

Right to Counsel at Courts-Martial

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Roadmap

- **Role of military criminal law in Armed Forces**
- **Evolution of military criminal legal system**
- **Courts-Martial & Right to Counsel**
 - **Articles of War**
 - **Uniform Code of Military Justice**
- **(Other Military Tribunals)**

Discipline

- **Effective and efficient Army must be a disciplined Army**
- **What is ‘discipline’?**
- **Military criminal legal system exists as commander’s tool for ensuring discipline**

Evolution of System

- **Judicialization**
(1917 to 1983)
- **Civilianization**
(1951 to present)

Courts-Martial

and the right to counsel

Early years—19th C

- **Does the Sixth Amendment apply to courts-martial?**
 - **“ ... to have the Assistance of Counsel for his defence [sic].”**

- **(Note: Nearly 80 years before 14th Amendment (1868) & more than 150 years before right to counsel applied to all felonies tried in state courts (1963))**

- **Articles of War (1775, 1786)**
 - **Judge advocate acts as (1) prosecutor; (2) legal advisor to court; and (3) “friend” of the accused**

- **Article 69, Articles of War (1806)**

The judge advocate ... shall prosecute ... but shall ... consider himself as counsel for the prisoner ... [he] shall object to any leading question to any witness or any question to the prisoner, the answer to which might tend to criminate himself

But ...

- **Where the accused elects to have his own counsel, that counsel *may not* participate in the proceedings because “the honor of the Army and the Interests of the service forbid it”**

- **No examination of witnesses**
- **No objections**
- **No argument on the accused's behalf**

(Article 69 remains in force through Civil War)

20th C: Pre-World War I

- **Manual for Courts-Martial, 1908:**
 - **Accused is not of right entitled to counsel, but the privilege is almost invariably conceded, and if refused, such refusal may be grounds for disapproval of the proceedings”**

- **An officer detailed as counsel for a soldier before a general court-martial should guard the interests of the accused *by all honorable and legitimate means known to the law, so far as they are not inconsistent with military relations***

- **Counsel should not obstruct the proceedings with frivolous or manifestly useless objections**
- **(No right to counsel at ‘inferior courts’ (special, summary))**

- **Manual for Courts-Martial, 1917**
 - **“Accused shall have the right to be represented before a general or special court-martial by counsel of his own selection”**

● **But**

- **Officers of the JAG Department are not available for appointment as counsel for the defense in trials by courts-martial**



● **Houston Riots Trial**

- **63 African-American soldiers defended by one defense counsel**
- **58 convicted**
 - **13 sentenced to be hanged**
 - **41 to life imprisonment**
 - **four others to short terms**



Largest Murder Trial in the History of the United States.
Scene during Court Martial of 64 members of 24th. Infantry U.S.A.
on trial for mutiny and murder of 17 people at Houston Tex. Aug 23, 1917
Trial held in Gift Chapel. Ft Sam Houston
Trial started -- Nov 1, 1917 -- Brig Genl. George K. Hunter, Presiding
Col J. A. Hull - Judge Advocate. Counsel for Defense.
Maj. D. V. Sulphin, Asst. Maj. Harry S. Grier.
Prisoners guarded by 19th. Infantry Co "C" Capt Carl J. Adler
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- **Manual for Courts-Martial, 1928**
- **...shall have the right to be represented ... by counsel of his own selection, civil counsel if he so provides, or military if such counsel is reasonably available**

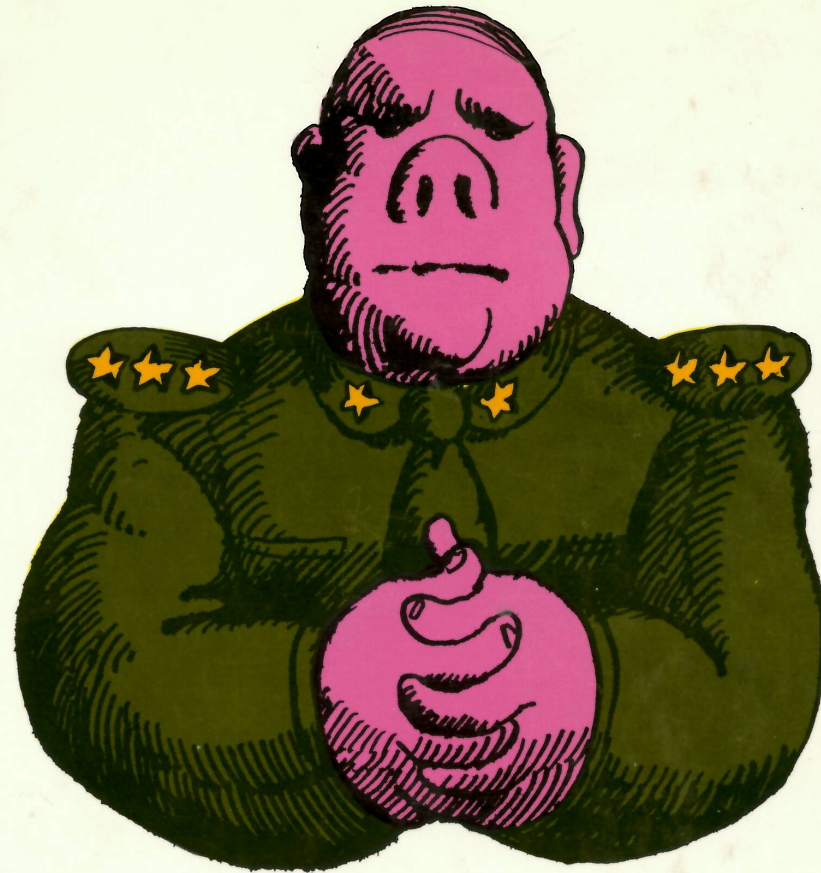
- **But ‘legally qualified counsel?’**

(As an aside)

- **Articles for the Government of the Navy (1930)**
 - **Article 43**
 - **Accused shall be given “reasonable time” to defend himself against charges**

- **World War II**
 - **8 million soldiers – 2 million courts-martial**
 - **1/3 of all cases tried on U.S. soil were courts-martial**

- **Uniform Code of Military Justice (1950)**
- **Manual for Courts-Martial (1951)**
 - **Right to be represented by *lawyer* defense counsel at general court-martial**
 - **Special courts? Summary courts?**



**MILITARY JUSTICE
IS TO JUSTICE
AS MILITARY MUSIC
IS TO MUSIC**

Robert Sherrill





- **Military Justice Act of 1968**
 - **Accused shall be afforded the opportunity to be represented at special courts by a lawyer**
 - **No BCD may be adjudged unless accused represented by lawyer (and a verbatim record of trial)**

- **Military Justice Act of 1983**
 - **Accused has the *right* to be represented in his defense before a general or special court-martial or at an investigation under Article 32**

- **Rule for Courts-Martial 502(d)**
 - **Certified under Article 27(b)**
 - **[must be graduate of accredited law school or member of bar of Federal court or of the highest court of a State]**

- **And that is where we are today ...**

Other Military Tribunals

- **Right to Counsel at Military Commissions?**
 - **U.S. Const. Article I**
 - **U.S. Const. Article II**

- **Comments?**
- **Questions?**