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Court-Martial Jurisdiction over Servicemen for Civilian Offenses: An Analysis of O'Callahan v. Parker

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I. INTRODUCTION

The Uniform Code of Military Justice,[1] enacted by Congress in 1951, provided military courts-martial with broad jurisdiction over military personnel[2] and over civilians employed by or accompanying the armed forces outside the United States.[3] In the decade after enactment, several controversial and divided Supreme Court opinions, based on constitutional principles, sounded the death knell for peacetime military jurisdiction over civilians.[4] These decisions have generated a plethora of valuable commentary.[5] On the other hand, relatively few doubts have been raised either by courts or scholars concerning the

* Visiting Assistant Professor of Law, University of Michigan; Assistant Professor of Law, University of Missouri—Columbia.
** Associate Professor of Law, University of Missouri—Columbia.

1. 10 U.S.C. §§ 801-940 (1964). Congressional enactment was based on Article I, § 8, clause 14, which gives Congress the power to "make Rules for the Government and Regulation of the land and naval forces" and, to some extent, on the fifth amendment of the United States Constitution, which specifically exempts "cases arising in the land and naval forces or in the militia, when in actual service in time of war or public danger" from the requirement of prosecution by indictment. *See* text accompanying notes 24-28 *infra*.

2. Uniform Code of Military Justice, art. 2(1), 10 U.S.C. § 802 (1) (1964) [hereinafter cited as UCMJ]. *See* text accompanying notes 115-17 *infra*.

3. UCMJ art. 2(11), 10 U.S.C. § 802 (11) (1964).

4. *The Supreme Court, 1959 Term*, 74 HARV. L. REV. 81, 116 (1960). Specifically, the Court struck down peacetime court-martial jurisdiction in both capital and noncapital cases over overseas civilian dependents of military personnel and civilian employees of the military. *See* Reid v. Covert, 354 U.S. 1 (1957) (dependent charged with capital offense); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960) (dependent charged with noncapital felony); Grisham v. Hagan, 361 U.S. 278 (1960) (civilian government employee charged with capital offense); McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960) (civilian government employee charged with noncapital felony). See further discussion of these cases in text accompanying notes 126-38 *infra*.

5. *See, e.g.*, Ehrenhaft, *Policing Civilians Accompanying the United States Armed Forces Overseas; Can United States Commissioners Fill the Jurisdictional Gap?* 36 GEO. WASH. L. REV. 273 (1967); Everett, *Military Jurisdiction Over Civilians*, 1960 DUKE L.J. 366;

constitutionality of the broad court-martial jurisdiction conferred on the military by Congress over members of the armed forces or, in particular, the power of the military to try its own personnel for so-called "civilian" offenses.[6] One senses an implicit assumption on the part of most of the courts and legal scholars during this period that the military status of an accused automatically conferred court-martial jurisdiction.[7] This "hands off" attitude is best exemplified by the 1962 statement of Chief Justice Warren that:

> [T]he tradition of our country, from the time of the Revolution until now, has supported the military establishment's broad power to deal with its own personnel for the most obvious reason . . . that courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have.[8]

The judicial philosophy reflected in the above statement was, however, assaulted and seriously jeopardized this year by the Supreme Court in *O'Callahan v. Parker*,[9] and Chief Justice Warren was among those leading the assault. In that case the petitioner, an army sergeant stationed in Hawaii in July, 1956, while off duty and off post, and in civilian clothes, broke into the hotel room of a 14-year-old tourist and attempted to rape her. He was charged with attempted rape, housebreaking, and assault with attempt to rape,[10] and was tried and convicted by a general court martial on all counts.[11] The conviction was

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Everett, *Persons Who Can Be Tried By Court-Martial*, 5 J. PUB. L. 148 (1956); Girard, *The Constitution and Court-Martial of Civilians Accompanying the Armed Forces—A Preliminary Analysis*, 13 STAN. L. REV. 461 (1960).

6. The notable exception was Duke & Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 VAND. L. REV. 435 (1960). *See also* Bishop, *Court-Martial Jurisdiction Over Military-Civilian Hybrids: Retired Regulars, Reservists, and Discharged Prisoners*, 112 U. PA. L. REV. 317 (1964); *Hearings on S. Res. 260 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 2nd Sess., 563, 571 (1962) (testimony of A. Kenneth Pye); Elair, *Court-Martial Jurisdiction Over Retired Regulars: An Unwarranted Extension of Military Power*, 50 GEO. L.J. 79, 103 (1961).

7. *See, e.g.*, M. FORKOSCH, CONSTITUTIONAL LAW 355 (1969). J. MOORE, FEDERAL PRACTICE ¶ 0.5[3.-4] at 149 (1964); Everett, *Persons Who Can Be Tried By Court-Martial*, 5 J. PUB. L. 148 (1956); Girard, *supra* note 5; Orfield, *Indictment and Information in Federal Procedure*, 13 SYR. L. REV. 14, 33 (1961). *See* text accompanying notes 131-38 *infra*.

8. Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. REV. 181, 187 (1962).

9. 395 U.S. 258 (1969).

10. *See* UCMJ arts. 80, 130, 134, 10 U.S.C. §§ 880, 930, 934 (1964).

11. Petitioner was sentenced to 10 years imprisonment at hard

reviewed and affirmed by an Army Board of Review and the United States Court of Military Appeals.[12] While imprisoned in a federal facility, petitioner sought a writ of habeas corpus in the United States District Court for the Middle District of Pennsylvania, alleging that the court-martial lacked jurisdiction to try him for non-military offenses committed off-post while on leave. The District Court refused relief without discussion of the jurisdictional issue[13] and the Third Circuit Court of Appeals affirmed in an opinion by Chief Judge Hastie which only briefly touched upon the jurisdictional issue.[14] The United States Supreme Court, on certiorari, reversed the Court of Appeals five to three and ruled that the court-martial had no jurisdiction to try the petitioner under the facts of the case. Justice Douglas wrote for the majority and was joined by Justices Warren, Brennan, Marshall and Black.

Although the Douglas opinion is full of troublesome and often gratuitous comments on military justice, the superiority of civilian trials, legal history and recent Supreme Court opinions, these matters are better considered elsewhere in the article. Briefly, the majority rejected the argument of the government that military "status" was the sole prerequisite to court-martial jurisdiction over members of the armed forces and stated instead that "status" was "merely the beginning of the inquiry, not its end."[15] The majority buttressed this determination in part by its observations that both English and American history revealed a suspicion of military trials for soldiers committing "civilian offenses" and that the founding fathers

labor, forfeiture of all pay and allowances and dishonorable discharge. A maximum sentence of 25 years would have been permissible.

12. After serving approximately four years of the sentence, the petitioner was paroled by federal authorities. Two years later, in 1962, the petitioner was cited for a parole violation. While on parole he apparently was sentenced by a Massachusetts state court and confined in a Massachusetts penal facility. *See* O'Callahan v. Attorney General of the United States, 230 F. Supp. 766 (D. Mass. 1964). Ultimately, he was returned to federal custody. For a complete chronology of petitioner's litigative history during the past decade see O'Callahan v. United States, 293 F. Supp. 122 (D. Minn. 1968).

13. United States *ex rel.* O'Callahan v. Parker, 256 F. Supp. 679 (M.D. Pa. 1966). The District Judge relied on an opinion of Chief Judge Wyzanski on the jurisdictional issue in an earlier habeas corpus action by the petitioner. *See* O'Callahan v. Chief United States Marshal, 293 F. Supp. 441 (D. Mass. 1966).

14. United States *ex rel.* O'Callahan v. Parker, 390 F.2d 360 (3d Cir. 1968). Judge Hastie, in deciding the jurisdictional issue, referred to a short discussion in the Third Circuit case of Thompson v. Willingham, 318 F.2d 657 (3d Cir. 1963).

15. 395 U.S. at 267.

expected that non-military offenses would be tried in civil courts.[16] Thus, the majority held, not only must military status be present, but it must be shown that the offense is

> 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 of an indictment by a grand jury and a trial by a jury of his peers.[17]

The majority further maintained that there was not the remotest connection between petitioner's military duties and the crimes in question, emphasizing that the offenses were committed off post, in peacetime, against a person having no relationship to the military, in an area where civil courts were open, within American territorial limits and did not involve "the flouting of military authority, the security of a military post, or the integrity of military property."[18]

Justice Harlan, in a strongly worded dissenting opinion joined by Justices White and Stewart, accused the majority of throwing the law into a "demoralizing state of uncertainty"[19] and proceeded to excoriate the majority on several other grounds. First, according to Justice Harlan, the Court had in the past consistently asserted that military status was a necessary *and sufficient* condition for the exercise of court-martial jurisdiction.[20] Second, Justice Harlan argued that the historical data referred to by the majority opinion provided "scant" support for the majority's conclusion and, if anything, supported broad military jurisdiction over "civilian" crimes.[21] Moreover, Justice Harlan maintained that the majority failed, in any event, to consider "strong and legitimate governmental interests" which support the exercise of court-martial jurisdiction over even non-military crimes. Scoring the majority's "ad hoc" approach, he concluded by asserting that "[a]bsolutely nothing in the language, history, or logic of the Constitution justifies this uneasy state of affairs which the Court has today created."[22]

This article will evaluate the majority and dissenting opinions. The validity of each opinion's reliance on the text of the Constitution and on English and American constitutional history will be emphasized. The variety of the possible interpretations

16. *Id.* at 268-72.
17. *Id.* at 272-73.
18. *Id.* at 273-74.
19. *Id.* at 275.
20. *Id.*
21. *Id.* at 276.
22. *Id.* at 281-84.

of the Court's "service-connected" test for determining jurisdiction over servicemen will be discussed, as will the problems inherent in applying such a standard. A multi-factor approach to determine which offenses are "service-connected" will be proposed. Finally, a number of collateral problems raised by the decision, such as retroactivity, a "petty offense" exception and the exhaustion of remedies doctrine will be analyzed.

II. THE TEXT OF THE CONSTITUTION

A detailed examination of *O'Callahan* should begin with an examination of the text of the Constitution, for the Court has said many times that collateral aids to construction are unnecessary if the language of the Constitution is clear.[23] Four provisions of the Constitution are relevant: (1) Article I, section 8, clause 14 empowers Congress: "To make Rules for the Government and Regulation of the land and naval forces . . . ."; Section 8 concludes by authorizing Congress: "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, . . ."[24]

(2) Article III, section 2, declares:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

(3) The fifth amendment provides that:

> 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; . . .[25]

(4) The sixth amendment states that:

> In all criminal prosecutions, the accused shall enjoy the right

23. ten Broeck, *Admissibility and Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction*, 26 CALIF. L. REV. 287, 290 (1938). *See, e.g.*, United States v. Sprague, 282 U.S. 716, 730-32 (1931); McPherson v. Blocker, 146 U.S. 1, 11 (1892); Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 302 (1827).

24. In Reid v. Covert, 354 U.S. 1 (1957), Justice Black argued that "having run up against the steadfast bulwark of the Bill of Rights, the Necessary and Proper Clause cannot extend the scope of Clause 14." 354 U.S. at 21. This proposition was challenged by Justice Harlan in a concurring opinion. 354 U.S. at 67, 71.

25. It was decided at an early date that the phrase "when in actual service in time of war or public danger" modified only "Militia." Johnson v. Sayre, 158 U.S. 109, 114 (1895). Thus, indictment by grand jury is never necessary "in cases arising in the land or naval forces." *See* 395 U.S. at 272 n.18 (1969).

> to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . .

Clause 14 is the source of congressional power to establish a special system of military courts. Although the fifth amendment exception for cases arising in the land or naval forces is the only reference in the Bill of Rights to military justice, it is clear that the clause "when in actual service . . ." modifies only "Militia"[26] and that neither the requirement of grand jury indictment nor right to trial by jury is applicable in trials by courts-martial.[27]

Standing alone, article I, section 8, clause 14, can be construed as empowering Congress to subject all persons in the armed forces to court-martial at all times. In his dissenting opinion, Justice Harlan asserted that the clear meaning of this provision was that "given the requisite military status, it is for Congress and not the Judiciary to determine the appropriate subject-matter jurisdiction of courts-martial."[28] The majority believed, however, that clause 14 did not provide a clear answer when considered in connection with the requirements of indictment by grand jury and trial by jury found in article III, section 2 and the fifth and sixth amendments. Justice Douglas purported to harmonize the express grant of power to Congress with the express guarantees of the Bill of Rights. In doing so he placed heavy reliance upon English constitutional history prior to the American Revolution and upon our own national history.

III. HISTORICAL DEVELOPMENT OF COURT-MARTIAL JURISDICTION

A. English Constitutional History

Justice Douglas began his discussion of English and American history by asserting that:

> Both in England prior to the American Revolution and in our own national history military trial of soldiers committing civilian offenses has been viewed with suspicion. Abuses of the court-martial power were an important grievance of the parliamentary forces in the English constitutional crises of the 17th century.[29]

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26. 395 U.S. at 272 n.18; Johnson v. Sayre, 158 U.S. 109 (1895); *Ex parte* Mason, 105 U.S. 696 (1881).

27. Whelchel v. McDonald, 340 U.S. 122, 127 (1950). One commentator states that this is "generally put in terms of implied exception." Weiner, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 Harv. L. Rev. 266, 280 (1958).

28. 395 U.S. at 276.

29. *Id.* at 268.

In his brief discussion of English constitutional history, Justice Douglas argued that the 17th century conflict between the Crown and Parliament over the proper role of courts-martial in the enforcement of the domestic criminal law was not merely a dispute over what organ of government had jurisdiction. Instead, he suggested, it involved substantive disapproval of the use of military courts for the trial of ordinary crimes. He bolstered his conclusion by pointing to the reluctance of Parliament to expand the jurisdiction of courts-martial over soldiers committing common law crimes, and to the fact that it was the rule in Britain at the time of the American Revolution that a soldier could not be tried by court-martial for a civilian offense committed in Britain.[30]

The available evidence suggests that the common law practice was to try members of the armed forces in civilian courts for offenses committed in peacetime in the Kingdom.[31] It was Macaulay's view that:

> The common law of England knew nothing of courts-martial, and made no distinction, in time of peace, between a soldier and any other subject; nor could the government then venture to ask even the most loyal parliament for a mutiny bill. A soldier, therefore, by knocking down his colonel, incurred only the ordinary penalties of assault and battery, and, by refusing to obey orders, by sleeping on guard, or by deserting his colours, incurred no legal penalty at all.[32]

On the other hand, soldiers were tried in military courts for offenses committed in time of war, whether the war was being waged in the Kingdom or abroad. Long before the constitutional conflicts of the 17th century, it was accepted practice for the Crown, relying on the royal prerogative, to issue specific directions for the government of the army during time of war.[33] These ordinances were in force only during the specific expedition or war that prompted their issuance.[34] At times the Crown issued special commissions empowering commanding generals to

30. *Id.* at 269. The specific example of Parliamentary reluctance cited by Justice Douglas was the 1st Annual Mutiny Act, discussed in the text accompanying notes 40-41 *infra*. The general article in the British Articles of War in effect at the time of the American Revolution quoted in the text accompanying note 60 *infra*, could have been used to punish for non-military offenses. *See* text accompanying note 60 *infra*.

31. *See* F. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 325 (Fisher ed. 1908); Bishop, *supra* note 6, at 321-23.

32. 1 I. MACAULAY, HISTORY OF ENGLAND 231 (1874 ed.).

33. *See generally* W. WINTHROP, MILITARY LAW AND PRECEDENTS 18, 19 (1895, reprinted 1920); Duke & Vogel, *supra* note 6, at 441.

34. Ordinances issued by Richard I and Richard II are reproduced in the Appendix of W. WINTHROP, *supra* note 33, at 903-04.

make rules for the government of the armies.[35] Although soldiers were occasionally subjected to military jurisdiction in time of peace on the basis of commissions issued under the royal prerogative[36] or even in the absence of a commission,[37] such proceedings probably were illegal[38] and did not represent the customary practice.[39]

Control of the army was given to Parliament by the Bill of Rights in 1689. The original Mutiny Act, adopted in the same year, represented the first use of this control to provide for the punishment of military offenses.[40] It affords useful insights into Parliament's attitude toward the army and toward military justice.[41] The Act was prompted by a serious mutiny at home of a regiment which supported the Stuarts and refused to obey the order of William III to proceed to Holland, as well as by doubt as to the loyalty of other regiments. Since the offenses of the mutinous regiment were committed in the Kingdom in time of peace, it was necessary for Parliament to authorize punishment by courts-martial. In spite of the seriousness of the situation, the Act provided very limited jurisdiction, punishing only mutiny, sedition and desertion. The Act was limited in its operation to about seven months. It applied only to members of the regular forces, exempting members of the militia.

The foregoing raises two important questions: Why was Parliament reluctant to expand courts-martial jurisdiction, and

35. W. WINTHROP, *supra* note 33, at 19 n.11, collects the citations to several such special commissions. The ordinances and special commissions were the forerunners of what later came to be known as the Articles of War.

36. *Id.* at 19 n.18; F. MAITLAND, *supra* note 31, at 279.

37. 1 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 577 (5th ed. 1931); F. MAITLAND, *supra* note 31, at 327.

38. 1 W. HOLDSWORTH, *supra* note 37, at 574, 575; F. MAITLAND, *supra* note 31, at 267.

39. One of the grievances specified by Parliament in the Petition of Right (1627) was the issuance by Charles I of commissions for the enforcement of military law against soldiers and sailors in time of peace. The Petition of Right prayed that:

> [T]he foresaid commissions for proceeding by martial law may be revoked and annulled; and that hereafter no commissions of like nature may issue forth to any person or persons whatsoever, to be executed as aforesaid, lest by color of them any of your Majesty's subjects be destroyed or put to death, contrary to the laws and franchise of the land . . . .

3 Car. 1, c. 1 (1627).

40. Mutiny Act 1 W. & M., c. 5 (1689).

41. See the discussion of the circumstances surrounding the adoption of the Act and its contents in W. WINTHROP, *supra* note 33, at 19-20; Bishop, *supra* note 31, at 322-23.

what lessons could the framers of the United States Constitution have derived from the English experience of this period? With respect to the first question, the most important single factor in molding Parliament's attitude was the fact that disputes over the jurisdiction of courts-martial took place within the context of a struggle between Crown and Parliament, with the army playing a key role in the struggle.[42] The Crown and Parliament were constantly embroiled in controversy over military matters.[43] During the seventeenth and eighteenth centuries, Parliament frequently debated at great length the size of the standing army.[44] Its concern over the army was not unfounded. Charles I had tried to govern through the Army; his reign was followed by military rule under Oliver Cromwell; and James II relied on the army in his fight against Parliament.[45] It became ever clearer that the independence of Parliament and the liberties of the subjects were closely related to the size of the armed forces at the disposal of the Crown.[46] Moreover, under the leadership of men such as Sir Edward Coke, the struggle between Crown and Parliament became in many respects a struggle between the Crown and the common law. The assertion of common law rights was in substance a demand for modifications of Crown authority.[47] It was natural, therefore, that the champions of the common law would be hostile to a system of law under the control of the Crown and the army.

Another important grievance arose from the fact that the Tudor and Stuart monarchs sometimes subjected civilians to the jurisdiction of military tribunals.[48] The army and its system of law were useful as a means of putting down insurrections and

42. A concise summary of the role of the army in this period can be found in T. TASWELL-LANGMEAD, ENGLISH CONSTITUTIONAL HISTORY 747-55 (Plucknett 10th ed. 1946).

43. *See, e.g.*, F. MAITLAND, *supra* note 31, at 326-27.

44. T. TASWELL-LANGMEAD, *supra* note 42, at 747.

45. *See* Reid v. Covert, 354 U.S. 1, 25-26 (1956); F. MAITLAND, *supra* note 31, at 326.

46. T. TASWELL-LANGMEAD, *supra* note 42, at 747.

47. F. MAITLAND, *supra* note 31, at 271; Goebel, *Constitutional History and Constitutional Law*, 38 COLUM. L. REV. 555, 565 (1938).

48. Bishop, *supra* note 6, at 322 n.17. Actually, the precedents for this practice can be traced back earlier. F. MAITLAND, *supra* note 31, at 266, 267, states that:

> Towards the end of the Wars of the Roses we find very terrible powers of summary justice granted to the constable. In 1462 Edward IV empowers him to proceed in all cases of treason, summarily and plainly, without noise and show of judgment on simple inspection of fact. A similar patent was granted to Lord Rivers in 1467. They show something very like a contempt for law—the constable is to exercise powers

preserving public order.[49] Speaking of the court of the Constable and Marshal, which is believed by some to be the origin of the modern courts-martial,[50] Holdsworth observed that:

> [T]he jurisdiction of the court within the realm was limited; but it was within the realm that the Tudors required its assistance. At a time when there was no standing army a jurisdiction over soldiers was capable of being confused with a jurisdiction over all citizens liable to serve as soldiers. On the principle that prevention is better than cure it was plausible to say that the jurisdiction of the court was legal, not only when war was actually proceeding, but also at a time of merely apprehended disturbance.[51]

Although this practice was never legally sanctioned and was declared unlawful in the Petition of Right,[52] it was invoked often enough to make Parliament wary of military tribunals.[53] There were also disputes from time to time as to who was subject to service in the army,[54] and over the billeting of troops by innkeepers and the public.[55]

It must also be recognized that in spite of Parliament's suspicion, court-martial jurisdiction was gradually expanded. From the time of the adoption of the first Mutiny Act in 1689 until the American Revolution, both the annual Mutiny Acts and the Articles of War which Parliament authorized the Crown to promulgate increased greatly in scope.[56] The early Mutiny Acts provided for the infliction of penalties by courts-martial for any military offense committed at home; Articles of War issued by the Crown originally dealt with offenses committed abroad. In 1718, however, the Mutiny Act authorized the Crown to promul-

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of almost unlimited extent, all statutes, ordinances, acts and restrictions to the contrary notwithstanding.

49. *See* 1 W. HOLDSWORTH, *supra* note 37, at 575; F. MAITLAND, *supra* note 31, at 267; T. TASWELL-LANGMEAD, *supra* note 42, at 749.

50. W. WINTHROP, *supra* note 33, at 46. *See also* Duke & Vogel, *supra* note 6, at 442.

51. 1 W. HOLDSWORTH, *supra* note 37, at 575.

52. Bishop, *supra* note 6, at 322 n.17.

53. The question of court-martial jurisdiction over civilians differs from the question presented in *O'Callahan* as to jurisdiction over individual servicemen. *See* Reid v. Covert, 354 U.S. 1, 19-20 (1956), for a contemporary example of the importance of the distinction.

54. F. MAITLAND, *supra* note 31, at 279; T. TASWELL-LANGMEAD, *supra* note 42, at 748-49.

55. F. MAITLAND, *supra* note 31, at 325; T. TASWELL-LANGMEAD, *supra* note 42, at 751.

56. W. WINTHROP, *supra* note 33, at 20. F. MAITLAND, *supra* note 31, at 449-50, contains a discussion of the process by which the annual Mutiny Acts gradually absorbed more and more of the content of the Articles of War. The 1881 Army Act for all practical purposes merged the Articles of War and the Mutiny Act into a single document. *See* W. WINTHROP, *supra* note 33, at 20-21.

gate Articles of War that would operate both within and without the Kingdom.[57] At the time of the American Revolution, the British Articles of War of 1765 were in force.[58] In addition to covering the usual military offenses, these articles covered some offenses that were contrary to both military and civil law. For example, Section XIV, Article XVI, provided that all officers and soldiers who

> shall maliciously destroy any Property whatsoever belonging to any of our subjects, unless by Order of the then Commander in Chief of Our Forces to annoy Rebels, or other Enemies in Arms against Us, he or they that shall be found guilty of offending herein, shall (besides such Penalties as they are liable to by Law) be punished according to the Nature and Degree of the Offence, by the Judgment of a Regimental or General Court-martial.[59]

Section XX, Article III, usually referred to as the "general article," provided that:

> All Crimes not Capital, and all Disorders or Neglects, which Officers and Soldiers may be guilty of, to the Prejudice of good Order and Military Discipline, though not mentioned in the above Articles of War, are to be taken Cognizance of by a Court-martial, and be punished at their Discretion.[60]

The second of the two questions posed earlier asked what lessons the framers of the United States Constitution could have derived from the English experience of this period. As suggested by Justice Harlan, the development of court-martial jurisdiction was only one aspect of a multi-faceted struggle between the Crown and the military on one hand, and Parliament on the other. Justice Harlan also pointed out that the martial law[61] of the time was arbitrary and alien to the established legal principles[62] and it was thus not surprising that when Parliament gained the authority to create peacetime court-martial jurisdiction, it exercised the authority sparingly.[63]

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57. W. WINTHROP, *supra* note 33, at 20.

58. These Articles of War are reproduced in W. WINTHROP, *supra* note 33, at 931-46.

59. *Id.* at 940.

60. *Id.* at 946.

61. The term "martial law" was used in 17th century England to refer to what is now called "military law." Duke & Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 VAND. L. REV. 435, 443 n.35 (1960).

62. Blackstone asserted that military justice "is built upon no settled principles, but is entirely arbitrary in its decisions, [and] is, as Sir Matthew Hale observes, in truth and reality no law, but something indulged rather than allowed as law." 1 BLACKSTONE, COMMENTARIES * 413 (1769).

63. In weighing the significance of English history in the con-

It does not seem likely, however, that the framers could have gone further and concluded, on the basis of this long and complex struggle between the Crown and Parliament, that constitutional limits should be placed on the congressional power to prescribe the jurisdiction of courts-martial over members of the armed forces. It seems clear only that the framers were influenced by the English experience in deciding that military authority should be regulated by the people acting through Congress. This was accomplished in Article I, section 8, clause 14.

B. AMERICAN CONSTITUTIONAL HISTORY

Because the drafters of the Constitution drew heavily on English law and tradition in fashioning American institutions,[64] the seventeenth century English experience is relevant in the construction of the Constitution. A more likely source of discovery of the framers' intention in drafting clause 14,[65] however, is the American history of the constitutional period. Clause 14 was taken from Article IX of the Articles of Confederation.[66] The scope of Congress' power under clause 14 apparently was not discussed in either the Constitutional Convention or the state ratifying conventions.[67] The delegates at the Constitutional

struction of the United States Constitution, the crucial question is how the framers viewed the English experience. The reconstruction of history is fraught with difficulty, and the task both of reconstructing history and determining how the framers viewed this history is doubly difficult. One commentator, in discussing the use of extrinsic aids in the construction of the Constitution, said:

> The conclusions of historians about what then prevailed are largely inductions from a great mass of specific facts, and the framers, if aware of these facts at all, may not have arrived at the same generalizations as the historians. The judgments of today concerning past periods are based on partial pictures and incomplete data. Certainly it cannot be assumed that facts now apparent presented themselves in the same light and with the same degree of force to the minds of the Convention and to the backward looking student of another age. Things plain to the hindsight view of retrospection may well have been obscured to contemporary vision.

ten Broeck, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction*, 26 CALIF. L. REV. 664, 678 (1938).

64. *See* Goebel, *supra* note 47, at 555-59.

65. *See* note 63 *supra*.

66. Article IX gave Congress the "exclusive right and power of . . . making rules for the government and regulation of [the] land and naval forces, and directing their operations." Clause 14 is set forth at text accompanying note 24 *supra*.

67. 5 ELLIOTT'S DEBATES 442-45, 544-45 (2d ed. 1901); Girard, *The Constitution and Court-Martial of Civilians Accompanying the Armed Forces—A Preliminary Analysis*, 13 STAN. L. REV. 461, 484 (1961); M.

and state conventions were concerned with a more pressing problem—the threat to civilian government and to political and civil rights which some thought was implicit in the presence of a standing army.[68] While Justice Douglas did not advert to the Constitutional Convention, the absence of debate on the meaning of clause 14 was an unspoken premise in Justice Harlan's assertion that nothing in the debates over the Constitution indicated that Congress was forever to be limited to the scope of court-martial jurisdiction existing in 17th century England. Justice Harlan was able to find more tangible support for his position in a statement by Alexander Hamilton in *The Federalist* that Congress' power over the armed forces

> ought to exist without limitation: Because it is impossible to foresee or define the extent & variety of national exigencies, or the corresponding extent & variety of the means which may be necessary to satisfy them.[69]

The sharpest disagreement between the majority and the minority in discussing the American history of that period was over the extent of jurisdiction exercised by American courts-martial before, during and after the Constitutional Convention. By examining the ideas and practices of the times it is possible to ascertain the tacit assumptions and circumstances that conditioned the words used in the Constitution.[70] Thus the court-martial practice of the period can afford insights into the meaning of clause 14, especially in light of the fact that many of the framers served in the Continental Army during the Revolutionary War and that some of these men helped to draft the early Articles of War.

Articles of War to govern the army were adopted by the Continental Congress in 1775 and 1776.[71] These articles were based on the British Articles of War with certain modifications

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FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 329-30 (1911).

68. Girard, *supra* note 67, at 484. Professor Girard discusses the provisions of the Constitution that were designed to obviate these dangers, and points out that in spite of these provisions, delegates to the state ratifying conventions continued to express fear of a standing army. *Id.* at 484 n.108.

69. THE FEDERALIST No. 23, (A. Hamilton) quoted in 395 U.S. at 277.

70. *See* ten Broeck, *supra* note 63.

71. The first Articles were drafted by a committee composed of George Washington, Philip Schuyler, Silas Deane, Thomas Cushing and Joseph Hewes. W. WINTHROP, *supra* note 33, at 21. The 1776 Articles were reported to the Congress by John Adams and Thomas Jefferson. 3 J. ADAMS, WORKS 68-69, 83-84 (C. Adams ed. 1865).

copied directly from the Massachusetts Articles of War.[72] Reliance on the British articles was probably due to the need to act quickly and the Continental Congress' lack of experience in such matters.[73]

For present purposes the most important provisions of the 1776 Articles of War were Sections IX and X of Article I, and the general article. Section IX instructed commanding officers to "see justice done on" any officer or soldier guilty of "beating, or otherwise ill-treating any person; of disturbing fairs or markets; or of committing any kind of riots to the disquieting of the good people of the United States . . . ."[74] Officers who failed to heed this injunction were themselves subject to the prescribed punishment. Section X required the commanding officer to deliver over to civil magistrates any officer or soldier accused of "a capital crime, or of having used violence, or . . . any offense against the persons or property of the good people of the United States, such as is punishable by the known laws of the land" upon application made by or in behalf of the injured party.[75] This provision was the basis of Justice Douglas' assertion that the context of the 1776 articles indicated that soldiers who committed crimes would be tried in civil courts. The Government argued in its brief, however, that the juxtaposition of Sections IX and X strongly suggested that court-martial jurisdiction was to be exercised when the citizens of the various states were subjected to abuses and disorders by officers or soldiers and *no* application was made by or on behalf of the injured party.[76] General Washington seems to have been of this view. When informed of the decision of a military Court of Inquiry that a complaint by a civilian against an officer should lie only in civil law, he stated in his General Order for February 24, 1779, that:

> All improper treatment of an inhabitant by an officer or soldier being destructive of good order and discipline as well as subversive of the rights of society is as much a breach of military, as civil law and as punishable by the one as the other.[77]

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72. W. WINTHROP, *supra* note 33, at 22. The Massachusetts Articles of War are reprinted in *id.* at 947.

73. Girard, *supra* note 67, at 482.

74. Articles of War 1776, Section IX, Article I, quoted in Brief for Respondent at 14-15, O'Callahan v. Parker, 395 U.S. 258 (1969).

75. Articles of War 1776, Section X, Article I, quoted in Brief for Respondent at 15, O'Callahan v. Parker, 395 U.S. 258 (1969).

76. Brief for Respondent at 15, O'Callahan v. Parker, 395 U.S. 258 (1969).

77. 14 WRITINGS OF WASHINGTON 140-41 (1779); Brief for Respondent at 14, O'Callahan v. Parker, 395 U.S. 258 (1969).

The crux of the argument between majority and minority, however, was over the role played by the general article, which punished crimes "to the prejudice of good order and military discipline."[78] While Justice Douglas maintained that the general article was interpreted to embrace only offenses which had some direct impact on military discipline, Justice Harlan argued that it was the vehicle for frequent courts-martial for offenses against civilians and civil laws between the end of the War of Independence and the beginning of the War of 1812. The Government noted more than one hundred instances of what it asserted were courts-martial of servicemen for non-military offenses under the general article.[79] Unpersuaded, Justice Douglas attempted to discredit the historical evidence presented by the Government in a footnote of his opinion.[80] He distinguished all prosecutions which occurred between 1773 and 1783 because they were for acts committed in wartime.[81] Justice Douglas also distinguished all offenses involving officers since, at least in the 18th century, the honor of an officer was thought to give military significance to an otherwise non-military crime. The remaining courts-martial were dismissed as involving situations in which some special military interest existed.

Even excluding the offenses prosecuted in wartime and those involving officers, however, Justice Douglas failed to distinguish adequately many of the court-martial prosecutions noted by the Government. For example, the Government listed peacetime prosecutions of non-officer servicemen for "riotously beating a woman kept by him as a mistress,"[82] "beating a Mr. Williams an inhabitant living near this garrison,"[83] "abusing and using violence on Mrs. Cronkhyte, a citizen of the United States,"[84] and "going to a civilian's house and raising a riot with the family, abusing wife and daughter."[85] Keeping in mind that the purpose of examining these early courts-martial is to determine the intent of the founding fathers in approving clause

78. *See* text accompanying note 60 *supra.*

79. Brief for Respondent at 35-52, O'Callahan v. Parker, 395 U.S. 258 (1969).

80. 395 U.S. at 270 n.14.

81. *Id.* This distinction must have been persuasive to Justice Harlan as well, for in discussing the prosecutions listed by the Government he referred only to those which took place between 1783 and 1812.

82. Brief for Respondent at 43, O'Callahan v. Parker, 395 U.S. 258 (1969).

83. *Id.* at 49.

84. *Id.*

85. *Id.* at 50.

14 of the Constitution, it is difficult to believe that they knew of and approved courts-martial under these circumstances but believed that any extension of court-martial jurisdiction would be unconstitutional. Moreover, if the "service-connected" test consistently were construed in light of the many distinctions Justice Douglas made in refuting the government's evidence, the test probably would be considerably narrower than Justice Douglas would like.

In maintaining that the general article was interpreted to apply only to crimes with some direct impact on military discipline, Justice Douglas relied on *Winthrop's Military Law and Precedents*,[86] one of the outstanding treatises on military law. After referring to crimes such as robbery, manslaughter and assault, Colonel Winthrop stated:

> [W]here such crimes are committed upon or against civilians, and not at or near a military camp or post, or in breach or violation of a military duty or order, they are not in general to be regarded as within the description of the Articles, but are to be treated as civil rather than military offenses.[87]

Winthrop's treatise was first published in 1886, nearly a century after the Constitutional Convention. Most of the courts-martial he referred to in support of his conclusions took place during and after the Civil War.[88] Consequently, it is not clear whether Colonel Winthrop had access to the material cited by the Government. Moreover, Winthrop was not attempting to reconstruct the practice at the time of the Constitutional Convention in order to ascertain the intent of the framers. His purpose was simply to provide a workable legal rule for construction of the general article during the latter part of the nineteenth century. It is also significant that he recognized that:

> [A] strict rule on this subject, however, has not been observed in practice; and, especially as the civil courts do not readily take cognizance of crimes when committed by soldiers, military commanders generally lean to the sustaining of the jurisdiction

86. W. WINTHROP, MILITARY LAW AND PRECEDENTS (2d ed. 1896, 1920 reprint). Winthrop is also relied on by Duke & Vogel, *supra* note 61, at 446, to bolster the conclusion that the general article was not used extensively in our early history to punish civilian crimes which did not have a reasonably direct impact on good order and military discipline. This was an important premise in the argument advanced by Duke and Vogel that the Constitutional Convention probably never believed that Congress would grant the military the power to punish civil crimes committed in time of peace.

87. W. WINTHROP, *supra* note 86, at 724.

88. *See* W. WINTHROP, *supra* note 86, at 723-26.

> of courts-martial in cases of crimes so committed against civilians.[89]

Colonel Winthrop believed that the question of which crimes were covered by the general article should "in general . . . properly be left to be decided by the Department, &c, commander, in each instance."[90] In light of the foregoing, Justice Douglas' reliance on Winthrop's treatise hardly seems warranted.

Justice Douglas did not discuss the jurisdiction of naval courts-martial during the period following the adoption of the Constitution, although the government presented arguments based thereon.[91] Congress enacted Articles for the Better Government of the Navy in 1800.[92] These articles provided that "All offences committed by persons belonging to the navy while on shore, shall be punished in the same manner as if they had been committed at sea."[93] Among the offenses punished if committed at sea were murder, embezzlement and theft.[94] The Government argued that the extension of Navy court-martial jurisdiction to some common law crimes committed on shore indicated that if, as argued by the petitioner, there were statutory limits on army courts-martial jurisdiction, they were the result of legislative choice rather than of any belief that Congress lacked constitutional power to extend court-martial jurisdiction to common law crimes.[95]

The question then arises as to what conclusions can be drawn from the available historical evidence relating to the framers' attitudes towards court-martial jurisdiction. Justice Douglas concluded that they were suspicious of the military trial of soldiers committing civilian offenses. Justice Harlan asserted that the pertinent American history proved "if anything, quite

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89. *Id.* at 725.

90. *Id.*

91. Brief for Respondent at 15-16, O'Callahan v. Parker, 395 U.S. 258 (1969).

92. Act of April 23, 1800, ch. 33, 2 Stat. 45. *See* the discussion of the Navy Articles in Weiner, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1, 13-15 (1958).

93. Art. XVII, 2 Stat. 47.

94. Art. XXI (murder), art. XXIV (embezzlement), art. XXVI (theft), 2 Stat. 48.

95. Brief for Respondent at 16, O'Callahan v. Parker, 395 U.S. 258 (1969). The petitioner's reply brief responded to this argument by asserting that (1) "This Court has noted, however, the unique exigencies of naval life which make precedents of naval court-martial jurisdiction 'entirely inapposite' to cases such as the present. *See* McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281, 284-85."; (2) that art. XVII was ambiguous; and (3) that the "on shore" reference did not indicate whether it meant foreign or United States territory. Reply Brief for Petitioner at 5-6, O'Callahan v. Parker, 395 U.S. 258 (1969).

the contrary."[96] It does seem clear that many of the drafters of the Constitution were acutely conscious of the dilemma posed by the need for an effective army, and, on the other hand, the dangers such an army would present to republican institutions and civil freedom. They attempted to reconcile this dilemma in part by vesting in Congress the power to make rules for the government of the land and naval forces. They thus insured that the people acting through Congress, rather than the President, would have the final word on such matters.[97] It is also true that they were sensitive to limitations on a civilian's right to a jury trial because Parliament had authorized courts of admiralty to try violations of the unpopular Molasses and Navigation Acts.[98] In order to find support for the majority's position, however, one must find in this history both a suspicion of military trial of soldiers committing civilian offenses and some basis for concluding that the framers assumed that such soldiers should have constitutional protection against such a trial. At best, the relevant historical evidence does not provide clear guidance. To be sure, it is doubtful that the drafters ever contemplated the broad jurisdiction over civilian crimes now provided by the statute. On the other hand, Justice Douglas notwithstanding, the historical data presented by the Government raises a strong presumption that the framers were familiar with some court-martial jurisdiction over civilian crimes.

Moreover, there is considerable logic in Justice Harlan's assertion that even if the practice of early American courts-martial differed from the interpretation urged by the Government, it does not follow that the limits of Congress' power are coterminous with its exercise in the late 18th and early 19th centuries.[99] If the framers had believed that Congressional power should be so limited, it seems likely that they would have expressed this belief in the Constitution. Instead, an examination of the text reveals a simple grant of power with no express limitations. The only reference in the fifth and sixth amendments to members of the armed forces is the express exception in the fifth amendment, and such an exception has been construed to apply to the sixth amendment by implication.[100] Ac-

96. 395 U.S. at 276.

97. See 1 W. CROSSKEY, POLITICS AND THE CONSTITUTION 413-14, 424-25 (1953); Duke & Vogel, *supra* note 61, at 448.

98. Reid v. Covert, 354 U.S. 1, 28-29 (1957).

99. 395 U.S. at 279-80.

100. Whelchel v. McDonald, 340 U.S. 122, 127 (1950); *Ex parte* Quirin, 317 U.S. 1, 40 (1942); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 123, 138-39 (1866).

cordingly, one must conclude that history does not provide an adequate basis for the decision in *O'Callahan.*

C. EXPANSION OF THE COVERAGE OF THE ARTICLES OF WAR

In 1863, Congress expressly authorized courts-martial to try civil crimes "in time of war, insurrection, or rebellion" without regard to whether the commission of the crime prejudiced good order and military discipline.[101] The authority extended to larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault and battery with intent to kill, wounding by shooting or stabbing with an intent to commit murder, and rape or assault with an intent to commit rape.[102] Congress further provided that the punishment in such cases "shall never be less than those inflicted by the laws of the state, territory, or district" in which the offense was committed.[103] With minor changes, this provision was incorporated in the Articles of War adopted by Congress in 1874.[104]

Peacetime court-martial jurisdiction for ordinary crimes committed by members of the armed forces was first explicitly authorized by the 1916 Articles of War.[105] These articles, largely the work of Judge Advocate General Enoch H. Crowder,[106] were the result of a substantial effort to update the Articles of War.[107] Several important changes were made with respect to military jurisdiction over civil crimes. Peacetime court-martial jurisdiction was extended to specific civil offenses such as robbery and assault.[108] In testimony before a Senate committee, General Crowder stated that the change would eliminate the confusion in pleading caused by the necessity of charging civil crimes under the general article in peacetime but under the specific article in time of war.[109] The extension of

101. Act of March 3, 1863, ch. 75, § 30, 12 Stat. 736.
102. *Id.*
103. *Id.*
104. Act of June 22, 1874, tit. XIV, ch. 5, art. 58, Rev. Stat. § 1342 (1878).
105. Act of August 29, 1916, ch. 418, § 1342, 39 Stat. 650-70. *See* 395 U.S. at 279 n.5.
106. Judge Advocate General of the Army from February 15, 1911, to February 23, 1923. Fratcher, *History of the Judge Advocate General's Corps, United States Army*, MIL. L. REV., Vols. 1-10, Selected Reprint 191, at 202-07 (1965), summarizes some of the important aspects of General Crowder's career as Judge Advocate General.
107. Duke & Vogel, *supra* note 61, at 451.
108. Act of August 29, 1916, ch. 418, § 1342, art. 93, 39 Stat. 664.
109. S. REP. No. 130, 64th Cong., 1st Sess. 89 (1916); Duke & Vogel, *supra* note 61, at 451.

court-martial jurisdiction to the offenses of murder and rape committed outside the United States[110] was the first authorization of peacetime court-martial jurisdiction over civil capital offenses.[111] The 1916 Articles were also extended to encompass all non-capital civil crimes not otherwise expressly covered, without regard to whether they were "to the prejudice of good order and military discipline."[112] Speaking of the previous language in the general article, Colonel Winthrop had stated that the words "[a]ll crimes not capital" were qualified by the words "to the prejudice of good order and military discipline."[113] Thus in order to show a violation of the previous general article, the prosecution had to prove both that a non-capital crime had been committed and that its commission was to the prejudice of good order and military discipline. The 1916 Articles also made it a violation of the general article to engage in "conduct of a nature to bring discredit upon the military service."[114] The present general article, Article 134, is substantially the same as that found in the 1916 promulgation.

The Articles of War were replaced by the Uniform Code of Military Justice (UCMJ) in 1950.[115] In addition to instituting a number of very significant advances in the military justice system, the UCMJ gave courts-martial power to try murder and rape committed in the United States in peacetime and to impose

110. Act of August 29, 1916, ch. 418, § 1342, art. 96, 39 Stat. 666.

111. The Army General Staff recommended that military jurisdiction also extend to cases of murder and rape committed within the United States. General Crowder and Findley M. Garrison, Secretary of War, publicly disagreed, however. S. REP. No. 130, 64th Cong., 1st Sess. 22, 87-89 (1916). Thus it was not surprising that Congress rejected the recommendation of the General Staff.

112. Act of August 29, 1916, ch. 418, § 1342, art. 96, 39 Stat. 666. General Crowder's views on this topic can be found in S. REP. No. 130, 64th Cong., 1st Sess. 91 (1916).

113. W. WINTHROP, *supra* note 86, at 723-24.

114. Act of August 29, 1916, ch. 418, § 1342, art. 96, 39 Stat. 666. For a discussion of this provision, see Hagan, *The General Article—Elemental Confusion*, 10 MIL. L. REV. 63, 75-76 (1960).

Another important change made by the 1916 Articles was the elimination of the requirement for delivery of military offenders to civil authorities in situations where the army was holding the soldier to answer for a crime punishable by the Articles of War. Act of August 29, 1916, ch. 418, § 1342, art. 74, 39 Stat. 662. Although this change gave the military priority of prosecution in certain cases, it did not give it exclusive jurisdiction.

115. 10 U.S.C. §§ 801-940 (1964). Of course, Congress adopted other Articles of War between the 1916 Articles and the UCMJ. *See, e.g.*, the 1920 Articles of War, Act of June 4, 1920, ch. 227, 41 Stat. 787. However, these articles did not make substantial changes in the jurisdiction of courts-martial over civil crimes.

the death penalty upon conviction.[116] The jurisdiction of courts-martial over members of the armed services was now complete.[117]

D. THE CASE LAW ON JURISDICTION OF MILITARY TRIBUNALS

Several distinctions must be made if the cases dealing with the jurisdiction of military tribunals are to be discussed with clarity. It is first necessary to distinguish between martial law, the law of war and military law.[118] "Martial law" is invoked when the civil courts cannot function by reason of invasion, insurrection or other disorder.[119] Under appropriate circumstances a civilian may be tried by a court-martial or military commission when martial law has been invoked. The Supreme Court has held, however, that civilians could not be tried by a military tribunal if the civil courts were "open, and in the proper and unobstructed exercise of their jurisdiction."[120]

The "law of war," a branch of international law, governs the rights and duties of nations and individual combatants during hostilities.[121] The Supreme Court held in *Ex parte Quirin*[122] that eight spies who came into the United States from a German submarine during World War II could be tried by a military commission. Although American civil courts were open and one of the spies may have been an American citizen, the Court applied the law of war and stated that there was no

116. UCMJ arts. 118, 120, 10 U.S.C. §§ 918, 920 (1964). For a discussion of improvements in military justice under the UCMJ, see Quinn, *Some Comparisons Between Courts-Martial and Civilian Practice,* 15 U.C.L.A.L. REV. 1240 (1968).

117. The only opposition to this extension of jurisdiction during the congressional hearings on the UCMJ was voiced by the Special Committee on Military Justice of the New York County Lawyers' Association. *Hearings on the Uniform Code of Military Justice Before the House Subcomm. of the Comm. on Armed Services,* 81st Cong., 1st Sess., at 644 (1949).

118. For discussion of the distinctions among these three categories, see Everett, *Military Jurisdiction Over Civilians,* 1960 DUKE L.J. 366, 366-70; Girard, *The Constitution and Court-Martial of Civilians Accompanying the Armed Forces—A Preliminary Analysis,* 13 STAN. L. REV. 461, 463-64 (1961).

119. Girard, *supra* note 118, at 463.

120. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 127 (1866). The case dealt with the trial of civilians by military commission during the Civil War. The holding was reaffirmed in Duncan v. Kahanamoku, 327 U.S. 304 (1946), which involved military jurisdiction over civilians in Hawaii after the Pearl Harbor attack.

121. Everett, *supra* note 118, at 367-68.

122. 317 U.S. 1 (1942).

right to a jury trial.[123] In the case of *Madsen v. Kinsella*,[124] the Supreme Court held that a military court in occupied Germany could try an American wife for killing her Air Force husband.

"Military law" provides rules for the government of the armed forces and is applicable in time of peace as well as war.[125] The Uniform Code of Military Justice provides the basic legal code for military law in the Armed Forces, and the judicial tribunal established for the enforcement of this body of law is the court-martial. It is military law and the court-martial with which *O'Callahan* is concerned.

One further distinction which must be noted is the distinction between civilians—whether military dependents, discharged soldiers, or civilian employees of the armed forces—and persons who admittedly are members of the armed forces. Beginning in 1955, the Supreme Court decided a series of cases which, taken together, established the proposition that civilians are not subject to court-martial jurisdiction in peacetime.[126] In that year, courts-martial were held not to have jurisdiction over a former serviceman who had terminated all connection with the armed forces.[127] In 1957, *Reid v. Covert*[128] held that courts-martial had no power to try civilian dependents for capital offenses committed overseas in peacetime. *Kinsella v. Singleton*[129] extended this ban to non-capital offenses committed by civilian dependents, and in 1960 the Court held that courts-martial have no jurisdiction over civilian employees of the military, whether for capital or non-capital offenses.[130]

123. *Id.* at 39.
124. 343 U.S. 341 (1952).
125. Girard, *supra* note 118, at 463-64.
126. For a thorough discussion of the subject of military jurisdiction over civilians, see the excellent articles by Everett and Girard, *supra* note 118. For a comprehensive treatment of the subject of military jurisdiction over quasi-military persons, see Bishop, *Court-Martial Jurisdiction Over Military-Civilian Hybrids: Retired Regulars, Reservaists, and Discharged Prisoners*, 112 U. PA. L. REV. 317 (1964).
127. Toth v. Quarles, 350 U.S. 11 (1955). After the defendant's discharge from the Air Force, evidence was discovered which indicated that, while serving in Korea, he had collaborated with two others in murdering a Korean.
128. 354 U.S. 1 (1957) (prosecution of a woman who had slain her serviceman husband while in Great Britain). In an earlier decision on the same case, the Court upheld the court martial jurisdiction. Reid v. Covert, 351 U.S. 487 (1956).
129. 361 U.S. 234 (1960) (prosecution in Germany of a civilian dependent for involuntary manslaughter of her young child).
130. Grisham v. Hagan, 361 U.S. 278 (1960) (civilian employee of the Army attached to an installation in France tried for murder); Mc-

The issue in *O'Callahan*, however, was whether a court-martial could constitutionally exercise jurisdiction over members of the armed forces alleged to have committed civil crimes. Although the Court had never directly passed on this issue, an examination of the cases dealing with other jurisdictional facets reveals a wealth of dicta stating rather clearly that jurisdiction over members of the armed forces depends solely on status, and that persons serving in the armed forces are subject to court-martial jurisdiction for any offense as long as Congress has so provided.

In 1885, the Court stated that:

> Under every system of military law for the government of either land or naval forces, the jurisdiction of courts martial extends to the trial and punishment of acts of military or naval officers which tend to bring disgrace and reproach upon the service of which they are members, whether those acts are done in the performance of military duties, or in a civil position, or in a social relation, or in private business.[131]

Writing for the majority in *Ex parte Quirin*[132] in 1942, Chief Justice Stone discussed the fifth amendment exception for cases arising in the land and naval forces:

> 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.[133]

More recently in the 1960 case of *Kinsella v. Singleton*,[134] the Court asserted that:

> The test for jurisdiction, it follows, is one of *status*, namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term "land and naval Forces."[135]

Elroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960). *Guagliardo* was a consolidation of two cases. In one, a civilian employee performing the duties of an electrical lineman at an air depot near Casablanca, Morocco, was tried for larceny and conspiracy to commit larceny. In the other, a civilian auditor employed by the Army in Berlin was tried for sodomy.

131. Smith v. Whitney, 116 U.S. 167 (1885). The defendant, who held the position of paymaster general, was alleged to have promoted the interests of certain contractors at the expense of the Government. He sought a writ of prohibition to prevent his trial by court martial, arguing, *inter alia*, that his office was purely civil.

132. 317 U.S. 1 (1942). *See also* text accompanying notes 122-23 *supra*.

133. *Id.* at 43.

134. 361 U.S. 234 (1960). *See also* text accompanying note 129 *supra*.

135. *Id.* at 240-41.

Kinsella involved the power of a court-martial to try a civilian dependent of a serviceman for a non-capital offense. In rejecting the Government's contention that *Reid v. Covert*,[136] which also involved a civilian dependent, was distinguishable because it involved a capital offense, the Court stated:

> The Government makes no claim that historically there was ever any distinction made as to the jurisdiction of courts-martial to try civilian dependents on the basis of capital as against noncapital offenses. 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. To say that military jurisdiction "defies definition in terms of military 'status'" is to defy unambiguous language of Art. I, § 8, cl. 14, as well as the historical background thereof and the precedents with reference thereto.[137]

Following the lead of the Supreme Court, the lower federal courts have consistently held that jurisdiction over members of the armed forces is solely a question of status.[138] Thus, although the *O'Callahan* decision did not specifically overrule any prior decisions of the Supreme Court, it clearly represents a sharp departure from what had long been considered to be an established principle of law.

IV. THE "SERVICE-CONNECTED" TEST FOR COURT-MARTIAL JURISDICTION

A. Some General Observations

Except in such fringe categories as reservists, retired military personnel and discharged prisoners,[139] the "status" test of

136. 354 U.S. 1 (1957). *See* text accompanying note 128 *supra*.

137. 361 U.S. 234, 243 (1960). Interestingly enough, Justice Harlan dissented in *Kinsella v. Singleton*, objecting to the reliance of the majority on status as the test of jurisdiction. *Id.* at 257. For other Supreme Court cases containing similar language, *see, e.g.*, Duncan v. Kahanamoku, 327 U.S. 304, 313 (1946); Johnson v. Sayre, 158 U.S. 109, 114 (1895); Coleman v. Tennessee, 97 U.S. 509, 514 (1878); *Ex parte* Milligan, 71 U.S. (4 Wall.) 123 (1866).

138. *E.g.*, Owens v. Markley, 289 F.2d 751 (7th Cir. 1961); Burns v. Taylor, 274 F.2d 141 (10th Cir. 1959); O'Callahan v. Chief United States Marshal, 293 F. Supp. 441 (D. Mass. 1966); Jennings v. Markley, 186 F. Supp. 611 (S.D. Ind. 1960).

The defendant's usual jurisdictional argument in the lower federal courts has been that the fifth amendment exception applies only in time of war or public danger. *See, e.g.*, Wright v. Markley, 351 F.2d 592 (7th Cir. 1965); Thompson v. Willingham, 318 F.2d 647 (3rd Cir. 1963). As pointed out in note 25 *supra*, however, the phrase "when in actual service in time of war or public danger" has long been construed to modify only "militia." *See* the discussion of the lower court treatment of this issue in Bishop, *supra* note 126, at 327-28.

139. For discussions of these problems see Blair, *Court-Martial*

military jurisdiction, which was the law prior to *O'Callahan*, was a relatively simple and workable tool to determine who was subject to court-martial. Whatever its shortcomings, its application required relatively little sophistication. And, at least on the surface, the *O'Callahan* standard also sounds relatively uncomplicated. The words "service-connected" do not automatically suggest the subtleties and complications lurking beneath the surface. Nevertheless, there is more than a little substance to Justice Harlan's assertion that the standard laid down by the majority "has thrown the law in this realm into a demoralizing state of uncertainty."[140]

Before considering some of the more difficult questions which may arise in the application of the "service-connected" test, it should be emphasized that some offenses under the UCMJ clearly are unaffected by *O'Callahan*. Implicit in the majority opinion is the assumption that offenses can be categorized either as "military" or as "ordinary civil crimes." Numerous offenses under the UCMJ are, indeed, by their terms and on their face, purely military and thus "service-connected." Examples of such offenses are desertion, absence without leave, missing movement, disrespect toward superior commissioned officers, willful disobedience of a superior commissioned officer, insubordination toward a noncommissioned officer, mutiny, failure to obey an order or regulation and damage or destruction of military property.[141] On the other hand, it does not follow that the military is without jurisdiction simply because other provisions of the UCMJ can be described as "civil" in nature. The offense of rape under the UCMJ can readily be categorized as "civil." Yet the attempted rape of a servicewoman on a military post clearly would be "service-connected." Put simply, the military has jurisdiction over these offenses in some cases but not in others. Thus, while it is possible to categorize certain provisions of the UCMJ as military on their face and therefore subject to military jurisdiction, it is impossible in the vast

Jurisdiction Over Retired Regulars: An Unwarranted Extension of Military Power, 50 GEO. L.J. 79 (1961); Bishop, *supra* note 126.

140. 395 U.S. at 276.

141. UCMJ arts. 85-92, 94(1)(3), 108; 10 U.S.C. §§ 885-92, 894 (1)(3), 908 (1964). Other examples of offenses in this category are escape, releasing a prisoner without proper authority, unlawful detention, misbehavior before enemy, subordinate compelling surrender, improper use of a countersign, forcing a safeguard, captured or abandoned property, aiding the enemy, drunk on duty, malingering, and misbehavior of a sentinel. *See* UCMJ arts. 95-97, 99, 100-104, 112, 113; 10 U.S.C. §§ 895-897, 899, 900-904, 912, 913 (1964).

majority of cases to classify other UCMJ provisions as "civil" on their face and therefore not subject to military jurisdiction.

B. Possible Constructions of the Standard

Some of the language in the majority opinion could be used to minimize the impact of *O'Callahan* on court-martial jurisdiction by narrowing the scope of the "service-connected" test. Specifically, the Court noted that the petitioner was

> on leave when he committed the crimes with which he is charged. There was no connection—not even the remotest one—between his military duties and the crimes in question. The crimes were not committed on a military post or enclave; nor was the person whom he attacked performing any duties relating to the military. Moreover, Hawaii, the situs of the crime, is not an armed camp under military control, as are some of our far-flung outposts.
>
> Finally, we deal with peacetime offenses, not with authority stemming from the war power. Civil courts were open. The offenses were committed within our territorial limits, not in the occupied zone of a foreign country. The offenses did not involve any question of the flouting of military authority, the security of a military post, or the integrity of military property.[142]

It could be argued that offenses are "service-connected" unless they fall completely within the above description. Under this reasoning, the fact that an offense was committed during a period other than "peacetime" would result in military jurisdiction. Similarly, any offense committed outside the territorial limits of the United States or any offense committed on a military post would be subject to court-martial jurisdiction. The result of such a reading would be that the great bulk of offenses committed by servicemen would be "service-connected." Since such an approach would as a practical matter emasculate *O'Callahan*, it seems unlikely that the Court will resort to it unless it decides to relegate the "service-connected" test to the scrap heap of unused doctrines.

It also would be possible to equate the "service-connected" test with the tests developed over the years to delineate the scope of the general article, now found in Article 134 of the UCMJ.[143] Three types of conduct are covered by Article 134: (1) disorders and neglects which prejudice good order and discipline in the armed forces; (2) service-discrediting conduct; and (3) crimes and offenses not capital.[144] The third clause, which

142. 395 U.S. at 273.

143. 10 U.S.C. § 934 (1964).

144. Everett, *Article 134, Uniform Code of Military Justice—A Study in Vagueness*, 37 N.C.L. Rev. 142, 143 (1959).

has only marginal importance to the analysis at this point, has been interpreted to be simply an assimilative provision which incorporates non-capital crimes established by Congress and made triable in federal civil courts.[145] The first two clauses are invoked to prosecute servicemen for offenses not specified in any other article of the UCMJ.[146] Examples of such offenses, which are listed by the *Manual For Courts-Martial*, are bigamy, indecent assault, negligent homicide and receiving stolen property.[147] However, prosecutions under Article 134 are not limited to those offenses specifically listed in the *Manual*.[148]

The reason that it would be possible to equate the *O'Callahan* standard with the first two clauses of Article 134 is that in prosecutions under these two clauses it is not sufficient to establish that a serviceman is guilty of one of the offenses listed in the *Manual*; it must also be proven that the acts constituting the offense were either "to the prejudice of good order and discipline in the armed forces" or "service-discrediting conduct."[149] In other words, the prosecution must prove the commission of an offense and also prove that its commission affects the military. *O'Callahan* would appear to impose a similar standard in its requirement that the offense be "service-connected." The advantage of equating these two situations would be that military and federal courts presumably could utilize ready-made case precedent in defining "service-connection" under the *O'Callahan* standard.

The overriding problem with such an approach, however, is that even after years of military court interpretation of Article 134, a uniform standard has not been achieved. To be sure, the *Manual For Courts-Martial* attempts to place some limits on the language "to the prejudice of good order and discipline" by stating that it encompasses directly prejudicial acts and excludes acts prejudicial in a remote or indirect sense.[150] Moreover, there is language in the cases to the effect that the concept of "service-discrediting conduct" was not intended to establish "a moral

145. *See* Grafton v. United States, 206 U.S. 333 (1907); Wiener, *Are the General Military Articles Unconstitutionally Vague?*, 54 A.B.A.J. 357, 358 (1968). For examples of federal crimes triable under this section, see Everett, *supra* note 144, at 147.

146. MANUAL FOR COURTS-MARTIAL, UNITED STATES 1969 (Rev. ed.) ¶ 213a at 28-71 [hereinafter cited as MANUAL].

147. *See* MANUAL ¶ 213a-f at 28-71 to 28-81.

148. *See* Everett, *supra* note 144, at 160.

149. MANUAL, ¶ 213d at 28-73.

150. *Id.* ¶ 213b at 28-72. *See also* United States v. Ragan, 14 U.S.C. M.A. 119, 33 C.M.R. 331 (1963).

standard for the conduct of an individual in private."[151] Even so, the judicial interpretations of Article 134 have not yielded a consistent standard.[152] For example, the United States Court of Military Appeals has indicated that simple fornication would not violate Article 134;[153] on the other hand, where two servicemen picked up two German girls in a Berlin cafe and later shared the same hotel room, the fact that there were four instead of two in the same room made the fornication "service discrediting."[154] As one scholar has pointed out, the criminal liability seems to have hinged upon the soldiers' thrift in sharing a room.[155] Moreover, the focus in recent years seems to be more on proving the substantive offense and less on determining whether the conduct prejudices order and discipline or discredits the service. This may be because the United States Court of Military Appeals considers the latter to be questions of fact, to be decided by the members of the court-martial, rather than questions of law.[156] A final reason for rejecting such an approach is the danger that Article 134 may be void for vagueness, a possibility mentioned by the *O'Callahan* majority and one which is receiving increasing attention by commentators.[157] Thus, although attempts to construe Article 134 may be relevant to questions raised by *O'Callahan*, equation of the *O'Callahan* standard with the scope of Article 134 would be unlikely to advance the understanding of either.

It is also difficult, if not impossible, to devise a workable, single-factor, talismanic test for use in applying the *O'Callahan* standard. A few examples will illustrate the problem. It could be argued that all crimes committed by servicemen on a military reservation should be subject to court-martial jurisdiction. There would be merit to such an argument since most crimes, violent or nonviolent, either affect the peace and good order of the reservation or are detrimental to military operations. On the other hand, suppose an army private owns property in a distant home state and needs the signature of a hesitant co-owner to convey the property. If the private forges the signature while at his desk on the post, it would be difficult to maintain that

151. United States v. Snyder, 1 U.S.C.M.A. 423, 4 C.M.R. 15 (1952).
152. Everett, *supra* note 144, at 143.
153. United States v. Snyder, 1 U.S.C.M.A. 423, 425, 4 C.M.R. 15, 17 (1952).
154. United States v. Barry, 6 U.S.C.M.A. 609, 20 C.M.R. 325 (1956).
155. Everett, *supra* note 144, at 145.
156. Everett, *supra* note 144, at 154-55; Hagan, *The General Article—Elemental Confusion*, 10 MIL. L. REV. 63, 114 (1960).
157. *See, e.g.*, Wiener, *supra* note 145.

the act is "service-connected" and thus subject to prosecution for forgery under Article 123 of the UCMJ.[158] The same difficulty is inherent in a single-factor test based on whether the serviceman is on or off duty. Although one would expect that offenses committed while on duty are service-connected it is difficult to argue that because a person is on duty when he deposits an obscene letter in a mail box, court-martial jurisdiction automatically attaches. It is equally difficult to maintain that all offenses committed by a serviceman on leave or off duty are not "service-connected." For example, court-martial jurisdiction would be proper as to a serviceman who, while on leave, conspires to rob the local army finance office or plans the assassination of his commanding general. Nor would it be desirable to premise jurisdiction wholly on whether a person is in or out of uniform. Although the military would have an interest in the conduct of a serviceman in uniform who commits an offense of a public nature, court-martial jurisdiction might not be proper in the case of an off-duty serviceman in uniform who discreetly enters a hotel room to have an extra-marital affair. In short, any single-factor jurisdictional test will not yield satisfactory results in all cases.

C. A MULTI-FACTOR APPROACH

The foregoing discussion illustrates the difficulties inherent in a simple, all-purpose standard for determining what offenses are "service-connected." Yet some general guidelines must be established if the military and the lower federal courts are to apply the "service-connected" test satisfactorily. Accordingly, it is submitted that "service-connection" could be determined by a multi-factor test analogous to that employed by the *Restatement (Second), Conflict of Laws* to determine the applicable law in a multi-state tort or contract case.[159] Such an approach would take into account the fact that in numerous situations a combination of factors, rather than any single factor in isolation, will determine whether court-martial jurisdiction exists. The following criteria are offered as a starting point for promulgating such a multi-factor test:

158. 10 U.S.C. § 923 (1964). The same objection could be raised in the following situation. Suppose an army private gives a deposition to a civilian court reporter in the living room of his quarters on a military reservation in connection with a will contest in his home state. He perjures himself. It would be equally difficult to sustain a court-martial under Article 131 of the UCMJ. 10 U.S.C. § 931 (1964).

159. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145, 188 (Proposed Official Draft 1968).

1. There shall be court-martial jurisdiction over any offense under the UCMJ which reasonably can be characterized as "purely military" or "military on its face."

COMMENT: It has already been noted that certain purely military offenses do not raise *O'Callahan* problems.[160] Examples of such offenses are desertion, disrespect toward superior commissioned officers and mutiny. Such offenses must be "service-connected" for the obvious reason that, by definition, they exist only in a military situation.

2. There shall be court-martial jurisdiction over any offense under the UCMJ not included in paragraph one (above) where it is determined that the offense is service-connected. Factors to be taken into account in making such a determination include:

a. The place where the offense was committed.

COMMENT: The commission of an offense on or near a military reservation supports court-martial jurisdiction while the fact that the offense was committed in an area remote from such a reservation tends to negate jurisdiction. If the offense takes place outside the United States or its territories, the likelihood of jurisdiction being present is increased because of the possible absence of other forms of judicial administration or of constitutional protections, or the presence of a treaty with a foreign government obligating the military to take jurisdiction.

b. The status of the victim and of those involved with the accused in committing the offense.

COMMENT: Where the victim or those aiding in the commission of the crime are members of the armed services or are military dependents, the effect on the military is multiplied and thus the case for military jurisdiction is strengthened. On the other hand, if the victim was unconnected with the military and the accused acted alone, as in *O'Callahan*, the case for court-martial jurisdiction is weakened.

c. Whether the accused is an officer or an enlisted man.

COMMENT: The fact that the accused is an officer rather than an enlisted man would weigh in favor of military jurisdiction because the commission of some offenses would impair the confidence of enlisted men in the officer and thus diminish

160. *See* text accompanying note 141 *supra.*

his effectiveness and the effectiveness of officers in general in the discharge of responsibilities.

d. The duty status of the accused.

COMMENT: Presumably, anything that a serviceman does while on duty can affect the performance of his responsibilities. Consequently, the case for jurisdiction is stronger if the offense is committed while the accused is on duty and weaker if it is committed while he is on leave.

e. Whether the accused was in uniform or civilian clothes.

COMMENT: The fact that a serviceman commits an offense in uniform to some extent associates the offense with the military establishment in the public's eye, and thus tends to impair public confidence in the military.

f. Whether the nation is at peace or war.

COMMENT: Since it is sometimes necessary to vest greater power in the military during war, the fact that the nation is at war might favor military jurisdiction.[161]

g. Whether the offense is committed in a zone of hostilities.

COMMENT: Because of the necessity to maintain order and discipline in a critical area, the fact that an offense is committed in an area of hostilities will dictate court-martial jurisdiction in most instances even in the absence of other factors favoring jurisdiction.

h. The extent to which the commission of the offense casts discredit upon the military.

COMMENT: To the extent that the circumstances indicate that the effect of the offense will tend to discredit the military, the existence of court-martial jurisdiction is enhanced. This factor depends to some degree upon the other factors and is more likely to be relevant when other factors favor court-martial jurisdiction.

3. The factors listed in paragraph two should be evaluated according to their relative importance with respect to the particular offense.

COMMENT: The decision on whether court-martial jurisdiction exists should not be based upon a quantitative evaluation of the factors enumerated in paragraph two. The fact that some

161. There is a considerable problem, of course, in determining what constitutes "in time of war." *See* text accompanying note 271 *infra*.

of the above factors are entitled to greater weight than others and that the importance of a factor may vary according to the offense and the circumstances surrounding the offense necessitates a qualitative analysis. For example, court-martial jurisdiction should exist over most offenses committed on a military reservation. Even if an off duty serviceman murders a civilian who happens to be traveling through the post, the necessity of maintaining the peace and order of the post is enough to sustain jurisdiction. As a general matter, it is submitted that factors a, b, c, d, g and h are more important than factors e and f. The fact that the nation is engaged in war in one part of the world should not be decisive on the issue of jurisdiction over a case arising in other parts of the world. Nor should the fact that the accused was in uniform at the time of the offense be especially important in the absence of other factors favoring court-martial jurisdiction. As suggested, the fact that the offense is committed on a military post can be very significant. On the other hand, the fact that a crime is committed outside the United States may not be of particular importance if the foreign government has adequate methods of coping with such offenses.

D. Application of a Multi-Factor Approach

The application of such a multi-factor test to concrete fact situations will illustrate how the test would operate in practice. It will also serve to illustrate the interrelationship and complexities of the various factors as well as to point out the problems created by the Court's rejection of the status test of court-martial jurisdiction.

Application of the multi-factor test to *O'Callahan* probably would yield the same result as was reached by the Court. With the possible exception of the extent to which the offense cast discredit upon the military, none of the factors favoring military jurisdiction were present. Suppose, however, that the petitioner in *O'Callahan* had acted in concert with several other servicemen in breaking into the room and attempting to rape the young girl. Factor b would be invoked and, in addition, the weight to be given factor h would be increased. Under such circumstances, the case for jurisdiction would have been much stronger.

During oral argument in *O'Callahan*, Justice Fortas asked whether a soldier in civilian clothes who cashed a bad check in

a civilian store would be subject to court-martial jurisdiction.[162] Assuming also that this serviceman was off duty and in the United States, application of the multi-factor test probably would result in a finding of civil jurisdiction. On the other hand, if it could be shown that bad check offenses by servicemen were a chronic problem in this particular community, perhaps the service-discrediting effect would be sufficient to change the result. So too, if several servicemen were engaged in a concerted effort to pass bad checks, this factor, when considered in connection with the service-discrediting effect, might tip the balance in favor of court-martial jurisdiction.

In *United States v. Stackhouse*,[163] recently decided by the Court of Military Appeals, an Air Force sergeant and his family occupied an apartment in a town not part of a military reservation. Several female occupants of the building complained that on numerous occasions the door to the accused's apartment was left partially open so that in passing they could see the accused in the nude. The accused was convicted by general court-martial of willful and wrongful indecent exposure under the general article of the UCMJ.[164] Although the conviction was reversed on other grounds, the facts provide an example of a case in which the application of a multi-factor test would probably result in a finding of no court-martial jurisdiction. The offense was committed by an enlisted man, off post, off duty, in the United States, and obviously out of uniform. Although the commission of the offense may have cast discredit on the military, the absence of any other factors connecting the offense to the armed services would make it difficult to sustain court-martial jurisdiction.

E. Observations

Because of the complexity of the problems created by the requirement that offenses must be "service-connected" before court-martial jurisdiction can arise, and because of the countless possible permutations of fact, it is inevitable that relevant factors were overlooked in drafting the test suggested above. But the promulgation of such a standard serves the corollary purpose of illustrating the difficulties that will be encountered by those charged with applying the "service-connected" test. Since a

162. 37 U.S.L.W. 3271 (1969).
163. 16 U.S.C.M.A. 479, 37 C.M.R. 99 (1967).
164. 10 U.S.C. § 934 (1964).

subsequent finding of no jurisdiction over the subject matter can invalidate an entire proceeding, it is particularly important to have jurisdictional rules that are relatively easy to apply. As suggested in another context:

> Jurisdiction should be as self-regulated as breathing . . . and litigation over whether the case is in the right court is essentially a waste of time and resources.[165]

Unfortunately, however, it does not seem that the "service-connected" test can be clear cut. It is possible, of course, that the problems inherent in a multi-factor approach will persuade the Supreme Court to give *O'Callahan* a narrow construction.[166] Absent such a denouement, however, it seems likely that a workable definition of "service-connection" must evolve on a case-by-case basis.

V. A POSSIBLE "PETTY OFFENSE" LIMITATION

Because the majority gave particular weight to the availability of the rights of indictment by grand jury and jury trial in a civil proceeding,[167] *O'Callahan* must be considered in light of the Supreme Court decisions defining the scope of these rights. The Court's recent decision in *Duncan v. Louisiana*[168] held that the fourteenth amendment requires the states to grant jury trials in all cases where the Constitution would impose the same requirement in federal courts. Under the federal standard, a jury trial is not constitutionally compelled for a "petty offense."[169] The Court, however, has yet to draw a clear line be-

165. Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1 (1968). In a similar vein is the following language from the American Law Institute's STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, pt. I, at 72 (Official Draft 1965): "It is of first importance to have a definition so clear cut that it will not invite extensive threshold litigation over jurisdiction."

166. *See* text accompanying note 142 *supra*.

167. *See* text accompanying note 17 *supra*. It should be pointed out, however, that the Court did mention other differences between a court-martial and a civilian court. Among these were the fact that the presiding officer at a court-martial is a military officer, not a judge; and the fact that command influence plays a role in the court-martial. 395 U.S. at 264. Although the Court was also disturbed about the possible vagueness of Article 134 and stated that "[o]ne of the benefits of a civilian trial is that the trap of Article 134 may be avoided by a declaratory judgment proceeding or otherwise." "The thrust of the Court's reasoning centered on the protection of the grand jury and jury trial rights." *Id.* at 266.

168. 391 U.S. 148 (1968).

169. *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 150 (1968); W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE,

tween petty and serious offenses, and the case law provides few guiding principles.[170] The Court in *Duncan* was confronted with an authorized punishment of two years for a simple battery and thus found it relatively easy to classify the crime as "serious." Among the considerations thought to be relevant in other cases have been the nature of the offense and the maximum authorized punishment or, in situations where there is no statutory limit on punishment, the actual punishment imposed.[171] The Court has recently said, however, that the "most relevant indication of the seriousness of an offense is the severity of the penalty authorized for its commission."[172] In addition, the Court in *Duncan* stated that "crimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty."[173] It has been pointed out that although there is logic in defining offenses on the basis of the infamy attributed to them by the public, "the nature of the offense test is difficult to apply objectively."[174] Moreover, in view of the fact that the "six months" rule has had wide acceptance,[175] it has been suggested that the court could well adopt the test as the constitutional standard.[176]

The right to indictment in "capital and infamous crimes" under the fifth amendment[177] has received somewhat similar treatment by the Court. Indictment by grand jury is not required in every federal prosecution; instead, whether or not a crime is "infamous" depends upon the character of the punishment which may be imposed.[178] Thus, although it has been held that an indictment is required for an offense punished by both

§ 371 (C. Wright ed. 1969). *See generally* Kaye, *Petty Offenders Have No Peers*, 26 U. CHI. L. REV. 245 (1959).

170. *The Supreme Court, 1967 Term, supra* note 169, at 152. *Cf.* Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guarantee of Trial by Jury*, 39 HARV. L. Rev. 917, 982 (1926).

171. *See* Cheff v. Schnackenberg, 384 U.S. 373 (1966) (actual punishment imposed); District of Columbia v. Clawans, 300 U.S. 617 (1937) (maximum authorized punishment); Callan v. Wilson, 127 U.S. 540 (1888) (nature of the offense).

172. Frank v. United States, 395 U.S. 147, 148 (1969).

173. Duncan v. Louisiana, 391 U.S. 145, 159 (1968).

174. *The Supreme Court, 1967 Term, supra* note 169, at 153.

175. *The Supreme Court, 1967 Term, supra* note 169, at 153. *See also* AMERICAN BAR ASS'N PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, ADVISORY COMM. ON THE CRIMINAL TRIAL STANDARDS RELATING TO TRIAL BY JURY 20-23 (Approved draft 1968).

176. *The Supreme Court, 1967 Term, supra* note 169, at 153.

177. The right to indictment by grand jury is not presently applicable to the states through the due process clause of the fourteenth amendment.

178. *Ex parte* Wilson, 114 U.S. 417 (1885).

imprisonment at hard labor for one year and deportation,[179] the Court has held that indictment was not mandatory under an act providing for a fine of not more than $1000 or imprisonment for not more than six months.[180] In fact, the Federal Rules of Criminal Procedure require a grand jury indictment only for offenses which may be punished by imprisonment at hard labor or for a term exceeding one year.[181] Thus, something roughly analogous to a "petty offense" exception also applies to the fifth amendment indictment requirement.

The Court's "petty offense" exceptions to rights of grand jury indictment and jury trial in civil proceedings suggest the possibility that *O'Callahan* may be limited by a similar exception, so that court-martial jurisdiction would attach to a petty offense despite the fact that it is not "service-connected." The argument finds support in logic and policy. If the Court is prepared to say that petty offenses tried in a civilian court do not require an indictment or jury trial, it would be anomalous to assert that the military loses jurisdiction because these rights are not available. To deny the military jurisdiction over the non-"service-connected" petty offense would create no new rights for the accused, and the reasoning behind the *O'Callahan* decision thereby becomes inapplicable.

At this point it must be noted that most courts-martial are conducted by judicial tribunals which are prohibited by statute from imposing more than six months' imprisonment. The tribunals thus limited in their power to impose sentence are the special and summary courts-martial. The special court-martial has been called "the military equivalent of a civilian court that can try only misdemeanor cases."[182] Although it has jurisdiction over all noncapital offenses and most servicemen, it may impose only a maximum of six months' confinement, hard labor without confinement for three months, forfeiture of two-thirds pay for six months, reduction in rank, a bad conduct discharge, or any combination of these.[183] The summary court-martial, a court somewhat akin to a civilian magistrate or com-

179. Wong Wing v. United States, 163 U.S. 228, 237 (1896).
180. Duke v. United States, 301 U.S. 492 (1937).
181. FED. R. CRIM. P. 7(a); *Ex parte* Wilson, 114 U.S. 417, 426 (1885).
182. Mounts & Sugarman, *The Military Justice Act of 1968*, 55 A.B.A.J. 470, 471 (1969).
183. UCMJ art. 19, 10 U.S.C. § 819 (1964); MANUAL ¶ 15a, b at 4-5, ¶ 127c at 25-18. As a practical matter, bad conduct discharges are infrequently adjudged because Article 19 requires a full transcript in order to impose them.

missioner's court,[184] may try most noncapital cases, but is generally limited to the trial of enlisted men and the imposition of a maximum of one month's imprisonment, hard labor without confinement for forty-five days, limited reduction in rank and a fine of two-thirds of a month's pay, or any combination of these.[185] Only the general court-martial is authorized to impose over six months' imprisonment.[186] Thus, if the Court were to apply the petty offense exception to *O'Callahan*, it follows that cases that would have been tried by a special or summary court-martial had *O'Callahan* not been decided would continue to be so tried. Although both types of court-martial may levy fines, impose grade reductions and in certain situations adjudge bad conduct discharges, the maximum imprisonment authorized is six months.[187] If six months is taken as the line of demarcation in determining the right to jury trial in civilian cases (and similar reasoning is adopted to determine the right to grand jury indictment), the Court could very well condone special and summary court-martial jurisdiction exactly as it existed prior to *O'Callahan*.[188] Indeed, since the serviceman would be "denied" the rights of indictment and jury trial only in situations where a civil trial would ordinarly not require such rights, an argument can well be made that the "service-connected" test is wholly inapplicable.

Three possible objections could be made to such an approach. First, it could be argued that it would be possible for the military to try every noncapital case by a special or summary court-martial free from the strictures of *O'Callahan*. It would conceivably place in the hands of the military an absolute discretion to exercise court-martial jurisdiction over non-"service-connected" offenses simply by downgrading the offense to a special court-martial, thereby stripping the accused of the rights contemplated by *O'Callahan*.[189] The concept of the petty of-

184. Mounts & Sugarman, *supra* note 182, at 472.

185. UCMJ art. 16, 10 U.S.C. § 816 (1964); MANUAL, ¶ 16a, b at 4-6, ¶ 127c at 25-18.

186. *See* UCMJ art. 18, 10 U.S.C. § 818 (1964); MANUAL, ¶ 14a, b at 4-4. As a general rule, the sentencing of any enlisted person to confinement, whether by general, special, or summary court-martial, results in an automatic grade reduction to the lowest enlisted grade. *See* UCMJ art. 58a, 10 U.S.C. § 858a (1964); MANUAL, ¶ 126e, at 25-4.

187. *See* text accompanying notes 183-85 *supra*.

188. *Cf. Hearings on S. Res. 260 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 2d Sess., 563 (1962).

189. *See* Kinsella v. Singleton, 361 U.S. 234, 244-45 (1960).

fense, it could be argued, should not completely span a criminal code; but it should be limited to truly minor offenses, such as public drunkenness, disorderly conduct, and the like. Of course, it is unlikely that the military would desire to try noncapital crimes such as armed robbery and manslaughter to a special or summary court-martial because of the limitations on the punishment. In any event, if the Court were reluctant to take the broad approach described above, it still would be possible to define a category of military "petty offenses" similar to those crimes considered petty in the civilian sector without regard to the special or summary court-martial's statutory jurisdiction. This would enable the military to maintain court-martial jurisdiction with respect to many minor but vexatious offenses not otherwise meeting the *O'Callahan* test.

Second, it could be argued that special court-martial punishment cannot be equated with the general exception to the grand jury indictment and jury trial requirements because military confinement is at hard labor, and such punishment not only requires a grand jury indictment in civil criminal trials under the Federal Rules of Civil Procedure[190] but is perhaps not to be considered "petty" for purposes of the jury trial requirement. However, it is questionable whether the term "hard labor" in the context of military confinement is meaningful, since all members of the armed forces are required to work whether in confinement or in duty status. The work performed by prisoners is often no different than that performed by comparable duty status personnel.[191]

Finally, it could be argued that the additional punishments that a special court-martial can impose in addition to the six months' imprisonment at hard labor cause the offense to surpass the definition of "petty." There is some merit to this argument, since the special court-martial can impose substantial fines, limited hard labor without confinement, reduction in grade, and in some instances a bad conduct discharge in addition to six months' imprisonment. This argument has less validity as applied to the summary court-martial because the punishments therein are relatively minor.[192] And, if a "petty offense" exception is adopted, Congress could perhaps circumvent the problem by limiting the punishment that could be imposed by special

190. *See* note 181 *supra.*

191. *See generally* Herrod, *The United States Disciplinary Barracks System,* 8 MIL. L. REV. 35, 36 (1960); ARMY REG. 210-181.

192. *See* text accompanying note 184 *supra.*

courts-martial in *O'Callahan* situations to the same punishment described in the federal criminal code definition of "petty offenses," i.e., imprisonment not to exceed six months or a fine of not more than $500, or both.[193] In fact, the Court itself could impose such a limitation. Such an approach would mean that the military would have to handle discharges and grade reductions either administratively or by general court-martial.[194]

VI. IMPLICATIONS AND PROBLEMS RAISED BY *O'CALLAHAN*

A. SHOULD *O'Callahan* BE APPLIED RETROACTIVELY?

Apparently the chief concern of the Department of Defense at present is whether *O'Callahan* will be applied retroactively.[195] When the decision was rendered, the Army Judge Advocate General stated that the Army had exercised the jurisdiction denied the military in *O'Callahan* for 180 years,[196] and estimated that since 1951 the Army alone had conducted 450,000 courts-martial which might be invalid under *O'Callahan*.[197] He stated

193. 18 U.S.C. § 1 (3) (1964).

194. The military services have broad power to discharge personnel administratively under less than honorable conditions for unsuitability, unfitness and misconduct. *See, e.g.*, ARMY REG. 635-212. Other services have comparable provisions. *See generally* Dougherty & Lynch, *The Administrative Discharge: Military Justice?*, 33 GEO. WASH. L. REV. 498 (1964).

195. For a general discussion of the problem of retroactivity, see Currier, *Time and Change in Judge-Made Law: Prospective Overruling*, 51 VA. L. REV. 201 (1965); Mishkin, *The Supreme Court, 1964 Term, Foreword: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56 (1965); *The Supreme Court, 1965 Term*, 80 HARV. L. REV. 91, 135 (1966); Note, *Linkletter, Shott, and the Retroactivity Problem in Escobedo*, 64 MICH. L. REV. 832 (1965); Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907 (1962). The problem is not just a question whether a decision shall be wholly prospective or wholly retrospective. There are degrees of retroactivity and the line is drawn at different places in different cases. *See* Bender, *The Retroactive Effect of an Overruling Decision: Mapp v. Ohio*, 110 U. PA. L. REV. 650, 673-78 (1962); Rogers, *Perspectives on Prospective Overruling*, 36 U. Mo. K.C. L. REV. 35, 57-63 (1968).

196. The Washington Evening Star, June 6, 1969, at A-3.

197. *Id.* The account of Judge Advocate General Hodson's remarks carried by the Chicago Tribune states that Hodson said that 1.3 million men in the Army alone had been court-martialed since 1951. Chicago Tribune, June 1, 1969, § 1, at 11. The two statements are not in conflict on their face, of course. Any estimate of the number of courts-martial that would be invalidated under *O'Callahan* is purely a matter of speculation at the moment. In any event it seems clear that large numbers of courts-martial will come into question.

that the Army, Navy and Air Force together have approximately 4,000 men in prison,[198] and that suits would not be limited to those in prison because presumably actions would be filed relating to other punishments and involving back pay, veterans' benefits and burial in military cemeteries.[199] The sheer numbers involved suggest that a retroactive application of *O'Callahan* would create staggering problems for the military. Moreover, civilian courts would likely be burdened by collateral attack proceedings and retrials.

Prior to the Supreme Court's 1965 decision in *Linkletter v. Walker*,[200] decisions establishing new principles of constitutional law were applied retroactively as a matter of course.[201] In *Linkletter* the court declined to apply *Mapp v. Ohio*,[202] which ruled that evidence obtained in violation of the fourth amendment is inadmissible in state criminal proceedings, to any cases which were not on direct appeal at the time of the *Mapp* decision. Writing for the majority, Justice Clark declared:

> [W]e believe that the Constitution neither prohibits nor requires retrospective effect.
>
> . . . We must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.[203]

The *Linkletter* principle has been adhered to in a series of cases in which full retroactive effect was denied to new constitutional rules. *Tehan v. United States ex rel. Shott*,[204] decided in 1966, denied general retroactive effect to *Griffin v. California*,[205] which forbade comment by either prosecutor or court on a defendant's failure to testify at a state trial. Shortly after the decision in *Tehan*, *Johnson v. New Jersey*[206] denied full retroactive effect to *Escobedo v. Illinois*[207] and *Miranda v. Arizona*,[208] which held inadmissible certain statements by defendants in an effort to guarantee full effectuation of the privilege against self-

198. The Washington Evening Star, June 6, 1969, at A-3.

199. On suits in the Court of Claims for back pay, see United States v. Augenblick, 393 U.S. 348 (1969); United States v. Brown, 206 U.S. 240 (1907); Swaim v. United States, 165 U.S. 553 (1897).

200. 381 U.S. 618 (1965).

201. Note, *Linkletter, Shott, and the Retroactivity Problem*, *supra* note 195.

202. 367 U.S. 643 (1961).

203. 381 U.S. 618, 629 (1965).

204. 382 U.S. 406 (1966).

205. 380 U.S. 609 (1965).

206. 384 U.S. 719 (1966).

207. 378 U.S. 478 (1964).

208. 384 U.S. 436 (1966).

incrimination. In *Stovall v. Denno*,[209] the Court was faced with the question whether the decisions in *United States v. Wade*[210] and *Gilbert v. California*[211] were to be applied retroactively. These decisions required the exclusion of evidence which was tainted because the accused was exhibited before trial to identifying witnesses in the absence of counsel. In an opinion denying retroactive effect, Justice Brennan summarized the test:

> The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.[212]

The closest case to *O'Callahan* on the issue of retroactivity is *De Stefano v. Woods*.[213] In that case the Court held per curiam that the right to jury trial announced in *Duncan v. Louisiana*[214] and *Bloom v. Illinois*[215] was inapplicable to trials begun prior to the date of the Court's decisions in those cases. Since the most important reason for the holding in *O'Callahan* was the absence of the right to trial by jury, the analogy to *De Stefano* is apparent. Yet, as Justice Clark pointed out in *Linkletter*, each case must be weighed individually, so that simply to observe that both *O'Callahan* and *De Stefano* dealt with the right to trial by jury is insufficient.

The first consideration mentioned by Justice Brennan in *Stovall* was "the purpose to be served by the new standards." It has been suggested elsewhere that the answer to this question depends on how the purpose is defined.[216] While on the surface this appears to be a truism, it takes on added meaning when combined with the suggestion that the Court has modified the reasoning of original decisions whenever that reasoning would support general retroactivity.[217] The "purpose of the new stand-

209. 388 U.S. 293 (1967).
210. 388 U.S. 218 (1967).
211. 388 U.S. 263 (1967).
212. 388 U.S. 293, 297 (1967).
213. 392 U.S. 631 (1968). Other recent decisions on retroactivity include McConnel v. Rhay, 393 U.S. 2 (1968), and Arsenault v. Massachusetts, 393 U.S. 5 (1968), both of which applied decisions involving right to counsel retroactively, and Fuller v. Alaska, 393 U.S. 80 (1968), which denied retroactive application to a decision holding inadmissible in state criminal trials evidence violative of § 605 of the Federal Communications Act. Each of these decisions was by per curiam opinion.
214. 391 U.S. 145 (1968).
215. 391 U.S. 194 (1968) (right to jury trial exists in trials for serious criminal contempt).
216. *The Supreme Court, 1965 Term*, 80 HARV. L. REV. 91, 139 (1966).
217. *Id.* at 138. It can be argued that once it is found that the

ards" is most persuasive as a reason for giving general retroactive effect when the standard in question relates to the fairness or reliability of the trial.[218] As Justice Clark explained in *Linkletter*, "[I]n each of the three areas in which we have applied our rule retrospectively the principle that we applied went to the fairness of the trial—the very integrity of the fact-finding process."[219]

Applying the "purpose" test in *De Stefano* to the jury trial standards laid down in *Duncan* and *Bloom*, the Court observed:

> *Duncan* held that the States must respect the right to jury trial because in the context of the institutions and practices by which we adopt and apply our criminal laws, the right to jury trial generally tends to prevent arbitrariness and repression. As we stated in *Duncan*, "We would not assert, however, that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury." . . . The values implemented by the right to jury trial would not measurably be served by requiring retrial of all persons convicted in the past by procedures not consistent with the Sixth Amendment right to jury trial.[220]

As one might expect of a per curiam opinion, the treatment of the "purpose" test in the above quotation is not a searching analysis of the problem; but it seems to suggest that since a trial before a judge is not inherently less reliable than a jury trial, the values of the sixth amendment would not be served by requiring a retrial of all persons convicted in the past by procedures not consistent with the sixth amendment. This raises the question whether trial by courts-martial should receive the same treatment as a trial before a civilian judge. To put it somewhat differently, is a trial by court-martial as fair a process as a trial before a civilian judge? The various epithets used by Justice Douglas in the *O'Callahan* opinion in referring to military justice make it fairly clear that he would answer the question in the negative. On the other hand, many writers

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purpose of a new rule will be advanced by retroactive application, the court should not consider reliance and impact, the second and third factors announced in *Stovall*. *See* Note, *Constitutional Rules of Criminal Procedure and the Application of Linkletter*, 16 J. PUB. LAW 193, 209-12 (1967). However, the discussion in this section proceeds on the assumption that no single factor is in itself determinative, but is to be weighed along with the other factors.

218. Linkletter v. Walker, 381 U.S. 618, 639 (1965). *See* the discussion in Note, *supra* note 201, at 842-49. For criticism of the reliability test, see Schwartz, *Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin*, 33 U. CHI. L. REV. 719, 724-42 (1966).

219. Linkletter v. Walker, 381 U.S. 618, 639 (1965).

220. De Stefano v. Woods, 392 U.S. 631, 633-34 (1968).

believe that the procedural protections accorded the accused in military proceedings are now superior to those provided in civil courts and that the military fact-finding process is very reliable indeed.[221] The chief difference between military and civilian proceedings at this time probably is the possibility of command influence,[222] and one's conclusion on this issue may very well turn on his assessment of the extent and seriousness of this factor. Insufficient empirical evidence exists to speak with complete assurance on the relative reliability of the two systems.

The second consideration mentioned by Justice Brennan in *Stovall* was "the extent of the reliance by law enforcement authorities on the old standards." It is clear that both the Congress and military authorities have relied on the old jurisdictional concepts. Congress' reliance is indicated by the fact that jurisdiction over civilian offenses has been premised on the status of membership in the armed forces since 1916.[223] Relying on Congressional enactments and dicta in numerous decisions, military authorities have not made a systematic attempt to develop a record in courts-martial to show "service-connection," thus leaving thousands of past cases open to collateral attack if *O'Callahan* is applied retroactively.

In applying this second part of the *Stovall* test to the *Duncan* and *Bloom* cases, the court stated in *De Stefano* that, "States undoubtedly relied in good faith upon the past opinions of this court to the effect that the Sixth Amendment right to jury trial was not applicable to the states."[224] As previously noted, the Supreme Court has stated on numerous occasions that servicemen are subject to court-martial jurisdiction on the basis of their status as servicemen, without regard to the offense.[225] Consequently, the reliance by Congress and the military undoubtedly was in good faith.

The third and final consideration in the *Stovall* test is "the effect on the administration of justice of a retroactive application of the new standards." The *De Stefano* court stated that:

> [T]he effect of a holding of general retroactivity on law enforcement and the administration of justice would be significant, because the denial of jury trial has occurred in a very great

221. *See* text accompanying note 303 *infra.*
222. *See* text accompanying note 302 *infra.*
223. *See* text accompanying notes 105-16 *supra.*
224. De Stefano v. Woods, 392 U.S. 631, 634 (1968).
225. *See* text accompanying notes 131-37 *supra.*

> number of cases in those states not until now accepting the Sixth Amendment guarantee.[226]

The emphasis here is on the number of prior convictions that would be placed in jeopardy if the decision is given retroactive effect. It also seems important to consider the difficulty of reprosecution of individuals whose convictions are overturned.[227] The Government's brief in *O'Callahan* stated that if the rule sought by petitioner had been applied from 1966 to the present, twenty percent of the "non-military" offenses tried in military courts would instead have been within the jurisdiction of the civil authorities.[228] Because of the inherent vagueness of the *O'Callahan* test, it is probably impossible to estimate accurately the percentage of prior convictions that could be challenged. Moreover, all of the challenged convictions that cannot meet the test will be overturned since the defect, being jurisdictional, goes to the competency of the court. Nor will the number of challenges be limited by the number of servicemen in confinement, inasmuch as suits for honorable discharges and back pay could also be brought. When one considers the fact that 1.3 million men have been court-martialed in the Army alone since 1951,[229] the staggering number of cases subject to challenge is apparent. As to the difficulty of reprosecution, the rapid turnover in military personnel and the fact that military people are transferred frequently renders the gathering of witnesses and evidence even more difficult than the already formidable task faced in this regard by civil courts. It is an understatement, therefore, to say that retroactive application of *O'Callahan* would have a seriously adverse effect on the administration of the military justice system.

One further point must be considered. *O'Callahan* dealt with a jurisdictional defect, and the question thus arises whether the fact that the new standard is jurisdictional necessitates a retroactive application of the "service-connected" test. The most obvious place to begin an examination of this question is *Linkletter v. Walker*,[230] since it spawned the recent series of decisions which refused to give general retroactive effect to cases

226. De Stefano v. Woods, 392 U.S. 631, 634 (1968).

227. Note, *Linkletter, Shott and the Retroactivity Problem*, *supra* note 195, at 841.

228. Brief for Respondent United States at 29 n.1.8, O'Callahan v. Parker, 395 U.S. 258 (1969).

229. *See* note 197 *supra*.

230. 381 U.S. 618 (1965). For a discussion of retroactivity of changes in jurisdiction by the NLRB, see Berger, *Retroactive Administrative Decisions*, 115 U. PA. L. REV. 371, 385-89 (1967).

establishing new principles. In that case Justice Clark concluded that the Constitution neither prohibits nor requires retrospective effect and that each case must be examined separately. There is nothing in this broad principle that would seem to require retroactivity as a matter of course simply because the new standard involves jurisdiction. One might object that a jurisdictional defect means that a tribunal had no power to proceed at all and that a defect so fundamental must be held to relate back. But to assume that the tribunal had no power to proceed one has also to assume that *O'Callahan* did not make new law, discovering instead the law that always existed though theretofore unexpressed. This assumption, with its roots in *Blackstone's Commentaries*,[231] was rejected in *Linkletter v. Walker*.

> The theory was . . . that a change of judicial decision after a contract has been made on the faith of an earlier one the other way is a change of the law . . . the actual existence of the law prior to the determination of unconstitutionality "is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration."[232]

It is thus both possible and appropriate to test court-martial jurisdiction by the standards that existed at the time the proceeding was held, and to assume that standards once valid are now no longer valid.

Although it is hornbook law that jurisdictional defects can be collaterally attacked because of the fundamental nature of such defects,[233] this policy is sometimes subordinated to others. For example, in civil cases the bootstrap doctrine sometimes prevents jurisdictional attacks because the issue of jurisdiction has already been litigated.[234] In other words, the policy permitting collateral attack of civil judgments must sometimes give way to the policy that litigation should come to an end at some point. Therefore, simply calling the problem one of "jurisdiction" does not solve the problem. The chameleon-like quality of this term is illustrated by the fact that in delineating the scope of habeas corpus review the Supreme Court has labeled such issues as the right to counsel "jurisdictional."[235] Different policies are rele-

231. 1 BLACKSTONE, COMMENTARIES *69 (1769).
232. 381 U.S. 618, 624-25 (1965).
233. R. LEFLAR, AMERICAN CONFLICTS LAW § 80 (2d ed. 1968).
234. *See generally* Dobbs, *Beyond Bootstrap: Foreclosing the Issue of Subject-Matter Jurisdiction Before Final Judgment*, 51 MINN. L. REV. 491 (1967); Dobbs, *The Validation of Void Judgments: The Bootstrap Principle*, 53 VA. L. REV. 1003 (1967); Dobbs, *The Scope of the Bootstrap Principle*, 53 VA. L. REV. 1241 (1967).
235. Johnson v. Zerbst, 304 U.S. 458 (1938). *See* text accompanying notes 238-39 *infra*.

vant to the analysis of different issues of jurisdiction, and there is no valid reason why the question of retroactivity of the *O'Callahan* principle cannot be analyzed in terms of the test established by the Supreme Court in *Stovall* and *De Stefano.*

Assuming that the fact that *O'Callahan* dealt with jurisdiction will not dictate a retroactive effect, an application of the tests laid down by the Court in *Stovall* should lead to a decision that *O'Callahan* will not be applied retroactively. The second and third parts of the test are clearly satisfied. Whether the "purpose" factor is satisfied depends on how it is defined and, in the final analysis, on a value judgment with respect to the military justice system. Yet however the "purpose" issue is resolved, the enormous problems indicated by the second and third parts of the *Stovall* standard are enough to justify denial of retroactive application.

B. An Exhaustion of Remedies Problem

Since *O'Callahan* inevitably will encourage collateral attacks on future court-martial judgments, some analysis of collateral review of military judgments is necessary. Until 1938, the scope of review in federal habeas corpus actions, the usual mode of collateral review,[236] was roughly the same regardless of whether the judgment reviewed was civilian or military. The test applied was whether the court had jurisdiction over the person and the offense charged, and whether the sentence was authorized by law.[237] In 1938, the scope of review in civilian cases was extended in *Johnson v. Zerbst,*[238] which held that a court would lose jurisdiction if it failed to provide counsel as required by the sixth amendment. By 1944, jurisdiction in the narrow sense was no longer the sole consideration; rather, the Supreme Court concluded that habeas corpus "extends also to

236. For a consideration of other modes of collateral review of courts-martial, see Fratcher, *Review By the Civil Courts of Judgments of Federal Military Tribunals,* 10 Ohio St. L.J. 271, 272 (1949); Sherman, *Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement,* 55 Va. L. Rev. 483, 537 (1969); Snedeker, *Habeas Corpus and Court-Martial Prisoners,* 6 Vand. L. Rev. 288, 292 (1953).

237. *See* Bishop, *Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions,* 61 Colum. L. Rev. 40, 43-44, 49-50 (1961); Katz & Nelson, *The Need for Clarification in Military Habeas Corpus,* 27 Ohio St. L.J. 193, 197 (1966). *Compare Ex parte* Reed, 100 U.S. 13, 23 (1879) *with In re* Gregory, 219 U.S. 210, 213 (1911). For a thorough discussion of the traditional jurisdictional concepts applied in military habeas corpus cases, see Fratcher, *supra* note 236.

238. 304 U.S. 458 (1938).

those exceptional cases where the conviction had been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights."[239] The scope of review of civilian habeas corpus was expanded further during the ensuing two decades and now the federal district judge need have few, if any, qualms about inquiring into the constitutional defects of a state or federal civilian conviction.[240] Habeas corpus is available in a federal court whenever the state proceeding fails to meet the standards of procedural fairness required of the states by the fourteenth amendment.[241] The scope of habeas corpus review of courts-martial has not experienced a similar expansion. Although the several opinions of the 1953 decision of *Burns v. Wilson*[242] indicate that federal courts in habeas corpus cases may review claims of denial of due process in court-martial proceedings, the case as applied has not notably expanded the scope of collateral review beyond the traditional jurisdictional concepts.[243]

O'Callahan, perhaps ironically, will increase habeas corpus review not in the area of its greatest recent expansion in the civilian cases, constitutional due process defects at trial, but rather in the pre-*Johnson* area of jurisdiction over the subject matter or offense. Since "status" is no longer the sole criteria for jurisdiction by the military over its members, every court-martial raising the slightest doubt as to "service connection" represents a potential habeas corpus action in the federal courts. Every serviceman held in detention after a court-martial determination of jurisdiction under the new test could very well view federal habeas corpus as a possible escape from the process of military law. This potential for disruption of the traditional process of court-martial review should be cause for considerable concern by the military and federal district courts charged with hearing habeas corpus petitions. In this respect, the doctrine of exhaustion of military remedies could play a crucial role.

A requirement of exhaustion of military remedies as a prerequisite to federal habeas corpus was approved almost twenty years ago in *Gusik v. Schilder*.[244] In that case the petitioner

239. Waley v. Johnston, 316 U.S. 101 (1942).
240. *See* Katz & Nelson, *supra* note 237, at 193-94.
241. C. WRIGHT, FEDERAL COURTS 180 (1963).
242. 346 U.S. 137 (1953).
243. *See* Katz & Nelson, *supra* note 237, at 194, 212.
244. 340 U.S. 128 (1950). *See* Sherman, *supra* note 236, at 500-01.

was convicted of murder by a court-martial and sought a writ of habeas corpus on the grounds that the court-martial denied him statutory and constitutional rights to a pre-trial investigation and effective assistance of counsel. The petitioner had not pursued the collateral review afforded him under the statutory predecessor of Article 73 of the UCMJ.[245] The Court ruled that the district court should refuse to hear the case prior to petitioner's exhaustion of his military remedies. The Court, per Justice Douglas, analogized the situation to state-federal habeas corpus practice, pointing out that interference of a federal court may be a needless irritant if the military offers a remedy.[246]

Gusik was reaffirmed this year by the Supreme Court in *Noyd v. Bond.*[247] In that case, the petitioner, an Air Force captain, had been found guilty by a general court-martial of willful disobedience of a lawful order and was sentenced to one year's confinement, forfeiture of all pay and allowances, and dismissal from the Air Force. The petitioner was ordered confined pending appellate review. While appealing the conviction to the Air Force Board of Review, petitioner sought a writ of habeas corpus from a federal district court claiming that his confinement pending review violated certain provisions of the UCMJ.[248] The district court granted the writ, rejecting the government's exhaustion of remedies argument on the ground that the military court system did not provide a method of testing the legality of his confinement pending appeal.[249] The Court of Appeals for the Tenth Circuit, relying on *Gusik*, reversed, holding that petitioner could not obtain habeas corpus relief until he had first challenged the validity of the confinement before appellate tribunals within the military system.[250] The Supreme Court affirmed the Court of Appeals by a 7 to 1 vote, holding that since the petitioner had not attempted to show that prompt and effective relief was unavailable from the Court of Military Appeals, his failure to exhaust that remedy before seeking habeas corpus in civilian courts was not excused.[251]

245. *See* note 264 *infra.*
246. Gusik v. Schilder, 340 U.S. 128, 131-32 (1950).
247. 395 U.S. 683, (1969).
248. UCMJ art. 71(c), 10 U.S.C. § 871 (c) (1964); UCMJ art. 13, 10 U.S.C. § 813 (1964).
249. Noyd v. Bond, 285 F. Supp. 785 (D.C.N.M. 1968).
250. Noyd v. Bond, 402 F.2d 441 (10th Cir. 1968).
251. Noyd v. Bond, 395 U.S. 683, (1969). Justice Black concurred

Justice Harlan's opinion in *Noyd* reiterated the state-military habeas corpus analogy of *Gusik* and stressed the fact that Congress purposely "chose to confide the power to review military justice to a specialized Court of Military Appeals, so that disinterested civilian judges could gain over time a fully developed understanding of the distinctive problems and legal traditions of the Armed Forces."[252] The Court found the principles of *Gusik* especially applicable to the case before it. Military courts could very well vindicate petitioner's claim and render civilian review unnecessary.[253] The exhaustion requirement, according to the Court, would avoid needless friction that would arise if civilian courts are required to review first level military decisions.[254] Finally, the Court would avoid interpreting extremely technical provisions of the UCMJ, at least until the Court of Military Appeals had offered its interpretation.[255] Interestingly, the tone of the *Noyd* opinion, which was issued only two weeks after *O'Callahan*, could not be more strikingly different than *O'Callahan* in the deference and sophistication displayed toward military courts as a judicial system.

The major question, of course, is whether the *Gusik* exhaustion requirement is applicable to habeas corpus proceedings raising jurisdictional issues under *O'Callahan*. In *Noyd*, the petitioner also contended that he should not be required to exhaust military remedies because exhaustion was not required in three previous cases holding that the Constitution barred peacetime court-martial jurisdiction over various classes of civilians connected with the military.[256] The petitioner was correct in the sense that in each of the three cases the Supreme Court passed on the merits without considering the exhaustion problem, although in one case the Court noted that the defendant was being held pending a proposed retrial by court-martial.[257]

However, in one of the cases, the District of Columbia Court of Appeals had fully considered the issue and had concluded that exhaustion was not required because the accused

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in the result. Justice White dissented on the ground that the petition for certiorari should have been dismissed as improvidently granted. *Id.* at 699.

252. Noyd v. Bond, 395 U.S. 683, 694 (1969).
253. *Id.* at 696.
254. *Id.*
255. *Id.*
256. Toth v. Quarles, 350 U.S. 11 (1955); Reid v. Covert, 354 U.S. 1 (1957); McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960). *See* text accompanying notes 127-30 *supra.*
257. Reid v. Covert, 354 U.S. 1, 4, (1957).

was a civilian and therefore "[t]he question is *whether appellant is subject to court-martial jurisdiction at all.*"[258] The Court distinguished *Gusik* on the grounds that the accused there was in the military and sought habeas corpus because of alleged errors in the court-martial procedure, not because of any question going to the court-martial's jurisdiction. The Court concluded that if the government had no court-martial jurisdiction *whatever* over the appellant, habeas corpus would be available to release him from custody.[259] As mentioned, the Supreme Court did not refer to this issue on appeal. However, in what may become a significant footnote, the Supreme Court in *Noyd* met the petitioner's contention with language somewhat similar to that used by the Court of Appeals in the earlier case.

> It is true that this Court [in the earlier cases] vindicated petitioners' claims without requiring exhaustion of military remedies. We did so, however, because we did not believe that the expertise of military courts extended to the consideration of constitutional claims of the type presented. Moreover, it appeared especially unfair to require exhaustion of military remedies when the petitioners raised substantial arguments denying the right of the military to try them *at all.* Neither of these factors is present in the case before us.[260]

In reality, the allegation in an *O'Callahan* situation will be a lack of jurisdiction over the subject matter or offense on the basis that the offense is not "service-connected." However, by applying the *Noyd* approach, in part by analogy, the exhaustion of military remedies should be required. Since the petitioner in an *O'Callahan* situation will almost always be a serviceman, the allegation cannot be that military courts have no jurisdiction "at all" or "whatever" because, unlike the case where the petitioner is a peacetime civilian, the military status of the accused will result in court-martial jurisdiction if the offense is "service-connected."[261]

It is submitted that, to permit the serviceman to use habeas corpus prior to exhaustion is to discount unjustifiably the availability and value of the fairly complete military appellate and

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258. United States v. McElroy, 259 F.2d 927, 929 (D.C. Cir. 1958) (emphasis added).

259. *Id.*

260. Noyd v. Bond, 395 U.S. 683, 696 n.8 (1969) (emphasis added).

261. In fact, the Seventh Circuit has specifically ruled that a convicted serviceman was required to exhaust his military remedies, even though one allegation was that the military did not have jurisdiction over the offense. In that case, the allegation was that the court-martial had no jurisdiction over a capital offense in time of peace. Branford v. United States, 356 F.2d 876, 877 (7th Cir. 1966).

collateral review procedure provided by the UCMJ. Depending on the type of court-martial and the sentence adjudged, a court-martial conviction will be reviewed by one or more of the following agencies: the convening authority of the court-martial or his superior in command; the office of the Judge Advocate General; Service Courts of Military Review; the United States Court of Military Appeals, a three-judge civilian court created by Congress to be the final appellate court in the military system; the Secretaries of the military departments; and the President.[262] Final appellate review of most convictions generally will be by one of the first three of the above-mentioned agencies. The United States Court of Military Appeals automatically reviews death sentences, convictions involving general or flag officers, and those cases certified to it by the Judge Advocate General.[263] That court also exercises a substantial discretionary power of review akin to the certiorari jurisdiction of the United States Supreme Court, and this jurisdiction represents the bulk of the caseload.[264] Moreover, the Court of Military Appeals has recently held that it has the power to issue writs of habeas corpus.[265] The issue of "service-connection" is especially suited to the expertise of military courts and the United States Court of Military Appeals; this is not so, as Justice Harlan points out, in the purely civilian cases. By requiring exhaustion, the federal district courts, before having to tackle the question of "service-connection," will in many cases have before them expert judgment of several echelons of military tribunals and often that of the Court of Military Appeals. While

262. *See* UCMJ arts. 59-76, 10 U.S.C. §§ 859-76 (1964).

263. UCMJ art. 67, 10 U.S.C. § 867 (1964).

264. UCMJ art. 67(b)(3), 10 U.S.C. § 867(b)(3) (1964). An examination of volume 38 of the *Court-Martial Reports* indicates that during 1967-68, the vast majority of the decisions reached by the Court of Military Appeals on the merits resulted from this discretionary jurisdiction. Over 60 percent of the cases accepted pursuant to this provision were reversed.

In addition, the Judge Advocate General is invested with a limited form of military collateral review under Article 73, which reads:

> At any time within one year after approval by the convening authority of a court-martial sentence . . . , the accused may petition the Judge Advocate General for a new trial on the ground of newly discovered evidence or fraud on the court. If the accused's case is pending before the board of review or before the Court of Military Appeals, the Judge Advocate General shall refer the petition to the [appropriate] . . . court . . . for action. Otherwise the Judge Advocate General shall act upon the petition.

UCMJ art. 73, 10 U.S.C. § 873 (1964).

265. Levy v. Resor, 17 U.S.C.M.A. 135, 37 C.M.R. 399 (1967).

such determinations are not binding on the civilian federal courts in habeas corpus actions,[266] they nevertheless provide helpful guidelines. Moreover, such an approach will to a great extent obviate the problems inherent in interpreting "a legal tradition which is radically different from that which is common in civil courts."[267]

C. IMPLICATIONS FOR CIVILIANS "IN THE FIELD"

Certain language in *O'Callahan*, whether intentional or inadvertent, raises a substantial doubt as to the constitutionality of the extension of military jurisdiction under Article 2, section 10 of the UCMJ to civilians with the armed forces "in the field" in "time of war."[268] While this issue is collateral to the subject matter of this article, its timeliness compels a brief consideration of the problem.

The doubts are raised by the following language in the majority opinion:

> We have held in a series of decisions that court-martial jurisdiction *cannot be extended to reach any person not a member of the Armed Forces at the times of both the offense and the trial* . . . . Similarly, *neither civilian employees of the Armed Forces overseas*, . . . nor civilian dependents of military personnel accompanying them overseas, . . . may be tried by court-martial. [cases omitted]
>
> These cases decide that *courts-martial have no jurisdiction to try those who are not members of the Armed Forces, no matter how intimate the connection between their offense and the concerns of military discipline.*[269]

Thereafter in the opinion, the Court mentioned that "courts-martial have no jurisdiction over non-soldiers, whatever their offense . . . ."[270] Taken literally, this language would simply

266. The doctrine of res judicata does not bar habeas corpus. *See* C. WRIGHT, *supra* note 241, at 182.

267. Noyd v. Bond, 395 U.S. 683 (1969). One question not considered in this discussion, assuming that the exhaustion doctrine applies in the *O'Callahan* situation, is whether exhaustion is necessary where there are remedies which a petitioner might have pursued in the past, but which are no longer open to him. *See* Fay v. Noia, 372 U.S. 391 (1963). In both *Gusik* and *Noyd* the Court used the words "which, though available, has not been exhausted" and "presently available," in analogizing to the state-federal exhaustion requirement. This would indicate that the exhaustion doctrine would be applicable only where there are presently existing military remedies. In any event, it would appear that the exhaustion doctrine would be available against a petitioner who deliberately bypassed military remedies. *See* Fay v. Noia, 372 U.S. 391, 439 (1963).

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

269. 395 U.S. at 267 (emphasis added).

270. *Id.*

negate court-martial jurisdiction over civilians, no matter what the circumstances, whether during war or peace. If the Court incorporated this dictum in a future holding, it would seem that any attempt to exercise court-martial jurisdiction under Article 2, section 10 of the UCMJ would be doomed to failure. Such a result would dispose of serious threshold questions that previously have occupied scholars, such as whether, for these purposes, the Vietnam conflict is a "war"[271] and what is contemplated by the language "in the field."[272] If all court-martial jurisdiction over civilians is constitutionally impermissible, there is no need to fret about construction of the statute which purports to define such jurisdiction.

The cases relied upon by the *O'Callahan* majority to buttress its statement[273] clearly do not compel such an all-encompassing proposition. *Toth v. Quarles*[274] simply stands for the proposition that court-martial jurisdiction is unconstitutional as to persons, who, although subject to the UCMJ at the time of the commission of the offense, later cease to occupy that status. The other cases dealt not with Article 2, section 10, but with Article 2, section 11 of the UCMJ.[275] Moreover, although the cases invalidated military jurisdiction over civilians accompanying the military,[276] they were concerned with peacetime courts-martial;[277] the "urgency of wartime" as Chief Justice Warren pointed out elsewhere, was absent.[278] The cases did not purport to invalidate previous decisions upholding court-martial jurisdiction over civilians serving with or accompanying the

271. *See, e.g.*, Wiener, *Courts-Martial for Civilians Accompanying the Armed Forces in Vietnam*, 54 A.B.A.J. 24, 25-26 (1968) for a thoughtful analysis of the meaning of "in time of war." The Court's language could also render unnecessary much of the valuable analysis of that phrase in the context of Article 2, section 10 of the UCMJ found in Note, *"In Time of War" Under the Uniform Code of Military Justice: An Elusive Standard*, 67 MICH. L. REV. 841 (1969).

272. *See, e.g.*, W. AYCOCK & S. WURFEL, MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE 58 (1955).

273. McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960); Kinsella v. Singleton, 361 U.S. 234 (1960); Grisham v. Hagan, 361 U.S. 278 (1960); Reid v. Covert, 354 U.S. 1 (1957); Toth v. Quarles, 350 U.S. 11 (1955).

274. 350 U.S. 11 (1955).

275. UCMJ art. 2(11), 10 U.S.C. § 802(11) (1964).

276. *See* text accompanying notes 128-38 *supra*.

277. *See* Wiener, *supra* note 271; *The Supreme Court, 1959 Term*, 74 HARV. L. REV. 81, 116-17 (1960); Note, *supra* note 271, at 843; J. MOORE, FEDERAL PRACTICE, ¶ 0.5[3.-5] at 152-53 (1964).

278. Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. REV. 181, 195 (1962).

military in the field in time of war.[279] In fact, as one scholar has pointed out, "from the time of our nation's birth to the present, there has been little doubt that such persons are constitutionally amenable to military law."[280]

Nevertheless, less than four weeks after *O'Callahan*, the Court of Appeals for the District of Columbia quoted part of the *O'Callahan* dictum as partial justification for its decision in *Latney v. Ignatius*.[281] In that case, Latney was arrested by military police in Da Nang, South Vietnam, and was charged by the military with premeditated murder in a local bar. Both the accused and the victim were civilian American merchant seamen serving aboard an American-owned tanker under charter to the United States Navy. Latney was tried and convicted of murder as charged by a court-martial. A federal district court denied his request for habeas corpus, holding that section 10 was constitutional and that Latney was a person "serving with or accompanying an armed force in the field in time of war,"[282] and thus subject to jurisdiction under that section. The Court of Appeals for the District of Columbia reversed, relying to some extent on the *O'Callahan* dictum quoted above that "[C]ourts-martial have no jurisdiction to try those who are not members of the Armed Forces, no matter how intimate the connection between their offense and the concerns of military discipline."[283]

279. Note, *supra* note 271, at 843. For examples of such decisions, see Perlstein v. United States, 151 F.2d 167 (3d Cir. 1945), *cert. granted*, 327 U.S. 777, *cert. denied*, 328 U.S. 822 (1946); Hammond v. Squier, 51 F. Supp. 227 (D.D.C. 1943). In fact, the plurality opinion in Reid v. Covert, 354 U.S. 1 (1957) expressly approved the statement that *"a statute cannot be framed by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace." Id.* at 35.

280. J. MOORE, FEDERAL PRACTICE ¶ 0.5[3.-5] at 153 (2d ed. 1964).

281. 38 U.S.L.W. 2015 (1969).

282. *Id.*

283. *Id. See* text accompanying note 269 *supra*. At the time this article was written, a full text of the *Latney* opinion was unavailable. However, the court appears alternatively to have applied the *O'Callahan* "service-connected" test and found that Latney, a civilian, should not be tried by court-martial under section 10 because the crime was not "service-connected." There may be some merit to this reasoning because if a serviceman can be tried by the military only for "service-connected" offenses, then *a fortiori*, the same rule should apply to civilians. On the other hand, it would seem that if an accused is "in the field" "in time of war" within the meaning of section 10, the offense is "service-connected." *See* text accompanying notes 159-66 *supra*.

The section 10 issue is squarely presented in another very recent court-martial arising out of the Vietnam conflict. The defendant in that case was charged with involuntary manslaughter and assault with a dangerous weapon and was convicted by a general court-martial.

It may well be that the *O'Callahan* dictum was inadvertent and was not intended to invalidate section 10 in such summary fashion. Arguably, the statements were prefatory remarks to fortify the central conclusion that military status alone is not enough to assure court-martial jurisdiction. Yet it is apparent that at least the Court of Appeals for the District of Columbia finds some substance in the statement. In any event, the Supreme Court clearly should not feel bound by the dictum in future litigation over section 10, since it is almost axiomatic that a new constitutional principle is better established after a full consideration of the issues in the context of a fact situation fairly raising it.[284] But one cannot ignore the possibility that the Court's assertion adumbrates future restrictions on court-martial jurisdiction.

D. Effect on a Double Jeopardy Problem

O'Callahan will alleviate to some extent a double jeopardy problem inherent in the overlapping criminal jurisdictions of our federal system. Under the double jeopardy provision of the fifth amendment, the acquittal or conviction of an accused for an offense in a court deriving its jurisdiction from the United States bars a subsequent trial for the same offense in another court deriving its jurisdiction from the same source.[285] Since courts-martial and federal courts derive their power and jurisdiction from the federal government, a serviceman may not be

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The charges arose out of the death of one American soldier and the wounding of two others during a drinking spree. The defendant, a young civilian, was employed in Vietnam by a concern that repaired battle-damaged helicopters pursuant to a contract with the United States Government. At trial, the military judge accepted the argument of counsel for the Government that military jurisdiction under Article 2, section 10 of the UCMJ was constitutional. New York Times, April 17, 1969, at 5, col. 1.

284. Another situation possibly affected by the *O'Callahan* dictum but not considered here is whether a military commission or court-martial has jurisdiction to try civilians who are spies or who aid the enemy. The dictum would prohibit this if construed literally, but it seems unlikely that the Court intended to overrule *Ex parte* Quirin, 317 U.S. 1 (1942).

285. Grafton v. United States, 206 U.S. 333, 352 (1906). A consideration of what constitutes the "same offense" for double jeopardy purposes is beyond the scope of this article. For a discussion of this problem, see Fisher, *Double Jeopardy: Two Sovereignties and the Intruding Constitution*, 28 U. Chi. L. Rev. 591, 597, 604-05, 608-12 (1961). *See also In re* Nielsen, 131 U.S. 176 (1889). The UCMJ also contains a double jeopardy provision. UCMJ art. 44(a), 10 U.S.C. § 844 (a) (1964). For an interesting interpretation of what constitutes the "same offense" under the latter article, see Manual ¶ 215b at 29-2.

tried in both courts for the same offense.[286] Thus, if a serviceman commits an assault on a federal reservation where the federal government has exclusive jurisdiction, he would be subject to trial and conviction by either a federal court or a court-martial, but not by both.[287] On the other hand, where a serviceman's conduct constitutes an offense under both military and state law, an acquittal or conviction in either a state court or a court-martial generally does not bar a subsequent trial in the other.[288] This principle is based on the constitutional doctrine that state and federal courts derive their existence and jurisdiction from "separate sovereigns."[289] After *O'Callahan*, however, a serviceman who commits an offense which is not "service-connected" will be amenable only to civilian jurisdiction and thus the danger of being tried in both a military and state tribunal is eliminated.

VII. REFLECTIONS ON THE MAJORITY OPINION

A literal reading of clause 14 and the fifth amendment exception for cases arising in the land and naval forces suggests that Congress, not the Supreme Court, has the responsibility for placing limits on the jurisdiction of courts-martial to try members of the armed services. Since few would argue that the Court should decide cases without careful respect for the terms of the Constitution,[290] it follows that those who argue for a result that seems to be contrary to a fair reading of the language of

286. Grafton v. United States, 206 U.S. 333 (1906); Everett, *Persons Who Can Be Tried by Court-Martial*, 5 J. PUB. L. 148, 167; Merriam & Thornton, *Double Jeopardy and the Court-Martial*, 19 BROOK. L. REV. 62, 67-68 (1952); Duke & Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 VAND. L. REV. 435, 454 (1960).

287. Duke & Vogel, *supra* note 286, at 454.

288. *E.g.*, Coleman v. Tennessee, 97 U.S. 509, 513 (1878); *In re* Stubbs, 133 F. 1012 (C.C. Wash. 1905); Everett, *supra* note 286, at 166.

289. *See* Abbate v. United States, 359 U.S. 187 (1959); Bartkus v. United States, 359 U.S. 121 (1959); United States v. Lanza, 260 U.S. 377 (1922). Of course, where the offense was committed under color of office, the serviceman apparently has the right to have an action against him removed to the federal district court. 28 U.S.C. § 1442(a) (1964); *See* Duke & Vogel, *supra* note 286, at 454. Prior to the enactment of the above statute, lower federal courts upheld the right of an accused serviceman to be discharged from state custody where the offense was committed while carrying out a lawful military order. *See* Lima v. Lawler, 63 F. Supp. 446 (E.D. Va. 1945). *See also In re* Neagle, 135 U.S. 1 (1890).

290. *See* Girard, *The Constitution and Court-Martial of Civilians Accompanying the Armed Forces—A Preliminary Analysis*, 13 STAN. L. REV. 461, 477-78 (1961).

the Constitution have the burden of persuasion. One must concede, of course, that while the literal text of the Constitution imposes limits on the range of choice available to the Court, there is much room for judgment within those limits in most of the cases before the Court.[291] Even so, it is submitted that a fair reading of the textual provisions relevant in *O'Callahan* indicates that the majority had the burden of persuasion. Another persuasive reason for assuming that the majority had the burden of persuasion is the unchallenged dicta in several previous Supreme Court opinions which indicated that jurisdiction over servicemen was based upon status.

The chief reliance of the majority was on English and American constitutional history, and, as pointed out earlier, the historical data is at best inconclusive. Yet this alone does not totally refute the decision in *O'Callahan*. We are constantly reminded by constitutional scholars that one of the strengths of the Constitution is that it has the flexibility to provide answers to new problems which could not have been foreseen by its drafters.[292] As Justice Holmes once said, "The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."[293] Perhaps the majority could have made a case for a departure from precedent by a careful examination of competing interests in the light of present day realities. But in this crucial area the majority opinion was most deficient.

One of the most striking aspects of the majority opinion is the overbreadth exhibited in its treatment of the military justice system. An analysis of the military justice system is certainly pertinent in the context of the facts presented to the Court, but the majority's discussion of this subject can fairly be characterized as superficial and misleading. Although the majority grudgingly acknowledges some advances in the military legal system, its tone is consistently hostile and condescending. Courts-martial, according to the Court, "are singularly inept in dealing with the nice subtleties of constitutional law."[294] The opinion continues, "[A] civilian trial . . . is held in an atmosphere conducive to the protection of individual rights, while the military trial is marked by the age-old manifest destiny of retribu-

291. *Id.* at 478.
292. *Id.* at 479-80; Hamilton, *The Constitution—Apropos of Crosskey*, 21 U. CHI. L. REV. 79 (1953).
293. Missouri v. Holland, 252 U.S. 416, 433 (1920).
294. 395 U.S. at 265.

tive justice."[295] It is probably true that retribution is one aspect of military justice. On the other hand, the majority's implicit assumption that this infirmity is not shared by the civilian criminal law system is hardly realistic.[296] Moreover, such generalizations tend to obscure the rehabilitative and deterrent functions served by the military justice system.[297] Rather than advancing meaningful analysis, these "sweeping dogmatic statements"[298] serve to obfuscate the more crucial problems raised by *O'Callahan.*

An interesting contrast to the majority's largely negative views on military justice is the statement of then Court of Appeals Judge Warren E. Burger in a dissenting opinion in *United States ex rel. Guagliardo v. McElroy,*[299] where he referred to the "universal recognition of the UCMJ as the most enlightened military code in history and as [one] affording the basic elements of fairness."[300] However one may view Chief Justice Burger's assessment of the UCMJ, the majority's conclusions seem considerably less than fair. To be sure, weaknesses still persist in the military justice system.[301] Command influence, for example, continues to be a problem.[302] At least at the general court-martial level, however, the military accused enjoys procedural rights roughly comparable, if not superior, to those enjoyed by a civilian defendant in a federal criminal court.[303]

Since the majority opinion emphasizes the value of the right to grand jury indictment in the civilian courts, it is interesting to examine comparable rights that are afforded members of the armed services. Article 32 of the UCMJ affords the accused in general courts-martial an investigation[304] analogous to the pre-

295. *Id.* at 266.

296. *See, e.g.,* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 36-38 (1968); Hart, *The Aims of the Criminal Law,* 23 LAW & CONTEMP. PROB. 401 (1959).

297. *See, e.g.,* Herrod, *The United States Disciplinary Barracks System,* 8 MIL. L. REV. 35 (1960).

298. Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case,* 71 HARV. L. REV. 1, 3 (1957).

299. 259 F.2d 927 (D.C. Cir. 1958).

300. *Id.* at 940 n.29. Then Chief Justice Warren had a more reserved but, nevertheless, favorable opinion of the UCMJ. *See* Warren, *The Bill of Rights and the Military,* 37 N.Y.U.L. REV. 181, 188-89 (1962).

301. *See* Quinn, *Some Comparisons Between Courts-Martial and Civilian Practice,* 15 U.C.L.A.L. REV. 1240, 1258 (1968).

302. *See, e.g.,* Johnson, *Unlawful Command Influence: A Question of Balance,* 19 JAG J. 87 (1965).

303. Quinn, *supra* note 301, at 1242-43.

304. UCMJ art. 32, 10 U.S.C. § 832 (1964).

liminary hearing and grand jury indictment in civilian courts.[305] The investigating officer is required to call all available witnesses and to conduct a thorough and impartial investigation.[306] The accused is given a full opportunity to cross-examine witnesses against him and to present any evidence in his own behalf.[307] He is entitled to obtain before trial, as a matter of course, the substance of expected testimony of every witness against him and information on every item of evidence in the possession of the prosecution which may be used against him.[308] These requirements arguably provide the accused substantially greater pretrial discovery than federal rules provide a civilian defendant.[309] Although the civilian accused is entitled to cross-examine and call witnesses at a preliminary hearing, the primary purpose is to determine whether there is sufficient evidence to justify holding the defendant for a grand jury.[310] Moreover, it is doubtful that the preliminary hearing provided for under the Federal Rules of Criminal Procedure was intended to afford any substantial discovery rights to a defendant.[311] In addition, unlike an Article 32 investigation, the grand jury may indict without affording the accused knowledge of the proceeding or permitting him either to cross-examine witnesses against him or to call witnesses in his favor.[312] Finally, in many states the prosecution bypasses the indictment and proceeds by information. Failure to comply with Article 32, however, is grounds for reversal.[313]

Not only does the UCMJ recognize in statutory form many rights guaranteed to civilians through constitutional provisions, but the United States Court of Military Appeals has expanded the statutory protections by its own application of constitutional principles to courts-martial. For example, that court

305. Bellen, *The Revolution in Military Law*, 54 A.B.A.J. 1194, 1195 (1968). *Compare* UCMJ arts. 30-34, 10 U.S.C. §§ 830-34 (1964) *with* FED. R. CRIM. P. 3-9.

306. MANUAL ¶ 34a at 7-9.

307. *Id.* ¶ 34d at 7-11.

308. Quinn, *supra* note 301, at 1242.

309. Bellen, *supra* note 305, at 1195. *See also* Barber v. United States, 142 F.2d 805 (4th Cir. 1944).

310. Bellen, *supra* note 305, at 1195.

311. *Id.*

312. *See* FED. R. CRIM. P. 6d; Bellen, *supra* note 305, at 1196.

313. United States v. Nichols, 8 U.S.C.M.A. 119 (1957). One weakness with the Article 32 investigation is that the convening authority apparently need not accept the recommendation of the investigating officer. *See* MANUAL ¶ 35a at 7-12.

has extended to servicemen the right to a speedy trial,[314] the right to confront witnesses,[315] the right of protection against unreasonable searches and seizures,[316] the right to compulsory process,[317] the privilege against self-incrimination[318] and the right to a public trial.[319] Not only has the Court of Military Appeals adopted *Miranda v. Arizona*,[320] which requires that the accused be advised of his right to counsel during custodial interrogation; the military has taken *Miranda* a step further by making appointed counsel available to every serviceman at the custodial interrogation stage without regard to whether he is an indigent.[321] In fact, the impact of *Miranda* on the military has been less pronounced and less disruptive than on civilian law enforcement agencies because the military had been accustomed to advising a suspect of his right to remain silent.[322]

O'Callahan, ironically, comes at a time when Congress has been active in expanding and refining the rights of the accused under the UCMJ. Thus, one of the usual justifications for judicial activism, the failure of the legislative branch to meet compelling needs,[323] hardly seems applicable. The Military Justice Act of 1968,[324] the most sweeping change in the UCMJ since its enactment in 1950, makes military judges of general courts-martial part of an independent judiciary, free from the potential influence of local commanders,[325] and grants the accused in a general court-martial the option in all noncapital cases to be tried by a military judge alone, if the military judge approves.[326] The prosecution has no power to veto the accused's request as

314. United States v. Schalck, 14 U.S.C.M.A. 371, 34 C.M.R. 151 (1964).
315. United States v. Jacoby, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960).
316. United States v. Vierra, 14 U.S.C.M.A. 48, 33 C.M.R. 260 (1963).
317. United States v. Sweeney, 14 U.S.C.M.A. 599, 34 C.M.R. 379 (1964).
318. United States v. Kemp, 13 U.S.C.M.A. 89, 32 C.M.R. 89 (1962).
319. United States v. Brown, 7 U.S.C.M.A. 251, 22 C.M.R. 41 (1956).
320. 384 U.S. 436 (1966). This was accomplished in United States v. Tempia, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).
321. *See* Bellen, *supra* note 305, at 1195.
322. UCMJ art. 31, 10 U.S.C. § 831 (1964); *see* United States v. Wilson, 2 U.S.C.M.A. 248, 8 C.M.R. 48 (1953); Quinn, *supra* note 301, at 1243.
323. *See, e.g.*, Auerbach, *The Reapportionment Cases: One Person, One Vote, One Value*, 1964 SUP. CT. REV. 1, 70.
324. 82 Stat. 1335 (1968).
325. 1 U.S. CODE, CONG. & AD. NEWS 1563 (1968).
326. *Id.* at 1561.

it has in civilian practice.[327] The military judge is also given the power to rule finally on challenges on all questions of law other than the issue of mental responsibility.[328] The 1968 Act extends to defendants in special courts-martial the right, previously available only in general courts-martial, to have legally qualified counsel appointed without a determination of indigency.[329] An accused in a special court-martial must now be provided with legally qualified counsel unless such counsel cannot be obtained because of "physical conditions or military exigencies."[330] In contrast, few states and federal circuits require the appointment of counsel where the punishment is six months' confinement or less.[331] Finally, the 1968 Act gives the accused the right to refuse trial by summary court-martial—the equivalent of a civilian magistrate court[332]—and instead request a special court-martial. Thus, the chances are strong that an accused will be represented by a lawyer without cost every time he is faced with the possibility of punishment, however minor.[333]

Before overturning long standing jurisdictional standards, it also would have been appropriate for the Court to analyze and compare the governmental interests served by the existing standard and the individual and governmental interests that would be served by change. The opinion made no effort to do this.[334] Nowhere does Justice Douglas allude to the fact that the United States has a substantial interest in preserving a high degree of discipline, integrity, reputation and morale in the armed forces. The fact that military offenders may be removed from their stations renders military efficiency and operating

327. Mounts & Sugarman, *The Military Justice Act of 1968*, 55 A.B. A.J. 470, 471 (1969).

328. 1 U.S. CODE, CONG. & AD. NEWS 1567 (1968).

329. UCMJ art. 27, 10 U.S.C. § 827 (1964).

330. 1 U.S. CODE, CONG. & AD. NEWS 1563 (1968). The exception is narrowly limited to "rare circumstances such as on an isolated ship on the high seas or in a unit in an inaccessible area, provided compelling reasons exist why trial must be held at that time and at that place." MANUAL ¶ 6c at 3-4-3-5.

331. Mounts & Sugarman, *supra* note 327, at 471-72.

332. 1 U.S. CODE, CONG. & AD. NEWS 1562 (1968).

333. The 1968 Act also substantially affects many other areas, such as the right to bail pending appellate review, use of military judges in special courts-martial and various aspects of appellate procedure. *See generally* Mounts & Sugarman, *supra* note 327.

334. It is difficult to ascertain when the Court will "weigh" or "balance" governmental interests where there is a conflict between those interests and an individual's exercise of arguably constitutional rights. *Compare* United States v. Robel, 389 U.S. 258 (1967), *with* United States v. O'Brien, 391 U.S. 367 (1968).

capability highly sensitive to the incidence of crime. When a serviceman is detained by civilian authorities pending trial, or is subsequently imprisoned, he is useless to his military unit. On the other hand, as Justice Harlan pointed out, a serviceman awaiting a court-martial may simply be restricted to limits, and may participate in the military activity of his unit. Moreover, although military reputation is in large measure an intangible concept, a rape or murder by a serviceman in a civilian community probably damages the reputation of the armed forces in that community to a greater degree than would a similar crime committed within the confines of a military reservation. In addition, the majority opinion fails to take into account the interest of the military in the rehabilitation of offenders. Military confinement facilities such as the Disciplinary Barracks at Fort Leavenworth, Kansas, operate retaining programs designed to return offenders to honorable military service.[335] To the extent, however, that under the *O'Callahan* test the offense is not "service-connected," the accused may well be confined in a civilian prison, where the rehabilitation program, if any, would not be concerned with retraining for military purposes.

It should be pointed out that state authorities have the power to try a military offender for violation of local laws notwithstanding the military disposition of the case.[336] To the extent, then, that civilian authorities would choose to take jurisdiction, the above arguments have less merit. As a practical matter, however, civil authorities frequently waive jurisdiction where the military desires to retain the accused in the military community.[337]

The majority opinion fails to mention the fact that Congress has quite recently reviewed the problem of court-martial jurisdiction over "civilian" offenses. In 1962, the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary considered the question of such jurisdiction and concluded that:

> The subcommittee does not favor an outright prohibition of the trial of civil offenses by court-martial, even if the prohibition were to relate only to offenses committed in the United States during peacetime. Such a prohibition would be difficult to administer, might in some instances act to the detriment of the serviceman, and would place an undue burden on military authorities in the performance of their duty to maintain discipline.[338]

335. *See* Herrod, *supra* note 297.
336. *See* text accompanying notes 288-89 *supra.*
337. Brief for Respondent at 28, O'Callahan v. Parker, 395 U.S. 258 (1969).
338. *Summary Report of Hearings by Subcomm. on Constitutional*

The subcommittee points out that court-martial jurisdiction may very well act to the benefit of the serviceman. For example, servicemen are separated to a significant extent from the local civilian community. Indeed, the Supreme Court has recognized that "[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian."[339] Not infrequently civilian communities may harbor racial or ethnic bias against members of the military stationed nearby.[340] For example, a black serviceman stationed at a post located in the southern part of the United States may very well prefer to be tried by court-martial for the robbery of a white civilian merchant than to be subjected to a local jury of his "peers."

Considered as a whole, the majority opinion is persuasive only to those who were already persuaded. Faced with a problem involving many complex variables and requiring the delicate balancing of competing interests, the Court responds with dogmatic assertions about military justice. Faced with the responsibility of articulating a standard to guide those who must live with the *O'Callahan* decision, the Court responds with a two word test that only hints at the complex factors that will have to be considered in deciding whether courts-martial have jurisdiction to try particular cases.

Criticism of *O'Callahan* as a constitutional decision should not be interpreted as acquiescence to the notion that the military should try a serviceman for all offenses simply because of his status as a member of the military. It reflects instead a belief that the scope of court-martial jurisdiction over servicemen should be defined by Congress rather than the Court. For example, O'Callahan's counsel claimed in oral argument that the military had tried a serviceman by court-martial for income tax evasion.[341] Mention was also made that courts-martial could be used to prosecute servicemen for violation of the anti-trust laws.[342] At best, such offenses have only a remote effect on the military. Although there is little actual evidence that the military is using courts-martial in such areas, it may well be that Congress should by statute prohibit the exercise of jurisdiction with respect to these and perhaps other specific offenses. In

Rights of the Comm. on the Judiciary, Constitutional Rights of Military Personnel, 88th Cong., 1st Sess. 27-26 (Comm. Print 1963).

339. Orloff v. Willoughby, 345 U.S. 83, 94 (1953).

340. Brief for Respondent at 31, O'Callahan v. Parker, 395 U.S. 258 (1969).

341. 37 U.S.L.W. 3269 (1969) (summary of oral argument).

342. *Id.*

any event, periodic review of the problem by Congress would be appropriate.

VIII. CONCLUSION

One's first reaction upon reading *O'Callahan* is to assume that it is both desirable and logical to limit court-martial jurisdiction to "service-connected" offenses. Yet when the decision is examined in light of the realities of the military justice system, there is good reason to conclude that *O'Callahan* may cause serious problems without really advancing governmental or individual interests. In any event, the opinion is seriously inadequate both in terms of explaining the reason for the decision and in providing guidance for those who must operate under the "service-connected" test.

Several important issues will need to be resolved by the Supreme Court in future cases. Absent a retreat from *O'Callahan* by the Burger Court, some clarification of the words "service-connected" will be necessary, and it is submitted that only a multi-factor approach will prove adequate to deal with the numerous fact situations that will arise. It will be necessary to resolve the issue of retroactivity, and a persuasive case can be made for not applying *O'Callahan* retroactively. There is much justification for the creation of a "petty offense" exception to the "service connected" test. Finally, in order to ensure the orderly working of the military appellate system, the exhaustion of remedies requirement in habeas corpus cases should be established as an adjunct to the *O'Callahan* principle.

EPILOGUE

Three decisions by the United States Court of Military Appeals involving the application of *O'Callahan* were handed down after the completion of this article. In *United States v. Borys*[343] the court reversed a court-martial conviction for rape, robbery, sodomy, and attempts to commit such acts because the offenses were civil in nature, occurred during the accused's off-duty hours or when he was on leave, involved civilian victims, and were committed while the accused was wearing civilian clothing and driving his own private automobile. In *United States v. Prather*[344] the court reversed a conviction for wrongful appropriation of an automobile, robbing a gasoline station, and resisting

343. United States v. Borys, No. 21,501 (U.S.C.M.A. Sept. 5, 1969).
344. United States v. Prather, No. 21,603 (U.S.C.M.A. Sept. 5, 1969).

arrest. The court found there was no service-connection since the civil courts were open, the offenses did not occur on a military post or an armed camp under military control, and did not breach military security, flout military authority, or affect military property. The court held in *United States v. Beeker*,[345] *inter alia*, that possession of marijuana on a military installation and use of marijuana either on or off a military installation were service-connected because "the use of these substances has 'disastrous effects . . . on the health, morale and fitness for duty of persons in the armed forces'."[346]

There was no discussion in any of the opinions of the issue of retroactivity. Yet the application of *O'Callahan* without discussion of the issue of retroactivity is not a reliable guide to the court's views on this issue since the three cases had not been finally adjudicated prior to the decision in *O'Callahan*. Although the Supreme Court held in *Linkletter v. Walker*[347] that *Mapp v. Ohio*[348] was not applicable to state court convictions which had become final before rendition of *Mapp*, *Mapp* was applied to cases still pending on direct review at the time it was handed down. It would appear, therefore, that the question of retroactivity of *O'Callahan* is still open in the United States Court of Military Appeals.

One final point is worthy of note. Chief Judge Quinn dissented in both *United States v. Borys*[349] and *United States v. Prather*.[350] One reason for his dissents was his assertion that the jurisdictional limitations imposed by *O'Callahan* were not applicable unless the offense in question was triable in a federal court. He argued that a successful jurisdictional attack under *O'Callahan* must show not only that the crime is not service connected, but also that a federal law makes the offense cognizable in a federal civilian court. The pressures of time and space do not permit a discussion of Chief Judge Quinn's lengthy defense of this assertion. Suffice it to say that he was speaking in dissent and that his construction of *O'Callahan* was rejected by the other members of the court.

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345. United States v. Beeker, No. 21,787 (U.S.C.M.A. Sept. 12, 1969).
346. Quoting from United States v. Williams, 8 U.S.C.M.A. 325, at 327, 24 C.M.R. 135 (1957).
347. 381 U.S. 618 (1965).
348. 367 U.S. 643 (1961).
349. United States v. Borys, No. 21,501 (U.S.C.M.A. Sept. 5, 1969).
350. United States v. Prather, No. 21,603 (U.S.C.M.A. Sept. 5, 1969).