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Thomas R. Crawford

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As the United States' involvement in Vietnam increased in the 1960's, the government found it necessary to deploy an increasingly large number of United States civilians to support our combat troops there. In a recent case, *United States v. Averette*,[1] the United States Court of Military Appeals[2] was directly presented with the question of whether these civilians are amenable to trial by court-martial for crimes committed in Vietnam.

Averette, a civilian employee of an army contractor in Vietnam, was a mobile equipment supervisor in charge of a motor pool at Camp Davies.[3] This job, which required Averette to work almost exclusively with active army personnel, entailed providing maintenance for all vehicles and equipment in the army motor pool at Saigon, keeping logbooks, and dispatching military vehicles.[4] These vehicles were used at five different army installations in Vietnam for repair and utility work and thus were in direct support of the war effort.[5] Additionally, Averette was closely integrated into the army life at Camp Davies in that "[h]e had access to a variety of Army facilities and benefits including the post exchange, the commissary, banking privileges, and other welfare and recreational activities."[6]

A general court-martial convicted Averette of conspiracy to commit larceny and attempted larceny of 36,000 Government-owned batteries.[7] The conspiracy involved military personnel with whom Averette was associated.[8] Appealing to the Court of Military Appeals, Averette successfully challenged the validity of the Army's jurisdiction by contending that since Congress had not formally declared war, the Vietnamese conflict did not constitute "a time of war" as required by article 2(10)[9] of

[1] 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970) (2-1 decision).

[2] Consisting of three civilian judges who hear appeals from all of the services, the Court of Military Appeals is the highest appellate court in the military judicial system. 10 U.S.C. § 867 (Supp. V, 1970).

[3] Averette v. Dillon, Civil No. L-863 (D. Kan., filed Jul. 24, 1969).

[4] *Id.* This intimate connection between Averette's employment and the military was not mentioned in the opinion of the Court of Military Appeals.

[5] *Id.* (not mentioned by the Court of Military Appeals).

[6] 19 U.S.C.M.A. at 365, 41 C.M.R. at —.

[7] *Id.* at 363, 41 C.M.R. at —.

[8] Averette v. Dillon, Civil No. L-863 (D. Kan., filed Jul. 24, 1969) (not mentioned by the Court of Military Appeals).

[9] UCMJ art. 2(10), 10 U.S.C. § 802(10) (1964) provides: "In time of war,

the Uniform Code of Military Justice.[10]

Before considering the validity of this contention and the effect of the court's acceptance of it, it is imperative to first consider the historical development of court-martial jurisdiction over civilians in general, and of article 2(10) specifically. The basis of American court-martial jurisdiction over civilians can be directly traced to a provision of the British Articles of War of 1765 which provided that "[a]ll 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 the Rules and Discipline of War."[11] In 1775 the Continental Congress enacted into the American Articles of War[12] a strikingly similar provision, which was thereafter included without substantial change in each revision of the Articles of War up to and including the Articles of War of 1874.[13]

The first significant change came with the enactment of article 2(d)[14] of the Articles of War of 1916, which for the first time expanded military jurisdiction to encompass civilians who accompanied the armed forces outside the territorial limits of the United States *in time of peace*.[15] It was contended that such jurisdiction was a constitutionally valid exercise of Congress' power "[t]o make Rules for the Government and Regulation of the land and naval Forces."[16] Congress' power to establish military

persons serving with or accompanying an armed force in the field [are subject to trial by court-martial]."

[10] 10 U.S.C. §§ 801-940 (1964).

[11] British Articles of War of 1765 section XIV, article XXIII. Reprinted in W. WINTHROP, MILITARY LAW AND PRECEDENTS app. VII, at 941 (2d ed. reprint 1920) [hereinafter cited as WINTHROP].

[12] The Articles of War were statutory provisions enacted by Congress in furtherance of military administration and discipline. Although the original Articles of War predate the Constitution, the later Articles were enacted under Congress' article I legislative power "[t]o make Rules for the Government and Regulation of the land and naval Forces" and its broader "war powers," which can be found scattered throughout article I, section 8 of the Constitution.

[13] The various articles mentioned are reprinted in WINTHROP apps. VII-XIII 941-91.

[14] Article of War 2(d), Act of Aug. 29, 1916, ch. 418, § 1, 39 Stat. 651 provided for jurisdiction over:

> 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.

[15] F. WIENER, CIVILIANS UNDER MILITARY JUSTICE 227-31 (1967) [hereinafter cited as WIENER].

[16] U.S. CONST. art. I, § 8.

courts independent of article III judicial power[17] and to make civilians amenable to these courts during *wartime* had not been seriously questioned. Apparently it was assumed that this power could be extended to make certain civilians amenable to courts-martial during *peacetime*. At any rate article 2(d) remained unchanged in the two subsequent revisions[18] of the Articles of War, and substantially the same provision was enacted into the Uniform Code of Military Justice in 1950.[19] The traditional wartime jurisdictional provision can be found in article 2(10) of the Uniform Code,[20] while the peacetime extension of 1916 is set forth in article 2(11).[21]

Shortly after the Uniform Code was enacted, the Supreme Court began to look with disfavor upon any expansion of court-martial jurisdiction. This attitude, stemming largely from the fact that certain constitutional safeguards inherent in article III courts are not constitutionally required of military courts,[22] culminated in a series of Supreme Court holdings unconditionally striking down court-martial jurisdiction over civilians in time of peace.[23] Consequently, for all practical purposes, juris-

[17] Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (1857).

[18] Act of June 24, 1948, ch. 625, Title II. § 202, 62 Stat. 628, and Act of June 4, 1920, ch. 227, subch. II, § 1, 41 Stat. 787.

[19] Act of May 5, 1950, ch. 169, 64 Stat. 107 (now 10 U.S.C. §§ 801-940 (1964)). *Compare* Article of War 2(d), Act of August 29, 1916, ch. 418, § 1, 39 Stat. 651 *with* UCMJ arts. 2(10)-(11), 10 U.S.C. § 802 (10)-(11).

[20] See note 9 *supra*.

[21] UCMJ art. 2(11), 10 U.S.C. § 802(11) (1964) provides:

> 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 [are subject to trial by court martial].

[22] *E.g.*, the fifth amendment expressly exempts "cases arising in the land or naval forces. . . ." This exception has been extended by implication to the sixth amendment right to a jury trial. *Ex parte* Quirin, 317 U.S. 1, 40 (1942); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 123 (1866). Furthermore, the array of safeguards provided in article III are not constitutionally required of military courts.

[23] Originally the Supreme Court had allowed court-martial jurisdiction over civilians in peacetime. Reid v. Covert, 351 U.S. 487 (1956); Kinsella v. Krueger, 351 U.S. 470 (1956). However, a rehearing was granted in both of these habeas corpus cases and subsequently the Court held that courts-martial could not constitutionally try civilian *dependents* charged with *capital* crimes *in time of peace*. Reid v. Covert, 354 U.S. 1 (1957). Less than three years later this holding was expanded to include *non-capital* offenses. Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960). It was further extended to cover *capital* crimes committed by civilian *employees* of the armed forces in time of peace. Grisham v. Hagan, 361 U.S. 278 (1960). Finally it was extended to cover *non-capital* crimes committed by civilian *employees*. McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960). These were all habeas corpus proceedings. For a concise

diction under article 2(11) is void. Thus, if jurisdiction is to be obtained over civilians, it must be based on article 2(10), the wartime jurisdictional provision. In spite of their disapproval of subjecting civilians to military justice, the courts have long recognized that *wartime conditions* warrant some restriction of civilian rights.[24] Traditionally, jurisdiction in such cases has been based constitutionally not upon article I, section 8, clause 14 as was peacetime jurisdiction, but rather upon Congress' broader "war powers"[25] and has repeatedly been upheld as constitutional.[26] Indeed, Justice Black, recognizing Congress' broad "war powers" and the court-martial jurisdiction which coincides with these powers, wrote in *Reid v. Covert*: "We believe that Article 2(10) sets forth the maximum historically recognized extent of military jurisdiction over civilians under the concept of 'in the field.' "[27] Circuit Judge (now Chief Justice) Burger also recognized such wartime jurisdiction and expressed the view that "[w]ithout doubt military jurisdiction over essential civilian employees at overseas bases would be sustained in wartime."[28]

Since none of the cases striking down court-martial jurisdiction over civilians in peacetime directly affected the traditional wartime jurisdiction, the Army in *Averette* based jurisdiction on article 2(10). Before a civilian is amenable to court-martial under article 2(10) the three conditions of the provision must be met: the civilian must be (1) "serving with or accompanying an armed force" (2) "in the field" (3) during a "time of war." Thus the court in *Averette*, by holding that "war" means a war formally declared by Congress, found that the third condition was not met and further restricted military jurisdiction over civilians.

Chief Judge Quinn, dissenting in *Averette*,[29] noted that a federal district court in Kansas had earlier expressly rejected this view in denying

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discussion of the rise and fall of military jurisdiction over civilians in time of peace see WIENER app. IV.

[24] Reid v. Covert, 354 U.S. 1, 33 (1957).

[25] The "war powers" stem from article I, section 8, of the Constitution which gives Congress the power "[t]o make all Laws which shall be necessary and proper . . . [to] provide for the common Defence . . . declare War . . . raise and support Armies . . . provide and maintain a Navy . . . [and] provide for calling forth the Militia to execute the Laws of the Union . . . and repel Invasions. . . ."

[26] Perlstein v. United States, 151 F.2d 167 (3d Cir. 1945), *cert. granted*, 327 U.S. 777 (1946), *dismissed as moot*, 328 U.S. 822 (1946); Hines v. Mikell, 259 F. 28 (4th Cir. 1919), *cert. denied*, 250 U.S. 645 (1919).

[27] 354 U.S. 1, 34 n.61 (1957).

[28] United States *ex rel.* Guagliardo v. McElroy, 259 F.2d 927, 937 (D.C. Cir. 1958) (dissenting opinion).

[29] 19 U.S.C.M.A. at 366, 41 C.M.R. at —.

Averette habeas corpus relief.[30] A survey of the case law dealing with the interpretation of the words "in time of war" as used in a military sense lends support to Chief Judge Quinn's view that a formal declaration of war is not a prerequisite for the exercise of article 2(10) jurisdiction.[31] Also, the Supreme Court in 1800 declared that hostilities between the French and American naval forces were "war" notwithstanding the absence of a formal declaration by Congress.[32] The test enunciated was whether Congress had authorized the hostilities, not whether Congress had declared war.[33] Furthermore, war in the context of every American military code has consistently been interpreted by the courts to include undeclared wars.[34] Thus the Indian wars of the nineteenth century constituted war[35] as did the Boxer Rebellion in 1900.[36] The Court of Military Appeals itself previously followed this reasoning by observing that both the Korean[37] and Vietnamese[38] conflicts fell within "a time of war." Thus, arguably, the court had ample precedent to hold that the Vietnamese conflict constituted "a time of war."

Indeed, Chief Judge Quinn noted that less than three years earlier the Court of Military Appeals in *Latney v. Ignatius*[39] rejected a contention "that court-martial jurisdiction under Article 2(10) depended upon a specific declaration of war by Congress."[40] *Latney* is particularly significant because it, like *Averette*, is concerned with article 2(10) jurisdiction over a civilian in Vietnam. Considering the fact that Latney was

[30] Averette v. Dillon, Civil No. L-863 (D. Kan., filed Jul. 24, 1969).

[31] *See, e.g.*, Wiener, *Courts Martial for Civilians Accompanying the Armed Forces in Vietnam*, 54 A.B.A.J. 24 (1968) and the cases cited therein.

[32] Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800).

[33] *Id.* at 43-44.

[34] Wiener, *Courts Martial for Civilians Accompanying the Armed Forces in Vietnam*, 54 A.B.A.J. 24 (1968).

[35] Montoya v. United States, 180 U.S. 261 (1901).

[36] Hamilton v. McClaughry, 136 F. 445 (C.C.D. Kan. 1905).

[37] *See, e.g.*, United States v. Shell, 7 U.S.C.M.A. 646, 23 C.M.R. 110 (1957); United States v. Sanders, 7 U.S.C.M.A. 21, 21 C.M.R. 147 (1956); United States v. Ayers, 4 U.S.C.M.A. 220, 15 C.M.R. 220 (1954); United States v. Bancroft, 3 U.S.C.M.A. 3, 11 C.M.R. 3 (1953).

[38] United States v. Anderson, 17 U.S.C.M.A. 588, 38 C.M.R. 386 (1968). However, it must be pointed out that in *Averette* the Court of Military Appeals specifically mentioned this case and those cited in note 37 *supra* and noted that none concerned subjecting a civilian to military trial, but rather dealt with other provisions of the Code and affected defendants who were soldiers and thus already amenable to trial by court-martial. *But see* United States v. Burney, 6 U.S.C.M.A. 776, 787, 21 C.M.R. 98, 109 (1965).

[39] 17 U.S.C.M.A. 677 (1967).

[40] 19 U.S.C.M.A. at 366, 41 C.M.R. at —.

only negligibly connected with the military, it seems anomalous that when presented with *Averette*, in which the accused was intricately connected with the military, the court would disregard its former decision and require, for the first time, a formal declaration of war by Congress.

However, within two years after *Latney* was decided, two significant developments occurred which undoubtedly influenced the Court of Military Appeals: *O'Callahan v. Parker*[41] was decided by the Supreme Court and four weeks later, Latney was granted habeas corpus relief in the federal courts.[42] Although it is by no means evident from the opinion itself that the Court of Military Appeals in *Averette* relied on *O'Callahan* and its interpretation in *Latney*, the court did state that "[a]s 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."[43] As *O'Callahan* is the only significant Supreme Court decision "in this area" handed down between the time that *Latney* and *Averette* were decided by the Court of Military Appeals, it must be assumed that the court was referring to *O'Callahan*.

Although *O'Callahan* was concerned with military jurisdiction over a *serviceman* within the territorial limits of the United States *in time of peace*,[44] it arguably has some effect on court-martial jurisdiction over civilians such as Averette. The *O'Callahan* decision drastically limited traditional military jurisdiction by requiring, *inter alia*, that the offense be "service-connected" before military jurisdiction can be exercised.[45] In *O'Callahan* Justice Douglas commenting upon the *Reid-Singleton-Grisham-McElroy* line of cases[46] wrote that "[t]hese 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."[47] Although the circuit court in *Latney* noted that Justice Douglas failed to mention that "these cases" dealt solely with *peacetime* jurisdiction under article 2(11), not *wartime* jurisdiction under article 2(10), it felt that

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[41] 395 U.S. 258 (1969).
[42] Latney v. Ignatius, 416 F.2d 821 (D.C. Cir. 1969) (per curiam).
[43] 19 U.S.C.M.A. at 365, 41 C.M.R. at —.
[44] 395 U.S. 258, 273 (1969).
[45] *Id.* For a concise discussion of the *O'Callahan* case see Note, *Military Law—Jurisdiction of Courts-Martial to Try Servicemen for Civilian Offenses*, 48 N.C.L. REV. 380 (1970).
[46] *See* cases cited note 23 *supra*.
[47] 395 U.S. 258, 267 (1969) (dictum).

> [i]t is fair to conclude that the *spirit of O'Callahan, and of the other Supreme Court precedents there reviewed, precludes an expansive view of Article 2(10) . . . even assuming as we do that this is a time of undeclared war which permits some invocation of the war power under which Article 2(10) was enacted.* We think Article 2(10) may not be read so expansively as to reach this civilian seaman, employed by a private shipping company, and in no closer physical proximity or duration to the armed forces than a seaman in port for a short period, living on his ship and under the discipline of his civilian captain while waiting for it to turn around, not assimilated to any military personnel in terms of living quarters or conditions, who had been arrested for a [non service-connected] crime committed in a bar frequented by civilians in port.[48]

Thus it can be seen that the federal court in *Latney* did not feel that *O'Callahan* demanded a "strict and literal construction of the phrase 'in time of war' " as did *Averette.* Instead, the court interpreted *O'Callahan* as intimating that before article 2(10) jurisdiction can be constitutionally applied the military must first show an intimate connection between the military and the accused. Such an analysis shifts the emphasis from the "time of war" requirement to more relevant policy considerations, and suggests a more pragmatic approach than that used in *Averette* for determining the jurisdictional bounds of article 2(10). The better approach would seem to require that three conditions coexist in order for jurisdiction under article 2(10) to vest in a time of undeclared war: (1) that there be an intimate connection between the accused and the military; (2) that the offense be service-connected in the sense that it in some way significantly affects military authority, security, or property; and (3) that the traditional broad view of "in the field"[49] be limited to the area of actual hostilities.

Such an approach appears to be warranted and can be supported by

[48] 416 F.2d at 823 (emphasis added).

[49] Hines v. Mikell, 259 F. 28 (4th Cir.), *cert. denied,* 250 U.S. 645 (1919). The court, distinguishing "in the field" from "in the theater of operations," observed that the question of whether or not an armed force is "in the field" "is not to be determined by the locality in which the army may be found, but rather by the activity in which it may be engaged at any particular time." *Id.* at 34. The court thus found that a stenographer employed by the Army at a temporary training camp in the United States was "in the field" during World War I. Similarly, a merchant ship and crew have been held to be "in the field." McCune v. Kilpatrick, 53 F. Supp. 80 (E.D. Va. 1943); *Ex parte* Gerlach, 247 F. 616 (S.D.N.Y. 1917). See W. AYCOCK & S. WURFEL, MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE 57-58 (1955).

precedent. As was noted the existence of war in the context of all military codes has been determined by the realities of the situation, not by the presence of a formal declaration by Congress. Secondly, while recognizing the constitutional power of Congress to provide for wartime military jurisdiction over civilians, the Court in *Reid* seemed to call for a restriction of this jurisdiction to the actual area of hostilities by stating that "[t]he exigencies which have required military rule on the battlefront are not present in areas where no conflict exists."[50] Finally, the general spirit of the *Reid* line of cases and the further limit placed on court-martial jurisdiction by *O'Callahan* would appear to require a direct and intimate connection between the military, the accused, and the crime.

The suggested analysis necessitates an examination of the underlying policy considerations and a balancing of the competing interests of the individual and the military. Obviously, the purpose behind article 2(10) is to insure that the military effectively functions under wartime conditions with a minimum of interference from its civilian component. In an area of actual hostilities, military commanders should have adequate powers to swiftly and effectively deal with those—both civilians and servicemen—who significantly threaten the morale, discipline, or security of American personnel in the war zone. In a situation such as Vietnam the necessity of article 2(10) jurisdiction is vividly portrayed. The combat readiness of our troops, and hence the lives of many Americans, can be severely jeopardized if the military has no effective means of dealing with such problems as the sale of illegal drugs, prostitution, blackmarket operations, unauthorized dealings with the enemy, and numerous petty crimes.[51] Such crimes are more easily perpetrated by those who are directly connected with the military operations. A trial by a civil court, if available, does not provide the swift discipline and strong deterrence necessary to the military effort.

An additional consideration—that of the "jurisdictional gap"—is also pertinent here. While it is constitutionally permissible to try citizens in a United States court for crimes committed outside the territorial limits

[50] Reid v. Covert, 354 U.S. 1, 35 (1957). The Court also declared that "[f]rom a time prior to the adoption of the Constitution the extraordinary circumstances present in an area of actual fighting have been considered sufficient to permit punishment of some civilians *in that area* by military courts under military rules." *Id.* at 33 (emphasis added).

[51] *See, e.g.*, United States v. Burney, 6 U.S.C.M.A. 776, 798-800, 21 C.M.R. 98, 120-22 (1956).

of the United States,[52] generally, only crimes against the Government are cognizable.[53] On the other hand, extraterritorial crimes against private individuals or their property (*i.e.*, assault, murder, and larceny) are not cognizable in federal courts.[54] Fortunately, a crime such as Averette's would be triable in a United States district court although such a trial would be plagued with lack of power to compel the attendance of foreign witnesses, tremendous expense, and fantastic waste.[55] However, in *Averette* the court's "time of war" holding was not limited to such offenses, and apparently would apply to murder abroad and numerous other crimes not triable in the United States courts. For such offenses the only acceptable alternative may well be to turn the accused over to the appropriate foreign government where he would enjoy no United States constitutional rights, hoping that the foreign government will be interested enough to prosecute, yet detached enough to give a fair trial.

Of necessity military trials do not provide the full array of constitutional safeguards that are inherent in the article III courts. However, the exigencies of wartime justify some restrictions on the rights of civilians who are intimately connected with the military operation. Indeed, this is the central idea behind the constitutional provisions for special war powers. The "formal declaration test" set forth by the Court of Military Appeals, while providing an objective test for determining at what point jurisdiction vests, ignores both the rationale for such jurisdiction, and the fact of modern international life that most shooting wars rage on without de jure declaration. The proposed test is more flexible and would require the court to look at underlying policy considerations. It does not indiscriminately include or exclude a civilian. Unwarranted encroachment upon the civilian's constitutional rights is protected, but if the needs of national military policy are adequately shown then jurisdiction vests.

THOMAS R. CRAWFORD

[52] U.S. CONST. art. III, § 2; 18 U.S.C. § 3238 (1964).
[53] United States v. Bowman, 260 U.S. 94 (1922).
[54] *Id.* at 98.
[55] *See, e.g.*, United States v. Burney, 6 U.S.C.M.A. 776, 802-03, 21 C.M.R. 98, 124-25 (1956).