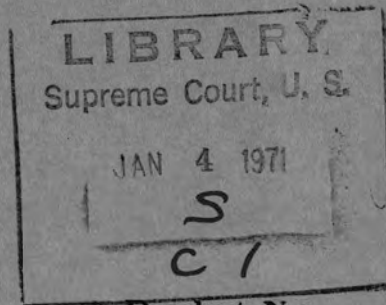


Supreme Court of the United States

OCTOBER TERM 1970



In the Matter of:

ISIAH RELFORD,

Petitioner,

vs.

COMMANDANT, U. S. DISCIPLINARY
BARRACKS, FT. LEVENWORTH, KANSAS

Respondent.

Docket No.

98

pt. 2

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C O N T E N T S

1	<u>ARGUMENT OF</u>	<u>P A G E</u>
2	Judson W. Detrick, Esq., on behalf of Petitioner,	19
3	Erwin N. Griswold, Solicitor General of the	
4	United States, on behalf of Respondent.	24
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

ISIAH RELFORD,

Petitioner

vs

No. 98

COMMANDANT, U. S. DISCIPLINARY
BARRACKS, FT. LEAVENWORTH, KANSAS

Respondent

The above-entitled matter came on for argument at
10:02 o'clock a.m., on Wednesday, December 16, 1970.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

JUDSON W. DETRICK, ESQ.
Denver, Colorado
On behalf of Petitioner

ERWIN N. GRISWOLD
Solicitor General of the U. S.
Department of Justice
On behalf of Respondent

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will resume arguments in Number 98: Belford against the Commandant. Do you wish to continue, Mr. Detrick, or do you wish to reserve for rebuttal?

MR. DETRICK: Yes, Your Honor, I would wish to continue at this time.

ORAL ARGUMENT (Continued) BY JUDSON W. DETRICK, ESQ.
ON BEHALF OF PETITIONER

MR. DETRICK: Mr. Chief Justice and may it please the Court:

The second question raised by this Court's grant of a writ of certiorari was the question of the retroactivity of O'Callahan v. Parker. It is our submission that O'Callahan v. Parker is precisely the kind of case that should be given full retroactive application so as to apply to Petitioner's conviction, even though it became final within the military appellate system some six years prior to this Court's decision in O'Callahan v. Parker.

The Court has laid down a series of three criteria for determining the question of retroactivity significantly in Linkletter v. Walker and Stovall v. Denno. Those three criteria are the purposes of the decision in question, the reliance by law enforcement authorities on the standards existing prior to the substantive decision and the impact on

1 the administration of justice of the retroactive application.

2 Now, in the context of these three criteria the
3 Court has often said that the crucial question is whether the
4 proscribed activity affects the integrity of the fact-finding
5 process.

6 I would submit that the very heart of the court
7 martial system is in question in O'Callahan. I think that the
8 integrity of the process by which O'Callahan and Petitioner
9 were convicted was no less impugned by his conviction for a
10 crime that the court had no powers to try and convict him for,
11 than for his conviction for a crime that he did not commit at
12 all.

13 In both cases the defect in his conviction goes to
14 the very center of its legal justification. Now, I think the
15 court's emphasis on the integrity of the fact-finding process
16 is merely an often articulated aspect of its general concern
17 that any conviction be the product of a fundamentally fair
18 proceeding. I do not think that the court necessarily only
19 means -- while it's very important that they are protecting
20 against the risk of the conviction of the innocent.

21 Now, I would cite the Court to its case in
22 Witherspoon v. Illinois, where the Court refused to find
23 that the jury selection standards in that case which would
24 exclude the jurors who were opposed to capital punishment from
25 the jury, the Court refused to find that that substantially

1 increased the risk of conviction and yet the -- conviction of
2 the innocent, and yet the Court went on to find that the
3 integrity of the fact-finding process by which that accused
4 was convicted, was necessarily undermined by that process.
5 And the Court went on to give Witherspoon v. Illinois full
6 retroactive application despite any considerations of
7 reliance by law enforcement authorities for the impact on the
8 administration of justice.

9 Q Well, if you prevail on the merits, the
10 retroactivity point is even stronger than that; isn't it? He
11 was tried by a tribunal that had no business trying him.

12 A Yes, Your Honor; I think that is absolutely
13 correct.

14 Now, the Respondent --

15 Q That is if you prevail on the merits, I'm
16 assuming, in my question.

17 A That is correct.

18 Respondent submits that the case should be given
19 partial retroactive application only in that it should not
20 apply to convictions that became final within the military
21 appellate system prior to this Court's decision in O' Callahan
22 which was June 2 of '69.

23 And in part, their position is based upon this
24 Court's decision in D. Stephano v. Woods. In Stephano
25 the Court found that the cases of Duncan v. Louisiana and

1 Bloom v. Illinois, which imposed the jury trial requirements
2 states should not be given retroactive application, general
3 retroactive application.

4 Now, Respondent maintains that the same reasoning
5 applies in that case. I submit that is not so. First of all,
6 the constitutional provision involved in this case, Respondent
7 would be saying the Sixth Amendment, should not be determinative
8 of the question. In each case the peculiarities of the
9 decision, the substantive decision, should be looked at closely.

10 Now, I feel, furthermore, that O'Callahan does
11 involve more than Stephano and that O'Callahan involves
12 a determination that a court had no subject matter jurisdic-
13 tion. This is not the case in Stephano v. Woods. Such a
14 determination necessarily, as I will point out, goes to the
15 very heart of the court martial process itself and does affect
16 the integrity of the fact-finding process. In fact, despite
17 any reference as to whether the court martial's process as a
18 whole is more fair or less fair than a civilian process, I
19 would submit that any trial and conviction of someone by the
20 court who has no jurisdiction over the subject matter, is un-
21 fair.

22 Furthermore, I think that O'Callahan involves more
23 than simply the right to trial by jury and the right to grand
24 jury indictment. I think O'Callahan involved the right to
25 trial by jury in civilian court with all the attendant

1 differences between civilian courts and military courts and I
2 think this Court's opinion in O'Callahan points out that --

3 Q Well, your position really is, isn't it,
4 that it is just as though he were convicted in the Royal Courts
5 of Justice in London. They had no jurisdiction and this court
6 has no --

7 A Well, this court had no jurisdiction over the
8 subject matter and no jurisdiction over the crime charged. Yes
9 Your Honor.

10 Q It doesn't make any difference whether one
11 trial was better than the other or not, does it?

12 A I don't feel that it does, Your Honor; no.
13 That would be my -- that would be my position.

14 Respondent also places great emphasis on the
15 factors of reliance by law enforcement authorities and the
16 impact on the administration of justice. I would like to point
17 out that this Court has often held that when the purposes of
18 a decision do favor its retroactive application, which I will
19 submit, the purposes of O'Callahan do, the factors of reliance
20 and the impact on the administration of justice are not sig-
21 nificant and are not to be taken into consideration.

22 It is only when the purpose is ambiguous as to
23 whether it favors retroactivity or not that those two considera-
24 tions are made.

25 Furthermore, I would like to state that the reliance

2
1 factor in O'Callahan is certainly not as strong as the reliance
2 factor is in many of the decisions of this Court.

3 My time is up. Thank you.

4 MR. CHIEF JUSTICE BURGER: Thank you.

5 Mr. Solicitor General.

6 ORAL ARGUMENT BY ERWIN N. GRISWOLD, SOLICITOR
7 GENERAL OF THE UNITED STATES, ON BEHALF OF
8 RESPONDENT.

9 MR. GRISWOLD: May it please the Court:

10 There is no dispute about the facts in this case.
11 It involves a serviceman who was stationed at Fort Dix, who was
12 off duty on the evening pass and not in uniform. The crimes
13 occurred within the boundaries of a military reservation,
14 incidentally his military reservation where he was stationed.
15 The victims were dependents of servicemen and in one case the
16 14-year-old sister of the serviceman who was visiting his wife
17 who had just given birth to a child in the Army hospital at
18 Fort Dix.

19 In the other case the wife of a member of the Air
20 Force stationed at McGraw Air Force Base, immediately adjacent
21 to Fort Dix, and employed on the base.

22 Q How did Fort Campbell get into this case?

23 A I don't know, Mr. Justice, I didn't know that
24 it had got into it.

25 Q I saw somewhere that --

1 A I don't know where Fort Campbell is.

2 Q -- I guess the soldier visiting his wife in
3 the hospital was right --

4 A I believe that he was assigned to Fort
5 Campbell, but the appropriate hospital, apparently, was at
6 Fort Dix, and that's where his wife had come.

7 These were crimes of violence, involving kidnapping
8 and rape. A rape is specifically made a crime under Article
9 120 of the Uniform Code of Military Justice and kidnapping, the
10 charge of kidnapping, was brought under the so-called General
11 Article, Article 134.

12 Q Did the rape actually take place on the post?

13 A Yes, Mr. Justice. All of the events, both
14 the rape and the kidnapping occurred on the military reservation.

15 A radical change, I think it may be fairly said,
16 was introduced under the law in this area by this Court's
17 decision in O'Callahan against Parker, decided on June 2, 1969.
18 That decision left in its wake many undecided and uncertain
19 questions of which the military lawyers and the Court of
20 Military Appeals had been working hard to resolve until other
21 cases can be brought forward like this one, for guiding light
22 from this Court.

23 One of the problems, of course, is the retroactive
24 application of the O'Callahan decision to which I will return
25 later in my argument.

1 An immediate concern, however, to the lawyers who
2 are responsible for the administration of military justice, are
3 such questions as these, not all of which are involved in this
4 case, but I want to list them as some of the problems in order
5 to put this case in a larger setting.

6 In the first place, the standard set up in the
7 O'Callahan case is service-connected. What is service-
8 connected? Is it enough if in this country the offense occurs
9 on a military reservation and is committed by a serviceman?
10 Does that apply to all offenses, including fraud, bad checks
11 and so on? Or only to crimes of violence? And if so, what
12 crimes under what circumstances?

13 And, enlarging somewhat on that, is there any way
14 that there can be a sure, simple test or standard of this or
15 must it be resolved case by case some way trying to work out
16 the facts of each case as to whether there is enough here to
17 make it service-connected or not? The latter, of course,
18 obviously involving great difficulty and frequent reconsidera-
19 tion through appeals, habeus corpus and so on.

20 Can a court martial try an offense which occurs
21 off a military reservation in any case? For example, an
22 assault by one serviceman on another in a non -- in a public,
23 non military place?

24 And then another question of great importance: can
25 there be a ruling of the right not to be tried by court martial?

1 For example, the serviceman in a city, near his base in a
2 southern state, might be charged with an offense with racial
3 overtones. He might much prefer to be tried by court martial
4 and the local authorities be willing. Can this be done with
5 his consent? If a court martial has no jurisdiction it may be
6 hard to support a waiver.

7 Q Is that question raised here?

8 A That question is not here. I'm trying to
9 put this in its broader context.

10 Or, suppose that a Navy ship calls at Norfolk.

11 Q As you know, the historic practice of the
12 Court is to put the problem in its narrowest, rather than its
13 broadest --

14 A Yes, Mr. Justice, but --

15 Q Especially with a constitutional overtone.

16 A And I will get to the narrow facts, but the
17 broad problem is one of great concern and the form of this
18 Court's opinion can be of considerable significance, as well as
19 the result it reached -- reaches.

20 Suppose a Navy ship calls at Norfolk and the crew
21 is given shore leave. While in the city one of the men gets
22 involved in a drunken brawl. There were injuries, but no one
23 is killed. The ship is under orders to leave the next morning.
24 The city authorities will turn the man over to the Navy if the
25 Navy will really try him for the offense and the man is willing.

1 The Navy needs him and can use him, despite the charge. He
2 may have an important assignment on the crew. Can the Navy
3 try him in such circumstances?

4 Suppose that all of the witnesses are likewise
5 members of the same crew and not too, that the civilian punish-
6 ment might be a certain number of months in jail while the
7 Navy can be much more flexible with such punishments as reduc-
8 tion in grade, extra duty or week-ends in the brig, which may
9 be effective in many cases and less disruptive of the military
10 service.

11 And then there is whole area abroad. Can there be
12 a court martial for any offense committed abroad, whether on or
13 off a military reservation; whether against military personnel
14 or civilian? Note that generally speaking no question of the
15 right to trial by jury is involved here. And in certain cases
16 status of forces treaties are in effect under which we can turn
17 the man over to the foreign authorities. But suppose there is
18 no such treaty? Or the foreign authorities do not want to try
19 the man, can he be validly tried by court martial against his
20 objection?

21 The alternatives may be to turn all such offenders
22 over to the local authorities, which may mean trial by an
23 alien system and punishment which would not meet with approval
24 here.

25 All of these questions and more have been left in

1 uncertainty since the O'Callahan decision. This Court's
2 guidance is needed.

3 The problems arise not only in the matter of current
4 trials, but in offense committed after the O'Callahan decision
5 and in habeus corpus with respect to past convictions, but also
6 in suits for various collateral remedies, such as back pay,
7 restoration to rank, correction of military records and so on.
8 It is a very complicated area filled with many difficulties,
9 both past and prospective.

10 And now let me turn to the particular problems
11 presented by this case. There are, as far as I know, only two
12 constitutional provisions which shed any light on this problem,
13 other than the provisions of the 5th and 6th Amendments, to the
14 extent that they are not made inapplicable. These two constitu-
15 tional provisions as Article I, Section 8, Clause 14 and the
16 except clause in the Fifth Amendment. The first of these
17 expressly --

18 Q Suppose the necessary and proper clause --

19 A Yes, Mr. Justice, but that was pretty much
20 right out of this area in the cases Reed and Covert(?) and the
21 later cases and I don't want to throw away anything that any
22 member of the Court thinks is useful to our side, but I don't
23 particularly rely on the Necessary and Proper Clause. I don't
24 see how it can expand the field within which Clause 14 gives
25 power, although it can certainly affect the way in which that

1 power is exercised.

2 Clause 14 expressly gives to Congress the power to
3 make rules for the Government and regulation of the land and
4 naval forces, and it is, of course, as much a part of the
5 constitution as are the 5th and 6th Amendments.

6 And second, excepts "cases arising in the land and
7 naval forces," from the Grand Jury Clause of the Fifth Amend-
8 ment, showing that the framers of the Fifth Amendment, two
9 years after the constitution went into effect, did not think
10 they were restricted in the power that had been granted by
11 Clause 14.

12 The whole structure of military justice rests on
13 these and it was these provisions which the Court construed and
14 applied in the O'Callahan decision. They are obviously quite
15 general and quite a lot can be read into them or not. Now,
16 obviously O'Callahan read less into them than had previously
17 been supposed, but how much and on what basis or principle is
18 not yet wholly clear.

19 Since June 2, 1969, a considerable number of cases
20 have come before the Court of Military Appeals, which has the
21 responsibility in the first instance, of trying to work these
22 matters out. These decisions are summarized on pages 6 to 8
23 of our brief. The Court of Military Appeals has held that
24 O'Callahan does not apply to petty offense and that court, the
25 Court of Claims, and several District Courts have held that an

1 off-duty, off-post crime committed overseas may be punished
2 by court martial and this Court denied certiorari in a case
3 involving that question last term, and again in another case
4 this term, the Gallagher case, Number 292 in which certiorari
5 was denied on October 13th.

6 With respect to serious crimes committee within the
7 United States, the few cases we know of have applied a multi-
8 factor approach that does not permit the statement of rules of
9 thumb. It reminds me a bit of the massing of the elements
10 approach that sometimes follows this conclusion, if I may say
11 so, in some modern state decisions in the field of conflict of
12 laws.

13 The Court of Military Appeals appears to have de-
14 veloped a rule that crimes committed by a serviceman on post
15 are without more, sufficiently service-connected to justify
16 court martial.

17 With respect to off-post crimes that court considers
18 a number of factors, case by case, including the military
19 status or the relationship of the victim and the role of the
20 offender -- the role which the offender's military status
21 played in the crime.

22 In addition to the cases on page 6 to 8 of our
23 brief, I can also refer to a decision of the Fifth Circuit
24 Court of Appeals on November 9th, Zenor, Z-e-n-o-r against
25 Vogt, V-o-g-t, which involves what you might call a routine

1 assault by one serviceman on another serviceman. They had
2 both been to the club on the base. The second serviceman had
3 danced with the first serviceman's girlfriend in a way that the
4 first man didn't like. There was a challenge and later, still
5 on the base, there was an assault.

6 Q May I have that case again, Mr. Solicitor
7 General? What case was this --

8 A This is one that the Fifth Circuit Court of
9 Appeals decided on November 9th. It is simply a case of an
10 assault committed on base and the Fifth Circuit held that there
11 could be no injunction against the conduct of a court martial;
12 that it was appropriate for court martial following the on-
13 base rationale. It was a case like this in many respects, ex-
14 cept that both parties were servicemen there and the offense
15 here is more serious.

16 The various aspects of this case, the present
17 Belford case which are in sharp contrast with O'Callahan: there
18 the crime occurred within the civilian community; here the
19 crimes were on military posts. There the victim had no
20 military connection; here the victims had military ties; one
21 the minor sister of a serviceman and the other the wife of a
22 serviceman.

23 The result we urge is that any crime by a serviceman
24 jeopardizing the security of persons or property on a military
25 reservation, particularly when it is his military reservation,

1 should be regarded as per se, service-connected because of the
2 basic impact such crimes have on the military mission. Whether
3 court martial jurisdiction should extend beyond that, to off-
4 post crimes or to nonphysical crimes on the post, like fraud
5 or bad checks, was not involved in this case and would not be
6 decided here.

7 The rule for which we intend is implicit in the
8 O'Callahan opinion itself. The Petitioners suggest that court
9 martial jurisdiction should extend only to cases where the
10 offender has violated a uniquely military standard of behavior,
11 such as failing to salute, or assaulting an officer.

12 But, the constitutional authority for the government
13 and regulation of the land and naval forces surely covers more
14 than the authority to arrest a member of the forces who
15 jeopardizes the safety and security of his post and turn him
16 over to the civilian authorities who may have a real natural
17 interest in the problem for prosecution.

18 Q Mr. Solicitor General, do you know how many
19 servicemen are now incarcerated or serving sentences under
20 court martial sentences? Are there any figures on it?

21 A There are some figures quoted in O'Callahan
22 and I believe in our brief in this case that were meaningful,
23 unless they are broken down to eliminate AWOL and things of that
24 kind. It lies in my mind that there are some 725 now incarcer-
25 ated for serious, what might be called criminal offenses.

1 Q And if you take the dichotomy or the division
2 that you are tendering here, suggesting, how would they break
3 down?

4 A Well, there are --

5 Q On post and not committed on post.

6 A There are some millions who have been sub-
7 jected to court martial trials in the period since the Second
8 World War. The number would be relatively small. It would be
9 of the order of a thousand or a few thousand, rather than the
10 25,000 if you include petty crimes and what might be called
11 purely military offenses. I can undertake to get some figures
12 on this and submit it in a memorandum. I am not prepared to
13 give you a definitive answer now.

14 The contention which we urge seems to have been
15 recognized in the O'Callahan opinion, which referred to the fact
16 that the crimes there were not committed on a military post or
17 enclave, quoting from the opinion, and also to the fact that
18 the crimes there did not affect the security of the military
19 post. There is surely a clear military interest in the
20 security of persons having business on a military post from
21 physical attack by servicemen on that post.

22 The Commander of a military installation clearly has
23 the responsibility to maintain law and order in his command and
24 he should have the authority to do so insofar as service per-
25 sonnel are concerned. A post cannot be segregated into

1 military and nonmilitary areas for law enforcement purposes,
2 nor should it make any difference whether the offender is
3 technically on duty or in or out of uniform, so long as he is
4 in the military service and remains on post, he necessarily
5 remains subject to such elementary regulations by his Comman-
6 der. And this is particularly true where the victims are
7 close relatives of servicemen, as they are here.

8 In the interest of clarity we urge the Court to
9 hold that a fact that a crime committed by a serviceman against
10 person or property occurring on a military reservation, the
11 territorial jurisdiction test which is traditional in our
12 criminal law, is alone enough to warrant a court martial of the
13 offender. It's not enough to say that the man should be
14 turned over to the civilian authorities. Some military
15 reservations are vast and remote and it's not clear as a
16 matter of the allocation of governmental responsibility why a
17 local court and jury, perhaps far removed, should be expected
18 to vindicate the military disciplinary problems with its own
19 personnel in its own community.

20 But, more fundamental, the constitutional grant of
21 power of government and regulations should carry with them the
22 power to punish and not simply the power to arrest and accuse.

23 Now I turn to the other question on which certiorari
24 was granted. It's also important in the administration of
25 military justice to know whether the O'Callahan decision is to

1 be applied retroactively and if so, to what extent. Although
2 a favorable decision on either question would dispose of this
3 case, we urge the Court to decide both questions in order that
4 the many people having responsibility in this area: military
5 personnel, military judges, the Court of Military Appeals and
6 the lower Federal Courts, may have appropriate guidance in
7 carrying out their duties.

8 In O'Callahan, statutory provisions going directly
9 back to 1916 and indirectly back to the beginning of the
10 Republic, were held unconstitutional. Now, this has required
11 the revamping of military justice on a large scale and it has
12 meant that practices long followed in good faith, can no longer
13 be followed. Of course the decisions of this Court will be
14 complied with in the future. There is, as I have indicated,
15 much guidance that's still needed.

16 But, things that were done in the past in good faith
17 should be regarded as having at least de facto validity. We
18 submit that this change in basic court martial law, for it was
19 a change, should be treated as prospective only.

20 Q Mr. Solicitor General, the -- was the
21 O'Callahan holding ever -- was the point raised in O'Callahan
22 ever raised before in any cases and rejected?

23 A Yes, Mr. Justice it had been raised in a
24 number of cases in the lower courts, all of which had decided
25 that there was jurisdiction for court martial trials. It was

1 the first time that this question had ever been brought to
2 this Court, although in a number of the previous cases
3 certiorari had been denied.

4 Q But, was the matter mooted at all in the
5 last codification of military --

6 A I think it's fair to say that it has not been
7 mooted at this level. The only suggestion, I think, was in an
8 article published in 1960 which is cited in our brief, a Law
9 Review article, but -- and I think it's also appropriate to say
10 that in the cases which held that nonmilitary persons could not
11 be subjected to court martial: Reed and Covert and Kinsella
12 against Singleton and several others, even with the benefit of
13 the hindsight which I now have in rereading those opinions, I
14 can find no suggestion by the Court that this was an area
15 involving servicemen which was subject to reconsideration.

16 I think more specifically on that, in the opinion
17 of the Court in Kinsella against Singleton in 361US written by
18 Mr. Justice Clark with seven members of the Court concurring
19 in that decision, he said, beginning on page 240 and continuing
20 on 241:

21 "The test for jurisdiction it follows, is one of
22 status, mainly whether the accused in the court martial pro-
23 ceeding is a person who can be regarded as falling within the
24 term "land and naval forces." And I think that was the last
25 authoritative word from this Court and the last intimation,

1 until the O'Callahan case was decided.

2 Q Mr. Solicitor General, the rule as I under-
3 stand it, was not that automatically and without exception he
4 was tried by the military.

5 There were cases in World War II where one in par-
6 ticular, at Camp Claiborne a rape occurred on Camp Claiborne's
7 territory and the men were investigated by the CID, et cetera
8 and they turned over to the civilian Federal authorities --

9 A I think, Mr. Justice, it is right that
10 there was quite a considerable practice of concurrent juris-
11 diction, and that it was not denied that the states had the
12 power to try, depending on these complicated questions about
13 the title and ownership of the military reservations, which
14 are very confused --

15 Q It may not be pertinent, but the largest
16 camp at that time was Totten Military Reservation.

17 A Yes. And I have no doubt that there are many
18 cases of concurrent jurisdiction. All I am asserting is that
19 where it does involve a serviceman and is on the base, that
20 it should be subject to military jurisdiction.

21 Now, the problems of retroactivity are now before
22 this Court in other cases and they are difficult. In closing
23 my argument on this I would like to refer to another -- a
24 pair of cases which are not cited in our brief. I gave Mr.
25 Detrick a memorandum of them yesterday.

1 In searching for guidance in this area, among the
2 things which I read was the opinion of Mr. Justice Brennan in
3 Barr against Maryland in 378 US. The problem there is rather
4 different from here but it is one of the few cases where there
5 is some discussion of what happens when there is a change in
6 the law. And in the footnote in that opinion there is cited
7 the case of United States against Chambers in 291 US, a case
8 on which I worked many years ago and that brought back recol-
9 lections to me.

10 The Chambers case is one which arose out of the
11 repeal of the 18th Amendment by the 21st Amendment in 1933 and
12 '34. And the Chambers case itself simply holds that pending
13 prosecutions which had not become final were solved with the
14 repeal of the 18th Amendment.

15 But the question of what to do about conditions which
16 had become final before the 21st Amendment was adopted never
17 came to this Court. It was decided a number of times in lower
18 courts and this Court always denied certiorari and the whole
19 inference, the whole basis of assumption in the Chambers
20 opinion, recognized in the ensuing failure to take up any cases
21 and reach a different result was that when the 18th Amendment
22 was repealed that had no effect on judgments which had become
23 final.

24 Now, I recognize that this is a different form of
25 constitutional change than was that involved in the adoption of

1 21st Amendment, repealing the 18th Amendment. Nevertheless, it
2 seems to me that whatever the form is, this is a case of
3 constitutional change, a well-understood and accepted and acted
4 upon understanding of constitutional power under which these
5 prior convictions had been obtained was determined in
6 O'Callahan to be no longer effective.

7 Of course, I do not --

8 Q Mr. Solicitor, do you have any figures at
9 all or have any idea of the impact on the -- that retroactivity
10 would have -- let's assume that O'Callahan did not reach this
11 case; that this was a service-connected crime. What about
12 retroactivity of O'Callahan on that understanding in terms of
13 impact?

14 A I do not know, Mr. Justice, how many persons
15 are now being held for nonpurely nonmilitary offenses, pursuant
16 to judgments which became final before June 2, 1969. I can
17 say from my own experience that there have been fewer petitions
18 for habeus corpus relying on O'Callahan than I anticipated that
19 there would be. Should this Court hold that it is retroactive,
20 I would anticipate that there would be a considerable increase
21 in the number of such petitions. I will endeavor to see if I
22 can get any figures on that and submit them with respect to
23 the other materials I have said I would present.

24 And so, we submit that the judgment below should be
25 affirmed on both grounds. That is that there was court martial

1 jurisdiction here and that O'Callahan should not be given
2 retroactive application to this case.

3 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor
4 General. ✓

5 Mr. Detrick, your time is exhausted. Thank you for
6 your submission. The case is submitted.

7 Mr. Detrick, I observe that you were appointed by
8 the Court to act in this case.

9 MR. DETRICK: Yes, Your Honor.

10 MR. CHIEF JUSTICE BURGER: And on behalf of the
11 Court we wish to express our appreciation for your services
12 to the Petitioner and your assistance to the Court.

13 MR. DETRICK: Thank you. It was my pleasure.

14 (Whereupon, at 11:42 o'clock a.m., the argument in
15 the above-entitled matter was concluded)