

# The Military Justice System and the Right to Trial by Jury: Size and Voting Requirements of the General Courts-Martial for Service Connected Civilian Offenses

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## Introduction

The Sixth Amendment to the United States Constitution guarantees that “[i]n all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury . . . .”<sup>1</sup> The Supreme Court has defined the right to a jury trial in criminal prosecutions and has mandated a standard applicable in all jurisdictions in the country save one: the military justice system. The exception is significant when one considers that the military justice system is the judicial system for over two million members of the armed forces, making it the thirty-second largest jurisdiction in the country.<sup>2</sup> Even within the realm of military justice, the lack of a constitutionally protected right to a jury trial in criminal prosecutions is significant since most other Sixth Amendment rights<sup>3</sup> and most other Bill of Rights guarantees are afforded

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1. U.S. CONST. amend. VI.

2. See Cook, *Courts-Martial: The Third System in American Criminal Law*, 1978 S. ILL. L.J. 1.

3. Many Sixth Amendment rights are found both in case law and in the Uniform Code of Military Justice, 10 U.S.C. §§ 801-940 (1979 & Supp. 1980). See, e.g., *Johnson v. Zerbst*, 304 U.S. 458 (1937); 10 U.S.C. § 846 (1979 & Supp. 1980) (right to counsel); *United States v. Houshell*, 7 C.M.A. 3, 21 C.M.R. 129 (1956); 10 U.S.C. § 810 (1979 & Supp. 1980) (speedy trial); *United States v. Mercier*, 5 M.J. 866 (A.F.C.M.R. 1978); U.S. DEP'T OF DEFENSE, *MANUAL FOR COURTS-MARTIAL* ¶ 53e (rev. ed. 1969) (public trial); *United States v. Clay*, 1 C.M.A. 74, 1 C.M.R. 74 (1951); 10 U.S.C. § 830(b) (1979 & Supp. 1980) (right to be informed of the accusation); *United States v. Jacoby*, 11 C.M.A. 428, 29 C.M.R. 244 (1960) (confrontation); *United States v. Iturralde-Aponte*, 1 M.J. 196, 198 (C.M.A. 1975) (compulsory service of

to members of the armed forces.<sup>4</sup>

Historically, the American military justice system, as regulated by the Uniform Code of Military Justice,<sup>5</sup> has conducted criminal prosecutions in a court-martial system in which a panel sits both as jury and as determiners of sentence.<sup>6</sup> This system is based on an Anglo-American tradition which has long recognized the need for a separate system of criminal justice for members of the armed forces.

Civilian criminal justice is designed in the main to deter individuals from abnormal or unconventional behavior in communities where there are few, if any, restrictions on, for example, their freedom to travel, or their selection of employment, residence or mode of dress. Military justice, on the other hand, is designed to control individuals in very peculiar circumstances, such as combat, and to require from them the performance of oftentimes disagreeable and undesirable tasks. The soldier may not go where and when he pleases; he may not choose his job or quit if he doesn't like what he is ordered to do; he lives under abnormal conditions; and he is told what to wear. In short, the military justice system is designed to implement discipline as well as to punish obvious criminal conduct.<sup>7</sup>

The United States Supreme Court early on adopted this reasoning, allowing the military to conduct trials, "courts-martial" as they are called in the military, in a manner and form substantially different from that required in the federal system. As late as 1957, in *Reid v. Covert*,<sup>8</sup> the Court, in an opinion by Justice Black, stated in a footnote that "[t]he exception in the Fifth Amendment, of course, provides that grand jury indictment is not required in cases subject to military trial and this exception has been read over into the Sixth Amendment so that the requirements of jury trial are inapplicable."<sup>9</sup> That footnote quoted the 1942 wartime case, *Ex parte Quirin*,<sup>10</sup> whose underlying principle has never subsequently been reaffirmed by the Supreme Court.<sup>11</sup>

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process). See also Cooper, *The Sixth Amendment and Military Criminal Law*, 84 MIL. L. REV. 41, 52 (1979).

4. See generally W. SCHUG, *UNITED STATES LAW AND THE ARMED FORCES* (1972); Pearl, *The Applicability of the Bill of Rights to a Court-Martial Proceeding*, 50 J. CRIM. L. 559 (1960); Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181 (1962).

5. 10 U.S.C. §§ 801-940 (1979 & Supp. 1980).

6. *Id.* § 816.

7. W. SCHUG, *supra* note 4, at 123.

8. 354 U.S. 1 (1957).

9. *Id.* at 37 n.68.

10. 317 U.S. 1, 40 (1942).

11. The appellate courts of the military justice system have commented frequently on

As early as 1866, the Court stated in general terms that the military has the "same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights."<sup>12</sup> In another footnote in *Reid* the Supreme Court stated that:

[T]he Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.<sup>13</sup>

Despite this language the Court has not considered the issue in over two decades.

Contrasted with the general lack of discussion by the Supreme Court of trial by jury in the military, the Court has commented extensively in the past decade on the role and necessity of jury trials in the scheme of American criminal jurisprudence.<sup>14</sup>

This note will explore the relationship between the Sixth Amendment right to trial by jury, as defined in recent Supreme Court cases, and jury trials in the military justice system. It will focus on the size and voting requirements of the general court-martial panel, which is referred to as the "court", where they apply the provisions of the Uniform Code of Military Justice.<sup>15</sup> Recognizing that the military holds criminal certain military offenses affecting discipline that would not be criminal in the civilian context, the scope of this note is limited to offenses that would have been tried in civilian courts had they been committed outside of military jurisdiction: civilian offenses.<sup>16</sup>

This note will suggest that with some minor variations in the Uniform Code of Military Justice the system could operate within the guidelines established by the recent jury trial cases and still accomplish the stated objectives of the system.

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the constitutionality of the present system. See *United States v. Kemp*, 22 C.M.A. 152, 154, 46 C.M.R. 152, 154 (1973); *United States v. Culp*, 14 C.M.A. 199, 33 C.M.R. 411 (1963); *United States v. Montgomery*, 5 M.J. 832 (A.C.M.R. 1978); *United States v. Rice*, 3 M.J. 1094 (N.C.M.R. 1977).

12. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

13. 354 U.S. at 35 n.62 (quoting *Ex parte Milligan*, 71 U.S. at 120-21).

14. See, e.g., *Burch v. Louisiana*, 441 U.S. 130 (1979); *Ballew v. Georgia*, 435 U.S. 223 (1978); *Duncan v. Louisiana*, 391 U.S. 145 (1968).

15. 10 U.S.C. §§ 801-940 (1979 & Supp. 1980).

16. "Civilian offenses" is a term used to describe those crimes that one generally considers crimes in any jurisdiction. See Note, *Courts-Martial Jurisdiction Over Members of Armed Forces for "Civilian" Offenses*, 14 A.L.R. FED. 152, 158 n.4 (1973).

## I. The Constitutional Standard—Trial by Jury

The right to trial by jury, guaranteed by the Sixth Amendment, is fundamental to the American system of justice.<sup>17</sup> Alexis de Tocqueville, the noted eighteenth century political observer, said: "The institution of the jury . . . places the real direction of society in the hands of the governed, or of a portion of the governed, and not in that of the government. . . . He who punishes the criminal is . . . the real master of society."<sup>18</sup>

Early on the Supreme Court applied the Sixth Amendment to the federal system requiring a jury of twelve and a unanimous verdict for all criminal convictions. The Court and legal scholars consider the size and voting requirements in the federal system an historical accident,<sup>19</sup> and over the past fifty years have been defining the parameters of the Sixth Amendment's right to trial by jury.

In *Duncan v. Louisiana*,<sup>20</sup> a 1968 decision involving a nineteen year old black man who had been convicted of simple battery before a Louisiana magistrate without the benefit of a jury, the Supreme Court considered the origins of the right to trial by jury, noting that:

by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta. Its preservation and proper operation as a protection against arbitrary rule were among the major objectives of the revolutionary settlement which was expressed in the Declaration and Bill of Rights of 1689.<sup>21</sup>

Additionally, the Court noted the importance of the right to trial by jury to the American system of jurisprudence:

The Declaration of Independence stated solemn objections to the King's making "Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries," to his "depriving us in many cases, of the benefits of Trial by Jury," and to his "transporting us beyond Seas to be tried for

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17. See *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 16, 18-19 (1955); *Thompson v. Utah*, 170 U.S. 343, 349-50 (1898); *Ex parte Milligan*, 71 U.S. at 122-23; 3 W. BLACKSTONE, COMMENTARIES\* 379; 2 J. KENT, COMMENTARIES ON AMERICAN LAW\* 3-10; THE FEDERALIST No. 83 (A. Hamilton).

18. A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 282-83 (H. Reeve Trans. 1948).

19. See *Williams v. Florida*, 399 U.S. 78, 89 (1970). See also P. DEVLIN, TRIAL BY JURY 8 (1956); F. HELLER, THE SIXTH AMENDMENT 64 (1951); W. HOLDSWORTH, A HISTORY OF ENGLISH LAW (1903); Thayer, *The Jury and Its Development*, 5 HARV. L. REV. 295 (1892); Wells, *The Origin of the Petty Jury*, 27 L.Q. REV. 347 (1911).

20. 391 U.S. 145 (1968).

21. *Id.* at 151.

pretended offenses."<sup>22</sup>

After extensively documenting the origins of jury trials, the Court determined that the right to a jury trial "is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants."<sup>23</sup> The Court extended the right to trial by jury to the state courts via the Fourteenth Amendment, and went on in succeeding cases to define that right.

The year after *Duncan*, the Court ruled in *Baldwin v. New York*<sup>24</sup> that the right to a jury trial was mandated by the Sixth Amendment for all serious crimes, whereas petty crimes could be tried without a jury. The Court went on to state that petty offenses for purposes of the right to trial by jury, were those in which the punishment was limited to imprisonment for less than six months.

On the same day the Court announced its decision in *Baldwin*, it decided *Williams v. Florida*,<sup>25</sup> which upheld a Florida conviction based on a rule allowing six member juries for non-capital offenses. The Court cited *Duncan* in stating that a twelve member jury was probably an historical accident. The Court also reaffirmed *Duncan* in stating that the "essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common-sense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence."<sup>26</sup> The Court recognized the goals of jury deliberation and found that the goals "are [not] in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers twelve—particularly if the requirement of unanimity is retained."<sup>27</sup> It is important to note that the Court in *Williams* only upheld the six member jury rule as meeting constitutional standards. It expressly declined to rule on what minimum number of jurors would pass constitutional muster, leaving that key question for future Court determination.

Like *Williams*, the 1972 case of *Apodaca v. Oregon*,<sup>28</sup> provided some definition but no definitive standard for the Sixth Amendment's right to trial by jury. The Court in *Apodaca*, in an opinion written by Justice White, who also wrote for the majority in *Wil-*

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22. *Id.* at 152-53.

23. *Id.* at 157-58.

24. 399 U.S. 66 (1970).

25. 399 U.S. 78 (1970).

26. *Id.* at 100.

27. *Id.*

28. 406 U.S. 404 (1972).

*Williams v. Florida*, considered the convictions of Robert Apodaca, Henry Morgan Cooper, Jr., and James Arnold Madden. They were convicted before separate Oregon juries, all of which returned less than unanimous verdicts. The vote in the cases of Apodaca and Madden was eleven to one, while the vote in the case of Cooper was ten to two, the minimum requisite vote under Oregon law for sustaining a conviction.<sup>29</sup> The Supreme Court followed the lead of the *Williams* decision in looking to history to determine if unanimity was a necessary ingredient for conviction.

The most salient fact in the scanty history of the Sixth Amendment, which we reviewed in full in *Williams*, is that, as it was introduced by James Madison in the House of Representatives, the proposed Amendment provided for trial "by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites. . . ."<sup>30</sup>

The draft quoted in *Apodaca* was not accepted by the Senate and eventually Congress provided only for trial "[b]y an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."<sup>31</sup> The *Apodaca* majority considered the deletion of the "requisite of unanimity" as an explicit rejection of that concept by the Framers. The Court concluded that there is

no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one . . . . "[I]n either case, the interest of the defendant in having the judgment of his peers interposed between himself and that of the State who prosecute and judge him is equally well served."<sup>32</sup>

*Ballew v. Georgia*,<sup>33</sup> decided in 1978, was a landmark case which provided a definitive standard for a constitutionally sufficient jury. Claude Ballew was convicted in 1973, by a jury of five, of distributing obscene material. The Georgia Constitution permitted juries of five persons for certain offenses, including offenses carrying a maximum penalty of one year imprisonment.<sup>34</sup> The Supreme Court noted that in *Williams v. Florida* it had held that a jury of six was constitutional but had expressly reserved the issue of whether a number smaller than six passed constitutional scru-

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29. *Id.* at 406.

30. *Id.* at 409.

31. *Id.*

32. *Id.* at 411.

33. 435 U.S. 223 (1978).

34. GA. CONST. art. VI, § 16.

tiny. The Court decided in *Ballew* that:

The purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree, by a reduction in size to below six members. We readily admit that we do not pretend to discern a clear line between six members and five. But the assembled data raise substantial doubt about the reliability and appropriate representation of panels smaller than six.<sup>35</sup>

The *Ballew* decision was based in large part on a variety of statistical and psychological studies concerning the reliability of juries which were conducted in the 1970's. The Court set forth several reasons for concluding that six members was the minimum number of jurors necessary for a constitutionally sufficient trial by jury. The Court found that "recent empirical data suggest that progressively smaller juries are less likely to foster effective group deliberation,"<sup>36</sup> and that "the data now raise doubts about the accuracy of the results achieved by smaller and smaller panels. Statistical studies suggest that the risk of convicting an innocent person rises as the size of the jury diminishes,"<sup>37</sup> and that "the data suggest that the verdicts of jury deliberation in criminal cases will vary as juries become smaller, . . . the variance amounts to an imbalance to the detriment of one side, the defense."<sup>38</sup> The Court decided in *Ballew*, based on numerous scientific studies, to define a clear constitutional standard. Six jurors are the minimum number necessary for a constitutionally sufficient jury.<sup>39</sup>

After *Ballew* there remained one question in the definition of the Sixth Amendment right to trial by jury: must all members of a six-member jury agree on conviction? The Court addressed this question in the 1979 case of *Burch v. Louisiana*,<sup>40</sup> finding that six-member juries must be unanimous in order to return a guilty verdict. The Court in *Burch* began its opinion by reviewing its holdings in *Williams v. Florida* and *Duncan v. Louisiana*. The Court noted its previous reliance on scientific studies when it stated:

much the same reasons that led us in *Ballew* to decide that use of a five-member jury threatened the fairness of the proceeding and the proper role of the jury, lead us to conclude now that convic-

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35. 435 U.S. at 239.

36. *Id.* at 232.

37. *Id.* at 234.

38. *Id.* at 236.

39. *Id.* at 244-45. The Court did not reach this decision without first considering the arguments of the State of Georgia. The state's claim that five jurors were more cost efficient than six was said to be of minimal value and provided little justification for the proposed sacrifice in jury reliability.

40. 441 U.S. 130 (1979).

tion for a nonpetty offense by only five members of a six-person jury presents a similar threat to preservation of the substance of the jury trial guarantee and justifies our requiring verdicts rendered by six-person juries to be unanimous.<sup>41</sup>

The Court in *Burch* finally and definitely set the constitutional standard for the right to trial by jury in the United States. Interestingly, the standard defined by the Court in *Ballew* and *Burch* was less restrictive than the standard already in use in every state except Louisiana and Oklahoma.<sup>42</sup>

From *Duncan v. Louisiana* in 1968 through *Burch v. Louisiana* in 1979, the Court had engaged in a line drawing process. The boundary was set at a unanimous six-member jury largely as a result of reliance on the near-uniform practices in state jurisdictions and the post-1970 studies of jury size and group deliberation. The Court recognized the arbitrariness of the line drawing process when it stated in *Duncan* that "although essential [the line drawing process] cannot be wholly satisfactory, for it requires attaching different consequences to events which, when they lie near the line, actually differ very little."<sup>43</sup> Nevertheless the line is clear. The right to trial by jury is satisfied only by juries with at least six members voting for conviction.

The constitutional standard derived by the Court for the right to trial by jury is stricter than the size and voting requirements used in the military justice system. However, the question still remains as to how that standard should be applied to the military justice system, if at all. Before one can analyze the impact of the Supreme Court's interpretation of the Sixth Amendment on the military justice system, it is necessary to outline that system and then evaluate the probable effect of the imposition of the constitutional standard.

## II. The Uniform Code of Military Justice

The military justice system is a separate system of criminal justice created by Congress pursuant to article I, section 8, clause 14 of the United States Constitution.<sup>44</sup> There has been much de-

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41. *Id.* at 133.

42. *Id.* at 134. The Court pointed to this fact in further justification of its delineating the line between those jury practices that are constitutionally permissible and those that are not.

43. 391 U.S. at 161.

44. U.S. CONST. art. I, § 8 states in part that Congress possesses the power "[t]o make Rules for the Government and Regulation of the land and naval Forces."

bate as to the origins of clause 14 of section 8 and whether the clause confers on Congress the power to try members of the armed forces for civilian offenses. The majority of research,<sup>45</sup> and, more importantly, Supreme Court decisions,<sup>46</sup> hold the view that clause 14 does vest that power in Congress with some jurisdictional limitations.

Pursuant to the authority granted to it by the Constitution, Congress has enacted laws governing military justice,<sup>47</sup> and in 1951 it enacted the Uniform Code of Military Justice (UCMJ).<sup>48</sup> The UCMJ deals exclusively with military law as distinguished from martial law or the law of war.<sup>49</sup> Military law is the law which provides the basic legal structure, including jurisdiction over common crimes, for members of the armed forces. It is distinguished from martial law which is a military administered civilian system and the law of war which is an area of international law dealing with countries at war and their combatants.<sup>50</sup>

The military justice system is administered pursuant to two basic sources. The UCMJ is incorporated into title 10 of the United States Code. It defines criminal conduct, establishes the various courts-martial and sets forth the basic procedures used in the military justice system. The UCMJ gives the President the authority to promulgate additional procedures for military criminal pro-

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45. Nelson, *Court-Martial Jurisdiction Over Servicemen for "Civilian" Offenses: An Analysis of O'Callahan v. Parker*, 54 MINN. L. REV. 1, 21 (1969).

46. See, e.g., *Ex parte Quirin*, 317 U.S. 1 (1942).

47. Prior to the Uniform Code of Military Justice (UCMJ) the Army was governed by the Articles of War, Chapter II of the National Defense Act of June 4, 1920, ch. 227, 40 Stat. 787 (as amended 10 U.S.C. § 1471). The Act of June 25, 1948, ch. 648, 62 Stat. 1014, extended the Articles of War to the then newly created United States Air Force. The Articles for the Government of the Navy were set forth in 50 U.S.C. §§ 551-736 (repealed 1956), primarily deriving from the Act of July 17, 1862, itself tracing back to the Act of July 1, 1797. These articles, with minor changes, were valid until the UCMJ went into effect. For further discussion see generally W. SCHUG, note 4 *supra*.

48. The Uniform Code of Military Justice was created by the Act of May 5, 1950, ch. 169, § 1, 64 Stat. 108 (codified at 10 U.S.C. § 801 (1979 & Supp. 1980)) which superseded both the Articles for the Government of the Navy and the Articles of War as they apply to all the armed forces.

49. The military administers martial law over civilian populations in times of great unrest or national emergency. Since martial law is an extraordinary application of government power, it bears little practical relation to military justice. The law of war is a portion of international law that deals with the rights and duties of nations and individual combatants during hostilities. For example, in *Ex parte Quirin* the Supreme Court held that eight spies (one of whom may have been an American citizen) who were landed from a German submarine into the United States during World War II, could be tried by a military court according to the laws of war. See Nelson, *supra* note 45, at 21.

50. *Id.*

ceedings. Presidents have utilized this authority to publish the *Manual for Courts-Martial*,<sup>51</sup> which was last revised in 1969, and, for example, amended by former President Carter in 1977.<sup>52</sup> The *Manual for Courts-Martial (MCM)* sets forth in exacting detail the process for application of the UCMJ. For example, the duties of all parties as well as the rules of evidence for military trials are outlined in the *MCM*.

The UCMJ is also the statutory basis for offenses punishable in the military justice system. Offenses fall into two general categories: military offenses and civilian offenses. Military offenses are those acts which become crimes because of the accused's status as a member of the armed forces,<sup>53</sup> and usually concern a breach of duty or a breach of the chain-of-command. For example, article 86 of the UCMJ makes it a crime for a member of the armed forces to be absent "from his unit, organization, or place of duty at which he is required to be at the time prescribed."<sup>54</sup> Clearly an article 86 offense is a uniquely military offense. What would be grounds for reprimand or possibly dismissal from a civilian job is a serious criminal offense punishable by imprisonment according to the UCMJ. Article 89 of the UCMJ makes criminal any behavior manifesting disrespect toward a superior commissioned officer.<sup>55</sup> Again article 89 creates a uniquely military offense designed to preserve the military chain-of-command<sup>56</sup> and would find no place in a civil-

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51. U.S. DEP'T OF DEFENSE, *MANUAL FOR COURTS-MARTIAL* (Rev. ed. 1969) (published pursuant to Exec. Order No. 11476, 34 Fed. Reg. 10502 (1969)) [hereinafter cited as *MCM*].

52. Exec. Order No. 12018, 42 Fed. Reg. 57943 (1977) (This amendment of Nov. 3, 1977, set forth a clear chain of command authority for use by members of the American armed forces taken prisoner of war). See also 18 U.S.C. § 13 which assimilates state law under certain circumstances.

53. See generally Note, *Courts-Martial Jurisdiction Over Members of the Armed Forces for "Civilian" Offenses*, 14 A.L.R. FED. 152 (1973).

54. 10 U.S.C. § 886 (1979 & Supp. 1980) (art. 86—Absence Without Leave): "Any member of the armed forces who, without authority—

(1) Fails to go to his appointed place of duty at the time prescribed;

(2) Goes from that place; or

(3) Absents himself or remains absent from his unit, organization, or place of duty at which he is required to be at the time prescribed;

shall be punished as a court-martial may direct."

55. 10 U.S.C. § 889 (1979) (art. 89.—Disrespect Toward A Superior Commissioned Officer): "Any person subject to this chapter who behaves with disrespect toward his superior commissioned officer shall be punished as a court-martial may direct."

56. "Chain-of-command" is a term of art describing the statutory authority of the military starting with the Commander-in-Chief, the President of the United States, and extending down to the lowest ranking private. Theoretically, a recruit can name the twenty or so individuals extending from his squad leader to the President. The term is sometimes used in the broader sense to refer to everyone of a higher rank.

ian criminal code.

There are also offenses listed in the UCMJ which one finds in almost any criminal code, that are *malum in se* offenses and violate general societal rules. For example, article 118 of the UCMJ makes "any person . . . who, without justification or excuse, unlawfully kills a human being . . . guilty of murder"<sup>57</sup> punishable by sentence of death in the military courts.<sup>58</sup> Other typically civilian offenses are manslaughter, robbery, forgery, rape, larceny, assault and burglary.<sup>59</sup> Although the need for military discipline is an indirect justification for inclusion of these offenses in the UCMJ, the overriding justification is that society as a whole decries these offenses and demands that their perpetrators be punished.

The UCMJ includes a broad "general article": article 134, which provides that "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."<sup>60</sup> Article 134 encompasses both military and civilian offenses. The *MCM*, commenting on article 134, states that

[c]rimes and offenses not capital which are referred to and made punishable by Article 134 include those acts or omissions, not made punishable by another Article, which are denounced as non-capital crimes or offenses by enactments of Congress or under authority of Congress and made triable in the Federal civil courts.<sup>61</sup>

Article 134, according to the *MCM*, acts as an assimilation statute encompassing all noncapital federal offenses.<sup>62</sup>

Many of the offenses in the UCMJ could fall into either the military or civilian category, depending on the circumstances. For example, if a member of the armed forces violates article 128,<sup>63</sup> by assaulting a member of his same military unit, the offense would so greatly affect discipline that it is arguably military. However, if that same member of the armed forces, in the privacy of his gov-

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57. 10 U.S.C. § 918 (1979) (art. 118—Murder).

58. *Id.*

59. See note 53 and accompanying text *supra*.

60. 10 U.S.C. § 934 (1979 & Supp. 1980) (art. 134—General Article).

61. *MCM*, *supra* note 51, ¶ 213(e), at 28-73.

62. For example, article 134 incorporated into the UCMJ the Narcotic Drugs Import and Export Act, 21 U.S.C. §§ 171-185 (repealed 1970), making illegal the importation of proscribed drugs not only into areas over which the United States is sovereign but also into territories subject to the control of the United States for a special purpose, including a military installation on foreign soil.

63. 10 U.S.C. § 928 (1979 & Supp. 1980) (art. 128—Assault).

ernment supplied on-post housing, assaults his visiting friend, the effect on discipline would be less direct and the offense would become arguably civilian. On its face the UCMJ is extremely broad, encompassing purely military and purely civilian offenses, and in many cases offenses can be both military and civilian depending on the circumstances of the violation.

The punishments for all offenses listed in the UCMJ are also contained in the code. Interestingly, the severity of the punishments; which may range from a verbal administrative reprimand, to confinement at hard labor, or even to death; are limited not only by the offense, but by the type of court-martial before which the accused is tried. Article 56 of the UCMJ states that "[t]he punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense."<sup>64</sup> The President has prescribed those limits in chapter 25 of the MCM.<sup>65</sup> There are three levels of courts-martial; however, only the general court-martial has the authority to sentence an individual to more than six months confinement.<sup>66</sup> Since the Supreme Court in *Baldwin v. New York* has stated that the fundamental right to trial by jury guaranteed by the Sixth Amendment attaches only to crimes where imprisonment for more than six months is authorized,<sup>67</sup> the general courts-martial are the only military courts where the right to trial by jury is potentially applicable.

### III. The Courts-Martial

The general court-martial is the most formal method of trial in the military justice system. Generally, only serious offenses are brought before it and only after rather involved preliminaries. General courts-martial have the power to try any person subject to the UCMJ for any offenses made punishable by the code; however, in practice a majority of minor offenses are handled administratively,<sup>68</sup> or by a lesser court-martial.

A criminal offense is originally brought to the attention of the

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64. *Id.* § 856 (1979 & Supp. 1980) (art. 56—Maximum Limits).

65. MCM, *supra* note 51, at ch. 25.

66. There are three types of courts-martial in the military. Summary courts-martial involve only confinement for up to one month, special courts-martial involve confinement for up to six months, and general courts-martial involve any punishment not forbidden by the UCMJ. Additionally, each court has various administrative sanctions available including restrictions, forfeitures of pay, hard labor, and, in the case of the special or general courts, a bad conduct discharge. *See* W. SCHUG, *supra* note 4, at 220.

67. *See* note 24 and accompanying text *supra*.

68. *See* 10 U.S.C. § 815 (1979 & Supp. 1980) (art. 15—Non-judicial Punishment).

accused's commanding officer. In the case of minor offenses, where the potential penalty is less than one year, the company commander can impose purely administrative punishment by removing certain privileges granted the serviceman.<sup>69</sup> Alternatively, with the consent of the accused, he can impose non-judicial punishment pursuant to article 15 of the UCMJ.<sup>70</sup> Article 15's purpose is primarily corrective.<sup>71</sup> It vests the power of punishment in the local commander who is able to enforce discipline directly and to punish while taking into account numerous factors about which he is knowledgeable. Additionally, it allows quick disposition of minor offenses at the local level. If the accused refuses punishment under article 15, or if the offense is too serious for non-judicial punishment, the company commander or any superior officer in the chain-of-command can prefer charges under article 30 of the UCMJ, and initiate a formal court-martial proceeding.

The summary court-martial is the lowest level court-martial, both in terms of the sentence that may be imposed and the legal formalities required.<sup>72</sup> It is an administrative rather than judicial proceeding conducted by a single commissioned officer. The presiding officer acts as judge, factfinder, prosecutor and defense counsel. He is appointed by the post or division commander and need not be an attorney. The presiding officer must inform the accused of the charges and the name of the accuser and call all witnesses whom he or the accused desires to call.<sup>73</sup> Additionally, the accused must be informed of his right to remain silent, can cross-examine all witnesses, may testify and present evidence including a mitigating statement in his own defense. However, since it is an adminis-

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69. For example, living off-post in private housing is a privilege for certain lower ranking enlisted members of the armed forces.

70. 10 U.S.C. § 815 (1979 & Supp. 1980) (art. 15—Non-judicial Punishment).

71. The *Manual for Courts-Martial*, paragraph 132, reads in part that "[e]xcept in the case of a person attached to or embarked in a vessel, punishment may not be imposed under Article 15 upon any member of the armed forces who has, before the imposition of the punishment under that article, demanded trial by court-martial in lieu of the punishment thereunder." MCM, *supra* note 51, at 26-28. See also *Parker v. Levy*, 417 U.S. 733, 750 (1974) for a good explanation of the article 15 procedure and sentencing.

72. "The summary court-martial occupies a position between informal nonjudicial disposition under Art. 15 and the courtroom type procedure of the general and special courts-martial." *Middendorf v. Henry*, 425 U.S. 25, 32 (1976). Its purpose as stated in the MCM, is to provide "justice promptly for relatively minor offenses under a simple form of procedure." MCM, *supra* note 51, at 14-1. Like the procedure under article 15 it requires the approval of the accused. If objection to trial by summary court-martial is made by the accused, trial is then ordered in either a special or general court-martial. 10 U.S.C. § 820 (1979) (art. 20—Jurisdiction of Summary Courts-Martial).

73. See MCM, *supra* note 51, at 14-2.

trative proceeding, the accused has no right to counsel.<sup>74</sup> According to article 20 of the UCMJ, the maximum sentences which may be imposed by summary courts-martial are 45 days hard labor without confinement; 30 days hard labor with confinement; two months restriction to a specified area, the company area for example; reduction in grade to the lowest enlisted pay grade; and forfeiture of two-thirds pay for one month.<sup>75</sup>

The special court-martial has jurisdiction to hear all noncapital offenses; however, the maximum penalties<sup>76</sup> that can be imposed by the special court are six months confinement or hard labor without confinement for three months; forfeiture of up to two-thirds pay per month for six months; and/or a bad conduct discharge.<sup>77</sup> The special court consists of three or more court members and a military judge. The accused is provided military counsel and the case is prosecuted by a military legal officer, commonly called a trial counsel.<sup>78</sup>

The court of general jurisdiction in the military is the general court martial. It has, according to the UCMJ, jurisdiction to "try persons . . . for any offense made punishable by this chapter . . ., under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death."<sup>79</sup> The general court-martial is the trial court of the military and is the court where all serious offenses are tried. The general courts-martial and special courts-martial are judicial as opposed to administrative proceedings. Between the two, the only difference is in the severity of punishment that may be adjudged and the number of court members.

The Supreme Court, in defining those instances where a right to a trial by jury is a fundamental right, has looked to the potential penalty.<sup>80</sup> If the requirement of trial by jury were applied to the military justice system, the general court-martial would definitely fall into the area where the jury trial is constitutionally mandated. The special court-martial, on the other hand, has jurisdiction over those offenses which would be classified by the Su-

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74. See generally *Middendorf v. Henry*, 425 U.S. 25 (1976).

75. 10 U.S.C. § 820 (1979) (art. 20—Jurisdiction of Summary Courts-Martial).

76. MCM, *supra* note 51, at 4-5.

77. According to paragraph 15(b) of the MCM, a bad conduct discharge cannot be adjudged unless a military judge presides over the trial and a verbatim record of that trial is kept. An exception to the requirement of a military judge is made when a "military judge could not be detailed because of physical conditions or military exigencies." *Id.* ¶ 15(b).

78. *Id.* at 9-11, -12. See also *id.* at 9-6.

79. 10 U.S.C. § 818 (1979) (art. 18—Jurisdiction of General Courts-Martial).

80. See note 24 and accompanying text *supra*.

preme Court as petty, and thus would not be held to the requirements of trial by jury. Consequently, when one considers the application of the fundamental right of trial by jury to the military justice system, one is actually considering the application of trial by jury to the general courts-martial.

Once charges have been referred to the jurisdiction of a general court-martial, after a statutorily mandated investigation<sup>81</sup> and on the advice of the Staff Judge Advocate,<sup>82</sup> the court is convened pursuant to article 22 of the UCMJ.<sup>83</sup> The court, consisting of a minimum of five individuals, is selected by the commander convening the court from among personnel in his command. Commissioned officers are normally appointed to the court; however, an enlisted member defendant can request that up to one-third of the members of the court be appointed from the enlisted ranks.<sup>84</sup> None of the court members comes from the immediate military unit of the accused and all members of the court have an equal vote regardless of rank. The defense and prosecution each have one peremptory challenge and there is an unlimited number of challenges for cause passed on by the military judge. Every general court-martial is supervised by a military judge.<sup>85</sup> The military judge performs much the same function as a civilian trial judge. For example, he or she decides questions of law, instructs the court members on the applicable law, rules on all evidentiary questions and generally administers the trial.

The accused at a general court-martial is guaranteed counsel provided without cost by the military.<sup>86</sup> Congress, echoing the 1938

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81. See 10 U.S.C. § 832 (1979 & Supp. 1980) (art. 32—Investigation).

82. See *id.* § 834 (1979 & Supp. 1980) (art. 34—Advice of Staff Judge Advocate and Reference for Trial).

83. *Id.* § 822 (1979 & Supp. 1980) (art. 22—Who May Convene General Courts-Martial).

84. See *id.* § 825 (art. 25—Who May Serve on Courts-Martial). This note will not consider the question of the fairness of the command appointing all members of the court. There is a substantial amount of case law defining the rights and duties of a convening authority vis-à-vis undue command influence. For an excellent discussion of this topic see R. BROOKSHIRE, *JUROR SELECTION UNDER THE UNIFORM CODE OF MILITARY JUSTICE: FACT AND FICTION* (1972); see also Scheisser, *Trial by Peers—Enlisted Members of a Court-Martial*, 15 *CATH. U. L. REV.* 171 (1966).

85. Military judges, according to article 26 of the UCMJ, are assigned to every general court-martial. They are military attorneys, judge advocates, selected and trained as military judges. Although under nominal local command they are functionally independent from the local commander. Additionally, they can, according to the UCMJ, hear and decide cases sitting alone when so requested by the accused. See 10 U.S.C. § 816 (1979 & Supp. 1980) (art. 16—Courts-Martial Classified).

86. *Id.* § 827 (1979 & Supp. 1980) (art. 27—Detail of Trial Counsel and Defense Counsel). See also *Johnson v. Zerbst*, 304 U.S. 458 (1938).

Supreme Court case of *Johnson v. Zerbst*,<sup>87</sup> recognized that the average defendant, including the military defendant, does not have the professional legal skill to provide an adequate defense<sup>88</sup> and thus the military provides counsel to the accused in general courts-martial.

In a general court-martial the number of votes required for conviction is determined by article 52 of the UCMJ.<sup>89</sup> The article states that no person may be convicted of an offense for which the penalty is mandatory death or be sentenced to death without a unanimous verdict. Conviction of all other offenses requires a two-thirds vote of the members of the court, and a sentence of ten years imprisonment or more requires a vote of three-fourths of the court-martial members.<sup>90</sup> Therefore, according to the UCMJ, a person subject to the jurisdiction of a general court-martial can be convicted of a serious crime by a four to one vote of the court.

Guilty verdicts returned by all courts-martial are reviewed by the convening authority pursuant to article 64 of the UCMJ.<sup>91</sup> The extra review is a uniquely military protection for the accused, as the convening authority can only reduce the sentence, either partially or entirely, or reject a finding of guilty by the court.<sup>92</sup> This extra review is in keeping with the military concept that a commander has ultimate responsibility for the persons under his control, and the review is in addition to<sup>93</sup> any appellate review.<sup>94</sup>

#### IV. Jurisdictional Limitations on the Military Justice System

Although the Supreme Court has declined to address directly the issue of the right to trial by jury in the military, the Court since the adoption of the UCMJ has limited the jurisdiction of the military justice system based in part on the lack of a constitutionally sufficient right to trial by jury in that system. These limitations have narrowly construed the jurisdiction of the UCMJ with

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87. *Id.*

88. *Id.* at 462-63.

89. 10 U.S.C. § 852 (1979) (art. 52—Number of Votes Required).

90. *Id.*

91. *Id.* § 864 (1979 & Supp. 1980) (art. 64—Approval by the Convening Authority).

92. *Id.*

93. In addition to a review by the convening authority there is a potential review by the Court of Military Review (art. 66) and the Court of Military Appeals (art. 67).

94. See 10 U.S.C. § 866 (1979 & Supp. 1980) (art. 66—Review by Court of Military Review), which makes mandatory a Court of Military Review review of all sentences of one year or more.

regard to civilian offenses committed in peacetime.

In 1955 the Court addressed the issue of whether a former member of the armed forces was subject to trial under the UCMJ for crimes committed while a member of the armed forces. The Court, in *United States ex rel. Toth v. Quarles*,<sup>95</sup> considered the conviction by general court-martial of Robert W. Toth who had been honorably discharged five months before his arrest and was accused of committing a murder while an airman stationed in Korea. The military claimed jurisdiction over Toth because he had committed the offense while a member of the armed forces.

The Court, rejecting the Government's argument, held that former members of the armed forces, once discharged, are not subject to the UCMJ, even if their crime goes undiscovered until after discharge.<sup>96</sup> The Court noted that to hold otherwise would subject a large percentage of the citizenry to potential imposition of military justice, and it also noted that the result would be inconsistent with the Sixth Amendment right to trial by jury.<sup>97</sup>

In *Reid v. Covert*,<sup>98</sup> the Supreme Court considered the propriety of military jurisdiction over civilian employees of the military living overseas and civilian dependents living with the military overseas. The case involved the consolidation of two similar cases in which military dependents had killed their husbands, both members of the armed forces, on overseas military posts. The military had exercised jurisdiction according to the UCMJ and tried them by general court-martial. The Court, after reviewing the history of the Fifth and the Sixth Amendments found that the defendants were not subject to trial in the military justice system. Citing *Toth*, the Court narrowly construed article I, section 8, clause 14,

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95. 350 U.S. 11 (1955).

96. *Id.* at 18-19.

97. *Id.* Interestingly, the Court noted in dicta that "military personnel because of their training and experience may be especially competent to try soldiers for infractions of military rules. Such training is no doubt particularly important where an offense charged against a soldier is purely military, such as disobedience of an order, leaving post, etc." *Id.* at 18. The recognition by the Court that for military offenses the military court may have special expertise is worth noting when one considers the differentiation between military and civilian offenses and the justification, that is special knowledge of the military situation, put forth by the military for its adjudication of civilian offenses. *See also* *United States ex rel. Hirschberg v. Cooke*, 336 U.S. 210 (1949); *United States v. Symonds*, 120 U.S. 46, 49-50 (1887); *United States v. Kelly*, 82 U.S. (15 Wall.) 34, 36 (1872).

This raises an interesting jurisdictional question. Where can Toth be tried? He cannot be tried in any district in the United States because the offense was committed in Korea and assuming the victim was an American armed forces member, the Koreans would be reluctant to exercise jurisdiction including extradition.

98. 354 U.S. 1 (1957).

holding that the term "land and naval Forces" applied only to members of the armed forces.<sup>99</sup>

The Court in *Toth* and *Covert* limited the jurisdiction of the military justice system to actual members of the armed forces. The constitutional issue presented in the cases was relatively simple, calling only for a narrow definition of the necessary and proper clause and a common sense definition of the term "land and naval Forces." The Court did not find it necessary in either case to address the application of the Bill of Rights to the military justice system. However, the Court did note in *Reid* that "[a]s yet it has not been clearly settled to what extent the Bill of Rights and other protective parts of the Constitution apply to military trials."<sup>100</sup> In effect, the Court addressed the issue tangentially by limiting the jurisdiction of the system.

In keeping with the trend established by *United States ex rel. Toth v. Quarles* and *Reid v. Covert*, the Court addressed the issue of the limits of military jurisdiction in the 1969 case of *O'Callahan v. Parker*.<sup>101</sup> O'Callahan was a member of the armed forces, an army sergeant, stationed on Oahu in what was then the Territory of Hawaii. On a July evening in 1956, O'Callahan, dressed in civilian clothes and in possession of a valid pass off-post, was arrested by civilian authorities for assault and attempted rape of a fourteen year old girl. He was subsequently tried and convicted of all charges before a general court-martial and sentenced to ten years imprisonment at hard labor, forfeiture of all pay and allowances, and given a dishonorable discharge. His conviction was affirmed by the Army Board of Review and subsequently by the United States Court of Military Appeals.<sup>102</sup> While in the United States Penitentiary at Lewisburg, Pennsylvania O'Callahan petitioned for a writ of *habeas corpus*.<sup>103</sup> The Supreme Court granted certiorari on the limited question of jurisdiction.

Again, as in *Toth* and *Reid*, the Court tangentially addressed the right to trial by jury in the military by considering the jurisdic-

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99. *Id.* at 19. See also *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960); *Grisham v. Hagan*, 361 U.S. 278 (1960) (holding that there is no military jurisdiction for civilian employees overseas).

100. 354 U.S. at 37.

101. 395 U.S. 258 (1969).

102. *Id.* at 260-61.

103. There is no direct right of appeal to the Supreme Court from decisions of the United States Court of Military Appeals. The United States Court of Military Appeals consists of three civilian judges appointed by the President and confirmed by the Senate for fifteen-year terms. The majority of military cases heard by the Supreme Court come to it through a writ of *habeas corpus* filed by the appellant while in federal prison.

tional limits of the military justice system. The *O'Callahan* opinion, written by Justice Douglas, examined in great detail the historical application of military justice. The Court noted that the Constitution, article I, section 8, clause 14, recognized that "the exigencies of military discipline require the existence of a special system of military courts in which not all of the specific procedural protections deemed essential in Art. III trials need apply."<sup>104</sup> The Court went on further to distinguish military "tribunals" from article III courts: "Unlike courts, it is the primary business of armies and navies to fight wars should the occasion arise. But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function."<sup>105</sup> The *O'Callahan* Court based the distinction between military "tribunals" and civilian courts on the special need for discipline inherent in the military. Recognizing that courts-martial are not conducted in strict compliance with the Bill of Rights, the Court noted that the "justification for such a system rests on the special needs of the military, and history teaches that expansion of military discipline beyond its proper domain carries with it a threat to liberty."<sup>106</sup>

Having determined that discipline is the distinguishing factor which allows the military justice system to deviate from constitutional guarantees, the Court, quoting its opinion in *Toth v. Quarles*, noted that: "[d]etermining the scope of the constitutional power of Congress to authorize trial by court-martial presents another instance calling for limitation to 'the least possible power adequate to the end proposed.'"<sup>107</sup> The Court concluded that for an offense to be subject to military jurisdiction it must be "service connected."<sup>108</sup> The Court specifically rejected the claim of the government that military jurisdiction was determined mainly by the status of the individual; instead it determined that military jurisdiction depends also on the nature of the offenses committed by members of the armed forces. "Status," the Court stated, "is necessary for jurisdiction; but it does not follow that ascertainment of 'status' completes the inquiry, regardless of the nature, time, and place of the offense."<sup>109</sup> The Court determined that military jurisdiction attached only when the accused was a member of the armed forces and the offense was "service connected"—that is, it

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104. 395 U.S. at 261.

105. *Id.* at 262 (quoting *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955)).

106. 395 U.S. at 265.

107. *Id.* (quoting *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 23 (1955)).

108. 395 U.S. at 272.

109. *Id.* at 267.

necessarily impacted on military discipline.

In the *O'Callahan* case, the Court determined that the offense was not service connected in that O'Callahan was legally off-post, dressed in civilian clothes, and the victim was not a member of the armed forces. Moreover, the Court noted that there was a civilian court system capable of exercising jurisdiction. The Court noted that an express grant of general power to Congress, like article I, section 8, clause 14, should be "exercised in harmony with express guarantees of the Bill of Rights" and that the offense committed by O'Callahan could best be adjudged in keeping with the Bill of Rights by a civilian court.<sup>110</sup>

The "service connected" standard adopted in *O'Callahan v. Parker* was further defined in *Relford v. Commandant*.<sup>111</sup> In *Relford* the Court held that two rapes committed by the accused against civilians on-post were "service connected" and that the accused, a member of the armed forces, was properly tried before a general court-martial.

The Court noted but rejected Relford's argument that *O'Callahan's* requirement that the crime be "service connected" demands that the crime itself be military in nature—that is, a crime "involving a level of conduct required only of servicemen and, because of the special needs of the military, one demanding military disciplinary action,"<sup>112</sup> and which is therefore "service connected."<sup>113</sup> The Court, in an apparent step back from the *O'Callahan* reasoning, held that the offenses were properly classified as "service connected." The Court cited several factors in support of its conclusion, most notably that the offenses were committed on-post and against victims properly on-post.<sup>114</sup> Additionally, the Court noted that "[t]he impact and adverse effect that a crime committed against a person or property on a military base,<sup>115</sup> . . . violating the base's very security . . . would be great upon the morale, discipline, reputation and integrity of the base itself, upon its personnel and upon the military operation and the military mission."<sup>116</sup> At the conclusion of its analysis the Court held that: "[w]hen a serviceman is charged with an offense committed within or at the geographical boundary of a military post and violative of

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110. *Id.* at 273.

111. 401 U.S. 355 (1971).

112. *Id.* at 363.

113. *Id.*

114. *Id.* at 366.

115. *Id.* at 367.

116. *Id.*

the security of a person or of property there, the offense may be tried by court-martial."<sup>117</sup>

*Covert* and *O'Callahan* have limited the jurisdiction of the military justice system. *O'Callahan* indicates that the military can only infringe on constitutional protections in the name of discipline. However, this is no longer clearly true after *Relford*.

*O'Callahan v. Parker* indicates that the protections are an issue, but *Relford v. Commandant* backs away from that point by giving a broad definition to discipline. Neither case considered the next logical step. That is, whether the military justice system, as it exercises jurisdiction on "service connected" civilian crimes in time of peace, need act in accordance with constitutional standards. Put another way, if one assumes, as the Court has, that "service connected" civilian offenses committed by members of the armed forces need to be tried by the military to accomplish its mission, is it somehow necessary that the military not guarantee constitutional protections? The Supreme Court has conveniently side-stepped that issue in the jurisdiction cases and has never really answered that question directly.

## V. The Bill of Rights and Other Constitutional Protections as Applied to the Military Justice System

There are definitely two sides to the issue of the applicability of constitutional protections to the military justice system. Some claim that the military justice system is a constitutional system—constitutional in that it draws its power from article I, section 8, clause 14 of the Constitution, and as such is not bound by the Bill of Rights or other constitutional guarantees. The argument is further bolstered by the terms of the Fifth Amendment exclusion, which provides for an exception "in cases arising in the land or naval forces or in the Militia, when in actual service in time of War or public danger."<sup>118</sup>

This argument relies primarily on dicta in an 1866 Civil War decision, *Ex parte Milligan*.<sup>119</sup> In that case Milligan, a citizen of Indiana who had never been a member of the armed forces, was arrested at his home by military authorities and tried "on certain charges and specifications; found guilty, and sentenced to be

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117. *Id.* at 369.

118. U.S. CONST. amend. V.

119. 71 U.S. (4 Wall.) 2 (1866).

hanged; and that sentence ordered to be executed on Friday, the 19th day of May, 1865."<sup>120</sup> The Court found that since Milligan was living in a state not then in rebellion and had never been a member of the armed forces, he was not liable to the jurisdiction of the military courts.

In dicta the Court went on to explain the role of the right to trial by jury in the military.

The Sixth Amendment affirms that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury," language broad enough to embrace all persons and cases; but the [F]ifth, recognizing the necessity of an indictment, or presentment, before any one can be held to answer for high crimes "excepts cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger;" and the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the Sixth Amendment, to those persons who were subject to indictment or presentment in the Fifth.<sup>121</sup>

The *Milligan* Court based this rationale on the theory that the "discipline necessary to the efficiency of the army and navy, required other and swifter modes of trial than are furnished by common law courts."<sup>122</sup>

The dicta in *Milligan* has often been cited by the Court of Military Appeals, and many legal scholars, as an implicit dismissal of the right to trial by jury in the military.<sup>123</sup> For example, in the 1963 case, *United States v. Culp*,<sup>124</sup> the Court of Military Appeals held that there was no such right on the basis that: "[t]he apparently mandatory provision of the Sixth Amendment of trial by jury is, when correctly interpreted, restricted by common law as it existed when the amendment was adopted, its contemporary interpretation, and in light of the long-continued and consistent interpretation thereof."<sup>125</sup>

The Court of Military Appeals again commented on the applicability of the right to trial by jury in the military in *United*

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120. *Id.* at 107.

121. *Id.* at 123.

122. *Id.*

123. See *United States v. Culp*, 14 C.M.A. 199, 207, 33 C.M.R. 411, 421-22 (1963); J. BISHOP, *JUSTICE UNDER FIRE* 140 (1974); Weiner, *Courts-Martial and The Bill of Rights: The Original Practice II*, 72 HARV. L. REV. 266, 294 (1958) (advocating the application of constitutional guarantees). See also Cooper, *The Sixth Amendment and Military Criminal Law: Constitutional Protections and Beyond*, 84 MIL. L. REV. 41 (1979).

124. 14 C.M.A. 199, 33 C.M.R. 411 (1963).

125. *Id.* at 209-10, 33 C.M.R. at 421-22.

*States v. Jenkins*,<sup>126</sup> noting that the right to trial by jury does not apply to the military: "[I]t has been held that all Fifth and Sixth Amendment guarantees do not apply to members of the armed forces since said members do not have the right to indictment by grand jury, nor trial by petit jury."<sup>127</sup>

The argument comes full circle when one considers that the quote appeared first in a footnote in *Reid v. Covert* quoting dicta in a 1942 Supreme Court case, *Ex parte Quirin*,<sup>128</sup> which relied in part on the commonly cited and above-quoted dicta in *Milligan*.<sup>129</sup> So there has never really been a clear decision by the Supreme Court on the issue. There has been much comment in dicta by the Supreme Court on the applicability of the Sixth Amendment's right to trial by jury to the military justice system, but never a decision on point. However, as late as 1973, the United States Court of Military Appeals in *United States v. Kemp*,<sup>130</sup> quoting *Ex parte Quirin* and citing *Ex parte Milligan*, stated that there was no right to trial by jury in the military justice system.<sup>131</sup> But this rather unclear holding may indicate only that jury selection procedures have no constitutional application in the military. In fact, the clearest statements on record concerning the right to trial by jury were made by the Naval Court of Military Review which held in a 1977 case, *United States v. Rice*,<sup>132</sup> that there was no right to trial by jury for military accused, and by the Army Court of Military Review which held in a 1978 case, *United States v. Montgomery*,<sup>133</sup> that the Supreme Court holding in *Ballew v. Georgia*<sup>134</sup> was not applicable to the military justice system.

The argument in favor of applying the right to jury trial is equally unclear. In the 1953 case of *Burns v. Wilson*,<sup>135</sup> the Supreme Court, again in dicta, stated that the "military courts, like the state courts, have the same responsibilities as do federal courts to protect a person from a violation of his constitutional rights."<sup>136</sup> However, the Court declined to discuss those rights, finding that their inquiry was limited to considering whether the Court of Mili-

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126. 20 C.M.A. 112, 42 C.M.R. 304 (1970).

127. *Id.* at 114, 42 C.M.R. at 306 (quoting *Reid v. Covert*, 354 U.S. 1, 37 n.68 (1957)).

128. See note 9 and accompanying text *supra*.

129. See note 12 and accompanying text *supra*.

130. 22 C.M.A. 152, 46 C.M.R. 153 (1973).

131. *Id.* at 154, 46 C.M.R. at 155.

132. 3 M.J. 1094 (N.C.M.R. 1977).

133. 5 M.J. 832 (A.C.M.R. 1978).

134. See notes 33-35 and accompanying text *supra*.

135. 346 U.S. 137 (1953).

136. *Id.* at 142.

tary Appeals fairly heard the appellant's claims. The Court found that it had and proceeded no further. Interestingly, and also in dicta, the Court stated:

[M]ilitary law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment. This Court has played no role in its development; we have exerted no supervisory power over the courts which enforce it; the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress.<sup>137</sup>

Additionally, the Court of Military Appeals has also supported the idea of the application of the Bill of Rights and other constitutional protections to the military justice system. In *Courtney v. Williams*,<sup>138</sup> the Court of Military Appeals held that "the burden of showing that military conditions require a different rule than that prevailing in the civilian community is upon the party arguing for a different rule."<sup>139</sup> There the Court determined that the Fifth Amendment's due process clause was applicable to the military justice system.

About the clearest indication of the feeling of the Court of Military Appeals is found in a note in a 1976 decision in *United States v. McCarthy*.<sup>140</sup> There the Court urged that "the perceived fairness of the military justice system would be enhanced immeasurably by congressional reexamination of the presently utilized jury selection process."<sup>141</sup> The Court of Military Appeals in *McCarthy* indicates some concern with the relevancy of the Sixth Amendment to the military justice system. In 1978, the Court, in *United States v. Lamela*,<sup>142</sup> originally granted a petition for review on the issue of the size of military juries; however, the Court later vacated that grant.<sup>143</sup> The Court of Military Appeals appears reluctant to consider the question which they view as up to Congress to decide.

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137. *Id.* at 140. However, this dicta precedes the landmark decision in *O'Callahan v. Parker* previously discussed in the text accompanying note 101 *supra*.

138. 1 M.J. 267 (C.M.A. 1976). The *Courtney* case involved the arbitrary prosecution under one of two equally applicable UCMJ offenses with a great disparity of potential sentences. However, the Court has declined to address the application of the Bill of Rights and other constitutional protections to the military justice system.

139. *Id.* at 270.

140. 2 M.J. 26 (C.M.A. 1976).

141. *Id.* at 29 n.3.

142. 6 C.M.R. 11 (C.M.A. 1978).

143. 6 C.M.R. 32 (C.M.A. 1978).

The question of the applicability of the total Bill of Rights to the military remains unanswered. However, the recent cases of *O'Callahan v. Parker* and *Burns v. Wilson* indicate that the Supreme Court considers some Bill of Rights and constitutional protections applicable to the military unless a showing can be made that they are inconsistent with the preservation of discipline. It appears that the Supreme Court is reluctant, as is the Court of Military Appeals, to tamper with the long standing tradition in the military justice system of independence from constitutional protections, based on article I, section 8, clause 14 of the Constitution, despite the fact that there is no clear constitutional source for this independence.

### Conclusion

The Supreme Court of the United States has set a clear standard for a constitutionally sufficient trial by jury. The Court, declaring the right to a jury trial to be a fundamental right, has determined that in a criminal case at least six jurors must unanimously agree to conviction. The Court has determined that less than six jurors voting for conviction does not provide justice according to the Constitution. The standard for constitutionally sufficient trial by jury has been applied to every jurisdiction in the country save one: the military justice system.

The Court seems reluctant to apply the standard directly to the military justice system. Most recent comments by the Court indicate that the need for military discipline is the distinguishing feature of the system. The Court seems reluctant to impose a standard on a system which, in addition to justice, has discipline as a goal. However, the Court has not hesitated in limiting the exercise of the military's jurisdiction. In *O'Callahan v. Parker*, the Court rejected the "status" of the individual as the determinant of military jurisdiction and held instead that military jurisdiction could attach only to "service connected" offenses. Service connection was further defined in *Relford v. Commandant* to include all military offenses and any civilian offense committed on-post. The Court, in limiting jurisdiction, was actually extending the protection of the Bill of Rights and other constitutional protections to members of the armed forces who committed crimes which did not directly affect discipline.

But limiting the jurisdiction of the military justice system seems to contradict the historical constitutional argument, first seen in 1866 in *Ex parte Milligan*, that the military justice system derives its power from Congress pursuant to article I, section 8,

clause 14 of the Constitution and thus is absolute and not subject to any constitutional constraints. The interpretation that supports this view has a sound historical basis. Since its inception with the Articles of War in 1797, the military justice system has functioned under the absolute grant of congressional authority. Additionally, the Court's support of this concept allows the Court to avoid the issue of the application of the right to trial by jury entirely, or at least gives the Court the option of considering the issue tangentially through the limitations on the military's jurisdiction—an easy and clean operation.

Certainly the importance of discipline as a goal of the military justice system deserves recognition, and the Court cannot be faulted for leaving the imposition of discipline to the military. However, one must balance the importance of discipline against the harm resulting from deprivation of constitutional protections. The Supreme Court has done this to a degree in *O'Callahan* where it found the discipline argument too remote to justify imposition of military justice on nonservice connected offenses. The Court in *Burns v. Wilson* also stressed in dicta, that the Bill of Rights must be heavily weighted in the balance.

Given the finding of the Court in the *Duncan v. Louisiana* line of cases and the trend of the Court to limit the jurisdiction of the military justice system to service connected offenses, the Court should decide which if any constitutional protections need be surrendered to foster discipline in an armed forces of over two million citizens. It seems reasonable that military offenses, which by their nature have a direct impact on discipline, should be viewed differently from civilian offenses, which do not have so direct an effect on discipline. When the latter are at issue, the system should be held to a closer constitutional standard.

It seems logical to extend the right of trial by jury to members of the armed forces in the case of civilian offenses committed in a time of peace. Such an integration of the right to trial by jury into the military justice system would provide both justice and discipline. Allowing the convening authority to select jurors, but requiring that once selected, the courts-martial should meet the constitutional standard of at least six members voting for conviction would place the military justice system in conformance with recent Supreme Court holdings and would ensure a constitutionally sufficient trial by jury. Also, discipline would not appreciably suffer if the size and voting requirements were changed to reflect these constitutional strictures. Members of the armed forces would still be tried by the military and by those superior in rank and the power

from which the court is convened would still be the military command structure.

It seems inequitable to grant an accused most constitutional protections, including the right to counsel, during a military trial and then in the name of discipline to allow a conviction to take place in a manner which would be found, in a civilian context, to be both unjust and unconstitutional by the United States Supreme Court. Where, in the case of civilian offenses committed in time of peace, discipline is so indirectly affected, the military justice system should provide a constitutionally sufficient right to trial by jury.

