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O'Callahan v. Parker: The Relford Decision and Further Developments in Military Justice

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O'Callahan v. Parker: THE *Relford* DECISION AND FURTHER DEVELOPMENTS IN MILITARY JUSTICE

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I. INTRODUCTION

IN an article published one year ago,[1] the present authors examined the holding in *O'Callahan v. Parker*[2] that courts-martial, at least in peacetime, have jurisdiction only over "service-connected" offenses, and reviewed the decisions of the United States Court of Military Appeals which determined what offenses were and were not in fact service connected. It was observed that two critical questions remained unanswered: Is *O'Callahan* retroactive as to cases which were *final* on the date of its promulgation,[3] and to what extent will the Supreme Court follow the decisions of the Court of Military Appeals as to the application of the test of service connection?

It was noted that the Supreme Court had recently granted certiorari in *Relford v. Commandant*,[4] offering hope that a decision on the question of retroactivity might be forthcoming. Since then, on February 24, 1971, that case has been decided.[5] Although a holding on retroactivity had been widely forecast and expected in military legal circles, the Supreme Court declined to speak on that matter. It did, however, cast some light on its view of the limits of service connection.

Though *Relford* did nothing to alleviate concern as to whether the thousands of earlier convicted servicemen will be able to reopen their cases in reliance on *O'Callahan*, some comments upon *Relford* appear to be timely, together with a summary of the military decisions on service connection which have been decided in the past year.[6]

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1. Birnbaum & Fowler, Military Appellate Decisions Following O'Callahan v. Parker, 38 Fordham L. Rev. 673 (1970) [hereinafter cited as Birnbaum & Fowler].

2. 395 U.S. 258 (1969).

3. The decision in O'Callahan v. Parker was rendered June 2, 1969.

4. 397 U.S. 934 (1970).

5. 91 S. Ct. 649 (1971).

6. The interested reader is directed to the present authors' earlier article for a discussion of prior developments, which will not be generally mentioned here. See Birnbaum & Fowler.

II. THE *Relford* DECISION

Isaiah Relford, in 1961, while a corporal on active duty in the United States Army and stationed at Fort Dix, New Jersey, committed certain acts which led to his court-martial. He was convicted for kidnapping and raping two women. The first victim was the 14 year old sister of another serviceman who was abducted at knife-point from the parking lot at the post hospital. The second was the wife of an Air Force man stationed at the adjacent McGuire Air Force Base. She was kidnapped at a stop sign while en route from her home on the base to her job as a waitress at the base exchange which was also located on the base. Both rapes took place on the Fort Dix Military Reservation and all of the events occurred on the military reservation composed of the contiguous Army and Air Force installations. Relford was in civilian clothes on both occasions.

Relford was convicted of two specifications of rape under Article 120[7] of the Uniform Code of Military Justice and two specifications of kidnapping under Article 134.[8] His sentence, which as imposed by the court-martial included the death penalty, was reduced in the course of appellate review to dishonorable discharge, total forfeiture of pay and allowances, and confinement at hard labor for 30 years. The Court of Military Appeals denied a petition for review on September 24, 1963. This terminated the appellate process and the proceedings became final and conclusive in due course, as provided by Article 76.[9]

In 1967, while in the United States Disciplinary Barracks at Leavenworth, Kansas, Relford began litigation seeking a writ of habeas corpus. Although his initial claim was not a challenge to jurisdiction, and the district court and the court of appeals holdings denying the writ antedated the *O'Callahan* decision, in due time the Supreme Court granted certiorari "limited to retroactivity and scope of *O'Callahan v. Parker* . . . ."[10]

The Government strongly urged that the question of retroactivity be decided,[11] but the decision when rendered dealt almost exclusively with the question of whether Relford's acts were distinguishable from those of O'Callahan, so as to permit military jurisdiction within the test of service connection. It will be recalled that O'Callahan, while absent on

7. The Uniform Code of Military Justice art. 120 [hereinafter cited as U.C.M.J.]. The U.C.M.J. is codified at 10 U.S.C. §§ 801-940 (1964), as amended, (Supp. V, 1970).

8. U.C.M.J. art. 134, 10 U.S.C. § 934 (1964).

9. U.C.M.J. art. 76, 10 U.S.C. § 876 (1964).

10. Relford v. Commandant, 397 U.S. 934 (1970).

11. 91 S. Ct. at 657.

leave in Hawaii (then a territory) committed the acts off-base which led to his court-martial conviction for the crimes of attempted rape, housebreaking, and assault with intent to commit rape.

The opinion of Mr. Justice Douglas in *O'Callahan* did not set forth any distinct tests for determining what was service connection. Rather, he stated a series of factors which led to the conclusion of the majority that there was no service connection in the case.[12] It is of interest to note that Mr. Justice Blackmun, speaking for the Court in *Relford*, reiterated the tabulation of the circumstances cited by Mr. Justice Douglas in *O'Callahan*, namely:

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 defendent'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.

[To these, the opinion adds] still another factor implicit in the others:

12. The offense's being among those traditionally prosecuted in civilian courts.[13]

Mr. Justice Blackmun then observed that the Court in *O'Callahan* had chosen to take "an *ad hoc* approach" in deciding on court-martial jurisdiction. Accordingly, after identifying the parallels between the two cases, he listed the differences—the factors relied on in *O'Callahan* which did not favor Corporal Relford. These factors were elements 1, 2, 3, 7, and 10. Relford was not absent from the base. The crimes were on-base. The second victim was engaged in PX work, "a duty relating to the military," and was returning to her post after a short, approved break. In addition, the security of two women properly on the post was threatened and their persons violated.

Other "significant aspects" were also mentioned by Mr. Justice Blackmun, one of which may have future importance: both victims

12. 395 U.S. at 273-74.
13. 91 S. Ct at 655.

were related to a serviceman—one being a sister, the other a wife of a serviceman.

In the discussion which followed, the interest of the military in the safety of personnel and property on military installations was analysed at some length. Of particular interest was the reference to a quotation from Colonel Winthrop,[14] the nineteenth century military justice authority, which was cited by both the majority[15] and the dissent[16] in *O'Callahan* and which, as Mr. Justice Blackmun noted, "even goes so far as to include [court-martial jurisdiction over] an offense against a civilian committed 'near' a military post."[17] The Court also declined to draw a line between a post's "strictly military areas and its nonmilitary areas" and between a serviceman's on-duty and off-duty activities and time on post.[18]

The discussion led to the Court's holding that:

> [W]hen a serviceman is charged with an offense committed within or at the geographical boundary of a military post and violative of the security of a person or of property there, that offense may be tried by a court-martial. Expressing it another way: a serviceman's crime against the person of an individual upon the base or against property on the base is "service-connected", within the meaning of that requirement as specified in *O'Callahan*, 395 U.S., at 272.[19]

In a highly useful appraisal of the scope of its decision, the Court then observed:

> We recognize that any *ad hoc* approach leaves outer boundaries undetermined. *O'Callahan* marks an area, perhaps not the limit, for the concern of the civil courts and where the military may not enter. The case today marks an area, perhaps not the limit, where the court-martial is appropriate and permissible. What lies between is for decision at another time.[20]

Finally, the Court addressed itself to the question of the retroactivity of *O'Callahan* but, while granting its important "direct and collateral" dimensions, declined to resolve that question until a later decision in which it may be "solely dispositive of the case."[21]

It may be seen that the decision in *Relford* did not go as far as military legal practitioners had hoped in providing a compendium for the application of *O'Callahan*. On the other hand, it is valuable in helping to

14. W. Winthrop, Military Law and Precedents 723-24 (2d ed. reprint. 1920).
15. 395 U.S. at 274 n.19.
16. Id. at 278-79.
17. 91 S. Ct. at 657.
18. Id.
19. Id.
20. Id.
21. Id.

sort out developments since *O'Callahan* and provides at least limited support for the validity of the decisions of the Court of Military Appeals in the area. Before discussing this, however, it would be helpful to discuss certain military cases decided during the past year.

III. Recent Military Cases

Since the early part of 1970, and while *Relford* was before the Supreme Court, the Court of Military Appeals addressed itself to the question of service connection in some dozen additional cases. The decisions were uniformly in line with those previously reported and, while they stated no new concepts, they further refined the court's view of the permissible limits of court-martial jurisdiction under *O'Callahan*.

A. *On-Base v. Off-Base Offenses*

The Court of Military Appeals has firmly adhered to its earlier holdings that crimes committed on-base in the United States are all service-connected.[22] However, the fact that a sequence of criminal activity begins on the base and continues in the civilian community has been held not to extend jurisdiction to divisible off-base aspects.

Thus, in *United States v. Wills*[23] the accused stole the auto of another serviceman from an on-base parking lot and drove it from the base and eventually across state lines. In addition to the larceny and other unrelated offenses, he was charged with interstate transportation of stolen property in violation of the United States Code,[24] which was pleaded as a violation of the portion of Article 134[25] providing for court-martial jurisdiction over "crimes and offenses not capital." The court found that the larceny was properly triable by the military court as an offense committed on base, citing *United States v. Paxiao*.[26] However, the court held that the larceny and the interstate transportation were not all part of one offense, thus distinguishing *United States v. Crapo*.[27] The court observed that the title 18 offense requires only *knowledge*

22. United States v. Harvey, 19 U.S.C.M.A. 539, 42 C.M.R. 141 (1970); United States v. Daniels, 19 U.S.C.M.A. 529, 42 C.M.R. 131 (1970); see Birnbaum & Fowler 679-80 & nn.29-42.

23. 20 U.S.C.M.A. 8, 42 C.M.R. 200 (1970).

24. 18 U.S.C. § 2312 (1964).

25. U.C.M.J. art. 134, 10 U.S.C. § 934 (1964).

26. 20 U.S.C.M.A. at 10, 42 C.M.R. at ___, citing United States v. Paxiao, 18 U.S.C.M.A. 608, 40 C.M.R. 320 (1969).

27. 18 U.S.C.M.A. 594, 40 C.M.R. 306 (1969). In this case, an assault on a taxi driver committed on-base was followed by his being taken off-base and robbed. The court held that the robbery was a continuation of the on-base offense and was triable by courts-martial.

that the vehicle is stolen, not that the offender be the same, and that it was not significant for this purpose that the accused had previously stolen the same car on base. Hence, it treated the transportation offense as an off-base offense without other military connection, and therefore beyond the jurisdiction of courts-martial. It should also be noted that the court found no significance in the fact that the car belonged to a serviceman. Thus, it adopted the position that the owner-serviceman was the *victim* in the larceny—which in itself would confer jurisdiction over that offense—but not in the subsequent movement of the stolen car across state lines.[28]

B. *Status of Victim*

Prior to *Relford*, the Court of Military Appeals had decided that the status of the victim of any offense as a serviceman was alone sufficient to constitute service connection,[29] but status as a retired serviceman or a dependent of a serviceman would not be.[30] This distinction was preserved in *United States v. Snyder*,[31] where the victims of a manslaughter and assault were the wife and child of the accused serviceman. Here, the offense occurred off-base. The court held that neither their status as military dependents nor the fact that the child's death occurred in a military hospital conferred court-martial jurisdiction.

C. *Overseas Cases*

Since the *O'Callahan* decision was rendered, the Court of Military Appeals has decided that courts-martial have jurisdiction over the crimes of servicemen committed outside the territorial jurisdiction of the United States unless extraterritorial jurisdiction is vested in a federal civilian court, or the trial is otherwise prohibited, as by treaty.[32] Three additional cases[33] have since been decided dealing with a very interesting distinction.

28. The court found no significance for the purpose of conferring jurisdiction in the fact that the title 18 offense was, for military purposes, charged under U.C.M.J. art. 134, 10 U.S.C. § 934 (1964).

29. See cases cited in Birnbaum & Fowler 680 nn.43 & 44.

30. Id. at 681 nn.45 & 46.

31. 20 U.S.C.M.A. 102, 42 C.M.R. 294 (1970).

32. See cases cited in Birnbaum & Fowler 678 nn.26 & 27.

33. United States v. Davis, 20 U.S.C.M.A. 27, 42 C.M.R. 219 (1970); United States v. Hargrave, 20 U.S.C.M.A. 27, 42 C.M.R. 219 (1970); United States v. Ortiz, 20 U.S.C.M.A. 21, 42 C.M.R. 213 (1970).

It would be helpful to briefly outline the historical context in which these cases arose. The United States gained control of Okinawa in the Ryukyu Islands by military conquest. Thereafter, in the peace treaty with Japan, the United States recognized Japanese "residual

In every one of the three cases, the defense contended that the military courts were without jurisdiction, since extraterritorial jurisdiction was actually vested in a federal civilian court. Chief Judge Quinn, in *United States v. Ortiz*,[34] observed that the language in *O'Callahan* "tends to indicate that the cognizability of an act in a civilian court established by the United States in the administration of [occupied foreign] territory does not preclude military prosecution of the act, if it constitutes a violation of the Uniform Code of Military Justice,"[35] and that *O'Callahan* referred to crimes " 'committed within our territorial limits . . . not in the occupied zone of a foreign country.' "[36] However, he did not rely on this distinction alone, for his review of the original grants of authority to the United States courts in Okinawa and the subsequent changes showed that the federal civilian courts there had no jurisdiction over service personnel unless the military commander decided not to exercise military jurisdiction. His earlier comments, however, signal the possibility that in a subsequent case unaffected by an executive order or treaty, the court may find military jurisdiction over crimes constituting a violation of the UCMJ committed on foreign territory, despite the presence of a federal civilian court of competent jurisdiction.

D. *Drug Offenses*

The Court of Military Appeals has been unanimous in its holding that the use and the possession of marijuana and other prohibited drugs are offenses having special military significance sufficient to confer court-martial jurisdiction wherever committed.[37] It has also held that the transfer of these drugs to another serviceman without compliance with

sovereignty" over the island, with the administration remaining in the United States until a trusteeship could be established under United Nations auspices. This arrangement was discussed at length in United States v. Vierra, 14 U.S.C.M.A. 48, 33 C.M.R. 260 (1963). The President granted authority for a Ryukyuan government, including a judiciary. This judiciary is composed of two court systems, one maintained by the Ryukyuan government and the other maintained by the United States for the trial of "employees of the United States Government who are United States nationals." Exec. Order No. 10,713, § 10(a)(2), 3 C.F.R. 368, 369 (1961), as amended, Exec. Order No. 11,010, 3 C.F.R. 587 (1964).

34. 20 U.S.C.M.A. 21, 42 C.M.R. 213 (1970).

35. Id. at 22, 42 C.M.R. at ___.

36. Id., quoting O'Callahan v. Parker, 395 U.S. 258, 273 (1969).

37. United States v. Adams, 19 U.S.C.M.A. 75, 41 C.M.R. 75 (1969), aff'd on reconsideration, 19 U.S.C.M.A. 262, 41 C.M.R. 262 (1970); United States v. Rose, 19 U.S.C.M.A. 3, 41 C.M.R. 3 (1969); United States v. Castro, 18 U.S.C.M.A. 598, 40 C.M.R. 310 (1969); United States v. DeRonde, 18 U.S.C.M.A. 575, 40 C.M.R. 287 (1969); United States v. Beeker, 18 U.S.C.M.A. 563, 40 C.M.R. 275 (1969); United States v. Wysingle, 39 C.M.R. 693 (1967), rev'd on reconsideration, 19 U.S.C.M.A. 81, 41 C.M.R. 81 (1969), rev'd on reconsideration, 19 U.S.C.M.A. 263, 41 C.M.R. 263 (1970).

the Marihuana Tax Stamp Act[38] is service connected.[39] The court has recently held that the transfer of these prohibited drugs to a *civilian off-base* is not service connected, although possession of the prohibited drug by the accused immediately before the transfer would be service connected and cognizable by a court-martial.[40] This distinction, like that made in *Wills*, reveals the nicety with which the court applies its analysis of the boundaries of service connection.

In *United States v. Beeker*,[41] the court held that possession and use of drugs is service connected but, absent other connection, importation and transportation are not. Recent per curiam decisions have confirmed this distinction as to importation.[42] In *United States v. Pieragowski*,[43] where smuggling was charged under Article 134,[44] the court held that military jurisdiction did not attach even where the prohibited substance was flown into the United States on a military-chartered aircraft which landed at a military base. The court noted that the charter did not change the aircraft into a military vehicle. Moreover, although the plane landed at a military field, the court observed that this "was a convenience which did not eliminate the civilian character of customs inspection, as evidenced by the inspection of the accused's effects by regular civilian customs inspectors."[45] It is interesting to note that the fact that the contraband was introduced into the United States through a military installation did not render the offense "on-base" for the purpose of conferring military jurisdiction. This, of course, does not disturb the court's holding that the unauthorized possession of contraband drugs by a serviceman is service connected.

IV. Some Analytical Comments

The first and most obvious observation inspired by correlating *Relford* with the growing body of military cases is that the Supreme Court has not at all indicated a more restricted view of service connec-

38. Act of Aug. 16, 1954, ch. 736, §§ 4741-62, 68A Stat. 560, repealed, Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 1101(b)(3)(A), 1970 U.S. Code Cong. & Ad. News 5329 (Oct. 27, 1970).

39. United States v. Adams, 19 U.S.C.M.A. 262, 41 C.M.R. 262 (1970), aff'g 19 U.S.C.M.A. 75, 41 C.M.R. 75 (1969).

40. United States v. Morley, 20 U.S.C.M.A. 179, 43 C.M.R. 19 (1970).

41. 18 U.S.C.M.A. 563, 40 C.M.R. 275 (1969).

42. United States v. Hughes, 19 U.S.C.M.A. 510, 42 C.M.R. 112 (1970); United States v. Pieragowski, 19 U.S.C.M.A. 508, 42 C.M.R. 110 (1970); United States v. LeBlanc, 19 U.S.C.M.A. 381, 41 C.M.R. 381 (1970).

43. 19 U.S.C.M.A. 508, 42 C.M.R. 110 (1970).

44. U.C.M.J. art. 134, 10 U.S.C. § 934 (1964).

45. 19 U.S.C.M.A. at 509, 42 C.M.R. at ___.

tion than that which the Court of Military Appeals has developed pursuant to *O'Callahan.*

The holding in *Relford* is fully consistent with the view of the latter court that military jurisdiction attaches to offenses committed on-base solely by virtue of the location. There is, perhaps, one small area yet undefined in this regard. The Supreme Court in *Relford* held that jurisdiction applies to "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 . . . .*"[46] Does this leave room for exclusion of jurisdiction in a case where the offense is committed on-base but is not directed against on-base persons or property? Such an instance would be rare as most of the offenses without victims committed on military installations are themselves military offenses, such as absence without leave and violations of lawful regulations and orders. What can most readily be hypothesized is an offense involving some means of communication, with a victim off-base, such as forgery or an indecent phone call originating on-base to a telephone in the civilian community. An analysis of the decisions of the Court of Military Appeals strongly suggests that it would not exclude these from court-martial jurisdiction, in light of the threat that they pose to base security and discipline. However, the careful language of Mr. Justice Blackmun only permits the observation that the Supreme Court in *Relford* has left their view on this an open question.

Another bit of language in the above quotation raises another question. It has been noted that the Court laid more stress in *Relford* than in *O'Callahan* on Colonel Winthrop's recognition of military jurisdiction over offenses against civilians "near" a military post.[47] In its holding, the Court referred to offenses *within or at* the geographical boundaries of a military post. The use of "at" in contradistinction to "within" the boundary must be given some analysis. At the least, it would seem to include an offense just outside the base gate or in the shadow of the boundary fence. Many bases are circumscribed by public roads just outside the boundary line; would these be included? An additional question posed by this language is whether it forecasts the possibility of some further extension along lines reflected in Colonel Winthrop's treatise.

It must be noted that Supreme Court consideration of this further extension would almost surely be conditional upon a previous affirmance of a conviction by the Court of Military Appeals. This court has not yet

46. 91 S. Ct at 657 (emphasis added).

47. See text accompanying note 17 supra.

discussed a crime that was not clearly either on or off a military installation. The nicety with which the Court of Military Appeals has applied the distinctions as to whether an offense is service connected has previously been noted, and this would seem to militate against this court's blurring the sharp distinction in this instance. On the other hand, Chief Judge Quinn's original strong views against any broad application of *O'Callahan*, expressed in his dissent in *United States v. Borys*,[48] the first of his court's decisions on service connection, suggests that he, at least, would not be adverse to re-evaluating the court's decisions limiting court-martial jurisdiction, to the extent that it may be clearly signaled by language of the Supreme Court. Moreover, of the three judges of the Court of Military Appeals, Judge Ferguson has taken by far the broadest view of the *O'Callahan* limitation.[49] His fifteen year term on the court ends this year. The future decisions of the court which will apply the guidance of the Supreme Court on service connection as incompletely expressed in *O'Callahan* and *Relford*, may depend to a large measure on its composition.

A third aspect of the *Relford* decision also merits consideration. The Supreme Court placed considerable emphasis on the fact that the two victims were *related* to military personnel on the reservation. However, the Court of Military Appeals has never seen a service connection in that factor. In *United States v. Shockley*,[50] the accused's stepson was the victim of multiple instances of sodomy and, without even noting that fact, Judge Ferguson's opinion reversed the conviction of the one offense which was not committed on-base. In *United States v. Henderson*,[51] Judge Ferguson held that off-base carnal knowledge of a serviceman's daughter was not service connected, while in *United States v. McGonigal*,[52] he held that sexual offenses by a serviceman against the daughter of another serviceman, also committed off-base, were not within court-martial jurisdiction. The most recent in this line of cases is *United States v. Snyder*,[53] which has been previously discussed.[54] It is worthy of note that Chief Judge Quinn dissented in all four cases. *Relford* may indicate that the Supreme Court would reach the same conclusion as the Chief Judge.

Relford thus leaves room for the Court of Military Appeals to adopt

48. 18 U.S.C.M.A. 547, 550, 40 C.M.R. 259, 262 (1969).
49. Birnbaum & Fowler 677.
50. 18 U.S.C.M.A. 610, 40 C.M.R. 322 (1969).
51. 18 U.S.C.M.A. 601, 40 C.M.R. 313 (1969).
52. 19 U.S.C.M.A. 94, 41 C.M.R. 94 (1969).
53. 20 U.S.C.M.A. 102, 42 C.M.R. 294 (1970).
54. See text accompanying note 31 supra.

future extensions on service connection through inclusion of some areas beyond strict base boundaries or based upon the relationship of the victim to the serviceman. However, it is not suggested that such a development will occur soon, if at all. It would require an appropriate case, with facts which would lead the respective military trial judge, staff judge advocate, and Court of Military Review[55] to find that there was service connection, notwithstanding the previous decisions of the Court of Military Appeals. Only then would the case go to the latter court, so as to give them an opportunity to reconsider their pronouncements in this field. A decision at any of the earlier levels that there was no jurisdiction, based on the existing case law, would terminate action so that the case would never reach the final appellate step.

In other respects, *Relford* does not conflict with the factors which the Court of Military Appeals has accepted as establishing service connection. In particular, its reference to the relationship of the victims to servicemen strongly indicates that the Supreme Court will accept the view of the service court that an offense against another serviceman is *per se* service connected.

A careful reading of *Relford* gives no real hint of what the Supreme Court will rule on the question of retroactivity. The importance of the question can scarcely be overstated. How many thousands of persons are alive who were convicted by courts-martial before, during, and after World War II for an offense which would not be held service connected under *O'Callahan* can only be conjectured. In many cases, the factors on which service connection might be based were never explored at the trial, so that the Government will be without access to the once-available evidence to counter an attack on this basis.

There is a surface attraction to the argument that if, as a constitutional matter, courts-martial have now been held not to have jurisdiction over a wide variety of off-base felonies, no person was ever validly convicted under those circumstances and all are entitled to redress. However, it must be recognized that many, and perhaps most, of those men were fairly convicted of crimes which they did commit. Selection of a military court for the trial did not reflect want of capability to convict by a civil court, but a decision as to who should take the case reached mutually by two levels of government on the basis of facts in the individual case. Indeed, in many cases the accused may have benefited by selection of the military forum—in others, perhaps not. In any case, the

55. This court is the successor to the boards of review. The Army, Air Force, Navy (which includes the Marine Corps), and Coast Guard each have one Court of Military Review. See U.C.M.J. art. 66, 10 U.S.C. § 866 (Supp. V, 1970).

vast majority would now be beyond the reach of the civilian court which might originally have tried them. The authors do not even pause to consider the vast caseload which the courts might have to consider for a belated application of the *O'Callahan* doctrine and assessment of monetary and other compensatory relief.

V. Future Prospects

There is no reason to expect any early change in the effective application of *O'Callahan* to current cases. For the time being at least, the Court of Military Appeals' decisions concerning what offenses are or are not service connected will doubtless mark the limits of military jurisdiction. No cases are now in the civilian federal court system which promise any immediate reference to the Supreme Court on that aspect of the question, while the Court's language in *Relford* certainly does not betray any impatience with the military cases which have followed its earlier pronouncement in *O'Callahan.*

On the other hand, there is reason to expect further definitive action on the question of retroactivity in the near future. A case is now before the United States Court of Appeals for the Fifth Circuit which sufficiently isolates that issue to provide the instance in which it will be "solely" dispositive as to which the Supreme Court spoke in *Relford.*

On December 2, 1966, James Ray Gosa, then a member of the Air Force, was convicted by a general court-martial of the offense of rape committed in Cheyenne, Wyoming while he was off-base on a pass and dressed in civilian clothes. His sentence included a bad conduct discharge, total forfeitures, and confinement at hard labor for ten years. The case was affirmed in due course by the Board of Review[56] and appeal was denied by the Court of Military Appeals on August 16, 1967.[57] An application for a writ of habeas corpus having been denied on August 19, 1969 by the United States District Court for the District of Kansas, he filed an application for another writ based entirely on his claim that his court-martial was void for want of jurisdiction, citing *O'Callahan.*[58] The writ was denied by the District Court for the Northern

56. United States v. Gosa, A.C.M. No. 19,784 (decided May 22, 1967).

57. United States v. Gosa, 17 U.S.C.M.A. 648 (1967).

58. The title of this action is Gosa v. Mayden. Overlapping his district court action, Gosa also petitioned the Court of Military Appeals for reconsideration of their earlier denial of appeal, basing his claim solely on O'Callahan v. Parker. That court denied his petition, holding that O'Callahan does not apply to cases which became final before its promulgation. Gosa v. United States, 19 U.S.C.M.A. 327, 41 C.M.R. 327 (1970). Judge Ferguson dissented to this decision.

District of Florida on November 13, 1969,[59] and in due course he took his appeal to the Court of Appeals for the Fifth Circuit.[60]

The appeal was at once set for hearing, but was subsequently postponed pending the Supreme Court's decision in *Relford*, in expectation of a ruling on retroactivity. In light of the absence from *Relford* of any guidance on that subject, a resetting of the hearing is being awaited and should be known shortly.[61]

The facts of *Gosa* are so closely parallel to those in *O'Callahan* that there is no reasonable likelihood of any consideration intruding into the decision other than the simple question of retroactivity. Whatever the decision of the Fifth Circuit, there appears to be a high probability that the losing side will seek certiorari from the Supreme Court. Whether the writ is granted and a formal opinion is forthcoming or the writ is denied, the result should be the first indication of the Court's view on whether *O'Callahan* shall be applied retroactively.

VI. Conclusion

At this time, the law determing what cases courts-martial may try under *O'Callahan* appears to be fairly stable. The group of inclusive factors determined by the Court of Military Appeals and listed in our previous article[62] has not been substantially altered and there is no basis for expecting an early decision by the Supreme Court which may affect it. While there is the possibility for some extensions noted above, they cannot really be expected at this juncture. Staff judge advocates are operating under these rules in advising commanders as to what cases they can order to trial, as are military judges and the Courts of Military Review in their judicial actions. The prospect of a case presenting the real opportunity for a decision by the Court of Military Appeals which might relax the strictures on military jurisdiction is slight.[63]

The question of the retroactivity of *O'Callahan* appears to be headed for determination with no more delay than the time inherent in the two appellate stages yet remaining in *Gosa*. A holding against retroactivity will present no problems to the courts and to the executive branch of

59. Gosa v. Mayden, 305 F. Supp. 1186 (N.D. Fla. 1969).

60. Appeal docketed, No. 29,139, 5th Cir., ___.

61. In March, 1971, as this article neared completion, the hearing date was expected momentarily. Argument may have been heard before publication of this article. The authors express their appreciation to Major Earl Hodgson, Military Justice Division, USAF Judiciary, for information regarding Gosa v. Mayden.

62. Birnbaum & Fowler 686.

63. While the judges would have an opportunity to encourage such a case through dictum or extra-judicial comment, such action on their part is unlikely.

the Government, including the military services. On the other hand, a decision which permits the reexamination of the question of service connection in all pre-1969 convictions by courts-martial for offenses not strictly military in character will require a hard look at the procedure to be used in processing the resulting demand for redress because of the case load potential. An appraisal of this must await the promised decision of the Supreme Court.