THE SUPREME COURT ADDS NEW GUIDELINES ON "SERVICE CONNECTION" IN DETERMINING COURT-MARTIAL JURISDICTION

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I. INTRODUCTION

In recent years, the military justice system has received an exceptional amount of discussion in both the courts and the legal periodicals.[1] The cumulative effect of this expanded and prolonged examination of justice in the military has produced marked differences and improvements in the system.[2] In June of 1969, the Supreme Court decided *O'Callahan v. Parker*,[3] and thereby rocked the very foundation of court-martial jurisdiction. Under that holding, a military court-martial had no jurisdiction to try a serviceman for a crime which occurred off-post, during off-duty hours, while he was on leave with an evening pass, and while he was in civilian clothing.[4] In summary, Mr. Justice Douglas, writing for a 5-3 majority, concluded that courts-martial lacked

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1. *See, e.g.*, O'Callahan v. Parker, 395 U.S. 258 (1969); Everett, *O'Callahan v. Parker—Milestone or Millstone for Military Justice?*, 1969 DUKE L.J. 835; Kester, *Soldiers Who Insult the President: An Uneasy Look at Article 88 of the Uniform Code of Military Justice*, 81 HARV. L. REV. 1697 (1968); Nelson & Westbrook, *Court-Martial Jurisdiction over Servicemen for "Civilian Offenses": An Analysis of O'Callahan v. Parker*, 54 MINN. L. REV. 1 (1969); Rice, *O'Callahan v. Parker: Court-Martial Jurisdiction, "Service Connection," Confusion and the Serviceman*, 51 MIL. L. REV. 41 (1970); Weiner, *Are the General Military Articles Unconstitutionally Vague?*, 54 A.B.A.J. 357 (1968); Wurtzel, *O'Callahan v. Parker: Where Are We Now?*, 56 A.B.A.J. 686 (1970); Note, *Civilian Court Review of Courts-Martial Adjudications*, 69 COLUM. L. REV. 1259 (1969); Note, *Servicemen in Civilian Courts*, 76 YALE L.J. 380 (1966).

2. For a complete analysis of the changes and improvements, *compare* MANUAL FOR COURTS-MARTIAL, UNITED STATES (1951) *with* MANUAL FOR COURTS-MARTIAL, UNITED STATES (1969) and MANUAL FOR COURTS-MARTIAL, UNITED STATES (Rev. ed. 1969).

3. O'Callahan v. Parker, 395 U.S. 258 (1969). There, Mr. Justice Douglas, speaking for a majority of the Supreme Court, concluded that "the crime to be under military jurisdiction must be service connected, lest 'cases arising in the land or naval forces or in the Militia, when in actual service in time of war or public danger,' as used in the Fifth Amendment, be expanded to deprive every member of the armed services of the benefits of an indictment by a grand jury and a trial by a jury of his peers." *Id.* at 272-73.

4. *Id.* at 259-60.

jurisdiction to try servicemen, on active duty, for offenses which had no "service connection".[5] The underlying reasons for the *O'Callahan* decision were given as a constitutional interpretation that the result was necessary to preserve (a) grand jury indictments and (b) trial by peers.[6]

The Supreme Court's pronouncement in *O'Callahan* of a "service connection" standard to be used in determining court-martial jurisdiction necessarily evoked a substantial amount of uncertainty as to its full meaning and extent. The military appellate courts immediately began their task of applying that standard to a great variety of factual situations. Yet, the *ad hoc* standard of *O'Callahan* needed further examination by the Supreme Court so that the Court could better explain the meaning of "service connection". New guidelines were necessary to provide additional insight into the meaning of *O'Callahan.* On February 25, 1971—almost two years after the *O'Callahan* decision—the Supreme Court decided *Relford v. Commandant, U.S. Disciplinary Barracks,*[7] which has added new dimensions in determining the scope of court-martial jurisdiction. However, to understand better the effects and implications of *Relford,* it is necessary first to examine the pre-*Relford* scope of *O'Callahan* as developed by the military appellate courts.

II. THE MILITARY'S APPLICATION OF *O'Callahan*

While the Supreme Court had said that "service connection" was a prerequisite to military jurisdiction, it was the initial task of the United States Court of Military Appeals to implement that standard and establish guidelines for the individual judge advocate to apply it correctly to specific factual situations. This necessarily required an *ad hoc* construction of rules which more clearly defined areas of court-martial jurisdiction.

The highest military court first considered the *O'Callahan* decision in *United States v. Borys.*[8] Borys had been convicted of various and sundry sex offenses, robbery, and attempts thereof. All were committed off-post and while he was off-duty or on leave; in addition, Borys was in civilian clothing and his victims were civilians. The only military connection was

5. *Id.* at 272-73.

6. *Id.* Perhaps the true reason was predicated on Mr. Justice Douglas' belief that a court-martial is not an independent judicial system, but instead, a part of military discipline. For example, he stated that "[w]hile the Court of Military Appeals takes cognizance of some constitutional rights of the accused who are court-martialed, courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law." *Id.* at 265.

7. 401 U.S. 355 (1971).

8. 18 U.S.C.M.A. 547, 40 C.M.R. 259 (1969).

his military status as an Army Officer. Moreover, all the offenses were cognizable in the civilian criminal courts. Based upon these facts, the court concluded that the offenses were not "service connected" and that the military had no jurisdiction.[9]

In little more than a year, the Court of Military Appeals distilled the *O'Callahan* and *Borys* decisions and indicated some definite areas in which *O'Callahan* had no limiting effect—in other words, some areas in which the military still had proper court-martial jurisdiction.[10] This judicial process resulted in the following areas in which, according to the Court of Military Appeals, a court-martial can still legitimately assume jurisdiction.

a. On Base or Military Reservation. The first area was over those offenses which are committed on base or on a military reservation.[11] Relying on the duty of the military to maintain the security of the military posts, the court consistently held that that factor alone was sufficient to vest jurisdiction in the court-martial.[12] Under this line of cases, as long as the offense was perpetrated on-post, the court has upheld jurisdiction over robbery off-post where the assault and force elements occurred on-post,[13] murder,[14] bad checks uttered[15] on base,[16] sex

9. *Id.* at 549, 40 C.M.R. at 261. *See also* United States v. Armstrong, 19 U.S.C.M.A. 5, 41 C.M.R. 5 (1969); United States v. Prather, 18 U.S.C.M.A. 560, 40 C.M.R. 272 (1969); United States v. Chandler, 18 U.S.C.M.A. 593, 40 C.M.R. 305 (1969); United States v. Crapo, 18 U.S.C.M.A. 594, 40 C.M.R. 306 (1969); United States v. Riehle, 18 U.S.C.M.A. 603, 40 C.M.R. 315 (1969).

10. *See also* Wurtzel, *O'Callahan v. Parker: Where Are We Now?*, 56 A.B.A.J. 686 (1970).

11. *See, e.g.*, United States v. Crapo, 18 U.S.C.M.A. 594, 40 C.M.R. 306 (1969); United States v. Williams, 18 U.S.C.M.A. 605, 40 C.M.R. 317 (1969); United States v. Paxiao, 18 U.S.C.M.A. 608, 40 C.M.R. 320 (1969); United States v. Smith, 18 U.S.C.M.A. 609, 40 C.M.R. 321 (1969); United States v. Schockley, 18 U.S.C.M.A. 610, 40 C.M.R. 322 (1969). The issue of whether the military has jurisdiction for kidnapping and rape which occurred on-post and for an offense perpetrated by a serviceman against a civilian on-post was recently decided in the affirmative by the United States Supreme Court, Relford v. Commandant, U.S. Disciplinary Barracks, 401 U.S. 355 (1971).

12. *See, e.g.*, United States v. Crapo, 18 U.S.C.M.A. 594, 40 C.M.R. 306 (1969); United States v. Williams, 18 U.S.C.M.A. 605, 40 C.M.R. 317 (1969); United States v. Paxiao, 18 U.S.C.M.A. 608, 40 C.M.R. 320 (1969); United States v. Smith, 18 U.S.C.M.A. 609, 40 C.M.R. 321 (1969); United States v. Schockley, 18 U.S.C.M.A. 610, 40 C.M.R. 322 (1969).

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

14. United States v. Allen, 19 U.S.C.M.A. 31, 41 C.M.R. 31 (1969); United States v. Fields, 19 U.S.C.M.A. 119, 41 C.M.R. 119 (1969).

15. "'[U]ttering' and 'delivering' have similar meanings. Both 'uttering' and 'delivering' mean transferring the instrument to another, but 'uttering' has the additional meaning of offering to transfer." MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 202A (Rev. ed. 1969); *See also* UNIFORM CODE OF MILITARY JUSTICE art. 123a; United States v. Jackson, 13 U.S.C.M.A. 66, 32 C.M.R. 66 (1962), United States v. Davis, 12 U.S.C.M.A. 576, 31 C.M.R. 162 (1961).

16. United States v. Williams, 18 U.S.C.M.A. 605, 40 C.M.R. 317 (1969).

offenses committed in government housing,[17] marijuana,[18] and wrongful appropriation of a truck which was parked on a military reservation.[19] But there was held to be an insufficient connection if a car was stolen off-post and subsequently brought on-post.[20] In that case, *United States v. Riehle*,[21] Judge Ferguson stated in dicta that the court was taking no position on whether a court-martial could try the accused for bringing stolen property onto a military base.[22]

b. Status of Victim. The second major limitation on *O'Callahan's* effect was applied to cases in which the victim was a fellow serviceman[23]—and this was true whether or not the perpetrator was aware of the victim's status.[24] In establishing this "service connection", Judge Darden relied on two footnotes in *O'Callahan* which indicated that offenses committed upon fellow soldiers are "peculiarly military crimes".[25] Judge Ferguson vigorously opposed this view, believing that status alone was "too slender a *nexus*".[26] But the view of Judges Darden and Quinn remained the law of the court.[27]

17. *E.g.*, carnal knowledge, United States v. Smith, 18 U.S.C.M.A. 609, 40 C.M.R. 321 (1969); sodomy, United States v. Schockley, 18 U.S.C.M.A. 610, 40 C.M.R. 322 (1969).

18. United States v. Rose, 19 U.S.C.M.A. 3, 41 C.M.R. 3 (1969); United States v. Beeker, 18 U.S.C.M.A. 563, 40 C.M.R. 275 (1969). Narcotic offenses, clearly within the ambit of court-martial jurisdiction if committed on-post, are also within the purview of court-martial jurisdiction off-post. *See* text accompanying notes 40-42 *infra*.

19. United States v. Paxiao, 18 U.S.C.M.A. 608, 40 C.M.R. 320 (1969).

20. United States v. Riehle, 18 U.S.C.M.A. 603, 40 C.M.R. 315 (1969). "When the automobile was taken from the used car lot, the crime of larceny was complete and jurisdiction was thereupon vested in the local courts." *Id.* at 604. Consistent with this theory was United States v. Wills, 20 U.S.C.M.A. 8, 42 C.M.R. 200 (1970), in which the court held that there was no court-martial jurisdiction for the offense of interstate transportation of an automobile, even though the car was stolen on-post, the charged offense did not occur on-post. In *Wills*, the court expressly overruled its earlier view that the accused stole the car on a military reservation was a sufficient "service connection" to sustain court-martial jurisdiction over the offense of interstate transportation of stolen property, Swisher v. United States, 19 U.S.C.M.A. 624, 41 C.M.R. 624 (1969).

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

22. *Id.* at 604, 40 C.M.R. at 316.

23. *See, e.g.*, United States v. Lovejoy, 20 U.S.C.M.A. 18, 42 C.M.R. 210 (1970); United States v. Rego, 19 U.S.C.M.A. 9, 41 C.M.R. 9 (1969); United States v. Camacho, 19 U.S.C.M.A. 11, 41 C.M.R. 11 (1969); United States v. Cook, 19 U.S.C.M.A. 13, 41 C.M.R. 13 (1969); United States v. Plamondon, 19 U.S.C.M.A. 22, 41 C.M.R. 22 (1969); United States v. Nichols, 19 U.S.C.M.A. 43, 41 C.M.R. 43 (1969); United States v. Everson, 19 U.S.C.M.A. 70, 41 C.M.R. 70 (1969).

24. *Compare* United States v. Rego, 19 U.S.C.M.A. 9, 41 C.M.R. 9 (1969), *with* United States v. Camacho, 19 U.S.C.M.A. 11, 41 C.M.R. 11 (1969).

25. United States v. Rego, 19 U.S.C.M.A. 9, 9-10, 41 C.M.R. 9, 9-10 (1969). *See also* O'Callahan v. Parker, 395 U.S. 258, 270 n. 14, 274 n. 19 (1969).

26. United States v. Camacho, 19 U.S.CM.A. 11, 12, 41 C.M.R. 11, 12 (1969).

27. *See, e.g.*, United States v. Lovejoy, 20 U.S.C.M.A. 18, 42 C.M.R. 210 (1970); United States v. Rego, 19 U.S.C.M.A. 9, 41 C.M.R. 9 (1969); United States v. Camacho, 19 U.S.C.M.A. 11, 41

It must be remembered, however, that while the status of the victim as a serviceman has been sufficient, if the victim's status is a dependent[28] or even a retired military person working on a base,[29] it has been insufficient to sustain military jurisdiction.

c. Overseas. A third area in which the otherwise limiting effect of *O'Callahan* has been restricted pertains to those offenses which occur overseas. Judge Ferguson, speaking for the court in *United States v. Keaton,*[30] held that *O'Callahan* does not apply "outside the territorial limits of the United States."[31] The reason, of course, is that the foreign countries' courts did not guarantee a grand jury indictment or a trial by peers.[32] Thus, the court's decisions made clear that *O'Callahan* had no effect on offenses committed in Germany,[33] the Philippines,[34] Okinawa,[35] and, presumably, Vietnam.

d. Exploitation or Reliance on Military Status. A fourth area in which the court ruled that a court-martial had jurisdiction, notwithstanding *O'Callahan,* includes situations in which the accused has exploited his military status or caused others to rely on his status as a basis in affording him the opportunity to commit the crime. For example, in *United States v. Peak,*[36] the accused was dressed in his military uniform when he went to a used car lot. After identifying himself and his unit, he convinced the salesman to let him test drive a car. He never returned. The court held that this was a sufficient abuse of

C.M.R. 11 (1969); United States v. Cook, 19 U.S.C.M.A. 13, 41 C.M.R. 13 (1969); United States v. Plamondon, 19 U.S.C.M.A. 22, 41 C.M.R. 22 (1969); United States v. Nichols, 19 U.S.C.M.A. 43, 41 C.M.R. 43 (1969); United States v. Everson, 19 U.S.C.M.A. 70, 41 C.M.R. 70 (1969).

28. United States v. Henderson, 18 U.S.C.M.A. 601, 40 C.M.R. 313 (1969); United States v. McGonigal, 19 U.S.C.M.A. 94, 41 C.M.R. 94 (1969); United States v. Schockley, 18 U.S.C.M.A. 610, 40 C.M.R. 322 (1969). For a discussion of the effect of the *Relford* decision on this line of cases *see* text accompanying notes 71 and 106 *infra.*

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

30. 19 U.S.C.M.A. 64, 41 C.M.R. 64 (1969); *see also* United States v. Ortiz, 20 U.S.C.M.A. 21, 42 C.M.R. 213 (1970); United States v. Weinstein, 19 U.S.C.M.A. 29, 41 C.M.R. 29 (1969); United States v. Easter, 19 U.S.C.M.A. 68, 41 C.M.R. 68 (1969); United States v. Stevenson, 19 U.S.C.M.A. 69, 41 C.M.R. 69 (1969); United States v. Bryan, 19 U.S.C.M.A. 184, 41 C.M.R. 184 (1969).

31. 19 U.S.C.M.A. 64 at 68, 41 C.M.R. 64 at 68.

32. *Id.* at 67, 41 C.M.R. at 67.

33. United States v. Weinstein, 19 U.S.C.M.A. 29, 41 C.M.R. 29 (1969); United States v. Easter, 19 U.S.C.M.A. 68, 41 C.M.R. 68 (1969); United States v. Stevenson, 19 U.S.C.M.A. 69, 41 C.M.R. 69 (1969); United States v. Bryan, 19 U.S.C.M.A. 184, 41 C.M.R. 184 (1969).

34. United States v. Keaton, 19 U.S.C.M.A. 64, 41 C.M.R. 64 (1969).

35. United States v. Ortiz, 20 U.S.C.M.A. 21, 42 C.M.R. 213 (1970).

36. 19 U.S.C.M.A. 19, 41 C.M.R. 19 (1969). *See also* United States v. Fryman, 19 U.S.C.M.A. 71, 41 C.M.R. 71 (1969).

military status to merit a service connection.[37] Judge Ferguson strongly dissented, believing that the mere fact that the accused was wearing his military fatigues was insufficient to clothe the court-martial with jurisdiction.[38] Another common instance is a situation in which an individual uses his military I.D. to cause the victim to rely on his military status as a basis for cashing checks or other negotiable instruments.[39] The cases seem to indicate clearly that anytime an individual uses his military status—by I.D. card, uniform, or oral identification—to facilitate the commission of an offense, the individual thereby forms the requisite "service connection" necessary to sustain court-martial jurisdiction.

e. Narcotics and Drug Offenses. The fifth specific area in which court-martial jurisdiction was retained, notwithstanding *O'Callahan*, was in the area of narcotics and marihuana. The cases of the Court of Military Appeals in the first post-*O'Callahan* year clearly established that it made no difference whether the offense was committed on or off-post.[40] The reason for the inclusion of off-post activities was the special detrimental significance that drugs have on the health, morale and fitness for duty.[41] Up until the present time, for purposes of determining jurisdiction, it has made no difference whether the offense was use, possession, sale or introduction. But in a case in which a serviceman made an off-post sale of marihuana and LSD to a civilian, the court concluded that the *nexus* was insufficient and that the court-martial had no jurisdiction for lack of a "service connection".[42]

f. National Defense Matters. The sixth *O'Callahan* exception

37. 19 U.S.C.M.A. 19 at 20-21, 41 C.M.R. 19 at 20-21.

38. *Id.* at 21, 41 C.M.R. at 21.

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

40. United States v. Beeker, 18 U.S.C.M.A. 563, 40 C.M.R. 275 (1969); United States v. Castro, 18 U.S.C.M.A. 398, 40 C.M.R. 318 (1969); United States v. Rose, 19 U.S.C.M.A. 3, 41 C.M.R. 3 (1969). *But see* United States v. Watson, 6 Cr. L. Rep. 2377 (1970); Moylan v. Laird, 305 F. Supp. 551 (D.R.I. 1969).

41. United States v. Beeker, 18 U.S.C.M.A. 563, 565, 40 C.M.R. 275, 277 (1969).

42. United States v. Morley, 20 U.S.C.M.A. 179, 43 C.M.R. 21 (1970). The Army Court of Military Review has found military jurisdiction over the offense of wrongful importation of marihuana where the serviceman placed it in a package and mailed it from a military post to the United States. United States v. Skelton, C.M. No. 420559, 41 C.M.R. 532 (1969). *But see* United States v. Pieragowski, 19 U.S.C.M.A. 508, 42 C.M.R. 110 (1970); United States v. Tripp, 19 U.S.C.M.A. 509, 42 C.M.R. 111 (1970); United States v. Hughes, 19 U.S.C.M.A. 510, 42 C.M.R. 112 (1970).

covered matters affecting military security. In two cases involving an espionage conspiracy with Soviet agents, the Court of Military Appeals upheld court-martial jurisdiction.[43] The cases were based on the same incident and involved an agreement to transfer copies of military documents which were "immediately connected with the operation of the military establishment."[44] Also included within this area were cases involving the uttering of disloyal statements which also have been held to be "service connected".[45]

g. *Petty Offenses.* The seventh and final area in which *O'Callahan* has not been applied by military courts is that of "petty offenses", *i.e.*, those offenses for which the accused would not be entitled to a grand jury indictment and jury trial in the civilian community.[46] Therefore, by being tried by a court-martial, the accused would lose no rights which *O'Callahan* sought to guarantee.[47]

The cumulative effect of the numerous decisions of the Court of Military Appeals established, at least for the military, a reasonably circumscribed area in which court-martial jurisdiction could be validly assumed. The promulgation of the military progeny of *O'Callahan* left almost no gray areas. The penumbra of court-martial jurisdiction was definitely cast over the seven types of factual situations described above.[48]

In the same time frame in which the Court of Military Appeals promulgated such a substantial amount of interpretive law on *O'Callahan,* the lower civilian courts were relatively silent. The few reported cases[49] reveal no particular rule of thumb, save perhaps a trend somewhat similar to that expounded by the Court of Military Appeals. Throughout this entire period, people vitally concerned with the military justice system were continually seeking further review and clarification—or even an overruling—by the Supreme Court.[50]

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

44. United States v. Harris, 18 U.S.C.M.A. 596, 597, 40 C.M.R. 308, 309 (1969).

45. United States v. Daniels, 19 U.S.C.M.A. 529, 42 C.M.R. 131 (1970); United States v. Harvey, 19 U.S.C.M.A. 539, 42 C.M.R. 141 (1970).

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

47. *Id.*

48. *See* text accompanying notes 10-45 *supra.*

49. *See, e.g.,* Silvero v. Chief of Naval Air Basic Training, 428 F.2d 1009 (5th Cir. 1970); Harris v. Ciccone, 417 F. 2d 479 (8th Cir. 1969), *cert. denied,* 397 U.S. 1078 (1970); Latney v. Ignatius, 416 F. 2d 821 (D.C. Cir. 1969).

50. Everett, *O'Callahan v. Parker—Milestone or Millstone for Military Justice?,* 1969 DUKE L.J. 835, 875 n. 93, 896.

III. APPLICATION OF "SERVICE CONNECTION" RULE

After the *O'Callahan* decision more than one and one-half years passed before the Supreme Court again considered the issue of court-martial jurisdiction, and applied the *O'Callahan* ruling to a situation in which there were critically differentiating facts. By a vote of 9-0, Mr. Justice Blackmun, speaking for the Court in *Relford v. Commandant, U.S. Disciplinary Barracks*,[51] delineated an area in which court-martial jurisdiction was appropriate and permissible.[52] The language of the decision, the vote of the Court, and the general thrust of the meaning to the military system of justice requires an examination and discussion of the various facets of the *Relford* decision.

In early October, 1961, a fourteen year-old sister of a serviceman was abducted at knife-point while she waited in an automobile parked at the Fort Dix hospital. The girl was subsequently raped by her abductor. Her assailant was dressed in civilian clothes.

Several weeks later, the wife of an Air Force man stationed at nearby McGuire Air Force Base was driving from her home on the base to another base facility, the P-X, where she worked. Her assailant dressed in civilian clothes, jumped in her car at a stop sign and forced her at knife-point to drive to a desolate training area of Fort Dix, where she was raped.

That same day, Corporal Isiah Relford, a member of the United States Army and stationed at Fort Dix, New Jersey, was apprehended and charged with kidnapping and rape. Based upon his confession made immediately after apprehension, the accused, Relford, was also charged with rape and kidnapping of the fourteen year-old girl.

In December of 1961, Relford was convicted of the charges of rape and kidnapping in violation of Articles 120[53] and 134,[54] respectively, of

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51. 401 U.S. 355 (1971).

52. *Id.*

53. Rape is proscribed in the UNIFORM CODE OF MILITARY JUSTICE art. 120 (a):

> Any person subject to this chapter who commits an act of sexual intercourse with a female not his wife, by force and without her consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct.

54. Kidnapping is not specifically proscribed in the UNIFORM CODE OF MILITARY JUSTICE. Therefore, it is charged under the general article, Article 134:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary, court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

the Uniform Code of Military Justice. His sentence was total forfeitures, reduction to the lowest enlisted grade, and death. On initial review by the convening authority,[55] the death sentence was affirmed, but this was subsequently reduced to thirty years confinement at hard labor when the case was reviewed by the Army Board of Review.[56] The United States Court of Military Appeals denied Relford's petition for grant of review.[57]

While in confinement at the United States Disciplinary Barracks[58] at Fort Leavenworth, Kansas, Relford sought habeas corpus relief in the local federal district court. His supplications for relief were based on his alleged inadequate representation by counsel at trial. Relief was denied; on appeal, the Tenth Circuit affirmed the dismissal.[59] No claim was made at either the district court or the appellate level that the court-martial which convicted him lacked jurisdiction because the offenses were unrelated to his military status.[60] Relford's subsequent petition for a writ of *certiorari* was granted by the Supreme Court on February 27, 1970.[61]

Relford contended, as indeed he was forced to by the very nature of the case, that court-martial jurisdiction should exist only to adjudicate alleged violations of uniquely military codes of conduct *(e.g.*, disobedience of orders, absence without proper authority, desertion, misbehavior before the enemy, etc.) and that, as to other types of

55. The convening authority is the commanding officer who convenes the court, refers the case to trial, and makes the initial review of the trial record, including findings and sentence. *See generally* MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ ¶ 5, 33, 35, 84-89 (Rev. ed. 1969).

56. This tribunal is now known as the Court of Military Review, P.L. 90-632, § 2(27), 82 Stat. 1341 (1968).

57. 14 U.S.C.M.A. 678 (1963). The Court of Military Appeals has a discretionary power in determining which cases it will review, somewhat similar to that exercised by the United States Supreme Court. *See* UNIFORM CODE OF MILITARY JUSTICE, art. 67.

58. The United States Disciplinary Barracks is the official military penitentiary for prisoners of the United States Army and the United States Air Force. *See generally* "Installations—United States Disciplinary Barracks," A.R. 210-170 (10 April 1964).

59. 409 F.2d 824 (10th Cir. 1969). At neither the federal district court nor the Tenth Circuit Court of Appeals did Relford raise the issue of court-martial jurisdiction for lack of service connection. The errors alleged at the lower level consisted of alleged inadequacy of counsel, improper lineup and involuntary confession. Each of these arguments was rejected. 409 F.2d at 824-25.

60. The Supreme Court's opinion in *O'Callahan* had not yet been published when Relford's decision by the Tenth Circuit was issued. However, the *O'Callahan* issue had been raised in O'Callahan's lower court proceedings; *see* U.S. *ex rel.* O'Callahan v. Parker, 390 F.2d 360, 363-64 (3rd Cir. 1968), *rev'd.*, 395 U.S. 258 (1969).

61. Brief for Government at 1, Relford v. Commandant, 401 U.S. 355 (1971).

offenses, even those committed on a military reservation, the military's interest should be limited to the power to arrest the suspect and turn him over to civilian authorities.[62] In reply, the government argued that *O'Callahan* itself recognized courts-martial jurisdiction encompassed more than pure military violations by its emphasis on the different factual factors which established lack of service connection.[63] In disputing the argued restriction of the military solely to the power of arrest, the government relied on the constitutional power invested in Congress "To make Rules for the Government and Regulation of the land and naval Forces"[64] and argued that "'Government and Regulation' necessarily carr[ied] with them the power to punish and not simply the power to arrest an accused."[65] The emphasis in *Relford* was clearly the on-post aspects of the crimes. The Government urged that the Court adopt a principle that court-martial jurisdiction would attach to any on-post crime against the person or against tangible property, *i.e.*, those crimes which directly implicated the physical security of the military reservation.[66] In spite of the request by some commentators that *O'Callahan* be overruled at the earliest possible moment,[67] the Supreme Court in *Relford* made clear from the outset that it was not reconsidering *O'Callahan*, but was merely applying it to the facts in *Relford*.[68] In its opinion, the Court laid great stress on the precise facts of *O'Callahan* which supported its conclusion that a court-martial lacked jurisdiction over that offense.[69] Twelve factors from *O'Callahan* were then abstracted as significant determiners of court-martial jurisdiction.[70] Those factors were then applied to the facts in *Relford*.

62. Brief for Petitioner at 10, Relford v. Commandant, 401 U.S. 355 (1971). This also was the position of the appellant at the oral argument which the author personally attended.

63. Brief for Government at 16-17.

64. U.S. CONST. art. I, § 8.

65. Brief for Government at 18.

66. *Id.*

67. *See, e.g.*, Everett, *O'Callahan v. Parker—Milestone or Millstone for Military Justice?*, 1969 DUKE L.J. 835, 896.

68. 401 U.S. at 360.

69. *Id.* at 365. In *O'Callahan*, the accused was on an evening pass, off-post and in civilian clothes. He entered a downtown hotel where he broke into the room of a young girl and attempted to rape her. He was subsequently arrested by civilian authorities who, upon learning his military status, released him to the military police. 395 U.S. 258, 259-60 (1969).

70. 401 U.S. at 365. Mr. Justice Blackmun abstracted the following factors from *O'Callahan* which indicated, in that case, a lack of sufficient service connection to warrant an exercise of court-martial jurisdiction:

1. The serviceman's proper absence from the base.
2. The crime's commission away from the base.

While some of the factors present in *O'Callahan* were also present in *Relford*,[71] there were significant factors which differentiated the two cases. Unlike the facts in *O'Callahan*, in this case

- Relford was not absent from the base;
- —the crimes were committed on the military enclave;
- —the second victim, because of her duties at the post exchange and because her abduction and subsequent attack took place as she was returning to the PX at the end of a short and approved break in her work, was engaged in the performance of a duty relating to the military;
- —the security of two women properly on the post was threatened and, indeed, their persons were violated.[72]

Further distinguishing the two situations were additional factors which were present in *Relford* but absent in *O'Callahan*. In *Relford*, one victim was a sister of a serviceman stationed at the base and the other victim was the wife of a serviceman who had quarters at the base.[73] Also, two automobiles, properly on base, were unlawfully entered.[74]

Although admitting that the *O'Callahan* decision and its application in *Relford* necessarily produced an *ad hoc* approach to the problem,[75] the

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3. Its commission at a place not under military control.
4. Its commission within our territorial limits and not in an occupied zone of a foreign country.
5. Its commission in peacetime and its being unrelated to authority stemming from the war power.
6. The absence of any connection between the defendant's military duties and the crime.
7. The victim's not being engaged in the performance of any duty relating to the military.
8. The presence and availability of a civilian court in which the case can be prosecuted.
9. The absence of any flouting of military authority.
10. The absence of any threat to a military post.
11. The absence of any violation of military property. One might add still another factor implicit in the others:
12. The offenses' being among those traditionally prosecuted in civilian courts.

71. It is at once apparent that elements 4, 5, 8, 11, and 12, and perhaps 5 and 9, operate in Relford's favor as they did in O'Callahan's: The offenses were committed within the territorial limits of the United States; there was no connection between Relford's military duties and the crimes with which he was charged; courts in New Jersey were open and available for the prosecution of Relford; despite the Vietnam conflict we may assume for present purposes that the offenses were committed in peacetime and that they were unrelated to any problem of authority stemming from the war power; military authority, directly at least, was not flouted; the integrity of military property was not violated; and the crimes of rape and kidnapping are traditionally cognizable in the civilian courts.
401 U.S. at 366.

72. *Id.*
73. *Id.* at 366-67.
74. *Id.*
75. *Id.* at 369.

Court, nevertheless, did enunciate a number of factors which would support court-martial jurisdiction, and which could be applied to any factual situation. The result has been that, in light of the *O'Callahan* and *Relford* decisions, and in light of the decisions of the Court of Military Appeals,[76] the military justice system has been accorded a number of indices which can be used in determining whether court-martial jurisdiction should be assumed in a particular case.[77] In all, the court listed nine factors which were stressed as supporting court-martial jurisdiction in *Relford*:

> (a) The essential and obvious interest of the military in security of persons and of property on the military enclave.[78]

Even *Relford* conceded the validity of this basic interest.[79] The government had strongly urged this point in its brief.[80] Indeed, this basic interest is so clear that it needs little discussion. The important point is that the Court was willing to upgrade this military interest in security of persons and property into support for judicial action with respect to violations of that security. The military's interest in the security of persons and property would not have been decreased if their power had been limited to that of arrest, as the petitioner contended. Of course, this factor, by the very nature of the *Relford* decision, would never be the sole factor in sustaining court-martial jurisdiction. The reason is that several other factors which were relied upon would always be present. One of these ever present factors was the second:

> (b) The responsibility of the military commander for maintenance of order in his command and his authority to maintain that order.[81]

This, in effect, sustained the government's position that the ability of the commander to carry out his military mission would be jeopardized if he were not able to follow up his arrests with prosecutorial proceedings

76. *See* text accompanying notes 11-47 *supra*.

77. Of course, there is still of necessity a small gray area in which court-martial jurisdiction is not clearly determined. "*O'Callahan* marks an area, perhaps not the limit, for the concern of the civil courts and where the military may not enter. The case today marks an area, perhaps not the limit, where the court-martial is appropriate and permissible. What lies between is for decision at another time." 401 U.S. at 369.

78. *Id.* at 367.

79. Brief for Petitioner at 9.

80. Brief for Government at 15.

81. 401 U.S. at 361. *See also* Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961); United States v. Jelinski, 411 F.2d 476 (5th Cir. 1969), *cert. denied*, 396 U.S. 943 (1969).

which, if successful, would result in disciplinary action being applied to the serviceman.[82] As was noted with respect to the first factor, the importance in the Court's stating this factor was that it translated what might be termed as an essentially military police[83] function into a reason for sustaining military jurisdiction over persons who are arrested pursuant to the exercise of that police function.

The third factor listed by the Court is perhaps least supportable by legal precedent or other authority, but most supportable by common sense:

> (c) The impact and adverse effect that a crime committed against a person or property on a military base, thus violating the base's very security, has upon morale, discipline, reputation and integrity of the base itself, upon its personnel and upon the military operation and the military mission.[84]

At almost every military installation, a substantial number of military personnel also reside in government quarters on the base. Crimes occurring on the base, particularly those crimes affecting persons or tangible property, cannot help but have a detrimental effect on the morale of those residing there. This is particularly true if the base is located in an area in which civilian prosecution of offenses occurring on military reservations is either lax or arbitrary.[85] Moreover, rampant and uncontrolled crime would have an adverse effect on the reputation of the installation. Finally, crimes against persons and tangible property occurring on the base would adversely reflect on the commander whose acknowledged duty is to secure the safety of the persons living there.

Necessarily, all cases concerning the jurisdiction of a court-martial must have their starting point with Article I, Section 8, Clause 14. In *O'Callahan,* the clause was interpreted to mean that status alone was not sufficient to sustain court-martial jurisdiction; the offense must be "service connected".[86] In *Relford* that same clause was further interpreted as significantly supporting court-martial jurisdiction over offenses which take place on a military base and are perpetrated against

82. Brief for Government at 15.

83. "Military police" is used in a broad connotation in the text. It has not been used in the limited sense that would normally apply to the Military Police branch of the United States Army.

84. 401 U.S. at 361.

85. *See* text accompanying notes 90-91 *infra.*

86. 395 U.S. at 271-73. Dissenting in *O'Callahan,* Mr. Justice Harlan stressed that the "Court has consistently asserted that military 'status' is a necessary *and sufficient* condition for the exercise of court-martial jurisdiction." 395 U.S. at 275 (emphasis in original).

individuals who are lawfully on that base. This was enunciated in the Court's fourth factor:

> (d) The conviction that Article I, Section 8, Clause 14, vesting in the Congress the power "To make Rules for the Government and Regulation of the land and naval Forces", means in appropriate areas beyond the purely military offense, more than the mere power to arrest a serviceman-offender and turn him over to the civil authorities. The term "Regulation" itself implies, for those appropriate cases, the power to try and punish.[87]

Herein lies one of the most important pronouncements in *Relford.* Presumably, the Court has thus ended arguments theretofore advanced that the military's interest in security of the base and safety for the personnel should be limited to the power to arrest and turn the suspect over to civilian authorities.[88] While certain gray areas still exist between *O'Callahan* and *Relford,* this factor makes sufficiently clear that, within the foreseeable future, the military will not be divested of court-martial jurisdiction over all offenses which are not peculiarly military type offenses.[89] Of course, as both Supreme Court decisions make doubly clear, the offense, even though not a violation of a uniquely military duty, still must have sufficient *nexus* to the military in order to sustain jurisdiction. Inferentially implied by the Court's pronouncement is that even though the Supreme Court has been somewhat reconstituted since the promulgation of *O'Callahan,*[90] it will be extremely reluctant to reconsider the basic tenets of that decision.

The practical implications that often support interpretations of constitutional language also emerge in the *Relford* decision. The pithy language of the Constitution sustains its flexibility by its ability to evolve different meanings to meet the challenges of the times. This is certainly true for the interpretation of the relevant constitutional clause in *Relford.* This is implicit in the Court's fifth factor:

> (e) The distinct possibility that civil courts, particularly nonfederal courts, will have less than complete interest, concern and capacity for all

87. 401 U.S. at 361.

88. The petitioner urged this position at the oral argument.

89. *See* text accompanying notes 62-66 *supra.*

90. Concurring with Mr. Justice Douglas in *O'Callahan* were Chief Justice Warren and Justices Black, Brennan and Marshall. Of that majority, all but the Chief Justice, who has since retired, concurred with the opinion of Mr. Justice Blackmun in *Relford.* New members of the Court who were not present for *O'Callahan* include the new Chief Justice and Mr. Justice Blackmun.

> the cases that vindicate the military's disciplinary problems within its own community.[91]

This factor is aimed solely at the practical problems of the military if *Relford* had ruled against court-martial jurisdiction. For example, if offenses occurring on-post by servicemen were thrust into the civilian courts, the practical result might be inadequate prosecution and a dissipation of discipline on the military post. This result could easily be caused if some local civilian prosecuting attorneys felt that their present workload was so high that they could not add to it by prosecuting servicemen for crimes occurring on a military base. This reflects the not uncommon attitude that if an offense is committed by a serviceman on a military installation, let the military worry about trying him. This last fact is a very important and significant reason why court-martial jurisdiction should be sustained for reasons unrelated to the pure questions of law surrounding court-martial jurisdiction.

The sixth factor elicited in *Relford* really abstracts the positive implications of *O'Callahan*. Mr. Justice Douglas's opinion set out a myriad of factors to be used in future *ad hoc* judicial determinations of "service connection". In *O'Callahan* all the factors tended away from service connection—the accused was on leave, off-post, and in civilian clothing; the crime was committed against a civilian. In *Relford*, the same factors supported service connection—the accused was on base when the crime was committed; the victims were properly on base since one was a wife and the other was a sister of a serviceman either stationed or living at the base.[92]

> (f) The very positive implication in *O'Callahan* itself, arising from its emphasis on the absence of service connected elements there, that the presence of factors such as geographic and military relationships have important contrary significance.[93]

In other words, that *O'Callahan* relied on so many factors—such as distance from post and military relationships—indicates that if those factors were not present, *O'Callahan* itself would uphold court-martial jurisdiction. This is in silent accord with Mr. Justice Blackmun's opening restrictive acknowledgement, *i.e.*, *Relford* was concerned only with the application of *O'Callahan*, not with its reconsideration.

The next factor amplifies earlier Court language which had heretofore

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91. 401 U.S. at 366.
92. *See* text accompanying notes 67-72 *supra*.
93. 401 U.S. at 366.

been restricted to a footnote in the majority opinion in *O'Callahan*[94] and to the dissenting opinion by Mr. Justice Harlan.[95] This is the significance of the victim's relationship to the military and of the nearness of the commission of the offense to a military installation as relating to the validity of the assumption of court-martial jurisdiction:

> (g) The recognition in *O'Callahan* that, historically, a crime against the person of one associated with the post was subject even to the General Article. The comment from Winthrop ". . . certainly so indicates and even goes so far as to include an offense against a civilian committed 'near' a military post."[96]

In comparing this factor with the guidelines established by the Court of Military Appeals,[97] it becomes evident that the Supreme Court perhaps enlarged the penumbra of court-martial jurisdiction over that permitted by the highest military court. In *United States v. Rego*,[98] the Court of Military Appeals had upheld the underlying principle that offenses perpetrated against fellow servicemen are, *ipso facto*, service connected. However, this holding was by a divided court and subject to continual assault.[99] The specific reference to that principle by the Supreme Court in a 9-0 decision will certainly solidly entrench the principle in the military, *i.e.*, that offenses committed against fellow servicemen are *per se* service connected. The other important aspect in the Court's delineation of this point is its statement that the basic Winthrop authority "even goes so far as to include offenses against a civilian committed 'near' a military post."[100] Quoting that language from

94. 395 U.S. at 274 n. 19.

95. *Id.* at 278-79.

96. 401 U.S. at 367. The quotation from Winthrop is as follows:

> Thus, such crimes as theft from or robbery of an officer, soldier, post trader, or campfollower . . . inasmuch as they directly affect military relations and prejudice military discipline, may properly be—as they frequently have been—the subject of charges under the present Article. On the other hand, where such crimes are committed upon or against *civilians*, and not at or near a military camp or post, or in breach or violation of a military duty or order, they are not in general to be regarded as within the description of the Article, but are to be treated as civil rather than military offenses.

W. WINTHROP, MILITARY LAW AND PRECEDENTS, 723-24 (2d ed. 1896) (footnotes omitted).

97. *See* text accompanying notes 11-47 *supra*.

98. 19 U.S.C.M.A. 9, 41 C.M.R. 9 (1969); United States v. Camacho, 19 U.S.C.M.A. 11, 41 C.M.R. 11 (1969).

99. 19 U.S.C.M.A. at 10, 41 C.M.R. at 10. *See also* United States v. Lovejoy, 20 U.S.C.M.A. 18, 42 C.M.R. 210 (1970); United States v. Cook, 19 U.S.C.M.A. 13, 41 C.M.R. 13 (1969); United States v. Plamondon, 19 U.S.C.M.A. 22, 41 C.M.R. 22 (1969); United States v. Nichols, 19 U.S.C.M.A. 43, 41 C.M.R. 43 (1969); United States v. Everson, 19 U.S.C.M.A. 70, 41 C.M.R. 70 (1969).

100. 401 U.S. at 368.

Winthrop approvingly—indeed, including it as one of the nine factors which the Court *stressed*[101]—certainly establishes a basis for a small enlargement of court-martial jurisdiction. For example, in a recent case decided prior to the *Relford* decision by the Court of Military Appeals, *United States v. Synder*,[102] the accused, a member of the United States Army, was convicted of involuntary manslaughter (child beating). The victim was the serviceman's own child, *i.e.*, a military dependent. Admittedly, the actual beatings occurred off-post; however, the victim died at the military hospital and, presumably, the serviceman's living quarters were somewhat proximate to the military base. The Court of Military Appeals concluded that there was no jurisdiction. It seems reasonable to argue that a different result would obtain if the *Snyder* case were decided after *Relford*. This argument is bolstered by the fact that the *Snyder* situation also fits into factors earlier discussed, *i.e.*; the distinct possibility that civil courts might have less than a complete interest in that type of situation,[103] and the victim was a dependent of a serviceman.[104] Another example in which court-martial jurisdiction might be validly assumed under this particular *Relford* factor, where it, presumably, would not have attached under earlier decisions, is the following: Sergeant Smith completes his normal duty day and, before leaving the military installation, changes into civilian clothing. Immediately upon departing the base, he walks across the street and hitches a ride from a passing motorist. Upon being picked up, he pulls a pistol out of his coat and forces the driver to proceed to a desolate area where the serviceman robs him and steals the car, leaving the victim stranded. The earlier decisions of the Court of Military Appeals would not have sustained court-martial jurisdiction. However, the Supreme Court's use of the entire Winthrop quotation,[105] and its indication, with no disapproval, that the principle would go "so far as to include an offense against a civilian committed 'near' a military post"[106] seems to dictate a contrary result. Thus, this factor enunciated by the Supreme Court will not only completely sustain the guidelines constructed earlier by the military courts, but also will provide a basis for an enlargement of

101. *Id.* at 367. The Court prefaced its list of factors supporting court-martial jurisdiction with the words "We stress". The fact that the Court stressed the factors further enlarges the significance of each of the factors.

102. 20 U.S.C.M.A. 102, 42 C.M.R. 294 (1970).

103. *See* text accompanying notes 90-91 *supra*.

104. *See* text accompanying notes 71-73 *supra*.

105. *See* note 96 *supra*.

106. 401 U.S. at 368.

offenses to which court-martial jurisdiction can legitimately attach.

The eighth factor listed by the Court is a declaration that *O'Callahan* would be entirely misread if it was interpreted to mean that the military's authority should be restricted to that of "arrest power" for all offenses which were not peculiarly military:

> (h) The misreading and undue restriction of *O'Callahan* if it were interpreted as confining the court-martial to the purely military offenses that have no counterpart in nonmilitary criminal law.[107]

This is intertwined with the Court's earlier reasoning that the Constitution vested in Congress the power to permit the military to try offenders and not merely to arrest them and turn them over to civil authorities.[108] This point had been strongly presented by the government in its brief and in its oral argument.[109] This point was deservedly written several times in different ways in the opinion, for it was the very premise upon which the entire *Relford* case turned. For *Relford* to be decided the other way, the crucial point would have been a ruling by the Supreme Court that the military had only the power to arrest suspects of offenses which were not peculiarly military offenses. If the petitioner had ever conceded that the military had jurisdiction to try some civilian type offenses and that the issue in his case was merely whether his offenses were service connected, Relford would have been summarily out of court. His offenses had so many "service connections" that by almost any rule he would still be subject to court-martial jurisdiction. Therefore, the importance of the decision, vis-a-vis this factor, was twofold: (1) the Court summarily refused to deny the military the power to prosecute servicemen for offenses which were not purely military in nature; (2) the Court, by its vote and by its language, significantly solidified and defined the concept of service connection.

The final factor in the *Relford* decision will lay to rest arguments which have been recurring, albeit unsuccessfully,[110] in the military. This is the argument that nonmilitary areas of a military reservation, *e.g.*, residential living quarters, provide a basis to conclude that there is no service connection. The corollary argument has been that if a serviceman commits a crime in off-duty hours, there also should be no service

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107. *Id.*

108. *See* text accompanying notes 62-66 *supra.*

109. Brief for Government at 17-18.

110. *See, e.g.*, United States v. Dale, C.M. No. 421584, ___ C.M.R. ___ (April 2, 1971).

connection. The death knell sounded quickly for these arguments:

> (i) Our inability appropriately and meaningfully to draw any line between a post's strictly military areas and its nonmilitary areas, or between a serviceman-defendant's on-duty and off-duty activities and hours on the post.[111]

After setting out these nine factors noted above, the Court went directly to its holding in the case:

> [W]e . . . hold, that when a serviceman is charged with an offense committed within or at the geographical boundary of a military post and violative of the security of a person or of property there, that offense may be tried by a court-martial. Expressing it another way: a serviceman's crime against the person of an individual upon the base or against property on the base is "service-connected" within the meaning of that requirement in *O'Callahan.*[112]

As with any decision by the Supreme Court an effort was made to restrict the decision to a narrow holding, *i.e.*, limiting it to the facts present in that case. However, also like any other decision by the Supreme Court, the importance of other language in the decision and the implications of that language carry great weight in the implementation of that decision by the lower federal and state courts. *Relford* will prove no exception in this regard.

IV. Unanswered Issues and Some Final Observations

Although, as Mr. Justice Blackmun pointed out, the *Relford* decision "should eliminate at least some of the confusion that the parties and commentators say has emerged from *O'Callahan,*"[113] it is also plain that important unanswered questions still remain for determination, hopefully by the Supreme Court in the near future. The first, of course, is the question of whether the rule of *O'Callahan* should be applied retroactively so as to invalidate convictions that became final before the date of the *O'Callahan* decision.[114] The Court, in declining to decide this

111. 401 U.S. at 369.

112. *Id.*

113. *Id.* at 370.

114. Brief for Government at 2. On July 19, 1971, a federal district judge ruled that the O'Callahan ruling must be applied retroactively to a navy seaman's 1944 conviction for auto theft. Fleming v. Chaffee, ___ F. Supp. ___, 9 Cr. L. Rptr. 2361 (E.D.N.Y. July 19, 1971). *See also* N.Y. Times, July 21, 1971, § 1, at 1, col. 5. It remains to be seen whether this view will be accepted by other district judges or by the appellate courts.

important question, admitted that the government had strongly urged a resolution of the issue.[115] Yet, it concluded that the issue would have to be resolved by the Court in some future litigation. The result of this inaction is that the rule of the Court of Military Appeals on this point still retains its vitality. Relying on earlier Supreme Court cases which had set the standard for determining the retroactivity of important rulings,[116] the Court of Military Appeals concluded in *Mercer v. Dillon*[117] that the rule announced in *O'Callahan* would apply only to those cases which were "still subject to direct review on the date of that decision."[118] Thus, the law in the military is firm on this point. The arguments in favor of only a prospective application of *O'Callahan* have been ably presented elsewhere[119] and require no repetition. Suffice it to say, as the Court of Military Appeals did in *Mercer*, that a retroactive application would mean that "the practical effect of voiding earlier convictions will often be to grant immunity from prosecution as a result of State statutes of limitations having run, witnesses having been scattered, and memories having been taxed beyond reasonable limits."[120]

The Supreme Court expressly left the retroactivity issue undecided in *Relford*. However, the issue is an important one and it will have a profound effect on a substantial number of individuals.[121] It remains to be seen whether the Supreme Court will receive a case in which that issue is squarely presented for its final determination.

Another very important unanswered question is whether the limiting effect on assumption of jurisdiction imposed by *O'Callahan* can be

115. 401 U.S. at 370.

116. DeStefano v. Woods, 392 U.S. 631 (1968); Stovall v. Denno, 388 U.S. 293, 297 (1967); Linkletter v. Walker, 381 U.S. 818 (1965).

117. 19 U.S.C.M.A. 264, 41 C.M.R. 264 (1970).

118. *Id.* at 265, 41 C.M.R. at 265. *See also* Enzor v. United States, 20 U.S.C.M.A. 257, 43 C.M.R. 97 (1971); United States v. Borys, 18 U.S.C.M.A. 547, 40 C.M.R. 259 (1969).

119. Everett, *O'Callahan v. Parker—Milestone or Millstone for Military Justice?*, 1969 DUKE L.J. 835, 886-89; Nelson & Westbrook, *Court-Martial Jurisdiction over Servicemen for "Civilian Offenses": An Analysis of O'Callahan v. Parker*, 54 MINN. L. REV. 1, 39-46 (1969); Rice, *O'Callahan v. Parker: Court-Martial Jurisdiction, "Service Connection", Confusion and the Serviceman*, 51 MIL. L. REV. 41, 75-79 (1970); Note, *Court-Martial Jurisdiction Limited to "Service-Connected" Case*, 44 TUL. L. REV. 417, 423-24 (1970). *See also* Mercer v. Dillon, 19 U.S.C.M.A. 264, 41 C.M.R. 264 (1970); Thompson v. Parker, 308 F.Supp. 904 (M.D.Pa.), *appeal dismissed*, ___ F.2d ___ (3rd Cir. April 24, 1970).

120. Thompson v. Dillon, 19 U.S.C.M.A. 264, 267, 41 C.M.R. 264, 267 (1970).

121. "When the ruling in *O'Callahan* was rendered, the Army Judge Advocate General stated that since 1951 . . . the Army alone had court-martialed approximately 1.3 million men and estimated that there were 450,000 courts-martial which might be invalid under *O'Callahan*." Brief for Government at 28.

waived by an accused. It seems clear that "jurisdiction" as used in *O'Callahan* is not synonymous with the traditional meaning of jurisdiction over persons and offenses.[122] Instead, the term is more akin to "assumption of jurisdiction" or an "exercise of jurisdiction"[123] by the military over offenses which are service connected. Once the hurdle is cleared that "service connection" is not *jurisdiction* in the traditional sense, the next question is whether an accused can waive the protective cloak of *O'Callahan*. Since the basic thrust of *O'Callahan* is the preservation for a serviceman of the right to grand jury indictment and jury trial—rights which themselves can be waived—it is more than reasonable to conclude that an accused serviceman could waive the right to be tried in a civilian court and, instead, elect to be tried by court-martial. Chief Judge Quinn of the Court of Military Appeals voiced this hypothesis in his dissenting opinion in *United States v. Prather*.[124] There, the accused was arrested by the civilian police and charged with wrongful appropriation of an automobile, armed robbery of a service station, and resisting arrest. Through the efforts of his civilian counsel, he succeeded in having the civilian authorities release him (with an informal agreement that the civilian authorities would not prosecute him) if the military "punished" him.[125] Judge Quinn reasoned that this was a waiver of the rights he would have had if he had been tried in the local state court and that, therefore, the court-martial had proper jurisdiction to try him for those offenses.[126] The same argument for waiver was presented in oral argument in *Relford* as part of the unsettled waters left in the wake of *O'Callahan*. The Solicitor General argued that in some instances it would be to the advantage of the serviceman if he would waive trial by civilian authorities and consent to court-martial jurisdiction. Suppose a black man was arrested for sexual assault upon a white girl in a small southern rural area. Because of his strong fear of retribution based on racial prejudice, the accused might well prefer to be tried by a military court-martial. Permitting him to waive *O'Callahan's*

122. If it is concluded that "jurisdiction" within the meaning expressed in *O'Callahan* is the same as the traditional concept of jurisdiction over persons and offenses, then *O'Callahan* must of necessity be retroactive. "Traditionally, lack of subject-matter voids a conviction." Mercer v. Dillon, 19 U.S.C.M.A. 264, 265, 41 C.M.R. 264, 265 (1970); *see also Ex parte* Siebold, 100 U.S. 371 (1880).

123. Brief for Government at 31-32. *Cf.* Mercer v. Dillon, 19 U.S.CM.A. 264, 41 C.M.R. 264 (1970); United States v. Prather, 18 U.S.C.M.A. 560, 40 C.M.R. 272 (1969); United States v. King, 40 C.M.R. 1030 (AFBR), *pet. denied*, 40 C.M.R. 327 (1969).

124. 18 U.S.CM.A. 560, 40 C.M.R. 272 (1969) (dissenting opinion).

125. *Id.* at 561, 40 C.M.R. at 273.

126. *Id.* at 561-62, 40 C.M.R. at 273-74.

penumbra of "constitutional protection" might be the only way this particular accused could receive a fair and impartial trial. The Court of Military Appeals has already rejected, perhaps conclusively, the concept that the *O'Callahan* doctrine can be waived by a particular accused.[127] Although presented as an important issue in *Relford*, the Supreme Court declined to speak on this issue. It is submitted that the Supreme Court should take the earliest opportunity to consider this issue and resolve it in favor of permitting an accused serviceman to waive the service connection rule if it is in his best interest to do so. This would, of course, necessarily include, like any waiver of a constitutionally protected right, a showing that the waiver was made knowingly and intelligently.[128]

Mr. Justice Blackmun wrote a strong opinion in favor of court-martial jurisdiction over offenses committed on a military reservation which involve the violation of the security of persons or property there.[129] This application of *O'Callahan* was expressed in a unanimous Supreme Court opinion. It might be argued that this was a strong victory in favor of court-martial jurisdiction. However, it is also just as reasonable to conclude that *Relford* merely stopped the erosion of court-martial jurisdiction which had been caused by *O'Callahan*. Perhaps *O'Callahan* represents the high-water mark on the extent of the limitation of court-martial jurisdiction. *Relford* establishes that the exercise of court-martial jurisdiction will continue to be upheld even though the offense is not a pure violation of a uniquely military duty.

The significance of the *Relford* decision does not clearly emerge from a simple reading of the opinion. Instead, the opinion must be viewed in light of the recent history of the Supreme Court's views on military justice and the proper scope of its jurisdiction. In what had appeared as a long but consistent history, the Supreme Court had continually constricted the jurisdiction of courts-martial.[130] In *Relford*, the Supreme

127. *Id.*

128. Boykin v. Alabama, 395 U.S. 238 (1969); Halliday v. United States, 394 U.S. 831 (1969); McCarthy v. United States, 394 U.S. 459 (1969).

129. The *Relford* decision will at least be of some benefit to military lawyers in the types of offenses within their realm of practice. *See generally* Everett, *O'Callahan v. Parker—Milestone or Millstone for Military Justice?*, 1969 DUKE L. J. 835, 895-96.

130. In 1955, the Supreme Court proscribed court-martial jurisdiction over discharged servicemen in United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955). Shortly thereafter, court-martial jurisdiction over dependents overseas was precluded under the Court's holdings in Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1961) and Reid v. Covert, 354 U.S. 1 (1957). Subsequently, under the decisions in McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960) and Grisham v. Hagan, 361 U.S. 278 (1960), civilian employees of the military were ruled not subject to court-martial jurisdiction. In O'Callahan v. Parker, 395 U.S. 258 (1969), the

Court refused to continue this trend. Instead, it held the *O'Callahan* limits steadfast—and may have even increased the scope of court-martial jurisdiction.[131] A second significant point is that the *Relford* opinion was by a unanimous Court. Whereas the *O'Callahan* opinion was scarred with inflammatory accusations in both the majority and dissenting opinions,[132] the *Relford* decision, issued less than two years later, reflected an unexpected concordant opinion on the proper scope of military jurisdiction. While it may be argued that the facts in *Relford* made its result highly predictable under *O'Callahan,* this view has merit only on hindsight. Until the announcement of the opinion, the result was highly unpredictable. As one commentator observed, "[i]n essence, Relford's crime mirror[ed] O'Callahan's except for its occurrence on post."[133] In view of the pronouncements in *O'Callahan* downgrading the entire military justice system,[134] it was hardly expected that the physical locus of the crime would necessarily determine whether the accused was to be tried by the civilian courts which would guarantee him his constitutional rights to grand jury and to trial by peers or whether the accused was to be tried by court-martial which "as an institution [was] singularly inept in dealing with the nice subtleties of constitutional law."[135] That *Relford* favors court-martial jurisdiction may well reflect a changed opinion among the members of the Supreme Court that the military justice system does protect the individual rights of the accused. Another significant point emanating from an examination of the *Relford* opinion is that it had the effect of *sub silentio* sustaining the great majority of the opinions of the United States Court of Military

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Supreme Court denied court-martial jurisdiction over those offenses which had no "service connection". For a discussion of the earlier cases, *see* Everett, *Military Jurisdiction Over Civilians,* 1960 DUKE L.J. 366. For a criticism of *O'Callahan see* Everett, *O'Callahan v. Parker—Milestone or Millstone for Military Justice?,* 1969 DUKE L.J. 835.

131. *See* text accompanying notes 140-41 *infra.*

132. Mr. Justice Douglas, speaking for the 5-3 majority, asserted the following barbs: "A court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved." 395 U.S. at 265. "[C]ourts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law . . ." *Id.* at 265-66. "[A] military trial is marked by the age old manifest destiny of retributive justice." *Id.* Mr. Justice Harlan, in his dissenting opinion, asserted that the majority view had "scant support" in English constitutional history and was "quite the contrary" to relevant American history. *Id.* at 276. He further alleged: "Absolutely nothing in the language, history, or logic of the Constitution justifies this uneasy state of affairs which the Court has today created." *Id.* at 284.

133. Zillman, *Recent Developments,* 52 MIL. L. REV. 169, 175 (1971).

134. *See* note 133 *supra.*

135. O'Callahan v. Parker, 395 U.S. 258, 265-66 (1969). *See also* note 132 *supra.*

Appeals.[136] Perhaps not as momentous as the points discussed earlier, this latter point is worth mentioning since it has the tacit effect of promoting and endorsing the competence and integrity of that court's pronouncements—no small fact in view of the recent number of notorious military cases which have been or will be reviewed by it. A final point, less important but again worthy of note, is that *Relford* was decided by a Court which had undergone important changes in composition since the *O'Callahan* opinion.[137] All the ramifications of this last point are not yet altogether clear and they must await further clarification in future decisions.

The Court did not, as some had urged,[138] overrule *O'Callahan*; it did, however,—by what was not said—establish that the scope of *O'Callahan* will not be enlarged in the near future.[139] On the contrary, the language and the authorities upon which the Court relied[140] lend strong support to a wider scope of service connected offenses than was perhaps initially indicated by the *O'Callahan* opinion. The Court's stress on the status of a victim who is a military dependent is one significant enlargement. Another enlargement might be premised on offenses committed against civilians *near* a military reservation. Each of these factors support a wider scope of service connected offenses.

The full meaning of *O'Callahan* has not yet emerged. There still must be decided the question of retroactivity and the question of waiver of the civilian court's jurisdiction. A propsective application of *O'Callahan*, conforming to the opinion of the Court of Military Appeals in *Mercer*,[141] would, it is submitted, result in the most equitable administration of

136. *Cf.* Zillman, *Recent Developments*, 52 MIL. L. REV. 169, 174 (1971).

137. The significance of this last factor is also dubious in view of Mr. Justice Douglas' silence in *Relford*. In view of the blistering effect of a number of his statements in *O'Callahan*, his unvoiced concurrence in *Relford* is somewhat surprising and perplexing. The changes in the Court, notably the addition of Chief Justice Burger and Mr. Justice Blackmun, have been expected to moderate somewhat the earlier Court decisions, particularly in the area of criminal law [*e.g.*, Harris v. New York, 401 U.S. 222 (1971)]. While the changed Court is often referred to as the "Burger Court", it should be noted that the Chief Justice has specifically rejected this appellation because: "the Court doesn't really warrant anybody's name being attached to it." Washington Post, July 6, 1971, at A-1, col. 2.

138. Everett, *O'Callahan v. Parker—Milestone or Millstone for Military Justice?*, 1969 DUKE L. J. 835, 896 (1969).

139. Although Mr. Justice Blackmun used the term that "perhaps" neither *O'Callahan* nor *Relford* represent the limits of civilian or court-martial jurisdiction in this area, it seems rather clear that the two decisions of the Supreme court-martial jurisdiction in this the military courts' opinions, have reasonably constructed workable concepts of "service connection".

140. *See* note 96 *supra*.

141. *See* text accompanying notes 114-19 *supra*.

justice. As to waiver, the public interest in fair and impartial trials would best be served by permitting an accused serviceman to waive the "benefits" of *O'Callahan* and elect to be tried by a military court-martial, if he so desires. Permitting him to make the decision insures that he will have those benefits to which he is entitled. Resolving these two issues in the manner indicated will preserve the basic tenets of the military justice system and will, prospectively, add further protections for the accused.