Duke Law Journal

VOLUME 1969 OCTOBER NUMBER 5

O'CALLAHAN V. PARKER—MILESTONE OR MILLSTONE IN MILITARY JUSTICE?

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Under the decision of the Supreme Court in O'Callahan v. Parker, 395 U.S. 258 (1969), *a court-martial was held to have no jurisdiction to try the accused, an Army sergeant, where the offenses in question occurred off-post, during the accused's off-duty hours while on leave with an evening pass, and while the accused was in civilian attire. In decisions since* O'Callahan, *the United States Court of Military Appeals has further construed the standards of that case, holding that courts-martial lack jurisdiction over offenses unconnected with military service and triable in civilian courts. In this article the author analyzes the opinions in* O'Callahan, *criticizes the Court for its apparent failure to consider the full impact of the decision on military justice, and calls for the reversal of* O'Callahan *at the earliest opportunity.*

Military lawyers wore long faces on the afternoon of June 2, 1969. The Supreme Court had just handed down its decision in *O'Callahan v. Parker*[1] to the effect that courts-martial lack jurisdiction to try military personnel for offenses that are not "service-connected." Perhaps even more depressing was the failure of Mr. Justice Douglas, writing for a five-member majority, to acknowledge the considerable reforms that had been made in "so-called military justice."[2]

Admittedly the result in *O'Callahan* was not completely unexpected by judge advocates and by many others. Years before, a provocative article had noted that for decades courts-martial lacked jurisdiction in peacetime to try civil type offenses and had argued that the expansion of military jurisdiction in the twentieth century constituted an unauthorized contraction of the constitutional rights

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[1] 395 U.S. 258 (1969).

[2] *Id.* at 266 n.7.

of military personnel.[3] At the 1962 Hearings of the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, Dean A. Kenneth Pye, a leading expert on military law, commented that "as a matter of constitutional law, it is questionable whether courts-martial should have the power to try civilian-type offenses, and as a matter of desirability it is also questionable whether they should have this power."[4] The very fact that the Supreme Court had granted certiorari was ominous, and the tenor of the argument had not been encouraging to those who favored military jurisdiction.[5] However, very few, either within the military justice system or outside, were fully prepared for the opinion of the Court delivered in *O'Callahan.*

THE OPINIONS IN O'CALLAHAN

O'Callahan, then a sergeant in the Army, was stationed at Fort Shafter, Oahu, in the Territory of Hawaii. On the night of July 20, 1956, "while on leave with an evening pass" petitioner and a friend left the post dressed in civilian clothes and went into Honolulu. After a few beers, O'Callahan allegedly entered a penthouse apartment at the Reef Hotel and assaulted a fourteen-year-old girl who was in bed there.[6] While fleeing from her room, he was apprehended by a hotel security officer, delivered to the Honolulu city police for questioning, and finally turned over to the military police. Subsequently he made a confession and was tried by court-martial on charges of attempted rape, housebreaking, and assault with intent to rape in violation of Articles 80, 130, and 134 of the Uniform Code of Military Justice.[7] Convicted on all charges, he

[3] Duke & Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction,* 13 VAND. L. REV. 435 (1960).

[4] *Constitutional Rights of Military Personnel, Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary,* 87th Cong., 2d Sess. 552-53 (1962) [hereinafter cited as *1962 Hearings*]. The American Legion recommended that civilian courts have priority of jurisdiction in peacetime over offenses of a civil nature committed off a military reservation and that former Article of War 92 be reenacted to prohibit trial by court-martial of certain capital civil offenses, such as rape and murder, "wherever a State or Federal court is functioning." *Id.* at 422-25. Colonel Frederick Bernays Wiener, an eminent authority on military law whose book CIVILIANS UNDER MILITARY JUSTICE (1967), was relied on in Justice Douglas' opinion in *O'Callahan,* testified at the same hearings that he did not believe courts-martial were constitutionally prohibited from trying civil-type offenses. *1962 Hearings, supra* at 778-79, 784-86. However, he considered it "the part of wisdom to restrict military jurisdiction to occasions that affect military discipline. But I don't think it is a constitutional limitation." *Id.* at 785-86.

[5] This observation is based on the author's discussion with persons who had heard the argument before the Supreme Court.

[6] 395 U.S. at 260.

[7] 10 U.S.C. §§ 880, 930 & 934 (1964).

was sentenced to ten years' imprisonment at hard labor, forfeiture of all pay and allowances, and dishonorable discharge.

The conviction was affirmed by an Army Board of Review and the Court of Military Appeals. Almost a decade after his conviction, O'Callahan filed a petition for a writ of error coram nobis in the Court of Military Appeals, in which he contended that the reception of deposition testimony at his trial had violated his constitutional rights. The court did not find it necessary to decide this contention since it concluded that his "guilt was proven beyond a reasonable doubt by evidence other than the depositions and the use of the latter was not prejudicial to him."[8] Apparently he did not urge in the Court of Military Appeals that the court-martial had lacked jurisdiction to try him for non-military offenses committed off-post while not on duty.

Prior to seeking extraordinary relief from the Court of Military Appeals, O'Callahan had filed a petition for a writ of habeas corpus in the federal district court for the district wherein he was confined; and, upon denial of relief, he appealed to the Court of Appeals for the Third Circuit, which affirmed the court below. Certiorari was granted on the question:

> Does a court-martial, held under the Articles of War, Tit. 10 U.S.C. § 801 *et seq.*, have jurisdiction to try a member of the Armed Forces who is charged with commission of a crime cognizable in a civilian court and having no military significance, alleged to have been committed off-post and while on leave, thus depriving him of his constitutional rights to indictment by a grand jury and trial by a petit jury in a civilian court?[9]

Since the "Articles of War" and other legislation were superseded in 1951 by the Uniform Code of Military Justice[10] and O'Callahan was tried in 1956, the phrasing of the question is technically inaccurate. More importantly, the phrase "having no military significance" in one sense begs the question; a major argument for military jurisdiction is that, because of discredit to the service and impairment of relationships between the military and nonmilitary communities, there is "military significance" to

[8] United States v. O'Callahan, 18 U.S.C.M.A. 568, 569, 37 C.M.R. 188, 189 (1967).

[9] 393 U.S. 822 (1968) granting certiorari; the court of appeals opinion is reported in 390 F.2d 360 (3d Cir. 1968).

[10] 10 U.S.C. §§ 801-940 (1964). The Uniform Code of Military Justice took effect on May 31, 1951, Act of May 5, 1950, 64 Stat. 108.

an incident where a soldier, whether or not in uniform, breaks into an apartment at night and assaults a young girl.

Mr. Justice Douglas, writing the opinion of the Court for himself, Chief Justice Warren, and Justices Black, Brennan, and Marshall, pointed out that Congress is empowered to "make Rules for the Government and Regulation of the land and naval Forces,"[11] and that under the fifth amendment "cases arising in the land or naval forces" are exempt from the requirement of prosecution by indictment.[12] On the other hand, for a case that does not arise in the land or naval forces, the accused is entitled to the benefit of an indictment by grand jury and trial by jury as guaranteed by the sixth amendment and by Article III, section 2 of the Constitution.

After quoting a passage from *Toth v. Quarles*[13] contrasting trial by court-martial with that available from an Article III court presided over by a judge with life tenure, the opinion noted that a court-martial is "empowered to act by a two-thirds vote; its presiding officer is not a judge whose objectivity and independence are protected by tenure and undiminishable salary and nurtured by the judicial tradition;" and it is subject to "substantially different rules of evidence and procedure."[14] Furthermore, there are dangers of command influence 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."[15]

While recognizing the need for a system of specialized military courts, Mr. Justice Douglas reiterated the admonition from *Toth* that because of "dangers lurking in military trials . . . . [f]ree countries . . . have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service."[16] Commenting that "courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law,"[17] the opinion

[11] U.S. CONST. art. I, § 8, cl. 14.

[12] As Mr. Justice Douglas pointed out, citing *Ex parte Quirin*, 317 U.S. 1, 40 (1942), the fifth amendment exclusion of "cases arising in the land and naval forces" has been construed to apply also to the sixth amendment right of trial by jury. 395 U.S. at 261.

[13] 350 U.S. 11, 17-18 (1955).

[14] 395 U.S. at 263-64.

[15] *Id.* at 264.

[16] *Id.* at 265.

[17] *Id.*

intimated that Article 134 of the Uniform Code of Military Justice,[18] which had been the basis for one of the charges against O'Callahan, is unconstitutionally vague. To emphasize the need for restricting military jurisdiction, the principal opinion referred to "so-called military justice" and "the travesties of justice perpetrated under the 'Uniform Code of Military Justice.' "[19]

Mr. Justice Douglas further noted that the decisions holding that court-martial jurisdiction cannot be extended to reach any person not a member of the Armed Forces at the times of both the offense and the trial do not establish the quite different proposition that any offense committed by a person on active duty in the Armed Forces may be made subject to trial by court-martial regardless of the "lack of relationship between the offense and identifiable military interests."[20] While status is necessary for jurisdiction, it does not follow that ascertainment of status completes the inquiry.

The opinion referred to British practice, whereunder at the time of the American Revolution a soldier could not be tried by court-martial for a civilian offense committed in Britain, and concluded that the "early American practice followed the British model." Even the "general article"—predecessor of the present Article 134—which punished "[a]ll crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline" had been interpreted, according to Mr. Justice Douglas, "to embrace only crimes the commission of which had some direct impact on military discipline."[21] During the Civil War there had been legislation providing for military trial of certain civil offenses, but it applied only "in time of war, insurrection, or rebellion;" and not until 1916 were the Articles of War revised to authorize military trial, even in peacetime, of various civil-type offenses committed by persons "subject to military law."[22]

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[18] 10 U.S.C. § 934 (1964). For a study of some of the case law under this Article, see Everett, *Article 134, Uniform Code of Military Justice—A Study in Vagueness*, 37 N.C.L. REV. 142 (1959).

[19] 395 U.S. at 266. Here the opinion quotes from Glasser, *Justice and Captain Levy*, 12 COLUM. F. 46, 49 (1969). *See also* Levy v. Parker, 90 S. Ct. 1, 2 (1969) (Douglas, J. sitting as Circuit Justice).

[20] 395 U.S. at 267.

[21] *Id.* at 271.

[22] *Id.* at 271-72.

With respect to the power conferred on Congress to make "Rules for the Government and Regulation of the land and naval Forces," the opinion assumed that "an express grant of general power to Congress is to be exercised in harmony with express guarantees of the Bill of Rights."[23] Noting the broad range of crimes that are within the scope of Article 134,[24] Mr. Justice Douglas concluded that

> we 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.
>
> In the present case petitioner was properly absent from his military base when he committed the crimes with which he is charged. There was no connection—not even the remotest one—between his military duties and the crimes in question. The crimes were not committed on a military post or enclave; nor was the person whom he attacked performing any duties relating to the military. Moreover, Hawaii, the situs of the crime, is not an armed camp under military control, as are some of our far-flung outposts.
>
> Finally, we deal with peacetime offenses, not with authority stemming from the war power. Civil Courts were open. The offenses were committed within our territorial limits, not in the occupied zone of a foreign country. The offenses did not involve any question of the flouting of military authority, the security of a military post, or the integrity of military property.
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> We have accordingly decided that since petitioner's crimes were not service connected, he could not be tried by court-martial but rather was entitled to trial by the civilian courts.[25]

Mr. Justice Harlan's dissent, joined by Justices Stewart and White, interpreted the Supreme Court precedents to mean that military status is both a necessary and a sufficient condition for the exercise of court-martial jurisdiction. The dissenting opinion disagreed with the majority's analysis of the English and early American practice concerning trial of military personnel for civil type offenses; nor did it concede

> as a general matter that the constitutional limits of congressional power are coterminous with the extent of its exercise in the late 18th and early 19th centuries. . . . The disciplinary requirements of today's armed force of over

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[23] *Id.* at 273.

[24] In this regard, the opinion cites R. EVERETT, MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES 68-69 (1956), and comments that "[w]e were advised on oral argument that Article 134 is construed by the military to give it power to try a member of the armed services for income tax evasion." 395 U.S. at 273.

[25] 395 U.S. at 273-74.

> 3,000,000 men are manifestly different from those of the 718-man army in existence in 1789.[26]

Furthermore, Mr. Justice Harlan accused the majority of ignoring "strong and legitimate governmental interests which support the exercise of court-martial jurisdiction even over 'nonmilitary' crimes."[27] For example, there is

> a vital interest in creating and maintaining an armed force of honest, upright, and well-disciplined persons, and in preserving the reputation, morale, and integrity of the military services. . . . The commission of offenses against the civil order manifests qualities of attitude and character equally destructive of military order and safety . . . . A soldier's misconduct directed against civilians, moreover, brings discredit upon the service of which he is a member . . . ."[28]

The dissent further suggested that trial by court-martial is more consistent than civil court trial with "rehabilitating offenders to return them to useful military service" and that a "soldier detained by the civil authorities pending trial, or subsequently imprisoned, is to that extent rendered useless to the service,"[29] while this may not be the case if his offense is disposed of within the military justice system. Finally, the dissent criticized the "uneasy state of affairs" which had been created by the failure of the majority opinion to "explain the scope of these 'service-connected' crimes as to which court-martial jurisdiction is appropriate . . . ."[30]

A CRITICISM OF THE MAJORITY OPINION

The first criticism of the majority opinion in *O'Callahan v. Parker* concerns the very fact that it was rendered by the Supreme Court as constituted on June 2, 1969. At that time Mr. Justice Fortas had already resigned from the Court, leaving only eight members. Chief Justice Warren, who joined in the majority opinion, had announced his impending retirement. The views on military jurisdiction stated by then-Circuit Judge Warren Burger in his dissent in *United States ex rel. Guagliardo v. McElroy*[31] suggest

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[26] *Id.* at 280.

[27] *Id.* at 281.

[28] *Id.* at 281-82.

[29] *Id.* at 282.

[30] *Id.* at 283. The dissent criticized the majority opinion for intimating that, in some instances, "as a *constitutional* matter the military is without authority to discipline an enlisted man for an offense that is punishable if committed by an officer." *Id.* at 283 n.11.

[31] 295 F.2d 927, 933 (D.C. Cir. 1958), *aff'd.* 361 U.S. 281 (1960).

that he would have favored the position of the dissenters in *O'Callahan.* Thus, it was readily foreseeable on June 2, 1969 that the views of Mr. Justice Douglas might not—indeed, probably would not—command a majority when the Fall Term commenced. However, under Rule 58 of the Supreme Court Rules it would be almost impossible for the Government to secure a rehearing.[32] Thus, the decision in *O'Callahan* would proclaim the law on military jurisdiction at least until it would be overruled in some other case.

Under the circumstances it would have been far preferable if the Court had set the case for reargument in the fall, instead of proceeding to invalidate well-established principles as to the scope of military jurisdiction. However, the Government must share the blame, since presumably it could have moved for reargument after it became clear that the impending change in Court membership would probably improve its chances for success.

A second criticism of the majority opinion is that it departs markedly from well-entrenched precedents. The ultimate irony is that only a few months earlier Mr. Justice Douglas also had authored the opinion in *United States v. Augenblick.*[33] There the Supreme Court reversed a Court of Claims decision that Augenblick's court-martial was invalid because of violations of the Jencks Act. And yet, under the reasoning of *O'Callahan,* the jurisdiction of a court-martial to convict him of committing an indecent, lewd, and lascivious act in violation of Article 134 would seem questionable.[34]

In 1960 the Supreme Court decided four cases concerning

[32] The petition must be submitted within twenty-five days after the decision. Moreover, a petition for rehearing may only be granted at the instance of a Justice who concurred in the judgment or decision and with the concurrence of a majority. SUP. CT. R. 58, 388 U.S. 987-88 (1967).

[33] 393 U.S. 348 (1969).

[34] In *Augenblick,* the accused, a Navy commander, was not on duty when the offense took place, was not in uniform, and it was not known that he was in the Navy until civilian authorities had charged him with disorderly conduct. The alleged offense did not concern performance of his military duties. It took place outside of any military installation in the District of Columbia. The victim, although an airman, was off duty and did not know Augenblick was a naval officer. There was no flouting of military authority, and military property was not involved. The accused was convicted under Article 134 of the Uniform Code, although charged under a different article. *See* Petitioner's Brief for Certiorari at 7-9, United States v. Augenblick, *petition for cert. filed,* 38 U.S.L.W. 3086 (U.S. Sept. 2, 1969) (No. 551).

military jurisdiction over civilians.[35] The Court's conclusion there that courts-martial could not be constitutionally empowered to try civilian employees or dependents for offenses committed overseas in peacetime does not imply that service personnel may be tried by court-martial for offenses that are not "service-connected." However, some of the comments seem to assume that military status would suffice to create military jurisdiction without regard to the type of offense involved. Thus, in *McElroy v. United States ex rel. Guagliardo*,[36] where the Court was considering the cases of a civilian employee who had been convicted of larceny from an air depot in Morocco and of a civilian auditor, who had been convicted of three acts of sodomy in Berlin, the opinion of the Court suggested as a "practical alternative" the incorporation of "those civilian employees who are to be stationed outside the United States directly into the armed services, either by compulsory induction or by voluntary enlistment."[37] There would be little reason for the Court to suggest this alternative if it would not confer jurisdiction for a court-martial to try offenses of the type there involved.[38]

Earlier precedents evidence the Supreme Court's assumption that military jurisdiction to try service personnel is not limited by the type of offense involved. Thus, in *Ex parte Quirin*, the Court observed:

> The exception from the Amendments of 'cases arising in the land or naval forces' was not aimed at trials by military tribunals, without a jury, of such offenses against the law of war. Its objective was quite different—to

[35] McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960); Wilson v. Bohlender, 361 U.S. 281 (1960); Grisham v. Hagan, 361 U.S. 278 (1960); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960). These cases and their antecedents are discussed in Everett, *Military Jurisdiction over Civilians*, 1960 DUKE L.J. 366.

[36] 361 U.S. 281 (1960).

[37] *Id.* at 286.

[38] In the same context, the Court added: "Although some workers might hesitate to give up their civilian status for government employment overseas, it is unlikely that the armed forces would be unable to obtain a sufficient number of volunteers to meet their requirements. The increased cost to maintain these employees in a military status is the price the Government must pay in order to comply with constitutional requirements." *Id.* at 287. Of course, one and perhaps both of these cases involved offenses that might well be "service-connected" under *O'Callahan*. Moreover, the offenses arose overseas and it has not yet been established that *O'Callahan* applies extraterritorially. Thus, these dicta about military status can he distinguished away; but the reader does get the distinct impression that once military status is established, military jurisdiction exists.

> authorize the trial by court-martial of the members of our Armed Forces for all that class of crimes which under the Fifth and Sixth Amendments might otherwise have been deemed triable in the civil courts. The cases mentioned in the exception are not restricted to those involving offenses against the law of war alone, but extend to trial of all offenses, *including crimes which were of the class traditionally triable by jury at common law. Ex parte Mason,* 105 U.S. 696; *Kahn v. Anderson,* 255 U.S. 1, 8-9; *cf. Caldwell v. Parker,* 252 U.S. 376.[39]

In *O'Callahan* the majority relies on rights conferred by the fifth and sixth amendments; and yet in *Ex parte Quirin* the Court concluded that the exception in the fifth amendment for "cases arising in the land or naval forces" was intended to eliminate those rights—even in cases which were triable by jury at common law.

In *Kahn v. Anderson*[40] the Supreme Court upheld the jurisdiction of a court-martial which had tried the accused for a murder he allegedly committed while a military prisoner. The trial had begun on November 4, 1918, and had finished November 25, after the Armistice. The Court did not inquire whether the offense was "service-connected."

Ex parte Mason[41] concerned a soldier on guard duty who had been tried for killing a prisoner. Prosecution was under Article 62 of the Articles of War, this being a "general article"—a predecessor of Article 134 of the Uniform Code—which punished conduct to the prejudice of good order and discipline. Upholding the jurisdiction of the court-martial, the Supreme Court observed that

> [t]he act done is a civil crime, and the trial is for that act. The proceedings are had in a court-martial because the offender is personally amenable to that jurisdiction, and what he did was not only criminal according to the laws of the land; but prejudicial to the good order and discipline of the army to which he belonged.[42]

Clearly the offense involved was "service-connected" since the accused had been performing guard duty; however, the Court placed no reliance on that fact and instead seemed to predicate jurisdiction on his military status.

This precedent was relied on by the Supreme Court in *Grafton v. United States*[43] in disposing of a problem of double jeopardy.

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[39] 317 U.S. 1, 43 (1942) (emphasis added).
[40] 255 U.S. 1 (1921).
[41] 105 U.S. 696 (1882).
[42] *Id.* at 700.
[43] 206 U.S. 333 (1907).

The accused had been prosecuted for homicide in a civil court in the Philippines, although previously acquitted by general court-martial. Apparently the acts—the killing of two Filipinos—were committed on a military reservation. The Court ruled that Grafton was entitled to protection from double jeopardy if the court-martial had the jurisdiction to try him, and jurisdiction did exist under Article of War 62 since, as the Court put it:

> The 62d article of War, in express words, confers upon a general, or a regimental garrison, or field officers' court-martial, according to the nature and degree of the offense, jurisdiction to try 'all crimes' not capital, committed in time of peace by an officer or soldier of the Army. The crimes referred to in that article manifestly embrace those not capital, committed by officers or soldiers of the Army in violation of public law as enforced by the civil power. No crimes committed by officers or soldiers of the Army are excepted by the above article from the jurisdiction thus conferred upon courts-martial, except those that are capital in their nature. While, however, the jurisdiction of general courts-martial extends to all crimes, not capital, committed against public law by an officer or soldier of the Army within the limits of the territory in which he is serving, this jurisdiction is not exclusive, but only concurrent with that of the civil courts.[44]

In *Coleman v. Tennessee*[45] the Supreme Court was inquiring whether a state court could try a serviceman for murder. However, it was not questioned that the military courts had jurisdiction; instead the only issue was whether this jurisdiction was exclusive. As the Court noted:

> In denying to the military tribunals exclusive jurisdiction, under the section in question, over the offenses mentioned, when committed by persons in the military service of the United States and subject to the articles of war, we have reference to them when they were held in States occupying, as members of the Union, their normal and constitutional relations to the Federal government, in which the supremacy of that government was recognized, and the civil courts were open and in the undisturbed exercise of their jurisdiction. When the armies of the United States were in the territory of insurgent States, banded together in hostility to the national government and making war against it, in other words, when the armies of the United States were in the enemy's country, the military tribunals mentioned had, under the law of war, and the authority conferred by the section named, exclusive jurisdiction to try and punish offences of every grade committed by persons in the military service.[46]

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[44] *Id.* at 348.
[45] 97 U.S. 509 (1879).
[46] *Id.* at 515.

Similarly, the Court observed in *Carter v. McClaughry* that

> [u]nder every system of military law for the government of either land or naval forces, the jurisdiction of courtsmartial extends to the trial and punishment of acts of military or naval officers which tend to hring disgrace and reproach upon the service of which they are members, whether those acts are done in the performance of military duties, or in a civil position, or in a social relation, or in private business.[47]

Admittedly, this passage applies directly only to officers, and the Court's opinion in *O'Callahan,* discussing a large number of courts-martial for civil offenses in the early days of the United States, noted:

> Those few which do appear to involve civilian crimes in clearly civilian settings appear also to have been committed by officers. In the 18th century at least the "honor" of an officer was thought to give a specific military connection to a crime otherwise without military significance.[48]

However, *Carter v. McClaughry* was decided in the present century; and furthermore the distinction between officer and enlisted man does not seem to have sufficient constitutional dimensions to allow the court-martial of the former, but not the latter, for a civil-type offense.

The majority opinion is predicated on the need to provide the serviceman the benefits of an indictment by a grand jury and trial by petit jury. As to the former, it is significant that the Supreme Court has not yet expressly overruled *Hurtado v. California,*[49] which held decades ago that fourteenth amendment due process does not require indictment by grand jury. Thus, to the extent that state courts try cases which heretofore would have been tried by

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[47] 183 U.S. 365, 401 (1902), quoting from Smith v. Whitney, 116 U.S. 167, 183-84 (1886).

[48] 395 U.S. at 270 n.14. The famous treatise of Colonel Winthrop, MILITARY LAW AND PRECEDENTS (2d ed. 1920), reveals that many civil-type offenses had been punished as conduct unbecoming an officer and a gentleman pursuant to then-Article of War 61. *See id.* at 710-20. *See also* Smith v. Whitney, 116 U.S. 167, 180 (1886). Conduct unbecoming an officer and gentleman is prohibited by Article 133 of the Uniform Code of Military Justice, 10 U.S.C. § 933 (1964). Officers are also singled out for punishment in Article 88 of the Code, which punishes any officer who uses certain contemptuous words against certain officials. 10 U.S.C. § 888 (1964). However, the history of military enforcement by court-martial of an especially high standard of behavior by officers would probably not suffice to permit court-martial of an officer for an offense that would not be "service-connected" if committed by an enlisted man. In his dissent in United States v. Borys, 18 U.S.C.M.A. 545, 40 C.M.R. 257 (1969), Chief Judge Quinn emphasized that "I, therefore, attach no signifieance to the fact that this accused is a commissioned officer whereas O'Callahan was an enlisted man." *Id.* at 551 n.1, 40 C.M.R. at 261 n.1.

[49] 110 U.S. 516 (1884).

courts-martial, there is no assurance that the accused will receive the benefit of an indictment. Moreover, neither in federal nor state courts does the grand jury procedure provide an accused with discovery of the prosecution's case as is afforded to servicemen pursuant to Article 32 of the Uniform Code. Indeed, in many instances the grand jury is more of a sword for the Government than a shield for the defendant.

There is no point in minimizing the importance of trial by jury. However, it should be remembered that the serviceman frequently is not from the same community which furnishes the jury for the state or federal court where he may be tried. Indeed, he may be viewed by that community as a hostile intruder. On the other hand, he may have considerable rapport with the members of the military community from whom the court-martial personnel would be selected.[50] Thus, even trial by jury may be a less valuable right for the serviceman than for many of his civilian counterparts.

In *O'Callahan* the Court was justifiably concerned with evils of command influence exercised on members of courts-martial. However, both Congress and the Court of Military Appeals have been alert to dangers in this area.[51] Furthermore, in civil life there are "horror stories" of improperly selected juries and grand juries to match the instances of command influence in the military.[52]

The majority opinion in *O'Callahan* does not make clear whether non-service-connected offenses may be tried by court-martial if committed overseas. The cases involving military jurisdiction to try civilians overseas have established that constitutional guarantees may apply extraterritorially.[53] And, if a court-martial is precluded from trying a servieeman for an offense in the United States which is not service-connected because such a trial would violate his rights, it is not evident why such rights would be any less violated if the trial occurred overseas. Moreover,

[50] *Cf.* R. EVERETT, *supra* note 24, at 5-6.

[51] The cases referred to in footnote 5 of the majority opinion involve instances where the convictions were reversed because of command influence. Congress recently amended Article 37 of the Uniform Code of Military Justice. 10 U.S.C. § 837 (1964), to expand the prohibitions against command influence. At least in theory, exercise of command influence would be punishable under Article 98 of the Uniform Code of Military Justice, 10 U.S.C. § 898 (1964).

[52] *See, e.g.*, Eubanks v. Louisiana, 356 U.S. 584 (1958); Avery v. Georgia, 345 U.S. 559 (1953); Hill v. Texas, 316 U.S. 400 (1942); Norris v. Alabama, 294 U.S. 587 (1935).

[53] Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960).

a civil-type felony would not be more service-connected if committed in Germany instead of in Alabama, unless it is assumed that some possible impact on foreign relations adds "service-connection" to the offense.

If a serviceman is not tried overseas for an offense which is not service-connected, he either will be tried by a foreign court or will not be tried at all. In the latter event, there will be no need for constitutional safeguards; in the former, the accused will not receive them and will be tried without the benefit of grand jury indictment or petit jury determination of guilt.[54] Thus, in terms of abstract legal rights—whether or not this holds true as to practical results[55]—the serviceman may be in a worse position under the *O'Callahan* rule than he was previously.[56]

The Supreme Court may avoid this consequence by holding that Congress' constitutional power under Article I, section 8, clause 14, "to make Rules for the Government and Regulation of the land and naval Forces," encompasses the power to punish by court-martial a crime of whatever nature if committed by a serviceman overseas. In support of this conclusion it could be argued that the absence of American civil tribunals overseas necessitates the use of courts-martial to maintain discipline under circumstances where trial by court-martial would be constitutionally forbidden in the United States. Thus, in authorizing such trials, Congress would be exercising "the least

[54] Very few foreign courts provide for jury trial. Even England, which retains trial by jury in criminal cases, has abolished the grand jury.

[55] The unavailability of rights that would be afforded in an American civil court or court-martial may be offset by the relatively light sentences that the foreign courts impose on American military personnel. Therefore, in many instances the serviceman might prefer to be tried in a foreign court rather than an American court of any kind. *Cf.* R. EVERETT, *supra* note 24, at 40-46.

[56] There is little practical remedy for this situation. To create extraterritorial jurisdiction of federal district courts to try crimes committed overseas by military personnel might raise a constitutional problem as to the power of Congress to enact such legislation. *See* Everett, *supra* note 35, at 388-89. Moreover, the American court would have no subpoena power in a foreign country and could not assure the presence of witnesses for the accused or for the government. *Id.* at 375-76. Under treaties, such as the NATO Status of Forces Agreement, the provisions for waiver of jurisdiction by a host country contemplate waiver of jurisdiction for trial of a serviceman by a military tribunal, rather than by a civil court. Thus, the host country would have no obligation or occasion to waive any jurisdiction it possessed in order to permit trial in an American civil court, even if that court possessed extraterritorial jurisdiction over the offense. *See* J. SNEE & A. PYE, STATUS OF FORCES AGREEMENT: CRIMINAL JURISDICTION 24-33 (1957).

possible power adequate to the end proposed," as required by *Toth v. Quarles*.[57]

If the effect of *O'Callahan* is limited on a territorial basis, then the thrust of the preceding criticism will have been blunted. But until that possibility becomes a reality—which may involve considerable adroitness on the Court's part—the majority opinion in *O'Callahan* must be viewed as a triumph of abstract concepts over practical realities.

The picture which Mr. Justice Douglas paints of courts-martial is so bleak as to create a natural reluctance to place service personnel within their clutches. However, the picture is far too one-sided. To illustrate, courts-martial excluded the fruits of unreasonable searches and of wiretapping long before state courts were compelled to do so.[58] Courts-martial have afforded protections as to resentencing which are not yet fully available in civil courts.[59] Military investigators are subject to a warning requirement that was a model for the *Miranda* rule.[60] Discovery of the prosecution's case is more available than in a state or federal court.[61] Qualified defense counsel were furnished without charge to accused in courts-martial for some time before they were required for indigents in state courts.[62] Appellate review of sentence appropriateness is

[57] 350 U.S. 11, 23 (1955), where the Court cited in support Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 230-31 (1821).

[58] *Compare* MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 152 (1951) *with* Mapp v. Ohio, 367 U.S. 643 (1961) *and* Lee v. Florida, 392 U.S. 378 (1968), *noted in* 1968 DUKE L.J. 1008.

[59] Under Article 63 of the Uniform Code of Military Justice the sentence imposed at the first trial constitutes a ceiling on sentence in the event of a rehearing. 10 U.S.C. § 863(b) (1964). In Pearce v. North Carolina, 393 U.S. 973 (1969), however, the Supreme Court ruled that the first sentence is not an absolute bar to an increase in sentence.

[60] Article 31 of the Uniform Code of Military Justice requires that anyone who is "accused or suspected" of a crime must be informed of its nature and told that he need make no "statement regarding the offense of which he is accused or suspected" but that anything he does say "may be used as evidence against him in a trial by court-martial." 10 U.S.C. § 831 (1964). The Supreme Court's opinion in Miranda v. Arizona, 384 U.S. 436 (1966) relies in part on the military practice. Subsequently, the court of appeals extended to military investigations the *Miranda* requirement that the suspect be warned of his right to counsel. United States v. Tempia, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).

[61] *Compare* FED. R. CRIM. P. 16 & 17 *with* MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 44h (1951).

[62] Appointment of defense counsel is dealt with in Article 27 of the Uniform Code of Military Justice; the record of trial, in Article 54. 10 U.S.C. §§ 827, 854 (1964). In Gideon v. Wainwright, 372 U.S. 335 (1963) the Court held that counsel must be furnished without charge in state courts to indigents who could not afford to retain their own counsel in a case

provided in the military justice system, but is generally unavailable in state and federal courts.[63] Courts-martial apply liberal rules of mental responsibility.[64]

Although Justice Douglas may consider trial by court-martial to be "substantially different" from trial in a civil court,[65] the Uniform Code of Military Justice authorizes the President to prescribe a

> procedure, including modes of proof, in cases before courts-martial . . . which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which shall not be contrary to or inconsistent with this chapter.[66]

The Manual for Courts-Martial, in its various editions, has provided for a court-martial procedure which accords with this mandate from Congress, and so courts-martial are now far less alien institutions than Justice Douglas recognizes.

The majority opinion in *O'Callahan* does strike a sore spot in its criticism of Article 134[67]—the "general article"—which allows punishment of conduct to the prejudice of good order, service-discrediting conduct, and crimes and offenses not capital. Although there is Supreme Court precedent for its constitutionality,[68] there

involving a felony or other major crime. In Griffin v. Illinois, 351 U.S. 12 (1956), the Supreme Court insisted that the indigent defendant who so desired be furnished a copy of the transcript to use in preparing his appeal.

[63] As to review of sentence *see* Uniform Code of Military Justice, arts. 63, 64, 66, 10 U.S.C. §§ 863, 864, 866 (1964).

[64] *See, e.g.*, United States v. Dunnahoe, 6 U.S.C.M.A. 745, 21 C.M.R. 67 (1956) (character disorder may negate premeditation); United States v. Kunak, 5 U.S.C.M.A. 346, 17 C.M.R. 346 (1954) (partial responsibility doctrine accepted in murder); United States v. Burns, 2 U.S.C.M.A. 400, 9 C.M.R. 30 (1953).

[65] 395 U.S. at 264.

[66] Article 36, 10 U.S.C. § 836 (1964). There are a few instances, requirements of corroboration and corpus delicti, for example, where the military practice seems to differ from that in the federal district courts. *See, e.g.*, United States v. Smith, 13 U.S.C.M.A. 105, 32 C.M.R. 105 (1962); United States v. Villasenor, 6 U.S.C.M.A. 3, 19 C.M.R. 129 (1955).

[67] 10 U.S.C. § 934 (1964), discussed in Everett, *supra* note 18. Although this Article does purport to incorporate many federal penal statutes into military law, there is some analogy for doing so in the Federal Assimilative Crimes Act, 18 U.S.C. § 13 (1964), which is a "catch-all" provision whereunder the criminal statutes of the surrounding state are incorporated into the federal penal law applicable to a federal enclave. In United States v. Sharpnack, 355 U.S. 286 (1958), the constitutionality of that legislation was upheld (Douglas, J., dissenting).

[68] *E.g.*, Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857). *See* Wiener, *Are the General Military Articles Unconstitutionally Vague?* 54 A.B.A.J. 357 (1968).

has in recent years been a greater sensitivity to problems of vagueness; and, as discussed elsewhere by the present writer, the Armed Services have sometimes pushed Article 134 to the breaking point.[69] Unfortunately this tendency is visible even in the most recent versions of the Manual for Courts-Martial;[70] and the results may prove disastrous for military jurisdiction. However, the only Article 134 offense charged against O'Callahan himself was assault with intent to rape,[71] which has long been recognized in military law, was discussed and specified at several points in the Manual for Courts-Martial,[72] and is familiar in civil courts. Thus, the issue of vagueness should not have been a central one in determining if the court-martial had jurisdiction to try O'Callahan.

Criticism of the majority opinion would be more muted if it had given a clearer test for deciding when military jurisdiction exists. Instead the Court ordains an inquiry as to which offenses are "service-connected;" prior military precedents provide no guidance in this regard.

In investigating the possible interpretations of "service-connected," the Air Force searched electronically the data bases used for its LITE (Legal Information Thru Electronics) system.[73]

[69] Everett, *supra* note 18.

[70] The Court of Military Appeals has held, under the MANUAL FOR COURTS-MARTIAL, UNITED STATES (1951), that solicitation of a crime is generally a simple "disorder" punishable by no more than four months confinement. United States v. Walker, 8 U.S.C.M.A. 38, 23 C.M.R. 262 (1957); United States v. Oakley, 7 U.S.C.M.A. 733, 23 C.M.R. 197 (1957). In the MANUAL FOR COURTS-MARTIAL, UNITED STATES (1969), the Table of Maximum Punishments provides specifically that: "Unless otherwise provided in the Table, any person subject to the Code who is found guilty of soliciting or inducing another person to commit an offense which, if committed by one subject to the Code, would be punishable under this table, shall be subject to the maximum punishment authorized for the offense solicited or induced, except that in no case shall the death penalty be imposed nor shall the period of confinement in any case, including offenses for which life imprisonment may he adjudged, exceed 5 years." *Id.* at ¶ 127c, Table of Maximum Punishments, § A n.7. Since Article 82 of the Uniform Code of Military Justice, 10 U.S.C. § 882 (1964), probibits solicitation to desert, mutiny, misbehave before the enemy, or engaging in sedition, but does not proscribe other types of solicitation, the recent change in the punishment authorized for solicitation to commit other offenses amounts to the use of Artiele 134 to create, without legislative sanction, a new and serious class of crimes.

[71] 395 U.S. at 260.

[72] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 213d (1951) (specific discussion of crime); *id.* at ¶ 127c, Table of Maximum Punishments, § A (punishment specified); *id.* at Appendix 6c (sample specifieation).

[73] The Special Activities Group in the Office of the Judge Advocate General of the Air Force operates LITE for the Department of Defense. Through LITE there can be obtained

By means of this search there was located every use of the word "service-connected" in the United States Code, in the 37 volumes of the Court-Martial Reports containing the published opinions of both the Court of Military Appeals and the Boards of Review, in Air Force Regulations, and in the published and unpublished opinions of the Comptroller General. This inclusive search demonstrated that the word "service-connected" had never been used by the Court of Military Appeals and had appeared in only one Board of Review opinion. In that single instance, the Board merely mentioned that the accused had suffered a "service-connected" injury; the fact of service-connection was not material to any issue in the case.[74]

The LITE search of the United States Code revealed that Congress has chiefly been concerned with service-connection in the context of retirement benefits and disability pay.[75] The same holds true as to the Air Force Regulations and the opinions of the Comptroller General.

Interestingly, Congress has employed a very broad concept of service-connection. Thus, in 38 U.S.C. section 101(16) the term is defined to mean death or disability incurred or aggravated "in line of duty in the active military, naval, or air service." In turn, "line

information as to the context in which a key-word appears each time it is used in materials being searched. Through the KWIC (key word in context) method, information was obtained as to the context in which the word "service-connected" was used, each time it appeared in the Court-Martial Reports, the United States Code, Air Force Regulations and Comptroller General Opinions. Further search made with other key words proved equally fruitless in providing standards for determining which offenses are "service-connected" for purposes of *O'Callahan*.

[74] United States v. Kelley, 22 C.M.R. 723, 724 (Bd. of Review, 1956).

[75] *See* 5 U.S.C. § 851 (1964) (entitlement to Federal employment preference); 5 U.S.C. § 2108 (1964) (veterans' preference in employment for disabled veterans); 5 U.S.C. § 2253 (1964) (creditable service for Federal employment); 5 U.S.C. § 3313 (1964) (veterans' preference in Federal employment); 5 U.S.C. § 8332 (1964) (creditable service in connection with Federal employment); 10 U.S.C. § 4342 (1964) (appointment of cadets); 10 U.S.C. § 6160 (1964) (pension to persons serving ten years); 10 U.S.C. § 6954 (1964) (number of midshipmen); 10 U.S.C. § 9342 (1964) (appointment of cadets); 22 U.S.C. § 1092 (1964) (credits for prior service); 38 U.S.C. §§ 101, 314, 351, 358, 360, 402, 410, 412, 512, 521, 523, 541-42, 601, 610, 612, 619, 624, 631-32, 634, 722, 725, 801, 902, 1501-03, 1652, 1701, 1712, 1765, 1801-03, 1818, 3012, 3503 (1964) (veterans' benefits); 42 U.S.C. § 428 (1964) (benefits at age 72 for certain uninsured individuals); 42 U.S.C. § 1581 (1964) (housing disposition preference); 42 U.S.C. § 1587 (1964) (preference in disposition of certain housing); 42 U.S.C. § 1592a, 1592n (1964) (preference in disposition of defense housing); 42 U.S.C. § 2651 (1964) (recovery by United States of certain sums).

of duty," as dealt with in 38 U.S.C. section 105, applies "when the person on whose account benefits are claimed was, at the time the injury was suffered or disease contracted, in active military, naval, or air service, *whether on active duty or on authorized leave*, unless such injury or disease was the result of his own willful misconduct."[76] Accordingly, for some purposes at least, the serviceman is deemed to be "in line of duty"—and any resultant injuries not due to his own misconduct are "service-connected"—whether he is on leave, on "evening pass" as was O'Callahan, or at his post. Admittedly this all-encompassing view of service-connection is especially appropriate in furthering the liberal policy which Congress and the armed services have adopted in making benefits available for service personnel. It would be far less appropriate if this view were used to limit the constitutional rights of service personnel. However, the possible wide scope of the service-connection concept reveals the difficulties that lie in its use as the touchstone for determining military jurisdiction.

Service-connection has been utilized by the Supreme Court as a criterion in deciding if military personnel can sue under the Federal Tort Claims Act.[77] Distinguishing an earlier case where recovery had been allowed to a serviceman who was then on furlough, the Supreme Court ruled in *Feres v. United States*[78] that military personnel could not sue under the Federal Tort Claims Act for "service-connected injuries or death due to negligence." But here again the concept of service-connection was being used solely in administering civil benefits; it had no relationship to military jurisdiction in criminal matters. Also, this particular case hinged on congressional intent. However, it appears that the Court's interpretation of "service-connected" in *Feres* would be broader than that of Justice Douglas in *O'Callahan*.[79]

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[76] Emphasis added.

[77] 28 U.S.C. §§ 2671-80 (1964).

[78] 340 U.S. 135 (1950), *distinguishing* Brooks v. United States, 337 U.S. 49 (1949).

[79] One point in the Court's reasoning in *Feres* might have relevance to *O'Callahan*. The Court suggested that it would be ironic for the serviceman tort claimant, who has no choice where he must serve, to bave his rights against the Federal Government hinge—as is true under the Federal Tort Claims Act—on the law of the state where the act or omission occurs which gives rise to liability. *See* 340 U.S. at 142-43. The *O'Callahan* case has the practical effect in some instances of subjecting the serviceman to the vagaries of the substantive and procedural law of the state where he is stationed, rather than to the Uniform Code of Military Justice. While recent Supreme Court decisions incorporating specific safeguards of

As noted earlier, Congress, in dealing with certain benefits for "service-connected" death or disability, has equated "service-connected" to "in line of duty."[80] "Line of duty" is also relevant in imposing liability on the Government under the Federal Tort Claims Act, which provides that a member of the armed services is acting within the scope of his office or employment if he is "acting in line of duty."[81] Although the problem is complicated by reference to state law in determining scope of employment,[82] there is no uniform pattern as to the circumstances which constitute "line of duty."[83] In some instances, members of the armed forces have been held to be acting within the scope of their employment and therefore to have generated liability under the Federal Tort Claims Act,[84] even though they were on leave at the time of the negligent act or omission, once again evidencing that service-connection is an ambiguous term by which to delineate military jurisdiction.

The majority opinion in *O'Callahan* does not make clear which factors are sufficient to create service-connection of an offense, and military jurisdiction over that offense. For instance, does it suffice to show service-connection if the victim of an offense is in the military? Or if the victim is a civilian dependent or employee? Must either the accused or the victim be in uniform? What if the offense occurred on a military reservation? Or in Government quarters? Is

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the fourteenth amendment into the due process guarantee do provide a minimum standard of procedural due process in the state courts, there remain areas of considerable difference. Moreover, if *O'Callahan* applies overseas, the difference in procedural and substantive law among different foreign courts would be greater than among the state courts in this country. Thus, *O'Callahan* moves military personnel further away from the goal of being subject to the application of uniform laws wherever they may be stationed—the goal of which the Court spoke with favor in *Feres*. However, even before *O'Callahan* there existed a possibility of considerable variety since local courts would generally have concurrent jurisdiction with courts-martial over civil type offenses.

[80] See text accompanying note 76 *supra*.

[81] 28 U.S.C. § 2671 (1964).

[82] *See, e.g.*, Williams v. United States, 350 U.S. 857 (1955) (per curiam).

[83] *See, e.g.*, Bissell v. McElligott, 369 F.2d 115 (8th Cir. 1966), *cert. denied*, 387 U.S. 917 (1967); Hinson v. United States, 257 F.2d 178 (5th Cir. 1958); United States v. Mraz, 255 F.2d 115 (10th Cir. 1958); United States v. Kennedy, 230 F.2d 674 (9th Cir. 1956); Farmer v. United States, 261 F. Supp. 750 (S.D. Iowa 1966); O'Brien v. United States, 236 F. Supp. 792 (D. Me. 1964).

[84] *See* cases cited note 83 *supra*.

the rank of the accused important? Is it significant whether military property, or Government property generally, is involved? There obviously will be considerable litigation in determining what are the proper tests of "service-connection;" and the necessity for this litigation would seem to be added reason for hesitancy in casting aside the previously established, much simpler test of military status.

Perhaps the most fundamental criticism of the majority opinion in *O'Callahan* is that from the time of the framing of the question on which certiorari was granted until the decision on June 2, 1969, the Court assumed that the commission of serious felonies by a serviceman would have no "military significance." The converse seems more probable—that is, that the commission of any serious crime by a serviceman does have military significance.

In one sense, this is illustrated by the case of General Yamashita, whose Japanese armies occupied the Philippines during World War II.[85] Some of his soldiers looted, pillaged, and raped; and, after Japan's surrender, Yamashita was tried by a military tribunal for failure in his responsibilities as a commander by not punishing those of his troops who had run amuck. In his defense Yamashita claimed that for various reasons he had lacked the power to control his men and that he should not be punished for occurrences which he could not prevent.[86] This contention was decided against him and ultimately he was executed. Although the case involves the law of war rather than American constitutional law, it seems to establish that a commander will be held responsible for maintaining discipline among his troops and preventing them from committing crimes against the populace. This responsibility may be difficult for a commander to fulfill if serious felonies must be dealt with through civil courts instead of by military tribunals. To put it differently, civil crimes do have "military significance" so long as the courts and the public are disposed to hold a commander responsible for failure to curtail those crimes.

Another type of "military significance" derives from the often-observed habit of grouping persons in terms of some general characteristic. Although there is vocal distrust for guilt by association, it is not unusual for the inference to be drawn that

[85] *In re* Yamashita, 327 U.S. 1 (1946).

[86] For an interesting account, *see* A. REEL, THE CASE OF GENERAL YAMASHITA (1949).

"birds of a feather flock together." An obvious basis for grouping persons together as the object of certain attitudes is that they are all members of the armed services. Thus, a publicized crime committed by one soldier may affect the reputation of every other serviceman in the same community:

> In effect, each serviceman holds the key to the reputation of his comrades-in-arms, and is under an obligation to them not to do things that will discredit them. Military justice seeks to enforce this obligation and to provide a pressure for each serviceman to abide by standards that will not lower the Armed Services and their personnel in the public eye. If those standards are not maintained, it makes life less tolerable for the man in uniform, frustrates recruitment of new servicemen, and diminishes the cooperation of the general public with the Armed Forces.[87]

Many civil type offenses have been tried as conduct unbecoming an officer and a gentleman.[88] This concern with the honor of officers may proceed from a premise that it is especially important for the reputation of the military establishment that its officers be considered as honorable men. However, can it be asserted that today there is any less "military significance" in assuring that *both* officers and enlisted personnel have the confidence and respect of the populace?

In instances where a member of the armed services is awaiting trial by civil court, he is often rendered useless for military duties. There may be considerable reluctance to reassign him because of the foreseeable need subsequently to return him for trial and for possible imprisonment. If an accused serviceman is sentenced to confinement, he obviously is much more suitable for rehabilitation and for further service in the armed forces if he can be retrained during that confinement.[89] Thus, an offense may have "military significance" because of the relationship between the trial and punishment alternatives for that offense and the feasibility of obtaining further military service from the accused serviceman.

THE AFTERMATH TO O'CALLAHAN

After the Supreme Court's decision the Government considered seeking a rehearing, by which, as in the *Reid v. Covert*[90] litigation,

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[87] R. EVERETT, *supra* note 24, at 3.

[88] See note 48 *supra* and accompanying text.

[89] The Air Force, for example, pioneered in rehabilitation with its Retraining Group at Amarillo Air Force Base—later moved to Lowry Air Force Base. This minimum custody facility was quite successful in retraining airmen for return to duty.

[90] 354 U.S. 1 (1957), *withdrawing* 351 U.S. 487 (1956).

a losing party might snatch victory from defeat.[91] However, Supreme Court Rule 58 provides that a petition for rehearing may be granted only at the instance of a justice who concurred in the judgment or decision and with the concurrence of a majority of the Court. Moreover, only twenty-five days are allowed for the submission of such a petition.[92] The primary problem was to find a Justice who had belonged to the majority in *O'Callahan* and who would vote for a rehearing, as Justice Harlan had done in the *Reid v. Covert* litigation. Apparently this hurdle was insuperable,[93] and no petition for rehearing was filed.

Meanwhile all the armed services decided to take a very restrictive view of *O'Callahan*, just as they had taken a narrow view of *Reid v. Covert* a decade before.[94] The Boards of Review—reconstituted on August 1, 1969, as Courts of Military Review—followed suit. It was held that *O'Callahan* had no extraterritorial effect and therefore did not apply to a court-martial

[91] Initially the Supreme Court upheld military jurisdiction over civilian dependents in an opinion announced by Mr. Justice Clark for the Supreme Court on June 11, 1956. Kinsella v. Krueger, 351 U.S. 470 (1956). Thereafter, a petition for rehearing was submitted, and Justice Harlan, who had concurred in the original opinion, decided to vote for the rehearing, which was granted on November 5, 1956. 352 U.S. 901-02 (1956). Justice Brennan, then serving on an interim appointment as a replacement to Justice Minton, who had retired on October 15, 1956, took no part in consideration of the petition for rehearing, and Justices Reed, Burton, and Clark indicated that they would deny the petition. Finally, on June 10, 1957, the Supreme Court published its final opinion on the subject in Reid v. Covert, 354 U.S. 1 (1957), and withdrew its earlier opinion, 351 U.S. 487 (1956). At that time, Justice Black wrote the plurality opinion, wherein Chief Justice Warren, and Justices Brennan and Douglas concurred. Justices Frankfurter and Harlan concurred in the result, on the ground that military jurisdiction over such civilians did not exist in capital cases. Justice Whittaker, who replaced Justice Reed on the Court on March 25, 1957, did not participate in the decision; and Justices Clark and Burton were the sole dissenters. *See* Everett, *supra* note 35.

[92] SUP. CT. R. 58, 388 U.S. 987-88 (1967).

[93] In a report to the Judge Advocates Association in Dallas, Texas, on August 11, 1969, Major General Kenneth Hodson, the Judge Advocate General of the Army, stated that he and the Solicitor General did not believe that any member of the original majority would be willing to join in the petition for rehearing. Also, it was anticipated that other cases concerning military jurisdiction would soon reach the Court and that the overruling of *O'Callahan* could then be urged before the Court as reconstituted.

[94] At that time the different Services had construed *Reid v. Covert* to mean only that civilian dependents could not be tried in peacetime for capital offenses committed overseas, but that military jurisdiction existed as to non-capital offenses. After *O'Callahan* the position was taken that the presence of almost any element lacking in *O'Callahan* would be sufficient to sustain military jurisdiction and that *O'Callahan* is neither retroactive nor extraterritorial in effect. *See, e.g.*, Army Judge Advocate General, Directive JAJG 1969/8399(June 4, 1969), *noted in* 5 CRIM. L. REV. 2229 (1969) (narrow construction of the case ordered by Judge Advocate General of the Army).

for a robbery committed in Germany.[95] The decision was held to be prospective and to apply only to trials commenced after June 2, 1969.[96] A Board of Review concluded that the Supreme Court had been "speaking only in terms of placing a limitation on the *exercise* of jurisdiction—not in terms of its existence or nonexistence" and that "the limitation imposed by *O'Callahan* is, in our view, functional rather than jurisdictional."[97] In an assault case, where one airman injured another while both were off-base, the Board of Review upheld jurisdiction of the court-martial and pointed out that both the accused and the victim

> [w]ere active duty members of the United States Air Force and such conduct on their part would certainly tend to bring discredit upon the Air Force in the eyes of the citizens of Las Vegas. Conduct of this nature is also prejudicial to good order and discipline in the armed forces. Additionally, the Air Force was deprived of the services of the victim during the period of time that he was hospitalized and unable to report for duty. . . .[98]

In another case, bigamy was deemed to be service-connected, the Board noting that:

> It is common knowledge that dependents of the service member become entitled under current statutes, implemented by directives of the respective services, to many substantial rights and benefits. The bona fide dependents are entitled to allotments, medical care, commissary and exchange privileges, to name but a few.
>
> It takes but little perspicacity to understand the plethora of ways in which the services are involved when one of its members acquires an illegal second set of dependents.
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> . . . .
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> . . . The facts of the instant case most eloquently illustrate that the ceremony was but the springboard from which the appellant proceeded to illegally extract from the Government monies and benefits to which his bigamous partner was not entitled, while living in this illegal status. We have no difficulty in perceiving that such a bigamous relationship, particularly within the circumstances of this case involves a flouting of military authority and directly facilitated the obtaining of the above-mentioned unauthorized money, services, and other military benefits. Furthermore, it is clear that this offense is prejudicial to good order and discipline in or brings discredit upon the armed forces . . . .[99]

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[95] United States v. Gill, ACM 20452 (Bd. of Review, July 31, 1969).

[96] United States v. King, ACM 20361 (Bd. of Review, July 30, 1969), contains an interesting review of Supreme Court precedents on prospective application of certain recent decisions.

[97] *Id.*

[98] United States v. Everson, ACM S-22769 (Bd. of Review, June 25, 1969).

[99] United States v. Burkhart, ACM S-22793 (Bd. of Review, June 27, 1969).

A forgery could be tried by court-martial, because the offense occurred in a barracks and a fellow soldier was the victim.[100] Utterance of a disloyal statement off-post in the continental United States is military-connected and so falls within court-martial jurisdiction.[101] Wrongful possession of marijuana close to midnight and some ten miles from the accused's duty station had military significance and could be punished by court-martial, the Board of Review remarking that "[t]he 'victim' or 'victims' of the alleged offense may legitimately be regarded as military, i.e.: either [accused] himself, or more directly, the United States Army or a portion thereof."[102] There have also been suggestions that offenses occurring at the present time do not fall within the *O'Callahan* rationale since they are not peacetime offenses.[103]

The Court of Military Appeals has proved less grudging in its application of *O'Callahan v. Parker*. On September 5, 1969 it held in *United States v. Borys*[104] that the accused officer could not be tried by a general court-martial convened in Georgia for offenses which occurred off-post in the homes of the victims, located in Georgia and South Carolina. The crimes took place

> during accused's off-duty hours or when he was on leave, involved purely civilian female victims, and constituted rape, robbery, sodomy, and attempts to commit such acts, all such crimes being civil in nature. The accused was described as wearing civilian clothing, and the vehicle which he used—and which eventually led to his apprehension—was his own private automobile. The sole mention of any military matter in the case was a bumper sticker which served to help in his identification and apprehension.[105]

Captain Borys had initially been arrested by civil authorities, tried and acquitted in a South Carolina state court as to some of his crimes, and then brought before a general court-martial. At the time of the decision in *O'Callahan*, the *Borys* case had been pending before the Court of Military Appeals on the issue of double jeopardy resulting from the state court acquittal. The opinion of the court made this comparison of the accused's offenses with those involved in *O'Callahan*:

> They, too, involved civilian victims, unconnected with the military.

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[100] United States v. Taylor, CM 420339 (Bd. of Review, June 17, 1969).
[101] United States v. Bell, CM 419988 (Bd. of Review, July 3, 1969).
[102] United States v. Konieczko, CM 419706 (Bd. of Review, June 19, 1969).
[103] *Id.* (Nemrow, J., concurring).
[104] United States v. Borys, 18 U.S.C.M.A. 545, 40 C.M.R. 257 (1969).
[105] *Id.* at 547-48, 40 C.M.R. at 257-58.

> Neither Georgia nor South Carolina were armed camps on far-flung outposts under Army control. Accused's horrible acts, like those of O'Callahan, did not flout military authority, breach military security, or affect military property. In fact, he himself did not even reside on post, but lived among the civilian community on which he preyed. Finally, the courts of South Carolina and Georgia were not only open and functioning, but resort to the former's facilities led only to accused's acquittal.
>
> In sum, accused's military status was only a happenstance of chosen livelihood, having nothing to do with his vicious and depraved conduct, and none of his acts were 'service connected' under any test or standard set out by the Supreme Court. In short, they, like O'Callahan's, were the very sort remanded to the appropriate civil jurisdiction in which indictment by grand jury and trial by petit jury could be afforded the defendant.[106]

This opinion, written by Judge Ferguson, rejected the dissent's argument that, in addition to service-connection, the offense must be triable in a federal court in order to escape the application of *O'Callahan*. Significantly the opinion does not suggest that the conviction of Captain Borys might be sustained because his trial had taken place prior to the *O'Callahan* decision or because it was not a "peacetime" offense.

Chief Judge Quinn's dissent noted that the Court of Military Appeals is bound by decisions of the Supreme Court interpreting the Constitution; but it expressed "hope that the searching criticism of the bench and bar may, as it has on other occasions, convince a new or future majority of the Supreme Court of the error of *O'Callahan*."[107] The Chief Judge reasoned that two factors must coexist in order to preclude military jurisdiction over an offense: (1) that it is "cognizable in a civilian court," and (2) that it is "not service-connected" or has "no military significance." As to the first factor, he added that the "civilian court" must be established under federal authority; thereby he distinguished *O'Callahan*, since the offenses committed by Sergeant O'Callahan could have been tried in a court of the then-Territory of Hawaii and any such court derived its power from the Federal Government.

In *United States v. Prather*,[108] decided by the Court of Military Appeals at the same time as *Borys*, a general court-martial was held to lack jurisdiction under the *O'Callahan* rule. The offenses involved were wrongful appropriation of an automobile, robbing a

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[106] *Id.* at 549, 40 C.M.R. at 259.

[107] *Id.* at 550, 40 C.M.R. at 260.

[108] 18 U.S.C.M.A. 560, 40 C.M.R. 272 (1969).

gasoline station, and resisting arrest. The important facts were these:

> On the morning of August 10, 1967, the accused appropriated a 1964 civilian-owned Volkswagen sedan parked behind an office building in Marietta, Georgia. After purchasing a .22 caliber revolver and box of cartridges, he held up the attendant of a service station in Mableton, Georgia, obtaining $148.00. Later, while driving the misappropriated vehicle, he exchanged gunshots with pursuing police. Eventually Prather drove into a block wall, escaped from the car, and ran to the home of his parents where he hid in the basement. There he was taken into police custody.[109]

Chief Judge Quinn again dissented, adding here the argument that under the circumstances—including an informal commitment from civil authorities that they would not prosecute if the military "punished" him—Prather had waived the constitutional rights he would have had if tried in a state court and had validly consented to trial by court-martial.

A week after its decisions in *Borys* and *Prather,* the Court of Military Appeals considered the applicability of the *O'Callahan* decision to marijuana offenses. The accused in *United States v. Beeker*[110] had been found guilty of five marijuana offenses: (1) unlawful importation of marijuana into the United States contrary to 21 U.S.C. § 176a; (2) unlawful transportation of marijuana contrary to 21 U.S.C. § 176a; (3) wrongful possession on a military installation; (4) wrongful use off-post; and (5) wrongful use of marijuana on a military installation. Noting that a federal civilian court has cognizance of the first two offenses alleged, the court ruled that they entailed "the exercise of governmental powers different from regulation of the armed forces" and were not triable by court-martial. However, use or possession of marijuana and narcotics, whether on or off-post, "has singular military significance which carries the act outside the limitation on military jurisdiction set out in the *O'Callahan* case."[111]

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[109] *Id.* at 561, 40 C.M.R. at 273.

[110] 18 U.S.C.M.A. 563, 40 C.M.R. 275 (1969).

[111] *Id.* at 565, 40 C.M.R. at 277. A federal district court has subsequently accepted the position that use of marijuana by a serviceman, either on or off post, might have military significance, but it would not accept this view as to off base possession of marijuana. Moylan v. Laird, C.A. File No. 4179 (D.R.I., Oct. 20, 1969). The Court of Military Appeals has held that unlawful delivery of drugs to another serviceman, whether on or off post, is service-connected. United States v. Rose, No. 21,715 (C.M.A., Oct. 3, 1969).

Two weeks later, the court held that a general court-martial lacked jurisdiction to try the accused for carnal knowledge of a female under the age of sixteen.[112] The victim was a military dependent whom the accused had met at an Air Force Base, but the offense occurred at his off-base apartment. Noting that only the status of the victim as a military dependent and the fact that he met her on-base differentiated the case from *O'Callahan* the court conceded that "these factors might, in a proper case, provide the necessary 'service connection' to invest a court-martial with jurisdiction over a particular offense," but it did "not believe they are controlling here." The court added:

> It was not essential to their initial meeting that the victim sball have been a military dependent for, in the main, military posts are open to the public. We know of no reason to believe that the rules at Ramey Air Force Base are to the contrary. In addition, her service connection was natal and not legal and, as such, insufficient to bring her personally within the ambit of the Uniform Code. Reid v. Covert [354 U.S. 1 (1957)]. In her testimony at trial, the victim did not indicate that her activities with the accused were in any manner premised on his status as a serviceman.[113]

In another case of carnal knowledge a distinction was drawn by the court as to the place where the offense had occurred.[114] There the accused had engaged in sexual intercourse in on-base housing, and in view of the need to maintain "the security of a military post," the court-martial was held to possess jurisdiction.

Three specifications of passing worthless checks with intent to defraud, in violation of Article 123a of the Code, were before the Court of Military Appeals in *United States v. Williams*.[115] Two of the checks had been cashed at the Consolidated Exchange located on base at Fort Bragg, North Carolina. The court reasoned that

> [i]nasmuch as the uttering of these particular checks took place on base, and cashed at the Fort Bragg Consolidated Exchange, a governmental ageney on the base, we believe that the offenses were 'service conneeted' within the meaning of O'Callahan v. Parker, supra, and that the court-martial had jurisdiction to try the accused.[116]

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[112] United States v. Henderson, 18 U.S.C.M.A. 601, 40 C.M.R. 313 (1969). The offense was charged under Article 120 of the Uniform Code of Military Justice, 10 U.S.C. § 920 (1964).

[113] *Id.* at 602, 40 C.M.R. at 314.

[114] United States v. Smith, 18 U.S.C.M.A. 609, 40 C.M.R. 321 (1969).

[115] 18 U.S.C.M.A. 605, 40 C.M.R. 317 (1969).

[116] *Id.* at 606, 40 C.M.R. at 318.

However, the third check had been written to satisfy a grocery account. In that instance the offense

> took place in the civilian community and a civilian was victimized thereby. The offense was triable in the courts of North Carolina. Under the rationale of O'Callahan v. Parker, supra, this offense was not 'service connected' and, hence, the court-martial was without jurisdiction to proceed.[117]

In *United States v. Crapo*[118] the Court of Military Appeals reviewed findings that the accused had been guilty of attempted robbery and robbery. The former had taken place in Seattle, Washington, and there was

> no evidence in this record that the offense had any military significance other than the status of the accused as a member of the armed forces of the United States. Since the courts of the State of Washington have cognizance of this offense, it is apparent that the court-martial was without jurisdiction to proceed thereon.[119]

The robbery, however, had been initiated when the accused and a companion assaulted a cab driver on a military reservation. Although the taking of the victim's money occurred three blocks outside the gate to the reservation,

> the fact that the assault and force and violence, elements of the robbery, took place within the confines of a military reservation is, in our opinion, a sufficient basis to sustain military jurisdiction over the offense, O'Callahan v. Parker, supra. The security of the base demands it.[120]

In another case, which involved a conviction for theft of an automobile, the car had been stolen from a car lot in Oceanside, California, and subsequently brought onto a military post. The Court of Military Appeals, although adverting to the contention that bringing of the vehicle on base compromised "the security of a military post," replied:

> When the automobile was taken from the used car lot, the crime of larceny was complete and jurisdiction was thereupon vested in the local courts. There is simply no evidence that the larceny was 'service connected' as the subsequent use of the vehicle was irrelevant to the proof of the charged offense. We take no view on whether the bringing of stolen property upon a military base is an offense triable by court-martial. That determination will have to be left for resolution in a proper case. We do

[117] *Id.*; *accord*, United States v. Cochran, 18 U.S.C.M.A. 588, 40 C.M.R. 300 (1969).
[118] 18 U.S.C.M.A. 594, 40 C.M.R. 306 (1969).
[119] *Id.* at 595, 40 C.M.R. at 306.
[120] *Id.* at 596, 40 C.M.R. at 308.

> hold that under the circumstances of this case, it is insufficient to vest this special court-martial with jurisdiction.[121]

In *United States v. Shockley*,[122] which involved a conviction of sodomy, the Court of Military Appeals ruled that military jurisdiction had been lacking as to the offenses which took place in the accused's off-base residence at Oceanview, Virginia. The court went on to say:

> A different conclusion, however, is dictated with reference to the commission of the offense of sodomy at Camp Allen. Camp Allen is a Government housing area located within the confines of the Naval Base at Norfolk, Virginia. As such, the military are charged with maintaining the security of that area. This factor is sufficient to vest in the court-martial jurisdiction to try this portion of the offense.[123]

In a case involving wrongful appropriation of a truck owned by a civilian, the Court of Military Appeals ruled that military jurisdiction existed since the offense occurred on the Presidio of San Francisco, a military reservation. In the court's view, the crime directly affected "the security of a military post."[124]

Espionage by an Army sergeant was the subject of *United States v. Harris*.[125] In upholding military jurisdiction, the Court of Military Appeals emphasized that

> the documents involved were inner-working papers of the military establishment and, while not containing a security classification, one was marked for official use only. They were not generally available to the civilian populace. The security and integrity of these documents rests exclusively within the military establishment.[126]

Furthermore, the accused's military duties played a major role in his participation in the conspiracy.

United States v. Castro[127] concerned a conviction for violating a general regulation by unlawful possession of barbiturates and for

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[121] United States v. Riehle, 18 U.S.C.M.A. 603, 604, 40 C.M.R. 315, 316 (1969).

[122] 18 U.S.C.M.A. 610, 40 C.M.R. 322 (1969). *See also* Fleiner v. Koch, Misc. No. 69-47 (C.M.A., writ of prohibition granted Oct. 7, 1969). It is interesting to contrast the result in these cases with that reached in the *Augenblick* litigation, notes 33-34 *supra* and accompanying text.

[123] *Id.* at 611, 40 C.M.R. 323.

[124] United States v. Paxiao, 18 U.S.C.M.A. 608, 609, 40 C.M.R. 320, 321 (1969).

[125] 18 U.S.C.M.A. 596, 40 C.M.R. 308 (1969). *See also* United States v. Safford, No. 21,929 (C.M.A., Oct. 17, 1969).

[126] *Id.* at 597, 40 C.M.R. at 309.

[127] 18 U.S.C.M.A. 598, 40 C.M.R. 310 (1969).

carrying a concealed weapon. As to the former charge, the Court of Military Appeals remarked:

> In our opinion, the existence of a general regulation declaring specified conduct as punishable, does not, standing alone, *per se* confer jurisdiction on a court-martial to try one accused of its violation. The conduct proscribed therein must be 'service connected' within the meaning of O'Callahan v Parker, supra. The reason is obvious, for to hold otherwise would be tantamount to giving to the military authority to regulate and punish conduct of servicemen in excess of that granted to Congress under Article I, section 8, clause 14 of the Constitution to 'make Rules for the Government and Regulation of the land and naval Forces.' Congressional power to regulate in this area is limited to those matters which are 'service connected.'[128]

Nonetheless, the court upheld the conviction for violating the regulation, since unlawful use and possession of the prohibited drugs is detrimental to the health, morale, and fitness for duty of persons in the armed forces.[129] As to carrying the concealed weapon, the court considered that such misconduct could be punished by court-martial if it occurred within the confines of a military establishment. Since such a fact had not been proved, no court-martial was entitled to try the case.

Over the dissent of Judge Ferguson, the Court of Military Appeals ruled that theft or robbery from another serviceman is service-connected,[130] and that breaking into the off-base residence of a fellow serviceman in Midwest City, Oklahoma was subject to military jurisdiction.[131] With Chief Judge Quinn dissenting, the court held that military jurisdiction was lacking to prosecute the theft of an automobile belonging to a retired major, even though the accused was wearing military fatigues.[132] However, where an accused who was wearing fatigues had used his military standing to facilitate his misappropriation of a car from a used-car salesman, a majority of the court upheld jurisdiction.[133] Similarly, the uttering of forged checks by the accused was considered to be service-connected where each

[128] *Id.* at 600, 40 C.M.R. at 312.

[129] *Id. See also* United States v. Beeker, 18 U.S.C.M.A. 563, 40 C.M.R. 275 (1969); United States v. Rose, No. 21,715 (C.M.A., Oct. 3, 1969).

[130] United States v. Plamondon, No. 21,569 (C.M.A., Oct. 10, 1969).

[131] United States v. Rego, No. 21,661 (C.M.A., Oct. 10, 1969); *accord*, United States v. Camancho, No. 21,659 (C.M.A., Oct. 10, 1969).

[132] United States v. Armes, No. 22,184 (C.M.A., Oct. 10, 1969).

[133] United States v. Peak, No. 21,880 (C.M.A., Oct. 10, 1969).

check was successfully cashed because the victims "were made aware of and placed reliance on his military status."[134]

In reviewing an appeal from conviction for misconduct involving marijuana, the Court of Military Appeals unanimously concluded that, since the offenses occurred in Germany, "the constitutional limitation on court-martial jurisdiction delineated in the *O'Callahan* case is inapplicable."[135] No attempt was made to justify in detail this important holding.

In none of these cases has the Court of Military Appeals dealt expressly with the issue of retroactivity. At least to some extent, *O'Callahan* has already been applied retroactively by the court. The court's decisions concerning the scope of the service-connection concept have been rendered in cases that were tried before the Supreme Court's opinion in *O'Callahan*.[136] The court has not suggested that *O'Callahan* is inapplicable during the present period of active hostilities abroad.

The presence of frequent dissents in the cases determining which offenses are service-connected helps demonstrate that this test is sometimes difficult to apply. In turn, the difficulty of application suggests that a different test of military jurisdiction should be utilized.

Of special import is the restriction which the Court of Military Appeals imposes upon the military's power to regulate conduct of military personnel which is not "service-connected." Absent this restriction, military authorities might establish military jurisdiction over otherwise non-service-connected conduct by promulgating orders that military personnel not engage in such conduct.

Some of the opinions seem to place emphasis on whether an American civil court might try the offense charged. There are some pitfalls in this approach since it tends to make military jurisdiction dependent on the vagaries of state and federal regulation. Thus, military jurisdiction over a citizen might be expanded by limiting the jurisdiction of state and federal civil courts to try that type of offense when committed by a serviceman.

The Court of Appeals for the District of Columbia Circuit has

[134] United States v. Hallahan, No. 22,229 (C.M.A., Oct. 24, 1969); *accord*, United States v. Morisseau, No. 22,250 (C.M.A., Oct. 10, 1969).

[135] United States v. Weinstein, No. 21,909 (C.M.A., Oct. 17, 1969).

[136] See Court of Military Appeals decisions cited notes 104-21, 123-35 *supra*.

given a broad interpretation to *O'Callahan.* In *Latney v. Ignatius*[137] the issue was the jurisdiction of a Navy general court-martial to try for murder an American merchant seaman accused of fatally stabbing another seaman at a bar in DaNang, South Viet-Nam. Both men had been serving on an oil tanker then under charter to the Navy and had been engaged in off-loading oil, gasoline, and aviation fuel. The court of appeals quoted a passage from Justice Douglas' opinion in *O'Callahan* wherein he had commented that earlier cases "decide that courts-martial have no jurisdiction to try those who are not members of the Armed Forces, no matter how intimate the connection between their offense and the concerns of military discipline . . . ."[138] Conceding that the *O'Callahan* opinion had concerned peacetime offenses committed within American territorial limits, the court's per curiam opinion nonetheless concluded that

> the spirit of *O'Callahan,* and of the other Supreme Court precedents there reviewed, precludes an expansive view of Article 2(10) of the Uniform Code of Military Justice, 10 U.S.C. § 802(10), even assuming as we do that this is a time of undeclared war which permits some invocation of the war power under which Article 2(10) was enacted.[139]

Although the case involved only the question of military jurisdiction over a civilian in South Viet-Nam, the court's opinion does not seem conducive to arguments that *O'Callahan* applies only within the United States and in time of complete peace.

The decision in *O'Callahan* has been utilized in some efforts to enjoin trial by court-martial. Also, it has been relied on in petitions for certiorari;[140] and probably the Government will in some instances join in requesting that the Supreme Court grant certiorari in order to define more clearly the full scope of *O'Callahan.* Thus, as an aftermath to *O'Callahan,* the federal courts at every level are being called upon to answer questions to which it gives rise.

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[137] No. 21,681 (D.C. Cir., June 30, 1969).

[138] *Id.*

[139] *Id.*

[140] *See, e.g.,* United States v. Augenblick, 393 U.S. 348 (1969), *petition for cert. filed,* 38 U.S.L.W. 3086 (U.S. Sept. 2, 1969) (No. 551); Swift v. Commandant, *petition for cert. filed,* (June 4, 1969) (No. 391); Relford v. Commandant, *petition for cert. filed,* (July 22, 1969) (No. 665).

SOME UNRESOLVED QUESTIONS

Retroactivity

In recent years the Supreme Court has developed the doctrine that, in some instances, its precedents should only be applied prospectively and should not affect criminal cases that have been completed. The exclusionary rule as to search and seizure was applied only to state court cases in which direct appeal had not been concluded before the Court's decision in *Mapp v. Ohio.*[141] A similar position was taken as to the prohibition of comment on a defendant's silence at his trial[142] but not as to the requirement that counsel be furnished to indigent defendants in state trials involving serious offenses.[143] In *Johnson v. New Jersey*[144] it was held that the *Escobedo*[145] and *Miranda*[146] decisions applied only to cases tried after the dates on which these two cases were decided. However, the *Miranda* rule was not extended to a case that was originally tried prior to the decision in *Miranda,* but was reversed and then retried after *Miranda.*[147] In *Stovall v. Denno*[148] the Supreme Court held that the rule concerning the right to counsel at police lineups should only be applied to lineups that were subsequent to the date of the decision in *Wade.*[149]

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[141] 367 U.S. 643 (1961). *Mapp* was held inapplicable to state convictions which had already become final. Linkletter v. Walker, 381 U.S. 618 (1965).

[142] Griffin v. California, 380 U.S. 609 (1965), which prohibited comment upon the defendant's failure to testify in a state criminal trial, was held applicable only to cases that had not become final before that decision was handed down. Tehan v. United States *ex rel.* Shott, 382 U.S. 406 (1966).

[143] Mempa v. Rhay, 389 U.S. 128 (1967). (applied right to counsel to revocation of probation and imposition of deferred sentencing); Douglas v. California, 372 U.S. 353 (1963) (extended right to counsel to the appellate process); Gideon v. Wainwright, 372 U.S. 335 (1963) (established the right to counsel in a criminal trial); Hamilton v. Alabama, 368 U.S. 52 (1961) (affirmed right to counsel at certain arraignments). In each instance, the right to counsel was applied retroactively. McConnell v. Rhay, 393 U.S. 2, 3 (1968).

[144] 384 U.S. 719 (1966).

[145] Escobedo v. Illinois, 378 U.S. 478 (1964).

[146] Miranda v. Arizona, 384 U.S. 436 (1966).

[147] Jenkins v. Delaware, 395 U.S. 213 (1969).

[148] 388 U.S. 293 (1967). Stovall was singularly unfortunate. His was one of three lineup cases pending before the Supreme Court. The defendants in Gilbert v. California, 388 U.S. 263 (1967) and United States v. Wade, 388 U.S. 218 (1967) appealed successfully on this issue. As to Stovall, on the other hand, the requirement of counsel at a lineup was applied prospectively.

[149] United States v. Wade, 388 U.S. 218 (1967).

In attempting to explain its techniques for prospective overruling of prior decisions, the Supreme Court has called attention to these factors:

> (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.[150]

Especially significant is this justification advanced by Chief Justice Warren for the Court in *Jenkins v. Delaware* concerning

> the problem inherent in prospective decision-making, *i.e.*, some defendants benefit from the new rule while others do not, solely because of the fortuities that determine the progress of their cases from initial investigation and arrest to final judgment. The resulting incongruities must be balanced against the impetus the technique provides for the implementation of long overdue reforms, which otherwise could not be practicably effected.[151]

Against this backdrop, what position will ultimately be taken by the Supreme Court as to the retroactivity of *O'Callahan v. Parker*? Certainly there has been protracted reliance on precedents and statutes which upheld military jurisdiction over offenses by servicemen that—under one interpretation—were not "service-connected." This reliance was one reason for the shock within the military establishment when *O'Callahan* was decided.

Most important, the practical consequences of retroactivity for *O'Callahan* are startling to contemplate. To some extent, these consequences are magnified by recent Supreme Court decisions allowing a conviction to be challenged even though the confinement imposed thereunder has been completely served.[152] Thus, convictions by court-martial—especially if accompanied by the stigma of a dishonorable or bad conduct discharge—might be challenged long after any confinement resulting therefrom had been served. Furthermore, conviction by court-martial often results in forfeiture of pay and allowances;[153] and suits to recover this back pay are a

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[150] Stovall v. Denno, 388 U.S. 293, 297 (1967); *see* Desist v. United States, 394 U.S. 244 (1969) (giving a fully prospective application to the limitations on electronic surveillance established in Katz v. United States, 389 U.S. 347 (1967)).

[151] Jenkins v. Delaware, 395 U.S. 213, 218 (1969).

[152] *See, e.g.*, Sibron v. New York, 392 U.S. 40 (1968); Carafas v. LaVallee, 391 U.S. 234 (1968).

[153] Concerning the power of courts-martial to subject a serviceman to forfeiture of pay and allowances, *see* Uniform Code of Military Justice, arts. 18-20, 57, 10 U.S.C. §§ 818-20, 857(a) (1964).

familiar means of challenging the jurisdiction of the court-martial.[154] Thus, subject to any statute of limitations applicable to such suits for back pay, persons who had been convicted by court-martial of offenses that were not service-connected might sue the United States for back pay.

Defense against collateral attack on court-martial convictions would be difficult because at the original trial, under the law as it was then understood, the Government had no occasion to offer evidence whether the offenses were service-connected. Thus, as to many offenses that, in fact, were service-connected, it might be especially difficult for the Government to establish military jurisdiction at this late date.

Military justice has always relied on the unitary sentence[155]—a single sentence for all the charges whereof the accused has been found guilty—rather than having a separate sentence imposed as to each charge. Thus, if an accused had been convicted by court-martial of a service-connected offense and also of an offense that was not service-connected, it may now be necessary to impose an entirely new sentence based solely on the offense as to which the court-martial had possessed jurisdiction.

Where in sentencing an accused a court-martial had considered a prior court-martial conviction[156] of an offense that was not service-connected, the accused would seem entitled to relief under a retroactive application of *O'Callahan*. Similarly, where a military administrative discharge had been predicated in part on court-martial conviction of an offense as to which jurisdiction had been lacking, the former serviceman might seek to invalidate the conviction.[157]

A recent decision concerning the right to a jury trial in a state court[158] was given only prospective application by the Supreme

[154] *See, e.g.*, United States v. Brown, 206 U.S. 240 (1907); Swaim v. United States, 165 U.S. 553 (1897); Runkle v. United States, 122 U.S. 543 (1887); Keyes v. United States, 109 U.S. 336 (1883); Shapiro v. United States, 69 F. Supp. 205 (Ct. Cl. 1947).

[155] *See, e.g.*, Jackson v. Taylor, 353 U.S. 569, 574, 578-79 (1957).

[156] After a finding of guilt but prior to sentencing the court-martial is presented evidence as to previous convictions. In some instances, the prior convictions will authorize increased punishment. See MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 127c, § B (1969).

[157] As to the grounds for military administrative discharges and the methods of attack on such discharges, *see* Everett, *Military Administrative Discharges—The Pendulum Swings*, 1966 DUKE L.J. 41.

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

Court.[159] Thus, since *O'Callahan* was concerned principally with the serviceman's right to grand jury indictment and to trial by jury, it might follow that *O'Callahan* should be given only prospective application. And this argument, together with important practical considerations, may prove decisive.

However, the Supreme Court has not hesitated to apply retroactively a decision which dealt with the fairness of the fact-finding process.[160] In view of Justice Douglas' condemnation of military justice in *O'Callahan,* it would follow that the integrity of the fact-finding process was at stake if a court-martial conviction for a non-service-connected offense were allowed to stand. Moreover, in view of the traditional reluctance to hold that jurisdiction of person or subject matter can be conferred even by consent,[161] there may well be judicial hesitancy to uphold a conviction of an offense as to which it now appears jurisdiction was lacking.

Hopefully, when the question of retroactivity is considered by the Supreme Court, that body will be better prepared than on June 2, 1969 to compare the fairness of military trial with that available in civil courts. If so, the Court may conclude that servicemen tried by court-martial for offenses lacking military significance were not placed at a disadvantage in relation to the fairness of the trials they might have received if tried in a civil tribunal. Then, with an eye to the dire practical consequences that would accompany a retroactive application of *O'Callahan,* the Court should hold that the decision would apply only to cases tried after June 2, 1969—or perhaps only to cases as to which appellate review had not been completed prior to that date. Since a majority of the Court, as now reconstituted, may be unhappy with the *O'Callahan* decision, it is all the more likely that, if not squarely overruled, the case will be limited by any available means, such as by applying it prospectively only.

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[159] DeStefano v. Woods, 392 U.S. 631 (1968).

[160] *See, e.g.,* Arsenault v. Massachusetts, 393 U.S. 5 (1968); McConnell v. Rhay, 393 U.S. 2 (1968); Roberts v. Russell, 392 U.S. 293 (1968). In the *Roberts* case the Court emphasized: "And even if the impact of retroactivity may be significant, the constitutional error presents a serious risk that the issue of guilt or innocence may not have been reliably determined." 392 U.S. at 295.

[161] *See* Everett, *supra* note 35, at 408.

Extraterritoriality

Another convenient technique for limiting *O'Callahan*—and one which has already been utilized[162]—is to hold that it applies only to the United States and has no extraterritorial effect. Such a holding is supported by strong practical considerations. In the first place, to hold otherwise would not further the goal of providing additional safeguards of fair trial for servicemen. Currently the United States is a party to various treaties and agreements dealing with criminal jurisdiction over American forces stationed in foreign countries. Most of these follow the pattern of the NATO Status of Forces Agreement[163] in providing that the host country has primary jurisdiction over most civil-type offenses committed within its territory by American servicemen. Thus, crimes which most clearly are not "service-connected" within the meaning of *O'Callahan* would also generally fall within the primary jurisdiction of the host country, if committed overseas. However, in a high percentage of cases the host country waives its primary jurisdiction, and the accused serviceman is tried by American court-martial.[164]

If the American court-martial lacks jurisdiction to try the servieeman, obviously there would be no basis for requesting a waiver of the host country's primary jurisdiction, and few waivers would be granted. If tried at all, the American serviceman would be tried in such instances by a foreign tribunal which usually would not provide him the rights to grand jury indictment and trial by petit jury that *O'Callahan* purports to protect.

The jurisdiction of American civil courts could not feasibly be expanded to fill the jurisdictional void that would be created by extraterritorial application of *O'Callahan*. First, it would be impractical for American civil courts, sitting in the United States, to obtain testimony about crimes that occurred several thousand miles away. There would be no procedure to compel the attendance of foreign nationals as witnesses; and the trier of fact would be totally unfamiliar with the scene of the crime. Secondly, the host countries where the crimes had been committed might resent the

[162] *See* United States v. Weinstein, No. 21,909 (C.M.A., Oct. 10, 1969); United States v. Gill, ACM 20452 (Bd. of Review, July 30, 1969).

[163] June 19, 1951, [1953] 2 U.S.T. 1792, T.I.A.S. No. 2846, art. VII.

[164] *See* R. EVERETT, *supra* note 24, at 44-45. In some instances, the serviceman might prefer trial in a foreign court, since such courts have generally been rather lenient. *Id.* at 43.

implicit disparagement of their ability to try fairly civil-type crimes committed within their own boundaries.[165] Finally, there might be serious constitutional questions about the basis for creating jurisdiction in American civil courts to try offenses committed overseas that were not "service-connected" and therefore could not be tried by court-martial.

A similar argument has been presented by the author in criticism of the Supreme Court's ruling that courts-martial could not be empowered—at least, in time of peace—to try offenses committed overseas by civilian employees and dependents.[166] There, however, the number of persons affected was far less,[167] and it was difficult to include civilians of any type within the phrase "land and naval Forces" for purposes of invoking Congressional power under article one, section eight, clause fourteen.

A difficulty of logic exists in concluding that an offense that would not be "service-connected" or have "military significance" if committed within the United States acquires these attributes when committed overseas. Nevertheless, the Supreme Court which, in dealing with retroactivity, has displayed its great concern for practical considerations[168] and which may now be unsympathetic with *O'Callahan*, might accept the argument that *O'Callahan* is not to be applied extraterritorially.

Wartime Offenses

The principal opinion in *O'Callahan* carefully notes: "Finally, we deal with peacetime offenses, not with authority stemming from the war power."[169] Obviously the war power is a broad one,[170] but it is not all-encompassing. Furthermore, what level of hostilities would suffice for purposes of distinguishing *O'Callahan*?

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[165] In some countries where American troops have been stationed, there has been resentment of treaty provisions which tended to insulate servicemen from trial in the local civil courts. In Wilson v. Girard, 354 U.S. 524 (1957), contention between the United States and Japan as to who should try a serviceman accused of homicide was finally resolved by an American waiver of its claim of primary jurisdiction.

[166] *See* Everett, *supra* note 35, at 380-81, 388-90, 396-97.

[167] *See* Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 244 (1960). *But see* Everett, *supra* note 35, at 391 n.102.

[168] See notes 142-43 *supra* and accompanying text.

[169] 395 U.S. at 273.

[170] *Cf.* Ludecke v. Watkins, 335 U.S. 160 (1948); Silesian-American Corp. v. Clark, 332 U.S. 469 (1947); Ashwander v. TVA, 297 U.S. 288 (1936).

In *Lee v. Madigan*,[171] the Supreme Court examined the validity of a court-martial conviction for an offense as to which the then Article of War 92 prohibited trial by court-martial if committed "in time of peace."[172] The crime had occurred on June 10, 1949, after cessation of World War II hostility but prior to formal termination of the war with either Germany or Japan. Distinguishing some other situations where wartime legislation and controls were deemed to remain effective until the formal establishment of peace, the opinion of the Court, authored by Justice Douglas, concluded that Congress had not "used 'in time of peace' in Article 92 to deny soldiers or civilians the benefit of jury trials for capital offenses four years after all hostilities had ceased."[173]

Although *Lee v. Madigan* hinged on Congressional intent, the case would tend to limit the creating of any wartime exception to *O'Callahan*. Thus, although both the Korean War and the Viet-Nam War have been viewed as "time of war" in construing the Uniform Code of Military Justice,[174] a different result would probably be reached as to military jurisdiction over offenses that are not service-connected.

If any exception to *O'Callahan* is recognized by the Supreme Court it may well require as a minimum either a formal declaration of war or hostilities that are not limited geographically. If, however, the existence of hostilities such as those in Viet-Nam are sufficient to create an exception to *O'Callahan* under the war power, then the exception will probably be limited to the geographic area of those hostilities. This, in turn, would make the exception almost academic if *O'Callahan* is not applied extraterritorially.

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[171] 358 U.S. 228 (1959).

[172] 41 Stat. 805 (1920). ". . . no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace." *Id.*

[173] 358 U.S. at 236. The court distinguished cases such as Ludecke v. Watkins, 335 U.S. 160 (1948) and Kahn v. Anderson, 255 U.S. 1 (1921). *See* 358 U.S. at 230-32.

[174] *See, e.g.*, United States v. Shell, 7 U.S.C.M.A. 646, 23 C.M.R. 110 (1957); United States v. Taylor, 4 U.S.C.M.A. 232, 15 C.M.R. 232 (1954); United States v. Ayers, 4 U.S.C.M.A. 220, 15 C.M.R. 220 (1954); United States v. Gann, 3 U.S.C.M.A. 12, 11 C.M.R. 12 (1953); United States v. Bancroft, 3 U.S.C.M.A. 3, 11 C.M.R. 3 (1953), all involving the Korean war; and United States v. Anderson, 17 U.S.C.M.A. 588, 38 C.M.R. 386 (1968), concerning the war in Viet-Nam.

Petty Offenses

The sixth amendment right to trial by jury has long been considered subject to an exception for "petty offenses."[175] At least for some purposes, this can include any misdemeanor for which the maximum penalty does not exceed imprisonment for six months, a fine of $500, or both.[176]

In the wake of Supreme Court decisions invalidating military jurisdiction over civilian dependents and employees, suggestions were offered that an exception might exist for petty offenses committed by such civilians.[177] It was contended that, since the Supreme Court had sought primarily to protect the civilians' rights to jury trial and grand jury indictment, there was no occasion for such protection as to offenses for which these rights would not have existed in the first place. A similar argument might be advanced with respect to offenses committed by service personnel which are "petty" but not "service-connected."[178] Thus, offenses customarily disposed of by Article 15 nonjudicial punishment[179] or by summary court-martial[180] could still be handled within the military justice system.

Conceptually, however, there is difficulty with this position. Under one reading of *O'Callahan*, offenses that are not service-connected and lack military significance do not fall within the sphere of "Rules for the Government and Regulation of the land and naval Forces" under article one, section eight, clause fourteen of the Constitution. In that event, and apart from the war power, what is the constitutional basis of federal legislation designed to punish such offenses—whether they be petty or major, whether they be committed in the United States or abroad, and whatever may be the forum provided for their trial?

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[175] *See* Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968); Cheff v. Schnackenberg, 384 U.S. 373 (1966); *Ex parte* Quirin, 317 U.S. 1, 39 (1942); District of Columbia v. Clawans, 300 U.S. 617 (1937); Act of June 25, 1948, 18 U.S.C. § 1 (1964); Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917 (1926).

[176] 18 U.S.C. § 1(3) (1964) and cases cited in note 175.

[177] *See* Everett, *supra* note 35.

[178] The Court of Military Appeals has taken this position in United States v. Sharkey, No. 22,248 (C.M.A., Oct. 10, 1969), upholding a conviction for being drunk and disorderly in a public place.

[179] 10 U.S.C. § 815 (1964).

[180] As to jurisdiction of summary courts-martial, *see* Uniform Code of Military Justice,

Service-Connection

This article's earlier criticism of the uncertain standard provided by the principal opinion in *O'Callahan v. Parker* can be incorporated by reference to avoid the need for discussing further the myriad factors that may bear on "service-connection."[181] Precedents existing for interpreting service-connection are so broad that almost any offense could be included within military jurisdiction.[182] Thus, if the Supreme Court as now constituted is inclined to whittle away at *O'Callahan*, instead of overruling it, there is ample authority for so doing.

Exhaustion of Remedies

Almost contemporaneously with *O'Callahan* the Supreme Court ruled that military remedies must be exhausted before a court-martial conviction can be attacked in a federal civil court.[183] In so doing, the Court distinguished in these words some of its cases where military jurisdiction over civilians had been collaterally attacked in the civil courts without reference to exhaustion of military remedies:

> The cited cases held that the Constitution barred the assertion of court-martial jurisdiction over various classes of civilians connected with the military, and it is true that this Court there vindicated petitioners' claims without requiring exhaustion of military remedies. We did so, however, because we did not believe that the expertise of military courts extended to the consideration of constitutional claims of the type presented. Moreover, it appeared especially unfair to require exhaustion ol military remedies when the petitioners raise substantial arguments denying the right of the military to try them at all. Neither of these factors is present in the case before us.[184]

What if a serviceman facing trial by court-martial seeks an injunction from a federal district court on the ground that the offense to be tried is not service-connected and therefore is outside the jurisdiction of the court-martial? Does this constitutional claim bring into play "the expertise of military courts?" Is this a situation where it is "unfair" to require the accused to stand trial

art. 20, 10 U.S.C. § 820 (1964). *See also* Uniform Code of Military Justice, art. 10, 10 U.S.C. § 810 (1964).

[181] See notes 73-84 *supra* and accompanying text.

[182] *Cf.* Feres v. United States, 340 U.S. 135 (1950); text accompanying note 76 *supra*.

[183] Noyd v. Bond, 395 U.S. 683 (1969).

[184] *Id.* at 696 n.8.

before a court-martial which may not have jurisdiction? And are there remedies within the military justice system itself which might be used to forestall the trial by court-martial?[185] Complicating the problem is the fact that, under the liberal joinder procedure permitted in military trials, an offense clearly military in nature might be joined for trial with one as to which service-connection is tenuous.

Impact on the Military Lawyer

The principal opinion in *O'Callahan* had its initial impact upon military lawyers by seeming to downgrade their profession: It was anticipated by some that the decision might ultimately obviate the need for many military lawyers.[186] Instead, the converse now seems true. The task of the military lawyer has been complicated by introducing a new and currently unpredictable issue into many otherwise routine cases. Except in the trial of a clearly military offense, such as unauthorized absence, the Government must introduce evidence to establish that the offense is service-connected; and the defense will often contest the point. Thus, while the total number of cases tried by court-martial should diminish, the time and effort involved per case may well increase. Moreover, collateral attacks on the jurisdiction of courts-martial to try particular offenses will add further responsibilities for the military lawyer.

Meanwhile, especially in areas where military installations are located, the dockets of civil courts will be further congested, with added annoyance for all concerned. The only consolation may be the reduction of occasions for arguments whether a serviceman can

[185] I have discussed some of these problems in more detail in Everett, *Collateral Attack on Court-Martial Convictions*, 11 A.F. JAG L. REV. ___ (1969). Apparently there is a remedy within the military justice system itself. *See* Fleiner v. Koch, Misc. No. 69-47 (C.M.A., writ of prohibition granted Oct. 7, 1969). In at least one case, a federal district judge has enjoined proceedings where he considered that the offense to be tried was not within military jurisdiction. Moylan v. Laird, C.A. File No. 4179 (D.R.I., Oct. 20, 1969).

[186] Questions were raised at a congressional hearing on appropriations as to whether the Army would have a diminished need for judge advocates because of the *O'Callahan* case. *Hearing by Real Estate Subcommittee. House Armed Services Committee* on July 10, 1969, 91st Cong., 1st Sess., at 168 (1969).

properly be tried by both a civil court and a court-martial for a single criminal transgression.[187]

SOME CONCLUSIONS

From the tenor of all that has preceded, it can be readily perceived that this writer does not agree with the approach of the majority in *O'Callahan v. Parker*. As to the very fact of its rendition on June 2, 1969, the intemperate nature of the criticism of military justice, and the result ultimately reached, the principal opinion by Justice Douglas was ill-starred. The uncertainty it has already generated may be difficult to dispel. There are many devices available for limiting materially the effect of *O'Callahan*. However, in preference to a gradual erosion of its strength, the Supreme Court should take the earliest opportunity to overrule the case.

[187] This issue would have been before the Court of Military Appeals in United States v. Borys, 18 U.S.C.M.A. 545, 40 C.M.R. 257 (1969), had the court not ruled that the offenses involved were not service-connected and so were beyond military jurisdiction. As to the relation between military and civil jurisdiction over servicemen, see Grafton v. United States, 206 U.S. 333 (1907); R. EVERETT, *supra* note 24, at 38-40.