GNAWING AT A FILE: AN ANALYSIS OF *RE TRACEY; EX PARTE RYAN*

STEPHEN GAGELER*

Mason CJ: The Order of the Court is: Order nisi for prohibition discharged. No order as to costs.

Mr Muecke (counsel for the Commonwealth): I note that the Court has made no order as to costs. On my instructions the matter of costs has not been argued. If the Court is not prepared to award the Commonwealth costs [now] perhaps the Court would allow 21 days?

Mason CJ: What I suggest you do is read the judgment. Whilst on the face of the Court's order you appear to have won the battle, I think you will find on reading the judgment you have limped away....[1]

Staff Sergeant Ryan, a member of the Australian Regular Army, was charged with three offences under the Commonwealth Defence Force Discipline Act 1982 ("the Act"). Two charges alleged absence without leave contrary to section 24(1). The third charge alleged the making of a false entry in a service document (a movement requisition) with intent to deceive, contrary to section 55(1)(b). The charges came before a Defence Force magistrate who overruled an objection to his jurisdiction and indicated his intention to hear and determine the charges.

Ryan's application to the High Court of Australia for a writ of prohibition was ultimately unsuccessful. In *Re Tracey; Ex parte Ryan*[2] ("*Tracey*") the Court unanimously upheld the jurisdiction of the Defence Force magistrate to hear and determine the two charges under

* B Ec LLB (Hons) (ANU) LLM (Harv); Formerly Principal Legal Officer, Commonwealth Attorney-General's Department. The views expressed are personal to the author.

1. High Court of Australia, Transcript of Proceedings, 10 February 1989.
2. (1989) 166 CLR 518.

section 24(1) and by majority[3] upheld his jurisdiction in relation to the charge under section 55(1)(b). In the course of its judgment, the Court engaged in a broadranging consideration of the constitutional validity of the Act and, in that context, the history of naval and military discipline.

While the Act produced for the first time a comprehensive code for the maintenance and enforcement of discipline throughout the three arms of the Australian Defence Force, replacing a series of separate regimes justifiably described as a "Serbonian bog of archaisms",[4] its system of service discipline administered by "service tribunals" can be seen as essentially a continuation of the tradition epitomised by the United Kingdom Discipline Act 1866 and the United Kingdom Army Act 1881. Those Acts in turn reflected several centuries of constitutional development which had culminated in Parliament wrestling from the executive the ultimate control of the naval and military forces. They had formed the basis of colonial defence force discipline legislation prior to federation and were largely adopted verbatim in early Commonwealth legislation.

Within this historical setting, the majority of the High Court had little difficulty in rejecting the principal argument for the prosecutor that the Defence Force magistrate was purporting invalidly to exercise the judicial power of the Commonwealth which is required by Chapter III of the Constitution[5] to be committed exclusively to federal, State or Territory courts. The argument had previously been rejected by the Court during the course of the Second World War in *R v Bevan; Ex parte Elias and Gordon*[6] (*"Bevan"*) and *R v Cox; Ex parte Smith*[7] (*"Cox"*). *Tracey* applied the same approach in a time of peace.

The legislative power of the Parliament under section 51(vi) of the Constitution to make laws with respect to "naval and military defence ... and the control of the forces to execute and maintain the laws of the Commonwealth" necessarily comprehends the power both in peace and

3. Mason CJ, Wilson, Brennan, Dawson, Toohey JJ, Deane J dissenting, Gaudron J not deciding.
4. Commonwealth of Australia Parliamentary Debates (1982) Vol 127, 2082, Killen, Minister for Defence.
5. The Australian Constitution forms s 9 of the (UK) Commonwealth of Australia Constitution Act 1900, 63 & 64 Victoria c 12.
6. (1942) 66 CLR 452.
7. (1945) 71 CLR 1.

in war to establish and maintain an effective system of naval and military justice. An essential concomitant of such a system is the existence of service tribunals, composed of service personnel, who discharge basically judicial functions. Service tribunals are regarded on essentially pragmatic grounds as falling outside the requirements of Chapter III. As Sir Harrison Moore pointed out in 1910:

> Even in those Constitutions in which the separation of powers has been accepted as fundamental, by no means every function, which is in its nature judicial is exclusively assigned, or permitted, to the judicial again ... logical consistency may have to yield something to history and established practice....[8]

In *Cox* Justice Dixon said:

> To ensure that discipline is just, tribunals acting judicially are essential to the organisation of an army or navy or air force. But they do not form part of the judicial system administering the law of the land.[9]

So, in *Tracey* Justice Gaudron referred to the history of defence force discipline and the decisions in *Bevan* and *Cox* as pointing "inexorably to the recognition within our legal system of a *military judicial power* which is separate and distinct from 'the judicial power of the Commonwealth' as used in Ch III of the Constitution".[10]

A subsidiary argument based on the requirement for trial by jury in section 80 of the Constitution was similarly rejected. The settled view of section 80 is that it requires only that proceedings actually brought on indictment be determined by a trial by jury but contains nothing to compel procedure by indictment.[11] That view was not challenged. What was argued was that, in the context of the charges brought against Staff Sergeant Ryan, section 42 of the Commonwealth Interpretation Act 1901 operated to compel procedure by indictment. That section provides that offences against an Act punishable by imprisonment for more than six months "shall, unless the contrary intention appears, be indictable offences". While conceding that the Act clearly exhibited a contrary intention, it was argued that the qualification in section 42 could not apply to service tribunals because it was impliedly limited to

8. W H Moore *The Constitution of the Commonwealth of Australia* 2nd edn (Melbourne: Maxwell, 1910) 315-316.
9. Supra n 7, 23.
10. Supra n 2, 598.
11. *R v Archdall and Roskruge; Ex parte Carrigan and Brown* (1928) 41 CLR 128, 139-140. See also *Kingswell v The Queen* (1985) 159 CLR 264, 277.

procedures before courts exercising the judicial power of the Commonwealth. As put by Justices Brennan and Toohey:

> The argument proves too much. If s.42 relates only to the procedure in Ch III courts, it has no relevance to the exercise of the power of service Tribunals: if the qualifying phrase in s.42 does not apply to service offences, neither does the substantive provision.[12]

On either view, section 80 of the Constitution could have no application. The Court therefore had no need to consider the more general question of whether section 80 can in any event apply to a trial that does not involve the exercise of the judicial power of the Commonwealth.[13]

Where the majority of the High Court recognised significant constitutional limitations on the operation of the Act was in relation to a consideration of the substantive scope of the defence power, a point which originally formed no part of the prosecutor's case and which had no effect on the result. Insofar as it authorises the establishment and maintenance of a system of service discipline, the defence power was held to be limited in accordance with two related notions:

(i) that the end to be achieved by service discipline is the promotion of the efficiency, good order and discipline of the defence force and no more;[14] and

(ii) that service personnel must remain at all times subject to the ordinary civil and criminal jurisdiction administered by civilian courts.[15]

Those limitations, derived after an extensive review of history and legal authority at common law and under the Constitution of the United States, were given effect by the decision of the majority in *Tracey* both to constrain the range of service offences capable of being heard and determined by a service tribunal and to deny the validity of the double-jeopardy provisions contained in sub-sections (3) and (5) of section 190 of the Act.

12. Supra n 2, 578-579.
13. Compare *State of New South Wales v The Commonwealth* (1915) 20 CLR 54, 90; *Spratt v Hermes* (1965) 114 CLR 226, 244; *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591, 606.
14. See supra n 2 Mason CJ, Wilson and Dawson JJ, 538.
15. Ibid Brennan and Toohey JJ, 576.

Justice Deane, who alone dissented on the issue of judicial power, saw similar limitations applying to the disciplinary powers of service tribunals excluded from the reach of Chapter III of the Constitution.[16] However, Justice Deane added that he would have adopted a similar analysis had he approached the case on the basis of the scope of legislative power.[17]

THE RANGE OF SERVICE OFFENCES

While accepting that service discipline must extend no further than is necessary for the regularity and efficiency of the defence forces, Chief Justice Mason and Justices Wilson and Dawson nevertheless conceded that it is for Parliament to determine what it considers to be appropriate and adapted to that end. Because contravention by service personnel of ordinary community standards of behaviour may act to the prejudice of good order and service discipline, their Honours considered that it is open to Parliament to proscribe as a service offence any conduct by a defence member which would also constitute an offence against civilian law.[18] Their Honours were therefore prepared to regard all of the offence-creating provisions of Part III of the Act, and section 61 in particular, as wholly valid in their application to defence members. In reaching this conclusion, they drew support from the recent rejection by the United States Supreme Court in *Solorio* v *United States*[19] ("*Solorio*") of earlier attempts in that country to draw any clear or satisfactory distinction between offences which are "service connected" and those which are not. The majority in *Solorio* considered it sufficient to found the jurisdiction of a service tribunal that the person charged be a member of the armed forces at the time of the offence charged.

Justices Brennan and Toohey, however, adopted into Australian law the precise approach which had been rejected in *Solorio*. Although acknowledging[20] the "service connection" approach in the United States to be based on an attempted resolution of conflict between the

16. Ibid Deane J, 585.
17. Ibid, 592.
18. Supra n 2, 545.
19. 483 US 435 (1987).
20. Supra n 2, 569.

constitutional power of Congress to regulate the armed forces and the individual liberties guaranteed by the Bill of Rights, their Honours found "similar competing objectives to appear in our own constitutional history and to demand a similar solution."[21]

> There are two sets of constitutional objectives to be reconciled. The first set of objectives, dictated by s.51(vi), consist of the defence of the Commonwealth and of the several States and the control of the armed forces. To achieve these objectives, it is appropriate to repose in service authorities a broad authority, to be exercised according to the exigencies of time, place and circumstance, to impose discipline on defence members and defence civilians. The second set of objectives, dictated both by Ch.III and s.106 of the Constitution and by the constitutional history we have traced, consist of recognition of the pre-ordinate jurisdiction of the civil courts and the protection of civil rights which those courts assure alike to civilians, and to defence members and defence civilians who are charged with criminal offences. To achieve these objectives, civil jurisdiction should be exercised when it can conveniently and appropriately be invoked and the jurisdiction of service tribunals should not be invoked, except for the purpose of maintaining or enforcing service discipline. These two sets of constitutional imperatives point to the limits of the valid operation of the Discipline Act. It may not impair civil jurisdiction but it may empower service tribunals to maintain or enforce discipline. Therefore proceedings may be brought against a defence member or a defence civilian for a service offence if, but only if, those proceedings can reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline.[22]

The application of this test was said to depend on the facts of the individual case and to be largely a matter of "impression and degree".[23] Consideration must be given to both the needs of service discipline and accessibility to civilian courts. Their Honours also referred[24] to the "service connection" factors listed by the United States Supreme Court in *Relford v Commandant, US Disciplinary Barracks*.[25] Those factors include the proximity of an alleged offence to a service installation, the nature of the offence, its connection with service duties and the identity of any victim or property.

Because it represents the narrowest view of Justices constituting the majority of the Court, the reasoning of Justices Brennan and Toohey must be treated as marking the outer limits of the constitutionally valid

21. Ibid.
22. Ibid, 569-570.
23. Ibid, 570.
24. Ibid, 571.
25. 401 US 355, 365 (1971).

operation of the Act. Justice Gaudron would not have regarded the defence power as supporting in a time of peace any service offence which was substantially the same as an offence against the ordinary civilian law[26] but, in the alternative, indicated support for the reasoning of Justices Brennan and Toohey.[27]

From the perspective of constitutional jurisprudence, the approach of Justices Brennan and Toohey represents a departure from orthodoxy in a number of respects.

The ordinary rule of construction, otherwise accepted as axiomatic, is that a grant of legislative power in section 51 of the Constitution must be construed "with all the generality that the words used admit".[28] Accordingly, and as settled in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*,[29] it is wrong to construe a constitutional power by reference to imaginary abuses of that power or by reference to an assumption that there is some content of power reserved to the States. Justices Brennan and Toohey implied into the federal structure, so as to fetter Commonwealth legislative power, considerations which are at root based on a conception of the need to contain governmental power in interests of individual liberty. Those considerations they derived from cases dealing with the express guarantees in the Constitution of the United States and from the early history of the common law. In so doing, however, they disregarded the point alluded to by Chief Justice Mason and Justices Wilson and Dawson, and by the majority in *Solorio*, that the supposed threat to civil authority posed by the defence forces was substantially eliminated with the final establishment of Parliamentary control over them by the end of the seventeenth century. General provisions subjecting service personnel to service discipline for conduct which also amounts to an offence against civilian law form part of the modern service discipline legislation of most countries including the United States, the United Kingdom, Canada and New Zealand.[30]

26. Supra n 2, 600-601.
27. Ibid, 605.
28. *The Commonwealth of Australia & Another v The State of Tasmania & Others* (1983) 158 CLR 1 Mason J, 127-128.
29. (1920) 28 CLR 129.
30. (US) Uniform Code of Military Justice 1950 Art 118-134; (UK) Army Act 1955 s 70; (UK) Naval Discipline Act 1957 s 42; (UK) Air Force Act 1955 s 70; (Can) National Defence Act 1950 s 120; (NZ) Armed Forces Discipline Act 1971 s 74.

Consistently with their overall approach, Justices Brennan and Toohey appeared also tacitly to acknowledge that it may be appropriate to apply varying standards of constitutional review according to the nature of a legislative power or the circumstances of its exercise. According to the usual formulations of the scope of a legislative power expressed in purposive terms, such as the external affairs power or the defence power, it is sufficient to found the validity of a law that it be capable of being reasonably considered to be appropriate and adapted to giving effect to a constitutional object, the choice of legislative means being for Parliament and not for the Court.[31] While not expressly rejecting the application of that approach to the case before them, Justices Brennan and Toohey adopted a test in relation to the Act which is based on a fundamentally different methodology; one which requires a close scrutiny of the particular factual circumstances in which the law is invoked and concedes validity "if, but only if" that invocation "can reasonably be regarded as substantially serving"[32] the relevant constitutional object. In this regard, it is significant that their Honours earlier quoted with approval the statement of Justice Douglas in the United States Supreme Court in *O'Callahan v Parker*[33] to the effect that a consideration of the scope of the legislative power to control service discipline presents an instance calling for "limitation to *'the least possible power adequate to the end proposed'*."[34]

Finally, the case by case approach of examining the validity of only individual proceedings rather than allowing the provisions of the Act to stand or fall as a whole challenges older authorities to the effect that a law which is overbroad in its terms cannot be saved merely because a general discretion conferred under it is exercised only in constitutionally permissible circumstances.[35] The approach represents a development of the view previously expressed by Justice Brennan that the width of a regulatory discretion will only be destructive of the validity of a statutory scheme if it cannot be restrained by judicial review so

31. See, for example, *Richardson v The Forestry Commission & Another* (1988) 164 CLR 261, 292, 295-296, 303, 312, 326, 336, 344.
32. Supra n 2, 570.
33. 395 US 258, 265 (1969).
34. Supra n 2, 566.
35. *Hughes and Vale Pty Ltd v New South Wales (No 1)* (1954) 93 CLR 1; *Boyd v Carah Coaches* (1979) 145 CLR 78.

that its exercise is within constitutional power.[36] Justices Brennan and Toohey thus went on to emphasise that their test is "an objective one":

> By whomsoever a decision to proceed is taken, the decision cannot empower service tribunals to exceed the jurisdiction which s.51(vi) supports.... Any such decision is examinable under s.75(v) of the Constitution.[37]

They added that service tribunals are themselves equally capable of determining whether proceedings before them will serve a substantial disciplinary purpose.[38]

In so far as their approach was directly concerned with the practical application of service discipline, the readiness with which Justices Brennan and Toohey dismissed the problems in administering the "service connection" approach detailed in *Solorio*[39] is also surprising. In their Honour's view, "practical difficulties in assessing facts cannot affect what is essentially a question of jurisdiction."[40]

Whether or not service authorities in Australia will experience the same difficulties in administering the "service connection" approach as those encountered in the United States remains to be seen. In an answer to a Parliamentary Question on the subject, the Minister for Defence Support said that the decision was "unlikely to make any practical difference to the administration of military justice and service discipline"[41] and that the principle that service Tribunals may exercise jurisdiction under the Act only if there is a substantial disciplinary purpose "had in practice been applied since the Act came into operation".[42] Be that as it may, it would be surprising if preliminary objections to jurisdiction were not to become a familiar feature of proceedings before service tribunals.

One qualification to the need for a case by case factual inquiry which may emerge from the judgment of Justices Brennan and Toohey is that it appears only to be warranted where a service offence is not on the face of it related to service discipline. Earlier in their judgment

36. *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 611-614.
37. Supra n 2, 571.
38. Ibid.
39. Supra n 19, 377 quoted in supra n 2, 544.
40. Supra n 2, 571.
41. Commonwealth of Australia Parliamentary Debates (House of Representatives) 5 April 1989, 1063, Kelly.
42. Ibid. For a more pessimistic view, see R Brown "Military Justice in Australia: W(h)ither Away? The Effects of *Re Tracey; Ex parte Ryan*" (1989) 13 Crim LJ 263.

Justices Brennan and Toohey referred to service offences such as those relating to insubordination and violence, performance of duty or service property as being "clearly related to the discipline of the defence force" and said that the offences with which Staff Sergeant Ryan was charged fell within that category.[43]

CIVIL COURT JURISDICTION

Sub-sections (3) and (5) of section 190 of the Act were held by the majority of the Court in *Tracey* to be constitutionally invalid but severable from the remainder of the Act. In accordance with the principle that service personnel must remain at all times subject to the ordinary civil and criminal jurisdiction administered by civilian courts, the statutory protection of defence members and defence civilians from double jeopardy in state court criminal proceedings was held to be incapable of being justified as incidental to the exercise of the defence power. Because they could not be read down to apply only to federal courts the provisions were wholly invalid.

Again, as a matter of orthodox constitutional analysis, this approach is not easily explained. The overriding principle, contained in section 190(2), is that nothing in the Act is intended to affect the jurisdiction of civilian courts to try civilian offences. Sub-sections (3) and (5) of section 190, like section 144(3), are ancillary provisions directed solely to the issue of double jeopardy. Chief Justice Mason and Justices Wilson and Dawson admitted that there were "cogent reasons" for applying the principles of autrefois acquit and autrefois convict to persons already subjected to military discipline and acknowledged the existence of similar provisions in the modern service discipline legislation of other countries.[44] Why, in this context, the provisions did not fall within the area of legislative choice open to Parliament is not adequately articulated.

An alternative ground of invalidity, suggested by Chief Justice Mason, Justices Dawson and Wilson and relied upon by Justices Brennan and Toohey, was section 106 of the Constitution. Justices Brennan and Toohey referred to state courts as "an essential branch of the government of a State" and said that the continuance of state

43. Supra n 2, 552.
44. Ibid, 546.

constitutions by section 106 precluded a law of the Commonwealth from prohibiting state courts from exercising their jurisdiction in matters arising under state law.[45] As a general proposition, this must be doubted.[46] But in any event, it is unlikely to prove to be any significant limitation on the reach of Commonwealth legislative power. The Commonwealth will simply need to be careful to cast its double-jeopardy provisions in terms of affecting the substantive operation of state law rather than the jurisdiction of state courts. On that basis, there seems to be little difficulty in regarding a provision such as the current section 75(2) of the Commonwealth Trade Practices Act 1974 as constitutionally valid.[47]

Whatever its source, the result of the invalidity of sub-sections (3) and (5) of section 190 of the Act was clearly stated by Justices Brennan and Toohey as being that:

> [A] defence member whose conduct renders him liable to punishment for a service offence and a corresponding civil offence is amenable to the jurisdiction of a civil court as well as the jurisdiction of a service tribunal and (subject to any common law protection from double jeopardy) punishment as for a civil offence as well as for a service offence.[48]

INCONSISTENCY WITH STATE CRIMINAL LAW

Implicit in the above conclusion, and in the second of the related notions underlying the general reasoning of the High Court in *Tracey*, that service personnel must remain at all times subject to the ordinary civil and criminal jurisdiction administered by civilian courts, is the proposition that the system of service discipline established by the Act must be regarded as supplementing and not displacing the ordinary state criminal law. The issue of whether inconsistency within the meaning of section 109 of the Constitution might exist between a particular offence-creating provision of the Act and a particular offence-creating provision of state law did not arise in *Tracey* but was considered several months later in *McWaters v Day*.[49]

45. Ibid, 575.
46. See J A Thomson "Are State Courts Invulnerable: Some Preliminary Notes" (1990) 20 UWAL Rev 61.
47. Compare *The Queen v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545.
48. Supra n 2, 577.
49. (1989) 89 ALR 83.

In that case a member of the Australian Regular Army was apprehended by Garrison Military Police while driving a privately owned vehicle within the confines of Enoggera Army Barracks in Brisbane. The Garrison Military Police handed him into the custody of the Queensland State Police who arrested him and charged him with an offence under section 16 (1)(a) of the Queensland Traffic Act 1949-1985. That section makes it an offence to drive a motor vehicle whilst under the influence of liquor and imposes a penalty not exceeding $1400 or imprisonment for nine months. Section 40(2) of the Act, on the other hand, makes it an offence for a defence member or defence civilian to drive a vehicle on service land while under the influence of intoxicating liquor to such an extent as to be incapable of having proper control of the vehicle and imposes a maximum punishment of imprisonment for twelve months.

By a majority, the Supreme Court of Queensland granted prohibition to restrain the hearing of the charge on the ground that the State provision was invalid as inconsistent with section 40(2) of the Act within the meaning of section 109 of the Constitution.[50] Justice McPherson, with whom Justice Dowsett agreed, accepted that the Act indicated an overall intention not to trench upon the ordinary operation of State law but characterised the case as one of "direct inconsistency" in relation to which section 109 of the Constitution has a self-executing effect. The "direct inconsistency" was said to arise because there was "a common area of operation of [the] two provisions creating offences proscribing differing standards of conduct and attracting maximum penalties of different amounts".[51] Justice Williams, dissenting, saw the case as falling within the well known principle stated by Justice Dixon in *Ex parte McLean*:

> [I]nconsistency does not lie in the mere coexistence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount Legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed.[52]

50. *McWaters v Day; Ex parte Day* (1989) 87 ALR 169.
51. Ibid, 174.
52. (1930) 43 CLR 472, 483.

As the reasoning in *Tracey* makes clear, the Act must be treated as being "supplementary to or cumulative upon State law" in which case "no inconsistency [could] be exhibited in imposing the same duties or in inflicting different penalties".[53]

On appeal, the Full Court of the High Court[54] unanimously applied the principle in *Ex parte McLean* to reverse the decision of the majority in the Supreme Court. In a joint judgment the Court specifically rejected an argument that there is a class of service offences created under the Act which are intended to operate as exhaustive statements of liability to the exclusion of equivalent offences under State law. All of the offence-creating provisions must be read within the context of the Act as a whole and, "[a]s is implicit in the judgments in *Re Tracey*, the Discipline Act does not seek to do other than enact a system of military law in accordance with the traditional and constitutional view of the supplementary function of such law".[55] The difference between the purposes underlying service discipline and the purposes underlying the ordinary criminal law removed any basis for suggesting that the specific offence-creating provisions of the Act were intended to operate other than to impose duties and liabilities additional to those existing under State criminal law.

A further potential difficulty with section 109 of the Constitution, touched upon by Justice Gaudron in *Tracey*,[56] concerns the possibility of "operational inconsistency" arising in the case of the actual exercise of jurisdiction by a civil court. For example, a defence force member punished by a service tribunal with a period of detention who is subsequently sentenced by a civil court to imprisonment for part of the same period might not be physically capable of fulfilling his or her obligations under both Commonwealth and State law. As a matter of practice such a result would doubtless be avoided, if not by an application of the common law rule against double jeopardy, then by the civil court tailoring its penalty to take account of any punishment already imposed by a service tribunal.

53. Ibid.
54. Supra n 49.
55. Ibid, 87.
56. Supra n 2, 599-600.

CONCLUSION

The qualified nature of the Commonwealth victory in *Tracey* can perhaps be overemphasised. The overwhelming significance of the case lies in its clear affirmation of the constitutional validity of the system of service discipline established by the Act.

However, the constraints imposed by the High Court on the constitutional validity of the operation of the Act are not insubstantial and are not easily reconciled with the broad thrust of Australian constitutional jurisprudence. They are perhaps more readily explained in terms of curial disposition than in terms of orthodox legal theory; as reflecting an importation into constitutional reasoning of the traditional hostility of the common law towards civil encroachment by the naval or military power. That hostility was pithily expressed by Chief Justice Hale more than three centuries ago, in language recently quoted by Justice Brennan as remaining applicable to the modern age.

> Whatever you military men think, you shall find that you are under civil jurisdiction, and you but gnaw a file, you will break your teeth ere you shall prevail against it.[57]

57. *The Case of Captain C* (1673) 1 Ventris 350, 251; 86 ER 167, 168; quoted in *A v Hayden* (1984) 156 CLR 532, 582.