

IN THE 7 JUDICIAL CIRCUIT  
Fort Leaning, Georgia 31905

WILLIAM L. CALLEY, JUNIOR

v.

MOTION TO DISMISS

WILLIAM L. CALLEY, JUNIOR  
FIRST LIEUTENANT  
U.S. ARMY

Comes now the accused, (William L. Calley, Junior), and moves to dismiss all pending charges and specifications because the Court-Martial lacks jurisdiction over the person of the accused. This lack of jurisdiction arises as follows:

I.

In U. S. Ex Rel Toth v. Quarles, 350 U.S. 11, 100 L ed 8, the United States Supreme Court clearly held that Courts-Martial lacked jurisdiction to try discharged servicemen. The Supreme Court, in its principal opinion, notified Congress that remedial legislation was required to correct this obvious jurisdictional deficiency. As the Supreme Court noted, "It is impossible to think that the discipline of the Army is going to be disrupted, its morale impaired, or its orderly processes disturbed, by giving ex-servicemen the benefit of a civilian court trial when they are actually civilians." It is clear that the Supreme Court has consistently considered trial by Courts-Martial to be constitutionally inferior to trial by jury, and that the subjection of an American citizen to such a disciplinary-judicial system deprives the individual of his guaranteed rights under the Constitution of the United States.

In O'Callahan v. Parker, \_\_\_ U.S. \_\_\_, 37 Law Week 4465, 4467, the Supreme Court most appropriately noted that "courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law", and that "A civilian trial... is held in an atmosphere conducive to the protection of individual rights while the military trial is marked by the age-old manifest destiny of retributive justice." The Supreme Court further noted that "The fact that courts-martial have no jurisdiction over nonsoldiers, whatever their offense, does not necessarily imply that they have unlimited jurisdiction over soldiers regardless of the nature of the offense charged." The principals of the O'Callahan decision has been applied to a case involving a merchant seaman in Viet Nam [Latney v. Ignatius, \_\_\_ F. 2d \_\_\_ (D. C. Cir 1969) as briefly discussed in Volume 55, American Bar Association Journal, page 1097, dated November 1969]. Thus, there can be no doubt that a Court-Martial though a separate disciplinary-judicial system cannot provide equal justice to the citizen soldier in terms of Constitutional protection and rights. The federal government is required through the Fifth Amendment of the United States Constitution to afford its citizens equal protection of the law (See Truax v. Corrigan, 257 US 312, 66 L ed 254, 262, 263; Steward Machine Co. v. Davis, 301 US 548, 585, 81 L ed 1279, 1290 (1937 -- Justice Cardozo); U.S. v. Yount, 267 F. 861, 863 (1920, DC Pa.); Sims v. Rives, 84 F. 2d 871, 878 (1936), cert. den

16<sup>th</sup> Dec

Mot to Dismiss

United States v. CALLEY, William L., Junior  
MOTION TO DISMISS

298 U.S. 662, 80 L ed 1402; See also, O'Connor v. District of Columbia, 153 F. 2d 225, 227, (1946); Antieau Modern Constitutional Law, Vol. 1, § 8:94, at 644 (1969)). By subjecting the accused to trial by court-martial, the federal government is unnecessarily depriving him of his equal rights under the 5th, 6th, and 9th Amendments of the Constitution of the United States. Such deprivations include, but are not limited to, denial of indictment by a grand jury, denial of trial by jury, denial of trial before a court constituted under Article 3 of the Constitution of the United States, denial of protection of the right to a fair trial, denial of the right to receive a unanimous verdict to convict. This latter right is most important in this case, where conviction on a mere 2/3d vote of the court-martial members will result in a minimal sentence to life imprisonment. Accordingly, that portion of the Uniform Code of Military Justice and the Manual for Courts-Martial, as allegedly provides a basis for jurisdiction over the accused is unconstitutional and thus void as it applies to said accused.

II.

Further, the accused is not subject to the jurisdiction of any court-martial because he was not placed in jeopardy before the expiration of his initial term of service. As the accused was not placed in jeopardy and as the offenses against him were not referred to trial before expiration of his initial term of service, he was a civilian and thus, is being denied the same and equal protection of the law as the Supreme Court granted in U.S. Ex Rel Toth v. Quarles, supra. Accordingly, those provisions of the law as allow retention of an accused beyond his initial term of military service for the purpose of criminal investigation and possible trial by court-martial are unconstitutional and void. In the alternative, where an accused is retained beyond his initial term of service, but has not been placed in jeopardy or had his case been referred to trial so that a court-martial has, in fact, obtained jurisdiction over him, such resulting military status is basically for purposes of continuing investigation and possible trial by a court-martial and constitutes a form of involuntary servitude in violation of the 13th Amendment of the United States Constitution. In any event, accused whether military or nonmilitary, is being denied equal protection of the law.

III.

Further, "...the scope of the constitutional power of Congress to authorize trial by court-martial presents another instance calling for limitation to the least possible power adequate to the end proposed." (U.S. Ex Rel Toth v. Quarles, supra at 100 L ed 23). Thus, in the absence of a clear showing by the government that the preservation of discipline, law and order within the Armed Forces of the United States, necessitates the subjection of any accused, military or nonmilitary, to the jurisdiction of a court-martial, for other than an offense of a pure military nature, the court-martial must be deemed to be without jurisdiction over the accused concerned. In this case, although the charged offenses allegedly occurred in Viet Nam, trial is being conducted in the United States. Thus, there obviously exists no valid reason for denying the accused equal protection of the law. In this age of jet airline where an entire rifle company can be

United States v. William L. CALLEY, Junior  
MOTION TO DISMISS

transported, within 24 hours, to a cite under federal court jurisdiction, the burden must be borne by the government to prove that necessity requires resort to court-martial for civilian type offenses. In the absence of such showing, the due process clause of the Fifth Amendment would appear to require the trial judge to dismiss the military charges to insure accused's equal protection of the law.

For the reasons above stated, but in no way thereto limited, the defense respectfully requests that all charges and specifications now pending against the accused be dismissed for lack of jurisdiction.

Dated this 16th day of December 1969.

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KENNETH A. RABY  
Major, JAGC  
Appointed Military Defense Counsel

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