Military Law -- Jurisdiction of Courts-Martial To Try Servicemen for Civilian Offenses

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this section to include section 8(a)(4) in the list of unfair labor practices for which injunctive relief is available would be a big step in providing the employee with more protection against coercion by his employer. Such a strengthening of the remedy against intimidation would complement adoption of pre-hearing discovery of employees' statements.

**CONCLUSION**

It seems anomalous that discovery of employees' statements to the Board is allowed in original proceedings in federal court but not for hearings before the Board itself. Since the main argument by the Board against discovery is fear of employer intimidation, the solution would appear to be a strengthening of the remedy against such intimidation to complement the adoption of discovery procedures.

On April 13, 1961, the Administrative Conference of the United States was established by executive order to consider administrative law problems and make recommendations. The Conference officially endorsed discovery in Recommendation No. 30 in 1963: “The Conference approves the principle of discovery in adjudicatory proceedings and recommends that each agency adopt rules providing for discovery to the extent and in the manner appropriate to its proceedings.”

Over five years have passed and the Board has not yet acted on this recommendation. It is obvious, therefore, that if a change is to be made, it must come about through amendment of the National Labor Relations Act by Congress. Hopefully such action will be forthcoming.

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**Military Law—Jurisdiction of Courts-Martial To Try Servicemen for Civilian Offenses**

Since the days of the Continental Army, the question of how much judicial authority should be vested in the military has been the subject of continuing debate. The Constitution gave Congress the power “[t]o make Rules for the Government and Regulation of the land and naval

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restraining order as it deems just and proper, notwithstanding any other provision of law.

Forces"¹ but did not further define this power, and Congress has liberally dispensed judicial power to the military by enacting the codes of military laws that have governed the armed forces.²

The codification of military law presently in effect is the Uniform Code of Military Justice³ (UCMJ), which became effective May 31, 1951. When passing the UCMJ, Congress had before it a group of cases that arose during World War II in which serious offenders escaped trial because there was no court having jurisdiction by the time their offenses were discovered.⁴ Furthermore, Congress was faced for the first time with large numbers of military dependents accompanying servicemen abroad.⁵ To meet these problems, Congress retained from the Articles of War court-martial jurisdiction for the military over certain civilians⁶ and enlarged military jurisdiction over discharged servicemen⁷ and active-duty personnel.⁸

Expanded court-martial jurisdiction under the UCMJ was rapidly attacked by both ex-servicemen⁹ and civilians,¹⁰ and their attacks were mostly successful.¹¹ The Supreme Court in these cases based its diminution

¹ U.S. Const. art. I, § 8.
⁵ AycocK & WurFel 59-63.
⁷ UCMJ art. 3(a), 10 U.S.C. § 803(a) (1964) provides:
Subject to section 843 of this title (article 43) no person charged with having committed, while in a status in which he was subject to this chapter, an offense against this chapter, punishable by confinement for five years or more and for which the person cannot be tried in the courts of the United States or of a state, a Territory, or the District of Columbia, may be relieved from amenability to trial by court-martial by reason of the termination of that status.

Article of War 94, Act of June 4, 1920, ch. 227, subch. II, § 1, 41 Stat. 805-06, provided for court-martial jurisdiction after discharge only for fraud, larceny, or embezzlement committed against the government while on active duty.

¹¹ Only Mrs. Covert was unsuccessful on her first attempt. Reid v. Covert, 351 U.S. 487 (1956).
of military jurisdiction on the fact that the defendants were not military personnel and therefore were not properly "in the land or naval forces" so as to be excluded from the fifth and sixth amendment rights to indictment and trial by jury.\textsuperscript{12} But the Court's language seemed to preclude its ever withholding military jurisdiction over active-duty servicemen.\textsuperscript{13} The lower courts in both the federal and military appeals systems considered the question closed after the statement in \textit{Kinsella v. United States ex rel. Singleton} that "[t]he test for jurisdiction . . . 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.'"\textsuperscript{14} In subsequent cases the question of military jurisdiction over active-duty personnel, when raised, was summarily dismissed.\textsuperscript{15}

The Supreme Court, without overruling the previous cases, decided in \textit{O'Callahan v. Parker}\textsuperscript{16} that an active-duty serviceman was not automatically subject to court-martial jurisdiction. The Court rejected so much of the \textit{Singleton} "status" test as would give automatic jurisdiction and stated that active-duty status is necessary, but not alone sufficient, to vest military jurisdiction.\textsuperscript{17} The Court furnished a list of seven, or possibly eight, factors indicating that the defendant O'Callahan was so severed from the military at the time and under the circumstances of his alleged offenses that he must be considered a civilian for jurisdictional

\textsuperscript{12} U.S. CONST. amend. V provides that "[n]o 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 . . . ." The exception has been extended by implication to the right to trial by jury contained in the sixth amendment. \textit{Ex parte Quirin}, 317 U.S. 1, 40 (1942); \textit{Ex parte Milligan}, 71 U.S. (4 Wall.) 2, 123 (1866).

\textsuperscript{13} When the offense was cognizable in a civil court, the military's jurisdiction was concurrent. \textit{See} Reid v. Covert, 354 U.S. 1, 23, 30 (1957). \textit{See also} Peek v. United States, 321 F.2d 934 (9th Cir. 1963), \textit{cert. denied}, 376 U.S. 954 (1964), in which an active-duty soldier committed an armed robbery of a military courier on a military post with a weapon issued him by the Army. The soldier objected to trial in the federal district court on the grounds that the military had preferential jurisdiction. His contention was held to be without merit.


\textsuperscript{17} 395 U.S. at 266-67.
purposes. The charges against O'Callahan grew out of an attempted rape perpetrated in the city of Honolulu, Hawaii—not "on a military post or enclave . . . ." At the time the crime was committed, O'Callahan was on leave in the city. The victim was a fourteen-year-old girl vacationing in Hawaii who had no military connection whatsoever; she was not a person "performing any duties relating to the military." The offense was committed in peacetime; the civil courts were open and available; and the offense was committed within the territorial limits of the United States. No question of military authority, security, or property was involved in the case. Finally, although the fact was not mentioned in the holding, O'Callahan was in civilian clothes when he allegedly attempted to rape the girl. This combination of factors was persuasive to the Court in its finding that the case did not arise "in the land or naval forces" and that O'Callahan was entitled to a grand jury indictment under the fifth amendment and a jury trial under the sixth amendment.

If the Court's statement that these offenses were not "committed on a military post or enclave" is strictly construed, it will mean that the military can exercise jurisdiction over any offense committed by an active-duty serviceman on post without considering the other factors, but that civil courts have jurisdiction over all off-post offenses. The Court of Military Appeals now will apparently sustain military jurisdiction over all on-post offenses committed by servicemen, and also will uphold military

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18 Id. at 273.
19 Id. at 259-61, 273.
20 O'Callahan v. Parker, 390 F.2d 360, 361 (3d Cir. 1968). The Supreme Court did not mention this total lack of military connection in the statement of facts.
21 395 U.S. at 273.
22 Id.
23 Id. at 274.
24 Id. at 259.
25 Certiorari was granted to consider the limited question of whether court-martial jurisdiction over essentially civilian crimes is a denial of the fifth and sixth amendment jury rights. 395 U.S. at 261. The Court mentioned other procedural deficiencies of courts-martial—possible command influence, ad hoc judicial bodies, vague statutes, a preference for discipline rather than justice—that may have influenced the decision. Id. at 262-66.
26 Id. at 273.
27 The Court of Military Appeals is the highest appellate court in the military justice hierarchy; it consists of three civilian judges who hear appeals from all services. 10 U.S.C.A. § 867 (Supp. 1969).
tary jurisdiction over off-post offenses in limited circumstances. The Court of Military Appeals seems to be correct in its interpretation of jurisdiction over on-post offenses inasmuch as the military commander is totally responsible for discipline and morale on his installation and thus has a significant interest in exercising jurisdiction. Military interests may extend to off-post offenses as well, and the territorial boundary of the post should not become an automatic jurisdictional barrier. Specific examples of the correct exercise of military jurisdiction over off-post offenses are more easily considered in connection with the other factors in O'Callahan since in such cases at least some of these other factors must be present to justify military jurisdiction.

The Court in deciding O'Callahan did not clearly define what relationship must exist between the accused's service duties and his offense for the military to exercise jurisdiction. If all other factors are the same, the absence status of the accused should make little difference in determining whether the offense is "service connected"; however, the duty status of the accused at the time of the offense bears directly on connection with the service. The Court did not confine itself strictly to on-duty offenses, but spoke of a "connection" between the accused's duties and the crime. Presumably, then, when the off-post offense is inseparable from the accused's duties, military jurisdiction is appropriate. The Court of Military Appeals has not yet directly addressed itself to the situation in which an on-duty serviceman commits an off-post offense, but it should permit the exercise of jurisdiction in such a case.

If the victim must actually be performing military duties at the time


\[8\] E.g., off-post narcotics offenses. See p. 388 & note 47 infra.

\[9\] 395 U.S. at 273.

\[10\] In the only reported case in which this factor was specifically discussed, the offender was either off duty or on leave when he committed each of his offenses. United States v. Borys, 18 U.S.C.M.A. 547, 40 C.M.R. 257 (1969). The court did not give the date of Borys' offenses, but the case apparently applies O'Callahan retroactively. N.Y. Times, Sept. 14, 1969, § 1, at 1, col. 4.
of the offense, few off-post cases will come before courts-martial: The only military persons regularly performing duties off post are military policemen, investigators, vehicle drivers, recruiters, and the like. On the other hand, if the victim need only be connected with the military in some fashion, many more off-post crimes committed by servicemen will be tried in military courts.

Thus far, the Court of Military Appeals has followed the language of the Supreme Court to the letter, even to the extent of finding that carnal knowledge of a military dependent off post does not invoke military jurisdiction. The court stated in United States v. Henderson\(^{38}\) that the victim's "service connection was natal and not legal and, as such, [was] insufficient to bring her personally within the ambit of the Uniform Code."\(^{33}\) If by this language the Court of Military Appeals meant that off-post offenses committed against other servicemen who are off duty, but still within the ambit of the UCMJ, are subject to court-martial jurisdiction, its interpretation should be sustained. However, by excluding dependents from the category of victims whose status allows court-martial jurisdiction, the Court of Military Appeals did not give sufficient attention to the impact on the military community of crimes perpetrated against dependents. That husbands and fathers are often absent for extended periods places on the military system an additional burden of protecting dependents; offenses by servicemen against dependents should be considered to have the same military significance as offenses against other servicemen.

Three factors in the Court's resolution of O'Callahan—that the offense occur in peacetime, that the civil courts be open, and that the offense be committed within the territorial limits of the United States\(^{34}\)—are obviously concomitants of one another. If civil jurisdiction is to vest only over those cases that occur within the territorial limits\(^{36}\) of the United States, then "civil courts" must mean the state and federal courts.\(^{38}\) Since

\(^{33}\) Id. (the quotation is extracted from the court's opinion).
\(^{34}\) 395 U.S. at 273.
\(^{36}\) But see the dissenting opinion in United States v. Borys, 18 U.S.C.M.A. 547, 551-53, 40 C.M.R. 257, — (1969), the key rationale of which is that the Hawaiian courts at the time of O'Callahan's alleged offenses were federal courts, and that therefore the words "civil courts" in O'Callahan mean only federal courts.
these courts will always be available, except in times of imposition of martial law or of actual invasion, the only question remaining is the meaning of the term "peacetime." One judge on the Army Court of Military Review\textsuperscript{37} has stated in several cases that the Vietnam conflict—a time of war for purposes of removing the statute of limitations on offenses of unauthorized absence\textsuperscript{38}—is a sufficient time of war for court-martial jurisdiction under \textit{O'Callahan}.\textsuperscript{39} Although the Court of Military Appeals has not explicitly decided the question, apparently the court has assumed that the Vietnam conflict is not a time of war. It has dismissed several cases arising after \textit{O'Callahan} on the grounds of lack of court-martial jurisdiction.\textsuperscript{40} Had the Court of Military Appeals found the present conflict to be a time of war, presumably it would have sustained jurisdiction. The court is probably correct in its assumption: The existence of a distant war, declared or undeclared, has little relevance to a crime committed within the territorial United States by an active-duty serviceman.\textsuperscript{41} Absent declared war, and probably not even then so long as the actual fighting remains distant, offenses committed within the United States should be deemed "peacetime" offenses.

The final factor that the Court outlined in \textit{O'Callahan} was that the offense charged did not concern military authority, security, or property.\textsuperscript{42} If "security" means the physical integrity of the installation and the documents and equipment thereon,\textsuperscript{43} few problems of interpretation

\textsuperscript{37}The Courts of Military Review are the intermediate appellate courts in the military. These courts review only the cases arising in the branch of the service that they serve. 10 U.S.C. § 866 (1964) established these courts, which were formerly called Boards of Review.

\textsuperscript{38}Anderson, C.M. 416112, 38 C.M.R. 582 (1967).


\textsuperscript{40}See those cases cited note 28 supra, that were dismissed for lack of court-martial jurisdiction.

\textsuperscript{41}The only authoritative case in point appears to be Caldwell v. Parker, 252 U.S. 376 (1920), holding that the civilian courts had concurrent jurisdiction over a murder committed by an active-duty serviceman in the state of Alabama during World War I. This case arose under the Articles of War, which forbade military trials of defendants charged with capital crimes committed within the United States. The Court indicated that there was a sufficient time of war for the exercise of military jurisdiction, but that such jurisdiction was not exclusive. \textit{But see Ex parte King}, 246 F. 868 (E.D. Ky. 1917).

\textsuperscript{42}395 U.S. at 274.

\textsuperscript{43}The Court of Military Appeals has not gone beyond this definition. \textit{See} DA PAM 27-69-24, at 2-4, 6-7, \textit{digesting} United States v. Smith, No. 22,180, Sept. 26,
should arise. “Property” is self-explanatory. “Military authority,” however, is a rather complex concept. If by the phrase “flouting of military authority” the Court means purely military offenses such as disobedience of a lawful order or assaulting a superior in the performance of his duties, then the same objections arise as when “military victim” is construed too literally. Situations immediately come to mind in which an off-duty individual could commit an offense against his direct superior, also off-duty, and be subject only to civil law under a restrictive interpretation of “military authority.” Yet civilian courts cannot consider the implications of the offense on military effectiveness, and the services must prevent off-duty activities from interfering with command structures. The danger exists, of course, that the phrase “flouting of military authority” could be used to justify prosecuting off-base political activism or other disapproved, but not illegal, conduct. This phrase should be broadly construed when an offense is committed against another service-man, but not when the crime is essentially victimless, as in narcotics cases or when non-illegal conduct, such as political activity, is involved.

Whether the accused was in civilian clothes at the time of the offense is also a pertinent consideration. The Court of Military Appeals has


"395 U.S. at 274.

Since there is no specific provision in the UCMJ under which enlisted personnel could be prosecuted for such activities, the charge would have to be brought under art. 134, 10 U.S.C. § 934 (1964), which provides:

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of the 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 the court.

The “crimes and offenses not capital” clause refers only to those crimes denounced by Congress in the United States Code and thus would not apply in the situation under consideration. Aycock & Wurzel 311-12. Prosecution could be brought under either the “to the prejudice of the good order and discipline” clause or the “discredit to the armed forces” clause. However, there could be no prosecution under art. 134 for an offense separately denounced in the UCMJ. United States v. Norris, 2 U.S.C.M.A. 236, 239-40, 8 C.M.R. 36, 39-40 (1953); United States v. Haywood, 2 U.S.C.M.A. 376, 377, 9 C.M.R. 6, 7 (1953); Aycock & Wurzel 313. Depending upon the particular activity involved, an officer can be prosecuted under art. 88, 10 U.S.C. § 888 (1964), for contempt toward officials, and under art. 133, 10 U.S.C. § 933 (1964), for conduct unbecoming an officer. United States v. Howe, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967).
found the lack of uniform to be significant. Where other considerations are inconclusive, that the offender was uniformed could tip the balance in favor of military jurisdiction; but the presence of the uniform, without more, should not be enough to sustain court-martial jurisdiction.

Narcotics present a special problem since Congress has not in the UCMJ specifically prohibited their use or possession. Traditionally, narcotics offenses have been punished as violations of the general article prohibiting conduct to the "prejudice of the good order and discipline in the armed forces." An alternative method has been the issuance of an order forbidding use and possession and prosecution for disobedience of the order. Because an off-post narcotics violation has no classical "victim" and will most likely occur while the offender is off duty and in civilian clothes, a strict reading of O'Callahan often will not allow the military to exercise jurisdiction. The Court of Military Appeals has decided, however, to sustain court-martial jurisdiction over all off-post narcotics offenses. In reaching this result, the court in narcotics cases apparently has considered the factors of whether there is "no military significance" and the offense is "not service connected" separately from the others set forth in O'Callahan. It seems obvious that these phrases have no meaning except that which is given them by the facts of the case. O'Callahan should be as binding on military jurisdiction over narcotics offenses as it is in all other cases.

Under O'Callahan, civilian courts are assured exclusive jurisdiction over a serviceman only when he is accused of an offense committed off post within the United States in peacetime while he was not on duty, and if it involves no question of military authority, property, or security. In civilian courts a serviceman charged with a felony is guaranteed a grand jury indictment and trial by his peers, a court and counsel owing allegiance only to their own consciences, the remedy of a declaratory judgment if he is prosecuted under an invalid statute, and "an atmosphere conducive to the protection of individual rights ... ." Another sig-

50 395 U.S. at 266.
significant advantage to the serviceman defendant, not mentioned by the Supreme Court in O'Callahan, is that vesting exclusive jurisdiction in the civil courts over certain offenses removes the double jeopardy to which he was subject when the civil and military courts had concurrent jurisdiction. With exclusive civil jurisdiction, the only legal action that can be taken by the military is a prosecution for any period of unauthorized absence generated by civilian confinement.

The holding of O'Callahan, however, is not limited to serious offenses, which entitle the offender to a jury trial. The Court simply stated that the defendant "could not be tried by court-martial but rather was entitled to trial by the civilian courts." By this statement it presumably meant to require exclusive civil jurisdiction over all offenses that satisfy the elements of O'Callahan. Since there is as yet no right to a jury in trials of "petty" offenses, the military offender tried in a civilian court for a petty offense is faced with severe military consequences without having gained the advantage of a jury trial. Because civil authorities with exclusive jurisdiction over a petty offender can no longer turn him over to the military for trial, he will either make bond or be jailed. If he is able to make bond and return to his unit before being declared absent without leave, his subsequent return to civil authorities for trial, and any sentence served, will not be considered a punishable unauthorized absence, but he will have to make up the lost time at the end of his enlistment.

The military petty offender who is unable to make bond before his authorized absence expires is in more serious trouble. If he is held in jail beyond his authorized absence period and is later convicted, even if he meanwhile returned to duty, the initial absence becomes unauthorized, although the period of confinement is not; both periods, however, must be made up by an equal amount of additional active duty. As for the

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53 395 U.S. at 274.
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petty offender who is unable to make bail at any time before trial, upon conviction his absence becomes unauthorized from the time that his pass or leave expired, as of that time his pay and any family allotment stop, the period of confinement is "bad time" that must be made up, and upon returning to duty he will be subject to military prosecution as an unauthorized absentee for the period of confinement by the civil authorities.

Conversely, if the serviceman were initially returned to the military for disciplinary action, he would not have to answer for unauthorized absence (unless he were held by civilian authorities past his authorized absence period); he could not lose more than two-thirds of his pay for whatever the period of punishment adjudged; his family allotment could not be added onto his pay before computing the forfeiture and would continue unabated, and he would incur no "bad time" to make up unless confined by the military as punishment.

The ragged division of jurisdiction resulting from O'Callahan will cause the military and civilian bench and bar considerable difficulty until firmer jurisdictional lines are hammered out in new cases, and the decision may result in injustice to individual defendants in test cases. Nevertheless, two valuable safeguards are afforded the serious offender by the holding in O'Callahan. First, the decision provides for the application of the procedural safeguard of the jury system to those cases involving servicemen that the military should have little interest in prosecuting; second, by vesting exclusive jurisdiction in the civil courts, O'Callahan reduces the possibility of double jeopardy for service personnel that was always present under concurrent jurisdiction. But until the Court extends the right to a jury trial to all civilian criminal defendants, or until the UCMJ and the military's financial regulations are altered to mitigate the military consequences of a civilian conviction,
those offenders whose crimes are classified as petty offenses under prevailing constitutional standards should not be deprived of the potential collateral advantages of a military trial and should be excluded from the O'Callahan rule.

Roger Groot

Patents—The Overruling of the Licensee Estoppel Doctrine

The favored status once enjoyed by patentees before the United States Supreme Court has undergone considerable change in this century. Many of the older concepts have been re-examined in light of the current state of the patent system and the competing demands of other areas of the law. For example, the exclusiveness of the patent grant is repugnant to the free-competition teachings of antitrust policy. These factors have prompted searching reappraisals of the privileges historically inherent in the grant; in some cases, privilege-bestowing decisions of the past have fallen.

More than one hundred years ago, the Supreme Court held that one who had derived benefits from the use of another’s patent was estopped to deny its validity when sued by the owner for a share of the profits. The effect of the estoppel doctrine was to shield many questionable patents from attack. In Lear, Inc. v. Adkins the Supreme Court recently disapproved this venerable doctrine. The Court stressed the strong public interest in general circulation and use of ideas not entitled to patent protection and reasoned that the estoppel doctrine was often a bar to the most logical contestant of patentability.

Adkins, while employed by Lear, had designed an apparatus increasing the accuracy of gyroscopes. While his patent application was pending, he licensed Lear to use his invention in return for royalties. After paying royalties for approximately two years, Lear decided that the discovery by Adkins had been fully anticipated by a prior patent and announced that it would no longer pay royalties on production at one of its locations. Lear later discontinued payments altogether. Shortly thereafter, Adkins finally

3 Id. at 1910-11.
4 Id. at 1911. The high costs of patent litigation and the specter of possible treble damages for infringement under 35 U.S.C. §284 (1964) can effectively deter a third party from attacking a patent that he desires to use. Although the same hardships may confront the licensee, he has more to gain since he is already utilizing the patent and is saddled with royalty payments.