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Military Law—PERSONS SUBJECT TO THE UNIFORM CODE OF MILITARY JUSTICE. *United States v. Averette*, 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970).

Raymond G. Averette was convicted by a general court-martial of conspiracy to commit larceny and attempted larceny of thirty-six thousand United States Government owned batteries.¹ At the time of the offenses, Raymond Averette was a civilian employee of a private firm in Saïgon, Republic of Vietnam.² Court-martial jurisdiction over the person of the accused was founded upon article 2(10) of the Uniform Code of Military Justice.³

The Court of Military Review reduced the sentence but affirmed the jurisdictional basis of the court-martial.⁴ On petition of the accused, the Court of Military Appeals granted review and reversed the proceedings below.⁵ The court held that only in time of *declared* war are civilians subject to the Uniform Code of Military Justice.⁶

The Code contains three groups of special provisions which are operable only "in time of war."⁷ The determination of when a state of war

1. *United States v. Averette*, C.M. 419556, *aff'd*, 40 C.M.R. 891 (1969), *rev'd*, 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970).

2. Mr. Averette was employed by Pacific Architects and Engineers, Inc. This firm was under contract to the United States forces in the Republic of Vietnam to perform post utilities functions.

3. 10 U.S.C. § 802(10) (1964) [hereinafter cited as UCMJ]: "The following persons are subject to this chapter:

.....
(10) In time of war, persons serving with or accompanying an armed force in the field. . . ."

4. *United States v. Averette*, 40 C.M.R. 891 (1969).

5. *United States v. Averette*, 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970).

6. *Id.* at 365, 41 C.M.R. at 365.

7. (a) The maximum penalty for certain offenses is changed "in time of war." The following offenses are punishable by death only "in time of war": desertion, UCMJ art. 85(c), 10 U.S.C. § 885(c) (1964); assaulting an officer, UCMJ art. 90, 10 U.S.C. § 890 (1964); and misbehavior of a sentinel, UCMJ art. 113, 10 U.S.C. § 913 (1964). Other offenses are cognizable only "in time of war": misconduct as a prisoner, UCMJ art. 105, 10 U.S.C. § 905 (1964); and spying, UCMJ art. 106, 10 U.S.C. § 906 (1964).

(b) The two-year statute of limitations for desertion and absence without leave, UCMJ art. 43(c), 10 U.S.C. § 843(c) (1964), is suspended indefinitely "in time of war." UCMJ art. 43(a), 10 U.S.C. § 843(a) (1964).

(c) Civilians accompanying an armed force in the field are subject to the UCMJ only "in time of war." UCMJ art. 2(10), 10 U.S.C. § 802(10) (1964).

See generally Note, *Military Law—"In Time of War" Under the Uniform Code of Military Justice: An Elusive Standard*, 67 MICH. L. REV. 841 (1969).

exists has prompted considerable litigation. The Supreme Court recognized as early as 1800 that a state of war could exist without a formal declaration by Congress.⁸ Later a United States circuit court also found that a formal declaration was not requisite to finding the existence of a state of war.⁹ The court remarked that the judicial branch was bound by political determinations of the issue.¹⁰

Traditionally, the Court of Military Appeals has approached this problem with a view to the pragmatic. *United States v. Bancroft* set forth what were considered the relevant criteria for finding a state of war.¹¹ The court then stated that “. . . it matters not whether the authorization for the military activities in Korea springs from Congressional declarations, United Nations Agreements or orders by the Chief Executive.”¹² In *United States v. Anderson*,¹³ the court applied similar reasoning in deciding that on November 3, 1964—and presumably at all times since that date—a state of war existed in the Republic of Vietnam.

The *Averette* case combined the problem of finding a satisfactory interpretation of the words “in time of war” with the delicate constitutional question of the extent of court-martial jurisdiction over civilians.¹⁴ Historically, the Supreme Court has viewed military authority over civilians with distaste.¹⁵ In a rapid succession of decisions from 1955 through 1969 the Court has made its position with respect to court-martial juris-

8. *The Eliza v. Tingy*, 4 U.S. (4 Dall.) 37 (1800).

9. *Hamilton v. McClaghry*, 136 F. 445 (C.C. Kan. 1905) (The Boxer Rebellion constituted a time of war).

10. *Id.* at 449.

11. 3 U.S.C.M.A. 3, 11 C.M.R. 3 (1953). The court said:

We believe a finding that this is a time of war, within the meaning of the language of the Code, is compelled by the very nature of the present conflict; the manner in which it is carried on; the movement to, and the presence of large numbers of American men and women on the battlefields of Korea; the casualties involved; the sacrifices required; the drafting of recruits to maintain the large number of persons in the military service; the national emergency legislation enacted and being enacted; the executive orders promulgated; and the tremendous sums being expended for the express purpose of keeping our Army, Navy and Air Force in the Korean theatre of operations.

Id. at 5.

12. *Id.*

13. 17 U.S.C.M.A. 588, 38 C.M.R. 386 (1968).

14. 19 U.S.C.M.A. at 365, 41 C.M.R. at 365.

15. See *Sterling v. Constantin*, 287 U.S. 378 (1932); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

diction abundantly clear. In *Toth v. Quarles*¹⁶ the Court held that the Constitution forbade the exercise of court-martial jurisdiction over a former serviceman for a violation of military law committed while he was a member of the service, but not prosecuted until after he was discharged. Two years later the Court, on similar reasoning, reversed two court-martial convictions of civilian dependents accompanying military members overseas.¹⁷ Finally, in *O'Callahan v. Parker*¹⁸ the Court refused to allow court-martial jurisdiction over a military member without a showing that the offense was "service connected."

The holding in *Averette* captures " 'the spirit of *O'Callahan*, and . . . the . . . precedents there reviewed . . . ' " ¹⁹ By restricting the "in time of war" activating clause of article 2(10) of the Uniform Code of Military Justice to times of *declared* war, the court avoids the constitutional question of the extent of Congressional power to subject civilians to court-martial jurisdiction.

The Court of Military Appeals distinguishes this approach from its earlier holdings on the question of when a state of war exists, and thereby allows those interpretations to remain undisturbed.²⁰ It now appears that where special provisions of the Uniform Code of Military Justice are activated by an "in time of war" clause two distinct criteria apply.

16. 350 U.S. 11 (1955).

17. *Reid v. Covert*, 354 U.S. 1 (1957). This decision applied only to capital crimes. The Court soon abrogated this distinction by extending the prohibition to trial of civilians by court-martial, in time of peace, to all offenses. *Kinsella v. Singleton*, 361 U.S. 234 (1960) (non-capital crime, civilian dependent); *Grisham v. Hagan*, 361 U.S. 278 (1960) (capital crime, civilian employee); *McElroy v. Guagliardo*, 361 U.S. 281 (1960) (non-capital crime, civilian employee). See generally Girard, *The Constitution and Court-Martial of Civilians Accompanying the Armed Forces—A Preliminary Analysis*, 13 STAN. L. REV. 461 (1961).

18. 395 U.S. 258 (1969). See generally Everett, *O'Callahan v. Parker—Milestone or Millstone in Military Justice?*, 1969 DUKE L. J. 853 (1969); Nelson & Westbrook, *Court-Martial Jurisdiction Over Servicemen for "Civilian" Offenses: An Analysis of O'Callahan v. Parker*, 54 MINN. L. REV. 1 (1969); Note, *Court-Martial Jurisdiction: The Effect of O'Callahan v. Parker*, 11 WM. & MARY L. REV. 508 (1969).

19. 19 U.S.C.M.A. at 364, 41 C.M.R. at 364, quoting from *Latney v. Ignatius*, 416 F.2d 821, 823 (D.C. Cir. 1969).

20. *Id.* at 365, 41 C.M.R. at 365. The court distinguishes its earlier holdings on two grounds: that the accused in the earlier cases had always been a military member, and that the earlier interpretations of the "in time of war" clauses had concerned procedural or substantive matters rather than jurisdictional as in *Averett*. In this context, the court appears to treat the UCMJ as merely a collection of statutes, each amenable to individual interpretation. However, the UCMJ purports to be a code, and as such it should not be capable of such construction.

First, where the provisions deal with the severity of a penalty²¹ or the statute of limitations²² the pragmatic criteria of *United States v. Bancroft*²³ are used to determine when a state of war exists. But when dealing with the extension of court-martial jurisdiction to include civilians, the special provision is activated only by a formal declaration of war by Congress.²⁴

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21. *United States v. Sanders*, 7 U.S.C.M.A. 21, 21 C.M.R. 147 (1956); *United States v. Bancroft*, 3 U.S.C.M.A. 3, 11 C.M.R. 3 (1953).

22. *United States v. Shell*, 7 U.S.C.M.A. 646, 21 C.M.R. 147 (1956); *United States v. Ayers*, 4 U.S.C.M.A. 220, 15 C.M.R. 220 (1954).

23. 3 U.S.C.M.A. 3, 11 C.M.R. 3 (1953).

24. 19 U.S.C.M.A. at 365, 41 C.M.R. at 365.