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COURT MARTIAL JURISDICTION—THE SERVICE CONNECTION STANDARD IN CONFUSION

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In a speech entitled "The Bill of Rights and the Military," [1] former Chief Justice Earl Warren discussed the problems arising from the existence of a large standing army. His purpose was to examine the "role to be assigned the military in a democratic society." [2] He noted that our government was founded upon "traditional subordination of military to civil power," and that "with minor exceptions, military men throughout our history have not only recognized and accepted this relationship in the spirit of the Constitution, but that they have also cheerfully cooperated in pursuing it." [3]

The Chief Justice discussed the role of the Supreme Court in resolving conflicts between the Bill of Rights and military discipline. He emphasized the existence of one acceptable conflict in particular—that the role of constitutional courts remains limited when the military is dealing with its own personnel. The Supreme Court has generally held that it lacks jurisdiction to review decisions of military courts.[4] The motivation for this "hands-off" attitude rests on strong historical precedent. "The tradition of our country, from the time of the Revolution until now, has supported the military establishment's broad power to deal with its own personnel." [5]

This long-standing policy, reaffirmed with the comments of the Chief Justice, lay largely unchallenged[6] before *O'Callahan v. Parker*.[7] Indeed, little had occurred in the field of military law to prepare the system for the shock of *O'Callahan*.

Army Sergeant James F. O'Callahan left his duty station with an evening pass. Dressed in civilian clothes, O'Callahan forced his way into a hotel room and seized a sleeping fourteen year old girl. An attempted sexual attack upon the youngster was unsuccessful. He was immediately apprehended by a hotel security guard and was returned to military authorities. After interrogation, he confessed.

He was charged with attempted rape,[8] housebreaking,[9] and assault with intent to commit rape.[10] A general court-martial tried the case and found him guilty as charged. The Army imposed a sentence of dishonorable discharge, forfeiture of all pay, and confinement at hard labor for ten years. The conviction was affirmed by an Army Board of Review, and the United States Court of Military Appeals later denied a petition for review.[11]

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[1] Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181 (1962).

[2] *Id.* at 182.

[3] *Id.* at 186.

[4] *See Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243 (1863). When the Court has released prisoners convicted by court-martial it has based its action upon lack of military jurisdiction over the person. *See* Reid v. Covert, 354 U.S. 1 (1957).

[5] Warren, *supra* note 1 at 187.

[6] One article challenging the military's authority was Duke & Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 VAND. L. REV. 435 (1960). *See also* Note, *O'Callahan v. Parker, 395 U.S. 258 (1969): New Limitations on Court Martial Jurisdiction*, 61 J. CRIM. L.C. & P.S. 195 (1970).

[7] 395 U.S. 258 (1969).

[8] Uniform Code of Military Justice, art. 80, 10 U.S.C. § 880 (1968) [hereinafter cited as U.C.M.J.].

[9] U.C.M.J. art. 130, 10 U.S.C. § 930 (1968).

[10] U.C.M.J. art. 134, 10 U.S.C. § 934 (1968).

[11] United States v. O'Callahan, 7 U.S.C.M.A. 800 (1957). There are five steps in the review of a general court-martial. The first review is by the convening authority under the U.C.M.J. art. 60. The convening authority is the commanding officer of a unit. He submits the case to the Battalion Judge Advocate General who issues an opinion under Art. 61 of the U.C.M.J. After rereading the transcript, the convening authority can review the facts, pass on the appropriateness of the sentence, reduce the penalty, or change the finding to "not guilty."

Next, the case goes to the office of the Judge Advocate General under Art. 66. He reviews the case but has no real power to change the finding of the lower court.

The Court of Military Review is the third step in the appeals structure. It is composed of three qualified lawyers, officers or civilians serving short terms. The appeal is automatic when the death penalty is imposed. Under Art. 66(c), they weigh evidence, judge credibility of witnesses, and determine controverted questions of fact.

The fourth step in the military appeal structure is the United States Military Court of Appeals. Art. 67, U.C.M.J., established the court which is composed of three civilians sitting for fifteen year terms. The

In April 1966,[12] O'Callahan petitioned the United States District Court for the Middle District of Pennsylvania for a writ of habeas corpus alleging that the court-martial had no jurisdiction to try him for a non-military offense committed while on leave.[13] The district court refused to consider that issue since O'Callahan had formerly obtained an unfavorable ruling from the district court in Massachusetts where he had once been confined.[14] The United States Court of Appeals for the Third Circuit affirmed the decision of the Pennsylvania court without discussion of the question.[15] On certiorari, the United States Supreme Court reversed the lower courts by holding that the crimes for which O'Callahan was convicted were not "service connected," and therefore not triable by court-martial.[16]

Speaking for the majority, Justice Douglas emphasized that the offenses in question were committed off duty and off post by a soldier dressed in civilian garb. O'Callahan's conduct, it was held, represented a "civilian" offense against a civilian victim. In establishing no service connection,[17] the majority further noted that peacetime offenses were involved which had been "committed within our territorial limits, not an occupied zone of a foreign country." [18]

The Court ignored the government's contention that status as a member of the Armed Forces granted military jurisdiction. As Mr. Justice Douglas phrased it,

> That is merely the beginning of the inquiry, not its end. Status is necessary for jurisdiction; but it does not follow that ascertainment of status completes the inquiry, regardless of nature, time, and place of the offense.[19]

The majority compared military tribunals with federal courts and concluded that courts-martial are not entitled "to rank along with Article III courts as adjudicators of the guilt or innocence of people charged with offenses for which they can be deprived of their life, liberty, or property." [20] It was asserted that "a court-martial is not yet an

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accused must petition for review but the court must hear every request for review involving capital sentences. Generally review is limited to matters of law by Art. 69(d), but under extreme conditions it can hear mixed questions of law and fact.

The President as commander-in-chief holds final appellate authority. But he, as any other appeal body, cannot increase the court-martial sentence. M. COMISKY & L. APOTHAKER, CRIMINAL PROCEDURE IN THE UNITED STATES DISTRICT AND MILITARY COURTS, 172 ff (1963).

[12] O'Callahan was sentenced in 1956, paroled in 1960, and returned to confinement in 1962 as a parole violator. *See* O'Callahan v. Attorney Gen., 230 F. Supp. 766 (D. Mass. 1964).

[13] The other allegations unsuccessfully raised in the writ were: (a) that his confession, which had been admitted in evidence without objection, had been obtained by use of coercion; (b) that testimony by use of written interrogatories had been admitted into evidence violating his sixth amendment right to confrontation of witnesses; (c) that his conviction by two-thirds vote rather than by unanimity violated his consitutional right to trial by jury. United States *ex rel* O'Callahan v. Parker, 256 F. Supp. 679 (M.D. Pa. 1966).

[14] United States *ex rel* O'Callahan v. Parker, 256 F. Supp. 679 (M.D. Pa. 1966). 28 U.S.C. § 2244 (1948) permits, in part, a district judge to refuse to entertain an application for a writ of habeas corpus where a prior application on the same grounds has been denied pursuant to a judgment of a court of the United States. Chief Judge Wyzanski had denied the Massachusetts writ of habeas corpus stating "there is no merit in plaintiff's position, which conflicts with an unbroken line of contrary authority." O'Callahan v. United States Marshal, 293 F. Supp. 441, 442 (D. Mass. 1966).

[15] United States *ex rel* O'Callahan v. Parker, 390 F.2d 360 (3d Cir. 1968). Judge Hastie relied upon Thompson v. Willingham, 318 F.2d 657 (3d Cir. 1963) in determining that the court-martial had jurisdiction. Thompson had alleged that a military court held no jurisdiction over him for a capital offense in time of peace.

[16] O'Callahan v. Parker, 395 U.S. 258 (1969). The Court defined the issue as follows:

> Does a court-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?

395 U.S. at 261. The U.C.M.J. replaced the Articles of War in 1951. Act of May 5, 1950, 64 Stat. 108.

It was a 5–3 decision. Together with Justice Douglas in the majority stood Chief Justice Warren and Justices Black, Brennan and Marshall.

[17] O'Callahan v. Parker, 395 U.S. 258, 273 (1969).

[18] *Id.* at 273–74.

[19] *Id.* at 267.

[20] *Id.* at 262. In that comparison, the Court observed that federal judges are appointed for life and that their salaries may not be diminished, whereas their military counterparts do not have the benefit of such constitutional protections. Military judges, it was asserted, are subject to the "will of the executive department which appoints, supervises and ultimately controls them." Toth v. Quarles, 350 U.S. 11, 17 (1955). The Court frowned on a military system in which the guilt of a soldier can be established by two-thirds of the court-martial as compared to the civilian system in which a unanimous jury decision is required for a finding of guilty. Finally, the Court noted the unique character of the authority vested by the military judicial system in the officer who convenes a court-martial—in particular the power he holds to appoint not only members of the court but counsel for both sides as well. O'Callahan v. Parker, 395 U.S. 258, 263–64 (1969).

independent instrument of justice" [21] and that Anglo-American history supported the proposition that a soldier could not be tried by court-martial for civilian type offenses.[22] The conclusion of the Court naturally followed:

> [A soldier's] crime to be under military jurisdiction must be service-connected, lest "cases arising in the land and 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.[23]

Mr. Justice Harlan, joined by Justices Stewart and White, strongly dissented. Harlan asserted that the majority had usurped Congress's constitutional power to determine the "appropriate subject matter jurisdiction of courts-martial." [24] He objected to the majority's interpretation of historical precedents. In his view, "English constitutional history provide[d] scant support" for the Court's position. Furthermore, "pertinent American history" was "quite the contrary." [25] He felt that if the majority insisted on balancing governmental interests, the interests on both sides should have been examined including that of the military. That, he insisted, the Court has not done. Lastly, his dissent decried the confusion created by the Court's failure to explain the scope of service connected crimes. "Absolutely nothing," he added, "in the language, history, or logic of the Constitution justifie[d] the uneasy state of affairs which the Court . . . created." [26]

Mr. Justice Douglas assumed solid support for his opinion in the pre-revolutionary English and early American law. He referred to the Crown's abuses of court-martial power in 17th century England which had prompted Parliament to seize the power to define court-martial jurisdiction.[27] Douglas argued that Parliament's seizure of that authority mirrored its "disapproval of the general use of military courts for trial of ordinary crimes." [28] He acknowledged that the Mutiny Act of 1720[29] allowed martial trial of common law felonies, but treated the Act as an exception to the British rule "that a soldier could not be tried by court-martial for a civilian offense." [30]

With the acceptance of the Bill of Rights in 1688,[31] authority to control the Army was vested in Parliament.[32] But conflict continued between Crown and legislature as to where jurisdiction over the Army rested.[33] Justice Harlan's dissent

[21] O'Callahan v. Parker, 395 U.S. 258, 265 (1969).

[22] *See* notes 27–35 *infra.* and accompanying text.

[23] O'Callahan v. Parker, 395 U.S. 258, 272–73 (1969).

[24] *Id.* at 276. Congress's power derives from the language of Art. I, sec., 8, cl. 14 of the Constitution which grants to Congress the power "to make rules for the government and regulation of the land and naval forces." In Kinsella v. Singleton, 361 U.S. 234 (1960), that constitutional language was reviewed and the assertion made that military jurisdiction was based upon whether a person could be regarded as falling within the term "land and naval forces." *Id.* at 241. Given the constitutional language, it would be for Congress and not the Judiciary to determine subject matter jurisdiction of courts-martial. *See* Coleman v. Tennessee, 97 U.S. 509, 514 (1879).

[25] O'Callahan v. Parker, 395 U.S. 258, 276 (1969).

[26] *Id.* at 284.

[27] Parliament exercised its authority through the passage of annual mutiny acts the first of which (enacted in 1689) read:

> Noe Man may be forejudged of Life or Limbe, or subjected to any kinde of punishment by Martiall Law or in any other manner than by the Judgment of his Peeres and according to the knowne and Established Laws of this Realme.

1 W. & M., c.5 (1689).

[28] O'Callahan v. Parker, 395 U.S. 258, 268 (1969).

[29] The act provided that a soldier could be court-martialed for

> any violence or Offense against the Person, Estate, or Property of any of the Subjects of this Kingdom which is punishable by the known Laws of the Land.

Civil authorities could within eight days of the conduct in question request that the accused soldier be turned over to them for trial. Such requests had to be honored. 7 GEO. 1, c.6 (1720).

[30] O'Callahan v. Parker, 395 U.S. 258, 269 (1969).

[31] For a discussion of the Bill of Rights *see generally* F. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND (1908).

[32] *See* Duke & Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 VAND. L. REV. 442–43 (1960). Having seized authority, Parliament moved with the passage of the first Mutiny Act (1 W. & M., c.5) to limit court-martial jurisdiction to three offenses—mutiny, sedition and desertion. *See* W. WINTHROP, MILITARY LAW AND PRECEDENTS 18–19 & 929–30 (2d ed. 1920). Later, however, Parliament initiated a series of legislative measures expanding allowable court-martial authority. First, it authorized courts-martial of soldiers overseas in time of peace. *See* Duke & Vogel, *supra.* at 444. Then, the Crown was granted the power to prescribe articles of war which were to be operative within the Kingdom as well as overseas. *See* W. WINTHROP, *supra.* at 20. A Mutiny Act of 1720 led to even broader military jurisdiction allowing court-martial for British soldiers committing common law felonies if within eight days subsequent to an offense civilian officials had not themselves asserted jurisdiction. 7 GEO. 1, c.6 (1720).

[33] It has been suggested that the seeds of the conflict rested with the very nature of martial law itself.

> For martial law, which is built upon no settled principles, but is entirely arbitrary in its decisions, is . . . in truth and reality no law, but something indulged rather than allowed as a law.

BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 413 (1915).

in *O'Callahan* analyzed that conflict. He noted that "the King's asserted prerogative to try soldiers by court-martial in time of peace" was one point of contention in the "long standing... struggle for power between the military and the Crown on the one hand and Parliament on the other." [34] The fact that military law proved so harsh, he argued, made it understandable that a Parliament vested with exclusive authority over the military would use it sparingly.[35] Harlan concluded that in that tradition control of the military must remain in the hands of the people through their representatives in Congress. The adoption of Article I, Section 8, Clause 14 represented American affirmation of that principle, for it vested in Congress authority "[t]o make rules for the government and regulation of the land and naval Forces."

The *O'Callahan* majority pointed to early instances of the assertion of legislative control over the military as precedence for its contemporary move to restrict court-martial jurisdiction. In particular, reference was made to the Articles of War of 1776.[36]

That act did require that the soldier accused of a civilian offense be delivered to a civil magistrate, but only after a request had been made for such delivery.[37] When no request was received from civilian authorities, the commanding officer was required to insure that disciplinary action was taken against his officers and men for the offenses in question. Indeed, if an officer failed to intitiate such action, he was compelled to stand court-martial himself for the crimes committed by his subordinate.[38] The commanding officer was ordered to charge the accused under a general article of war enacted in 1775[39] which sanctioned military punishment for "all crimes [by servicemen] not capital." [40] The 1776 legislation, then, requiring delivery of an accused to civil authorities in no way limited court-martial jurisdiction when civil application for such delivery was not forthcoming.

Furthermore, historical precedent indicates that civilian offenses have long been tried by courts-martial. An appendix to the Government's brief cited over 100 instances of military punishment applied to non-military crimes tried between 1775 and 1815.[41] Justice Douglas challenged the import of that list asserting that "in almost every case summarized, it appears that some special military interest existed." [42] He termed the crimes involved peculiarly military—prosecutions for abuse of military position, crimes involving officers, and courts-martial held in wartime between 1773 and 1783.[43] Yet, he ignored those additional cases which did not fall into one of the above categories.

Indeed, the Douglas attempt to discredit the

[34] O'Callahan v. Parker, 395 U.S. 258, 276 (1969).

[35] *Id.* at 276.

[36] Those articles were passed by the Continental Congress.

[37] Sec. X, Art. 1 of the Articles of War of 1776 read:

> When any officer or soldier shall be accused of a crime, or of having used violence, or committed any offense against the persons or property of the good people of any of the United American States, such as is punishable by the known laws of the land, the commanding officer and officers of every regiment, troop, or party, to which the person or persons so accused shall belong, are hereby required upon application duly made by or in behalf of the party or parties injured, to use his utmost endeavor to deliver over such accused person or persons to the civil magistrate; and likewise to be aiding and assisting to the officers of justice in apprehending and securing such person or persons so accused, in order to bring them to a trial. If any commanding officer or officers shall wilfully neglect or shall refuse, upon the application aforesaid, to deliver over such accused person or persons to the civil magistrates, or to be aiding and assisting to the officers of justice in apprehending such person or persons, the officer or officers so offending shall be cashiered.

W. WINTHROP, MILITARY LAW AND PRECEDENTS 964–65 (2d ed. 1920).

[38] Every officer commanding in quarters, garrison, or on a march, shall keep good order, and, to the utmost of his power, redress all such abuses or disorders which may be committed by any officer or soldier under his command; if, upon complaint made to him of officers or soldiers beating or otherwise ill-treating any person; or disturbing fairs or markets; of committing any kind of riots to the disquieting of the good people of the United States; he the said commander who shall refuse or omit to see justice is done on the offender or offenders, and reparation made to the party or parties injured, as far as part of the offender's pay shall enable him or them, shall, upon proof thereof, be punished, by a general court-martial, as if he himself had committed the crimes or disorders complained of. Articles of War 1776, § IX, Art. 1.

W. WINTHROP, *supra* note 37 at 964.

[39] The General Article remained structurally consistent from 1775 to 1916:

> All crimes, not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the articles of war, are to be taken cognizance of by a general or regimental court-martial, according to the nature and degree of the offense, and be punished at their discretion.

W. WINTHROP, *supra* note 37 at 957.

[40] O'Callahan v. Parker, 395 U.S. 258, 271 (1969).

[41] Brief for Respondent at 35–52, O'Callahan v. Parker, 395 U.S. 258 (1969).

[42] O'Callahan v. Parker, 395 U.S. 258, 270 n.7 (1969).

[43] *Id.* at 270 n.7.

Government's list was not persuasive, for some of those cases failed to fit any of the Justice's categories. One case, for instance, involved "killing a cow, stealing fowls, and stealing geese;" [44] another "stealing a horse from the Widow Duncan." [45] Others arose from "beating a woman kept as a mistress," [46] the "beating [of] a Mr. Williams ... living near [a] garrison," [47] and the use of "violence on Mrs. Cronkhyte, a citizen of the United States." [48] Those offenses could not be defined as "peculiarly military." Still, court-martial disposition of them was allowed.

History belies the *O'Callahan* majority's additional assertion that the 1777 General Article of War failed to take cognizance of civilian crimes. A noted military historian has written that crimes were cognizable by a court-martial under the General Article only when "committed under such circumstances as to have directly offended against the government and discipline of the military state." [49] However, he later commented that the strict interpretation of the General Article had not been realized in practice. As long as commanders instituted courts-martial for crimes commited against civilians, civil courts avoided such cases.[50]

Support for the propriety of that broadened approach to the authority of courts-martial over soldiers received support with the Supreme Court's comments on the "General Article" in *Grafton v. United States*.

> The crimes referred to in [the General] [A]rticle manifestly embrace those not capital, committed by officers or soldiers in violation of public law as enforced by the civil power. No crimes committed by officers or soldiers of the Army are excepted by the ... [A]rticle from the jurisdiction thus conferred upon courts-martial except those that are capital in nature .... [T]he jurisdiction of general courts-martial [is] ... concurrent with that of the civil courts.[51]

The Supreme Court had, prior to *O'Callahan*, consistently treated the military status of an accused as sufficient "service connection" to justify court-martial jurisdiction.[52] While the particular issue in *O'Callahan* had never been decided, a reading of the earlier opinions set out below raises a strong presumption that a questioning of military status as a valid jurisdictional base for courts-martial had never been considered.

In *Ex parte Milligan*,[53] the Supreme Court had ruled that a military commission held no jurisdiction to try a civilian citizen of the State of Indiana. The state had neither been under siege nor engaged in rebellion at the time of the offense. Federal courts were open and functioning. Nevertheless, comparing the constitutional guarantees of civilians with those of military personnel the Court stated,

> The discipline necessary to the efficiency of the army and navy required other and swifter modes of trial than are furnished by the common law courts; and, in pursuance of the power conferred by the Constitution, Congress has declared the kinds of trial, and the manner in which they shall be conducted, for offenses committed while the party is in the military or naval service. Every one connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts.[54]

The Court determined in *Coleman v. Tennessee*[55] that during the Civil War a hostile state had no

[44] Brief for Respondent at 41, O'Callahan v. Parker, 395 U.S. 258 (1969).

[45] *Id.* at 43.

[46] *Id.* at 43.

[47] *Id.* at 49.

[48] *Id.* at 49. It is doubtful that Mr. Justice Douglas would find service connection today for many of the cases he summarily dismissed from the government's list because of their "military significance." *E.g.*, in a case in which a soldier absented himself from camp without leave and rioted in Cincinnati, the fact that the soldier was AWOL at the time he was arrested for his role in the civil disturbance in question would hardly be sufficient grounds for a finding of service connection. Brief for Respondent at 43, O'Callahan v. Parker, 395 U.S. 258 (1969).

[49] W. WINTHROP, MILITARY LAW AND PRECEDENTS 723–24 (2d ed. 1920).

[50] *Id.* at 725.

[51] 206 U.S. 333, 348 (1907).

[52] *See* notes 53–58 *infra*. and accompanying text. It was held that Article I, Section 8, Clause 14 of the Constitution granted to Congress "the power to provide for the trial and punishment of military ... offenses in a manner ... practiced by civilized nations ..." Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (1857). Furthermore, the Court had ruled that the language of the fifth amendment excepted "cases arising in the land and naval forces" from the right to indictment by grand jury, and, by implication, from the sixth amendment right to trial by jury. Whelchel v. McDonald, 340 U.S. 122, 127 (1950). *Accord, Ex parte* Quirin, 317 U.S. 1, 40 (1942).

[53] 71 U.S. (4 Wall.) 2 (1866).

[54] *Id.* at 123. The government was asserting jurisdiction over Milligan under martial law which may be imposed when the civil courts cannot function because of invasion, rebellion or some other disorder. *See* Everett, *Military Jurisdiction Over Civilians*, 1960 DUKE L.J. 366, 366–67 (1960).

[55] 97 U.S. 509 (1878).

jurisdiction over a member of the occupying army. In holding that the Army possessed exclusive jurisdiction the Court asserted,

> As Congress is expressly authorized by the Constitution "to raise and support armies," and "to make rules for the government and regulation of the land and naval forces," its control over the whole subject of the formation, organization and government of the national armies, including therein the punishment of offenses committed by persons in the military service, would seem to be plenary.[56]

As recently as 1960, the case of *Kinsella v. United States*[57] forwarded military status as the jurisdictional foundation for the power of courts-martial over members of the Armed Forces.

> The test for jurisdiction ... is one of status, namely whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term "land and naval forces." [58]

The O'Callahan majority attempted to overcome the weight of such precedents.[59] Difficult to deny, however, was the reality of a tradition of military justice in the United States based upon an understanding that Article I, Section 8, Clause 14 empowered Congress to establish discipline for citizens "in the land and naval forces." Military status was accepted as the Congressionally sanctioned jurisdictional test for courts-martial. "To say that military jurisdiction defies definition in terms of military status [would be] to [deny the import of] unambiguous language [in] ... Clause 14." [60] Yet, the Court decided in *O'Callahan* to forward a new interpretation of that language. The majority reasoned in part upon a distrust of and an aversion to military justice.

Justice Douglas asserted that courts-martial afford only "so called justice." [61] He compared the civilian trial "held in an atmosphere conducive to the protection of individual rights" with the military trial "marked by the age old manifest destiny of retributive justice." [62] He condemned the entire court-martial institution as being "singularly inept in dealing with the nice subtleties of constitutional law." [63]

That disparagement of military justice overlooked a history of adjustments by the court-martial system to insure protection of the accused's basic rights. Military police and criminal investigators, as part of their standard procedure, were advising suspects of their right to remain silent long before *Miranda*.[64] The exclusionary rule was being applied by courts-martial in search and seizure cases before *Mapp v. Ohio* and *Lee v. Florida* applied the rule to the state civil courts.[65] The military furnished counsel for indigent defendants years before *Gideon v. Wainwright*[66] required state courts to do likewise. Indeed, courts-martial jurisdiction presented an unexpected target for judicial attack since military tribunals have stood with the vanguard in moving to insure the rights of the accused.

One wonders, in light of the Court's attack, whether there is any justification for the military judicial system. The answer remains clear. The military holds a vested interest in deterring the commission of crimes by soldiers regardless of where they are perpetrated. The discipline, morale, and integrity of our Armed Forces are at stake.[67]

[56] *Id.* at 514. In a later case, *Ex parte* Quirin, 317 U.S. 1 (1942), the Court affirmed a military trial for servicemen who attempted sabotage in the United States in wartime. The basis for military jurisdiction was examined with the Court concluding that the Constitution

> authorized the trial by court-martial of the members of our Armed Forces for all that class of crimes which under the Fifth and Sixth Amendments might otherwise have been deemed triable in the civil courts. The [crimes so triable] are not restricted to those offenses against the law of war alone, but extend to trial of all offenses, including crimes which were of the class traditionally triable by jury at common law. *Id.* at 43

[57] 361 U.S. 234 (1960). The Court concluded that the military lacked jurisdiction to court-martial civilian dependents accompanying the Armed Forces overseas.

[58] *Id.* at 240–41.

[59] The Court's approach led one commentator to observe that "the majority opinion in O'Callahan must be viewed as a triumph of abstract concept over practical realities." Everett, *O'Callahan v. Parker—Milestone or Millstone in Military Justice*, 1960 DUKE L.J. 853, 867 (1969).

[60] Kinsella v. United States, 361 U.S. 234, 243 (1960).

[61] O'Callahan v. Parker, 395 U.S. 258, 266 n.7 (1969).

[62] *Id.* at 266.

[63] *Id.* at 265.

[64] *Compare* U.C.M.J. art. 31, 10 U.S.C. § 831 (1968), *with* Miranda v. Arizona, 384 U.S. 436 (1966). After *Miranda*, the Court of Military Appeals required all suspects to be advised of their right to free counsel at all custodial interrogations irrespective of their ability to hire an attorney. United States v. Tempia, 16 U.S.C.M.A. 629 (1967).

[65] *Compare* MANUAL FOR COURTS-MARTIAL, para. 152, which has been substantially the same since 1951 *with* Mapp v. Ohio, 367 U.S. 643 (1961) *and* Lee v. Florida, 392 U.S. 378 (1968).

[66] 372 U.S. 335 (1963).

[67] Moreover, when civilian courts assume jurisdiction over a member of the military, he becomes ineffective as a soldier until the conclusion of his case. If

In its distrust of military justice, the majority stressed the significance of affording the uniformed defendant two right's of the accused civilian—indictment by grand jury and jury trial. The Court failed to recognize that a grand jury would provide questionable advantage to the accused serviceman. The grand jury procedure often represents an oppressive tool of the prosecutor[68] since such proceedings are held in secrecy without the presence of the accused or his counsel. The same cannot be said of the military equivalent—the Article 42[69] investigation. The article provides that prior to each general court-martial a thorough hearing must be conducted at which the accused may be present and represented by counsel.[70] The investigating officer must call all available witnesses whom the accused is entitled to cross-examine.[71] The suspect himself may call witnesses, enter evidence, or testify on his own behalf.[72]

Trial by jury may seem most desirable as well. But is the accused serviceman a peer of the community just outside the gate? In *Orloff v. Willoughby*,[73] the Court acknowledged that "the military constitutes a specialized community governed by a separate discipline from that of the civilian." [74] The soldier does not choose where he is to be stationed. Many times local civilian inhabitants house antagonism toward members of the military who are stationed near their community, especially those of different ethnic or racial backgrounds. Jury trial, then, may well provide no benefit to the serviceman accused of criminal conduct far from his home.

The Judiciary's call for new restrictions on court-martial jurisdiction was based upon a distrust of the military judicial system coupled with the expressed need to afford certain military defendants the civil amenities of grand jury and jury trial proceedings. Disagreement over the strength of such arguments as the basis for the overthrow of well established principles of military jurisdiction continued unabated. No more satisfactory was the fact that the *O'Callahan* opinion left unexplained the new jurisdictional standard. What were the proper bounds of "service connected" crime?

Justice Harlan, alarmed by the majority's failure to define "service connection", proclaimed,

> 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.[75]

The extent of confusion over jurisdictional standards in the wake of *O'Callahan* soon became apparent.

The Court of Military Appeals quickly initiated the task of interpreting the decision and handling

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his unit or vessel is alerted and relocated, he will be left behind. Military courts dispose of cases swiftly with punishment for guilt often leaving the soldier in a duty status encouraging his rehabilitation.

A defendant found guilty would be retained in duty status under any of the following sentences: reprimand or admonishment; restriction; hard labor without confinement; forfeiture, fine or detention of pay; and reduction in rank. MANUAL FOR COURTS-MARTIAL, para. 126 (1969).

Army statistics for 1967 indicate that 85% of the cases involving serious offenses committed off post were retained by the civilian authorities. Brief for Respondent at 27 n.16, O'Callahan v. Parker, 395 U.S. 258 (1969). The other 15%, probably involving defendants with the best potential for rehabilitation, will be the ones affected by the *O'Callahan* limitation upon military jurisdiction.

[68] *See* Antell, *The Modern Grand Jury: Benighted Supergovernment*, 51 A.B.A.J. 153 (1965).

[69] Article 32 reads in part as follows:

> No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made. This investigation shall include inquiry as to the truth of the matter set forth in the charges, consideration of the form of the charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline

U.C.M.J. art. 32, 10 U.S.C. § 832 (1968).

[70] The accused shall be advised of the charges against him and of his right to be represented at that investigation by counsel. Upon his own request he shall be represented by civilian counsel if provided by him, or military counsel of his own selection if such counsel is reasonably available, or by counsel detailed by the officer exercising general court-martial jurisdiction over the command.

U.C.M.J. art. 32, 10 U.S.C. § 832 (1968).

[71] It is not the function of the investigating officer to perfect a case against the accused, but to ascertain and impartially weigh all available facts in arriving at his conclusion.

MANUAL FOR COURTS-MARTIAL, para. 34 at 7–9.

[72] At that investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused.

U.C.M.J. art. 32, 10 U.S.C. § 832 (1968). *See also* MANUAL FOR COURTS-MARTIAL, para. 34 at 7–10 & 7–11.

[73] 354 U.S. 83 (1953).

[74] *Id.* at 94.

[75] O'Callahan v. Parker, 395 U.S. 258, 284 (1969).

its jurisdictional uncertainties. In *United States v. Borys*[76], that court first indicated how it would respond to the *O'Callahan* ruling.

Army Captain Stephen Borys had been tried and convicted by court-martial in a case similar on its facts to *O'Callahan*.[77] Like defendant O'Callahan, Borys was found guilty of a rape attempted while off duty and dressed in civilian clothes.[78] The comparison with *O'Callahan* satisfied the majority that service connection was not present leaving court-martial jurisdiction invalid. The military court's conviction was reversed with charges dismissed.

The *Borys* opinion represented a mechanical application of *O'Callahan* principles. Judge Ferguson, speaking for the majority, envisioned no basis for distinguishing *Borys* from the earlier case. The fact that in both instances civilian courts were open, that the situs of the conduct in question was not territory under siege, an armed camp or a distant military outpost convinced the majority that the fact situations were indistinguishable. As Judge Ferguson phrased it,

> [the] accused's military status was only a happenstance of chosen livelihood . . . none of his acts were service connected under any test or standard set out by the Supreme Court. In short, they, like O'Callahan's, were the very sort remanded to the appropriate civil jurisdiction in which indictment by grand jury and trial by petit jury could be afforded the defendant.[79]

Chief Judge Quinn, in dissent, questioned what he termed the majority's application of *O'Callahan* "by rote." [80] He asserted that before the military could be precluded from trying its own personnel the offense in question would have to be both cognizable in a federal civilian court and marked by a lack of military significance. He insisted that the Supreme Court in *O'Callahan* had looked to the fact that the offenses in issue there had occurred in the Federal Territory of Hawaii prior to statehood. The federal government in such territory possessed criminal jurisdiction over both civilian and military personnel. As Quinn viewed it, *O'Callahan* stood for the narrow principle that Congress in exercising that federal authority could not prescribe different forums for the prosecution of a civilian and military man's misconduct unless the service member's offense was service connected.

Quinn's dissent noted that defendant Borys' offenses had occurred off base in Georgia and South Carolina. He stressed the fact that federal and state governments remained separate sovereigns vested with authority to determine what action would be criminal within their jurisdictions. That a state criminal code declared a particular act criminal in no way limited the federal power of Congress to grant to the military jurisdiction over its personnel responsible for such criminal conduct.[81] Quinn reasoned that Borys' offenses were not cognizable in a civilian court since civilian court as used in *O'Callahan* meant federal court.[82]

Furthermore, the dissent viewed Borys' misconduct as militarily significant tolling service connection. Congress, it was argued, had exercised its power under Article I, Section 8, Clause 14 to make rules for government and regulation of the Armed Forces in order to afford federal protection of the civilian population from the military. Congress sanctioned courts-martial for that purpose. Military status of an accused in his alleged misconduct toward a civilian would properly precipitate court-martial action in light of Congress's jurisdictional grant.[83]

[76] 18 U.S.C.M.A. 547 (1969).

[77] Borys had been charged with rape, robbery, sodomy and attempted rape in violation of U.C.M.J. arts. 120, 122, 125, and 80 respectively.

[78] Borys' crime, like that of O'Callahan, could be termed "civilian" in nature. In fact, the accused had been tried and acquitted by a civil court in Aiken, South Carolina of seven of twelve counts against him. *See* United States v. Borys, 39 C.M.R. 608, 611 (1968).

[79] United States v. Borys, 18 U.S.C.M.A. 547, 549 (1969).

[80] *Id.* at 550.

[81] Chief Judge Quinn compared the carnal knowledge (statutory rape) statutes in the State of Florida—"... unmarried person, of previous chaste character ... under the age of eighteen years," FLA. STAT. ANN. tit. 44, § 794.05(1) (1961); and in the State of Hawaii—"... with any female under the age of sixteen years," HAWAII REV. STAT. tit. 38, § 768.62 (1955); with the military counterpart—"... has not attained the age of sixteen years." U.C.M.J. art. 120(b), 10 U.S.C. § 920(b) (1968). If the girl involved in a rape case were fifteen and not of previously chaste character, the offense would be cognizable in a Hawaii court but not in Florida. Quinn, assuming arguendo that "cognizable in a civilian court" meant either state or federal court, showed that the military would be able to court-martial the service member in Florida but not Hawaii. That would mean that the ability of Congress to exercise its enumerated constitutional power over the military would, in fact, be controlled in part by each state's determination as to what acts are criminal in that state. United States v. Borys, 18 U.S.C.M.A. 547, 556–7 (1969).

[82] United States v. Borys, 18 U.S.C.M.A. 547, 557 (1969).

[83] *Id.* at 557–60. The dissent in *Borys*, then, joined

In reality the dissent in *Borys* represented an initial attempt to place a precise definition upon the term service connection.[84] A majority of the Court of Military Appeals soon took up the task a minority had begun in *Borys*. Results of that effort revealed a tendency to assume much from an opinion (*O'Callahan*) that offered little in terms of specific guidelines.

The Supreme Court had stated that O'Callahans "offenses did not involve any question of . . . the security of a military post." [85] The question then arose—what if defendant O'Callahan's attempted rape had occured on a military post? Would his status plus occurrence of the offense upon a military installation permit trial by court-martial? The Court of Military Appeals answered affirmatively.[86] The situs of a serviceman's criminal conduct was termed one factor in resolving the service connection question. Authority to govern its own posts invested the military with authority to act in insuring their safety. Crimes committed on base were to be dealt with by a court-martial.

This standard was invoked in *United States v. Crapo*.[87] Defendant Crapo stood convicted of robbery and attempted robbery. His two victims were taxicab drivers. One was attacked on a military reservation[88] and the other in Seattle, Washington. On appeal, court-martial conviction for the attempted robbery in Seattle was reversed. Conviction for the on-base offense was affirmed.[89]

The situs criterion if strictly applied would bring within court-martial jurisdiction cases which in no way involved the security of a military post. For instance, a serviceman's preparation of a fraudulent income tax form or his forgery of a check to be cashed off base would fit that category. That the Court of Military Appeals may have established too broad a standard proved no problem. Exceptions to that general jurisdictional rule were soon recognized.[90]

Furthermore, the broad general rule was workable. The Court of Military Appeals had recognized that military trial and lower appellate courts were awaiting guidelines to assist them in sorting out the *O'Callahan* puzzle. Anything less than a jurisdictional standard simple in application would have left the lower courts in a continuing state of uncertainty.[91]

Additional refinement in the definition of "service connected" crime in terms of the situs of the conduct in question came with the decision in *United States v. Keaton*.[92] Airman Keaton was tried and convicted by general court-martial in the Republic of the Philippines for the crime of assault with intent to commit murder. He appealed arguing that the purpose of *O'Callahan* was to protect for servicemen the constitutional privileges of indictment and trial by jury. The Court of Military Appeals answered that such privileges

that of *O'Callahan* in decrying judicial assault upon the traditional scope of court-martial jurisdiction.

[84] The jurisdictional watchword in *O'Callahan* remained largely undefined. The Court's creation of the "service connection" standard was not designed to question court-martial jurisdiction over many cases. The military's authority to court-martial a soldier for desertion or for wilful disobedience of the lawful order of a superior officer remained unchallenged. But concern arose as to designation of the proper forum to handle cases involving servicemen's crimes in which "service connection", or the lack thereof, was not so clear.

[85] O'Callahan v. Parker, 395 U.S. 258, 274 (1969).

[86] *See* United States v. Henderson, 18 U.S.C.M.A. 601 (1969) and United States v. Smith, 18 U.S.C.M.A. 609 (1969). Defendants Henderson and Smith were court-martialed and convicted of rape in separate trials. Their victims were the daughters of fellow servicemen. Henderson lured the one girl to his quarters off post, while Smith took a girl to his quarters on post. Henderson's conviction was reversed by the appeals court while Smith's conviction was affirmed. The court acknowledged that the cases differed "in only one respect—the place where the offense occurred." United States v. Smith, 18 U.S.C.M.A. 609, 609 (1969).

[87] 18 U.S.C.M.A. 594 (1969).

[88] The driver was struck over the head on the reservation but was forced to drive off the base before defendant Crapo took his money. *Id.* at 595–96.

[89] United States v. Crapo, 18 U.S.C.M.A. 594, 596 (1969). *Accord* United States v. Shockley, 18 U.S. C.M.A. 610 (1969), where a conviction for sodomy committed off post was reversed while conviction for the same offense committed on post was affirmed. United States v. Williams, 18 U.S.C.M.A. 605 (1969), where the offense of cashing a bad check on post was held to be service connected while the cashing of another at a civilian grocery store was not.

[90] *E.g.*, United States v. Castro, 18 U.S.C.M.A. 598 (1969), in which the Court of Military Appeals held that the court-martial did not have jurisdiction over an on post concealed weapon offense when the facts indicated that the bringing of the weapon onto the post was not a voluntary act. Castro had been injured in a traffic accident off post and was transported to an Army hospital by military police. The weapon was discovered at the hospital.

[91] The Supreme Court may within the year rule on a case that could affect even the situs criterion for military jurisdiction. On February 27, 1970 the Court granted certiorari on the issue of whether *O'Callahan v. Parker* would bar a court-martial from trying a soldier charged with committing rape and kidnapping against civilians on a military post. Relford v. Commandant, 397 U.S. 934 (1970).

[92] 19 U.S.C.M.A. 64 (1969).

would only be available through the civil courts of the United States. It noted that "military courts [alone] are authorized to function within the Republic of the Phillippines." [93] The *Keaton* court stated that while some offenses committed abroad are triable in the federal civilian courts, "the number and kind of offenses in which such action can be taken is limited." [94] The Supreme Court, it was added, did not intend to proscribe court-martial jurisdiction in friendly foreign countries. Court-martial jurisdiction over defendants charged with offenses in a foreign land represented a "valid exercise of constitutional authority." [95]

Specific offenses as well were found by their very nature to be service connected. In *United States v. Beeker*[96], for instance, the Court of Military Appeals reaffirmed jurisdictional guidelines for treatment of drug cases involving military personnel.

Beeker had been convicted of numerous marijuana offenses—unlawful importation and transportation[97]; wrongful possession on a military post; wrongful use off and on post.[98] The court upheld military jurisdiction over the accused for use offenses both off and on base. It reasoned that drug use anywhere by the military prejudiced the order and discipline of the Armed Forces. A court-martial was also held proper in instances of on base possession of marijuana consistent with the situs criterion for jurisdiction established in *Crapo*.[99] Subsequent cases extended the bounds of service connection to cover off post use of heroin and cocaine,[100] possession of dangerous drugs,[101] and off post transfer of drugs to another service member.[102]

In addition, the petty offenses of military men had long been tried by courts-martial.[103] *O'Callahan's* denial of military jurisdiction over cases involving civilian type crimes not service connected in no way disturbed the jurisdictional authority of courts-martial in the petty offense realm.

The Court of Military Appeals in *United States v. Sharkey*[104] asserted the propriety of a petty offense exception to the *O'Callahan* rule. The sole issue before the court was whether the military held jurisdiction to court-martial a marine for the offense of drunk and disorderly conduct.[105] The court noted that *O'Callahan* should be read "with an eye to the important constitutional protections which it sought to preserve," namely the benefits of indictment and trial by jury.[106] Emphasis was placed on the fact that the Supreme Court itself recognized no constitutional right to grand jury indictment or jury trial in cases of petty offense.[107] Under *O'Callahan* then, military trial of that type of case would be entirely proper.

The Armed Forces gain much from continued jurisdiction over petty offense cases. Courts-martial expeditiously handle petty charges leaving the uniformed defendant available for immediate further duty. The slower civil court procedures lead to undesirable delay. Holding *O'Callahan* inapplicable to cases of petty offense relieved what otherwise would have been a judicial hindrance to efficient military operations.

Many crimes committed against fellow servicemen likewise fall outside the bounds of *O'Callahan* applicability. The Court of Military Appeals first defined that genre of crime as service connected in *United States v. Rego*.[108]

Defendant Rego's court-martial conviction for larceny was affirmed. The victim of the crime was a fellow airman. The court relied on language of the *O'Callahan* majority which had recognized "assaults on and thefts from other soldiers" as "peculiarly military crimes." [109]

The *Rego* holding led the way for a broader rule

[93] *Id.* at 67.
[94] *Id.* at 67.
[95] *Id.* at 67.
[96] 18 U.S.C.M.A. 563 (1969).
[97] In violation of 21 U.S.C. § 176(a).
[98] In violation of U.C.M.J. art. 134, 10 U.S.C. § 934 (1968).
[99] United States v. Crapo, 18 U.S.C.M.A. 954 (1969). *See* notes 87–90 *supra*. and accompanying text.
[100] *See* United States v. Boyd, 18 U.S.C.M.A. 581 (1969).
[101] *See* United States v. Castro, 18 U.S.C.M.A. 598 (1969).
[102] *See* United States v. Rose, 19 U.S.C.M.A. 3 (1969).
[103] The exact limits upon the definition of a petty offense are not certain, though it is generally held that any crime carrying a maximum punishment of six months is a petty offense. *See* Duncan v. Louisiana, 391 U.S. 145 (1968); Cheff v. Schnackenberg, 384 U.S. 373 (1966).
[104] 19 U.S.C.M.A. 26 (1969).
[105] The maximum penalty for the offense is confinement at hard labor for six months and forfeiture of two-thirds pay per month for a like period. MANUAL FOR COURTS-MARTIAL, para. 127(c).
[106] United States v. Sharkey, 19 U.S.C.M.A. 26, 27 (1969).
[107] *See* Duncan v. Louisiana, 391 U.S. 145 (1968); District of Columbia v. Clawans, 300 U.S. 617 (1937); *Ex parte* Wilson, 114 U.S. 417 (1885).
[108] 19 U.S.C.M.A. 9 (1969).
[109] O'Callahan v. Parker, 395 U.S. 258, 270 n.14 (1969). In *Rego*, Judge Ferguson of the United States Court of Military Appeals dissented. He asserted that the offense in question was not service connected. He argued that service connection in such a case ought to depend on whether the victim, a serviceman, had been affected in the performance of his military duty.

of court-martial jurisdiction over cases involving a military defendant and a military victim.

> [W]here an offense cognizable under the Uniform Code of Military Justice is perpetrated against the person or property of another serviceman, regardless of the circumstances, the offense is cognizable by court-martial.[110]

Instances of abuse of military status also have signaled court-martial jurisdiction in the wake of *O'Callahan*. In particular, cases arose involving servicemen's breach of faith placed in them by businessmen in recognition of their military identity. *United States v. Peak*,[111] for example, upheld a court-martial conviction for wrongful appropriation of a motor vehicle.[112] The accused escaped from the post stockade and went to a used car lot in a neighboring community. He was dressed in fatigues and identified himself and his military unit to the salesman. He was permitted to take a car for a test drive, but never returned. The court recognized that

> such an abuse of a military status is likely to influence the extent of confidence by the public in members of the Armed Forces. We believe the impact of such abuse is direct and substantial enough to provide the requisite service connection for the Armed Forces to exercise jurisdiction over the offense.[113]

Court-martial action in response to a marine's forgery of a check while off base likewise received approval on appeal.[114] The accused used his military identification card in presenting the check. The court held that the soldier utilized military standing to facilitate commission of the crime. Service connection, therefore, was present.[115]

The defendant in *United States v. Fryman*[116] had registered in a hotel under a ficticious name wearing the uniform and insignia of a first lieutenant. He amassed a $203.13 bill, advised the management that he was on temporary duty with $600 in back pay due to him, and left with credit granted. A later conviction for wrongful and dishonorable failure to pay that debt[117] was affirmed. The court stated that "positive misuse of [military] status to secure privileges or recognition not accorded others cause[d] the Armed Forces to have a substantial interest in punishing the abuse." [118]

Establishment of the bounds of service connected crime involved not only demarcation of those factors which would bring a case within the standard, but also recognition of those that would force one without. The Court of Military Appeals has since *O'Callahan* specifically designated two criteria upon which court-martial jurisdiction may not be based.

The majority in *O'Callahan* had stated that crimes committed by officers were traditionally cognizable in military tribunals.[119] Nothing more was said. The Court of Military Appeals then moved to specifically reject any implication that the commissioned status of a defendant alone tolled service connection.[120]

The court also ruled that "the wearing of the [military] uniform at the time of arrest" alone

[110] United States v. Everson, 19 U.S.C.M.A. 70, 71 (1969). This case involved the off post offenses of assault with a dangerous weapon and careless discharge of a firearm under circumstances such as to endanger human life in violation of U.C.M.J. arts. 128 & 134, 10 U.S.C. §§ 928 & 934 (1968).

[111] 19 U.S.C.M.A. 19 (1969).

[112] In violation of U.C.M.J. art. 121, 10 U.S.C. § 921 (1968).

[113] United States v. Peak, 19 U.S.C.M.A. 20–21 (1969).

[114] *See* United States v. Frazier, 19 U.S.C.M.A. 40 (1969).

[115] Dissenting opinions by Judge Ferguson in both *Peak* and *Frazier* forwarded the view that discredit upon the Armed Forces was not in issue. "Reliance on one's status as a serviceman," he insisted, was not "an element of the forgery offenses." United States v. Frazier, 19 U.S.C.M.A. 40, 42 (1969). In another forgery case, the court examined five checks holding that one instance of forgery was service connected because the check in question was cashed on a military installation. The forgery of three others was service connected because the endorsements contained the accused's military address. The last forgery was held to be cognizable in a civilian court because neither the instrument nor other available evidence pointed to the accused's use of military standing in cashing the check. United States v. Hallahan, 19 U.S.C.M.A. 46 (1969).

[116] 19 U.S.C.M.A. 71 (1969).

[117] In violation of U.C.M.J. art. 134, 10 U.S.C. § 934 (1968).

[118] United States v. Fryman, 19 U.S.C.M.A. 71, 73 (1969). In finding service connection in cases such as *Fryman* the Court of Military Appeals appeared to overlook one key question—was the victim's reliance on the military status of the accused justifiable? Justification for reliance on military status would appear sound in cases where the accused was dressed in uniform or presented military identification. If, however, a serviceman dressed in civilian clothes entered an off post business establishment and represented himself as a military man, justification for reliance on the military status of the accused would seem weak.

[119] O'Callahan v. Parker, 395 U.S. 258, 270 n.14 (1969).

[120] United States v. Borys, 18 U.S.C.M.A. 547, 550–51 (1969). Chief Judge Quinn, who dissented in *Borys*, specifically rejected the implication that a crime by an officer would be service connected while the same crime committed by an enlisted man would not. The majority in *Borys* rejected the theory by implication—the opinion included no comment on the issue.

would not confer jurisdiction on the courts-martial.[121] There as before the military court responded to offer definition for the *O'Callahan* pronouncement on military jurisdiction. Its continuous effort at refinement of the term "service connection" precluded widespread confusion within the military judicial system as to the course of appropriate action in the *O'Callahan* era.

O'Callahan aroused more than confusion over the extent of court-martial jurisdiction. Doubt arose as well on the question whether courts could apply the decision retroactively. Once again the Court of Military Appeals stepped in to offer an interim view[122] with the matter set for final resolution by the Supreme Court within the next year.[123] The military court's decision forwarded at least one approach available to the Supreme Court in handling the issue.

Treatment of this matter arose in consideration of the appeal of an officer from a rape conviction.[124] Original proceedings in the case had become final in August 1968. His petition for reconsideration under *O'Callahan* was denied. The Court of Military Appeals held that it would "apply the decision [*O'Callahan*] only to those convictions that were not final before June 2, 1969, the date of the . . . decision." [125] The court acknowledged that it opposed retroactivity save in cases subject to direct review on the *O'Callahan* decision date.[126]

The military court assumed the approach of the 1965 *Linkletter v. Walker*[127] decision of the Supreme Court where it was asserted that "the constitution neither prohibits nor requires retrospective effect." [128] The military tribunal assumed that it would have to determine whether retroactive or prospective application was appropriate. As to retroactive application of the new *O'Callahan* standard for military jurisdiction, the court noted that the issue could only be resolved by weighing in balance

> [t]he extent of the reliance of law enforcement authorities on the old standards and the effect on the administration of justice of a retroactive application of the new standard.[129]

Decision against retroactivity came with the tribunal's analysis of those two factors.

Congress, the military, and even the Supreme Court had accepted or relied upon status as the jurisdictional test prior to *O'Callahan*.[130] Courts-martial had accepted cases through June of 1969 with a view to well established jurisdictional principles. The Supreme Court, in *DeStefano v. Woods*,[131] stated that a decision would not be applied retroactively if cases decided prior to assertion of new principles of law had been handled with good faith reliance upon past opinions of the Court.[132] It would be difficult to argue that disposition by the military of the type of case later affected by O'Callahan was in bad faith.

Decision against retroactive application of *O'Callahan* would seem even more necessary in light of the second factor—the effect such application would have upon the administration of military justice. Rehearing of cases tried by courts-martial under pre-*O'Callahan* principles of jurisdiction would bring the military judicial system to a standstill. As the Court of Military Appeals emphasized, the Armed Forces conducted approximately 74,000 courts-martial in 1968 alone.

> If only the smallest fraction of these courts-martial and those conducted in the other years since 1916 involved an *O'Callahan* issue, it is an understatement that thousands of courts-martial would still be subject to review.[133]

Nevertheless, the Supreme Court's approach to the retroactivity issue could well rest, as did *O'Callahan*, upon an analysis of the fairness of the military judicial system compared with civilian courts.[134] Should such an approach be taken, it is hoped that the examination of military courts will prove more objective than that undertaken in *O'Callahan*.

The *O'Callahan* decision shocked the Armed

[121] United States v. Armes, 19 U.S.C.M.A. 15, 16 (1969).

[122] *See* Mercer v. Dillon, 19 U.S.C.M.A. 264 (1970).

[123] On February 27, 1970 the Supreme Court granted certiorari to determine whether *O'Callahan v. Parker* should be applied retroactively. Relford v. Commandant, 397 U.S. 934 (1970).

[124] Mercer v. Dillon, 19 U.S.C.M.A. 264 (1970).

[125] *Id.* at 265.

[126] *Id.* at 265.

[127] 381 U.S. 618 (1965).

[128] *Id.* at 629. *See* Haddad, *Retroactivity Should be Rethought: A Call for the End of the Linkletter Doctrine*, 60 J. CRIM. L.C. & P.S. 417 (1969), for a critical analysis of *Linkletter*.

[129] Mercer v. Dillon, 19 U.S.C.M.A. 264, 266 (1970).

[130] *See* notes 52–58 *supra*. and accompanying text.

[131] 392 U.S. 631 (1968).

[132] *Id.* at 634.

[133] Mercer v. Dillon, 19 U.S.C.M.A. 264, 271 (1970). Judge Ferguson dissented in *Mercer*. He felt that the Court of Military Appeals should not rule on the retroactivity issue until the Supreme Court had acted on the matter. Further, he expressed basic opposition to the *Linkletter* approach to retroactivity particularly with jurisdictional rules in question. *Id.* at 271.

[134] *See* note 123 *supra*.

Forces. The military judicial system had operated for years with a workable jurisdictional standard established under the authority of Congress granted by the Constitution. The Supreme Court rejected that standard and offered a new interpretation of constitutional language heretofore termed "unambiguous." [135] The Court's justification for the move was not persuasive. Historical support for the *O'Callahan* holding drawn from the history of English and early American practice was not foolproof. Inferences raised by the Court that the present day court-martial system denied defendants fundamental justice were unfounded. If indeed limits are required upon the constitutional grant of power to Congress over the military in order to preserve other constitutional guarantees, careful consideration should be given to the legitimate needs of the military to preserve discipline. The *O'Callahan* decision did not do so.

Furthermore, the new jurisdictional standard of service connection was proclaimed in vague terms giving rise to widespread confusion. The Court of Military Appeals accepted the task of defining service connection and pursued it vigorously. For a period of six months beginning with *United States v. Borys*[136] thirty-five per cent of that tribunal's decisions dealt with interpretation of *O'Callahan* on military jurisdiction. That court has, with a view to the distinctive legal problems of the military, justifiably established liberal standards for defining the bounds of service connection.

It will be a substantially different Supreme Court that resolves subsequent questions arising out of *O'Callahan*.[137] Reexamination by the Court of *O'Callahan* issues may well lead to limitation of the opinion's ultimate effect on military jurisdiction.

[135] *See* note 60 *supra*. and accompanying text.

[136] 18 U.S.C.M.A. 545 (1969).

[137] It remains to be seen what course the Court will follow in treating *O'Callahan* issues now that Chief Justice Burger and Justice Blackman have replaced Chief Justice Warren and Justice Fortas.