Jacob J. Parker. (Photo courtesy of author)

Lore of the Corps

The Man Behind the SCOTUS Military Justice Case Names

Warden Jacob J. Parker

By Mr. Dwight H. Sullivan

Two of the U.S. Supreme Court's most significant military justice decisions share a party's name. In both *O'Callahan v. Parker*[1] and *Parker v. Levy*,[2] the "Parker" was Warden Jacob J. Parker of the Federal penitentiary at Lewisburg, Pennsylvania. This article contributes to military justice heritage by providing a biography of Parker. Studying Parker's role in two landmark military justice cases also highlights a significant and ongoing shift in the Supreme Court's approach to review of court-martial cases resulting from the Military Justice Act of 1983.[3]

Jacob J. Parker's Background

Jacob Jordan Parker was born in Bloomington, Illinois, on 9 December 1923.[4] A recent high school graduate, he was working for the Campbell Soup Company in Chicago when he enlisted in the Marine Corps on 29 July 1942—almost eight months after the "day that will live in infamy."[5] His term of enlistment was "for the DURATION OF THE NATIONAL EMERGENCY."[6] At the time, he was 5-feet-8.5-inches tall and weighed 153 pounds.[7] He had light brown hair, blue eyes, and a "[r]uddy" complexion.[8]

Parker reported to Marine Corps Recruit Depot San Diego for basic training.[9] He stayed put after completing the arduous program, serving as a drill instructor from September 1942 to June 1944.[10] Then, as a corporal, he participated in the Marine Corps's Pacific island-hopping campaign. From 15 September through 28 October 1944, as a member of the newly formed 3d Armored Amphibian Battalion (Provisional), Amphibian Tractor Group, Fleet Marine Force, Pacific Troops, he engaged in combat operations against Japanese forces on Peleliu.[11]

General Roy S. Geiger—who by the end of World War II commanded Fleet Marine Force, Pacific—called the battle for Peleliu the toughest in the Pacific campaign.[12] One veteran of the battle observed that the island's Japanese "defenders would delay the attacking Marines as long as they could, attempting to bleed them as heavily as possible."[13] They did so by combining "the devilish terrain with the stubborn, disciplined, Japanese soldiers to relinquish Peleliu

at the highest cost to the invaders."[14] As a result, what was expected to be a four-day battle dragged out into seventy-three days of close combat.[15] U.S. casualties numbered 9,615, of whom 1,656 died.[16] Almost all of Peleliu's Japanese garrison fought to the death; an estimated 10,900 Japanese service members were killed while only nineteen were captured during the operation.[17]

Parker took part in the operation from D-Day through D-plus 43.[18] His battalion performed significant duties throughout that time. The unit's armored amphibian tractors—commonly called LVT(A)s or amphibian tanks—preceded the first wave during the initial assault.[19] Their mission was to "[n]eutralize shore defenses by fire with particular attention to Flanks" and then, after "passing through the water line beach defenses," render "immediate fire support for assault waves."[20] Japanese resistance was heavy. By noon on D-Day—less than four hours into the operation—just forty-five of the battalion's seventy-three LVT(A)s remained operational.[21]

As the Marines slowly advanced inland over the following days, the amphibian tanks evacuated casualties and delivered ammunition, food, water, and other supplies to Marines on the frontline.[22] The LVT(A)s' 75mm howitzers and mounted .50 caliber machine guns sometimes augmented infantry units' firepower.[23] But Parker's battalion was mostly employed on reef-patrol duty to protect against Japanese counter-landings.[24] Utilizing their amphibious capability, the LVT(A)s also executed special direct-fire missions against targets best approached from offshore.[25] On 28 September (D-plus 13), thirty-five of the battalion's LVT(A)s led an amphibious assault against Ngesebus—an adjacent island.[26] The Marines completed their seizure of the island the following day.[27]

Like the other U.S. Service members on Peleliu, amphibian tank crews performed their duties in sweltering heat and humidity.[28] On most days, the temperature reached 105 degrees, sometimes spiking to as high as 115.[29] The U.S. Service members on Peleliu were also plagued by ubiquitous blowflies. As one member of Parker's battalion later recalled:

> Flies were everywhere. They covered your clothing and it didn't do any good to brush them off, because they were right back at you. What was really bad was trying to eat. If you opened a can of jam, the top would be instantly covered with flies. Try as you might, you could not get a cracker with jam into your mouth without a few flies included.

No wonder so many men got deathly sick on Peleliu. These flies had a perfect dinner on Marines and Japanese dead that lay bloated and black in the tropical sun. When you ate one, you didn't know which kind of body they had just finished working on.[30]

As the battle progressed and the need for amphibious vehicles waned, many members of Parker's unit were reassigned to infantry duties.[31] Their primary mission was to support a clearing operation against a heavily defended Japanese cave complex.[32] Later, many of the battalion's Marines became stretcher bearers.[33]

The battalion began reboarding U.S. transport ships on 25 October (D-plus 40).[34] Parker left Peleliu on 29 October 1944—a little more than a week after the Marine Corps relinquished command of the operation to the Army's 81st Infantry Division.[35] His 819-member battalion suffered roughly 15 percent casualties during the Peleliu campaign.[36]

Three LVT(A)s assault Ngesebus during the battle for Peleliu. (Photo courtesy of author)

A month-and-a-half after withdrawing from Peleliu, Parker was transferred to an officer training program.[37] Assigned to study at the University of Southern California, he did not last long.[38] Parker washed out of the program, displaying what we would now recognize as symptoms of post-traumatic stress disorder[39]—probably resulting from the horrific combat at Peleliu. He was honorably discharged, having served in the Marine Corps for three years and seventeen days.[40]

Following his military service, Parker studied at the University of Notre Dame.[41] He probably used his GI Bill benefits to attend.[42] While still an undergraduate, Parker became engaged to Hedy Klein of Evergreen Park, Illinois.[43] At that time, she worked as an executive secretary at Inland Steel Corporation.[44] They would go on to marry and have eight children.[45] Parker graduated with a degree in social studies in 1949.[46] The following year, he received a master's degree in criminal justice, also from Notre Dame.[47]

Parker began his career in the Federal prison system in March 1950 as a tower guard at the Terre Haute, Indiana, penitentiary.[48] He rose quickly. After sixteen months as a correctional officer, he became a case worker and then a classification officer.[49] In 1959, he was elevated to associate warden in charge of treatment at the McNeil Island Federal penitentiary in Washington State.[50] Five years later, he was transferred to the

Atlanta Federal penitentiary, where he held the same position.[51] After just one year in Georgia, Parker was selected as warden of the U.S. Federal Penitentiary, Lewisburg, Pennsylvania.[52]

Parker as Lewisburg's Warden

Parker was forty-one years old when he became Lewisburg's warden on 4 October 1965.[53] Built in an Italian Renaissance architectural style, Lewisburg (originally named the Northeastern Penitentiary) was designed as a model correctional facility that would emphasize rehabilitation of inmates.[54] When it opened on 15 November 1932, it was considered "the world's most modern penal institution in operation."[55] The facility's 1,000-acre grounds included both the medium-security penitentiary and a minimum-security farm camp.[56] The prison staff numbered approximately 300.[57] About 1,400 inmates were confined at the facility.[58] Roughly 250 to 350 more were located at the minimum-security Allenwood Camp, which also fell under Parker's authority.[59]

Consistent with the guiding concept for the Lewisburg penitentiary's establishment, Parker's penological philosophy emphasized rehabilitation.[60] An oft-repeated saying of his was, "These men are committed as punishment, not for punishment."[61]

The position as Lewisburg's warden came with certain perquisites. The warden's official residence was "a fifteen-room house resting on a very ample plot of land atop a hill."[62] Three prisoners served year-round as "houseboys" at the residence, where they would "clean house, polish floors, wash, hang, and iron the clothes, cook the food, and wash the dishes—as well as do the baby sitting."[63] From spring through fall, another three prisoners tended the warden's garden.[64] The warden and his staff also enjoyed a clubhouse operated by inmate labor.[65]

Parker received considerable newspaper coverage in 1967 resulting from the arrival of a new inmate: Jimmy Hoffa. In 1964, the Teamsters Union president was convicted in two separate Federal trials of jury tampering and fraud related to his union's pension fund; he was sentenced to two consecutive terms of confinement totaling thirteen years.[66] Following aggressive but ultimately unsuccessful efforts to overturn his convictions,[67] Hoffa arrived at Lewisburg on 7 March 1967 to begin serving his sentence.[68] Upon the Teamster president's incarceration, Parker was widely quoted as saying the high-profile inmate would be treated like any other prisoner.[69] While confined at Lewisburg, Hoffa played a role in Parker's name becoming associated with one of the Supreme Court's most significant military justice rulings.

O'Callahan v. Parker

Victor Rabinowitz—who earlier in his career had co-founded the National Lawyers' Guild—was friendly with Hoffa.[70] The union leader had previously retained Rabinowitz to represent two local Teamster officials charged with mail fraud.[71] During one of Rabinowitz's visits with Hoffa at Lewisburg, the Teamster chief introduced him to James F. O'Callahan.[72] O'Callahan was a former Army sergeant who had been convicted at a 1956 general court-martial of attempted rape, assault with intent to commit rape, and housebreaking.[73] His convictions arose from his unlawful entry into a Honolulu hotel room, where he accosted a fourteen-year-old girl.[74] O'Callahan battered the girl's face, gagged her, and bound her wrists before she managed to flee from the room.[75] The court-martial sentenced him to confinement for ten years, a dishonorable discharge, and forfeiture of all pay and allowances.[76] The entire contested case, including sentencing, lasted less than seven hours; the parties were on the record for less than four hours.[77] Remarkably, the trial counsel began his closing argument by telling the members that the "prosecution has taken an unusually long time in presenting its case,"[78] suggesting that general courts-martial of the era tended to be rather cursory.

After the convening authority approved the sentence,[79] the Army Board of Review affirmed the findings and sentence[80] and the Court of Military Appeals denied review.[81] O'Callahan was initially confined at the Branch United States Army Disciplinary Barracks, Lompoc, California.[82] In March 1958, he was transferred to Federal civilian custody at Lewisburg.[83] From there, in May 1960, he was paroled.[84] Two years later, he was convicted in Massachusetts state court of rape, leading Federal officials to revoke his parole.[85] After completing his state prison sentence in 1966, O'Callahan returned to Lewisburg to serve the remainder of his court-martial confinement.[86]

Rabinowitz disliked O'Callahan but believed his case presented a compelling legal issue: the constitutionality of applying the Uniform Code of Military Justice (UCMJ) to an offense unconnected to military service.[87] Rabinowitz later recalled that "O'Callahan had no money for legal fees, but Jimmy [Hoffa], very generous with my time, quickly talked me into taking the case and talked O'Callahan into assigning to me the substantial back pay he would get if he won his case."[88] Rabinowitz added, "I didn't think the assignment was worth anything, but I couldn't resist the legal issue and Jimmy's blandishments."[89] He thought O'Callahan's case would probably go before the Supreme Court.[90] Rabinowitz's view was that "when I get paid for arguing an issue at the Supreme Court level, I regard it as gravy. The argument itself is compensation enough."[91]

Until Hoffa talked Rabinowitz into taking on the case, O'Callahan had been representing himself.[92] Both the U.S. District Court for the Middle District of Pennsylvania and the U.S. Court of Appeals for the Third Circuit had already ruled against O'Callahan, who had also failed to persuade the Court of Military Appeals to grant habeas relief.[93] But Rabinowitz secured a fresh look from the Third Circuit, which again ruled against O'Callahan.[94] A little more than three months after that decision, the Federal Bureau of Prisons transferred O'Callahan from Lewisburg to Federal Correctional Institution (FCI) Sandstone, Minnesota.[95] His prison record explains that he was transferred because "he was the suspected leader of a strike at Lewisburg for the purpose of demanding more Industries pay and better working conditions."[96]

Rabinowitz had been right when he predicted that O'Callahan's case would interest the Supreme Court. On 14 October 1968, the Court granted certiorari to consider whether a court-martial has "jurisdiction to try a member of the Armed Forces who is charged with commission of a crime cognizable in a civilian court and having no military significance, alleged to have been committed off-post and while on leave."[97] After hearing oral argument, a 6-3 majority of Supreme Court justices initially voted to uphold O'Callahan's conviction.[98] Justice Harlan

Jimmy Hoffa enters the U.S. Federal Penitentiary in Lewisburg, PA. (Photo courtesy of author)

circulated a draft opinion for the Court that would have rejected the argument that the Constitution forbids "the military trial and punishment of a soldier for a purely civilian offense."[99] Two days later, Justice Douglas circulated a draft dissent that began:

> The Court's opinion leaves me aghast.
>
> The sweep of power of the Pentagon over members of the Armed Forces is now broad and seemingly limitless, save and unless the Pentagon exercises its discretion to let a civilian authority take over the prosecution. Anything, however, which a soldier, sailor, or marine does apparently reflects on the image of the Pentagon and the Pentagon may move to vindicate its interests.[100]

The day after Justice Douglas circulated that draft dissent, Justice Fortas sent a memorandum to Justice Harlan, with copies to the other Justices.[101] Although Justice Fortas had voted with the majority in conference, he informed Justice Harlan that "I cannot go along with your draft."[102] He proposed that the Court

> remand to require the military to prove—and to give them an opportunity to prove that this court-martial, rather than civil trial, served a substantial purpose with respect to "the Government and Regulation" of the Armed Forces (Art. I, § 8, cl. 14) *in terms of* the performance of their military functions.[103]

Justice Harlan responded on 14 April, rejecting Justice Fortas's proposed disposition.[104] He circulated a memorandum arguing against a "'status' test" for court-martial jurisdiction.[105] He also opposed a remand, noting that the court-martial had occurred more than a decade earlier. "I doubt that either the respondent or petitioner can now garner relevant information as to the circumstances of, and military interests affected by, petitioner's crime," he observed.[106]

Amid the Supreme Court's deliberations on *O'Callahan*, on 15 May 1969, President Nixon accepted the resignation of Justice Fortas, who was under an ethical cloud.[107] On that same day, his chambers circulated a never-to-be-published, detailed, twenty-one-page draft dissenting opinion in *O'Callahan*.[108]

By 19 May, Justice Harlan had lost the majority. Justice Douglas circulated a draft opinion of the Court setting aside O'Callahan's court-martial conviction.[109] With some minor revisions, that became the opinion of the Court issued on 2 June 1969.[110] The final ruling was 5-3, with Chief Justice Warren and Justice Brennan having reversed their initial votes to deny habeas relief.[111] The landmark ruling held that a court-martial did not have subject-matter jurisdiction to try a Service member for an offense unconnected to military service.[112] Because there "was no connection—not even the remotest

CPT Howard B. Levy. (Photo courtesy of author)

one—between [O'Callahan's] military duties and the crimes in question," the Supreme Court set aside his convictions under its newly announced service-connection test.[113] But it was not Warden Parker whose resulting duty it was to release O'Callahan from confinement. Because of O'Callahan's transfer the previous year, that responsibility fell on FCI Sandstone's warden.[114]

While Rabinowitz had the satisfaction of prevailing at the Supreme Court, he obtained no monetary recompense. After the Supreme Court's decision, the U.S. Court of Claims ruled that O'Callahan was entitled to back pay only until 8 March 1961, the date his enlistment would have expired had he not been dishonorably discharged.[115] Although the Court of Claims rejected Rabinowitz's argument that O'Callahan was entitled to back pay through his release from confinement in 1969, O'Callahan still received what Rabinowitz characterized as "quite a tidy sum for back pay and allowances lost—money he had assigned to us for legal fees."[116] But, contrary to the fee agreement Jimmy Hoffa had brokered, Rabinowitz received none of O'Callahan's back pay. Nor did his client provide him with "even a 'thank you.'"[117] Rabinowitz added, "A year or so later, I did hear from him again—he was in trouble in Massachusetts, and he asked me for help. This time I declined."[118]

After eighteen years of *O'Callahan*'s service-connection test, the Supreme Court renounced it. In its 1987 *Solorio v. United States* decision, the Court overruled *O'Callahan*, holding that "the requirements of the Constitution are not violated where, as here, a court-martial is convened to try a serviceman who was a member of the Armed Services at the time of the offense charged."[119]

Justice Douglas's opinion for the Court in *O'Callahan* referred to another Lewisburg inmate with whose name Parker's is indelibly linked. In his disquisition on the evils of the military justice system, Douglas cited an article titled *Justice and Captain Levy*.[120]

Parker v. Levy

Captain Howard B. Levy's case was the subject of an extraordinary volume of litigation, much of it bearing Parker's name.

Levy was assigned as the chief of the Dermatological Service of the U.S. Army Hospital, Fort Jackson, South Carolina, from July 1965 until his court-martial in 1967.[121] He opposed the United States' military operations in Vietnam.[122] One of his duties was to provide dermatology training to Special Forces medics.[123] In the summer of 1966, the hospital's commander determined that the training Levy was providing was "totally unsatisfactory."[124] Believing that "strong corrective action was demanded," he gave Levy a written order to conduct the training.[125] Levy "read the order, acknowledged that he understood it, but stated that he would not obey it because he did not feel that obedience of it would be consistent with his sense of medical ethics."[126] The hospital commander replied that Levy must nevertheless obey the order.[127] When Levy thereafter failed to conduct the training, "the order was in essence repeated."[128] Levy nevertheless "persisted in his refusal to obey, frequently remarking to associates and enlisted subordinates during this period that he had received the order but that he would not obey it, and in fact, he did not."[129] When his enlisted subordinates offered to conduct the training in his place, Levy "ordered them not to, and accompanied his order with a threat of punishment."[130]

Levy also made statements to enlisted personnel expressing his opposition to the war in Vietnam. For example, he stated that he would not go to Vietnam if ordered, that Black Soldiers should refuse to fight because they are subjected to discrimination, and that Special Forces personnel are "thieves and

killers of peasants and murderers of women and children."[131] He also told some Special Forces enlisted personnel that "I hope when you get to Vietnam something happens to you and you are injured."[132]

Levy was charged with violating Article 90, UCMJ, by willfully disobeying an order to establish and operate a dermatology training program for Special Forces medics; violating Article 134, UCMJ, by promoting "disloyalty and disaffection among the troops"; and violating Article 133, UCMJ, by making "[i]ntemparate, defamatory, provoking, and disloyal statements."[133] At the conclusion of a fifteen-day general court-martial, the members found him guilty and sentenced him to a dismissal, forfeiture of all pay and allowances, and confinement at hard labor for three years.[134]

Before his court-martial, Levy engaged in extensive—although ultimately unsuccessful—litigation in Article III courts to prevent his trial.[135] After Levy's conviction, the convening authority and the Secretary of the Army declined his requests to defer confinement while the case was under review.[136] The Court of Military Appeals rejected Levy's request that it intercede.[137] Levy then unsuccessfully asked Article III courts to order his release on bail pending disposition of his appeal.[138] Justice Douglas dissented from the Supreme Court's denial of certiorari to review the Fourth Circuit's rejection of Levy's bail request.[139]

The Army Board of Review affirmed the findings and sentence on 29 August 1968 and the Court of Military Appeals denied review on 6 January 1969.[140] Following completion of the direct appeal process, military officials executed Levy's dismissal on 20 January 1969.[141] Eleven days later, Levy was transferred from the U.S. Disciplinary Barracks to the Lewisburg Federal penitentiary.[142] Levy spent most of his time there assigned to the minimum-security farm camp.[143] Charles Morgan of the American Civil Liberties Union filed a habeas petition for Levy on 19 April 1969.[144] That petition named Levy's immediate custodian—Warden Jacob J. Parker—as the first respondent.[145]

On the same day they filed the habeas petition, Levy's legal team also asked the district court to grant him bail.[146] The district court denied that request on 7 May 1969.[147] The Third Circuit similarly denied bail on 2 June 1969.[148] Levy's counsel then applied to Justice William J. Brennan—the Third Circuit justice—for bail on 3 July 1969.[149] Five days later, Justice Brennan denied the request.[150] Undeterred, Levy's counsel submitted a new bail application to Justice Douglas on 19 July.[151]

On 2 August 1969—exactly two months after issuance of his opinion for the Court in *O'Callahan* mentioning Levy's case—Justice Douglas ordered Levy's release from confinement on bail.[152] Justice Douglas acknowledged that the application to him "carries a special burden, for we very seldom grant an order that has been denied by the Circuit Justice," as Levy's had.[153] The normal practice in such an instance "is to refer such renewed application to the full Conference of this Court."[154] But, Justice Douglas rationalized, "We are now in recess and widely scattered; hence referral to the Conference is not immediately possible."[155] Justice Douglas suggested that relief was appropriate given questions about whether Article 134 of the UCMJ is unconstitutionally vague and because some of Levy's convictions presented the issue of the extent to which First Amendment rights apply in the military.[156] He ordered Levy released on bail of $1,000.[157] The order was captioned *Levy v. Parker*.[158]

Levy was freed on the evening of 5 August—just nine days before his confinement was set to expire.[159] Newspapers quoted Warden Parker as saying, "He left no forwarding address."[160] The year after his release, Levy co-authored a book with an anti-Vietnam War protestor convicted of burning his draft card about their experiences in the prison system.[161] The book referred to Warden Parker by name in only one passage; the reference was not favorable.[162]

In October 1969, the Supreme Court left in place Justice Douglas's order granting Levy bail.[163] Although the full Court's published order did not indicate any dissents, a handwritten note in Justice Douglas's papers recorded the vote as four-to-three.[164]

Almost a year after Levy's release on bail, Parker left Lewisburg. In July 1970, Parker became the warden at the Federal correctional facility at McNeil Island in Washington State.[165] Levy's collateral challenge to his court-martial convictions continued.

After being denied habeas relief at the district court level, Levy appealed to the Third Circuit.[166] Parker's name remained on the case, even though it should not have. Federal Rule of Appellate Procedure 43(c)(1) then provided:

> When a public officer is a party to an appeal or other proceeding in the court of appeals in his official capacity and during its pendency . . . ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party . . . .[167]

Thus, Marvin R. Hogan—Lewisburg's warden at the time of the Third Circuit's proceedings in the case—should have been substituted for Parker. The Supreme Court's landmark decision in the case should be known as *Hogan v. Levy*. But, for whatever reason, Jacob Parker's name remained.

In 1973, the Third Circuit concluded that "Articles 133 and 134 are void for vagueness."[168] The court also expressed concern that those articles would "chill protected speech."[169] The court held that Captain Levy's findings of guilty for violating those statutes were constitutionally infirm.[170]

The Supreme Court heard argument in the case on 20 February 1974.[171] It was a clash of legal titans. Solicitor General Robert Bork argued the case for Parker and the other petitioners.[172] Charles Morgan Jr.—then the regional director of the American Civilian Liberties Union's Atlanta office—had represented Levy at his court-martial and ever since.[173] He once again appeared on the doctor's behalf.[174] Bork prevailed.

Four months after hearing oral argument, in a landmark 5-3 ruling, the Court rejected Levy's vagueness and overbreadth challenges to Articles 133 and 134.[175] Justice Rehnquist's opinion for the Court emphasized the unique military needs of discipline and obedience to orders:

> While the members of the military are not excluded from the protection granted by the First

Jacob J. Parker (left) walks alongside U.S. Attorney General Nicholas Katzenbach, 1965. (Photo courtesy of author)

> Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.[176]

Following that decision, Levy was not required to return to confinement to serve the few remaining days of his sentence.[177]

According to Shepard's Citations Service, as of 1 March 2026, *Parker v. Levy* had been cited by 1,786 court decisions. For comparison purposes, the cases that appeared in *United States Reports* immediately before and after it had been cited by 251 and 319 court decisions.[178] One of the myriad cases that cited *Parker v. Levy* was *Solorio v. United States*—the Supreme Court decision that overturned *O'Callahan v Parker*.[179]

Parker's Post-Warden Career

Parker was no longer a warden when the Supreme Court issued its decision in Levy's case. Following his transfer to the McNeil Island Federal Penitentiary, he remained for only seventeen months.[180] His tenure there was tempestuous, including an extended strike by a large portion of the inmate population.[181] Upon leaving the McNeil Island facility, Parker became a correctional program advisor for the Law Enforcement Assistance Administration.[182]

In 1975, he made another career change. Parker left the Federal Government for a position as coordinator and instructor for the criminal justice program at Tacoma Community College.[183] In April 1980, Washington's governor appointed him to the state's Board of Prison Terms and Paroles.[184] But when a new governor assumed office in January 1981, he replaced Parker on the board.[185] After retiring from his position at Tacoma Community College in 1993, Parker volunteered with Tacoma Crime Stoppers.[186]

Parker died in 2009 at the age of eight-five.[187] A touching obituary published in a Tacoma newspaper noted that during Parker's career with the U.S. Federal Bureau of Prisons, he and his wife "nurtured their eight children and as of today, none of them have had to do hard time in the joint."[188]

Supreme Court Military Justice Direct Appeals Supplanting Supreme Court Military Justice Habeas Decisions

O'Callahan v. Parker being overturned by a case captioned *Solorio v. United States* reflected a profound change in how military justice cases typically reach the Supreme Court. For roughly a century, the Supreme Court periodically reviewed court-martial cases by means of reviewing lower Article III courts' rulings on habeas petitions.[189] But since the passage of the Military Justice Act of 1983, which established the Supreme Court's certiorari jurisdiction over most

cases decided by the U.S. Court of Military Appeals[190] (later renamed the U.S. Court of Appeals for the Armed Forces[191]), the Supreme Court has not heard a single court-martial case via review of a habeas petition.[192] In that same period, it has given plenary consideration to ten court-martial cases via writ of certiorari to the Court of Military Appeals/Court of Appeals for the Armed Forces—an option that did not exist before passage of the Military Justice Act of 1983.[193]

The National Defense Authorization Act for Fiscal Year 2024 greatly expanded the Supreme Court's jurisdiction over military justice cases, broadening the right to seek certiorari to any case in which review or extraordinary relief was *sought* from the Court of Appeals for the Armed Forces, regardless of whether that court granted the petition.[194] Before that legislation, the Supreme Court had no statutory certiorari jurisdiction over cases in which the Court of Appeals for the Armed Forces denied a petition for grant of review or a petition for extraordinary relief.[195]

The existence of the direct review option has two important implications compared to the pre-Military Justice Act of 1983 regime. First, it allows the United States to challenge a ruling issued by the Court of Appeals for the Armed Forces; before adoption of the Military Justice Act of 1983, the United States had no practical means to seek further judicial review of an adverse decision by the Court of Military Appeals.

Second, the certiorari route allows for more searching review of Court of Appeals for the Armed Forces decisions compared to the habeas route, in which review is constrained by the Supreme Court's *Burns v. Wilson* standard.[196] Under the Supreme Court's plurality opinion in *Burns*, "when a military decision has dealt fully and fairly with an allegation raised in [a habeas petition], it is not open to a Federal civil court to grant the writ simply to re-evaluate the evidence."[197] Only if "the military courts manifestly refused to consider" a claim is a Federal civilian court "empowered to review" it de novo.[198] Although there has been some disagreement across and even within the Article III courts of appeals as to the precise scope of review under *Burns*,[199] that standard is unquestionably more constrained than that which the Supreme Court applies when reviewing court-martial cases on direct review.

Despite the availability of review of military justice cases on direct appeal, perhaps we have not seen the last of Supreme Court military justice cases bearing a warden's name. There is currently a significant habeas challenge on appeal before the Fourth Circuit raising the question of military retirees' susceptibility to court-martial jurisdiction.[200] And a habeas petition raising significant challenges in a military capital case is currently pending before the U.S. District Court for the District of Kansas.[201] Either of those cases could conceivably become the first habeas challenge to a court-martial conviction to obtain Supreme Court review in half a century. But notwithstanding such a possibility, the prospect of another warden's name being affixed to two significant Supreme Court military justice decisions is remote. Jacob J. Parker's feat will probably remain unrivaled.

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Notes

1. O'Callahan v. Parker, 395 U.S. 258 (1969).

2. Parker v. Levy, 417 U.S. 733 (1974).

3. Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393.

4. Certificate of Birth, Jacob Jordan Parker (on file with Nat'l Pers. Rec. Ctr., St. Louis, Mo., Jacob Jordan Parker Official Military Personnel File, Serial No. 425864) [hereinafter Parker OMPF], https://perma.cc/LJ5X-EET9.

5. Enlistment contract, *in* Parker OMPF, *supra* note 4; Occupational Qualification Record *in* Parker OMPF, *supra* note 4.

6. Enlistment contract, *in* Parker OMPF, *supra* note 4.

7. *Id.*

8. *Id.*

9. Professional and Conduct Record of Parker, Jacob Jordan, *in* Parker OMPF, *supra* note 4.

10. Ratings as Specialist and Special Duty Details, *in* Parker OMPF, *supra* note 4.

11. Expeditions, Engagements, Distinguished Service, *in* Parker OMPF, *supra* note 4. Parker was a member of the battalion's headquarters and service company. Larry L. Woodard, Before the First Wave: The 3d Armored Amphibian Tractor Battalion—Peleliu & Okinawa 200 (1994); *see also* Frank O. Hough, The Assault on Peleliu 30 (1950) (discussing the battalion's formation).

12. Hough, *supra* note 11, at 1.

13. Gordon D. Gayle, Bloody Beaches: The Marines at Peleliu 4 (1996).

14. *Id.*

15. Hough, *supra* note 11, at 35, 178.

16. Gayle, *supra* note 13, at 48.

17. *Id.* Another thirty-three Japanese naval personnel who had been hiding in a Peleliu cave complex surrendered on 21 April 1947—more than nineteen months after Japan's formal surrender ended hostilities in World War II. *Id.* at 44–45.

18. Expeditions, Engagements, Distinguished Service, *in* Parker OMPF, *supra* note 4.

19. Gayle, *supra* note 13, at 1; Hough, *supra* note 11, at 30, 36–37.

20. Woodard, *supra* note 11, at 1–3 (quoting Operation Plan 1-44, First Marine Division).

21. *Id.* at 19.

22. Hough, *supra* note 11, at 41, 75; Woodard, *supra* note 11, at 125.

23. Woodard, *supra* note 11, at 103–04l; Hough, *supra* note 11, at 66, 78, 87.

24. Hough, *supra* note 11, at 101, 105.

25. *Id.* at 101.

26. *Id.* at 123–26; Woodard, *supra* note 11, at 106–09.

27. Woodard, *supra* note 11, at 109; Hough, *supra* note 11, at 126.

28. Hough, *supra* note 11, at 94.

29. *Id.*

30. Woodard, *supra* note 11, at 99–100 (quoting Henry Harris, a private first class assigned as a gunner on one of the battalion's LVT(A)s, *id.* at 13, 204–05).

31. *Id.* at 109–10; Hough, *supra* note 11, at 101.

32. Woodard, *supra* note 11, at 110–13.

33. *Id.* at 118.

34. *Id.*

35. Expeditions, Engagements, Distinguished Service, *in* Parker OMPF, *supra* note 4; Hough, *supra* note 11, at 172–75.

36. Woodard, *supra* note 11, at 200–14.

37. Memorandum from Commanding Officer, Third Armored Amphibian Battalion (Provisional), Amphibian Tractor Group, to Corporal Jacob Jordan Parker, Jr., subject: Orders to Officer Candidates' Battalion, Camp Lejeune, North Carolina, for assignment to College Training Program (12 Dec. 1944), *in* Parker OMPF, *supra* note 4.

38. Transfer Order (2 May 1945), *in* Parker OMPF, *supra* note 4.

39. Navy V-12 Program Separation Report (2 May 1945); Report of Medical Survey, U.S. Naval Hospital, Long Beach, California, Name PARKER, Jacob Jordan Jr. (18 June 1945); Memorandum from Commanding Gen., Marine Corps Base, San Diego, to Commanding Officer, First Separation Co., subject: Discharge of enlisted men, order for, modification of (23 July 1945); all *in* Parker OMPF, *supra* note 4. *See generally* Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 301–03, 305–12 (5th ed., text rev. 2022) (discussing post-traumatic stress disorder and its symptoms).

40. Honorable Discharge, United States Marine Corps, Jacob J. Parker, Jr. (15 Aug. 1945), *in* Parker OMPF,

supra note 4.

41. *Evergreen Park Engagement*, Chi. Sunday Trib., Apr. 6, 1947, at pt. 3, 3; *Jacob Parker*, News Trib. (Tacoma, Wash.), Feb. 15, 2009, at B4 [hereinafter *Parker Obituary*].

42. *See* Servicemen's Readjustment Act, Pub. L. No. 78-346, § 400, 58 Stat. 284, 287–90 (1944) (popularly known as the GI Bill). *See generally* Keith W. Olson, *The G.I. Bill and Higher Education: Success and Surprise*, 25 Am. Q. 596 (1973) (discussing G.I. Bill benefits and their usage).

43. *Evergreen Park Engagement*, *supra* note 41.

44. *Hedy G. Parker*, News Trib. (Tacoma, Wash.), Dec. 30, 1995, at B4.

45. *Parker Obituary*, *supra* note 41.

46. *New Warden Assesses Lewisburg Challenge*, Sunbury Daily Item, Aug. 21, 1965, at 3.

47. *Id.*; *Parker Obituary*, *supra* note 41.

48. *New Warden at Lewisburg*, Times-Leader (Wilkes-Barre, Pa.), July 30, 1965, at 20; *Parker Obituary*, *supra* note 41.

49. *New Warden Assesses Lewisburg Challenge*, *supra* note 46.

50. *New Warden at Lewisburg*, *supra* note 48.

51. *Id.*

52. *Id.*

53. *US Pen Inmates to Be Permitted Home Visitations*, Sunbury Daily Item, Oct. 6, 1965, at 1.

54. John W. Roberts, *The Origins of USP Lewisburg*, *in* The History of the Federal Penitentiary at Lewisburg 125, at 6, 9 (M. Lois Huffines ed., 2005) [hereinafter History of the Federal Penitentiary].

55. *Id.* at 13.

56. Diana Medina Lasansky, *The Architecture of Redemption: The Federal Prison at Lewisburg*, *in* History of the Federal Penitentiary, *supra* note 54, at 20, 21; Lee Linder, *Justice Department Says 'Untrue' to Charges Against Federal Prison System*, Greenville News, Mar. 8, 1969, at 1; Bureau of Prisons, U.S. Penitentiary Lewisburg, Pa. 1 (1958) [hereinafter U.S. Penitentiary Lewisburg, Pa].

57. U.S. Penitentiary Lewisburg, Pa., *supra* note 56, at 2.

58. Bureau of Prisons, Federal Bureau of Prisons Statistical Report Fiscal Year 1966, at 22 (1966) [hereinafter 1966 BOP Report]; Bureau of Prisons, Federal Bureau of Prisons Statistical Report Fiscal Years 1969 and 1970, at 22 (1970) [hereinafter 1969 & 1970 BOP Report].

59. 1966 BOP Report, *supra* note 58, at 22; 1969 & 1970 BOP Report, *supra* note 58, at 22; Linder, *supra* note 56, at 1; *New Warden Assesses Lewisburg Challenge*, *supra* note 46.

60. *New Warden Assesses Lewisburg Challenge*, *supra* note 46.

61. Patrick J. Owens, *No. 33298 at Lewisburg (That's Hoffa) Sorts Shoes*, Evening News (Harrisburg, Pa.), Mar. 24, 1967, at 3 (quoting Parker).

62. Howard Levy & David Miller, Going to Jail: The Political Prisoner 209 (1970).

63. *Id.*

64. *Id.*

65. *Id.*

66. Walter Sheridan, The Fall and Rise of Jimmy Hoffa 352–55, 376–77 (1972). *See generally* United States v. Hoffa, 437 F.2d 11 (6th Cir. 1971); United States v. Hoffa, 436 F.2d 1243 (7th Cir. 1970) (providing background of Hoffa's prosecutions and convictions).

67. *See generally* Sheridan, *supra* note 66, at 377–413 (discussing Hoffa's various efforts to overturn his convictions). Hoffa ultimately served less than five years of his term of confinement. On 23 December 1971, President Richard M. Nixon granted Hoffa a conditional commutation that resulted in his release from the Lewisburg penitentiary. Fred P. Graham, *Nixon Commutes Hoffa Sentence, Curbs Union Role*, N.Y. Times, Dec. 24, 1971, at 1; *see generally* Hoffa v. Saxbe, 378 F. Supp. 1221 (D.D.C. 1974) (discussing President Nixon's partial commutation of Hoffa's sentence and rejecting Hoffa's challenge to conditions on that commutation). Three years and seven months later, Hoffa disappeared, presumably murdered at the direction of an organized crime boss. *See generally* John Wisely, *Hoffa 40 Years Gone, the Mystery Never Dies*, Detroit Free Press, July 30, 2015, at A1 (discussing Hoffa's disappearance and competing theories as to his fate).

68. David R. Jones, *Hoffa, Manacled, Is Led into Prison*, N.Y. Times, Mar. 8, 1967, at 1.

69. *E.g.*, *Warden at Lewisburg Rules Out Special Privileges for Hoffa*, Wilkes-Barre Times Leader, Mar. 8, 1967, at 1.

70. Victor Rabinowitz, Unrepentant Leftist: A Lawyer's Memoir 290 (1996). For a biographical sketch of Rabinowitz, see Marjorie Cohn, *Peace Profile: Victor Rabinowitz*, 20 Peace Rev. 398 (2008); *see also* Douglas Martin, *Victor Rabinowitz, 96, Leftist Lawyer, Dies*, N.Y. Times, Nov. 20, 2007, at B7 (obituary of Rabinowitz).

71. Rabinowitz, *supra* note 70, at 290. The case against the two Teamster local officials resulted in an acquittal. *Id.* at 291; *Teamster Cleared of Fraud*, Miami Herald, Dec. 3, 1965, at 31-A.

72. Rabinowitz, *supra* note 70, at 291.

73. Record of Trial of O'Callahan, James F., RA 11 221 278, Sergeant, Field Station (8605) APO 957, by General Court-Martial Appointed by the Commanding General, United States Army, Pacific, Tried at Fort Shafter, T.H., APO 958 on 11 October 1956, Case No. 393590 (on file with Nat'l Pers. Rec. Ctr., St. Louis, Mo.) [hereinafter O'Callahan ROT], https://perma.cc/BJ5Y-ZYWU.

74. *Id.* Pros. Exs. 1, 5.

75. *Id.* Pros. Exs. 1, 5.

76. *Id.*, Trial Tr. 67.

77. *Id.*, Trial Tr. 1–67.

78. *Id.*, Trial Tr. 49.

79. *Id.*, Action of the Officer Exercising General Court-Martial Jurisdiction (Nov 6, 1956).

80. The Army Board of Review affirmed the findings and sentence in a one-sentence decision on 4 January 1957. United States v. O'Callahan, CM 393590 (A.B.R. Jan. 4, 1957), *in* O'Callahan ROT, *supra* note 73.

81. The Court of Military Appeals denied review on 1 March 1957. United States v. O'Callahan, 7 C.M.A. 800 (1957) (mem.).

82. General Court-Martial Order No. 168 (28 Mar. 1957), *in* O'Callahan ROT, *supra* note 73; Admission Classification Summary, O'Callahan, James F. (28 Mar. 1957) (on file with Nat'l Pers. Rec. Ctr., St. Louis, Mo., James F. O'Callahan Official Military Personnel File, Service No. RA 11221278) [hereinafter O'Callahan OMPF], https://perma.cc/926B-QX6X. For information about the Branch United States Army Disciplinary Barracks, Lompoc, California, see, *e.g.*, Jerry S. Price, History of the United States Disciplinary Barracks, 1875–Present, Student Study Project #4016, USACGCS, Ft. Leavenworth, Kan. 37 (7 May 1978), https://apps.dtic.mil/sti/pdfs/ADA437867.pdf [https://perma.cc/4CT6-PN8J]; U.S. Dep't of Just. & U.S. Dep't of Def., Report to Congress Pursuant to Section 20413 of the Violent Crime Control and Law Enforcement Act of 1994, Conversion of Closed Military Installations into Federal Prison Facilities, at I-2, app. B-3 (Feb. 1995), https://www.esd.whs.mil/Portals/54/Documents/FOID/Reading%20Room/Other/BRAC/Conversion_of_Closed_Military_Installations_into_Federal_Prison_Facilities_749.pdf [https://perma.cc/4F9M-635H].

83. O'Callahan v. Parker, Respondents' Return and Answer to Petition, app. at 16, O'Callahan v. Parker, 395 U.S. 258 (1969) (No. 646) [hereinafter O'Callahan Appendix].

84. *Id.*

85. *Id.*

86. *Id.* First the U.S. District Court for the District of Massachusetts and then the U.S. Court of Appeals for the First Circuit rejected O'Callahan's argument that the Federal civilian parole board had no authority to parole him as a military prisoner, and thus his confinement time had continued to run since his release from Lewisburg in 1960. O'Callahan v. Att'y Gen., 230 F. Supp. 766 (D. Mass.), *aff'd*, 338 F.2d 989 (1st Cir. 1964); *see also* O'Callahan v. Att'y Gen., 351 F.2d 43 (1st Cir. 1965) (per curiam) (ruling against O'Callahan's claim that it was unconstitutional to deny him confinement credit for time spent on parole); *accord* O'Callahan v. United States, 293 F. Supp. 122 (D. Minn. 1968). The judge in the Minnesota case aptly referred to O'Callahan's "litigative life." *O'Callahan*, 293 F. Supp. at 122.

87. Rabinowitz, *supra* note 70, at 292–93.

88. *Id.* at 293.

89. *Id.*

90. *Id.* at 292.

91. *Id. O'Callahan* was one of nine cases Rabinowitz argued at the Supreme Court. *See* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 684 (1976); First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 760 (1972); Samuels v. Mackell, 401 U.S. 66, 66 (1971); O'Callahan, 395 U.S. at 259; Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 399 (1964); Yellin v. United States, 374 U.S. 109, 110 (1963); Silber v. United States, 370 U.S. 717, 717 (1962) (per curiam); Harmon v. Brucker, 355 U.S. 579, 579 (1958) (per curiam); Am. Commc'ns Ass'n v. Douds, 339 U.S. 382, 384 (1950). He prevailed in five of them: *O'Callahan*, *Banco Nacional de Cuba v. Sabbatino*, *Yellin*, *Silber*, and *Harmon*.

92. Rabinowitz, *supra* note 70, at 292; Petition for Writ of Habeas Corpus, No. 756 (M.D. Pa. 1966), *in* O'Callahan Appendix, *supra* note 83, at 3–12; Petitioner's Traverse, No. 756 (M.D. Pa. 1966), *in* O'Callahan Appendix, *supra* note 83, at 21–26.

93. O'Callahan v. Parker, 256 F. Supp. 679 (M.D. Pa. 1966), *aff'd*, 372 F.2d 136 (3d Cir. 1967); United States v. O'Callahan, 16 C.M.A. 568, 37 C.M.R. 188 (1967).

94. United States *ex rel.* O'Callahan v. Parker, 390 F.2d 360 (3d Cir. 1968).

95. Notice of Change – Military Prisoner, O'Callahan, James F. (June 19, 1968), *in* O'Callahan OMPF, *supra* note 82.

96. Current Data for Restoration, Clemency and Parole Review, O'Callahan, James F. (5 Mar 1969), *in* O'Callahan OMPF, *supra* note 82.

97. O'Callahan v. Parker, 393 U.S. 822 (1968) (mem.). The issue statement erroneously averred that O'Callahan's court-marital was "held under the Articles of War" rather than the UCMJ. *Id.*

98. The majority consisted of Chief Justice Warren and Justices John Marshall Harlan II, William J. Brennan, Potter Stewart, Byron White, and Abe Fortas. Justice Wiliam O. Douglas's conference notes include a cautionary caveat: "but AF [Fortas] is dubious – at least says authority is very narrow." The dissent consisted of Justices Douglas, Hugo L. Black, and Thurgood Marshall. Conference January 24, 1969, No. 646 – O'Callahan v. Parker (on file with Lib. of Cong., Manuscript Div., William J. Brennan, Jr. Papers [hereinafter Brennan Papers]); Box I:180, "Case File O.T. 1968, Administrative File, Dockets, 68-601 to 68-800" Folder; Lib. of Cong., Manuscript Div., William O. Douglas Papers [hereinafter Douglas Papers], Box 1450, "No. 646(d) O'Callahan v. Parker MISC. MEMOS, CERT MEMOS, VOTE OF CT" Folder.

99. O'Callahan v. Parker opinion circulated Apr. 8, 1969, at 10, *in* Brennan Papers, *supra* note 98, Box I:197, Case File No. 68-646 (1 of 2).

100. O'Callahan v. Parker dissent circulated Apr. 10, 1969, *in* Brennan Papers, *supra* note 98, Box I:197, Case File No. 68-646 (2 of 2). Justice Douglas omitted Airmen and Coast Guardsmen from his list of those subject to the UCMJ.

101. A.F. to Mr. Justice Harlan, Re: O'Callahan v. Parker, No. 646 (Apr. 11, 1969), *in* Brennan Papers, *supra* note 98, Box I:197, Case File No. 68-646 (2 of 2).

102. *Id.*

103. *Id.* (emphasis adjusted from underline to italics).

104. J. M. H. to Mr. Justice Fortas (Apr. 14, 1969), *in* Brennan Papers, *supra* note 98, Box I:197, Case File No. 68-646 (1 of 2).

105. *Id.*

106. *Id.*

107. Fred P. Graham, *Fortas Quits the Supreme Court, Defends Dealings with Wolfson; Liberal Majority May Be Curbed*, N.Y. Times, May 16, 1969, at 1; *see also The Texts of Letters and Statements Involving the Resignation of Justice Fortas*, N.Y. Times, May 16, 1969, at 20 (reprinting statements of Chief Justice Earl Warren and the Justice Department and correspondence from Justice Fortas concerning his resignation). *See generally* Laura Kalman, Abe Fortas: A Biography 322–25, 359–78 (1990) (describing ties between Justice Fortas and financier Louis Wolfson, who was convicted of Federal offenses, and Fortas's resulting resignation).

108. O'Callahan v. Parker dissenting opinion ("May —, 1969") (on file with Lib. of Cong., Manuscript Div., Earl Warren Papers [hereinafter Warren Papers], Box 565, "No. 646 – O'Callahan v. Parker" Folder); Chambers of Justice Abe Fortas, Memorandum for the Conference (May 15, 1969), *in* Warren Papers, *supra*, Box 565, "No. 646 – O'Callahan v. Parker" Folder ("Mr. Justice Fortas thought the members of the Court might like to see the dissent which he prepared in No. 646 – O'Callahan v. Parker.").

109. O'Callahan v. Parker opinion circulated May 19, 1969, *in* Brennan Papers, *supra* note 98, Box I:197, Case File No. 68-646 (1 of 2).

110. O'Callahan v. Parker, 395 U.S. 258 (1969).

111. *Compare id.*, *with supra* note 98.

112. *O'Callahan*, 395 U.S. at 272–74.

113. *Id.* at 273.

114. *See supra* notes 95–96 and accompanying text.

115. O'Callahan v. United States, 451 F.2d 1390 (Cl. Ct. 1971).

116. Rabinowitz, *supra* note 70, at 293.

117. *Id.*

118. *Id.*

119. Solorio v. United States, 483 U.S. 435, 450 (1987).

120. O'Callahan v. Parker, 395 U.S. 258, 266 (1969) (citing Ira Glasser, *Justice and Captain Levy*, 12 Colum. Forum 46 (1969)).

121. United States v. Levy, 39 C.M.R. 672, 675 (A.B.R. 1968), *petition denied*, 18 C.M.A. 627 (1969); Parker v. Levy, 417 U.S. 733, 736 (1974).

122. *Levy*, 417 U.S. at 736–37.

123. *Levy*, 39 C.M.R. at 675.

124. *Id.*

125. *Id.*

126. *Id.* at 675–76.

127. *Id.* at 676.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 674.

132. *Id.* at 673–75.

133. *Id.* at 675.

134. *Id.* at 673, 675. The convening authority approved the sentence as adjudged. *Id.* at 675.

135. *See, e.g.*, Levy v. Corcoran, 387 U.S. 915 (1967); Levy v. Corcoran, 389 F.2d 929 (D.C. Cir.) (per curiam), *cert. denied*, 389 U.S. 960 (1967).

136. Robert N. Strassfeld, *The Vietnam War on Trial: The Court-Martial of Dr. Howard B. Levy*, 1994 Wis. L. Rev. 839, 949 n.482.

137. Levy v. Resor, 17 C.M.A. 135, 37 C.M.R. 399 (1967) (per curiam).

138. Levy v. Resor, 384 F.2d 689 (4th Cir. 1967), *cert. denied*, 389 U.S. 1049 (1968).

139. Levy v. Resor, 389 U.S. 1049 (1968) (mem.).

140. United States v. Levy, 39 C.M.R. 672 (A.B.R. 1968), *petition denied*, 18 C.M.A. 627 (1969).

141. *Move for Howard Levy*, Kan. City Star, Jan. 31, 1969, at 4.

142. *Id.*

143. *See generally* Howard Levy & David Miller, Going to Jail: The Political Prisoner (1970) (discussing, *inter alia*, Levy's conditions of confinement at the USDB and Lewisburg).

144. Levy v. Parker, No. 1057, Petition for Writ of Habeas Corpus (M.D. Pa. Apr. 19, 1969), *reprinted in* App. at 12–21, Parker v. Levy, 417 U.S. 733 (1974) (No. 73-206) [hereinafter Levy Appendix].

145. *Id.* at 1, *reprinted in* Levy Appendix, *supra* note 144, at 12. The other respondent was Secretary of the Army Stanley R. Resor. *Id.*

146. Levy Appendix, *supra* note 144, at 1.

147. *Id.*

148. Memorandum for the Respondents in Opposition 2, Levy v. Parker 396 U.S. 1204 (1969), *in* Douglas Papers, *supra* note 98, Box 1468, "App. For Bail – Levy v. Parker O.T. 69" Folder.

149. Application for Bail Addressed to the Honorable William J. Brennan, Jr., As Circuit Justice for the Third Circuit, Levy v. Parker (received 3 July 1969), *in* Douglas Papers, *supra* note 98, Box 1468, "App. For Bail – Levy v. Parker O.T. 69" Folder.

150. *Id.* (handwritten note on petition).

151. Application for Bail Addressed to the Honorable William O. Douglas, Associate Justice of the Supreme Court (received 19 July 1969), *in* Douglas Papers, *supra* note 98, Box 1468, "App. For Bail – Levy v. Parker O.T. 69" Folder.

152. Levy v. Parker, 396 U.S. 1204 (1969) (Douglas, J., chambers opinion).

153. *Id.* at 1204–05.

154. *Id.* at 1205.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 1204.

159. Phil Gailey, *Levy Says GI Dissent Prods Volunteer Army*, Atlanta Const., Aug. 7, 1969, at 16-A.

160. *E.g.*, *Dr. Levy Leaves Prison; Refused to Train Medics*, Indianapolis Star, Aug. 7, 1969, at 72.

161. Levy & Miller, *supra* note 143.

162. *Id.* at 65–66 ("At Lewisburg there was recently a horrendous newspaper article posted on the Jaycee bulletin board. Two inmates, a bank robber and a dope pusher, were photographed while attending a Jaycee convention some distance away from the institution. They were reported as saying that prison was tough but that the Jaycees gave new hope and Warden Parker was as helpful as he could be. Warden Parker, they said, would give prisoners any possible break. This was sheer propaganda.").

163. Levy v. Parker, 396 U.S. 804 (1969).

164. Justice Thurgood Marshall did not participate in the case and there was a vacant seat on the Court at the time. The note in Justice Douglas's papers indicated that Chief Justice Warren Burger and Justices Byron White and Potter Stewart voted to vacate the order granting bail while Justices Douglas, Brennan, Hugo Black, and John Marshall Harlan II voted to continue the order granting bail. Levy v. Parker, Application for bail pending habeas, *in* Douglas Papers, *supra* note 98, Box 1468, "App. For Bail – Levy v. Parker O.T. 69" Folder.

165. *Reassign Warden at Lewisburg Pen*, Tribune (Scranton, Pa.), July 7, 1970, at 9.

166. Levy v. Parker, 478 F.2d 772, 778 (3d Cir. 1973).

167. Fed. R. App. P. 43(c)(1); Federal Rules of Appellate Procedure with Conforming Amendments to Federal Rules of Civil Procedure and Federal Rules of Criminal Procedure, 43 F.R.D. 61, 105–06 (1968). A similar provision is included in the current Fed. R. App. P. 43(c)(2).

168. *Levy*, 478 F.2d at 795. Future U.S. District Judge Royce C. Lamberth—then a captain in the Office of the Judge Advocate General of the Army—was among the counsel for the respondents before the Third Circuit. *See id.* at 776.

169. *Id.* at 794.

170. *Id.* at 796. In addition to setting aside Levy's convictions for the violating Articles 133 and 134, the Third Circuit held that the finding of guilty to the Article 90 charge may have been influenced by evidence the court-martial would not have heard but for the constitutionally infirm charges. *Id.* at 796–99. The court, therefore, granted relief as to the Article 90 conviction as well. *Id.* at 799. Chief Judge Seitz dissented from the portion of the opinion setting aside the Article 90 conviction. *Id.* at 808–13 (Seitz, C.J., concurring in part, dissenting in part).

171. *Levy*, 417 U.S. at 733. That same day, the Court heard oral argument in *Secretary of the Navy v. Avrech*. Sec'y of Navy v. Avrech, 418 U.S. 676, 676 (1974) (per curiam). In *Avrech*, the United States Court of Appeals for the District of Columbia—in an opinion by United States Supreme Court Justice Tom C. Clark sitting by designation—had held Article 134, UCMJ, unconstitutionally vague. Avrech v. Sec'y of Navy, 477 F.2d 1237 (D.C. Cir. 1973). The Supreme Court would ultimately reverse that ruling. *Avrech*, 418 U.S. at 676–77.

172. *Levy*, 417 U.S. at 735. *See generally* Steven G. Calabresi, *In Memoriam: Robert H. Bork*, 36 Harv. J.L. & Pub. Pol'y 1235 (2013) (discussing Bork's legal career); Ethan Bronner, *A Conservative Whose Supreme Court Bid Set the Senate Afire*, N.Y. Times, Dec. 20, 2012, at A1 (same).

173. Don McKee, *Jury Trial Sought in Army Case*, Burlington Times-News, Apr. 23, 1969, at 15-A.

174. *Levy*, 417 U.S. at 735.

175. *See id.* at 758.

176. *Id.*

177. Charles Morgan, One Man, One Voice 149 n.* (1979).

178. Bangor Punta Operations v. Bangor & A.R. Co., 417 U.S. 703 (1974); Florida Power & Light Co. v. International Brotherhood of Elec. Workers, 417 U.S. 790 (1974).

179. *See* Solorio v. United States, 483 U.S. 435, 448 (1987).

180. *See supra* note 165 and accompanying text; *McNeil Bids Its Warden 2 Goodbyes*, Tacoma News Trib., Jan. 8, 1972, at 2.

181. *See generally There's Trouble at McNeil Island*, Wash. State Bar News, May 1971, at 5 (discussing prisoner strike at the McNeil Island Federal Penitentiary and litigation in Federal district court over conditions of confinement there); Dwight Jarrell, *McNeil 'Normal,' but Prisoners Can't Tell Story*, News Tribune (Tacoma, Wash.), Mar. 11, 1971, at A-1 (reporting on an interview with Warden Parker concerning the prisoner strike).

182. Win Anderson, *Warden in Line for Adviser Post*, Tacoma News Trib., Dec. 10, 1971, at A-3; *McNeil Bids Its Warden 2 Goodbyes*, *supra* note 180, at 2; William F. Powers, The Law Enforcement Assistance Administration, An Administrative History (D.P.A. dissertation, Nova University), https://www.ojp.gov/pdffiles1/Photocopy/153696NCJRS.pdf [https://perma.cc/63NM-PJJC].

183. *Former Warden Turns Teacher*, News Trib. (Tacoma, Wash.), July 25, 1975, at A-4.

184. *Ex-Warden Named to Parole Board*, Spokane Daily Chronicle, Apr. 15, 1980, at 10.

185. Adele Ferguson, *City Attorney Named to Parole Board Post*, Bremerton Sun, Jan. 28, 1981, at 2.

186. *Parker Obituary*, *supra* note 41.

187. *Id.*

188. *Id.*

189. "[T]he Supreme Court did not review a court-martial habeas case until 1879." Santucci v. Commandant, 66 F.4th 844, 853 (10th Cir. 2023). Significant Supreme Court military justice decisions arising from habeas petitions starting in that year include *Ex parte* Reed, 100 U.S. 13 (1879); *Ex parte* Mason, 105 U.S. 696 (1881); *In re* Grimley, 137 U.S. 147 (1890); Johnson v. Sayre, 158 U.S. 109 (1895); Carter v. Roberts, 177 U.S. 496 (1900); Carter v. McClaughry, 183 U.S. 365 (1902); McClaughry v. Deming, 186 U.S. 49 (1902); Givens v. Zerbst, 255 U.S. 11 (1921); Kahn v. Anderson, 255 U.S. 1 (1921); Collins v. McDonald, 258 U.S. 416 (1922); Billings v. Truesdell, 321 U.S. 542 (1944); United States *ex rel.* Hirshberg v. Cooke, 336 U.S. 210 (1949); Humphrey v. Smith, 336 U.S. 695 (1949); Wade v. Hunter, 336 U.S. 684 (1949); Hiatt v. Brown, 339 U.S. 103 (1950); Gusik v. Schilder, 340 U.S. 128 (1950); Whelchel v. McDonald, 340 U.S. 122 (1950); Burns v. Wilson, 346 U.S. 137 (1953); United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955); Kinsella v. Krueger, 351 U.S. 470 (1956); Jackson v. Taylor, 353 U.S. 569 (1957); Fowler v. Wilkinson, 353 U.S. 583 (1957); Reid v. Covert, 354 U.S. 1 (1957); Lee v. Madigan, 358 U.S. 228 (1959); McElroy v. United States, 361 U.S. 281 (1960); Kinsella v. United States, 361 U.S. 234 (1960); Grisham v. Hagan, 361 U.S. 278 (1960); Noyd v. Bond, 395 U.S. 683 (1969); Relford v. Commandant, U.S. Disciplinary Barracks, 401 U.S. 355 (1971); Gosa v. Mayden, 413 U.S. 665 (1973); and Middendorf v. Henry, 425 U.S. 25, 29–30 (1976) (noting that the case originated as a "class action seeking habeas corpus (release from confinement), an injunction against future confinement resulting from uncounseled summary court-martial convictions, and an order vacating the convictions of those previously convicted"). Military justice cases have also sometimes reached the Supreme Court on review of other forms of collateral challenges to court-martial convictions. *E.g.*, McLucas v. De Champlain, 421 U.S. 21 (1975) (reviewing a Federal district court's injunction precluding proceeding with a court-martial*);* Schlesinger v. Councilman, 420 U.S. 738, 744 (1975) (presuming that "the District Court found jurisdiction under 28 U. S. C. § 1331, which grants subject-matter jurisdiction of civil actions where the matter in controversy exceeds $ 10,000 'and arises under the Constitution, laws, or treaties of the United States'"); United States v. Augenblick, 393 U.S. 348 (1969) (reviewing Court of Claims' ruling on collateral challenge to court-martial conviction); Mullan v. United States, 212 U.S. 516 (1909) (same); United States v. Brown, 206 U.S. 240 (1907) (same); United States v. Smith, 197 U.S. 386 (1905) (same); Swaim v. United States, 165 U.S. 553 (1897) (same); Ide v. United States, 150 U.S. 517 (1893) (same); United States v. Fletcher, 148 U.S. 84 (1893) (same); United States v. Page, 137 U.S. 673 (1891) (same); Runkle v. United States, 122 U.S. 543 (1887) (same); Smith v. Whitney, 116 U.S. 167 (1886) (reviewing Supreme Court of the District of Columbia's denial of petition for writ of prohibition to stop a naval court-martial); Keyes v. United States, 109 U.S. 336 (1883) (reviewing Court of Claims' ruling on collateral challenge to court-martial conviction); Dynes v. Hoover, 61 U.S. 65 (1857) (reviewing collateral challenge to a naval court-martial conviction brought as an action for assault and battery and false imprisonment against the marshal of the District, who confined Dynes as a result of a court-martial conviction).

190. Military Justice Act of 1983, Pub. L. No. 98-209, § 10, 97 Stat. 1393, 1405.

191. Congress gave the court its present name in 1994. *See* National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 924, 108 Stat. 2663, 2831 (1994); *see also* Special Session for Court Name Change, 41 M.J. LIII (C.A.A.F. 1994) (marking the change of the court's name); Notice of Court Name Change, 42 M.J. 9 (C.A.A.F. 1994) (same).

192. On the other hand, the Court did hear a challenge to the military commission system via review of lower Article III courts' rulings on a habeas petition. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 567 (2006).

193. Solorio v. United States, 483 U.S. 435 (1987); Weiss v. United States, 510 U.S. 163 (1994); Davis v. United States, 512 U.S. 452 (1994); Ryder v. United States, 515 U.S. 177 (1995); Loving v. United States, 517 U.S. 748 (1996); Edmond v. United States, 520 U.S. 651 (1997); United States v. Scheffer, 523 U.S. 303 (1998); United States v. Denedo, 556 U.S. 904 (2009); Ortiz v. United States, 585 U.S. 427 (2018); United States v. Briggs, 592 U.S. 69 (2020). The Supreme Court engaged in plenary review of another case via writ of certiorari to the Court of Appeals for the Armed Forces that involved not a court-martial, but rather the President's action in dropping an officer from the rolls. The Supreme Court held that the Court of Appeals for the Armed Forces had exceeded its jurisdiction by granting extraordinary relief in that case. *See* Clinton v. Goldsmith, 526 U.S. 529 (1999).

194. National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, § 533, 137 Stat. 136, 261 (2023). That expansion applies to cases in which a petition for grant of review was filed on or after 22 December 2024. *Id.* § 533(b), 137 Stat. at 261.

195. *See* 10 U.S.C. § 867a (2018); 28 U.S.C. § 1259 (2018).

196. Burns v. Wilson, 346 U.S. 137 (1953).

197. *Id.* at 142.

198. *Id.*

199. *See, e.g.,* Santucci v. Commandant, 66 F.4th 844, 855 (10th Cir. 2023) ("[O]ur interpretation of 'the language in *Burns*'—as expressed in our post-*Burns* decisions—'had been anything but clear.'" (quoting Dodson v. Zelez, 917 F.2d 1250 (10th Cir. 1990))), *cert. denied,* 144 S. Ct. 191 (2023). *See generally* Clara D. Crenshaw, Note, *Habeas Review of Courts-Martial: Revisiting the* Burns *Standard*, 99 Tex. L. Rev. 787, 797–802 (2021) (surveying various circuits' application of *Burns*).

200. Bork v. Infante, C/A No. 9:23-CV-01073/JFA, 2024 U.S. Dist. LEXIS 9288 (D.S.C. Jan. 17, 2024), *appeal filed*, No. 24-6218 (4th Cir. Mar. 8, 2024).

201. Gray v. Curtis, No. 5:18-cv-03305-EFM (D. Kan.). The case is before the district court on remand from the U.S. Court of Appeals for the Tenth Circuit. *See* Gray v. Gray, 645 F. App'x 624 (10th Cir. 2016) (per curiam).