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Sword and Nice Subtleties of Constitutional Law: O'Callahan v. Parker

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THE SWORD AND NICE SUBTLETIES OF CONSTITUTIONAL LAW:

O'CALLAHAN v. PARKER[1]

"Military justice is to justice as military music is to music."[2]

In an era of increasingly close and critical scrutiny of military justice, the Supreme Court of the United States rendered a decision greeted both as an overdue extension of the right to grand jury indictment and trial by jury for servicemen on active duty; and as a confusing and unwarranted limitation of the power granted Congress to "[m]ake rules for the government and regulation of the land and naval forces."[3]

The Court, in *O'Callahan v. Parker*,[4] determined that a military courts-martial had been without jurisdiction to try an army sergeant for attempted rape, assault with intent to commit rape, and housebreaking, while off-post, on leave and in civilian clothes.[5] Justice Douglas, writing for the majority, held that for a courts-martial to have jurisdiction over a member of the Armed Forces the crime:

> must be *service connected*, lest 'cases arising in the land or naval forces, or in the Militia when in actual service in time of War or public danger,' as used in the Fifth Amendment, be expanded to deprive every member of the armed services of the benefits of an indictment by a grand jury and a trial by a jury of his peers (emphasis added).[6]

The Court thus decided that when an offender is found to be in the land or naval forces, an examination of the circumstances and the nature of the offense must be made to determine whether a military courts-martial or a civil court is the proper forum for the trial of the individual. Status as a serviceman, without further investigation, will not resolve the question of the jurisdiction of a military court.

Prior to this decision, Congress, in exercising its power to induct citizens into the armed services,[7] effected a change in status that traditionally had limiting effects upon the exercise of personal liberties.[8] At the time of the decision in *O'Callahan*, this change in status served to effectively deny a serv-

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1 395 U.S. 258 (1969).

2 Attributed to Clemenceau in 37 U.S.L.W. 1187 (June 3, 1969).

3 U.S. CONST. art. I, § 8, cl. 14.

4 395 U.S. 258 (1969).

5 A 5-3 decision with Harlan, J., joined by Stewart and White, JJ., dissenting.

6 395 U.S. 258, 272-73 (1969).

7 U.S. CONST. art. I, § 8, cl. 12.

8 "Courts-martial are deeply rooted in history. War is a grim business, requiring sacrifice of ease, opportunity, freedom from restraint, and liberty of action. Experience has demonstrated that the law of the military must be capable of prompt punishment to maintain discipline." United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 29 (1955) (dissenting opinion).

iceman the right to an indictment by grand jury and a trial by jury, when accused of committing a civil offense.[9]

The decision can thus be seen to have great significance for those presently serving on active duty and the large numbers of Americans presently subject to induction into the Armed Forces; for the events of the last thirty years and our present foreign policy indicate that the United States will continue to maintain a large standing army.[10] However, the unsettling effect upon the system of military justice and the effect upon servicemen themselves invites a careful consideration of the rationale of the decision.

The Uniform Code of Military Justice of 1950[11] was enacted to standardize military justice by providing a single code for the government and regulation of all the services, formerly regulated under separate codes.[12] Many procedural safeguards were included in an attempt to approximate those available in federal courts,[13] with the exception of grand jury indictment and trial by jury. While the Code was a significant improvement over the previous codes,[14] it did mark the extension of courts-martial jurisdiction over servicemen on active duty for all offenses cognizable in civil courts.[15]

Originally, American courts-martial jurisdiction was limited, stemming from the English conflict between Parliament and the Crown over the scope and extent of the jurisdiction of military courts to try civil offenses.[16] The

[9] Members of the Armed Forces on active duty are subject to the provisions of the Uniform Code of Military Justice, [hereinafter cited as UCMJ] art. 2 § 1, 10 U.S.C. § 802 (1) (1964).

[10] The 1969 estimate is that 3,477,500 servicemen are now on active duty. U.S. Bureau of the Census, *Statistical Abstract of the United States:* 257 (89th ed. 1968); Duke & Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 VAND. L. REV. 435 (1960).

[11] 10 U.S.C. § 801 *et seq.* (1964).

[12] "From the time of the Revolution until 1951, each branch of the Armed Forces had its own set of articles, separate and distinct from those of the other branches. . . . Courts-martial on land had a fundamentally different origin from those at sea." J. SNEDEKER, A BRIEF HISTORY OF COURTS-MARTIAL 1 (1954). Consideration in this Note is limited to the development and application of the military law of the United States Army.

[13] Duke & Vogel, *supra* note 10, at 453.

[14] The new Code provides in part for: (1) Reduction of non-judicial punishment [UCMJ art. 15, 10 U.S.C. § 815 (1964)], (2) Right to counsel in General and Special Courts-Martial [UCMJ art. 27, 10 U.S.C. § 827 (1964)], and (3) An election offered the accused to have enlisted men serve as members of the court [UCMJ art. 25(c), 10 U.S.C. § 825(c) (1964)]. *See* White, *Has the Uniform Code of Military Justice Improved the Courts-Martial System?*, 28 ST. JOHN'S L. REV. 19 (1953).

[15] The new Code authorized the trial of rape and murder within the United States. These were the last two offenses reserved for trial by civil courts. Duke & Vogel, *supra* note 10, at 453.

[16] In the Petition of Right, 3 Car. 1, c. 1 (1627), Parliament demanded that trials by military commission authorized by Charles I in peacetime for "murder, robbery, felony, mutiny or other outrage or misdemeanor" be halted. Then the Bill of Rights, 1 W. & M., c. 2 (1688), was successfully pressed upon William and Mary by Parlia-

maintenance by Parliament of a firm grip upon the power to regulate the services and to narrow courts-martial jurisdiction was reflected in the British Articles of War,[17] adopted almost without change as the Massachusetts Articles.[18] A combination of these articles was later adopted for the government and regulation of the existing Continental Army.[19]

Following the Revolution, a complete revision of the Articles was enacted in 1806 to conform with the changed form of government. The Articles contained a section, incorporated from earlier British Articles, that required a commanding officer to deliver a serviceman under his command to civil authorities on demand, to stand trial for *all* civil offenses.[20]

Major substantive changes were to await the Articles of War of 1916,[21] which extended the jurisdiction of courts-martial over all offenses, except murder and rape committed in the United States in peacetime. Delivery of servicemen on demand, to civil authorities for trial of all other civil offenses, was no longer required.

The final extension of military courts-martial jurisdiction was the Uniform Code of Military Justice of 1950, providing for the trial and imposition of the death penalty for rape and murder committed within the United States in time of peace.[22]

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ment. The Bill required the express consent of Parliament before the Crown could raise armies in time of peace. Additionally, Parliament permitted courts-martial jurisdiction in peacetime only for mutiny, sedition and desertion by the Mutiny Act, 1 W. & M., c. 4 (1688). The Crown did not obtain authority to promulgate articles for the government of troops in England in peacetime until the Mutiny Act, 43 Geo. 3, c. 20 (1803). *See generally* W. WINTHROP, MILITARY LAW AND PRECEDENTS 19 (2d ed. 1920) [hereinafter cited as WINTHROP]; Duke & Vogel, *supra* note 10.

[17] The British Articles of War of 1765, reprinted in WINTHROP at 931-46; Duke & Vogel, *supra* note 10, at 445 & n.47.

[18] The Massachusetts Articles of War (adopted by the Provisional Congress of Massachusetts Bay on April 5, 1775). WINTHROP at 22 n.32, 947-52.

[19] The Continental Army consisted of 718 men at that time. 395 U.S. 258, 280 n.8 (1969) (dissenting opinion).

[20] The American Articles of War of 1806, 2 Stat. 366, reprinted in WINTHROP at 979. Article 33 provided that when a serviceman was accused of a capital crime, of having used violence, or having committed an offense against the person or property of any United States citizen, his commanding officer was to deliver the offender to the civil magistrate on demand. An officer willfully refusing to deliver an offender to the civil authorities could be cashiered from the service.

[21] Articles of War, 1916, 39 Stat. 650; Duke & Vogel, *supra* note 10, at 451-52 & n.83.

[22] UCMJ arts. 118, 120, 10 U.S.C. §§ 918, 920 (1964); Duke & Vogel, *supra* note 10, at 453. The Military Justice Act of 1968, PUB. L. No. 90-632, 82 Stat. 1335 (1968), *amending* 10 U.S.C. 801 *et seq.* (1964), made nine significant changes to the Code, but did not require the trial of any civilian offenses in civil courts. *See* Ervin, *The Military Justice Act of 1968*, 5 WAKE FOREST INTRA. L. REV. 223 (1969), quoted in 115 CONG. REC. 6760, 6761-62 (June 19, 1969). Senator Ervin notes the following changes: (1) Right to counsel; (2) Independent judiciary of military judges; (3) Modernization of trial procedures to conform more closely to federal courts; (4) Waiver of trial by full court for trial before a military judge alone; (5) Strengthening of the

This brief review illustrates that what had originally been a narrow grant of jurisdiction to the military had been gradually expanded by statute, until all offenses committed by a serviceman while on active duty were within courts-martial jurisdiction at the time O'Callahan was tried by a military court.

While Congress was gradually *extending* courts-martial jurisdiction to fully encompass all crimes committed by those subject to the Articles of War and the Uniform Code of Military Justice, the Supreme Court was concurrently *limiting* the class of persons subject to trial by a military court.

During the Civil War, President Lincoln suspended the writ of habeas corpus and ordered that persons aiding the rebels should be tried by courts-martial or military commission. In *Ex Parte Milligan*,[23] the Court unanimously held that a civilian tried and convicted in Indiana by a military commission was entitled to trial in a civil court. Having no existing or pre-existing connection with the armed services, a civilian defendant could not be tried by a military commission while the local courts were open.

Directly after the attack on Pearl Harbor, Governor Poindexter, under the provisions of the Hawaii Organic Act, declared martial law in the Territory, suspending the writ of habeas corpus and closing the local courts. A civilian convicted by a military court during this period challenged the court's jurisdiction with a petition for a writ of habeas corpus in *Duncan v. Kahanamoku*.[24] The Supreme Court held that the trial of civilans by courts-martial was not authorized, as the Hawaii Organic Act was not meant to supersede the rights of citizens to a fair trial in a civil court after the immediate threat of an enemy invasion had passed.[25]

The Court, in *United States ex rel. Toth v. Quarles*,[26] reversed the conviction of a veteran who, pursuant to the Uniform Code of Military Justice, was recalled six months after his discharge and tried by a courts-martial for offenses committed while on active duty overseas.[27] Justice Black, writing for

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ban on command interference; (6) Waiver of summary courts-martial upon objection of the accused; (7) Establishment of courts of military review; (8) Authorization of release from confinement pending appeal; and (9) Extension of the time for appeal and strengthening of other post-conviction remedies.

23 71 U.S. (4 Wall.) 2 (1868). Milligan was charged with conspiring against the government of the United States, affording aid and comfort to the rebels, inciting insurrection, disloyal practices, and violation of the laws of war.

24 327 U.S. 304 (1946).

25 *Id.* at 318-19.

26 350 U.S. 11 (1955).

27 *Id.* at 13. Toth was charged with violation of UCMJ arts. 81 and 118, 10 U.S.C. §§ 881, 918 (1964) (conspiracy to murder, and murder, respectively). UCMJ art. 3(a), 10 U.S.C. § 803(a) (1964), provided for courts-martial when any person was charged with an offense committed while subject to the Uniform Code of Military Justice, punishable by confinement for 5 years or more, and for which the person could not be tried in the courts of the United States. Termination of active duty did not relieve the offender from courts-martial jurisdiction.

the majority, held that the statute had to be justified solely on the power of Congress to regulate the land and naval forces. A proper interpretation of the power granted Congress was then found to restrict courts-martial jurisdiction to persons who were actually members or part of the Armed Forces.[28] The Court felt there was no reason to subject millions of veterans to military trials whose characteristics were unfavorable when compared to trials in civil courts.[29] In a vigorous dissent, Justice Reed, joined by Justices Burton and Minton, found no justification in limiting the power of Congress.[30]

In *Reid v. Covert*,[31] the Court considered the convictions by military courts-martial of two dependent wives for capital offenses committed overseas while accompanying their servicemen husbands.[32] In a six to three decision, on rehearing, the Court held that the statute providing for courts-martial jurisdiction over civilian dependents of servicemen abroad was invalid. Justice Black, for the plurality, was of the opinion that Congress, under the power granted in Article I of the Constitution, did not have the authority to subject civilians to the jurisdiction of a military court. The term "land and naval forces" referred to members of the armed services and not their wives, children or other dependents.[33] The Necessary and Proper Clause could not extend courts-martial jurisdiction beyond this class to deprive civilians of their Bill of Rights guarantees while outside the United States and its possessions.

Justices Frankfurter and Harlan, in separate concurring opinions, would have limited the decision to capital cases under the guarantees of Article III and the Fifth and Sixth Amendments, not the lack of power of Congress under Article I. Justices Burton and Clark dissented, in accordance with the Court's original decision, emphasizing the practical problems in trying extra-territorial offenses in Article III courts. In their opinion, the practical effect of the decision would be to force civilian dependents into foreign courts.[34]

In 1960, the Court, in four separate cases,[35] firmly established the prin-

[28] 350 U.S. 11, 15 (1955).

[29] *Id.* at 15-19, 22-23.

[30] *Id.* at 28-29. "Nothing, we think, in the words of Article I or in the history of that congressional power justifies limiting trial and punishment by the military, for crimes committed by members of the armed services, to the period of service." *Id.*

[31] 354 U.S. 1 (1957), *rev'g on rehearing*, 351 U.S. 487 (1956) and Kinsella v. Krueger, 351 U.S. 470 (1956).

[32] Both dependent wives had been tried overseas by courts-martial for the murder of their husbands. UCMJ art. 2 (11), 10 U.S.C. § 802 (11) (1964), provided for trial in a military court for dependents accompanying servicemen overseas. Both challenged their convictions in habeas corpus proceedings, alleging a denial of their right to jury trial.

[33] 354 U.S. 1, 19-20 (1957).

[34] *Id.* at 79, 88-89.

[35] Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960); Grisham v. Hagan, 361 U.S. 278 (1960); McElroy v. United States *ex rel.* Guagliardo and Wilson v. Bohlender, 361 U.S. 281 (1960).

ciple that without status as a member of the land and naval forces, courts-martial jurisdiction could not be exercised over non-capital offenses committed by dependents overseas or capital or non-capital offenses committed by civilian employees while accompanying the Armed Forces abroad in peacetime.[36]

Thus the Supreme Court through a series of decisions, had limited the class of offenders subject to the jurisdiction of a military courts-martial to servicemen on active duty in the land and naval forces.

Sergeant James O'Callahan was stationed at Fort Shafter, Hawaii. On the night of July 20, 1956, while on leave with an evening pass and in civilian clothes, he broke into a hotel room, assaulted and attempted to rape a fourteen year old girl. He was apprehended while trying to flee from the hotel, turned over to Honolulu authorities, and when identified as a serviceman, was delivered to the military police. After extensive questioning, he confessed and was charged with attempted rape, assault with intent to commit rape and housebreaking.[37]

Upon trial by courts-martial, he was convicted and sentenced to ten years imprisonment at hard labor, forfeiture of all pay and allowances and awarded a dishonorable discharge. His conviction was affirmed by the Army Board of Review and subsequently by the United States Court of Military Appeals.[38]

While confined in the Federal Penitentiary, he filed a petition for a writ of habeas corpus with the United States District Court for the Middle District

[36] In November, 1966, the Department of the Army determined that the hostilities in Vietnam had reached a state deserving classification as a "time of war", subjecting civilians accompanying the Armed Forces in the field to courts-martial jurisdiction. Keeffe, *Court Martial of Civilians*, 53 A.B.A.J. 961 (1967). It is unlikely that a courts-martial of a civilian accompanying the troops in the field in Vietnam could be successfully challenged as being without jurisdiction. *See* Wiener, *Courts-Martial for Civilians Accompanying the Armed Forces in Vietnam*, 54 A.B.A.J. 24 (1968); Neutze, *Court-Martial Jurisdiction over Civilians in Vietnam*, 24 U.S. NAVY J.A.G.C. 35 (1969).

[37] 395 U.S. 258, 259-60 & n.1 (1969).

UCMJ art. 80, 10 U.S.C. § 880 (1964). Attempts:
(a) An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect it's commission, is an attempt to commit that offense.
(b) Any person subject to this chapter who attempts to commit any offense punishable by this chapter shall be punished as a court-martial may direct, unless otherwise specifically prescribed.

UCMJ art. 130, 10 U.S.C. § 930 (1964). Housebreaking:
Any person subject to this chapter who unlawfully enters the building or structure of another with intent to commit a criminal offense therein is guilty of housebreaking and shall be punished as a court-martial may direct.

UCMJ art. 134, 10 U.S.C. § 934 (1964). General Article:
Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of the nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

[38] Unreported decisions on Jan. 4, 1957 and March 1, 1957.

of Pennsylvania, alleging *inter alia* that the courts-martial was without jurisdiction to try him for non-military offenses committed off-post, on leave and in civilian clothes. The District Court denied relief without considering the issue on the merits.[39] The United States Court of Appeals for the Third Circuit affirmed the District Court denial.[40]

The Supreme Court granted certiorari limited to the question:

> Does a courts-martial, held under the Articles of War, Tit. 10, U.S.C. § 801 *et seq.*, have jurisdiction to try a member of the Armed Forces who is charged with commission of a crime cognizable in a civilian court and having no military significance, alleged to have been committed off-post and while on leave, thus depriving him of his constitutional rights to indictment by a grand jury and trial by a petit jury in a civilian court?[41]

The Supreme Court answered this question in the negative, and reversed the courts-martial conviction, holding that since the crimes committed were not "service connected", a courts-martial had no jurisdiction to try him, thus denying his right to trial in a civil court.

O'Callahan contended that Congress had no authority to extend courts-martial jurisdiction to crimes committed in peacetime by a member of the Armed Forces off-duty and off-post; and that federal jurisdiction may not extend to substantive civil offenses, but is confined solely to military offenses, or at most, the military aspect of civil offenses.[42]

The Government responded that Congress has the constitutional power to provide for the trial for all offenses committed by members of the land and naval forces in a military court; that status alone, as member of the land and naval forces, has always been determinative in questions of courts-martial jurisdiction presented to the Supreme Court; and that O'Callahan was in a military status when the offenses were committed.[43]

Justice Douglas, for the majority, acknowledged that Congress had the power, due to the exigencies of military discipline, to maintain a system of military courts that did not afford all the specific procedural safeguards pro-

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[39] United States *ex rel.* O'Callahan v. Parker, 256 F. Supp. 679 (M.D. Pa. 1966). O'Callahan had raised the issue in a prior habeas corpus action. The motion was denied in a memorandum opinion and he took no appeal. He was then in custody as a result of a Massachusetts conviction for rape in 1962, committed while on parole from his federal sentence. He was in custody during the present trial, following the revocation of his federal parole in 1966, upon completion of service of his state sentence. Brief for the United States on Certiorari at 3 n.2, O'Callahan v. Parker, 395 U.S. 258 (1969). Brief, information and suggestions provided by Mr. James Springer, Deputy Solicitor General of the United States are gratefully acknowledged.

[40] United States *ex rel.* O'Callahan v. Parker, 390 F.2d 360 (3d Cir. 1968). The court ruled that in accordance with the decision in Thompson v. Willingham, 318 F.2d 657 (3d Cir. 1963), a courts-martial had jurisdiction.

[41] 393 U.S. 822 (1968).

[42] Petitioner's Brief for Certiorari at 11-30, O'Callahan v. Parker, 395 U.S. 258 (1969).

[43] Brief for the United States on Certiorari *supra* note 39, at 4-5.

vided in Article III courts.[44] As a result, a system of military courts had developed that differed fundamentally from its civilian counterpart. However, the fact that O'Callahan was on active duty in the armed services did not automatically resolve the question of courts-martial jurisdiction, since the "express grant of general power to Congress is to be exercised in harmony with the express guarantees of the Bill of Rights."[45] The exception within the Fifth Amendment concerning "cases arising in the land and naval forces" had to be examined to define "cases" that would subject him to the jurisdiction of a military court. An Article III right, guaranteed by the Bill of Rights, could not be abridged by the improper extension of an Article I power granted to Congress. Congress thus could not provide for courts-martial of all crimes, but only those which were "service connected" offenses. "Service connected" offenses were held to be those which prejudiced the good order and discipline of the armed services.[46] Where a service connection is found, the "case" is held to be one arising in the land and naval forces and places the offender within the jurisdiction of a military court, without the benefits of a grand jury indictment or a trial by a jury of his peers.

The majority opinion emphasized the need to narrowly construe the exception in the Fifth Amendment, because of the inequities of courts-martial proceedings when compared to those of civil courts.[47] While a civil court functions primarily to administer justice, a courts-martial was to a great degree, an instrument by which military discipline was preserved.[48] The difference between civil trials "held in an atmosphere conducive to the protection of individual rights . . . [and] the military trial . . . marked by the age-old manifest destiny of retributive justice,"[49] required the narrowest definition of the scope of power granted Congress, consistent with the preservation of military order and discipline. For "[w]hile the Court of Military Appeals takes cognizance of some constitutional rights . . . courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law."[50]

Justice Douglas concluded, that by deciding O'Callahan had been properly tried by courts-martial, there would be no way for the Court to pre-

44 395 U.S. 258, 261 (1969).

45 *Id.* at 273.

46 *Id.* at 274 n.19.

47 *Id.* at 265, quoting from United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 22-23 (1955): "[The Court] has recognized that 'There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution. . . . Determining 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.*'" *Id.*

48 395 U.S. 258, 265 (1969).

49 *Id.* at 266.

50 *Id.* at 265.

serve the benefits of indictment by grand jury and trial by jury for servicemen, forcing their Bill of Rights guarantees to yield to the power granted Congress under Article I. Since O'Callahan's crimes were not "service connected", he was entitled to a trial in a civilian court.[51]

Justice Harlan, joined by Justices Stewart and White, dissented on the basis that the Court had "grasped for itself the making of a determination which the Constitution has placed in the hands of Congress."[52] He pointed out that Justice Black, now in the majority in *O'Callahan*, in writing for the plurality in *Reid v. Covert*,[53] had explained that if the "language of [Article I, Section 8] Clause 14 is given its natural meaning, . . . the term 'land and naval forces' refers to persons who are members of the armed services."[54] The Fifth Amendment exception encompasses persons in the "land and naval forces."[55] Justice Harlan further added, that the Court had never previously questioned the natural meaning of Clause 14 and thus, once status of an individual was established, Congress, not the Court, should determine the subject matter jurisdiction of a courts-martial.[56]

The dissent also questioned whether the majority's interpretation of Clause 14 was supported by the "inconclusive historical data"[57] cited. The proper interpretation, he felt, was that the Framers of the Constitution, fearing an independent exercise of military authority by the Executive, desired to place this power exclusively in the hands of Congress, but that nothing in our history indicated that Congress was to be limited by the scope of courts-martial jurisdiction as it was defined in the 17th century.[58] However, if the early practices had in fact been limited to trial of strictly military offenses, the power of Congress was not limited to the practices of the late 18th and early 19th centuries.[59]

Justice Harlan concluded, "Whatever role an *ad hoc* judicial approach may have in some areas of the law, the Congress and the military are at least entitled to know with some certainty the allowable scope of court-martial jurisdiction."[60] The lack of definition of "service connection" would create

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51 *Id.* at 273-74.

52 *Id.* at 275.

53 354 U.S. 1 (1957).

54 *Id.* at 19-20.

55 395 U.S. 258, 275 (1969).

56 *Id.* at 275-76.

57 *Id.* at 274.

58 *Id.* at 277.

59 *Id.* at 280-83. Justice Harlan felt this was particularly true in view of the disciplinary requirements of an army of over 3 million men, compared to the 718 man army of 1789. He stated that while the clear language of clause 14 did not call for a balancing of interests, should an investigation be made, these interests would support an exercise of military jurisdiction over non-military offenses both to preserve the efficient operation, integrity and morale of the services, and to rehabilitate offenders and return them to duty with their units.

60 *Id.* at 284.

confusion and "proliferate litigation over the jurisdictional issue in each instance . . . [and] nothing in the language, history, or logic of the Constitution justifies this uneasy state of affairs . . . ."[61]

It is clear that *O'Callahan* requires the Armed Forces to comply with a new constitutional standard before courts-martial jurisdiction may be exercised over servicemen on active duty. Unless offenses are "service connected", he *must* be tried, if at all, in a civil court. The essentially mechanical determination of an offender's status has been expanded to place the burden upon the military to demonstrate that there is an identifiable relationship between the offender's status as a serviceman and the offense committed, through an examination of the "nature, time and place" of the offense.[62] The majority was explicit in holding that the power granted Congress "to make rules for the government and regulation of the land and naval forces"[63] must "be exercised in harmony with express guarantees of the Bill of Rights."[64]

The Court did not define a specific standard for determining when the exercise of courts-martial jurisdiction would be permissible. However, by example, the Court did demonstrate that there was no service connection between O'Callahan's military duties and the crimes for which he had been tried:

> 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. Moreover, Hawaii, the situs of the crime, is not an armed camp under military control, as are some of our far-flung outposts.
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> 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.[65]

From the examples cited, the following identifiable service connections may be implied, placing servicemen within courts-martial jurisdiction: 1) accused not on leave at the time of the offense; 2) crimes involving abuse of the accused's military position; 3) crimes committed on a military post or enclave; 4) victim performing duties related to the military; 5) crimes that can be tied to the war power; 6) offenses committed in an armed camp under military control or in the occupied zone of a foreign country; 7) crimes involving the flouting of military authority; 8) the security of a military

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61 *Id.*
62 *Id.* at 267.
63 U.S. CONST. art. I, § 8, cl. 14.
64 395 U.S. 258, 273 (1969).
65 *Id.* at 273-74.

post or; 9) the integrity of military property. However, nothing in the decision indicates if the individual factors will, standing alone, provide the requisite "service connection," thereby authorizing courts-martial jurisdiction.

The practical effect of the decision, as the dissent suggested, has been to create a state of great uncertainty regarding the scope and extent of permissible courts-martial jurisdiction. The wearing of a uniform, or the commission of a crime by an officer, rather than an enlisted man might provide the requisite connection for crimes that otherwise might be without independent military significance.[66] While extensions of constitutional safeguards need not be framed in terms permitting an immediate practical application of the new standards, the emphasis in the dissent of the practical problems which accrue by leaving the determination of the proper standard to ad hoc judicial proceedings, does illustrate a very real problem posed by the decision. Litigation of the jurisdictional issue can realistically be expected in every case that might conceivably fall within the class of cases lacking a "service connection".[67]

Decisions of the United States Court of Military Appeals and the Court of Military Review, following *O'Callahan*, have provided some indication of the military court's interpretation of the new standards. Offenses involving the possession and use of marijuana and narcotics by servicemen, either on or off a military base are interpreted as having a special military significance,[68] placing the offender within the jurisdiction of a military court. Offenses committed against other servicemen off-post, though civil in nature, will pro-

[66] *Id.* at 283-84 & n.11.

[67] The question of retroactivity was not decided by the Court and invites a brief consideration. The Court in DeStefano v. Woods, 392 U.S. 631 (1968), declined to retroactively apply Duncan v. Louisiana, 391 U.S. 145 (1968), and Bloom v. Illinois, 391 U.S. 194 (1968). The following factors were considered:

(a) The purpose served by the new standards.
(b) The extent of the reliance by law enforcement authorities on the old standards.
(c) The effect on the administration of justice of a retroactive application of the new standards.

(*Accord*: Desist v. United States, 394 U.S. 244 (1969)).

A retroactive application of *O'Callahan* could affect a tremendous number of courts-martial convictions. The burden upon the services, administrative and fiscal implications, and a consideration of the factors noted above would seem to indicate that the decision will not be given retroactive effect.

A petition for a writ of certiorari filed in Swift v. United States, 391 Misc. (1969), pending before the Supreme Court may resolve the question of retroactivity and the extra-territorial effects of *O'Callahan*. Among the questions presented is whether *O'Callahan v. Parker* applies retroactively to the courts-martial conviction of a serviceman stationed in Germany for the murder of a German civilian off-post.

[68] United States v. Castro, 18 U.S.C.M.A. 598, 40 C.M.R. 310 (1969); United States v. Boyd, 18 U.S.C.M.A. 581, 40 C.M.R. 293 (1969); United States v. Beeker, 18 U.S.C.M.A. 563, 40 C.M.R. 275 (1969); United States v. Weinstein, 19 U.S.C.M.A. 29, 41 C.M.R. 29 (1969); United States v. Williams, 8 U.S.C.M.A. 325, 24 C.M.R. 135 (1957).

vide the requisite service connection.[69] Offenses involving a relationship with the offender's military duties will be sufficient to justify trial by courts-martial.[70] Purely civil offenses, unrelated to the offender's military duties committed while on a military base will permit a trial by courts-martial.[71] But civil offenses committed off-post, with no relationship to the serviceman's military duties will not place him within the jurisdiction of a military courts-marital, even when committed against the dependents of another serviceman.[72]

The only reference to the Armed Forces in the Bill of Rights is the Fifth Amendment exception of "cases arising in the land and naval forces" from the guarantee of indictment by grand jury when accused of a crime.[73] No other guarantees are expressly made inapplicable to the Armed Forces and this has led to a "spirited controversy with regard to the original intent of those who prepared the Bill of Rights."[74] While a "Framer's intent" argument justifying a decision should be given some weight, it seems that it should not be wholly conclusive. As the dissent indicated, the contrary practices of the times and the significant increase in numbers and great geo-

[69] United States v. Frazier, 19 U.S.C.M.A. 40, 41 C.M.R. 40 (1969) (forgery of a serviceman's government pay check); United States v. Nichols, 19 U.S.C.M.A. 43, 41 C.M.R. 43 (1969) (robbery of fellow serviceman); United States v. White, CM 420140 (August 12, 1969) (murder of a serviceman off-post, in the presence of other servicemen); United States v. Gunter and Stavis, CM 420194 (July 11, 1969) (robbery of hitchhiking serviceman).

[70] United States v. Harris, 18 U.S.C.M.A. 596, 40 C.M.R. 308 (1969); United States v. Safford, 19 U.S.C.M.A. 33, 41 C.M.R. 33 (1969) (conspiracy to provide information related to national security to foreign nationals).

[71] United States v. Smith, 18 U.S.C.M.A. 609, 40 C.M.R. 321 (1969) (carnal knowledge); United States v. Schockley, 18 U.S.C.M.A. 610, 40 C.M.R. 322 (1969) (on-post sodomy); United States v. Paxiao, 18 U.S.C.M.A. 608, 40 C.M.R. 320 (1969) (wrongful appropriation); United States v. Williams, 18 U.S.C.M.A. 605, 40 C.M.R. 317 (1969) (bad checks); United States v. Allen, 19 U.S.C.M.A. 31, 41 C.M.R. 31 (1969) (murder).

[72] United States v. Borys, 18 U.S.C.M.A. 547, 40 C.M.R. 257 (1969) (rape, robbery and sodomy); United States v. Schockley, 18 U.S.C.M.A. 610, 40 C.M.R. 322 (1969) (off-post sodomy); United States v. Henderson, 18 U.S.C.M.A. 601, 40 C.M.R. 313 (1969) (carnal knowledge). These offenses committed against dependents of servicemen can certainly be expected to have an adverse effect upon the serviceman's morale, as he looks to the armed services to provide for the welfare of his dependents during absences occasioned by military orders.

[73] U.S. CONST. amend. V: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; . . ."

[74] Duke & Vogel, *supra* note 10, at 441. *See* Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293 (1957), for the position that the Bill of Rights was intended to apply. *See* Wiener, *Courts-Martial and the Bill of Rights: The Original Practice*, 72 HARV. L. REV. 1-49, 266-302 (1958), for the position that the Bill of Rights was not intended to apply.

graphical distribution of today's armed services should permit a balancing of interests to be made in the application of a new constitutional standard.[75]

In *Reid v. Covert*,[76] a divided court, by reversing their prior decision on rehearing, indicated that the question of the extent of permissible courts-martial jurisdiction had been a difficult one to decide. Thus it is interesting to note the change by Justices Black and Douglas from their position in *Reid*, supporting the Article I power of Congress, to place servicemen within courts-martial jurisdiction by virtue of their status alone,[77] to their position in *O'Callahan*, that Article III and the Bill of Rights will not permit courts-martial jurisdiction without both status as a member of the armed services and a "service connection" between the offense and the offender's military duties. The Justices could easily justify another change in position and widen the scope of military jurisdiction again in a future decision.

A major factor leading to the decision of the majority of the Court was the alleged inequity of a military courts-martial when compared to a civil court proceeding. Justice Douglas felt that:

> The presiding officer at a court-martial is not a judge whose objectivity and independence are protected by tenure and undiminishable salary and nurtured by the judicial tradition, but is a military law officer. Substantially different rules of evidence and procedure apply in military trials. Apart from those differences, the suggestion of the possibility of influence on the actions of the court-martial by the officer who convenes it, selects its members and the counsel on both sides, and who usually has direct command authority over its members is a pervasive one in military law, despite strenuous efforts to eliminate the danger.[78]

If being within the jurisdiction of a courts-martial subjects a serviceman to proceedings that are as undesirable and unjust as the majority seems to indicate, it seems that a proper remedy would either be to impose additional safeguards by additions to the Uniform Code of Military Justice, or a constitutional amendment, rather than an undefined limitation on the jurisdiction of the court. It seems curious to remove some, but not all, offenders from the jurisdiction of a judicial body, rather than to correct any obvious inequities of courts-martial, thus uniformly safeguarding the rights of all accused. The Court's decision in *In Re Gault*,[79] extending constitutional guarantees to defendants in juvenile court proceedings, did not remove some

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[75] 395 U.S. 258, 281-83 (1969). The Government cited 112 courts-martials of soldiers for civilian offenses between 1775 and 1815, including 42 offenses committed off-post and 18 in an off-duty status. Brief for the United States at 35-52, O'Callahan v. Parker, 395 U.S. 258 (1969). The information, suggestions, citations and Brief for the United States in United States v. Borys, 18 U.S.C.M.A. 547, 40 C.M.R. 257 (1969), provided by Captain L.S. Seuferer, JAGC, Appellate Counsel, Office of the Judge Advocate General, U.S. Army, relied upon extensively in this note, are gratefully acknowledged.

[76] 354 U.S. 1 (1957).

[77] *Id.* at 19-20.

[78] 395 U.S. 258, 264 (1969) (footnotes omitted).

[79] 387 U.S. 1 (1967).

juveniles from the court's jurisdiction, but rather required that certain safeguards be implemented within the proceedings themselves. This would appear to be both more beneficial to all members of the armed services and a more logical alternative than requiring that only offenses with independent military significance must be tried by courts-martial.

The Court assumes that a serviceman accused of a crime of a civil nature will receive substantial advantages by requiring that the trial be in a civil court.[80] The basis of the assumption is that there is an inherent unfairness in military courts, oriented toward the maintenance of order and discipline, rather than the administration of justice.[81] While a courts-martial may compare unfavorably with a trial by a jury in a federal court, not all offenses tried in federal courts require that the trial be by jury.[82] In addition, the same generalization regarding the advantages of trial in a federal court certainly cannot be made about the trial of offenders in *all* state and local courts.

Procedures in state and local courts vary, subject of course, to the safeguards guaranteed by the United States Constitution. In state courts, also, the jury trial guarantee is not applicable to all offenses.[83] Prosecution in state and local courts may be instituted without a Fifth Amendment indictment by grand jury, requiring only an information filed by the prosecutor. This is similar, in fact, to the procedure for filing charges against a serviceman by his commanding officer.[84]

The objection to military courts-martial jurisdiction most often voiced is probably that of the susceptibility of the proceedings to command influence. Members of a courts-martial are selected by the convening authority who is generally the senior officer of the member's command. The fear of incurring

[80] As a matter of practice, many servicemen were already being tried in civil courts for civilian offenses. Army regulations state that it is the policy of the Army to deliver servicemen to civil authorities for trial of civilian offenses under local agreements, unless the best interests of the Army will be thereby prejudiced. Local authorities are usually primarily interested in the trial of serious crimes. Statistics from the Military Offenders Report for 1967 show that 85% of the serious offenses committed by army servicemen were tried in civil courts. AR 633-1 (Sept. 13, 1962); Brief for the United States at 41 n.16, United States v. Borys, 18 U.S.C.M.A. 609, 40 C.M.R. 257 (1969).

[81] 395 U.S. 258, 265 (1969).

[82] Crimes otherwise qualifying as petty offenses and not carrying penalties in excess of six months confinement do not require a trial by jury. Cheff v. Schnackenberg, 384 U.S. 373, 379-80 (1966).

[83] Duncan v. Louisiana, 391 U.S. 145 (1968).

[84] *E.g.*, CAL. PEN. CODE § 682 (West 1957). Although there is no military grand jury system, UCMJ art. 32, 10 U.S.C. § 832 (1964), provides a substitute for any offense cognizable by a trial by general courts-martial. An officer must conduct an impartial investigation and recommend appropriate disposition of the charges. The accused has the right to counsel, an opportunity to cross-examine witnesses, the right to present evidence in defense or mitigation and the right to have the investigating officer examine any witness requested by the accused.

the displeasure in superiors through a finding not in accordance with the senior officer's wishes, it is argued, will adversely affect an accused serviceman's chances for an impartial trial. So long as the members of the board are subject to the authority of the convening officer, the criticism will continue to be heard.

All civil trials are not, however, necessarily free of a civilian form of command influence. While the independence of federal judges is protected by Article III of the Constitution, all state constitutions do not similarly protect the independence of state and local judges who are frequently elected officials, not guaranteed life tenure or income. Thus a judge, district attorney, or public defender may just as easily find himself subjected to a form of command influence as is an officer on active duty, who must perform well in the estimation of his superiors to advance in grade.

When a serviceman is tried in a civil court for an offense in the community that has no military significance, he will not necessarily be judged by a jury of his peers. On many occasions, he will actually be displaced from his own military community for a trial among strangers. The hostility of some communities toward servicemen is well known.[85] A serviceman who is a member of a minority group, stationed in an area by chance, not choice, may encounter hostility due to his race, creed or color. *O'Callahan* requires that all offenses without a "service connection" be tried in civil courts. These courts may just as easily be "marked by the age-old manifest destiny of retributive justice"[86] and demonstrate that they too, are "singularly inept in dealing with the nice subtleties of constitutional law."[87]

The situation in which a serviceman finds himself overseas serves to illustrate this point.[88] Treaties with nations that permit us to maintain military bases on their soil generally provide that foreign courts shall exercise primary jurisdiction over American servicemen who commit crimes, unrelated to their military duties, against the host country's citizens.[89] It is clear that a serviceman may be delivered to a foreign country against his will, to stand trial for offenses committed while stationed there under the provisions of these

[85] *E.g.*, The expression "Dogs and sailors keep off the grass."

[86] 395 U.S. 258, 266 (1969).

[87] *Id.* at 265.

[88] It is clear that *Reid v. Covert* will not allow a deprivation of any Bill of Rights safeguards (in a United States court) merely because the offenses are committed overseas. 354 U.S. 1, 7-8 (1957). The Court, in *O'Callahan*, implied that an offense outside the territorial United States, committed by a serviceman, will have the requisite "service connection." 395 U.S. 258, 273-74 (1969).

[89] NATO Status of Forces Agreement, (1951) 4 U.S.T. 1792-98, 199 U.N.T.S. 67, gives the host nation the primary right to exercise jurisdiction over offenses against the host nation's civilian community when unrelated to inter-service and official duties. *See* Brief for the United States at 49-50 n.19, United States v. Borys, 18 U.S.C.M.A. 547, 40 C.M.R. 257 (1969).

treaties.[90] The provisions of the Bill of Rights are not applicable in a foreign court. As a practical matter, when the assurance is made that a courts-martial will follow, foreign countries will usually waive their right to exercise primary jurisdiction over members of the armed services.[91] An extension of *O'Callahan* to offenses committed off-post overseas would effectively force a serviceman into a foreign court, possibly depriving him of the safeguards available in a courts-martial.

The assignment of exclusive jurisdiction for the trial of all offenses with no independent military significance to civil courts will result in an increased civil court caseload. Many of the cases will be minor offenses that would have been left for the military to try under the provisions of local working agreements. The increased caseload will occasion delays in trial and require additional counsel. Delays in some jurisdictions are already reaching alarming proportions. Civil authorities may be forced to disregard minor offenses, allowing the offender to escape punishment as a result of the local court congestion.

There will not necessarily be a commensurate reduction of courts-martials following the assignment of all offenses without a "service connection" to civil courts. Confinement while awaiting trial and pursuant to a civil court conviction subjects the serviceman to liability for courts-martial for unauthorized absence during this period.[92] A combination of service and non-service connected crimes will subject the offender to two trials, one civil and one military, even though he would prefer a single courts-martial within his command for all offenses.

O'Callahan requires trial of non-service connected offenses in a civil court. It seems that the serviceman might have been better protected by an opportunity to make an intelligent and understanding waiver of a right to trial in a local civil court that may not offer him the protections afforded in a military courts-martial conducted within his command.[93]

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[90] Wilson v. Girard, 354 U.S. 524 (1957) (authorized delivery of a serviceman against his will to stand trial in a Japanese court for the shooting of a Japanese national).

[91] From Dec. 1, 1966 to Nov. 30, 1967, 21,305 United States servicemen were charged with offenses where a concurrent foreign jurisdiction existed. Jurisdiction was waived in 17,188 cases by the host country. In NATO countries, of 16,195 offenses committed, waivers were made by the host country in 15,129 cases. S. REP. No. 1630, 90th Cong., 2d sess. 3 (1968); Brief for the United States at 50 n.19, United States v. Borys, 18 U.S.C.M.A. 547, 40 C.M.R. 257 (1969).

[92] UCMJ art. 86, 10 U.S.C. § 886 (1964) (unauthorized absence). While beyond the scope of this Note, variation of penalties for offenses from state to state should also be considered. UCMJ art. 56, 10 U.S.C. § 856 (1964), specifies standard penalties and permissible maximum limits for punishment for all offenses committed while subject to courts-martial jurisdiction without variation from state to state.

[93] *See* Brennan, J., in Fay v. Noia, 372 U.S. 391, 439 (1963), for a discussion of an intelligent and understanding waiver.

In considering a waiver of a civil trial, the serviceman should weigh the continuing

If the Supreme Court has correctly held that the Framers of the Constitution intended that the Bill of Rights and Article III requirements of indictment by grand jury and trial by jury were meant to apply to members of the land and naval forces for trial of all offenses unrelated to their military duties, then a strong argument may be made that the contemporary practice did not adhere to that intent. The significant increase in size and wide distribution of our Armed Forces certainly invites a balancing of interests before the rigid application of an historically questionable 18th century standard. The effectiveness of the Constitution has been due, to a great extent, to the adaptability of its provisions to change as our Nation has developed. It seems that a rigid application of 1776 standards should yield to the practicalities of the present.

The assumption that a serviceman will receive substantial benefits by requiring that all offenses unrelated to his military duties be tried in civil courts is not necessarily correct. In some cases, a trial by courts-martial offers greater safeguards and benefits to a serviceman than a trial in a state or local court. When balancing the interests of a serviceman against the advantages and disadvantages of trial in a military court, it certainly seems that a member of the Armed Forces would have been better benefited by a decision that offered him an opportunity to take his justice as he takes his music . . . . . military.

Allan Tebbetts

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effects of a conviction. As a general rule, the effects of felony, sex and narcotics convictions by civil courts or courts-martial are the same.

A significant exception is the unique California expungement statute, CAL. PEN. CODE § 1203.4 (West 1957). This statute provides for provisional conviction and probation. Satisfactory completion of the terms of probation may result in an order from the court to expunge the conviction from the records, restoring any lost civil rights and negating state and local offender registration requirements. For an excellent discussion of this statute, *see* Comment, *Effects of Expungement on a Criminal Conviction*, 40 S. CAL. L. REV. 127 (1967).