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The Demise of the Service-Connection Test: Solorio v. United States

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NOTES

THE DEMISE OF THE SERVICE-CONNECTION TEST: *SOLORIO v. UNITED STATES*

The United States Constitution grants to Congress the power "[t]o make Rules for the Government and Regulation of the land and naval Forces."[1] Pursuant to this grant of authority, Congress enacted the Uniform Code of Military Justice[2] (UCMJ), creating a military court system independent of article III federal courts and providing that system with broad jurisdiction over military servicemembers.[3] When the military subjects an individual to court-martial, it denies that person significant procedural safeguards afforded to his civilian counterpart; the most important of these are indictment by grand jury[4] and trial by petit jury.[5]

The historical and practical importance of these protections to the American scheme of justice is well established.[6] As such, the United States Supreme Court has been wary in permitting court-martial jurisdiction without giving thoughtful consideration to both the interests of the military purportedly fostered through its exercise of jurisdiction[7] and the rights of the

1. U.S. CONST. art. I, § 8, cl. 14.

2. Pub. L. No. 506, 64 Stat. 107 (1950) (codified as amended at 10 U.S.C. §§ 801-940 (1982 & Supp. IV 1986) (U.C.M.J.).

3. U.C.M.J., art. 2, 10 U.S.C. § 802.

4. The fifth amendment exempts "cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger" from its operation. U.S. CONST. amend. V.

5. The sixth amendment guarantees the criminally accused a speedy trial and a trial by an impartial jury in the state and district where the offense was committed. U.S. CONST. amend. VI. The justification for constitutionally excluding the right to trial by jury in the case of military tribunals is that the framers of the Constitution meant to limit jury trials to those defendants subject to grand jury indictment under the fifth amendment. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 123 (1866).

6. *See* United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 16-18 (1955).

7. Justice Harlan's dissent in O'Callahan v. Parker, 395 U.S. 258 (1969), provides an excellent synopsis of the military interests involved:

> The United States has a vital interest in creating and maintaining an armed force of honest, upright, and well-disciplined persons, and in preserving the reputation, morale, and integrity of the military services. Furthermore, because its personnel must, perforce, live and work in close proximity to one another, the military has an obligation to protect each of its members from the misconduct of fellow servicemen. The commission of offenses against the civil order manifests qualities of attitude and char-

individual that are abrogated when he is subjected to military law.[8] In an effort to reconcile these competing interests, the United States Supreme Court established the service-connection test in *O'Callahan v. Parker.*[9] In order to subject a military defendant to court-martial, the test established that a sufficient proximity must exist between the crime committed on the one hand and military duty and necessity on the other, thereby averting the denial of indictment by grand jury and trial by jury to the extent that an offender's crime lacks military significance.[10] The Court clarified the service-connection test in *Relford v. Commandant, United States Disciplinary Barracks,*[11] where it identified the factors that are of primary importance in determining whether to deny the servicemember's fifth and sixth amendment rights.[12] In 1987, however, the Supreme Court abandoned these concerns in *Solorio v. United States,*[13] a decision that renders unavailable procedural

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acter equally destructive of military order and safety. The soldier who acts the part of Mr. Hyde while on leave is, at best, a precarious Dr. Jekyll when back on duty.

Id. at 281 (Harlan, J., dissenting). Justice Harlan further noted that "[a] soldier's misconduct directed against civilians . . . brings discredit upon the service of which he is a member." *Id.* at 282 (Harlan, J., dissenting).

8. *See infra* notes 36-52, 69-73, and accompanying text.

9. 395 U.S. 258, 272-73 (1969) (the exercise of court-martial jurisdiction over a servicemember for a nonservice-connected crime violates the fifth and sixth amendments).

10. *Id.* at 273-74.

11. 401 U.S. 355 (1971).

12. *Id.* at 365. Justice Blackmun, speaking for the majority, articulated the 12 "*Relford* factors," which have become the analytical determinants of the service-connection test. *Id.* They are:

> 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 offenses being among those traditionally prosecuted in civilian courts.

Id. (citing O'Callahan v. Parker, 395 U.S. 258, 273-74 (1969)).

13. 107 S. Ct. 2924 (1987).

safeguards that are germane to notions of liberty to every American servicemember, regardless of the crime committed.

In *Solorio,* military officials charged the petitioner[14] with sexually abusing the minor daughters of fellow Coast Guardsmen in his private residence in Juneau, Alaska, in violation of articles 134,[15] 128,[16] and 80[17] of the UCMJ.[18] Solorio committed these offenses while properly absent from his post, creating no connection between his crimes and his assigned duties.[19] The military convened a general court-martial in New York to try Solorio for these and other similar, but unrelated, crimes.[20] Solorio moved to dismiss the charges for the Alaska offenses, alleging that the court-martial lacked subject matter jurisdiction because the crimes lacked a service-connection within the meaning of *O'Callahan* and *Relford.*[21] The trial judge granted Solorio's motion, finding the facts insufficient to meet the requirements of the service-connection test.[22] Upon the government's appeal, the United States Coast Guard Court of Military Review reversed and reinstated the charges.[23] The United States Court of Military Appeals affirmed, focusing on the military interests compromised by the adverse effect on military morale that results from sex offenses against military dependents[24] and the convenience of trying all offenses in one proceeding.[25]

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14. Richard Solorio was on active duty in the Coast Guard at the time he committed the offenses. *Id.* at 2925.

15. 10 U.S.C. § 934 (1982).

16. *Id.* § 928.

17. *Id.* § 880.

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

19. *Id.* at 2939 (Marshall, J., dissenting).

20. The military also charged Solorio with seven specifications alleging indecent liberties, lascivious acts, and indecent assault in violation of U.C.M.J., 10 U.S.C. § 934, for crimes that he committed after his unit transferred him from Juneau, Alaska, to Governors Island, New York. *Solorio,* 107 S. Ct. at 2926 n.1. Because Solorio committed these crimes on-base, their service connection was beyond dispute and jurisdiction went unchallenged. As such, they will not be considered further herein.

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

22. *Id.*

23. *Id.*

24. United States v. Solorio, 21 M.J. 251, 256 (C.M.A. 1985).

25. *Id.* at 258. The United States Court of Military Appeals found the fact that the victim's parents and petitioner were of the same military command compelling to its finding of service-connection. *Id.* at 255-56. Further, trying the off-base Alaskan offenses separately from the on-base New York offenses would impede judicial economy and increase the burdens on the military, the civilian court system, the servicemember defendant, and the victims. *Id.* at 258. The court also pointed to the fact that the state had a reduced interest in prosecuting Solorio for his offenses because he and the victims had since been transferred from Alaska. *Id.* at 257.

Chief Justice Rehnquist delivered the opinion of the Supreme Court,[26] affirming the decision of the Court of Military Appeals. Rather than addressing the propriety of the lower court's application of the service-connection test to the merits, however, the Court simply overruled *O'Callahan.*[27] In short, Chief Justice Rehnquist found that the historical evidence the *O'Callahan* Court used to establish the intent of the framers with respect to courts-martial was inconclusive and without merit.[28] He further imparted that the plain language of the Constitution supported the vesting in Congress of plenary power to control court-martial jurisdiction.[29] Finally, the majority discussed the impotency of civilian courts in policing military concerns and the confusion experienced by military courts in applying the service-connection test.[30]

Justice Stevens wrote an opinion concurring in the judgment. Agreeing with the decision of the Court of Military Appeals, Justice Stevens urged a finding that petitioner's crimes were service-connected and criticized the majority for its readiness to overrule precedent.[31]

The dissent, delivered by Justice Marshall,[32] analyzed the same historical evidence as did the *O'Callahan* Court and found that such evidence supported the limitation on court-martial jurisdiction.[33] The dissent further opined that Solorio's crimes lacked service connection and that the trial court acted properly in denying jurisdiction.[34] Justice Blackmun did not join in the portion of the dissent that contained a vehement attack on the majority's willingness to overturn precedent and its contemptuous disregard for constitutionally mandated protections.[35]

This Note will compare procedures and protections available in civilian courts with those used in courts-martial to articulate arguments in favor of

26. Justices White, Powell, O'Connor, and Scalia joined the Chief Justice. *Solorio,* 107 S. Ct. at 2925.

27. *Id.* at 2933.

28. *Id.* at 2928-31.

29. *Id.* at 2928.

30. *Id.* at 2931-32.

31. *Id.* at 2933 (Stevens, J., concurring). Justice Stevens remarked: "While there might be some dispute about the exact standard to be applied in deciding whether to overrule prior decisions, I had thought that we all could agree that such drastic action is only appropriate when essential to the disposition of a case or controversy before the Court." *Id.* (Stevens, J., concurring).

32. Justices Brennan and Blackmun joined Justice Marshall. *Id.* at 2933 (Marshall, J., dissenting).

33. *Id.* at 2936-39 (Marshall, J., dissenting).

34. *Id.* at 2939-41 (Marshall, J., dissenting).

35. *Id.* at 2941 (Marshall, J., dissenting) ("The Court's action today reflects contempt, both for members of our armed forces and for the constitutional safeguards intended to protect us all.").

limiting those instances in which an accused is subjected to the military court system. It will present the relevant historical data considered by the Court to determine the intent of the framers and will focus on the underlying considerations that have prevailed in this area; namely, separation of powers, military necessity, judicial economy, and constitutional interpretation. The Note will trace the case law on the subject of constitutionally permissible extensions of court-martial jurisdiction and determine whether the service-connection requirement is in harmony with prior decisions. It will then examine the soundness of the majority's opinion and that of the dissent. As to the future impact of this decision, the Court has been very clear. Unless it reconsiders its position, all servicemembers will, without qualification, forego the greater constitutional protections of a civilian trial.

I. ADVANCES IN MILITARY PROCEDURE: ARE THEY ENOUGH?

Critics propound that various revisions of the UCMJ have cured the procedural deficiencies that existed when the Court decided *O'Callahan* and have dissipated the causes for concern over the denial of access to civilian courts.[36] This section will examine the differences between military and civilian courts that the *O'Callahan* Court found compelling and will trace the advances that apparently support this proposition.

*A. Pre-*O'Callahan *Procedure*

The *O'Callahan* Court primarily concerned itself with four characteristics of courts-martial: the extent to which commanding authority influenced the decisions of court-martial actors,[37] the propriety of having military personnel engaged in fact finding,[38] the subordination of judicial decisions to the will of the executive department,[39] and the absence of grand jury indictments.[40]

The O'Callahan Court predicated its concern about command influence on the process for convening a court-martial. The commanding officer, vested with the authority to initiate and direct investigations, appointed the judicial officer to preside over the court-martial. Frequently, the officer reported directly to the convening authority.[41] The convening authority also

36. *See* Brief for Respondent at 32-40, Solorio v. United States, 107 S. Ct. 2924 (1987) (No. 85-1581). *See generally* Kaczynski, *From O'Callahan to Chappel: The Burger Court and the Military*, 18 U. RICH. L. REV. 235, 279-83 (1984).

37. O'Callahan v. Parker, 395 U.S. 258, 264 (1969).

38. *Id.* at 262-63 (citing Toth v. Quarles, 350 U.S. 11, 17-18 (1955)).

39. *Id.* at 264 (citing United States *ex rel. Toth v. Quarles, 350 U.S. 11, 17-18 (1955)).*

40. *Id.* at 262.

41. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, ¶ 4g(1) (1951). The presid-

selected counsel for both the prosecution and the defense from among his subordinates.[42] In addition, the commanding officer selected the panel members, who served as finders of fact and likewise reported to him.[43] Although these relationships do not invariably lead to a conclusion that the will of the convening authority dictated the results of the proceeding, arguably, factors such as direct and indirect discipline[44] and upward mobility could have influenced the decisionmaking of these actors. Nevertheless, the Court found that the interdependence of these functions posed an inappropriate threat of wrongful influence.[45]

The O'Callahan Court also expressed concern that officers, rather than a jury of the defendant's peers, tried the court-martial.[46] While conceding that military personnel may have a special competence for trying soldiers for purely military infractions, the Court recognized the underlying constitutional preference for laymen over specialists to determine guilt or innocence.[47]

Article III of the Constitution establishes a civilian judiciary separate and distinct from the executive and the legislature, providing its judges with life tenure and undiminishable salaries.[48] Military judges, on the other hand, remain subject to the will of the executive department. The executive department appoints and removes military judges at will without the protec-

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ing officer was required to be certified by the Judge Advocate General for this duty. U.C.M.J., art. 26(b); 10 U.S.C. § 826(b) (1982).

42. U.C.M.J., art. 27(a), 10 U.S.C. § 827(a) (1982).

43. *See* Kaczynski, *supra* note 36, at 281 ("Although Article 37 of the U.C.M.J. had forbidden commanders to take disciplinary action against court-members on account of their service on a court-martial panel, perceptions of command influence on court-members persisted.").

44. One commentator described direct discipline as consisting of "rules governing individual behavior, sanctions for noncompliance or rewards for compliance, and application of sanctions by superiors in the hierarchy who scrutinize individual behavior." Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights,* 62 N.C.L. REV. 177, 219 (1983). No less influential upon the servicemember's behavior is indirect, or internalized, discipline, which "brings the individual to identify his own emotional well being with the goals of the organization so that he will consider it in his own interest to fulfill his role even when there is no prospect of scrutiny by superiors." *Id.*

45. O'Callahan v. Parker, 395 U.S. 258, 264 (1969).

46. *See id.* at 263 n.2 (although article 25(c) of the U.C.M.J., 10 U.S.C. § 825(c) (1982 & Supp. IV 1986), provides that an enlisted man could request that one-third of the panel be comprised of enlisted men, in practice only senior enlisted personnel actually serve).

47. *Id.* at 263 (citing United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17-18 (1955)). "Juries fairly chosen from different walks of life bring into the jury box a variety of different experiences, feelings, intuitions and habits. Such juries may reach completely different conclusions than would be reached by specialists in any single field, including specialists in the military field." Toth v. Quarles, 350 U.S. 11, 18 (1955).

48. U.S. CONST. art. III, § 1; *see also Toth,* 350 U.S. at 16.

tion of article III's impeachment requirements or its salary provisions.[49] The possibility, if not the inevitability, of coercion exerted by congressional and executive delegates is undeniable.

The Constitution also provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."[50] Although critics argue that the absence of indictment by grand jury in courts-martial is a de minimis loss of protection,[51] the *O'Callahan* Court still found the right significant to the extent that the framers had included it in the Constitution.[52] Therefore, the Court believed it should not lightly abrogate that right.

B. Recent Developments in the Military Justice System

The Military Justice Act of 1968[53] became effective shortly after the *O'Callahan* decision[54] and was the first major revision of military court-martial practice and procedure since the enactment of the UCMJ.[55] The Act attempts to cure many of the previously mentioned defects in the military's criminal justice system, with a special emphasis on ameliorating command influences.[56]

The Act establishes a judiciary that purportedly operates independent of local commanding authority. It provides that the military judge,

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49. *Toth,* 350 U.S. at 17.

50. U.S. CONST. amend. V.

51. *See, e.g.,* Everett, O'Callahan v. Parker: *Milestone or Millstone in Military Justice,* 1969 DUKE L.J. 853, 864 (citing Hurtado v. California, 110 U.S. 516 (1884)) (indictment by grand jury not required by fourteenth amendment due process clause); *id.* at 865 ("[N]either in federal nor state courts does the grand jury procedure provide an accused with discovery of the prosecution's case as is afforded to servicemen pursuant to Article 32 of the *Uniform Code.*"); *id.* ("[I]n many instances the grand jury is more of a sword for the Government than a shield for the defendant."); *see also* Nelson & Westbrook, *Court-Martial Jurisdiction Over Servicemen for "Civilian" Offenses: An Analysis of* O'Callahan v. Parker, 54 MINN. L. REV. 1, 58-59 (1969) (article 32 of the U.C.M.J., 10 U.S.C. § 832 (1982), gives the accused the right to a preliminary investigation which includes examination and cross-examination of witnesses, the right to present evidence in his own behalf, and the right to acquire testimony expected to be used against him).

52. *See Toth,* 350 U.S. at 16.

53. Pub. L. No. 90-632, 82 Stat. 1335 (1968) (codified as amended in scattered sections of 10 U.S.C.).

54. The Court decided *O'Callahan* on June 2, 1969. O'Callahan v. Parker, 395 U.S. 258, 258 (1969). The Act became effective on August 1, 1969. *See* Kaczynski, *supra* note 36, at 279.

55. *See* Kaczynski, *supra* note 36, at 279.

56. The Military Justice Act of 1968 also sought to improve methods of pleading, rules of evidence, and summary court-martial procedures. *See* Kaczynski, *supra* note 36, at 281-91. These revisions are not as vital to the purpose of this Note as are those affecting the province of the military judge, panel members, and defense counsel, and are therefore beyond its scope.

subordinate only to the Judge Advocate General, not report to the convening authority.[57] Further, it expressly prohibits the convening authority from preparing or reviewing a report concerning the judge's fitness, effectiveness, and efficiency in performing his judicial duties.[58] It also prohibited the convening authority from adversely evaluating defense counsel's performance if that evaluation is based on the zealous representation of his client.[59] The same prohibition applies to the performance reports of court-martial members.[60] Finally, the Act grants the accused the option of being tried before a military judge alone, subject to the approval of that military judge.[61]

The Military Justice Act of 1983[62] divests the convening authority of the power to designate the military judge in a court-martial[63] and requires each service to prescribe the method for appointment of defense counsel.[64] The Army, Air Force, and Navy have thus established systems of independent defense counsel.[65]

Despite these efforts to eliminate the threat of command influence, many differences between the civilian and military justice systems remain. Military judges remain untenured and without salary protections. The Constitution designed the tenure and salary provisions to establish an independent and detached federal judiciary, free from the threat of executive and congressional coercion and free to conduct their judicial duties according to individual conscience and sound legal principles. The dangers that the framers sought to obviate through these provisions continue to exist in the military justice system today.[66]

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57. Article 26(c) of the U.C.M.J., 10 U.S.C. § 826(c) (1982), reads in relevant part: "A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial may perform such duties only when he is assigned and directly responsible to the Judge Advocate General." *Id.*

58. *Id.*

59. U.C.M.J., art. 37(b)(2), 10 U.S.C. § 837(b)(2).

60. *Id.* art. 37(b)(1), § 837(b)(1).

61. U.C.M.J., art. 16(1)(B), 10 U.S.C. § 816(1)(B), (2)(B) (1982). The U.C.M.J. affords the military judge significant discretion in approving or disapproving a request for trial by military judge alone, but such discretion is "subject to review for abuse." United States v. Butler, 14 M.J. 72, 73 (C.M.A. 1982).

62. Pub. L. No. 98-209, 97 Stat. 1393 (1983) (codified as amended in scattered sections of 10 U.S.C.).

63. U.C.M.J., art. 26(a), 10 U.S.C. § 826(a) (Supp. IV 1986).

64. U.C.M.J., art. 27(a)(1), 10 U.S.C. § 827(a)(1) (Supp. IV 1986).

65. *See* Brief for Respondent at 35-36, Solorio v. United States, 107 S. Ct. 2924 (1987) (No. 85-1581) (citing Army Reg. 27-10, ch. 6 (Dec. 10, 1985); Air Force Reg. 111-1, paras. 3-6, 13-3 (Aug. 1, 1984); NAVY LEGAL SERVICES OFFICE MANUAL, NAVLEGSVCINST 5800.1, §§ 0100-0104, 0401(a)-(c) (Apr. 18, 1980)).

66. The government in *Solorio* argued that these differences were insignificant. Brief for Respondent at 35 n.32. Because these provisions are not applicable to the states, they would not apply to a strictly local crime. *Id.* (citing Palmore v. United States, 411 U.S. 389, 410

The convening authority continues to possess a degree of control unmatched among his civilian counterparts. He has sole discretion to determine who serves as members of the court-martial.[67] Further, he can circumvent the investigating officer's recommendation in a pretrial investigation and refer charges to court-martial if, in his opinion, the evidence warrants the charge.[68]

Finally, and arguably most important, the military defendant has no right to indictment by grand jury or trial by jury. As already discussed, the preliminary investigation provided by article 32 of the UCMJ has imitated the grand jury indictment to a limited extent.[69] The court-martial members, however, do not bear a sufficiently convincing resemblance to civilian jury members to equate them with civilians as impartial finders of fact. After selection by the convening authority, they serve subject to the accused's exercise of only one peremptory challenge.[70] Because the number of court-martial members need not exceed five,[71] the convening authority retains largely unchecked discretion, which is especially significant given the fact that the UCMJ requires only a two-thirds vote to convict.[72] Moreover, the military system's failure to secure a representative cross-section on the panel through civilian jury selection procedures offends traditional notions of justice.[73]

II. INTENT OF THE FRAMERS

Much of the controversy over the constitutional limitations of court-martial jurisdiction stems from the seemingly unidentifiable intent of the fram-

(1973)). The government asserted that trial by an untenured judge would deprive neither a federal defendant, nor a state defendant, of due process of law. *Id.* (citing Palmore v. United States, 411 U.S. 389, 410 (1973)).

67. Article 25(d)(2) of the U.C.M.J., 10 U.S.C. § 825(d)(2) (1982), provides in relevant part: "[T]he convening authority shall detail as members [of the court-martial] such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." *Id.*

68. Petitioner's Reply Brief at 13, Solorio v. United States, 107 S. Ct. 2924 (1987) (No. 85-1581) (citing art. 34, 10 U.S.C. § 834 (Supp. III 1985); RULES FOR COURTS-MARTIAL, MANUAL FOR COURTS-MARTIAL, UNITED STATES, rule 601(d)(1) (1984)).

69. *See* U.C.M.J., art. 32, 10 U.S.C. § 832 (1982); *supra* note 51 and accompanying text.

70. U.C.M.J., art. 41(b), 10 U.S.C. § 841(b) (1982).

71. A general court-martial consists of five or more members. U.C.M.J., art. 16, 10 U.S.C. § 816(1)(a) (1982). A special court-martial consists of three or more members. *Id.* art. 16, § 816(2)(a).

72. *Id.* art. 52(a)(2), § 852(a)(2). When the death penalty is made mandatory for a specific offense, the vote must be unanimous to convict. *Id.* art. 52(a)(1), § 852(a)(1).

73. *Contra* Everett, *supra* note 51, at 865 (suggesting that because a serviceman is not usually from the community in which a civil authority would try him, trial by jury may be undesirable given the community's possible hostility to him as an outside intruder).

ers.[74] Specifically, the disputed issue is whether the framers intended to restrict trial by court-martial "to the least possible power adequate to the end proposed."[75] The continuing debate focuses upon the practices in seventeenth and eighteenth century England and the American colonies.

The English Bill of Rights of 1689 granted to Parliament the power to make and define the jurisdictional limits of courts-martial.[76] Due to Parliament's suspicious view of the military, it narrowly confined court-martial jurisdiction to such service-related crimes as desertion, sedition, and mutiny.[77] Section X, article I of the American Articles of War, based on section XI, article I of the British Articles of War, reflected this sentiment.[78] It provided for civil jurisdiction over servicemembers who committed any capital offense or any crime against civilians and commanded the accused's superior officer to deliver such person to the civil authorities.[79] Such evidence alone seems sufficient to create an inference of a policy to strictly limit military jurisdiction.

There is evidence that American colonists acutely distrusted broad military authority.[80] The Declaration of Independence itself charged that "George III had 'affected to render the Military independent of and superior to the Civil Power' and that Americans had been deprived in many cases of 'the benefits of Trial by Jury.' "[81] The second amendment right of the people to bear arms and the third amendment protection against nonconsensual quartering of soldiers further reflect this suspicion.[82] It is also significant that the framers felt the right to trial by jury was so essential that they in-

74. *See* O'Callahan v. Parker, 395 U.S. 258, 268-72 (1969); *see also id.* at 276-80 (Harlan, J., dissenting); Reid v. Covert, 354 U.S. 1, 23-30 (1957).

75. United States *ex rel.* Toth v. Quarles, 350 U.S. 1, 23 (1955) (quoting Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 231 (1821)).

76. 1 W. & M., ch. 2, sched. 2.

77. *O'Callahan,* 395 U.S. at 269.

78. Section X, article I of the American Articles of War of 1776 provided that:

> Whenever any officer or soldier shall be accused of a capital crime, or of having used violence, or committed any offence [sic] against the persons or property of the good people of any of the United American States, such as is punishable by the known laws of the land, the commanding officer and officers of every regiment, troop, or party, to which the person or persons so accused shall belong, are hereby required, upon application duly made by or in behalf of the party or parties injured, to use his utmost endeavors to deliver over such accused person or persons to the civil magistrate.

Id., reprinted in 2 W. WINTHROP, MILITARY LAW AND PRECEDENTS 1494 (1896).

79. *Id., reprinted in* 2 W. WINTHROP, MILITARY LAW AND PRECEDENTS 1494 (1896).

80. "The Founders envisioned the army as a necessary institution, but one dangerous to liberty if not confined within its essential bounds." Reid v. Covert, 354 U.S. 1, 23-24 (1957).

81. *Id.* at 29 (quoting The Declaration of Independence para. 2 (U.S. 1776)).

82. *Id.* at 29 n.54.

cluded it twice in the Constitution.[83] It seems incongruous to conclude that the framers, who placed such emphasis on trial by jury and who evinced such contempt for unfettered military authority, intended to deny servicemembers jury trials where their crimes do not implicate military interests.

III. THE SEPARATION OF POWERS CONTROVERSY

In his dissent in *O'Callahan v. Parker,*[84] Justice Harlan contended that no constitutional basis exists for the judicial curtailment of congressional power to define the jurisdictional limits of courts-martial.[85] This view deems plenary[86] Congress' power to "make Rules for the Government and Regulation of the land and naval Forces."[87] Antithetically, the majority in *United States ex rel. Toth v. Quarles*[88] urged that unnecessary and unreasonable expansion of court-martial jurisdiction encroached on federal court jurisdiction under article III by circumventing the federal judiciary's power over cases and controversies between the people and the federal government.[89] These views comprise the extreme positions in the separation of powers controversy. What lies between are countervailing considerations of congressional expertise, individual rights, executive capability, military necessity, and accepted methods of constitutional interpretation.

Historically, federal courts have exercised considerable restraint in reviewing congressional legislation and executive implementation in the area of courts-martial.[90] The Court has resorted to intervention only when it has

83. *See* United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 16 (1955). The Constitution provides that "[t]rial of all Crimes, except in Cases of Impeachment, shall be by Jury." U.S. CONST., art. III, § 2. The sixth amendment charges that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. CONST., amend. VI.

84. 395 U.S. 258, 281 (1969) (Harlan, J., dissenting).

85. *Id.* (Harlan, J., dissenting).

86. WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1952) defines plenary as "unqualified" and "absolute." *Id.* at 1889.

87. U.S. CONST., art. I, § 8, cl. 14. Congressional power in this area also derives from a number of other clauses of article I, § 8. Clause 1 grants to Congress the power to "provide for the common Defense." *Id.* cl. 1. Clause 9 gives Congress the power "to constitute Tribunals inferior to the Supreme Court." *Id.* cl. 9. Clause 10 empowers the Congress to "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations." *Id.* cl. 10. Clause 11 gives Congress the power to "declare War." *Id.* cl. 11. Clause 12 gives Congress the power "to raise and support Armies." *Id.* cl. 12. Clause 13 gives Congress the power "[t]o provide and maintain a Navy." *Id.* cl. 13. J. HORBALY, COURT MARTIAL JURISDICTION 142 (1986).

88. 350 U.S. 11 (1955).

89. *Id.* at 15.

90. *See* Warren, *The Bill of Rights and the Military,* 37 N.Y.U. L. REV. 181, 186 (1962) ("So far as the relationship of the military to its own personnel is concerned, the basic attitude

found that the military constitutionally or statutorily lacked jurisdiction over the defendant's person.[91] This practice derives from the notion that because Congress has the constitutionally mandated power to make rules for the military, it has the primary responsibility for reconciling the needs of the military with the rights of the servicemember.[92] Consistent with this view is the proposition that Congress has considerable experience and resources to strike this balance and is therefore in the best position to do so.[93] Conversely, the courts are "ill-equipped" in this respect.[94]

O'Callahan critics also urge deference by virtue of the executive's superior ability to assess the pros and cons in determining whether to exercise jurisdiction in a particular case.[95] Beyond its "war powers,"[96] executive authority in this area derives from general statutory delegation by Congress,[97] with

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of the court has been that the latter's jurisdiction is most limited."). Among the reasons for the lack of judicial intervention are the lack of supervisory control by the federal judiciary over military justice, the fact that the judiciary has not participated meaningfully in the development of military law, and the lack of familiarity with military traditions and customs. J. HORBALY, *supra* note 87, at 168-69.

91. *See* Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 248 (1960) (court-martial lacks jurisdiction over a defendant accused of committing a noncapital offense); *see also* Reid v. Covert, 354 U.S. 1, 34-35 (1957) (court-martial lacks jurisdiction over military dependents for capital offenses committed in time of peace outside of the United States); *Toth,* 350 U.S. at 14-15 (court-martial lacks jurisdiction over an accused who had been discharged from the service for five months); Duncan v. Kahanamoku, 327 U.S. 304, 322-24 (1946) (military trial of civilians in Hawaii under martial law is constitutionally impermissible); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 122-23 (1866) (court-martial without jurisdiction to try a civilian resident of a loyal state for treason under martial law during the Civil War).

92. *See* Burns v. Wilson, 346 U.S. 137 (1953), which stated:

> This Court has played no role in [military law] development; we have exerted no supervisory power over the courts which enforce it; the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress.

Id. at 140.

93. *See* Warren, *supra* note 90, at 187-88.

94. "[C]ourts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have. Many of the problems of the military society are, in a sense, alien to the problems with which the judiciary is trained to deal." *Id.* at 187.

95. Brief for Respondent at 41, Solorio v. United States, 107 S. Ct. 2924 (1987) (No. 85-1581).

96. Military jurisdiction has been subject to less stringent limitations in time of war. *See* Reid v. Covert, 354 U.S. 1, 33 (1956) ("[T]he extraordinary circumstances present in an area of actual fighting have been considered sufficient to permit punishment of some civilians in that area by military courts under military rules").

97. The Executive also possesses constitutionally granted power relative to his function in military courts-martial. Article II, § 2 declares the President to be Commander-in-Chief, giving him authority to command the armed services and to implement the laws concerning them. U.S. CONST. art. II, § 2. Article II, § 3 empowers the President to "[c]ommission all the

such authority ultimately resting in the hands of a military commander. As the commanding officer bears the ultimate responsibility for enforcing adherence to military law and is most familiar with the military interests involved in a particular case, court-martial proponents contend that judicial intervention unreasonably interferes with the executive's province to further those interests.[98]

The Court has also argued that Congress must exercise an express grant of constitutional power in accordance with the express guarantees conferred by the Bill of Rights.[99] By this view, the power of Congress to orchestrate military court-martial jurisdiction is qualified rather than plenary. Any exercise of congressional power under article I, section 8, clause 14 necessarily impinges on and restricts article III and the fifth and sixth amendments.[100] The appropriateness of the exercise of this power depends upon consideration of the constitutional privileges denied. This view lends credence to the notion that judicial intervention is appropriate, if not urgent, where Congress or the Executive has made rules or applied them to an area void of military concern or, more specifically, to one not involving "the land or naval Forces." The Constitution, from this perspective, is an "organic scheme of government to be dealt with as an entirety,"[101] giving different grants of power and rights their appropriate weight in determining whether the circumstances warrant judicial intervention.

IV. COURT-MARTIAL LIMITATIONS AND THE COURT

*A. Pre-*O'Callahan *Precedents*

O'Callahan v. Parker[102] marked the Court's first denial of court-martial jurisdiction over a defendant who was a servicemember at the time of the commission of the offense and at the time of the attempted exercise of jurisdiction. Although it may appear that *O'Callahan* clearly broke from existing precedent in this respect, an analysis of prior case law reveals a tendency to limit jurisdiction whenever its exercise exceeded the scope neces-

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Officers of the United States" and to ensure that the "Laws be faithfully executed." U.S. CONST. art. II, § 3; *see also* J. HORBALY, *supra* note 87, at 144-45 ("What is clear from these provisions is that the President of the United States is in charge of, responsible for, and exercises control over the military forces of the United States.").

98. In Orloff v. Willoughby, 345 U.S. 83 (1953), the Court stated: "[J]udges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates." *Id.* at 93-94.

99. *See* O'Callahan v. Parker, 395 U.S. 258, 273 (1969).

100. *Reid,* 354 U.S. at 46 (Frankfurter, J., concurring).

101. *Id.* at 44 (Frankfurter, J., concurring).

102. 395 U.S. 258 (1969).

sary to foster military interests. In this light, the result in *O'Callahan* comports with *Ex parte Milligan*[103] and its progeny, where the Court found constitutionally impermissible exercises of jurisdiction in areas involving negligible military necessity.

Ex parte Milligan involved a civilian defendant tried and convicted by a military commission during the late Civil War.[104] Because Milligan was neither a person in the military service, a prisoner of war, nor a citizen of a rebellious state,[105] the Court found that the military commission's exercise of jurisdiction violated the fifth and sixth amendments.[106] Particularly compelling to the Court's disposition of the case were the existence and jurisdiction of the civilian courts in the state where Milligan was arrested and charged.[107] Therefore, martial law could not justify military jurisdiction.

The military again asserted martial law to justify broad military jurisdiction in *Duncan v. Kahanamoku,*[108] a case involving a military tribunal's trial and conviction of two civilians in Hawaii during World War II.[109] Despite an executive proclamation of martial law in Hawaii,[110] the Court rejected the exercise of military jurisdiction and noted the historical abhorrence of subordinating civilian courts to military tribunals.[111] Although it acknowledged the presence and necessity of martial law in Hawaii at that time, the Court narrowly construed congressional intent to authorize the executive proclamation of martial law.[112] It held that this authority did not exist where the proper divisions between military and civilian power were offended.[113] These divisions, the Court said, have "become part of our polit-

103. 71 U.S. (4 Wall.) 2 (1866).

104. *Id.* at 118.

105. Milligan was a citizen of Indiana, a loyal state, and was arrested in that state by military officials. *Id.*

106. *Id.* at 122-23.

107. *Id.* at 121-22. Indeed, a grand jury was convened in the district where the military authorities arrested Milligan and failed to return an indictment on the charges against him. *Id.* at 116.

108. 327 U.S. 304 (1946).

109. *Id.* at 305-06. One petitioner, Duncan, was convicted for assaulting two Marines and the other, White, for embezzling stock from another civilian. *Id.*

110. Section 67 of the Hawaiian Organic Act, ch. 339, 31 Stat. 141, 153 (1900) (codified as amended at 48 U.S.C. §§ 1509-1512 (1982)) authorized the territorial governor to place the territory under martial law in case of rebellion or invasion. *Id.* The President approved martial law in Hawaii on December 8, 1941. *Duncan,* 327 U.S. at 308 n.2.

111. *Duncan,* 327 U.S. at 324. The Court stressed that it has been loath to permit the courts-martial to supplant civilian courts in cases not involving American occupation of enemy territory, noting that "civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish." *Id.* (quoting *Ex parte* Milligan, 71 U.S. (4 Wall.) at 124-25).

112. *Id.*

113. *Id.*

ical philosophy and institutions."[114] The Court went beyond *Milligan* in this respect by limiting military jurisdiction despite a recognized military emergency and a broad congressional grant of power to declare martial law.

United States ex rel. Toth v. Quarles[115] called upon the Court to determine the constitutionality of article 3(a) of the UCMJ, which authorized the exercise of court-martial jurisdiction for certain offenses[116] even if the accused's military status had terminated.[117] Five months after the Air Force honorably discharged Toth, military authorities arrested him on charges of murder committed while he served in Korea.[118] The Court held that the exercise of military jurisdiction in this instance would involve an unacceptably broad construction of Congress' power to regulate the armed forces.[119] *Toth*'s significance is three-fold: it recognized the inherent inferiority of military tribunals to civilian courts;[120] it stressed the importance of narrowly limiting military jurisdiction;[121] and, most critically, it noted that congressional power in this area is not plenary but is qualified by the Bill of Rights.[122] The Necessary and Proper Clause, the Court held, did not justify circumventing the greater constitutional protections of civilian trials.[123] Rather, the Bill of Rights' safeguards took precedence over considerations of congressional power and the maintenance of military discipline.[124]

Reid v. Covert[125] reiterated these principles when the Court found constitutionally impermissible the exercise of court-martial jurisdiction over a military dependent charged with capital crimes.[126] The Court similarly struck down such jurisdiction for noncapital cases in *Kinsella v. United States ex*

114. *Id.*

115. 350 U.S. 11 (1955).

116. These offenses included those which were punishable by confinement of five years or more and those which could not be tried in the courts in the United States. Ch. 169, 64 Stat. 107, 109-10 (1950) (current version at 10 U.S.C. § 803 (1982)).

117. *Id.*

118. *Toth,* 350 U.S. at 13.

119. *Id.* at 14-15.

120. The Court noted: "[M]ilitary tribunals have not been and probably never can be constituted in such a way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts." *Id.* at 17.

121. Observing that "[f]ree countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service," *id.* at 22, the Court concluded that Congress' power is constricted to *"the least possible power adequate to the end proposed."* *Id.* at 23 (emphasis in original) (quoting Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 231 (1821)).

122. *Id.* at 21-22.

123. *Id.*

124. *Id.* at 22-23.

125. 354 U.S. 1 (1957).

126. *Id.* at 34-35.

rel. Singleton.[127] These and other court-martial cases have two common threads: the denial of jurisdiction over nonservicemember defendants and the limitation of congressional power in this area to instances critical to military preparedness and discipline.[128] *O'Callahan* viewed the latter principle as controlling.

B. O'Callahan, Relford, *and the Service-Connection Test*

The petitioner in *O'Callahan* was an Army sergeant who authorities accused of assaulting and attempting to rape a civilian while he was off-duty and properly off-base.[129] The Court held that a court-martial lacked authority to exercise jurisdiction over such a person under the fifth and sixth amendments.[130] Refusing to extrapolate from the case law that status alone determines jurisdiction, the Court concluded instead that status "is merely the beginning of the inquiry, not its end."[131] The *O'Callahan* Court read the "cases arising in the land or naval forces" exclusion from the fifth amendment's operation to apply only when the crime committed is connected intrinsically to the armed forces.[132] Like the Court in *Toth,* it refused to read article I, section 8, clause 14 broadly so as to permit infringement of constitutionally guaranteed rights.[133]

The dissent in *O'Callahan,* written by Justice Harlan, charged that the Court's decision was wholly one-sided, giving little, if any, consideration to the governmental interests involved.[134] Disagreeing with the majority's, and consequently *Toth*'s, contention that Congress does not have unqualified freedom to define the limits of court-martial jurisdiction, Justice Harlan asserted that the plain meaning of clause 14 left that determination solely to Congress.[135] This interpretation denied the Court's province to balance these interests.[136] Further, Justice Harlan expressed his concern with the vagueness of the Court's decision, for it suggested "no general standard

127. 361 U.S. 234 (1960).

128. *See* McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281, 286 (1960) (exercise of court-martial jurisdiction over a civilian employee of the armed forces charged with a noncapital offense is unconstitutional); *see also* Grisham v. Hagen, 361 U.S. 278, 280 (1960) (court-martial cannot constitutionally exercise jurisdiction over a civilian employee of the armed forces charged with a capital offense).

129. O'Callahan v. Parker, 395 U.S. 258, 259-60 (1969).

130. *Id.* at 272-74.

131. *Id.* at 267.

132. *Id.* at 272-73.

133. *Id.* at 273 ("For it is assumed that an express grant of general power to Congress is to be exercised in harmony with express guarantees of the Bill of Rights.").

134. *Id.* at 274 (Harlan, J., dissenting).

135. *Id.* at 275-76 (Harlan, J., dissenting).

136. *Id.* at 281 (Harlan, J., dissenting).

for determining when the exercise of court-martial jurisdiction is permissible."[137]

The Court responded to Justice Harlan's concern over the vagueness of the ruling and its tendency "to create confusion and proliferate litigation"[138] in *Relford v. Commandant, United States Disciplinary Barracks.*[139] The Court there articulated the factors applicable in determining service-connection in a particular case, focusing upon the place of the crime's commission, the character of the crime, and the military duties involved.[140] Recognizing the obvious tension between article I, section 8, clause 14 and the right to trial by jury and presentment to grand jury,[141] the Court carefully considered the interests involved in order to best reconcile these provisions.[142] Because the petitioner in *Relford* had committed his crimes upon the military enclave,[143] the Court found them service-connected and deemed military jurisdiction proper.[144]

O'Callahan and its companion cases evince a tendency on the part of the Court to limit court-martial jurisdiction to the "least possible power adequate to the end proposed."[145] In *O'Callahan,* the Court first crossed the status line to give effect to this principle, and *Relford* set the standard to preserve it.[146]

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137. *Id.* at 284 (Harlan, J., dissenting). Justice Harlan asserted: "Whatever role an *ad hoc* judicial approach may have in some areas of the law, the Congress and the military are at least entitled to know with some certainty the allowable scope of court-martial jurisdiction." *Id.* (Harlan, J., dissenting).

138. *Id.* (Harlan, J., dissenting).

139. 401 U.S. 355 (1971).

140. *See id.* at 365; *see also supra* note 12.

141. *Relford,* 401 U.S. at 362-63.

142. *Id.* at 365, 367-69.

143. *Id.* at 360. The petitioner was charged with rape and abduction. *Id.* at 361.

144. *Id.* at 369.

145. United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 23 (1955).

146. This is not to imply that the "*Relford* factors" have proven entirely successful in preserving the service-connection test. In Justice Harlan's dissent in *O'Callahan,* he warned that "the infinite permutations of possibly relevant factors are bound to create confusion and proliferate litigation over the jurisdictional issue in each instance." O'Callahan v. Parker, 395 U.S. 258, 284 (1969) (Harlan, J., dissenting).

The confusion wrought in the area of drug offenses illustrates the problem forecasted by Justice Harlan. In United States v. Beeker, 18 C.M.A. 563, 40 C.M.R. 275 (1969), the Court of Military Appeals held that wrongful use and possession of marijuana, either on or off base, has such unique military significance that it is per se service-connected. *Id.* at 277. Seven years later in United States v. McCarthy, 2 M.J. 26 (C.M.A. 1976), the Court of Military Appeals disregarded *Beeker* and sent drug offenses back into the fact-specific, ad hoc realm of the "*Relford* factors." *Id.* at 28. In 1980, the Court of Military Appeals again did an about-face and found that "almost every involvement of service personnel with the commerce of drugs is 'service-connected.' " United States v. Trottier, 9 M.J. 337, 350 (C.M.A. 1980).

The abstract nature of the test, coupled with the ever-apparent quest of the court to expand

In summary, the *O'Callahan* Court established the service-connection test to give effect to the individual rights of the servicemember while preserving Congress' power to control the military. The Court arrived at the standard by considering the factors set forth thus far; namely, the rights to indictment by grand jury and trial by jury, the differences between military and civilian courts, accepted methods of constitutional interpretation and the special needs of the military in maintaining discipline, honor, and integrity. It is against this background that the Supreme Court's decision in *Solorio v. United States*[147] must be analyzed.

V. *SOLORIO V. UNITED STATES*

A. Eliminating the Service-Connection Test

In *Solorio v. United States,* the Supreme Court held that a court-martial's exercise of jurisdiction over a nonservice-connected crime does not violate the fifth or sixth amendments.[148] Chief Justice Rehnquist, writing for the majority, based his conclusion upon three broad considerations: the "plain meaning" of article I, section 8, clause 14;[149] the less-than-accurate historical interpretation engaged in by the Court in *O'Callahan;*[150] and the need for judicial deference in the affairs of the military.[151]

The Court began with the proposition that the decisions prior to

its jurisdiction, has led the Court of Military Appeals to abandon the test put forth in *Relford* and instead substitute per se rules. Lieutenant Colonel Jonathan P. Tomes has noted this phenomenon and asserts that the only limitation remaining is "the imagination of the prosecutor." Tomes, *The Imagination of the Prosecutor: The Only Limitation to Off-Post Jurisdiction Now, Fifteen Years After* O'Callahan v. Parker, 25 A.F. L. REV. 1, 33 (1985).

A few examples of the per se rules are illustrative. The "overseas exception" was formulated by United States v. Keaton, 19 C.M.A. 64, 67-68, 41 C.M.R. 64, 67-68 (1969), where the court reasoned that, as servicemembers overseas do not enjoy the protection of the Constitution, court-martial jurisdiction will not infringe upon any rights to which the accused is entitled. Tomes, *supra,* at 9-10. The "petty offenses exception," formulated in United States v. Sharkey, 19 C.M.A. 26, 28, 41 C.M.R. 26, 28 (1969), operates under the same principle and deems court-martial jurisdiction proper when the crime is punishable by imprisonment of less than six months. Tomes, *supra,* at 10. Crimes against other servicemembers were also deemed per se service-connected in United States v. Rego, 19 C.M.A. 9, 9, 41 C.M.R. 9, 9 (1969). Tomes, *supra* at 10-11.

One commentator has remarked: "There is no question that the Supreme Court has for all practical purposes departed from the *O'Callahan* field and fenced out federal court interference, permitting the military courts to determine those areas where court-martial jurisdiction over offenses is appropriate and permissible." Cooper, O'Callahan *Revisited: Severing the Service Connection,* 76 MIL. L. REV. 165, 185 (1977).

147. 107 S. Ct. 2924 (1987).

148. *Id.* at 2933.

149. *Id.* at 2928.

150. *Id.* at 2928-31.

151. *Id.* at 2931.

O'Callahan displayed a judicial determination that the military status of the accused was the sole condition for the proper exercise of court-martial jurisdiction.[152] In support of this proposition, the Court quoted *Kinsella v. United States ex rel. Singleton,*[153] which provided: "[t]he test for jurisdiction . . . is one of *status,* namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval Forces.' "[154] The Court failed to point out that *Singleton* did not involve a determination of the constitutionality of subjecting a servicemember to a court-martial. Rather, that case decided that a court-martial lacked jurisdiction over a servicemember's dependent accused of a noncapital offense.[155] The fact that a court-martial lacks jurisdiction because military status is lacking does not, ipso facto, lead to a conclusion that it has jurisdiction where status is present. No case before *O'Callahan,* nor since, has held that status begins and ends the inquiry.

Chief Justice Rehnquist continued with an examination into the facial indicia of a constitutional grant of plenary power to Congress to "make Rules for the Government and Regulation of the land and naval Forces" in article I, section 8, clause 14.[156] Noting that this grant appears in the "same section as do the provisions granting Congress authority, *inter alia*, to regulate commerce among the several States, to coin money, and to declare war,"[157] he would not distinguish the amount of power given to Congress to control those functions from the amount of power to control the military. He concluded that Congress' power in this instance was no less plenary.[158] Further, he indicated that the debates over the adoption of the Constitution provided no evidence that the framers intended to grant limited power.[159]

The dissent, written by Justice Marshall, began by attacking the majority's focus on, and expansive reading of, article I.[160] The majority, Justice Marshall contended, incorrectly assumed that the *O'Callahan* limitation on courts-martial involved only a construction of article I.[161] That grant of power did not stand alone. Rather, it remained subject to the procedural

152. *Id.* at 2926-27.

153. 361 U.S. 234 (1960).

154. *Solorio,* 107 S. Ct. at 2927 (quoting Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 240-41 (1960)).

155. *Kinsella* 361 U.S. at 248-49.

156. *Solorio,* 107 S. Ct. at 2928.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 2934 (Marshall, J., dissenting).

161. *Id.* (Marshall, J., dissenting).

safeguards provided in the fifth and sixth amendments.[162] In support of this proposition, the dissent quoted *United States ex rel. Toth v. Quarles,*[163] which the majority had cited to support its assertion that the cases before *O'Callahan* relied solely on status.[164] The dissenters wrote that: "[t]he constitutional grant of power to Congress to regulate the armed forces . . . itself does not empower Congress to deprive people of trials under 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."[165] This constitutional power, then, cannot be exercised within the sole discretionary limits of Congress. Instead, to the extent that a congressional exercise offends other provisions of the Constitution, it is the Court's province to intervene.

Justice Marshall further argued that the service-connection test relied more on a construction of the fifth amendment's exception of "cases arising in the land and naval Forces" than on a construction of article I.[166] The Court in *O'Callahan,* he contended, based its decision on the fact that a case that involves a crime which is not service-connected is not a case "arising in" the armed forces.[167] Therefore, the rights to presentment to a grand jury and trial by jury must attach. Regardless of Congress' power to make rules, it did not possess power to infringe upon these constitutional rights unless the circumstances fulfilled the requirements of the exception.

The dissent argued that status alone did not trigger this exception.[168] Had the framers intended to except those *persons* in the armed forces from the protection of the fifth and sixth amendments, they would have so provided.[169] Further, considering the primacy of these safeguards to our "constitutional scheme of justice," Justice Marshall urged that their possible infringement necessitated a strict construction of the exception.[170] Strictly

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162. *Id.* (Marshall, J., dissenting).

163. *Id.* (Marshall, J., dissenting).

164. *Id.* at 2927.

165. *Id.* at 2934 (Marshall, J., dissenting) (quoting United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 21-22 (1955)).

166. *Id.* at 2934-35 (Marshall, J., dissenting).

167. *Id.* at 2935 (Marshall, J., dissenting).

168. *Id.* (Marshall, J., dissenting).

169. *Id.* at 2934 (Marshall, J., dissenting). In the dissenter's words:

> Had that been the Framers' intent, it would have been easy to have said so, given that the grand jury provision of the Amendment, which states that '[n]o Person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury,' speaks not in terms of 'crimes' or 'cases,' but of individual defendants.

Id. at 2934-35 (Marshall, J., dissenting) (quoting U.S. CONST. amend. V).

170. *Id.* at 2935 (Marshall, J., dissenting).

construing the exception would lead invariably to a conclusion that a crime that did not involve military interests, duties, rights, or property would not constitute a *case* "arising in" the armed forces.

Chief Justice Rehnquist also justified overruling the *O'Callahan* decision based upon his conviction that the historical data offered by the *O'Callahan* Court did not suffice to prove that the framers intended a limited extension of power to Congress to regulate courts-martial.[171] In particular, he contended that the Court was "less than accurate" in its representation that the British military could not try soldiers for civilian crimes at the time of the American Revolution.[172] In rebutting the *O'Callahan* Court's evidence, the majority quoted section XIV, article XVI of the British Articles of War of 1774, which provided for punishment by a court-martial for malicious destruction of property and related offenses.[173] The majority, however, omitted the beginning of the quote which read: "All Officers and Soldiers are to behave themselves orderly in Quarters, and on their March."[174] This omission lends credence to the dissent's charge that this section was designed to prohibit dereliction of military duty rather than to adjudicate purely civilian crimes.[175] Given that section X, article I of the American Articles of War of 1776 expressly provided that soldiers be brought directly to civil magistrates upon committing a crime against the people of the United States,[176] the majority's contention that courts-martial historically tried soldiers for civilian crimes is less than plausible.

The majority's principal contention with respect to the historical data available was that such data proved too inconclusive to justify restraint of the plenary language with which the framers conferred upon Congress the

171. *Id.* at 2928.

172. *Id.*

173. *Id.* at 2929. Section XIV, article XVI of the British Articles of War of 1774 provided:

> All Officers and Soldiers are to behave themselves orderly in Quarters, and on their March; and whoever shall commit any Waste or Spoil either in Walks or Trees, Parks, Warrens, Fish Ponds, Houses or Gardens, Corn Fields, Enclosures or Meadows, or shall maliciously destroy and Property whatsoever belonging to any of Our Subjects, unless by order of the then Commander in Chief of Our Forces, to annoy any Rebels or other Enemies in Arms against Us, he or they shall be found guilty of offending herein shall (besides such Penalties as they are liable to be law) be punished according to the Nature and Degree of the Offence [sic], by the Judgment of a Regimental or General Court Martial.

British Articles of War of 1774 art. XVI, § XIV, *reprinted in* G. DAVIS, MILITARY LAW OF THE UNITED STATES 581, 593 (3d rev. ed. 1915).

174. British Articles of War of 1774 art. XVI, § XIV, *reprinted in* G. DAVIS, MILITARY LAW OF THE UNITED STATES 581, 593 (3d rev. ed. 1915); *see also Solorio,* 107 S. Ct. at 2929.

175. *Solorio,* 107 S. Ct. at 2937 (Marshall, J., dissenting).

176. *See supra* notes 77-79 and accompanying text.

power to make rules for the military.[177] The dissent attacked this narrow reading of *O'Callahan* with respect to its focus and accuracy. Again focusing upon the "cases arising in" language of the fifth amendment, the dissent insisted that the overwhelming historical evidence pointed to the conclusion that the framers did not intend this language to receive a broad construction.[178] Justice Marshall cited numerous eighteenth and nineteenth century British political and legal writers who demonstrated a suspicion of overly broad court-martial jurisdiction.[179] Considering the primacy given the Bill of Rights and the contempt with which the framers viewed overly expansive military authority,[180] it is reasonable to suggest that the framers did not consider nonmilitary crimes to "arise in" the armed forces.

B. Warrantless Overruling of Precedent

The majority pointed to the administrative difficulties that had arisen since *O'Callahan* as evidence that civilian courts are "ill-equipped" to vindicate military interests where the rights of a servicemember are concerned.[181] It is plausible to opine that these administrative inconveniences provided the impetus behind the majority's decision to overrule *O'Callahan* and formulate a bright-line status test.[182] The issue that Richard Solorio petitioned the Court to adjudicate was not whether a court-martial violated the Constitution when it tried an accused for a nonservice-connected offense, but whether Solorio had committed one.[183] Indeed, Justice Stevens, concurring in the judgment, charged that the facts justified an affirmance of the United States Court of Military Appeals and that the court had "no business reaching out to reexamine the decisions in [*O'Callahan*] and [*Relford*]."[184]

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177. *Solorio,* 107 S. Ct. at 2930.

178. *Id.* at 2935-36 (Marshall, J., dissenting).

179. *Id.* at 2936 (Marshall, J., dissenting); S. AYDE, A TREATISE ON COURTS MARTIAL 60 (1786) (crimes other than those stipulated by the Mutiny Act or Articles of War are to be tried by regular civilian courts); 1 C. CLODE, MILITARY FORCES OF THE CROWN: THEIR ADMINISTRATION AND GOVERNMENT 158 (1869) (offenses that are purely military are within the jurisdiction of courts-martial and those that are political or civil are within the sole jurisdictions of civilian tribunals); J. TANNER, ENGLISH CONSTITUTIONAL CONFLICTS OF THE SEVENTEENTH CENTURY 61-62 (1983 reprint) (discussing Petition of Right of 1627, where both houses of the legislature petitioned the Crown to redress unreasonable trial of soldiers by military commissions).

180. *See supra* notes 80-83 and accompanying text.

181. *Solorio,* 107 S. Ct. at 2931; *see also supra* note 146.

182. *See id.* at 2931-32 ("the service-connection approach, even as elucidated in *Relford,* has proved confusing and difficult for military courts to apply").

183. *See generally* Brief for Respondent at 10-27, Solorio v. United States, 107 S. Ct. 2924 (1987) (No. 85-1581); Brief for Petitioner at 13-22, Solorio v. United States, 107 S. Ct. 2924 (1987) (No. 85-1581).

184. *Solorio,* 107 S. Ct. at 2933 (Stevens, J., concurring).

The dissent charged that the majority opinion "shows a blatant disregard for principles of *stare decisis,* and makes more dubious the presumption 'that bedrock principles are founded in the law rather than in the proclivities of individuals.' "[185] Among the rationales that have been given by the Court in support of principled adherence to the doctrine of stare decisis is the importance of preserving public faith in the judiciary.[186] The age-old maxim that ours is a government of laws and not of men dictates that settled rules of law not be the subject of individual caprice, especially from a branch of government which operates without direct democratic accountability. Stare decisis exists as a buffer between nonmajoritarian lawmaking and judicial caprice, and should not be disregarded unless the prior decision is demonstrably incorrect.[187]

The Court claimed only that the historical evidence used by the *O'Callahan* court was "less than accurate"[188] and "far too ambiguous."[189] It never charged that the *O'Callahan* evidence was wrong, nor that its own interpretation was more plausible. Assuming, as the Court intimates, that the historical data is reasonably susceptible to more than one interpretation, *Solorio* represents the exact type of arbitrariness that undermines the legitimacy of the Court in the public perception. Arguably, if the Court demonstrated that *O'Callahan* lacked any justifiable constitutional foundation, it would have been within its province to supplant the prior rule with its own rule which it considered more workable and more congruous with the purported "plain meaning" of article I, section 8, clause 14.[190] But, short of such a finding, stare decisis mandates that *O'Callahan* continue in vitality.

The Court's reasoning for eliminating the service-connection test is unconvincing. In both its historical analysis and its constitutional construction, the Court unreasonably shifted the focus from an examination of what cases

185. *Id.* at 2941 (Marshall, J., dissenting) (quoting Vasquez v. Hillery, 474 U.S. 254, 265 (1986)).

186. Moragne v. States Marine Lines, 398 U.S. 375, 403 (1970). Other rationales include: predictability, so that people can conduct their affairs with confidence, *id.;* judicial economy, to alleviate the need for relitigating issues, *id.;* and fairness, that similarly situated individuals will be treated equally. Note, *The Power that Shall be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court,* 66 B.U.L. REV. 345, 347 (1986). These values are not particularly offended in the case of jurisdiction precedents because such precedents are not generally relied upon by persons in conducting their affairs and, generally speaking, are not of the type subject to challenge for relitigation and lack of uniformity in application.

187. *See* Williams v. Florida, 399 U.S. 78, 128-29 (1970) (Harlan, J., dissenting) ("precedent should not be jettisoned when the rule of yesterday remains viable, creates no injustice, and can reasonably be said to be no less sound than the rule sponsored by those who seek change").

188. *Solorio,* 107 S. Ct. at 2928.

189. *Id.* at 2930.

190. *See Moragne,* 398 U.S. at 404-05.

"arise in" the armed forces to one of the degree of power given Congress under article I. As the decision in this case has neither a sound basis in law nor in fact, it is arguable that the primary motivation for overruling *O'Callahan* rested in alleviating the administrative difficulties that have arisen in the military court system.[191] A bright-line test is generally desirable, but not if the benefits are derived at the expense of individual rights.[192]

The Court justifies an expansion of court-martial jurisdiction based upon the needs of the military in promoting and maintaining discipline, integrity, and honor. It defies logic to say that the military can realize these objectives through exercising jurisdiction over an accused whose crimes are alien to any military concern. This ruling should be changed, if not through reconsideration by the Court, then through a congressional revision of the Uniform Code of Military Justice.[193] The tenets of individual rights so dictate.

VI. CONCLUSION

In *Solorio v. United States,* the Supreme Court held that a military court-martial can exercise jurisdiction over a servicemember who commits a non-service-connected crime without violating the fifth or sixth amendments. In so holding, the Court overruled *O'Callahan v. Parker,* a decision that properly recognized the unreasonableness of denying the greater constitutional protections of a civilian trial to a servicemember whose crimes are extraneous to military concerns. The Court's reasoning for effecting this change was unpersuasive in that it failed to demonstrate any erroneous constitu-

191. *See supra* note 146.

192. The Court has long recognized that infringing constitutional rights by the use of bright-line tests cannot be justified by administrative considerations. *See* Tashjian v. Republican Party, 107 S. Ct. 544, 550-52 (1986) ("closed primary" statute violative of freedom of association, despite the possibility of voter confusion, increased administrative costs, and "party raiding" in allowing independents to vote in party primaries); Stanley v. Illinois, 405 U.S. 645, 656-57 (1972) (procedure by presumption violative of the Due Process Clause where state presumed unwed fathers to be unfit for purposes of child custody); Bell v. Burson, 402 U.S. 535, 542-43 (1971) (state driver's license revocation scheme presuming fault on the part of uninsured motorists involved in accidents unconstitutional); Carrington v. Rush, 380 U.S. 89, 95-96 (1965) (blanket exclusion of servicemen from the right to vote in state elections without inquiry into actual residency criteria unconstitutional).

193. Indeed, recent congressional revisions of the U.C.M.J. evince a concern for the rights of servicemember defendants that may drive Congress to make service-connection a condition precedent to the exercise of court-martial jurisdiction. *See supra* notes 53-66 and accompanying text. Another possible remedial action would be to amend the catch-all provisions of the U.C.M.J., such as article 134, 10 U.S.C. § 934 (1982), which confers jurisdiction on the court-martial for, inter alia, "[a]ll disorders and neglects to the prejudice of good order and discipline in the armed forces," to restrict such crimes to those involving only military "disorders" and "neglects." *See also* U.C.M.J., art. 133, 10 U.S.C. § 933 (1982) ("Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.").

tional basis to the *O'Callahan* decision. Rather, the Court merely supplanted its own will, based upon an alternate reading of the historical evidence involved and an assertion that the service-connection test announced in *O'Callahan* has proven unworkable.

This holding demonstrates an unprecedented extension of judicial deference to Congress and to the Executive. While recognizing the powers granted these branches, the Court failed to give even cursory treatment to the rights due the individual servicemember. The service-connection test provided the rights due when the rationale for infringing rights was lacking. Based upon the common-sense appeal of the test and its constitutional foundation, it should be restored.

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