Journal of Criminal Law and Criminology

Volume 63 | Issue 1 Article 2

1972

Trimming Military Judisdiction: An Unrealistic Solution to Reforming Military Justice

Dennis R. Hunt

THE JOURNAL OF CRIMINAL LAW, CRIMINOLOGY AND POLICE SCIENCE
Vol. 63, No. 1
Printed in U.S.A.

TRIMMING MILITARY JUDISDICTION: AN UNREALISTIC SOLUTION TO REFORMING MILITARY JUSTICE

*DENNIS R. HUNT**

Legislative concern with the inequities of American military justice was much in evidence during the post World War II era.[1] In 1950 the Congress enacted the Uniform Code of Military Justice[2] partially in an attempt to remedy the injustice of military law which was demonstrated during World War II. The controversial Vietnam involvement with its masses of draftees subject to military discipline again drew attention to courts-martial practice[3] and produced a less pervasive reform measure, the Military Justice Act of 1968.[4] The latter, however, did not wholly satisfy critics of military criminal law, and recently legislation providing further reforms of court-martial practice has been suggested by Senators Bayh,[5] Hatfield,[6] and Congressman Whalen.[7] Though not disturbing the basic structure of the military criminal process,[8] these proposals offer extensive modifications of court-martial practice. Against the background of these legislative proposals, this article will evaluate the efficacy of one frequently suggested remedy for the ills of the military criminal legal process: the exclusion of certain categories of offenses from military jurisdiction.

When viewed from an historical perspective, proposals to modify the jurisdiction of military courts have not been infrequent. Legislative and judicial history readily illustrate that military criminal jurisdiction in the United States is something other than an immutable jurisdictional preserve.[9] The first legislative definition[10] of do-

* Major, United States Army, Judge Advocate General's Corps; B.S., Northwestern University, 1961; L.L.B., Harvard Law School, 1964; L.L.M. Northwestern University, 1971; presently military judge for the United States Army in Frankfurt. The present article is a section of a thesis prepared in partial fulfillment of the requirements for the L.L.M. degree.

[1] *See, e.g., Hearings Before a Subcomm. of the House Comm. on Armed Services on H.R. 2498*, 81st Cong., 1st Sess. (1949); H. REP. No. 491, 81st Cong., 1st Sess. (1949); *Hearings Before a Subcomm. of the Senate Comm. on Armed Services on S. 857 and H.R. 4080*, 81st Cong., 1st Sess. (1949); S. REP. No. 846, 81st Cong., 1st Sess. (1949).

[2] Act of May 5, 1950, ch. 169, § 1, 64 Stat. 108.

[3] *See* Ervin, *The Military Justice Act of 1968*, 5 WAKE FOREST L.L. REV. 223, 223–42 (1969).

[4] Act of October 24, 1968, 82 Stat. 1335.

[5] S. 1127, 92d Cong., 1st Sess. (1971) [Hereinafter cited as Bayh Bill]. This legislation, in a slightly modified form, was previously introduced as S. 4191, 91st Cong., 2d Sess. (1970) and H.R. 18835, 91st Cong., 2d Sess. (1970).

[6] S. 4168–S. 4178, 91st Cong., 2d Sess. (1970), reprinted in 116 CONG. REC. S12, 669–73 (daily ed., August 4, 1970).

[7] H.R. 6901, 92d Cong., 1st Sess. (1971). This legislation was previously introduced as S. 3117, 91st Cong., 1st Sess. (1969).

[8] Present law provides four strata of military criminal proceedings. The most serious offenses are tried by general courts-martial composed of a judge and five or more jurors. 10 U.S.C. § 816(1) (Supp. V, 1970). The penalties for offenses heard in general court are those provided in the statutes defining the offenses or are established by the President, *id.* § 856, and include imprisonment, fines, forfeiture of military salary, loss of military grade, punitive discharge from the armed forces, and capital punishment. Special courts-martial include a jury of three, *id.* § 816 (2), and may try any non-capital offense, *id.* § 819, but the penalty adjudged may not exceed confinement at hard labor for six months, reduction to the lowest enlisted grade, and forfeiture of two-thirds pay per month for six months. *Id.* A punitive discharge may also be returned by the special court, but only if a verbatim record of trial is kept. *Id.* Summary courts-martial are composed of only one officer who serves as judge, jury, prosecution and defense counsel; he need not be legally trained. *Id.* § 816 (3); *Manual for Courts-Martial, United States, 1969* para. 79 (rev. ed. 1969) [Hereinafter cited as MCM 1969].

Limited like the special court-martial to non-capital offenses, the summary court may not return a sentence in excess of confinement at hard labor for 30 days, forfeiture of two-thirds of one months pay, and reduction to the lowest enlisted grade. 10 U.S.C. § 820 (Supp. V, 1970). Use of the summary court-martial has declined in the past decade, *see Annual Reports of the United States Court of Military Appeals and the Judge Advocate General of the Armed Forces and the General Counsel of the Department of Transportation* (1961–1969); and the Bayh legislation would eliminate this forum, Bayh Bill §§ 816–19. Below this tripartite court system are administrative disciplinary measures, the "Article 15" or "Captains Mast," which are imposed by the offender's commanding officer without an evidentiary hearing. 10 U.S.C. § 815 (1964). The sanctions possible here depend to some extent upon the grade and command position of the officer imposing punishment, but do not include confinement at hard labor nor the degree of sanctions possible in the summary court-martial. *Id.* The average rate per 1,000 for these various proceedings in the Army during the last quarter of 1970 was: general courts, 0.16; special courts, 1.79; summary courts, 0.92; Article 15, 16.75. 71–6 JALS 6–7 (Dept. of Army Pamphlet 27-71-6).

[9] Military courts and military criminal jurisdiction

mestic court-martial jurisdiction was a product of the Continental Congress in 1776[11] and took cognizance of military offenses and non-capital common law crimes when the latter were to the prejudice and good order of military discipline.[12] During the Civil War, Congress expanded court-martial jurisdiction of the Army[13] to include certain common law crimes committed by servicemen without regard to the offenses' impact on military discipline and order, providing the crimes occurred in time of war. Shortly before World War I, Congress again moved to enlarge court-martial jurisdiction over servicemen by including in the military purview a wide range of non-capital, civilian-type offenses which were triable in time of peace,[14] and jurisdiction of capital crimes—murder and rape—in time of war.[15] The final expansion of military jurisdiction came in 1950 when Congress enacted the Uniform Code of Military Justice. The Uniform Code purported to extend domestic court-martial jurisdiction to all civilian offenses, whether capital or not, committed by servicemen in time of peace.[16]

This furthest reach of the jurisdiction of the military court-martial, as defined in the 1950 Uniform Code of Military Justice, was soon to be eroded, however. The Supreme Court responded to the 1950 legislation by striking down peripheral provisions which included civilians within the court-martial jurisdiction; the Court found that there was no jurisdiction in peace-time to court-martial military dependents abroad for capital[17] or non-capital offenses,[18] no jurisdiction to court-martial ex-servicemen for offenses committed while they were in the military,[19] and no jurisdiction to try citizen military employees abroad in time of peace.[20]

The Court's attempts to reduce the scope of military jurisdiction, however, did not end with limiting jurisdiction over civilians. In 1969 the Supreme Court restricted the authority of courts-martial to try servicemen's offenses which were subject to the jurisdiction of civilian courts.[21]

are not inevitable features of a national military establishment. Since World War II, *all* domestic offenses of servicemen in the military forces of the German Federal Republic have been tried in regular civilian courts, and the military forces within themselves may exercise only very minor disciplinary powers. Mority, *The Administration of Justice Within the Armed Forces of the German Federal Republic*, 7 MIL. L. REV. 1, 3–4 (1960).

[10] The present power of Congress to create and define the jurisdiction of military courts is derived from U.S. CONST. art. I, § 8, cl. 14, which states: "The Congress shall have the Power To: To make rules for the Government and Regulation of the land and naval forces." *See* O'Callahan v. Parker, 395 U.S. 258, 261, 273 (1969).

[11] Articles of War of 1776, reprinted in WINTHROP, MILITARY LAW AND PRECEDENTS 961 (2d. ed. 1970).

[12] A crime which is to the prejudice and good order of military discipline is defined as an act which must have been committed under such circumstances as to have directly offended against the government and discipline of the military state. *Id.* at 723–24. Early courts-martial also assumed jurisdiction of servicemen's domestic offenses when civilian courts declined to prosecute. Rice, *O'Callahan v. Parker: Court-Martial Jurisdiction, "Service Connection," Confusion and the Serviceman*, 51 MIL. L. REV. 41, 51–54 (1971).

[13] Act of March 3, 1863, ch. 75, § 30, 12 Stat. 736. Congress allowed differing jurisdictional limitations for Navy courts. *See, e.g.*, Articles for Better Government of the Navy, Act of April 23, 1800, ch. 33, 2 Stat. 45.

[14] These crimes included insurrection, rebellion, murder, assault and battery with intent to kill, manslaughter, mayhem, wounding by shooting or stabbing with intent to commit murder, robbery, arson, burglary, rape, assault and battery with intent to commit rape and larceny. 1916 Articles of War, art. 93, 39 Stat. 664.

[15] *Id.* at art. 92.

[16] *See* 10 U.S.C. §§ 802–03, 805, 877–934 (1964).

[17] Reid v. Covert, 354 U.S. 1 (1957) (on rehearing). Article 2(11) of the 1950 act purported to extend court-martial jurisdiction to "persons serving with, employed by, or accompanying the armed forces outside the United States...." The Bayh legislative proposal would eliminate this provision. Bayh Bill at § 802.

[18] Kinsella v. U.S. *ex rel.* Singleton, 361 U.S. 234 (1960).

[19] Toth v. Quarles, 350 U.S. 11 (1955). Servicemen who are discharged and later re-enlist are subject to court-martial for offenses committed during the prior enlistment. United States v. Wilson, 15 U.S.C.M.A. 222, 35 C.M.R. 194 (1965). Recent concern with Vietnam "war crimes" of discharged American servicemen has prompted proposals that such offenses be triable in federal civilian courts. *See, e.g.*, FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, § 208(f)–(h), commentary at 22 (1971).

[20] Grisham v. Hogan, 361 U.S. 278 (1960); McElroy v. U.S. *ex rel.* Guagliardo, 361 U.S. 281 (1960). The United States Court of Military Appeals has recently extended this doctrine, holding that, despite actual hostilities, military employees in Vietnam are beyond court-martial jurisdiction in the absence of a Congressional declaration of war. United States v. Averette, 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970).

[21] The ruling substantially reduces double jeopardy problems associated with military criminal proceedings. The double jeopardy protection, *cf.* 10 U.S.C. §§ 814, 844 (1964), bars prosecution for the same offense in military and federal courts. Grafton v. United States, 206 U.S. 333 (1907). The protection has not been applied to identical prosecutions in courts-martial and state courts, however. MCM 1969, para. 215*b*; United States v. Borys, 39 C.M.R. 608 (1968), *rev'd on other grounds*, 18 U.S.C.M.A. 547, 40 C.M.R. 259 (1969); *In re* Stubbs, 133 F. 1012 (C.C. Wash. 1905); *see* Coleman v. Tennessee, 97 U.S. 509, 513–15, 518 (1878). Service policy directs that men first tried in civilian courts will "normally" not be subjected to military disciplinary proceedings unless further punitive action is necessary to maintain discipline. Army Reg. 27-10, ch. 6 (Novem-

In *O'Callahan v. Parker*[22] the Court held that the military lacked jurisdiction to try a serviceman's domestic offenses which were not "service connected."[23] Subject to extensive criticism for the vagueness of this jurisdictional test,[24] the Supreme Court in 1970 further elucidated the concept of "service connection" in *Relford v. Commandant*[25] by enumerating twelve factors which might in combination establish that an offense is *not* service connected and therefore beyond the jurisdiction of a court-martial.[26] The *Relford* factors do clarify *O'Callahan*'s import to some extent, but the balancing test which *Relford* created imposes a difficult task for courts which must apply it and promises varying results[27] until authoritative case precedent develops.

The present scope of court-martial jurisdiction of offenses committed by service personnel as defined in the Uniform Code of Military Justice and Supreme Court decisions, is subject to further limitation by two other sources. The first, an agreement[28] between the Departments of Defense and Justice,[29] provides for division of investigative and prosecutory responsibilities when a serviceman's crime is triable in both federal and military courts. As a general rule, offenses committed on base by servicemen against other persons residing on the base will be tried in military courts; major offenses against government prop-

ber 26, 1968); Judge Advocate General (Navy) Instruction P 5800.7 at § 0106(d) (January 3, 1969). The *O'Callahan* rule reduces the circumstances in which such an overlap of state and military juristiction is possible by excluding the latter altogether. *See* Gaynor, *Prejudicial and Discreditable Military Conduct: A Critical Appraisal of the General Article*, 22 HASTINGS L.J. 259, 264 (1971); Nelson, *Court-Martial Jurisdiction Over Servicemen for Civilian Offenses: An Analysis of O'Callahan v. Parker*, 54 MINN. L. REV. 1, 55–56 (1970). Similarly, the Bayh legislation would abolish the jurisdiction of military and state courts to try the defendant for an offense previously heard in the other forum. Bayh Bill at § 844 (a)(2).

[22] 395 U.S. 258 (1969).

[23] *Id.* at 272. Sergeant O'Callahan was convicted by court-martial for attempted rape, housebreaking, and assault with intent to rape. While off duty and in civilian clothes in Honolulu, the defendant had broken into a hotel room and attacked its occupant. In finding no "service connection," the court stressed that the defendant was properly on pass from his duty station at Fort Shafter, the offense was unrelated to the defendant's military duties, the offense did not occur on post, the victim had no connection with the military community, the regular civilian courts were open, the offense occurred domestically at peacetime, and the case involved no factor of defiance of military authority, security of a military post, or hazard to military property. *Id.* at 273–74. The court's emphasis on the lack of Bill of Rights protections in court-martial proceedings, *id.* at 261–66, as a reason for shifting jurisdiction to civilian courts has caused the United States Court of Military Appeals to affirm military jurisdiction even where "service connection" is lacking when the defendant, because of the petty nature of his crime, would not be entitled to such constitutional protections in local civilian courts. United States v. Sharkey, 19 U.S.C.M.A. 26, 41 C.M.R. 26 (1969).

[24] *See* Relford v. Commandant, 401 U.S. 355, 356 n.1 (1971).

[25] *Id.*

[26] The *Relford* factors are

1. The serviceman's proper absence from the base.
2. The crime's commission away from the base.
3. Its commission at a place not under military control.
4. Its commission within our territorial limits and not in an occupied zone of a foreign country.
5. Its commission in peacetime and its being unrelated to authority stemming from the war power.
6. The absence of any connection between the defendant's military duties and the crime.
7. The victim's not being engaged in the performance of any duty relating to the military.
8. The presence and availability of a civilian court in which the case can be prosecuted.
9. The absence of any flouting of military authority.
10. The absence of any threat to a military post.
11. The absence of any violation of military property. One might add still another factor implicit in the others:
12. The offense's being among those traditionally prosecuted in civilian courts.

401 U.S. at 365.

Corporal Relford was convicted by court-martial for rape and kidnapping on two separate occasions. Both transactions occurred within Fort Dix and McGuire Air Force Base while the defendant was off duty and in civilian clothes. His first victim was the visiting sister of another serviceman, the second the wife of a serviceman. The Supreme Court concluded that "service connection" elements 4, 6, 8, 11, 12 and possibly 5 and 9 tended to establish that Relford's offenses were not in military jurisdiction; the contrary was true of elements 1, 2, 3, 7 and 10. *Id.* at 366. Concluding with a very geographic emphasis, the court held "that when a serviceman is charged with an offense committed on or at the geographical boundary of a military post and violative of the security of a person or of property there, that offense may be tried by a court-martial. . . ." *Id.* at 369.

[27] *Compare* United States v. DeRonda, 18 U.S.C.M.A. 575, 40 C.M.R. 287 (1969) (Off post, off duty possession of marijuana *is* service connected) *with* Moylan v. Laird, 305 F. Supp. 551 (D.R.I. 1969) (enjoining court-martial proceedings for off post, off duty possession of marijuana as *not* service connected).

[28] Under such regulations as the Secretary concerned may prescribe, a member of the armed forces accused of an offense against civil authority may be delivered, upon request, to the civil authority for trial.

10 U.S.C. § 814(a) (1964).

[29] *Memorandum of Understanding Between the Departments of Justice and Defense Relating to the Investigation and Prosecution of Crimes Over Which the Two Departments Have Concurrent Jurisdiction* (July 19, 1955), reprinted in pertinent part in Army Reg. 27-10, ch. 7 (November 26, 1968).

erty, cases involving non-military co-accuseds or victims, and off-post crimes unrelated to organized military maneuvers are to be tried in federal district courts.[30] Secondly, treaties and executive agreements[31] with foreign governments grant to host countries of United States military installations primary jurisdiction to try servicemen for "civilian offenses" not involving American victims and not done in the performance of military duty as well as exclusive jurisdiction of offenses relating to the security of the host state.[32]

Against this history of current court-martial jurisdiction, the critics of military criminal law have repeatedly suggested various schemes to even further limit the offenses which courts-martial may try.[33] More specifically, Senator Hatfield in 1970 offered legislation[34] proposing elimination of military jurisdiction over domestic offenses which involve the physical safety and security of the nation and over acts which would be viewed as offenses regardless of the military status of the defendant.[35] Such a division,[36] however, does not appear to be ideal. For one thing, this allocation of offenses between military and civilian courts curiously excludes from military jurisdiction a number of traditional military offenses which are foreign to civilian criminal law and depend upon martial evidentiary factors and legal concepts: mutiny;[37] misbehavior before the enemy;[38] subordinate compelling surrender;[39] improper use of a countersign;[40] forcing a safeguard;[41] conversion of captured or abandoned property;[42] misconduct as a prisoner of war,[43] and improper hazarding of a vessel.[44] For another, this categorization of crimes as "civilian" or "military" ignores circumstances in which the former assume significance only because of their character within

[30] *Id.*

[31] *See, e.g.*, NATO Status of Forces Agreement, June 19, 1951 (1953), 4 U.S.T. 1792, T.I.A.S. No. 2846.

[32] *Id.*, art. VII. Though more than 80 percent of primary jurisdiction is waived back to American military authorities by foreign governments, in 1969 American servicemen were tried for approximately 46,000 offenses in foreign courts; 75 percent of these were traffic cases, and slightly more than 100 servicemen were serving sentences in host nation prisons. Army Times, January 20, 1971, at c, col. 1. Foreign courts convict United States servicemen in more than 98 percent of the cases they try, but only 1.3 percent of those convicted are sentenced to jail. *Id.*

[33] *See, e.g.*, Averna, *Citizen Servicemen and their Constitutional Rights*, 43 TEMP. L.Q. 213, 226 (1970); Comment, *Military Trial of Civilian Offenses: Drumhead Justice in the Land of the Free*, 43 So. CAL. L. REV. 356, 373 (1970); *Hearings on the Constitutional Rights of Military Personnel Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary, pursuant to S. Res. 260*, 87th Cong. 2d Sess., at 301 (1962) [Hereinafter cited as 1962 Hearings].

[34] S. 4178, 91st Cong., 2d Sess., §§ 5–6 (1970).

[35] 116 CONG. REC. S12,667 (daily ed. August 4, 1970) (remarks of Senator Hatfield).

[36] Under this limitation, courts-martial in the United States would only be able to try the offenses of: fraudulent or unlawful enlistment, appointment or separation, 10 U.S.C. §§ 883–84 (1964); desertion, *id.* at § 885; absence without leave, *id.* at § 886; missing movement, *id.* at § 887; assaulting or willfully disobeying a superior commissioned officer, *id.* at § 890; insubordination toward a warrant, noncommissioned, or petty officer, *id.* at § 891; failure to obey an order or regulation, *id.* at § 892; cruelty or maltreatment, *id.* at § 893; resistance, breach of arrest, escape, *id.* at § 895; wrongful release of a prisoner, *id.* at § 896; unlawful detention, *id.* at § 897; noncompliance with military procedural requirements, *id.* at § 898; false official statements, *id.* at § 907; loss, damage, destruction or wrongful disposition of military property of the United States, *id.* at § 908; waste, destruction or spoilage of non-military property of the United States, *id.* at § 909; drunk on duty, *id.* at § 912; misbehavior of a sentinel, *id.* at § 913; and malingering, *id.* at § 915. *See generally*, 116 CONG. REC. S12,672–73 (daily ed. August 4, 1970).

Also excluded from the Hatfield list of offenses for which a serviceman may be tried in any court are conduct unbecoming an officer, 10 U.S.C. § 933, and conduct which is service discrediting or prejudicial to good order and discipline within the military, *id.* at § 934; these may only be prosecuted through military administrative punishments. Federal district courts would have jurisdiction to try the following domestic offenses of United States servicemen: accessory after the fact, *id.* at § 878; solicitation to commit desertion, mutiny, misbehavior before the enemy, or sedition, *id.* at § 882; contempt toward public officials, *id.* at § 888; disrespect toward a superior commissioned officer, *id.* at § 889; mutiny and sedition, *id.* at § 894; misbehavior before the enemy, *id.* at § 899; subordinate compelling surrender, *id.* at § 900; improper use of countersign, *id.* at § 901; forcing a safeguard, *id.* at § 902; conversion of captured or abandoned property, *id.* at § 903; aiding the enemy, *id.* at § 904; misconduct as a prisoner of war, *id.* at § 905; spying, *id.* at § 906; improper hazarding of vessel, *id.* at § 910; drunken or reckless driving, *id.* at § 911; duelling, *id.* at § 914; riot or breach of peace, *id.* at § 916; provoking speeches or gestures, *id.* at § 917; murder, *id.* at § 918; manslaughter, *id.* at § 919; rape, carnal knowledge, *id.* at § 920; larceny, wrongful appropriation, *id.* at § 921; robbery, *id.* at § 922; forgery, *id.* at § 923; bad checks, *id.* at § 923a, maiming, *id.* at § 924; sodomy, *id.* at § 925; arson, *id.* at § 926; extortion, *id.* at § 927; assault, *id.* at § 928; burglary, *id.* at § 929; housebreaking, *id.* at § 930; perjury, *id.* at § 931; frauds against the United States, *id.* at § 932.

[37] *Id.* at § 894.

[38] *Id.* at § 899.

[39] *Id.* at § 900.

[40] *Id.* at § 901.

[41] *Id.* at § 902. This baroque offense is committed by one who breaches security measures designed to protect persons, places or property of the enemy or of a neutral in time of war or belligerency. M.C.M. *1969*, para. 181.

[42] 10 U.S.C. § 903 (1964).

[43] *Id.* at § 904.

[44] *Id.* at § 910.

the military community: the soldier who assaults his off-duty commanding officer in public on a military post has committed a far more socially disturbing delict that a non-military court is likely to recognize or punish. The Hatfield proposals, then, are nothing more than a facile but arbitrary alternative to the more demanding *O'Callahan-Relford* criteria which allocate particular offenses to the courts of the jurisdition most concerned with the offense.

In addition to being arbitrary in terms of classification, the Hatfield proposals are also subject to question on a practical level. The impact of *O'Callahan* and *Relford* suggests that excluding "civilian" offenses from military jurisdiction may not be a numerically significant reform. Even before *O'Callahan*, the military was only prosecuting 15 percent of the domestic offenses of its off-duty personnel,[45] and 85 to 90 percent of servicemen now in military prisons are being punished for absence offenses.[46] In view of the predominantly military nature of offenses presently tried in military courts and the shift to civilian jurisdiction accomplished by *O'Callahan*, comparatively few prosecutions would be affected by redrawing jurisdiction for non-military crimes.[47]

If Congressional interest and energy to reform military criminal law is finite, then such jurisdiction reshaping should be abandoned for measures which would improve the functions of military courts with regard to persons and offenses presently within their jurisdiction.

Additional reasons also raise doubt whether the limitation of military jurisdiction should go beyond *O'Callahan-Relford*. Paradoxically, transfer of offenses from military to civilian jurisdiction would pose numerous disadvantages to military defendants themselves.[48] At the outset, the military defendant in civilian criminal court will face financial demands which do not exist in military courts like bail, counsel fees, and witness expenses.[49] The majority of military defendants

[45] Brief for Respondent at 27 n. 16, O'Callahan v. Parker, 395 U.S. 258 (1969).

[46] *Report of the Special Civilian Committee for the Study of the United States Army Confinement System* at 101 (1970). For a severe criticism of the committee membership, investigative technique and report, *see* GARDNER, THE UNLAWFUL CONCERT: AN ACCOUNT OF THE PRESIDIO MUTINY CASE 216 (1970); SHERRIL, MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC 22 (1970). Professor Sherman, a prolific commentator on military law, has estimated that 90 percent of the crimes that bring servicemen to military jails are offenses that do not appear in civilian law. Remarks of Edward Sherman at the Federal Bar Association Convention, September 17, 1970, Washington D.C., reported in 7 BNA CRIM. L. REPTR. 2523, 2529 (1970).

[47] 116 CONG. REC. S10,443 (daily ed. July 1, 1970) (remarks of Senator Bayh). However, during the first eleven months of 1970, a median monthly percentage of 40.5 of the charges appearing in convictions automatically reviewed by the Army Court of Military Review were "civilian" type offenses. UNITED STATES ARMY JUDICIARY RECORDS CONTROL AND ANALYSIS BRANCH, JANUARY–NOVEMBER 1970 ANALYSIS OF GENERAL AND SPECIAL (BCD) COURT-MARTIAL DATA, paras. 5–6. This data is subject to some qualification. First, it only reflects convictions in which the adjudged sentence included a punitive discharge or confinement for one year or more. *See* 10 U.S.C. § 66 (Supp. V, 1970). Missing are the majority of Army prosecutions in special courts-martial. Second, military practice favors joinder of criminal charges, MCM *1969*, paras. 24, 25, hence the figure does not necessarily reflect the number of trials in which such civilian offenses were present. Finally, this data includes offenses occurring outside the United States and its possessions where no American civilian courts are available; among the studied cases the median monthly percentage for such "outside" offenses was 37. *Id.*

[48] Occasionally the argument is made that the military would be disadvantaged by loss of mobility resulting from any jurisdictional shift which would put large numbers of servicemen at the discretion of local civilian courts. This proposition is reinforced by the military's sparing use of pretrial confinement within its own justice system. *See*, Boller, *Pretrial Restraint in the Military*, 50 MIL. L. REV. 71, 97 (1970); Sherman, *Military Injustice*, 4 TRIAL 21, 23 (1968). The greater reliance of the civilian courts on this technique is shown by the fact that more than half of the 160,830 persons held in local civilian jails in early 1970 were not there as a result of a criminal conviction, CENSUS BUREAU AND LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, NATIONAL JAIL CENSUS, reported at 8 BNA CRIM. L. REPTR. 2276 (1971). Comparatively speedier trials are afforded in military courts. Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3, 72 (1970).

This argument against civilian jurisdiction of servicemen's offenses must first be discounted by the fact that the military survives though already sharing jurisdiction with civilian courts through the workings of *O'Callahan*, the status of forces agreements, and the understanding with the Justice Department. *See* text accompanying notes *supra*. Clearly there is no inherent reason why civilian court jurisdiction should unnecessarily entangle servicemen, for civilian judges could give calendar preference to military defendants and respond to the needs of military exigencies. Civilian jurisdiction might be subject to removal on showing of military need. *See* Comment, *supra* note 33 at 380. In the United Kingdom, British courts-martial and civilian courts share jurisdiction over almost all servicemen's offenses, and the final decision as to trial forum rests upon a cooperative evaluation of a variety of factors—reminiscent of the Justice and Defense Department agreement, (*see* note 21 *supra* and accompanying text)—including military exigencies. Stuart-Smith, *Military Law: Its History, Administration and Practice*, 85 L.Q. REV. 478, 491–92 (1969) (British).

[49] While there is no bail right in the military, United States v. Wilson, 10 U.S.C.M.A. 337, 27 C.M.R. 411 (1959), pretrial confinement is less frequent than in civilian courts, *see* note *supra* and accompanying text, and pretrial freedom is not conditioned upon a deposit

are under 21 years old and in the lower enlisted grades;[50] their military salary levels[51] would probably qualify them as indigents for purposes of obtaining a court-appointed defender in a federal court.[52] But if the military defendant's offense is minor, he may not be entitled to appointed counsel in the civilian court,[53] and if the offense is punishable by no more than confinement for six months, he may receive no jury trial.[54] In military practice, however, no matter how minor the offense, the defendant has a right, on request, to representation by a fully qualified lawyer and trial by a military jury.[55]

Furthermore, it is questionable whether the military defendant would receive any fairer trial under civilian jurisdiction. Military personnel—sometimes because of racial or ethnic factors, and sometimes just because they are military personnel—may well find that civilian jurors in areas surrounding military installations are significantly biased against them.[56] In addition, the state or federal jury which the military defendant faces will not contain persons from his special community, that is, military personnel on active duty.[57] It is also true that in many instances the defendant may not be guaranteed an indictment from a grand jury,[58] for many states have abandoned or significantly restricted this procedure.[59] Moreover, in civilian courts the military defendant will find far more constricted discovery rights than exist in military courts,[60] and nothing resembling the Uniform Code of Military Justice's automatic appellate review and free representation for all major convictions.[61] Considering all these factors, a number of civilian critics of military practice have conceded that in many circumstances the military defendant facing trial for a "civilian" offense would be better served by a military court than its local, civilian counterpart.[62]

Besides possible disadvantage to the military defendant, another perspective for regarding proposed shifts of jurisdiction with caution is that of possible effects on civilian legislators and law enforcement authorities. Any legislative effort to extend state court jurisdiction to civilian-type crimes occurring on military enclaves or to extend federal court power to offenses occurring off federal enclaves, and not otherwise proscribed in federal domestic law, will encounter geographic obstacles.[63] Most large military posts contain a hodge-podge of real estate parcels acquired at different times and with different jurisdictional understandings.[64] Some tracts are in exclusive federal jurisdiction, in others the state possesses

of money. *See* 10 U.S.C. §§ 9–10 (1964); MCM 1969, paras. 18–22. A qualified lawyer is provided without charge to all general and special court-martial defendants. 10 U.S.C. § 827 (Supp. V, 1970). No military defendant may be subjected over his objection to disciplinary or judicial proceedings where he is not so represented—except in the case of military personnel embarked on a vessel. *See* 10 U.S.C. §§ 815, 820 (Supp. V, 1970). In courts-martial, defense witness fees and costs for expert witnesses are paid for by the government. MCM 1969, para. 115.

[50] *See* ANALYSIS OF GENERAL AND SPECIAL (BCD) COURT-MARTIAL DATA *supra* note 47, at paras. 7–8.

[51] The 1972 monthly base pay rates for Army enlisted personnel in the lowest grades are: Private (E-1) $288.00; Private (E-2) $320.70; Private First Class (E-3) $333.60; Corporal or Specialist (E-4) $346.80.

[52] Franks, *Prosecution in Civil Courts of Minor Offenses Committed on Military Installations*, 61 MIL. L. REV. 85, 111 (1971). It is conceivable that the military could continue to provide free legal counsel to servicemen tried in civilian courts. Though presently military lawyers do not represent servicemen in civilian court proceedings, a pilot program is operating at three Army posts which provides Army counsel for servicemen in civilian criminal and civil cases providing 1) the serviceman is financially unable to retain his own counsel, and 2) civilian legal aid is unavailable. Army Times, January 20, 1971 at 4, col. 3.

[53] *Order Prescribing Rules of Procedure For the Trial of Minor Offenses Before (Federal) Magistrates*, 8 BNA CRIM. L. REPTR. 3091 (U.S. January 27, 1971).

[54] *See* Baldwin v. New York, 399 U.S. 66 (1970).

[55] 10 U.S.C. §§ 815–16, 820, 827 (Supp. V, 1970).

[56] Gardner, *supra* note 46, at 223; Nelson, *supra* note 22, at 63.

[57] *See, e.g.*, 28 U.S.C. §§ 1863, 1865 (Supp. V, 1970). However there are estimated to be 27.5 million veterans in the United States (Chicago Daily News, February 27, 1971, at 16, col. 4) who should bring some understanding of military life to those juries on which they may serve.

[58] The grand jury is not constitutionally required of the states. Hurtado v. California, 110 U.S. 516 (1884); Moreford v. Hocker, 394 F.2d 169 (9th Cir.), *cert. denied*, 392 U.S. 944 (1968).

[59] *See* Spain, *The Grand Jury, Past and Present: A Survey*, 2 AM. CRIM. L.Q. 119, 126–42 (1964).

[60] Everett, *Military Justice is to Justice . . .*, 12 JAG L. REV. 202, 208–09 (1970) (Air Force); Moyer, *Procedural Rights of the Military Accused: Advantages Over a Civilian Defendant*, 51 MIL. L. REV. 1, 11–14 (1971).

[61] *Id.* at 27. Military law provides appellate counsel and automatic appellate court review for all defendants whose court-martial sentences include confinement at hard labor for a year or a punitive discharge. 10 U.S.C. §§ 865–66, 870 (Supp. V, 1970).

[62] RIVKIN, G. I. RIGHTS AND ARMY JUSTICE, THE DRAFTEE'S GUIDE TO MILITARY LIFE AND LAW 215 (paperback ed. 1970); 1962 Hearings at 353.

[63] *O'Callahan* handily escapes such problems by only applying to cases in which court-martial jurisdiction is presently concurrent with civilian jurisdiction.

[64] Comment, *Military Installations: Recent Legal Developments*, 11 MIL. L. REV. 201, 202 (1961).

exclusive legislative power, and in others the two authorities share.[65] As to federal jurisdiction tracts, local police have no powers,[66] and acts done there are outside the present jurisdiction of state courts.[67] Any expansion of state court responsibilities into these areas would require extensive legislative action by state and federal government.[68] Federal courts may apply state criminal law to offenses occurring on the federal tracts through the federal assimilative crimes provision,[69] but they ordinarily have no authority over prosaic criminal acts occurring off such tracts which are not expressly proscribed in federal law. And further, in order for state or federal courts to acquire jurisdiction over servicemen's offenses proscribed in the Uniform Code of Military Justice but not in their respective criminal codes, additional legislation would be required.[70]

If such legislation were to shift significant numbers of cases into civilian jurisdiction, there would have to be a correlative transfer of responsibility for law enforcement. It seems unlikely that civilian authorities would be desirous of assuming this burden. Many populous military bases[71] are located in thinly populated rural counties which would be hard-pressed to provide legal and law enforcement services for the large, substantially tax exempt federal military enclaves.[72] The already overburdened civilian criminal law processes[73] would be strained further by an enlargement of their responsibilities. Thrown into domestic courts, cases with primary impact in the military community and beyond the ken and political sensitivity of local prosecutors and courts might become secondary to domestic business and be manipulated to serve parochial interests.[74] Thus, the Supreme Court, in refusing to oust military courts and extend domestic jurisdiction to civilian type offenses occurring on a military post, commented in *Relford:*

> The distinct possibility exists that civil courts . . . will have less than complete interest, concern and capacity for all the cases that vindicate the military's disciplinary problems within its own community. . . .[75]

Finally, with regard to offenses with primary impact in the military community, it is uncertain that non-military judges, administrators, and jurors possess sufficient insight into the problems of military society to render fitting judgements.[76]

In sum, further jurisdiction-shifting does not seem a very helpful technique for improving the level of justice for the serviceman or military society. The present jurisdictional frontiers provided in *O'Callahan* and *Relford,* though sometimes difficult to find, do quite rationally allocate servicemen's domestic offenses to trial in the military or civilian community most affected by the delict. Stripping the military of authority to try offenses with primary impact in its own community would place responsibility for such law enforcement in the unenthusiastic hands of those substantially unwilling and unable to execute it. A dubious advantage to the military defendant himself, a shift of all servicemen's civilian type offenses into domestic courts is a reformer's feint which would have no bearing on the great majority of defendants in military courts and the need to improve the legal processes therein.

[65] *Id.* at 202 n. 5.

[66] Franks, *supra* note 52, at 95.

[67] *See* Ryan v. Washington, 302 U.S. 186 (1937).

[68] Comment, *The New Boundaries of Military Jurisdiction,* 43 TEMP. L.Q. 166, 179 n. 80 (1970).

[69] 18 U.S.C. § 13 (1964).

[70] Thus the Hatfield proposal, S. 4178, 91st Cong., 2d Sess., § 5 (1970), grants federal courts jurisdiction to try servicemen's domestic civilian offenses described in the UNIFORM CODE OF MILITARY JUSTICE. *See* note 36 *supra.* Paradoxically, though *O'Callahan* destroyed the concurrent jurisdiction of courts-martial when state jurisdiction existed, the Hatfield measure revives this dual jurisdiction between state and federal courts.

[71] The Army presently maintains 10 Stateside posts with resident populations in excess of 20,000. The largest, Fort Lewis, Washington, contains almost 40,000. The others, in descending order are: Fort Hood, Texas; Fort Bragg, North Carolina; Fort Knox, Kentucky; Fort Dix, New Jersey; Fort Carson, Colorado; Fort Ord, California; Fort Benning, Georgia; Fort Riley, Kansas; and Fort Leonard Wood, Missouri. Army Times, February 17, 1971, at 5, col. 1

[72] It would be possible for the federal government to provide financial resources or assistance for those civil jurisdictions assuming law enforcement responsibility for servicemen, *see* note 52 *supra,* but the Hatfield legislation makes no provision for this.

[73] Address by Chief Justice Warren E. Burger to the American Bar Association, August 10, 1970, reprinted in *The State of the Judiciary,* FORBES, July 1, 1971, at 1.

[74] Franks, *supra* note 52, at 113; *cf.* Wilkinson, *The Narrowing Scope of Court-Martial Jurisdiction: O'Callahan v. Parker,* 9 WASHBURN L.J. 193, 208 (1970).

[75] 401 U.S. at 367–68.

[76] Address by Chief Justice Earl Warren, reprinted in *The Bill of Rights and the Military,* 37 N.Y.U.L. REV. 181, 187 (1962).