Indiana Law Journal

Volume 52 | Issue 1 Article 9

Fall 1976

Parties and Offenses in the Military Justice System: Court-Martial Jurisdiction

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Parties and Offenses in the Military Justice System: Court-Martial Jurisdiction

The military justice system has traditionally conducted trials of those persons connected with the military services who have been accused under military rules of criminal acts.[1] These defendants are tried at courts-martial composed of military officers and presided over by military judges, without the right to trial by jury or to indictment by grand jury.[2] In recent years serious challenges to the exercise of military jurisdiction both by those who have claimed not to have military "status," thus avoiding court-martial jurisdiction of the person,[3] and by those who have argued that certain offenses were not cognizable in military courts,[4] have been heard in both civilian and military courts. While the system of military justice is explicitly created by the Constitution,[5] the principal justification for the existence of this separate system has been the proposition that military life engenders unique problems which require a distinctly military means of resolution.[6] This rationale has provided a basis for attacking court-martial jurisdiction.

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[1]The constitutional bases of military law in general and court-martial jurisdiction in particular are found in U.S. CONST. art. I, § 8; art. II, § 2; amend. V.

Article I, § 8 gives Congress the power "To make Rules for the Government and Regulation of the land and naval Forces." Article II, § 2 established the President as commander-in-chief of the army and navy. The fifth amendment excepts from the requirement of grand jury indictment "cases arising in the land or naval forces . . . ."

The statutory source of the present military justice system is the Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 801-940 (1970). The UCMJ establishes court-martial and military justice procedures, defines court-martial jurisdiction, enumerates substantive offenses, and authorizes the President to prescribe maximum punishments and further procedural rules. The President has exercised this authority by promulgating the Manual for Courts-Martial, United States, 1969 (rev.) [hereinafter cited as MCM]. The current edition of the MCM was given the force of law by Exec. Order No. 11, 476. Additionally, the branches of the armed forces and the Department of Defense promulgate regulations further implementing the UCMJ and MCM. Failure to obey such regulations may be a court-martial offense. UCMJ art. 92, 10 U.S.C. § 892 (1970).

[2]*See generally* H. MOYER, JUSTICE AND THE MILITARY, §§ 2-585 to 609 (1972) [hereinafter cited as MOYER]. Almost all courts are composed of officers. When the defendant is an enlisted man he has the option pursuant to UCMJ art. 25 (c)(1), 10 U.S.C. § 825 (c)(1) (1970), of electing to have one-third of the court composed of enlisted personnel. However, because senior noncommissioned officers are almost always named, this option is rarely pursued. *See* MOYER § 2-598.

[3]*See, e.g., Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866):

> Every one connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts. *All other persons,* citizens of states where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury.

Id. at 123 (emphasis in original).

[4]*See* O'Callahan v. Parker, 395 U.S. 258 (1969).

[5]*See* note 1 *supra.*

[6]Apart from convenience and feasibility, there is an especially important reason for

Historically, military jurisdiction was deemed best suited for cases to which military judges brought a special expertise. The need for this military expertise seemed to exist whenever a member of the armed forces was accused of a violation of the Uniform Code of Military Justice,[7] the substantive and procedural criminal statute of the military; and until 1969, status as a serviceman was sufficient to vest a military court with the power to try an accused serviceman for any offense. In that year, however, this broad jurisdictional authority was limited by the United States Supreme Court in *O'Callahan v. Parker*.[8] The Court held that court-martial jurisdiction required that two concurrent jurisdictional bases be present: personal jurisdiction and subject matter jurisdiction. More specifically, *O'Callahan* holds that a serviceman's rights to grand jury indictment and to trial by jury outweigh the military authority to exercise court-martial jurisdiction over a serviceman, even though the accused is a member of the military, unless the offense charged is "service-connected."[9] If it is, then the offense is within court-martial jurisdiction under the UCMJ,[10] and the exercise of that jurisdiction is within constitutional bounds. It has been left primarily to the military courts in general, and to the Court of Military Appeals in particular, to sort out the impact of the *O'Callahan* decision and its progeny.[11]

This note will discuss the decisions of COMA during its 1975-76 term in three areas of jurisdiction: the question of what constitutes a

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> having service personnel subject to trial by military courts. There is a much higher probability that the persons who hear the case will understand and be responsive to the problems involved. . . . Most important, a military court will often be better qualified than a civilian body to grapple with the problem of imposing a sentence on the accused, for it will have more acquaintance with the purposes which punishment should serve and more understanding of the seriousness of his crime in the military context.

R. EVERETT, MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES 5 (1956). For a discussion of the Supreme Court's thoughts on the necessity for separate systems, see United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17-18 (1955).

[7]10 U.S.C. §§ 801-940 (1970). *See generally* Willis, *The Court of Military Appeals; Born Again*, 52 IND. L.J. ____ (1976) *supra*, Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3 (1970).

[8]395 U.S. 258 (1969).

[9]*Id.* at 272-74.

Few would deny that the military justice system is not set up for the same purposes as the civilian system. Implicit in the differences between the two systems is the characterization of the military system as providing the justice of necessity. The special needs of the military have long been recognized as the justification for the specialized procedures of the court-martial system. The implication is that where those special needs are absent, court-martial jurisdiction should not attach. This result is predicated upon the assumption that military law is not necessarily equal to civilian law. This was the theme of Mr. Justice Douglas' opinion in *O'Callahan*, which characterized the expansion of military discipline beyond its proper domain as "a threat to liberty," and described courts-martial as "singularly inept in dealing with the nice subtleties of constitutional law." *Id.* at 265.

[10]UCMJ arts. 17-21, 10 U.S.C. §§ 817-21 (1970).

[11]Relford v. Commandant, U.S. Disciplinary Barracks, 401 U.S. 355 (1971), is the principal civilian case after *O'Callahan*.

constructive enlistment giving rise to a militry status to which personal jurisdiction of a court-martial may attach;[12] the exception to the subject matter requirement of service connection which permits trial by court-martial of certain offenses because committed "overseas";[13] and the doctrine finding service connection, and thus subject matter jurisdiction, over drug related offenses even though they occur outside the military environment.[14]

Presently COMA appears to be contracting court-martial jurisdiction. Whether on the ground of fairness in a particular case or as a result of the mandate of the Supreme Court's decisions in recent years, the court seems to be responding to what are in some cases unnecessary discrepancies between civilian and military systems of justice. In some areas, such as speedy trial, search and seizure, and self-incrimination, COMA has adopted for the military system constitutional doctrines developed in civilian courts or by COMA itself.[15] But an additional method of harmonizing the coexistence of the two separate systems, one apparently still evolving, is the development of jurisdictional doctrines that divert from the military justice system those who either are not in fairness "members" of the service or who do not commit crimes which are military in essence. An example of this process is found in the 1975-76 cases which COMA decided concerning the application of the doctrine of constructive enlistment.

JURISDICTION OF THE PERSON WITH MILITARY STATUS: "CONSTRUCTIVE ENLISTMENT"

Constructive enlistment is a doctrine which confers court-martial jurisdiction over a defendant who would otherwise not be subject to such jurisdiction because of a defective enlistment that was either void or voidable.[16] A defect in enlistment procedures can operate to prevent military jurisdiction of the individual because it negates the military status required for personal jurisdiction.[17] But such lack of status has frequently

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[12]*See* United States v. Russo, 23 C.M.A. 511, 50 C.M.R. 650 (1975); United States v. Barrett, 23 C.M.A. 474, 50 C.M.R. 493 (1975). *See* notes 16-36 *infra* & text accompanying.

[13]United States v. Black, 24 C.M.A. 162, 51 C.M.R. 381 (1976). *See* notes 37-50 *infra* & text accompanying.

[14]United States v. McCarthy, 25 C.M.A. 30, 54 C.M.R. 30 (1976). *See* notes 51-90 *infra* & text accompanying.

[15]*See* Note, *The Right to Counsel at Summary Courts-Martial: COMA at the Crossroads*, 52 IND. L.J. ____ (1976), *infra;* Note, *Searches and Seizures in the Military Justice System*, 52 IND. L.J. ____ (1976), *infra;* Note, *Self-incrimination in the Military Justice System*, 52 IND. L.J. ____ (1976), *infra.*

[16]*See* note 27 *infra;* MOYER, *supra* note 2, §§ 1-210 to 220.

[17]*See* Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960):

> Without contradiction, . . . military jurisdiction has always been based on the "status" of the accused, rather than on the nature of the offense. To say that military jurisdiction "defies definition in terms of military 'status' " is to defy unambiguous language of Art. I, § 8, cl. 14, as well as the historical background thereof and the precedents with reference thereto.

Id. at 243 (citation omitted).

been held to have been cured by the defendant's acquiescence in his apparent status as a member of the military subsequent to the enlistment challenged as defective, the acquiescence giving rise to a constructive enlistment.[18] The typical objection of the accused has been that the enlistment was void from the outset because of the violation of some applicable regulation. In such an instance, the court is called upon to examine the circumstances surrounding the enlistment and to decide whether sufficient subsequent acquiescence existed to override the challenge.

Until 1974 COMA took the position that if the regulation violated was for the benefit of the armed services,[19] the enlistment contract was not void, but merely voidable at the option of the government. In 1974 COMA changed its approach to this issue when it considered two such cases.

In *United States v. Catlow*,[20] the accused was tried at a court-martial and convicted following an extended unauthorized absence. The accused's enlistment had been the product of a choice put to him by a juvenile court judge between "five years indefinite in jail" or a three-year term in the Army. An Army recruiter had obtained his release from jail to enable him to "fill out the papers and take the test." After Catlow's induction the juvenile charges were dismissed. It was clear that this was a violation of the Army's own regulations and that the enlistment was therefore defective.[21] The government sought to raise a constructive enlistment on the ground of Catlow's acceptance of army pay, medical attention and mess

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See also Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866). *See generally* MOYER, *supra* note 2, §§ 1-205 to 225.

[18]Factors relevant to a finding of accused's acquiescence in apparent military status have been said to include wearing the uniform, receiving pay, performing basic duties, application for a service I.D. card, participation in serviceman's insurance program, application for special training and written acknowledgment of induction. *See* United States v. Hall, 17 C.M.A. 88, 37 C.M.R. 352 (1967); United States v. Wilson, 44 C.M.R. 891 (ACMR 1971). Federal courts may attach somewhat different significance to these and other factors in collateral attack on court-martial jurisdiction, especially where the accused has continuously asserted the military's lack of jurisdiction over him. *See, e.g.*, Cox v. Wedemeyer, 192 F. 2d 920 (9th Cir. 1951); United States *ex rel.* Caputo v. Sharp, 282 F. Supp. 362 (E.D. Pa. 1968); United States *ex rel.* Wiedman v. Sweeney, 117 F. Supp. 739 (E.D. Pa. 1953).

[19]*See, e.g.*, United States v. Russo, 23 C.M.A. 511, 50 C.M.R. 650 (1975).

The military and the courts had taken the traditional position that when a regulation contained a disqualifying factor merely as a convenience to one of the parties, *e.g.*, a requirement for a certain level of vision before entering the armed forces, it was a matter which in any given situation that party might waive. In the particular context of constructive enlistment, this means that when the standard of the regulation is not met and enlistment nevertheless ensues, the enlistment contract is voidable at the option of the party whom the regulation was intended to benefit, *i.e.* the armed forces in this example.

[20]23 C.M.A. 142, 48 C.M.R. 758 (1974).

[21]Army Regulations specifically forbade enlistment of persons

> who as an alternative to . . . incarceration in connection with the charges, or to further proceedings relating to adjudication as a youthful offender or juvenile delinquent, are granted a release from the charges at any stage of the court proceedings on the condition that they will apply for or be accepted for enlistment in the Regular Army.

AR 601-210, ¶ 2-6, at 2-12 n.2, May 1, 1968.

privileges, but COMA found this insufficient in light of Catlow's persistent protestations against continued service.[22] The outcome was to enable Catlow to challenge successfully defective enlistment which previously would have been voidable only by the military because the regulations were to benefit the Army.

One week later, in *United States v. Brown*,[23] the court held that in the interest of fairness two breaches of duty precluded the government from relying on the jurisdictional base of constructive enlistment. First, Brown's recruiter failed to observe regulations concerning notarization of the parental consent form, resulting in Brown's successful forgery of his father's signature. Second, upon being informed of Brown's fraudulent minority enlistment during his second week of basic training, his commanding officer failed to take adequate measures. Combining the two instances of governmental misconduct, the court proceeded to estop the government to raise a constructive enlistment upon Brown's attaining enlistment age.

In *Catlow*, recruiter misconduct alone was not enough to bar the possibility of a future constructive enlistment.[24] Catlow's post-induction protests were also relied on by the court. In *Brown*, the combination of recruiter misconduct and subsequent misconduct on the part of the military itself after discovery of the defective enlistment was sufficient to negate reliance on constructive enlistment. The net effect seems to be to raise at least a presumption of a void enlistment which no constructive enlistment will save where the original enlistment was forced as in *Catlow*,[25] or where there has been governmental misconduct leading to a wrongful continuation of a void enlistment. Where both of these elements are present there can be no constructive enlistment.[26]

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[22]23 C.M.A. at 146, 48 C.M.R. at 762. *Cf.* United States v. Graham, 22 C.M.A. 75, 76, 46 C.M.R. 75, 76 (1972); United States v. Overton, 9 C.M.A. 684, 688, 26 C.M.R. 464, 468 (1958).

[23]23 C.M.A. 162, 48 C.M.R. 778 (1974). Brown enlisted at age 16 by using a false birth certificate and forging his father's signature on a consent form. Normally under such circumstances, a constructive enlistment will arise from acquiescence in the status after the enlistment age of 17 is achieved. But because of governmental misconduct, the government was estopped to apply the rule.

[24]23 C.M.A. at 146, 48 C.M.R. at 762. In *Catlow* COMA did not discuss potential distinctions in this context where the enlistment was obtained by recruiter misconduct on the one hand and civilian coercion on the other, possibly because it was clear from the Army Court of Military Review opinion below that the military recruiter who contacted Catlow was aware of the judge's "offer." United States v. Catlow, 47 C.M.R. 617, 618 (ACMR 1973). What the court clearly was not saying is that all fraudulent enlistments have the same effect for future constructive enlistments as Catlow's had. Fraudulent enlistments can occur in a variety of contexts not associated with recruiter misconduct, the most common being an underage enlistment. In such situations the normal rules of constructive enlistment apply, in the absence of subsequent governmental misconduct.

[25]*See* United States v. Dumas, 23 C.M.A. 278, 49 C.M.R. 453 (1975) (no reasonable basis for constructive enlistment where 17 year-old's recruiter, probation officer and juvenile judge arranged his enlistment as alternative to confinement, without parental knowledge or consent).

[26]United States v. Brown, 23 C.M.A. 162, 48 C.M.R. 778 (1974).

Constructive Enlistment During the 1975-76 Term

The court continued the erosion of the availability of the doctrine of constructive enlistment in the 1975-76 term when it took up two more cases which raised the problem. In *United States v. Barrett*,[27] the appellant had elected to enter the Army in 1967 rather than serve a four-year term in a reformatory following a juvenile conviction. The recruiting officer had sought out Barrett and advised his enlistment. In a per curiam opinion, COMA held the enlistment void at its inception on the authority of the *Catlow* decision. However, the court went further and held that the recruiter's improper conduct was of such a type as to prevent the government from asserting constructive enlistment based on subsequent acquiescence. This was definitely not the holding of *Catlow*, although the circumstances in the two cases are remarkably similar. In effect, what the *Barrett* court did was to separate recruiter misconduct from subsequent misconduct on the part of the military and to declare either sufficient to prevent the government from using constructive enlistment as a jurisdictional base.[28]

In the second case of the 1975 term, *United States v. Russo*,[29] the appellant suffered from a reading disability which disqualified him from enlistment. However, the recruiter supplied Russo with answers for the Armed Forces Qualification Test. The "void-voidable" distinction,[30] applicable since the benefit of the disqualifying regulation presumably redounded solely to the armed services, was rejected by the court on the ground that the regulation was not solely for the benefit of the armed services, but was also to protect unfit applicants from entering an

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[27]23 C.M.A. 474, 50 C.M.R. 493 (1975).

[28]As previously noted, *see* note 19 *supra* & text accompanying, prior to *Catlow* and *Barrett* an enlistment which was obtained in violation of some regulation was not, solely on that ground, void ab initio. Rather, the enlistment contract was voidable at the option of the party not in violation of the regulation. If, for example, the recruiter failed to disqualify an enlistee for medical reasons when directed to do so by the pertinent regulations, the enlistee could void the contract at his option. The government, however, could not void the enlistment on its instigation, on the theory that a party cannot set up its own misconduct as a "breach" of the contract. But in *Barrett*, COMA clearly held recruiter misconduct to be the sort of misconduct which renders the contract void in the sense that a constructive enlistment, which is in essence merely the denial of the power to void by the enlistee, cannot revive it.

[29]23 C.M.A. 511, 50 C.M.R. 650 (1975).

[30]Cases in which enlistments have been held to be void involve persons who were below the minimum statutory age when they enlisted and at the time they committed the offenses for which court-martial jurisdiction is asserted. No constructive enlistment can arise before the disabling condition is removed. *See* United States v. Blanton, 7 C.M.A. 664, 23 C.M.R. 128 (1957). Enlistments where parental consent is required but not obtained are voidable at the parents' option. *E.g., In re* Morrissey, 137 U.S. 157 (1890). In addition, it has always been held that a regulation "solely for the benefit of the service" violated by the enlistee in a fraudulent enlistment is only voidable at the option of the service. *See* United States v. Overton, 9 C.M.A. 684, 26 C.M.R. 464 (1958). *Catlow* did not destroy this distinction; it merely interpreted a regulation as not being solely for the benefit of the service. 23 C.M.A. at 145, 48 C.M.R. at 761.

environment in which they would not be able to function effectively.[31]

More interesting is the court's treatment of the government's contention, advanced in order to meet Russo's argument that recruiter misconduct should prevent the government from invoking constructive enlistment, that the court should adhere to the old Supreme Court view that:

> "[e]nlistment is a contract, but it is one of those contracts which changes the *status,* and where that is changed, no breach of the contract destroys the new *status* or relieves from the obligations which its existence imposes. . . . [I]t is a general rule accompanying a change of *status,* that when once accomplished it is not destroyed by the mere misconduct of one of the parties, and the guilty party cannot plead his own wrong as working a termination and destruction thereof."[32]

COMA dismissed this argument, reasoning that in order to effect a voluntary change in status from civilian to soldier, a valid enlistment contract or a constructive enlistment is a prerequisite. Neither was evident here, for having foregone the void-voidable distinction as a bar to Russo's challenge, it was clearly a case of a defective enlistment, and on the basis of *Barrett* (and presumably *Brown*) the facts thus prevented a constructive enlistment from being relied on. Moreover, the court held alternatively that under certain circumstances a fraudulent enlistment contract is void on grounds of public policy:

> Because fraudulent enlistments are not in the public interest, we believe that common law contract principles appropriately dictate that where recruiter misconduct amounts to a violation of the fraudulent enlistment statute, . . . the resulting enlistment is void as contrary to public policy. Hence the change of status alluded to in *Grimley* never occurred in this case.[33]

Conclusion

The cases decided in the 1975-76 term both confirmed COMA's hostility to the application of the doctrine of constructive enlistment where

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[31] 23 C.M.A. at 512, 50 C.M.R. at 651.

[32] 23 C.M.A. at 513, 50 C.M.R. at 652, *quoting In re* Grimley, 137 U.S. 147, 151-52 (1890). *Grimley* involved a petition for habeus corpus by a soldier contending a court-martial was without jurisdiction to try him because his enlistment was void for overage.

[33] 23 C.M.A. at 513, 50 C.M.R. at 652 (citations omitted). The fraudulent enlistment statute alluded to is UCMJ art. 84, 10 U.S.C. § 884 (1970): "Any person subject to this chapter who effects an enlistment . . . of any person who is known to him to be ineligible for that enlistment . . . because it is prohibited by law, regulation, or order shall be punished as a court-martial may direct."

This seemingly broader-sounding alternative holding is actually the narrower position because of the relevant standard of conduct on the part of the recruiter. A material element of the fraudulent enlistment statute, violation of which the court implies will void an enlistment on public policy grounds, requires knowledge on the part of the recruiter that a subject is ineligible for enlistment.

recruiting service personnel have violated enlistment regulations, and held forced enlistment void ab initio. On the one hand, these developments are in keeping with the historical justification of the constructive enlistment doctrine: acceptance of military status which because of its voluntary nature supercedes formal requisites, compliance with which was defective in some manner.[34] On the other hand, the newly adopted position that certain violations of regulations foreclose the application of the doctrine and the adamant insistence on considerations of fairness to the defendant[35] regardless of mechanical analysis indicate that COMA is moving toward a more realistic analysis of the voluntariness of enlistment.[36] While these holdings doubtless will serve to constrict court-martial jurisdiction, COMA may well be acting in the interest of preserving the integrity of the separate military system of justice. That is, the narrowing of bases for finding personal jurisdiction is consonant with the constriction of court-martial jurisdiction in terms of subject matter that occurred during the same term.

THE "OVERSEAS" EXCEPTION TO THE SUBJECT-MATTER JURISDICTION REQUIREMENT

Following *O'Callahan v. Parker*,[37] court-martial jurisdiction could not be founded solely upon the accused's status as a serviceman. Under *O'Callahan*, servicemen were entitled to the same rights to indictment by grand jury and trial by jury as civilians when the crime alleged was not service connected.[38] Though military status was still a prerequisite to

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[34]*See, e.g.*, United States v. Hall, 17 C.M.A. 88, 37 C.M.R. 352 (1967). *See also* United States v. Scheunemann, 14 C.M.A. 479, 34 C.M.R. 259 (1964).

[35]*See, e.g.*, Appendix to United States v. Catlow, 23 C.M.A. 142, 146-47, 48 C.M.R. 758, 762-63 (1974). Judge Advocate General Prugh explains some of the consequences to the individual who makes an unfortunate decision to enlist.

[36]The court emphasized voluntarism in the sense of a willing submission to all facets of military life. The acquiescence that heretofore formed the basis of a constructive enlistment actually presented, in many cases, the only practical course of action open to an enlistee. Rather than focus on that acquiescence, the court has instead chosen to view the initial choice regarding submission to military authority as the operative fact.

There is a possible side effect of these recent cases. Constructive enlistment, as now viewed by the court, may turn out to be an unfortunately two-edged sword. With the "Volunteer Army" concept in a preeminent position now, the military may attempt to use disqualifying conditions such as those suggested by COMA in order to trim what it feels is "dead wood" so as to realize personnel cutback goals. Presumably, if the disqualifying conditions do not render an enlistment void, but voidable, and prevent a constructive enlistment from ever arising, the armed forces could discharge such personnel. It remains an open question whether COMA will permit the new outlook to work in this fashion.

COMA has subsequently decided two cases in this area in per curiam opinions. Both held that court-martial jurisdiction was lacking and merely cited *Russo*. United States v. Muniz, 23 C.M.A. 530, 50 C.M.R. 669 (1975); United States v. Burden, 23 C.M.A. 510, 50 C.M.R. 649 (1975).

[37]395 U.S. 258 (1969).

[38]*Id.* at 272-73.

personal jurisdiction, the service connection of the offense, or subject matter jurisdiction, became the primary issue.[39]

One application of these two interrelated factors, status and subject matter, to circumstances where the constitutional purposes of *O'Callahan* cannot be served by avoiding court-martial jurisdiction has come to be referred to as the "overseas exception" to the *O'Callahan* service connection test. The past cases construing the overseas exception have held that to determine whether there is court-martial jurisdiction over a non-service connected offense occurring outside the United States, two questions must be answered: 1) Is the accused a member of the armed services? 2) Is the offense contrary to American civilian penal statutes having effect in the foreign country so as to be cognizable in an American civilian court?[40] If the first question is answered in the affirmative, but the second in the negative, the overseas exception applies and court-martial jurisdiction attaches regardless of service connection.[41]

In this situation, the alternatives are trial by court-martial, trial by

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[39]In *O'Callahan,* Justice Douglas set out some factors relevant to the service connection of an offense:

> In the present case petitioner was properly absent from his military base when he committed the crimes with which he is charged. There was no connection — not even the remotest one — between his military duties and the crimes in question. The crimes were not committed on a military post or enclave; nor was the person whom he attacked performing any duties relating to the military. Moreover, Hawaii, the situs of the crime, is not an armed camp under military control, as are some of our far-flung outposts.
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> Finally, we deal with peacetime offenses, not with authority stemming from the war power. Civil courts were open. The offenses were committed within our territorial limits, not in the occupied zone of a foreign country. The offenses did not involve any question of the flouting of military authority, the security of a military post, or the integrity of military property.

395 U.S. at 273-74 (citation omitted). These factors were further explicated by the Supreme Court in Relford v. Commandant, U.S. Disciplinary Barracks, 401 U.S. 355 (1971). *See* note 59 *infra.*

[40]As the UCMJ applies to servicemen overseas, UCMJ art. 5, 10 U.S.C. § 805 (1970), a court-martial has subject matter jurisdiction over an offense "in all places." Applying *O'Callahan's* test to other offenses to determine whether the court-martial could have subject matter jurisdiction because of service connection required a determination of whether an American civil court could have tried the accused. *See generally* MOYER, *supra* note 2, §§ 1-620 to 629; United States v. Weinstein, 19 C.M.A. 29, 41 C.M.R. 29 (1969); United States v. Goldman, 18 C.M.A. 389, 40 C.M.R. 101, *reh. den.* 18 C.M.A. 516, 40 C.M.R. 228 (1969). In *Weinstein* COMA declared: "The offenses occurred in a foreign country and are not contrary to American civilian penal statutes having effect in Germany. Consequently, the constitutional limitation on court-martial jurisdiction delineated in the *O'Callahan* case is inapplicable." 19 C.M.A. at 30, 41 C.M.R. at 30.

[41]Adhering to this method of analysis, COMA had little trouble reaching the same result where American civilian courts were open and functioning in a foreign country but had no power to take jurisdiction over the offense. United States v. Ortiz, 20 C.M.A. 21, 42 C.M.R. 213 (1970).

COMA has also made it clear that whether a serviceman is at the crime situs for military or personal reasons is immaterial; he still maintains status as a member of the military. United States v. Newvine, 23 C.M.A. 208, 48 C.M.R. 960 (1974).

foreign court,[42] or no trial at all. The benefits of indictment by grand jury and trial by jury sought to be preserved by *O'Callahan* cannot be conferred on the accused serviceman; there is therefore no purpose in determining whether the alleged offense was service connected. However, an offense may be a violation of both the UCMJ and American civilian penal statutes that have effect, usually pursuant to treaty, in a foreign country. In that case, because civilian courts could take jurisdiction, thereby making available grand jury indictment and jury trial, subject matter jurisdiction or service connection must be found before a court-martial can take jurisdiction. Otherwise, the case must be heard in a civilian court. Without the overseas exception, there would be a large number of acts which would be offenses under the UCMJ but which would not be offenses under civilian penal statutes.[43] COMA has reasoned that the Supreme Court in *O'Callahan* could not have intended such a result, and that therefore trial by court-martial of such offenses is constitutionally valid even in the absence of service connection.[44]

United States v. Black: Subject Matter Jurisdiction and "Overseas" Offenses

This line of inquiry was refined somewhat by COMA's decision in the 1975-76 term in *United States v. Black*.[45] In *Black* the accused was

[42]Some concurrent jurisdiction situations result in trial of servicemen by the country in which the offense occurred, pursuant to treaty. *See* MOYER, *supra* note 2, §§ 1-620 to 629.

[43]This large number of offenses results from heavy use of the "general article" in charging military offenses. UCMJ art. 134, 10 U.S.C. § 934 (1970) 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 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.

This "general article," as it is called, is of particular significance to the armed services in the situation of overseas offenses. There, a charge under the general article is not held to be bound by the strictures of state and federal law, as is usually the case for offenses which operate generally to ease the prosecution's burden of proof, relax the specificity with which the elements have to be proved, and lower the standard for sufficiency of evidence which must be met to sustain a conviction. *See* MOYER, *supra* note 2, §§ 5-120 to 170.

[44]United States v. Keaton, 19 C.M.A. 64, 41 C.M.R. 64, 67 (1969). In *Keaton*, which involved an assault on a civilian in the Philippines, military jurisdiction was the result of a treaty. 61 Stat. 4019, 4025, (1947), T.I.A.S. No. 1775, amended August 10, 1965 (16 U.S.T. 1090, T.I.A.S. No. 5851).

The overseas exception is one area where the military and federal courts appear to be in accord. the federal courts have adopted the rationale used by COMA — the availability of indictment and trial by jury — and have upheld court-martial jurisdiction when convictions were challanged on collateral attack. *See, e.g.*, United States *ex rel.* Jacobs v. Froehlke, 481 F.2d 540 (D.C. Cir. 1973); Hemphill v. Moseley, 443 F.2d 322 (10th Cir. 1971); Swift v. Commandant, U.S. Disciplinary Barracks, 440 F.2d 1074 (10th Cir. 1971); Gallagher v. United States, 423 F.2d 1371 (Ct. Cl. 1970); Williamson v. Aldridge, 320 F. Supp. 840 (W.D. Okla. 1970).

[45]24 C.M.A. 162, 51 C.M.R. 381 (1976).

convicted of conspiring with a Vietnamese national while in Saigon to smuggle heroin into the United States. When he returned to the United States, Black sent to one Beech, still in Vietnam, currency and a letter which were to be delivered to the Vietnamese co-conspirator. Instead, Beech informed the authorities.

In support of trying Black by court-martial rather than in a civilian court, the government contended that Black's completion of a substantial portion of the crime overseas was sufficient to subject his offense to military jurisdiction. Black argued that the overseas exception was inapplicable, since the conspiracy was not complete until execution of the overt act in the United States, the sending of the letter to Beech. The court held that since the overt act was done in the United States, the offense was actually not committed in Vietnam for court-martial purposes.[46]

After a careful reading, *Black* appears to be consistent with the prior constructions of the overseas exception. In asking whether the offense had been legally committed in this country, the *Black* court was simply attempting to determine whether American civilian courts would have had jurisdiction of the offense, absent an applicable American statute in effect in Vietnam which would have allowed American civil court jurisdiction to attach in any case. The effect of the alternative holding in *Black* is less clear. The court also held that the offense was "contrary to American civil penal statutes in effect in Vietnam so as to be cognizable in a United States civil court."[47] This, of course, renders unnecessary any inquiry into the situs of the offense.

Nevertheless, *Black* is valuable for the light it sheds on COMA's view of the purpose of the overseas exception and its relationship to the *O'Callahan* opinion:

> The purpose of *O'Callahan* is to insure indictment and trial by jury, and the rationale of the overseas exception . . . is that those benefits are not available in foreign courts, anyway, so trial by court-martial is as close as is possible to affording all the rights and privileges to an accused in Anglo-American jurisprudence. Where our federal statutes prohibit conspiracies or attempts to import controlled substances, where that is the essence of the charged offense, and where an American civil court has jurisdiction over the person of the accused . . . the rationale of the overseas exception is not satisfied, for under the *O'Callahan* reasoning, a court-martial of this appellant is *not* as close as is possible to get toward affording him all the jury-related benefits of our constitutional law.[48]

Conclusion

There can now be no doubt that the sole purpose of the overseas

[46] *Id.* at 164-65, 51 C.M.R. at 383-84.

[47] *Id.* The court gave extraterritorial effect to 21 U.S.C. § 952 (1970), prohibiting importation of controlled substances, and 21 U.S.C. § 963 (1970), proscribing attempts or conspiracies to violate narcotics laws.

[48] 24 C.M.A. at 166, 51 C.M.R. at 385 (emphasis in original).

exception is to operate to preserve as many of an accused's constitutional rights as is possible when the rights which concerned the *O'Callahan* court, indictment by grand jury and trial by jury, are unavailable because of the extraterritoriality of the offense. It remains to be seen, however, whether the majority's emphasis on the twin constitutional thrusts of *O'Callahan* could be the basis for an actual expansion of court-martial jurisdiction by COMA, in apparent contravention of Justice Douglas' intent in *O'Callahan.* One member of the court has argued that since for some offenses right to grand jury indictment and trial by jury do not exist, an inquiry into service connection of these offenses is inappropriate, whether committed overseas or not.[49] The logic behind this position is that if the guarantees of *O'Callahan* cannot be implemented in a particular case, that offense should be an exception to the service connection requirement. This position has not yet been adopted, but neither has it been expressly rejected.[50] Perhaps in a future case the majority will be unable to avoid this issue. The most obvious fact situation which squarely poses this problem is a non-overseas, non-service connected offense which the military seeks to prosecute, and which is of such a "minor" nature that neither indictment nor jury trial is available as a matter of civilian law.

THE SERVICE CONNECTION OF OFF-POST DRUG OFFENSES

A challenge to court-martial jurisdiction of off-post drug offenses on the ground of a lack of service connection presents one of the most interesting questions in military law today. This is an area where COMA and the federal courts have found themselves in direct and continued conflict.[51] The typical scenario has a member of the armed forces committing some drug offense, *e.g.,* use, possession, transfer, sale or importation, while off-post, out of uniform, and off-duty. As will be demonstrated, the slight variations in fact situations often result in totally different resolutions of the jurisdictional issue.

Prior to *O'Callahan v. Parker,*[52] on the few occasions when COMA addressed the jurisdiction question where drug offenses were involved, the uniform holding was that drug offenses were triable by court-martial.[53] This result was predicated on the presumed "disastrous effects occasioned

[49]United States v. McCarthy, 25 C.M.A. 30, 54 C.M.R. 30 (1976) (Cook, J., concurring).

[50]While Judge Cook has taken this position, the other judges did not respond to it. *Id. Cf.* notes 80-89 *infra* & text accompanying.

[51]MOYER, *supra* note 2, § 1-445.

[52]395 U.S. 258 (1969). The Supreme Court held that in order for an offense to be triable by court-martial it must be "service connected." *See* note 9 *supra* & text accompanying.

[53]In United States v. Brice, 17 C.M.A. 336, 38 C.M.R. 134 (1967), the court said:

> There exists no specific codal provision regarding the possession, use, or sale of marihuana. When charged, it is normally treated as a violation of [Article 134]. The Manual [for Courts-Martial] discussion of offenses encompassed by Article 134 included the admonition that "It is a violation of this article WRONGFULLY *to possess marijuana or a habit forming narcotic drug.*"

by the wrongful use of narcotics on the health, morale and fitness for duty of persons in the armed forces."[54]

As a consequence of this attitude, when the Supreme Court established the service connection test in *O'Callahan,* COMA had little trouble justifying a blanket rule finding jurisdiction over the offenses of possession, use, or sale of drugs by a service member whether committed on or off-post.[55] In those cases following *O'Callahan* where the service connection of an army drug offense was an issue, COMA summarily found jurisdiction.[56] Service connection was also held to exist where one serviceman, by delivering drugs, served as a "conduit" for the unlawful possession of another serviceman.[57]

Id. at 340, 38 C.M.R. at 138 (emphasis in original). *See also* United States v. West, 15 C.M.A. 3, 6-7, 34 C.M.R. 449, 452-53 (1964). The Manual for Courts-Martial also provides that "[p]ossession or use of marihuana or a habit forming narcotic drug may be inferred to be wrongful unless the contrary appears." MCM ¶ 213b, 1969 (rev.).

[54]United States v. Williams, 8 C.M.A. 325, 327, 24 C.M.R. 135, 137 (1957).

[55]United States v. Beeker, 18 C.M.A. 563, 40 C.M.R. 275 (1969), is the leading case.

> Apart from the specifics of Federal and State law, use of marihuana and narcotics by military persons on or off a military base has special military significance. . . . As a result, the circumstance of "no military significance," described in *O'Callahan* as an essential condition for the limitation on court-martial jurisdiction, is not present . . . .
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> . . . Like wrongful use, wrongful possession of marihuana and narcotics on or off base has singular military significance which carries the act outside the limitation of military jurisdiction set out in the *O'Callahan* case.

Id. at 565, 40 C.M.R. at 277.

However, COMA refused to extend the *"Beeker* rule" to cover the unlawful importation and transportation specifications with which Beeker was charged, since the prohibition against these offenses "involves different considerations from the act of possession and entails the exercise of governmental powers different from regulation of the armed forces." *Id.* at 565, 40 C.M.R. at 277.

The offenses of importing marijuana into the counry and concealment and facilitation of the transfer of marijuana are contrary to 21 U.S.C. § 176a (1970). COMA's holding that importation of drugs is not, in itself, service connected has been rigorously adhered to. *See* MOYER, *supra* note 2, § 1-447 and cases cited therein.

[56]*See, e.g.,* United States v. DeRonde, 18 C.M.A. 575, 40 C.M.R. 287 (1969); United States v. Boyd, 18 C.M.A. 581, 40 C.M.A. 293 (1969); United States v. Castro, 18 C.M.A. 598, 40 C.M.R. 310 (1969). In *Castro,* the accused was discovered using and possessing drugs in the course of apprehension for being AWOL. To the extent that the rationale applied was that drugs are harmful because of their effect on health, morale and fitness for duty of persons in the armed forces, the relevance of the AWOL factor is unclear. It might be argued that the armed forces' interest in maintaining health, morale and fitness for duty is greatly diminished in the case of a serviceman who has already been AWOL for an extended period. In any event, the court did not address this issue. *Castro* was still considered good law two years after *Relford* by the Army Court of Military Review. United States v. Truelove, 47 C.M.R. 691 (ACMR 1973).

[57]United States v. Rose, 19 C.M.A. 3, 41 C.M.R. 3 (1969). This holding reflects the determination of COMA to base service connection on the "disastrous effects" proposition announced in *Williams.*

COMA has even gone so far as to uphold court-martial jurisdiction to try a service member for sale of marijuana to a serviceman-informer. *See* United States v. Sexton, 23 C.M.A. 101, 48 C.M.R. 662 (1974). The court rejected the Tenth Circuit's holding in Councilman v. Laird, 481 F.2d 613 (1973), *rev'd sub nom* Schlesinger v. Councilman, 420 U.S. 738 (1975), that an outward indication that the informer was performing a military duty was needed to show

Relford and Beyond: The Federal Courts and the Military Courts At Odds

The Supreme Court decision in *Relford v. Commandant, U.S. Disciplinary Barracks*[58] attempted to delineate more specifically the factors to be considered in implementing *O'Callahan.*[59] While it failed to indicate

service connection. However, United States v. Morley, 20 C.M.A. 179, 43 C.M.R. 19 (1970), held in part that a court-martial had no jurisdiction to try the accused for off-post sale of drugs to a *civilian.* But to be consistent with the "conduit" rationale of *Rose,* COMA would have to find service connection in such an offense if there appeared to be a *possibility* of resale or transfer to the military community. It is not clear that this would be the result. It is also unclear what would be the result where the "civilian" to whom the transfer was made was actually an undercover agent. The Courts of Military Review have reached varying results on the issue of sale to an undercover agent. *See* United States v. Mueller, 40 C.M.R. 862 (ACMR 1969) (purchaser a serviceman and defendant knew it); United States v. Butler, 41 C.M.R. 620 (ACMR 1969) (purchaser a civilian undercover agent); and United States v. Johnston, 41 C.M.R. 461 (ACMR 1969), all upholding jurisdiction to try a sale to an undercover agent. *Contra,* United States v. Blancuzzi, 46 C.M.R. 922 (NCMR 1972), where the Court of Military Review resolved the issue of service connection of a drug sale to an informer in this way:

> "Service connection" in the case of delivery or sale of a prohibited drug off base in the civilian community stems from the fact that the accused in selling the drug serves as a conduit for the *unlawful possession by another* service member with its concomitant deleterious effect on the health, morale, and fitness for duty of persons in the armed forces. In the case sub judice, since the sale was made to a CID agent, albeit a noncommissioned officer, it cannot be said that the latter's possession as a result of the sale was "unlawful" or that it adversely affected the health, morale, or fitness of the agent. Absent these ingredients the "service connection" link is missing and court-martial jurisdiction is lacking.

Id. at 923 (citation omitted).

[58]401 U.S. 355 (1971).

[59]In listing the factors to be given weight in a determination as to service connection, Mr. Justice Blackmun, speaking for a unanimous Court said:

> We stress seriatim what is thus emphasized in the [*O'Callahan*] holding:
> 1. The serviceman's proper absence from the base.
> 2. The crime's commission away from the base.
> 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 offense's being among those traditionally prosecuted in civilian courts.

Id. at 365.

The original issue framed by the parties was the retroactivity of *O'Callahan,* since Relford's case became final more than 5½ years prior to *O'Callahan.* But when the Court found service connection on the facts, it declined to reach this issue. This issue was reached in Gosa v. Mayden, 413 U.S. 665 (1973), where the Court declined to apply *O'Callahan* retroactively after utilizing the three-pronged analysis of Stovall v. Denno, 388 U.S. 293 (1970).

which factors were conclusive or what weight each should be given,[60] the decision did provide a clearer blueprint for finding the service connection of an offense. It would have been reasonable to expect this clarification to result in a more sophisticated analysis of drug related offenses. However, COMA generally continued to apply the blanket rule to hold that all drug offenses which could be related to possession by military personnel were triable by court-martial.[61]

COMA thus initially refused to avail itself of the tools of analysis on service connection questions made available in *Relford.* The same cannot be said, however, of the federal courts. As a general matter, the federal courts have eschewed a blanket rule such as COMA used. The federal courts conducted the kind of analysis contemplated by *O'Callahan* even before the clarifying decision of *Relford.*[62] Some federal courts seized upon the distinction between marijuana and "hard" drugs[63] and were not

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[60]For an amplification of this and other problems left unanswered by *Relford, see* MOYER, *supra* note 2, § 1-410.

[61]*See, e.g.,* Rainville v. Lee, 22 C.M.A. 464, 47 C.M.R. 554 (1973). A service member was convicted of wrongful use, possession and sale of marijuana while off duty, off post, and out of uniform. After citing the narrow exceptions to *Beeker,* the court held the case to be directly controlled by *Beeker. Id.* at 464-65, 47 C.M.R. at 554-55.

In some of the post-*Relford* cases, COMA has used an abbreviated analysis of the *Relford* factors. *See, e.g.,* United States v. Teasley, 22 C.M.A. 131, 46 C.M.R. 131 (1973), in which near the end of its opinion finding no service connection in the offense of possessing a hypodermic syringe for the purpose of injecting heroin while in the civilian community, COMA engaged in its cursory *Relford* analysis: "Since the act charged was committed in the civilian community, had no independent service significance, and was an offense in the civilian community cognizable in the courts of Maryland, it could not be tried by court-martial." *Id.* at 132, 46 C.M.R. at 132. Even if a full *Relford* analysis had been undertaken here, however, it is doubtful that service connection would have been found. At least seven out of twelve of the factors delineated in *Relford* cut against service connection here. The only possible factor which points the other way is the "flouting of military authority." Even this, though, would rest on the somewhat specious logic that Teasley was flouting military authority be injecting heroin while wearing fatigues, contrary to a post regulation as to attire while off post in an off duty status.

Nevertheless, for the most part the blanket rule of *Beeker, see* note 57 *supra,* has been reaffirmed. *But see* United States v. Morley, 20 C.M.A. 179, 43 C.M.R. 19 (1970); United States v. Hughes, 19 C.M.A. 510, 42 C.M.R. 112 (1970); United States v. Pieragowski, 19 C.M.A. 508, 42 C.M.R. 110 (1970).

[62]*See, e.g.,* Moylan v. Laird, 305 F. Supp. 551 (D. R.I. 1969). The case distinguished between use and possession of marijuana for purposes of service connection:

> The court is frank to acknowledge that use of marijuana by servicemen, whether on or off base, whether on or off duty, might well have special military significance. Accordingly, the court accepts the reasoning of the *Beeker* decision in so far as it deals with use of marijuana. However, possession is an entirely different matter. It is a matter cognizable by the civilian sovereignties, who are presently busily coping with it. No more so than the commission of other crimes does this particular crime tend to undermine military authority.

Id. at 557.

[63]*E.g.,* Cole v. Laird, 468 F.2d 829 (5th Cir. 1972). Comparing the present case with *Moylan,* preparatory to a *Relford*-type analysis, the court explained:

> [The government] seeks to distinguish the case at bar [from *Moylan*] on the basis that Cole was charged with the *use* of marijuana. The only basis for making this distinction is the Court of Military Appeals' opinion in *Beeker.* But . . . *Beeker*

amenable to the "conduit" theory espoused by COMA,[64] at least where small amounts of marijuana were concerned. Even the distinction between marijuana and "hard" drugs was not convincing to all federal courts.[65] The point to be made from the federal cases is that through the application of the *Relford* criteria, the federal courts were reaching results inconsistent with those reached in the military system.[66]

The 1975-76 Term: Relford Fulfilled

The 1975-76 term saw the mandate of *Relford* fulfilled by COMA. It is now clear that no blanket rule can be utilized by the military as an alternative to conducting an inquiry along the lines set out in *O'Callahan* and *Relford.* The first step in reaching this point was *United States v. Black.*[67] There the court foreshadowed its new emphasis on the literal requirements of *Relford:*

> rested on dicta in *Williams* to the effect that habitual narcotics use impairs the readiness of troops for action. It is clear that marijuana does not rise to the level of heroin or other physically addictive, "hard" drugs and the dangers associated with its use — whatever they may be — are not as great as those associated with heroin and the like.

Id. at 833 (citation omitted).

[64]*See* Lyle v. Kincaid, 344 F. Supp. 223 (M.D. Fla. 1972).

[65]*See* Redmond v. Warner, 355 F. Supp. 812 (D. Haw. 1973), and Schroth v. Warner, 353 F. Supp. 1032 (D. Haw. 1973), where the court was unable rationally to support a distinction between the rules applicable to marijuana on the one hand and controlled substances on the other. The Fifth Circuit, however, true to its language in Cole v. Laird, 468 F.2d 829 (5th Cir. 1972), found service connection in sale and possession of heroin in 1975, holding that there is a substantial variation between the interests of the military depending on whether the drug involved was heroin or marijuana. Peterson v. Goodwin, 512 F.2d 479 (5th Cir. 1975).

[66]It had been hoped that the Supreme Court's decision in Schlesinger v. Councilman, 420 U.S. 738 (1975), would settle the issue. In that case, military authorities had been enjoined from proceeding against the accused with a court-martial for sale, transfer and possession of marijuana. However, the Court declined to reach the service connection question, holding that Councilman had failed to exhaust his remedies within the military system and, as a result, injunction would not lie. *Id.* at 753-60. Although the merits of service connection were not discussed, there were some relevant dicta:

> [I]f the offenses . . . are not "service connected", the military courts will have had no power to impose any punishment whatever. But that issue turns in major part on gauging the impact of an offense on military discipline and effectiveness, on determining whether the military interest in deterring the offense is distinct from and greater than that of civilian society, and on whether the distinct military interest can be vindicated adequately in civilian courts. These are matters of judgment that often will turn on the precise set of facts in which the offense has occurred. See Relford v. U.S. Disciplinary Commandant, 401 U.S. 355 (1971). More importantly, they are matters as to which the expertise of military courts is singularly relevant, and their judgments indispensable to inform any eventual review in Art. III courts.

Id. at 760 (citation omitted).

Whatever the effect of this dicta on future resolutions of service connection issues, it was clear that the Supreme Court intended that a *Relford* analysis be applied, even in light of the singularly relevant expertise of military courts on these questions. Happily, COMA has recently conformed to that mandate.

[67]24 C.M.A. 162, 51 C.M.R. 381 (1976).

> Once it is judged that the overseas exception is not present in this case, the inquiry must then advance to the stage of applying the *O'Callahan* standard and the *Relford* criteria to determine whether there exists "service connection" so as to vest jurisdiction in the military nonetheless.[68]

United States v. Moore,[69] while not a drug case, continued to demonstrate COMA's new found emphasis on the literal application of *Relford*. After setting out the text of the *Relford* criteria[70] in the opinion, the court said:

> What *Relford* makes clear is the need for a detailed, thorough analysis of the jurisdictional criteria enunciated to resolve the service-connection issue in all cases tried by court-martial. A more simplistic formula, while perhaps desirable, was not deemed constitutionally appropriate by the Supreme Court. It no longer is within our province to formulate such a test.
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> . . . [The language of *Relford*] suggests that there may be instances in which a crime committed off post against a fellow servicemember or the service itself is *not* triable by court-martial applying the more detailed criteria previously outlined.[71]

The court rejected what had previously been a nearly conclusive presumption of service connection when the victim of the crime was a service member.[72] The court reaffirmed this position in *United States v. Hedlund*[73] when it said:

> Under certain unusual circumstances, this factor [*i.e.*, victim a service member] alone might be enough to cause such a high degree of military interest and concern as to compel jurisdiction in the military to try the accused. However, in most instances, including the one now before us, that is not the case. In fact, we believe that the degree of interest by the military in this AWOL Marine is de minimus and, alone, will not result in "service connection" as that term has come to be known.[74]

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[68]*Id.* at 167, 51 C.M.R. at 386 (footnotes omitted).

Judge Cook's dissent in *Black* focuses on two areas, the situs of the conspiracy and the fact that the overt act (mailing of a letter and currency) affected the integrity of the military postal system. *Id.* at 168, 51 C.M.R. at 387. The latter emphasis, which goes to one particular balance struck when the *Relford* criteria are applied, was a portent of his concurrence in United States v. McCarthy, 25 C.M.A. 30, 54 C.M.R. 30 (1976), which followed.

[69]24 C.M.A. 293, 52 C.M.R. 4 (1976). Petitioner devised a scheme at his off-base residence, while not properly off post, to fake his own drowning to avoid further military service. Assisted by his wife and a fellow airman, the accused also conspired to collect $20,000 under the accidental death provisions of the Serviceman's Group Life Insurance program by falsely reporting the drowning incident. As a result of the false report, the accused's wife also received a "death gratuity" out of Air Force appropriated funds.

[70]*See* note 61 *supra*.

[71]24 C.M.A. 293, 295, 52 C.M.R. 4, 6 (1976).

[72]For implicit recognition of this presumption *see* United States v. Hedlund, 25 C.M.A. 1, 3, 54 C.M.R. 1, 3 (1976).

[73]25 C.M.A. 1, 54 C.M.R. 1 (1976).

[74]*Id.* at 7, 54 C.M.R. at 7.

Only one week after *Hedlund,* COMA met the issue of off-post drug offenses head on.

In *United States v. McCarthy*[75] appellant challenged the jurisdiction of the general court-martial which tried him for wrongfully transferring three pounds of marijuana to a fellow soldier "just outside" the gate of Fort Campbell, Kentucky. After conducting a *Relford*-type analysis, the court reached the conclusion that the accused's offense was service connected.[76] But *McCarthy* is more than a simple application of the *Relford* standards to drug cases, albeit in a fashion not utilized theretofore by COMA. This case also indicates a growing recognition by the court that its simplistic approach to drug-related offenses was wrong, and that civilian courts are well-equipped to protect military interests at all times short of the point where a drug offense attains special military significance through rigorous application of *Relford.* The court said:

> In so concluding, we wish to stress that this factual situation is materially different under *Relford* than those in which off-duty servicemen commit a drug offense while blended into the general civilian populace. While it may very well be that a given civilian community takes a "hands-off" approach to marihuana, that circumstance, in and of itself, is an insufficient basis upon which to predicate military jurisdiction. To the extent that *United States v. Beeker,* 18 U.S.C.M.A. 563, 40 C.M.R. 275 (1969), suggest a different approach in resolving drug offense jurisdictional questions, it no longer should be considered a viable precedent of this Court.[77]

It appears that COMA has rejected the blanket rule in favor of the delicate

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[75]25 C.M.A. 30, 54 C.M.R. 30 (1976).

[76]COMA quoted the Supreme Court's opinion in Schlesinger v. Councilman, 420 U.S. 738, 760 (1975), as to what the task of the service connection doctrine essentially was: "The issue requires careful balancing of the *Relford* factors to determine 'whether the military interest in deterring the offense is distinct from and greater than that of civilian society, and whether the distinct military interest can be vindicated adequately in civilian courts.' " 25 C.M.A. 30, 33, 54 C.M.R. 30, 33 (1976). The court concluded that

> the four factors weighing in favor of military jurisdiction in this instance were sufficient to vest the court-martial with jurisdiction . . . .
>
> 1. The formation of the criminal intent for the offense on-post.
> 2. The substantial connection between defendant's military duties and the crime.
> 3. The transferee's being engaged in the performance of military duties, known to the defendant, at the time the agreement to transfer was reached.
> 4. The threat posed to military personnel, and hence the military community itself, by the transfer of a substantial quantity of marihuana to a fellow soldier who was a known drug dealer.

Id. at 34, 54 C.M.R. at 34. The facts show that appellant had become acquainted with the transferee through a military unit. Knowing that he was a drug dealer, accused sold him three pounds of marijuana, the physical transfer actually taking place outside the fort in Montgomery County, Tennessee. It appeared that the drug transaction actually was arranged in the accused's unit on post even though the physical transfer occurred in the civilian community. *Id.* at 33-34, 54 C.M.R. at 33-34.

[77]*Id.* at 35, 54 C.M.R. at 35 (citations omitted).

ad hoc approach mandated by *Relford.* This seems to suggest the possibility of a finding of no service connection in some variations of the typical scenario proposed in the introduction to this section.

The *McCarthy* decision is also significant in that it helps to resolve a problem left unanswered in *Relford.* While the Supreme Court articulated a number of factors to be considered in making a determination regarding service connection, it left unclear the weight to be given each factor, or whether some factors might have a conclusive effect. In *McCarthy,* COMA concluded that the four factors which pointed to service connection were sufficient to overbalance the remaining eight.[78] Thus it appears that COMA regards as a more compelling case for service connection those situations in which a drug offense is at least partially consummated on-post and where military personnel in addition to the perpetrator of the offense are involved.[79] This is a rational distinction, supported by the policy of *O'Callahan* that the military should concern itself with those situations in which it has a particular expertise or interest.

Judge Cook's Approach

Judge Cook has consistently taken a different approach to this question. For example, in his concurrence in *United States v. McCarthy*[80] he focused on the rights of indictment by grand jury and trial by jury that *O'Callahan* was intended to provide. He reasoned that since under Kentucky law McCarthy would have had neither a right to a jury trial, nor to indictment by grand jury, *O'Callahan* would not serve to deny court-martial jurisdiction.[81] And, since the offense charged could have been prosecuted on information under federal law, the guarantee-of-indictment justification for the bar to trial by court-martial was considered by Judge Cook not to exist. He therefore saw no need to determine service connection. In short, he views the justifications of *O'Callahan,* that is grand jury indictment and jury trial, as also being the limits of the reach of *O'Callahan* in questioning court-martial jurisdiction.

However, even if this analysis of *O'Callahan* is correct, Judge Cook's reasoning also rests in major part on his conceptualization of the court-

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[78]*See* note 76, *supra.*

[79]This again poses the problem of what to do in the case of a military undercover agent, *see* note 59 *supra.* Viewing *McCarthy* with a special eye toward the dicta concerning offenses blending into the civilian community, it may well be that COMA could distinguish, for purposes of service connection, those situations where the military undercover agents pose as civilians, from those in which the agents impersonate other military personnel.

[80]25 C.M.A. 30, 36, 54 C.M.R. 30, 36 (1976).

[81]As 'preserv[ing] . . . [the] two important constitutional guarantees' of indictment by grand jury and trial by petit jury was the predicate perceived in *O'Callahan v. Parker* for the limitation on the exercise of court-martial jurisdiction . . . the unavailability of those rights in state prosecutions eliminates the cognizability of the offense in the state courts as a bar to trial by court-martial.

Id. at 36-37, 54 C.M.R. at 36-37 (citations omitted).

martial members as "the functional equivalents of the jurors in a civilian criminal trial . . . ."[82] This viewpoint ignores the obvious differences in approach and background between civilian criminal trial juries and the members of a court-martial. The Supreme Court has said:

> [T]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence.[83]

Compare this statement with Moyer's observations regarding the members of a military court-martial:

> USCMA has ruled that some constitutional limitations apply to the process of court member selection. For example, commanders are prohibited by fifth amendment due process requirements from systematically excluding identifiable groups from service on courts-martial. . . . It is nonetheless clear that commanders have wide discretion in fashioning the composition of court panels. This personal authority is obviously foreign to civilian practice; if applicable, constitutional guarantees of jury trial would require a far more representative military jury, if not a system of random selection. . . . Under prevailing constitutional interpretation, however, the selection process need conform only to the requirements of article 25, UCMJ. . . .[84]

The potential for prejudicial exercise of command influence in court selection and instruction is also inherent in the military justice system.[85] It is reasonable to conclude that if the members of the court-martial are the "functional equivalents" of civilian criminal juries, it is only in the sense that both are triers of fact, and not in the larger sense contemplated by the Supreme Court.

Nor is it clear that the only purpose of the service connection requirement in *O'Callahan* was to insure the twin constitutional guarantees of grand jury indictment and trial by jury. There are inherent differences between the military and civilian systems, if not necessarily in the quality of justice, at least in the interests emphasized. COMA has construed the overseas exception to the subject matter jurisdiction requirement of *O'Callahan* as insuring a proceeding "as close as is possible to affording *all* the rights and privileges to an accused in Anglo-American jurisprudence."[86] Surely a construction of *O'Callahan* which grants

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[82]*Id.* at 37, 54 C.M.R. at 37. Judge Cook relies on Williams v. Florida, 399 U.S. 78 (1970), where the Supreme Court held that a criminal court jury may consist of less than the customary twelve members.

[83]Williams v. Florida, 399 U.S. 78, 100 (1970).

[84]MOYER, *supra* note 2, § 2-585. *See also id.* at §§ 2-590 to 600.

[85]MOYER, *supra* note 2, §§ 3-200 to 225. *See also* Note, *Self-incrimination in the Military Justice System*, 52 IND. L.J. ___ (1976), *infra*.

[86]United States v. Black, 24 C.M.A. 162, 166, 51 C.M.R. 381, 385 (1976) (emphasis added).

military jurisdiction in preference to civilian jurisdiction for the reasons suggested by Judge Cook flies in the face of this reading of *O'Callahan.*

Judge Cook has also emphasized the point made by the Supreme Court in *Schlesinger v. Councilman*[87] that military courts have particular expertise in evaluating the "military interest in deterring the offense"[88] and the possibility of vindicating that interest in civilian courts. However, while these are indeed factors to be considered in determining service connection, they are already included in the *Relford* criteria.[89] They should not be given weight independent of the *Relford* examination. Judge Cook may still be advocating the use of the blanket rule that drug offenses are per se service connected.

Conclusion

While COMA has finally dedicated itself to conforming to the mandate of *O'Callahan* and *Relford,* it is unclear how the service connection issue will be resolved in certain fact situations. One possible resolution is the marijuana - "hard drugs" distinction adhered to by the Fifth Circuit.[90] The court has a chance to break some new ground. There should be data on drug use and abuse available now that were not available when *Beeker* was decided in 1969. Such data could take the place of the court's previous broad statements about drug use and could become a useful tool not only for COMA, but also for other courts and legislatures faced with questions involving drugs. COMA should also be careful not to lay down a blanket rule of the opposite sort, as some may interpret the dicta regarding drug offenses committed while blending into the civilian community to be. While line drawing is difficult in an area involving as many variables as service connection, the court must be true to the ad hoc approach of *Relford* and seek to apply the criteria consistently with a view toward balancing the military's interest in insuring discipline, morale and fitness for duty with the constitutional preference for civilian jurisdiction expressed in *O'Callahan.*

ROBERT PARKER

[87]420 U.S. 738 (1975). *See* note 68 *supra.*
[88]420 U.S. at 760. *See* note 68 *supra.*
[89]*See* note 61 *supra,* points 8 and 12.
[90]*See* note 65 *supra* & text accompanying.