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Military Law: Should Military Personnel Be Court-Martialed for Offenses That Are Not Service-Connected?

Someone in the military shoplifts a cassette tape from a local off-base store. Is this crime service-connected? Should it matter if the military member was in uniform? Should it matter if this same event occurred in a foreign country?

In *O'Callahan v. Parker*,¹ the United States Supreme Court held that any court-martial lacks jurisdiction to try a military member accused of a crime that is not service-connected. In June 1987 the Court overruled *O'Callahan* in *Solorio v. United States*.² It held that the subject matter jurisdiction of a court-martial depends solely on the accused's military status and not on the service connection of the offense charged.

This note will begin with a brief overview of military law. An overview is important because the rationale of *O'Callahan* is dependent upon the inaccurate belief that military courts do not adequately protect a defendant's rights, and therefore their jurisdiction should be limited. Next it will analyze and assess the impact of *O'Callahan*, including its various interpretations, on military law. This historical analysis is necessary because even though *O'Callahan* was overruled; there is a current movement in Congress to return to pre-*Solorio* law. Finally, this note will examine *Solorio*, its meaning as new law and the changes it will bring.

Military Law

The purpose of military law is twofold. The first purpose is to preserve order and discipline.³ Military discipline has been defined as "that standard of personal deportment, work requirement, courtesy, appearance, and ethical conduct which, inculcated in men and women, will enable them singly or collectively to perform their mission with an optimum efficiency."⁴ In combat, a unit's discipline level may determine whether its members live or die.⁵

The second purpose concerns the equitable administration of justice.⁶ In reality, defendants in military courts possess rights at least equal to if not greater than their civilian counterparts. Military law has not been based solely on a commander's will for quite some time.

American military law has been traced back to the Code of Gustavus Adolphus in 1621 and to the British Articles of War of 1774.⁷ In 1775 the

1. 395 U.S. 258 (1969).

2. 107 S. Ct. 2924 (1987), *reh'g denied* 108 S. Ct. 30 (1988).

3. H. MOYER, *JUSTICE AND THE MILITARY*, 12 (1972).

4. ARMED FORCES INFORMATION SERVICE, *THE ARMED FORCES OFFICER* 122 (1975). *See also* *United States v. Johnson*, 107 S. Ct. 2063, 2069 (1987) ("military discipline involves not only obedience to orders, but more generally duty and loyalty to one's service and to one's country").

5. Imwinkelried & Gilligan, *The Unconstitutional Burden of Article 15: A Rebuttal*, 83 *YALE L.J.* 534, 548 (1974).

6. H. MOYER, *supra* note 3, at 12.

7. W. AYCOCK & S. WURFEL, *MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE* 9 (1955).

Continental Congress adopted the American Articles of War and the Rules for the Regulation of the Navy of the United Colonies.⁸ American military law was unified when the Uniform Code of Military Justice (U.C.M.J.) became effective on May 31, 1951.⁹

Courts-martial are assembled by the proper convening authority¹⁰ and are temporary criminal courts that exist under the executive branch, rather than as Article III courts under the judicial branch.¹¹ Even so, courts-martial decisions may ultimately be appealed to the United States Supreme Court.¹² Two chief differences distinguish a trial by court-martial from a trial before a federal district court. First, the court-martial is bifurcated, with presentation of material concerning sentencing occurring only after the defendant has been found guilty.¹³ During sentencing, the defense has substantial latitude to offer evidence of mitigating factors.¹⁴ Second, the court members or "jurors" have the power to question witnesses, request evidence, and sentence those convicted.¹⁵

Under military law, courts-martial are differentiated according to the range of punishments they may impose. In addition, commanders are given the option to impose punishment that is usually less severe than sanctions handed down by a court-martial. This lesser degree of sanction is referred to as non-judicial punishment.

Nonjudicial Punishment: Article 15

Nonjudicial punishment is available under article 15 of the U.C.M.J.¹⁶ Punishments under article 15 include levels of disciplinary action that are within the discretion of a commanding officer to impose for minor offenses.¹⁷ They

8. H. MOYER, *supra* note 3, at 10.

9. See 10 U.S.C. §§ 801-940 (1982). See generally Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169 (1953).

10. Lawful convening authorities are designated by the Secretary of Defense and are usually general officers for general courts-martial and base commanders for special courts-martial. In a general court-martial, the convening authority may not refer a case to trial unless the Staff Judge Advocate determines that the specifications alleged offenses that are warranted by the evidence and are subject to military jurisdiction. U.C.M.J. art. 34, 10 U.S.C. § 834 (Supp. IV 1986). See generally Garner, *Structural Changes in Military Criminal Practice at the Trial and Appellate Level as a Result of the Military Justice Act of 1983*, 33 FED. B. NEWS & J. 116, 117 (1986).

11. The primary constitutional bases of military law are found in U.S. CONST. art. I, § 8, U.S. CONST. art. II, § 2, and U.S. CONST. amend. V. See generally Cox, *The Army, The Courts, and The Constitution: The Evolution Of Military Justice*, 118 MIL. L. REV. 1 (1987); Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293 (1957).

12. 28 U.S.C. § 1259 (1983). Free military counsel is supplied to the accused at all appellate levels or the accused may retain civilian counsel at his own expense. F. LEDERER, *THE ROAD TO THE MILITARY COURTHOUSE* 14 (1976).

13. F. Lederer, *supra* note 12, at 14.

14. *Id.*

15. *Id.*

16. 10 U.S.C. § 815 (1982).

17. Whether an offense is minor depends on several factors: the nature of the offense and the circumstances surrounding its commission; the offender's age, rank, duty

are more serious than an administrative corrective measure,¹⁸ but avoid the stigma of a court-martial conviction.¹⁹ A commander's authority to impose punishment under article 15 is qualified because any military member has the right to demand trial by court-martial rather than accept an article 15 punishment.²⁰ Furthermore, the severity of nonjudicial punishment depends on the rank of the commander imposing it.²¹

Article 32 Pretrial Investigation

U.C.M.J. article 32²² requires a pretrial investigation before a charge may be referred to a general court-martial.²³ An article 32 investigation basically serves the same purpose as a civilian grand jury. Both determine whether sufficient evidence exists to warrant future prosecution against an accused. The major differences between the two are that during an article 32 investigation, the accused is entitled to be present, to be informed of his or her rights, and to be represented by counsel.²⁴

assignment, record, and experience; and the maximum sentence possible for the offense if tried by general court-martial. . . . The decision whether an offense is "minor" is a matter of discretion for the commander imposing nonjudicial punishment.

MANUAL FOR COURTS-MARTIAL (1984), pt. V, *Nonjudicial Punishment Procedure*, ¶ 1e [hereinafter M.C.M.].

18. Administrative corrective measures include letters of reprimand, counseling sessions and administrative withholding of privileges. M.C.M., *supra* note 17, ¶ 1g (1984).

19. *Id.*, ¶ 1b and c. (1984). See generally Imwinkelried & Gilligan, *supra* note 5.

20. J. HAWKINS, *THE AIR FORCE OFFICER'S GUIDE* 174 (27th ed. 1986).

21. A commander in the grade of major or above may adjudge punishment to an airman of his command as follows: not more than 30 days correctional custody, forfeiture of half of his pay for two months, extra duty of 45 days, restriction for two months, detention of half his pay for three months, or reduction in grade (an E-4 or higher may not be reduced more than two grades). A commander below the grade of major may under Article 15 punish an airman of his command by imposing not more than: one week of correctional custody, forfeiture of one week's pay, extra duty for two weeks, restriction to limits for two weeks, detention of two weeks pay, or reduction of one grade (provided the commander has the authority to promote to the grade from which the airman is to be demoted). . . . A commander in general officer grade may under Article 15 punish an officer under his command by imposing not more than: suspension from duty for two months, arrest in quarters for one month, forfeiture of half his pay for two months, or detention of half his pay for three months.

Id.

22. 10 U.S.C. § 832 (1982).

23. RULES OF COURTS-MARTIAL 405(a) (1984) [hereinafter R.C.M.].

24. (f) Rights of the accused. At any pre-trial investigation under this rule the accused shall have the right to:

- (1) Be informed of the charges under investigation;
- (2) Be informed of the identity of the accuser;
- (3) Except in circumstances described in R.C.M. 804(b)(2), be present throughout the taking of evidence;
- (4) Be represented by counsel;
- (5) Be informed of the witnesses and other evidence then known to the investigating officer;

An article 32 investigation begins when a court-martial convening authority appoints an investigating officer. This officer must be at least a major or a lieutenant commander, or a military member who has had legal training.²⁵ At the conclusion of an article 32 investigation, the investigating officer compiles a report that recommends what action, if any, should be taken.

Summary Courts-Martial

The summary court-martial is the most restricted of all courts-martial in the maximum penalties it may impose. Its jurisdiction is limited to the trial of enlisted personnel for noncapital offenses. A summary court-martial is presided over by a single commissioned officer who need not be an attorney.²⁶ Although no counsel is provided to the prosecution or defense, the appearance of counsel on behalf of the accused is not prohibited.²⁷ After receiving timely notice of the charges and the name of his accuser, the accused has the option to refuse trial by summary court-martial. However, this refusal could result in the referral of charges to a special or general court-martial.

Special Courts-Martial

The special court-martial is the intermediate type of court-martial. Its makeup is flexible; it can consist of a military judge and a panel of three or more members, or the judge or the panel alone.²⁸ The accused may request trial by a military judge alone and may request free military counsel. If members are present and the accused is an enlisted person, he may demand that at least one-third of the members actually sitting be enlisted personnel.²⁹

(6) Be informed of the purpose of the investigation;

(7) Be informed of the right against self-incrimination under Article 31;

(8) Cross-examine witnesses who are produced under subsection (g) of this rule;

(9) Have witnesses produced as provided for in subsection (g) of this rule;

(10) Have evidence, including documents or physical evidence, within the control of military authorities produced as provided under subsection (g) of this rule;

(11) Present anything in defense, extenuation, or mitigation for consideration by the investigating officer; and

(12) Make a statement in any form.

R.C.M., *supra* note 23, at 405(f).

25. *Id.* at 405(d)(1).

26. This officer should be at least a lieutenant in the Navy or Coast Guard or a captain in the Army, Air Force or Marine Corps. *Id.*, 1301(a).

27. The "presiding officer acts as judge, fact finder, prosecutor, and defense counsel." *Middendorf v. Henry*, 425 U.S. 25, 32 (1976). At least one commentator feels that summary courts-martial violate due process of law. Note, *The Summary Court-Martial in Constitutional Perspective*, 14 *Hous. L. Rev.* 449 (1977).

28. R.C.M., *supra* note 23, at 501(a)(2).

29. As a practical matter, few enlisted personnel make this demand in part because enlisted personnel tend to seek higher penalties for other enlisted personnel than would an officer. Everett, *Some Comments On the Role of Discretion In Military Justice*, 37 *LAW & CONTEMP. PROBS.* 173, 205 (1972).

In either a special or a general court-martial with members, no set number of members is required beyond the minimum. For the accused, the number of members selected is significant because military courts require only a two-thirds vote for a guilty verdict.³⁰ A special court-martial cannot adjudge sentences of death or confinement for more than six months, nor grant a dishonorable discharge.³¹ A bad conduct discharge may be adjudged only if the accused was provided a free military lawyer, a military judge presided over the court, and a verbatim transcript was made.³²

General Courts-Martial

A general court-martial is the most powerful military trial court. The full spectrum of punishments are available, including a dishonorable discharge and the death penalty.³³ A general court-martial consists of a military judge and not less than five members or, except in capital cases, a military judge alone if requested by the accused.³⁴ The defense attorney "must be admitted to practice either before a Federal court or the highest court of a State and be certified by the Judge Advocate General as competent to serve as counsel at courts-martial."³⁵ Again, if the accused is enlisted, he may demand that one third of the members be enlisted as well.³⁶ The accused is also entitled to a free verbatim trial transcript.

Jurisdiction of Military Courts

Like Article III courts, jurisdiction must be established before a court-martial can convene. Seven requirements must be met before a court-martial has jurisdiction over a military member. The court-martial must: (1) be convened by an official empowered to do so; (2) be properly constituted as to the number of members; (3) be composed of members legally competent to sit thereon; (4) have the power to try the accused; (5) have the power to try the offense charged; (6) ensure that a proper convening authority referred the case to a particular court-martial for trial; and (7) have the power to award the sentence adjudged.³⁷ *O'Callahan v. Parker* provided a test for the fifth jurisdictional requirement.

30. *Id.* at 204. Critics of military justice often charge that a base commander usually "packs" the potential member lists with law-and-order types. In reality, military juries are composed of individuals who are available. Even so, a discussion of unlawful command influence is beyond the scope of this note. See generally Rob, *Command Influence Update: The Impact of Cruz and Levite*, ARMY LAWYER (May 1988), at 15.

31. R.C.M., *supra* note 23, at 201(f)(2)(B)(i).

32. *Id.* at 201(f)(2)(B)(ii), 1103(c).

33. U.C.M.J. art. 106, 10 U.S.C. § 906 (1982) vests general courts-martial with the authority to sentence a convicted spy to death.

34. R.C.M., *supra* note 23, at 501(a)(1).

35. H. MOYER, *supra* note 3, at 467.

36. See *supra* note 29.

37. E. BYRNE, MILITARY LAW 274-75 (3d ed. 1981).

O'Callahan v. Parker

On July 20, 1956, Army Sergeant James O'Callahan and his roommate, Charles Redden, left Fort Shafter, Hawaii, on an evening pass. They were dressed in civilian clothes. After a few beers, they went to the fourth-floor balcony of a Honolulu hotel. From there they observed a girl asleep in her room. O'Callahan suggested that they enter the room and force the girl to have sex with them. Redden refused and departed.

O'Callahan entered the room and attempted to sexually assault the fourteen-year-old girl. He fled the scene as she screamed for help. O'Callahan was apprehended by a hotel security guard and placed in the custody of military authorities. Ultimately, he confessed.

O'Callahan was tried and convicted by general court-martial of attempted rape,³⁸ housebreaking,³⁹ and assault with intent to commit rape.⁴⁰ His conviction was affirmed by an Army Board of Review and the United States Court of Military Appeals.⁴¹

In April 1966, while in confinement, O'Callahan sought a writ of habeas corpus in the United States District Court for the Middle District of Pennsylvania. He alleged that the general court-martial lacked subject-matter jurisdiction to try him for nonmilitary offenses committed off-post while on an evening pass. The district court denied relief and the Third Circuit affirmed without addressing the issue.

The Supreme Court granted certiorari and held that O'Callahan's crimes were not service-connected and therefore not triable by court-martial.⁴² He was entitled to a civilian trial. Justice Douglas, writing for the majority, described military courts as "a threat to liberty" that "are singularly inept in dealing with the nice subtleties of constitutional law."⁴³

Douglas' characterization of military jurisprudence has two primary problems. First, as Chief Justice Earl Warren pointed out seven years before *O'Callahan*, "the tradition of our country, from the time of the Revolution until now, has supported the military establishment's broad power to deal with its own personnel."⁴⁴

More important, any serious crime committed by a serviceman has military significance.⁴⁵ In fact, perhaps the principal argument against a service-

38. U.C.M.J. art. 80, 10 U.S.C. § 880 (1958).

39. U.C.M.J. art. 130, 10 U.S.C. § 930 (1958).

40. U.C.M.J. art. 134, 10 U.S.C. § 934 (1958) (prejudice of good order and discipline).

41. *United States v. O'Callahan*, 7 U.S.C.M.A. 800 (1957).

42. 395 U.S. at 273-74.

43. *Id.* at 265.

44. Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. REV. 181, 187 (1962).

45. Everett, *O'Callahan v. Parker—Milestone or Millstone In Military Justice*, 1969 DUKE L.J. 853, 873 (1969). For example, effect on unit morale is not contingent upon whether or not one of its members was caught stealing on or off base. Rice, *O'Callahan v. Parker: Court-Martial Jurisdiction, "Service Connection," Confusion, and the Serviceman*, 51 MIL. L. REV. 41, 59 (1971).

connection requirement "is that, because of discredit to the service and impairment of relationships between the military and nonmilitary communities, there is 'military significance' to an incident where a soldier, whether or not in uniform, breaks into an apartment at night and assaults a young girl."⁴⁶

Any location-oriented test for military jurisdiction will most likely result in inequity rather than justice. This fact is exemplified by comparing *United States v. Henderson*⁴⁷ with *United States v. Smith*.⁴⁸ Henderson and Smith were both stationed at Ramey Air Force Base. Both were court-martialed under article 120(b) of the U.C.M.J. and convicted of the statutory rape of dependent daughters of fellow service members.⁴⁹ Henderson took a girl to his quarters off-base, whereas Smith took a girl to his quarters on-base. Henderson's conviction was reversed.⁵⁰ Smith's conviction was affirmed.⁵¹

The court in *Smith* stated that *Henderson* differed "in only one respect—the place where the offense occurred."⁵² Even so, the *Smith* court held that "[t]his difference [was] a vital one."⁵³ In short, a completely different result for virtually identical facts was found proper.

The second problem with Justice Douglas' opinion in *O'Callahan* was his incorrect assumption that military courts are not up to civilian standards. In reality, military courts have been setting the standard.⁵⁴ Military suspects were informed of their right to remain silent long before *Miranda v. Arizona*.⁵⁵ Furthermore, products of illegal military searches, seizures, and wiretapping were excluded in military courts⁵⁶ previous to *Mapp v. Ohio*,⁵⁷ and *Lee v. Florida*.⁵⁸ Perhaps most important, free defense counsel was furnished in military court⁵⁹ some time before *Gideon v. Wainwright*.⁶⁰ Moreover, military defense counsel is appointed shortly after the commission of the offense; whereas a public defender usually is not appointed until after arraignment.⁶¹ Justice Douglas' complaint that "[s]ubstantially different rules of evidence and procedure apply in military trials" is at least partially no longer valid because the military essentially adopted the Federal Rules of Evidence in 1980.⁶²

46. Everett, *supra* note 45, at 855-56.

47. 18 U.S.C.M.A. 601, 40 C.M.R. 313 (1969).

48. 18 U.S.C.M.A. 609, 40 C.M.R. 321 (1969).

49. 10 U.S.C. § 920(b) (1964).

50. *Henderson*, 40 C.M.R. 313 (1969).

51. *Smith*, 40 C.M.R. at 322.

52. *Smith*, 40 C.M.R. at 321.

53. *Id.* at 322.

54. See Rice, *supra* note 45, at 61, and Everett, *supra* note 45, at 867.

55. 384 U.S. 436 (1966). Compare *Miranda* with U.C.M.J. art. 31, 10 U.S.C. § 830 (Supp. IV 1952).

56. M.C.M., *supra* note 17, at ¶ 152.

57. 367 U.S. 643 (1961).

58. 392 U.S. 378 (1968).

59. U.C.M.J. art. 27, 10 U.S.C. § 827 (Supp. IV 1952).

60. 372 U.S. 335 (1963).

61. Rice, *supra* note 45, at 61 n. 124.

62. S. SALTZBURG, L. SCHINOSI & D. SCHLEUTER, *MILITARY RULES OF EVIDENCE MANUAL* (2d ed. 1986).

Justice Douglas also maintained that military tribunals deprived military personnel of the right to indictment by grand jury and to trial by jury.⁶³ In reality, grand juries do little if anything to protect the rights of the accused.⁶⁴ However, the same is not true of an article 32 investigation.⁶⁵ In fact, the balance is reversed because unlike grand jury investigations, the only counsel required to be present at an article 32 investigation is representing the accused.⁶⁶ In addition, a military member subject to indictment by grand jury probably would not be from the same community where civilian jurors would be selected. He might even be viewed as an intruder.⁶⁷ In contrast, the accused may have considerable rapport with the military personnel from whom court-martial members would be selected.⁶⁸

In short, Justice Douglas presented a picture of military law that was both inaccurate and unfair. Justice Harlan, in his dissent, accurately described the majority's opinion as being "largely one-sided".⁶⁹

Interpretations of O'Callahan

Although post-*O'Callahan* decisions did provide guidelines, the Supreme Court neither defined "service-connection" in the criminal context of *O'Callahan* nor in subsequent opinions.⁷⁰ This failure resulted in great confusion throughout the military's judicial system.

Military courts generally responded to *O'Callahan* by creating exceptions to it. Their initial response focused on Justice Douglas' misplaced emphasis on the unavailability of grand jury indictments. This rationale was an easy target. If the Court in *O'Callahan* intended the military's lack of grand jury indictments to be a significant reason for its service-connection jurisdiction requirement, two deeper inquiries emerge. These two inquiries were addressed by the Court of Military Appeals.

First, the Court of Military Appeals examined whether the *O'Callahan* Court meant that the service-connection requirement should also apply to petty offenses.⁷¹ It carved out an exception to *O'Callahan* and held that petty offenses did not fall under the service-connection requirement. The holding was based on the lack of a constitutional right to grand jury indictment or jury trial for such crimes.⁷²

63. 395 U.S. at 263-66.

64. D. NEUBAUER, *AMERICA'S COURTS AND THE CRIMINAL JUSTICE SYSTEM*, 36 & 243 (1979).

65. See *supra* notes 22-25 and accompanying text.

66. Rice, *supra* note 45, at 60.

67. Everett, *supra* note 45, at 865.

68. *Id.*

69. 395 U.S. at 274.

70. In *Feres v. United States*, 340 U.S. 135 (1950), the Court held that military personnel could not sue under the Federal Tort Claims Act for service-connected injuries due to negligence. However, service-connection in the civil context appears to be broader than in the criminal context. Everett, *supra* note 44, at 871.

71. *United States v. Sharkey*, 19 U.S.C.M.A. 26, 41 C.M.R. 26 (1969). See Everett, *supra* note 29, at 183.

72. 41 C.M.R. at 28.

Second, the Court of Military Appeals considered whether *O'Callahan* was intended to apply to crimes committed in foreign countries where grand jury indictment is also unavailable.⁷³ It ruled that *O'Callahan* did not apply to offenses committed overseas.⁷⁴

In addition, the Court of Military Appeals also considered whether the President or any other military commander could issue an order prohibiting conduct that in itself was not service-connected in order to establish service-connection.⁷⁵ Of course, if such a policy were allowed, the armed services would be free to create endless exceptions to *O'Callahan* merely by issuing orders.⁷⁶ On this question, the Court of Military Appeals seemed to draw the line by rejecting the view that the issuance of an order or a regulation, by itself, results in service-connection.⁷⁷ Perhaps the Supreme Court noticed the almost immediate confusion that resulted from *O'Callahan* and attempted to provide guidance by recommending criteria for service-connection jurisdiction.

In *Schlesinger v. Councilman*,⁷⁸ the Court suggested a balancing test by stating:

the issue turns in major part on gauging the impact of an offense on military discipline and effectiveness, on determining whether the military interest in deterring the offense is distinct from and greater than that of civilian society, and on whether the distinct military interest can be vindicated adequately in civilian courts.⁷⁹

Even so, the *Schlesinger* Court did not directly address the confusion concerning what should determine the basis for military jurisdiction.⁸⁰ The Court's first and arguably last attempt to provide direction in this area was in *Relford v. Commandant*.⁸¹

Relford v. Commandant: Twelve Limitations on Jurisdiction

In *Relford v. Commandant*, an Army corporal was convicted by general court-martial of kidnapping and raping two women on a military installation. On appeal the Supreme Court enumerated twelve factors that would tend to defeat court-martial subject-matter jurisdiction.⁸² They are: (1) the serviceman's proper absence from base; (2) the crime's commission away from the base; (3) its commission at a place not under military control; (4) its com-

73. *United States v. Keaton*, 19 U.S.C.M.A. 64, 41 C.M.R. 64 (1969). See Everett, *supra* note 29, at 183.

74. 41 C.M.R. at 68.

75. *United States v. Castro*, 18 U.S.C.M.A. 598, 40 C.M.R. 310 (1969).

76. Everett, *supra* note 29, at 183.

77. 40 C.M.R. at 312.

78. 420 U.S. 738 (1975).

79. *Id.* at 760.

80. Cooper, *O'Callahan Revisited: Severing The Service Connection*, 76 MIL. L. REV. 165, 166 (1967).

81. 401 U.S. 355 (1971).

82. *Id.* at 365.

mission within U.S. 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 accused's military duties and the crime; (7) the victim's not being engaged in 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; and (12) the offense being among those traditionally prosecuted in civilian courts.⁸³ Following this test, the Court determined that the Army had jurisdiction and affirmed Relford's convictions.⁸⁴

Arguably, the twelve *Relford* factors created even more confusion concerning the nature of service-connection jurisdiction. Military appellate courts attempted to follow *Relford* while simultaneously creating additional exceptions to *O'Callahan*.

In *United States v. Scott*,⁸⁵ a Yeoman Second Class was charged at a special court-martial with conspiring with a Junior Petty Officer to entice females to provide prostitution for new Navy recruits. The military trial judge dismissed the case for lack of service-connection. The United States Navy-Marine Corps Court of Military Review reversed. The court in *Scott* followed *Relford* and held that the conspiracy to provide sex for hire, although off-base, constituted a flouting of military authority. Therefore, the court established the offenses as service-connected.⁸⁶ *Scott* provided an example of how an off-base offense could be service-connected.

Drug-Related Cases and Service-Connection

A split of authority exists as to whether drug-related cases, off-base or on, are service-connected. In *United States v. Alef*,⁸⁷ an Air Force sergeant was convicted by special court-martial of simultaneous possession and sale of cocaine. The *Alef* court reversed the defendant's conviction and held that the off-post sale of cocaine, during off-duty hours to an undercover Office of Special Investigations agent, was not service-connected in light of the twelve *Relford* factors.⁸⁸

The majority opinion attempted to comply with *O'Callahan*, *Relford*, and *Schlesinger* by narrowing the issue into simple components.⁸⁹ The majority sought to encourage proof of the facts necessary for jurisdiction by requiring that they be alleged.⁹⁰ This requirement also provided the accused an increased

83. AIR FORCE JUDGE ADVOCATE GENERAL SCHOOL, MILITARY JUSTICE DESKBOOK, 2-21 - 2-22 (chapter two authored by Captain Dixie Morrow) (1987).

84. *Relford*, 401 U.S. at 367-70.

85. 24 M.J. 578 (N.M.C.M.R. 1987).

86. *Id.* at 584.

87. 3 M.J. 414 (C.M.A. 1977).

88. *Id.* at 416.

89. James, *Pleading and Practice Under United States v. Alef*, 20 A.F. L. REV. 22, 31 (1978).

90. *Alef*, 3 M.J. at 419.

opportunity to contest the prosecution's theory of trial. Judge Perry's concurring opinion agreed with the majority and maintained that the intent of *Alef* was to require "the Government to allege all facts necessary to constitute personal and subject-matter jurisdiction in any case."⁹¹

Although *Alef* is usually cited as placing a limit on jurisdiction, it is not the typical drug-related case. In 1980, the landmark case of *United States v. Trotter*⁹² created another exception to *O'Callahan* by holding that practically every involvement of military personnel with a controlled substance is service-related.

Airman first class Gerard Trotter was convicted by special court-martial for selling marijuana at Bolling Air Force Base and for selling both marijuana and LSD in Oxon Hill, Maryland. The Air Force Court of Military Review affirmed his convictions.⁹³ The U.S. Court of Military Appeals granted review.⁹⁴

Chief Judge Everett, writing for the majority summarized his opinion by stating the following.

In short, when we reflect on the broad scope of the war powers, the realistic manner in which the Supreme Court has allowed Congress to exercise power over commerce, and the flexibility which the Supreme Court intended for the concept of service connection so that, with the aid of experience, there could be a suitable response to changing conditions that affect the military society, we come to the conclusion that almost every involvement of service personnel with the commerce in drugs is "service-connected."⁹⁵

Summary of O'Callahan and Its Progeny

O'Callahan and its progeny clearly created more problems than they solved. Chaos resulted because the Supreme Court avoided a definition of service-connection and because military courts were busy establishing exceptions.⁹⁶

91. *Id.* at 421.

92. 9 M.J. 337, 350 (C.M.A. 1980).

93. *United States v. Trotter*, 4 M.J. 916 (A.F.C.M.R. 1978), *aff'd*, 9 M.J. 337 (U.S.C.M.A. 1980).

94. 9 M.J. at 337.

95. *Id.* at 350. See generally *United States v. Osburn*, 23 M.J. 903 (N.M.C.M.R. 1987) (wrongful use of marijuana and cocaine during extended leave); *United States v. Askew*, 23 M.J. 818 (N.M.C.M.R. 1987) (drug transaction in off-base parking lot); *United States v. Walker*, 23 M.J. 740 (A.C.M.R. 1987) (sold only to civilians off-base); *United States v. Hemenway*, 19 M.J. 955 (A.F.C.M.R. 1985) (use of cocaine during 40-day leave); *Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983) (test is if individual is subject to effects of drug when entering base); *United States v. Kashiwabara*, 10 M.J. 602 (A.F.C.M.R. 1980), *petition denied*, 10 M.J. 344 (1981) (on-base negotiations consummated by off-base sale). But see *United States v. Barideaux*, 22 M.J. 60 (C.M.A. 1986) (insufficient interests to warrant jurisdiction over sale of marijuana to CID agent).

96. See generally Tomes, *The Imagination of the Prosecutor: The Only Limitation to Off-Post Jurisdiction Now, Fifteen Years After O'Callahan v. Parker*, 25 A.F. L. REV. 1 (1985).

For example, in addition to drug-related offenses, service-connection exceptions were created for sex crimes,⁹⁷ overseas exceptions⁹⁸ and others.⁹⁹

Despite these problems, five generalizations about service-connection jurisdiction were established. First, offenses committed on-base were normally service-connected.¹⁰⁰ Second, on-base preparation to commit an offense might or might not be service-related.¹⁰¹ Third, the victim's status as a member of the military did not, by itself, establish service-connection.¹⁰² Fourth, the accused's status as a member of the military did not, by itself, establish service-connection.¹⁰³ Fifth, most drug offenses are service-connected.¹⁰⁴

The *Solorio* decision affected these generalizations in two ways. First, the opposite of the third generalization became the supreme law of the land. Second, the other four generalizations, absent a return to pre-*Solorio* law, are now largely of only historical interest.

Solorio v. United States

Richard Solorio was stationed in Juneau, Alaska with the Seventeenth Coast Guard District. While on active duty in Alaska, he sexually abused two daughters of other Coast Guardsmen. This abuse continued for two years until he was transferred to Governors Island, New York. An investigation of similar abuse in New York led to the discovery of the crimes in Alaska.

97. See *United States v. Brenton*, 24 M.J. 562 (A.F.C.M.R. 1987), *petition for review denied*, 25 M.J. 393 (U.S.C.M.A. 1981) (found jurisdiction under *Relford* when crime involved indecent acts with female under age of 16); *United States v. Abell*, 23 M.J. 99 (C.M.A. 1986), *cert. denied*, 479 U.S. 1028 (1987) (sexual abuse in area that was on housing referral list); *United States v. Bolser*, 22 M.J. 564 (A.F.C.M.R. 1986) (molesting one's own children); *United States v. Benedict*, 20 M.J. 939 (A.F.C.M.R. 1985) (indecent acts with 10-year-old dependent daughter off-base); *United States v. Rappaport*, 19 M.J. 708 (A.F.C.M.R. 1984), *aff'd*, 22 M.J. 445 (U.S.C.M.A. 1986), *petition for review denied*, 26 M.J. 80 (U.S.C.M.A. 1988) (psychologist engaged in sodomy and adultery with lieutenant off-base); *United States v. Wierzba*, 11 M.J. 742 (A.F.C.M.R. 1981) (used official status to engage in indecent liberties with CAP cadets); *United States v. Coronado*, 11 M.J. 522 (A.F.C.M.R. 1981), *aff'd*, 15 M.J. 750 (A.F.C.M.R. 1983), *petition for review denied*, 18 M.J. 11 (C.M.A. 1984) (off-base sodomy of enlisted man by officer); *United States v. Brown*, 8 M.J. 501 (A.F.C.M.R. 1979), *petition for review denied*, 8 M.J. 234 (C.M.A. 1980) (continuing course of homosexual conduct). *But see* *United States v. Black*, 24 M.J. 600 (A.F.C.M.R. 1987), *petition for review denied*, 25 M.J. 373 (C.M.A. 1987) (no jurisdiction when crime involved off-base sodomy with accused's daughter); *United States v. Avila*, 24 M.J. 501 (A.F.C.M.R. 1987), *rev'd*, 27 M.J. 62 (C.M.A. 1988) (no jurisdiction when crime involved off-base sodomy with accused's four-year-old stepdaughter; reversed when service-connection requirement was abolished); *United States v. Barber*, 23 M.J. 751 (A.F.C.M.R. 1987), *petition for review denied*, 25 M.J. 206 (C.M.A. 1987) (no jurisdiction when crime involved off-base sodomy with accused's son).

98. *United States v. Overton*, 24 M.J. 309 (C.M.A. 1987), *cert. denied*, 108 S. Ct. 487 (1987) (larceny in the Philippines); *United States v. Keaton*, 41 C.M.R. 64 (1969) (assault with intent to commit murder in the Philippines).

99. *United States v. Henderson*, 23 M.J. 860 (A.C.M.R. 1987) (bad checks).

100. AIR FORCE JUDGE ADVOCATE SCHOOL, *supra* note 83, at 2-31.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

A general court-martial was convened in New York. Solorio was charged with a total of twenty-one specifications of sexual abuse of the dependent children of fellow servicemembers in both New York and Alaska. Solorio moved to dismiss the charges for the alleged crimes committed in Alaska because (1) there was no base or post where Coast Guard personnel lived and worked in Juneau, (2) his alleged crimes in Alaska were committed in his privately owned home, and (3) the holdings in *O'Callahan* and *Relford* required some type of service-connection.¹⁰⁵

The trial court granted Solorio's motion. The government appealed to the Coast Guard Court of Military Review, which reinstated the Alaska charges.¹⁰⁶ The Court of Military Appeals affirmed the reinstatement by holding that service connection existed because "sex offenses against young children . . . have a continuing effect on the victims and their families and ultimately on the morale of any military unit or organization to which the family member is assigned."¹⁰⁷ The court-martial was reconvened and Solorio was convicted of twelve of the twenty-one specifications. The United States Supreme Court granted Solorio's petition for a writ of certiorari.

The Supreme Court expressly overruled *O'Callahan* and held that subject matter jurisdiction of courts-martial depends solely on the accused's status as a member of the armed forces and not on the service-connection of the offense charged.¹⁰⁸ Justice Rehnquist's majority opinion focused on the ambiguous history of British and American court-martial jurisdiction and on the unbroken line of decisions from 1866 to 1960, showing that American court-martial jurisdiction was historically based solely on the status of the accused.¹⁰⁹ Furthermore, the majority recognized the confusion resulting from *O'Callahan*.¹¹⁰

The three dissenters focused on the accused's loss of the right to indictment by grand jury and to trial by jury.¹¹¹ They also disagreed with Rehnquist's interpretation of history.¹¹²

Perhaps more important, following *Solorio*, Representative Pat Schroeder (D-Colorado) introduced legislation on March 29, 1988 that would reestablish

105. 107 S. Ct. at 2926.

106. *United States v. Solorio*, 21 M.J. 512 (C.G.C.M.R. 1985), *aff'd*, 107 S. Ct. 2924 (1987), *reh'g denied*, 108 S. Ct. 30 (1988).

107. *United States v. Solorio*, 21 M.J. 251, 256 (C.M.A. 1986), *aff'd* 107 S. Ct. 2924 (1987), *reh'g denied*, 108 S. Ct. (1988).

108. 107 S. Ct. at 2933.

109. Williamson, *Solorio v. United States*, 14 REPORTER 2 (1987).

110. *Id.*

111. Williamson, *supra* note 109, at 2. Much of the response to *O'Callahan* was generally favorable. McCoy, *Equal Justice for Serviceman: The Situation Before and Since O'Callahan v. Parker*, 16 N.Y.L.F. 1 (1970); Note, *Constitutional Law—The Serviceman's Right To A Civilian Trial For A Non-Service Connected Crime*, 19 BUFFALO L. REV. 400 (1970); Note, *O'Callahan v. Parker: New Limitation On Court-Martial Jurisdiction*, 61 J. CRIM. L. C. & P.S. 195 (1970); Note, *Constitutional Law—Non-Military Offenses Committed Off Post While On Leave Not Justifiable By Courts-Martial*, 18 KAN. L. REV. 335 (1970).

112. Williamson, *supra* note 109, at 2.

the service-connection doctrine.¹¹³ This legislation would allow trial by court-martial only if the offenses were in one of the following categories.

- (1) The offense was committed in time of war,
- (2) The offense was committed on a military installation, vessel, or aircraft of the United States,
- (3) The offense was committed outside the United States or any territory or possession of the United States and is not punishable under any other law of the United States,
- (4) The offense is punishable without indictment by grand jury or trial by jury under another law of the United States or under the law of any State, the District of Columbia, or any territory or possession of the United States and
- (5) The offense is service-connected.¹¹⁴

Representative Schroeder further stated that “[i]t is well settled that drug-related offenses are a priori service connected.”¹¹⁵

Contrary to Schroeder’s position, the *Solorio* military membership test is clearly preferable to the *O’Callahan* service connection test. Of course, the complete impact of *Solorio* has yet to be seen. The increase in caseload for military attorneys could be at least partially offset by eliminating the service-connection jurisdictional challenge.

The nature and scope of military interaction with civilian authorities will also change. Under article 14 of the U.C.M.J., the military has discretion on whether to deliver a military defendant to civil authorities for trial.¹¹⁶ If a civilian conviction interrupts the execution of a court-martial sentence, the military may request that the accused be returned to military custody, after the accused has answered to civilian authorities for his or her offense.¹¹⁷ This procedure is not as unfair as it may initially sound.

While courts-martial have exclusive jurisdictions over purely military offenses,¹¹⁸ offenses that violate both military and civilian law may be tried by either a court-martial or the proper civilian tribunal.¹¹⁹ As a general rule, if the accused has previously been tried by a civilian court for the same offense, any court-martial charges or specifications will be dismissed.¹²⁰ However,

113. H.R. 4282, 100th Cong., 2d Sess. (1988).

114. *Court-Martial Jurisdiction*, 15 REPORTER 26 (June 1988). This legislation was referred to the Military Personnel Subcommittee of the House Armed Services Committee on April 7, 1988. The bill died in committee and had not been reintroduced at press time. Telephone interview with Chris Nichols, Field Representative for Congressman Dave McCurdy (Feb. 6, 1989).

115. 134 CONG. REC. E879 (daily ed. Mar. 29, 1988) (extensions of remarks).

116. 10 U.S.C. § 814 (1982).

117. *Id.*

118. R.C.M., *supra* note 23, at 201(d)(1).

119. *Id.* at 201(d)(2). Generally, military authorities will defer prosecution to civilian courts if a district attorney makes such a request.

120. *Id.* at 907(b)(2). If the civilian court were a federal court, retrial in a military court would be double jeopardy. State courts could present a different situation. *Benton v. Maryland*, 395 U.S. 784 (1969) (trial in a state court is not a legal bar to a later prosecution in a federal court). However, “[m]ilitary punitive measures will not be taken when state civil authorities have brought the alleged offender to trial for substantially the same offense, regardless of whether conviction

when an offense violates military, civilian, and/or foreign law, the forum is determined by the nation, state, or agency and is not a right of the accused.¹²¹ An innocent accused, given a choice, would probably opt for trial by court-martial, where his chances for acquittal are arguably greater.

F. Lee Bailey, who started as a Marine Corps legal officer, compared military justice to civilian courts by stating the following.

If I were accused of an offense and I were innocent—I didn't do it—I would much rather be in the military system from start to finish; but if I were guilty of that offense, I would like to find me a jury somewhere and wait, because reasonable doubts can be fashioned; prominent counsel can dismantle even the toughest case; and there would be a chance of squeaking through. I suppose the difference is accounted for in part because, although military justice is often accused of all kinds of politicking, that really doesn't happen very often.¹²²

While it is fairly obvious that *Solorio* will result in an increased number of military defendants, it may not be as obvious that abolishing the service-connection requirement will increase the rights of the accused. Military courts are at least as equitable and just as their civilian counterparts.¹²³ Moreover, military courts, with a greater emphasis on pretrial fact finding, are far less likely to convict an innocent individual. In addition to removing some of the workload from civilian courts, *Solorio* will help civilian courts in other ways as well.

Unfortunately, funding for the judicial branch has not traditionally been a priority for governments at any level. Some local and county governments have difficulty locating the required funds for jury trials.¹²⁴ If these courts were required to handle all off-base offenses committed by nearby military personnel, the effort could bankrupt the county's budget.¹²⁵ Consequently, *Solorio* will help civilian courts located near military installations to decrease their backlog and will allow those civilian courts to reallocate their scarce financial resources.

In short, *Solorio* has contributed tremendously to the civilian judicial system. But, more important, it has given the military what it has always insisted

or acquittal has resulted." Air Force Regulation 111-1, ¶ 2-4a, 1 August 1984. Cf. *United States v. Talbot*, 825 F.2d 991 (6th Cir. 1987), cert. denied, 108 S. Ct. 773 (1987) (federal district court has concurrent jurisdiction with military tribunal).

121. R.C.M., *supra* note 23, 201(d)(3). *Florida v. Simanonak*, 850 F.2d 1429 (11th Cir. 1988) (driver's military status did not justify removal of state criminal prosecution). See also *Return of Servicemen From the United States to the Host State For Trial and Confinement*, 15 REPORTER 20 (Sept. 1988) (international law).

122. Bailey, *Evolution of Military Justice Under the Constitution*, in 25 M.J. CIII, CXIV (1987).

123. See *supra* notes 54-68 and accompanying text.

124. Hodson, *Evolution of Military Justice Under the Constitution*, in 25 M.J. CXIX, CXX (1987).

125. *Id.* The Attorney General of Alaska, through a district attorney, deferred the prosecution of Richard Solorio in part because of the expense involved. 21 M.J. at 515.