UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

ESEQUIEL TORRES, SERGEANT, U. S. ARMY, Plaintiff	:	CIVIL ACTION
vs.	:	NO. 13895
ALBERT O. CONNOR, LT. GENERAL, U. S. ARMY, AS COMMANDING GENERAL, THIRD U. S. ARMY, Defendant	:	

THE COMPLAINT SHOULD BE DISMISSED PURSUANT TO RULE 12(h)(3), F. R. CIV. P. IN THAT THE COURT LACKS JURISDICTION OVER THE SUBJECT MATTER

The district court entertains a limited jurisdiction, and in every case the jurisdictional facts must be alleged affirmatively. Engel v. Tribune Company, 189 F.2d 176 (7th Cir. 1951). In attempting to enjoin his court-martial, or in the alternative, transfer the charges to this district court for trial, the plaintiff omits a "short and plain" statement of jurisdictional grounds. See Rule 8(a)(1), F.R. Civ. P. In Paragraph one of the complaint there is an invocation of 28 U.S.C. 2282, but this statute is procedural and confers no jurisdiction in itself. Van Buskirk v. Wilkinson, 216 F.2d 735 (9th Cir. 1954). There is no reference to the presence or absence of the requisite jurisdictional amount if jurisdiction is silently premised under 28 U.S.C. 1331. See Giancana v. Johnson, 335 F.2d 366 (7th Cir. 1964); Oestereich v. Selective Service Bd., 393 U.S. 233, 239 (1968). The district court does not have original jurisdiction of every question under the laws and the Constitution. Hague v. C. I. O., 307 U.S. 496, 507-508 (1939).

There is utterly no equitable jurisdiction within a district court to enjoin a court-martial. From the adoption of the Constitution, military law has existed "separate and apart from the law which governs in our federal judicial establishment." Burns v. Wilson, 346 U.S. 137, 140 (1952). The civil judicial authority was established pursuant to Article III of the Constitution in the Supreme Court and in such inferior courts as the Congress might establish. See Lockerty v. Phillips, 319 U.S. 182, 187 (1953). At the same time the Congress was authorized "To make Rules for the Government and Regulations of the land and naval Forces." Article I, §8, Cl. 14. Congress has formulated a system of court-martial procedure uniformly applicable to all branches of the armed forces including final appellate review by the United States Court of Military Appeals, an independent tribunal composed of three civilians appointed by the President. Uniform Code of Military Justice, 64 Stat. 107, et seq. [1/] The Congress has never given the Supreme Court appellate jurisdiction to supervise the administration of military courts. Noyd v. Bond, 395 U.S. 683, 694 (1969). The appellate determinations of the Court of Military Appeals are "final and conclusive." Article 76, U.C.M.J.; 70A Stat. 64, 10 U.S.C. 876.

Constitutionally, the Uniform Code of Military Justice administered by Article I Military Courts works independently of the Article III judicial power and the Article III civil courts. In those few instances where military courts have

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1/ Enacted as Title 10 and Title 32, United States Code, as positive, codified law in 1956. 70A Stat., 10 U.S.C. 1, et seq.

been found beyond their jurisdiction by the Supreme Court, e.g.: O'Callahan v. Parker, 395 U.S. 258 (1969) (non service connected offense); Reid v. Covert, 354 U.S. 1 (1957) (dependent of serviceman); Toth v. Quarles, 350 U.S. 11 (1955) (discharged serviceman); the military courts were not enjoined. The constitutional and legislative separation of military and civil jurisdiction remained inviolate. 2/ The Supreme Court reviewed the decisions of the military courts only in considering petitions for habeas corpus. By specific legislation (28 U.S.C. 2241), Congress charged the district courts with the exercise of this power. Burns v. Wilson, 346 U.S. 137, 139 (1953). The plaintiff must exhaust his remedies under the Uniform Code of Military Justice before seeking legal or equitable relief from the district court. Gusik v. Schilder, 340 U.S. 128 (1950); Noyd v. Bond, 395 U.S. 683 (1969). 3/ The plaintiff "would have civilian courts intervene precipitately into military life without the guidance of the court to which Congress has confided primary responsibility for the supervision of military justice in this country and abroad." Noyd, supra, at 695. In an almost identicial case recently ruled upon, the plaintiff sought to enjoin his court-martial on charges of murdering a Vietnamese civilian. The court dismissed the complaint for lack of jurisdiction on the ground that the

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2/ For a recent case in which the Court of Appeals refused to stay an impending court-martial even to preserve jurisdiction while considering the merits of the complaint, see Levy v. Corcoran, 389 F.2d 929 (D.C. Cir. 1967), cert. den. 389 U.S. 690 (1967). The court held that it lacked equity jurisdiction.

3/ In addition, and as compelling are Burns v. Wilson, 346 U.S. 137 (1953); Levy v. Corcoran, 389 F.2d 929 (D.C. Cir. 1967), cert. den. 389 U.S. 960 (1967); Noyd v. McNamara, 378 F.2d 538 (10 Cir. 1967), cert. den. 389 U.S. 1022 (1967).

plaintiff had an adequate remedy within the military courts which he had failed to exhaust. Green v. Laird, Civ. No. 1700-70 (D.D.C. decided 9 July 1970). (Copy of the transcript available to the Court if desired.) The plaintiff does not avoid his deficient grounds for jurisdiction by an extensive enumeration of factual considerations. Even the plaintiff's fifteen grounds allegedly rising to the height of constitutional violations are subject to determination in the court-martial process. See Noyd v. Bond, supra; In Re Kelley, 401 F.2d 211 (5th Cir. 1968). The fifteen grounds advanced in the complaint are drawn mostly from the Fifth and Sixth Amendments and Article III of the Constitution. However, these amendments do not extend the right to trial by jury to soldiers charged with military crimes. Ex parte Quirin, 317 U.S. 1, 40 (1942). All persons in the regular land or naval forces of the United States are subject to court-martial rather than indictment by grand jury and jury trial for military crimes. 4/ Whelchel v. McDonald, 340 U.S. 122, 127 (1950); O'Callahan v. Parker, 395 U.S. 258, note 18, p. 272 (1969); Stanford v. United States, 413 F.2d 1048 (5th Cir. 1969) It is long settled that without benefit of Article III and apart from it, Congress is authorized to provide for the trial of military offenses. Dynes v. Hoover, 61 U.S. 65, 79 (1858). Most recently in O'Callahan v. Parker, Justice Douglas premised the court's holding upon the observation that the specific procedural protections

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4/ The plaintiff's quotation from the Fifth Amendment, upon which the first ground of the complaint is based, is obviously inapplicable. The passage relied upon, ". . .in actual service in time of war or public danger," refers only to the militia. Johnson v. Sayre, 158 U.S. 109, 114 (1895); O'Callahan v. Parker, supra.

deemed essential in Article III trials are not mandatory to the military system of courts. 395 U.S. 258, at 261-62 (1969). 5/

Finally, the plaintiff seeks to have this Court determine the legality or constitutionality of the Vietnam war. Previous challenges to the constitutionality of the President's actions in Vietnam have been dismissed as involving a political question not presenting a justiciable controversy, for lack of standing, or as unconsented suits. Luftig v. McNamara, 373 F.2d 664, 665-6 (D.C. Cir. 1967), cert. den. 387 U.S. 945 (1967); Mitchell v. United States, 369 F.2d 323 (2nd Cir. 1966), cert. den. 386 U.S. 972 (1967); Velvel v. Johnson, 287 F. Supp. 846, 849-60, 853 (D. Kan.1968) aff'd. 415 F.2d 236 (10th Cir. 1969), cert. den. 396 U.S. 1042. The rule has been that it is not the function of the judicial branch to entertain litigation challenging the legality or wisdom of the executive branch in sending troops abroad in foreign military operations. Cooper v. United States, 403 F.2d 71, 74 (10th Cir. 1968); United States v. Hogans, 369 F.2d 359 (2nd Cir. 1966); Johnson v. Eisentrager, 339 U.S. 763 (1950). However, on July 1, 1970, Judge Dooling of the United States District Court for the Eastern District of New York in the case of Orlando v. Laird, Civil Action No. 70 C 745, concluded "that no defect exists in the constitutionality of the commitment of the nation to the combat activities in Vietnam." (Slip Opinion attached, pp. 18-19). The plaintiff's allegations on the illegality of the war are

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5/ In this case, the court held that when (1) there was not the remotest connection between the serviceman's duties and the charges, (2) the situs of the alleged offense was not an armed camp under military control, (3) the alleged offense was a peacetime offense, and (4) the civil courts were open, the alleged offense was not service connected; the accused was entitled to indictment and trial by jury. 395 U.S. at 273,274. None of the conditions considered by the court advantage the plaintiff in this case, and we note particularly that the alleged offense occurred in a war zone. See Gallagher v. United States, 423 F.2d 1371 (Ct.Cls.1970) (holding O'Callahan inapplicable to offenses committed in foreign nations).

untimely as are the remaining constitutional issues, all of which can be raised in the court martial. Noyd v. Bond, supra. But even considering the issue on the merits, it it not justiciable or, following Orlando, it is without merit.

We urge the three-judge court to dismiss the complaint for lack of jurisdiction pursuant to Rule 12(h)(3), F.R. Civ. P. Hoffman v. Stevens, 177 F. Supp. 898, 904 (M.D. Pa. 1959). In the alternative [6/] we request that the three-judge district court be dissolved because there is (1) no formal allegation of a basis for equitable relief in that there is no jurisdictional allegation, (2) no basis for jurisdiction, and (3) no substantial constitutional issue. Hargrave v. McKinney, 413 F.2d 320 (5th Cir. 1969). It is settled that trial by court-martial is without constitutional infirmity, and that the plaintiff must exhaust his review within the military system before petitioning the civil courts. Burns v. Wilson, supra, Noyd v. Bond, supra. It is not necesary to convene a three-judge court to consider constitutional questions which have been resolved. Bailey v. Patterson, 369 U.S. 31 (1962); Hargrave v. McKinney, supra, (dissenting opinion). Moreover, the plaintiff limits his attack on the Uniform Code of Military Justice to the particular facts of his case. See McGuire v. Sadler, 337 F.2d 902 (5th Cir. 1964). His prayer for relief merely seeks to enjoin his court-martial; he does not seek a declaration that the Uniform Code is unconstitutional. Under these circumstances there is no jurisdiction for a three-judge court. Flemming v. Nestor, 363 U.S. 603 (1960); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).

6/ Under Jackson v. Choate, 404 F.2d 910, (5th Cir. 1968), the court may initially determine that the case does not present a three-judge matter.

CONCLUSION

WHEREFORE, it is requested that the complaint be dismissed for lack of jurisdiction, or in the alternative that the three-judge court be dissolved.

John W. Stokes, Jr.

JOHN W. STOKES, JR.
UNITED STATES ATTORNEY

Beverly B. Bates

BEVERLY B. BATES
ASSISTANT U. S. ATTORNEY