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Courts Martial--Jurisdiction--Service-Connected Crime

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COMMENTS

COURTS MARTIAL — JURISDICTION — SERVICE - CONNECTED CRIME*

In the recent case of *O'Callahan v. Parker*[1] the United States Supreme Court reversed a trend expanding courts-martial jurisdiction since 1863.

Petitioner James F. O'Callahan, a sergeant in the United States Army, broke into a girl's hotel room and assaulted and attempted to rape her while he was on leave and dressed in civilian clothes. After being delivered to the military police, he was tried and convicted by a court-martial for attempted rape, housebreaking, and assault with attempt to rape, in violation of Articles 80, 130, and 134 of the Uniform Code of Military Justice.[2] The Army Board of Review and later the United States Court of Military Appeals affirmed his conviction. His subsequent petition for the writ of habeas corpus, filed in the United States District Court for the Middle District of Pennsylvania, was denied, and the Third Circuit Court of Appeals affirmed. On certiorari, the United States Supreme Court reversed, holding that the court-martial had no jurisdiction to try the petitioner for the crimes in question, since they were not service-

*O'Callahan v. Parker, 89 S.Ct. 1683 (1969).

1. 89 S.Ct. 1683 (1969).
2. Article 80 of Articles of War, 10 U.S.C. § 880 (1964) provides:
   > (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.

   Article 130, 10 U.S.C. § 930 (1964) provides:
   > 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 house-breaking and shall be punished as a court-martial may direct.

   Article 134, 10 U.S.C. § 934 (1964) provides:
   > 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.

connected, but that he was entitled to an indictment by a grand jury and a trial by a petit jury.[3]

INTRODUCTION

War or preparation for war is a serious endeavor, requiring considerable sacrifices of comfort, freedom from restraint, and liberty of action. Since experience has demonstrated the consequences that result when these sacrifices are not made, the law of the military must be capable of prompt punishment to maintain discipline and to insure that efficient armed forces are ready and available to defend this country should the need arise.[4] Courts-martial are a means to this end.

JURISDICTIONAL DEVELOPMENT

The *O'Callahan* Court said that ". . . history teaches that expansion of military discipline beyond its proper domain carries with it a threat to liberty."[5]

The common law in England made no distinction between the crimes of soldiers and those of civilians in time of peace. All subjects were tried by the same civil courts: if a soldier deserted, he could only be sued for breach of contract, and if he assaulted an officer he was punishable by an indictment for assault. The common law recognized an exception that permitted armies to try soldiers "in the field" in time of war.[6]

Continued struggles by the Crown against Parliament and the common-law courts resulted in the Crown's gradual expansion of courts-martial jurisdiction during times of peace to maintain control over the army.[7] This expansion was intermittent however, and in 1765 Parliament's increased strength resulted in the British Articles of War which provided that a soldier could

3. O'Callahan v. Parker, 89 S.Ct. 1683 (1969).
4. *See* Toth v. Quarles, 350 U.S. 11, 22, 29 (1955).
5. O'Callahan v. Parker, 89 S.Ct. 1683, 1689 (1969).
6. 2 Campbell, LIVES OF THE CHIEF JUSTICES 91 (1st ed. 1849), *cited in* Reid v. Covert, 354 U.S. 1, 24 n. 44 (1957). The history of courts-martial jurisdiction is extensively reviewed in Mr. Justice Black's opinion in Reid v. Covert, 354 U.S. 1, 23-30 (1957). *See generally* WINTHROP, MILITARY LAW AND PRECEDENTS (2d ed., Reprint 1920); Duke & Vogel, *The Constitution and the Standing Army: Another Problem of Courts-Martial Jurisdiction,* 13 VAND. L. REV. 435 (1960) [hereinafter cited as Duke & Vogel]. These are excellent works on courts-martial jurisdiction history upon which the author has considerably relied.
7. *See* 3 RUSHWORTH, HISTORICAL COLLECTIONS APP. 76-81, *cited in* Reid v. Covert, 354 U.S. 1, 24 n. 44 (1957).

not be tried by court-martial for a civilian offense; instead military officers were required to use their efforts to insure that the accused soldiers would be tried before a civilian court.[8] The American Articles of War adopted by the Continental Congress in 1776 and later the 1806 Articles of War were in essence a reproduction of these British Articles.[9]

In America the trend toward expanding court-martial jurisdiction began in 1863 when Congress authorized them, in time of war, to try various civil crimes and permitted the imposition of the death penalty.[10] The requirement that officers were to deliver the accused soldiers to civil courts for trial for civil crimes was made inapplicable, in time of war, by the 1874 Articles of War.[11] In 1916 courts-martial jurisdiction was extended to certain non-capital offenses in time of peace;[12] the general article was modified to allow court-martial for all crimes and offenses which were not capital;[13] and the requirement that officers deliver soldiers accused of civil crimes to civil courts for trial was further reduced.[14]

In 1950 when the Uniform Code of Military Justice was enacted, courts-martial were given authority, even in time of peace, to prosecute and impose the death penalty with respect to murder and rape committed within the United States, removing the last remaining limitation on jurisdiction over civil crimes.[15]

CONSTITUTIONAL AUTHORITY

Trial by court-martial in the United States is the exercise of an exceptional jurisdiction springing from the power granted the Congress in art. I, § 8, clause 14, "to make rules for the government and regulation of the land and naval forces . . ." as supplemented by the "necessary and proper clause", art. I, § 8, clause 18, "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers . . . ."[16]

Since it is the primary purpose of armies and navies to fight or be ready to fight wars should the occasion arise, trial of

8. *See* Duke & Vogel at 445, 449. This work illustrates the statutory changes which have expanded courts-martial jurisdiction since the American Revolution.
9. *Id.*
10. *Id.* at 449-450.
11. *Id.* at 451.
12. *Id.*
13. *Id.*
14. *Id.* at 452.
15. *Id.* at 453.
16. *See* Kinsella v. Singleton, 361 U.S. 235, 237, 247 (1960).

soldiers to maintain discipline is merely incidental to an army's primary fighting function.[17] The *O'Callahan* Court therefore concluded that in determining the scope of the constitutional power of Congress to authorize trial by court-martial only the "least possible power adequate to the end proposed" should be allowed.[18]

Clause 14 was derived by modifying a similar provision that existed in the Articles of Confederation, which conferred on Congress "exclusive right and power of . . . making rules for the government and regulation of [the] land and naval forces, *and directing their operations.*"[19] This derivation reveals that Clause 14 was designed to accomplish two objects. First, Congress was not to retain the power of command which it had experienced under the Articles of Confederation. This was in conjunction with the express grant of authority to the President to act as Commander-in-Chief of the Armed Forces. Second, Congress, not the President, was to have the power to govern and regulate the Armed Forces, including the punishment of military offenses.[20] The reason for this was stated by Justice Harlan: "What [the Constitutional Founders] feared was a military branch unchecked by the *legislature* and susceptible of use by an arbitrary *executive* powers."[21] Justice Harlan thus concluded that the Founders did not intend to limit the power of Congress in regulating the Armed Forces, which included the power to establish courts-martial. Similarly, Alexander Hamilton stated that Congress' power to prescribe rules for the government of the armed forces "ought to exist without limitation, because it is impossible to foresee or define the extent and variety of national exigencies, or the corresponding extent and variety of the means which may be necessary to satisfy them."[22]

While it seems that Congress was intended to have the sole, broad power to govern and regulate the armed services, which includes making rules for courts-martial, it is apparent that the Constitutional Founders had no idea that Congress would expand courts-martial jurisdiction to its present scope.[23] After raising the issue of the scope of Clause 14, the *O'Callahan* Court evaded it by saying that Clause 14:

17. *See* Toth v. Quarles, 350 U.S. 11, 17 (1955).
18. 89 S.Ct. 1683, 1687 (1969).
19. ARTICLES OF CONFEDERATION, art. IX (1781).
20. *See* Duke & Vogel at 447.
21. Reid v. Covert, 354 U.S. 1, 68 (1957) (Emphasis by Mr. Justice Harlan).
22. THE FEDERALIST, No. 23.
23. *See* Reid v. Covert, 354 U.S. 1, 23, 24 (1957).

> . . . need not be sparingly read in order to preserve those two important constitutional guarantees [the right to trial by jury and indictment by a grand jury]. For it is assumed that an express grant of general power to Congress is to be exercised in harmony with express guarantees of the Bill of Rights.[24]

UNIQUENESS OF COURTS-MARTIAL

Courts-martial are unique in that the authority enabling their existence is in article I of the Constitution rather than article III wherein the Judiciary finds its enabling authority. Unlike the Judiciary, courts-martial are governed and regulated by the Congress and commanded by the President—they are an integral part of the armed forces, not an autonomous branch of the government. As a result the supervisory powers of the civil courts over courts-martial are considerably limited.[25]

In earlier decisions the general rule existed that, in a collateral proceeding brought in the federal courts by a soldier or sailor convicted by court-martial, the inquiry would be restricted to the issues of whether the court-martial had jurisdiction over the person accused[26] and the offense charged[27] and whether the sentence imposed was within the power of the court-martial.[28] During that period the Court refused to hear all questions bearing on the fairness of the proceedings resulting in the accused's conviction.[29] This limited scope of inquiry into courts-martial convictions was reaffirmed as late as 1950.[30]

In *Burns v. Wilson*[31] the Court expanded this rule and said that it was the limited function of the civil courts to determine whether the military had given fair consideration to the accused's claims with respect to matters affecting the fairness of the trial, i.e., brutality, coerced confessions, etc. The Court refused to expand this rule further in *United States v. Augenblick*,[32] a case decided earlier this year, which indicates that its

24. O'Callahan v. Parker, 89 S.Ct. 1683, 1691 (1969).
25. *See Ex parte* Reed, 100 U.S. 13 (1886).
26. *Id.*
27. Smith v. Whitney, 100 U.S. 167 (1886).
28. Swaim v. United States, 165 U.S. 553 (1897).
29. *Ex parte* Reed, 100 U.S. 13 (1886).
30. Hiatt v. Brown, 339 U.S. 103 (1950).
31. 346 U.S. 137, 144 (1953).
32. 89 S.Ct. 528 (1969). The Court indicated it would overturn a court-martial decision only when the "barriers and safeguards are so relaxed or forgotten . . . that the proceeding is more a spectacle . . . or trial by ordeal . . . than a disciplined contest." *Id.* at 533-4.

scope will remain constant, at least for a while. Jurisdiction being the only issue before the *O'Callahan* Court, it left the *Burns* rule unaffected.

BILL OF RIGHTS v. COURTS-MARTIAL JURISDICTION

The Bill of Rights entitles citizens to certain safeguards against oppressive governmental actions. The fifth and sixth amendments, as well as article III, § 2, contain safeguards which pertain to criminal prosecutions.[33] Whether the Bill of Rights applies to members of the armed forces has been a question which has caused considerable controversy.[34] It was long ago held that Clause 14 creates an exception to the normal method of trial in civilian courts as provided by the Constitution and permits Congress to authorize military trials of members of the Armed Services without all the safeguards given an accused by article III and the Bill of Rights.[35]

More recently, in *Burns v. Wilson* the Court said that:

> the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment.[36]

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33. The fifth amendment provides in part:
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger . . . .

The sixth amendment provides in part:
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed. . . .

Article III, § 2 provides in part:
> The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

34. *See generally* Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293 (1957) (arguing that the Bill of Rights do apply to members of the armed forces); Weiner, *Courts-Martial and the Bill of Rights; The Original Practice*, 72 HARV. L. REV. 1, 266 (1958) (arguing contra).

35. *E.g.*, Dynes v. Hoover, 61 U.S. (20 How.) 65 (1858); *Ex parte* Reed, 100 U.S. 13 (1879).

36. 346 U.S. 137, 140 (1953). *See generally* Weiner, *Courts-Martial and the Bill of Rights: The Original Practice*, 72 HARV. L. REV. 266, 280 (1958). Weiner said that since all proceedings before courts-martial are criminal

Although jurisdiction was the only issue before the Court, it is evident from reading the *O'Callahan* opinion, written by Justice Douglas, that he was deeply concerned about the rights of members of the Armed Forces and felt considerable disdain towards courts-martial. He said:

> A civil trial . . . is held in an atmosphere conducive to the protection of individual rights, while the military trial is marked by age-old manifest destiny of retributive justice . . . . Courts-martial as an institution are . . . inept in dealing with the nice subtleties of consitutional law.[37]

While he attacked the propriety of the courts-martial system as a whole, Justice Douglas particularly attacked the method of selecting the members of a court-martial, the military counterpart to the jury, and the command influence which generally exists on them. He said:

> A court-martial is tried, not by a jury of the defendant's peers which must decide unanimously, but by a panel of officers empowered to act by a two-thirds vote.[38]

Although the accused may request that one-third of the members be enlisted personnel,[39] "[i]n practice usually only senior enlisted personnel, i.e., non-commissioned officers, are selected."[40] Justice Douglas did not mention that if the accused were of private grade, the membership of the court-martial could be composed entirely of enlisted personnel. The only requirement is that no member shall be subordinate in rank to the accused.[41]

The Court did not mention that the accused could request that certain members be removed, although until recently the members themselves determined whether the reason for the request was relevant or valid.[42] Also there is no limit to the number of

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in nature, the sixth amendment's provision that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . as a matter of language alone includes prosecutions by courts-martial. Since, however, the significance of this and other constitutional provisions is to be gathered not simply by taking the words and a dictionary, we know that this does not follow. The soldier or sailor never had a right to trial by jury." 72 HARV. L. REV. 266 at 280 (1958).

37. 89 S.Ct. 1683, 1687 (1969).

38. *Id.* at 1686.

39. Uniform Code of Military Justice [hereinafter cited as UCMJ], Art. 25(c)(1), 10 U.S.C. 835 (c)(1) (1964).

40. O'Callahan v. Parker, 89 S.Ct. 1683, 1686 n. 2 (1969).

41. Art. 25 (d)(1) of UCMJ, 10 U.S.C. § 825(d)(1) (1964).

42. Art 41(a) of UCMJ, 10 U.S.C. § 841(a) (1964).

removal requests that the accused may make.[43] Another safeguard available to the accused, which the Court did not mention, was the peremptory challenge, of which he was allowed one.[44]

> Concerning command influence, Justice Douglas said that the "influence on the actions of the court-martial by the officer who convenes it, selects its members and the counsel on both sides, and who usually has direct command authority over its members is a pervasive one in military law . . ."[45]

Cases have proven that command influence exists, however, these cases also prove that it does not go unchecked.[46] Undoubtedly this is the weakest element of the courts-martial system, but the extent of its pervasiveness is difficult to determine. It must be admitted that at the time O'Callahan was tried, the Uniform Code of Military Justice gave the commanding officer considerable opportunity to exercise his authority over the court-martial.[47] Yet it must also be realized that in 1957 when O'Callahan was tried, *Mapp v. Ohio*[48] had not been decided, which meant that he had many safe-guards that did not exist in a considerable number of the states.[49] As a result O'Callahan probably experienced a fairer trial than he would have had if he had been tried in a civil court.

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43. *Id.*
44. Art. 41(b) of UCMJ, 10 U.S.C. § 841(b) (1964).
45. O'Callahan v. Parker, 89 S.Ct. 1683, 1686 (1969).
46. *See, e.g.,* Hearings on Constitutional Rights of Military Personnel before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 87th Cong., 2d Sess., 780-781 (1962), wherein Col. F. B. Wiener, one of the foremost authorities in military law, listed cases illustrating command influence and discussed its dangers.
47. Art. 25(d)(2) of UCMJ, 10 U.S.C. § 825(d)(2) (1964), provides that the convening authority, usually the commanding officer, shall select the members of a court-martial; Art. 26 of UCMJ, 10 U.S.C. § 826 (1964), provides that the commanding officer shall select the law officer who presides over the court; and provides that the law officer may discuss the "form" of the findings in private, out of the presence of the accused or his counsel; Art. 27(a) of UCMJ, 10 U.S.C. § 27(a) (1964), provides that the commanding officer shall select both trial counsel and defense counsel.
48. 367 U.S. 643 (1961).
49. Art. 31(a) and (b) of UCMJ, 10 U.S.C. § 831 (1964), protects the accused from compulsory self-incrimination or coerced confessions; Art. 32 of UCMJ, 10 U.S.C. § 832 (1964) provides that the accused be informed of charges against him before attending an investigatory inquiry; allowed the right to have counsel represent him at such inquiry; and allowed to cross-examine any witness who testifies against him; Art. 27 of UCMJ, 10 U.S.C. § 827 (1964) provides the accused the right to counsel; Art. 44 of UCMJ, 10 U.S.C. § 844 (1964) protects the accused from double jeopardy; Art. 45 of UCMJ, 10 U.S.C. § 845 (1964) protects the accused from indirect guilty pleas.

It is interesting to note that at no time did the Court indicate that the form of indictment used by the armed forces was not fair. On the contrary, those military code provisions related to indictment appear to be as fair as that used by article III courts,[50] and while this "indictment" is not by a Grand Jury, the difference is one of form rather than substance.

Electing to use a balancing approach, the Court weighed O'Callahan's rights as a citizen against the governmental interests which support the exercise of court-martial jurisdiction and concluded that O'Callahan must prevail. In his dissent Justice Harlan said:

> . . . [i]f one engage[s] in a balancing process, one cannot fairly hope to come up with a meaningful answer unless the interests on both sides are fully explored. The Court does not do this. Rather, it chooses to ignore [the] strong and legitimate governmental interests . . .[51]

COURTS-MARTIAL JURISDICTION—THE NEW RULE

Since 1950 when the Uniform Code of Military Justice was enacted, it has been decided that discharged soldiers could not be court-martialed for crimes committed while in service;[52] neither could courts-martial try civilian employees of the Armed Forces overseas;[53] nor civilian dependants of military personnel accompanying them overseas.[54] While these decisions reversed the expansionary trend of courts-martial jurisdiction, *O'Callahan*, which applied to members of the armed services, the people most frequently tried by courts-martial, makes the reversal of the trend considerably more pronounced.

The crux of *O'Callahan* was the interpretation of the fifth amendment which provides in part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, *except in cases arising in the land or naval forces*, or in the Militia, when in actual service in time of war or public danger . . . (emphasis added).

50. *See* Arts. 30, 32, 34, and 35 of UCMJ, 10 U.S.C. §§ 830, 832, 834, and 835 (1964).
51. O'Callahan v. Parker, 89 S.Ct. 1683, 1695 (1969) (dissenting opinion).
52. Toth v. Quarles, 350 U.S. 11 (1955).
53. McElroy v. Guargliardo, 361 U.S. 281 (1960).
54. Reid v. Covert, 354 U.S. 1 (1957).

While the exception expressly applies to the right to indictment by a grand jury, using the authority of *Ex parte Quirin*,[55] the Court inferentially applied it to the sixth amendment right to trial by jury. Determining that the alleged crime did not arise "in the land or naval forces", the Court concluded that jurisdiction must rest solely in the civil courts, since neither institution was provided in a trial by court-martial.[56]

Prior to *O'Callahan* it had been generally understood that one's *status*, whether he was a member of the Armed Services, was determinative of courts-martial jurisdiction.[57] In his dissenting opinion, Justice Harlan said that "this court has consistently asserted that military 'status' is a necessary and *sufficient* condition for the exercise of court-martial jurisdiction."[58] The Court majority conceded that in many cases it had decided that court-martial jurisdiction did not extend to persons who were not members of the Armed Forces. In its opinion, however, these decisions did not conclude that courts-martial had jurisdiction over members of the Armed Forces, regardless of the alleged crime committed. The Court decided that while *status* was necessary for jurisdiction, its ascertainment did not "complete the inquiry regardless of the nature, time, and place of the offense."[59]

Thus the status of the soldier's crime, whether it is connected with the Armed Forces, rather than the status of the accused, becomes the rule for determining courts-martial jurisdiction.

PROBLEM OF INTERPRETING O'CALLAHAN

The factual situation in *O'Callahan* resulted in an extremely narrow holding. Sergeant O'Callahan had been on leave; the crime was committed off the military post; the victim was a civilian who was performing no military duties; the situs of the

55. 317 U.S. 1 (1942).

56. 89 S.Ct. 1683, 1690-91 (1969). It would seem that the fifth amendment clause, "when in actual service in time of war or public danger" would modify "except in cases arising in the land or naval forces," making it applicable only in time of war or public danger. However it was held at a very early date that the clause modifies only "Militia", and the general rule has been that indictment by grand jury is never necessary "in cases arising in the land or naval forces." *E.g.*, Smith v. Whitney, 116 U.S. 167 (1886); Ex parte Mason, 105 US 696 (1882).

57. *E.g.*, Grafton v. United States, 206 U.S. 333, 348 (1907); Johnson v. Sayre, 158 U.S. 109, 114 (1895); Smith v. Whitney, 116 U.S. 167, 184-85 (1886).

58. O'Callahan v. Parker, 89 S.Ct. 1683, 1692 (1969) (dissenting opinion).

59. 89 S.Ct. 1683, 1688 (1969).

crime was within the United States, committed during peacetime when civil courts were readily available; and furthermore, the offense did not involve the flouting of military authority, the security of a military post, or the integrity of military property. Indeed it would be difficult for a member of the armed services to commit a crime more distantly related to the Armed Services. But now that *status* is no longer a sufficient condition for courts-martial jurisdiction, the courts will have to decide when the crime is service-connected. As Justice Harlan said, "[T]he Court has thrown the law [of court-martial jurisdiction] . . . into a demoralizing state of uncertainty."[60]

While the Court of Military Appeals has not yet made a determination of the scope of *O'Callahan*, the special courts-martial boards have considered it to be extremely narrow. They have held that their jurisdictions vested in an off-post assault against a superior non-commissioned officer attempting to persuade the offender to return to duty;[61] when statements were uttered on-post with the intent to promote disloyalty among the troops;[62] when the victim of an off-post robbery was also a member of the Armed Forces;[63] when a soldier made an off-post sale of marijuana to an undercover CID agent;[64] and when the accused stole a credit card from a fellow soldier and forged his name to gasoline invoices when he was off-post.[65] From these decisions it is evident that courts-martial boards intend to restrict the scope of the *O'Callahan* rule to its particular facts.

The Court indicated that the "nature, time, and place of the offense," as well as the accused's "status", are the conditions to be used in determining jurisdiction.[66] *Nature* would seemingly indicate whether the crime would be to the prejudice of military authority and discipline; *time* would seemingly indicate whether the accused was on duty; and *place* would seemingly indicate whether the alleged crime occurred on-post.

60. 89 S.Ct. 1683, 1692 (1969) (dissenting opinion).
61. CM 419911, Bell (1969), *cited in* 1 The Advocate No. 6 at 7 (Aug. 1969). This is a monthly Newsletter for military defense counsel.
62. CM 419988, Bell (1969), *cited in* 1 The Advocate No. 6 at 7 (Aug. 1969).
63. CM 420194, Gunter (1969), *cited in* 1 The Advocate No. 6 at 7 (Aug. 1969).
64. CM 420337, Mueller (1969), *cited in* 1 The Advocate No. 6 at 8 (Aug. 1969).
65. CM 420264, Vipond (1969), *cited in* 1 The Advocate No. 6 at 8 (Aug. 1969). Noting that the war powers control, and believing that the U.S. was presently at war, several courts-martial boards have held that *O'Callahan* has no present viability. *E.g.*, CM 419489, Elwood (1969); CM 420522, Williams (1969), cited in 1 The Advocate No. 6 at 6 (Aug. 1969).
66. 89 S.Ct. 1683, 1688 (1969).

If the crime meets any one of these conditions, combined with the accused's being a member of the Armed Forces, it should be considered service-connected. For example, regardless of whether the accused was on duty or on-post, if the victim was an officer or another soldier, the crime should be service-connected since it would prejudice military authority and discipline; regardless of whether the accused was on-post or the victim was another soldier, if the alleged crime was committed while the accused was on duty, the crime should be service-connected; and regardless of whether the accused was on duty or military authority and discipline was prejudiced, if the alleged crime occurred on-post, even though the victim may have been a civilian, the crime should be service-connected.

A questionable situation arises when the victim of the crime is a civilian who is dependent upon a member of the Armed Forces for his livelihood. While the Armed Forces have a responsibility of protecting these dependents, it is doubtful whether a crime against one of them would be any more to the prejudice of military discipline than a crime against any other civilian. The fact that the victim was a dependent should not by itself be determinative of whether the alleged crime was service-connected. Rather the inquiry should be whether the crime occurred *on-post* or whether the accused was *on duty* when the crime was committed.

It would seem to be unquestioned that a serviceman's crimes involving the flouting of military authority, the security of a military post, or the integrity of military property would be service-connected.

Concerning conditions relevant to jurisdiction, Justice Harlan said:

> . . . the Court intimates that it is relevant to the jurisdictional issue . . . that the petitioner was wearing civilian clothes rather than a uniform when he committed the crimes. . . . And it implies . . . that officers may be court-martialed for purely civilian crimes . . .[67]

It is not clear to what extent the Court intended these facts to be relevant. However, it seems that they were used merely to strengthen the basis upon which the decision was made.[68] It is

67. *Id.* at 1696 (dissenting opinion).

68. At the end of his opinion when he emphasized the facts of the case and their lack of connection with the Armed Forces, Justice Douglas did not mention that O'Callahan had been dressed in civilian clothes. 89 S.Ct. 1683, 1691

highly doubtful that the decision would have been any different had they not been mentioned, because the Court said:

> [w]e see no way of saving to servicemen and women in any case the benefits of indictment and of trial by jury, if we conclude that this petitioner was properly tried by court-martial.[69]

In order to have a rule that is as coherent as possible, it seems that the "status-nature-time-place" distinction will have to be followed. Any deviation from this standard will probably lead to more confusion than already exists.

RETROACTIVE EFFECT

Articles 2 and 17 of the UCMJ[70] provide that members of the Armed Forces are subject to courts-martial jurisdiction if their alleged crimes come within its provisions. *O'Callahan*, in effect, overrules these statutes on constitutional grounds, leaving the question to be answered as to whether the decision will have retroactive effect.

The early position taken by the Court was that when it ruled a statute unconstitutional, the decision had a retroactive effect as to all rights, duties, and liabilities created pursuant to the statute.[71] This position was changed in *Chicot County Drainage Dist. v. Baxter State Bank*,[72] wherein the Court decided that in determining whether a declaration of unconstitutionality will have retroactive effect, consideration must be given to its effect on vested rights, status, prior determinations, etc.

In *Johnson v. New Jersey*,[73] expressing the modern view as applied in criminal law, the Court said that retroactive effect is to be given only to those decisions which affect the integrity of the fact-finding process where the previous standard posed a convincing danger of convicting innocent persons.

(1969). And when he spoke of officers being court-martialed for civilian crimes, he was speaking of 18th century beliefs that the " 'honor' of an officer was thought to give specific military connection to a crime otherwise without military significance." The context in which he used the word "honor" indicates that he is of the opinion that such is not the belief today. *Id.* at 1690 n. 14.

69. O'Callahan v. Parker, 89 S.Ct. 1683, 1691 (1969).
70. 10 U.S.C. §§ 802, 807 (1964).
71. Norton v. Shelby, 118 U.S. 425 (1886).
72. 308 U.S. 371 (1940).
73. 384 U.S. 719 (1966).

In *O'Callahan* Justice Douglas said that

> . . . military tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials . . .[74]

While he had his qualms about the fairness of courts-martial, Justice Douglas did not indicate that they evinced dangers of convicting innocent persons. Furthermore the Court has recently said that a non-jury trial is not necessarily an unfair one.[75] Therefore the conclusion would seem to be that *O'Callahan* will not have retroactive effect.

CONCLUSION

The philosophy of the *O'Callahan* Court can best be described by words that Blackstone once wrote:

> [M]artial 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 law. The necessity of order and discipline in an army is the only thing which can give it countenance; and therefore it ought not be permitted in time of peace, when the King's courts are open for all persons to receive justice according to the laws of the land.[76]

What mattered to the Court was not whether O'Callahan was denied a fair trial by a court-martial, but that he did not receive a trial in a civil court which provided those institutions guaranteed to citizens.

Designed especially for the Armed Forces, courts-martial were not intended to imitate trials by jury. But, as noted above, the Court itself has recently said that a non-jury trial is not necessarily an unfair one.[77] The Military Act of 1968[78] eliminated some of the problems that existed in the court-martial system when O'Callahan was tried, especially those pertaining to command influence. Efficiency ratings of servicemen cannot be based on court-martial performance or zeal as was done in the

74. 89 S.Ct. 1683, 1685 (1969).
75. DeStefano v. Woods, 392 U.S. 631 (1968).
76. 1 BLACKSTONE'S COMMENTARIES 413, *quoted in* Reid v. Covert, 354 U.S. 1, 26-27 (1957).
77. DeStefano v. Woods, 392 U.S. 631 (1968).
78. Pub. L. No. 90-632; 82 Stat. 1335 (Oct. 1968).

past;[79] an independent judiciary has been established, divorcing the presiding officer of the court-martial from the command of the convening authority;[80] and the accused may request his court-martial to be by the military judge alone, instead of by appointed members.[81] The fundamental difference between civil courts and courts-martial is still the same, however. While civil courts put more weight on the side of the individual's rights, courts-martial give more weight to the interests of the Armed Forces. If it were any other way, discipline in the military would be a farce.

Due to the uncertainty of the new rule promulgated by the *O'Callahan* Court, combined with the influx of two new Justices, it probably will not be long before similar cases reach the Court in an effort to test the scope of this new rule. But assuming that the new Court will be somewhat more conservative than before, it would not be unlikely for the scope of the rule to remain considerably limited.

The rule developed in *O'Callahan* is a good one, philosophically, although the method used in developing it may be regretted in that the strength of the attack on the court-martial system was unwarranted, and the attack was unnecessary to the decision. Jurisdiction was the only issue before the Court, therefore this case could have been decided without even mentioning the inherent weaknesses of courts-martial. Beginning with the premise that a soldier is also a citizen, realizing that this country's system of justice is based on a jury trial, yet also recognizing the need of maintaining discipline in the military, it is only logical to conclude that a citizen-soldier should be entitled to those rights guaranteed to any other citizen when the crime which he has been accused of committing has no connection with his duties as a soldier.

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79. *Id.* at § 2(13).
80. *Id.* at § 2(9)(c). Individuals presiding over most courts-martial will be Military Judges who are members of the Judge Advocate Generals Corps. They will be given efficiency ratings by their superior officers within that branch of the military service, not by the authority convening courts-martial, usually the commanding general.
81. *Id.* at § 2(6).