

# Supreme Court of the United States

OCTOBER TERM, 1968

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In the Matter of:

Docket No. 646

JAMES F. O'CALLAHAN:

vs.

Petitioner;

J. J. PARKER

Respondent.

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Place Washington, D. C.

Date January 23, 1969

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2 Victor Rabinowitz, Esq. on behalf of Petitioner			3	
3 James vanR. Springer, Esq. on behalf of				
4 Respondent			21	

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1968

3 -----x  
 4 JAMES F. O'CALLAHAN, :  
 5 Petitioner; :  
 6 vs. : No. 646  
 7 J.J. PARKER :  
 8 Respondent. :  
 9 -----x

10 Washington, D.C.  
11 January 23, 1969

12 The above-entitled matter came on for argument at  
13 12:50 p.m.

14 BEFORE:

- 15 EARL WARREN, Chief Justice
- 16 HUGO L. BLACK, Associate Justice
- 17 WILLIAM O. DOUGLAS, Associate Justice
- 18 JOHN M. HARLAN, Associate Justice
- 19 WILLIAM J. BRENNAN, JR., Associate Justice
- 20 POTTER STEWART, Associate Justice
- 21 BRYON R. WHITE, Associate Justice
- 22 ABE FORTAS, Associate Justice
- 23 THURGOOD MARSHALL, Associate Justice

24 APPEARANCES:

25 VICTOR RABINOWITZ  
 30 East 42nd Street  
 New York, New York 10017  
 Counsel for Petitioner

JAMES vanR. SPRINGER  
 Department of Justice  
 Washington, D.C. 20530  
 Counsel for Respondent

1                                   P R O C E E D I N G S

2                   MR. CHIEF JUSTICE: No. 646, James F. O'Callahan  
3                   Petitioner versus J.J. Parker, Warden.

4                   Mr. Rabinowitz?

5                                   ARGUMENT OF VICTOR RABINOWITZ, ESQ.

6   ON BEHALF OF PETITIONER

7                   MR. RABINOWITZ: May it please the court, this case  
8                   is before the court on a writ of certiorari to the Court  
9                   of Appeals from the Third Circuit. It is limited to a single  
10                  legal issue which we think is of profound importance to  
11                  several million young Americans now in the armed forces of the  
12                  United States, relating to the balance between civil and  
13                  military jurisdiction over them.

14                  The question is a simple one. Does a court martial  
15                  have jurisdiction in peace time to try a member of the armed  
16                  forces charged with a civilian crime, and by that I mean a  
17                  crime which is normally cognizable in the civil courts,  
18                  alleged to have been committed by him off post and off duty.

19                  In this case the crime is attempted rape. But if  
20                  the government is right, it could try a member of the armed  
21                  forces for any crime at all, including security violations,  
22                  violation of the anti-trust laws or anything else.

23                  Unless the court thinks this is a far fetched  
24                  example, I learned this morning that a Technical Sargeant  
25                  at Myrtle Air Base in South Carolina was convicted just a



1 few days ago of the crime of income tax evasion by a court  
2 martial.

3         The relative role of the military in civilian  
4 governments has been of considerable concern throughout our  
5 history and for that matter, throughout the history of England.  
6 On the one hand, the Constitution provides that Congress may  
7 make rules for the government in regulation of the land and  
8 naval forces. On the other hand, it provides for jury trial,  
9 in an Article 3 court, for grand jury indictment. In federal  
10 cases, and most states, have similar provisions, with some  
11 variation on the grand jury, but all of them provide for  
12 a trial before a civilian court and a jury trial.

13         In this kind of situation this court has always  
14 taken the position that in order to determine the relationship  
15 of these two apparently conflicting decisions or provisions  
16 that may conflict in our Constitution, that it is appropriate  
17 to look into the historical factor, to look at the probable  
18 intent of the framers of the Constitution and to determine on  
19 the basis of that what rule shall apply.

20         Now, we differ somewhat with the government on our  
21 views of history, which is not particularly surprising. But  
22 as we see the history, for over 100 years, both before and  
23 after the adoption of the Constitution, court martial juris-  
24 diction was limited both in this country and in England, to  
25 offenses such as desertion, mutiny, striking or scorning a

1 superior officer, tardiness for parade, failure to salute,  
2 theft from military stores, and a host of other offenses,  
3 bearing an obvious and immediate relationship to the army,  
4 many of which are not punishable in the civilian court at all.

5 These are the kind of offenses, and the only kind of  
6 offenses, listed in the Articles of War adopted by the  
7 Continental Congress in 1775, renewed in 1776, and in essence,  
8 they are the offenses to which court martial jurisdiction was  
9 provided in the United States in peacetime up until 1916.

10 It was in the Articles of 1916, perhaps anticipation  
11 of another war, but in any event, in 1916 for the first time,  
12 Congress provided court martial jurisdiction. And the Articles  
13 of War for the first time defined crimes other than military  
14 crimes, going to offenses such as rape, murder, assault and  
15 similar ordinary conventional civilian offenses.

16 Now, the framers of the Constitution obviously did  
17 not act in a vacuum. As this court has pointed out on  
18 numerous occasions, both in handling jury cases, such as patent  
19 particularly in handling military law cases, such as  
20 Covert against Reed, and many cases that follow that, the  
21 people who framed the Constitution were quite aware of the  
22 English Revolution, they were aware of the abuses they  
23 themselves suffered in this very field and it may reasonably  
24 be assumed that they wrote the Constitution with this in mind.

25 English history is I think fairly clear. In 1627,

1 the Petition of Right addressed to Charles I, complained  
2 of the institution of court martial for any offense, even  
3 an offense trying a soldier, if that happened in the courts  
4 of England where the civil courts were open. And the Petition  
5 was addressed to the King, because the King had directed  
6 commissions to go forth and to try members of the armed  
7 forces, although the civilian courts, according to the  
8 Petition, were perfectly capable of trying these offenses.

9 As a result of the Petition of Right, King Charles  
10 withdrew his military commissions, but the subject was a  
11 matter of considerable conflict between Parliament and the  
12 Stuarts for a good while after.

13 In 1689, after the Revolution of 1688, Parliament  
14 passed the Mutiny Act, which for the first time, provided  
15 by Act of Parliament at least, trial by court martial of  
16 people in the armed forces and the only three offenses that  
17 were listed in the Mutiny Act were desertion, sedition and  
18 mutiny.

19 Now the Act was of very limited duration. The first  
20 Act was passed for a period of one single year. And Parliament  
21 did, over the next century, renew the statute annually. Each  
22 time confining court martial jurisdiction for crimes committed  
23 within England to crimes that were clearly military in nature  
24 of the type mentioned in the Mutiny Act of 1689, desertion,  
25 sedition, disrespect to a superior officer, that sort of thing.

1           Now it is true that as the English Empire expanded  
2 and England took up commitments in foreign countries that  
3 court martial jurisdiction was exercised over crimes committed  
4 by members of the armed forces on civilians in foreign  
5 countries, but only in foreign countries, never in England.

6           There is some discussion among the authorities  
7 indicating -- and there is a case of England in the middle  
8 of the 18th century -- holding that whereas court martial  
9 jurisdiction within England came under the Mutiny Act and  
10 therefore within the area of Parliament's jurisdiction  
11 court martial jurisdiction overseas was within the King's  
12 prerogative.

13           And I think by analogy we might very well say that  
14 whereas court martial jurisdiction in the United States in  
15 time of peace is quite a different thing from court martial  
16 jurisdiction in times of war. And in time of war an extended  
17 court martial jurisdiction may perhaps be argued for as coming  
18 within the war power of Congress, this particular offense  
19 in the issue presented before us was committed in time of  
20 peace. It was in 1956. It was in the Territory of Hawaii.  
21 Civil courts were open. There was no war. It was one of  
22 those periods in history in which there didn't have to be  
23 a war.

24           The issue is not an issue of the war power of  
25 Congress, but rather an issue of Congress' power to take



1 away from persons in the armed forces the right of trial by  
2 jury and the other protections of the Constitution.

3 Q You see no escape from the constitutional  
4 question?

5 A I really see no escape. I think that the  
6 statute is clear. The statute asserts jurisdiction over  
7 everybody in the armed forces and I really have difficulty  
8 in avoiding the constitutional issue.

9 I think, and I will come to that in a moment, your  
10 Honor, there may be several different views of the  
11 constitutional issue as your Honor suggested in the  
12 concurring opinion in Covert. But that there is a  
13 constitutional issue here, it seems to me, is unavoidable.

14 Now, when the Colonists drew the Constitution it is  
15 perfectly obvious that this was a matter of considerable  
16 importance. And as a matter of fact, the Declaration of  
17 Independence contains a reference to the fact that one of  
18 the complaints listed against the King was that he had  
19 asserted military jurisdiction over crimes committed by the  
20 armed forces, by the English soldiers on civilians in the  
21 United States, or what was then the Colonies. And this was  
22 protested against.

23 And I might say that throughout history there have  
24 been two parallel lines here. On the one hand there has  
25 been the complaint of the civilian that the Army will take

1 jurisdiction and provide what the Declaration of Independence  
2 calls a mock trial, thus permitting the military to abuse  
3 the civilian by trying them in according with presumably  
4 more lenient rules. On the other hand, there has been a similar  
5 complaint, or I should say the opposite complaint, arising  
6 out of the same context, that the Army will provide for the  
7 soldier a more strict and a more difficult form of punishment  
8 than he would get in the civilian courts because he does not  
9 have in the Army the right of trial by jury, right to a civilian  
10 court and the right to a grand jury indictment.

11 And I think the fact is that both of these things may  
12 happen and it is to avoid both of these things that we think  
13 civilian jurisdiction ought to be given.

14 Now the Articles of War adopted in 1776 remain  
15 unchanged so far as this particular subject is concerned. Until  
16 the Enrollment Act of 1863 in the midst of the Civil War,  
17 when for the first time, Congress passed the statute giving  
18 some degree of military jurisdiction over civilian crimes.  
19 That was specifically confined to time of war and this court  
20 held in the Coleman case and the series of cases that  
21 followed, that Congress intended by that statute to give  
22 jurisdiction of the military only in cases where the civilian  
23 courts were not operating. The leading case of course is  
24 Coleman against Tennessee, where the issue arose as to who  
25 had jurisdiction over a crime committed by a member of the

1 Union forces in the then occupied territory of Tennessee. There  
2 were then no civilian courts operating, certainly no civilian  
3 courts of the United States. There may have been civilian  
4 courts of the Confederacy operating. The court said it would  
5 be absurd to say that a soldier in the Union Army could be  
6 tried by a civilian federal court by a Confederate civilian  
7 court and held that the Army had military jurisdiction over  
8 that crime.

9 But this court has repeatedly since that time  
10 interpreted the 1863 Act as applying only where Armies were  
11 actually in the field and where civilian courts were not open.

12 As I say it was not until 1916 that the Articles of  
13 War were amended to cover substantially the situation we have  
14 now.

15 Now although this case is one of first impression and  
16 the court has never decided this precise issue, as a matter of  
17 fact there are only three or four decisions even in the  
18 Court of Appeals on this issue --

19 Q Is there a split in the court?

20 A No, sir. I think there are only two circuits  
21 that have passed on this. The Third Circuit and one other --  
22 I don't recall which -- they both came to the same conclusion  
23 without very much of a discussion. I think they just assumed  
24 without any constitutional discussion at all on any of the  
25 cases, they merely went to the Articles of War, noted that

1 the Articles of War did give jurisdiction over this sort of  
2 offense and proceeded from that point. I don't know of a  
3 single case -- and I have checked the records where they are  
4 available -- where any of this was raised by counsel.

5 Now, in the Toth case and Covert against Reid and  
6 Kinsella against Singleton and the McElroy case and Lee  
7 against Madigan, the whole series of cases that were decided,  
8 most of them after the Second World War, this court touched  
9 upon a similar issue -- not touched upon -- but discussed  
10 at very great length a similar issue, namely, the jurisdiction  
11 of a court martial over people who were not members of the  
12 armed forces and the history is quite familiar to this court  
13 and I won't go into those cases now, except to note that there  
14 was one theme which it seems to me ran through all of those  
15 cases and that was the very deep concern shown by all of the  
16 members of the court to prevent too broad an extension of  
17 military jurisdiction.

18 And the court felt that unlike the Commerce Clause  
19 or other provisions of the Constitution, which have been given  
20 a very broad interpretation, that here so far as this clause  
21 was concerned, the Constitution would be given a very narrow  
22 interpretation.

23 And that view as I say was expressed in Covert  
24 against Reid where the court said every extension of military  
25 jurisdiction is an encroachment on the jurisdiction of the



1 civil courts and more important, acts as a deprivation of the  
2 right to jury trial and other treasured constitutional  
3 protection.

4 In Lee against Madigan also the court indicated its  
5 reluctance to give military tribunals authority to try people  
6 for a non-military offense.

7 And so, we are face to face with this problem now  
8 and it seems to us that on the basis of the history that we  
9 have before us, there is no justification for extending juris-  
10 diction of court martial over persons who commit ordinary  
11 conventional civilian crimes where the courts are open,  
12 perfectly capable of handling the case, where there are no  
13 extraordinary circumstances such as war or some similar event  
14 to make it impossible for these people to be handed over to  
15 the civilian court for trial.

16 And as a matter of fact, the government in its brief  
17 says that some 80 percent of these cases are tried in the  
18 civilian courts, but apparently 20 percent are not.

19 Q Where is it that you are drawing the line? I  
20 take it military offenses in either peace or war you put  
21 on one side.

22 A If by military offenses we mean this sort of  
23 thing which is directly and immediately concerned with the  
24 military, yes. In peace or war I would say that there is a  
25 long tradition of court martial jurisdiction.

1 Q What about so-called civil civilian crimes in  
2 time of war?

3 A I would argue if I had to that if the crime  
4 is committed in this country where the civilian courts are  
5 open and are available that it ought to be tried in the  
6 civilian courts in that case also, because I don't see any  
7 particular reason why a soldier who is drunk and disorderly  
8 in a camp in the United States should be tried by a military  
9 court just because there happens to be a war 5,000 miles away.

10 Q You wouldn't distinguish in any of these  
11 arguments between crimes? All crimes are the same and should  
12 be treated the same.

13 A As long as they are non-military crimes.

14 Q Yes.

15 A I would say they should all be treated the same.

16 Q How about assault and battery? Between two  
17 G.I.'s?

18 A If they go into town and they get drunk and  
19 there is a fight --

20 Q In uniform.

21 A I don't see that it makes any difference. I  
22 don't see any reason why the civil courts are not perfectly  
23 capable of handling that situation.

24 Q Don't you think the Army has some interest  
25 in stopping their men from brawling in uniform?

1           A     I think the Army has an interest in that just  
2 as I think the Army has an interest in seeing to it that wives  
3 of servicemen stationed abroad don't kill their husbands. I  
4 think the Army has an interest --

5           Q     The wives don't have uniforms on.

6           A     Pardon me?

7           Q     The wives don't have uniforms.

8           A     I don't think that that really should be the  
9 decisive issue in determining whether or not a man is to be  
10 deprived of a jury trial and the other protection of a  
11 civilian trial.

12          Q     Well, then I would assume if they were brawling  
13 on the post they would be entitled to a jury trial too.

14          A     I don't think so. I admit that a line has to be  
15 drawn somewhere and that seems to me to be a reasonable way  
16 to draw the line. I can understand that on a post there are  
17 lots of things --

18          Q     What about drawing the line when he is not in  
19 uniform?

20          A     No, I don't think I would draw the line on whether  
21 he is in uniform. I am sure that Sargeant whatever his name  
22 was, was probably in uniform when he filled out a false  
23 income tax return, but I don't think that that determines the  
24 question of whether he is to be tried in a civilian court or  
25 not.

1 Q In some of the cases in this field, hasn't it  
2 been the question of status rather than where the crime has  
3 been committed?

4 A Yes. Well, so far, the cases have all revolved  
5 on the question of the status of the offender. In this case  
6 it might be said that the issue is the nature of the offense  
7 as to whether it is what we have been calling a military  
8 offense or a civilian offense.

9 Now I will admit in response to what Justice Marshall  
10 said that there is an area in here, as there is in almost all  
11 legal questions, which is marginal, but if I had to draw the  
12 line I would say that if it committed off post -- it may be  
13 committed 1000 miles from post, it may be committed on Times  
14 Square -- I don't think that there is any reason why the  
15 civilian authorities cannot try such a case, and why persons  
16 engaged in this kind of a brawl, in or out of uniform, should  
17 not be subjected to the civilian authority.

18 Q Does your argument extend to people in the  
19 military service who are overseas in time of peace?

20 A I think that is a much more difficult problem.

21 Q Well, I think so too. I was asking you a  
22 question.

23 A Well, I would say that there is a much better  
24 argument for court martial jurisdiction there, although  
25 even there, as your Honor may know, in too many cases these



1 matters are determined -- let me interrupt one moment.

2 I would assume what we are talking about when we  
3 say in time of peace, we are not talking about the United  
4 States Army as an occupying force. We are rather talking about  
5 Americans who are stationed at an air base in Germany, for  
6 example. There is a difference where the Army is in, even  
7 though it may be technically a time of peace, where the  
8 Army ---

9 Q Well, I would suppose that there is at least  
10 a factual if not a juridical difference between a soldier in  
11 South Vietnam and one in London, England today.

12 A Yes. In most cases I believe this matter is  
13 handled now by treaty. There is no doubt that if we look at  
14 this historically the United States has always asserted the  
15 right to try people who commit crimes abroad by techniques,  
16 methods, other than civilian trial. The In re Ross  
17 controversy was involved in that and that also was, I think,  
18 affected by an extent by Covert against Reid.

19 I would be inclined to think and I think this is a  
20 matter of policy perhaps, rather than a constitutional  
21 matter, perhaps a constitutional matter as well, that under  
22 such cases the civilian courts of the country in which the  
23 crime is committed just try the case. But that is not this  
24 case. I really can't explore all these problems to their  
25 outer limits, because I think that the facts do vary from

1 time to time and as a matter of policy and as a matter of  
2 treaty law I do think that in most cases these persons are  
3 tried in the courts of the country in which the crime is  
4 committed.

5 Q I should think, Mr. Rabinowitz, thinking out loud  
6 if you will, that your constitutional argument would  
7 necessarily extend to military people overseas in time of  
8 peace who commit basically what are civilian crimes.

9 A I think that is probably so.

10 Q Larceny and rape and murder and theft and  
11 assault and battery against say the local civilian population.

12 A Yes. If we all assume that in Re Rose is no  
13 longer the law, I think --

14 Q Your constitutional right to jury trial is  
15 that what you are talking about?

16 A Your constitutional right to a jury trial.

17 Q Where do you get that overseas?

18 A It may be that he will have to be brought back  
19 to the United States and there are provisions in the statute---

20 Q There are also treaties that govern the  
21 disposition of cases.

22 A Yes, sir. It is my understanding that almost all  
23 of these situations are covered by treaties. I think some  
24 of them are mentioned in the government's brief.

25 Q I was just wondering why you give that point up

1 about overseas.

2 A If I gave anything up your Honor, I didn't do  
3 it intentionally. I did not intend to give anything up, but  
4 there are of course provisions in the statutes providing for  
5 the trial in the United States of crimes which are committed  
6 abroad.

7 Now of course it would have to be a crime against the  
8 United States and if an American -- let's see the hypothesis  
9 we are making -- we are assuming that an American soldier,  
10 for example, assaults or steals money from an English  
11 civilian, or from a German civilian, he being stationed there.

12 Q It gets a bit circular, doesn't it? In your  
13 submission, it might not even be a crime against the United  
14 States.

15 A It might not even be a crime against the United  
16 States, yes, sir.

17 Now, the government doesn't agree with this analysis  
18 at all. It takes the position that under the general  
19 articles of the Articles of War, which is set forth on page 5  
20 of my brief, court martials have always tried civilian  
21 crimes, always, from the beginning.

22 The article says, although not mentioned specifically  
23 in this chapter, all disorders and neglect to the prejudice  
24 of good order and discipline in the armed forces, all conduct  
25 of a nature to bring discredit upon the armed forces and

1 crimes and offenses not capital may be subjected to a general  
2 or summary court martial. And I must say that the tax evasion  
3 case that I referred to just a few moments ago was tried under  
4 this section.

5 Now I am not going to raise the question of whether  
6 that section isn't so vague that it could hardly be upheld  
7 today, but the citation, the references quoted by the  
8 government and it was really a magnificent bit of research,  
9 all 115 cases or so listed in the Appendix, are supposed to be  
10 cases in which the general article was used to punish civilian  
11 crimes.

12 Now they start in 1775 and for example the first one  
13 is that the soldier was charged with stealing. The next one  
14 says the soldier robbed Dr. Foster, General Hospital. The  
15 third one says the soldier stole a hat from Captain Waterman.  
16 Now these descriptions are so brief that you can't tell at  
17 all whether the men are on duty or off duty at the time of  
18 the offense.

19 One thing we can be sure of is that the civilian  
20 courts were not open, because these crimes took place in  
21 General Washington's army in 1775 in Cambridge, the first one  
22 three weeks after the Battle of Bunker Hill. In 1776 in  
23 New York. In 1777 in Morristown. In 1778 in Valley Forge  
24 at Fredericksburg and Yorktown. And then after the Treaty of  
25 Paris they moved to the frontier where there are a series



1 of offenses against Indians.

2 Now no one is talking about the kinds of case where  
3 the Army is in the course of a military campaign in the United  
4 States or where there is a frontier battle going on. Those  
5 situations bear no resemblance at all to this situation and  
6 I think we are then talking about the war power and we have  
7 a situation which is really quite different.

8 I might say that Winthrop in his authoritative work  
9 comes to a completely different conclusion with respect to  
10 the general article. He says it was never used except very,  
11 very sporadically on the frontier, but aside from that, it  
12 was never used except when the offense was of a military  
13 nature.

14 Now, if the history is not conclusive, then mindful  
15 of Mr. Justice Holmes' concurrence in Covert, I would like just  
16 to note this: In that opinion, the Justice said that the  
17 crucial question is and I quote: "Which guarantees of the  
18 Constitution should apply in view of the particular  
19 circumstances, the practical necessities, and the possible  
20 alternatives which Congress had before it."

21 Now while that might have been a close question in  
22 cases like Covert and Kinsella, there is nothing close about  
23 it here. The particular circumstances of the case is that  
24 a soldier goes off base, off duty, commits a crime against  
25 a civilian in Hawaii. There is no reason at all why a

1 Hawaiian court can't try him.

2 The practical necessities are practically the same  
3 and the possible alternatives are obvious. No reason, no  
4 compelling reason in policy, no reason why the Constitution  
5 should not apply, appears in this case. Now here of course  
6 the government also disagrees. It says the right of the  
7 soldier to be tried in the Army community. That is the  
8 community he lives in and that is the community that he is  
9 to be tried in.

10 Well, I wonder whether an average non-commissioned  
11 officer tried by a court martial consisting of ranking officers  
12 senior officers, officers with the rank of Colonel or Major,  
13 or Captain, is being tried "in the Army community".

14 The government says there may be different standards  
15 in the Army. Well of course there may be different standards  
16 in the Army. That is precisely what the difficulty is.

17 If the standards in the Army are more strict than  
18 the standards in the community at large the soldier we think  
19 has a right to complain, because he committed his crime in  
20 the community and not in the Army. And if the standards in  
21 the Army are less strict then we think that the community  
22 has a right to complain, because the soldier should not  
23 be permitted to come into town, into a civilian community,  
24 commit crimes and then be excused because the Army doesn't  
25 think those crimes are very serious.

1 Now, there is just one point I will refer your Honors  
2 to.

3 Q Make it briefly if you will.

4 A Just very briefly. And that was raised in point  
5 two of my brief, namely, some question as to whether Congress  
6 has the power to punish this crime at all. In other words,  
7 the crime is the crime of rape. There is nothing in the  
8 statute that talks about rape in connection with military and  
9 rape is a crime which is normally punished by the state.

10 And the mere fact that a man happens to be in the  
11 armed forces would not seem to me to give the government the  
12 right to punish him because he commits rape.

13 To put it another way, and as I say developed in  
14 the brief, Congress can make it a crime to embezzle property  
15 of the United States, but I do not think that Congress can  
16 make it a crime which said that anyone who was a federal  
17 employee and who commits embezzlement anywhere is guilty  
18 of a federal crime. And I think that is what has been  
19 attempted here. This is discussed in the Mason case where  
20 the court discusses the crime of murder in these circumstances  
21 and I rest on that.

22 MR. CHIEF JUSTICE WARREN: Mr. Springer.

23 ARGUMENT OF JAMES vanR. SPRINGER, ESQ.

24 ON BEHALF OF RESPONDENT

25 MR. SPRINGER: Mr. Chief Justice, if it please the

1 court, I think it is important in this case what we are  
2 discussing is a constitutional grant of jurisdiction to the  
3 Congress to legislate.

4 Clause 14 of Section 8 of Article I provides that  
5 Congress has the jurisdiction to make rules for the government  
6 and regulation of the land and naval forces.

7 It is our position that this power permitted Congress  
8 to legislate specific provisions in the Uniform Code of  
9 Military Justice upon which Sargeant O'Callahan was convicted.  
10 And we submit that Congress does have a concurrent jurisdiction  
11 with the civil authorities to punish offenses committed  
12 by military personnel who are on active military status without  
13 limitation as to whether or not the offenses are committed  
14 on a military post or on duty.

15 In fact, the Uniform Code of Military Justice and  
16 the Articles of War 1916, which in substance were in effect  
17 until 1950, when the Code was enacted, have quite detailed  
18 provisions relating to so-called non-military offenses.

19 The Code includes, of course, the offenses in  
20 question in this case, rape, attempted rape, assault, house-  
21 breaking. And it also covers specifically most of the other  
22 principal offenses that servicemen might commit against the  
23 civilian community, such as murder, larceny, bad check  
24 offenses, drunken driving, reckless driving, disorderly  
25 conduct, breech of the peace.

1 As Mr. Rabinowitz has suggested this jurisdiction  
2 has been exercised and is being exercised in a great many  
3 cases that arise both in the United States and abroad.

4 In the United States there are working arrangements  
5 between the military and the civil authorities both the  
6 Department of Justice and state and local authorities which  
7 divide up the concurrent jurisdiction that exists under the  
8 Uniform Code.

9 Generally speaking, the military does turn offenders  
10 against the civil laws over to the civil authorities, if the  
11 civil authorities request it.

12 Q In this case the civil authorities had it.

13 A The civil authority turned him over to the  
14 military police, and they proceeded with the case.

15 Q Getting back to the old theory of interfering  
16 with the King's peace, how was the United States peace  
17 interfered with in this case?

18 A Mr. Justice Marshall, I would suggest that  
19 the test should perhaps be framed in terms of the Constitution  
20 which constitutes the government regulation of the land  
21 and naval forces. We submit that one aspect of the government  
22 regulation of the land and naval forces is a reasonable amount  
23 of control by the forces over the behavior of their members  
24 when they are so to speak turned loose on communities.

25 Q Would your position be the same today if a



1 G.I. shot and killed the Governor of Hawaii? Hawaii wouldn't  
2 have a chance to try him?

3 A No. We are not saying there is an exclusive  
4 military jurisdiction. We say there is a concurrent juris-  
5 diction.

6 Q What would the odds be? Do you know?

7 A The odds as to what would happen in that case  
8 I am sure that the case would be handled by the authorities.

9 Q Why?

10 A Well, the policy of the Army and of the other  
11 services is that ordinarily upon request offenders against  
12 civilian law will be turned over to the civilian authorities.

13 Q It has to be a request.

14 A Yes, but I am sure--

15 Q The G.I.'s constitutional right to a jury trial  
16 depends on who makes the request.

17 A Yes, yes, that certainly is the consequence  
18 of the existence of this concurrent military jurisdiction.

19 In about 85 percent of the cases within the United  
20 States in the year 1967, the civilian authorities in fact  
21 did take jurisdiction over serious offenses. But there were  
22 something like 750 cases, serious cases, where the military  
23 authorities did prosecute. And there are many more cases,  
24 and I believe a clerical portion in the case of less serious  
25 offenses.

1 Overseas in 1967, although our status of forces  
2 agreements do give jurisdiction to the local authorities where  
3 American men are stationed in almost cases except for cases  
4 involving only American personnel and cases involving crimes  
5 committed while on duty, in those overseas cases there were  
6 some 18,000 military prosecutions in the year 1967.

7 So that we submit that this is a broad jurisdiction,  
8 broadly exercised jurisdiction that is at stake. One as to  
9 which there are smoothly operated arrangements between civilian  
10 and military. And we submit that the Constitution does not  
11 require this jurisdiction to be given up by the military.

12 Q Are these limitations as you see them on the  
13 power of Congress in Article I, Section 8?

14 A You are thinking perhaps of the tax evasion case.

15 Q I am thinking generally. What is your view  
16 of the tax evasion case?

17 A First of all, I think there might well be a  
18 statutory question.

19 Q I take it that that might come under the 10 U.S.C.  
20 Section 934. All disorders and neglect and prejudice of  
21 good order and discipline in the armed forces or conduct or  
22 nature to bring discredit on the armed forces. It would  
23 be brought under that.

24 A I am quite sure that is what it was brought  
25 under, not knowing the case.

1 But, as I say, there may be some questions that are  
2 not raised in this case.

3 Q I don't want you to comment on another case, but  
4 I would like to know whether you think there are any  
5 restrictions of Congressional power in Article I, Section 8,  
6 and what are they, because that clause empowers Congress to  
7 make rules for the government and regulation of the land and  
8 naval forces.

9 Now, does that in effect mean Congress can set up  
10 a separate set of rules for members of the armed forces, if not,  
11 what are the limitations?

12 A I think it probably does mean that, but we don't  
13 have to go that far in this case.

14 Q Maybe we do, maybe I do. So, I would like to  
15 know from you directly, do you think Congress could set up a  
16 totally comprehensive set of rules to govern the conduct of  
17 individuals by virtue of their status in the armed forces,  
18 to be separate and apart.

19 A I think that does have to follow from the broad  
20 language that is in the Constitution itself, but as I say,  
21 this case is not --

22 Q I understand that. I understand that. What I  
23 am trying -- I think you have answered my question. You say  
24 that Congress could make any rules whatever that they wanted  
25 to. I suppose those rules could be preclusive of civilian

1 authority.

2 A Again, we don't have a preclusion case here. I  
3 think that would be a very troublesome case.

4 Q If you try to confine our discussion here to  
5 this particular case, you are going to leave me substantially  
6 without the benefit of your assistance.

7 A I think I would have to say if the military or  
8 Congress purported to preclude state jurisdiction over some  
9 of these crimes, that would certainly be a difficult case.

10 I think the question here is framed and perhaps to  
11 my mind should be restricted to the question whether legis-  
12 lation can, as the plaintiff asserts, deprive the individual  
13 defendant of his jury right. It is not a jurisdictional  
14 crisis between the military authorities and the states.

15 Q Then you say Congress could not, under this  
16 constitutional provision, set up a system of rules that would  
17 be preclusive of the civilian authority in some respects.

18 I am trying to find out what the phrase "government  
19 and regulation of land and naval forces" means in terms of  
20 your submission as counsel for the government.

21 A I do have to confess that I am troubled and  
22 I hate to make a commitment as to the most extreme application  
23 that this could be given.

24 Q Is there any First Amendment limitation upon the  
25 power of Congress?

1           A     Under these Articles? Yes, I believe there is.  
2 In fact, the court of military justice, drawing suggestions  
3 from this court in Burns and Wilson has said that the  
4 Constitution does in general apply to military men and the  
5 procedure in military trials.

6           Q     So that the First Amendment does restrict this.  
7 How about the Sixth Amendment?

8           A     As to the right to jury trial, I think it has  
9 been established --

10          Q     How about the right to confrontation of  
11 witnesses?

12          A     That is a case which has, in fact, within  
13 the last couple of years, arisen in the Court of Military  
14 Appeals. The Court of Military Appeals has held that that right  
15 does exist.

16          Q     Under the Constitution?

17          A     Yes. The Court of Military Appeals has said as  
18 flatly as could be said that the Constitution operates  
19 directly --

20          Q     Then I will ask you one more question. I take  
21 it then from what you have said that it is your submission  
22 that Article 1, Section 8, Clause 14, authorizes the Congress  
23 to make a complete set of criminal rules, which we ordinarily  
24 refer to as criminal rules, applicable to the persons by  
25 virtue of their status as members of the land and naval forces



of the United States. It would include, for example, the power of Congress to make it a crime not to submit their income tax returns on time.

A I think I would have to say it would be our position that the power could do that, could go that far. Although, of course, I would say again that I don't think it is necessary to go that far to decide this case or really the general problem raised by this case.

Q Maybe you and I think differently because I have to think beyond the limits in the individual case. I guess you do too, don't you really?

A Yes, indeed. And of course this case does involve the general principle, but it does not involve the furthest most exercise of jurisdiction that might be conceived of.

The question is then whether the government in regulation of land and naval forces can encompass activities by soldiers beyond what in the narrow sense can be called military, obedience, behavior in formation and things like that.

We submit that there are good reasons why this jurisdiction should go further. Activities, actions of the kind in question in this case do have, in a very real sense, a military significance that makes them a proper concern of the military forces.

The fundamental factor here is the fact that the military is and always has been in our society a kind of

1 unique community that is governed by rules and customs of its  
2 own and it is separate from the civilian community and in some  
3 respects alien to it.

4         The real community of the people in the services is  
5 the community of other people in the services. It is not the  
6 civilian community where a particular military base with  
7 its transient personnel happens to be located.

8         Of course, the existence of a military unit in a  
9 civilian community presents certain problems for that community.  
10 Military people in fact are often a different kind or a  
11 different make-up of ages, and attitudes. There are frequently  
12 young people without local ties, without family roots in the  
13 community, who in their free time do, as a matter of practical  
14 fact, create problems for that community. I think that  
15 community rightly looks to the military to maintain some degree  
16 of control over what these people do in the community.

17         And of course general discipline is something that  
18 is of enormous significance to an effectively functioning Army.  
19 I think to the extent that soldiers who are sometimes off  
20 duty what they do during those off duty hours does have an  
21 impact on the operations of the military force and the  
22 existence of an effective discipline.

23         One factor involved in civilian punishment of military  
24 offenders against the civilian laws is that those civilian  
25 punishments, the delays in civilian trials, may well interfere

1 with the operation of a military unit by making the man  
2 unavailable for transfer, unavailable for the performance of  
3 his military duties.

4 The Army has special facilities, special abilities  
5 because of the nature of the community that it is, for the  
6 punishment and rehabilitation of members of the forces who may  
7 have gone astray. In fact, because of the possibilities of  
8 limited restraint, it may well be that an appropriate punish-  
9 ment for a military man can be much more lenient than any  
10 punishment that would be available to the civilian courts and  
11 the civilian authorities.

12 Finally, a point that Mr. Rabinowitz --

13 Q What is the general scheme, or has been under  
14 the Articles of War? Do they set up different penalties from  
15 the civilian penalties for a comparable crime?

16 A Yes. In fact, the Articles of War in general  
17 as to most of these crimes, as to all but two or three, simply  
18 say, as a matter of statute, that punishment shall be as the  
19 court martial shall direct. The Manual for Courts Martial  
20 which is in form an Executive Order at present specifies maximum  
21 penalties, generally I believe, not minimum penalties.

22 Q Isn't the national penalty for rape death still?

23 A Under the Uniform Code --

24 Q I think it is.

25 A I think the Code says --

1 Q What is it?

2 A This was not a rape case, this was in fact an  
3 attempted rape case.

4 Q What was the national sentence for attempted  
5 rape in Hawaii at that time?

6 A That I am sorry I don't know.

7 Q Isn't this the whole thing? I mean isn't he  
8 subjected to a longer penalty --

9 A In fact the maximum penalty available under  
10 the military law in this case was 25 years.

11 Q We don't know what it was in Hawaii then.

12 A No, I would suspect it was something of that  
13 magnitude that would have been available in the civilian law  
14 that I am familiar with.

15 I think there is a very real practical point here that  
16 the factors that basically underlie the jury right, the right  
17 of an individual to be tried and judged by members of his  
18 community don't fully apply in practical fact in the case of  
19 the military man who against his will is often dragged to  
20 a community where he has no ties, where he doesn't want to be,  
21 where in fact there may be for one reason or another a strong  
22 community bias against him.

23 So, I am just suggesting there may be some cases where  
24 in fact the military man does benefit from a military trial as  
25 distinguished from a civilian trial.

1 Q Have you been to an Army court martial?

2 A No, I have not.

3 Q Now I can see why you say it.

4 A But in fact I am told and, of course, there is  
5 nothing in the record to support this, that generally a  
6 comparison of the cases of civilian crimes tried by court  
7 martial with those tried by civilian courts indicates that  
8 more lenient penalties are given out, generally by the court  
9 martial, and this, I am sure, is conditioned by the fact that  
10 a more lenient penalty can, in some cases, be effective  
11 against the military man, where that kind of penalty wouldn't  
12 make sense ---

13 Q They cut them when they go up on appeal.

14 A Yes, there are several stages of review within  
15 the military scheme and sentences in fact can be reviewed  
16 all the way up to the top in the military.

17 Along this line, I think it is important to bear in  
18 mind that the Uniform Code and specifically the approach that  
19 has been taken by the Court of Military Appeals, does assure a  
20 military man virtually all of the constitutional rights that  
21 exist in civil trials, except, of course, for the requirement  
22 of indictment and the right to a trial by jury.

23 With respect to the history upon which the petitioner  
24 put so much weight, we think that the research is reflected  
25 in our brief does, in fact, show that the framers of the



1 Constitution were familiar with, or had reason to be familiar  
2 with the fact that court martials contemporaneously were used  
3 to punish crimes which could not be regarded as purely military  
4 in the sense for which the petitioner contends.

5 To be sure, some of the crimes listed in the appendix  
6 to our brief, it may be a little hard to tell which they were,  
7 but there are certainly a great many of them as to which it is  
8 clear that they were what the petitioner would call non-military  
9 or civilian in offenses.

10 For example, cashing a bad check in a civilian  
11 restaurant. Rioting in town, fraud, assault of a civilian. I  
12 think it is fair to say that you simply can't say that the  
13 provision in the 1916 Articles of War laying out specific  
14 jurisdiction over specific non-military crimes was something  
15 novel. This is something that existed prior to the  
16 ratification of the Constitution and, in fact, existed over  
17 the years under the general article of the Articles of War  
18 up until 1916.

19 So, it is not a new jurisdiction. It is one that  
20 must have been in the contemplation of the framers.

21 Q Tell me as a matter of interest, what is the  
22 source of material of this remarkable appendix you have.

23 A In fact, this was done by the Army. Some of the  
24 records, most of them appear in the National Archives.

25 Q If one wanted to go and look at the source of

1 materials to see the context in which the case arose, where would  
2 you go? Does your brief show that?

3 A Yes. Generally it is in the National Archives.  
4 At least there is one instance where it is the library at  
5 West Point, or some of the records kept at West Point, but most  
6 of these are available in the Archives.

7 I think although it is right to say this is a case  
8 of first impression, it is important to consider this case in  
9 the light of the cases where the court has considered the certainly  
10 not unrelated question of jurisdiction over civilians.

11 Q May I ask you this? Let's suppose that a member  
12 of the armed forces in civilian uniform while on furlough  
13 cashed a bad check at a store in a civilian community.

14 Now, is it your construction of the Constitution that  
15 court martial jurisdiction would be authorized?

16 A Yes.

17 Q Have I made myself clear?

18 A Yes. Though perhaps there is the distinction  
19 as to the location of the offense.

20 Q What do you mean by that? I am stating to you  
21 that there is a check cashed in a store. Let me particularize  
22 it. Let's suppose it was a clothing store, a men's clothing  
23 store on the corner of Main and Madison in Memphis, Tennessee.

24 A Mr. Justice, I think conceivably a line could  
25 be drawn according to whether the soldier in question was

1 stationed in the Memphis community --

2 Q Suppose he wasn't? I am not asking you that.  
3 I am asking you for your constitutional theory. Does the  
4 phrase "government and regulation of the sea and land forces  
5 of the United States" authorize Congress by statute to  
6 provide for the prosecution of this man in civilian clothes  
7 for this particular offense.

8 A Yes, it does. But I can see that a distinction  
9 could be drawn as to the scope of the jurisdiction to govern  
10 and regulate the land and naval forces according to the  
11 geographic distance perhaps between where the individual is  
12 stationed and where he commits his crime.

13 I think there is --

14 Q You have to take the position, if I understand  
15 you, that if a distinction were drawn, it would be incorrect,  
16 it would be in violation of the Constitution. Do you not say  
17 that?

18 A I say that the jurisdiction extends that far,  
19 but I think I can say, one might say, that the government and  
20 regulation of the land and naval forces properly includes  
21 the relationship between a military unit and the community  
22 in which it is located.

23 Q You don't take that position?

24 A No, I am not insisting on that position.

25 Q It doesn't make any difference to you whether

1 the man was on furlough or whether he was AWOL or whether he  
2 was just out for a night on the town?

3 A It does not, but I could conceive that it might  
4 to someone else.

5 I think one of the problems in this case, of course,  
6 is if you try to draw a circle around military offense. What  
7 is a military offense. To take the problem of rape: Is rape  
8 of a WAC in uniform on a military post a military offense or  
9 not. I think you can play with all of these various factors.

10 Q That is not one of the questions, that is the  
11 question, isn't it?

12 A Yes, it is certainly a question that necessarily  
13 follows from the position that the petitioner is putting  
14 forth in this case.

15 Q If you correct there can be a constitutional  
16 difference, what limits do you ask us to put upon this then?

17 A Well, I think the Constitution does have to be  
18 read as leaving to the judgment of the legislature of Congress  
19 as to how far this jurisdiction shall extend.

20 Q If Congress authorizes this, then there is  
21 no constitutional question.

22 A Yes. But I think if you say anything short of  
23 that, even if you just say as to rape of a civilian, there is  
24 no jurisdiction. I think you are necessarily in the question  
25 of where the line does exist.

1           If you say there is no limit other than the good  
2 judgment of the legislature, then you don't have this problem  
3 of course. But I think -- it is not easy to define what is  
4 a military offense, even if you try to do it quite narrowly.  
5 I think this is a problem.

6           Q     I thought the quest of your argument was as  
7 far as the Constitution is concerned the framers intended to  
8 leave these complicated questions, these line-drawing  
9 instructions to the Congress, and that in interpreting the  
10 language of the Constitution on its face in that regard, that  
11 there is nothing inconsistent in that interpretation with the  
12 past history, Colonial and subsequent history, of the practice  
13 of court martial.

14           Isn't that the guts of your argument?

15           A     Yes, that certainly is, Mr. Justice.

16           Q     I should think an answer to the Chief Justice's  
17 question and my brother Fortas' questions would have to stand  
18 on that position.

19           A     Yes, I do, though I think in this particular case  
20 we might even come under a less sweeping statement --

21           Q     There might be room in a given case, some of  
22 the hypotheticals, for you to construe Congressional statutes  
23 to the Articles of War or the Army regulations in a narrow  
24 way, but that is the only scope there, isn't it?

25           A     Certainly our position does rest upon the



1 existence of a jurisdiction that is limited only by the good  
2 sense of the legislature.

3 Of course that I think was the historical issue in  
4 England, realistically, whether the King should be able to  
5 determine the jurisdiction of court martials, or whether  
6 Parliament did.

7 The one thing that our Constitution decided was that  
8 it was the legislature, not the executive, who would have the  
9 authority to determine this jurisdiction, but I think that  
10 the jurisdiction given the legislature was a broad one.

11 And that, of course, although admittedly it was a  
12 different issue, that is what this court said in Kinsella  
13 against Singleton. It said, "the test is the status of the  
14 accused, whether or not it was a military man when he committed  
15 the crime and when he was tried."

16 I think it is very hard to understand the case  
17 decided at the same time in Kinsella involving civilian  
18 employees who were, by all tests, in effect, operating as  
19 members of the military forces.

20 In McElroy against Guagliardo the court said that  
21 although a civilian was in this working relationship since  
22 he did not have military status there was not court martial  
23 jurisdiction over him.

24 I think any test other than status makes it very  
25 hard to understand the connection that was drawn in that case.

1 (Whereupon, at 1:50 p.m., the case in the above-  
2 entitled matter was concluded.)  
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