CRIME WITHOUT PUNISHMENT—EX-SERVICEMEN, CIVILIAN EMPLOYEES AND DEPENDENTS

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Crime without punishment does not conform to prevailing concepts of justice. Yet a jurisdictional gap now exists which permits some categories of crime to go unpunished. Most recently the problem has been called to public attention in reference to alleged atrocities committed in Viet Nam by servicemen who subsequently were discharged and no longer can be tried by court-martial and who, as a practical matter, do not seem subject to trial in any other tribunal. A decade ago several Supreme Court decisions established the general rule that, at least in peacetime, no American military tribunal would have jurisdiction to punish offenses committed by civilian employees or dependents accompanying the armed forces overseas. Thus persons in this category often enjoy virtual immunity from prosecution.

I

TOOTH v. QUARLES

In the wake of World War II there came to the attention of Congress several instances in which crimes committed by servicemen escaped punishment because the culprits had been discharged prior to discovery of the offenses and could not be punished by court-martial. For example, Hirshberg v. Cooke\(^1\) concerned an enlisted man who had been a Japanese prisoner of war and, after his liberation, was honorably dis-

\(^1\) 356 U.S. 210 (1949).
charged from the Navy on March 26, 1946 because of the expiration of his original term of enlistment. He reenlisted the next day in the Navy and a year later was court-martialed on charges of mistreating other American prisoners of war while in a Japanese prison camp. The Supreme Court ruled—although not as a matter of constitutional interpretation—that crimes committed in one enlistment could not be made the basis for court-martial jurisdiction during a later enlistment; and by this ruling the defendant was given virtual immunity from punishment for his alleged misdeeds. Congress was also acquainted with a case which concerned a WAC officer who, while on terminal leave, was apprehended by military authorities seeking to court-martial her for participating in the theft of the crown jewels of Hesse.1

Another case illustrating the problem became widely known in 1950–51 after the Uniform Code had been drafted. Two American OSS agents, while on a World War II assignment in Italy, had apparently murdered their superior officer and disposed of his corpse in a deep lake. Since both of them had been discharged from the armed services before these events came to light, they were not subject to court-martial under the existing law; nor did any American civil court have statutory authority to try them. Extradition to Italy also failed; and so the two men were free from punishment.2

Article 3(a) of the Uniform Code3 was designed to close the jurisdictional gap by providing that, unless prohibited by the statute of limitations contained in Article 43 of the Code, any person subject to the Code who committed an offense thereunder punishable by five years or more would remain amenable to trial by court-martial if he could not be tried for the offense in a State or Federal civil court.

The constitutionality of this provision was soon considered by the Supreme Court in Toth v. Quarles.4 Robert Toth had served as an airman in Korea; and allegedly he was involved with an officer and another airman in the slaying of a Korean who had been arrested near a bomb dump. The other two men were tried by court-martial and found guilty of murder and conspiracy to murder (with Toth named as a co-conspirator).5 Each was sentenced to life imprisonment, although upon review the sentences were drastically reduced. Since Toth had already been discharged and returned to civilian life, the Air Force sought to proceed against him under Article 3(a), there being no American civil court, whether state or federal, which had authority to punish a homicide committed in Korea.

The opinion of the Supreme Court, written by Mr. Justice Black and joined in by five other Justices, centers on the lack of power under the Constitution to provide for trial by court-martial of a person who has terminated all connection with the armed forces. The authority conferred on Congress by Article One, Section Eight, Clause Fourteen of the Constitution “to make rules for the government and regulation of the land and naval forces” was considered by the Court “to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces.” This “natural meaning” found by the Court in the Constitution came as a surprise to many persons familiar with military law.6

In its opinion the Supreme Court also pointed to the supposed dangers in military trials and the advantages of a trial in federal civil courts—such as the independence granted by Article Three of the Constitution to federal judges, who hold life tenure, and the constitutional provisions for grand

1 Hironimus v. Durant, 168 F. 2d 288 (4th Cir. 1948), cert. denied, 335 U.S. 818 (1948).
3 One of the men was called to testify as a witness before a congressional committee and then prosecuted for perjury by reason of testimony he gave concerning the slaying. However, the court ruled that under the circumstances the testimony could not be made the basis for such a prosecution. United States v. Icardi, 140 F. Supp. 383 (D.D.C. 1956).
jury indictment and trial by jury. Furthermore, under Article 3(a) of the Code, millions of veterans would remain indefinitely subject to the threat of trial by court-martial and the ensuring deprivation of important safeguards.

Despite its invalidity as applied to ex-servicemen who have become civilians, Article 3(a) retains a breath of life. The Court of Military Appeals has ruled that under its provisions a serviceman can be prosecuted for serious crimes committed in a prior enlistment.\footnote{United States v. Gallagher, 7 USCMA 506, 22 CMR 296 (1957).}  

II  
CIVILIAN DEPENDENTS AND EMPLOYEES

At the time of the drafting of the Constitution there was little expectation that American fighting forces would be stationed overseas in time of peace. Thus, there was little occasion to consider the status of civilians who might be accompanying the armed forces overseas.

During World Wars I and II, cases arose which involved court-martial of civilians serving “in the field” with the armed forces. In 1951 the Uniform Code made these categories of civilians subject to court-martial:  
(a) “in time of war all persons serving with or accompanying an armed force in the field”;\footnote{Art. 2 (10), 10 US.C. 802 (10).}  
(b) subject to treaty or agreement or to any accepted rule of international law, “all persons serving with, employed by, or accompanying the armed forces” overseas;\footnote{Art. 2 (11), 10 US.C. 802 (11).}  
and (c) subject to treaty and international law, “all persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of a Secretary of a Department and which is overseas.”\footnote{Art. 2 (12), 10 US.C. 802 (12). In addition to these categories of civilians whom the Uniform Code made amenable to military justice, there are a few other situations in which persons who in some sense are civilian are made subject to military justice by the Code: See Everett, supra note 8, at 368–70.}

which created military jurisdiction over civilian dependents and employees overseas in peacetime, was considered by the Supreme Court in cases involving two service wives—one in Japan and the other in Great Britain.\footnote{Reid v. Covert, 354 U.S. 1 (1957), which superseded on rehearing the prior opinions in Kinsella v. Krueger, 351 U.S. 470 (1956) and Reid v. Covert, 351 U.S. 487 (1956).} Each woman had been found guilty by court-martial of premeditated murder of her husband; each had received a life sentence;\footnote{Mrs. Covert’s conviction had been reversed by the Court of Military Appeals because of errors at the trial in the treatment of her insanity defense; and a rehearing had been ordered, which was to take place in the United States at Bolling Air Force Base, rather than overseas. Of course, on rehearing the sentence could not have been increased.} and each sought release on a writ of habeas corpus.

The Government contended that civilians accompanying the armed forces overseas could be viewed as a part of the “land and naval forces” and therefore subject to rules enacted by Congress pursuant to Article One, Section Eight, Clause Fourteen of the Constitution. Unlike Toth, the two civilian dependents did have a close connection with the armed forces both at the time of the offenses and at the time of trial. They had been transported overseas at government expense; they possessed special passports that reflected their status as dependents of military personnel; they enjoyed special commissary, post exchange, housing, postal, and currency privileges, and so forth. Moreover, in the eyes of people in the countries to which the two spouses had accompanied their husbands, they were closely identified with the American armed forces.\footnote{See Everett, supra note 8, at 384.}

The Supreme Court had previously upheld Congressional power to establish legislative courts outside the territorial limits of the United States proper. Also, in one case the Court had upheld the jurisdiction of an American consular court in Japan to convict an American seaman of an offense committed there;\footnote{In re Ross, 140 U.S. 453 (1891), cited with approval in Ex parte Bakelite Corp., 279 U.S. 438, 451 (1929).} and this jurisdiction seemed
analogous to that authorized as to civilian dependents and employees.

After an initial victory for the Government contentions, the two accused were granted a rehearing and the Court ruled that, at least for capital offenses committed overseas by military dependents in time of peace, trial by court-martial is unconstitutional.48

In 1960 the Court broadly extended the holding to include civilian employees as well as dependents, and non-capital offenses as well as capital.49 Justice Clark, writing for a majority of the Court, rejected any distinction between capital and non-capital offenses as unsupported by the Constitution. Relying on Toth v. Quarles, the majority repudiated “new expansion of court-martial jurisdiction at the expense of normal and constitutionally preferable systems of trial by jury”.50 In dealing with the military establishment’s alleged need for control over civilian employees, the majority suggested that such employees might be required to sign agreements to submit to military jurisdiction or might even be recruited or drafted to serve in the armed services.

The distrust of military justice which underlies Supreme Court decisions refusing court-martial jurisdiction over ex-servicemen and civilian dependents and employees has been manifested once again by the Court in the recent case of O’Callahan v. Parker.51 There the majority, in an opinion by Justice Douglas, concluded that not only does military jurisdiction depend on the military status of the accused but also that the offense to be tried must be service-connected. Justice Douglas reiterated the warning from Toth that by reason of “dangers lurking in military trials * * * [i]n free countries * * * have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service.”52 Furthermore, the Court’s opinion observes that “court-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law”;53 and it refers to “so-called military justice” and “the travesties of justice perpetrated under the” Uniform Code.54

Relying on the spirit of the O’Callahan case, a Federal Court of Appeals ruled soon thereafter that a civilian seaman in Viet Nam could not be court-martialed for a homicide, since he was not with an armed force in the field in time of war within the meaning of Article 2(10).55 Subsequently the Court of Military Appeals emasculated military jurisdiction still further by ruling that whatever it may mean elsewhere in the Uihlan v. Parker—Milestone or Milestone in Military Justice?, 1969 Duke L. J. 853. In a recent decision, Reiford v. Parker, 401 U.S. 355 (1971), the Supreme Court has displayed greater acceptance of military justice.


49 395 U.S. 355.

50 395 U.S. 355.

51 395 U.S. 355.

52 395 U.S. 355.


54 395 U.S. 355.


56 395 U.S. 355.

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form Code, “time of war” in Article 2(10) means a declared war.” Under this interpretation civilian employees are not subject to military justice even if they participate in combat operations in Viet Nam; and apparently they would not have been subject to military jurisdiction during the Korean War.23

III

1962 CONGRESSIONAL
HEARINGS

Chaired by Senator Ervin, the Senate Subcommittee on Constitutional Rights, in connection with its 1962 hearings on the rights of military personnel, also sought information concerning the problems created by Supreme Court decisions curtailing military jurisdiction.

Replying to a questionnaire from the Subcommittee, the Department of the Army stated that legislation was needed and commented: 24

The fact that foreign courts have jurisdiction over certain offenses committed by persons within these categories does not provide an adequate substitute for U.S. jurisdiction. The trial of service-connected personnel by foreign courts is the very thing which the United States desired to avoid through the negotiation of status of forces agreements. Furthermore, many offenses which relate to the security interests of the countries although many offenses may be cognizable under the local law, they are subject to the exclusive jurisdiction of the United States which the United States is unwilling to relinquish because of the system of justice or the conditions of confinement which prevail (e.g., a recent aggravated assault against a

Korean national by a dependent of a U.S. Army officer). Additionally, foreign courts may have little or no interest in prosecuting U.S. personnel for offenses which the United States considers to be serious (e.g., a recent case in which the Japanese refused to prosecute the wife of a U.S. serviceman who had thrown lye on his face). In some cases the punishment which is authorized or which is imposed by foreign courts is inadequate (e.g., recent cases in which German courts imposed upon wives who had murdered their serviceman-husbands or their children sentenced to confinement for 1 year and 3 months, 10 months of which were suspended; confinement for 1 year, 11 months of which were suspended; and confinement for 9 months which was suspended for 4 years). In some cases the punishment imposed by foreign courts is too severe (e.g., a sentence to confinement for 16 years imposed by a Greek court on appeal after earlier acquittal of the wife of a serviceman who had killed her children while temporarily insane).

The Department of the Army has prepared draft legislation which the Department of Defense submitted to the Department of Justice for comment on June 27, 1961, which would vest in Federal district courts jurisdiction over all serious offenses which are committed abroad by citizens, nationals, and other persons owing allegiance to the United States. This draft legislation would also create new offenses. It would subject to the jurisdiction of Federal district courts any persons (1) who in time of war or armed hostilities and in a theater of war or area of belligerent activities (a) fails to give notice and deliver up to proper authority captured or abandoned property in his possession or custody, or who in any way deals in or disposes of captured or abandoned property and receives or expects from such dealing or disposition profit or advantage to himself or another, or who engages in looting or pillaging; or (b) willfully aids or attempts to aid, the enemy or a hostile government with which the United States is engaged in armed hostilities with arms, ammunition, supplies, money, propaganda material, or other thing, or knowingly harbors or protects or gives intelligence to, or corresponds with or holds any intercourse with the enemy or a hostile government with which the United States is engaged in armed hostilities; or (2) who while in the hands of a foreign power (a) willfully acts to the detriment of others of whatever nationality held by the foreign power as civilian or military prisoners for the purpose of securing favorable treatment from his captors; or (b) while in a position of authority over such persons maltreat them without justifiable cause. Additionally, this proposed legislation would make the offenses specified in sections 2387 and 2388 of title 19,

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United States Code (espionage and activities affecting armed forces), applicable wherever the offenses may occur. At the present time sections 2337 and 2338 are applicable only within the United States, its maritime jurisdiction, and on the high seas.

The proposed legislation would fill the gap which now exists in the jurisdiction of the courts of the United States with respect to (1) serious offenses committed abroad in time of peace by any U.S. citizen, national or other person owing allegiance to the United States, including U.S. military personnel and persons serving with, employed by, or accompanying the U.S. Armed Forces abroad, (2) serious offenses committed by such persons in time of war, and (3) serious offenses committed abroad by such persons which are now punishable by U.S. courts only when committed within the United States (e.g., murder, and other serious offenses against the person).

The reasons presented as requiring an extension of Federal court jurisdiction over offenses committed abroad by servicemen and by persons formerly covered by article 2(11) of the Uniform Code of Military Justice apply with equal validity to all persons owing allegiance to the United States and it is for this reason that the proposed legislation extends the jurisdiction of Federal courts to all citizens, nationals, and other persons owing allegiance to the United States.

As to the jurisdictional gap resulting from Toth v. Quarles, the Army observed: 35

The legislation proposed by the Department of the Army and submitted to the Department of Justice by the Department of Defense for comment in June of 1961 would vest in Federal district courts jurisdiction over all serious offenses which were committed by former servicemen prior to their discharge from the Armed Forces. This proposed legislation, furthermore, gives the Federal district court a concurrent jurisdiction over all serious offenses committed by U.S. servicemen abroad.

The Department of the Navy also recommended that legislation be enacted: 31

The Navy Department has previously favored the enactment of legislation submitted as DOD items 87-109 and 87-138. The latter proposal would extend the jurisdiction of Federal district courts in espionage cases. The former DOD proposal (87-109) proposes a constitutional amendment authorizing the exercise of court-martial jurisdiction over persons serving with, employed by, or accompanying the Armed Forces of the United States. As an alternative, the proposal recommends that the jurisdiction of Federal district courts be extended to offenses committed overseas by any person owing allegiance to the United States. If the constitutional amendment cannot be obtained, the alternative proposal is needed.

* * *

Under Article 3(a), two types of offenses are involved: Those of a purely military nature, and those committed outside the territorial jurisdiction of any Federal district court. Although the Navy has attempted no trials under article 3(a), it is considered that legislation is needed to give Federal district courts jurisdiction over offenses, other than purely military offenses, which are committed overseas. The constitutional amendment referred to in question No. 35, will not answer this need since it would provide jurisdiction only over persons while they are still under military control. However, the legislation favored as an alternative to the constitutional amendment (to subject persons owing allegiance to the United States to the jurisdiction of Federal district courts for crimes committed overseas), if enacted, would adequately provide the needed jurisdiction.

Concerning civilian employees and dependents, the Department of the Air Force replied to the Subcommittee questionnaire: 37

* * *

Following these decisions, the Department of Defense drafted alternative proposals to meet the problem, consisting of:

1. A constitutional amendment authorizing the exercise of court-martial jurisdiction over persons serving with, employed by, or accompanying the Armed Forces outside the United States;

2. Legislation subjecting persons owing allegiance to the United States to the jurisdiction of U.S. district courts for crimes committed outside the United States and the Canal Zone;

3. Legislation providing for the apprehension, detention, and disposition of certain persons serving with, employed by, or accompanying the U.S. Armed Forces outside the United States and the Canal Zone.

Since the feasibility of a constitutional amendment was doubtful and the alternative proposals either involved persons not connected with the Armed Forces or required the use of civilian law enforcement agencies in the arrest, custody, and removal aspects of exercising jurisdiction, the draft proposals were forwarded to the Department of Justice on June 21, 1961, with a request that that Department assume responsibility for further action on the proposals.

1962 Hearings at 946.
With regard to the feasibility of legislation of the nature referred to in this question, the attention of the subcommittee is invited to the analysis of the practical problems involved, by Judge Burger in his dissenting opinion in United States ex rel Guagilardo v. McElroy, (255 F. 2d 927, 928).

As to ex-servicemen, the Air Force deferred to the Department of Justice in regard to the means for filling the jurisdictional gap.

IV
1966 CONGRESSIONAL HEARINGS

In 1966 Senator Ervin presided over hearings that considered some twenty bills pertinent to military justice—among them two bills introduced by Senator Ervin which would have granted jurisdiction to Federal district courts to try certain military dependents and employees and former servicemen. With respect to these bills an Assistant Secretary of Defense testified that, despite extended consideration of the jurisdictional problem, "we currently do not have agreement in the executive branch on feasible remedies. The Department of Defense is now staffing substitute legislation on which we hope to obtain agreement and thereafter propose for your consideration in lieu of S. 761 and S. 762 [Senator Ervin's proposals]. Accordingly, it is respectfully requested that consideration of these two bills also be deferred." 13

Questioned at the hearings about the seriousness of the jurisdictional problem for civilian employees or dependents, General Manss, The Judge Advocate General of the Air Force, testified:

"It depends upon the offense. For the minor offenses, traffic offenses, for example, where there is no personal injury or a death, more or less minor, we can use the point system, and we can prevent the offenders from driving on the base. Admittedly in the more serious offenses we do have a problem. Now, we could probably split these offenses into two different categories. One are the offenses committed on the base property within our control or concerning an employee or a civilian employee or a civilian dependent. In those cases, most of the time we have no jurisdiction, and the receiving State under most of the agreements, even if they have concurrent jurisdiction, are not very much interested in it because, after all, it costs money to hold trials, and if there is a conviction they have to put the people in jail and feed them.

Right now, there is a former wife of an Air Force sergeant who was convicted in a Greek court of murdering her two children. She was tried by the Greek court and convicted and sentenced to life imprisonment. She has been in jail in Athens for 7 years. We are still trying to get her out.

We had a case not too long ago involving the wife of a civilian employee, military assistance advisory group in Taiwan who—he incidentally was a U.S. national of Japanese extraction. They had two children. They had been stationed in Tokyo. They were transferred to Taipei. He was in the process of bringing another Japanese woman down from Tokyo in a position which his wife did not think was quite suitable, so she waited for him one night in the living room when he came in the door, and she shot him with a .22 rifle. It did not kill him right away, and she put him out of his suffering by shooting him in the head.

At the time she had diplomatic immunity, and the result of this thing was that she never was tried by anybody. She was brought back to the United States.

..."

..."

We had another case where the stepdaughter of an Air Force sergeant in Japan shot and killed him. The Japanese declined to assume jurisdiction, and we had to bring her back. In other words, what we have in those particular cases are a couple of murders on the house.

..."

Frankly, my own personal opinion is that we probably should have a constitutional amendment if we are going to get the complete answer. I am practical enough to realize that this will probably never fly, so that I do not think that we are going to get this solution to it."

..."

As I said, there have been some objections to it. To me, the most serious objections are practical because where we have an offense committed in a foreign country, and we are going to try it over here, it is a little hard to get witnesses, despite the fact that somebody remarks that if you offered to pay for all the..."
expenses of somebody to come over here from almost any place in the world they would do it. I am not quite that optimistic about it. We have another problem that I do not think you have covered in your bill, that we have tried to cover in our proposed package, and that is one of authority to arrest and confine pending disposition of charges which could present quite a problem particularly in the foreign countries.

So that actually this is the reason that we are of the opinion now that action in this particular area should be withheld until we see what the other agencies, interested agencies, in the Government, particularly the Department of Justice and the Department of State think about this thing that we have started out with, which is actually very similar to these bills.

General Kenneth Hodson, then Assistant Judge Advocate General of the Army, presented recent statistics concerning the involvement of American civilians in criminal cases overseas and noted that the foreign countries had exercised jurisdiction in only about one-fourth of the cases subject to their jurisdiction. He explained: \(^{45}\)

Generally speaking, we have got several problems in this area. Some countries such as Japan won’t exercise jurisdiction.

For example, our latest figures from Japan indicated that they refused to exercise jurisdiction in three serious cases out of three during the last year. Their prior record was that they refused to exercise jurisdiction in seven out of seven serious cases in 1964.

On the other hand, Germany last year—these are Army cases only, I do not have all of the forces yet—Germany, on the other hand, exercised jurisdiction in 34 out of 50 serious cases last year, and this will partially answer your question with respect to the sentences.

The sentence adjudged by the German courts in some rather serious cases, we felt, were certainly lighter than they would have received had they been tried by a U.S. court. For example, in a murder case of a wife killing her husband, she was released from confinement—she was given confinement, I believe, but she was released from confinement, after about 32 days in jail upon conviction of murdering her husband.

Italy, on the other hand, is a different situation. In Italy the authorities there exercised jurisdiction in almost every case, and the sentences are reasonably similar, by our standards. So it varies from country to country.

It is an unhappy situation in that it does vary from country to country.

Of course, we—if we had the type or (sic) jurisdiction we could exercise in the United States, it would prevent trials by foreign courts of the type of offenses when one of our people kills one of our people or steals his property.”

... The right-hand side of the chart illustrates what we do by way of administrative sanctions, which is not very much, and we have concluded, as General Manns has indicated, we need to provide remedies in three areas. We do not contemplate trying everybody who commits an offense overseas. So what we really need, in the first place, is some kind of jurisdiction to try petty offenders for the minor offenses where administrative sanction are not proper or just do not fit the case.

Secondly, we need some kind of jurisdiction to try the exceptionally serious case, mostly a homicide case, I would say, where the foreign courts are not interested, but where it shocks the U.S. sense of justice, and there should be some way to handle the case, as in the case of the Ascension Island man.

If we could have brought him back to Miami, Fla., and tried him in the Federal court, it would have been easier on him, easier on us, easier on the British, and it would have been better all the way around.

As General Manns mentioned, we need some authority to restrain these people in advance of trial, to turn them over to the foreign authorities under our SOF agreements, to return them to the United States, or to get them out of the country at the request of the foreign authorities.

Although a trial in the U.S. district court is a very expensive thing, I think it might be something we would have to indulge ourselves in in these exceptionally serious cases.”

When asked about substitute legislation which the Department of Defense was preparing, General Manns replied that a draft had gone over to the Bureau of the Budget, “and they will send it probably to State and Justice. We do not know just how long it is going to take before we get comments from them”. \(^{46}\)

At the same hearings Professor Seymour W. Wurzel, a retired Army judge advocate, suggested that the proposed expansion of Federal District Court jurisdiction to include civilian employees and dependents would be appropriate, but that it does not “overcome the fact that the writ of the United States does not run abroad to compel the attendance

\(^{45}\) 1966 Hearings at 67, 68.

\(^{46}\) 1966 Hearings at 68.
of foreign witnesses before courts in the United States nor the utter impracticability of convening U.S. Federal courts, complete with jury panels, in foreign countries, even assuming that treaties or administrative agreements permitting this action be obtained.” He added: 48

In view of this setting it is suggested that Congress amend 10 U.S.C. 802(10) by adding thereto the following sentence:

"Whenever and wherever any person serving with, employed by or accompanying the armed forces of the United States is, with initial official permission, in any place outside the United States, the Canal Zone, Puerto Rico, Guam, or the Virgin Islands and beyond the maritime jurisdiction of the United States, these facts alone shall constitute time of war and service in the field for the purpose of the exercise of courts-martial jurisdiction over such persons."

The Founding Fathers, if they could have conceived of the stationing in foreign countries of U.S. Armed Forces, Federal civilian employees whose sole function is to further the purposes of the Armed Forces, and the camp followers of both these elements, would certainly have said cases involving any of these people were "cases arising in the land and naval forces" for fifth amendment purposes. They would also have said that the involvement of U.S. forces in Korea, the Dominican Republic, Vietnam and other foreign countries constitutes war in the constitutional sense for domestic purposes. The express power of Congress to declare war surely includes the power to declare a "time of war" for limited purposes short of total war. The Founding Fathers would not have stood impotent in a cynical world in which formal declarations of war are no longer made.

Professor Wurfel also recommended that the ex-serviceman be subject to trial by Federal district court for offenses that permitted maximum punishment of one year or more.49 "Why continue a hiatus of this 4-year gap in cases, all of which would obviously be felonies? If we are going to plug the gap, let's plug it realistically and completely." 50

A witness representing the American Legion at the Hearings expressed some doubt concerning the constitutionality of the legislation proposed by Senator Ervin and stated that his organization "would rather leave to the Department of Justice the question of whether or not it should be enacted." 51 On the other hand, the American Veterans Committee supported the proposed legislation in principle and suggested that, as to civilian dependents and employees, the range of offenses triable in Federal District Courts "be broadened to include all those encompassed in Articles 77 through 134 of the Code, except offenses of a purely military nature." 52

Chief Judge Robert E. Quinn of the Court of Military Appeals approved the objective of Senator Ervin's bill that would make ex-servicemen subject to trial by Federal district court. He observed, however, that there is "no useful purpose served in subjecting a discharged serviceman to a Federal court trial for a purely military type offense, such as unauthorized absence (if the table of maximum punishment is unsuspended, the offense is theoretically punishable by confinement at hard labor for life) or disobedience to a superior officer." 53 Accordingly, he recommended that the class of offenses subject to trial be redefined. Also, Chief Judge Quinn urged that the discharged serviceman not be subject to trial if he was previously tried for the same offense in a foreign court and noted that this addition would be consistent with the double jeopardy provisions of existing Status of Forces Agreements.

Chief Judge Quinn also favored the objective of the legislation proposed by Senator Ervin to make civilian dependents and employees subject to trial in a District Court, but he urged a material narrowing of scope. "For example, a Federal court should not be burdened with trying a drunken driving case (Art. 111, Uniform Code of Military Justice) or punishing a civilian for being an accessory after the fact to an unauthorized absence (Art. 78, Uniform Code of Military Justice)." 54

Moreover, subjecting "a civilian to the crimes and offenses provision of Article 134,

1966 Hearings at 45.
1966 Hearings at 145.
1966 Hearings at 143, 149.
1966 Hearings at 149.
1966 Hearings at 172.
1966 Hearings at 202.
1966 Hearings at 280.
1966 Hearings at 280.

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Uniform Code of Military Justice, seems unnecessary. If the crime is one of extraterritorial applicability, the wrongdoer is already subject to the statute; if the statute is not one of extraterritorial application, then the act should not be made criminal by Article 134, and thereby materially alter the traditional American approach to criminal conduct." 44

Colonel Frederick Bernays Wiener, who had argued some of the Supreme Court cases involving military jurisdiction over civilians, suggested that for offenses committed by civilians accompanying the armed forces overseas, 44 "it is necessary to distinguish between serious felony-type offenses and minor infractions. Serious offenses must be tried in a United States civil court, minor infractions can either be dealt with administratively, by withdrawal of privileges or return to the United States, or by U.S. commissioners as petty offenses under the provisions of 18 U.S.C. 3401–3402." Colonel Wiener perceived no constitutional barrier to trial in American civil courts of crimes committed by American citizens abroad and concluded that, under Blackmer v. United States, 44 there is no question of legislative power. Furthermore, the venue can properly be laid in the Federal District "where first found or brought", as provided in 18 U.S.C. § 3233. 44

Colonel Wiener suggested that S. 762, which had been introduced by Senator Ervin to provide for trial of civilian dependents and employees in Federal District Courts, should be rewritten along the following lines: 49

(a) The special maritime and territorial jurisdiction of the United States (18 U.S.C. 7) should be expanded to cover areas where civilians accompany the Armed Forces of the United States.
(b) Such civilians, when they commit offenses punishable under title 18 while accompanying the Armed Forces overseas, shall be tried for such offenses in the district in which they are first found or brought.
(c) The only provisions of S. 762 as now drawn which should be retained are the last sentence of draft section 952(a)—no second trial where person has already been tried by foreign courts—and draft section 952(d), retaining concurrent military jurisdiction for war offenses.

This redraft, it is believed, will create no new problems, and will permit all civilians committing serious crimes abroad to be tried at home under familiar procedures.

Alternative suggestion.—Why not dispose of the entire problem of extraterritorial crime by American citizens in a single package? It can easily be done.

(a) Expand the special maritime and territorial jurisdiction of the United States (18 U.S.C. 7) to cover all areas where American citizens of every description are physically present, with suitable qualifying clauses to guard against offending foreign sensibilities, i.e., provisos stating that this jurisdiction to be exercised only if the foreign power having primary jurisdiction does not proceed.
(b) Such American civilians, which of course will include those having diplomatic immunity, may, if they commit offenses abroad that are punishable under title 18, be tried for such offenses in the U.S. district court for the district in which they are first found or brought.
(c) Foregoing provisions shall apply to per-

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* 1966 Hearings at 280.

* 284 U.S. 421 (1932). The proceedings against Harry Blackmer were for contempt in failing to respond to subpoenas served upon him in France and requiring him to appear as a witness for the United States at a criminal trial in the District of Columbia. The passages in the opinion relied upon by Colone Wiener include these:

"By virtue of the obligations of citizenship, the United States retained its authority over him, and he was bound by its laws made applicable to him in a foreign country.... For disobedience to its laws through conduct abroad he was subject to punishment in the courts of the United States. United States v. Bowman, 260 U.S. 94, 102. With respect to such an exercise of authority, there is no question of international law but solely of the purport of the municipal law which establishes the duties of the citizen in relation to his own government. While the legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States, the question of its application, so far as citizens of the United States in foreign countries are concerned, is

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* 1966 Hearings at 309.
* 1966 Hearings at 310–311.
sion who, subject to the uniform code at the
time of committing a serious offense punishable
thereunder by 5 years' confinement or more,
have since such time become civilians. If their
offense is covered by title 18, they shall be tried
for violation of that title; if covered only by
title 10 because essentially military in nature,
then punishment on conviction in U.S. district
court shall not exceed that which could have
been adjudged had they still remained subject
to uniform code.

(d) No second trial in U.S. district
court where person has already been tried for same
offense in substance either by (i) foreign
tribunal or by (ii) courts of a State of the
Union.

(e) Concurrent military jurisdiction for war
offenses retained.

Colonel Wiener's "proposal would be to
take the definition of the special admiralty,
special maritime and territorial jurisdiction
of the United States, which is now in section
7 of title 18 of the United States Code, and
expand that to make it applicable to American
citizens anywhere in the world, with an
appropriate saving clause for the sensibilities
of the foreign countries. I mean after all, if an American commits a murder in a
Paris nightclub, we are not going to deliver
an ultimatum to General deGaulle so that
we can try that American in an American
court. The only purpose of this expansion is
to have a head of jurisdiction where a foreign
country refuses to act, and as I have indicated
in the memorandum, the British have
exercised such a jurisdiction since about
1829. So that when any British subject any-
where in the world, commits a homicide,
he is subject to trial in a British court."

Father Joseph M. Snee of Georgetown
Law School indicated doubt as to the
constitutionality of attempting to punish every
crime committed by every American citizen
overseas. He stated: 

I have no difficulty where the persons involved
stand in peculiar relationship to the United
States, such as Embassy personnel, military
personnel, or persons accompanying them or
working for the U.S. Government overseas, but
if we extend it to the ordinary tourist and draw
a statute so broadly worded that it could be
extended to the ordinary tourist, I would have
a question how that might fare with the Su-
preme Court of the United States, because the
United States is a government of limited and
delegated jurisdiction.

It is not in the same position as the ordinary
sovereign state, which has all the criminal jur-
isdiction inherent in sovereignty. I think that
might make a difference if we worded the
statute so broadly that it went beyond the three
classes of people we were trying to hit.

As to proposals that United States Com-
missioners sit in foreign countries for the
trial of petty offenses, Father Snee—a rec-
ognized authority on Status of Force Agree-
ments—stated: 

"From my own experience in this field, I would
say it is absolutely impossible. I do not think
that most foreign countries would agree to it
at all.

Witnesses testifying in behalf of the
American Civil Liberties Union also took
issue with Colonel Wiener as to the power of
Congress to create Federal court jurisdiction
over offenses not directly affecting the
Federal Government." The ACLU was con-
cerned with the difficulty in providing the
defendant a fair trial in an American court
if the offense occurred overseas and the
witnesses were foreign nationals not amena-
able to subpoena. In the opinion of the ACLU
the justification for creating jurisdiction in
a Federal District Court over the ex-service-
man is far greater than in the case of the
civilian dependent or employee."

V

WHAT IS THE BEST SOLUTION
FOR THE JURISDICTIOINAL
PROBLEM OF THE
EX-SERVICEMAN?

In the Congressional hearings a greater
consensus appears as to the best solution for
the jurisdictional problem of the ex-service-
man than as to any remedy for the jurisdic-
tional gap concerning civilian dependents
and employees. Apparently that solution
would be the expansion of Federal district
court jurisdiction to allow prosecution of
former servicemen for offenses committed
prior to their discharge. This also was the

"1966 Hearings at 334.
"1966 Hearings at 349-354.
"1966 Hearings at 347-8.
solution apparently contemplated by the majority opinion in *Toth v. Quarles.*

Apart from any constitutional questions, there are some practical difficulties with this solution. Typically—as in *Toth* and as in the recent Viet Nam cases—the crime of the former serviceman occurred overseas. Then if principal prosecution or defense witnesses are foreign nationals not subject to American subpoena, how can their presence be assured for a trial in the United States? How and from whom will the grand jury and petty jury be chosen? And regardless of the method for selection, a civilian grand jury or petty jury sitting in the United States will have little familiarity with the conditions that existed where the crime was committed. Indeed, the Federal District Judge who tries the case may also be unfamiliar with those conditions.

Senator Ervin has posed the question whether there would be any violation of the constitutional prohibition against ex post facto laws if Congress were now to provide for Federal District Court trial of violations of the Uniform Code of Military Justice by ex-servicemen committed while they were still in uniform. As Senator Ervin points out, the conduct involved was prohibited by the Code at the time of its commission and so the offender had notice at the time that he was violating the law. There would be no increase in punishment. Furthermore, a change in the place of trial of an offense after its commission does not involve ex post facto legislation.

On the other hand, to provide for a civilian trial of an offense which at the time of its commission was subject only to trial by military tribunal does more than change the place of trial. It also substitutes a trier of fact who is less knowledgeable concerning the standards of the military community and the conditions under which the military establishment operates. In practice, the change in the type of forum could create a harm much greater than that resulting from change in a rule of evidence—which it has been held should not be changed retroactively to the defendant’s detriment. Thus, if Congress chose to provide retroactively for Federal District Court jurisdiction to try violations of the Uniform Code committed by persons no longer on duty, it seems unlikely that such provision would withstand attack as being ex post facto legislation.

An alternative to civilian trial has recently been suggested in connection with alleged crimes by American military personnel against Vietnamese civilians. Under this proposal former servicemen who could not be tried by court-martial would be prosecuted by military commissions established pursuant to the law of war—a branch of international law.

The leading American precedent for use of the law of war is *Ex parte Quirin,* where the Supreme Court authorized the trial by military commission of eight spies who landed in New Jersey from a German submarine during World War II. Even though one of the spies claimed American citizenship and the Federal civil courts were readily available, the Supreme Court concluded that Congress had provided in the Articles of War for trial by military commission of crimes against the law of war and that such legislation was justified by the power “to define and punish Piracies and Felonies committed on the high Seas, and offenses against the Law of Nations.” Like petty offenses and criminal contempt, violations of the law of war had not been triable by jury at common law; and the

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1*350 U.S. 11, 21 (1955).*

2Proceedings of 92nd Congress, 1st Sess. for May 3, 1971, 117 Congressional Record No. 63. S. 1744 introduced by Senator Ervin on May 3, 1971 would apply to violations of the Uniform Code of Military Justice committed by persons who subsequently were discharged from the armed services.

3Cook v. United States, 138 U.S. 157 (1891). The Supreme Court in the early case of Calder v. Bull, 3 Dall. 386, 390 (1798) described the laws which fall under the ex post facto prohibition. Article One, Section Nine prohibits Congress from enacting ex post facto laws; and Article One, Section Ten contains a like prohibition for the States.


6317 U.S. 1 (1942).

7U.S. Constitution, Art. I, Sec. 8, Cl. 10.
Constitution did not provide a right in such cases to trial by jury or trial in the civil courts.

In the case of General Yamashita, trial by a specially-created military commission was upheld pursuant to the law of war. Furthermore, under the power conferred on a victorious belligerent by the law of war, the Supreme Court ruled that an American military government court sitting in occupied Germany could try an American wife who had there killed her officer husband.44

In Toth v. Quarles, the case concerned the killing of a Korean and so might have been stretched to fit the category of crime against the law of war. However, that possibility does not seem to have been suggested to the Supreme Court, which dealt only with the question of the constitutionality of Article 3(a) of the Uniform Code in light of Congressional power to make rules for the government and regulation of the land and naval forces.45

In Wilson v. Bohlender,46 which involved military jurisdiction over a civilian employee, the crime had been committed in Berlin; and possibly, because of Berlin's special status, military jurisdiction could have been justified under the law of war. However, the Supreme Court declined to consider that possibility, since it had been suggested by the Government as an afterthought and the case had not been tried on such a theory.

Under Articles 18 and 21 of the Uniform Code,47 courts-martial have concurrent jurisdiction with military commissions and other military tribunals over the law of war. Thus, if ex-servicemen are subject to trial by military commission for such offenses, they also could be tried by courts-martial, acting pursuant to the procedures provided by the Uniform Code and the Manual for Court-Martial. If, however, they are tried by military commission rather than court-martial, it would seem from the Quirin case that no requirement exists that the accused be afforded the safeguards that would be available in a trial by court-martial.

In view of the distrust of military jurisdiction evident in Supreme Court opinions from Toth v. Quarles through O'Callahan v. Parker, it seems unlikely that the Court would permit trial of ex-servicemen by military tribunal for alleged crimes in Vietnam against the law of war. The likelihood is even less, since the trial could be by military commission without the safeguards that have been evolved for trial by court-martial. If confronted with the question, the Court could readily distinguish Ex parte Quirin as arising in connection with a declared war.48

VI

HOW TO SOLVE THE JURISDICTIONAL PROBLEM OF THE CIVILIAN DEPENDENT OR EMPLOYEE?

The inability of Senator Ervin and others to obtain passage of legislation to deal with the jurisdictional gap as to the civilian dependents and employees overseas may indicate that the problem is not so serious as might have been anticipated. And certainly in some instances the problem is mitigated by trial of the civilian dependent or employee in foreign court, if his conduct overseas violates the laws of the host country. While such trials do not afford an accused the same safeguards that he would enjoy in an American court—whether civil or military—the sentence imposed may be lighter than that which would be customary in American tribunals.49

44 In re Yamashita, 327 U.S. 1 (1946).
46 The Court commented that Article 3(a) of the Uniform Code could not be sustained on the constitutional power of Congress to raise and support armies, declare war, or punish offenses against the law of nations; and it cited Quirin and Yamashita. However, the case cannot be viewed as negating directly the possibility that a military tribunal might try an ex-serviceman for a violation of the law of war.
50 The Air Force Times for October 21, 1970 points out that, although few American servicemen tried by foreign courts are acquitted, the sentences have been light (at page 11).
In the 1960 Supreme Court decisions negating military jurisdiction over civilians, Justice Clark suggested that civilian employees sign agreements to submit to military jurisdiction. Presumably the same suggestion could be advanced for civilian dependents. The Supreme Court has upheld waiver by a defendant of important rights, such as the right to trial by jury. Moreover, recently the Court has indicated greater willingness to accept a "bargain theory" in the administration of criminal justice.

Even so, it is difficult to see how the Court could uphold an agreement by civilians that, as a condition for employment overseas or for accompanying their spouses or parents on overseas tours of duty, they would allow themselves to be tried by court-martial and would become subject to the Uniform Code. Would such an agreement be voluntary? Would there be a knowing and intelligent waiver by the civilian of his right to jury trial and grand jury indictment? Furthermore, under the Court's rationale that civilians are not part of the land and naval forces, how would the agreement of the civilian provide Congress with the power to denominate his conduct as criminal? "To give weight to any such agreement would resemble allowing a federal district court to try a man for a violation of state law merely because he consented to the trial."

A second alternative proposed by Justice Clark in 1960 was the enlistment or drafting of civilians into the armed services so that they would be clearly subject to military control. This solution would be peculiarly unsatisfactory to dependents. However, even as to most employees, it would have any number of practical difficulties—including those concerning the rights, liabilities, rank, compensation, and duties of these members of the armed services.

Peter D. Ehrenhaft has argued persuasively that the jurisdictional problem as to petty offenses committed by civilians overseas is quite distinct from that presented by serious offenses. As to the petty offense—which apparently is one permitting no more than six months confinement—there seems to be no right to trial by jury or to grand jury indictment. Ehrenhaft suggests, therefore, that provision should be made for trial by United States Commissioner's Court of offenses committed overseas by civilian employees and dependents. These Commissioners would be appointed by District Courts in certain prescribed Districts of the United States; and appeal would be permitted to the appointing District Courts. Under this proposal suitable international agreements would be negotiated with host countries to permit the convening of these courts. Since civilians are not part of the land and naval forces and congressional power to regulate their conduct would not be premised on the Article One, Section


"Under Ehrenhaft's proposal the appeal would entitle the defendant to a trial de novo in the reviewing United States District Court. Supra note 74 at 284. Other aspects of the proposal include: additions to the offices of United States Attorneys to handle the cases before the Commissioners' Courts; amendment of the Posse Comitatus Act to permit the armed forces to provide counsel and administrative assistance for the courts; establishment of Legal Aid Agency to provide defense counsel for the courts; and amendments of the United States Code to permit military commanders at overseas bases to adopt regulations violation of which would constitute a petty offense punishable by confinement of not more than six months. Ibid. The Federal Magistrates Act, P.L. 90-678, substitutes Federal magistrates for U.S. Commissioners.
Eight, Clause Fourteen authority "to make rules for the government and regulation of the land and naval forces," jurisdiction would apparently be premised on nationality and the obligations of citizenship. 7

As was made clear during the 1966 hearings of the Senate Subcommittee on Constitutional Rights, some observers doubt that foreign countries would be willing to authorize the convening of these commissioners' courts in their territory to punish offenses—however minor—that occurred within their borders. More important, the question was raised whether nationality or citizenship provides an adequate jurisdictional basis for the punishment of offenses that do not interfere directly with some important government interest. Since a petty offense would almost inevitably involve only minimal interference with any Government interest, the right of the American government to punish such conduct—whatever forum is used—is not completely clear.

If petty offenses do constitute a special category of crimes and do not require trial by jury or grand jury indictment, it would seem that courts-martial as well as commissioners' courts could also be empowered to try such offenses. In the past the absence of trial by jury and grand jury indictment has been among the major objections to trial by court-martial. If, however, those rights do not exist as to petty offenses, then the absence of those rights in courts-martial should not be an objection in cases involving petty offenses. Furthermore, although the military judges who preside over courts-martial do not have life tenure, neither do the United States Commissioners enjoy the life tenure provided by the Constitution for Article III courts. 8

If petty offenses are to receive special treatment, it would seem feasible for Congress, which has provided for the independence of military judges, to authorize military judges to try the petty offenses of civilian employees and dependents overseas.

With respect to the suggestion that Federal District Court jurisdiction be expanded to include the trial of offenses committed by civilian dependents and employees overseas, there are the same practical difficulties that have been discussed in connection with proposals to expand District Court jurisdiction to include violations of the Code by former service personnel. For example, there is no subpoena power to obtain the presence in Court of foreign witnesses needed by prosecution or defense.

Also, there is the jurisdictional question as to the extent of Congressional power to regulate the conduct of persons overseas. The Supreme Court has made clear in United States v. Bowman 9 that some Federal penal

7 260. U.S. 94 (1922). (False claim against the United States Government, or against a Government-owned corporation, is punishable even though committed aboard ship on the high seas or in a foreign port.) The Court commented:

"We have in this case a question of statutory construction. The necessary locus, when not specially defined, depends upon the purpose of Congress as evinced by the description and nature of the crime and upon the territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations. Crimes against private individuals or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement, and frauds of all kinds, which affect the peace and good order of the community must, of course, be committed within the territorial jurisdiction of the government where it may properly exercise it. If punishment of them is to be extended to include those committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to so do will negative the purpose of Congress in this regard. . . ."

8 But the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers, or agents. Some such offenses can only be committed within the territorial jurisdiction of the government because of the local acts required to constitute them. Others are such that to limit their locus to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home. In such cases, Congress has not thought it necessary to make specific provision.

8 90-578 full-time magistrates are appointed for 8-year terms, and part-time magistrates for 4-year terms.
On the other hand, the nationality principle would allow extension of jurisdiction not only to employees and dependents overseas, but also to diplomatic personnel, businessmen, and even tourists.

If Congress chose, however, to stop short of this ultimate extension of jurisdiction, where should the line be drawn? While doubts have been expressed concerning the constitutionality of singling out civilian dependents and employees to be amenable to Federal District Court trial for offenses committed overseas, such a classification seems reasonable. Certainly Congress would have a special concern for controlling the conduct of those who are so closely associated with the American armed forces overseas. As was discussed during the 1966 Congressional hearings, diplomatic personnel could also be subjected to District Court jurisdiction for offenses committed overseas.

There have been proposals that jurisdiction be limited only to those crimes or omissions that occur while the civilian dependent or employee is engaged in performance of official duties, or is present on an American installation or which are directed against the persons or property of American service personnel or of American civilian dependents or employees. Here, too, the classification of offenses subject to District Court jurisdiction seems reasonable and the jurisdictional gap would be closed as to the offenses which the host countries are least likely to prosecute.

Since the offenses of civilian dependents and employees overseas will often be subject to trial by foreign countries, would a constitutional bar exist to trial by Federal District Court if the same offense has been tried by a foreign tribunal? Under the dual sovereignty view which considers that a State Court trial does not bar Federal prosecution, and vice versa, a foreign trial clearly would have no effect on American jurisdiction, in the absence of an international agreement to the contrary. However, the dual sovereign approach is far less
popular than it was in the past and conceivably a foreign proceeding would be deemed to preclude American proceedings. Far more probable than judicial recognition of any constitutional barrier to prosecution would be enactment of a legislative prohibition of trial by any American court for conduct which has been punished by a foreign country. Such a limitation would parallel the NATO Status of Force Agreement’s prohibition of the right of American military authorities to court-martial a serviceman for the same conduct for which he has already been tried by foreign court. ⁸⁸

One of the complaints sometimes voiced against military justice is that the maximum punishments are, for the most part, not specified by statute and instead are set forth in the Table of Maximum Punishments, ⁸⁴ which is subject to change by the President. To avoid this complaint in dealing with the offenses of civilian employees and dependents, some have proposed that the conduct prohibited be set forth without reference to the Uniform Code of Military Justice and that maximum punishments be specified by statute.

Expansion of the special maritime and territorial jurisdiction of Federal courts ⁸⁵ so that it would apply worldwide to the conduct of civilian dependents and employees has been suggested as a means of achieving the goal. Another possibility would be to define the crimes of civilian dependents and employees, and the punishments for those crimes, in terms of the District of Columbia Code.

VII

RECENT LEGISLATIVE PROPOSALS

On July 21, 1970 Congressman Bennett of the House Armed Services Committee introduced H.R. 18548, which provides that an American national or citizen who, while in the Armed Services or serving with, employed by, or accompanying the armed forces overseas, is guilty of an act or omission outside the United States and its special maritime and territorial jurisdiction shall, other than for petty offenses, be guilty of like offenses against the United States and subject to like punishment as for offenses committed within the special maritime and territorial jurisdiction of the United States. There is a savings clause to retain any existing jurisdiction of military tribunals. The bill was referred to the Judiciary Committee.

A companion bill, H.R. 18547, was introduced by Congressman Bennett that same day and referred to the Armed Services Committee. It provides for apprehension of any national or citizen of the United States serving with, employed by, or accompanying the armed forces outside the United States pursuant to a warrant issued by a military judge. Removal to stand trial can take place after the military judge has conducted a hearing on probable cause. Release under bail is also contemplated by this bill; and the accused is to be furnished a military lawyer to represent him without expense. Search warrants are also to be issued by military judges; and both search warrants and warrants for apprehension are to be executed by military law enforcement personnel.

A few weeks later, on August 10, 1970, Congressman Bennett introduced H.R. 18857 which provides for a much more restricted jurisdiction over the offenses of civilian employees and dependents. Under its terms any national or citizen who, as a serviceman or a person employed by or accompanying the armed forces, is guilty of any act or omission

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²⁸ Cf. Murphy v. Waterfront Commission, 378 U.S. 52 (1964) where the Court held that the privilege against self-incrimination protects a state witness against incrimination under federal as well as state law, and a federal witness against incrimination under state law as well as federal.

²⁹ NATO Status of Forces Agreement, Art. VII, Sec. 8.


³¹ 18 U.S.C. 7. Among the offenses specifically made punishable within the special maritime and territorial jurisdiction of the United States are: Arson § 81; Assault § 113; Malming § 114; Embezzlement and Theft § 661; Receiving Stolen Property § 662; Fraud and False Pretenses § 1025; Murder § 1111; Manslaughter § 1112; Attempt to Commit Murder or Manslaughter § 1113; Malicious Mischief, Buildings or Property § 1365; Rape § 2081; Carnal Knowledge of a Female Under 16 § 2082; Robbery § 2111.
outside the United States and the special maritime and territorial jurisdiction of the United States, and if the act or omission took place while he was engaged in the performance of official duties or was within an armed forces installation or the area of operations of a unit in the field or was directed against any serviceman or national or citizen of the United States serving with, employed by, or accompanying the Armed Forces, shall be guilty of a like crime against the United States and subject to a like punishment as is provided for offenses within the special maritime and territorial jurisdiction of the United States. A savings clause is provided to retain any existing jurisdiction of courts-martial, military commissions, and other military tribunals.

On the Senate side, Senator Ervin has once again introduced bills to deal with the existing jurisdictional gap over ex-service men and civilian dependents and employees. S. 1744, which was introduced on May 3, 1971 and referred to the Committee on the Judiciary, provides that, subject to the statute of limitations contained in Article 43 of the Uniform Code, any person charged with having committed, while subject to trial by court-martial, an offense punishable under the Code by five years confinement or more and who has not been tried for such offense and is not subject to trial by court-martial for such offense may be tried in a Federal District Court. Venue lies in any judicial district in which any act or omission constituting an element of such offense was committed, if such offense was committed in the United States; or, if the offense was committed outside the United States, then in the district in which the accused is found or into which he is first brought. Trial is barred if there has already been a trial “for substantially the same offense” in a foreign court. The maximum punishment is that provided under the Uniform Code for the offense. However, the offenses would, for procedural purposes, be treated like other crimes punishable under title 18 of the United States Code. The bill is retroactive and applies to prior offenses. It contains a savings clause as to any concurrent jurisdiction of court-martial, military commissions, or other military tribunals.

On its face the bill would appear to create Federal District Court jurisdiction without regard to whether the same conduct would be subject to State court prosecution, as might be true of offenses committed within the United States. On the other hand, Article 3(a) of the Uniform Code provided for military jurisdiction only if there were no possibility of prosecution in either a Federal or State civil court. S. 1744 also does not provide that double jeopardy arises from a State court trial, even though such jeopardy is created by trial in a foreign country. These omissions were probably inadvertent on the part of the draftsman.

On May 3, 1971, Senator Ervin also introduced S. 1745, which was referred to the Committee on the Judiciary. It would amend title 18 of the United States Code by providing that any omission occurring overseas on the part of a citizen, national, or other person owing allegiance to the United States who is employed by the United States or serving in a civilian capacity with or accompanying the armed forces, shall be treated as if it had occurred within the special maritime and territorial jurisdiction of the United States. A dependent residing abroad with a civilian employee of the Armed Forces is also made amenable to this jurisdiction. Venue lies in the District Court for the district in which such person is found or into which he is first brought. Trial is not permitted if the accused has already been tried for substantially the same offense in a foreign court. A savings clause exists in this bill for the concurrent jurisdiction of military tribunals.

VIII

CONCLUSION

As a result of Supreme Court decisions a jurisdictional gap has existed for more than a decade with respect to offenses committed by former servicemen and by civilian dependents and employees overseas. Apparently the existence of this gap has not yet created insuperable difficulties for the armed forces; (continued on page 223)