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Constitutional Law—The Serviceman's Right to a Civilian Trial for a Non-Service Connected Crime

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CONSTITUTIONAL LAW—THE SERVICEMAN'S RIGHT TO A CIVILIAN TRIAL FOR A NON-SERVICE CONNECTED CRIME

Petitioner was a sergeant in the United States Army, stationed in Hawaii. One evening, on a pass, and in civilian clothes, he broke into a hotel room, assaulted and attempted to rape the occupant and fled. A security guard apprehended him and turned him over to the city police, who, upon learning of his military status, turned him over to the military authorities. He was charged with attempted rape, housebreaking, and assault with intent to rape, in violation of Articles 80, 130, and 134 respectively of the Uniform Code of Military Justice.[1] Petitioner was convicted on all counts by a court-martial and sentenced to ten years imprisonment at hard labor, forfeiture of all pay and allowances, and a dishonorable discharge. The conviction was affirmed by the Army Board of Review and the United States Court of Military Appeals. While in prison, petitioner filed for a writ of *habeas corpus* in the United States District Court alleging that the court-martial was without jurisdiction to try him for non-military offenses committed off-base and off-duty. The district court denied petitioner relief without considering the issue on the merits and the Third Circuit Court of Appeals affirmed.[2] The Supreme Court granted certiorari[3] and per Mr. Justice Douglas, *held*, that a court-martial's exercise of jurisdiction over a nonservice connected crime is violative of the fifth and sixth amendments of the Constitution and contrary to the history of military jurisdiction. Therefore, petitioner was entitled to a trial by a civilian court. *O'Callahan v. Parker*, 395 U.S. 258 (1969).

The judicial system of the Armed Forces is provided for in the Uniform Code of Military Justice.[4] Some basic and necessary differences exist between the military and civilian judicial systems. The two systems developed and

1. Article 80 of the Uniform Code of Military Justice, 10 U.S.C. § 880 (1964) [hereinafter cited as U.C.M.J.] provides:

> (a) An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing to effect its commission, is an attempt to commit that offense.
> (b) Any person subject to this chapter who attempts to commit any offense punishable by this chapter shall be punished as a court-martial may direct, unless otherwise specifically prescribed.

Article 130 (10 U.S.C. Sec. 930) provides:

> Any person subject to this chapter who unlawfully enters the building or structure of another with intent to commit a criminal offense therein is guilty of housebreaking and shall be punished as a court-martial may direct.

Article 134 (10 U.S.C. Sec. 934) provides:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

2. O'Callahan v. Parker, 390 F.2d 360 (3d Cir. 1968).
3. O'Callahan v. Parker, 393 U.S. 822 (1969).
4. 10 U.S.C. §§ 801-935 (1964).

exist separately. In *Burns v. Wilson*[5] the Court, in recognizing these differences said that:

> Military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment. This Court has played no role in its development; we have exerted no supervisory power over the courts which enforce it; the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress.[6]

When discussing the problem of court-martial jurisdiction, one must keep in mind that the primary function of a military is fighting. As the Court stated in *United States, ex rel. Toth v. Quarles:*[7]

> To the extent that those responsible for the performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served. . . . [I]t still remains true that military tribunals have not been and probably never can be constituted in such a way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts.[8]

Moreover, there is a great difference between trial-by-jury and trial by selected members of the military forces. As stated in *Reid v. Covert,*[9] a court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved. The Court has recognized[10] that free countries throughout the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service. Article III, Sec. 2 of the Constitution says "The trial of all crimes except in cases of impeachment shall be by jury. . . ." In *Ex parte Quirin*[11] the Court said "[t]he object [of Art. III, Sec. 2] was to preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law and in all cases of a like nature . . . in the future."[12] The early American practice of Military Law was derived from the laws of England. The English Bill of Rights of 1689 established that Parliament would have the power to define the jurisdictional limits of courts-

5. 346 U.S. 137 (1953).
6. *Id.* at 140.
7. 350 U.S. 11 (1955).
8. *Id.* at 17, 18.
9. 354 U.S. 1 (1957).
10. Burns v. Wilson, 346 U.S. 137 (1953).
11. 317 U.S. 1 (1942).
12. *Id.* at 39; *see also* Patton v. United States, 281 U.S. 276, 289 (1930); *Ex parte* Grossman, 267 U.S. 87, 108-09 (1925); Callan v. Wilson, 127 U.S. 540, 548 (1888); Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866).

martial.[13] Originally, court-martial jurisdiction was narrowly confined to certain military offenses. The American Articles of War of 1776 established this jurisdiction following the pattern of English law in the area. Nowhere in the Articles, or its re-enactment in 1789, or its revision in 1806, was jurisdiction asserted over non-military crimes or over crimes committed off-post by off-duty members of the military. Article I, Sec. X of the 1776 Articles provided that:

> Whenever any officer or soldier shall be accused of a capital crime, or of having used violence, or committed any offense against the persons or property of the people of the United States, such as is punishable by the known laws of the land, the commanding officer and the officers of every regiment, troop, or party, to which the person(s) so accused shall belong are hereby required, upon application duly made by or on behalf of, the party or parties injured to use his utmost endeavors to deliver over such accused person(s) to the civil magistrate and likewise to be aiding or assisting to the officers of justice in apprehending and securing the person(s) so accused, in order to bring them to trial. . . .

The model for the 1776 Articles, the British Articles of War, had contained a similar provision to compel military compliance with the Constitutional principle that all civil offenses committed by servicemen shall be tried by civilian courts.[14] The court-martial jurisdiction over civilian crimes committed in peacetime was provided for by the revised Articles of War of 1916.[15] These provided for jurisdiction over all offenses committed by members of the Armed Forces even in time of peace, except that jurisdiction over capital crimes (such as rape and murder) was limited to wartime.[16] This continued the principle that in wartime, any offense committed by a soldier is cognizable by a court-martial. Military courts do not have exclusive jurisdiction over members of the military, even in wartime, for violations of state laws.[17] However, in *Caldwell v. Parker*,[18] the Court conceded that Congress may provide that as the mere result of a declaration of war, state authority over offenses committed by persons in service shall be completely destroyed. The Court further said that the hostility of the

13. W. & M. C. 2.
14. WINTHROP, MILITARY LAW AND PRECEDENTS 1446 (2d Ed. 1920).
15. Articles of War of 1916, 39 U.S. Stat. 650.
16. Article 93, Articles of War of 1916, 39 U.S. Stat. 650, 664:
Any person subject to military law who commits manslaughter, mayhem, arson, burglary, robbery, larceny, embezzlement, perjury, assault with intent to commit any felony, or assault with intent to do bodily harm, shall be punished as a court-martial may direct.
Article 92, Articles of War of 1916, 39 U.S. Stat. 650, 664:
Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may direct; but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.
17. Caldwell v. Parker, 252 U.S. 376 (1920).
18. *Id.*

American people to military interference with the regular administration of justice in the civil courts requires that such intention should not be ascribed to Congress in the absence of clear and direct language to that effect. The Articles of War provide that civil courts are to have concurrent jurisdiction with respect to violations of federal or state laws committed within the geographical limits of the United States. In time of war, however, the Articles give the military preference in the exercise of this jurisdiction.[19]

The Court saw a constitutional problem presented in *O'Callahan*, that is, whether Congress can authorize courts-martial to decide, in peacetime, cases dealing with capital or non-capital crimes committed by servicemen within the United States, when the nature of the alleged crime is "civil" in that it fails to have any substantial adverse effect upon the military. The provisions of the 1776 Articles of War concerning the limitations on peace-time jurisdiction of courts-martial over civil offenses were repeated in the Articles of War of 1806.[20] However, these limitations have slowly disappeared. In 1863, during the Civil War, Congress authorized that courts-martial would have jurisdiction over various civil crimes, regardless of whether or not the order and discipline of the military was affected. This authorization, however, extended the jurisdiction of courts-martial only in time of war. The Articles of War of 1874 incorporated the 1863 law.[21] The 1806 Articles concerning the delivery of military offenders to civil authorities were made inapplicable in time of war to conform to this.[22] The 1916 Articles of War, passed during World War I, extended the jurisdiction of courts-martial to specific non-capital civil offenses, regardless of whether the acts took place in time of war or not.[23] These Articles also provided that the capital crimes of rape and murder, if committed outside the United States, could be tried by a court-martial during peacetime.[24] Prior to this, a court-martial had no peacetime jurisdiction over any capital civil offense. The remaining limitation of court-martial jurisdiction, the jurisdiction over capital crimes (murder and rape) committed within the United States during peacetime, was removed by the adoption of the Uniform Code of Military Justice of 1950.[25] With respect to the concurrent jurisdiction of both military and civilian courts, the working rule became whoever apprehended the accused first could try him. Recently, however, the trend of Supreme Court decisions has been to refuse to allow the enlargement of peacetime jurisdiction of courts-martial. In *United States, ex rel. Toth v. Quarles*[26] the Supreme Court struck down an attempt by the Air Force to court-

19. Ex parte King, 246 F. 868 (1917).
20. Articles of War of 1806, Article I, Sec. X.
21. Rev. Stat. Art. 58, § 1342 (1874).
22. Rev. Stat. Art. 59, § 1342 (1874).
23. Article 93, Articles of War of 1916, 39 U.S. Stat. 664.
24. Article 92, Articles of War of 1916, 39 U.S. Stat. 664.
25. U.C.M.J. Arts. 118, 120, 10 U.S.C. §§ 918, 920 (1964).
26. 350 U.S. 11 (1955).

martial a former member who had been discharged prior to his arrest by military authorities. In *Reid v. Covert*[27] the Court said that there is no jurisdiction for a court-martial to try civilian dependents of servicemen for capital crimes committed in time of peace, outside the borders of the United States. In each of the above cases, the Court held the exercise of jurisdiction violative of the sixth amendment. In a series of cases in 1960, the Court held that in a non-capital offense committed by civilian dependents of a serviceman[28] and in either capital or non-capital crimes committed by civilian employees of the Armed Forces[29] a court-martial is without jurisdiction to try the offenders. Relying on the principles of the sixth amendment, the Court held that a court-martial cannot exercise jurisdiction over an individual who does not possess a "status" as a member of the Armed Forces. These decisions can be viewed as an extension of the doctrine first espoused in *Ex parte Milligan*[30] in which it was held that a military commission is without jurisdiction under martial law to try a civilian resident for offenses in the nature of treason. In *Duncan v. Kahanamoku*[31] the Court held that the trial of civilians by the military in Hawaii could not be upheld under an executive proclamation of martial law. In both these cases, the Court said that the alleged crimes could have been tried in accordance with civil procedures in the civilian courts. In the 1960 group of cases, courts-martial were the only means provided by Congress for the crimes involved therein.[32]

Thus, the decision in the instant case is another in a line of recent Supreme Court decisions limiting the jurisdiction of courts-martial to what was intended by the Articles of War of 1776 and by the Constitutional Convention of 1776. It reflects a growing trend of disenchantment with military justice. The Court undoubtedly had these thoughts in mind in deciding this case. The Court said:

> 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. Thus discharged soldiers cannot be court-martialed for offenses committed while in service. *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955). Similarly, neither civilian employees of the Armed Forces overseas, *McElroy v. Guagliardo*, 361 U.S. 281 (1960); *Grisham v. Hagan*, 361 U.S. 278 (1960); nor civilian dependents of military personnel accompanying them overseas, *Kinsella v. Singleton*, 361 U.S. 234 (1960); *Reid v. Covert*, 354 U.S. 1 (1957), may be tried by court-martial.

27. 354 U.S. 1 (1957).
28. Kinsella v. United States, *ex rel.* Singleton, 361 U.S. 234 (1960).
29. McElroy v. United States, *ex rel.* Guagliardo, 361 U.S. 281 (1960); Grisham v. Hagan, 361 U.S. 278 (1960).
30. 71 U.S. (4 Wall.) 2 (1866).
31. 327 U.S. 304 (1946).
32. Congress may constitutionally provide, however, that such persons be tried in federal district court. Skiriotes v. Florida, 313 U.S. 69, 73-74 (1941).

> 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.[33]

The Court, moreover, noted that even if courts-martial lack jurisdiction over civilians, this does not imply that they have unlimited jurisdiction over soldiers, regardless of the nature of the offense charged. Thus the rationale of the cases decided in 1960, based on the concept of "status," is being discarded by the instant case. The Court, in answering the Government's contention on this point, said that even though status is a necessary element for jurisdiction, there are other factors which must be taken into account, among them, the nature, time, and place of the offense.[34] The Court traced the historical evolution of court-martial jurisdiction both in England and the United States. It concluded that for a crime to fall within military jurisdiction, it must be *"service-connected,* lest 'cases arising in the land and naval forces or in the militia, when in actual service in time of war or public danger,' 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."[35] As the Court pointed out, the facts of the instant case reflect absolutely no connection between the military duties of the petitioner and the crimes involved.[36] The restrictions placed on the jurisdiction of courts-martial were so erected to protect the rights of the individual. Even though the Court of Military Appeals takes cognizance of some constitutional rights of the accused, courts-martial as an institution are inept to deal with the subleties of constitutional law. Mr. Justice Harlan, joined by Justices Stewart and White, dissented:

> The Court has grasped for itself the making of a determination which the Constitution has placed in the hands of the Congress, and in so doing the Court has thrown the law in this realm into a demoralizing state of uncertainty.[37]

The dissent clings to the idea of "status" as determinative of court-martial jurisdiction. In discussing Article I, Sec. 8 of the Constitution, which gives Congress the power to "make rules for the government and regulation of the land and naval forces . . . ," the dissent says:

> [T]his Court has consistently asserted that military "status" is a necessary *and sufficient* condition for the exercise of court-martial jurisdiction. The Court has never previously questioned what the language of Clause 14 (Article I, Sec. 8) would seem to make plain—that, given the requisite military status, it is for Congress

33. Instant case at 267.
34. *Id.*
35. U.S. CONST. amend. V.
36. Instant case at 272, 273.
37. *Id.* at 275.

> and not the Judiciary to determine the appropriate subject-matter jurisdiction of courts-martial.[38]

The dissent traces the same historical evolution as the majority but reaches the opposite conclusion. It relies on a theory of a "balancing of interests"[39] and determines that there are in existence, strong governmental interests that support the exercise of court-martial jurisdiction over non-military crimes. "The United States has a vital interest in creating and maintaining an armed force of honest, upright, and well-disciplined persons, and in preserving the reputation, morale, and integrity of the military services."[40] The dissent then points out that misconduct by a soldier against a civilian will bring discredit upon the service with which he is associated.[41] It also states that whatever role an ad hoc judicial approach may have in some areas of the law, the Congress and the military are at least entitled to know with some certainty the allowable scope of court-martial jurisdiction. Otherwise, the infinite permutations of possibly relevant facts are bound to create confusion and proliferate litigation over the jurisdictional issue in each instance. The dissenters are of the opinion that nothing in the language of the Constitution justifies the uneasy state of affairs that the majority has created.[42]

The majority decision appears to be the right one, the one that appeals to the layman, and the one that most effectively carries out the intent of the Constitution. Article I, Sec. 8 of the Constitution gives Congress the power to make *rules*, not to *define* military crimes and *punish*. Furthermore, the rules must be for the government and regulation of the armed forces. The fair import of this section is, therefore, not to authorize general criminal jurisdiction over servicemen, but to make rules proscribing punishment for offenses having a relationship with the armed forces.[43] This conforms with the evolution of courts-martial in England and is consistent with the Articles of War that were in effect in the United States until 1863.[44] It does not appear reasonable that the petitioner's crime could be construed to have a substantial bearing on the maintenance of good order or military discipline. Perhaps an underlying reason for the Court's decision centered around the locale of the case, *i.e.* Hawaii. During World War II, the military claimed that the whole of the Hawaiian Islands was a battle area thus giving the military jurisdiction over civilians on the Islands. In *Duncan v. Kahanamoku*[45] this issue was raised. The Court however, rejected this contention in restricting the areas to the military posts and the immediate adjoining areas.

38. *Id.*
39. *Id.* at 281.
40. *Id.*
41. *Id.* at 282.
42. *Id.* at 284.
43. Duke and Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 VAND. L. REV. 435, 455-456 (1960).
44. *Id.*
45. 327 U.S. 304 (1946).

But the military was plentiful in Hawaii, and, primarily to ease the strain on local police forces, military personnel arrested for civilian crimes were usually turned over to the military authorities. This custom continued after the War until the present day. Hence, there exists a possibility that if this case occurred on the continental United States, it would never have arisen since the civilian courts would have exercised immediate jurisdiction over the accused. The potential consequences of the decision are staggering. Possibly as many as 500,000 courts-martial convictions could be affected, and it could change the military's control over its personnel while they are off-base.[46] It should be noted that the Court did not define the term "service-connected;" accordingly, the decision will be subject to varying interpretations, ranging from all crimes committed off-base, including crimes routinely handled by the military, such as drunkenness, to crimes with almost identical circumstances as the instant case.[47] Also of interest is whether or not the decision will be applied retroactively. It remains for the future and for the second wave of cases to reach the courts for these questions to be answered and to see what direction the lower courts will take in their interpretation of *O'Callahan*. Probably, as a matter of practicality and administrative feasibility, the courts will narrowly interpret *O'Callahan* to avoid being swamped with future cases.

BRUCE R. FENWICK

CONSTITUTIONAL LAW—WARRANTLESS SEARCH INCIDENT TO A LAWFUL ARREST MUST BE LIMITED TO AREA WITHIN SUSPECT'S CONTROL

Police officers went to the home of defendant, Chimel, with a warrant for his arrest for burglarizing a coin shop. No search warrant had been issued. The officers waited for his return and presented him with the arrest warrant. Notwithstanding Chimel's objection, the officers searched his house. During the search, under the direction of the police officers, Chimel's wife opened drawers and moved the contents thereof so that the officers might view any items that might have been taken during the burglary. The search included Chimel's three-bedroom home, as well as his attic, garage and small workshop. After the search, which lasted for more than forty-five minutes, the officers seized coins, medals and tokens which were found in Chimel's home. At petitioner's subsequent trial on two counts of burglary, the items taken from his house were admitted into evidence against him over his objection that they had been unconstitutionally seized, and he was convicted. The judgment of conviction was affirmed by both the California District Court of Appeals[1] and the California Supreme Court.[2]

46. *See* The National Observer, Sept. 22, 1969, at p. 2, col. 4.
47. *Id.*

1. 61 Cal. Rptr. 714 (1967).
2. 68 Cal. 2d 436, 67 Cal. Rptr. 421, 439 P.2d 333 (1968).