Service-Connection and Drug-Related Offenses: The Military Courts' Ever-Expanding Jurisdiction

Michael Caudell-Feagan
micheal.feagan@nyls.edu

Daniel Warshawsky
New York Law School

Follow this and additional works at: http://digitalcommons.nyls.edu/fac_articles_chapters

Part of the Military, War, and Peace Commons

Recommended Citation
SERVICE-CONNECTION AND DRUG-RELATED OFFENSES: THE MILITARY COURTS' EVER-EXPANDING JURISDICTION*

The military community in the United States now consists of over two million volunteers.1 If any of these servicemembers are accused of a crime, their only judicial recourse may be to courts-martial: a system of military courts created under Congress's Article I powers, independent of — and with limited review by — Article III courts.2 This judicial system denies its defendants basic constitutional rights3 — rights otherwise guaranteed by the Constitution these men and women have sworn to defend, if necessary, with their lives.4

The Supreme Court has acknowledged both the constitutional basis and the need for a separate military judicial system.5 Nonetheless, to minimize the military's encroachment on individual liberties, the Court restricts military courts' jurisdiction to "'the least possible power adequate to the end proposed'"6 by allowing military courts jurisdiction only over military personnel7 who allegedly commit "service-connected" crimes.8 By devising the service-connection requirement in O'Callahan v. Parker,9 the Court provided eligible servicemembers the right to a trial in a civilian court, free from the shortcomings of the military courts. To clarify the O'Callahan decision, the Court, in Relford v. Commandant,10 refined the service-connection test by specifying criteria probative of service connection, requiring courts, by reference to the enumerated criteria, to determine on a case-by-case basis whether a given offense is service connected.11

In the years since O'Callahan and Relford, military courts have

---

* This Note was developed by Michael Caudell-Feagan and Daniel Warshawsky.
2. See infra notes 18-24 and accompanying text.
3. See infra notes 27-30 and accompanying text.
7. Id. at 267 (indicating that precedent dictates courts-martial have no jurisdiction over persons who are not members of the military).
8. Id. at 272.
10. 401 U.S. 355 (1971). The Court recognized that the O'Callahan decision had engendered confusion in the military courts. See id. at 370.
11. See id. at 365-69. For the Court's list of probative criteria see infra note 84.
Military Courts' Jurisdiction
THE GEORGE WASHINGTON LAW REVIEW

at times only reluctantly adhered to the Supreme Court’s strict service-connection analysis, particularly for defendants charged with drug-related offenses. Nevertheless, until recently, military courts set aside their reluctance and diligently applied the service-connection criteria whenever defendants challenged the courts’ jurisdiction. Yet, military courts are now discarding the ad hoc approach and are returning to a virtual per se test that finds all drug offenses service connected. Instead of judging each case against the Relford Court’s criteria, military courts justify their assertions of jurisdiction merely by incanting broad generalizations about the gravity of narcotics abuse in the military. This total disregard of the Supreme Court’s mandate undermines the Court’s attempt at providing some military defendants with the individual liberties otherwise available only through the civilian legal system.

This Note explores the service-connection requirement and military courts’ application of the requirement to service personnel charged with drug-related offenses. Part I outlines the organization and constitutional basis of the court-martial system. By contrasting the civilian and military judicial systems, this Note demonstrates the serious disadvantages suffered by defendants in military courts. Part II traces the Supreme Court’s development of the service-connection test for military courts’ jurisdiction. Part III summarizes the military courts’ application of the service-connection test to drug-related offenses, and emphasizes the Court of Military Appeals’ recent reinterpretation and expansion of the jurisdiction of courts-martial. Part IV analyzes and critiques the military courts’ redefinition of the service-connection test, and suggests that the military courts’ current approach violates the Supreme Court’s precedential explication of this jurisdictional requirement.

14. In United States v. Trottier, the Court of Military Appeals questioned its “slavish” application of the Relford criteria. See United States v. Trottier, 9 M.J. 337, 343-45 (C.M.A. 1980). This decision was characterized as a return to a per se rule, see infra note 171 and accompanying text, and military courts have adhered to such an approach, see infra notes 172, 177, 189 and accompanying text.
I. Military Courts: The Society Apart

Article I of the Constitution empowers Congress to "make Rules for the Government and Regulation of the land and naval Forces." Pursuant to this provision, Congress enacted the Uniform Code of Military Justice and created a system of court-martial independent of the federal courts established under Article III. This separate military system has developed its own procedures and defined its own crimes and sanctions.

In light of Article I's explicit grant of congressional power, and in deference to the particular needs of the military, the Supreme Court has taken a very limited role in developing and supervising military courts. Until relatively recently, all federal courts lacked power to review directly the substantive determinations of military courts; instead, the courts were limited to a collateral review of the military courts' personal and subject-matter jurisdiction. Further, although Congress's 1983 amendments to the Uniform Code of Military Justice gave parties in military tribunals the right to submit writs of certiorari to the Supreme Court, the avenues for direct review remain limited. The military and

---

19. Id.
20. See Burns v. Wilson, 346 U.S. 137, 140 (1952). The Court stated:
   Military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment. This Court has played no role in its development; we have exerted no supervisory power over the courts which enforce it; the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The framers expressly entrusted that task to Congress.
   Id. (footnotes omitted).
21. See Hiatt v. Brown, 339 U.S. 103, 111 (1950) (stating that a court-martial has sole jurisdiction over the accused, and that any errors it may have committed are solely the concern of the military authorities); In re Grimley, 137 U.S. 147, 150 (1890) (because civil courts exercise no supervisory powers over courts-martial, court-martial errors are not open to consideration by civilian courts); Ex parte Valandigham, 68 U.S. (1 Wall.) 243, 253 (1863) (stating that a court of military commission exercises a special authority).
23. In deference to concerns about the Supreme Court's docket, Congress limited the number of decisions subject to direct review. H.R. Rep. No. 549, 98th Cong., 1st Sess. 16, 17 (1983). Only decisions by the highest military court, the Court of Military Appeals, are subject to review. See 10 U.S.C. § 867(h)(1) (Supp. II 1984). If the Court of Military Appeals does not grant a petition for review, the Supreme Court has complete discretion to refuse to grant petitions for writs of certiorari. H.R. Rep. No. 549, supra, at 17.
its court system thus remain a "society apart from civilian society."24

Members of the military who are unfortunate enough to appear as defendants before military courts face a tribunal far different from its civilian counterpart. Over the past four decades, Congress has extensively reformed the military court system,25 and the military has, itself, extended a panoply of constitutional protections to its defendants.26 Yet, despite these reforms, defendants tried in military courts suffer serious disadvantages that do not afflict defendants in civilian courts — disadvantages rooted in both the Constitution and the nature of the military courts.27

Defendants in military courts are not necessarily entitled to all the procedural protections available to defendants in civilian courts. Although the Fifth Amendment guarantees the right to a grand jury indictment, the Amendment specifically excludes "cases arising in the land or naval forces."28 Further, the Supreme


28. U.S. CONST. amend. V.
Court has held that the Constitution does not guarantee the right to trial by jury in military courts. Though each of these deprivations is significant, a military defendant's inability to secure a trial by jury is the more serious.

Article III of the Constitution provides: "The trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ." The Sixth Amendment reafirms the right to trial by jury: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." The Supreme Court has characterized trial by jury as the citizen's bulwark against governmental oppression, and has emphasized the jury's importance by expanding the criminal defendant's right to a trial by an impartial jury of his peers. The Court has protected the right to trial by jury by applying the requirement to state courts as a fundamental right under the Fourteenth Amendment when the accused is charged with a serious crime, by holding juries with fewer than six members unconstitutional, by requiring unanimous verdicts from six-person juries, and by ensuring the impartiality and representativeness of the jury. Indeed, trial

29. See O'Callahan v. Parker, 395 U.S. 258, 261 (1969); Ex parte Quirin, 317 U.S. 1, 40 (1942). See generally Van Loan, The Jury, the Court-Martial, and the Constitution, 57 CORNELL L. REV. 363, 410-11 (1972) (arguing that the framers did not intend to require trial by jury in military tribunals and that the omission of a specific exception from the Sixth Amendment was an oversight).

30. The Uniform Code of Military Justice has partially remedied the unavailability of the right to a grand jury indictment by requiring a "thorough and impartial investigation of all matters set forth in a charge or specification." 10 U.S.C. § 832(a) (1982). In a precourt-martial investigation, the accused now has the right to counsel, the right to present evidence, and the right to cross-examine witnesses. 10 U.S.C. § 832(b) (1982). However, unlike constitutional protections, these rights can be curtailed through the normal legislative process. Moreover, upon completion of the investigation, the convening authority, not a grand jury, determines whether the evidence warrants a trial. See 10 U.S.C. § 834 (Supp. II 1984). On the other hand, the right to indictment by a grand jury, unlike the right to a jury trial, has not been incorporated in the Fourteenth Amendment's Due Process Clause, Hurtado v. California, 110 U.S. 516, 538 (1884), and therefore is not necessarily available in all state courts where servicemembers accused of non-service-connected crimes may be tried. D. Emerson, Grand Jury Reform: A Review of Key Issues 11-12 (1983). Thus, defendants in courts-martial are not necessarily deprived of a civilian right to a grand jury.

32. U.S. Const. amend. VI.
37. See Taylor v. Louisiana, 419 U.S. 522, 533 (1975) (right to petit jury selected from a representative section of the community is violated by systematic exclusion of women from jury panels); Witherspoon v. Illinois, 391 U.S. 510, 521-22 (1968) (overturning conviction because statute excluded potential jurors if they stated they had "conscientious scruples" against capital punishment).
by jury is considered a jewel of Anglo-American jurisprudence. Nevertheless, military courts try defendants without this fundamental protection.

Military and Article III courts also differ in the essential nature of their respective judiciaries. Defendants tried in federal civilian courts are protected by Article III's requirement of an independent judiciary. Article III judges are essentially uninfluenced by the prosecutor or other branches of the government; the judges' sole purpose is to administer justice. Moreover, judges' independence and objectivity are protected by tenure and undiminishable salary, as well as by longstanding judicial tradition.

The court-martial system stands in stark contrast to the civilian courts. Courts-martial serve a dual role: they both administer justice and enforce the military's need for discipline and efficiency. Generally, a court-martial is an ad hoc tribunal convened by a commanding officer to hear a specific case. As the convening authority, the commanding officer can exert substantial influence over the court-martial's proceeding. He decides not only whether to pursue a case, but also what type of court-martial to convene. The officer's selection of a general, special, or summary court-martial determines the punishments that may be imposed and the protections that are available to the defendant.

No matter what forum is selected, the accused has the right to select a trial by a panel of servicemembers, rather than solely by a
military judge or commissioned officer. If the defendant requests a panel, the convening authority selects the panel members. Thus, the individual who, after an initial review of the case, signed the charges and decided that the case warranted a trial also selects the panel that will try the accused. Moreover, panel members, aware that the convening authority can affect their progress in the military and respectful of their superiors, are often subject to the subtle or direct influence of the commanding officer who has already indicated that a defendant should stand trial. Further, the panels tend to be unrepresentative of the mil-

fourths of the members must concur, id. § 852(b)(2), and, for other guilty verdicts, only two-thirds need concur, id. § 852(b)(3).

The special court-martial is the intermediate court in the military judicial structure and may be comprised of a single military judge, a minimum of three members without a military judge, or a military judge and three panel members. Id. § 816(2). The special court-martial may try any noncapital offense, but the maximum sentences it may impose are six months confinement, three months hard labor without confinement, six months forfeiture of two-thirds pay, demotion, or a bad conduct discharge. Id. § 819.

The summary court-martial may be convened only with the accused's consent. Id. § 820. One commissioned officer, who need not be a lawyer, presides. Id. § 816. The maximum punishment is one month's confinement, hard labor without confinement for 45 days, restriction to specified limits for two months, or forfeiture of two-thirds of one month's pay. Id. § 820. Because the summary court-martial cannot imprison the defendant, the defendant has no right to appointed counsel. See Argersinger v. Hamlin, 407 U.S. 25, 37 (1972).

Commanders are also empowered to impose nonjudicial punishments, including correctional custody for up to 30 days, reduction in pay, restrictions, extra duties and forfeiture of up to seven day's pay. 10 U.S.C. § 815(b) (1982 & Supp. II 1984). A servicemember may, however, refuse nonjudicial punishment and demand a court-martial, except when on a vessel at sea. Id. § 815(a) (1982).

Although summary courts-martial and nonjudicial punishment do not provide for trial by a panel of servicemembers, 10 U.S.C. §§ 816(3), 815(b) (1982 & Supp. II 1984), the accused must acquiesce before the initiation of a summary court-martial, id. § 820 (1982), and in most cases must consent to the infliction of nonjudicial punishments, id. § 815(a). If a servicemember objects to these proceedings, he will be tried by either special or general court-martial; in both cases he has the right to trial by a panel of servicemembers. Id. § 816(1)-(2) (1982 & Supp. II 1984).

49. Id. §§ 825(d)(2), 850(a). After a pretrial investigation, see id. § 832(a), and upon the advice of the staff judge advocate, see id. § 834(a) (Supp. II 1984), the convening authority independently decides whether to refer charges to trial. See id. § 830(b) (1982). Generally, the convening authority's decision to refer the case to a court-martial is sacrosanct. See D. SCHLUETER, supra note 13, at 202.

Legal scholars have attacked the 1968 Act. Luther C. West states: "The real cause of the disease itself . . . remains uninhibited by [the 1968 Act's] changes. The military judicial setting is still dominated by military commanders, from the inception of charges to the completion of appellate review . . . ." West, A History of Command Influence on the Military Judicial System, 18 UCLA L. REV. 1, 151 (1970). See also Remcho, Military Juries: Constitutional Analysis and the Need for Reform, 47 IND. L.J. 193, 195 (1972) (general critique of military juries); Comment, Stacked Juries: A Problem of Military Injustice, 11 SANTA CLARA L. REV. 362, 374 (1970) (observing that when an enlisted man elects trial by a panel as provided by the 1968 Act, he is usually
Military Courts' Jurisdiction
THE GEORGE WASHINGTON LAW REVIEW

Military community: they are normally comprised of commissioned officers or senior noncommissioned officers.52 Thus, enlisted personnel are judged not by their peers, but by members of the command structure.53

Not surprisingly, court-martial panels are widely perceived as biased in favor of the military authorities.54 Indeed, the Court of Military Appeals itself has recognized that court-martial panels, handpicked by a commanding officer and requiring less than a unanimous vote by their five or fewer members for a valid conviction, are a far cry from the impartial jury trials that the Supreme Court has mandated in civilian criminal trials.55

Finally, unlike Article III judges, military judges are not protected by tenure or an undiminishable salary.56 Although the Military Justice Act of 1968 created a field judiciary of full-time judges assigned directly to the Judge Advocate General,57 the military judge's independence remains circumscribed by the judge's position as an officer in the very branch of the government that prosecutes the defendants appearing before the judge.58

In sum, military courts afford defendants significantly fewer protections than do their civilian counterparts. Not only is the military defendant denied certain fundamental civil rights, such as trial by an impartial jury, he is also judged by decisionmakers whose impartiality is not guaranteed.

faced with officers and noncommissioned officers, thereby increasing rather than reducing command influence).

52. Remcho, supra note 51, at 195; Comment, supra note 51, at 374.

53. In contrast, courts struggle to assure that civilian juries remain impartial and representative. See supra notes 33-38 and accompanying text.

54. Court-martial panels are criticized both by legal scholars, see infra note 51, and by servicemembers. One survey asked military defendants whether the military panels in their cases were "fair and unbiased." 17.1% answered yes, 63.4% said no, and 19.5% did not know. The survey's author concluded: "[I]t is unlikely that the strongly negative attitudes of military defendants would be duplicated among the civilian prisoner population." Pitkin, The Military Justice System: An Analysis from the Defendant's Perspective, 29 JAG 251, 267-268 (1977); see also Remcho, supra note 51, at 196 (suggesting that few enlisted personnel elect the jury option because of fear of bias in favor of military authorities on the part of senior noncommissioned officers).

55. See United States v. McCarthy, 2 M.J. 26, 29 n.3 (C.M.A. 1976). Five-member panels do not meet the base size and voting requirements that the Supreme Court has found necessary to avoid seriously impairing the functioning of juries. See supra notes 35-36 and accompanying text. The General Accounting Office has recommended that Congress require random selection of military jurors and consider enlarging the size of juries. U.S. G.A.O., MILITARY JURY SYSTEM NEEDS SAFEGUARDS FOUND IN CIVILIAN FEDERAL COURTS 44 (1977).


II. The Supreme Court: Restrictions On Military Courts' Jurisdiction

Although the Supreme Court has acknowledged both the constitutional basis and the necessity for restricting the rights of military defendants, the Court has also attempted to ameliorate these deprivations by progressively restricting the jurisdiction of the military courts.\(^{59}\) To balance the necessity for Article I military tribunals with the need to protect the constitutional rights of individual military defendants,\(^{60}\) the Court has limited Congress's power to authorize trial by court-martial to "the least possible power adequate to the end proposed."\(^{61}\)

In *United States ex rel. Toth v. Quarles*,\(^{62}\) the first in a series of decisions limiting military courts' jurisdiction, the Supreme Court held that military courts lack jurisdiction over ex-servicemembers— even if the ex-servicemembers are charged with crimes allegedly committed while on active duty.\(^{63}\) The *Quarles* Court strictly construed Congress's power to vest military courts with jurisdictional authority, based partly on the Court's conclusion that military courts lack the qualifications that the Constitution deems essential to fair civil trials.\(^{64}\) In *Reid v. Covert*,\(^{65}\) the Court further narrowed the jurisdiction of courts-martial, holding that military courts lack jurisdiction to try and imprison civilians, even if the civilians are dependents of servicemembers and live on a military base overseas.\(^{66}\) The Court again emphasized the limitations inherent in military justice,\(^{67}\) stressing that every extension of military courts' jurisdiction encroaches on the jurisdiction of the civil courts, and "acts as a deprivation of the right to jury trial and of other treasured constitutional protections."\(^{68}\) *Quarles, Reid,* and several later decisions\(^{69}\) stripped the military courts of jurisdiction over civilians and laid down the first of two prerequisites for jurisdiction of a court-martial: military status.\(^{70}\)

In 1969, the Supreme Court took a giant step forward, and for

---

59. *See infra* notes 62-89 and accompanying text.
63. *See* id. at 23.
64. *See* id. at 14-15, 17.
66. *See* id. at 19.
67. *See* id. at 35-36.
68. *Id.* at 21.
70. *See* D. SCHLUETER, *supra* note 18, at 126. In dictum, the *Reid* Court expressed that military courts might have jurisdiction to try a civilian only if the civilian is arrested in an area of actual fighting. *See* Reid, 354 U.S. at 33-35.
the first time denied a military court jurisdiction to try an active servicemember. In *O'Callahan v. Parker*, a sergeant in the United States Army was charged with housebreaking, attempted rape, and assault with intent to rape while properly off-base and on leave. The Supreme Court held that the defendant's military status, although necessary, was not sufficient to establish the military court's jurisdiction. The Court enunciated the further requirement that for a court-martial to have jurisdiction, the alleged offense “must be service connected.” If it is not, the defendant is entitled to a trial in a civilian court.

In restricting the military court's jurisdiction over active servicemembers, the *O'Callahan* Court emphasized the constitutional stakes, the weaknesses in court-martial proceedings, and the threat to liberty engendered by any unnecessary expansion of military discipline. In a vehement condemnation of the military courts, the Court stated: “[C]ourts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law . . . .”

In enumerating the service-connection requirement, the Court engendered some confusion by failing to formulate any simple test for determining the presence or absence of service connection in a given case. Instead, the Court discussed a series of factors indicating the lack of service connection: the defendant was properly absent from the base; the crime was committed off a military post; there was no connection between the defendant’s military duties and the crime; the offense was committed within the United States’ territorial limits, during peacetime; and the offense did not threaten military security, property, or authority.

Two years later, in a unanimous decision, the Court attempted to clarify *O'Callahan*, refining the service-connection test by applying it in a different factual context. In *Relford v. Comman-

---

72. Id. at 260.
73. See id. at 267 (“[C]ourt-martial jurisdiction cannot be extended to reach any person not a member of the Armed Forces at the times of both the offense and the trial.”).
74. Id. at 272.
75. Id. at 273-74.
76. See id. at 262-65.
77. Id. at 265. The Court further observed: “A civilian trial . . . is held in an atmosphere conducive to the protection of individual rights, while a military trial is marked by the age-old manifest destiny of retributive justice.” Id. at 266 (footnote omitted).
the Court granted a court-martial jurisdiction over an Army corporal charged with kidnapping and raping two civilians who were properly within the military enclave. In reviewing the propriety of the jurisdiction of courts-martial, the Supreme Court again emphasized the tension between constitutional guarantees for individual citizens and constitutional provisions for the establishment of a military court system. To clarify the service-connection analysis, the Relford Court listed the criteria emphasized in O'Callahan, stressed nine considerations relevant to a service-connection inquiry, and sanctioned an ad hoc approach for determining the presence of service connection. The Court apparently felt that only by carefully analyzing each case in light of a series of service-connection factors could courts balance the fundamental rights of the defendant and the legitimate exercise of military courts’ power. The Court recognized that its ad hoc approach left “outer boundaries undetermined,” but concluded that Corporal Relford’s alleged crimes were service connected. Finally, the Court opined that its holding fully comported with

---

81. See id. at 360-61.
82. See id. at 362-63.
83. See id. at 365.
84. The Court stressed:
   (a) The military’s interest in the security of persons and property on the military enclave;
   (b) the military commander’s responsibility and authority to maintain order;
   (c) the adverse effect of crime upon the morale, discipline, reputation, and integrity of the base and its personnel, and upon the military operation and mission;
   (d) the conviction that article I vests Congress with the power to grant military courts the jurisdiction to try and punish military offenders;
   (e) the distinct possibility that civil, particularly nonfederal, courts will inadequately assess and respect the military’s disciplinary authority within its own community;
   (f) the O'Callahan Court’s implication that geographical and military relationships are important factors for ruling out a service connection;
   (g) the O'Callahan Court’s recognition that even the Continental Congress allowed military jurisdiction over crimes by service members against individuals associated with a military base;
   (h) the impropriety of interpreting the O'Callahan decision as confining the court-martial to purely military offenses with no counterpart in nonmilitary criminal law; and
   (i) the Court’s inability to draw a meaningful distinction between strictly military and nonmilitary areas, or between a serviceman-defendant’s on-duty and off-duty activities and hours on the military post. See id. at 367-69.
85. See id. at 365-66, 369; see also United States v. Moore, 1 M.J. 448, 450 (C.M.A. 1976) (opining that the Relford Court constitutionalized the need for a detailed analysis of the enumerated jurisdictional criteria to resolve the service-connection issue).
86. See Relford, 401 U.S. at 369.
87. Id. The Court elaborated: “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.” Id.
88. See id. at 367, 369. The Court emphasized that the crimes were committed on a military base, the victims were properly on the base, tangible personal property on the base was impaired, and the security of the installation was threatened. Id. at 366-67. In final analysis, the Court formulated a limited per se rule: “a serviceman's
the O'Callahan standard for limiting military courts’ jurisdiction to “the least possible power adequate to the end proposed.”

In 1975, the Supreme Court was once again faced with an opportunity to refine the service-connection test. In Schlesinger v. Councilman, the Court refused to enjoin a pending court-martial, despite the defendant’s assertion that his alleged acts were not service connected. The Court avoided the merits of the defendant’s service-connection defense, choosing instead to limit the power of Article III courts to intervene in pending court-martial proceedings.

In reaching its decision, the Court reemphasized that, “[of] course, if the offenses with which [the defendant] is charged are not ‘service connected,’ the military courts will have had no power to impose any punishment whatever.” The Court departed from Justice Douglas’s earlier scathing criticism of the military courts, however, and stated that, in deference to Congress’s judgment as embodied in the Uniform Code of Military Justice, the Court was required to assume that military courts can safeguard defendants’ crime against the person of an individual upon the base or against property on the base is ‘service connected’ . . .” Id. at 369.

90. See id. at 369. While off-post and off-duty, the defendant allegedly transferred small quantities of marijuana to an undercover agent who represented that he was also off-duty. Id. at 740-41.

91. See id. at 743-44. Proceeding to the service-connection inquiry, the dissenting justices conducted an ad hoc analysis employing the Relford criteria, and found no service connection. See id. at 767 (Brennan, J., concurring in part and dissenting in part).

92. See id. at 758. Unlike the defendants in Relford and O'Callahan, who had exhausted their rights to review in the military-court system and had filed their habeas corpus petitions only upon actual imprisonment, see 401 U.S. at 362; 395 U.S. at 261, the defendant in Councilman sought to enjoin his pending court-martial, see 420 U.S. at 741-42. Although the Supreme Court did not hold that Congress had limited Article III court review of military court proceedings exclusively to habeas corpus proceedings, the Court found that Captain Councilman had not suffered such irreparable harm as to justify the extraordinary relief of enjoining a pending court-martial. See id. at 754-55. The Court withheld the district court’s remedial power because the accused could “show no harm other than that attendant to resolution of his case in the military-court system.” Id. at 758. Councilman was thereby required to pursue his rights through the military court system. See id. at 759-60. The Court in no way limited Councilman’s ultimate right to seek review of the military court’s assertion of jurisdiction after exhausting his rights in the military courts. See id. at 758.

The Court reaffirmed Councilman in McLucas v. DeChamplain, 421 U.S. 21, 33-34 (1975) (“When a serviceman . . . can show no harm other than that attendant to resolution of his case in the military court system, the federal district courts must refrain from intervention.”) (quoting Councilman, 420 U.S. at 758). It remains unclear what situation might justify a federal court’s intervention in court-martial proceedings other than by habeas corpus relief. See Bartley, Military Law in the 1970's: The Effects of Schlesinger v. Councilman, 17 A.F.L. REV., Winter 1975, at 65, 71.

93. Councilman, 420 U.S. at 760.

94. Councilman, 420 U.S. at 760.

95. See O'Callahan, 395 U.S. at 265-66.
constitutional rights. The Court recognized that the service-connection inquiry is a matter within the singular expertise of military courts, and concluded that military courts' judgments are indispensable to an informed review by Article III courts. Yet, notwithstanding this apparent reassessment of military courts’ competence, the Councilman Court reaffirmed the ad hoc approach of Relford and concluded that the service-connection determination “often will turn on the precise set of facts in which the offense has occurred.” The ad hoc test thus remained the linchpin of the Court's service-connection analysis.

The chief consequence of Schlesinger v. Councilman has been a substantial restriction of Article III courts' review of military courts' determinations. Thus, since Councilman, military courts have been the primary arena for litigating the service-connection doctrine. This Note now analyzes military courts’ development of the service-connection test, focusing on the courts’ application of the test to drug-related offenses. This Note concludes that the current approach of military courts — a per se approach that holds virtually all drug-related offenses involving servicemembers to be service connected — violates the Supreme Court’s test for military courts’ jurisdiction.

III. Military Courts’ Application of the Service-Connection Requirement to Drug-Related Offenses

During the late 1960s, the military experienced a growing drug-abuse problem, and, in the ensuing years, military courts

96. See Councilman, 420 U.S. at 758 (“[I]mplicit in the congressional scheme embodied in the Code is the view that the military court system generally is adequate to and responsibly will perform its assigned task.”).
97. See id. at 760.
98. See id. (citing Relford, 401 U.S. at 365-66).
99. By restricting federal courts’ review of military cases to habeas corpus petitions, and by leaving only a narrow undefined opening for equitable jurisdiction when a servicemember can show harm other than that attendant to the resolution of a case, the Court closed the paths by which many military defendants had reached Article III courts. See, e.g., Cole v. Laird, 468 F.2d 829 (5th Cir. 1972) (holding that a federal conviction for drug possession is sufficient for judicial review even though defendant failed to exhaust existing military remedies); Gerko v. Commanding Officer, 314 F.2d 858 (10th Cir. 1963) (in light of Sixth Amendment’s provision for a speedy trial, judicial review granted to determine whether military court properly exercised jurisdiction over defendant whose enlistment expired prior to date of court-martial proceedings); Redmond v. Warner, 353 F. Supp. 1032 (D. Hawaii 1973) (holding that defendant's good faith allegation that court-martial is without jurisdiction is sufficient to establish grounds for Article III courts’ review); Moylan v. Laird, 305 F. Supp. 551 (D.R.I. 1969) (off-base possession of marijuana established substantial question as to military court's jurisdiction appropriate for Article III court review); see also Bartley, supra note 93, at 78 (“The difficulty of surmounting the equitable jurisdiction requirement makes it doubtful that the [service-connection] issue will come before the Court again in the near future.”).
processed many drug-related cases.\textsuperscript{101} Although most off-base offenses are clearly not service-connected, the military has long argued that drug-related offenses pose unique problems and that even those committed off-base are service-connected.\textsuperscript{102} As a consequence, the service-connection inquiry frequently has been litigated in cases involving drug-related offenses.

The Court of Military Appeals,\textsuperscript{103} the supreme military court, has taken the lead in formulating military courts’ service-connection analysis. Immediately after the Supreme Court decided \textit{O’Callahan}, the Court of Military Appeals broadly held, in \textit{United States v. Beeker},\textsuperscript{104} that both wrongful use and wrongful possession of marijuana or narcotics “on or off base, has singular military significance which carries [each] act outside the limitation on military jurisdiction set out in the \textit{O’Callahan} case.”\textsuperscript{105} Under this per se rule, military courts concluded that servicemembers accused of any drug-related offense — wherever or whenever committed — were automatically subject to courts-martial. For the next seven years, the per se rule was applied to all cases involving drug-related offenses in the military courts.\textsuperscript{106}

In marked contrast to the military courts’ per se approach to determining jurisdiction in drug-related cases, the lower Article III courts properly employed the Supreme Court’s ad hoc analysis and consistently restricted military courts’ jurisdiction over defendants charged with off-base offenses involving nonaddictive drugs.\textsuperscript{107} Thus, for a number of years immediately following the

\textsuperscript{101} Id. at 253 (by 1970, the Department of Defense reported 4,908 courts-martial and 5,906 nonjudicial punishments for drug-related offenses).


\textsuperscript{103} The Court of Military Appeals is a civilian appellate forum attached to the Department of a military court of review. 10 U.S.C. § 867(a)(1), (d) (1982). The President appoints the three civilian judges for 15-year terms. \textit{Id.} § 867(a)(1). The Court of Military Appeals reviews all lower military-court decisions involving death sentences, \textit{Id.} § 867(b)(1) (Supp. II 1984), cases certified by a Judge Advocate General, \textit{Id.} § 867(b)(2) (1982), and hears some cases after accepting an accused’s petition for review, \textit{Id.} § 867(b)(2). \textit{See generally Cooke, The United States Court of Military Appeals, 1975-1977: Judicializing the Military Justice System, 76 Mil. L. Rev. 43 (1977) (discussing the court’s authority, operation, and related jurisdictional issues).}

\textsuperscript{104} 18 C.M.A. 563, 40 C.M.R. 275 (1969).

\textsuperscript{105} Id. at 565, 40 C.M.R. at 277.


\textsuperscript{107} \textit{See, e.g.}, \textit{Peterson v. Goodwin}, 512 F.2d 479, 480 (5th Cir.) (off-base possession
O'Callahan decision, the military and Article III courts took sharply different views of the meaning of service connection.

In 1976, however, the Court of Military Appeals acknowledged its "own prior analytical shortcomings," and overruled Beeker and its per se approach to jurisdiction over drug offenses. The Court of Military Appeals adopted an "analytical process of carefully balancing the Relford criteria . . . on a case-by-case, offense-by-offense basis," and began reading the Supreme Court's opinions as a mandate to abandon any simplistic formulations of the service-connection test. The ad hoc approach mandated by the Supreme Court in Relford thus became the cornerstone of the service-connection analysis in both Article III and military courts.

In 1980, however, the Court of Military Appeals again drastically altered its interpretation of the service-connection requirement. In United States v. Trottier, a special court-martial convicted the defendant of selling marijuana and lysergic acid diethylamide (LSD) to an Air Force informant at an off-base apartment. Because the informant professed an intention to distribute the drugs on a military base, the Court of Military Appeals could have found a service connection based on precedent. Instead, the court chose to extend its analysis beyond the facts before it and to reconsider completely its interpretation of the service-connection requirement.


109. See id. at 29.
112. The Court of Military Appeals zealously adhered to the Supreme Court's analysis and mandated that the government affirmatively establish the Relford factors through sworn pleadings. See United States v. Alef, 3 M.J. 414, 419 (C.M.A. 1977).
113. 9 M.J. 387 (C.M.A. 1980).
114. Id. at 338-39.
115. Id. at 339. In prior decisions, the Court of Military Appeals had consistently held that sale of narcotics to a servicemember who professed the intention to introduce the narcotics on a military installation was service connected. See, e.g., United States v. Chambers, 7 M.J. 24, 24 (C.M.A. 1979).
116. See Trottier, 9 M.J. at 339.
Military Courts' Jurisdiction
THE GEORGE WASHINGTON LAW REVIEW

connected.'"117 In reaching that conclusion, the court did not return completely to the per se approach of *Beeker;*118 it noted that in unusual circumstances certain drug-related offenses might not be service connected.119 Yet, the *Trottier* court greatly minimized the importance of the ad hoc approach mandated by the *Relford* decision.120 Instead, the court postulated that military courts have jurisdiction over whole classes of drug offenses and that courts need not take an ad hoc approach in every case.121 Ultimately the *Trottier* Court applied the *Relford* criteria to the facts before it;122 however, the court made a series of sweeping generalizations that led it to conclude that the service-connection inquiry ought to be made far more flexible.123 Not surprisingly, the court found the defendant's offenses service connected.124

IV. Critique of the Military Courts' Application of the Service-Connection Requirement to Drug-Related Offenses

In *United States v. Trottier*, the Court of Military Appeals reinterpreted the service-connection requirement in the context of drug-related offenses, and vastly expanded its jurisdiction to try cases involving such offenses by returning, at least in practice, to a per se rule for military courts' jurisdiction over drug-related

117. Id. at 350 (footnote omitted).
118. See id. at 352 n.34. But see id. at 353 (Fletcher, J., concurring) (suggesting that the majority opinion revives *Beeker* and "discloses . . . a lessening of the requirement that the Government fulfill its obligation . . . to meet the letter of the law").
119. See id. at 350 n.28. The court noted:
   For instance, it would not appear that use of marihuana by a serviceperson on a lengthy period of leave away from the military community would have such an effect on the military as to warrant the invocation of a claim of special military interest and significance adequate to support court-martial jurisdiction under *O'Callahan*. Similarly, the interest of the military in the sale of a small amount of contraband substance by a military person to a civilian for the latter's personal use seems attenuated.
   Id. (citation omitted).
120. See id.
121. See id. at 345. The court asked and answered its own rhetorical question: "[D]id the Supreme Court intend that each individual case be dealt with separately and that no classes of cases be recognized in which military jurisdiction exists? *Relford* implies that the *ad hoc* approach need not necessarily be taken to this extreme." Id.
122. See id. at 351-53.
123. The court emphasized the gravity of the drug problem in the armed forces, and concluded that the problem was so severe that it required the extension of court-martial jurisdiction "to the greatest extent legally permissible." Id. at 346. Asserting that "[e]ven constitutional law must be molded to the times," id. at 344, the court broadly concluded that almost all drug-related offenses involving service personnel are service connected, see id. at 350.
124. See id. at 352-53.
cases. Indeed, since Trottier, the military high court has expansively interpreted its jurisdiction to hear cases involving service members' drug offenses. This Note argues that the Trottier court's rationale is seriously flawed, and that military courts' recent assertions of jurisdiction over drug-related offenses directly contradict both the letter and spirit of the Supreme Court's decisions requiring an ad hoc approach to assessing the service-connection requirement for courts-martial jurisdiction.

In deciding Trottier, the Court of Military Appeals observed that the Supreme Court's decision in Schlesinger v. Councilman arguably supports the conclusion that a "slavish" application of the Relford criteria is no longer required. In Councilman, however, the Court never reached the merits of the defendant's service-connection claim. Instead, by limiting the power of federal courts to enjoin pending courts-martial, the Councilman Court avoided the service-connection issue entirely. Although the Court tempered its prior criticism of military courts and recognized the relevance of military courts' expertise, the Court also reemphasized the importance of the service-connection analysis and the need to closely analyze each factual situation. Indeed, the Councilman Court cited Relford for the proposition that the existence of service-connection "often will turn on the precise set of facts in which the offense has occurred." Thus, Councilman does not substantiate the Trottier court's redefinition of the service-connection requirement.

The Trottier court also justified an expanded interpretation of its jurisdiction over drug-related offenses by asserting that "constitutional law must be molded to the times." For support, the court cited two decisions in which the Supreme Court broadly discussed the validity of interpreting constitutional principles elastically. In the first of the decisions relied on by the Trottier court, the Supreme Court reasoned that the Depression created a national emergency justifying an interpretation of the contract clause that varied from the one offered by the framers almost a century and a half earlier. The Trottier court further supported
its assertion by citing a decision in which the Supreme Court con­
sidered the extent to which the country’s demographics had
changed in the more than 130 years since the ratification of the
Constitution as a justification for rejecting a constitutional chal­
lenge to the validity of zoning laws. 135

Neither of these decisions supports the Court of Military Ap­
peals’ decision to mold the service-connection requirement to
meet the exigencies of drug abuse in the military. The Supreme
Court’s decision to reinterpret a constitutional provision when
more than a century of societal changes have rendered its initial
interpretation obsolete, 136 or when a national emergency has pro­
duced circumstances unforeseen by the framers, 137 is simply not
analogous to the situation that confronted the Trottier court. In
Trottier, the Court of Military Appeals reinterpreted two
Supreme Court cases — O’Callahan and Relford — decided within
the preceding nine years. The gravity of drug abuse in the mili­
tary had been widely recognized prior to both O’Callahan and
Relford, 138 and there was neither a dramatic emergency compara­
bable to the Depression, nor a gradual societal change justifying a
reinterpretation of the constitutionally mandated service­
connection analysis. Nonetheless, the Court of Military Appeals
performed exactly such a reinterpretation.

The Trottier court further justified its expanded jurisdiction
under a reformulated service-connection test by emphasizing the
broad reach of Congress’s war powers. 139 The court asserted that
the war powers are plenary, applying equally both in wartime and
in peacetime. 140 Analogizing to Congress’s broad remedial powers
under the commerce clause, the court claimed that the war power
embued Congress — and, in turn, courts-martial — with the broad
power to rid the military of drug abuse and thereby preserve our

135. See Trottier, 9 M.J. at 344-45 (citing Euclid v. Ambler Realty Co., 272 U.S. 365, 386-87 (1926) (zoning regulations that would have been invalidated 30 years earlier
now can be upheld due to increased congestion and complexity of contemporary urban life)).
136. See Euclid, 272 U.S. at 386-87.
137. See Blaisdell, 290 U.S. at 425.
138. See generally Donnelly, Mary Jane in Action, NEWSWEEK, Nov. 6, 1967, at 40
(discussing marijuana use by servicemembers throughout Vietnam); Marijuana
Termed Big Problem Among U.S. Troops in Vietnam, N.Y. Times, Oct. 26, 1967 at 4,
col. 3 (finding more servicemembers arrested on marijuana charges than on any other
charge); Shuster, Addict Says He Shot 2 South Vietnamese While High, N.Y. Times,
June 15, 1966 at 1, col. 3 (servicemember testified to his use of drugs in Vietnam at
hearings in the Senate).
139. See Trottier, 9 M.J. at 346-50 (stating that because Congress created the mili­
tary courts pursuant to its Article I powers, Congress’s war powers conferred broad
jurisdiction upon the courts-martial).
140. See id. at 347-50.
military preparedness.  

These sweeping assertions fly in the face of the Supreme Court's precedents restricting military courts' jurisdiction. When the war powers do not conflict with provisions in the Bill of Rights, they, like the commerce power, are very broad; however, the Supreme Court initially adopted the service-connection test to safeguard the individual liberties of military defendants. In deciding Relford and O'Callahan, the Court fully considered Congress's Article I powers and nonetheless concluded that military courts' deprivation of defendants' Fifth and Sixth Amendment rights mandated the application of a service-connection test to limit military courts' jurisdiction. Because the Commerce Clause decisions relied upon by the Trottier court did not involve any conflict between Congress's power to regulate interstate commerce and constitutionally protected individual liberties, the cited decisions in no way support the Trottier court's redefinition of the service-connection requirement.

The military court further misconstrued the scope of Congress's war powers by asserting that these powers are as broad during peacetime as they are during war, at least as the powers apply to servicepersons. In Reid v. Covert, one of the earliest decisions in which the Supreme Court limited the jurisdiction of military courts, the Court found the absence of hostilities fatal to the

---

141. See id. at 349-50.
142. The Supreme Court has generally given Congress wide discretion in its exercise of the war powers. See Hirabayashi v. United States, 320 U.S. 81, 93 (1943) (prescription of curfew as an emergency war measure is within the constitutional scope of congressional and executive discretion). However, like all of Congress's Article I powers, the Bill of Rights limits Congress's exercise of the war powers. See Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146, 156 (1919); see also 2 Anteau, Modern Constitutional Law: The States and the Federal Government § 12:73 (1969) (Congress's normally broad war powers are limited when they conflict with provisions in the Bill of Rights).
143. See O'Callahan, 395 U.S. at 272-73.
144. See Relford, 401 U.S. at 362-66; O'Callahan, 395 U.S. at 272-73.
145. See Trottier, 9 M.J. at 348-49.
146. See, e.g., Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261 (1964) (Congress may prohibit racial discrimination in public accommodations serving interstate travellers); Campbell v. Hussey, 368 U.S. 297, 302 (1961) (Congress may preempt state law by establishing standards for tobacco products); North American Co. v. SEC, 327 U.S. 686, 704-05 (1946) (Congress may regulate public-utility holding companies engaged in interstate commerce); Wickard v. Filburn, 317 U.S. 111, 128-29 (1942) (Congress may regulate wheat produced for personal consumption in order to control prices in interstate commerce); United States v. Wrightwood Dairy Co., 315 U.S. 110, 125 (1942) (Congress may regulate handling of intrastate transactions so related to interstate milk commerce as to substantially interfere with regulation of the latter); United States v. Darby, 312 U.S. 100, 115 (1941) (Congress may prohibit interstate shipment of goods produced under substandard labor conditions); Weiss v. United States, 308 U.S. 321, 327 (1939) (Congress may set quotas on tobacco to avoid oversupply of tobacco); Curran v. Wallace, 306 U.S. 3, 13-14 (1939) (Congress may establish standards for, designate auction markets for, and require inspection of tobacco involved in interstate-commerce transactions); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 41 (1937) (Congress may safeguard employees' right to organize in plant engaged in interstate commerce).  
government's reliance on the war powers as the basis for military jurisdiction. The Court explicitly stated: "[W]e deal with peacetime offenses, not with authority stemming from the war power."

Nonetheless, the Trottier court proposed that "for trying servicepersons, a realistic view of the role of our military in the modern world minimizes any need for preoccupation with the presence or absence of actual hostilities." The decisions that it relied upon, however, in no way support a departure from the Supreme Court's emphasis on limiting the military's peacetime jurisdiction via a service-connection inquiry. In Ashwander v. Tennessee Valley Authority, for example, the Supreme Court took judicial notice that when Congress approved construction of the Wilson Dam in 1916, it did so in anticipation of World War I. The Ashwander Court broadly construed Congress's war powers specifically because active hostilities were anticipated.

The Court of Military Appeals' reliance on Brown v. Glines to support its assertion that the presence or absence of hostilities is irrelevant to the scope of Congress's war powers was similarly misplaced. In Brown, the Supreme Court upheld an Air Force regulation requiring members of that service to obtain approval from their commanders before circulating petitions on Air Force bases. The restriction on freedom of speech was limited: it restricted only on-base activity and permitted the commander to disallow a petition only if the petition posed a clear danger to the military. The Supreme Court has repeatedly acknowledged the

148. See Reid v. Covert, 354 U.S. 1, 33-35 (1957). The Trottier court distinguished the Reid decision as a basis for restricting military courts' jurisdiction over civilians, and argued for expansive peacetime jurisdiction over servicepersons. See Trottier, 9 M.J. at 347.
149. O'Callahan, 395 U.S. at 273.
150. Trottier, 9 M.J. at 347 (emphasis in original).
151. See id. at 347 (citing Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936); Brown v. Glines, 444 U.S. 348 (1980)).
152. 297 U.S. 288 (1936).
153. See id. at 327.
154. Further, unlike Trottier, the state action in Ashwander did not infringe on any constitutionally protected individual liberties. See id. at 339-40. Instead, it involved an attempt by a utility company's shareholders to prevent the sale of transmission lines to the Tennessee Valley Authority. Id.
156. See Trottier, 9 M.J. at 347. The Trottier court's citation of Brown shows its limited application to exigent circumstances, emphasizing "that there are 'special dangers present in certain military situations' that 'may warrant' special 'restrictions on the rights of military persons.'" Id. (quoting Brown, 444 U.S. at 356 n.14).
157. See Brown, 444 U.S. at 361.
158. Id. at 355.
necessity of protecting the integrity of military bases. Indeed, the _Relford_ Court held that on-base violations of the security of persons or property are per se service-connected offenses. At the same time, however, _Relford_ reasserted _O'Callahan_ ’s reliance on the peacetime-wartime distinction. _Brown v. Glines_ did not undermine that distinction; it merely reaffirmed the Court’s acceptance of the military’s special need to restrict on-base activity that threatens military preparedness and poses a clear danger to the military.

Perhaps most telling of the _Trottier_ court’s refusal to accept restrictions on military courts’ jurisdiction over drug-related offenses is the court’s devaluation of the rights to trial by jury and indictment by grand jury. Although military courts’ denial of these guarantees sparked the Supreme Court’s enunciation of the service-connection test, the _Trottier_ court chose to emphasize the limits of these guarantees, asserting that the denial of these rights would not subject servicemembers charged with off-base drug-related offenses to “'drumhead justice.'”

Finally, the _Trottier_ court disregarded the Supreme Court’s repeated warning that courts-martial jurisdiction must be limited to “the least possible power adequate to the end proposed.” While summarily acknowledging the Supreme Court’s mandate, the Court of Military Appeals instead declared that courts-martial must exercise jurisdiction over drug-related offenses “to the greatest extent legally permissible.” By broadly redefining the extent of its jurisdiction, and by minimizing the importance of the

---

159. See, e.g., Greer v. Spock, 424 U.S. 828, 839 (1976) (stating that the policy of keeping on-base activities free from partisan political involvement consistent with constitutional tradition of a politically neutral military); _Relford_, 401 U.S. at 369.
160. See _Relford_, 401 U.S. at 369.
161. See _id._ at 365.
162. The Court of Military Appeals seemed to recognize the tenuousness of its citation to _Brown_ as support for disregarding the distinction between peacetime and wartime activities of servicemembers. The court admitted that _Brown_ only “implied” that the presence or absence of actual hostilities was no longer important. See _Trottier_, 9 M.J. at 347.
163. See _Trottier_, 9 M.J. at 351.
164. See _O’Callahan_, 395 U.S. at 272-73.
165. See _Trottier_, 9 M.J. at 351. The military court remarked that the Supreme Court has not incorporated the right to indictment by grand jury in the fourteenth amendment due process provisions, and that the Court did not retroactively apply the right to trial by jury or the requirements of the _O’Callahan_ decision. See _id._
166. _Id._
167. _Relford_, 401 U.S. at 369 (emphasis added); _O’Callahan_, 395 U.S. at 265 (emphasis in original); United States _ex rel._ Toth v. Quarles, 350 U.S. 11, 23 (1955) (emphasis in original).
168. _Trottier_, 9 M.J. at 346 (citing _Reinstitution of Procedures for Registration Under the Military Selective Service Act: Hearings on S.109 & S.226 Before the Subcomm. on Manpower and Personnel of the Senate Armed Services Comm., 96thCong., 1st Sess. 51-53 (1979) (statements of Gen. Lew Allen, Jr., Chief of Staff, United States Air Force; Adm. Thomas B. Hayward, Chief of Naval Operations; Gen. Bernard W. Rogers, Chief of Staff, United States Army; and Gen. Louis H. Wilson, Commandant, United States Marine Corps) (criticizing Court of Military Appeals’ restriction of court-martial jurisdiction, making it virtually impossible to punish servicemembers who commit drug offenses off-base)).
fundamental rights to trial by jury and grand jury indictment, the Court of Military Appeals violated the spirit, if not the letter, of O'Callahan and Relford.

In sum, the Trottier decision violated the Supreme Court's mandate for an ad hoc determination of whether a given offense is service connected. Though the Trottier court concluded by actually applying the Relford criteria to the case before it, the court's expansive rationale indicates that it paid only lip service to the ad hoc approach. Instead of carefully balancing the service-connection criteria set forth in Relford, assuring that military jurisdiction — and its attendant limitations on individual rights — will be limited to "the least possible power," the court vastly expanded its jurisdiction by laying down a nearly per se rule for jurisdiction over off-base, drug-related offenses. Indeed, by implicitly concluding that the interests in military discipline and preparedness automatically outweigh all of the other Relford factors, the Trottier court turned Relford and O'Callahan on their heads. For servicemembers charged with drug-related offenses, the important individual rights that an ad hoc, service-connection inquiry helps protect were thus eliminated from consideration. Since Trottier, military courts have taken an even more cursory approach to the service-connection requirement in cases involving drug-related offenses.

When it was handed down, the Trottier decision was widely regarded as heralding the return of the military courts' per se rule announced in United States v. Beeker. Lower military courts immediately expanded the scope of Trottier's jurisdiction analysis. In United States v. Brace, decided only eight months after Trottier, a serviceman was charged with the use and possession of marijuana while on a six-day leave, 275 miles from his base. The dissenting judge found that the facts of Brace fit squarely within one of the Trottier court's two exceptions to a per se rule for jurisdiction over drug-related offenses — the exception for use of drugs while on extended leave from the base. Nonetheless, the majority, finding no reason to apply any exception to Trottier's

169. See 9 M.J. at 351-52.
170. See infra note 189 and accompanying text.
171. See generally Trottier, 9 M.J. at 353 (Fletcher, J., concurring) ("the majority opinion is a homograft of Beeker"); Schutz, supra note 125, at 20, 26 (statements by the chief judge of the Court of Military Appeals and recent decisions by lower military courts indicate that Trottier is coextensive with Beeker).
174. Id. at 794.
175. Id. at 795 (Kastl, J., dissenting) (citing Trottier, 9 M.J. at 350 n.28).
general principles, did not even allude to the Relford Court's criteria for service-connected offenses. 176

Recent decisions of the Court of Military Appeals remove any doubts that the court has returned to an essentially per se rule for finding service connection in drug-related offenses. In Murray v. Haldeman, 177 the defendant was charged with using marijuana while on an authorized one-month leave from the service. 178 A compulsory urine test given to the defendant soon after he reported for duty showed that he had at some prior time used marijuana. 179 The lower military court ruled against Murray's contention that the court-martial lacked jurisdiction, 180 and the Court of Military Appeals affirmed that ruling. 181

The Court of Military Appeals held that "even when a servicemember uses a psychoactive drug in private while he is on extended leave far away from any military installation, that use is service-connected, if he later enters a military installation while subject to any physiological or psychological effects of the drug." 182 To support its conclusion, the court emphasized the gravity of the drug-abuse problem in the armed forces and the need to curtail drug-related offenses by military personnel. 183 The court then turned to Trottier. Even though the facts paralleled Trottier's jurisdictional exception for use of drugs on a lengthy period of leave, 184 the court held that the trace of THC present in Murray's urine was dispositive. 185 Most significantly, the court did not even refer to the Relford criteria; instead, it simply cited the Trottier court's broad justifications for redefining the service-connection test. 186

In effect, the Murray court totally disregarded the ad hoc analysis mandated by the Supreme Court to protect defendants' basic constitutional rights. In its cursory analysis, the military court relied solely upon Trottier's questionable reasoning and on the court's concern for the gravity of drug abuse in the military. 187 The Court of Military Appeals thus denied basic constitutional

---

176. See Brace, 11 M.J. at 795.
177. 16 M.J. 74 (C.M.A. 1983).
178. Id. at 75-76.
179. Id. at 76.
180. Id. at 75.
181. Id.
182. Id. at 80 (emphasis added). In support, the court cited the Supreme Court's "[repeated recognition of] the importance of protecting the security and integrity of military installations." See id. n.6 (citations omitted).
183. See id. at 78-79.
184. See Trottier, 9 M.J. at 350 n.28.
185. See Murray, 16 M.J. at 80.
186. See id. at 79-80; supra notes 128-68 and accompanying text.
187. See Murray, 16 M.J. at 78-79. It is interesting to note that a 1982 survey commissioned by the Department of Defense found that overall drug use in the military forces had declined significantly since 1980, see R. Bray, L. Guess, R. Mason, R. Hubbard, D. Smith, M. Mardseen & J. Rachel, Highlights of the 1982 Worldwide Survey of Alcohol and Nonmedical Drug Use Among Military Personnel 45 (1983), and that the military's use of marijuana and cocaine was significantly lower than that of the civilian population; see id. at 54.
rights to a defendant accused of a drug-related offense without properly employing the ad hoc analysis necessary to balance the military's need for discipline against the defendant's interest in a civilian trial.\textsuperscript{188} In the cases decided since \textit{Trottier} and \textit{Murray}, military courts have continued to ignore the ad hoc service-connection test mandated by the Supreme Court in \textit{O'Callahan} and \textit{Relford}. Rather than perform detailed service-connection analyses of their own, military courts have simply cited \textit{Trottier} and \textit{Murray} to support ever-expanding assertions of jurisdiction over drug-related offenses.\textsuperscript{189}

\textsuperscript{188} Had the court actually performed an ad hoc service-connection analysis, it is extremely unlikely that it would have found Murray's alleged offenses service connected. Murray was on an authorized one-month leave hundreds of miles from his military base when he allegedly used marijuana. \textit{Murray}, 16 M.J. at 75. The only evidence of his alleged unlawful use was a trace of THC found in his urine when he submitted to a compulsory urinalysis upon returning to base at the end of his leave. \textit{Id.} at 76. Very few, if any, of the 21 factors stressed by the Supreme Court in \textit{Relford}, see supra notes 83-84, are implicated by Murray's personal use of marijuana while on an authorized, extended leave from his military base: Murray was properly absent from his base; his alleged crime was committed away from the base, in a place not under military control, and within United States' territorial limits; the alleged crime was committed during peacetime and was therefore unrelated to Congress's war power, see supra notes 147-62 and accompanying text; because of the inexactness and ineffectiveness of urinalysis for determining whether an individual's abilities remain in any way impaired simply because a trace of THC is found in his urine, see Perez-Reyes, Di Guiseppi, Davis, Schindler & Cook, \textit{Comparison of Effects of Marijuana Cigarettes of Three Different Potencies}, 31 \textit{CLINICAL PHARMACOLOGY \& THERAPEUTICS} 617, 620 (1982); Whiting & Manders, \textit{Confirmation of a Tetrahydrocannabinol Metabolite in Urine by Gas Chromatography}, 6 \textit{J. ANALYTICAL TOXICOLOGY} 49, 49 (1982), there was no evidence of any connection between Murray's military duties and his alleged offense; Murray was not engaged in the performance of any duty related to the military when he committed his alleged offense; civilian courts also prosecute drug offenses; Murray's alleged use of marijuana while on an authorized, extended leave did not likely constitute a flouting of military authority; Murray's alleged offense did not threaten the military post or any military property; and Murray's alleged offense did not threaten the security of persons on his military base.

\textsuperscript{189} See, e.g., United States v. Hemenway, 19 M.J. 955, 956 (A.F.C.M.R. 1985) (use of cocaine during 40-day leave provides unique military interest sufficient to support jurisdiction); United States v. Brown, 19 M.J. 826, 831 (N.M.C.M.R. 1984) (pursuant to \textit{Murray}, a positive urinalysis test for drugs alone confers jurisdiction upon a court-martial, with no added need for a showing of impairment); United States v. Frost, 19 M.J. 509, 511 (A.F.C.M.R. 1984) (positive urinalysis satisfies the jurisdictional requirement for courts-martial); United States v. White, 17 M.J. 1119, 1120 (N.M.C.M.R. 1984) (admissions by accused as to his use of marijuana would be sufficient to satisfy the service-connection test because the military has a special interest in punishing illegal conduct that has the effect of lowering public esteem for the service); United States v. Stookey, 14 M.J. 975, 976 (N.M.C.M.R. 1982) (the two jurisdictional exceptions in \textit{Trottier} do not apply to a servicemember on leave who remains in the local civilian community adjoining a military base); United States v. Lange, 11 M.J. 884, 885-86 (A.F.C.M.R. 1981) (accused's use of marijuana on leave in a remote location held service connected because he later participated in a drug-rehabilitation program and his absence had an adverse impact on the mission of his unit); United States v. Brace, 11 M.J. 794, 795 (A.F.C.M.R. 1981) (airman's remote use of marijuana service connected due to potential and actual adverse impact on military authority, discipline, security, morale, mission, and readiness).
Conclusion

The Supreme Court designed the service-connection inquiry to balance the military’s need for discipline with the defendant’s constitutional rights to a jury trial and a grand jury indictment. Since the Trottier decision, the military courts have focused exclusively on the perceived severity of the drug problem in the armed services and have disregarded both the defendants’ rights and the Supreme Court’s test designed to preserve those rights. If military defendants are to be guaranteed their fundamental constitutional rights, Trottier and the line of decisions following it must be overruled, and the military courts must return to a diligent application of the service-connection criteria. “Today, as always, the people, no less than their courts, must remain vigilant to preserve the principles of our Bill of Rights, lest in our desire to be secure we lose our ability to be free.”