

May 1971

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Charles W. Boohar Jr.

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Charles W. Boohar Jr., *The Honorable Discharge: A Farewell to Responsibility for War Crimes?*, 12 Wm. & Mary L. Rev. 878 (1971), <https://scholarship.law.wm.edu/wmlr/vol12/iss4/9>

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THE HONORABLE DISCHARGE: A FAREWELL TO RESPONSIBILITY FOR WAR CRIMES?

On March 16, 1968, Company C, 1st Battalion, 20th Infantry conducted a military operation which allegedly degenerated into a massacre of the noncombatant populace of a South Vietnamese village known as My Lai(4).¹ The alleged massacre was not revealed until after some twenty-two participants had been discharged from the service.² These events triggered a vigorous debate over the effect of separation from the service upon the exercise of military jurisdiction.³ Subsequently, on April 8, 1971, the Department of Defense announced that because of an apparent lack of jurisdiction there would be no prosecution of discharged individuals under the Uniform Code of Military Justice.⁴

The incident at My Lai(4) has resulted in the arraignment of two enlisted members, and the conviction of one officer of Company C,⁵ all of whom were on active duty in April, 1969, when the facts surrounding the incident were uncovered.⁶ The failure to prosecute other alleged participants, some of whom have made what appear to be dangerous admissions,⁷ raises serious questions concerning the fundamental fairness of the American penal system. Could the criminal liability of an individual who has committed offenses in the nature of the alleged My Lai(4) incident turn absolutely upon whether he has been separated from the service? Could our penal system allow a discharged former serviceman to expose the misconduct of his compatriots, misconduct of which he, too, was a part, to the accountability of the criminal law while maintaining for himself a position of absolute immunity?⁸

1. For an extensive journalistic account of these events see S. HERSH, MY LAI 4—A REPORT ON THE MASSACRE AND ITS AFTERMATH 44-75 (1970).

2. 75 NEWSWEEK, March 23, 1970, at 37.

3. Compare McKenzie, *Special War Crimes Panel Weighed to Try Ex-GIs*, Washington Post, Nov. 27, 1969, at 1, col. 5, with 115 CONG. REC. 39,584 (1969) (remarks of Senator Young) and 115 CONG. REC. 36,344 (1969) (remarks of Senator Young).

4. Chapman, *Pentagon Can't Find Way to Prosecute Former Soldiers*, Washington Post, April 9, 1971, at A3, col. 5.

5. United States v. Hutto (Ft. McPherson, Ga. 1971); United States v. Calley (Ft. Benning, Ga. 1970); United States v. Mitchell (Ft. Hood, Tex. 1970).

6. S. HERSH, *supra* note 1, at 105-113.

7. See, e.g., 'So I . . . Killed 10 or 15,' Washington Post, Nov. 25, 1969, at 1, col. 1.

8. This immunity resulting from an unintended quirk in the penal system is not to be confused with immunity conferred by a sovereign in order to procure informa-

It would appear that affirmative answers to these questions, even in view of the Department of Defense pronouncement, would be offensive to basic concepts of American justice.

Much of the argument surrounding any assertion of criminal jurisdiction, military or civilian, over former members of Company C, and similar offenders, necessarily concerns the desirability, in terms of justice, of punishing American soldiers for crimes against the law of war. However, for the purposes of this study, this rather abstract desirability shall be taken as settled national policy.⁹ This note proposes to examine the effect of separation from the service upon the assertion of criminal jurisdiction over former servicemen who, while on active duty, have committed offenses against the law of war.¹⁰

tion or testimony which might not otherwise be available. The latter form of immunity when strictly circumscribed and sparingly employed doubtless serves a valid social purpose.

9. The national policy of mid-19th Century America can be taken from the following:

All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offence.

A soldier, officer or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior.

Cowles, *Universality of Jurisdiction Over War Crimes*, 33 CALIF. L. REV. 177, 201-02 (1945), quoting from F. Lieber, *Instructions for the Government of Armies of the United States in the Field*, UNITED STATES WAR DEPT. GENERAL ORDERS 100, ¶ 44 (Apr. 24, 1863).

Post World War II America reconsidered this problem. The following statement attributed to Justice Robert Jackson fairly summarizes the national policy of that time:

If certain acts in violation of treaties are crimes, they are crimes whether the United States does them or whether Germany does them, and we are not prepared to lay down a rule of criminal conduct against others which we would be unwilling to invoke against ourselves.

53 SATURDAY REVIEW, July 18, 1970, at 14.

10. It is no objection that Congress in providing for the trial of such offenses has not itself undertaken to codify that branch of international law or to mark its precise boundaries, or to enumerate or define by statute all the acts which that law condemns. . . . Similarly, by the reference in the 15th Article of War to "offenders or offenses that . . . by the law of war may be triable by such military commissions," Congress has incorporated by reference, as within the jurisdiction of military commissions, all offenses which are defined as such by the law of war, . . . and which may constitutionally be included within that jurisdiction. Congress had the choice of crystallizing in permanent form and in minute detail every offense against

JURISDICTION OVER THE PERSON

The English common law and most American jurisdictions have adopted the territorial theory of criminal jurisdiction.¹¹ Under this theory, the states may punish a criminal offender only when the situs of his crime is within the territorial limits of the state. Thus initially, it must be concluded that it is not possible to use the criminal sanctions of any state in connection with offenses committed in a foreign country by former servicemen. The territorial theory would, however, support an assertion of criminal jurisdiction over these offenders by the country in which the offenses were committed. However, when the offenses have been committed in allied countries there is an understandable reluctance on their part to prosecute the offender and thereby to risk creating animosity within the American public. Furthermore, the former serviceman may evade subjugation to foreign jurisdiction merely by remaining under the control of the United States where, presumably, he is immune from extradition.¹² Therefore, the effect of this sanction upon former servicemen is minimal.

The United States, as a member of the community of nations, is empowered to act in conformity with the recognized customs of nations.¹³ According to these customs, or international law, sovereign nations may exercise extraterritorial criminal jurisdiction on the basis of any of four theories.¹⁴ Of these theories, two confer adequate bases for

the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts. It chose the latter course.

Ex parte Quirin, 317 U.S. 1, 29-30 (1942).

11. R. PERKINS, *CRIMINAL LAW* 671 (2d ed. 1969).

12. The Supreme Court has said: "It is well settled that a foreign Army permitted to march through a friendly country, or to be stationed in it, by permission of its government or sovereign, is exempt from the civil and criminal jurisdiction of the place. . . ." *Coleman v. Tennessee*, 97 U.S. 509, 515 (1878). *See also* *Dow v. Johnson*, 100 U.S. 158 (1879). *But see* *Wilson v. Girard*, 354 U.S. 524 (1957).

13. *The Paquete Habana—The Lola*, 175 U.S. 677 (1900).

14. The theories are generally:

- (1) Personal—a sovereign may make and enforce rules for the conduct of its citizens no matter where they may be located.
- (2) Protective—a sovereign may exercise criminal jurisdiction whenever the acts are directed against and affect particular interests of that nation.
- (3) Passive Personality—a sovereign may exercise criminal jurisdiction on the basis of the nationality of the victim.
- (4) Universal Jurisdiction—any sovereign may exercise jurisdiction over certain classes of crimes.

See, Jurisdiction with Respect to Crime, 29 AM. J. INT'L L. SUPP. 435 (1935).

the assertion of criminal jurisdiction by the United States over former servicemen who have committed crimes against the law of war while serving in foreign countries. First, the personal theory of criminal jurisdiction maintains that a nation may make and enforce rules for the conduct of its citizens even when they are outside the territory of that nation.¹⁵ This theory has been recognized by the United States as sufficient to support the extraterritorial exercise of jurisdiction in at least two instances: The trial of individuals by consular courts in certain nations,¹⁶ and the applicability of the Uniform Code of Military Justice¹⁷ in all places.¹⁸ Additionally, the universal theory of criminal jurisdiction allows assertion of jurisdiction over certain offenses by any nation finding the offender within its territory.¹⁹ Although this latter theory formerly enjoyed general acceptance only with respect to brigands and pirates, there seems to be a growing acceptance of the theory with respect to offenders against the law of war.²⁰

One of the underlying concepts of justice in America is the feeling that there can be no punishment for harmful social conduct unless such punishment was provided for at the time of the offense.²¹ Thus any attempt by Congress to construct a forum for the trial of individuals who had committed offenses before the enactment of the statute would be subject to serious, but not necessarily fatal, *ex post facto* criticism. It is, therefore, necessary to consider the current jurisdictional grants to the tribunals which administer the federal criminal law to determine whether an adequate basis for the assertion of jurisdiction exists.

There is no question that participants in the alleged massacre at My Lai(4) and similar incidents who are still members of the armed forces may be prosecuted before military tribunals under the UCMJ.²² But, this problem is not as easily disposed of in the case of discharged indi-

15. *Blackmer v. United States*, 284 U.S. 421 (1932).

16. *In Re Ross*, 140 U.S. 453 (1891). *See also* *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Dorr v. United States*, 195 U.S. 138 (1904); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Downes v. Bidwell*, 182 U.S. 244 (1901).

17. 10 U.S.C. §§ 801-940 (1964) [hereinafter cited as UCMJ].

18. "This chapter applies in all places." UCMJ art. 5, 10 U.S.C. § 805 (1964).

19. C. HYDE, *INTERNATIONAL LAW, CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES*, 767-77 (2d ed., 1945); 2 G. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 681 (1941).

20. Cowles, *supra* note 9, at 216-18.

21. U.S. CONST. art. 1, § 9, cl. 3; *id.* art. 1, § 10, cl. 1.

22. UCMJ art. 2(1), 10 U.S.C. § 802(1) (1964). *See, The Law of Land Warfare* § 506 (United States Dept. of the Army, FM 27-10) (July 18, 1956).

viduals, whether viewed in the context of the jurisdiction of federal district courts or United States military tribunals.

At present, federal district courts have no jurisdiction over offenses committed by citizens of the United States in other nations.²³ Although the Supreme Court has intimated that the exercise of such jurisdiction would be constitutionally permissible²⁴ and the Department of Defense has recommended that such jurisdiction be granted as a matter of urgency,²⁵ to date Congress has not conferred extraterritorial jurisdiction upon the federal district courts.²⁶

Military tribunals are created by statute and may exercise jurisdiction only in consonance with that statute.²⁷ The statute creating military courts, the Uniform Code of Military Justice, is applicable in all places,²⁸ so that military courts may exercise jurisdiction over all offenses no matter where committed, provided that the accused is a person subject to the Code. Therefore, an examination of the jurisdictional grant of the UCMJ is in order.

As a traditional proposition, military jurisdiction over former servicemen has terminated upon discharge from the service.²⁹ However, in response to the near escape of the thief of the German crown jewels after World War II,³⁰ Congress, in 1950, inserted a jurisdiction saving provision in the UCMJ.³¹ This provision was subsequently declared unconstitutional insofar as it purported to subject a former serviceman

23. Cf. 18 U.S.C. § 3238 (1964).

24. *Reid v. Covert* 354 U.S. 1, 64 (Frankfurter, J., concurring); *id.* at 76 n.12 (Harlan, J., concurring); *id.* at 86-87 (Clark, J., dissenting). Cf. *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 245 (1960); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 21 (1955).

25. Letter from Frank J. Sherlock (Director, Legislative Reference Service, Department of Defense, Office of General Counsel), to Wilfred H. Rommel (Assistant Director for Legislative Reference, Bureau of the Budget), April 15, 1970.

26. Proposals for such action were before the last Congress. S.3188, S.3189, H.R. 4225, 91st Cong., 1st Sess. (1969); H.R. 18547, H.R. 18548, 91st Cong., 2d Sess. (1970).

27. W. WINTHROP, *MILITARY LAW AND PRECEDENTS* 86 (2d ed. 1920).

28. UCMJ art. 5, 10 U.S.C. § 805 (1964).

29. Zeigler, *The Termination of Jurisdiction over the Person and the Offense*, 10 *MILITARY L. REV.* 139, 144-47 (1960).

30. *Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1 Sess., 879-85 (1949). See *Durant v. Hiatt*, 81 F. Supp. 948 (1948). See also *United States ex rel. Hirshberg v. Cooke*, 336 U.S. 210 (1949). For other cases where former servicemen escaped punishment because of this lack of jurisdiction see Myers & Kaplan, *Crime Without Punishment*, 35 *GEO. L.J.* 303, 314-16 (1947).

31. UCMJ art. 3(a), 10 U.S.C. § 803(a) (1964).

to military jurisdiction³² for in service violations of the punitive articles of the Code.³³

Without regard to the above provision, the UCMJ grants jurisdiction to general courts-martial “. . . to try *any person* who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.”³⁴ The phrase *any person* brings within the jurisdiction of military tribunals all natural persons of whatever nationality or status.³⁵ Furthermore, former servicemen accused of participation in incidents comparable to the alleged incident at My Lai(4) are accused of “grave breaches” of the Geneva Conventions of 1949.³⁶ The Conventions entitle persons accused of “grave breaches” to be tried only in a manner comparable to that employed for the administration of criminal justice within the armed forces of the accusing sovereign.³⁷ Thus, the jurisdictional grant of the UCMJ is sufficiently broad to encompass former servicemen, since by the basic terms of the Geneva Conventions they have committed offenses which are triable by military tribunals.

32. United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955).

33. The punitive articles state substantive crimes. UCMJ arts. 77-134, 10 U.S.C. §§ 877-934 (1964).

34. UCMJ art. 18, 10 U.S.C. § 818 (1964) (emphasis added). A concurrent grant of jurisdiction to other military tribunals, such as military commissions and provost courts, is contained in UCMJ art. 21, 10 U.S.C. § 821 (1964). For discussion of these tribunals see Green, *The Military Commission*, 42 AM. J. INT'L L. 832 (1948).

35. The unqualified phrase *any person* appears in other articles of the UCMJ. See UCMJ art. 83, 10 U.S.C. § 883 (1964); UCMJ art. 104, 10 U.S.C. § 904 (1964); UCMJ art. 106, 10 U.S.C. § 906 (1964). These sections, when compared with the other punitive articles where the phrase *any person* is qualified by phrases such as *subject to this chapter*, clearly indicate the congressional intent to apply a broader scope to the provisions containing the unqualified words *any person*. See also MANUAL FOR COURTS-MARTIAL, UNITED STATES, ¶¶ 183, 185 (rev. ed. 1969).

36. “Grave breaches . . . shall be those involving any of the following acts, if committed against persons . . . protected by the present Convention: wilful killing, torture or inhumane treatment, . . . wilfully causing great suffering or serious injury to body or health. . . .” Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, art. 147, [1955], 3 U.S.T. 3516, T.I.A.S. No. 3365 [hereinafter cited as Geneva Convention—Civilians]. The protection afforded by the Conventions to persons residing within the territorial limits of South Vietnam is arguable. See Bond, *Protection of Non-Combatants in Guerrilla Wars*, 12 WM. & MARY L. REV. 787 (1971). But see note 76 *infra*.

37. Geneva Convention—Civilians, *supra* note 36, art. 146. See also Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, arts. 105-08, [1955] 3 U.S.T. 3316, T.I.A.S. No. 3364.

PROBLEMS IN ASSERTING JURISDICTION

Federal District Courts

Although the Supreme Court has said that the criminal jurisdiction of the federal district courts may be expanded to encompass extraterritorial offenses committed by United States citizens, the Department of Justice has continuously opposed such a plan.³⁸ This executive opposition stems not from abstract legal concepts, but from practical considerations engendered by the sometimes irrational vagaries of international politics.³⁹

The end of World War II signaled the beginning of an era in which the United States would for the first time maintain large military forces in foreign countries.⁴⁰ Along with this extensive foreign commitment came an increased sensitivity to accusations of usurpation of the sovereignty of the host nations. The propaganda conflicts of the following two decades have increased this sensitivity to the point that it now pervades every act of the United States government which might conceivably be considered related to international affairs. Consequently, the most cogent objection to the exercise of extraterritorial jurisdiction by the federal district courts concerns the possibility of international embarrassment which might accompany interference with the sovereignty of other nations.

As pointed out earlier, international law recognizes four basic theories which support the exercise of criminal jurisdiction by a nation. However, the feasibility of the exercise of this jurisdiction must be determined with a view to the general recognition by American courts that the primary right to punish criminal offenders resides in the nation wherein the offense was committed.⁴¹ This superiority of territorial jurisdiction is generally referred to as primary jurisdiction. The result of the recognition of this primary right is that the United States may undertake no prosecution without the consent, express or implied, of the nation entitled to exercise primary jurisdiction.⁴² Agreements cur-

38. Letter from Frank J. Sherlock, *supra* note 25, enclosure at 1.

39. *Id.*

40. For an excellent discussion of the size and scope of the post-war commitment of the United States in one area see Cleveland, *How to Make Peace with the Russians*, 58 DEP'T STATE BULL. 687 (1968); Rostow, *Europe and the United States—The Partnership of Necessity*, 58 DEP'T. STATE BULL. 680 (1968).

41. *Jurisdiction with Respect to Crime*, *supra* note 14.

42. Recognition of this concept can be traced to Chief Justice Marshall's statement that "[t]he jurisdiction of the nation, within its own territory, is necessarily exclusive

rently in force between the United States and the nations in which American servicemen and their civilian followers are present provide for waiver of this primary right only in favor of United States military authorities.⁴³ The proposed extension of the criminal jurisdiction of the federal district courts would require extensive renegotiation of these agreements. These renegotiations would probably be viewed by other nations as an overt attempt to extend United States sovereignty. That the United States could not risk such an interpretation of its actions, however incorrect, is patently obvious.⁴⁴

A further objection to the practicality of this exercise of extraterritorial jurisdiction by the federal district courts is that they would face insurmountable problems in procuring witnesses.⁴⁵ The power to compel the appearance of a witness at a judicial proceeding is essentially a police power, and the proposition that one nation may not exercise police power within the boundaries of another nation is an accepted canon of international law.⁴⁶ Although this canon may be varied by agreement, those presently existing provide only for exercise of limited police power by United States military authorities.⁴⁷ Still the possibility of renegotiating these agreements so that federal district courts, sitting in the United States, might compel necessary witnesses who are foreign nationals to appear at the trials of a United States citizen is doubtful.⁴⁸

The possibility that Congress might adopt this solution is of consequence to former servicemen whose acts were committed prior to the passage of an implementing statute only if the statute should contain a provision allowing retroactivity. As previously noted, such a provision would create a serious *ex post facto* question. Not all subsequent statutes

and absolute; it is susceptible of no limitation, not imposed by itself. . . . All exceptions, therefore, to the full and complete power of a nation, within its own territories, must be traced up to the consent of the nation. They can flow from no other legitimate source." *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 135 (1812).

43. The United States has agreements of this type in effect with over fifty nations. The most significant of these arrangements is with the members of the North Atlantic Treaty Organization. Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, art. VII, para. 1(a), [1953] 2 U.S.T. 1792, T.I.A.S. No. 2846 [hereinafter cited as NATO SOFA].

44. Schuck, *Trial of Civilian Personnel by Foreign Courts*, 2 MILITARY L. REV. 37, 39 (1958).

45. Girard, *The Constitution and Court-Martial of Civilians Accompanying the Armed Forces—A Preliminary Analysis*, 13 STAN. L. REV. 461, 509-11 (1961).

46. For an interesting example of the application of this principle see the case of Sun-Yet-Sen. I L. OPPENHEIM, *INTERNATIONAL LAW—A TREATISE* 567 (3d ed. 1920).

47. Cf. NATO SOFA, *supra* note 43, art. VII, para. 6(a).

48. Girard, *supra* note 45, at 509-10.

enacted with an eye toward punishing an act are *ex post facto* laws, however; the theory generally employed by the courts to save such statutes is that there has merely been a change of forum.⁴⁹ Should Congress grant the requisite extraterritorial jurisdiction to the federal district courts, it would be necessary to provide a code of substantive crimes to be enforced by that jurisdiction. Since those individuals whose acts were consummated prior to the enactment of such legislation committed offenses against the law of war and the UCMJ, the legislation would have an excellent chance of surviving an *ex post facto* attack if it were to incorporate by reference one or both of these codes of substantive crimes. This course seems neither desirable nor politically palatable in the current context.⁵⁰ A better solution to the problem of providing a code of substantive crimes seems to be the adoption of certain offenses punishable by the federal district courts if committed within the special maritime and territorial jurisdiction of the United States.⁵¹ If the latter course were followed, not only would the forum have been changed, but also, at least technically, so would have been the proscribed conduct. Therefore, with respect to former servicemen currently contemplating disclosure of personal activity, congressional action in this area would be unlikely to pass muster under the *ex post facto* test.

It seems, therefore, that although the exercise of jurisdiction by federal district courts over former servicemen accused of having committed war crimes while serving in a foreign nation is constitutionally permissible, it is not a practical possibility at this time. Under these circumstances, it is necessary to consider whether past Supreme Court decisions concerning the exercise of military jurisdiction over civilians foreclose trial of these former servicemen before military tribunals.

Military Tribunals

The recent announcement by the Department of Defense that it had been unable to find a way to prosecute former servicemen who were involved in the My Lai(4) incident⁵² might seem to render further discussion of the jurisdiction of military tribunals unnecessary. It must be remembered, however, that such a pronouncement carries little weight as guidance for judicial precedent and does not represent a def-

49. *Cook v. United States*, 138 U.S. 157 (1891).

50. Letter from Frank J. Sherlock, *supra* note 25, enclosure at 4.

51. *See, e.g.*, 18 U.S.C. §§ 81, 113, 114, 661, 662, 1111, 1112, 1113, 1363, 2031, 2032, 2111 (1964).

52. Chapman, *supra* note 4.

initive adjudication of the constitutionality of the UCMJ provisions discussed earlier. Thus the decision concerning the exercise of the at least arguable jurisdictional grant of articles 18 and 21 of the UCMJ may well be different under other executive leadership and a more favorable political climate. When contemplating declarations of personal participation in incidents similar to My Lai(4), former servicemen must weigh the possibility of such an executive change of heart against the fact that under the UCMJ there is no statute of limitations for the crime of murder.⁵³ It is therefore imperative that these former servicemen have a clear understanding of the constitutional aspects of the war crimes jurisdiction of military tribunals.

Congress may provide a system of tribunals for the maintenance of discipline in the armed forces⁵⁴ which is not subject to the grand jury and jury trial guarantees of the fifth and sixth amendments of the United States Constitution.⁵⁵ Under exactly what circumstances these tribunals may exercise jurisdiction over civilians, either former service members or other civilians having a close connection with the armed services, is not clear. At the outset, it is recognized that the trial of any individual not a service member by a military tribunal is in derogation of the specific guarantees of the Bill of Rights.⁵⁶ Therefore, any such exercise of jurisdiction must be strictly circumscribed and limited to those instances where it is essential to the maintenance of effective discipline of the armed services.⁵⁷

Although there had been earlier broad extensions of military jurisdiction over civilian American citizens, the Supreme Court in 1866 announced that if the civilian courts were open and functioning there could be no assertion of military jurisdiction over a civilian who had never had any connection with the armed services.⁵⁸ In 1955, former servicemen accused of certain offenses were classified as civilians en-

53. U.C.M.J. art. 43(a), 10 U.S.C. § 843(a) (1964).

54. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 123 (1866).

55. U.S. CONST. amend. V: "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 . . ."

U.S. CONST. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . ."

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

57. *Reid v. Covert*, 354 U.S. 1, 33-36 (1957).

58. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 121 (1866).

titled to the protections afforded by the fifth and sixth amendments.⁵⁹ These decisions and those which followed denying military jurisdiction over other civilians⁶⁰ were based on two considerations. The most important of these was a determination of the necessity of the proposed jurisdiction over civilians to the maintenance of discipline within the service. The other involved an inquiry into whether Congress might provide for the trial of these individuals in such a manner that their constitutional rights might be protected. Mr. Justice Black stated, in 1955, that the legislative power of Congress over courts-martial jurisdiction was limited to "the least possible power adequate to the end proposed." ⁶¹

Examples of "the least possible power"

The latest expression by the Supreme Court restricting the reach of military jurisdiction is found in the 1969 case, *O'Callahan v. Parker*.⁶² The Court in *O'Callahan* held that a serviceman on active duty who committed an offense which was not service connected could not be deprived of his fifth and sixth amendment rights by trial before a military tribunal.⁶³ This decision has raised a serious question as to the power of military tribunals to try soldiers in overseas areas for crimes which would not be service connected if committed within the continental United States.⁶⁴ In post-*O'Callahan* decisions both the Court of

59. *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955).

60. *Kinsella v. United States ex rel. 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. United States ex rel. Guagliardo*, 361 U.S. 281 (1960) (non-capital crime, civilian employee). See generally Girard, *supra* note 45.

61. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 23 (1955), quoting from *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 230 (1821) (emphasis added). Compare the quotation in *Toth* with the traditional statement of the extent of Congressional power found in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 315, 420 (1819): "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional."

62. 395 U.S. 258 (1969).

63. 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).

64. See Everett, *supra* note 63, at 890-91.

Military Appeals and the Court of Claims have sustained the jurisdiction of military tribunals in such cases.⁶⁵

There are two theories which sustain the jurisdiction of military tribunals to try cases arising in overseas areas and which are not service connected. First, it may be argued that all the acts of servicemen assigned overseas are service connected. Alternatively, it may be said that under the existing facts of international life, the Congress is exercising the least possible power adequate to the end proposed.⁶⁶ The effective disciplinary control of American soldiers on foreign soil in order to preserve hospitable relations with the host country. The latter theory seems to be the one upon which the courts have chosen to rely in sustaining this exercise of military jurisdiction.⁶⁷

The trial of offenders against the law of war has been traditionally recognized as a legitimate function of military courts, whether the offender be civilian⁶⁸ or military.⁶⁹ Furthermore, the mere fact that the civilian offender claimed United States citizenship and protection of the Bill of Rights has been held not to deprive military tribunals of jurisdiction where the individual was charged with a violation of the law of war.⁷⁰ Although these decisions were rendered prior to the major pronouncements by the Supreme Court in *United States ex rel. Toth v. Quarles*⁷¹ and *Reid v. Covert*,⁷² it seems that they are sustainable under Mr. Justice Black's "least possible power" theory.

Jurisdiction over Former Servicemen as an Exercise of "the least possible power"

The United States has a paramount interest in preserving the reputation of its armed services for respect of the international agreements

65. *Gallagher v. United States*, 423 F.2d 1371 (Ct. Cl.), *cert. denied*, 91 S. Ct. 58 (1970); *United States v. Keaton*, 19 U.S.C.M.A. 64, 41 C.M.R. 64 (1969); *United States v. Easter*, 19 U.S.C.M.A. 68, 41 C.M.R. 68 (1969); *United States v. Stevenson*, 19 U.S.C.M.A. 69, 41 C.M.R. 69 (1969); *United States v. Higginbotham*, 19 U.S.C.M.A. 73, 41 C.M.R. 73 (1969).

66. See Everett, *supra* note 63, at 866-67.

67. Cf. *Gallagher v. United States*, 423 F.2d 1371, 1374-75 (Ct. Cl. 1970); *United States v. Keaton*, 19 U.S.C.M.A. 64, 67, 41 C.M.R. 64, 67 (1969).

68. *Ex parte Quirin*, 317 U.S. 1 (1942).

69. *In re Yamashita*, 327 U.S. 1 (1946).

70. *Ex parte Quirin*, 317 U.S. at 36-41. See also *United States v. Schultz*, 1 U.S.C.M.A. 512, 4 C.M.R. 104 (1952).

71. 350 U.S. 11 (1955).

72. 354 U.S. 1 (1956).

concerning the permissible methods of conducting warfare.⁷³ Additionally, the treaties concerning this subject impose a positive duty upon all signatories to provide adequate machinery for the prevention and punishment of war crimes by members of their armed forces.⁷⁴ Unfortunately, the two-year service provisions of the Selective Service Act of 1967⁷⁵ create a situation in which it is not only possible but likely that servicemen who commit offenses against the law of war while serving in enemy country⁷⁶ will be discharged prior to discovery of their crimes.⁷⁷ The nexus between allowing such offenders to go unpunished and a possible breakdown in the effective discipline of the armed services seems clearer than the general interest of the Congress in seeing that all former servicemen are punished for crimes committed while on active duty.⁷⁸ This interest should afford Congress a broader scope of power to subject former servicemen to military jurisdiction than would be sustainable were the national interest of the United States not so clear.

73. President Nixon has phrased this interest in the following manner:

. . . [W]e have 1,200,000 Americans who have been in Viet Nam. Forty thousand of them have given their lives. Virtually all of them have helped the people of Viet-Nam in one way or another. . . .

Now, this record of generosity, of decency, must not be allowed to be smeared and slurred because of this kind of incident. That is why I am going to do everything I possibly can to see that all of the facts in this incident are brought to light and that those who are charged, if they are found guilty, are punished. Because if it is isolated, it is against our policy; and we shall see to it that what these men did, if they did it, does not smear the decent men that have gone to Viet-Nam in a very, in my opinion, important cause.

President Nixon's News Conference of December 8, 61 DEP'T STATE BULL. 617-18 (1969).

74. "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. . . ." Geneva Convention—Civilians, *supra* note 36, art. 146.

75. 50 U.S.C. § 454(b) (Supp. 1968).

76. ". . . [T]he country [is] none the less "enemy's country" and the territory hostile, because it [is] harassed by insurrection against a sovereignty perfect in law, rather than attacked or defended by a recognized belligerent." 24 OP. ATT'Y GEN. 570, 574 (1903).

77. Witness the fact that twenty-two out of approximately thirty-five participants in the incident at My Lai(4) had been discharged from the service prior to the discovery of their crime. Here suppression of the facts lasted only eighteen months.

78. The latter interest is definitely not sufficient to allow Congress to deprive former servicemen of constitutional rights to grand jury indictment and trial by jury. *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955).

Congress has only three alternative means available to insure that this national interest is protected with respect to individuals who might be discharged prior to discovery of their crimes. Initially, Congress might provide for an extension of the jurisdiction of the federal district courts. Secondly, military jurisdiction over these individuals might be preserved by extending the term of service for individuals returning from combat zones for a period during which exposure of violations of the law of war is likely to occur. Finally, military tribunals might exercise jurisdiction to try offenders against the law of war without regard to their status, military or civilian.⁷⁹

An extraterritorial extension of criminal jurisdiction of the federal district courts is not, for all practical purposes, available to the Congress. The renegotiation of international agreements which would be necessary to effectuate such an extension would run the risk of creating considerable adverse feeling toward the United States. In light of the current propaganda conflict between the United States and powerful nations of other political persuasions, Congress cannot afford to adopt such a course. It could not have been the intent of the Supreme Court in 1955 to place Congress in the position of requiring a choice between international embarrassment for failing to perform its treaty obligations⁸⁰ and international condemnation for a supposed usurpation of the sovereignty of less powerful nations.

The second alternative may be dismissed as involving an exercise of congressional power over the individual merely to effectuate the maintenance of military jurisdiction. This is an exercise of power superior to the mere statutory preservation of military jurisdiction over soldiers who are allowed to leave the service upon return from combat zones.

The third alternative, that of providing for a statutory preservation of military jurisdiction over former soldiers who are accused of having committed war crimes while on active duty, should be constitutionally sustainable as a congressional exercise of "the least possible power adequate to the end proposed."⁸¹ Such jurisdiction would be in consonance with the American attitude that war criminals are somehow "beyond the pale" and deserve to be treated only on the level of minimal human decency rather than on the chivalrous level normally accorded to American citizens accused of more conventional criminal conduct.⁸²

79. See notes 34, 35 *supra*.

80. Note 74 *supra*.

81. United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 23 (1955).

82. See Cowles, *supra* note 9.

The Attitude of the Newly-Composed Supreme Court

The years of the Warren Court saw severe restriction placed upon the extent of military jurisdiction. The majority decisions on this subject during those years generally reflected a strong reaction to what Mr. Justice Black characterized as a "harsh law which is frequently cast in very sweeping and vague terms . . .,"⁸³ rather than sound historical interpretation of the constitutional matters in question.⁸⁴ As the ultimate direction of these decisions became obvious, strong dissents began to appear culminating with Mr. Justice Harlan's dissent in *O'Callahan v. Parker*.⁸⁵ In that case, Justice Harlan, joined by Justices Stewart and White, would have found the congressional interest in punishing service members for non-service-connected crimes sufficient to support an exercise of military jurisdiction.⁸⁶

Chief Justice Burger expressed his views on the basic problems involved in a dissent to the circuit court of appeals' decision in *United States ex rel. Guagliardo v. McElroy*.⁸⁷ The court had reversed a lower court decision denying habeas corpus to an Air Force civilian employee at Nouasseur Air Depot, Morocco, who had been convicted of larceny by a court-martial. The then Judge Burger summarized his position by saying, "I am unable to join this kind of judicial negativism which strikes down sound, historically supported legal action and leaves a vacuum which cannot be filled."⁸⁸

It seems clear that on the question of whether the exercise of military jurisdiction over former servicemen accused of war crimes is an exercise of the least possible power adequate to the end proposed, the Chief Justice would join the dissenters in *O'Callahan*. On the other hand, four members of the majority of *O'Callahan* remain on the Court.⁸⁹ Any decision in the matter would probably fall upon the shoulders of the newest justice, Mr. Justice Blackmun, who coincidentally is the only justice who has not expressed a definite opinion in a closely related case.

83. *Reid v. Covert*, 354 U.S. 1, 38 (1957).

84. *United States ex rel. Guagliardo v. McElroy*, 259 F.2d 927, 936-39 (D.C. Cir. 1958) (Burger, J., dissenting).

85. 395 U.S. 258 (1969).

86. "The Government, thus, has a proper concern in keeping its own house in order, by deterring members of the armed forces from engaging in criminal misconduct on or off base. . . ." *Id.* at 282.

87. 259 F.2d 927, 933 (D.C. Cir. 1958) (Burger, J., dissenting).

88. *Id.* at 940.

89. Justices Black, Douglas, Brennan, and Marshall.

Prognostication as to the final decision of this all important justice will be left for those with closer Delphic connections.⁹⁰

CONCLUSION

The Department of Defense decision not to bring former servicemen involved in the My Lai(4) incident to trial before military tribunals places Congress in an awkward situation. Congress may now grant jurisdiction to the federal district courts to try these or similar cases. The considerations of international policy and ex post facto application, however, militate strongly against this action. Alternately, Congress might revise the UCMJ to make the appropriate jurisdictional grant to military tribunals unmistakably clear. Finally, Congress might simply let the current situation continue in the hope that a new executive might find more compelling the mandate to "... take Care that the Laws be faithfully executed. . . ." ⁹¹ The current political climate certainly points strongly toward the latter course of inaction. However, it must be remembered that the decisions in *Toth v. Quarles* and *Reid v. Covert* have created a jurisdictional vacuum which cannot, at least as a practical matter, be filled. The years of experience under the doctrine announced in these decisions have not resulted in a disastrous decline in the conduct of American citizens overseas. However, certain events during these years have served to point out the difficulties in filling the jurisdictional voids thus created. The current complexion of the Supreme Court seems to indicate that the extent of the voids already in existence will be limited where possible. Seemingly, the grounds for such limitation can easily be found where the nexus between the conduct to be punished and the maintenance of effective discipline within the service is clearer than in the earlier cases. This is currently the case when dealing with former servicemen who are accused of war crimes.

To describe the current state of the law with respect to punishing former servicemen for violations of the law of war as unclear, is to indulge in the worst form of understatement. There are certainly some who believe that the exercise of military jurisdiction over former servicemen would be unconstitutional under all circumstances.⁹² There are

90. Justice Blackmun seems to be inclined to join the minority in *O'Callahan*. See the opinion of the Court, by Mr. Justice Blackmun in *Relford v. Commandant*, 91 S. Ct. 649 (1971).

91. U.S. CONST. art. 2, § 3.

92. Secretary of Defense Laird now makes a claim that Pentagon will bring

others who would consider the recent disclaimer of jurisdiction by the Department of Defense as a license to former servicemen to make admissions without fear of prosecution.⁹³ In the final analysis, it is through this maze of existing criminal jurisdiction, executive inaction, possible congressional action, and ultimate judicial review that the former serviceman who wishes to disclose his own misconduct must consider his ultimate decision.

CHARLES W. BOOHAR, JR.

to trial former U.S. soldiers who participated. Secretary Laird would do well to read the Bill of Rights of our Constitution before making any claim that Pentagon will bring to trial former soldiers who are now in civilian life.

Very definitely, Paul Meadlo of Indiana and others who admittedly shot and killed some of these civilians on order of their officers and who are no longer in the Army but are now in civilian life cannot be court-martialed....

The Supreme Court has definitely settled any claim that the Pentagon can bring charges against former soldiers. The United States has no extradition treaty whatever with Saigon militarist regime or with the Government of South Vietnam. Therefore, Paul Meadlo and all others who participated cannot be extradited from the United States and placed on trial in South Vietnam. Therefore, Paul Meadlo and all these former soldiers now in civilian life are definitely immune from prosecution for their part in the Mylai massacre....

Secretary Laird knows, and Lieutenant Colonel Kennedy should know, that the United States has no extradition treaty whatever with the Government of South Vietnam. Therefore, civilians who were in the Army on March 16, 1968, cannot be extradited. They cannot be placed on trial for murder.

The Pentagon which has not given evidence of much brain power in recent years cannot devise in 1969 any new laws that would permit the trial, conviction, and imprisonment of any person now a civilian who participated in a crime while in the Armed Forces in March of 1968.

115 CONG. REC. 39,584 (1969) (remarks of Senator Young).

93. The Citizen's Commission of Inquiry into U.S. War Crimes has predicted that the recent Department of Defense announcement will "encourage thousands of Vietnam veterans to come forward and relate their own experiences in Vietnam without fear of criminal prosecution." Chapman, *supra* note 4, at col. 6.