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MILITARY APPELLATE DECISIONS FOLLOWING *O'CALLAHAN v. PARKER*

MYRON L. BIRNBAUM AND CHARLES W. FOWLER***

I. INTRODUCTION[1]

THE decision of the Supreme Court of the United States in *O'Callahan v. Parker*,[2] handed down on June 2, 1969, compelled a fundamental change in prevailing concepts of court-martial jurisdiction. The decades previous had been marked by a growing tendency for military tribunals, often with the active concurrence of local jurisdictions, to try all military offenders for all classes of offenses. This was sometimes pithily expressed within the services as the military's "washing its own dirty linen."

Some degree of Congressional support for this exercise of jurisdiction may be seen in the 1950 reenactment[3] of the then current basic military justice statutes[4] into the new Uniform Code of Military Justice.[5] Article 5 states that the Code applies "in all places."[6] Among the Punitive Articles which define the offenses covered by the Code, Articles 116 through 132[7] define essentially common law offenses from breach of the peace through the common felonies to rape and murder, while the restatement of the General Article declared court-martial jurisdiction over unspecified offenses in the broadest language yet used:

> [A]ll 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 . . . .[8]

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1. At the outset, the authors invite attention to the scholarly article by Professor Grant S. Nelson, University of Michigan, and Professor James E. Westbrook, University of Missouri—Columbia, Court-Martial Jurisdiction Over Servicemen for "Civilian" Offenses: An Analysis of O'Callahan v. Parker, 54 Minn. L. Rev. 1 (1969). That article deals brilliantly and in depth with the background and content of the decision itself, matters not covered in the present discussion. We also desire to express appreciation to Major Robert L. Bates, Associate Appellate Government Counsel, USAF Judiciary, for editorial and research assistance.

2. 395 U.S. 258 (1969).

3. Act of May 5, 1950, ch. 169, 64 Stat. 107.

4. For the Army and the Air Force, the Articles of War; for the Navy, the Articles for the Government of the Navy.

5. The Uniform Code of Military Justice [hereinafter cited as UCMJ] is codified at 10 U.S.C. §§ 801-940 (1964), as amended, 10 U.S.C. §§ 810-940 (Supp. IV, 1969).

6. UCMJ art. 5, 10 U.S.C. § 805 (1964).

7. UCMJ arts. 116-32, 10 U.S.C. §§ 916-32 (1964).

8. UCMJ art. 134, 10 U.S.C. § 934 (1964).

In *O'Callahan*, Mr. Justice Douglas, speaking for a 5-to-3 majority of the Court, examined this broad exercise of military jurisdiction. After a wide ranging, sometimes disparaging chronicle of military justice history, precedents, and practice, he held that—at least in peacetime—courts-martial have jurisdiction only over "service-connected" offenses.[9]

O'Callahan, an Army sergeant, had been stationed in Hawaii and on leave in 1956, the time of the offense. He had been convicted by a general court-martial of the crimes of attempted rape, housebreaking, and assault with intent to rape.[10] The appellate procedures under the Code had been completed and the case had become "final" in the sense of Article 76.[11]

In holding that the offenses were not service-connected, the author Justice did not attempt to set forth any compendium of rules for use as a touchstone in determining whether an offense is service-connected. Instead, he spoke in terms of the instant crimes and offender, making a number of points which may be conveniently restated as follows:

1. O'Callahan was on leave when the crimes were committed.
2. The crimes were not connected with his military duties.
3. The crimes were not committed on a military post or enclave.
4. The victim was not performing duties related to the military.
5. Hawaii was not "an armed camp under military control."
6. It was peacetime, not involving war power authority.
7. Civil courts were open.
8. The offenses were in United States territory, "not in the occupied zone of a foreign country."
9. The offenses did not involve flouting of military authority, security of a military post, or integrity of military property.[12]

The military justice system responded immediately to the decision. Electrical messages went to the field and an unreported and unknown number of prosecutions of non-service-connected offenses were dropped and convictions under initial review were reversed. At the appellate level, the service Boards of Review[13] and the United States Court of Military Appeals immediately extended their review of the cases before them to the question introduced by *O'Callahan*.

The problem which the decision gave the military practitioner at the outset was the definition of "service-connected" and how to apply it as a

9. 395 U.S. at 272.

10. Id. at 260-61, in violation of UCMJ arts. 80, 130, 134, 10 U.S.C. §§ 880, 930, 934 (1964).

11. UCMJ art. 76, 10 U.S.C. § 876 (1964).

12. 395 U.S. at 273-74.

13. Then the intermediate military appellate tribunal, now reconstituted as Military Courts of Review under the Military Justice Act of 1968, UCMJ art. 66, 10 U.S.C. § 866 (Supp. IV, 1969).

test for jurisdiction. Would a reversal of the *O'Callahan* pattern in *any one* of the criteria enumerated above provide a basis for trial by court-martial? And were these the only criteria, or were there other possibilities not mentioned in the decision?

The Court of Military Appeals issued its first definitive decision on the question in early September in *United States v. Borys*[14] and, during the ensuing months, has established a body of case law which maps the greater part of the territory into service-connected and non-service-connected areas. At the date of the present writing, the views of this highest service court have been well enough enunciated that the military lawyer may once again approach most offenses with a clear idea of whether the court will find jurisdiction.

Two fundamental questions remain to be answered by the Supreme Court. First, is *O'Callahan* retroactive as to cases which were *final* at the date of its promulgation? The Supreme Court, on February 27, 1970, granted certiorari in one case, *Relford v. Commandant*,[15] in which decision on this question may be anticipated. However, the Court of Military Appeals has already spoken on the matter.

The very first case decided by the Court of Military Appeals in this area touched on retroactivity, for the *Borys* court-martial had occurred before the *O'Callahan* decision. The court's reversal of *Borys* was generally accepted as establishing that military cases which had not become "final in the sense of Article 76"[16] were still subject to review for compliance with *O'Callahan*.

In *Mercer v. Dillon*,[17] the Court expressly addressed the question of retroactivity. At the outset, citing *Borys*, Judge Darden, writing for himself and Chief Judge Quinn, noted that they had treated *O'Callahan* as retrospective as to those cases which were still "subject to direct review"[18] when it was promulgated. He then discussed at length the previous views of the Supreme Court as to when retroactivity is and is not required and justified[19] and applied these to the situation created by the *O'Callahan*

14. 18 U.S.C.M.A. 547, 40 C.M.R. 259 (1969); accord, United States v. Prather, 18 U.S.C.M.A. 560, 40 C.M.R. 272 (1969).

15. 90 S. Ct. 958 (1970) (No. 665, 1969 Term).

16. 10 U.S.C. § 876 (1964).

17. 19 U.S.C.M.A. 264, 41 C.M.R. 264 (1970). See also Gosa v. United States, 19 U.S.C.M.A. 327, 41 C.M.R. 327 (1970); Wright v. United States, 19 U.S.C.M.A. 328, 41 C.M.R. 328 (1970); Hooper v. Laird, 19 U.S.C.M.A. 329, 41 C.M.R. 329 (1970). These latter cases all followed the rationale of Mercer v. Dillion. Judge Ferguson dissented in all except Hooper v. Laird, where he did not reach the question of retroactivity because he found service connection based on the facts.

18. 19 U.S.C.M.A. at 264, 41 C.M.R. at 264.

19. Id. at 265, citing Jenkins v. Delaware, 395 U.S. 213 (1969); Stovall v. Denno, 388 U.S. 293 (1967); Linkletter v. Walker, 381 U.S. 618 (1965); Gosa v. Mayden 305 F. Supp. 1186 (D. Fla. 1969).

reversal of accepted concepts of court-martial jurisdiction. He concluded that previous courts-martial had not been categorically unfair—indeed, many accused had pleaded guilty—and that the armed forces had undoubtedly relied on the previous law. Finally, he noted that "a holding of general retroactivity would place countless convictions for serious crimes in jeopardy and would often result not in a retrial by a civilian court but an avoidance of further trial."[20] So saying, he denied the petition for reconsideration of Mercer's conviction and held that *O'Callahan* is not retroactive as to cases in which the military appellate process was complete as of the date the *O'Callahan* opinion was promulgated.

Judge Ferguson dissented. He first suggested that the Court of Military Appeals should not have spoken on the question since the Supreme Court had already agreed to decide *Relford*. However, he then went on to discuss the Supreme Court's doctrine of prospective application of constitutional protections. He expressed dislike for the concept and at length set forth his views that, whether the concept be accepted or not, *O'Callahan* demonstrated that there had never been jurisdiction under the 1950 Uniform Code of Military Justice over non-service-connected offenses. In consequence, he concluded that Sergeant Mercer's conviction should have been overturned.[21]

At this writing, military tribunals are operating under *Mercer*, in the understanding that *O'Callahan* is retroactive as to cases which had not completed the appellate process prior to its promulgation on June 2, 1969, but not as to those in which the process had been completed. The first opportunity for expression of the Supreme Court's views will be *Relford*. If it follows Judge Ferguson's view, an incalculable number of offenders who were convicted of non-service-connected offenses will have claims for money and other possible relief.

The second question on which the Supreme Court's pronouncements will be critical is whether that Court will follow the Court of Military Appeals' decisions as to what offenses are or are not service-connected. These questions must await a later article. The present discussion will be confined to the decisions of the Court of Military Appeals, through March 1970, as to what offenses are service-connected.

II. The Court of Military Appeals' Approach

The basic position of the United States Court of Military Appeals was established on September 5, 1969, when the majority handed down its decisions in *Borys* and *United States v. Prather*.[22] Of these, the *Borys* decision was the leading case in which the Court expressed its views at

20. 19 U.S.C.M.A. at 264, 41 C.M.R. at 264.
21. Id. at 274, 41 C.M.R. at 274.
22. 18 U.S.C.M.A. 560, 40 C.M.R. 272 (1969).

length. Like *O'Callahan*, it was a sex case, the offenses having been committed off-base and not otherwise service-connected. Judge Ferguson, speaking for himself and Judge Darden, followed *O'Callahan* exactly. Chief Judge Quinn dissented vigorously. Much of his discussion was in effect a dissent from the concepts of the *O'Callahan* decision itself, but he moved on to distinguish *O'Callahan* and to find service connection, as he interpreted the phrase. Further, he interpreted *O'Callahan* as intended to oust military jurisdiction only where a federal court would have jurisdiction, not a state court. In *Borys*, he fully expounded his view of the limited application of *O'Callahan* and, in many subsequent dissents, he has referred to that first opinion as stating the basis for his position in the later case then under consideration. In the development of the subsequent lines of cases, he has been by far the most liberal in finding service connection.

Judge Ferguson, on the other hand, has dissented in most cases in which Chief Judge Quinn and Judge Darden have concurred in holding that the military has jurisdiction where the offense, although committed off-base, was consummated at least in part because of the victim's reliance on the *perpetrator's* military status.[23] Judge Ferguson has also dissented vigorously in cases where military jurisdiction has been sustained by the majority because of the military status of the *victim*.[24] It is his position that a crime committed in the civilian community is a civilian offense, and that the criminal should not be required to forgo his right to indictment and trial by jury merely because of the military status of either the criminal or the victim.[25] In split decisions in this line of cases, it has generally been Judge Darden's agreement with the Chief Judge or with Judge Ferguson which has determined the outcome.

The court, although divided variously depending on the specific factual situation giving rise to the jurisdictional question, has established a body of precedent from which there is no reason to expect it to vary substantially.

A. *Overseas Cases*

Because of the worldwide locations of U.S. military personnel, one of the most immediate questions raised by the *O'Callahan* decision was

23. United States v. Haagenson, 19 U.S.C.M.A. 332, 41 C.M.R. 332 (1970); United States v. Peterson, 19 U.S.C.M.A. 319, 41 C.M.R. 319 (1970); United States v. Hallahan, 19 U.S.C.M.A. 46, 41 C.M.R. 46 (1969); United States v. Frazier, 19 U.S.C.M.A. 40, 41 C.M.R 40 (1969); United States v. Peak, 19 U.S.C.M.A. 19, 41 C.M.R. 19 (1969); United States v. Morisseau, 19 U.S.C.M.A. 17, 41 C.M.R. 17 (1969).

24. United States v. Plamondon, 19 U.S.C.M.A. 22, 41 C.M.R. 22 (1969); United States v. Cook, 19 U.S.C.M.A. 13, 41 C.M.R. 13 (1969); United States v. Camacho, 19 U.S.C.M.A. 11, 41 C.M.R. 11 (1969); United States v. Rego, 19 U.S.C.M.A. 9, 41 C.M.R. 9 (1969).

25. In this connection, see the discussion of status vis-a-vis service connection in O'Callahan v. Parker, 395 U.S. 258, 267, 274 (1969).

whether it applied overseas. If it did have extra-territorial application, then U.S. servicemen overseas would be amenable to trial only in foreign tribunals and possible confinement in foreign prisons, because federal courts have no broad grant of jurisdiction over persons or crimes outside the United States. If the Supreme Court did intend to divest courts-martial of jurisdiction overseas in favor of trial by a jury of peers, would that mean that, in countries where no trial by jury is available, courts-martial would retain jurisdiction? Or would no one have jurisdiction to try the offender? Would Status of Forces agreements between the United States and foreign countries providing for trial of United States servicemen by courts-martial for crimes committed off-base make a difference?

In the first decision of the Court of Military Appeals touching on this point after *O'Callahan*, the court found that military courts had jurisdiction over an off-base offense in a "zone of conflict" in Vietnam.[26] Judge Ferguson dissented, noting that the offense in question was charged as possession of counterfeit bills in violation of 18 U.S.C. § 472. He contended that the accused should have been returned to the United States for trial by a federal district court.

Thereafter, without dissent, the court has uniformly held that *O'Callahan* has no extra-territorial application, since crimes committed overseas are not cognizable in state or federal courts and hence trial by court-martial does not abrogate any right to indictment and trial by jury.[27]

The Supreme Court has not spoken on the question of court-martial jurisdiction since *O'Callahan*, but it is interesting to note that this Court recently refused to consider the petition of an ex-serviceman convicted by court-martial in Germany for the murder of a German citizen.[28] In that case, the Justice Department urged in its brief, *inter alia*, that all crimes committed by servicemen abroad be considered service-connected, but the Supreme Court's action left this assertion unanswered. Pending Supreme Court action, it is clear that the Court of Military Appeals considers that courts-martial have jurisdiction over the crimes of servicemen committed overseas, unless extra-territorial jurisdiction is vested in a federal civilian court. Meanwhile, the answer to the questions first posed in this section remain moot, so long as jurisdiction is found to exist over all offenses committed outside United States territory.

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26. United States v. Goldman, 18 U.S.C.M.A. 516, 40 C.M.R. 228 (1969).

27. United States v. Gill, 19 U.S.C.M.A. 93, 41 C.M.R. 93 (1969); United States v. Higginbotham, 19 U.S.C.M.A. 73, 41 C.M.R. 73 (1969); United States v. Stevenson, 19 U.S.C.M.A. 69, 41 C.M.R. 69 (1969); United States v. Easter, 19 U.S.C.M.A. 68, 41 C.M.R. 68 (1969); United States v. Keaton, 19 U.S.C.M.A. 64, 41 C.M.R. 64 (1969); United States v. Weinstein, 19 U.S.C.M.A. 29, 41 C.M.R. 29 (1969).

28. Swift v. Commandant, 396 U.S. 1028 (1970).

B. *On-Base vs. Off-Base Offenses*

It is now well established that the Court of Military Appeals will find that court-martial jurisdiction attaches in all offenses committed by a serviceman *on-base*, reasoning that the security of the military installation is affected thereby.

Thus, in *United States v. Fields*,[29] it was held that the military had jurisdiction where a serviceman murdered his wife on Schofield Barracks though federal and local courts had concurrent jurisdiction with the military and were available to try him. In other cases, the court held that a court-martial had jurisdiction over (1) larceny of a civilian-owned vehicle where the taking occurred on a military reservation,[30] (2) carnal knowledge which took place on a military base,[31] and (3) sodomy which occurred in government quarters on a military installation.[32]

When offenses are committed off-base by military personnel, service connection must be found in some other aspect before courts-martial have jurisdiction. In *Borys* and *Prather*, the court followed *O'Callahan* in reversing convictions where the offenses were committed off-base and no other service connection was found. Thereafter, the court has reversed convictions for (1) burglary and larceny off-base though the serviceman was AWOL from military service at the time,[33] (2) murder off-base,[34] (3) larceny of a negotiable instrument off-base,[35] (4) larceny of a vehicle from an off-base used car lot, even though the vehicle was later brought on-base,[36] and (5) larceny of a vehicle off-base, even though from a retired army officer while the accused was in uniform and in AWOL status, having escaped from military confinement.[37]

The court has clearly made a distinction in line with the rationale of *O'Callahan*, between the military *status* of the serviceman,[38] and the particular facts and circumstances of his offense.[39] If the *facts* do not otherwise establish service connection, his military status will not do so and a court-martial conviction will be reversed for lack of jurisdiction.

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29. 19 U.S.C.M.A. 119, 41 C.M.R. 119 (1969).
30. United States v. Paxiao, 18 U.S.C.M.A. 608, 40 C.M.R. 320 (1969).
31. United States v. Smith, 18 U.S.C.M.A. 609, 40 C.M.R. 321 (1969).
32. United States v. Shockley, 18 U.S.C.M.A. 610, 40 C.M.R. 322 (1969).
33. United States v. Chandler, 18 U.S.C.M.A. 593, 40 C.M.R. 305 (1969).
34. United States v. Armstrong, 19 U.S.C.M.A. 5, 41 C.M.R. 5 (1969).
35. United States v. Safford, 19 U.S.C.M.A. 33, 41 C.M.R. 33 (1969); United States v. Cochran, 18 U.S.C.M.A. 588, 40 C.M.R. 300 (1969).
36. United States v. Riehle, 18 U.S.C.M.A. 603, 40 C.M.R. 315 (1969).
37. United States v. Armes, 19 U.S.C.M.A. 15, 41 C.M.R. 15 (1969). This case is one of those which confirms the mere fact that an offense committed while in uniform does not establish service connection.
38. 395 U.S. at 267.
39. Id. at 274.

A particularly difficult problem arises where the criminal and the persons or property against whom the crime is committed travel between an on-base and an off-base location. The court has held that jurisdiction did not attach where a car was stolen off-base and driven to an on-base location, since the larceny was completed off-base.[40] Jurisdiction did not attach where a serviceman met an under-age female dependent of another serviceman on-base, then accompanied her off-base and engaged in intercourse with her, since her connection with the service was "natal" only, and the crime itself was consummated off-base.[41]

In a robbery prosecution, where a taxi was hired by two servicemen who hit the driver on the head and mentioned their possession of a pistol to him while the taxi was still on-base, court-martial jurisdiction was found even though the extraction of money did not occur until the taxi had passed into the civilian community.[42] The rationale in this case was that force-and-violence and assault, elements of the offense of robbery, had taken place within the confines of the military installation.

C. *Servicemen as Victims*

The Court of Military Appeals has uniformly found sufficient service connection to sustain court-martial jurisdiction over an offense committed off-base, where the crime is directed against the person or property of another serviceman,[43] even though the service status of the victim was unknown to the offender.[44]

If the crime is directed against a *retired* serviceman, however, this will

40. United States v. Riehle, 18 U.S.C.M.A. 603, 40 C.M.R. 315 (1969).

41. United States v. Henderson, 18 U.S.C.M.A 601, 40 C.M.R. 313 (1969); cf. United States v. Smith, 18 U.S.C.M.A. 609, 40 C.M.R. 321 (1969), in which the carnal knowledge of a serviceman's dependent occurred on-base and jurisdiction was confirmed.

42. United States v. Crapo, 18 U.S.C.M.A. 594, 40 C.M.R. 306 (1969).

43. Offenses against the person: United States v. Huff, 19 U.S.C.M.A. 56, 41 C.M.R. 56 (1969) (assault); United States v. Nichols, 19 U.S.C.M.A. 43, 41 C.M.R. 43 (1969) (robbery); United States v. Plamondon, 19 U.S.C.M.A. 22, 41 C.M.R. 22 (1969) (robbery). Offenses against property of servicemen: United States v. Cook, 19 U.S.C.M.A. 13, 41 C.M.R. 13 (1969) (larceny of an automobile); United States v. Camacho, 19 U.S.C.M.A. 11, 41 C.M.R. 11 (1969) (housebreaking and larceny); United States v. Rego, 19 U.S.C.M.A. 9, 41 C.M.R. 9 (1969) (housebreaking and larceny). In this regard, see United States v. O'Callahan, 395 U.S. 258, 270, 274 (1969). The disagreement between the members of the Court of Military Appeals on the significance of the military status of the victim is well illustrated by Judge Ferguson's dissent in United States v. Plamondon, 19 U.S.C.M.A. 22, 25, 41 C.M.R. 22, 25 (1969), in which he vigorously criticizes the majority's interpretation of those two footnotes. A further interesting case, demonstrating how far the majority will go to find service connection in the status of the victim is United States v. Everson, 19 U.S.C.M.A. 70, 41 C.M.R. 70 (1969). There the accused was charged with the careless discharge of a firearm off-base and it appeared that the bullet struck another serviceman through sheer misadventure. The court found that this conferred jurisdiction on the court-martial.

44. See United States v. Camacho, 19 U.S.C.M.A. 11, 41 C.M.R. 11 (1969).

not confer court-martial jurisdiction;[45] nor will jurisdiction attach merely by reason of an attack on the persons or property of a serviceman's family.[46]

D. *Reliance on Military Status*

There is a line of recent cases in which the Court of Military Appeals has held that court-martial jurisdiction attaches when the victim is led to rely on the accused's military status to his detriment. The majority opinions generally note that the accused's military status was obvious and emphasized, and that the victim relied at least in part on that status in (1) permitting the accused to cash a check,[47] (2) charging a large bill for hotel room, meals and services,[48] or (3) allowing him to take an automobile from a used car lot, after discussing its purchase with a salesman while in uniform, charged as wrongful appropriation based on false pretenses.[49]

The second of these three cases, *United States v. Fryman*,[50] raises an interesting point and suggests the possibility of an additional category of service connection. In that case, the accused used not his own rank but an assumed one, since he was a Marine Corps private and incurred the indebtedness while impersonating an officer of the Corps, complete with insignia, medals, and ribbons. Judge Darden observed:

> But in this case we think it is not status alone but the positive misuse of the status to secure privileges or recognition not accorded others that causes the armed forces to have a substantial interest in punishing the abuse lest innocent members suffer.[51]

His discussion of the circumstances raises the possibility that the court may find service discredit and, hence, service connection in odd circumstances which do not necessarily fall under the discrete categories which we are discussing here.

Judge Ferguson concurred in the result in this case, without explanation, although he had previously dissented in every case wherein the status of either the offender or his victim was held to establish service connection. Some light on his reason for concurrence may be drawn from his previous dissent in *United States v. Peak*,[52] where the accused was

45. United States v. Armes, 19 U.S.C.M.A. 15, 41 C.M.R. 15 (1969).

46. United States v. McGonigal, 19 U.S.C.M.A. 94, 41 C.M.R. 94 (1969), where the accused committed sodomy with a female under 16 years of age who was the dependent of another serviceman. All acts occurred in an off-base dwelling.

47. United States v. Haagenson, 19 U.S.C.M.A. 332, 41 C.M.R. 319 (1970); United States v. Frazier, 19 U.S.C.M.A. 40, 41 C.M.R. 40 (1969); United States v. Morisseau, 19 U.S.C.M.A. 17, 41 C.M.R. 17 (1969).

48. United States v. Fryman, 19 U.S.C.M.A. 71, 41 C.M.R. 71 (1969).

49. United States v. Peak, 19 U.S.C.M.A. 19, 41 C.M.R. 19 (1969).

50. 19 U.S.C.M.A. 71, 41 C.M.R. 71 (1969).

51. Id. at 73, 41 C.M.R. at 73.

52. 19 U.S.C.M.A. 19, 41 C.M.R. 19 (1969).

convicted of wrongful appropriation on the basis of false pretenses made while he was in uniform, and the Judge said:

> The fact that the accused was in uniform or made representations as to his military status is simply irrelevant insofar as the wrongful appropriation of this car is concerned. How then can it be said that this is a factor to be considered in determining the question of jurisdiction.
>
> This was not an offense involving the use or misuse of the uniform, nor was the offense *charged* under Article 134 . . . as being "of a nature to bring discredit upon the armed forces" which might be the case where public confidence in the armed forces is an element of the offense . . . . The fact of discredit on the armed forces plays no part in any criminal conduct, no matter how heinous, except where the offense is properly chargeable under Article 134.[53]

In *Fryman*, the prosecution *was* brought under Article 134, suggesting one possible explanation for Judge Ferguson's concurrence.

The court has found military connection in one case where the only evidence of the accused's military status was his military identification, contained in the endorsement of three checks which he had forged to himself as payee.[54] The majority reasoned that the victims were made aware of and relied on the accused's status. Judge Ferguson dissented. He pointed out that status alone was found insufficient in *O'Callahan* to sustain military jurisdiction and contended that it was insufficient here. He reasoned that, regardless of the military status of the accused or the victim's awareness of it, the crime is essentially one committed in the civilian community, and is the concern of the individual state.

The most extreme application of this test for jurisdiction based on reliance on status is found in another recent worthless check case, *United States v. Peterson*.[55] The checks had been issued by a serviceman to merchants in the local civilian community. No service identification was written or hand-printed in the endorsement, as is frequently the case where such identification is desired or required by the merchant. On the face of the checks, however, the serviceman's name, service number, and box number at an air force base were preprinted. Upon non-payment, the payees complained to the commander of the serviceman's unit. The majority reasoned that "[t]he fair inference from this evidence is that each check was accepted by the named payee in reliance upon the accused's military status."[56] Judge Ferguson dissented once again, pointing out that, in his opinion, even the fact that the check was drawn on a branch bank located on a military base would make no difference, and that the offenses were "complete" when they were committed off-base.

53. Id. at 21, 41 C.M.R. at 21.
54. United States v. Hallahan, 19 U.S.C.M.A. 46, 41 C.M.R. 46 (1969).
55. 19 U.S.C.M.A. 319, 41 C.M.R. 319 (1970).
56. Id. at 321, 41 C.M.R. at 321.

E. *Drug Offenses*

The court has been unanimous in holding that the use and the possession of marihuana and narcotic drugs are offenses having special military significance sufficient to confer court-martial jurisdiction.[57] The court considers that use of the substances has disastrous effects on the health of the user as well as his morale and fitness for military duties, and hence is to the prejudice of good order and discipline in the armed forces. The court applies the same rationale to the possession of marihuana and narcotic drugs.

The offense of transfer of marihuana or narcotics has involved an additional complexity. In *United States v. Beeker*,[58] the court held that possession and use were service-connected offenses but that, absent other connection, importation and transportation were not. This holding has not been disturbed. In *United States v. Adams*,[59] and *United States v. Wysingle*,[60] however, the court considered the question of the transfer of marihuana from one serviceman to another without the specific order of the transferee required by 26 U.S.C. § 4742. In the original decisions on these two cases, Judge Darden considered that the conviction should be sustained, finding sufficient service connection and no other prejudicial error. Judge Ferguson, without finding any difficulty with the service connection aspect, considered that the conviction was barred by the much-publicized case of *Leary v. United States*,[61] on the ground that the Marihuana Tax Act[62] compelled the accused to "expose himself to a 'real and appreciable' risk of self-incrimination."[63] Chief Judge Quinn, on the other hand, found that reversal was required because the prosecution was based upon the first or second provisions of Article 134,[64] denouncing conduct "to the prejudice of good order and discipline in the armed forces" and "of a nature to bring discredit upon the armed forces," respectively. Indeed, it appears that he concluded that service connection

57. United States v. Wysingle, 19 U.S.C.M.A. 81, 41 C.M.R. 81 (1969), reconsidered, 19 U.S.C.M.A. 263, 41 C.M.R. 263 (1970); United States v. Adams, 19 U.S.C.M.A. 81, 41 C.M.R. 81 (1969), reconsidered, 19 U.S.C.M.A. 262, 41 C.M.R. 262 (1970); United States v. Rose, 19 U.S.C.M.A. 3, 41 C.M.R. 3 (1969); United States v. Castro, 18 U.S.C.M.A. 598, 40 C.M.R. 310 (1969); United States v. DeRonde, 18 U.S.C.M.A. 575, 40 C.M.R. 287 (1969); United States v. Beeker, 18 U.S.C.M.A. 563, 40 C.M.R. 275 (1969).

58. 18 U.S.C.M.A. 563, 40 C.M.R. 275 (1969).

59. 19 U.S.C.M.A. 75, 41 C.M.R. 75 (1969), reconsidered, 19 U.S.C.M.A. 262, 41 C.M.R. 262 (1970).

60. 19 U.S.C.M.A. 81, 41 C.M.R. 81 (1969), reconsidered, 19 U.S.C.M.A. 263, 41 C.M.R. 263 (1970).

61. 395 U.S. 6 (1969).

62. 26 U.S.C. § 4741 et seq. (1964).

63. 395 U.S. at 16, quoted in 19 U.S.C.M.A. at 80, 41 C.M.R. at 80.

64. 10 U.S.C. § 934 (1964).

under *Beeker* was conditioned upon the prosecution falling under one of those two provisions. In consequence, he found prejudicial error in that the law officer had failed to instruct the court-martial on the necessity that they find the conduct to be prejudicial to good order and discipline or service-discrediting, a required instruction in such cases pursuant to a long line of the court's decisions.[65]

Following the initial decisions in *Adams* and in *Wysingle*, the Supreme Court handed down the decision in *Minor v. United States*,[66] which held that the rationale of *Leary* did not protect the *transferor* of marihuana. Following this, upon motions for reconsideration by the government, Judge Ferguson reversed his position in *Adams* and *Wysingle*, although Chief Judge Quinn adhered to his conclusion that the convictions in the two cases must be reversed because of the instructional problem. In sum, the rule of the court is now that transfer of marihuana *to another serviceman* without compliance with 26 U.S.C. § 4742 *is* a service-connected offense.

F. *Military Offenses*

In no case has it been contended that a court-martial would not have jurisdiction to try a purely military offense such as absence without leave or disobedience of a lawful order. Such offenses have no counterpart in civilian life, and are creatures of statute designed solely for the maintenance of order and discipline in the military services.

While violations of orders and regulations may generally be considered to be service-connected, in *United States v. Castro*[67] Judge Ferguson expressed the view that *the conduct proscribed in a regulation* must be service-connected, lest the power to issue regulations extend military jurisdiction beyond that delimited in *O'Callahan*. On this basis, he held that an order forbidding possession of barbiturates, amphetamines, and other dangerous drugs covered service-connected conduct and a violation was triable by court-martial, but off-base violation of a regulation prohibiting the carrying of concealed weapons was not. Chief Judge Quinn dissented as to the latter point, on the ground that carrying a concealed

65. 19 U.S.C.M.A. at 76-77, 41 C.M.R. at 76-77, citing United States v. Williams, 8 U.S.C.M.A. 325, 327, 24 C.M.R. 135, 137 (1957). Judges Darden and Ferguson concluded that the prosecution was under the third provision of Article 134, denouncing "crimes and offenses not capital," so that they found no need for this instruction.

66. 396 U.S. 87 (1969). In the advance copies of the reconsideration decision in United States v. Adams, 19 U.S.C.M.A. 75, 41 C.M.R. 75 (1969), the Court of Military Appeals cites this as Buie v. United States, the style of a companion case covered by the same decision. This will be changed in the bound volumes of the Reports.

67. 18 U.S.C.M.A. 598, 40 C.M.R. 310 (1969).

68. Id. at 601, 40 C.M.R. at 61, citing United States v. Tobin, 17 U.S.C.M.A. 625, 631, 38 C.M.R. 423, 429 (1968).

weapon constituted conduct to the prejudice of good order and discipline without regard to local law,[68] but Judge Ferguson's limitation on prosecutions for violations of regulations effectively curtails the application of Article 92(1) and, almost certainly, of Articles 90(2), 91(2), and 92(2) as well.[69]

An interesting question presents itself with regard to such crimes as treason and espionage. When these are committed by a serviceman, they certainly affect the security of the nation, its government and all of its people. The Court of Military Appeals has held that, where a serviceman conspired to pass documents containing military information to a foreign power and where his military duties played a major part in his ability to obtain the documents, there was sufficient service connection to establish jurisdiction in a court-martial even though the crime was cognizable in the federal courts.[70]

G. *Petty Offenses*

The rationale for *O'Callahan* was that persons tried by court-martial are denied their constitutional right to indictment and trial by jury. In other decisions, the Supreme Court has held that an accused is not constitutionally entitled to indictment or trial by jury for petty offenses[71] and that offenses punishable by penalties of up to six months' imprisonment do not require trial by jury.[72]

Following this line of reasoning, the Court of Military Appeals has held that a serviceman who was drunk and disorderly in uniform off-base is triable by court-martial, since the maximum punishment is six months' confinement at hard labor and forfeiture of two-thirds pay per month for a like period. The court observed that the accused lost no constitutional right through trial by court-martial, since he would not be entitled to indictment and trial by jury in the civilian community.[73]

The Chief Judge concurred in the result, but arrived at his opinion by a different route. He cited his dissent in *United States v. Armes*,[74] where he stated his opinion that offenses committed while the offender is in uniform are triable by courts-martial. In support of his opinion, the Chief Judge pointed out that Congress has considered the wearing of the uniform such a manifest and significant circumstance of military

69. These statutes, respectively 10 U.S.C. §§ 890(2), 891(2), 892(1), 892(2) (1964), comprise all of the Articles which denounce violations of various classes of orders and regulations.

70. United States v. Safford, 19 U.S.C.M.A. 33, 41 C.M.R. 33 (1969); United States v. Harris, 18 U.S.C.M.A. 596, 40 C.M.R. 308 (1969).

71. Bloom v. Illinois, 391 U.S. 194 (1968) (dictum); District of Columbia v. Clawans, 300 U.S. 617 (1937).

72. Cheff v. Schnackenberg, 384 U.S. 373 (1966).

73. United States v. Sharkey, 19 U.S.C.M.A. 26, 41 C.M.R. 26 (1969).

association that it has forbidden the wearing of it or any distinctive part of it without authority.[75] He then pointed to the observation in *O'Callahan, inter alia*, that the accused was wearing civilian clothes and deduced that the wearing of the uniform while committing a crime, together with the resulting discredit to the armed forces, is sufficient service connection to establish the jurisdiction of a court-martial to try the accused.

So far, *United States v. Sharkey*[76] stands alone in excepting petty offenses from the *O'Callahan* rule. It dealt only with drunk and disorderly conduct, and obviously covers the lesser offenses of drunkenness under service discrediting circumstances and of disorderly conduct. There are a very few other offenses which courts-martial have considered in the past and which may be categorized as similarly petty, based on the authorized maximum punishment. This basis for jurisdiction may be extended to them in the future.

III. Conclusion

From the foregoing, it may be seen that a list of criteria for the exercise of court-martial jurisdiction may be derived which is somewhat parallel to the points which Justice Douglas noted in *O'Callahan*, as first listed above. That is, that peacetime jurisdiction will exist if any one or more of the following apply:

1. Offense committed outside United States territory.
2. Offense committed on a military installation.
3. An active duty serviceman as victim.
4. Reliance of the victim on the accused's military status.
5. Possession or use of drugs or marihuana (including unauthorized transfer to a serviceman).
6. Military offenses (e.g., AWOL, desertion, disobedience).
7. Petty offenses.

Of course, no opportunity has arisen for testing the significance of martial law or of a formally declared "time of war." Whether other circumstances may be added to this list, as a basis for peacetime jurisdiction, remains to be seen, but it may be anticipated that they will be few, infrequently found, and applicable to rare cases.[77] Experience with the flow of court-martial cases strongly suggests that the categories above will comprise by far the most significant bases for the exercise of jurisdiction under *O'Callahan*. Always, of course, with the caveat that this body of law, developed by the Court of Military Appeals, still awaits the *imprimatur* of the Supreme Court.

74. 19 U.S.C.M.A. 15, 41 C.M.R. 15 (1969).

75. United States v. Sharkey, 19 U.S.C.M.A. 26, 28, 41 C.M.R. 26, 28 (1969); see 18 U.S.C. § 702 (1964).

76. 19 U.S.C.M.A. 26, 41 C.M.R. 26 (1969).

77. See the discussion of United States v. Fryman, text accompanying note 50, supra.