O'Callahan v. Parker: Sounding the Death Knell of Military Justice

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COMMENTS

O'CALLAHAN V. PARKER: SOUNDING THE DEATH KNELL OF MILITARY JUSTICE?

Although the question had been tangentially noted on numerous occasions and in various contexts, until O'Callahan v. Parker,¹ the Supreme Court had never directly considered whether a court-martial had jurisdiction to try a serviceman for commission of a non-service connected offense.² In a monumental 5-3 decision, the Court held that where there was no sufficient overriding military interest, a court-martial could not exercise jurisdiction over an offense civil in nature, although the alleged offender was a member of the regular forces on active duty.

In determining whether a court-martial had jurisdiction to try O'Callahan, the Court was necessarily faced with several questions: (1) what are “cases arising in the land or naval forces” within the meaning of the fifth amendment; (2) what is the scope of congressional power under article I, section 8, clause 14 to grant courts-martial jurisdiction over members of the regular armed forces; (3) can Congress grant courts-martial jurisdiction over offenses not exclusively military in nature, where the offenses have little or no impact on the maintenance of military discipline; (4) what is the relationship of the language of article I, section 8, clause 14 to that of the fifth amendment; (5) what is the effect of any such relationship on congressional power; (6) what are the relevant factors in deciding whether a case does or does not arise “in the land or naval forces.”³ Commencing with a brief analysis

2. Certiorari was granted to O'Callahan, limited to 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?
3. Upon reading the majority opinion in O'Callahan, it becomes obvious that a seventh question was also entertained: what is the social desirability of permitting a gigantic modern military establishment to exercise, in practice, a virtually exclusive jurisdiction in policing its own forces, regardless of the nature of the offense alleged? However, this question of desirability will not be considered here.
of the O'Callahan decision, the above questions will be considered, in order, and an attempt will be made to place each in perspective. Where practicable, some attempt at prognostication may also be made.4

A. THE O'CALLAHAN DECISION

O'Callahan was a sergeant in the United States Army stationed on Oahu, in what was then the territory of Hawaii. On a July evening in 1956, he went into downtown Honolulu, wearing civilian clothes and in possession of a pass. At a hotel bar he consumed several beers, after which he broke into the room of a fourteen year old girl. He assaulted and attempted to rape her, but fled when she screamed. O'Callahan was apprehended while still on the hotel grounds by a hotel security officer, and was turned over to the civilian authorities for questioning. When they discovered that O'Callahan was a serviceman, the civilian authorities turned him over to the Army. He was questioned by the military authorities, confessed, and was charged with attempted rape, housebreaking, and assault with attempt to rape. He was subsequently found guilty of all charges by a court-martial and imprisoned. His case came before the Supreme Court by granted certiorari resulting from denial at a lower level of a petition for writ of habeas corpus.

The Supreme Court, in deciding that a court-martial was without jurisdiction to try O'Callahan, was drawn in part to its prior decisions holding that a court-martial was without jurisdiction to try (1) discharged soldiers for offenses committed while in service;5 (2) civilian employees of the Armed Forces, stationed overseas;6 or (3) civilian dependents of military personnel accompanying them overseas.7 However, these decisions do not bear directly on the questions before the Court, for consideration of them involves equating the status of a serviceman, in certain circumstances, with that of a civilian. To

4. Predictions, or predelictions if one prefers, will be based on the decision, the regulations governing the current military environment, and some extrapolations. Discounted for the moment will be the relatively obvious fact that the Supreme Court is in a period of transition, and what effects that transition might produce.


so equate the two is to entertain a proposition wholly inconsistent
with the recognized status of a serviceman, and analogizing them
is little more than a bald fiction. For whatever it might have once
been worth as a guideline, the substance of the holdings in the
above decisions was that “courts-martial have no jurisdiction to
try those who are not members of the Armed Forces...” Now
the Court in O’Callahan asserts that if the converse was ever
considered to be true, i.e., if being a member of the Armed Forces
was ever deemed to be sufficient to vest jurisdiction in a court-
martial, it is no longer so. The Court reasons that there are
certain conditions under which an offense committed by a
serviceman does not arise “in the land or naval forces,” and hence
the fifth amendment exception from right to presentment or
indictment by grand jury and the sixth amendment exception from
right to jury trial are not applicable. In effect, the Court has
determined that Congress may grant court-martial jurisdiction
only for those “cases arising in the land or naval forces,” and the
fact that the offender is a member of the land or naval forces does
not, of itself, cause a case to so arise. The first proposition, that
congressional power is limited to “cases arising in the land or
naval forces,” is neither recent nor very disturbing, so long as the
restriction is predicated on the language of article I, section 8,
clause 14, and the language of the fifth amendment is considered
to be synonymous. However, the majority insists that the
language of the fifth amendment is different from and more
restrictive than that of article I, and so controls the scope of
congressional power.

The latter proposition, that status as a member of the land
or naval forces is not sufficient to vest jurisdiction in a court-
martial, is revolutionary and cuts a swath through what had
become by congressional act and judicial acceptance the realm of
article I military courts, although it had never been judicially
determined to be such.

8. Justice Frankfurter, in his concurring opinion in Reid v. Covert, 354 U.S. 1, 50
(1957), cited with apparent approval T. Powell, VAGARIES AND VARIETIES IN
CONSTITUTIONAL INTERPRETATION, 36: “If a precedent involving a black horse is applied
to a case involving a white horse, we are not excited. If it were an elephant or an animal
ferae naturae or a chose in action, then we would venture into thought. The difference
might make a difference.”
10. See text accompanying note 17, infra, for a discussion of the significance of this
matter.
B. "CASES ARISING IN THE LAND OR NAVAL FORCES . . . ."

Article I, section 8, clause 14, in relevant part, provides:
"The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces; . . ."\(^\text{11}\)

The fifth amendment provides:
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia when in actual service in time of War or public danger . . . .\(^\text{12}\)

(1) **Historical appreciation of the meaning given to article I, section 8, clause 14 and to the fifth amendment**

The fifth amendment expressly excepts from the right to indictment by a grand jury "cases arising in the land or naval forces . . . ."\(^\text{13}\) The same exception has been considered to extend to the sixth amendment right to jury trial.\(^\text{14}\) What is such a case as arises "in the land or naval forces" has yet to be squarely determined by the Supreme Court. *O'Callahan* is only an example of what it is not, and if Supreme Court reasoning continues on the same plane as represented by *O'Callahan*, it would be foolhardy to predicate a definition on the converse of the facts in *O'Callahan*.

The scope of the express exception of the fifth amendment apparently had always been considered to correlate to the general constitutional grant of power to Congress under article I, section 8, clause 14,\(^\text{15}\) and never, until *O'Callahan*, had the language of the fifth amendment been considered a restriction on that congressional power. Chief Justice Chase, in 1866, wrote in *Ex parte Milligan* that "the power of Congress, in the government of the land and naval forces and of the militia, is not at all affected by the fifth or any other amendment."\(^\text{16}\)

In 1943, Justice Stone wrote in *Ex parte Quirin* that

The exception from the Amendments of "cases arising in the land or naval forces" was not aimed at trials by military

14. *Id.: Ex parte Quirin*, 317 U.S. 1, 30 (1943).
tribunals, without a jury, of such offenses against the law of
war. Its objective was quite different—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.\textsuperscript{17}

Until \textit{O'Callahan}, the phrase “land and naval forces” had
uniformly been construed to mean persons who are members of
the armed forces. Specifically, when \textit{United States ex rel. Toth v.
Quarles} was decided in 1955, it was said “[T]he power granted
Congress ‘To make Rules’ to regulate ‘the land and naval Forces’
would seem to restrict court-martial jurisdiction to persons who
are actually members or part of the armed forces.”\textsuperscript{18} In \textit{Reid v.
Covert}, the Supreme Court reiterated, and wrote:

The term “land and naval Forces” refers to persons who are
members of the armed services . . .

. . . .

It is true that the Constitution expressly grants Congress power
to make all rules necessary and proper to govern and regulate
those persons who are serving in the ‘land and naval Forces.’
But the Necessary and Proper Clause cannot operate to extend
military jurisdiction to any group of persons beyond that class
described in Clause 14—‘the land and naval Forces.’\textsuperscript{19}

While it is true that the Court in \textit{Covert} was considering the
meaning of the phrase in relation to article I, and in \textit{O'Callahan}
the Court was concerned with its use in the fifth amendment, can
there be any serious question that the framers of the Constitution
had any intention of referring to two separate classes of persons
in the two different provisions, as the \textit{O'Callahan} Court would
have one believe?

(2) \textit{Congressional power}

Until \textit{O'Callahan}, with one exception to be noted,
congressional power to provide for court-martial jurisdiction for
all members of the Armed Forces had gone virtually unchallenged

\textsuperscript{17} 317 U.S. 1, 43 (1943) (emphasis added).
\textsuperscript{19} 354 U.S. 1, 19-21 (1957).
for over a century. In 1857, the Supreme Court wrote in *Dynes v. Hoover*, concerning article I, section 8, clause 14 and the fifth amendment, that:

These provisions show that Congress has the power to provide for the trial and punishment of military and naval offences in the manner then and now practiced by civilized nations; and that the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other.  

In 1878, the Supreme Court, in *Coleman v. Tennessee*, wrote:

We do not mean to intimate that it was not within the competency of Congress to confer exclusive jurisdiction upon military courts over offenses committed by persons in the military service of the United States. As Congress is expressly authorized by the Constitution “to raise and support armies,” and “to make rules for the government and regulation of the land and naval forces,” its control over the whole subject of the formation, organization, and government of the national armies, including therein the punishment of offences committed by persons in the military service, would seem to be plenary.  

Of particular note is *Kahn v. Anderson*, decided in 1920, where the Court considered a contention similar to that raised in *O'Callahan*, *i.e.*, that Congress was without power to provide for military court jurisdiction because it was inconsistent with the fifth and sixth amendment guaranties. The Court said the proposition was:

[Without foundation, since it directly denies the existence of a power in Congress exerted from the beginning, and disregards the numerous decisions of this court by which its exercise has been sustained,—a situation which was so obvious more than forty years ago as to lead the court to say in *Ex parte Reed*, 100 U.S. 13, 21:

“'The constitutionality of the acts of Congress touching army and navy courts martial in this country, if there could ever have been a doubt about it, is no longer an open question in this court. (citations omitted) In *Dynes v. Hoover*, [61 U.S. 65] the subject was fully considered and their validity affirmed.'

22. 255 U.S. 1, 8-9 (1920).
As recently as 1960, in *Kinsella v. United States ex rel. Singleton*, the Court said "There can be no question but that Clause 14 grants the Congress power to adopt the Uniform Code of Military Justice."\(^{23}\) The Uniform Code is codified in 10 U.S.C. Section 801, *et seq.*, and despite the above, several of its provisions came under fire in *O'Callahan*, and were invalidated because they exceeded the congressional power.

The Supreme Court made little note of the source of the purported jurisdiction in the *O'Callahan* court-martial, in announcing that a court-martial did not have jurisdiction. As mentioned, Congress had adopted the Uniform Code of Military Justice, and one of the provisions so adopted was article 2,\(^ {24}\) which provides that all members of the regular forces are subject to military law. Under the statute, jurisdiction is solely a question of status, and is a continuing amenability so long as the member remains in that status. It is not dependent on the nature, time, or place of the offense. However, *O'Callahan* holds that where an offense is committed, and certain circumstances exist, the military cannot exercise jurisdiction over the case. The Court refused to admit either that *O'Callahan* was subject to military law, but could not be tried by the military, despite article 2; or that *O'Callahan* was not subject to military law, contrary to the express provisions of article 2. In either case, the Court has clearly held that the congressional grant of court-martial jurisdiction under article 2 is excessive, and is unconstitutional to the extent that it is so excessive.

Even more significant is the fact that despite the multitude of persuasive authority to the contrary, the *O'Callahan* Court said: "[I]t is assumed that an express grant of general power to Congress is to be exercised in harmony with express guarantees of the Bill of Rights."\(^ {25}\) With these very words, the Court took the express grant of power made to Congress in the Constitution under article I, section 8, clause 14, heretofore considered unaffected by the fifth amendment, and tied to its tail the fifth amendment exception of "cases arising in the land or naval forces." Justice Musmanno's "acetylene torch" could not have performed a more confounding fusion of formerly separate constitutional provisions.

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25. 89 S. Ct. at 1691 (emphasis added).
Another provision of the Uniform Code of Military Justice has been rendered largely superfluous by *O'Callahan*—article 14, which provides for delivery of servicemen, upon demand, to civilian authorities for offenses over which there is concurrent jurisdiction under the Code. Substantially the same provision has been in effect since the American articles of war were adopted by the Continental Congress in 1776. Now, in view of *O'Callahan*, it is significant only in those cases where the offense committed is civil in nature, and the military has a sufficient interest to be able to exercise jurisdiction, for only then could they exercise the provision to waive jurisdiction under article 14.

A third provision of the Uniform Code of Military Justice, article 134, a general article which incorporates virtually all offenses not specifically proscribed elsewhere in the Code, was under heavy attack in *O'Callahan*. It was dubbed "the trap," and questioned for vagueness. However, because the Court found that the court-martial was without jurisdiction to try O'Callahan, it left for another day the validity of article 134. Speculation on the portents, at this point in time, would be next to meaningless.

The attack of *O'Callahan* on congressional power to grant court-martial jurisdiction has not gone unnoticed by Congress. On June 25, 1969, Senator Ervin of North Carolina addressed the Senate on the decision, and said that it appeared to him "that here again the Supreme Court has changed the Constitution, rather than interpreted it." Nor is the charge unfounded, for there is little basis for holding that the drafters of the fifth amendment intended to restrict the article I, section 8, clause 14

26. 10 U.S.C. § 814(a) (1956) provides:
Under such regulations as the Secretary concerned may prescribe, a member of the armed forces accused of an offense against civil authority may be delivered, upon request, to the civil authority for trial.


28. 10 U.S.C. § 934 (1956) provides:
Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed services, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

29. 89 S. Ct. at 1687.

power granted to Congress by tying to it the fifth amendment. Indeed, a plain meaning interpretation of the Constitution and the amendments would appear to be that the express exception of the fifth amendment relates to the article I, section 8, clause 14 power to make rules and regulations for the Armed Forces, and provides only that where Congress makes a grant of jurisdiction under that power, the right to indictment by grand jury, and to a jury trial under the sixth amendment, do not exist. The exception to the fifth amendment was, in effect, merely a recognition that the above rights were inconsistent with the necessary concept of military courts-martial. Accepting the O'Callahan view that the fifth amendment is a limitation on the article I power means that the drafters must have intended that there be instances when Congress could not exercise its constitutional authority to make rules and regulations to govern the Armed Forces—it means acceptance of an untenable concept from the standpoint of congressional control of the military establishment, and of a view wholly inconsistent with the grant of a general power by the Constitution. In O'Callahan the majority felt that the crime to be under military jurisdiction must be service-connected, lest “cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger,” as used in the Fifth Amendment, be expanded to deprive every member of the armed services of the benefits on an indictment by a grand jury and a trial by a jury of his peers.

However, there is no showing that any member of the regular forces on active duty was ever intended to have such rights while

31. See note 32, infra.
32. It is also inconsistent with the view of the majority in Reid v. Covert, 354 U.S. at 22-23, where it is written:

Since the exception in this Amendment [fifth] for “cases arising in the land or naval forces” was undoubtedly designed to correlate with the power granted Congress to provide for the “Government and Regulation” of the armed services, it is a persuasive and reliable indication that the authority conferred by Clause 14 does not encompass persons who cannot fairly be said to be “in” the military service.

. . . . We recognize that there might be circumstances where a person could be “in” the armed services for purposes of Clause 14 even though he had not formally been inducted into the military or did not wear a uniform. Now the Court is asking one to accept that a person properly inducted into the service and authorized to wear the uniform may not be “in” the armed services for purposes of clause 14.

33. 89 S. Ct. at 1690-91 (emphasis added).
in such a status. The power to provide or not to provide for these rights originally rested with the drafters who made no affirmative declaration that these rights were to extend to the military, and thus encroach on the power granted to Congress. Undoubtedly, the drafters could have so provided if they had so desired. Instead, they expressly excepted from the fifth, and impliedly from the sixth, "cases arising in the land or naval forces." Since ratification of the amendments, the power to provide these rights has always been considered to lie in Congress, to exercise at its discretion. To say that for capital offenses a serviceman was historically tried in a civilian court is to say that Congress had not elected under its power to vest the jurisdiction in the court-martial, which, in regard to certain offenses, it originally had not. With the adoption of the Uniform Code of Military Justice, Congress did exercise its power to expand the scope of court-martial jurisdiction in regard to offenses, a course of action clearly not proscribed by the plain meaning of the Constitution and the fifth amendment.

The questionable historical data cited by the Court does not support the proposition that the fifth amendment was intended to be a restriction on congressional power, for the National Archives contains records of scores of courts-martial for civil offenses, many dating as far back as 1775. The drafters were aware of the practice; neither hue nor cry was raised about it, and there is no evidence to support the theory propounded by the O'Callahan majority that the drafters had a different class of persons in mind when they drafted the fifth amendment than when they conceived article I, section 8, clause 14. It is apparent that the Court took the following words of Toth at face value:

Determining the scope of the constitutional power of Congress to authorize trial by court-martial presents another

34. Brief for Appellee at 35, O'Callahan v. Parker, 89 S. Ct. 1683 (1969). The validity of the history cited is in doubt because the major proposition for which the English history of the 17th and 18th centuries stands is the running battle between the throne and Parliament over control of the military. Once Parliament obtained control, it did restrict courts-martial jurisdiction, not because the military lacked the competence to administer its own justice, but because the military had been too closely allied with the throne. The same proposition was ostensibly a factor in granting to Congress the power to make rules to govern the Armed Forces, instead of the Executive. The early British and American history does not even suggest that the military was denied jurisdiction because it either lacked the competence to fairly handle its own personnel, or was any the less equitable in its treatment of offenders.
instance calling for limitation to "the least possible power adequate to the end proposed."35

The Court failed to note, however, that the words were written concerning the power of Congress to make civilians amenable to court-martial jurisdiction. Instead, it appears the Court determined the end it sought, which was to curb military jurisdiction and, by necessity, congressional authority, and set out to achieve that end.

C. THE O’CALLAHAN FACTORS

Just as in the recent past the impassable Himalayas formed a natural barrier separating the Communist Chinese from the Peoples of India, so until O’Callahan there was a gulf between the status of a serviceman and that of a civilian. Just as the Communist Chinese paved a way across the mountains, O’Callahan has bridged the gulf called "status." There are now no barriers to contain the Communist Chinese along what was once the Sino-Indian border, and there appear to be few theoretical barriers to preclude the abolition of the entire military judicial system. The size and strength of the bridge (named "service-connected") is determinable by the soundness of each of the eight planks used in its construction. They are: (1) off-duty serviceman; (2) off-base offense; (3) serviceman in civilian clothes; (4) civilian victim; (5) offense civil in nature; (6) open civilian courts; (7) offense committed within the territorial United States; and (8) offense not sufficiently prejudicial to vest jurisdiction in the military.

The gulf of "status" had seen few ripples prior to O’Callahan, and had even received judicial recognition upon occasion. One such occasion was in 1960, in Kinsella v. United States ex rel. Singleton, when the Supreme Court reasoned from the second Covert case that:

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

. . . . .

Without contradiction, . . . military jurisdiction has always been based on the 'status' of the accused, rather than on the

nature of the offense. To say that military jurisdiction "defies
definition in terms of military status" is to defy unambiguous
language of Art. I, Section 8, cl. 14, as well as the historical
background thereof and the precedents with reference thereto.\textsuperscript{36}

\textit{O'Callahan} provides that "[s]tatus' is necessary for
jurisdiction; but it does not follow that ascertainment of 'status'
completes the inquiry, regardless of the nature, time, and place of
the offense."\textsuperscript{37} Consequently, in deciding whether a court-martial
may exercise jurisdiction in a particular case, one must consider
not only the status of the offender, but also "the nature, time, and
place of the offense," to determine if there is a sufficient service
connection to vest jurisdiction in a court-martial.

There is little doubt that the meaning of "service-connected"
will be the subject of considerable litigation in the coming months,
for the Court in \textit{O'Callahan} failed to lay down any guidelines for
interpretation of the new requirement. Status as a serviceman
would appear to be a necessary, but not sufficient, condition on
which to predicate court-martial jurisdiction, and "service-
connected" is a "black box"\textsuperscript{38} full of the \textit{O'Callahan} planks. The
question is, which one plank, or combination of planks, must be
absent before a sufficient service connection is established.

(1) The status of \textit{O'Callahan} was that he was a sergeant in
the United States Army, on active duty, and, as such, was
amenable to court-martial jurisdiction under the provisions of
Title 10, Section 802 of the United States Code. At the time of
the offenses he was in possession of a pass authorizing him to
leave the post for a limited period of time. One must be careful
in characterizing his status as "off-duty," however, for the duty
status of a serviceman on active duty is always something far
different from that of, for example, a civilian taxi driver, who can
put an "off-duty" sign on his windshield and refuse fares at will.
In this regard, the Navy provides:

\textquote{All persons in the naval service, on active service, on furlough,
on the retired list with pay, and transferred members of the
Fleet Reserve and the Fleet Marine Corps Reserve, are at all
times subject to naval authority.\textsuperscript{39}}

\textsuperscript{36} 361 U.S. at 240-41, 243 (emphasis added).
\textsuperscript{37} 89 S. Ct. at 1688.
\textsuperscript{38} The concept of a "black box" concerns an electronic component which one is
taught to operate, but not taught how it functions. The nature of its innards remains
undisclosed.
\textsuperscript{39} United States Navy Regulations (1948), Chapter 13, section 2, article 1316.
"Passes are not a right to which one is specifically entitled, but a privilege to be awarded to deserving individuals by their commanders."\textsuperscript{40} The granting of a pass is subject to a number of considerations, some of which are: (1) whether the individual serviceman is assigned to a duty unit for that day; (2) whether all assigned tasks for the day have been completed; (3) whether there are any other exigencies of service precluding the granting of the pass. As a practical matter, review of the criteria is not made daily, or even regularly. The pass merely becomes effective when the serviceman is told he may depart from his regularly assigned post. The granting of a pass is recognition that there is no requirement for the serviceman to remain at his post during the specified period of time for which it is granted. Being in possession of a pass makes the serviceman no less subject to military authority and orders of his superiors, whether he remains on post or departs it. Having a valid pass is significant in only one respect—it distinguishes the holder from a serviceman on unauthorized absence.\textsuperscript{41}

The entire concept of the pass is subject to military control, even the scope of it. The Navy provides that "[u]nless otherwise authorized by the commanding officer in specific cases, all persons on liberty shall remain in the general vicinity of the command, as prescribed by competent authority."\textsuperscript{42} There are even restrictions on what a serviceman may do when authorized to leave the post. He may not visit certain establishments placed "off-limits" by the local commander; he may not seek employment where to do so would interfere "with the customary or regular employment of local civilians in their art, trade, or profession."\textsuperscript{43}

The commission of an offense by a serviceman while in the performance of duty is clearly inconsistent with the maintenance of good order and discipline in the Armed Forces, which is a prerequisite to military effectiveness. Consequently, there is a strong military interest in prosecution of the offense. In \textit{Ex parte Mason}, a soldier had been assigned guard duty at a United States jail. While on duty, he killed a civilian prisoner. The Supreme

\textsuperscript{40} Army Regulation No. 630-20, para. 1, of 3 January 1966.
\textsuperscript{41} 10 U.S.C. § 886 (1956).
\textsuperscript{42} United States Navy Regulations (1948), Chapter 12, article 1284.
\textsuperscript{43} 10 U.S.C. § 6114 (1956); \textit{See} Army Regulation No. 600-50, para. 12, of June 1966.
Court, in dismissing an appeal of a denial of a petition for writ of habeas corpus, said:

As the proper steps were not taken to have him proceeded against by the civil authorities, it was the clear duty of the military to bring him to trial under that jurisdiction.

The 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.44

consequently, if Mason stands, the fact that the accused was in the performance of assigned duties when he committed the offense charged may, of itself, vest jurisdiction in a court-martial, regardless of other factors considered in O'Callahan, and absent a demand by civilian authorities.45

An example of a problem raised by O'Callahan is Marshall v. Laird,46 where a serviceman was on unauthorized absence when he committed rape, sodomy, assault, assault with intent to commit rape and sodomy. The Court of Military Appeals, on July 1, 1969, denied a petition for habeas corpus, indicating the military had prima facie jurisdiction (accused was being detained pending investigation required under article 32 of the Uniform Code of Military Justice, and had not yet been tried). The court noted that the alleged victims were naval dependents, and that the alleged offenses were committed on a dependent's housing reservation, although off the main base. The problem is whether the military can take jurisdiction for the unauthorized absence alone, if at all, or whether it can adjudicate all the offenses committed. On September 26, 1969, the Court of Military Appeals handed down its opinion in United States v. Chandler,47 a case which concerned the commission of multiple larcenies off base by two servicemen on unauthorized absence. The court held that military jurisdiction did not lie because there was no specific

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44. 105 U.S. 696, 699-700 (1881).
46. Court of Military Appeals, Misc. Docket No. 69-24. No opinion has been reported to date, but the writer had access to copies of the government's brief and the order filed.
47. 6 CRIM. L. REP. 2031 (1969).
relation of the offenses to the military. It is not yet known whether
the Court of Military Appeals directly considered the question of
military jurisdiction in regard to the exclusively military offense
of unauthorized absence. On its facts, Chandler presents the most
controversial question concerning the factor of duty status because
neither the victim nor the situs bore any relation to the military.

(2) One of the most critical factors in post-O'Callahan cases
may be whether the offense was committed on a military post,
inasmuch as there is, without question, a military interest in
preserving the security of a post and the integrity of military
property. This factor has already been tested to a considerable
extent in the Court of Military Appeals. Because of O'Callahan,
a borderline case would appear to exist when a serviceman
committed an offense civil in nature against a civilian who is on
a post for a limited purpose, e.g., making a delivery. The question
appears to have been answered temporarily, however, by United
States v. Paxiao, when the Court of Military Appeals held that
the on-base robbery of a civilian by a serviceman "so directly
affects the security of a military post as to supply service
connection, and hence there is military jurisdiction." The business
of the civilian on the post is at present unknown, but is relevant
to the question of what is a sufficient relationship of the civilian
victim to the maintenance of discipline on a post or base.
However, in United States v. Crapo, the Court of Military
Appeals held a serviceman amenable to military jurisdiction for
robbery of a taxi driver, although the actual taking of the money
occurred off-base, because the assault which was an element of the
robbery took place on a military reservation. It thus appears that
fortuitous presence on the post is sufficient to establish a service
connection when an offense is committed on post against a
civilian victim. The off-base factor was considered of particular
significance in United States v. Henderson, which was recently
decided by the Court of Military Appeals. In that case, a
serviceman was charged with the illicit carnal knowledge of
another serviceman's daughter. Despite the fact that the victim
was a military dependent, and that she had met the accused on
base, the court found no sufficient service connection. The offense

48. Id.
49. Id.
50. Id.
itself had been committed off-base. However, the court indicated that there could be circumstances when the above facts could enable the military to exercise jurisdiction, and suggested that such a circumstance might exist if the victim had predicated her association with the accused on the fact of his status as a serviceman.

Also concerned with the off-base factor was United States v. Riehle, in which the accused had appropriated an automobile from a civilian dealership in Oceanside, California, and had driven it onto the post. The government argued that there was a sufficient service connection because of the composition of the town and its proximity to the post involved. The government also urged that the court decide on the basis of the "prerequisites of military discipline, instead of a rigid application of academic concepts." The Court of Military Appeals, however, apparently rejected these arguments, because it found no sufficient service connection, even though the stolen car had been driven onto the post.

A unique jurisdictional question, because of O'Callahan, was raised in United States v. Shockley. In that case, the victim of multiple acts of sodomy was a dependent of the offender. Some of the acts were committed in private housing off-base, and some in government housing on-base. The government argued that there was a sufficient service connection not only because some of the offenses were committed on-base, but also because the military would have to provide medical care to the mentally or physically injured dependent. The Court of Military Appeals ruled that the military could exercise jurisdiction only over the acts committed on the base. Such a ruling raises a problem of separate jurisdictions in that an accused under such circumstances is liable for prosecution in both a military and a civilian court for separate acts of a basic offense which is civil in nature. This situation advances the argument for abolition of military jurisdiction over any offense civil in nature, even if service-connected, because the accused could properly be tried in the civilian court on all counts.

52. 6 CRIM. L. REP. 2031 (1969).
From the rash of cases which have already been adjudicated on the off-base factor, it appears that the Court of Military Appeals considers that the military enclave is still sacrosanct. The majority reasoning in *O'Callahan* would tend to indicate, however, that the Supreme Court does not consider a military compound inviolable. It is submitted that a petition to the Supreme Court for certiorari in *Crapo* could provide a good vehicle for testing the supremacy of military jurisdiction on a military post.

(3) In *O'Callahan*, the Court made note of the fact that O'Callahan was in civilian clothes while committing the offenses for which he was court-martialed.\(^5\) It is readily apparent that this criterion is of little moment in determining service connection. Whether or not a serviceman is permitted to wear civilian clothes when off the base or post, and not in the course of performance of assigned duties, is discretionary with the service and the local commanding officer.\(^6\) When an offender is apprehended, the only significance of the fact that he is in uniform is the prejudicial reaction it often evokes from the civilian populace against the services in general. Clearly, under *O'Callahan*, such prejudice would not be of sufficient military interest to vest court-martial jurisdiction.

(4) The status of the victim is an extremely important factor, for if the victim is a civilian, there is little military interest in prosecution, in regard to this factor, simply because there is no direct injury to the esteem of the services, or to the maintenance of discipline. However, if the victim is a serviceman, there is a strong service connection in regard to the maintenance of good order and discipline. Nevertheless, it is arguable under *O'Callahan* that if both servicemen were off-base, on authorized absence, and one committed an offense civil in nature against the other, *e.g.*, battery, their status may well not be sufficient to vest jurisdiction in a court-martial, because maintenance of good order and discipline is only significantly relevant when military authority is challenged. The federal government does have an interest in prosecution to the extent that it has to provide medical care for

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55. 89 S. Ct. at 1684.
56. United States Navy Uniform Regulations, NAVPERS 15665, Chapter 11, section 4, article 1140; Army Regulation No. 670-5 of 1 July 1969, Chapter 1, section 1-3; Army Regulation No. 670-6 of 11 Dec. 1967.
the injured victim, and quite possibly also to an injured offender. The same argument is applicable where the victim is a military dependent, but Shockley would tend to indicate that it is not enough for jurisdiction.

(5) Under the Uniform Code of Military Justice, Congress has both expressly and impliedly codified crimes under both state and federal law, as well as offenses which are exclusively military in nature. Examples of exclusively military offenses are unauthorized absence, desertion, and disobedience of a lawful order. Other offenses, such as rape, assault, murder, robbery, are considered in O'Callahan to be civil in nature. Without doubt, the military still has exclusive jurisdiction over the exclusively military offenses. All other offenses, however, are subject to O'Callahan, and the finding of a sufficient service connection. Moreover, O'Callahan is causing courts to look at the nature of the erstwhile exclusively military offense. In United States v. Castro, the Court of Military Appeals held that a serviceman cannot be court-martialed for violation of a lawful general order if the order allegedly violated proscribes conduct which has no other service connection than the fact that it is the subject of such an order or regulation.\(^7\) This opinion indicates that the court intends to look behind the name of the offense alleged to ascertain the nature of the conduct on which the order's violation is premised. Such investigation on the part of the court raises the question of whether the military can prosecute a serviceman for unauthorized absence when the absence is solely attributable to incarceration in a civilian jail because of the serviceman's misconduct. If Castro is being correctly construed, it would appear that the military cannot so prosecute a serviceman for his unauthorized absence.

(6) A criterion recognized by the Court in O'Callahan was whether there were civilian courts open at the time of the offense. It is not a relevant factor in determining a service connection, but it has practical significance in that it is to be expected that the military will continue to exercise jurisdiction if civilian courts are not open, whenever and wherever that might be. The only significant consequence to the military of the existence of open civilian courts is the restriction it imposes on the mobility of an offender pending trial. The civilian court cannot waive jurisdiction

to the military because the military cannot exercise the jurisdiction without a sufficient service connection, in which case it would likely have asserted jurisdiction originally. To be tried, an offender must remain in the civilian jurisdiction, regardless of where the military unit might go. This restriction raises a problem peculiar to the military, and is currently recognizable in the civilian prosecution of evaders of the Selective Service. It is to be anticipated that some servicemen will leave their post on the eve of departure to a combat zone, or somewhere else they might not desire to go, and commit a minor offense for the sole purpose of having themselves incarcerated temporarily until after their unit has left. There can be no question that such conduct would be highly prejudicial to good order and discipline; yet it would appear that if the offender is to be prosecuted for the offense, the civilian courts must take jurisdiction.

(7) If the offense was committed within the territorial United States, *O'Callahan* is directly applicable. However, where the offense is outside the territorial United States, *O'Callahan* raises a potential problem, inasmuch as the fifth amendment has suddenly become a restriction on congressional power. Assume that an offense is committed off-base, for example in Japan, by a serviceman on authorized absence, and the victim is a Japanese national or an American citizen. Does the Bill of Rights extend only to territorial limits of the United States, or does it travel with an American serviceman wherever he may go (with the possible exception of a combat zone), and apply in any dealings he has with the United States and her representatives. Presuming that Japan could have asserted jurisdiction, but waived it to the military, can it seriously be contended that the rights now promised under *O'Callahan* can be denied solely because the offender is outside the territorial limits. There are treaties with a number of foreign nations, advised and consented to by the Senate, which provide for jurisdiction, and waiver of jurisdiction, by the United States for offenses committed by servicemen in foreign lands. Have Congress and the Executive branch exceeded their respective constitutional powers in this instance, as Congress is said to have done in *O'Callahan*? In *Wilson v. Girard*, the Supreme Court upheld just such an arrangement with Japan, saying that the agreements constituted no encroachments on constitutional rights and guaranties.88 Potentially, the Court on

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the basis of *O'Callahan* could deny to the military the power to waive jurisdiction, and could require the return of all persons over whom the military could not exercise jurisdiction for lack of a sufficient service connection. Trial would then be conducted in a civilian court within the territorial limits of the United States, presuming there is a court with jurisdiction over the offense. The question raised is whether, under the *O'Callahan* concept of constitutional power, there is any constitutional basis for asserting that Congress can grant a broader jurisdiction to the military outside the territorial limits than it can within?

(8) The final plank of the “service-connected” bridge is conduct prejudicial to the good order and discipline of the Armed Forces. Unfortunately, the Court did not express whether it considered the concept in relation to service connection, or as a phrase of the maligned article 134, or both. Whether conduct is actually prejudicial to the maintenance of good order and discipline will be primarily determinative of whether a service connection is found, for it is in just such a challenge to the military establishment, whether direct or indirect, that military interest lies. Prejudicial conduct can really be said to be synonymous with “service-connected,” for the sum of the *O'Callahan* factors used to determine a service connection is also a summation of the total impact of the conduct on the military establishment, and will be determinative of where jurisdiction lies. This leads, however, to the question of whether military jurisdiction is determined by matching facts with *O'Callahan*, or by a more genuine test of requiring a legitimate military interest in prosecution of the offense. What “sufficiently prejudicial conduct” will come to mean will depend on when lip-service to the phrase is discontinued, both by the military and the courts, and when a meaningful analysis is made of the impact on the military of certain modes of conduct.

**Conclusion**

The full significance of *O'Callahan* in relation to the administration of military justice is yet to be realized. As indicated, counsel are presently arguing the decision before the Court of Military Appeals, and no doubt *O'Callahan* is being argued elsewhere. In reflection upon the setting aside by the Court of Military Appeals of the 1964 conviction of an Army captain
for rape and robbery, the Army Judge Advocate General “estimated that as many as 2,000 of the 4,000 military prisoners currently serving time in disciplinary barracks and federal prisons might be affected . . . ,” and “also estimated that possibly 450,000 court-martial convictions handed down since 1951 might be set aside if the persons involved or their families chose to seek a correction of the record.”

For the immediate future, the practice will most likely be much as outlined by the Secretary of the Navy in a statement sent out to all Navy and Marine activities on June 19, 1969:

In particular, military jurisdiction could be asserted if otherwise appropriate where offense was committed on any military installation, where offense was 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. The fact that an alleged offender was in uniform or otherwise identified with the military when offense was committed may well be a relevant factor in the circumstances to determine service connection or impact. Offenses such as unlawful use of marijuana or harmful drugs may have a clearly demonstrable impact on service effectiveness in the impairment of ability to perform military duties.

It is to be expected that these temporary guidelines will not remain in effect for very long, both because it is doubtful that O'Callahan can be limited to its facts, and because there is already such a flurry of litigation that some more definitive guidelines will almost surely be developed. Recently, in United States v. Beeker, the Court of Military Appeals held that “use of marijuana and narcotics by military persons on or off a military base has special military significance.” The use of these substances had “disastrous effects . . . on the health, morale, and fitness for duty of persons in the armed forces” and the court said “that under the circumstances, the conduct of the accused was, to the prejudice of good order and discipline in the armed forces.”

61. SECNAVNOTE 5820 of 19 June 1969.
In addition, more problems may be anticipated, for the Court has bridged the "status" gulf, and there is little left to prevent evaporation of the remainder of military jurisdiction, albeit "in the interests of justice." If the Court continues in the *O'Callahan* vein, perhaps a decision in the near future will provide, in so many words, what *O'Callahan* implies, that a civilian court has prima facie exclusive jurisdiction of all offenses not exclusively military in nature, and the burden will be on the military to formally establish a valid service connection, and thereby, court-martial jurisdiction. Soon after, the question may be asked: "why should the military have any judicial jurisdiction at all?" The question does not overreach the *O'Callahan* bridge by much. Only rivulets remain of what was once a vast gulf, separating military and civilian court jurisdiction, and a drought caused by *O'Callahan*-oriented decisions could dry up the distinction in a relatively short period of time. Gone would be military judicial jurisdiction and, more importantly, the constitutional grant of a general power to Congress would be seriously abridged, or even eliminated, without a de jure amendment of the Constitution, a journey on which *O'Callahan* has already embarked.

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63. It is not intended to include in this consideration article 15 Non-Judicial Punishment powers [codified at 10 U.S.C. § 815, as amended, (1967)], which can be expected to be around for some time to come. Nor is the question of jurisdiction when the offense was committed in a combat zone meant to be included.