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# The Judge Advocate JOURNAL



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**JUDGE ADVOCATES ASSOCIATION**

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# WHO'S RUNNING THE MILITARY?

Robert Gerwig\*

*"... judges are not given the task of running the Army..."*

*Robert H. Jackson*<sup>1</sup>

Some twenty years ago, an impetuous, if not immature, writer sought to assess the impact of selected Supreme Court precedents respecting the power of civil courts to review military discretion. The fruits of his limited essay into judicial history were summarized in a rather unexceptionable conclusion that "when discretion is so emasculated that it cannot longer be recognized as the 'decision of what is just and proper' [footnote omitted], it should be subject to judicial control."<sup>2</sup> The proposition necessarily posed the lingering dilemma of what is "just and proper" in a given case and emphasized the difficulty of formulating a rule of predictable judicial review.

The rule of thumb fashioned by Justice Jackson in 1953 evolved in the context of a challenge to the Army's classification and assignment of a draftee—Dr. Stanley J. Orloff—who sought commissioned rank or release. Satisfied that the Court had not previously revised duty orders of an individual lawfully in the military, Justice Jackson viewed the military as a "specialized community" governed by a discipline separate from that of the civilian—a discipline which he believed required the judiciary "scrupulously" to avoid interference with "legitimate Army matters." Accordingly, he asserted, "... the exercise of such jurisdiction as is here urged would be a disruptive force as to affairs peculiarly within the jurisdiction of the military authorities . . ."

A score of years later, military commanders may wonder, in the

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\* Opinions and conclusions presented herein are the author's and do not necessarily represent the views of the Department of the Army or any government agency.

<sup>1</sup> Orloff v. Willoughby, 345 U.S. 83 (1953) @ 93. The *ratio decidendi* comports with the constitutional authority of Congress to make rules and regulations for the government of the armed forces.

<sup>2</sup> Gerwig, "Judicial Control of Administrative Discretion Exercised by Military Authorities," 25 Miss. L. J. 217 (1954) @ 235. An expressive definition of an act beyond the limits of reasonable discretion is found in *Panama Refining Co. v. Ryan*, 293 U. S. 388 (1935) @ 446: "... an act of mere oppression, an arbitrary fiat that overleaps the bounds of judgment," based on the rationale of *Sterling v. Constantin*, 287 U.S. 378 (1932), @ 399-401.

wake of frequent judicial intervention into military decisions, whether judges have assumed the function disavowed by Justice Jackson. What constitutes "legitimate Army matters" or "affairs peculiarly within the jurisdiction of the military authorities" necessarily depends upon the perspective of the reviewing judge. This commentary notes a few cases which tend to reflect changing contours of judicial review since *Orloff*. The cases represent a cross-section of litigation arising from courts-martial, personnel actions, and decisions relating to the authority of commanders over military posts, indicative of the broad spectrum of "military cases" now reaching the courts.

### Courts-Martial

Shortly after the Supreme Court declined to review the duty status of Dr. Orloff, its focus shifted to the court-martial scene—an area of military law theretofore traditionally insulated from civil court review, except for the purpose of ascertaining military jurisdiction. Reviewing habeas corpus applications alleging denial of due process in general court-martial convictions, in *Burns v. Wilson*,<sup>3</sup> the

Court articulated a standard which would prolong the quest for a readily acceptable formula for judicial review. Speaking through Chief Justice Vinson, joined by three justices and supported by the unelaborated concurrence of a fourth, the Court determined that a military decision which dealt "fully and fairly" with an issue raised by the habeas corpus action is not open simply for reevaluation of the evidence.<sup>4</sup>

Undeterred by implications possibly favorable to the military arising from the *Burns* formula, the Court reiterated its judicial responsibility to limit court-martial jurisdiction to the least possible power adequate to meet the purposes of such jurisdiction. In sequence the Court successively precluded the military from exercising jurisdiction over (a) persons lawfully separated from the military service (even if the offense charged was committed by the offender while on active duty); (b) dependents of military personnel who accompany their sponsors on peacetime overseas tours; and (c) civilian employees who accompany the armed forces overseas in time of peace.<sup>5</sup>

<sup>3</sup> *Burns v. Wilson*, 346 U.S. 137 (1953) (affirming dismissals of habeas applications).

<sup>4</sup> The "full and fair" doctrine must "protect the rights of servicemen, and . . . articulate and defend the needs of the service as they affect those rights." *Kauffman v. Secretary of the Air Force*, 415 F.2d 991 (D.C. Cir. 1969), cert. denied, 396 U.S. 1013 (1970).

<sup>5</sup> *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955); *Reid v. Covert*, 354 U.S. 1 (1957); *Kinsella v. United States*, 361 U.S. 234 (1960); *McElroy v. Guagliardo*, 361 U.S. 281 (1960); *Grisham v. Hagan*, 361 U.S. 276 (1960).

The jurisdictional test was significantly expanded by the Supreme Court in the 1969 case of *O'Callahan v. Parker*<sup>6</sup> to require, in addition to military status of the person, that the offense be "service connected." *O'Callahan* thus eliminated from military criminal jurisdiction non-service connected offenses even though committed by military personnel, provided the offenses are cognizable in a civilian court and were committed off duty, off post, and out of uniform. The Court determined that the accused was entitled, in other than service-connected cases (despite his inherent military status), to the rights of indictment by a grand jury (requirement not binding upon the States) and trial by jury in a civilian court.<sup>7</sup> The "spirit of *O'Callahan*" and the earlier "civilian" cases prompted a Court of Appeals to bar military prosecution of a

civilian merchant seaman, charged with murder in a DaNang bar in Vietnam while his ship was in the harbor off-loading fuel for use by the armed forces.<sup>8</sup>

In a different vein the Supreme Court assumed *arguendo* that collateral attack on a court-martial judgment could be made through a back pay suit alleging constitutional defect in the military action. However, the Court determined that the controversy before it did not rise to the level of constitutional proportions.<sup>9</sup>

Subsequently the Supreme Court held that the pendency of court-martial proceedings should not delay federal court review of a serviceman's conscientious objector claim once military administrative remedies had been exhausted.<sup>10</sup> The Court stressed the fact that the habeas petition was independent of the military criminal proceedings

<sup>6</sup> *O'Callahan v. Parker*, 395 U.S. 258 (1969).

<sup>7</sup> Besides the obvious diminution of military jurisdiction directly due to *O'Callahan*, additional potential impact existed until the issue of retrospective application was determined in favor of the military in *Gosa v. Mayden*, — U.S. — (1973), 41 USLW 5075. A military appellant convicted by a district court of armed robbery of two other servicemen on a military post recently argued (unsuccessfully) that his right to indictment by grand jury is a substantially *lesser* right than that granted military personnel by Art. 32, UCMJ, claiming more comprehensive rights under the military system than those inherent in indictment by grand jury. *United States v. Hodge*, 487 F.2d 945 (5 Cir. 1973).

<sup>8</sup> *Latney v. Ignatius*, 416 F.2d 821 (1969). Another *O'Callahan* jurisdictional seed—the issue of off-post drug offenses committed by military personnel—has gone to the Supreme Court, *Councilman v. Schlesinger*, 42 USLW 3362.

<sup>9</sup> *United States v. Augenblick*, 393 U.S. 348 (1969).

<sup>10</sup> *Parisi v. Davidson*, 405 U.S. 34 (1972).

and remanded the case for expeditious consideration of the merits of the petitioner's habeas corpus application.

The Courts of Appeal for the District of Columbia and the Third Circuit held unconstitutional the general provisions of Articles 133 and 134, Uniform Code of Military Justice.<sup>11</sup> Both Circuits agreed that the Articles failed to satisfy constitutional standards of precision and hence gave less than fair warning of the conduct sought to be proscribed. Appeals to the Supreme Court have been filed and arguments addressed to the Court's jurisdiction have been heard.\*

Supreme Court holdings, in non-military cases, may have a pervasive effect on military procedures. For example, the *Argersinger*<sup>12</sup> prerequisite of counsel before imposing sentence of confinement (except upon knowing waiver) was immediately implemented by the Army as to summary courts-martial (the single aspect of courts-martial where military counsel had not been furnished). Similarly, the *Morrissey*<sup>13</sup> hearing requirement

for parole revocations prompted the Army to require hearings in analogous military proceedings to vacate suspended sentences to confinement.

Summarizing contemporary precedents pertaining to the scope of collateral review of court-martial proceedings, a federal district judge recently found those precedents in "a somewhat tangled web." Determining a mandamus proceeding proper to recover back pay and other benefits following conviction by an improperly convened court-martial, he conceded that (although habeas corpus had become the primary way to test the legal sufficiency of court-martial proceedings), the Supreme Court had never held invalid any particular means of raising the issue. And with regard to doctrines of exhaustion of remedy and abstention for reasons of comity, he asserted that those principles were not fixed concepts of substantive law nor of jurisdiction or procedure but that they are flexible and must be examined with special care to keep the role of the courts "in

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<sup>11</sup> *Avrech v. Secretary of Navy*, 477 F.2d 1237 (D.C. Cir. 1973); *Levy v. Parker*, 478 F.2d 772 (3 Cir. 1973), and 42 USLW 3246. The Articles, 10 U.S.C. 933-934, prescribe, inter alia, punishment for conduct unbecoming officer and gentleman and for all disorders and neglects to prejudice of good order and discipline and all conduct of a nature to bring discredit on armed forces.

\* Editor's Note—and reversed.

<sup>12</sup> *Argersinger v. Hamlin*, 407 U.S. 25 (1972). Cf. *Daigle v. Warner*, — F.2d — (9 Cir. 1973), 42 USLW 2269 (a Navy case).

<sup>13</sup> *Morrissey v. Brewer*, 408 U.S. 471 (1972).

proper symbiotic balance" with other agencies of legal decision.<sup>14</sup>

### Personnel Actions

Equally insulated from early judicial interest were cases arising from military actions directly affecting the personal status of servicemen involving orders, duty assignments, and other administrative determinations. Particularly far removed from traditional judicial inquiry were circumstances of discharge. In fact, the Congress—seeking to avoid a post-World War II burden of private bills concerning military matters for which judicial relief was deemed inappropriate—provided a statutory system of boards to review administrative discharges and other military procedures, primarily to insure that personnel would not be deprived unjustly of any benefits because of improper discharge or other inequitable action.

Some years after *Orloff*, a Court of Appeals affirmed a routine dismissal by a district court of actions to declare void certain military discharges in form other than honorable (for security reasons related to pre-service activity). Thereafter, the Supreme Court, by per curiam decision, asserted jurisdiction to determine whether the Secretary of the Army had exceed-

ed his powers. Indeed, the Court construed the Secretary's discharge authority as limited to consideration of records solely of military service and thereby countermanded that official's reliance upon evidence of petitioners' pre-military activity<sup>15</sup> as grounds for issuing an undesirable discharge.

By way of *Burns* and *Harmon*, it became evident that judicial inquiry into military discretion had expanded. In 1962, Chief Justice Warren reminded a lecture audience that this country's tradition had supported the military establishment's broad power to deal with its personnel because courts "are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have." "Nevertheless," he explained, "events quite unrelated to the expertise of the judiciary have required a modification in the traditional theory of the autonomy of military authority." Adverting to the vastly increased size of our armed forces, he elaborated: "When the authority of the military has such a sweeping capacity for affecting the lives of our citizenry, the wisdom of treating the military establishment as an enclave beyond the reach of the civilian courts almost

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<sup>14</sup> *Brown v. United States*, 365 F.Supp. 328 (E.D. Pa. 1973). Massive potential liability upon the public treasury was a significant factor upon which the decision ultimately turned favorably for the defendants.

<sup>15</sup> *Harmon v. Brucker*, 355 U.S. 579 (1958).

inevitably is drawn into question."<sup>16</sup>

The Warren rationale may have stimulated theretofore unprecedented challenge to military authority as the armed forces expanded in the late 1960's and early 1970's, punctuated by strident sounds of dissent aimed at the military as well as at institutional authority generally. In any event, the courts tended to discard earlier reluctance for reviewing military actions. Ensuing review did not always reward the petitioner, but counsel defending the military no longer could anticipate summary dismissal as the order of the day. Personnel action cases, in particular, reflected wavering dimensions of judicial inquiry, varying from greater depth of review in discharge matters to a more literal application of the *Orloff* doctrine in cases involving duty assignments and related questions. The results tend to coalesce into what had been identified as a rule of procedural or administrative due process under which the military are held to comply with regulatory requirements which meet minimum standards of fundamental fairness (as determined by the courts in each case).<sup>17</sup> Courts have articulated varied formulas by which to

balance contending interests in deciding whether to intervene in particular cases.<sup>18</sup>

A recent transfer case, against a background of alleged constitutional infringement, illustrates the plight of the commander whose action is subjected to the uncertainties of review in different judicial forums. Briefly, a soldier launched a broad legal barrage at alleged interference with rights of free speech caused by his involuntary transfer from an Army band in New York to a comparable assignment in Texas. (The transfer was directed to diminish apparent adverse effect upon military discipline in the New York command by reason of soldier protest against government policies.) The District Judge, perceiving a responsibility to exercise a "new role" (based upon the impact on society, according to his view, of enlarged armed forces) in balancing military needs against personal constitutional privileges, was persuaded that the transfer constituted a disciplinary measure to suppress constitutionally protected freedom of speech. On appeal, the Second Circuit (2-1) reversed—convinced that (1) the Army's action reflected a legitimate means of maintaining its efficiency and (2) the constitutional

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<sup>16</sup> Warren, "The Bill of Rights and the Military," 37 N.Y.U.L. Rev. 181 (1962) @ 187-188.

<sup>17</sup> E.g., *Dunmar v. Ailes*, 348 F.2d 51 (D.C. Cir. 1965).

<sup>18</sup> E.g., *United States ex rel Schonbrun v. Commanding Officer*, 403 F.2d 371 (2 Cir. 1968), cert. denied, 394 U.S. 929 (1969); *Mindes v. Seaman*, 453 F.2d 197 (5 Cir. 1971).

elements of the case were considerably less portentous than assumed at the trial level. To hold otherwise, the appellate court reasoned, would stimulate a flood of applications that would interfere with efficient administration of the Armed Forces.<sup>19</sup>

The long reach of a federal judge's edict into internal military administration, even overseas, became manifest, in a recent class action purporting to represent 145,000 American soldiers stationed in Europe, filed in the U. S. District Court for the District of Columbia. The suit attacked Army policies and practices instituted to curtail widespread drug abuse in Europe affecting military discipline and efficiency. The court found, *inter alia*, that health and welfare inspections designed to ferret out drugs and drug traffic and to rehabilitate drug users in the overseas command constituted unreasonable searches and seizures because the fruits of such inspections were available for discipli-

nary purposes, including adverse administrative actions. Non-medically oriented administrative sanctions which came under judicial condemnation due to the absence of a prior "due process" hearing included temporary withdrawal of pass privileges, suspension of driver licenses, required moves onto a military post or segregation in separate barracks sections for medically confirmed drug abusers.<sup>20</sup>

Other examples of action in which the courts recently disapproved internal military administrative procedures include disparate treatment between sexes of dependents' benefits, compulsory chapel attendance, prohibition of wigs at reserve drill meetings, denial of medical benefits to illegitimate children, reimbursement by conscientious objectors of expenses of government-paid education, and discharge of married cadets.<sup>21</sup>

### Military Posts

Legal actions respecting a commander's authority over a military

<sup>19</sup> Cortright v. Resor, 447 F.2d 245 (2d Cir. 1971), cert. denied, 405 U.S. 965 (1972). In a different setting, the Supreme Court reminded petitioners that the federal courts do not render advisory opinions and held, on the record presented, that subjective allegations that an Army civilian surveillance program had a chilling effect on First Amendment freedoms are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm. Laird v. Tatum, 408 U.S. 1 (1972).

<sup>20</sup> The Committee for GI Rights v. Callaway, — F.Supp.— (D.C. 1974), 42 USLW 2365. At this writing, the Army was seeking to appeal the decision.

<sup>21</sup> *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Anderson v. Laird*, 466 F.2d D.C. Cir. 1972), cert. denied, 409 U.S. 494 (1972); *Friedman v. Froehlke*, 470 F.2d 1351 (2 Cir. 1972); *Miller v. Laird*, 349 F.Supp. 1034 (D.C. 1972); *Miller v. Chaffee*, 462 F.2d 335 (9 Cir. 1972); and *O'Neill v. Dent*, 364 F.Supp. 565 (E.N.Y. 1973).

post—especially as to control of entry thereto and behavior thereon—traditionally were not accorded searching judicial inquiry. As the convening authority's role in the court-martial system flows from statutory power, so an installation commander's responsibility is fortified by a statute making punishable (1) entry upon a military site for prohibited purposes and (2) reentry after removal and order not to reenter. In 1961, the Supreme Court, with a deferential nod to "unquestioned authority which commanding officers of military installations have exercised throughout our history," affirmed summary denial in the interest of good order and military discipline—i.e., in that case, for security reasons—of access to a Navy installation by a civilian employed thereon as a cafeteria worker.<sup>22</sup>

That rationale prevailed through most of the Sixties. But the new era of litigation arising largely out of dissidence against the Vietnam war gradually reached military installations. Challenges to military authority usually presented constitutional issues pertaining to freedom of speech and assembly or due process requiring delicate balancing of individual rights against governmental interests in a precise factual context. This led to the

formulation by some judges of a curious dichotomy which purported to insulate from review "day-to-day operations" of the armed forces but would not preclude review of "decisions allegedly violating constitutional or statutory rights."<sup>23</sup> Inevitably, some previously effective military-legal defenses were breached. For example, a Court of Appeals, reversing a District Court, held that peaceable distribution of leaflets on a post by college students did not violate a post regulation proscribing picketing and similar forms of protest, particularly in the absence of evidence showing disruption, confusion or inconvenience accompanying the questioned activity. Shortly thereafter, a District Court decision upholding a commander's denial of access to a civilian employee (believing that she would try to distribute anti-war literature on the post) was overruled by a Court of Appeals. That court found the evidence insufficient to support the commander's inference that the employee's presence would constitute a threat to military discipline.<sup>24</sup> Challenges by servicemen desiring to hold open meetings to discuss government foreign policy and to distribute related papers and leaflets were successfully defended by the military authorities,

<sup>22</sup> *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961) @ 892.

<sup>23</sup> A recent instance is found in *Zister v. Walsh*, 352 F.Supp. 438 (Conn. 1972).

<sup>24</sup> *United States v. Bradley*, 418 F.2d 688 (4 Cir. 1969); *Kiiskila v. Nichols*, 433 F.2d 745 (7 Cir. 1970).

though the decisions emphasized that similar situations would have to be resolved each time by consideration of the pertinent facts involved, depending particularly on specific justification offered by the commander to deny requested privileges.<sup>25</sup>

The commander's control was perceptibly lessened when the Supreme Court (in a per curiam decision) overruled the Fifth Circuit's affirmation of the civil conviction of a civilian for violating a commander's prohibitory order by distributing leaflets on a main thoroughfare of Fort Sam Houston. The Court of Appeals had stressed the need to distinguish public areas such as parks, towns, and shopping centers from military enclaves. However, the Supreme Court concluded that ("Whatever power the authorities may have to restrict general access to a military facility") because the commander had not chosen to exclude the public from the street where the petitioner was arrested, he could "no

more order petitioner off his public street . . . than could the city police order any leafleteer off of any public street."<sup>26</sup>

Political campaigners also appear to be gaining access to military posts, and at least one district judge rejected regulations, (even in a combat zone), intended to bar, without prior approval, circulation of petitions on base, holding as impermissibly vague provisions predicating the bar on "clear danger to the loyalty, discipline or morale of members or material interference with the accomplishment of military mission."<sup>27</sup>

The practice of permitting unimpeded general entry to military posts has tended to erode normally inherent restrictions to the extent that, absent some manifestation of unique military requirement other than mere identification as military installations, such areas are becoming judicially regarded as similar in nature to parks, streets and other freely accessible public areas.<sup>28</sup> Justification of traditional

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<sup>25</sup> E.g., *Dash v. Commanding General*, 429 F.2d 427 (4 Cir. 1970), cert. denied, 401 U.S. 981 (1971), and *Yahr v. Resor*, 330 F.Supp. (E.D.N.C. 1972).

<sup>26</sup> *Flower v. United States*, 407 U.S. 197 (1972). Seeds of *Flower* include *Burnett v. Tolson*, 474 F.2d 877 (4 Cir. 1973), and *CCCO-Western Region v. Fellows*, 359 F.Supp. 644 (N.D. Calif. 1973).

<sup>27</sup> E.g., *Spock v. David*, 469 F.2d 1047 (3d Cir. 1972) and *Carlson v. Schlesinger*, 364 F.Supp. 626 (D.C. 1973).

<sup>28</sup> For the most recent judicial expression of the earlier traditional view that persons who visit a military base are mere licensees whose privilege is subject to revocation or denial in the interest of military discipline, see *United States v. Flower*, 452 F.2d 80 (5 Cir. 1971), @ 83, *reversed*, 407 U.S. 197 (1972).

military controls now seems to require proof of particular measures delineating the extent of control required, to include provision for specific permission to enter areas intended to be restricted, accompanied by appropriate warning signs, effective patrols through the area and (when practical) fences and guarded entryways.<sup>29</sup>

Search for the elusive standard of judicial review over matters committed to the discretion of the military continues. Variables affecting the relation of the military (which is in many ways to be distinguished from civilian governmental agencies) to society at large at any given time complicate the problem. Pending formulation of a compelling definitive rule, the military must satisfy potential judicial concern that requirements

allegedly peculiar and necessary to its needs justify deviation from otherwise controlling legal principles.

Although judges may not really be "running the Army," a modern commander—even in combat areas—may be excused for glancing over his shoulder while giving an order. For the odds are reasonably favorable that he can perceive a shadowy figure in judicial robes observing the action with more interest than was contemplated by Justice Jackson. Or, to put it another way: The limits of military discretion are what a court determines them to be in a particular case.<sup>30</sup> As the armed forces contract in size, perhaps the views of Jackson and Warren can be reconciled to permit appropriate accommodation of the respective functions of commanders and judges.

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<sup>29</sup> E.g., *United States v. Floyd*, 477 F.2d 217 (10 Cir. 1973).

<sup>30</sup> *Orloff* is still applied, especially if the challenge lacks substantial constitutional proportions. See, e.g., *Gilligan v. Morgan*, — U.S. — (1973), 41 USLW 4966; *Emma v. Armstrong*, 473 F.2d 656 (1 Cir. 1973); *Allgood v. Kenan*, 470 F.2d 1071 (9 Cir. 1972); *Arnheiter v. Chafee*, 435 F.2d 691 (9 Cir. 1970); *Talley v. McLucas*, 366 F.Supp. 1241 (N.D. Texas 1975).

# O'CALLAHAN REVISITED AND BUTTONED UP

By Charles M. Munnecke \*

The Supreme Court, in a startling decision on June 2, 1969, reversed the long and well-established practice that "the status of the military accused controls in determining court-martial jurisdiction." In short, in *O'Callahan v. Parker*<sup>1</sup> the court ruled that, in addition to the military status of the defendant, the offense must be service connected to sustain court-martial jurisdiction.

This revolutionary decision rocked the foundations of military jurisprudence and was of immediate and extended concern to those charged with the administration of military justice—the servicemen, the civilian bar, and particularly the local law enforcement agencies in civilian communities adjacent to

military posts and stations. Numerous law review articles and comments have been written and the legal implications and ramifications therefrom have been the subject matter of an extensive case load in the Court of Military Appeals (hereinafter referred to as COMA) and a number of cases in Federal District and Circuit Courts, the Court of Claims, and the Supreme Court, as well as applications for relief to Administrative Boards. A survey of the literature and cases is incorporated in this article.

Initially, it was feared that the decision would create a state of uncertainty, and it would be difficult, if not impossible to implement—that it would precipitate a terrific and unprecedented volume of litigation,<sup>2</sup> particularly in view of

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<sup>1</sup> 395 U.S. 258, 89 S. Ct. 1683, 23 L Ed 291 (1969).

<sup>2</sup> In his brief *Relford v. Commandant*, 401 U.S. 355 (1971), the Solicitor General stated:

When the ruling in *O'Callahan* was rendered, the Army Judge Advocate General stated that since 1951 . . . the Army alone had court-martialed approximately 1.3 million men and estimated that there were 450,000 courts-martial which might be invalid under *O'Callahan*. He further stated that approximately 4,000 men in the combined services were in prison at that time but that lawsuits would not be limited to those in prison because presumably actions would be filed relating to other

the potential retroactive application. It was feared that it would result in hardship, by creating a severe strain on personnel and on the finances of the civilian communities adjacent to military posts. These fears however, have in large measure, been dissipated following the initial wave of cases and their resolution by COMA. The diligent efforts of COMA and the Federal Courts in their careful considera-

tion of the points presented have resulted in a crystalization of guidelines to establish a workable field of law and a feeling that all concerned "can live with it".<sup>3</sup>

With the comparatively recent cases of *Gosa* and *Flemings*,<sup>4</sup> the Supreme Court has finally resolved the issue of retroactivity, ruling a prospective application only. This, coupled with the law and interpretation that has emerged from a large number of COMA cases,<sup>5</sup> and

punishments and involving back pay, veteran's benefits and other collateral matters. . . .

The Court of Military Appeals observed. . . . For the one fiscal year of 1968, the Army, the Navy, and the Air Force conducted approximately 74,000 special and general courts-martial. If only the smallest fraction of these courts-martial and those conducted in other years since 1916 involved an *O'Callahan* issue, it is an understatement that thousands of courts-martial would still be subject to review. The range of relief could be extensive . . . . [Brief at 28-29].

<sup>3</sup> It appears that the time has come for the submission of a complete and current listing of all such articles, with citations to court cases. Further, a number of new concepts dealing with *O'Callahan* need to be advanced. Moreover, the author demonstrates how the initial fears as to uncertainty, lack of standards, and potential litigation, have proven to be generally unfounded.

<sup>4</sup> *Gosa v. Mayden, Warner v. Flemings*, 413 U.S. 665, 93 S. Ct. 2926 (1973).

<sup>5</sup> In addition to the 62 *COMA* cases cited in Relford (401 U.S. 355 fn. 8 pg 358 and 359) the author has noted 10 additional cases to wit:

U.S. v. Goldman, 18 U.S.C.M.A. 516; 40 C.M.R. 228 (1969) (Possession of counterfeit money—overseas)

U.S. v. Augenblick, 19 U.S.C.M.A. 638 (1970) (Sodomy—serviceman victim)

U.S. v. Hughes. 19 U.S.C.M.A. 510, 42 C.M.R. 112 (1971) (smuggling drugs.)

U.S. v. LeBlanc, 19 U.S.C.M.A. 381, 41 C.M.R. 381 (1970) (smuggling drugs.)

U.S. v. Pieragowski, 19 U.S.C.M.A. 508, 42 C.M.R. 110 (1970) (smuggling drugs)

U.S. v. Enzor, 20 U.S.C.M.A. 257, 43 C.M.R. 97 (1971) (Writ of Coram Nobis—held no retroactivity)

[Footnote continued]

of Federal Court cases,<sup>6</sup> leads to the conclusion that, generally speaking, all matters relating to *O'Callahan* can now be put to rest.

- U.S. v. Bonivita, 21 U.S.C.M.A. 407, 45 C.M.R. 181 (1972) (Concealment of stolen car—on post)
- U.S. v. Wolfson, 21 U.S.C.M.A. 549, 45 C.M.R. 323 (1972) (Bad checks)
- U.S. v. Teasley, 22 U.S.C.M.A. 131, 46 C.M.R. 131 (1973) (Possession of narcotics equipment)
- U.S. v. Rainville, 22 U.S.C.M.A. 464, 47 C.M.R. 554 (1973) (Drugs—use and possession)
- U.S. v. Sexton, 23 U.S.C.M.A. 101, June 7, 1974 Off base sale to Serviceman

<sup>6</sup> In addition to the five Federal Circuit Court cases cited in Relford, *supra*, Fn 7 pg 358, the author has noted 29 additional cases in the *Federal District and Circuit Courts*, to wit:

- Bell v. Clark, 308 F. Supp. 384, 432 F.2d 200 (CA 4 1971) Rape off-post Germany—Court martial has jurisdiction.
- Blount v. Laird Dist. Ct. D.C. Civil #2715-70 (1970) Not published, Appeal denied Oct. 24, 1971. Serviceman charged with murder in Korean court—asked for writ to prohibit his transfer to Korean authorities—denied.
- Chatain v. Slay, 365 F.S. 522 D. Colo. (1974) Use and possession off base not service connected.
- Cole v. Laird, 468 F.2d 829 (CA 5 1972) Hawaii Off base use of drugs—not service connected.
- Councilman v. Laird WD Okla 72-462 (not published) 481 F.2d 613 (CA 10 1973) Cert. Granted 94 S.Ct. 839 under name of Schlessinger v. Councilman
- Devlin v. U.S. E.D. So. Car. (CA 4 1972) opinion July 5, 1972 # 923. Serviceman victim off-post—Court disagreed with COMA as to service connection, but held no retroactivity.
- Diorio v. McBride, 306 F. Supp. 528, 431 F.2d 730 (CA 5 1970) On-post possession of marijuana service connected.
- Flemings v. Chafee, 330 F. Supp. 193, 458 F.2d 544 (CA 2 1972) Cert. granted 40 Law Week 3597, 1944 Larceny off-post.
- Gosa v. Mayden, 305 F. Supp. 1186, 450 F.2d 753 (CA 5 1971) Cert. Granted 6/19/72 71-6314. Rape civilian off-base—held no retroactive application.
- Harkcom v. Parker, 439 F.2d 265 (CA 3 1971) Attempted rape of dependent started on-post continued off-post. Held service connected.
- Harrington v. Seaman Dist. Ct. D.C. #2353-71 decision May 19, 1972 Not published. Murder of dependent off-post—no retroactivity.
- Hemphill v. Moseley, 313 F. Supp. 114, 443 F.2d 322 (CA 10 1971) Offense committed on foreign soil—held jurisdiction.
- Holder v. Richardson, 364 F. Supp. 1207 D.C.D.C. 1973. Use and possession off base not service connected.

[Footnote continued]

At the risk of being criticized "ground",<sup>7</sup> a review of the cases and for going over "well plowed a complete and current abbreviated

- Hooper v. Laird, 482 F.2d 784 (CADDC) 1973. No retroactivity.
- Jacobs v. Froehlke, 334 F. Supp. 1107, 481 F.2d 540 (CA DC 1971)  
Carnal knowledge of dependent Okinowa—held military court has jurisdiction.
- Lichtenstein v. Laird, N.D. Calif. 72-13 Decision Aug. 31, 1972. Not published. Assault on dependent. Held no retroactivity.
- Lyle v. Kincaid, 352 F. Supp. 81 (M.D. FLA, 1972) Off-post possession of drugs—not service connected.
- Marymont v. Joyce, 352 F. Supp. 547 (W.D. Ark 1972) Murder of dependent—overseas. Petition for Habeas corpus dismissed.
- Moylan v. Laird, 305 F. Supp. 551 (CA 1 1969). Importation of marijuana not service connected.
- Redman v. Warner, 355 F. Supp. 812 (DC Hawaii (1973) Possession and sale off base not service connected.
- Schlomann v. Moseley, 340 F. Supp. 1393, 457 F.2d 1223, (CA 10 1972). Held no retroactivity—action suspended pending Flemings decision.
- Schroth v. Warner, 353 F. Supp. 1032 (DC Hawaii 1972). Possession of drugs off base—not service connected.
- Sedivy v. Laird, 485 F.2d (CA 3 1973). Poss. of Marajuana off-post—not S.C.
- Seegar v. Kincaid, MD. Fla. 352 F. Supp. 81 (1972). Off-post possession of drugs on duty status off post—service connected.
- Swift v. Commandant, 440 F.2d 1074 (CA 10 1971). Cert. Denied 396 U.S. 1028. Murder in Germany—held jurisdiction.
- Swisher v. Moseley, 442 F.2d 1331 (CA 10 1971). Assault on-post. Transportation of vehicle across state lines. Service connected.
- Thompson v. Parker, 308 F. Supp. 904 MD. Penn. (1970). Held no retroactive application. Murder on post.
- Williams v. Froehlke, 356 F. Supp. 591 affd. 490 F.2d 998 (CA 2 1974)  
Robbery in Germany—held jurisdiction.
- Williamson III v. Alldridge, 320 F. Supp. 840, Okla. (CA 8 1970). Murder Okinowa. Held jurisdiction following Gallagher, and also held no retroactivity.
- Wimberly v. Laird, 472 F.2d 923 (CA 8 1973). Murder in Germany—held jurisdiction.

<sup>7</sup> In addition to 10 articles, 11 notes, 3 comments and 5 recent cases (a total of 29) cited in *Relford, supra*, fn. 1 pg. 356-357, the author has noted an additional 21 articles and 14 notes (a total of 35) to wit:

- Birnbaum and Fowler: 38 Fordham L. Rev. 673-86 (1970). Military Appellate Decisions Following *O'Callahan*.
- Birnbaum and Fowler: 39 Fordham L. Rev. 729-42 (1971), The Relford Decision.
- Blumenfeld: 10 Am. Cr. L. Rev. 57-80 (1971). Courtmartial Jurisdiction over Civilian Type crimes.

[Footnote continued]

- Blumenfeld: 60 Geo. L. J. 551-582 (1972). Retroactivity After O'Callahan.
- Crawford: 12 JAG L. Rev. 100-111 (1970). The Ambit of O'Callahan.
- Derrick: VI Suffolk L. Rev. 1096-1105 (1972). Jurisdiction Limited to Service Connected Offenses.
- Everett: 1973 Duke L. J. 649-701. The New Look in Military Justice.
- Hahn: 10 San Diego L. Rev. 194-206 (1973). Back Pay Issues in the Military.
- Hindley: 12 JAG L. Rev. 154-157 (1970). The Effect of O'Callahan on Drug Abuse Cases.
- Higley: 27 JAG J. 85-88 (1972). O'Callahan Retroactivity.
- Menaco and Ripple: 26 JAG J. 131-137 (1971). Relford v. Commandant.
- Menaco: 26 JAG J. 248-55 (1972). Military Jurisdiction: Retroactivity of O'Callahan.
- Morrison: 11. Wm. and Mary L. Rev. 508-524 (1969). Court-Martial Jurisdiction: The Effect of O'Callahan.
- Moyer: 22 Maine L. Rev. 105-140 (1970). Procedural Rights of the Military Accused.
- Patterson: 50 N. Car. L. Rev. 402-411 (1972). Retroactivity of the Service Connected Test of Jurisdiction.
- Rice: 61 J. Crim. L. 339-51 (1971). Court-Martial Jurisdiction, "Service Connection" Standard in Confusion.
- Rice: 51 Mil. L. Rev. 41-84 (1971). O'Callahan: Court-Martial Jurisdiction, "Service Connection" Confusion and the Serviceman.
- Sernovitz: 43 Temple L. Rev. 166-179 (1970). The New Boundaries of Military Jurisdiction.
- Sirak: 21 Am. U. L. Rev. 241-262 (1971). Relford: Fashioning a Military Jurisdictional Test.
- Wilberding: 1971 Wash. U. L. Q. 413-437 (1971). The Supreme Court Adds New Guidelines in Determining Court-Martial Jurisdiction.
- Zellman: 52 Mil. L. Rev. 169-179 (1971). Relford: On Post Offenses and Military Jurisdiction.

## NOTES

- 22 Case W. Res. L. Rev. 279-307 (1971).
- 19 Catholic L. Rev. 101-112 (1971)
- 63 Criminal L. J. 23 (1971)
- 22 U. of Florida L. Rev. 476-481 (1970).
- 40 Fordham L. Rev. 939-49 (1972).
- 43 So. Car. L. Rev. 356-82 (1970).
- 15 S.D. L. Rev. 335- (1970).
- VI Suffolk U. L. Rev. 1096-1105 (1972).
- 21 Syracuse L. Rev. 175-185 (1969).
- 50 Texas L. Rev. 405-410 (1971).
- 2 Texas Tech. L. Rev. 106 (1970).
- 7 Texas Int. L. J. 319 (1971).
- 24 U. of Miami L. Rev. 399-405 (1970).
- 27 Wash. & Lee L. Rev. 118-124 (1970).
- 1970 Wisc. L. Rev. 172-181 (1970).
- For an extensive annotation see 14 ALR Fed. 159 (1973)

digest, as may be noted in the text and footnotes, may be of general and historical interest sufficient to warrant the publication of another *O'Callahan* article.

### I. The Supreme Court Decisions

Prior to 1969, it was the universal rule, consistently recognized by the courts, that *status* of the accused was the controlling factor in court-martial jurisdiction. Thus any offense proscribed by the Uniform Code of Military Justice, be it a military offense (e.g. absences, violations of orders, disobedience) or a civil-type offense (e.g. larceny, murder, assault) was recognized as within military jurisdiction and subject to trial, when committed by a person with the proper status.

*O'Callahan* altered this premise. There the accused, while on leave and in civilian clothes, assaulted and attempted to rape a civilian. The Supreme Court held that since petitioner's crimes were not service connected, he could not be tried by court-martial but rather was entitled to trial in the civilian courts.<sup>8</sup> Thus the Court rendered suspect all civil type offenses. The criteria for court-martial jurisdiction was no longer the status alone, but status plus a "service-connected" offense. The court stated:

In the present case petitioner was properly absent from his

military base when he committed the crimes with which he is charged. There was no connection—not even the remotest one—between his military duties and the crimes in question. The crimes were not committed on a military post or enclave, nor was the person whom he attacked performing any duties relating to the military. . . .

Finally, we deal with peacetime offenses, not with authority stemming from the war power. Civil courts were open. The offenses were committed within our territorial limits, not in the occupied zone of a foreign country. The offenses did not involve any question of the flouting of military authority, the security of a military post, or the integrity of military property.<sup>9</sup>

Justice Harlan, joined by Justices Stewart and White, in his dissent adhered to *status* as the sole requirement and added that "the Court has thrown the law in this realm into a demoralizing state of uncertainty." He criticized the majority as suggesting "no general standard for determining when the exercise of court-martial jurisdiction is permissible."<sup>10</sup>

Initially, many commentators asserted the common criticism that the opinion failed to set proper standards or criteria to determine

<sup>8</sup> Fn. 1 pg. 274.

<sup>9</sup> Id. 273, 274.

<sup>10</sup> Id. pg. 275.

which offenses were service-connected and felt that the many legal problems presented would seriously impede the administration of military justice.<sup>11</sup> To a large degree, experience has by now established that these fears were exaggerated.

An attempt to obtain further clarification of the question of the application of *O'Callahan* to crimes committed outside the territorial limits of the United States was early presented on the application for certiorari in *Swift*.<sup>12</sup> The petitioner had been convicted by court-martial in 1965 for the murder of a German civilian, off-post, and the lower courts had held that *O'Callahan* had no application overseas. Certiorari was denied.

Subsequently, in *Relford*,<sup>13</sup> the petitioner was convicted of rape of a dependant on-post. The Circuit Court had denied application for a writ of habeas corpus. Later, the *O'Callahan* decision was handed down and certiorari was granted.

Notwithstanding the need for a definitive judicial statement on retroactivity as urged in the Solicitor General's brief<sup>14</sup> and heavily stressed by him during oral

argument, the Court observed, "the issue is better resolved in other litigation where, perhaps, it would be solely dispositive of the case."<sup>15</sup> Thus the decision was limited to the scope of *O'Callahan*.

The Court set forth as standards to determine service connection:

1. The serviceman's proper absence from the base;
2. The crime's commission away from the base;
3. Its commission at a place not under military control;
4. Its commission within our territorial limits and not in an occupied zone of a foreign country;
5. Its commission in peacetime and its being unrelated to authority stemming from the war powers;
6. The absence of any connection between the defendant's military duties and the crime;
7. The victim's not being engaged in the performance of any duty relating to the military;

<sup>11</sup> 56 A.B.A.J. 686 Wurtzel; 22 Baylor L. Rev. 64 Wetzel; 1969 Duke Law J. 853, 872 Everett; 38 Geo. Wash. L. Rev. 170; 12 J.A.G. L. Rev. 102 Crawford; 51 Mil. L. Rev. 41 Rice; 54 M.L.R. 1, 25-29, 64 Nelson; 16 NY L. F. 1 McCoy; 1 San Diego L. Rev. 55, 66 Bowie.

<sup>12</sup> *Swift v. Commandant*, 396 U.S. 1028 (1970).

<sup>13</sup> *Relford v. Commandant*, 401 U.S. 355 (1971).

<sup>14</sup> Brief for Respondent, *Relford* Supra Fn. 2 pgs. 56. The two issues were retroactivity and scope.

<sup>15</sup> *Relford* pg. 370.

8. The presence and availability of a civilian court in which the case can be prosecuted;
9. The absence of any flouting of military authority;
10. The absence of any threat to a military post;
11. The absence of any violation of military property.

One might add still another factor implicit in the others;

12. The offense's being among those traditionally prosecuted in civilian courts.<sup>16</sup>

In applying the facts of *Relford* to these standards, the Court noted the military interest in security on the base, the necessity for maintenance of order, and the impact upon Military discipline. The Court concluded that an offense committed on the base is service connected and within military jurisdiction.<sup>17</sup>

While *Relford* clearly establishes that all on-post offenses are to be considered to be service connected,

some potential issues are unresolved, for example, the status of offenses committed at or near the post, and some types of drug offenses.

## II. Subsequent Applications

On August 22, 1969, approximately two months after the ruling on a petition for reconsideration on another issue, the Court of Military Appeals had its first opportunity to consider the application of the *O'Callahan* ruling in *Goldman*.<sup>18</sup> During the next three terms of court, a total of 65 pertinent opinions were published. After an interval of approximately a year and a half and ending with *Rainville* (Sept. 1973), four more opinions brought the total to 69.<sup>19</sup> COMA has performed a Herculean job and has been most successful in establishing definite and workable guidelines, and, on the whole, the Federal Courts have supported COMA.

It is interesting to note a case in the District Court of the District of Columbia where, in effect, *O'Cal-*

<sup>16</sup> Id. pg. 365.

<sup>17</sup> Id. pg. 367-69.

<sup>18</sup> U.S. v. Goldman, 18 U.S.C.M.A. 516, 40 C.M.R. 228 (1969).

<sup>19</sup> U.S. v. Wolfson, 21 U.S.C.M.A. 549, 45 C.M.R. 323 (1971).  
U.S. v. Bonavita, 21 U.S.C.M.A. 407, 45 C.M.R. 181 (1972).  
U.S. v. Teasley, 22 U.S.C.M.A. 131, 46 C.M.R. 131 (1973).  
*Rainville v. Lee*, 22 U.S.C.M.A. 464 47 C.M.R. 554 (1973).

The Court has also issued opinions involving civil type offenses in *Frost* (233) *Walters* (255) *Logan* (349) *Ross* (353) *Colon* (399) *Seigle* (403) and *Cady* (408). All are reported in Vol. 22. However, these cases make no reference to *O'Callahan*; rather the general principle of service connection for on-post offenses has been accepted.

*lahan* has been invoked for reverse purposes. In *Blount*,<sup>20</sup> a serviceman was charged with murder in the Korean Courts and was being held by the military for transfer for trial pursuant to the Status of Forces Agreement (SOFA). In seeking a writ of prohibition in the District Court, petitioner was claiming that he should have been tried by the military authorities. The Court held that SOFA is not unconstitutional.

### A. Overseas Offenses

One of the first questions raised was the applicability of *O'Callahan* to overseas offenses. COMA addressed itself promptly to the issue in *Goldman*, finding *O'Callahan* did not support any contention "that the military may not try the accused for these offenses committed

by him while on active overseas duty in a zone of conflict. . . ." <sup>21</sup>

The next term the Court in *Keaton*, wrote an extended opinion elaborating on *Goldman* and noted that the authority of Congress to make rules governing the armed forces, when read with the "necessary and proper" clause of the Constitution, results in a valid exercise of constitutional authority where jurisdiction is assumed over crimes committed abroad.<sup>22</sup>

This principle has been followed consistently in all succeeding COMA cases,<sup>23</sup> and has been upheld by the Federal courts.<sup>24</sup>

In *Hemphill*<sup>25</sup> the Federal court, following *Keaton*, stated:

When a crime occurs on foreign soil, United States civilian courts are generally not available to

<sup>20</sup> *Blount v. Laird*, D.C.D.C. Civil 2715-70. Order dated Dec. 7, 1970. Appeal denied Oct. 24, 1971.

<sup>21</sup> Fn. 18 pg. 517.

<sup>22</sup> *U.S. v. Keaton*, 19 U.S.C.M.A. 64, at 67, 41 C.M.R. 64 (1969).

<sup>23</sup> *U.S. v. Weinstein*, 19 U.S.C.M.A. 29, 41 C.M.R. 29 (1969).  
*U.S. v. Easter*, 19 U.S.C.M.A. 68, 41 C.M.R. 68 (1969).  
*U.S. v. Stevenson*, 19 U.S.C.M.A. 69, 41 C.M.R. 69 (1969).  
*U.S. v. Higginbotham*, 19 U.S.C.M.A. 73, 41 C.M.R. 73 (1969).  
*U.S. v. Gill*, 19 U.S.C.M.A. 93, 41 C.M.R. 93 (1969).  
*U.S. v. Bryan*, 19 U.S.C.M.A. 184, 41 C.M.R. 184 (1969).  
*U.S. v. Blackwell*, 19 U.S.C.M.A. 196, 41 C.M.R. 196 (1969).

In *U.S. v. Newvine*, 23 U.S.C.M.A. 208 (Aug. 1974) murder of a civilian in Mexico, the accused was in the country solely for personal reasons. The court did not buy the argument that Weinstein had no application because the accused was on foreign soil and not on military duty, and affirmed the jurisdiction of the military court.

<sup>24</sup> *Bell, Harris, Jacobs and Williamson*. See Fn. 6 for citations. See also the recent case of *Williams v. Frohlike*, 490 F.2d 998 (CA 2 1974).

<sup>25</sup> *Hemphill v. Mosely*, 443 F.2d 322 (CA 10 1971), pg. 323-24.

vouchsafe the rights of the accused. . . . We conclude that military jurisdiction . . . is left untouched by O'Callahan.

In *Gallagher*<sup>26</sup> the petitioner in the Court of Claims sought back pay lost by a court-martial conviction for larceny committed in Germany. After noting the COMA decision in *Keaton* and the Status of Forces Agreement, the court concluded that the court-martial had jurisdiction,<sup>27</sup> Petitioner's application for certiorari was denied. Subsequently the Court of Claims denied a similar petition in *Huggins*.<sup>28</sup>

### B. On-Post Offenses

COMA and the federal district courts consistently have held that on-post offenses are service connected, and have found *O'Callahan* inapplicable.<sup>29</sup> It is well settled that once "on-post status" has been established there is jurisdiction. For example, in *Crapo*<sup>30</sup> the court held that a robbery in which the

taking was committed off-post but which began with violence on the post was sufficient to establish service connection and jurisdiction.

The Federal courts have concurred. In *Swisher*<sup>31</sup> the accused robbed and assaulted a dependant on-post and then drove the vehicle from the post. The court, in holding service connection, noted that this crime affected the security of the post and military discipline sufficient to justify military jurisdiction as service connected.<sup>32</sup>

### C. Minor Offenses

Likewise military jurisdiction has been consistently upheld over "minor offenses." In *Sharkey*,<sup>33</sup> COMA held that one charged with being drunk off-post was subject to a trial by special court-martial, and not entitled to a jury trial because of the six months limitation rule provided for by paragraph 127c,<sup>34</sup> Table of Maximum Punishments (hereinafter cited as T.M.P.) and hence *O'Callahan* was inap-

<sup>26</sup> *Gallagher v. United States*, 191 Ct.Cl. 546, 423 F.2d 1371 (1970). Cert. Denied, 405 U.S. 1043.

<sup>27</sup> *Id.* pg. 551.

<sup>28</sup> *Huggins v. United States*, 196 Ct.Cls. 779 (1971), cert. den. 405 U.S. 1043.

<sup>29</sup> *Relford, Diorio, Harcom, King, Swisher, Thompson and Zenor*. For citations and charges, see fn. 6.

<sup>30</sup> *U.S. v. Crapo*, 18 U.S.C.M.A. 594, 40 C.M.R. 306 (1969).

<sup>31</sup> *Swisher v. Moseley*, 442 F.2d 1331, (CA 10 1971).

<sup>32</sup> *Id.* pg. 1332.

<sup>33</sup> *U.S. v. Sharkey*, 19 U.S.C.M.A. 26, 41 C.M.R. 26 (1969).

<sup>34</sup> *Manual for Court-martial*, 1969 (revised).

plicable. The court stated that this was a minor offense punishable by confinement for six months, and noted that the Supreme Court in *Cheff* has recognized that offenses punishable by penalties up to six months do not require a jury trial.<sup>35</sup> There the test used was the maximum and actual punishment of six months.

The above has likewise been recognized in at least one Federal Court. In *Diorio*<sup>36</sup> the Court noted that as the petitioner would be tried by Special Court-Martial where the maximum sentence that can be imposed is six months, following the Supreme Court decision, he is not entitled to a jury trial, hence the *O'Callahan* protection of a jury trial would have no application.<sup>37</sup> In both *Sharkey* and *Diorio* the maximum sentence was six months. But what of an offense tried by a special court-martial or summary court-martial where the maximum penalty under the T.M.P. is over six months but the actual

sentence could not exceed six months, due to the jurisdictional limitation of these courts?

In *Cheff*,<sup>38</sup> *supra*, relied upon by COMA in *Sharkey*, the contempt proceedings resulted in a sentence of six months' confinement although a longer sentence could have been imposed. The court stated that as *Cheff* received a sentence of only six months, his offense can be treated as "petty" and, accordingly, he was properly convicted without a jury.<sup>39</sup>

In *Duncan*,<sup>40</sup> the maximum sentence prescribed in the statute was two years, with no specification of hard labor. But Louisiana law required a jury only where hard labor was prescribed. The sentence was two months without hard labor. The court considered the maximum penalty as controlling and held entitlement to a jury trial.<sup>41</sup>

It accordingly appears that we must look to the maximum *authorized* sentence rather than to the sentence itself on the ques-

<sup>35</sup> *Cheff v. Schnackenberg*, 384 U.S. 373. The Supreme Court recognized that an offense punishable by penalties up to six months did not require a trial by jury.

<sup>36</sup> *Diorio v. McBried*, 306 F.Supp. 528, 431 F.2d 730 (CA 5 1970).

<sup>37</sup> Although the decision was service connection, the court took occasion to note: "It is interesting to observe. . . . that since petitioner Diorio will be tried by a special court-martial the maximum period of confinement he can receive for the offenses with which he is charged is six months."

<sup>38</sup> *Cheff*, *supra* fn. 35.

<sup>39</sup> *Id.* pg. 380.

<sup>40</sup> *Duncan v. Louisiana*, 391 U.S. 145 (1948).

<sup>41</sup> *Id.* pg. 159.

tion of entitlement to jury trial, which in turn affects the applicability of *O'Callahan*. In the case of special court-martial trials, the jurisdictional limitation to confinement for not more than six months becomes of controlling significance. Thus, it is submitted that *O'Callahan* does not apply to any special or summary court-martial case, and is limited to general court-martial cases, where the maximum confinement exceeds six months.

#### D. Off-Post Offenses-Necessity for Service Connection

As *O'Callahan* and *Relford* stress on-post situs as one ingredient which will establish jurisdiction, it would appear that any crimes committed off-post would be within *O'Callahan*. However, the Supreme Court has also recognized other categories of service connection as taking the case outside the ambit of *O'Callahan*, giving consideration to (1) the flouting of military authority, (2) the security of the military post and (3) the integrity of military property. In *Relford* the Court stated:

We stress: (a) the essential and obvious interest of the military in the security of persons and of property on the military enclave. . . . (b) The responsibility of the military commander for maintenance of order in his

command, and his authority to maintain that order.<sup>42</sup>

It may readily be seen that the simplest basis for establishing service connection is the fact that an offense was committed on a military installation. Thus the other criteria which may establish service connection need be examined only when the offense occurred off the post, as may be noted in the various factual situations set forth below, from COMA and Federal Court Cases.

#### 1. Non-Service Connection—Civilian Victims

In *Borys*,<sup>43</sup> COMA found no military jurisdiction over the accused, an officer, who had committed various acts of rape and robbery against civilians, while off-base, wearing civilian clothes and using his private automobile. The Court relied upon the reasoning expressed in *O'Callahan* that the jurisdiction of the military courts should justifiably be limited. In a strong dissent, Chief Judge Quinn indicated that he would have found jurisdiction because, in his opinion, the Supreme Court intended to eliminate court-martial jurisdiction only when the case could have been tried by a *Federal* civilian court, not one created by a State. However, that view was not then nor thereafter, adopted.

<sup>42</sup> Fn. 13, pg. 367.

<sup>43</sup> *U.S. v. Borys*, 18 U.S.C.M.A. 547, 40 C.M.R. 259 (1969). It is interesting to note that Borys's claim for pay was denied by the Court of Claims. 201 Ct.Cl. 597 (1973) cert. denied Nov. 5, 1973.

Subsequent cases have shown that *certain* off-base civilian victim offenses do fall within military jurisdiction.

## 2. Non-Service Connection— Dependent Victims

In *Henderson*<sup>44</sup> carnal knowledge of a dependant of a serviceman, committed off-base, was held to be not service connected. This was followed in *Shockley*<sup>45</sup> (commission of lewd acts on accused's step-son; off-base in civilian housing) *McGonigal*<sup>46</sup> (indecent liberties with daughter of a servicemen at a civilian residence off-base) and *Snyder*,<sup>47</sup> (child beating assault of accused's son in a civilian community). However, in a second specification involving an offense committed by Shockley (lewd acts committed within the confines of the Naval Base), the court held service connection.

## 3. Service Connection—Civilian Reliance on Military Identification

Where the civilian has relied on military representations or identification, COMA has generally held service connection. In *Peak*,<sup>48</sup> an automobile salesman, in reliance of accused's military status, granted permission to drive the car from the car lot. Thereupon the accused absconded with the car. The Court held that the impact of such abuse of military status was substantial enough to provide service connection and military jurisdiction.<sup>49</sup> *Peak* was followed in five additional cases involving military identification.<sup>50</sup>

In *Haagenson*<sup>51</sup> accused cashed checks off-base in civilian establishments. In one series, he identified himself as a member of the Navy, giving his military organiza-

<sup>44</sup> *U.S. v. Henderson*, 18 U.S.C.M.A. 601, 40 C.M.R. 313 (1969).

<sup>45</sup> *U.S. v. Shockley*, 18 U.S.C.M.A. 610, 40 C.M.R. 322 (1969).

<sup>46</sup> *U.S. v. McGonigal*, 19 U.S.C.M.A. 94, 41 C.M.R. 94 (1969).

<sup>47</sup> *U.S. v. Snyder*, 20 U.S.C.M.A. 102, 42 C.M.R. 294 (1970).

<sup>48</sup> *U.S. v. Peak*, 19 U.S.C.M.A. 19, 41 C.M.R. 19 (1969).

<sup>49</sup> *Id.* p. 21.

Such an abuse of a military status is likely to influence the extent of confidence by the public in members of the armed forces. We believe the impact of such an abuse is direct and substantial enough to provide the requisite service-connection for the armed forces to exercise jurisdiction.

<sup>50</sup> *Frazier, Fryman, Hallahan, Morriseau, Peterson*. For full citations and discussion, see fn. 5.

<sup>51</sup> *U.S. v. Haagenson*, 19 U.S.C.M.A. 332, 41 C.M.R. 332 (1970).

tion; in another series he used his signature with no identification of a military nature. The court clearly pointed out the distinction of a reliance on representations and identification, as opposed to a signature alone, holding service connection as to the former, and not as to the latter.

In the 1972 case of *Wolfson*,<sup>52</sup> a bad check was cashed at a J.C. Penney store. The accused had been issued a Penney's credit card as Lt. Wolfson. The court found that the check was cashed in reliance on the Penney credit card, rather than on a military identification, hence there was no service connection. This appears to be a proper and justifiable distinction from the situation in *Peak*.<sup>53</sup>

#### 4. Service Connection— Serviceman as Victim

Another exception to the off-post rule has been recognized by COMA when the victim is a serviceman.

In *Rego*,<sup>54</sup> the Court held service connection in an off-post larceny committed in the home of a serv-

iceman, known to be such by the accused.

In *Camacho*,<sup>55</sup> the Court extended the *Rego* principle to the specification alleging larceny off base of a serviceman's property, but not known to be such by the accused; but in the second specification held that there was no service connection in the larceny of a civilian.

*Rego*,<sup>56</sup> was recognized and followed in four other cases involving off-post offenses committed against the property of the person of a serviceman, known or unknown<sup>57</sup> to the accused. However, in *Armes*<sup>58</sup> the Court refused to allow service connection in the off-post larceny of the property of a *retired* serviceman.

In *Silvero*,<sup>59</sup> the 5th Circuit held that an offense committed off-post with a serviceman victim was service connected. The Court reasoned that while the crimes were not directly connected with the military, they have sufficient persuasive effect to warrant service connection. Thus the Court placed emphasis on Justice Douglas' principle of "Military Significance."

<sup>52</sup> *U.S. v. Wolfson*, 21 U.S.C.M.A. 549, 45 C.M.R. 323 (1972).

<sup>53</sup> *Supra*, Fn. 48.

<sup>54</sup> *U.S. v. Rego*, 19 U.S.C.M.A. 9, 41 C.M.R. 9 (1969).

<sup>55</sup> *U.S. v. Camacho*, 19 U.S.C.M.A. 11, 41 C.M.R. 11 (1969).

<sup>56</sup> *Supra*, Fn. 54.

<sup>57</sup> *Cook, Nichols, Palamondon, Hallahan*. (See Fn. 5).

<sup>58</sup> *U.S. v. Armes*, 19 U.S.C.M.A. 15, 41 C.M.R. 15 (1969).

<sup>59</sup> *Silvero v. Chief of Naval Air Base Training*, 302 F. Supp. 646, reversed 428 F.2d 1009 (CA 5 1970).

However, the district court in *Devlin*<sup>60</sup> dismissed the petition on the grounds of no retroactivity, but expressed the view that larceny of the property of a serviceman off-post was not service-connected; there mere military service connection was insufficient.

Thus there appears to be a conflict among the Federal courts to whether there is court-martial jurisdiction committed off-post but with a serviceman as the victim.

#### 5. Service Connected—Conspiracy

In *Harris*<sup>61</sup> COMA held that conspiracy to deliver secret documents to foreign powers was service connected. A charge of espionage was considered service connected in *Safford*.<sup>62</sup>

#### E. Drug Cases

Drug offenses have such repercussions and implications as to be of a serious concern in the field of discipline, security, and keeping military personnel in a state of readiness for the performance of assigned missions. Thus, in a very real sense, any drug offense is service connected, placing particular emphasis on the military significance. However, the Courts have not given the military carte blanche

jurisdiction, but rather, under certain factual conditions, have denied service connection. Thus facts involving use, possession, sale to civilians or military, on or off base, and smuggling must be analysed. Finally, the Department of Defense Directive Subject—"Illegal or Improper Use of Drugs" plays an important role. The COMA and Federal Court cases are analyzed in the following paragraphs, pointing out how these factors are determinative on the question of service connection.

#### 1. Court of Military Appeals

The basic principle was stated by COMA in *Beeker*.<sup>63</sup> There it was held that the use and possession of a drug is service connected whether committed *on or off post*. The court specifically observed as to use:

(U)se of marijuana and narcotics by military persons on or off a military base, has special military significance. . . The use of these substances has disastrous effects on the health, morale and fitness for duty of persons in the armed forces.<sup>64</sup>

COMA has consistently found service connection as to use and posses-

<sup>60</sup> *Devlin v. U.S.E.D. So. Carolina #923 Civil July 5, 1972*—note this case arose in another circuit—same action was dismissed in Court of Claims. Unpublished order Dec. 13, 1972, Ct.Cls. 265-72.

<sup>61</sup> *U.S. v. Harris*, 18 U.S.C.M.A. 596, 40 C.M.R. 308 (1969).

<sup>62</sup> *U.S. v. Safford*, 19 U.S.C.M.A. 33, 41 C.M.R. 33 (1969).

<sup>63</sup> *U.S. v. Beeker*, 18 U.S.C.M.A. 563, 40 C.M.R. 275 (1969).

<sup>64</sup> *Id.* p. 565.

sion, on and off post, following *Beeker*.<sup>65</sup>

In *Rose*,<sup>66</sup> the accused was charged with delivery of drugs to a *serviceman* off post, in addition to a specification of possession. The court noted that both offenses had a deleterious effect on the health, morale and fitness for duty of persons in the armed forces and were accordingly service connected.

In *Morley*<sup>67</sup> the sale of drugs to a *civilian* off base was held to be not service connected.

The court, in *Beeker*;<sup>68</sup> limited service connection to cases charging use or possession; dicta raised doubts as to importation and transportation. Subsequently these doubts were resolved in the cases of *LeBlanc*, *Hughes*, and *Pieragowski*<sup>69</sup> which involved smuggling of drugs. The court held no service connection. In *Pieragowski*, the court so ruled even though the accused had arrived in the United

States on a plane chartered by the military and had landed at a military base. The court commented that the landing at the base was a convenience which did not alter the civilian nature of the criminal act.

In *Teasley*,<sup>70</sup> possession of narcotic paraphernalia off base, the Court found no service connection.

In the recent case of *Rainville*,<sup>71</sup> the petitioner by way of application for writ of prohibition, sought a reversal of *Beeker* on the basis of the Federal Court holdings in *Cole* and *Moylan* (discussed below). Here the charges were for use, possession and sale to a fellow serviceman while petitioner was off duty and off post. The Court held that although some Federal decisions were contra, it would continue to follow *Beeker* and *Morley*, supra and, accordingly, held that petitioner had committed a service connected offense.<sup>71a</sup>

<sup>65</sup> Boyd, Castro, DeRonde, 1968 Term; Adams, Rose 1969 Term; Hargrave 1970 Term; for citations see Fn. 5.

<sup>66</sup> U.S. v. Rose, 19 U.S.C.M.A. 3; 41 C.M.R. 3 (1969).

<sup>67</sup> U.S. v. Morley, 20 U.S.C.M.A. 179; 43 C.M.R. 3 (1970).

<sup>68</sup> Supra Fn. 63 p. 565.

<sup>69</sup> U.S. v. Le Blanc, 19 U.S.C.M.A. 381, 41 C.M.R. 381 (1970).  
U.S. v. Hughes, 19 U.S.C.M.A. 510, 42 C.M.R. 112 (1970).  
U.S. v. Pieragowski, 19 U.S.C.M.A. 508, 42 C.M.R. 110 (1970).

<sup>70</sup> U.S. v. Teasley, 22 U.S.C.M.A. 131, 46 C.M.R. 131 (1973).

<sup>71</sup> *Rainville v. Lee*, 22 U.S.C.M.A. 464, 46 C.M.R. 554 (1974). Same case Federal Court see Fn. 81.

<sup>71a</sup> In *U.S. v. Sexton*, 23 U.S.C.M.A. 101 (June 7, 1974), the Court held jurisdiction. Here, the accused claimed *Rainville* was inapplicable on the basis of Councilman (infra, Fn. 74) as the agent informer was not actually on

## 2. Federal Cases

In *Moylan*,<sup>72</sup> a district court (R.I.) in the first Circuit held that importation and transportation of marijuana and possession, off post, was not service connected. The court noted *Beeker* but refused to follow as to possession; however, the court did acknowledge service connection for use of drugs.

In *Diorio*<sup>73</sup> the 5th Circuit court affirmed a district court holding service connection for possession on base.

In *Councilman*<sup>74</sup> the district court (Okla) (CA 10) and in *Sedivy*<sup>75</sup> a district court (NJ) (CA 3), held no service connection in possession of marijuana off post and in the sale to a serviceman.

Both cases were affirmed by the Circuit Court and are now pending in the Supreme Court.

The District Court (Fla) in the fifth circuit in the companion cases of *Seegar* and *Lyle*<sup>76</sup> had for consideration off post possession of drugs. The court found no service connection in *Lyle*. However, *Seegar* was distinguished as he was on assignment (for treatment) to the Drug Rehabilitation Center, under the Department of Defense Rehabilitation Directive,<sup>77</sup> this was the necessary link to establish service connection.

In 1972 the 5th Circuit in *Cole*<sup>78</sup> held that use of drugs, off post, was not service connected, refusing to make any distinction between

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duty status. COMA held that public demonstration of the performance of a military duty is not essential. The Court was not impressed with the Court of Appeals assumption (*Councilman*) that for court-martial jurisdiction to exist one must have suffered personal harm. Judge Duncan concurring stated.

“A drug seller cannot transfer possession to another service person and defend on the basis of the fact that the buyer’s use of the contraband will not have any effect on the military since the buyer is a government agent.”

<sup>72</sup> *Moylan v. Laird*, 305 F.Supp. 551 (CA 1 1969).

<sup>73</sup> *Diorio v. McBride*, 306 F.Supp. 528, 431 F.2d 730 (CA 5 1970).

<sup>74</sup> *Councilman v. Laird*, WD Okla. #72-462 unpublished order. Aff’d. 481 F.2d 613 (CA 10 1973) Cert. Granted *Schlessinger v. Councilman* #73-662.

<sup>75</sup> *Sedivy v. Laird*, DC N.J. #701-22 unpublished order. Aff’d. 485 F.2d 1115 (CA 3 1973) Pet. for cert. pending #73-6030.

<sup>76</sup> *Seegar v. Kincaid, Lyle v. Kincaid*, 352 F. Supp. 81 (MD Fla. 1972).

<sup>77</sup> Department of Defense Directive 1300.11 Subject: Illegal or Improper use of Drugs by members of the Department of Defense Oct. 23, 1970.

<sup>78</sup> *Cole v. Laird*, 468 F.2d 829 (CA 5 1972).

use and possession in determining service connection.

Finally, in the cases of *Redmond*<sup>79</sup> and *Schroth*<sup>80</sup> in the 8th Circuit (Hawaii), the sale and possession of drugs off post was held to be not service connected. In one of the specifications in *Schroth*, the situs was stated as Fort De-Russy, an on post offense. The court noted that the Fort is at the Waikki Beach Recreational Center for Armed Forces, but is not the kind of military reservation to which the Supreme Court made reference in *Relford*, hence the crime cannot be considered as an on post offense.

In very recent cases, some of which are pending awaiting a Supreme Court decision in *Councilman* and *Sedvig*, supra, there is a conflict in the Courts on service connection in off post drug offenses. In *Holder*, *Mascavage* and *Rainville*,<sup>81</sup> the Courts held no service connection, whereas in *O'Connell*, *Peterson*, *Scott* and *Walden*,<sup>82</sup> the courts held service connection in off post drug offenses.

<sup>79</sup> *Redmond v. Warner*, 355 F.Supp. 812 (DC Hawaii 1973).

<sup>80</sup> *Schroth v. Warner*, 353 F.Supp. 1032 (DC Hawaii 1973).

<sup>81</sup> *Holder v. Richardson*, 364 F.Supp. 1207 (DS DC 1973)

Use and possession off post—no service connection.

*Mascavage v. Schlessinger*, CA DC 73-1446 Mar. 1, 1974 unpublished.

*Rainville v. Lee*, CA DC 73-1446 Mar. 1, 1974 unpublished.

<sup>82</sup> *O'Connell v. McLucas*, ED Calif. S 74—2 Febr. 7, 1974 unpublished.

*Peterson v. Goodwin*, WD Tex. EP 73 CA 105 Aug. 22, 1973 unpublished.

Appeal filed Sept. 12, 1973 CA 5.

*Scott v. Schlessinger*, DC No. Tex. 4-2371 Oct. 7, 1973 unpublished.

Appeal denied CA 5 73-3382 Oct. 30, 1973 unpublished.

*Walden v. McLucas*, ED Calif. S-2852 Dec. 21, 1973 unpublished.

<sup>83</sup> *Supra* Fn. 74, 75.

### 3. Differences between COMA and the Federal Cases

Summarizing the above, it may be noted that COMA has consistently held service connection for on and off post use and possession cases. In off post sales, service connection is held where a serviceman is involved; with a civilian there is no service connection. Smuggling is not service connected.

Federal courts have recognized on post offenses as service connected, but have not followed the COMA ruling of service connection for use and possession committed off post.

### 4. Pending Supreme Court Cases

The issue of service connection for off post drug offenses as noted above, is now pending in the case of *Sedvig* and *Councilman*.<sup>83</sup>

### 5. A Corollary Issue— Exhaustion of Remedies

In a number of recent cases, the accused has sought to enjoin the Court-Martial proceedings, or to obtain a writ of habeas corpus, and

has applied for a determination of non service connection, while his case was pending in the military courts. This, in turn, poses the question of a failure to exhaust remedies as a bar to the Federal Court action. Here again we have a conflict in the Federal Courts. In *Chastain, Dooley, Gnip, Mascavage, Rainville, and Peterson*,<sup>84</sup> writs of Habeas Corpus or Injunction were granted. But in *Holder, O'Connell, and Scott*,<sup>85</sup> the military courts were allowed to proceed.

It is significant that in *Councilman* the Supreme Court on April 2, 1974 directed

"Counsel for the parties are requested to file within forty-five days supplemental briefs on the issues of (1) the jurisdiction of the District Court, (2) exhaustion of remedies, and (3) the propriety of a federal district court enjoining a pending court-martial proceeding."<sup>86</sup>

### III. Administrative Actions

One last area in which *O'Callahan* influence should be mentioned is its effect on administrative ac-

tions. Two administrative procedures are available for the applicant for relief, and merit discussion:

1. The Boards for the Correction of Military Records, and
2. Action by the Judge Advocate General of each of the Services.

#### A. Correction Boards

Section 1331 of Title 10 of the United States Code provides:

The Secretary of a Military Department acting through boards of civilians may correct any military record of that Department when he considers it necessary to correct an error or remove an injustice . . . a correction under this section is final and conclusive on all officers of the United States.

At first glance, it would appear that the Board has authority to take whatever action it may deem appropriate to correct the records for a determined error or injustice. Thus in *O'Callahan* type cases, it could make a determination whether a matter fell within the

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<sup>84</sup> *Chastain v. Slay*, DC Col C-5221 Febr. 25, 1974  
*Dooley v. Ploger*, 491 F.2d 608 CA 4 1974  
*Gnip v. McLaughlin*, 491 F.2d 608 CA 4 1974  
*Mascavage*, supra Fn 81  
*Rainville*, supra Fn 81 see also Fn 71  
*Peterson*, supra Fn 82

<sup>85</sup> *Holder*, supra Fn. 81  
*O'Connell*, supra Fn. 82  
*Scott*, supra Fn. 82, however the reason for the denial was the failure to submit the case to a 3 court panel as a constitutional question was presented.

<sup>86</sup> Letter Clerk of Supreme Court to Counsel April 2, 1974.

ambit of *O'Callahan* and could grant monetary relief, and/or correct the records to show no termination of service, in cases of punitive discharge.

In the light of the availability of this type of relief through the Correction Boards, it might have been reasonably expected that a tremendous number of applications would have been made to the Boards. The actual experience is quite to the contrary, since only a minimal number of applications have been filed to date. The initial fears as to the repercussions of the *O'Callahan* decision, as noted earlier,<sup>87</sup> have been very materially allayed in so far as Board action is concerned. Whether the small volume may be attributed to lack of knowledge of this type of relief, or a desire to "let sleeping dogs lie" and not run the risk of a public disclosure of incidents of the past, or other reasons one cannot even venture a guess at this time. Prior to the *Gosa* decision,<sup>88</sup> the question of retroactive application of *O'Callahan* was, of course, unresolved; the Correction Boards generally held no retroactivity, awaiting a Supreme Court decision. This may well have put a check on the case load.

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<sup>87</sup> *Supra* Fn. 2.

<sup>88</sup> *Supra* Fn. 4.

<sup>89</sup> Every record of trial by general court-martial, in which there has been a finding of guilty and a sentence, the appellate review of which is not otherwise provided by Section 886 of this title (Article 66) shall be examined in the office of the Judge Advocate General.

<sup>90</sup> *Supra* Fn. 33-41.

## B. Proceedings Under Article 69; Uniform Code of Military Justice (UCMJ)

Article 69 as amended in 1969, provides in substance for an application for review of court-martial convictions where no review was taken by the Boards of Review or the Court of Military Review.<sup>89</sup> Thus, all summary courts-martial, most of the special courts-martial and some of the general courts-martial, are within the purview of Article 69. While serious offenses are seldom within this scope, the potential volume of sentences within Article 69 consideration is exceedingly high.

Again, there has been an extremely small number of applications for relief in *O'Callahan*-type cases. Similar reasons for the paucity of actions might be postulated as set forth in the preceding section. The comments on minor offense<sup>90</sup> should again be called to the reader's attention. If the premise is accepted that all summary and special court-martial cases are outside the scope of *O'Callahan* (because of no right to a jury trial by reason of the six months limitation), it would operate to dispose of a tremendous

number of potential applications; *O'Callahan*-type Article 69 activity would be limited to the comparatively few general court-martial cases coming within Article 69 jurisdiction.

Again, with the *Gosa* ruling of prospective application only, and thus being dispositive of any application that might be made under Article 69, the above comments are largely limited to historical interest.

#### IV. Unresolved Issues—Possible Challenges to Existing Rulings

##### A. At or Near the Post— A Contiguous Off-Post Area

One of the main points raised in *O'Callahan* is the distinction, for service-connection purposes, between on-post and off-post offenses. Where the offense is clearly within the geographical limits of the post or reservation, there is no problem. But what of a situs of a crime within a contiguous area? It is a fair observation that posts generally have a community, commercial and residential, immediately adjacent to a military post wherein offenses might frequently occur. Further, residential areas occupied predominantly by military personnel are located near military posts. Under such a set of facts would an offense committed there come

within the on-post category, and hence be service-connected?

In *Henderson*,<sup>91</sup> Chief Judge Quinn dissented from the holding of non-service-connection where the offense was off-post, stating:

The accused met her in a cafeteria on the base and the acts were committed in his apartment outside gate 5 of the base. In *O'Callahan* . . . the Supreme Court referred with apparent approval to Colonel Winthrop's observation that an offense against a civilian "at or near a military camp or post" is a distinctively military crime. 395 U.S. 258, footnote 19.<sup>92</sup>

This reference to Winthrop was also noted by the Supreme Court in *Relford*, supra, wherein it was stated:

The comment from Winthrop. . . . Cited both by the Court in *O'Callahan* at 395 U.S. 274 n. 19, and by the dissent at 278-79 certainly so indicates and even goes so far as to include an offense against a civilian committed "near" a military post.<sup>93</sup>

Finally, the Supreme Court concluded:

This leads us to hold, and we do so hold, that when a serviceman is charged with an offense committed within or at the geo-

<sup>91</sup> *Supra* Fn. 44.

<sup>92</sup> *Id.* pg. 602.

<sup>93</sup> Fn. 13 pg. 368.

graphical boundary of a military post and violative of the security of a person or of property there, that offense may be tried by courtmartial<sup>93</sup>

While the Supreme Court has seemed to lay down the gauntlet, nothing, from a reading of succeeding cases in COMA and the district courts, indicates any disposition to challenge the existing holdings in off-post (contiguous) offenses wherein service connection was denied.

In light of the comments in *Relford, supra*, with a logical argument and claim based on the maintenance of security and integrity of the post, it would appear that there is a fertile field for a claim of service connection in an offense committed on-post but in a contiguous area.

### B. Possible Challenges to COMA Decisions

In view of the long hiatus in COMA decisions after the 1969 term, i.e. from *Enzer*,<sup>94</sup> January 15, 1975, to *Bonavita*,<sup>95</sup> May 19, 1972, the fact that there have been only three subsequent cases, *Wolfson*, *Teasley*, and *Rainville*<sup>96</sup> and the comparatively small number of Federal Court cases, it appears unlikely that there will be any

challenges of existing interpretations of service connection. The COMA ruling of service connection on all types of use and possession of drugs is firmly established and accepted. With the advent of *Wolfson, supra*, however, certain manifestations of reliance on military identification by the civilian community, as distinguished from the mere fact that accused was on active duty, may appear in future cases and result in further refinements of this aspect of service connection.

### C. Leased Lands on Military Posts.<sup>96</sup>

One of the curious side issues which the Court's decision in *Relford* may ultimately prompt is, exactly what is "on-post." For example, the author has been advised that, at Fort Knox, Kentucky there is a portion of the enclave which is not under the jurisdiction of the Commanding General. Presumably, this area includes the access street to the gold storage vault. Is it still on-post for purpose of *Relford*?

Another example is the Pendleton School, which is located on the Base at Camp Pendleton, California. The school is operated by the San Diego Department of Ed-

<sup>94</sup> U.S. v. Enzor, 20 U.S.C.M.A. 257, 43 C.M.R. 97 (1971).

<sup>95</sup> *Supra* Fn. 19.

<sup>96</sup> The author is indebted to Peter Bowie, attorney with the Department of Justice, Civil Division, and the author of the articles cited in fn 7, for assistance in the preparation of this and the next sub-topic.

ucation under a permit granted by the Navy.<sup>97</sup>

Given the hypothetical case of a serviceman stationed at Pendleton breaking and entering the school, was the offense committed on-post? Perhaps the answer may lie in Sect. 4 of the permit, which provided:

If and to the extent that facilities and personnel for fire and police protection are maintained on the Reservation, Permitter agrees to furnish without reimbursement, such fire and police protection as may be required by the Permittee. . .<sup>98</sup>

Additionally, Sect. 9 states that activities under the permit are subject to the Commanding General's rules regarding security, ingress, egress and other matters.<sup>98</sup> However, the school is not military property, not built with military appropriations, not operated by the military authorities; its operating expenses are not funded by the military. Query, whether under *Relford* the above facts will provide court-martial jurisdiction.

#### D. "Time of War" In Determining Service-Connection

What constitutes "Time of War" for purposes of determining service connection under the War Power Act, of Article 1, S. 8, Cl. 11 for determining expanded court-martial jurisdiction?

In both *O'Callahan* and *Relford*<sup>99</sup> the court was unequivocal in specifying that the offenses were committed during peacetime. It remains to be seen what difference time of war will make, however, it is ultimately defined. The author noted that during the argument in *Flemings* and *Gosa*<sup>100</sup> there were several comments made and questions raised by members of the court, to the extent that it appeared that the court might consider the war time aspect in *Flemings* squarely, in the interest of setting forth additional guidelines for *O'Callahan* and, as was done in *Relford*, leave the retroactivity question for *Gosa* the pending companion case.

The court did not reach the war time aspect of *Flemings*. However, Justices Rehnquist, Douglas and Stewart<sup>101</sup> in their opinions concluded that *O'Callahan* had no ap-

<sup>97</sup> Permit # N.Oy (r) 47907 eff. Dec. 4, 1952.

<sup>98</sup> Id. p. 5 & 7.

<sup>99</sup> *O'Callahan*, *supra*, fn. 1, p. 274; *Relford*, *supra*, fn. 13, p. 365.

<sup>100</sup> *Warner v. Flemings*,—captioned as *Flemings v. Chaffee* in lower courts, 330 F. Supp. 193, 458 F.2d 544, CA 2 1972. *Gosa v. Madden*, 450 F.2d 753 (CA 5 1970, 413 U.S. 665, 93 S Ct. 2926 (1973)).

<sup>101</sup> *Warner*, *Supra* fn. 100 p. 692 and p. 693.

plication to wartime offenses, thereby giving full recognition to Article 2(1) of the Uniform Code of Military Justice<sup>102</sup> which provides:

The following persons are subject to this chapter:

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

In *Latney*,<sup>103</sup> the Court of Appeals for the District of Columbia Circuit concluded that Vietnam was not "time of war" for the purposes of Article 2(10). The Court wrote that a formal declaration was necessary to so expand court-martial jurisdiction. However, recently, the 9th Circuit Court in *Brouard* stated:

It is the established rule of military law that for the purposes of Article 43, "time of war" refers to *de facto* war and does not require a formal Congressional action.<sup>104</sup>

The Court held that the military had jurisdiction.

The Court of Claims in the case of *Robb*<sup>105</sup> adopted the position

of the Court of Military Appeals, which in *Averette*<sup>106</sup> held that a court-martial had no jurisdiction over a civilian employee of an Army contractor in Vietnam.

So, at this point, the courts are uniformly requiring a formal declaration of war before jurisdiction to prosecute certain classes of civilians will vest in a court-martial. But when will Article 2 (10) jurisdiction terminate, once having vested? Will a cease-fire be sufficient, or will formalism require a peace treaty?

It would seem that the answer may lie in the determination of when the civilian courts are reasonably open and available, for so the *O'Callahan* Court suggested, but rulings on these questions will not be forthcoming inasmuch as Vietnam is not now considered a "war" within the meaning of Article 2(10).

It is significant that in the oral argument in *Flemings* a specific question was raised as to the effect of an undeclared war (i.e. Korea or Vietnam); to which the Solicitor General responded that his argument related to a declared

<sup>102</sup> Art. 2 (10) is codified at 10 U.S.C. 802.

<sup>103</sup> *Latney v. Ignatius*, 416 F.2d 821 (D.C. Cir. 1969).

<sup>104</sup> *Brouard v. Patton*, 466 F.2d 816 (CA 9 1972) pp. 819.

<sup>105</sup> *Robb v. United States*, 197 Ct.Cl. 534, 456 F.2d 768 (1972). Parenthetically, the court took occasion to recognize the expertise of COMA, a matter worthy of comment, in the opinion of the author, quoted as follows:

We acknowledge the special competence of the Court of Military Appeals. Its expertise in administering military justice has already been explained by the Supreme Court, p. 539.

<sup>106</sup> *United States v. Averette*, 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970).

war, which was the factual situation in *Flemings*, i.e., a 1944 offense.

In summary, it may be reasonably concluded that *O'Callahan* has no application to offenses committed in time of declared war; but as to offenses committed during periods of undeclared war, there may be doubt. With the prospective application of *O'Callahan* and the termination of hostilities in Vietnam, there seems to be no prospect of a Supreme Court decision in the foreseeable future.

<sup>107</sup> 1969 Duke Law Journal 853, p. 865

However it should be remembered that the serviceman frequently is not from the same community which furnishes the jury for the state or federal court where he may be tried. Indeed, he may be viewed by that community as a hostile intruder. On the other hand, he may have considerable rapport with the members of the military community from whom the court-martial personnel would be selected. Thus, even trial by jury may be a less valuable right for the serviceman than for many of his civilian counterparts.

Other writers have commented in similar vein. In 22 Baylor L. Rev. 64, I note:

A fourth effect will fall near the territorial bases of U.S. towns and cities located in the vicinity of the many large American bases and stations will feel the unappropriate burden of litigating the many minor and major conflicts of the service man. Such expenses needless to say will not be welcome. Over burdened expenses and the increased number of cases may likewise cut the efficiency and equity of local justice for the man in uniform. p. 75.

See also. 44 Tulane L. Rev. 417, 425; 15 Vill. L. Rev. 712, 721; 22 Vanderbilt L. Rev. 1377; 9 Washburn L. Rev. 193, 197; Dissent of Chief Judge Quinn in Borys, 18 U.S.C.M.A. 547, 100.

<sup>108</sup> Brief for the U.S. #646 *O'Callahan v. Parker*, pp. 30-31.

Members of the military are not well situated to enjoy the benefits of this mode of trial in civilian courts. To a significant extent they are separated from the local civilian community. Their real "community" consists primarily of other members of the military forces from all parts of the nation, constantly moving about among a variety of military installations throughout the country . . . . A Soldier's "peers" are not likely to be persons in the local civilian community. Not infrequently the local civilian inhabitants may even harbor bias against members of the military stationed in a nearby base in general or against those of a particular ethnic or racial group.

## V. The Civilian Impact

Initially there was considerable concern that the *O'Callahan* decision would impose severe hardship on law enforcement agencies in areas adjacent to military posts; conversely it might result in great hardship to the military personnel concerned, as noted by Colonel Everett in his article.<sup>107</sup>

The Solicitor General in his brief in *O'Callahan* expressed views in similar vein:<sup>108</sup>

## VI. Retroactivity

The single greatest controversy which revolved around the decision in *O'Callahan* is whether its mandate is to be applied to court-martials convictions which were "final" prior to the date of the Supreme Court's opinion which was filed June 2, 1969. This issue has been the subject of numerous law review articles.<sup>109</sup>

COMA in *Mercer*<sup>110</sup> held that the *O'Callahan* decision would apply only to those convictions which were not final on June 2, 1969. Federal courts have held no retroactivity in *Gosa*,<sup>111</sup> *Thompson*<sup>112</sup> and *Schloman*.<sup>113</sup> However, in *Flemings*<sup>114</sup> the Second Circuit court held that *O'Callahan* had retroactive application.

The need for a Supreme Court decision as to whether *O'Callahan*

is prospective or retroactive was clearly stressed by the Solicitor General in *Relford*, but the court turned its decision on scope.<sup>115</sup> The issue was squarely presented in *Gosa* and was one of the issues in *Flemings* in the arguments before the Supreme Court on December 4, 1972. On June 26, 1973, the Court held that *O'Callahan* had no retroactive application.<sup>116</sup> Mr. Justice Blackman, joined by the Chief Justice, Justices White and Powell, concluded that the test to be applied was the three pronged test of *Stovall*<sup>117</sup> to wit:

1. The purpose to be served by the new standards (purpose)
2. The extent of the reliance by law enforcement agencies on the old standard (reliance)

<sup>109</sup> A number of writers have expressed views on retroactive application of *O'Callahan*:

Blumenfield, 60 Georgetown L. Rev. 551-583; Bowie, 7 San Diego L. Rev. 55; Birnbaum and Fowler, 39 Fordham L. Rev. 739; Derrick VI Suffolk L. Rev. 1106; McCoy, 16 N.Y.L.F. 42; Monaco, 26 JAG Journal 248; Nelson and Westbrook, 54 Minn. L. Rev. 39-46; Patterson, 50 No. Car. L. Rev., 403; Rice, 51 Mil. L. Rev. 75; Wilberding, 1971 Wash. U.L.Q. 413; Wilkinson, 9 Washburn L. J. 193 and case note 40 Fordham L. Rev. 939.

<sup>110</sup> *Mercer v. Dillon*, 19 U.S.C.M.A. 264, 41 C.M.R. 264 (1970).

<sup>111</sup> *Supra*, fn. 6.

<sup>112</sup> *Thompson v. Parker*, 308 F. Supp. 904 (CA 3 1970).

<sup>113</sup> *Schloman v. Moseley*, 340 F. Supp. 1393, 456 F.2d 1223 (CA 10 1972).

<sup>114</sup> *Supra*, fn. 100.

<sup>115</sup> *Supra*, fn. 13.

<sup>116</sup> *Gosa v. Madden, Warner v. Flemings*, 93 SC. 2926 (1973).

<sup>117</sup> *Stovall v. Denno*, 388 U.S. 293 (1967).

3. the effect on the administration of justice by a retroactive application of the new standards (effect)<sup>118</sup>

The Justices then analyzed the facts in *Gosa* and *Flemings* in the light of the above three tests and concluded that

the purpose to be served by *O'Callahan*, the reliance on the law as it stood before that decision, and the effect of a holding of retroactivity, all require that *O'Callahan* be accorded prospective application only.<sup>118</sup>

#### VII. Application of the Statute of Limitations

The *Gosa* decision which requires the prospective application of *O'Callahan*, is dispositive of all cases finalized prior to June 2, 1969, thus mooted most issues of the defense of the Statute of Limitations. However, the *O'Callahan* decision may have potential application to court-martial cases arising after that date, wherein a claim of lack of jurisdiction might be alleged. For these limited cases, and as a matter of historical in-

terest in the field of military jurisprudence, a short resume of the case law relating to the application of the Statute of Limitations may be in order.

The Court of Claims has consistently held that, in punitive or administrative discharges, the "claim first accrues," for Statute of Limitations purposes, on the date of discharge. Any petition filed more than 6 years thereafter is barred by 28 U.S.C. 2501, and will be dismissed.<sup>119</sup>

This has been consistently applied in *O'Callahan* type cases<sup>120</sup> and was so ruled when *O'Callahan* petitioned for back pay—then the Court of Claims following *Mathias* held that the cause of action accrued on the date of discharge (i.e. action by convening authority) and dismissed the petition, concluding:

Our Statute of Limitations, 28 U.S.C. 2501, is jurisdictional and we cannot restructure it to satisfy our own ideas of what is right and just.<sup>121</sup>

*Mathias*, following an initial adverse Court of Claims decision, sought the same relief in the Federal Courts.<sup>122</sup> His petition was

<sup>118</sup> *Gosa* fn. 116, p. 2936 and pg. 2938.

<sup>119</sup> *Mathias v. United States*, 183 Ct.Cl. 145, 391 F.2d 938 (1968).

<sup>120</sup> *Hamilton v. United States*, 192 Ct.Cl. 952 (1970)  
*Allen v. United States*, 194 Ct.Cl. 1035, cert. den. 404 U.S. 939 (1971).  
*Wilson v. United States*, 193 Ct.Cl. 1090 (1970)  
*Devlin v. United States* unpublished order March 12, 1937 361-72.

<sup>121</sup> *O'Callahan v. United States*, 196 Ct.Cl. 556 451 F.2d 1390 (1971) p. 564

<sup>122</sup> *Mathias v. Laird*, 324 F.Supp. 885, 457 F.2d 926 (CA 5 1972).

likewise dismissed, the District Court giving full effect and acceptance of the decision of the Court of Claims.<sup>123</sup> Thus it appears that the same limitations would apply in all federal court actions seeking status (i.e. a change in the type of discharge) or pay within the \$10,000.00 limitation.

### VIII. Summary

From the review and discussions above, it can be seen that much of the furor which initially surrounded the *O'Callahan* decision on June 2, 1969, and shortly thereafter, has

proven to be little more than much ado about nothing.

It should be apparent at this point that the law has crystallized and, particularly because of the military administrative and review procedures, has proven quite workable. Of even greater concern and importance is the fact that the fears of most as to the volume of litigation which *O'Callahan* might produce have been allayed, particularly in view of the *Gosa* decision establishing only prospective application of *O'Callahan*.

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<sup>123</sup> *Ibid.* p. 887. There are several federal Statutes of Limitations, but regardless of which one is applicable, this action is clearly barred, 28 USC 2401 provides that every civil action commenced against the United States shall be brought within six years after the right of action first accrues. This Court believes the Court of Claims was correct when it stated that instant claim accrued when plaintiff was discharged, i.e. in September, 1960.

\* Colonel Munnecke served on active duty in the Army JAGC from 1948 to 1959. He then served as trial attorney, Court of Claims Section, Department of Justice until 1972. He is a member of the Minnesota and District of Columbia Bars and is now engaged in private practice.

## RECENT CASE

*Court interprets Section of P.L. 90-179, an act to establish a JAGC in the Navy.* Sharratt and Sellman v. U.S., 204 Ct.Cl.— 498 F.2d 1354 (June 1974); order denying rehearing 15 October 1974 is a consolidated military pay suit in which plaintiffs claim they are entitled to rear admiral (lower half) pay for their periods of service as Assistant Judge Advocates General (AJAGs) of the Navy. They were ordered in 1968 to report for duty as Navy AJAGs. They served in this capacity for several years. Neither plaintiff was advanced to the rank of rear admiral, which the office of AJAG normally calls for. This was apparently due to a nonstatutory limit on the number of Naval flag officers, imposed by the Stennis Ceiling.

37 U.S.C. § 202(1) reads:

Unless appointed to a higher grade under another provision of law, an officer of the Navy or Marine Corps serving as Assistant Judge Advocate General of the Navy is entitled to the basic pay of a rear admiral (lower half) or brigadier general, as appropriate.

The Comptroller General ruled that section 202 had to be read in conjunction with 10 U.S.C. § 5149 (b) which provides:

An officer may be *detailed* as Assistant Judge Advocate General. While so serving he is entitled to the rank and grade of rear admiral,

and claimed that only officers *detailed* as AJAGs were eligible for the higher pay. Plaintiffs were only "administratively assigned".

The Judge Advocate General took the position that the bill establishing a Navy JAG Corps provided for *permissive* assignment of flag rank personnel as AJAGs in section 5149, but made *mandatory* pay to such personnel at the flag rank level.

The Court held that 202 obviously directs that an officer of the Navy while serving as AJAG, is entitled to the pay of a rear admiral. Because plaintiffs undisputedly served as AJAGs, regardless of the means by which they were named to such positions, they are entitled to judgment.

Another Court of Claims case of a somewhat similar vein is Powers v. U.S., 185 Ct.Cl. 481, 401 F.2d 813 (1968). Admiral Powers, Deputy JAG when retired, held a permanent grade of Captain and sought advancement on the retired list to Rear Admiral, upper half, the grade and pay received while serving as Deputy. The government unsuccessfully contended that as the law made specific provision for advancement for TJAG but was silent as to Deputy JAG, retired pay for the grade of Rear Admiral, upper half, was not authorized. This was remedied by a specific provision in the JAG Act to provide for retirement pay in the upper grade for both TJAG and DJAG.

## In Memoriam

Since the last issue of the Journal the Association has been advised of the death of the following members:

Brig. General Oliver P. Bennett, AUS-Ret., Iowa  
Colonel James P. Brice, AUS-Ret., California  
Colonel Herman M. Buck, AUS-Ret., Pennsylvania  
Lt. Colonel George F. Dilleuth, USAF-Ret., California  
Colonel Howard Epstein, AUS-Hon.-Ret., New York  
Lt. Colonel Robert R. George, USAFR, South Carolina  
Major Samuel M. Goldberg, AUS-Hon.-Ret., Colorado  
Colonel William J. Hughes, Jr., AUS-Ret., Maryland  
Colonel Julien C. Hyer, AUS-Ret., Texas  
Colonel Thomas Kayler Jenkins, AUS-Ret., New York  
Colonel Ira Kaye, AUS-Ret., Maryland  
Lt. Colonel John J. McCarthy, Jr., USAF-Ret., Illinois  
Colonel Joe T. Mizell, Jr., AUS-Ret., Virginia  
Lieutenant Charles Pickett, AUS-Hon.-Ret., New York  
Lieutenant Maxwell I. Snider, AUS-Hon.-Ret., New York  
Captain Max Solorsy, AUS-Ret., New York  
Colonel John C. Spence, USMC-Ret., California

The members of the Judge Advocates Association profoundly mourn the passing of their fellow members and extend to their surviving families, relatives and friends, deepest sympathy.

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# THE JUDGE ADVOCATE GENERAL—1983

Charles A. White, Jr.\*

The morning sun was just sneaking past the window shield and beginning to start its daily journey illuminating, letter by letter, General Hansell's name plate. BRETT FAIRMOUNT HANSELL the plate proclaimed in raised letters. From October to February the rays never completed their task. However, in March there was a chance and they began to win the race. By July the days were long enough for the entire name plate to be illuminated for two hours before the sun commenced its duty of drawing a shadow across the office—the name plate—inch by inch—letter by letter until finally it concluded the day's activities and finalized the closing of the activity. A strange phenomenon—this daily ritual. General Hansell had noted this daily contest between sunbeams and darkness and had concluded numerous side bets with himself regarding this natural sundial. In fact, he even had a chart which projected the time of day by letter for the entire year. A minor crisis had occurred twenty months previously when the office had been painted and the desk, name plate and window shield had been re-

aligned. For two days the office personnel had wondered why the General was "out of sorts" but fortunately Hansell had been able to reconstruct the precise relationships and thereafter a series of pencil marks, tapes, and scratches had prevented a repeat of that catastrophe.

The communicator on General Hansell's desk changed from a soft green to bright red just as Pauline's voice announced "General Cary for you on Channel three, Sir." Immediately the screen was filled with the round red countenance of Robert Cary, Assistant Judge Advocate General, Naval Operations. The voice fitted the face as it boomed a cheery "Morning, Brett—today's the big day—Huh?—any word, old boy? No? Guess we will have to keep our fingers crossed—good luck—let me know when you hear?" The screen went momentarily blank and then transformed again into its usual soft green. It was a typical Cary conversation—a series of statements, questions that didn't require or expect an answer, followed by the statement which filled this void occasioned by the question mark

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\* Major, J.A.G.C., U.S. Army. The Judge Advocate General's School, Charlottesville, Virginia. This farce on the future of JAGC has no basis in fact, no reference to any member of the Corps, living or deceased, and is the sole responsibility of the author who submits the essay for his readers entertainment only.

and then he would be gone. Still it was Bob's way of wishing him well on the selection process for Defense Force, Judge Advocate General—probably though the same conversation had been repeated for Tony Krauter's benefit earlier or was being played at this moment. Brett supposed they were all hedging their bets as either he or Krauter would be the Chief for the next three years.

Today *was* the day after all—the day of the announcement of the new top legal officer for the Defense Forces. It had come down to the wire between himself and Antonio Krauter and the result was still in doubt. The Selection Committee had finished their deliberations and were to sign their report this afternoon.

The last week had been the worse, Brett concluded, work had been impossible and the incoming papers had stacked up so high that until he made two piles, the desk sundial had been partially obscured. The new reorganization plan for the field offices had lain on his desk for most of the week,\* but he hadn't the concentration to see if the action officers project had conformed to his directions. Anyway the implementation of the whole concept might be moot after today. Brett and Tony were not in agreement with the basic philosophy for the Defense Force Legal Corps. Their disagreements were no secret within the Rivers Building and in fact had been pub-

licly aired during the testimony on the 1981 Crime Control Act hearings.

The subcommittee had been equally split and only the help of Congressman Cochran (R-Miss.) had kept the wolves from tearing him to pieces, all over the *Legislative Transcript*. Cochran was now a Senator and a good friend on the Senate Defense Force Committee. That would be helpful if his nomination ever got to the Hill.

Brett's gaze dropped again to the nameplate. Two days ago the sun-ray had almost gone to the second "I" in his last name. Brett had begun to look upon it as an omen—symbolic of his possible advancement and the fruition of the reorganization program. Of course, if Tony should be chosen the plan was dead and Brett's retirement request would be effective at the end of the fiscal year. The whole week had been constant speculation—those rays advanced ever so slowly—at one point, Brett had been tempted to move his name plate one eighth of an inch to the left to insure that his entire name would be included in the day's illumination but superstitiousness of the possible celestial retribution for this one small transgression had stayed his hand. Nevertheless he had retrieved his ruler and after locking the door of his office, carefully rechecked the position of the desk, the window shield and the name plate. No sense in loading the odds in Tony's favor.

\* Attached.

Yesterday had been the worse, a cloudy day ending in rain and the sun did not make even a brief appearance.

Today would decide it all, bright sunny with a beam of light which marched across his desk with a precise well define edge like a knife cutting through the butter of gloom—it was already on its way past “Fairmount” and into the second support leg of the “H” in Hansell.

Brett’s thoughts drifted again and reviewed for what seemed like the one-hundredth time the last ten years of his career and the events which had transpired.

1974 had seen the old Army Judge Advocate General’s Corps move from a position within the office of the Chief of Staff and made directly responsible to the Secretary of the Army. This arrangement had followed as a result of a successful similar move two years previously by the office of the Inspector General. These shifts had been occasioned by the testimony which had preceded the Bayh and Hatfield Bills. The change was a good one as the Navy had used a similar arrangement for many years. The Army and the Air Force had a brief conflict with their General Counsels of the two services but the Service Secretaries finally resolved the issue by arbitrarily combining the organizations and renaming it the Legal Advisors Corps. After the incumbents had retired, the military side of the house had assumed the paramount role and that arrangement had con-

tinued uninterrupted to the next reorganization. The major reshuffle occurred as a result of the mounting public concern over military personnel costs. Beginning in 1973 and for the next four years this issue became a boiling cauldron of congressional interest. The final solution was enacted in 1978 with the Defense Force Reorganization Act of ’78. Over the next five years, Congress had declared that the separate military departments were to be combined into one single service, Defense Force. By 1981, the end of Phase I, the administrative, legal, and medical had been combined. Phase II, was to close by the end of FY ’83 and would see a common logistics organization the final Phase III, would achieve by 1985 the full integration of the combat arms.

Phase I had brought Brett and Tony Krauter into competition for the first time. The Deputy for Legal Services, Air Operations, and Brett Hansell had disagreed on almost every choice which had to be made. The biggest open clash had occurred when they integrated the Army International Affairs Division, the Navy International Law Directorate and the Air Force Aerospace Law Divisions. The final solution, Universal Law Directorate had pleased no one, but the superhuman efforts of the three service one-stars who had headed the specialty groups had made it work in spite of Brett’s and Tony’s differences. They had to make it work—for the world-wide and universal-wide communicators and operations

of the hundreds of defense bases and space probes had necessitated a 24-hour watch operation with opinions and attorneys being sent to all parts of the universe—negotiating agreements, prosecuting claims, administering space criminal law, rendering opinions and treaties, etc.

Yes that had been quite a fight,—Brett mused. The shaft of light was well on its way now across the “a” and into the “n.” At the same time the trailing edge was being diffused with the first hint of a shadow starting to become apparent on the “Br” of Brett.

The final disagreement had been over the reorganization plans for the Force Legal Corps structure. It had come to a fiery impasse the previous month during the staff meeting with the Chief. Vice Admiral Monroe Wilkerson had become irritated over the heated discussion and finally proclaimed that after he left in three months they could do damn well what they pleased. The resulting hiatus had left both Brett and Tony with their own concepts which would no doubt be implemented upon either of them assuming the three star slot to the exclusion of the other’s ideas.

For the twentieth time that day Brett picked up the memorandum and tried again to concentrate on its meaning and impact.

Soon he became engrossed in the paper and packet of supporting papers. Unnoticed the beam of sunshine continued its advance until it was less than an eighth of an inch away from the edge of the final “l” and its ultimate goal.

Suddenly Pauline’s excited voice interrupted Brett’s concentration and brought him back to reality. “Admiral Wilkerson wants both you and General Krauter in his office immediately! It’s the announcement!” she exclaimed.

General Hansell straightened immediately and started toward the door, checking the zippers on the pockets of his jumpsuit as he went. At the threshold he hesitated, realizing he still had the memo papers in his hand. With a slight backward movement he tossed the papers back on his desk and without a second look, continued.

The memo landed on the top of the first pile of papers and slid over to the edge of the second stack where it tottered precariously without coming to a final stop. As the sun was beginning the final four minutes of its daily battle with the forces of darkness before the close of the day, Pauline entered the office, glanced over the scene, turned off the wall switch and closed the door. The slightest circulation of air was caused by the movement of the door but it was enough to cause the memorandum to topple from its perch and fall to the desk.

It landed in the center pushing the silver ash tray forward where it came in contact with the name plate causing the latter to move almost imperceptibly forward. The sunrays lived for only an additional ninety seven seconds and then the edge of the window shield sliced them off and plunged the room into twilight.

Commander Haines/7:R  
17 May 1983

Memorandum:

For Major General Brett  
F. Hansell, Dep. Force, JAG-  
Land

From:

Plans Forecast, Earth Branch

Subject:

Legal Staffing at the Installation  
Level Talking Paper

1. In compliance with your request is a brief outline of the legal staffing for a 15,000 member installation located, on the planet Earth, within the territorial boundaries of the North American continent.

2. Assumptions:

a. Universal Constitution with Amendments I-XXIV and all U.S. Statutes and Procedural Regulations will remain in effect for three years.

b. Space commitments will be restricted to those probes launched by the installation and no augmentation will be required to service other terraspacial probes lasting less than 1-year in duration. Space operations launched from fixed spacial installation will be supported by that installation's legal staff or by Universal Law Directorate at DFH as appropriate.

c. Same assumption set forth in paragraph b above will relate to nautical operations on this planet. Nautical probes originally from permanent sea bed installa-

tion will be supported by that installation, legal staff or by Universal Law Directorate at DFH as appropriate.

d. Same assumption as in b and c for other transnational operations originating at this installation.

e. There are adequate non-force legal practitioners available for Contract Legal Aid and Criminal Law Defense.

f. No criminal violation within the territorial limits of the United States will be tried in military tribunals. Prosecuting officers will be supplied to the staff of U.S. District Attorney as required in crime cases and military tribunals will only operate with peacetime jurisdiction i.e. on Earth outside the territorial limits of this country and at full jurisdiction in space.

g. Section 53A(1)ii of the Defense Reorganization of 1978 abolishing discharge certificates and substituting certificates of service will continue in effect.

h. Communicator Opinion Retrieval System will be fully operational allowing direct access from all terraspacial installations to central memory bank located at (*Secret*).

i. Assignment of judicial police detachments to Force Judge Advocate points will be approved.

j. Central claims computer data circuits will be operational relieving all installations of adjudication and payment functions.

k. Assignment of Force Legal Advisor will continue to be made

based upon skill classification I-IV without regard to military grade or civilian pay grade.

l. Following the recommendations of twenty-ninth Service Force Legal Officers Course at the Defense Forces Legal Academy that the reserve units form an integral part of the installation legal services, the command of those units attached will rest in the installation Force Judge Advocate. This will allow him to allocate his full time and part time resources without conflict. Legal teams required to support each office per 10,000 population at installation: two team equivalent.

m. Force wide budgets for all legal support will be centralized at Defense Force Headquarters level

as well as all library, reference materials, periodicals, micro-card and communicator legal research retrieval system support.

n. Attorney General will continue to issue the certificates under the provisions of Section 5117 National Crime Control Act of 1981 allowing military prosecutors to appear in all United States Federal and State Courts where a member of military service, dependent or federal employee is charged with a crime carrying a penalty in excess of 1-year; or in any instance involving an offense against the property or security of the United States.

Section 5118—(Powers of Judicial Investigators, etc.) will remain in effect.

## FORCE JUDGE ADVOCATE (CODE SERIES 874 - ----)

Applicable at Type A, B, C, D Installations

Work Performed: Advises the Commanding Officer and Staff on all legal matters (less criminal violations); renders legal advice and assistance concerning civic law and legal aid to authorized personnel; forwards claims. Commands Judge Advocate reserve units attached. Advises U.S. Attorney on disposition of criminal matters, investigates cases and prosecutes in U.S. courts as appropriate. Contracts for legal services as required.\* Performs programming, budgeting, and other Force management system functions.

Strength of Installation Population 15,000  
 Manpower Requirement \_\_\_\_\_

Line	Duty Pos. Title	MOS	Skill	Number of Positions	Grade
1	Force Judge Advocate	8103	II, III	1	06, 05/GS 15-13
2	Deputy Force JA	8103	II, III	1	05, 04/GS 14-12 Contract—full time partner of Class II, III law firm
3	Communication Processing Technician	71C30	4, 5 Level	2	E-5/GS 5-6/Contract
4	Transportation Specialist (electro-magnetic vehicle)	—	Basic	1	E-4/GS-4/Optional deletion in contract situation

\* Entire legal service can be contracted out to law firm which qualifies as a Class II or III firm.

Administration

Work Performed: Administrative control of communications and furnishes guidance in administrative directives and procedure; active duty and reserve teams. General office services; communications, reference material retrieval and input system.

Line	Duty Pos. Title	MOS	Skill	Number of Positions	Grade
5	Administrative Technician (Legal)	713A	Graduate DFLA crs 7-54 (Min)	1	CWO 3, 4/GS 9-10/ Cannot be contracted
6	Legal Technician	71D50	Graduate DFLA crs 7-28 (Min)	1	E9/GS 9/Contract
7	Legal Technician	71D20	Graduate DFLA crs 7-21 (Min)	1	E-6/GS 9/Contract
8	Communication Processing Technician	71C30	4, 5 Level	2	E-4/GS-4, 5/Contract

Universal Law Branch

Work Performed: Advises commanders and staff on provision of Universal and International Law relating to oceanic and space law, transnational responsibilities, applicable treaty, convention, and other agreement provisions. Give instruction in humanitarian law—negotiates agreements as required. Administer applicable provisions of SOFA arrangements pertaining to installation personnel.

9	Judge Advocate	8103	U-II, III	1	05, 04/GS 15-13/ Contract
10	Communication Processing Specialist (Int'l)	71C30	4, 5 Level	1	E-5/GS 5-6/Contract

Industrial Relations Branch

Work Performed: Frames legal questions for central computer research center, inputs local opinions for central files, renders legal opinions concerning matters pertaining to interpretation and application of U.S. law, regulations and statutes related to administration of personnel and operations of the installation. Advises Boards and Investigative Councils. Assists in the negotiation of Labor Relations Agreements and other aspects of Labor-Management Relations. Provides legal advice to the command regarding all aspects of procurement and contracting. Process claims for consideration by Defense Forces HQS.

Line	Duty Pos. Title	MOS	Skill	Number of Positions	Grade
11	Judge Advocate	8103	I, II	1	04/GS 13, 12/ Contract
12	Judge Advocate	8103	I, II	1	03/GS 9-11/ Contract
13	Legal Administration Technician (Claims)	713	Grad. DFLA crs 7-61 (Min)	1	CWO 3-4/GS 9-10/ Contract
14	Legal Administration Technician (General)	713A	Grad. DFLA crs 7-53 (Min)	1	CWO 2, 3/GS 7-9 Contract
15	Communication Processing Technician	71C30	4, 5 Level	2	E-5/GS 5-6/Contract

Legal Aid

Work Performed: Renders legal assistance and advice to military personnel, their dependents and authorized civilian personnel concerning their personal legal problems.

Total contract under judicare program or local contract with Class I or above level law firm.

## Government Attorney Division

Work Performed: Investigates complaints of major violations of state, federal or foreign law by U.S. military personnel, dependents or civilian employees. Handle the disposition of the charges to include the prosecution as appropriate in state, federal, and foreign courts. Convene military tribunals as required outside the jurisdictional limits of U.S. federal and local laws and in space. Record electronically the records of the proceeding and handle appellate proceedings as appropriate. Advise commanders on administrative sanctions and now judicial punishment. Request pretrial confinement in cases as required. Prosecute crimes against international law as required.

Line	Duty Pos. Title	MOS	Skill	Number of Positions	Grade
16	Judge Advocate (Criminal Law)	8103J	II, III	3	04, 03/GS 12-14/ Contract
17	Judicial Investigator	815J	Advance II	3	CWO 4, 3/GS-9-10/ Contract
18	Judicial Investigator	813J	Basic I	6	CWO 1, 2/GS 7-9/ Contract
19	Communications Technician Data Processing/Analysis Programmer	817J	Lab. III	1	CWO 3, 4/GS 12-14/ Contract
20	Communications Processing Technician	71C80	4, 5 Level	4	E-4/GS-4, 5/Contract
21	Communications Processing Technician (Judicial)	817J	Graduate DF LA crs 817J	2	CWO 3, 4/GS 12-14/ Contract
22	Transportation Specialist (Electro-Magnetic Vehicle)	---	Basic	3	E-4/GS-4/Contract

# MILITARY JUSTICE—1873

Julien C. Hyer \*

*“This General Court Martial will come to order! Bang!”*

That has a familiar ring to many a graying or balding lawyer senior citizen as well as to many younger members of the Bar and the Association who have served through the post World War II years as judge advocate officers of the military services. For those Ann Arbor grads of WW II who are still in the practice, wearing the ermine of the judiciary or enjoying a semi-retirement status in the suite of a son’s law office somewhere in the U.S.A., there may be a familiar ring to make them reminiscent.

This latter group brings to mind a story Maury Hughes, prominent Dallas criminal lawyer, long deceased, used to tell on himself. He said he was waiting at a red light one day when a citizen, fresh back from serving a term in the State pen, came up beside him and they recognized each other as lawyer-and-client of a former day. After the greeting the former client in-

quired, “Mistah Hughes, is yo’ still piddlin’ wid de Law?” Perhaps some of Colonel Young’s proteges from Ann Arbor, still “piddlin’ wid de Law” will relish knowing how they administered Military Justice 100 years ago in Texas.

Perhaps, they themselves were SJAs or attached for training at Camps Maxey, Gruber, Bowie, Bliss, Wolters or at Fort Sam and were having their papers corrected at 8th Service Command by Colonel Tom McElroy (now deceased), Lieutenant Colonel Leon Jaworski (now front page) or Major (now District Judge) Ardell Young stationed at Dallas.

They were preceded, a century earlier, by a set of experts in Military Law, back in 1873, who dealt it out at fort, stage-coach posts and Indian border stations on the Texas Frontier.

Leafing through a volume of the GCMs of that year one finds the usual run of disciplinary cases. They tried 2nd Lt. John Gotschall,

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\* Colonel Julien C. Hyer, recently died in Ft. Worth, Texas. He was a Retired District Judge of the 44th District Court, Dallas, Texas, and served in World War I as an Artillery Officer and after the hostilities in France he served in the JAGD at St. Aignan and other places. In World War II he served as SJA of the 8th Service Command (8th Corps Area) in San Antonio and Dallas from 1941-1946 as well as SJA of the 4th and 15th U.S. Armies (in the latter, overseas under Lt. Gen. L. T. Gerow) and also as Chief of the JA Section of The General Board, USFET, under Gen. George S. Patton in writing the history of the European campaigns.

10th Infantry at Fort McKavitt, Texas, on April 18, 1873 for "being drunk on dress parade". He was found guilty and sentenced "To be cashiered". It stood up.

1st Lt. Charles L. Davis, 10th Infantry was tried at Ringgold Barracks on August 18, 1873 for falsifying official papers about certain QMC supplies entrusted to his care, was found "Guilty" and was sentenced "To be dismissed the service". This sentence was "busted" on review "because of reasonable doubts as to the false intent of the accused". The officer was ordered "released from arrest and restored to duty".

Then, at Fort Concho, Texas, on ?? August 1873, 1st Lt. Gustave H. Radetski, 9th Cavalry, was tried for scheming to retain in his private ownership a mount that was found to be Government property and for drinking with an enlisted man at a public bar room on the North Side of the Concho River at a grocery-store and also for being too drunk to perform the duties of an officer. They threw the proverbial book at him. He was found guilty and dismissed the service. Sustained.

At Fort Griffin on September 19, 1873 Captain William L. Foulk, 10th Cavalry, was charged with striking a superior officer (another Captain) with a drawn sword or sabre and cussing him out, "G—D—you, I will give it to you, or words to that effect". He was found guilty and sentenced to be dismissed the service. Approved.

But these were regarded then,

as in 1943, and now, perhaps, as perfunctory GCM cases. However, there is one that catches the eye and reminds the JA officer of any era of certain proclivities of that awesome ogre—The Reviewing Authority—and its way of doing business.

It seems that 1st Lt. Henry F. Leggett, 24th Infantry, was hauled before a GCM convened at Fort Brown (Brownsville, Texas) on 14 July 1873 under two charges. The first was "Conduct to the Prejudice of Sound Order and Military Discipline" and had two Specifications.

The first alleged, that while acting as Counsel for Hospital Steward Weed, U.S. Army, the accused did, during a Court Martial Trial at Fort Duncan, Texas, when certain rulings of the Court did not suit him, nor conform to his own ideas of the law, "express his dissatisfaction with said decision of the Court by demanding improperly that the Court be polled". It also went on to charge that the Lieutenant did express his disgust with several rulings of the Court and "did emphasize his remarks by rapping in a contemptuous and disrespectful manner on the paper on which the said Judge Advocate was writing".

Likewise, it is charged that he continued to address the Court when told by the President (a Major) to be seated. The Specification reads, ". . . in a defiant and disrespectful manner assert, 'I will not sit down by your order, you are only President of the Court'

or words to that effect'". When finally ejected by the President's order, he was alleged to have said, "I will go out, but under protest."

Specification 2 covered the aftermath when Lt. Leggett went out and wrote a heated letter to the Court, saying, "Having been, as I consider it, insulted by the President of the Court, I decline to act further as counsel for Hospital Steward George W. Weed, U.S. Army, now being tried."

Charge II was entitled, "*Conduct unbecoming an officer and a gentleman*". It had only one Specification and had to do with the accused's conduct when, he was, quite familiarly, ordered "to explain by endorsement hereon" his conduct at the GCM incident and he replied as follows:

"... the Accused was then called upon to plea to such specifications as were not barred by the decision of the Court, whereupon, as the Specifications were being called over by the Judge Advocate, I proceeded to plea for the Accused to such Specifications, Not Guilty, without waiver, however, to his rights, under his former Plea in Bar. The President replied in effect but (that) such pleading was irregular. I proceeded to remark that I was but following the rule of the Civil Law, as I had decided to take exception to the ruling of the Court, and this, in my opinion, would be the proper manner to call the attention to the proper Reviewing Authority to it. At

the same time the Judge Advocate, who appeared almost entirely ignorant of his duties, was asking me some questions as to form, and where to write certain portions of the proceedings and I did say to him, but referring to an entirely different matter than the question of the moment occupying the attention of the Court, 'Put it down there', at the same time indicating the place by a motion of my finger (that was not a contemptuous one). . ."

The Specification includes this letter, signed by the accused, and goes on to allege "Which statement was false and known to be false by him and made with intent to deceive."

The Lieutenant was found "Guilty" of Charge I and of both Specifications thereof, but the Court went into detail in regards to Specification 1 and found him "Guilty, except of the word in the 9th line 'Improperly' (which referred to the request to poll the Court)". There were some other words singled out and included.

Of Charge II he was found "Not Guilty", but "Guilty" of the Specification thereunder, excepting certain specific words in certain lines. The Sentence was, "To be reprimanded in General Orders by the Reviewing Authority."

The proceedings were duly forwarded to the Secretary of War for the action of the President and where the entry was made: "They are approved. The findings, with

the exceptions hereafter stated, and the sentence are confirmed." And then some wordy person in the War Department prepared for the signature of The Adjutant General, by Order of the Secretary of War, the following "eating-out" of the Court in the usual acidic language saved for such occasions by the Washington critic throughout the generations:

"Upon the 1st Specification, the finding declares that accused, being present at the session of the General Court Martial in the capacity of Counsel for the prisoner on trial, 'expressed his dissatisfaction with a decision of the Court by requesting the Court to be polled' but that such conduct on his part was not 'improper'. 'Surely this Court could not have sufficiently considered the import and effect of this portion of their verdict. Can it ever be proper for a counsel to express his dissatisfaction with the action of a Court before which he stands in that capacity? He may, indeed, in behalf of his client, express his respectful remonstrance, in order that it may be noted on the record, but it does not become him to signify in a spirit of self-assertion his dissatisfaction or discontent with the action of the competent authority to which he rather owes deference. But the incongruous feature of this judgment relates to the manner in which this dissatisfaction was expressed—by requesting the

Court to be polled. When, in a civil court, the foreman of a jury announces that they have agreed upon a verdict, in this announcement the unanimity required by law of such body is implied. Lest, however, the assent to the verdict might have been unwillingly extorted from some jurors under the secret intimidation or undue persuasion of others, it is the privilege of the prisoner to have the jury polled.

"But it is not to be presumed that any such reason as that in which this practice originated could exist for an analagous procedure in a Court composed of officers of the Army. And while unanimity is never essential to a decision of such a Court, the oath of its members binds them not to reveal the vote or opinion of any particular one of them, unless judicially required to do so. Hence upon any question of moment, the vote in a Court Martial is taken in secret and upon every interlocutory question determined by a majority or the want of it. But it is manifest that when a conclusion thus obtained is announced in open court that the honor of every member who by his silence consents to such announcement is pledged to its correctness.

"How, then, could it be proper to poll a Court and publicly disclose, contrary to the oath of its members, the vote or opinion of each of them? And how could a request to have a Court polled

upon its ruling, which has been duly announced through its proper organ, be made without impeaching the honor of every member, all of whom had assented to such an announcement?

"The part of the finding which declares that accused's action in this particular was not improper is therefore emphatically disapproved.

"The Secretary of War trusts that the condemnation of the conduct of Lieutenant Leggett by the Court will prove, notwithstanding the extreme lenity of the sentence, a sufficient rebuke for his gross misbehavior toward a General Court Martial and that hereafter the lesson will be impressed upon his mind

that the most scrupulous and courteous deference is due from every officer to a tribunal in which, by the wise dispensation of Law, is embodied the highest judicial authority of the Army."

To some who still bear the scars of "eatings-out" that they received from topside in the 1940's and since through the medium of "The Reviewing Authority", this may have a familiar ring. It will at least show that it was a favorite indoor sport of "The Washington Office" not only for some 30 or more years but for 100 and more years.

"To poll or not to poll," seems to have been a very definitely settled principle of Military Law for a long, long time.



# Remarks of Kenneth J. Hodson Before the House of Delegates of the American Bar Association on August 12, 1974

Mr. Chairman and Fellow Delegates. I am speaking to you this morning as the representative of the Judge Advocates Association, an association of some 1500 military lawyers, active, reserve, and retired. The Executive Committee of that association voted unanimously to oppose the recommendation of The Section of Individual Rights that the American Bar Association support the conditional amnesty bill sponsored by Senator Taft (S.2832).

Before I left Washington, I knew that this item would be controversial. I knew that it would have a certain popular and emotional appeal because it would permit those who opposed the Vietnam conflict to express their opposition. I knew that I would be opposed by the eloquent pleading of Mr. Poole. I was not aware, however, that I would be opposed so strongly by Mr. Chesterfield Smith, our Association President.

Shortly after arriving in Honolulu, I read that Mr. Smith had proposed total amnesty for the President. I asked myself the question: If we are to hold the king blameless, what about the king's men? I did not have long to wait for an answer to that question, for, on Monday, Mr. Smith, in his open-

ing speech to the Assembly, urged total amnesty for all draft resisters; he also called for legislative action to set aside the thousands of less than honorable discharges given by the armed services "without a semblance of what lawyers style as due process."

In the short time allotted to me, I cannot answer Mr. Smith's broadsides. I do regret that he made those remarks, particularly those related to the lack of due process in the military. For, had Mr. Smith's speech writers done their homework, they would have discovered that the due process safeguards for the issuance of undesirable discharges in the military services have been and are now in complete conformity with the Standards approved by the House of Delegates of The American Bar Association in 1968.

I cannot leave this subject without commenting that I do not agree with the implications of Mr. Smith's remarks, which are to the effect that all persons who serve in the Armed Forces of the United States should get honorable discharges. It is my opinion, and this is a view that is shared by many who have served in the military: that a man who serves his country faithfully and honorably deserves a

public testimonial to the fact. Since the beginning of our country, we have used the Honorable Discharge as a means of signifying the Nation's thanks for a job well done. If we follow Mr. Smith's suggestion and give an honorable discharge to all persons in the Armed Forces, we degrade the Honorable Discharge and we reduce the standards of our Armed Forces to the lowest common denominator. I am convinced that our Nation cannot afford to risk its security to an Armed Force whose standards of conduct are so low.

I come now to the question of earned immunity for draft resisters. In effect, this is a provision for conditional amnesty. I do not have time to debate the question of how many people are involved, except to note that the Government estimates that perhaps as many as 10,000 are involved. The figures furnished by the resisters themselves—and of course it is in their interest to magnify the problem—go as high as a hundred thousand.

I don't have time to discuss the doubtful constitutionality of this legislative proposal, except to note that it seems to invade the constitutional prerogative of the President; nor do I have time to discuss the many defects in the legislation itself. I can only say in passing that I have full confidence in the President and the Judiciary to solve the problem of draft resisters to the satisfaction of the American people. I think it would be unfortunate if we, by indorsing this

legislation, cast doubt upon the efficacy of the criminal justice system and the constitutional authority of the President to grant reprieves and pardons in meritorious cases. By approving this legislation, we are, in effect, condemning the many Federal Judges and the many draft board members who have conscientiously carried out their duties under the Selective Service System.

My specific objections to the legislation are as follows:

*First:* It is unfair to the millions of young men who complied with the law and who served their country honorably.

*Second:* It unfairly discriminates against those who were inducted and who thereafter, for a variety of reasons, deserted the armed forces, for it offers them no relief, whether they were apprehended and tried or are still at large.

*Third:* Civil disobedience is recognized as a means of showing disapproval of a law, but it has always been understood that those who violate the law because of their beliefs, such as Thoreau, Ghandi, and Martin Luther King know they will be punished and are willing to accept their punishment. But to suggest, as this legislation does, that people are free to pick and choose which laws they will obey—without fear of punishment—can lead only to anarchy.

*Fourth:* The numbers involved are not critical—whether there are 10,000 as estimated by the Government, or 30,000 as claimed by the

resisters themselves. Neither 10,000 nor 30,000 people who refuse to fight for their country present a real threat, a real danger, to the security of this country. The real threat is that by approving this proposal, we will set a precedent for future wars. We will be encouraging others to avoid military service in future conflicts. The question I have is whether our Nation can long survive if we follow such a philosophy.

*Fifth:* This bill would use military service as a penalty for disobeying civil law, for it would permit a draft resister to clear his record by serving for a specified period in the armed forces: Presumably, although it is not clear, he would earn an honorable discharge and would be entitled to all veterans' rights. Those of us in the military view military service as a privilege. Using it as a penalty for refusing to obey civil law will degrade military service. Further, in the event of armed conflict while a draft resister is serving his probation in the armed services, there is no reason to believe that he would not again exercise his right not to serve.

I favor rehabilitation, and I have compassion for these young men who have rejected their country and disobeyed its laws—but I cannot equate these young men to the

millions who served their country honorably, the 50,000 dead and the several hundred thousand wounded. Nor can I treat them as equals to the scores of prisoners of war who kept their faith in their country during years of deprivation, torture and starvation—and whose first remarks upon being returned to the United States were, "God Bless America".

If this legislation is approved, particularly if it permits the draft resisters to pay their penalty for civil disobedience by serving in the Armed Forces, it would surely reduce the quality of our military forces and in so doing would endanger the nation's security.

The American Bar Association has traditionally stood for the rule of law and for respect for the law. I ask you to help carry forward this traditional respect for the law by opposing this legislation. I ask you to do this, not so much for yourselves, or your wives, or your children—but for your children's children, and their children. For when the people of a nation, under the label of freedom, refuse to fight in behalf of that nation, they will surely lose the freedom for which that nation stands.

Note—The House of Delegates voted 117-110 to support the legislation.



# Employer Support of the Guard and Reserve

For the first time since 1947, this nation is filling its military personnel requirements without the aid of a draft. With this all-volunteer force has come an increased role for the National Guard and Reserve Forces.

Established policy on the future role of the Guard and Reserve Forces states that:

Guard and Reserve units and individuals of the Selected Reserves will be . . . the initial and primary source for augmentation of the active forces in any future emergency requiring a rapid and substantial expansion of the active forces.

This means our country will turn first to the Guard and Reserve Components, rather than to the Selective Service, to augment the active forces in a time of national need.

As we reduce the size of our active forces we rely more heavily on our Reserve forces by bringing their readiness and responsiveness to the highest achievable levels. As we achieve our goal on an all-volunteer force, the Guard and Reserve will become an even more vital segment of our total military capability. Necessary steps are being taken to upgrade their readiness and to provide them with the modern and combat-serviceable

ships, aircraft, vehicles, armament and equipment they require.

Besides equipping Guard and Reserve forces adequately, other necessary steps are being taken to make citizen-military careers both attractive and challenging. However, the ultimate success in obtaining and maintaining a strong Guard and Reserve will depend on businessmen and employers across the United States.

The individuals who make up the Guard and Reserve are people from our communities and our local businesses who have undertaken an added responsibility for the security of our nation by making themselves available for recall or mobilization. These men and women who put service to their country ahead of comfort—who are willing to leave family and friends when their duty calls—cannot be allowed to risk loss of employment security. They need our support and understanding.

Many businesses can point with satisfaction to personnel policies that reflect a real appreciation of the peacetime and wartime roles of the Guard and Reserve and their individual members. A similar understanding has to exist throughout the business community. Policy statements are not enough. Managers, supervisors and co-workers must realize the vital role the Guard and Reserve play in our Na-

tional Security. There must be an atmosphere that does not penalize a man or woman for being patriotic.

It is discouraging to the individual Guardsman or Reservist to be confronted by a company policy which, in essence, says, "You can belong to the Guard and Reserve as long as it doesn't interfere with your job here." That is apt to mean using one's annual vacation for a two-week encampment. That is no way to keep a happy family.

It is recognized that fostering Guard and Reserve membership among employees causes sacrifices to the company. Employees are provided with time off for monthly and annual training periods, and businesses are confronted with uncertainties involved in a recall situation. But these are adjustments that must be made if we are to strengthen our national defense system with trained, responsible Guard and Reserve forces.

The National Committee for Em-

ployer Support of the Guard and Reserve is asking every employer to sign a Statement of Support of the Guard and Reserve. Through this action, an employer agrees to (1) not limit or reduce job and career opportunities because of service in the Guard or Reserve; (2) grant leaves of absence for military training without sacrifice of vacation time; and (3) to ensure that this agreement and the resultant policies are made known through the organization.

The National Committee was established by the President on June 22, 1972, with Mr. James M. Roche, former Chairman of the Board of General Motors, appointed as its Chairman.

Members of this Association who occupy the role of employer or who sit in the councils of business organizations are urged to lend their assistance to the National Committee and to give and encourage employer support of the Guard and Reserve.



## *What The Members Are Doing . . .*

### **ARIZONA:**

Colonel Frederick Bernays Wiener, AUS-Ret. of Phoenix was recently awarded the "Outstanding Civilian Service Medal of the Department of the Army by Major General George S. Prugh, The Judge Advocate General of the Army. The citation reads:

"Mr. Frederick Bernays Wiener has distinguished himself by a lifetime of outstanding public service to the United States Army and the legal profession. His devotion to military law and military history, as evidenced by his innumerable scholarly writings and addresses, has served to enhance the stature of military law in the legal profession and to enrich the traditions of the United States Army. Through his continued close association with the United States Army Judge Advocate General's Corps, military lawyers have become primary beneficiaries of his scholarly achievements. To the man who has helped the military lawyer up the ladder of professional excellence, the United States Army hereby expresses its gratitude."

The May 1974 issue of Army carries an article by Colonel Wiener entitled "Siren Call To Treason" wherein the author answers recent attempts to give respectability to

the name of Benedict Arnold by reviewing the evidence that shows the traitor was guided each step of the way by "his constant and consistent love of money".

### **CALIFORNIA:**

Colonel Robert E. Walker of Los Angeles was recently awarded the Department of the Army Meritorious Service Medal for his reserve service on the staff of the Judge Advocate General's School. Colonel William E. O'Donovan, SJA, 6th U.S. Army, made the presentation at ceremonies at Ft. MacArthur. Colonel Walker has served as Director of this Association and as president of the Southern California chapter of JAA. In civilian life, he is a Field Attorney with the Veterans Administration. He served 31 years in the Army Reserve and retired in 1969.

Colonel Richard L. Riemer and Major John C. Pope commanders of the 78th and 82nd JAG Detachments were presented Department of the Army Superior Unit awards at the Ft. MacArthur ceremony by Lieutenant Colonel Maurice L. Brundige, SJA of the 63rd Army Reserve Command.

RAAdm. Horace B. Robertson, Jr., JAGC, USN, was the guest speaker at a luncheon meeting of JAA members and guests at Sacramento

on 9 September 1974. Each year, either the Northern California Chapter or the J. P. Oliver (Southern California) Chapter of JAA sponsors a luncheon during the Annual Meeting of the California Bar Association for military lawyers. Colonel William L. Shaw, AUS-Ret. presided and over 60 persons attended the luncheon.

#### **DISTRICT OF COLUMBIA:**

Colonel Smith W. Brookhart, AUS-Ret., who has been counsel to the firm of Pope, Ballard and Loos in Washington, has retired and will take up residence in Denver, Colorado.

Lieutenant Commander Donald H. Dalton, USNR-Ret. of Washington has announced his new firm for the practice of law under the style Dalton, Matthews & Sheehy with offices in the Federal Bar Building.

Mr. Neil B. Kabatchnick, recently relocated his office for the practice of law, specializing in military law cases, at 1225 Connecticut Avenue N.W.

Brigadier General Thomas H. King, USAFR-Ret. recently formed a professional corporation with Colonel Maurice A. Biddle, USAF-Ret. for the practice of law, specializing in military causes, with offices in the Southern Building. Colonel Charles M. Munnecke, USAR-Ret. is associated with King and Biddle.

Colonel Richard H. Love, USAR-Ret., following his retirement after more than 30 years of active reserve service, was awarded the Legion of Merit for meritorious service in the Army Reserve.

#### **GEORGIA:**

Rear Admiral Hugh H. Howell, Jr., JAGC-USNR of Atlanta, the first reserve legal officer to hold a flag billet, is the Director of the Naval Reserve Law Programs. He is charged with the responsibility of ensuring that the NRLP is manned and trained to meet mobilization requirements and coordinates the efforts of the Naval Reserve Law Companies and Other Reinforcement Units. Admiral Howell is a past president of the Association.

#### **INDIANA:**

Major Albert B. Chipman, AUS-Ret., of Plymouth, has been appointed judge of the Superior Court of Marshall County. Major Chipman served as Circuit Court Judge in Marshall County from 1927-1938. The Superior Court was newly established by a 1973 Act of the General Assembly of Indiana.

#### **MISSOURI:**

Colonel William F. Fratcher, AUS-Ret. of Columbia, distinguished professor of law at the University of Missouri-Columbia, is author of an article on the Law of Mortgages in the new 15th

Edition of Encyclopaedia Britannica. The article treats the mortgage historically and comparatively and covers the law of mortgages in England, France, Germany and the United States.

Brigadier General Nathaniel B. Rieger, USA-Ret. of Jefferson City, is an officer of the University of Missouri-Columbia Law School Foundation. The Foundation was established in 1928 to seek funds to benefit the law school by supporting scholarships, lectureships and faculty grants. It awards prizes for scholarship and excellence in work on the Missouri Law Review.

#### UTAH:

Colonel Calvin A. Behle, USAR, has been elected an officer of the Fellows of the American Bar Foundation. Colonel Behle, Secretary of the Foundation, is a member of the ABA Board of Governors and the American College of Trial Lawyers.

#### VIRGINIA:

Colonel William S. Fulton, USA, Commandant of the Judge Advocate General's School at Charlottesville, hosted the National Guard Judge Advocates Conference at the school. The National Guard JAG officers from all over the United States attended the Conference

which is an annual event held for the purpose of keeping National Guard officers abreast of current developments in military law. Major General Harold R. Vague, the Judge Advocate General of the Air Force gave the keynote address.

Lieutenant Colonel Robinson O. Everett, USAR, Professor of Law at Duke University School of Law, gave the third annual lecture from the Edward H. Young Chair of Legal Education at the Judge Advocate General's School on September 13, 1974. The Judge Advocates Association, which funded the Chair, was represented by Rear Admiral Donald D. Chapman, USN-Ret., First Vice President of the Association.

Colonel William H. Erickson, USAR-Ret., Justice of the Supreme Court of Colorado presented the Third Kenneth J. Hodson Lecture on Criminal Law at the Judge Advocate General's School in January 1974.

#### WASHINGTON:

Colonel Wheeler Grey, AUS-Ret. of Seattle recently announced the addition of Major John L. West, USAR as a member of his firm. Colonel Grey's firm under the style of Jones, Grey, Bayley & Olsen has offices in the Norton Building.

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# SUPREME COURT AUTOMATION PROJECT

The Office of the Clerk, Supreme Court of the United States is in the process of reducing much of the material in the office to machine-readable form. A part of the project is to list all accredited lawyers on machine-readable tape. To help in this project all lawyers who are members of the Bar of the Supreme Court of the United States are asked to fill out the form below and return it to:

Clerk, Supreme Court of the United States  
Washington, D.C. 20543  
Attn: BAR-PROJ.

## SUPREME COURT OF THE UNITED STATES

Information Form For Attorneys Admitted to Practice Before the Court

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City & State \_\_\_\_\_ ZIP \_\_\_\_\_

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# JUDGE ADVOCATES ASSOCIATION

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## Executive Secretary and Editor

RICHARD H. LOVE  
Washington, D.C.

