In the

Supreme Court of the United States

J. WILLIAM MIDDENDORF, II, et al., Petitioners, v. DANIEL EDWARD HENRY, et al., Respondents.	No. 74-175
- - - - and - - - - - - - - - - - - - - - - DANIEL EDWARD HENRY, et al., Petitioners, v. J. WILLIAM MIDDENDORF, II, et al., Respondents.	No. 74-5176

Washington, D. C.
January 22, 1975

Pages 1 thru 50

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

inks

IN THE SUPREME COURT OF THE UNITED STATES

J. WILLIAM MIDDENDORF, II, et al., Petitioners, v. DANIEL EDWARD HENRY, et al., Respondents.	No. 74-175
- - - and - - - DANIEL EDWARD HENRY, et al., Petitioners, v. J. WILLIAM MIDDENDORF, II, et al., Respondents.	No. 74-5176

Washington, D. C.,

Wednesday, January 22, 1975.

The above-entitled matters came on for consolidated argument at 2:26 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

NATHAN R. ZAHM, ESQ., 4422 Sherman Oaks Circle, Sherman Oaks, California 91403; on behalf of Daniel Edward Henry, et al.

ANDREW L. FREY, ESQ., Office of the Solicitor General of the United States, Department of Justice, Washington, D. C. 20530; on behalf of the Federal Parties.

- - -

C O N T E N T S

ORAL ARGUMENT OF:	PAGE
Nathan R. Zahm, Esq., for Daniel Edward Henry, et al.	3
Andrew L. Frey, Esq., for the Federal Parties	25

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in 74-175 and 74-5176, Middendorf against Henry, and the consolidated case.

Mr. Zahm, you may proceed whenever you're ready.

ORAL ARGUMENT OF NATHAN R. ZAHM, ESQ.,

ON BEHALF OF DANIEL EDWARD HENRY, ET AL.

MR. ZAHM: Mr. Chief Justice, and if the Court please:

I think it is fair to say that the facts of this particular consolidated cases are simple are are not in dispute.

The named plaintiffs were Marines stationed at El Toro Marine Base near Los Angeles, California. They were all in pay grades E-1 to E-4, the lowest pay grades in the military services, and therefore subject to summary court martial under Article 20 of the Uniform Code of Military Justice; and, if convicted, they could stand confinement -- they would be confined for up to thirty days.

And five of the named plaintiffs were so convicted and sentenced to up to thirty days, respectively, for various minor offenses. And at their summary courts-martial, they did not have their own retained counsel nor were they appointed counsel.

Three of the named plaintiffs were ordered to stand

trial subject at the summary courts-martial. Those trials were not yet convened at the time the action was brought, but they, too, were advised that they would not have appointed counsel at summary courts-martial.

Class action, worldwide in scope, was brought for habeas corpus relief of the five imprisoned as a result of the summar courts-martial convictions and sentence, and there was a paryer for relief in the nature of mandamus also, and for injunction against the topmost officials of the Navy and the Marine Corps, and the named plaintiffs' commanding officers at El Toro Marine Base, requiring the relief -- required that the accused servicemen at summary courts-martial resulting in confinement be provided the opportunity to have the assistance of defense counsel, who does not also represent the prosecution.

And in the District Court all of this requested relief was granted.

QUESTION: You mean a member of the bar or a helper of some kind?

MR. ZAHM: Pardon me?

QUESTION: You mean a member of the bar or simply someone to help him?

MR. ZAHM: In all of this discussion, Mr. Chief Justice, we are referring as counsel be not necessarily a lawyer but a person who, to some degree at least, might be of

assistance to the accused.

QUESTION: In other words, the "next friend" concept is what you're talking about.

MR. ZAHM: The "next friend" might be a proper term, Your Honor, yes.

But there have been cases, which we could go into later if the Court pleases, where the military court of the highest nature, the United States Court of Military Appeals has determined that, constitutionally speaking, unless Congress has otherwise required, counsel does not mean lawyer counsel.

And so here we, in this case, are speaking of counsel from the constitutional standpoint of being a person who assists the accused at trial, who is not necessarily a lawyer counsel.

At any rate, the District Court in this case granted habeas corpus relief to those who had been confined, and issued relief in the nature of mandamus, on a worldwide level.

Now, the issue before this Court is, whether the holding of this Court in Argersinger vs. Hamlin, 407 U.S., in the year 1972, in which this Court held, in a landmark decision, that an accused in any criminal prosecution, for whatever offense, petty or otherwise, may not be deprived of his liberty if he was denied the assistance of counsel at trial.

And this, by virtue of the right to assistance of counsel guaranteed by the Sixth Amendment, and also the due process clause of the Fifth Amendment.

QUESTION: I suppose -- well, what would be your answer to this -- Suppose, instead of confinement, following a summary court-martial of this kind, the penalty provided was loss of pay for six months; that would be much more painful, perhaps, than thirty days for many people, wouldn't it?

MR. ZAHM: Your Honor, it might be more painful, we might agree; but from the standpoint of the decision of this Court in Argersinger, we are limited to the decision of this Court with reference to loss of liberty.

QUESTION: I just wanted to be sure that you were only arguing to the Argersinger point and not any penalty, however heavy it might be.

MR. ZAHM: Most specifically, Your Honor, we are, in this case, limiting ourselves to the decision of this Court in Argersinger, with regard to loss of liberty.

Now, this question, of course, would never have arisen with regard to any other kind of courts-martial in the military, for the reason that the Congress of the United States has seen to it, in the Uniform Code of Military Justice, that in the general court-martial and the special court-martial defense counsel shall be provided the accused.

And so the problem arises, therefore, only with

regard to summary court-martial. Because, under Article 20 of the Uniform Code of Military Justice, no provision is made in that Article for defense counsel for the accused, such as in the case of General Court Martial and Special Court Martial.

QUESTION: Mr. Zahm, --

MR. ZAHM: Yes, Your Honor?

QUESTION: -- you say that you're confining your argument to loss of liberty. Can a man go to the brig as a result of a summary court?

MR. ZAHM: Most positively. He may be confined in the brig for up to thirty days, Your Honor.

And that is the problem here, that these named plaintiffs and the hundreds of thousands of others in the class, under summary court-martial, not only may be confined for up to thirty days but for some, perhaps, 200 years have been so confined.

QUESTION: Well, he can go to the brig from a Captain's Mast -- or at least that used to be correct.

MR. ZAHM: I would have to say that that is not correct, Your Honor. Under Captain's Mast, as we refer to it in the Navy -- and I am a former Navy man myself -- Captain's Mast --

QUESTION: That was the old Navy, at least for me. That was the old Navy.

MR. ZAHM: Yes.

[Laughter.]

MR. ZAHM: Captain's Mast, as we refer to it, today is referred more technically as proceedings under Article 15. Non-judicial administrative punishment.

Correctional custody is what might result from a Captain's Mast, from Article 15.

QUESTION: And on a ship at sea, doesn't that include the power of the commanding officer to have the man locked up in the brig, on reduced rations, still?

MR. ZAHM: It would still be, even that ship at sea would be correctional custody and not confinement.

QUESTION: But he's in the brig!

[Laughter.]

QUESTION: He's in the brig, but he's not confined.

MR. ZAHM: I would have to say he is not in the brig, to my knowledge. Correctional custody, he would still be in the position of performing his regular duties, but under very strict guidance and counseling, as the distinction is made, to my knowledge, in the Navy.

He is not in the brig.

QUESTION: I take it, you wouldn't want to be arguing for counsel for people faced with that kind of custody, correctional?

MR. ZAHM: Well, at the present time I'm satisfied to be arguing strictly on the matter of summary courts-

martial, because, as a matter of fact, I will be getting to it, the --

QUESTION: Mr. Zahm, having interrupted you once, let me ask you another question that's a little confusing to me.

MR. ZAHM: Yes, Your Honor.

QUESTION: Is what we're talking about here what used to be called a deck court?

MR. ZAHM: Originally it was called a deck court --

QUESTION: In the Navy, at least, a deck court.

MR. ZAHM: Yes.

QUESTION: And a summary court, back in World War II, was quite a different thing; that was a three-officer court, in which you did have a right to counsel.

MR. ZAHM: Well, my only --

QUESTION: In the Navy, not the Army but the Navy.

MR. ZAHM: -- difference would be, from an historical standpoint, I believe by the time of World War II, --

QUESTION: I mean -- yes, World War II.

MR. ZAHM: -- we had summary court as we have it today. Historically speaking, the first one-man court, which is what a summary court is, a one-officer court, --

QUESTION: That used to be called a deck court.

MR. ZAHM: Yes, originally. It started in 1909, so the concept of the one-officer court is only that old, since

1909. It does not date back to the Revoluntary War period, or the time of the adoption of the Bill of Rights.

QUESTION: But a summary court used to be a three-member court.

MR. ZAHM: That is correct. Originally.

QUESTION: Well, maybe originally, and that went up to thirty years ago that it was.

MR. ZAHM: Yes.

QUESTION: And in a summary court, in those days, you had a right to counsel.

MR. ZAHM: That is correct.

QUESTION: And in a deck court, you didn't, you did you own defense.

MR. ZAHM: In the summary court that we refer to today, and the one to which great objection is made in this suit and by the authorities and by the commentators, is the one-officer court, who is serving as the judge, as the prosecutor, and, to some extent if at all, assistance of defense to the accused.

QUESTION: Right.

MR. ZAHM: He is serving in a tripartite manner and this is called a court, where one man is serving as the judge, if you will, the jury, and the prosecutor.

And this Court --

QUESTION: Maybe the problem is one of nomenclature.

If you were called an investigator or something like that, maybe --.

MR. ZAHM: Whatever the nomenclature, Your Honor, it is a single man serving under three hats at the same time, presuming to be a court.

QUESTION: And, well, in a quasi-investigative capacity; it's a quasi-inquisitorial proceeding, is it not?

MR. ZAHM: No, I --

QUESTION: I used to serve as a deck court officer, and that's the reason I asked you.

MR. ZAHM: Your Honor, that is not correct under the Uniform Code of Military Justice, because a summary courts-matial is a court, it is not an investigation, and --

QUESTION: But you're not complaining about the investigation, you're complaining about it -- it ends up putting the man in the brig.

MR. ZAHM: That is correct.

QUESTION: That's what you're complaining of.

[Laughter.]

MR. ZAHM: That is correct. Conviction puts him --

QUESTION: Regardless of what the other two think.

MR. ZAHM: Your Honor, that is precisely the point. Whatever you call it, whatever nomenclature, it is a decision by a court, a military court, in which, upon conviction, the man loses his liberty, just as the civilian indigent under

this Court's ruling in Argersinger loses his liberty. Whether it be for a moment, an hour, or a day. The result is the same.

The question --

QUESTION: Go down a notch on the scale, of what was in my day, as I remember, called company punishment, and I take it Justice Stewart's reference is to some sort of an investigative thing like that, which you say you're not complaining about, where you can have conditions of close confinement and supervision. There the company commander simply investigates -- if you're there, he probably asks you your side of the story. And what he ends up doing is frequently confining you to the post or something like that. He may not put you in the stockade.

Now, there's some loss of liberty there, and yet no one would call it a court, I don't think. It seems to me your emphasis on the fact that this is a court is wide of the mark.

I think the analysis has got to be in terms of loss of liberty.

MR. ZAHM: Your Honor, the United States Court of Military Appeals has decided on this very question, the distinction between proceedings under an Article 15 and summary court martial, and most positively -- this is the Court, incidentally, which this Court, in Noyd vs. Bond, said

we look to for the development of military expertise.

Well, that Court, with its military expertise, sees a tremendous significant difference between proceedings under Article 15 and summary; for the following reason: that under Article 15 there is no conviction of crime, so to speak, of military crime, on the man's record.

The explosive effects of a conviction under summary court-martial may be drastic. As a matter of fact, due to the escalator clauses that we find in the military regulations, two convictions of summary court-martial, when later brought up at a special court-martial, may result very positively in a bad conduct discharge, with the result that for the rest of the man's life, in or out of service, he suffers a tremendous lifetime economic disability.

None of that accrues as the result of any number, any number, of Article 15 proceedings.

QUESTION: But there you're addressing yourself now, not to the punishment but to the proceeding itself. What if he had a summary court-martial and didn't get any confinement? Your complaint would be the same in terms of your last point.

But I thought you were only arguing about a confinement case, ala Argersinger?

MR. ZAHM: Your Honor, if, as we feel this Court should rule, making Argersinger, if you will, the requirements

of Argersinger apply to the military, then the Navy would either appoint counsel for the man in summary court-martial or not. If they did not, the man would not have a conviction, you see, to confinement.

And without that, the escalator clause would not apply to the future.

So therefore he would not suffer in that regard.

Now, the basic --

QUESTION: Mr. Zahm, --

MR. ZAHM: Yes, Your Honor?

QUESTION: -- as I understand it, under Article 20 of the Uniform Military Code, an enlisted man has the privilege of not being tried by summary court; is that correct?

MR. ZAHM: He may reject the summary court-martial under Article 20. You're correct, Your Honor. He may reject it.

QUESTION: And then what happens to him?

MR. ZAHM: Then he will either have the charges dismissed, or he will subject himself to trial court-martial, special court-martial, or even general court-martial. And as a result of that, the possibilities of his punishment, of his confinement will be tremendously greater than if he had taken summary court-martial.

The distinction being that if he opts for the special or the general, he will have the opportunity to have the

assistance of defense counsel.

QUESTION: Right.

MR. ZAHM: That is the difference.

QUESTION: If he has a good defense, with the assistance of defense counsel, presumably he'd get off.

MR. ZAHM: That is one of the reasons, perhaps, why he would take the greater risk, if you will, of greater punishment, in order to get his constitutional right of the assistance of counsel. That would be perhaps the only basis for his taking that risk, if you will.

What he does by not opting to reject his summary court-martial is to feel that he does not wish to take the risk of even greater punishment: better I should get in the brig for thirty days, and all the rest of the punishment that may accrue later in life, than to have an even greater punishment.

QUESTION: You refer to the summary court as exercising prosecutorial functions. My reading of the regulations indicates that the summary court has the duty to function not as a prosecutor but as a fact-finding officer, with an equal responsibility to safeguard the rights of the accused and those of the government.

MR. ZAHM: That is correct, Your Honor.

QUESTION: Do you differ from that general summary of the regulations?

MR. ZAHM: When we study, Your Honor, the provisions of the Manual of Courts Martial, as to the functions of the summary court officer, we find that he is to be the prosecutor. The language used in the Manual of Courts Martial requires him to do the same as a trial counsel at a general court-martial or a special court-martial, including the obtaining of witnesses for the prosecution against the accused, the questioning, the interrogation, the cross-examination of those witnesses, and in every sense, therefore, he must in fact be doing what a prosecutor would be doing.

QUESTION: But he must subpoena witnesses for the enlisted man also?

MR. ZAHM: He must do that. But this is the very problem, and the criticism of the summary court-martial that has been extant by all authorities for many years. He must do all of those things.

And in the First Circuit case of Figueroa Ruiz vs. Delgado, which is cited in the brief, the Court says -- it was a Puerto Rican District Court -- points out that it is literally impossible for a man to be a judge and function, to whatever degree, as a prosecutor. He just simply cannot successfully do it.

QUESTION: Even before some of the administrative tribunals around the country?

MR. ZAHM: Well, perhaps so, there are administrative

tribunals. But here we're speaking of courts of law where men are subject, upon conviction, to loss of liberty, Your Honor, which this Court thought, in the landmark case of Argersinger, no matter how petty the offense, he deserves the assistance of counsel at trial.

QUESTION: But in Argersinger, a defendant usually was confronted with a professional prosecutor, and there is this difference here, isn't there? Whether it's controlling or not is an issue, obviously; but in the Argersinger situation the city or county prosecutor is there in court, and if you are by yourself, you have nobody to look out for you.

But here you have a man who, by law, is required to be impartial and to serve the interests of both sides.

MR. ZAHM: Your Honor, Mr. Justice Powell, may I suggest, under A-20 a summary court consists of one officer, that's one individual; the only other person physically in tha courtroom therefore is the accused, obviously, and perhaps any other witnesses who may have been called as witnesses.

Now, somebody has to prosecute that case against the accused. We certainly can't expect that the accused will be serving as the prosecutor against himself. Somebody has to be acting as prosecutor. And obviously, by the very regulations of the Manual of Courts-Martial, that is the man who is also serving as judge, the man who will find whether

or not the accused is guilty or innocent.

QUESTION: Mr. Zahm, I find your reference to the -- assume that the First Circuit supports what you say, but it seems to me that disregards the whole course of civil law adjudication, which we couldn't have in this country in criminal cases, because of the guarantee of jury trial. But you're judged on _____ in your French courts, under a typical civil law.

It's just what Justice Powell says it is, it's an inquiry magistrate who is supposed to find out the truth, and whereas you couldn't have it in civil proceedings here, because of the jury trial guarantees, I'm not persuaded that you have carried any burden of showing it basically unfair, which you have to under the due process clause.

MR. ZAHM: Under the due process clause, this Court has enunciated, in Gideon vs. Wainwright, that the rule of Betts vs. Brady, the case-by-case approach for determination of proper due process, does not apply in criminal prosecutions, that the per se rule, the absolute standard of right to counsel applies in criminal prosecutions.

Courts-martials are criminal prosecutions, and so, following the dictates of this Court in Gideon, it would appear that the due process rights in a summary court-martial calls for assistance of counsel in every case.

Now, if I may say at this juncture, this is where we

feel this Court should not affirm the view of the Ninth Circuit in the Daigle case, where the due process test applied there, differently from the test applied by the United States Court of Military Appeals, by the Fifth Circuit in the Betonie vs. Sizemore case, where the absolute standard of due process is applied in a criminal prosecution, which means to every accused in a summary court-martial. This is the following of this Court's precept as indicated in Gideon vs. Wainwright.

And since Argersinger is an extension of Gideon vs. Wainwright, we maintain that this Court should follow, by the way, what even the government has previously argued this term before this Court, that the decisions, because of its special expertise, of the United States Court of Military Appeals should be followed by this very Court, was an argument in a case this term by the government.

We merely suggest that it is correct that the decisions of the United States Court of Military Appeals should be followed, because they know best what is needed by the military, and they decided this issue in United States vs. Alderman.

And in United States vs. Alderman, the majority of the United States Court of Military Appeals ruled that the requirements of Argersinger apply to the military; and I have not yet had the opportunity to say, I would like to emphasize that these plaintiffs recognize that military necessity, to a

great degree, determines whether or not the constitutional rights of men in service are retained by those men when they don their uniform.

QUESTION: What provisions of the Constitution define procedural rights in military justice?

On what provisions of the Constitution relating to military justice -- there are references to it, but will you pinpoint what it is you rely on?

MR. ZAHM: Well, Your Honor, ever since Burns vs. Wilson, the decision of this Court in 1953, there have been a multitude of cases in the lower federal courts and by the United States Court of Military Appeals, following Burns vs. Wilson, which, in effect, say that except for those specific exemptions from the Bill of Rights, and those that are necessarily to be implied, all constitutional rights belong to men in service as well as men not in service.

And the one single express exception, as this Court, through Mr. Justice Douglas, has indicated in Parker vs. Levy, in his dissent, the only express exception is the indictment by a grand jury. The only implied exception has been the right to trial by jury.

Other than that, there is no other exception, other than in the application of rights to the military man.

And this Court, only last term, in Parker vs. Levy, implicitly stated what I have just said, and in that particular

case, with regard to First Amendment principles, this Court said that the right of a serviceman with regard to First Amendment has to be in some way different from that of a civilian, because of the special needs of the military.

We recognize that. The Navy, allthrough the courts in which this matter, this issue has been litigated, in the Fifth Circuit, before the United States Court of Military Appeals, the District Courts in Hawaii and California, and the Ninth Circuit, has argued that military necessity requires that there be no counsel appointed at summary courts-martial.

QUESTION: Mr. Zahm, has the Secretary of the Navy followed the decision in Alderman?

MR. ZAHM: The Secretary of the Navy? Yes, Your Honor, --

QUESTION: Has he issued regulations so that now Alderman is being followed?

MR. ZAHM: That is correct. He did do exactly what you ask me; in June of 1973, following the decision of the United States Court of Military Appeals, the Navy sent out an ALMAP worldwide that the decision of Alderman shall be followed.

QUESTION: Well, Alderman was a decision of the Military Court of Appeals, I take it, --

MR. ZAHM: That is correct.

QUESTION: -- on the merits.

MR. ZAHM: That is correct.

QUESTION: Is the Secretary of the Navy required to follow that?

MR. ZAHM: The answer to that, to my knowledge, is yes.

QUESTION: Well, whether he is or not, he is following it now?

MR. ZAHM: And has been ever since June 1973, Your Honor.

QUESTION: Well, what's at issue in this lawsuit, then?

MR. ZAHM: The issue is that the Navy wants this Court to overrule the decision of the United States Court of Military Appeals, which it is asking this Court to do, to my knowledge, for the first time in history.

QUESTION: Well, has the Secretary withdrawn his regulations?

MR. ZAHM: He has not.

QUESTION: But I gather your point is, if he were to prevail here, he probably would; is that it?

MR. ZAHM: The supposition is, Your Honor, that if this Court should rule contrary to the way plaintiffs here request, that you would in effect be overruling the decision of the United States Court of Military Appeals.

QUESTION: In other words, his regulations are only

under the compulsion of Alderman, and that if Alderman is reversed, he won't be under any compulsion; right?

MR. ZAHM: That is correct, Your Honor.

May I at this point --

QUESTION: Is that what he said, do you know; has he said that?

MR. ZAHM: Pardon?

QUESTION: Well, maybe I should ask Mr. Frey.

QUESTION: We'll ask the government about that.

MR. ZAHM: Yes.

May I point out at this juncture that when the Argersinger decision came forth from this Court in May -- excuse me, in -- yes, in May, I think it was May or June of 1972, the Army and the Air Force, within weeks and without anyone other than their own commands requesting it, immediately followed the procedures as required by Argersinger.

QUESTION: Well now, Mr. Zahm, what is -- what's the present status of your clients? Where are they?

MR. ZAHM: Well, --

QUESTION: Are they -- they aren't in the brig somewhere. They long since --

MR. ZAHM: No.

QUESTION: -- would have served their --

MR. ZAHM: A number of them were released under the writ of habeas corpus issued by Judge Williams in the District

Court. Others either have served their time or --

QUESTION: Well, it seems to me they would be entitled to relief and to retrial, or whatever it is, under the Secretary's regulation.

MR. ZAHM: As my -- as I understand it, Your Honor, the Navy does not provide for retrial.

QUESTION: Well, what about -- aren't -- your clients cannot get the benefit of the Secretary's regulations?

MR. ZAHM: Well, for them it was too late. And, as a matter of fact, I believe a number of them are already out of service. They either have served their time -- their relief, if we --

QUESTION: Well, tell me just one person who, that if you lose, is going to suffer.

MR. ZAHM: Their records will remain as being -- showing that their conviction of a summary court-martial, and if they're still in service they may suffer by the escalator clauses later --

QUESTION: I see.

MR. ZAHM: -- and as a civilian. This is on their record, you see. They lost pay, which they otherwise may, theoretically at least, ask for it to be recompensed.

QUESTION: But that's a -- of course, that's a consequence that normally Argersinger doesn't protect against.

MR. ZAHM: But, Your Honor, may I say that the

concern here is not --

QUESTION: Well, you're not -- you don't face confinement any more.

MR. ZAHM: Not these main plaintiffs, but, if I may point out, Your Honor, this action was brought as a class action, habeas corpus class action worldwide. And also in the form of mandamus.

QUESTION: Well, was it declared to be such?

MR. ZAHM: By the District Court, yes. And never undone by the appellate court.

QUESTION: Well, the class, though, the class can't go on under the Secretary's regulations, the class ends. Because there's no more people being deprived.

MR. ZAHM: Unless this Court rules otherwise.

QUESTION: Well, the Secretary's regulation -- the class hasn't had anybody added to it ever since the Secretary's regulations went into effect.

MR. ZAHM: Not since then, Your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Frey.

ORAL ARGUMENT OF ANDREW L. FREY, ESQ.,

ON BEHALF OF THE FEDERAL PARTIES

MR. FREY: Mr. Chief Justice --

QUESTION: Are the regulations going to be rescinded if you win?

MR. FREY: They are, yes.

Unless Congress changes the legislative structure.

QUESTION: Is that something that's in your brief, or -- has he said that, or what?

MR. FREY: I don't believe it's in the brief, but we would not have petitioned for certiorari had he not requested a -- I mean we petitioned for certiorari on behalf of the Secretary, because the Secretary was very anxious to have this matter clarified, and to be able to enforce the congressional scheme for courts-martial, which he was unable to do as a result of the Alderman decision.

QUESTION: Was the Alderman decision made prospective in its application only?

MR. FREY: Well, that's a very strange thing. Retroactivity was not argued in Alderman, as far as I know, but in fact it was a retroactive decision, because the Court of Military Appeals has no jurisdiction over summary courts-martial, they are not reviewed into the court system. It has no particular expertise with respect to that special facet of the system.

And the issue there was that enhanced punishment had been imposed on Mr. Alderman at a subsequent special court --

QUESTION: Because of a prior summary conviction.

MR. FREY: -- because of a prior summary conviction. So, in effect, they gave it -- they gave Argersinger retroactive

effect.

And we of course take the position, and I think it's clear from reading their opinion in Alderman, that they did not deal with this as military experts, they dealt with this by reading the opinion of the Court of Appeals -- I mean of the Supreme Court in Argersinger, and concluding, quite summarily, in the case of Judge Quinn's opinion and almost equally summarily in the case of Judge Duncan's, that this was binding on the Court of Military Appeals.

In fact, Judge Duncan said, as far as he was concerned, this was a perfectly fair and reasonable procedure, and if he were not under the force of Argersinger, he would uphold it.

QUESTION: But in the last portion of your brief you ask us that even if we should decide against you on the underlying merits, that we not make any decision retroactive; and that's what prompted my question was to whether the Alderman decision itself was retroactive.

MR. FREY: Our interest with respect to retroactivity is as of the date of Alderman. In other words, our position would be that Alderman, if it was correct in declaring that there was a right to counsel in summary courts-martial, would be the break with the past for retroactivity pruposes, and the Secretary complied with Alderman, under the force of that decision.

QUESTION: From then on.

MR. FREY: But there are -- we think that under the Morrissey approach, that the proper standard for retroactivity -- and I didn't mean to get into this at length, because I trust you'll never have to reach it -- but that the proper standard would be from the date the rule was changed. If that's not to be the standard, there's a mare's nest of possible retroactive problems of various consequences in various future and past consequences, and we would suggest that you not get into the details of what parts would be retroactive and what parts not.

QUESTION: Mr. Frey, Gideon was retroactive, Argersinger, I think, has been made retroactive; this is a claim of right to counsel in a criminal proceeding.

MR. FREY: Right.

QUESTION: Is there any really very persuasive argument that it shouldn't be retroactive under the fairness of fact determination?

MR. FREY: Well, I think there is, because I think it's clear, from Morrissey and from Wolff, that the mere fact that the right to counsel is held to contribute to the fairness of the proceeding substantially -- after all, in Morrissey there was a liberty interest at stake, and the Chief Justice began by recognizing that there was a substantial liberty interest that was being affected by this action, and therefore

looking into the due process requirements surrounding that. And the Court nevertheless recognized that -- it held it prospective in Morrissey and it subsequently recognized it in Wolff, that those kinds of rulings may be prospective.

I think it's a judgment, and I think in part the judgment would turn on this Court's belief as to how defective these proceedings without counsel have been. And I think, as I get into my argument, I hope I'll persuade you, if our brief hasn't already, that these are quite fair proceedings, and that the system that Congress has devised is an admirable one.

QUESTION: Well, the revocation of parole is not precisely --

MR. FREY: Of course there's a difference --

QUESTION: -- the criminal proceeding that Justice Rehnquist was talking about.

MR. FREY: I agree. I think our opponents in this case are interested in analyzing the case by label. They want to attach the label that says this is a criminal proceeding. And we don't deny that this is a criminal proceeding.

And then they want to take the label "imprisonment" and then they want to ask the Court to stop thinking about the case any further, and proceed automatically.

Now, I suggest that it's necessary to make a pragmatic and a functional analysis, and to look at what's happening

here, and I -- as I say, I think the substantial problem about which we're concerned is the validity of these procedures in the first place, and the retroactivity problem is quite a secondary one.

Now, a little over twenty years ago, in Burns v. Wilson, this Court considered the nature of the constitutional protections applicable to the Military Justice System, and thus the scope of its powers to oversee the operation of that system in these terms.

It said: the constitutional guarantee of due process is meaningful enough and sufficiently adaptable to protect soldiers as well as civilians from the crude injustices of a trial so conducted that it becomes on fixing guilt by dispensing with rudimentary fairness, rather than finding truth through adherence to those basic guarantees which have long been recognized and honored by the military courts as well as the civilian courts.

Those words are in some ways reminescent of Justice Cardozo's formulation of the power of this Court over State courts in Palko v. Connecticut?

Of course much has changed in our constitutional jurisprudence since those words were penned. But this Court has never stepped beyond the bounds of its self-imposed restraints in order to strike down as unconstitutional any provision of the Uniform Code of Military Justice, or to

invalidate any procedure deliberately chosen by Congress for the administration of military justice.

If the Court rules against the Navy in this proceeding and declare invalid the congressional decision to use the relatively informal non-adversarial procedures of a summary court-martial, for the disposition of relatively minor charges, it will have taken an historic step. It will have broken sharply with the past, and it will, I suggest, have intruded unjustifiably on the responsibilities of the Congress.

QUESTION: Mr. Frey, do you know of any other situation where a man is put in jail without a judicial proceeding?

MR. FREY: Well, we have a judicial proceeding here. We don't mean to suggest that -- in non-judicial punishment he may be put in the brig.

QUESTION: Well, first let me say, if I might. You don't go to jail except as a result of a judicial proceeding.

QUESTION: If you're arrested, you go to jail. For a while, at least, until there's a bail hearing or probable-cause hearing.

MR. FREY: Well, that's true, but this is a somewhat different matter, because this is an adjudication of a finding that an offense has been committed; and the imposition of

punishment consequent to that.

QUESTION: Well, how about in cancellation of parole and probation?

MR. FREY: Well, you would -- you would go to jail there without a judicial proceeding.

QUESTION: Well, but you also -- you go to -- you can go to jail without counsel, too.

MR. FREY: You could.

QUESTION: Sometimes you might have it and sometimes you might not.

MR. FREY: Yes, but we don't -- we are not advocating here the Ninth Circuit formulation in Daigle, because we don't think it's workable for summary courts-martial.

And we think that the procedure over-all is sufficiently fair that there is no question of -- there should be no question of requiring counsel.

QUESTION: But at least in the -- I know you're not supporting that result, but at least the -- again your argue that probation and parole is an instance where the court says you're not entitled to counsel every single time you might face imprisonment.

MR. FREY: Well, that's true. And of course in Wolff, where the duration of your imprisonment was at stake, you're not normally entitled to counsel.

QUESTION: Mr. Daigle, you just --

[Laughter.]

-- Mr. Frey, you just suggested that the government would not support the Daigle formulation. Do I -- am I to infer from that that if there is to be a right to counsel, you'd rather have the forthright Argersinger than the Daigle formulation?

MR. FREY: Well, let me --

QUESTION: Daigle relied on Gagnon, I think, didn't it?

MR. FREY: That's right.

It relied on cases which required a case-by-case evaluation.

QUESTION: Yes.

MR. FREY: We feel that it is not feasible under these circumstances to conduct that kind of case-by-case evaluation.

QUESTION: You'd rather not have any, but if --

MR. FREY: Well, we'd rather not --

QUESTION: -- if this is to be affirmed, you don't want the Daigle formulation, I guess.

MR. FREY: Congress wished to have none, and we would like to abide by the scheme that Congress established until Congress changes it, if we can. If we can't, we don't feel it's workable to --

QUESTION: Mr. Frey, may I add one more point to my question?

Do you know of any instance where a man is put in jail in a non-judicial proceeding from which there is no review, any place, under any circumstances?

MR. FREY: There is review of this proceeding. There is administrative review of the summary court conviction.

QUESTION: Is it reviewed by a court?

MR. FREY: No, I don't believe it is a court review.

QUESTION: That's right. It's not.

QUESTION: Well, one example would be, if your footnote is correct on page 12 of your brief, that -- what do you call it now -- an Article 15 administrative proceeding, which we used to call Captain's Mast, for a ship at sea can put a man in jail for three days on bread and water, and I think there's no review of that, is there?

MR. FREY: Yes, it could, it could do that.

QUESTION: Well, do you know any place else in the Navy?

[Laughter.]

QUESTION: If the Court should conclude that the Daigle formula were a proper one, I suppose the Navy would accommodate to it by appointing counsel in all cases, by reason of the workability argument.

MR. FREY: I think that's the way the Navy would

react under that.

QUESTION: Well, except -- it seems to me you're awful reluctant about it, because if -- under that formulation, if people wanted to plead guilty, there wouldn't have to be counsel or waive of counsel.

MR. FREY: Well, it's possible. I can't -- this is what the Navy tells me they feel is viable, and this is what they've been doing, although they've been doing it under an Argersinger basis, rationale from the Court of Military Appeals.

Now, much of the argument in my opponent's brief has been directed to the proposition that summary court-martial, as presently constituted, are not really such a good idea. It's relied on the views expressed by Senator Ervin in dissent to the 1968 decision to continue --

QUESTION: Excuse me, Mr. Frey, may I interrupt you once more?

MR. FREY: Yes.

QUESTION: Since Alderman and the Navy regulations carved by Alderman, has the Navy had to staff ships at sea with special personnel --

MR. FREY: No, Alderman does not require the provision of lawyer counsel at sea, nor is it necessary, even in the case of a special court, and special courts are also conducted at sea, although not with the same frequency as summary courts are.

QUESTION: Yes. Well, are there special -- I'm interested, that apparently the Army and the Air Force have acted as though they were bound by Argersinger and provide counsel in comparable proceedings. What's the special problem about the Navy, if it's not applicable to use at sea?

MR. FREY: Well, I don't -- I think that the Army acquiesced, and I think they may be now reluctant about it, but they did acquiesce in the view. They read Argersinger as being applicable.

Now, the degree of sophistication of their analysis at the time they issued that, I can't speak to.

QUESTION: Was that true of the Air Force, too?

MR. FREY: The Air Force made very little use of summary courts, and I think the character, the nature of the personnel in the Air Force are somewhat different in terms of levels of education and so on --

[Laughter.]

MR. FREY: -- that it affects the utility of, or the need for the summary court as a device for maintaining discipline.

QUESTION: Did Alderman say it was not applicable to ships at sea?

MR. FREY: They recognized that there could be an exception. Because lawyer counsel -- what happens in summary courts that are still conducted at sea is that sometimes they

are on an aircraft carrier, which is practically a traveling city, and which may have two attorneys on it, in which case lawyer counsel would be provided. But, if not, they'd provide an officer to serve a counsel who is not a lawyer.

By the way, no one is prevented from having, as far as I know, counsel of his choice, that is, by having a friend, his warrant officer, come and help him in a summary court proceeding. Even now, he is not required to go into the proceeding alone.

Now, there's been a suggestion that you wouldn't be declaring a statute unconstitutional if you ruled against the Navy's position in this case. And while in some technical sense it's true, the Congress hasn't prohibited the use of counsel in summary courts, I think that this Court should make no mistake about concluding that a declaration of invalidity of the summary court procedure would represent an exercise of the Court's constitutional veto over the powers of Congress.

QUESTION: It wouldn't say that you couldn't hold it, but said that you could hold it with counsel.

MR. FREY: Well, you would say that the Constitution did not permit it to be held the way the Congress planned for it to be held, and it's quite clear, if you look at Article 27 of the --

QUESTION: Well, does it say specifically that he

can't have counsel?

MR. FREY: No, I was just saying it does not say that it can't have counsel --

QUESTION: That's right.

MR. FREY: -- but there is no doubt that Congress, which is supposed to provide for the administration of military justice, deliberately selected a system in which summary courts would not entail the provision of counsel. And if you look at Article 27, which deals with the provision of counsel in special and general courts, it's clear that this was a carefully thought-out, deliberate decision of Congress.

Now, the framework of analysis for a case of this sort, we suggest, is found in the Court's recent decision in Parker v. Levy.

Now, the Court there recognized the important differences between the military and the civilian community, and the differences in their criminal justice systems that flowed from that.

These differences derive in large part from the special relationship of the government to its servicemen and the vastly greater proportion of the serviceman's life that's subject to regulation.

And, in light of this, the Court held, in Parker v. Levy, for the reasons which differentiate military society from civilian society -- and I'm quoting from page 21 of the

slip opinion -- we think Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the former -- that is the military society -- shall be governed, than when it is when prescribing the rules for the latter.

It then went on to say, at page 23: The fundamental necessity for obedience and the consequent necessity for the imposition of discipline may render permissible within the military that which would be constitutionally impermissible outside of it.

Against this background, I would like the Court now to consider the role that the summary court-martial plays in the system that Congress has established for the administration of military justice.

The system is a flexible one; as you've read, I'm sure, there are four levels which are designed to deal with the broad range of offenses.

The most minor disciplinary infractions are dealt with the most informally in a proceeding that is quite limited, and the punishments that can be imposed.

The most grave are dealt with in proceedings of considerable formality, with substantial procedural protections and potent penalties available. That is, the general court-martial.

Now, this Court recognized in Parker v. Levy that

the Article 15 proceeding, which imposes punishments which, in most respects, are similar to the punishments at summary court, but which do not include confinement at hard labor, that that partook, in many ways, of the aspects of a labor-relations matter between an employee and an employee.

Well, here, while it's true that we have a criminal proceeding, it's also true that the summary court, the next step up in the scale, partakes very much of these same factors.

It's frequently used for -- it can be used for the same kind of offenses for which non-judicial punishment under Article 15 could be employed, or forwhich a special court could be convened. Part of the judgment that would go into the decision to invoke a summary court would be, for instance, that this particular individual had committed the same offenses several times, he had been punished under Article 15, he was not responding to discipline, and it was necessary to step up a little the degree of punishment that could be imposed on him in an effort to generate obedience and discipline, on his part.

QUESTION: Who decides this? The commanding officer?

MR. FREY: The commanding officer.

QUESTION: And he can decide whether to deal with it under Article 15 or to --

MR. FREY: Convene a summary court of a special court.

QUESTION: -- convene a summary court or a special court.

MR. FREY: But the --

QUESTION: And any of those can be on shipboard.

MR. FREY: Yes.

QUESTION: Is that right?

MR. FREY: Yes.

QUESTION: But beyond that, for a general court, it has to be somewhere else. Right?

MR. FREY: I think that's right.

QUESTION: It used to be.

MR. FREY: Now, on shore, the sailor could reject either an Article 15, and he could reject the summary court, he could insist on the more formal judicial proceeding, the next step up the scale.

QUESTION: How about at sea? You say that could be done ashore; are you implying that it cannot be done at sea?

MR. FREY: At sea they can reject summary court, but they cannot reject Article 15 punishment.

That's the special exception that has been drawn.

I think for reasons that are traditional with the Navy, in terms of authority of the captain, which is even

greater than the authority of other commanding officers in the service under other circumstances.

QUESTION: Of a ship at sea?

MR. FREY: Of a ship at sea, yes.

Now, the summary court-martials are mostly for military types of offenses. Still these are the vast bulk -- I think it was 86 percent, according to the table we have in our brief; are offenses that would not be offenses in civilian life at all. The majority of them are unauthorized absence; also disobeying an order; disrespect to a superior officer, and so on.

There are substantial procedural differences. We've shown in our brief that the summary court-martial takes about -- before Alderman took about 33 days. Special courts take somewhere on the order of two to three times as long, from charge to disposition.

There are, it seems to me, clear reasons why the Navy would prefer not to use a special court if it didn't feel that such severe punishments were necessary to deal with the particular offense.

Now, if this Court's decision substantially alters and impairs the utility, the flexibility of the summary court-martial, then the carefully balanced structure of graduated procedures and penalties established by Congress will be itself impaired, and its character substantially altered.

These consequences may, of course, be constitutionally compelled, and they would be if the Court concludes that the use of non-adversarial procedures comes anywhere close -- harking back to the Burns v. Wilson language -- to, quote, "the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness."

We don't think these words are even remotely applicable to the summary court procedure.

In answering the constitutional inquiry that you have before you, there are three factors to be considered:

First, the fairness of the procedures as a means of adjudicating guilt and imposing punishment for relatively minor infractions.

Second, a consideration of what is at stake for the individual in the proceeding. In other words, what's the potential impact, of a mistake, on his life?

Thirdly, what are the governmental interests that are served by the procedure.

And I'd like to consider that last factor first.

The principal consideration that I think is important to the services, in the use of the summary court-martial, is speed of disposition. They want to get the man back on the job swiftly. They want to impose punishment swiftly, to maximize the deterrent or corrective effect of the punishment. And I think it's well-recognized that a small

punishment, swiftly imposed, is frequently much more effective as a means of correcting behavior than a larger punishment substantially delayed.

Now, if you would look at the table on page 26 of our brief, you will see that what has happened since the first period, that is January 1 through June 30th of 1973, was largely pre-Alderman, counsel were generally not provided during most of that period.

The two subsequent periods were post-Alderman, and counsel was provided. And the time of disposition increased from 33 and a half days, approximately, to -- we have now a corrected figure, on the basis of final figures that were not available at the time we did the brief -- 43.62 days for the first half of calendar 1974.

Now, in their brief, my opponents have suggested that the increase in acquittal rates is a product of the provision of counsel, and that this increase is as much as 32 percent more acquittals.

Now, I'm willing, for purposes of driving home a point, which I think is very important for this Court to consider, to accept the proposition -- although I'm not sure that it's scientifically valid -- that the increase in acquittals is due to the presence of counsel.

Now, if you will compute the effect of that -- that is, if you will assume that the 4.9 percent acquittal rate

during the pre-Alderman period is the rate of acquittals that would have occurred without counsel, you will find that out of about 8800 cases there would have been approximately 80 people who were acquitted with counsel, who would not have been acquitted without counsel. About 80 people out of 8800 cases.

Now, in exchange,however, if you will attribute the increased time, and I'm not saying that this is precisely correct, but I think that the major component in the increased time that it takes to try these cases is the presence of counsel, you will find that there are approximately 80,000 man-days of additional time with people having charges hanging over their head undisposed, as a result of counsel.

So, in other words -- and I don't mean to minimize the importance to the 80 people who would have been convicted had they not had lawyers -- the significance to the Navy and to these people is 80,000 man-days of people with charges hanging over their heads, people who can't be assigned on mission, and some of these people innocent, with charges hanging over their heads.

Now, turning to the considerations of fairness, we think there are significant differences in terms of the fairness of the procedure, as compared to the civilian procedures that this Court was considering in Argersinger.

I think one was brought out in the questioning of

Mr. Zahm, and it's a central one. This is not an adversarial procedure. The misdemeanor and petty offense trials at stake in Argersinger were adversarial procedures. They didn't always involve judges. Sometimes in police courts, police officers presented the case. But even there it was somebody that was experienced in court, who knew what he was doing.

The inquisitorial system of justice is not so fundamentally unfair, as Justice Rehnquist pointed out, that it can't be used for substantial aspects of the criminal justice system in many European countries.

Also, the criminal justice system in the military is not burdened with the kinds of backlogs that cause the court concern in Argersinger; the rush to judgment, that was a worry in Argersinger, we believe is clearly not a concern in this area.

And even in terms of impact on the individual, while I don't wish to minimize it, it is simply not as great as it is in civilian life.

For instance, employment consequences, immediate employment consequences. A man in the Navy, who's convicted at a summary court-martial and goes to the brig for three weeks or thirty days, he has a job when he gets out. He can still get an honorable discharge from the Navy if the rest of his record is good.

On the other hand, a man who gets thirty days in jail as a civilian may very well not have a job waiting.

The fact of imprisonment has a far more severe consequence --

QUESTION: But he gets something other than bread and water if he's a civilian.

MR. FREY: And also if he's a sailor. The bread and water is a limited exception and applies to non-judicial punishment on board ship for up to three days. I don't know whether reduced rations is a penalty that can be imposed under a summary court. I don't think so.

QUESTION: I don't think it can any more.

MR. FREY: It's the same -- the same amount of reduced rations for non-judicial punishment.

QUESTION: Yes, but not bread and water.

MR. FREY: Bread and water for a limited period of time can be imposed in both non-judicial punishment and court-martial.

QUESTION: But I still -- you still admit that this is a judicial proceeding?

And I'm not just getting the words there.

MR. FREY: Yes. The summary court is a judicial proceeding. That is the distinction that the Navy makes. But we believe, and we urge this Court to recognize, that Congress can say to itself: We're going to have a judicial proceeding

that won't exactly resemble the judicial proceeding in the civilian system.

QUESTION: Well, I don't think Congress we could set up some other kind of proceeding to put a man in jail that is not judicial. I don't think Congress can do it.

MR. FREY: No, but Congress has not -- to say that it's judicial is not to answer the question as to what specific procedures are required.

QUESTION: I submit that the determining fact is whether he goes to jail. That's the one factor.

QUESTION: Would it help if you term this a judmental process, to get away from the implications of judicial? It is a judgment that's formed on the man, isn't it?

MR. FREY: Well, it certainly is, it's a determination of facts as to whether or not he's --

QUESTION: That's a different proceeding.

MR. FREY: It's a non-adversarial proceeding, yes.

QUESTION: And you put a man in jail without an adversary proceeding.

MR. FREY: Well, that's true, but that's not -- in Europe it's not considered fundamentally --

QUESTION: But this is not Europe. We had to go to war about that.

MR. FREY: But you're dealing -- but you are dealing

here with the military, and this Court, unless it's going to depart from a long tradition that it has never departed from in this area, gives deference to the military, gives room for special procedures and special rules in the military that would not be available in our civilian system, which is bound by a different and more rigid set of rules.

The impact on the sailor who's convicted at summary court is far less than in Gault, on the juvenile who might be sent away until he's age 21; in Morrissey, on the parolee who might face eight, ten, twelve years in jail. Yet -- or even in Wolff, where he might lose several years of good time allowances and have other significant consequences.

Now, finally, I would like to point out to the Court the effect on the fairness of the system and on its constitutionality of the option to reject a summary court.

The serviceman has a right to counsel. He can exercise it by rejecting the non-adversarial procedure that is offered to him with the summary court.

Now, it is true that if he rejects it he exposes himself to the punishment of a special court, if the commanding officer decides to convene a special court rather than to resort to non-judicial punishment, or to dismiss the charges altogether.

Now, there has been some discussion of the Jackson case in this connection, and I would like to say, first of all,

that we don't think Jackson is controlling. In part, because it's a bootstrap thing -- well, I guess my time has expired.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 3:27 o'clock, p.m., the case in the above-entitled matter was submitted.]

- - -