The Military Jurisdictional Dilemma Revisited: A Return to the Status-Only Requirement for Court-Martial Subject Matter Jurisdiction

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THE MILITARY JURISDICTIONAL DILEMMA REVISITED: A RETURN TO THE STATUS-ONLY REQUIREMENT FOR COURT-MARTIAL SUBJECT MATTER JURISDICTION*

I. INTRODUCTION

In June of 1969, the Supreme Court of the United States handed down a controversial decision in the area of military law. This decision dealt with an assessment of the constitutional rights of individuals serving in the armed forces. In O'Callahan v. Parker, the Court held that a military court has jurisdiction over a criminal case only if the crime was service-connected. Two years later, in Relford v. Commandant, United States Disciplinary Barracks, the Court enumerated twelve factors that should be used to determine service-connection. In June of 1987, eighteen years after O'Callahan, the Court decided the case of Solorio v. United States. In Solorio, the Court expressly overruled O'Callahan and held that "the jurisdiction of a court-martial depends solely on the accused's

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* The author wishes to thank her husband, Shawn, for his understanding and patience. She also wishes to thank Robert Blesch for helping her frame and develop this comment.
4. Id. at 2925. In delivering the opinion of the court, Chief Justice Rehnquist stated:
   This case presents the question whether the jurisdiction of a court-martial convened pursuant to the Uniform Code of Military Justice (U.C.M.J.) to try a member of the armed forces depends on the 'service-connection' of the offense charged. We hold that it does not, and overrule our earlier decision in O'Callahan v. Parker.
Id.
5. Court-martial is defined as:
   A military court, convened under authority of government and the Uniform Code of Military Justice, 10 U.S.C.A. § 801 et seq., for trying and punishing offenses committed by members of the armed forces. Courts-martial are courts of law and courts of justice although they are not part of the Federal Judiciary established under Article III of the Constitution. They are legislative criminal courts established in the Armed Forces under the Constitutional Power of Congress to regulate the Armed Forces. Their jurisdiction is entirely penal and disciplinary. They may be convened by the President, Secretaries of Military Departments and by senior commanders specifically empowered by law. The type (e.g., summary, special, or general) and composition of the courts-martial varies according to the gravity of offenses. Courts-martial are ad hoc bodies empow-
status as a member of the Armed Forces, and not on the 'service connection' of the offense charged."

This comment examines the subject-matter jurisdiction of military courts over crimes committed by soldiers during peacetime, the due process violations inherent in the system of military justice and the need to limit the jurisdiction of military courts to a minimum during peacetime. The following section traces the historical development of the military justice system. Section III examines the possible effects of Solorio, points out the difficulties that military courts and practitioners experienced in applying the O'Callahan/Relford service-connection standard, and discusses the justifications for limiting court-martial jurisdiction. Section IV proposes alternative methods for determining court-martial jurisdiction. Finally, section V concludes that the status-only standard expands court-martial subject-matter jurisdiction impermissibly beyond the constitutional limits imposed by O'Callahan and Relford.

II. BACKGROUND

A. Historical Perspective and the Military Justice Act of 1968

"Military establishments throughout history have had their own systems of criminal law, radically different from the civilian law . . . mismo. Servicemembers are subject to a stricter criminal law, with less procedural due process rights than those enjoyed by civilian defendants. This more stringent mode of justice is the result of a perceived need for the military to maintain discipline and efficiency under unusual or exigent conditions. These demands placed upon the military establishment require that the trial and punishment of military offenders be swift and unimpeded by certain safeguards otherwise guaranteed civilians."

"Prior to the Civil War, the military authorities could try servicemen for various offenses punishable by civilian courts, provided

8. Id. See also 1 W. Blackstone, Commentaries 413 (T. Cooley, ed. 1884); Ex parte Milligan, 71 U.S. (4 Wall.) 2, 123 (1866).
the charges fit into an offense over which Congress had granted jurisdiction to the military." During the Civil War, Congress gave to courts-martial concurrent jurisdiction over certain civilian-type crimes of violence committed during wartime by military personnel.

More recently, starting from the middle of this century, the military justice system was brought into greater conformity with the civilian system through the Military Justice Acts of 1948, 1950, and 1968.

Great progress was made in establishing and expanding due process and equal justice for all soldiers between 1950 and 1970. A liberalized set of Articles of War was enacted for Army and Air Force personnel in 1948. In 1950, the Uniform Code of Military Justice was enacted and made applicable to all of the armed forces. The Code extended to personnel of the other military branches (Navy, Marines, Coast Guard and National Guard) the new protections that the 1948 Articles of War had given Army and Air Force personnel and added other important protections in the area of due process. More recently, the Military Justice Act of 1968 brought the system of military justice closer to the civilian system.

In addition to the Acts, the courts, including the United States Court of Military Appeals, began to provide additional due process rights to defendants in the military justice system. Thus, the gap

10. Concurrent jurisdiction is defined as:

The jurisdiction of several different tribunals, each authorized to deal with the same subject-matter at the choice of the suitor. Authority shared by two or more legislative, judicial, or administrative officers or bodies to deal with the same subject matter. Jurisdiction exercised by different courts, at same time, over same subject matter; and within same territory, and wherein litigants may, in first instance, resort to either court indifferently.

BLACK'S LAW DICTIONARY 264 (5th ed. 1979).
14. Id.

For examples of ways in which the military system was made more similar to the civilian system, see infra note 18.
17. For example, in United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955), the United States Supreme Court held that Congress has no power to subject a discharged soldier to trial by court-martial and thereby deprive him of the constitutional safeguards protecting persons tried in federal court.
between due process for civilians and due process for military personnel has been greatly narrowed by statutes, court decisions, and executive actions starting in 1950. The military defendant now enjoys most of the same constitutionally guaranteed due process rights accorded to civilians.\textsuperscript{18}

Action at the congressional level to give greater constitutional protections to military personnel was paralleled by action at the judicial level. The Supreme Court's decision in \textit{O'Callahan v. Parker} in 1969 repealed a century-old law which gave military courts authority to hear criminal cases by virtue of the fact that the offender was "in the land or naval forces."\textsuperscript{19}

\section{B. Subject-matter Jurisdiction of Military Courts}

\subsection{1. The Century Prior to \textit{O'Callahan v. Parker}}

From 1776 to 1863, the jurisdiction of military courts over non-military offenses\textsuperscript{20} committed within the United States lacked clear statutory authorization.\textsuperscript{21} Then, from 1863 to 1969, court-martial jurisdiction over non-military offenses was not only legitimatized by

\begin{footnotesize}
\begin{itemize}
    \item 18. McCoy, \textit{Due Process}, \textit{supra} note 7, at 69.
    
    Despite these improvements within the military justice system, similarities with due process protections available in the civilian court system were not achieved. \textit{O'Callahan v. Parker}, 395 U.S. 258, 262-63 (1968); \textit{Toth}, 350 U.S. at 17-18; \textit{Burns v. Wilson}, 346 U.S. 137 (1953). Article I, section 8, clause 14 of the Constitution recognizes that the need for military discipline allows military courts to dispense with some of the procedural safeguards of article III trials. The fifth amendment exempts "cases arising in the land or naval forces in the militia, when in actual service in time of war or public danger" from the requirement of prosecution by indictment and the right to trial by jury. \textit{Ex parte Quirin}, 317 U.S. 1, 40 (1942).

    Military defendants are entitled to the right to indictment by grand jury and trial by petit jury, the right to bail, and the right to be confronted in non-capital cases with adverse witnesses. McCoy, \textit{Due Process}, \textit{supra} note 7, at 69.

    Petit jury is defined as "[t]he ordinary jury for the trial of a civil or criminal action; so called to distinguish it from the grand jury." \textit{BLACK'S LAW DICTIONARY} 768 (5th ed. 1979).

    19. U.S. Const. amend. V states:

\begin{quote}
    No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelling in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
\end{quote}

(emphasis added).

    20. For the purpose of this comment, non-military offenses are those unrelated to the individual's status as a soldier, such as robbery, larceny, and rape.

\end{itemize}
\end{footnotesize}
Congress, but also expanded under a series of statutes and court decisions. The Act of March 3, 1863 established jurisdiction of courts-martial over soldiers charged with the following offenses whether or not the offense in question had an effect on order and discipline: larceny, robbery, burglary, arson, mayhem, manslaughter, rape, and related offenses involving an intent to kill or rape. This expanded jurisdiction was limited to times of war, insurrection and rebellion, and covered both capital and non-capital offenses. The Act clearly established an unequal system of justice based solely on an individual's status as a soldier.

In 1866, the United States Supreme Court in Ex Parte Milligan placed its stamp of approval on a dual system of justice, with military personnel being deprived of otherwise inalienable rights solely because of their status as members of the armed forces. The Court stated:

The Discipline necessary to the efficiency of the army and navy, required other and swifter modes of trial than are furnished by the common law courts; and, in pursuance of the power conferred by the Constitution, Congress has declared the kinds of trial, and the manner in which they shall be conducted, for offenses committed while the party is in the military or naval services. Every one connected with these branches of public service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts.

The dictum in Milligan established the constitutionality of the 1863 Act which extended military jurisdiction to listed non-military offenses committed by soldiers during wartime. It also served to support a 1916 statute which extended court-martial jurisdiction to

22. McCoy, Equal Justice, supra note 21, at 6. In 1916, the Articles of War were enacted and used as authority to establish military jurisdiction over a wide range of offenses. Articles of War, ch. 418, 39 Stat. 619, 650-70 (1916). Some of the articles forbade offenses of a military nature, such as desertions on the field of battle, mutiny, and striking a superior officer. 10 U.S.C. §§ 885(a)(2), 899(1), 894(a)(1), 890(1) (1982). The articles also included two "all-purpose" provisions which were not limited to clearly military offenses. They currently appear as article 133, "Conduct Unbecoming an Officer and a Gentleman" and article 134, the "General Article." 10 U.S.C. §§ 933, 934 (1982).
24. Id.
25. Id.
27. 71 U.S. (4 Wall.) 2 (1866).
28. Id. at 123.
29. Articles of War, ch. 418, art. 93 (1916).
non-military, non-capital offenses committed by soldiers during peacetime.

Another United States Supreme Court decision, Johnson v. Sayre, served as strong authority until O'Callahan that regular Army and Navy personnel are subject to military law at all times. The Court held that “All persons in the military or naval service of the United States are subject to the military law; the members of the regular army and navy, at all times; the militia, so long as they are in such service.”

Some sixty-eight years later, the Court relied on Johnson in deciding court-martial jurisdiction over soldiers for crimes committed during peacetime. In Thompson v. Willingham, the petitioner had been convicted by general court-martial for premeditated murder, larceny, and reckless driving. The petitioner sought relief from the court-martial on the basis that his offenses had been committed in time of peace and, therefore, he was entitled to a fifth amendment-type trial. The circuit court held that petitioner’s contention that servicemen were entitled during peacetime to jury and grand jury protections of the fifth amendment was without merit. The Court based its holding on Johnson.

Likewise, in Wright v. Markley, the Seventh Circuit Court of Appeals upheld a denial of habeas corpus relief to a soldier who had been convicted of rape by a general court-martial. The court held that military trials are not governed by fifth and sixth amendment procedures and that a general court-martial has jurisdiction to try a rape case in peacetime.

The Court did not overturn its century-old approval of court-martial jurisdiction based on status as a soldier until the decision in

30. 158 U.S. 109 (1895). Sayre, a paymaster’s clerk in the United States Navy, had been charged with embezzlement of money belonging to the United States and had been convicted by a general court-martial. He then petitioned for a writ of habeas corpus; the circuit court granted the writ on the finding that Sayre “was unlawfully restrained of his liberty, because [he was] detained under a sentence to an infamous punishment, not in time of war or public danger, without indictment or trial by jury, in violation of the 5th Article of Amendment of the Constitution.” Id. at 113.
31. Id. at 114.
32. Id.
33. 318 F.2d 657 (3d Cir. 1963).
36. Id. at 658.
37. 351 F.2d 592 (7th Cir. 1965).
38. Id. at 593.
39. Id.
O'Callahan v. Parker.

2. Jurisdiction Based on "Service Connection" Under O'Callahan v. Parker and Relford v. Commandant, United States Disciplinary Barracks, Ft. Leavenworth

Petitioner O'Callahan, a United States Army sergeant, while on an evening pass from his army post in Hawaii and in civilian clothing, broke into a hotel room, assaulted a fourteen-year-old girl, and attempted to commit rape. Following his apprehension, city police, on learning that O'Callahan was in the Armed Forces, delivered him to the military police. After an interrogation, O'Callahan confessed. He was charged with attempted rape, housebreaking, and assault with attempt to rape, in violation of articles 80, 130, and 134 of the Uniform Code of Military Justice.

O'Callahan was tried by court-martial and convicted on all counts. O'Callahan was dishonorably discharged and sentenced to 10 years at hard labor and forfeiture of all pay and allowances. His conviction was affirmed by the Army Board of Review and, later, by the United States Court of Military Appeals. O'Callahan later filed a petition for a writ of habeas corpus in the United States District Court "claiming' that the court-martial was without jurisdiction to try him for non-military offenses committed while off-post." The District Court denied relief and the Third Circuit Court of Ap-


(a) An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense.

(b) Any person subject to this chapter who attempts to commit any offense punishable by this chapter shall be punished as a court-martial may direct, unless otherwise specifically prescribed.

41. Article 130, 10 U.S.C. § 930 (1982) provides:

Any person subject to this chapter who unlawfully enters the building or structure of another with intent to commit a criminal offense therein is guilty of housebreaking and shall be punished as a court-martial may direct.

42. Article 134, 10 U.S.C. § 934 (1982) provides:

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.


44. Id.
appeals affirmed.  

The United States Supreme Court granted certiorari limited to the question:

Does a court-martial, held under the Articles of War, Tit. 10, U.S.C. § 801 et seq., have jurisdiction to try a member of the Armed Forces who is charged with commission of a crime cognizable in a civilian court and having no military significance, alleged to have been committed off-post and while on leave, thus depriving him of his constitutional rights to indictment by a grand jury and trial by a petit jury in a civilian court?  

The Court held that a crime must be "service connected" for it to fall under military jurisdiction. The Court wanted to prevent "cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger," as used in the Fifth Amendment, . . . [from being] expanded to deprive every member of the armed forces of [the due process benefits of] indictment by a grand jury and trial by a jury of his peers.

O'Callahan eliminated the status-based jurisdiction of the military courts and took a major step toward minimizing the deprivation of equal justice suffered by soldiers. By using "status" as the standard for courts-martial jurisdiction, Justice Douglas concluded that O'Callahan had been denied "first, the benefit of an indictment by a grand jury and second, a trial by jury before a civilian court as guaranteed by the Sixth Amendment" and by Article III, section 2 of

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45. Id. The circuit court of appeals affirmed per curiam the denial of the writ of habeas corpus, not on the merits but because the issues presented by O'Callahan were scheduled for briefing and arguing before the Court of Military Appeals. United States ex rel. O'Callahan v. Parker, 372 F.2d 136 (3d Cir. 1967), reargued, 390 F.2d 360, 361 (3d Cir. 1968), cert. denied, 393 U.S. 822, rev'd, 395 U.S. 258 (1969).

46. O'Callahan, 395 U.S. at 261.

47. Id. at 272-73.


49. U.S. Const. amend. VI states:

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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

50. U.S. Const. art. III, § 2, cl. 3 states:

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.
the Constitution . . . .”

Justice Douglas found that the military justice system was without equivalent guarantees. Although he recognized that there was “a genuine need for special military courts,” he also determined that “courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law.” Thus, Justice Douglas, quoting Toth v. Quarles, concluded that jurisdiction of courts-martial should be limited to “the least possible power adequate to the end proposed.”

The majority opinion identified several factors which indicated that O'Callahan's crime lacked service connection; they are:

1. the accused's proper absence from the military base;
2. the lack of connection between the accused's military duties and the alleged crimes;
3. the fact that the crimes were not committed on a military post or enclave;
4. the victim of the crimes was not performing duties relating to the military;
5. the situs of the crime was not an armed camp;
6. the alleged offenses dealt with peacetime offenses, not with authority stemming from the war power;
7. the civil courts were open;
8. the offenses were committed within the territorial limits of the United States, not in an occupied zone or foreign country;

51. O'Callahan, 395 U.S. at 262.
52. Justice Douglas states:

And conceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, it still remains true that military tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts. For instance, the Constitution does not provide life tenure for those performing judicial functions in military trials. They are appointed by military commanders and may be removed at will. Nor does the Constitution protect their salaries as it does judicial salaries. Strides have been made toward making courts-martials less subject to the will if the executive department which appoints, supervises and ultimately controls them. But from the very nature of things, courts have more independence in passing on the life and liberty of people than do military tribunals.

O'Callahan, 395 U.S. at 262-63 (quoting Toth v. Quarles, 350 U.S. 11, 17-18 (1955)).
53. O'Callahan, 395 U.S. at 265.
55. O'Callahan, 395 U.S. at 265 (quoting Toth, 350 U.S. at 22-23).
(9) the offenses did not involve any questions of flouting military authority;

(10) the offenses did not involve the security of a military post; and

(11) the offenses did not involve the integrity of military property.\(^6\)

By limiting court-martial jurisdiction to "service connection," the Court's intent was to restrict, to the greatest extent possible, military jurisdiction over crimes committed within the territorial limits of the United States during peacetime.\(^7\) According to the Court, the "status" of an individual was just the "beginning of the inquiry" into service connection.\(^8\)

Two short years after its decision in *O'Callahan*, the Supreme Court again addressed the question of court-martial jurisdiction over crimes committed by military personnel during peacetime in *Relford v. Commandant*.\(^9\) The petitioner in *Relford* was convicted by general court-martial on two specifications of kidnapping and two specifications of rape. Each of the offenses occurred on an Army installation. One of the rape and kidnapping victims was an Army dependant; the other was a civilian employee of the Army. At the time of the offenses, the petitioner was on active duty with the Army and was not on a leave or other "non-duty" status.

The Court in *Relford* basically applied the standards enumerated in *O'Callahan* and added a twelfth factor requiring that the offense be "among those traditionally prosecuted in civilian courts."\(^10\) The Court noted that its list of factors in *O'Callahan* indicates "that it chose to take an ad hoc approach to cases where trial by court-martial is challenged."\(^11\) When the Court turned to the factors in Relford's case that were relevant to the issue of court-martial jurisdiction, the Court determined that there were as many of the *O'Callahan* factors present as there were ones missing.\(^12\) Thus, the Court held that the crimes with which Relford was charged were triable by a military court.

The Court's use of the *O'Callahan* factors and its enunciation

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56. *Id.* at 273-74.
60. *Id.* at 365.
61. *Id.* at 365-66.
62. *Id.* at 366.
of nine additional factors\textsuperscript{63} amplifying the concept of service connection did much to promote the concept and application of service connection.\textsuperscript{64} The Court recognized that any subsequent analysis of court-martial jurisdiction would be an ad hoc approach.

For seventeen years, \textit{O'Callahan} and \textit{Relford} were the standards used by the courts to determine court-martial subject matter jurisdiction. Then, in 1987, the Supreme Court handed down the decision of \textit{Solorio v. United States}.\textsuperscript{65}

3. \textit{The Return to Jurisdiction Based Solely on the Military Defendant's Status as a Member of the Armed Forces Under Solorio v. United States}

In \textit{Solorio}, the petitioner, a Coast Guardsman, was charged with various offenses against two young girls, including attempted rape, indecent assault, and indecent liberties. The offenses allegedly

\begin{itemize}
  \item \textsuperscript{63} Id. at 367. The Court enunciated nine additional factors amplifying the concept of service connection:
    \begin{itemize}
    \item (a) The essential and obvious interest of the military in the security of persons and of property on the military enclave.
    \item (b) The responsibility of the military commander for maintenance of order in his command and his commander's authority to maintain that order. [Citations omitted]
    \item (c) The impact and adverse effect that a crime committed against a person or property on a military base, thus violating the base's very security, has upon morale, discipline, reputation and integrity of the base itself, upon its personnel, and upon the military operation and the military mission.
    \item (d) The conviction that [article I, section 8, clause 14 of the Constitution of the United States,] vesting in Congress the power "To make Rules for the Government and Regulation of the land and naval Forces," means, in appropriate areas beyond the purely military offense, more than the mere power to arrest a serviceman offender and turn him over to the civil authorities.
    \item (e) The distinct possibility that civil courts, particularly nonfederal courts, will have less than complete interest, concern, and capacity for all the cases that vindicate the military's disciplinary authority within its own community. [Citations omitted]
    \item (f) The presence of factors such as geographical and military relationships have important contrary significance [in favor of service-connection].
    \item (g) Historically, a crime against the person of one associated with the post was subject even to the General Article.
    \item (h) The misreading and undue restriction of \textit{O'Callahan} if it were interpreted as confining the court-martial to the purely military offenses that have no counterpart in nonmilitary criminal law.
    \item (i) The inability appropriately and meaningfully to draw any line between a post's strictly military areas and its nonmilitary areas, or between a servicemember-defendant's on-duty and off-duty activities and hours on the post.
  \end{itemize}

\textsuperscript{64} Thwing, \textit{supra} note 57, at 23.
\textsuperscript{65} 107 S. Ct. 2924 (1987).
took place between March of 1982 and June of 1984. The alleged victims were between the ages of ten and twelve during the period when the offenses allegedly occurred. The fathers of the two victims were also active duty members of the Coast Guard. The offenses purportedly took place in Juneau, Alaska, where both Solorio and the victims resided in civilian housing; one of the victim’s family lived next door to Solorio and his family and the other lived a half-mile away. The families lived in civilian quarters because government housing was unavailable.

Information concerning the alleged offenses was not provided by the girls until both they and Solorio had been transferred to different Coast Guard duty stations outside Alaska. Solorio had been transferred to Governors Island, New York, where he was charged with the Alaska offenses, as well as similar offenses involving two other minor daughters of Coast Guardsmen which allegedly had occurred in government quarters at Governors Island from November 20, 1984 to January 5, 1985.66

After the general court-martial was convened in New York, Solorio moved to dismiss the charges for crimes committed in Alaska on the ground that the court lacked jurisdiction under the Supreme Court’s decisions in *O’Callahan* and *Relford*.67 The judge granted the motion to dismiss, ruling that the Alaska offenses were “not sufficiently service connected to be tried in the military criminal justice system.”68 The United States Coast Guard Court of Military Review reversed the trial judge’s order and reinstated the charges.69

The United States Court of Military Appeals affirmed the Court of Military Review, concluding that the Alaska offenses were service connected within the meaning of *O’Callahan* and *Relford*.70 The Court stated that “not every off-base offense against a soldier’s dependent is service-connected,” the court reasoned that “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.”71 Other factors that the court weighed included: “the interest of Alaska civilian officials in prosecuting petitioner; the hardship on the victims; and the benefits to petitioner and the Coast Guard from trying

68. Id.
69. Id.
70. Id.
71. Id. (quoting *Solorio*, 21 M.J. at 256).
the Alaska and New York offenses together."

The United States Supreme Court subsequently granted certiorari to review the decision of the Court of Military Appeals. The Court affirmed the decision of the appeals court holding that "[t]he jurisdiction of a court-martial depends solely on the accused's status as a member of the Armed Forces, and not on the 'service connection' of the offenses charged," thus overruling O'Callahan.

Justice Rehnquist found that "[t]he plain meaning of Article I, section 8, clause 14 of the Constitution—which grants Congress plenary power to make Rules for the Government and Regulation of the land and naval forces—supports the military status test." The constitutional grant of power to Congress to regulate the armed forces appears in the same section as the provisions granting Congress authority to regulate commerce, coin money, and declare war.

Justice Rehnquist also found that, "[o]n its face, there is no indication that the grant of power in clause 14 was any less plenary than the grants of other authority to Congress in the same section." Thus, "Congress' power embraces the authority to regulate the conduct of persons who are actually members of the armed services."

In his dissent, Justice Marshall asserts that the majority opinion disregards the limitations the Bill of Rights imposes on the reach of article I, section 8, clause 14. Justice Marshall quotes the Court's opinion in Toth, stating, "[T]he constitutional grant of power to Congress to regulate the armed forces ... itself does not empower Congress to deprive people of trials under the Bill of Rights safeguards, and we are not willing to hold that power to circumvent those safeguards should be inferred through the Necessary and Proper Clause."

Recognizing that the fifth amendment rights to grand jury and trial by jury are limited in application to the military, Justice Mar-
shall contended that the amendment’s exception covers only “cases arising in the land and naval forces.” The amendment makes no reference to the status of the individual. Additionally, “[t]he protection afforded individuals by the fifth and sixth amendments... ranks very high in our catalogue of constitutional safeguards and, therefore, “trial by court-martial should be limited to the least possible power adequate to the end proposed.”

In concluding his dissent, Justice Marshall chastised the majority opinion for its blatant disregard of stare decisis. Justice Marshall expressed his fear that the majority opinion would subject every member of the armed forces to court-martial jurisdiction—without grand jury indictment or trial by jury—for any offense, regardless of its lack of connection to “military discipline, morale and fitness.”

III. ANALYSIS

A. Return to Jurisdiction Based on Soldier Status-only Under Solorio

The Court’s decision in Solorio was the culmination of an erosion of the soldiers’ right to civilian trials for predominately, if not purely civilian offenses. Solorio reversed the precedents established by O’Callahan and Relford and expanded court-martial subject matter jurisdiction far beyond the constitutional limits enunciated in those cases.

O’Callahan held that a military tribunal may not try a soldier charged with a crime that has no service-connection. Relford held that service-connection must be determined on an ad hoc basis. Solorio simply returned to the pre-O’Callahan standard permitting military courts to find subject-matter jurisdiction over offenses based solely on the status of an individual as a member of the armed services. The Solorio military status-only requirement does not provide soldiers any protection of their right to a civilian trial for predomi-

81. Id. at 2934 (emphasis added).
82. Id. at 2935.
83. Id.
84. Id.
85. The Court of Military Appeals has, case-by-case, eviscerated the O’Callahan and Relford decisions by adopting a broad definition of service-connection. The flexible service-connection test allows military courts to make jurisdictional decisions based on any single factor or combination of factors, tangible or intangible, proven or presumed. See, e.g., United States v. Trotter, 9 M.J. 337 (C.M.A. 1980) (the Court of Military Appeals extended military subject-matter jurisdiction to all drug offenses committed by soldiers); United States v. Scott, 21 M.J. 345 (C.M.A. 1986) (the Court of Military Appeals has indicated that all offenses committed by officers are service-connected).
nately or purely civilian offenses. The Court’s holding suggested that any asserted impact on the military, regardless of how remote or indirect, will be sufficient to outweigh the soldier’s interest in the greater constitutional protections of a civilian trial.

How far is the court willing to take the status-only test? Does the Court mean to say that civilian offenses committed by soldiers who are reservists or reserve officer training cadets while not on active duty can be tried by military courts? The Court did indicate that court-martial subject matter jurisdiction can be stretched to unreasonable and unconstitutional lengths to encompass even these soldiers.86

For example, suppose that Mr. Smith is a reservist serving his two week yearly obligation with the United States Army. Mr. Smith is, by profession, an investment banker for Big Money Investors. Mr. Smith’s rank in the Army is private first class (PFC). During his two week tour with the Army, the Securities and Exchange Commission reveals that PFC Smith has been involved in some insider-trading deals. In this instance, under Solorio, PFC Smith’s status as a member of the armed forces is sufficient for the military court to exercise subject-matter jurisdiction over his purely civilian offense. Thus, PFC Smith is deprived of his right to indictment by a grand jury and his right to a trial by a jury of his peers.

The foregoing example illustrates that with the Court’s return to the status-only test, the guidelines and limitations required by the service-connection test are no longer relevant. There is seemingly very little to prevent military courts from extending their jurisdiction over purely civilian offenses committed by civilian military employees or dependents. While some case law currently prohibits the exercise of military jurisdiction over civilian military employees and dependants,87 Solorio may be looked to as precedent for overturning those cases.

B. Solorio as a Reaction to the Difficulty of Using the Service-connection Standard

On one level, Solorio may simply have been a reaction to the difficulty and uncertainty that application of the O’Callahan and

86. Solorio, 107 S. Ct. at 2930.
Relford factors and considerations have brought to the military justice system. Justice Harlan, in his dissent in O'Callahan, stated that "the infinite permutations of possibly relevant factors are bound to create confusion and proliferate litigation over the jurisdiction issue in each instance." 88

As if in response to Justice Harlan's criticism, the Court in Relford enumerated twelve factors and nine additional considerations which were to serve as guidelines in determining service-connection and subject-matter jurisdiction. 89 Yet, even with the Relford factors and considerations, the mental gymnastics used by practitioners and courts in applying the standards evidenced their frustration with the service-connection test. 90 As a result, in the years following Relford, the Court of Military Appeals gradually eroded the intent of O'Callahan (i.e., limiting court-martial jurisdiction over civilian offenses to those which are service-connected) by broadly construing the definition of service-connection. 91 Courts are looking at what effect, in general terms, a civilian, off-post offense has upon the combat readiness, efficiency, discipline, morale or reputation of a military installation and its personnel. 92 Using this type of quasi-service-connection analysis easily allows the conclusion that any civilian offense is of "special military significance." 93

The erosion of the O'Callahan-Relford standard was one factor that led to the Court's decision in Solorio to base court-martial jurisdiction on status only. 94 Adopting a broad definition of service-connection, it stated that any offense committed by a soldier, whether on-post or off-post and whether against another soldier or civilian, has an impact on the armed forces. 95 At the very least, the military is deprived of the soldier's services while he is defending himself and serving his sentence. 96 Moreover, the soldier's offense casts a bad light on the military when his uniformed status is exposed. 97 Thus, any soldier offense has an effect on the combat readiness, efficiency, discipline, morale and reputation of the armed forces. The status-

89. See supra notes 56 and 63 and accompanying text.
90. See generally Thwing, supra note 57, at 28.
91. See infra text accompanying note 100.
94. Solorio, 107 S. Ct. at 2933.
95. See Brief for Petitioner, supra note 92, at 17.
96. See Brief for Petitioner, supra note 92, at 17.
97. Id.
only test facilitates the practitioner and the court’s analysis of court-martial subject-matter jurisdiction by providing a bright-line standard which simplifies the jurisdiction issue.

Justice Marshall in his dissent in Solorio criticizes the argument that simpler is better. Justice Marshall states: “It is true that the test requires a careful, case-specific factual inquiry. But this is not beyond the capacity of military courts.”

Any soldier being tried by court-martial is being deliberately deprived of the procedural protections guaranteed by the Constitution. The Constitution specifically states that fifth and sixth amendment protections must be provided in any case not “arising in” the armed forces. Those protections cannot be lightly swept aside simply because an individual is a member of the armed forces. Simpler is not better. Military courts, regardless of their similarity to civilian courts, were not intended and are not equipped to provide the procedural protections that are characteristic of civilian courts.

C. Justifications for Limiting Court-martial Subject-matter Jurisdiction

The O’Callahan Court summarized the limitations of military courts: “While the Court of Military Appeals takes cognizance of some constitutional rights of the accused who are court-martialed, courts-martials as an institution are singularly inept in dealing with the nice subtleties of constitutional law.”

Under the Solorio status-only requirement for court-martial jurisdiction, no thought is given to the balancing of the accused’s interests in the greater constitutional protections of a civilian trial and the military’s interest in maintaining discipline and order. Regardless of how trivial and unrelated a soldier’s offense may be to the military mission of readiness, efficiency, and discipline, an accused may be stripped of the basic procedural protections guaranteed by the Constitution “simply because they doffed their civilian clothes.” In order to deprive a soldier of a basic constitutional right, the armed services must be required to point to a legitimate military interest that justifies the deprivation.

The primary importance of O’Callahan was that it provided

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98. Id. at 2941 (Marshall, J., dissenting).
99. U.S. CONST. amend. V.
100. See supra note 21 and accompanying text.
the proper balance between the constitutional rights of soldiers against the military's interest in trying the case in a court-martial. More specifically, the importance of an accused's right to the protections of an article III court—right to indictment by a grand jury and right to trial by jury—is weighed against the legitimate need of the military to maintain order and discipline. The service-connection requirement in O'Callahan helped to insure that the scope of military courts was limited to the least possible power deemed absolutely essential for the maintenance of order and discipline during peacetime. Court-martial jurisdiction must be limited because its overriding purpose is to maintain discipline. Its purpose is not to provide constitutional protections to the accused.

Many improvements in the military justice system have taken place in the seventeen years since O'Callahan. Some improvements include the Military Rules of Evidence of 1980, which were taken in large part from the Federal Rules of Evidence. Additional improvements were made regarding the quality of legal representation an accused receives. Under the Uniform Code of Military Justice (UCMJ), the accused is entitled to an appointed licensed military attorney and may also retain a civilian attorney (at no cost to the United States Government) to represent him.\textsuperscript{103}

However, many of the basic deficiencies recognized in O'Callahan still remain. Additionally, recent changes have worked to the detriment of the military accused. For example, the Military Justice Act of 1981\textsuperscript{104} for the first time allows commanders to involuntarily place certain soldiers on leave-without-pay status during their appeals.\textsuperscript{105} The 1981 amendments also provide that the sixty-day time period for seeking further appeal can be started by constructive, rather than personal service of Court of Military Review decisions.\textsuperscript{106} The Military Justice Act of 1983\textsuperscript{107} allows convening authorities\textsuperscript{108} to execute any punishments, except death or punitive discharge, without conducting any legal review of the court-martial or taking any action on the findings.\textsuperscript{109}

In O'Callahan, the majority was concerned with the impartiality of the military judge and the fact that the military accused in a

\begin{footnotes}
\item[108] See infra notes 132-138 and accompanying text.
\item[109] 10 U.S.C. § 860(c) (added by amendment 1983).
\end{footnotes}
court-martial is not truly tried by a jury of his peers. The majority was also concerned with the fact that the convening authority, a non-lawyer, has extraordinary control over law enforcement, prosecution, and adjudicative functions and may intentionally or unintentionally exert unlawful command influence on the criminal proceedings. Those concerns are still valid today.

Military judges, although they certainly may be honest, are nonetheless military officers who must answer to those above them. Much has been done to make military judges more independent of command influence. Today, military judges are appointed by and serve at the discretion of the Judge Advocate General, not the military commander as was the case during O'Callahan. However, unlike article III judges, military judges still do not serve under the protection of life tenure and serve for limited periods of time. Thus, military judges do not have the opportunity to gain experience and develop judicial temperament.

Likewise, courts-martial are not tried by a jury of the accused's peers. A court-martial is tried by a panel of officers empowered to convict by a two-thirds vote, except where the death penalty is mandatory. The panel is generally not required to be larger than five members, even for the most serious crimes. If the accused is an enlisted person he may request that at least one-third of the panel members are enlisted personnel. In reality, only senior enlisted personnel (non-commissioned officers) will be selected to serve on the panel.

The convening authority hand-picks the members of the panel from his own command. Thus, there is potential for improper command influence by the convening authority on the panel members because their officer evaluation reports (similar to job performance evaluations) are prepared by the same person who decides that

111. Id. at 264.
113. U.S. CONST. art. III, § 1 states:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, Compensation, which shall not be diminished during their Continuance in Office.

116. Id. § 825.
117. Id. § 825(d)(2).
the accused should be court-martialed.

The accused is entitled to only one peremptory challenge to the hand-picked panel. This is a significant difference from the Federal Rules of Criminal Procedure, which require that each side be given twenty peremptory challenges if the offense charged is punishable by death. If the offense is punishable by imprisonment of more than one year, the government is entitled to six peremptory challenges and the defendant, or defendants jointly, to ten challenges. If the offense is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to three challenges. If there is more than one defendant, the court may allow the defendants additional challenges and permit them to be exercised separately or jointly. Thus, it is evident that a court-martial panel fails to meet the minimal requirements of the sixth amendment.

The area of greatest concern deals with the extraordinary control and influence the convening authority has over the accused's criminal process. The convening authority is a military commander who generally is a non-lawyer with little or no legal knowledge or education. The convening authority is charged by the UCMJ with judicial authority to create a court-martial. Thus, a convening authority can initiate and direct investigations within his command. He can authorize searches without complying with the procedural requirement like those proscribed by the Federal Rules of Criminal Procedure. If charges result from the investigation, the convening authority may refer them to a court-martial. He may grant immunity to accomplices and witnesses. He may bargain with the accused over terms of pretrial agreements and approve the sentence adjudged.

In serious cases, an article 32 pre-trial investigation may be required. An officer is appointed by the special court-martial con-

118. 10 U.S.C. § 841(b) (1982).
120. Id.
121. Id.
125. R.C.M., supra note 123, at Rules 404 and 407.
126. R.C.M., supra note 123, at Rule 704.
127. R.C.M., supra note 123, at Rule 705.
128. R.C.M., supra note 123, at Rule 1107.
The convening authority's convening authority is not bound by the investigating officer's finding or recommendations and may ignore them. Thus, the convening authority can refer the charges to court-martial as long as he reasonably believes the evidence supports the charges. In fact, the convening authority may even eliminate the required article 32 investigation by referring the charges to a special court-martial which has the authority to administer severe punishment.

While the UCMJ prohibits unlawful command influence, it may nevertheless occur. Illegal command influence can deny an accused his constitutional right to a fair trial. Unfortunately, neither Congress nor the military courts have found a way to remedy the problem. In fact, it is very unlikely that courts-martial will ever be free from unlawful command influence.

Military law has always been and continues to be primarily an instrument of discipline, not justice. The primary business of armies and navies is to fight or be ready to fight wars should the occasion arise. The trial of soldiers to maintain discipline is merely incidental to the armed forces' primary fighting function. Justice Douglas pointed out in his opinion in O'Callahan that the "exigencies of military discipline require the existence of a special system of military courts in which not all of the specific procedural protection deemed essential in Article III trials need apply." However, the expansion of military discipline beyond its proper domain carries with it a threat to liberty. Military courts must be restricted to the narrowest jurisdiction deemed absolutely essential for maintaining discipline among soldiers.

130. A special court-martial is empowered to administer confinement for six months, a bad conduct discharge, forfeiture of two-thirds pay, and reduction to the lowest enlisted rank. 10 U.S.C. § 819 (1982).
132. R.C.M., supra note 123, at Rules 405(a), 407(a).
133. Article 34 of the U.C.M.J. provides, however, that a commander must receive advice from his staff judge advocate that the charge is supported by evidence. 10 U.S.C. § 834 (1982).
135. Id. § 837.
137. 395 U.S. at 261.
IV. Proposal

The primary complaint regarding the O'Callahan/Relford service-connection test is that courts and practitioners find it is too uncertain and difficult to apply. There is no easy or quick solution to the problem of how to determine court-martial jurisdiction. The status-only requirement of Solorio should not be employed simply because it is the easiest way for the military to determine and obtain court-martial jurisdiction over soldiers. Again, simplest is not necessarily best.

A. End Concurrent Jurisdiction

One solution is to completely end concurrent jurisdiction of military courts. Only if an offense is purely military in nature would a military court have jurisdiction. If an offense can in any way be tried by an article III court, then the civilian court would have jurisdiction. If this solution is employed, military courts would undoubtedly be restricted to the least possible power.

Problems with this solution arise when an offense that could be dealt with in civilian court is truly a military matter. For example, one soldier may strike another soldier on a military installation. The assault could be dealt with in a civilian court if the injured party filed suit against the aggressor. However, this matter seems more appropriate for military courts since both soldiers were on the military installation and their actions may have an effect on the maintenance of order and discipline within their unit.

B. Alternative Jurisdictional System of Civilian-military Justice

A second possible solution would require Congress to create a system of civilian-military justice. Military courts would have jurisdiction over purely military offenses, i.e., desertion, insubordination and the like. Civilian courts would have jurisdiction over purely civilian offenses, writing bad checks, fraud and the like. In the event that both courts claim to have concurrent jurisdiction (e.g., drugs) federal courts will establish which court will take jurisdiction. On one side, federal courts would balance the individual's interest in having the constitutional and procedural protections of a civilian court and the civilian court's interest in retaining jurisdiction over the soldier's offense. On the other side, the court will look at the military's interest in trying the case in court-martial. Federal courts

138. For the definition of concurrent jurisdiction, see supra note 10.
would use the service-connection test of *O'Callahan* and *Relford* to determine who has the overriding interest in the litigation. Both the military and the civilian courts would be bound by the federal court decision.

The concurrent system of civilian-military justice combines the best of the no concurrent jurisdiction solution and the service-connection analysis. Military courts would maintain jurisdiction over those offenses in which they have the greatest interest. Yet, military courts would also have the opportunity to argue that they should be able to exercise jurisdiction over those offenses which may be civilian in nature, but have significance with regard to the preservation of military discipline and order. Civilian courts, on the other hand, would also retain jurisdiction over those offenses in which they have the greatest interest. However, they too would have the opportunity to argue that their interest in an offense takes precedence over the military's interest.

The soldier is also benefited in that he is assured that he is at least being afforded a fair opportunity to be heard on the issue of jurisdiction in federal court. Federal court is free of the influence of the convening authority. Judges in the civilian courts have greater independence to determine the constitutionality of depriving the soldier of his right to an article III court, his right to indictment by a grand jury and his right to trial by jury. Most importantly, the power of the military court is restricted to the narrowest jurisdiction possible.  

The person most interested in who retains jurisdiction over his offense is, naturally, the soldier. He is the individual who is deprived of his procedural guarantees under the Constitution if he is court-martialed. The soldier is also the individual that must pay for counsel if he is haled into civilian courts.

The solution may not be simple. However, when the difference between whether a crime is tried in civilian or in military court is the difference between being afforded due process rights or not, courts should not succumb to the temptation of embracing solutions that are not optimal. While any one of these solutions may work, the reality is that military and civilian courts do not argue over who has jurisdiction over a particular offense. In many cases, the military court gladly allows the civilian court to take jurisdiction over a matter. Military judges, prosecutors and defense attorneys are too overworked and have limited access to paralegal and clerical assistance to take on an unlimited flow of cases. In other matters, civilian courts are very willing to allow military courts to retain jurisdiction over a matter because the military punishments are more severe. Similarly, civilian judges, district attorneys and public defenders have so many cases that they are glad to lessen their load.
which offer only administrative convenience.

V. CONCLUSION

Under *Solorio v. United States*, the United States Supreme Court affirmed the conviction of the defendant-soldier, holding that court-martial jurisdiction will be based solely on the status of that individual as a member of "land and naval forces." Prior to this decision, military courts were required to prove that the soldier's offense was service-connected using the *O'Callahan/Reford* factors and considerations. However, under *Solorio*, service-connection is no longer significant. The status of the accused as a member of the armed forces is the only element required in determining court-martial jurisdiction.

By adopting the status-only test, the Court has overturned seventeen years of stare decisis and has expanded court-martial subject matter jurisdiction far beyond the constitutional limits spelled out in *O'Callahan* and *Reford*. The Court refuses to recognize that soldiers have an interest in preserving their right to the greater constitutional protections of a civilian trial which must be balanced against the proper interests of the military in maintaining discipline and order.

Many of the fears expressed by Justice Douglas in his *O'Callahan* opinion and echoed by Justice Marshall in his dissent in *Solorio* are still valid. Military law is an instrument of discipline, not justice. The need to limit court-martial jurisdiction to its proper domain is as great now as it was when *O'Callahan* and *Reford* were decided. Since those cases were decided, no development in either the military or society at large have justified the expansion of court-martial jurisdiction over civilian offenses as allowed by *Solorio*.

The most reasonable solution to the dilemma of military court jurisdiction is to create a system of civilian-military courts. The system would allow civilian and military courts to exercise jurisdiction over issues that are purely civilian and purely military, respectively. Any disputes regarding jurisdiction would be settled by federal courts. Most importantly, military court jurisdiction will be carefully monitored by the federal courts who will insure that soldiers are not unconstitutionally deprived of their procedural rights.

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