In the

Supreme Court of the United States

J. William Middendorf, 11, Et Al, Petitioners v. Daniel Edward Henry, Et Al and Daniel Edward Henry, Et Al Petitioners v. J. William Middendorf, 11, Et Al	No. 74-175 No. 74-5176

Washington, D. C.
November 5, 1975

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IN THE SUPREME COURT OF THE UNITED STATES

J. WILLIAM MIDDENDORF, II, ET AL, Petitioners	:	
v.	:	No. 74-175
DANIEL EDWARD HENRY, ET AL and DANIEL EDWARD HENRY, ET AL Petitioners	:	
v.	:	No. 74-5176
J. WILLIAM MIDDENDORF, II, ET AL	:	

Washington, D. C.

Wednesday, November 5, 1975

The above-entitled matter came on for argument at 1.01 o'clock p.m.

BEFORE.

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
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, Sherman Oaks, CAlifornia
For Henry et al

HARVEY M. STONE, ESQ., Appellate Section, Criminal Division, Department of Justice, Washington, D.C. (pro hac vice) For Middendorf et al

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Nos. 74-175 and 74-156 consolidated, Middendorf against Henry.

Mr. Zahm, you may proceed whenever you are ready.

ORAL ARGUMENT OF NATHAN R. ZAHM, ESQ.

MR. ZAHM: Mr. Chief Justice. If the Court please:

Since these consolidated cases are here on reargument today, it would seem unnecessary and more expeditious to refrain from repeating the facts of the case, which are undisputed and are relatively simple.

Suffice it to say that in a routine manner the Petitioners, members of the Marine Corps, were up on charges on courts-martial. Five of them were convicted and incarcerated as a result. Three others were facing courts-martial and sought relief by way of injunction to prevent it.

Now, we ask this Court to affirm that the Sixth Amendment guarantee of assistance of counsel in criminal prosecutions, which was this Court's principal basis for its ruling in Argersinger versus Hamlin in 1972, also applies to persons in military service.

Every court that has ever considered the question including the Court of Military Appeals, in United States versus Culp, United States versus Tempia in 1967 and more

recently, United States versus Alderman in 1973, has so held, with a single exception, that being the Ninth Circuit in the case of Dagle versus Warner, which has sufficient pending here, sub nom Crosby versus Warner.

Now, the Federal Parties have asked this Court for the first time ever to overrule the United States Court of Military Appeals on this issue in favor of a single civilian court's view, despite this Court's repeated recognition over the years and repeated only last year in Schlesinger versus Councilman, that Colna is the court established by Congress to gain, over time, thorough familiarity with military problems.

Now, for this Court to do so would undermine the Court of Military Appeals' very significant role as the Supreme Court of the Military, which it has been designated to be.

Now, the only basis for the Ninth Circuit's holding on this question of the Sixth Amendment's application to the military is based on a single historical treatise; specifically, Wiener's Harvard Law Review article in 1958.

Now, this despite the fact that there was another equally authoritative historical treatise in the Harvard Law Review the preceding year by Henderson on the identical question with exactly the opposite conclusion from that reached by Wiener. But the Ninth Circuit chose to go along

with Wiener, despite the fact that the Court of Military Appeals and every other court before whom the question has been raised, with both those articles presented to the courts for their consideration, have chosen Henderson instead, if they chose any.

Now, with regard to the reliance on history for constitutional interpretation, where the documentation is inconclusive and disputable, Mr. Chief Justice Burger, dissenting with Mr. Justice Blackmun and Mr. Justice Rehnquist, just last term, on June 30th, stated in the case of Peretta Versus California, and I quote, "Like Mr. Justice Blackmun, I hesitate to participate in the Court's attempt to use history to take it where legal analysis cannot, piecing together shreds of English legal history and early state constitutional and statutory provisions without a full elaboration of the context in which they occurred or any evidence that they were relied on by the drafters of our Federal Constitution creates more questions than it answers and hardly provides the firm foundation upon which the creation of new constitutional rights should rest and, more pertinent, we are well-reminded that this Court once employed an exhaustive analysis of English and colonial practices regarding the right to counsel to justify the conclusion that it was fundamental to a fair trial and less than ten years later, used essentially the same material

to conclude that it was not.

"Compare Powell versus Alabama and Betts versus Brady."

I think that that should be kept in mind when we are considering whether or not a fundamental question like this should be decided, as the Ninth Circuit did, on a single documentation which is in dispute.

Now, aside from the disputed historical documentation on the question, logic demands acceptance of the view but the framers of the Constitution did not intend to accept the Sixth Amendment from applicability to the military service by silence because they specifically wrote in an express exception in the Fifth Amendment with regard to presentment or indictment of a Grand Jury.

That is the position of the Court of Military Appeals which has considered the matter.

The United States versus Jacoby in 1960 and United States versus Tempia in 1967 so we don't need this historical documentation which is in dispute. Logic explains to us, as the Court of Military Appeals has pointed out, that if the framers intended an exception, they would have done what they did with the Fifth. They would have written it in.

Now, this Court in Parker versus Leavey in 1974 implicitly affirmed the impact of Burns versus Wilson some

20 years ago.

That, quoting from United States versus Tempia, "The protections of the Constitution are available to servicemen in military trials."

Now, this Court, in Parker, held -- as the Court of Military Appeals had previously held and recognized by virtue of the Priest case that was involved in the Parker case that the constitutional guarantees may be applied differently to servicemen where military necessity requires it. In other words, where it can be shown and the burden is on the military to show it, that it requires a somewhat different application as applied to military men than as applied to civilians.

Now, the Court of Military Appeals knew that full well, as they indicated by their holding in Priest with regard to the issue of the First Amendment rights there involved and so it is nothing new to the Court of Military Appeals that there is such a doctrine that where military necessity requires it the Constitutional guarantees may be applied somewhat differently.

But the point is that in this case, which does not involve the First Amendment but involves the Sixth Amendment where the Court of Military Appeals, recognizing this concept of military necessity, has considered the issue, has decided that there is no military necessity for a ruling which would

deny to men in service their Sixth Amendment rights of assistance to counsel.

I think that on this question of military necessity which the federal parties have laid such great stress upon, that the Ninth Circuit stated it most succinctly in their decision in Dagle versus Warner, which is Crosby versus Warner, petition pending in this Court.

And I am quoting from the Ninth Circuit decision, "While the Navy argues with some vigor that naval discipline will suffer severely if appointed counsel are required, there is scant support of this in the record.

"The Army and Air Force already provide counsel to all accused before summary courts-martial and the Navy allows private retained counsel to participate in such proceedings.

"The Navy suggests that the effectiveness of a summary court-martial as a tool for preserving discipline and order will be undermined by the participation of counsel. If so, this must already be true as to those defendants who can afford retained counsel." End quote from that opinion.

Now, aside from the argument with regard to military necessity, I think this also points out that it is a refutation of the argument also made that affording counsel to men in service disrupts some Congressional scheme which specifically, according to the federal parties, is designed

not to provide counsel to men in service at summary courts-martial.

Now, the fact is that when Congress adopted the Military Practices Act in 1968, the decision of this Court in Argersinger had not yet been rendered, which was in 1972 so it is fairly clear that if Congress had known that this Court considered, for the first time, mind you, that petty offenses required assistance of counsel, they might have considered differently when passing that act in 1968 and the net effect -- the net effect as it stands now is that, yes, counsel, retained counsel by those servicemen who can afford retained counsel, are permitted to have counsel at summary courts-martial.

The practical result is that those who do not have counsel because they are not afforded counsel in summary courts-martial, are the poor, the indigent, the enlisted man of the lowest ranks who cannot afford to retain counsel.

Most certainly Congress did not intend that that should be the result. That is not the Congressional scheme of Congress and the fact that a counsel may be obtained by a serviceman at a summary court-martial indicates that there is n o firm scheme on the part of Congress that absolutely under no circumstances shall there be appointed counsel at summary courts-martial.

QUESTION: Well, now, may a serviceman opt out of the summary court and have a general court?

MR. ZAHM: He may opt out and he may have, instead, a special court-martial or a general court-martial.

QUESTION: And at which he would have counsel?

MR. ZAHM: At which he would have counsel which Congress has provided for specifically in those courts-martials.

QUESTION: But you don't think that saves the system at all.

MR. ZAHM: Oh, it doesn't save the system at all for the reason that under this Court's doctrine of United States versus Jackson, it is a limitation on his use of the constitutional right.

QUESTION: Well, what if, you know, a state provides a two-level criminal trial for certain kinds of crimes and if you are charged with a certain kind of a crime you are tried in a municipal court or something like that? No jury trial. No jury trial but you can appeal if you are convicted and have a trial de novo.

MR. ZAHM: Yes.

QUESTION: Now, what do you think about that?

MR. ZAHM: I have given the matter some thought Mr. Justice Blackmun.

QUESTION: Yes, I thought you would. I would

think you would.

MR. ZAHM: Yes, but because the two situations are not analagous at all, in my view for the reason that the two-tier court system provides two different trials. The man has a choice after having one trial to completely negate the result of that trial and choose to go and have another trial but in the summary courts-martial --

QUESTION: Well, what if a man can plead guilty -- plead guilty at the first trial and avoid that trial al-together and get his / jury trial with a trial de novo?

MR. ZAHM: But in summary court-martial set-up --

QUESTION: Here he doesn't have to plead guilty. He can go have his general court.

MR. ZAHM: He may go have it, but he will stand the risk of much greater punishment if he does.

QUESTION: And in my example I gave you on the two-tier system, if you opt for the jury trial in the first instance, you face a higher penalty in some of these state systems.

MR. ZAHM: But at least you would have the opportunity of being found not guilty in the second trial. You are having the choice of two different trials.

QUESTION: You certainly have that here.

MR. ZAHM: You have only one opportunity for trial of any sort in the summary courts-martial system. You are

either going to take the summary courts-martial or you want --

QUESTION: But if you want a lawyer, you can get it.

MR. ZAHM: You can get it at the risk of greater punishment, which this Court in the United States versus Jackson says is an unconstitutional limitation and your use of your constitutional rights.

QUESTION: But in the other situation, if you want a jury you can get it but you have to expose yourself to greater punishment, Justice White's two-tier example.

MR. ZAHM: In the two-tier example, as I understand it, you may have jury trial in the first trial, as a matter of fact, under the Kentucky system in Colton.

QUESTION: You didn't get a jury trial the first tier in Colton, I don't think.

MR. ZAHM: Well, I wouldn't be too sure about that at the moment but I believe that that is the opportunity, a jury trial even at the first level, in the first court.

Now, the federal parties have made the point that the Court of Military Appeals was not considering the question of military necessity when they decided in the United States versus Alderman in the favorable -- with the favorable view with regard to the Sixth Amendment right.

Now, we have taken the opportunity in our brief to quote in full that portion of the brief that was presented in the Alderman case before the Court of Military Appeals on

this entire question of military necessity.

Pages 15 to 28 of our brief are directly quoted from the brief presented to the Court of Military Appeals in Alderman. This specifically indicates that that issue of military necessity was very forcefully made by the Navy before the Court of Military Appeals, fully considered by the Court of Military Appeals and in their opinion, the Court of Military Appeals in Alderman flatly stated that there is no showing of military necessity made out to indicate that the Sixth Amendment right to counsel should be deprived to men in service.

Again, we have cited at length and quoted at length in our briefs from the Fidel article, "Summary Courts-Martial, a Proposal in 1971," pages 29 and 30 of our second brief in which, although the entire article shows that there is no military necessity for summary courts-martial in general, the specific point is made in that article by Fidel that the number of summary courts-martials dropped from 64 percent of the total number of courts-martials in the military in 1962 to 25 percent in 1969 and he suggests the obvious, that the reason for the drop in summary courts-martials in those years -- which were pre-Alderman years, pre-Argersinger years -- when, as we have indicated previously, since June 8th, 1973 the Navy, along with the Army and the Air Force, has been providing counsel as a result of the Alderman decision

but prior to that time --

QUESTION: When a service -- when a Naval person is charged, does he have an initial option to take a general court-martial in place of a summary? Right at the time of the charge could he opt for a general court-martial?

MR. ZAHM: He would be given at a very early stage, by being charged with a summary court-martial, he would be given the opportunity to opt, but he certainly wouldn't be opting for a general court-martial, if he was going to opt at all.

Now, the only conceivable reason from a practical standpoint, that a man who could have a summary courts-martial without counsel, would choose special courts-martial with a risk of greater punishment would be that he feels, if he is sophisticated enough, and both of these men are not, that if he has a lawyer he probably won't go to jail at all -- at least he has a chance of not going to jail at all and what he is trying to avoid -- which is the very thing that Argersinger, with regard to civilians, was all about -- was not to be forced to go to jail, liberty, not to be forced to go to jail.

It is the right to have counsel before you are sentenced to jail, to have the defense of counsel, of your own personal counsel, which is the whole principle of Argersinger and it should certainly apply to our men in

service who have every right to be protected by the Constitution, even more so, perhaps, because they are serving their country and they should be penalized because they are wearing the uniform of the United States.

So the reason given by Fidel, which is the obvious one, for the tremendous drop in summary courts-martials in those years between 1962 and '69 is that in 1962, the Article 15 provisions were so strengthened by Congress that the military commanders themselves saw that it was much more practical to give a man an Article 15, which is non-judicial punishment, than to go through the procedure of a summary courts-martial and so the basic reason for the drop in summary courts-martial, even prior to the Alderman decision, which had nothing to do with the requirement of giving counsel, was the Article 15, practicality that commanders saw and there was this complete drop in summary courts-martials for that reason, which is certainly strong indication of the lack of military necessity for summary courts-martials in the first place, with or without counsel.

QUESTION: What are the differences in punishment that can be inflicted under Article 15 or company punishment, whatever you call it, as opposed to a summary court?

MR. ZAHM: Mr. Justice Rehnquist, in an Article 15, in the Navy known as "Captain's Mass," you may be given punishment of restriction to limits, correctional custody,

not confinement and the Court of Military Appeals, which has the expertise in these matters over some many years of considering this, in United States versus Chandler, after the Alderman decision, specifically determined the question that the Argersinger application that was ruled necessary in Alderman does not apply to Article 15 punishment because it is non-judicial. It does not call for a conviction and there is no confinement, so the man does not go to jail in an Article 15.

QUESTION: That is the first part of my question. Now, how about the second part?

MR. ZAHM: Excuse me, sir, I'm --

QUESTION: I said, you have answered the first part of my question.

MR. ZAHM: Yes. What was the second question?

QUESTION: Well, to compare the punishment that can be inflicted by a special court with this Article 15 punishment as to outside limits.

MR. ZAHM: Do you mean special or summary, sir?

QUESTION: Summary, I'm sorry.

MR. ZAHM: Summary. The basic difference, the most significant difference is going to jail, being incarcerated, confinement, to use the term of Argersinger.

The whole point of Argersinger is that the man should not be sent to jail as part of --

QUESTION: What are the limits on the jail term in the summary court --

MR. ZAHM: Thirty days -- thirty days' confinement.

QUESTION: Thirty days, but no 30 days on the Captain's Mass, no confinement.

MR. ZAHM: The Captain's Mass isn't even a question of time. You are not confined.

QUESTION: That's right.

MR. ZAHM: You are restricted to base, perhaps.

QUESTION: So if the commander thought that the acts involved warranted some confinement, he would not go under Article 15.

MR. ZAHM: If he thought it was serious enough that the man should have a conviction on his record and should have a confinement in the brig, he would not be giving him an Article 15.

QUESTION: Because the Article 15 doesn't permit that.

MR. ZAHM: That is correct. But the point is, we are speaking of minor offenses and the types of offenses for which punishment is meted out under both Article 15 and summary are the same general type, small matters, minor matters. And as Fidel points out, the commanders of military establishments have long determined that for these minor offenses, the punishment is certainly sufficient under

Article 15 and that it is unnecessary to go through the rigamarole and the formalities that exist at all under summary courts-martial.

Now, it would be significant to this Court to be aware --

QUESTION: Well, there are still thousands of them that go on.

MR. ZAHM: The figures, I was just about to give you, sir, as obtained at special request from the Judge Advocate General's office, Department of the Navy, August 21, 1975. Co-counsel requested information from that source and we have non-judicial punishment under Article 15 in 1965, 122,660 of them as compared to summary courts-martial of 11,152.

QUESTION: Why did they choose 11,000 summary courts?

MR. ZAHM: Well, I couldn't give you a specific answer to that but I think the significance --

QUESTION: Well, there are 11,000 instances in which the authorities thought a summary court was appropriate.

MR. ZAHM: Perhaps I ought to point out, your Honor, Petitioners --

QUESTION: Well, that is right, isn't it?

MR. ZAHM: Yes. Our position is not that summary

courts-martials should be abolished. That is not our position. We are not trying to destroy the institution of summary courts-martial.

QUESTION: I know, but you are suggesting that the judgment of the Court of Military Appeals is that you can get along pretty well with Article 15 and you don't need this confinement possibility.

MR. ZAHM: The necessity for it is certainly not that great.

QUESTION: I know, but in 11,000 instances, the authorities thought that it was essential.

MR. ZAHM: I would grant you that point. I would emphasize the tremendous discrepancy in the number between the Article 15s and the summaries.

QUESTION: I understand that.

MR. ZAHM: And I want to emphasize that it is not our desire before this Court to seek the abolition of the summary courts-martial. The issue of this case and all that we are contending for is that if you are going to have summary courts-martial, the accused should have his own personal defense counsel as required under Argersinger and there is no reason not to apply it to the military.

QUESTION: Now, if he opts for a special or a general for these same crimes, what can he -- what is the possibility of the penalty in each case?

MR. ZAHM: For the special courts-martial, confinement, which is what we are interested in specifically here, is six months.

QUESTION: Six months for exactly the same offense.

MR. ZAHM: It would be for the same offense.

QUESTION: Mr. Zahm, is it your position that the counsel must be a member of the bar?

MR. ZAHM: Absolutely not.

QUESTION: How would you define or characterize the qualifications that would be necessary?

MR. ZAHM: There are many instances throughout the Uniform Code of Military Justice which do not require counsel, where counsel is required, to be an attorney.

Now, Judge Pence, in the Dagle case, pointed out that, on this question of military necessity, that there is no tremendous burden on the military to provide counsel because no one is saying that the counsel must be a lawyer and we don't say that he has to be a lawyer. That is not our contention and so, certainly, as Judge Pence pointed out in the Dagle opinion, it should be the best-qualified person available at the military institution. Good logic demands that but --

QUESTION: How do you identify the best possible?

MR. ZAHM: Well, in my brief -- I don't know if

I could find it quickly enough, but it is in the brief, the Coast Guard has an entire established guideline for determining who is best-equipped to serve as counsel, starting out with people who are present who happen to be lawyers.

QUESTION: You said "the best." You meant, then, did you, just someone who is qualified to help?

MR. ZAHM: I would say that, yes. Someone who is qualified to help, who is best-qualified to help, which does not mean that he has to be a lawyer. He has to have a certain degree of intelligence and good common sense and a willingness to serve a person who is accused of a crime and so forth.

QUESTION: Who is the Court in a summary court-martial?

MR. ZAHM: In the summary courts-martial?

QUESTION: A single commissioned officer, isn't it?

MR. ZAHM: A single commissioned officer who need not be a lawyer and generally is not.

QUESTION: That is what I thought.

MR. ZAHM: Who need not be a lawyer and generally is not so we are not saying that the lawyer who needs to be appointed to defend the accused -- I mean, that the counsel should be a lawyer, either. We are not making that point at all.

QUESTION: Well, what function does the counsel serve?

QUESTION: Exactly. Let's assume a lay counsel of about equal knowledge and sophistication with potential defendant.

MR. ZAHM: Even if he were poorly-qualified, the greatest attribute that he has for defending that accused person is his own divided loyalty in an attempt to the best of his ability to defend him. Now, that is exactly --

QUESTION: It is just a hand-holding operation then, isn't it?

MR. ZAHM: It is not a hand-holding operation. He has had at least the operation to the extent of his ability to interview witnesses which the accused certainly can't call upon the one court-martial officer who is wearing the three hats of the judge, the prosecutor and the so-called, the defense counsel, because that officer, as full of integrity as he may be, as fully desirous as he may be of doing his duty as Article 20 calls for, simply cannot perform the function of serving both the prosecution and the defense.

QUESTION: Well, why can't the accused interview witnesses himself?

MR. ZAHM: Because in many instances it requires his interviewing such witnesses as his commanding officer, colonels. How --

QUESTION: But supposing that the guy is a -- whatever the Naval equivalent of a corporal is and his counsel is a corporal? Certainly the accused is as capable as a corporal counsel of interviewing the commanding officer.

MR. ZAHM: Well, he is not the accused. He may be at the disadvantage, and that is the reason why Judge Pence in Dagle said he should be the best-qualified person available, not --

QUESTION: Best-qualified. Does that suggest that the sailor could not say, "I want my bunk-mate to represent me"?

MR. ZAHM: If he were stupid enough to make that request rather than making --

QUESTION: Well, should that be honored or should the commanding officer say no? He is not best-qualified if the commanding officer has the duty.

I want -- I am going to pick someone else; you can't have him.

Can they do that?

MR. ZAHM: Well, I would say that I don't believe that is an issue that we are trying to bring before the Court right now but I would say if that is what the man wants, this Court just decided last term that if the man absolutely wants no counsel, he has a constitutional right to have no counsel.

QUESTION: Can he says as follows, if he wants John Jones, he is entitled to have John Jones?

MR. ZAHM: I would say so, yes. I would say he would be mighty stupid to want the poorest possible defense counsel that he can find when there is much better qualified to represent him.

QUESTION: Then if he picks his bunk mate and his bunk mate is not very well-qualified, then would you say he has made a waiver of this "best-qualified" standard?

MR. ZAHM: I -- in that sense he has made a waiver but certainly he has been given his constitutional right under the Sixth Amendment to right to counsel and we would be certainly satisfied with that but I don't think that these hypotheticals would be the general rule. A man given the opportunity to have counsel at summary courts-martial is going to request the best possible counsel that he can be provided with.

QUESTION: Now, you don't want us or the federal judiciary to get into the determination of who is best, do you?

MR. ZAHM: No. No specific standard or guideline need be announced by this Court. The manner in which Judge Pence determined it in the Dagle case was to say that under Argersinger, the person who was available under the circumstances to be counsel would be sufficient, depending on the

circumstances; out at sea or an outpost or whatever, who may be best-qualified will differ with the circumstances. The general concept that the best-qualified counsel should be made available is the one that we are speaking to.

MR. CHIEF JUSTICE BURGER: Your time has expired.

QUESTION: You don't want us to say that the wiper in the engine room is better than the bunk mate, do you?

MR. ZAHM: No, I am not asking you to say that.

QUESTION: Or to get into that question.

MR. ZAHM: Pardon?

QUESTION: Or to get into that question.

MR. ZAHM: Not necessarily to get into that question, no.

MR. CHIEF JUSTICE BURGER: Your time has expired, Mr. Zahm.

MR. ZAHM: Thank you, your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Stone.

ORAL ARGUMENT OF HARVEY M. STONE, ESQ.

MR. STONE: Mr. Chief Justice and may it please the Court:

The purpose of the summary court-martial is to exercise justice promptly for minor military offenses under a simple form of procedure.

In keeping with this intended purpose, Congress made a deliberate decision to entrust the active conduct of

the trial to an impartial court officer rather than opposing counsel. This Congressional determination is entitled to great deference since this Court has long recognized that it is the Constitutional role of Congress and not the courts to strike the balance between the rights of men in the Armed Forces and certain overriding demands of discipline and duty.

While the Court has been careful to confine court-martial jurisdiction to service-connected offenses committed by servicemen, it has never struck down a deliberate Congressional provision governing military justice.

QUESTION: Am I right in my understanding that this really isn't a trial -- you used the word "trial" -- but that Congress said that it is not a trial in the Constitutional sense, in the Anglo-Saxon sense of being an adversary proceeding?

MR. STONE: I think that is right. I think that Congress decided that it was important to be able to use a magisterial or inquisitorial proceeding for --

QUESTION: An inquisitorial proceeding.

MR. STONE: -- for dealing with --

QUESTION: And isn't the ultimate question here whether that is within the -- whether that is Constitutional?

MR. STONE: I think that is the ultimate question.

QUESTION: I mean, if it is an adversary proceeding, I suppose the -- if it is akin to a civilian adversary trial, then I suppose it would follow that Argersinger applies and counsel is required. But if -- so the question is whether or not Congress has power under the Constitution and despite the Bill of Rights to provide that at this level, the proceeding in the military shall not be a "trial" but shall be something more akin to a continental European proceeding.

Isn't that the basic question?

MR. STONE: I think that is the basic question and our position --

QUESTION: Even if it results in jail.

QUESTION: Yes.

MR. STONE: Even if it results in jail and the considerations that go into the analysis are whether the military has a significant interest or whether Congress reasonably concluded that the military has a significant interest in this kind of procedure plus an examination of the fairness of the procedure and what is at stake for the individual.

Now, this Court's decision in Parker v. Leavey also provides a framework of analysis for a case like this.

There, the Court recently stated that the fundamental necessity for obedience and the consequent

necessity for imposition of discipline may render permissible within the military that which would be constitutionally impermissible outside it.

The Court in Leavey reaffirmed the principle that because of the unique mission of the Armed Forces, many Constitutional provisions apply to servicemen in different degree. There, the Court held that the proper standard of review for vagueness challenge to the UCMJ, even with respect to statutes impinging on the First Amendment, is that which applies to civilian criminal statutes regulating economic affairs.

Now, we submit that these rules governing the right to counsel in civilian adversary proceedings cannot be mechanically applied to courts-martial.

Specifically, labels such as incarceration and criminal prosecution do not automatically establish a right to counsel under Argersinger and related civilian cases dealing with a different system of justice.

What is needed here, rather, is a pragmatic, functional analysis of the problem and such an approach, we think, reveals that Congress, in determining that this should be an inquisitorial kind of procedure rather than a strictly adversarial procedure, has fairly and reasonably accommodated the private and governmental interests at stake and we emphasize first of all that the summary court

martial in the form intended by Congress is a fundamentally fair procedure.

A fundamental rationale underlying Argersinger and related cases was that it is grossly unfair to pit a lay accused against a legally-trained prosecutor or anyone who is experienced in the courtroom.

In the summary court-martial, of course, there is no prosecutor. The only people present aside from necessary witnesses are the accused and the court officer.

The Manual for Courts-Martial, which implements the Code, describes the basic role of the court officer. "He will thoroughly and impartially inquire into both sides of the matter and will assure that the interests of both the Government and the accused are safe-guarded."

The Manual also contains extensive regulations requiring the court officer to play an active role in helping the accused present his case and develop his evidence and there is no reason to assume that the court officer does not fulfill that duty.

Another concern in Argersinger was the unfairness produced by the rush to justice in civilian misdemeanor courts.

The summary court-martial presents no such problem. While justice is swift, the proceeding itself is dignified and orderly and there is no necessity for assembly-line

justice.

Now, if the presence of defense counsel really improved the fairness of summary court proceedings significantly, one would expect to see a significant decline in the percentage of convictions following the Navy's implementation of Alderman on June 8th, 1973.

This is not the case, as our supplemental brief shows on page 4.

Except for the last few weeks of fiscal year 1973, ending in June 30th, 1973, counsel was not provided at summary courts. During that fiscal year, the conviction rate at summary courts was 95.2 percent.

In calendar year 1974, the last annual period for which final statistics were available, the percentage of convictions at summary courts was 93.6 percent. This figure represents a decline of only 1.6 percent as compared to fiscal year 1973 and, of course, we can't be certain that the presence of defense counsel at summary courts has actually caused this 1.6 percent decline in the percentage of convictions but even if there is a causal connection, the 1.6 percent decline does not necessarily indicate that the presence of counsel has improved the fairness or accuracy of the fact-finding process.

Now, Argersinger, by --

QUESTION: Do those figures also show, however,

that there was a decline in the total number of summary courts?

MR. STONE: Yes, there was a decline in the total number of summary courts.

QUESTION: And might that suggest that with the knowledge that now, in a summary court, the defendant would have the right to have counsel, that they were a little more careful about instituting a summary court or, rather, they might have -- what is it called now? Article 15? We used to call it Captain's Mast instead.

MR. STONE: That is possible. It is also possible that --

QUESTION: The gist of these statistics, in other words, are pretty blunt and they might not show the whole story and they might not show considerations such as I have just mentioned.

MR. STONE: It is hard to say with certainty what the statistics mean. The statistics show that with the new rules, there was a decline in the use of summary courts.

QUESTION: Right.

MR. STONE: And a shift towards the Article 15 on judicial punishment as well as a shift towards special courts.

QUESTION: Right.

MR. STONE: And it is very hard to say what the --

QUESTION: I have grave troubles with the

statistics at all. You just picked out one year. How long has this been going on?

MR. STONE: Well, the statistics --

QUESTION: You just picked out the last year, didn't you?

MR. STONE: We picked out the last annual year for which statistics were available.

QUESTION: That's right. Well, how many were available before?

MR. STONE: The year before represents approximately the same trend.

QUESTION: You don't know. Do you know?

MR. STONE: It's --

QUESTION: Do you know how many there were the year before?

MR. STONE: I think our supplemental brief has a break-down of the statistics.

QUESTION: What is the first full year of change and the last full year previous to that? That is reasonable enough, I suppose.

MR. STONE: It is in the supplemental brief.

QUESTION: Yes.

QUESTION: Where is that?

QUESTION: Yes, I think they have had these courts for a few years.

MR. STONE: The year before that reveals a percentage of convictions that shows a slightly lesser decline.

QUESTION: And how much in the year before that?

MR. STONE: So if we picked out statistics --

QUESTION: How many years are you using as your norm?

MR. STONE: We are using one year, the year before the new rules compared to the last final year for which statistics are available.

QUESTION: And that's --

MR. STONE: Generally, the trend reflects the same pattern that we show here. We could have picked the year immediately after the new rule. That would have been slightly more favorable to us but we picked the last final year for which statistics were available.

QUESTION: Well, I submit that I have never heard of anything like that before in my life. If you want to show a norm, you take a series of years. You don't just take the last year.

I mean, maybe the year before nobody went to the Mast or nobody had a special court.

MR. STONE: The year before, calendar year of 1974, shows that the percentage of convictions was down just slightly more than the year before the new rules began.

The year that we picked out shows statistics that are unfavorable to us because they show of an increase in the difference between the two and that is why we picked that out to avoid the complaint that we were picking out the year that was most favorable to us. We have picked out the year that was the least favorable to us in that sense.

Now, Argersinger, by contrast, seemed to have been premised on the notion that the presence of defense counsel in civilian criminal prosecutions would help the accused in a major percentage of cases.

Indeed, at one point, at page 36, the Court referred to a study which concluded that misdemeanants represented by attorneys are five times as likely to emerge from police court with all charges dismissed, as are defendants who face criminal charges without counsel.

What is now termed to be --

QUESTION: Argersinger was derived from Gideon against Wainwright, which was based upon the principle that, basically, that in order to make the sides even the defendant had to be represented by counsel which was based upon the hypothesis -- upon a model of an Anglo-American trial, with a judge sitting on the bench and with a prosecutor and the defendant over here.

If the judge was a lawyer and the prosecutor was a lawyer and the defendant was uncounseled, it was just

a triangle, if you will, that was going to fall on its face.

MR. STONE: That is a part of our basic point. Argersinger --

QUESTION: /One begins with a hypothesis of a person on the bench who is not a lawyer, no prosecutor at all and the person on the bench whose job is to sit on the bench as well as represent this side as well as to represent that side and not a single one -- nobody in the room is a lawyer, you begin with a highly different given factual environment and context, do you not?

MR. STONE: Yes, it's a different system and Argersinger was premised on the notion that there had to be an evenness in representation, it was unfair to have an accused who was opposed by someone who was trained in the court, even if he wasn't a legally-trained prosecutor.

Our point about this system is that it is a balanced procedure and, indeed, the injection of defense counsel into these proceedings, the argument might be made, distorts the previous balance and could even -- assuming that there is still no prosecutor which there is not at this point, could even prompt the court officer into a prosecutorial role. He may be thinking that he should protect the prosecution now more than the defense since the defense is already represented by a lawyer or --

QUESTION: Well, how can he do that under what you

just told us was in the Courts-Martial Manual? It said he can't do that.

MR. STONE: He is not supposed to do that.

QUESTION: Well, I thought you said he couldn't, under the Courts-Martial Manual. It didn't say he --

MR. STONE: It is supposed to represent the interests of both sides, but there have been cases that held that if you have a system in which you have a defense counsel representing the defendant and you have a judge who is supposed to be judge and prosecutor, that can present problems. I am not saying that the summary court-martial was unfair as it's structured today.

I think it was fairer the way it was before but I am just saying it wouldn't be surprising to see claims made that the proceedings are now not properly balanced because of the presence of defense counsel and it is not -- I think that that claim is no less persuasive than the claim made today that it is not fair and the result of that could be some judicial rule that prosecutors also should be required at summary courts-martials and then you would really have a strictly adversary --

QUESTION: Well, but the Government isn't entitled to due process of law, is it?

MR. STONE: No, but I am just taking the analysis one step further to show that it is unwise to start

requiring a defense counsel in here because the basic point of the summary courts is that it is originally a balanced procedure and I am anticipating claims by defendants, perhaps in the future, that could be made.

QUESTION: Certainly one can anticipate the claim that the court, that the judge should be a lawyer --

MR. STONE: One can anticipate that claim.

QUESTION: -- but as I understand it, as I understood Mr. Zahm orally and also in his brief, there is no attack made in this case upon the constitutional validity of a summary court-martial as such.

Do you understand him likewise?

MR. STONE: His attack is if the defendant needs counsel.

QUESTION: Well, do you understand that there is no attack upon the summary court-martial as such?

MR. STONE: That is correct.

QUESTION: That is my understanding. But one certainly could anticipate that there might be one. We have a case in which we have granted certiorari -- this will be heard later this term -- involving an attack upon the constitutional validity of an ordinary civilian court, the judge of which is not a lawyer.

MR. STONE: Well, I will say this about the summary court officer. He does have training, legal

training and he is experienced in these matters.

He is not a lawyer. That is --

QUESTION: Does every ship in the Navy carry an officer like that?

MR. STONE: Every ship?

QUESTION: Yes.

MR. STONE: There are -- on ships there are officers available who can conduct summary courts.

QUESTION: In other words, if you had a rather small commissioned vessel in the United States Navy, let's say a submarine chaser with not more than five officers, would it have to have one who has had this special training?

MR. STONE: Well, the rules are in effect now when we make room for military exigencies and what is reasonably available, but I can't say that on every ship that there will be a summary court-martial officer who necessarily has that training. I just don't know.

QUESTION: I don't think so.

MR. STONE: The Article 15 power is used on a ship --

QUESTION: Well, that is on account of the officer, not the ship.

MR. STONE: -- perhaps for that reason.

And an accused can't even refuse an Article 15 on

a ship.

QUESTION: And you not only have the problem with respect to ships but there are military outposts virtually all over the world with outlying units.

MR. STONE: That's right, isolation posts.

There are manpower problems which --

QUESTION: Yes, but I am addressing the point you made that the summary court officer had to have some legal training. That can be true, can't it, Mr. Stone?

MR. STONE: He is not required to have legal training but as a practical matter, he has to be familiar with the system and he is given books which he has to study, trial guides which he is --

QUESTION: There is a Manual.

MR. STONE: A Manual. This is not equivalent to law school training.

QUESTION: Right.

MR. STONE: But he has to become experienced with this system and has received some training and has to study these books and discuss the process before he conducts the court.

I wanted to turn to the military interest in eliminating the requirement of defense counsel at summary court-martial which is, our main argument here is really not the manpower problem but something quite different.

The military does, obviously, have a special interest in prompt and formal methods of discipline for minor offenses.

Like Article 15 proceedings, the summary court is designed to regulate a vastly greater proportion of the serviceman's life than would be subject to regulation in civilian society.

The purpose of the summary court is not only to deter him in his conduct but also to instill a positive sense of discipline and to return the accused quickly to his military duties and these aspects of the summary court reflect the special relationship of the Government to its servicemen described in Parker v. Leavey.

Unlike the civilian situation, the Court stated, the Government is often employer, landlord, provisioner and lawgiver rolled into one.

Now, the presence of defense counsel, who is bound by professional duty to develop every argument favorable to his client, has thwarted the purposes of summary court-martial in several ways.

First of all, it formalizes and rigidifies the the proceedings and --

QUESTION: You indicated that the claim was not for a professionally-trained lawyer but for a bunk mate or what was sometimes in the old days called "next friend."

MR. STONE: I think I understand Mr. Zahm's claim to include something slightly more than that, that he wants --

QUESTION: You said the man could pick anyone he wanted.

MR. STONE: He can pick anyone he wanted but if he wants someone with some reasonable training, he may be entitled to have just a representation by some officer who has some experience in this system.

As the system operates now, the military has simply been providing lawyers if they are available and if not, other people who have training in the system.

Our most important concern with respect to the military interest here is that the presence of defense counsel has apparently caused a substantial delay in the disposition of charges and thus counteracted the Congressional objective of swift reaction to minor offenses.

As we show on page 4 of our supplemental brief -- and, again, the figures aren't conclusive, they merely tend to support our point -- the presence of defense counsel has coincided with the marked increase in the average time span between preferral of charges and final review and it may be that factors other than the presence of defense counsel has added to this delay, but it seems reasonable to infer that the presence of defense counsel has been the main cause of the delay.

QUESTION: Now, what, just -- I can't remember the last argument as well as I should. What is the controversy here now between these people and the military? All the services now furnish counsel.

MR. STONE: Following Alderman they provide counsel because they are bound by Alderman at this point.

QUESTION: The Air Force did even before Alderman, did it not?

MR. STONE: The Air Force did even then and this is something that the Court of Military Appeals relied on as we --

QUESTION: Well, now, how about these particular parties? What controversy do they still have with the services? Do they still have a sentence to serve or --

MR. STONE: No, they have completed their sentence, but when they came into the District Court they were still in confinement and what is at stake for them is back pay and a conviction.

QUESTION: Back pay? That is still a real controversy?

MR. STONE: Well, in our view the case is not moot because of the fact that they came into the District Court when they were still in confinement under Karapas.

And that would be --

QUESTION: Well, that was a habeas, wasn't it?

MR. STONE: Yes, the holding in Karapas that I refer to was that if you enter the District Court and you are in confinement, jurisdiction of the court doesn't terminate simply because the custody terminates and these people, we are talking about a system in which people are sentenced to very short periods of confinement and very quickly they are going to be released from confinement and on that basis, it is very difficult for --

QUESTION: Well, if all the Services have adopted this regulation for the future, what does the Service -- you are representing the United States here --

MR. STONE: Right. The Services only adopted these regulations because they were bound by Alderman. If the Government wins this case, the Army and the Navy are going to rescind their regulations.

QUESTION: Then Mr. Zahm is right, you --

QUESTION: That was never said in the argument the last time, but that is --

MR. STONE: Yes, in the beginning of Mr. Frey's argument the last time he said the Navy is going to rescind. Subsequently we found out that the Army is going to rescind and I think that is very important.

QUESTION: Who has said that besides the lawyer? Is there some statement by the --

MR. STONE: Yes. I am advised from the Judge

Advocate General of the Navy, who communicated with the Judge Advocate General of the Army, that that is going to happen.

QUESTION: Do you really want us to overrule the Court of Appeals? The Military Court of Appeals?

MR. STONE: We do because it conflicts with the Congressional --

QUESTION: That is a kind of lefthandedly way of doing it, isn't it?

MR. STONE: It's --

QUESTION: You can just as easily follow it.

MR. STONE: No, it is important for the military that we not follow it because it has diminished the utility of these procedures. It has increased the time for the disposition of charges by something like --

QUESTION: Well, have you lost any wars as a result of it? No.

MR. STONE: No. But that is not the problem.

We could. Anything that affects military discipline --

QUESTION: That's just it.

MR. STONE: -- and under well-recognized principles, a delay in the imposition of punishment can lessen the corrective impact of punishment.

We are talking ultimately about the Army's preparedness to fight or be ready to fight wars should the

occasion arise. That is what this Court has always defined as the primary task of the Armed Forces and when we are talking about matters of military discipline, this is what we are talking about and that is why the Congressional judgment is empowered with such deference in these matters.

QUESTION: Mr. Stone, tell me, could you have come here from the decision of the Court of Military Appeals in Alderman?

MR. STONE: No, we couldn't come directly.

QUESTION: The only way you got here is the --

MR. STONE: Because --

QUESTION: -- the accident that this sailor went into the federal courts -- the civil courts.

MR. STONE: That is right.

QUESTION: That is the only way the Government could have us review the Court of Military Appeals right now.

MR. STONE: Direct -- yes, a decision which lost.

QUESTION: I mean, the principle, the principle --

MR. STONE: Right.

QUESTION: The Government can never initiate a review of that.

MR. STONE: The Government can't initiate a review if it has lost in the Court of Military --

QUESTION: You could lose back pay, I suppose, and be sued in the Court of Claims.

MR. STONE: Yes, it could possibly come up indirectly through some fashion like that which we have no control over.

But if I may talk about Alderman for a minute --

QUESTION: I gather this is why you are not anxious to urge, as you always have, I gather, in this type of cases, the necessity for exhaustion of military remedies under 69?

MR. STONE: We think there are exceptional circumstances, yes.

QUESTION: But you urged that here and we agreed with you and didn't reach this and you couldn't come here from the Court of Military Appeals because I assume they would follow Alderman, if you went up the 69 route, wouldn't they?

MR. STONE: Right. But in our supplemental brief we set out our argument why there are very special circumstances.

QUESTION: Well, I have just been curious.

MR. STONE: Yes.

QUESTION: Because ordinarily when you are here the military is always arguing that there must first be exhaustion of --

MR. STONE: Here our decision not to urge exhaustion was based on the record in this case, primarily.

QUESTION: Yes.

MR. STONE: The added delay in the imposition of punishment which averages out now to about a 13-day additional period comparing the year before Alderman to the current year is very damaging to military interest, primarily it renders the summary court-martial a more cumbersome procedure and prevents the Government from imposing punishment quickly.

But it also, the 13-day period of unresolved charges can be damaging. It can have an adverse psychological effect on the accused and in some instances it can render him temporarily ineligible for transfer or security clearance and that is another consideration that ultimately has to do with the Army's preparedness to fight wars.

The decline of the use of summary courts has been causing a proportional shift towards other procedures and to that extent we suggest that the diminished utility of summary courts has upset the entire system of military justice designed by Congress and the summary court-martial fills an important gap between the Article 15 nonjudicial punishment proceedings below it and the special court-martial above it.

It is an option that is advantageous to both the Government and, sometimes, to the accused.

The Government might want to convene a summary court if previous Article 15 proceedings have failed to generate obedience of a particular accused.

The accused might want a summary court if he has

had run-ins with his commanding officer with an Aritcle 15 and he may prefer this kind of procedure.

QUESTION: In an Article 15 it is only one officer, isn't it?

MR. STONE: The commanding officer imposes punishment but --

QUESTION: It is only one officer.

MR. STONE: Yes.

QUESTION: And in the special court is one officer.

MR. STONE: Right.

QUESTION: And in the Captain's Mast you can't give any time.

MR. STONE: You can get something called "correctional custody," but the point of the summary court-martial and why it would be used --

QUESTION: In a Captain's Mast, I understand you cannot put him in the brig. Am I right or wrong?

MR. STONE: Except on ships. You can put him in the brig for three days.

QUESTION: All right. But you can't give him --

MR. STONE: But you can't generally.

QUESTION: You can't give him six months.

MR. STONE: No. You can't give him any confinement.

QUESTION: But the only way to give him six months

is to give him a special court and the special court is -- could be the captain again, couldn't it?

It just has to be an officer.

MR. STONE: The --

QUESTION: There must have been some reason for making this special court able to give time.

MR. STONE: The reason --

QUESTION: It must have been more due process, I would assume, and it develops it is no more due process than the Captain's Mast.

MR. STONE: I don't follow -- that the special court has no more due process? The special court is a --

QUESTION: No, I mean the summary court. Excuse me. I mean the summary court.

MR. STONE: It is more due process because the Captain's Mast, the commanding officer has enormous discretion and he can listen to the various witnesses and impose a summary punishment and in the summary court, the court officer is bound by regulations to protect the interest. There are formal rules of evidence. He has a reasonable doubt standard. He is an impartial fact-finding officer and because of that he is able to impose greater penalties than can be imposed in the Article 15 proceeding.

That is the basic progression here shows that with each tier within the military justice system -- and

there are four tiers, as you go higher up, the procedures become more elaborate and the punishments authorized are more severe.

QUESTION: You have given us all the other statistics. How much time does the second tier take?

MR. STONE: Summary court?

QUESTION: Yes. Usually. You have been giving us all the other times.

MR. STONE: Before Alderman from preferral of charges to final review it took 32.5 days.

QUESTION: No, I mean the hearing itself.

MR. STONE: The hearing itself is relatively short but punishment --

QUESTION: That's right.

MR. STONE: -- but punishment can't be imposed --

QUESTION: Isn't it about the same with the Captain's Mast?

MR. STONE: Probably not too much different in the hearing itself but the whole process takes more time and punishment can't be imposed until final review is completed.

I see that my time has expired.

QUESTION: Mr. Stone, if I may ask, getting back to this question of exhaustion of administrative remedies, I have read what you have had to say in your supplemental brief -- separate memorandum filed October 30 and in there

there is a reference to a supplemental memorandum, as I understand it, filed by your brother.

Now, I don't have a copy of that and the last time I checked with the clerk's office it had not been filed.

Perhaps Mr. Zahm could be more helpful than you.

You refer to it in footnote 9 on page 10 of your supplemental memorandum.

I have not seen it yet.

MR. STONE: Our supplemental memorandum here, part of it was written in response to their supplemental memorandum.

QUESTION: Which I have not seen.

It is perhaps the fault of our clerk's office, but this was filed, was it?

MR. ZAHM: That was filed some six weeks ago and I should certainly hope that the members of this Court had read that memorandum.

QUESTION: Well, I have not read it and I don't have it.

QUESTION: I don't have it either.

QUESTION: I have the Government's answer to it.

MR. ZAHM: I was a little surprised you asked no questions on it.

QUESTION: I have the Government's answer to it but I don't have anything else.

MR. ZAHM: I would certainly recommend that you read it.

QUESTION: All right.

[Laughter].

MR. CHIEF JUSTICE BURGER: Before you leave, Mr. Zahm, will you consult with the clerk's office and if it does not show that it was logged in to the Court, then will you provide the same number of copies as you thought you filed in the first place?

MR. ZAHM: I certainly will.

Thank you, your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:04 o'clock p.m., the case was submitted.]