Notre Dame Law Review

Volume 46 | Issue 3 Article 8

3-1-1971

Case Comments

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CONSTITUTIONAL LAW — CRIMINAL LAW — CRIMINAL PROCEDURE — PLEA OF GUILTY IS INVULNERABLE TO IMPEACHMENT WHERE NO ADEQUATE PROCEDURE EXISTS TO CHALLENGE THE VOLUNTARINESS OF A CONFESSION MOTIVATING THE PLEA.—Defendants Dash, Richardson and Williams, each convicted after pleading guilty to felonies committed in the state of New York,[1] filed petitions for habeas corpus, alleging that their pleas were products of coerced confessions. After all three petitions were denied without a hearing, the petitioners appealed to the Court of Appeals for the Second Circuit,[2] which reversed in each case and directed that a hearing be held on the petition for habeas corpus. The appellate court considered a plea of guilty as an effective waiver of pretrial irregularities only if the plea were voluntary. A plea is not voluntary if it is the consequence of an involuntary confession.

Each of the defendants had submitted his guilty plea prior to *Jackson v. Denno*.[3] The New York procedure for testing the voluntariness of a confession at that time required the trial judge to submit the issue of voluntariness to the jury without the court resolving the disputed circumstances of the confession. *Jackson* held this procedure unconstitutional because it did not afford a reliable determination of the voluntariness of a confession, did not adequately protect a defendant's right to be free from a coerced confession, and hence could not withstand constitutional attack under the due process clause of the fourteenth amendment.[4]

Reasoning from *Jackson,* the court of appeals concluded that since New York had provided no constitutionally acceptable procedure for Dash, Richardson and Williams to challenge the validity of their confessions at the trial level, they had had no reasonable alternative to pleading guilty. The court held that if the petitioners' confessions were coerced, their pleas were the fruits of the state's prior illegality and were ipso facto void. The court therefore ruled that the petitioners were entitled to a hearing on their petitions for habeas corpus. With certiorari granted, the United States Supreme Court reversed and *held*: the effect of *Jackson* is limited to confessions of an accused actually introduced at trial and has no application to guilty pleas allegedly a consequence of prior confessions for which the state provided no constitutionally acceptable procedure for contesting. *McMann v. Richardson,* 397 U.S. 759 (1970).

In the prior touchstone of *Jackson v. Denno,* petitioner had been involved in a shoot-out wherein a police officer was fatally wounded. Jackson was immediately taken to a hospital to be treated where, in response to protracted questioning, he admitted shooting the officer. Later investigations of the circumstances surrounding Jackson's confession disclosed that he had been administered both demerol and scopolamine prior to his interrogation. At Jackson's trial, the trial judge submitted the voluntariness issue to the jury along with the other issues in

1 Dash and Williams pleaded guilty to robbery; Richardson pleaded guilty to murder in the second degree.
2 United States *ex rel.* Ross v. McMann, 409 F.2d 1016 (2d Cir. 1969).
3 378 U.S. 368 (1964).
4 *Id.* at 377.

the case. The jury was told that if it found the confession involuntary, it was to disregard it entirely and determine Jackson's guilt or innocence solely from the other evidence in the case; alternatively, if the jury found the confession voluntary, it was to determine its truth or reliability and accord it weight accordingly. Following a subsequent sentence of death, Jackson filed a petition for habeas corpus, claiming that the New York procedure for determining the voluntariness of a confession was unconstitutional.

The New York rule, as formulated in *Stein v. New York*,[5] admitted to the jury both the evidence going to the voluntariness of a confession and all the corroborating evidence showing the confession to be true. It was precisely at this point, however, as Mr. Justice White observed in *Jackson*, that there arises "the danger that matters pertaining to the defendant's guilt will infect the jury's findings of fact upon voluntariness, as well as its conclusion upon that issue itself. . . ."[6] The central criticism of the New York rule amounted to the proposition that it failed to distinguish adequately between admissibility and credibility of an allegedly coerced confession. "Under the New York rule," continued Justice White in *Jackson*, "the evidence given to the jury inevitably injects irrelevant and impermissible considerations of truthfulness into the assessment of voluntariness."[7] According to Justice White, the procedure used in the trial courts to arrive at its conclusions on the voluntariness issue must "be fully adequate to insure a reliable and clear-cut determination of the voluntariness of the confession, including the resolution of disputed facts upon which the voluntariness issue may depend."[8] *Jackson* held that the New York rule failed to satisfy these constitutional requirements.

In granting petitioners a hearing on their petitions for habeas corpus, the court of appeals in *McMann* argued that pre-*Jackson* procedures afforded no reliable and clear-cut determination of the voluntariness of the confession.[9] The court reasoned that since the state failed to afford the petitioners a constitutionally acceptable means of presenting their claims, they could not be deemed to have entered a voluntary plea of guilty.

It has long been held that a plea of guilty, even where the defendant is represented by effective counsel, is not an absolute bar to a collateral attack upon a conviction.[10] A fundamental question involving a collateral attack upon a conviction secured by a guilty plea, however, is whether or not the plea was "voluntary," for an involuntary plea is inconsistent with due process.[11] Perhaps with this in mind, Judge Kaufman, responding to the court of appeals' dissenting minority, announced that it would be

> the rankest unfairness, and indeed a denigration of the rule of law, to recognize the infirmity of the pre-*Jackson v. Denno* procedure for challenging the legality of a confession in the case of prisoners who went to trial but

5 346 U.S. 156 (1953).
6 378 U.S. at 383.
7 *Id.* at 386.
8 *Id.* at 391.
9 409 F.2d at 1023, 1024.
10 Waley v. Johnston, 316 U.S. 101 (1942).
11 Machibroda v. United States, 368 U.S. 487, 493 (1962).

> to deny access to the judicial process to those who improperly pleaded guilty.[12]

This, however, is precisely what Mr. Justice White did in writing the majority opinion in *McMann v. Richardson.*

Mr. Justice Brennan, dissenting in *McMann,* noted that "the result reached by this Court is inconsistent . . . with prior decisions of this Court."[13] He did not point out, as he might have, that the decision struck down by Justice White in *McMann* was in fact largely based upon the reasoning set forth in *Jackson,* as well as upon dicta enunciated in that decision by Justice White himself. Instead, Brennan elected to cite *Harrison v. United States*[14] as an illustration of the Court's inconsistency.

In the *Harrison* case, illegally procured confessions had been introduced at trial. At a new trial, after a reversal of the defendant's conviction, the defendant objected to the introduction of testimony from the previous trial on the ground that he had been improperly induced to testify at the former trial by the introduction of the inadmissible confessions. His objections were sustained, the Court noting in part that:

> the petitioner testified only after the government had illegally introduced into evidence three confessions, all wrongfully obtained, and the same principle that prohibits the use of confessions so procured also prohibits the use of any testimony impelled thereby—the fruit of the poisonous tree.[15]

The question in *Harrison* was not *whether* the petitioner made a knowing decision to testify, but *why* he testified. "If he did so to overcome the impact of confessions illegally obtained and hence improperly introduced, then his testimony was tainted by the same illegality that rendered the confessions themselves inadmissible."[16]

Thus, if the New York procedure prior to *Jackson* was constitutionally inadequate to challenge the illegality of an allegedly coerced confession, and if it is asserted that a guilty plea was made as a result of the confession, the same reasoning applicable in *Harrison* would appear to be applicable in *McMann.* If defendants Dash, Richardson and Williams were induced to plead guilty because of the unavailability of a constitutionally acceptable procedure to challenge the admissibility of their confessions, then their pleas were the fruits of the state's illegality and were vulnerable to collateral attack. In light of *Harrison,* Justice Brennan's disapproval of the majority opinion in *McMann* would seem eminently justified: "the Court moves yet another step toward the goal of insulating all guilty pleas from subsequent attack no matter what unconstitutional action of government may have induced a particular plea."[17]

Justice Brennan suggests that there are three reasons given for holding in *McMann* that pre-*Jackson* defects should not unconstitutionally infect the

12 409 F.2d at 1027.
13 397 U.S. at 776.
14 392 U.S. 219 (1968).
15 *Id.* at 222.
16 *Id.* at 223.
17 397 U.S. at 775.

pleading process. Each of these reasons he finds unsatisfactory. The first is the majority's contention that the guilty plea and not the antecedent confession constitutes the basis of a conviction resulting from the plea. This he dismisses as "highly formalistic"[18] and valid in only a technical sense. It hardly disposes adequately of the contention, accepted by the court of appeals, that the plea was induced by the fact that no constitutionally acceptable procedure existed prior to *Jackson* for testing the voluntariness of a confession. Justice Brennan reiterates that the crucial question to be answered is not *whether,* but *why,* a guilty plea may have been entered.[19] The majority's contention that "whether a guilty plea was entered before or after *Jackson v. Denno,* the question remains the same: was the plea a voluntary and intelligent act of the defendant?"[20] is correct; but to Justice Brennan, it fails to take into account that a defendant's counsel must offer his advice with respect to the desirability of a guilty plea in the absence of a constitutionally acceptable procedure for challenging the voluntariness of his client's confession.

The second reason Justice Brennan finds in the majority opinion is that "the Court views the entry of guilty pleas as waiver of objections to the allegedly coerced confessions."[21] Justice Brennan finds this rationale even more unconvincing than the former. He points out that the petitioners' pleas were in no sense the relinquishment of a known right, "for it was only when *Stein v. New York* was overruled by *Jackson v. Denno* that it became clear that the New York procedure was constitutionally inadequate."[22] Therefore, he argues, "there is no sense in which respondents deliberately 'by-passed' or 'waived' State procedures constitutionally adequate to adjudicate their coerced confession claims."[23]

The third reason for the majority decision, according to Justice Brennan, is the belief that the defect in the *Stein*-approved New York procedure was not very great—only "a little bit unconstitutional,"[24] in Justice Brennan's words. Therefore, it would seem too speculative to inquire into whether the difference between the pre-*Jackson* and the post-*Jackson* procedures would alter the advice given by counsel concerning the desirability of a guilty plea. Justice Brennan complains that he never considered *Jackson v. Denno* so trivial and suggests that the extent to which the unconstitutional defect in the pre-*Jackson* procedure might have actually infected the pleading process "cannot be determined by *a priori* pronouncements of this Court."[25]

Mr. Justice Brennan is correct in asserting that the extent to which the defect in pre-*Jackson* procedure might have actually infected the pleading process cannot be determined by a priori pronouncements; but something might be learned of the so-called "triviality" of *Jackson v. Denno* by inquiring a posteriori into the actual procedures themselves, before and after *Jackson.*

Justice Black in his dissenting opinion in *Jackson* expressed his belief that

18 *Id.* at 784.
19 *Id.*
20 *Id.* at 772.
21 *Id.* at 785.
22 *Id.*
23 *Id.*
24 *Id.*
25 *Id.*

the holding in *Stein*, which constitutionally upheld the pre-*Jackson* procedure in 1953, was correct. He would

> be far more troubled about constitutionality should either a state or the Federal Government declare that a jury in trying a defendant charged with a crime is compelled to accept without question the trial judge's factual finding that a confession was voluntarily given.[26]

One of the additional reasons given by the Court in *Jackson* for invalidating the New York rule was that it was unfair to permit the jury to pass on the issue of voluntariness since the jury might believe the confession to be true. As Justice Black noted, "This is a possibility, of a nature inherent in any confession fact-finding by human fact-finders—a possibility present perhaps as much in judges as in jurors."[27]

The New York procedure for testing a claim of coercion with regard to confessions before *Jackson* required the trial judge "to reject a confession if a verdict that it was freely given would be against the weight of the evidence."[28] The heart of this procedure amounted in particular to a reliance upon the jury to resolve disputed questions of fact concerning the circumstances in which a confession was made. What such a reliance amounts to, in short, is the choice of a jury rather than a court determination of the issue of coercion. It should be appreciated that just such a choice has its roots deep in a general Anglo-American preference for submission to a jury of disputed issues of fact. Justice Black, certainly most aware of this, appeared to be acutely distressed with the Court majority in *Jackson* for seemingly failing to countenance it. "The Court's new constitutional doctrine is, it seems to me, a strange one," Justice Black ruminated in his dissent, for "it appears to challenge the soundness of the Founders' great faith in jury trials."[29]

The *Jackson* majority, stating that "it is only a reliable determination on the voluntariness issue which satisfies the rights of a defendant,"[30] concludes that a jury's findings on this question are necessarily tainted with an inherent unreliability. This is so, they reason, because the jury may be unwilling to follow the court's instructions. This is a spectacular non sequitur, for it fails wholly to take into consideration the fact that "our theory of trials relies upon the ability to follow instructions."[31]

Mr. Justice Harlan, also dissenting in *Jackson*, appears to have been equally as disturbed as Black by the majority's deep-seated suspicion of the jury. He noted in part that

> the Court's distrust of the jury system in this area stands in curious contrast to the many pages in its reports in which the right to a jury trial has been extolled in every context, and affords a queer basis indeed for a new departure.[32]

26 378 U.S. at 401.
27 *Id.* at 402.
28 People v. Leyra, 302 N.Y. 353, 362, 98 N.E.2d 553, 558 (1951).
29 378 U.S. at 405.
30 *Id.* at 387.
31 Opper v. United States, 348 U.S. 84, 95 (1954).
32 378 U.S. at 430.

The *Jackson* ruling seems even more hollow in its acceptance of the so-called "Massachusetts rule" in place of the old *Stein*-approved New York rule. Under the Massachusetts rule the trial judge decides the question of voluntariness. If he should decide against the defendant, he submits the question to the jury for its independent decision. But whatever their theoretical variations may be, in practice the New York and Massachusetts rules are likely to show little difference. In fact, Mr. Justice White speaking for the *Jackson* majority proclaimed his inability to distinguish clearly between those states which did and those which did not follow the rule found to be constitutionally required by *Jackson*. Moreover, annotations at 85 A.L.R. 870, and 170 A.L.R. 156, recognizing only two general practices, divided the states into those in which "voluntariness" was solely for the court (the "orthodox" rule), and those in which "voluntariness" was ultimately for the jury. Both Massachusetts and New York were listed as jurisdictions in which the question was ultimately for the jury. One commentator, while recognizing a difference between the two rules, states that "the distinction may be more semantical than real."[33] He goes on to ask:

> [I]s the trial judge's finding under the New York view that a confession is "not voluntary" so that it may go to the jury very much different from the trial judge's finding under the Massachusetts view that a confession is "voluntary", with the jury given an opportunity to pass again on the same question?[34]

It would seem not.

The heart of the supposed distinction between the Massachusetts and the New York rules is the requirement that the judge resolve disputed questions of fact and actually determine the issue of coercion. Under the New York rule the judge decides only whether a jury determination would be against the weight of the evidence. But since it is only the exclusion of a confession which is conclusive under the Massachusetts rule, it is highly likely that where there exists any doubt the trial judge will resolve the doubt in favor of admissibility and will rely upon the jury for a final determination. The so-called "triviality" of *Jackson v. Denno,* which Mr. Justice Brennan challenged in his *McMann* dissent, would seem more real than apparent. To be sure, Justice Black dissenting in *Jackson* expressed his belief that "no matter what label a particular state gives its rule and no matter what the purpose for which the rule says the jury may consider the confession's voluntariness, it is clear that all the states do, in the end, let the jury pass on the question of voluntariness for itself, whether in deciding 'admissibility' or 'credibility'."[35] Judge Friendly, dissenting with the court of appeals' majority, suggests that an argument can indeed be formulated concerning the pre-*Jackson* confessions on the basis that the accused had no constitutionally acceptable means for testing their validity. This, indeed, was the very argument advanced by the court of appeals, and also amounts to Justice Brennan's most vigorous argument

33 Ritz, *Twenty-five Years of State Criminal Confessions in the U.S. Supreme Court,* 19 WASH. & LEE L. REV. 35, 57 (1962).
34 *Id.* at 57, n.120. *See also* Meltzer, *The Allocation of Responsibility between Judge and Jury,* 21 U. CHI. L. REV. 317 (1954).
35 378 U.S. at 403.

in his *McMann* dissent. But as the learned judge notes, "the pejorative overtones of such a statement considerably outrun the fact."[36] He even goes so far as to suggest that the supposed distinction between the pre-*Jackson* and the post-*Jackson* procedures actually amounts to nothing more than "a construct of the fertile brains of defense lawyers without a counterpart in reality"[37]

Jackson v. Denno was an unfortunate decision. Its sweeping denigration of the jury system was as unnecessary as its untenable distinction between two rules of procedure which for all worldly purposes were identical. In a sense, every plea is "involuntary" in that the defendant is constrained or even forced by the situation confronting him. If he chooses the lesser of two evils he is hardly making a "voluntary" choice—not, at least, in any Websterian sense.

Justice White's contention in *McMann* that "what is at stake . . . is not the integrity of the state convictions obtained on guilty pleas, but whether, years later, defendants must be permitted to withdraw their pleas, *which were perfectly valid when made,*"[38] seems easier to agree with now, in light of the "triviality" of *Jackson*. It may be supposed that perhaps even Mr. Justice Brennan might have been more easily persuaded of the correctness of *McMann* too, if only Mr. Justice White had made it clear that he no longer recognized *Jackson* as viable.

John Hund

CONSTITUTIONAL LAW—CRIMINAL LAW—WARRANTLESS SEARCH OF AUTOMOBILE IN POLICE CUSTODY UPHELD EVEN THOUGH NOT INCIDENT TO ARREST, AND EVEN THOUGH IT WOULD HAVE BEEN PRACTICABLE TO SECURE A WARRANT. —Two armed men robbed a gas station in the state of Pennsylvania. Two bystanders noted a blue station wagon circling the block prior to the robbery, and later saw it speed away. They reported this to the police, along with the fact that one of the occupants of the car was wearing a green sweater. The gas station attendant reported that one of the men who robbed him was wearing a green sweater. A description of the car and two robbers was broadcast over the police radio, and within an hour a blue station wagon was stopped by the police two miles from the gas station. Petitioner, wearing a green sweater, was one of the men in the car. Both were arrested and the car was driven to the police station. Police searched the car at the station without a search warrant, finding two weapons and other fruits of the crime. These materials were introduced into evidence, and petitioner was convicted of robbery by a state court.

Petitioner subsequently sought a writ of habeas corpus in the United States District Court for the Western District of Pennsylvania, alleging, *inter alia,* that the search of the vehicle at the police station without a warrant was a violation of the fourth amendment. Holding that the search was incident to a lawful arrest, his petition was denied.[1] The Court of Appeals for the Third Circuit affirmed.[2] Certiorari was sought and granted, and the United States Supreme

36 409 F.2d at 1041.
37 *Id.*
38 397 U.S. at 773.

1 United States v. Maroney, 281 F. Supp. 96 (W.D. Pa. 1968).
2 United States *ex rel.* Chambers v. Maroney, 408 F.2d 1186 (3rd Cir. 1969).

Court affirmed the decision and *held*: an automobile may be searched without a warrant if probable cause exists for the search; and this is true even though the search is not incident to an arrest, the automobile is in police custody, and it is practicable to secure a warrant for the search. *Chambers v. Maroney,* 399 U.S. 42 (1970).

The fourth amendment to the United States Constitution protects against unreasonable searches and seizures and prescribes warrants for the conduct of permissible, reasonable searches.[3] Many well-known exceptions to the warrant requirement have been created to validate searches which would be impossible if the warrant procedure were strictly adhered to. But, the Supreme Court has been generally skeptical of warrantless searches. In *Katz v. United States,*[4] the Court assembled language from various opinions to reinforce its constitutional predisposition for search warrants.

> Searches conducted without warrants have been held unlawful "notwithstanding facts unquestionably showing probable cause," *Agnello v. United States,* 269 U.S. 20, 33, for the Constitution requires "that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizens and the police. . . ." *Wong Sun v. United States,* 371 U.S. 471, 481-482. "Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes," *United States v. Jeffers,* 342 U.S. 48, 51, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.[5]

The two exceptions pertinent to the *Chambers* case are (1) warrantless searches of automobiles on the highways based upon probable cause and (2) warrantless searches incident to a lawful arrest.

Carroll v. United States[6] is the origin of the first exception. In that case, Carroll was convicted of transporting liquor in his automobile in violation of the National Prohibition Act. A federal agent stopped him as he was traveling on the road, did not arrest him, but searched his car. The liquor found was admitted into evidence. The Court upheld his conviction on the theory that probable cause alone is sufficient to justify a warrantless search of an automobile on a highway since the automobile could be moved while the authorities pursued the warrant procedures. The Court said:

> [T]he guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon

3 The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. CONST. amend. IV.

4 389 U.S. 347 (1967).

5 *Id.* at 357.

6 267 U.S. 132 (1925).

> or automobile, for contraband goods, *where it is not practicable* to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.[7] (Emphasis added.)

The *Carroll* Court, mindful that such a sweeping exception to the fourth amendment warrant requirements would leave automobiles unprotected from police abuse, qualified the auto exception with a caveat: "In cases where the securing of a warrant is reasonably practicable, *it must be used* . . . ."[8] (Emphasis added.)

The Court followed the *Carroll* decision in *Husty v. United States,*[9] *Scher v. United States,*[10] and *Brinegar v. United States.*[11] Like *Carroll,* these cases involved the search of an automobile being operated on the highway by the suspect.[12] Hence, the exigent circumstances which justify the exception to the warrant requirement were present. Indeed, *Brinegar* read *Carroll* in this way: "The *Carroll* decision held that, under the Fourth Amendment, a valid search of a *vehicle moving on a public highway* may be had without a warrant, but only if probable cause for the search exists."[13] (Emphasis added.)

Dyke v. Taylor Implement Co.[14] followed the *Carroll* rule, suggesting that the mobility inherent in an automobile on a highway was a necessary element to qualify under the exception. The Court failed to reach the question as to whether the auto exception would apply to a car which "having been stopped originally on a highway, is parked outside a courthouse."[15]

While *Carroll* applies whether there is an arrest or not, clearly, there must be a prior lawful arrest for the second exception to the warrant requirement—a warrantless search incident to a lawful arrest—to apply. Any analysis of warrantless automobile searches as incident to an arrest must begin with *Preston v. United States.*[16] In that case, three men sitting in an automobile on a public street were arrested for vagrancy. The car was not searched on the street, but was towed to a garage where the police searched it, discovering two loaded revolvers, women's stockings (one with mouth and eye holes), and other items potentially useful in a robbery. The evidence was admitted at trial, and Preston and his companions were convicted of conspiracy to rob a federally insured bank. In reversing the convictions, the Court held the evidence was obtained through an unlawful search, and was therefore inadmissible. Concluding that the *Carroll* exception did not save this search, the Court noted:

> Nor, since the men were under arrest at the police station and the car was in police custody at a garage, was there any danger that the car would be moved out of the locality or jurisdiction. See *Carroll v. United States, supra,* 267 U.S., at 153.[17]

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7 *Id.* at 153.
8 *Id.* at 156.
9 282 U.S. 694 (1931).
10 305 U.S. 251 (1938).
11 338 U.S. 160 (1949).
12 In *Scher,* the police followed the suspect's car into his garage; but since the operator was still present, the car still had the mobility element. 305 U.S. 251, 253 (1938).
13 338 U.S. at 164.
14 391 U.S. 216 (1968).
15 *Id.* at 222.
16 376 U.S. 364 (1964).
17 *Id.* at 368.

This suggests that the *Carroll* exception applies only to automobiles characterized by mobility—not autos seized and held by the police. *Preston* did acknowledge the right to search incident to a lawful arrest. This rule was justified since there is a need to seize weapons which could be used against an officer and to prevent the destruction of evidence of the crime. But, the Court observed, ". . . these justifications are absent where a search is remote in time or place from the arrest. Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest."[18] Hence, although a warrantless search may be incident to an arrest at the time and place of arrest, a warrantless search at another place (*e.g.*, a police garage) and at another time (a short time later) is not incident to the arrest.

In *Cooper v. California,*[19] a 5-4 and much criticized opinion,[20] a sui generis exception was created. The Court upheld a narcotics conviction even though evidence was admitted which was seized by police as a result of a search which took place one week after the arrest, without a warrant, and while the car was impounded in accordance with a state statute. Unlike earlier, and even subsequent, cases, the Court did not eagerly look for exceptions to the warrant requirement. *Preston* was dismissed as being an "incident to an arrest exception" case, and *Carroll* was not mentioned at all. One could conceivably conclude that the police had probable cause in *Cooper,* yet the Court failed to apply the *Carroll* exception to justify the search. Perhaps because the car was not searched on a highway and was rendered immobile, the Court was unwilling to stretch the *Carroll* exception further. But in the process, they created a sui generis exception and resorted to the language[21] of *United States v. Rabinowitz*[22] to justify it.

In *Rabinowitz,* the defendant was arrested in his one-room place of business by government officials who possessed an arrest warrant. Over his objection, the officers conducted a warrantless search of the desk, safe and file cabinets in the office for about 1½ hours, and seized 573 forged stamps. The Supreme Court upheld the search as being within the scope of a permissible search incident to an arrest, despite the fact that the officers had time to procure a search warrant.

Justice Frankfurter dissented to the holding in this case on the grounds that *Rabinowitz* extended the scope of a permissible search incident to an arrest beyond the exigent circumstances which justify the exception. To support his theory that exceptions should be no broader than the necessity that creates them, he cited *Carroll's* requirement for a warrant for an auto search if practicable.[23] "Even as to moving vehicles, this Court did not lay down an absolute rule dispensing with a search warrant. It limited dispensation to the demands of necessity, where want of time precluded the obtaining of a warrant."[24]

In 1969, the Supreme Court rejected its holding in *Rabinowitz.* In

18 *Id.* at 367.
19 386 U.S. 58 (1967).
20 *See, e.g.,* 52 MINN. L. REV. 533, 540 (1967); 14 LOYOLA L. REV. 402, 411 (1967).
21 386 U.S. at 66. "The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable."
22 339 U.S. 56 (1950).
23 267 U.S. at 156.
24 339 U.S. at 73.

Chimel v. California[25] it set out on a new course, limiting the scope of a search incident to an arrest to the area "within the immediate control" of the arrestee. The Court approvingly cited *Terry v. Ohio*[26] for the proposition that, ". . . the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure . . . ."[27] In repudiating *Rabinowitz* and limiting the scope of a warrantless search incident to an arrest to the area created by the reasons for the exception, the Court maintained the constitutional distinction between a car and a dwelling house. It noted:

> Our holding today is of course entirely consistent with the recognized principle that, assuming the existence of probable cause, automobiles and other vehicles may be searched without warrants, "*where it is not practicable to secure a warrant because the vehicle can be quickly moved* out of the locality or jurisdiction in which the warrant must be sought." *Carroll v. United States,* 267 U.S. 132, 153; see *Brinegar v. United States,* 338 U.S. 160.[28] (Emphasis added.)

The Court concluded that insofar as the principles *Rabinowitz* stands for are inconsistent with *Chimel,* they are no longer to be followed.[29]

In *Chambers,* the district court justified the search at the police station as incident to the arrest on the street as follows: "At the time the arrest was originally made, darkness would have prevented any search from being effective; therefore the search at the police station under more favorable conditions was permissible."[30] The district court failed to mention *Preston.* Neither did it invoke *Carroll.* Instead, the court relied on *United States v. Dento,*[31] a case which stretched *Preston* to allow a search incident to an arrest at a police station where it was inconvenient to do so on the highway where the arrest occurred. The court of appeals affirmed, noting that the district court properly relied on *Dento.*[32] *Preston* was distinguished away, yet still no mention was made of *Carroll.* Thus, the search issue, as presented to the Supreme Court in *Chambers,* was whether the lower courts erred in refusing to apply *Preston.*

Counsel for petitioner asked the Court to disapprove *Dento,* apply *Preston* and reverse the lower courts.[33] Counsel for respondent answered the issue on petitioner's terms, asking the Court to distinguish *Preston* and apply the *Cooper-Rabinowitz* test[34] to uphold the search as incident to an arrest.[35] It is crucial to note that neither brief for the respondent nor for the petitioner mentioned *Carroll* to support or attack the search.[36] The issue was simply whether the search was incident to the arrest.

25 395 U.S. 752 (1969).
26 392 U.S. 1 (1968).
27 *Id.* at 20.
28 395 U.S. at 764 n.9.
29 *Id.* at 768.
30 281 F. Supp. at 100.
31 382 F.2d 361 (3rd Cir. 1967), *cert. denied,* 389 U.S. 944 (1967), *rehearing denied,* 389 U.S. 997 (1967). *But see* Ramon v. Cupp, 423 F.2d 248 (9th Cir. 1970).
32 408 F.2d 1186, 1193 (3rd Cir. 1969).
33 Brief for Petitioner at 31, Chambers v. Maroney, 399 U.S. 42 (1970).
34 *See* note 21 *supra.*
35 Brief for Respondent at 25-26, Chambers v. Maroney, 399 U.S. 42 (1970).
36 Counsel for respondent did, however, cite *Carroll* to support the *arrest.* Brief for Respondent at 23, Chambers v. Maroney, 399 U.S. 42 (1970).

In similar circumstances, where a car is in the custody of the police, other courts have limited their analysis to the "incident to arrest" theory.[37] They have applied *Preston* and found warrantless searches unlawful if they were neither incident to the time nor incident to the place of the arrest on the highway. Hence, even though the police had probable cause to search the autos, warrantless searches were struck down.

Under existing law, then, the facts in *Chambers* would not fit into any of the established exceptions to warrant requirements. *Carroll* would not save the search since the car was rendered immobile by police seizure and it was practicable to get a warrant.[38] *Preston* would strike down the search since the search was at a different place and at a different time than the arrest.[39] *Cooper* would not save the search since no state law required that the car be held for forfeiture proceedings.[40] Despite this, the Court upheld the search in *Chambers*.

The Court apparently rejected *Dento* since it held that *Preston* controlled and that the search could not be justified as incident to the arrest.[41] But if the Court strictly adhered to *Preston,* it gave a new, broadly sweeping significance to *Carroll*. In using *Carroll* to support this search, the Court deleted the *Carroll* requirements that (1) the automobile be mobile and (2) a warrant be secured if practicable. The Court has created a constitutional distinction between a house and a car, not based on exigent or emergency circumstances, and has ignored the clear mandate of *Katz* that ". . . the Fourth Amendment protects people, not places."[42] *Chambers* leaves automobiles completely out of the judicial process. Police need never again obtain a warrant to search an automobile. For if they do not have probable cause to search, they cannot get a warrant. But if they do have probable cause, they do not need a warrant. Probable cause alone is sufficient, whether it is practicable to procure a warrant or not. Nevertheless, the Court denies that *Chambers* establishes this result:

> Neither *Carroll, supra,* nor other cases in this Court require or suggest that in every conceivable circumstance the search of an auto even with probable cause may be made without the extra protection for privacy that a warrant affords. But . . . the opportunity to search is fleeting since a car is readily movable. . . . [T]his is true . . . in *Carroll* and the case before us now . . . .[43]

But to say it is so does not make it so. If the Court says a warrant is not required to search a car at a police station, where is a warrant required? The Court ignores the facts of the situation. With the chaos of *Preston* and *Cooper,* the legal community needed guidance. Instead, the Court gave it *Chambers*.

Presuming there is order in all this, one could speculate that in *Chambers,* the Court is sub silentio recognizing the mechanical nature of the warrant procedure and the little, if any, protection it offers. But any judicial protection

37 *See* State v. Madden, 105 Ariz. 383, 465 P.2d 363 (1970); People v. Burke, 39 Cal. Rptr. 531, 394 P.2d 67 (1964).
38 267 U.S. at 156.
39 376 U.S. at 367.
40 386 U.S. at 60-61.
41 399 U.S. at 47.
42 389 U.S. at 351.
43 399 U.S. at 50-51.

from governmental invasion is better than none. If the Court really believes that "For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant,"[44] then why is there a difference between stationing five men around an empty house waiting for a warrant and carrying out an immediate search of the house? It is no answer to say that cars are different from houses. Indeed, they are different on a highway; but a car in the custody of the police at the station house is as immobile as a dwelling house.

By expanding an exception to the fourth amendment requirement for a search warrant beyond the exigent circumstances which justify the exception, the Court violates the spirit of *Chimel* and treats too lightly the role of the judiciary as a force which stands between the person and the state.

Frederick J. Martone

FEDERAL COURTS—FEDERAL ANTI-INJUNCTION STATUTE—INJUNCTIONS IN FEDERAL COURTS TO STAY PROCEEDINGS IN STATE COURTS MUST BE WITHIN ONE OF THE STATUTORY EXCEPTIONS TO THE FEDERAL ANTI-INJUNCTION STATUTE.—In 1967 the Brotherhood of Locomotive Engineers (BLE) commenced picketing the Moncrief Yard, the major railroad yard of the Atlantic Coast Line Railroad (ACL) in Florida.[1] Two days after the picketing began, ACL filed a complaint against BLE in the United States District Court for the Middle District of Florida. The only relief prayed for was a temporary injunction against the picketing at Moncrief Yard, which was denied the next day by the district court.[2]

Immediately after the denial of the federal court injunction, the ACL filed an action in the Circuit Court for Duval County, Florida, again seeking an injunction against the picketing at Moncrief Yard. In this court, ACL succeeded in obtaining an injunction.[3]

No further legal action concerning this matter was taken until two years later when, in 1969, the union applied to the Circuit Court for Duval County for dissolution of the injunction granted to the ACL in 1967. The BLE claimed that the 1969 decision of the Supreme Court in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*[4] precluded the grant of a state court injunction

44 *Id.* at 52.

1 There was no labor dispute between the ACL and the BLE at the time the latter began picketing the Moncrief Yard. This case arose as a result of a labor dispute of extraordinary duration between the Florida East Coast Railroad (FEC) and the BLE. The Moncrief Yard, essentially a switching yard, handled railroad cars belonging to the FEC. The BLE, by picketing this facility, hoped to discourage ACL employees from handling these FEC cars.

2 Brief for Petitioner at 12, Atlantic Coast Line R.R. v. Bhd. of Locomotive Eng'rs, 398 U.S. 281 (1970).

3 *Id.* at 13.

4 394 U.S. 369 (1969). In this case the Supreme Court considered the validity of a state court injunction against picketing by the BLE and other unions at a terminal located immediately next to the switching yard involved in *Atlantic Coast Line*. The Court concluded that the unions had a federally protected right to picket the Jacksonville terminal under the Railway Labor Act, and that that right could not be interfered with by state court injunctions.

against the picketing in this case. The circuit court judge refused to dissolve the 1967 injunction, holding that the *Jacksonville Terminal* decision was distinguishable and not controlling.

The union decided not to appeal this decision directly but, rather, returned to the federal district court and prayed for an injunction to prevent the railroad's enforcement of the 1967 state court injunction. The district judge granted the injunction, holding that the prohibition of 28 U.S.C. § 2283, the federal anti-injunction statute, did not deprive the court of jurisdiction to enter this injunction.[5]

Subsequently, the railroad appealed to the Court of Appeals for the Fifth Circuit, and upon the parties' stipulation the court summarily affirmed the district court's decision.[6]

The Supreme Court granted ACL's petition for certiorari to consider the validity of the federal court injunction against the state court order.[7]

The railroad argued, *inter alia,* that the federal court injunction could not be sustained since this case is not within any of the statutory exceptions to the prohibitions of 28 U.S.C. § 2283. The union contended, *inter alia,* that the federal injunction was proper either "to protect or effectuate" the district court's 1967 denial of an injunction or as "necessary in aid of" that court's jurisdiction under 28 U.S.C. § 2283.

The Supreme Court reversed, remanded, and *held*: the federal court injunction against the enforcement of the state court injunction was not properly granted since it was not justified by any of the three specifically enumerated exceptions to the anti-injunction statute's broad prohibition against the grant of injunctive relief by a federal court against state court proceedings. *Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers,* 396 U.S. 281 (1970).

In reaching this decision, the Supreme Court took the opportunity to express its views upon the character of the anti-injunction statute. This decision evidences an effort once again to halt the recent trend of loose interpretation in the area of federal injunctions against state court proceedings.

Cognizant of the need "to prevent needless friction between state and federal courts,"[8] Congress, almost at the beginning of our nation's history, strictly limited the federal courts' power to intervene in state court proceedings. The original act of 1793[9] forbade the issuance of federal court injunctions to stay state court proceedings. The language of this statute continued as originally drafted until the revision of the United States Statutes in 1874, when an exception was made as to proceedings in bankruptcy.[10] Although a few other legisla-

5 Atlantic Coast Line R.R. v. Bhd. of Locomotive Eng'rs, 71 L.R.R.M. 2809 (M.D. Fla. 1969).

6 Atlantic Coast Line R.R. v Bhd. of Locomotive Eng'rs, 72 L.R.R.M. 2416 (5th Cir. 1969).

7 Atlantic Coast Line R.R. v. Bhd. of Locomotive Eng'rs, 396 U.S. 901 (1969).

8 Oklahoma Packing Co. v. Oklahoma Gas Co., 309 U.S. 4, 9 (1939).

9 Act of March 2, 1793, ch.22, § 5, 1 Stat. 333. This act provided in part: "[N]or shall a writ of injunction be granted [by any court of the United States] to stay proceedings in any court of a state . . . ." *Id.* at 335.

10 Rev. Stat., ch 12, § 720 (2d ed. 1874).

tive exceptions to this statute have been enacted,[11] the basic language remained unchanged through the Judicial Code of 1911 and the codification thereof as 22 U.S.C. § 379 in 1940.[12]

In spite of its express prohibition and apparent inflexibility, the anti-injunction statute was subjected to erosion by judicial gloss and judge-made exceptions. By 1941, numerous judicial exceptions had been established by federal court cases. These included the res exception, the relitigation exception, the ancillary exception, the void or fraudulent judgment exception, and the constitutional litigation exception based on the rationale of *Ex parte Young*.[13]

In the 1941 landmark decision of *Toucey v. New York Life Insurance Co.*,[14] the Supreme Court called an abrupt halt to this loose judicial interpretation of the anti-injunction statute by giving a strict reading to that statute's prohibition. The precise question faced by the Court in *Toucey* was whether the so-called "relitigation" doctrine was a valid exception to the statute, i.e., whether a federal court had the power to stay a state court proceeding concerning an in personam claim which had already been adjudicated by the federal court.[15] The rule by this time was well settled that if an action was in rem the court first obtaining jurisdiction over the res, whether federal or state court, could enjoin suits in other courts involving the same res.[16] Several cases had extended this doctrine to in personam actions, holding that notwithstanding § 265 (now § 2283), a federal court may enjoin relitigation in a state court of issues determined in a prior federal case.[17]

Mr. Justice Frankfurter, speaking for the majority in *Toucey,* repudiated this latter doctrine by stating:

> The fact that one exception [the res exception] has found its way into § 265 is no justification for making another. . . .
>
> In striking contrast are the "relitigation cases." Loose language and a sporadic, ill-considered decision cannot be held to have imbedded in our law a doctrine which so patently violates the expressed prohibition of Congress.[18] (Footnote omitted.)

The theory of the majority in *Toucey* was that § 265 should be subject to strict construction and applied against the extension of federal power. Thus, the majority was willing to accept only one judicial exception to the anti-injunction statute—the res exception. Even though the Court directed itself exclusively to the "relitigation" exception, it was recognized that this decision cast doubt upon the foundations of the other heretofore well-recognized judicial exceptions to

11 For a discussion of the statutory exceptions, *see* Note, *Federal Power to Enjoin State Court Proceedings,* 74 HARV. L. REV. 726, 737-40 (1961); 1a J. MOORE, FEDERAL PRACTICE ¶ 0.209-.213 (2d ed. 1965).

12 *See* 1a J. MOORE, *supra* note 11, ¶ 0.208[1].

13 209 U.S. 123 (1908). For a detailed discussion of these exceptions, *see* Comment, *Federal Injunctions Against Proceedings in State Courts,* 35 CALIF. L. REV. 545 (1947).

14 314 U.S. 118 (1941).

15 *See* 1a J. MOORE, *supra* note 11, ¶ 0.208[2].

16 *E.g.,* Oklahoma v. Texas, 265 U.S. 490 (1924); Kline v. Burke Constr. Co., 260 U.S. 226 (1922); Texas & Pacific Ry. v. Cox, 145 U.S. 593 (1892).

17 *E.g.,* Local Loan Co. v. Hunt, 292 U.S. 234 (1934); Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921); Looney v. Eastern Texas R.R., 247 U.S. 214 (1918).

18 314 U.S. at 139.

§ 265. The decision in *Toucey* was "the high-water mark of what has been termed a 'revived attitude of respect for the statute and its underlying principles.' "[19]

In 1948, by significantly changing the statute, Congress manifested its rejection of the strict approach taken by the *Toucey* case. The revised statute, § 2283, provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.[20]

The Revisor's Note to § 2283 broadly states that "the revised section restores the basic law as generally understood prior to the *Toucey* decision."[21] More specifically, the Note indicates that Congress, contrary to the holding in *Toucey,* expressly embraced the relitigation doctrine as a valid exception to the statute. The purpose of the exception for injunctions "necessary in aid of its jurisdiction" was "to make clear the recognized power of the Federal courts to stay proceedings in State cases removed to the district courts."[22]

In *Amalgamated Clothing Workers v. Richman Brothers Co.*,[23] the Supreme Court was called upon to construe the new statute. The Court, in a 5-3 decision, held that a federal court could not, at the request of a union, enjoin a state court from issuing an injunction against the union's peaceful picketing, even though the state court had invaded a field preempted by Congress and was wholly without jurisdiction.[24] The Court in *Richman* said that Congress had made it clear that resort to federal injunctive relief against state court proceedings was not to be substituted for the normal process of state appellate review.

Justice Frankfurter, who also wrote the majority opinion for *Toucey,* in making it clear that the existing exceptions in § 2283 were to be strictly construed and no additional judicial exceptions created, stated:

> By . . . enactment [of § 2283], Congress made clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation. . . .
>
> . . . .
>
> . . . This is not a statute conveying a broad general policy for appropriate ad hoc application. Legislative policy is here expressed in a *clear-cut prohibition qualified by specifically defined exceptions.*[25] (Footnote omitted, emphasis added.)

Two years later, however, the Supreme Court appeared to have abandoned

19 *See* 20 TEXAS L. REV. 621, 625 (1942).
20 28 U.S.C. § 2283 (1964).
21 *See* 1a J. MOORE, *supra* note 11, ¶ 0.208 [3.-1].
22 *Id.*
23 348 U.S. 511 (1955).
24 Capital Service, Inc. v. NLRB, 347 U.S. 501 (1954) had held that a federal court may stay a state court proceeding under § 2283 when the NLRB had taken jurisdiction of the unfair labor practice charges. The Court in *Richman* distinguished *Capital Service* on the ground that in the latter case the NLRB had sought the injunction. They thus held that only the NLRB, and not a private litigant, can seek such an injunction to protect its exclusive authority. 348 U.S. at 517.
25 348 U.S. at 514-16.

the strict interpretation of the *Richman* case. Despite the restrictive effect of that case on the further development of judge-made exceptions, the Court, in *Leiter Minerals, Inc. v. United States,*[26] held that the bar of § 2283 is inapplicable when the United States is the party seeking an injunction against state court proceedings. Justice Frankfurter, again speaking for the majority, maintained that this exception was warranted since:

> The frustration of superior federal interests that would ensue from precluding the Federal Government from obtaining a stay of state court proceedings except under the severe restrictions of 28 U.S.C. § 2283 would be so great that we cannot reasonably impute such a purpose to Congress from the general language of 28 U.S.C. § 2283 alone.[27]

There are basically two conflicting viewpoints as to what effect the *Leiter* decision had on the *Richman* case. One view holds that *Leiter* is a definite liberalization of the absolute prohibition developed in the *Richman* case.[28] Another, and perhaps the better interpretation, is that the Court's justification for finding the implied exception was expressly tied to the unique situation when the United States was a party, and thus "*Leiter* should not impart a general weakening of [*Richman*]."[29]

In *Atlantic Coast Line,* the Supreme Court faced the task of determining whether, in light of § 2283, a federal court injunction issued to stay proceedings in a state court was properly granted. Included in this problem was the assertion of a federal preemption defense, i.e., that due to the Supreme Court's 1969 decision in *Jacksonville Terminal,* a state court could not interfere with the union's right to picket. Neither party argued that this injunction could be justified under the "Act of Congress" exception of § 2283—there being no express Congressional authorization for injunctions in this situation. Rather, the respondent union, in contending that the injunction was properly issued, relied upon the second and third statutory exceptions contained in § 2283.

First, the union argued that the 1969 injunction was properly granted in order that the district court could "protect or effectuate" its 1967 order which denied the railroad injunctive relief. When the district court in 1967 denied the railroad's request for an injunction against the union picketing, that court determined that the BLE, in its labor dispute with the FEC, had exhausted the procedures available under the Railway Labor Act and thus left the union "free to engage in self-help." The union maintained that inherent in the court's decision that the union was "free to engage in self-help" was a determination that it had a federally protected right to picket Moncrief Yard and, further, that this right could not be negated by recourse to state court proceedings. Therefore, continues the argument, when the Florida court granted an injunction against this same picketing, it interfered with the union's right to picket. In order to protect and effectuate its prior judgment, the District Court could enjoin the

26 352 U.S. 220 (1957).
27 *Id.* at 226.
28 *See* Note, *The Dombrowski Remedy—Federal Injunctions Against State Court Proceedings Violative of Constitutional Rights,* 21 RUTGERS L. REV. 92, 104 (1966).
29 *See* Comment, *Federal Injunctions Against State Actions,* 35 GEO. WASH. L. REV., 744, 765 (1967).

railroad's enforcement of the state court injunction. In effect, then, the union was arguing that the 1967 district court order, in refusing to enjoin the Moncrief Yard picketing, had anticipated the *Jacksonville Terminal* decision, which held that in those circumstances where a union had exhausted the administrative remedies required by the Railway Labor Act, the union had a federally protected right to picket, which could not be interfered with by state court injunctions.

The *Atlantic Coast Line* Court rejected the union's interpretation of the 1967 district court order and accepted the railroad's argument that the order merely determined that the federal court could not enjoin the picketing because of the Norris-LaGuardia Act's prohibition against issuance of federal court injunctions in labor disputes. Mr. Justice Black, speaking for the majority, stated:

> [T]he District Court in 1967 determined that federal law could not be invoked to enjoin the picketing . . . , and that the union did have a right "to engage in self-help" as far as federal courts were concerned. But that decision is entirely different from a decision that the Railway Labor Act precludes state regulation of the picketing as well, and this latter decision is an essential prerequisite for upholding the 1969 injunction as necessary "to protect or effectuate" the 1967 order.[30]

Justice Black further observed that:

> [T]he union in effect tried to get the Federal District Court [in 1969] to decide that the state court judge was wrong in distinguishing the *Jacksonville Terminal* decision. Such an attempt to seek appellate review of a state decision in a Federal District Court cannot be justified as necessary "to protect or effectuate" the 1967 order.[31]

Thus, the federal court injunction could not be justified by the "relitigation" exception to § 2283. Even though the federal court had determined that it was precluded by federal law to enjoin the Moncrief Yard picketing, it had no power to enjoin the enforcement of a state court injunction which was based solely on state law. This result ensues from the fact that the federal court did not determine that a state court was also precluded from issuing an injunction. Therefore, the federal court could not enjoin state proceedings which litigated matters outside the scope of the district court's judgment.

In 1969, the district court accepted the union's position that the Supreme Court's decision in *Jacksonville Terminal* operated to define the scope of the federally protected right to self-help granted the union by the district court in 1967. The district court's order concluded that the state court injunction interfered with that right as defined by *Jacksonville Terminal*.[32] The Court in *Atlantic Coast Line* read the 1969 order as an indication that the district court viewed *Jacksonville Terminal* as having amplified its 1967 order. In this context, Justice Black said:

> [I]t was this amplification, rather than the original order itself, that required

30 398 U.S. at 290.
31 *Id.* at 293.
32 71 L.R.R.M. 2809, 2810 (M.D. Fla. 1969).

> protection. Such a modification of an earlier order through an opinion in another case is not a "judgment" that can properly be protected by an injunction against state court proceedings.[33]

The second major thrust of the union's argument was based on the exception which allows a federal court to issue an injunction to stay proceedings in a state court "where necessary in aid of its jurisdiction."[34] Under this exception an injunction against state court proceedings is permitted only if it is necessary for the proper disposition of the federal case. If the federal and state courts have concurrent jurisdiction, generally there is no right to have the action heard exclusively in the federal court.[35]

The respondent union contended that the district court acquired jurisdiction over the controversy in 1967 when the railroad sought the injunction. That court determined that the picketing was legal. Subsequently, the *Jacksonville Terminal* decision held that such picketing was protected from interference by state courts. Therefore, when the Florida court enjoined the picketing, it interfered with the union's right to picket Moncrief Yard, making the subsequent federal injunction "necessary in aid of its jurisdiction."[36] The union attempted to bolster this argument by drawing attention to the several occasions when the district courts had taken jurisdiction of controversies during the seven-year dispute between the BLE and the FEC. The union urged that the present appeal must be viewed within the context of the district court's "assumed plenary jurisdiction over the continuing litigation . . . of the parties to the FEC's disputes. . . ."[37]

The majority in *Atlantic Coast Line* flatly rejected this argument on several grounds. First, citing *Richman* with approval, Justice Black declared:

> [A] federal court does not have inherent power to ignore the limitations of § 2283 and to enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law, even when the interference is unmistakably clear. . . . Congress itself set forth the only exceptions to the statute, and those exceptions do not include this situation.[38]

Second, the Court recognized that there were situations in which state court proceedings could so interfere with a federal court's disposition of a case "as to seriously impair the federal court's flexibility and authority to decide that case."[39] However, the possibility that the requested injunction is related to the district court's jurisdiction is not enough. Rather, "it must be *'necessary in aid of'* that jurisdiction."[40] Finally, the Supreme Court could find no such necessity in the case before it.

33 398 U.S. at 293.
34 28 U.S.C. § 2283 (1964).
35 Kline v. Burke Constr. Co., 260 U.S. 226, 233-35 (1922).
36 398 U.S. at 294.
37 Brief for Respondents at 30, Atlantic Coast Line R.R. v. Brhd. of Locomotive Eng'rs, 398 U.S. 281 (1970) [hereinafter cited as Brief for Respondents].
38 398 U.S. at 294-95.
39 *Id.* at 295.
40 *Id.*

The courts had concurrent jurisdiction over the controversy in this case. The federal court had jurisdiction of the railroad's complaint by virtue of federal law. The state court had jurisdiction of both the state law claims as well as the federal preemption issue. In this situation, "neither court was free to prevent either party from simultaneously pursuing claims in both courts."[41] The federal court's jurisdiction was not sufficiently interfered with by the state court proceedings to make an injunction necessary to aid its jurisdiction. Further, "An injunction was no more necessary because the state court may have taken action which the federal court was certain was improper under the *Jacksonville Terminal* decision."[42] The Court concluded that:

> [F]ederal courts possess *no power whatever* to sit in direct review of state court decisions. If the union was adversely affected by the state court's decision, it was free to seek vindication of its federal right in the Florida appellate courts and ultimately, if necessary, in this Court.[43] (Emphasis added.)

The Supreme Court, then, has basically followed its previous rationale in *Richman*. Here, as in *Richman,* the Court strongly asserts that federal district courts have no power to "sit in direct review of state court decisions," even where federal law has preempted resort to state court remedies. The practical effect of such a decision is to force the aggrieved party to seek review of the state court judgment within the appellate machinery of the state court system. The resultant delays in seeking adjudication of a union's federal preemption defense could easily have the result of effectively breaking a strike and thus rendering any ultimate reversal of a state court injunction a hollow victory. On the other hand, the Court in *Atlantic Coast Line,* in favoring a strict approach to § 2283, reasserts the importance of preventing friction in our dual system of courts. The Court is standing on firm precedential grounds when it says: "Proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts. . . ."[44] To be sure, if the lower federal courts could use their injunctive powers to review state court adjudications of a federal preemption issue, these state court judgments would predictably be reviewed in a nonuniform way—and before the state courts had fully dealt with the case. Such a situation would be intolerable. The Court's decision in *Atlantic Coast Line* is designed to prevent such "needless friction between state and federal courts."

The importance of this decision, in reaffirming the rationale of *Richman* and extending the holding in that case to a situation of concurrent state and federal jurisdiction, should not be underestimated. However, perhaps a much more far-reaching significance lies in the philosophy of the majority in *Atlantic Coast Line* toward the meaning and underlying policy of § 2283. The majority did not confine themselves to the narrow scope of the labor problem involved but, rather, addressed the broader problem of whether § 2283 is to be liberally

41 *Id.*
42 *Id.* at 296.
43 *Id.*
44 *Id.* at 287.

or strictly construed. Indeed, a resolution of this problem is a necessity to insure a consistent and uniform application of this important federal statute.

It has been noted that by 1941 the absolute language of the 1793 anti-injunction statute had been severely weakened by the proliferation of judicial exceptions. The apparent judicial disrespect for this statutory restriction was in large part due to conflicting theories of interpretation regarding the specific nature of the statute. One theory contends that in § 2283 Congress has drawn strict jurisdictional boundaries and, accordingly, the anti-injunction statute should be strictly construed.[45] A second theory advocates that the statute is merely an embodiment of guidelines for the application of federal court equity powers.[46] The latter theory has prevailed and has provided ample justification for judge-made exceptions. Following this line of thinking, it has been authoritatively held that § 2283 is not a jurisdictional statute but, rather, an affirmation of the rule of comity.[47] As the Supreme Court stated in *Smith v. Apple,* "§ 265 [now § 2283] is not a jurisdictional statute . . . it goes merely to the question of equity in the particular bill."[48]

In 1941, the Supreme Court in *Toucey* attempted to reverse this trend of weakening the statute by embracing the concept that the anti-injunction statute was indeed jurisdictional and therefore was to be strictly interpreted.[49] Again, in 1955, after the enactment of the present § 2283, the Court in *Richman* made clear that the three statutory exceptions were to be strictly construed and no additional judicial exceptions created.[50] These decisions however, did not persuade the federal courts. Many of the lower federal courts have refused to abandon the theory that § 2283 is but a statutory pronouncement of the principles of comity.[51] They thus consider the statute as subject to further judge-created exceptions.[52]

These courts have, in effect, considered the doctrine of comity as synonymous with discretion. Such an interpretation, that "Comity persuades, but . . . does not command,"[53] seems to relegate the Congressional mandate embodied in § 2283 to the status of a mere advisory opinion—an opinion which the federal courts, when circumstances warrant, may in their discretion ignore. This attitude is emphasized by the decision in *Douglas v. City of Jeanette,*[54] and more recently

45 *See* Schell v. Food Mach. Corp., 87 F.2d 385 (5th Cir. 1937), *cert. denied,* 300 U.S. 679 (1937).

46 *See generally* Warren, *Federal & State Court Interference,* 43 HARV. L. REV. 345, 347 (1930).

47 *E.g.,* Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939); Smith v. Apple, 264 U.S. 274 (1924); Woodmen of the World v. O'Neill, 266 U.S. 292 (1924); Wells Fargo & Co. v. Taylor, 254 U.S. 175 (1920); Jamerson v. Alliance Ins. Co., 87 F.2d 253 (7th Cir. 1937).

48 264 U.S. 274, 278-79 (1924).

49 314 U.S. at 141.

50 348 U.S. at 515-16.

51 "[Comity is] . . . a doctrine which teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter." (Footnote omitted.) Darr v. Burford, 339 U.S. 200, 204 (1950), *overruled on other grounds,* Fay v. Noia, 372 U.S. 391 (1963).

52 *E.g.,* Machesky v. Bizzell, 414 F.2d 283 (5th Cir. 1969); Sheridan v. Garrison, 415 F.2d 699 (5th Cir. 1969); Stevens v. Frick, 372 F.2d 378 (2d Cir. 1967); Baines v. City of Danville, 337 F.2d 579, 586-94 (4th Cir. 1964). *Contra,* Javelin Oil Co. v. T.C. Morrow Drilling Co., 266 F. Supp. 119 (W.D. La. 1967).

53 Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485, 488 (1900).

54 319 U.S. 157 (1943).

in *Baines v. City of Danville*,[55] which held that the statutory prohibition of § 2283 could be ignored in special circumstances where issuance of a federal injunction against state court proceedings is the only means of avoiding grave and irreparable injury.[56] But the basis for such a position is questionable, for even without § 2283 "injunctions cannot issue save to prevent irreparable injury, and there would be no point in the statute if it meant no more than this."[57]

The most recent applications of the comity doctrine are to be found in the context of the civil rights movement, in what have been termed the *Dombrowski*-type suits.[58] The celebrated case of *Dombrowski v. Pfister*,[59] the original case in this area, concerned an action brought by a civil rights group under the Civil Rights Act of 1871 [presently codified in 42 U.S.C. § 1983 (1964)][60] to enjoin the threatened enforcement of a Louisiana subversive activities statute. The Supreme Court found this statute unconstitutionally broad, and in light of defendant's bad faith threats to prosecute plaintiffs under the statute, held that plaintiffs were entitled to an injunction.

Due to the peculiar facts in this case, the Court was able to avoid the issue of whether § 2283 constituted a bar to an injunction, or whether § 1983 is an exception to § 2283. The court referred to this problem in a footnote: "This statute . . . [does] not preclude injunctions against the institution of state court proceedings, but only bar[s] stays of suits already instituted. . . . We therefore find it unnecessary to resolve the question whether suits under 42 U.S.C. § 1983 (1958 ed.) come under the 'expressly authorized' exception to § 2283."[61] To be sure, the statutory language would not apply to the *Dombrowski* situation since plaintiffs sought the injunction prior to the institution of state court proceedings.

The Court went on to develop the remedy that special circumstances, such as those shown by this case, which have a "chilling effect upon the exercise of First Amendment rights,"[62] constitute a sufficient showing of threatened irreparable injury and, therefore, make appropriate the exercise of federal equity powers. In short, this case was regarded as falling within an exception to the general rule of comity (as stated in *Douglas v. City of Jeanette*) prohibiting federal court interference with state court proceedings.[63]

Shortly after *Dombrowski*, in *Cameron v. Johnson*,[64] the question was raised whether the *Dombrowski* rationale could be applied to pending state prosecutions. The Supreme Court, however, was again able to dodge a direct

55 337 F.2d 579 (4th Cir. 1964).
56 *Id.* at 593.
57 C. WRIGHT, LAW OF FEDERAL COURTS 182 (2d ed. 1970).
58 Sedler, *The Dombrowski-Type Suit As An Effective Weapon for Social Change: Reflections From Without and Within*, 18 KAN. L. REV. 237 (1970).
59 380 U.S. 479 (1965).
60 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

61 380 U.S. at 484 n.2.
62 *Id.* at 487.
63 *Id.* at 485-86.
64 390 U.S. 611 (1968). Appellants were arrested for violating a Mississippi anti-picketing statute. They sought an injunction against the pending state criminal prosecutions, alleging

confrontation with this issue by affirming the district court's holding that appellants had failed to meet the irreparable injury test.[65]

The Supreme Court has thus far failed to determine whether § 1983, which appears to grant federal courts authority to enjoin state criminal proceedings, constitutes an expressly authorized exception to § 2283's general prohibition of such actions.[66] The absence of any clear guidelines from the Supreme Court has resulted in a division of attitude among those federal courts which have undertaken to resolve this conflict between statutes.[67]

Consistent with the recognition that § 2283 is not jurisdictional, but merely a limitation upon the equitable powers of the federal courts based on comity considerations, it has been recently held that § 2283 is not a bar to *Dombrowski*-type relief even though the state proceeding has been commenced. Two Fifth Circuit decisions provide the leading authority for this extension of *Dombrowski*. In *Machesky v. Bizzell*,[68] appellants, members of the "Greenwood Movement," sought federal injunctive relief under § 1983 against a state court injunction. This injunction, issued in a civil proceeding, had enjoined appellants from engaging in numerous picketing activities. The district court dismissed the action.[69] On appeal the Fifth Circuit Court of Appeals reversed and held that because the state injunction was overly broad, and due to the "chilling effects" upon appellants' first amendment rights, injunctive relief was justified. Further, the court stated that § 2283 was not a bar to the grant of such injunctive relief. Judge Bell, speaking for the court, observed:

> Our decision is grounded on the premise that § 2283 is non-jurisdictional in that it is no more than a statutory enactment of the principle of comity for application in the relationship between federal and state courts. As such, it is to give way in those extraordinary cases where the federal injunction is necessary to vindicate clear First Amendment rights.[70]

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that the statute was unconstitutionally vague and, further, that § 1983 constituted an express exception to § 2283. The district court dismissed the complaint [244 F. Supp. 846 (S.D. Miss. 1964)]. Resolution of this case involved two trips to the Supreme Court. In *Cameron* I [381 U.S. 741 (1965)], the Supreme Court remanded the case for reconsideration in light of *Dombrowski*, and instructed the district court to determine whether § 1983 was an exception to § 2283. On remand, the district court found that the anti-picketing statute was not void on its face and, further, that appellants had failed to show sufficient irreparable injury to justify injunctive relief. In *Cameron* II [390 U.S. 611 (1968)], the Supreme Court affirmed.

65 390 U.S. at 617-20.

66 The Supreme Court has recently heard reargument in two cases involving this issue. *See* Fernandez v. Mackell, 288 F. Supp. 348 (S.D.N.Y.), *prob. juris. noted*, 393 U.S. 975 (1968) (No. 813, 1968 Term; renumbered No. 9, 1970 Term); Samuels v. Mackell, 288 F. Supp. 348 (S.D.N.Y.), *prob. juris. noted*, 393 U.S. 975 (1968) (No. 580, 1968 Term; renumbered No. 7, 1970 Term).

67 Compare Honey v. Goodman, No. 20314 (6th Cir., Oct. 9, 1970); Cooper v. Hutchinson, 184 F.2d 119 (3rd Cir. 1950); Landry v. Daley, 288 F. Supp. 189 (N.D. Ill. 1968); Baker v. Binder, 274 F. Supp. 658 (W.D. Ky. 1967) (holding that § 1983 is an express exception to § 2283); *with* Baines v. City of Danville, 337 F.2d 579 (4th Cir. 1964), *cert. denied*, 381 U.S. 939 (1965); Goss v. Illinois, 312 F.2d 257 (7th Cir. 1963); Armstrong v. Ellington, —F. Supp. — (W.D. Tenn. 1970) (holding that § 1983 is not an express exception to § 2283).

68 414 F.2d 283 (5th Cir. 1969).

69 Machesky v. Bizzell, 288 F. Supp. 295 (N.D. Miss. 1968).

70 414 F.2d at 287. The court cited numerous authorities for this position, *e.g.*, Douglas v. City of Jeanette, 319 U.S. 157 (1943); Smith v. Apple, 264 U.S. 274 (1924); Baines v. City of Danville, 337 F.2d 579 (4th Cir. 1964).

Judge Bell, in basing his decision on the above premise, found it unnecessary to consider whether § 1983 is an express exception to § 2283 since the comity basis of § 2283 alone would allow injunctions under *Dombrowski*-type cases.[71] Thus, *Machesky,* by adhering to the premise that § 2283 is a statutory enactment of comity principles and therefore not jurisdictional, has extended the *Dombrowski* exception for first amendment rights to pending state civil proceedings.

The Fifth Circuit was soon to extend the *Machesky* rationale. In *Sheridan v. Garrison,*[72] the court faced the question of whether § 2283 barred *Dombrowski*-type relief when there is a pending state criminal proceeding. While *Machesky* had found § 2283 to be no bar to injunctions against state civil proceedings, the *Sheridan* court, by answering this question in the affirmative, went a step further in applying that decision to pending criminal proceedings. The court concluded that § 2283 is not a bar to injunctive relief against pending criminal cases when the prosecution is brought in bad faith for the purpose of suppressing first amendment rights. In reaching this conclusion, the *Sheridan* court relied heavily upon the premise enunciated in *Machesky,* i.e., that § 2283 is no more than a statutory enactment of comity principles and is, therefore, non-jurisdictional. Reliance on this premise allowed the court in *Sheridan* to hold that comity must give way in the face of irreparable injury. Here again, reliance upon the premise that the anti-injunction statute is merely a rule of comity has provided a court with a vehicle for tempering the absolute language of that statute.

In *Atlantic Coast Line* it would thus appear that the union was standing on rather solid precedential ground when it alluded in its argument that § 2283 should be read in the light of the principles of comity.[73] The Supreme Court, however, emphatically rejected this premise and refused to accept any such interpretation of the anti-injunction statute.

Mr. Justice Black, at the outset of his majority opinion, discussed the background and policy underlying the anti-injunction statute and concluded that the 1793 Act was at least in part a response to the need " 'to prevent needless friction between state and federal courts.' "[74] Within this framework, Justice Black laid the groundwork for his strict interpretation of § 2283 by stating:

> [T]he lower federal courts . . . were not given any power [by the Judiciary Act of 1789] to review directly cases from state courts, and they have not been given such powers since that time. Only the Supreme Court was authorized to review on direct appeal the decisions of state courts.[75]

Justice Black, in rejecting the union's intimation that § 2283 was merely a codification of comity principles, declared:

> The respondents here have intimated that the [Anti-injunction] Act only establishes a "principle of comity," not a binding rule on the power of the

71 *Id.*
72 415 F.2d 699 (5th Cir. 1969), *cert. denied,* 396 U.S. 1040 (1970).
73 Brief for Respondents at 36-37. Respondent quoted a passage from *Baines* v. *City of Danville,* and cited *Smith* v. *Apple* and the dissenting opinion in *Toucey,* as authority.
74 398 U.S. at 286.
75 *Id.*

> federal courts. The argument implies that in certain circumstances a federal court may enjoin state court proceedings even if that action cannot be justified by any of the three exceptions. *We cannot accept any such contention.*[76] (Emphasis added.)

Justice Black continues this discussion by quoting the passage from *Richman* which states that § 2283 is a "clear-cut prohibition qualified only by specifically defined exceptions." The majority voices its approval of that language and the strict construction approach embodied in the *Richman* decision with these words:

> [W]e . . . adhere to that position [in *Richman*] and hold that any injunction against state court proceedings otherwise proper under general equitable principles must be based on one of the specific statutory exceptions to § 2283 if it is to be upheld. Moreover . . . the exceptions should not be enlarged by loose statutory construction.[77]

The Supreme Court in *Atlantic Coast Line* has thus taken a definitive stand on what shall be the proper interpretation of § 2283. The majority, in very clear language, rejected the notion of long-standing popularity that § 2283 is a legislative enactment of the principles of comity to be ignored at the discretion of federal judges. Rather, it was held that § 2283 is an absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of three specifically defined exceptions.

This rejection of the comity argument and the adoption of a strict approach where the applicability of § 2283 is at issue took place early in the opinion—indeed, prior to any discussion of that statute as it applied to the particular facts of the instant case. Justice Black, however, took several opportunities to reiterate his position. In discussing the union's second contention, Justice Black stated: ". . . a federal court does not have inherent power to ignore the limitations of § 2283 and to enjoin state court proceedings . . . ."[78] Justice Black found it again appropriate to make his point clear by stating: ". . . lower federal courts possess no power whatever to sit in direct review of state court decisions."[79] Such precise language leads to the inescapable conclusion that § 2283 is indeed a jurisdictional statute since federal courts have no power to grant injunctive relief against state proceedings except as provided for within the three statutory exceptions.

This case has without a doubt invalidated the liberal construction given § 2283 by cases such as *Baines v. City of Danville*. Furthermore, while the Court in *Atlantic Coast Line* was not directly faced with a first amendment rights claim, this decision would appear to have a restrictive influence upon the recent cases extending *Dombrowski*-type relief to pending state proceedings. In particular, the continued vitality of cases such as *Machesky* and *Sheridan* would now seem to be questionable. This would be the effect of *Atlantic Coast Line,* at least insofar as those cases have relied upon the premise that § 2283 is a non-jurisdictional statutory embodiment of the principles of comity.

The Supreme Court has here manifested its unwillingness to sanction an

76 *Id.* at 286-87.
77 *Id.* at 287.
78 *Id.* at 294.
79 *Id.* at 296.

extension of the exceptional circumstances—irreparable injury test to cases in which § 2283 is applicable. While it must be recognized that *Atlantic Coast Line* did not involve a *Dombrowski*-type suit, it should be noted that Justice Black addressed the problem of the irreparable injury exception in these words:

> [I]f, because of the Florida Circuit Court's action [in enjoining the union picketing], the union faced the threat of immediate irreparable injury sufficient to justify an injunction under usual equitable principles, it was undoubtedly free to seek such relief from the Florida appellate courts, and might possibly in certain emergency circumstances seek such relief from this [Supreme] Court as well.[80]

This statement, coupled with the holding that federal courts are powerless to directly review state court actions, arguably dictates the demise of the availability of *Dombrowski*-type injunctive relief against state proceedings which have already been commenced. It would appear that the alternative left for claimants whose first amendment rights have been violated by bad faith state prosecutions is to seek vindication of those rights from state appellate courts, and not from the lower federal courts, even in the face of imminent irreparable injury.

By closing this door to federal injunctive relief, the only alternative open for providing relief in these first amendment cases would appear to be a finding by the Supreme Court that the Civil Rights Act of 1871 constitutes an express Congressional exception to § 2283. Such a finding must be made if injunctive relief is to be extended in this special type of case involving pending state proceedings, for the strong language of *Atlantic Coast Line* will no longer allow the grant of such relief to be based upon the doctrine that where exceptional circumstances warrant, comity must yield. The Supreme Court has here delivered the final blow to the judicial philosophy equating § 2283 with comity. A recent commentator in discussing *Machesky v. Bizzell* has astutely noted that "It is possible that the Supreme Court will again cut back the exceptions to section 2283, as it did once in *Toucey v. New York Life Insurance Co.*"[81] In *Atlantic Coast Line,* the Supreme Court has done just that.

Francis J. Gebhardt

MILITARY LAW—JURISDICTION—A CIVILIAN EMPLOYEE OF AN ARMY CONTRACTOR IN VIETNAM IS NOT SUBJECT TO TRIAL BY COURT-MARTIAL SINCE, FOR PURPOSES OF ARTICLE 2(10) OF THE UNIFORM CODE OF MILITARY JUSTICE, THE WORDS "IN TIME OF WAR" MEAN A WAR FORMALLY DECLARED BY CONGRESS.—In July, 1967, Raymond G. Averette was hired by Pacific Architects and Engineers, Inc., a Department of Defense contractor employing approximately 25,000 civilians in Vietnam. Averette was sent to Vietnam, where he was employed as a mobile equipment supervisor in the Fish Market Installation, which is located within Camp Davies, a United States Army installation in Saigon. While so employed, Averette was charged with being a member of a

80 *Id.*
81 *See* 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV., 501, 511 (1970).

group (including several soldiers) which was conspiring to steal 36,000 flashlight batteries for sale to a Vietnamese civilian.

On October 12, 1968, a general court-martial at Long Binh, Vietnam convicted Averette of conspiracy to commit larceny and attempted larceny,[1] violations of Articles 81[2] and 80[3] respectively of the Uniform Code of Military Justice. The United States Army Court of Military Review affirmed the decision with some modification of the findings and reduced the sentence imposed by the general court-martial.[4] On appeal, the United States Court of Military Appeals reversed Averette's conviction and *held*: for purposes of Article 2(10) of the Uniform Code of Military Justice, providing for jurisdiction over persons accompanying the armed forces in the field in time of war, the words "in time of war" mean a war formally declared by Congress. *United States v. Averette,* 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970).

Article 2(10) of the Uniform Code of Military Justice provides: "The following persons are subject to this chapter . . . (10) In time of war, persons serving with or accompanying an armed force in the field."[5] The authority for this jurisdiction by military courts is said to originate in article I, section 8, clause 14 of the Constitution, and is allowed by the exception in the fifth amendment's requirement of indictment by a grand jury for those "in the land or naval

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1 A third charge of solicitation of another to commit a crime, punishable under Article 134 of the Uniform Code of Military Justice [hereinafter cited as UCMJ], 10 U.S.C. § 934, was dismissed prior to Averette's trial.

2 UCMJ, art. 81, 10 U.S.C. § 881 (1964) provides:

> Any person subject to this chapter who conspires with any other person to commit an offense under this chapter shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct.

3 UCMJ, art. 80, 10 U.S.C. § 880 (1964) provides:

> (a) An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense.
>
> (b) Any person subject to this chapter who attempts to commit any offense punishable by this chapter shall be punished as a court-martial may direct, unless otherwise specifically prescribed.
>
> (c) Any person subject to this chapter may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated.

Larceny is defined in UCMJ, art. 121, 10 U.S.C. § 921 (1964):

> (a) Any person subject to this chapter who wrongfully takes, obtains, or withholds, by any means, from the possession of the owner or of any other person any money, personal property, or article of value of any kind —
>
> (1) with intent permanently to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other than the owner, steals that property and is guilty of larceny; or
>
> (2) with intent temporarily to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other than the owner, is guilty of wrongful appropriation.
>
> (b) Any person found guilty of larceny or wrongful appropriation shall be punished as a court-martial may direct.

4 The United States Court of Military Review affirmed only so much of the findings of guilt of the specification and Charge I as included the offense of conspiracy to commit larceny with respect to batteries of an unknown quantity, type and value; and only so much of findings of guilt of the specification and Charge II as included the offense of attempt to steal some unknown type of battery of a value in excess of $20.00.

The sentence of the general court-martial was reduced from confinement at hard labor for one year and a fine of $2,000.00 to confinement at hard labor for one year and a fine of $500.00. Brief for Appellant at 1, United States v. Averette, 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970) [hereinafter cited as Brief for Appellant].

5 UCMJ, art. 2(10), 10 U.S.C. § 802(10) (1964).

forces."[6] Article 2(10) is a lineal descendent of the British Articles of War of 1765, which were in effect at the time of the American Revolution and which gave British military commanders authority over civilians accompanying English armies. The British Articles of War provided, in section 14, article XXIII: "All Suttlers and Retainers to a Camp, and all persons whatsoever serving with Our Armies in the field, though no inlisted Soldiers, are to be subject to orders, according to the Rules and Discipline of War."[7] Substantially the same provision was incorporated into the Massachusetts Articles of War,[8] and subsequently was included in the American Articles of War of 1775, 1776, 1806 and 1874.[9]

In 1916, the Articles of War underwent extensive revision.[10] The result was not only a new phraseology, replacing the traditional formulation passed down from the British Articles of War, but an expansion of military jurisdiction as well. Article 2(d) of the Articles of War of 1916 stated:

> The following persons are subject to these articles
>
> . . . .
>
> All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles;[11]

Three significant changes were effectuated by this revision: 1) military jurisdiction was expanded to include not only the traditional categories of civilians amenable to military jurisdiction, but "all persons accompanying or serving with" United States armed forces outside the territorial bounds of the United States;[12] 2) jurisdiction was explicitly conferred on the military over civilians when they accompanied United States forces outside the territorial jurisdiction of the United States; and 3) military jurisdiction applied to civilians "accompanying or serving with" armed forces not only "in time of war" but in time of peace as well. There seems to have been some historical basis for this drastic revision, but that basis was hardly sound.[13] The drafter of the Articles of War of 1916, General Enoch H.

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6 U.S. CONST., art. I, § 8, cl. 14 gives Congress power "to make Rules for the Government and Regulation of the land and naval Forces."

7 WITHROP, MILITARY LAW AND PRECEDENTS 941 (2d ed. 1920).

8 *Id.* at 950.

9 *Id.* at 956, 967, 981, 991.

10 Act of August 29, 1916, ch. 418, § 1342, 39 Stat. 651.

11 *Id.*

12 Traditionally, two classes of civilians were amenable to military jurisdiction: "retainers to the camp" and "persons serving with the armies in the field." The former category included officers' servants, sutlers, sutlers' employees, newspaper correspondents, telegraph operators and post traders. The latter category included civilian clerks, teamsters, laborers, hospital officials and attendants, veterinaries, interpreters, guides, scouts and spies, and men employed on transports and military railroads as telegraph operators. WITHROP, *supra* note 7, at 98-100.

13 Girard, *The Constitution and Court-Martial of Civilians Accompanying the Armed Forces—A Preliminary Analysis*, 13 STAN. L. REV. 461, 485-90 (1961) notes cases of military jurisdiction over sutlers in Virginia (1825), Maryland (1825), the Indiana Territory (1833), Florida (1838), and over civilian employees in the Utah Territory (1858). *But see* 16 OP. ATT'Y GEN. 13 (1878) (civilian quartermaster's clerk held not amenable to military jurisdiction in time of peace); DIG. OP. J.A.G. (McClure ed. 1901) § 2023 at 563 (post trader not amenable to military jurisdiction in time of peace). *Cf. Ex parte* Milligan, 71 U.S. (4 Wall.) 1, 123 (1866); 13 OP. ATT'Y GEN. 59, 63-65 1869).

Crowder, Judge Advocate General of the United States Army from 1911 to 1923, based this expansion of jurisdiction not only on historical precedent but also on two assumptions: first, that the "cases arising in the land or naval forces" clause of the fifth amendment constituted an affirmative source of military jurisdiction; and secondly, that the protections of the Constitution did not extend overseas, but "stopped at the water's edge."[14] This expanded concept of military jurisdiction subsequently became incorporated into the Uniform Code of Military Justice.[15]

But as the assumptions upon which General Crowder had based his expanded version of military jurisdiction crumbled, so too did the rationale for the adoption of those Articles in the Code granting such jurisdiction.[16] Recognizing this development, the Supreme Court, after initially rejecting challenges to the expansive jurisdiction granted by the Code,[17] held, in rapid succession, that civilian dependents accompanying United States forces abroad were not amenable to military jurisdiction when accused of capital[18] or noncapital[19] crimes, and similarly situated civilian employees were not amenable to military jurisdiction

14 WIENER, CIVILIANS UNDER MILITARY JUSTICE 305-14 (1967).

15 UCMJ, arts. 2(11)-(12), 10 U.S.C. § 802 (11)-(12) (1964) provide:

> The following persons are subject to this chapter:
>
> . . . .
>
> (11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the following: the Canal Zone, Puerto Rico, Guam, and the Virgin Islands.
>
> (12) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the following: the Canal Zone, Puerto Rico, Guam, and the Virgin Islands.

16 The assumption that the fifth amendment was an affirmative source of military jurisdiction ended with United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 14n. 5 (1955):

> The Fifth Amendment provides that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger. . . ." This provision does not grant court-martial power to Congress, it merely makes clear that there need be no indictment for such military offenses as Congress can authorize military tribunals to try under its Article I power to make rules to govern the armed forces.

The assumption that the protections of the Constitution stopped at the water's edge, which had originated in the case of *In re* Ross, 140 U.S. 453 (1891), died earlier, but not so suddenly. By 1922, the Supreme Court was admitting that the Constitution could apply extraterritorially, but only to those territories incorporated by the Congress into the United States. Balzac v. Porto Rico, 258 U.S. 298, 304 (1922). The Court then began to hint that the Constitution did have application in foreign territories with respect to United States citizens. *See* United States v. Curtis-Wright Export Corp., 299 U.S. 304, 318 (1936). That position was expressly adopted in Duncan v. Kahanamoku, 327 U.S. 304, 317-18 (1946):

> [I]t becomes clear that Congress did not intend the Constitution to have a limited application to Hawaii. . . . Even when Hawaii was first annexed Congress had provided that the Territory's existing laws should remain in effect unless contrary to the Constitution. . . .
>
> It follows that civilians in Hawaii are entitled to the Constitutional guarantee of a fair trial to the same extent as those who live in any other part of our country.

17 At first, both the Supreme Court and lower federal courts had no trouble in upholding the validity of military jurisdiction over civilians as embodied in UCMJ, arts. 2(11)-(12), 10 U.S.C. § 802(11)-(12) (1964). Kinsella v. Krueger, 351 U.S. 470 (1956); Reid v. Covert, 351 U.S. 487 (1956), *rev'd on rehearing,* 354 U.S. 1 (1957); *In re* Yokoyama, 170 F. Supp. 467 (S.D. Cal. 1959); *In re* Varney's Petition, 141 F. Supp. 190 (S.D. Cal. 1956).

18 Reid v. Covert, 354 U.S. 1 (1957).

19 Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960).

when accused of capital[20] or noncapital[21] crimes. These holdings effectively emasculated Articles 2(11) and 2(12) of the Code, although they continue to remain on the books.[22]

In those cases, the Supreme Court formulated the requirement that a civilian have the "status" of a member of the land or naval forces in order for him to be subjected to military jurisdiction. As Justice Frankfurter stated in his concurring opinion in *Reid v. Covert*:[23]

> Trial by court-martial is constitutionally permissible only for persons who can, on a fair appraisal, be regarded as falling within the authority given to Congress under Article I to regulate the "land and naval forces," and who therefore are not protected by specific provisions of Article III and the Fifth and Sixth Amendments.[24]

The theme was repeated by Justice Clark in *Kinsella v. United States ex rel. Singleton*:[25] "The test for jurisdiction, it follows, is one of *status*, namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval forces.' "[26]

But throughout this contractive process, the traditional exercise of military jurisdiction over civilians, as embodied in Article 2(10) of the Code, was consistently upheld. Justice Black made this clear in *Reid*: "We recognize that there might be circumstances where a person could be 'in' the armed services for purposes of Clause 14 even though he had not formally been inducted into the military or did not wear a uniform."[27] Twelve years later Justice Douglas was still providing for the traditional military jurisdiction over civilians in *O'Callahan v. Parker*:[28] ". . . [W]e deal with peacetime offenses, not with authority stemming from the war power."[29]

It was against this background that Averette brought his petition to the United States Court of Military Appeals. The court, in granting Averette's petition, made it clear that his "status" under Article 2(10) would be discussed completely.[30] As a consequence, the court heard arguments on the issues of whether or not Averette was "in the field" and whether or not he was "serving with or accompanying an armed force" within the meaning of Article 2(10) as well as on the issue of whether Vietnam was a "time of war" within the meaning of the same Article.

On the issue of whether Averette was "in the field" for purposes of Article 2(10), Averette's counsel maintained that Averette could not be said to be "in the field" because that phrase connoted the idea of being on some sort of battle-front without civilian forums to try crimes and a resulting need for strong

20 Grisham v. Hagan, 361 U.S. 278 (1960).
21 McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960).
22 WIENER, *supra* note 14, at 313.
23 354 U.S. 1 (1957).
24 *Id.* at 42.
25 361 U.S. 234 (1960).
26 *Id.* at 240-41.
27 354 U.S. at 22-23.
28 395 U.S. 258 (1969).
29 *Id.* at 273.
30 Brief for Appellant at 2.

discipline.[31] On the contrary, while working within Camp Davies, Averette lived in Saigon with his Vietnamese wife and child. Furthermore, it was deemed unnecessary to restrain Averette after he had been charged but prior to his trial.[32] The United States responded that Saigon was no different from any other area of enemy activity. The city had been a major target of the Tet offensive, and eighteen enemy battalions were in or about the Saigon area. The Government further noted that Pacific Architects and Engineers, Inc., had lost eighteen civilian employees in Vietnam. Consequently, Vietnam could by any criterion, it maintained, be deemed an actual area of fighting, where armed forces of the United States were engaged in combat. Hence, argued the United States, the appellant could be said to be "in the field."[33]

The court never specifically decided the question of whether Averette was "in the field" during the period of his employment in Vietnam. But it seems apparent from existing case authority that, had it been the crucial issue, Averette would have been held to have been "in the field" within the meaning of Article 2(10). The phrase "in the field," which was also included in the Articles of War of 1916, has in the past been somewhat broadly construed. Thus, civilian employees on merchant vessels transporting supplies for armed forces have been held to be "in the field";[34] so, too, have civilian employees working in Army installations within the United States, as well as on overseas bases.[35] The case most closely approximating that of Averette was *In re DiBartolo*.[36] In that case a civilian was employed by a government contractor during World War II as a mechanic at a depot in Eritrea. Having been charged with theft, he was held to be subject to military jurisdiction. The court concluded, *inter alia*:

> Since the events material here occurred outside the territorial jurisdiction of the United States it is not really necessary to determine whether the armies were in the field although it is too clear for argument that such was the fact, that is they were away from their home base and their established location and on an operational, indeed hostile, mission.[37]

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31 *Id.* at 22-24.

32 *Id.*

33 Brief for Appellee at 15, United States v. Averette, 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970) [hereinafter cited as Brief for Appellee].

34 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); *Ex parte* Falls, 251 F. 415 (D.N.J. 1918); *Ex parte* Gerlach, 247 F. 616 (S.D.N.Y. 1917). Representative of the reasoning used in such cases is the following passage from the opinion of McCune v. Kilpatrick:

> A military voyage for the purpose of transporting army troops and supplies during the present war is, in my opinion, clearly a military expedition "in the field." Such a voyage is necessary for the maintenance of supplies for the troops in the combat area, and for the transportation of replacements, and is fraught with grave dangers from the land, the sky and the sea. 53 F. Supp. at 84.

Contra, Latney v. Ignatius, 416 F.2d 821 (D.C.Cir. 1969).

35 Hines v. Mikell, 259 F. 28 (4th Cir. 1919); *Ex parte* Jochen, 257 F. 200 (S.D. Tex. 1919). One must doubt whether such decisions would continue to be followed today, since the rationale normally used to support jurisdiction over accompanying civilians has ordinarily been absent within the territorial jurisdiction of the United States in a conventional war. Even before the Supreme Court's rulings beginning with *Reid*, UCMJ, arts. 2(11)-(12) applied only extraterritorially.

36 50 F. Supp. 929 (S.D.N.Y. 1943).

37 *Id.* at 933.

It would seem, therefore, that the imminence of enemy activity would not have been so minimal in Averette's case as to have placed him anywhere but within the category of being "in the field," regardless of his residence outside the perimeter of Camp Davies. His employment within a guarded military installation of the United States, outside the territorial jurisdiction of the United States federal courts, under hostile conditions, would appear to be sufficient to place him "in the field."

The court also seemed to be disinclined to specifically decide that Averette was "serving with or accompanying an armed force," although Averette's argument here was perhaps stronger than it had been for the proposition that he was not "in the field." Counsel for Averette noted that South Vietnam, by agreement with the United States, maintained primary criminal jurisdiction over certain United States citizens (including Averette, as a United States citizen and Department of Defense contractor employee), while the United States retained primary criminal jurisdiction over United States military personnel, their dependents, and citizens employed by a United States government agency.[38] This agreement, they argued, was arbitrarily discriminatory since all Americans were not subject to military jurisdiction, and those regulations which made citizens amenable to military jurisdiction did not reflect the legislative intent of Article 2(10). But the court appeared to implicitly reject this argument by calling attention to certain facts which would seem to establish Averette's close association with the United States armed forces: "Averette . . . was employed every day within Camp Davies, a United States Army Installation. He had access to a variety of Army facilities and benefits including the post exchange, the commissary, banking privileges, and other welfare and recreational activities."[39]

The court's rejection of Averette's argument again appears to have been consistent with previous case law on this subject.[40] The holding of *DiBartolo* is again illustrative of the rationale used in these cases:

> We have it as fact that Gura was a military base. Its existence, maintenance and operation were in the hands of the military. Its activities were purely military, the repair and servicing of military aircraft actively employed

38 Brief for Appellant at 24-25. Under USMACV Directive No. 27-4 (2 November 1967), the United States has primary criminal jurisdiction over United States military personnel, their United States citizen dependents, and all United States citizens employed by a United States government agency or instrumentality and their United States citizen dependents. South Vietnam retains primary criminal jurisdiction over: (1) United States citizen Department of Defense contractor employees; (2) United States citizen merchant seamen; (3) news media personnel; and (4) United States citizen tourists or businessmen in the Republic of South Vietnam in pursuit of their own private interests. Since Averette was technically a United States citizen Department of Defense contractor employee, it was necessary for South Vietnam first to waive its jurisdiction over him.

Military authorities assumed jurisdiction over Averette pursuant to USMACV Directive No. 190-1 (23 June 1967) which provided that, pursuant to Article 2(10) of the Code, all civilians are considered "United States Armed Forces personnel," except (1) certain employees of the United States Government agencies; (2) news media personnel; and (3) United States citizens having no connection with the United States armed forces, such as persons in private enterprise, tourists and civilian dependents.

39 19 U.S.C.M.A. at 364-65.

40 Perlstein v. United States, 151 F.2d 167 (3rd 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); *In re* DiBartolo, 50 F. Supp. 929 (S.D.N.Y. 1943); *Ex parte* Falls, 251 F. 415 (D. N.J. 1918); *Ex parte* Gerlach, 247 F. Supp. 616 (S.D.N.Y. 1917).

> in the waging of war. Petitioner was at that base, not casually, not as a visitor, not by chance. He was there for a purpose, to work as a mechanic upon military aircraft. For that purpose he went to Eritrea, a field of military operations. His presence there under the conditions indicated shows the appropriateness of military jurisdiction since it serves the expressed objectives of the amendments already mentioned. He is a person in a place "to which the civil jurisdiction of the United States does not extend and where it is contrary to international policy to subject such persons to the local jurisdiction." Clearly, the petitioner accompanied the armies of the United States.[41]

Counsel for Averette also argued that no mention was made in Averette's contract with Pacific Architects and Engineers, Inc. that he would be amenable to military jurisdiction. Nor was the applicability of the Uniform Code of Military Justice explained to him within six days of his entrance upon active employment in Vietnam, a warning which is required in the case of enlisted personnel.[42] But the court was similarly unimpressed with this argument. It appeared that the appellant was doing little more than masquerading an argument of lack of consent as an argument for lack of notice. Since the court did not deal with the argument in particular, it can be presumed that they would have been willing to follow the statement found in *In re Berue*,[43] another case of military jurisdiction over civilians in time of war:

> [E]xistence of jurisdiction cannot be defeated by lack of consent or lack of knowledge that such jurisdiction exists. Assuredly one who committed a crime without knowing that he was thereby subjected to the jurisdiction of a Federal Court, could not be heard to contest the jurisdiction on that ground. It is proper, therefore, to determine the question of jurisdiction upon the facts and circumstances; it cannot rest upon knowledge or consent.[44]

It was on the issue of whether or not Vietnam was a "time of war" that the court specifically decided that "the words 'in time of war' mean, for the purposes of Article 2(10), Code, supra, a war formally declared by Congress."[45] This was a somewhat surprising departure from the position previously taken not only by the Court of Military Appeals, but also by civil courts. Counsel for Averette argued that the military has only the most limited jurisdiction over civilians under article I, section 8, clause 14 of the Constitution. It was contended that the need for military jurisdiction exists only where there is no other way to deal with the offender. *United States v. Anderson*,[46] which held that an unauthorized absence

41 50 F. Supp. at 933.

42 UCMJ, art. 137, 10 U.S.C. § 937 (1964) provides:

> Section 802 . . . of this chapter shall be carefully explained to each enlisted member at the time of his entrance on active duty, or within six days thereafter. They shall be explained after he has completed six months of active duty, and again at the time when he re-enlists. A complete text of the Uniform Code of Military Justice and of the regulations prescribed by the President thereunder shall be made available to any person on active duty, upon his request, for his personal examination.

43 54 F. Supp. 252 (S.D. Ohio 1944).

44 *Id.* at 256.

45 19 U.S.C.M.A. at 365.

46 17 U.S.C.M.A. 588, 38 C.M.R. 386 (1968). In *Anderson*, the Court of Military Appeals concluded that the accused, an enlisted man who had been convicted of unauthorized

during the Vietnam conflict was "in time of war," was distinguishable, Averette's counsel argued, on the grounds that the case involved a violation by a serviceman, not a civilian.

Averette's counsel maintained that the phrase "in time of war" could only mean a declared war. Without such a declaration, they argued, the war was in fact a presidential war, and as such was an intrusion on Congressional power and consequently inconsistent with the Gulf of Tonkin Resolution.[47] Furthermore, it was contended that armed conflict alone would not suffice to create a time of war. To rely on armed conflict alone would create the necessity for determining whether each incident, each reprisal, each crisis, was a time of war. As the appellant's brief queried:

> Is there a "time of war" in northern Thailand? In Laos? Was there a "time of war" during the military intervention in the Dominican Republic? Is there a "time of war" when the military is called in to preserve the peace during a domestic civil disorder? Civilians should have the protection of a declaration of war made by their representatives before they become subject to military jurisdiction . . . .[48]

The United States simply rested its argument on prior case law, emphasizing the decisions in *Bas v. Tingy*,[49] the *Prize Cases*,[50] and the *Anderson*[51] case.

The court's decision on the meaning of the words "in time of war" was surprisingly terse. Resting their conclusion on the results reached in a Colorado insurance case[52] and a 1920 federal district court case involving military jurisdiction over an officer,[53] the court refused in *Averette* to renew its inquiry into the meaning of the Gulf of Tonkin Resolution, a course of action which had fragmented the court earlier in the *Anderson* case. Instead, they simply said:

> We conclude that the words "in time of war" mean, for purposes of Article 2(10), Code, supra, a war formally declared by Congress. . . . As a result of the most recent guidance in this area from the Supreme Court we believe that a strict and literal construction of the phrase "in time of war" should be applied. A broader construction of Article 2(10) would open the possibility of civilian prosecution by military courts whenever military action on a varying scale of intensity occurs.[54]

An analysis of the "recent guidance" from the Supreme Court and of the case authority cited by the Court of Military Appeals in support of its decision leaves much to be desired.

Despite consistent exceptions made by the Supreme Court for military juris-

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absence during the Vietnam War, had committed his offense during a "time of war." Hence, the conviction was not barred by the two-year statute of limitations contained in UCMJ, art. 43(c), 10 U.S.C. § 843(c) (1964).

47 Brief for Appellant at 16-18.

48 *Id.* at 21-22.

49 4 U.S. (4 Dall.) 37 (1800).

50 67 U.S. (2 Black) 635 (1862).

51 17 U.S.C.M.A. 588, 38 C.M.R. 386 (1968).

52 Pyramid Life Ins. Co. v. Masch, 134 Colo. 70, 299 P.2d 117 (1956).

53 *Ex parte* Givins, 262 F. 702 (N.D. Ga. 1920), *aff'd* Givins v. Zerbst, 255 U.S. 11 (1921).

54 19 U.S.C.M.A. at 365.

diction over civilians pursuant to Article 2(10), nevertheless there was wording in *O'Callahan v. Parker* which authorities analyzed to mean that the Court was willing to question even the jurisdiction conferred by Article 2(10).[55] Said the Court:

> We have held in a series of decisions that court-martial jurisdiction cannot be extended to reach any person not a member of the Armed Forces at the times of both the offense and the trial. . . .
>
> These cases decide that courts-martial have no jurisdiction to try those who are not members of the Armed Forces, no matter how intimate the connection between their offense and the concerns of military discipline.[56]

Following close on the heels of *O'Callahan* came the decision in *Latney v. Ignatius*.[57] That case, admittedly following the "spirit of *O'Callahan*,"[58] held that a civilian seaman, who murdered a fellow seaman while his vessel was in the port of Da Nang for a short period of time, was not amenable to military jurisdiction.

O'Callahan involved a serviceman who was held not to be amenable to military jurisdiction in peacetime for crimes which were not "service-connected." *Latney* was decided on the ground that Latney could not be said to be accompanying or serving with an armed force. The District of Columbia Court of Appeals in *Latney* expressly assumed that "this is a time of undeclared war, which permits some invocation of the war power under which Article 2(10) was enacted."[59] *O'Callahan,* therefore, is formulating a separate test (that of the service-connected offense) in addition to the traditional test of "status," while *Latney* appears to evince a willingness simply to look more closely to determine which civilians can truly be said to possess the "status" of accompanying or serving with an armed force in the field. Neither case appears to offer a direct challenge to the jurisdiction conferred by Article 2(10).

The Court of Military Appeals based its decision that Article 2(10) required a formal declaration of war on two decisions: *Pyramid Life Insurance Co. v. Masch*[60] and *Ex parte Givins*.[61] It distinguished those cases cited by the appellee United States which held consistently to the contrary. The main problem which the court found with these latter decisions was that none dealt specifically with the question of military jurisdiction over civilians. It seems, however, that that criticism is equally applicable to the two cases cited in support of the court's decision. *Pyramid Life Insurance Co. v. Masch* dealt with the death of a policyholder while serving in the armed forces in Korea. It held that the Korean War was not a "time of war" for purposes of triggering an exception clause in the policy.[62] The federal courts have been unanimous in their rejection of this position and a majority of state courts have refused to require formal declarations in order to

55 Nelson and Westbrook, *Court-Martial Jurisdiction Over Servicemen for "Civilian" Offenses: An Analysis of O'Callahan v. Parker,* 54 MINN. L. REV. 1, 52 (1969).
56 395 U.S. at 267.
57 416 F.2d 821 (D.C.Cir. 1969).
58 *Id.* at 823.
59 *Id.*
60 134 Colo. 70, 299 P.2d 117 (1956).
61 262 F. 702 (N.D. Ga. 1920), *aff'd* Givins v. Zerbst, 255 U.S. 11 (1921).
62 134 Colo. 73, 299 P.2d at 119.

trigger "in time of war" clauses in policies.[63] *Ex parte Givins* dealt with the issue of whether courts-martial had jurisdiction to try a captain of the United States Army for a murder committed within the geographical bounds of the United States, where the trial occurred after the Armistice but before the signing of any peace treaty. The holding of the court was:

> [I]t must be held that for military persons, at least, such a time [of war] continued from the date of the declaration . . . by Congress until some formal proclamation of peace by an authority competent to proclaim it. The rapid movement of soldiers, causing the scattering of witnesses before the civil courts could act, as well as the necessity of firm discipline and full control over an army when on a war footing, are prime causes for the substitution of courts-martial for civil courts in time of war.[64]

The rationale of the case, it can be seen, revolves around the need for court-martial jurisdiction over military personnel and in no way deals with the problem of limiting court-martial jurisdiction over civilians.[65]

An overview of prior decisions on the question of when hostilities constitute a genuine war reveals that the Supreme Court, lower federal courts, and the United States Court of Military Appeals have been unanimous in attributing minimal significance to a formal declaration of war. As early as 1800 the undeclared naval war with France was termed a war for purposes of applying salvage laws.[66] Justice Washington's statement in that case has been reiterated through the years:

> It may, I believe, be safely laid down, that *every* contention by force, between two nations, in external matters, under the authority of their respective governments is not only war, but public war. If it be declared

63 FEDERAL: Stinson v. New York Life Ins. Co., 167 F.2d 233 (D.C. Cir. 1948); New York Life Ins. Co. v. Durham, 166 F.2d 874 (10th Cir. 1948); New York Life Ins. Co. v. Bennion, 158 F.2d 260 (10th Cir. 1946); Gagliormella v. Metropolitan Life Ins. Co., 122 F. Supp. 246 (D. Mass. 1954); Weisman v. Metropolitan Life Ins. Co., 112 F. Supp. 420 (S.D. Cal. 1953); Verano v. De Angelis Coal Co., 41 F. Supp. 954 (M.D. Pa. 1941).

STATE (no declaration of war required): *Connecticut*: Zaccardo v. John Hancock Mut. Life Ins. Co., 20 Supp. 75, 124 A.2d 926 (1956); *Georgia*: Mutual Life Ins. Co. of N.Y. v. Davis, 79 Ga. App. 336, 53 S.E.2d 571 (1949); *Indiana*: Stucker v. College Life Ins. Co. of America, 139 Ind. App. 422, 208 N.E.2d 731 (1965); *Iowa*: Langlas v. Iowa Life Ins. Co., 245 Ia. 713, 63 N.W.2d 885 (1954); *Maine*: Dole v. Merchants' Mut. Marine Ins. Co., 51 Me. 465 (1863); *Massachusetts*: Gudewicz v. John Hancock Mut. Life Ins. Co., 331 Mass. 754, 122 N.E.2d 900 (1954); Stankus v. New York Life Ins. Co., 312 Mass. 366, 44 N.E.2d 687 (1942); *Missouri*: Lynch v. National Life & Accident Ins. Co., 278 S.W.2d 32 (Mo. App. 1955); *New Jersey*: Stanberry v. Aetna Life Ins. Co., 26 N.J. Super. 498, 98 A.2d 134 (1953); *New York*: Wilkinson v. Equitable Life Assurance Soc'y of the United States, 2 Misc.2d 249, 151 N.Y.S.2d 1018 (1956); Vanderbilt v. Traveller's Ins. Co., 112 Misc. 248, 184 N.Y.S. 54 (1920); *Pennsylvania*: Thomas v. Metropolitan Life Ins. Co., 388 Pa. 499, 131 A.2d 600 (1957); *Texas*: Western Reserve Life Ins. Co. v. Meadows, 152 Tex. 559, 261 S.W.2d 554 (1953); *Washington*: Christensen v. Sterling Ins. Co., 46 Wash.2d 713, 284 P.2d 287 (1955).

STATE (declaration of war required): *Colorado*: Pyramid Life Ins. Co. v. Masch, 134 Colo. 70, 299 P.2d 117 (1956); *Ohio*: Trimble v. Western & Southern Life Ins. Co., 83 Ohio App. 102, 82 N.E.2d 548 (1948); *Pennsylvania*: Harding v. Pennsylvania Mut. Life Ins. Co. 373 Pa. 270, 95 A.2d 221 (1953); Beley v. Pennsylvania Mut. Life Ins. Co., 373 Pa. 231, 95 A.2d 202 (1953); *South Carolina*: West v. Palmetto State Life Ins. Co., 202 S.C. 422, 25 S.E.2d 475 (1943).

64 262 F. at 705.

65 Even the holding in *Ex parte* Givins that an armistice did not reestablish a time of peace, was rejected in Lee v. Madigan, 358 U.S. 228 (1959).

66 Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800).

> in form, it is called solemn, and is of the perfect kind; because one whole nation is at war with another whole nation; and all the members of the nation declaring war are authorized to commit hostilities against all the members of the other, in every place and under every circumstance. In such a war, all the members act under a general authority, and all the rights and consequences of war attach to their condition.
>
> But hostilities may subsist between two nations, more confined in its nature and extent; being limited as to places, persons and things; and this is more properly termed imperfect war; because not solemn, and because those who are authorized to commit hostilities act under special authority and can go no further than to the extent of their commission. Still, however, it is a public war, because it is external contention by force, between some of the members of two nations, authorized by the legitimate powers. It is a war between the two nations, though all the members are not authorized to commit hostilities, such as in solemn war, where the government restrain the general power.[67]

More than sixty years later the *Prize Cases*[68] adopted the same position:

> If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. . . . [I]t is none the less a war on *that account,* for war may exist without a declaration on either side. It is so laid down by the best writers on the law of nations. A declaration of war by one country only, is not a mere challenge to be accepted or refused at pleasure by the other.[69]

Even the Indian Wars were sufficient to constitute a time of war.[70] And there was authority for the proposition that civilians accompanying armed forces on the frontier were amenable to military jurisdiction.[71] By a similar reasoning process, courts reached the conclusions that the Boxer Rebellion[72] and the border clashes with Mexico in 1917[73] could also be said to constitute times of war. And, prior to *Averette,* the Court of Military Appeals never had any trouble reaching the conclusion that a "time of war" could exist without a formal declaration.[74]

The decision of the Court in *Averette* is unsatisfactory for three reasons. First, by its holding, the court has created an internal inconsistency in the Code. By concluding that the words "in time of war" refer only to a declared war in Article 2(10), while distinguishing their holding in *Anderson* that the the same

67 *Id.* at 40-41.
68 67 U.S. (2 Black) 635 (1862).
69 *Id.* at 668.
70 Montoya v. United States, 180 U.S. 261 (1901).
71 14 Op. Att'y Gen. 22 (1872).
72 Hamilton v. McClaughry, 136 F. 445 (C.C.D. Kan. 1905) (Boxer Rebellion held to be a time of war within the Fifty-Eighth Article of War, providing for trial by court-martial of offenses by soldiers).
73 Arce v. State, 83 Tex. Crim. 292, 202 S.W. 951 (1918) (courts of Texas had no jurisdiction to try Mexican soldiers for killing American troops incidental to a battle in Mexico between forces of the two nations since it was a "time of war").
74 United States v. Anderson, 17 U.S.C.M.A. 588, 38 C.M.R. 386 (1968) (Vietnam War); United States v. Shell, 7 U.S.C.M.A. 646, 23 C.M.R. 110 (1957) (Korean War); United States v. Sanders, 7 U.S.C.M.A. 21, 21 C.M.R. 147 (1956) (Korean War); United States v. Ayers, 4 U.S.C.M.A. 220, 15 C.M.R. 220 (1954) (Korean War); United States v. Gann, 3 U.S.C.M.A. 12, 11 C.M.R. 12 (1953) (Korean War); United States v. Bancroft, 3 U.S.C.M.A. 3, 11 C.M.R. 3 (1953) (Korean War).

phrase in Article 43 refers to undeclared wars as well, the court has created a contradiction that is certainly not based on any discernible legislative intent.[75]

Second, the court's decision does little to ultimately protect the constitutional rights of civilians accompanying armed forces abroad in war zones. If the military is deprived of jurisdiction, foreign courts (such as Vietnam in this case, which retains primary criminal jurisdiction by agreement) will take jurisdiction—a situation which provides no guarantee of constitutional rights for United States citizens.[76] And even though jurisdiction is waived by foreign courts, problems remain. Although the United States district courts can take jurisdiction,[77] the cost of transporting the defendant, the problems in obtaining evidence and witnesses, and the other problems of holding a trial far from the scene of the crime would make such a transfer process disadvantageous for all but the most serious crimes.[78] It would certainly be impossible to transfer petty offenses back to the United States for hearing.[79]

Third, the court's decision creates an unsatisfactory criterion for determining when hostilities reach the level of war. Even granting the court's assumption of a need for narrowly circumscribing military jurisdiction over civilians, it is questionable whether that need is properly met by an unrealistic definition of the term "in time of war." Common sense tells one that not every act of hostility creates a state of war between nations. But common sense also tells one that hostilities such as have occurred in Korea and Vietnam are war in every sense of the word, even though there was no formal declaration of war in either case. Holding that there is no "time of war" until there is a formal declaration is to judicially blind oneself to situations such as Korea and Vietnam, the warlike

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75 Appellee's Petition for Rehearing at 11-12, 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970).

76 SNEE AND PYE, STATUS OF FORCES AGREEMENT: CRIMINAL JURISDICTION 44 (1957). Perhaps the loss of any guarantee of Constitutional rights by civilians in foreign courts is an exaggerated danger. As the authors conclude:

> From our study of the case material and our discussions with the men working in the field, we believe that the trials of American military personnel in the four countries visited are conducted fairly and impartially. The few cases in which we disagreed with the result reached were, in our opinion, marginal cases. In no case studied did we feel that the fundamental rights of any serviceman were violated, or that procedures were followed or results were reached which were such as to shock the conscience or offend against a concept of ordered liberty. *Id.* at 124.

Whether this analysis of justice available in Status of Forces Agreement countries would be equally applicable to countries such as Vietnam, which are in a state of war, is the issue which will determine how seriously civilian Constitutional rights have been jeopardized by the *Averette* decision.

77 18 U.S.C. § 3238 (1964) provides:

> The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia.

78 The alternatives to court-martial and the problems presented by these alternatives are discussed in Dunbar, Criminal Jurisdiction Over Civilians in Peace and War 41-64 (1961) (unpublished thesis in Judge Advocate General's School, Charlottesville, Virginia).

79 *See generally* Ehrenhaft, *Policing Civilians Accompanying the United States Armed Forces Overseas: Can United States Commissioners Fill the Jurisdictional Gap,* 36 GEO. WASH. L. REV. 273 (1967); Comment, 21 OHIO ST. L.J. 438 (1960).

characteristics of which are per se evident.[80] The court may well have settled on this stringent definition of war in order to avoid another clash over the meaning and sufficiency of the Gulf of Tonkin Resolution. Such a renewed clash as to the Resolution's meaning might have provoked a confrontation with the Supreme Court not only over the validity of Article 2(10) but also over the meaning of the Resolution and the legality of the war itself. Regardless of the motivations of the court in so formulating its decision, it failed to establish an effective definition of what conditions constitute a "time of war."

There are at least three alternatives to the court's criterion for determining when a "time of war" occurs. One would be to return to the status quo ante of simply taking judicial cognizance of the fact of war, wherever the circumstances warranted making such a recognition. This alternative is highly flexible in application and could be subject to abuse; but if one accepts the proposition that there are valid interests on the part of the military in acquiring jurisdiction over civilians in war zones, then judicial recognition of the fact of war can satisfy this interest in the myriad situations where war zones can exist without a formal declaration of war. Another alternative would be to simply eliminate the "time of war" criterion and substitute an alternative system, such as executive order, to trigger military jurisdiction over civilians.[81] Finally, Chief Judge Quinn suggests the alternative which appears to have been strenuously avoided in this case: judicial discovery of some sort of independent Congressional participation in the creation of a *de facto* war.[82] In the case at hand, this would mean evaluating whether the Gulf of Tonkin Resolution constituted such an independent Congressional participation. But whatever form the final solution takes, it must include a reasonable criterion to determine when a war exists. The formal declaration is a seldom used and unsatisfactory criterion.

Christopher Schraff

80 The point was cogently made in New York Life Ins. Co. v. Bennion, 158 F.2d 260, 264 (10th Cir. 1946):

> When one sovereign nation attacks another with premeditated and deliberate intent to wage war against it, and that nation resists the attacks with all force at its command, we have war in the grim sense of reality. It is war in the only sense that men know and understand it. Mankind goes no further in his definitive search —he does not stand on ceremony or wait for technical niceties. To say that courts must shut their eyes to realities and wait for formalities, is to cut off the power to reason with concrete facts. We cannot believe that the courts are deprived of the power to deal with this vital question in a practical and realistic sense.

81 Note, 67 MICH. L. REV. 841 (1969).

82 This appears to be the position taken by Chief Judge Quinn in his opinion in United States v. Anderson, 17 U.S.C.M.A. 588, 38 C.M.R. 386 (1968), as well as his dissenting opinion in United States v. Averette, 19 U.S.C.M.A. 363, 366, 41 C.M.R. 363, 366 (1970).