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Court-Martial Jurisdiction: The Effect of O'Callahan v. Parker

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COURT-MARTIAL JURISDICTION: THE EFFECT OF *O'CALLAHAN V. PARKER*

In 1957 the United States Supreme Court held, that "[e]very extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections." [1] With its recent decision of *O'Callahan v. Parker*,[2] the Supreme Court turned from merely preventing extension of military jurisdiction, to the more significant, and more questionable, task of removing power from the military courts that has been authorized by Congress and approved by the courts for more than half a century.[3] *O'Callahan* holds that the jurisdiction of courts-martial is limited to crimes that are "service-connected." [4] The opinion of the Court, however, contained few guidelines for determining what is "service connected." [5] The purpose of this article is to discuss the background and effect of this loss of jurisdiction.

HISTORICAL PERSPECTIVE

The early English practice conferring court-martial jurisdiction over civil offenses varied with the ascendance to power of either parliament or the Crown. Parliament, in an attempt to limit the King's power, sought a very limited application of court-martial jurisdiction.[6] In the United States, the peacetime jurisdiction of courts-martial was originally limited to purely military crimes.[7] In time of war, however, the juris-

1. 354 U.S. 1, 21 (1957).

2. 89 S. Ct. 1683 (1969).

3. Act of Aug. 29, 1916, ch. 418, § 3, Articles of War, art. 93, 39 Stat. 664, was the first to authorize court-martial jurdisdiction over civilian crimes committed in peacetime.

4. 89 S. Ct. at 1690.

5. In the dissent, Justice Harlan says, "the Court suggests no general standard for determining when the exercise of court-martial jurisdiction is permissible." *Id.* at 1696. In a speech before the Senate, Senator Sam J. Ervin, Jr. stated that "the element of uncertainty that now exists is heightened by the failure of the majority in O'Callahan to provide meaningful guidelines for the future exercise of military jurisdiction." 115 CONG. REC. S7175 (daily ed. June 25, 1969).

6. O'Callahan v. Parker, 89 S. Ct. at 1692-93. *See generally* F. WIENER, CIVILIANS UNDER MILITARY JUSTICE (1967); Duke & Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 VAND. L. REV. 435, 441-49 (1960).

7. Duke & Vogel, *supra* note 6, at 445.

diction of the military courts was extended to cover numerous situations not service-connected.[8]

The constitutional basis for military jurisdiction, Article I, section 8, clause 14, confers upon Congress the power "to make Rules for the Government and Regulation of the land and naval forces." In addition, that portion of the fifth amendment which provides that "[n]o person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . ." has frequently been mentioned as a source of court-martial jurisdiction. Court-martial jurisdiction over civilian offenses committed in peacetime was not authorized by statute until the passage of the Articles of War of 1916.[9] These articles made four extensions of court-martial jurisdiction. Jurisdiction was increased to include specified non-capital offenses, such as arson, robbery, embezzlement, and assault, whether or not the offense was committed in time of war. The requirement that a non-capital offense had to be prejudicial to good order and discipline in order to be tried by a court-martial, was eliminated. The articles also provided for trial by court-martial of persons charged with murder or rape committed outside the United States in time of peace. Finally, if a military offender was being held by the military for a crime punishable by a local law, the offender did not have to be delivered to civil authorities.

Until the enactment of the Uniform Code of Military Justice[10] in 1950, the jurisdiction of courts-martial remained substantially as it had been under the Articles of War of 1916. The new code provided for peacetime court-martial jurisdiction over rape and murder committed in the United States, thereby eliminating the only remaining restriction on court-martial jurisdiction over military personnel.[11] The UCMJ granted court-martial jurisdiction over any offense enumerated in the code,[12] including all violations of federal law and the broad terms of

8. O'Callahan v. Parker, 89 S.Ct. at 1693 n.3, lists examples.

9. Act of Aug. 29, 1916, ch. 418, § 3, Articles of War, art. 93, 39 Stat. 664.

10. 10 U.S.C. §§ 801-940 (1964) [hereinafter cited as UCMJ].

11. UCMJ arts. 118, 120, 10 U.S.C. §§ 918, 920 (1964).

12. UCMJ art. 18, 10 U.S.C. § 818 (1964). "[G]eneral courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter. . . ."

the general article,[13] committed by anyone subject to the code at any place and at any time.[14]

Congress, through passage of the UCMJ, has made virtually all crimes, and numerous classes of persons subject to the jurisdiction of courts-martial. In the past, the Supreme Court, while leaving untouched the types of crimes subject to trial by court-martial, has made significant inroads into the types of persons subject to the code. In 1954, the Court declared in *Toth v. Quarles*,[15] that a discharged serviceman was not subject to trial by court-martial for an offense committed while in the service. The effect of *Toth* was to declare unconstitutional the provision of the UCMJ that provides for court-martial of discharged servicemen.[16] This decision cast grave doubt on the theory that the fifth amendment phrase, "cases arising in the land and naval forces," was a source of court-martial jurisdiction rather than just a sanction of existing jurisdiction.[17] If all cases "arising in the land and naval forces" were not subject to military jurisdiction, then perhaps other classes of persons would also be exempt from trial by court-martial. Shortly after *Toth* the Supreme Court, in *Reid v. Covert*,[18] declared that a serviceman's wife accompanying the armed forces overseas in time of peace was not amenable to trial by court-martial for a capital offense. Following this, the Court held in *Kinsella v. Singleton*[19] that the ban against court-martial of civilian dependents applied to non-capital offenses as well. The court then turned its attention to civilian employees

13. UCMJ art. 134, 10 U.S.C. § 934 (1964). "[A]ll disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital . . . shall be punished. . . ." MANUAL FOR COURTS-MARTIAL, UNITED STATES, para. 213e, at 28-73 (rev. ed. 1969), construes the phrase "all crimes and offenses not capital" to include "those acts of omissions . . . which are denounced as noncapital crimes or offenses by enactments of Congress or under authority of Congress and made triable in the Federal civil courts."

14. UCMJ art. 5, 10 U.S.C. § 805 (1964). "This chapter applies in all places."

15. 350 U.S. 11 (1954).

16. 10 U.S.C. § 803(a) (1964).

> [N]o person charged with having committed, while in a status in which he was subject to this chapter, an offense against this chapter, punishable by confinement for five years or more and for which the person cannot be tried in the courts of the United States or of a State, a Territory, or the District of Columbia, may be relieved from amenability to trial by court-martial by reason of the termination of that status.

17. F. WIENER, *supra* note 6, at 306-09; W. WINTHROP, MILITARY LAW AND PRESIDENTS 48 (2d ed. 1920).

18. 354 U.S. 1 (1957).

19. 361 U.S. 234 (1960).

accompanying the armed services overseas. In *Grisham v. Hagan*,[20] the Court held that civilian employees could not be tried for capital offenses, and in *McElroy v. Guagliardo*[21] it extended this freedom from court-martial to include non-capital offenses.

There has been much litigation over which persons are subject to trial by court-martial, but the question of which crimes may be punished by court-martial has received far less attention. When the question has arisen, the power of a general court-martial to try offenses made punishable by the UCMJ[22] has been consistently upheld.[23] Early military records frequently show instances of trials by court-martial for non-service-connected crimes.[24] In *Grafton v. United States*,[25] the Supreme Court upheld the power of military courts under the general article of war to punish civilian crimes. The Court stated that "no crimes committed by officers or soldiers of the Army are excepted by the . . . article from the jurisdiction thus conferred upon courts-martial, except those that are capital in their nature." [26] Since passage of the UCMJ, courts have upheld peacetime court-martial convictions for capital offenses committed both overseas[27] and within the territorial limits of the United States.[28] In *Kinsella v. Singleton*,[29] the Supreme Court appeared to settle the relationship between court-martial jurisdiction and the particular offense:

> The test for jurisdiction, it follows, is one of *status*, namely, whether the accused in the court-martial proceeding is a per-

20. 361 U.S. 278 (1960).

21. 361 U.S. 281 (1960).

22. UCMJ art. 18, 10 U.S.C. § 818 (1964).

23. Whelchel v. McDonald, 340 U.S. 122, 123 (1950) (rape); Grafton v. United States, 206 U.S. 333, 341 (1907) (murder of a civilian); Johnson v. Sayre, 158 U.S. 109, 111 (1895) (embezzlement); Smith v. Whitney, 116 U.S. 167, 169, 184-85 (1886) (improper management of contracts and culpable inefficiency); Coleman v. Tennessee, 97 U.S. 509 (1879) (murder of a civilian).

24. O'Callahan v. Parker, 89 S. Ct. 1683 (1969). For additional examples, *see* 37 U.S.L.W. 3270 (U.S. Jan. 28, 1969).

25. 206 U.S. 333 (1907).

26. *Id.* at 348.

27. Burns v. Wilson, 346 U.S. 137 (1953) (rape and murder committed in Guam).

28. Owens v. Markley, 289 F.2d 751 (7th Cir. 1961) (rape committed in the United States); Burns v. Taylor, 274 F.2d 141 (10th Cir. 1959), *cert. denied*, 364 U.S. 837 (1960) (rape committed in Alaska); Thompson v. Willingham, 217 F. Supp. 901 (M.D. Pa. 1962), *aff'd*, 318 F.2d 657 (3rd Cir. 1963) (murder committed in the United States); United States v. Schaffer, 13 U.S.C.M.A. 83, 32 C.M.R. 83 (1962) (murder committed in the United States).

29. 361 U.S. 234 (1960).

> son who can be regarded as falling within the term "land and naval Forces." [30]
>
> Without contradiction, the materials furnished show that military jurisdiction has always been based on the "status" of the accused rather than on the nature of the offense.[31]

The theory that the jurisdiction of military courts should be limited to purely military offenses, however, has not been without advocates. In 1965 at its national convention, the American Legion heard a report from a special committee that had completed a study on the operation and quality of the new code.[32] The recommendations of that committee were similar to the results of the *O'Callahan* decision. The report stated:

> The field of courts-martial jurisdiction is one that preeminently calls for application of the principle of limitation to "the least possible power adequate to the end proposed. . . ."
>
> The least possible power adequate to the end proposed would be provided by affording jurisdiction in peace times over purely military matters to military courts. The civilian courts, in time of peace, with their rights to jury trials, and other safeguards, can and should handle offenses of every other nature.[33]

This position was affirmed by Frederick Bernays Wiener, an authority on military law, when he quoted the "least possible power" phrase from *Anderson v. Dunn*[34] while testifying before a Senate subcommittee on the constitutional rights of military personnel.[35] A 1960 article written by two former army judge advocates, recommended that a military accused who is charged with certain civilian offenses have the right to demand trial in a federal district court.[36] The authors of this article anticipated *O'Callahan* when they wrote:

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30. *Id.* at 240-41.

31. *Id.* at 243.

32. NATIONAL SECURITY DIVISION, THE AMERICAN LEGION, REPORT ON THE UNIFORM CODE OF MILITARY JUSTICE (1956).

33. *Id.* at 22-23. This position was also presented before a Senate subcommittee by the chairman of the American Legion Committee that had prepared the REPORT, *supra* note 32. *Hearings on Constitutional Rights of Military Personnel Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 2d Sess. 486 (1962).

34. 19 U.S. (6 Wheat.) 93, 105 (1821).

35. *Hearings*, *supra* note 33, at 778.

36. Duke & Vogel, *supra* note 6, at 460.

> It is true that for more than forty years courts-martial have, apparently without objection, exercised jurisdiction over non-capital civil offenses. Acquiesence is not however, equivalent to approval; and the fact remains that the Supreme Court has never decided the basic constitutional issue.[37]

O'Callahan v. Parker,[38] involved the offenses of housebreaking, attempted rape, and assault to commit rape. These offenses were committed in 1956, by Sergeant O'Callahan in the civilian community of Honolulu, Hawaii, and were committed against a civilian who had no connection with the military. When the offenses were committed, O'Callahan was wearing civilian clothes and was on an authorized pass. The effect of the Court's decision was that a court-martial has no jurisdiction to try a member of the armed forces charged with a crime cognizable in a civilian court and not "service-connected," committed while on leave, during peacetime, off-post, within the territorial limits of the United States.[39] The tone of the Court's opinion leaves the impression that future denials of court-martial jurisdiction will not be limited to the precise facts of the *O'Callahan* case. Perhaps the absence of any of the above mentioned factors would be sufficient to confer court-martial jurisdiction.[40] Justice Harlan, in dissent, said:

> [T]he Congress and the military are at least entitled to know with some certainty the allowable scope of court-martial juris-

37. *Id.* at 458.

38. 89 S. Ct. 1683 (1969).

39. 89 S. Ct. at 1690-92.

40. The Office of the Judge Advocate General of the Army seems to feel that the absence of any of the operative factors present in the *O'Callahan* decision would be sufficient for court-martial jurisdiction. In an unclassified teletype message, DA911375, June 6, 1969, Subject: Supreme Court Case—O'Callahan v. Parker which was sent to the army's staff advocates, he stated:

> The problem now presented in the administration of military justice is whether a change in any single one of the operative facts will lead to a different result. . . .
>
> Military authorities may continue to exercise jurisdiction over offenses in violation of UCMJ unless the facts of the specific case bring it squarely within the rule of the decision in O'Callahan case. In particular, military jurisdiction could be asserted if otherwise appropriate where offense was committed on any military installation, where offense committed against a military person or government property, where offender was in a duty status at time of offense, where offense is purely military, not civil, in nature, where offense is committed outside U. S. Territorial jurisdiction, or where a factual relation to military effectiveness exists.

> diction. Otherwise, the infinite permutations of possibly relevant factors are bound to create confusion and proliferate litigation over the jurisdictional issue in each instance.[41]

The basic criterion for court-martial jurisdiction is that the offense be "service-connected." Is this phrase the equivalent of the fifth amendment phrase, "arising in the land and naval forces?" Does the absence of any of the operative elements of the *O'Callahan* fact situation result in a "service-connected" crime? The operative elements are the status of the victim, the dress of the offender (in or out of uniform), and the circumstances of the commission of the offense (whether on-post or overseas, whether or not in time of war). In the past, the concept of service connection has been applied chiefly in determining availability of veterans benefits. In this context, the United States Code has given the concept of service connection a very broad scope. The code even classifies an injury that occurred while a serviceman was on an authorized leave as "service-connected." [42] It is doubtful that the Supreme Court would accept such a broad interpretation in determining whether a particular crime is "service-connected."

The Aftermath of O'Callahan

The future of court-martial jurisdiction must, of course, wait upon the decisions of the Supreme Court, but, trends are beginning to emerge from the decisions of the lower military courts. Most of the decisions, construing *O'Callahan*, are coming from the Courts of Military Review.[43]

The United States Court of Appeals for the District of Columbia ruled that based on "the spirit of *O'Callahan*," a court-martial does not have jurisdiction over a merchant seaman on a ship delivering supplies to a combat zone.[44] In the past, a merchant seaman was the classic example[45] of a civilian subject to court-martial jurisdiction un-

41. 89 S. Ct. at 1696.

42. 38 U.S.C. § 105 (1964).

43. The Military Justice Act of 1968, 10 U.S.C.A. § 866 (Supp. 1969), substituted "Court of Military Review" for the former designation "board of review." Each service has a Court of Military Review composed of one or more panels. Each panel is composed of not less than three appellate military judges. These judges must be lawyers and are either commissioned officers or civilians. While the name change was not effective until August 1, 1969, this note will use the term "Court of Military Review," when referring to the old "boards of review."

44. Latney v. Ignatius, ——F. 2d—— (D.C. Cir. 1969).

45. Shilman v. United States, 73 F. Supp. 648 (S.D. N.Y.), *modified*, 164 F.2d 649

der the provision of the UCMJ that provided for jurisdiction over "persons serving with or accompanying an armed force in the field."[46]

The Courts of Military Review, the intermediate appellate courts in the military court system, are predictably applying *O'Callahan* rather narrowly. These courts have found a service connection or military significance in all but the most obviously inappropriate fact situations. In most cases, the Courts of Review are relying on the status of the victim in determining that a crime is "service-connected." This approach is justified when a serviceman is the victim of a violent crime such as murder, assault, or robbery.[47] The rationale for this view was expressed by Judge Collings in *United States v. Gunter and Stavis*,[48] where jurisdiction was exercised for the armed robbery of an off-duty soldier's car and money. In finding the offense to be "service-connected," Judge Collings stated:

> There can be no doubt that the armed forces have a direct interest in the personal security and well-being of their members. Whenever servicemen are victimized by offenses committed against their persons or property, their military effectiveness diminishes inevitably, more palpably perhaps when they are hospitalized or otherwise rendered unavailable for duty as a result of the crime, but significantly also, we believe, when their peace of mind is clouded by concern over loss of property or other indignities experienced.[49]

As an apparent extension of this reasoning, two courts have found "service-connection" in forgery cases,[50] even though the offenses were committed at commercial facilities in civilian communities, because "the forged documents operated to the legal prejudice of a member of the armed forces."[51]

(2d Cir. 1947), *cert. denied*, 333 U.S. 837 (1948); *In re* Berue, 54 F. Supp. 252 (S.D. Ohio 1944); McCune v. Kilpatrick, 53 F. Supp. 80 (E.D. Va. 1943); *Ex parte* Falls, 251 F. 415 (D.N.J. 1918).

46. UCMJ art. 2(10), 10 U.S.C. § 802(10) (1964).

47. United States v. White, C.M. 420140 (Aug. 12, 1969); United States v. Williams, C.M. 420522 (July 23, 1969); United States v. Gunter and Stavis, C.M. 420194 (July 11, 1969); United States v. Hurt, C.M. 420028 (July 11, 1969); United States v. Clifford A. Bell, C.M. 419911 (July 9, 1969).

48. C.M. 420194 (July 11, 1969).

49. *Id.*

50. United States v. Vipond, C.M. 420264 (July 23, 1969); United States v. Taylor, C.M. 420339 (June 17, 1969).

51. United States v. Vipond, C.M. 420264 (July 23, 1969).

This application of "service-connection" seems less clear in the marihuana and drug cases, where the accused himself is considered to be the victim of his own crime.[52] If the theory is that the accused was injuring himself then he should be charged with the offense of intentional infliction of self-injury,[53] rather than the unlawful use of narcotics. This tenuous interpretation of service connection is often supported by additional justification such as in *United States v. Konieczko*.[54] There it was held that the army is the victim when a soldier abuses himself with drugs. This theory could be justified assuming that the use of drugs impairs the soldier's performance of duty or results in the necessity of the government furnishing medical care.

Oddly enough, the *Konieczko* court found a service connection in marihuana cases based on the reasoning that such use brings discredit upon the service.[55] If this holding were to be accepted by the higher courts, *O'Callahan* would become ineffectual, as almost any crime can be said to bring discredit upon the service.

In *United States v. Bell*,[56] the Court of Review held that uttering statements designed to promote disloyalty among the troops, a crime triable in a federal district court,[57] was an offense prejudicial to good order and discipline, a purely military offense. In an apparent effort to ignore the thrust of *O'Callahan*, the court repeated the pre-*O'Callahan* fifth amendment justification for court-martial jurisdiction. If a case "arises in the land and naval forces," the accused is not entitled to the protections of a grand jury and petit jury, and therefore, *O'Callahan* would not deprive the military of jurisdiction.[58] One judge on the Army Court of Military Review has attempted to nullify the effects of *O'Callahan* by holding that its rule does not apply in time of war.[59] He

52. United States v. Mueller, C.M. 420337 (July 24, 1969); United States v. Elwood, C.M. 419489 (July 15, 1969); United States v. Johnson, C.M. 419705 (July 3, 1969); United States v. Konieczko, C.M. 419706 (June 19, 1969).

53. UCMJ art. 115(2), 10 U.S.C. § 915(2) (1964). This article is entitled "Malingering." To obtain a conviction it would be necessary to prove that the injury was intentionally inflicted for the purpose of avoiding work, duty, or service. This would be a very difficult task for the prosecutor.

54. C.M. 419706 (June 19, 1967).

55. *Id.*

56. C.M. 419988 (July 3, 1969).

57. 18 U.S.C. §§ 2387-88 (1964).

58. C.M. 419988 (July 3, 1969).

59. United States v. White, C.M. 420140 (Aug. 12, 1969); United States v. Vipond, C.M. 420264 (July 23, 1969); United States v. Williams, C.M. 420522 (July 23, 1969); United States v. Elwood, C.M. 419489 (July 15, 1969); United States v. Konieczko, C.M. 419706 (June 19, 1969); United States v. Taylor, C.M. 420339 (June 17, 1969). In

cites a Court of Military Appeals case holding that the United States has been at war since the Gulf of Tonkin resolution.[60] Judge Nemrow's holding is obviously in violation of the "spirit" of *O'Callahan*. The mere fact that the nation happens to be at war, absent a clear showing that court-martial jurisdiction is required for the effective prosecution of that war, is not sufficient grounds for jurisdiction. No other judges on the Courts of Review have been willing to confer jurisdiction based on this power.

With two exceptions, the military courts have treated *O'Callahan* as being retroactive. Of the two courts holding that *O'Callahan* is not retroactive, a Navy court[61] declined to reinforce its opinion with any reasons and an Air Force court stated that the limitations imposed by the *O'Callahan* decision were functional rather than jurisdictional in that they amount to the withholding of an otherwise authorized jurisdiction.[62]

The only judiciary to refuse jurisdiction since *O'Callahan* was a Coast Guard court in *United States v. Korbel*.[63] While absent without leave, Korbel stole a credit card and used the card to obtain a phonograph and hotel room. As these offenses were clearly not "service-connected," the court posed the question "whether sufficient connection exists between Korbel's crimes and his status as an AWOL serviceman to warrant a determination that they were service-connected offenses." [64] The court, holding that there was not a sufficient connection between the crimes and the accused's AWOL status, denied court-martial jurisdiction.

The most significant decisions construing *O'Callahan* will come from the Court of Military Appeals.[65] To date five cases have discussed the question raised by *O'Callahan*. Of these cases two referred to the pos-

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each case the court had additional persuasive grounds for upholding court-martial jurisdiction; in each case the two judges sitting with Judge Nemrow dissociated themselves from his war-peace distinction.

60. United States v. Anderson, 17 U.S.C.M.A. 588, 38 C.M.R. 386 (1968).

61. United States v. Spears, N.C.M. 69-1277 (June 6, 1969).

62. United States v. King, A.C.M. 20361 (July 30, 1969).

63. C.G.C.M.S. 22128 B.R. 699 (July 29, 1969).

64. *Id.*

65. This court, composed of three civilian judges, functions as the Supreme Court for the Military Justice System. The judges are appointed by the President with the consent of the Senate and serve terms of fifteen years. UCMJ art. 67, 10 U.S.C. § 867 (1964).

sible application of the issue on rehearing,[66] one did not reach the issue, as the court declared that it did not have appellate jurisdiction to hear the case,[67] another decided that a court-martial has jurisdiction over a civilian offense committed by a soldier on active duty overseas and in a combat zone.[68]

In *United States v. Borys*,[69] the court denied court-martial jurisdiction because the offenses were not service-connected. As the defendant's crimes were committed prior to the *O'Callahan* decision, it appears that the Court of Military Appeals intends to give *O'Callahan* retroactive application. Borys' offenses were committed off-post, off-duty, were clearly crimes cognizable in a civilian court, and were committed upon civilian victims. Thus, the case is significant for its discussion of the issues rather than for its holding. Captain Borys had been convicted by a court-martial for rape, sodomy, robbery, and attempts to commit such acts. All of these offenses occurred off-post in the civilian homes of his victims during off-duty hours or when the accused was on leave. Borys was described as wearing civilian clothing at the time of the offenses; the only identity with the armed services was the military bumper sticker on the accused's car. This sticker, subsequently served to aid in his identification and eventual apprehension by civilian authorities. The court's opinion, written by Judge Ferguson, solved the question of jurisdiction as follows:

> The question presented by these facts is simply whether an accused may be tried by court-martial for civil crimes committed in the United States against the civilian community when the local courts are open and functioning. O'Callahan v. Parker, . . . would seem to provide the answer—an emphatic "No," unless such crimes are military-connected, a test which we all agree cannot be met in this case.
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> . . . .
>
> [I]n sum, [the] 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 con-

66. United States v. Anglin, No. 21, 858 (C.M.A. Aug. 22, 1969); United States v. Ardell, 18 U.S.C.M.A. 448, 40 C.M.R. 160 (1969).

67. United States v. Snyder, Misc. Docket No. 69-23 (C.M.A. Aug. 14, 1969).

68. United States v. Goldman, 18 U.S.C.M.A. 516, 40 C.M.R. 228 (1969). The offense charged under UCMJ art. 134, 10 U.S.C. § 934 (1964), was violation of 18 U.S.C. § 472 (1964) (possession of counterfeit military payment certificates and fifty-dollar bills, purporting to be obligations of the United States).

69. 18 U.S.C.M.A. 545, 40 C.M.R. 257 (1969).

> nected" 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.[70]

Chief Judge Quinn, who obviously disagrees with *O'Callahan*, attempts by his dissent to avoid the consequences of the *O'Callahan* ruling by giving it the narrowest possible construction. In a carefully reasoned opinion that ignores the obvious intent of the Supreme Court, the Chief Judge interprets *O'Callahan* to the effect that military courts only lack jurisdiction over crimes which are cognizable in a federal civilian court and lack any military significance or service connection. He justifies the theory that a crime must be cognizable in a federal civilian court on the doctrine of separate sovereignty of state and federal government and upon the fact that at the time *O'Callahan* committed his crimes, Hawaii was still a territory and completely under the jurisdiction of the federal courts. In deciding that a court-martial had jurisdiction over Borys' crimes, Judge Quinn reasoned that the crimes did not violate federal law, other than military law, and the crimes were not committed on a federal reservation or territory and thus were not within the jurisdiction of the district courts. The judge decided that the offenses had military significance "[s]ince, the offenses have their source in the military powers of the Federal Government, and there are no counterpart federal offenses that can be committed by civilians in the circumstances of this case, I think the offenses have military significance within the meaning of *O'Callahan*." [71] For all his elaborate reasoning, Judge Quinn appears to be saying only that the *O'Callahan* decision was incorrect.

Judge Quinn declined to base his claim for court-martial jurisdiction on the fact that the accused was an officer. The *O'Callahan* opinion implied that this fact might be sufficient to justify jurisdiction.[72] The Chief Judge stated that an officer, "is not clothed with any less con-

70. *Id.* at 549.

71. *Id.* at 550. The chief judge begins his dissent as follows:

> The accumulated wisdom and literature of legislative and legal opinion are, I believe, opposed to the reasoning in O'Callahan v. Parker. . . . For the purpose of this case, I am constrained to accept its premise and its conclusion, but I 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*.

72. 89 S. Ct. at 1689-90 n.14.

stitutional . . . rights than is an enlisted person." [73] He also declined to decide if the presence of an officer bumper sticker on the accused's car was the equivalent of being in uniform.

In *United States v. Prather*,[74] decided the same day as *Borys*, the court again found a lack of jurisdiction over the robbery of a gas station and resisting arrest. Again, Chief Judge Quinn dissented, based upon his dissent in *Borys*, and because the accused consented to trial by court-martial in order to avoid trial in the civilian courts. He construed the accused's consent as a waiver of the constitutional right to a civilian trial in a state court, thus making the accused amenable to trial by court-martial. In this instance, Judge Quinn has apparently given *O'Callahan* the novel interpretation that it creates the constitutional right of trial by jury for servicemen rather than the more obvious interpretation that it forbids court-martial jurisdiction over nonservice-connected crimes.[75] If a court lacks jurisdiction, such jurisdiction can not be conferred by the consent of the accused.[76]

The few cases that have attempted to apply the *O'Callahan* rule have not provided a clear analysis of the future of court-martial jurisdiction. The Courts of Military Review will, no doubt, give *O'Callahan* a very restricted interpretation, leaving the task of broadening its application to the Court of Military Appeals. Moreover, since two of the court's three judges are diametrically opposed[77] in their opinions on the proper application of *O'Callahan*, the third judge[78] is in the position of being able to determine the future of court-martial jurisdiction.

Application of the O'Callahan Decision

The practical difficulties inherent in a broad application of the *O'Callahan* rule are numerous and significant, while the benefits to the individual serviceman will be minimal or, in most cases, nonexistent. In those areas of the country where large military installations are located

73. United States v. Borys, 18 U.S.C.M.A. 545, 40 C.M.R. 257 (1969).

74. 18 U.S.C.M.A. 560, 40 C.M.R. 272 (1969).

75. 55 A.B.A.J. 871 (1969).

76. See cases cited at 22 C.J.S. *Criminal Law* § 147 (1961).

77. Judge Ferguson urges an extremely liberal application of O'Callahan. *See* his dissent in United States v. Goldman, 18 U.S.C.M.A. 516, 517, 40 C.M.R. 228 (1969). As already discussed, Chief Judge Quinn advocates the most limited interpretation conceivable. *See* his dissents in United States v. Borys, 18 U.S.C.M.A. 545, 550, 40 C.M.R. 272 (1969); United States v. Prather, 18 U.S.C.M.A. 560, 561, 40 C.M.R. 272 (1969).

78. This is Judge William H. Darden, the newest member of the court, who was appointed on Nov. 5, 1968.

near small civilian communities the burden placed on the local courts could be overwhelming.[79] A serviceman does not benefit when his case is removed from the jurisdiction of the court-martial system, where lengthy delays are rare, and is placed on the docket of an already overburdened civilian court where his trial may be delayed weeks or even months.

Clearly, the military has a legitimate interest in preventing its members from engaging in criminal activity. This was a major element of Justice Harlan's dissent in *O'Callahan*:

> [B]ecause its personnel must, perforce, live and work in close proximity with one another, the military has an obligation to protect each of its members from the misconduct of fellow servicemen. The commission of offenses against the civil order manifests qualities of attitude and character equally destructive of military order and safety . . . . The exercise of military jurisdiction is also responsive to other practical needs of the armed forces. A soldier detained by the civil authorities pending trial, or subsequently imprisoned, is to that extent rendered useless to the service. Even if he is released on bail or recognizance, or ultimately placed on probation, the civil authorities may require him to remain within the jurisdiction, thus making him unavailable for transfer with the rest of his unit or as the service otherwise requires. In contrast, a person awaiting trial by court-martial may simply be restricted to limits, and may "participate in all military duties and activities of his organization while under the restriction. . . . The trial need not be held in the jurisdiction where the offense was committed. . . . And punishments—such as forfeiture of pay, restriction to limits, and hard labor without confinement—may be imposed, which do not keep the convicted serviceman from performing his military duties.[80]

If *O'Callahan* is held to apply to servicemen overseas, it will result in servicemen being tried by foreign courts or in crimes going unpunished. Trial by foreign courts does not protect the constitutional

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79. 89 S. Ct. at 1695 n.9. Justice Harlan discusses this problem in his dissenting opinion. "For the military is often responsible for bringing to a locality thousands of its personnel—whose numbers may be as great as, and sometimes exceed, the neighboring population—thereby imposing on the local law-enforcement agencies a burden which they may be unable to carry."

80. *Id.* at 1695.

rights of our military personnel, and permitting crimes to go unpunished will not achieve the ends of justice.[81]

The Supreme Court is unlikely to reverse *O'Callahan v. Parker*, but in light of a more conservative makeup of the Court, the lower courts probably will continue to give the decision a very narrow interpretation. If court-martial jurisdiction is to be denied, a correct application of *O'Callahan* would require that the offense in question have the following characteristics: a civilian offense; a civilian victim; an offense committed within the territorial limits of the United States and not on a military reservation; and an offender who is not on duty and not in uniform.

The Constitution vests in Congress the right to govern the military.[82] In *Burns v. Wilson*,[83] the Supreme Court discussed the separate status of the military law created by Article I:

> Military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment. This Court has played no role in its development; we have exerted no supervisory power over the courts which enforce it; the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. *The Framers expressly entrusted that task to Congress.* [Emphasis added.][84]

The right to trial by jury, means jury trial as it existed at common law.[85] At the time the Constitution was written, courts-martial did not

81. 115 CONG. REC., *supra* note 4, at S7175.

82. U.S. CONST. art. I, § 8, cl. 14. "The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces. . . ." Article 9, § 4 of the Articles of Confederation from which Art. I, § 8, cl. 14 of the Constitution was taken provided: "The United States in Congress assembled shall . . . have the *sole and exclusive* right and power of . . . making rules for the government and regulation of the land and naval forces, and directing their operations." (emphasis added).

83. 346 U.S. 137 (1953).

84. *Id.* at 140 (emphasis added). *See also* Hiatt v. Brown, 339 U.S. 103 (1950); Reaves v. Ainsworth, 219 U.S. 296 (1911); *In re* Grimley, 137 U.S. 147 (1890); *Ex parte* Reed, 100 U.S. 13 (1879); Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857).

85. *Ex parte* Quirin, 317 U.S. 1, 39 (1942). [I]t was not the purpose or effect of § 2 of Article III, read in the light of the common law, to enlarge the then existing right to a jury trial. The object was to preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law and in all cases of a like nature as they might arise in the future,

provide the right to a jury trial. The fifth amendment clause excepting military trials from the requirement of indictment by grand jury has been held to apply by implication to the sixth amendment right to trial by petit jury.[86] The purpose of these exceptions from the fifth and sixth amendment provisions in cases "arising in the land and naval forces," is

> . . . to 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.[87]

When Congress enacted the Uniform Code of Military Justice, it did not provide for trial by jury. This conformed to the history of military law, before the Bill of Rights, before the adoption of the Constitution, and before the Republic itself.[88]

The proper concern of the courts is the power to enact statutes, not the wisdom of the statute. The power to court-martial servicemen who commit "nonservice-connected" offenses belongs to Congress, and such power infringes no constitutional right. Restrictions on court-martial jurisdiction not required by the Constitution should come from the legislature and not from the judiciary. *O'Callahan v. Parker* does not interpret the Constitution, it changes it. This is not a situation where Congress has neglected its responsibility, thus forcing the Supreme Court to intervene. Rather than limiting court-martial jurisdiction, Congress has chosen to improve military justice, and make it

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> . . . but not to bring within the sweep of the guaranty those cases in which it was then well understood that a jury trial could not be demanded as of right.

86. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 123 (1866). "[T]he framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth." *See also Ex parte* Quirin, 317 U.S. 1, 39-41 (1942).

87. *Ex parte* Quirin, 317 U.S. at 43. *See also* Kahn v. Anderson, 255 U.S. 1, 8-9 (1920); *cf.* Caldwell v. Parker, 252 U.S. 376 (1920); *Ex parte* Mason, 105 U.S. 696 (1881).

88. *See* Whelchel v. McDonald, 340 U.S. 122, 127 (1950); *Ex parte* Quirin, 317 U.S. 1, 40 (1942); Johnson v. Sayre, 158 U.S. 109 (1895); *Ex parte* Mason, 105 U.S. 696 (1881); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 138-39 (1866); Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857).

the equal of our civilian systems. To this end, Congress, over the past twenty years, has made strong, continual, and effective efforts,[89] culminating in the Military Justice Act of 1968.[90]

This decision cannot be ignored. By limiting its application to offenses closely analogous to the facts of *O'Callahan*, however, the practical difficulties can be minimized and most of the jurisdiction which Congress intended to grant the military will remain intact.

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89. For defenses of military justice, *see* Senator Ervin's Speech, 115 CONG. REC., *supra* note 41, at S7175; and Chief Judge Quinn's dissent in United States v. Borys, 18 U.S. C.M.A. 545,560, 40 C.M.R. 257 (1969).

> [I]t [the court-martial system] can survive any point by point comparison of the substantive and procedural provisions of the military criminal law as delineated by Congress in the Uniform Code of Military Justice and the actual administration of the law as reflected in the cases with the criminal law and its administration in the civilian community. In my opinion, the American people can take just pride in the system of Government of the armed forces provided by Congress and in the administration of that system by their fellow civilians in uniform.

90. 10 U.S.C.A. §§ 801-936 (Supp. 1969). *See generally* McCoy, *Due Process for Servicemen—The Military Justice Act of 1968*, 11 WM. & MARY L. REV. 66 (1969).