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extent and limits of such a doctrine can only be matters of speculation at this time.

The reckless-disregard standard is very complex and may be difficult to apply. If the Supreme Court decides many of these cases, the complexity of the application of the standard combined with the necessity for constitutional fact-finding may prove to be an unhappy burden on an already greatly overworked Court. Some commentators have suggested that the quality of the Court’s work has already begun to suffer. In light of these considerations, perhaps Mr. Justice Harlan’s desire to formulate simple rules which can be easily and quickly applied without pulling the Court so far into the fact-finding process can be appreciated.

Kenneth S. Cannaday

Military Law—Retroactivity of the Service-Connection Test of the Jurisdiction of Courts-Martial

Throughout the history of the United States, the relationship of the nation’s military establishment to the civilian government has been a recurring problem. One facet of this relationship that has resulted in significant tension concerns the proper division of jurisdiction between the military and civilian courts. The determination of when a particular defendant is subject to military jurisdiction is difficult because of the inherent stress between constitutional guarantees in the application of military justice. Several constitutional provisions and a myriad of federal statutes deal with the military’s jurisdiction over its members. The problem is complicated because these provisions are not always consistent.

The difference between the civilian and military systems of justice lies in the denial to military personnel of some of the protections of the

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7See note 43 supra.

8See Strong, The Time Has Come To Talk of a Major Curtailment in the Supreme Court’s Jurisdiction, 48 N.C.L. Rev. 1 (1969), and commentators cited therein.


2See, e.g., U.S. Const. art. I, § 8; U.S. Const. art. II, § 2; U.S. Const. amend. V; U.S. Const. amend. VI.


4For example, until 1957 precisely how the Bill of Rights applies to servicemen was uncertain. Reid v. Covert, 354 U.S. 1, 37 (1957).
Bill of Rights. Although only the right to a grand jury indictment is specifically denied to servicemen by the Constitution, the military trial procedure that evolved in the early years of the United States was based upon standards enacted by Congress under its article I power to make laws to regulate and control the armed forces and not upon constitutional guarantees. For example, pursuant to this authority Congress formulated a system of military justice that excluded the right to trial by jury. The federal courts traditionally have been hesitant to involve themselves in the developments of the system of military justice primarily because of the differences in the constitutional sources of power of the two systems. Consequently, servicemen are allowed to move from the military to the civilian courts only through a petition for habeas corpus and only after the exhaustion of all military remedies.

6U.S. Const. amend V.
9Military courts are said to draw their authority from article I rather than article III of the Constitution. Comment, Civilian Court Review of Court-Martial Adjudications, 69 Colum. L. Rev. 1259, 1274 (1969). The limited power of the civilian courts to review military affairs was recognized as early as 1858. Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (1858). More recent cases have demonstrated the continuing deference of the civilian courts to the military courts. See, e.g., Fowler v. Wilkinson, 353 U.S. 583, 584 (1956); Swisher v. United States, 237 F. Supp. 921, 928 (W.D. Mo. 1965) aff'd., 354 F.2d 472 (8th Cir. 1966). The UCMJ art. 76, 10 U.S.C. § 876 (1970) states that all court-martial decisions following appeal within the military process are "final and conclusive."

10See UCMJ art. 76, 10 U.S.C. § 876 (1970). The civilian courts may receive military cases only by a petition for habeas corpus. This petition must allege a failure of military jurisdiction, a defect in the composition of the court-martial, or a defect in the sentencing procedure. Wurfel, Military Habeas Corpus II, 49 Mich. L. Rev. 699, 713 (1951). Burns v. Wilson, 346 U.S. 137, reh. denied, 346 U.S. 844 (1953), allows habeas corpus review of military decisions that fail to give "full and fair consideration" to the assertion of a constitutional right by the defendant. The history of the military appellate procedure demonstrates, however, that such rights are virtually always accorded the "full and fair consideration" required. Between 1953 and 1965 the federal courts did not grant a single petition for habeas corpus based on failure of "full and fair consideration" in the military system. Comment, 69 Colum. L. Rev., supra note 9, at 1265. However, some recent cases may portend an expansion in the scope of review on habeas corpus by civilian courts of court-martial decisions. For example, in Allen v. VanCantfort, 446 F.2d 625 (1st Cir. 1971), noted in 50 N.C.L. Rev. 173 (1971), it was held that federal district courts must review allegations of UCMJ statutory error. For a recent interpretation of the scope of review by the civilian courts, see Everett, Collateral Attacks on Court-Martial Convictions, 11 JAG L. Rev. 399 (1969).

11Everett, supra note 10, at 399 & 401 n.16.
It was on such a petition in *O'Callahan v. Parker*\(^{12}\) that the Supreme Court rejected the military status of the defendant as the jurisdictional test of military courts and adopted in its place the "service-connection" of the crime as the proper jurisdictional test.\(^{13}\) The Court indicated that unless the crime was service-connected, the defendant could be tried only in civilian courts. However, the opinion was silent as to the possible retroactive application of its principle. Following a year and a half of attempts by lower courts to put legalistic flesh on the jurisdictional skeleton of *O'Callahan*,\(^{14}\) the Supreme Court in *Relford v. Commandant*\(^{15}\) granted certiorari\(^{16}\) to Corporal Isiah Relford's petition for habeas corpus to discuss the "scope and retroactivity of *O'Callahan*." Because it decided that Relford's crimes were service-connected, the Court sustained the military's jurisdiction to try him. More importantly, this outcome negated the necessity to consider the issue of the retroactivity of the *O'Callahan* decision.\(^{17}\)

The issue of the retroactive application of *O'Callahan* is a problem of significant magnitude in both the military and civilian court systems. A retroactive application of the service-connection test would affect hundreds of thousands of servicemen and ex-servicemen tried by military courts.\(^{18}\) It could disturb convictions dating from 1916\(^{19}\) and affect possi-

\(^{13}\)Id. at 272.
\(^{15}\)401 U.S. 355 (1971).
\(^{17}\)401 U.S. at 369.
\(^{19}\)In 1916 Congress passed the Articles of War, which extended military jurisdiction to non-capital civilian crimes committed in peacetime by servicemen. Duke & Vogel, supra note 7, at 451.
bly as many as 450,000 petitions for restoration of rank, pay, or benefits and as many as four thousand petitions for release from federal custody. 20

Although Relford failed to solve the dilemma as to whether the service-connection test is to be applied retroactively, the opinion appeared to invite another case in which retroactivity would be "solely dispositive." 21 However, while the Supreme Court awaits another case to work its way through the military system, lower courts are faced with immediate demands for retroactive application of O'Callahan.

The Court of Military Appeals, in Mercer v. Dillon, 22 held that O'Callahan would not apply to cases finalized before June 21, 1969, the date of the O'Callahan decision. 23 The Mercer court refused to apply O'Callahan retroactively for two reasons. First, it stated that O'Callahan was not a jurisdictional decision at all but instead was concerned only with the denial of the procedural due process rights to a jury trial and a grand jury indictment. 24 The court's second ground was that O'Callahan did not rule on the existence of subject matter jurisdiction of the military courts but rather limited the exercise of that jurisdiction to crimes that are service-connected. 25

The principle reason advanced for denying retroactive effect to O'Callahan was that O'Callahan was concerned primarily with the denial of the defendant's procedural guarantees and not with the jurisdiction of a military court to try him. It was argued that the contention that O'Callahan was grounded in jurisdiction is "merely playing with words, and ignores both the rationale . . . and the realistic issue in the case." 26 Thus the issue was said to be simply whether a new trial should be given to those already tried. Under this argument the retroactivity issue would be decided according to the criteria laid down by the Supreme Court when ruling on the retroactive effect of decisions which granted procedural due process rights. Thus, the measure of "reliance

21401 U.S. at 370.
25Id.
by law enforcement authorities on the old standards and the effect on the administration of justice that the new standards" would likely have led the Mercer court to deny retroactive effect to O'Callahan.

Evidently the Mercer court felt that in O'Callahan the Supreme Court did not mean "jurisdiction" when it said "jurisdiction." The Mercer court stated that the O'Callahan Court had been concerned with the "individual's particular rights in a trial rather than the power of the court-martial to judge him." To assess the validity of this argument it is necessary to consider the nature and extent of military jurisdiction.

The military courts are largely creatures of statute. Thus, they exercise only the limited jurisdiction granted by Congress pursuant to its article I power to establish rules for military courts. Prior to the decision in O'Callahan, it was clear that the military had jurisdiction to try any criminal case in which a serviceman was the defendant. Moreover, the Supreme Court had not overruled the military court's exercise of jurisdiction in this area. However, the O'Callahan decision held that the military courts had not been granted the power to exercise jurisdiction over servicemen for crimes not "service-connected." Much of the O'Callahan opinion was devoted to a justification in terms of due process of its holding, and thus it is not clear from the opinion that the Court relied solely upon jurisdictional doctrine. O'Callahan asserted his right to a civilian trial not because the military court failed to try him by an impartial jury but because in this instance the military had no jurisdiction to try him at all. Thus, while it may be true that the lack

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28In at least one instance the Court has said "jurisdiction" when it did not mean "jurisdiction." See Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557; 561 (1968). In Avco the Court declared that its statement in Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 215 (1962) that a complaint was being dismissed "for lack of jurisdiction under the Norris-LaGuardia Act" had really been intended to mean "only that the Federal District Court lacked the general equity power to grant the particular relief." 390 U.S. at 561 (emphasis added).

29In U.S.C.M.A. at 272, 41 C.M.R. at 272 (Ferguson, J., dissenting).

30See C. Wright, HANDBOOK OF THE LAW OF FEDERAL COURTS § 12, at 34 (2d ed. 1970) [hereinafter cited as Wright].


3395 U.S. at 272.
of procedural guarantees precipitated O'Callahan's claim, it was the question of a lack of military jurisdiction that afforded the Court the opportunity to grant relief. It therefore seems that the O'Callahan decision turned primarily on whether the defendant was subject to military jurisdiction. That question being resolved negatively, it incidentally followed that he was to be accorded the procedural guarantees of the Constitution. Arguably, then, the criteria for determining the retroactivity of decisions according procedural rights should not apply to the O'Callahan situation.

The Mercer court's second ground for denying retroactive effect to O'Callahan was that "O'Callahan did not rule on the existence of subject matter jurisdiction, [but rather] limited the exercise of such jurisdiction . . . ." The Mercer majority found authority for this view in an earlier decision by the Air Force Court of Military Review. That decision held that the military does have jurisdiction to try military members for criminal misconduct sanctioned by the Uniform Code of Military Justice and that O'Callahan "merely withholds the exercise of jurisdiction" over offenses that are not service-connected. However, after expressing this view of O'Callahan, the Court of Military Review grounded its decision in the same procedural and administrative considerations applied by the Supreme Court in its procedural due process decisions.

O'Callahan neither suggested a difference between jurisdiction and the exercise of jurisdiction nor spoke in terms of abstention by military courts. If O'Callahan merely ordered the military courts to abstain from exercising jurisdiction, by analogy to the present general rule respecting abstention by federal courts to permit decision by state courts, the military courts would be able to reassume and exercise their jurisdiction if the non-military courts failed to act or acted outside the limits of the Constitution. However the language of O'Callahan clearly forbids any exercise of military jurisdiction over non-service-connected crimes. The Court laid down a mandate in terms of jurisdiction but justified and

36 Id. at 1035.
37 Id. at 1034-35.
38 WRIGHT, § 52, at 198 & n.20. There are limited instances in which the federal courts have been ordered to abstain completely and forfeit all original jurisdiction to state courts. Id. at 199.
explained it in terms of procedural due process guarantees. This has opened the possibility for the lower courts to latch onto one or the other of these theories to determine the retroactivity issue. The legal and verbal gymnastics of the Mercer court and the Air Force Board of Review evidence concern in military circles regarding the overwhelming deluge of collateral attacks against convictions that will result if O'Callahan is applied retroactively.

The specific wording of the O'Callahan opinion adds some credence to the belief that the decision was not jurisdictional and therefore should be denied retroactive effect. The O'Callahan Court appeared to suggest that the military system of justice is in need of procedural reform because it is "singularly inept in dealing with the nice subtleties of constitutional law." By focusing upon the procedural deficiencies "lurking in military trials" instead of upon the military's lack of jurisdiction to try O'Callahan, the Court did not unmistakably ground its decision in jurisdiction.

There is some authority for the proposition that O'Callahan should be applied retroactively. The dissent in Mercer felt that "where jurisdiction is lacking there can be no question of prospective or retrospective application, for where a court-martial proceeds without jurisdiction, its action is null and void." The Mercer dissent concluded that the court should be "concerned not with an individual's particular rights in a trial, but the power of the court-martial to judge him. O'Callahan ... teaches clearly that such power is lacking ... ." A New York federal district court in Flemings v. Chafee, arguing from the same viewpoint, added that it would observe the "traditional rule" and allow retroactive effect unless specifically told not to do so by the Supreme Court.

Both Flemings and the Mercer dissent expressed the belief that the retroactivity issue was mooted by a prior determination of a lack of jurisdiction. This view has been concurred in by the author of the Military Justice Act of 1968, Senator Sam J. Ervin. Senator Ervin feels that

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395 U.S. at 265.
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the effect of *O'Callahan* was to decide that the military never had the power to try a soldier's non-military crimes and that such convictions are invalid.  

When the dust of the battle of semantics settles, the ultimate decision to be made is whether the tremendous administrative burdens that would be caused by retroactive application will outweigh the traditional requirement that before the defendant can be legally convicted the court must be one of competent jurisdiction. The retroactivity question arose because of the ambiguities of the *O'Callahan* opinion. The question was left unanswered by the Supreme Court in *Relford*. The lower courts are already in conflict on the question, and it will not be definitively answered until the Supreme Court decides the retroactivity of *O'Callahan*. It is vital that the Court do so and restore the certainty of jurisdiction that is essential to all criminal justice.

**Lee Austin Patterson II**

**Torts—Negligence—The Substitute Birth Control Pill**

By the turn of the 19th century Thomas Malthus and his disciples were predicting dire consequences for a world rapidly proving too small for its fertile population. These fears are ardently espoused in the 20th century as well by zero population societies urgently crying, "make love not babies—ban the population bomb." With the advent of sophisticated and successful birth control techniques the ills of overpopulation might someday be realistically avoided. Meanwhile, social mores are undergoing change and the law is being challenged to keep pace by re-examining traditional concepts in light of these changes. One such concept is the benefits-of-the-healthy-child rule, which proclaims that the event of childbirth and the happiness of rearing a child always outweigh the financial liability. Recently a Michigan Court of Appeals took issue with this concept.

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*See Note, Dential of Military Jurisdiction Over Servicemen's Crimes Having No Military Significance and Cognizable in Civilian Courts, 64 Nw. U.L. Rev. 930, 938 (1970).*

*Wright § 53, at 211.*

*See 401 U.S. at 370.*


*46 N.C.L. Rev. 948, 949 (1968).*

*46 N.C.L. Rev. 948, 949 (1968).*