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A NEW SUBJECT MATTER JURISDICTION FOR THE MILITARY JUSTICE SYSTEM

Solorio v. United States

The United States Supreme Court in *Solorio v. United States*¹ delivered a severe blow to the constitutional rights of Armed Forces members. The Court stated that the court-martial jurisdiction of the United States Armed Forces is to be based upon the “military status” of the accused.² In so doing, the Court overruled their 1969 decision which held that the “service-connection” of the offense was the determinate factor in jurisdiction.³ The result of this ruling is that members of the armed forces will not benefit of the right to trial by jury,⁴ the right to a trial by civilian jury⁵ and the requirement of a grand jury indictment⁶ even where they are the object of prosecution for offenses unconnected to their military duty.

In writing the opinion, Chief Justice Rehnquist followed the recent Supreme Court trend of deferring to Congress in cases involving military matters. The Court believes “Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military.”⁷ This trend is evidenced in cases where servicemen have gone to court to challenge their lack of constitutional rights.⁸ Today’s answer to the constitutional problems of the serviceman seems to lie not in judicial review, but rather in legislative action.

Richard Solorio was charged with sexually abusing two daughters of a fellow guardman while on duty with the United States Coast Guard in Juneau, Alaska.⁹ The offenses were allegedly committed in Solorio’s privately

1. 107 S. Ct. 2924 (1987).

2. *Id.*

3. O’Callahan v. Parker, 395 U.S. 258 (1969).

4. U.S. CONST. art. III, § 2, cl. 3.

5. U.S. CONST. amend. VI.

6. U.S. CONST. amend. V.

7. *Solorio*, 107 S. Ct. at 2931.

8. *E.g.*, Goldman v. Weinberger, 475 U.S. 503, 507-08 (1986) (free exercise of religion); Chappell v. Wallace, 462 U.S. 296, 300-05 (1983) (racial discrimination); Rostker v. Goldberg, 453 U.S. 57, 70-71 (1981) (sex discrimination); Brown v. Glines, 444 U.S. 348, 357-60 (1980) (free expression). *See also* Kaczynski, *From O’Callahan to Chappell: The Burger Court and the Military*, 18 U. RICH. L. REV. 235, 295-99 (1984); Sherman, *Legal Inadequacies and Doctrinal Restraints in Controlling the Military*, 49 IND. L.J. 539, 564-67 (1974).

9. *Solorio*, 107 S. Ct. at 2925.

owned home located in the civilian community.¹⁰ The incident was discovered after Solorio's transfer to New York, where a general court-martial was convened to try him for the alleged crimes in Alaska.¹¹

The military judge hearing the case granted Solorio's motion to dismiss for lack of subject matter jurisdiction, applying the "service-connection" test of *O'Callahan v. Parker*.¹² On appeal,¹³ the United States Coast Guard Court of Military Review reversed, stating that the offenses "were violations against persons associated with one particular Coast Guard command"¹⁴ and were thus service-connected as a matter of law.¹⁵ The United States Court of Military Appeals affirmed the Court of Military Review.¹⁶

The United States Supreme Court received the case on writ of certiorari.¹⁷ In an opinion delivered by Chief Justice Rehnquist, the Court stated "that the requirements of the Constitution are not violated where, as here, a court-martial is convened to try a serviceman who was a member of the armed services at the time of the offense charged."¹⁸ This means that every statutory offense¹⁹ listed by the Uniform Code of Military Justice²⁰ (hereinafter U.C.M.J.) may be prosecuted by court-martial against an armed services member regardless of whether the alleged offense was committed while on duty, on pass, on leave or on any other category of separation from his military duties. Further, the U.C.M.J. and the Supreme Court specify which persons qualify as "members" of the armed forces.²¹

10. The court martial was convened to try Solorio on charges resulting from incidents in both Alaska and New York. The New York offenses were not in issue, however, because they occurred in government quarters, thus, meeting the "service connection" test. *Id.*

11. *Id.*

12. *United States v. Solorio*, 21 M.J. 512, 513 (C.G.C.M.R. 1985), *aff'd*, 21 M.J. 251 (C.M.A. 1986), *aff'd*, 107 S. Ct. 2924 (1987).

13. Uniform Code of Military Justice, art. 62, 10 U.S.C. § 862(a)(1) (1982) [hereinafter U.C.M.J.], authorizes certain appeals by the government from an assortment of rulings and orders made by military judges.

14. *Solorio*, 21 M.J. at 520.

15. *Id.*

16. *United States v. Solorio*, 21 M.J. 251, 258 (C.M.A. 1986).

17. *Solorio*, 107 S. Ct. at 2926.

18. *Id.* at 2933. *Cf. W. AYCOCK & S. WURFEL, MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE* 62 (1955). "National Guard personnel, who have no other dual military status, are not in the armed forces of the United States except when called into the active federal service by direction of the President either as units or as individuals." *Id.* See also *O'Callahan v. Parker*, 395 U.S. 258, 272 n.18 (1969).

19. The jurisdiction extends to all offenses expressly denounced by Congress in the punitive articles of the U.C.M.J. U.C.M.J. art. 77-134, 10 U.S.C. §§ 877-934 (1982).

20. The U.C.M.J. was first enacted on May 5, 1950 and for the first time brought regulation of the several branches of the armed forces under one code. See F. WEINER, *THE UNIFORM CODE OF MILITARY JUSTICE* 1 (1950).

21. U.C.M.J. art. 2, 10 U.S.C. § 802 (Supp. 1988), states:

This jurisdictional issue is of great constitutional significance to the accused. While being prosecuted in a court-martial, the accused "loses" many constitutional rights.²² Pursuant to its article I power to "make rules for the Government and Regulation of the land and naval forces," Congress created the U.C.M.J. to regulate military courts.²³ Because courts-martial receive their authority under this article I provision they are not part of the judiciary

(a) The following persons are subject to this chapter:

(1) Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster or acceptance into the armed forces; inductees from the time of their actual induction into the armed forces; and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it.

(2) Cadets, aviation cadets, and midshipmen.

(3) Members of a reserve component while they are on inactive duty training authorized by written orders which are voluntarily accepted by them and which specify that they are subject to this chapter.

(4) Retired members of a regular component of the armed forces who are entitled to pay.

(5) Retired members of a reserve component who are receiving hospitalization from an armed force.

(6) Members of the Fleet Reserve and Fleet Marine Corp Reserve.

(7) Persons in custody of the armed forces serving a sentence imposed by a court-martial.

(8) Members of the National Oceanic and Atmospheric Administration, Public Health Service, and other organizations, when assigned to and serving with the armed forces.

(9) Prisoners of war in custody of the armed forces.

(10) In time of war, persons serving with or accompanying an armed force in the field.

(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the following: the Canal Zone, Puerto Rico, Guam, and the Virgin Islands.

(12) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the secretary concerned and which is outside the United States and outside the following, the Canal Zone, Puerto Rico, Guam, and the Virgin Islands.

See also *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960) (code does not apply to civilian dependents accompanying members during peacetime); *Reid v. Covert*, 354 U.S. 1 (1957) (code does not apply to dependent of serviceman accompanying him abroad); *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955) (code does not apply to discharged servicemen); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) (code does not apply to civilians).

22. See generally, Willis, *The Constitution, the United States Court of Military Appeals and the Future*, 57 MIL. L. REV. 27, 27 n.2 (1972) (material contrasting individual rights in civilian and military criminal proceedings).

23. U.S. CONST. art. I, § 8, cl. 14.

of the United States within the meaning of article III.²⁴ As a result, the fifth amendment right to indictment by grand jury,²⁵ the sixth amendment right to an impartial jury²⁶ and the right to trial by jury found in article III section 2, clause 3,²⁷ do not apply to military courts-martial.²⁸

The loss of the right to trial by jury, and especially the constitutional selection process for members thereof, is a notable omission.²⁹ Only the convening authority may select court-martial members and the selection criteria are very broad.³⁰ Consequently, "hand picked" panels are common.³¹ Even the Military Court of Appeals recognized the danger that court-martial members will be selected to aid the prosecution.³² Congress, in the Military Justice Act of 1983,³³ created a partial remedy by granting the Supreme Court direct review of military appeals on a discretionary basis.³⁴

24. *Relford v. Commandant*, 401 U.S. 355, 362-63 (1966).

25. U.S. CONST. amend. V. "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 the land or naval forces, or in the Militia, when in actual service in time of War or public danger. . . ." *Id.*

26. U.S. CONST. amend. VI. "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. . . ." *Id.*

27. U.S. CONST. art. III, § 2, cl. 3. "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury. . . ." *Id.*

28. "None of the travesties of justice perpetrated under the U.C.M.J. is really very surprising, for military law has always been and continues to be primarily an instrument of discipline, not justice." Glasser, *Justice and Captain Levy*, 12 COLUM. F. 46, 49 (1969).

29. See generally Goodrich, *Denying Soldiers the Rights They Fight to Protect*, 2 CAL. LAW. 48 (Nov 1982) (result when military law conflicts with constitutional rights). See also O'Callahan v. Parker, 395 U.S. 258, 266 n.7 (1969) (shocking accounts of military injustice).

30. U.C.M.J. art. 25(d)(2), 10 U.S.C. § 825 (1982): "When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for duty by reason of age, education, training, experience, length of service, and judicial temperament."

31. See *United States v. Hedges*, 11 C.M.A. 642, 29 C.M.R. 458 (1960) (conviction overturned because court-martial composition gave the appearance of having been "hand-picked" by the government); *United States v. Greene*, 20 C.M.A. 232, 43 C.M.R. 72 (1970) (court composed primarily of high ranking officers raising doubts as to the fairness of the selection process); *United States v. Daigle*, 1 M.J. 139 (C.M.A. 1975) (integrity of the military justice system harmed where persons excluded from serving on a court-martial because of rank). See generally Bogert, *Court-Martial: Criticisms and Proposed Reforms*, 5 CORNELL L.Q. 18, 21 (1919) (quoting Gen. Ansell, "the charges [in military courts-martial] may be and frequently are, the result of caprice and petty tyranny").

32. Morgan, "Best Qualified" or Not? *Challenging the Selection of Court-Martial Members*, 1987 ARMY LAWYER 34.

33. Military Justice Act, Pub. L. No. 98-209, 97 Stat. 1393, 1405-06 (codified in 23 U.S.C. § 1259 (Supp. I 1983)).

34. See generally Boskey & Gressman, *The Supreme Court's New Certiorari Jurisdiction over Military Appeals*, 102 F.R.D. 329 (1984).

Dispute over the proper jurisdiction of armed forces courts-martial focuses on the interpretation of the article I grant of power to Congress "to make Rules for the Government and Regulation of the land and naval Forces"³⁵ and the fifth amendment exception for "cases arising in the land or naval forces."³⁶ From 1866 to 1960, the Supreme Court interpreted the article I grant to mean that the violation of any statutory offense could be prosecuted by court-martial without regard to the nature of the offense.³⁷ The military status of the offender was enough to invoke court-martial jurisdiction.³⁸ The Court based its decision on the plain meaning of article I, section 8, clause 14 and the exception in the fifth amendment.³⁹

This practice was changed by *O'Callahan v. Parker*,⁴⁰ in which the Court determined that an offense committed by a serviceman while off base, out of uniform, and off duty was not sufficiently "service-connected" to invoke court-martial jurisdiction.⁴¹ Uncertainty developed over the meaning and application of the "service-connected" test. This led to the Court's effort to clarify the test in *Relford v. Commandant*.⁴² The revised test considered twelve factors in making a determination of the service-connection of the offense.⁴³

The Supreme Court in *Solorio* based their return to the military status test upon what it saw as a misinterpretation of the historical roots of court martial jurisdiction by Justice Douglas in *O'Callahan* and upon the military

35. U.S. CONST. art. I, § 8, cl. 14.

36. U.S. CONST. amend. V.

37. *Solorio*, 107 S. Ct. at 2926.

38. *Id.*

39. *Id.* at 2927.

40. 395 U.S. 258 (1969).

41. *O'Callahan*, 395 U.S. at 274. *O'Callahan* was found to be a "newly recognized constitutional principle" and after application of the *Stovall* test for divining retrospective effect, *Stovall v. Denno*, 388 U.S. 293 (1967), *O'Callahan* was found to be worthy of prospective effect only. *Gosa v. Mayden*, 413 U.S. 665, 675 (1973). See also Blumenfeld, *Retroactivity After O'Callahan: An Analytical and Statistical Approach*, 60 GEO. L.J. 551 (1972) (discussion of possible results of retroactive application); Kaczynski, *supra* note 8, at 246-50.

42. 401 U.S. 355 (1971).

43. *Id.* at 365. These twelve factors were:

1. The serviceman's proper absence from the base;
2. The crime's commission away from the base;
3. Its commission at a place not under military control;
4. Its commission within our territorial limits and not in an occupied zone of a foreign country;
5. Its commission in peacetime and its being unrelated to authority stemming from the war power;
6. The absence of any connection between the defendant's military duties and the crime;
7. The victim's not being engaged in the performance of any duty relating to the military;
8. The presence and availability of a civilian court in which the case can be prosecuted;
9. The absence of any flouting of military authority;
10. The absence of any threat to a military post;
11. The absence of any violation of military property;
12. The offense's being among those traditionally prosecuted in civilian courts.

Id.

courts' inability to administer the "service-connected" test.⁴⁴ The Court began with the premise that the plain meaning of article I, section 8, clause 14 does not indicate that its grant of power "was any less plenary than the grants of other authority to Congress in the same section."⁴⁵ No language in the debates over the adoption of the Constitution differs with the Court.⁴⁶ In attacking the *O'Callahan* opinion, the Court examined the common roots of America's court-martial system and the traditional English system.⁴⁷

The Court agreed only with the *O'Callahan* characterization of the conflict over control of military court-martial jurisdiction in 17th century England.⁴⁸ The Court doubted the *O'Callahan* statement that citizens in pre-American England and in our own country had been suspicious of military trial of soldiers.⁴⁹ To back this assertion the Court sought to show that authority existed to court-martial soldiers for civilian offenses during this period.⁵⁰ The means of doing so was the citation of Section 14, article 16 of the Articles of War of 1774⁵¹, which provided for court-martial of any soldier destroying

44. *Solorio*, 107 S. Ct. at 2928-29.

45. *Id.* at 2928.

46. *Id.* 2 FARRAND, THE RECORDS OF THE FEDERAL CONSTITUTION OF 1787, 329-30 (1911); 5 ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 443-545 (1876). However, compare the viewpoint of Brigadier General Ansell, acting Judge Advocate General from 1917 to 1919, questioning the adoption of a system based upon that of an overthrown government:

I contend - and I have gratifying evidence of support not only from the public generally but from the profession - that the existing system of Military Justice is un-American, having come to us by inheritance and rather witless adoption out of a system of government which we regard as fundamentally intolerable; that it is archaic, belonging as it does to an age when armies were but bodies of armed retainers and bands of mercenaries; that it is a system arising out of and regulated by the mere power of Military Command rather than Law; and that it has ever resulted, as it must ever result, in such injustice as to crush the spirit of the individual subjected to it, shock the public conscience and alienate public esteem and affection from that which insists upon maintaining it."

Ansell, *Military Justice*, 5 CORNELL L.Q. 1 (1919).

47. They sought to show that "the history of court-martial jurisdiction in England and [the United States] during the 17th and 18th centuries is far too ambiguous to justify restriction on the plain language of clause 14." *Solorio*, 107 S. Ct. at 2930.

48. This conflict was settled by an acceptance of the Bill of Rights by William and Mary in 1689. The Parliament, which received the power from the executive branch in this compromise, used its power sparingly to enact a statute in 1689 that allowed for court-martial only in the case of sedition, mutiny or desertion. *Solorio*, 107 S. Ct. at 2928; *O'Callahan*, 395 U.S. at 268; Mutiny Act of 1689, 1 Wm. & Mary, ch. 5; see Schlueter, *The Court-Martial: An Historical Survey*, 87 MIL. L. REV. 129, 142-44 (1986).

49. *O'Callahan*, 395 U.S. at 268.

50. *Id.* at 269. The court had recited from the British Articles of War of 1765, § 11, art. 1, reprinted in 2 W. WINTHROP, MILITARY LAW AND PRECEDENTS 1448, 1456 (2d ed. reprint 1920), which established a military offense for any officer failing to produce a soldier for civilian trial.

51. There is disagreement among historians about which British Articles of War

property of one of Britain's subjects.⁵² The existence of this article was enough to cast doubt on the *O'Callahan*⁵³ theory.

The Court then examined court-martial jurisdiction in early America beginning with the American Articles of War of 1776. These articles contained a provision similar to one of the British Articles that required officers to deliver to the civilian authorities any soldier accused of crimes against the persons or property of the United States.⁵⁴ Drawing an inference from this article that soldiers were not court-martialed for civilian offenses is hampered by specific evidence of courts-martial to the contrary⁵⁵ and confusion over the "general article" allowing court-martial jurisdiction over all crimes.⁵⁶ The Court decided that this was not sufficient backing to undo over one-hundred years of court-martial jurisdiction founded upon the military status test.⁵⁷

The perceived inability of the courts, both civilian and military, to apply consistently the "service-connected" factors was the second basis for overturning *O'Callahan*. The Court was uncomfortable with the many subtle distinctions which had developed out of the jurisdictional factors.⁵⁸ The confusion reached a high with the military's treatment of drug offenses.⁵⁹ The Court

were in effect. The substantive content is the same, however, for present purposes. *Solorio*, 107 S. Ct. at 2929 n.6.

52. Under article 16 it was established that some offenses were prosecutable under both military and civilian law. Nelson & Westbrook, *Court Martial Jurisdiction Over Servicemen for "Civilian" Offenses: An Analysis of O'Callahan v. Parker*, 54 MINN. L. REV. 1, 11 (1969). This fact had not been ignored by *O'Callahan*. In a footnote the *O'Callahan* court stated that any crime punishable under civil law could be brought under court-martial unless the authorities demanded the accused be turned over within eight days of the offense. *O'Callahan*, 395 U.S. at 269 n.11.

53. 395 U.S. 258 (1969).

54. American Articles of War of 1776, § X, art. I, reprinted in 2 W. WINTHROP, *supra* note 50, at 1494 (2d ed. reprint 1920).

55. Evidence shows court-martials were held in the late 18th century for crimes which normally would be punishable as civilian offenses. *O'Callahan*, 295 U.S. at 278 n.3 (Harlan, J., dissenting); Duke & Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 VAND. L. REV. 435 (1960).

56. Much confusion arises over the "general article" which allowed court-martial jurisdiction over "all crimes not capital, and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order and military discipline", American Articles of War of 1776, § XVIII, art. 5, reprinted in 2 W. WINTHROP, *supra* note 50, at 1503, and whether it limited court-martial jurisdiction to those crimes having an affect on military discipline. *Solorio*, 107 S. Ct. at 2929-30 (view that court-martial jurisdiction was limited to those offenses having direct impact on military discipline), 2930 n.10 (view that language encompassed all noncapital crimes proscribed by the law).

57. *Solorio*, 107 S. Ct. at 2931. *O'Callahan* was said to be backed by a "dearth of historical support". *Id.*

58. *Solorio*, 107 S. Ct. at 2931-32. See Cooper, *O'Callahan Revisited: Severing the Service Connection*, 76 MIL. L. REV. 165, 167-85 (1977).

59. *Solorio*, 107 S. Ct. at 2932. See generally Caudell-Feagen & Warshawsky, *Service-Connection and Drug-Related Offenses: The Military Courts' Ever-Expanding Jurisdiction*, 54 GEO. WASH. L. REV. 118, 130-42 (1985) (examination of military

found this to be a valid reason for a return to the traditional status test.

It is possible, however, that much of the confused interpretation flows from the reluctance of military courts to release jurisdiction even in cases involving an attenuated military interest.⁶⁰ Nevertheless, the Court felt that the combination of scattered decisions and *O'Callahan's* doubtful foundation led to a reading of "clause 14 in accord with the meaning of its language as [given by the Court] in the many years before *O'Callahan* was decided."⁶¹

Justice Stevens concurred in the judgment.⁶² Stevens felt that prudential considerations were adequate to prevent the Court from overruling *O'Callahan*.⁶³ "The fact that any five members of the Court have the power to reconsider settled precedents at random does not make that practice legitimate."⁶⁴ Justice Stevens believed the Court could easily have found the offenses "service-connected" under the *Relford* factors and bypassed this Constitutional realignment.⁶⁵

The dissent in *Solorio*, written by Justice Marshall, points out that the *O'Callahan* decision was not based upon an interpretation of article I, section 8, clause 14 but rather upon whether Congress had encroached upon the rights of servicemen when they exercised their power over cases not arising in the military.⁶⁶ *O'Callahan* accepted that cases held in military courts do not require the 5th and 6th amendment protections.⁶⁷ To Marshall, and the *O'Callahan* court, the pivotal question was whether the case arose in the land or naval forces, as recited by the fifth amendment, and consequently used to deny the grand jury indictment requirement and inferentially trial by jury in court-martial proceedings.⁶⁸ If a case did not "arise 'in the land or naval

court's view that drug offenses are always of such a nature to directly affect military performance).

60. Cooper, *supra* note 58, at 186. See also Sherman, *supra* note 8; Caudell-Feagen & Warshawsky, *supra* note 59, at 142.

61. *Solorio*, 107 S. Ct. at 2933.

62. *Id.*

63. Cf. *United Pub. Workers v. Mitchell*, 330 U.S. 75, 89 (1947) ("The power of courts, and ultimately of [the Supreme Court], to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference."); *Rescue Army v. Municipal Court*, 331 U.S. 549, 552 (1947) ("[C]onstitutional issues affecting legislation will not be determined . . . in advance of the necessity of deciding them. . .").

64. 107 S. Ct. at 2933 (Stevens, J., concurring).

65. *Id.*

66. *Solorio*, 107 S. Ct. at 2934 (Marshall, J., dissenting).

67. *O'Callahan*, 395 U.S. at 261. See Van Loan III, *The Jury, the Court-Martial, and the Constitution*, 57 CORNELL L. REV. 363, 366 (1972). But see Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293, 303-15 (1957) (reading the Constitution to include Bill of Rights protections in court-martial proceedings); Remcho, *Military Juries: Constitutional Analysis and the Need for Reform*, 47 IND. LEGAL F. 193, 207-18 (1972) (challenging the military court exclusion from Bill of Rights guarantees).

68. *Whelchel v. MacDonald*, 340 U.S. 122, 127 (1950); *Ex parte Quirin*, 317 U.S. 1, 40 (1942); *O'Callahan*, 395 U.S. at 261; Caudell-Feagen & Warshawsky,

forces' " then the Bill of Rights safeguards must be enforced.⁶⁹

It was by interpreting this "arise in the land or naval forces" language that the *O'Callahan* court sought to establish the "service-connected" test.⁷⁰ This explains why "suspicion" of military courts was more important to the Court than a determination of the actual practice which was applied or which had been applied previously in American history.⁷¹ The majority in *Solorio* ignores what limitations the Bill of Rights might impose on the reach of article I, section 8, clause 14.⁷² Thus the view held in *O'Callahan* that Congress' general powers are to be "exercised in harmony with express guarantees of the Bill of Rights"⁷³ was discounted.

An interesting portion of the opinion in *O'Callahan* was a quote from an earlier decision in *Toth v. Quarles*⁷⁴ which stated the "constitutional power of Congress to authorize trial by court-martial must be limited to 'the least possible power adequate to the end proposed.'"⁷⁵ This suggested that any infringement upon the serviceman's constitutional rights would necessarily be limited to the smallest amount required to achieve the military courts' goal of maintaining discipline. The *Solorio* court passed over this point quickly in an early footnote, by distinguishing *Toth* on the grounds that it addressed only court-martial jurisdiction over ex-servicemen who had committed unlawful acts while still active members of the armed forces.⁷⁶ In *Toth*, the Court reached its result after an assessment of whether discipline in the military would be enhanced by allowing military jurisdiction over the accused.⁷⁷ The Court reasoned that the value of maintaining the right to jury trial and the great historical significance found therein requires that any apparent limitation upon the right be examined closely.⁷⁸ It is probable that the Court in *Toth* intended this principle to apply beyond simply an "ex-serviceman" factual setting.

Further what the majority perceived as an inability on the part of civilian

supra note 59, at 121-22.

69. *Solorio*, 107 S. Ct. at 2933 (Marshall, J., dissenting); *O'Callahan*, 395 U.S. at 262 (Marshall, J., dissenting). *But see* Comment, *O'Callahan and Its Progeny: A Survey of Their Impact on the Jurisdiction of Courts-Martial*, 15 VILL. L. REV. 712, 719-21 (1970) (no need to harmonize congressional powers because of legitimate interest in regulating soldier's relationship with civilian community).

70. *O'Callahan*, 395 U.S. at 272-73. "[T]he crime to be under military jurisdiction must be service-connected, lest '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, be expanded to deprive every member of the armed services of the benefits of an indictment by a grand jury and a trial by a jury of his peers." *Id.*

71. *See generally* Kaczynski, *supra* note 41, at 241-42.

72. *Solorio*, 107 S. Ct. at 2934.

73. *O'Callahan*, 395 U.S. at 273.

74. 350 U.S. 11 (1955).

75. *O'Callahan*, 395 U.S. at 265 (quoting *Toth v. Quarles*, 350 U.S. 11, 22-23 (1955)).

76. *O'Callahan*, 395 U.S. at 265.

77. *Toth v. Quarles*, 350 U.S. 11, 22 (1955).

78. *Id.* at 23 n.22; *Dimick v. Scheidt*, 293 U.S. 474, 485-86 (1935).

and military courts to apply the service-connection test is evidenced in the almost immediate expansion of the *O'Callahan* doctrine after the decision.⁷⁹ The majority claimed that the confusion was not reduced by the 1971 decision in *Relford*, which attempted to clarify the test.⁸⁰

Justice Marshall, however, contended that *Solorio* is an example that the test is workable even though it may require a careful analysis of the specific facts.⁸¹ The complete and well reasoned application of the *Relford* factors exhibited by the military judge in *Solorio* was ignored by the Supreme Court.⁸²

That military courts have ignored the "service-connection" test and refused to take the time and consideration necessary to give a fair assessment of the accused's constitutional rights⁸³ is no reason to allow those courts to escape the test and infringe upon these rights. If the Bill of Rights is to be honored, then inconvenience and judicial time saving should not justify its dismissal.⁸⁴

The return to the military status test is a sad note in our nation's history. It appears that in this arena the United States has failed to keep pace with the democratic procedures developed by some of our European counterparts.⁸⁵ If

79. *United States v. Keaton*, 19 C.M.A. 64, 41 C.M.R. 64 (1969) (recognition of an exception for service personnel stationed overseas); *United States v. Paxiao*, 18 C.M.A. 608, 40 C.M.R. 320 (1969) (exception for offenses committed on-post even where civilian persons and property involved); *United States v. Beeker*, 18 C.M.A. 563, 40 C.M.R. 275 (1969) (drug offenses deemed as imposing an inherent threat to the military community); *United States v. Rego*, 19 C.M.A. 9, 41 C.M.R. 9 (1969) (housebreaking and larceny in the civilian community where victim was a fellow serviceman); *United States v. Morisseau*, 19 C.M.A. 17, 41 C.M.R. 17 (1969) (check forgery off-post facilitated by military status). See generally Cooper, *supra* note 58; Birnbaum & Fowler, *Military Appellate Decisions Following O'Callahan v. Parker*, 38 *FORDHAM L. REV.* 673, 673-86 (1970).

80. See Caudell-Feagen & Warshawsky, *supra* note 59, at 127-30.

81. *Solorio*, 107 S. Ct. at 2941.

82. *Id.*

83. Caudell-Feagen & Warshawsky, *supra* note 59, at 140. *Cf.* *United States v. Alef*, 3 M.J. 414, 416 n.4 (C.M.A. 1977); *United States v. McCarthy*, 2 M.J. 26, 28 n.1 (C.M.A. 1976).

84. The Supreme Court has declared:

The concept that the Bill of Rights and other constitutional protections against arbitrary government actions are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government.

Reid v. Covert, 354 U.S. 1, 14 (1957) (plurality opinion).

85. Sherman, *supra* note 8, at 566. The *O'Callahan* decision had merely brought the United States in line with West Germany, Sweden, Austria and Denmark, who provide civilian trial for all offenses, and the United Kingdom which provides civilian trial for offenses against the person or property of a civilian. *Id.*

this is so, we have been set back in our attempt to develop a fair military justice system.⁸⁶

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86. S.F. Ansell, acting Judge Advocate General from 1917 to 1919, called for the following change in the military justice system:

With the utmost care it should guarantee those safeguards and that protection for an accused whose life and liberty are placed in jeopardy, which are the pride of our enlightened civilization. None of these things does our code do, and none of these things can it do, until it changes its base from the ancient English theory and comes to conform to American principles of government.

Ansel, *supra* note 46, at 3.

