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Refining Military Jurisdiction over Civilians

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COMMENTARY/Refining Military Jurisdiction over Civilians

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Article 2(10) of the Uniform Code of Military Justice (UCMJ) asserts military jurisdiction "[i]n time of war, [over] persons serving with or accompanying an armed force in the field."[1] The Court of Appeals for the District of Columbia Circuit was recently asked whether this article applies to civilians presently serving with the armed forces in Vietnam.[2] In *Latney v. Ignatius*[3] the district court had denied habeas corpus relief to the petitioner, finding that his relationship with the military in Vietnam was such as to subject him to military jurisdiction by virtue of Article 2(10).[4] Reversing, the court of appeals found that, in light of the Supreme Court's decision in *O'Callahan v. Parker*,[5] Article 2(10) could not be expanded to include a civilian who had not been assimilated into the military organization, and who

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1. 10 U.S.C. § 802(10) (1964). In recent years the Supreme Court has declared unconstitutional two provisions of the UCMJ which had vested jurisdiction in the military to try civilians by court-martial in time of peace. In Toth v. Quarles, 350 U.S. 11 (1955), the Court declared unconstitutional Article 3(a) of the UCMJ, 10 U.S.C. § 803(a) (1964), which vested jurisdiction in the military over ex-servicemen charged with offenses committed while in the military. In that case the petitioner, after being honorably discharged from active military duty, was arrested by the military police and returned to Korea to stand trial for murder and conspiracy alleged to have been committed while he was on active duty.

Article 2(11), Uniform Code of Military Justice, 10 U.S.C. § 802(11) (1964), granting the military jurisdiction over all persons serving with, employed by, or accompanying the armed forces in foreign countries, was declared constitutionally inapplicable to civilian dependents charged with murder overseas. Reid v. Covert, 354 U.S. 1 (1957). Later, the Court held that this article did not apply to dependents charged with noncapital offenses, Kinsella v. Singleton, 361 U.S. 234 (1960), nor to civilian employees of the armed forces. McElroy v. Guagliardo, 361 U.S. 281 (1960); Grisham v. Hagan, 361 U.S. 278 (1960).

2. Brief for Appellant at 12, 14-24, Latney v. Ignatius, 416 F.2d 821 (D.C. Cir. 1969).

3. 416 F.2d 821 (D.C. Cir. 1969).

4. Habeas Corpus No. 539-67 (D.D.C. 1968).

5. 395 U.S. 258 (1969).

was arrested and tried for committing a crime in a bar frequented only by civilians.[6]

The distance of the Vietnamese conflict from the United States has necessitated the American military's use of a large fleet of civilian merchant ships to supply its troops. The SS *Amtank* was part of this fleet when it sailed into DaNang Harbor on August 7, 1967. The ship was under a time charter to the Military Sea Transport Service (MSTS), but was manned by a civilian crew of which petitioner was a member. Under the charter agreement the National Bulk Carriers, Inc. owned and operated the ship, and was responsible through its agent, the master of the ship, for the hiring and supervision of the crew.[7] The Naval officers attached to the MSTS could control the ship only to the extent of directing its master as to which cargo to load and to which port to sail with the ship.[8] While the members of the crew were in Vietnam they were not granted any of the privileges granted to members of the armed forces or to civilians who were an integral part of the United States Armed Forces Command in Vietnam.[9] They were not compelled to observe the off-limits designation placed on certain areas by the military authorities,[10] and were even prohibited from entering military bases, unless on official business or in need of medical assistance.[11]

While the SS *Amtank* was unloading her cargo of petroleum products, members of the crew were permitted to leave the ship. Latney had been at odds with another member of the crew and when they met in a bar in DaNang East they had an altercation which resulted in the death of the

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6. 416 F.2d at 823.

7. Petition for Writ of Habeas Corpus at 1, Habeas Corpus No. 539-67 (D.D.C. 1968).

8. *Id.* at 2.

9. Appellant, since he was a merchant seaman, was not allowed any of the rights, benefits and privileges of a serviceman, such as post exchange and commissary privileges; armed forces hospitalization and medical care; use of the armed forces mail system; or use of military payment certificates. Nor was he subject to armed forces regulations or entitled to a Geneva Convention identification card. Brief for Appellant at 4, 5, Latney v. Ignatius, 416 F.2d 821 (D.C. Cir. 1969).

Compare these circumstances with those of the female dependents in Reid v. Covert, 354 U.S. 1 (1957), who "were transported overseas at government expense; they went overseas with special passports which reflected their status as dependents of military personnel; they received special commissary, post exchange, housing, postal, and currency privileges; and so on." Everett, *Military Jurisdiction over Civilians*, 1960 DUKE L. REV. 366, 384.

10. Proceedings of Article 32 Pretrial Investigation at 16 (conducted Aug. 26 to Sept. 2, 1967, in Da-Nang). Moreover, Mamasan's Bar, where the fight started, was in an area of DaNang East that had been declared by the United States Armed Forces Assistance Command to be off-limits to all military personnel and civilians employed by the armed forces. *Id.*

11. *Id.* at 16-17. Since there was no public health hospital in Vietnam the civilian merchant seamen were permitted to go to a naval hospital when in need of medical assistance.

other seaman. Petitioner was apprehended on the beach by members of the United States Marine Military Police. The United States Armed Forces Command was able to obtain a rapid waiver of the Vietnamese primary jurisdiction[12] and then claimed the right under Article 2(10) to try Latney by court-martial for violation of Article 118 of the UCMJ.[13]

Development of Anglo-American Military Jurisdiction over Civilians

Historically, the responsibility for the maintenance of discipline over civilians accompanying the army fell on the commanding officer.[14] The British parliament resisted all attempts by the Crown and the military to violate the principle set forth in the Magna Carta that "no freeman shall be tried and punished 'except by the lawful judgment of his peers and by the law of the land.' "[15] The civilian courts required the military authorities to prove why a court-martial, which was of special and limited jurisdiction, did in fact have jurisdiction over the accused.[16] There was a period during which the British military was even prohibited from trying officers and soldiers except for those crimes specifically mentioned in the Mutiny Act.[17]

The practice of permitting the military to try camp-followers by courts-martial was continued during the Revolutionary War, even though the colonists had seen the dangers to liberty which such procedures presented. The founding fathers foresaw the need for maintaining the army, but also were deeply attached to the principle that all trials be conducted by a judiciary free from executive control and influence.[18] This belief in a fair trial for all accused led to the adoption by the first Congress of the Bill of Rights, which among other things guarantees the right to a trial by jury and to a grand jury indictment.[19]

The military advocates contend that the source of military jurisdiction to try civilians by courts-martial is Article I of the Constitution which gives

12. Colonel Broome, Latney's assigned defense counsel, reported that special procedures were used to obtain the necessary waiver of jurisdiction by the Vietnamese Government. The only knowledge the district prosecutor had of the case consisted of a brief entry in a police blotter. Letter from Lt. Col. Norris Broome, USMC to Captain W.H. Hogan, Jr., USNR, Appellate Defense Division, Oct. 25, 1967.

13. 10 U.S.C. § 918 (1964). This article defines the various degrees of murder.

14. A. FORTESCUE, HISTORY OF THE BRITISH ARMY 89 (1899). *See also* W. WINTHROP, MILITARY LAW AND PRECEDENTS 98 (2d ed. 1920).

15. Maurer, *The Court-Martialing of Camp Followers, World War I*, 9 AM. J. LEGAL HIST. 203, 206 (1965).

16. *Id.* at 210.

17. *See* Wiener, *History Vindicates the Supreme Court's Rulings on Military Jurisdiction*, 51 A.B.A.J. 1127, 1128 (1965).

18. Girard, *The Constitution and Court-Martial of Civilians Accompanying the Armed Forces—A Preliminary Analysis*, 13 STAN. L. REV. 461, 486-87 (1961).

19. U.S. CONST. amends. V, VI.

Congress authority "To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures . . . ."[20] and the authority to make all laws which are necessary for a successful execution of this constitutional mandate.[21] They argue that this clause permits limitations on individual freedoms and constitutionally guaranteed rights under certain conditions:

> In the face of an actively hostile enemy, military commanders necessarily have broad power over persons on the battlefront. From a time prior to the adoption of the Constitution the extraordinary circumstances present in an area of actual fighting have been considered sufficient to permit punishment of some civilians in that area by military courts under military rules.[22]

The military wants the authority to try civilians accompanying the army because it believes that this is the only way to protect the morale and discipline of the troops against any civilian impairments. In *United States v. Burney*[23] the United States Court of Military Appeals said that it would be demoralizing to a soldier if a civilian co-worker could commit a major offense and then walk free, because the only institution capable of bringing about a rapid disposition of the matter was prohibited from becoming involved. The court declared: "There is no rational basis for this discrimination, and a fixed belief in the minds of servicemen that the civilian component of an overseas force is free from restraint, while the serviceman is closely circumscribed, has an immediate, palpable, and adverse effect on discipline and morale."[24]

Challenging the System

The first major challenge to the arbitrary use by the military of courts-martial arose during the Civil War. The military commander of Indiana had ordered the arrest and trial by a special military court of Lambden Milligan.[25] The Supreme Court ruled that the military had no authority to try the petitioner, since "no usage of war could sanction a military trial there for any offence whatever of a citizen in civil life, in nowise connected with the military service,"[26] especially when the civil courts in the area were open and properly functioning.[27] The Court admitted that there could be instances in which the jurisdiction over civilians could be constitutionally

20. *Id.* art. I, § 8, cl. 11.
21. *Id.* cl. 18.
22. Reid v. Covert, 354 U.S. 1, 33 (1957).
23. 6 U.S.C.M.A. 776, 21 C.M.R. 98 (1956).
24. *Id.* at 800, 21 C.M.R. at 122.
25. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866).
26. *Id.* at 121-22. This has been in part incorporated in Article 2(10).
27. *Id.* at 121.

vested in the military, but that these instances must be limited to areas of active hostilities in time of war.[28]

Thereafter the federal courts upheld the trial of civilians by courts-martial during both world wars. These civilians were employed primarily in positions which were vital for a successful completion of the war effort and in some instances the civilians were under the direct supervision of military officers.[29]

In one instance a court denied the military authority to try a civilian because he was not directly connected with the military activities being conducted on the base.[30] In *Hammond v. Squier*[31] the petitioner was a merchant seaman who was employed on a ship that was being operated by a private concern for the Navy during World War II, in a situation similar to that which confronted Latney. He was charged with disobeying a lawful order, being disrespectful to a superior and striking a civilian superior and was tried and convicted by a special military commission. In granting a writ of habeas corpus, the court pointed out that the court-martial authorities had found "[t]he evidence in the case does not establish that the objectionable language was of itself 'to the detriment of the success of the United States military operations', as alleged," and therefore, "there [was] no basis whatever for the creation of the special military commission which tried him. . . ."[32]

Moreover, in *Duncan v. Kahanamoku*[33] the Supreme Court prohibited the military from supplanting the civilian courts which were open and properly functioning in Hawaii during the middle of World War II. Justice Murphy in his concurring opinion pointed out that:

> Those who founded this nation knew full well that the arbitrary power of conviction and punishment for pretended offenses is the hallmark of despotism. . . . History had demonstrated that fact to them time and again. They shed their blood to win independence from a ruler who they alleged was attempting to render the "Mili-

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28. *Id.* at 127.

29. During World War I: Hines v. Mikell, 259 F. 28 (4th Cir. 1919); *Ex parte* Jochen, 257 F. 200 (S.D. Tex. 1919); *Ex parte* Falls, 251 F. 415 (D.N.J. 1918); *Ex parte* Gerlach, 247 F. 616 (S.D.N.Y. 1917). During World War II: Perlstein v. United States, 151 F.2d 167 (3d Cir. 1945); Shilman v. United States, 73 F. Supp. 648 (S.D.N.Y. 1947); *In re* Berue, 54 F. Supp. 252 (S.D. Ohio 1944); McCune v. Kilpatrick, 53 F. Supp. 80 (E.D. Va. 1943).

30. *Ex parte* Weitz, 256 F. 58 (D. Mass. 1919). Petitioner was a chauffeur employed by a contractor who was doing work on a military base, whose duties involved transporting certain civilians to and from different locations on the base. The case arose when he accidentally ran down and killed a soldier on the base.

31. 51 F. Supp. 227 (W.D. Wash. 1943).

32. *Id.* at 231.

33. 327 U.S. 304 (1946). Duncan had assaulted two Marine sentries at the naval base where he worked.

> tary independent of and superior to the Civil power" and who was "depriving us . . . of the benefits of Trial by Jury." . . . This supremacy of the civil over the military is one of our great heritages. It has made possible the attainment of a high degree of liberty regulated by law rather than by caprice. Our duty is to give effect to that heritage at all times, that it may be handed down untarnished to future generations.[34]

In *Toth v. Quarles*,[35] a case which arose during a time of peace, the status of the civilian in relation to the military was further refined. The Court said that the military authorities could exercise court-martial jurisdiction over a civilian only if it could show that the accused could be regarded as a person falling within the class included in the term "land and naval Forces."[36] In subsequent cases the Supreme Court has declared that in peacetime the class of civilians who could be subject to military jurisdiction does not include dependents of members of the armed forces,[37] nor civilian employees of the armed forces.[38]

More recently the Supreme Court in *O'Callahan v. Parker*,[39] found that the military need not be given jurisdiction to try a soldier by court-martial for every criminal offense. Although the petitioner was a member of the armed services on active duty when he committed the crime, the Court said that he could not be tried by court-martial since the crime was not committed on a military post or enclave nor impaired the successful completion of military affairs.[40] The Court felt that the right to trial by jury and to a grand jury indictment were far too important to permit such an arbitrary deprivation by the military.[41] Moreover, the law officers, who act as judges at a court-martial, do not have the same degree of freedom and independence as judges in state and federal courts.[42]

The Status of the Vietnam Conflict

For the military to exercise constitutional jurisdiction over a civilian it must first be shown that there is a time of war. The district court in *Latney*

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34. *Id.* at 325.
35. 350 U.S. 11 (1955).
36. *Id.* at 15. The Court declared: "[G]iven its natural meaning, the power granted Congress 'To make Rules' to regulate 'the land and naval Forces' would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces." *Id.*
37. Kinsella v. Singleton, 361 U.S. 234 (1960); Reid v. Covert, 354 U.S. 1 (1957).
38. McElroy v. Guagliardo, 361 U.S. 281 (1960); Grisham v. Hagan, 361 U.S. 278 (1960).
39. 395 U.S. 258 (1969).
40. *Id.* at 273-74.
41. *Id.* at 272-74. *See* 19 CATHOLIC U.L. REV. 101 (1969).
42. A law officer, acting as a military judge at a general court-martial could be

found that Vietnam constituted a "time of war" even though Congress has made no official declaration.[43] This is not the first time that a court had declared an armed conflict equivalent to a war. There has been no unity of agreement among the courts as to what constitutes a war. In *Bas v. Tingy*[44] the Supreme Court said that there are two types of wars: "perfect" wars (approved by Congress) and "imperfect" wars (lacking official approval).[45] A century later the Court declared: "While as between the United States and other civilized nations, an act of Congress is necessary to a formal declaration of war, no such act is necessary to constitute a state of war with an Indian tribe."[46]

During the Korean War much legal controversy arose as to whether or not the armed conflict there constituted a war. The United States Court of Military Appeals took the position that the Korean conflict was a war, and therefore special regulations could be applied to the soldiers serving there. The court arrived at its conclusion after examing all the events surrounding the armed conflict, such as: 1) increase in pay for the soldiers serving there; 2) presence of large number of Americans on the battlefield of Korea; 3) the number of casualties; 4) the increase in the draft; and 5) the large sums being expended by the Government in order to achieve a successful result.[47] If such a practical test were applied to the circumstances surrounding Vietnam there would be no difficulty in another court's declaring that the armed conflict there also is a war. The status of the Vietnam armed conflict is confusing in light of the limited declared purpose for the presence of American soldiers there: "*Mission*: To assist the government of Vietnam to defeat the VC/NVA forces and to extend GVN control through out the Republic of Vietnam."[48] In any event, the Judge Advocate General of the Army asserts the armed conflict in Vietnam is a war within the meaning of the UCMJ and therefore, after the government of the Re-

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under the direct command of the convening officer. MANUAL FOR COURTS-MARTIAL ¶ 4(g)(1) (rev. ed. 1969). Under the recently passed amendments to the UCMJ, however, the military judge is no longer under the command of the convening authority, but is designated by the Judge Advocate General and detailed thereto. Military Justice Act of 1968, 10 U.S.C. § 826 (Supp. IV, 1969). *See* 18 CATHOLIC U.L. REV. 429 (1969).

43. Habeas Corpus No. 539-67 (D.D.C. 1968).

44. 4 U.S. (4 Dall.) 322 (1800). The central question presented to the Court was whether France could be considered an enemy for purposes of a salvage act passed by Congress.

45. *Id.* at 324-25.

46. Montoya v. United States, 180 U.S. 261, 267 (1901).

47. United States v. Bancroft, 3 U.S.C.M.A. 3, 5-6, 11 C.M.R. 3, 5-6 (1953). *See also* United States v. Taylor, 4 U.S.C.M.A. 232, 236-37, 15 C.M.R. 232, 236-37 (1954); United States v. Gann, 3 U.S.C.M.A. 12, 13, 11 C.M.R. 12, 13 (1953).

48. United States Military Assistance Command, Vietnam, Directive 10-11 (March 2, 1967).

public of Vietnam has waived primary jurisdiction over the accused civilian, the United States military authorities have the right to try him by court-martial.[49]

The power to resolve this question concerning the status of the Vietnam conflict rests in the Congress. For, as one court said: "The existence or nonexistence of a state of war is a political, not a judicial, question and it is only when a formal declaration of war had been made by the Congress that judicial cognizance may be taken thereof. Once so declared by the political department, it becomes binding upon the courts, otherwise not."[50]

The ultimate requirement of Article 2(10) of the UCMJ is that the civilian be "in the field." Most authorities favor a limited interpretation of this phrase since it would otherwise permit the military to encroach on the jurisdiction which is vested in the civil courts by the Constitution. Colonel Winthrop, the Blackstone of military law, believes that the term should be construed to encompass only areas of active hostilities.[51] This view was mentioned by the Court in its opinion in *Reid v. Covert*: "Experts on military law, the Judge Advocate General and the Attorney General have repeatedly taken the position that 'in the field' means in an area of actual fighting."[52]

When the altercation took place in August of 1967 DaNang was not a theatre of hostilities. The United States Marines had reported that upon landing there in 1965 they had met no enemy opposition on the beach, but instead were met by village leaders, army officers and students who presented gifts to the troops as they came ashore.[53] Regulations of the United Service Organization prohibit it from establishing operations in any area which has not been declared secure by the Department of Defense. This organization had been operating in the DaNang area long before the altercation took place. Furthermore:

> Approximately 100 yards north from Mamasan's Bar, where the offense allegedly occurred, is located a beach house which is reserved for the recreational use of the Assistant Commander, III Marine Amphibious Force. Approximately 500 yards south of Mamasan's Bar is located an Officer's Club and Rest and Rehabilitation Center, which had been in operation about a year prior to August 11, 1967.[54]

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49. Record of Oral Argument, Latney v. Ignatius, 416 F.2d 821 (D.C. Cir. 1969). *See also* Keefe, *Court Martial of Civilians*, 53 A.B.A.J. 961 (1967).

50. Pyramid Life Ins. Co. v. Masch, 134 Colo. 70, 73, 299 P.2d 117, 119 (1956). The court ruled that the Korean conflict did not constitute a war and therefore the insurer was liable to the beneficiary under a double indemnity provision.

51. W. WINTHROP, MILITARY LAW AND PRECEDENTS 101 (2d ed. 1920).

52. 354 U.S. 1, 34 n.61 (1957).

53. 9th Marine Expeditionary Brigade Command Diary (March 1965).

54. Brief for Appellant at 44, Latney v. Ignatius, 416 F.2d 821 (D.C. Cir. 1969).

Conclusion

Civilians play a vital role in the American war effort in Vietnam. The constitutional rights of these civilians require protection from military encroachment. One solution which has been set forth by the Supreme Court would be for the Congress to vest jurisdiction over all such cases in a federal district court.[55] Another would be for Congress to make an official declaration as to the status of every military armed conflict. Either of these procedures would prevent the military from encroaching on the jurisdiction vested by the Constitution in civil court, and thereby, also prevent the arbitrary deprivation of constitutionally protected rights of civilians, especially when the status of the conflict is in open dispute. Prior to *Latney* any other course of action would have permitted the Executive to unilaterally decide when the military is to have jurisdiction over a civilian so that he can be tried by court-martial. However, with the decision by the court of appeals neither proposal is needed to insure a jury trial to a civilian in Vietnam whose actions do not impede the armed forces. But if he does hinder the military, he is still subject to military jurisdiction, because the *Latney* court failed to answer the question of whether the Executive branch has the unilateral authority to declare war and deprive a person of his constitutional right to a trial by jury of his peers.

55. Toth v. Quarles, 350 U.S. 11, 21 (1955). The armed services have seen this problem ever since *Toth*, but have refused to seek legislation to rectify it. Instead they have continually tried to argue around it in an attempt to justify their actions. The Supreme Court has already upheld a statute which vests jurisdiction in a federal district court for a crime committed outside of the territorial United States. Blackmer v. United States, 284 U.S. 421 (1932).

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