# New Limits on Court-Martial Jurisdiction: O'Callahan v. Parker

Donald L. Sweatt

now make credit sales to any person presenting a card with the card itself being sufficient identity of the person presenting the card.

It has been suggested that all credit cards should have a signature block and photograph of the card holder, and that the card holder be protected by insurance.[25] Illinois and Massachusetts have already taken action on the credit card problem.[26] As to unauthorized purchases made prior to notification of loss or theft of the card, the Illinois statute limits the card holder's liability to $75 if the card has a signature block and to $25 if the card has no signature block.[27] The statute seems to unreasonably discriminate against the card issuer-seller because there is no difference in the maximum possible liability of an innocent card holder and a negligent card holder. Also, as in the *Union Oil* case, the burden is on the seller to prove that he exercised due care in making unauthorized credit card sales. As a result, the card issuer-seller is effectively made insurer for any losses which may arise from the unauthorized use of a credit card notwithstanding the negligence of the card holder.

A suggested statute for Texas would limit card holder liability to $100 if the card has no signature block, $200 if the card has a signature block, and $400 if the card has a signature block and photograph of the card holder. Furthermore, such a statute should provide that the maximum possible liability be doubled in situations of card holder negligence. Negligence on the part of the seller should be a complete defense against any recovery by the card issuer-seller. Such a statute would prevent a card holder from becoming an insurer of a potentially unlimited loss resulting from unauthorized purchases, and would provide a favorable balance of the responsibilities and liabilities between the card issuer and card holder.

*Charles G. White*

## New Limits on Court-Martial Jurisdiction: O'Callahan v. Parker

O'Callahan, a sergeant in the United States Army, was stationed at Fort Shafter in the Territory of Hawaii. While on leave with an evening pass, he was arrested by the Honolulu police for assaulting and attempting to rape a young girl in a civilian hotel. At the time of the offense and the arrest, O'Callahan was wearing civilian clothes, but was delivered to the military police after it was determined that he was a member of the armed forces. O'Callahan was convicted by a court-martial of attempted rape,

[25] Murray, *A Legal-Empirical Study of Unauthorized Use of Credit Cards*, 21 U. MIAMI L. REV. 811 (1967). American Express credit card holders are protected against loss above $100 even if the card holder fails to report the loss or theft of the card.

[26] ILL. ANN. STAT. ch. 121½, § 382 (Smith-Hurd Supp. 1969); MASS. ANN. LAWS ch. 255, § 12E (Supp. 1968). The Massachusetts statute limits recovery to a maximum of $100, but has no provision concerning the burden of proof.

[27] ILL. ANN. STAT. ch. 121½, § 382 (Smith-Hurd Supp. 1969).

assault with attempt to rape, and housebreaking.[1] The conviction was affirmed on appeal and he was placed in a federal penitentiary. While confined, he filed a petition for writ of habeas corpus, alleging that the court-martial had no jurisdiction to try him for an offense which was committed on leave and away from a military reservation. Relief on the petition was denied.[2] *Held, reversed*: A military court-martial is without jurisdiction to try a member of the armed forces for a peacetime offense that was not service-connected and which was committed in the United States or its territories. *O'Callahan v. Parker*, 395 U.S. 258 (1969).

## I. Court-Martial Jurisdiction

Article I of the United States Constitution gives Congress the power to "make Rules for the Government and Regulation of the land and naval Forces."[3] Pursuant to this grant of power, Congress has promulgated an extensive Code governing the trial and punishment of military personnel.[4] Even before the Constitution was drafted, the Continental Congress had established, by the Articles of War in 1776, court-martial jurisdiction over offenses having obvious military significance.[5] The offenses subject to court-martial jurisdiction were not altered when the Articles were reenacted in 1789, and remained substantially unaltered through several revisions.[6] In 1916, however, the Articles were revised to grant court-martial jurisdiction over all offenses committed by members of the armed forces,[7] except that jurisdiction over capital crimes was limited to wartime.[8] Finally, in 1950, the Uniform Code of Military Justice extended court-martial jurisdiction to include capital crimes even in peacetime.[9] This jurisdiction remained unaltered with the 1968 amendments to the Code.[10]

Despite the fact that the jurisdiction of courts-martial has progressively been enlarged as to offenses, there has always been a fear of allowing that jurisdiction to become too broad.[11] Especially when the offense was one not military in nature, the courts have been reluctant to allow court-martial jurisdiction to expand because of the consequent loss of constitutional rights.[12] Nevertheless, the offenses subject to court-martial jurisdiction have

---

[1] The offenses charged were in violation of Uniform Code of Military Justice arts. 80, 130, 134, 10 U.S.C. §§ 880, 930, 934 (1964).

[2] O'Callahan v. Parker, 390 F.2d 360 (3d Cir. 1968).

[3] U.S. Const. art. I, § 8.

[4] Uniform Code of Military Justice, tit. 10 U.S.C. (1964).

[5] W. Winthrop, Military Law and Precedents 1489 (2d ed. 1920).

[6] *Id.*

[7] Art. 92 of the Articles of War of 1916, 39 Stat. 650, 664 (1916); Bishop, *Court-Martial Jurisdiction Over Military-Civilian Hybrids*, 112 U. Pa. L. Rev. 317 (1964).

[8] Art. 93 of the Articles of War of 1916, 39 Stat. 650, 664 (1916).

[9] Uniform Code of Military Justice arts. 77-134, 10 U.S.C. §§ 877-934 (1964).

[10] Military Justice Act of 1968, 82 Stat. 1336 (1968).

[11] "The attitude of a free society toward the jurisdiction of military tribunals—our reluctance to give them authority to try people for non-military offenses—has a long history." Lee v. Madigan, 358 U.S. 228, 232 (1959).

[12] "Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service." Toth v. Quarles, 350 U.S. 11, 22 (1955). For a discussion of the rights lost when an individual enters the service, *see*, Comment, *Military Justice and the Military Justice Act of 1968: How Far Have We Come?*, 23 Sw. L.J. 554 (1969).

increased because the Congress was not limited by the Constitution as to offenses in making the rules for the government and regulation of the armed forces.[13]

Historically, the determinative element of court-martial jurisdiction has always been the "status" of the accused, *i.e.*, whether he was a member of the "land and naval Forces."[14] If the requisite "status" was present, this was sufficient for the exercise of court-martial jurisdiction over the person, regardless of the nature of the offense.[15] In cases where the requisite "status" was not present, however, court-martial jurisdiction was denied, even if the offense was one related in some way to the military.[16] When the necessary jurisdiction over the person existed, the subject-matter jurisdiction of courts-martial was for Congress, rather than the courts, to determine.[17]

## II. Constitutional Rights Afforded Military Personnel

In granting Congress the power to make the rules for the government and regulation of the land and naval forces, the drafters of the Constitution undoubtedly recognized that the exigencies of military operations made it necessary to deny those in the armed services certain rights. Specifically, the right to indictment by a grand jury, guaranteed in the fifth amendment, was excepted in cases arising in the land and naval forces.[18] Although not specifically excepted, the right to be tried by a jury was also withheld, by implication, in military cases.[19] Constitutional rights not explicitly excepted, other than the right to jury trial, have also been denied to military personnel.[20]

Recently, there has been an emphasis toward extending to military personnel more of the constitutional rights afforded to civilians. In *Burns v. Wilson*[21] the United States Supreme Court, for the first time, extended the requirement of due process to military courts. In doing so, the Court stated that "[t]he military courts, like the state courts, have the same responsibility as do the federal courts to protect a person from a violation of his constitutional rights."[22] The Court of Military Appeals, following *Burns*, has extended the *Miranda v. Arizona*[23] "requirements," including the right to have counsel present during interrogation, to apply to military per-

[13] Kinsella v. Singleton, 361 U.S. 234 (1960).

[14] "[M]ilitary jurisdiction has always been based on the 'status' of the accused, rather than on the nature of the offense." *Id.* at 243.

[15] *Id.*

[16] When Congress attempted by Uniform Code of Military Justice art. 2(11), 10 U.S.C. § 802 (1964), to subject civilian dependents of members of the armed forces overseas to court-martial jurisdiction, this was held repugnant to Congress' constitutional power because of the lack of the requisite "status" of the accused. Kinsella v. Singleton, 361 U.S. 234 (1960), and the companion cases thereto.

[17] Coleman v. Tennessee, 97 U.S. 509 (1878).

[18] The phrase "when in actual service in time of war or public danger" is a limitation which applies only to the militia, not to the land and naval forces. *Ex parte* Mason, 105 U.S. 696 (1881).

[19] *Ex parte* Quirin, 317 U.S. 1 (1942).

[20] *See* note 12 *supra.*

[21] 346 U.S. 137 (1953).

[22] *Id.* at 142.

[23] 384 U.S. 436 (1966).

sonnel.[24] In reaching its decision, the Court of Military Appeals said that *Burns* was "an unequivocal holding by the Supreme Court that the protections of the Constitution are available to servicemen in military trials . . . except those which are expressly or by necessary implication inapplicable . . . ."[25] *Burns*, and the way it has been interpreted, seems to mark a trend to broaden the constitutional rights afforded to servicemen.

## III. Service-Connected Offense—New Element of Court-Martial Jurisdiction

In *O'Callahan v. Parker*[26] the Supreme Court added a new element that must be considered in determining court-martial jurisdiction. While recognizing that the "status" of the accused is necessary for such jurisdiction, the Court held that "status" alone was not sufficient. Before a court-martial acquires jurisdiction, the offense must be "service-connected." If the offense does not have the requisite connection with the military, then the civilian, rather than the military courts, have jurisdiction. This was found even though the fifth amendment excludes these rights "in cases arising in the land or naval forces."[27]

Recognizing that indictment and trial by jury were not necessary in such cases, the Court reached its decision by interpreting the constitutional provision that gives Congress the power "to make Rules for the Government and Regulation of the land and naval Forces."[28] That Congress possesses this power was not denied. However, in exercising this power, the Court found that no conflict should arise with the Bill of Rights, and since the offense must be "service-connected" to arise in the land and naval forces, Congress could not subject a person to court-martial jurisdiction merely on the grounds that he was a member of the armed services. *O'Callahan* thus limits congressional power to establish court-martial jurisdiction by redefining the phrase, "cases arising in the land and naval Forces," to include only cases having military significance rather than all cases involving an offense committed by a member of the military.

In limiting the power of Congress to establish court-martial jurisdiction, the Supreme Court relied heavily on the dictum in *Toth v. Quarles*,[29] a case in which an attempt was made to assert court-martial jurisdiction over a discharged soldier. The holding in that case could not be used as precedent for *O'Callahan* because jurisdiction was denied the court-martial in *Toth* as a result of the absence of the requisite "status."[30] The dictum relied on in *Toth* relates mainly to the inferiority of military courts, as compared with civilian courts, in dispensing justice and protecting the rights of the

[24] United States v. Tempia, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).
[25] *Id.* at 634.
[26] 395 U.S. 258 (1969).
[27] U.S. Const. art. I, § 8.
[28] *Id.*
[29] 350 U.S. 11 (1955).
[30] Toth v. Quarles, 350 U.S. 11 (1955), involved a discharged soldier who had been tried by court-martial for an offense committed before his discharge. The court-martial was denied jurisdiction because the accused was no longer a member of the armed services, *i.e.*, lacked the necessary status.

accused. This reliance is weak, not only because it is dictum and the facts are distinguishable, but also because the Court took little notice of the efforts for improving the quality of courts-martial justice.[31] Although much of what the Court stated about the quality of courts-martial may have been true in the past, it is debatable whether or not the arguments will be valid in the future.[32]

The Court also placed considerable reliance on the historical limitations of court-martial jurisdiction. However, this was again drawn from dictum contained in a case decided on grounds of the absence of the requisite "status."[33] The *O'Callahan* dissent pointed out that nothing in the history of court-martial jurisdiction was binding since the Constitution does not limit such jurisdiction to the extent it was exercised in the eighteenth and early nineteenth centuries.[34] Also, the dissent expressed the view that the majority ignored many facts of history that weakened, rather than strengthened, their view.[35]

Not only did the Court have little on which to base the addition of the "service-connected" offense, it also ignored the precedential value of some of its own prior decisions. In the same case from which the Court drew its historical argument,[36] it was stated that the "natural meaning" of the term "land and naval Forces" in clause 14 "refers to persons who are members of the armed services."[37] It was also stated that accordingly, the exceptions of the fifth amendment refer to persons "in the armed services."[38] Even the stronger language of a more recent case was also rejected. In *Kinsella v. Singleton*[39] the Court stated that "military jurisdiction has always been based on the 'status' of the accused, rather than the nature of the offense" and that the language of article I[40] unambiguously defines military jurisdiction in terms of "status."[41] Even though presented to the Court, the clear language of this, as well as other cases,[42] was not accepted. It would seem, therefore, that the Court was acting in keeping with its recent emphasis on procedural due process rather than trying to apply the language of past decisions.

---

[31] *See* Comment, *supra* note 12, for a discussion of the improvements made by the Military Justice Act of 1968, 82 Stat. 1336 (1968).

[32] *See generally* O'Malley, *Broader Justice For Military Personnel*, 5 TRIAL 45 (Dec./Jan. 1968-69); Sherman, *Revised Military Code: A Qualified Assent*, 5 TRIAL 44 (Dec./Jan. 1968-69).

[33] Reid v. Covert, 354 U.S. 1 (1957).

[34] The dissenting opinion was written by Justice Harlan, joined by Justices Stewart and White. 395 U.S. 258, 274 (1969).

[35] The dissent stated that other considerations entered into the history of court-martial jurisdiction, such as the struggle for power between the Crown and the military on the one hand, and the Parliament on the other. These other considerations cause history to be a weak point on which to depend for the majority decision. Also, the dissent stated that the balance of interests between the needs of the military and the need of protecting individual rights should enter into the decision. The majority looked only at the need to protect the rights of the individual. 395 U.S. 258, 276-84 (1969).

[36] Reid v. Covert, 354 U.S. 1 (1957).

[37] *Id.* at 19-20.

[38] *Id.* at 22-23.

[39] 361 U.S. 234 (1960).

[40] U.S. CONST. art. I, § 8.

[41] Kinsella v. Singleton, 361 U.S. 234, 243 (1960).

[42] Grafton v. United States, 206 U.S. 333 (1907); Johnson v. Sayre, 158 U.S. 109 (1895); Coleman v. Tennessee, 97 U.S. 509 (1879).

## IV. Limitations and Impact of O'Callahan

Exactly how much *O'Callahan* limits the jurisdiction of courts-martial is not clear. The failure of the Court to define the term "service-connected" has caused the extent of court-martial jurisdiction to be placed in doubt. In determining if an offense is "service-connected," the Court implies that the relevant factors to be considered are: (1) Whether or not the accused was in uniform at the time the offense was committed; (2) whether the accused was on leave or was performing military duties; (3) whether or not the offense occurred on a military reservation; (4) whether or not the victim, if any, was a member of the military or was performing duties related to the military; (5) whether or not the offense had a connection with military authority or the flouting of military authority; and (6) whether or not the offense was committed within the boundaries of the United States or its territories. These factors are, however, merely those that were apparently considered by the Court in deciding *O'Callahan* and are not definite guidelines.[43]

Since there is not a clear definition of "service-connected" from the Court, the full impact of *O'Callahan* cannot be determined. Until further elucidation of the term is given by the Court, it will often be difficult to determine under what fact situations offenses will be under civilian, rather than military, jurisdiction when the accused is a member of the armed forces. If given its fullest impact, an extremely heavy case load will be placed on civilian prosecutors and courts in areas adjacent to military bases. This would create a definite problem since many of these prosecutors and courts are already burdened by inadequate resources and small staffs. An even more important problem might arise if *O'Callahan* is construed to be retroactive. In this event, all of those persons now confined as the result of a court-martial would have adequate grounds for a release under a writ of habeas corpus if the offense for which they were convicted was not "service-connected." The result would undoubtedly be a tremendous amount of litigation.

Regardless of the impact of *O'Callahan*, however, it is consistent with the trend of the Supreme Court to interpret the Constitution, whenever possible, to broaden the rights of members of the armed services. If this trend continues in the future, the traditional structures of the military will be forced to change drastically in order to be able to grant servicemen their rights.

*Donald L. Sweatt*

[43] In a military justice opinion issued by the Military Justice Division, Office of the Judge Advocate General, U.S. Army, it appears that the military intends to apply *O'Callahan* narrowly. The opinion stated that courts-martial should continue to exercise jurisdiction over all offenses in violation of the Uniform Code of Military Justice unless the facts of the case bring it squarely within the *O'Callahan* decision. 1969 J.A.G.J. 8399 (June 4, 1969).