Journal of Criminal Law and Criminology

Volume 61 | Issue 2 Article 6

1970

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THE JOURNAL OF CRIMINAL LAW, CRIMINOLOGY AND POLICE SCIENCE
Vol. 61, No. 2

Printed in U.S.A.

O'CALLAHAN V. PARKER, 395 U.S. 258 (1969): NEW LIMITATION ON COURT-MARTIAL JURISDICTION

O'Callahan, a United States Army Sergeant stationed in Hawaii, was arrested by civilian authorities in Honolulu in 1956. While out of uniform and off-post, he allegedly attempted to rape a 14 year old girl. Apprehended by a hotel security guard, he was turned over to city police. On disclosing his military association, he was released to military authorities.

O'Callahan was charged with attempted rape, housebreaking, and assault with the intent to rape, in violation of Articles 80, 130, and 134 of the Uniform Code of Military Justice.[1] After trial by court-martial and conviction on all counts, he was sentenced to ten years imprisonment at hard labor, forfeiture of all pay and allowances, and a dishonorable discharge. Following unsuccessful appeals to the Army Board of Review and the United States Court of Military Appeals[2], he petitioned for a writ of habeas corpus in the United States District Court, Middle District of Pennsylvania.[3] He contended, *inter alia*,[4] that the court-martial was without jurisdiction to try him for non-military offenses committed off post while on evening pass and in civilian clothes. The District Court denied relief[5] and the Third Circuit

[1] 10 U.S.C. § 880 (1950), provides in relevant part:
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 its 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.

Id. § 930, provides in relevant part:
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.

Id. § 934, provides in relevant part:
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 a 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.

[2] United States v. O'Callahan, 16 U.S.C.M.A. 568, 37 C.M.R. 188 (1967).

There are five steps in the review of a general court-martial. The first review is by the convening authority under the Uniform Code of Military Justice (hereinafter 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 reweigh 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 *inter alia* 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 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 has final appellate authority. But he, as any other appeal body, cannot increase the court-martial sentence. M. COMISKY AND L. APOTHAKER, CRIMINAL PROCEDURE IN THE UNITED STATES DISTRICT AND MILITARY COURTS, 172 ff (1963).

[3] The action was brought in the Middle District of Pennsylvania because at the time O'Callahan was being held at the U.S. Penitentiary, Lewisburg, Pa. Parker was warden there. *See* 28 U.S.C. § 2241 (federal habeas corpus statute).

[4] O'Callahan also argued: (1) that his confession was coerced (The army investigators allegedly told him that if he confessed, he would not be militarily charged or affected in any way; but they used the confession against him); (2) that depositions of the victim and certain other witnesses were improperly introduced into evidence; (3) that he was denied his right to trial by jury and his right to a unanimous guilty verdict under Article III and the Fifth Amendment to the United States Constitution. United States *ex rel.* O'Callahan v. Parker, 256 F. Supp. 679 (M.D. Pa. 1966).

[5] Apparently, O'Callahan unsuccessfully argued the case on the same grounds in a petition for habeas corpus filed in the United States District Court for Massachusetts. O'Callahan v. Chief U. S. Marshall and Department of Army, Misc. Civil. 66-8W (1966). This court refused to consider the second petition on the

Court of Appeals affirmed.[6] The Supreme Court, however, reversed on the ground that courts-martial of soldiers for crimes cognizable in a civilian court and not militarily related are beyond the intended scope of Article I, section 8, clause 14 of the United States Constitution.[7]

Clause 14 gives Congress the power to make rules for the governing of the land and naval forces and is a grant of authority for establishing military courts-martial to administer the rules.[8] The effect is to create a unique jurisdiction for military courts which is separate and independent from the civilian court system. Traditionally, the Supreme Court has reviewed only jurisdictional questions in connection with courts-martial.[9] In the case of *Hiatt v. Brown*, even though substantive unfairness was evident on the face of the record, the Court denied habeas corpus because the trial level court-martial had heard the objections and, after investigation, rejected them.[10] As a matter of dictum, the Court announced, however, that if first-level court-martial procedure proved grossly unfair, jurisdiction is spoiled with reference to that court. If it has no jurisdiction, then review is available through the federal courts after exhaustion of all existing remedies.[11]

In the absence of such prejudicial procedural error, jurisdictional questions are confined to those arising from interpretation of Clause 14. In the bounds of this narrow framework, the Supreme Court has exhibited considerable concern over the rights of persons subjected to military law. Because it has no power to conduct a direct review, the Court has not corrected violations of due process by ordering revised court-matrial procedures. Instead, it has acted on a case-by-case basis to limit military jurisdiction to the narrowest possible scope. In this respect, *O'Callahan* can be viewed as only part of a continuum of cases in which a growing disquietude with military procedure has resulted in the Court stripping from the military much of its jurisdiction. *O'Callahan* holds that a soldier who commits a crime while off duty, outside the confines of a military base, and out of uniform must be tried in a civilian court. The Court stated that military jurisdiction is confined to those cases involving crimes actually related to functioning of the military in some direct way.

The first indication of judicial dissatisfaction with military law surfaced in Mr. Justice Murphy's dissent in *Wade v. Hunter*.[12] There, the Court held

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basis of 28 U.S.C. § 2244 (1964) which reads in relevant part:

> No circuit or district judge shall be required to entertain an application for a writ of habeas corpus . . . if it appears that the legality of such detention has been determined by a judge or court of the United States. . . .

[6] United States *ex rel.* O'Callahan v. Parker, 390 F.2d 360, 364 (3rd Cir. 1968). The court affirmed on the basis of the similarity between this case and the one decided in Thompson v. Willingham, 318 F.2d 657 (3rd Cir. 1963), in which the court upheld a decision which ruled that the U.C.M.J. applied to all soldiers on active duty.

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

[8] Not all procedural protections deemed essential in civilian courts need apply. The Fifth Amendment inferentially exempts "cases arising in the land and naval forces, or in the militia in actual service in time of war or public danger," U. S. CONST, Fifth Amendment, from the right to trial by jury. 395 U. S. at 261. *See Ex parte* Quirin, 317 U. S. 1, 40 (1942).

[9] This includes whether the court was properly constituted, whether it had jurisdiction over the offense and the person convicted, and whether the sentence was authorized by law, Whelchel v. McDonald, 340 U. S. 122 (1950); *See Ex parte* Reed, 100 U.S. 13 (1879).

Habeas corpus is the proper method for attacking jurisdiction of a military tribunal in a federal court, *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866); and it is recognized by statute, *see* 28 U.S.C. § 2241. The Constitution, in fact, is held to have conferred no power to review courts-martial determinations except as it has been granted judicial power (through Congress) to grants writs of habeas corpus for the purpose of an inquiry into the cause of the restraint of liberty. *In re* Yamashita, 327 U.S. 1 (1946). A military tribunal may not be attacked directly, *i.e.* by certiorari, *Ex parte* Vallandigham 68 U.S. (1 Wall.) 243 (1863). The writ can, however, be used for attacking a district court's decision concerning the petition for a writ. *See* Burns v. Wilson, 346 U.S. 137 (1953).

Habeas corpus requires exhaustion of all other relevent procedures. This means that an accused soldier, for instance, must appeal to the camp commander, the Judge Advocate General of the Army, the Army Court of Military Review, and the United States Court of Military Appeals *before* he has any right to file a writ of habeas corpus. The ruling is directly analagous to administrative law exhaustion of remedies doctrine. *See* Noyd v. Bond, 395 U.S. 683 (1969); Gusik v. Schilder, 340 U.S. 128 (1950).

[10] 339 U.S. 103 (1950).

[11] It is beyond the scope of this note to inquire into proposed liberalization of the use of the writ of habeas corpus in military cases. This inquiry is strictly limited to the new jurisdictional test in *O'Callahan*. For a general discussion of recent procedural developments, see Katz and Nelson, *The Need for Clarification in Military Habeas Corpus*, 27 OHIO ST. L.J. 193 (1966).

[12] 336 U.S. 684, 692 (1949). Petitioner was charged with rape and assault with the intent to rape. He was convicted by a military court-martial and sentenced. The action for a writ of habeas corpus was denied by the district court, 72 F. Supp. 755 (M.D. Pa. 1947). The court of appeals reversed, 169 F.2d 973 (3rd Cir. 1948).

that the rule against double jeopardy[13] need not be complied with if military expediency[14] requires reconvening an already completed court-marital proceeding. Justices Murphy, Douglas, and Rutledge believed, contrary to the feelings of the majority, that military courts should not have a free hand in dealing with accused soldiers and that the Fifth Amendment cannot be circumscribed for the sake of military expediency.[15]

Advocating general review wherever the military courts did not fairly and conscientiously apply the standards of due process, Justices Douglas and Black dissented in *Burns v. Wilson*.[16] They condemned practices leading to coerced confessions and convictions based on violations of due process.[17] And to insure that military courts-martial followed all Supreme Court standards of judicial fairness, they called for review of all proceedings involving violations of due process.[18]

However, the majority in *Burns* expressed their confidence that military courts were qualified to review their own proceedings and rule fairly on accusations of unfairness arising from their rulings. They listed in detail reforms in the system which contributed to its fairness.[19] Because the court-martial had heard and ruled on the objections, the Court felt that there was no ground for review in a civilian court.[20]

Through Justice Black, a dissentor in *Burns*, the Court in *United States ex rel. Toth v. Quarles*,[21] revised the "hands off" attitude exhibited previously in *Wade* and *Burns* and began the process of restricting court-martial jurisdiction. The Court held that a discharged serviceman was not subject to a military court-martial for a crime committed while on active duty.[22] Both parties relied heavily upon historical arguments and upon Article I, section 8, clauses 12 and 14 of the Constitution;[23] but the case turned on a finding that courts-martial are substantially unfair when compared with Article III civilian courts. The Court said:

> And conceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, it still remains true that military tribunals have not been and probably never can be constituted in such a way that the

[13] Double jeopardy, a single sovereign, trying someone more than once for a single act, most often is alleged in the military context for crimes such as "conduct unbecoming a soldier," or "breach of military discipline." Such an accusation is usually made after a soldier has been convicted in some civilian court of a felony or relatively serious misdemeanor.

[14] The armed forces require, as recognized by the Supreme Court, the Constitution, and Congress, a certain amount of discipline beyond that demanded of civilians. The military must be a close-knit, authoritarian organization since the exigencies of battle call for the highest degree of cooperation among men. *See* note 45 *infra*.

[15] 336 U.S. at 694. The Fifth Amendment specifically excludes cases arising "in the land and naval Forces." This exclusion provides the basis for a constitutional argument that the military infrastructure has the general power to discipline its troops. The question becomes the implications of "in," and this is the issue to which the Court really addresses itself.

[16] 346 U.S. at 150. Petitioners were found guilty of murder and rape and sentenced to death. They exhausted their right to appeal in the military appeals system and then applied for habeas corpus on claims of substantive unfairness. The district court dismissed the application, 104 F Supp. 310 (D.D.C. 1952); the court of appeals affirmed, 202 F.2d 335 (D.C. Cir. 1952).

[17] 346 U.S. at 153.

[18] Justice Douglas said,

> If the military agency has fairly and conscientiously applied the standards of due process formulated by this court, I would agree that a rehash of the same facts by a federal court would not advance the cause of justice. But where the military reviewing agency has not done that, a court should entertain the petition for habeas corpus, *Id.* at 154.

[19] *Id.* at 141. Reforms listed are:

1) the right to prompt arraignment;
2) the right to counsel of one's own choosing;
3) the right to secure witnesses and prepare an adequate defense;
4) the right to appeal a decision through a hierarchy of military appeals boards;
5) the right to a trial free from command influence.

The reforms were part of the Uniform Code of Military Justice, which replaced the Articles of War in 1950 (Act of May 5, 1950, ch. 169, 64 Stat. 108).

[20] Professor Jaffe agrees with the dissent. He says:

> It is not unusual for special bodies to vindicate their own procedures, thus review (by the court-martial) without retrial (by the reviewing court) may not be a very effective protection. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 369 (1965).

Professor Jaffe is discussing *Burns v. Wilson* in this section. It is not uncommon to construe courts-martial to be administrative agencies by reasoning that they are an arm of the executive for the purpose of disciplining the armed forces. WINTHROP, MILITARY LAW AND PRECEDENTS 32 (1886). For a modern view of this argument, *see* Note *Military Law—The Constitution v. Congress*, 12 N.Y.L.F. 459 (1966).

[21] 350 U.S. 11 (1955). Five months after he was honorably discharged from the United States Air Force, petitioner was arrested by military authorities and charged with conspiracy to commit murder while on active duty. He was taken to Korea to stand trial before a court-martial under U.C.M.J. art. 3 (a), 10 U.S.C. § 803 (a). The court of appeals sustained the act, 215 F.2d 22 (D.C. Cir. 1954). The Supreme Court granted certiorari to pass on the jurisdictional question, 348 U.S. 809 (1954).

[22] 350 U.S. at 23.

[23] Brief for petitioner at 14, 23; Brief for respondent at 10; United States ex. rel. Toth v. Quarles, 350 U.S. 11 (1950).

Constitution has deemed essential to fair trials of civilians in federal courts.[24]

Because of this shortcoming, the Court reasoned that military jurisdiction was not appropriate for trying a discharged serviceman. Dissentor Justice Reed (joined by Justices Burton and Minton, members of the majority in *Burns*) argued that the court-martial was deeply rooted in history and that Congress did have authority to define jurisdiction under Article I, section 8, clause 14 of the Constitution. Moreover, he stated that the Uniform Code of Military Justice [25] was compiled in such a manner so as to "assure that the military justice of the unified services would be in accordance with present-day standards of fairness." [26]

In 1956, the Court temporarily halted the process of limiting court-martial jurisdiction. In *Reid v. Covert*[27] and *Kinsella v. Krueger*,[28] it refused to allow civilian dependents of American servicemen living in foreign military bases the right to civilian trials for capital offenses committed by them while outside the country. Justice Clark, who wrote the *Burns* majority opinion, overlooked procedural miscarriages, going no further than to say that jurisdiction can be exercised on dependents overseas under Article I, section 8, clause 14. Specifically, he relied on *In re Ross*[29] for the proposition that constitutional protections apply only to persons actually in the United States or there for trial.

Early in the next term, the Court reheard *Reid* and *Kinsella* and reversed the stand it had taken previously.[30] In the second *Reid* case, the Court again criticized the narrow scope of military procedure and its failure to provide civilian type protections.[31] It characterized the Uniform Code of Military Justice as "harsh law . . . frequently cast in very sweeping and vague terms. . . ."[32] It also virtually overruled *In re Ross* in the process.[33] Justice Harlan, who changed his previous stand to make the reversal possible, stated that capital cases require especially senstive standards for procedural fairness which can only inhere in a civilian court where the judge and the trier of fact are not responsible to the convening authority.[34]

Despite these frontal attacks on military procedure, the Court did not forbid those procedures which it found repugnant, as it probably would have done with the procedures of some lower federal or state court.[35] Because of the traditional prohibition against reviewing court-martial decisions and procedure, the Court here, as in *Toth*, reacted by limiting jurisdiction of the military court sufficient to exclude the petitioner.

Later in the same term, Justice Clark reversed his previously unyielding stand and wrote the opinion which extended the jurisdiction of an Article III court to civilian dependents living over-

[24] 350 U.S. at 17. Specific deficiencies listed by the majority were:
a) military courts emphasize retribution, not justice;
b) there is no tenure for those performing judicial functions in the army, they can be removed at will;
c) judicial officers are appointed by military commanders;
d) salaries of the judges are not protected as in civilian judiciary;
e) trial by jury is vastly different (and more fair) than is trial by military tribunal.

[25] Enacted May 5, 1950.

[26] 350 U.S. at 26. Note the clear difference in points of view as to the substantive fairness of the U.C.M.J.

[27] 351 U.S. 487 (1956). The dependent wife of an Air Force Sergeant was tried and convicted by a military court-martial in England for the murder of her husband there.

[28] 351 U.S. 470 (1956). Pursuant to U.C.M.J. art. 2(11), 10 U.S.C. § 802(11), a wife of an army officer was convicted of her husband's death.
Article 2(11) reads in relevant part:
The following persons are subject to this chapter . . .(11) Subject to the provision of any treaty or agreement . . . all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States. . . . *Id.*
Jurisdiction is granted by foreign countries through Status of Forces Agreements, *see* note 92 *infra*. Here it reads in relevant part:
. . . the United States Service courts and authorities shall have the right to exercise within Japan exclusive jurisdiction over all offenses which may be committed in Japan by members of the United States' armed forces, the civilian component, and their dependents. . . . 3 TIA 3353 (Part 3, 1952).

[29] 140 U.S. 453 (1891).

[30] 354 U.S. 1 (1957). Justice Frankfurter suggested rehearing.

[31] *Id.* at 36-40.

[32] *Id.* at 38. The Court also stated that military law ". . . emphasizes the iron hand of discipline more than it does the even scales of justice. . . ." *Id.* at 38.

[33] The Court says:
The *Ross* case is one of those cases that cannot be understood except in its peculiar setting; even then it seems highly unlikely that a similar result would be reached today. *Id.* at 10.

[34] *Id.* at 77. Justices Clark and Burton dissent holding their previous position that the grant in Article I was sufficiently broad to allow Congress to include civilian dependents in military jurisdiction.

[35] *See e.g.* Gilbert v. California, 388 U.S. 263 (1967) (error in admission of evidence of a lineup); Klopfer v. North Carolina, 386 U.S. 213 (1965) (right to speedy, public trial).

seas and charged with non-capital crimes.[36] His changed position was due to the persuasiveness of the *Reid* opinion and his own misgivings about permitting the military to exercise unreviewable jurisdictional discretion over civilian defendants merely by lowering the offense to some non-capital charge. This, he said, would operate to strip the accused of constitutional protections.[37] Justice Frankfurter dissented, contending that military courts were competent to deal with all cases other than those involving the death penalty. As to capital offenses, Frankfurter agreed[38] that a court more responsive to the subtleties of criminal procedure is necessary.

In two subsequent cases, the Court further limited court-martial jurisdiction by removing the power to try civilian employees of the armed services working on United States military bases overseas. The prohibition extended in one case to capital offenses[39] and in the other to non-capital crimes.[40] In so doing, the Court refused to accept specific arguments that courts-martial proceedings are fair;[41] and it prepared for *O'Callahan* by requiring that military jurisdiction must be limited to the least power adequate to promote military discipline.[42]

O'Callahan is the latest case in this group and again the Court makes clear its dissatisfaction with the military system by saying that "courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law."[43] As before, the Court responds by excluding petitioner from military jurisdiction.

Theoretically, the Court could be criticized for its methodology in dealing with the problems in military law. Arguably the most thorough and equitable way of approaching the problem would be for the Court to disregard the ban on direct review of military procedure and eliminate each procedural shortcoming as it is presented rather than collaterally narrowing the breadth of military jurisdiction.

However, the Court's approach is more responsive to the problem than appears on first impression. Article I, section 8, clause 14 does provide Congress with the exclusive power to make rules relating to the land and naval forces. Coupling Clause 14 with the Necessary and Proper Clause,[44] the retributive nature of the military legal system is tolerable insofar as it is necessary for the efficient disciplining of troops in the military establishment.[45] The Court, then, has recognized this need by refusing to reform a system required for efficient military operation. When it recognizes that the system has clear procedural shortcomings, it strips from the military court-martial all but militarily essential jurisdictional powers. Starting with *Toth* and moving to *O'Callahan*, the Court has taken an increasingly restrictive view of the quantity of jurisdiction essential for military operation.[46]

The test is not one of pure military expediency, however. Before coming to that question, the Court will make preliminary inquiries. In *Reid v. Covert*, for example, the Court never reached the

[36] Kinsella v. U.S. *ex Rel.* Singleton, 361 U.S. 234 (1960). The wife of a serviceman abroad was convicted of unpremeditated murder in connection with the death of her child. She filed a writ of habeas corpus and was released by the district court. The warden of the federal penitentiary brought the appeal.

[37] *Id.* at 244.

[38] *See* 354 U.S. at 41–64.

[39] Grisham v. Hagan, 361 U.S. 278 (1960).

[40] McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960).

[41] Brief for respondent at 15, McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960).

[42] 361 U.S. at 280.

[43] 395 U.S. at 265.

[44] U.S. CONST. art. I, § 8, cl. 18.

[45] *See* U.S. *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955): Court-martial jurisdiction sprang from the belief that within the military ranks there is a need for a prompt, ready-at-hand means of compelling obedience and order. *Id.* at 22.

[The exigencies of military discipline require the existence of a special system of military courts in which not all of the specific procedural protections deemed essential to Art. III trials need apply. 395 U.S. at 261.

The purpose of the military establishment is the effective waging of battle at the front lines. When the enemy is in open confrontation, insubordination, individuality, or personal preference could needlessly endanger the entire unit as well as jeopardize the mission of a unit. Soldiers must be trained to act as a single group if campaigns are to be successful.

Military discipline is also necessary for other reasons. With a large number of persons eating, sleeping, working, and playing together, the absence of tight order could result in frequent fights, destruction, thefts, and desertions.

This, in turn, would cause the moral of the troops to be seriously impaired. Not only would they lack security from personal and physical attacks, but there would be a noticeable lack of group feeling, affecting quality of work, stamina in battle, and personal interdependence.

[46] Turning military tribunals into Article III courts complete with all civilian safeguards is not the answer to the problem. Military exigencies require that there be an efficient and speedy method of handling military discipline. *See* note 45 *supra*.

Necessary and Proper Clause argument. It held that Article I, section 8, clause 14 did not apply to the defendants as a matter of jurisdiction because their civilian *status* excluded them from the "land and naval forces."[47] Moreover, the defendants in *Toth v. Quarles* avoided military jurisdiction because of their non-military status. The relationship between good order and discipline and the individual crime was never discussed. O'Callahan, though, could not meet the status test; and as a consequence, the Court's ruling was based on the failure to establish the requisite military necessity.[48]

This approach was not new. As early as the second *Reid* case, the Court had questioned whether jurisdiction was "necessary and proper." [49] In addition, Justice Harlan in his dissent in *Kinsella v. United States ex rel. Singleton* denounced the majority's reliance on status as the only test. He said that the words "land and naval forces" do not set a strict limitation as to inclusion or exclusion.[50] Justice Harlan further decided that in order for courts-martial to exercise their right to adjudicate cases involving the military, the relation between military discipline and the soldier defendant must be so close that

> in the light of all the factors involved, [Congress] appropriately deems it "necessary" that the military be given jurisdiction to deal with offenses committed by such persons.[51]

The Court's holding is also supported by a comparison of Article I, section 8, clause 14 with other specific grants of power to Congress in section 8. There is a difference in emphasis. For instance, Clause 10 authorizes Congress to "*define* and *punish* Piracies and Felonies committed on the high seas. . . . .[52] Clause 4 gives Congress power to establish bankruptcy *laws;*[53] and Clause 6 grants the privilege to *define and punish* counterfeiting of United States currency.[54] But Clause 14 provides not for punishment of military personnel or for defining of laws to govern them, but for the making of *rules* for the specific purpose of governing and regulating land and naval forces. The purport of this clause in this light is to grant a very limited criminal jurisdiction—an authorization to promulgate rules and regulations governing only that conduct which has some special relation to the armed forces.[55]

What *O'Callahan* has decided is that because there are inherent injustices in the military court-martial system, trial in civilian court is preferable whenever possible. In the opinion, Justice Douglas points specifically to several glaring injustices: the presence of command influence; the absence of impartial judiciary, jury trial, and grand jury indictment; the emphasis on retribution instead of justice and rehabilitation; and the difference in procedural and evidentiary rules.[56] Although he criticizes the military for these short-comings, he also admits that the system is needed for the narrow purpose of maintaining discipline.

Because of its broad scope and hazy language, the case generates new problems which are not handled in the opinion.[57] Justice Harlan in his

[47] 354 U.S. at 21. The Court later said:
> We have no difficulty in saying that such persons do not loose their civilian status and their right to a civilian trial because the government helps them live as members of a soldier's family. *Id.* at 23.

[48] 395 U.S. at 274.

[49] 354 U.S. at 20.

[50] 361 U.S. at 253–5.

[51] *Id.* at 257.

[52] U.S. CONST., art. I, § 8, cl. 10 (emphasis added).

[53] *Id.* cl. 4, which reads in relevant part: "*establish* . . . uniform laws on the subject of Bankruptcies;" (emphasis added).

[54] *Id.* cl. 6, which reads in relevant part: "To provide for the *Punishment* of counterfeiting current Coins of the United States:" (emphasis added).

[55] *Id.* cl. 14, which reads in relevant part, "to make Rules for the Government and Regulation of the land and naval Forces:" (emphasis in text added).

The military might successfully argue that within certain limits, strict military laws could have substantial relation to the proper government and regulation of the armed forces, and, therefore, fall within the scope of Clause 14. Justice Clark would take this view. He says that the

> [P]ower to make "Rules for the Government and Regulation of the land and naval Forces" bears no limitation as to offenses. The power there granted includes not only the creation of offenses but the fixing of the punishment therefore. 361 U.S. at 246.

But so long as a crime has no direct relation to the maintenance of good order and discipline, nor any deterrent effect within the military itself, the inclusion of a broad spectrum of crimes may serve to deprive a person of his rights as a citizen merely because he was "in" the army. Duke and Vogel, *The Constitution and the Standing Army: Another Problem of Court-martial Jurisdiction*, 13 VAND. L. REV. 435, 457–58 (1960).

[56] 395 U.S. at 264.

[57] Douglas also relies unnecessarily on historical analysis—that the Framers' intent was to severely limit Congress' ability to add new categories to court-martial jurisdiction. 395 U.S. at 268–72. History should not, however, be controlling, much less the sole guide to constitutional interpretation. See Home Building and Loan Ass'n v. Blaiselell, 290 U.S. 398, 443 (1933).

Other criticism could be levied against Douglas'

dissent recognizes this shortcoming.[58] He complains that the Court does not explain the scope of the phrase "service-connected crimes," but merely glosses over a comprehensive definition in reaching its conclusion.[59] The present state of confusion in military courts justifies his position.

Two days after the *O'Callahan* decision, the Judge Advocate General of the Army issued an order commanding that his subordinates follow a very narrow reading of the *O'Callahan* opinion.[60] He urged that waiver of jurisdiction to civilian authorities over servicemen's offenses be held to a minimum. He further suggested that the test for "service connection" be any clear relation to military effectiveness or in the alternative any identification with the military organization, i.e. uniform, car bumper sticker, military vehicle, and so forth. The Judge Advocate decided that the decision applied only within the United States and then only to cases directly similar to *O'Callahan*.[61]

The three-man United States Court of Military Appeals, while not applying the Judge Advocate General's test, could not agree on the meaning of *O'Callahan*. In *United States v. Borys*,[62] the majority nullified the finding of a court-martial of a soldier who had committed sex crimes off-base. They relied entirely on *O'Callahan*. But Chief Judge Quinn, dissenting, found *O'Callahan* to be such a radical departure that he would greatly limit its application.[63]

He interprets the decision as holding that both civilians and soldiers are to be treated equally

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opinion. He states that military courts are unfair because the judge does not have life tenure and guaranteed salary. *Id.* at 264. In doing so, however, he fails to point out that the same could be said of many state courts. Similarly, he holds that civilian courts are superior because the right to grand jury indictment is a foundation stone of the system. *Id.* at 262. He does not mention that the Constitution does not grant the right to a grand jury indictment "arising in the land or naval forces." U.S. CONST. amend. V. Therefore, it is far from a fundamental right.

These criticisms are undue. Justice Douglas is not claiming that all civilian courts are without blemish by comparison but only that military courts lack important safeguards.

Arguably, also, Douglas prejudicially applied a balancing test in *O'Callahan*. The decision could be construed as a balancing between military necessity and personal rights. If this is so, then Douglas is unfair to the military side. He carefully lists all the considerations in favor of extending personal rights but superficially passes over military necessity arguments. But this case does not apply an orthodox balancing approach at all. Douglas attempts not to do that but only to very strictly limit military jurisdiction.

Finally, Justice Douglas fails to state whether the decision is retroactive to previously committed service unrelated crimes. This is a substantial problem since an estimated 450,000 courts-martial involving 4000 prisioners may be invalid under *O'Callahan*. There is a strong argument to be made in favor of applying the decision retroactively since the *O'Callahan* court rules that the military courts have no jurisdiction over non-service related crimes. If they have no jurisdiction, then as a matter of law, the proceedings held under them would be invalid. However, the effect of accepting this argument would be to put the civilian courts to a substantial burden in retrying these cases. *See* Nelson and Westbrook, *Court-Martial Jurisdiction Over Servicemen for "Civilian" Offenses: An Analysis of O'Callahan v. Parker*, 54 MINN. L. REV. 1, 39–46 (1969); Comment Note—*Prospective or Retroactive Operation Of Overruling Decision*, 10 A.L.R. 3d 1371.

[58] *Id.* at 274 and forward.

[59] The majority listed a group of conditions for testing service connection, but the list was not by any means exhaustive. These are:

a) being properly off duty;
b) no connection at all between military duties and the crimes in question;
c) crime not committed on a military post or enclave, nor was any other military person affected;
d) the location of the offense is not an armed camp under military control;
e) there was no war and the civil courts were open;
f) the offense occurred on U.S. soil; and
g) there was no flaunting of military authority and no endangering of security or property of a military post. Id. at 273.

[60] JAJG 1969/8399, June 4, 1969, 5 CRIM. L. RPTR. 2229–30. Specifically, the court-martial can exert jurisdiction, according to this release if,

a) the offense is committed against a military person or government property,
b) the offense is committed on base,
c) the offender is on duty,
d) the offense is purely military,
e) the offense is outside the United States, and
f) there is a factual relation to military effectiveness.

It is not unreasonable to infer that the Judge Advocate General is construing the holding very narrowly to create more habeas corpus actions in federal court. This in turn would result in a more precise definition of the holding. *See e.g.*, DA 91 375, Communication from W. J. Chilcoat, COL, JAGC, Chief, Military Justice Division, OTJAG to all army commands, *passim* but *esp.* page 4.

The Judge Advocate General does make it clear that the jurisdictional question should be carefully analysed before proceeding with trial to avoid de novo post-trial inquiry. He places responsibility for this job with the military judge. Department of the Army Pamphlet 27-69-15 page 17, Headquarters, Department of the Army.

[61] *See* note 60 *supra*.

[62] 18 U.S.C.M.A. 547, 40 C.M.R. 257 (1969). Petitioner roamed through Georgia and South Carolina committing rape, robbery, sodomy, and attempts to do each on female victims. The accused wore civilian clothing, he was off-duty, and he drove a private vehicle. The only identifying characteristic was his auto bumper sticker. He was first tried and acquitted by civilian authorities and then subjected to a general court martial.

[63] *Id.* at 550.

when they commit the same criminal act.[64] The question in the case according to Quinn is framed to provide that the criminal act must be "cognizable in civilian court",[65] arguing that the Supreme Court is likening the situation of a civilian charged with a crime to the plight of an accused soldier. Then he infers, that if a crime is not recognized in civilian court but is included in the Uniform Code of Military Justice, *ipso facto*, the offense gains military significance. Since no civilian is faced with such hypothetical charges in a particular state, no equal treatment is necessary.[66] Therefore, Congress intended exclusive military jurisdiction whenever it enacted statutes peculiar to the Uniform Code alone.

In summary, Chief Judge Quinn creates a bifurcated test by adding the "cognizable in civilian court" requirement to the "service connected" requisite. The operation of this bifurcated approach raises a presumption in favor of military trials by making it necessary for the accused to show that a crime is cognizable in civilian court.

Furthermore, the only civilian court qualified to hear the case under the reading of *O'Callahan* is a federal district court.[67] *O'Callahan* says nothing which would deny Congress the right to prescribe a criminal code for persons in the military service; it only speaks to the proper forum for trial. The Supremacy Clause of the Constitution[68] precludes state law from preempting a similar federal law. And from this Quinn reasons that since federal courts have concurrent original jurisdiction in all cases arising under federal law, the federal district court is the court of first impression in a case involving a soldier committing a non-military crime.[69]

Since it was unnecessary for the Supreme Court to reach the questions of "court" and "body of law" because *O'Callahan* occurred in the territory of Hawaii, Quinn's approach is not merited. The only courts in the area were federal courts, and the only law in question was federal law.[70] As a consequence, Justice Douglas never needed to consider the conflict of forum or laws problems.

The majority of the United States Court of Military Appeals has articulated no one test in the light of the bifurcated approach of the dissent in *Borys*.[71] In *United States v. Prather*,[72] they listed three alternative criteria for establishing the required connection to the army—breach of military security, a flaunting of military authority, or an effect on military property. The existence of any one factor would prove sufficient to place an alleged criminal properly in military court. This test was derived from a portion of the *O'Callahan* opinion.[73] The identity of the victim in *United*

[64] *Id.*

[65] *Id.* citing 395 U.S. at 261. The only time this phrase is mentioned by the Supreme Court is in the early pages of *O'Callahan*. The question is framed so that it is included.

[66] 18 U.S.C.M.A. at 551.

[67] This effectively eliminates trial in civilian type court with civilian type trial for American soldiers stationed abroad.

[68] U.S. CONST. art. VI, which reads in relevant part:
> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; ... shall be the supreme Law of the Land; ....

To make this argument, Quinn assumes his own interpretation of "cognizable in a civilian court."

[69] 18 U.S.C. § 3231 (1948), which provides in relevant part:
> The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

[70] 18 U.S.C.M.A. at 552.

[71] Besides those mentioned in the text, the following decisions have been made by the U.S.C.M.A. since *O'Callahan:* United States v. Beeker, 18 U.S.C.M.A. 563, 40 C.M.R. 275 (1969), possession of marijuana off post considered a crime cognizable under the U.C.M.J. because of the effect of smoking pot on health, morals, and fitness (Chief Judge Quinn writing for the majority); United States v. Burkhart (U.S.A.F. Bd. Rev.) 5 CRIM. L. RPTR. 2421, July 27, 1969, bigamy is "service connected" because of many benefits accorded serviceman's dependents by armed services; United States v. Reid (U.S. Navy Bd. Rev.), 5 CRIM. L. RPTR. 2329, June 11, 1969, using LSD off base service connected; United States v. Chandler, 18 U.S.C.M.A. 593, 40 C.M.R. 305 (1969), burglary off base unrelated to military; United States v. Riehle, 18 U.S.C.M.A. 603, 40 C.M.R. 315 (1969), bringing stolen goods on base does not furnish service connection; United States v. Paxio, 18 U.S.C.M.A. 608, 40 C.M.R. 320 (1969), on base robbery of civilian service connected; United States v. Crapo, 18 U.S.C.M.A. 594, 40 C.M.R. 306 (1969), soldier committing violent assault on base and then robbery off base as a result of the assault is triable in a court-martial; United States v. Williams, 18 U.S.C.M.A. 605, 40 C.M.R. 317 (1969), passing bad checks at post exchange is service connected; United States v. Henderson, 18 U.S.C.M.A. 601, 40 C.M.R. 313 (1969), off base carnal knowledge of serviceman's daughter is not service connected; United States v. Smith, 18 U.S.C.M.A. 609, 40 C.M.R. 321 (1969), on base carnal knowledge in government housing is service connected ("The need to maintain security of a military post is sufficient. ..."); United States v. Shockley, 18 U.S.C.M.A. 610, 40 C.M.R. 322 (1969), on base sodomy in government housing is service connected, off-base is not; and United States v. Harris, 18 U.S.C.M.A. 596, 40 C.M.R. 308 (1969), espionage is service connected.

[72] 18 U.S.C.M.A. 560, 40 C.M.R. 308 (1969).

[73] The Court stated:
> The offenses did not involve any question of the flounting of military authority, the security of a military post, or the integrity of military property. 395 U.S. at 274.

States v. Guntner[74] was the most important consideration. If the person was a civilian, the military could not reach the crime. If however, the victim was a member of the armed forces, then there was sufficient relation to military expediency to justify a court-martial. The Court reasoned that there was overwhelming military necessity because the person victimized loses at least some of his effectiveness as a soldier. In another case, *United States v. Anclin*,[75] the majority left the determination of "service connection" to the trier of fact.

The majority of the United States Court of Military Appeals specifically disclaims the bifurcated approach[76]—that if a general military regulation exists, the case may be tried in a military court, regardless of its "service connection," unless there is a special federal law like it. They say that if this were true, the armed services could easily circumvent *O'Callahan* and its limited definition of Congress' power under Article I, section 8, clause 14,[77] especially considering that the federal criminal code is at best incomplete. It would be necessary only to alter the definition of a crime slightly so that it would be like no crime "cognizable in civilian court."

Although it is true that the decision has led to several inconsistent interpretations it is also probable that the decision cannot fairly be emasculated by the use of narrow judicial interpretation, as Chief Judge Quinn and the Army Judge Advocate General would prefer. The Court in *O'Callahan* reiterates its conviction, expressed in *Toth*, that

> [f]ree countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service. . . .
>
> Determining the scope of the constitutional powers of Congress to authorize trial by court-martial presents another instance calling for limitation *to the least possible power adequate to the end proposed.*[78]

This least possible power doctrine is clearly inconsistent with the bifurcated test. Indeed, the precedent relied upon by the Court[79] included all crimes which had a direct impact on military discipline. For example, shooting a civilian with the intent to kill is purely a civil crime, but shooting a prisoner while standing guard in a military stockade is a crime and a breach of military discipline.[80] The Court believes that the *Toth* approach will best effect its purpose of providing every member of the armed services the benefits of an indictment by a grand jury and a trial by a jury of his peers whenever possible.[81]

An interpretation of the Court's language and reasoning points to the conclusion that the Justices intended to delimit Congressional powers, not that they wished to decide a conflict of laws question between military and civilian courts. Notwithstanding this, the bifurcated approach leads to the assumption that the determinations of Congress are sacrosanct.[82] This is erroneous since the Supreme Court believes that the power of Congress to make rules for the armed forces under Article I, Section 8, clause 14 is strictly limited by a soldier's right to a jury trial. A narrow interpretation such as the bifurcated approach could scarcely stand for such a proposition.

Under these circumstances, the meaning of the phrase "cognizable in civilian court" is clear. The Supreme Court is not trying to limit its decision but is merely making an exception for the type of crime which has a purely military purpose. For instance, the crime "conduct unbecoming a soldier" is peculiar to the military system. This is not to say that other crimes become militarily related upon the showing that technically they are different from the same crime in civilian court. Statutory rape, for example, is not a military crime merely because the military sets a lower age cut-off than any state. This crime is of the type cognizable in a civilian court; consequently, it cannot be tried by the military, absent a showing of service connection.

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[74] (U.S. Army Bd. of Rev.), 5 CRIM. L. RPTR. 2401, July 11, 1969.

[75] 18 U.S.C.M.A. 520, 40 C.M.R. 232 (1969). The result of the remand is not available.

[76] United States v. Castro, 18 U.S.C.M.A. 598, 40 C.M.R. 310 (1969).

[77] *Id.* 18 U.S.C.M.A. at 600.

[78] 395 U.S. at 265 citing 350 U.S. at 22–23.

[79] The Court found that in pre-revolution England and America courts-martial were always viewed with suspicion. *Id.* at 268. As per tradition, the British did not try soldiers for ordinary crimes committed in the British Isles. *Id.* at 269. And the Continental Congress was viewed as following this tradition. *Id.* at 271.

[80] 395 U.S. at 271 n. 16 citing *Ex parte* Mason, 105 U.S. 696, 698 (1881). Historical arguments may not be relevant in deciding current questions; but what the Court thought history said is germane to interpreting the Court's opinion.

[81] *Id.* at 273.

[82] Judge Quinn says,

> On the authority of this language alone (Art. I, § 8, cl. 14 and 17) it would appear that the right of Congress to define criminal conduct for the Government of the armed forces is as broad as its power to legislate for the territories, which, I pointed out earlier, is as extensive as the power of a state to define a criminal code. 18 U.S.C.M.A. at 555.

The test most consistent with the intent of the Court is the one articulated by the majority of the United States Court of Military Appeals, which calls for determination as to a breach of military security, a flaunting of military authority, or an effect on military property[83] or military personnel.[84] The majority's experiment in remanding to the trier of fact[85] for a determination as to "service connection" [86] is analogous to allowing the jury to apply the "reasonable man" test to negligence cases. Because "service connection" is a mixed question of law and fact, this procedure would substantially avoid the problem of interpreting the phrase. But possibilities of abuse of the holding in *O'Callahan* are great if the determination is placed in the hands of the body the Court found "singularly inept"—the first round court-martial.[87]

Assuming that *O'Callahan's* impact is to limit Congress' military jurisdiction, courts must apply present state and local rules of criminal procedure to select the appropriate trial court. The soldier is to be tried for service unrelated crimes as if he were a civilian under civilian laws and rules of criminal procedure.[88] The bifurcated test does not lead to this result because the doctrine fails to put the decision in its broader perspective as a limitation on Congressional power to grant military jurisdiction.

[83] United States v. Prather, *supra* note 73 at 561.
[84] Guntner, 5 CRIM. L. RPTR. 2401.
[85] The first level military court-martial.
[86] United States v. Anclin, *supra* note 76 at 520.
[87] 395 U.S. at 265.
[88] If a soldier is wrongly brought for trial in military court, however, he cannot remove to a civilian court until after he has exhausted his remedies in military courts. This means appeal through to the United States Court of Military Appeals. *See* note 2 *supra*.
The military wishes to avoid de novo hearings in civilian court and as a consequence requires careful determination of jurisdiction before proceeding with a court-martial, *see* note 60 *supra*.
Moreover, since the United States Court of Military Appeals declared that it has power to issue extraordinary writs under the All Writs Act, 28 U.S.C. 1651, United States v. Frischholz, 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966), accused can petition directly to that court for a writ of habeas corpus if he has a jurisdictional issue (Noyd v. Bond, 395 U.S. 683 (1969), approved this assumption of power).
A recent district court opinion challenged the doctrine of exhaustion of remedies on the ground that a constitutional question should go directly to the federal courts for disposition, Moylan v. Laird, 6 CRIM. L. RPTR. 2138 (D.C. R.I. October 20, 1969). But that case is inconsistent with *Noyd;* and moreover, there is a strong argument in favor of allowing the military system a chance to sift through their own cases before federal relief can be sought.

Even if the United States Court of Military Appeals' test is adequate under the decision, there are still unresolved jurisdictional questions. The Court is unclear as to whether the decision applies outside the jurisdictional boundaries of the United States in the first place. It is true that in its listing of conditions at the end of the opinion, the Court says:

> [W]e 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.[89]

But this statement, taken as a whole, speaks more to the problem encountered by advancing armies in occupied foreign territory than it does to offenses committed during peacetime by American soldiers located in foreign nations. Moreover, applying by analogy the Court's prior decision affecting dependents and government employees outside the United States,[90] the Court means to give all servicemen the same rights as afforded servicemen inside the United States. The implication of the decision is that soldiers committing civilian crimes must be treated as civilians. Civilians in foreign nations are granted civilian trials; and therefore, soldiers outside the United States committing non-military crimes must receive civilian trials as well. The Court does not intend that a person, merely because he is outside of the United States, becomes automatically subject to a different standard. It demonstrated this in cases prior to *O'Callahan* by deciding that each citizen under United States jurisdiction must receive the same protections everywhere as he does in the United States.[91]

[89] 395 U.S. at 273–4.
[90] *See* text *supra*.
[91] *See* note 35 *supra*. *In re* Ross was overruled.
There is probative circumstantial evidence for the proposition that the Judge Advocate General of the United States believed that *O'Callahan* had extra-territorial application. He advised the military judge "as a matter of prudence" to make a full inquiry into the jurisdictional facts of a case even when a court-martial is to be conducted for a crime committed outside the United States. Department of the Army Pamphlet 27-69-15, page 17.
The United States Court of Military Appeals settled the question for the military in United States v. Neaton, 6 CRIM. L. RPTR. 2156, November 14, 1969. The court held that courts-martial have jurisdiction over all crimes committed by U.S. soldiers outside the United States. They argued that it would be better for a soldier to be subjected to a court-martial than a trial in foreign court or no trial at all.
The court's decision is impliedly based on their

If this is true, then, a court or system must exist or develop to fill the "jurisdictional gap" created by restricting military jurisdiction.[92] Possibilities are advance waiver of procedural rights, host country prosecution, domestic trial in federal district court, overseas trials by itinerate civil courts, and extraterritorial trial by special courts convened.[93] Advance waiver may have "duress" and "knowledge" problems from a constitutional standpoint. Foreign courts dislike assuming the job of policing American citizens; and foreign law, procedure, and penal systems are often substantially different and sometimes significantly inferior by American standards.[94] Trial by itinerate or special courts face potential undue influence in the military milieu, problems in procuring adequate unbiased jurors, and potential conflicts from recalcitrant host powers. Domestic trials are difficult to arrange because they involve long distance transportation of witnesses, prosecution personnel, and defense counsel.[95] For felonies, however, this procedure seems necessary to realize the intent of *O'Callahan*. For misdemeanors, where penalties are minimal, United States Commissioners should be allowed to act for district courts.[96]

No matter what extension of the United States judiciary receives jurisdiction, the "gap" cannot be completely filled until some criminal code is made applicable to the soldier outside the country committing a non-military crime.[97] Whereas the Uniform Code of Military Justice is a body of federal law, there is no generally applicable civilian federal code.[98] Congress must take action to either extend the federal criminal code to military bases located in foreign nations or allow federal district courts to enforce the Uniform Code of Military Justice.[99] Either alternative is consistent with the *O'Callahan* opinion.

The "new test" for jurisdiction as articulated in *O'Callahan* consists of making a determination as to the degree of connection present between the crime and efficient military operations. Unfortunately, this test is more easily characterized by the problems it creates than the rights it grants.

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previous decision that any crime on a military base is ipso facto service-connected, United States v. Smith, 18 U.S.C.M.A. 609, 40 C.M.R. 321 (1969), and on the premise that a foreign court will automatically assume jurisdiction in all off-base crimes. The first assumption still has not been decided by the Supreme Court. The second assumption is probably not true, *see* text *supra*.

[92] This dilemna only exists for those crimes which are of no real concern to foreign governments. If an American commits espionage, for instance, a foreign power will naturally assume jurisdiction over the individual.

Such matters are governed by Article VII of the Status of Forces Agreements. Under these treaties, the United States reserves exclusive jurisdiction over persons, and offenses they commit, under military law. For all other offenses, i.e. those committed under the law of the host country, the country has jurisdiction. A problem arises when the offense would be punishable under both American and foreign law. Although jurisdiction is ostensibly concurrent, a primary jurisdiction is assigned to United States courts in cases of offenses solely against the security or property of the United States, or against the person or property of American personnel, or action arising in pursuance of official duty. Naturally, host allies often give great weight to requests of the United States authorities. C. EVERETT, MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES, 41 (1st Ed. 1956). *See* note 31 *supra*.

[93] See Note, *Civilian Dependents and Employees at Overseas Bases Not Subject to Court Martial Jurisdiction*, 46 VA. L. REV. 576, 582–87 (1960); Ehrenhaft, *Policing Civilian Accompanying the United States Armed Forces Overseas: Can United States Commissioners Fill the Jurisdictional Gap*, 36 GEO. WASH. L. REV. 273, 280–83 (1967); Note, *Courts-Martial Jurisdiction Over Civilians in Peacetime*, 20 MD. L. REV. 338, 342 (1960).

[94] *See* Note, *Courts-Martial over Civilians in Peacetime*, 20 MD. L. REV. 338, 342 (1960).

[95] *Id.*

[96] 36 GEO. WASH. L. REV. at 284 ff.

[97] There is a federal criminal code for admiralty and territories. See 18 U.S.C. §§ 7 (1964), 113 (1964), 114 (1964), 661 (1964), 1111 (1964), 1113 (1964), 2031 (1964), 2111 (1964), 2191–93 (1964).

[98] Military commanders on foreign bases have been unable to apply any criminal sanctions against civilians since 1960; and as a result, they feel this problem especially acutely. They have been forced to apply administrative sanctions such as suspension of "PX" privileges, confinement to post, or involuntary return to the United States to cover the situation as well as they can. See Note, 36 GEO. WASH. L. REV. at 279.

[99] This type of jurisdiction is based on nationality as opposed to territory, which is ordinarily the basis for jurisdiction. But, "there does not appear to be any constitutional objection to giving the United States District Courts jurisdiction of crimes committed by Americans overseas," *Current Legal Literature*, 56 A.B.A.J. 193 (1970). There is also precedence for nationalistic jurisdiction in American law. The U.S. Code gives a federal district court the power to hear cases arising out of the maritime jurisdiction whenever such crime is committed outside the jurisdiction of any state, 18 U.S.C. § 7 (1969) (The proper district court is the accused's Port of Entry). And this section has held to apply even when this nationalistic jurisdiction conflicts with the territorial jurisdiction of another nation, U.S. v. Flores, 289 U.S. 137 (1933) (A United States vessel was on a river 250 miles inside the Belgian Congo unloading cargo).

Senator Sam Ervin of North Carolina has introduced legislation specifically giving a United States District Court jurisdiction to hear cases involving discharged servicemen, civilian dependents and government employees with U.S. forces outside the country. 115 CONG. REC. 15169–72 (daily ed. Dec. 1, 1969); *Current Legal Literature*, 56 A.B.A.J. 193 (1970). This legislation could be broadened to apply to soldiers on active duty as well.

Although it may be argued that the Court made a general statement so as to give the United States Court of Military Appeals broad discretion, the problems that remain are beyond the scope of a mere interpretation of words. Not only is there rather severe disagreement over the interpretation of "service connection" in the court-martial system itself, but also extra-national military installations have a substantial potential problem in implementing the Court's new test. Either Congress or the Court must treat this decision as a starting point for a general rethinking of military jurisdiction.

This note has argued throughout for a broad interpretation of the decision not only because the opinion pointed in that direction but more importantly because the Supreme Court in recent years has consistently insisted upon broad safeguards for accused individuals.[100] In this sense, the opinion becomes a segment of this judicial revolution, and it is best viewed in this light.

[100] *See e.g.* Miranda v. Arizona, 384 U.S. 436 (1966) (warning before arrest); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); Draper v. United States, 358 U.S. 307 (1959) (probable cause).