Relford v. Commandant; Fashioning A Military Jurisdictional Test After *O'Callahan*

James F. O'Callahan, an enlisted man in the United States Army, was tried and convicted by a military court martial for allegedly raping a civilian woman.[1] At the time of the offense, petitioner was off base and on leave, dressed in civilian clothes and within the jurisdiction of civilian courts.[2] Thirteen years later, O'Callahan's case was reviewed and reversed by the Supreme Court. In its landmark decision of *O'Callahan v. Parker*, 395 U.S. 258 (1969),[3] the Court *held* that a military court martial could not try a soldier, unless it could show that the alleged wrongs were "service connected."[4] In the case of *O'Callahan*, the military's connection to this crime, namely the fact that it was committed by a soldier, was no longer enough by itself to vest the military with jurisdiction.[5]

While the majority established a new "service connected" test, upon which jurisdiction would depend, they mentioned no general standards for determining its scope.[6] Justice Harlan, in dissent, warned the Court

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1. United States v. O'Callahan, 7 U.S.C.M.A. 800 (1957). O'Callahan was charged with attempted rape, housebreaking and assault with intent to rape in violation of Articles 80, 130 and 134, 10 U.S.C. §§ 880, 930, 934 (1964) of the Uniform Code of Military Justice [hereinafter cited as U.C.M.J.].

2. In July, 1956, the petitioner was stationed at Fort Shafter, Oahu. On the evening pass mentioned, he was in Honolulu, Hawaii, which at that time was still a territory of the United States.

3. United States *ex rel* O'Callahan v. Parker, 390 F.2d 360 (3rd Cir. 1968), *aff'g* 256 F. Supp. 679 (M.D. Pa. 1966). While serving his sentence of confinement for ten years, petitioner filed with the District Court for the Middle District of Pennsylvania a petition for a writ of habeas corpus, alleging *inter alia* that the court martial was without jurisdiction. The district court denied relief and the court of appeals for the third circuit affirmed.

4. O'Callahan v. Parker, 395 U.S. 258 (1969). "We have concluded that the crime to be under military jurisdiction must be service connected, . . ." 395 U.S. at 272.

5. Kinsella v. United States *ex rel* Singleton, 361 U.S. 234, 240-241 (1960). In this, the Court's prior major decision pertaining to military jurisdiction, it hinted strongly that "status" was the sole consideration. Under this criterion, if the military had jurisdiction over the person, then jurisdiction over the offense automatically followed.

6. O'Callahan v. Parker, 395 U.S. 258 (1969). "[T]he Court suggests no general standard for determining when the exercise of court martial jurisdiction is permissible." 395 U.S. at 284 (Harlan, J. dissenting).

that it had "thrown the law in this realm into a demoralizing state of uncertainty."[7]

The accuracy of this contention was formally recognized when certiorari was granted to hear *Relford v. Commandant*,[8] a case chosen for determining the scope of *O'Callahan v. Parker*.[9]

In 1961, Isiah Relford, then a corporal in the United States Army, was charged and convicted by a military court martial of kidnapping and raping two women.[10] His first victim, the fourteen-year-old sister of another serviceman, was abducted while waiting in a parked automobile located in a hospital parking lot.[11] His second victim, the wife of a serviceman who lived at Fort Dix, was abducted while she was returning to the PX where she worked as a waitress.[12] At the time of the alleged crimes, petitioner was on an evening pass and dressed in civilian clothes.[13] It was also undisputed that both offenses took place on the Army base of Fort Dix.[14] Both women were also civilians.

Justice Blackmun, writing for a unanimous Court, *held* "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."[15]

Relford will not end the confusion which has stemmed from

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7. 395 U.S. at 275.

8. 397 U.S. 934 (1970).

9. *Id.* Originally, *Relford* was to determine the scope and retroactive application of *O'Callahan*. Though the parties argued both issues, and the Government in particular pressed for a decision on the latter one, the Court abstained stating, "the issue is better resolved in other litigation where, perhaps, it would be solely dispositive of the case." Relford v. Commandant, 401 U.S. 355, 370 (1971).

10. United States v. Relford, 14 U.S.C.M.A. 687 (1963). Petitioner was charged with violations of Articles 120 and 134, 10 U.S.C. §§ 920, 934 (1964) of the U.C.M.J. Article 120 includes all of the sexual intercourse clauses; Article 134 is the "general" article which includes all conduct deemed to be prejudicial to good order and discipline in the armed forces. On May 20, 1970, Relford was released on parole.

11. At the time the abduction occurred, the brother of the victim, a serviceman stationed at Fort Campbell, Kentucky, was visiting with his wife shortly after she had given birth at the base hospital.

12. At the time this second abduction occurred, complainant was returning from her dinner break. She was able to attract the attention of nearby military police while her assailant was still in the car. This led to Relford's apprehension.

13. Relford v. Commandant, 401 U.S. 355, 360 (1971). Brief for Petitioner at 5, Relford v. Commandant, 401 U.S. 355 (1971).

14. More specifically, both offenses occurred on the military reservation known as Fort Dix, and the contiguous McGuire Air Force Base.

15. Relford v. Commandant, 401 U.S. 355, 369 (1971).

O'Callahan, as the following paper will show. The uncertainty resulting from the "service connected" test does provide us, however, with an excellent example of what can unfold, when the jurisdictional test for competing court systems is predicated upon words, open to interpretation, rather than firmly defined limits which are beyond the reach of syllogistic logic and verbal manipulation.

Constitutional Factors

The military court martial[16] is a creation of Congress pursuant to its power to make "Rules for the Government and Regulation of the land and naval Forces," as supplemented by the "necessary and proper" clause.[17] Most controversies pertaining to military jurisdiction center upon the proper extent of the "necessary and proper" clause.[18] In a subjective sense, the tone of *O'Callahan* indicates that this has been no exception to the rule; the majority simply considered the military's jurisdiction extended to an unwarranted degree to encompass this case.[19]

But nowhere in *O'Callahan* did the Court actually hold this. Instead, the dispositive constitutional factor in the *O'Callahan* decision appears to be the assurance of an indictment and trial by grand jury for servicemen.[20] A trial by grand jury is guaranteed to all civilians.[21]

16. The U.C.M.J. provides the basic code for military law, and the judicial tribunal established for the enforcement of this body of law is the court martial, as opposed to martial law and the law of war. Nelson & Westbrook, *Court Martial Jurisdiction Over Servicemen for "Civilian" Offenses; An Analysis of O'Callahan v. Parker*, 54 MINN. L. REV. 1, 22 (1969).

17. U.S. CONST. art. I, § 8, provides in part: "The Congress shall have Power . . . To raise and support Armies . . . To provide and maintain a Navy . . . To make Rules for the Government and Regulation of the land and naval Forces . . . To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers. . . ."

18. *See* notes 36, 37 and 44, *infra*.

19. O'Callahan v. Parker, 395 U.S. 258 (1969). At one point the Court stated:

> Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service . . . . Determining the scope of the constitutional power of Congress to authorize trial by court martial presents another instance calling for limitation to "the least possible power adequate to the end proposed."

Id. at 265. In the above passage, the Court quoted dicta from *Toth v. Quarles*, 350 U.S. 11, 22-23 (1955), where the issue was the proper extent of the necessary and proper clause.

20. O'Callahan v. Parker, 395 U.S. 258 (1969). "[W]e see no way of saving to servicemen and servicewomen in any case the benefits of indictment and of trial by jury, if we conclude that this petitioner was properly tried by court-martial." 395 U.S. at 273.

21. U.S. CONST. art. III, § 2, reads as follows: "The trial of all crimes, except on

However, the fifth amendment exempts all "cases arising in the land and naval forces" from these basic rights. The interpretation of this phrase raised a corollary issue in *O'Callahan*, namely, can citizens in the armed forces retain these constitutional rights at least partially, or were they automatically shed upon entry into the armed forces.[22]

If the fifth amendment exemption is viewed as going to the source of Congress' power to provide for courts martial,[23] along with the "rules and regulations" phrase of article I, section 8, then these basic rights would not be available to members of our armed forces.[24] For just as the "rules and regulations" must apply to all without exception, so must the fifth amendment exemption be applicable to all in the "land and naval forces."

In *O'Callahan*, this blanket application of the fifth amendment has been explicitly rejected. Writing for the Court, Justice Douglas stated that the fifth amendment need not "be expanded to deprive every member of the armed forces . . . the benefits of an indictment by grand

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cases of impeachment, shall be by jury." U.S. CONST. amend. V, provides in part: "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment by a grand jury, except in cases arising in the land and naval Forces. . . ."

22. Brief for Petitioner at 8, Relford v. Commandant, 401 U.S. 355 (1971), states in part:

> Finally, it is implicit in this Court's decision that all citizens, regardless of their military status, are entitled to the fundamental rights of indictment by grand jury and trial by jury in a civilian court guaranteed them by the Constitution unless they are in fact members of the armed forces and unless the crimes of which they are accused have an immediate adverse effect upon the ability of the military to perform its mission. Citizens of the United States do not automatically shed their citizenship upon entry into the armed forces.

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

23. Kahn v. Anderson, 255 U.S. 1 (1921). In noting the prevailing view of the time, the Court stated:

> [A] further contention, that they could not be tried by a military court because Congress was without power to so provide consistently with the guarantees as to jury trial and presentment or indictment by grand jury, respectively, . . . is also without foundation since it directly denies the existence of a power in Congress exerted from the beginning and disregards the numerous decisions of this Court by which its exercise has been sustained.

Id. at 8-9.

24. Toth v. Quarles, 350 U.S. 11 (1955). Justice Black directly rebutted this presumption in a footnote when he stated: "This provision (the fifth amendment) does not grant court martial power to Congress, it merely makes clear that there be no indictment for such military offenses as Congress can authorize military tribunals to try under its article I power to make rules to govern the armed forces." 350 U.S. at 14 n. 5.

jury and a trial by a jury of his peers."[25] "If the case does not arise 'in the land and naval forces', then the accused gets first, the benefits of an indictment by a grand jury and second, a trial by jury before a civilian court as guaranteed by the Sixth Amendment . . ."[26] Thus, the phrase "arising in the land and naval forces," after *O'Callahan*, must be read as requiring the actual "offense" to arise within the land and naval forces, rather than just the "person."

But when has the offense taken place within the armed forces?

Relford answers this question, at least partially, by stating that "a serviceman's crime against the person of an individual upon the base or property on the base is 'service connected.' "[26.1] In other words, location is one determinative factor. Thus, after *Relford,* the fifth amendment exemption still retains sufficient breadth to deprive all servicemen of trials and indictments by grand jury, if the situs of the offense is on a military base.

Legislative and Judicial History Behind Relford

In 1776, the Continental Congress adopted the first Articles of War.[27] Included in these Articles was the provision that:

> whenever any officer or soldier shall be accused of a capital crime, or of having used violence, or committed any offense against the persons or property of any of the United States, such as is punishable by the known laws of the land, the commanding officer . . . to which the persons so accused shall belong, are hereby required . . . to use his utmost endeavors to deliver over such accused person or persons to the civil magistrate.[28]

In 1806, the Articles of 1776 were reenacted and then not formally revised until 1874. In general, these Articles restricted themselves to punishment of crimes which had a "reasonably direct and palpable impact on military discipline."[29] The concept of peacetime court martial jurisdiction over civilian crimes committed by soldiers did not creep

25. O'Callahan v. Parker, 395 U.S. 258, 273 (1969).

26. *Id.* at 262.

26.1. Relford v. Commandant, 401 U.S. 355, 369 (1971).

27. 2 JOURNALS OF THE CONTINENTAL CONGRESS III (Ford ed. 1905). *See* Ujevich, *Military Justice; A Summary of Its Legislative and Judicial Development* 1 (Legislative Reference Service, Library of Congress).

28. Section X, art. I, of the Articles of War of 1776.

29. Duke & Vogel, *The Constitution and Standing Army; Another Problem of Court Martial Jurisdiction*, 13 VAND. L. REV. 435, 446-51 (1960).

into our law until the revised Articles of War of 1916.[30] But by 1950, the Articles of War began to include a wide range of civilian type crimes, including for the first time several which carried the death penalty.[31] With the 1950 Code's inclusion of capital offenses, the last vestige of restraint upon jurisdiction over civil crimes had toppled.[32] In 1968, the Military Justice Act made no changes in this regard.[33] Thus, it has been this 1950 Code which has confronted the Court in all of its recent decisions leading up to *Relford*, beginning with *Toth v. Quarles* in 1955.[34]

In *Toth*, the Court confronted the issue of whether the "necessary and proper" clause gave the military the right to prosecute discharged soldiers for the crimes they committed while in the service.[35] Viewing this as an encroachment upon the jurisdiction of article III courts, affecting at that time over three million civilians, the Court ruled this an unnecessary extension and struck it down.[36] In *Reid v. Covert*,[37] argued twice before the Court and decided two years later, the issue again was the "necessary and proper" clause and whether this gave the military the right to try by court martial, civilian dependents accompanying members of the armed forces overseas. Again it was the encroachment upon the jurisdiction of civil courts and the denial of a jury trial which moved the Court to hold that the Bill of Rights cannot be abridged at the expense of an extension of the "necessary and proper" clause.[38]

In 1960, the Court decided three companion cases, all of which involved article II(11) of the 1950 Code.[39] This provided for the trial by court martial of all persons serving with, employed by or accompanying the armed forces in foreign countries during times of peace and war. In

30. Bishop, *Court Martial Jurisdiction Over Military-Civilian Hybrids; Retired Regulars, Reservists and Discharged Prisoners*, 112 U. PA. L. REV. 317, 327 (1964).

31. McCoy, *Due Process for Servicemen; The Military Justice Act of 1968*, 11 WM & MARY L. REV. 65, 67-68 (1969).

32. Duke & Vogel, *supra* note 29.

33. McCoy, *supra* note 31.

34. 354 U.S. 1 (1955).

35. U.C.M.J., Art. 3(a), Act of May 5, 1950, ch. 169, § 1, 64 Stat. 109 (formerly codified as 50 U.S.C. § 553 (1960)) provided in part: "any person charged with having committed while in a status in which he was subject to this chapter, an offense against this chapter, punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States . . . shall not be relieved from amenability to trial by courts martial by reason of the termination of said status."

36. Toth v. Quarles, 350 U.S. 1, 19 (1955).

37. 354 U.S. 1 (1957).

38. *Id.* at 20-21.

39. 10 U.S.C. § 802 (1964).

the principle decision, *Kinsella v. Singleton*,[40] petitioner was the mother of a serviceman and thus fit the description of one who was accompanying the armed forces. In *Grisham v. Hagan*,[41] petitioner was a civilian employee charged with a capital offense, while in *McElroy v. Guagliardo*,[42] the charges involved a civilian employee accused of a non-capital crime.[43] Pointing to *Reid* as controlling, the Court ruled again that the "necessary and proper" clause cannot be expanded to include prosecution by court martial for civilians charged with either capital or non-capital crimes.[44] Justice Clark stated for the majority, "The test for jurisdiction, it follows, is one of status, namely, whether the accused in the court martial proceeding is a person who can be regarded as falling within the term land and naval forces."[45] Justice Clark went on to state "without contradiction, the materials furnished show that military jurisdiction has always been based on the 'status' of the accused, rather than on the nature of the offense."[46]

Running through this series of decisions, four common threads can be detected. First, they all purport to decrease the number of people subject to a court martial's power.[47] Second, there is a tone of mistrust toward the military system of justice that is sounded throughout these opinions.[48] Third, there is a fear of encroachment on the part of the military, into areas of civil jurisdiction.[49] Fourth, and perhaps most pervasive of all, is the desire of the Court to protect the rights of trial and indictment by grand jury from being infringed by the military.[50]

The next major decision pertaining to military jurisdiction was

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40. 361 U.S. 234 (1960).

41. 361 U.S. 278 (1960).

42. 361 U.S. 281 (1960).

43. The distinction between a capital and non-capital offense was necessary, because *Reid* involved a capital offense, and was construed by the military as only applying to capital offenses.

44. Kinsella v. Singleton, 361 U.S. 234, 249 (1960); Grisham v. Hagan, 361 U.S. 278, 280 (1960); McElroy v. Guagliardo, 361 U.S. 281, 284 (1960).

45. Kinsella v. Singleton, 361 U.S. 234, 240-41 (1960).

46. *Id.* at 243.

47. In *Toth*, the Court removed discharged soldiers from the 1950 U.C.M.J. In *Reid*, they removed civilian dependents and in *Kinsella*, it was civilians accompanying the armed forces. In *McElroy* and *Hagan*, it was civilians employed by the armed forces.

48. Toth v. Quarles, 350 U.S. 11, 23 (1955); Reid v. Covert, 354 U.S. 1, 24, 25, 27 (1957); Kinsella v. Singleton, 361 U.S. 234, 240 (1960).

49. Toth v. Quarles, 350 U.S. 11, 15 (1955); Reid v. Covert, 354 U.S. 1, 6-10 (1957); Kinsella v. Singleton, 361 U.S. 234, 237, 249 (1960).

50. Toth v. Quarles, 350 U.S. 11, 17 (1955); Reid v. Covert, 354 U.S. 1, 6-10 (1957); Kinsella v. Singleton, 361 U.S. 234, 237, 249 (1960).

O'Callahan v. Parker.[51] All four threads of concern, noted above, can also be found in this decision.[52] That is to say, that all of the concerns which moved the Court as they did in *Toth, Reid*, and *Kinsella*, reappeared again in *O'Callahan* and influenced the Court to go in the direction which it did. As for the end result, this decision represents a significant departure from those mentioned above, in the following respects.

To begin with, *O'Callahan* revolved around a soldier in an active duty status, rather than a civilian. In the context of these cases, this represents a wholly new subject matter; namely, a member of the land and naval forces, rather than one who is not. Second, *O'Callahan* turns on whether the crime is cognizable by civilian courts, rather than the proper scope of the "necessary and proper" clause. This is the first decision of the Court which draws a distinction between crimes peculiarly military in nature and crimes which are not. Finally, *O'Callahan* flatly rejects the dicta in *Kinsella* pertaining to "status," and establishes a new and narrower ground for court martial jurisdiction, the service-connection requirement.

If *O'Callahan* were to be interpreted liberally, what this decision seems to be saying, is that there is no longer any justification for a dual system of courts, operating and sharing concurrent jurisdiction over any single segment of the citizenry, military included. What this means really, is that the court martial is to confine itself to only purely military offenses. On the other hand, if *O'Callahan* is given a strict interpretation, then the court martial could decide civilly cognizable crimes that range over the entire spectrum of criminal law, provided that they can find something, regardless of how insignificant or small, from which they can draw a service connection. In other words, the scope given to *O'Callahan* is a matter which can be as important as the original decision itself.

This is why *Relford* promised to be the next major statement forthcoming on military jurisdiction. The liberal construction of *O'Callahan*, noted above, was forcefully offered on petitioner's behalf;[53] and just as forcefully, it was rejected.[53.1] In dicta which might come back

51. 395 U.S. 258 (1969).

52. O'Callahan v. Parker, 395 U.S. 258 (1969). Decreasing the people subject to military authority, 395 U.S. at 272. For the lurking dangers which the military has always posed to the liberty of free nations, 395 U.S. at 265. For concern over the expanding domain of the military, 395 U.S. at 265. For preventing a denial of fifth and sixth amendment rights, 395 U.S. at 277.

53. Relford v. Commandant, 401 U.S. 355, 363-64 (1971).

53.1. *Id.* at 657. Here the Court quoted with approval from W. WINTHROP, MILITARY

to haunt the Court, an interpretation was adopted, which was slightly less than generous. Thus, the military's continued jurisdiction over all types of civilly cognizable crimes, appears to be assured for at least the forseeable future.

Interpreting O'Callahan: The Military Court of Appeals

Because of its subject, and jurisdiction, *O'Callahan* has been open to interpretation on two fronts, through both the military and civilian court systems. A large number of decisions turning on *O'Callahan* have been decided by the Military Court of Appeals. From these, a relatively clear set of guidelines has emerged.

First, there is the guideline put forth under the rationale which holds that "any act by a serviceman in violation of the Uniform Code which takes place on a military base affects the 'security' of the base, and is triable by court martial as a service connected offense, even though the victim is a civilian and the act also contravenes the penal code of the State in which the case is located."[54] Comporting with this guideline, the Military Court of Appeals has on two occasions sustained the court martial's jurisdiction in homicide cases.[55] But more anomalous are cases in which the court has found the "security" of the base affected by the issuing of two checks,[56] the larceny of a civilian's truck,[57] carnal knowledge of another soldier's daughter under the age of sixteen,[58] and sodomy in government housing located within the confines of the base.[59] In one case, where the offense originated and ended in the civilian community, the court martial's power was sustained because the course of the crime crossed one of the base's outer gates.[60] Thus, the essence of

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LAW AND PRECEDENTS 723-24 (2d ed. 1896, 1920 Reprint):

> Thus such crimes as theft from or robbery of an officer, soldier, post-trader, or camp-follower . . . 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.

54. United States v. Peterson, 19 U.S.C.M.A. 319, 41 C.M.R. 319 (1970).

55. United States v. Allen, 19 U.S.C.M.A. 605, 40 C.M.R. 317 (1969); United States v. Fields, 19 U.S.C.M.A. 119, 41 C.M.R. 119 (1969).

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

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

58. United States v. Smith, 18 U.S.C.M.A. 609, 40 C.M.R. 321 (1969). *See also* United States v. Henderson, 18 U.S.C.M.A. 601, 40 C.M.R. 313 (1969). Though the crime in *Henderson* was identical to that which took place in *Smith*, because the crime took place outside of the base, charges were dropped.

59. United States v. Shockley, 18 U.S.C.M.A. 610, 40 C.M.R. 322 (1969).

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

this guideline is location, rather than security. What this suggests is that if any element of the crime can be found to have occurred on the military base, this will suffice to vest the court martial with the service connection required. This may be so, even if material elements of the crime have reached beyond the base's perimeter, affecting the civilian community's "security" even more.

A second guideline has been founded "on the view that an offense is service connected if the accused's military status was the 'moving force' in its commission,"[61] even though reliance on the military association "is not an element of the offense and in fact, is simply irrelevant to the charge."[62] Here the Military Court of Appeals has sustained jurisdiction in a forgery case where military status was emphasized and relied upon;[63] wrongful appropriation of an auto because a soldier's uniform led a used car salesman to trust him enough to let him take a test ride;[64] forgery and issuing of bad checks because they included a military address;[65] and positive misuse of an officer's uniform used to obtain credit which he could not repay.[66] Expressed in its true form, this guideline dictates that

involved the robbery of a cab driver. Defendant began his assault while the driver was going toward the base. At the time the driver was being assaulted, the cab crossed a military gate and then headed for a civilian district. Here the driver was robbed. Because an element of the robbery, assault, was inflicted while on military property, the court martial's sentence was upheld.

61. United States v. Peterson, *supra* note 54.

62. United States v. Hallahan, 19 U.S.C.M.A. 46, 41 C.M.R. 46 (1969) (Ferguson, J. dissenting).

63. United States v. Morisseau, 19 U.S.C.M.A. 17, 41 C.M.R. 17 (1969). *See also* United States v. Frazier, 19 U.S.C.M.A. 40, 41 C.M.R. 40 (1969).

64. United States v. Peak, 19 U.S.C.M.A. 19, 41 C.M.R. 19 (1969). In a vigorous dissent, Judge Ferguson wrote:

> [A]n exception which my brothers deem is sufficient to clothe a court martial with jurisdiction is that the accused was wearing his military fatigue uniform at the time he obtained permission to drive the auto . . . the charge wasn't misuse of the uniform. . . . The majority however, has used this as a vehicle to grant military jurisdiction over an offense which is not otherwise service connected.

65. United States v. Hallahan, *supra* note 62. Again in dissent, Judge Ferguson wrote:

> The apparent rationale behind the use of this factor of affirmance is that it reflects discredit upon the armed services. But discredit upon the armed services is properly chargeable only under Article 134, 10 U.S.C. § 934 (1964). Uttering of a false instrument is defined in Article 123, 10 U.S.C. § 923 (1964). A violation of that article is not at the same time a violation of Article 134.

66. United States v. Fryman, 19 U.S.C.M.A. 71, 41 C.M.R. 71 (1969). This case should be distinguished from the other cases listed under this guideline, for here the accused did intentionally and wrongfully use a uniform that was not his own. He was an enlisted man, and the uniform belonged to an officer. The charges in this case actually included misrepresentation.

if there is any evidence of reliance upon the accused as military personnel, this nexus is sufficient because it is assumed that the accused status was a "moving force" in the commission of the offense. In other words, the crux upon which this guideline rests is reliance upon status by another, rather than wrongful use of one's status by the accused.

A third guideline advanced by the military court of appeals pertains to crimes which carry a special military significance, and thus are deemed to be detrimental to the "health, morale and fitness for duty of persons in the armed services."[67] Considered to be of special military significance so far, are all offenses pertaining to either the use or possession of marijuana or drugs.[68] Under this guideline, it is immaterial whether the accused was apprehended while off base and off duty at the time, for the court martial's power rests on Article 134,[69] which prohibits all disorders "to the prejudice of good order and discipline. . . ."[70] It should be noted, however, that this is a guideline predicated on "special significance" and then grouped under Article 134, rather than the reverse. At least a majority of the military's highest court has not yet suggested that the "general" article be used as a subterfuge for bringing a case within the purview of the service connection requirement.[71]

A fourth guideline dictates that a court martial is empowered to listen to all offenses arising between or committed against any soldier by any other member of the armed forces, regardless of where the crime took place. Cases sustained under this rule include robbery committed off base against fellow soldiers while all concerned were off duty;[72]

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67. United States v. Boyd, 18 U.S.C.M.A. 581, 40 C.M.R. 293 (1969).

68. 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. 563, 40 C.M.R. 310 (1969); United States v. Rose, 19 U.S.C.M.A. 3, 41 C.M.R. 3 (1969); United States v. Adams, 19 U.S.C.M.A. 75, 41 C.M.R. 75 (1969).

69. 10 U.S.C. § 934 (1964).

70. *Id.* Article 134 is known also as the "general" article. This provides:

> 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 in 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 the court.

71. United States v. Fryman, *supra* note 66. The majority stated: "We are aware that not all offenses that might be discrediting under Article 134, 10 U.S.C. § 934 (1964) are service connected under *O'Callahan*." Chief Judge Quinn dissented from this reasoning.

72. United States v. Nichols, 19 U.S.C.M.A. 43, 41 C.M.R. 43 (1969). Judge Ferguson, dissenting in this case wrote: "The gravamen of the term 'service connected'

housebreaking not committed against the other officer personally, but rather against his off-base residence and property;[73] housebreaking with the intent to simply commit larceny, it being mere happenstance that the home belonged to one in the military;[74] and personal robbery where the status of the victims, dressed at that time as civilians, was unknown to the accused.[75] The test then, is the status of the victim after investigation. This guideline represents another instance where a service connection is presently claimed, though there might be no military significance attached to the offense other than the status of those involved.[76]

A fifth guideline states that *O'Callahan* is not to be applied extraterritorially.[77] This is supported by a consistent series of decisions which claim that a court martial's power abroad rests on our international treaties, such as the NATO Status of Forces Agreement.[78]

Still a sixth guideline asserts that *O'Callahan* is not applicable when the maximum punishment provides for penalties of six months duration or less. The rationale is that these are petty crimes, and thus, a trial by jury would not be guaranteed even in a civil court.[79] Because no constitutional rights of the accused would be abridged by a trial under court martial, the rule of *O'Callahan* is held not to apply.[80]

The last guideline provides that when the accused has committed a crime within the United States, cognizable by the civilian courts, while off base and off duty at the time; and where there is no evidence that his military status was a "moving force" in the crime's commission; and

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as formulated by the Supreme Court is, in my opinion, the actual impact of the offense on military matters. If the offense tends realistically toward some direct deleterious effect on military matters or discipline, then the offense is service connected. If however, the effect of the offense on military matters of discipline is remote [as he felt it was here], then military jurisdiction may not constitutionally attach."

73. United States v. Rego, 19 U.S.C.M.A. 9, 41 C.M.R. 9 (1969).

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

75. United States v. Plamondon, et al, 19 U.S.C.M.A. 22, 41 C.M.R. 22 (1969).

76. This guideline appears to be in direct conflict with the Court's reasoning. *See* O'Callahan v. Parker, 395 U.S. 258, 267 (1969).

77. Two distinct issues are raised under this guideline. Setting the rule of *O'Callahan* aside in Vietnam is not analogous to setting the rule aside in West Germany, years after the Second World War has ended. See discussion accompanying notes 122 to 125 *infra.*

78. United States v. Keaton, 19 U.S.C.M.A. 64, 41 C.M.R. 64 (1969); United States v. Stevenson, 19 U.S.C.M.A. 69, 41 C.M.R. 69 (1969); United States v. Easter, 19 U.S.C.M.A. 68, 41 C.M.R. 68 (1969); United States v. Blackwell, 19 U.S.C.M.A. 196, 41 C.M.R. 196 (1970); United States v. Higgenbotham, 19 U.S.C.M.A. 73, 41 C.M.R. 73 (1970).

79. Cheff v. Schnackenberg, 384 U.S. 373 (1966).

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

which was not directed at either another soldier or his property and was not something of special significance to the military, then the court martial's power is barred by *O'Callahan* from proceeding, and the military charges must be dropped.[81] In short, the Military Court of Appeals has adopted a construction of the *O'Callahan* test which limits its applicability strictly to the facts of that case.

One more point deserves mentioning, before leaving the military's interpretation of *O'Callahan*. Even when a crime is cognizable and the situs is obviously within the jurisdiction of an article III court, the military judiciary, after *O'Callahan*, still does not feel itself pre-empted from proceeding against the accused. The Military Court of Appeals stated:

> We have determined that the right of a state to prosecute a serviceman for murder in violation of state law because it has concurrent jurisdiction with the military over the place where the act was committed, does not eliminate the "military significance" of the homicide and deny the military the right to prosecute it as a violation of the Uniform Code. Similarly, the fact that an act having military significance may also constitute a violation of a Federal penal statute, for which the accused may be triable in a Federal district court, does not preclude the exercise of court martial jurisdiction for a violation of the Uniform Code.[82]

Interpreting O'Callahan: The Civil Courts

At this juncture, it is still premature to say that a civil court meaning has attached to *O'Callahan*. Although a sizable number of habeas corpus writs have now reached district and appellate courts,[83] the civilian tribunals have been far more reluctant about confronting the issue of what is "service connected." Many of these writs have been distinguished or dismissed on the basis of technicalities.[84] Still, with only a few

81. United States v. Prather, 18 U.S.C.M.A. 560, 40 C.M.R. 272 (1969); United States v. Cochran, 18 U.S.C.M.A. 588, 40 C.M.R. 300 (1969). United States v. Borys, 18 U.S.C.M.A. 545, 40 C.M.R. 257 (1969).

82. United States v. Fields, *supra* note 55.

83. *See* Gosa v. Mayden, 305 F. Supp. 1186 (N.D. Fla. 1969); Diorio v. McBride, 431 F.2d 730 (5th Cir. 1970), *aff'g* 306 F. Supp. 528 (N.D. Ala. 1969); Bell v. Clark, 308 F. Supp. 384 (E.D. Va. 1970); Thompson v. Parker, 308 F. Supp. 904 (M.D. Pa. 1970); Johnston v. United States, 310 F. Supp. 1 (N.D. Ga. 1970); Williamson v. Alldridge, 320 F. Supp. 840 (W.D. Okla. 1970); United States v. Bronson, 433 F.2d 537 (D.C. Cir. 1970); King v. Moseley, 430 F.2d 732 (10th Cir. 1970); and Zenor v. Vogt, 434 F.2d 189 (5th Cir. 1970).

84. The following cases have been dismissed because they would have required a retroactive application of *O'Callahan*: Gosa v. Mayden, 305 F. Supp. 1186 (N.D. Fla.

substantive rulings, there is already a blossoming of the uncertainty predicted by Justice Harlan.

Probably the most thorough and exhaustive analysis of what the Supreme Court meant by "service connected," is still to be found in *Moylan v. Laird*,[85] the first district court case to turn on *O'Callahan*. Here, petitioner was found off base, dressed in civilian clothes and in possession of 42.5 ounces of marijuana. After being apprehended by customs officials, he was charged with violations of 21 U.S.C. § 176(a) (1964) and 26 U.S.C. § 4741(a) (1964).[86] He was then released, pending action by the grand jury. Immediately thereafter, petitioner returned to his marine base. Two months later he was charged by military authorities with violations of Articles 86 and 134 of the Uniform Code of Military Justice.[87] While this writ of habeas corpus was pending, the Court of Military Appeals had already decided *United States v. Beeker*,[88] which introduced the special military significance guideline (mentioned above) and applied it to a marijuana offense.

The district court confronted three issues: whether it was an essential requisite of *O'Callahan* that the accused be charged with the identical offense in both the civilian and military courts; whether plaintiff's absence without leave at the time the offense occurred was controlling; and whether the possession of marijuana alone should provide the necessary service connection, because of the special military significance attached to the offense in *Beeker*.[89]

To the government's first contention, the district court responded that:

> *O'Callahan* looks to whether the civilian courts are open and to whether the particular domestic civilian sovereignty is *able* (emphasis the court's) to charge the military personnel

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1969); Thompson v. Parker, 308 F. Supp. 904 (M.D. Pa. 1970); Williamson v. Alldridge, 320 F. Supp. 904 (M.D. Pa. 1970); Williamson v. Alldridge, 320 F. Supp. 840 (W.D. Okla. 1970). Although the Government would certainly not consider the issue of retroactivity a technicality, it is a means of skirting the central issue of whether or not the offense was truly service connected.

85. 305 F. Supp. 551 (D.R.I. 1969).

86. Petitioner was apprehended in Puerto Rico, which is included within the jurisdiction of the First Circuit.

87. Article 86 U.C.M.J., 10 U.S.C. § 886 (1964), is a violation for being absent without leave from one's place of duty. There was no controversy as to whether or not this was service connected. Only Article 134 U.C.M.J., 10 U.S.C. § 934 (1964) was in dispute.

88. 18 U.S.C.M.A. 598, 40 C.M.R. 310 (1969). This decision is cited in *Moylan v. Laird*, 305 F. Supp. 551, 557 (1969).

89. Moylan v. Laird, 305 F. Supp. 551, 556-57 (D.R.I. 1969).

> involved. . . . Hence, if the conduct involved is able to be cognized in the civilian courts, and is not service connected, the military system does not gain jurisdiction merely by denominating the conduct something different from its civilian denomination, and then making that "something different" a violation of Article 134 (10 U.S.C. 934).[90]

To the government's second contention, the court ruled that "leave itself does not change the quality of the criminal act."[91] The court stated, "The test of service connection rests on where the crime was committed, whether its victim, if any, was involved in the performance of a military duty, and whether there was criminal process available to handle the type of offense."[92]

Finally, to the contention that drugs carry a special military significance, the district court accepted the *Beeker* decision as it was applied to its facts, which were limited to an "on base" offense.[93] But in relation to the possession of marijuana "off base," this the court stated, is "an entirely different matter."[94]

> It is a matter cognizable by the civilian sovereignties who are busily coping with it. No more so than the commission of other crimes does this particular crime tend to undermine military authority.[95]

Shortly after *Moylan v. Laird*, a writ of habeas corpus reached the District Court of Northern Alabama, which in turn led to the decision of *Diorio v. McBride*.[96] Petitioner in this case was charged with possession and use of marijuana while he was on base. At the time of the offense, he was not on duty but his job, as a military policeman, did subject him to recall at any time.

Here the court concluded that because petitioner was "on base" while committing the offense, it appeared to be service connected under the guidelines set out in *O'Callahan*.[97] In its deliberations, the *Diorio* court paid equal heed to all of the factors enumerated in *O'Callahan*, rather than giving special emphasis to the cognizance guideline as the *Moylan* court did. Because one of the factors enumerated was "whether the

90. *Id.* at 556.
91. *Id.* at 557.
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. 306 F. Supp. 528 (N.D. Ala. 1969), *aff'd*, 431 F.2d 730 (5th Cir. 1970).
97. *Id.* at 530.

offense occurred on post or off post," the court in *Diorio* felt compelled to hold this within the service connection requirement.[98]

On the appellate level, the fifth circuit went to the merits of what constituted a sufficient service connection in *Silvero v. Chief of Naval Air Basic Training*.[99] Here the petitioner, an officer, was accused of entering a private dwelling located off base but inhabited by Navy enlisted men, with the intent to commit oral sodomy. In this instance the nature of the crime heavily influenced the verdict. After stating that ". . . status alone is not sufficient to control the outcome of our decision here . . . ."[100] the court went on to hold: "Because it is a homosexual crime which is alleged, the Navy has a particular service connection interest, for its personnel are subject to sea duty assignment confining all-male crews together for long periods of the time."[101] The court also deemed it noteworthy, that an officer was trying to perpetrate this act upon enlisted men, giving the crime further military significance. This decision appears to go contrary to the military guideline which holds that all offenses committed against other soldiers or their property are service connected, since the court stated that status alone was not a controlling factor.[102] On the other hand, the court does recognize and affirm the concept of a crime carrying "special military significance," which indirectly affirms the *Beeker* guideline set down by the military, but rejects the reasoning of the district court in *Moylan*.

Before leaving the subject of court interpretation, one more decision deserves mentioning at this point. In a special court martial at Fort

98. *Id.* The guidelines enumerated in *O'Callahan* were: (1) whether the accused was on duty or off duty at the time; (2) whether there was a connection between the accused's military duties and the offenses charged; (3) whether the offenses occurred on or off post; (4) whether the offense involved other servicemen; (5) whether the offense occurred in peacetime or war; (6) whether the offense involved the security of the post; (7) whether it involved the integrity of military property; (8) whether the accused was in military or civilian clothes at the time the offense took place; (9) the presence of a civilian court. In *Relford*, these were rephrased in such a way as to amount to eleven guidelines. In addition, another guideline was added, namely whether the offense was among those traditionally prosecuted in a civilian court. Relford v. Commandant, 401 U.S. 355, 365 (1971).

99. 428 F.2d 1009 (5th Cir. 1970).

100. *Id.* at 1012.

101. *Id.*

102. There is authority in the civilian sphere to support the contention that a crime committed against another soldier is service connected. *See* King v. Mosely, 430 F.2d 732, 734 (10th Cir. 1970); Zenor v. Vogt, 434 F.2d 189 (5th Cir. 1970). Both of these cases involved crimes committed on the base, and this was truly the controlling factor. The status of the victim was offered to support the end result.

Bliss; the guideline set out by the Military Court of Appeals pertaining to use and possession of marijuana, on and off base, was explicitly rejected by the lower military court, which chose instead the rule of *Moylan v. Laird* mentioned above.[103] The court martial stated, "this court must follow the holding of the United States District Court in the *Moylan* case in determining the proper application of *O'Callahan*, rather than dicta of the Court of Military Appeals in *Beeker*."[103.1]

The resulting uncertainty, thus, is a clash between two competing court systems, each vying for a greater portion of control over the citizen-soldier, but neither knowing really where their power is supposed to end or where the other's power is supposed to begin. Thus, we have a situation where pockets of concurrent jurisdiction are being created. Because of the unfirm lines presently delineating each system's boundaries, military and civilian jurisdictions are overlapping.

This means that a lower military court, when confronted with a case that is analogous to *Moylan*, must either reject their own system's highest court, or rule against the article III court's decision, something which they are also forbidden to do. Regardless of which way they choose to rule, there is going to be an undermining of higher authority.

Thus, the predicted demoralizing state of uncertainty had arrived, and the stage was set for *Relford*.

Relford—A Step in the Right Direction . . .

The original purpose for deciding *Relford*, was to give *O'Callahan* scope.[104] But in the two short years that had elapsed prior to *Relford*, *O'Callahan* was already in need of much more than just scope. It was in need of meaning, literally, for the jurisdictional test created was totally unsuited for the job that it was required to do. Resting as it did, upon mere words, these soon carried civilian and military meanings which overlapped. Thus, in isolated instances, two court systems were capable of exercising concurrent jurisdiction, the very thing that a jurisdictional test is supposed to avoid.

In *Relford*, the Court was presented with the opportunity of doing one of two things: either giving *O'Callahan* a new jurisdictional base,[105] or

103. United States v. Watson, Army SPCM, 7th Jud. Cir., Feb. 13, 1970. *See* 6 CRIM. L. REP. 2377.

103.1. 6 Crim. L. Rep. 2378.

104. 397 U.S. 934 (1970).

105. Counsel for Relford strongly urged the Court to adopt the cognizance jurisdictional test, hinted at in *Moylan v. Laird*. The brief stated: "A military crime is one involving a level of conduct required only of servicemen and, because of the special

amending the present one so that it would be slightly less fluid. The Court chose the latter course.

By holding that "an offense committed within or at the geographical boundary of a military post"[106] is service connected, the Court has injected something very tangible into the service connection test, namely the outer perimeter of a military base. Now at least, two court systems can point to something that is readily ascertainable and know, that on one side of the line military jurisdiction is to prevail, and on the other side, it is to become a civilian matter. In short, *Relford* gives *O'Callahan* its first objective criteria for determining jurisdiction.

. . . *And Also a Step in the Wrong Direction*

If the Court had concluded that the geographical boundary of the base was determinative of the facts presented in *Relford*, and stopped, all would have been fine. But instead, the Court went on to add that the offense must be "violative of the security of a person or of property"[107] located on the military post. In doing so, the Court predicated their holding directly upon the "security being affected" rationale mentioned earlier.[108] Considered within the context of *Relford*, which involved charges of kidnapping and rape, the "security being affected" rationale makes perfect sense. One is led strongly to the inference that the Court must have been ignorant of the wide array of meanings that have been attached to the word "security," via the Military Court of Appeals,[109] because they follow this holding with the statement, "This delineation, we feel, fully comports with the standard of the least possible power adequate to the end proposed. . . ."[110]

In view of the above comment which immediately followed their holding, the Court probably had in mind the normal and accustomed meaning for the term "security." If this was the case, then not every offense occurring on the base should automatically come under a court martial's jurisdiction. Only those crimes, violative of the security of a

needs of the military, demanding military disciplinary action . . . [the offenses here] do not involve a level of conduct required *only* of servicemen." Brief for Petitioner at 6, Relford v. Commandant, 401 U.S. 355 (1971).

106. Relford v. Commandant, 401 U.S. 355, 369 (1971).

107. *Id.*

108. See text accompanying notes 54 to 60 *supra.*

109. Under *United States v. Peterson,* 19 U.S.C.M.A. 319, 41 C.M.R. 319 (1970), all acts violative of the Uniform Code of Military Justice are deemed to be threats to the military's security.

110. Relford v. Commandant, 401 U.S. 355, 369 (1971).

person or his property on the base, should qualify.[111] Under this criteria, use and possession of marijuana should not qualify. Read in this light, the court martial's power is limited by the security requirement to only the more direct and serious offenses.

But in the military court system, the word "security" carries a well established meaning, which is probably far broader than anything contemplated by the Court. The Court of Military Appeals has held that "any act . . . in violation of the Uniform Code, affects the security of the base."[112] One of the guidelines put forth to interpret *O'Callahan* states in essence that if any element of the crime can be found to have occurred on the military base, the service connection requirement is met.[113] Furthermore, the element of the crime which is traceable to the post, does not have to be all that significant.[114] As noted earlier, this rationale has been stretched to encompass crimes that have affected the security of the civilian community even more than they have the security of the military.[115] In short, the word "security" has already come into some use as a vehicle for fabricating a service connection in instances where there truly should not have been one.

With the holding of *Relford* now predicated upon this "security being affected" rationale, it will probably come into even wider use, as a means of giving the military jurisdiction. Again, the Court has made jurisdiction partially dependent upon a mere word, "security." *Relford*, like *O'Callahan*, is open to interpretation in two court systems, and thus vulnerable to acquiring both a military and a civilian meaning. In view of the unusually broad meaning that the military has already given to the word "security," more conflict between the two systems is probably inevitable.

Thus, not only has *Relford* failed to eliminate all pockets of concurrent jurisdiction, it has probably added to the instances that already exist, and may even be responsible for creating a few new ones entirely on its own. In this sense, *Relford* represents a step in the wrong direction.

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111. This could be construed to be a throwback to the old standard, which existed under the 1874 Articles of War. These articles restricted the jurisdiction of the military during peacetime to only those offenses deemed directly prejudicial to military order and discipline. *See* Act of March 3, 1863, ch. 75; W. WINTHROP, MILITARY LAW AND PRECEDENTS 670 (2d ed. 1896, 1920 Reprint).

112. United States v. Peterson, 19 U.S.C.M.A. 319, 41 C.M.R. 319 (1970).

113. United States v. Crapo, 18 U.S.C.M.A. 594, 40 C.M.R. 306 (1969). *See also* text accompanying notes 54 to 60 *supra*.

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

115. *Id.*

The Uncertainty Still Untouched

The Court concedes in *Relford* that it has chosen an ad hoc approach towards alleviating the uncertainty stemming from *O'Callahan*. The Court stated, "We recognize that any ad hoc approach leaves outer boundaries undetermined."[116]

To mention just a few of the problems still unresolved, there is first the military guideline which holds that crimes against fellow soldiers, though committed off base, are still service connected.[117] On facts which consisted of more than just an offense between fellow soldiers, a federal appeals court stated "that status alone is not sufficient to control the outcome of our decision here."[118]

Secondly, there is the problem of acquiring jurisdiction over the soldier who acquires marijuana on the base, carries it off the base and is then caught with it. Because he has violated the Uniform Code while he was on the base, a court martial might claim jurisdiction under *United States v. Peterson*.[119] But since he has not violated the security of a person or property located on the base, a civil court may feel that it is vested with jurisdiction. These facts might also call into use the special military significance guideline which has been applied to all narcotics and marijuana offenses.[120] As was noted earlier, a federal district court has already rejected this guideline for instances of possession occurring off base.[121]

Then there is the guideline established by the Military Court of Appeals, which states that *O'Callahan* is not to be applied extraterritorially.[122] Two federal appeal courts have ruled on this question, and both have followed the decisions of the military on this matter. In one case, the offense occurred in Vietnam;[123] in the other instance, the alleged crimes took place in Germany five years after the Second World War had ended.[124] In *Reid v. Covert*, which also involved

116. Relford v. Commandant, 401 U.S. 355, 369 (1971).

117. See text accompanying notes 72 to 76 *supra*.

118. Silvero v. Chief of Naval Air Basic Training, 428 F.2d 1009, 1012 (5th Cir. 1970).

119. 19 U.S.C.M.A. 319, 41 C.M.R. 319 (1970).

120. See text accompanying notes 67 to 71 *supra*.

121. Moylan v. Laird, 305 F. Supp. 551, 557 (D.R.I. 1969).

122. See text accompanying notes 77 to 80 *supra*.

123. Latney v. Ignatius, 135 U.S. App. D.C. 65, 416 F.2d 821 (1969).

124. Harris v. Ciccone, 417 F.2d 479 (8th Cir. 1969), *cert. denied*, 397 U.S. 1078. The author of this opinion, now Associate Justice Blackmun, stated: "We note too, that the offenses in *Humphrey v. Smith*, 336 U.S. 695 (1949) were committed in England and yet the Supreme Court in *O'Callahan* did not question the holding in *Smith*, and, indeed did not even cite it." 417 F.2d 479, 488 n.5.

an alleged offense in Germany during peacetime, Justice Black stated: "we reject the idea that when the United States acts against *citizens* abroad, it can do so free of the Bill of Rights"[125] (emphasis added). Since under *O'Callahan*, application of the fifth and sixth amendments hangs in the balance, this statement lends strong support for applying the rule extraterritorially for peacetime offenses.

Finally, there is the problem of deciding whether *O'Callahan* should be applied to those offenses, which provide for penalties of six months duration or less. Because these are considered "petty" crimes, a trial by jury is not guaranteed even in a civil court.[126] Since no constitutional rights of the accused are being abridged by a trial under a court martial, the military has held that the rule of *O'Callahan* can be set aside.[127] Though the argument has been presented in a federal district court, it has not yet been adopted.[128]

Conclusion

In *Relford*, the Court was granted the opportunity of limiting court martial jurisdiction to only those offenses which are completely military in nature, such as desertion, absence without leave and assaulting a superior commissioned officer. If the Court had adopted a jurisdictional test dependent upon the nature of the crime, namely whether or not the offense was cognizable to civilian authorities, the confusion in this area would have been removed. Instead, *Relford* impliedly holds that the military's continued jurisdiction over some civilly cognizable crimes is assured, at least for the forseeable future. Thus, two relatively efficient jurisdictional tests, the status of the offender and cognizance of the crime, have been rejected. Until another criteria can be found, which rivals in efficiency the above two standards, some confusion and friction in this area is bound to remain.

Perhaps the best alternative available to the Court, would be to submerge the service connection requirement into the military enclave concept. To do this, the Court could hold that when the victim resides and is victimized while actually being present on the military base, then the crime is contained to the post and article III courts should be pre-empted from trying the accused. On the other hand, when any element of the offense extends or victimizes anyone beyond the military's perimeter, the military would be pre-empted from proceeding. At least this would

125. Reid v. Covert, 354 U.S. 1, 15 (1957).

126. Cheff v. Schnackenberg, 384 U.S. 373 (1966).

127. See text accompanying notes 79 and 80 *supra*.

128. Diorio v. McBride, 306 F. Supp. 528, 531 (N.D. Ala. 1969).