JUDICIAL REVIEW — ABSTENTION — FEDERAL COURT ABSTAINS FROM PRE-TRIAL JURISDICTIONAL ATTACK ON MILITARY COURT-MARTIAL — *Sedivy v. Richardson*, 485 F.2d 1115 (3d Cir. 1973).

INTRODUCTION

When confronted with an impending court-martial, a member of the Armed Forces must normally go to trial and, if convicted, pursue his appeal through the established channels of the military justice system.[1] Thereafter, a collateral attack on his conviction is available by way of habeas corpus in civilian federal courts.[2] A few civilian courts have entertained collateral attacks *before* the initiation of a court-martial.[3] These cases have granted injunctive relief on the grounds that the military court lacked subject-matter jurisdiction under the United States Supreme Court's test in *O'Callahan v. Parker*[4] — a case which limited military jurisdiction to offenses which could be characterized as "service connected."[5]

In *Sedivy v. Richardson*,[6] the Third Circuit Court of Appeals disallowed such an approach. The court abstained from deciding the case until the serviceman had exhausted his remedies in the military court system. In explanation of its exhaustion requirement, the court suggested that the practice of federal court abstention, previously limited to a federal-state context, should be extended to the situation

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1. Exhaustion of military remedies in a court-martial involves: (1) court-martial (10 U.S.C. §§ 816, 817(a) (1970)); (2) review by the court-marital's convening authority (10 U.S.C. § 864 (1970)); (3) review by a court of military review (10 U.S.C. § 866(b) (1970)); (4) review, in a proper case, by the civilian United States Court of Military Appeals in Washington, D.C. (10 U.S.C. §§ 867 (a), (b) (1970)).

2. *See Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1208-63 (1970).

3. Redmond v. Warner, 355 F. Supp. 812 (D. Hawaii 1973); Schroth v. Warner, 353 F. Supp. 1032 (D. Hawaii 1973); Moylan v. Laird, 305 F. Supp. 551 (D.R.I. 1969).

4. 395 U.S. 258 (1969) [hereinafter cited as *O'Callahan*].

5. *Id. O'Callahan* itself is not very helpful in determining what the parameters of the "*O'Callahan* tests" are. A later case, Relford v. Commandant, 401 U.S. 355 (1971), distilled a list of twelve factors from *O'Callahan* (*e.g.*, on-post occurrence, military status or victim, time of war), added nine of its own, and indicated that the question of whether a crime is "service connected" must be an ad hoc decision. *Id.* at 365-69. Last term an array of plurality, concurring, and dissenting opinions added little in the way of clarification, with two Justices (Rehnquist and Stewart) calling for *O'Callahan* to be overruled. Gosa v. Mayden, 413 U.S. 665 (1973).

6. 485 F.2d 1115 (3d Cir. 1973) [hereinafter cited as *Sedivy*].

of pre-trial injunctive intervention in military courts-martial. This note will first briefly examine *Sedivy* and the exhaustion requirement which it announced, then analyze *Sedivy* in terms of the abstention doctrine which it implicitly adopts, and finally compare *Sedivy* to contrary decisions from other jurisdictions.

SEDIVY v. RICHARDSON

While off-duty, Sergeant Sedivy, a senior non-commissioned officer in an Army military police company at Fort Monmouth, New Jersey, was arrested by civilian and military authorities during a narcotics raid on his off-post house trailer. The raid was conducted pursuant to a civilian state judge's warrant. Standing alone, such facts might seem to indicate that Sedivy's *O'Callahan* claim was not frivolous. The off-post, off-duty possession of marijuana and narcotics has been held in some cases not to be sufficiently service-connected to accord jurisdiction to a court-martial.[7] Other facts, however, may have suggested a sufficient service connection: Sedivy's rank and office, clearly announced by a sign on his house trailer, and the presence at the scene of four lower-ranking enlisted men, one of whom was directly under Sedivy's command.[8]

When a general court-martial was subsequently convened to try Sergeant Sedivy, he petitioned a federal court to enjoin the court-martial on the ground that the military tribunal lacked jurisdiction under *O'Callahan*. The district court agreed with Sedivy and granted the injunction in an unreported decision. The court of appeals reversed and instructed the district court that it should not have reached the merits of Sedivy's *O'Callahan* claim, but should have abstained from deciding the jurisdictional facts and required Sedivy to exhaust his military remedies.

The appellate court supported its exhaustion requirement largely by analogy to habeas corpus. The need for exhaustion of military remedies prior to civilian habeas relief is generally well established.[9] All the precedents which the court cites in support of exhaustion are habeas cases.

The force of this analogy, however, was somewhat blunted by the

7. Annot., 14 A.L.R. FED. 152, 224-26 (1973), *citing inter alia*, Moylan v. Laird, 305 F. Supp. 551 (D.R.I. 1969).
8. *Sedivy* at 1121. *See generally*, Annot., 14 A.L.R. FED. 152, 220-24 (1973).
9. *See, e.g.*, Gusik v. Schilder, 340 U.S. 128 (1950).

court's constraint of the issue before it: "This is not habeas corpus. This is not an inquiry into the present detention of a military prisoner following a court-martial adjudication."[10] Rather, *Sedivy* was a petition for pre-trial prohibitory relief on a constitutional jurisdictional claim.[11] Although exhaustion is required for habeas corpus, *Sedivy* could hardly rely summarily on the habeas exhaustion requirement in a non-habeas situation. Yet the court could find "no countervailing circumstances" justifying what it regarded as the "normal requirement of exhaustion of military remedies before recourse to federal civilian courts."[12]

The court offered a further reason for non-intervention and exhaustion by citing the Supreme Court case of *Younger v. Harris*,[13] a case usually associated with the abstention doctrine. Although only briefly covered by *Sedivy*, the use of *Younger* abstention merits further attention.

ABSTENTION: SEDIVY AND YOUNGER

The *Sedivy* court, citing the Supreme Court, remarked that exhaustion and abstention were "closely analogous."[14] Its use of *Younger* was not offered as an alternative rationale, but as a further explication of its exhaustion requirement. Exhaustion and abstention in *Sedivy*, if not generally, are two ways of looking at the same phenomenon. Abstention describes what judges do; exhaustion describes what petitioners do when judges abstain.

Younger and its companion cases[15] deal "with the proper policy to be followed by a federal court when asked to intervene by injunction or declaratory judgment in a criminal prosecution which is contemporaneously pending in a state court."[16] That policy, absent "extraordinary circumstances,"[17] is one of non-intervention — known familiarly as "abstention."[18]

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10. *Sedivy* at 1118.
11. *Id.* at 1116.
12. *Id.* at 1120.
13. 401 U.S. 37 (1971) [hereinafter cited as *Younger*].
14. *Sedivy* at 1120 n.8, *citing* Parisi v. Davidson, 405 U.S. 34, 40 n.6 (1972).
15. Byrne v. Karaleis, 401 U.S. 216 (1972); Dyson v. Stein, 401 U.S. 200 (1971); Perez v. Ledesma, 401 U.S. 82 (1971); Boyle v. Landry, 401 U.S. 77 (1971); Samuels v. Mackell, 401 U.S. 66 (1971).
16. *Younger* at 55 (Stewart, J., concurring).
17. *Id.* at 53.
18. *See* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 196-208 (2d ed. 1970).

It is, in fact, probably not correct to speak of an "abstention doctrine" as though it were a clearly defined part of the judicial repertoire. One analysis characterizes abstention "doctrines" as sets of circumstances, under which a federal court will feel free to abstain (from whatever quantum of jurisdiction it might possess) in deference to the jurisdiction of some other (state) court.[19] Such deference will occur in circumstances where by abstaining the federal court will avoid: (1) premature decision of a constitutional question; (2) needless conflict with state administration; (3) unnecessary decision of state law questions; and (4) congestion of federal court dockets.[20] Other typologies of abstention have been suggested.[21]

Indeed, *Younger* and *Sedivy* are not explicitly abstention doctrine cases at all (in that neither case uses that term). But abstention is certainly their procedural posture; and exhaustion of other remedies their procedural effect. By utilizing the rubric of "exhaustion," these cases permit a court to abstain from exercising whatever jurisdiction it might have by requiring a party to *exhaust* his remedies available elsewhere.

By requiring Sergeant Sedivy to exhaust his remedies in the military courts, the court of appeals was abstaining from deciding the *O'Callahan* claim. The court was apparently of the view that, under whatever cataloging of abstention, the rationale behind such a doctrine was fully met in the context of a military defendant's *O'Callahan* claim.

Sedivy read *Younger* abstention to require that "one court system should not intrude when another court system holds out hope of an

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19. *Id.* at 196.

20. *Id.* Professor Wright has elsewhere written disapprovingly of the fourth category as justification for abstention. Wright, *The Abstention Doctrine Reconsidered*, 37 TEXAS L. REV. 815, 824 (1959).

21. *See, e.g.*, 6 DUQUESNE L. REV. 269, 273-77 (1967) (civil rights: narrow and broad areas). Certainly one could point to the famous criteria of Justice Brandeis as formulating a type of abstention from constitutional adjudication whose federal-state dimension is quite irrelevant to the present situation. Ashwander v. TVA, 297 U.S. 288, 346-48 (1935) (Brandeis, J., concurring). Abstention as a form of judicial behavior may be much broader than it is usually thought to be. One judge, from the perspective of adjudication and not academics, has identified over forty factors which may or may not be present in a given case inviting federal abstention. Pell, *Abstention—A Primrose Path by Any Other Name*, 21 DEPAUL L. REV. 926 (1972). Another judge's survey of the field of abstention led her to call for a complete re-examination of the concept. Hufstedler, *Comity and the Constitution: The Changing Role of the Federal Judiciary*, 47 N.Y.U.L. REV. 841, 860 (1972).

adequate remedy."[22] Review of *O'Callahan* jurisdictional claims are routinely heard in the United States Court of Military Appeals.[23] Military courts "are required to follow the mandate of *O'Callahan*,"[24] and under *Sedivy*'s abstention are given the first opportunity to do so.

Furthermore, *Younger* is said to have been "premised on considerations of equity practice."[25] *Younger*'s foundation in classic equity principles required a showing of immediate irreparable injury as a condition precedent to injunctive relief. This injury would *not* include "the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution."[26] A basic criterion of *Younger* is that the threat "must be one that cannot be eliminated by his defense against a single criminal prosecution."[27] In terms of *Younger*, it would appear that a military petitioner in Sedivy's position would be unable to allege irreparable injury.

Sergeant Sedivy could argue his constitutional claim through the military courts as fully as John Harris, in *Younger*, could argue his in the courts of California. Indeed, Sedivy's crime might be found non-service connected by the military court system. Pre-trial intervention could carry with it all the problems which abstention seeks to avoid: needless conflict with the administration of the military justice system, needless decision of unsettled questions of military law, and crowding of civilian court dockets.[28] Considering the rationale of abstention, then, it would appear that the *Sedivy* court correctly thought a persuasive case could be made for the extension of abstention in the context of a court-martial.

But perhaps a more formidable problem for the *Sedivy* court was that the "abstention doctrine" has typically arisen in and been justified in terms of avoiding conflicts in federal-state relationships. In *Sedivy*, the potential conflicts were totally intra-federal. The extension of *Younger* to the federal-military context was an entry onto unfamiliar ground.

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22. *Sedivy* at 1122.
23. Between *O'Callahan*, decided June, 1969, and *Relford*, *supra* note 5, decided Feb. 1971, the Supreme Court noted over sixty opinions of the United States Court of Military Appeals dealing with *O'Callahan* issues. *Relford* at 358 n.8.
24. *Sedivy* at 1121.
25. Lake Carriers Ass'n v. MacMullan, 406 U.S. 498, 509 (1972).
26. *Younger* at 46.
27. *Id.*
28. These goals of abstention here are those proposed by Professor Wright. C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 196 (2d ed. 1970). He, of course, phrases them in terms of possible federal-state conflict.

ABSTENTION IN FEDERAL-MILITARY CASES

Younger v. Harris abstention is said to be founded on considerations of "[f]ederalism;"[29] *i.e.*, the appropriate demands of comity between state and federal court systems. In the federal-state context, comity is something more than good manners which leads federal courts to defer to their state counterparts.[30] While *Younger* is said to have sprung from considerations of comity,[31] it is not clear what the precise demands of comity are in the federal-military context; but that comity has some federal-military dimension is apparent. The Supreme Court, in *Parisi v. Davidson*,[32] has characterized the exhaustion of remedies requirement established for military habeas corpus as being dictated by the "appropriate demands of comity between two separate judicial systems."[33] The decision in *Parisi* was that habeas corpus proceedings on an administrative discharge question should continue despite the fact that petitioner had subsequently come up for court-martial. The administrative procedure to be reviewed, however, "antedated and was independent of the military criminal proceedings."[34] Interference with the court-martial was an unavoidable consequence of review of the administrative process in question. Because of the potential ambiguity arising from such interference with a court martial, the court cautioned that its decision was "not to be understood as impinging upon the basic principles of comity that must prevail between civilian courts and the military judicial system."[35]

The strong suggestion throughout *Parisi* that comity is a forceful consideration in federal-military relations was strongly excepted to by Justice Douglas' concurrence. He was of the view that the military court system was undeserving of any offer of comity — that "[t]he military is simply another administrative agency, insofar as judicial review is concerned."[36] In any event, *Sedivy* carried *Parisi's* suggestion to its logical conclusion by abstaining on *Younger v. Harris* grounds.[37]

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29. *Younger* at 44.
30. Covell v. Heyman, 111 U.S. 176, 182 (1884).
31. *Younger* at 44.
32. 405 U.S. 34 (1972).
33. *Id.* at 40.
34. *Id.* at 41.
35. *Id.* at 46.
36. *Id.* at 51. Justice Douglas observed that "the Pentagon is not yet sovereign." *Id.*
37. *But see* McCormack, *Federal Court Intervention in Military Courts—Interrelationship of Defenses and Comity*, 6 GA. L. REV. 532 (1972).

Sedivy's unstated presumption must be that the demands of comity under federalism (state-federal) are functionally equivalent to the demands of comity under separation of powers (intra-federal). And that functional equivalence, in the case of pending criminal proceedings, requires abstention.

OTHER DECISIONS

As noted above, the pre-trial enjoining of a court-martial on *O'Callahan* jurisdictional grounds has arisen in several cases before *Sedivy*, and has regularly been granted. One such injunction in the Tenth Circuit[38] was distinguished by the *Sedivy* court on the grounds that exhaustion of military remedies as an alternative to federal intervention was never considered by the Tenth Circuit in either the submitted briefs or its opinion.[39] Alternatives to preemptive adjudication of the constitutional *O'Callahan* claim were, however, considered and rejected by the Rhode Island District Court in *Moylan v. Laird*[40] and two Hawaii District Court cases[41] which adopted the *Moylan* rationale. *Sedivy* acknowledged *Moylan* as contrary authority and explicitly rejected it.

The *Moylan* line of cases was apparently of the view that abstention from intervention in court-martial cases (requiring defendants to exhaust their military remedies) was inappropriate where defendant's attack in federal court "goes to the very power of the military over him as a constitutional jurisdictional matter,"[42] and specifically where the attack is framed in terms of the *O'Callahan* "service connected" test. *Moylan* placed its reliance on footnote dicta in the Supreme Court case of *Noyd v. Bond*.[43] *Noyd* actually held that in a post-trial habeas corpus proceeding a military petitioner must ex-

38. Councilman v. Laird, 481 F.2d 613 (10th Cir. 1973), *cert. granted*, 42 U.S.L.W. 3362 (U.S. Dec. 17, 1973). A later case, however, reads *Councilman* as not requiring exhaustion once the jurisdictional claim has been denied at the court-martial level. Chastian v. Slay, 365 F. Supp. 522, 523 (D. Colo. 1973).

39. *Sedivy* at 1118 n.5.

40. 305 F.Supp. 551 (D.R.I. 1969).

41. Redmond v. Warner, 355 F. Supp. 812 (D. Hawaii 1973); Schroth v. Warner, 353 F. Supp. 1032 (D. Hawaii 1973). Other cases which have granted relief typically involved habeas corpus considerations which are distinct from the problem in *Sedivy*. *See, e.g.*, McCahill v. Eason, 361 F. Supp. 588 (N.D. Fla. 1973). One court apparently felt *Younger* prevented injunctive relief, but proceeded to the merits by way of declaratory judgment. Holder v. Richardson, 364 F.Supp. 1207, 1211-12 (D.D.C. 1973).

42. *Moylan* at 554.

43. *Id.*, *citing* Noyd v. Bond, 395 U.S. 683, 696 n.8 (1969).

haust his appeals through the military criminal process before seeking civilian court relief. But *Noyd* parenthetically suggested (and *Moylan* so held) that a different result might follow where petitioner's claim was of a constitutional jurisdictional nature, as it was in *Reid v. Covert*[44] and the line of cases[45] associated with *Reid* (which removed civilians from court-martial jurisdiction under most circumstances). Those cases, however, as noted in *Sedivy*,[46] arose in the procedural posture of habeas corpus, not injunction; furthermore, they dealt with jurisdiction over persons (civilian status), not jurisdiction over offenses (service connected). Despite these potentially distinguishing characteristics, the *Moylan* cases felt justified in not requiring exhaustion where allegations of lack of jurisdiction were made. *Moylan* and its progency have not inconsiderable support for such a proposition. While there has been a tradition of deferance to military determination, this deference has always been tempered by the caveat that it was operative only to the extent that the military courts, in a given case, were acting within their proper sphere.[47] A typical statement is that of the 1885 Supreme Court:

> Courts martial form no part of the judicial system of the United States, and their proceedings, *within the limits of their jurisdiction*, cannot be controlled or revised by the civil courts.[48]

Moylan and its followers held that allegations of non-*O'Callahan* jurisdiction were sufficient to generate federal injunctive relief. *Sedivy* never directly confronted this *Moylan* argument of no-jurisdiction-no-exhaustion. But possibly an adequate answer is available by implication from *Sedivy*'s use of *Younger* abstention; for abstention makes no comment as to a reviewing court's power, only the propriety of its use. Such a practice, the Supreme Court has said, does not "involve the abdication of federal jurisdiction, but only the postponement of its exercise . . . and it spares the federal courts

44. 354 U.S. 1 (1957).

45. McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960); Grisham v. Hagan, 361 U.S. 278 (1960); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960); United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955).

46. *Sedivy* at 1120 n.7.

47. This tradition can be traced from Wise v. Withers, 7 U.S. (3 Cranch) 198 (1806), through Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857); *Ex parte* Reed, 100 U.S. 13 (1879); *Ex parte* Mason, 105 U.S. 696 (1881); Keyes v. United States, 109 U.S. 336 (1883); Wales v. Whitney, 114 U.S. 564 (1885).

48. Kurtz v. Moffitt, 115 U.S. 487, 500 (1885).

of unnecessary constitutional adjudication."[49] It cannot be fairly questioned that there is some quantum of federal court jurisdiction over the constitutional claims presented in *Younger*, *Moylan*, and *Sedivy*. The threshold inquiry, beyond which *Sedivy* chose not to go, was not whether there was jurisdiction, but whether its exercise was appropriate at a given stage in a specific case or controversy. Abstention outlines circumstances in which such non-exercise of jurisdiction is called for; *Sedivy* has added a new category to the list.

By abstaining, as the court in *Sedivy* did, full room is given to what the Supreme Court saw as Congress' intention to assure "direct civilian review over military justice"[50] by the Court of Military Appeals, whose "disinterested civilian judges could gain over time a fully developed understanding of the distinctive problems and legal traditions of the Armed Forces."[51] The stated goals of abstention are achieved, while *Sedivy's* constitutional claim is fully aired in a single criminal prosecution. In strangely modern, abstention-evocative language, the 1885 Supreme Court summarized this view:

> [T]his manner of relief is more in accord with the orderly administration of justice and the delicate relations of the two classes of courts, civil and military, than the assumption in advance by the one court that the other will exercise a jurisdiction which does not belong to it.[52]

CONCLUSION

Further extension of *Younger* to intra-federal situations may be forthcoming.[53] At least one court has raised, but not decided, the problem in connection with the lower courts of the District of Columbia.[54] Similar considerations may be operative in certain legislative courts, beyond the military courts, whose jurisdiction is attacked in a given case.

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49. Harrison v. NAACP, 360 U.S. 167, 177 (1959).
50. Noyd v. Bond, 395 U.S. 683, 694 (1969).
51. *Id.*
52. Wales v. Whitney, 114 U.S. 564, 575 (1885).
53. In Waters v. Schlesinger, 366 F. Supp. 460, 462 (N.D. Tex. 1973), the court utilized *Younger* abstention where the military petitioner attacked the constitutionality of art. 134 of the Uniform Code of Military Justice (10 U.S.C. § 34 (1970)).
54. Sullivan v. Murphy, 478 F.2d 938, 961-62 (D.C. Cir. 1973), *cert. denied*, 42 U.S.L.W. 3199 (U.S. Oct. 9, 1973).

In any event, by explicating another set of circumstances in which federal judicial abstention is appropriate, and by suggesting an expansion of abstention beyond its normal federal-state boundaries to the federal-military context, the Third Circuit has outlined a refinement of the understanding of that practice, while at the same time placing a long judicial tradition squarely in line with newer learning. For what it says about further clarifications of federal jurisdictional practice, *Sedivy* may be useful beyond its immediate reach.

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