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MILITARY JURISDICTION OVER NON-SERVICE CONNECTED OFFENSES

The traditional test of whether the military had the necessary jurisdiction to try an accused was whether that individual could be classed as falling within the category, "land and naval forces."[1] The Supreme Court used the term "status" to describe this category, and this was all that was necessary to confer jurisdiction on a military court-martial.[2] If a person were an active duty member of the armed forces, he possessed "status" as to any offenses charged while on active duty.[3] However, the growing awareness of the courts that individual constitutional rights must be afforded the widest possible application has led to a conflict with this traditionally military sphere of jurisdiction.[4] In *O'Callahan v. Parker*,[5] the Supreme Court was faced with the issue of where the jurisdictional line should be drawn between civilian trials which afford full constitutional rights and trial by courts-martial which do not.[6] The Court considered whether court-martial jurisdiction was properly invoked where a serviceman committed a felony, cognizable in civilian courts, that had no "military significance"[7] except that the individual satisfied the "status" requirement. In deciding that the military must establish "status" plus an identifiable military interest to obtain jurisdiction, the Court has taken the view that full constitutional rights must be afforded, absent a showing of interference with the military apparatus.[8] The extent to which this interference must be demonstrated is and will continue to become apparent through decisions of the Court of Military Appeals and perhaps by future Supreme Court decisions.[9]

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[1]U.S. CONST. art. I, § 8.

[2]Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960); Reid v. Covert, 354 U.S. 1 (1957); *Ex parte* Quirin, 317 U.S. 1 (1942); Grafton v. United States, 206 U.S. 333 (1907); Johnson v. Sayre, 158 U.S. 109 (1895); Smith v. Whitney, 116 U.S. 167 (1886); Coleman v. Tennessee, 97 U.S. 509 (1878); *see Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866).

[3]Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960); Reid v. Covert, 354 U.S. 1 (1957).

[4]O'Callahan v. Parker, 89 S. Ct. 1683, 1686 (1969).

[5]89 S. Ct. 1683 (1969).

[6]The Supreme Court was concerned in this case with the loss of rights to indictment by grand jury and trial by petit jury under the fifth and sixth amendments.

[7]89 S. Ct. at 1685.

[8]*Id.* at 1690-91.

[9]A serviceman may challenge the jurisdiction of the court-martial which tried him only when he has exhausted his remedies under the system of military law.

O'Callahan, then an Army sergeant, was convicted of attempted rape, housebreaking and assault with intent to rape.[10] O'Callahan had status as an active duty soldier, but when the offense was committed, he was off-duty, in civilian clothes and not related to the military in any other demonstrable way. A court-martial sentenced him to ten years at hard labor, forfeiture of all pay and allowances and dishonorable discharge. This sentence was approved by the Army Board of Review, and the case was affirmed by the United States Court of Military Appeals.[11] The case entered the federal court system on petition for a writ of habeas corpus which was denied in the district court[12] and also in the court of appeals.[13] The Supreme Court granted certiorari and subsequently reversed the lower courts' rulings.[14]

Despite the fact that no case has arisen wherein a member of the armed services challenged his conviction on jurisdictional grounds, a series of cases where the party involved did not have "status" has covered the subject of proper military jurisdiction.[15] Over a quarter of a century ago, in *Ex parte Quirin*[16] the Court stated that the first amendment clause, "cases arising in the land or naval forces," authorized trial by court-martial of all members of the armed forces for all classes of crimes. Under the fifth and sixth amendments, these crimes might otherwise have been deemed triable in a civil court.[17] More recent decisions upholding challenges to military jurisdiction by persons not having "status" seem to have strengthened the position that "status" is the sole criterion for establishing that jurisdiction.[18] The cases suggest that jurisdiction over the person is all that is required, without any need to establish jurisdiction over the offense.

In *Toth v. Quarles*[19] a soldier was tried by a court-martial after his

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Following adverse consideration of his case by the United States Court of Military Appeals, he may enter the federal system at the district court level on petition for a writ of habeas corpus and later appeal to the court of appeals and the Supreme Court as O'Callahan did. D. WALKER, MILITARY LAW 400 (1954).

[10]O'Callahan was convicted under the Uniform Code of Military Justice arts. 80, 130, 134, 10 U.S.C. §§ 880, 930, 934 (1964).

[11]United States v. O'Callahan, 16 U.S.C.M.A. 568, 37 C.M.R. 188 (1967).

[12]United States *ex rel.* O'Callahan v. Parker, 256 F. Supp. 679 (M.D. Pa. 1966).

[13]United States *ex rel.* O'Callahan v. Parker, 390 F.2d 360 (3d Cir. 1968).

[14]89 S. Ct. at 1692.

[15]*See* Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960); Reid v. Covert, 354 U.S. 1 (1957); United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955).

[16]317 U.S. 1 (1942).

[17]*Id.* at 43.

[18]Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960); Reid v. Covert, 354 U.S. 1 (1957).

[19]350 U.S. 11 (1955).

discharge for an offense committed prior to his discharge. The Court, in upholding his jurisdictional challenge, said that the powers granted to Congress to make rules to regulate the land and naval forces act to restrict court-martial jurisdiction to those actually members of the armed forces.[20]

In *Reid v. Covert*[21] a dependent of a serviceman had murdered her husband while living with him at his duty station abroad. She was convicted by a court-martial of murder. In upholding her challenge to the jurisdiction of the court-martial, the Court, relying on *Toth,* held that dependents could not be classified as falling within the category "land and naval forces."[22] *Kinsella v. United States ex rel Singleton*[23] held that the test for jurisdiction is one of status; namely, whether the accused in a court-martial proceeding is a person who can be regarded as falling within the term "land and naval forces." In *Kinsella* the government sought to distinguish *Reid* on the ground that military authorities may try a civilian-dependent by court-martial for non-capital offenses.[24] In rejecting this distinction, the Court stated:

> 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 deny unambiguous language of Art. I, § 8, cl. 14, as well as . . . the precedents with reference thereto.[25]

These cases suggest that military jurisdiction is determined solely on the basis of jurisdiction over the person and that the grant of power to Congress under clause 14[26] "bears no limitation as to offenses."[27]

In *O'Callahan,* the Court was faced with the contention that military jurisdiction is properly obtained only where there is a demonstrated connection between the offense committed and the accused's status as an active duty member of the armed forces. This contention clearly defined two opposing positions and called for a definition of the correct jurisdictional grounds by the Court. On the one hand, the military contended that all members of the armed forces affect the reputation, discipline and morale of the service by their conduct, and hence, trial

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[20]*Id.* at 15.
[21]354 U.S. 1 (1957).
[22]*Id.* at 19-20.
[23]361 U.S. 234 (1960). Thus "status" of the victim was irrelevant to a determination of "service connection."
[24]*Id.*
[25]*Id.* at 243.
[26]U.S. CONST. art. I, § 8.
[27]361 U.S. at 246.

by court-martial is proper for offenses covered by the Uniform Code of Military Justice and committed under any circumstances by a member of the armed forces. More succinctly, the military claimed that any offense committed by a serviceman is ipso facto contrary to legitimate military interests and warrants court-martial jurisdiction. On the other hand, there is the principle that individual constitutional rights should be given the widest possible application.[28] It has been held that "status" created an exception to this principle.[29] In *O'Callahan* the Court, in effect, reversed the presumption necessary to obtain military jurisdiction. Where it was formerly presumed that an offense committed by a military member violated a legitimate military interest, the burden is now on the military to show a legitimate interest in the form of what the Court called a "service connection."[30] Without this affirmative showing on the part of the military, jurisdiction is never obtained.[31]

O'Callahan specified a number of instances wherein service connection might be properly obtained. Rather than establishing a concrete standard for the military and lower civilian courts to follow, the Court gave examples that illustrate a philosophy and concept of service connection. The application of this broad principle through the decisions of the Court of Military Appeals and perhaps through future decisions by the Supreme Court will serve to outline more clearly the circumstances that will give rise to service connection.

The Court strongly emphasized that O'Callahan was on an authorized pass when the offense was committed,[32] leading to the conclusion that had he been absent without leave (AWOL) a different result may have been obtained.[33] However, in applying the principle of *O'Callahan,* the Court of Military Appeals has refused to uphold military jurisdiction over an offense where an accused is absent without leave and there is no other service connection.[34] The military court decided that crimes committed in an AWOL status are cognizable in civilian courts and show no military interest sufficient to justify court-martial jurisdiction. This view seems to be consonant with *O'Callahan.*

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[28]*See* Bloom v. Illinois, 391 U.S. 194 (1968); Shelton v. Tucker, 364 U.S. 479 (1960); Tally v. California, 362 U.S. 60 (1960); Schneider v. New Jersey, 308 U.S. 147 (1939); Lovell v. Griffin, 303 U.S. 444 (1938).

[29]Cases cited note 2 *supra.*

[30]89 S. Ct. at 1690.

[31]*Id.* at 1692.

[32]*Id.* at 1684.

[33]*Id.* at 1691.

[34]United States v. Chandler, 18 U.S.C.M.A. —, 40 C.M.R. — (1969, digested 69-24 JALS 6); United States v. Borys, 18 U.S.C.M.A. —, 40 C.M.R. — (1969, digested 69-22 JALS 3).

Abuse of military position was mentioned by the Supreme Court as leading to service connection.[35] In a recent case,[36] a soldier used his military uniform and status to obtain an automobile from a dealer on a trial basis. He then stole the auto. In upholding trial by court-martial, the Court of Military Appeals stated that the military interest in preventing such use of the good name of the service was sufficient to show service connection.[37] That the military should be able to prevent its members from using their status as soldiers to facilitate perpetration of crime seems to be within the spirit of *O'Callahan.*

Crimes committed on a military post were mentioned in *O'Callahan* as leading to a conclusion that there was service connection.[38] Because these are not crimes that are normally cognizable in a civilian court,[39] the distinction seems to be a valid one. *United States v. Smith*[40] has supported this view. In that case, a serviceman was convicted of unlawful carnal knowledge of a daughter of another serviceman. The offenses charged were committed both off and on the military reservation. The military court reversed the convictions for acts committed off-post as not being service connected. However, it affirmed the convictions for acts committed on-post, reasoning that there was legitimate military interest in maintaining "the security of a military post."[41] In a similar case the court rejected the claim by the military that service connection was present due to the fact that the victim was the dependent of another soldier and that the contact was facilitated by the accused's military status.[42] The victim's own testimony demonstrated that the acts were in no way predicated on either the accused's status as a serviceman or her own status as a dependent.[43] Even had the evidence been to the contrary, it is doubtful that jurisdiction based on the victim's status as a military dependent alone could have been obtained under *O'Callahan.*

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[35]89 S. Ct. at 1691.

[36]United States v. Peak, 18 U.S.C.M.A. —, 40 C.M.R. — (1969, digested 69-25 JALS 3-4).

[37]*Id.*

[38]89 S. Ct. at 1691.

[39]There may be situations where there is concurrent jurisdiction in military and state authority due to a portion of a military installation being leased from a state.

[40]18 U.S.C.M.A. —, 40 C.M.R. — (1969, digested 69-24 JALS 2); *see* United States v. Shockley, 18 U.S.C.M.A. —, 40 C.M.R. — (1969, digested 69-24 JALS 3-4).

[41]United States v. Smith, 18 U.S.C.M.A. —, 40 C.M.R. — (1969, digested 69-24 JALS 2).

[42]United States v. Henderson, 18 U.S.C.M.A. —, 40 C.M.R. — (1969, digested 69-24 JALS 1-2).

[43]*Id.*

The Supreme Court gave some further examples of cases where there might be legitimate military interest wherein service connection could be properly invoked. It suggested that where the victim of the crime was performing duties related to the military, jurisdiction would be valid.[44] It may be a legitimate military interest to prevent servicemen from committing offenses against civilians who perform services that are essential to the armed forces. The contact these civilians have with the military must be established as the principal factor leading to commission of the crime. Additional circumstances mentioned by the Court as warranting jurisdiction were: where the war power is applicable;[45] where the occupied zone of a foreign country is involved;[46] and where the offense charged is the result of a flouting of military authority.[47] All of these give amplification to the principle of *O'Callahan.*

In examining the offenses charged to determine whether service connection is present, the Court of Military Appeals has reached some conclusions that seem to be violative of the holding in *O'Callahan.* These must be analyzed as to whether they are within the ambit of the decision. In recent decisions the Court of Military Appeals has held that use and possession of marijuana are inherently service connected due to their deleterious effect on military discipline.[48] The court has deemed other drug offenses to be non-service connected,[49] *e.g.,* off-post importing and transporting.[50] However, it continues to treat possession and use as service connected.[51] Whether an individual who is accused of the use of marijuana while on leave, many miles from his post, can be properly convicted by a court-martial is questionable under *O'Callahan.* Certainly the burden is on the government to show a clear case of detriment to the armed forces.

Another instance of interpolation by the Court of Military Appeals with regard to *O'Callahan* concerns the area of petty offenses. In a recent case, the court held that petty offenses are always triable by

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[44]89 S. Ct. 1691.

[45]*Id.*

[46]*Id.*

[47]*Id.*

[48]United States v. Rose, 18 U.S.C.M.A. —, 40 C.M.R. — (1969, digested 69-25 JALS 7-8); United States v. Castro, 18 U.S.C.M.A. —, 40 C.M.R. — (1969, digested 69-24 JALS 4); United States v. Konieczko, 18 U.S.C.M.A. —, 40 C.M.R. — (1969, digested 69-20 JALS 9); United States v. Nabors, 10 U.S.C.M.A. 27, 29, 27 C.M.R. 101, 103 (1958).

[49]United States v. Beeker, 18 U.S.C.M.A. —, 40 C.M.R. — (1969, digested 69-23 JALS 1-2).

[50]Unless, of course, the importing or transporting occurred on-post where it could be considered "service connected."

[51]Cases cited note 47 *supra.*

court-martial.[52] In arriving at this decision, the court observed that *O'Callahan* was concerned with the loss of fifth and sixth amendment rights by servicemen when trial is by court-martial. Since some of these rights are not afforded persons accused of minor offenses by the states,[53] the court concluded that they were not within the contemplated scope of *O'Callahan*.[54] A reason for this position may have been to allow the military to retain jurisdiction over those minor offenses which require neither lengthy incarceration nor discharge from the service. This approach allows the military services to use their facilities for restraint and discipline and to retain continued presence of the military member, avoiding any disruption of the movement of personnel. To do otherwise could result in ships sailing without full crews or units leaving without full complements. Particularly in crowded port cities and replacement centers this could be a severe problem. This conclusion, although undoubtedly in the best interests of the military, seems to be inconsistent with the holding in *O'Callahan,* which makes no distinction on the basis of the type of offense charged. *O'Callahan* requires establishment of an identifiable military interest for any offense in which the military attempts to invoke court-martial jurisdiction.[55]

The United States Supreme Court has evidenced its mounting concern that constitutional rights should enjoy the widest possible application.[56] It is against this background that *O'Callahan* must be viewed. Where the military formerly exercised personal jurisdiction over all servicemen without regard to the offense committed, it now must affirmatively show that an area of legitimate military interest has been invaded. As the Court stated, it must show "service connection." Although some clarification may be needed with regard to the application given *O'Callahan* by the United States Court of Military Appeals, the principle remains sound. United States servicemen cannot be deprived of their constitutional rights via court-martial without appropriate justification in terms of harm done to the armed forces.

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[52]United States v. Sharkey, 18 U.S.C.M.A. —, 40 C.M.R. — (1969, digested 69-25 JALS 6).

[53]*E.g.,* Cheff v. Schnackenburg, 384 U.S. 373 (1966); Shillitani v. United States, 384 U.S. 364 (1966); United States v. Barnett, 376 U.S. 681 (1964); District of Columbia v. Clawans, 300 U.S. 617 (1937); District of Columbia v. Colts, 282 U.S. 63 (1930); Schick v. United States, 195 U.S. 65 (1904).

[54]United States v. Sharkey, 18 U.S.C.M.A. —, 40 C.M.R. — (1969, digested 69-25 JALS 6).

[55]89 S. Ct. 1691-92.

[56]*See* cases cited note 28 *supra.*