Military Appeals and Military Due Process,* 35 ST. JOHN'S L. REV. 225, 232 (1967). The concept of military due process was first set out in United States v. Clay, 1 C.M.A. 74, 1 C.M.R. 74 (1951) and qualified in United States v. Sutton, 3 C.M.A. 220, 11 C.M.R. 220 (1953). *See* Wurfel, *"Military Due Process": What Is It?,* 6 VAND. L. REV. 251 (1953); *COMA: Origin, Operation and Future, supra* at 79-83, for an account of the development of military due process. This doctrine has fallen into desuetude following the *Tempia-Jacoby* line of cases. *See* note 74 *infra.*

[69]*See COMA: Origin, Operation and Future, supra* note 68, at 79-83.

[70]*Id.* at 87, 83-89. COMA has recognized that "[p]art of [its] responsibility includes the protection and preservation of the Constitutional rights of persons in the armed forces." United States v. Frischholz, 16 C.M.A. 150, 152, 36 C.M.R. 306, 308 (1966). COMA has also recognized its "general supervisory power over the administration of military justice." Gale v. United States, 17 C.M.A. 40, 42, 37 C.M.R. 304, 306 (1967). *See also* United States v. Clay, 1 C.M.A. 74, 1 C.M.R. 74 (1951) (duty to see court-martial conducted fairly); United States v. O'Neal, 1 C.M.A. 138, 2 C.M.R. 44 (1952) (authority to regulate law officer and court members); United States v. Drexler, 9 C.M.A. 405, 26 C.M.R. 185 (1958) (duty to prevent miscarriage of justice or to preserve integrity of court-martial). It would seem that the "inherent powers" are not necessarily limited to the protection of constitutional rights.

[71]UCMJ art. 67(b), 10 U.S.C. § 867(b) (1970). *See* note 11 *supra.* COMA's statutory review extends to all cases which involve either a death sentence or a general or flag officer; cases from the Courts of Military Review which the Judge Advocate General sends to COMA for review; and cases on petition of the accused from the Court of Military Review in which COMA grants review. UCMJ art. 66(b), 10 U.S.C. § 866(b) (1970), restricts Court of Military Review jurisdiction to cases involving a death sentence or a general or flag officer; dismissal of a commissioned officer, cadet or midshipman; dishonorable or bad-conduct discharge, or confinement for one year or more.

The Court of Military Appeals has often held that military due process or congressional intent,[72] as expressed in the Uniform Code of Military Justice, required a more stringent protection of rights than the Supreme Court had theretofore recognized.[73] It has also followed the Supreme Court's interpretation of constitutional rights.[74] At the forefront of these cases has been the expansion of the right to counsel.[75]

It is somewhat anomalous for an accused, who is afforded the benefit of counsel at an interrogation or a pretrial lineup, to have no right to counsel if he is subsequently referred to a summary court-martial.[76] From the preliminary investigation through the entire court-martial process, the accused enjoys the benefits of legal counsel *unless* he happens to be tried at a summary court.[77] In addition, the difficulties an accused faces in preparing his own defense before a summary court are increased where he is in confinement: he is able neither to obtain advice easily from the staff

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[72]Since military due process is also supposed to be based on congressional intent, it is often difficult to tell when military due process stands alone. United States v. Clay, 1 C.M.A. 74, 77, 1 C.M.R. 74, 77 (1951).

[73]*E.g.*, COMA held that the harmless error rule does not apply where a person is impeached with a statement taken after warnings under UCMJ art. 31, 10 U.S.C. § 831 (1970), but without advice as to right to counsel. United States v. Hall, 23 C.M.A. 549, 50 C.M.R. 720 (1975). This holding goes beyond Harris v. New York, 401 U.S. 22 (1971) and Milton v. Wainwright, 407 U.S. 371 (1972); *accord*, United States v. Girard, 23 C.M.A. 263, 49 C.M.R. 438 (1975); United States v. Jordan, 20 C.M.A. 614, 44 C.M.R. 44 (1971). *See* Armstrong, *The Impeachment Exception to the Exclusionary Rules: The Military's Options in the Wake of Jordan and Harris*, 26 JAG J. 1 (1971).

COMA set a ninety-day speedy trial rule in United States v. Burton, 21 C.M.A. 112, 44 C.M.R. 166 (1971) and United States v.Driver, 23 C.M.A. 243, 49 C.M.R. 376 (1974), whereas the Supreme Court had said that it was not possible to set a time limit for speedy trial in Barker v. Wingo, 407 U.S. 514 (1972).

COMA also announced, in United States v. Tomazewski, 8 C.M.A. 266, 24 C.M.R. 76 (1957), a right to counsel at the Article 32 preliminary hearing. The Supreme Court did not recognize a similar civilian right until Coleman v. Alabama, 399 U.S. 1 (1970).

In United States v. Greer, 3 C.M.A. 576, 13 C.M.R. 132 (1953), COMA held that an accused cannot be forced to provide a voice exemplar. This exceeded what was then required under the fifth amendment right against self-incrimination.

[74]*E.g.*, Courtney v. Williams, 24 C.M.A. 87, 51 C.M.R. 260 (1976); United States v. Alderman, 22 C.M.A. 298, 46 C.M.R. 298 (1973); United States v. Greene, 21 C.M.A. 543, 45 C.M.R. 317 (1972); United States v. Tempia, 16 C.M.A. 629, 37 C.M.R. 249 (1967); United States v. Jacoby, 11 C.M.A. 428, 29 C.M.R. 244 (1960). These cases all followed an expansion of the Supreme Court's interpretation of constitutional rights. It remains to be seen whether COMA will act in the face of a Supreme Court decision specifically restricting a right.

[75]*See* notes 73 and 74 *supra*; United States v. Dohle, 24 C.M.A. 34, 51 C.M.R. 84 (1975); United States v. Brady, 8 C.M.A. 456, 24 C.M.R. 266 (1957).

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

Even a person who may receive nonjudicial punishment under UCMJ art. 15, 10 U.S.C. § 815 (1970), has a right to consult with counsel and is allowed to have a person speak in his behalf. Para. 3-12*a*, *b*, Army Reg. 27-10, Change 16 (4 Nov. 75), interpreting MCM ¶132, 1969 (rev.).

[77]This also means that an attorney-client relationship established during the pretrial stages may be broken when an accused is brought to trial at a summary court. Military courts

judge advocate's office nor to gather evidence in mitigation.[78] Although it has been claimed that counsel at summary courts-martial would unduly lengthen a proceeding[79] designed to "exercise justice promptly,"[80] the time taken to complete summary courts before *Alderman* indicates that they were not in actuality summary proceedings.[81]

Finally, there is a two-pronged equal protection argument to be made for requiring counsel at all summary courts-martial.[82] First, an accused at a summary court-martial has always been allowed to retain civilian counsel at his own expense.[83] Persons who are indigent will be in an unfairly disadvantaged position.[84] Second, a summary court-martial can award confinement only to persons holding the rank of E-4 or below.[85] Persons of the rank of E-5 and above may be sentenced to confinement only at a special or general court-martial where full constitutional protections are

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have frowned on any interference with the attorney-client relationship. *E.g.*, United States v. McOmber, 24 C.M.A. 207, 51 C.M.R. 452 (1976); United States v. Otterbeck, 50 C.M.R. 7 (NCMR 1974).

[78]"Most accused persons, who are scheduled to appear before special and summary courts-martial, seem to be confined before trial, as a matter of course." Lermack, *Summary and Special Courts-Martial: An Empirical Investigation*, 18 ST. LOUIS U.L.J. 329, 351 (1974). For a discussion of the problems an accused before a summary court faces and of the pressures on the summary court officer, see *id.* at 354-55.

[79]The Supreme Court, in *Middendorf*, believed that the "presence of counsel will turn a brief, informal hearing which may be quickly convened and rapidly concluded into an attenuated proceeding which consumes the resources of the military . . . ." 425 U.S. at 45. As previously noted, the right to refuse trial by summary court-martial negates in large part the objection to the consumption of resources. *See* note 7 *supra*. Only dropping the charges altogether would conserve resources.

[80]MCM ¶ 79*a*, 1969 (rev.).

[81]An everage of 33½ days for summary court-martial without counsel was quoted in oral argument before the Supreme Court. Oral argument before the Supreme Court 44, Middendorf v. Henry, Nos. 74-175, 74-5176, Jan. 22, 1975. In addition, the government offered nothing "to indicate that the average time of the summary court-martial proceeding itself has been lengthened as a result of providing counsel to defendants." Middendorf v. Henry, 425 U.S. at 64-65 n.16 (Marshall, J., dissenting).

[82]This is not necessarily a constitutional right. COMA has recognized, however, that "even though the Fifth Amendment contains no express equal protection clause, the principle long has been applied via the Fifth Amendment's language which forbids discrimination which is 'so unjustifiable as to be violative of due process.' " United States v. Courtney, 24 C.M.A. 280, 281 n.3, 51 C.M.R. 796, 797 n.3 (1976) (charging marijuana possession offense under art. 134 rather than art. 96 as denial of equal protection). COMA could apply this same analysis to the military due process concept in order to protect the integrity of the court-martial system and to inspire confidence among members of the armed forces in the fairness of the system.

[83]*See* Middendorf v. Henry, 425 U.S. 25, 65 & n.17 (1976) (Marshall, J., dissenting); Daigle v. Warner, 490 F.2d 358, 366 (9th Cir. 1974); Lermack, *supra* note 78, at 373; Army Regulation 27-10, Change 12 (12 Dec 73), para. 2-12 governs the qualifications of civilian counsel at courts-martial and makes no exception for the summary court.

[84]It has been said that "under the system of military justice, the concept of indigency is of no real relevancy." United States v. Alderman, 22 C.M.A. 298, 306, 46 C.M.R. 298, 306 (1972) (Duncan, J., concurring and dissenting). It is relevant, however, where some accused can afford to retain civilian counsel while others cannot, a situation analogous to Gideon v. Wainwright, 372 U.S. 335 (1963).

[85]MCM ¶ 16*b*, 1969 (rev.).

afforded.[86] Thus, only one segment of the enlisted population[87] is subject to confinement without the assistance of counsel. Therefore, military due process should require that the right to counsel be extended to all summary courts-martial.[88]

Two other policies militate in favor of action by COMA in the area of the right to counsel. One is COMA's continuing concern for the integrity and impartiality of court-martial procedures,[89] particularly in cases of one counsel representing joint accused.[90] The other is the maintenance and improvement of morale among members of the armed forces and of increased public confidence in military justice.[91] Counsel at summary courts-martial would further both goals.

ALTERNATIVE CONGRESSIONAL SOLUTIONS

If the Court of Military Appeals chooses not to act decisively in the *Redmond* case, there are several alternate solutions, all involving congressional action. First is the abolition of the summary court-martial. Commentators have recommended this course of action for years,[92] and

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[86]UCMJ arts. 26, 27(a), 28 and 29, 10 U.S.C. §§ 826, 827(a), 828 and 829 (1970). This may partially explain why higher ranking NCOs are rarely brought to summary courts-martial. *See also* Lermack, *Summary and Special Courts-Martial: An Empirical Investigation,* 18 ST. LOUIS U.L.J. 329, 345 (1974).

[87]Officers are not subject to summary courts-martial. UCMJ art. 20, 10 U.S.C. § 820 (1970).

[88]*See* Fidell, *The Summary Court-Martial: A Proposal,* 8 HARV. J. LEGIS. 571, 585, 600 (1971). As one judge remarked, concerning the effect of the escalator clause: "I doubt . . . that any offense can, abstractly, be described as minor." United States v. Sharkey, 19 C.M.A. 26, 28, 41 C.M.R. 26, 28 (1969) (concurring opinion).

[89]In addition to stressing that "the impression of partiality must not be created," United States v. Clower, 23 C.M.A. 15, 18, 48 C.M.R. 307, 310 (1974), COMA has frequently mentioned the ABA Code of Professional Responsibility and various ABA Standards. *E.g.,* United States v. Nelson, 24 C.M.A. 49, 51 C.M.R. 143 (1975); United States v. Beach, 23 C.M.A. 480, 50 C.M.R. 560 (1975); United States v. Wilkerson, 23 C.M.A. 440, 50 C.M.R. 459 (1975); United States v. Kimble, 23 C.M.A. 251, 49 C.M.R. 384 (1974) (concurring opinion).

[90]MCM ¶ 48*c*, 1969 (rev.), provides that counsel for co-accused must inform them of possible conflicts or disabilities which might warrant requesting other counsel. United States v. Evans, 24 C.M.A. 14, 51 C.M.R. 64 (1975) contained the admonition that representation of multiple accused is the exception to the preferred situation of each accused being represented by his own individual defense attorney. In *Evans,* prejudice to defendant was found. Even though no prejudice to a defendant with co-defendants was found in United States v. Blakey, 24 C.M.A. 63, 51 C.M.R. 192 (1976), the court reiterated its strong suggestion that representation of multiple accused be avoided. Canon Five, ABA Code of Professional Responsibility, was cited in both cases.

[91]Lermack, *supra* note 86, at 373.

[92]*Id.* at 378; I UNITED STATES TASK FORCE ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE ARMED FORCES, 76, 122 (1972); Fidell, *supra* note 88, at 572; Bayh, *The Military Justice Act of 1971: The Need for Legislative Reform,* 10 AM. CRIM. L. REV. 9 (1971); Hatfield, *Civil Safeguards for the Military,* 7-8 TRIAL 43 (1971); Sherman, *Congressional Proposals for Reform of Military Law,* 10 AM. CRIM. L. REV. 25 (1971); Ervin, *The Military Justice Act of 1968,* 45 MIL. L. REV. 77 (1968). *But see* Staring, *The Role of the Commander,* 61 A.B.A.J. 305, 306-07 (1975); REPORT OF THE JUDGE ADVOCATE GENERAL OF THE ARMY, ANNUAL REPORT

several bills have been proposed that would do away with summary courts.[93] Nonjudicial punishment under UCMJ Article 15[94] could fill in the gap easily.[95] Another solution is congressional grant of counsel at summary courts-martial. The last major amendment to the Uniform Code of Military Justice was in 1968,[96] four years before the decision in *Argersinger*. After the decision in *Middendorf*, Congress may want to change its mind. A third possibility is a grant to COMA of discretionary review of major questions in all courts-martial. This would resolve the awkwardness which COMA has experienced in extending its jurisdiction under the All Writs Act.[97] Finally, direct review of Court of Military Appeals decisions in the Supreme Court could be created.[98] This would avoid the inefficiency and delay of collateral habeas corpus attacks in the federal courts.[99]

In conclusion, COMA should take charge, continue its early trend of activism and grant a right to counsel at all summary courts-martial. If it chooses not to do so, it should at least void the now anomalous collateral effects of certain provisions of the Manual for Courts-Martial and strongly suggest to Congress that changes be made. Such actions and suggestions might finally spur Congress to act on the proposals that have been languishing for years. It might also clarify the relationship of COMA, as part of the federal court system, to the Supreme Court. As it now stands, there is no review of COMA decisions in the Supreme Court, but each court

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OF THE UNITED STATES COURT OF MILITARY APPEALS AND THE JUDGE ADVOCATE GENERAL OF THE ARMED FORCES AND THE GENERAL COUNSEL OF THE DEPARTMENT OF TRANSPORTATION 12 (1972).

[93]S.987, 93d Cong., 1st Sess. (1973 Bayh); H.R. 291, 93d Cong., 1st Sess. (1973 Bennett); S.2171-2183, 92d Cong., 1st Sess. (1971 Hatfield). Legislative history indicates that the summary court-martial survived in 1968 only because of compromise. *See* Fidell, *The Summary Court-Martial: A Proposal*, 8 HARV. J. LEGIS. 571, 574 (1974).

[94]10 U.S.C. § 815 (1970). See note 49 *supra*.

[95]TASK FORCE, *supra* note 92, at 75; Fidell, *supra* note 93, at 572; Lermack, *Summary and Special Courts-Martial: An Empirical Investigation*, 18 ST. LOUIS U.L. REV. 329, 378 (1974). *See* Oral argument before the Supreme Court 40, Middendorf v. Henry, Nos. 74-175, 74-5176, Jan. 22, 1975.

[96]Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 133 (1968).

[97]28 U.S.C. § 1651(a) (1970). See notes 65, 70 & 71 *supra*. COMA has been undecided as to the ground of its jurisdiction under the All Writs Act, limiting itself to statutory jurisdiction in some cases, while referring to inherent powers not contained in UCMJ art. 67, 10 U.S.C. § 867 (1970), in others.

[98]*See* Bishop, *The Case for Military Justice*, 62 MIL. L. REV. 215, 223 (1973); Willis, *The Constitution, the United States Court of Military Appeals and the Future*, 57 MIL. L. REV. 27, 84-85 (1972). The Supreme Court's lack of expertise in military law would present a serious problem, however. See text accompanying notes 23-28 *supra*. The Supreme Court could formulate a policy of deference in most cases to COMA's interpretation of military necessity. *Cf.* Middendorf v. Henry, 425 U.S. 25, 43-44 (1976).

[99]On oral reargument, government counsel conceded that but for the fortuity of a sailor going to federal court, the decision of COMA in *Alderman* could not have been brought before the Supreme Court for review. Oral reargument before the Supreme Court 45, Middendorf v. Henry, Nos. 74-175, 74-5176, Nov. 5, 1975.

gives great deference to the other. The unresolved question is whether COMA can ignore a Supreme Court decision, or, in an extreme case, reach a contrary result.[100]

PATRICIA A. DALY

[100]*See* Kaplan v. Superior Ct., 6 Cal. 3d 150, 491 P.2d 1, 98 Cal. Rptr. 649 (1971), where the Supreme Court of California retained a rule on standing to challenge an unlawful search and seizure despite a United States Supreme Court decision to the contrary. COMA, as part of the federal court system, is in a somewhat different position.